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Transcript of Hearing

Date: October 22, 2021

Case: Fairfax County School Board -v- Tisler, et al.

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IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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FAIRFAX COUNTY SCHOOL BOARD, :
Plaintiff, : Case No.:
v. : 2021-13491
DEBRA TISLER AND CALLIE :
OETTINGER, :
Defendants. :

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HEARING

Fairfax, Virginia

Friday, October 22, 2021

11:04 a.m.

Job: 408941

Pages: 1 -

Transcribed by: Sheila Martin

1 Hearing held at:

2

3 FAIRFAX COUNTY COURTHOUSE

4 4110 Chain Bridge Road

5 Fairfax, Virginia 22030

6 (703) 691-7320

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9 Pursuant to agreement, before Mawira Nyamete,

10 Notary Public in and for the Commonwealth of

11 Virginia.

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A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF, FAIRFAX COUNTY

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C O N T E N T S

PAGE

ARGUMENTS ON INJUNCTION

5

JUDGE'S RULING

41

E X H I B I T S

(None Entered)

1 P R O C E E D I N G S

2 THE COURT: This is Fairfax County School
3 Board versus Debra Tisler and Callie Oettinger, Case
4 Number 2021-134 -- 13491. And if I could have
5 counsel please introduce themselves for the record.

6 MR. BATES: Good morning, Your Honor, Ryan
7 Bates representing Fairfax County School Board.

8 THE COURT: Good morning, sir.

9 MR. SANDEFUR: Good morning, Your Honor,
10 Timothy Sandefur representing the Defendants.

11 THE COURT: Mr. Sandefur, good morning.

12 MR. SANDEFUR: With me at the table is
13 Ketan Bhirud who is my co-counsel.

14 THE COURT: Good morning, sir.

15 MR. BHIRUD: Good morning.

16 MR. BATES: Your Honor, we're here this
17 morning seeking a preliminary injunction that would
18 bar the Defendants from possessing and disseminating
19 the school system's confidential --

20 THE COURT: Yeah, what is the -- neither
21 party told me what this information is, so I -- I
22 have no idea. I'm completely in the dark as to what

1 the confidential student and staff information
2 allegedly is. Is this Social Security numbers for
3 those people or -- without obviously identifying it,
4 what is it?

5 MR. BATES: Right. Tthe -- and we didn't
6 put -- we weren't able to put it in the original
7 complaint because there's so many documents that
8 we're actually still going through it. The latest
9 count is that there were 10,000 items that were
10 unredacted in this production that consist of several
11 categories. And to directly answer your question,
12 the names of -- of students that is protected by the
13 Family and Educational Rights Protection Act, FERPA,
14 the federal law.

15 THE COURT: Names of students in what
16 context? Why would they be on law firm bills?

17 MR. BATES: Because when students engage
18 in special education type cases where they're seeking
19 an IEP and there's a dispute about that, that often
20 results in hearings where outside counsel is
21 retained, lawsuits, also disciplinary proceedings --

22 THE COURT: Lawsuits that have been

1 brought, I mean, you're talking about in court by the
2 parents of those -- of that student?

3 MR. BATES: Yeah -- yeah, that -- exactly,
4 Your Honor.

5 THE COURT: Wouldn't that name be on the
6 caption of the case?

7 MR. BATES: In that circumstance, yes. So
8 that would not be -- well, the circumstance --
9 certain circumstances it is and -- certainly the
10 parent's name. But there are certainly some
11 confidential proceedings -- hearings before that in
12 which it's not public. So that's really what I'm --
13 I should've been more precise. That's what I'm
14 referencing, these nonpublic proceedings involving
15 special education issues, disciplinary proceedings,
16 Your Honor, involving students' names attached with
17 various disciplinary --

18 THE COURT: How is counsel for the school
19 board involved in disciplinary proceedings?

20 MR. BATES: Your Honor, I'm personally not
21 involved with that. All I can speak to is that there
22 is some involvement with outside counsel when

1 necessary.

2 THE COURT: Okay.

3 MR. BATES: And then -- so the student
4 information really ties the students to precisely
5 what is mentioned in these -- in these bills. So
6 those names should've been redacted and, Your Honor,
7 this is not in the complaint, and I heard you loud
8 and clear on the four corners of the complaint. But
9 since you asked specifically, it's -- I believe it's
10 18 different student names that were mentioned in --
11 in -- in the course of this 1300 pages.

12 THE COURT: Eighteen student names?

13 MR. BATES: Eighteen student names, right.

14 THE COURT: And they're mentioned over and
15 over again or?

16 MR. BATES: Yes.

17 THE COURT: Because you said there were
18 10,000 references.

19 MR. BATES: Right. 10,000 -- at least
20 10,000. We stopped counting at 10,000, Your Honor.
21 So 10,000 individual entries that should've been
22 redacted over the course of 1300 pages. So you're

1 talking on average maybe about ten redactions per
2 page. Staff member names, so there were at my count
3 36 staff member names that should've been redacted
4 from these records.

5 THE COURT: And why should staff member
6 names be redacted?

7 MR. BATES: So this is -- these involve,
8 you know, confidential complaint -- well, there's
9 several categories that staff members are involved
10 in. So if a staff member files an internal
11 complaint, let's say a harassment complaint that they
12 allege that -- that they were harassed by some other
13 individual and they filed an internal complaint with
14 the -- the HR department and outside counsel may have
15 been consulted in how to handle that, that staff
16 member's name would've been put in the legal bills.

17 And so it would essentially out a staff
18 member who has a complaint of, it could be
19 discrimination, it could be harassment. And the fear
20 of that is certainly -- if -- if -- if you go to the
21 school system with an employment issue, you expect
22 that to be maintained confidentially. You don't

1 expect that to be out in the public. And the school
2 system has had, as a result of this, certainly
3 complaints from staff members that they feel like
4 they'll be subjected to some type of retaliation in
5 -- in future jobs because it's been -- they've been
6 outed as a complainer here.

7 THE COURT: And do those bills -- do those
8 legal bills say harassment claim by Joe Smith? So if
9 you crossed off Joe Smith you'd still see that there
10 it a harassment claim that the counsel was
11 representing --

12 MR. BATES: Correct, yes.

13 THE COURT: -- the school board in?

14 MR. BATES: Yes, it is. And that's just
15 one example. So internal grievances, investigations,
16 confidential contract negotiations, all of these
17 things pertain to staff that is not public
18 information, it's redactable under VFOIA. It
19 certainly should've -- should've been redacted here.
20 Attorney-client privileged information --

21 THE COURT: Let me ask you. Have you gone
22 through all these 1300 plus pages and redacted what

1 you think should be redacted and provided a redacted
2 version to the Defendants?

3 MR. BATES: That -- yes, yes, Your Honor.
4 That was done a month ago.

5 THE COURT: Okay.

6 MR. BATES: So that's part of our position
7 as to we're a little bit unclear why this is an
8 issue. Everything that is provided that is entitled
9 to them under the law, they have already been
10 provided with. They have the corrected records, and
11 we did that -- there was a lot of effort put into
12 getting that to them immediately. So we really want
13 the unredacted records back.

14 And I just want to mention, Your Honor, I
15 don't think it's in dispute that -- the confidential
16 nature of this information. I hesitate to mention
17 this because it's not in the complaint but the
18 Defendants themselves have in -- in -- in --

19 THE COURT: This isn't a demurrer either
20 so.

21 MR. BATES: Okay. Okay. Well, I will --
22 I will mention it, Your Honor, two -- two things.

1 Number one, they have filed a complaint with the
2 Virginia Department of Education essentially alleging
3 that privacy was breached by all of this. And in --
4 in doing so they allege --

5 THE COURT: Who's -- who filed the
6 complaint?

7 MR. BATES: The Defendants, claiming that
8 the Department of Education needs to investigate
9 Fairfax County Public Schools for this breach of
10 privacy. So on one hand they're complaining about
11 the breach of privacy and -- while on the other hand,
12 they're wanting to retain records that they admit are
13 private. And also, one of the Defendants maintains a
14 website and she referred to this information as
15 "extraordinarily sensitive information about FCPS
16 teachers." And she's right. That's -- that's why
17 we're here and that's why -- that's why we're seeking
18 the return of this.

19 So, Your Honor, what we're -- what we're
20 seeking is the return and the relief we're seeking is
21 -- is laid out in our motion. But just to reiterate
22 it, the return of the unredacted materials, that the

1 -- they enjoined from accessing or using or
2 reproducing these materials, and that they be
3 enjoined from disseminating these materials. And
4 then we have some type of accounting as to where this
5 information has gone so we can fulfill our obligation
6 to locate and remediate this situation.

7 So these type of situations do happen.
8 Mistakes can be made. We certainly did not want to
9 go to this length to file a lawsuit because normally
10 it's -- there's cooperation on the other side. But
11 we've -- despite a dozen attempts to get this
12 information back in a -- in a cooperative manner,
13 those -- those attempts have been rebuffed. And --
14 and just -- just so Your Honor's clear, this is an
15 equity only action. We're not seeking any monetary
16 damages here. We just want the records back.

17 And so I'm going to skip past -- since we
18 -- since we went through a lot of the -- the
19 background details, the sole issue before the court
20 today is whether we can establish the requirements
21 for a preliminary injunction -- temporary injunction.
22 The Defendants in their briefing only contest one of

1 the elements, the likelihood of success on the
2 merits. And so the two claims that we're bringing
3 are detinue and imposition of constructive trust.
4 And we only need to prevail on one of those claims or
5 the Court only find a likelihood of success on one of
6 those claims for us to get the relief that we're
7 seeking.

8 And let me just briefly mention -- because
9 these are -- these are rarely filed claims, Your
10 Honor. Detinue is -- is a claim just to facilitate
11 the return of property. And unlike conversion, which
12 requires an actual theft of property, detinue does
13 not require that. The prongs are outlined in the
14 brief but, essentially, we just need to identify
15 property --

16 THE COURT: It's known you've got it.

17 MR. BATES: Right, right. You've got it,
18 you're not supposed to have it, we need it back. The
19 constructive trust claim is -- is -- is an equitable
20 claim where there's an equitable duty to convey the
21 property of another because the title holder, for
22 them to retain it would be "unjust." And so it's not

1 necessary to establish fraud or any type of improper
2 motive there.

3 And so both of these claims fit precisely
4 into what occurred here. The school system does not
5 contend that they acquired this information by fraud,
6 theft or any improper means, but -- but they possess
7 it and it should be returned to the -- to the
8 rightful owner.

9 Now as mentioned the other three
10 requirements of the preliminary injunction to -- to
11 -- to get a preliminary injunction were not -- were
12 not contested by the Defendants. But just to -- to
13 speak briefly about irreparable harm, here we have to
14 look not only at the irreparable harm suffered by the
15 -- by the school system but also from the parent's
16 and staff's perspective and the students perspective
17 of who's information is really out there and the
18 school system cannot control it.

19 So by nature irreparable harm is -- is
20 when -- when compensation cannot cure what -- what
21 went on, and that's precisely what happened here.
22 There's no monetary damages; there's only irreparable

1 harm. And if an injunction is not granted that would
2 maintain the statue quo, then this information --
3 this information just essentially is gone forever and
4 we feel you cannot put a price tag on somebody's
5 privacy being violated so -- and public interest
6 certainly favors an injunction and it is literally
7 zero harm to Defendants to have -- to have this
8 injunction granted considering the fact that they
9 have what they're legally entitled to.

10 THE COURT: Do you want to address their
11 argument about prior restraint?

12 MR. BATES: Yes.

13 THE COURT: There's no question that they
14 got the documents because the school board employee
15 made a mistake.

16 MR. BATES: Right.

17 THE COURT: So they got -- they got them,
18 as you said, legally. Why is it if I ordered them to
19 return them or not to use them, why isn't that a
20 prior restraint?

21 MR. BATES: So a couple responses to that,
22 Your Honor. To be honest with you, at first, I think

1 the question is do you even have to reach that
2 constitutional issue? Their brief focuses on
3 publication and there's two distinct really issues
4 here, is possession and then publication. If you
5 don't have possession, you can't actually publish
6 them.

7 They don't claim that they have a
8 constitutional right to possess somebody's private
9 information and that's because they can't claim that.
10 They focus on the publishing. So -- so to me the
11 constitutional issue need not even be addressed
12 because if they don't possess it, they can't publish
13 it.

14 And to address the prior restraints, so,
15 you know, courts have indicated several categories of
16 situations where the rule against prior restraints
17 are -- are relaxed. It's -- it's not an absolute.
18 And we site some of those cases in our reply on page
19 five at note four.

20 Another point I want to make, when
21 analyzing this issue, the Court should consider
22 whether Defendants have a first amendment right to

1 even publish. Now we're talking about publication
2 which I don't even think we addressed. But the right
3 to pubic -- to publish the type of information here.
4 Certainly they have a first amendment right to speak
5 out about public expenditures. They have a first
6 amendment right to speak out against elected
7 officials. That -- that has nothing to do with the
8 issues here.

9 THE COURT: Why wouldn't they have a first
10 amendment right to publish information that they've
11 lawfully obtained?

12 MR. BATES: Because -- because of the
13 nature of the information contained in there. The
14 privacy interests here -- a couple points on that.
15 The privacy interests here are extremely high. And
16 we're dealing with individuals who are not public
17 figures. They cite the famous New York Times versus
18 Sullivan case that pertains to public figures.
19 School children are not public figures. Teachers are
20 not public figures. We're not dealing with the
21 Pentagon Papers here, Your Honor. We're dealing with
22 student records, personnel information, privileged

1 information.

2 Now certainly, as I've mentioned, they --
3 they have the corrected records. In those records --
4 in those records, it essentially outlines precisely
5 what they say they want to have in their brief. They
6 say they want to have a "legitimate debate about the
7 waste of taxpayer money."

8 So the corrected invoices, and this is an
9 important part, does not redact the hourly rates of
10 the firms involved. It does not redact the amount of
11 hours, the amount of total -- total bill. That is
12 not redacted at all. What's only redacted is this
13 private information. So that debate can continue.
14 They have a first amendment right to that; they don't
15 have a first amendment right to other people's
16 private information. So with that, Your Honor, I
17 think I will just reserve the remainder of my time
18 for rebuttal.

19 THE COURT: All right. Thank you. Mr.
20 Sandefur?

21 MR. SANDEFUR: Thank you, Your Honor.
22 Everything that they seek in their case and in their

1 motion is an unconstitutional prior restraint. And
2 for that reason this Court cannot avoid the
3 constitutional question. It must inevitably address
4 it in order to attempt to grant them the relief that
5 they seek. They are seeking to ignore the
6 constitutional question, not to avoid it. And
7 they're seeking truly extreme and unprecedented
8 relief here.

9 They mention that an injunction is
10 preserving the status quo. The status quo here is
11 that the documents had already been published and
12 pursuant to their complaint, that information has now
13 been ordered to be removed from the internet which is
14 a plain violation of the prior restraint rule as the
15 Burfoot case says, the case we cite in our brief. In
16 that case the court, the Circuit Court of Virginia
17 said ordering somebody to remove a website was a
18 prior restraint because it foreclosed --

19 THE COURT: What-- what was on that
20 website?

21 MR. SANDEFUR: That was information that
22 was allegedly untrue information about candidates

1 running for office. The court granted an injunction
2 ordering the removal of the website. The next day
3 the Court sua sponte reversed its order on the
4 grounds that that was an unconstitutional prior
5 restraint.

6 THE COURT: But there you have a
7 defamation case.

8 MR. SANDEFUR: That's right, Your Honor.
9 You don't have that excuse here. Here you have
10 information that was lawfully --

11 THE COURT: Right. Here you don't have
12 any -- you don't have any remedy of law that these
13 students don't and these teachers don't for the
14 reviewing of their -- of private information.

15 MR. SANDEFUR: And -- well first of all,
16 Your Honor, our position is no private information
17 has been revealed. However, that's irrelevant. If
18 there's one case I would ask this Court to read as it
19 considers this case it's Florida Star versus B.J.F.
20 That's a case both of -- both we and they cited, but
21 we don't talk about it a lot in the brief so I want
22 to talk about what happened in that case.

1 In that case, there was a newspaper that
2 every day sent a reporter down to the press room at
3 the police precincts to get the published -- public
4 reports about crimes that had occurred. The statute
5 prohibited the publication of a rape victim's name.
6 However, through an accident, the police department
7 put the name in the report that they then put into
8 this room. The reporter obtained that report and
9 published it in the newspaper and the newspaper was
10 sued for damages.

11 Now, note that that was not a prior
12 restraint case. So our case is even stronger than
13 that case. Nevertheless the Supreme Court said the
14 first amendment guaranteed the right to publish that
15 information. It said, "even though B.J.F.'s identity
16 would never have come to light were it not for the
17 erroneous if inadvertent inclusion by the department,
18 the first amendment nonetheless protected it."

19 Whereas -- again, "whereas here the
20 government has failed to police itself in
21 disseminating information, it is clear that the
22 imposition of damages for its subsequent publication

1 cannot be said to be of narrowly tailored means of
2 safeguarding anonymity."

3 And even more importantly the court said,
4 "once the government has placed information in the
5 public domain, reliance must rest upon the judgment
6 of those who decide what to publish and hopes for
7 restitution must rest upon the willingness of the
8 government to compensate victims for their loss of
9 privacy and protect them from the consequences of the
10 government's mishandling of it's -- of this
11 information."

12 So the Supreme Court has said already that
13 even though that was a case involving privacy
14 interests of the highest order, nevertheless the
15 first amendment prohibited a prior restraint against
16 publication.

17 THE COURT: And that's cited in your
18 brief?

19 MR. SANDEFUR: Yes, Your Honor. And I
20 have the citation here if you'd like. It's 491US524.
21 And both parties cite it in their briefs. Of course,
22 there are plenty of other cases. The opposing

1 counsel mentioned the Pentagon Papers case. In the
2 Pentagon's Papers case the government could easily
3 have said well we're not asking for a prior
4 restraint, Your Honor, we're just asking that the
5 documents be returned because "if they don't have
6 them they can't publish them."

7 THE COURT: [unintelligible] different
8 situation. I mean, that -- those were documents
9 about the -- the internal functioning of the
10 government. These are documents, at least
11 apparently, I haven't seen them, but according to the
12 school board, these are documents with names of -- of
13 students among other things and apparently names of
14 staff, but let's focus for the moment on the
15 students.

16 How is that a public interest that a --
17 that a particular student is dealing with the school
18 board in a disciplinary procedure unlike the Pentagon
19 Papers, which dealt with how the government was lying
20 to the public about how the Vietnam War was being
21 conducted?

22 MR. SANDEFUR: To begin with, Your Honor,

1 we are not obligated to justify what we want to
2 publish and why. It is their burden, first of all,
3 they're the Plaintiffs, they're the moving party.
4 And this is a prior restraint, so they bear an
5 extremely high burden to be extremely precise of what
6 information they want censored and why. But the
7 answer to that, Your Honor, is --

8 THE COURT: Well, they've -- they've met
9 the burden, haven't they, in the sense of telling you
10 specifically -- because they've said here's the
11 redacted version, so the unredacted version --

12 MR. SANDEFUR: Not at all, Your Honor.
13 No, we are not required to take them at their word
14 that they have redacted the correct information.
15 They've simply said here's how -- this is as precise
16 --

17 THE COURT: No, you said you had to know
18 what it was they thought shouldn't be published and
19 they told you that.

20 MR. SANDEFUR: Well, and why. And then we
21 have a right to challenge those censorship demands in
22 a court that -- to -- to review whether they're

1 legitimate and we have not had that opportunity.

2 THE COURT: Okay. But you do know what it
3 is they want to censor?

4 MR. SANDEFUR: We have their documents
5 with their redactions in them.

6 THE COURT: Okay. And you can put them
7 side by side and say okay, they want to censor that
8 --

9 MR. SANDEFUR: Well, I'm not even sure
10 about that, Your Honor. Counsel said that we -- that
11 they were done with the redactions, but at the same
12 time they said that they were still going through the
13 documents. They've said that there's 10,000
14 instances they want to censor out of only 1300 pages.
15 That's ten redactions per document. That's a great
16 deal of work.

17 And on top of that they allege in their
18 complaint that they spent a month redacting the
19 documents before they turned them over to us. So
20 that's a lot of taking them at their word, which we
21 are not required to do under prior restraint
22 doctrine. This is how specific they get --

1 THE COURT: I don't know what you mean by
2 taking them at their word. Haven't they given you --
3 you're saying -- I'm not clear now. Haven't they
4 given you redacted versions and said this is okay?

5 MR. SANDEFUR: On their -- they want us to
6 take them -- take them on their word that those
7 redactions are appropriate. See, they not -- they're
8 not only required to [crosstalk] --

9 THE COURT: I understand that. But -- but
10 they're -- but they're telling you what it is --

11 MR. SANDEFUR: Yes.

12 THE COURT: -- that they believe should be
13 redacted.

14 MR. SANDEFUR: Yes, Your Honor, that is
15 correct. But here --

16 THE COURT: And you could as easily as
17 they could sit down and compare the two a page at a
18 time and say, well, I disagree this should redacted.

19 MR. SANDEFUR: I don't think that's true,
20 Your Honor, because these redactions are black marks,
21 right, they're just black boxes and one could guess
22 it's a name --

1 THE COURT: But you have the unredacted
2 version and --

3 MR. SANDEFUR: Yes, Your Honor.

4 THE COURT: -- you can see exactly what
5 was redacted.

6 MR. SANDEFUR: Yes, that is true. If --

7 THE COURT: And you -- and you could say,
8 well, I think line seven on page eight shouldn't be
9 redacted, but I don't have any problem with line
10 eight on page eight.

11 MR. SANDEFUR: And that's as specific as
12 they get. And in their complaint they say the
13 confidential information included -- I'm sorry, this
14 is in their motion. The confidential information
15 includes among other things information that
16 identifies specific students and staff members,
17 information subject to attorney client and work
18 product privileges, and banking information.

19 Banking -- what is banking information?
20 Is that the name of their bank? Is that the account
21 number? Is that copies of checks? We don't know and
22 if we get a document that's just got black marks on

1 it, we have to search through the documents, find the
2 copy --

3 THE COURT: And you haven't done that?

4 MR. SANDEFUR: No, we have not done that,
5 Your Honor, nor are we obligated to by the first
6 amendment. They have the burden of overcoming the
7 extremely high presumption against the
8 constitutionality of prior restraint. Now Your Honor
9 asked about names.

10 THE COURT: So meaning in your view they
11 would have to take -- go through page by page --

12 MR. SANDEFUR: Yes.

13 THE COURT: -- saying we redacted this
14 because.

15 MR. SANDEFUR: Exactly right, Your Honor,
16 just like a privilege log. Now, I want to get to
17 some -- because I mentioned privilege logs I want to
18 talk about some of the cases that they cite. They
19 cite six cases by my count, Hirsch and Hirsch, ACLU,
20 QLT (phonetic), and then three cases in the footnote
21 that were cited.

22 Now, Hirsch and Hirsch and ACLU were --

1 had both -- they're unpublished cases from the
2 federal courts that don't have anything -- don't say
3 anything about Virginia law. The QLT case, there was
4 no opposition even filed in that case to the
5 censorship motion. And then the cases that they --
6 the other cases that they cite are Central Hudson,
7 which concerned commercial speech. Bosley versus Wet
8 N Wild, which also concern commercial speech. And
9 Seattle Times, which involved a protective order in
10 ongoing litigation.

11 And this case didn't involve any ongoing
12 litigation so none of those cases apply. Nor is
13 there any statutory grounds for their demand. There
14 -- maybe there might be something under Virginia
15 FOIA, but in their motion -- or in their reply brief
16 they expressly disclaim that. They say we're not
17 relying on Virginia FOIA. And there's nothing --

18 THE COURT: Mr. Sandefur, let's -- let's
19 say for sake of argument, because I haven't seen the
20 documents. But let's say for sake of argument that
21 one of the things they wanted redacted was the Social
22 Security number of a student. Is that -- is that

1 something that you believe that they couldn't do?

2 MR. SANDEFUR: No, Your Honor. I think
3 that Florida versus B.J.F. leaves open the
4 possibility that that would be an appropriate
5 censorship demand. They would have to put together a
6 motion to that effect and file it. They have not
7 done that. What they have done is demand not only
8 the -- the return -- they use the term return, what
9 they mean is the destruction of this information.

10 Not only is the destruction of this
11 information and the adjoining of the Defendants or
12 anyone on their behalf from reproducing or -- or
13 disseminating it, but they want a full counting of
14 the full identity of anyone to whom they provided a
15 portion. Now this website was already published.
16 We're supposed to find out everybody who read the
17 website?

18 THE COURT: How long was it up?

19 MR. SANDEFUR: I don't know the honor --
20 Your honor, it was just a few weeks at most because
21 the --

22 THE COURT: So I mean a zillion people

1 could have seen it.

2 MR. SANDEFUR: Our understanding is that
3 at least one reporter from The Washington Post has
4 already seen this information prior to them filing
5 their lawsuit. So who knows who has this
6 information.

7 Now the -- to get back to your questions
8 about names and why would people need to know these
9 names, two answers to that, Your Honor. In Smith
10 versus Daily Mail, the Supreme Court said there was a
11 constitutional right to publish the names of juvenile
12 delinquents even though West Virginia state law
13 prohibited that. The names were inadvertently
14 disclosed by the government, the newspaper published
15 that, they were sued for damages and the US Supreme
16 Court said that would violate the first amendment.
17 And again, that's not a prior restraint case so our
18 case is even stronger than that case.

19 But the second answer is, as opposing
20 counsel mentioned, my clients believe that the school
21 district is careless with the privacy rights of
22 students. They filed a complaint to that effect, he

1 says. Well, what better way to prove that than by
2 showing copies of the documents that the school board
3 itself admits it handed over in violation of privacy
4 rules. So there's a legitimate public interest in
5 seeing these documents.

6 My clients are extremely sensitive to the
7 concerns about privacy and for that reason they took
8 it upon themselves to redact documents before they
9 published these, so no confidential information has
10 been published. I can affirm that to the Court.
11 There's no evidence before the Court. This is just a
12 preliminary injunction hearing where they bear a
13 tremendous burden that they have not discharged.

14 Now one final point I'd like to make, Your
15 Honor, is Your honor mentioned that this is not a
16 demurrer. It's true this is not a demurrer.
17 Nevertheless Virginia law provides that whenever it
18 is brought to the attention of a court of equity that
19 the bill does not state a case for proper relief in
20 equity, the court must dismiss it even if the
21 defendant hasn't raised that objection. That's Hagan
22 versus Dungannon Lumber Company that we cite in our

1 brief.

2 So this Court should not only deny the
3 motion, it should revoke the September 30th motion,
4 and it should immediately dismiss this case as being
5 inappropriate for equitable relief. They said it's
6 only an equitable case and there's no equities here.
7 As for what elements of injunctive relief we dispute,
8 it's not just that we dispute that its success on
9 merits. We also dispute that it is in the public
10 interest to violate the first amendment.

11 The Supreme Court has said in the Elrod
12 versus Burns that the deprivation of first amendment
13 rights, even for a short period, inflicts an
14 irreparable injury. Well, that's my clients who face
15 the possibility of irreparable injury if they get
16 their way. This is unconstitutional and the Court
17 should not -- should deny the motion.

18 MR. BATES: Judge, I want to start with
19 one of Mr. Sandefur's final points which was -- and
20 I'm honestly quite surprised if not shocked that I
21 heard nothing is -- and I think I heard him right,
22 nothing is confidential in what we're talking about

1 that was produced. And I'm confused because given
2 what the statements that the Plaintiffs made to the
3 Virginia Department of Education, and I've got a copy
4 of that, Your Honor, if you'd like to see it, the
5 statements that I mentioned on the website, but also
6 the fact that Mr. Sandefur just mentioned that when
7 they published some of these invoices on their
8 website, they took the extra step to do their own
9 redactions.

10 Why would you do your own redactions if
11 nothing was confidential? And I'm -- if this were an
12 evidentiary -- evidentiary hearing, I believe that
13 the Defendants would they themselves say that it --
14 agree that the names in there are certainly
15 confidential and --

16 THE COURT: What they -- what they did
17 publish on the website, but now has been taken down,
18 as I understand it, your position is that some of
19 that information was in fact confidential in your
20 view, despite the fact that they did on their own
21 redact some -- some confidential information?

22 MR. BATES: Correct, they -- they --

1 THE COURT: But they didn't redact it all.

2 MR. BATES: Correct, that's right. As far
3 as we can tell, and I believe as -- as to what was
4 posted on the website, I think it was less than 1000
5 was actually posted on the website. And from what we
6 can tell, they redacted all of the student names, and
7 we appreciate that. But there was a lot of
8 information of the other type more so attorney-
9 client, work product that was not redacted. So I
10 find that to be rather interesting. But it's -- it's
11 -- it's important because it's an important sort of
12 point of this case.

13 Just to -- to address a few things,
14 everything is a prior restraint. I believe that's
15 what I heard. That's not true, in our brief we
16 addressed that, that it's the -- the -- the case, the
17 Florida case that was mentioned addresses sort of the
18 case by case determination that is -- is required to
19 be done in that circumstance. There was the Virginia
20 Beach case --

21 THE COURT: Before we get to that, have
22 you finished the redactions and as far as you're

1 concerned what you -- you've sent the redacted
2 version and that's it; you're happy with that?

3 MR. BATES: Yes, that -- and that was done
4 a month ago. So yes, that's --

5 THE COURT: There's no -- nothing further
6 coming from your side saying, oh, oops, page 83 we
7 should have redacted this?

8 MR. BATES: No, no further redactions,
9 Your Honor. The Burfoot case that's mentioned is --
10 is not in this circumstance. In that circumstance
11 where the judge apparently realized his or her own
12 mistake, ordered the website to be removed and then
13 reversed that order. Judge Oblon -- Oblon, who
14 issued essentially what is a TRO here, never ordered
15 the website to be removed. Defendant Oettinger has a
16 website. She continues to maintain that website. It
17 was just temporarily the dissemination of this
18 material.

19 The Pentagon Papers case, Your Honor made
20 some good points there about the documents in that
21 case were of public importance. Again, we're dealing
22 with student records. If you might have the records

1 of a seven-year-old who might be involved in a
2 disciplinary proceeding, I -- I -- I struggle to
3 understand the public interest in that. If that were
4 my seven-year-old I'd struggle to understand why they
5 -- they believe they have the right to do that.
6 Again, that was public interest and there was -- it
7 involved public figures. That's not what we have
8 here.

9 He mentioned about it's not a
10 constitutional issue if they take -- if they take
11 issue with some of our redactions. There's -- the
12 VFOIA deals with that. There's specific exemptions -
13 -

14 THE COURT: Well, doesn't it -- it becomes
15 a constitutional issue at this point because you're
16 asking an agent of the government, that is this
17 court, to tell them to do something. I mean, you
18 made it into a constitutional issue, the school board
19 did by releasing information and then asking for it
20 back. That -- that leaked over the constitutional
21 barrier.

22 MR. BATES: Right. So if it -- if it were

1 -- were -- were the Court to find that there's a
2 constitutional issue in play despite sort of the
3 publish versus possess issue, then again we have to
4 look at what is the type of material? In the Florida
5 Star case it's a case by case determination, not
6 everything is a prior restraint. Let's look at
7 what's at issue here. We're not talking about a
8 matter of public importance, again. We're talking
9 about insignificant student records.

10 THE COURT: Right. I understand -- I
11 understand that point.

12 MR. BATES: So but if -- if they take
13 issue -- and you're right, Your Honor, to point out
14 the fact that they have both sets of those documents.
15 Judge Oblon did not order them to not look at those
16 documents. He just ordered them not to disseminate
17 them. So they have had a month since this case is
18 pending to do that cross-referencing and say we take
19 an issue with this. This is -- this is suppressing
20 our constitutional rights to speech.

21 They've had that opportunity for a month.
22 They've got nothing in the record that would show

1 there was any type of improper redactions. And we
2 take the position if they feel like that occurred,
3 they have their rights under VFOIA that they can
4 pursue themselves. That is not an issue in this
5 case. And I think I'll --

6 THE COURT: What -- what's your response
7 to Mr. Sandefur's argument that you have a burden --
8 the initial burden of showing why you redacted
9 information before they have to respond to the
10 redactions?

11 MR. BATES: That's under VFOIA. That's --
12 that's a VFOIA issue. That's not a -- that's not a
13 first amendment constitutional issue. It's --

14 THE COURT: Why isn't it? Because
15 otherwise you're asking me to restrain them from
16 publishing that information.

17 MR. BATES: Because we have met our
18 evidentiary burden to show we're not dealing with
19 matters of public importance, and that has been
20 completely ignored on an evidentiary standpoint.
21 They -- they've -- we've met that burden to show that
22 it doesn't fall -- it's not -- that we're not dealing

1 with the Pentagon Papers here. And then yes, at that
2 point, they've got to show something. You just can't
3 claim you've got a first amendment right to
4 everything. And they have the materials, they've had
5 the opportunity, and there's nothing in the record.
6 We're just dealing with arguments from counsel on
7 this.

8 THE COURT: Okay.

9 MR. BATES: With that, Judge, I believe
10 I'm out of time so thank you.

11 THE COURT: All right. Thank you.
12 Gentlemen, I'm going to take this matter under
13 advisement. I will be in touch with you as quickly
14 as I possibly can. Thank you for the interesting
15 argument and like I said, we'll be in touch as soon
16 as possible.

17 MR. SANDEFUR: Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Sandefur.

19 MR. BATES: Thank you, Your Honor.

20 UNKNOWN: Your Honor, I just have one
21 question about that. So that means the -- the
22 existing TRO or, whatever it is, is still in place --

1 THE COURT: Correct.

2 UNKNOWN: Got it.

3 THE COURT: As Judge -- just for the
4 record, Judge Oblan's order of September 30th,
5 essentially with a TRO, remains in place.

6 (Off the record at 11:39 a.m.)

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CERTIFICATE OF NOTARY PUBLIC

I, Mawira Nyamete, the officer before whom the foregoing proceedings were taken, do hereby certify that said proceedings were electronically recorded by me; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

Notary Registration No.: 7936703

My Commission Expires: 4/30/2025

Mawira Nyamete

Mawira Nyamete, Court Reporter

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I, Sheila Martin, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by and of the parties to this case and have no interest, financial or otherwise, in its outcome.



Sheila Martin

October 29, 2021

A			
ability	addressed	also	argument
44:5	17:11, 18:2,	6:21, 12:13,	16:11, 30:19,
able	36:16	15:15, 30:8,	30:20, 40:7,
6:6	addresses	34:9, 35:5	41:15
about	36:17	amendment	arguments
6:19, 7:1, 9:1,	adjoining	17:22, 18:4,	4:3, 41:6
12:10, 12:15,	31:11	18:6, 18:10,	arizona
15:13, 16:11,	admit	19:14, 19:15,	3:15
18:1, 18:5,	12:12	22:14, 22:18,	asked
19:6, 20:22,	admits	23:15, 29:6,	8:9, 29:9
21:21, 21:22,	33:3	32:16, 34:10,	asking
22:4, 24:9,	advisement	34:12, 40:13,	24:3, 24:4,
24:20, 26:10,	41:13	41:3	38:16, 38:19,
29:9, 29:18,	affirm	among	40:15
30:3, 32:8,	33:10	24:13, 28:15	attached
33:7, 34:22,	again	amount	7:16
37:20, 38:9,	8:15, 22:19,	19:10, 19:11	attempt
39:7, 39:9,	32:17, 37:21,	analyzing	20:4
41:21	38:6, 39:3, 39:8	17:21	attempts
absolute	against	andrews	13:11, 13:13
17:17	17:16, 18:6,	3:5	attention
accessing	23:15, 29:7	anonymity	33:18
13:1	agent	23:2	attorney
accident	38:16	another	28:17, 36:8
22:6	ago	14:21, 17:20	attorney-client
according	11:4, 37:4	answer	10:20
24:11	agree	6:11, 25:7,	audio
account	35:14	32:19	44:5
28:20	agreement	answers	avenue
accounting	2:9	32:9	3:6
13:4	all	any	average
aclu	7:21, 10:16,	13:15, 15:1,	9:1
29:19, 29:22	10:22, 12:3,	15:6, 21:12,	avoid
acquired	19:12, 19:19,	28:9, 30:11,	20:2, 20:6
15:5	21:15, 25:2,	30:13, 40:1,	
act	25:12, 36:1,	43:6	B
6:13	36:6, 41:11	anyone	back
action	allege	31:12, 31:14	11:13, 13:12,
13:15	9:12, 12:4,	anything	13:16, 14:18,
actual	26:17	30:2, 30:3	32:7, 38:20
14:12	allegedly	apparently	background
actually	6:2, 20:22	24:11, 24:13,	13:19
6:8, 17:5, 36:5	alleging	37:11	bank
address	12:2	apply	28:20
16:10, 17:14,	already	30:12	banking
20:3, 36:13	11:9, 20:11,	appreciate	28:18, 28:19
	23:12, 31:15,	36:7	bar
	32:4	appropriate	5:18
		27:7, 31:4	

<p>barrier 38:21</p> <p>bates 3:4, 5:6, 5:7, 5:16, 6:5, 6:17, 7:3, 7:7, 7:20, 8:3, 8:13, 8:16, 8:19, 9:7, 10:12, 10:14, 11:3, 11:6, 11:21, 12:7, 14:17, 16:12, 16:16, 16:21, 18:12, 34:18, 35:22, 36:2, 37:3, 37:8, 38:22, 39:12, 40:11, 40:17, 41:9, 41:19</p> <p>beach 36:20</p> <p>bear 25:4, 33:12</p> <p>because 6:7, 6:17, 8:17, 10:5, 11:17, 13:9, 14:8, 14:21, 16:14, 17:9, 17:12, 18:12, 20:18, 24:5, 25:10, 27:20, 29:14, 29:17, 30:19, 31:20, 35:1, 36:11, 38:15, 40:14, 40:17</p> <p>becomes 38:14</p> <p>been 6:22, 7:13, 8:6, 8:21, 9:3, 9:15, 9:16, 10:5, 10:19, 11:9, 13:13, 20:11, 20:13, 21:17, 33:10, 35:17, 40:19</p>	<p>before 2:9, 7:11, 13:19, 26:19, 33:8, 33:11, 36:21, 40:9, 43:2</p> <p>begin 24:22</p> <p>behalf 3:2, 3:10, 31:12</p> <p>being 16:5, 24:20, 34:4</p> <p>believe 8:9, 27:12, 31:1, 32:20, 35:12, 36:3, 36:14, 38:5, 41:9</p> <p>best 44:5</p> <p>better 33:1</p> <p>bhirud 5:13, 5:15</p> <p>bill 19:11, 33:19</p> <p>bills 6:16, 8:5, 9:16, 10:7, 10:8</p> <p>bit 11:7</p> <p>black 27:20, 27:21, 28:22</p> <p>board 1:3, 3:3, 5:3, 5:7, 7:19, 10:13, 16:14, 24:12, 24:18, 33:2, 38:18</p> <p>bosley 30:7</p> <p>both 15:3, 21:20, 23:21, 30:1, 39:14</p>	<p>boxes 27:21</p> <p>breach 12:9, 12:11</p> <p>breached 12:3</p> <p>bridge 2:4</p> <p>brief 14:14, 17:2, 19:5, 20:15, 21:21, 23:18, 30:15, 34:1, 36:15</p> <p>briefing 13:22</p> <p>briefly 14:8, 15:13</p> <p>briefs 23:21</p> <p>bringing 14:2</p> <p>brought 7:1, 33:18</p> <p>burden 25:2, 25:5, 25:9, 29:6, 33:13, 40:7, 40:8, 40:18, 40:21</p> <p>burfoot 20:15, 37:9</p> <p>burns 34:12</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>callie 1:6, 3:11, 5:3</p> <p>can't 17:5, 17:9, 17:12, 24:6, 41:2</p> <p>candidates 20:22</p> <p>cannot 15:18, 15:20, 16:4, 20:2, 23:1</p> <p>caption 7:6</p>	<p>careless 32:21</p> <p>case 1:4, 5:3, 7:6, 18:18, 19:22, 20:15, 20:16, 21:7, 21:18, 21:19, 21:20, 21:22, 22:1, 22:12, 22:13, 23:13, 24:1, 24:2, 30:3, 30:4, 30:11, 32:17, 32:18, 33:19, 34:4, 34:6, 36:12, 36:16, 36:17, 36:18, 36:20, 37:9, 37:19, 37:21, 39:5, 39:17, 40:5, 43:6, 44:8</p> <p>cases 6:18, 17:18, 23:22, 29:18, 29:19, 29:20, 30:1, 30:5, 30:6, 30:12</p> <p>categories 6:11, 9:9, 17:15</p> <p>cancel 26:3, 26:7, 26:14</p> <p>censored 25:6</p> <p>ensorship 25:21, 30:5, 31:5</p> <p>central 30:6</p> <p>certain 7:9</p> <p>certainly 7:9, 7:10, 9:20, 10:2, 10:19, 13:8, 16:6, 18:4,</p>
--	--	---	---

Transcript of Hearing
 Conducted on October 22, 2021

<p>19:2, 35:14 certificate 43:1, 44:1 certify 43:3, 44:2 chain 2:4 challenge 25:21 checks 28:21 children 18:19 circuit 1:1, 20:16 circumstance 7:7, 7:8, 36:19, 37:10 circumstances 7:9 citation 23:20 cite 18:17, 20:15, 23:21, 29:18, 29:19, 30:6, 33:22 cited 21:20, 23:17, 29:21 claim 10:8, 10:10, 14:10, 14:19, 14:20, 17:7, 17:9, 41:3 claiming 12:7 claims 14:2, 14:4, 14:6, 14:9, 15:3 clear 8:8, 13:14, 22:21, 27:3 client 28:17, 36:9 clients 32:20, 33:6, 34:14</p>	<p>co-counsel 5:13 come 22:16 coming 37:6 commercial 30:7, 30:8 commission 43:11 commonwealth 2:10 company 33:22 compare 27:17 compensate 23:8 compensation 15:20 complainer 10:6 complaining 12:10 complaint 6:7, 8:7, 8:8, 9:8, 9:11, 9:13, 9:18, 11:17, 12:1, 12:6, 20:12, 26:18, 28:12, 32:22 complaints 10:3 completely 5:22, 40:20 concern 30:8 concerned 30:7, 37:1 concerns 33:7 conducted 24:21 confidential 5:19, 6:1, 7:11, 9:8, 10:16, 11:15, 28:13, 28:14,</p>	<p>33:9, 34:22, 35:11, 35:15, 35:19, 35:21 confidentially 9:22 confused 35:1 consequences 23:9 consider 17:21 considering 16:8 considers 21:19 consist 6:10 constitutional 17:2, 17:8, 17:11, 20:3, 20:6, 32:11, 38:10, 38:15, 38:18, 38:20, 39:2, 39:20, 40:13 constitutionality 29:8 constructive 14:3, 14:19 consulted 9:15 contained 18:13 contend 15:5 contest 13:22 contested 15:12 context 6:16 continue 19:13 continues 37:16 contract 10:16 control 15:18</p>	<p>conversion 14:11 convey 14:20 cooperation 13:10 cooperative 13:12 copies 28:21, 33:2 copy 29:2, 35:3 corners 8:8 coronado 3:14 correct 10:12, 25:14, 27:15, 35:22, 36:2, 42:1, 44:3 corrected 11:10, 19:3, 19:8 could 5:4, 9:18, 9:19, 24:2, 27:16, 27:17, 27:21, 28:7, 32:1 couldn't 31:1 counsel 5:5, 6:20, 7:18, 7:22, 9:14, 10:10, 24:1, 26:10, 32:20, 41:6, 43:5, 44:7 count 6:9, 9:2, 29:19 counting 8:20, 31:13 county 1:1, 1:3, 2:3, 3:2, 5:2, 5:7, 12:9 couple 16:21, 18:14</p>
--	--	--	---

Transcript of Hearing
Conducted on October 22, 2021

<p>course 8:11, 8:22, 23:21 court 1:1, 5:2, 5:8, 5:11, 5:14, 5:20, 6:15, 6:22, 7:1, 7:5, 7:18, 8:2, 8:12, 8:14, 8:17, 9:5, 10:7, 10:13, 10:21, 11:5, 11:19, 12:5, 13:19, 14:5, 14:16, 16:10, 16:13, 16:17, 17:21, 18:9, 19:19, 20:2, 20:16, 20:19, 21:1, 21:3, 21:6, 21:11, 21:18, 22:13, 23:3, 23:12, 23:17, 24:7, 25:8, 25:17, 25:22, 26:2, 26:6, 27:1, 27:9, 27:12, 27:16, 28:1, 28:4, 28:7, 29:3, 29:10, 29:13, 30:18, 31:18, 31:22, 32:10, 32:16, 33:10, 33:11, 33:18, 33:20, 34:2, 34:11, 34:16, 35:16, 36:1, 36:21, 37:5, 38:14, 38:17, 39:1, 39:10, 40:6, 40:14, 41:8, 41:11, 41:18, 42:1, 42:3, 43:14 courthouse 2:3</p>	<p>courts 17:15, 30:2 crimes 22:4 cross-referencing 39:18 crossed 10:9 crosstalk 27:8 cure 15:20</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>daily 32:10 damages 13:16, 15:22, 22:10, 22:22, 32:15 dark 5:22 day 21:2, 22:2 dc 3:7 deal 26:16 dealing 18:16, 18:20, 18:21, 24:17, 37:21, 40:18, 40:22, 41:6 deals 38:12 dealt 24:19 debate 19:6, 19:13 debra 1:6, 3:10, 5:3 decide 23:6 defamation 21:7 defendant 33:21, 37:15 defendants 1:8, 3:10,</p>	<p>5:10, 5:18, 11:2, 11:18, 12:7, 12:13, 13:22, 15:12, 16:7, 17:22, 31:11, 35:13 delinquents 32:12 demand 30:13, 31:5, 31:7 demands 25:21 demurrer 11:19, 33:16 deny 34:2, 34:17 department 9:14, 12:2, 12:8, 22:6, 22:17, 35:3 deprivation 34:12 despite 13:11, 35:20, 39:2 destruction 31:9, 31:10 details 13:19 determination 36:18, 39:5 detinue 14:3, 14:10, 14:12 different 8:10, 24:7 directly 6:11 disagree 27:18 discharged 33:13 disciplinary 6:21, 7:15, 7:17, 7:19, 24:18, 38:2 disclaim 30:16</p>	<p>disclosed 32:14 discrimination 9:19 dismiss 33:20, 34:4 dispute 6:19, 11:15, 34:7, 34:8, 34:9 disseminate 39:16 disseminating 5:18, 13:3, 22:21, 31:13 dissemination 37:17 distinct 17:3 district 32:21 doctrine 26:22 document 26:15, 28:22 documents 6:7, 16:14, 20:11, 24:5, 24:8, 24:10, 24:12, 26:4, 26:13, 26:19, 29:1, 30:20, 33:2, 33:5, 33:8, 37:20, 39:14, 39:16 doing 12:4 domain 23:5 done 11:4, 26:11, 29:3, 29:4, 31:7, 36:19, 37:3 down 22:2, 27:17, 35:17 dozen 13:11</p>
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Transcript of Hearing
 Conducted on October 22, 2021

<p>dungannon 33:22</p> <p>duty 14:20</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>easily 24:2, 27:16</p> <p>east 3:14</p> <p>education 6:18, 7:15, 12:2, 12:8, 35:3</p> <p>educational 6:13</p> <p>effect 31:6, 32:22</p> <p>effort 11:11</p> <p>eight 28:8, 28:10</p> <p>eighteen 8:12, 8:13</p> <p>either 11:19</p> <p>elected 18:6</p> <p>electronically 43:4</p> <p>elements 14:1, 34:7</p> <p>elrod 34:11</p> <p>employed 43:6, 44:7</p> <p>employee 16:14</p> <p>employment 9:21</p> <p>engage 6:17</p> <p>enjoined 13:1, 13:3</p> <p>entered 4:10</p> <p>entitled 11:8, 16:9</p> <p>entries 8:21</p>	<p>equitable 14:19, 14:20, 34:5, 34:6</p> <p>equities 34:6</p> <p>equity 13:15, 33:18, 33:20</p> <p>erroneous 22:17</p> <p>esquire 3:4, 3:12</p> <p>essentially 9:17, 12:2, 14:14, 16:3, 19:4, 37:14, 42:5</p> <p>establish 13:20, 15:1</p> <p>even 17:1, 17:11, 18:1, 18:2, 22:12, 22:15, 23:3, 23:13, 26:9, 30:4, 32:12, 32:18, 33:20, 34:13</p> <p>every 22:2</p> <p>everybody 31:16</p> <p>everything 11:8, 19:22, 36:14, 39:6, 41:4</p> <p>evidence 33:11</p> <p>evidentiary 35:12, 40:18, 40:20</p> <p>exactly 7:3, 28:4, 29:15</p> <p>example 10:15</p> <p>excuse 21:9</p> <p>exemptions 38:12</p>	<p>existing 41:22</p> <p>expect 9:21, 10:1</p> <p>expenditures 18:5</p> <p>expires 43:11</p> <p>expressly 30:16</p> <p>extra 35:8</p> <p>extraordinarily 12:15</p> <p>extreme 20:7</p> <p>extremely 18:15, 25:5, 29:7, 33:6</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 34:14</p> <p>facilitate 14:10</p> <p>fact 16:8, 35:6, 35:19, 35:20, 39:14</p> <p>failed 22:20</p> <p>fairfax 1:1, 1:3, 1:13, 2:3, 2:5, 3:2, 5:2, 5:7, 12:9</p> <p>fall 40:22</p> <p>family 6:13</p> <p>famous 18:17</p> <p>far 36:2, 36:22</p> <p>favors 16:6</p> <p>fcps 12:15</p> <p>fear 9:19</p>	<p>federal 6:14, 30:2</p> <p>feel 10:3, 16:4, 40:2</p> <p>ferpa 6:13</p> <p>few 31:20, 36:13</p> <p>figures 18:17, 18:18, 18:19, 18:20, 38:7</p> <p>file 13:9, 31:6</p> <p>filed 9:13, 12:1, 12:5, 14:9, 30:4, 32:22</p> <p>files 9:10</p> <p>filing 32:4</p> <p>final 33:14, 34:19</p> <p>financial 43:7, 44:9</p> <p>find 14:5, 29:1, 31:16, 36:10, 39:1</p> <p>finished 36:22</p> <p>firm 6:16</p> <p>firms 19:10</p> <p>first 16:22, 17:22, 18:4, 18:5, 18:9, 19:14, 19:15, 21:15, 22:14, 22:18, 23:15, 25:2, 29:5, 32:16, 34:10, 34:12, 40:13, 41:3</p> <p>fit 15:3</p>
--	--	---	---

Transcript of Hearing
 Conducted on October 22, 2021

<p>five 17:19 florida 21:19, 31:3, 36:17, 39:4 focus 17:10, 24:14 focuses 17:2 foia 30:15, 30:17 footnote 29:20 foreclosed 20:18 foregoing 43:3, 44:3 forever 16:3 four 8:8, 17:19 fraud 15:1, 15:5 friday 1:14 fulfill 13:5 full 31:13, 31:14 functioning 24:9 further 37:5, 37:8 future 10:5</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gentlemen 41:12 getting 11:12 given 27:2, 27:4, 35:1 go 9:20, 13:9, 29:11 going 6:8, 13:17,</p>	<p>26:12, 41:12 goldwater 3:13 gone 10:21, 13:5, 16:3 good 5:6, 5:8, 5:9, 5:11, 5:14, 5:15, 37:20 government 22:20, 23:4, 23:8, 24:2, 24:10, 24:19, 32:14, 38:16 government's 23:10 grant 20:4 granted 16:1, 16:8, 21:1 great 26:15 grievances 10:15 grounds 21:4, 30:13 guaranteed 22:14 guess 27:21</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hagan 33:21 hand 12:10, 12:11 handed 33:3 handle 9:15 happen 13:7 happened 15:21, 21:22 happy 37:2</p>	<p>harassed 9:12 harassment 9:11, 9:19, 10:8, 10:10 harm 15:13, 15:14, 15:19, 16:1, 16:7 heard 8:7, 34:21, 36:15 hearing 1:12, 2:1, 33:12, 35:12 hearings 6:20, 7:11 held 2:1 here 5:16, 10:6, 10:19, 12:17, 13:16, 15:4, 15:13, 15:21, 17:4, 18:3, 18:8, 18:14, 18:15, 18:21, 20:8, 20:10, 21:9, 21:11, 22:19, 23:20, 27:15, 34:6, 37:14, 38:8, 39:7, 41:1 here's 25:10, 25:15 hereby 43:3, 44:2 hesitate 11:16 high 18:15, 25:5, 29:7 highest 23:14 hirsch 29:19, 29:22 holder 14:21</p>	<p>honest 16:22 honestly 34:20 honor 5:6, 5:9, 5:16, 7:4, 7:16, 7:20, 8:6, 8:20, 11:3, 11:14, 11:22, 12:19, 14:10, 16:22, 18:21, 19:16, 19:21, 21:8, 21:16, 23:19, 24:4, 24:22, 25:7, 25:12, 26:10, 27:14, 27:20, 28:3, 29:5, 29:8, 29:15, 31:2, 31:19, 31:20, 32:9, 33:15, 35:4, 37:9, 37:19, 39:13, 41:17, 41:19, 41:20 honor's 13:14 hopes 23:6 hourly 19:9 hours 19:11 however 21:17, 22:6 hr 9:14 hudson 30:6 hunton 3:5</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 5:22 identifies 28:16 identify 14:14</p>
---	--	---	--

Transcript of Hearing
Conducted on October 22, 2021

<p>identifying 6:3 identity 22:15, 31:14 iep 6:19 ignore 20:5 ignored 40:20 immediately 11:12, 34:4 importance 37:21, 39:8, 40:19 important 19:9, 36:11 importantly 23:3 imposition 14:3, 22:22 improper 15:1, 15:6, 40:1 inadvertent 22:17 inadvertently 32:13 inappropriate 34:5 included 28:13 includes 28:15 inclusion 22:17 indicated 17:15 individual 8:21, 9:13 individuals 18:16 inevitably 20:3 inflicts 34:13 information 5:21, 6:1, 8:4,</p>	<p>10:18, 10:20, 11:16, 12:14, 12:15, 13:5, 13:12, 15:5, 15:17, 16:2, 16:3, 17:9, 18:3, 18:10, 18:13, 18:22, 19:1, 19:13, 19:16, 20:12, 20:21, 20:22, 21:10, 21:14, 21:16, 22:15, 22:21, 23:4, 23:11, 25:6, 25:14, 28:13, 28:14, 28:15, 28:17, 28:18, 28:19, 31:9, 31:11, 32:4, 32:6, 33:9, 35:19, 35:21, 36:8, 38:19, 40:9, 40:16, 44:6 initial 40:8 injunction 4:3, 5:17, 13:21, 15:10, 15:11, 16:1, 16:6, 16:8, 20:9, 21:1, 33:12 injunctive 34:7 injury 34:14, 34:15 insignificant 39:9 instances 26:14 institute 3:13 interest 16:5, 24:16, 33:4, 34:10, 38:3, 38:6,</p>	<p>43:7, 44:8 interesting 36:10, 41:14 interests 18:14, 18:15, 23:14 internal 9:10, 9:13, 10:15, 24:9 internet 20:13 introduce 5:5 investigate 12:8 investigations 10:15 invoices 19:8, 35:7 involve 9:7, 30:11 involved 7:19, 7:21, 9:9, 19:10, 30:9, 38:1, 38:7 involvement 7:22 involving 7:14, 7:16, 23:13 irrelevant 21:17 irreparable 15:13, 15:14, 15:19, 15:22, 34:14, 34:15 issue 9:21, 11:8, 13:19, 17:2, 17:11, 17:21, 38:10, 38:11, 38:15, 38:18, 39:2, 39:3, 39:7, 39:13, 39:19, 40:4, 40:12, 40:13 issued 37:14</p>	<p>issues 7:15, 17:3, 18:8 items 6:9 itself 22:20, 33:3</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>job 1:20 jobs 10:5 joe 10:8, 10:9 judge 34:18, 37:11, 37:13, 39:15, 41:9, 42:3, 42:4 judge's 4:4 judgment 23:5 justify 25:1 juvenile 32:11</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>ketan 5:13 know 9:8, 17:15, 25:17, 26:2, 27:1, 28:21, 31:19, 32:8 known 14:16 knows 32:5 kurth 3:5</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>laid 12:21 latest 6:8</p>
--	---	---	--

Transcript of Hearing
Conducted on October 22, 2021

<p>law 6:14, 6:16, 11:9, 21:12, 30:3, 32:12, 33:17 lawfully 18:11, 21:10 lawsuit 13:9, 32:5 lawsuits 6:21, 6:22 leaked 38:20 least 8:19, 24:10, 32:3 leaves 31:3 legal 9:16, 10:8 legally 16:9, 16:18 legitimate 19:6, 26:1, 33:4 length 13:9 less 36:4 let's 9:11, 24:14, 30:18, 30:20, 39:6 light 22:16 likelihood 14:1, 14:5 line 28:8, 28:9 literally 16:6 litigation 30:10, 30:12 little 11:7 llp 3:5 locate 13:6</p>	<p>log 29:16 logs 29:17 long 31:18 look 15:14, 39:4, 39:6, 39:15 loss 23:8 lot 11:11, 13:18, 21:21, 26:20, 36:7 loud 8:7 lumber 33:22 lying 24:19</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made 13:8, 16:15, 35:2, 37:19, 38:18 mail 32:10 maintain 16:2, 37:16 maintained 9:22 maintains 12:13 make 17:20, 33:14 manner 13:12 many 6:7 marks 27:20, 28:22 martin 1:22, 44:2, 44:14 material 37:18, 39:4</p>	<p>materials 12:22, 13:2, 13:3, 41:4 matter 39:8, 41:12 matters 40:19 mawira 2:9, 43:2, 43:14 maybe 9:1, 30:14 mean 7:1, 24:8, 27:1, 31:9, 31:22, 38:17 meaning 29:10 means 15:6, 23:1, 41:21 member 9:2, 9:3, 9:5, 9:10, 9:18 member's 9:16 members 9:9, 10:3, 28:16 mention 11:14, 11:16, 11:22, 14:8, 20:9 mentioned 8:5, 8:10, 8:14, 15:9, 19:2, 24:1, 29:17, 32:20, 33:15, 35:5, 35:6, 36:17, 37:9, 38:9 merits 14:2, 34:9 met 25:8, 40:17, 40:21 might 30:14, 37:22,</p>	<p>38:1 mishandling 23:10 mistake 16:15, 37:12 mistakes 13:8 moment 24:14 monetary 13:15, 15:22 money 19:7 month 11:4, 26:18, 37:4, 39:17, 39:21 more 7:13, 23:3, 36:8 morning 5:6, 5:8, 5:9, 5:11, 5:14, 5:15, 5:17 most 31:20 motion 12:21, 20:1, 28:14, 30:5, 30:15, 31:6, 34:3, 34:17 motive 15:2 moving 25:3 must 20:3, 23:5, 23:7, 33:20</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>name 7:5, 7:10, 9:16, 22:5, 22:7, 27:22, 28:20 names 6:12, 6:15, 7:16, 8:6, 8:10,</p>
---	--	--	---

Transcript of Hearing
Conducted on October 22, 2021

<p>8:12, 8:13, 9:2, 9:3, 9:6, 24:12, 24:13, 29:9, 32:8, 32:9, 32:11, 32:13, 35:14, 36:6 narrowly 23:1 nature 11:16, 15:19, 18:13 necessary 8:1, 15:1 need 14:4, 14:14, 14:18, 17:11, 32:8 needs 12:8 negotiations 10:16 neither 5:20, 43:5, 44:7 never 22:16, 37:14 nevertheless 22:13, 23:14, 33:17 new 18:17 newspaper 22:1, 22:9, 32:14 next 21:2 none 4:10, 30:12 nonetheless 22:18 nonpublic 7:14 normally 13:9 notary 2:10, 43:1, 43:10 note 17:19, 22:11</p>	<p>nothing 18:7, 30:17, 34:21, 34:22, 35:11, 37:5, 39:22, 41:5 number 5:4, 12:1, 28:21, 30:22 numbers 6:2 nw 3:6 nyamete 2:9, 43:2, 43:14</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objection 33:21 oblan's 42:4 obligated 25:1, 29:5 obligation 13:5 oblon 37:13, 39:15 obtained 18:11, 22:8 obviously 6:3 occurred 15:4, 22:4, 40:2 october 1:14, 44:15 oettinger 1:7, 3:11, 5:3, 37:15 office 21:1 officer 43:2 officials 18:7 often 6:19 oh 37:6</p>	<p>okay 8:2, 11:5, 11:21, 26:2, 26:6, 26:7, 27:4, 41:8 once 23:4 one 10:15, 12:1, 12:10, 12:13, 13:22, 14:4, 14:5, 21:18, 27:21, 30:21, 32:3, 33:14, 34:19, 41:20 ongoing 30:10, 30:11 only 13:15, 13:22, 14:4, 14:5, 15:14, 15:22, 19:12, 26:14, 27:8, 31:7, 31:10, 34:2, 34:6 oops 37:6 open 31:3 opportunity 26:1, 39:21, 41:5 opposing 23:22, 32:19 opposition 30:4 order 20:4, 21:3, 23:14, 30:9, 37:13, 39:15, 42:4 ordered 16:18, 20:13, 37:12, 37:14, 39:16 ordering 20:17, 21:2 original 6:6</p>	<p>other 9:12, 12:11, 13:10, 15:9, 19:15, 23:22, 24:13, 28:15, 30:6, 36:8 otherwise 40:15, 43:7, 44:9 out 9:17, 10:1, 12:21, 15:17, 18:5, 18:6, 26:14, 31:16, 39:13, 41:10 outcome 43:8, 44:9 outed 10:6 outlined 14:13 outlines 19:4 outside 6:20, 7:22, 9:14 over 8:14, 8:15, 8:22, 26:19, 33:3, 38:20 overcoming 29:6 own 35:8, 35:10, 35:20, 37:11 owner 15:8</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>page 4:2, 9:2, 17:18, 27:17, 28:8, 28:10, 29:11, 37:6 pages 1:21, 8:11, 8:22, 10:22, 26:14</p>
---	---	---	---

Transcript of Hearing
 Conducted on October 22, 2021

<p>papers 18:21, 24:1, 24:2, 24:19, 37:19, 41:1 parent's 7:10, 15:15 parents 7:2 part 11:6, 19:9 particular 24:17 parties 23:21, 43:6, 44:8 party 5:21, 25:3 past 13:17 pending 39:18 pennsylvania 3:6 pentagon 18:21, 24:1, 24:18, 37:19, 41:1 pentagon's 24:2 people 6:3, 31:22, 32:8 people's 19:15 period 34:13 personally 7:20 personnel 18:22 perspective 15:16 pertain 10:17 pertains 18:18 phoenix 3:15</p>	<p>phonetic 29:20 place 41:22, 42:5 placed 23:4 plain 20:14 plaintiff 1:4, 3:2 plaintiffs 25:3, 35:2 play 39:2 please 5:5 plenty 23:22 plus 10:22 point 17:20, 33:14, 36:12, 38:15, 39:11, 39:13, 41:2 points 18:14, 34:19, 37:20 police 22:3, 22:6, 22:20 portion 31:15 position 11:6, 21:16, 35:18, 40:2 possess 15:6, 17:8, 17:12, 39:3 possessing 5:18 possession 17:4, 17:5 possibility 31:4, 34:15 possible 41:16 possibly 41:14</p>	<p>post 32:3 posted 36:4, 36:5 precincts 22:3 precise 7:13, 25:5, 25:15 precisely 8:4, 15:3, 15:21, 19:4 preliminary 5:17, 13:21, 15:10, 15:11, 33:12 preserving 20:10 press 22:2 presumption 29:7 prevail 14:4 price 16:4 prior 16:11, 16:20, 17:14, 17:16, 20:1, 20:14, 20:18, 21:4, 22:11, 23:15, 24:3, 25:4, 26:21, 29:8, 32:4, 32:17, 36:14, 39:6 privacy 12:3, 12:10, 12:11, 16:5, 18:14, 18:15, 23:9, 23:13, 32:21, 33:3, 33:7 private 12:13, 17:8, 19:13, 19:16, 21:14, 21:16 privilege 29:16, 29:17</p>	<p>privileged 10:20, 18:22 privileges 28:18 problem 28:9 procedure 24:18 proceeding 38:2 proceedings 6:21, 7:11, 7:14, 7:15, 7:19, 43:3, 43:4, 44:4 produced 35:1 product 28:18, 36:9 production 6:10 prohibited 22:5, 23:15, 32:13 prongs 14:13 proper 33:19 property 14:11, 14:12, 14:15, 14:21 protect 23:9 protected 6:12, 22:18 protection 6:13 protective 30:9 prove 33:1 provided 11:1, 11:8, 11:10, 31:14 provides 33:17 pubic 18:3</p>
---	---	---	---

Transcript of Hearing
Conducted on October 22, 2021

<p>public 2:10, 7:12, 10:1, 10:17, 12:9, 16:5, 18:5, 18:16, 18:18, 18:19, 18:20, 22:3, 23:5, 24:16, 24:20, 33:4, 34:9, 37:21, 38:3, 38:6, 38:7, 39:8, 40:19, 43:1 publication 17:3, 17:4, 18:1, 22:5, 22:22, 23:16 publish 17:5, 17:12, 18:1, 18:3, 18:10, 22:14, 23:6, 24:6, 25:2, 32:11, 35:17, 39:3 published 20:11, 22:3, 22:9, 25:18, 31:15, 32:14, 33:9, 33:10, 35:7 publishing 17:10, 40:16 pursuant 2:9, 20:12 pursue 40:4 put 6:6, 9:16, 11:11, 16:4, 22:7, 26:6, 31:5</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qlt 29:20, 30:3 question 6:11, 16:13, 17:1, 20:3, 20:6, 41:21</p>	<p>questions 32:7 quickly 41:13 quite 34:20 quo 16:2, 20:10</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raised 33:21 rape 22:5 rarely 14:9 rates 19:9 rather 36:10 reach 17:1 read 21:18, 31:16 realized 37:11 really 7:12, 8:4, 11:12, 15:17, 17:3 reason 20:2, 33:7 rebuffed 13:13 rebuttal 19:18 record 5:5, 39:22, 41:5, 42:4, 42:6, 44:3 recorded 43:4, 44:4 recording 44:6 records 9:4, 11:10, 11:13, 12:12, 13:16, 18:22,</p>	<p>19:3, 19:4, 37:22, 39:9 redact 19:9, 19:10, 33:8, 35:21, 36:1 redactable 10:18 redacted 8:6, 8:22, 9:3, 9:6, 10:19, 10:22, 11:1, 19:12, 25:11, 25:14, 27:4, 27:13, 27:18, 28:5, 28:9, 29:13, 30:21, 36:6, 36:9, 37:1, 37:7, 40:8 redacting 26:18 redactions 9:1, 26:5, 26:11, 26:15, 27:7, 27:20, 35:9, 35:10, 36:22, 37:8, 38:11, 40:1, 40:10 references 8:18 referencing 7:14 referred 12:14 registration 43:10 reiterate 12:21 related 43:5, 44:7 relaxed 17:17 releasing 38:19 reliance 23:5 relief 12:20, 14:6,</p>	<p>20:4, 20:8, 33:19, 34:5, 34:7 relying 30:17 remainder 19:17 remains 42:5 remediate 13:6 remedy 21:12 removal 21:2 remove 20:17 removed 20:13, 37:12, 37:15 reply 17:18, 30:15 report 22:7, 22:8 reporter 22:2, 22:8, 32:3, 43:14 reports 22:4 representing 5:7, 5:10, 10:11 reproducing 13:2, 31:12 require 14:13 required 25:13, 26:21, 27:8, 36:18 requirements 13:20, 15:10 requires 14:12 reserve 19:17 respond 40:9 response 40:6</p>
--	---	--	--

Transcript of Hearing
Conducted on October 22, 2021

<p>responses 16:21 rest 23:5, 23:7 restitution 23:7 restrain 40:15 restraint 16:11, 16:20, 20:1, 20:14, 20:18, 21:5, 22:12, 23:15, 24:4, 25:4, 26:21, 29:8, 32:17, 36:14, 39:6 restraints 17:14, 17:16 result 10:2 results 6:20 retain 12:12, 14:22 retained 6:21 retaliation 10:4 return 12:18, 12:20, 12:22, 14:11, 16:19, 31:8 returned 15:7, 24:5 revealed 21:17 reversed 21:3, 37:13 review 25:22 reviewing 21:14 revoke 34:3 right 6:5, 8:13, 8:19, 12:16,</p>	<p>14:17, 16:16, 17:8, 17:22, 18:2, 18:4, 18:6, 18:10, 19:14, 19:15, 19:19, 21:8, 21:11, 22:14, 25:21, 27:21, 29:15, 32:11, 34:21, 36:2, 38:5, 38:22, 39:10, 39:13, 41:3, 41:11 rightful 15:8 rights 6:13, 32:21, 34:13, 39:20, 40:3 road 2:4, 3:14 room 22:2, 22:8 rule 17:16, 20:14 rules 33:4 ruling 4:4 running 21:1 ryan 3:4, 5:6</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>s 22:15 safeguarding 23:2 said 8:17, 16:18, 20:17, 22:13, 22:15, 23:1, 23:3, 23:12, 24:3, 25:10, 25:15, 25:17, 26:10, 26:12, 26:13, 27:4,</p>	<p>32:10, 32:16, 34:5, 34:11, 41:15, 43:4, 44:4 sake 30:19, 30:20 same 26:11 sandefur 3:12, 5:9, 5:10, 5:11, 5:12, 19:20, 19:21, 20:21, 21:8, 21:15, 23:19, 24:22, 25:12, 25:20, 26:4, 26:9, 27:5, 27:11, 27:14, 27:19, 28:3, 28:6, 28:11, 29:4, 29:12, 29:15, 30:18, 31:2, 31:19, 32:2, 35:6, 41:17, 41:18 sandefur's 34:19, 40:7 say 9:11, 10:8, 19:5, 19:6, 26:7, 27:18, 28:7, 28:12, 30:2, 30:16, 30:19, 30:20, 35:13, 39:18 saying 27:3, 29:13, 37:6 says 20:15, 33:1 school 1:3, 3:3, 5:2, 5:7, 5:19, 7:18, 9:21, 10:1, 10:13, 15:4, 15:15, 15:18, 16:14, 18:19,</p>	<p>24:12, 24:17, 32:20, 33:2, 38:18 schools 12:9 search 29:1 seattle 30:9 second 32:19 security 6:2, 30:22 see 10:9, 27:7, 28:4, 35:4 seeing 33:5 seek 19:22, 20:5 seeking 5:17, 6:18, 12:17, 12:20, 13:15, 14:7, 20:5, 20:7 seen 24:11, 30:19, 32:1, 32:4 sense 25:9 sensitive 12:15, 33:6 sent 22:2, 37:1 september 34:3, 42:4 sets 39:14 seven 28:8 seven-year-old 38:1, 38:4 several 6:10, 9:9, 17:15 sheila 1:22, 44:2, 44:14</p>
---	---	--	---

Transcript of Hearing
 Conducted on October 22, 2021

<p>shocked 34:20 short 34:13 should 9:5, 11:1, 15:7, 17:21, 27:12, 27:18, 34:2, 34:3, 34:4, 34:17, 37:7 should've 7:13, 8:6, 8:21, 9:3, 10:19 shouldn't 25:18, 28:8 show 39:22, 40:18, 40:21, 41:2 showing 33:2, 40:8 side 13:10, 26:7, 37:6 signature-oso 44:12 signature-zrhbi 43:12 simply 25:15 since 8:9, 13:17, 13:18, 39:17 sir 5:8, 5:14 sit 27:17 site 17:18 situation 13:6, 24:8 situations 13:7, 17:16 six 29:19 skip 13:17 smith 10:8, 10:9,</p>	<p>32:9 social 6:2, 30:21 sole 13:19 some 7:10, 7:22, 9:12, 10:4, 13:4, 17:18, 29:17, 29:18, 35:7, 35:18, 35:21, 37:20, 38:11 somebody 20:17 somebody's 16:4, 17:8 something 30:14, 31:1, 38:17, 41:2 soon 41:15 sorry 28:13 sort 36:11, 36:17, 39:2 speak 7:21, 15:13, 18:4, 18:6 special 6:18, 7:15 specific 26:22, 28:11, 28:16, 38:12 specifically 8:9, 25:10 speech 30:7, 30:8, 39:20 spent 26:18 sponte 21:3 staff 6:1, 9:2, 9:3, 9:5, 9:9, 9:10, 9:15, 9:17,</p>	<p>10:3, 10:17, 24:14, 28:16 staff's 15:16 standpoint 40:20 star 21:19, 39:5 start 34:18 state 32:12, 33:19 statements 35:2, 35:5 statue 16:2 status 20:10 statute 22:4 statutory 30:13 step 35:8 still 6:8, 10:9, 26:12, 41:22 stopped 8:20 stronger 22:12, 32:18 struggle 38:2, 38:4 student 6:1, 7:2, 8:3, 8:10, 8:12, 8:13, 18:22, 24:17, 30:22, 36:6, 37:22, 39:9 students 6:12, 6:15, 6:17, 7:16, 8:4, 15:16, 21:13, 24:13, 24:15, 28:16, 32:22 sua 21:3</p>	<p>subject 28:17 subjected 10:4 subsequent 22:22 success 14:1, 14:5, 34:8 sued 22:10, 32:15 suffered 15:14 sullivan 18:18 supporting 44:6 supposed 14:18, 31:16 suppressing 39:19 supreme 22:13, 23:12, 32:10, 32:15, 34:11 sure 26:9 surprised 34:20 system 9:21, 10:2, 15:4, 15:15, 15:18 system's 5:19</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table 5:12 tag 16:4 tailored 23:1 take 25:13, 27:6, 29:11, 38:10, 39:12, 39:18, 40:2, 41:12</p>
--	---	---	---

Transcript of Hearing
Conducted on October 22, 2021

<p>taken 35:17, 43:3 taking 26:20, 27:2 talk 21:21, 21:22, 29:18 talking 7:1, 9:1, 18:1, 34:22, 39:7, 39:8 taxpayer 19:7 teachers 12:16, 18:19, 21:13 tell 36:3, 36:6, 38:17 telling 25:9, 27:10 temporarily 37:17 temporary 13:21 ten 9:1, 26:15 term 31:8 th 34:3, 42:4 thank 19:19, 19:21, 41:10, 41:11, 41:14, 41:17, 41:18, 41:19 theft 14:12, 15:6 themselves 5:5, 11:18, 33:8, 35:13, 40:4 things 10:17, 11:22, 24:13, 28:15, 30:21, 36:13 think 11:1, 11:15,</p>	<p>16:22, 18:2, 19:17, 27:19, 28:8, 31:2, 34:21, 36:4, 40:5 thought 25:18 three 15:9, 29:20 through 6:8, 10:22, 13:18, 22:6, 26:12, 29:1, 29:11 ties 8:4 time 19:17, 26:12, 27:18, 41:10 times 18:17, 30:9 timothy 3:12, 5:10 tisler 1:6, 3:10, 5:3 title 14:21 today 13:20 together 31:5 told 5:21, 25:19 took 33:7, 35:8 top 26:17 total 19:11 touch 41:13, 41:15 transcribed 1:22, 44:5 transcriber 44:1 transcript 44:3 tremendous 33:13</p>	<p>tro 37:14, 41:22, 42:5 true 27:19, 28:6, 33:16, 36:15, 44:3 truly 20:7 trust 14:3, 14:19 tthe 6:5 turned 26:19 two 11:22, 14:2, 17:3, 27:17, 32:9 type 6:18, 10:4, 13:4, 13:7, 15:1, 18:3, 36:8, 39:4, 40:1</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unclear 11:7 unconstitutional 20:1, 21:4, 34:16 under 10:18, 11:9, 26:21, 30:14, 40:3, 40:11, 41:12 understand 27:9, 35:18, 38:3, 38:4, 39:10, 39:11 understanding 32:2 unintelligible 24:7 unjust 14:22 unknown 41:20, 42:2</p>	<p>unlike 14:11, 24:18 unprecedented 20:7 unpublished 30:1 unredacted 6:10, 11:13, 12:22, 25:11, 28:1 untrue 20:22 use 16:19, 31:8 using 13:1</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>various 7:17 version 11:2, 25:11, 28:2, 37:2 versions 27:4 versus 5:3, 18:17, 21:19, 30:7, 31:3, 32:10, 33:22, 34:12, 39:3 vfoia 10:18, 38:12, 40:3, 40:11, 40:12 victim's 22:5 victims 23:8 vietnam 24:20 view 29:10, 35:20 violate 32:16, 34:10 violated 16:5 violation 20:14, 33:3</p>
--	--	--	---

Transcript of Hearing
 Conducted on October 22, 2021

<p>virginia 1:13, 2:5, 2:11, 12:2, 20:16, 30:3, 30:14, 30:17, 32:12, 33:17, 35:3, 36:19</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>want 11:12, 11:14, 13:8, 13:16, 16:10, 17:20, 19:5, 19:6, 21:21, 25:1, 25:6, 26:3, 26:7, 26:14, 27:5, 29:16, 29:17, 31:13, 34:18</p> <p>wanted 30:21</p> <p>wanting 12:12</p> <p>war 24:20</p> <p>washington 3:7, 32:3</p> <p>waste 19:7</p> <p>way 33:1, 34:16</p> <p>we'll 41:15</p> <p>we're 5:16, 6:8, 11:7, 12:17, 12:19, 12:20, 13:15, 14:2, 14:6, 18:1, 18:16, 18:20, 18:21, 24:3, 24:4, 30:16, 31:16, 34:22, 37:21, 39:7, 39:8, 40:18, 40:22, 41:6</p> <p>we've 13:11, 40:21</p>	<p>website 12:14, 20:17, 20:20, 21:2, 31:15, 31:17, 35:5, 35:8, 35:17, 36:4, 36:5, 37:12, 37:15, 37:16</p> <p>weeks 31:20</p> <p>went 13:18, 15:21</p> <p>weren't 6:6</p> <p>west 32:12</p> <p>wet 30:7</p> <p>what- 20:19</p> <p>whatever 41:22</p> <p>whenever 33:17</p> <p>whereas 22:19</p> <p>whether 13:20, 17:22, 25:22</p> <p>wild 30:8</p> <p>willingness 23:7</p> <p>without 6:3</p> <p>word 25:13, 26:20, 27:2, 27:6</p> <p>work 26:16, 28:17, 36:9</p> <p>would've 9:16</p> <p>wouldn't 7:5, 18:9</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yeah 5:20, 7:3</p>	<p>york 18:17</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero 16:7</p> <p>zillion 31:22</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>04 1:15</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10,000 6:9, 8:18, 8:19, 8:20, 8:21, 26:13</p> <p>1000 36:4</p> <p>11 1:15, 42:6</p> <p>1300 8:11, 8:22, 10:22, 26:14</p> <p>134 5:4</p> <p>13491 1:5, 5:4</p> <p>1596 3:8</p> <p>18 8:10</p> <p>1971 3:16</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>20037 3:7</p> <p>202 3:8</p> <p>2021 1:5, 1:14, 5:4, 44:15</p> <p>2025 43:11</p> <p>22 1:14</p>	<p>2200 3:6</p> <p>22030 2:5</p> <p>29 44:15</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>30 34:3, 42:4, 43:11</p> <p>36 9:3</p> <p>39 42:6</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>408941 1:20</p> <p>41 4:4</p> <p>4110 2:4</p> <p>491 23:20</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>500 3:14</p> <p>524 23:20</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>602 3:16</p> <p>691 2:6</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>703 2:6</p> <p>712 3:16</p> <p>7320 2:6</p> <p>74 44:12</p> <p>7936703 43:10</p>
--	--	--	--

8	
83 37:6 85004 3:15	
9	
91 5:4 955 3:8	