

THE HIGH COURT - COURT 29

COMMERCIAL

Case No. 2016/4809P

THE DATA PROTECTION COMMISSIONER

PLAINTIFF

and

FACEBOOK IRELAND LTD.

AND

DEFENDANTS

MAXIMILLIAN SCHREMS

HEARING HEARD BEFORE BY MS. JUSTICE COSTELLO

ON MONDAY, 20th FEBRUARY 2017 - DAY 8

Gwen Malone Stenography
Services certify the
following to be a
verbatim transcript of
their stenographic notes
in the above-named
action.

8

GWEN MALONE STENOGRAPHY
SERVICES

APPEARANCES

For the PLAINTIFF: MR. MICHAEL COLLINS SC
MR. BRIAN MURRAY SC
MS. C. DONNELLY BL

Instructed by: MR. DAMIEN YOUNG
PHILIP LEE SOLICITORS
7/8 WILTON TERRACE
DUBLIN 2

For the 1ST DEFENDANT: MR. PAUL GALLAGHER SC
MS. NIAMH HYLAND SC
MR. FRANCIS KIERAN BL

Instructed by: MASON HAYES & CURRAN
SOUTH BANK HOUSE
BARROW STREET
DUBLIN 4

FOR THE 2ND DEFENDANT: MR. EOIN McCULLOUGH SC
MR. JAMES DOHERTY SC
MR. SEAN O'SULLIVAN BL

Instructed by: AHERN RUDDEN QUIGLEY
5 CLARE STREET
DUBLIN 2

FOR UNITED STATES OF AMERICA: MS. EILEEN BARRINGTON SC
MS. SUZANNE KINGSTON BL

Instructed by: MCCANN FITZGERALD
RIVERSIDE ONE
37-42 SIR JOHN
ROGERSON'S QUAY
DUBLIN 2

FOR BSA The Software Alliance: MR. MAURICE COLLINS SC
MS. KELLEY SMITH BL

Instructed by: WILLIAM FRY SOLICITORS
2 GRAND CANAL SQUARE
DUBLIN 2

FOR DIGITAL EUROPE:

**MR. MICHAEL CUSH SC
MS. NESSA CAHILL BL**

Instructed by:

**A&L GOODBODY
28 NORTH WALL QUAY
NORTH WALL
DUBLIN 1**

**FOR ELECTRONIC PRIVACY
INFORMATION CENTER:**

**MR. COLM O'DWYER SC
MS. GRAINNE GILMORE BL**

Instructed by:

**FREE LEGAL ADVICE CENTRE
13 DORSET STREET LOWER
DUBLIN 1**

COPYRIGHT: Transcripts are the work of Gwen Malone Stenography Services and they must not be photocopied or reproduced in any manner or supplied or loaned by an appellant to a respondent or to any other party without written permission of Gwen Malone Stenography Services

INDEX

WITNESS	PAGE
THE HEARING RESUMED ON MONDAY, 20TH DAY OF	5
FEBRUARY, 2017	
RULING BY THE COURT	5
SUBMISSION BY MR. O'DWYER	13
PROF. RICHARDS	
DIRECTLY EXAMINED BY MR. MURRAY	14
CROSS-EXAMINED BY MR. GALLAGHER	30
THE HEARING CONTINUED AFTER LUNCH	76
RE-EXAMINED BY MR. MURRAY	145

1 THE HEARING RESUMED ON MONDAY,
2 20TH DAY OF FEBRUARY, 2017 AS FOLLOWS:

3
4 **REGISTRAR:** At hearing in the matter of Data Protection
5 Commissioner -v- Facebook Ireland and another. 11:12

6
7 **RULING BY THE COURT**

8
9 **MS. JUSTICE COSTELLO:** Good morning. I apologise for
10 the delay. I literally just got my typing back, it's 11:12
11 not in a position to be handed out to the court, but
12 I will give my ruling in relation to the application to
13 admit the three affidavits.

14
15 On 19th July 2016 McGovern J joined four parties to the 11:12
16 proceedings as amici, and I set that out. And I have
17 set out from paragraphs 15 and 16 of his judgment, he
18 said:

19
20 *"That the proceedings do involve issues of public law 11:12*
21 *But they are not, in any real sense, a lis inter*
22 *partes. One of the reliefs sought by the plaintiff is*
23 *a reference to the CJEU. It is accepted by all the*
24 *applicants that, if a reference is made, they cannot be*
25 *heard before the CJEU unless they were involved in some*
26 *way before the court of first instance.*

27
28 *16. Because there is no factual dispute or lis inter*
29 *partes in the proceedings, the applicants argue that*

1 *the usual rule, excluding the involvement of an amicus*
2 *curiae at the first instance hearing, does not apply.*
3 *Furthermore, when the issues raised in the proceedings*
4 *are almost certainly to involve a reference to the*
5 *CJEU, it is essential that any party who has a right to* 11:13
6 *be heard as an amicus curiae should be heard in the*
7 *proceedings before the High Court. It seems to me that*
8 *that is a reasonable view."*

9
10 And then I proceed: It seems to me clear, therefore, 11:13
11 that he permitted the four amici curiae to be joined in
12 order that they would not be excluded from a hearing
13 before the CJEU if the High Court makes a reference as
14 requested by the Plaintiffs. Secondly, he accepted the
15 arguments advanced by the Applicant that there was no 11:13
16 factual dispute or lis inter partes in the proceedings
17 such as would lead to the exclusion of an amicus curiae
18 at the first instance hearing.

19
20 There was nothing in his judgment to suggest that, in 11:13
21 order to fulfil their role of assisting the High Court
22 in its determination that the amici curiae needed to
23 advance evidence in relation to the BSA The Software
24 Alliance, he stated that they should be in a position
25 to offer views which might not otherwise be available 11:14
26 to the court.

27
28 In relation to Digital Europe he held that it would be
29 in a position to assist the court by bringing to bear

1 its expertise in a way which might otherwise not be
2 available to the court.

3
4 And in relation to EPIC he would be in a position to
5 offer a counterbalancing perspective from the US 11:14
6 government on the position in the US and could bring an
7 expertise that might not otherwise be available to the
8 court.

9
10 The language he used clearly reflected the language 11:14
11 used in the prior authorities including Fitzpatrick -v-
12 FK. He declined to join the other six applicants as
13 amici curiae on the grounds that they could not offer
14 any particular assistance to the court which will not
15 be furnished by the parties to the proceedings or bring 11:14
16 a new perspective beyond that of the parties and the
17 amici admitted. He refused to admit Mr. Kevin Cahill
18 as an amicus curiae and McGovern J stated that, as a
19 general rule, an amicus curiae is not permitted to give
20 evidence. 11:15

21
22 Then he concluded his judgment by putting the matter
23 back for giving directions to discuss, inter alia, the
24 nature of the assistance to be given by the amici
25 curiae, in particular whether or not the party wished 11:15
26 to give evidence on US law as opposed to the US régime
27 surrounding data transfer and whether evidence of law
28 should be given by way of affidavit or in submissions.
29

1 It is thus clear that he accepted, as do I, that there
2 is no absolute rule that an amicus curiae can never
3 give evidence and then this reflects the decision of
4 the Chief Justice in HI where Chief Justice Keane 11:15
5 stated he was not normally entitled to adduce evidence
6 and the Chief Justice made this observation in the
7 context of holding that the jurisdiction to join an
8 amicus curiae is to be exercised sparingly.

9
10 In Fitzpatrick -v- FK Clarke J in the High Court 11:15
11 considered the question of joining an applicant as an
12 amicus curiae. He held that it was an important fact
13 to be taken into account is whether the party might
14 reasonably said to be in a position to bring to bear
15 expertise in respect of an area which might not 11:16
16 otherwise be available to the court, but he also
17 accepted that an amicus curiae will more readily be
18 joined at the stage of a *final* court. He emphasised
19 the importance of the involvement of the amicus in the
20 legal debate. 11:16

21
22 At paragraph 31 of his report he stated:

23
24 *"It is obvious, therefore, that an amicus should not be*
25 *permitted to involve itself in the specific facts of an* 11:16
26 *individual case. It is only after those facts have*
27 *been determined that the extent to which issues of*
28 *general importance may remain for decision will be*
29 *clear. That is far more likely to be the case at the*

1 *appellate rather than at the trial level."*

2
3 Then he continued: "*while I am not persuaded that*
4 *there is an absolute bar on parties being joined as*
5 *amici curiae at trial level, I believe that the* 11:16
6 *circumstances in which it would be appropriate to do so*
7 *should ordinarily be confined to cases where there is*
8 *no significant likelihood that the facts of an*
9 *individual case are likely to be controversial or to*
10 *have a significant effect on determining what issues of* 11:17
11 *general importance required to be determined."*

12
13 Clarke J does not envisage amici curiae having any role
14 in adducing evidence at the trial, and it would very
15 much be the exception for a court to permit an amicus 11:17
16 curiae to adduce evidence at the trial.

17
18 It is absolutely clear that an amicus curiae cannot
19 contest the undisputed facts in the case, and I refer
20 to **EMI Records**. The role of amicus curiae is to assist 11:17
21 the courts, therefore, the question the court must ask
22 is 'will the evidence sought to be adduced assist the
23 court in its determination?'

24
25 In this case the Plaintiff seeks declarations in 11:17
26 relation to the standard contractual clauses insofar as
27 they apply to data transfers from the EEA to the United
28 States and a preliminary reference to the CJEU for
29 ruling on the validity of the SCCs insofar as they

1 apply for data transfers from the EEA to the United
2 States.

3
4 Mr. Schrems' complaints to the Data Protection
5 Commissioner relates to the data transfers by Facebook 11:18
6 Ireland Ltd. to Facebook Inc. in the United States.
7 It follows that the issues for determination by this
8 court relate to transfers of data to the United States,
9 not to any other third country outside the EEA.

10 11:18
11 Mr. Higgins on behalf of Digital Europe has sworn an
12 affidavit which is concerned with transfers to third
13 countries pursuant to SCCs, including transfers to the
14 United States. The only third country with which this
15 case is concerned is the United States. Facebook 11:18
16 Ireland Ltd. has adduced evidence in relation to
17 transfers to the United States. I believe that Digital
18 Rights may fulfil its brief as an amicus curiae based
19 on the evidence which has been adduced by the parties.
20 It is not necessary for the court to depart from the 11:18
21 normal rule and admit into evidence an affidavit
22 largely concerned with matters outside the parameters
23 of the case. I, therefore, refuse to permit Digital
24 Europe to file the affidavit of Mr. Higgins.

25 11:19
26 Counsel for BSA submitted that the touchstone is
27 whether the evidence will assist the court. I agree.
28 However, the fact that the evidence is new material
29 [evidence] not contested by any party is not

1 sufficient. The normal rule is that the parties to the
2 proceedings adduce the evidence and in this case the
3 Plaintiff and the first first-named Defendant oppose
4 the introduction of the evidence and the second-named
5 Defendant is neutral. That should be the new *evidence*. 11:19

6
7 The test the court should apply is not whether there is
8 no reason *not* to permit the affidavit to be adduced,
9 the test is whether, in the light of the evidence to be
10 adduced by the parties, additional evidence would 11:19
11 assist the court.

12
13 BSA says that it has not tried to get involved in the
14 facts in the dispute, though it clearly wishes to fill
15 what it says is a deficit in the court's factual 11:19
16 framework. However, having read the written
17 submissions filed on behalf of the BSA I am of the
18 opinion that it will be able to fulfil its brief as an
19 amicus curiae without the need for it to adduce
20 evidence which will not be adduced by the parties to 11:20
21 the proceedings. I see no reason to depart from the
22 normal view that an amicus curiae does not adduce
23 evidence and therefore I refuse the application of BSA
24 to deliver the affidavit of Prof. Boué.

25 11:20
26 Prof. Butler on behalf of EPIC filed an affidavit which
27 deals with US law and practice. Counsel for EPIC
28 explained that this was done in order to produce
29 materials into evidence in relation to US law at a time

1 which the affidavits adduced by the parties had not yet
2 been made available. To that extent his affidavit has
3 been overtaken by events. The court has and will have
4 its evidence from five experts who will give evidence
5 on behalf of the parties in relation to US law. 11:20

6
7 Extensive materials have been adduced in evidence and
8 the experts will be cross-examined with due respect to
9 Prof. Butler's expertise. His affidavit on US law and
10 practice is not in the circumstances necessary for the 11:20
11 court.

12
13 I note at paragraph 17 of his affidavit grounding the
14 application for the admission of EPIC as an amicus
15 curiae, he confirmed that the intervention would be 11:21
16 limited through written or oral submissions on relevant
17 questions of law. It was not suggested before
18 McGovern J that he would need to give evidence.

19 I understand why as a matter of timing he swore his
20 affidavit but it has been overtaken by events and it is 11:21
21 not necessary for him to file the affidavit in evidence
22 in order that EPIC may assist the court as an amicus
23 curiae. I likewise refuse to admit his affidavit.

24
25 I will have proper copies of that, I afraid it's in 11:21
26 less than perfect form at the moment.

27 **MR. GALLAGHER:** Thank you, Judge.

28 **MS. JUSTICE COSTELLO:** I will have those available
29 probably tomorrow.

1 **SUBMISSION BY MR. O'DWYER:**

2
3 **MR. O'DWYER:** Judge, could I just ask in respect of our
4 particular submissions, I think I made this point on
5 Friday, could we have the permission of the court just 11:21
6 to amend the submissions slightly to reflect.

7 **MS. JUSTICE COSTELLO:** Yes, obviously to refer -- yes,
8 that was inherent.

9 **MR. O'DWYER:** I can't see with what the court has said
10 there will be any difficulty. 11:22

11 **MS. JUSTICE COSTELLO:** Certainly, yes. In terms of
12 timing I don't suppose the parties will be prejudiced
13 if you don't have it til next Monday, I think that
14 would be, would that be sufficient time for you?

15 **MR. O'DWYER:** Yes, Judge. 11:22

16 **MS. JUSTICE COSTELLO:** I mean I think they get the
17 thrust of what your submissions are going to be, it is
18 merely you'll be referring to the other reports.

19 **MR. O'DWYER:** Exactly. We'll find where the individual
20 authorities are elsewhere. 11:22

21 **MS. JUSTICE COSTELLO:** So if I extend the time til next
22 Monday.

23 **MR. O'DWYER:** Next Monday. Thank you, Judge.

24 **MS. JUSTICE COSTELLO:** Obviously if you can do it
25 sooner that's of benefit, but I'll leave you til next 11:22
26 Monday.

27 **MR. O'DWYER:** Thank you, Judge.

28 **MR. MURRAY:** May it please the court. Judge, we're now
29 in a position to call our first witness who is

1 Prof. Richards. Prof. Richards?
2

3 **PROF. RICHARDS, HAVING BEEN SWORN, WAS DIRECTLY**
4 **EXAMINED BY MR. MURRAY AS FOLLOWS:**

5 11:22
6

7 1 Q. Prof. Richards, I'm going to ask, first of all, that
8 you be given a copy of your report and of the note of
9 the experts meeting. I think you were involved in
10 assembling the note of the experts meeting?

11:23

11 A. That's correct.

12 2 Q. Now you are the Thomas and Karole Green Professor At
13 Law at Washington University School of Law in
14 St. Louis?

15 A. That's correct.

11:23

16 3 Q. And I will ask you, Prof. Richards, if you could just
17 outline to the court very briefly your qualifications
18 and your relevant experience?

19 A. Yes. So I have lived in the United States since I was
20 11 years old, I was born in England, and received all
21 my education in the United States; University at George
22 Washington University and then law school at the
23 Universal of Virginia School of Law where I took a
24 Juris Doctor degree and a Masters in Legal History.

11:23

25 11:24

26 I then clerked for two federal judges: Judge Paul
27 Niemeyer of the United States Court of Appeals for the
28 Fourth Circuit in Baltimore and William H. Rehnquist,
29 the Chief Justice of the United States, in the Supreme

1 Court of the United States.

2
3 After a teaching fellowship in Alabama, I returned to
4 Washington where I practised privacy and appellate
5 litigation law with Wilmer Cutler Pickering in DC for a 11:24
6 couple of years and then I joined the Academy full-time
7 at Washington University in St. Louis where I have
8 taught for the past 13 years and now hold my chair.

9 4 Q. And what are your areas of specialisation and your
10 research interests? 11:24

11 A. I research privacy law and First Amendment law
12 primarily. I also teach constitutional law where we
13 cover standing doctrine.

14 **MR. MURRAY:** I think, Prof. Richards, that appended to
15 your statement there's a short document outlining your 11:24
16 employment and professional service but also your
17 various publications and I think they start on page 3
18 of that document.

19 **MS. JUSTICE COSTELLO:** Sorry, Mr. Murray, which book is
20 his report to be found, I have got the joint report? 11:25

21 **MR. MURRAY:** Judge, please excuse me. It's Trial
22 Booklet Book 2.

23 **MS. JUSTICE COSTELLO:** Thank you. I beg your pardon,
24 Professor.

25 **MR. MURRAY:** And, Judge, if you turn, just to identify 11:25
26 the relevant documents, Tab 5 is Prof. Richards'
27 affidavit.

28 **MS. JUSTICE COSTELLO:** Yes, I have it.

29 **MR. MURRAY:** Tab 6 then the report and the appendix to

1 which I am referring is at Tab 7.

2

3 5 Q. So Prof. Richards, at page 3 of that you list your
4 various publications and perhaps if you could just
5 summarise the nature and extent of your published work? 11:25

6 A. Of course. My work covers primarily privacy law,
7 particularly the relationships between privacy and the
8 First Amendment to the US Constitution which covers
9 freedom of expression. I also write about trust and
10 increasingly about Fourth Amendment law. 11:26

11 6 Q. And amongst your publications I think is a book
12 "Intellectual Privacy Rethinking Civil Liberties in the
13 Digital Age" published by Oxford University Press?

14 A. Yes, that book pulls together some of the arguments
15 that I made in prior scholarship. It advances the 11:26
16 argument that American law has, in my academic opinion,
17 has failed to properly recognise its traditions of the
18 ways in which privacy and freedom of expression are
19 related and that the law should do that, should
20 recognise better protections for social activities of 11:26
21 thinking and reading and communicating in private in
22 order to advanced the theories of the First Amendment
23 that are already established.

24 7 Q. Now if I can ask you to turn to your report,
25 Prof. Richards, at paragraph 2 you explain there the 11:26
26 matters in respect of which you were instructed by the
27 solicitors for the DPC to furnish your opinion. So if
28 I could ask you first just to outline in respect of
29 those matters the conclusions which you have posited in

1 your report?
2 A. Of course. With respect to the first question, the
3 judicial remedies of which EU citizens can have
4 recourse in the event their data is transferred from
5 the EU to the US, I agreed with the determination, with 11:27
6 the description of US law by the Data Protection
7 Commissioner that there *were* remedies but they were
8 fragmented and subject to individual limitations in
9 particular cases and that they were in some respects
10 incomplete. 11:27

11
12 On the second point, the constraints or limitations,
13 I found that one of the practical constraints that is a
14 particular problem in this area, at least vis-à-vis the
15 access to judicial remedies, is the problem of notice, 11:28
16 that it is difficult to challenge a government
17 programme which may or may not infringe one's
18 fundamental rights if one does not learn about the
19 programme or one's inclusion in the programme.

20 11:28
21 With respect to the third, I concluded - this is the
22 standing - whether and to what extent the doctrine of
23 standing may constrain or limit access to such
24 remedies. I agreed with the Data Protection
25 Commissioner and I believe essentially all the other 11:28
26 experts to the extent that standing places substantial
27 obstacles in the way, in the face of these lawsuits.
28 I concluded that standing was not a fatal obstacle but
29 it was nevertheless material and substantial and one

1 that every plaintiff in these cases would have to
2 consider and surmount.

3
4 And, fourth, I was asked to consider the nature and
5 extent of the remedy or remedies that an EU citizen may 11:29
6 access in the United States in the particular context
7 at hand in light of the adoption of the Privacy Shield
8 mechanism. I examined the Privacy Shield materials and
9 I determined that there was not a judicial remedy that
10 was available. There were some remedies available 11:29
11 under the Privacy Shield. I was particularly asked to
12 consider the Ombuds mechanism and I think I said in my
13 report that, while it has the potential to be a useful
14 reform, it is of course too early to tell what form or
15 what remedies it will provide in practice, but it is to 11:29
16 me analytically distinct from a judicial remedy.

17 8 Q. Now, in relation to the question of standing, you have
18 referred in that summary to what you describe as
19 *substantial* obstacles, could you elaborate upon that
20 for the court and explain where those obstacles derive 11:29
21 from and what they are?

22 A. Yes, I believe the phrase "*substantial obstacles*" is
23 one used by Prof. Vladeck in this report. I did -- and
24 I would concur that it is a substantial obstacle.
25 Standing doctrine in the United States is a, because of 11:30
26 the nature of the judicial power in the United States,
27 judges have placed limitations, substantial limitations
28 upon their own authority and one of these is standing.
29 It is derived from the constitution, it is derived from

1 the vesting of the judicial power in the federal courts
2 and the limiting of their jurisdiction to quote cases
3 and controversies in Article 3 of the Constitution.
4

5 what the courts, the Supreme Court in particular, has 11:30
6 determined is that, in order to state a claim, it is
7 important, in order to entertain jurisdiction it is
8 important the courts have an actual controversy before
9 them. One element is that that the plaintiff must
10 have "standing" to bring the claim before the court. 11:30
11 This has three elements, which are not in dispute among
12 the experts in this case: Injury in fact, causation
13 and redressability.

14 9 Q. And insofar as those three elements are brought to bear
15 in the case law on data privacy claims, how do they 11:31
16 create in your opinion obstacles to such claims?

17 A. The difficulty with data privacy claims, including data
18 protection claims, is that because American law doesn't
19 recognise a fundamental right of privacy, a textual
20 constitutional right of privacy or a general right, 11:31
21 fundamental right of data protection, the rights are
22 likely to be considered by courts to be intangible or
23 abstract. The ideal claim for injury in fact is
24 pecuniary or it is physical. And, as we have seen in
25 recent cases, including two recent Supreme Court cases 11:31
26 involving data privacy claims, the Clapper decision and
27 the Spokeo decision, privacy claims have proven
28 challenging to bring.
29

1 I want to be clear about my opinion. It is not that
2 privacy claims are barred, far from it, but rather that
3 the injury in fact requirement in particular in
4 standing doctrine makes it more difficult for courts to
5 entertain privacy claims because of their non-corporeal 11:32
6 intangible nature and, as a result, standing is an
7 obstacle that is quite present in privacy cases,
8 whether they are brought against the government or
9 whether they are brought in the civil context, perhaps
10 in the context of privacy violations under the civil 11:32
11 law.

12 10 Q. Can I ask you in that connection, Prof. Richards, to
13 look at the document produced following the experts
14 meeting and to turn, if you will, to page 33 of that.
15 And if you could just explain to us, Prof. Richards, 11:33
16 what your involvement, you obviously attended the
17 experts meeting, what your involvement in the
18 production of this document was?

19 A. I did. The meeting was chaired by Prof. Swire in terms
20 of organising logistics. I was tasked with the 11:33
21 thankless task of assembling all of the charts together
22 in Microsoft word. But I was the sort of custodial
23 secretarial part of the operation and so I assembled
24 the inputs that were written by each of the experts to
25 create the whole document. 11:33

26 11 Q. So if we look at page 33, I think you begin by
27 outlining the matters on which the experts agreed?

28 A. Yes.

29 12 Q. If you could you turn to that first.

1 A. Yes.

2 13 Q. And you have, I think, seven points there, one over the
3 page. And if I can just take you to the last three.
4 No. 6: "*The Clapper decision rejected plaintiff's
5 standing to bring a claim for future injury at the 11:34
6 summary judgment stage of litigation, at which point
7 the plaintiffs could no longer rest on mere allegations
8 but must have set forth by affidavit or other evidence
9 specific facts.*

10 11:34

11 7. In *Spokeo -v- Robins* the Supreme Court held that a
12 trivial procedural violation of a federal statute (Fair
13 Credit Reporting Act), without any actual harm to the
14 plaintiff beyond the trivial procedural violation,
15 would be insufficient to satisfy the 'injury-in-fact' 11:34
16 prong of Article III standing."

17

18 And then, finally: "*The Article III standing doctrine
19 is, to a large degree, indeterminate. Although the
20 elements are, as shown above, capable of objective 11:34
21 description, their application to specific cases is
22 often difficult to predict and may turn on case
23 specific factual variations otherwise unaccounted for
24 in the doctrinal standard.*"

25 11:34

26 And then you refer to lower court decisions in post
27 Clapper, post Snowden suits.

28

29 what were the areas on which there was *disagreement*

1 between the experts in relation to standing,
2 Prof. Richards?

3 A. I was, I will confess I did not know what to expect
4 from this procedure of an expert meeting, never having
5 experienced it. But I was struck, and I believe some 11:35
6 of the other experts were too, by how much agreement
7 there was on certainly the basic elements of American
8 law in general but standing law in particular. We all
9 degree on the doctrinal elements, we agree on many
10 points. 11:35

11

12 The disagreements I was -- my interpretation of the
13 disagreements are they were disagreements of degree and
14 emphasis and interpretation rather than kind, as one
15 might expect when a group of experts, some of whom are 11:35
16 professors, are put together in a room and asked to
17 discuss law.

18

19 There were three points of disagreement that were
20 agreed upon, which is a bit ironic, but three points of 11:35
21 disagreement that were agreed upon by the experts and
22 they are listed on page 35 and 36.

23 14 Q. And one of those relates to the effect of the Spokeo
24 case?

25 A. That's correct, Spokeo, that's the first one. 11:36

26 15 Q. Could you just explain what your position was on that?

27 A. So my position on Spokeo is that, while the Clapper
28 decision - both Clapper and Spokeo in my opinion
29 tightened the requirements for standing in privacy

1 cases under injury in fact. Clapper tightened the
2 requirement of imminence for future injuries and Spokeo
3 tightened the requirement of concreteness of injuries.
4

5 And my interpretation of Spokeo, though of course 11:36
6 Spokeo was just decided this past summer, was that it
7 made relief in privacy cases more difficult, perhaps
8 not immeasurably more difficult, but I think more
9 difficult as is relevant to some of the issues in this
10 case in particular by holding that a *concrete* issue 11:37
11 injury was required, and this of course was a term that
12 was in the doctrine going back to the Lujan case in
13 1992, but it gave teeth or further interpretation or
14 gloss to the meaning of concreteness. The court said
15 that concreteness means *real*. 11:37
16

17 And then it said something which is difficult perhaps
18 to understand in one's mind. It said *real* is, can be
19 intangible but it might not be hypothetical. So an
20 injury coming after Spokeo has to be concrete, and 11:37
21 concrete can include intangible injuries, but it does
22 not include fair procedural violations. The types of
23 intangible concrete injuries that the court is prepared
24 to recognise as satisfying the injury in fact
25 requirement, the court talks about two kinds of them. 11:38
26

27 One of them ones which had been traditionally
28 recognised under American law. Some of the sorts of
29 data processing injuries that are implicated in these

1 proceedings would not be in that category; and the
2 second category were ones in which Congress had decided
3 to recognise new types of injuries. The court did not
4 say that it would defer to Congress but that it would
5 certainly, and the precise verbal formulation escapes 11:38
6 me right now, but it said that it would give due course
7 to Congress's, that it would consider Congress's
8 judgment, but it didn't say it would defer to it
9 uncritically.

10 16 Q. If we look just in the table on page 35, you record 11:38
11 that the experts agree, in the context of standing and
12 notice, the experts agree on the respective thresholds
13 a plaintiff must satisfy at the 'motion to dismiss' and
14 'summary judgment' stage, and you refer back to your
15 discussion of that, but also that the government's 11:39
16 failure to notify individuals subject to its secret
17 surveillance programs makes it more difficult for
18 plaintiffs to establish Article III standing?

19 A. Yes.

20 17 Q. That was -- yes. Now, Prof. Richards, you, I think, 11:39
21 signed your report on 1st December last and I wonder
22 could you outline what developments which you believe
23 are of significance have occurred since then?

24 A. Yes. The experts discussed at our meeting several
25 developments, and these are listed on pages 1 through 4 11:39
26 of the experts chart. I would like to highlight
27 several of these. There are four developments that
28 I think are particularly relevant to my testimony.
29

1 The first, and this is listed as point 1 of the experts
2 report, that the outgoing Obama administration Attorney
3 General designated the EU and all Member States except
4 Denmark and the United Kingdom as covered countries
5 under the JRA which meant that the Judicial Redress Act 11:40
6 entered into force on 1st February.

7
8 The second point is that it is my understanding that
9 the initial Ombudsperson at the State Department,
10 I believe her name was Catherine Novelli, is no longer 11:40
11 at the State department and that the position is
12 formally unfilled but is being filled, I believe, by a
13 career civil servant on the interim basis while the
14 State department staffs up.

15 11:40
16 The third point is that the new Trump administration
17 issued an executive order and I think it was, in
18 January, that directed federal agencies to exclude
19 non-US persons from coverage of their privacy policies
20 under the Privacy Act. And there has been quite a bit 11:40
21 of debate on this point among the privacy Bar in the
22 United States, particularly the part that is interested
23 in EU data transfers. I think their consensus is that
24 this executive order does not invalidate the Privacy
25 Shield but that by the same token it is not a positive 11:41
26 development with respect to the Privacy Shield and it
27 is, I think, prescribed as an area to watch.

28 18 Q. I think that's the executive order, is it, which is
29 referred to in No. 2 on page 2, executive order on

1 immigration of 25th January?

2 A. That's correct. And the fourth point, and this is a
3 development in law which occurred after the experts met
4 and the experts agreed that American law -- I will read
5 the, this is on page 1, the last paragraph of the 11:41
6 introductory comments:

7

8 *"The experts agree with the content of this document as*
9 *of the date it is filed. The experts further agree*
10 *that there is more than the typical amount of*
11 *uncertainty, under the new US administration, about*
12 *what will occur with respect to multiple aspects of US*
13 *law and policy – including developments that may arise*
14 *between the date of this document and the date of the;*
15 *experts' testimonies."*

16

17 One such document is approximately ten days ago. A
18 district court in Seattle issued a judgment in the
19 Microsoft secret search order case. This was a case
20 brought by Microsoft against the Department of Justice 11:42
21 alleging that the government was essentially abusing
22 its power under the Stored Communication Act to serve
23 search warrants and other orders on Microsoft about its
24 customers data and forbid Microsoft from telling
25 anybody about them subject to indefinite injunctions. 11:42

26 19 Q. And I think, Prof. Richards, this is the case that you
27 refer to in paragraph 59 of your report; is that right,
28 on page 20?

29 A. That is correct. And the court, very briefly, ruled

1 that, while Microsoft had stated a First Amendment
2 claim that could survive a motion to dismiss, that its
3 own expression in wishing to disclose to the world the
4 actions of the government in this area did state a
5 claim.

11:43

6 20 Q. **MS. JUSTICE COSTELLO:** Did, sorry?

7 A. Did state a claim. The court dismissed Microsoft's
8 *Fourth* Amendment searches and seizures fundamental

9 right claim on the ground that, under US law, third
10 parties cannot assert or parties cannot assert the

11:43

11 Fourth Amendment rights of other people, a holding
12 peculiar to the Fourth Amendment guarantee against

13 unreasonable searches and seizures. And so it

14 dismissed Microsoft's Fourth Amendment claim, but the

15 litigation proceeds under the First Amendment free
16 expression guarantee.

11:44

17 21 Q. **MR. MURRAY:** You disclose at paragraph 59 of your
18 report that you had signed an amicus brief which was
19 filed in that case?

20 A. I had. A number of law professors who specialise as
21 I do in First Amendment law had drafted a brief and
22 I was asked to join that brief and I did. The argument
23 is on the side of Microsoft's First Amendment argument.

11:44

24 22 Q. You refer there to First Amendment claims and in that
25 section of your report on paragraph 35 and following
26 page 12 where you identify constitutional law claims,
27 you refer to Fourth Amendment claims and to what you
28 describe as the constitutional right of information
29 privacy, you don't address the First Amendment itself

11:44

1 in your report; could you explain to the court the role
2 that you see the First Amendment as having in
3 circumstances such as those with which the court is
4 concerned?

5 A. That's correct. I was asked to examine other potential 11:44
6 avenues of relief and I focussed my attention on the
7 ones that I thought might have the greatest chance of
8 success. And so I say there are at least two rights
9 recognised in the constitution that could provide
10 avenues for relief and I talk about the Fourth 11:45
11 Amendment and the 14th amendment.

12
13 I did not get into the First Amendment because
14 I believe it is a weaker claim in contexts like this
15 for EU citizens to bring. I think there is, while 11:45
16 there is substantial doubt about whether EU citizens
17 who lack substantial connections to the United States
18 can assert Fourth Amendment claims in US courts,
19 I think there is even more doubt about whether they can
20 assert a *First* Amendment claim. The First Amendment is 11:45
21 usually justified in terms of listeners rather than
22 speakers, and I think it would be particularly
23 difficult to bring that claim.

24
25 In addition, unlike a Fourth Amendment claim routed in 11:45
26 data where, when data is seized or searched, the
27 protection of the Fourth Amendment immediately
28 attaches, the First Amendment is predominantly about
29 *expression* rather than data. And so there would need

1 to be some additional showing of a chilling effect or
2 an effect upon association or expression private or
3 public.

4
5 In my scholarly work I have argued of course that 11:46
6 courts should make this linkage and bring intellectual
7 privacy claims within the protection of the US
8 constitution under the first and Fourth amendments, but
9 I considered it particularly important in my role as an
10 independent expert to assist the court to opine on what 11:46
11 I believe the law to actually be in practice rather
12 than what I would like the law to be in theory.

13 **MR. MURRAY:** Thank you very much, Prof. Richards, if
14 you could just answer any of Mr. Gallagher's questions.

15 **MR. GALLAGHER:** Judge, before asking any questions 11:46
16 I wonder is Mr. McCullough, who has served a notice of
17 cross-examination, going to ask any questions because,
18 if he is, I should clearly follow him.

19 **MR. MURRAY:** I must say I wasn't aware Mr. McCullough
20 had served. 11:46

21 **MR. GALLAGHER:** He had.

22 **MR. MCCULLOUGH:** I haven't. Judge, I thought it made
23 that clear on Friday. I have served notice to
24 cross-examine on the Facebook witnesses, I haven't
25 served notice to cross-examine these witnesses. 11:47

26 **MS. JUSTICE COSTELLO:** That's as I understood it.

27 **MR. GALLAGHER:** Oh, sorry.

28 **MS. JUSTICE COSTELLO:** Possibly there was.

29 **MR. GALLAGHER:** No. Well then, sorry, I picked it up

1 incorrectly, that's fine.

2
3 **PROF. RICHARDS, WAS CROSS-EXAMINED BY MR. GALLAGHER AS**
4 **FOLLOWS:**

5
6 23 Q. Prof. Richards, if I can just ask you for a moment to 11:47
7 go to your report and if you go to paragraph 99 of that
8 report, you mention there that you:

9
10 *"Agree with the Swire report that the US does have real 11:47*
11 *privacy law, and that there is a lot of it."*

12
13 And you go on to say: *"However, that US privacy law is*
14 *substantial is not directly responsive, in my opinion,*
15 *to the questions I have been asked to address in this 11:47*
16 *report, such as the availability of judicial remedies*
17 *to EU citizens who wish to challenge unlawful data*
18 *processing by the US government once their data has*
19 *been transferred to the US."*

20
21 And do I understand that correctly that that is the
22 issue on which your report concentrates, the question
23 of remedies in circumstances where the US government
24 accesses the data?

25 A. That is correct, yes. 11:48

26 24 Q. Yes. And you don't opine on the position with regard
27 to the private sphere and remedies that are available
28 in the private sphere by EU citizens against private
29 operators?

1 A. That is correct.

2 25 Q. In commenting on the remedies that are available as
3 against the US government, did you consider what the
4 position is as to the remedies available against
5 governments in any of the Member States? 11:48

6 A. Could you repeat the question, please.

7 26 Q. In considering the adequacy of remedies available
8 against the US government, did you consider the
9 remedies that are in fact available to EU citizens in
10 any of the Member States? 11:49

11 A. I would say that I did not consider -- I want to be
12 clear about the contours of my report. I deliberately
13 steered away from using words like 'adequacy' because
14 I know that that is a term of art under substantive
15 European law, and I do not take any position on 11:49
16 European law. So consequently I did not take any
17 position on remedies available in EU law. I am an
18 expert in *US* law and not in EU law as I point out in my
19 report.

20 27 Q. That clarification, Prof. Richards, is very fair and 11:49
21 perhaps if I rephrase my question just to make sure
22 there is no misunderstanding: You didn't consider at
23 all the extent or nature of the remedies available to
24 EU citizens as against governments in their Member
25 States? 11:49

26 A. No, I did not.

27 28 Q. So in considering the views of the DPC who did opine on
28 the adequacy of remedies, one thing that you did not
29 address was those remedies available in Member States

1 to EU citizens in similar circumstances?

2 A. I did not address to the best of my recollection in my
3 report, I did not address any remedies available to EU
4 citizens in the EU.

5 29 Q. And I think one of the points that you raise, 11:50
6 particularly in the context of standing, though this
7 morning - and this is not a point of criticism - you
8 drew a distinction between the question of giving
9 notice to the citizen that its data has been accessed
10 or surveyed or interfered with and the question of 11:50
11 standing; is that correct?

12 A. I'm not sure I understand the question.

13 30 Q. This morning in answer to Mr. Murray, and I am just
14 looking for clarification of this, Professor, it is
15 possible that I misunderstood it, Mr. Murray said to 11:50
16 you you make three points: One that the remedies are
17 fragmented and subject to limitations that are
18 incomplete; two, that without notice it is difficult to
19 challenge any decision; and, three, standing. And
20 I just want to clarify are you advancing the issue of 11:51
21 lack of notice as separate from standing or is it an
22 integral part of the standing issue?

23 A. I would say that notice is both separate on its own
24 terms and integral to the standing issue for the
25 following reason. 11:51

26 31 Q. Hmm.

27 A. At a practical matter, and one of the points which the
28 DPC asked me to examine were practical limitations to
29 relief as well as legal bars and obstacles. If you

1 don't know that your rights are being infringed, as a
2 logical matter you cannot bring suit to challenge them.
3 At the very least if one is unaware that an injury is
4 happening then it's more difficult to realise the
5 injury is happening and to bring suit.

11:52

6
7 with respect to *standing*, we have seen in, particularly
8 in the Supreme Court Clapper decision, that when
9 plaintiffs cannot prove or allege but ultimately prove
10 that their rights have been violated, they cannot
11 maintain injury in fact in many circumstances. And the
12 lack of, the fact that the Clapper plaintiffs could not
13 show that their rights were going to be imminently
14 violated was a consideration in their not having injury
15 in fact. And, similarly, the fact that they could not
16 show that, even if their data had been accessed, that
17 it was not traceable to the particular programme they
18 were challenging, they would lack standing on the
19 second prong of standing which is causation, sometimes
20 referred to as fairly traceable.

11:52

11:52

11:53

21 32 Q. Okay. Standing is defined in Clapper and in the Lujan
22 cases and the other cases is of course broader than the
23 question of notice, but notice or lack of notice is an
24 important issue in considering standing; is that
25 correct, you would agree on that?

11:53

26 A. I think notice or lack of notice can be an important
27 issue in considering standing, particularly in these
28 sorts of cases, but it is not always an issue in
29 standing.

1 33 Q. And if somebody has notice that their data has been
2 intercepted or collected, then that satisfies one
3 element of the three standing requirements; isn't that
4 correct?

5 A. I don't think so. I think there is a difference 11:53
6 between, as we're using it in this colloquy, a
7 difference between notice and an allegation that one's,
8 that one has suffered an injury in fact and then being
9 able to prove that injury in fact.

10 34 Q. Okay. 11:54

11 A. So the absence of notice alone, no, does not obviate
12 the injury in fact enquiry. Even putting notice to one
13 side injury in fact is a substantial obstacle as it was
14 in the Spokeo case in which notice was not an issue.

15 35 Q. Well I suggest that if somebody had notice that the 11:54
16 government had intercepted their e-mail or collected
17 their e-mail, that would establish standing in terms of
18 a concrete and particularised injury?

19 A. As opposed to --

20 36 Q. Well... 11:54

21 A. -- actual or imminent?

22 37 Q. Well, if somebody had notice that the government had in
23 the past intercepted their e-mail, that would satisfy
24 the concrete and particularised injury element of
25 standing? 11:55

26 A. I don't think that's correct.

27 **MR. GALLAGHER:** Could I just ask you to look at the
28 Clapper decision, Clapper -v- Amnesty for a moment,
29 it's in divide 13. Sorry Book 14, it's a different

1 book you have, Judge, and I'll just help you with the
2 reference to it.

3 **MS. JUSTICE COSTELLO:** I have got the US ones.

4 **MR. GALLAGHER:** It's 14-1. It's the US, it's the first
5 book of the US. 11:55

6 **MS. JUSTICE COSTELLO:** Is this ACLU -v- Clapper or
7 Clapper -v- Amnesty?

8 **MR. GALLAGHER:** Clapper -v- Amnesty.

9 **MS. JUSTICE COSTELLO:** Thank you.

10 **THE WITNESS:** which tab? 11:55

11 **MR. GALLAGHER:** Sorry, Professor, it is divide 16 and
12 if you go to page 1155 and it's the dissenting judgment
13 of Justice Breyer with whom Justice Ginsburg, Sotomayor
14 and Kagan joined?

15 A. Yes. 11:56

16 38 Q. And if you go to right-hand column on the last
17 paragraph in the statement: "*No one here denies that*
18 *the Government's interception of a private telephone or*
19 *e-mail conversation amounts to an injury that is*
20 *'concrete and particularised'.*" 11:56

21

22 Do you see that, the last paragraph on the right-hand
23 column of 1155?

24 A. Yes.

25 39 Q. So there the Supreme Court is saying that if your 11:56
26 e-mail is intercepted that satisfies the concrete and
27 particularised element of standing?

28 A. I want to be sure that I get this thing exactly right.
29 Could you repeat that again.

1 40 Q. Yes.

2 A. I was looking at a different part where Justice Breyer
3 referred to concrete and particularised.

4 41 Q. Yes. If you look at the right-hand column on the last
5 paragraph on 1155: "*No one here denies that the* 11:57
6 *Government's interception of a private telephone or*
7 *e-mail conversation amounts to an injury that is*
8 *'concrete and particularised'.*"

9 A. Yes, I believe that Justice Breyer correctly states the
10 law there, though he is in the dissent. 11:57

11 42 Q. Yes, but he is saying "*no one here denies*", so I take
12 it he is saying that nobody in the Supreme Court
13 disputes that?

14 A. I would say that - very often in Supreme Court dissents
15 the justices being good lawyers like to advance 11:57
16 positions of agreement where perhaps there is less
17 agreement. I think it is difficult to read dictum into
18 Supreme Court opinions. But I would say that Justice
19 Breyer's point that the interception of the contents --

20 43 Q. Mm hmm. 11:57

21 A. -- of an e-mail or a telephone conversation by the
22 government are likely to be found to be concrete and
23 particularised. I think the situation might be
24 difficult - different with other types of data because
25 of the third party doctrine. 11:58

26 44 Q. Okay. But, certainly in terms of somebody looking at
27 the content of your e-mail, without more that's a
28 concrete and particularised injury?

29 A. Actually there's a great dispute on that question in

1 American law. E-mail is treated differently from
2 telephone calls under the Fourth Amendment or at least
3 there is greater dispute about whether the contents of
4 e-mails are protected by the Fourth Amendment. There
5 is no dispute that the contents of telephone calls are 11:58
6 protected by the Fourth Amendment as a general
7 proposition, at least where those are US persons in the
8 United States. That's the holding of the Katz case,
9 and I believe it was 1967, which established the famous
10 reasonable expectation of privacy case. 11:58

11
12 The problem - and I should pause and say standing
13 doctrine is complicated for American lawyers and I have
14 to apologise to my own students when I introduce the
15 topic in the classroom because it is frequently 11:59
16 maddening. But under American law there's a Fourth
17 Amendment doctrine called the third party doctrine
18 which is highly controversial but is accepted by the
19 government. It holds that information that is shared
20 with a "third party" waives the protection of the 11:59
21 Fourth Amendment. And for a very long time the United
22 States government has taken the position that this
23 covers the contents of e-mails and of course also
24 things like location data, data collected by internet
25 of things devices, transactional information that are 11:59
26 non-content, even addressing information with respect
27 to the content of information.

28 45 Q. Professor, we'll come back to the third party doctrine,
29 I just want to focus on one specific point here, just

1 the element of what amounts to a concrete and
2 particularised harm in terms of standing. What the
3 Supreme Court are saying here, and certainly Justice
4 Breyer and the other justices, is that access to the
5 contents of e-mail, of somebody's e-mail without more 12:00
6 represents a concrete and particularised injury; isn't
7 that correct?

8 A. I can't say that's the case because the answer on
9 whether there is a concrete injury depends upon whether
10 it's a real injury. I would certainly agree that 12:00
11 access to a telephone conversation would, to individual
12 telephone contents of the conversation would constitute
13 concreteness and that eliminates the difficulty.

14 46 Q. Prof. Richards, here *they* are saying that not only
15 access to a telephone conversation but access to an 12:00
16 e-mail conversation amounts to particularised and
17 concrete injury; isn't that correct, that's what they
18 are saying?

19 A. That is what Justice Breyer and the dissenters do say
20 at that point in their opinion, but I would refer back 12:01
21 to my prior answer about the rhetorical techniques
22 involved in dissent.

23 47 Q. Okay.

24 A. So this is dictum in a dissent.

25 48 Q. Okay. Well subject to this rhetorical technique as you 12:01
26 describe it, certainly in a formal judgment of the
27 Supreme Court in Clapper Justice Breyer is stating on
28 its face something that he says none of the justices
29 disagree with?

1 A. Justice Breyer absolutely states that.

2 49 Q. Leave aside the Fourth Amendment and the third party
3 doctrine, the requirement of a concrete and
4 particularised injury in terms of standing applies also
5 to a claim brought on the basis of a statute; isn't 12:01
6 that correct?

7 A. That is correct.

8 50 Q. Yes. And in fact the claim being brought here was on
9 the basis of Section 702?

10 A. There were several claims. 12:01

11 51 Q. Yes. There was a constitutionality claim but it was
12 brought by reference to Section 702; isn't that
13 correct? (Short pause)

14 A. I believe that a number of claims were brought, but
15 there was a 702 claim here, yes. 12:02

16 52 Q. And in Spokeo, to which you make reference, the court
17 was looking at what was the meaning of a concrete and
18 particularised injury in the context of a statute;
19 isn't that correct?

20 A. The court was looking at what constituted a concrete 12:02
21 and particularised injury in the context of a private
22 right of action authorised by a statute.

23 53 Q. Yes.

24 A. I think there is a distinction between challenging the
25 constitutionality of a statute and having to assert a 12:02
26 concrete and particularised injury. The issue in
27 Spokeo was whether the statutory cause of action,
28 whether the plaintiff had standing to assert the
29 statutory cause of action.

1 54 Q. Absolutely, Professor. And one of the things that your
2 report addresses is the plaintiff's standing to invoke
3 the statutory protections that are provided for in US
4 law; isn't that correct? That's what your report
5 addresses under various statutes, Section 702 and other 12:03
6 statutes; isn't that correct?

7 A. My report governs standing generally and would include
8 both --

9 55 Q. Exactly.

10 A. -- constitutional claims and claims brought pursuant to 12:03
11 private rights of action authorised by statute, that's
12 correct.

13 56 Q. All right. So can we exclude just for the moment the
14 constitutional claims because the issue of whether or
15 not an EU citizen is entitled to invoke the 12:03
16 constitution and just look at the *statutory* claims,
17 whether under ECPA or not. If what Mr. Justice Breyer
18 says is correct, if somebody can establish that their
19 e-mails have been, the contents of their e-mails have
20 been unlawfully examined then they meet the concrete 12:03
21 and particularised requirement of standing?

22 A. I think it is likely that a court would accept that
23 argument, that is correct.

24 57 Q. One of the difficulties that you have pointed out, not
25 unfairly, is the fact that without notice it may be 12:04
26 difficult to establish that your e-mails have been
27 accessed and read; isn't that correct?

28 A. That's correct.

29 58 Q. And you're not in a position to opine on what is the

1 practice in any other member, sorry in any Member State
2 with regard to notice in the intelligence sphere; isn't
3 that correct?

4 A. I am not an expert on EU law or EU security service
5 practice, that is correct. 12:04

6 59 Q. Yes. And you accept, Prof. Richards, I take it, that
7 significant issues arise in the intelligence sphere
8 with regard to giving notice to people whose data may
9 be intercepted, isn't that correct?

10 A. I agree that the questions of notice and the 12:05
11 appropriateness of notice are an issue in the
12 intelligence sphere, yes.

13 60 Q. I think they're more than just an issue,
14 Prof. Richards. They're a *major* issue, isn't that
15 correct? It's a major concern? 12:06

16 A. I think it would depend, a concern by whom. But yes,
17 there has been a major debate on questions of notice
18 and individualised access in the intelligence sphere.

19 61 Q. And the Ombudsperson scheme on which you opine, set up
20 under the Privacy Shield, recognises that notice is *not* 12:06
21 going to be given to somebody whose data has been
22 intercepted, isn't that correct?

23 A. That's correct.

24 62 Q. Now, can I ask you to look at the Spokeo decision for a
25 moment? And you'll find that, Judge, in the second of 12:06
26 the books on US law, I call it 14(2), but I think you
27 have a different designation. It's book three of
28 yours, I think, Judge. Sorry about that. It's tab 35
29 in my book.

1 MS. JUSTICE COSTELLO: Thank you.

2 63 Q. MR. GALLAGHER: And the opinion of the court on page
3 seven, if I can direct you to that. And it explains
4 that for an injury to be particularised, it must affect
5 the plaintiff in a personal and individual way. I 12:07
6 think there's no dispute about that, is that correct?

7 A. Yes.

8 64 Q. Then, as you acknowledged, on page eight the court says
9 that:

10 12:07

11 *"'Concrete' is not necessarily synonymous with*
12 *'tangible'. Although tangible injuries are perhaps*
13 *easier to recognise, we have confirmed in many of our*
14 *previous cases that intangible injuries can never be*
15 *concrete" -- "can nevertheless be concrete", excuse me. 12:08*

16 A. This is on page eight?

17 65 Q. This is page eight and going over to page nine. Down
18 at the bottom of page eight, do you see under "2"?

19 A. Yes.

20 66 Q. And going over to page nine. And: 12:08

21
22 *"In determining", it says, "whether an intangible harm*
23 *constitutes injury in fact, both history and the*
24 *judgment of Congress... derives from the*
25 *case-or-controversy requirement, and because that*
26 *requirement in turn is grounded in historical practice,*
27 *it is instructive to consider whether an alleged*
28 *intangible harm has a close relationship to a harm that*
29 *has traditionally been regarded as providing a basis*

1 *for a lawsuit...*"

2

3 Isn't that correct?

4 A. That is what the Supreme Court says, yes.

5 67 Q. Yeah. And a harm that has been traditionally regarded 12:08
6 as providing a basis for a lawsuit is an intrusion in
7 somebody's privacy, isn't that correct?

8 A. That's a very complicated question under US law and I
9 think it depends upon what we mean as an intrusion upon
10 privacy. Certainly in the torts context, the intrusion 12:09
11 upon seclusion tort *has* been recognised as a valid
12 cause of action in American law for decades certainly.
13 But I think we often, unfortunately, as lawyers as well
14 as citizens of our respective countries, tend to use
15 the words "intrusion into privacy" loosely. And so I 12:09
16 would accept the point with respect to recognised
17 causes of action, but not in a general sense under
18 American law.

19 68 Q. But I suggest to you, Professor, that it is *in fact*
20 quite common for the law to protect privacy and 12:09
21 security without *any* requirement of harm. Do you
22 agree?

23 A. That it's quite -- the question is whether I agree that
24 it's quite common for the court to protect privacy and
25 security without -- yes, I do agree with that, yes. 12:10

26 69 Q. So if you're looking at the type of harm that has
27 traditionally been regarded as providing a basis for a
28 lawsuit, an intrusion of privacy is captured by that
29 statement, isn't that correct?

1 A. Well, no. And it depends upon a perhaps maddening
2 distinction in American law. Because the -- just
3 because -- and Spokeo actually is a fantastic example
4 of this point. Just because the law protects
5 something, which is to say it outlaws a certain course 12:10
6 of conduct, it doesn't necessarily mean that a private
7 right of action can be granted in court that would
8 support standing. And this, I think, one example of
9 this is the court's holding in Spokeo that a cause of
10 action to support what it calls a bare procedural 12:10
11 violation would not maintain concreteness and thus
12 injury in fact. And also, presumably a cause of action
13 recognising a non-traditional injury would also not
14 provide standing.

15 70 Q. Well, we'll come back to procedural violation just in a 12:11
16 moment. But obviously intercepting somebody's e-mail,
17 collecting their data is more than a procedural
18 violation, isn't that correct?

19 A. I would agree with that, subject to the exceptions that
20 I've already discussed. 12:11

21 71 Q. Yeah. And that sort of intrusion is something that,
22 right across the private sphere of the law in the US,
23 has, for a very long time, been regarded as something
24 that in and of itself gives rise to harm in respect of
25 which a claim can be brought, isn't that correct? 12:11

26 A. I would say that there is a very good argument that
27 that is the case and if I were acting as an advocate or
28 if I were acting in my scholarly capacity, that is
29 precisely the argument I would make about the best way

1 to read the law and the best way the law should evolve.
2 However, as we've seen in the past years in the United
3 States, standing in privacy cases has represented an
4 obstacle in the private sector and also in the public
5 sector.

12:12

6 72 Q. But I'm just taking it step by step, Professor, and
7 trying to keep what, as you say, is a very complicated
8 step simple. Certainly in the private sector, somebody
9 interferes with your e-mails and gets access to your
10 e-mails, that's something which in and of itself is a
11 harm that would sustain a claim, isn't that correct?

12:12

12 A. Assuming the other elements of standing were -- injury
13 in fact were met, yes.

14 73 Q. Well, I mean, there would be injury in fact if somebody
15 accessed your e-mails and looked at the content, isn't
16 that correct? That would be an injury in fact. And it
17 would be particularised as well, Professor.

12:12

18 A. I believe that's correct.

19 74 Q. And I think you yourself have written, Professor, that
20 if we step away from US tort law and look at US law as
21 a whole, we see it's quite common for the law to
22 protect privacy and security without a requirement of
23 harm. You remember that, do you?

12:13

24 A. I have written thousands of pages, I believe, over the
25 years --

12:13

26 75 Q. I'm sure you have. I'm sorry.

27 A. -- and it sounds like something I wrote. But I would
28 like to see it in context in order to explain it.

29 76 Q. Okay. Well, then I'll give it to you. Sorry, that was

1 a naive question on my part.

2 A. In the interests of accuracy, it may just be hundreds
3 of pages.

4 **MS. JUSTICE COSTELLO:** Modesty noted.

5 77 Q. **MR. GALLAGHER:** It's just an article published by you, 12:13
6 "Privacy Law - From a National Dish to a Global Stew",
7 and co-authored by you, isn't that correct? Daniel
8 Solove, whom you refer to, I think, as an authority in
9 a few of your passages in your opinion, is that
10 correct? 12:14

11 A. Correct.

12 78 Q. And just if you'd go to the second page, above "*Privacy*
13 *law is becoming a global stew*", there's a paragraph:
14
15 "*If we step away from US tort law and look at US law as 12:14*
16 *a whole, we see that it is quite common for the law to*
17 *protect privacy and security without a requirement of*
18 *harm. Many data breach notification laws apply*
19 *regardless of harm, HIPAA and other privacy statutes*
20 *are enforced without regard to harm. Many other 12:14*
21 *federal and state statutes provide for damages even*
22 *without a showing of harm.*"
23

24 That's accurate, I take it?

25 A. Yes, that is what Prof. Solove and I wrote in, in what, 12:14
26 to be fair, is not a scholarly article, but a LinkedIn
27 blog post that we issued after the Gore Vidal -- Google
28 -v- Vidal-Hall decision in the UK came down before
29 Spokeo was decided.

1 79 Q. I think we might infer that from the name. But
2 nevertheless, whether a formal article in a peer review
3 journal or not, what you state there is an accurate
4 statement of the law?

5 A. I would say this is a simplified version of the law for 12:15
6 a general audience. I note that data breach
7 notification laws can be -- I think so as not to bore
8 the general audience with the niceties of US standing
9 doctrine, we conflated here regulation - including
10 regulation by public authorities, for which standing is 12:15
11 not required - with private rights of action for
12 plaintiffs. And we deliberately used the phrase "harm"
13 rather than "injury in fact".

14
15 And also, this decision, this article, this blog post 12:16
16 was drafted before the Spokeo decision came down and
17 Prof. Solove also wrote a perhaps even more informal
18 post after Spokeo came down in which he called the
19 intangible concreteness test in Spokeo to be
20 incomprehensible. 12:16

21 80 Q. Well, I'll come to that in a moment, Professor. I just
22 don't want to get confused, and maybe it's just me; you
23 keep saying "harm" and "injury in fact". I thought we
24 had established that if your data was interfered with
25 by a private operator and somebody looked at your 12:16
26 e-mails, that that constituted harm and it constituted
27 an injury in fact because it's particularised and
28 concrete, isn't that correct? You've agreed that?

29 A. If I follow what you're saying, yes.

1 81 Q. Yeah. And what this is saying is that you suffer harm
2 by the mere interference with your data, isn't that
3 correct?

4 A. That, the idea that you suffer harm from the mere
5 interference with your data, is a claim that I agree 12:17
6 with as a scholar. The difficulty is American law, the
7 American law of standing does not always recognise that
8 as an injury in fact sufficient to support standing in
9 these cases. And I think the difference here -- the
10 relevant passage here actually is on page nine of 12:17
11 Spokeo, where Justice -- where the court talks about
12 Congress' ability to recognise new kinds of, it uses
13 the word "injuries" rather than "harms". This is
14 halfway down:

15 12:18
16 *"In addition, because Congress is well positioned to*
17 *identify intangible harms that meet minimum Article III*
18 *requirements, its judgment is also instructive and*
19 *important."*

20 12:18
21 This suggests that the Supreme Court in Spokeo
22 envisions intangible harms that *do* meet injury, Article
23 III requirements of injury in fact and intangible harms
24 that do not as being insufficiently concrete.

25 82 Q. Yeah. I'll come to that in a moment. In the case of 12:18
26 the statutes that you refer to in your report - the
27 SCA, for example, and the unauthorised use and
28 disclosure of your data - if somebody was in a position
29 to demonstrate that their data had, unauthorised use

1 had been made of it or it had been disclosed, they
2 would satisfy the particularised and concrete
3 requirement of the standing rule?

4 A. Given the complexity of standing doctrine, it is always
5 difficult to make universal statements. But I think it 12:19
6 is highly likely that a court would recognise, yes.
7 Maybe even more than that.

8 83 Q. And that goes for the other statutory provisions
9 providing remedies that you refer to in your report?

10 A. I think I would want to talk about the remedies 12:19
11 individually rather than accept them all --

12 84 Q. All right.

13 A. -- on an individual, on a blanket basis.

14 85 Q. Would you go this far with me: As a general rule, that
15 does apply to the other statutory provisions referred 12:19
16 to in your report?

17 A. I would say that I would want to go through them --

18 86 Q. Okay.

19 A. -- at least at a more granular level in order to be
20 accurate. 12:20

21 87 Q. Okay. well, just sticking at the moment with Spokeo,
22 what the court is saying there is the ultimate legal
23 principle that sets out the parameters of standing is
24 Article III of the Constitution and within that
25 ultimate legal or constitutional requirement, Congress 12:20
26 have a certain flexibility in terms of defining what is
27 the requirement for standing for a particular statute,
28 is that fair?

29 A. I think I would accept -- so there are two things there

1 in that question. I would agree that, I would agree
2 completely that Article III is the source of
3 constitutional standing doctrine. With respect to the
4 role of Congress, the court in Spokeo is acknowledging
5 that in certain circumstances Congress does have the 12:20
6 ability to recognise novel causes of action, novel
7 kinds of, whether we call them harm or injury that are
8 concrete and particularised, and that the court - and
9 the court is being very cagey here - that the court
10 *could* recognise these in the past. But it is not 12:21
11 saying that they will defer to Congress' judgment,
12 ultimately because Article III roots in -- because
13 standing doctrine roots in Article III, it's a
14 jurisdictional requirement, the courts have to make a
15 case by case judgment in each instance. 12:21

16 88 Q. Yeah, that's a constitutional requirement, with the
17 ultimate limitation being the terms of Article III.
18 But subject to that, there is a certain room on the
19 part of Congress for defining what constitutes an
20 injury for the purposes of the particular statute? 12:21

21 A. In Spokeo, the court recognised that Congress *can*
22 define injuries and that sometimes these injuries, even
23 if intangible, can suffice as injuries in fact for
24 purposes of Article III, correct.

25 89 Q. Then if you go to the next page of the judgment, ten, 12:22
26 you'll see -- or, sorry, maybe just start at the last
27 sentence in nine:
28
29 "For that reason, Robins could not, for example, allege

1 a bare procedural violation, divorced from any concrete
2 harm, and satisfy the injury-in-fact requirement."

3
4 And they say:

5
6 "See *Summers*... '[D] eprivation of a procedural right
7 without some concrete interest that is affected by the
8 deprivation ... is insufficient to create Article III
9 standing'); see also *Lujan*."

10
11 You see that?

12 A. Yes.

13 90 Q. So Spokeo there is referring to existing authority for
14 that principle.

15 A. Yes.

16 91 Q. Yeah. And Lujan is a very unusual case, isn't it? I
17 mean, they claim -- sorry, that's an unhelpful
18 question. The basis for standing alleged in Lujan was
19 a very broad idea of standing, isn't that correct?

20 A. The standing alleged by the plaintiffs in Lujan was
21 very broad, yes.

22 92 Q. Quite extravagant?

23 A. I'm not sure I would characterise it as extravagant.

24 93 Q. Well, I think what they were doing was challenging, was
25 it the Secretary of State's funding of organisations
26 that didn't protect wildlife, organisations *outside* of
27 the US, isn't that correct?

28 A. That's correct.

29 94 Q. And the basis of standing was 'well, that concerns us,

1 because from time to time we might travel to those
2 countries and the wildlife that should be protected
3 might not be there for us to see'. That was the basic
4 -- wasn't it?

5 A. That was how Justice Scalia, in the Lujan decision, 12:23
6 characterised the position of the claimants. I believe
7 the claimants were environmental organisations and
8 their members who asserted an aesthetic interest in
9 certain overseas environments and in order to fit that
10 argument -- and challenged an act or inaction of the US 12:24
11 Government in funding or not funding. And in order to
12 challenge that, they had to filter their argument
13 through the constitutional requirements of standing.
14 But that is how Justice Scalia caricatured --

15 95 Q. well, I think in giving the judgment of the court, is 12:24
16 that correct?

17 A. I'm sorry?

18 96 Q. Was he giving the judgment of the court, Justice
19 Scalia?

20 A. I believe he was, yes. 12:24

21 97 Q. Yeah. So that's how the court characterised it?

22 A. Absolutely. Correct.

23 98 Q. Then in page ten, the next paragraph:

24
25 *"This does not mean, however, that the risk of real 12:24*
26 *harm cannot satisfy the requirement of concreteness."*

27
28 So a *risk* of real harm is capable, or potentially
29 capable of satisfying concreteness, isn't that correct?

1 A. What the court is saying here is, in this paragraph -
2 and I think it probably makes sense to take the
3 paragraph as a whole, but I agree this is a very
4 important passage in Spokeo for understanding what the
5 court is saying - is that Congress can, in some 12:25
6 circumstances, recognise intangible injuries and that
7 some of those, but perhaps not all of them, will be
8 accepted by the court as constituting a sufficiently
9 concrete injury to support this element of injury in
10 fact. 12:25

11
12 Then the court talks about what happens when Congress
13 recognises a cause of action and it holds, or it
14 suggests that Article III standing requires a concrete
15 injury even in the context of a statutory violation. 12:25
16 So even when Congress can recognise a statutory -- can
17 pass a statute that violates it, in order to bring a
18 private right of action enforcing one's rights against
19 a violation, you have to show standing and you have to
20 show injury in fact, and in this case you have to show 12:26
21 a concrete injury that you yourself have suffered.

22 99 Q. I think we've established that. But I'm just trying to
23 keep it simple, and please *do* correct me if I'm unduly
24 simplifying it in a way that is misleading or
25 incorrect. But just taking that statement there: "*This* 12:26
26 *does not, however, mean that the risk*" - that's a risk
27 as opposed to an actual occurrence - "*of real harm*
28 *cannot satisfy the requirements of concreteness.*" And
29 they say "*see, e.g. Clapper -v- Amnesty.*" And that was

1 stated in Clapper -v- Amnesty, isn't that correct?

2 A. What the court is doing here is it is noting that the
3 two traditional subparts - and I apologise again for
4 the necessary complexity here - the two subparts of
5 injury in fact doctrine which come from Lujan - (A) 12:26
6 actual or imminent and (B) concrete and particularised
7 - that you can have a risk of real harm, an imminent
8 injury, that can also be concrete as long as
9 concreteness is otherwise satisfied.

10 100 Q. Okay. Well, maybe I'll approach it a different way; 12:27
11 they are drawing a distinction between actual harm,
12 i.e. harm that has occurred, and the risk of harm,
13 isn't that correct?

14 A. That's correct.

15 101 Q. And they are saying the risk of harm *may* satisfy that 12:27
16 aspect of the law of standing and may in and of itself
17 be particularised and concrete?

18 A. Yes. The court is saying that injury must be actual or
19 imminent and concrete and particularised. And it is
20 saying specifically here that an imminent injury that 12:27
21 satisfies the elements of (A), as I was calling it, can
22 also, under certain circumstances, be concrete and
23 particularised.

24 102 Q. Yeah. And then at the bottom of the page in the last 12:28
25 paragraph they say:
26
27 *"In the context of this particular case, these general*
28 *principles tell us two things: On the one hand,*
29 *Congress plainly sought to curb the dissemination of*

1 *false information by adopting procedures designed to*
2 *decrease that risk. On the other hand, Robins cannot*
3 *satisfy the demands of Article III by alleging a bare*
4 *procedural violation."*

5
6 So having looked at the statute and examined it in the
7 context of Article III, they held that a bare
8 procedural violation of the type identified didn't
9 satisfy the demands of Article III, isn't that correct?

10 A. The court is saying that because Robins proved a -- 12:28
11 that even though Robins proved a violation of the
12 statute, because he did not show that he suffered an
13 injury in fact stemming from that violation, he lacked
14 standing to sue even though Congress authorised a cause
15 of action, I believe, with a damages requirement 12:29
16 attached and he could, therefore, not maintain suit for
17 failure of standing, even though it *had* violated the
18 statute, Spokeo in this case, the defendant had
19 violated the statute and it had violated the statute in
20 a way that was linked to him. 12:29

21 103 Q. Well, would you just go on:

22
23 *"A violation of one of the FCRA's" - that's the statute*
24 *- "procedural requirements may result in no harm."*

25
26 And it gives an example:

27
28 *"Even if a consumer reporting agency fails to provide*
29 *the required notice to a user of the agency's consumer*

1 *information, that information regardless may be*
2 *entirely accurate."*

3
4 Do you see that? So that wouldn't give rise to a claim.

5 A. I believe the example the court is giving here is that 12:29
6 a failure to provide notice that did not cause harm
7 would not provide the necessary quantum of injury.

8 104 Q. They're making it clear the mere fact that there's a
9 procedural violation doesn't in and of itself give you
10 standing - you need to look at what the procedural 12:30
11 violation is, isn't that correct?

12 A. The court is saying that the mere fact of a procedural
13 violation of a law does not automatically give a
14 plaintiff standing to sue.

15 105 Q. And equally it is saying that the mere procedural 12:30
16 violation *may*, in certain circumstances, give a
17 plaintiff standing to sue, isn't that correct?

18 A. I think the court would not be saying "a *mere*
19 procedural violation", because it is clearly holding
20 bare procedural violations, which is an even stronger 12:30
21 concept, to one side. I think the court is saying
22 that -- well, it is difficult to say --

23 106 Q. Okay.

24 A. It is difficult for me to speculate on what the court
25 is saying on this point. 12:30

26 107 Q. Okay. Well, then if you just read on:

27
28 *"In addition, not all inaccuracies cause harm or*
29 *present any material risk of harm. An example that*

1 *comes readily to mind is an incorrect zip code. It is*
2 *difficult to imagine how the dissemination of an*
3 *incorrect zip code, without more, could work any*
4 *concrete harm."*

5
6 Do you see that?

7 A. I do.

8 108 Q. But then it goes on in the last paragraph to say:

9
10 *"Because the Ninth Circuit failed to fully appreciate*
11 *the distinction between concreteness and*
12 *particularisation, its standing analysis was*
13 *incomplete. It did not address the question framed by*
14 *our discussion, namely, whether the particular*
15 *procedural violations alleged in this case entail a*
16 *degree of risk sufficient to meet the concreteness*
17 *requirement. We take no position as to whether the*
18 *Ninth Circuit's ultimate conclusion - that Robins*
19 *adequately alleged an injury in fact - was correct."*

20
21 So they're remanding it to see whether an aspect of the
22 procedural violation did create the necessary element
23 of risk so as to give standing, isn't that correct?

24 A. They are vacating and remanding the decision below. I
25 think the way most observers read what the court did
26 here was that the Ninth Circuit failed to fully
27 appreciate a distinction that the court had not
28 articulated prior to that point, that up until Spokeo,
29 most observers, in my opinion, viewed concrete and

12:32

1 particularised to be the same thing, or at least to be
2 related, and that Spokeo appears to have refined the
3 law or clarified the law, in that both concreteness *and*
4 particularisation are requirements that plaintiffs must
5 make in order to prove standing. 12:32

6 109 Q. So up until then, people didn't particularly focus or
7 realise the importance of the distinction between
8 concrete and particular, is that correct? Is that what
9 you're saying?

10 A. Up until Spokeo, most observers - and I think the Ninth 12:32
11 Circuit might be in this category - didn't realise that
12 concreteness was a separate inquiry.

13 110 Q. Well, can that be correct, Professor? would you look at
14 page eight of the judgment? And if you go six lines
15 down on the first paragraph, beginning 12:33
16 "*Particularisation*", it says:

17
18 "*First, the court noted that Robins 'alleges that*
19 *Spokeo violated his statutory rights, not just the*
20 *statutory rights of other people'.*"

21
22 That's the "particularise" part of it.

23
24 "*Second, the court wrote that 'Robins's personal*
25 *interests in the handling of his credit information are*
26 *individualised rather than collective.'* *Both of these*
27 *observations concern particularization, not*
28 *concreteness. We have made it clear time and time*
29 *again that an injury in fact must be both concrete and*

1 *particularised.*"

2

3 So the court certainly believed *it* had made it very
4 clear *time and time again* that the injury had to be
5 concrete and particularised, isn't that correct? 12:34

6 A. Yes.

7 111 Q. So it's *not* correct to say then, I put it to you, that
8 until **Spokeo** made this distinction, people were under
9 *any* misapprehension or *ought* to have been under any
10 misapprehension as to this requirement. 12:34

11 A. I don't think that's correct. Certainly the court
12 believed that it had made it clear, which I think was
13 the question that I answered, the court believed it had
14 made it clear time and time again that injury in fact
15 must be both concrete and particularised. And 12:34
16 certainly the concrete and particularised language *did*
17 appear - going back to **Lujan** - and I am sure there are
18 cases in which concreteness was examined.

19 112 Q. But to say to the court that up until then it was
20 thought that concrete and particularised related to the 12:34
21 same issue, that's *not* correct. It just *can't* be
22 correct, Professor. (Short Pause)

23 **MS. JUSTICE COSTELLO:** I think he's inviting you to
24 respond, if you wish to.

25 A. Oh, I'm sorry. 12:35

26 113 Q. **MR. GALLAGHER:** Oh, I'm sorry, Judge. My mannerisms,
27 or the mannerisms of this court might not have been
28 obvious. I do apologise, Professor. No, I'm
29 suggesting to you that that cannot be correct.

1 A. That the court had never said that injuries must be
2 both concrete and particularised?

3 114 Q. No, that people who understood this area *couldn't* have
4 believed that, prior to Spokeo, particularisation and
5 concreteness were, in effect, the one issue and weren't 12:35
6 separate hurdles that had to be met.

7 A. I think, judging by the surprise which I observed in
8 the legal Community when Spokeo came down, that that
9 was the case outside of the court.

10 115 Q. Well, the List -v- Driehaus decision... 12:35

11 A. Yes.

12 116 Q. Yeah. That preceded Spokeo.

13 A. Yes, it did.

14 117 Q. And that made it also clear that an imminent risk of
15 harm that hadn't actually occurred was sufficient -- 12:36
16 or, sorry, was sufficient if the other conditions of
17 standing were satisfied.

18 A. That case involved a prosecution of a politician, I
19 believe, under a statute that made it a misdemeanour to
20 engage in false speech in relation to an election. 12:36

21 118 Q. Yeah.

22 A. But I think that is essentially what that case --

23 119 Q. I think that *is* what it's about.

24 A. -- held. That is what it's about.

25 120 Q. Yeah. But what I'm asking you about is it concerned 12:36
26 also this question of imminent risk of harm because the
27 politician wasn't re-elected. So the complaint, he
28 didn't pursue the complaint, he withdrew his complaint
29 that List or Driehaus - I think it was List, the

1 plaintiff - had made a false statement about him - it
2 was his position on abortion - and it was argued that
3 because the complaint was withdrawn that there was no
4 standing. And the court rejected that, the Supreme
5 Court, and allowed the case to proceed on the basis of 12:37
6 a risk of future harm, isn't that correct?

7 A. Yes. And that was consistent with another principle in
8 standing doctrine that a likelihood of prosecution in
9 particular, particular for the exercise of First
10 Amendment rights, is sufficient to -- or *can* be 12:37
11 sufficient to support standing.

12 121 Q. Just going back to page 11 of Spokeo. They remanded it
13 to see whether a particular procedural violation did
14 entail a degree of risk sufficient to meet the
15 concreteness requirement, thereby, I suggest to you, 12:38
16 making it clear that a procedural violation may well
17 satisfy the requirement.

18 A. Yes, the court contemplates that procedural violations
19 under American standing law *can* satisfy the requirement
20 of concreteness. But equally it contemplates that 12:38
21 sometimes procedural violations, what it calls bare
22 procedural violations that lack those elements, cannot.
23 And it remanded it to deal with those circumstances.
24 And I think this illustrates not just the perhaps at
25 times maddening complexity of American standing law, 12:38
26 but also that any one of these requirements can be an
27 obstacle of the kind that I talked about in my report.

28 122 Q. Well, you talk about the maddening complexity. I mean,
29 it doesn't come as a surprise that a mere procedural

1 violation of the type that the court instanced there
2 might not give rise to standing? That didn't come as a
3 surprise?

4 A. When I was observing the Spokeo decision, one of the
5 arguments that, I believe it was counsel for Spokeo 12:39
6 were making, was that procedural violations that have
7 no harm cannot be authorised by Congress. And there
8 were implications there that Congress lacked the power
9 to recognise new causes of action beyond those that had
10 been recognised in the common law. And Spokeo, as I 12:39
11 talk about in my report, within the privacy Community
12 in the United States, represented a real risk that the
13 court might have read this doctrine even more
14 stringently and significantly curtailed the
15 availability of private rights of action to enforce 12:40
16 privacy rights under American law and consumer
17 protection rights more generally. And it is unclear
18 what the effect of this passage that we have been
19 discussing is going to have moving forward and we'll
20 have to observe what happens. 12:40

21 123 Q. Prof. Richards, there may have been an apprehension
22 that the court would make standing more difficult, but
23 in the event, it didn't do so, isn't that correct?

24 A. I would say, as I say in my report, that the court in
25 Spokeo tightened the concreteness requirement, but did 12:40
26 not, by its own terms, necessarily eliminate private
27 rights of action; that would be correct.

28 124 Q. Well, when you say "tightened the concreteness", it
29 reaffirmed that an intangible harm could be concrete,

1 isn't that correct? That's what we've been looking at.

2 A. The court *did* countenance that an intangible harm could
3 be concrete. But most of the court's discussion, I
4 would submit, in my opinion, is from the opposite
5 perspective, is that intangible harms are frequently 12:41
6 not going to be concrete, even when they are
7 recognised.

8 125 Q. Well, the one that wasn't recognised is what you
9 describe as a bare procedural right. And could you
10 tell the court what you mean by a bare procedural 12:41
11 right?

12 A. The bare procedural right is the court's term. And as
13 I have explained, Spokeo is a difficult case to
14 explain.

15 126 Q. But you quoted and I'm just asking for your 12:41
16 understanding of what "bare procedural right"...

17 A. I would say, my best reading of what "bare procedural
18 right" -- bare procedural violation I think is the term
19 that the court uses. My best interpretation of bare
20 procedural violation - I have to stress that this is 12:41
21 bounded by uncertainty, I'm not sure what the court
22 means, but my -- in fact, I'm not sure I can speculate,
23 I don't want to speculate to this court.

24 127 Q. But it did give some examples; a wrong Zip Code, isn't
25 that correct? 12:42

26 A. The court gave one example at the end about the
27 disclosure of a zip code as a possible illustration.

28 128 Q. Or an absence of notice where no inaccurate information
29 was given. Isn't that correct? In that paragraph that

1 we were looking at.

2 A. The court said:

3
4 *"An example that comes readily to mind is an incorrect*
5 *zip code. It is difficult to imagine how the* 12:42
6 *dissemination of an incorrect zip code, without more,*
7 *could work any concrete harm".*

8 129 Q. So I suggest to you, Professor, that its explanation of
9 a bare procedural right is certainly an explanation
10 that gives it a *narrow* meaning. 12:42

11 A. I can't say whether it's narrow or whether it's broad.

12 130 Q. And, therefore, I suggest you can't say either that
13 **Spokeo** has actually made standing more difficult in the
14 context with which the judge is concerned.

15 A. I would say that **Spokeo** has added -- **Spokeo** has 12:43
16 certainly reaffirmed the importance of standing in any
17 case in which a private right of action is asserted.
18 It has reaffirmed the importance of standing as a
19 potential obstacle in any case in which a private right
20 of action is asserted that deals with privacy. And 12:43
21 **Spokeo** has, as not just a privacy standing case, but as
22 an Article III standing case, has injected further
23 uncertainty into standing law.

24
25 And my position in my report is not that standing is an 12:43
26 insurmountable obstacle to plaintiffs in the United
27 States, merely that it is a substantial obstacle to
28 plaintiffs, particularly those alleging violations of
29 statutory remedies provided by Congress and that that

1 uncertainty further contributes to the difficulty. But
2 it is not impossible.

3 131 Q. Well, the question that I'm putting to you,
4 Prof. Richards, I think is slightly different and I'm
5 sorry if I didn't make it clear. All of the points you 12:44
6 say that are reaffirmed in Spokeo, those were points of
7 principle that were clear from Amnesty -v- Clapper,
8 isn't that correct?

9 A. I don't think that's correct.

10 132 Q. Okay. Insofar as we're concerned here with breaches of 12:44
11 the various provisions - 2702, the ECPA, the various
12 provisions that I've identified - if those provisions
13 are broken, that's not just a procedural violation,
14 isn't that correct? If somebody unlawfully collects
15 your data or unlawfully uses your data or unlawfully 12:44
16 discloses your data, those are not procedural
17 violations?

18 A. I think the court in Spokeo contemplates that the
19 disclosure of an incorrect zip code, which presumably
20 would be personal data, might or might not -- in fact 12:45
21 it suggests that it would not work any concrete harm.
22 So I think the court does countenance that certain
23 kinds of processing or certain kinds of disclosure --
24 and again, one is having to speculate here because the
25 court is not clear about what it means and this will 12:45
26 require further development in the cases and this case
27 was only decided last summer.

28
29 But I think it's difficult to speculate further about

1 the effect of Spokeo. And my opinion, having read the
2 case and having talked to other privacy scholars and
3 lawyers about the effect of Spokeo, is that the general
4 consensus in our community is that Spokeo did tighten
5 the standing requirements and it did do so around 12:45
6 concreteness. And absolutely one can parse the language
7 in other ways, but in my opinion, that is what I
8 believe the general opinion to be and it is also my
9 personal opinion about the effect that Spokeo had on
10 the law. 12:46

11 133 Q. Professor, Spokeo, as we know, was in the commercial
12 sphere in relation to commercial regulation. The
13 provisions that are the subject of your evidence before
14 the court involve interception of people's data, use or
15 wrongful disclosure -- wrongful use or wrongful 12:46
16 disclosure. Those, I suggest to you, are not
17 procedural matters of the type contemplated by the
18 court in Spokeo.

19 A. I can't speak to that. I will say that Spokeo is not
20 just a standing and a privacy standing case, Spokeo is 12:46
21 an Article III case and I have no doubt that Spokeo
22 will be cited in government access cases. In fact,
23 Judge Robart, in the Microsoft opinion that came down
24 that I spoke about at the beginning of my testimony,
25 cited Spokeo right after he cited Clapper for general 12:47
26 principles of standing law.

27 134 Q. Sorry, I'll just ask you once more; is it your view to
28 this court that you would equate the bare procedural
29 violation described by the Supreme Court in Spokeo with

1 the collection, wrongful collection, wrongful use or
2 wrongful disclosure of data that is contemplated by the
3 provisions of the US code that are relevant to this
4 case?

5 A. That's a very difficult question to ask in light of 12:47
6 what Spokeo actually decides and where it is unclear.
7 I would certainly -- I can state that Spokeo reaffirms
8 the relationship between injury in fact and harm.

9 135 Q. Professor, you said and you agreed that the Zip Code
10 procedural violation, you're not equating that, I take 12:48
11 it, with use or misuse of information under the US
12 code, the provisions that we're concerned with here?
13 It's entirely different, isn't it?

14 A. I can't speak to that. I do know that when this
15 opinion came down, I did hear privacy lawyers and 12:48
16 privacy scholars - and it's difficult to be specific -
17 but I do recall an objection to the Zip Code line along
18 the grounds 'well, of course zip codes can produce
19 privacy harm and of course they're disclosure of
20 information'. But I think the law is too unclear for 12:48
21 me to speculate further on this point.

22 136 Q. If you go to Justice Thomas' concurring opinion. And
23 that begins after the conclusion of the court's, which
24 is on 11, Judge. The next one is page one and it's
25 Justice Thomas concurring. At page seven of his 12:49
26 judgment and the last paragraph, he says:

27
28 *"A remand is required because one claim in Robins'*
29 *complaint rests on a statutory provision that could*

1 *arguably establish a private cause of action to*
2 *vindicate the violation of a privately held right.*
3 *Section 1681e(b) requires Robins to 'follow reasonable*
4 *procedures to assure maximum possible accuracy of the*
5 *information concerning the individual about whom the*
6 *report relates'... If Congress has created a private*
7 *duty owed personally to Robins to protect his*
8 *information, then the violation of the legal duty*
9 *suffices for Article III injury in fact. If that*
10 *provision, however, vests any and all consumers with*
11 *the power to police the 'reasonable procedures' of*
12 *Spokeo, without more, then Robins has no standing."*
13

14 That was the issue that was remanded back, isn't that
15 correct?

12:50

16 A. I believe so.

17 137 Q. And Justice Thomas gives an explanation of the basis
18 for Article III and its fundamental relevance to the
19 separation of powers on paragraph, or page five halfway
20 down the page. You see his description:

12:50

21
22 *"The separation-of-powers concerns underlying our*
23 *public-rights decisions are not implicated when private*
24 *individuals sue to redress violations of their own*
25 *private rights. But, when they are implicated,*
26 *standing doctrine keeps courts out of political*
27 *disputes by denying private litigants the right to test*
28 *the abstract legality of government action."*
29

1 That's what Article III is about, isn't that correct?

2 A. Article III is about a lot of things. But standing
3 doctrine certainly is a limit on judicial discretion to
4 entertain claims so that courts focus on questions of
5 law between adverse parties who have a stake in the 12:51
6 outcome.

7 138 Q. "In live controversies" I think is the phrase used in
8 some of the cases, is that correct?

9 A. Yes.

10 139 Q. And I think that's a doctrine that's common to many 12:51
11 legal systems, isn't that correct?

12 A. I can't speak to other legal systems. I'm an expert in
13 US law.

14 140 Q. Just US law. Okay. And the reason is so that the
15 courts aren't asked for advisory opinions or asked to 12:51
16 determine matters on the basis of assumed facts or
17 abstract issues in respect of which no facts are
18 established, isn't that correct?

19 A. I'm not sure I understand the question.

20 141 Q. The purpose, or one of the purposes of the Article III 12:51
21 requirement is to ensure that the court doesn't have to
22 give advisory opinions, that the court is not
23 determining matters on the basis of assumed facts or
24 matters on the basis, on an abstract basis where no
25 facts are established? 12:51

26 A. Yes, that is one of the justifications -- this is for
27 standing doctrine?

28 142 Q. Yes.

29 A. Yes, this is one of the justifications. The advisory

1 opinions doctrine is a separate doctrine under Article
2 III that is not within standing. And in the American
3 system, several states do not have an Advisory Opinions
4 Bar that you can submit opinions to state courts for
5 resolution. So the Article III requirement may have 12:52
6 analogues in other legal systems, it certainly has
7 analogues in state legal systems in the United States,
8 but I think looking at Article III, it seems to be a
9 stricter requirement and it is one that, as I say in my
10 report, imposes substantial or material obstacles for 12:52
11 all plaintiffs, perhaps to serve some of these
12 purposes, among others.

13 143 Q. Yeah. And it is a doctrine that applies generally to
14 all legal spheres in US law, isn't that correct?

15 A. No. 12:53

16 144 Q. It's of general application?

17 A. Not under US law. Standing applies to claimants in
18 federal court.

19 145 Q. I'm terribly sorry - and that's entirely my fault - to
20 all claimants in federal courts. Because obviously the 12:53
21 Constitution applies to those courts, as opposed to
22 state claims. But it applies right across all areas of
23 law. It's of general application.

24 A. I'm sorry, there's several technical things. I want to
25 be sure that I get the answer right. Article III is of 12:53
26 general application to private claimants bringing suit
27 in federal court. Article III standing is of general
28 application, correct.

29 146 Q. And it's not confined to privacy law, it's to --

1 A. No.

2 147 Q. -- all areas of private claims in federal courts?

3 A. No, but I think that standing appears to have special
4 relevance to privacy law because of the intangible
5 nature of the claims of privacy and also their relative 12:53
6 novelty, as opposed to other, what the court calls in
7 Spokeo, traditionally established claims under American
8 law. As I say in my report, I think it's no, it should
9 be no surprise that the first wave of modern standing
10 cases involved environmental law, which was a 12:54
11 relatively new field of law in the second half of the
12 20th century and that many of the modern cases involve
13 privacy. And in fact, as I have said in some of my
14 work, in privacy cases, standing is a particular issue.
15 And this is the case both in cases of private 12:54
16 litigation and in litigation against the government.

17 148 Q. But privacy law in the United States has a fairly long
18 pedigree, isn't that correct? It goes back a very long
19 time?

20 A. Any time one discusses time in America versus time in 12:55
21 Europe, I think the scales are different.

22 149 Q. Okay.

23 A. I would say that privacy law in America as a tort
24 concept dates back to 1890 and the publication of a law
25 review article. I've written in some of my other work 12:55
26 that the interests protected by privacy law do go back
27 much further to the English common law.

28 150 Q. And you yourself, in your report, instance that the
29 ECPA - which, correct me if I'm wrong, was introduced,

1 I think, in 1974 - was a very innovative piece of
2 legislation at the time?

3 A. It was introduced in 1986.

4 151 Q. I'm sorry.

5 A. But it was an update of an earlier law from 1968. 12:55

6 152 Q. Thank you.

7 A. Yes, so the electronic communications, in 1967
8 Congress -- the Supreme Court, in the Katz decision,
9 held that telephone call contents are protected by the
10 Fourth Amendment. Then the following year, watching 12:56
11 what the court did, Congress passed the Wire Tap Act,
12 protecting the privacy of the contents of telephone
13 calls, in 1968. In 1986 Congress amended the Wire Tap
14 Act by adding protection for e-mails and protection for
15 stored communications. And *that* is the ECPA or the 12:56
16 Electronic Communications Privacy Act of 1986. And
17 that is one of the statutes that we are talking about
18 in these proceedings.

19 153 Q. I think you said in your report that it was - and maybe
20 not used the word "innovative", but something 12:56
21 synonymous with that - piece of legislation at the
22 time, isn't that correct?

23 A. That's correct. I may have used the term "farsighted".

24 154 Q. "Farsighted". And that obviously predated the
25 Directive with which we're concerned, the 1995 12:56
26 Directive, isn't that correct?

27 A. Yes.

28 155 Q. Could you tell the court what the fair information
29 practices are?

1 A. The fair information practices, or the fair information
2 practice principles - both terms are used in privacy
3 law - are a set of principles that govern a set of
4 ethical principles for the handling of personal data.
5 They were developed in the United States and they been 12:57
6 applied in various forms - and there's great
7 variability - in privacy and data protection regimes
8 around the world.

9 156 Q. And they were developed in the United States, I think,
10 around the 1970's, isn't that correct? 12:57

11 A. That's correct.

12 157 Q. And I think they informed the 1995 Directive, isn't
13 that correct?

14 A. That would require me to give an opinion on European
15 law. But I believe that is the case. 12:57

16 158 Q. Well --

17 A. And I believe I have written about that.

18 159 Q. You're looking at me looking at the book where you say
19 they're the foundation of the OECD privacy guidelines
20 and the basis of the 1995 Data EU Directive. Isn't 12:58
21 that right?

22 A. Then it must undoubtedly be the case. But I'm
23 reluctant to issue any opinions on European law,
24 because I don't want to tread outside my expertise.

25 160 Q. Well, you issued them to the public and stated, 12:58
26 Professor, that it was the basis. I presume you were
27 satisfied, given your exemplary credentials, you were
28 satisfied of the accuracy of that statement when you
29 made it?

1 **MS. JUSTICE COSTELLO:** Do books have to be issued under
2 oath, Mr. Gallagher?
3 **MR. GALLAGHER:** No they don't. But one would've
4 thought that people do endeavour to make sure that they
5 are accurate. 12:58
6 **MS. JUSTICE COSTELLO:** Particularly ethical books I
7 presume.
8 161 **Q. MR. GALLAGHER:** Yes. Intellectual privacy, I think,
9 that Mr. Murray referred to. (To witness) So I take it
10 you were fairly happy they were accurate when you made 12:58
11 that statement?
12 **A.** I'm sorry?
13 162 **Q.** I'm sure you were happy that that statement was
14 accurate when you included it in your book?
15 **A.** I'm not sure we proved the statement, but assuming that 12:59
16 it is, yes, I'm glad you agree.
17 163 **Q.** You talk about standing creating *more* difficulty in the
18 area of privacy, but in fact I think you agreed earlier
19 that intrusions on privacy in and of themselves
20 constitute harm, so that actually, in the area of 12:59
21 privacy, the standing doctrine in terms of establishing
22 harm in many cases is more easily satisfied in respect
23 of that aspect of it?
24 **A.** I'm not sure I would agree with that. And I apologise
25 again, because I'm going to have to give a complicated 12:59
26 answer. Privacy in America originated in the form that
27 called itself privacy in the torts context. And what
28 has happened with the growth of digital technology is a
29 lot of those concepts have been imported, as has been

1 the term, to refer to what Europeans would call data
2 protection. And it's a very uneasy and complicated
3 mix. And so I could say that when tort concepts have
4 been applied in data contexts - for instance, in areas
5 like cookies or privacy policies - tort remedies really 13:00
6 have not been found to be present in some cases.

7 **MR. GALLAGHER:** I might leave it there, Judge, until
8 after lunch, if I may?

9 **MS. JUSTICE COSTELLO:** Yes, certainly. Two o'clock.

10 13:00

11
12 (LUNCHEON ADJOURNMENT)

1 THE HEARING CONTINUED AFTER LUNCH AS FOLLOWS:
2
3

4 MS. JUSTICE COSTELLO: Good afternoon.
5

14:05

6 CONTINUATION OF CROSS-EXAMINATION OF PROF. RICHARDS BY
7 MR. GALLAGHER
8

9 164 Q. MR. GALLAGHER: Prof. Richards, over the time since the
10 introduction of the ECPA there have been, I take it,
11 significant advances in terms of the protection of
12 privacy in the US; isn't that correct?

14:05

13 A. There certainly has been a growth in American privacy
14 law and in the privacy bar in the United States.
15 I would suggest, though, at the same time technological
16 change has been so immense since 1986 that it's
17 difficult to make that comparison on those terms.

14:05

18 165 Q. And in the last few years there have been some
19 significant advances in the protection of privacy;
20 isn't that correct, in the US?

14:05

21 A. Is there something in particular you are referring to?

22 166 Q. No, I am just asking you a general question, Professor,
23 do you know?

24 A. I would say that privacy law in the last few years,
25 there certainly have been some surveillance reforms in
26 the last years of the Obama administration.

14:06

27 167 Q. But apart from those surveillance reforms, there have
28 been other advances in the protection of privacy; isn't
29 that correct?

1 A. There have been new laws passed, yes.

2 168 Q. Yes. Quite a number of advances, would that be fair to
3 say?

4 A. Without being more specific I think it's difficult for
5 me to comment on that. 14:06

6 169 Q. Can I just ask you or refer you, Professor, just to
7 another one of your prodigious outputs, it may not be
8 published yet, "*Privacy's Trust Gap*" February 2017
9 forthcoming in the Yale journal?

10 A. Yes. 14:07

11 **MS. JUSTICE COSTELLO:** Where is that -- oh, to be
12 handed in.

13 170 Q. **MR. GALLAGHER:** It has just been handed in, sorry,
14 Judge. That's something you wrote recently, I take it?

15 A. Yes, it is. 14:07

16 171 Q. Yes. And if you go to page 30, in the last paragraph?

17 A. Yes.

18 172 Q. You refer to: "*The legal campaign for being effective
19 and consider the numerous examples in the past
20 few years of instances in which privacy law has
21 advanced human interest over those of government or
22 corporations*"? 14:07

23 A. That's correct.

24 173 Q. Yes. And you give various examples?

25 A. Yes, we do. 14:07

26 174 Q. Including the expansion of Federal Trade Commission
27 enforcement of privacy and security rules; isn't that
28 correct?

29 A. That's correct. Could I qualify this?

1 175 Q. By all means.
2 A. This book review is a response to an argument that
3 privacy and privacy law - privacy is doomed and privacy
4 law is hopeless. And this in a section that is called
5 on page 29, part (b), "*Legal Reform is Not Hopeless*". 14:08
6 So we are arguing against a position that there is no
7 privacy law in the United States and we point to
8 several developments, which I agree are important ones.
9 I would also draw our attention to page 20 --
10 176 Q. Mm hmm. 14:08
11 A. -- footnotes 75 and 76 where I talk about standing and
12 I write:
13
14 "*Similarly one of the major obstacles to privacy*
15 *regulation through litigation is the requirement that* 14:08
16 *privacy plaintiffs demonstrate an individually*
17 *traceable 'injury in fact' to satisfy constitutional*
18 *standing or related doctrines. The imposition by*
19 *courts of these requirements rooted in notions of*
20 *individual rights and injuries cognizable in* 14:08
21 *individuals terms have ossified privacy rights in areas*
22 *as diverse as government surveillance of First*
23 *Amendment activities and privacy rights created by*
24 *statute*".
25 177 Q. I think we've been over that, Professor, in some detail 14:09
26 this morning; isn't that correct? I was just asking
27 you about some significant developments in
28 recent years, of which you are well aware; isn't that
29 correct?

1 A. Yes.

2 178 Q. In your report for this court you make a comment in
3 paragraph 33 on page 11 that: "*As the DPC noted,*
4 *unlike the EU and virtually all other industrialised*
5 *western democracies, the US does not have a* 14:09
6 *comprehensive data protection statute*"?

7 A. That's correct.

8 179 Q. Are you familiar with the data protection law in other
9 industrial, western industrialised economies or
10 countries, sorry? 14:09

11 A. I am familiar with it.

12 180 Q. You are?

13 A. I am, but not expert to offer legal opinions.

14 181 Q. Yes. But you are not familiar, you told us, with the
15 national surveillance law; isn't that correct? 14:10

16 A. With which?

17 182 Q. With the national surveillance law in these countries
18 you are not familiar with, you told us?

19 A. In Europe, not to be able to testify to, no.

20 183 Q. And yet this report is dealing with national 14:10
21 surveillance law; isn't that correct, you told us that
22 at the beginning?

23 A. My report?

24 184 Q. Yes.

25 A. Yes. 14:10

26 185 Q. Yes. So when you speak of a comprehensive law in
27 other, data protection law, in other western
28 industrialised countries, you are speaking about the
29 generalised protection of privacy as opposed to

1 protection in terms of national surveillance or
2 national intelligence surveillance; isn't that correct?

3 A. I am drawing a distinction here between the general
4 protection, general data protection statute of the sort
5 contemplated by my understanding of the Directive and 14:10
6 the forthcoming GDPR versus American law which does not
7 have a general baseline statute.

8 186 Q. But that's a general comment with regard to privacy in
9 general as opposed to the area of privacy which you
10 identify in paragraph 99, to which I brought you this 14:11
11 morning, to which your report is directed? At
12 paragraph 99 on page 38 you confirmed this morning that
13 your report is directed to the:

14

15 *"Availability of judicial remedies to EU citizens who 14:11*
16 *wish to challenge unlawful data processing by the US*
17 *government once their data has been transferred to the*
18 *US".*

19 A. That's correct.

20 187 Q. So you're not in a position to say, I take it, in 14:11
21 respect of any western industrialised country that
22 there is a comprehensive protection in respect of that
23 area of the law?

24 A. Excluding the United States as a western industrialised
25 country? 14:12

26 188 Q. Yes, because you are comparing the United States so
27 I think it follows.

28 A. I am not comparing US law, I'm not taking a position on
29 the adequacy of US law under EU law.

1 189 Q. No, no, Professor, that's not the question I asked you.
2 You are not in a position to say to this court that any
3 other western industrialised country has comprehensive
4 data protection law in the area of national
5 surveillance? 14:12

6 A. Insofar as I don't offer opinions on the laws of other
7 countries, that would be correct.

8 190 Q. Yes. Well, I know you don't offer, but you're not even
9 in a position to say it, you don't know; isn't that
10 correct? 14:12

11 A. I don't know what?

12 191 Q. You don't know of any other country that has a
13 comprehensive data protection law in the area of
14 national surveillance?

15 A. I have not studied it so I cannot speak to that. 14:13

16 192 Q. Yes. Just simple, you don't know, Professor. You
17 don't know of any other country; isn't that correct?

18 A. Not to my knowledge, no.

19 193 Q. Yes. And you also appreciate that, with the exception
20 of four countries in Europe as it stands at the moment, 14:13
21 all of the other countries are civil law countries, are
22 you aware of that?

23 A. Yes.

24 194 Q. And that in civil law countries you generally address
25 legal issues by legislation or by code; isn't that 14:13
26 correct?

27 A. That's my understanding.

28 195 Q. Yes. Whereas the United States is a different legal
29 system, a common law legal system?

1 A. The United States system is a common law system but it
2 has substantial statutory protections.

3 196 Q. Yes. And the protections derive from both statute and
4 decided cases; isn't that correct?

5 A. The protections in law in general, yes, derive from the 14:13
6 constitution, from statutes, from common law
7 principles.

8 197 Q. And because it's a common law system that, as you say,
9 has extensive statutory laws as well, of its nature the
10 protection is going to be fragmentary in a country like 14:14
11 the US?

12 A. I don't think necessarily. When the Privacy Act of
13 1974 was being debated the original plan, applying the
14 fair information practice principles to which we made
15 reference this morning, was to deploy the Privacy Act 14:14
16 across the United States as a general privacy
17 regulation covering both government databases and
18 privacy sector databases. Because of complicated
19 political events and then Watergate that didn't happen.

20 198 Q. Okay, I'll refine that question. It is much more 14:14
21 likely in a common law country like the United States
22 that the protection is going to be fragmentary; isn't
23 that correct, as opposed to encompassed in one omnibus
24 piece of legislation?

25 A. I am sorry, I can't speak to that. 14:15

26 199 Q. Okay. Can I ask you to look at the Nickelodeon
27 decision, are you familiar with that decision,
28 Professor?

29 A. Not off the top of my head.

1 200 Q. That was a decision of December 2015 in this area of
2 privacy law. (SAME HANDED TO THE COURT) (SAME HANDED
3 TO THE WITNESS)
4 A. I have not read this decision.
5 201 Q. You have never read this? 14:15
6 A. No.
7 202 Q. Could you go to page 11 please. Just so that you can
8 put it in context, it is dealing, it's in a section
9 dealing with the issue of standing. The opinion of the
10 court, Professor, begins on page 5, it's the Third 14:15
11 Circuit. The Third Circuit covers what states,
12 Professor?
13 A. New Jersey, Pennsylvania, perhaps Delaware.
14 203 Q. Yes. If you go to page 10 you'll see Article III 14:16
15 standing and it identifies the three components that
16 you have all agreed upon. At the top of the page ten:
17 "*An injury in fact, sufficient causal connection*
18 *between the injury and the conduct complained of and*
19 *likelihood that the injury will be redressed by a*
20 *favourable decision*"? 14:16
21 A. Yes.
22 204 Q. And on page 11 it refers to **Spokeo**. In the first
23 paragraph it gives a brief description of **Spokeo** and if
24 you go to the last paragraph on the left-hand column,
25 it says: 14:16
26
27 "*In doing so the Supreme Court explained that the Ninth*
28 *Circuit erred in its standing analysis by focussing*
29 *only on whether the plaintiff's purported injury was*

1 *particularised without also assessing whether it was*
2 *sufficiently concrete. In reaching this conclusion,*
3 *the Court noted that even certain kinds of 'intangible'*
4 *harms can be 'concrete' for purposes of Article III.*
5 *When evaluating whether such a harm qualifies as an*
6 *injury-in-fact, judges should consider whether the*
7 *purported injury 'has a close relationship to a harm*
8 *that has traditionally regarded as providing a basis*
9 *for a lawsuit in English or American courts'."*

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

14:17

That's the court in interpreting **Spokeo**; isn't that correct?

A. It appears so.

205 Q. Yes. And over the page: "*Intangible harms that may give rise to standing also include harms that 'may be difficult to prove or measure', such as unlawful denial of access to information subject to disclosure. What a plaintiff cannot do, according to the Court, is to treat a 'bare procedural violation that may result in no harm as an Article III injury-in-fact'."*

14:17

14:17

That's giving its understanding of what **Spokeo** holds; isn't that correct?

A. That's correct.

206 Q. And then it goes on: "*None of these pronouncements calls into question whether the plaintiffs in this case have Article III standing. The purported injury here is clearly particularised, as each plaintiff complains about the disclosure of information relating to his or*

14:18

1 *her online behaviour. While perhaps 'intangible', the*
2 *harm is also concrete in the sense that it involves a*
3 *de facto injury, the unlawful disclosure of legally*
4 *protected information."*

14:18

5
6 That's a statement that accords with what I have put to
7 you this morning, that the unlawful disclosure of
8 legally protected information *is* sufficient to satisfy
9 the first limb of the standing test?

10 A. The actual or imminent limb or the concrete or
11 particularised?

14:18

12 207 Q. Well the actual. If you go back to the previous page,
13 if you want, an injury-in-fact and that is *actual* in
14 this case because there was disclosure and it meets the
15 particularised and concrete test; isn't that correct?

14:19

16 A. In this case that appears to be the case.

17 208 Q. Yes. Just so that the court, I'm sure it does
18 understand, Professor, the system in the US, of course
19 the Supreme Court has the final say. But, when it
20 delivers its judgment, it's up to the federal district
21 courts, which are the federal courts of first instance
22 as I understand it, and then the appeal courts,
23 sometimes referred to as the circuit courts, to
24 interpret those decisions; isn't that correct?

14:19

25 A. That's correct.

14:19

26 209 Q. And certainly decisions of the appeal courts, and
27 particularly a respected appeal court like the Third
28 Circuit, carries significant standing; isn't that
29 correct?

1 A. There are twelve regional circuits. There is also the
2 District of Columbia circuit which sits in DC. There's
3 also the court of appeals for the federal circuit which
4 also sits in DC which hears patent law claims and
5 specialised matters like that. So I would say, yes, 14:20
6 but the Third Circuit is one of, depending how one
7 counts, 13 or 14 regional federal circuits.

8 210 Q. Yes. And of course, as I think we all know, very few
9 cases ultimately end up in the Supreme Court; isn't
10 that correct? 14:20

11 A. That's correct.

12 211 Q. And therefore like in any system of precedent and of
13 common law, when you are seeking to interpret or to
14 inform somebody of what the law is at any stage, you
15 are doing so by reference to the decided cases which in 14:20
16 the case of the US includes those decisions of the
17 courts and in particular the circuit courts
18 interpreting the law as ultimately laid down by the
19 Supreme Court?

20 A. That's correct. 14:20

21 212 Q. And could I ask you, and I am sorry about this, just
22 one matter that -- well, it's actually, I haven't
23 referred to this case, I think, this is the ACLU -v-
24 Clapper case, but it does involve going back to what
25 I call the first book of 14, you may have it 14:21
26 differently, but it's divide 15 of that book of
27 American materials that you had this morning.

28 A. Which tab, sorry?

29 213 Q. It's divide 15, Professor.

1 A. 15.

2 214 Q. The court is already familiar with ACLU -v- Clapper
3 involving the striking down of the metadata programme
4 under Section 215 as being unlawful; isn't that
5 correct? 14:22

6 A. This case held that the 215 metadata programme exceeded
7 statutory authority but it did not issue an injunction
8 striking it down.

9 215 Q. It struck it down; isn't that correct? It declared it
10 was unlawful? 14:22

11 A. It declared that it was unlawful.

12 216 Q. Yes.

13 A. But it pointedly declined to issue an injunction
14 because Congress was reforming surveillance law at the
15 time. 14:22

16 217 Q. Well it actually had reformed it or it was in the
17 course of reforming it, sorry, 2014. This decision was
18 issued in September or argued in September and decided
19 in May of 2015. So it didn't need to grant injunctive
20 relief, a declaration, I take it, of an appeal court is 14:22
21 sufficient remedy; isn't that correct? It doesn't need
22 to be granted an injunction if the court gives a
23 declaration?

24 A. It was remanded, my understanding is that when the USA
25 Freedom Act was passed after this it retained the 14:23
26 programme for an interim period, I think perhaps six
27 months, in order to allow for alternative measures to
28 be made by the intelligence community.

29 218 Q. If you go to 801 and you'll see, Professor, paragraph 6

1 on the left-hand side, the government was arguing the
2 appeal and if you'd be kind enough to go half way down
3 that paragraph and it says:

4
5 *"Appellants contend the collection of their metadata* 14:23
6 *exceeds the scope of what was authorised by 215 and*
7 *constitutes a Fourth Amendment search we think such*
8 *collection is more appropriately challenged, at least*
9 *from a standing perspective, as a seizure rather than*
10 *as a search. whether or not such claims prevail on the* 14:23
11 *merits, appellants surely have standing to allege*
12 *injury from collection and maintenance in a government*
13 *database."*

14
15 So there they are recognising that collection and 14:23
16 maintenance in a government database gives standing;
17 isn't that correct?

18 A. I believe this is a summary judgment motion, so I would
19 say proof - allegation at the pleading stage and then
20 proof at the summary judgment phase. 14:24

21 219 Q. Oh, absolutely, it is a summary judgment that disposed
22 of the matter. But what they are saying as a matter of
23 law, forget the question of proof, they are saying if
24 you establish collection and maintenance, that gives
25 you standing; isn't that correct? 14:24

26 A. This court did hold that.

27 220 Q. All right. And over on the right-hand column, four
28 lines down it says:

29

1 *"If the telephone metadata programme is unlawful,*
2 *appellants have suffered a concrete and particularised*
3 *injury fairly traceable to the challenged program and*
4 *redressable by a favourable ruling."*

14:25

5
6 And it goes on to say Amnesty International -v- Clapper
7 did not hold otherwise; isn't that correct?

8 A. This case distinguishes the Supreme Court decision in
9 Amnesty International we discussed this morning,
10 correct.

14:25

11 221 Q. Yes, it does distinguish it, but it is making a
12 statement here, apart from any factual distinction, and
13 there are many, it is saying, as a matter of principle,
14 Amnesty International -v- Clapper did not hold
15 otherwise; isn't that correct?

14:25

16 A. That's correct, because this case had peculiar facts.

17 222 Q. But just forget about the facts for a moment,
18 Professor, I'm just looking at the principle. And it
19 says as a matter of principle collection of the
20 metadata under an unlawful programme gives standing and
21 it is saying *"Amnesty International does not hold*
22 *otherwise"*?

14:25

23 **MS. JUSTICE COSTELLO:** where exactly are you reading
24 from?

25 **MR. GALLAGHER:** I am terribly sorry, Judge, 801, and
26 it's four lines down from the top of the right-hand
27 column *"if the telephone metadata programme is*
28 *unlawful"*.

14:25

29 **MS. JUSTICE COSTELLO:** Oh, yes, thank you.

1 **MR. GALLAGHER:** And then just on to the next paragraph.
2 **MS. JUSTICE COSTELLO:** It's the next paragraph, yes.
3 **MR. GALLAGHER:** The next paragraph, yes. "*Amnesty*
4 *International*", that's stating the principle of
5 Amnesty; isn't that correct. 14:26
6 A. Yes. I would say that, as in the **Nickelodeon** case,
7 it's stating an interpretation of **Amnesty**.
8 223 Q. Well --
9 A. To the extent those of the same thing I would agree.
10 224 Q. It's the court interpreting **Amnesty** and stating what it 14:26
11 understands **Amnesty** to mean?
12 A. Yes.
13 225 Q. And therefore **Amnesty -v- Clapper** does not prevent
14 standing where somebody can show that their data has
15 been collected? 14:26
16 A. Yes.
17 226 Q. And --
18 A. As they were able to show in this particular case.
19 227 Q. In that particular case. And if that can be shown, as
20 it was shown in that particular case then there is an 14:26
21 entitlement to relief?
22 A. If that can be shown, the injury and fact element of
23 standing has been satisfied and one would move on to
24 the causation and redressability elements of standing.
25 228 Q. Yes. 14:27
26 A. And assuming that one could then satisfy all of those
27 elements there would be standing for further
28 proceedings and the court would be able to entertain
29 jurisdiction over whatever claims were in the lawsuit.

1 229 Q. And that claim was brought under the Administrative
2 Procedure Act; isn't that correct?

3 A. It was brought under a series --

4 230 Q. Sorry, it was brought under a number of, excuse me for
5 interrupting you, Professor, brought under a number of 14:27
6 grounds but one of them was the APA and relief was
7 granted pursuant to the APA?

8 A. That's correct.

9 231 Q. And the Administrative Procedure Act provided a
10 freestanding remedy in circumstances where their data 14:27
11 had been unlawfully collected?

12 A. The Administrative Procedure Act provided a procedural
13 vehicle for challenging the extent to which this claim,
14 to the extent it was not otherwise pre-empted or
15 precluded, was consistent with federal law and allowed 14:28
16 the issuance of an injunction but not damages because
17 the APA does not provide for damage relief.

18 232 Q. But when you say a procedural vehicle, it is a basis
19 for bringing a claim to seek relief, a declaration or
20 an injunction; isn't that correct? 14:28

21 A. Yes.

22 233 Q. And could you tell the court where you mention the APA
23 your report?

24 A. I do not mention the APA in my report. In focussing my
25 report I decided to focus on the avenues of relief that 14:28
26 appear to be the most substantive and the APA in my
27 opinion was not one of them.

28 234 Q. But the APA has been used in a number of cases,
29 Professor, to obtain relief; isn't that correct?

1 A. It has. The APA is an old statute, I believe it was
2 passed in 1946.

3 235 Q. Yes.

4 A. And it was available for relief in this case. But the
5 interesting thing about the use of the APA in this case 14:29
6 is once the court navigated, once the Claimants
7 navigated standing they also had to navigate a rather
8 convoluted procedural inquiry about the applicability
9 of the APA and whether it had been pre-empted or
10 precluded in an express or implied way and then it 14:29
11 allowed the assessment of the 215 metadata programme,
12 the programme to collect all of the call records of all
13 of the Verizon customers, which incidentally is why
14 they could prove standing due for the Snowden leaks.
15 Every plaintiff, every Verizon customer could then 14:29
16 prove as a result of the illegal leaks that their
17 communications had been absorbed.

18

19 The court did rule that the decision of the FISC court
20 in approving the Verizon metadata order, which it had 14:30
21 renewed 41 times, exceeded the relevance threshold in
22 the Foreign Intelligence Surveillance Act, so-called
23 FISA. Because it was not the case that the
24 government's order that had retained all metadata on
25 all Verizon customers could possibly have been 14:30
26 relevant, that it exceeded the meaning of the word
27 relevance.

28

29 what's interesting about the use of the word APA in

1 this case is that even though -- sorry, what is
2 interesting about using the Administrative Procedures
3 Act in this case is that even though it navigated that
4 procedural, almost akin to standing, a sort of tortuous
5 maze that it had to get through, it allowed the court 14:30
6 to invalidate the programme. But then, because there
7 had been a violation of the statute the court found,
8 using the doctrine of constitutional avoidance it
9 didn't get to the very interesting First and Fourth
10 Amendment claims. It was actually preclusive of the 14:31
11 court's ability to get to the constitutional claims in
12 favour of the narrower statutory claim in this case.

13 236 Q. I think we are familiar with that here as well,
14 Professor. But my question was a very simple one, and
15 I know you make all these points about the APA and what 14:31
16 you say are the other aspects of it: It provided the
17 basis for relief in that case; isn't that correct?

18 A. It did.

19 237 Q. Yes. And it was not mentioned by Mr. Serwin either;
20 isn't that correct, in his report? 14:31

21 A. It is not mentioned by Mr. Serwin in his initial report
22 but his supplemental report, I believe, which was filed
23 the same day as my report does address it at length.

24 238 Q. That's after Prof. Vladeck drew attention to it; isn't
25 that correct? 14:32

26 A. Well Prof. Swire doesn't mention the APA either except
27 in a statutory appendix. Ms. Gorski doesn't mention
28 the APA. Mister - am I allowed to refer to the Butler
29 Report?

1 **MS. JUSTICE COSTELLO:** I think it's been ruled out, so
2 we'll leave that.

3 A. Okay. Thank you, Judge. Mr. Vladeck refers to the APA
4 in three paragraphs in which he, citing only this case,
5 and in which he says it appears to provide relief and 14:32
6 he is rather equivocal in that statement.

7 239 Q. **MR. GALLAGHER:** well, I think the judge will judge that
8 report for itself. I asked you a very simple question:
9 Mr. Serwin only referred to it after Prof. Vladeck had
10 referred to it. I know you want to tell the court 14:32
11 nobody else had referred to it, but Mr. Serwin only
12 referred to it in that context; isn't that correct?

13 A. Mr. Serwin referred to the APA in his second memorandum
14 only, that is correct.

15 240 Q. Following Prof. Vladeck mentioning it and addressing 14:33
16 what Prof. Vladeck said; isn't that right?

17 A. That is correct.

18 241 Q. And yet in his first report where he outlined the basis
19 for challenging unlawful actions he didn't mention the
20 APA and yet you in your report said he gave a 14:33
21 comprehensive account of the basis for challenge; isn't
22 that correct?

23 A. That's correct.

24 242 Q. But he hadn't given a comprehensive account?

25 A. Well, Mr. Serwin in his report details I think what he 14:33
26 referred to as a list of the most promising causes of
27 action and the APA was not in there.

28 243 Q. Well, the APA has been relied on in a number of other
29 cases with which you are familiar; isn't that correct?

1 A. The APA does appear in some of the surveillance
2 challenge cases, that's correct.

3 244 Q. Would you tell the court, if you would be kind enough,
4 what other cases it appears in?

5 A. Off the top of my head I believe it appears in the ACLU 14:34
6 -v- NSA case as well.

7 245 Q. Any other?

8 A. Not that I can recall.

9 246 Q. Valdez -v- NSA?

10 A. I believe it is there. 14:34

11 247 Q. Wikimedia -v- NSA?

12 A. I don't know. I believe so.

13 248 Q. Can I just then go to a passage in your report
14 Prof. Vladeck [sic], excuse me for bending down, sorry.
15 In page 9 of your report, it's the end of paragraph 27, 14:34
16 you refer to Clapper -v- Amnesty International in 27
17 and just to help you refresh your memory as to what you
18 say and give you a chance to put it in context. So 27
19 refers to Clapper. And over the page you say:
20 14:35

21 *"The US Supreme Court held the Plaintiffs lacked*
22 *standing because, inter alia, their fears were 'highly*
23 *speculative' in nature, and because 'they could not*
24 *demonstrate that the future injury they purportedly*
25 *fear is certainly impending and because they* 14:35
26 *manufacture standing by incurring costs in anticipation*
27 *of non-imminent harm'."*

28

29 You say: *"I consider that such an approach is not*

1 *reconcilable with those outlined in Schrems where the*
2 *CJEU made it clear that a claimant cannot be required*
3 *to demonstrate that harm has in fact been suffered as a*
4 *result of the interference alleged."*
5
6 Do you see that?
7 A. I believe that is quoting the DPC Draft Decision.
8 249 Q. Yes. And you say that, and you come back to that
9 later, you don't actually say that that's not correct;
10 isn't that correct? You don't say that's not correct? 14:35
11 A. I'm not sure I understand the point that you are trying
12 to make.
13 250 Q. Well it's not correct to say, as the DPC does there,
14 that interference with the data isn't in and of itself
15 constitute harm or doesn't in and of itself constitute 14:36
16 harm, excuse me?
17 A. I'm not sure I understand the point.
18 251 Q. We've gone through the cases which demonstrate the
19 interpretation that interference with the data,
20 unlawful collection, disclosure of the data, all 14:36
21 constitute harm; isn't that correct?
22 A. I think we've gone through some cases that suggest or
23 in some cases hold that it *can* constitute harm.
24 252 Q. Yes.
25 A. Or that in particular cases that it did, but I don't 14:36
26 believe we have established the general proposition.
27 253 Q. Well, in Clapper it *did* constitute harm?
28 A. In which Clapper?
29 254 Q. The one we have just been looking at, ACLU -v- Clapper?

1 A. The Second Circuit decision?

2 255 Q. Yes, the Third Circuit decision in ACLU -v- Clapper.

3 A. Clapper is a Second Circuit decision decided by Judge
4 Lynch in, I think, 2015. I think the Nickelodeon case
5 is the Third Circuit. 14:37

6 256 Q. Okay.

7 A. Judge Lynch who decided the Clapper decision was
8 actually, as I note in my report, the same judge who
9 decided the lower court decision that the Supreme Court
10 reversed in the first Clapper decision. And so a judge 14:37
11 who in that case accepted the objectively reasonable
12 likelihood of success standard for proving standing.
13

14 This case was not reviewed by the Supreme Court.
15 I have no doubt that if Congress had not acted that 14:37
16 this case would have gone to the Supreme Court on a
17 petition for writ of certiorari because the Supreme
18 Court does tend to take cases that strike down federal
19 programmes.

20 257 Q. I do apologise, Professor, you are absolutely correct. 14:38
21 That was Second Circuit, Nickelodeon was third. But
22 that case and Nickelodeon are both circuit court cases
23 which say, as a matter of American law, that the
24 interference with the data in and of itself constitutes
25 harm? 14:38

26 A. They are both cases that find that, I don't think they
27 say it overtly. And one of the difficulties with
28 standing doctrine, and we discussed this this morning,
29 and this is something on which all of the experts are

1 in agreement in the expert chart, is that standing
2 doctrine is notoriously indeterminate. So that it is
3 possible, regrettably, to find cases across a range of
4 possibilities. The Nickelodeon case for instance is
5 one of those cases. I do not think it suggests a
6 universal proposition in data breach cases involving
7 children's data or data breach cases more generally.

14:38

8
9 The Clapper case, because of its peculiar facts, that
10 they had actually proved that everyone's data was there
11 is a --

14:39

12 **MS. JUSTICE COSTELLO:** This is the ACLU -v- Clapper?

13 A. This is the ACLU -v-Clapper. I am sorry, Judge, the
14 naming of these cases --

15 **MS. JUSTICE COSTELLO:** No, no, there is two of them, at
16 least.

14:39

17 A. And these are, this is a separate case. Clapper -v-
18 Amnesty International is a Supreme Court case which
19 found there was no standing because they had not
20 alleged that their data had been seized.

14:39

21 258 Q. Yes.

22 A. In the Clapper -v- ACLU case they found that there was
23 standing because, due to the unlawful Snowden
24 revelations about the Verizon metadata programme,
25 everybody who was a Verizon customer within that
26 division could show that their data had been exercised,
27 had been accessed sorry.

14:39

28 259 Q. **MR. GALLAGHER:** Sorry. It's just important not to
29 confuse two issues. They were able to prove their data

1 had been accessed, that's a question of proof, but
2 that, if you are in a position to prove your data has
3 been accessed, ACLU -v- Clapper and Nickelodeon are
4 authorities for the proposition that the access to the
5 data is in and of itself a harm sufficient to give rise 14:40
6 to fulfil that leg of the standing requirement?

7 A. Those two cases do stand for that proposition.

8 260 Q. And neither of them are mentioned in your report in
9 that context; isn't that correct?

10 A. That is correct. There was -- because standing is -- 14:40
11 I do cite the Clapper -v- ACLU case because it is
12 relevant to the issues in this litigation. I don't
13 cite the Nickelodeon case, but I also don't cite any
14 one of the dozens or hundreds of other decisions
15 involving standing and data breaches. Mr. Serwin has 14:40
16 collected many of these in his book and perhaps he
17 might be a better person to put this to.

18 261 Q. Well, if you don't mind, I'll just ask you a few
19 questions on it, Professor: You don't cite it in this
20 context, you don't explain to the court that in fact 14:40
21 there are two decisions, one of which you were aware
22 of, ACLU -v- Clapper, that states that the mere access
23 to the data constitutes harm?

24 A. Standing doctrine, as I have said before today, as the
25 experts agree in their chart, is complex and there are 14:41
26 many, many issues. If I were to have addressed every
27 sub-issue, particularly if I were to address every
28 Circuit Court case that has addressed standing my
29 report would rival some other documents in the record

1 for length.

2 262 Q. I see. Is that a reference to Prof. Swire's report?

3 A. Yes.

4 263 Q. Yes. Well do you think it would have been taken a lot
5 of pages to say that in ACLU -v- Clapper that actually 14:41
6 accessing the data constituted a harm in and of itself?

7 A. Any individual thing I could have added to the report
8 would not have added more length. The difficulty is
9 addressing the whole range of potential things that
10 I could have included but did not. 14:42

11 264 Q. This is something very specific, Professor. It is a
12 decision that is interpreting a decision on which you
13 rely, Amnesty -v- Clapper?

14 A. Yes, and I believe I do cite in my report that standing
15 was found -- 14:42

16 265 Q. You do.

17 A. -- in Clapper ACLU and I cite of course the Clapper -v-
18 Amnesty International case.

19 266 Q. Yes, but you do not explain that access to the data in
20 and of itself as per the ACLU -v- Clapper constitutes 14:42
21 harm?

22 A. I'm not sure the case can be logically reduced to that
23 and only that proposition.

24 267 Q. All right.

25 A. I think, and I apologise for the indeterminacy in 14:42
26 American law but these cases are very, very
27 complicated. When I explain standing to my students or
28 to other people, I say that standing is one of these
29 doctrines where the basic elements of the legal test

1 are easy to define and to quote with precision. But
2 because these terms of art are malleable and they are
3 ambiguous, when the doctrine hits application, when the
4 doctrine hits the lower court cases there is inevitably
5 splintering and one can find cases that stand for a 14:43
6 variety of interpretation and propositions as we are
7 seeing in the interpretation of the first Clapper case
8 and the Spokeo case in the lower courts right now.

9
10 I think my point in the standing discussion of my 14:43
11 report is at a general level it is absolutely correct
12 in my opinion, that the DPC was correct that standing
13 represents an obstacle to relief that must be
14 navigated, if only by going through some of the
15 complexity that we have gone through this morning and 14:43
16 this afternoon. I don't think that is disturbed at all
17 by this discussion, if anything I think it is
18 illustrated by it.

19 268 Q. You see you go to the trouble of mentioning ACLU -v-
20 Clapper on a number of occasions in your report but you 14:44
21 don't cite it in terms of the interference being in and
22 of itself harm?

23 A. I don't.

24 269 Q. Can I ask you to look at paragraph 91 of your report?

25 A. Yes. 14:44

26 270 Q. You are challenging what vladeck said in his report
27 where:

28
29 *"The vladeck report acknowledges that the Clapper*

1 *decision is substantively unsatisfying, but it suggests*
2 *that the DPC Draft opinion 'errs' in concluding that*
3 *'US law thereby requires a claimant 'to demonstrate*
4 *that a harm has in fact been suffered as a result of*
5 *the interference alleged''."*

14:45

6
7 Do you see that?

8 A. Yes.

9 271 Q. Yes. And what you say is you do not agree with that
10 critique; isn't that correct?

14:45

11 A. That's correct.

12 272 Q. So you are addressing that very issue, that something
13 over and above the interference is required in order to
14 constitute harm?

15 A. I am addressing -- I'm sorry, I'm trying to follow both
16 what I said in my report, our trail of discussion and
17 Vladeck which is all wrapped up in that question.
18 Could you restate the question please.

14:45

19 273 Q. Yes, I certainly will. You identify what Prof. Vladeck
20 says: "*US law thereby requires*" -- sorry. He
21 criticises the DPC's decision for concluding that: "*US*
22 *law thereby requires a claimant to demonstrate that a*
23 *harm has in fact been suffered as a result of the*
24 *interference alleged."*

14:45

25 A. Yes.

14:45

26 274 Q. And he criticises that because his contention is that
27 the interference in and of itself constitutes a harm;
28 isn't that correct?

29 A. I don't think he puts it in those terms.

1 275 Q. I see. well, he is criticising the DPC for saying
2 something additional to the interferences required;
3 isn't that correct?
4 A. I'm sorry, I don't follow this line.
5 276 Q. I am sorry, Professor, I'm sorry sure it's my fault. 14:46
6 He criticises the DPC for saying US law thereby
7 requires a claimant to demonstrate that a harm has in
8 fact been suffered as a result of the interference
9 alleged?
10 A. Yes. 14:46
11 277 Q. In other words, the interference in and of itself is
12 not a harm?
13 A. That's correct.
14 278 Q. Yes. And Vladeck says the DPC was correct in so
15 concluding? 14:46
16 A. Ah, no, I think Vladeck says the DPC was not correct in
17 so concluding.
18 279 Q. Exactly, that the DPC was incorrect in so concluding?
19 A. Correct.
20 280 Q. Yes. And you say you don't agree with this critique? 14:47
21 A. Correct.
22 281 Q. Yes. But Vladeck's critique is in fact supported by
23 ACLU -v- Clapper; isn't that right?
24 A. Yes. Vladeck cites *that* particular case which I have
25 already discussed has some peculiarities to it. 14:47
26 282 Q. Yes. well leave aside the peculiarities, Professor,
27 you keep saying *peculiarities*, but that's engaging with
28 the facts and the circumstances. In terms of the
29 statement of principle it says that unambiguously?

1 A. Yes. I think the best way to explain what I think is
2 happening here is that the DPC writes: "*The US law*
3 *thereby requires a claimant to demonstrate that a harm*
4 *has in fact been alleged, been suffered as a result of*
5 *the interference alleged.*" 14:47

6
7 I think that is a correct statement of US law. Vladeck
8 cites one circuit court opinion, a significant circuit
9 court opinion, but one that he reads for a slightly
10 different progression. But this does not disturb, 14:48
11 I think, the DPC's conclusion here.

12 283 Q. Well now just wait a minute. It's not a slightly
13 different proposition, it is a proposition that is in
14 contradiction of what the DPC says there; isn't that
15 correct? We have established that? 14:48

16 A. I think perhaps the best way might be to look at
17 Vladeck's report. I do say that I read the DPC report
18 here as stating a basic principle of standing law that
19 injury in fact, causation and redressability are
20 necessary. 14:49

21 284 Q. Yes. Well can we leave aside causation and
22 redressability?

23 A. Yes.

24 285 Q. We just don't want to confuse it.

25 A. Right. No, I appreciate that. 14:49

26 286 Q. We'll just keep to the harm. And then you go on:

27
28 "*In my opinion the DPC Draft Decision correctly states*
29 *this basic principle of standing law that the*

1 *constitutional requires each federal court plaintiff to*
2 *demonstrate that an injury-in-fact (harm) has been*
3 *suffered."* Do you see that?

4 A. Yes.

5 287 Q. Well now isn't it relevant to that to tell the court 14:49
6 'well actually in ACLU -v- Clapper that wasn't the
7 position'?

8 A. I don't understand in what way ACLU -v- Clapper is
9 different.

10 288 Q. Well, ACLU -v- Clapper says the mere interference with 14:49
11 the data in and of itself constitutes harm?

12 A. I don't see that being a distinction. I understand the
13 court in ACLU -v- Clapper to be saying that a harm was
14 suffered by the Plaintiffs that was caused by the
15 defendant. 14:49

16 289 Q. Yes. But the harm was the interference with the data,
17 the unlawful collection of the data was in and of
18 itself harm?

19 A. And I would agree that interference with data, that
20 some courts would find inference of data -- 14:50

21 290 Q. Harm?

22 A. -- in some circumstances to be harm but not in all
23 circumstances.

24 291 Q. Okay. well, do you say that there or anywhere in your
25 report? 14:50

26 A. No.

27 292 Q. No. Is there any reason why you didn't draw the
28 court's attention to that fact?

29 A. Well in part because we might have had to go through a

1 similar discussion to this in order to get to that
2 point. But, no, what I tried to do in my discussion of
3 standing doctrine was to state, was to make it as clear
4 as possible without omitting any necessary complexity.
5 And I don't see this point as disturbing that, nor do
6 I see the point affecting the general conclusion of the
7 standing section.

14:50

8 293 Q. Okay. Well, would you just go then to the next page,
9 paragraph 93, and if you look at the last sentence in
10 that:

14:51

11
12 *"In my opinion, the DPC is correct that standing is a*
13 *general obstacle to all litigants and particularly*
14 *correct that American standing doctrine's injury and*
15 *fact requirement always requires the demonstration of*
16 *actual injury"*, do you see that?

14:51

17 A. I am sorry, which paragraph is this?

18 294 Q. Paragraph 93?

19 A. On 34 or 35? Because 93 -- this is following on from
20 Vladeck.

14:51

21 295 Q. I am terribly sorry, Professor, it's over the page in
22 93, the last sentence I think I said:

23
24 *"In my opinion, the DPC is correct that standing is a*
25 *general obstacle to all litigants, and particularly*
26 *correct that American standing doctrine's injury in*
27 *fact requirement always requires the demonstration of*
28 *actual injury."*

14:51

29 A. Yes.

1 296 Q. So that's not correct a la ACLU -v- Clapper; isn't that
2 correct?

3 A. No, I read ACLU -v- Clapper as finding that the
4 interference was, it was an injury within the
5 constitutional concept of an injury in fact. 14:52

6 297 Q. What are you saying here, Professor, that you need
7 something more than the interference, isn't that what
8 you are saying?

9 A. No, no. What I'm saying is that whatever is necessary
10 it has to constitute an injury in fact which requires 14:52
11 us to run through the Lujan test that we discussed this
12 morning.

13 298 Q. Well now --

14 A. As modified by Spokeo and Clapper.

15 299 Q. So you are not saying and your evidence is not to the 14:52
16 effect, so that the court can be clear on this, that
17 you need something in addition to the interference with
18 the data in order to establish an actual injury?

19 A. What I am saying is that some courts -- American courts
20 don't talk in terms of interference with data to my 14:53
21 knowledge. What I am saying is that in some
22 circumstances courts might find that an interference
23 with data would constitute an injury, an interception
24 of a telephone call would constitute injury which in
25 that sense is interference with data. 14:53

26 300 Q. Well, can we just keep it simple, and I am sorry for
27 introducing the word 'interference', that was my fault.
28 Collection of data, looking at the data, that is
29 sufficient harm for the purposes of that leg of the

1 standing rule according to ACLU -v- Clapper; you are
2 suggesting here that something more is required in
3 order to satisfy that leg of the rule?

4 A. No. What I am saying is that I don't think you can
5 reduce the injury in fact requirement to a simpler 14:54
6 proposition as mere collection is injury in fact. The
7 question is injury in fact and then a court has to
8 determine whether the action alleged by the plaintiffs
9 whether it is a collection, whether it is an
10 interference, whether it is something else constitutes 14:54
11 injury in fact. And I would also say that this injury,
12 as all of the experts agree, is subject to a certain
13 amount of indeterminacy and variation which we see in
14 the wide variety of factual outcomes we see lower
15 courts taking on these points. 14:54

16 301 Q. Okay. Well, could you give the court then an example
17 of what you say is required in addition to collection
18 of the data in a case such as ACLU -v- Clapper in order
19 to constitute harm?

20 A. An example of what is required in addition? 14:55

21 302 Q. In addition to the collection of data.

22 A. I would say that courts might find relevant what kind
23 of data is being collected.

24 303 Q. Okay.

25 A. I gave the example of the interception of a telephone 14:55
26 call is something that has been protected by the Fourth
27 Amendment, that we know is a constitutionally
28 cognisable injury that implicates a fundamental right.
29 One of the great difficulties in this area of the law

1 right now is there are so many kinds of data that the
2 law is having trouble categorising all of them. The
3 law is moving slowly and it is dealing with data breach
4 cases like we saw in the Nickelodeon case and there's a
5 range of perspectives on that opinion, and in the 14:55
6 surveillance cases as well.

7
8 I would say Clapper -v- ACLU, and this may resolve the
9 difference, Clapper -v- ACLU is an important case in
10 understanding the surveillance litigation, but it is 14:55
11 not authoritative because it is not a US Supreme Court
12 court case.

13 304 Q. Well now, Professor, I don't want to go over the ground
14 again. It was authoritative, it doesn't have the same
15 standing as the Supreme Court, it is interpreting the 14:56
16 Supreme Court and it is finding that collection of data
17 in and of itself constitutes a harm, we agreed that
18 much?

19 A. Yes.

20 305 Q. Now I want you to tell us what you say in addition to 14:56
21 the collection of data must be established to
22 constitute harm in the light of ACLU -v- Clapper?

23 A. I don't say that anything additional must, those are
24 not the terms which I am understanding this point. The
25 law is indeterminate and some courts will doubtless 14:56
26 find that what was present in Clapper is present, other
27 courts I think are less likely to do so.

28 306 Q. Okay. So when you say the DPC is particularly correct
29 that American standing doctrine injury-in-fact

1 requirement *always* requires the demonstration of actual
2 injury, that's not correct, that needs to be modified?

3 A. The word 'actual' there is a reference to the first
4 prong of the Lujan test which requires actual or
5 imminent injury. 14:57

6 307 Q. We know that. It's the word 'always' I'm focussing on,
7 that it *always* requires it?

8 A. I would say it always requires a demonstration of
9 either actual or imminent injury and that's the holding
10 in Lujan. 14:57

11 308 Q. Yes, we know that, but we're looking at what
12 constitutes actual injury?

13 A. Okay.

14 309 Q. And you know we're talking about that. I mean you know
15 that ACLU -v- Clapper said that the collection of the 14:57
16 data constituted actual injury. You are saying here
17 something that is on your evidence now not correct or
18 accurate, that something in addition is always required
19 for the demonstration of actual injury, that's what you
20 are saying? 14:57

21 A. I don't see myself saying that.

22 310 Q. I see. Well, maybe you'll just help us then: "*The DPC*
23 *is correct that standing as a general obstacle to all*
24 *litigants, and particularly correct that American*
25 *standing doctrine's injury in fact requirement always* 14:58
26 *requires the demonstration of actual injury*"?

27 A. I would say it would be more accurate to say actual or
28 imminent injury, but that it otherwise is correct. It
29 says the injury in fact requirement always requires

1 proof of injury that is actual or imminent and concrete
2 or particularised. That's elementary American black
3 letter law.

4 311 Q. So, Professor, insofar as there is collection, wrongful
5 collection of data, that's an actual injury, the 14:58
6 wrongful collection in and of itself is capable of
7 satisfying the actual injury requirement and in that
8 respect it's no different from the DPC's description of
9 what European law requires?

10 A. I can't speak to European law. What I can say is that 14:58
11 courts could certainly find that collection of data
12 that is proven constituted an injury in fact if it was
13 otherwise concrete and particularised and met the other
14 elements of the test, yes. And that's fully consistent
15 with my report and everything I have said today. 14:59

16 312 Q. Would you turn to page [sic] 96?

17 A. Yes.

18 313 Q. And it is page 37.

19 A. Yes.

20 314 Q. And you say that, six lines down: 14:59

21
22 *"However, as I understand both the Swire report and the*
23 *DPC Draft Decision there is no disagreement that*
24 *standing is an obstacle to relief, particularly where*
25 *there is no injury in fact. Under EU law as 14:59*
26 *I understand it, particularly as the CJEU interpreted*
27 *47 in Schrems, a stringent requirement of*
28 *injury-in-fact akin to that required by the US Supreme*
29 *Court in Clapper and Spokeo is not always required."*

1 Sorry.

2

3 You see, you're giving there your understanding of

4 Schrems, isn't that correct?

5 A. I am giving there my understanding of the DPC's 15:00

6 understanding of Schrems.

7 315 Q. I see.

8

9 "Under EU law as I understand it" - that's reference to

10 your understanding of EU law - "particularly in the 15:00

11 CJEU interpretation of Article 47 in Schrems."

12

13 You're giving *your* understanding of Schrems there,

14 isn't that correct?

15 A. My understanding of Schrems, as I think I note earlier 15:00

16 in the report, is based upon the DPC's understanding --

17 316 Q. Oh, I see.

18 A. -- and I have taken it from the assumptions about

19 European law that are contained in the DPC report so

20 that I could assess the DPC's conclusions of American 15:01

21 law for general accuracy. There is a sentence in the

22 DPC report that makes reference to this and that is all

23 I'm referring to. I am not interpreting Schrems in my

24 report.

25 317 Q. Okay. So when you write *your* understanding, 15:01

26 particularly as -- "*as I understand it, particularly as*

27 *the CJEU interpreted it*", what you mean to say there is

28 under EU law, as you understand the DPC's understanding

29 of the CJEU interpretation --

1 A. Yes.

2 318 Q. -- is that fairer?

3 A. Yes.

4 319 Q. It means something quite different, doesn't it? Because
5 it means that you're not able to express *any* opinion on 15:01
6 the difference between US and EU law on this issue?

7 A. No, I'm not. What I am doing here is flagging the fact
8 that I understand that this was something raised by the
9 DPC in her report for the convenience of the reader, to
10 point out why this discussion is relevant. 15:02

11 320 Q. Could I ask you, Professor - I don't mean to be in any
12 way the slightest bit impertinent or rude, but you
13 specialise in this area and you've written extensively
14 on it - how come you missed the Nickelodeon decision.

15 A. By "missed" -- the Courts of Appeal of the United 15:02
16 States decide cases every week dealing with a wide
17 variety of privacy issues. I am not, I don't follow
18 every decision that comes down the moment it comes
19 down. And I have not been writing in the data breach
20 area over the past six months. 15:02

21 321 Q. December 8th 2015. Over a year and a quarter ago,
22 isn't that correct? Are you suggesting there are so
23 many cases coming down from the circuits that you're
24 unable to keep track of a case that interprets Spokeo,
25 on which you place so much reliance? 15:03

26 A. December 2015 did you say?

27 322 Q. Yes, December 2015. I'm terribly sorry, June 2016.
28 Argued December 2015. June 2016.

29 A. Yes.

1 323 Q. So more than six months ago, nearly eight months ago.
2 Are you saying that you don't keep track of decisions
3 of the Courts of Appeal that interpret Spokeo?
4 A. I am saying that I don't keep track of this kind of
5 decision on a day-to-day basis. Because what is going 15:03
6 to happen after Spokeo is there's going to be a variety
7 of courts are going to churn and they're going to try
8 and interpret Spokeo as best they can and more likely
9 than not it would end up back at the Supreme Court. So
10 no, I'm not going to read them on a daily -- if I spent 15:04
11 all of my time reading every case that came down as
12 soon as it came down across the entirety of privacy law
13 then I wouldn't have time to do anything else.
14 324 Q. But you see, you were talking about Prof. Vladeck
15 speculating as to what the position was with regard to 15:04
16 standing. I mean, you're not being asked to read all
17 of the cases that come down, but this is a case
18 directly dealing with Spokeo. And how many decisions
19 of the Circuit Courts have there been since Spokeo
20 dealing with this issue of standing in the privacy 15:04
21 area?
22 A. It would be difficult for me to speculate.
23 325 Q. Well, would you hazard a guess that it's less than ten?
24 A. I wouldn't want to speculate.
25 326 Q. Since Spokeo? You wouldn't want to speculate? 15:04
26 A. I have seen discussions of Spokeo in lower court cases
27 and my impression that I have taken from them is that
28 courts are trying to work out what Spokeo means.
29 327 Q. But this was a matter of great interest to all of the

1 people that you described in what you called, I think,
2 the privacy circle or the privacy sphere. And how
3 could it be that when you all were interested to know
4 what the implications of Spokeo was that you miss a
5 circuit decision *interpreting* Spokeo and explaining it? 15:05

6 A. Our interest in Spokeo was not whether or not it would
7 refine the contours of standing doctrine, our interest
8 is -- was the fear that if the court had accepted
9 Spokeo's argument that Congress lacked the power to
10 define intangible causes of action, if it had gone 15:05
11 further than it did in that case and held that Congress
12 could only define causes of action where there was
13 material injury or where there was economic injury or
14 something more than intangible consumer protection type
15 injuries, enormous damage would be done to the private 15:06
16 remedial regime in the United States, part of which we
17 are talking about in these proceedings.

18
19 That was the real interest for Spokeo. It was less the
20 refinement of adoption, more the real risk that Spokeo 15:06
21 would eliminate chunks of privacy law. And Spokeo did
22 not do that. It certainly tightened up the
23 concreteness requirement, but it did not cause massive
24 damage to the --

25 328 Q. No. But you say and you rely on it in your report as 15:06
26 tightening up the doctrine; are you seriously
27 suggesting that it would've been difficult to do? I
28 take it you could do a database search fairly easily,
29 putting in the word "Spokeo", in any of your legal --

1 A. Yes, you could have.

2 329 Q. And you don't need to be watching the productions of
3 the Circuit Court; with your research assistants and
4 your own ability, it would be very easy when offering a
5 view as to the implications of Spokeo to the court, to 15:07
6 make sure that you had an up to date understanding of
7 how Spokeo has been interpreted?

8 A. My understanding of how Spokeo has been interpreted is
9 that there is a range of opinion on that.

10 330 Q. So there *is* a range of opinion on Spokeo? 15:07

11 A. That's my understanding, yes.

12 331 Q. And part of that range is that it *hasn't* tightened up
13 the standing rules, isn't that correct?

14 A. Certainly if the Nickelodeon case...

15 332 Q. No, but you didn't know about the Nickelodeon case. 15:07
16 You told us there's a range of opinion. Part of that
17 range is that it *hasn't* tightened up on the standing
18 rules.

19 A. That's correct.

20 333 Q. And you were aware of that when you wrote your report. 15:07

21 A. I suppose that's right. But my reading of the case is
22 that it will tighten things up.

23 334 Q. Well --

24 A. And it *has* tightened things up.

25 335 Q. But Professor, I take it as a very skilled lawyer, that 15:08
26 when reading the case, you actually also look to see
27 how it's been read by other decisions? That's very
28 relevant, isn't it?

29 A. It is relevant. But the problem with standing is that

1 the cases tend to sprawl all over the place.

2 336 Q. Ah, yeah, but Nickelodeon isn't sprawling over anywhere
3 - it's interpreting Spokeo, Professor. And a simple
4 search on *any* database would've yielded this case.

5 A. I suppose that is correct. 15:08

6 337 Q. And when offering an expert opinion on the court on
7 something as important as this case, for my clients and
8 for others, I suggest that it would've been a simple
9 matter before interpreting Spokeo for the court to
10 check how it had been interpreted by the very courts 15:09
11 under which you practice.

12 A. I would say that that, along with perhaps 50 other
13 things I could've done to my report, might have made it
14 incrementally better. But I am confident in my
15 judgment, in the opinions that I have given and I do 15:09
16 not believe that our discussion of the Nickelodeon case
17 has disturbed them.

18 338 Q. Well, normally a lawyer is confident in his or her
19 opinion if they have looked at the relevant cases -
20 nobody assumes that they can be confident without 15:09
21 looking at the cases, isn't that correct?

22 A. That is correct.

23 339 Q. Now that you've seen Nickelodeon for the first time,
24 does that shake your confidence in any way,
25 Prof. Richards? 15:09

26 A. No.

27 340 Q. Now, there are a number of other cases that have
28 interpreted Spokeo, District Court cases since, isn't
29 that correct?

1 A. Yes.

2 341 Q. Could you tell us any of those cases or identify any of
3 those cases for us?

4 A. I testified earlier that the Microsoft case --

5 342 Q. Yeah. 15:10

6 A. -- interprets Spokeo.

7 343 Q. Yeah. Any other case?

8 A. I would assume any case involving standing in privacy
9 and probably cases involving standing in other areas of
10 the law. 15:10

11 344 Q. But, sorry, you're here as the expert. Can you name me
12 any other case, other than Microsoft, that has
13 interpreted Spokeo?

14 A. I believe there was a case decided in the Fourth
15 Circuit by Judge Diaz last week. 15:10

16 345 Q. Yeah. What case was that?

17 A. It was a data breach case.

18 346 Q. Yeah. And do you know the name of it?

19 A. Off the top of my head, no.

20 347 Q. Well, apart from that case, do you know of any other 15:10
21 cases?

22 A. Off the top of my head, no.

23 348 Q. Are you familiar with the Syed -v- M-I, LLC case, Ninth
24 Circuit, January 20th, 2017?

25 A. I'm not. 15:11

26 349 Q. I'll hand that case in to you (Same Handed). Before
27 looking at the case, that case was a class action,
28 Professor, in which the employer had an employee sign a
29 credit disclosure release form that included not only

1 the statutorily prescribed release information, but
2 also a broad waiver of liability on behalf of the
3 employer and the employer subsequently procured the
4 credit information. And the plaintiff argued this
5 procuring of the credit history violated his privacy 15:11
6 rights, because the credit disclosure form was not in
7 the precise form indicated and thus his consent was not
8 perfected under the statute. And the Ninth Circuit
9 found standing; they said that he had alleged more than
10 a bare procedural violation and that the disclosure 15:11
11 requirement created a right of information by requiring
12 prospective employers to inform job applicants that
13 they intend to procure their consumer reports as part
14 of the application process and that the authorisation
15 requirement created a right to privacy by enabling 15:12
16 applicants to withhold permission to obtain the report
17 from the prospective employer and a concrete injury
18 when applicants were deprived of their ability to
19 meaningfully authorise the credit check, and by
20 providing a private cause of action for a violation, 15:12
21 Congress had recognised the harm such violations cause.

22

23 That's not a case you're familiar with?

24 A. It is not. This was a District Court case decided a
25 few weeks ago in San Francisco. 15:12

26 350 Q. Yes, the Ninth Circuit. "*United States Courts of*
27 *Appeal for the Ninth Circuit*", do you see that?

28 A. Oh, I'm sorry, yes.

29 351 Q. So it's not a District Court case?

1 A. It is not a District Court case.

2 352 Q. No. Are you familiar with the Moody -v- Ascenda case?

3 A. I am not.

4 353 Q. Hillson -v- Kelly?

5 A. I don't think so. 15:13

6 354 Q. Adams -v- Fifth Third Bank?

7 A. No.

8 355 Q. All cases which adopted that theory of standing in
9 those circumstances. You're familiar with none of
10 those? 15:13

11 A. I am not.

12 356 Q. Can I ask if you'd be kind enough to go back to your
13 report, Professor? And in paragraph 39 of the report
14 you mention the warshak case, isn't that right?

15 A. Yes. 15:14

16 357 Q. And that was a case where the court held that a warrant
17 was required, isn't that correct?

18 A. The court in warshak held that the Fourth Amendment
19 required a warrant before the government could search
20 the contents of e-mails, yes. 15:14

21 358 Q. And you said:
22
23 *"The federal government did not seek to appeal that
24 case to the Supreme Court, and as a result, the rule in
25 warshak is only binding in the handful of American
26 states governed by the ruling of that regional court."*
27
28 And you identify them.

29 A. Yes.

1 359 Q. And in fairness, you do say:

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

"whilst I believe that the Supreme Court would likely ratify the result... were it to hear a case squarely presenting the issue, the constitutional protection of e-mails in the United States remains unclear at present."

But that latter qualification, you are aware, I think, now that the Department of Justice announced that it was following the warshak decision in *all* states, isn't that correct?

15:15

A. That is the Obama Justice Department's policy was to follow the warrant requirement. The Obama Justice Department's policy was to seek a warrant before it obtained the contents of e-mails, that is correct.

15:15

360 Q. But it wasn't just a policy, it was a *stated* policy disclosed to Congress, isn't that correct?

A. I believe so.

361 Q. And a policy that was followed...

15:15

A. Yes.

362 Q. ... so far as you're aware?

A. Yes.

363 Q. And why didn't you state that? Doesn't that put it in a different status, that the government states to Congress that it's going to follow this precedent?

15:15

A. I don't think so.

364 Q. I see.

A. I think if we're concerned about fundamental rights,

1 government policy is not a fundamental right. I'm
2 reminded of the Reilly case that the Supreme Court
3 decided several years ago in which the government
4 argued that it did not need to obtain a warrant in
5 order to search the contents of a mobile phone incident 15:16
6 to arrest, because it had procedures that protected the
7 data. And Chief Justice John Roberts, writing for the
8 court, said something to the effect - and I quote this
9 in my report --

10 365 Q. You do. 15:16

11 A. -- 'The founders did not fight a revolution for access
12 to better government procedures'. And I think what is
13 important when we are discussing fundamental rights -
14 and I was looking at judicial remedies rather than
15 government policy, because government policy can be 15:16
16 changed and particularly at times in changes of the
17 Attorney General government policies can be changed - I
18 thought it was important for me to note the judicial
19 remedies and the fundamental rights that were actually
20 guaranteed by constitutional law rather than ones which 15:16
21 were permitted by government practice.

22
23 Incidentally, the government policy to always obtain a
24 warrant enabled them to argue at the same time that
25 they didn't need to get a warrant, so that other kinds 15:16
26 of information or other issues involved in the case
27 were not imbued with constitutional significance.

28
29 Moreover, if the government *didn't* get a warrant, as I

1 do say in my report, I do believe that the case would
2 go to the Supreme Court and the Supreme Court would
3 hold that e-mails were protected. But the government's
4 policy in always getting a warrant seems to be
5 intentionally designed to avoid sending the case to the 15:17
6 Supreme Court to preclude the further development of
7 the law of digital searches and seizures in this area.

8 366 Q. The reference to Chief Justice Roberts' statement is in
9 paragraph 67. But I don't think we need to turn to
10 that. It is significant if the government decides not 15:17
11 to appeal a decision and says that it will follow it.
12 Isn't that correct? That's of significance?

13 A. It is significant, yes.

14 367 Q. And that was nowhere mentioned by you.

15 A. It was -- not in my report, it was discussed at the 15:17
16 experts' meeting. And I believe there's a field --

17 368 Q. There is.

18 A. -- in the experts' report that reconciles these
19 positions.

20 369 Q. Yeah. In paragraph 47 you refer to the Privacy Act. 15:18
21 A. Yes.

22 370 Q. And the entitlement to make routine use if the
23 disclosure is compatible with the purpose for which the
24 agency collected the information.

25 A. That's correct. 15:18

26 371 Q. And you make some criticism of that exception. I take
27 it you're familiar that most data protection systems
28 allow the controller to make use of the data if it's
29 not incompatible with the purpose for which it's

1 collected?

2 A. Yes.

3 372 Q. Could I ask you to turn to 57, where you deal with the
4 ECPA and Title 1, which I think is the wire Tap Act, is
5 that correct? 15:19

6 A. That's correct.

7 373 Q. And you refer to the fact that it's enforceable by
8 criminal prosecution and civil penalties, including a
9 private right of action for substantial damages. And
10 you say the right of action is not available against 15:19
11 the United States, isn't that correct?

12 A. That's correct.

13 374 Q. But it is against persons, isn't that correct? It's
14 available against persons?

15 A. It is available against persons, yes. 15:20

16 375 Q. And that includes officials of the United States, isn't
17 that correct? As defined in the statute?

18 A. Yes.

19 376 Q. And actions are frequently brought against persons and
20 the government indemnifies those persons, isn't that 15:20
21 correct?

22 A. I can't speak to government indemnification policies,
23 but I will agree that actions are frequently brought --
24 no, actions can be brought against officers. I don't
25 know the actual frequency with which federal officers 15:20
26 have been sued and have been successfully sued under
27 ECPA civil suits.

28 377 Q. You don't mention there that the persons against whom
29 the action can be brought include - specifically

1 defined in the statute - officials of the US, isn't
2 that correct?

3 A. That is correct. I italicise the word "person". Any
4 person.

5 378 Q. And -- 15:21

6 A. And I do discuss the civil remedy against the United
7 States in the next paragraph.

8 379 Q. Oh, you do. But that's a different section, that's the
9 Stored Communications Act. And in fact you draw a
10 distinction, because you deal with Title 1, where you 15:21
11 say that it can't be brought against the US Government
12 but don't say 'well, it can be brought against US
13 officials'. And in relation to the Stored
14 Communications Act, you *do* say it can be brought
15 against the US Government. 15:21

16 A. That's correct.

17 380 Q. Just taking Title 2 there, that involves the use or
18 disclosure of the information, isn't that correct?

19 A. Title 2 in general in its cause of action?

20 381 Q. Yes. The cause of action that you mention there -- 15:21

21 A. Yes.

22 382 Q. -- includes use or disclosure of the information, isn't
23 that correct?

24 A. Yes.

25 383 Q. So if you establish the mere use of the information or 15:21
26 the mere disclosure of the information, you have
27 sufficient standing, isn't that correct?

28 A. If you -- the *unlawful* use.

29 384 Q. Exactly.

1 A. Yes. If you establish the *unlawful* use, you would have
2 standing --

3 385 Q. You'd have standing.

4 A. -- under this provision.

5 386 Q. So there's no issue about standing under the ECPA if 15:22
6 you establish that somebody has unlawfully used or
7 disclosed the information?

8 A. I think you would have to prove that it was your
9 information and that it -- but yes. I believe you're
10 referring to the injury in fact requirement again? 15:22

11 387 Q. Yeah.

12 A. But yes, it is my belief that a violation of the
13 unlawful use or disclosure provisions of the Electronic
14 Communications Act broadly defined would suffice for
15 stand -- if proven, would suffice to satisfy the injury 15:22
16 in fact requirement, yes.

17 388 Q. So when we spent, and your report spends a long time
18 discussing standing in the context of the Constitution,
19 it's important that the court should know and bear in
20 mind that in terms of the statutory provisions that 15:23
21 provide remedies, if you establish that your data has
22 been unlawfully obtained -- sorry, I'll change that;
23 unlawfully used or disclosed, you will meet the
24 standing requirements?

25 A. That's correct. 15:23

26 389 Q. And there's no complexity or difficulty or doubt about
27 that, is there?

28 A. With respect to the information covered by ECPA, no.

29 390 Q. Yeah. No difficulty or doubt that there's standing

1 there.

2 A. That there's an injury in fact there.

3 391 Q. That there's an injury in fact, that that requirement
4 of standing, which is the one we've been focusing on is
5 met. No -- 15:23

6 A. If a person can prove that the contents of their
7 communications certainly have been unlawfully
8 intercepted, the injury in fact requirement, if they
9 could find - and of course, notice remains a problem
10 here - but if they find out about it and if they can 15:24
11 prove and establish proof, then no, in those
12 circumstances standing would be satisfied.

13 392 Q. Yeah. And it's not just the injury in fact, but the
14 other two components would be satisfied as well, isn't
15 that correct? 15:24

16 A. The injury in those cases would be caused by the
17 unlawful act of the defendant and the injury would be
18 redressed by the deposition of the statutory damages.

19 393 Q. So there's no issue about standing *at all* there if you
20 can do that? 15:24

21 A. Under those facts, if proven, of course not.

22 394 Q. And is that stated anywhere in your report?

23 A. No.

24 395 Q. No. And when you told the court *at length* about the
25 complexity and uncertainty of standing and the general 15:24
26 references to standing in the DPC's report, you never
27 identified that when it comes to a statutory cause of
28 action, if you can establish that your data has been
29 used or disclosed or interfered with, you automatically

1 have standing?

2 A. That's not true. And it actually is quite complex.
3 The question that I was asked referred to ECPA, which
4 is a long standing statute - apologies for using
5 "standing" - is a statute of --

15:25

6 396 Q. **MS. JUSTICE COSTELLO:** You mean ECPA, is that it?

7 A. The ECPA, the Electronic Communications Privacy Act.
8 Because the Supreme Court has, since 1967, recognised
9 that when the government intercepts the contents of a
10 telephone call, that injury is well established and,
11 thus, under the Spokeo framework would satisfy one
12 which has been traditionally recognised. The
13 difficulty comes when we are discussing other kinds of
14 data, such as location data or what is referred to
15 sometimes as meta-data or data stored in the cloud, or
16 even perhaps e-mails, given the ambiguity which is
17 caused by the warshak doctrine. Until the Supreme
18 Court recognises that e-mails are protected, I think
19 there *will* be questions about standing.

15:25

15:25

15:26

20
21 But - and this is why I was discussing telephone calls
22 earlier - on the context of telephone calls, because of
23 the long standing establishment of that particular
24 injury, yes, if a person can prove that their
25 telephone, the contents of their telephone
26 communication were in fact intentionally intercepted by
27 use of a device and satisfies the other statutory
28 requirements of ECPA, standing should not be a problem.

15:26

29 397 Q. **MR. GALLAGHER:** Well, firstly, the ambiguity about

1 **warshak** - there's no ambiguity so far as we're all
2 concerned at the moment; it extended the protection to
3 e-mails, and the government didn't challenge that. In
4 the ECPA, there is no issue of standing. And the same
5 would apply in respect of the APA; if you established 15:26
6 that your data was interfered with, you could bring
7 your action under the APA and you would satisfy the
8 standing rules, isn't that correct?

9 A. The Administrative Procedures Act is a statute that has
10 an awful lot of administrative complexity and I would 15:27
11 not want to speculate as to that.

12 398 Q. Professor, you know that if you established that *your*
13 data was unlawfully used or disclosed or collected -
14 *your* data - that you could bring an action under the
15 APA and you would have standing, isn't that correct? 15:27

16 A. I can't speculate about that.

17 399 Q. The complexity that you refer to about the APA arises
18 as to whether it applies in the context of other
19 statutory remedies, isn't that correct?

20 A. That's correct. 15:27

21 400 Q. And the court in **Clapper** has held that the APA *does*
22 apply to FISA.

23 A. In that case, that Circuit Court did conclude that the
24 APA did provide a statutory remedy to assess the
25 validity of FISA. Now, of course -- 15:28

26 **MS. JUSTICE COSTELLO:** which **Clapper** were we talking
27 about now?

28 **MR. GALLAGHER:** Sorry, Judge, **ACLU -v- Clapper**, the
29 2015. I do apologise.

1 A. Yes, the Supreme Court decision in Clapper did not
2 address this issue.

3 401 Q. MR. GALLAGHER: Thank you for that, Professor. In ACLU
4 -v- Clapper there was no question but that the APA
5 standing requirement was met when it was shown that the 15:28
6 information was collected.

7 A. The court concluded that there was standing. I'm not
8 sure I would say there was no question. But the court
9 did conclude that under those facts, which as I said,
10 were unusual facts in which the notice problem and the 15:28
11 proof of surveillance and data capture problem was
12 satisfied, the court did, and the court *did* find there
13 was standing.

14 402 Q. Could you leave aside the notice problem for the
15 moment? Because I started off by saying that the notice 15:28
16 problem may create an issue with regard to standing.
17 We're talking about cases where, for whatever reason,
18 the person is in a position to prove their data has
19 been interfered with. That's what we're talking about,
20 Professor. And there is *nothing* in ACLU -v- Clapper 15:29
21 which suggests that there is *any* complexity about the
22 application of the standing rule in the context of APA
23 in such a situation.

24 A. I wouldn't say there's not *any* complexity. But the
25 court did find there was standing in that case, that is 15:29
26 correct.

27 403 Q. Once the court found that FISA did not exclude APA,
28 there was *no* difficulty or complexity in saying that
29 there was standing when it could be demonstrated the

1 data had been interfered with.

2 A. I believe that is correct. But it is a long and at
3 times tortuous opinion. But my recollection of the
4 opinion, that is consistent with that, that once that
5 was satisfied, standing was found. 15:30

6 404 Q. But it's a decision you're familiar with. And
7 therefore, when you responded to my question by saying
8 big problems of complexity arise in the context of APA,
9 that answer was actually directed to a separate *issue*
10 of the APA, namely, whether APA provides a remedy in 15:30
11 circumstances where there might be other statutory
12 remedies, isn't that correct?

13 A. I believe that's correct.

14 405 Q. And that's not a standing issue, in the sense in which
15 we have been talking about it in terms of actual 15:30
16 injury, isn't that correct?

17 A. I believe that's correct.

18 406 Q. Why did you give that answer then when I put that
19 question to you?

20 A. I was trying to answer the question. 15:30

21 407 Q. But it *wasn't* an answer to the question, it was
22 confusing the issue, isn't that correct, Professor? It
23 was putting us on a different inquiry, suggesting a
24 complexity that actually didn't apply to the standing
25 issue that we've been discussing. 15:31

26 A. I was under the impression that I was being asked to
27 accept that ACLU -v- Clapper was a simple case. And it
28 is most certainly not. Nor is it a representative
29 case. It is a very unusual case.

1 408 Q. I take it that you agree in the context of Section 1810
2 of FISA that if there is unlawful use or disclosure in
3 *that* context and somebody can establish that, there is
4 no difficulty about standing?

5 A. If someone learns about it and is able to use the facts 15:31
6 that they have learned about the secret acquisition of
7 their data by whatever means and that it was unlawful
8 under US law then it is my belief that standing would
9 be able to be satisfied in that case, that is correct.

10 409 Q. Now, do we find any mention in your report that the 15:32
11 complexities and difficulties with standing do not
12 arise in those three instances that I've put to you?

13 A. One of the complexities of standing that I have
14 maintained in my report though is the problem of proof.
15 The problem of proof is a huge problem. It was the 15:32
16 problem in the ACLU -v- Amnesty International case and
17 it was only due to the quirk of the Snowden revelations
18 that plaintiffs in ACLU -- that Clapper -v- ACLU were
19 able to satisfy the injury in fact requirement in order
20 to bring the challenge to the 215 programme. 15:32

21 410 Q. We know about the notice, because the very first few
22 questions I asked you was to distinguish between the
23 notice situation and standing. You said notice was
24 only *part* of standing. We're accepting in all of these
25 questions that somebody is, whether through notice or 15:33
26 some other means, able to prove their data has been
27 interfered with. In those circumstances, standing is
28 not complex or difficult to establish under those three
29 statutory provisions that I've referred you to.

1 A. In those circumstances, however factually unlikely, it
2 is my belief that standing can be satisfied, yes.

3 411 Q. And can you tell the court why that wasn't stated in
4 clear terms in your report in the context of an issue
5 you told us is *terribly* complex and terribly complex 15:33
6 for your students and for everybody else, that you
7 didn't make that clear?

8 A. My report dealt with standing the way that I understand
9 it and I believe that the exception which I have been
10 asked about is factually, "improbable" is perhaps too 15:34
11 strong of a word, but looking at the cases that we see,
12 seems to be an unusual set of facts. And I think the
13 broader point to take is that it is only the unusual
14 nature of the facts in which there was a leak, not only
15 that there was surveillance, but the surveillance was 15:34
16 bulk, which is to say everybody who fell within a
17 certain category could thus prove standing, is what
18 made those cases atypical.

19 412 Q. Professor, I don't want to delay on this. On a number
20 of occasions I've distinguished the issue as to whether 15:34
21 somebody is *aware* of the interference or can prove the
22 interference, either because they're put on notice or
23 on some other ground, whether bulk collection or
24 whatever. But that is distinct, as you made clear to
25 me at the very beginning today, from the separate 15:34
26 question of standing. And nowhere in your report do
27 you make it clear that, subject to proof, that standing
28 is not an issue in respect of those remedies. Isn't
29 that correct?

1 A. Well, in my discussion of Clapper on page 30, I do say
2 that much of the speculation could've been resolved if
3 the government had disclosed. So I do suggest that if
4 the fact of surveillance had been disclosed in the
5 first Clapper case, much of the speculation and, thus, 15:35
6 most of the defect under the immanence prong of
7 standing would've been eliminated.

8 413 Q. Prof. Richards, you know that's a separate issue.
9 That's establishing the proof that somebody's data has
10 been interfered with, that's what that's about. I'm 15:35
11 saying assuming that you can prove the data has been
12 interfered with, standing is not an issue in the three
13 cases I've identified and you have nowhere stated that
14 in your report.

15 A. That is correct. 15:36

16 414 Q. And the complexity of the standing arises principally
17 in the context of your report in relation to the
18 constitutional claims, isn't that correct?

19 A. No. The complexity of standing arises under both
20 statutory *and* constitutional claims. 15:36

21 415 Q. Well, the statutory complexity was in the context of an
22 entirely different statute - Spokeo - isn't that
23 correct?

24 A. That's correct.

25 416 Q. But not in the context of the statutes with which this 15:36
26 court is concerned?

27 A. That is correct.

28 417 Q. So in the context of *your* report on this issue, the
29 complexity of standing arose in a constitutional

1 context.

2 A. No, I think it arose in both.

3 418 Q. I see. And the constitutional context, you say, is
4 irrelevant, or not *very* relevant because of what you
5 say is the difficulty of non-US persons availing of 15:36
6 *constitutional* causes of action?

7 A. Yes, that is a difficulty there.

8 419 Q. But what we're looking at is what causes of action are
9 there to enable somebody whose data has been interfered
10 with to get a remedy. That's the broad question. 15:37

11 A. Yes.

12 420 Q. So in the context of three of the well recognised
13 remedies, standing is not a problem, provided you have
14 notice or other information that establishes the
15 interference? 15:37

16 A. I would never say that standing is not a problem.

17 421 Q. Okay. well, you say that the government didn't, in
18 Clapper -- Amnesty -v- Clapper, sorry, Judge, say
19 whether or not that they had data on the people, isn't
20 that correct? You say -- 15:37

21 A. In the Supreme Court case, yes.

22 422 Q. And aren't you well aware that it's a general practice,
23 not only in the US, but amongst all intelligence
24 agencies not to confirm or deny the position? Isn't
25 that right? 15:37

26 A. That is correct.

27 423 Q. Yeah. So it's not just a simple thing of the
28 government saying 'Yeah, here you were the subject of
29 surveillance' or 'You weren't'. That's correct, isn't

1 it?

2 A. That's correct.

3 424 Q. And just as we're on Clapper - I don't want to delay on
4 it - but the facts of that case were *indeed* very
5 peculiar, isn't that correct? 15:38

6 A. Clapper -v- Amnesty International?

7 425 Q. I'm sorry. Thank you, Professor. Clapper -v- Amnesty
8 International. They *were* very peculiar, isn't that
9 correct?

10 A. I'm not sure what one means by "peculiar". 15:38

11 426 Q. Well, it was peculiar in the sense that the court had
12 to address a situation where, the day the Act was
13 passed, it was challenged, isn't that correct?

14 A. Yes.

15 427 Q. A facial challenge? 15:38

16 A. Yes.

17 428 Q. Something courts don't like generally in relation to
18 legislation. They prefer to assess the
19 constitutionality in a factual context, isn't that
20 correct? 15:38

21 A. That is correct.

22 429 Q. Because otherwise --

23 A. In a general matter.

24 430 Q. -- it becomes like an advisory opinion?

25 A. I think courts, I think the preference for as-applied 15:39
26 challenges over facial challenges is that courts like
27 to have facts with which to assess...

28 431 Q. Yeah.

29 A. ... the claims before them.

1 432 Q. And the court rejected standing in Amnesty for the
2 following reasons: One, the plaintiffs were not able to
3 point to any evidence at all of a surveillance
4 programme *established* by the government under Section
5 702, isn't that correct? 15:39
6 A. That's correct.
7 433 Q. Two, they had no actual knowledge and could only
8 speculate as to how the Attorney General and the
9 Director of National Intelligence would exercise their
10 discretion in determining which communications to 15:39
11 target?
12 A. Which page in the opinion is this?
13 434 Q. I'm sorry, I'm not referring to a page in the opinion.
14 But that *is* the case. I'll get the page of the opinion
15 if you want. But you know that -- 15:39
16 A. Yes.
17 435 Q. -- you're very familiar...
18 A. Yes.
19 436 Q. You're very familiar with this.
20 A. The court gave five reasons in the chain of 15:39
21 speculation --
22 437 Q. Yeah, but that's one of them isn't it?
23 A. -- that -- I believe so.
24 438 Q. And you know that without my directing your attention
25 to *any* page, Professor. They said it was highly 15:40
26 speculative to know how the Attorney General or the
27 Director of National Intelligence was going to target,
28 isn't that correct?
29 A. It did.

1 439 Q. Yeah. And in those circumstances, apart from the
2 speculation, the five possibilities, one possibility
3 upon another, it's no surprise the court rejected
4 standing for that challenge, that constitutional
5 challenge, isn't that correct? 15:40

6 A. I don't agree.

7 440 Q. I see. So you expected the court to declare, or to
8 entertain a challenge to the constitutionality of
9 legislation with no facts, no idea of the programme, no
10 idea of how discretion is going to operate, no idea, 15:40
11 it's said, as to how the FISC court was going to review
12 these matters, isn't that correct?

13 A. The difficulty in these cases is, because they are
14 classified, there can never be any facts. If there is
15 going to be a judicial review, it will require either 15:41
16 an illegal leak, which is not ideal from a governance
17 perspective, or some other way of challenging the
18 statute. What the court could've done in that case was
19 to accept the standard that the lower court, the second
20 circuit applied in that case - incidentally, also an 15:41
21 opinion written by Judge Lynch, who is the author of
22 the other Clapper -v- ACLU case that we've been
23 discussing --

24 441 Q. I think you told us that.

25 A. -- at length. And he offered that the standard for 15:41
26 injury in fact in this case should be that whether
27 plaintiffs can allege an objectively reasonable
28 likelihood that their communications had been
29 intercepted. And this case involved, it involved

1 facts. The facts were what the plaintiffs' activities
2 had been and what they believed would happen to their
3 activities as a result of the allegedly
4 unconstitutional government surveillance conducted by
5 Section 702.

15:42

6
7 And some of these involved lawyers who were
8 representing clients in Guantanamo Bay or otherwise are
9 terror suspects and they knew that there was a high
10 likelihood that their telephone conversations were
11 being intercepted and that was deterring their frank
12 exchange of advice with their clients. And also they
13 had incurred additional costs, such as travelling out
14 of the country in order to meet with people, rather
15 than calling them on the phone or sending them an
16 e-mail in order to protect their client confidences.

15:42

15:42

17
18 And the Supreme Court could have held in Clapper that
19 that was sufficient for an adversarial proceeding about
20 the nature of the statute which authorised the
21 programme. Because after all, it's not just an
22 American scheme government programme, some of which may
23 be secret or subordinate to the Constitution, it's the
24 statutes themselves that need to be assessed. And in
25 this case, the court's reading of standing doctrine in
26 that way, the court's requirement that they actually
27 allege surveillance, when they could have merely proven
28 an objectively reasonable standard that led to the
29 logical problems that the court was able to deploy

15:42

15:43

1 against the complaint in its opinion.

2 442 Q. Prof. Richards, apart from the standing issue of actual
3 injury that we have been referring to for some length
4 today, there were other complicating factors in Clapper
5 -v- Amnesty that I've identified, including not knowing 15:43
6 how this was going to operate and basically asking the
7 court to do a facial examination of the
8 constitutionality of the statute that in and of itself
9 created a different issue and, so far as the court was
10 concerned, a significant difficulty, isn't that 15:44
11 correct?

12 A. The majority opinion of the court did find that to be
13 an issue, yes.

14 443 Q. So any interpretation of Amnesty -v- Clapper in terms
15 of its restriction on standing has to take that into 15:44
16 account?

17 A. I think in understanding the case it is a relevant
18 consideration, but I think the thing, the most
19 important take-away from Clapper -v- Amnesty
20 International is that it required the pleading of 15:44
21 actual surveillance, of an actual injury, rather than
22 objectively reasonable likelihood of that. In fact, I
23 quote in my report that Prof. Vladeck agrees with this
24 reading. And he says that in paragraph... sorry,
25 Judge. Paragraph 96, I conclude on standing: 15:45
26

27 *"Thus, while standing doctrine is not a complete bar to*
28 *relief in surveillance cases, it is still frequently a*
29 *substantial and frequently unsatisfying one (see*

1 *Vladeck Report at 90). I agree here with scholarly*
2 *work by Professor Vladeck in which he has argued that*
3 *'perhaps the most important takeaway from [Clapper] is*
4 *the extent to which the Supreme Court's Article III*
5 *standing jurisprudence interposes substantial obstacles*
6 *to judicial review of secret surveillance programs (if*
7 *not all secret government conduct) on the merits'."*

8 444 Q. Professor, apart from the remedies that you have
9 referred to, you're aware, of course, under Section 702
10 that -- or the Section 702 programme, that the 15:45
11 companies who are directed or issued with a directive
12 to hand over information are able to challenge that
13 directive, isn't that correct?

14 A. That's correct.

15 445 Q. And potentially, companies that hand over information 15:46
16 unlawfully are subject to very substantial damages
17 claims?

18 A. That is correct. But as we saw in the **Microsoft** case
19 that was decided earlier this year, it's an established
20 provision of Fourth Amendment law. Because the 15:46
21 company's challenge to a surveillance order in the 702
22 would perhaps be made under the Fourth Amendment, that
23 they cannot assert the Fourth Amendment rights of their
24 customers with respect to data.

25 446 Q. No, they can't assert the Fourth Amendment rights of 15:46
26 their customers. But here they're given a specific
27 standing under FISA, isn't that correct?

28 A. Yes.

29 447 Q. Yeah. And the point I put to you is a different one,

1 that if they *do* hand over information unlawfully then
2 they are subject to potentially very damaging claims,
3 isn't that correct?

4 A. To civil claims?

5 448 Q. Yeah, civil claims. 15:47

6 A. If it is discovered, that is correct.

7 449 Q. By the data subjects.

8 A. Yes. Though when the telecom companies allegedly did
9 that in the early years of last decade, Congress did
10 pass an immunity statute which immunised those claims. 15:47

11 450 Q. I want on and try and get finished, Professor, but I
12 just want to put to you that you disagree with
13 Prof. Swire in particular about the important of all of
14 these systemic procedures within the intelligence
15 agencies that limit access to data, require supervision 15:47
16 and oversight. You're inclined to down-play the
17 importance of those procedures compared with
18 Prof. Swire, isn't that correct?

19 A. In my report, I was asked to assess, consistent with
20 the DPC draft decision, the adequacy of remedies under 15:47
21 US law.

22 451 Q. Yeah.

23 A. Prof. Swire, his report talks about what I believe what
24 he calls systemic safeguards. And for reasons that I
25 have given in my testimony today and for further 15:48
26 reasons that I give in my report, to me a systemic
27 safeguard is analytically distinct from a judicially
28 enforceable remedy, particularly one involving
29 fundamental rights. And I note in my report - and this

1 is pages 23 and 24, where I address that - I note there
2 is a factual disagreement, on the bottom of page 23,
3 between the Swire and Vladeck reports on the one hand
4 with respect to the efficacy and substantiality of
5 these systemic safeguards and the Gorski report on the 15:48
6 other hand.

7
8 And the substantive note that I make, given the limits
9 of my brief, is that many of the systemic safeguards
10 which are identified - like the decision to get a 15:49
11 warrant in Fourth Amendment cases and like the policy
12 of minimisation in the Reilly case, which the Chief
13 Justice was so skeptical of - they are analytically
14 distinct from fundamental rights, or even some of them
15 from law, because they depend upon administrative 15:49
16 discretion. I understood my brief to be to examine law
17 and fundamental rights and particularly remedies.

18 452 Q. But some of these procedures are actually *required* by
19 the statutes, they're based on a *legal* obligation,
20 isn't that correct? 15:49

21 A. That is correct.

22 453 Q. And secondly, just as a matter of principle, while
23 judicial remedies are all very well and fine, most
24 people would prefer not to have to *resort* to judicial
25 remedies and would prefer that things are done 15:50
26 properly. And in attempting to ensure that things are
27 done properly, then these systemic safeguards and
28 procedures are of considerable significance, isn't that
29 correct?

1 A. I can't speak to most people on what they would find
2 proper. I would say that systemic safeguards *are*
3 important, but that ultimately, when we are discussing
4 questions of fundamental rights, a judicial remedy is
5 necessary. 15:50

6 454 Q. Yeah, and a judicial remedy is the *ultimate* remedy.
7 But governments and states protecting fundamental
8 rights also need to ensure and have in place procedures
9 that reduce the risk of a fundamental right being
10 infringed. That's an important part of the fabric of 15:50
11 protection, isn't that right?

12 A. That's correct.

13 455 Q. Now, I just want to ask you two more questions. This
14 willfulness that's a requirement of most of these
15 statutes where you're claiming damages, do you 15:51
16 understand as to what is required by that willfulness
17 threshold?

18 A. Willfulness is a heightened mens rea requirement that
19 requires some kind of intentionality, but perhaps not
20 the intention to violate the law, but certainly that 15:51
21 one would know the consequences of one's acts.

22 456 Q. And it includes recklessness, isn't that correct?

23 A. Recklessness -- negligence -- strict liability,
24 negligence and recklessness would all be included --
25 I'm sorry... 15:51

26 457 Q. I don't think you're right with negligence, in fairness
27 to you, Professor. I think you're giving me too much
28 there.

29 A. No, I was going in the wrong direction. I think there

1 is some debate about whether willfulness includes
2 recklessness, but I will submit that there is certainly
3 an argument that willfulness includes recklessness.

4 458 Q. And I take it I'm correct in saying that right across
5 the broad spectrum of federal law in the US, where the 15:51
6 actions of government agencies or government are in
7 issue, it is frequently, I won't say invariably, but
8 frequently the position that the threshold for making a
9 damages claim is that the government has acted
10 willfully, isn't that correct? 15:52

11 A. It is a common theme across the law. The Privacy Act,
12 for instance, talks about intentional and willful. But
13 the willfulness requirement does appear.

14 459 Q. Right across, away from the privacy sphere altogether,
15 right across areas where government acts, isn't that 15:52
16 correct?

17 A. I don't know whether it is universal, but it is
18 certainly common, yes.

19 **MR. GALLAGHER:** Thank you very much, Professor.
20 15:52

21 **PROF. RICHARDS WAS RE-EXAMINED BY MR. MURRAY AS**
22 **FOLLOWS:**

23

24 460 Q. **MR. MURRAY:** Now, Prof. Richards, you said on, I think,
25 a number of occasions in response to Mr. Gallagher's 15:52
26 questions that ACLU -v- Clapper, the Second Circuit
27 decision, was unusual, it presented unusual facts. So
28 I wonder could you identify what, in *your* view, it is
29 about the facts of that case that are noteworthy as the

1 court comes to consider what it decided?
2 A. One of the real practical difficulties in proving
3 standing is establishing proof. Proof, as we've seen
4 in some of the lower court cases that are discussed in
5 some of the other expert reports, need not be proven at 15:53
6 the level of the complaint. The well pleaded complaint
7 rule, as I believe Ms. Gorski got into over a week ago,
8 requires that facts be alleged that, if proven, would
9 satisfy injury in fact. In practice, because of the
10 secret nature of government surveillance programmes, it 15:53
11 is very difficult to prove that which is secret. And
12 there are a variety of procedural bars that are also in
13 dispute amongst the experts that can get in the way of
14 this.
15
16 what is unusual about Clapper 2, the ACLU case that we
17 have been discussing, is this: Edward Snowden's
18 disclosures revealed that within a subset of phone
19 customers, everyone was being surveilled, therefore
20 everyone had standing. In fact, I remember when I 15:54
21 learned the facts of the Verizon method - they
22 disclosed it - was at the annual privacy conference.
23 This was immediately seized upon by all of the experts
24 present as one of the most significant developments of
25 the Snowden revelations, that not only the scope of 15:54
26 surveillance and the scale of surveillance, but more
27 importantly, as American lawyers and American law
28 professors, finally there was a solution to the logical
29 dilemma - the Catch 22 if you will - that Clapper -v-

1 Amnesty International had provided; if everybody has
2 been surveilled in their communications then everybody
3 potentially has standing.

4
5 There was actually another complexity of standing here, 15:55
6 which was the counter element, 'well, if everybody has
7 suffered injury then the injury is not particularised,
8 therefore an individual plaintiff cannot show a
9 different injury other than the run of the mill
10 people'. This is why taxpayers, for instance, cannot 15:55
11 sue.

12
13 In the Clapper 2 decision, the ACLU decision, the court
14 found against that particularisation argument, but it
15 could've been made and a court, because of the 15:55
16 indeterminacy of standing doctrine, could have found
17 it. And so it is those facts that there was actual
18 proof that was available. And I think we see in lower
19 court cases proof which is necessary, it's summary
20 judgment, which is the state at which the Clapper -v- 15:55
21 Amnesty International case had standing dismissed can
22 be very difficult to be held.

23 461 Q. Can I ask you, Professor, to take out the decision of
24 the Second Circuit? It's tab 15 in, I think, book one.

25 A. Yes, I have it. 15:56

26 462 Q. If you go to page 801, which was the page on which
27 Mr. Gallagher dwelt, we see in the bottom right-hand
28 corner the statement by the court that:

29

1 *"Here, appellants' alleged injury requires no*
2 *speculation whatsoever as to how events will unfold*
3 *under section 215 – appellants' records (among those of*
4 *numerous others) have been targeted for seizure by the*
5 *government; the government has used the challenged*
6 *statute to effect that seizure; the orders have been*
7 *approved by the FISC; and the records have been*
8 *collected. Amnesty International's 'speculative chain*
9 *of possibilities' is, in this context, a reality. That*
10 *case in no way suggested that such data would need to*
11 *be reviewed or analysed in order for respondents to*
12 *suffer injury."*

13
14 Now, Professor, what was the -- we've already heard
15 that the APA was the remedial vehicle, as it were, by 15:57
16 which this claim was brought and I think it's the case
17 at the time you delivered your report that you had
18 received Prof. Vladeck's report?

19 A. Yes, I had.

20 463 Q. And were aware that that was before the court and part 15:57
21 of the record before the court?

22 A. Yes.

23 464 Q. And I think Prof. Vladeck refers to the APA in his
24 report.

25 A. He does. 15:57

26 465 Q. And were you conscious of that when you delivered and
27 decided what was going to go into your own report?

28 A. I was.

29 466 Q. But the APA itself, could you just explain to the judge

1 what relationship the APA bears to an underlying cause
2 of action?

3 A. The APA does not offer a substantive theory of
4 liability. It is a residual procedural vehicle by
5 which an aggrieved person, I think, under the statute - 15:58
6 again some of the echoes of standing doctrine - by
7 which any person aggrieved can bring a cause of action
8 to challenge - and there's a series of elements as
9 relevant here - things that are illegal or things that
10 are unconstitutional. 15:58

11 467 Q. So am I correct in saying, Professor, that the APA is a
12 vehicle through which an underlying breach of the law,
13 whether statutory or constitutional, can be agitated?

14 A. Not only is the Administrative Procedure Act that, it
15 is only that. 15:58

16 468 Q. And in the ACLU -v- Clapper case, what was the
17 underlying claim, brought through the APA, but what was
18 the underlying claim, the illegality upon which the
19 plaintiffs were relying?

20 A. There were, unsurprisingly, multiple claims that the 15:58
21 plaintiffs were relying upon in the ACLU -v- Clapper
22 case. There was a statutory claim that was brought
23 under the Foreign Intelligence Surveillance Act, FISA,
24 that the FISA orders under the meta-data programme
25 exceeded the FISA standard, which limited orders to 15:59
26 things which were relevant to a foreign surveillance
27 national security investigation. However though, there
28 were also two other claim -- there were constitutional
29 claims, I believe a First Amendment claim and a Fourth

1 Amendment claim, that were being brought. And the
2 Administrative Procedures Act, once the court had
3 navigated the issues of preclusion and they had
4 demonstrated that it was viable, allowed and required
5 the court to vacate on the narrower statutory ground of 15:59
6 exceeding relevance, rather than bringing the
7 constitutional claims, which could have been brought in
8 any event, at least by US citizens.

9 469 Q. Now, can I ask you to look over the column on the
10 left-hand side, paragraph six, to which Mr. Gallagher 16:00
11 attached *some* importance, but I don't think he opened
12 the first part of this and I'd like to just read it to
13 you and for you to explain what significance, if any,
14 you believe this has:

15
16 *"But the government's argument misapprehends what is*
17 *required to establish standing in a case such as this*
18 *one. Appellants challenge the telephone metadata*
19 *program as a whole, alleging injury from the very*
20 *collection of their telephone metadata. And, as the*
21 *district court observed, it is not disputed that the*
22 *government collected telephone metadata associated with*
23 *the appellants' telephone calls. The Fourth Amendment*
24 *protects against unreasonable searches and seizures.*
25 *Appellants contend that the collection of their*
26 *metadata exceeds the scope of what is authorized by*
27 *Section 215 and constitutes a Fourth Amendment search.*
28 *We think such collection is more appropriately*
29 *challenged, at least from a standing perspective, as a*

1 seizure rather than as a search."

2
3 Prof. Richards, from the perspective of standing
4 analysis, what, in your view, is the significance of
5 the fact that the court looked at this under the Fourth 16:01
6 Amendment and found a seizure?

7 A. The significance here -- I think there's two things
8 that are significant for these proceedings. The first
9 is that it is the Fourth Amendment which established
10 standing here from the seizure of the meta-data. And 16:01
11 the second is that I do not believe that this claim
12 would've been available to an EU citizen. Because if
13 you actually go further down the page, you will see: "*A*
14 *violation of the Fourth Amendment is fully accomplished*
15 *at the time of unreasonable governmental intrusion.*" 16:01
16 But the case that the court cites in Clapper -v- ACLU,
17 United States -v- Verdugo-Urquidez, is a very
18 interesting case, because that case established that
19 foreign nationals who lacked physical presence and a
20 substantial connection to the United States could not 16:02
21 assert Fourth Amendment rights and the exclusionary
22 rule, or may have a Bivens action in that case in US
23 courts.

24
25 In addition, there's another problem with using the 16:02
26 Fourth Amendment in this context. Whilst it is my
27 belief, based upon my scholarly work, that courts
28 *should* recognise Fourth Amendment protection from the
29 seizure of personal data, that is a proposition which

1 is debated, particularly given the third party
2 doctrine, which has not been repudiated by the Supreme
3 Court which --

4 470 Q. Now --

5 A. Should I stop? 16:02

6 471 Q. No, but just following from that. Mr. Gallagher
7 repeatedly used the words "interference" and the phrase
8 "interference with data". But for the purposes of *this*
9 paragraph of the decision, what was the interference?

10 A. It was the seizure of the data, which was a viol -- the 16:03
11 court found, *this* court found - not all courts would -
12 but this court found to be a violation of the Fourth
13 Amendment, which was partly why I was resisting
14 accepting that it was interference, this was a Fourth
15 Amendment case. 16:03

16 **MR. MURRAY:** Judge, I will be a little more time with
17 --

18 **MS. JUSTICE COSTELLO:** Yes, we'll take it up in the
19 morning, I think it's preferable to...

20 **MR. MURRAY:** we had had a discussion, Judge, about 16:03
21 whether we would sit tomorrow or...

22 **MS. JUSTICE COSTELLO:** Oh, yes, that's right, you're in
23 difficulty. Right. So it's -- poor Professor, you're
24 going to see more of Dublin than you might've planned,
25 because that's wednesday. Is that a problem? 16:03

26 **MR. MURRAY:** Very good, Judge. Thank you. He can
27 blame me, Judge.

28 **MS. JUSTICE COSTELLO:** I'm afraid you're under
29 re-examination. So if your solicitor explained the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

situation to him in that regard.

MR. MURRAY: Certainly, Judge. Thank you.

MS. JUSTICE COSTELLO: Thank you.

MR. MURRAY: I might ask Mr. Gallagher's permission to *apologise* to the witness.

16:04

MR. GALLAGHER: well, if he sends the apology to me as well, I've no difficulty, Judge.

MR. MURRAY: well, in that case, I withdraw the request.

MS. JUSTICE COSTELLO: wednesday.

16:04

**THE HEARING WAS THEN ADJOURNED UNTIL WEDNESDAY, 22ND
FEBRUARY**

	86:7, 86:25	95:18	8	17:23, 18:6, 38:4,
	14(2) [1] - 41:26	2702 [1] - 65:11		38:11, 38:15, 41:18,
	14-1 [1] - 35:4	28 [1] - 3:3		45:9, 66:22, 84:17,
	145 [1] - 4:13	29 [2] - 1:2, 78:5	8 [1] - 1:18	99:4, 99:22, 100:19,
	14th [1] - 28:11	2ND [1] - 2:16	801 [3] - 87:29,	122:11, 142:15
	15 [5] - 5:17, 86:26,		89:25, 147:26	accessed [7] - 32:9,
	86:29, 87:1, 147:24	3	8th [1] - 113:21	33:16, 40:27, 45:15,
	16 [3] - 5:17, 5:28,			98:27, 99:1, 99:3
	35:11		9	accesses [1] - 30:24
	1681e(b) [1] - 68:3	3 [3] - 15:17, 16:3,		accessing [1] -
	17 [1] - 12:13	19:3	9 [1] - 95:15	100:6
	1810 [1] - 132:1	30 [3] - 4:11, 77:16,	90 [1] - 141:1	accomplished [1] -
	1890 [1] - 71:24	134:1	91 [1] - 101:24	151:14
	1946 [1] - 92:2	31 [1] - 8:22	93 [4] - 106:9,	according [2] -
	1967 [3] - 37:9, 72:7,	33 [3] - 20:14, 20:26,	106:18, 106:19,	84:18, 108:1
	128:8	79:3	106:22	accords [1] - 85:6
	1968 [2] - 72:5, 72:13	34 [1] - 106:19	96 [2] - 111:16,	account [4] - 8:13,
	1970's [1] - 73:10	35 [5] - 22:22, 24:10,	140:25	94:21, 94:24, 140:16
	1974 [2] - 72:1, 82:13	27:25, 41:28, 106:19	99 [3] - 30:7, 80:10,	accuracy [4] - 46:2,
	1986 [4] - 72:3,	36 [1] - 22:22	80:12	68:4, 73:28, 112:21
	72:13, 72:16, 76:16	37 [1] - 111:18		accurate [9] - 46:24,
	1992 [1] - 23:13	37-42 [1] - 2:23	A	47:3, 49:20, 56:2,
	1995 [3] - 72:25,	38 [1] - 80:12		74:5, 74:10, 74:14,
	73:12, 73:20	39 [1] - 120:13		110:18, 110:27
	19th [1] - 5:15		A&L [1] - 3:3	acknowledged [1] -
	1ST [1] - 2:10	4	ability [5] - 48:12,	42:8
	1st [2] - 24:21, 25:6		50:6, 93:11, 116:4,	acknowledges [1] -
		4 [2] - 2:14, 24:25	119:18	101:29
	2	41 [1] - 92:21	able [14] - 11:18,	acknowledging [1] -
		47 [3] - 111:27,	34:9, 79:19, 90:18,	50:4
	2 [14] - 2:8, 2:19,	112:11, 123:20	90:28, 98:29, 113:5,	ACLU [43] - 35:6,
	2:24, 2:28, 2:29,	5	132:5, 132:9, 132:19,	86:23, 87:2, 95:5,
	15:22, 16:25, 25:29,		132:26, 137:2,	96:29, 97:2, 98:12,
	42:18, 125:17,	5 [5] - 2:18, 4:4, 4:6,	139:29, 141:12	98:13, 98:22, 99:3,
	125:19, 146:16,	15:26, 83:10	abortion [1] - 61:2	99:11, 99:22, 100:5,
	147:13	50 [1] - 117:12	above-named [1] -	100:17, 100:20,
	20 [2] - 26:28, 78:9	57 [1] - 124:3	1:26	101:19, 103:23,
	2014 [1] - 87:17	59 [2] - 26:27, 27:17	absence [2] - 34:11,	105:6, 105:8, 105:10,
	2015 [8] - 83:1,		63:28	105:13, 107:1, 107:3,
	87:19, 97:4, 113:21,	6	absolute [2] - 8:2,	108:1, 108:18, 109:8,
	113:26, 113:27,		9:4	109:9, 109:22,
	113:28, 129:29	6 [3] - 15:29, 21:4,	absolutely [8] - 9:18,	110:15, 129:28,
	2016 [3] - 5:15,	87:29	39:1, 40:1, 52:22,	130:3, 130:20,
	113:27, 113:28	67 [1] - 123:9	66:6, 88:21, 97:20,	131:27, 132:16,
	2016/4809P [1] - 1:5		101:11	132:18, 138:22,
	2017 [5] - 1:18, 4:5,	7	absorbed [1] - 92:17	145:26, 146:16,
	5:2, 77:8, 118:24		abstract [4] - 19:23,	147:13, 149:16,
	20TH [2] - 4:4, 5:2	7 [2] - 16:1, 21:11	68:28, 69:17, 69:24	149:21, 151:16
	20th [3] - 1:18,	7/8 [1] - 2:8	abusing [1] - 26:21	acquisition [1] -
	71:12, 118:24	702 [9] - 39:9, 39:12,	academic [1] - 16:16	132:6
	215 [7] - 87:4, 87:6,	39:15, 40:5, 137:5,	Academy [1] - 15:6	act [2] - 52:10,
	88:6, 92:11, 132:20,	139:5, 141:9, 141:10,	accept [7] - 40:22,	127:17
	148:3, 150:27	141:21	41:6, 43:16, 49:11,	Act [27] - 21:13, 25:5,
	22 [1] - 146:29	75 [1] - 78:11	49:29, 131:27, 138:19	25:20, 26:22, 72:11,
	22ND [1] - 153:12	76 [2] - 4:12, 78:11	accepted [8] - 5:23,	72:14, 72:16, 82:12,
	23 [2] - 143:1, 143:2		6:14, 8:1, 8:17, 37:18,	82:15, 87:25, 91:2,
	24 [1] - 143:1		53:8, 97:11, 115:8	91:9, 91:12, 92:22,
	25th [1] - 26:1		accepting [2] -	93:3, 123:20, 124:4,
	27 [3] - 95:15, 95:16,		132:24, 152:14	125:9, 125:14,
			access [16] - 17:15,	126:14, 128:7, 129:9,
1				
1 [7] - 3:4, 3:10,				
24:25, 25:1, 26:5,				
124:4, 125:10				
10 [1] - 83:14				
11 [6] - 14:20, 61:12,				
67:24, 79:3, 83:7,				
83:22				
1155 [3] - 35:12,				
35:23, 36:5				
12 [1] - 27:26				
13 [5] - 3:9, 4:7, 15:8,				
34:29, 86:7				
14 [4] - 4:10, 34:29,				

136:12, 145:11,
149:14, 149:23, 150:2
acted [2] - 97:15,
145:9
acting [2] - 44:27,
44:28
action [41] - 1:27,
39:22, 39:27, 39:29,
40:11, 43:12, 43:17,
44:7, 44:10, 44:12,
47:11, 50:6, 53:13,
53:18, 55:15, 62:9,
62:15, 62:27, 64:17,
64:20, 68:1, 68:28,
94:27, 108:8, 115:10,
115:12, 118:27,
119:20, 124:9,
124:10, 124:29,
125:19, 125:20,
127:28, 129:7,
129:14, 135:6, 135:8,
149:2, 149:7, 151:22
actions [6] - 27:4,
94:19, 124:19,
124:23, 124:24, 145:6
activities [4] - 16:20,
78:23, 139:1, 139:3
acts [2] - 144:21,
145:15
actual [31] - 19:8,
21:13, 34:21, 53:27,
54:6, 54:11, 54:18,
85:10, 85:12, 85:13,
106:16, 106:28,
107:18, 110:1, 110:4,
110:9, 110:12,
110:16, 110:19,
110:26, 110:27,
111:1, 111:5, 111:7,
124:25, 131:15,
137:7, 140:2, 140:21,
147:17
Adams [1] - 120:6
added [3] - 64:15,
100:7, 100:8
adding [1] - 72:14
addition [10] - 28:25,
48:16, 56:28, 107:17,
108:17, 108:20,
108:21, 109:20,
110:18, 151:25
additional [5] -
11:10, 29:1, 103:2,
109:23, 139:13
address [12] - 27:29,
30:15, 31:29, 32:2,
32:3, 57:13, 81:24,
93:23, 99:27, 130:2,
136:12, 143:1
addressed [2] -
99:26, 99:28
addresses [2] - 40:2,
40:5
addressing [5] -
37:26, 94:15, 100:9,
102:12, 102:15
adduce [5] - 8:5,
9:16, 11:2, 11:19,
11:22
adduced [8] - 9:22,
10:16, 10:19, 11:8,
11:10, 11:20, 12:1,
12:7
adducing [1] - 9:14
adequacy [4] - 31:7,
31:28, 80:29, 142:20
adequately [1] -
57:19
ADJOURNED [1] -
153:12
ADJOURNMENT [1]
- 75:12
administration [4] -
25:2, 25:16, 26:11,
76:26
administrative [2] -
129:10, 143:15
Administrative [7] -
91:1, 91:9, 91:12,
93:2, 129:9, 149:14,
150:2
admission [1] -
12:14
admit [4] - 5:13,
7:17, 10:21, 12:23
admitted [1] - 7:17
adopted [1] - 120:8
adopting [1] - 55:1
adoption [2] - 18:7,
115:20
advance [2] - 6:23,
36:15
advanced [3] - 6:15,
16:22, 77:21
advances [5] -
16:15, 76:11, 76:19,
76:28, 77:2
advancing [1] -
32:20
adversarial [1] -
139:19
adverse [1] - 69:5
advice [1] - 139:12
ADVICE [1] - 3:9
advisory [4] - 69:15,
69:22, 69:29, 136:24
Advisory [1] - 70:3
advocate [1] - 44:27
aesthetic [1] - 52:8
affect [1] - 42:4
affected [1] - 51:7
affecting [1] - 106:6
affidavit [15] - 7:28,
10:12, 10:21, 10:24,
11:8, 11:24, 11:26,
12:2, 12:9, 12:13,
12:20, 12:21, 12:23,
15:27, 21:8
affidavits [2] - 5:13,
12:1
afraid [2] - 12:25,
152:28
AFTER [2] - 4:12,
76:1
afternoon [2] - 76:4,
101:16
Age [1] - 16:13
agencies [4] - 25:18,
135:24, 142:15, 145:6
agency [2] - 55:28,
123:24
agency's [1] - 55:29
aggrieved [2] -
149:5, 149:7
agitated [1] - 149:13
ago [7] - 26:17,
113:21, 114:1,
119:25, 122:3, 146:7
agree [31] - 10:27,
22:9, 24:11, 24:12,
26:8, 26:9, 30:10,
33:25, 38:10, 41:10,
43:22, 43:23, 43:25,
44:19, 48:5, 50:1,
53:3, 74:16, 74:24,
78:8, 90:9, 99:25,
102:9, 103:20,
105:19, 108:12,
124:23, 132:1, 138:6,
141:1
agreed [11] - 17:5,
17:24, 20:27, 22:20,
22:21, 26:4, 47:28,
67:9, 74:18, 83:16,
109:17
agreement [4] - 22:6,
36:16, 36:17, 98:1
agrees [1] - 140:23
AHERN [1] - 2:18
akin [2] - 93:4,
111:28
Alabama [1] - 15:3
alia [2] - 7:23, 95:22
allegation [2] - 34:7,
88:19
allegations [1] - 21:7
allege [5] - 33:9,
50:29, 88:11, 138:27,
139:27
alleged [15] - 42:27,
51:18, 51:20, 57:15,
57:19, 96:4, 98:20,
102:24, 103:9, 104:4,
104:5, 108:8, 119:9,
146:8, 148:1
alleged" [1] - 102:5
allegedly [2] - 139:3,
142:8
alleging [4] - 26:21,
55:3, 64:28, 150:19
Alliance [2] - 2:26,
6:24
allow [2] - 87:27,
123:28
allowed [6] - 61:5,
91:15, 92:11, 93:5,
93:28, 150:4
almost [2] - 6:4, 93:4
alone [1] - 34:11
alternative [1] -
87:27
altogether [1] -
145:14
ambiguity [3] -
128:16, 128:29, 129:1
ambiguous [1] -
101:3
amend [1] - 13:6
amended [1] - 72:13
Amendment [54] -
15:11, 16:8, 16:10,
16:22, 27:1, 27:8,
27:11, 27:12, 27:14,
27:15, 27:21, 27:23,
27:24, 27:27, 27:29,
28:2, 28:11, 28:13,
28:18, 28:20, 28:25,
28:27, 28:28, 37:2,
37:4, 37:6, 37:17,
37:21, 39:2, 61:10,
72:10, 78:23, 88:7,
93:10, 108:27,
120:18, 141:20,
141:22, 141:23,
141:25, 143:11,
149:29, 150:1,
150:23, 150:27,
151:6, 151:9, 151:14,
151:21, 151:26,
151:28, 152:13,
152:15
amendment [1] -
28:11
amendments [1] -
29:8
AMERICA [1] - 2:21
America [3] - 71:20,
71:23, 74:26
American [35] -
16:16, 19:18, 22:7,
23:28, 26:4, 37:1,
37:13, 37:16, 43:12,
43:18, 44:2, 48:6,
48:7, 61:19, 61:25,
62:16, 70:2, 71:7,
76:13, 80:6, 84:9,
86:27, 97:23, 100:26,
106:14, 106:26,
107:19, 109:29,
110:24, 111:2,
112:20, 120:25,
139:22, 146:27
amici [8] - 5:16, 6:11,
6:22, 7:13, 7:17, 7:24,
9:5, 9:13
amicus [20] - 6:1,
6:6, 6:17, 7:18, 7:19,
8:2, 8:8, 8:12, 8:17,
8:19, 8:24, 9:15, 9:18,
9:20, 10:18, 11:19,
11:22, 12:14, 12:22,
27:18
Amnesty [31] -
34:28, 35:7, 35:8,
53:29, 54:1, 65:7,
89:6, 89:9, 89:14,
89:21, 90:3, 90:5,
90:7, 90:10, 90:11,
90:13, 95:16, 98:18,
100:13, 100:18,
132:16, 135:18,
136:6, 136:7, 137:1,
140:5, 140:14,
140:19, 147:1,
147:21, 148:8
amount [2] - 26:10,
108:13
amounts [4] - 35:19,
36:7, 38:1, 38:16
analogues [2] - 70:6,
70:7
analysed [1] -
148:11
analysis [3] - 57:12,
83:28, 151:4
analytically [3] -
18:16, 142:27, 143:13
AND [1] - 1:13
announced [1] -
121:10
annual [1] - 146:22
answer [10] - 29:14,
32:13, 38:8, 38:21,
70:25, 74:26, 131:9,
131:18, 131:20,
131:21
answered [1] - 59:13
anticipation [1] -
95:26
APA [39] - 91:6, 91:7,

91:17, 91:22, 91:24, 91:26, 91:28, 92:1, 92:5, 92:9, 92:29, 93:15, 93:26, 93:28, 94:3, 94:13, 94:20, 94:27, 94:28, 95:1, 129:5, 129:7, 129:15, 129:17, 129:21, 129:24, 130:4, 130:22, 130:27, 131:8, 131:10, 148:15, 148:23, 148:29, 149:1, 149:3, 149:11, 149:17

apart [6] - 76:27, 89:12, 118:20, 138:1, 140:2, 141:8

apologies [1] - 128:4

apologise [9] - 5:9, 37:14, 54:3, 59:28, 74:24, 97:20, 100:25, 129:29, 153:5

apology [1] - 153:6

appeal [7] - 85:22, 85:26, 85:27, 87:20, 88:2, 120:23, 123:11

Appeal [3] - 113:15, 114:3, 119:27

Appeals [1] - 14:27

appeals [1] - 86:3

appear [4] - 59:17, 91:26, 95:1, 145:13

APPEARANCES [1] - 2:3

appellant [1] - 3:24

Appellants [2] - 150:18, 150:25

appellants [3] - 88:5, 88:11, 89:2

appellants' [3] - 148:1, 148:3, 150:23

appellate [2] - 9:1, 15:4

appended [1] - 15:14

appendix [2] - 15:29, 93:27

applicability [1] - 92:8

applicant [1] - 8:11

Applicant [1] - 6:15

applicants [6] - 5:24, 5:29, 7:12, 119:12, 119:16, 119:18

application [11] - 5:12, 11:23, 12:14, 21:21, 70:16, 70:23, 70:26, 70:28, 101:3, 119:14, 130:22

applied [4] - 73:6, 75:4, 136:25, 138:20

applies [6] - 39:4, 70:13, 70:17, 70:21, 70:22, 129:18

apply [9] - 6:2, 9:27, 10:1, 11:7, 46:18, 49:15, 129:5, 129:22, 131:24

applying [1] - 82:13

appreciate [4] - 57:10, 57:27, 81:19, 104:25

apprehension [1] - 62:21

approach [2] - 54:10, 95:29

appropriate [1] - 9:6

appropriately [2] - 88:8, 150:28

appropriateness [1] - 41:11

approved [1] - 148:7

approving [1] - 92:20

area [17] - 8:15, 17:14, 25:27, 27:4, 60:3, 74:18, 74:20, 80:9, 80:23, 81:4, 81:13, 83:1, 108:29, 113:13, 113:20, 114:21, 123:7

areas [8] - 15:9, 21:29, 70:22, 71:2, 75:4, 78:21, 118:9, 145:15

arguably [1] - 68:1

argue [2] - 5:29, 122:24

argued [7] - 29:5, 61:2, 87:18, 113:28, 119:4, 122:4, 141:2

arguing [2] - 78:6, 88:1

argument [13] - 16:16, 27:22, 27:23, 40:23, 44:26, 44:29, 52:10, 52:12, 78:2, 115:9, 145:3, 147:14, 150:16

arguments [3] - 6:15, 16:14, 62:5

arise [4] - 26:13, 41:7, 131:8, 132:12

arises [3] - 129:17, 134:16, 134:19

arose [2] - 134:29, 135:2

arrest [1] - 122:6

art [2] - 31:14, 101:2

article [5] - 46:5, 46:26, 47:2, 47:15, 71:25

Article [35] - 19:3, 21:16, 21:18, 24:18, 48:17, 48:22, 49:24, 50:2, 50:12, 50:13, 50:17, 50:24, 51:8, 53:14, 55:3, 55:7, 55:9, 64:22, 66:21, 68:9, 68:18, 69:1, 69:2, 69:20, 70:1, 70:5, 70:8, 70:25, 70:27, 83:14, 84:4, 84:20, 84:27, 112:11, 141:4

articulated [1] - 57:28

AS [5] - 5:2, 14:4, 30:3, 76:1, 145:21

as-applied [1] - 136:25

Ascenda [1] - 120:2

aside [4] - 39:2, 103:26, 104:21, 130:14

aspect [3] - 54:16, 57:21, 74:23

aspects [2] - 26:12, 93:16

assembled [1] - 20:23

assembling [2] - 14:10, 20:21

assert [9] - 27:10, 28:18, 28:20, 39:25, 39:28, 141:23, 141:25, 151:21

asserted [3] - 52:8, 64:17, 64:20

assess [4] - 112:20, 129:24, 136:18, 142:19

assess.. [1] - 136:27

assessed [1] - 139:24

assessing [1] - 84:1

assessment [1] - 92:11

assist [7] - 6:29, 9:20, 9:22, 10:27, 11:11, 12:22, 29:10

assistance [2] - 7:14, 7:24

assistants [1] - 116:3

assisting [1] - 6:21

associated [1] - 150:22

association [1] - 29:2

assume [1] - 118:8

assumed [2] - 69:16, 69:23

assumes [1] - 117:20

assuming [4] - 45:12, 74:15, 90:26, 134:11

assumptions [1] - 112:18

assure [1] - 68:4

attached [2] - 55:16, 150:11

attaches [1] - 28:28

attempting [1] - 143:26

attended [1] - 20:16

attention [5] - 28:6, 78:9, 93:24, 105:28, 137:24

Attorney [4] - 25:2, 122:17, 137:8, 137:26

atypical [1] - 133:18

audience [2] - 47:6, 47:8

author [1] - 138:21

authored [1] - 46:7

authorisation [1] - 119:14

authorise [1] - 119:19

authorised [6] - 39:22, 40:11, 55:14, 62:7, 88:6, 139:20

authoritative [2] - 109:11, 109:14

authorities [4] - 7:11, 13:20, 47:10, 99:4

authority [4] - 18:28, 46:8, 51:13, 87:7

authorized [1] - 150:26

automatically [2] - 56:13, 127:29

availability [3] - 30:16, 62:15, 80:15

available [23] - 6:25, 7:2, 7:7, 8:16, 12:2, 12:28, 18:10, 30:27, 31:2, 31:4, 31:7, 31:9, 31:17, 31:23, 31:29, 32:3, 92:4, 124:10, 124:14, 124:15, 147:18, 151:12

availing [1] - 135:5

avenues [3] - 28:6, 28:10, 91:25

avoid [1] - 123:5

avoidance [1] - 93:8

aware [11] - 29:19, 78:28, 81:22, 99:21, 116:20, 121:9, 121:22, 133:21, 135:22, 141:9, 148:20

awful [1] - 129:10

B

Baltimore [1] - 14:28

BANK [1] - 2:13

Bank [1] - 120:6

bar [3] - 9:4, 76:14, 140:27

Bar [2] - 25:21, 70:4

bare [16] - 44:10, 51:1, 55:3, 55:7, 56:20, 61:21, 63:9, 63:10, 63:12, 63:16, 63:17, 63:18, 63:19, 64:9, 66:28, 119:10

barred [1] - 20:2

BARRINGTON [1] - 2:21

BARROW [1] - 2:13

bars [2] - 32:29, 146:12

based [4] - 10:18, 112:16, 143:19, 151:27

baseline [1] - 80:7

basic [5] - 22:7, 52:3, 100:29, 104:18, 104:29

basis [23] - 25:13, 39:5, 39:9, 42:29, 43:6, 43:27, 49:13, 51:18, 51:29, 61:5, 68:17, 69:16, 69:23, 69:24, 73:20, 73:26, 84:8, 91:18, 93:17, 94:18, 94:21, 114:5

Bay [1] - 139:8

bear [4] - 6:29, 8:14, 19:14, 126:19

bears [1] - 149:1

becomes [1] - 136:24

becoming [1] - 46:13

BEEN [1] - 14:3

BEFORE [1] - 1:17

beg [1] - 15:23

begin [1] - 20:26

beginning [4] - 58:15, 66:24, 79:22, 133:25

begins [2] - 67:23, 83:10

behalf [5] - 10:11, 11:17, 11:26, 12:5,

119:2
behaviour [1] - 85:1
belief [4] - 126:12,
132:8, 133:2, 151:27
below [1] - 57:24
bending [1] - 95:14
benefit [1] - 13:25
best [8] - 32:2,
44:29, 45:1, 63:17,
63:19, 104:1, 104:16,
114:8
better [4] - 16:20,
99:17, 117:14, 122:12
between [17] - 16:7,
22:1, 26:14, 32:8,
34:6, 34:7, 39:24,
54:11, 57:11, 58:7,
67:8, 69:5, 80:3,
83:18, 113:6, 132:22,
143:3
beyond [3] - 7:16,
21:14, 62:9
big [1] - 131:8
binding [1] - 120:25
bit [3] - 22:20, 25:20,
113:12
Bivens [1] - 151:22
BL [7] - 2:6, 2:11,
2:17, 2:21, 2:27, 3:2,
3:8
black [1] - 111:2
blame [1] - 152:27
blanket [1] - 49:13
blog [2] - 46:27,
47:15
book [14] - 15:19,
16:11, 16:14, 35:1,
35:5, 41:27, 41:29,
73:18, 74:14, 78:2,
86:25, 86:26, 99:16,
147:24
Book [2] - 15:22,
34:29
Booklet [1] - 15:22
books [3] - 41:26,
74:1, 74:6
bore [1] - 47:7
born [1] - 14:20
bottom [4] - 42:18,
54:24, 143:2, 147:27
bounded [1] - 63:21
Boué [1] - 11:24
breach [8] - 46:18,
47:6, 98:6, 98:7,
109:3, 113:19,
118:17, 149:12
breaches [2] - 65:10,
99:15
Breyer [8] - 35:13,
36:2, 36:9, 38:4,

38:19, 38:27, 39:1,
40:17
Breyer's [1] - 36:19
BRIAN [1] - 2:5
brief [8] - 10:18,
11:18, 27:18, 27:21,
27:22, 83:23, 143:9,
143:16
briefly [2] - 14:17,
26:29
bring [16] - 7:6, 7:15,
8:14, 19:10, 19:28,
21:5, 28:15, 28:23,
29:6, 33:2, 33:5,
53:17, 129:6, 129:14,
132:20, 149:7
bringing [4] - 6:29,
70:26, 91:19, 150:6
broad [6] - 51:19,
51:21, 64:11, 119:2,
135:10, 145:5
broader [2] - 33:22,
133:13
broadly [1] - 126:14
broken [1] - 65:13
brought [27] - 19:14,
20:8, 20:9, 26:20,
39:5, 39:8, 39:12,
39:14, 40:10, 44:25,
80:10, 91:1, 91:3,
91:4, 91:5, 124:19,
124:23, 124:24,
124:29, 125:11,
125:12, 125:14,
148:16, 149:17,
149:22, 150:1, 150:7
BSA [6] - 2:26, 6:23,
10:26, 11:13, 11:17,
11:23
bulk [2] - 133:16,
133:23
Butler [1] - 93:28
butler [1] - 11:26
butler's [1] - 12:9
BY [12] - 1:17, 4:6,
4:7, 4:10, 4:11, 4:13,
5:7, 13:1, 14:4, 30:3,
76:6, 145:21

C

cagey [1] - 50:9
CAHILL [1] - 3:2
Cahill [1] - 7:17
campaign [1] - 77:18
CANAL [1] - 2:28
cannot [19] - 5:24,
9:18, 27:10, 33:2,
33:9, 33:10, 52:26,

53:28, 55:2, 59:29,
61:22, 62:7, 81:15,
84:18, 96:2, 141:23,
147:8, 147:10
capable [4] - 21:20,
52:28, 52:29, 111:6
capacity [1] - 44:28
capture [1] - 130:11
captured [1] - 43:28
career [1] - 25:13
caricatured [1] -
52:14
carries [1] - 85:28
case [163] - 8:26,
8:29, 9:9, 9:19, 9:25,
10:15, 10:23, 11:2,
19:12, 19:15, 21:22,
22:24, 23:10, 23:12,
26:19, 26:26, 27:19,
34:14, 37:8, 37:10,
38:8, 42:25, 44:27,
48:25, 50:15, 51:16,
53:20, 54:27, 55:18,
57:15, 60:9, 60:18,
60:22, 61:5, 63:13,
64:17, 64:19, 64:21,
64:22, 65:26, 66:2,
66:20, 66:21, 67:4,
71:15, 73:15, 73:22,
84:26, 85:14, 85:16,
86:16, 86:23, 86:24,
87:6, 89:8, 89:16,
90:6, 90:18, 90:19,
90:20, 92:4, 92:5,
92:23, 93:1, 93:3,
93:12, 93:17, 94:4,
95:6, 97:4, 97:11,
97:14, 97:16, 97:22,
98:4, 98:9, 98:17,
98:18, 98:22, 99:11,
99:13, 99:28, 100:18,
100:22, 101:7, 101:8,
103:24, 108:18,
109:4, 109:9, 109:12,
113:24, 114:11,
114:17, 115:11,
116:15, 116:21,
116:26, 117:4, 117:7,
117:16, 118:4, 118:7,
118:8, 118:12,
118:14, 118:16,
118:17, 118:20,
118:23, 118:26,
118:27, 119:23,
119:24, 119:29,
120:1, 120:2, 120:14,
120:16, 120:24,
121:4, 122:2, 122:26,
123:1, 123:5, 129:23,
130:25, 131:27,

131:29, 132:9,
132:16, 134:5,
135:21, 136:4,
137:14, 138:18,
138:20, 138:22,
138:26, 138:29,
139:25, 140:17,
141:18, 143:12,
145:29, 146:16,
147:21, 148:10,
148:16, 149:16,
149:22, 150:17,
151:16, 151:18,
151:22, 152:15, 153:8
Case [1] - 1:5
case-or-
controversy [1] -
42:25
case.. [1] - 116:14
cases [75] - 9:7,
17:9, 18:1, 19:2,
19:25, 20:7, 21:21,
23:1, 23:7, 33:22,
33:28, 42:14, 45:3,
48:9, 59:18, 65:26,
66:22, 69:8, 71:10,
71:12, 71:14, 71:15,
74:22, 75:6, 82:4,
86:9, 86:15, 91:28,
94:29, 95:2, 95:4,
96:18, 96:22, 96:23,
96:25, 97:18, 97:22,
97:26, 98:3, 98:5,
98:6, 98:7, 98:14,
99:7, 100:26, 101:4,
101:5, 109:4, 109:6,
113:16, 113:23,
114:17, 114:26,
117:1, 117:19,
117:21, 117:27,
117:28, 118:2, 118:3,
118:9, 118:21, 120:8,
127:16, 130:17,
133:11, 133:18,
134:13, 138:13,
140:28, 143:11,
146:4, 147:19
Catch [1] - 146:29
categorising [1] -
109:2
category [4] - 24:1,
24:2, 58:11, 133:17
Catherine [1] - 25:10
causal [1] - 83:17
causation [5] -
19:12, 33:19, 90:24,
104:19, 104:21
caused [3] - 105:14,
127:16, 128:17
causes [8] - 43:17,

50:6, 62:9, 94:26,
115:10, 115:12,
135:6, 135:8
CENTER [1] - 3:7
CENTRE [1] - 3:9
century [1] - 71:12
certain [12] - 44:5,
49:26, 50:5, 50:18,
52:9, 54:22, 56:16,
65:22, 65:23, 84:3,
108:12, 133:17
certainly [34] - 6:4,
13:11, 22:7, 24:5,
36:26, 38:3, 38:10,
38:26, 43:10, 43:12,
45:8, 59:3, 59:11,
59:16, 64:9, 64:16,
67:7, 69:3, 70:6, 75:9,
76:13, 76:25, 85:26,
95:25, 102:19,
111:11, 115:22,
116:14, 127:7,
131:28, 144:20,
145:2, 145:18, 153:2
certify [1] - 1:22
certiorari [1] - 97:17
chain [2] - 137:20,
148:8
chair [1] - 15:8
chaired [1] - 20:19
challenge [18] -
17:16, 30:17, 32:19,
33:2, 52:12, 80:16,
94:21, 95:2, 129:3,
132:20, 136:15,
138:4, 138:5, 138:8,
141:12, 141:21,
149:8, 150:18
challenged [6] -
52:10, 88:8, 89:3,
136:13, 148:5, 150:29
challenges [2] -
136:26
challenging [8] -
19:28, 33:18, 39:24,
51:24, 91:13, 94:19,
101:26, 138:17
chance [2] - 28:7,
95:18
change [2] - 76:16,
126:22
changed [2] -
122:16, 122:17
changes [1] - 122:16
characterise [1] -
51:23
characterised [2] -
52:6, 52:21
chart [3] - 24:26,
98:1, 99:25

charts [1] - 20:21
check [2] - 117:10, 119:19
Chief [7] - 8:4, 8:6, 14:29, 122:7, 123:8, 143:12
children's [1] - 98:7
chilling [1] - 29:1
chunks [1] - 115:21
churn [1] - 114:7
circle [1] - 115:2
Circuit [25] - 14:28, 57:10, 57:26, 58:11, 83:11, 83:28, 85:28, 86:6, 97:1, 97:2, 97:3, 97:5, 97:21, 99:28, 114:19, 116:3, 118:15, 118:24, 119:8, 119:26, 119:27, 129:23, 145:26, 147:24
circuit [9] - 85:23, 86:2, 86:3, 86:17, 97:22, 104:8, 115:5, 138:20
Circuit's [1] - 57:18
circuits [3] - 86:1, 86:7, 113:23
circumstances [22] - 9:6, 12:10, 28:3, 30:23, 32:1, 33:11, 50:5, 53:6, 54:22, 56:16, 61:23, 91:10, 103:28, 105:22, 105:23, 107:22, 120:9, 127:12, 131:11, 132:27, 133:1, 138:1
cite [7] - 99:11, 99:13, 99:19, 100:14, 100:17, 101:21
cited [3] - 66:22, 66:25
cites [3] - 103:24, 104:8, 151:16
citing [1] - 94:4
citizen [4] - 18:5, 32:9, 40:15, 151:12
citizens [12] - 17:3, 28:15, 28:16, 30:17, 30:28, 31:9, 31:24, 32:1, 32:4, 43:14, 80:15, 150:8
civil [10] - 20:9, 20:10, 25:13, 81:21, 81:24, 124:8, 124:27, 125:6, 142:4, 142:5
Civil [1] - 16:12
CJEU [10] - 5:23, 5:25, 6:5, 6:13, 9:28, 96:2, 111:26, 112:11, 112:27, 112:29
claim [36] - 19:6, 19:10, 19:23, 21:5, 27:2, 27:5, 27:7, 27:9, 27:14, 28:14, 28:20, 28:23, 28:25, 39:5, 39:8, 39:11, 39:15, 44:25, 45:11, 48:5, 51:17, 56:4, 67:28, 91:1, 91:13, 91:19, 93:12, 145:9, 148:16, 149:17, 149:18, 149:22, 149:28, 149:29, 150:1, 151:11
claimant [5] - 96:2, 102:3, 102:22, 103:7, 104:3
claimants [5] - 52:6, 52:7, 70:17, 70:20, 70:26
Claimants [1] - 92:6
claiming [1] - 144:15
claims [40] - 19:15, 19:16, 19:17, 19:18, 19:26, 19:27, 20:2, 20:5, 27:24, 27:26, 27:27, 28:18, 29:7, 39:10, 39:14, 40:10, 40:14, 40:16, 69:4, 70:22, 71:2, 71:5, 71:7, 86:4, 88:10, 90:29, 93:10, 93:11, 134:18, 134:20, 136:29, 141:17, 142:2, 142:4, 142:5, 142:10, 149:20, 149:29, 150:7
Clapper [94] - 19:26, 21:4, 21:27, 22:27, 22:28, 23:1, 33:8, 33:12, 33:21, 34:28, 35:6, 35:7, 35:8, 38:27, 53:29, 54:1, 65:7, 66:25, 86:24, 87:2, 89:6, 89:14, 90:13, 95:16, 95:19, 96:27, 96:28, 96:29, 97:2, 97:3, 97:7, 97:10, 98:9, 98:12, 98:13, 98:17, 98:22, 99:3, 99:11, 99:22, 100:5, 100:13, 100:17, 100:20, 101:7, 101:20, 101:29, 103:23, 105:6, 105:8, 105:10, 105:13, 107:1, 107:3, 107:14, 108:1, 108:18, 109:8, 109:9, 109:22, 109:26, 110:15, 111:29, 129:21, 129:26, 129:28, 130:1, 130:4, 130:20, 131:27, 132:18, 134:1, 134:5, 135:18, 136:3, 136:6, 136:7, 138:22, 139:18, 140:4, 140:14, 140:19, 141:3, 145:26, 146:16, 146:29, 147:13, 147:20, 149:16, 149:21, 151:16
CLARE [1] - 2:18
clarification [2] - 31:20, 32:14
clarified [1] - 58:3
clarify [1] - 32:20
Clarke [2] - 8:10, 9:13
class [1] - 118:27
classified [1] - 138:14
classroom [1] - 37:15
clauses [1] - 9:26
clear [24] - 6:10, 8:1, 8:29, 9:18, 20:1, 29:23, 31:12, 56:8, 58:28, 59:4, 59:12, 59:14, 60:14, 61:16, 65:5, 65:7, 65:25, 96:2, 106:3, 107:16, 133:4, 133:7, 133:24, 133:27
clearly [5] - 7:10, 11:14, 29:18, 56:19, 84:28
clerked [1] - 14:26
client [1] - 139:16
clients [3] - 117:7, 139:8, 139:12
close [2] - 42:28, 84:7
cloud [1] - 128:15
co [1] - 46:7
co-authored [1] - 46:7
code [6] - 57:1, 57:3, 63:27, 67:3, 67:12, 81:25
Code [6] - 63:24, 64:5, 64:6, 65:19, 67:9, 67:17
codes [1] - 67:18
cognisable [1] - 108:28
cognizable [1] - 78:20
collect [1] - 92:12
collected [13] - 34:2, 34:16, 37:24, 90:15, 91:11, 99:16, 108:23, 123:24, 124:1, 129:13, 130:6, 148:8, 150:22
collecting [1] - 44:17
collection [26] - 67:1, 88:5, 88:8, 88:12, 88:15, 88:24, 89:19, 96:20, 105:17, 107:28, 108:6, 108:9, 108:17, 108:21, 109:16, 109:21, 110:15, 111:4, 111:5, 111:6, 111:11, 133:23, 150:20, 150:25, 150:28
collective [1] - 58:26
collects [1] - 65:14
COLLINS [2] - 2:5, 2:26
colloquy [1] - 34:6
COLM [1] - 3:7
Columbia [1] - 86:2
column [7] - 35:16, 35:23, 36:4, 83:24, 88:27, 89:27, 150:9
coming [2] - 23:20, 113:23
comment [3] - 77:5, 79:2, 80:8
commenting [1] - 31:2
comments [1] - 26:6
COMMERCIAL [1] - 1:3
commercial [2] - 66:11, 66:12
Commission [1] - 77:26
Commissioner [4] - 5:5, 10:5, 17:7, 17:25
COMMISSIONER [1] - 1:7
common [15] - 43:20, 43:24, 45:21, 46:16, 62:10, 69:10, 71:27, 81:29, 82:1, 82:6, 82:8, 82:21, 86:13, 145:11, 145:18
communicating [1] - 16:21
Communication [1] - 26:22
communication [1] - 128:26
communications [7] - 72:7, 72:15, 92:17, 127:7, 137:10, 138:28, 147:2
Communications [5] - 72:16, 125:9, 125:14, 126:14, 128:7
community [2] - 66:4, 87:28
Community [2] - 60:8, 62:11
companies [3] - 141:11, 141:15, 142:8
company's [1] - 141:21
compared [1] - 142:17
comparing [2] - 80:26, 80:28
comparison [1] - 76:17
compatible [1] - 123:23
complained [1] - 83:18
complains [1] - 84:28
complaint [8] - 60:27, 60:28, 61:3, 67:29, 140:1, 146:6
complaints [1] - 10:4
complete [1] - 140:27
completely [1] - 50:2
complex [5] - 99:25, 128:2, 132:28, 133:5
complexities [2] - 132:11, 132:13
complexity [20] - 49:4, 54:4, 61:25, 61:28, 101:15, 106:4, 126:26, 127:25, 129:10, 129:17, 130:21, 130:24, 130:28, 131:8, 131:24, 134:16, 134:19, 134:21, 134:29, 147:5
complicated [7] - 37:13, 43:8, 45:7, 74:25, 75:2, 82:18, 100:27
complicating [1] - 140:4
components [2] - 83:15, 127:14
comprehensive [7] - 79:6, 79:26, 80:22, 81:3, 81:13, 94:21, 94:24
concentrates [1] -

30:22
concept [3] - 56:21, 71:24, 107:5
concepts [2] - 74:29, 75:3
concern [3] - 41:15, 41:16, 58:27
concerned [13] - 10:12, 10:15, 10:22, 28:4, 60:25, 64:14, 65:10, 67:12, 72:25, 121:29, 129:2, 134:26, 140:10
concerning [1] - 68:5
concerns [2] - 51:29, 68:22
conclude [3] - 129:23, 130:9, 140:25
concluded [4] - 7:22, 17:21, 17:28, 130:7
concluding [5] - 102:2, 102:21, 103:15, 103:17, 103:18
conclusion [5] - 57:18, 67:23, 84:2, 104:11, 106:6
conclusions [2] - 16:29, 112:20
concrete [57] - 23:10, 23:20, 23:21, 23:23, 34:18, 34:24, 35:26, 36:3, 36:22, 36:28, 38:1, 38:6, 38:9, 38:17, 39:3, 39:17, 39:20, 39:26, 40:20, 42:15, 47:28, 48:24, 49:2, 50:8, 51:1, 51:7, 53:9, 53:14, 53:21, 54:6, 54:8, 54:17, 54:19, 54:22, 57:4, 57:29, 58:8, 58:29, 59:5, 59:15, 59:16, 59:20, 60:2, 62:29, 63:3, 63:6, 64:7, 65:21, 84:2, 85:2, 85:10, 85:15, 89:2, 111:1, 111:13, 119:17
concreteness [23] - 23:3, 23:14, 23:15, 38:13, 44:11, 47:19, 52:26, 52:29, 53:28, 54:9, 57:11, 57:16, 58:3, 58:12, 58:28, 59:18, 60:5, 61:15, 61:20, 62:25, 62:28, 66:6, 115:23
concur [1] - 18:24
concurring [2] - 67:22, 67:25
conditions [1] - 60:16
conduct [3] - 44:6, 83:18, 141:7
conducted [1] - 139:4
conference [1] - 146:22
confess [1] - 22:3
confidence [1] - 117:24
confidences [1] - 139:16
confident [3] - 117:14, 117:18, 117:20
confined [2] - 9:7, 70:29
confirm [1] - 135:24
confirmed [3] - 12:15, 42:13, 80:12
conflated [1] - 47:9
confuse [2] - 98:29, 104:24
confused [1] - 47:22
confusing [1] - 131:22
Congress [28] - 24:2, 24:4, 48:16, 49:25, 50:4, 50:5, 50:19, 50:21, 53:5, 53:12, 53:16, 54:29, 55:14, 62:7, 62:8, 64:29, 68:6, 72:8, 72:11, 72:13, 87:14, 97:15, 115:9, 115:11, 119:21, 121:18, 121:26, 142:9
Congress' [2] - 48:12, 50:11
Congress's [2] - 24:7
Congress.. [1] - 42:24
connection [3] - 20:12, 83:17, 151:20
connections [1] - 28:17
conscious [1] - 148:26
consensus [2] - 25:23, 66:4
consent [1] - 119:7
consequences [1] - 144:21
consequently [1] - 31:16
consider [13] - 18:2, 18:4, 18:12, 24:7, 31:3, 31:8, 31:11, 31:22, 42:27, 77:19, 84:6, 95:29, 146:1
considerable [1] - 143:28
consideration [2] - 33:14, 140:18
considered [3] - 8:11, 19:22, 29:9
considering [4] - 31:7, 31:27, 33:24, 33:27
consistent [5] - 61:7, 91:15, 111:14, 131:4, 142:19
constitute [13] - 38:12, 74:20, 96:15, 96:21, 96:23, 96:27, 102:14, 107:10, 107:23, 107:24, 108:19, 109:22
constituted [6] - 39:20, 47:26, 100:6, 110:16, 111:12
constitutes [12] - 42:23, 50:19, 88:7, 97:24, 99:23, 100:20, 102:27, 105:11, 108:10, 109:17, 110:12, 150:27
constituting [1] - 53:8
Constitution [6] - 16:8, 19:3, 49:24, 70:21, 126:18, 139:23
constitution [5] - 18:29, 28:9, 29:8, 40:16, 82:6
constitutional [27] - 15:12, 19:20, 27:26, 27:28, 40:10, 40:14, 49:25, 50:3, 50:16, 52:13, 78:17, 93:8, 93:11, 105:1, 107:5, 121:5, 122:20, 122:27, 134:18, 134:20, 134:29, 135:3, 135:6, 138:4, 149:13, 149:28, 150:7
constitutionality [5] - 39:11, 39:25, 136:19, 138:8, 140:8
constitutionally [1] - 108:27
constrain [1] - 17:23
constraints [2] - 17:12, 17:13
consumer [5] - 55:28, 55:29, 62:16, 115:14, 119:13
consumers [1] - 68:10
contained [1] - 112:19
contemplated [3] - 66:17, 67:2, 80:5
contemplates [3] - 61:18, 61:20, 65:18
contend [2] - 88:5, 150:25
content [5] - 26:8, 36:27, 37:26, 37:27, 45:15
contention [1] - 102:26
contents [15] - 36:19, 37:3, 37:5, 37:23, 38:5, 38:12, 40:19, 72:9, 72:12, 120:20, 121:16, 122:5, 127:6, 128:9, 128:25
contest [1] - 9:19
contested [1] - 10:29
context [38] - 8:7, 18:6, 20:9, 20:10, 24:11, 32:6, 39:18, 39:21, 43:10, 45:28, 53:15, 54:27, 55:7, 64:14, 74:27, 83:8, 94:12, 95:18, 99:9, 99:20, 126:18, 128:22, 129:18, 130:22, 131:8, 132:1, 132:3, 133:4, 134:17, 134:21, 134:25, 134:28, 135:1, 135:3, 135:12, 136:19, 148:9, 151:26
contexts [2] - 28:14, 75:4
CONTINUATION [1] - 76:6
CONTINUED [2] - 4:12, 76:1
continued [1] - 9:3
contours [2] - 31:12, 115:7
contractual [1] - 9:26
contradiction [1] - 104:14
contributes [1] - 65:1
controller [1] - 123:28
controversial [2] - 9:9, 37:18
controversies [2] - 19:3, 69:7
controversy [2] - 19:8, 42:25
convenience [1] - 113:9
conversation [7] - 35:19, 36:7, 36:21, 38:11, 38:12, 38:15, 38:16
conversations [1] - 139:10
convoluted [1] - 92:8
cookies [1] - 75:5
copies [1] - 12:25
copy [1] - 14:8
COPYRIGHT [1] - 3:22
corner [1] - 147:28
corporations [1] - 77:22
corporeal [1] - 20:5
correct [258] - 14:11, 14:15, 22:25, 26:2, 26:29, 28:5, 30:25, 31:1, 32:11, 33:25, 34:4, 34:26, 38:7, 38:17, 39:6, 39:7, 39:13, 39:19, 40:4, 40:6, 40:12, 40:18, 40:23, 40:27, 40:28, 41:3, 41:5, 41:9, 41:15, 41:22, 41:23, 42:6, 43:3, 43:7, 43:29, 44:18, 44:25, 45:11, 45:16, 45:18, 46:7, 46:10, 46:11, 47:28, 48:3, 50:24, 51:19, 51:27, 51:28, 52:16, 52:22, 52:29, 53:23, 54:1, 54:13, 54:14, 55:9, 56:11, 56:17, 57:19, 57:23, 58:8, 58:13, 59:5, 59:7, 59:11, 59:21, 59:22, 59:29, 61:6, 62:23, 62:27, 63:1, 63:25, 63:29, 65:8, 65:9, 65:14, 68:15, 69:1, 69:8, 69:11, 69:18, 70:14, 70:28, 71:18, 71:29, 72:22, 72:23, 72:26, 73:10, 73:11, 73:13, 76:12, 76:20, 76:29, 77:23, 77:28, 77:29, 78:26, 78:29, 79:7, 79:15, 79:21, 80:2, 80:19, 81:7, 81:10, 81:17, 81:26, 82:4, 82:23, 84:12, 84:23, 84:24,

85:15, 85:24, 85:25,
85:29, 86:10, 86:11,
86:20, 87:5, 87:9,
87:21, 88:17, 88:25,
89:7, 89:10, 89:15,
89:16, 90:5, 91:2,
91:8, 91:20, 91:29,
93:17, 93:20, 93:25,
94:12, 94:14, 94:17,
94:22, 94:23, 94:29,
95:2, 96:9, 96:10,
96:13, 96:21, 97:20,
99:9, 99:10, 101:11,
101:12, 102:10,
102:11, 102:28,
103:3, 103:13,
103:14, 103:16,
103:19, 103:21,
104:7, 104:15,
106:12, 106:14,
106:24, 106:26,
107:1, 107:2, 109:28,
110:2, 110:17,
110:23, 110:24,
110:28, 112:4,
112:14, 113:22,
116:13, 116:19,
117:5, 117:21,
117:22, 117:29,
120:17, 121:12,
121:16, 121:18,
123:12, 123:25,
124:5, 124:6, 124:11,
124:12, 124:13,
124:17, 124:21,
125:2, 125:3, 125:16,
125:18, 125:23,
125:27, 126:25,
127:15, 129:8,
129:15, 129:19,
129:20, 130:26,
131:2, 131:12,
131:13, 131:16,
131:17, 131:22,
132:9, 133:29,
134:15, 134:18,
134:23, 134:24,
134:27, 135:20,
135:26, 135:29,
136:2, 136:5, 136:9,
136:13, 136:20,
136:21, 137:5, 137:6,
137:28, 138:5,
138:12, 140:11,
141:13, 141:14,
141:18, 141:27,
142:3, 142:6, 142:18,
143:20, 143:21,
143:29, 144:12,
144:22, 145:4,
145:10, 145:16,

149:11
correctly [3] - 30:21,
36:9, 104:28
COSTELLO [38] -
1:17, 5:9, 12:28, 13:7,
13:11, 13:16, 13:21,
13:24, 15:19, 15:23,
15:28, 27:6, 29:26,
29:28, 35:3, 35:6,
35:9, 42:1, 46:4,
59:23, 74:1, 74:6,
75:9, 76:4, 77:11,
89:23, 89:29, 90:2,
94:1, 98:12, 98:15,
128:6, 129:26,
152:18, 152:22,
152:28, 153:3, 153:10
costs [2] - 95:26,
139:13
could've [4] -
117:13, 134:2,
138:18, 147:15
counsel [3] - 10:26,
11:27, 62:5
countenance [2] -
63:2, 65:22
counter [1] - 147:6
counterbalancing
[1] - 7:5
countries [12] -
10:13, 25:4, 43:14,
52:2, 79:10, 79:17,
79:28, 81:7, 81:20,
81:21, 81:24
country [10] - 10:9,
10:14, 80:21, 80:25,
81:3, 81:12, 81:17,
82:10, 82:21, 139:14
counts [1] - 86:7
couple [1] - 15:6
course [20] - 16:6,
17:2, 18:14, 23:5,
23:11, 24:6, 29:5,
33:22, 37:23, 44:5,
67:18, 67:19, 85:18,
86:8, 87:17, 100:17,
127:9, 127:21,
129:25, 141:9
COURT [5] - 1:2, 4:6,
5:7, 83:2
court [186] - 5:11,
5:26, 6:26, 6:29, 7:2,
7:8, 7:14, 8:16, 8:18,
9:15, 9:21, 9:23, 10:8,
10:20, 10:27, 11:7,
11:11, 12:3, 12:11,
12:22, 13:5, 13:9,
13:28, 14:17, 18:20,
19:10, 21:26, 23:14,
23:23, 23:25, 24:3,

26:18, 26:29, 27:7,
28:1, 28:3, 29:10,
39:16, 39:20, 40:22,
42:2, 42:8, 43:24,
44:7, 48:11, 49:6,
49:22, 50:4, 50:8,
50:9, 50:21, 52:15,
52:18, 52:21, 53:1,
53:5, 53:8, 53:12,
54:2, 54:18, 55:10,
56:5, 56:12, 56:18,
56:21, 56:24, 57:25,
57:27, 58:18, 58:24,
59:3, 59:11, 59:13,
59:19, 59:27, 60:1,
60:9, 61:4, 61:18,
62:1, 62:13, 62:22,
62:24, 63:2, 63:10,
63:19, 63:21, 63:23,
63:26, 64:2, 65:18,
65:22, 65:25, 66:14,
66:18, 66:28, 69:21,
69:22, 70:18, 70:27,
71:6, 72:11, 72:28,
79:2, 81:2, 83:10,
84:11, 85:17, 85:27,
86:3, 87:2, 87:20,
87:22, 88:26, 90:10,
90:28, 91:22, 92:6,
92:19, 93:5, 93:7,
94:10, 95:3, 97:9,
97:22, 99:20, 101:4,
104:8, 104:9, 105:1,
105:5, 105:13,
107:16, 108:7,
108:16, 109:12,
114:26, 115:8, 116:5,
117:6, 117:9, 120:16,
120:18, 120:26,
122:8, 126:19,
127:24, 129:21,
130:7, 130:8, 130:12,
130:25, 130:27,
133:3, 134:26,
136:11, 137:1,
137:20, 138:3, 138:7,
138:11, 138:18,
138:19, 139:29,
140:7, 140:9, 140:12,
146:1, 146:4, 147:13,
147:15, 147:19,
147:28, 148:20,
148:21, 150:2, 150:5,
150:21, 151:5,
151:16, 152:11,
152:12
Court [58] - 6:7, 6:13,
6:21, 8:10, 14:27,
15:1, 19:5, 19:25,
21:11, 33:8, 35:25,
36:12, 36:14, 36:18,

38:3, 38:27, 43:4,
48:21, 61:5, 66:29,
72:8, 83:27, 84:3,
84:18, 85:19, 86:9,
86:19, 89:8, 95:21,
97:9, 97:14, 97:16,
97:18, 98:18, 99:28,
109:11, 109:15,
109:16, 111:29,
114:9, 116:3, 117:28,
119:24, 119:29,
120:1, 120:24, 121:3,
122:2, 123:2, 123:6,
128:8, 128:18,
129:23, 130:1,
135:21, 139:18, 152:3
court's [9] - 11:15,
44:9, 63:3, 63:12,
67:23, 93:11, 105:28,
139:25, 139:26
Court's [1] - 141:4
Courts [4] - 113:15,
114:3, 114:19, 119:26
courts [43] - 9:21,
19:1, 19:5, 19:8,
19:22, 20:4, 28:18,
29:6, 50:14, 68:26,
69:4, 69:15, 70:4,
70:20, 70:21, 71:2,
78:19, 85:21, 85:22,
85:23, 85:26, 86:17,
101:8, 105:20,
107:19, 107:22,
108:15, 108:22,
109:25, 109:27,
111:11, 114:7,
114:28, 117:10,
136:17, 136:25,
136:26, 151:23,
151:27, 152:11
courts' [1] - 84:9
cover [1] - 15:13
coverage [1] - 25:19
covered [2] - 25:4,
126:28
covering [1] - 82:17
covers [4] - 16:6,
16:8, 37:23, 83:11
create [5] - 19:16,
20:25, 51:8, 57:22,
130:16
created [5] - 68:6,
78:23, 119:11,
119:15, 140:9
creating [1] - 74:17
credentials [1] -
73:27
credit [6] - 58:25,
118:29, 119:4, 119:5,
119:6, 119:19

Credit [1] - 21:13
criminal [1] - 124:8
criticises [3] -
102:21, 102:26, 103:6
criticising [1] - 103:1
criticism [2] - 32:7,
123:26
critique [3] - 102:10,
103:20, 103:22
CROSS [3] - 4:11,
30:3, 76:6
cross [4] - 12:8,
29:17, 29:24, 29:25
CROSS-
EXAMINATION [1] -
76:6
cross-examination
[1] - 29:17
cross-examine [2] -
29:24, 29:25
cross-examined [1]
- 12:8
CROSS-EXAMINED
[2] - 4:11, 30:3
curb [1] - 54:29
curiae [23] - 6:2, 6:6,
6:11, 6:17, 6:22, 7:13,
7:18, 7:19, 7:25, 8:2,
8:8, 8:12, 8:17, 9:5,
9:13, 9:16, 9:18, 9:20,
10:18, 11:19, 11:22,
12:15, 12:23
CURRAN [1] - 2:12
curtailed [1] - 62:14
CUSH [1] - 3:1
custodial [1] - 20:22
customer [2] - 92:15,
98:25
customers [6] -
26:24, 92:13, 92:25,
141:24, 141:26,
146:19
Cutler [1] - 15:5

D

daily [1] - 114:10
damage [3] - 91:17,
115:15, 115:24
damages [8] - 46:21,
55:15, 91:16, 124:9,
127:18, 141:16,
144:15, 145:9
damaging [1] - 142:2
DAMIEN [1] - 2:7
Daniel [1] - 46:7
data [125] - 7:27,
9:27, 10:1, 10:5, 10:8,
17:4, 19:15, 19:17,

19:21, 19:26, 23:29, 25:23, 26:24, 28:26, 28:29, 30:17, 30:18, 30:24, 32:9, 33:16, 34:1, 36:24, 37:24, 41:8, 41:21, 44:17, 46:18, 47:6, 47:24, 48:2, 48:5, 48:28, 48:29, 65:15, 65:16, 65:20, 66:14, 67:2, 73:4, 73:7, 75:1, 75:4, 79:6, 79:8, 79:27, 80:4, 80:16, 80:17, 81:4, 81:13, 90:14, 91:10, 96:14, 96:19, 96:20, 97:24, 98:6, 98:7, 98:10, 98:20, 98:26, 98:29, 99:2, 99:5, 99:15, 99:23, 100:6, 100:19, 105:11, 105:16, 105:17, 105:19, 105:20, 107:18, 107:20, 107:23, 107:25, 107:28, 108:18, 108:21, 108:23, 109:1, 109:3, 109:16, 109:21, 110:16, 111:5, 111:11, 113:19, 118:17, 122:7, 123:27, 123:28, 126:21, 127:28, 128:14, 128:15, 129:6, 129:13, 129:14, 130:11, 130:18, 131:1, 132:7, 132:26, 134:9, 134:11, 135:9, 135:19, 141:24, 142:7, 142:15, 148:10, 149:24, 151:10, 151:29, 152:10

DATA [1] - 1:7

Data [5] - 5:4, 10:4, 17:6, 17:24, 73:20

data [1] - 152:8

database [4] - 88:13, 88:16, 115:28, 117:4

databases [2] - 82:17, 82:18

date [4] - 26:9, 26:14, 116:6

dates [1] - 71:24

DAY [3] - 1:18, 4:4, 5:2

day-to-day [1] - 114:5

days [1] - 26:17

DC [3] - 15:5, 86:2, 86:4

de [1] - 85:3

deal [3] - 61:23, 124:3, 125:10

dealing [7] - 79:20, 83:8, 83:9, 109:3, 113:16, 114:18, 114:20

deals [2] - 11:27, 64:20

dealt [1] - 133:8

debate [4] - 8:20, 25:21, 41:17, 145:1

debated [2] - 82:13, 152:1

decade [1] - 142:9

decades [1] - 43:12

December [6] - 24:21, 83:1, 113:21, 113:26, 113:27, 113:28

decide [1] - 113:16

decided [17] - 23:6, 24:2, 46:29, 65:27, 82:4, 86:15, 87:18, 91:25, 97:3, 97:7, 97:9, 118:14, 119:24, 122:3, 141:19, 146:1, 148:27

decides [2] - 67:6, 123:10

Decision [3] - 96:7, 104:28, 111:23

decision [50] - 8:3, 8:28, 19:26, 19:27, 21:4, 22:28, 32:19, 33:8, 34:28, 41:24, 46:28, 47:15, 47:16, 52:5, 57:24, 62:4, 72:8, 82:27, 83:1, 83:4, 83:20, 87:17, 89:8, 92:19, 97:1, 97:2, 97:3, 97:7, 97:9, 97:10, 100:12, 102:1, 102:21, 113:14, 113:18, 114:5, 115:5, 121:11, 123:11, 130:1, 131:6, 142:20, 143:10, 145:27, 147:13, 147:23, 152:9

decision.. [1] - 60:10

decisions [10] - 21:26, 68:23, 85:24, 85:26, 86:16, 99:14, 99:21, 114:2, 114:18, 116:27

declaration [3] - 87:20, 87:23, 91:19

declarations [1] - 9:25

declare [1] - 138:7

declared [2] - 87:9, 87:11

declined [2] - 7:12, 87:13

decrease [1] - 55:2

defect [1] - 134:6

DEFENDANT [2] - 2:10, 2:16

defendant [3] - 55:18, 105:15, 127:17

Defendant [2] - 11:3, 11:5

DEFENDANTS [1] - 1:13

defer [3] - 24:4, 24:8, 50:11

deficit [1] - 11:15

define [4] - 50:22, 101:1, 115:10, 115:12

defined [4] - 33:21, 124:17, 125:1, 126:14

defining [2] - 49:26, 50:19

degree [6] - 14:24, 21:19, 22:9, 22:13, 57:16, 61:14

Delaware [1] - 83:13

delay [3] - 5:10, 133:19, 136:3

deliberately [2] - 31:12, 47:12

deliver [1] - 11:24

delivered [2] - 148:17, 148:26

delivers [1] - 85:20

demands [2] - 55:3, 55:9

democracies [1] - 79:5

demonstrate [10] - 48:29, 78:16, 95:24, 96:3, 96:18, 102:3, 102:22, 103:7, 104:3, 105:2

demonstrated [2] - 130:29, 150:4

demonstration [6] - 106:15, 106:27, 110:1, 110:8, 110:19, 110:26

denial [1] - 84:16

denies [3] - 35:17, 36:5, 36:11

Denmark [1] - 25:4

deny [1] - 135:24

denying [1] - 68:27

depart [2] - 10:20, 11:21

Department [3] - 25:9, 26:20, 121:10

department [2] - 25:11, 25:14

Department's [2] - 121:13, 121:15

deploy [2] - 82:15, 139:29

deposition [1] - 127:18

deprivation [1] - 51:8

deprived [1] - 119:18

derive [3] - 18:20, 82:3, 82:5

derived [2] - 18:29

derives [1] - 42:24

describe [4] - 18:18, 27:28, 38:26, 63:9

described [2] - 66:29, 115:1

description [5] - 17:6, 21:21, 68:20, 83:23, 111:8

designated [1] - 25:3

designation [1] - 41:27

designed [2] - 55:1, 123:5

detail [1] - 78:25

details [1] - 94:25

determination [4] - 6:22, 9:23, 10:7, 17:5

determine [2] - 69:16, 108:8

determined [4] - 8:27, 9:11, 18:9, 19:6

determining [4] - 9:10, 42:22, 69:23, 137:10

deterring [1] - 139:11

developed [2] - 73:5, 73:9

development [4] - 25:26, 26:3, 65:26, 123:6

developments [7] - 24:22, 24:25, 24:27, 26:13, 78:8, 78:27, 146:24

device [1] - 128:27

devices [1] - 37:25

Diaz [1] - 118:15

dictum [2] - 36:17, 38:24

difference [5] - 34:5, 34:7, 48:9, 109:9, 113:6

different [21] - 34:29, 36:2, 36:24, 41:27, 54:10, 65:4, 67:13, 71:21, 81:28, 104:10, 104:13, 105:9, 111:8, 113:4, 121:25, 125:8, 131:23, 134:22, 140:9, 141:29, 147:9

differently [2] - 37:1, 86:26

difficult [33] - 17:16, 20:4, 21:22, 23:7, 23:8, 23:9, 23:17, 24:17, 28:23, 32:18, 33:4, 36:17, 36:24, 40:26, 49:5, 56:22, 56:24, 57:2, 62:22, 63:13, 64:5, 64:13, 65:29, 67:5, 67:16, 76:17, 77:4, 84:16, 114:22, 115:27, 132:28, 146:11, 147:22

difficulties [5] - 40:24, 97:27, 108:29, 132:11, 146:2

difficulty [18] - 13:10, 19:17, 38:13, 48:6, 65:1, 74:17, 100:8, 126:26, 126:29, 128:13, 130:28, 132:4, 135:5, 135:7, 138:13, 140:10, 152:23, 153:7

DIGITAL [1] - 3:1

Digital [5] - 6:28, 10:11, 10:17, 10:23, 16:13

digital [2] - 74:28, 123:7

dilemma [1] - 146:29

direct [1] - 42:3

directed [5] - 25:18, 80:11, 80:13, 131:9, 141:11

directing [1] - 137:24

direction [1] - 144:29

directions [1] - 7:23

Directive [5] - 72:25, 72:26, 73:12, 73:20, 80:5

directive [2] - 141:11, 141:13

DIRECTLY [2] - 4:10, 14:3

directly [2] - 30:14, 114:18

Director [2] - 137:9, 137:27

disagree [2] - 38:29, 142:12

disagreement ^[5] - 21:29, 22:19, 22:21, 111:23, 143:2
disagreements ^[3] - 22:12, 22:13
disclose ^[2] - 27:3, 27:17
disclosed ^[9] - 49:1, 121:18, 126:7, 126:23, 127:29, 129:13, 134:3, 134:4, 146:22
discloses ^[1] - 65:16
disclosure ^[23] - 48:28, 63:27, 65:19, 65:23, 66:15, 66:16, 67:2, 67:19, 84:17, 84:29, 85:3, 85:7, 85:14, 96:20, 118:29, 119:6, 119:10, 123:23, 125:18, 125:22, 125:26, 126:13, 132:2
disclosures ^[1] - 146:18
discovered ^[1] - 142:6
discretion ^[4] - 69:3, 137:10, 138:10, 143:16
discuss ^[3] - 7:23, 22:17, 125:6
discussed ^[8] - 24:24, 44:20, 89:9, 97:28, 103:25, 107:11, 123:15, 146:4
discusses ^[1] - 71:20
discussing ^[9] - 62:19, 122:13, 126:18, 128:13, 128:21, 131:25, 138:23, 144:3, 146:17
discussion ^[12] - 24:15, 57:14, 63:3, 101:10, 101:17, 102:16, 106:1, 106:2, 113:10, 117:16, 134:1, 152:20
discussions ^[1] - 114:26
Dish ^[1] - 46:6
dismiss ^[1] - 27:2
dismiss' ^[1] - 24:13
dismissed ^[3] - 27:7, 27:14, 147:21
disposed ^[1] - 88:21
dispute ^[9] - 5:28, 6:16, 11:14, 19:11, 36:29, 37:3, 37:5, 42:6, 146:13
disputed ^[1] - 150:21
disputes ^[2] - 36:13, 68:27
dissemination ^[3] - 54:29, 57:2, 64:6
dissent ^[3] - 36:10, 38:22, 38:24
dissenters ^[1] - 38:19
dissenting ^[1] - 35:12
dissents ^[1] - 36:14
distinct ^[4] - 18:16, 133:24, 142:27, 143:14
distinction ^[12] - 32:8, 39:24, 44:2, 54:11, 57:11, 57:27, 58:7, 59:8, 80:3, 89:12, 105:12, 125:10
distinguish ^[2] - 89:11, 132:22
distinguished ^[1] - 133:20
distinguishes ^[1] - 89:8
district ^[3] - 26:18, 85:20, 150:21
District ^[5] - 86:2, 117:28, 119:24, 119:29, 120:1
disturb ^[1] - 104:10
disturbed ^[2] - 101:16, 117:17
disturbing ^[1] - 106:5
diverse ^[1] - 78:22
divide ^[4] - 34:29, 35:11, 86:26, 86:29
division ^[1] - 98:26
divorced ^[1] - 51:1
Doctor ^[1] - 14:24
doctrinal ^[2] - 21:24, 22:9
doctrine ^[43] - 15:13, 17:22, 18:25, 20:4, 21:18, 23:12, 36:25, 37:13, 37:17, 37:28, 39:3, 47:9, 49:4, 50:3, 50:13, 54:5, 61:8, 62:13, 68:26, 69:3, 69:10, 69:27, 70:1, 70:13, 74:21, 93:8, 97:28, 98:2, 99:24, 101:3, 101:4, 106:3, 109:29, 115:7, 115:26, 128:17, 139:25, 140:27, 147:16, 149:6, 152:2
doctrine's ^[3] - 106:14, 106:26, 110:25
doctrines ^[2] - 78:18, 100:29
document ^[8] - 15:15, 15:18, 20:13, 20:18, 20:25, 26:8, 26:14, 26:17
documents ^[2] - 15:26, 99:29
DOHERTY ^[1] - 2:16
done ^[6] - 11:28, 115:15, 117:13, 138:18, 143:25, 143:27
DONNELLY ^[1] - 2:6
doomed ^[1] - 78:3
DORSET ^[1] - 3:9
doubt ^[6] - 28:16, 28:19, 66:21, 97:15, 126:26, 126:29
doubtless ^[1] - 109:25
down ^[28] - 42:17, 46:28, 47:16, 47:18, 48:14, 58:15, 60:8, 66:23, 67:15, 68:20, 86:18, 87:3, 87:8, 87:9, 88:2, 88:28, 89:26, 95:14, 97:18, 111:20, 113:18, 113:19, 113:23, 114:11, 114:12, 114:17, 142:16, 151:13
down-play ^[1] - 142:16
dozens ^[1] - 99:14
DPC ^[26] - 16:27, 31:27, 32:28, 79:3, 96:7, 96:13, 101:12, 102:2, 103:1, 103:6, 103:14, 103:16, 103:18, 104:2, 104:14, 104:17, 104:28, 106:12, 106:24, 109:28, 110:22, 111:23, 112:19, 112:22, 113:9, 142:20
DPC's ^[8] - 102:21, 104:11, 111:8, 112:5, 112:16, 112:20, 112:28, 127:26
draft ^[1] - 142:20
Draft ^[4] - 96:7, 102:2, 104:28, 111:23
drafted ^[2] - 27:21, 47:16
draw ^[3] - 78:9, 105:27, 125:9
drawing ^[2] - 54:11, 80:3
drew ^[2] - 32:8, 93:24
Driehaus ^[2] - 60:10, 60:29
DUBLIN ^[7] - 2:8, 2:14, 2:19, 2:24, 2:29, 3:4, 3:10
Dublin ^[1] - 152:24
due ^[5] - 12:8, 24:6, 92:14, 98:23, 132:17
duty ^[2] - 68:7, 68:8
dwelt ^[1] - 147:27

E

e-mail ^[14] - 34:16, 34:17, 34:23, 35:19, 35:26, 36:7, 36:21, 36:27, 37:1, 38:5, 38:16, 44:16, 139:16
e-mails ^[17] - 37:4, 37:23, 40:19, 40:26, 45:9, 45:10, 45:15, 47:26, 72:14, 120:20, 121:6, 121:16, 123:3, 128:16, 128:18, 129:3
e.g ^[1] - 53:29
early ^[2] - 18:14, 142:9
easier ^[1] - 42:13
easily ^[2] - 74:22, 115:28
easy ^[2] - 101:1, 116:4
echoes ^[1] - 149:6
economic ^[1] - 115:13
economies ^[1] - 79:9
ECPA ^[14] - 40:17, 65:11, 71:29, 72:15, 76:10, 124:4, 124:27, 126:5, 126:28, 128:3, 128:6, 128:7, 128:28, 129:4
education ^[1] - 14:21
Edward ^[1] - 146:17
EEA ^[3] - 9:27, 10:1, 10:9
effect ^[12] - 9:10, 22:23, 29:1, 29:2, 60:5, 62:18, 66:1, 66:3, 66:9, 107:16, 122:8, 148:6
effective ^[1] - 77:18
efficacy ^[1] - 143:4
eight ^[6] - 42:8, 42:16, 42:17, 42:18, 58:14, 114:1
EILEEN ^[1] - 2:21
either ^[6] - 64:12, 93:19, 93:26, 110:9, 133:22, 138:15
elaborate ^[1] - 18:19
elected ^[1] - 60:27
election ^[1] - 60:20
ELECTRONIC ^[1] - 3:7
electronic ^[1] - 72:7
Electronic ^[3] - 72:16, 126:13, 128:7
element ^[9] - 19:9, 34:3, 34:24, 35:27, 38:1, 53:9, 57:22, 90:22, 147:6
elementary ^[1] - 111:2
elements ^[13] - 19:11, 19:14, 21:20, 22:7, 22:9, 45:12, 54:21, 61:22, 90:24, 90:27, 100:29, 111:14, 149:8
eliminate ^[2] - 62:26, 115:21
eliminated ^[1] - 134:7
eliminates ^[1] - 38:13
elsewhere ^[1] - 13:20
EMI ^[1] - 9:20
emphasis ^[1] - 22:14
emphasised ^[1] - 8:18
employee ^[1] - 118:28
employer ^[4] - 118:28, 119:3, 119:17
employers ^[1] - 119:12
employment ^[1] - 15:16
empted ^[2] - 91:14, 92:9
enable ^[1] - 135:9
enabled ^[1] - 122:24
enabling ^[1] - 119:15
encompassed ^[1] - 82:23
end ^[4] - 63:26, 86:9, 95:15, 114:9
endeavour ^[1] - 74:4
enforce ^[1] - 62:15
enforceable ^[2] - 124:7, 142:28

enforced [1] - 46:20
enforcement [1] - 77:27
enforcing [1] - 53:18
engage [1] - 60:20
engaging [1] - 103:27
England [1] - 14:20
English [2] - 71:27, 84:9
enormous [1] - 115:15
enquiry [1] - 34:12
ensure [3] - 69:21, 143:26, 144:8
entail [2] - 57:15, 61:14
entered [1] - 25:6
entertain [5] - 19:7, 20:5, 69:4, 90:28, 138:8
entirely [4] - 56:2, 67:13, 70:19, 134:22
entirety [1] - 114:12
entitled [2] - 8:5, 40:15
entitlement [2] - 90:21, 123:22
environmental [2] - 52:7, 71:10
environments [1] - 52:9
envisage [1] - 9:13
envisions [1] - 48:22
EOIN [1] - 2:16
EPIC [5] - 7:4, 11:26, 11:27, 12:14, 12:22
epprivation [1] - 51:6
equally [2] - 56:15, 61:20
equate [1] - 66:28
equating [1] - 67:10
equivocal [1] - 94:6
erred [1] - 83:28
escapes [1] - 24:5
essential [1] - 6:5
essentially [3] - 17:25, 26:21, 60:22
establish [16] - 24:18, 34:17, 40:18, 40:26, 68:1, 88:24, 107:18, 125:25, 126:1, 126:6, 126:21, 127:11, 127:28, 132:3, 132:28, 150:17
established [17] - 16:23, 37:9, 47:24, 53:22, 69:18, 69:25, 71:7, 96:26, 104:15, 109:21, 128:10, 129:5, 129:12, 137:4, 141:19, 151:9, 151:18
establishes [1] - 135:14
establishing [3] - 74:21, 134:9, 146:3
establishment [1] - 128:23
ethical [2] - 73:4, 74:6
EU [29] - 17:3, 17:5, 18:5, 25:3, 25:23, 28:15, 28:16, 30:17, 30:28, 31:9, 31:17, 31:18, 31:24, 32:1, 32:3, 32:4, 40:15, 41:4, 73:20, 79:4, 80:15, 80:29, 111:25, 112:9, 112:10, 112:28, 113:6, 151:12
Europe [6] - 6:28, 10:11, 10:24, 71:21, 79:19, 81:20
EUROPE [1] - 3:1
European [7] - 31:15, 31:16, 73:14, 73:23, 111:9, 111:10, 112:19
Europeans [1] - 75:1
evaluating [1] - 84:5
event [3] - 17:4, 62:23, 150:8
events [4] - 12:3, 12:20, 82:19, 148:2
evidence [33] - 6:23, 7:20, 7:26, 7:27, 8:3, 8:5, 9:14, 9:16, 9:22, 10:16, 10:19, 10:21, 10:27, 10:28, 10:29, 11:2, 11:4, 11:5, 11:9, 11:10, 11:20, 11:23, 11:29, 12:4, 12:7, 12:18, 12:21, 21:8, 66:13, 107:15, 110:17, 137:3
evolve [1] - 45:1
exactly [6] - 13:19, 35:28, 40:9, 89:23, 103:18, 125:29
EXAMINATION [1] - 76:6
examination [3] - 29:17, 140:7, 152:29
examine [5] - 28:5, 29:24, 29:25, 32:28, 143:16
EXAMINED [6] - 4:10, 4:11, 4:13, 14:4, 30:3, 145:21
examined [5] - 12:8, 18:8, 40:20, 55:6, 59:18
example [12] - 44:3, 44:8, 48:27, 50:29, 55:26, 56:5, 56:29, 63:26, 64:4, 108:16, 108:20, 108:25
examples [3] - 63:24, 77:19, 77:24
exceeded [4] - 87:6, 92:21, 92:26, 149:25
exceeding [1] - 150:6
exceeds [2] - 88:6, 150:26
except [2] - 25:3, 93:26
exception [4] - 9:15, 81:19, 123:26, 133:9
exceptions [1] - 44:19
exchange [1] - 139:12
exclude [3] - 25:18, 40:13, 130:27
excluded [1] - 6:12
excluding [2] - 6:1, 80:24
exclusion [1] - 6:17
exclusionary [1] - 151:21
excuse [5] - 15:21, 42:15, 91:4, 95:14, 96:16
executive [4] - 25:17, 25:24, 25:28, 25:29
exemplary [1] - 73:27
exercise [2] - 61:9, 137:9
exercised [2] - 8:8, 98:26
existing [1] - 51:13
expansion [1] - 77:26
expect [1] - 22:15
expectation [1] - 37:10
expected [1] - 138:7
experience [1] - 14:18
experienced [1] - 22:5
expert [11] - 22:3, 22:4, 29:10, 31:18, 41:4, 69:12, 79:13, 98:1, 117:6, 118:11, 146:5
expertise [5] - 7:1, 7:7, 8:15, 12:9, 73:24
experts [28] - 12:4, 12:8, 14:9, 14:10, 17:26, 19:12, 20:13, 20:17, 20:24, 20:27, 22:1, 22:6, 22:15, 22:21, 24:11, 24:12, 24:24, 24:26, 25:1, 26:3, 26:4, 26:8, 26:9, 97:29, 99:25, 108:12, 146:13, 146:23
experts' [3] - 26:15, 123:16, 123:18
explain [13] - 16:25, 18:20, 20:15, 22:26, 28:1, 45:28, 63:14, 99:20, 100:19, 100:27, 104:1, 148:29, 150:13
explained [4] - 11:28, 63:13, 83:27, 152:29
explaining [1] - 115:5
explains [1] - 42:3
explanation [3] - 64:8, 64:9, 68:17
express [2] - 92:10, 113:5
expression [6] - 16:9, 16:18, 27:3, 27:16, 28:29, 29:2
extend [1] - 13:21
extended [1] - 129:2
extensive [2] - 12:7, 82:9
extensively [1] - 113:13
extent [11] - 8:27, 12:2, 16:5, 17:22, 17:26, 18:5, 31:23, 90:9, 91:13, 91:14, 141:4
extravagant [2] - 51:22, 51:23

F

fabric [1] - 144:10
face [2] - 17:27, 38:28
FACEBOOK [1] - 1:12
Facebook [5] - 5:5, 10:5, 10:6, 10:15, 29:24
facial [3] - 136:15, 136:26, 140:7
fact [90] - 8:12, 10:28, 19:12, 19:23, 20:3, 23:1, 23:24, 31:9, 33:11, 33:12, 33:15, 34:8, 34:9, 34:12, 34:13, 39:8, 40:25, 42:23, 43:19, 44:12, 45:13, 45:14, 45:16, 47:27, 48:8, 48:23, 50:23, 51:2, 53:10, 53:20, 54:5, 55:13, 56:8, 56:12, 57:19, 58:29, 59:14, 63:22, 65:20, 66:22, 67:8, 68:9, 71:13, 74:18, 83:17, 84:6, 85:13, 90:22, 96:3, 99:20, 102:4, 102:23, 103:8, 103:22, 104:4, 104:19, 105:2, 105:28, 106:15, 106:27, 107:5, 107:10, 108:5, 108:6, 108:7, 108:11, 109:29, 110:25, 110:29, 111:12, 111:25, 111:28, 113:7, 124:7, 125:9, 126:10, 126:16, 127:2, 127:3, 127:8, 127:13, 128:26, 132:19, 134:4, 138:26, 140:22, 146:9, 146:20, 151:5
fact* [2] - 47:13, 47:23
fact' [3] - 21:15, 78:17, 84:20
facto [1] - 85:3
factors [1] - 140:4
facts [31] - 8:25, 8:26, 9:8, 9:19, 11:14, 21:9, 69:16, 69:17, 69:23, 69:25, 89:16, 89:17, 98:9, 103:28, 127:21, 130:9, 130:10, 132:5, 133:12, 133:14, 136:4, 136:27, 138:9, 138:14, 139:1, 145:27, 145:29, 146:8, 146:21, 147:17
factual [8] - 5:28, 6:16, 11:15, 21:23, 89:12, 108:14, 136:19, 143:2
factually [2] - 133:1, 133:10
failed [3] - 16:17, 57:10, 57:26
fails [1] - 55:28

failure [3] - 24:16, 55:17, 56:6
Fair [1] - 21:12
fair [9] - 23:22, 31:20, 46:26, 49:28, 72:28, 73:1, 77:2, 82:14
fairer [1] - 113:2
fairly [5] - 33:20, 71:17, 74:10, 89:3, 115:28
fairness [2] - 121:1, 144:26
false [3] - 55:1, 60:20, 61:1
familiar [15] - 79:8, 79:11, 79:14, 79:18, 82:27, 87:2, 93:13, 94:29, 118:23, 119:23, 120:2, 120:9, 123:27, 131:6, 137:19
familiar.. [1] - 137:17
famous [1] - 37:9
fantastic [1] - 44:3
far [6] - 8:29, 20:2, 49:14, 121:22, 129:1, 140:9
farsighted [2] - 72:23, 72:24
fatal [1] - 17:28
fault [3] - 70:19, 103:5, 107:27
favour [1] - 93:12
favourable [2] - 83:20, 89:4
FCRA's [1] - 55:23
fear [2] - 95:25, 115:8
fears [1] - 95:22
February [2] - 25:6, 77:8
FEBRUARY [4] - 1:18, 4:5, 5:2, 153:13
Federal [1] - 77:26
federal [19] - 14:26, 19:1, 21:12, 25:18, 46:21, 70:18, 70:20, 70:27, 71:2, 85:20, 85:21, 86:3, 86:7, 91:15, 97:18, 105:1, 120:23, 124:25, 145:5
fell [1] - 133:16
fellowship [1] - 15:3
few [8] - 46:9, 76:18, 76:24, 77:20, 86:8, 99:18, 119:25, 132:21
field [2] - 71:11, 123:16
Fifth [1] - 120:6
fight [1] - 122:11

file [2] - 10:24, 12:21
filed [5] - 11:17, 11:26, 26:9, 27:19, 93:22
fill [1] - 11:14
filled [1] - 25:12
filter [1] - 52:12
final [2] - 8:18, 85:19
finally [2] - 21:18, 146:28
fine [2] - 30:1, 143:23
finished [1] - 142:11
First [19] - 15:11, 16:8, 16:22, 27:1, 27:15, 27:21, 27:23, 27:24, 27:29, 28:2, 28:13, 28:20, 28:28, 58:18, 61:9, 78:22, 93:9, 149:29
first [29] - 5:26, 6:2, 6:18, 11:3, 13:29, 14:7, 16:28, 17:2, 20:29, 22:25, 25:1, 29:8, 35:4, 58:15, 71:9, 83:22, 85:9, 85:21, 86:25, 94:18, 97:10, 101:7, 110:3, 117:23, 132:21, 134:5, 150:12, 151:8
first-named [1] - 11:3
firstly [1] - 128:29
FISA [9] - 92:23, 129:22, 129:25, 130:27, 132:2, 141:27, 149:23, 149:24, 149:25
FISC [3] - 92:19, 138:11, 148:7
fit [1] - 52:9
FITZGERALD [1] - 2:22
Fitzpatrick [2] - 7:11, 8:10
five [4] - 12:4, 68:19, 137:20, 138:2
FK [2] - 7:12, 8:10
flagging [1] - 113:7
flexibility [1] - 49:26
focus [4] - 37:29, 58:6, 69:4, 91:25
focusing [1] - 127:4
focussed [1] - 28:6
focussing [3] - 83:28, 91:24, 110:6
follow [8] - 29:18, 47:29, 102:15, 103:4, 113:17, 121:14, 121:26, 123:11

followed.. [1] - 121:20
following [10] - 1:23, 20:13, 27:25, 32:25, 72:10, 94:15, 106:19, 121:11, 137:2, 152:6
follows [2] - 10:7, 80:27
FOLLOWS [5] - 5:2, 14:4, 30:4, 76:1, 145:22
footnotes [1] - 78:11
FOR [4] - 2:21, 2:26, 3:1, 3:7
forbid [1] - 26:24
force [1] - 25:6
foreign [2] - 149:26, 151:19
Foreign [2] - 92:22, 149:23
forget [2] - 88:23, 89:17
form [6] - 12:26, 18:14, 74:26, 118:29, 119:6, 119:7
formal [2] - 38:26, 47:2
formally [1] - 25:12
forms [1] - 73:6
formulation [1] - 24:5
forth [1] - 21:8
forthcoming [2] - 77:9, 80:6
forward [1] - 62:19
foundation [1] - 73:19
founders [1] - 122:11
four [6] - 5:15, 6:11, 24:27, 81:20, 88:27, 89:26
fourth [2] - 18:4, 26:2
Fourth [40] - 14:28, 16:10, 27:8, 27:11, 27:12, 27:14, 27:27, 28:10, 28:18, 28:25, 28:27, 29:8, 37:2, 37:4, 37:6, 37:16, 37:21, 39:2, 72:10, 88:7, 93:9, 108:26, 118:14, 120:18, 141:20, 141:22, 141:23, 141:25, 143:11, 149:29, 150:23, 150:27, 151:5, 151:9, 151:14, 151:21, 151:26, 151:28, 152:12,

152:14
fragmentary [2] - 82:10, 82:22
fragmented [2] - 17:8, 32:17
framed [1] - 57:13
framework [2] - 11:16, 128:11
FRANCIS [1] - 2:11
Francisco [1] - 119:25
frank [1] - 139:11
free [1] - 27:15
FREE [1] - 3:9
Freedom [1] - 87:25
freedom [2] - 16:9, 16:18
freestanding [1] - 91:10
frequency [1] - 124:25
frequently [8] - 37:15, 63:5, 124:19, 124:23, 140:28, 140:29, 145:7, 145:8
Friday [2] - 13:5, 29:23
FRY [1] - 2:28
frying [1] - 45:7
fulfil [4] - 6:21, 10:18, 11:18, 99:6
full [1] - 15:6
full-time [1] - 15:6
fully [4] - 57:10, 57:26, 111:14, 151:14
fundamental [16] - 17:18, 19:19, 19:21, 27:8, 68:18, 108:28, 121:29, 122:1, 122:13, 122:19, 142:29, 143:14, 143:17, 144:4, 144:7, 144:9
funding [3] - 51:25, 52:11
furnish [1] - 16:27
furnished [1] - 7:15
furthermore [1] - 6:3
future [4] - 21:5, 23:2, 61:6, 95:24

G

GALLAGHER [31] - 2:10, 4:11, 12:27, 29:15, 29:21, 29:27, 29:29, 30:3, 34:27, 35:4, 35:8, 35:11, 42:2, 46:5, 59:26,

74:3, 74:8, 75:7, 76:7, 76:9, 77:13, 89:25, 90:1, 90:3, 94:7, 98:28, 128:29, 129:28, 130:3, 145:19, 153:6
Gallagher [4] - 74:2, 147:27, 150:10, 152:6
Gallagher's [3] - 29:14, 145:25, 153:4
Gap [1] - 77:8
GDPR [1] - 80:6
General [4] - 25:3, 122:17, 137:8, 137:26
general [37] - 7:19, 8:28, 9:11, 19:20, 22:8, 37:6, 43:17, 47:6, 47:8, 49:14, 54:27, 66:3, 66:8, 66:25, 70:16, 70:23, 70:26, 70:27, 76:22, 80:3, 80:4, 80:7, 80:8, 80:9, 82:5, 82:16, 96:26, 101:11, 106:6, 106:13, 106:25, 110:23, 112:21, 125:19, 127:25, 135:22, 136:23
generalised [1] - 79:29
generally [6] - 40:7, 62:17, 70:13, 81:24, 98:7, 136:17
George [1] - 14:21
GILMORE [1] - 3:8
Ginsburg [1] - 35:13
given [14] - 7:24, 7:28, 14:8, 41:21, 49:4, 63:29, 73:27, 94:24, 117:15, 128:16, 141:26, 142:25, 143:8, 152:1
glad [1] - 74:16
Global [1] - 46:6
global [1] - 46:13
gloss [1] - 23:14
GOODBODY [1] - 3:3
Google [1] - 46:27
Gore [1] - 46:27
Gorski [3] - 93:27, 143:5, 146:7
govern [1] - 73:3
governance [1] - 138:16
governed [1] - 120:26
Government [3] - 52:11, 125:11, 125:15
government [56] -

7:6, 17:16, 20:8,
26:21, 27:4, 30:18,
30:23, 31:3, 31:8,
34:16, 34:22, 36:22,
37:19, 37:22, 66:22,
68:28, 71:16, 77:21,
78:22, 80:17, 82:17,
88:1, 88:12, 88:16,
120:19, 120:23,
121:25, 122:1, 122:3,
122:12, 122:15,
122:17, 122:21,
122:23, 122:29,
123:10, 124:20,
124:22, 128:9, 129:3,
134:3, 135:17,
135:28, 137:4, 139:4,
139:22, 141:7, 145:6,
145:9, 145:15,
146:10, 148:5, 150:22
government's [4] -
24:15, 92:24, 123:3,
150:16
Government's [2] -
35:18, 36:6
governmental [1] -
151:15
governments [3] -
31:5, 31:24, 144:7
governs [1] - 40:7
GRAINNE [1] - 3:8
GRAND [1] - 2:28
grant [1] - 87:19
granted [3] - 44:7,
87:22, 91:7
granular [1] - 49:19
great [4] - 36:29,
73:6, 108:29, 114:29
greater [1] - 37:3
greatest [1] - 28:7
Green [1] - 14:12
ground [4] - 27:9,
109:13, 133:23, 150:5
grounded [1] - 42:26
grounding [1] -
12:13
grounds [3] - 7:13,
67:18, 91:6
group [1] - 22:15
growth [2] - 74:28,
76:13
Guantanamo [1] -
139:8
guarantee [2] -
27:12, 27:16
guaranteed [1] -
122:20
guess [1] - 114:23
guidelines [1] -
73:19

H

half [2] - 71:11, 88:2
halfway [2] - 48:14,
68:19
Hall [1] - 46:28
hand [18] - 18:7,
35:16, 35:22, 36:4,
54:28, 55:2, 83:24,
88:1, 88:27, 89:26,
118:26, 141:12,
141:15, 142:1, 143:3,
143:6, 147:27, 150:10
handed [3] - 5:11,
77:12, 77:13
HANDED [2] - 83:2
Handed [1] - 118:26
handful [1] - 120:25
handling [2] - 58:25,
73:4
happy [2] - 74:10,
74:13
harm [82] - 21:13,
38:2, 42:22, 42:28,
43:5, 43:21, 43:26,
44:24, 45:11, 45:23,
46:18, 46:19, 46:20,
46:22, 47:12, 47:23,
47:26, 48:1, 48:4,
50:7, 51:2, 52:26,
52:28, 53:27, 54:7,
54:11, 54:12, 54:15,
55:24, 56:6, 56:28,
56:29, 57:4, 60:15,
60:26, 61:6, 62:7,
62:29, 63:2, 65:21,
67:8, 67:19, 74:20,
74:22, 84:5, 84:7,
84:20, 85:2, 96:3,
96:15, 96:16, 96:21,
96:23, 96:27, 97:25,
99:5, 99:23, 100:6,
100:21, 101:22,
102:4, 102:14,
102:23, 102:27,
103:7, 103:12, 104:3,
104:26, 105:2,
105:11, 105:13,
105:16, 105:18,
105:21, 105:22,
107:29, 108:19,
109:17, 109:22,
119:21
harm" [1] - 64:7
harm' [1] - 95:27
harms [7] - 48:17,
48:22, 48:23, 63:5,
84:4, 84:14, 84:15
harms" [1] - 48:13

HAVING [1] - 14:3
HAYES [1] - 2:12
hazard [1] - 114:23
head [4] - 82:29,
95:5, 118:19, 118:22
hear [2] - 67:15,
121:4
HEARD [1] - 1:17
heard [4] - 5:25, 6:6,
148:14
hearing [4] - 5:4, 6:2,
6:12, 6:18
HEARING [6] - 1:17,
4:4, 4:12, 5:1, 76:1,
153:12
hears [1] - 86:4
heightened [1] -
144:18
held [15] - 6:28, 8:12,
21:11, 55:7, 60:24,
68:2, 72:9, 87:6,
95:21, 115:11,
120:16, 120:18,
129:21, 139:18,
147:22
help [3] - 35:1,
95:17, 110:22
HI [1] - 8:4
Higgins [2] - 10:11,
10:24
HIGH [1] - 1:2
High [4] - 6:7, 6:13,
6:21, 8:10
high [1] - 139:9
highlight [1] - 24:26
highly [3] - 37:18,
49:6, 137:25
Hillson [1] - 120:4
HIPAA [1] - 46:19
historical [1] - 42:26
History [1] - 14:24
history [2] - 42:23,
119:5
hits [2] - 101:3,
101:4
hmm [3] - 32:26,
36:20, 78:10
hold [7] - 15:8,
88:26, 89:7, 89:14,
89:21, 96:23, 123:3
holding [7] - 8:7,
23:10, 27:11, 37:8,
44:9, 56:19, 110:9
holds [3] - 37:19,
53:13, 84:22
hopeless [1] - 78:4
Hopeless" [1] - 78:5
HOUSE [1] - 2:13
huge [1] - 132:15
human [1] - 77:21

hundreds [2] - 46:2,
99:14
hurdles [1] - 60:6
HYLAND [1] - 2:11
hypothetical [1] -
23:19
I
i.e [1] - 54:12
idea [5] - 48:4, 51:19,
138:9, 138:10
ideal [2] - 19:23,
138:16
identified [6] - 55:8,
65:12, 127:27,
134:13, 140:5, 143:10
identifies [1] - 83:15
identify [8] - 15:25,
27:26, 48:17, 80:10,
102:19, 118:2,
120:28, 145:28
Ill [33] - 21:16, 21:18,
24:18, 48:17, 48:23,
49:24, 50:2, 50:12,
50:13, 50:17, 50:24,
51:8, 53:14, 55:3,
55:7, 55:9, 64:22,
66:21, 68:9, 68:18,
69:1, 69:2, 69:20,
70:2, 70:5, 70:8,
70:25, 70:27, 83:14,
84:4, 84:20, 84:27,
141:4
illegal [3] - 92:16,
138:16, 149:9
illegality [1] - 149:18
illustrated [1] -
101:18
illustrates [1] - 61:24
illustration [1] -
63:27
imagine [2] - 57:2,
64:5
imbued [1] - 122:27
immanence [1] -
134:6
immeasurably [1] -
23:8
immediately [2] -
28:27, 146:23
immense [1] - 76:16
immigration [1] -
26:1
imminence [1] - 23:2
imminent [13] -
34:21, 54:6, 54:7,
54:19, 54:20, 60:14,
60:26, 85:10, 95:27,

110:5, 110:9, 110:28,
111:1
imminently [1] -
33:13
immunised [1] -
142:10
immunity [1] -
142:10
impending [1] -
95:25
impertinent [1] -
113:12
implicated [3] -
23:29, 68:23, 68:25
implicates [1] -
108:28
implications [3] -
62:8, 115:4, 116:5
implied [1] - 92:10
importance [8] -
8:19, 8:28, 9:11, 58:7,
64:16, 64:18, 142:17,
150:11
important [20] - 8:12,
19:7, 19:8, 29:9,
33:24, 33:26, 48:19,
53:4, 78:8, 98:28,
109:9, 117:7, 122:13,
122:18, 126:19,
140:19, 141:3,
142:13, 144:3, 144:10
importantly [1] -
146:27
imported [1] - 74:29
imposes [1] - 70:10
imposition [1] -
78:18
impossible [1] - 65:2
impression [2] -
114:27, 131:26
improbable [1] -
133:10
inaccuracies [1] -
56:28
inaccurate [1] -
63:28
inaction [1] - 52:10
Inc [1] - 10:6
incident [1] - 122:5
incidentally [3] -
92:13, 122:23, 138:20
inclined [1] - 142:16
include [5] - 23:21,
23:22, 40:7, 84:15,
124:29
included [4] - 74:14,
100:10, 118:29,
144:24
includes [6] - 86:16,
124:16, 125:22,

144:22, 145:1, 145:3
including [9] - 7:11, 10:13, 19:17, 19:25, 26:13, 47:9, 77:26, 124:8, 140:5
inclusion [1] - 17:19
incompatible [1] - 123:29
incomplete [3] - 17:10, 32:18, 57:13
incomprehensible [1] - 47:20
incorrect [7] - 53:25, 57:1, 57:3, 64:4, 64:6, 65:19, 103:18
incorrectly [1] - 30:1
increasingly [1] - 16:10
incrementally [1] - 117:14
incurred [1] - 139:13
incurring [1] - 95:26
indeed [1] - 136:4
indefinite [1] - 26:25
indemnification [1] - 124:22
indemnifies [1] - 124:20
independent [1] - 29:10
indeterminacy [3] - 100:25, 108:13, 147:16
indeterminate [3] - 21:19, 98:2, 109:25
INDEX [1] - 4:1
indicated [1] - 119:7
individual [11] - 8:26, 9:9, 13:19, 17:8, 38:11, 42:5, 49:13, 68:5, 78:20, 100:7, 147:8
individualised [2] - 41:18, 58:26
individually [2] - 49:11, 78:16
individuals [3] - 24:16, 68:24, 78:21
industrial [1] - 79:9
industrialised [6] - 79:4, 79:9, 79:28, 80:21, 80:24, 81:3
inevitably [1] - 101:4
infer [1] - 47:1
inference [1] - 105:20
inform [2] - 86:14, 119:12
informal [1] - 47:17
INFORMATION [1] - 3:7
information [38] - 27:28, 37:19, 37:25, 37:26, 37:27, 55:1, 56:1, 58:25, 63:28, 67:11, 68:5, 68:8, 72:28, 73:1, 82:14, 84:17, 84:29, 85:4, 85:8, 119:1, 119:4, 119:11, 122:26, 123:24, 125:18, 125:22, 125:25, 125:26, 126:7, 126:9, 126:28, 130:6, 135:14, 141:12, 141:15, 142:1
information' [1] - 67:20
informed [1] - 73:12
infringe [1] - 17:17
infringed [2] - 33:1, 144:10
inherent [1] - 13:8
initial [2] - 25:9, 93:21
injected [1] - 64:22
injunction [5] - 87:7, 87:13, 87:22, 91:16, 91:20
injunctions [1] - 26:25
injunctive [1] - 87:19
injuries [16] - 23:2, 23:3, 23:21, 23:23, 23:29, 24:3, 42:12, 42:14, 48:13, 50:22, 50:23, 53:6, 60:1, 78:20, 115:15
injury [136] - 19:12, 19:23, 20:3, 21:5, 23:1, 23:11, 23:20, 23:24, 33:3, 33:5, 33:11, 33:14, 34:8, 34:9, 34:12, 34:13, 34:18, 34:24, 35:19, 36:7, 36:28, 38:6, 38:9, 38:10, 38:17, 39:4, 39:18, 39:21, 39:26, 42:4, 42:23, 44:12, 44:13, 45:12, 45:14, 45:16, 47:13, 47:23, 47:27, 48:8, 48:22, 48:23, 50:7, 50:20, 51:2, 53:9, 53:15, 53:20, 53:21, 54:5, 54:8, 54:18, 54:20, 55:13, 56:7, 57:19, 58:29, 59:4, 59:14, 67:8, 68:9, 83:17, 83:18, 83:19, 83:29, 84:6, 84:7, 84:20, 84:27, 85:3, 85:13, 88:12, 89:3, 90:22, 95:24, 104:19, 105:2, 106:14, 106:16, 106:26, 106:28, 107:4, 107:5, 107:10, 107:18, 107:23, 107:24, 108:5, 108:6, 108:7, 108:11, 108:28, 109:29, 110:2, 110:5, 110:9, 110:12, 110:16, 110:19, 110:25, 110:26, 110:28, 110:29, 111:1, 111:5, 111:7, 111:12, 111:25, 111:28, 115:13, 119:17, 126:10, 126:15, 127:2, 127:3, 127:8, 127:13, 127:16, 127:17, 128:10, 128:24, 131:16, 132:19, 138:26, 140:3, 140:21, 146:9, 147:7, 147:9, 148:1, 148:12, 150:19
injury-in-fact [6] - 51:2, 84:6, 85:13, 105:2, 109:29, 111:28
injury-in-fact' [1] - 84:20
innovative [2] - 72:1, 72:20
inputs [1] - 20:24
inquiry [3] - 58:12, 92:8, 131:23
insofar [6] - 9:26, 9:29, 19:14, 65:10, 81:6, 111:4
instance [10] - 5:26, 6:2, 6:18, 50:15, 71:28, 75:4, 85:21, 98:4, 145:12, 147:10
instanced [1] - 62:1
instances [2] - 77:20, 132:12
Instructed [3] - 2:7, 2:12, 3:3
instructed [5] - 2:18, 2:22, 2:28, 3:9, 16:26
instructive [2] - 42:27, 48:18
insufficient [2] - 21:15, 51:8
insufficiently [1] - 48:24
insurmountable [1] - 64:26
intangible [21] - 19:22, 20:6, 23:19, 23:21, 23:23, 42:14, 42:22, 42:28, 47:19, 48:17, 48:22, 48:23, 50:23, 53:6, 62:29, 63:2, 63:5, 71:4, 84:14, 115:10, 115:14
integral [2] - 32:22, 32:24
Intellectual [1] - 16:12
intellectual [2] - 29:6, 74:8
intelligence [8] - 41:2, 41:7, 41:12, 41:18, 80:2, 87:28, 135:23, 142:14
Intelligence [4] - 92:22, 137:9, 137:27, 149:23
intend [1] - 119:13
intention [1] - 144:20
intentional [1] - 145:12
intentionality [1] - 144:19
intentionally [2] - 123:5, 128:26
inter [5] - 5:21, 5:28, 6:16, 7:23, 95:22
intercepted [10] - 34:2, 34:16, 34:23, 35:26, 41:9, 41:22, 127:8, 128:26, 138:29, 139:11
intercepting [1] - 44:16
interception [6] - 35:18, 36:6, 36:19, 66:14, 107:23, 108:25
intercepts [1] - 128:9
interest [7] - 51:7, 52:8, 77:21, 114:29, 115:6, 115:7, 115:19
interested [2] - 25:22, 115:3
interesting [5] - 92:5, 92:29, 93:2, 93:9, 151:18
interests [4] - 15:10, 46:2, 58:25, 71:26
interfered [10] - 32:10, 47:24, 127:29, 129:6, 130:19, 131:1, 132:27, 134:10, 134:12, 135:9
interference [31] - 48:2, 48:5, 96:4, 96:14, 96:19, 97:24, 101:21, 102:5, 102:13, 102:24, 102:27, 103:8, 103:11, 104:5, 105:10, 105:16, 105:19, 107:4, 107:7, 107:17, 107:20, 107:22, 107:25, 108:10, 133:21, 133:22, 135:15, 152:7, 152:8, 152:9, 152:14
interferences [1] - 103:2
interferes [1] - 45:9
interim [2] - 25:13, 87:26
International [14] - 89:6, 89:9, 89:14, 89:21, 90:4, 95:16, 98:18, 100:18, 132:16, 136:6, 136:8, 140:20, 147:1, 147:21
International's [1] - 148:8
internet [1] - 37:24
interposes [1] - 141:5
interpret [4] - 85:24, 86:13, 114:3, 114:8
interpretation [12] - 22:12, 22:14, 23:5, 23:13, 63:19, 90:7, 96:19, 101:6, 101:7, 112:11, 112:29, 140:14
interpreted [7] - 111:26, 112:27, 116:7, 116:8, 117:10, 117:28, 118:13
interpreting [9] - 84:11, 86:18, 90:10, 100:12, 109:15, 112:23, 115:5, 117:3, 117:9
interprets [2] - 113:24, 118:6
interrupting [1] - 91:5
intervention [1] - 12:15
introduce [1] - 37:14
introduced [2] - 71:29, 72:3
introducing [1] - 107:27
introduction [2] - 11:4, 76:10
introductory [1] -

leaks [2] - 92:14, 92:16
learn [1] - 17:18
learned [2] - 132:6, 146:21
learns [1] - 132:5
least [11] - 17:14, 28:8, 33:3, 37:2, 37:7, 49:19, 58:1, 88:8, 98:16, 150:8, 150:29
leave [7] - 13:25, 39:2, 75:7, 94:2, 103:26, 104:21, 130:14
led [1] - 139:28
LEE [1] - 2:7
left [3] - 83:24, 88:1, 150:10
left-hand [3] - 83:24, 88:1, 150:10
leg [3] - 99:6, 107:29, 108:3
legal [19] - 8:20, 32:29, 49:22, 49:25, 60:8, 68:8, 69:11, 69:12, 70:6, 70:7, 70:14, 77:18, 79:13, 81:25, 81:28, 81:29, 100:29, 115:29, 143:19
Legal [2] - 14:24, 78:5
LEGAL [1] - 3:9
legality [1] - 68:28
legally [2] - 85:3, 85:8
legislation [6] - 72:2, 72:21, 81:25, 82:24, 136:18, 138:9
length [6] - 93:23, 100:1, 100:8, 127:24, 138:25, 140:3
less [5] - 12:26, 36:16, 109:27, 114:23, 115:19
letter [1] - 111:3
level [5] - 9:1, 9:5, 49:19, 101:11, 146:6
liability [3] - 119:2, 144:23, 149:4
Liberties [1] - 16:12
light [4] - 11:9, 18:7, 67:5, 109:22
likelihood [7] - 9:8, 61:8, 83:19, 97:12, 138:28, 139:10, 140:22
likely [10] - 8:29, 9:9, 19:22, 36:22, 40:22, 49:6, 82:21, 109:27, 114:8, 121:3
likewise [1] - 12:23
limb [2] - 85:9, 85:10
limit [3] - 17:23, 69:3, 142:15
limitation [1] - 50:17
limitations [6] - 17:8, 17:12, 18:27, 32:17, 32:28
limited [2] - 12:16, 149:25
limiting [1] - 19:2
limits [1] - 143:8
line [2] - 67:17, 103:4
lines [4] - 58:14, 88:28, 89:26, 111:20
linkage [1] - 29:6
linked [1] - 55:20
LinkedIn [1] - 46:26
lis [3] - 5:21, 5:28, 6:16
List [3] - 60:10, 60:29
list [2] - 16:3, 94:26
listed [3] - 22:22, 24:25, 25:1
listeners [1] - 28:21
literally [1] - 5:10
litigants [4] - 68:27, 106:13, 106:25, 110:24
litigation [8] - 15:5, 21:6, 27:15, 71:16, 78:15, 99:12, 109:10
live [1] - 69:7
lived [1] - 14:19
LLC [1] - 118:23
loaned [1] - 3:23
location [2] - 37:24, 128:14
logical [3] - 33:2, 139:29, 146:28
logically [1] - 100:22
logistics [1] - 20:20
look [17] - 20:13, 20:26, 24:10, 34:27, 36:4, 40:16, 41:24, 45:20, 46:15, 56:10, 58:13, 82:26, 101:24, 104:16, 106:9, 116:26, 150:9
looked [5] - 45:15, 47:25, 55:6, 117:19, 151:5
looking [20] - 32:14, 36:2, 36:26, 39:17, 39:20, 43:26, 63:1, 64:1, 70:8, 73:18, 89:18, 96:29, 107:28, 110:11, 117:21, 118:27, 122:14, 133:11, 135:8
loosely [1] - 43:15
Louis [2] - 14:14, 15:7
LOWER [1] - 3:9
lower [9] - 21:26, 97:9, 101:4, 101:8, 108:14, 114:26, 138:19, 146:4, 147:18
LTD [1] - 1:12
Ltd [2] - 10:6, 10:16
Lujan [12] - 23:12, 33:21, 51:9, 51:16, 51:18, 51:20, 52:5, 54:5, 59:17, 107:11, 110:4, 110:10
lunch [1] - 75:8
LUNCH [2] - 4:12, 76:1
LUNCHEON [1] - 75:12
Lynch [3] - 97:4, 97:7, 138:21

M

maddening [4] - 37:16, 44:1, 61:25, 61:28
mail [14] - 34:16, 34:17, 34:23, 35:19, 35:26, 36:7, 36:21, 36:27, 37:1, 38:5, 38:16, 44:16, 139:16
mails [17] - 37:4, 37:23, 40:19, 40:26, 45:9, 45:10, 45:15, 47:26, 72:14, 120:20, 121:6, 121:16, 123:3, 128:16, 128:18, 129:3
maintain [3] - 33:11, 44:11, 55:16
maintained [1] - 132:14
maintenance [3] - 88:12, 88:16, 88:24
major [4] - 41:14, 41:15, 41:17, 78:14
majority [1] - 140:12
malleable [1] - 101:2
Malone [3] - 1:21, 3:22, 3:24
MALONE [1] - 1:31
manner [1] - 3:23
mannerisms [2] - 59:26, 59:27
manufacture [1] - 95:26
MASON [1] - 2:12
massive [1] - 115:23
Masters [1] - 14:24
material [5] - 10:28, 17:29, 56:29, 70:10, 115:13
materials [4] - 11:29, 12:7, 18:8, 86:27
matter [15] - 5:4, 7:22, 12:19, 32:27, 33:2, 86:22, 88:22, 89:13, 89:19, 97:23, 114:29, 117:9, 136:23, 143:22
matters [10] - 10:22, 16:26, 16:29, 20:27, 66:17, 69:16, 69:23, 69:24, 86:5, 138:12
MAURICE [1] - 2:26
MAXIMILLIAN [1] - 1:14
maximum [1] - 68:4
maze [1] - 93:5
McCANN [1] - 2:22
McCullough [4] - 2:16, 29:16, 29:19, 29:22
McGovern [3] - 5:15, 7:18, 12:18
mean [15] - 13:16, 43:9, 44:6, 45:14, 51:17, 52:25, 53:26, 61:28, 63:10, 90:11, 110:14, 112:27, 113:11, 114:16, 128:6
meaning [4] - 23:14, 39:17, 64:10, 92:26
meaningfully [1] - 119:19
means [10] - 23:15, 63:22, 65:25, 78:1, 113:4, 113:5, 114:28, 132:7, 132:26, 136:10
meant [1] - 25:5
measure' [1] - 84:16
measures [1] - 87:27
mechanism [2] - 18:8, 18:12
meet [7] - 40:20, 48:17, 48:22, 57:16, 61:14, 126:23, 139:14
meeting [8] - 14:9, 14:10, 20:14, 20:17, 20:19, 22:4, 24:24, 123:16
meets [1] - 85:14
Member [6] - 25:3, 31:5, 31:10, 31:24, 31:29, 41:1
member [1] - 41:1
members [1] - 52:8
memorandum [1] - 94:13
memory [1] - 95:17
mens [1] - 144:18
mention [10] - 30:8, 91:22, 91:24, 93:26, 93:27, 94:19, 120:14, 124:28, 125:20, 132:10
mentioned [4] - 93:19, 93:21, 99:8, 123:14
mentioning [2] - 94:15, 101:19
mere [13] - 21:7, 48:2, 48:4, 56:8, 56:12, 56:15, 56:18, 61:29, 99:22, 105:10, 108:6, 125:25, 125:26
merely [3] - 13:18, 64:27, 139:27
merits [1] - 88:11
merits' [1] - 141:7
met [6] - 26:3, 45:13, 60:6, 111:13, 127:5, 130:5
meta [3] - 128:15, 149:24, 151:10
meta-data [3] - 128:15, 149:24, 151:10
metadata [14] - 87:3, 87:6, 88:5, 89:1, 89:20, 89:27, 92:11, 92:20, 92:24, 98:24, 150:18, 150:20, 150:22, 150:26
method [1] - 146:21
MI [1] - 118:23
MICHAEL [2] - 2:5, 3:1
Microsoft [10] - 20:22, 26:19, 26:20, 26:23, 26:24, 27:1, 66:23, 118:4, 118:12, 141:18
Microsoft's [3] - 27:7, 27:14, 27:23
might [27] - 6:25, 7:1, 7:7, 8:13, 8:15, 22:15, 23:19, 28:7, 36:23, 47:1, 52:1, 52:3, 58:11, 59:27, 62:2, 62:13, 65:20, 75:7, 99:17, 104:16, 105:29, 107:22, 108:22, 117:13, 131:11, 153:4
might've [1] - 152:24

mill [1] - 147:9
mind [5] - 23:18, 57:1, 64:4, 99:18, 126:20
minimisation [1] - 143:12
minimum [1] - 48:17
minute [1] - 104:12
misapprehends [1] - 150:16
misapprehension [2] - 59:9, 59:10
misdemeanour [1] - 60:19
misleading [1] - 53:24
miss [1] - 115:4
missed [2] - 113:14, 113:15
Mister [1] - 93:28
misunderstanding [1] - 31:22
misunderstood [1] - 32:15
misuse [1] - 67:11
mix [1] - 75:3
mobile [1] - 122:5
modern [2] - 71:9, 71:12
modesty [1] - 46:4
modified [2] - 107:14, 110:2
moment [14] - 12:26, 30:6, 34:28, 40:13, 41:25, 44:16, 47:21, 48:25, 49:21, 81:20, 89:17, 113:18, 129:2, 130:15
MONDAY [3] - 1:18, 4:4, 5:1
Monday [4] - 13:13, 13:22, 13:23, 13:26
months [4] - 87:27, 113:20, 114:1
Moody [1] - 120:2
moreover [1] - 122:29
morning [14] - 5:9, 32:7, 32:13, 78:26, 80:11, 80:12, 82:15, 85:7, 86:27, 89:9, 97:28, 101:15, 107:12, 152:19
most [15] - 57:25, 57:29, 58:10, 63:3, 91:26, 94:26, 123:27, 131:28, 134:6, 140:18, 141:3, 143:23, 144:1, 144:14, 146:24

motion [2] - 27:2, 88:18
move [1] - 90:23
moving [2] - 62:19, 109:3
MR [69] - 2:5, 2:5, 2:7, 2:10, 2:11, 2:16, 2:16, 2:17, 2:26, 3:1, 3:7, 4:7, 4:10, 4:11, 4:13, 12:27, 13:1, 13:3, 13:9, 13:15, 13:19, 13:23, 13:27, 13:28, 14:4, 15:14, 15:21, 15:25, 15:29, 27:17, 29:13, 29:15, 29:19, 29:21, 29:22, 29:27, 29:29, 30:3, 34:27, 35:4, 35:8, 35:11, 42:2, 46:5, 59:26, 74:3, 74:8, 75:7, 76:7, 76:9, 77:13, 89:25, 90:1, 90:3, 94:7, 98:28, 128:29, 129:28, 130:3, 145:19, 145:21, 145:24, 152:16, 152:20, 152:26, 153:2, 153:4, 153:6, 153:8
MS [45] - 1:17, 2:6, 2:11, 2:21, 2:21, 2:27, 3:2, 3:8, 5:9, 12:28, 13:7, 13:11, 13:16, 13:21, 13:24, 15:19, 15:23, 15:28, 27:6, 29:26, 29:28, 35:3, 35:6, 35:9, 42:1, 46:4, 59:23, 74:1, 74:6, 75:9, 76:4, 77:11, 89:23, 89:29, 90:2, 94:1, 98:12, 98:15, 128:6, 129:26, 152:18, 152:22, 152:28, 153:3, 153:10
multiple [2] - 26:12, 149:20
Murray [4] - 15:19, 32:13, 32:15, 74:9
MURRAY [20] - 2:5, 4:10, 4:13, 13:28, 14:4, 15:14, 15:21, 15:25, 15:29, 27:17, 29:13, 29:19, 145:21, 145:24, 152:16, 152:20, 152:26, 153:2, 153:4, 153:8
must [16] - 3:23, 9:21, 19:9, 21:8, 24:13, 29:19, 42:4, 54:18, 58:4, 58:29,

59:15, 60:1, 73:22, 101:13, 109:21, 109:23

N

naive [1] - 46:1
name [4] - 25:10, 47:1, 118:11, 118:18
named [3] - 1:26, 11:3, 11:4
namely [2] - 57:14, 131:10
naming [1] - 98:14
narrow [2] - 64:10, 64:11
narrower [2] - 93:12, 150:5
national [8] - 79:15, 79:17, 79:20, 80:1, 80:2, 81:4, 81:14, 149:27
National [3] - 46:6, 137:9, 137:27
nationals [1] - 151:19
nature [12] - 7:24, 16:5, 18:4, 18:26, 20:6, 31:23, 71:5, 82:9, 95:23, 133:14, 139:20, 146:10
navigate [1] - 92:7
navigated [5] - 92:6, 92:7, 93:3, 101:14, 150:3
nearly [1] - 114:1
necessarily [4] - 42:11, 44:6, 62:26, 82:12
necessary [11] - 10:20, 12:10, 12:21, 54:4, 56:7, 57:22, 104:20, 106:4, 107:9, 144:5, 147:19
need [16] - 11:19, 12:18, 28:29, 56:10, 87:19, 87:21, 107:6, 107:17, 116:2, 122:4, 122:25, 123:9, 139:24, 144:8, 146:5, 148:10
needed [1] - 6:22
needs [1] - 110:2
negligence [3] - 144:23, 144:24, 144:26
NESSA [1] - 3:2
neutral [1] - 11:5
never [8] - 8:2, 22:4,

42:14, 60:1, 83:5, 127:26, 135:16, 138:14
nevertheless [3] - 17:29, 42:15, 47:2
New [1] - 83:13
new [10] - 7:16, 10:28, 11:5, 24:3, 25:16, 26:11, 48:12, 62:9, 71:11, 77:1
next [12] - 13:13, 13:21, 13:23, 13:25, 50:25, 52:23, 67:24, 90:1, 90:2, 90:3, 106:8, 125:7
NIAMH [1] - 2:11
niceties [1] - 47:8
Nickelodeon [15] - 82:26, 90:6, 97:4, 97:21, 97:22, 98:4, 99:3, 99:13, 109:4, 113:14, 116:14, 116:15, 117:2, 117:16, 117:23
Niemeyer [1] - 14:27
nine [4] - 42:17, 42:20, 48:10, 50:27
Ninth [9] - 57:10, 57:18, 57:26, 58:10, 83:27, 118:23, 119:8, 119:26, 119:27
nobody [3] - 36:12, 94:11, 117:20
non [6] - 20:5, 25:19, 37:26, 44:13, 95:27, 135:5
non-content [1] - 37:26
non-corporeal [1] - 20:5
non-imminent [1] - 95:27
non-traditional [1] - 44:13
non-US [2] - 25:19, 135:5
none [3] - 38:28, 84:25, 120:9
normal [3] - 10:21, 11:1, 11:22
normally [2] - 8:5, 117:18
NORTH [2] - 3:3, 3:4
note [10] - 12:13, 14:8, 14:10, 47:6, 97:8, 112:15, 122:18, 142:29, 143:1, 143:8
noted [4] - 46:4, 58:18, 79:3, 84:3
notes [1] - 1:25

noteworthy [1] - 145:29
nothing [2] - 6:20, 130:20
notice [41] - 17:15, 24:12, 29:16, 29:23, 29:25, 32:9, 32:18, 32:21, 32:23, 33:23, 33:26, 34:1, 34:7, 34:11, 34:12, 34:14, 34:15, 34:22, 40:25, 41:2, 41:8, 41:10, 41:11, 41:17, 41:20, 55:29, 56:6, 63:28, 127:9, 130:10, 130:14, 130:15, 132:21, 132:23, 132:25, 133:22, 135:14
notification [2] - 46:18, 47:7
notify [1] - 24:16
noting [1] - 54:2
notions [1] - 78:19
notoriously [1] - 98:2
novel [2] - 50:6
Novelli [1] - 25:10
novelty [1] - 71:6
nowhere [3] - 123:14, 133:26, 134:13
NSA [3] - 95:6, 95:9, 95:11
number [11] - 27:20, 39:14, 77:2, 91:4, 91:5, 91:28, 94:28, 101:20, 117:27, 133:19, 145:25
numerous [2] - 77:19, 148:4

O

o'clock [1] - 75:9
O'DWYER [9] - 3:7, 4:7, 13:1, 13:3, 13:9, 13:15, 13:19, 13:23, 13:27
O'SULLIVAN [1] - 2:17
oath [1] - 74:2
Obama [4] - 25:2, 76:26, 121:13, 121:14
objection [1] - 67:17
objective [1] - 21:20
objectively [4] - 97:11, 138:27, 139:28, 140:22

obligation [1] - 143:19
observation [1] - 8:6
observations [1] - 58:27
observe [1] - 62:20
observed [2] - 60:7, 150:21
observers [3] - 57:25, 57:29, 58:10
observing [1] - 62:4
obstacle [14] - 17:28, 18:24, 20:7, 34:13, 45:4, 61:27, 64:19, 64:26, 64:27, 101:13, 106:13, 106:25, 110:23, 111:24
obstacles [9] - 17:27, 18:19, 18:20, 18:22, 19:16, 32:29, 70:10, 78:14, 141:5
obtain [4] - 91:29, 119:16, 122:4, 122:23
obtained [2] - 121:16, 126:22
obviate [1] - 34:11
obvious [2] - 8:24, 59:28
obviously [6] - 13:7, 13:24, 20:16, 44:16, 70:20, 72:24
occasions [3] - 101:20, 133:20, 145:25
occur [1] - 26:12
occurred [4] - 24:23, 26:3, 54:12, 60:15
occurrence [1] - 53:27
OECD [1] - 73:19
OF [5] - 2:21, 4:4, 5:2, 76:6
offer [7] - 6:25, 7:5, 7:13, 79:13, 81:6, 81:8, 149:3
offered [1] - 138:25
offering [2] - 116:4, 117:6
officers [2] - 124:24, 124:25
officials [2] - 124:16, 125:1
officials' [1] - 125:13
often [3] - 21:22, 36:14, 43:13
old [2] - 14:20, 92:1
Ombuds [1] - 18:12
Ombudsperson [2] - 25:9, 41:19
omitting [1] - 106:4

omnibus [1] - 82:23
ON [3] - 1:18, 4:4, 5:1
once [8] - 30:18, 66:27, 80:17, 92:6, 130:27, 131:4, 150:2
One [1] - 5:22
ONE [1] - 2:23
one [84] - 17:13, 17:18, 17:29, 18:23, 18:28, 19:9, 21:2, 22:14, 22:23, 22:25, 23:27, 26:17, 31:28, 32:5, 32:16, 32:27, 33:3, 34:2, 34:8, 34:12, 35:17, 36:5, 36:11, 37:29, 40:1, 40:24, 44:8, 54:28, 55:23, 56:21, 60:5, 61:26, 62:4, 63:8, 63:26, 65:24, 66:6, 67:24, 67:28, 69:20, 69:26, 69:29, 70:9, 71:20, 72:17, 74:3, 77:7, 78:14, 82:23, 86:6, 86:22, 90:23, 90:26, 91:6, 91:27, 93:14, 96:29, 97:27, 98:5, 99:14, 99:21, 100:28, 101:5, 104:8, 104:9, 108:29, 127:4, 128:11, 132:13, 136:10, 137:2, 137:22, 138:2, 140:29, 141:29, 142:28, 143:3, 144:21, 146:2, 146:24, 147:24, 150:18
one's [6] - 17:17, 17:19, 23:18, 34:7, 53:18, 144:21
ones [6] - 23:27, 24:2, 28:7, 35:3, 78:8, 122:20
online [1] - 85:1
opened [1] - 150:11
operate [2] - 138:10, 140:6
operation [1] - 20:23
operator [1] - 47:25
operators [1] - 30:29
opine [5] - 29:10, 30:26, 31:27, 40:29, 41:19
opinion [44] - 11:18, 16:16, 16:27, 19:16, 20:1, 22:28, 30:14, 38:20, 42:2, 46:9, 57:29, 63:4, 66:1,

66:7, 66:8, 66:9, 66:23, 67:15, 67:22, 73:14, 83:9, 91:27, 101:12, 104:8, 104:9, 104:28, 106:12, 106:24, 109:5, 113:5, 116:9, 116:10, 116:16, 117:6, 117:19, 131:3, 131:4, 136:24, 137:12, 137:13, 137:14, 138:21, 140:1, 140:12
Opinion [1] - 102:2
opinions [9] - 36:18, 69:15, 69:22, 70:1, 70:4, 73:23, 79:13, 81:6, 117:15
Opinions [1] - 70:3
oppose [1] - 11:3
opposed [8] - 7:26, 34:19, 53:27, 70:21, 71:6, 79:29, 80:9, 82:23
opposite [1] - 63:4
or.. [1] - 152:21
oral [1] - 12:16
order [32] - 6:12, 6:21, 11:28, 12:22, 16:22, 19:6, 19:7, 25:17, 25:24, 25:28, 25:29, 26:19, 45:28, 49:19, 52:9, 52:11, 53:17, 58:5, 87:27, 92:20, 92:24, 102:13, 106:1, 107:18, 108:3, 108:18, 122:5, 132:19, 139:14, 139:16, 141:21, 148:11
orders [4] - 26:23, 148:6, 149:24, 149:25
ordinarily [1] - 9:7
organisations [3] - 51:25, 51:26, 52:7
organising [1] - 20:20
original [1] - 82:13
originated [1] - 74:26
ossified [1] - 78:21
otherwise [14] - 6:25, 7:1, 7:7, 8:16, 21:23, 54:9, 89:7, 89:15, 89:22, 91:14, 110:28, 111:13, 136:22, 139:8
ought [1] - 59:9
outcome [1] - 69:6
outcomes [1] - 108:14

outgoing [1] - 25:2
outlaws [1] - 44:5
outline [3] - 14:17, 16:28, 24:22
outlined [2] - 94:18, 96:1
outlining [2] - 15:15, 20:27
outputs [1] - 77:7
outside [5] - 10:9, 10:22, 51:26, 60:9, 73:24
overseas [1] - 52:9
oversight [1] - 142:16
overtaken [2] - 12:3, 12:20
overtly [1] - 97:27
owed [1] - 68:7
own [8] - 18:28, 27:3, 32:23, 37:14, 62:26, 68:24, 116:4, 148:27
Oxford [1] - 16:13

P

PAGE [1] - 4:2
page [57] - 15:17, 16:3, 20:14, 20:26, 21:3, 22:22, 24:10, 25:29, 26:5, 26:28, 27:26, 35:12, 42:2, 42:8, 42:16, 42:17, 42:18, 42:20, 46:12, 48:10, 50:25, 52:23, 54:24, 58:14, 61:12, 67:24, 67:25, 68:19, 68:20, 77:16, 78:5, 78:9, 79:3, 80:12, 83:7, 83:10, 83:14, 83:16, 83:22, 84:14, 85:12, 95:15, 95:19, 106:8, 106:21, 111:16, 111:18, 134:1, 137:12, 137:13, 137:14, 137:25, 143:2, 147:26, 151:13
pages [5] - 24:25, 45:24, 46:3, 100:5, 143:1
paragraph [44] - 8:22, 12:13, 16:25, 26:5, 26:27, 27:17, 27:25, 30:7, 35:17, 35:22, 36:5, 46:13, 52:23, 53:1, 53:3, 54:25, 57:8, 58:15,

63:29, 67:26, 68:19, 77:16, 79:3, 80:10, 80:12, 83:23, 83:24, 87:29, 88:3, 90:1, 90:2, 90:3, 95:15, 101:24, 106:9, 106:17, 106:18, 120:13, 123:9, 123:20, 125:7, 140:25, 150:10, 152:9
paragraph.. [1] - 140:24
paragraphs [2] - 5:17, 94:4
parameters [2] - 10:22, 49:23
pardon [1] - 15:23
pars [1] - 66:6
part [17] - 20:23, 25:22, 32:22, 36:2, 46:1, 50:19, 58:22, 78:5, 105:29, 115:16, 116:12, 116:16, 119:13, 132:24, 144:10, 148:20, 150:12
partes [3] - 5:22, 5:29, 6:16
particular [29] - 7:14, 7:25, 13:4, 17:9, 17:14, 18:6, 19:5, 20:3, 22:8, 23:10, 33:17, 49:27, 50:20, 54:27, 57:14, 58:8, 61:9, 61:13, 71:14, 76:21, 86:17, 90:18, 90:19, 90:20, 96:25, 103:24, 128:23, 142:13
particularisation [4] - 57:12, 58:4, 60:4, 147:14
Particularisation [1] - 58:16
particularise [1] - 58:22
particularised [38] - 34:18, 34:24, 35:27, 36:3, 36:23, 36:28, 38:2, 38:6, 38:16, 39:4, 39:18, 39:21, 39:26, 40:21, 42:4, 45:17, 47:27, 49:2, 50:8, 54:6, 54:17, 54:19, 54:23, 58:1, 59:1, 59:5, 59:15, 59:16, 59:20, 60:2, 84:1, 84:28, 85:11, 85:15, 89:2, 111:2, 111:13, 147:7

particularised' [2] - 35:20, 36:8
particularization [1] - 58:27
particularly [27] - 16:7, 18:11, 24:28, 25:22, 28:22, 29:9, 32:6, 33:7, 33:27, 58:6, 64:28, 74:6, 85:27, 99:27, 106:13, 106:25, 109:28, 110:24, 111:24, 111:26, 112:10, 112:26, 122:16, 142:28, 143:17, 152:1
parties [14] - 5:15, 7:15, 7:16, 9:4, 10:19, 11:1, 11:10, 11:20, 12:1, 12:5, 13:12, 27:10, 69:5
partly [1] - 152:13
party [11] - 3:24, 6:5, 7:25, 8:13, 10:29, 36:25, 37:17, 37:20, 37:28, 39:2, 152:1
pass [2] - 53:17, 142:10
passage [4] - 48:10, 53:4, 62:18, 95:13
passages [1] - 46:9
passed [5] - 72:11, 77:1, 87:25, 92:2, 136:13
past [7] - 15:8, 23:6, 34:23, 45:2, 50:10, 77:19, 113:20
patent [1] - 86:4
Paul [1] - 14:26
PAUL [1] - 2:10
pause [2] - 37:12, 39:13
Pause [1] - 59:22
peculiar [6] - 27:12, 89:16, 98:9, 136:5, 136:8, 136:11
peculiar" [1] - 136:10
peculiarities [3] - 103:25, 103:26, 103:27
pecuniary [1] - 19:24
pedigree [1] - 71:18
peer [1] - 47:2
penalties [1] - 124:8
Pennsylvania [1] - 83:13
people [12] - 27:11, 41:8, 58:6, 59:8, 60:3, 74:4, 100:28, 115:1, 135:19, 139:14, 143:24, 144:1
people' [2] - 58:20, 147:10
people's [1] - 66:14
per [1] - 100:20
perfect [1] - 12:26
perfected [1] - 119:8
perhaps [22] - 16:4, 20:9, 23:7, 23:17, 31:21, 36:16, 42:12, 44:1, 47:17, 53:7, 61:24, 70:11, 83:13, 85:1, 87:26, 99:16, 104:16, 117:12, 128:16, 133:10, 141:22, 144:19
period [1] - 87:26
permission [4] - 3:24, 13:5, 119:16, 153:4
permit [3] - 9:15, 10:23, 11:8
permitted [4] - 6:11, 7:19, 8:25, 122:21
person [7] - 99:17, 125:4, 127:6, 128:24, 130:18, 149:5, 149:7
person" [1] - 125:3
personal [6] - 42:5, 58:24, 65:20, 66:9, 73:4, 151:29
personally [1] - 68:7
persons [9] - 25:19, 37:7, 124:13, 124:14, 124:15, 124:19, 124:20, 124:28, 135:5
perspective [7] - 7:5, 7:16, 63:5, 88:9, 138:17, 150:29, 151:3
perspectives [1] - 109:5
persuaded [1] - 9:3
petition [1] - 97:17
phase [1] - 88:20
PHILIP [1] - 2:7
phone [3] - 122:5, 139:15, 146:18
photocopied [1] - 3:23
phrase [4] - 18:22, 47:12, 69:7, 152:7
physical [2] - 19:24, 151:19
picked [1] - 29:29
Pickering [1] - 15:5
piece [3] - 72:1, 72:21, 82:24
place [3] - 113:25, 117:1, 144:8
placed [1] - 18:27
places [1] - 17:26
plainly [1] - 54:29
Plaintiff [2] - 9:25, 11:3
plaintiff [16] - 5:22, 18:1, 19:9, 21:14, 24:13, 39:28, 42:5, 56:14, 56:17, 61:1, 84:18, 84:28, 92:15, 105:1, 119:4, 147:8
PLAINTIFF [2] - 1:7, 2:5
plaintiffs [3] - 21:4, 40:2, 83:29
Plaintiffs [3] - 6:14, 95:21, 105:14
plaintiffs [18] - 21:7, 24:18, 33:9, 33:12, 47:12, 51:20, 58:4, 64:26, 64:28, 70:11, 78:16, 84:26, 108:8, 132:18, 137:2, 138:27, 149:19, 149:21
plaintiffs' [1] - 139:1
plan [1] - 82:13
planned [1] - 152:24
play [1] - 142:16
pleaded [1] - 146:6
pleading [2] - 88:19, 140:20
point [30] - 13:4, 17:12, 21:6, 25:1, 25:8, 25:16, 25:21, 26:2, 31:18, 32:7, 36:19, 37:29, 38:20, 43:16, 44:4, 56:25, 57:28, 67:21, 78:7, 96:11, 96:17, 101:10, 106:2, 106:5, 106:6, 109:24, 113:10, 133:13, 137:3, 141:29
pointed [1] - 40:24
pointedly [1] - 87:13
points [11] - 21:2, 22:10, 22:19, 22:20, 32:5, 32:16, 32:27, 65:5, 65:6, 93:15, 108:15
police [1] - 68:11
policies [4] - 25:19, 75:5, 122:17, 124:22
policy [12] - 26:13, 121:13, 121:15, 121:17, 121:20, 122:1, 122:15, 122:23, 123:4, 143:11
political [2] - 68:26, 82:19
politician [2] - 60:18, 60:27
poor [1] - 152:23
posited [1] - 16:29
position [31] - 5:11, 6:24, 6:29, 7:4, 7:6, 8:14, 13:29, 22:26, 22:27, 25:11, 30:26, 31:4, 31:15, 31:17, 37:22, 40:29, 48:28, 52:6, 57:17, 61:2, 64:25, 78:6, 80:20, 80:28, 81:2, 81:9, 99:2, 114:15, 130:18, 135:24, 145:8
position' [1] - 105:7
positioned [1] - 48:16
positions [2] - 36:16, 123:19
positive [1] - 25:25
possibilities [2] - 98:4, 138:2
possibilities' [1] - 148:9
possibility [1] - 138:2
possible [5] - 32:15, 63:27, 68:4, 98:3, 106:4
possibly [2] - 29:28, 92:25
post [5] - 21:26, 21:27, 46:27, 47:15, 47:18
potential [4] - 18:13, 28:5, 64:19, 100:9
potentially [4] - 52:28, 141:15, 142:2, 147:3
power [6] - 18:26, 19:1, 26:22, 62:8, 68:11, 115:9
powers [2] - 68:19, 68:22
practical [4] - 17:13, 32:27, 32:28, 146:2
practice [13] - 11:27, 12:10, 18:15, 29:11, 41:1, 41:5, 42:26, 73:2, 82:14, 117:11, 122:21, 135:22, 146:9
practices [2] - 72:29, 73:1
practised [1] - 15:4
pre [2] - 91:14, 92:9
pre-empted [2] - 91:14, 92:9
preceded [1] - 60:12
precedent [2] - 86:12, 121:26
precise [2] - 24:5, 119:7
precisely [1] - 44:29
precision [1] - 101:1
preclude [1] - 123:6
precluded [2] - 91:15, 92:10
preclusion [1] - 150:3
preclusive [1] - 93:10
predated [1] - 72:24
predict [1] - 21:22
predominantly [1] - 28:28
prefer [3] - 136:18, 143:24, 143:25
preferable [1] - 152:19
preference [1] - 136:25
prejudiced [1] - 13:12
preliminary [1] - 9:28
prepared [1] - 23:23
prescribed [2] - 25:27, 119:1
presence [1] - 151:19
present [7] - 20:7, 56:29, 75:6, 109:26, 121:7, 146:24
presented [1] - 145:27
presenting [1] - 121:5
Press [1] - 16:13
presumably [2] - 44:12, 65:19
presume [2] - 73:26, 74:7
prevail [1] - 88:10
prevent [1] - 90:13
previous [2] - 42:14, 85:12
primarily [2] - 15:12, 16:6
principally [1] - 134:16
principle [12] - 49:23, 51:14, 61:7, 65:7, 89:13, 89:18, 89:19, 90:4, 103:29, 104:18, 104:29, 143:22
principles [7] - 54:28, 66:26, 73:2, 73:3, 73:4, 82:7, 82:14

privacy [96] - 15:4, 15:11, 16:6, 16:7, 16:18, 19:15, 19:17, 19:19, 19:20, 19:26, 19:27, 20:2, 20:5, 20:7, 20:10, 22:29, 23:7, 25:19, 25:21, 27:29, 29:7, 30:11, 30:13, 37:10, 43:7, 43:10, 43:15, 43:20, 43:24, 43:28, 45:3, 45:22, 46:17, 46:19, 62:11, 62:16, 64:20, 64:21, 66:2, 66:20, 67:15, 67:16, 67:19, 70:29, 71:4, 71:5, 71:13, 71:14, 71:17, 71:23, 71:26, 72:12, 73:2, 73:7, 73:19, 74:8, 74:18, 74:19, 74:21, 74:26, 74:27, 75:5, 76:12, 76:13, 76:14, 76:19, 76:24, 76:28, 77:20, 77:27, 78:3, 78:7, 78:14, 78:16, 78:21, 78:23, 79:29, 80:8, 80:9, 82:16, 82:18, 83:2, 113:17, 114:12, 114:20, 115:2, 115:21, 118:8, 119:5, 119:15, 145:14, 146:22

Privacy [16] - 16:12, 18:7, 18:8, 18:11, 25:20, 25:24, 25:26, 41:20, 46:6, 46:12, 72:16, 82:12, 82:15, 123:20, 128:7, 145:11

PRIVACY [1] - 3:7

Privacy's [1] - 77:8

private [31] - 16:21, 29:2, 30:27, 30:28, 35:18, 36:6, 39:21, 40:11, 44:6, 44:22, 45:4, 45:8, 47:11, 47:25, 53:18, 62:15, 62:26, 64:17, 64:19, 68:1, 68:6, 68:23, 68:25, 68:27, 70:26, 71:2, 71:15, 115:15, 119:20, 124:9

privately [1] - 68:2

problem [18] - 17:14, 17:15, 37:12, 116:29, 127:9, 128:28, 130:10, 130:11, 130:14, 130:16, 132:14, 132:15, 132:16, 135:13, 135:16, 151:25, 152:25

problems [2] - 131:8, 139:29

procedural [47] - 21:12, 21:14, 23:22, 44:10, 44:15, 44:17, 51:1, 51:6, 55:4, 55:8, 55:24, 56:9, 56:10, 56:12, 56:15, 56:19, 56:20, 57:15, 57:22, 61:13, 61:16, 61:18, 61:21, 61:22, 61:29, 62:6, 63:9, 63:10, 63:12, 63:16, 63:17, 63:18, 63:20, 64:9, 65:13, 65:16, 66:17, 66:28, 67:10, 84:19, 91:12, 91:18, 92:8, 93:4, 119:10, 146:12, 149:4

Procedure [4] - 91:2, 91:9, 91:12, 149:14

procedure [1] - 22:4

Procedures [3] - 93:2, 129:9, 150:2

procedures [8] - 55:1, 68:4, 122:6, 142:14, 142:17, 143:18, 143:28, 144:8

procedures' [2] - 68:11, 122:12

proceed [2] - 6:10, 61:5

proceeding [1] - 139:19

proceedings [14] - 5:16, 5:20, 5:29, 6:3, 6:7, 6:16, 7:15, 11:2, 11:21, 24:1, 72:18, 90:28, 115:17, 151:8

proceeds [1] - 27:15

process [1] - 119:14

processing [4] - 23:29, 30:18, 65:23, 80:16

procure [1] - 119:13

procured [1] - 119:3

procuring [1] - 119:5

prodigious [1] - 77:7

produce [2] - 11:28, 67:18

produced [1] - 20:13

production [1] - 20:18

productions [1] - 116:2

PROF [5] - 4:8, 14:3, 30:3, 76:6, 145:21

Prof [49] - 11:24, 11:26, 12:9, 14:1, 14:7, 14:16, 15:14, 15:26, 16:3, 16:25, 18:23, 20:12, 20:15, 20:19, 22:2, 24:20, 26:26, 29:13, 30:6, 31:20, 38:14, 41:6, 41:14, 46:25, 47:17, 62:21, 65:4, 76:9, 93:24, 93:26, 94:9, 94:15, 94:16, 95:14, 100:2, 102:19, 114:14, 117:25, 134:8, 140:2, 140:23, 142:13, 142:18, 142:23, 145:24, 148:18, 148:23, 151:3

professional [1] - 15:16

professor [2] - 37:28, 66:11

Professor [61] - 14:12, 15:24, 32:14, 35:11, 40:1, 43:19, 45:6, 45:17, 45:19, 47:21, 58:13, 59:22, 59:28, 64:8, 67:9, 73:26, 76:22, 77:6, 78:25, 81:1, 81:16, 82:28, 83:10, 83:12, 85:18, 86:29, 87:29, 89:18, 91:5, 91:29, 93:14, 97:20, 99:19, 100:11, 103:5, 103:26, 106:21, 107:6, 109:13, 111:4, 113:11, 116:25, 117:3, 118:28, 120:13, 129:12, 130:3, 130:20, 131:22, 133:19, 136:7, 137:25, 141:2, 141:8, 142:11, 144:27, 145:19, 147:23, 148:14, 149:11, 152:23

professors [3] - 22:16, 27:20, 146:28

program [2] - 89:3, 150:19

programme [21] - 17:17, 17:19, 33:17, 87:3, 87:6, 87:26, 89:1, 89:20, 89:27, 92:11, 92:12, 93:6, 98:24, 132:20, 137:4, 138:9, 139:21, 139:22, 141:10, 149:24

programmes [2] - 97:19, 146:10

programs [2] - 24:17, 141:6

progression [1] - 104:10

promising [1] - 94:26

prong [4] - 21:16, 33:19, 110:4, 134:6

pronouncements [1] - 84:25

proof [15] - 88:19, 88:20, 88:23, 99:1, 111:1, 127:11, 130:11, 132:14, 132:15, 133:27, 134:9, 146:3, 147:18, 147:19

proper [2] - 12:25, 144:2

properly [3] - 16:17, 143:26, 143:27

proposition [10] - 37:7, 96:26, 98:6, 99:4, 99:7, 100:23, 104:13, 108:6, 151:29

propositions [1] - 101:6

prosecution [3] - 60:18, 61:8, 124:8

prospective [2] - 119:12, 119:17

protect [7] - 43:20, 43:24, 45:22, 46:17, 51:26, 68:7, 139:16

protected [11] - 37:4, 37:6, 52:2, 71:26, 72:9, 85:4, 85:8, 108:26, 122:6, 123:3, 128:18

protecting [2] - 72:12, 144:7

Protection [4] - 5:4, 10:4, 17:6, 17:24

PROTECTION [1] - 1:7

protection [31] - 19:18, 19:21, 28:27, 29:7, 37:20, 62:17, 72:14, 73:7, 75:2, 76:11, 76:19, 76:28, 79:6, 79:8, 79:27, 79:29, 80:1, 80:4, 80:22, 81:4, 81:13, 82:10, 82:22, 115:14, 121:5, 123:27, 129:2, 144:11, 151:28

protections [5] - 16:20, 40:3, 82:2, 82:3, 82:5

protects [2] - 44:4, 150:24

prove [19] - 33:9, 34:9, 58:5, 84:16, 92:14, 92:16, 98:29, 99:2, 126:8, 127:6, 127:11, 128:24, 130:18, 132:26, 133:17, 133:21, 134:11, 146:11

proved [4] - 55:10, 55:11, 74:15, 98:10

proven [7] - 19:27, 111:12, 126:15, 127:21, 139:27, 146:5, 146:8

provide [11] - 18:15, 28:9, 44:14, 46:21, 55:28, 56:6, 56:7, 91:17, 94:5, 126:21, 129:24

provided [7] - 40:3, 64:29, 91:9, 91:12, 93:16, 135:13, 147:1

provides [1] - 131:10

providing [6] - 42:29, 43:6, 43:27, 49:9, 84:8, 119:20

proving [2] - 97:12, 146:2

provision [4] - 67:29, 68:10, 126:4, 141:20

provisions [11] - 49:8, 49:15, 65:11, 65:12, 66:13, 67:3, 67:12, 126:13, 126:20, 132:29

public [6] - 5:20, 29:3, 45:4, 47:10, 68:23, 73:25

public-rights [1] - 68:23

publication [1] - 71:24

publications [3] - 15:17, 16:4, 16:11

published [4] - 16:5, 16:13, 46:5, 77:8

pulls [1] - 16:14

purported [3] - 83:29, 84:7, 84:27

purportedly [1] - 95:24

purpose [3] - 69:20, 123:23, 123:29

purposes [7] - 50:20, 50:24, 69:20, 70:12, 84:4, 107:29, 152:8

pursuant [3] - 10:13, 40:10, 91:7

pursue [1] - 60:28
put [12] - 22:16, 59:7,
83:8, 85:6, 95:18,
99:17, 121:24,
131:18, 132:12,
133:22, 141:29,
142:12
puts [1] - 102:29
putting [5] - 7:22,
34:12, 65:3, 115:29,
131:23

Q

qualification [1] -
121:9
qualifications [1] -
14:17
qualifies [1] - 84:5
qualify [1] - 77:29
quantum [1] - 56:7
quarter [1] - 113:21
QUAY [2] - 2:24, 3:3
questions [15] -
12:17, 29:14, 29:15,
29:17, 30:15, 41:10,
41:17, 69:4, 99:19,
128:19, 132:22,
132:25, 144:4,
144:13, 145:26
QUIGLEY [1] - 2:18
quirk [1] - 132:17
quite [11] - 20:7,
25:20, 43:20, 43:23,
43:24, 45:21, 46:16,
51:22, 77:2, 113:4,
128:2
quote [4] - 19:2,
101:1, 122:8, 140:23
quoted [1] - 63:15
quoting [1] - 96:7

R

raise [1] - 32:5
raised [2] - 6:3,
113:8
range [8] - 98:3,
100:9, 109:5, 116:9,
116:10, 116:12,
116:16, 116:17
rather [19] - 9:1,
20:2, 22:14, 28:21,
28:29, 29:11, 47:13,
48:13, 49:11, 58:26,
88:9, 92:7, 94:6,
122:14, 122:20,
139:14, 140:21,
150:6, 151:1

ratify [1] - 121:4
re [2] - 60:27, 152:29
RE [2] - 4:13, 145:21
re-elected [1] - 60:27
re-examination [1] -
152:29
RE-EXAMINED [2] -
4:13, 145:21
rea [1] - 144:18
reaching [1] - 84:2
read [17] - 11:16,
26:4, 36:17, 40:27,
45:1, 56:26, 57:25,
62:13, 66:1, 83:4,
83:5, 104:17, 107:3,
114:10, 114:16,
116:27, 150:12
reader [1] - 113:9
readily [3] - 8:17,
57:1, 64:4
reading [8] - 16:21,
63:17, 89:23, 114:11,
116:21, 116:26,
139:25, 140:24
reads [1] - 104:9
reaffirmed [4] -
62:29, 64:16, 64:18,
65:6

reaffirms [1] - 67:7
real [13] - 5:21,
23:15, 23:18, 30:10,
38:10, 52:25, 52:28,
53:27, 54:7, 62:12,
115:19, 115:20, 146:2
realise [3] - 33:4,
58:7, 58:11
reality [1] - 148:9
really [1] - 75:5
reason [7] - 11:8,
11:21, 32:25, 50:29,
69:14, 105:27, 130:17
reasonable [7] - 6:8,
37:10, 68:3, 97:11,
138:27, 139:28,
140:22
reasonably [1] - 8:14
reasons [4] - 137:2,
137:20, 142:24,
142:26
received [2] - 14:20,
148:18
recent [3] - 19:25,
78:28
recently [1] - 77:14
recklessness [5] -
144:22, 144:23,
144:24, 145:2, 145:3
recognise [15] -
16:17, 16:20, 19:19,
23:24, 24:3, 42:13,

48:7, 48:12, 49:6,
50:6, 50:10, 53:6,
53:16, 62:9, 151:28
recognised [12] -
23:28, 28:9, 43:11,
43:16, 50:21, 62:10,
63:7, 63:8, 119:21,
128:8, 128:12, 135:12
recognises [3] -
41:20, 53:13, 128:18
recognising [2] -
44:13, 88:15
recollection [2] -
32:2, 131:3
reconcilable [1] -
96:1
reconciles [1] -
123:18
record [3] - 24:10,
99:29, 148:21
records [3] - 92:12,
148:3, 148:7
Records [1] - 9:20
recourse [1] - 17:4
Redress [1] - 25:5
redress [1] - 68:24
redressability [4] -
19:13, 90:24, 104:19,
104:22
redressable [1] -
89:4
redressed [2] -
83:19, 127:18
reduce [2] - 108:5,
144:9
reduced [1] - 100:22
refer [19] - 9:19,
13:7, 21:26, 24:14,
26:27, 27:24, 27:27,
38:20, 46:8, 48:26,
49:9, 75:1, 77:6,
77:18, 93:28, 95:16,
123:20, 124:7, 129:17
reference [15] - 5:23,
5:24, 6:4, 6:13, 9:28,
35:2, 39:12, 39:16,
82:15, 86:15, 100:2,
110:3, 112:9, 112:22,
123:8
references [1] -
127:26
referred [18] - 18:18,
25:29, 33:20, 36:3,
49:15, 74:9, 85:23,
86:23, 94:9, 94:10,
94:11, 94:12, 94:13,
94:26, 128:3, 128:14,
132:29, 141:9
referring [8] - 13:18,
16:1, 51:13, 76:21,

112:23, 126:10,
137:13, 140:3
refers [4] - 83:22,
94:3, 95:19, 148:23
refine [2] - 82:20,
115:7
refined [1] - 58:2
refinement [1] -
115:20
reflect [1] - 13:6
reflected [1] - 7:10
reflects [1] - 8:3
Reform [1] - 78:5
reform [1] - 18:14
reformed [1] - 87:16
reforming [2] -
87:14, 87:17
reforms [2] - 76:25,
76:27
refresh [1] - 95:17
refuse [3] - 10:23,
11:23, 12:23
refused [1] - 7:17
regard [8] - 30:26,
41:2, 41:8, 46:20,
80:8, 114:15, 130:16,
153:1
regarded [5] - 42:29,
43:5, 43:27, 44:23,
84:8
regardless [2] -
46:19, 56:1
regime [1] - 115:16
regimes [1] - 73:7
regional [3] - 86:1,
86:7, 120:26
REGISTRAR [1] - 5:4
regrettably [1] - 98:3
regulation [5] - 47:9,
47:10, 66:12, 78:15,
82:17
Rehnquist [1] -
14:28
Reilly [2] - 122:2,
143:12
rejected [4] - 21:4,
61:4, 137:1, 138:3
relate [1] - 10:8
related [4] - 16:19,
58:2, 59:20, 78:18
relates [2] - 10:5,
22:23
relates'.. [1] - 68:6
relating [1] - 84:29
relation [15] - 5:12,
6:23, 6:28, 7:4, 9:26,
10:16, 11:29, 12:5,
18:17, 22:1, 60:20,
66:12, 125:13,
134:17, 136:17

relationship [4] -
42:28, 67:8, 84:7,
149:1
relationships [1] -
16:7
relative [1] - 71:5
relatively [1] - 71:11
release [2] - 118:29,
119:1
relevance [5] -
68:18, 71:4, 92:21,
92:27, 150:6
relevant [19] - 12:16,
14:18, 15:26, 23:9,
24:28, 48:10, 67:3,
92:26, 99:12, 105:5,
108:22, 113:10,
116:28, 116:29,
117:19, 135:4,
140:17, 149:9, 149:26
reliance [1] - 113:25
relied [1] - 94:28
relief [17] - 23:7,
28:6, 28:10, 32:29,
87:20, 90:21, 91:6,
91:17, 91:19, 91:25,
91:29, 92:4, 93:17,
94:5, 101:13, 111:24,
140:28
reliefs [1] - 5:22
reluctant [1] - 73:23
rely [2] - 100:13,
115:25
relying [2] - 149:19,
149:21
remain [1] - 8:28
remains [2] - 121:6,
127:9
remand [1] - 67:28
remanded [4] -
61:12, 61:23, 68:14,
87:24
remanding [2] -
57:21, 57:24
remedial [2] -
115:16, 148:15
remedies [37] - 17:3,
17:7, 17:15, 17:24,
18:5, 18:10, 18:15,
30:16, 30:23, 30:27,
31:2, 31:4, 31:7, 31:9,
31:17, 31:23, 31:28,
31:29, 32:3, 32:16,
49:9, 49:10, 64:29,
75:5, 80:15, 122:14,
122:19, 126:21,
129:19, 131:12,
133:28, 135:13,
141:8, 142:20,
143:17, 143:23,

141:18
SC [10] - 2:5, 2:5, 2:10, 2:11, 2:16, 2:16, 2:21, 2:26, 3:1, 3:7
SCA [1] - 48:27
scale [1] - 146:26
scales [1] - 71:21
Scalia [3] - 52:5, 52:14, 52:19
SCCs [2] - 9:29, 10:13
scheme [2] - 41:19, 139:22
scholar [1] - 48:6
scholarly [5] - 29:5, 44:28, 46:26, 141:1, 151:27
scholars [2] - 66:2, 67:16
scholarship [1] - 16:15
School [2] - 14:13, 14:23
school [1] - 14:22
Schrems [8] - 96:1, 111:27, 112:4, 112:6, 112:11, 112:13, 112:15, 112:23
SCHREMS [1] - 1:14
Schrems' [1] - 10:4
scope [3] - 88:6, 146:25, 150:26
SEAN [1] - 2:17
search [10] - 26:19, 26:23, 88:7, 88:10, 115:28, 117:4, 120:19, 122:5, 150:27, 151:1
searched [1] - 28:26
searches [4] - 27:8, 27:13, 123:7, 150:24
Seattle [1] - 26:18
seclusion [1] - 43:11
second [12] - 11:4, 17:12, 24:2, 25:8, 33:19, 41:25, 46:12, 58:24, 71:11, 94:13, 138:19, 151:11
Second [5] - 97:1, 97:3, 97:21, 145:26, 147:24
second-named [1] - 11:4
secondly [2] - 6:14, 143:22
secret [8] - 24:16, 26:19, 132:6, 139:23, 141:6, 141:7, 146:10, 146:11
secretarial [1] - 20:23
Secretary [1] - 51:25
section [6] - 27:25, 78:4, 83:8, 106:7, 125:8, 148:3
Section [11] - 39:9, 39:12, 40:5, 68:3, 87:4, 132:1, 137:4, 139:5, 141:9, 141:10, 150:27
sector [4] - 45:4, 45:5, 45:8, 82:18
security [7] - 41:4, 43:21, 43:25, 45:22, 46:17, 77:27, 149:27
see [48] - 11:21, 13:9, 28:2, 35:22, 42:18, 45:21, 45:28, 46:16, 50:26, 51:9, 51:11, 53:29, 56:4, 57:6, 57:21, 61:13, 68:20, 83:14, 87:29, 96:6, 100:2, 101:19, 102:7, 103:1, 105:3, 105:12, 106:5, 106:6, 106:16, 108:13, 108:14, 110:21, 110:22, 112:3, 112:7, 112:17, 114:14, 116:26, 119:27, 121:28, 133:11, 135:3, 138:7, 140:29, 147:18, 147:27, 151:13, 152:24
See [1] - 51:6
see' [1] - 52:3
seeing [1] - 101:7
seek [3] - 91:19, 120:23, 121:15
seeking [1] - 86:13
seeks [1] - 9:25
seized [3] - 28:26, 98:20, 146:23
seizure [8] - 88:9, 148:4, 148:6, 151:1, 151:6, 151:10, 151:29, 152:10
seizures [4] - 27:8, 27:13, 123:7, 150:24
sending [2] - 123:5, 139:15
sends [1] - 153:6
sense [7] - 5:21, 43:17, 53:2, 85:2, 107:25, 131:14, 136:11
sentence [4] - 50:27, 106:9, 106:22, 112:21
separate [9] - 32:21, 32:23, 58:12, 60:6, 70:1, 98:17, 131:9, 133:25, 134:8
separation [2] - 68:19, 68:22
separation-of-powers [1] - 68:22
September [2] - 87:18
series [2] - 91:3, 149:8
seriously [1] - 115:26
servant [1] - 25:13
serve [2] - 26:22, 70:11
served [4] - 29:16, 29:20, 29:23, 29:25
service [2] - 15:16, 41:4
Services [3] - 1:22, 3:23, 3:24
SERVICES [1] - 1:32
Serwin [7] - 93:19, 93:21, 94:9, 94:11, 94:13, 94:25, 99:15
set [7] - 5:16, 5:17, 21:8, 41:19, 73:3, 133:12
sets [1] - 49:23
seven [3] - 21:2, 42:3, 67:25
several [7] - 24:24, 24:27, 39:10, 70:3, 70:24, 78:8, 122:3
shake [1] - 117:24
shared [1] - 37:19
Shield [6] - 18:7, 18:8, 18:11, 25:25, 25:26, 41:20
Short [1] - 59:22
short [2] - 15:15, 39:13
show [10] - 33:13, 33:16, 53:19, 53:20, 55:12, 90:14, 90:18, 98:26, 147:8
showing [2] - 29:1, 46:22
shown [5] - 21:20, 90:19, 90:20, 90:22, 130:5
sic [2] - 95:14, 111:16
side [5] - 27:23, 34:13, 56:21, 88:1, 150:10
sign [1] - 118:28
signed [2] - 24:21, 27:18
significance [7] - 24:23, 122:27, 123:12, 143:28, 150:13, 151:4, 151:7
significant [13] - 9:8, 9:10, 41:7, 76:11, 76:19, 78:27, 85:28, 104:8, 123:10, 123:13, 140:10, 146:24, 151:8
significantly [1] - 62:14
similar [2] - 32:1, 106:1
similarly [2] - 33:15, 78:14
simple [10] - 45:8, 53:23, 81:16, 93:14, 94:8, 107:26, 117:3, 117:8, 131:27, 135:27
simpler [1] - 108:5
simplified [1] - 47:5
simplifying [1] - 53:24
SIR [1] - 2:23
sit [1] - 152:21
sits [2] - 86:2, 86:4
situation [5] - 36:23, 130:23, 132:23, 136:12, 153:1
six [7] - 7:12, 58:14, 87:26, 111:20, 113:20, 114:1, 150:10
skeptical [1] - 143:13
skilled [1] - 116:25
slightest [1] - 113:12
slightly [4] - 13:6, 65:4, 104:9, 104:12
slowly [1] - 109:3
SMITH [1] - 2:27
Snowden [5] - 21:27, 92:14, 98:23, 132:17, 146:25
Snowden's [1] - 146:17
so-called [1] - 92:22
social [1] - 16:20
Software [2] - 2:26, 6:23
solicitor [1] - 152:29
SOLICITORS [2] - 2:7, 2:28
solicitors [1] - 16:27
Solove [3] - 46:8, 46:25, 47:17
solution [1] - 146:28
someone [1] - 132:5
sometimes [5] - 33:19, 50:22, 61:21, 85:23, 128:15
soon [1] - 114:12
sooner [1] - 13:25
sorry [53] - 15:19, 27:6, 29:27, 29:29, 34:29, 35:11, 41:1, 41:28, 45:26, 45:29, 50:26, 51:17, 52:17, 59:25, 59:26, 60:16, 65:5, 66:27, 70:19, 70:24, 72:4, 74:12, 77:13, 79:10, 82:25, 86:21, 86:28, 87:17, 89:25, 91:4, 93:1, 95:14, 98:13, 98:27, 98:28, 102:15, 102:20, 103:4, 103:5, 106:17, 106:21, 107:26, 112:1, 113:27, 118:11, 119:28, 126:22, 129:28, 135:18, 136:7, 137:13, 140:24
sorry.. [1] - 144:25
sort [4] - 20:22, 44:21, 80:4, 93:4
sorts [2] - 23:28, 33:28
Sotomayor [1] - 35:13
sought [3] - 5:22, 9:22, 54:29
sounds [1] - 45:27
source [1] - 50:2
SOUTH [1] - 2:13
sparingly [1] - 8:8
speakers [1] - 28:22
speaking [1] - 79:28
special [1] - 71:3
specialisation [1] - 15:9
specialise [2] - 27:20, 113:13
specialised [1] - 86:5
specific [9] - 8:25, 21:9, 21:21, 21:23, 37:29, 67:16, 77:4, 100:11, 141:26
specifically [2] - 54:20, 124:29
spectrum [1] - 145:5
speculate [12] - 56:24, 63:22, 63:23, 65:24, 65:29, 67:21, 114:22, 114:24, 114:25, 129:11, 129:16, 137:8
speculating [1] - 114:15
speculation [5] -

134:2, 134:5, 137:21, 138:2, 148:2
speculative [1] - 137:26
speculative' [1] - 95:23
speech [1] - 60:20
spends [1] - 126:17
spent [2] - 114:10, 126:17
sphere [10] - 30:27, 30:28, 41:2, 41:7, 41:12, 41:18, 44:22, 66:12, 115:2, 145:14
spheres [1] - 70:14
splintering [1] - 101:5
Spokeo [97] - 19:27, 21:11, 22:23, 22:25, 22:27, 22:28, 23:2, 23:5, 23:6, 23:20, 34:14, 39:16, 39:27, 41:24, 44:3, 44:9, 46:29, 47:16, 47:18, 47:19, 48:11, 48:21, 49:21, 50:4, 50:21, 51:13, 53:4, 55:18, 57:28, 58:2, 58:10, 58:19, 59:8, 60:4, 60:8, 60:12, 61:12, 62:4, 62:5, 62:10, 62:25, 63:13, 64:13, 64:15, 64:21, 65:6, 65:18, 66:1, 66:3, 66:4, 66:9, 66:11, 66:18, 66:19, 66:20, 66:21, 66:25, 66:29, 67:6, 67:7, 68:12, 71:7, 83:22, 83:23, 84:11, 84:22, 101:8, 107:14, 111:29, 113:24, 114:3, 114:6, 114:8, 114:18, 114:19, 114:25, 114:26, 114:28, 115:4, 115:5, 115:6, 115:19, 115:20, 115:21, 115:29, 116:5, 116:7, 116:8, 116:10, 117:3, 117:9, 117:28, 118:6, 118:13, 128:11, 134:22
Spokeo's [1] - 115:9
sprawl [1] - 117:1
sprawling [1] - 117:2
SQUARE [1] - 2:28
squarely [1] - 121:4
St [2] - 14:14, 15:7
staffs [1] - 25:14
stage [5] - 8:18, 21:6, 24:14, 86:14, 88:19
stake [1] - 69:5
stand [3] - 99:7, 101:5, 126:15
standard [7] - 9:26, 21:24, 97:12, 138:19, 138:25, 139:28, 149:25
standing [236] - 15:13, 17:22, 17:23, 17:26, 17:28, 18:17, 18:25, 18:28, 19:10, 20:4, 20:6, 21:5, 21:16, 21:18, 22:1, 22:8, 22:29, 24:11, 24:18, 32:6, 32:11, 32:19, 32:21, 32:22, 32:24, 33:7, 33:18, 33:19, 33:21, 33:24, 33:27, 33:29, 34:3, 34:17, 34:25, 35:27, 37:12, 38:2, 39:4, 39:28, 40:2, 40:7, 40:21, 44:8, 44:14, 45:3, 45:12, 47:8, 47:10, 48:7, 48:8, 49:3, 49:4, 49:23, 49:27, 50:3, 50:13, 51:18, 51:19, 51:20, 51:29, 52:13, 53:14, 53:19, 54:16, 55:14, 55:17, 56:10, 56:14, 56:17, 57:12, 57:23, 58:5, 60:17, 61:4, 61:8, 61:11, 61:19, 61:25, 62:2, 62:22, 64:13, 64:16, 64:18, 64:21, 64:22, 64:23, 64:25, 66:5, 66:20, 66:26, 68:12, 68:26, 69:2, 69:27, 70:2, 70:17, 70:27, 71:3, 71:9, 71:14, 74:17, 74:21, 78:11, 78:18, 83:9, 83:15, 83:28, 84:15, 84:27, 85:9, 85:28, 88:9, 88:11, 88:16, 88:25, 89:20, 90:14, 90:23, 90:24, 90:27, 92:7, 92:14, 93:4, 95:22, 95:26, 97:12, 97:28, 98:1, 98:19, 98:23, 99:6, 99:10, 99:15, 99:24, 99:28, 100:14, 100:27, 100:28, 101:10, 101:12, 104:18, 104:29, 106:3, 106:7, 106:12, 106:14, 106:24, 106:26, 108:1, 109:15, 109:29, 110:23, 110:25, 111:24, 114:16, 114:20, 115:7, 116:13, 116:17, 116:29, 118:8, 118:9, 119:9, 120:8, 125:27, 126:2, 126:3, 126:5, 126:18, 126:24, 126:29, 127:4, 127:12, 127:19, 127:25, 127:26, 128:1, 128:4, 128:5, 128:19, 128:23, 128:28, 129:4, 129:8, 129:15, 130:5, 130:7, 130:13, 130:16, 130:22, 130:25, 130:29, 131:5, 131:14, 131:24, 132:4, 132:8, 132:11, 132:13, 132:23, 132:24, 132:27, 133:2, 133:8, 133:17, 133:26, 133:27, 134:7, 134:12, 134:16, 134:19, 134:29, 135:13, 135:16, 137:1, 138:4, 139:25, 140:2, 140:15, 140:25, 140:27, 141:5, 141:27, 146:3, 146:20, 147:3, 147:5, 147:16, 147:21, 149:6, 150:17, 150:29, 151:3, 151:10
standing' [1] - 51:9
stands [1] - 81:20
start [2] - 15:17, 50:26
started [1] - 130:15
state [12] - 19:6, 27:4, 27:7, 46:21, 47:3, 67:7, 70:4, 70:7, 70:22, 106:3, 121:24, 147:20
State [4] - 25:9, 25:11, 25:14, 41:1
State's [1] - 51:25
statement [17] - 15:15, 35:17, 43:29, 47:4, 53:25, 61:1, 73:28, 74:11, 74:13, 74:15, 85:6, 89:12, 94:6, 103:29, 104:7, 123:8, 147:28
statements [1] - 49:5
States [48] - 9:28, 10:2, 10:6, 10:8, 10:14, 10:15, 10:17, 14:19, 14:21, 14:27, 14:29, 15:1, 18:6, 18:25, 18:26, 25:3, 25:22, 28:17, 31:5, 31:10, 31:25, 31:29, 37:8, 37:22, 45:3, 62:12, 64:27, 70:7, 71:17, 73:5, 73:9, 76:14, 78:7, 80:24, 80:26, 81:28, 82:1, 82:16, 82:21, 113:16, 115:16, 119:26, 121:6, 124:11, 124:16, 125:7, 151:17, 151:20
states [10] - 36:9, 39:1, 70:3, 83:11, 99:22, 104:28, 120:26, 121:11, 121:25, 144:7
STATES [1] - 2:21
stating [5] - 38:27, 90:4, 90:7, 90:10, 104:18
status [1] - 121:25
statute [35] - 21:12, 39:5, 39:18, 39:22, 39:25, 40:11, 49:27, 50:20, 53:17, 55:6, 55:12, 55:18, 55:19, 55:23, 60:19, 79:6, 80:4, 80:7, 82:3, 92:1, 93:7, 119:8, 124:17, 125:1, 128:4, 128:5, 129:9, 134:22, 138:18, 139:20, 140:8, 142:10, 148:6, 149:5
statute" [1] - 78:24
statutes [11] - 40:5, 40:6, 46:19, 46:21, 48:26, 72:17, 82:6, 134:25, 139:24, 143:19, 144:15
statutorily [1] - 119:1
statutory [30] - 39:27, 39:29, 40:3, 40:16, 49:8, 49:15, 53:15, 53:16, 58:19, 58:20, 64:29, 67:29, 82:2, 82:9, 87:7, 93:12, 93:27, 126:20, 127:18, 127:27, 128:27, 129:19, 129:24, 131:11, 132:29, 134:20, 134:21, 149:13, 149:22, 150:5
steered [1] - 31:13
stemming [1] - 55:13
stenographic [1] - 1:25
Stenography [3] - 1:21, 3:23, 3:24
STENOGRAPHY [1] - 1:31
step [5] - 45:6, 45:8, 45:20, 46:15
stew [1] - 46:13
Stew [1] - 46:6
sticking [1] - 49:21
still [1] - 140:28
stop [1] - 152:5
stored [2] - 72:15, 128:15
Stored [3] - 26:22, 125:9, 125:13
STREET [3] - 2:13, 2:18, 3:9
stress [1] - 63:20
strict [1] - 144:23
stricter [1] - 70:9
strike [1] - 97:18
striking [2] - 87:3, 87:8
stringent [1] - 111:27
stringently [1] - 62:14
strong [1] - 133:11
stronger [1] - 56:20
struck [2] - 22:5, 87:9
students [3] - 37:14, 100:27, 133:6
studied [1] - 81:15
sub [1] - 99:27
sub-issue [1] - 99:27
subject [14] - 17:8, 24:16, 26:25, 32:17, 38:25, 44:19, 50:18, 66:13, 84:17, 108:12, 133:27, 135:28, 141:16, 142:2
subjects [1] - 142:7
SUBMISSION [2] - 4:7, 13:1
submissions [6] - 7:28, 11:17, 12:16, 13:4, 13:6, 13:17
submit [3] - 63:4, 70:4, 145:2
submitted [1] - 10:26
subordinate [1] - 139:23

subparts [2] - 54:3, 54:4
subsequently [1] - 119:3
subset [1] - 146:18
substantial [18] - 17:26, 17:29, 18:19, 18:22, 18:24, 18:27, 28:16, 28:17, 30:14, 34:13, 64:27, 70:10, 82:2, 124:9, 140:29, 141:5, 141:16, 151:20
substantiality [1] - 143:4
substantive [4] - 31:14, 91:26, 143:8, 149:3
substantively [1] - 102:1
success [2] - 28:8, 97:12
successfully [1] - 124:26
sue [5] - 55:14, 56:14, 56:17, 68:24, 147:11
sued [2] - 124:26
suffer [3] - 48:1, 48:4, 148:12
suffered [12] - 34:8, 53:21, 55:12, 89:2, 96:3, 102:4, 102:23, 103:8, 104:4, 105:3, 105:14, 147:7
suffice [3] - 50:23, 126:14, 126:15
suffices [1] - 68:9
sufficient [16] - 11:1, 13:14, 48:8, 57:16, 60:15, 60:16, 61:10, 61:11, 61:14, 83:17, 85:8, 87:21, 99:5, 107:29, 125:27, 139:19
sufficiently [2] - 53:8, 84:2
suggest [11] - 6:20, 34:15, 43:19, 61:15, 64:8, 64:12, 66:16, 76:15, 96:22, 117:8, 134:3
suggested [2] - 12:17, 148:10
suggesting [5] - 59:29, 108:2, 113:22, 115:27, 131:23
suggests [6] - 48:21, 53:14, 65:21, 98:5, 102:1, 130:21
suit [4] - 33:2, 33:5,

55:16, 70:26
suits [2] - 21:27, 124:27
summarise [1] - 16:5
summary [6] - 18:18, 21:6, 88:18, 88:20, 88:21, 147:19
summer [2] - 23:6, 65:27
Summers.. [1] - 51:6
supervision [1] - 142:15
supplemental [1] - 93:22
supplied [1] - 3:23
support [5] - 44:8, 44:10, 48:8, 53:9, 61:11
supported [1] - 103:22
suppose [3] - 13:12, 116:21, 117:5
Supreme [45] - 14:29, 19:5, 19:25, 21:11, 33:8, 35:25, 36:12, 36:14, 36:18, 38:3, 38:27, 43:4, 48:21, 61:4, 66:29, 72:8, 83:27, 85:19, 86:9, 86:19, 89:8, 95:21, 97:9, 97:14, 97:16, 97:17, 98:18, 109:11, 109:15, 109:16, 111:28, 114:9, 120:24, 121:3, 122:2, 123:2, 123:6, 128:8, 128:17, 130:1, 135:21, 139:18, 141:4, 152:2
surely [1] - 88:11
surmount [1] - 18:2
surprise [5] - 60:7, 61:29, 62:3, 71:9, 138:3
surrounding [1] - 7:27
surveillance [30] - 24:17, 76:25, 76:27, 78:22, 79:15, 79:17, 79:21, 80:1, 80:2, 81:5, 81:14, 87:14, 95:1, 109:6, 109:10, 130:11, 133:15, 134:4, 137:3, 139:4, 139:27, 140:21, 140:28, 141:6, 141:21, 146:10, 146:26, 149:26
Surveillance [2] - 92:22, 149:23

surveillance' [1] - 135:29
surveilled [2] - 146:19, 147:2
surveyed [1] - 32:10
survive [1] - 27:2
suspects [1] - 139:9
sustain [1] - 45:11
SUZANNE [1] - 2:21
Swire [8] - 20:19, 30:10, 93:26, 111:22, 142:13, 142:18, 142:23, 143:3
Swire's [1] - 100:2
swore [1] - 12:19
sworn [1] - 10:11
SWORN [1] - 14:3
Syed [1] - 118:23
synonymous [2] - 42:11, 72:21
system [8] - 70:3, 81:29, 82:1, 82:8, 85:18, 86:12
systemic [7] - 142:14, 142:24, 142:26, 143:5, 143:9, 143:27, 144:2
systems [5] - 69:11, 69:12, 70:6, 70:7, 123:27

T

Tab [3] - 15:26, 15:29, 16:1
tab [4] - 35:10, 41:28, 86:28, 147:24
table [1] - 24:10
take-away [1] - 140:19
takeaway [1] - 141:3
talks [5] - 23:25, 48:11, 53:12, 142:23, 145:12
tame [1] - 25:25
tangible [1] - 42:12
tangible' [1] - 42:12
Tap [3] - 72:11, 72:13, 124:4
target [2] - 137:11, 137:27
targeted [1] - 148:4
task [1] - 20:21
tasked [1] - 20:20
taught [1] - 15:8
taxpayers [1] - 147:10
teach [1] - 15:12
teaching [1] - 15:3

technical [1] - 70:24
technique [1] - 38:25
techniques [1] - 38:21
technological [1] - 76:15
technology [1] - 74:28
teeth [1] - 23:13
telecom [1] - 142:8
telephone [24] - 35:18, 36:6, 36:21, 37:2, 37:5, 38:11, 38:12, 38:15, 72:9, 72:12, 89:1, 89:27, 107:24, 108:25, 128:10, 128:21, 128:22, 128:25, 139:10, 150:18, 150:20, 150:22, 150:23
ten [5] - 26:17, 50:25, 52:23, 83:16, 114:23
tend [3] - 43:14, 97:18, 117:1
term [6] - 23:11, 31:14, 63:12, 63:18, 72:23, 75:1
terms [27] - 13:11, 20:19, 28:21, 32:24, 34:17, 36:26, 38:2, 39:4, 49:26, 50:17, 62:26, 73:2, 74:21, 76:11, 76:17, 78:21, 80:1, 101:2, 101:21, 102:29, 103:28, 107:20, 109:24, 126:20, 131:15, 133:4, 140:14
TERRACE [1] - 2:8
terribly [6] - 70:19, 89:25, 106:21, 113:27, 133:5
terror [1] - 139:9
test [10] - 11:7, 11:9, 47:19, 68:27, 85:9, 85:15, 100:29, 107:11, 110:4, 111:14
testified [1] - 118:4
testify [1] - 79:19
testimonies [1] - 26:15
testimony [3] - 24:28, 66:24, 142:25
textual [1] - 19:19
thankless [1] - 20:21
THE [13] - 1:2, 1:7, 2:16, 4:4, 4:6, 4:12, 5:1, 5:7, 35:10, 76:1,

83:2, 83:3, 153:12
theme [1] - 145:11
themselves [2] - 74:19, 139:24
THEN [1] - 153:12
theories [1] - 16:22
theory [3] - 29:12, 120:8, 149:3
thereby [6] - 61:15, 102:3, 102:20, 102:22, 103:6, 104:3
therefore [12] - 6:10, 8:24, 9:21, 10:23, 11:23, 55:16, 64:12, 86:12, 90:13, 131:7, 146:19, 147:8
thinking [1] - 16:21
third [13] - 10:9, 10:12, 10:14, 17:21, 25:16, 27:9, 36:25, 37:17, 37:20, 37:28, 39:2, 97:21, 152:1
Third [7] - 83:10, 83:11, 85:27, 86:6, 97:2, 97:5, 120:6
Thomas [8] - 14:12, 67:25, 68:17
Thomas' [1] - 67:22
thousands [1] - 45:24
three [16] - 5:13, 19:11, 19:14, 21:3, 22:19, 22:20, 32:16, 32:19, 34:3, 41:27, 83:15, 94:4, 132:12, 132:28, 134:12, 135:12
threshold [3] - 92:21, 144:17, 145:8
thresholds [1] - 24:12
thrust [1] - 13:17
tighten [2] - 66:4, 116:22
tightened [9] - 22:29, 23:1, 23:3, 62:25, 62:28, 115:22, 116:12, 116:17, 116:24
tightening [1] - 115:26
til [3] - 13:13, 13:21, 13:25
timing [2] - 12:19, 13:12
Title [4] - 124:4, 125:10, 125:17, 125:19
TO [2] - 83:2, 83:3
to.. [1] - 152:19

today [5] - 99:24, 111:15, 133:25, 140:4, 142:25
together [3] - 16:14, 20:21, 22:16
token [1] - 25:25
tomorrow [2] - 12:29, 152:21
took [1] - 14:23
top [6] - 82:29, 83:16, 89:26, 95:5, 118:19, 118:22
topic [1] - 37:15
tort [6] - 43:11, 45:20, 46:15, 71:23, 75:3, 75:5
torts [2] - 43:10, 74:27
tortuous [2] - 93:4, 131:3
touchstone [1] - 10:26
traceable [4] - 33:17, 33:20, 78:17, 89:3
track [3] - 113:24, 114:2, 114:4
Trade [1] - 77:26
traditional [2] - 44:13, 54:3
traditionally [7] - 23:27, 42:29, 43:5, 43:27, 71:7, 84:8, 128:12
traditions [1] - 16:17
trail [1] - 102:16
transactional [1] - 37:25
transcript [1] - 1:24
Transcripts [1] - 3:22
transfer [1] - 7:27
transferred [3] - 17:4, 30:19, 80:17
transfers [8] - 9:27, 10:1, 10:5, 10:8, 10:12, 10:13, 10:17, 25:23
travel [1] - 52:1
travelling [1] - 139:13
tread [1] - 73:24
treat [1] - 84:19
treated [1] - 37:1
Trial [1] - 15:21
trial [4] - 9:1, 9:5, 9:14, 9:16
tried [2] - 11:13, 106:2
trivial [2] - 21:12, 21:14

trouble [2] - 101:19, 109:2
true [1] - 128:2
Trump [1] - 25:16
trust [1] - 16:9
Trust [1] - 77:8
try [2] - 114:7, 142:11
trying [5] - 53:22, 96:11, 102:15, 114:28, 131:20
turn [9] - 15:25, 16:24, 20:14, 20:29, 21:22, 42:26, 111:16, 123:9, 124:3
twelve [1] - 86:1
two [19] - 14:26, 19:25, 23:25, 28:8, 32:18, 49:29, 54:3, 54:4, 54:28, 75:9, 98:15, 98:29, 99:7, 99:21, 127:14, 137:7, 144:13, 149:28, 151:7
type [5] - 43:26, 55:8, 62:1, 66:17, 115:14
types [3] - 23:22, 24:3, 36:24
typical [1] - 26:10
typing [1] - 5:10

U

UK [1] - 46:28
ultimate [5] - 49:22, 49:25, 50:17, 57:18, 144:6
ultimately [5] - 33:9, 50:12, 86:9, 86:18, 144:3
unable [1] - 113:24
unaccounted [1] - 21:23
unambiguously [1] - 103:29
unauthorised [2] - 48:27, 48:29
unaware [1] - 33:3
uncertainty [5] - 26:11, 63:21, 64:23, 65:1, 127:25
unclear [4] - 62:17, 67:6, 67:20, 121:6
unconstitutional [2] - 139:4, 149:10
uncritically [1] - 24:9
under [67] - 18:11, 20:10, 23:1, 23:28, 25:5, 25:20, 26:11,

26:22, 27:9, 27:15, 29:8, 31:14, 37:2, 37:16, 40:5, 40:17, 41:20, 42:18, 43:8, 43:17, 54:22, 59:8, 59:9, 60:19, 61:19, 62:16, 67:11, 70:1, 70:17, 71:7, 74:1, 80:29, 87:4, 89:20, 91:1, 91:3, 91:4, 91:5, 111:25, 112:9, 112:28, 117:11, 119:8, 124:26, 126:4, 126:5, 127:21, 128:11, 129:7, 129:14, 130:9, 131:26, 132:8, 132:28, 134:6, 134:19, 137:4, 141:9, 141:22, 141:27, 142:20, 148:3, 149:5, 149:23, 149:24, 151:5, 152:28
underlying [5] - 68:22, 149:1, 149:12, 149:17, 149:18
understood [3] - 29:26, 60:3, 143:16
undisputed [1] - 9:19
undoubtedly [1] - 73:22
unduly [1] - 53:23
uneasy [1] - 75:2
unfairly [1] - 40:25
unfilled [1] - 25:12
unfold [1] - 148:2
unfortunately [1] - 43:13
unhelpful [1] - 51:17
United [44] - 9:27, 10:1, 10:6, 10:8, 10:14, 10:15, 10:17, 14:19, 14:21, 14:27, 14:29, 15:1, 18:6, 18:25, 18:26, 25:4, 25:22, 28:17, 37:8, 37:21, 45:2, 62:12, 64:26, 70:7, 71:17, 73:5, 73:9, 76:14, 78:7, 80:24, 80:26, 81:28, 82:1, 82:16, 82:21, 113:15, 115:16, 119:26, 121:6, 124:11, 124:16, 125:6, 151:17, 151:20
UNITED [1] - 2:21
Universal [1] - 14:23
universal [3] - 49:5,

98:6, 145:17
University [5] - 14:13, 14:21, 14:22, 15:7, 16:13
unlawful [20] - 30:17, 80:16, 84:16, 85:3, 85:7, 87:4, 87:10, 87:11, 89:1, 89:20, 94:19, 96:20, 98:23, 105:17, 125:28, 126:1, 126:13, 127:17, 132:2, 132:7
unlawful [1] - 89:28
unlawfully [12] - 40:20, 65:14, 65:15, 91:11, 126:6, 126:22, 126:23, 127:7, 129:13, 141:16, 142:1
unless [1] - 5:25
unlike [2] - 28:25, 79:4
unlikely [1] - 133:1
unreasonable [3] - 27:13, 150:24, 151:15
unsatisfying [2] - 102:1, 140:29
unsurprisingly [1] - 149:20
UNTIL [1] - 153:12
unusual [8] - 51:16, 130:10, 131:29, 133:12, 133:13, 145:27, 146:16
up [19] - 25:14, 29:29, 41:19, 57:28, 58:6, 58:10, 59:19, 85:20, 86:9, 102:17, 114:9, 115:22, 115:26, 116:6, 116:12, 116:17, 116:22, 116:24, 152:18
update [1] - 72:5
Urquidez [1] - 151:17
US [75] - 7:5, 7:6, 7:26, 11:27, 11:29, 12:5, 12:9, 16:8, 17:5, 17:6, 25:19, 26:11, 26:12, 27:9, 28:18, 29:7, 30:10, 30:13, 30:18, 30:19, 30:23, 31:3, 31:8, 31:18, 35:3, 35:4, 35:5, 37:7, 40:3, 41:26, 43:8, 44:22, 45:20, 46:15, 47:8, 51:27, 52:10, 67:3, 67:11, 69:13, 69:14, 70:14, 70:17, 76:12, 76:20, 79:5,

80:16, 80:28, 80:29, 82:11, 85:18, 86:16, 95:21, 102:20, 102:21, 103:6, 104:2, 104:7, 109:11, 111:28, 113:6, 125:1, 125:11, 125:12, 125:15, 132:8, 135:5, 135:23, 142:21, 145:5, 150:8, 151:22
US [1] - 80:18
USA [1] - 87:24
useful [1] - 18:13
user [1] - 55:29
uses [3] - 48:12, 63:19, 65:15
usual [1] - 6:1

V

v-Clapper [1] - 98:13
vacate [1] - 150:5
vacating [1] - 57:24
Valdez [1] - 95:9
valid [1] - 43:11
validity [2] - 9:29, 129:25
variability [1] - 73:7
variation [1] - 108:13
variations [1] - 21:23
variety [5] - 101:6, 108:14, 113:17, 114:6, 146:12
various [7] - 15:17, 16:4, 40:5, 65:11, 73:6, 77:24
vehicle [5] - 91:13, 91:18, 148:15, 149:4, 149:12
verbal [1] - 24:5
verbatim [1] - 1:24
Verdugo [1] - 151:17
Verdugo-Urquidez [1] - 151:17
Verizon [7] - 92:13, 92:15, 92:20, 92:25, 98:24, 98:25, 146:21
version [1] - 47:5
versus [2] - 71:20, 80:6
vesting [1] - 19:1
vests [1] - 68:10
viable [1] - 150:4
Vidal [2] - 46:27, 46:28
Vidal-Hall [1] - 46:28
view [6] - 6:8, 11:22, 66:27, 116:5, 145:28, 151:4

viewed [1] - 57:29
views [2] - 6:25, 31:27
vindicate [1] - 68:2
viol [1] - 152:10
violate [1] - 144:20
violated [7] - 33:10, 33:14, 55:17, 55:19, 58:19, 119:5
violates [1] - 53:17
violation [36] - 21:12, 21:14, 44:11, 44:15, 44:18, 51:1, 53:15, 53:19, 55:4, 55:8, 55:11, 55:13, 55:23, 56:9, 56:11, 56:13, 56:16, 56:19, 57:22, 61:13, 61:16, 62:1, 63:18, 63:20, 65:13, 66:29, 67:10, 68:2, 68:8, 84:19, 93:7, 119:10, 119:20, 126:12, 151:14, 152:12
violations [12] - 20:10, 23:22, 56:20, 57:15, 61:18, 61:21, 61:22, 62:6, 64:28, 65:17, 68:24, 119:21
Virginia [1] - 14:23
virtually [1] - 79:4
vis-à-vis [1] - 17:14
Vladeck [22] - 18:23, 93:24, 94:3, 94:9, 94:15, 94:16, 95:14, 101:26, 101:29, 102:17, 102:19, 103:14, 103:16, 103:24, 104:7, 106:20, 114:14, 140:23, 141:1, 141:2, 143:3, 148:23
Vladeck's [3] - 103:22, 104:17, 148:18

W

wait [1] - 104:12
waiver [1] - 119:2
waives [1] - 37:20
WALL [2] - 3:3, 3:4
warrant [10] - 120:16, 120:19, 121:14, 121:15, 122:4, 122:24, 122:25, 122:29, 123:4, 143:11
warrants [1] - 26:23

Warshak [6] - 120:14, 120:18, 120:25, 121:11, 128:17, 129:1
WAS [4] - 14:3, 30:3, 145:21, 153:12
Washington [4] - 14:13, 14:22, 15:4, 15:7
watch [1] - 25:27
watching [2] - 72:10, 116:2
Watergate [1] - 82:19
wave [1] - 71:9
ways [2] - 16:18, 66:7
weaker [1] - 28:14
Wednesday [2] - 152:25, 153:10
WEDNESDAY [1] - 153:12
week [3] - 113:16, 118:15, 146:7
weeks [1] - 119:25
well.. [1] - 34:20
weren't [1] - 135:29
western [6] - 79:5, 79:9, 79:27, 80:21, 80:24, 81:3
whatsoever [1] - 148:2
whereas [1] - 81:28
Whilst [1] - 121:3
whilst [1] - 151:26
whole [6] - 20:25, 45:21, 46:16, 53:3, 100:9, 150:19
wide [2] - 108:14, 113:16
Wikimedia [1] - 95:11
wildlife [2] - 51:26, 52:2
willful [1] - 145:12
willfully [1] - 145:10
willfulness [6] - 144:14, 144:16, 144:18, 145:1, 145:3, 145:13
WILLIAM [1] - 2:28
William [1] - 14:28
Wilmer [1] - 15:5
WILTON [1] - 2:8
Wire [3] - 72:11, 72:13, 124:4
wish [3] - 30:17, 59:24, 80:16
wished [1] - 7:25
wishes [1] - 11:14

wishing [1] - 27:3
withdraw [1] - 153:8
withdrawn [1] - 61:3
withdrew [1] - 60:28
withhold [1] - 119:16
witness [2] - 13:29, 153:5
WITNESS [3] - 4:2, 35:10, 83:3
Witness [1] - 74:9
witnesses [2] - 29:24, 29:25
wonder [3] - 24:21, 29:16, 145:28
Word [1] - 20:22
word [10] - 48:13, 72:20, 92:26, 92:29, 107:27, 110:3, 110:6, 115:29, 125:3, 133:11
words [4] - 31:13, 43:15, 103:11, 152:7
world [2] - 27:3, 73:8
would've [6] - 74:3, 115:27, 117:4, 117:8, 134:7, 151:12
wrapped [1] - 102:17
write [1] - 97:17
write [3] - 16:9, 78:12, 112:25
writes [1] - 104:2
writing [2] - 113:19, 122:7
written [10] - 3:24, 11:16, 12:16, 20:24, 45:19, 45:24, 71:25, 73:17, 113:13, 138:21
wrongful [8] - 66:15, 67:1, 67:2, 111:4, 111:6
wrote [6] - 45:27, 46:25, 47:17, 58:24, 77:14, 116:20

Y

Yale [1] - 77:9
year [3] - 72:10, 113:21, 141:19
years [12] - 14:20, 15:6, 15:8, 45:2, 45:25, 76:18, 76:24, 76:26, 77:20, 78:28, 122:3, 142:9
yielded [1] - 117:4
YOUNG [1] - 2:7
yourself [3] - 45:19, 53:21, 71:28

Z

Zip [6] - 63:24, 64:5, 64:6, 65:19, 67:9, 67:17
zip [4] - 57:1, 57:3, 63:27, 67:18

— [2] - 26:13, 148:3