

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

THE COALITION FOR EQUITY  
AND EXCELLENCE IN MARYLAND  
HIGHER EDUCATION, et al.

PLAINTIFFS

VS.

CIVIL NO. CCB-06-2773

MARYLAND HIGHER EDUCATION  
COMMISSION, et al.

DEFENDANTS

Baltimore, Maryland  
October 19, 2012

The above-entitled case came on for trial  
before the Honorable Catherine C. Blake, United  
States District Judge

CLOSING ARGUMENTS

A P P E A R A N C E S

For the Plaintiffs:

Jon M. Greenbaum, Esquire  
Henry Thompson, Esquire  
Michael D. Jones, Esquire  
Savaria B. Harris, Esquire  
Paloma A. Zepeda, Esquire  
John C. Brittain, Esquire  
Brenda L. Shum, Esquire

Gail A. Simpkins, RPR  
Official Court Reporter

1        For the Defendants:

2                Kenneth L. Thompson, Esquire  
3                Craig A. Thompson, Esquire  
4                Katherine D. Bainbridge, Esquire  
5                Gregory T. Wasylak, Esquire  
6                Carolyn W. Skolnik, Esquire  
7                Catherine M. Shultz, Esquire

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P R O C E E D I N G S

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2 THE CLERK: The matter now pending before the  
3 Court is Civil Docket Number CCB-06-2773, The  
4 Coalition for Equity and Excellence in Maryland Higher  
5 Education, et al. versus Maryland Higher Education  
6 Commission, et al.

7 Counsel for the plaintiffs, would you please  
8 stand and introduce yourself for the Court?

9 MR. JONES: Mike Jones of the law firm of  
10 Kirkland & Ellis.

11 MR. GREENBAUM: Jon Greenbaum from the Lawyers  
12 Committee for Civil Rights Under Law, and also my  
13 colleague, Brenda Shum.

14 MR. BRITTAIN: Good morning.

15 THE COURT: Good morning.

16 MR. BRITTAIN: John Brittain.

17 THE COURT: Thank you.

18 THE CLERK: Counsel for the defendants, would  
19 you please introduce yourself?

20 MR. C. THOMPSON: Craig Thompson.

21 MR. K. THOMPSON: Kenneth L. Thompson, no  
22 relation.

23 MS. SKOLNIK: Carolyn Skolnik.

24 MR. WASYLAK: Gregory Wasylak.

25 MS. SHULTZ: Catherine Shultz.

1           MR. JONES: Your Honor, I would note for the  
2 plaintiffs that our reinforcements have arrived.  
3 We've got Mr. Thompson, whom the Court has met, again,  
4 no relation to the other side.

5           THE COURT: Good. I thought we were missing a  
6 Thompson.

7           (Laughter.)

8           MR. JONES: Ms. Zepeda and Ms. Harris will be  
9 with us shortly.

10           Your Honor, I have a presentation that the Court  
11 will be able to see electronically, but our fancy,  
12 super-duper Holiday Inn printer was having some  
13 problems, so we are having it vended out. So we'll  
14 have the copies for you shortly.

15           THE COURT: Great. Thank you.

16           I see we have Dr. Howard here as well.

17           DR. HOWARD: Yes.

18           THE COURT: Okay.

19           All right. Thank you all. We do have a number  
20 of issues to talk about today. I thought as a  
21 preliminary matter, I would be happy to hear from one  
22 of you on each side about how you, if you have  
23 consulted about sort of dividing up the issues or what  
24 order you want to go in.

25           I know you are essentially dividing the time

1 equally. We certainly have until one, and I could  
2 resume at about probably 2:15 in the afternoon, if we  
3 still have more to talk about.

4 Why don't we start with plaintiffs' counsel, Mr.  
5 Jones or Mr. Greenbaum.

6 MR. JONES: Your Honor, what I was kind of  
7 envisioning is sort of a discussion of traceability,  
8 part of the de jure era, and mission funding, and then  
9 the facilities, to the extent they relate to the  
10 limited missions during the de jure era.

11 What I would envision is discussing how we led  
12 up to the Partnership Agreement, what the  
13 understanding was or what the intention of the  
14 Partnership Agreement, related to the three current  
15 policies and practices that we challenge, and then to  
16 trace the evidence, what the Court has heard in a  
17 summary fashion, and then to discuss funding, as well  
18 as mission and unnecessary program duplication. It  
19 would be the bulk of my presentation.

20 THE COURT: Right.

21 MR. JONES: In terms of what I will call the  
22 plaintiffs' October surprise, the standing issue, my  
23 thinking was that I would spend --

24 I think our brief pretty fairly covers it. I  
25 actually got some Scalia clerks in my firm to help

1 with the writing of that.

2 So what I was envisioning was that I would cover  
3 that really just very, very briefly in the beginning,  
4 and then to the extent necessary, in the afternoon  
5 session I would spend more time on the standing issue.

6 But that was kind of how I was envisioning my  
7 presentation. Obviously I will do whatever the Court  
8 wants me to do, but that was how I had mapped it out.

9 THE COURT: Sure. I think that's perfectly  
10 reasonable. On the standing, we'll see whether  
11 defense counsel is really pushing it after they have  
12 had a chance to read your brief in response, standing  
13 and mootness. I will certainly hear from defense  
14 count. I was a little surprised to see the standing  
15 issue myself.

16 Regarding the possibility of remedies, should we  
17 get to that point, I'm interested in hearing from you  
18 and defense counsel as well.

19 Obviously plaintiffs spent at least some amount  
20 of time discussing that question, educational  
21 justification and remedies. I, frankly, didn't -- I  
22 may have missed it -- I didn't see that highlighted in  
23 any particular way in the defendants' briefing.

24 So maybe that's something we can leave for a  
25 little bit further down the road in the arguments as

1 well.

2 MR. JONES: Well, that was my observation too,  
3 Your Honor. On sound educational justification, as I  
4 read Fordice, that really is a part of the plaintiffs'  
5 burden after we have established, and I hope we will  
6 to the Court's satisfaction, traceability. I didn't  
7 see much of that from them. I have a couple of  
8 observations about that during my presentation.

9 Now in terms of a remedy, the Court is right. I  
10 think really the only extent we got into it was with  
11 Dr. Allen, giving just the Court some ideas about the  
12 kinds of programs in particular that might help to  
13 expand the mission of the HBIs.

14 So it would seem to me that depending on the  
15 Court's finding, we would need to have another session  
16 to discuss remedies.

17 I know that in the Knight and Fordice cases, the  
18 remedies phase, especially on missions, was pretty  
19 elongated.

20 The Court may recall in the Fordice case, even  
21 though, unlike Judge Murphy in Knight, Judge Biggers  
22 did not find funding traceable. He did find mission  
23 traceable, and there was a long proceeding that led to  
24 like a \$500 million settlement on the mission, but it  
25 was many, many weeks.

1           So I think that we would not want to rest on  
2 what we have presented by way of remedy.

3           THE COURT: I appreciate that because I'm not  
4 sure I would feel comfortable either. They are, if we  
5 get to that, they are very complex issues, of course.

6           I appreciated your expert's suggestion of some  
7 programmatic niches and so forth, but obviously it  
8 would require further conversation if we get to that  
9 point.

10          Okay. Let me turn to defense counsel briefly  
11 for sort of an overview.

12          MR. C. THOMPSON: Thank you, Your Honor.

13          Our presentation, Your Honor, is very similar in  
14 terms of the scope, addressing the traceability issue  
15 or the lack thereof, as well as the issues that were  
16 raised during trial, those being mission, program  
17 duplication, and funding, and the lack of traceability  
18 or the absence of traceability from the de jure era of  
19 segregation.

20          To the extent that the Court wishes to hear from  
21 the defense on that standing issue, we can certainly  
22 reserve to do that after counsel's presentation and  
23 then in the afternoon, if that makes more sense.

24          THE COURT: Yeah. The standing issue, is there  
25 any dispute at the moment that there are current, as I



1 understand it, current students at historically black  
2 institutions who are members of the plaintiffs'  
3 Coalition?

4 We have at least, I believe, Muriel Thompson,  
5 who is still an enrolled student, as I understand it.  
6 Is there any dispute about that, and does that  
7 affect --

8 MR. C. THOMPSON: Well, at this point, based on  
9 the affidavits that we have received, we don't dispute  
10 that Muriel Thompson is still in school. We were  
11 relying, of course, Your Honor, on her testimony, that  
12 she was scheduled to graduate in May, and that was the  
13 basis of our presumption that she had in fact  
14 graduated. Based on the affidavits, we don't have any  
15 reason to believe that she's not still taking classes  
16 and she's not still in school.

17 My understanding of the members of the Coalition  
18 was that they were alumni of the HBCUs.

19 THE COURT: Just to divert onto that for a  
20 moment, are there current students who are members of  
21 the Coalition as well?

22 MR. JONES: There are, Your Honor. We submitted  
23 an affidavit from, well, we submitted an affidavit  
24 from David Burton, and then the actual name of the  
25 current student, we set it out in our papers. I'm

1 blanking on which one he is now.

2 THE COURT: That's all right.

3 MR. JONES: But I can address that to the extent  
4 that the Court is interested. But it's clear that we  
5 did provide an affidavit from a current student, at  
6 least one current student who is a member.

7 THE COURT: All right. Well, let's see. If we  
8 need to get to standing, we'll push that back down the  
9 road a bit.

10 MR. C. THOMPSON: Thank you, Your Honor.

11 THE COURT: All right. Then I'm happy to hear  
12 from you.

13 MR. JONES: Okay. Thank you, Your Honor.

14 MR. H. THOMPSON: May I approach, Your Honor?

15 THE COURT: Sure. This is the Holiday Inn  
16 printer material?

17 MR. JONES: No. This actually came from the  
18 vendor, Your Honor.

19 THE COURT: Okay.

20 MR. JONES: If we waited on the Holiday Inn, we  
21 would still be there. It wasn't necessarily their  
22 fault. So if anybody here is an employee of the  
23 Holiday Inn, no offense.

24 (Laughter.)

25 THE COURT: Thank you.

1 MR. JONES: Thank you, Your Honor.

2 By the way, Your Honor, this first slide  
3 actually indicates. Under Coalition Members, the  
4 current student names are listed there, Joshua Harris,  
5 and I'm not going to try to pronounce the second name.

6 THE COURT: Uh-huh. In terms of standing, going  
7 back to when the suit was filed, there clearly were  
8 current students.

9 MR. JONES: Yes. Yes, Your Honor.

10 THE COURT: Okay.

11 MR. JONES: Let me begin, Your Honor, with the  
12 cover slide that I have. We call it Maryland's  
13 Failure to Restructure The Policies and Practices That  
14 Have "Substantially Marginalized" Its Historically  
15 Black Institutions.

16 We chose the phrase substantially marginalized  
17 and to restructure the policies and practices. That  
18 actually comes from the language of the HBI Panel  
19 Report, which I will discuss in some more detail.

20 But I'm not going to spend time on the Fordice  
21 standard. The Court is very familiar with that, and  
22 set it out in the summary judgment order.

23 I did want to remind the Court, as I indicated  
24 in my preliminary discussion with the Court of the  
25 findings in both Knight and Fordice in terms of

1 traceability, having found missions and unnecessary  
2 program duplication traceable, they diverge in terms  
3 of the traceability of funding. Judge Biggers in  
4 Fordice did not find funding traceable for reasons  
5 that I will describe later that really are not  
6 applicable to this case.

7 But the key point is consistent with Justice  
8 Thomas's concurrence in Fordice, traceability is not a  
9 very difficult or hypertechnical standard.

10 Now how does our case differ from, and in fact  
11 is stronger than the cases presented in Knight and  
12 Fordice?

13 I put the bullet points here. The Court has  
14 seen the Maryland historical documents that actually  
15 chronicle a policy of providing inferior facilities  
16 and underfunding of the HBIs. There are documents  
17 that chronicle the need to expand the mission. Of  
18 course, there's a Partnership Agreement.

19 Then number four, the Court may recall there was  
20 one published opinion from the Attorney General in  
21 2005, that contrary to Maryland's argument that the  
22 Partnership Agreement is irrelevant, he discussed the  
23 significance of the Partnership Agreement in terms of  
24 assessing compliance with Fordice.

25 So the other bullet points I will discuss in

1 somewhat more detail, Your Honor, but we have, of  
2 course, the HBI Panel Report, in which Maryland has  
3 adopted its 2009 State Plan, and the testimony of  
4 Maryland's 30(b)(6) witness, Former Secretary, Dr.  
5 James Lyons, who Maryland indicated in their opening  
6 statement that they had planned to call to testify,  
7 but they did not, and we submitted his deposition  
8 testimony.

9 Now in the lead up to talking about the HBI  
10 Panel Report, the Court may recall that the  
11 presidents --

12 THE COURT: If I could divert you back a moment  
13 to the 30(b)(6) testimony.

14 MR. JONES: Yes, Your Honor.

15 THE COURT: I have a, maybe important, but a  
16 semantic issue. I'm wanting to understand the word  
17 vestige as compared to the concept of traceability.

18 Obviously there are cases that say simply  
19 proving that there are still disparities, regrettable  
20 as that may be, are not sufficient to permit a court  
21 to order a remedy. It has got to be traceable.

22 Perhaps you are going to be coming to this  
23 later, but I would like to hear more about the dual  
24 missions in particular as to how that is a traceable,  
25 if you are saying it is, a current policy that is

1 traceable.

2 The facilities also, what, either through  
3 Secretary Lyons or elsewhere, do you have to show it  
4 as being traceable rather than again simply,  
5 unfortunately, a carrying-over continuing effect of  
6 past discrimination?

7 MR. JONES: Yes, Your Honor. I appreciate that  
8 question. I will discuss the dual mission separately  
9 and the traceability of the dual mission.

10 The Court may recall that, just sort of to  
11 preview it, there are de jure era documents that  
12 essentially describe the dual mission. They say that  
13 the HBIs have students who have higher financial need,  
14 they have higher remedial needs, and in fact, what the  
15 State ought to do is to give these schools more money  
16 than they give the traditionally white institutions on  
17 account of this.

18 They didn't use the phrase dual mission. But if  
19 you look at the HBI Panel Report and the testimony of  
20 the witnesses, that really is what encapsulates the  
21 dual mission.

22 Then we have the HBI Panel Report that describes  
23 the dual mission as sort of the historic mission and  
24 into the future, the foreseeable mission of the HBIs.

25 We have the testimony of Dr. Allen and I believe

1 Dr. Conrad also, who testified that the dual mission  
2 was traceable to the de jure era.

3 There's no question that the dual mission exists  
4 today. I think that's undisputed, and I don't think  
5 there's any real question there was a dual mission in  
6 the de jure era. We have at least the one document  
7 that I will bring to the Court's attention that  
8 describes that. So that's why I think, Your Honor, we  
9 have the traceability of the dual mission.

10 In terms of -- were you about to ask a question,  
11 Your Honor?

12 THE COURT: Well, it's traceable in the sense  
13 that historically, there was additional funding and  
14 resources necessary at the HBIs, and it still remains  
15 so because of lack of preparation, lack of finances,  
16 financial capability, and so forth. Carry the  
17 analysis forward a little bit into the educationally,  
18 sound educational justification.

19 The dual mission itself is something that the  
20 plaintiffs support. I mean it's a good thing that  
21 there be a dual mission.

22 So I'm just struggling a little bit to fit that  
23 into the Fordice analysis.

24 MR. JONES: Well, Your Honor, I believe that in  
25 the Knight case, Judge Murphy, in finding both mission

1 and funding to be traceable to the de jure era,  
2 discussed and found traceable what we are describing  
3 as a dual mission, in the sense that the HBI Panel,  
4 for example, essentially concluded that what Maryland  
5 has done is to assign the --

6 First of all, the HBI Panel concluded that the  
7 State assigns missions, and that schools don't just  
8 adopt missions.

9 THE COURT: Right.

10 MR. JONES: So when they said that Maryland's  
11 policies have substantially marginalized the HBIs,  
12 they talked about two things.

13 They said number one, they have this dual  
14 mission, and there was no suggestion in the HBI Panel  
15 Report that this was a voluntary mission. In fact,  
16 the 2009 State Plan makes clear that the HBIs are  
17 "charged" with this mission, and all of the presidents  
18 talked about that this is a mission that they believe  
19 is imposed by the State.

20 So what the HBI Panel says is that Maryland has  
21 given the HBIs this dual mission --

22 THE COURT: Uh-huh.

23 MR. JONES: -- disproportionately theirs, but  
24 has not given them the funding to go along with this  
25 dual mission.



1           Your Honor, we --

2           THE COURT: Is it the failure of funding that's  
3 the traceable part? Because the dual mission itself,  
4 and I do understand the part about it's being imposed  
5 by the State, and not being voluntary, and being  
6 consistent with the de jure past.

7           The presidents I believe also supported the dual  
8 mission. I mean I don't think anybody was suggesting  
9 that the dual mission itself, correct me if I'm wrong,  
10 should be eliminated, or that it was not appropriate  
11 to have that dual mission at the HBIs.

12           MR. JONES: I think it is both, Your Honor. I  
13 think it is the imposition of the dual and limited  
14 mission.

15           The mission component, as the Court is aware,  
16 has two components. One is the dual mission, which  
17 really manifests itself in terms of funding, I think  
18 is what the Court is asking, and I agree with that,  
19 and then the limited programmatic mission.

20           I think the HBI presidents were saying that  
21 they, you know, they like, they accept the dual  
22 mission, but logic, fairness, and Fordice, in my view,  
23 requires that this dual mission be funded. I believe  
24 that was a part of the analysis and finding from Judge  
25 Murphy in the Knight case.

1           The Court asked about the --

2           Well, let me just back up and talk about Dr.  
3 Lyons. I appreciate that there is indeed a  
4 distinction between how sometimes vestiges is used  
5 versus traceability. Dr. Lyons did not, and we don't  
6 rely on Dr. Lyons for traceability. He's not, you  
7 know, our expert.

8           He talked about that. He was asked a question,  
9 whether Maryland had eliminated the vestiges, and he  
10 highlighted the dual mission and facilities.

11           And separate and apart from Dr. Lyons, we can  
12 show the traceability of both of those, and I propose  
13 to talk about them somewhat more in my presentation.

14           THE COURT: Okay.

15           MR. JONES: So I started to talk, Your Honor,  
16 about the HBI Panel Report. The Court may recall, the  
17 way this came about is the HBI presidents actually  
18 requested the appointment of an independent panel of  
19 experts really for the purpose of how they could  
20 expand their missions and make them more substantive.

21           Dr. Kirwan described, and the Court may recall,  
22 that these were leading experts in higher education.  
23 Maryland, I think tellingly, specifically asked them  
24 not to look at the issue of whether it had complied  
25 with the Partnership Agreement and whether it had

1 complied with Fordice. This lawsuit was pending at  
2 the time, and presumably they didn't want to create a  
3 bad record.

4 The next slide, Your Honor, I have basically  
5 outlines the key findings of the HBI Panel, the  
6 limited missions, the more limited academically, more  
7 difficult financially. That's the dual mission that  
8 the Court talked about, and that how the facilities do  
9 not support the dual mission. That's the next slide,  
10 Your Honor.

11 Again, in reference to the Court's question,  
12 when the HBI Panel was talking about these conditions,  
13 they were not assessing traceability. They were just  
14 talking about okay, here's where we are today when we  
15 look at the HBIs.

16 I have some other slides, and we'll talk about  
17 the de jure era. We will see the same conditions  
18 exist from the de jure era. I'm not really just  
19 focusing on conditions. They are married with the  
20 limited missions of the HBIs.

21 When Maryland established the HBIs during the de  
22 jure era with limited missions, it equipped them with  
23 laboratories and facilities that were in line with  
24 what Maryland saw as that limited mission, and they  
25 never expanded either the missions or the facilities

1 capacity of the HBIs.

2 I should also say, Your Honor, I think that in,  
3 I believe in both the Knight and the Fordice case, and  
4 I understand, of course, the Court's prior ruling on  
5 facilities, but I think where this came really into  
6 play there is on the issue of expanding the missions  
7 would require more facilities, and the inability to  
8 expand the missions in light of these facilities that  
9 are themselves traceable to the de jure era.

10 But I will talk about that in somewhat more  
11 detail in a minute, Your Honor.

12 THE COURT: All right.

13 MR. JONES: Now the Bohanan Commission, as the  
14 Court recalls, and I am not going to go through this  
15 in any great detail, but it had a number of specific  
16 recommendations in terms of the HBIs to respond to  
17 this issue of their being marginalized. They required  
18 funding the dual mission.

19 They also had some specific suggestions on the  
20 right-hand side in terms of programs and  
21 infrastructure, and in particular, Your Honor, they  
22 called for the appointment of essentially another  
23 panel to look at the HBIs' programs and to figure out  
24 what additional programs they might need.

25 As the Court is aware, on the next slide,

1 Maryland has fully adopted the HBI Panel Report --

2 THE COURT: Uh-huh.

3 MR. JONES: -- and has agreed that the HBIs need  
4 substantial additional resources to overcome the  
5 competitive disadvantages of prior discrimination.

6 That's not the heart of our case. The heart of  
7 our case is traceability, but that really goes to the  
8 notion that the Court saw during the trial, the  
9 suggestion really through Dr. Lichtman that the HBIs  
10 are in fact overfunded rather than being underfunded.

11 This next slide, Your Honor, though, makes clear  
12 that in the HBI Panel's view, we're not just talking  
13 about things that happened in the past.

14 They called upon Maryland to restructure the  
15 process that has caused inequities. So this is not  
16 just making up for something that happened in the  
17 past, and they talk about the process, that Maryland  
18 sets missions, approves new programs, and funds the  
19 institutions.

20 THE COURT: Let me just interrupt you for a  
21 moment. I'm just seeing that there are a number of  
22 people standing. I don't know if there is any room to  
23 slide over a little bit and let people sit down.  
24 There are a couple more seats here in the jury box.  
25 There are three seats in the jury box. There is still

1 one more over here. That fills up the jury box I  
2 think.

3 Sorry to interrupt. Go ahead.

4 MR. JONES: That's okay, Your Honor.

5 So this next slide, which the Court may recall  
6 from the testimony of Dr. Kirwan, who admitted, in  
7 testifying before the legislature in 2006, essentially  
8 that Maryland underfunds the HBIs.

9 Now I want to talk about the de jure era so we  
10 can talk about the policies, you know, from that era.

11 The Court may recall this document where, unlike  
12 some states that actually pretended to provide  
13 separate, but equal, Maryland admitted that its policy  
14 was just to do the opposite, was to provide education  
15 facilities for the Negroes that were inferior to the  
16 whites. We talked about how that's not just the  
17 buildings, but that's the programs.

18 In the next slide, Your Honor, we see that this  
19 inequality supplied across the board in terms of the  
20 breadth of the academic programs, the quality of the  
21 programs, teacher salaries, the libraries, the science  
22 labs and things.

23 In fact, if you look at 1937, Your Honor the  
24 Soper Commission indicated that Maryland, what they  
25 should do is to equip. Rather than have these HBIs

1 equipped for minimal education, they should equip them  
2 basically to start to provide college and graduate  
3 level work.

4 THE COURT: Right.

5 MR. JONES: In 1937, there's a discussion about  
6 the deficiencies in the curriculum, the library and  
7 the labs.

8 In 1937, the Soper Commission said the exact  
9 same thing.

10 You go up to the Marbury Commission in 1947,  
11 saying that the graduate programs of the facilities at  
12 the HBIs are extensive, but nothing really at the  
13 HBIs.

14 Your Honor, you may recall that the HBI Panel  
15 Report talked about generally the HBIs versus the  
16 TWIs, but then it specifically focused on the graduate  
17 HBIs. It talked about Morgan, it talked about UMES,  
18 and that they don't have the -- you know, you call  
19 them graduate programs, but they don't have the  
20 infrastructure. The Court heard some testimony that  
21 some of the institutions don't even have working  
22 microscopes.

23 So this limited missions and facilities during  
24 the de jure era, as we walk through it, you will see  
25 that Maryland recognized that they needed to expand

1 both the facility capacity and the missions of the  
2 HBIs, but they just never did it.

3 This next slide, Your Honor, is where we say  
4 that you can see the dual mission during the de jure  
5 era. This is from the Soper Commission Report from  
6 1937.

7 THE COURT: Uh-huh.

8 MR. JONES: By the way, the Court may recall  
9 that in the opening statement, you know, we had  
10 quotations from Fordice and other places that say  
11 that, you know, vestige, and I think even the Court's  
12 summary judgment decision said it, basically it's a  
13 remnant. It's not a hypertechnical requirement of  
14 drawing a straight line from the de jure era to the  
15 present day.

16 The next slide, Your Honor, talks about the  
17 limited missions at the HBIs. Again, the Court has  
18 seen this, so I am not going to read that. Of course,  
19 we will leave it with Your Honor to review.

20 THE COURT: Right.

21 MR. JONES: This slide, as with any of the other  
22 slides, Your Honor, I am happy to take whatever  
23 questions you have. Otherwise, I will, with apologies  
24 in advance, go through these pretty quickly so I can  
25 focus on some of the specific things that the Court



1 raised.

2 THE COURT: That's fine. Thank you.

3 MR. JONES: So what I'm going to do is just skip  
4 through these next several slides, because I don't  
5 think there was any real dispute about the program  
6 inequality during the de jure era and the recognized  
7 need to remedy that.

8 Your Honor, I will talk towards the end of my  
9 presentation on funding, that the current inequality  
10 between land-grant funding is traceable to the de jure  
11 era.

12 We did not focus on that so much at trial. I  
13 know Dr. Toutkoushian didn't talk about it, but we  
14 presented evidence on that from the president of, I  
15 think UMES, and through one of Maryland's documents.

16 So I just want to spend a minute to talk about  
17 that during the land-grant era, I'm sorry, during the  
18 de jure era, the Court will recall the land-grant  
19 institutions were Princess Anne, which is now UMES,  
20 and essentially College Park. That really was the  
21 greatest disparity I think in terms of the HBIs  
22 between those two institutions.

23 In fact, the next slide talks about that, that  
24 the most obvious difference is between Princess Anne  
25 and College Park.

1 THE COURT: Right.

2 MR. JONES: In fact, Maryland's de jure era  
3 documents recognize the need to provide UMES or  
4 Princess Anne with an equitable share of the  
5 land-grant funding. That was not done during the de  
6 jure era, and I will discuss a little bit later on  
7 that that funding disparity continues, and it is  
8 traceable to the de jure era.

9 I want to skip now, Your Honor, to the slide  
10 that I have on the screen. The Court may recall the  
11 significance of this, Your Honor, to me is this:

12 During the de jure era, we had Maryland  
13 documents that talked about how bad off the HBIs were.  
14 This one talks about Princess Anne or UMES and says in  
15 fact it is so bad, we should just abandon it. There  
16 were other documents that said it was a disgrace to  
17 the State of Maryland.

18 But in court, Maryland said something very  
19 different than that. They argued to the Court that it  
20 affords equal facilities, and that Princess Anne was  
21 just as good, and in fact, Princess Anne was better  
22 funded on a per FTE basis than College Park.

23 Now why does that sound familiar? Because we  
24 have the exact same thing, you know, happening here.

25 We talked about all of these documents. We have

1 the HBI Panel Report. We have the State Plan,  
2 President Kirwan in front of the legislature, who were  
3 making one sets of arguments in terms of what they  
4 recognized to be the condition of the HBIs and the  
5 underfunding of the HBIs.

6 But the defense in this case seems to be  
7 different, that the HBIs are overfunded on an FTE  
8 basis, that their facilities aren't any worse off than  
9 anybody else's.

10 So in some sense, Your Honor, not only are the  
11 policies traceable, but at least some of the defenses  
12 as well.

13 Limited missions, this, Your Honor, is just a  
14 slide from Dr. Conrad, where he recites what the Court  
15 has already seen about the limited missions during the  
16 de jure era. So I've skipped ahead now.

17 Now, Your Honor, 1974, Maryland recognized the  
18 need to expand the missions of the HBIs. Now you will  
19 see, Your Honor, this slide and a couple others that  
20 bump into the notion from Maryland that the HBIs  
21 controlled their own missions. It points out, of  
22 course, that they need to have funding in order to  
23 expand their missions.

24 In 1981, Maryland had a comprehensive study to  
25 figure out well, what do we need to do to enhance the

1 HBIs, and in particular, they were talking about to  
2 strengthen the rate -- that should say role -- the  
3 role and mission of the historically black  
4 institutions.

5 The Court asked about facilities, and I just put  
6 this slide here in some ways in anticipation of that  
7 question, to talk about, from Dr. Kaiser, the role  
8 between facilities and missions.

9 So in this 1981 report, Maryland documents the  
10 continuation of these facility inequalities, the  
11 limiting facilities at the HBIs that really prevent  
12 them from having more robust missions.

13 So I'm going to skip through all of these. They  
14 talk about the libraries, of course. One thing that's  
15 interesting, Your Honor, it points out that the  
16 failure to respond and to correct these problems in  
17 terms of the libraries will become permanent.

18 Now the Court heard from a lot of witnesses  
19 about the inadequacies of the HBI libraries. I think  
20 it's pretty telling, Your Honor, to talk about the  
21 Maryland defense, the per FTE defense.

22 The Court may recall that Dr. Lichtman even  
23 presented slides that say well, on a per FTE basis,  
24 the HBIs have a higher per FTE library holdings than  
25 the TWIs, notwithstanding the documented

1       insufficiencies of the libraries.

2               THE COURT:  You're probably going to get to it.

3               On mission, I understand the point that a  
4 college, again, a university cannot just create its  
5 own mission as it likes.  There are restraints and so  
6 forth.

7               Of course, on the other hand, not every  
8 institution should have the same mission presumably  
9 across the State.  There's room for research  
10 institutions and for non-research institutions.

11              I guess I would like some help on the missions,  
12 what the evidence is in the record of the HBIs  
13 attempting to expand their missions and not being  
14 able, not being able to do that, if that evidence is  
15 in the record.  I think there are one or two  
16 instances.

17              I understand your general overall argument of  
18 limited missions, but specifically focused on what the  
19 mission should have gone to, what the attempts were to  
20 make it greater for a particular HBI that was rebuffed  
21 in some way, if that happened, by the State.

22              MR. JONES:  Thank you, Your Honor.  I appreciate  
23 that question.  I will respond to it now and touch  
24 upon it in somewhat more detail in the rest of my  
25 presentation.

1           I think the question requires a discussion a  
2 little bit, Your Honor, about what does it take to  
3 have a mission, what does it take to expand the  
4 mission? Of course, it takes, as the Court is aware,  
5 it takes funding. It takes facilities.

6           The Court may recall, in the late 1960's, at  
7 about the same time that OCR approached Maryland in  
8 1969 to say that it was still operating a dual and  
9 unequal system, just before that, Morgan requested to  
10 be established as the State's first biracial  
11 institution. Maryland turned down that request.  
12 Instead, what it did was to found a brand new  
13 institution, UMBC, to take that role.

14           The Court may recall that there was a report in  
15 the 1970's, 1974 or '75, that recommended that UMES  
16 actually be the principal institution on the Eastern  
17 Shore, because at that time it actually was somewhat  
18 ahead of Salisbury. Maryland denied, well, ignored  
19 that recommendation, and in fact, it invested more  
20 heavily in Salisbury, such that Salisbury outgrew  
21 UMES.

22           THE COURT: Right.

23           MR. JONES: The Court may recall also that  
24 rather than put resources into either Coppin or  
25 Morgan, Maryland took over the then bankrupt, or was

1 about to go bankrupt, UoB, even though there was  
2 concern about the impact that this acquisition was  
3 going to have on the HBIs.

4 THE COURT: Yeah. Certainly that seemed to be a  
5 focus on the program duplication issue as well,  
6 University of Baltimore being taken over.

7 All right. In terms of mission, okay.

8 MR. JONES: In terms of mission, the Court could  
9 see that the way that the programs -- I guess there  
10 are two things. One, there is sort of missions and  
11 then there are programs.

12 In terms of whether the HBIs wanted to have  
13 their missions expanded, and where do they make a  
14 request to do that, I think if you look at the 2005  
15 letter that we talked about, I think it's kind of  
16 telling that the HBIs, the Court will remember, they  
17 didn't even want to be known to be the authors of this  
18 letter.

19 So they submit a letter saying they want their  
20 missions to be expanded. This comes, of course, Your  
21 Honor after Maryland had already committed in the  
22 Partnership Agreement to expand their role and  
23 missions.

24 So I appreciate the Court's question about well,  
25 not all institutions can have the same role or can

1 have the same mission, but I think that Maryland has  
2 already made the determination in its 2009 State Plan,  
3 and by entering the Partnership Agreement, that in its  
4 view, it was educationally sound and practical for the  
5 HBIs to have more expanded missions, and to be able to  
6 compete with the TWIs for students, regardless of  
7 race.

8 So, you know, in some other kind of case there  
9 could be a defense that it is not educationally sound  
10 and practical to give the HBIs more expanded mission,  
11 but I think that door is blocked to Maryland because  
12 of the Partnership Agreement, the State Plan.

13 In fact, the Court may recall that in my  
14 cross-examination of Dr. Kirwan, he agreed that the  
15 HBIs should be able to compete with the TWIs for  
16 students, regardless of race.

17 THE COURT: Sure.

18 MR. JONES: So the next slide, Your Honor --

19 I hope I fully answered the Court's question. I  
20 do have some additional slides on mission. So maybe  
21 when I get to that, the Court can indicate whether I  
22 have satisfied the Court's concern or not, if that's  
23 okay.

24 THE COURT: Okay.

25 MR. JONES: So I will go through the next one



1 pretty quickly. The Court has seen the comparisons of  
2 the institutions in 1981, about the science labs and  
3 the like.

4 So then 1992, Your Honor, in terms of funding,  
5 this really gets to the whole issue of the adequacy of  
6 the per FTE funding. This was a draft document from  
7 Maryland, but they recognized the need to, in order to  
8 allow the HBIs to basically do what colleges should be  
9 doing, they needed to provide catch-up funding.

10 So that takes us to the Partnership Agreement,  
11 Your Honor, and the Partnership Agreement, as the  
12 Court will remember, had discussions about -- in fact,  
13 one big part of it was Maryland committed itself to  
14 expanding the programs at the HBIs and to provide them  
15 with unique programmatic identities.

16 Now let's look at how that came about. This is  
17 the testimony of Dr. Sabatini, who was the Former  
18 Acting Secretary of Higher Education.

19 Essentially Maryland did not believe that it was  
20 in compliance with Fordice. It did not believe that  
21 it had dismantled the vestiges of the de jure era, and  
22 rather than have the OCR have a compliance review,  
23 they entered the Partnership Agreement.

24 MR. C. THOMPSON: Your Honor, I have to object.  
25 I certainly don't want to interrupt the presentation,

1 but that misstates the record. I'm not sure how Your  
2 Honor wishes to address that, but that's not what Dr.  
3 Sabatini said.

4 MR. JONES: I have a number of slides on this  
5 point, Your Honor.

6 THE COURT: Probably in general, if you want to  
7 take notes on points like that that you want to  
8 disagree with, that's probably the best way to do it.

9 I guess we should also be thinking about -- the  
10 other possibility is to figure out how far, or at what  
11 point would be a good time for a short recess and a  
12 chance for the defense to do some talking. If we were  
13 to go until about 11:30 and take a break, and then I  
14 will hear from the defense.

15 MR. JONES: That sounds fine, Your Honor. The  
16 way I have it organized is to go through mission. I  
17 think that by that time, that's about where I will be.

18 THE COURT: All right.

19 MR. JONES: So Judge Garbis, Your Honor, this is  
20 from his summary judgment opinion, where indicated  
21 that we didn't have standing to pursue the contract  
22 claim.

23 But this is how Judge Garbis saw it, that in  
24 exchange for the commitments that Maryland made in the  
25 Partnership Agreement, OCR agreed not to commence an

1 enforcement action against the State.

2 THE COURT: Which is, of course, different from  
3 Maryland admitting that it was not in compliance.

4 MR. JONES: Exactly. I've got some additional  
5 slides on that point. Judge Garbis didn't get into  
6 that point, but it is sort of consistent with.

7 This is from the MHEC Chairman, Mr. Oliver, who  
8 agreed that the Partnership Agreement was to eliminate  
9 the remaining vestiges of segregation, and that was  
10 the understanding of the State of Maryland at the  
11 time.

12 THE COURT: Uh-huh.

13 MR. JONES: Again, this is from Mr. Oliver, who  
14 was Maryland's signatory to the agreement.

15 In that first sentence, "Did MHEC understand at  
16 the time of the initiation of the Partnership  
17 Agreement that vestiges of segregation still existed  
18 in Maryland?"

19 His testimony was, "Yes."

20 THE COURT: Is there anything in that testimony,  
21 though -- Mr. Oliver can certainly speak for the State  
22 on certain things, but is there anything that defines  
23 vestiges in a Fordice context?

24 MR. JONES: Well, Your Honor, the Partnership  
25 Agreement, I think in the context of the Partnership

1 Agreement, yes, because what was being discussed in  
2 particular were limited missions, unnecessary program  
3 duplication, and the funding of the HBIs. That was  
4 really in Commitments 8 and 9, which Dr. Conrad, the  
5 Court may recall, was instrumental in helping OCR to  
6 craft the language for the Partnership Agreement.

7 So I think that in this context, vestige is  
8 discussed in terms of traceable policy or practice.

9 Your Honor may recall that the Partnership  
10 Agreement, and I didn't put the details of the  
11 Partnership Agreement up there because the Court has  
12 seen it and can go and look at it again.

13 THE COURT: Sure.

14 MR. JONES: But this relates to the point that I  
15 made earlier, that in order to have programs, you have  
16 to have funding. In the Partnership Agreement, when  
17 Maryland agrees and commits itself to provide programs  
18 to the HBIs, that necessarily carried with it a  
19 commitment to provide the funding, and this is the  
20 understanding from Maryland's signatory to the  
21 Partnership Agreement, Mr. Oliver.

22 In fact, Your Honor, as we talked about --  
23 again, this is related to the Court's question about  
24 well, what does it mean when it talks about vestiges  
25 in this context, the Partnership Agreement?

1           The Attorney General's opinion is instructive on  
2 that, and it talks about --

3           You know, the Court can read it there, but I  
4 think that if you look at the body of the testimony  
5 and the documents in the case, and his testimony, that  
6 the Partnership Agreement was designed to enhance  
7 student choice and reduce the stigmatic identity of  
8 the institutions.

9           I don't think there is any real question that  
10 vestiges, in the context that Mr. Oliver was  
11 discussing, and as we have been discussing the last  
12 few minutes, is talking about traceable policies and  
13 practices.

14           The Court asked about the testimony of Dr. Lyons  
15 on vestiges. I just reproduce that here for the  
16 Court's convenience. I'm not going to dwell on it.

17           THE COURT: Right. Okay.

18           MR. JONES: Okay?

19           THE COURT: Uh-huh.

20           MR. JONES: I want to spend some time, Your  
21 Honor, talking about mission, and what is the  
22 importance of missions.

23           If the Court may recall, that in Maryland's  
24 statement of the case, they had a different view that  
25 they adopted at the trial. The view then was that the

1 mission was very important. It determines -- it  
2 influences the kind of program one offers, the funding  
3 it receives, the buildings, and the students it  
4 attracts.

5 As I said, the Partnership Agreement, when you  
6 take the testimony of Mr. Oliver, committed Maryland  
7 to providing and funding programs at the HBIs.  
8 Maryland, according to Dr. Kirwan, never changed its  
9 policy.

10 This is the issue the Court raised about what  
11 did the HBIs do to try to expand their missions?

12 Under the Maryland statute, in order to have a  
13 program, you have to have, in fact, you have to  
14 document that you have the resources, you have the  
15 library, you have the facilities, you have the faculty  
16 to do that.

17 Now one way that the HBIs could show that they  
18 were trying to expand their missions and have  
19 programs, they could just go and set up a program, to  
20 put out a sign to say we have a Ph.D. in whatever,  
21 microphysics, and that would be some evidence that  
22 they tried. But Maryland didn't give them the funding  
23 and didn't give them the facilities.

24 But I don't think that's really the level of  
25 evidence that is necessary when you look at the

1 structure of Maryland's system, and Dr. Kirwan  
2 admitted that they didn't change their policy, though,  
3 essentially they agreed to do it.

4 I referenced this earlier, Your Honor. The  
5 Attorney General indicated that the Court would look  
6 at compliance with agreements with the OCR with  
7 respect to institutional missions in terms of whether  
8 Maryland had complied with its obligations under  
9 Fordice.

10 This is from the letter from the HBIs. I'm not  
11 going to spend time talking about that.

12 What I do want to talk about, though, the  
13 funding, Your Honor, if you look at that first bullet  
14 point -- this is slide 57, the hard copy -- they make  
15 the point that I had made, that the budget enhancement  
16 for the HBIs is weak, and if you don't have the money,  
17 you can't expand your missions.

18 If you can't expand your missions -- if you look  
19 at the next point, Your Honor -- they say you can't be  
20 attractive to students, regardless of race. This is  
21 what they were looking to do.

22 What is the current role of the HBIs? The Court  
23 may remember this testimony from Dr. Kirwan, that it  
24 is essentially as it as was during the de jure era, to  
25 provide education for African Americans. This is the

1       operative mission. He agreed that they have been  
2       unsuccessful in attracting non-African American  
3       students.

4               I thought this was pretty telling, interesting  
5       testimony, Your Honor, to look at sort of what's the  
6       programmatic quality in comparison to the TWIs and the  
7       HBIs, and what's the scope and the missions, that the  
8       HBIs play in a whole different arena than the TWIs  
9       that Dr. Eschbach doesn't consider them to be  
10      recruiting peers.

11              That's consistent, I think, with the testimony  
12      of Dr. Conrad and Dr. Allen in terms of the role and  
13      mission of the HBIs within the System.

14              THE COURT: Didn't Dr. Conrad find the least  
15      issue of program duplication as between UMES and  
16      Salisbury?

17              MR. JONES: That's correct, Your Honor. That's  
18      correct.

19              THE COURT: Okay.

20              MR. JONES: So what's the evidence that we have  
21      presented in terms of limited missions? We presented  
22      the testimony of Dr. Allen. We bullet point it here.  
23      I know the Court was very attentive, so I don't have  
24      to spend a lot of time on these.

25              So I want to go next to the HBI Panel, and, Your



1 Honor, to say that the HBI Panel found the HBIs and  
2 TWIs were not comparable and competitive. Let me just  
3 spend a moment, because the Court may be about to ask  
4 me, what did they mean by the phrase comparable and  
5 competitive? So I want to talk about that in the  
6 context of this case, in the context of what they were  
7 called upon to do, and what they did.

8 One of the things that they did, as I indicate  
9 in the slide, Your Honor, is to look at the programs  
10 at each set of institutions, and they looked at, paid  
11 particular attention to the graduate programs, but  
12 they looked at all the programs. They visited the  
13 institutions. They looked at the facilities, and  
14 basically saying that the HBIs --

15 There are two phrases, comparable and  
16 competitive. So let me talk about comparable first.

17 I think, Your Honor, this traces back to the de  
18 jure era slide that the Court saw earlier that talks  
19 about the quality and the scope of the programs at the  
20 HBIs are not the same, are inferior to those at the  
21 TWIs.

22 So the HBI Panel was talking about two things.  
23 One, they were talking about quality, but they were  
24 also talking about results.

25 So when they talked about competitive in

1 particular, they were talking about things like  
2 graduation and retention rates, and there is a stark  
3 difference between the graduation rate and the  
4 retention rate of the HBIs versus the TWIs, even when  
5 comparing just African Americans at both sets of  
6 institutions.

7 What the HBI Panel Report recommended, if the  
8 Court recalls, was to increase funding to get up the  
9 graduation and retention rate. We have testimony from  
10 one of Maryland's 30(b)(6) witnesses who agrees that  
11 this is an area where the HBIs need substantial  
12 additional funding.

13 THE COURT: Some additional funding was  
14 provided, was it not?

15 MR. JONES: The Access and Success? Yes, Your  
16 Honor.

17 I would say that substantial additional funding,  
18 minus the \$1400 -- minus the Access and Success,  
19 because when the State Plan in 2009 agreed, and when  
20 Maryland's 30(b)(6) witnesses agreed that the HBIs  
21 need substantial additional resources, they were  
22 indicating in addition to the Access and Success  
23 funding.

24 Dr. Conrad testified at length about the limited  
25 missions and programs at the HBIs.

1           The Court may recall -- you know, I'm not going  
2 to read this, but this is just from Knight that talked  
3 about limited missions and lack of comparability have  
4 segregative effect.

5           The next slide, which is slide 65 in the hard  
6 copy, is where we say that Maryland concedes. Now I'm  
7 talking about missions, but they concede that program  
8 duplication and limited missions are traceable to the  
9 de jure era.

10           This is from the 2006 Committee I report. This  
11 is where they talk about, Your Honor -- the Court can  
12 read this, so I will just pause for a second.

13           THE COURT: All right.

14           MR. JONES: So in terms of missions, Your  
15 Honor -- and I think I maybe have three more slides on  
16 this, but just kind of see where we are on missions --  
17 we know that during the de jure era they had more  
18 limited missions academically, more expensive  
19 financially. That was the dual mission.

20           1981, Maryland recognized that enhancing the  
21 HBIs required expansion of the missions. So we look  
22 at the current missions to see that they are more  
23 limited academically, more expensive financially, as  
24 was the case in the de jure era. So it's a limited  
25 dual mission.

1           Maryland agreed to expand the missions of the  
2 HBIs and promised to fund them with new academic  
3 programs, says the Partnership Agreement.

4           2005, it hadn't been done.

5           2008, the HBI Panel recommended expanded  
6 missions.

7           2009, Maryland adopted the conclusions of the  
8 HBI Panel, and the Court has the trial testimony of  
9 Dr. Conrad and Allen.

10           I quote again from Knight about enhancing the  
11 mission as a way of dismantling the vestiges of the de  
12 jure era.

13           THE COURT: I think that's the part --

14           There's again sort of attention or caution I  
15 think in the case law, that while you can say there is  
16 a need to upgrade an HBI, if that is absolutely, I  
17 mean if that is to make up for a traceable policy that  
18 still has segregative effects, you have to be careful  
19 to distinguish between that and upgrading or enhancing  
20 an HBI just for the sake of the institution.

21           MR. JONES: Absolutely, Your Honor, absolutely.  
22 In fact, if I had not had so many slides already, I  
23 might have had some slides on that. But I'm glad you  
24 asked the question, and I think it is worth my  
25 spending some time on it.

1           The Partnership Agreement and the State Plan  
2 talk about enhancing the HBIs, funding facilities and  
3 programs to make them more attractive to students,  
4 regardless of race. That's the same thing that the  
5 HBI presidents' letter talked about in 2005, and I  
6 think what Dr. Allen and Dr. Conrad testified about.

7           So where this comes in, we have been able to  
8 prove, I think, that the HBIs had limited missions in  
9 the de jure era.

10           We have been able to prove I think that the HBIs  
11 had limited missions coming up to the Partnership  
12 Agreement in 1999, that Maryland agreed, in order to  
13 enhance, in order to make the HBIs more attractive to  
14 students, regardless of race, this is a traceable  
15 policy, they agreed to enhance the HBIs and expand  
16 their missions.

17           So I recognize, of course, that before you get  
18 to having to expand the missions of the HBIs, you have  
19 to prove, we have to prove that they are traceable  
20 policies, and then all of the rest that Fordice  
21 indicates is a part of the analysis.

22           So Dr. Conrad, Your Honor, did an analysis of  
23 program uniqueness, comparing the TWIs to the HBIs,  
24 and he found in the statewide analysis a large  
25 disparity in terms of the number of unique high demand

1 programs at each set of institution.

2 Even the Court asked about Eastern Shore, but  
3 even on the Eastern Shore, you have 18 programs at  
4 Salisbury, and UMES has 10 programs. You still have  
5 that program inequality there.

6 The next thing I would like to talk about, Your  
7 Honor, and this is also on the issue of missions --  
8 this is my hard copy slide number 69 -- is not only  
9 are the missions more limited, but then you have this  
10 quality disparity between the TWIs and the HBIs, which  
11 you also had during the de jure era which has, we  
12 believe the evidence has shown, segregative effects.

13 Dr. Conrad listed these quality indicators of  
14 where the HBIs lag, I'm sorry, where the HBIs lag the  
15 TWIs, and the Court can see them there.

16 THE COURT: Coming back to that slide for a  
17 moment, faculty salary, for example, to the extent you  
18 would argue that that's traceable, does it depend on  
19 limited mission, or is that just an example you are  
20 giving me out of Dr. Conrad's expert report?

21 I mean some of the cases specifically addressed  
22 the question of faculty salary.

23 MR. JONES: I think, Your Honor, yes, and let me  
24 say this. Your Honor said yes to what?

25 Yes, it is an example of quality indicators, but

1 we also believe that the faculty salary differential  
2 is traceable.

3 In particular, the Court may remember in the de  
4 jure era, the black teachers at the black schools were  
5 paid less, and Maryland had the nerve to argue but  
6 that didn't affect the quality of the teaching.

7 But in any event, they were paid less. I have  
8 some slides in my funding discussion.

9 The doctoral HBIs, and this is again the focus  
10 of the HBI Panel Report, the doctoral HBIs, their  
11 salary substantially lags the salaries of the doctoral  
12 TWIs.

13 In fact, the faculty at the doctoral HBIs, like  
14 Morgan, for example, their salaries are more in line  
15 with master's institutions rather than the doctoral  
16 TWI institutions.

17 Your Honor, the next slide, really, you know,  
18 the Court has seen some of this before, but on the  
19 left-hand side, we sort of talk about Bowie. The  
20 first bullet is what was the state of play in terms of  
21 the size-related facilities in the 1950's? Then we  
22 look at, you know, these same kind of buildings.

23 I think I skipped over the slide, Your Honor,  
24 where during the de jure era, Maryland said when it  
25 put up the HBI buildings, it didn't pay much attention

1 to quality. That's not that big of a surprise, but  
2 you still have some of these buildings that are  
3 supposed to be providing science education for  
4 African-American students in the State of Maryland.

5 If we look at the last bullet, what Dr. Burnim  
6 was talking about is that -- again, I think this is  
7 traceable to the de jure era -- the science building  
8 is so bad that when they bring students in who are  
9 interested in science, they don't even like to take  
10 them to the science building.

11 So we saw on the right-hand side something  
12 similar. The Court has heard a lot about Morgan, so  
13 I'm not going to really spend much time on that point.

14 Your Honor, this is the doctoral institutions of  
15 the HBIs and the TWIs, again, talking about the  
16 missions, that the HBIs are at the top (sic). College  
17 Park is at the very top, followed by UMBC, and the  
18 doctoral institutions, Morgan and Bowie are at the  
19 bottom.

20 Now Bowie, the Court may recall, sort of has  
21 just moved up to that Carnegie Classification.

22 THE COURT: Right.

23 MR. JONES: If we look at the master's  
24 institutions, we sort of see the same thing. We see  
25 the TWIs are at the top, there's nobody in the middle,



1 and at the bottom are the HBIs.

2 Now what's interesting about this, Your Honor,  
3 is the bottom point, master's smaller programs,  
4 Coppin, UMES.

5 Now the Court may remember that the HBI Panel  
6 Report talked about the doctoral institutions as  
7 including UMES. But an objective assessment of UMES  
8 under the Carnegie Classifications, it really puts  
9 them down at the master's smaller programs, smaller,  
10 in terms of their programs.

11 The Court may remember some discussion about how  
12 bad off the library is. This, of course, I think is  
13 traceable to the de jure era, all of the discussion we  
14 had about Maryland's treatment of Princes Anne during  
15 the de jure era.

16 The Court asked about salary. So this is the  
17 next slide that gets to that, Your Honor.

18 THE COURT: When you say it's traceable, again,  
19 that's the current policy. That's again because of  
20 funding and limited mission?

21 MR. JONES: Yes, Your Honor.

22 The Court asked about salary. This slide shows  
23 the doctoral faculty salaries at the TWIs versus the  
24 HBIs in terms of the doctoral institutions. You can  
25 see quite a disparity there.

1           Your Honor, we believe that the evidence shows  
2 that this program inequality, in term of the quality  
3 indicators, is traceable to the de jure era.

4           In the de jure era, we see that none of the HBIs  
5 are equal in quality to the institutions maintained  
6 for the white population, their phrase. In Dr.  
7 Conrad's view, this continue today.

8           So what we have we seen from Maryland by way of  
9 defenses to the missions? I think one part of it is  
10 that they write their own mission statements. As we  
11 point out, I think this ignores the reality that the  
12 mission statements have to follow this formula that  
13 Maryland establishes, and has to follow the State  
14 Plan.

15           The Court in Knight recognized that to a certain  
16 extent, the HBIs are involved in writing their own  
17 mission statement, for what that's worth, but that's  
18 very different from their role and operative missions.

19           The Court even made a comment about that I think  
20 at the summary judgment hearing.

21           I think, Your Honor, that -- oh, one more?

22           The final point I want to make, Your Honor, in  
23 terms of the missions, one of Maryland's defense, they  
24 cited to four exhibits.

25           The Court may remember this exchange. You know,

1 during the testimony of Dr. Blanshan, we alleged that  
2 we were being sandbagged. But it eventually came out  
3 that Dr. Blanshan was asked to testify and sponsor  
4 some exhibits that the truth was she didn't really  
5 know anything about.

6 The Court struck those exhibits, but they popped  
7 up again in Maryland's findings of fact inexplicably.

8 So, Your Honor, I think that consistent with  
9 your suggestion about now being a time for a break, I  
10 have gone through missions, and obviously I am happy,  
11 when my time comes again, to answer whatever questions  
12 the Court has.

13 I will confer with my colleagues to see whether  
14 there were some questions that the Court asked that I  
15 did not adequately address, but that's what I have to  
16 say on missions, Your Honor, so far.

17 THE COURT: Okay. That would leave when it's  
18 your turn again?

19 MR. JONES: I would propose to go into  
20 unnecessary program duplication, funding, including  
21 the dual mission. But I think maybe given the Court's  
22 question, I will pull up -- I will make dual mission  
23 more prominent. Maybe I will discuss that earlier.  
24 But then I've got unnecessary program duplication and  
25 funding.

1           If the Court wants me to reverse the order, I  
2           can do that, but I think right now I'm discussing  
3           unnecessary program duplication first, and then  
4           funding last.

5           THE COURT: That's fine.

6           MR. C. THOMPSON: If I might be heard on that,  
7           Your Honor?

8           THE COURT: Yes.

9           MR. C. THOMPSON: I would just as soon have it  
10          that Mr. Jones finish, and if that takes us into after  
11          the break, that's fine. I think it would be more  
12          efficient to have Mr. Jones complete his presentation,  
13          and then I can respond to same.

14          THE COURT: How long do you think it would take  
15          you to go ahead and complete your presentation, Mr.  
16          Jones?

17          MR. JONES: I'm advised, Your Honor, that I have  
18          been going about an hour. So under the original  
19          allocation, that means that I have I guess a half an  
20          hour left.

21          I don't want to act like those guys in the  
22          debate, presidential debate.

23          (Laughter.)

24          THE COURT: Oh, no. You are all much --

25          MR. JONES: Let the record reflect that Your

1 Honor had no comment on that.

2 (Laughter.)

3 So a half an hour, I will get to point, I will  
4 get myself to the point of finishing-ish within a half  
5 an hour, to give them their hour and a half

6 Maybe I'll take 20 minutes, because I will want  
7 some rebuttal. Then we will see where we are after  
8 that.

9 But I will get through all of the issues, Your  
10 Honor, though, there may be some additional points and  
11 questions that the Court has for me, and I will make  
12 myself available to answer them.

13 THE COURT: Great. Is our court reporter and  
14 everybody doing okay to press forward for another 20  
15 to 30 minutes? Okay.

16 MR. JONES: Okay.

17 THE COURT: Unless you need a break, Mr. Jones.

18 MR. JONES: Your Honor, actually, that wouldn't  
19 be a bad idea. If I had about five minutes, that will  
20 help me to consolidate them and to be sure that I am  
21 covering what the Court wants me to do.

22 THE COURT: Let's take a short break.

23 (A recess was taken.)

24 THE COURT: All right.

25 MR. JONES: Thank you, Your Honor.

1           What I would propose to do is to actually go  
2 forward to funding instead of unnecessary program  
3 duplication, which on the hard copy slides will be 92,  
4 in light of some of the Court's questions. But I want  
5 to double back very briefly, Your Honor, to one of the  
6 questions that you asked about the phrase vestige.

7           Mr. Greenbaum seems to remember that in the  
8 Supreme Court principle decision, the decision in  
9 Fordice, the Court actually used the phrase remnant  
10 instead of vestige, and maybe the concurrence used the  
11 phrase vestige. Of course, the other courts have used  
12 the phrase vestige.

13           It's pretty clear that they are synonymous. I  
14 think when we see, for example, Secretary Lyons saying  
15 that the facilities and the dual mission are a vestige  
16 of the de jure era, it's just as simple to say it is a  
17 remnant of the de jure era. It's something that was  
18 taking place in the de jure era, and it is still  
19 existing, a remnant.

20           So on funding, Your Honor, I just want to start  
21 with the fact that Court knows that we contend that  
22 funding is a traceable policy.

23           The Maryland Code indicates that funding is  
24 mission based, and this is one of the things that  
25 Judge Murphy noted in the Knight case, about

1 mission-based funding.

2 "If the past has been noted for inequitable  
3 allocations to institutions, so will the future --  
4 unless the formula is changed to ignore the inequities  
5 of the past."

6 One of the things that the Court noted at least  
7 at one point in the decision, which is something that  
8 Maryland has focused on a lot, is that even though the  
9 HBIs had been funded on a per student basis for some  
10 period of time, that was not enough under Fordice to,  
11 first of all, get the HBIs out of the hole that they  
12 were in, but it was not a defense to a traceable  
13 policy, mission-based funding.

14 The Court noted here in the Knight case that the  
15 funding for the HBIs was not sufficient for funding of  
16 the students to overcome the effect of past  
17 discrimination, and to provide an education that was  
18 free from the stigma of past discrimination, such as  
19 physical facilities and the tarnish of a reputation of  
20 lack of quality education.

21 Now I want to turn to what exactly is Maryland's  
22 current funding policy.

23 THE COURT: Yes.

24 MR. JONES: The Court may remember there's the  
25 Funding Guidelines, and I think the testimony was that

1 initially the Funding Guidelines drove the  
2 appropriations. This is from Mr. Vivona.

3 THE COURT: right.

4 MR. JONES: It seems to be the case that once  
5 the recession came, Maryland, instead of having the  
6 Funding Guidelines drive the funding allocations, it  
7 now, I guess as court decisions may say, it informs  
8 it. They use it sort of as a benchmark, but it is a  
9 part of the funding process.

10 So what they do now, according to --

11 Your Honor, let me do this. Let me skip forward  
12 a minute. Let's see. Okay. I'm skipping forward.  
13 You can see it on the screen. This is slide 100.

14 So what Mr. Vivona describes is what they call  
15 the Current Services or Cost Model, and that is what  
16 are you currently doing in terms of services and  
17 programs and the like, and what does it cost to  
18 continue that, continue funding you at that level?

19 So now I'm going to go back, if I can, a couple  
20 of slides. I might need your help. I did it. Okay.

21 So what Mr. Vivona says is that under the  
22 Current Services Funding Model, mission is a part of  
23 that. He said mission determines a lot, but within  
24 the appropriate Carnegie Classification.

25 So I think it is fair to say that the current



1 funding model is mission-based.

2 So what we see, Your Honor, if we look at the de  
3 jure era, we had mission-based funding. The HBIs had  
4 the limited missions, and we saw that the Funding  
5 Guidelines were mission-based, and the Current  
6 Services Model is also mission-based.

7 THE COURT: Do you distinguish between the  
8 funding system that was in place during the 1990's,  
9 which I recall was perhaps more mission-based than  
10 what the State then put into place in 1998 and 1999?

11 MR. JONES: I think that's right, Your Honor. I  
12 think that it was more mission-based in the 1990's. I  
13 think that's what Dr. Toutkoushian said.

14 But the Funding Guidelines, as Dr. Toutkoushian  
15 explained, has a mission component, as does the  
16 Current Services. It's not exactly the same as the  
17 1990's model.

18 THE COURT: It seemed like a fairly significant  
19 change to me at that time; but I understand your point  
20 that it still reflects mission to some extent.

21 MR. JONES: Your Honor, I think, just on that  
22 point, I think under the case law, even if there were  
23 a change in the 1990's that the Court believed was  
24 more advantageous to the HBIs, I don't think that's  
25 enough to cut off traceability of the current funding

1 formula and the Current Services Model under the  
2 Fordice decision.

3 This is from Dr. Toutkoushian. The Court, of  
4 course, remembers him. He described the deficiencies  
5 from the de jure era which he believed were -- I'm  
6 sorry. He described the deficiencies. He did a  
7 calculation from 1984 to 2009, and he came up with  
8 some cumulative deficiencies which he believed was the  
9 result of the HBIs being assigned less  
10 research-intensive missions.

11 The Court has seen these slides, so I am not  
12 going to spend time on them. I just wanted to put  
13 them up. But if you look at appropriations and then  
14 the enhancement, the Court will recall this was a part  
15 of Dr. Toutkoushian's rebuttal testimony, where the  
16 1400 was done, as actually intended by the Bohanan  
17 Commission, 1400 per students needing remediation.

18 Now, of course, this is not -- I guess I should  
19 make this point, Your Honor, which I think I made in  
20 the opening statement as well, which is that it is  
21 impossible to calculate the extent of the  
22 underfunding. So this is not what that was purporting  
23 to do.

24 I think that Dr. Lichtman took Dr. Toutkoushian  
25 to task for a few errors that he made in some of his

1 calculations, but I think what you will see is, when I  
2 get to the gist of it, the gist of Dr. Toutkoushian's  
3 testimony was fully supported by Maryland's own  
4 records in terms of the cumulative underfunding of the  
5 HBIs.

6 One of the key points that Dr. Toutkoushian was  
7 indicating was that in terms of trying to understand  
8 the underfunding of the HBIs, you should take into  
9 account not just State appropriations, but tuition and  
10 fees, because tuition and fees are an important part  
11 of an institution's revenue source. This chart, which  
12 the Court has seen, makes that point.

13 Dr. Toutkoushian indicated that he could not  
14 quantify, his deficiency calculation did not include  
15 economies of scale, because it was so difficult to  
16 quantify. But there's no question that Maryland  
17 itself has recognized that there are economies of  
18 scale.

19 So the smaller HBIs who end up with higher per  
20 FTE funding -- in fact, I think Judge Murphy in Knight  
21 made this point, Your Honor, which I believe I  
22 discussed in the opening statement, that the HBIs  
23 seemed to be better funded than they in fact are  
24 because they are smaller and don't take advantage of  
25 the economies of scale.

1           You know, I'm not going to spend time on this  
2 slide, Your Honor. This is in terms of funding.

3           One of the arguments that Maryland made through  
4 Dr. Lichtman was that it gives -- this is one of its  
5 current defenses -- that Maryland gives more money per  
6 FTE to its HBCUs than the other southern states do,  
7 and I just thought it was interesting that they made  
8 that same argument during the de jure era.

9           One of the other points that Dr. Toutkoushian  
10 made, Your Honor, was that, and the Court may remember  
11 this, in terms of the support of institutions -- he  
12 made a couple points.

13           One is that Maryland gives an inordinate amount  
14 of money to private institutions -- let me go back to  
15 that -- an inordinate amount of money to private  
16 institutions, and as a state, for its wealth, it  
17 actually underfunds higher education. So it actually  
18 could afford to provide additional funding to the  
19 HBIs.

20           So I want to go now to the dual mission very  
21 briefly, Your Honor, because I mentioned it. This is  
22 just from the HBI Panel that talked about historically  
23 and into the future, they have the dual mission.

24           The 2009 State Plan, if the Court reads it, it  
25 makes a number of references to the dual mission, and

1 not a single time does it use the phrase optional or  
2 voluntary or non-mandatory to refer to this dual  
3 mission.

4 In fact, the next slide, which is the hard copy  
5 slide 110, this is where they use the language that  
6 the HBIs are charged with providing this access  
7 mission.

8 The Court has seen this, so I am not going to  
9 spend much time on it, except to say that the HBI  
10 Panel recognized the additional expenses that the HBIs  
11 have on account of the dual mission, and the number  
12 two point in particular, Your Honor, where they talk  
13 about they have to charge lower tuition and fees.

14 This is one of the reasons why it is appropriate  
15 under Dr. Toutkoushian's analysis to look at, when you  
16 are looking at the total amount of money that is  
17 coming into the HBIs, you look at not just State  
18 appropriations, but tuition and fees as well.

19 THE COURT: Does the State appropriation not  
20 take into account revenue from tuition and fees?

21 MR. JONES: I would say this, Your Honor. It  
22 does not adequately take it into account. Dr.  
23 Toutkoushian made two points about that.

24 He mentioned that the State guidelines look at  
25 tuition and fees to support his point that you should

1 consider tuition and fees, but it does not adequately  
2 take that into account for the HBIs. This is I think  
3 also a point that the HBI Panel was making, because if  
4 it was adequately taking it into account, they  
5 wouldn't need to call that out as one of the reasons  
6 why the HBIs need substantial additional funding.

7 Of course, the Court has seen, you know, where  
8 the HBI Panel concluded they were not funded  
9 appropriately to carry out both of those missions.

10 Your Honor may remember this. I think we  
11 presented him by way of deposition. This is a  
12 30(b)(6) witness from Maryland. Again, contrary to  
13 the suggestion presented in court that the HBIs are,  
14 you know, that they are doing swimmingly, that he  
15 agreed, that MHEC agreed that they need substantial  
16 additional resources in terms of recruitment,  
17 retention and graduation.

18 I alluded to, and I think the part of this, Your  
19 Honor, that I want to focus on is the first bullet  
20 point, that Maryland has recognized that what we are  
21 talking about in terms of the missions of the HBIs,  
22 the funding of the HBIs, and the facilities of the  
23 HBIs, it's not just to -- I can't remember now --

24 Well, actually, just as I said I couldn't  
25 remember, it came into my head.

1           Another thing I thought was interesting, Your  
2 Honor, about the defenses that Maryland makes now,  
3 just like they made in the de jure era, Maryland now  
4 says well, if you do all of the things for the HBIs  
5 that we promised we would do in the Partnership  
6 Agreement, if you do all the things for the HBIs that  
7 we said in the State Plan that we were committed to  
8 doing for them, that would somehow be a violation of  
9 the Brown decision, because what you are simply going  
10 to do is to create a good, high quality private  
11 enclave just for African-American students, and that's  
12 what Fordice says you can't do.

13           It's interesting that that same argument was  
14 made back in the Murray case. But when we look at  
15 this first bullet point, consistent with what's in the  
16 Partnership Agreement, Maryland recognizes that in  
17 order for the HBIs to recruit, retain and graduate an  
18 academically, racially, culturally and ethnically  
19 diverse student body, that is one of the reasons why  
20 you need to provide the expanded missions and the  
21 funding.

22           I think I can skip this next slide, Your Honor,  
23 because you have seen it. You have seen the financial  
24 aid slide.

25           I'm about to start talking, I think, about some

1 of Dr. Lichtman's analysis. So I wanted to spend a  
2 moment talking about what are the drains on the HBIs'  
3 budgets that existed during the de jure era and that  
4 exist now, and that are not accounted for in a strict  
5 per FTE analysis?

6 The Court may remember that during the de jure  
7 era, there was discussion about the HBIs were not  
8 getting sufficient funding for maintenance because  
9 then, as now, you have to fund maintenance out of the  
10 same budget that you have to fund your dual mission  
11 out of.

12 The leaking Jenkins Building and that Cartabello  
13 Building, or whatever the name, Montebello Building at  
14 Morgan, the abandoned psychiatric hospital, has to all  
15 come out of this operating budget.

16 So what the HBI Panel also talked about was that  
17 the HBIs, they don't have money for, consistent money  
18 for maintenance. This is one of things that Dr.  
19 Kaiser, who went and saw the buildings at the HBIs,  
20 said, look, some of these labs are like high schools.

21 Anyway, this is all impacting the operating  
22 budget and is relevant to our discussion of the FTE  
23 funding by Dr. Lichtman.

24 As the Court will recall, on the left-hand side,  
25 Dr. Lichtman's principal thing that he brought to us



1 was that if you do a mathematical calculation, divide  
2 the amount of money that the HBIs get by the number of  
3 students they get, voilà, you get a per FTE that is  
4 higher than the HBI, so let's go home.

5 But if we look at the HBI Panel Report and the  
6 Knight decision, both, I think it is a fair reading to  
7 say, rejected that approach in part because the HBIs  
8 have this more difficult mission, a mission that is  
9 more difficult than the TWIs.

10 Dr. Lichtman also brought to us a per FTE  
11 analysis of the libraries at the two institutions. I  
12 think I said in the opening statement that I had never  
13 ever seen anybody do a per FTE analysis in terms of  
14 the library books.

15 So what he told us is that the HBIs have more  
16 books per FTE than the TWIs. So when all of these  
17 people were talking about having to go to the TWIs to  
18 visit their libraries, I guess they weren't aware of  
19 this FTE calculation.

20 But in any event, if we look at Maryland's  
21 documents, Dr. Allen and Dr. Conrad, these libraries  
22 are some of the smallest ones that they have seen.

23 Dr. Lichtman also did an FTE analysis to try to  
24 say that well, in terms of space, the HBIs, you know,  
25 they are in better shape than the TWIs, because they

1 have lower space deficits. Well, the HBI Panel also  
2 addressed that and said that's something to talk  
3 about, but what you need to look at is the quality of  
4 the space. They indicated, and I guess it will be in  
5 my next slide what they thought about that.

6 So Dr. Lichtman we know did not visit the  
7 campuses, but the HBI Panel did, and found that they  
8 visibly, and this was a phrase that they used, they  
9 visibly lagged the campuses of the TWIs.

10 What they noted, Your Honor, was that not only  
11 do they visibly lag, but if you are going to put the  
12 HBIs in the position to compete with the TWIs in terms  
13 of attracting students, regardless of race, and  
14 improving the retention and graduation rate, these  
15 were points that needed to be addressed.

16 The only point of this, Your Honor, is that Dr.  
17 Lichtman did not, of course, look at whether this was  
18 true during the de jure era. The Court saw in my  
19 opening statement, we know that part of the time it  
20 was true, and I focused on --

21 THE COURT: Princess Anne.

22 MR. JONES: Princess Anne -- good memory, Your  
23 Honor -- but it was also true -- there were some  
24 slides, and I took them out, but I think we cited to  
25 them in our findings of fact -- the same was true for

1 Bowie. Bowie had a very high per FTE. In fact, I  
2 think it was higher than almost all of the other TWIs  
3 because of its size.

4 Of course, we know that Dr. Lichtman pointed out  
5 that there was a trend line in favor of the HBIs in  
6 terms of per FTE funding, and that was true when the  
7 HBI Panel made its recommendations. That was true  
8 when Maryland promulgated the 2009 State Plan, and  
9 that was true when their 30(b)(6) witnesses testified  
10 as well.

11 On the issue of whether College Park is a  
12 substantive outlier in terms of its programs, I just  
13 thought it was interesting that -- Dr. Toutkoushian,  
14 of course, disagreed with Dr. Lichtman -- neither the  
15 Partnership Agreement, nor the HBI Panel, nor the  
16 State Plan, so far as I could see, excluded out  
17 College Park from its comparisons with the HBIs.

18 So, for example, when the 2009 State Plan says  
19 we want to make, we are committed to making the HBIs  
20 comparable and competitive with the TWIs, it doesn't  
21 say except for College Park, and the same thing with  
22 the HBI Panel Report.

23 Now in terms of the issue of statistical,  
24 whether it's a statistical outlier, which this is the  
25 testimony of Dr. Lichtman, the Court can see this

1 slide. What you can see is that, you know, UoB  
2 University of Maryland - Baltimore is pretty far out,  
3 and they both agreed that was a statistical outlier.

4 The same thing with University of Maryland -  
5 College Park, I'm sorry, University of Maryland -  
6 University College on the far right. But looking at  
7 this data, University of Maryland - College Park does  
8 not seem to us to be a statistical outlier. I think  
9 we pointed out that Dr. Lichtman did not do a standard  
10 deviation analysis to prove up this point.

11 So what's the, you know, what's the sum of it  
12 all? Even though Dr. Toutkoushian initially, when he  
13 was trying to calculate the deficiencies from '84 to  
14 2009, you know, he made some miscalculations that Dr.  
15 Lichtman gleefully pointed out, but in terms of who  
16 has the bulk of the evidence in their favor in terms  
17 of whether there is or isn't a cumulative  
18 underfunding, the Court can see this score card.

19 I haven't seen any evidence outside of this  
20 litigation from Maryland to suggest that they believe  
21 that the HBIs are not underfunded.

22 So land-grant funding --

23 THE COURT: I think you probably need to wrap up  
24 reasonably quickly, understanding you may be able to  
25 come back later this afternoon. But we're at 12

1 o'clock.

2 MR. JONES: So what I would propose to do, Your  
3 Honor, if it pleases the Court, is to talk about my  
4 next slide, land-grant funding. I will spend a minute  
5 on that. Then it would be a good time to break. I  
6 think I will be done with funding.

7 THE COURT: Okay.

8 MR. JONES: I could cede the floor to Mr.  
9 Thompson after the break.

10 So land-grant funding, Your Honor, I think the  
11 slide speaks for itself. We talked about during the  
12 de jure era there was a discrepancy in land-grant  
13 funding. That's true today.

14 The first bullet point is from Maryland's own  
15 document that talks about how UMES struggles with the  
16 required match. Mr. Neufville testified that Maryland  
17 provides College Park seven dollars for every dollar  
18 of federal land grant, and UMES receives far, far less  
19 than that, making it difficult to make their match.

20 So, Your Honor, at this point I'm happy to have  
21 to pause for the lunch break and, as I said, hear from  
22 Mr. Thompson when we come back, unless the Court wants  
23 me to --

24 THE COURT: It's noon. I was going to take the  
25 lunch break at one.

1           MR. JONES: Oh, I'm sorry. I was going to move  
2 into Mr. Thompson, if he's ready.

3           MR. C. THOMPSON: I am, Your Honor, if I could  
4 have just three minutes to get my notes together.

5           THE COURT: Sure.

6           MR. C. THOMPSON: So if I understand, Your  
7 Honor, you have a hard cutoff at one?

8           THE COURT: I was going to take lunch from one  
9 to two. I've got a 2 o'clock conference call, but I  
10 don't think it will be more than 15 minutes. So I can  
11 pick up again at 2:15. Does that make sense?

12          MR. C. THOMPSON: To the extent that it makes  
13 sense, Your Honor, we can take a lunch break now and  
14 resume at one, and then go until Your Honor has her  
15 meeting. I'm fine either way.

16          THE COURT: All right. If you would prefer to  
17 do it that way, we can --

18          MR. C. THOMPSON: I don't prefer to. I'm simply  
19 saying that to the extent that's feasible. Otherwise,  
20 I'm ready to go now, after three minutes.

21          (Laughter.)

22          THE COURT: Okay. Well, why don't we give you  
23 five minutes, but really five minutes instead of 15.  
24 Then if you are okay with it, then go ahead till --

25          I mean it could be a little bit after one. It

1 doesn't have to be a full hour, but that's what I was  
2 thinking of doing.

3 MR. C. THOMPSON: That's fine. Thank you, Your  
4 Honor.

5 THE COURT: We'll take five minutes.

6 (A recess was taken.)

7 THE COURT: Okay. Mr. Thompson.

8 MR. C. THOMPSON: Good afternoon, Your Honor.

9 May it please the Court, and please excuse my  
10 voice, I would like to begin where Mr. Jones spent  
11 quite a bit of time, and then place in context some of  
12 what you heard so far.

13 Your Honor, glaringly absent from Mr. Jones's  
14 presentation was any evidence, any testimony, any  
15 information provided in the record that demonstrated a  
16 cognizable legal injury to students who have rights  
17 under the Constitution.

18 On January 3rd, I suggested to Your Honor in my  
19 opening that the plaintiffs were going to talk about  
20 institutions who did not have rights under the  
21 Constitution, and the State would talk about students.

22 It's interesting that in the hour and a half  
23 that Mr. Jones presented, not once did he mention the  
24 plaintiffs in this case.

25 The plaintiffs in this case are not the HBIs.

1 The plaintiffs in this case are not the institutions  
2 in the State of Maryland or the institutions of higher  
3 education in the State of Maryland.

4 I would like to begin first, if I might, with  
5 the title of the presentation, Maryland's Failure to  
6 Restructure The Policies and Practices That Have  
7 "Substantially Marginalized" Its Historically Black  
8 Institutions.

9 This case is guided under the case law under  
10 Fordice.

11 I also suggested to Your Honor on January 3rd  
12 that this case was about three things, three major  
13 themes, choices, change and context. What we  
14 attempted to do, Your Honor, was focus on the context  
15 of this litigation, the context of the case law, look  
16 at the changes that have taken place not only within  
17 the HBIs, but education generally, as well as the  
18 demographics of not only the State of Maryland, but  
19 the nation, how the mechanism of changing -- the  
20 delivery of education is simply different. This isn't  
21 1970 in Mississippi.

22 In 2012, Your Honor, you heard a great deal of  
23 testimony from Dr. Kirwan, and even from the  
24 plaintiffs' witnesses, about how the delivery of  
25 education is changing in terms of online education, in



1 terms of Tegrity programs. You heard Dr. Reginald  
2 Avery say that Coppin has become a leader in Tegrity  
3 education, and the technology that is available with  
4 regard to how students receive education.

5 So the title of the presentation, Maryland's  
6 Failure to Restructure The Policies and Practices That  
7 Have "Substantially Marginalized" Its Historically  
8 Black Institutions, is not what this case is about.  
9 The case is about whether or not the State has removed  
10 the policies and practices that have been traceable,  
11 or that are traceable to the de jure era segregation  
12 that continue to have segregative effects. I think  
13 that's an important distinction, Your Honor.

14 If we go to page two of Mr. Jones's  
15 presentation, it lists who the actual plaintiffs in  
16 this case are, and I think it's telling that there was  
17 not a discussion about how these particular plaintiffs  
18 were injured.

19 You did hear testimony from Muriel Thompson who  
20 testified in January that she was scheduled to  
21 graduate from Morgan State University with a doctorate  
22 in community college leadership development in May.  
23 She testified that she chose Morgan because of its  
24 rich academic history, because of its academic  
25 tradition of producing leaders in, not only the State

1 of Maryland, but the nation, and that she wanted to  
2 attend an HBI.

3 She didn't suggest that she was channeled there,  
4 that she was funneled there, or in any way pushed by  
5 any policy or practice to attend Morgan State  
6 University.

7 Most important, she indicated that she was set  
8 to graduate. So she didn't indicate that there was  
9 any policy or practice by the State of Maryland that  
10 prevented her from graduating. In fact, she testified  
11 that she was scheduled to graduate I believe a year or  
12 two ago, and that the reason that she did not at that  
13 time was because of a health issue, not because of  
14 anything with regard to the school or with regard to  
15 any policy or practice of the State of Maryland.

16 Importantly, she also testified that although  
17 she had to travel to University of Maryland - College  
18 Park at times, and Towson State University at times,  
19 she understood as a graduate student that the library  
20 offerings, the physical library offerings in graduate  
21 school in a doctoral program were more limited, and  
22 that there would be some additional interlibrary loans  
23 and online viewing of books.

24 We also find, Your Honor, Muriel Thompson's  
25 involvement as a plaintiff in this case to be

1 particularly interesting, because she is involved in a  
2 unique program that the plaintiffs have argued the  
3 State simply doesn't allow, and the program itself is  
4 the product of the program approval process that  
5 avoids program duplication working.

6 This, as you remember, Your Honor, was one of  
7 those programs that was challenged by Morgan State  
8 University when the University of Maryland - University  
9 College attempted to introduce it, and that program,  
10 after going through the program approval process, it  
11 was determined that UMUC could not host that program  
12 in the State of Maryland.

13 THE COURT: Actually --

14 MR. C. THOMPSON: I'm sorry. Does Your Honor  
15 have a question?

16 THE COURT: Let's back up. We talked about this  
17 a little bit briefly at the beginning, separate and  
18 apart from the point you're making, which I  
19 understand.

20 Why did the defendants bring up standing? Why  
21 was that such a major issue in your proposed findings  
22 of fact and conclusions of law after a six-week bench  
23 trial?

24 MR. C. THOMPSON: I will address it as quickly  
25 and as efficiently as I can, Your Honor.

1           First, the defendants did assert standing as a  
2 defense in its answer to the complaint. The issue of  
3 standing itself, as Your Honor is aware, is a  
4 jurisdictional question.

5           With regard to whether that issue would be  
6 abandoned or that defense would be abandoned, in the  
7 pretrial order, there was a listing or a segment or  
8 section for items that would be abandoned, and the  
9 State never listed in that area that it was abandoning  
10 the issue of standing.

11           The assumption, if you will, Your Honor, was  
12 that the plaintiffs would put on evidence  
13 demonstrating an actual injury by the plaintiffs, and  
14 they did not do that. So that's the reason why, Your  
15 Honor, it took that time to introduce the issue in our  
16 submissions.

17           THE COURT: All right.

18           MR. C. THOMPSON: Let me continue, Your Honor,  
19 with the other plaintiffs in this case.

20           Dr. Chris Heidelberg, you also heard testimony  
21 from Dr. Heidelberg, who received three degrees from  
22 Morgan State University, both a bachelor's degree, a  
23 master's degree, and a doctoral degree.

24           Once again, Dr. Heidelberg did not suggest or  
25 testify that he was restricted in his choices in

1 determining whether he wanted to attend Morgan State  
2 University or another university. In fact, he said he  
3 had the option of attending a non-HBI, but chose to  
4 select Morgan because of its programs.

5 Dr. Heidelberg is gainfully employed. He is at  
6 another well-regarded institution in the State of  
7 Maryland. He is also working with the Social Security  
8 Administration.

9 He's a leader in his field. He has created a  
10 video technology, something that's unique that he has  
11 created, all based on his operation and his education  
12 at Morgan State University.

13 You also heard from Mr. Anthony Robinson, who  
14 graduated from Morgan State University in 1970, I  
15 believe. I'll just go through this quickly, because I  
16 think it's important in terms of who the actual  
17 plaintiffs are and the lack of a demonstration of  
18 injury.

19 Mr. Robinson graduated in 1970 and received a  
20 full scholarship to American University School of Law,  
21 and he has been a successful business person and  
22 lawyer over the last 40 years.

23 Finally, Your Honor, you heard from Mr. David  
24 Burton, who is the president of the Coalition, who  
25 also graduated from Morgan State University in the

1 1960's and then received an opportunity to attend the  
2 University of Pennsylvania, where he matriculated and  
3 earned a master's degree.

4           Once again, Mr. Burton has also become a  
5 successful business person and a successful leader in  
6 his field.

7           So the extent to which 90 minutes was spent  
8 solely on the buildings, and the mission, and the  
9 institutions themselves, I just want to remind the  
10 Court that our charge and our defense in this case was  
11 not only that the State of Maryland made sufficient  
12 efforts, and continues to make efforts to enhance the  
13 HBIs, more important, that the State eliminated the  
14 policies and practices that were traceable to the de  
15 jure era of segregation.

16           That was the context in which we litigated this  
17 case. There has been no distinction between a  
18 non-litigation position and a litigation position.

19           Your Honor, if I could just direct everyone  
20 attention to the screen.

21           Quite a bit was made of the HBI Panel Report.  
22 If my clock was serving me correctly, about an hour or  
23 so was spent talking about some of the findings of the  
24 HBI Panel Report.

25           I just want to remind the Court that this was a

1 panel that was convened after the cessation of, or the  
2 completion of the Partnership Agreement. You heard  
3 quite a bit of testimony on this, Your Honor.

4 What the Commission or the panel was asked to  
5 do, in the broader context of what was known as the  
6 Bohanan Commission, to develop the Maryland model for  
7 funding higher education, was to look specifically at  
8 the issues of HBIs, and to make a recommendation.  
9 Once that recommendation was made, the State, as you  
10 heard from Dr. Kirwan and others, could take certain  
11 parts of it and not take other parts of it.

12 The same holds true with all of the commissions  
13 that were mentioned, Your Honor, in Mr. Jones's report  
14 from the 1940's, the 1930's, and the 1970's. These  
15 commissions were charged with making recommendations.  
16 These weren't policy concessions by the State. These  
17 were recommendations made.

18 If I could turn to page 92.

19 THE COURT: Page 92 of?

20 MR. C. THOMPSON: Page 92. It's on the screen.

21 THE COURT: This is the HBI Panel Report?

22 MR. C. THOMPSON: This is from the HBI Panel  
23 Report. We see here it's a note from the panel.

24 Actually, if we can go to page 92, we see the  
25 charge. We are going to highlight the second

1 paragraph under the charge.

2 Your Honor, this came out in some of the  
3 cross-examination, but I wanted to remind the Court  
4 that this is what the HBI Panel said in the context of  
5 it making its recommendations.

6 This report is intended to provide information  
7 and policy guidance to the Commission to develop the  
8 Maryland model for funding higher education as it  
9 recommends appropriate levels of funding for  
10 Maryland's historically black institutions. It is not  
11 intended to assess Maryland's compliance with the  
12 legal requirements of U.S. v. Fordice or Title VI of  
13 the Civil Rights Act.

14 If we could go back to the page, Chris, that you  
15 just had, which is a note from the panel, and if we go  
16 to the final paragraph.

17 This was important, Your Honor, and we went  
18 through this with Dr. Kirwan, who explained the  
19 importance of HBIs in the context of education, higher  
20 education in the State of Maryland. He talked about  
21 how committed Maryland was not only to providing a  
22 world-class education, but providing a world-class  
23 education with institutions, including HBIs, that  
24 could deliver positive and productive citizens.

25 If we could highlight that final paragraph.



1           We read in taking this initiative, Maryland has  
2 become the first state to ask not simply for more  
3 specific definitions of comparable capacity, but also  
4 what it means to be competitive in terms of outcomes  
5 and results. In doing so, Maryland on its own has  
6 reached for not only a more specific standard, but a  
7 higher and more exacting one, which demonstrates its  
8 commitment to strengthening the HBIs and the Maryland  
9 system of higher education as a whole.

10           The reason that that's important, Your Honor, is  
11 because Mr. Jones made several comments, some of them  
12 sarcastic, during his presentation about Maryland's  
13 desire to enhance the HBIs. The testimony that you  
14 heard, and the evidence that's in the record is just  
15 the opposite. It's that Maryland has committed to  
16 enhancing HBIs.

17           But more importantly, in the context of Fordice,  
18 it has eliminated the vestiges of de jure era  
19 segregation, and removed any policies or practices.  
20 There are no current policies or practices that are  
21 traceable.

22           Now when talking about "deficiencies," when  
23 talking about "consequences" or results, i.e.  
24 underfunding, Fordice made it pretty clear that the  
25 issue of the results, it's not about tracing

1       disparities.  It's about tracing the policies that  
2       lead to those disparities.

3               So we're not in this case about tracing the  
4       disparities or the deficiencies, but looking at  
5       whether there are any specific policies that the State  
6       of Maryland has undertaken, or it is currently  
7       undertaking, that's leading to those deficiencies.

8               Your Honor's question with regard to the funding  
9       issue, which I'll get to in just a moment, was I  
10      thought instructive, because Mr. Jones indicated by  
11      referencing the Knight case the language, and we'll  
12      get to it in just a moment, about there being a  
13      traceable policy, unless the formula is changed.

14              Well, Your Honor, you heard quite a bit of  
15      testimony about the process of funding and the  
16      mechanism of funding higher education in the State of  
17      Maryland, and it has changed.  It has changed.  It has  
18      changed dramatically.

19              In fact, Mr. Jones mentioned the Access and  
20      Success funds.  Well, there were two enhancement  
21      funds.  There was the Access to Success, as well as  
22      the HBI enhancement.

23              You heard testimony from I believe David  
24      Treasure that one of the two is now currently in the  
25      base budget for HBIs.

1           So the defense in this case has not been to  
2 suggest HBIs are overfunded or HBIs are greatly funded  
3 or they are funded adequately. That's not the defense  
4 in this case. The defense in this case is that the  
5 funding formula in the State of Maryland has changed,  
6 and it's not the same as it was during the de jure era  
7 of segregation.

8           With that in mind, Your Honor, just as a quick  
9 backdrop, once again, the State of Maryland recognizes  
10 and tried this case understanding that what Mr. Jones  
11 said, and what the documents said, and what the  
12 witnesses said was absolutely true. The de jure era  
13 of segregation was horrible. It was tragic, and it  
14 was an embarrassing stain on this country's history.

15           Maryland's defense in this case has not been to  
16 run from that history. Maryland's defense in this  
17 case has not been to try to forget that history.  
18 Maryland's defense in this case has been to suggest  
19 that it has eliminated the policies of that history or  
20 of that era, and we are moving forward. That has been  
21 the defense in this case.

22           So if I might Your Honor, looking at page 11 of  
23 Mr. Jones's report, once again, looking at the title,  
24 HBI Panel Chronicles Conditions Traceable to the De  
25 Jure Era That Prevent HBIs from Being Competitive,

1 once again, Your Honor, we are talking about  
2 chronicling or tracing conditions. What Fordice  
3 demands that we attend to and look at is whether there  
4 are any current policies and practices that are  
5 leading to that, and importantly, that have  
6 segregative effects.

7 Your Honor, Mr. Jones talked quite a bit about  
8 missions. When we, when the defense talked about the  
9 issue of change, and I'll get to this a bit more in  
10 response to the slide presentation, you heard from Dr.  
11 Muriel Thompson, Dr. Mortimer Neufville, from Dr.  
12 Reginald Avery at Coppin, Dr. Mickey Burnim at Bowie  
13 State University, Dr. Earl Richardson from Morgan  
14 State University, and each of those HBI presidents  
15 testified about the changes that have taken place not  
16 only in their mission, but in their program offerings.

17 Now in our opening, Your Honor, we went to the  
18 website of each of the institutions that looked at, or  
19 chronicled the histories of each of the institutions,  
20 and each of the institutions was originally founded  
21 generally as a teachers college or as a religious  
22 institution.

23 When we look at what these institutions offer  
24 today, each of the HBI presidents were extremely proud  
25 about what was offered in terms of the cyber security

1 program, for example, at Bowie State University, at  
2 the University of Maryland Eastern Shore, the aviation  
3 science program and the pharmacy program, and the golf  
4 management program, and the restaurant and hotel  
5 management programs. These were all world-class  
6 programs that had received rewards not only  
7 nationally, but internationally. You heard Dr.  
8 Thompson talking about those.

9 You heard Dr. Avery talk about the Tegrity  
10 program, and you heard also Dr. Avery talk about the  
11 unique relationship that Coppin State University has  
12 to the West Baltimore community and its partnership  
13 with the Rosemont Elementary/Middle School.

14 So each of the institutions is unique, and each  
15 of the institutions has its own program offerings.  
16 And candidly, Your Honor, any suggestion that an HBI  
17 is an HBI, is an HBI, is simply wrong. Each of the  
18 institutions has its own brand, its own imprint, and  
19 to suggest that there is some limited mission to  
20 create an HBI in a certain box is not the evidence  
21 that's in this record.

22 I'll note for the record, Your Honor, you heard  
23 the testimony of Dr. Burnim and Dr. Richardson and Dr.  
24 Wilson about where they are in the Carnegie  
25 Classification. Now the State of Maryland doesn't

1 dictate or determine what your Carnegie Classification  
2 is.

3 You heard some information in Mr. Jones's  
4 presentation about funding being tied to missions, and  
5 the quote that he listed said it was tied to the  
6 Carnegie Classification.

7 You also heard or saw, and I'm getting ahead of  
8 myself because I sort of know the notes that I made,  
9 the issue of faculty salaries. He listed UMBC,  
10 University of Maryland - Baltimore and University of  
11 Maryland - College Park and said that Morgan was the  
12 worst of the worst in terms of faculty salaries, but  
13 those salaries were related to the types of research  
14 that are done.

15 So what Mr. Jones argued was that even among  
16 doctoral-granting institutions, there's a disparity in  
17 terms of the faculty pay.

18 Well, University of Maryland - Baltimore has all  
19 the professional schools, and I think Your Honor may  
20 have even mentioned that. University of Maryland -  
21 Baltimore is a doctoral research university, high  
22 research. University of Maryland - College Park is a  
23 doctoral research university, very high research.

24 So the faculty salaries are related to the type  
25 of doctoral program that you are. It's not just a

1       doctoral program in general. So you would anticipate  
2       there to be some difference in the average salaries.

3               THE COURT: Sure. But isn't part of Mr. Jones's  
4       argument that Morgan, for example, at the doctoral  
5       level hasn't had the opportunity to become that kind  
6       of high research institution?

7               MR. C. THOMPSON: Yes, that is their argument.  
8       In terms of the process that it takes to get there, we  
9       did hear testimony about the program approval process  
10      and the fact that MHEC doesn't give HBIs or any  
11      institution a laundry list of programs to implement to  
12      get it where it needs to be. The institutions are the  
13      drivers of the programs that may expand or maintain a  
14      particular mission.

15              So the suggestion that the State has prevented  
16      any institution from suggesting or proposing a program  
17      that would expand where they are is simply incorrect  
18      and not supported by the record.

19              If I look at page 17 of Mr. Jones's  
20      presentation, he lists some testimony by Dr. William  
21      Kirwan, who is the Chancellor of the University System  
22      of Maryland. The testimony is that there is no  
23      question that we have not done right over time by  
24      Historically Black Institutions and they deserve  
25      special scrutiny and attention in terms of adequacy of

1 funding.

2 Chancellor Kirwan was being honest, and the HBI  
3 Panel, and the actions of the State of Maryland have  
4 continued to suggest that all of the institutions  
5 generally would be enhanced, but a special attention  
6 or special attention would be provided to the HBIs.

7 That's not inconsistent with suggesting that the  
8 system is desegregated, or that the system is a  
9 unitary system, and more important, that any student  
10 who wishes to attend an institution in the State of  
11 Maryland could do so.

12 Page 19, the heading is De Jure Era: Inequality.  
13 Page 20, 1937: "Deficiencies" in Curriculum, Library  
14 and Labs.

15 Once again, Your Honor, we are looking at  
16 deficiencies and whether the deficiencies are  
17 traceable; but the focus has to be on whether a  
18 current policy is producing or causing those  
19 deficiencies.

20 Your Honor, I was struck by a statement that you  
21 made as a preliminary matter with regard to the  
22 State's, I'll simply say, failure to, or absence of a  
23 significant argument regarding educational  
24 justification.

25 The evidence in this case, Your Honor, is that



1 the process for program approval includes within it,  
2 both in the statute and the COMAR regulation, a strict  
3 attention to whether there is an educational  
4 justification for a program.

5 Out of all of the programs that Dr. Conrad  
6 listed, and as we discussed, the two that were really  
7 discussed more intensely than the others were the two  
8 that the State of Maryland demonstrated the  
9 educational justification for a particular program, or  
10 why it would be violative of, or potentially violative  
11 of Fordice in the UMUC matter.

12 THE COURT: Let's take, for example, the  
13 University of Baltimore, and changing it from a  
14 two-year upper level division institution to a  
15 four-year institution. Do you think you presented  
16 educational, sound educational justification for that?

17 MR. C. THOMPSON: In the submissions or in the  
18 trial?

19 THE COURT: I guess in the trial.

20 MR. C. THOMPSON: Let me answer your question  
21 directly. The answer is yes.

22 There was testimony by Dr. Kirwan, as well as  
23 President Bogomolny, regarding the market need for  
24 additional students, as well as the fact that there  
25 was already the first and second students who were at

1 the University of Baltimore.

2 So I believe that the evidence is pretty strong,  
3 and that there was evidence of an educational  
4 justification for that.

5 In terms of the argument that there has to be an  
6 educational justification for the expansion of an  
7 existing institution, I am not sure if that's a  
8 Fordice question, but I understand Your Honor's point.

9 THE COURT: Well, let me tell you how it's  
10 troubling me. One of the issues is unnecessary  
11 program duplication, and there is some suggestion in  
12 the case law that it doesn't take a great deal to find  
13 that that is traceable, that if you find unnecessary  
14 program duplication, that it doesn't take a great leap  
15 to say that that is traceable back to the day when  
16 there had to be two of everything.

17 I'm troubled by what seems to me to be a  
18 duplication of programs at geographically proximate  
19 institutions that have grown up particularly in the  
20 Baltimore area over the years, and there are some  
21 relatively recent examples of it. I sort of think  
22 that the University of Baltimore is one of them that  
23 troubles me.

24 MR. C. THOMPSON: If I might, Your Honor, just  
25 to respond a bit further, the expansion of the

1 University of Baltimore was called a  
2 Freshman-Sophomore Initiative. So in other words, the  
3 University had already been sort of an upper-level  
4 provider of education, and what this intended to do  
5 was to allow freshmen and sophomores into the  
6 University of Baltimore.

7 THE COURT: I understand.

8 MR. C. THOMPSON: So I understand Your Honor's  
9 point about educational justification, but the Fordice  
10 context suggests that it's educational justification  
11 with regard to unnecessary program duplication of  
12 non-core programs that lead to segregative effects.

13 So the University of Baltimore story is about  
14 core programs, and I think the testimony from Dr.  
15 Kirwan bore that out.

16 So most of the courses, and I think President  
17 Bogomolny testified to this as well, the  
18 Freshman-Sophomore Initiative, after it was fully  
19 vetted, determined that most of the courses in the  
20 freshman/sophomore year are core courses, and that  
21 that was the educational justification for expanding.

22 I believe at this time there was a boom in the  
23 number of students who were college age and college  
24 ready, and the justification for that was that they  
25 would have additional institutions to attend for their

1 first and second year, whether it was a community  
2 college or University of Baltimore for  
3 freshman/sophomore year.

4 But I think the additional testimony in terms of  
5 whether it was educationally justified was the fact  
6 that it didn't violate Fordice because Fordice talks  
7 about unnecessary program duplication of non-core  
8 programs. I believe, Your Honor, that's clearly in  
9 the record in terms of what the vetting process was  
10 with regard to the University of Baltimore. It was  
11 about adding freshmen and sophomores.

12 The upper level course were already in existence  
13 at the institution.

14 THE COURT: Right, which was the result of the  
15 decision by the State, by the failing private  
16 institution back in the '70s, as I recall.

17 How am I to take, in terms of unnecessary  
18 program duplication, how am I to take chronology into  
19 account?

20 I mean supposing there was a decision, whether  
21 it's the University of Baltimore in the '70s, or going  
22 to UMBC whenever it was, late '60s, early '70s, rather  
23 than another institution, if there's a decision like  
24 that that's made in the past, but supposing I were to  
25 find that the record supported unnecessary program

1 duplication in the present, is there a cutoff? Is  
2 there some sort of time, something that intervenes,  
3 would you say?

4 MR. C. THOMPSON: Oh, I think there clearly is,  
5 Your Honor. When the evidence in the record is, and  
6 once again, circling back to the context of Fordice,  
7 that being current policies and practices, when the  
8 COMAR regulations and the statute in the Maryland  
9 Higher Education Article expanded or changed the  
10 program approval process, I believe at that point  
11 there was that detachment or vitiating, if you will,  
12 from any program duplication that may have been  
13 unnecessary or may have been determined to be  
14 unnecessary in the past.

15 When we look at the current program, and the  
16 current practice, and the current policy, that current  
17 policy is certainly not traceable to the extent that  
18 there is not only a determination of, or a  
19 demonstration, that there needs to be unreasonable  
20 duplication with demonstrable harm, which is sort of  
21 any institution objecting to any institution's  
22 proposed programs.

23 But it is also codified that the program  
24 approval process has within it language that addresses  
25 the Fordice question, that being whether or not there

1 is an unnecessary program that duplicates a program at  
2 a geographically proximate HBI.

3 So I think that the evidence that's in the  
4 record with regard to the current COMAR regulation and  
5 the current statute that looks at all of those issues,  
6 as well as, Your Honor, which is very important, that  
7 additional step of the other institutions within the  
8 State of Maryland having access to proposed programs  
9 to determine whether or not, and then being given 30  
10 days to object, that type of involvement and  
11 engagement is important.

12 I think it is also important, Your Honor, to  
13 note, if you recall the testimony of Dr. Hrabowski at  
14 UMBC, Dr. Hrabowski said that UMBC is the only  
15 institution, the only research institution in the  
16 country that has a master's program in electrical  
17 engineering, and a doctoral program in electrical  
18 engineering, but not a bachelor's program in  
19 electrical engineering. The reason that UMBC doesn't  
20 have it is because Morgan State University has it.

21 He also testified that UMBC proposed to have, I  
22 believe it was a Ph.D. in policy and history, and that  
23 they wanted a Ph.D. in policy and history for several  
24 years, but that the program approval process prevented  
25 UMBC from getting it.

1           In fact, Dr. Hrabowski's testimony was that  
2 whenever Morgan State University objected to a program  
3 that UMBC proposed, it was denied.

4           In fact, another instance is when Dr. Conrad --  
5 you heard the testimony of Dr. Conrad -- I believe  
6 during my cross-examination.

7           He had been hired several years ago by the State  
8 of Maryland to look at a couple of the programs that  
9 had been objected to, and he made the recommendation  
10 after his review that they were unnecessarily  
11 duplicative, and those programs were denied.

12           So the process now, the practice now is to take  
13 those things into consideration to avoid unnecessary  
14 program duplication.

15           So I think with the current policy and the  
16 current practices, it does in fact, in response to  
17 Your Honor's question, detach itself from that which  
18 may have occurred in the past.

19           THE COURT: And remind what year.

20           MR. C. THOMPSON: What year?

21           THE COURT: The current program approval process  
22 that you are relying on took effect.

23           MR. C. THOMPSON: I think it was in the 2000's,  
24 Your Honor, but I'll have to --

25           THE COURT: That's fine. I'm sure it's in

1       there.

2               MR. C. THOMPSON: I do believe, however, Your  
3 Honor, that it was in effect during the time of the  
4 Partnership Agreement. I'll have to check that, but I  
5 do think it has been in existence for over a decade.

6               If I might, on that question, Your Honor, there  
7 were two programs that were discussed, as I mentioned,  
8 a bit more than the others, the community college  
9 leadership development program, as well as the joint  
10 program at the University of Baltimore and at Towson.  
11 The evidence in the record did demonstrate what the  
12 vetting process was, and what the process was for  
13 determining whether there was educational  
14 justification for those particular programs.

15              So the suggestion that either the creation of  
16 institutions or the placement of institutions is not  
17 educationally sound, I think the evidence suggests,  
18 when you heard the testimony of Dr. Kirwan and others,  
19 who testified that during the Baby Boom, there was a  
20 need for additional institutions. I believe that was  
21 the testimony that's in the record with regard to the  
22 need for educational institutions.

23              If I might, Your Honor, on this issue of change,  
24 Dr. Kirwan also testified about the number of other  
25 types of deliver, if you will, of higher education,



1 the regional hubs in the State of Maryland, the online  
2 institutions, as well as the for-profit institutions.

3 In fact, in the State Plan it talks about one of  
4 the major threats to the State of Maryland, to the  
5 public institutions, are the for-profit institutions.

6 If Your Honor recalls, during the  
7 cross-examination of Dr. Sabatini, not only did he  
8 reveal that he was employed by one of the for-profit  
9 institutions, but it was also the record and the  
10 testimony that Walden University, the university that  
11 his company controls, actually was just recently  
12 awarded a high ranking for awarding a larger number of  
13 doctorates to African Americans. They were second in  
14 the country. I believe Howard University was first.  
15 Morgan State University was fourth.

16 So the private institution that plaintiffs'  
17 witness is employed by is a bigger threat to the HBIs  
18 in terms of its providing or awarding doctorate  
19 degrees.

20 So the issue as we were discussing, Your Honor,  
21 in context is a bit more complex than whether the  
22 University of Baltimore exists. I think the current  
23 landscape suggests that not only are there a number of  
24 additional mechanisms of delivery for education, but  
25 all of them are thriving.

1           You heard testimony from Thelma Thompson. The  
2 enrollment at the University of Maryland Eastern Shore  
3 has gone up.

4           You heard testimony from David Wilson at Morgan.  
5 The enrollment is going up. In fact, it's at its  
6 highest level that it has ever been at Morgan State  
7 University.

8           You heard term from Dr. Mickey Burnim that the  
9 enrollment is going up.

10          You also heard testimony from Dr. Avery. I  
11 believe the enrollment at Coppin has either gone up  
12 slightly or has been sort of flat, but it is  
13 continuing to go up.

14          So the issue of whether even in spite of, or in  
15 light of the creation of a University of Baltimore,  
16 the institutions within the State of Maryland are  
17 still continuing to thrive.

18          THE COURT: Assume they are continuing to thrive  
19 and the enrollment is going up. Can you address the  
20 issue of what appears to be a decline in the other  
21 race enrollment.

22          MR. C. THOMPSON: Certainly, Your Honor.

23          The major issue that came out during this trial,  
24 and I believe that not only did Dr. Kirwan address it,  
25 but it was also addressed by Dr. Mickey Burnim, as

1 well as Dr. John Sabatini, if Your Honor recalls, I  
2 sort of took a journey with Dr. Sabatini from 1974  
3 Prince George's County to 2012 Prince George's County,  
4 during the time that he was -- actually, 2003, before  
5 he left MHEC, and he acknowledged the 1970's and the  
6 issue of busing, and the mandatory busing that  
7 occurred -- this is just one example, Your Honor --  
8 the mandatory busing that occurred in Prince George's  
9 County where Bowie State University resides, and how  
10 the demographic shifts in Prince George's County in  
11 particular had a major impact on the demography or the  
12 demographics of Bowie State University.

13 Dr. Burnim testified in the same manner. He  
14 testified that he was aware that at a certain point in  
15 time in the '70s and '80s, there were simply more  
16 whites in Prince George's County, and now it has been  
17 reversed. Whereas in the '70s, Prince George's County  
18 was 80 percent white, now it's 20 percent white, and  
19 that has had an impact on the students who attend  
20 Bowie State University.

21 Another example, Your Honor, and this came out  
22 through the testimony of Dr. Kirwan, and I believe  
23 most of the other presidents, the changing  
24 demographics of America are real. You heard Dr.  
25 Kirwan testify that the State of Maryland and the

1 country is simply becoming more brown.

2 The number of college-age and college-ready  
3 students who are white is decreasing, and has  
4 decreased dramatically over the last several years.  
5 The number of college-age students who are black,  
6 brown, Asian and Latino is increasing. So when you  
7 look at the demographics of college campuses, it's  
8 reflecting that reality.

9 So I think at least in those two instances, the  
10 demographics of the nation, and the demographics of  
11 specific counties in which these schools reside I  
12 think is a response to Your Honor's question. There  
13 was testimony from Dr. Burnim that he knew that prior  
14 to his arrival, there was a higher percentage of, or  
15 number of white students, and that changed because of  
16 the demographic changes.

17 If I might, Your Honor, just sort of circling  
18 back to this issue of enrollment, and threats to  
19 enrollment, Your Honor might recall Dr. Burnim's  
20 testimony in that regard. He was asked, because it  
21 was in the Bowie State University Master Plan, what  
22 the major threats were, what the major competitors  
23 were to Bowie State University.

24 Your Honor might recall that in the Master Plan  
25 for Bowie State University, the major competitors and

1 the major threats that were identified were University  
2 of Maryland Eastern Shore, Towson, Morgan State  
3 University, and Howard University.

4 Then when he was asked the specific question  
5 about a particular doctorate in education, and why the  
6 enrollment had gone down, his testimony was that the  
7 program itself had an internal pullback. The school  
8 simply wasn't putting as much emphasis on the program.

9 But then he also testified that he talked to one  
10 of his vice presidents and asked where are our  
11 students going, and that vice president responded to  
12 him that they were going to Hood College, another  
13 private institution, and they were going to Johns  
14 Hopkins, and those were where these other students  
15 were going.

16 So there was not a State policy that created  
17 Hood College or a State policy that created Johns  
18 Hopkins University. Those are independent  
19 institutions.

20 So to the extent that Your Honor's question  
21 suggests that the creation of University of Baltimore,  
22 the Freshman-Sophomore Initiative had an impact, once  
23 again, the analysis of where students are going, as  
24 you heard from Dr. Don Hossler, is much different from  
25 whether there's a physical building in close proximity

1 to another physical building. There's a great deal  
2 more involved in that.

3 In the 2009 State Plan, Dr. Kirwan also  
4 testified who the major threats were. He identified  
5 major threats generally as the independent  
6 institutions -- these were threats to state  
7 institutions -- independent institutions, online  
8 institutions, and for-profit institutions.

9 So the complex landscape of higher education is  
10 the reality that we are dealing with right now in  
11 terms of student choice. Once again, one of the  
12 things that was glaringly absent from the presentation  
13 by Mr. Jones was how the context of that current  
14 reality is impacting student choice.

15 Now you did hear from the defense that it's  
16 impacting it greatly. The school, as you heard,  
17 within the State that has the fastest-growing  
18 enrollment is the school with no facilities, that  
19 being University of Maryland University College.

20 So students are choosing to attend college in a  
21 different way now, and in fact, there is a large  
22 number of minority students who are attending  
23 University of Maryland University College as well.

24 I hope I answered Your Honor's question.

25 THE COURT: Fine. Thank you.

1           MR. C. THOMPSON: On page 45 of Mr. Jones's  
2 presentation, I just want to deal with this real  
3 quick, Your Honor, because I did object. This was an  
4 attempt to suggest that MHEC or Maryland conceded  
5 something.

6           The question was was it MHEC's position at this  
7 time that Maryland was already in full compliance,  
8 that being with the Partnership Agreement, and there  
9 was an objection.

10           Then the other question was what was your  
11 position at this time at MHEC?

12           That we were not in compliance.

13           So what Dr. Sabatini was saying was what his  
14 position was, what he thought, what his individual  
15 position was, not what the position of the State or  
16 the official position of MHEC was at that time.

17           Since we are talking about the Partnership  
18 Agreement, similar to the language that is in the HBI  
19 Panel Report, the Partnership Agreement makes it clear  
20 in the language of the Partnership Agreement that it  
21 was not created for the purpose of demonstrating  
22 compliance with Fordice or the Constitution or Title  
23 VI.

24           If I might briefly, Your Honor, on this issue of  
25 vestiges and dual mission, there was quite a bit of

1 time taken on dual mission.

2 In the Fordice case, in the opinion, and I'm  
3 looking at page 31, but there's a footnote that reads  
4 plaintiffs argued that the district court should have  
5 considered adjustments to the funding formula in two  
6 respects, neither which has merit.

7 First, plaintiffs argue that the formula should  
8 be adjusted for the higher cost of remedial education.  
9 Plaintiffs have not, however, identified any traceable  
10 policy related to the funding of remedial education,  
11 nor have they identified any record evidence that  
12 remedial education as structured under the remedial  
13 decree is, or is likely to be underfunded.

14 Your Honor, if I might, and I'm circling back to  
15 one of the first questions that you asked Mr. Jones on  
16 this issue of dual mission, the dual mission is not a  
17 mission that is assigned to the HBIs.

18 I believe my colleague, Mr. Thompson, during his  
19 cross-examination of several of the witnesses,  
20 confirmed, and the evidence reflects, that the dual  
21 mission, while embraced by each of the HBIs, and  
22 subsequently embraced by the State, is not assigned by  
23 the State. It's not dictated by the State.

24 And if the HBIs chose to move from the dual  
25 mission, they could. It's not a traceable policy, to



1 suggest that there is a dual mission.

2 Also on this issue of limited mission, there was  
3 quite a bit of time spent on limited mission.

4 The limited mission that was at issue in the  
5 Fordice case, for example, was the distinction between  
6 the assignment of limited missions to the HBIs, those  
7 being regional or undergraduate-only universities or  
8 institutions, and providing a more comprehensive, as  
9 well as graduate mission to the TWIs or the non-HBIs.

10 We don't have that in this case. That was the  
11 type of distinction in mission that Fordice was  
12 addressing. In other words, the --

13 THE COURT: Why do we not, why do we not have  
14 that in this case, the limited mission?

15 MR. C. THOMPSON: Not one of the HBIs, Your  
16 Honor, is only an undergraduate institution. In fact,  
17 two of the HBIs are identified by Carnegie  
18 Classification as doctoral research universities, and  
19 you heard the testimony of Dr. Thelma Thompson, which  
20 is also a Ph.D. granting university, by the way, which  
21 as Your Honor may recall, Dr. Kirwan said is the gold  
22 standard.

23 So none of the HBIs in the State of Maryland are  
24 only undergraduate-degree-providing institutions, and  
25 two of the HBIs are designated by the Carnegie

1       Classifications as doctoral research. As you heard  
2       the testimony of Dr. Thompson, University of Maryland  
3       Eastern Shore offer several doctorate degrees, and  
4       they are right on the cusp, I believe her testimony  
5       was, of increasing in their Carnegie Classification.

6             If I might, Your Honor, there was also quite a  
7       bit of time spent on the lower Eastern Shore. The  
8       testimony in this case, Your Honor, was not that Dr.  
9       Dudley-Eschbach said that Salisbury, I'm sorry, that  
10      University of Maryland Eastern Shore, they didn't view  
11      them as a competitor. The testimony was that Dr.  
12      Dudley-Eschbach said that there are clear distinct  
13      missions between Salisbury, which is primarily an  
14      undergraduate degree institution, and University of  
15      Maryland Eastern Shore, which does provide the  
16      doctoral degree.

17            In fact, Dr. Dudley-Eschbach's testimony was  
18      that Salisbury does not offer a Ph.D., and doesn't  
19      aspire to, because in the lower Eastern Shore,  
20      University of Maryland Eastern Shore is viewed as the  
21      graduate school, the graduate degree, the  
22      doctoral-granting institution in the lower Eastern  
23      Shore.

24            In fact, since we are on the lower Eastern  
25      Shore, you heard the testimony of Dr. Thompson, as

1 well as the testimony of Dr. Dudley-Eschbach, and  
2 interestingly, I'm going like this because I recall  
3 there being a distinction between where they were  
4 sitting.

5 But you heard the testimony of Dr. Thompson and  
6 Dr. Dudley-Eschbach. Those two schools, if we are  
7 looking at schools within a particular geographic  
8 area, are partnering on a number of programs. I  
9 believe they have more than five joint programs that  
10 they are working on together.

11 So the suggestion that there is some issue in  
12 the lower Eastern Shore, that's not borne out by the  
13 facts and by the evidence in this case. It was very  
14 clear that Dr. Dudley-Eschbach was proud of the rich  
15 tradition of Salisbury and of the University of  
16 Maryland Eastern Shore, and they work together quite a  
17 bit.

18 In fact, both institutions testified that both  
19 of their campuses are more diverse because of their  
20 collaboration. That's also one of the things, with  
21 regard to how we address these issues, that can be  
22 done. These two institutions voluntarily partnered on  
23 a number of programs in order to do that.

24 THE COURT: Okay. Perhaps this is a good time  
25 to take the lunch recess, and you probably still have

1 a half hour or so to go when we come back --

2 MR. C. THOMPSON: That's fine, Your Honor.

3 THE COURT: -- or whatever you need. Is this a  
4 good breaking point or is there something else you  
5 wanted to --

6 MR. C. THOMPSON: I'm going to accept that. The  
7 Court raised it, so this is a good time to take a  
8 break.

9 THE COURT: Okay. We will resume at 2:15 then.  
10 Thank you all.

11 (A luncheon recess was taken.)

12 AFTERNOON SESSION

13 THE COURT: All right.

14 MR. C. THOMPSON: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. C. THOMPSON: Just as a housekeeping matter,  
17 Your Honor, if I might, in terms of time, I think I  
18 may have gone a little less than an hour. So I wasn't  
19 sure what Your Honor's preference is in terms of how  
20 we use the balance of our time.

21 THE COURT: Well, I was going to think that if  
22 you go for as much as another half hour, as you want  
23 to use, that would put you roughly equal with your  
24 brother counsel. Then I can turn back to Mr. Jones  
25 for some 15 to 20 minutes of rebuttal, and then the

1 same for you. Does that work?

2 MR. C. THOMPSON: Yes, Your Honor.

3 Your Honor, when we broke, we were talking about  
4 lower Eastern Shore. One of the things I also wanted  
5 to mention about the lower Eastern Shore and the  
6 schools there, and I believe Your Honor mentioned it  
7 during Mr. Jones's presentation, Dr. Conrad excluded  
8 the lower Eastern Shore from his program duplication  
9 analysis, and his reasoning at the time was that the  
10 program inventory of both schools was very low. It  
11 was very limited. Therefore, he didn't see any  
12 program duplication.

13 It was on cross that it was revealed that in  
14 fact the schools at Salisbury and University of  
15 Maryland Eastern Shore had more programs in their  
16 inventory than some of the other schools at which he  
17 said he found program duplication.

18 I wanted to remind Your Honor, if we can put the  
19 slide up, that you even intervened and asked the  
20 question of Dr. Conrad with regard to his explanation  
21 that he didn't find any program duplication at  
22 University of Maryland Eastern Shore and Salisbury for  
23 that reason. You asked Dr. Conrad, and I'm going down  
24 a couple of lines, if it's the same time period.

25 What I understood Mr. Thompson's point to be is

1 that the number of programs at the University of  
2 Maryland Eastern Shore and Salisbury is actually  
3 greater than, take out UMB, but according to this,  
4 there are more programs than the ones below.

5 Dr. Conrad's response was telling. They do have  
6 a sizeable number of program offerings -- that's a  
7 good observation, one that he didn't make -- and which  
8 would cause me to reflect a little bit more in my  
9 interpretation as to why there's so relatively little  
10 unnecessary program duplication in that corner of the  
11 state. It's a very helpful question.

12 Well, Your Honor, the reason that he didn't find  
13 any in that state is because there wasn't any in the  
14 state, in that area of the state.

15 What he found in his statewide analysis, which  
16 was not a Fordice analysis, which speaks pretty  
17 clearly about geographic proximity, but Dr. Conrad did  
18 what he called a statewide analysis, was that there  
19 unreasonable or unnecessary program duplication in  
20 certain areas of the state.

21 Dr. Thompson testified that she has never  
22 objected to a program that has been offered by  
23 Salisbury or any other school.

24 Dr. Avery testified that he never objected to a  
25 program that has been offered by a non-HBI in the

1 state.

2 Dr. Burnim testified that he has never objected  
3 to a program, and he doesn't believe that there are  
4 any programs that are unnecessarily duplicative of any  
5 of the programs at Bowie.

6 The school that has objected, within their right  
7 to do so, is Morgan State University. As you heard  
8 Dr. Hrabowski say, at least as it relates to UMBC,  
9 when the program is objected to, the non-HBI doesn't  
10 get it, and that's because the program, the process,  
11 the practice works. On the lower Eastern Shore,  
12 that's also the case.

13 THE COURT: So I agree that the lower Eastern  
14 Shore seemed to be pretty good from that point of  
15 view. Remind me of your basic objection to Dr.  
16 Conrad's analysis if we are looking at the other areas  
17 of the state, the Baltimore region, for example.

18 MR. C. THOMPSON: Once again, Your Honor, the  
19 issue in Fordice was -- you can take that down,  
20 Chris -- the issue in Fordice was unnecessary program  
21 duplication geographically, between geographically  
22 proximate HBIs and non-HBIs that led to segregative  
23 effects.

24 THE COURT: Right:

25 MR. C. THOMPSON: What Dr. Conrad did is rather

1 than look at the geographic proximity issue, he did a  
2 statewide analysis. In other words, he was looking at  
3 programs at College Park and Coppin or Bowie State and  
4 Towson, or schools that were within the state, but not  
5 necessarily geographically proximate, which was not  
6 the analysis in Fordice, number one.

7 Number two, what Dr. Conrad did, and this was an  
8 issue in the case, was he looked at CIP codes, which  
9 are the markers or the identifiers for these  
10 particular courses. What Your Honor heard with Dr.  
11 Blanshan's testimony, the Director of Academic Affairs  
12 at MHEC, was that you can't just look at CIP codes.  
13 You've got to dig a little deeper.

14 What Dr. Blanshan found in her analysis, and  
15 simply looking at the program inventory, was that many  
16 of these programs, they weren't the same. Many of the  
17 programs, the TWI had the program first.

18 I asked Dr. Conrad specifically -- if we could  
19 go to slide five -- I asked Dr. Conrad specifically,  
20 okay. And did you consider programs duplicative even  
21 if the HBI program was developed after the TWI had the  
22 program first?

23 His response, I did not.

24 But when we looked at the inventory of programs  
25 that he identified as necessarily duplicative, many of



1 those programs, if you might recall, Your Honor, the  
2 non-HBI had the program first. Many of the programs  
3 were before 1976. Some of the programs were in core  
4 areas.

5 Then there was also a discussion, Your Honor,  
6 about the fact that several of them were in areas  
7 where there was high market demand, like teachers or a  
8 STEM areas.

9 So that was in essence part of the challenge  
10 with Dr. Conrad's analysis, his very simple analysis  
11 of only looking at CIP codes.

12 Now his testimony was that he did look at a  
13 little more, and there was some exchange about being  
14 provided program files, and he was asked some  
15 questions about some specific programs. But overall,  
16 he did acknowledge, and I believe his terminology was  
17 that he did not do a systematic review, looking at  
18 either educational justification or anything else  
19 beyond the CIP codes.

20 So those were in essence some of the challenges  
21 to Dr. Conrad's analysis.

22 THE COURT: Okay.

23 MR. C. THOMPSON: If I might, Your Honor, just  
24 to circle back, I just wanted to flesh out my response  
25 to your question with regard to the University of

1 Baltimore and remind Your Honor that the challenge to  
2 University of Baltimore's program actually came from  
3 the Community College of Baltimore, or Baltimore City  
4 Community College, because many of the programs that  
5 were to be offered or would be offered at UB would, in  
6 BCCC's mind, impact the community college, not  
7 necessarily any of the other colleges.

8 An important distinction, Your Honor, is that  
9 there were no new programs that were offered when that  
10 Freshman-Sophomore Initiative was initiated. Once  
11 again, it was an upper level school already. So these  
12 were programs that already existed at the University  
13 of Baltimore, and they were simply adding the freshman  
14 and sophomore levels of those already existing  
15 courses.

16 So this was not an addition of a number of new  
17 programs. There were no new programs that were added,  
18 but simply the undergraduate level courses of already  
19 existing programs.

20 Your Honor mentioned, when you asked me that  
21 question, that the threshold for determining or the  
22 standard is quite low in determining program  
23 duplication. I might remind Your Honor that that  
24 standard as it relates to Fordice presumed a  
25 segregated system.

1           In Maryland, we don't have a segregated system.  
2           In Maryland, we have a unitary system, and that  
3           standard should be a bit higher. In terms of whether  
4           program duplication is in and of itself a Fordice  
5           violation, I even asked Dr. Conrad that question.

6           I'll find it, Your Honor. But the testimony  
7           was, the question was you agree that program  
8           duplication in and of itself is not a Fordice  
9           violation, and Dr. Conrad agreed with that. I will  
10          get to the specific cite when I can, but he did agree  
11          that program duplication in and of itself was not a  
12          Fordice violation.

13          THE COURT: But it has to be unnecessary, sort  
14          of as a term of art. Is that the thrust of what  
15          you're looking for?

16          MR. C. THOMPSON: When we are looking at a  
17          segregated system, it was unnecessary program  
18          duplication in geographically proximate areas, and  
19          this is important, Your Honor, that causes segregation  
20          or continues to cause segregation. There had to be a  
21          segregative effect, which actually leads me to another  
22          question that Your Honor asked me, and I responded  
23          with some demographic data with regard to the  
24          declining numbers of whites on the campuses.

25          Your Honor heard testimony throughout the course

1 of the litigation about this issue, and Your Honor  
2 actually asked several witnesses about it and said  
3 look, right or wrong, we have heard testimony about  
4 this theme or theory of comfort with the familiar.  
5 That was a phrase that had come out from a number of  
6 witnesses.

7 When Dr. Allen from UCLA was testifying, he was  
8 talking about a societal stigma that HBIs are the  
9 victims of. Right before the cross-examination, Your  
10 Honor said I would like to deal with this stigma  
11 issue, and we heard some testimony, right or wrong,  
12 that there are some students who may be more  
13 comfortable on certain campuses. How, if at all, have  
14 you looked at that issue?

15 Dr. Allen's response was that he hadn't really  
16 looked at it that way, but that it's possible that  
17 students could simply be comfortable with the  
18 familiar.

19 It's clear in the Fordice case that racial  
20 identifiability on college campuses in and of itself  
21 is not violative of Fordice.

22 Mr. Jones mentioned Justice Thomas's concurring  
23 opinion. Justice Thomas made clear that the  
24 identification of HBIs as such was not a violation of  
25 Fordice.

1           Even Dr. Allen, in his writings, he has a paper  
2 that's pretty well-known, and it's called Honoring,  
3 HBIs, Honoring the Past and Appreciating the Future,  
4 and in that, he indicates that HBIs have played, and  
5 continue to play a very important role in terms of  
6 educating African Americans.

7           That was an issue in this case with regard to  
8 the role, or not the role, but the function and the  
9 ability of HBIs to provide an education for African  
10 Americans, and there was nothing wrong with that.  
11 There was nothing violative of the Constitution in  
12 that regard. That whole issue of student choice is  
13 one that even Don Hossler talked about.

14           So I think in response to Your Honor's question,  
15 there is even that additional element of student  
16 choice at the granular level, and whether or not that  
17 played a role in the choices of students to attend any  
18 institution at which they have a desire.

19           THE COURT: I think that certainly does play a  
20 role, but it doesn't necessarily answer the question  
21 of why there would be a decline.

22           I mean assuming that to the extent that it  
23 exists, it's a human nature characteristic, that it  
24 has been around for a while, that in itself wouldn't  
25 explain the decline in other race population at HBIs.

1       Would it?

2               MR. C. THOMPSON:  Let me direct Your Honor's  
3 attention to an exhibit, and this is the enrollment  
4 trends.

5               Your Honor heard testimony, and this was when  
6 Dr. Richardson was on the stand.  This was looking at  
7 the MBA program at Morgan State University.

8               In 1997, as you see, Your Honor, the enrollment  
9 at that time was 86 students.  What you will see, Your  
10 Honor, is that over time, that number was fluctuating  
11 a bit, such that in 2004, that number was 28.

12              Now this is two years before the implementation  
13 of the joint program at University of Baltimore and  
14 Towson.  So the decrease, not only in other race  
15 students, but students generally in the MBA program  
16 was occurring before the creation of the joint  
17 program.

18              Then as you will see, Your Honor, after 2006,  
19 when the joint program was in existence, the numbers  
20 were going up.

21              But the complexity of Your Honor's question I  
22 think speaks to the context issue that we have been  
23 dealing with.

24              Once again, when Dr. John Sabatini was on the  
25 stand, I remember asking him about the number of

1 students, I'm sorry, the number of institutions, both  
2 private, independent, for profit and online, that had  
3 an MBA program. He recalled that there were at least  
4 12 other programs besides the program that was being  
5 offered that had, the institutions that had MBA  
6 programs.

7 So when talking about enrollment reductions at  
8 one school versus another, it's not as simple as to  
9 say because there's "an unnecessary program  
10 duplication" in this particular area, that that's what  
11 drove other students away. There were online  
12 programs. There were programs at I believe Notre Dame  
13 and Loyola that were getting a number of programs, as  
14 well as Johns Hopkins that were getting a number of  
15 students, as well as some students who were going out  
16 of state.

17 One of the challenges that Dr. Kirwan talked  
18 about was how do we keep our best and brightest in the  
19 State of Maryland? Because what was happening was  
20 that the K through 12 system in Maryland was so  
21 strong, that many institutions outside of the state  
22 were capturing the best and the brightest, and so a  
23 number of all race students who were the best and  
24 brightest in the State of Maryland were actually going  
25 outside of the state. So that issue of student choice

1 once again is extremely complex.

2 On that issue of not just program duplication,  
3 Your Honor, but educational justification, I did want  
4 to speak for a moment to Your Honor's question about  
5 the evidence in the record about educational  
6 justification. I wanted to remind Your Honor that we  
7 spent, the State spent quite a bit of time sort of  
8 walking through both the COMAR regulations, as well as  
9 the Maryland Higher Education Code, and there were  
10 several that we had discussed. 1988, Your Honor, was  
11 the answer to your question as to when the  
12 coordination began.

13 But the regulation and the Code make it clear  
14 that there are separate listings or separate  
15 procedures for, number one, submitting an application  
16 for a program, and then number two, dealing with this  
17 issue of program duplication.

18 So in terms of the educational justification for  
19 any particular program, you heard quite a bit of  
20 testimony that the regs require each institution to  
21 show that there is a market demand for the program,  
22 that the institution has the resources for the  
23 program, that they have the faculty for the program.

24 But even Dr. Sabatini indicated, and you heard  
25 the same from Dr. Thompson, that market demand is an



1 extremely important driver of educational  
2 justification.

3 In fact, Dr. Thompson testified that when  
4 University of Maryland Eastern Shore proposed an  
5 engineering program, they received an objection to  
6 that program, and the objection came from Morgan State  
7 University.

8 So even when it comes to the issue of objecting,  
9 that process allows for that kind of back and forth in  
10 terms of communicating that there may not be market  
11 demand for a certain program.

12 I will say, and Your Honor may recall, that  
13 University of Maryland Eastern Shore's engineering  
14 program was ultimately approved because there was an  
15 educational justification demonstrated for it.

16 Also with the testimony of Dr. Sue Blanshan, we  
17 went through quite a bit, when looking at Dr. Conrad's  
18 listing of programs that he found were unnecessarily  
19 duplicative, and for certain programs that maybe two  
20 or three institutions had, it was usually in the STEM  
21 area. We saw the State Plan, and the State Plan  
22 usually drives what MHEC does in terms of allowing  
23 certain programs and approving certain programs.

24 So once the State Plan identifies a need, and  
25 even Dr. Sabatini was testifying to this in terms of

1 teachers. We always need more teachers in the State  
2 of Maryland, and now we are talking about the need for  
3 STEM, science, technology, engineering, and  
4 mathematics.

5 So in those areas there is almost an assumption  
6 or a presumption that there will be a market need for  
7 that. So that, in terms of educational justification,  
8 is also what is in the record in terms of why certain  
9 programs may be approved.

10 There was testimony, Your Honor, about the issue  
11 of missions, and quite a bit about missions. I just  
12 wanted to flesh out the fact, Your Honor, that the  
13 presidents of the HBIs were fairly confident, and they  
14 were also fairly proud of the dramatic changes that  
15 have taken place over the years.

16 It seems to be the litigation position of the  
17 plaintiffs, as Dr. Conrad said in his testimony, that  
18 HBIs only provide a modest educational opportunity for  
19 black people, but that's not what the HBI presidents  
20 said. That's not what the Chancellor of the  
21 University System of Maryland said. That's not what  
22 Dr. Howard said.

23 In fact, if you recall, both Dr. Howard and  
24 Chancellor Kirwan were quite offended when Dr. Conrad  
25 said that HBIs' only role is to provide modest or

1 moderate educational opportunity for black people.

2 The HBI presidents said much more.

3 Back on the Eastern Shore, and Dr. Mickey Burnim  
4 testified to it as well, the HBI presidents were  
5 extremely proud of all of the offerings that they had,  
6 and the changes, the modifications, the expansion of  
7 what they were able to offer in terms of not only  
8 undergraduate programs, but doctorate programs.

9 There was a point, Your Honor, made about, and I  
10 referenced this earlier, Mr. Jones referenced the  
11 Knight case in terms of funding. Let me find it.  
12 It's on page 93 of Mr. Jones's presentation, and it  
13 talks about mission-based funding.

14 The quote from Knight was that, "If the past has  
15 been noted for inequitable allocations to  
16 institutions, so will the future -- unless the formula  
17 is changed to ignore the inequities of the past."

18 Your Honor, on this issue of funding, you heard  
19 from Joe Vivona and David Treasure and others about  
20 the process for funding higher education in general,  
21 as well as the HBIs in particular. There has been a  
22 lot made about the defense's position, which is not  
23 the defense's position, that well, HBIs are funded at  
24 a higher FTE, so they are doing fine.

25 That's not the position. The position is that

1 the formula has changed, the mechanism has changed,  
2 and that way of funding higher education is not  
3 traceable to the de jure era of segregation, and the  
4 complex nature of the budget process, starting with  
5 DBM, and starting immediately after the general  
6 session ends, and looking at the 15-month period  
7 prospectively to determine what the budget will be,  
8 the base budget will be, and then guiding that or  
9 using Funding Guidelines against that.

10 The additional piece that I think is important  
11 and instructive, Your Honor, is that the Funding  
12 Guidelines are just that, they are instructive. They  
13 are guidelines. The idea is that Maryland wants to  
14 see how it's funding higher education as against other  
15 states, other jurisdictions. The idea or the goal  
16 would be to be at the 75th percentile.

17 So the point that was being made about the  
18 funding changes, and the differences in funding, and  
19 how that is not traceable is that in addition to the  
20 base budget, there is the HBI Enhancement Fund and the  
21 Access to Success funds.

22 But even within the peer guidelines or the  
23 Funding Guidelines, Your Honor may recall that the  
24 system, the process even allows, and has successfully  
25 worked, for institutions to sort of protest who their

1 peers are.

2 If you remember, in 2008, there were a number of  
3 institutions, including Morgan State University, who  
4 were able to change who their peers were to make them  
5 more aspirational. There were several criteria that  
6 Your Honor heard about what Morgan State in particular  
7 wanted to have as its peers.

8 The testimony that you heard was that of the ten  
9 peers who were selected, eight of them were the ones  
10 who were suggested and proposed by Morgan State  
11 University.

12 That process, Your Honor, is not traceable to  
13 the de jure era of segregation. The HBI Enhancement  
14 Fund is not traceable to the de jure era of  
15 segregation.

16 You heard testimony that the Access to Success  
17 funds are now incorporated within the base budget for  
18 HBIs only. Non-HBIs are not permitted to get that  
19 funding.

20 That formula, Your Honor, that process is not  
21 traceable to the de jure era of segregation. This  
22 issue of looking at funding peers is clearly not  
23 traceable to the de jure era of segregation.

24 When trying to compare the FTE funding in the  
25 1930's and '40s, when there may have been 29 to 50

1 students on a campus, and saying well, there's a  
2 higher FTE during that period of time, therefore, they  
3 are doing fine, that's not what the State is saying.  
4 That's not what the State is saying at all. The State  
5 is simply saying that the funding mechanism, the  
6 guideline is different.

7 It looks like Your Honor has a question.

8 THE COURT: I was just going to say, and I think  
9 I understand your point, but to the extent that the  
10 Funding Guidelines, even just for comparison purposes,  
11 are based on so-called peers, isn't that in a way, to  
12 some extent it has to be reflective of mission?

13 You're going to compare yourself as a peer to a  
14 doctoral institution or a regional, whatever it might  
15 be, but it is somewhat influenced by mission who your  
16 peers are.

17 MR. C. THOMPSON: Somewhat, Your Honor, but I  
18 think the emphasis is on somewhat, because that's part  
19 of the story, but not the full story.

20 So when selecting peers, it's not just missions  
21 that are determinative, but it's the program mix.  
22 It's whether they are more urban, in terms of  
23 geography. It's faculty. It's size. It's a number  
24 of things beyond what the missions are of a particular  
25 institution.

1           One of the things that we don't know, Your  
2 Honor, when Your Honor was asking Dr. Toutkoushian  
3 some questions -- because he indicated, his testimony  
4 was that the funding formula or the Funding Guidelines  
5 do not take dual mission into account.

6           Your Honor asked Dr. Toutkoushian, well, if you  
7 are looking at institutions that have similar  
8 backgrounds as peers, wouldn't that possibly take dual  
9 mission into account as well?

10          Dr. Toutkoushian's response was I just don't  
11 know. I just don't know.

12          So it's incorrect to suggest that the Funding  
13 Guidelines do not take dual mission into account based  
14 on that. So there are a number of things that are  
15 included in determining who the peer group is.

16          Your Honor, if I might, on the issue of the land  
17 grant, there was a slide that talked about some of the  
18 challenges with the land grant at UMES. I don't want  
19 to spend a lot of time on that, Your Honor, because  
20 that issue is extremely complex, and I don't want to  
21 pretend that I understand it fully.

22          However, I will direct Your Honor's attention to  
23 the January 24th testimony of Chancellor Kirwan, who  
24 was asked specifically about that issue and talked  
25 about the interplay between the State and the federal

1 government with regard to land grants, and some of the  
2 issues that worked out around that time.

3 I just want to remind the Court that even at  
4 that time, Chancellor Kirwan indicated that there was  
5 a deficiency request that was placed in the budget  
6 with the State to provide additional funding to make  
7 up for that gap for the land grant, and that they were  
8 working, that the State, the USM, was working very  
9 closely at that time with UMES. So that was an issue  
10 that was acknowledged and addressed, and there was a  
11 deficiency request that was placed in the budget for  
12 that to address it.

13 So it's not just the case that there is some  
14 policy not to fund the land grant properly. Once  
15 again, the practice is to make sure that there's a  
16 continuing effort to do what's right.

17 Chancellor Kirwan talked about the fact that in  
18 that particular instance, there was some interplay  
19 between the federal spending and the State spending.  
20 So it wasn't simply a State allocation on the land  
21 grant issue.

22 So I just wanted to address that issue, because  
23 it did come up.

24 THE COURT: I think that might be an hour and a  
25 half. If we can take a break to switch speakers for a



1 moment, and let Mr. Jones get up, and you will still  
2 have some time to come back, Mr. Thompson.

3 MR. JONES: Are you ready, Your Honor?

4 Okay. Do I need to hit it again?

5 THE COURT: It's the importance of technology  
6 that we have all been talking about.

7 MR. JONES: While he is working on that, Your  
8 Honor, I can go ahead and start. I think that --

9 You got it? Good.

10 THE COURT: Thank you.

11 MR. JONES: One of the points that my friend  
12 pointed out, Your Honor, was that I had spent an  
13 inordinate amount of time talking about schools. I  
14 had a recollection that in the Knight case, that Judge  
15 Murphy addressed that very point, and he did.

16 He said the comparisons are made among schools,  
17 not because schools have rights or are entitled to  
18 funds as such, but because schools are the instruments  
19 through which the students are reached, which means  
20 that the overall resources of a school, whether in  
21 funds, facilities or programs, determines what is  
22 received by the school students.

23 Your Honor, we've got a big binder over there  
24 with the decisions in Knight and Fordice, and we spent  
25 the lunch break trying to see if we saw a big

1 discussion of the individual plaintiffs in the case,  
2 and we didn't see it, for the very reason that Judge  
3 Murphy pointed out there.

4 One of the other questions I think that the  
5 Court raised was about the University of Baltimore and  
6 having a lower level division. I asked Dr. Kirwan  
7 about that. This is on the issue of educational  
8 justification and less segregative effects.

9 Now the obvious thing that one could have done  
10 if there was a demand for students, you could kill, as  
11 I think I said at one point during the trial, two  
12 birds with one stone. You can have those students go  
13 to Morgan or they can go to Coppin, and he  
14 acknowledged that yeah, you know, those schools, they  
15 could have gone to those schools, and Maryland did not  
16 consider that.

17 This is not a principal point that I want to  
18 make, Your Honor, but since I had a slide, I wanted to  
19 just really give the broader context of what I was  
20 talking about in terms of the HBIs not being  
21 recruiting peers of the TWIs, at least so far as Dr.  
22 Eschbach was concerned. She talked about the other  
23 TWIs that are recruiting peers, but none of the HBIs,  
24 not just UMES.

25 There was a discussion again on the issue of

1 University of Baltimore, that when they first came in,  
2 I think the suggestion was made that they didn't add  
3 new programs. But there's no question that they  
4 subsequently added new programs.

5 The Court asked the question -- I forgot exactly  
6 how Your Honor framed it, but it had to do with the  
7 chronology, and when do you take that into account, or  
8 is there some breaking of the chain, so to speak? My  
9 friend indicated that that was done in his view by the  
10 adoption of the COMAR, which we ultimately learned was  
11 adopted in 1998. But I think it was --

12 THE COURT: I'm sorry '98 or '88?

13 MR. C. THOMPSON: '88.

14 THE COURT: '88 I think I heard him say.

15 MR. JONES: '88, yes. It was in adopted in '88.

16 The point I want to make is that even after  
17 COMAR was adopted, when we see the Attorney General in  
18 a published decision analyzing the applicability of  
19 Fordice's unnecessary program duplication, he  
20 indicated there's no question that unnecessary program  
21 duplication is traceable to the de jure era. There  
22 was no suggestion that there was some type of,  
23 something that cut off this chain of traceability as a  
24 general proposition.

25 The Court will recall that with respect to the

1 Morgan State MBA program that was duplicated, the  
2 Assistant Attorney General, Pace McConkie, who was  
3 responsible for providing advice to MHEC, specifically  
4 wrote a memo to MHEC, indicating that in this  
5 particular instance, they were perpetuating a vestige  
6 rather than eliminating one.

7 So there was no suggestion that COMAR or  
8 anything else had eliminated the chain of  
9 traceability.

10 Now on the issue of declining demographics, the  
11 Court properly noted the decline in white population.

12 My friend talked a fair amount about Bowie and  
13 Prince George's County, the change in demographics  
14 there. I don't recall hearing anything about any  
15 great change in Baltimore, and the Court will recall  
16 that there was testimony from Maryland's own witnesses  
17 that demographic changes couldn't account for the  
18 decline in white population at Coppin or at UMES or at  
19 Morgan.

20 We discussed in some great detail these  
21 demographic issues, Your Honor, in our findings of  
22 facts. For the Court's reference, they are at  
23 paragraphs 677 and 680 through 685.

24 We also talked at great length in our findings  
25 of facts about the issue of student choice, so I don't

1 feel the need to rehash that here. I do want to spend  
2 a minute talking about some of the things that I think  
3 were said with not as much devotion to accuracy as  
4 they might have been with respect to Dr. Conrad's  
5 analysis.

6 We point out in our findings of facts that Dr.  
7 Conrad's analysis was not limited to CIP codes, but  
8 that he actually did, and I think the Court may  
9 remember there was some back and forth about this at  
10 the trial, that he actually included things other than  
11 CIP code, and that was in his report, in his  
12 supplemental report.

13 I'm reminded that there was a slide about  
14 Morgan, and I think the focus was on 2006 with respect  
15 to the MBA program.

16 I think in 2006, the slide, am I right, Mr.  
17 Greenbaum, that showed an increase in student  
18 population.

19 That 2006 increase in student population  
20 coincided exactly when the State provided Morgan with  
21 additional funds for the program after all of the  
22 controversy I think about the duplication.

23 On the issue of market demand, that 2005 AG  
24 opinion that I have made a couple of references to,  
25 talks about what the standard is, that Maryland is

1 going to try to ride the horse of demand to justify  
2 unnecessary program duplication. The Attorney General  
3 points out that this needs to be based on objective  
4 data, and we didn't see any objective data.

5 In fact, the market demand that we saw, at least  
6 that we heard about, wasn't even as of the time that  
7 the programs were approved. It was Dr. Blanshan's  
8 discussion, I think that's really what it was, rather  
9 than a study of market demand.

10 There was one instance. We saw the transcript,  
11 but I'm pretty confident that Dr. Conrad simply  
12 misspoke when he indicated, at least according to the  
13 transcript that we saw, that if a program was started  
14 first at an HBI, he did not count that in his  
15 unnecessary program duplication analysis.

16 It's pretty clear, if you look at his report and  
17 the rest of his testimony, that he in fact did.

18 THE COURT: It counted regardless of whether it  
19 started at a TWI or an HBI.

20 MR. JONES: Yes, Your Honor, right, and Dr.  
21 Allen made that point as well.

22 The point that Mr. Greenbaum insists that I make  
23 is that Dr. Allen talked about why that is still  
24 important, why it would be continuing to foster a  
25 segregative system, regardless of which one had it

1 first.

2 On the issue of funding, I was both intrigued  
3 and surprised to hear that Maryland has abandoned the  
4 per FTE funding defense. We heard a lot about that  
5 from Dr. Lichtman.

6 You didn't abandon?

7 THE COURT: I don't think they quite abandoned  
8 it.

9 MR. JONES: Maybe I misunderstood. I got  
10 carried away with what Mr. Thompson was saying.

11 THE COURT: I think he just said that was not  
12 the entire defense, that there was a higher FTE.

13 MR. JONES: I guess that a key point. I didn't  
14 hear the entire, Your Honor.

15 I was also, though, interested to hear them  
16 acknowledge that the funding formula is somewhat  
17 influenced by peers. He mentioned programs, which, of  
18 course, has to do with missions. So there's no  
19 question, Your Honor, that the funding is  
20 mission-based.

21 Now it may well be that it's less mission-based  
22 than it was in the 1990's, but I think under Fordice,  
23 it is still a remnant. It's perhaps less of a remnant  
24 than it would have been if we were -- I'm sorry.

25 THE COURT: Supposing it was based entirely on

1 student enrollment, didn't pay any attention to  
2 mission at all. Would that make it okay?

3 MR. JONES: I don't think it would, Your Honor.  
4 Here's why I don't think it would make it okay, and  
5 I'm not sure that Judge Murphy in Knight would have  
6 found it okay.

7 In this case, what we have seen, the Court will  
8 remember some of these de jure era documents, for  
9 example, where Maryland recognized that by  
10 underfunding the HBIs, and giving them the limited  
11 missions, they were constraining the growth of the  
12 HBIs.

13 So if we come out of the Brown decision, and  
14 then we go up to around like 1969 or so, Morgan, I  
15 think at that time Morgan may have been actually  
16 larger than Towson, if I'm remembering this right.

17 But through Maryland's funding decisions, they  
18 actually funded Towson so that it outgrew Morgan  
19 substantially, and on the Eastern Shore, Salisbury  
20 outgrew UMES substantially.

21 So I think that the answer, Your Honor, is that  
22 the size of the HBIs themselves is a function of their  
23 limited missions, partly their limited missions, and  
24 their underfunding. So I don't think they would be  
25 off the hook entirely if it was just enrollment



1 driven.

2 THE COURT: What would take them off the hook?  
3 What is a funding system that would not be traceable?  
4 Other than just saying more money, is there any other  
5 formula or approach you can suggest from the case law  
6 or the literature that would not be traceable under  
7 your view?

8 MR. JONES: Well, let's talk about the case law  
9 first and then I'll try to think. The two cases, of  
10 course, are Knight and Fordice, and we talked about  
11 Knight.

12 Now in Fordice, Judge Biggers' analysis was  
13 interesting. I think he found that the mission, the  
14 de jure era funding was mission-based. The  
15 contemporary funding was not mission-based. I think  
16 it's enrollment-based, if I'm remembering that right.

17 But a part of his conclusion was that funding  
18 the HBIs, and he used the phrase equitably, and I'm  
19 not a hundred percent sure what he meant, but he said  
20 funding the HBIs equitably in comparison to the TWIs,  
21 number one, it would not be educationally sound;  
22 number two, it would not be practical, and I'm not  
23 sure that he thought it would actually lessen  
24 segregation of the TWIs in Mississippi.

25 So those three things are not at play here

1 because, number one, Maryland has agreed that when you  
2 talk about funding the HBIs equitably, I'm going to  
3 use Judge Biggers' phrase, but in this context, what  
4 we are talking about is a funding level that takes  
5 into account the dual mission, the dual mission, the  
6 limited mission, the need to grow the mission, and  
7 with that, facilities and equipment.

8 Maryland has recognized, and I think we heard  
9 echos of that today, they have embraced that that is  
10 something that they want to do, but contest whether  
11 the Court can force them to do it.

12 So I think that that is a distinction from the  
13 Fordice case that we don't really have here.

14 Now to answer the question about whether there  
15 is some other kind of funding in the context of  
16 Maryland and its history that would not be traceable  
17 to the de jure era, I guess I have to think about that  
18 a little bit more, Your Honor, because what the cases  
19 tell us is, and I think even Judge Biggers in Fordice  
20 would say, that if he believed that that formula was  
21 mission-based, I think he might say that he would have  
22 to find traceability. That would certainly line him  
23 up with Judge Murphy in Knight.

24 So I haven't thought about it sufficiently, Your  
25 Honor, to say well, if we were doing something

1 radically different than what we are doing here, what  
2 the answer to the question might be.

3 So the final point, Your Honor, that I want to  
4 make is I thought I heard it said that the Funding  
5 Guidelines funds a dual mission? Maybe I misheard on  
6 that.

7 THE COURT: What I recall was that there was  
8 some enhancement for the HBIs that had been built into  
9 the base budget for HBIs.

10 MR. JONES: Well, let me just make this point,  
11 because maybe I just wrote it down wrong. I'm sure  
12 the Court remembers my pointing out that Dr. Lyons  
13 indicated that the current funding formula or  
14 mechanism does not take into account the dual mission,  
15 and I just want to emphasize that point.

16 I think even Dr. Kirwan agreed that Maryland  
17 should fund the dual mission, an acknowledgement. He  
18 didn't agree that it was traceable, but he agreed that  
19 they should fund it as a matter of sound educational  
20 policy.

21 So anyway, Your Honor, I think that those are  
22 the points that were made that I wanted to respond to.  
23 I'm sure that my colleagues have a lot of other  
24 questions they want me to answer, but unless the Court  
25 has another question for me, I think I will cede the

1 podium.

2 THE COURT: Let me just ask, because I'm going  
3 to ask the same thing, is there anything that you want  
4 to say on this flagship question?

5 I mean other than the issue as to whether it's a  
6 statistical outlier, which you did address, the notion  
7 of a state wanting to, and being permitted to develop  
8 a flagship institution, like the University of  
9 Maryland College Park, and should that in some way be  
10 treated differently or affect the analysis that is  
11 applied under a theory of sound educational  
12 justification, if nothing else?

13 MR. JONES: Well, Your Honor, the two cases, of  
14 course, that we have, we talk about Knight and  
15 Fordice, neither of them did anything separately with  
16 the flagships.

17 I mean if anything, I think Maryland having  
18 designated College Park the flagship when it did  
19 really just shows, as is obvious, that the state is  
20 the one that determines missions of an institution.

21 But I'm not aware, Your Honor, of any kind of  
22 legal reason why exempting out College Park from any  
23 of this analysis should be done. It wasn't done in  
24 either Knight or Fordice.

25 THE COURT: Thank you.

1 MR. JONES: Thank you, Your Honor.

2 MR. C. THOMPSON: Let me begin, Your Honor, by  
3 just thanking Mr. Jones for finally calling me Mr.  
4 Thompson. I'm reminded of the number of times that  
5 Joe Biden called Mr. Ryan my friend, and I don't think  
6 it was in the sincerest manner.

7 (Laughter.)

8 But thank you, Mr. Jones, for that.

9 MR. JONES: You're welcome. You're welcome.

10 MR. C. THOMPSON: I'll address each point  
11 seriatim, Your Honor.

12 Mr. Jones talked about the Knight case, and the  
13 binders that they have that do not have any evidence  
14 of a great deal of discussion about the plaintiffs.

15 What those binders do have, and what those cases  
16 do have, and what Fordice does have, is an extensive  
17 discussion on the impact on student choice, on student  
18 choice, not specific plaintiffs, but on student  
19 choice, and the impact that a policy or practice of  
20 the state may have in influencing, in either a  
21 negative of a positive way, student choice.

22 What we have in this case, Your Honor, is no  
23 evidence, no testimony about the impact on any  
24 specific students who were injured by a policy or  
25 practice of the State.

1           Once again, the plaintiffs in this case all  
2 testified that they chose to attend Morgan State  
3 University, and graduated from Morgan State  
4 University, because they wanted to attend, not because  
5 they were pushed there or funneled there or channeled  
6 there or restricted from choosing a non-HBI.

7           So the issue in Knight, as well as Fordice, and  
8 all of these cases, relate to student choice.

9           Mr. Jones also mentioned the UB case again, and  
10 talked about less segregative effects.

11           Just briefly on this, Your Honor, you may recall  
12 the testimony of President Bogomolny who said that UB  
13 now is, I think he used the term majority minority,  
14 that the student population of the University of  
15 Baltimore now is increasingly minority.

16           Once again, when we are talking about a unitary  
17 system, it is important, when we are talking about a  
18 desegregated system, to acknowledge the fact that the  
19 non-HBIs are attracting, and retaining, and graduating  
20 African-American students and other students of color.  
21 That's part of what it means to have a unitary system  
22 that doesn't restrict student choice.

23           THE COURT: Do any of the cases -- do you have a  
24 case that addresses that?

25           I mean you are essentially saying that the fact

1 that the traditionally white institutions are  
2 desegregated means there is no legal justification, no  
3 need, no basis for a remedy where you have other  
4 institutions that are virtually entirely one race.

5 MR. C. THOMPSON: Well, the answer is Fordice,  
6 because Fordice addresses that question as to  
7 whether --

8 Once again, citing Justice Thomas's opinion,  
9 Justice Thomas makes it clear that it's not violative  
10 of the Constitution, and it's not violative of Fordice  
11 to have racially identifiable schools within a  
12 desegregated school system.

13 Now in terms of whether there are any cases that  
14 speak to that point exactly, I may have to say no,  
15 Your Honor. I think this is a case that's the first  
16 of its kind. Most of the other cases dealt with the  
17 presumption of a segregated system, with both non-HBIs  
18 and HBIs.

19 So I don't think I'm talking out of school to  
20 suggest that this is the first of its kind in terms of  
21 litigating this specific issue.

22 Mr. Jones indicated that I didn't mention any  
23 demographic issues or demographic data in Baltimore,  
24 and that's true. When I responded to Your Honor's  
25 question, I did give examples in Prince George's

1 County.

2 But the record does reflect, Your Honor, that  
3 there was evidence, and that there is evidence in the  
4 record that there have been changes demographically in  
5 Baltimore City.

6 The white population in Baltimore City has gone  
7 down dramatically. Not only has the white population  
8 gone down dramatically over the last 20 to 30 years,  
9 but the population itself in Baltimore City, which in  
10 the '80s boasted over a million people, is almost a  
11 little bit more than half that now.

12 So there is evidence in the record of  
13 demographic changes in Baltimore City. So I just  
14 wanted to at least correct the record on that.

15 On the issue of the chain of traceability, Your  
16 Honor's question was about whether there was any break  
17 or detachment in any potential policy or practice that  
18 allowed program duplication. My response was to that,  
19 Your Honor, in terms of the coordination in 1988, and  
20 the creation of the program approval process. That's  
21 what that issue was about, and there was a detachment  
22 of any policy or practice that may have existed or may  
23 not have existed, that that was broken at that time.

24 Even Dr. Popovich who testified gave quite a bit  
25 of testimony about that issue, and he spent a lot of



1 time. He wrote a paper on it, about Maryland's  
2 coordination efforts in 1988. He said 1988 was very  
3 significant for a number of reasons, two of which Your  
4 Honor asked questions about. Number one, that's the  
5 year that the University of Maryland College Park  
6 became a flagship.

7 Interestingly, and I was a bit surprised that  
8 Mr. Jones said this, but when Your Honor asked the  
9 question about funding being more enrollment driven,  
10 the whole case that the plaintiffs laid out was that  
11 the times that the HBIs had the best funding was  
12 during the time that the Funding Guidelines were  
13 enrollment driven.

14 You may recall, there were several witnesses  
15 representing Morgan State University, and Dr.  
16 Toutkoushian himself said that during the '80s, there  
17 was this huge enrollment growth of the HBIs, and that  
18 the Funding Guidelines, the funding mechanism was  
19 related to enrollment growth.

20 Then in 1988, when the coordination took place,  
21 it changed, and there was more of an emphasis on  
22 College Park.

23 I mean that has been their position during the  
24 litigation, that the funding changed in '88 and was  
25 more missions driven. Then it changed again in 1999

1 or 2000.

2 So there was a point at which the plaintiffs  
3 were happy with the funding, when it was enrollment  
4 driven, and they weren't happy when it was more  
5 missions driven, and then when it was a mix.

6 I mean in terms of whether there was any break  
7 or detachment, there seems to be a suggestion that  
8 there was a desegregation in the '80s and then a  
9 resegregation in the years of 2000 and beyond.

10 So Mr. Jones indicated that even an  
11 enrollment-driven funding guideline wouldn't work, but  
12 that's not what their expert said. That's not what  
13 their witnesses said. So at this point, I'll move on.

14 In terms of student choice, Your Honor, there  
15 was a slide that Mr. Jones responded to when asking  
16 about the MBA program at Morgan State University. I  
17 recall the testimony of Dr. Taylor, Your Honor, that  
18 he did not recall any additional funding going into  
19 the graduate school budget.

20 So that issue of whether the increase in  
21 enrollment after 2006 was related to any additional  
22 funding by the State is not supported by the record.

23 If I might, on that issue, Your Honor, the  
24 State, MHEC, in no way throughout this litigation is  
25 criticizing Morgan for objecting to programs. That's

1 the process. That's the practice. That's the policy.

2 Mr. Jones seemed to suggest that I was being  
3 critical of Morgan for objecting to programs. Morgan  
4 is well within its right to do that. My point, Your  
5 Honor, and the point that the defense has made in this  
6 case, is that the process works.

7 As you heard from Dr. Hrabowski, every time UMBC  
8 has proposed a program, and Morgan has objected, it  
9 was denied. The only times, the only times, and there  
10 are several objections in the record, but the only  
11 times that the program has been approved over the  
12 objection of Morgan are the two programs that we spent  
13 quite a bit of time talking about, the community  
14 college leadership program, which was ultimately  
15 approved, but only out of state, and the joint MBA  
16 program.

17 So the point that the defense has been making is  
18 not in any way to be critical of Morgan for objecting.  
19 It's to demonstrate that that's the process, that's  
20 the policy, that's the practice, and it works.

21 On this issue of Dr. Conrad, Your Honor may  
22 recall, Dr. Conrad was a very precise thinker and  
23 speaker, and the idea that he would have misspoken  
24 when asked a specific question, did you consider a  
25 program duplicative if the non-HBI had it first, I did

1 not, that's his testimony, and that's what's in the  
2 record, Your Honor.

3 Let me simply say finally, on the issue of Dr.  
4 Lyons, Dr. Lyons did testify in addition to, and part  
5 of his testimony was not included, but it was  
6 included, Your Honor, as one of our rebuttals to the  
7 submissions -- to the designations. I'm sorry.

8 Dr. Lyons was asked the question about whether  
9 the Partnership Agreement was designed to address any  
10 vestiges, and Dr. Lyons responded no, because the  
11 system was desegregated at that time, and that part of  
12 his testimony was excluded.

13 I think that's all the points that were raised  
14 which I will address.

15 However, Your Honor's final question about the  
16 flagship, as Your Honor heard, there was quite a bit  
17 of testimony about whether or not University of  
18 Maryland's designation as a flagship was educationally  
19 justifiable.

20 Chancellor Kirwan spent quite a bit of time  
21 talking about the need for the State of Maryland to  
22 compete not only on a national stage, but a global  
23 stage in terms of providing world-class education,  
24 with a flagship, as well as a number of comprehensive  
25 and research universities within it. So during that

1 time, College Park was viewed as the best suited for  
2 that.

3 In terms of funding, in terms of programs, in  
4 terms of missions, the plaintiffs did want to lump, if  
5 you will, College Park into all of their analyses and  
6 it did skew the results.

7 But even when College Park was included as it  
8 relates to the funding piece, Dr. Lichtman still found  
9 that there was an excess, however you define that, for  
10 the HBIs. So the analysis that Dr. Lichtman looked at  
11 was important.

12 As it relates to programs, Dr. Conrad seemed to  
13 believe that programs that were at College Park were  
14 unreasonably duplicative of programs throughout the  
15 state. If we are to accept that the state has a need  
16 to compete on the global stage with the flagship, like  
17 many other states, along with a number of other  
18 high-quality institutions, to provide and inform and  
19 drive student choice, then once again the State  
20 continues to support the position that the University  
21 of Maryland College Park's designation as a flagship  
22 was a good thing.

23 THE COURT: Thank you.

24 MR. C. THOMPSON: Thank you, Your Honor.

25 THE COURT: We're all satisfied to stop here.

1           MR. JONES: Your Honor, I am, though I probably  
2 for the record should talk some more just so I can say  
3 Mr. Thompson, Mr. Thompson, Mr. Thompson.

4           (Laughter.)

5           But I don't have any other points to make, Your  
6 Honor.

7           THE COURT: All right. Well, let me just thank  
8 you all. These are extremely complicated issues, and  
9 you all have done a wonderful job on both sides  
10 presenting them, and being cordial and professional,  
11 whether you call each other a friend or not.

12          (Laughter.)

13          But I very much appreciate it. We will  
14 certainly continue to put our attention on this and  
15 get you a ruling. I'm not going to tell you it's  
16 going to be immediate. There's a lot, there's a lot  
17 to go through here. But I appreciate your arguments.

18          MR. C. THOMPSON: If I might, Your Honor, and  
19 I'm certain that Mr. Jones agrees --

20          MR. JONES: We're friendly on this one.

21          MR. C. THOMPSON: We're friendly on this issue.

22          We want to thank you. This has been a matter  
23 with some very complex issues. So we want to thank  
24 you for your time, for your attention, and for your  
25 commitment to making sure that all of the issues were

1 fully explored.

2 So on behalf of the State of Maryland, we want  
3 to thank you as well.

4 THE COURT: Thank you.

5 MR. JONES: I join with that, Your Honor, and  
6 say that we are all very happy about the ruling that  
7 came out in terms of judicial compensation.

8 (Laughter.)

9 MR. K. THOMPSON: Now, now.

10 THE COURT: Well, if you can -- I'm not holding  
11 my breath -- get that extended to me.

12 Thank you all very much.

13 MR. K. THOMPSON: Thank you.

14 (The proceedings concluded.)

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25

INDEX

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

CLOSING ARGUMENTS	PAGE
By Mr. Jones:	5
By Mr. C. Thompson:	71



REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of The Coalition for Equity and Excellence in Maryland Higher Education, Inc., et al., Plaintiffs vs. Maryland Higher Education Commission, et al., Defendants, Civil Action No. CCB-06-2773, before the Honorable Catherine C. Blake, United States District Judge, on October 19, 2012 is true and accurate.

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Gail A. Simpkins

Official Court Reporter

<b>\$</b>	<b>1988</b> [5] - 120:10, 144:19, 145:2, 145:20 <b>1990's</b> [5] - 57:8, 57:12, 57:17, 57:23, 135:22 <b>1992</b> [1] - 33:4 <b>1997</b> [1] - 118:8 <b>1998</b> [2] - 57:10, 131:11 <b>1999</b> [3] - 45:12, 57:10, 145:25	<b>5</b>	<b>Academic</b> [1] - 112:11 <b>academically</b> [4] - 19:6, 43:18, 43:23, 63:18 <b>accept</b> [3] - 17:21, 108:6, 149:15 <b>access</b> [2] - 61:6, 94:8 <b>Access</b> [7] - 42:15, 42:18, 42:22, 82:19, 82:21, 124:21, 125:16 <b>according</b> [4] - 38:8, 56:10, 110:3, 134:12 <b>account</b> [15] - 14:17, 59:9, 61:11, 61:20, 61:22, 62:2, 62:4, 92:19, 127:5, 127:9, 127:13, 131:7, 132:17, 138:5, 139:14 <b>accounted</b> [1] - 64:4 <b>accuracy</b> [1] - 133:3 <b>accurate</b> [1] - 153:8 <b>acknowledge</b> [3] - 113:16, 135:16, 142:18 <b>acknowledged</b> [3] - 99:5, 128:10, 130:14 <b>acknowledgement</b> [1] - 139:17 <b>acquisition</b> [1] - 31:2 <b>Act</b> [1] - 80:13 <b>act</b> [1] - 52:21 <b>Acting</b> [1] - 33:18 <b>action</b> [1] - 35:1 <b>Action</b> [1] - 153:6 <b>actions</b> [1] - 88:3 <b>actual</b> [4] - 9:24, 73:15, 76:13, 77:16 <b>add</b> [1] - 131:2 <b>added</b> [2] - 114:17, 131:4 <b>adding</b> [2] - 92:11, 114:13 <b>addition</b> [4] - 42:22, 114:16, 124:19, 148:4 <b>additional</b> [27] - 15:13, 20:24, 21:4, 32:20, 35:4, 42:12, 42:13, 42:17, 42:21, 53:10, 60:18, 61:10, 62:6, 62:16, 74:22, 89:24, 91:25, 92:4, 94:7, 96:20, 97:24, 117:15, 124:10, 128:6, 133:21, 146:18, 146:21 <b>address</b> [13] - 10:3, 34:2, 51:15, 75:24,	98:19, 98:24, 107:21, 128:12, 128:22, 140:6, 141:10, 148:9, 148:14 <b>addressed</b> [6] - 46:21, 66:2, 66:15, 98:25, 128:10, 129:15 <b>addresses</b> [3] - 93:24, 142:24, 143:6 <b>addressing</b> [2] - 8:14, 105:12 <b>adequacy</b> [2] - 33:5, 87:25 <b>adequately</b> [5] - 51:15, 61:22, 62:1, 62:4, 83:3 <b>adjusted</b> [1] - 104:8 <b>adjustments</b> [1] - 104:5 <b>Administration</b> [1] - 77:8 <b>admitted</b> [3] - 22:6, 22:13, 39:2 <b>admitting</b> [1] - 35:3 <b>adopt</b> [1] - 16:8 <b>adopted</b> [7] - 13:3, 21:1, 37:25, 44:7, 131:11, 131:15, 131:17 <b>adoption</b> [1] - 131:10 <b>advance</b> [1] - 24:24 <b>advantage</b> [1] - 59:24 <b>advantageous</b> [1] - 57:24 <b>advice</b> [1] - 132:3 <b>advised</b> [1] - 52:17 <b>Affairs</b> [1] - 112:11 <b>affect</b> [3] - 9:7, 47:6, 140:10 <b>affidavit</b> [3] - 9:23, 10:5 <b>affidavits</b> [2] - 9:9, 9:14 <b>afford</b> [1] - 60:18 <b>affords</b> [1] - 26:20 <b>African</b> [9] - 39:25, 40:2, 42:5, 48:4, 63:11, 97:13, 117:6, 117:9, 142:20 <b>African-American</b> [3] - 48:4, 63:11, 142:20 <b>afternoon</b> [7] - 5:2, 6:4, 8:23, 68:25, 71:8, 108:14, 108:15 <b>AFTERNOON</b> [1] - 108:12 <b>AG</b> [1] - 133:23 <b>age</b> [3] - 91:23, 100:2, 100:5
<b>\$1400</b> [1] - 42:18 <b>\$500</b> [1] - 7:24		<b>5</b> [1] - 152:3 <b>50</b> [1] - 125:25 <b>57</b> [1] - 39:14		
<b>'</b>		<b>6</b>		
<b>'40s</b> [1] - 125:25 <b>'60s</b> [1] - 92:22 <b>'70s</b> [5] - 92:16, 92:21, 92:22, 99:15, 99:17 <b>'75</b> [1] - 30:15 <b>'80s</b> [4] - 99:15, 144:10, 145:16, 146:8 <b>'84</b> [1] - 68:13 <b>'88</b> [6] - 131:12, 131:13, 131:14, 131:15, 145:24 <b>'98</b> [1] - 131:12	<b>2</b>	<b>65</b> [1] - 43:5 <b>677</b> [1] - 132:23 <b>680</b> [1] - 132:23 <b>685</b> [1] - 132:23 <b>69</b> [1] - 46:8		
<b>1</b>	<b>2</b> [1] - 70:9 <b>20</b> [6] - 53:6, 53:14, 88:13, 99:18, 108:25, 144:8 <b>2000</b> [2] - 146:1, 146:9 <b>2000's</b> [1] - 95:23 <b>2003</b> [1] - 99:4 <b>2004</b> [1] - 118:11 <b>2005</b> [5] - 12:21, 31:14, 44:4, 45:5, 133:23 <b>2006</b> [7] - 22:7, 43:10, 118:18, 133:14, 133:16, 133:19, 146:21 <b>2008</b> [2] - 44:5, 125:2 <b>2009</b> [11] - 13:3, 16:16, 32:2, 42:19, 44:7, 58:7, 60:24, 67:8, 67:18, 68:14, 102:3 <b>2012</b> [4] - 1:11, 72:22, 99:3, 153:8 <b>24th</b> [1] - 127:23 <b>28</b> [1] - 118:11 <b>29</b> [1] - 125:25 <b>2:15</b> [3] - 5:2, 70:11, 108:9	<b>7</b>	<b>71</b> [1] - 152:4 <b>75th</b> [1] - 124:16	
<b>10</b> [1] - 46:4 <b>100</b> [1] - 56:13 <b>11</b> [1] - 83:22 <b>110</b> [1] - 61:5 <b>11:30</b> [1] - 34:13 <b>12</b> [3] - 68:25, 119:4, 119:20 <b>1400</b> [2] - 58:16, 58:17 <b>15</b> [3] - 70:10, 70:23, 108:25 <b>15-month</b> [1] - 124:6 <b>17</b> [1] - 87:19 <b>18</b> [1] - 46:3 <b>19</b> [3] - 1:11, 88:12, 153:8 <b>1930's</b> [2] - 79:14, 125:25 <b>1937</b> [5] - 22:23, 23:5, 23:8, 24:6, 88:13 <b>1940's</b> [1] - 79:14 <b>1947</b> [1] - 23:10 <b>1950's</b> [1] - 47:21 <b>1960's</b> [2] - 30:6, 78:1 <b>1969</b> [2] - 30:8, 136:14 <b>1970</b> [3] - 72:21, 77:14, 77:19 <b>1970's</b> [3] - 30:15, 79:14, 99:5 <b>1974</b> [3] - 27:17, 30:15, 99:2 <b>1976</b> [1] - 113:3 <b>1981</b> [4] - 27:24, 28:9, 33:2, 43:20 <b>1984</b> [1] - 58:7	<b>3</b>	<b>8</b>	<b>8</b> [1] - 36:4 <b>80</b> [1] - 99:18 <b>86</b> [1] - 118:9	
	<b>4</b>	<b>9</b>	<b>9</b> [1] - 36:4 <b>90</b> [1] - 78:7 <b>92</b> [5] - 54:3, 79:18, 79:19, 79:20, 79:24 <b>93</b> [1] - 123:12	
	<b>30</b> [3] - 53:15, 94:9, 144:8 <b>30(b)(6)</b> [6] - 13:4, 13:13, 42:10, 42:20, 62:12, 67:9 <b>31</b> [1] - 104:3 <b>3rd</b> [2] - 71:18, 72:11	<b>A</b>	<b>abandon</b> [2] - 26:15, 135:6 <b>abandoned</b> [6] - 64:14, 76:6, 76:8, 135:3, 135:7 <b>abandoning</b> [1] - 76:9 <b>ability</b> [1] - 117:9 <b>able</b> [10] - 4:11, 29:14, 32:5, 32:15, 45:7, 45:10, 68:24, 123:7, 125:4 <b>above-entitled</b> [1] - 1:13 <b>absence</b> [2] - 8:18, 88:22 <b>absent</b> [2] - 71:13, 102:12 <b>absolutely</b> [4] - 44:16, 44:21, 83:12 <b>academic</b> [4] - 22:20, 44:2, 73:24	

<p><b>ago</b> [2] - 74:12, 95:7  <b>agree</b> [5] - 17:18, 111:13, 115:7, 115:10, 139:18  <b>agreed</b> [18] - 21:3, 32:14, 34:25, 35:8, 39:3, 40:1, 42:19, 42:20, 44:1, 45:12, 45:15, 62:15, 68:3, 115:9, 138:1, 139:16, 139:18  <b>agreement</b> [1] - 35:14  <b>Agreement</b> [38] - 5:12, 5:14, 12:18, 12:22, 12:23, 18:25, 31:22, 32:3, 32:12, 33:10, 33:11, 33:23, 34:25, 35:8, 35:17, 35:25, 36:1, 36:6, 36:10, 36:11, 36:16, 36:21, 36:25, 37:6, 38:5, 44:3, 45:1, 45:12, 63:6, 63:16, 67:15, 79:2, 96:4, 103:8, 103:18, 103:19, 103:20, 148:9  <b>agreements</b> [1] - 39:6  <b>agrees</b> [3] - 36:17, 42:10, 150:19  <b>ahead</b> [7] - 22:3, 27:16, 30:18, 52:15, 70:24, 86:7, 129:8  <b>aid</b> [1] - 63:24  <b>al</b> [6] - 1:5, 1:9, 3:5, 3:6, 153:4, 153:5  <b>alleged</b> [1] - 51:1  <b>Allen</b> [11] - 7:11, 14:25, 40:12, 40:22, 44:9, 45:6, 65:21, 116:7, 117:1, 134:21, 134:23  <b>Allen's</b> [1] - 116:15  <b>allocation</b> [2] - 52:19, 128:20  <b>allocations</b> [3] - 55:3, 56:6, 123:15  <b>allow</b> [3] - 33:8, 75:3, 91:5  <b>allowed</b> [1] - 144:18  <b>allowing</b> [1] - 121:22  <b>allows</b> [2] - 121:9, 124:24  <b>alluded</b> [1] - 62:18  <b>almost</b> [3] - 67:2, 122:5, 144:10  <b>alumni</b> [1] - 9:18  <b>America</b> [1] - 99:24  <b>American</b> [5] - 40:2, 48:4, 63:11, 77:20, 142:20</p>	<p><b>Americans</b> [5] - 39:25, 42:5, 97:13, 117:6, 117:10  <b>amount</b> [7] - 6:19, 60:13, 60:15, 61:16, 65:2, 129:13, 132:12  <b>analyses</b> [1] - 149:5  <b>analysis</b> [32] - 15:17, 15:23, 17:24, 45:21, 45:22, 45:24, 61:15, 64:1, 64:5, 65:11, 65:13, 65:23, 68:10, 101:23, 109:9, 110:15, 110:16, 110:18, 111:16, 112:2, 112:6, 112:14, 113:10, 113:21, 133:5, 133:7, 134:15, 137:12, 140:10, 140:23, 149:10  <b>analyzing</b> [1] - 131:18  <b>AND</b> [1] - 1:4  <b>Anne</b> [9] - 25:19, 25:24, 26:4, 26:14, 26:20, 26:21, 49:14, 66:21, 66:22  <b>answer</b> [12] - 51:11, 53:12, 76:2, 89:20, 89:21, 117:20, 120:11, 136:21, 138:14, 139:2, 139:24, 143:5  <b>answered</b> [2] - 32:19, 102:24  <b>Anthony</b> [1] - 77:13  <b>anticipate</b> [1] - 87:1  <b>anticipation</b> [1] - 28:6  <b>anyway</b> [2] - 64:21, 139:21  <b>apart</b> [2] - 18:11, 75:18  <b>apologies</b> [1] - 24:23  <b>applicability</b> [1] - 131:18  <b>applicable</b> [1] - 12:6  <b>application</b> [1] - 120:15  <b>applied</b> [1] - 140:11  <b>appointment</b> [2] - 18:18, 20:22  <b>appreciate</b> [7] - 8:3, 14:7, 18:3, 29:22, 31:24, 150:13, 150:17  <b>appreciated</b> [1] - 8:6  <b>Appreciating</b> [1] - 117:3  <b>approach</b> [3] - 10:14, 65:7, 137:5</p>	<p><b>approached</b> [1] - 30:7  <b>appropriate</b> [4] - 17:10, 56:24, 61:14, 80:9  <b>appropriately</b> [1] - 62:9  <b>appropriation</b> [1] - 61:19  <b>appropriations</b> [4] - 56:2, 58:13, 59:9, 61:18  <b>approval</b> [9] - 75:4, 75:10, 87:9, 89:1, 93:10, 93:24, 94:24, 95:21, 144:20  <b>approved</b> [5] - 121:14, 122:9, 134:7, 147:11, 147:15  <b>approves</b> [1] - 21:18  <b>approving</b> [1] - 121:23  <b>area</b> [7] - 42:11, 76:9, 90:20, 107:8, 110:14, 119:10, 121:21  <b>areas</b> [7] - 110:20, 111:16, 113:4, 113:6, 113:8, 115:18, 122:5  <b>arena</b> [1] - 40:8  <b>argue</b> [3] - 46:18, 47:5, 104:7  <b>argued</b> [4] - 26:19, 75:2, 86:15, 104:4  <b>argument</b> [8] - 12:21, 29:17, 60:8, 63:13, 87:4, 87:7, 88:23, 90:5  <b>arguments</b> [4] - 6:25, 27:3, 60:3, 150:17  <b>ARGUMENTS</b> [2] - 1:16, 152:2  <b>arrival</b> [1] - 100:14  <b>arrived</b> [1] - 4:2  <b>art</b> [1] - 115:14  <b>Article</b> [1] - 93:9  <b>Asian</b> [1] - 100:6  <b>aspirational</b> [1] - 125:5  <b>aspire</b> [1] - 106:19  <b>assert</b> [1] - 76:1  <b>assess</b> [1] - 80:11  <b>assessing</b> [2] - 12:24, 19:13  <b>assessment</b> [1] - 49:7  <b>assign</b> [1] - 16:5  <b>assigned</b> [3] - 58:9, 104:17, 104:22  <b>assignment</b> [1] - 105:6  <b>assigns</b> [1] - 16:7</p>	<p><b>Assistant</b> [1] - 132:2  <b>assume</b> [1] - 98:18  <b>assuming</b> [1] - 117:22  <b>assumption</b> [2] - 76:11, 122:5  <b>attempt</b> [1] - 103:4  <b>attempted</b> [2] - 72:14, 75:9  <b>attempting</b> [1] - 29:13  <b>attempts</b> [1] - 29:19  <b>attend</b> [12] - 74:2, 74:5, 77:1, 78:1, 84:3, 88:10, 91:25, 99:19, 102:20, 117:17, 142:2, 142:4  <b>attending</b> [2] - 77:3, 102:22  <b>attention</b> [14] - 15:7, 41:11, 44:14, 47:25, 78:20, 87:25, 88:5, 88:6, 89:3, 118:3, 127:22, 136:1, 150:14, 150:24  <b>attentive</b> [1] - 40:23  <b>Attorney</b> [6] - 12:20, 37:1, 39:5, 131:17, 132:2, 134:2  <b>attracting</b> [3] - 40:2, 66:13, 142:19  <b>attractive</b> [3] - 39:20, 45:3, 45:13  <b>attracts</b> [1] - 38:4  <b>authors</b> [1] - 31:17  <b>available</b> [2] - 53:12, 73:3  <b>average</b> [1] - 87:2  <b>Avery</b> [6] - 73:2, 84:12, 85:9, 85:10, 98:10, 110:24  <b>aviation</b> [1] - 85:2  <b>avoid</b> [1] - 95:13  <b>avoids</b> [1] - 75:5  <b>awarded</b> [1] - 97:12  <b>awarding</b> [2] - 97:12, 97:18  <b>aware</b> [7] - 17:15, 20:25, 30:4, 65:18, 76:3, 99:14, 140:21</p>	<p>53:19  <b>Bainbridge</b> [1] - 2:3  <b>balance</b> [1] - 108:20  <b>Baltimore</b> [36] - 1:11, 31:6, 68:2, 85:12, 86:10, 86:18, 86:21, 89:13, 90:1, 90:20, 90:22, 91:1, 91:6, 91:13, 92:2, 92:10, 92:21, 96:10, 97:22, 98:15, 101:21, 111:17, 114:1, 114:3, 114:13, 118:13, 130:5, 131:1, 132:15, 142:15, 143:23, 144:5, 144:6, 144:9, 144:13  <b>Baltimore's</b> [1] - 114:2  <b>bankrupt</b> [2] - 30:25, 31:1  <b>base</b> [5] - 82:25, 124:8, 124:20, 125:17, 139:9  <b>based</b> [23] - 9:8, 9:14, 54:24, 55:1, 55:13, 57:1, 57:3, 57:5, 57:6, 57:9, 57:12, 77:11, 123:13, 126:11, 127:13, 134:3, 135:20, 135:21, 135:25, 137:14, 137:15, 137:16, 138:21  <b>basic</b> [1] - 111:15  <b>basis</b> [6] - 9:13, 26:22, 27:8, 28:23, 55:9, 143:3  <b>BCCC's</b> [1] - 114:6  <b>became</b> [1] - 145:6  <b>become</b> [5] - 28:17, 73:2, 78:4, 81:2, 87:5  <b>becoming</b> [1] - 100:1  <b>began</b> [1] - 120:12  <b>begin</b> [4] - 11:11, 71:10, 72:4, 141:2  <b>beginning</b> [2] - 6:3, 75:17  <b>behalf</b> [1] - 151:2  <b>below</b> [1] - 110:4  <b>bench</b> [1] - 75:22  <b>benchmark</b> [1] - 56:8  <b>best</b> [6] - 34:8, 119:18, 119:22, 119:23, 145:11, 149:1  <b>better</b> [3] - 26:21, 59:23, 65:25  <b>between</b> [17] - 18:4, 25:10, 25:22, 25:24,</p>
			<b>B</b>	
			<p><b>Baby</b> [1] - 96:19  <b>bachelor's</b> [2] - 76:22, 94:18  <b>backdrop</b> [1] - 83:9  <b>backgrounds</b> [1] - 127:8  <b>bad</b> [6] - 19:3, 26:13, 26:15, 48:8, 49:12,</p>	

<p>28:8, 40:15, 42:3, 44:19, 46:10, 57:7, 78:17, 105:5, 106:13, 107:3, 111:21, 127:25, 128:19</p> <p><b>beyond</b> [3] - 113:19, 126:24, 146:9</p> <p><b>Biden</b> [1] - 141:5</p> <p><b>big</b> [4] - 33:13, 48:1, 129:23, 129:25</p> <p><b>bigger</b> [1] - 97:17</p> <p><b>Biggers</b> [3] - 7:21, 12:3, 138:19</p> <p><b>Biggers'</b> [2] - 137:12, 138:3</p> <p><b>binder</b> [1] - 129:23</p> <p><b>binders</b> [2] - 141:13, 141:15</p> <p><b>biracial</b> [1] - 30:10</p> <p><b>birds</b> [1] - 130:12</p> <p><b>bit</b> [36] - 6:25, 10:9, 15:17, 15:22, 21:23, 26:6, 30:2, 70:25, 71:11, 75:17, 78:21, 79:3, 82:14, 84:7, 84:9, 90:25, 96:8, 97:21, 103:25, 105:3, 106:7, 107:17, 110:8, 115:3, 118:11, 120:7, 120:19, 121:17, 122:11, 138:18, 144:11, 144:24, 145:7, 147:13, 148:16, 148:20</p> <p><b>black</b> [8] - 9:1, 28:3, 47:4, 80:10, 100:5, 122:19, 123:1</p> <p><b>Black</b> [4] - 11:15, 72:7, 73:8, 87:24</p> <p><b>Blake</b> [2] - 1:14, 153:7</p> <p><b>blanking</b> [1] - 10:1</p> <p><b>Blanshan</b> [4] - 51:1, 51:3, 112:14, 121:16</p> <p><b>Blanshan's</b> [2] - 112:11, 134:7</p> <p><b>blocked</b> [1] - 32:11</p> <p><b>board</b> [1] - 22:19</p> <p><b>boasted</b> [1] - 144:10</p> <p><b>body</b> [2] - 37:4, 63:19</p> <p><b>Bogomolny</b> [3] - 89:23, 91:17, 142:12</p> <p><b>Bohanan</b> [3] - 20:13, 58:16, 79:6</p> <p><b>books</b> [3] - 65:14, 65:16, 74:23</p> <p><b>Boom</b> [1] - 96:19</p> <p><b>boom</b> [1] - 91:22</p>	<p><b>bore</b> [1] - 91:15</p> <p><b>borne</b> [1] - 107:12</p> <p><b>bottom</b> [3] - 48:19, 49:1, 49:3</p> <p><b>Bowie</b> [16] - 47:19, 48:18, 48:20, 67:1, 84:12, 85:1, 99:9, 99:12, 99:20, 100:21, 100:23, 100:25, 111:5, 112:3, 132:12</p> <p><b>box</b> [4] - 21:24, 21:25, 22:1, 85:20</p> <p><b>brand</b> [2] - 30:12, 85:18</p> <p><b>breadth</b> [1] - 22:20</p> <p><b>break</b> [15] - 34:13, 51:9, 52:11, 53:17, 53:22, 69:5, 69:9, 69:21, 69:25, 70:13, 108:8, 128:25, 129:25, 144:16, 146:6</p> <p><b>breaking</b> [2] - 108:4, 131:8</p> <p><b>breath</b> [1] - 151:11</p> <p><b>Brenda</b> [2] - 1:23, 3:13</p> <p><b>brief</b> [2] - 5:24, 6:12</p> <p><b>briefing</b> [1] - 6:23</p> <p><b>briefly</b> [7] - 6:3, 8:10, 54:5, 60:21, 75:17, 103:24, 142:11</p> <p><b>brightest</b> [3] - 119:18, 119:22, 119:24</p> <p><b>bring</b> [3] - 15:7, 48:8, 75:20</p> <p><b>BRITAIN</b> [2] - 3:14, 3:16</p> <p><b>Brittain</b> [2] - 1:23, 3:16</p> <p><b>broader</b> [2] - 79:5, 130:19</p> <p><b>broke</b> [1] - 109:3</p> <p><b>broken</b> [1] - 144:23</p> <p><b>brother</b> [1] - 108:24</p> <p><b>brought</b> [2] - 64:25, 65:10</p> <p><b>Brown</b> [2] - 63:9, 136:13</p> <p><b>brown</b> [2] - 100:1, 100:6</p> <p><b>budget</b> [14] - 39:15, 64:10, 64:15, 64:22, 82:25, 124:4, 124:7, 124:8, 124:20, 125:17, 128:5, 128:11, 139:9, 146:19</p> <p><b>budgets</b> [1] - 64:3</p> <p><b>building</b> [4] - 48:7,</p>	<p>48:10, 101:25, 102:1</p> <p><b>Building</b> [3] - 64:12, 64:13</p> <p><b>buildings</b> [7] - 22:17, 38:3, 47:22, 47:25, 48:2, 64:19, 78:8</p> <p><b>built</b> [1] - 139:8</p> <p><b>bulk</b> [2] - 5:19, 68:16</p> <p><b>bullet</b> [9] - 12:13, 12:25, 39:13, 40:22, 47:20, 48:5, 62:19, 63:15, 69:14</p> <p><b>bump</b> [1] - 27:20</p> <p><b>burden</b> [1] - 7:5</p> <p><b>Burnim</b> [9] - 48:5, 84:12, 85:23, 98:8, 98:25, 99:13, 100:13, 111:2, 123:3</p> <p><b>Burnim's</b> [1] - 100:19</p> <p><b>Burton</b> [3] - 9:24, 77:24, 78:4</p> <p><b>business</b> [2] - 77:21, 78:5</p> <p><b>busing</b> [3] - 99:6, 99:8</p>	<p>17:25, 20:3, 21:6, 21:7, 27:6, 32:8, 37:5, 37:24, 41:6, 43:24, 44:15, 54:25, 55:14, 56:4, 57:22, 63:14, 71:24, 71:25, 72:1, 72:9, 72:12, 72:15, 73:8, 73:9, 73:16, 74:25, 76:19, 78:10, 78:17, 82:3, 82:11, 83:1, 83:4, 83:10, 83:15, 83:17, 83:18, 83:21, 88:25, 90:12, 104:2, 105:5, 105:10, 105:14, 106:8, 107:13, 111:12, 112:8, 116:19, 117:7, 123:11, 128:13, 129:14, 130:1, 136:7, 137:5, 137:8, 138:13, 141:12, 141:22, 142:1, 142:9, 142:24, 143:15, 145:10, 147:6</p> <p><b>cases</b> [12] - 7:17, 12:11, 13:18, 46:21, 137:9, 138:18, 140:13, 141:15, 142:8, 142:23, 143:13, 143:16</p> <p><b>catch</b> [1] - 33:9</p> <p><b>catch-up</b> [1] - 33:9</p> <p><b>Catherine</b> [4] - 1:14, 2:4, 3:25, 153:7</p> <p><b>caused</b> [1] - 21:15</p> <p><b>causes</b> [1] - 115:19</p> <p><b>causing</b> [1] - 88:18</p> <p><b>caution</b> [1] - 44:14</p> <p><b>CCB-06-2773</b> [3] - 1:7, 3:3, 153:6</p> <p><b>cede</b> [2] - 69:8, 139:25</p> <p><b>certain</b> [13] - 35:22, 50:15, 79:10, 85:20, 99:14, 110:20, 116:13, 121:11, 121:19, 121:23, 122:8, 150:19</p> <p><b>certainly</b> [11] - 5:1, 6:13, 8:21, 31:4, 33:25, 35:21, 93:17, 98:22, 117:19, 138:22, 150:14</p> <p><b>CERTIFICATE</b> [1] - 153:1</p> <p><b>certify</b> [1] - 153:2</p> <p><b>cessation</b> [1] - 79:1</p> <p><b>chain</b> [4] - 131:8, 131:23, 132:8,</p>	<p>144:15</p> <p><b>Chairman</b> [1] - 35:7</p> <p><b>challenge</b> [3] - 5:15, 113:9, 114:1</p> <p><b>challenged</b> [1] - 75:7</p> <p><b>challenges</b> [3] - 113:20, 119:17, 127:18</p> <p><b>chance</b> [2] - 6:12, 34:12</p> <p><b>Chancellor</b> [7] - 87:21, 88:2, 122:20, 122:24, 127:23, 128:4, 128:17</p> <p><b>chancellor</b> [1] - 148:20</p> <p><b>change</b> [9] - 39:2, 57:19, 57:23, 72:13, 84:9, 96:23, 125:4, 132:13, 132:15</p> <p><b>changed</b> [15] - 38:8, 55:4, 82:13, 82:17, 82:18, 83:5, 93:9, 100:15, 123:17, 124:1, 145:21, 145:24, 145:25</p> <p><b>changes</b> [9] - 72:16, 84:15, 100:16, 122:14, 123:6, 124:18, 132:17, 144:4, 144:13</p> <p><b>changing</b> [4] - 72:19, 72:25, 89:13, 99:23</p> <p><b>channeled</b> [2] - 74:3, 142:5</p> <p><b>characteristic</b> [1] - 117:23</p> <p><b>charge</b> [4] - 61:13, 78:10, 79:25, 80:1</p> <p><b>charged</b> [3] - 16:17, 61:6, 79:15</p> <p><b>chart</b> [1] - 59:11</p> <p><b>check</b> [1] - 96:4</p> <p><b>choice</b> [15] - 37:7, 102:11, 102:14, 117:12, 117:16, 119:25, 132:25, 141:17, 141:18, 141:19, 141:21, 142:8, 142:22, 146:14, 149:19</p> <p><b>choices</b> [3] - 72:13, 76:25, 117:17</p> <p><b>choosing</b> [2] - 102:20, 142:6</p> <p><b>chose</b> [5] - 11:16, 73:23, 77:3, 104:24, 142:2</p> <p><b>Chris</b> [3] - 76:20, 80:14, 111:20</p>
		<b>C</b>		
		<p><b>calculate</b> [2] - 58:21, 68:13</p> <p><b>calculation</b> [4] - 58:7, 59:14, 65:1, 65:19</p> <p><b>calculations</b> [1] - 59:1</p> <p><b>campus</b> [1] - 126:1</p> <p><b>campuses</b> [7] - 66:7, 66:9, 100:7, 107:19, 115:24, 116:13, 116:20</p> <p><b>candidly</b> [1] - 85:16</p> <p><b>cannot</b> [1] - 29:4</p> <p><b>capability</b> [1] - 15:16</p> <p><b>capacity</b> [3] - 20:1, 24:1, 81:3</p> <p><b>capturing</b> [1] - 119:22</p> <p><b>card</b> [1] - 68:18</p> <p><b>careful</b> [1] - 44:18</p> <p><b>Carnegie</b> [9] - 48:21, 49:8, 56:24, 85:24, 86:1, 86:6, 105:17, 105:25, 106:5</p> <p><b>Caroly</b> [2] - 2:4, 3:23</p> <p><b>carried</b> [2] - 36:18, 135:10</p> <p><b>carry</b> [2] - 15:16, 62:9</p> <p><b>carrying</b> [1] - 14:5</p> <p><b>carrying-over</b> [1] - 14:5</p> <p><b>Cartabello</b> [1] - 64:12</p> <p><b>case</b> [73] - 1:13, 7:20, 12:6, 12:10, 15:25,</p>		

<p><b>chronicle</b> [2] - 12:15, 12:17</p> <p><b>chronicled</b> [1] - 84:19</p> <p><b>Chronicles</b> [1] - 83:24</p> <p><b>chronicling</b> [1] - 84:2</p> <p><b>chronology</b> [2] - 92:18, 131:7</p> <p><b>CIP</b> [6] - 112:8, 112:12, 113:11, 113:19, 133:7, 133:11</p> <p><b>circle</b> [1] - 113:24</p> <p><b>circling</b> [3] - 93:6, 100:17, 104:14</p> <p><b>cite</b> [1] - 115:10</p> <p><b>cited</b> [2] - 50:24, 66:24</p> <p><b>citing</b> [1] - 143:8</p> <p><b>citizens</b> [1] - 80:24</p> <p><b>City</b> [5] - 114:3, 144:5, 144:6, 144:9, 144:13</p> <p><b>Civil</b> [4] - 3:3, 3:12, 80:13, 153:6</p> <p><b>CIVIL</b> [1] - 1:7</p> <p><b>claim</b> [1] - 34:22</p> <p><b>class</b> [4] - 80:22, 85:5, 148:23</p> <p><b>classes</b> [1] - 9:15</p> <p><b>Classification</b> [7] - 48:21, 56:24, 85:25, 86:1, 86:6, 105:18, 106:5</p> <p><b>Classifications</b> [2] - 49:8, 106:1</p> <p><b>clear</b> [13] - 10:4, 16:16, 21:11, 54:13, 81:24, 103:19, 106:12, 107:14, 116:19, 116:23, 120:13, 134:16, 143:9</p> <p><b>clearly</b> [5] - 11:7, 92:8, 93:4, 110:17, 125:22</p> <p><b>CLERK</b> [2] - 3:2, 3:18</p> <p><b>clerks</b> [1] - 5:25</p> <p><b>clock</b> [1] - 78:22</p> <p><b>close</b> [1] - 101:25</p> <p><b>closely</b> [1] - 128:9</p> <p><b>CLOSING</b> [2] - 1:16, 152:2</p> <p><b>Coalition</b> [7] - 3:4, 9:3, 9:17, 9:21, 11:3, 77:24, 153:3</p> <p><b>COALITION</b> [1] - 1:4</p> <p><b>code</b> [1] - 133:11</p> <p><b>Code</b> [3] - 54:23, 120:9, 120:13</p> <p><b>codes</b> [5] - 112:8, 112:12, 113:11, 113:19, 133:7</p> <p><b>codified</b> [1] - 93:23</p>	<p><b>cognizable</b> [1] - 71:16</p> <p><b>coincided</b> [1] - 133:20</p> <p><b>collaboration</b> [1] - 107:20</p> <p><b>colleague</b> [2] - 3:13, 104:18</p> <p><b>colleagues</b> [2] - 51:13, 139:23</p> <p><b>college</b> [16] - 23:2, 29:4, 73:22, 84:21, 91:23, 92:2, 96:8, 100:2, 100:5, 100:7, 102:20, 114:6, 116:20, 147:14</p> <p><b>College</b> [32] - 25:20, 25:25, 26:22, 48:16, 67:11, 67:17, 67:21, 68:5, 68:6, 68:7, 69:17, 74:17, 75:9, 86:11, 86:22, 101:12, 101:17, 102:19, 102:23, 112:3, 114:3, 114:4, 140:9, 140:18, 140:22, 145:5, 145:22, 149:1, 149:5, 149:7, 149:13, 149:21</p> <p><b>college-age</b> [2] - 100:2, 100:5</p> <p><b>college-ready</b> [1] - 100:2</p> <p><b>colleges</b> [2] - 33:8, 114:7</p> <p><b>color</b> [1] - 142:20</p> <p><b>COMAR</b> [7] - 89:2, 93:8, 94:4, 120:8, 131:10, 131:17, 132:7</p> <p><b>comfort</b> [1] - 116:4</p> <p><b>comfortable</b> [3] - 8:4, 116:13, 116:17</p> <p><b>coming</b> [4] - 13:22, 45:11, 46:16, 61:17</p> <p><b>commence</b> [1] - 34:25</p> <p><b>comment</b> [2] - 50:19, 53:1</p> <p><b>comments</b> [1] - 81:11</p> <p><b>COMMISSION</b> [1] - 1:9</p> <p><b>Commission</b> [11] - 3:6, 20:13, 22:24, 23:8, 23:10, 24:5, 58:17, 79:4, 79:6, 80:7, 153:5</p> <p><b>commissions</b> [2] - 79:12, 79:15</p> <p><b>commitment</b> [3] - 36:19, 81:8, 150:25</p> <p><b>commitments</b> [1] -</p>	<p>34:24</p> <p><b>Commitments</b> [1] - 36:4</p> <p><b>commits</b> [1] - 36:17</p> <p><b>committed</b> [7] - 31:21, 33:13, 38:6, 63:7, 67:19, 80:21, 81:15</p> <p><b>Committee</b> [2] - 3:12, 43:10</p> <p><b>communicating</b> [1] - 121:10</p> <p><b>community</b> [6] - 73:22, 85:12, 92:1, 96:8, 114:6, 147:13</p> <p><b>Community</b> [2] - 114:3, 114:4</p> <p><b>company</b> [1] - 97:11</p> <p><b>comparability</b> [1] - 43:3</p> <p><b>comparable</b> [6] - 41:2, 41:4, 41:15, 41:16, 67:20, 81:3</p> <p><b>compare</b> [2] - 125:24, 126:13</p> <p><b>compared</b> [1] - 13:17</p> <p><b>comparing</b> [2] - 42:5, 45:23</p> <p><b>comparison</b> [3] - 40:6, 126:10, 137:20</p> <p><b>comparisons</b> [3] - 33:1, 67:17, 129:16</p> <p><b>compensation</b> [1] - 151:7</p> <p><b>compete</b> [5] - 32:6, 32:15, 66:12, 148:22, 149:16</p> <p><b>Competitive</b> [1] - 83:25</p> <p><b>competitive</b> [7] - 21:5, 41:2, 41:5, 41:16, 41:25, 67:20, 81:4</p> <p><b>competitor</b> [1] - 106:11</p> <p><b>competitors</b> [2] - 100:22, 100:25</p> <p><b>complaint</b> [1] - 76:2</p> <p><b>complete</b> [2] - 52:12, 52:15</p> <p><b>completion</b> [1] - 79:2</p> <p><b>complex</b> [7] - 8:5, 97:21, 102:9, 120:1, 124:4, 127:20, 150:23</p> <p><b>complexity</b> [1] - 118:21</p> <p><b>compliance</b> [9] - 12:24, 33:20, 33:22, 35:3, 39:6, 80:11, 103:7, 103:12, 103:22</p>	<p><b>complicated</b> [1] - 150:8</p> <p><b>complied</b> [3] - 18:24, 19:1, 39:8</p> <p><b>component</b> [2] - 17:15, 57:15</p> <p><b>components</b> [1] - 17:16</p> <p><b>comprehensive</b> [3] - 27:24, 105:8, 148:24</p> <p><b>concede</b> [1] - 43:7</p> <p><b>conceded</b> [1] - 103:4</p> <p><b>concedes</b> [1] - 43:6</p> <p><b>concept</b> [1] - 13:17</p> <p><b>concern</b> [2] - 31:2, 32:22</p> <p><b>concerned</b> [1] - 130:22</p> <p><b>concessions</b> [1] - 79:16</p> <p><b>concluded</b> [4] - 16:4, 16:6, 62:8, 151:14</p> <p><b>conclusion</b> [1] - 137:17</p> <p><b>conclusions</b> [2] - 44:7, 75:22</p> <p><b>concurrence</b> [2] - 12:8, 54:10</p> <p><b>concurring</b> [1] - 116:22</p> <p><b>condition</b> [1] - 27:4</p> <p><b>conditions</b> [4] - 19:12, 19:17, 19:19, 84:2</p> <p><b>Conditions</b> [1] - 83:24</p> <p><b>confer</b> [1] - 51:13</p> <p><b>conference</b> [1] - 70:9</p> <p><b>confident</b> [2] - 122:13, 134:11</p> <p><b>confirmed</b> [1] - 104:20</p> <p><b>Conrad</b> [30] - 15:1, 27:14, 36:4, 40:12, 40:14, 42:24, 44:9, 45:6, 45:22, 46:13, 65:21, 89:5, 95:4, 95:5, 109:7, 109:20, 109:23, 110:17, 111:25, 112:7, 112:18, 112:19, 115:5, 115:9, 122:17, 122:24, 134:11, 147:21, 147:22, 149:12</p> <p><b>Conrad's</b> [9] - 46:20, 50:7, 110:5, 111:16, 113:10, 113:21, 121:17, 133:4, 133:7</p> <p><b>consequences</b> [1] - 81:23</p> <p><b>consider</b> [5] - 40:9, 62:1, 112:20,</p>	<p>130:16, 147:24</p> <p><b>consideration</b> [1] - 95:13</p> <p><b>considered</b> [1] - 104:5</p> <p><b>consistent</b> [7] - 12:7, 17:6, 35:6, 40:11, 51:8, 63:15, 64:17</p> <p><b>consolidate</b> [1] - 53:20</p> <p><b>Constitution</b> [5] - 71:17, 71:21, 103:22, 117:11, 143:10</p> <p><b>constraining</b> [1] - 136:11</p> <p><b>consulted</b> [1] - 4:23</p> <p><b>contemporary</b> [1] - 137:15</p> <p><b>contend</b> [1] - 54:21</p> <p><b>contest</b> [1] - 138:10</p> <p><b>context</b> [24] - 35:23, 35:25, 36:7, 36:25, 37:10, 41:6, 71:11, 72:13, 72:14, 72:15, 78:16, 79:5, 80:4, 80:19, 81:17, 91:10, 93:6, 97:21, 102:13, 118:22, 130:19, 138:3, 138:15</p> <p><b>continuation</b> [1] - 28:10</p> <p><b>continue</b> [7] - 50:7, 56:18, 73:12, 76:18, 117:5, 150:14</p> <p><b>continued</b> [1] - 88:4</p> <p><b>continues</b> [4] - 26:7, 78:12, 115:20, 149:20</p> <p><b>continuing</b> [6] - 14:5, 98:13, 98:17, 98:18, 128:16, 134:24</p> <p><b>contract</b> [1] - 34:21</p> <p><b>contrary</b> [2] - 12:21, 62:12</p> <p><b>controlled</b> [1] - 27:21</p> <p><b>controls</b> [1] - 97:11</p> <p><b>controversy</b> [1] - 133:22</p> <p><b>convened</b> [1] - 79:1</p> <p><b>convenience</b> [1] - 37:16</p> <p><b>conversation</b> [1] - 8:8</p> <p><b>coordination</b> [4] - 120:12, 144:19, 145:2, 145:20</p> <p><b>copies</b> [1] - 4:14</p> <p><b>Coppin</b> [9] - 30:24, 49:4, 73:2, 84:12, 85:11, 98:11, 112:3, 130:13, 132:18</p>
--	--	--	---	---

<p><b>copy</b> [5] - 39:14, 43:6, 46:8, 54:3, 61:4</p> <p><b>cordial</b> [1] - 150:10</p> <p><b>core</b> [5] - 91:12, 91:14, 91:20, 92:7, 113:3</p> <p><b>corner</b> [1] - 110:10</p> <p><b>correct</b> [5] - 17:9, 28:16, 40:17, 40:18, 144:14</p> <p><b>correctly</b> [1] - 78:22</p> <p><b>Cost</b> [1] - 56:15</p> <p><b>cost</b> [2] - 56:17, 104:8</p> <p><b>counsel</b> [7] - 3:7, 3:18, 5:4, 6:11, 6:18, 8:10, 108:24</p> <p><b>counsel's</b> [1] - 8:22</p> <p><b>count</b> [2] - 6:14, 134:14</p> <p><b>counted</b> [1] - 134:18</p> <p><b>counties</b> [1] - 100:11</p> <p><b>country</b> [3] - 94:16, 97:14, 100:1</p> <p><b>country's</b> [1] - 83:14</p> <p><b>County</b> [8] - 99:3, 99:9, 99:10, 99:16, 99:17, 132:13, 144:1</p> <p><b>couple</b> [8] - 7:7, 21:24, 27:19, 56:19, 60:12, 95:8, 109:24, 133:24</p> <p><b>course</b> [26] - 8:5, 9:11, 12:18, 13:2, 20:4, 24:18, 27:22, 28:14, 29:7, 30:4, 31:20, 35:2, 45:17, 49:12, 54:11, 58:4, 58:18, 62:7, 66:17, 67:4, 67:14, 92:12, 115:25, 135:18, 137:10, 140:14</p> <p><b>courses</b> [6] - 91:16, 91:19, 91:20, 112:10, 114:15, 114:18</p> <p><b>COURT</b> [127] - 1:1, 3:15, 3:17, 4:5, 4:15, 4:18, 5:20, 6:9, 8:3, 8:24, 9:19, 10:2, 10:7, 10:11, 10:15, 10:19, 10:25, 11:6, 11:10, 13:12, 13:15, 15:12, 16:9, 16:22, 17:2, 18:14, 20:12, 21:2, 21:20, 23:4, 24:7, 24:20, 25:2, 26:1, 29:2, 30:22, 31:4, 32:17, 32:24, 34:6, 34:18, 35:2, 35:12, 35:20, 36:13,</p>	<p>37:17, 37:19, 40:14, 40:19, 42:13, 43:13, 44:13, 46:16, 48:22, 49:18, 51:17, 52:5, 52:8, 52:14, 52:24, 53:13, 53:17, 53:22, 53:24, 55:23, 56:3, 57:7, 57:18, 61:19, 66:21, 68:23, 69:7, 69:24, 70:5, 70:8, 70:16, 70:22, 71:5, 71:7, 75:13, 75:16, 76:17, 79:19, 79:21, 87:3, 89:12, 89:19, 90:9, 91:7, 92:14, 95:19, 95:21, 95:25, 98:18, 102:25, 105:13, 107:24, 108:3, 108:9, 108:13, 108:15, 108:21, 111:13, 111:24, 113:22, 115:13, 117:19, 126:8, 128:24, 129:5, 129:10, 131:12, 131:14, 134:18, 135:7, 135:11, 135:25, 137:2, 139:7, 140:2, 140:25, 142:23, 149:23, 149:25, 150:7, 151:4, 151:10</p> <p><b>court</b> [6] - 13:20, 26:18, 53:13, 56:7, 62:13, 104:4</p> <p><b>Court</b> [124] - 1:25, 3:3, 3:8, 4:3, 4:10, 5:16, 6:7, 7:9, 7:11, 7:20, 8:20, 10:4, 11:21, 11:23, 11:24, 12:13, 12:19, 13:10, 14:10, 17:15, 17:18, 18:1, 18:16, 18:21, 19:8, 20:14, 20:25, 21:8, 22:5, 22:11, 23:20, 24:8, 24:17, 24:25, 25:18, 26:10, 26:19, 27:14, 28:5, 28:18, 28:22, 30:4, 30:6, 30:14, 30:23, 31:8, 31:16, 32:13, 32:21, 33:1, 33:12, 36:5, 36:11, 37:3, 37:14, 37:23, 38:10, 39:5, 39:22, 40:23, 41:3, 41:18, 42:8, 43:1, 43:11, 44:8, 46:2, 46:15, 47:3, 47:18, 48:12, 48:20, 49:5, 49:11, 49:16, 49:22, 50:15, 50:19, 50:25,</p>	<p>51:6, 51:12, 51:14, 52:1, 53:11, 53:21, 54:8, 54:9, 54:21, 55:6, 55:14, 55:24, 57:23, 58:3, 58:11, 58:14, 59:12, 60:10, 60:24, 61:8, 62:7, 64:6, 64:24, 66:18, 67:25, 68:18, 69:3, 69:22, 71:9, 78:10, 78:25, 80:3, 108:7, 128:3, 130:5, 131:5, 131:25, 132:11, 132:15, 133:8, 136:7, 138:11, 139:12, 139:24, 153:12</p> <p><b>Court's</b> [14] - 7:6, 7:15, 15:7, 19:11, 20:4, 24:11, 31:24, 32:19, 32:22, 36:23, 37:16, 51:21, 54:4, 132:22</p> <p><b>courts</b> [1] - 54:11</p> <p><b>cover</b> [2] - 6:2, 11:12</p> <p><b>covering</b> [1] - 53:21</p> <p><b>covers</b> [1] - 5:24</p> <p><b>craft</b> [1] - 36:6</p> <p><b>Craig</b> [2] - 2:2, 3:20</p> <p><b>create</b> [4] - 19:2, 29:4, 63:10, 85:20</p> <p><b>created</b> [5] - 77:9, 77:11, 101:16, 101:17, 103:21</p> <p><b>creation</b> [5] - 96:15, 98:15, 101:21, 118:16, 144:20</p> <p><b>criteria</b> [1] - 125:5</p> <p><b>critical</b> [2] - 147:3, 147:18</p> <p><b>criticizing</b> [1] - 146:25</p> <p><b>cross</b> [7] - 32:14, 80:3, 95:6, 97:7, 104:19, 109:13, 116:9</p> <p><b>cross-examination</b> [6] - 32:14, 80:3, 95:6, 97:7, 104:19, 116:9</p> <p><b>culturally</b> [1] - 63:18</p> <p><b>cumulative</b> [3] - 58:8, 59:4, 68:17</p> <p><b>current</b> [34] - 5:14, 8:25, 9:1, 9:20, 9:25, 10:5, 10:6, 11:4, 11:8, 13:25, 25:9, 39:22, 43:22, 49:19, 55:22, 56:25, 57:25, 60:5, 81:20, 84:4, 88:18, 93:7, 93:15, 93:16, 94:4, 94:5,</p>	<p>95:15, 95:16, 95:21, 97:22, 102:13, 139:13</p> <p><b>Current</b> [5] - 56:15, 56:22, 57:5, 57:16, 58:1</p> <p><b>Curriculum</b> [1] - 88:13</p> <p><b>curriculum</b> [1] - 23:6</p> <p><b>cuspid</b> [1] - 106:4</p> <p><b>cut</b> [2] - 57:25, 131:23</p> <p><b>cutoff</b> [2] - 70:7, 93:1</p> <p><b>cyber</b> [1] - 84:25</p>	<p>92:20, 92:23, 131:18, 136:13</p> <p><b>decisions</b> [3] - 56:7, 129:24, 136:17</p> <p><b>decline</b> [5] - 98:20, 117:21, 117:25, 132:11, 132:18</p> <p><b>declining</b> [2] - 115:24, 132:10</p> <p><b>decrease</b> [1] - 118:14</p> <p><b>decreased</b> [1] - 100:4</p> <p><b>decreasing</b> [1] - 100:3</p> <p><b>decree</b> [1] - 104:13</p> <p><b>deeper</b> [1] - 112:13</p> <p><b>DEFENDANTS</b> [1] - 1:10</p> <p><b>Defendants</b> [2] - 2:1, 153:6</p> <p><b>defendants</b> [3] - 3:18, 75:20, 76:1</p> <p><b>defendants'</b> [1] - 6:23</p> <p><b>defense</b> [29] - 6:11, 6:13, 6:18, 8:10, 8:21, 27:6, 28:21, 32:9, 34:12, 34:14, 50:23, 55:12, 76:2, 76:6, 78:10, 83:1, 83:3, 83:4, 83:15, 83:16, 83:18, 83:21, 84:8, 102:15, 135:4, 135:12, 147:5, 147:17</p> <p><b>defense's</b> [2] - 123:22, 123:23</p> <p><b>defenses</b> [4] - 27:11, 50:9, 60:5, 63:2</p> <p><b>deficiencies</b> [11] - 23:6, 58:4, 58:6, 58:8, 68:13, 81:22, 82:4, 82:7, 88:16, 88:19</p> <p><b>Deficiencies</b> [1] - 88:13</p> <p><b>deficiency</b> [3] - 59:14, 128:5, 128:11</p> <p><b>deficits</b> [1] - 66:1</p> <p><b>define</b> [1] - 149:9</p> <p><b>defines</b> [1] - 35:22</p> <p><b>definitions</b> [1] - 81:3</p> <p><b>degree</b> [8] - 76:22, 76:23, 78:3, 105:24, 106:14, 106:16, 106:21</p> <p><b>degrees</b> [3] - 76:21, 97:19, 106:3</p> <p><b>deliver</b> [2] - 80:24, 96:25</p> <p><b>delivery</b> [3] - 72:20, 72:24, 97:24</p> <p><b>demand</b> [10] - 45:25,</p>
<b>D</b>				
			<p><b>Dame</b> [1] - 119:12</p> <p><b>data</b> [5] - 68:7, 115:23, 134:4, 143:23</p> <p><b>David</b> [5] - 9:24, 77:23, 82:23, 98:4, 123:19</p> <p><b>days</b> [1] - 94:10</p> <p><b>DBM</b> [1] - 124:5</p> <p><b>de</b> [65] - 5:8, 5:10, 8:18, 14:11, 15:2, 15:6, 16:1, 17:6, 19:17, 19:18, 19:21, 20:9, 22:9, 23:24, 24:4, 24:14, 25:6, 25:10, 25:18, 26:2, 26:5, 26:8, 26:12, 27:16, 33:21, 39:24, 41:17, 43:9, 43:17, 43:24, 44:11, 45:9, 46:11, 47:3, 47:24, 48:7, 49:13, 49:15, 50:3, 50:4, 54:16, 54:17, 54:18, 57:2, 58:5, 60:8, 63:3, 64:3, 64:6, 66:18, 69:12, 73:11, 78:14, 81:18, 83:6, 83:12, 124:3, 125:13, 125:14, 125:21, 125:23, 131:21, 136:8, 137:14, 138:17</p> <p><b>De</b> [2] - 83:24, 88:12</p> <p><b>deal</b> [6] - 72:22, 90:12, 102:1, 103:2, 116:10, 141:14</p> <p><b>dealing</b> [3] - 102:10, 118:23, 120:16</p> <p><b>dealt</b> [1] - 143:16</p> <p><b>debate</b> [2] - 52:22</p> <p><b>decade</b> [1] - 96:5</p> <p><b>decision</b> [12] - 24:12, 54:8, 55:7, 58:2, 63:9, 65:6, 92:15,</p>	

<p>113:7, 120:21, 120:25, 121:11, 130:10, 133:23, 134:1, 134:5, 134:9</p> <p><b>demands</b> [1] - 84:3</p> <p><b>demographic</b> [8] - 99:10, 100:16, 115:23, 132:17, 132:21, 143:23, 144:13</p> <p><b>demographically</b> [1] - 144:4</p> <p><b>demographics</b> [8] - 72:18, 99:12, 99:24, 100:7, 100:10, 132:10, 132:13</p> <p><b>demography</b> [1] - 99:11</p> <p><b>demonstrable</b> [1] - 93:20</p> <p><b>demonstrate</b> [2] - 96:11, 147:19</p> <p><b>demonstrated</b> [3] - 71:15, 89:8, 121:15</p> <p><b>demonstrates</b> [1] - 81:7</p> <p><b>demonstrating</b> [2] - 76:13, 103:21</p> <p><b>demonstration</b> [2] - 77:17, 93:19</p> <p><b>denied</b> [4] - 30:18, 95:3, 95:11, 147:9</p> <p><b>deposition</b> [2] - 13:7, 62:11</p> <p><b>describe</b> [2] - 12:5, 14:12</p> <p><b>described</b> [3] - 18:21, 58:4, 58:6</p> <p><b>describes</b> [3] - 14:22, 15:8, 56:14</p> <p><b>describing</b> [1] - 16:2</p> <p><b>desegregated</b> [5] - 88:8, 142:18, 143:2, 143:12, 148:11</p> <p><b>desegregation</b> [1] - 146:8</p> <p><b>deserve</b> [1] - 87:24</p> <p><b>designated</b> [2] - 105:25, 140:18</p> <p><b>designation</b> [2] - 148:18, 149:21</p> <p><b>designations</b> [1] - 148:7</p> <p><b>designed</b> [2] - 37:6, 148:9</p> <p><b>desire</b> [2] - 81:13, 117:18</p> <p><b>detach</b> [1] - 95:17</p> <p><b>detachment</b> [4] - 93:11, 144:17,</p>	<p>144:21, 146:7</p> <p><b>detail</b> [6] - 11:19, 13:1, 20:11, 20:15, 29:24, 132:20</p> <p><b>details</b> [1] - 36:10</p> <p><b>determination</b> [2] - 32:2, 93:18</p> <p><b>determinative</b> [1] - 126:21</p> <p><b>determine</b> [3] - 86:1, 94:9, 124:7</p> <p><b>determined</b> [3] - 75:11, 91:19, 93:13</p> <p><b>determines</b> [4] - 38:1, 56:23, 129:21, 140:20</p> <p><b>determining</b> [5] - 77:1, 96:13, 114:21, 114:22, 127:15</p> <p><b>develop</b> [3] - 79:6, 80:7, 140:7</p> <p><b>developed</b> [1] - 112:21</p> <p><b>development</b> [2] - 73:22, 96:9</p> <p><b>deviation</b> [1] - 68:10</p> <p><b>devotion</b> [1] - 133:3</p> <p><b>dictate</b> [1] - 86:1</p> <p><b>dictated</b> [1] - 104:23</p> <p><b>differ</b> [1] - 12:10</p> <p><b>difference</b> [3] - 25:24, 42:3, 87:2</p> <p><b>differences</b> [1] - 124:18</p> <p><b>different</b> [11] - 26:19, 27:7, 35:2, 37:24, 40:8, 50:18, 72:20, 101:24, 102:21, 126:6, 139:1</p> <p><b>differential</b> [1] - 47:1</p> <p><b>differently</b> [1] - 140:10</p> <p><b>difficult</b> [6] - 12:9, 19:7, 59:15, 65:8, 65:9, 69:19</p> <p><b>dig</b> [1] - 112:13</p> <p><b>direct</b> [3] - 78:19, 118:2, 127:22</p> <p><b>directly</b> [1] - 89:21</p> <p><b>Director</b> [1] - 112:11</p> <p><b>disadvantages</b> [1] - 21:5</p> <p><b>disagree</b> [1] - 34:8</p> <p><b>disagreed</b> [1] - 67:14</p> <p><b>discrepancy</b> [1] - 69:12</p> <p><b>discrimination</b> [4] - 14:6, 21:5, 55:17, 55:18</p> <p><b>discuss</b> [7] - 5:17, 7:16, 11:19, 12:25,</p>	<p>14:8, 26:6, 51:23</p> <p><b>discussed</b> [10] - 12:22, 16:2, 36:1, 36:8, 59:22, 89:6, 89:7, 96:7, 120:10, 132:20</p> <p><b>discussing</b> [6] - 5:11, 6:20, 37:11, 52:2, 97:20</p> <p><b>discussion</b> [16] - 5:7, 11:24, 23:5, 30:1, 47:8, 49:11, 49:13, 64:7, 64:22, 73:17, 113:5, 130:1, 130:25, 134:8, 141:14, 141:17</p> <p><b>discussions</b> [1] - 33:12</p> <p><b>disgrace</b> [1] - 26:16</p> <p><b>dismantled</b> [1] - 33:21</p> <p><b>dismantling</b> [1] - 44:11</p> <p><b>disparities</b> [4] - 13:19, 82:1, 82:2, 82:4</p> <p><b>disparity</b> [6] - 25:21, 26:7, 45:25, 46:10, 49:25, 86:16</p> <p><b>disproportionately</b> [1] - 16:23</p> <p><b>dispute</b> [4] - 8:25, 9:6, 9:9, 25:5</p> <p><b>distinct</b> [1] - 106:12</p> <p><b>distinction</b> [8] - 18:4, 73:13, 78:17, 105:5, 105:11, 107:3, 114:8, 138:12</p> <p><b>distinguish</b> [2] - 44:19, 57:7</p> <p><b>district</b> [1] - 104:4</p> <p><b>DISTRICT</b> [2] - 1:1, 1:2</p> <p><b>District</b> [2] - 1:15, 153:7</p> <p><b>diverge</b> [1] - 12:2</p> <p><b>diverse</b> [2] - 63:19, 107:19</p> <p><b>divert</b> [2] - 9:19, 13:12</p> <p><b>divide</b> [1] - 65:1</p> <p><b>dividing</b> [2] - 4:23, 4:25</p> <p><b>division</b> [2] - 89:14, 130:6</p> <p><b>Docket</b> [1] - 3:3</p> <p><b>doctoral</b> [24] - 47:9, 47:10, 47:11, 47:13, 47:15, 48:14, 48:18, 49:6, 49:23, 49:24, 74:21, 76:23, 86:16, 86:21, 86:23, 86:25, 87:1, 87:4, 94:17, 105:18, 106:1,</p>	<p>106:16, 106:22, 126:14</p> <p><b>doctoral-granting</b> [2] - 86:16, 106:22</p> <p><b>doctorate</b> [5] - 73:21, 97:18, 101:5, 106:3, 123:8</p> <p><b>doctorates</b> [1] - 97:13</p> <p><b>document</b> [5] - 15:6, 22:11, 33:6, 38:14, 69:15</p> <p><b>documented</b> [1] - 28:25</p> <p><b>documents</b> [13] - 12:14, 12:16, 14:11, 25:15, 26:3, 26:13, 26:16, 26:25, 28:9, 37:5, 65:21, 83:11, 136:8</p> <p><b>dollar</b> [1] - 69:17</p> <p><b>dollars</b> [1] - 69:17</p> <p><b>Don</b> [1] - 117:13</p> <p><b>don</b> [1] - 101:24</p> <p><b>done</b> [13] - 16:5, 26:5, 44:4, 58:16, 69:6, 86:14, 87:23, 107:22, 130:9, 131:9, 140:23, 150:9</p> <p><b>door</b> [1] - 32:11</p> <p><b>double</b> [1] - 54:5</p> <p><b>down</b> [11] - 6:25, 10:8, 21:23, 30:11, 49:9, 101:6, 109:23, 111:19, 139:11, 144:7, 144:8</p> <p><b>Dr</b> [190] - 4:16, 7:11, 13:4, 14:25, 15:1, 18:2, 18:5, 18:6, 18:11, 18:21, 21:9, 22:6, 25:13, 27:14, 28:7, 28:22, 32:14, 33:17, 34:2, 36:4, 37:14, 38:8, 39:1, 39:23, 40:9, 40:12, 40:14, 40:22, 42:24, 44:9, 45:6, 45:22, 46:13, 46:20, 48:5, 50:6, 51:1, 51:3, 57:13, 57:14, 58:3, 58:15, 58:24, 59:2, 59:6, 59:13, 60:4, 60:9, 61:15, 61:22, 64:1, 64:18, 64:23, 64:25, 65:10, 65:21, 65:23, 66:6, 66:16, 67:4, 67:13, 67:14, 67:25, 68:9, 68:12, 68:14, 72:23, 73:1, 76:20, 76:21, 76:24, 77:5, 79:10, 80:18,</p>	<p>84:10, 84:11, 84:12, 84:13, 85:7, 85:9, 85:10, 85:23, 87:20, 89:5, 89:22, 91:14, 94:13, 94:14, 95:1, 95:4, 95:5, 96:18, 96:24, 97:7, 98:8, 98:10, 98:24, 98:25, 99:1, 99:2, 99:13, 99:22, 99:24, 100:13, 100:19, 101:24, 102:3, 103:13, 105:19, 105:21, 106:2, 106:8, 106:11, 106:17, 106:25, 107:1, 107:5, 107:6, 107:14, 109:7, 109:20, 109:23, 110:5, 110:17, 110:21, 110:24, 111:2, 111:8, 111:15, 111:25, 112:7, 112:10, 112:14, 112:18, 112:19, 113:10, 113:21, 115:5, 115:9, 116:7, 116:15, 117:1, 118:6, 118:24, 119:17, 120:24, 120:25, 121:3, 121:16, 121:17, 121:25, 122:17, 122:22, 122:23, 122:24, 123:3, 127:2, 127:6, 127:10, 130:6, 130:21, 133:4, 133:6, 134:7, 134:11, 134:20, 134:23, 135:5, 139:12, 139:16, 144:24, 145:15, 146:17, 147:7, 147:21, 147:22, 148:3, 148:4, 148:8, 148:10, 149:8, 149:10, 149:12</p> <p><b>DR</b> [1] - 4:17</p> <p><b>draft</b> [1] - 33:6</p> <p><b>drains</b> [1] - 64:2</p> <p><b>dramatic</b> [1] - 122:14</p> <p><b>dramatically</b> [4] - 82:18, 100:4, 144:7, 144:8</p> <p><b>drawing</b> [1] - 24:14</p> <p><b>drive</b> [2] - 56:6, 149:19</p> <p><b>driven</b> [7] - 137:1, 145:9, 145:13,</p>
--	--	---	--	---

<p>145:25, 146:4, 146:5, 146:11 <b>driver</b> [1] - 121:1 <b>drivers</b> [1] - 87:13 <b>drives</b> [1] - 121:22 <b>drove</b> [2] - 56:1, 119:11 <b>dual</b> [57] - 13:23, 14:8, 14:9, 14:12, 14:18, 14:21, 14:23, 15:1, 15:3, 15:5, 15:9, 15:19, 15:21, 16:3, 16:13, 16:21, 16:25, 17:3, 17:7, 17:9, 17:11, 17:13, 17:16, 17:21, 17:23, 18:10, 19:7, 19:9, 20:18, 24:4, 30:8, 43:19, 43:25, 51:21, 51:22, 54:15, 60:20, 60:23, 60:25, 61:2, 61:11, 64:10, 103:25, 104:1, 104:16, 104:20, 104:24, 105:1, 127:5, 127:8, 127:13, 138:5, 139:5, 139:14, 139:17 <b>Dudley</b> [6] - 106:9, 106:12, 106:17, 107:1, 107:6, 107:14 <b>Dudley-Eschbach</b> [5] - 106:9, 106:12, 107:1, 107:6, 107:14 <b>Dudley-Eschbach's</b> [1] - 106:17 <b>duper</b> [1] - 4:12 <b>duplicated</b> [1] - 132:1 <b>duplicates</b> [1] - 94:1 <b>duplication</b> [43] - 5:18, 8:17, 12:2, 31:5, 36:3, 40:15, 43:8, 51:20, 51:24, 52:3, 54:3, 75:5, 90:11, 90:14, 90:18, 91:11, 92:7, 92:18, 93:1, 93:12, 93:20, 95:14, 109:8, 109:12, 109:17, 109:21, 110:10, 110:19, 111:21, 114:23, 115:4, 115:8, 115:11, 115:18, 119:10, 120:2, 120:17, 131:19, 131:21, 133:22, 134:2, 134:15, 144:18 <b>duplicative</b> [7] - 95:11, 111:4,</p>	<p>112:20, 112:25, 121:19, 147:25, 149:14 <b>during</b> [41] - 5:10, 7:8, 8:16, 19:21, 21:8, 23:23, 24:4, 25:6, 25:17, 26:5, 26:12, 27:15, 39:24, 43:17, 46:11, 47:24, 49:14, 51:1, 57:8, 60:8, 64:3, 64:6, 66:18, 69:11, 81:12, 83:6, 95:6, 96:3, 96:19, 97:6, 98:23, 99:4, 104:18, 109:7, 126:2, 130:11, 145:12, 145:16, 145:23, 148:25 <b>dwell</b> [1] - 37:16</p> <p style="text-align: center;"><b>E</b></p> <p><b>Earl</b> [1] - 84:13 <b>early</b> [1] - 92:22 <b>earned</b> [1] - 78:3 <b>Eastern</b> [28] - 30:16, 46:2, 46:3, 85:2, 98:2, 101:2, 106:3, 106:7, 106:10, 106:15, 106:19, 106:20, 106:22, 106:24, 107:12, 107:16, 109:4, 109:5, 109:8, 109:15, 109:22, 110:2, 111:11, 111:13, 121:4, 121:13, 123:3, 136:19 <b>echos</b> [1] - 138:9 <b>economies</b> [3] - 59:15, 59:17, 59:25 <b>educating</b> [1] - 117:6 <b>Education</b> [7] - 3:5, 33:18, 93:9, 120:9, 153:4, 153:5 <b>EDUCATION</b> [2] - 1:5, 1:8 <b>education</b> [37] - 18:22, 22:14, 23:1, 39:25, 48:3, 55:17, 55:20, 60:17, 72:3, 72:17, 72:20, 72:25, 73:3, 73:4, 77:11, 79:7, 80:8, 80:19, 80:20, 80:22, 80:23, 81:9, 82:16, 91:4, 96:25, 97:24, 101:5, 102:9, 104:8, 104:10, 104:12, 117:9,</p>	<p>123:20, 124:2, 124:14, 148:23 <b>educational</b> [27] - 6:20, 7:3, 15:18, 88:23, 89:3, 89:9, 89:16, 90:3, 90:6, 91:9, 91:10, 91:21, 96:13, 96:22, 113:18, 120:3, 120:5, 120:18, 121:1, 121:15, 122:7, 122:18, 123:1, 130:7, 139:19, 140:11 <b>educationally</b> [7] - 15:17, 32:4, 32:9, 92:5, 96:17, 137:21, 148:18 <b>effect</b> [6] - 14:5, 43:4, 55:16, 95:22, 96:3, 115:21 <b>effects</b> [8] - 44:18, 46:12, 73:12, 84:6, 91:12, 111:23, 130:8, 142:10 <b>efficient</b> [1] - 52:12 <b>efficiently</b> [1] - 75:25 <b>effort</b> [1] - 128:16 <b>efforts</b> [3] - 78:12, 145:2 <b>eight</b> [1] - 125:9 <b>either</b> [10] - 8:4, 14:2, 19:25, 30:24, 70:15, 96:15, 98:11, 113:18, 140:24, 141:20 <b>electrical</b> [3] - 94:16, 94:17, 94:19 <b>electronically</b> [1] - 4:11 <b>element</b> [1] - 117:15 <b>Elementary/Middle</b> [1] - 85:13 <b>eliminate</b> [1] - 35:8 <b>eliminated</b> [6] - 17:10, 18:9, 78:13, 81:18, 83:19, 132:8 <b>eliminating</b> [1] - 132:6 <b>Ellis</b> [1] - 3:10 <b>elongated</b> [1] - 7:19 <b>elsewhere</b> [1] - 14:3 <b>embarrassing</b> [1] - 83:14 <b>embraced</b> [3] - 104:21, 104:22, 138:9 <b>emphasis</b> [3] - 101:8, 126:18, 145:21 <b>emphasize</b> [1] - 139:15</p>	<p><b>employed</b> [3] - 77:5, 97:8, 97:17 <b>employee</b> [1] - 10:22 <b>encapsulates</b> [1] - 14:20 <b>enclave</b> [1] - 63:11 <b>end</b> [2] - 25:8, 59:19 <b>ends</b> [1] - 124:6 <b>enforcement</b> [1] - 35:1 <b>engagement</b> [1] - 94:11 <b>engineering</b> [6] - 94:17, 94:18, 94:19, 121:5, 121:13, 122:3 <b>enhance</b> [6] - 27:25, 37:6, 45:13, 45:15, 78:12, 81:13 <b>enhanced</b> [1] - 88:5 <b>Enhancement</b> [2] - 124:20, 125:13 <b>enhancement</b> [5] - 39:15, 58:14, 82:20, 82:22, 139:8 <b>enhancing</b> [5] - 43:20, 44:10, 44:19, 45:2, 81:16 <b>enrolled</b> [1] - 9:5 <b>enrollment</b> [23] - 98:2, 98:5, 98:9, 98:11, 98:19, 98:21, 100:18, 100:19, 101:6, 102:18, 118:3, 118:8, 119:7, 136:1, 136:25, 137:16, 145:9, 145:13, 145:17, 145:19, 146:3, 146:11, 146:21 <b>enrollment-based</b> [1] - 137:16 <b>enrollment-driven</b> [1] - 146:11 <b>entered</b> [1] - 33:23 <b>entering</b> [1] - 32:3 <b>entire</b> [2] - 135:12, 135:14 <b>entirely</b> [3] - 135:25, 136:25, 143:4 <b>entitled</b> [2] - 1:13, 129:17 <b>envision</b> [1] - 5:11 <b>envisioning</b> [3] - 5:7, 6:2, 6:6 <b>equal</b> [4] - 22:13, 26:20, 50:5, 108:23 <b>equally</b> [1] - 5:1 <b>equip</b> [2] - 22:25, 23:1 <b>equipment</b> [1] - 138:7 <b>equipped</b> [2] - 19:22, 23:1</p>	<p><b>equitable</b> [1] - 26:4 <b>equitably</b> [3] - 137:18, 137:20, 138:2 <b>Equity</b> [2] - 3:4, 153:3 <b>EQUITY</b> [1] - 1:4 <b>Era</b> [2] - 83:25, 88:12 <b>era</b> [67] - 5:8, 5:10, 8:18, 14:11, 15:2, 15:6, 16:1, 19:17, 19:18, 19:22, 20:9, 22:9, 22:10, 23:24, 24:5, 24:14, 25:6, 25:11, 25:17, 25:18, 26:2, 26:6, 26:8, 26:12, 27:16, 33:21, 39:24, 41:18, 43:9, 43:17, 43:24, 44:12, 45:9, 46:11, 47:4, 47:24, 48:7, 49:13, 49:15, 50:3, 50:4, 54:16, 54:17, 54:18, 57:3, 58:5, 60:8, 63:3, 64:3, 64:7, 66:18, 69:12, 73:11, 78:15, 81:18, 83:6, 83:12, 83:20, 124:3, 125:13, 125:14, 125:21, 125:23, 131:21, 136:8, 137:14, 138:17 <b>errors</b> [1] - 58:25 <b>Eschbach</b> [7] - 40:9, 106:9, 106:12, 107:1, 107:6, 107:14, 130:22 <b>Eschbach's</b> [1] - 106:17 <b>especially</b> [1] - 7:18 <b>Esquire</b> [13] - 1:20, 1:21, 1:21, 1:22, 1:22, 1:23, 1:23, 2:2, 2:2, 2:3, 2:3, 2:4, 2:4 <b>essence</b> [2] - 113:9, 113:20 <b>essentially</b> [10] - 4:25, 14:12, 16:4, 20:22, 22:7, 25:20, 33:19, 39:3, 39:24, 142:25 <b>established</b> [3] - 7:5, 19:21, 30:10 <b>establishes</b> [1] - 50:13 <b>et</b> [6] - 1:5, 1:9, 3:5, 3:6, 153:4, 153:5 <b>ethnically</b> [1] - 63:18 <b>event</b> [2] - 47:7, 65:20 <b>eventually</b> [1] - 51:2 <b>evidence</b> [31] - 5:16, 25:14, 29:12, 29:14, 38:21, 38:25, 40:20,</p>
--	---	--	--	--



<p>46:12, 50:1, 68:16, 68:19, 71:14, 76:12, 81:14, 85:20, 88:25, 90:2, 90:3, 93:5, 94:3, 96:11, 96:17, 104:11, 104:20, 107:13, 120:5, 141:13, 141:23, 144:3, 144:12</p> <p><b>exact</b> [2] - 23:8, 26:24</p> <p><b>exacting</b> [1] - 81:7</p> <p><b>exactly</b> [6] - 35:4, 55:21, 57:16, 131:5, 133:20, 143:14</p> <p><b>examination</b> [6] - 32:14, 80:3, 95:6, 97:7, 104:19, 116:9</p> <p><b>example</b> [15] - 16:4, 46:17, 46:19, 46:25, 47:14, 54:14, 67:18, 85:1, 87:4, 89:12, 99:7, 99:21, 105:5, 111:17, 136:9</p> <p><b>examples</b> [2] - 90:21, 143:25</p> <p><b>EXCELLENCE</b> [1] - 1:4</p> <p><b>Excellence</b> [2] - 3:4, 153:3</p> <p><b>except</b> [2] - 61:9, 67:21</p> <p><b>excess</b> [1] - 149:9</p> <p><b>exchange</b> [3] - 34:24, 50:25, 113:13</p> <p><b>excluded</b> [3] - 67:16, 109:7, 148:12</p> <p><b>excuse</b> [1] - 71:9</p> <p><b>exempting</b> [1] - 140:22</p> <p><b>exhibit</b> [1] - 118:3</p> <p><b>exhibits</b> [3] - 50:24, 51:4, 51:6</p> <p><b>exist</b> [2] - 19:18, 64:4</p> <p><b>existed</b> [5] - 35:17, 64:3, 114:12, 144:22, 144:23</p> <p><b>existence</b> [3] - 92:12, 96:5, 118:19</p> <p><b>existing</b> [4] - 54:19, 90:7, 114:14, 114:19</p> <p><b>exists</b> [3] - 15:3, 97:22, 117:23</p> <p><b>expand</b> [19] - 7:13, 12:17, 18:20, 20:8, 23:25, 27:18, 27:23, 29:13, 30:3, 31:22, 38:11, 38:18, 39:17, 39:18, 44:1, 45:15, 45:18, 87:13, 87:17</p> <p><b>expanded</b> [8] - 19:25,</p>	<p>31:13, 31:20, 32:5, 32:10, 44:5, 63:20, 93:9</p> <p><b>expanding</b> [3] - 20:6, 33:14, 91:21</p> <p><b>expansion</b> [4] - 43:21, 90:6, 90:25, 123:6</p> <p><b>expenses</b> [1] - 61:10</p> <p><b>expensive</b> [2] - 43:18, 43:23</p> <p><b>expert</b> [3] - 18:7, 46:20, 146:12</p> <p><b>expert's</b> [1] - 8:6</p> <p><b>experts</b> [2] - 18:19, 18:22</p> <p><b>explain</b> [1] - 117:25</p> <p><b>explained</b> [2] - 57:15, 80:18</p> <p><b>explanation</b> [1] - 109:20</p> <p><b>explored</b> [1] - 151:1</p> <p><b>extended</b> [1] - 151:11</p> <p><b>extensive</b> [2] - 23:12, 141:16</p> <p><b>extent</b> [17] - 5:9, 6:4, 7:10, 8:20, 10:3, 46:17, 50:16, 57:20, 58:21, 70:12, 70:19, 78:7, 93:17, 101:20, 117:22, 126:9, 126:12</p> <p><b>extremely</b> [6] - 84:24, 120:1, 121:1, 123:5, 127:20, 150:8</p>	<p>67:1, 74:10, 75:22, 77:2, 82:19, 87:10, 89:24, 92:5, 95:1, 95:4, 95:16, 97:3, 98:5, 102:21, 105:16, 106:17, 106:24, 107:18, 109:14, 113:6, 121:3, 122:12, 122:23, 128:17, 134:5, 134:17, 142:18, 142:25</p> <p><b>facts</b> [4] - 107:13, 132:22, 132:25, 133:6</p> <p><b>faculty</b> [12] - 38:15, 46:17, 46:22, 47:1, 47:13, 49:23, 86:9, 86:12, 86:17, 86:24, 120:23, 126:23</p> <p><b>failing</b> [1] - 92:15</p> <p><b>Failure</b> [3] - 11:13, 72:5, 73:6</p> <p><b>failure</b> [3] - 17:2, 28:16, 88:22</p> <p><b>fair</b> [3] - 56:25, 65:6, 132:12</p> <p><b>fairly</b> [4] - 5:24, 57:18, 122:13, 122:14</p> <p><b>fairness</b> [1] - 17:22</p> <p><b>familiar</b> [4] - 11:21, 26:23, 116:4, 116:18</p> <p><b>fancy</b> [1] - 4:11</p> <p><b>far</b> [9] - 34:10, 51:16, 67:16, 68:2, 68:6, 69:18, 71:12, 130:21</p> <p><b>fashion</b> [1] - 5:17</p> <p><b>fastest</b> [1] - 102:17</p> <p><b>fastest-growing</b> [1] - 102:17</p> <p><b>fault</b> [1] - 10:22</p> <p><b>favor</b> [2] - 67:5, 68:16</p> <p><b>feasible</b> [1] - 70:19</p> <p><b>federal</b> [3] - 69:18, 127:25, 128:19</p> <p><b>fees</b> [7] - 59:10, 61:13, 61:18, 61:20, 61:25, 62:1</p> <p><b>few</b> [2] - 37:12, 58:25</p> <p><b>field</b> [2] - 77:9, 78:6</p> <p><b>figure</b> [3] - 20:23, 27:25, 34:10</p> <p><b>filed</b> [1] - 11:7</p> <p><b>files</b> [1] - 113:14</p> <p><b>fills</b> [1] - 22:1</p> <p><b>final</b> [5] - 50:22, 80:16, 80:25, 139:3, 148:15</p> <p><b>finally</b> [3] - 77:23, 141:3, 148:3</p> <p><b>finances</b> [1] - 15:15</p>	<p><b>financial</b> [3] - 14:13, 15:16, 63:23</p> <p><b>financially</b> [3] - 19:7, 43:19, 43:23</p> <p><b>findings</b> [9] - 11:25, 19:5, 51:7, 66:25, 75:21, 78:23, 132:21, 132:24, 133:6</p> <p><b>fine</b> [11] - 25:2, 34:15, 52:5, 52:11, 70:15, 71:3, 95:25, 102:25, 108:2, 123:24, 126:3</p> <p><b>finish</b> [1] - 52:10</p> <p><b>finishing</b> [1] - 53:4</p> <p><b>finishing-ish</b> [1] - 53:4</p> <p><b>firm</b> [2] - 3:9, 5:25</p> <p><b>first</b> [30] - 11:2, 16:6, 30:10, 35:15, 39:13, 41:16, 47:20, 52:3, 55:11, 62:19, 63:15, 69:14, 72:4, 76:1, 81:2, 89:25, 92:1, 97:14, 104:7, 104:15, 112:17, 112:22, 113:2, 131:1, 134:14, 135:1, 137:9, 143:15, 143:20, 147:25</p> <p><b>fit</b> [1] - 15:22</p> <p><b>five</b> [6] - 53:19, 70:23, 71:5, 107:9, 112:19</p> <p><b>flagship</b> [9] - 140:4, 140:8, 140:18, 145:6, 148:16, 148:18, 148:24, 149:16, 149:21</p> <p><b>flagships</b> [1] - 140:16</p> <p><b>flat</b> [1] - 98:12</p> <p><b>flesh</b> [2] - 113:24, 122:12</p> <p><b>floor</b> [1] - 69:8</p> <p><b>fluctuating</b> [1] - 118:10</p> <p><b>focus</b> [8] - 24:25, 25:12, 31:5, 47:9, 62:19, 72:14, 88:17, 133:14</p> <p><b>focused</b> [4] - 23:16, 29:18, 55:8, 66:20</p> <p><b>focusing</b> [1] - 19:19</p> <p><b>follow</b> [2] - 50:12, 50:13</p> <p><b>followed</b> [1] - 48:17</p> <p><b>footnote</b> [1] - 104:3</p> <p><b>FOR</b> [2] - 1:2, 1:4</p> <p><b>for-profit</b> [4] - 97:2, 97:5, 97:8, 102:8</p> <p><b>force</b> [1] - 138:11</p>	<p><b>Fordice</b> [62] - 7:4, 7:17, 7:20, 11:20, 11:25, 12:4, 12:8, 12:12, 12:24, 15:23, 17:22, 19:1, 20:3, 24:10, 33:20, 35:23, 39:9, 45:20, 54:9, 55:10, 58:2, 63:12, 72:10, 80:12, 81:17, 81:24, 84:2, 89:11, 90:8, 91:9, 92:6, 93:6, 93:25, 103:22, 104:2, 105:5, 105:11, 110:16, 111:19, 111:20, 112:6, 114:24, 115:4, 115:8, 115:12, 116:19, 116:21, 116:25, 129:24, 135:22, 137:10, 137:12, 138:13, 138:19, 140:15, 140:24, 141:16, 142:7, 143:5, 143:6, 143:10</p> <p><b>Fordice's</b> [1] - 131:19</p> <p><b>foregoing</b> [1] - 153:2</p> <p><b>foreseeable</b> [1] - 14:24</p> <p><b>forget</b> [1] - 83:17</p> <p><b>forgot</b> [1] - 131:5</p> <p><b>Former</b> [2] - 13:4, 33:17</p> <p><b>formula</b> [15] - 50:12, 55:4, 58:1, 82:13, 83:5, 104:5, 104:7, 123:16, 124:1, 125:20, 127:4, 135:16, 137:5, 138:20, 139:13</p> <p><b>forth</b> [5] - 8:7, 15:16, 29:6, 121:9, 133:9</p> <p><b>forward</b> [6] - 15:17, 53:14, 54:2, 56:11, 56:12, 83:20</p> <p><b>foster</b> [1] - 134:24</p> <p><b>founded</b> [1] - 84:20</p> <p><b>four</b> [3] - 12:19, 50:24, 89:15</p> <p><b>four-year</b> [1] - 89:15</p> <p><b>fourth</b> [1] - 97:15</p> <p><b>framed</b> [1] - 131:6</p> <p><b>frankly</b> [1] - 6:21</p> <p><b>free</b> [1] - 55:18</p> <p><b>freshman</b> [1] - 114:13</p> <p><b>Freshman</b> [4] - 91:2, 91:18, 101:22, 114:10</p> <p><b>Freshman-Sophomore</b> [4] -</p>
<b>F</b>				
<p><b>facilities</b> [30] - 5:9, 12:15, 14:2, 18:10, 19:8, 19:23, 19:25, 20:5, 20:7, 20:8, 22:15, 23:11, 23:23, 26:20, 27:8, 28:5, 28:8, 28:11, 30:5, 38:15, 38:23, 41:13, 45:2, 47:21, 54:15, 55:19, 62:22, 102:18, 129:21, 138:7</p> <p><b>facility</b> [2] - 24:1, 28:10</p> <p><b>fact</b> [51] - 9:13, 12:10, 14:14, 16:15, 21:10, 22:23, 25:23, 26:2, 26:15, 26:21, 30:19, 32:13, 33:12, 36:22, 38:13, 44:22, 47:13, 51:7, 54:21, 59:20, 59:23, 61:4, 66:25,</p>				

<p>91:2, 91:18, 101:22, 114:10</p> <p><b>freshman/</b> <b>sophomore</b> [2] - 91:20, 92:3</p> <p><b>freshmen</b> [2] - 91:5, 92:11</p> <p><b>friend</b> [5] - 129:11, 131:9, 132:12, 141:5, 150:11</p> <p><b>friendly</b> [2] - 150:20, 150:21</p> <p><b>front</b> [1] - 27:2</p> <p><b>FTE</b> [23] - 26:22, 27:7, 28:21, 28:23, 28:24, 33:6, 59:20, 60:6, 64:5, 64:22, 65:3, 65:10, 65:13, 65:16, 65:19, 65:23, 67:1, 67:6, 123:24, 125:24, 126:2, 135:4, 135:12</p> <p><b>full</b> [4] - 71:1, 77:20, 103:7, 126:19</p> <p><b>fully</b> [6] - 21:1, 32:19, 59:3, 91:18, 127:21, 151:1</p> <p><b>function</b> [2] - 117:8, 136:22</p> <p><b>fund</b> [6] - 44:2, 64:9, 64:10, 128:14, 139:17, 139:19</p> <p><b>Fund</b> [2] - 124:20, 125:14</p> <p><b>funded</b> [9] - 17:23, 26:22, 55:9, 59:23, 62:8, 83:2, 83:3, 123:23, 136:18</p> <p><b>funding</b> [118] - 5:8, 5:17, 7:22, 8:17, 12:3, 12:4, 15:13, 16:1, 16:24, 17:2, 17:17, 20:18, 25:9, 25:10, 26:5, 26:7, 27:22, 30:5, 33:4, 33:6, 33:9, 36:3, 36:16, 36:19, 38:2, 38:7, 38:22, 39:13, 42:8, 42:12, 42:13, 42:17, 42:23, 45:2, 47:8, 49:20, 51:20, 51:25, 52:4, 54:2, 54:20, 54:22, 54:23, 55:1, 55:13, 55:15, 55:22, 56:6, 56:9, 56:18, 57:1, 57:3, 57:8, 57:25, 59:20, 60:2, 60:18, 62:6, 62:22, 63:21, 64:8, 64:23, 67:6, 68:22,</p>	<p>69:4, 69:6, 69:10, 69:13, 79:7, 80:8, 80:9, 82:8, 82:15, 82:16, 83:5, 86:4, 88:1, 104:5, 104:10, 123:11, 123:13, 123:18, 123:20, 124:2, 124:14, 124:18, 125:19, 125:22, 125:24, 126:5, 127:4, 128:6, 135:2, 135:4, 135:16, 135:19, 136:17, 137:3, 137:14, 137:15, 137:17, 137:20, 138:2, 138:4, 138:15, 139:13, 145:9, 145:11, 145:18, 145:24, 146:3, 146:11, 146:18, 146:22, 149:3, 149:8</p> <p><b>Funding</b> [15] - 55:25, 56:1, 56:6, 56:22, 57:4, 57:14, 124:9, 124:11, 124:23, 126:10, 127:4, 127:12, 139:4, 145:12, 145:18</p> <p><b>funds</b> [9] - 21:18, 82:20, 82:21, 124:21, 125:17, 129:18, 129:21, 133:21, 139:5</p> <p><b>funneled</b> [2] - 74:4, 142:5</p> <p><b>Future</b> [1] - 117:3</p> <p><b>future</b> [4] - 14:24, 55:3, 60:23, 123:16</p>	<p><b>geographically</b> [6] - 90:18, 94:2, 111:21, 112:5, 115:18</p> <p><b>geography</b> [1] - 126:23</p> <p><b>George's</b> [8] - 99:3, 99:8, 99:10, 99:16, 99:17, 132:13, 143:25</p> <p><b>gist</b> [2] - 59:2</p> <p><b>given</b> [4] - 16:21, 16:24, 51:21, 94:9</p> <p><b>glad</b> [1] - 44:23</p> <p><b>glaringly</b> [2] - 71:13, 102:12</p> <p><b>gleefully</b> [1] - 68:15</p> <p><b>global</b> [2] - 148:22, 149:16</p> <p><b>goal</b> [1] - 124:15</p> <p><b>gold</b> [1] - 105:21</p> <p><b>golf</b> [1] - 85:3</p> <p><b>government</b> [1] - 128:1</p> <p><b>graduate</b> [16] - 9:12, 23:2, 23:11, 23:16, 23:19, 41:11, 63:17, 73:21, 74:8, 74:11, 74:19, 74:20, 105:9, 106:21, 146:19</p> <p><b>graduated</b> [5] - 9:14, 77:14, 77:19, 77:25, 142:3</p> <p><b>graduating</b> [2] - 74:10, 142:19</p> <p><b>graduation</b> [5] - 42:2, 42:3, 42:9, 62:17, 66:14</p> <p><b>grant</b> [14] - 25:10, 25:17, 25:18, 26:5, 68:22, 69:4, 69:10, 69:12, 69:18, 127:17, 127:18, 128:7, 128:14, 128:21</p> <p><b>granting</b> [3] - 86:16, 105:20, 106:22</p> <p><b>grants</b> [1] - 128:1</p> <p><b>granular</b> [1] - 117:16</p> <p><b>great</b> [11] - 4:15, 20:15, 53:13, 72:22, 90:12, 90:14, 102:1, 132:15, 132:20, 132:24, 141:14</p> <p><b>greater</b> [2] - 29:20, 110:3</p> <p><b>greatest</b> [1] - 25:21</p> <p><b>greatly</b> [2] - 83:2, 102:16</p> <p><b>Greenbaum</b> [6] - 1:20, 3:11, 5:5, 54:7,</p>	<p>133:17, 134:22</p> <p><b>GREENBAUM</b> [1] - 3:11</p> <p><b>Gregory</b> [2] - 2:3, 3:24</p> <p><b>group</b> [1] - 127:15</p> <p><b>grow</b> [1] - 138:6</p> <p><b>growing</b> [1] - 102:17</p> <p><b>grown</b> [1] - 90:19</p> <p><b>growth</b> [3] - 136:11, 145:17, 145:19</p> <p><b>guess</b> [11] - 29:11, 31:9, 34:9, 52:19, 56:7, 58:18, 65:18, 66:4, 89:19, 135:13, 138:17</p> <p><b>guidance</b> [1] - 80:7</p> <p><b>guided</b> [1] - 72:9</p> <p><b>guideline</b> [2] - 126:6, 146:11</p> <p><b>Guidelines</b> [14] - 55:25, 56:1, 56:6, 57:5, 57:14, 124:9, 124:12, 124:23, 126:10, 127:4, 127:13, 139:5, 145:12, 145:18</p> <p><b>guidelines</b> [3] - 61:24, 124:13, 124:22</p> <p><b>guiding</b> [1] - 124:8</p> <p><b>guys</b> [1] - 52:21</p>	<p>44:16, 44:20, 45:5, 47:10, 47:25, 49:5, 60:22, 61:9, 62:3, 62:8, 64:16, 65:4, 65:5, 66:1, 66:7, 67:7, 67:15, 67:22, 74:2, 77:3, 78:21, 78:24, 79:21, 79:22, 80:4, 82:22, 83:24, 84:14, 84:24, 85:16, 85:17, 85:20, 88:2, 94:2, 103:18, 110:25, 111:9, 112:21, 113:2, 122:19, 123:2, 123:4, 124:20, 125:13, 134:14, 134:19, 142:6, 147:25</p> <p><b>HBIs</b> [172] - 7:13, 12:16, 14:13, 14:24, 15:14, 16:11, 16:16, 16:21, 17:11, 19:15, 19:20, 19:21, 20:1, 20:16, 21:3, 21:9, 22:8, 22:25, 23:12, 23:13, 23:15, 23:17, 24:2, 24:17, 25:21, 26:13, 27:4, 27:5, 27:7, 27:18, 27:20, 28:1, 28:11, 28:24, 29:12, 31:3, 31:12, 31:16, 32:5, 32:10, 32:15, 33:8, 33:14, 36:3, 36:18, 38:7, 38:11, 38:17, 39:10, 39:16, 39:22, 40:7, 40:8, 40:13, 41:1, 41:14, 41:20, 42:4, 42:11, 42:20, 42:25, 43:21, 44:2, 45:2, 45:8, 45:10, 45:13, 45:15, 45:18, 45:23, 46:10, 46:14, 47:9, 47:10, 47:13, 48:15, 48:16, 49:1, 49:24, 50:4, 50:16, 55:9, 55:11, 55:15, 57:3, 57:24, 58:9, 59:5, 59:8, 59:19, 59:22, 60:19, 61:6, 61:10, 61:17, 62:2, 62:6, 62:13, 62:21, 62:22, 62:23, 63:4, 63:6, 63:17, 64:7, 64:17, 64:19, 65:2, 65:7, 65:15, 65:24, 66:12, 67:5, 67:17, 67:19, 68:21, 71:25, 72:17, 78:13, 79:8, 80:19, 80:23, 81:8, 81:13,</p>
	<p style="text-align: center;"><b>G</b></p> <p><b>Gail</b> [2] - 1:25, 153:11</p> <p><b>gainfully</b> [1] - 77:5</p> <p><b>gap</b> [1] - 128:7</p> <p><b>Garbis</b> [3] - 34:19, 34:23, 35:5</p> <p><b>general</b> [6] - 29:17, 34:6, 87:1, 123:20, 124:5, 131:24</p> <p><b>General</b> [5] - 12:20, 39:5, 131:17, 132:2, 134:2</p> <p><b>General's</b> [1] - 37:1</p> <p><b>generally</b> [6] - 23:15, 72:17, 84:21, 88:5, 102:5, 118:15</p> <p><b>geographic</b> [3] - 107:7, 110:17, 112:1</p>	<p><b>geographically</b> [6] - 90:18, 94:2, 111:21, 112:5, 115:18</p> <p><b>geography</b> [1] - 126:23</p> <p><b>George's</b> [8] - 99:3, 99:8, 99:10, 99:16, 99:17, 132:13, 143:25</p> <p><b>gist</b> [2] - 59:2</p> <p><b>given</b> [4] - 16:21, 16:24, 51:21, 94:9</p> <p><b>glad</b> [1] - 44:23</p> <p><b>glaringly</b> [2] - 71:13, 102:12</p> <p><b>gleefully</b> [1] - 68:15</p> <p><b>global</b> [2] - 148:22, 149:16</p> <p><b>goal</b> [1] - 124:15</p> <p><b>gold</b> [1] - 105:21</p> <p><b>golf</b> [1] - 85:3</p> <p><b>government</b> [1] - 128:1</p> <p><b>graduate</b> [16] - 9:12, 23:2, 23:11, 23:16, 23:19, 41:11, 63:17, 73:21, 74:8, 74:11, 74:19, 74:20, 105:9, 106:21, 146:19</p> <p><b>graduated</b> [5] - 9:14, 77:14, 77:19, 77:25, 142:3</p> <p><b>graduating</b> [2] - 74:10, 142:19</p> <p><b>graduation</b> [5] - 42:2, 42:3, 42:9, 62:17, 66:14</p> <p><b>grant</b> [14] - 25:10, 25:17, 25:18, 26:5, 68:22, 69:4, 69:10, 69:12, 69:18, 127:17, 127:18, 128:7, 128:14, 128:21</p> <p><b>granting</b> [3] - 86:16, 105:20, 106:22</p> <p><b>grants</b> [1] - 128:1</p> <p><b>granular</b> [1] - 117:16</p> <p><b>great</b> [11] - 4:15, 20:15, 53:13, 72:22, 90:12, 90:14, 102:1, 132:15, 132:20, 132:24, 141:14</p> <p><b>greater</b> [2] - 29:20, 110:3</p> <p><b>greatest</b> [1] - 25:21</p> <p><b>greatly</b> [2] - 83:2, 102:16</p> <p><b>Greenbaum</b> [6] - 1:20, 3:11, 5:5, 54:7,</p>	<p style="text-align: center;"><b>H</b></p> <p><b>half</b> [9] - 52:19, 53:3, 53:4, 53:5, 71:22, 108:1, 108:22, 128:25, 144:11</p> <p><b>hand</b> [5] - 20:20, 29:7, 47:19, 48:11, 64:24</p> <p><b>happy</b> [8] - 4:21, 10:11, 24:22, 51:10, 69:20, 146:3, 146:4, 151:6</p> <p><b>hard</b> [6] - 39:14, 43:5, 46:8, 54:3, 61:4, 70:7</p> <p><b>harm</b> [1] - 93:20</p> <p><b>Harris</b> [3] - 1:22, 4:8, 11:4</p> <p><b>HBCUs</b> [2] - 9:18, 60:6</p> <p><b>HBI</b> [75] - 11:18, 13:2, 13:9, 14:19, 14:22, 16:3, 16:6, 16:14, 16:20, 17:20, 18:16, 18:17, 19:5, 19:12, 21:1, 21:12, 23:14, 27:1, 28:19, 29:20, 40:25, 41:1, 41:22, 42:7, 44:5, 44:8,</p>	<p>44:16, 44:20, 45:5, 47:10, 47:25, 49:5, 60:22, 61:9, 62:3, 62:8, 64:16, 65:4, 65:5, 66:1, 66:7, 67:7, 67:15, 67:22, 74:2, 77:3, 78:21, 78:24, 79:21, 79:22, 80:4, 82:22, 83:24, 84:14, 84:24, 85:16, 85:17, 85:20, 88:2, 94:2, 103:18, 110:25, 111:9, 112:21, 113:2, 122:19, 123:2, 123:4, 124:20, 125:13, 134:14, 134:19, 142:6, 147:25</p> <p><b>HBIs</b> [172] - 7:13, 12:16, 14:13, 14:24, 15:14, 16:11, 16:16, 16:21, 17:11, 19:15, 19:20, 19:21, 20:1, 20:16, 21:3, 21:9, 22:8, 22:25, 23:12, 23:13, 23:15, 23:17, 24:2, 24:17, 25:21, 26:13, 27:4, 27:5, 27:7, 27:18, 27:20, 28:1, 28:11, 28:24, 29:12, 31:3, 31:12, 31:16, 32:5, 32:10, 32:15, 33:8, 33:14, 36:3, 36:18, 38:7, 38:11, 38:17, 39:10, 39:16, 39:22, 40:7, 40:8, 40:13, 41:1, 41:14, 41:20, 42:4, 42:11, 42:20, 42:25, 43:21, 44:2, 45:2, 45:8, 45:10, 45:13, 45:15, 45:18, 45:23, 46:10, 46:14, 47:9, 47:10, 47:13, 48:15, 48:16, 49:1, 49:24, 50:4, 50:16, 55:9, 55:11, 55:15, 57:3, 57:24, 58:9, 59:5, 59:8, 59:19, 59:22, 60:19, 61:6, 61:10, 61:17, 62:2, 62:6, 62:13, 62:21, 62:22, 62:23, 63:4, 63:6, 63:17, 64:7, 64:17, 64:19, 65:2, 65:7, 65:15, 65:24, 66:12, 67:5, 67:17, 67:19, 68:21, 71:25, 72:17, 78:13, 79:8, 80:19, 80:23, 81:8, 81:13,</p>

<p>81:16, 82:25, 83:2, 83:25, 87:10, 88:6, 97:17, 104:17, 104:21, 104:24, 105:6, 105:9, 105:15, 105:17, 105:23, 105:25, 111:22, 116:8, 116:24, 117:3, 117:4, 117:9, 117:25, 122:13, 122:18, 123:21, 123:23, 125:18, 130:20, 130:23, 136:10, 136:12, 136:22, 137:18, 137:20, 138:2, 139:8, 139:9, 142:19, 143:17, 143:18, 145:11, 145:17, 149:10</p> <p><b>HBIs'</b> [3] - 20:23, 64:2, 122:25</p> <p><b>head</b> [1] - 62:25</p> <p><b>heading</b> [1] - 88:12</p> <p><b>health</b> [1] - 74:13</p> <p><b>hear</b> [13] - 4:21, 6:13, 8:20, 10:11, 13:23, 34:14, 69:21, 73:19, 87:9, 102:15, 135:3, 135:14, 135:15</p> <p><b>heard</b> [55] - 5:16, 23:20, 28:18, 48:12, 52:6, 71:12, 72:22, 73:1, 76:20, 77:13, 77:23, 79:2, 79:10, 81:14, 82:14, 82:23, 84:10, 85:7, 85:9, 85:10, 85:22, 86:3, 86:7, 95:5, 96:18, 98:1, 98:4, 98:8, 98:10, 99:24, 101:24, 102:16, 105:19, 106:1, 106:25, 107:5, 111:7, 112:10, 115:25, 116:3, 116:11, 118:5, 120:19, 120:24, 123:18, 125:6, 125:8, 125:16, 131:14, 134:6, 135:4, 138:8, 139:4, 147:7, 148:16</p> <p><b>hearing</b> [3] - 6:17, 50:20, 132:14</p> <p><b>heart</b> [2] - 21:6</p> <p><b>heavily</b> [1] - 30:20</p> <p><b>Heidelberg</b> [4] - 76:20, 76:21, 76:24,</p>	<p>77:5</p> <p><b>help</b> [5] - 5:25, 7:12, 29:11, 53:20, 56:20</p> <p><b>helpful</b> [1] - 110:11</p> <p><b>helping</b> [1] - 36:5</p> <p><b>Henry</b> [1] - 1:21</p> <p><b>hereby</b> [1] - 153:2</p> <p><b>high</b> [10] - 45:25, 63:10, 64:20, 67:1, 86:21, 86:23, 87:6, 97:12, 113:7, 149:18</p> <p><b>high-quality</b> [1] - 149:18</p> <p><b>higher</b> [26] - 14:13, 14:14, 18:22, 28:24, 59:19, 60:17, 65:4, 67:2, 72:2, 79:7, 80:8, 80:19, 81:7, 81:9, 82:16, 96:25, 100:14, 102:9, 104:8, 115:3, 123:20, 123:24, 124:2, 124:14, 126:2, 135:12</p> <p><b>Higher</b> [7] - 3:4, 3:5, 33:18, 93:9, 120:9, 153:4, 153:5</p> <p><b>HIGHER</b> [2] - 1:5, 1:8</p> <p><b>highest</b> [1] - 98:6</p> <p><b>highlight</b> [2] - 79:25, 80:25</p> <p><b>highlighted</b> [2] - 6:22, 18:10</p> <p><b>himself</b> [1] - 145:16</p> <p><b>hired</b> [1] - 95:7</p> <p><b>historic</b> [1] - 14:23</p> <p><b>historical</b> [1] - 12:14</p> <p><b>historically</b> [5] - 9:1, 15:13, 28:3, 60:22, 80:10</p> <p><b>Historically</b> [4] - 11:14, 72:7, 73:7, 87:24</p> <p><b>histories</b> [1] - 84:19</p> <p><b>history</b> [8] - 73:24, 83:14, 83:16, 83:17, 83:19, 94:22, 94:23, 138:16</p> <p><b>hit</b> [1] - 129:4</p> <p><b>holding</b> [1] - 151:10</p> <p><b>holdings</b> [1] - 28:24</p> <p><b>holds</b> [1] - 79:12</p> <p><b>hole</b> [1] - 55:11</p> <p><b>Holiday</b> [4] - 4:12, 10:15, 10:20, 10:23</p> <p><b>home</b> [1] - 65:4</p> <p><b>honest</b> [1] - 88:2</p> <p><b>Honor</b> [271] - 4:1, 4:10, 5:6, 7:3, 8:12, 8:13, 9:11, 9:22,</p>	<p>10:10, 10:13, 10:14, 10:18, 11:1, 11:2, 11:9, 11:11, 13:1, 13:14, 14:7, 15:8, 15:11, 15:24, 17:1, 17:12, 18:15, 19:4, 19:10, 20:2, 20:11, 20:21, 21:11, 22:4, 22:18, 22:23, 23:14, 24:3, 24:16, 24:19, 24:22, 25:8, 26:9, 26:11, 27:10, 27:13, 27:17, 27:19, 28:15, 28:20, 29:22, 30:2, 31:21, 32:18, 33:4, 33:11, 33:24, 34:2, 34:5, 34:15, 34:19, 35:24, 36:9, 36:22, 37:21, 39:4, 39:13, 39:19, 40:5, 40:17, 41:1, 41:9, 41:17, 42:16, 43:11, 43:15, 44:21, 45:22, 46:7, 46:23, 46:24, 47:17, 47:23, 48:14, 49:2, 49:17, 49:21, 50:1, 50:21, 50:22, 51:8, 51:16, 52:7, 52:17, 53:1, 53:10, 53:18, 53:25, 54:5, 54:20, 56:11, 57:2, 57:11, 57:21, 58:19, 59:21, 60:2, 60:10, 60:21, 61:12, 61:21, 62:10, 62:19, 63:2, 63:22, 66:10, 66:16, 66:23, 69:3, 69:10, 69:20, 70:3, 70:7, 70:13, 70:14, 71:4, 71:8, 71:13, 71:18, 72:11, 72:14, 72:22, 73:13, 74:24, 75:6, 75:14, 75:25, 76:3, 76:11, 76:15, 76:18, 77:23, 78:19, 79:3, 79:13, 80:2, 80:17, 81:10, 82:14, 83:8, 83:22, 84:1, 84:7, 84:17, 85:16, 85:22, 86:19, 88:15, 88:20, 88:25, 90:24, 92:8, 93:5, 94:6, 94:12, 95:24, 96:3, 96:6, 96:23, 97:6, 97:20, 98:22, 99:1, 99:7, 99:21, 100:17, 100:19, 100:24, 103:3, 103:24, 104:14, 105:16, 105:21, 106:6, 106:8, 108:2, 108:14, 108:17,</p>	<p>109:2, 109:3, 109:6, 109:18, 110:12, 111:18, 112:10, 113:1, 113:5, 113:23, 114:1, 114:8, 114:20, 114:23, 115:6, 115:19, 115:22, 115:25, 116:1, 116:10, 118:5, 118:8, 118:10, 118:18, 120:3, 120:6, 120:10, 121:12, 122:10, 122:12, 123:9, 123:18, 124:11, 124:23, 125:6, 125:12, 125:20, 126:7, 126:17, 127:2, 127:6, 127:16, 127:19, 129:3, 129:8, 129:12, 129:23, 130:18, 131:6, 132:21, 134:20, 135:14, 135:19, 136:3, 136:21, 138:18, 138:25, 139:3, 139:21, 140:13, 140:21, 141:1, 141:2, 141:11, 141:22, 142:11, 143:15, 144:2, 144:19, 145:4, 145:8, 146:14, 146:17, 146:23, 147:5, 147:21, 148:2, 148:6, 148:16, 149:24, 150:1, 150:6, 150:18, 151:5</p> <p><b>Honor's</b> [16] - 82:8, 90:8, 91:8, 95:17, 100:12, 101:20, 102:24, 108:19, 117:14, 118:2, 118:21, 120:4, 127:22, 143:24, 144:16, 148:15</p> <p><b>Honorable</b> [2] - 1:14, 153:7</p> <p><b>Honoring</b> [2] - 117:2, 117:3</p> <p><b>Hood</b> [2] - 101:12, 101:17</p> <p><b>hook</b> [2] - 136:25, 137:2</p> <p><b>hope</b> [3] - 7:5, 32:19, 102:24</p> <p><b>Hopkins</b> [3] - 101:14,</p>	<p>101:18, 119:14</p> <p><b>horrible</b> [1] - 83:13</p> <p><b>horse</b> [1] - 134:1</p> <p><b>hospital</b> [1] - 64:14</p> <p><b>Hossler</b> [2] - 101:24, 117:13</p> <p><b>host</b> [1] - 75:11</p> <p><b>hotel</b> [1] - 85:4</p> <p><b>hour</b> [12] - 52:18, 52:20, 53:3, 53:5, 71:1, 71:22, 78:22, 108:1, 108:18, 108:22, 128:24</p> <p><b>housekeeping</b> [1] - 108:16</p> <p><b>Howard</b> [5] - 4:16, 97:14, 101:3, 122:22, 122:23</p> <p><b>HOWARD</b> [1] - 4:17</p> <p><b>Hrabowski</b> [4] - 94:13, 94:14, 111:8, 147:7</p> <p><b>Hrabowski's</b> [1] - 95:1</p> <p><b>hubs</b> [1] - 97:1</p> <p><b>huge</b> [1] - 145:17</p> <p><b>human</b> [1] - 117:23</p> <p><b>hundred</b> [1] - 137:19</p> <p><b>hypertechnical</b> [2] - 12:9, 24:13</p>
<b>I</b>				
<p><b>i.e</b> [1] - 81:23</p> <p><b>idea</b> [4] - 53:19, 124:13, 124:15, 147:23</p> <p><b>ideas</b> [1] - 7:11</p> <p><b>identifiability</b> [1] - 116:20</p> <p><b>identifiable</b> [1] - 143:11</p> <p><b>identification</b> [1] - 116:24</p> <p><b>identified</b> [6] - 101:1, 102:4, 104:9, 104:11, 105:17, 112:25</p> <p><b>identifiers</b> [1] - 112:9</p> <p><b>identifies</b> [1] - 121:24</p> <p><b>identities</b> [1] - 33:15</p> <p><b>identity</b> [1] - 37:7</p> <p><b>ignore</b> [2] - 55:4, 123:17</p> <p><b>ignored</b> [1] - 30:18</p> <p><b>ignores</b> [1] - 50:11</p> <p><b>immediate</b> [1] - 150:16</p> <p><b>immediately</b> [1] - 124:5</p> <p><b>impact</b> [8] - 31:2,</p>				

<p>99:11, 99:19, 101:22, 114:6, 141:17, 141:19, 141:23 <b>impacting</b> [3] - 64:21, 102:14, 102:16 <b>implement</b> [1] - 87:11 <b>implementation</b> [1] - 118:12 <b>importance</b> [3] - 37:22, 80:19, 129:5 <b>important</b> [2] - 13:15, 38:1, 59:10, 73:13, 74:7, 77:16, 78:13, 80:17, 81:10, 88:9, 94:6, 94:11, 94:12, 114:8, 115:19, 117:5, 121:1, 124:10, 134:24, 142:17, 149:11 <b>importantly</b> [3] - 74:16, 81:17, 84:5 <b>imposed</b> [2] - 16:19, 17:4 <b>imposition</b> [1] - 17:13 <b>impossible</b> [1] - 58:21 <b>imprint</b> [1] - 85:18 <b>improving</b> [1] - 66:14 <b>IN</b> [2] - 1:1, 1:4 <b>inability</b> [1] - 20:7 <b>inadequacies</b> [1] - 28:19 <b>Inc</b> [1] - 153:4 <b>include</b> [1] - 59:14 <b>included</b> [5] - 127:15, 133:10, 148:5, 148:6, 149:7 <b>includes</b> [1] - 89:1 <b>including</b> [4] - 49:7, 51:20, 80:23, 125:3 <b>inconsistent</b> [1] - 88:7 <b>incorporated</b> [1] - 125:17 <b>incorrect</b> [2] - 87:17, 127:12 <b>increase</b> [4] - 42:8, 133:17, 133:19, 146:20 <b>increasing</b> [2] - 100:6, 106:5 <b>increasingly</b> [1] - 142:15 <b>indeed</b> [1] - 18:3 <b>independent</b> [5] - 18:18, 101:18, 102:5, 102:7, 119:2 <b>INDEX</b> [1] - 152:1 <b>indicate</b> [3] - 32:21, 41:8, 74:8 <b>indicated</b> [18] - 11:23,</p>	<p>13:5, 22:24, 34:20, 39:5, 59:13, 66:4, 74:7, 82:10, 120:24, 127:3, 128:4, 131:9, 131:20, 134:12, 139:13, 143:22, 146:10 <b>indicates</b> [4] - 11:3, 45:21, 54:23, 117:4 <b>indicating</b> [3] - 42:22, 59:7, 132:4 <b>indicators</b> [3] - 46:13, 46:25, 50:3 <b>individual</b> [2] - 103:14, 130:1 <b>inequalities</b> [1] - 28:10 <b>inequality</b> [6] - 22:19, 25:6, 25:9, 46:5, 50:2, 88:12 <b>inequitable</b> [2] - 55:2, 123:15 <b>inequities</b> [3] - 21:15, 55:4, 123:17 <b>inexplicably</b> [1] - 51:7 <b>inferior</b> [3] - 12:15, 22:15, 41:20 <b>influenced</b> [2] - 126:15, 135:17 <b>influences</b> [1] - 38:2 <b>influencing</b> [1] - 141:20 <b>inform</b> [1] - 149:18 <b>information</b> [3] - 71:15, 80:6, 86:3 <b>informs</b> [1] - 56:7 <b>infrastructure</b> [2] - 20:21, 23:20 <b>initiated</b> [1] - 114:10 <b>initiation</b> [1] - 35:16 <b>initiative</b> [1] - 81:1 <b>Initiative</b> [4] - 91:2, 91:18, 101:22, 114:10 <b>injured</b> [2] - 73:18, 141:24 <b>injury</b> [3] - 71:16, 76:13, 77:18 <b>Inn</b> [4] - 4:12, 10:15, 10:20, 10:23 <b>inordinate</b> [3] - 60:13, 60:15, 129:13 <b>insists</b> [1] - 134:22 <b>instance</b> [4] - 95:4, 128:18, 132:5, 134:10 <b>instances</b> [2] - 29:16, 100:9 <b>instead</b> [5] - 30:12, 54:2, 54:10, 56:5,</p>	<p>70:23 <b>institution</b> [33] - 29:8, 30:11, 30:13, 30:16, 44:20, 46:1, 77:6, 84:22, 87:6, 87:11, 87:16, 88:10, 89:14, 89:15, 90:7, 92:13, 92:16, 92:23, 93:21, 94:15, 97:16, 101:13, 105:16, 106:14, 106:22, 117:18, 120:20, 120:22, 126:14, 126:25, 140:8, 140:20 <b>institution's</b> [2] - 59:11, 93:21 <b>institutional</b> [1] - 39:7 <b>institutions</b> [78] - 9:2, 14:16, 21:19, 23:21, 25:19, 25:22, 28:4, 29:10, 31:25, 33:2, 37:8, 41:10, 41:13, 42:6, 47:15, 47:16, 48:14, 48:18, 48:24, 49:6, 49:24, 50:5, 55:3, 60:11, 60:14, 60:16, 65:11, 71:20, 72:1, 72:2, 78:9, 80:10, 80:23, 84:18, 84:19, 84:20, 84:23, 85:14, 85:15, 85:18, 86:16, 87:12, 88:4, 90:19, 91:25, 94:7, 96:16, 96:20, 96:22, 97:2, 97:5, 97:9, 98:16, 101:19, 102:6, 102:7, 102:8, 105:8, 105:24, 107:18, 107:22, 119:1, 119:5, 119:21, 121:20, 123:16, 124:25, 125:3, 127:7, 143:1, 143:4, 149:18 <b>Institutions</b> [4] - 11:15, 72:8, 73:8, 87:24 <b>instructive</b> [4] - 37:1, 82:10, 124:11, 124:12 <b>instrumental</b> [1] - 36:5 <b>instruments</b> [1] - 129:18 <b>insufficiencies</b> [1] - 29:1 <b>intended</b> [4] - 58:16, 80:6, 80:11, 91:4 <b>intensely</b> [1] - 89:7</p>	<p><b>intensive</b> [1] - 58:10 <b>intention</b> [1] - 5:13 <b>interested</b> [4] - 6:17, 10:4, 48:9, 135:15 <b>interesting</b> [10] - 28:15, 40:4, 49:2, 60:7, 63:1, 63:13, 67:13, 71:22, 75:1, 137:13 <b>interestingly</b> [2] - 107:2, 145:7 <b>interlibrary</b> [1] - 74:22 <b>internal</b> [1] - 101:7 <b>internationally</b> [1] - 85:7 <b>interplay</b> [2] - 127:25, 128:18 <b>interpretation</b> [1] - 110:9 <b>interrupt</b> [3] - 21:20, 22:3, 33:25 <b>intervened</b> [1] - 109:19 <b>intervenes</b> [1] - 93:2 <b>intrigued</b> [1] - 135:2 <b>introduce</b> [4] - 3:8, 3:19, 75:9, 76:15 <b>inventory</b> [4] - 109:10, 109:16, 112:15, 112:24 <b>invested</b> [1] - 30:19 <b>involved</b> [3] - 50:16, 75:1, 102:2 <b>involvement</b> [2] - 74:25, 94:10 <b>irrelevant</b> [1] - 12:22 <b>ish</b> [1] - 53:4 <b>issue</b> [79] - 5:22, 6:5, 6:15, 8:14, 8:21, 8:24, 13:16, 18:24, 20:6, 20:17, 31:5, 33:5, 38:10, 40:15, 46:7, 67:11, 67:23, 74:13, 75:21, 76:2, 76:5, 76:10, 76:15, 81:25, 82:9, 84:9, 86:9, 96:23, 97:20, 98:14, 98:20, 98:23, 99:6, 100:18, 103:24, 104:16, 105:2, 105:4, 107:11, 111:19, 111:20, 112:1, 112:8, 116:1, 116:11, 116:14, 117:7, 117:12, 118:22, 119:25, 120:2, 120:17, 121:8, 122:10, 123:18, 125:22,</p>	<p>127:16, 127:20, 127:24, 128:9, 128:21, 128:22, 130:7, 130:25, 132:10, 132:25, 133:23, 135:2, 140:5, 142:7, 143:21, 144:15, 144:21, 144:25, 146:20, 146:23, 147:21, 148:3, 150:21 <b>issues</b> [15] - 4:20, 4:23, 8:5, 8:15, 53:9, 79:8, 90:10, 94:5, 107:21, 128:2, 132:21, 143:23, 150:8, 150:23, 150:25 <b>items</b> [1] - 76:8 <b>itself</b> [18] - 15:19, 17:3, 17:9, 17:17, 33:13, 36:17, 59:17, 69:11, 75:3, 76:3, 95:17, 101:7, 115:4, 115:8, 115:11, 116:20, 117:24, 144:9</p>
<b>J</b>				
			<p><b>James</b> [1] - 13:5 <b>January</b> [4] - 71:18, 72:11, 73:20, 127:23 <b>Jenkins</b> [1] - 64:12 <b>job</b> [1] - 150:9 <b>Joe</b> [2] - 123:19, 141:5 <b>John</b> [4] - 1:23, 3:16, 99:1, 118:24 <b>Johns</b> [3] - 101:13, 101:17, 119:14 <b>join</b> [1] - 151:5 <b>joint</b> [6] - 96:9, 107:9, 118:13, 118:16, 118:19, 147:15 <b>Jon</b> [2] - 1:20, 3:11 <b>JONES</b> [82] - 3:9, 4:1, 4:8, 5:6, 5:21, 7:2, 9:22, 10:3, 10:13, 10:17, 10:20, 11:1, 11:9, 11:11, 13:14, 14:7, 15:24, 16:10, 16:23, 17:12, 18:15, 20:13, 21:3, 22:4, 23:5, 24:8, 24:21, 25:3, 26:2, 29:22, 30:23, 31:8, 32:18, 32:25, 34:4, 34:15, 34:19, 35:4, 35:13, 35:24, 36:14, 37:18,</p>	

<p>37:20, 40:17, 40:20, 42:15, 43:14, 44:21, 46:23, 48:23, 49:21, 51:19, 52:17, 52:25, 53:16, 53:18, 53:25, 55:24, 56:4, 57:11, 57:21, 61:21, 66:22, 69:2, 69:8, 70:1, 129:3, 129:7, 129:11, 131:15, 134:20, 135:9, 135:13, 136:3, 137:8, 139:10, 140:13, 141:1, 141:9, 150:1, 150:20, 151:5</p> <p><b>Jones</b> [32] - 1:21, 3:9, 5:5, 52:10, 52:12, 52:16, 53:17, 71:10, 71:23, 81:11, 82:10, 82:19, 83:10, 84:7, 86:15, 102:13, 104:15, 108:24, 116:22, 123:10, 129:1, 141:3, 141:8, 141:12, 142:9, 143:22, 145:8, 146:10, 146:15, 147:2, 150:19, 152:3</p> <p><b>Jones's</b> [10] - 71:13, 73:14, 79:13, 83:23, 86:3, 87:3, 87:19, 103:1, 109:7, 123:12</p> <p><b>Joshua</b> [1] - 11:4</p> <p><b>journey</b> [1] - 99:2</p> <p><b>Judge</b> [18] - 1:15, 7:21, 12:3, 15:25, 17:24, 34:19, 34:23, 54:25, 59:20, 129:14, 130:2, 136:5, 137:12, 138:3, 138:19, 138:23, 153:8</p> <p><b>judge</b> [1] - 35:5</p> <p><b>judgment</b> [4] - 11:22, 24:12, 34:20, 50:20</p> <p><b>judicial</b> [1] - 151:7</p> <p><b>jure</b> [65] - 5:8, 5:10, 8:18, 14:11, 15:2, 15:6, 16:1, 17:6, 19:17, 19:18, 19:22, 20:9, 22:9, 23:24, 24:4, 24:14, 25:6, 25:10, 25:18, 26:2, 26:6, 26:8, 26:12, 27:16, 33:21, 39:24, 41:18, 43:9, 43:17, 43:24, 44:12, 45:9, 46:11, 47:4, 47:24, 48:7, 49:13, 49:15,</p>	<p>50:3, 50:4, 54:16, 54:17, 54:18, 57:3, 58:5, 60:8, 63:3, 64:3, 64:6, 66:18, 69:12, 73:11, 78:15, 81:18, 83:6, 83:12, 124:3, 125:13, 125:14, 125:21, 125:23, 131:21, 136:8, 137:14, 138:17</p> <p><b>Jure</b> [2] - 83:25, 88:12</p> <p><b>jurisdictional</b> [1] - 76:4</p> <p><b>jurisdictions</b> [1] - 124:15</p> <p><b>jury</b> [3] - 21:24, 21:25, 22:1</p> <p><b>Justice</b> [4] - 12:7, 116:22, 143:8, 143:9</p> <p><b>justice</b> [1] - 116:23</p> <p><b>justifiable</b> [1] - 148:19</p> <p><b>justification</b> [24] - 6:21, 7:3, 15:18, 88:24, 89:4, 89:9, 89:16, 90:4, 90:6, 91:9, 91:10, 91:21, 91:24, 96:14, 113:18, 120:3, 120:6, 120:18, 121:2, 121:15, 122:7, 130:8, 140:12, 143:2</p> <p><b>justified</b> [1] - 92:5</p> <p><b>justify</b> [1] - 134:1</p>	<p>91:15, 96:18, 96:24, 98:24, 99:22, 99:25, 102:3, 105:21, 119:17, 122:24, 127:23, 128:4, 128:17, 130:6, 139:16, 148:20</p> <p><b>Knight</b> [27] - 7:17, 7:21, 11:25, 12:11, 15:25, 17:25, 20:3, 43:2, 44:10, 50:15, 54:25, 55:14, 59:20, 65:6, 82:11, 123:11, 123:14, 129:14, 129:24, 136:5, 137:10, 137:11, 138:23, 140:14, 140:24, 141:12, 142:7</p> <p><b>known</b> [3] - 31:17, 79:5, 117:2</p> <p><b>knows</b> [1] - 54:21</p>	<p>52:4, 77:22, 100:4, 144:8</p> <p><b>late</b> [2] - 30:6, 92:22</p> <p><b>Latino</b> [1] - 100:6</p> <p><b>Laughter</b> [9] - 4:7, 10:24, 52:23, 53:2, 70:21, 141:7, 150:4, 150:12, 151:8</p> <p><b>laundry</b> [1] - 87:11</p> <p><b>law</b> [9] - 3:9, 44:15, 57:22, 72:9, 72:15, 75:22, 90:12, 137:5, 137:8</p> <p><b>Law</b> [2] - 3:12, 77:20</p> <p><b>lawsuit</b> [1] - 19:1</p> <p><b>lawyer</b> [1] - 77:22</p> <p><b>Lawyers</b> [1] - 3:11</p> <p><b>lead</b> [3] - 13:9, 82:2, 91:12</p> <p><b>leader</b> [3] - 73:2, 77:9, 78:5</p> <p><b>leaders</b> [1] - 73:25</p> <p><b>leadership</b> [3] - 73:22, 96:9, 147:14</p> <p><b>leading</b> [3] - 18:22, 82:7, 84:5</p> <p><b>leads</b> [1] - 115:21</p> <p><b>leaking</b> [1] - 64:12</p> <p><b>leap</b> [1] - 90:14</p> <p><b>learned</b> [1] - 131:10</p> <p><b>least</b> [14] - 6:19, 9:4, 10:6, 15:6, 27:11, 40:14, 55:6, 100:9, 111:8, 119:3, 130:21, 134:5, 134:12, 144:14</p> <p><b>leave</b> [3] - 6:24, 24:19, 51:17</p> <p><b>led</b> [3] - 5:11, 7:23, 111:22</p> <p><b>left</b> [4] - 47:19, 52:20, 64:24, 99:5</p> <p><b>left-hand</b> [2] - 47:19, 64:24</p> <p><b>legal</b> [4] - 71:16, 80:12, 140:22, 143:2</p> <p><b>legislature</b> [2] - 22:7, 27:2</p> <p><b>length</b> [2] - 42:24, 132:24</p> <p><b>less</b> [9] - 47:5, 47:7, 58:9, 69:18, 108:18, 130:8, 135:21, 135:23, 142:10</p> <p><b>lessen</b> [1] - 137:23</p> <p><b>letter</b> [5] - 31:15, 31:18, 31:19, 39:10, 45:5</p> <p><b>level</b> [13] - 23:3, 38:24, 56:18, 87:5, 89:14,</p>	<p>91:3, 92:12, 98:6, 114:11, 114:18, 117:16, 130:6, 138:4</p> <p><b>levels</b> [2] - 80:9, 114:14</p> <p><b>libraries</b> [8] - 22:21, 28:14, 28:17, 28:19, 29:1, 65:11, 65:18, 65:21</p> <p><b>Library</b> [1] - 88:13</p> <p><b>library</b> [7] - 23:6, 28:24, 38:15, 49:12, 65:14, 74:19, 74:20</p> <p><b>Lichtman</b> [17] - 21:9, 28:22, 58:24, 60:4, 64:23, 65:10, 65:23, 66:6, 66:17, 67:4, 67:14, 67:25, 68:9, 68:15, 135:5, 149:8, 149:10</p> <p><b>Lichtman's</b> [2] - 64:1, 64:25</p> <p><b>light</b> [3] - 20:8, 54:4, 98:15</p> <p><b>likely</b> [1] - 104:13</p> <p><b>limited</b> [40] - 5:10, 17:13, 17:19, 19:6, 19:20, 19:22, 19:24, 23:23, 24:17, 27:13, 27:15, 29:18, 36:2, 40:21, 42:24, 43:3, 43:8, 43:18, 43:23, 43:24, 45:8, 45:11, 46:9, 46:19, 49:20, 57:4, 74:21, 85:19, 105:2, 105:3, 105:4, 105:6, 105:14, 109:11, 133:7, 136:10, 136:23, 138:6</p> <p><b>limiting</b> [1] - 28:11</p> <p><b>line</b> [5] - 19:23, 24:14, 47:14, 67:5, 138:22</p> <p><b>lines</b> [1] - 109:24</p> <p><b>list</b> [1] - 87:11</p> <p><b>listed</b> [6] - 11:4, 46:13, 76:9, 86:5, 86:9, 89:6</p> <p><b>listing</b> [2] - 76:7, 121:18</p> <p><b>listings</b> [1] - 120:14</p> <p><b>lists</b> [2] - 73:15, 87:20</p> <p><b>literature</b> [1] - 137:6</p> <p><b>litigated</b> [1] - 78:16</p> <p><b>litigating</b> [1] - 143:21</p> <p><b>litigation</b> [8] - 68:20, 72:15, 78:18, 116:1, 122:16, 145:24, 146:24</p> <p><b>loans</b> [1] - 74:22</p>
		<b>L</b>		
		<p><b>laboratories</b> [1] - 19:23</p> <p><b>Labs</b> [1] - 88:14</p> <p><b>labs</b> [4] - 22:22, 23:7, 33:2, 64:20</p> <p><b>lack</b> [7] - 8:15, 8:17, 15:15, 43:3, 55:20, 77:17</p> <p><b>lag</b> [3] - 46:14, 66:11</p> <p><b>lagged</b> [1] - 66:9</p> <p><b>lags</b> [1] - 47:11</p> <p><b>laid</b> [1] - 145:10</p> <p><b>land</b> [15] - 25:10, 25:17, 25:18, 26:5, 68:22, 69:4, 69:10, 69:12, 69:18, 127:16, 127:18, 128:1, 128:7, 128:14, 128:20</p> <p><b>land-grant</b> [8] - 25:10, 25:17, 25:18, 26:5, 68:22, 69:4, 69:10, 69:12</p> <p><b>landscape</b> [2] - 97:23, 102:9</p> <p><b>language</b> [7] - 11:18, 36:6, 61:5, 82:11, 93:24, 103:18, 103:20</p> <p><b>large</b> [2] - 45:24, 102:21</p> <p><b>larger</b> [2] - 97:12, 136:16</p> <p><b>last</b> [6] - 37:11, 48:5,</p>		
	<b>K</b>			
	<p><b>Kaiser</b> [2] - 28:7, 64:19</p> <p><b>Katherine</b> [1] - 2:3</p> <p><b>keep</b> [1] - 119:18</p> <p><b>Kenneth</b> [2] - 2:2, 3:21</p> <p><b>key</b> [4] - 12:7, 19:5, 59:6, 135:13</p> <p><b>kill</b> [1] - 130:10</p> <p><b>kind</b> [13] - 5:6, 6:6, 31:15, 32:8, 38:2, 43:16, 47:22, 87:5, 121:9, 138:15, 140:21, 143:16, 143:20</p> <p><b>kinds</b> [1] - 7:12</p> <p><b>Kirkland</b> [1] - 3:10</p> <p><b>Kirwan</b> [29] - 18:21, 22:6, 27:2, 32:14, 38:8, 39:1, 39:23, 72:23, 79:10, 80:18, 87:21, 88:2, 89:22,</p>			

<p><b>logic</b> [1] - 17:22</p> <p><b>look</b> [43] - 14:19, 18:24, 19:15, 20:23, 22:23, 31:14, 33:16, 36:12, 37:4, 38:25, 39:5, 39:13, 39:18, 40:5, 41:9, 43:21, 47:22, 48:5, 48:23, 57:2, 58:13, 61:15, 61:17, 61:24, 63:14, 64:20, 65:5, 65:20, 66:3, 66:17, 72:15, 79:7, 84:3, 84:23, 87:19, 93:15, 95:8, 100:7, 112:1, 112:12, 113:12, 116:3, 134:16</p> <p><b>looked</b> [9] - 41:10, 41:12, 41:13, 84:18, 112:8, 112:24, 116:14, 116:16, 149:10</p> <p><b>looking</b> [21] - 39:21, 61:16, 68:6, 82:4, 83:22, 83:23, 88:15, 104:3, 107:7, 111:16, 112:2, 112:15, 113:11, 113:17, 115:15, 115:16, 118:6, 121:17, 124:6, 125:22, 127:7</p> <p><b>looks</b> [2] - 94:5, 126:7</p> <p><b>low</b> [2] - 109:10, 114:22</p> <p><b>lower</b> [13] - 61:13, 66:1, 106:7, 106:19, 106:22, 106:24, 107:12, 109:4, 109:5, 109:8, 111:11, 111:13, 130:6</p> <p><b>Loyola</b> [1] - 119:13</p> <p><b>lump</b> [1] - 149:4</p> <p><b>lunch</b> [6] - 69:21, 69:25, 70:8, 70:13, 107:25, 129:25</p> <p><b>luncheon</b> [1] - 108:11</p> <p><b>Lyons</b> [13] - 13:5, 14:3, 18:3, 18:5, 18:6, 18:11, 37:14, 54:14, 139:12, 148:4, 148:8, 148:10</p>	<p><b>major</b> [11] - 72:12, 75:21, 97:4, 98:23, 99:11, 100:22, 100:25, 101:1, 102:4, 102:5</p> <p><b>majority</b> [1] - 142:13</p> <p><b>management</b> [2] - 85:4, 85:5</p> <p><b>mandatory</b> [3] - 61:2, 99:6, 99:8</p> <p><b>manifests</b> [1] - 17:17</p> <p><b>manner</b> [2] - 99:13, 141:6</p> <p><b>mapped</b> [1] - 6:8</p> <p><b>Marbury</b> [1] - 23:10</p> <p><b>Marginalized</b> [3] - 11:14, 72:7, 73:7</p> <p><b>marginalized</b> [3] - 11:16, 16:11, 20:17</p> <p><b>markers</b> [1] - 112:9</p> <p><b>market</b> [9] - 89:23, 113:7, 120:21, 120:25, 121:10, 122:6, 133:23, 134:5, 134:9</p> <p><b>married</b> [1] - 19:19</p> <p><b>MARYLAND</b> [3] - 1:2, 1:4, 1:8</p> <p><b>Maryland</b> [159] - 1:11, 3:4, 3:5, 12:14, 13:2, 13:5, 16:4, 16:20, 18:9, 18:23, 19:21, 19:24, 21:1, 21:14, 21:17, 22:8, 22:13, 22:24, 23:25, 26:12, 26:17, 26:18, 27:17, 27:20, 27:24, 28:9, 28:21, 30:7, 30:11, 30:18, 30:25, 31:21, 32:1, 32:11, 33:7, 33:13, 33:19, 34:24, 35:3, 35:10, 35:18, 36:17, 38:6, 38:8, 38:12, 38:22, 39:8, 43:6, 43:20, 44:1, 44:7, 45:12, 47:5, 47:24, 48:4, 50:8, 50:13, 54:23, 55:8, 56:5, 59:16, 60:3, 60:5, 60:13, 62:12, 62:20, 63:2, 63:3, 63:16, 67:8, 68:2, 68:4, 68:5, 68:7, 68:20, 69:16, 72:2, 72:3, 72:18, 74:1, 74:9, 74:15, 74:17, 75:8, 75:12, 77:7, 78:11, 79:6, 80:8, 80:20, 80:21, 81:1, 81:5, 81:8, 81:15,</p>	<p>82:6, 82:17, 83:5, 83:9, 85:2, 85:25, 86:10, 86:11, 86:18, 86:20, 86:22, 87:22, 88:3, 88:11, 89:8, 93:8, 94:8, 95:8, 97:1, 97:4, 98:2, 98:16, 99:25, 101:2, 102:19, 102:23, 103:4, 103:7, 105:23, 106:2, 106:10, 106:15, 106:20, 107:16, 109:15, 109:22, 110:2, 115:1, 115:2, 119:19, 119:20, 119:24, 120:9, 121:4, 121:13, 122:2, 122:21, 124:13, 130:15, 133:25, 135:3, 136:9, 138:1, 138:8, 138:16, 139:16, 140:9, 140:17, 145:5, 148:21, 149:21, 151:2, 153:4, 153:5</p> <p><b>Maryland's</b> [31] - 11:12, 12:21, 13:4, 16:10, 25:15, 26:2, 35:14, 36:20, 37:23, 39:1, 42:10, 42:20, 49:14, 50:23, 51:7, 55:21, 59:3, 65:20, 69:14, 72:5, 73:5, 80:10, 80:11, 81:12, 83:15, 83:16, 83:18, 132:16, 136:17, 145:1, 148:18</p> <p><b>Master</b> [2] - 100:21, 100:24</p> <p><b>master's</b> [7] - 47:15, 48:23, 49:3, 49:9, 76:23, 78:3, 94:16</p> <p><b>match</b> [2] - 69:16, 69:19</p> <p><b>material</b> [1] - 10:16</p> <p><b>mathematical</b> [1] - 65:1</p> <p><b>mathematics</b> [1] - 122:4</p> <p><b>matriculated</b> [1] - 78:2</p> <p><b>matter</b> [8] - 3:2, 4:21, 88:21, 89:11, 108:16, 139:19, 150:22, 153:3</p> <p><b>MBA</b> [8] - 118:7, 118:15, 119:3, 119:5, 132:1, 133:15, 146:16,</p>	<p>147:15</p> <p><b>McConkie</b> [1] - 132:2</p> <p><b>mean</b> [14] - 15:20, 17:8, 36:24, 41:4, 44:17, 46:21, 70:25, 92:20, 117:22, 140:5, 140:17, 142:25, 145:23, 146:6</p> <p><b>means</b> [5] - 52:19, 81:4, 129:19, 142:21, 143:2</p> <p><b>meant</b> [1] - 137:19</p> <p><b>mechanism</b> [6] - 72:19, 82:16, 124:1, 126:5, 139:14, 145:18</p> <p><b>mechanisms</b> [1] - 97:24</p> <p><b>meeting</b> [1] - 70:15</p> <p><b>member</b> [1] - 10:6</p> <p><b>members</b> [3] - 9:2, 9:17, 9:20</p> <p><b>Members</b> [1] - 11:3</p> <p><b>memo</b> [1] - 132:4</p> <p><b>memory</b> [1] - 66:22</p> <p><b>mention</b> [3] - 71:23, 109:5, 143:22</p> <p><b>mentioned</b> [11] - 60:21, 61:24, 79:13, 82:19, 86:20, 96:7, 109:6, 114:20, 116:22, 135:17, 142:9</p> <p><b>merit</b> [1] - 104:6</p> <p><b>met</b> [1] - 4:3</p> <p><b>MHEC</b> [13] - 35:7, 35:15, 62:15, 87:10, 99:5, 103:4, 103:11, 103:16, 112:12, 121:22, 132:3, 132:4, 146:24</p> <p><b>MHEC's</b> [1] - 103:6</p> <p><b>Michael</b> [1] - 1:21</p> <p><b>Mickey</b> [4] - 84:12, 98:8, 98:25, 123:3</p> <p><b>microphysics</b> [1] - 38:21</p> <p><b>microscopes</b> [1] - 23:22</p> <p><b>middle</b> [1] - 48:25</p> <p><b>might</b> [28] - 7:12, 20:24, 44:23, 52:6, 56:20, 72:4, 83:22, 90:24, 96:6, 96:23, 100:17, 100:19, 100:24, 103:24, 104:14, 106:6, 108:17, 113:1, 113:23, 114:23,</p>	<p>126:14, 127:16, 128:24, 133:4, 138:21, 139:2, 146:23, 150:18</p> <p><b>Mike</b> [1] - 3:9</p> <p><b>million</b> [2] - 7:24, 144:10</p> <p><b>mind</b> [2] - 83:8, 114:6</p> <p><b>minimal</b> [1] - 23:1</p> <p><b>minority</b> [3] - 102:22, 142:13, 142:15</p> <p><b>minus</b> [2] - 42:18</p> <p><b>minute</b> [5] - 20:11, 25:16, 56:12, 69:4, 133:2</p> <p><b>minutes</b> [12] - 37:12, 53:6, 53:15, 53:19, 70:4, 70:10, 70:20, 70:23, 71:5, 78:7, 108:25</p> <p><b>miscalculations</b> [1] - 68:14</p> <p><b>misheard</b> [1] - 139:5</p> <p><b>missed</b> [1] - 6:22</p> <p><b>missing</b> [1] - 4:5</p> <p><b>mission</b> [133] - 5:8, 5:18, 7:13, 7:22, 7:24, 8:16, 12:17, 14:8, 14:9, 14:12, 14:18, 14:21, 14:23, 14:24, 15:1, 15:3, 15:5, 15:9, 15:19, 15:21, 15:25, 16:3, 16:14, 16:15, 16:17, 16:18, 16:21, 16:25, 17:3, 17:8, 17:9, 17:11, 17:14, 17:15, 17:16, 17:19, 17:22, 17:23, 18:10, 19:7, 19:9, 19:24, 20:18, 24:4, 28:3, 29:3, 29:5, 29:8, 29:19, 30:3, 30:4, 31:7, 31:8, 32:1, 32:10, 32:20, 34:16, 37:21, 38:1, 40:1, 40:13, 43:19, 43:25, 44:11, 46:19, 49:20, 50:10, 50:12, 50:17, 51:21, 51:22, 54:15, 54:24, 55:1, 55:13, 56:22, 56:23, 57:1, 57:3, 57:5, 57:6, 57:9, 57:12, 57:15, 57:20, 60:20, 60:23, 60:25, 61:3, 61:7, 61:11, 64:10, 65:8, 78:8, 84:16, 85:19, 87:14, 103:25, 104:1, 104:16, 104:17,</p>
<b>M</b>				
<p><b>maintain</b> [1] - 87:13</p> <p><b>maintained</b> [1] - 50:5</p> <p><b>maintenance</b> [3] - 64:8, 64:9, 64:18</p>				

<p>104:21, 104:25, 105:1, 105:2, 105:3, 105:4, 105:9, 105:11, 105:14, 123:13, 126:12, 126:15, 127:5, 127:9, 127:13, 135:20, 135:21, 136:2, 137:13, 137:14, 137:15, 138:5, 138:6, 138:21, 139:5, 139:14, 139:17</p> <p><b>mission-based</b> [14] - 55:1, 55:13, 57:1, 57:3, 57:5, 57:6, 57:9, 57:12, 123:13, 135:20, 135:21, 137:14, 137:15, 138:21</p> <p><b>missions</b> [85] - 5:10, 7:18, 12:1, 13:24, 16:7, 16:8, 18:20, 19:6, 19:20, 19:22, 19:25, 20:6, 20:8, 21:18, 23:23, 24:1, 24:17, 27:13, 27:15, 27:18, 27:21, 27:23, 28:8, 28:12, 29:11, 29:13, 29:18, 31:10, 31:13, 31:20, 31:23, 32:5, 36:2, 37:22, 38:11, 38:18, 39:7, 39:17, 39:18, 40:7, 40:21, 42:25, 43:3, 43:7, 43:8, 43:14, 43:16, 43:18, 43:21, 43:22, 44:1, 44:6, 45:8, 45:11, 45:16, 45:18, 46:7, 46:9, 48:16, 50:9, 50:18, 50:23, 51:10, 51:16, 57:4, 58:10, 62:9, 62:21, 63:20, 84:8, 86:4, 105:6, 106:13, 122:11, 126:20, 126:24, 135:18, 136:11, 136:23, 140:20, 145:25, 146:5, 149:4</p> <p><b>Mississippi</b> [2] - 72:21, 137:24</p> <p><b>misspoke</b> [1] - 134:12</p> <p><b>misspoken</b> [1] - 147:23</p> <p><b>misstates</b> [1] - 34:1</p> <p><b>misunderstood</b> [1] - 135:9</p> <p><b>mix</b> [2] - 126:21, 146:5</p> <p><b>Model</b> [4] - 56:15,</p>	<p>56:22, 57:6, 58:1</p> <p><b>model</b> [4] - 57:1, 57:17, 79:6, 80:8</p> <p><b>moderate</b> [1] - 123:1</p> <p><b>modest</b> [2] - 122:18, 122:25</p> <p><b>modifications</b> [1] - 123:6</p> <p><b>moment</b> [11] - 8:25, 9:20, 13:12, 21:21, 41:3, 46:17, 64:2, 82:9, 82:12, 120:4, 129:1</p> <p><b>money</b> [10] - 14:15, 39:16, 60:5, 60:14, 60:15, 61:16, 64:17, 65:2, 137:4</p> <p><b>Montebello</b> [1] - 64:13</p> <p><b>mootness</b> [1] - 6:13</p> <p><b>Morgan</b> [50] - 23:17, 30:9, 30:25, 47:14, 48:12, 48:18, 64:14, 73:21, 73:23, 74:5, 75:7, 76:22, 77:1, 77:4, 77:12, 77:14, 77:25, 84:13, 86:11, 87:4, 94:20, 95:2, 97:15, 98:4, 98:6, 101:2, 111:7, 118:7, 121:6, 125:3, 125:6, 125:10, 130:13, 132:1, 132:19, 133:14, 133:20, 136:14, 136:15, 136:18, 142:2, 142:3, 145:15, 146:16, 146:25, 147:3, 147:8, 147:12, 147:18</p> <p><b>morning</b> [2] - 3:14, 3:15</p> <p><b>Mortimer</b> [1] - 84:11</p> <p><b>most</b> [6] - 25:24, 74:7, 91:16, 91:19, 99:23, 143:16</p> <p><b>move</b> [3] - 70:1, 104:24, 146:13</p> <p><b>moved</b> [1] - 48:21</p> <p><b>moving</b> [1] - 83:20</p> <p><b>MR</b> [138] - 3:9, 3:11, 3:14, 3:16, 3:20, 3:21, 3:24, 4:1, 4:8, 5:6, 5:21, 7:2, 8:12, 9:8, 9:22, 10:3, 10:10, 10:13, 10:14, 10:17, 10:20, 11:1, 11:9, 11:11, 13:14, 14:7, 15:24, 16:10, 16:23, 17:12, 18:15, 20:13, 21:3, 22:4,</p>	<p>23:5, 24:8, 24:21, 25:3, 26:2, 29:22, 30:23, 31:8, 32:18, 32:25, 33:24, 34:4, 34:15, 34:19, 35:4, 35:13, 35:24, 36:14, 37:18, 37:20, 40:17, 40:20, 42:15, 43:14, 44:21, 46:23, 48:23, 49:21, 51:19, 52:6, 52:9, 52:17, 52:25, 53:16, 53:18, 53:25, 55:24, 56:4, 57:11, 57:21, 61:21, 66:22, 69:2, 69:8, 70:1, 70:3, 70:6, 70:12, 70:18, 71:3, 71:8, 75:14, 75:24, 76:18, 79:20, 79:22, 87:7, 89:17, 89:20, 90:24, 91:8, 93:4, 95:20, 95:23, 96:2, 98:22, 103:1, 105:15, 108:2, 108:6, 108:14, 108:16, 109:2, 111:18, 111:25, 113:23, 115:16, 118:2, 126:17, 129:3, 129:7, 129:11, 131:13, 131:15, 134:20, 135:9, 135:13, 136:3, 137:8, 139:10, 140:13, 141:1, 141:2, 141:9, 141:10, 143:5, 149:24, 150:1, 150:18, 150:20, 150:21, 151:5, 151:9, 151:13</p> <p><b>MS</b> [2] - 3:23, 3:25</p> <p><b>Muriel</b> [5] - 9:4, 9:10, 73:19, 74:24, 84:11</p> <p><b>Murphy</b> [9] - 7:21, 15:25, 17:25, 54:25, 59:20, 129:15, 130:3, 136:5, 138:23</p> <p><b>Murray</b> [1] - 63:14</p>	<p>124:4</p> <p><b>necessarily</b> [6] - 10:21, 36:18, 112:5, 112:25, 114:7, 117:20</p> <p><b>necessary</b> [3] - 6:4, 15:14, 38:25</p> <p><b>need</b> [37] - 7:15, 10:8, 12:17, 14:13, 20:24, 21:3, 25:7, 26:3, 27:18, 27:22, 27:25, 33:7, 42:11, 42:21, 44:16, 53:17, 56:20, 62:5, 62:6, 62:15, 63:20, 66:3, 68:23, 89:23, 96:20, 96:22, 108:3, 121:24, 122:1, 122:2, 122:6, 129:4, 133:1, 138:6, 143:3, 148:21, 149:15</p> <p><b>needed</b> [3] - 23:25, 33:9, 66:15</p> <p><b>needing</b> [1] - 58:17</p> <p><b>needs</b> [4] - 14:14, 87:12, 93:19, 134:3</p> <p><b>negative</b> [1] - 141:21</p> <p><b>Negroes</b> [1] - 22:15</p> <p><b>nerve</b> [1] - 47:5</p> <p><b>Neufville</b> [2] - 69:16, 84:11</p> <p><b>never</b> [8] - 19:25, 24:2, 38:8, 65:12, 76:9, 110:21, 110:24, 111:2</p> <p><b>new</b> [8] - 21:18, 30:12, 44:2, 114:9, 114:16, 114:17, 131:3, 131:4</p> <p><b>next</b> [22] - 19:4, 19:9, 20:25, 21:11, 22:5, 22:18, 24:3, 24:16, 25:4, 25:23, 32:18, 32:25, 39:19, 40:25, 43:5, 46:6, 47:17, 49:17, 61:4, 63:22, 66:5, 69:4</p> <p><b>niches</b> [1] - 8:7</p> <p><b>NO</b> [1] - 1:7</p> <p><b>nobody</b> [1] - 48:25</p> <p><b>non</b> [17] - 29:10, 40:2, 61:2, 77:3, 78:18, 91:12, 92:7, 105:9, 110:25, 111:9, 111:22, 113:2, 125:18, 142:6, 142:19, 143:17, 147:25</p> <p><b>non-African</b> [1] - 40:2</p> <p><b>non-core</b> [2] - 91:12, 92:7</p>	<p><b>non-HBI</b> [6] - 77:3, 110:25, 111:9, 113:2, 142:6, 147:25</p> <p><b>non-HBIs</b> [5] - 105:9, 111:22, 125:18, 142:19, 143:17</p> <p><b>non-litigation</b> [1] - 78:18</p> <p><b>non-mandatory</b> [1] - 61:2</p> <p><b>non-research</b> [1] - 29:10</p> <p><b>none</b> [3] - 50:4, 105:23, 130:23</p> <p><b>noon</b> [1] - 69:24</p> <p><b>note</b> [5] - 4:1, 79:23, 80:15, 85:22, 94:13</p> <p><b>noted</b> [7] - 54:25, 55:2, 55:6, 55:14, 66:10, 123:15, 132:11</p> <p><b>notes</b> [3] - 34:7, 70:4, 86:8</p> <p><b>nothing</b> [4] - 23:12, 117:10, 117:11, 140:12</p> <p><b>notion</b> [3] - 21:8, 27:20, 140:6</p> <p><b>Notre</b> [1] - 119:12</p> <p><b>Number</b> [1] - 3:3</p> <p><b>number</b> [47] - 4:19, 12:19, 16:13, 20:15, 21:21, 34:4, 45:25, 46:8, 60:25, 61:11, 65:2, 91:23, 96:24, 97:12, 97:23, 100:2, 100:5, 100:15, 102:22, 107:8, 107:23, 110:1, 110:6, 112:6, 112:7, 114:16, 116:5, 118:10, 118:11, 118:25, 119:1, 119:13, 119:14, 119:23, 120:15, 120:16, 125:2, 126:23, 127:14, 137:21, 137:22, 138:1, 141:4, 145:3, 145:4, 148:24, 149:17</p> <p><b>numbers</b> [2] - 115:24, 118:19</p>
<b>N</b>				<b>O</b>
<p><b>name</b> [3] - 9:24, 11:5, 64:13</p> <p><b>names</b> [1] - 11:4</p> <p><b>nation</b> [3] - 72:19, 74:1, 100:10</p> <p><b>national</b> [1] - 148:22</p> <p><b>nationally</b> [1] - 85:7</p> <p><b>nature</b> [2] - 117:23,</p>	<p><b>o'clock</b> [2] - 69:1, 70:9</p> <p><b>object</b> [3] - 33:24, 94:10, 103:3</p>			

<p><b>objected</b> [8] - 95:2, 95:9, 110:22, 110:24, 111:2, 111:6, 111:9, 147:8</p> <p><b>objecting</b> [5] - 93:21, 121:8, 146:25, 147:3, 147:18</p> <p><b>objection</b> [5] - 103:9, 111:15, 121:5, 121:6, 147:12</p> <p><b>objections</b> [1] - 147:10</p> <p><b>objective</b> [3] - 49:7, 134:3, 134:4</p> <p><b>obligations</b> [1] - 39:8</p> <p><b>observation</b> [2] - 7:2, 110:7</p> <p><b>observations</b> [1] - 7:8</p> <p><b>obvious</b> [3] - 25:24, 130:9, 140:19</p> <p><b>obviously</b> [5] - 6:7, 6:19, 8:7, 13:18, 51:10</p> <p><b>occurred</b> [3] - 95:18, 99:7, 99:8</p> <p><b>occurring</b> [1] - 118:16</p> <p><b>OCR</b> [5] - 30:7, 33:22, 34:25, 36:5, 39:6</p> <p><b>October</b> [3] - 1:11, 5:22, 153:8</p> <p><b>OF</b> [1] - 1:2</p> <p><b>offended</b> [1] - 122:24</p> <p><b>offense</b> [1] - 10:23</p> <p><b>offer</b> [4] - 84:23, 106:3, 106:18, 123:7</p> <p><b>offered</b> [7] - 84:25, 110:22, 110:25, 114:5, 114:9, 119:5</p> <p><b>offerings</b> [6] - 74:20, 84:16, 85:15, 110:6, 123:5</p> <p><b>offers</b> [1] - 38:2</p> <p><b>official</b> [1] - 103:16</p> <p><b>Official</b> [2] - 1:25, 153:12</p> <p><b>Oliver</b> [6] - 35:7, 35:13, 35:21, 36:21, 37:10, 38:6</p> <p><b>once</b> [22] - 56:4, 71:23, 76:24, 78:4, 79:9, 83:9, 83:23, 84:1, 88:15, 93:6, 101:22, 102:11, 111:18, 114:10, 118:24, 120:1, 121:24, 128:14, 142:1, 142:16, 143:8, 149:19</p> <p><b>one</b> [79] - 4:21, 5:1, 10:1, 10:6, 12:20,</p>	<p>15:6, 16:13, 17:16, 22:1, 25:15, 26:14, 27:3, 28:14, 29:15, 31:10, 32:25, 33:13, 38:2, 38:17, 41:8, 41:23, 42:10, 50:9, 50:21, 50:23, 54:5, 54:24, 55:6, 55:7, 59:6, 60:3, 60:4, 60:9, 60:13, 61:14, 62:5, 63:19, 64:18, 69:25, 70:7, 70:8, 70:14, 70:25, 75:6, 81:7, 82:24, 90:10, 90:22, 97:3, 97:8, 99:7, 101:9, 102:11, 104:15, 105:15, 107:20, 109:4, 110:7, 112:6, 117:13, 119:8, 119:17, 120:15, 127:1, 129:11, 130:4, 130:9, 130:11, 130:12, 132:6, 134:10, 134:25, 137:21, 138:1, 140:20, 143:4, 145:4, 148:6, 150:20</p> <p><b>ones</b> [3] - 65:22, 110:4, 125:9</p> <p><b>online</b> [6] - 72:25, 74:23, 97:1, 102:7, 119:2, 119:11</p> <p><b>opening</b> [8] - 13:5, 24:9, 58:20, 59:22, 65:12, 66:19, 71:19, 84:17</p> <p><b>operating</b> [3] - 30:8, 64:15, 64:21</p> <p><b>operation</b> [1] - 77:11</p> <p><b>operative</b> [2] - 40:1, 50:18</p> <p><b>opinion</b> [7] - 12:20, 34:20, 37:1, 104:2, 116:23, 133:24, 143:8</p> <p><b>opportunity</b> [4] - 78:1, 87:5, 122:18, 123:1</p> <p><b>opposite</b> [2] - 22:14, 81:15</p> <p><b>option</b> [1] - 77:3</p> <p><b>optional</b> [1] - 61:1</p> <p><b>order</b> [13] - 4:24, 11:22, 13:21, 27:22, 33:7, 36:15, 38:12, 45:12, 45:13, 52:1, 63:17, 76:7, 107:23</p> <p><b>organized</b> [1] - 34:16</p> <p><b>original</b> [1] - 52:18</p>	<p><b>originally</b> [1] - 84:20</p> <p><b>otherwise</b> [2] - 24:23, 70:19</p> <p><b>ought</b> [1] - 14:15</p> <p><b>outcomes</b> [1] - 81:4</p> <p><b>outgrew</b> [3] - 30:20, 136:18, 136:20</p> <p><b>outlier</b> [5] - 67:12, 67:24, 68:3, 68:8, 140:6</p> <p><b>outlines</b> [1] - 19:5</p> <p><b>outside</b> [3] - 68:19, 119:21, 119:25</p> <p><b>overall</b> [3] - 29:17, 113:15, 129:20</p> <p><b>overcome</b> [2] - 21:4, 55:16</p> <p><b>overfunded</b> [3] - 21:10, 27:7, 83:2</p> <p><b>overview</b> [1] - 8:11</p> <p><b>own</b> [11] - 27:21, 29:5, 50:10, 50:16, 59:3, 69:14, 81:5, 85:15, 85:18, 132:16</p>	<p style="text-align: center;"><b>P</b></p> <p><b>Pace</b> [1] - 132:2</p> <p><b>Pack</b> [1] - 145:5</p> <p><b>page</b> [13] - 73:14, 79:18, 79:19, 79:20, 79:24, 80:14, 83:22, 87:19, 88:12, 88:13, 103:1, 104:3, 123:12</p> <p><b>PAGE</b> [1] - 152:2</p> <p><b>paid</b> [3] - 41:10, 47:5, 47:7</p> <p><b>Paloma</b> [1] - 1:22</p> <p><b>Panel</b> [42] - 11:18, 13:2, 13:10, 14:19, 14:22, 16:3, 16:6, 16:14, 16:20, 18:16, 19:5, 19:12, 21:1, 23:14, 27:1, 40:25, 41:1, 41:22, 42:7, 44:5, 44:8, 47:10, 49:5, 60:22, 61:10, 62:3, 62:8, 64:16, 65:5, 66:1, 66:7, 67:7, 67:15, 67:22, 78:21, 78:24, 79:21, 79:22, 80:4, 83:24, 88:3, 103:19</p> <p><b>panel</b> [6] - 18:18, 20:23, 79:1, 79:4, 79:23, 80:15</p> <p><b>Panel's</b> [1] - 21:12</p> <p><b>paper</b> [2] - 117:1, 145:1</p>	<p><b>papers</b> [1] - 9:25</p> <p><b>paragraph</b> [3] - 80:1, 80:16, 80:25</p> <p><b>paragraphs</b> [1] - 132:23</p> <p><b>Park</b> [22] - 25:20, 25:25, 26:22, 48:17, 67:11, 67:17, 67:21, 68:5, 68:7, 69:17, 74:18, 86:11, 86:22, 112:3, 140:9, 140:18, 140:22, 145:22, 149:1, 149:5, 149:7, 149:13</p> <p><b>Park's</b> [1] - 149:21</p> <p><b>part</b> [23] - 5:8, 7:4, 17:3, 17:4, 17:24, 33:13, 44:13, 45:21, 50:9, 56:9, 56:22, 58:14, 59:10, 62:18, 65:7, 66:19, 87:3, 113:9, 126:18, 137:17, 142:21, 148:4, 148:11</p> <p><b>particular</b> [26] - 6:23, 7:12, 13:24, 20:21, 28:1, 29:20, 36:2, 41:11, 42:1, 47:3, 61:12, 73:17, 87:14, 89:9, 96:14, 99:11, 101:5, 107:7, 112:10, 119:10, 120:19, 123:21, 125:6, 126:24, 128:18, 132:5</p> <p><b>particularly</b> [2] - 75:1, 90:19</p> <p><b>partly</b> [1] - 136:23</p> <p><b>partnered</b> [1] - 107:22</p> <p><b>partnering</b> [1] - 107:8</p> <p><b>partnership</b> [1] - 85:12</p> <p><b>Partnership</b> [38] - 5:12, 5:14, 12:18, 12:22, 12:23, 18:25, 31:22, 32:3, 32:12, 33:10, 33:11, 33:23, 34:25, 35:8, 35:16, 35:24, 35:25, 36:6, 36:9, 36:11, 36:16, 36:21, 36:25, 37:6, 38:5, 44:3, 45:1, 45:11, 63:5, 63:16, 67:15, 79:2, 96:4, 103:8, 103:17, 103:19, 103:20, 148:9</p> <p><b>parts</b> [2] - 79:11</p> <p><b>Past</b> [1] - 117:3</p> <p><b>past</b> [13] - 14:6, 17:6,</p>	<p>21:13, 21:17, 55:2, 55:5, 55:16, 55:18, 92:24, 93:14, 95:18, 123:14, 123:17</p> <p><b>pause</b> [2] - 43:12, 69:21</p> <p><b>pay</b> [3] - 47:25, 86:17, 136:1</p> <p><b>peer</b> [3] - 124:22, 126:13, 127:15</p> <p><b>peers</b> [13] - 40:10, 125:1, 125:4, 125:7, 125:9, 125:22, 126:11, 126:16, 126:20, 127:8, 130:21, 130:23, 135:17</p> <p><b>pending</b> [2] - 3:2, 19:1</p> <p><b>Pennsylvania</b> [1] - 78:2</p> <p><b>people</b> [6] - 21:22, 21:23, 65:17, 122:19, 123:1, 144:10</p> <p><b>per</b> [17] - 26:22, 28:21, 28:23, 28:24, 33:6, 55:9, 58:17, 59:19, 60:5, 64:5, 65:3, 65:10, 65:13, 65:16, 67:1, 67:6, 135:4</p> <p><b>percent</b> [3] - 99:18, 137:19</p> <p><b>percentage</b> [1] - 100:14</p> <p><b>percentile</b> [1] - 124:16</p> <p><b>perfectly</b> [1] - 6:9</p> <p><b>perhaps</b> [4] - 13:22, 57:9, 107:24, 135:23</p> <p><b>period</b> [4] - 55:10, 109:24, 124:6, 126:2</p> <p><b>permanent</b> [1] - 28:17</p> <p><b>permit</b> [1] - 13:20</p> <p><b>permitted</b> [2] - 125:18, 140:7</p> <p><b>perpetuating</b> [1] - 132:5</p> <p><b>person</b> [2] - 77:21, 78:5</p> <p><b>Ph.D</b> [5] - 38:20, 94:22, 94:23, 105:20, 106:18</p> <p><b>pharmacy</b> [1] - 85:3</p> <p><b>phase</b> [1] - 7:18</p> <p><b>phrase</b> [13] - 11:16, 14:18, 41:4, 50:6, 54:6, 54:9, 54:11, 54:12, 61:1, 66:8, 116:5, 137:18, 138:3</p> <p><b>phrases</b> [1] - 41:15</p> <p><b>physical</b> [4] - 55:19,</p>
---	--	---	--	---	--



<p>74:20, 101:25, 102:1  <b>pick</b> [1] - 70:11  <b>piece</b> [2] - 124:10, 149:8  <b>place</b> [8] - 54:18, 57:8, 57:10, 71:11, 72:16, 84:15, 122:15, 145:20  <b>placed</b> [2] - 128:5, 128:11  <b>placement</b> [1] - 96:16  <b>places</b> [1] - 24:10  <b>plaintiff</b> [1] - 74:25  <b>plaintiffs</b> [26] - 3:7, 4:2, 6:19, 15:20, 71:19, 71:24, 71:25, 72:1, 73:15, 73:17, 75:2, 76:12, 76:13, 76:19, 77:17, 104:4, 104:7, 104:9, 122:17, 130:1, 141:14, 141:18, 142:1, 145:10, 146:2, 149:4  <b>PLAINTIFFS</b> [1] - 1:6  <b>Plaintiffs</b> [2] - 1:19, 153:4  <b>plaintiffs'</b> [6] - 5:4, 5:22, 7:4, 9:2, 72:24, 97:16  <b>Plan</b> [20] - 13:3, 16:16, 27:1, 32:2, 32:12, 42:19, 45:1, 50:14, 60:24, 63:7, 67:8, 67:16, 67:18, 97:3, 100:21, 100:24, 102:3, 121:21, 121:24  <b>planned</b> [1] - 13:6  <b>play</b> [6] - 20:6, 40:8, 47:20, 117:5, 117:19, 137:25  <b>played</b> [2] - 117:4, 117:17  <b>pleases</b> [1] - 69:3  <b>podium</b> [1] - 140:1  <b>point</b> [64] - 6:17, 8:9, 9:8, 12:7, 29:3, 34:5, 34:11, 35:5, 35:6, 36:14, 39:14, 39:15, 39:19, 40:22, 48:13, 49:3, 50:11, 50:22, 53:3, 53:4, 55:7, 57:19, 57:22, 58:19, 59:12, 59:21, 61:12, 61:25, 62:3, 62:20, 63:15, 66:16, 68:10, 69:14, 69:20, 75:18, 90:8, 91:9, 93:10, 99:14, 108:4,</p>	<p>109:25, 111:14, 123:9, 124:17, 126:9, 129:15, 130:11, 130:17, 131:16, 133:6, 134:21, 134:22, 135:13, 139:3, 139:10, 139:15, 141:10, 143:14, 146:2, 146:13, 147:4, 147:5, 147:17  <b>pointed</b> [5] - 67:4, 68:9, 68:15, 129:12, 130:3  <b>pointing</b> [1] - 139:12  <b>points</b> [16] - 12:13, 12:25, 27:21, 28:15, 34:7, 53:10, 59:6, 60:9, 60:12, 61:23, 66:15, 129:11, 134:3, 139:22, 148:13, 150:5  <b>policies</b> [16] - 5:15, 11:17, 16:11, 22:10, 27:11, 37:12, 45:20, 73:10, 78:14, 81:19, 81:20, 82:1, 82:5, 83:19, 84:4, 93:7  <b>Policies</b> [3] - 11:13, 72:6, 73:6  <b>policy</b> [36] - 12:15, 13:25, 22:13, 36:8, 38:9, 39:2, 44:17, 45:15, 49:19, 54:22, 55:13, 55:22, 74:5, 74:9, 74:15, 79:16, 80:7, 82:13, 88:18, 93:16, 93:17, 94:22, 94:23, 95:15, 101:16, 101:17, 104:10, 104:25, 128:14, 139:20, 141:19, 141:24, 144:17, 144:22, 147:1, 147:20  <b>Popovich</b> [1] - 144:24  <b>popped</b> [1] - 51:6  <b>population</b> [10] - 50:6, 117:25, 132:11, 132:18, 133:18, 133:19, 142:14, 144:6, 144:7, 144:9  <b>position</b> [16] - 66:12, 78:18, 103:6, 103:11, 103:14, 103:15, 103:16, 122:16, 123:22, 123:23, 123:25, 145:23, 149:20  <b>positive</b> [2] - 80:24,</p>	<p>141:21  <b>possibility</b> [2] - 6:16, 34:10  <b>possible</b> [1] - 116:16  <b>possibly</b> [1] - 127:8  <b>potential</b> [1] - 144:17  <b>potentially</b> [1] - 89:10  <b>practical</b> [3] - 32:4, 32:10, 137:22  <b>practice</b> [14] - 36:8, 74:5, 74:9, 74:15, 93:16, 95:12, 111:11, 128:15, 141:19, 141:25, 144:17, 144:22, 147:1, 147:20  <b>practices</b> [10] - 5:15, 11:17, 37:13, 73:10, 78:14, 81:19, 81:20, 84:4, 93:7, 95:16  <b>Practices</b> [3] - 11:13, 72:6, 73:6  <b>precise</b> [1] - 147:22  <b>prefer</b> [2] - 70:16, 70:18  <b>preference</b> [1] - 108:19  <b>preliminary</b> [3] - 4:21, 11:24, 88:21  <b>preparation</b> [1] - 15:15  <b>present</b> [2] - 24:15, 93:1  <b>presentation</b> [24] - 4:10, 5:19, 6:7, 7:8, 8:13, 8:22, 18:13, 25:9, 29:25, 33:25, 52:12, 52:15, 71:14, 72:5, 73:5, 73:15, 81:12, 84:10, 86:4, 87:20, 102:12, 103:2, 109:7, 123:12  <b>presented</b> [10] - 8:2, 12:11, 25:14, 28:23, 40:21, 62:11, 62:13, 71:23, 89:15  <b>presenting</b> [1] - 150:10  <b>president</b> [3] - 25:14, 77:24, 101:11  <b>President</b> [4] - 27:2, 89:23, 91:16, 142:12  <b>presidential</b> [1] - 52:22  <b>presidents</b> [13] - 13:11, 16:17, 17:7, 17:20, 18:17, 84:14, 84:24, 99:23, 101:10, 122:13, 122:19, 123:2, 123:4</p>	<p><b>presidents'</b> [1] - 45:5  <b>press</b> [1] - 53:14  <b>presumably</b> [2] - 19:2, 29:8  <b>presumed</b> [1] - 114:24  <b>presumption</b> [3] - 9:13, 122:6, 143:17  <b>pretend</b> [1] - 127:21  <b>pretended</b> [1] - 22:12  <b>pretrial</b> [1] - 76:7  <b>pretty</b> [15] - 5:24, 7:18, 24:24, 28:20, 33:1, 40:4, 54:13, 68:2, 81:24, 90:2, 110:16, 111:14, 117:2, 134:11, 134:16  <b>Prevent</b> [1] - 83:25  <b>prevent</b> [1] - 28:11  <b>prevented</b> [3] - 74:10, 87:15, 94:24  <b>preview</b> [1] - 14:11  <b>primarily</b> [1] - 106:13  <b>Prince</b> [8] - 99:3, 99:8, 99:10, 99:16, 99:17, 132:13, 143:25  <b>Princes</b> [1] - 49:14  <b>Princess</b> [8] - 25:19, 25:24, 26:4, 26:14, 26:20, 26:21, 66:21, 66:22  <b>principal</b> [3] - 30:16, 64:25, 130:17  <b>principle</b> [1] - 54:8  <b>printer</b> [2] - 4:12, 10:16  <b>private</b> [7] - 60:14, 60:15, 63:10, 92:15, 97:16, 101:13, 119:2  <b>problems</b> [2] - 4:13, 28:16  <b>procedures</b> [1] - 120:15  <b>proceeding</b> [1] - 7:23  <b>proceedings</b> [1] - 151:14  <b>process</b> [28] - 21:15, 21:17, 56:9, 75:4, 75:10, 82:15, 87:8, 87:9, 89:1, 92:9, 93:10, 93:24, 94:24, 95:12, 95:21, 96:12, 111:10, 121:9, 123:20, 124:4, 124:24, 125:12, 125:20, 144:20, 147:1, 147:6, 147:19  <b>producing</b> [2] - 73:25, 88:18  <b>product</b> [1] - 75:4  <b>productive</b> [1] - 80:24</p>	<p><b>professional</b> [2] - 86:19, 150:10  <b>profit</b> [5] - 97:2, 97:5, 97:8, 102:8, 119:2  <b>program</b> [125] - 5:18, 8:16, 12:2, 25:5, 31:5, 36:2, 38:2, 38:13, 38:19, 40:15, 43:7, 45:23, 46:5, 50:2, 51:20, 51:24, 52:3, 54:2, 74:21, 75:2, 75:3, 75:4, 75:5, 75:9, 75:10, 75:11, 84:16, 85:1, 85:3, 85:4, 85:10, 85:15, 86:25, 87:1, 87:9, 87:16, 89:1, 89:4, 89:9, 90:11, 90:14, 91:11, 92:7, 92:18, 92:25, 93:10, 93:12, 93:15, 93:23, 94:1, 94:16, 94:17, 94:18, 94:24, 95:2, 95:14, 95:21, 96:9, 96:10, 101:7, 101:8, 109:8, 109:10, 109:12, 109:17, 109:21, 110:6, 110:10, 110:19, 110:22, 110:25, 111:3, 111:9, 111:10, 111:20, 112:15, 112:17, 112:21, 112:22, 113:2, 113:14, 114:2, 114:22, 115:4, 115:7, 115:11, 115:17, 118:7, 118:13, 118:15, 118:17, 118:19, 119:3, 119:4, 119:9, 120:2, 120:16, 120:17, 120:19, 120:21, 120:23, 121:5, 121:6, 121:11, 121:14, 126:21, 131:19, 131:20, 132:1, 133:15, 133:21, 134:2, 134:13, 134:15, 144:18, 144:20, 146:16, 147:8, 147:11, 147:14, 147:16, 147:25  <b>programmatically</b> [4] - 8:7, 17:19, 33:15, 40:6  <b>programs</b> [97] - 7:12, 20:20, 20:23, 20:24,</p>
--	---	--	--	---

<p>21:18, 22:17, 22:20, 22:21, 23:11, 23:19, 31:9, 31:11, 33:14, 36:15, 36:17, 38:7, 38:19, 41:9, 41:11, 41:12, 41:19, 42:25, 44:3, 45:3, 46:1, 46:3, 46:4, 49:3, 49:9, 49:10, 56:17, 67:12, 73:1, 75:7, 77:4, 85:5, 85:6, 87:11, 87:13, 89:5, 90:18, 91:12, 91:14, 92:8, 93:22, 94:8, 95:8, 95:11, 96:7, 96:14, 107:8, 107:9, 107:23, 109:15, 110:1, 110:4, 111:4, 111:5, 112:3, 112:16, 112:17, 112:20, 112:24, 113:1, 113:2, 113:3, 113:15, 114:4, 114:9, 114:12, 114:17, 114:19, 119:4, 119:6, 119:12, 119:13, 121:18, 121:19, 121:23, 122:9, 123:8, 129:21, 131:3, 131:4, 134:7, 135:17, 146:25, 147:3, 147:12, 149:3, 149:12, 149:13, 149:14</p> <p><b>prominent</b> [1] - 51:23</p> <p><b>promised</b> [2] - 44:2, 63:5</p> <p><b>promulgated</b> [1] - 67:8</p> <p><b>pronounce</b> [1] - 11:5</p> <p><b>properly</b> [2] - 128:14, 132:11</p> <p><b>propose</b> [4] - 18:12, 51:19, 54:1, 69:2</p> <p><b>proposed</b> [8] - 75:21, 93:22, 94:8, 94:21, 95:3, 121:4, 125:10, 147:8</p> <p><b>proposing</b> [1] - 87:16</p> <p><b>proposition</b> [1] - 131:24</p> <p><b>prospectively</b> [1] - 124:7</p> <p><b>protest</b> [1] - 124:25</p> <p><b>proud</b> [4] - 84:24, 107:14, 122:14, 123:5</p> <p><b>prove</b> [5] - 45:8, 45:10, 45:19, 68:10</p>	<p><b>provide</b> [20] - 10:5, 22:12, 22:14, 23:2, 26:3, 33:9, 33:14, 36:17, 36:19, 39:25, 55:17, 60:18, 63:20, 80:6, 106:15, 117:9, 122:18, 122:25, 128:6, 149:18</p> <p><b>provided</b> [5] - 42:14, 71:15, 88:6, 113:14, 133:20</p> <p><b>provider</b> [1] - 91:4</p> <p><b>provides</b> [1] - 69:17</p> <p><b>providing</b> [1] - 12:15, 38:7, 48:3, 61:6, 80:21, 80:22, 97:18, 105:8, 105:24, 132:3, 148:23</p> <p><b>proving</b> [1] - 13:19</p> <p><b>proximate</b> [5] - 90:18, 94:2, 111:22, 112:5, 115:18</p> <p><b>proximity</b> [3] - 101:25, 110:17, 112:1</p> <p><b>psychiatric</b> [1] - 64:14</p> <p><b>public</b> [1] - 97:5</p> <p><b>published</b> [2] - 12:20, 131:18</p> <p><b>pull</b> [1] - 51:22</p> <p><b>pullback</b> [1] - 101:7</p> <p><b>purporting</b> [1] - 58:22</p> <p><b>purpose</b> [2] - 18:19, 103:21</p> <p><b>purposes</b> [1] - 126:10</p> <p><b>pursue</b> [1] - 34:21</p> <p><b>push</b> [1] - 10:8</p> <p><b>pushed</b> [2] - 74:4, 142:5</p> <p><b>pushing</b> [1] - 6:11</p> <p><b>put</b> [13] - 12:13, 28:5, 30:24, 36:10, 38:20, 47:25, 57:10, 58:12, 66:11, 76:12, 108:23, 109:18, 150:14</p> <p><b>puts</b> [1] - 49:8</p> <p><b>putting</b> [1] - 101:8</p>	<p>51:11, 51:14, 53:11, 54:4, 54:6, 104:15, 113:15, 127:3, 130:4, 139:24, 145:4</p> <p><b>quick</b> [2] - 83:8, 103:3</p> <p><b>quickly</b> [5] - 24:24, 33:1, 68:24, 75:24, 77:15</p> <p><b>quite</b> [21] - 49:25, 71:11, 78:21, 79:3, 82:14, 84:7, 103:25, 105:3, 106:6, 107:16, 114:22, 120:7, 120:19, 121:17, 122:11, 122:24, 135:7, 144:24, 147:13, 148:16, 148:20</p> <p><b>quotations</b> [1] - 24:10</p> <p><b>quote</b> [3] - 44:10, 86:5, 123:14</p>	<p><b>really</b> [29] - 6:3, 6:11, 7:4, 7:10, 12:5, 14:20, 17:17, 18:19, 19:18, 20:5, 21:7, 21:9, 23:12, 25:20, 28:11, 33:5, 36:4, 38:24, 47:17, 48:13, 49:8, 51:4, 70:23, 89:6, 116:15, 130:19, 134:8, 138:13, 140:19</p> <p><b>reason</b> [9] - 9:15, 74:12, 76:14, 81:10, 94:19, 109:23, 110:12, 130:2, 140:22</p> <p><b>reasonable</b> [1] - 6:10</p> <p><b>reasonably</b> [1] - 68:24</p> <p><b>reasoning</b> [1] - 109:9</p> <p><b>reasons</b> [5] - 12:4, 61:14, 62:5, 63:19, 145:3</p> <p><b>rebuffed</b> [1] - 29:20</p> <p><b>rebuttal</b> [3] - 53:7, 58:15, 108:25</p> <p><b>rebuttals</b> [1] - 148:6</p> <p><b>recalled</b> [1] - 119:3</p> <p><b>receive</b> [1] - 73:4</p> <p><b>received</b> [7] - 9:9, 76:21, 77:19, 78:1, 85:6, 121:5, 129:22</p> <p><b>receives</b> [2] - 38:3, 69:18</p> <p><b>recent</b> [1] - 90:21</p> <p><b>recently</b> [1] - 97:11</p> <p><b>recess</b> [5] - 34:11, 53:23, 71:6, 107:25, 108:11</p> <p><b>recession</b> [1] - 56:5</p> <p><b>recites</b> [1] - 27:14</p> <p><b>recognize</b> [2] - 26:3, 45:17</p> <p><b>recognized</b> [12] - 23:25, 25:6, 27:4, 27:17, 33:7, 43:20, 50:15, 59:17, 61:10, 62:20, 136:9, 138:8</p> <p><b>recognizes</b> [2] - 63:16, 83:9</p> <p><b>recollection</b> [1] - 129:14</p> <p><b>recommendation</b> [4] - 30:19, 79:8, 79:9, 95:9</p> <p><b>recommendations</b> [5] - 20:16, 67:7, 79:15, 79:17, 80:5</p> <p><b>recommended</b> [3] - 30:15, 42:7, 44:5</p> <p><b>recommends</b> [1] -</p>	<p>80:9</p> <p><b>record</b> [28] - 19:3, 29:12, 29:15, 34:1, 52:25, 71:15, 81:14, 85:21, 85:22, 87:18, 92:9, 92:25, 93:5, 94:4, 96:11, 96:21, 97:9, 104:11, 120:5, 122:8, 144:2, 144:4, 144:12, 144:14, 146:22, 147:10, 148:2, 150:2</p> <p><b>records</b> [1] - 59:4</p> <p><b>recruit</b> [1] - 63:17</p> <p><b>recruiting</b> [3] - 40:10, 130:21, 130:23</p> <p><b>recruitment</b> [1] - 62:16</p> <p><b>reduce</b> [1] - 37:7</p> <p><b>reductions</b> [1] - 119:7</p> <p><b>refer</b> [1] - 61:2</p> <p><b>reference</b> [2] - 19:11, 132:22</p> <p><b>referenced</b> [3] - 39:4, 123:10</p> <p><b>references</b> [2] - 60:25, 133:24</p> <p><b>referencing</b> [1] - 82:11</p> <p><b>reflect</b> [3] - 52:25, 110:8, 144:2</p> <p><b>reflecting</b> [1] - 100:8</p> <p><b>reflective</b> [1] - 126:12</p> <p><b>reflects</b> [2] - 57:20, 104:20</p> <p><b>regard</b> [18] - 73:4, 74:14, 76:5, 82:8, 88:21, 91:11, 92:10, 94:4, 96:21, 100:20, 107:21, 109:20, 113:25, 115:23, 117:7, 117:12, 128:1</p> <p><b>regarded</b> [1] - 77:6</p> <p><b>regarding</b> [3] - 6:16, 88:23, 89:23</p> <p><b>regardless</b> [8] - 32:6, 32:16, 39:20, 45:4, 45:14, 66:13, 134:18, 134:25</p> <p><b>Reginald</b> [2] - 73:1, 84:12</p> <p><b>region</b> [1] - 111:17</p> <p><b>regional</b> [3] - 97:1, 105:7, 126:14</p> <p><b>regrettable</b> [1] - 13:19</p> <p><b>regs</b> [1] - 120:20</p> <p><b>regulation</b> [3] - 89:2, 94:4, 120:13</p> <p><b>regulations</b> [2] - 93:8, 120:8</p> <p><b>rehash</b> [1] - 133:1</p>
	<b>Q</b>			
	<p><b>quality</b> [15] - 22:20, 40:6, 41:19, 41:23, 46:10, 46:13, 46:25, 47:6, 48:1, 50:2, 50:5, 55:20, 63:10, 66:3, 149:18</p> <p><b>quantify</b> [2] - 59:14, 59:16</p> <p><b>questions</b> [12] - 24:23,</p>	<p><b>race</b> [11] - 32:7, 32:16, 39:20, 45:4, 45:14, 66:13, 98:21, 117:25, 118:14, 119:23, 143:4</p> <p><b>racial</b> [1] - 116:19</p> <p><b>racially</b> [2] - 63:18, 143:11</p> <p><b>radically</b> [1] - 139:1</p> <p><b>raised</b> [6] - 8:16, 25:1, 38:10, 108:7, 130:5, 148:13</p> <p><b>ranking</b> [1] - 97:12</p> <p><b>rate</b> [5] - 28:2, 42:3, 42:4, 42:9, 66:14</p> <p><b>rates</b> [1] - 42:2</p> <p><b>rather</b> [10] - 14:4, 21:10, 22:25, 30:24, 33:22, 47:15, 92:22, 111:25, 132:6, 134:8</p> <p><b>reached</b> [2] - 81:6, 129:19</p> <p><b>read</b> [7] - 6:12, 7:4, 24:18, 37:3, 43:2, 43:12, 81:1</p> <p><b>reading</b> [1] - 65:6</p> <p><b>reads</b> [2] - 60:24, 104:3</p> <p><b>ready</b> [5] - 70:2, 70:20, 91:24, 100:2, 129:3</p> <p><b>real</b> [5] - 15:5, 25:5, 37:9, 99:24, 103:2</p> <p><b>reality</b> [4] - 50:11, 100:8, 102:10, 102:14</p>		

<p><b>reinforcements</b> [1] - 4:2</p> <p><b>rejected</b> [1] - 65:7</p> <p><b>relate</b> [2] - 5:9, 142:8</p> <p><b>related</b> [8] - 5:14, 36:23, 47:21, 86:13, 86:24, 104:10, 145:19, 146:21</p> <p><b>relates</b> [5] - 36:14, 111:8, 114:24, 149:8, 149:12</p> <p><b>relation</b> [2] - 3:22, 4:4</p> <p><b>relationship</b> [1] - 85:11</p> <p><b>relatively</b> [2] - 90:21, 110:9</p> <p><b>relevant</b> [1] - 64:22</p> <p><b>religious</b> [1] - 84:21</p> <p><b>rely</b> [1] - 18:6</p> <p><b>relying</b> [2] - 9:11, 95:22</p> <p><b>remaining</b> [1] - 35:9</p> <p><b>remains</b> [1] - 15:14</p> <p><b>remedial</b> [5] - 14:14, 104:8, 104:10, 104:12</p> <p><b>remediation</b> [1] - 58:17</p> <p><b>remedies</b> [4] - 6:16, 6:21, 7:16, 7:18</p> <p><b>remedy</b> [5] - 7:9, 8:2, 13:21, 25:7, 143:3</p> <p><b>remember</b> [19] - 31:16, 33:12, 39:23, 47:3, 49:5, 49:11, 50:25, 54:7, 55:24, 60:10, 62:10, 62:23, 62:25, 64:6, 75:6, 118:25, 125:2, 133:9, 136:8</p> <p><b>remembering</b> [2] - 136:16, 137:16</p> <p><b>remembers</b> [2] - 58:4, 139:12</p> <p><b>remind</b> [11] - 11:23, 78:9, 78:25, 80:3, 95:19, 109:18, 111:15, 114:1, 114:23, 120:6, 128:3</p> <p><b>reminded</b> [2] - 133:13, 141:4</p> <p><b>remnant</b> [6] - 24:13, 54:9, 54:17, 54:19, 135:23</p> <p><b>removed</b> [2] - 73:9, 81:19</p> <p><b>report</b> [10] - 28:9, 30:14, 43:10, 46:20, 79:13, 80:6, 83:23, 133:11, 133:12,</p>	<p>134:16</p> <p><b>Report</b> [21] - 11:19, 13:2, 13:10, 14:19, 14:22, 16:15, 18:16, 21:1, 23:15, 24:5, 27:1, 42:7, 47:10, 49:6, 65:5, 67:22, 78:21, 78:24, 79:21, 79:23, 103:19</p> <p><b>Reporter</b> [2] - 1:25, 153:12</p> <p><b>reporter</b> [1] - 53:13</p> <p><b>REPORTER'S</b> [1] - 153:1</p> <p><b>representing</b> [1] - 145:15</p> <p><b>reproduce</b> [1] - 37:15</p> <p><b>reputation</b> [1] - 55:19</p> <p><b>request</b> [4] - 30:11, 31:14, 128:5, 128:11</p> <p><b>requested</b> [2] - 18:18, 30:9</p> <p><b>require</b> [3] - 8:8, 20:7, 120:20</p> <p><b>required</b> [3] - 20:17, 43:21, 69:16</p> <p><b>requirement</b> [1] - 24:13</p> <p><b>requirements</b> [1] - 80:12</p> <p><b>requires</b> [2] - 17:23, 30:1</p> <p><b>research</b> [13] - 29:9, 29:10, 58:10, 86:13, 86:21, 86:22, 86:23, 87:6, 94:15, 105:18, 106:1, 148:25</p> <p><b>research-intensive</b> [1] - 58:10</p> <p><b>resegregation</b> [1] - 146:9</p> <p><b>reserve</b> [1] - 8:22</p> <p><b>reside</b> [1] - 100:11</p> <p><b>resides</b> [1] - 99:9</p> <p><b>resources</b> [8] - 15:14, 21:4, 30:24, 38:14, 42:21, 62:16, 120:22, 129:20</p> <p><b>respect</b> [4] - 39:7, 131:25, 133:4, 133:14</p> <p><b>respects</b> [1] - 104:6</p> <p><b>respond</b> [6] - 20:16, 28:16, 29:23, 52:13, 90:25, 139:22</p> <p><b>responded</b> [5] - 101:11, 115:22, 143:24, 146:15, 148:10</p> <p><b>response</b> [11] - 6:12,</p>	<p>84:10, 95:16, 100:12, 110:5, 112:23, 113:24, 116:15, 117:14, 127:10, 144:18</p> <p><b>responsible</b> [1] - 132:3</p> <p><b>rest</b> [4] - 8:1, 29:24, 45:20, 134:17</p> <p><b>restaurant</b> [1] - 85:4</p> <p><b>restraints</b> [1] - 29:5</p> <p><b>restrict</b> [1] - 142:22</p> <p><b>restricted</b> [2] - 76:25, 142:6</p> <p><b>Restructure</b> [3] - 11:13, 72:6, 73:6</p> <p><b>restructure</b> [2] - 11:17, 21:14</p> <p><b>result</b> [2] - 58:9, 92:14</p> <p><b>results</b> [5] - 41:24, 81:5, 81:23, 81:25, 149:6</p> <p><b>resume</b> [3] - 5:2, 70:14, 108:9</p> <p><b>retain</b> [1] - 63:17</p> <p><b>retaining</b> [1] - 142:19</p> <p><b>retention</b> [5] - 42:2, 42:4, 42:9, 62:17, 66:14</p> <p><b>reveal</b> [1] - 97:8</p> <p><b>revealed</b> [1] - 109:13</p> <p><b>revenue</b> [2] - 59:11, 61:20</p> <p><b>reverse</b> [1] - 52:1</p> <p><b>reversed</b> [1] - 99:17</p> <p><b>review</b> [4] - 24:19, 33:22, 95:10, 113:17</p> <p><b>rewards</b> [1] - 85:6</p> <p><b>rich</b> [2] - 73:24, 107:14</p> <p><b>Richardson</b> [3] - 84:13, 85:23, 118:6</p> <p><b>ride</b> [1] - 134:1</p> <p><b>right-hand</b> [2] - 20:20, 48:11</p> <p><b>Rights</b> [2] - 3:12, 80:13</p> <p><b>rights</b> [3] - 71:16, 71:20, 129:17</p> <p><b>road</b> [2] - 6:25, 10:9</p> <p><b>Robinson</b> [2] - 77:13, 77:19</p> <p><b>robust</b> [1] - 28:12</p> <p><b>role</b> [15] - 28:2, 28:3, 28:7, 30:13, 31:22, 31:25, 39:22, 40:12, 50:18, 117:5, 117:8, 117:17, 117:20, 122:25</p> <p><b>room</b> [2] - 21:22, 29:9</p>	<p><b>Rosemont</b> [1] - 85:13</p> <p><b>roughly</b> [1] - 108:23</p> <p><b>RPR</b> [1] - 1:25</p> <p><b>ruling</b> [3] - 20:4, 150:15, 151:6</p> <p><b>run</b> [1] - 83:16</p> <p><b>Ryan</b> [1] - 141:5</p> <p style="text-align: center;"><b>S</b></p> <p><b>Sabatini</b> [9] - 33:17, 34:3, 97:7, 99:1, 99:2, 103:13, 118:24, 120:24, 121:25</p> <p><b>sake</b> [1] - 44:20</p> <p><b>salaries</b> [9] - 22:21, 47:11, 47:14, 49:23, 86:9, 86:12, 86:13, 86:24, 87:2</p> <p><b>salary</b> [6] - 46:17, 46:22, 47:1, 47:11, 49:16, 49:22</p> <p><b>Salisbury</b> [14] - 30:18, 30:20, 40:16, 46:4, 106:9, 106:13, 106:18, 107:15, 109:14, 109:22, 110:2, 110:23, 136:19</p> <p><b>sandbagged</b> [1] - 51:2</p> <p><b>sarcastic</b> [1] - 81:12</p> <p><b>satisfaction</b> [1] - 7:6</p> <p><b>satisfied</b> [2] - 32:22, 149:25</p> <p><b>Savaria</b> [1] - 1:22</p> <p><b>saw</b> [14] - 19:24, 21:8, 34:23, 41:18, 48:11, 57:4, 64:19, 66:18, 86:7, 121:21, 129:25, 134:5, 134:10, 134:13</p> <p><b>scale</b> [3] - 59:15, 59:18, 59:25</p> <p><b>Scalia</b> [1] - 5:25</p> <p><b>scheduled</b> [3] - 9:12, 73:20, 74:11</p> <p><b>scholarship</b> [1] - 77:20</p> <p><b>school</b> [17] - 9:10, 9:16, 74:14, 74:21, 101:7, 102:16, 102:18, 106:21, 110:23, 111:6, 114:11, 119:8, 129:20, 129:22, 143:12, 143:19, 146:19</p> <p><b>School</b> [2] - 77:20,</p>	<p>85:13</p> <p><b>schools</b> [20] - 14:15, 16:7, 47:4, 64:20, 86:19, 100:11, 107:6, 107:7, 109:6, 109:10, 109:14, 109:16, 112:4, 129:13, 129:16, 129:17, 129:18, 130:14, 130:15, 143:11</p> <p><b>science</b> [8] - 22:21, 33:2, 48:3, 48:7, 48:9, 48:10, 85:3, 122:3</p> <p><b>scope</b> [3] - 8:14, 40:7, 41:19</p> <p><b>score</b> [1] - 68:18</p> <p><b>screen</b> [4] - 26:10, 56:13, 78:20, 79:20</p> <p><b>scrutiny</b> [1] - 87:25</p> <p><b>seats</b> [2] - 21:24, 21:25</p> <p><b>second</b> [6] - 11:5, 43:12, 79:25, 89:25, 92:1, 97:13</p> <p><b>Secretary</b> [4] - 13:4, 14:3, 33:18, 54:14</p> <p><b>section</b> [1] - 76:8</p> <p><b>Security</b> [1] - 77:7</p> <p><b>security</b> [1] - 84:25</p> <p><b>see</b> [42] - 4:11, 4:16, 6:10, 6:14, 6:22, 7:7, 10:7, 19:17, 22:18, 23:24, 24:4, 27:19, 31:9, 43:16, 43:22, 46:15, 48:24, 49:25, 50:4, 51:13, 53:7, 54:14, 56:12, 56:13, 57:2, 59:1, 67:16, 67:25, 68:1, 68:18, 79:23, 79:24, 109:11, 118:8, 118:9, 118:18, 124:14, 129:25, 130:2, 131:17, 134:4</p> <p><b>seeing</b> [1] - 21:21</p> <p><b>seem</b> [2] - 7:14, 68:8</p> <p><b>segment</b> [1] - 76:7</p> <p><b>segregated</b> [4] - 114:25, 115:1, 115:17, 143:17</p> <p><b>segregation</b> [16] - 8:19, 35:9, 35:17, 73:11, 78:15, 81:19, 83:7, 83:13, 115:19, 115:20, 124:3, 125:13, 125:15, 125:21, 125:23, 137:24</p>
--	---	--	---	--

<p><b>segregative</b> [11] - 43:4, 44:18, 46:12, 73:12, 84:6, 91:12, 111:22, 115:21, 130:8, 134:25, 142:10</p> <p><b>select</b> [1] - 77:4</p> <p><b>selected</b> [1] - 125:9</p> <p><b>selecting</b> [1] - 126:20</p> <p><b>semantic</b> [1] - 13:16</p> <p><b>sense</b> [6] - 8:23, 15:12, 16:3, 27:10, 70:11, 70:13</p> <p><b>sentence</b> [1] - 35:15</p> <p><b>separate</b> [5] - 18:11, 22:13, 75:17, 120:14</p> <p><b>separately</b> [2] - 14:8, 140:15</p> <p><b>seriatim</b> [1] - 141:11</p> <p><b>Services</b> [5] - 56:15, 56:22, 57:6, 57:16, 58:1</p> <p><b>services</b> [1] - 56:16</p> <p><b>servicing</b> [1] - 78:22</p> <p><b>session</b> [3] - 6:5, 7:15, 124:6</p> <p><b>SESSION</b> [1] - 108:12</p> <p><b>set</b> [6] - 9:25, 11:22, 38:19, 41:10, 46:1, 74:7</p> <p><b>sets</b> [3] - 21:18, 27:3, 42:5</p> <p><b>settlement</b> [1] - 7:24</p> <p><b>seven</b> [1] - 69:17</p> <p><b>several</b> [13] - 25:4, 81:11, 94:23, 95:7, 100:4, 104:19, 106:3, 113:6, 116:2, 120:10, 125:5, 145:14, 147:10</p> <p><b>shape</b> [1] - 65:25</p> <p><b>share</b> [1] - 26:4</p> <p><b>shifts</b> [1] - 99:10</p> <p><b>Shore</b> [27] - 30:17, 46:2, 46:3, 85:2, 98:2, 101:2, 106:3, 106:7, 106:10, 106:15, 106:19, 106:20, 106:23, 107:16, 109:4, 109:5, 109:8, 109:15, 109:22, 110:2, 111:11, 111:14, 121:4, 123:3, 136:19</p> <p><b>Shore's</b> [1] - 121:13</p> <p><b>short</b> [2] - 34:11, 53:22</p> <p><b>shortly</b> [2] - 4:9, 4:14</p>	<p><b>show</b> [4] - 14:3, 18:12, 38:17, 120:21</p> <p><b>showed</b> [1] - 133:17</p> <p><b>shown</b> [1] - 46:12</p> <p><b>shows</b> [3] - 49:22, 50:1, 140:19</p> <p><b>Shultz</b> [2] - 2:4, 3:25</p> <p><b>SHULTZ</b> [1] - 3:25</p> <p><b>Shum</b> [2] - 1:23, 3:13</p> <p><b>sic</b> [1] - 48:16</p> <p><b>side</b> [6] - 4:4, 4:22, 20:20, 47:19, 48:11, 64:24</p> <p><b>sides</b> [1] - 150:9</p> <p><b>sign</b> [1] - 38:20</p> <p><b>signatory</b> [2] - 35:14, 36:20</p> <p><b>significance</b> [2] - 12:23, 26:11</p> <p><b>significant</b> [3] - 57:18, 88:23, 145:3</p> <p><b>similar</b> [4] - 8:13, 48:12, 103:18, 127:7</p> <p><b>Simpkins</b> [2] - 1:25, 153:11</p> <p><b>simple</b> [3] - 54:16, 113:10, 119:8</p> <p><b>simply</b> [21] - 13:18, 14:4, 63:9, 70:18, 72:20, 75:3, 81:2, 85:17, 87:17, 88:22, 99:15, 100:1, 101:8, 112:15, 114:13, 114:18, 116:17, 126:5, 128:20, 134:11, 148:3</p> <p><b>sincerest</b> [1] - 141:6</p> <p><b>single</b> [1] - 61:1</p> <p><b>sit</b> [1] - 21:23</p> <p><b>sitting</b> [1] - 107:4</p> <p><b>six</b> [1] - 75:22</p> <p><b>six-week</b> [1] - 75:22</p> <p><b>size</b> [4] - 47:21, 67:3, 126:23, 136:22</p> <p><b>size-related</b> [1] - 47:21</p> <p><b>sizeable</b> [1] - 110:6</p> <p><b>skew</b> [1] - 149:6</p> <p><b>skip</b> [5] - 25:3, 26:9, 28:13, 56:11, 63:22</p> <p><b>skipped</b> [2] - 27:16, 47:23</p> <p><b>skipping</b> [1] - 56:12</p> <p><b>Skolnik</b> [2] - 2:4, 3:23</p> <p><b>SKOLNIK</b> [1] - 3:23</p> <p><b>slide</b> [47] - 11:2, 11:12, 19:4, 19:9, 20:25, 21:11, 21:23, 22:5, 22:18, 24:3, 24:16, 24:21, 25:23,</p>	<p>26:9, 27:14, 27:19, 28:6, 32:18, 39:14, 41:9, 41:18, 43:5, 46:8, 46:16, 47:17, 47:23, 49:17, 49:22, 56:13, 60:2, 61:4, 61:5, 63:22, 63:24, 66:5, 68:1, 69:4, 69:11, 84:10, 109:19, 112:19, 127:17, 130:18, 133:13, 133:16, 146:15</p> <p><b>slides</b> [15] - 19:16, 24:22, 25:4, 28:23, 32:20, 34:4, 35:5, 43:15, 44:22, 44:23, 47:8, 54:3, 56:20, 58:11, 66:24</p> <p><b>slightly</b> [1] - 98:12</p> <p><b>smaller</b> [5] - 49:3, 49:9, 59:19, 59:24</p> <p><b>smallest</b> [1] - 65:22</p> <p><b>so-called</b> [1] - 126:11</p> <p><b>Social</b> [1] - 77:7</p> <p><b>societal</b> [1] - 116:8</p> <p><b>solely</b> [1] - 78:8</p> <p><b>sometimes</b> [1] - 18:4</p> <p><b>somewhat</b> [9] - 13:1, 18:13, 20:10, 29:24, 30:17, 126:15, 126:17, 126:18, 135:16</p> <p><b>soon</b> [1] - 52:9</p> <p><b>Soper</b> [3] - 22:24, 23:8, 24:5</p> <p><b>sophomore</b> [1] - 114:14</p> <p><b>Sophomore</b> [4] - 91:2, 91:18, 101:22, 114:10</p> <p><b>sophomores</b> [2] - 91:5, 92:11</p> <p><b>sorry</b> [12] - 22:3, 25:17, 46:14, 58:6, 68:5, 70:1, 75:14, 106:9, 119:1, 131:12, 135:24, 148:7</p> <p><b>sort</b> [24] - 4:23, 5:7, 8:11, 14:10, 14:23, 31:10, 35:6, 40:5, 44:14, 47:19, 48:20, 48:24, 56:8, 86:8, 90:21, 91:3, 93:2, 93:20, 98:12, 99:2, 100:17, 115:13, 120:7, 124:25</p> <p><b>sound</b> [10] - 7:3, 15:18, 26:23, 32:4,</p>	<p>32:9, 89:16, 96:17, 137:21, 139:19, 140:11</p> <p><b>sounds</b> [1] - 34:15</p> <p><b>source</b> [1] - 59:11</p> <p><b>southern</b> [1] - 60:6</p> <p><b>space</b> [3] - 65:24, 66:1, 66:4</p> <p><b>speaker</b> [1] - 147:23</p> <p><b>speakers</b> [1] - 128:25</p> <p><b>speaks</b> [3] - 69:11, 110:16, 118:22</p> <p><b>special</b> [3] - 87:25, 88:5, 88:6</p> <p><b>specific</b> [14] - 20:15, 20:19, 24:25, 81:3, 81:6, 82:5, 100:11, 101:4, 113:15, 115:10, 141:18, 141:24, 143:21, 147:24</p> <p><b>specifically</b> [9] - 18:23, 23:16, 29:18, 46:21, 79:7, 112:18, 112:19, 127:24, 132:3</p> <p><b>spend</b> [16] - 5:23, 6:5, 11:20, 25:16, 37:20, 39:11, 40:24, 41:3, 48:13, 58:12, 60:1, 61:9, 64:1, 69:4, 127:19, 133:1</p> <p><b>spending</b> [3] - 44:25, 128:19</p> <p><b>spent</b> [13] - 6:19, 71:10, 78:7, 78:23, 105:3, 106:7, 120:7, 129:12, 129:24, 144:25, 147:12, 148:20</p> <p><b>spite</b> [1] - 98:14</p> <p><b>sponsor</b> [1] - 51:3</p> <p><b>stage</b> [3] - 148:22, 148:23, 149:16</p> <p><b>stain</b> [1] - 83:14</p> <p><b>stand</b> [3] - 3:8, 118:6, 118:25</p> <p><b>standard</b> [9] - 11:21, 12:9, 68:9, 81:6, 105:22, 114:22, 114:24, 115:3, 133:25</p> <p><b>standing</b> [15] - 5:22, 6:5, 6:10, 6:12, 6:14, 8:21, 8:24, 10:8, 11:6, 21:22, 34:21, 75:20, 76:1, 76:3, 76:10</p> <p><b>stark</b> [1] - 42:2</p> <p><b>start</b> [5] - 5:4, 23:2,</p>	<p>54:20, 63:25, 129:8</p> <p><b>started</b> [3] - 18:15, 134:13, 134:19</p> <p><b>starting</b> [2] - 124:4, 124:5</p> <p><b>State</b> [130] - 13:3, 14:15, 16:7, 16:16, 16:19, 17:5, 26:17, 27:1, 29:9, 29:21, 32:2, 32:12, 35:1, 35:10, 35:21, 42:19, 45:1, 48:4, 50:13, 57:10, 59:9, 60:24, 61:17, 61:19, 61:24, 63:7, 67:8, 67:16, 67:18, 71:21, 72:2, 72:3, 72:18, 73:9, 73:21, 73:25, 74:5, 74:9, 74:15, 74:18, 75:3, 75:7, 75:12, 76:9, 76:22, 77:1, 77:6, 77:12, 77:14, 77:25, 78:11, 78:13, 79:9, 79:16, 80:20, 82:5, 82:16, 83:5, 83:9, 84:13, 84:14, 85:1, 85:11, 85:25, 87:15, 88:3, 88:10, 89:8, 92:15, 94:8, 94:20, 95:2, 95:7, 97:1, 97:3, 97:4, 97:15, 98:6, 98:16, 99:9, 99:12, 99:20, 99:25, 100:21, 100:23, 100:25, 101:2, 101:16, 101:17, 102:3, 102:17, 103:15, 104:22, 104:23, 105:23, 111:7, 112:3, 118:7, 119:19, 119:24, 120:7, 121:6, 121:21, 121:24, 122:1, 125:3, 125:6, 125:10, 126:3, 126:4, 127:25, 128:6, 128:8, 128:19, 128:20, 132:1, 133:20, 141:25, 142:2, 142:3, 145:15, 146:16, 146:22, 146:24, 148:21, 149:19, 151:2</p> <p><b>state</b> [21] - 47:20, 60:16, 81:2, 102:6, 110:11, 110:13, 110:14, 110:20, 111:1, 111:17, 112:4, 119:16,</p>
--	--	--	---	---

<p>119:21, 119:25, 140:7, 140:19, 141:20, 147:15, 149:15 <b>State's</b> [2] - 30:10, 88:22 <b>statement</b> [9] - 13:6, 24:9, 37:24, 50:17, 58:20, 59:22, 65:12, 66:19, 88:20 <b>statements</b> [2] - 50:10, 50:12 <b>states</b> [4] - 22:12, 60:6, 124:15, 149:17 <b>STATES</b> [1] - 1:1 <b>States</b> [2] - 1:15, 153:7 <b>statewide</b> [4] - 45:24, 110:15, 110:18, 112:2 <b>statistical</b> [5] - 67:23, 67:24, 68:3, 68:8, 140:6 <b>statute</b> [4] - 38:12, 89:2, 93:8, 94:5 <b>STEM</b> [3] - 113:8, 121:20, 122:3 <b>step</b> [1] - 94:7 <b>stigma</b> [3] - 55:18, 116:8, 116:10 <b>stigmatic</b> [1] - 37:7 <b>still</b> [22] - 5:3, 9:5, 9:10, 9:15, 9:16, 10:21, 13:19, 15:14, 21:25, 30:8, 35:17, 44:18, 46:4, 48:2, 54:18, 57:20, 98:17, 107:25, 129:1, 134:23, 135:23, 149:8 <b>stone</b> [1] - 130:12 <b>stop</b> [1] - 149:25 <b>story</b> [3] - 91:13, 126:19 <b>straight</b> [1] - 24:14 <b>strengthen</b> [1] - 28:2 <b>strengthening</b> [1] - 81:8 <b>strict</b> [2] - 64:4, 89:2 <b>strong</b> [2] - 90:2, 119:21 <b>stronger</b> [1] - 12:11 <b>struck</b> [2] - 51:6, 88:20 <b>structure</b> [1] - 39:1 <b>structured</b> [1] - 104:12 <b>struggles</b> [1] - 69:15 <b>struggling</b> [1] - 15:22 <b>student</b> [28] - 9:5,</p>	<p>9:25, 10:5, 10:6, 11:4, 37:7, 55:9, 63:19, 74:19, 88:9, 102:11, 102:14, 117:12, 117:15, 119:25, 132:25, 133:17, 133:19, 136:1, 141:17, 141:18, 141:21, 142:8, 142:14, 142:22, 146:14, 149:19 <b>students</b> [52] - 9:1, 9:20, 11:8, 14:13, 32:6, 32:16, 38:3, 39:20, 40:3, 45:3, 45:14, 48:4, 48:8, 55:16, 58:17, 63:11, 65:3, 66:13, 71:16, 71:21, 73:4, 89:24, 89:25, 91:23, 99:19, 100:3, 100:5, 100:15, 101:11, 101:14, 101:23, 102:20, 102:22, 116:12, 116:17, 117:17, 118:9, 118:15, 119:1, 119:11, 119:15, 119:23, 126:1, 129:19, 129:22, 130:10, 130:12, 141:24, 142:20 <b>study</b> [2] - 27:24, 134:9 <b>submissions</b> [3] - 76:16, 89:17, 148:7 <b>submit</b> [1] - 31:19 <b>submitted</b> [3] - 9:22, 9:23, 13:7 <b>submitting</b> [1] - 120:15 <b>subsequently</b> [2] - 104:22, 131:4 <b>substantial</b> [6] - 21:4, 42:11, 42:17, 42:21, 62:6, 62:15 <b>Substantially</b> [3] - 11:14, 72:7, 73:7 <b>substantially</b> [5] - 11:16, 16:11, 47:11, 136:19, 136:20 <b>substantive</b> [2] - 18:20, 67:12 <b>Success</b> [7] - 42:15, 42:18, 42:22, 82:20, 82:21, 124:21, 125:16 <b>successful</b> [3] - 77:21, 78:5</p>	<p><b>successfully</b> [1] - 124:24 <b>Sue</b> [1] - 121:16 <b>sufficient</b> [4] - 13:20, 55:15, 64:8, 78:11 <b>sufficiently</b> [1] - 138:24 <b>suggest</b> [13] - 68:20, 74:3, 76:24, 83:2, 83:18, 85:19, 88:4, 103:4, 105:1, 127:12, 137:5, 143:20, 147:2 <b>suggested</b> [3] - 71:18, 72:11, 125:10 <b>suggesting</b> [3] - 17:8, 87:16, 88:7 <b>suggestion</b> [14] - 8:6, 16:14, 21:9, 51:9, 62:13, 85:16, 87:15, 90:11, 96:15, 107:11, 131:2, 131:22, 132:7, 146:7 <b>suggestions</b> [1] - 20:19 <b>suggests</b> [4] - 91:10, 96:17, 97:23, 101:21 <b>suit</b> [1] - 11:7 <b>suited</b> [1] - 149:1 <b>sum</b> [1] - 68:11 <b>summary</b> [5] - 5:17, 11:22, 24:12, 34:20, 50:20 <b>super</b> [1] - 4:12 <b>super-duper</b> [1] - 4:12 <b>supplemental</b> [1] - 133:12 <b>supplied</b> [1] - 22:19 <b>support</b> [5] - 15:20, 19:9, 60:11, 61:25, 149:20 <b>supported</b> [5] - 17:7, 59:3, 87:18, 92:25, 146:22 <b>supposed</b> [1] - 48:3 <b>supposing</b> [3] - 92:20, 92:24, 135:25 <b>Supreme</b> [1] - 54:8 <b>surprise</b> [2] - 5:22, 48:1 <b>surprised</b> [3] - 6:14, 135:3, 145:7 <b>swimmingly</b> [1] - 62:14 <b>switch</b> [1] - 128:25 <b>synonymous</b> [1] - 54:13 <b>system</b> [21] - 30:9, 39:1, 57:8, 81:9, 88:8, 88:9, 114:25,</p>	<p>115:1, 115:2, 115:17, 119:20, 124:24, 134:25, 137:3, 142:17, 142:18, 142:21, 143:12, 143:17, 148:11 <b>System</b> [3] - 40:13, 87:21, 122:21 <b>systematic</b> [1] - 113:17</p>	<p>121:25, 122:7, 122:8, 123:7, 123:11, 126:22, 130:20, 143:13, 143:20, 144:19, 146:6, 146:14, 148:23, 149:3, 149:4, 151:7 <b>testified</b> [26] - 15:1, 42:24, 45:6, 67:9, 69:16, 73:20, 73:23, 74:10, 74:16, 84:15, 91:17, 94:21, 96:19, 96:24, 99:13, 99:14, 101:9, 102:4, 107:18, 110:21, 110:24, 111:2, 121:3, 123:4, 142:2, 144:24 <b>testify</b> [5] - 13:6, 51:3, 76:25, 99:25, 148:4 <b>testifying</b> [3] - 22:7, 116:7, 121:25 <b>testimony</b> [88] - 9:11, 13:3, 13:8, 13:13, 14:19, 14:25, 22:6, 23:20, 33:17, 35:19, 35:20, 37:4, 37:5, 37:14, 38:6, 39:23, 40:5, 40:11, 40:22, 42:9, 44:8, 51:1, 55:25, 58:15, 59:3, 67:25, 71:14, 72:23, 73:19, 76:20, 79:3, 81:13, 82:15, 82:23, 85:23, 87:9, 87:20, 87:22, 89:22, 91:14, 92:4, 94:13, 95:1, 95:5, 96:18, 96:21, 97:10, 98:1, 98:4, 98:10, 99:22, 100:13, 100:20, 101:6, 105:19, 106:2, 106:4, 106:8, 106:11, 106:17, 106:25, 107:1, 107:5, 112:11, 113:12, 115:6, 115:25, 116:3, 116:11, 118:5, 120:20, 121:16, 122:10, 122:17, 125:8, 125:16, 127:3, 127:23, 132:16, 134:17, 141:23, 142:12, 144:25, 146:17, 148:1, 148:5, 148:12, 148:17 <b>thanking</b> [1] - 141:3</p>
<b>T</b>				
<p><b>talks</b> [11] - 24:16, 25:23, 26:14, 36:24, 37:2, 41:18, 69:15, 92:6, 97:3, 123:13, 133:25 <b>tarnish</b> [1] - 55:19 <b>task</b> [1] - 58:25 <b>Taylor</b> [1] - 146:17 <b>teacher</b> [1] - 22:21 <b>teachers</b> [5] - 47:4, 84:21, 113:7, 122:1 <b>teaching</b> [1] - 47:6 <b>technology</b> [4] - 73:3, 77:10, 122:3, 129:5 <b>Tegrity</b> [3] - 73:1, 73:2, 85:9 <b>tellingly</b> [1] - 18:23 <b>ten</b> [1] - 125:8 <b>term</b> [4] - 50:2, 98:8, 115:14, 142:13 <b>terminology</b> [1] - 113:16 <b>terms</b> [83] - 5:21, 7:9, 8:14, 11:6, 11:25, 12:2, 12:23, 15:10, 17:17, 20:16, 20:20, 22:19, 25:21, 27:3, 28:17, 31:7, 31:8, 31:12, 33:4, 36:8, 39:7, 40:12, 40:21, 43:14, 45:25, 47:20, 49:10, 49:24, 50:23, 56:16, 59:4, 59:7, 60:2, 60:11, 62:16, 62:21, 65:13, 65:24, 66:12, 67:6, 67:12, 67:23, 68:15, 68:16, 72:25, 73:1, 77:16, 81:4, 84:25, 86:12, 86:17, 87:8, 87:25, 90:5, 92:4, 92:9, 92:17, 97:18, 102:11, 108:17, 108:19, 115:3, 117:5, 120:18, 121:10, 121:22,</p>	<p><b>talks</b> [11] - 24:16, 25:23, 26:14, 36:24, 37:2, 41:18, 69:15, 92:6, 97:3, 123:13, 133:25 <b>tarnish</b> [1] - 55:19 <b>task</b> [1] - 58:25 <b>Taylor</b> [1] - 146:17 <b>teacher</b> [1] - 22:21 <b>teachers</b> [5] - 47:4, 84:21, 113:7, 122:1 <b>teaching</b> [1] - 47:6 <b>technology</b> [4] - 73:3, 77:10, 122:3, 129:5 <b>Tegrity</b> [3] - 73:1, 73:2, 85:9 <b>tellingly</b> [1] - 18:23 <b>ten</b> [1] - 125:8 <b>term</b> [4] - 50:2, 98:8, 115:14, 142:13 <b>terminology</b> [1] - 113:16 <b>terms</b> [83] - 5:21, 7:9, 8:14, 11:6, 11:25, 12:2, 12:23, 15:10, 17:17, 20:16, 20:20, 22:19, 25:21, 27:3, 28:17, 31:7, 31:8, 31:12, 33:4, 36:8, 39:7, 40:12, 40:21, 43:14, 45:25, 47:20, 49:10, 49:24, 50:23, 56:16, 59:4, 59:7, 60:2, 60:11, 62:16, 62:21, 65:13, 65:24, 66:12, 67:6, 67:12, 67:23, 68:15, 68:16, 72:25, 73:1, 77:16, 81:4, 84:25, 86:12, 86:17, 87:8, 87:25, 90:5, 92:4, 92:9, 92:17, 97:18, 102:11, 108:17, 108:19, 115:3, 117:5, 120:18, 121:10, 121:22,</p>			

<p><b>THE</b> <sup>[131]</sup> - 1:1, 1:2, 1:4, 3:2, 3:15, 3:17, 3:18, 4:5, 4:15, 4:18, 5:20, 6:9, 8:3, 8:24, 9:19, 10:2, 10:7, 10:11, 10:15, 10:19, 10:25, 11:6, 11:10, 13:12, 13:15, 15:12, 16:9, 16:22, 17:2, 18:14, 20:12, 21:2, 21:20, 23:4, 24:7, 24:20, 25:2, 26:1, 29:2, 30:22, 31:4, 32:17, 32:24, 34:6, 34:18, 35:2, 35:12, 35:20, 36:13, 37:17, 37:19, 40:14, 40:19, 42:13, 43:13, 44:13, 46:16, 48:22, 49:18, 51:17, 52:5, 52:8, 52:14, 52:24, 53:13, 53:17, 53:22, 53:24, 55:23, 56:3, 57:7, 57:18, 61:19, 66:21, 68:23, 69:7, 69:24, 70:5, 70:8, 70:16, 70:22, 71:5, 71:7, 75:13, 75:16, 76:17, 79:19, 79:21, 87:3, 89:12, 89:19, 90:9, 91:7, 92:14, 95:19, 95:21, 95:25, 98:18, 102:25, 105:13, 107:24, 108:3, 108:9, 108:13, 108:15, 108:21, 111:13, 111:24, 113:22, 115:13, 117:19, 126:8, 128:24, 129:5, 129:10, 131:12, 131:14, 134:18, 135:7, 135:11, 135:25, 137:2, 139:7, 140:2, 140:25, 142:23, 149:23, 149:25, 150:7, 151:4, 151:10</p> <p><b>theirs</b> <sup>[1]</sup> - 16:23</p> <p><b>Thelma</b> <sup>[2]</sup> - 98:1, 105:19</p> <p><b>theme</b> <sup>[1]</sup> - 116:4</p> <p><b>themes</b> <sup>[1]</sup> - 72:13</p> <p><b>themselves</b> <sup>[3]</sup> - 20:9, 78:9, 136:22</p> <p><b>theory</b> <sup>[2]</sup> - 116:4, 140:11</p> <p><b>therefore</b> <sup>[2]</sup> - 109:11, 126:2</p> <p><b>thereof</b> <sup>[1]</sup> - 8:15</p>	<p><b>thinker</b> <sup>[1]</sup> - 147:22</p> <p><b>thinking</b> <sup>[3]</sup> - 5:23, 34:9, 71:2</p> <p><b>Thomas</b> <sup>[2]</sup> - 116:23, 143:9</p> <p><b>Thomas's</b> <sup>[3]</sup> - 12:8, 116:22, 143:8</p> <p><b>Thompson</b> <sup>[32]</sup> - 1:21, 2:2, 2:2, 3:20, 3:21, 4:3, 4:6, 9:4, 9:10, 69:9, 69:22, 70:2, 71:7, 73:19, 84:11, 85:8, 98:1, 104:18, 105:19, 106:2, 106:25, 107:5, 110:21, 120:25, 121:3, 129:2, 135:10, 141:4, 150:3, 152:4</p> <p><b>THOMPSON</b> <sup>[52]</sup> - 3:20, 3:21, 8:12, 9:8, 10:10, 10:14, 33:24, 52:6, 52:9, 70:3, 70:6, 70:12, 70:18, 71:3, 71:8, 75:14, 75:24, 76:18, 79:20, 79:22, 87:7, 89:17, 89:20, 90:24, 91:8, 93:4, 95:20, 95:23, 96:2, 98:22, 103:1, 105:15, 108:2, 108:6, 108:14, 108:16, 109:2, 111:18, 111:25, 113:23, 115:16, 118:2, 126:17, 131:13, 141:2, 141:10, 143:5, 149:24, 150:18, 150:21, 151:9, 151:13</p> <p><b>Thompson's</b> <sup>[2]</sup> - 74:24, 109:25</p> <p><b>threat</b> <sup>[1]</sup> - 97:17</p> <p><b>threats</b> <sup>[7]</sup> - 97:4, 100:18, 100:22, 101:1, 102:4, 102:5, 102:6</p> <p><b>three</b> <sup>[10]</sup> - 5:14, 21:25, 43:15, 70:4, 70:20, 72:12, 76:21, 121:20, 137:25</p> <p><b>threshold</b> <sup>[1]</sup> - 114:21</p> <p><b>thrive</b> <sup>[2]</sup> - 98:17, 98:18</p> <p><b>thriving</b> <sup>[1]</sup> - 97:25</p> <p><b>throughout</b> <sup>[3]</sup> - 115:25, 146:24, 149:14</p> <p><b>thrust</b> <sup>[1]</sup> - 115:14</p>	<p><b>tied</b> <sup>[2]</sup> - 86:4, 86:5</p> <p><b>Title</b> <sup>[2]</sup> - 80:12, 103:22</p> <p><b>title</b> <sup>[3]</sup> - 72:5, 73:5, 83:23</p> <p><b>today</b> <sup>[7]</sup> - 4:20, 15:4, 19:14, 50:7, 69:13, 84:24, 138:9</p> <p><b>together</b> <sup>[3]</sup> - 70:4, 107:10, 107:16</p> <p><b>took</b> <sup>[7]</sup> - 30:25, 58:24, 66:24, 76:15, 95:22, 99:2, 145:20</p> <p><b>top</b> <sup>[3]</sup> - 48:16, 48:17, 48:25</p> <p><b>total</b> <sup>[1]</sup> - 61:16</p> <p><b>touch</b> <sup>[1]</sup> - 29:23</p> <p><b>Toutkoushian</b> <sup>[14]</sup> - 25:13, 57:13, 57:14, 58:3, 58:24, 59:6, 59:13, 60:9, 61:23, 67:13, 68:12, 127:2, 127:6, 145:16</p> <p><b>Toutkoushian's</b> <sup>[4]</sup> - 58:15, 59:2, 61:15, 127:10</p> <p><b>towards</b> <sup>[1]</sup> - 25:8</p> <p><b>Towson</b> <sup>[7]</sup> - 74:18, 96:10, 101:2, 112:4, 118:14, 136:16, 136:18</p> <p><b>trace</b> <sup>[1]</sup> - 5:16</p> <p><b>traceability</b> <sup>[21]</sup> - 5:7, 7:6, 8:14, 8:17, 8:18, 12:1, 12:3, 12:8, 13:17, 14:9, 15:9, 18:5, 18:6, 18:12, 19:13, 21:7, 57:25, 131:23, 132:9, 138:22, 144:15</p> <p><b>Traceable</b> <sup>[1]</sup> - 83:24</p> <p><b>traceable</b> <sup>[53]</sup> - 7:22, 7:23, 12:2, 12:4, 13:21, 13:24, 14:1, 14:4, 15:2, 15:12, 16:1, 16:2, 17:3, 20:9, 25:10, 26:8, 27:11, 36:8, 37:12, 43:8, 44:17, 45:14, 45:19, 46:18, 47:2, 48:7, 49:13, 49:18, 50:3, 54:22, 55:12, 73:10, 73:11, 78:14, 81:21, 82:13, 88:17, 90:13, 90:15, 93:17, 104:9, 104:25, 124:3, 124:19, 125:12, 125:14, 125:21, 125:23, 131:21, 137:3,</p>	<p>137:6, 138:16, 139:18</p> <p><b>traces</b> <sup>[1]</sup> - 41:17</p> <p><b>tracing</b> <sup>[4]</sup> - 81:25, 82:1, 82:3, 84:2</p> <p><b>tradition</b> <sup>[2]</sup> - 73:25, 107:15</p> <p><b>traditionally</b> <sup>[2]</sup> - 14:16, 143:1</p> <p><b>tragic</b> <sup>[1]</sup> - 83:13</p> <p><b>transcript</b> <sup>[3]</sup> - 134:10, 134:13, 153:2</p> <p><b>travel</b> <sup>[1]</sup> - 74:17</p> <p><b>Treasure</b> <sup>[2]</sup> - 82:24, 123:19</p> <p><b>treated</b> <sup>[1]</sup> - 140:10</p> <p><b>treatment</b> <sup>[1]</sup> - 49:14</p> <p><b>trend</b> <sup>[1]</sup> - 67:5</p> <p><b>trends</b> <sup>[1]</sup> - 118:4</p> <p><b>trial</b> <sup>[12]</sup> - 1:13, 8:16, 21:8, 25:12, 37:25, 44:8, 75:23, 89:18, 89:19, 98:23, 130:11, 133:10</p> <p><b>tried</b> <sup>[2]</sup> - 38:22, 83:10</p> <p><b>troubled</b> <sup>[1]</sup> - 90:17</p> <p><b>troubles</b> <sup>[1]</sup> - 90:23</p> <p><b>troubling</b> <sup>[1]</sup> - 90:10</p> <p><b>true</b> <sup>[12]</sup> - 66:18, 66:20, 66:23, 66:25, 67:6, 67:7, 67:9, 69:13, 79:12, 83:12, 143:24, 153:8</p> <p><b>truth</b> <sup>[1]</sup> - 51:4</p> <p><b>try</b> <sup>[6]</sup> - 11:5, 38:11, 65:23, 83:17, 134:1, 137:9</p> <p><b>trying</b> <sup>[5]</sup> - 38:18, 59:7, 68:13, 125:24, 129:25</p> <p><b>tuition</b> <sup>[7]</sup> - 59:9, 59:10, 61:13, 61:18, 61:20, 61:25, 62:1</p> <p><b>turn</b> <sup>[5]</sup> - 8:10, 51:18, 55:21, 79:18, 108:24</p> <p><b>turned</b> <sup>[1]</sup> - 30:11</p> <p><b>TWI</b> <sup>[4]</sup> - 47:16, 112:17, 112:21, 134:19</p> <p><b>TWIs</b> <sup>[29]</sup> - 23:16, 28:25, 32:6, 32:15, 40:6, 40:8, 41:2, 41:21, 42:4, 45:23, 46:10, 46:15, 47:12, 48:15, 48:25, 49:23, 65:9, 65:16, 65:17, 65:25, 66:9, 66:12, 67:2, 67:20, 105:9, 130:21, 130:23, 137:20, 137:24</p>	<p><b>two</b> <sup>[36]</sup> - 16:12, 17:16, 25:22, 29:15, 31:10, 41:15, 41:22, 61:12, 61:23, 65:11, 70:9, 73:14, 74:12, 82:20, 82:24, 89:6, 89:7, 89:14, 90:16, 96:7, 100:9, 104:5, 105:17, 105:25, 107:6, 107:22, 112:7, 118:12, 120:16, 121:19, 130:11, 137:9, 137:22, 140:13, 145:3, 147:12</p> <p><b>two-year</b> <sup>[1]</sup> - 89:14</p> <p><b>type</b> <sup>[4]</sup> - 86:24, 94:10, 105:11, 131:22</p> <p><b>types</b> <sup>[2]</sup> - 86:13, 96:25</p>
<b>U</b>				
<p><b>U.S</b> <sup>[1]</sup> - 80:12</p> <p><b>UB</b> <sup>[3]</sup> - 114:5, 142:9, 142:12</p> <p><b>UCLA</b> <sup>[1]</sup> - 116:7</p> <p><b>ultimately</b> <sup>[3]</sup> - 121:14, 131:10, 147:14</p> <p><b>UMB</b> <sup>[1]</sup> - 110:3</p> <p><b>UMBC</b> <sup>[12]</sup> - 30:13, 48:17, 86:9, 92:22, 94:14, 94:19, 94:21, 94:25, 95:3, 111:8, 147:7</p> <p><b>UMES</b> <sup>[19]</sup> - 23:17, 25:15, 25:19, 26:3, 26:14, 30:15, 30:21, 40:15, 46:4, 49:4, 49:7, 69:15, 69:18, 127:18, 128:9, 130:24, 132:18, 136:20</p> <p><b>UMUC</b> <sup>[2]</sup> - 75:11, 89:11</p> <p><b>Under</b> <sup>[1]</sup> - 3:12</p> <p><b>under</b> <sup>[19]</sup> - 11:3, 38:12, 39:8, 49:8, 52:18, 55:10, 56:21, 57:22, 58:1, 61:15, 71:17, 71:20, 72:9, 80:1, 104:12, 135:22, 137:6, 140:11</p> <p><b>underfunded</b> <sup>[3]</sup> - 21:10, 68:21, 104:13</p> <p><b>underfunding</b> <sup>[9]</sup> - 12:16, 27:5, 58:22, 59:4, 59:8, 68:18,</p>				

<p>81:24, 136:10, 136:24</p> <p><b>underfunds</b> [2] - 22:8, 60:17</p> <p><b>undergraduate</b> [6] - 105:7, 105:16, 105:24, 106:14, 114:18, 123:8</p> <p><b>undergraduate-degree-providing</b> [1] - 105:24</p> <p><b>undergraduate-only</b> [1] - 105:7</p> <p><b>understood</b> [2] - 74:19, 109:25</p> <p><b>undertaken</b> [1] - 82:6</p> <p><b>undertaking</b> [1] - 82:7</p> <p><b>undisputed</b> [1] - 15:4</p> <p><b>unequal</b> [1] - 30:9</p> <p><b>unfortunately</b> [1] - 14:5</p> <p><b>unique</b> [6] - 33:15, 45:25, 75:2, 77:10, 85:11, 85:14</p> <p><b>uniqueness</b> [1] - 45:23</p> <p><b>unitary</b> [4] - 88:9, 115:2, 142:16, 142:21</p> <p><b>UNITED</b> [1] - 1:1</p> <p><b>United</b> [2] - 1:14, 153:7</p> <p><b>universities</b> [3] - 105:7, 105:18, 148:25</p> <p><b>University</b> [97] - 31:6, 68:2, 68:4, 68:5, 68:6, 68:7, 73:21, 74:6, 74:17, 74:18, 75:8, 76:22, 77:2, 77:12, 77:14, 77:20, 77:25, 78:2, 84:13, 84:14, 85:1, 85:2, 85:11, 86:10, 86:18, 86:20, 86:22, 87:21, 89:13, 90:1, 90:22, 91:1, 91:3, 91:6, 91:13, 92:2, 92:10, 92:21, 94:20, 95:2, 96:10, 97:10, 97:14, 97:15, 97:22, 98:2, 98:7, 98:15, 99:9, 99:12, 99:20, 100:21, 100:23, 100:25, 101:1, 101:3, 101:18, 101:21, 102:19, 102:23, 106:2, 106:10, 106:14, 106:20, 107:15,</p>	<p>109:14, 109:22, 110:1, 111:7, 113:25, 114:2, 114:12, 118:7, 118:13, 121:4, 121:7, 121:13, 122:21, 125:3, 125:11, 130:5, 131:1, 140:8, 142:3, 142:4, 142:14, 145:5, 145:15, 146:16, 148:17, 149:20</p> <p><b>university</b> [6] - 29:4, 77:2, 86:21, 86:23, 97:10, 105:20</p> <p><b>unless</b> [6] - 53:17, 55:4, 69:22, 82:13, 123:16, 139:24</p> <p><b>unlike</b> [2] - 7:21, 22:11</p> <p><b>unnecessarily</b> [3] - 95:10, 111:4, 121:18</p> <p><b>unnecessary</b> [27] - 5:18, 12:1, 36:2, 51:20, 51:24, 52:3, 54:2, 90:10, 90:13, 91:11, 92:7, 92:17, 92:25, 93:13, 93:14, 94:1, 95:13, 110:10, 110:19, 111:20, 115:13, 115:17, 119:9, 131:19, 131:20, 134:2, 134:15</p> <p><b>unreasonable</b> [2] - 93:19, 110:19</p> <p><b>unreasonably</b> [1] - 149:14</p> <p><b>unsuccessful</b> [1] - 40:2</p> <p><b>UoB</b> [2] - 31:1, 68:1</p> <p><b>up</b> [39] - 4:23, 5:12, 13:9, 18:2, 21:16, 22:1, 23:10, 33:9, 36:11, 38:19, 42:8, 44:17, 45:11, 47:25, 48:21, 51:7, 51:22, 58:7, 58:13, 59:19, 68:10, 68:23, 70:11, 75:16, 75:20, 90:19, 98:3, 98:5, 98:9, 98:11, 98:13, 98:19, 109:19, 118:20, 128:7, 128:23, 129:1, 136:14, 138:23</p> <p><b>upgrade</b> [1] - 44:16</p> <p><b>upgrading</b> [1] - 44:19</p> <p><b>upper</b> [4] - 89:14, 91:3, 92:12, 114:11</p>	<p><b>upper-level</b> [1] - 91:3</p> <p><b>urban</b> [1] - 126:22</p> <p><b>USM</b> [1] - 128:8</p> <p style="text-align: center;"><b>V</b></p> <p><b>vended</b> [1] - 4:13</p> <p><b>vendor</b> [1] - 10:18</p> <p><b>versus</b> [6] - 3:5, 18:5, 23:15, 42:4, 49:23, 119:8</p> <p><b>vestige</b> [9] - 13:17, 24:11, 36:7, 54:6, 54:10, 54:11, 54:12, 54:15, 132:5</p> <p><b>vestiges</b> [13] - 18:4, 18:9, 33:21, 35:9, 35:17, 35:23, 36:24, 37:10, 37:15, 44:11, 81:18, 103:25, 148:10</p> <p><b>vettid</b> [1] - 91:19</p> <p><b>vetting</b> [2] - 92:9, 96:12</p> <p><b>VI</b> [2] - 80:12, 103:23</p> <p><b>vice</b> [2] - 101:10, 101:11</p> <p><b>victims</b> [1] - 116:9</p> <p><b>video</b> [1] - 77:10</p> <p><b>view</b> [10] - 17:22, 21:12, 32:4, 37:24, 37:25, 50:7, 106:10, 111:15, 131:9, 137:7</p> <p><b>viewed</b> [2] - 106:20, 149:1</p> <p><b>viewing</b> [1] - 74:23</p> <p><b>violate</b> [1] - 92:6</p> <p><b>violation</b> [5] - 63:8, 115:5, 115:9, 115:12, 116:24</p> <p><b>violative</b> [6] - 89:10, 116:21, 117:11, 143:9, 143:10</p> <p><b>virtually</b> [1] - 143:4</p> <p><b>visibly</b> [3] - 66:8, 66:9, 66:11</p> <p><b>visit</b> [2] - 65:18, 66:6</p> <p><b>visited</b> [1] - 41:12</p> <p><b>vitation</b> [1] - 93:11</p> <p><b>Vivona</b> [4] - 56:2, 56:14, 56:21, 123:19</p> <p><b>voice</b> [1] - 71:10</p> <p><b>voilà</b> [1] - 65:3</p> <p><b>voluntarily</b> [1] - 107:22</p> <p><b>voluntary</b> [3] - 16:15, 17:5, 61:2</p> <p><b>VS</b> [1] - 1:7</p> <p><b>vs</b> [1] - 153:5</p>	<p style="text-align: center;"><b>W</b></p> <p><b>waited</b> [1] - 10:20</p> <p><b>Walden</b> [1] - 97:10</p> <p><b>walk</b> [1] - 23:24</p> <p><b>walking</b> [1] - 120:8</p> <p><b>wants</b> [5] - 6:8, 52:1, 53:21, 69:22, 124:13</p> <p><b>Wasylak</b> [2] - 2:3, 3:24</p> <p><b>WASYLAK</b> [1] - 3:24</p> <p><b>ways</b> [1] - 28:6</p> <p><b>weak</b> [1] - 39:16</p> <p><b>wealth</b> [1] - 60:16</p> <p><b>website</b> [1] - 84:18</p> <p><b>week</b> [1] - 75:22</p> <p><b>weeks</b> [1] - 7:25</p> <p><b>welcome</b> [2] - 141:9</p> <p><b>well-known</b> [1] - 117:2</p> <p><b>well-regarded</b> [1] - 77:6</p> <p><b>West</b> [1] - 85:12</p> <p><b>whereas</b> [1] - 99:17</p> <p><b>white</b> [11] - 14:16, 50:6, 99:18, 100:3, 100:15, 132:11, 132:18, 143:1, 144:6, 144:7</p> <p><b>whites</b> [3] - 22:16, 99:16, 115:24</p> <p><b>whole</b> [5] - 33:5, 40:8, 81:9, 117:12, 145:10</p> <p><b>william</b> [1] - 87:20</p> <p><b>Wilson</b> [2] - 85:24, 98:4</p> <p><b>wishes</b> [3] - 8:20, 34:2, 88:10</p> <p><b>withstanding</b> [1] - 28:25</p> <p><b>witness</b> [3] - 13:4, 62:12, 97:17</p> <p><b>witnesses</b> [13] - 14:20, 28:18, 42:10, 42:20, 67:9, 72:24, 83:12, 104:19, 116:2, 116:6, 132:16, 145:14, 146:13</p> <p><b>wonderful</b> [1] - 150:9</p> <p><b>word</b> [1] - 13:16</p> <p><b>words</b> [3] - 91:2, 105:12, 112:2</p> <p><b>works</b> [3] - 111:11, 147:6, 147:20</p> <p><b>world</b> [4] - 80:22, 85:5, 148:23</p> <p><b>world-class</b> [4] - 80:22, 85:5, 148:23</p> <p><b>worse</b> [1] - 27:8</p> <p><b>worst</b> [2] - 86:12</p>	<p><b>worth</b> [2] - 44:24, 50:17</p> <p><b>wrap</b> [1] - 68:23</p> <p><b>write</b> [1] - 50:10</p> <p><b>writing</b> [2] - 6:1, 50:16</p> <p><b>writings</b> [1] - 117:1</p> <p><b>wrote</b> [3] - 132:4, 139:11, 145:1</p> <p style="text-align: center;"><b>Y</b></p> <p><b>year</b> [9] - 74:11, 89:14, 89:15, 91:20, 92:1, 92:3, 95:19, 95:20, 145:5</p> <p><b>years</b> [9] - 77:22, 90:20, 94:24, 95:7, 100:4, 118:12, 122:15, 144:8, 146:9</p> <p><b>yourself</b> [3] - 3:8, 3:19, 126:13</p> <p style="text-align: center;"><b>Z</b></p> <p><b>Zepeda</b> [2] - 1:22, 4:8</p>
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