

DISTRICT OF COLUMBIA  
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ALCOHOLIC BEVERAGE CONTROL BOARD  
+ + + + +  
MEETING

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IN THE MATTER OF: :  
: :  
Watergate Hotel Lessee, LLC :  
t/a Watergate Hotel : Protest  
2650 Virginia Avenue, NW : Hearing  
Retailer CH :  
License No. 91162 :  
Case #13-PRO-00005 :  
: :  
(New Application) :  
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May 8, 2013

The Alcoholic Beverage Control Board met in the Alcoholic Beverage Control Hearing Room, Reeves Building, 2000 14th Street, N.W., Suite 400S, Washington, D.C. 20009, Chairperson Ruthanne Miller, presiding.

PRESENT:

- RUTHANNE MILLER, Chairperson
- NICK ALBERTI, Member
- DONALD BROOKS, Member
- HERMAN JONES, Member
- MIKE SILVERSTEIN, Member

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

(3:59 p.m.)

CHAIRPERSON MILLER: Our next hearing is at 4:30, I believe, so the Board will take a recess until 4:30. Thank you.

(Whereupon, at 3:59 p.m. a recess until 4:36 p.m.)

CHAIRPERSON MILLER: Okay. We have a full house this afternoon. And I assume everybody is here for a Protest Hearing, Case No. 13-PRO-00005, the Watergate Hotel Lessee located at 2650 Virginia Avenue, N.W., License No. 91162.

I see some individuals have already come to the table, so you probably signed in. And would you identify yourselves for the record, please?

MR. O'BRIEN: Stephen O'Brien for the applicant and I'm accompanied by Jacques Cohen, C-O-H-E-N, who is the applicant's managing member.

CHAIRPERSON MILLER: Okay.

1 MR. MARCUS: Stephen Marcus and my  
2 colleague, Erica Mueller, for the protestants.

3 CHAIRPERSON MILLER: Okay. So --

4 MS. DYMOWSKI: Good afternoon.

5 CHAIRPERSON MILLER: Oh.

6 MS. DYMOWSKI: -- Julie Dymowski  
7 on behalf of Watergate West.

8 CHAIRPERSON MILLER: Do you want  
9 to pull up a chair there?

10 MS. DYMOWSKI: I'm fine.

11 CHAIRPERSON MILLER: You're okay.  
12 All Right. If you need to speak, you can come  
13 back again. Thank you.

14 Okay. So this is scheduled for a  
15 Protest Hearing. However, we need to  
16 determine whether there are any parties left  
17 to carry on a protest.

18 So I know that Ms. Mueller has  
19 submitted a letter stating that there are.  
20 Upon review of the file, the Board is not so  
21 certain that there are any parties left.

22 I understand the ANC has come into

1 settlement agreement as has a group of 14, is  
2 what they were known as, with a designated  
3 representative of Mr. William Smith and then  
4 there is another group, I believe. They have  
5 been referred to as either the group of 8 or  
6 the Watergate West.

7 So I would like the parties first  
8 to speak to whether there are already parties  
9 left in this proceeding who are entitled to  
10 pursue the Protest Hearing.

11 MS. MUELLER: My name is Erica  
12 Mueller and I'm here on behalf of the  
13 protestants. And I just want to do what I can  
14 to satisfy you that there is a group of  
15 protestants who are here and we believe they  
16 do have standing to proceed before the Board.

17 CHAIRPERSON MILLER: Okay. Okay.  
18 First, I want to be clear who you are  
19 representing and then I just want to, this is  
20 kind of an unusual situation, just figure out  
21 who should go first, if it matters.

22 So, Ms. Mueller, who exactly are

1 you representing here?

2 MS. MUELLER: I'm representing the  
3 group of protestants. I'm here on their  
4 behalf.

5 CHAIRPERSON MILLER: Who?

6 MS. MUELLER: My --

7 CHAIRPERSON MILLER: What part?

8 MS. MUELLER: The individuals who  
9 are here today are Judge Pauline Newman,  
10 Cynthia Walker, who are clients. We also have  
11 here today Michael Walsh, June Walsh, Herbert  
12 Goda, Robert Burney, Maria Hughes and Jerry  
13 Waldman. All of these individuals signed the  
14 protest initially.

15 CHAIRPERSON MILLER: Okay. Before  
16 we get into the full blown argument on that,  
17 do you have an opinion with respect to do you  
18 care who goes first with addressing this  
19 issue?

20 MS. MUELLER: I would prefer to go  
21 first, but --

22 CHAIRPERSON MILLER: Do you have

1 an opinion, Mr. O'Brien?

2 MR. O'BRIEN: I'm have no  
3 objection to that.

4 CHAIRPERSON MILLER: Okay. Fine.

5 MS. MUELLER: Under DC Code 25-  
6 601, all you are required to have is a group  
7 of no fewer than five residents or property  
8 owners. And the Board can require protestants  
9 to appear before a Roll Call Hearing and my  
10 understanding is some of the Board's concerns  
11 today are that not every individual in the  
12 group appeared at the Roll Call Hearing.

13 There was originally a group of 32  
14 protestants who were represented by a Dr.  
15 William Smith. And certain of those  
16 individuals attended the Roll Call.

17 Now, the purpose of the Roll Call,  
18 as is laid out in the Municipal Regulations,  
19 is to ensure that the group seeking standing  
20 has a sufficient number of members here, five  
21 people. It is not to determine which  
22 individuals in the group have standing. You

1 are conferring standing on the group, not on  
2 the individuals who are part of the group.

3 And at the Roll Call, each  
4 individual can appear either in person or  
5 through a designated resident --  
6 representative.

7 Now, Dr. Smith appeared at the  
8 Roll Call Hearing on behalf of many of those  
9 in the group, including four of those who are  
10 here today.

11 Now, I understand that eight of  
12 the names -- you said there is a group of 11  
13 that had withdrawn from the group. Eight of  
14 those names were never part of the protest, so  
15 it was a group of 32 protestants, eight  
16 withdrew, the other 24 signatories did not  
17 withdraw and each of the protestants who is  
18 here today either personally attended the  
19 February 25th meeting or had their designated  
20 representative either Dr. Smith or another  
21 individual appear on their behalf.

22 Hence, we believe the group was

1 found to have standing, at that time, and  
2 merely because certain members of that group  
3 have withdrawn after the Roll Call Hearing,  
4 does not mean that the group as a whole no  
5 longer has standing.

6 Now, there are more than five  
7 individuals who are still members of that  
8 group who are here today and, as I said, I  
9 identified them before and I would like them  
10 to raise their hand to show that they are,  
11 indeed, president -- present.

12 We have Judge Pauline Newman. We  
13 have Michael Walsh, Cynthia Walker, Herbert  
14 Goda, Robert Burney, Maria Hughes and Jerry  
15 Waldman, who was originally part of the group  
16 of eight, as you referred to it, but he has a  
17 common grounds for protest with our group and  
18 he is here to join on our behalf.

19 CHAIRPERSON MILLER: Okay. So I  
20 think, at this point then, we should hear from  
21 Mr. O'Brien and then maybe ask questions,  
22 unless Board Members feel otherwise. Okay.

1 MR. O'BRIEN: Very well. The  
2 starting point is, as counsel cited, DC Code  
3 25-601, standing to file a protest. And it  
4 says that the following persons may file a  
5 protest: An abutting property owner, a group  
6 of five or more, a citizens association, and  
7 ANC and on.

8 So a group of five or more is a  
9 person for purposes of standing. Section 602  
10 says "Any person objecting under 601," a  
11 person again being a group of five or more,  
12 "shall notify the Board of its intention to  
13 object and the grounds for the objection  
14 within the protest period."

15 The protest period is defined at  
16 DC Code 101(41) as a 45 day period during  
17 which objection to the issuance or renewals  
18 may be filed.

19 So a person must file the person's  
20 protest within 45 days, within that 45 day  
21 window, which I represent to the Board expired  
22 on February 11th.

1                   The ANC protested. The ANC has  
2 essentially withdrawn. The Watergate West, an  
3 abutting property owner, Watergate West, Inc.  
4 protested. Watergate West has since  
5 withdrawn.

6                   There were two groups of five or  
7 more that filed objections. And resolution of  
8 this may require reading of portions of the  
9 transcript of the Roll Call Hearing, which  
10 occurred on February 25.

11                   And notwithstanding Ms.  
12 Fletcher's, Ms. Fletcher for the record is the  
13 person who conducted the Roll Call, explicit  
14 invitation that these groups might want to  
15 merge and consider themselves one happy group,  
16 both groups said no, we are not with the other  
17 group. We are with our group.

18                   The one group which was  
19 represented by Ms. Dymowski consisted of eight  
20 individuals. The Board should have copies of  
21 the withdrawal by four of those. And if you  
22 need those names that were withdrawn, I can

1 supply them. But four of the original eight  
2 have withdrawn, leaving only four.

3 Of those, counsel purports to  
4 represent -- of the four remaining, counsel  
5 were forced to represent three, Newman -- I'm  
6 sorry, two, Newman and Waldman. I don't think  
7 we have to spend a lot of time --

8 MEMBER ALBERTI: What was the  
9 second name? I'm sorry.

10 MR. O'BRIEN: Waldman, W-A-L-D-M-  
11 A-N. I don't think we have to spend a lot of  
12 time on this part of it, because although two  
13 is less than five, so is four. That group is  
14 below five and thus is no longer a person  
15 entitled to standing.

16 Now, the second protest was filed  
17 by a group of 22 names, I counted. Of those,  
18 I believe it was 11 were represented at the  
19 Roll Call Hearing either in-person or through  
20 a written designation of Dr. Smith as their  
21 representative.

22 That group included, I think it

1 was 11, Mr. Walsh, but not Mrs. Walsh, who  
2 although she signed the protest petition, did  
3 not appear at the Roll Call and did not  
4 appoint a representative.

5 Mr. Goda signed the original  
6 petition, but did not appear at the Roll Call  
7 and did not appoint a representative.

8 At the conclusion -- during the  
9 course of the Roll Call, the group, that group  
10 I should say, the latter group, was held to  
11 consist of Will Smith, Ann Smith, Pauline  
12 Newman, and to avoid confusion Pauline Newman  
13 is a member of both groups, Daniel Deming,  
14 Michael Walsh, Sharie Kelly, Kel Kelly,  
15 Madeline Deming, Michelle Michaels, Carrie  
16 Time and I think that was it. One, two,  
17 three, four, five, six, seven, eight, nine,  
18 ten.

19 Eight of those names that I just  
20 read have withdrawn. That group is well below  
21 five, so that group is no longer a person.

22 Now, what I understand the

1 protestants, and of course use of the term  
2 protestants begs the very question that we are  
3 discussing here, to be trying to do is on the  
4 day of the Protest Hearing, months after the  
5 Roll Call, is to create a bionic group of five  
6 or more by taking a couple from this group and  
7 a couple from that group and maybe adding some  
8 that were -- who never even showed up in the  
9 first place and were denied standing at the  
10 Roll Call.

11           Neither group has five or more  
12 remaining. And it is months too late to  
13 create a group. A group is a person and a  
14 person had to have filed the protest during  
15 the 45 day window, which closed on February  
16 11th.

17           MS. MUELLER: I would like to  
18 respond to that, because I think he is  
19 misstating what I'm actually saying. And  
20 there is a couple of points that I would like  
21 to make here.

22           First, the purpose of the Roll

1 Call Hearing is to ensure that a group has at  
2 least five members. There is no requirement  
3 in the Municipal Regulations saying that there  
4 is a determination to be made at the Roll Call  
5 Hearing as to which individuals are members of  
6 the group.

7 It is a determination of whether  
8 the group has standing. And as he indicated,  
9 it was found at the Roll Call Hearing that the  
10 group of 32 residents, the 22 is incorrect,  
11 there were 32 people on the original petition,  
12 was found to have standing nor as he suggests  
13 is there any requirement in the Municipal  
14 Regulations that you need to designate a  
15 representative in writing.

16 Dr. Smith had been functioning as  
17 the designated representative for the group  
18 and he was not -- only there on behalf of any  
19 members of the group who were unable to get  
20 there on that day.

21 The group that was found to have  
22 standing consisted of 32 members. As Mr.

1 O'Brien has indicated, eight of those members  
2 have withdrawn their support. That does not  
3 mean that the group no longer has standing or  
4 that the group --

5 CHAIRPERSON MILLER: Okay. Can I  
6 interrupt you, so we can focus on certain  
7 issues?

8 MS. MUELLER: Sure.

9 CHAIRPERSON MILLER: Okay. So one  
10 of your points is that it was a group of 32  
11 that was given standing as a group. And when  
12 I read the transcript, I didn't see a group of  
13 32 being given standing.

14 MS. MUELLER: There was a group of  
15 32 who had filed a petition, that is the group  
16 that we are referring to here. And the  
17 purpose of the Roll Call Hearing --

18 CHAIRPERSON MILLER: Yes, okay.  
19 They filed a petition with --

20 MS. MUELLER: Yes.

21 CHAIRPERSON MILLER: -- the  
22 Agency?

1 MS. MUELLER: Yes.

2 CHAIRPERSON MILLER: Okay.

3 MS. MUELLER: There is a petition  
4 with 32 names that was submitted to the  
5 Agency.

6 CHAIRPERSON MILLER: Right. But  
7 that doesn't mean that they were granted  
8 standing as part of a group.

9 MS. MUELLER: The purpose of the  
10 Roll Call Hearing is to -- is -- pursuant to  
11 Municipal Regulations is to determine whether  
12 the group that submitted the protest has  
13 standing. There is nothing in the Municipal  
14 Regulations that states that it -- the  
15 function of the Roll Call Hearing is to  
16 determine whether any individual name -- any  
17 individual person who signed a protest has  
18 standing for the -- you are granting standing  
19 to the group. You are not granting standing  
20 to the individual.

21 The group was granted standing.

22 The group consists of 32 names who signed a

1 petition. I think any determination that she  
2 makes to the contrary is actually legal error.

3 CHAIRPERSON MILLER: So you are  
4 challenging? Ms. Fletcher, at the Roll Call  
5 Hearing, granted standing to a group of, I  
6 believe, 22 and said that all those  
7 individuals who did not appear in person or  
8 through a designated representative were  
9 dismissed.

10 MS. MUELLER: Well, the --

11 CHAIRPERSON MILLER: Was that ever  
12 appealed?

13 MS. MUELLER: The individuals who  
14 -- did appear through a representative and Dr.  
15 Smith was that representative.

16 CHAIRPERSON MILLER: Did --

17 MS. MUELLER: They are not  
18 required to submit anything in writing saying  
19 that Dr. Smith is their representative.  
20 Absolutely no requirement of regulations for  
21 that.

22 CHAIRPERSON MILLER: What is there

1 in the record that shows that Mr. Smith was  
2 the designated representative of 32 people?

3 MS. MUELLER: His function, as the  
4 designated representative of the group  
5 throughout this process, he is the one who  
6 your Board has been dealing with. He is the  
7 one who has been in negotiations with the  
8 other side about the possibility of entering  
9 into a voluntary agreement instead of  
10 continuing with the protest.

11 Up until he withdrew, because  
12 there was a difference of opinion within the  
13 group, he was leading the protest.

14 CHAIRPERSON MILLER: You  
15 understand that at the Roll Call Hearing that  
16 some individuals submitted written letters  
17 designating someone to represent them?

18 MS. MUELLER: Yes, I understand  
19 that. I also know that it's not required.

20 CHAIRPERSON MILLER: I think it is  
21 required. I just want to bring your  
22 attention, besides the regulation, to a letter

1 dated February 13, 2013 that our community  
2 resource advisor sent to all who had submitted  
3 indication that they wanted to protest The  
4 Watergate Hotel and it says "You must appear  
5 for the Roll Call Hearing in person or provide  
6 a written statement designating a  
7 representative who must appear for the hearing  
8 on your behalf. Failure to do so will result  
9 in the dismissal of the protest without  
10 further notice."

11 And I think this is tied to our  
12 Regulation 1602.3, "Failure to appear in  
13 person or through a designated representative  
14 may result in denial of the license  
15 application or dismissal of a protest, unless  
16 good cause is shown."

17 MS. MUELLER: I think what you are  
18 referring to is saying that failure to appear  
19 -- this is 1602.3, "Failure to appear in  
20 person may result in the dismissal of the  
21 protest." That is because the purpose of the  
22 Roll Call Hearing is to ensure that there are

1 at least five members and that the group,  
2 hence, has standing.

3 There were more than five members  
4 that attended. The group was found to have  
5 standing and, hence, there was no basis for  
6 dismissing the protest.

7 CHAIRPERSON MILLER: So it's your  
8 position that a group could be given standing  
9 and then the majority of them could drop out  
10 and new members could come in and they should  
11 be given the same standing?

12 MS. MUELLER: The new members did  
13 not come in. The -- I have seven individuals  
14 here today who were signatories to that  
15 original protest, that is more than the five  
16 that is --

17 CHAIRPERSON MILLER: So  
18 signatories to a protest, you think that gives  
19 them standing?

20 MS. MUELLER: I think it does.

21 CHAIRPERSON MILLER: Just because  
22 they sign a protest?

1 MS. MUELLER: Standing is  
2 required. You need to have a group of five or  
3 more residents with a common interest who  
4 submit a protest application and that is what  
5 was done.

6 Then there was a Roll Call Hearing  
7 to determine whether that group of 32  
8 individuals had standing. Several individuals  
9 appeared in person, several individuals  
10 appeared through a designated representative  
11 and the group, the group who is the person, as  
12 Mr. O'Brien pointed out here, was found to  
13 have standing.

14 CHAIRPERSON MILLER: But --

15 MS. MUELLER: There is nothing in  
16 the regulations that say that you can make a  
17 determination that any individual protestor is  
18 not able to continue with the protest. The  
19 only thing that the Board can determine is  
20 whether -- if there is not five people who are  
21 present and they don't find that there is a  
22 group accordingly that has standing, then,

1 yes, they risk having the protest dismissed.

2 That was not the case here.

3 CHAIRPERSON MILLER: So it's your  
4 position that it doesn't matter, as long as  
5 it's over five, whether it is called group of  
6 14 or it's called a group of 50 and it doesn't  
7 matter?

8 MS. MUELLER: I'm not following  
9 what you are saying.

10 CHAIRPERSON MILLER: Well, Ms.  
11 Fletcher found that it was a group of 22 on  
12 the record.

13 MS. MUELLER: Well, I think that--

14 CHAIRPERSON MILLER: So I'm asking  
15 you, I think that that has significance that  
16 she recognized 22 members as being the group.

17 MS. MUELLER: I think she might  
18 have miss -- respectfully, I think she may  
19 have miscounted. I have copies for everyone  
20 on the Board of the protest petition that was  
21 submitted and there were actually 32 names.

22 CHAIRPERSON MILLER: Right.

1 MS. MUELLER: Not 22.

2 CHAIRPERSON MILLER: I under --

3 MS. MUELLER: Regardless of  
4 whether there was 32 or 22, if only eight  
5 people have withdrawn, then there are still  
6 sufficient names to satisfy the five person  
7 threshold that we need to hit here.

8 CHAIRPERSON MILLER: But I just  
9 don't want to argue too much, but I have read  
10 the Roll Call transcript and that she came to  
11 the number of 22 by not recognizing some  
12 protestants, because they hadn't appeared in  
13 person or submitted something in writing  
14 designating a representative.

15 MS. MUELLER: Respectfully, there  
16 is nothing in the regulations that say that  
17 the Board can or cannot recognize an  
18 individual protestant who is a member of a  
19 group, they can recognize the group at the  
20 Roll Call Hearing and they can determine --  
21 the purpose of the Roll Call Hearing is to  
22 determine whether there are sufficient

1 individuals to have standing for that group  
2 and that was satisfied.

3 CHAIRPERSON MILLER: That's my  
4 question though. Like just different members  
5 can come in as long as there is a group --

6 MS. MUELLER: I think --

7 CHAIRPERSON MILLER: -- of members  
8 over five?

9 MS. MUELLER: -- we are not  
10 tracking. We are not having different members  
11 come in. There was a group of 32 individuals  
12 who signed a protest, I have it here,  
13 submitted the protest to ABRA. There was then  
14 a Roll Call Hearing. Most of the members of  
15 the group designated Dr. Smith as their  
16 representative to attend the hearing.

17 Other members attended in person  
18 and the purpose of the Roll Call Hearing, in  
19 any event, is to determine and I quote "that  
20 a sufficient number of individuals exist to  
21 have standing." Not to determine which  
22 individual protesters may or may not continue

1 as part of the group. That is not what the  
2 regulations provide.

3 So of those 32 names, the group  
4 was certified to have standing, eight names  
5 have withdrawn and there is 24 names that have  
6 not withdrawn, seven of those individuals are  
7 sitting behind me today.

8 CHAIRPERSON MILLER: Okay. What  
9 regulation are you looking at?

10 MS. MUELLER: I am looking at  
11 1605.4. "The Board may require protestants to  
12 appear before the Board for the purpose of  
13 determining that a sufficient number of  
14 individuals exist to have standing, pursuant  
15 to DC Code 25-601."

16 DC Code 25-601 says standing,  
17 "Often required for standing is a group of no  
18 fewer than five residents or property owners  
19 of the District sharing common grounds for  
20 their protest." And that was the purpose of  
21 the Roll Call Hearing, whether you had five  
22 residents or property owners who were members

1 of that group.

2 If it would be helpful --

3 CHAIRPERSON MILLER: So is it --

4 MS. MUELLER: -- I could bring up  
5 a copy of the petition that has all 32 names  
6 on it.

7 CHAIRPERSON MILLER: No, I think I  
8 have that in the record.

9 MS. MUELLER: Okay.

10 CHAIRPERSON MILLER: But I think  
11 what I'm hearing you say is -- wait you think  
12 she committed legal error by --

13 MS. MUELLER: Yes, I do because I  
14 think the purpose of the Roll Call Hearing is  
15 as she states one purpose of the hearing is  
16 I'm going to break it down and see who is here  
17 from each group and determine if the group has  
18 standing as protestants.

19 She is not -- there is nothing in  
20 the regulations that says that she can  
21 determine which individual signatories to a  
22 protest can continue with the protest, based

1 on their appearance at the Roll Call Hearing.

2 The purpose of the Roll Call  
3 Hearing is to ensure that there is a group  
4 that exists that has more than five members  
5 who are residents with a common purpose who  
6 are districts -- members of the District of  
7 Columbia and, hence, can be certified as a  
8 group who has standing.

9 I do think it is error if she went  
10 through each individual, because there is  
11 absolutely no legal basis for that in the  
12 regulations.

13 CHAIRPERSON MILLER: Okay.

14 MR. O'BRIEN: Madam Chair?

15 CHAIRPERSON MILLER: Yes?

16 MR. O'BRIEN: I don't recall my  
17 review of the transcript disclosing that Ms.  
18 Smith ever announced -- I'm sorry, Ms.  
19 Fletcher ever announced that there existed a  
20 group of 32.

21 CHAIRPERSON MILLER: No.

22 MR. O'BRIEN: Now if I have missed

1 it, so be it. What I see in the transcript is  
2 that Ms. Fletcher says on page 29, starting on  
3 line 12, "Okay, thank you. So the group that  
4 started out as a group of 22 is now a group of  
5 nine," because nine showed up in person or  
6 through a written designation.

7 She then says "Anybody that is not  
8 present today and did not designate a  
9 representative to appear on the behalf is  
10 dismissed." But the Roll Call Hearing Notice  
11 states that.

12 The group of nine has standing to  
13 file a protest. Now, we have a group of nine.  
14 What she then did is very charitably added to  
15 that group Cynthia Walker who had filed her  
16 own separate individual protest, which, of  
17 course, as we all know does not confer  
18 standing on anybody. But she said I'll -- she  
19 could have dismissed Ms. Walker. Instead she  
20 said I'll add her to the Smith group of nine  
21 and now you have 10.

22 And then Mr. Smith came up with a

1 couple written designations, three more, I  
2 believe it was Ann Smith was the designated  
3 representative and that got it up to maybe 13  
4 and that's where it was left.

5 Standing was not granted to a  
6 group of 32 or even to a group of 22.

7 MS. MUELLER: Nonetheless, it was  
8 a group of 32 who applied for standing. There  
9 -- despite what the Board may have posted in  
10 The Watergate, there is nothing in the  
11 regulations that require any individual to  
12 designate a representative in writing in order  
13 to appear at that meeting. So Dr. Smith was  
14 there as the representative of the remainder  
15 of the group.

16 And despite what Ms. Fletcher may  
17 have done at the hearing and deciding to  
18 dismiss individual member of the protest,  
19 there is no authority for her to do so under  
20 the regulations. She can give standing to a  
21 group. She cannot take away the rights of  
22 individual protestants to be a member of that

1 group.

2 CHAIRPERSON MILLER: How do we  
3 know that Mr. Smith was the designated  
4 representative of those other individuals?

5 MS. MUELLER: Well, we thought  
6 that he was going to present that at the time  
7 and he acted --

8 CHAIRPERSON MILLER: He didn't.

9 MS. MUELLER: -- as the leader of  
10 the group and he had been -- the group  
11 believed he was there on behalf to express  
12 their interests.

13 MR. O'BRIEN: I would note that  
14 Dr. Smith sent an email today, which I think  
15 the Board has explicitly renouncing --

16 CHAIRPERSON MILLER: Okay.

17 MR. O'BRIEN: -- that he  
18 represented anybody other than the people that  
19 were with him and the three whose designations  
20 were -- nominated his wife.

21 CHAIRPERSON MILLER: So let me ask  
22 you this, okay, so if a group gets

1 represented, I mean, gets acknowledged or  
2 given standing as a protestant and then the  
3 group as represented at the Roll Call, 14  
4 individuals or whatever, negotiates a  
5 settlement agreement, that group has acted.

6 How is it that you are saying then  
7 other individuals can come do something else?

8 MS. MUELLER: Well, these aren't  
9 other individuals coming and doing something  
10 else. There was a group of 32 individuals.  
11 This is the group who 14 members of this group  
12 came to the Roll Call Hearing. The only  
13 purpose of the Roll Call Hearing was to ensure  
14 that you had a sufficient number of people  
15 that the -- so that the group had standing.

16 There were 14 people, as I believe  
17 you said, who were there on behalf of the  
18 group or 22 whatever the number is, far more  
19 than five.

20 There -- the only reason to  
21 require them to be there is to ensure that the  
22 group, and the group we are talking about is

1 not the group of individuals who shows at the  
2 Roll Call Hearing, it is the group who submits  
3 a petition, it's a group of five residents or  
4 owners in a property abutting who submits a  
5 petition.

6           There is nothing saying that if  
7 you don't show -- I will read to you from  
8 1602.3. "Failure to appear in person or  
9 through designated representative may result  
10 in denial of or dismissal of a protest." It  
11 does not say that it may result in a denial or  
12 dismissal of your individual rights to  
13 participate in the protest.

14           CHAIRPERSON MILLER: I don't think  
15 you are answering my question though. Okay?  
16 Because I know I understand what you are  
17 saying, I do.

18           MS. MUELLER: Okay.

19           CHAIRPERSON MILLER: So but my  
20 question is Mr. Smith as the designated  
21 representative of this group, that has been  
22 recognized at Roll Call, and that group, as

1 recognized at Roll Call, and particularly Mr.  
2 Smith as the designated representative have  
3 entered into a settlement agreement.

4 So how is it that some other  
5 members who weren't at the Roll Call can now  
6 say they have a right to do something  
7 different? There was only one group that was  
8 recognized.

9 MS. MUELLER: I think that's an  
10 error, because Dr. Smith and eight other  
11 individuals have withdrawn from the protest.  
12 They have not entered into a voluntary  
13 agreement.

14 CHAIRPERSON MILLER: Oh, I'm  
15 sorry. Thank you.

16 MS. MUELLER: No, they haven't.  
17 They have merely withdrawn from the protest.  
18 Their interest diverged from the rest of the  
19 protest group. They are -- opted to no longer  
20 take part in the protest, but they have not  
21 signed any voluntary agreement either  
22 individually or on behalf of a larger group.

1                   CHAIRPERSON MILLER: Okay. Have  
2 they withdrawn as a group or as individuals?

3                   MS. MUELLER: They have withdrawn  
4 as individuals.

5                   CHAIRPERSON MILLER: Okay. Mr.  
6 O'Brien?

7                   MR. O'BRIEN: I was raising my  
8 hand because I did want to correct --

9                   CHAIRPERSON MILLER: Oh. Thank  
10 you.

11                   MR. O'BRIEN: -- that Dr. Smith's  
12 group did not enter into a voluntary  
13 agreement. Rather Dr. Smith's group -- I  
14 shouldn't say group. The individuals, I think  
15 it was eight names that Dr. Smith submitted  
16 withdrew their protest in reliance upon the  
17 voluntary agreement that was entered into with  
18 protestant Watergate West.

19                   MS. MUELLER: That's actually --

20                   MEMBER ALBERTI: What was that  
21 last part of that, Mr. O'Brien?

22                   CHAIRPERSON MILLER: Okay.

1 MR. O'BRIEN: Sir?

2 MEMBER ALBERTI: What was the last  
3 part of your statement? They withdrew that?

4 MR. O'BRIEN: They withdrew their  
5 protest. Let me go back a step. All the Dr.  
6 Smith group in whatever constitution are all  
7 residents of The Watergate West Building.

8 MEMBER ALBERTI: Okay.

9 MR. O'BRIEN: In addition to the  
10 protest originally filed by The Watergate West  
11 board of directors, an abutting property  
12 owner, there was this group led, at one point,  
13 by Dr. Smith that also filed protest. Rather  
14 than sign the voluntary agreement, eight  
15 persons from the Smith group withdrew --

16 CHAIRPERSON MILLER: Okay.

17 MR. O'BRIEN: -- in reliance upon  
18 the voluntary agreement that West had  
19 negotiated.

20 MS. MUELLER: And to correct  
21 something that he said a minute ago, just in  
22 case it's not clear, they did not withdraw

1 their protest. I'm reading from what they  
2 submitted. They withdraw their names from the  
3 protest. They have not withdrawn the protest.  
4 And I have copies of this as well, if you  
5 would like to see it.

6 CHAIRPERSON MILLER: Okay. Do  
7 other Board Members have questions?

8 MEMBER ALBERTI: I'm trying to  
9 understand. Well, just so I understand your  
10 argument, Ms. Mueller, I'm going to sort of  
11 put it in my own words and hopefully in a very  
12 simple way.

13 MS. MUELLER: Okay.

14 MEMBER ALBERTI: I think what you  
15 are saying is that you have a group of  
16 protestants who sent in a protest letter and  
17 they are not -- their names all appear on it.  
18 In this case, it was -- you referred to it as  
19 a petition, but all their names appear on  
20 that. All right?

21 And what you are saying is that  
22 they should be viewed, from then on, as part

1 of the group, regardless of whether they  
2 designate a representative or show up at Roll  
3 Call or any of those things. Is that what you  
4 are saying?

5 MS. MUELLER: One, I believe they  
6 did designate a representative. I do believe  
7 they designated Dr. Smith. Two, I believe the  
8 purpose of the Roll Call is not to establish  
9 that every single individual -- not to require  
10 every single individual in a protest to  
11 appear, but, as I cited to you, to satisfy  
12 that there are a sufficient number of  
13 individuals that will satisfy the requirements  
14 of 1602.1, which is that there are five people  
15 in the group.

16 MEMBER ALBERTI: Okay.

17 MS. MUELLER: And that's the first  
18 Roll Call Hearing.

19 MEMBER ALBERTI: Well, let's go to  
20 that last point. So at Roll Call what --  
21 we'll take your interpretation. At Roll Call  
22 we verified that there is a sufficient number

1 of people. All Right. And then everybody  
2 drops out except one. Do we still have --  
3 when we go to the protest, do we still have a  
4 sufficient number of people?

5 MS. MUELLER: Are you saying as a  
6 group of six and five have withdrawn?

7 MEMBER ALBERTI: Yes, yes.

8 MS. MUELLER: In the hypothetical  
9 situation?

10 MEMBER ALBERTI: Yes.

11 MS. MUELLER: Well, I think that  
12 you need to have a group of five that still  
13 remains.

14 MEMBER ALBERTI: Okay.

15 MS. MUELLER: And that's not the  
16 issue here.

17 MEMBER ALBERTI: Okay. So we  
18 still have to have a group of five that  
19 remains.

20 MS. MUELLER: Yes.

21 MEMBER ALBERTI: And we have to  
22 determine somehow that there are five

1 remaining people, correct?

2 MS. MUELLER: Correct.

3 MEMBER ALBERTI: Okay.

4 MS. MUELLER: That's why I brought  
5 seven today.

6 MEMBER ALBERTI: Right, right,  
7 right. So all right. Let's go back to our  
8 dates. The 32 people, how do we know, other  
9 than the letter that we have coming forward to  
10 us originally, all right, at the next step at  
11 the Roll Call, how do we know that they are  
12 still interested in being protestants?

13 MS. MUELLER: Well I've got a  
14 petition. I have names on a list as well who  
15 have signed their name in the past couple of  
16 days reaffirming --

17 MEMBER ALBERTI: No, huh-uh. At  
18 the time of the -- we can't do this. You  
19 can't do this after the fact. You've got to  
20 do this as we go along. At the Roll Call, how  
21 do we know who of that 32 is still interested  
22 in being part of the group?

1 MS. MUELLER: We had four  
2 individuals who are here today show up and the  
3 remainder designated Dr. Smith as their  
4 representative.

5 MEMBER ALBERTI: And how did they  
6 -- okay. So we have four individuals, that  
7 leaves 28. How did they designate Dr. Smith  
8 to be their representative?

9 MS. MUELLER: He was acting --

10 MEMBER ALBERTI: How do I know  
11 that?

12 MS. MUELLER: -- as their de facto  
13 leader. You know that because you treated him  
14 as the leader. Mr. O'Brien treated him as the  
15 leader in negotiating on behalf of the group.

16 MEMBER ALBERTI: But how do I know  
17 that, and I hope this isn't a name on the  
18 list, John Smith -- John Doe. How do I know  
19 that John Doe really wants Mr. Smith to  
20 represent him? How do I know that? Just  
21 because Mr. Smith says oh, I represent the  
22 group? He doesn't tell me I'm specifically --

1 I never hear in the transcript that I'm  
2 representing John Doe.

3 How do I know? Just because John  
4 Doe's name is in this list of 32 people, how  
5 do I know that he wants Dr. Smith to represent  
6 him?

7 MS. MUELLER: He threw his name on  
8 the petition and knew that Dr. Smith was going  
9 to be attending on his behalf. The purpose of  
10 the Roll Call Hearing is to ensure that the  
11 group has a sufficient number of people.

12 MEMBER ALBERTI: I understand.  
13 But I'm looking at this and now we have the  
14 letter going forward and people drop out, we  
15 see it, people drop out all the time.

16 MS. MUELLER: Well --

17 MEMBER ALBERTI: I have to be  
18 certain that those people still are interested  
19 in the protest when we get to the Roll Call  
20 and how do I do that?

21 MS. MUELLER: You certify or your  
22 team certified at the Roll Call that there was

1 a group of protesters that existed that had  
2 standing.

3 MEMBER ALBERTI: Right. And we  
4 certified a group of how many was it?

5 MS. MUELLER: The group was --  
6 that you certified was a group of 32.

7 MEMBER ALBERTI: No. No, I think  
8 the group was certified as people -- if I read  
9 the transcript, and I forget the number, there  
10 was a smaller number that we had evidence. We  
11 had solid evidence through either their  
12 letters of representation or the present. we  
13 had evidence that we -- that led us to be  
14 confident that they were still interested.  
15 And that was, I think, what 22 people. Am I  
16 correct.

17 MR. O'BRIEN: 13 people.

18 MEMBER ALBERTI: 13 people. Okay.  
19 13 people.

20 MS. MUELLER: But the point of the  
21 Roll Call Hearing, the purpose of the Roll  
22 Call Hearing as laid out in the regulations,

1 is not to determine whether every single  
2 individual is a member of the group is still  
3 interested in continuing with the protest.  
4 And I would, you know, argue as an aside that  
5 if they weren't interested in continuing with  
6 the protest, they would have signed Dr.  
7 Smith's letter withdrawing.

8 The purpose is to determine  
9 whether there are sufficient numbers in the  
10 group to -- that it has standing. And that  
11 was satisfied.

12 Now, those eight individuals have  
13 since withdrawn. I think that it's a fair  
14 question once you receive the withdrawal  
15 letter to say, okay, eight people are gone.  
16 Who else is left? And my answer to you is 24  
17 people. 24 people.

18 This is not a situation where you  
19 had 10 names and eight withdrew. You had 32  
20 members of the group, that group was certified  
21 and if Ms. Fletcher went through and  
22 determined that certain individuals lost their

1 right to participate in the protest, then  
2 that's something that she does not have  
3 authority to do pursuant to the Municipal  
4 Regulations and that any of the protestors had  
5 no notice would happen as a result.

6 MEMBER ALBERTI: Well, there is  
7 the other side of the coin. It's not that she  
8 determined that they didn't have standing.  
9 She wasn't able to determine that they were --  
10 that they had standing. She wasn't able to  
11 determine that they were still part of this  
12 protest. I mean, I think that is how she made  
13 her judgment.

14 MS. MUELLER: But you are not  
15 granting them individual standing. You are  
16 granting a group standing.

17 MEMBER ALBERTI: No.

18 MS. MUELLER: And the group that--

19 MEMBER ALBERTI: I'm not. It's  
20 not individuals necessarily I'm granting  
21 standing, but I have to make sure that this  
22 group still has five members who are bona fide

1 participants, who are still interested. And  
2 that is what that purpose Ms. Fletcher was  
3 doing at the Roll Call was determining who was  
4 still interested.

5 MS. MUELLER: Well, she was --

6 MEMBER ALBERTI: She can't read  
7 minds.

8 MS. MUELLER: -- determining  
9 whether there were sufficient number for the  
10 group to continue with standing. And she  
11 determined that.

12 MEMBER ALBERTI: Okay.

13 MS. MUELLER: And I would  
14 represent to you there still is. I wouldn't  
15 have these seven individuals sitting behind me  
16 if there were not. And every single one of  
17 them signed that original petition.

18 MEMBER ALBERTI: Thank you.

19 CHAIRPERSON MILLER: Other  
20 questions? I mean, I hear what you are  
21 saying. I just want to ask you though, I  
22 think that at the Roll Call, she seemed to

1 dismiss some individuals who were part of the  
2 group, because they didn't have a letter, a  
3 written request for designation. Correct? So  
4 and you are saying that is legal error? I  
5 think is what you are saying.

6 MS. MUELLER: Respectfully, that's  
7 legal error, yes. She -- you could dismiss  
8 the protest. You can't dismiss an individual  
9 from the protest, at that time.

10 CHAIRPERSON MILLER: From the  
11 protest group?

12 MS. MUELLER: No, yes. You can't  
13 dismiss an individual from the protest group.  
14 "Failure to appear in person may result in a  
15 dismissal of the protest." It does not say  
16 failure to appear in person may result in your  
17 dismissal from the protest.

18 And I think that is a very  
19 critical distinction to make here.

20 CHAIRPERSON MILLER: I guess I  
21 think your case would be a lot cleaner if  
22 there was a clear designation that Mr. Smith

1 represented, you know, 100 people or 50 people  
2 or whatever, because --

3 MS. MUELLER: I agree.

4 CHAIRPERSON MILLER: Okay.

5 MS. MUELLER: I don't think that  
6 he was their designated representative. And  
7 I also think that it is unnecessary as long as  
8 there was sufficient numbers to designate the  
9 group. The purpose of it there, you can't  
10 take away an individual's rights without  
11 notification, without any authority to do so  
12 and failure to appear.

13 There was no indication to any of  
14 these individuals pursuant to DC Law that  
15 "Failure to appear in a Roll Call Hearing  
16 could result in withdrawal of their name from  
17 a protest petition that they had signed."

18 MR. O'BRIEN: That's not true.

19 CHAIRPERSON MILLER: Well, do you  
20 think that if Mr. Smith was their designated  
21 representative, he had a duty to let them know  
22 they had been dismissed?

1 MS. MUELLER: What Dr. Smith did  
2 or did not do is not something I can answer.

3 CHAIRPERSON MILLER: Yes, okay.

4 MEMBER ALBERTI: May I just for  
5 the record?

6 CHAIRPERSON MILLER: Yes, yes, go.

7 MEMBER ALBERTI: Ms. Mueller, just  
8 for the record, I have one of the letters that  
9 was sent out and this one was addressed to  
10 Jennifer Smith. In the third paragraph it  
11 says "You must appear for the Roll Call  
12 Hearing in person or provide written statement  
13 designating representative who must appear for  
14 the hearing on your behalf. Failure to do so  
15 will result in the dismissal of the protest  
16 without further notice."

17 So I think --

18 MS. MUELLER: That's --

19 MEMBER ALBERTI: -- there is some  
20 gray area here. I'll grant you that. And  
21 whether these people were -- it's not black  
22 and white. I mean, you could argue that these

1 people -- these protestants, these people who  
2 signed this petition were all notified. Every  
3 one of them were notified of the Board's  
4 practice that they are required to appear.

5 MS. MUELLER: If I --  
6 respectfully, if I heard what you just read  
7 correctly, it said "Your failure to appear may  
8 result in the dismissal of the protest." Is  
9 that correct?

10 MEMBER ALBERTI: Right.

11 MS. MUELLER: Yes, that tracks the  
12 statute.

13 CHAIRPERSON MILLER: Right.

14 MS. MUELLER: It may result in the  
15 dismissal of the protest, meaning if there are  
16 not five individuals who satisfy the critical  
17 threshold for your group, yes, it may result  
18 in dismissal of your protest. That does not  
19 say if you do not appear, that may result in  
20 your being dismissed from the protest group,  
21 even if the protest itself is allowed to  
22 continue.

1 MEMBER ALBERTI: Well --

2 MS. MUELLER: That is not what it  
3 says.

4 MEMBER ALBERTI: So even if we say  
5 that this letter doesn't tell you what the  
6 consequences are, the first sentence tells you  
7 what the requirement is.

8 MS. MUELLER: It tells you are  
9 required to appear. The purpose of it is to  
10 determine you have sufficient people for  
11 standing. It does not say that if you fail to  
12 appear, you may be removed from the protest  
13 group. I'm sorry, it just doesn't.

14 MEMBER ALBERTI: You know, I'll  
15 grant that you can argue that. I'll grant  
16 that, but it also is very clear that it says--  
17 the requirement is very clear. Whether or not  
18 the consequences are clearly stated, the  
19 requirement is very clear. You must appear.

20 MS. MUELLER: Well, the  
21 requirement is clearly stated in Municipal  
22 Regulations as well. The Municipal

1 Regulations also lay out what the consequence  
2 could be, which is dismissal of a protest.  
3 And the only grounds for the dismissal of  
4 protest would be if less than five people  
5 appeared and you did not, hence, find that the  
6 group had standing. And that's not the case  
7 that happened here.

8 MEMBER ALBERTI: Okay. Thank you.

9 CHAIRPERSON MILLER: Yes, Mr.  
10 O'Brien?

11 MR. O'BRIEN: Yes. Two things.  
12 Number one, the argument with respect to  
13 counsel is essentially circular, because the  
14 purpose of the Roll Call is to establish the  
15 existence of a person, in this case, a person  
16 consistent of a group of five or more.

17 If merely signing a piece of paper  
18 and doing nothing more would put one into a  
19 person then why bother having a Roll Call?  
20 What's the purpose of it?

21 In order to establish that a  
22 person existed, Ms. Fletcher had to see who

1 that person consisted of, how many individuals  
2 and by naming them, otherwise there is no way  
3 to keep track of this.

4 And to illustrate the point,  
5 counsel insisted she has seven people here  
6 today. I think she failed to count the  
7 Walshes twice. I think it's actually eight.  
8 Of those, four have never darkened this  
9 doorway until the case was called for trial.  
10 And that is June Walsh, Mr. Goda, Mr. Burney  
11 and Ms. Hughes. Never appeared, never  
12 designated anybody, did nothing.

13 And again, the purpose of the Roll  
14 Call is to figure out who the players are.  
15 And until today, we have no notice that these  
16 people are continuing to participate as Mr.  
17 Alberti argued. How does Ms. Fletcher know  
18 that they are still interested? Anybody will  
19 sign a piece of paper if a neighbor sticks it  
20 under their nose.

21 The purpose of the Roll Call is to  
22 see who is serious about this.

1 MS. MUELLER: Mr. O'Brien's  
2 argument is that he -- they were required to  
3 see which persons were interested in  
4 continuing with the group. But as Mr. O'Brien  
5 himself acknowledged before, the person  
6 referring to here is the group for the purpose  
7 -- in considering standing the following  
8 persons may protest, which is a group of no  
9 fewer than five residents.

10 We determined at the Roll Call  
11 Hearing that there was a group that existed.  
12 And honestly, it would not make sense just as  
13 a procedural matter to require every single  
14 member of a group to -- who signed any  
15 petition and was protesting anything to all  
16 appear en mass any time you had a hearing.

17 We are talking about a population  
18 that has a number of older residents, who may  
19 be mobility impaired. We have a number of  
20 residents who don't have access to email.  
21 There is an older -- significantly older crowd  
22 in this protest list. It's -- I think what he

1 is suggesting that every single member of a  
2 protest needs to appear every time is simply  
3 not what is required by the law.

4 And there is nothing that suggests  
5 that every individual needs to appear in order  
6 to remain a part of a protest.

7 MR. O'BRIEN: Appear or designate  
8 or represent?

9 CHAIRPERSON MILLER: Yes, right.  
10 Okay. Mr. Silverstein?

11 MEMBER SILVERSTEIN: I would like  
12 to ask Mr. O'Brien is the purpose of this  
13 entire proceeding beginning with the signing  
14 of a protest petition to come to a hearing or  
15 to come to hopefully a settlement through a  
16 voluntary agreement?

17 MR. O'BRIEN: I think the Board  
18 always hopes that cases are settled, but has  
19 to prepare for the eventuality that it will  
20 not be and that a hearing must be held.

21 MEMBER SILVERSTEIN: In order to  
22 have a settlement, do you need to know who

1 speaks for whom? Do you need to know who is  
2 on what team?

3 MR. O'BRIEN: Yes, and that's  
4 exactly what were -- the entries used. And  
5 that's exactly why we are here arguing this at  
6 this moment.

7 MEMBER SILVERSTEIN: That's --

8 MR. O'BRIEN: Okay? Let's say  
9 there were 150 people who signed a petition,  
10 does that mean that the settlement has to be  
11 negotiated individually with 150 people?  
12 That's just not practical.

13 The people who have enough  
14 interest in this case to bother either showing  
15 up or designating a representative, right,  
16 ended up, I think, we counted eventually 13,  
17 including designations and the number of those  
18 is well less than five.

19 And even if you take counsel's  
20 argument all the way with her, you still will  
21 have to mix and match protestant groups to  
22 create a new group at 5:20 in the afternoon of

1 trial a brand new group, okay?

2 Mr. Waldman was not part of the  
3 Smith group. Mr. Walsh was. Yes, I'm sorry.

4 MEMBER ALBERTI: Sir?

5 CHAIRPERSON MILLER: You have to  
6 come up to the table.

7 MEMBER SILVERSTEIN: He is not  
8 invited.

9 CHAIRPERSON MILLER: Mr. Walsh?  
10 Okay.

11 MEMBER SILVERSTEIN: This is not  
12 an arcane matter. That is why this is a  
13 difficult thing perhaps for folks out there to  
14 understand. If we are going to negotiate  
15 voluntary agreements, there has to be some  
16 understanding that the people who are doing  
17 the negotiating actually do speak for the  
18 people who have signed the petition.

19 And that is one of the reasons why  
20 this paragraph is there. If we have hundreds  
21 of protests filed, we have hundreds of  
22 voluntary agreements and very few protest

1       hearings, the process itself works that way.  
2       And what we are trying to determine here is  
3       what are the teams who were on those teams,  
4       and if something was or wasn't done, does that  
5       end the protest? And as the one side says,  
6       "can the other sides cobble together a group  
7       of five," or have the rights of the original  
8       protestants been taken?

9                       I would return it now, but --

10                      MEMBER ALBERTI:  Yes, but --

11                      CHAIRPERSON MILLER:  Mr. Alberti,  
12       go ahead.

13                      MEMBER ALBERTI:  I'm very focused  
14       here.  Mr. O'Brien, you made a claim that the  
15       other side is calling together a group of  
16       five.  So I want you to tell me who do you  
17       think belong -- who of the people -- whether  
18       or not you think that they had standing or  
19       not, I want you to divide all the people that  
20       they named.  How many people, Ms. Mueller, did  
21       you name?

22                      CHAIRPERSON MILLER:  Eight.

1 MS. MUELLER: There are seven here  
2 who signed the original petition and one here  
3 who had signed another petition, but also  
4 appeared at the February 25th hearing.

5 MEMBER ALBERTI: Okay.

6 MS. MUELLER: So eight in total.

7 MEMBER ALBERTI: You have eight in  
8 total. Mr. O'Brien, do you have those eight  
9 names? Can you tell me what you -- how you  
10 think they divide up into the two groups? And  
11 then I'll ask Ms. Mueller to respond to that.

12 I'm just trying to see if we do  
13 have a mix and match.

14 MR. O'BRIEN: I'm going to try and  
15 answer your question, but by the two groups?

16 MEMBER ALBERTI: I'm not sure.  
17 You said you are mixing together. Well, all  
18 right. Okay.

19 MR. O'BRIEN: All Right.

20 MEMBER ALBERTI: You do it however  
21 you want.

22 MR. O'BRIEN: All we know is was a

1 member of both groups.

2 MEMBER ALBERTI: Okay.

3 CHAIRPERSON MILLER: Yes.

4 MR. O'BRIEN: Mr. Waldman was a  
5 member of a group of eight.

6 MEMBER ALBERTI: Okay. Waldman?

7 MR. O'BRIEN: Yes, was a member of  
8 the group of eight. Mr. Walsh was a member of  
9 what we are calling the Smith group.

10 MEMBER ALBERTI: Okay.

11 MR. O'BRIEN: Those are the only  
12 ones that took any active role in this.

13 MEMBER ALBERTI: Those are the  
14 only people who either showed up -- according  
15 to you, the only people who showed up or had  
16 a letter of designation?

17 MR. O'BRIEN: Correct.

18 MEMBER ALBERTI: Okay.

19 MR. O'BRIEN: Now, Ms. Walker was  
20 added at Roll Call.

21 CHAIRPERSON MILLER: Yes.

22 MR. O'BRIEN: Ms. Walker ended the

1 role of protestant and her letter started by  
2 saying I'm writing you in my personal  
3 capacity.

4 MEMBER ALBERTI: I'm aware of  
5 that. All Right.

6 CHAIRPERSON MILLER: Yes.

7 MR. O'BRIEN: She should have been  
8 dismissed at Roll Call, but we will live with  
9 the result. She was added to the Smith group.

10 MEMBER ALBERTI: Okay.

11 MR. O'BRIEN: So there you have  
12 got one, two, three, four.

13 MEMBER ALBERTI: Right.

14 MR. O'BRIEN: And now, that's four  
15 by -- four from two different groups. Not  
16 four from one group.

17 MEMBER ALBERTI: Okay.

18 CHAIRPERSON MILLER: Right.

19 MR. O'BRIEN: The others, June  
20 Walsh, Goda, Burney and Hughes were not  
21 members of the Smith group and they were not  
22 members of the group of --

1                   MEMBER ALBERTI: June Walsh, Goda,  
2                   who else?

3                   MR. O'BRIEN: Burney, I think it  
4                   is spelled B-U-R-N-E-Y and Hughes, H-U-G-H-E-  
5                   S, were not members of the -- excuse me?

6                   MEMBER ALBERTI: Hughes?

7                   PARTICIPANT: I was on the Smith  
8                   group. He was on the Smith group.

9                   PARTICIPANT: He is not even a  
10                  resident.

11                  CHAIRPERSON MILLER: Okay. You  
12                  are not on the record, so we are only talking  
13                  to the parties at the table. Okay.

14                  MEMBER ALBERTI: Okay. I mean,  
15                  Ms. Mueller is going to have a chance to  
16                  respond to this. So okay, so again, these  
17                  four people were --

18                  MR. O'BRIEN: I'm looking at the  
19                  protest which is on three pages --

20                  MEMBER ALBERTI: Yes.

21                  MR. O'BRIEN: -- filed by -- the  
22                  first name is Ann Smith.

1 MEMBER ALBERTI: Okay.

2 MR. O'BRIEN: Now, on page 2 you  
3 have five signatures there, but those five  
4 signatures are also repeated on the third  
5 page.

6 MEMBER ALBERTI: Okay.

7 MR. O'BRIEN: And I counted 22  
8 here on --

9 MEMBER ALBERTI: Okay.

10 MR. O'BRIEN: -- the third page.

11 MEMBER ALBERTI: So but what's the  
12 status according --

13 MR. O'BRIEN: Now, Mr Goda was on  
14 that list originally. He is at the very  
15 bottom.

16 MEMBER ALBERTI: So he was in the  
17 group, the Smith group, but he didn't sign a  
18 letter of designation or appearance?

19 MR. O'BRIEN: He did not show.

20 MEMBER ALBERTI: Did not show.  
21 Okay.

22 MR. O'BRIEN: Okay.

1 MEMBER ALBERTI: June Walsh?

2 MR. O'BRIEN: And June Walsh also  
3 I see on that --

4 MEMBER ALBERTI: Okay.

5 MR. O'BRIEN: -- list. I do not  
6 see on this list Burney or Hughes.

7 MEMBER ALBERTI: Okay.

8 MS. MUELLER: On the original  
9 list, that's true.

10 MEMBER ALBERTI: Okay.

11 MR. O'BRIEN: Yes.

12 MEMBER ALBERTI: We can come back  
13 to you.

14 MR. O'BRIEN: I counted there are  
15 22.

16 MEMBER ALBERTI: Let me see what  
17 Ms. Mueller has to say. We'll come back.  
18 Okay. Ms. Mueller, you just heard this  
19 description of who belongs to who and whether  
20 they appeared and were designated.

21 Can you go through that same list  
22 for me? Because that's what -- those are the

1 eight people we are talking about. Those are  
2 the eight people we are talking about, right?

3 MS. MUELLER: Who are --

4 MEMBER ALBERTI: There's nobody --

5 MS. MUELLER: Who are here today.

6 MEMBER ALBERTI: I know. I know,  
7 but there is nobody else that we are concerned  
8 about, right?

9 MS. MUELLER: Well, we have other  
10 individuals.

11 MEMBER ALBERTI: Is that correct?

12 MS. MUELLER: We have other  
13 individuals who have signed the petition  
14 saying that they were a member of the original  
15 group and they are interested in continuing.  
16 Yes, but for the purposes of right now, we can  
17 continue with that list of names.

18 MEMBER ALBERTI: Okay. So let's  
19 go through that list and tell me that kind of  
20 information. Where did they first appear?  
21 What group were -- did they belong to? And do  
22 you believe that they appear or gave us a

1 letter of designation?

2 MS. MUELLER: I will say -- I will  
3 reiterate what I said before, there is no  
4 requirement that you give a letter of  
5 designation.

6 MEMBER ALBERTI: I got you. I got  
7 you. I'm still considering that.

8 MS. MUELLER: But let me --

9 MEMBER ALBERTI: But I want to get  
10 all the information --

11 MS. MUELLER: -- tell you what --

12 MEMBER ALBERTI: -- as I look at  
13 this. I've got to have all the information  
14 when I judge this, so --

15 MS. MUELLER: Respectfully, I  
16 think that when he is looking at the longer  
17 protest, which I'm calling the group of 32 and  
18 he is calling group of 22, I think he is not  
19 looking at the second page. There are two  
20 pages of names.

21 MEMBER ALBERTI: Okay. So you --

22 MS. MUELLER: So let me --

1 MEMBER ALBERTI: -- tell me where  
2 you are getting these names and --

3 MS. MUELLER: -- to go --

4 MEMBER ALBERTI: -- Mr. O'Brien  
5 can respond.

6 MS. MUELLER: We have Judge  
7 Pauline Newman, who was on the group of 32.  
8 We have Michael Walsh --

9 MEMBER ALBERTI: All Right. So  
10 she was part of the GS?

11 MS. MUELLER: Yes. And she also  
12 appeared at the Roll Call. We have Michael  
13 Walsh, who was part of that group of 32.

14 MEMBER ALBERTI: Okay.

15 MS. MUELLER: And attended the  
16 Roll Call. We have June Smith, who was part  
17 of the group of 32.

18 MEMBER ALBERTI: Wait, wait, wait.  
19 June Smith?

20 MS. MUELLER: June Walsh, I'm  
21 sorry. I'm misspeaking.

22 MEMBER ALBERTI: June Walsh?

1 MS. MUELLER: Yes, was part of the  
2 group of 32.

3 MEMBER ALBERTI: And was she --  
4 so, okay. I have Mr. Walsh as being  
5 designated through a letter. I have --  
6 designating a representative through a letter.  
7 Did June Walsh appear or designate somebody  
8 through a letter?

9 MS. MUELLER: She believed she was  
10 represented by Dr. Smith. She did not  
11 designate through a letter.

12 MEMBER ALBERTI: Okay. Okay.

13 MS. MUELLER: Or was she required  
14 to.

15 MEMBER ALBERTI: Okay. Fine.

16 MS. MUELLER: We have Herbert Goda  
17 who was part of that list of 32.

18 MEMBER ALBERTI: And did he appear  
19 or have a --

20 MS. MUELLER: He believed that Dr.  
21 Smith was representing his interests.

22 MEMBER ALBERTI: Okay. No letter

1 of designation. Okay. Okay.

2 MEMBER SILVERSTEIN: No letter?

3 MS. MUELLER: No letter  
4 designating.

5 MEMBER ALBERTI: Okay. I'm not  
6 passing judgment.

7 MS. MUELLER: Well, I understand.

8 MEMBER ALBERTI: I just want the  
9 information.

10 MS. MUELLER: I'm going through  
11 the list.

12 MEMBER SILVERSTEIN: We're just  
13 taking this down.

14 MS. MUELLER: Yes, I understand.  
15 Robert Burney was on that list of 32.

16 MEMBER ALBERTI: Yes.

17 MS. MUELLER: It was the same  
18 thing, he referred to Dr. Smith. No letter of  
19 designation.

20 MEMBER ALBERTI: Okay.

21 MS. MUELLER: Is what you're going  
22 to ask that next.

1 MEMBER ALBERTI: Right.

2 MS. MUELLER: Maria Hughes was on  
3 that list of 32.

4 MEMBER ALBERTI: Okay.

5 MS. MUELLER: Same thing, did not  
6 designate in writing, but believed Dr. Smith  
7 was appearing on behalf.

8 MEMBER ALBERTI: Okay.

9 MS. MUELLER: Cynthia Walker was  
10 not present when they were passing around the  
11 petition, which is why she submitted her's  
12 individually and at the Roll Call Hearing,  
13 they determined that was a non-issue and she  
14 was added to the group of 32.

15 MEMBER ALBERTI: Right.

16 MS. MUELLER: And then we have --  
17 that's seven of the eight we have here today.  
18 And then we have Jerry Waldman who was part of  
19 the separate group originally.

20 MEMBER ALBERTI: What separate  
21 group?

22 MS. MUELLER: There was a group of

1 -- there were two resident groups who  
2 submitted protests.

3 MEMBER ALBERTI: Okay. So he was  
4 part of the G8?

5 MS. MUELLER: G8. We will call  
6 them the G8.

7 MEMBER ALBERTI: Yes. Well,  
8 that's the way I'm designating it. I'm sorry.  
9 The group of eight.

10 MS. MUELLER: If we are coddling  
11 them together, we have seven people here who  
12 are members of the original protest list.

13 MEMBER ALBERTI: Okay. I got your  
14 argument. So is there some reason -- so the  
15 only -- we have two people who Mr. O'Brien  
16 isn't seeing and where do they appear, just to  
17 help Mr. O'Brien out. Where do they appear on  
18 that list?

19 MS. MUELLER: There is -- I think  
20 it might be the first page. I have copies for  
21 everyone on the Board if they don't have  
22 copies of the list.

1                   MEMBER ALBERTI: Can we get those  
2 copies, please?

3                   CHAIRPERSON MILLER: Yes, we might  
4 as well.

5                   MR. O'BRIEN: I have -- counsel  
6 has kindly shared with me an additional page  
7 of signatures which I have not seen before.  
8 When I got my copy, it didn't have this second  
9 page.

10                  MEMBER ALBERTI: Okay.

11                  MR. O'BRIEN: On the same form  
12 that -- I can see it's on the same form. But  
13 if you go to the transcript, again, I don't  
14 know where the number 32 appear.

15                  MEMBER ALBERTI: Okay.

16                  MR. O'BRIEN: I keep hearing that  
17 there is a group of 32. I don't know where  
18 this group of 32 is. I don't think Ms.  
19 Fletcher had it either, because she talks  
20 about a group of 22, original group of 22,  
21 because there is 22 names on this first sheet.  
22 And then she said of those, including nine

1 present, adding Ms. Walker charitably makes it  
2 10 and three designations.

3 MEMBER ALBERTI: So are you saying  
4 that you believe that because of the  
5 transcript that there was only one page here?

6 MR. O'BRIEN: I'm not saying that.  
7 I'm saying I have never seen it before and it  
8 is apparent that Ms. Fletcher had not seen it,  
9 because she is talking about a group of 22.

10 MS. MUELLER: Well, if there was  
11 an administrative error and Ms. Fletcher  
12 wasn't aware there was a second page, this is  
13 what was submitted and this is the petition  
14 that was signed.

15 MR. O'BRIEN: But none of this  
16 makes any difference.

17 CHAIRPERSON MILLER: Okay.

18 MEMBER ALBERTI: Well, I know. I  
19 know. From your point of view it doesn't make  
20 any difference. And but I just want to get  
21 all the facts out. Okay. I think that's all  
22 for me right now.

1                   CHAIRPERSON MILLER: Mr. O'Brien,  
2 I would like to ask you a question when you  
3 are free.

4                   MR. O'BRIEN: Can I respond  
5 further to Mr. Alberti?

6                   CHAIRPERSON MILLER: You might  
7 want to wait until he has your attention.

8                   MR. O'BRIEN: Okay. As a matter  
9 of fact, I do want his attention.

10                  CHAIRPERSON MILLER: You have his  
11 attention, I mean.

12                  MR. O'BRIEN: All Right. All  
13 Right.

14                  CHAIRPERSON MILLER: Yes.

15                  MEMBER ALBERTI: I was just  
16 getting some information from the transcript.

17                  MR. O'BRIEN: This is --

18                  MEMBER ALBERTI: Go ahead. I'm  
19 sorry.

20                  MR. O'BRIEN: -- a letter. This  
21 is the email to Ms. Fashbaugh of your staff of  
22 this afternoon from William Smith. And it

1 says in pertinent part "I believe 22 of these  
2 protestants who signed this note in advance of  
3 the ABRA protest deadline and eight signatures  
4 came in later." That's what Dr. Smith says in  
5 an email today.

6 That would explain why I only saw  
7 22, why Ms. Fletcher only saw 22. It appears,  
8 according to Dr. Smith, that the other eight  
9 were tardy.

10 MS. MUELLER: There is at least 10  
11 names on the second page. I don't think that  
12 would explain it. I don't see dates on any of  
13 this stuff, so I don't know if there is any  
14 support that he has for that other than Dr.  
15 Smith's hearsay.

16 MEMBER ALBERTI: So who was this  
17 letter submitted by originally?

18 MS. MUELLER: This was submitted  
19 by Dr. Smith, I believe. Yes.

20 MEMBER ALBERTI: So he was really  
21 the only person we could ask as to when this--  
22 these lists were signed.

1 CHAIRPERSON MILLER: Well --

2 MR. O'BRIEN: Yes, but as I state  
3 it doesn't matter.

4 MEMBER ALBERTI: I understand  
5 that.

6 CHAIRPERSON MILLER: It may be  
7 reflected in our file, too, if we got a  
8 separate list later.

9 MEMBER ALBERTI: All Right.

10 CHAIRPERSON MILLER: Mr. O'Brien,  
11 I just wanted to ask you a question as I know  
12 that you have been practicing before this  
13 Board for a while. Have you had this kind of  
14 situation before where you -- where a party  
15 has been or a group has represented some  
16 organization or whatever made up of a certain  
17 amount of individuals or does it matter?

18 I mean, it may be that the group,  
19 that the universe is bigger than what appears  
20 at the Roll Call, for instance. You know, if  
21 they represent a lot of tenants and only maybe  
22 20 show up because they think that is enough,

1       because they only need five.

2                   Have you seen this situation where  
3 others were allowed to interchange themselves  
4 or become part of the group, even though they  
5 didn't come to Roll Call? Maybe they  
6 submitted -- maybe like here they put their  
7 names in an original protest. I don't know.

8                   MR. O'BRIEN: Well, as I alluded  
9 to a minute ago, experience teaches that  
10 people will sign anything a neighbor puts  
11 under their nose. It's quite something else  
12 to expect them to come down here and  
13 participate in a protest proceeding.

14                   In my -- I hate to admit it, three  
15 decades plus practice here, the Board's  
16 practice has been uniform. You become  
17 eligible to become a protestant by signing.  
18 You become a protestant for a member, in this  
19 case of a group of five, by showing up and  
20 participating, either in person or through a  
21 designated representative.

22                   And the Board's practice has been

1 uniform that when the number of protestants in  
2 a group falls below the required five, that  
3 group is no longer a person entitled to  
4 standing. And I would throw in what I alluded  
5 to before, any other outcome would render a  
6 Roll Call effectively meaningless.

7 MS. MUELLER: Respectfully, I  
8 don't think it would render the Roll Call  
9 meaningless, because, as I said, the purpose  
10 of the Roll Call is to establish whatever  
11 group exists.

12 And respectfully, nothing in what  
13 Mr. O'Brien has said today has been -- he  
14 hasn't cited to a single provision either in  
15 DC Code or DC Municipal Regulations that say  
16 that failure to attend at a Roll Call Hearing  
17 will result in an individual name withdrawn  
18 from a protest group, even if the remainder of  
19 that group is still allowed to go forward.

20 And if there is such a section, I  
21 would like him to point it out to the Board  
22 right now.

1 MR. O'BRIEN: I haven't seen a  
2 signal from the Board that they want a  
3 response to that challenge.

4 MEMBER ALBERTI: I have another  
5 question for Ms. Mueller.

6 CHAIRPERSON MILLER: Yes.

7 MEMBER ALBERTI: Sorry to prolong  
8 this, but you keep saying that people who  
9 signed, whoever the number were, this original  
10 petition believed that they were being  
11 represented by Dr. Smith.

12 MS. MUELLER: Correct.

13 MEMBER ALBERTI: How do I know  
14 that?

15 MS. MUELLER: We have a current  
16 petition which has been signed saying that we  
17 current -- that we continue to --

18 MEMBER ALBERTI: This time, how  
19 did I know that? This is my original -- this  
20 is my base. I mean, at some point, I can't  
21 have this amorphous list floating out there--

22 MS. MUELLER: Well --

1                   MEMBER ALBERTI:  -- and just you,  
2                   at some point, say well, this is the point in  
3                   time where I want to nail it down.  No.

4                   We, as an Agency, as a Board, get  
5                   to tell you when it gets nailed down.

6                   MS. MUELLER:  I --

7                   MEMBER ALBERTI:  I mean, we have  
8                   to do that to be fair to everyone.  I hope you  
9                   understand that.

10                  So I have to nail it down when I  
11                  get this.  How do I know that he was  
12                  representative of these people?

13                  MS. MUELLER:  Respectfully, I  
14                  think you have to ask Dr. Smith.  I would say  
15                  that my client -- the protestants put their  
16                  reliance on Dr. Smith and had no indication  
17                  that he wasn't representing their interests at  
18                  the group.

19                  And if he failed to make that  
20                  clear before the group, I regret that, but  
21                  that's certainly something he should have  
22                  done.  And that in any event, if, as a result

1 of his failure to state for the record that he  
2 was representing the group, that there was  
3 insufficient numbers for standing as a group,  
4 then that's something that there would have  
5 been a right to a challenge on. And there  
6 wasn't.

7 I mean, all that is required is  
8 that you have sufficient numbers to identify  
9 a group, a person that has standing, there is  
10 no requirement that every individual who  
11 signed the protest must appear at the Roll  
12 Call Hearing in order to continue to be part  
13 of the protest. It does -- that does not  
14 exist.

15 MEMBER ALBERTI: Thank you.

16 CHAIRPERSON MILLER: Okay. And  
17 could you just refresh my memory, which  
18 provisions in the law you are relying on?

19 MS. MUELLER: Sure. If you look  
20 at the Municipal Regulation 1605.4, it says  
21 "The Board may require protestants to appear  
22 before the Board for the purpose of

1 determining that a sufficient number of  
2 individuals exist to have standing, pursuant  
3 to DC Code 25-601."

4 That is one provision that I'm  
5 looking at here. And then the other one is  
6 Municipal Regulation 1602.3 which says  
7 "Failure to appear in person or through a  
8 designated representative may result in the  
9 dismissal of the protest."

10 It does not say it may result in  
11 your inability to continue as part of the  
12 protest group.

13 MEMBER ALBERTI: All Right.

14 CHAIRPERSON MILLER: Okay. All  
15 Right. Anything else from Board Members?  
16 Okay. I think that what we are going to do,  
17 at this point, is --

18 MS. MUELLER: I have one  
19 additional point to make. If this hearing is  
20 proceeding, we intend to present argument that  
21 the application was actually incomplete and  
22 this Board, therefore, has no authority to

1 either have this hearing or to take any action  
2 on the application.

3 And if that is in fact the case,  
4 there should never have been a Roll Call  
5 associated with that, this application. I  
6 wanted to just also state that for the record.  
7 But we will get there in the future, but I  
8 just wanted to add that point in for right now  
9 as well.

10 CHAIRPERSON MILLER: Okay. So  
11 what I was starting to say is, okay, we have  
12 heard all the arguments with respect to the  
13 standing issues. And so at this point, I  
14 believe that the Board would like to convene  
15 in closed session and confer with counsel and  
16 consider the arguments that have been made.

17 So I'm going to take a vote or ask  
18 for a vote on this and we will probably have  
19 10 minutes, anyway, and if anybody wants to  
20 take a break also.

21 Sir?

22 MR. WALSH: (Speaking off mike.)

1                   CHAIRPERSON MILLER: I can't hear  
2 you. You might have to come to a microphone  
3 if you are going to --

4                   MEMBER ALBERTI: Why?

5                   CHAIRPERSON MILLER: Because to  
6 get on the record. I don't know. We are  
7 about to --

8                   MR. WALSH: My question is this.

9                   CHAIRPERSON MILLER: Who are you,  
10 sir?

11                  MR. WALSH: Because as I have  
12 listened to Mr. Alberti --

13                  CHAIRPERSON MILLER: Sir?

14                  MR. WALSH: Oh, excuse me, I'm  
15 sorry.

16                  CHAIRPERSON MILLER: No. You just  
17 need to talk into a microphone. There is one  
18 there and you need to -- well, there is a  
19 microphone right there if you want to sit in  
20 the witness stand. But we need to make this  
21 pretty quick, because it's already 5:45.

22                  MR. WALSH: Yes.

1 CHAIRPERSON MILLER: You have to  
2 identify yourself.

3 MR. WALSH: My name is Michael  
4 Walsh.

5 CHAIRPERSON MILLER: Okay.

6 MR. WALSH: I'm a resident. I was  
7 at both hearings, the standing hearing and so  
8 forth. Just quickly on the standing hearing,  
9 there were a lot of people. There was an idea  
10 to get everybody down to the smallest group we  
11 could, whether they wanted to do that or not.

12 Now, here is my question. As I  
13 heard Mr. Alberti, and here is my question, do  
14 you have to have five people who were at the  
15 standing and are here today? Is that the  
16 criteria?

17 CHAIRPERSON MILLER: Okay. We  
18 will get back to you after we go into closed  
19 session.

20 MEMBER ALBERTI: Well, that would  
21 be --

22 CHAIRPERSON MILLER: Unless you

1 are ready to --

2 MEMBER ALBERTI: -- explained in  
3 our decision.

4 CHAIRPERSON MILLER: He will  
5 address that in his --

6 MR. WALSH: Sure.

7 MEMBER ALBERTI: Thank you.

8 CHAIRPERSON MILLER: Okay. All  
9 right. As Chairperson of the Alcoholic  
10 Beverage Control Board for the District of  
11 Columbia and in accordance with Section 405 of  
12 the Open Meetings Amendment Act of 2010, I  
13 move that the ABC Board hold a closed meeting  
14 for the purpose of seeking legal advice from  
15 our counsel on Case No. 13-PRO-00005,  
16 Watergate Hotel, per Section 405(b)(4) of the  
17 Open Meetings Amendment Act of 2010, and  
18 deliberating on it for the reasons cited in  
19 Section 405(b)(13) of the Open Meetings  
20 Amendment Act of 2010.

21 Is there a second?

22 MEMBER BROOKS: Second.

1 CHAIRPERSON MILLER: Mr. Brooks  
2 has seconded the motion. I'll now take a roll  
3 call.

4 Mr. Brooks?

5 MEMBER BROOKS: I agree.

6 CHAIRPERSON MILLER: Mr. Alberti?

7 MEMBER ALBERTI: I agree.

8 CHAIRPERSON MILLER: Ms. Miller  
9 agrees.

10 Mr. Silverstein?

11 MEMBER SILVERSTEIN: I agree,  
12 Madam Chair.

13 CHAIRPERSON MILLER: And, Mr.  
14 Jones?

15 MEMBER JONES: I agree.

16 CHAIRPERSON MILLER: Okay. It  
17 appears the motion has passed by a 5-0-0 vote.

18 I hereby give notice that the ABC  
19 Board will recess this proceeding to hold a  
20 closed meeting in the ABC Board conference  
21 room pursuant to the Open Meetings Amendment  
22 Act of 2010.

1                   Okay. And we should return with--  
2 well, you are welcome to take a 10 minute  
3 break as well. Thank you.

4                   (Whereupon, at 5:44 p.m. a recess  
5 until 6:15 p.m.)

6                   CHAIRPERSON MILLER: Okay. The  
7 Board had an opportunity to review the  
8 arguments and look at the law and confer with  
9 our counsel with respect to the issue of  
10 standing, which is our threshold issue today,  
11 as to whether or not this Protest Hearing goes  
12 forward.

13                   So I just would like to start off  
14 the conversation by saying that I'm pretty  
15 much where I was at the beginning of this  
16 hearing, though some good arguments were made.

17                   We have a lot of different  
18 regulations in our DCMR and I think that Ms.  
19 Mueller was looking at 1605.4 as to the  
20 purpose of a Roll Call Hearing, and that being  
21 to determine that a sufficient number of  
22 individuals exist to have standing, that's in

1 1605.4.

2           However, that is not the only  
3 purpose of the Roll Call Hearing and I rely on  
4 1601.9, which talks about the Board's agent  
5 having authority to identify the parties with  
6 standing and file protest issues.

7           And I think that that's what the  
8 Board recognizes as a very important part of  
9 the Roll Call process, that just because  
10 someone files a letter indicating that they  
11 want to protest, they are not considered a  
12 protestant and they are not given standing  
13 until the Roll Call.

14           And at this particular Roll Call,  
15 which we all have read the transcript of, Ms.  
16 Fletcher specifically gives standing to a  
17 party of 14 with those 14 individuals clearly  
18 designated as a group of 14. So that is what  
19 I see as being those who were granted status  
20 as part of this group.

21           And I don't think that it is a  
22 fungible group that other people could move in

1 and out just because they had submitted a  
2 Letter of Intent to Protest.

3 We also have a regulation that  
4 talks about authority to represent some other  
5 individuals in our hearings or practice in  
6 general. Let me see if I can find that one.  
7 I think it is 1707.1.

8 It says "No person may appear  
9 before the Board in a representative capacity  
10 prior to submission of a signed statement  
11 containing that person's name, address,  
12 occupation, telephone number and the nature of  
13 representation."

14 So this goes to the fact or the  
15 issue that it may be burdensome for, you know,  
16 50 people to show up for a Roll Call, but the  
17 regs don't require that, but what the regs to  
18 require is if you are not going to show up,  
19 that you submit something in writing, so that  
20 the Board knows that the person there who says  
21 they are representing you actually are  
22 representing you. And so that representation

1 is clear and in the record.

2 For that reason, I don't believe  
3 that based on the record here that groups that  
4 were given, groups of individuals that were  
5 given, standing to protest no longer exist as  
6 protestants, that individuals have withdrawn  
7 their names from the groups and, therefore,  
8 it's under five and there is no one left of  
9 the group that were recognized at Roll Call to  
10 protest.

11 So I would move to dismiss the  
12 protest. I wonder if someone wants to second  
13 and then continue the conversation, if any?

14 MEMBER BROOKS: I'll second it.

15 CHAIRPERSON MILLER: Okay. So Mr.  
16 Brooks has seconded the motion. Now, do  
17 others want to make further comments on this?

18 MEMBER ALBERTI: I don't really  
19 have anything to add to what you said. I  
20 think you really laid out all the arguments  
21 that we considered and I agree with everything  
22 you said. Thank you.

1 CHAIRPERSON MILLER: Okay. All  
2 Right. Then --

3 MEMBER SILVERSTEIN: Madam Chair?

4 CHAIRPERSON MILLER: Yes, Mr.  
5 Silverstein?

6 MEMBER SILVERSTEIN: Ms. Mueller  
7 argued persuasively and passionately, but Mr.  
8 O'Brien spoke of what has been our practice  
9 ever since I have come to this Board and  
10 before that as an ANC Commissioner when we had  
11 to involve ourselves on the other side as  
12 protestants.

13 And what we are requiring here has  
14 been a longstanding practice of the Board in  
15 our interpretation of what we are permitted to  
16 do under the statute. If we were to rule  
17 otherwise, we would be reversing this practice  
18 of many, many years. And as such, even though  
19 this may seem to be unfair, we really have no  
20 choice, Madam Chair.

21 CHAIRPERSON MILLER: Okay.  
22 Others? No, I don't think it is unfair. You

1 know, I feel for those people who maybe  
2 thought that they were represented or  
3 whatever, but --

4 MEMBER SILVERSTEIN: I do not  
5 think the decision is unfair.

6 CHAIRPERSON MILLER: Okay.

7 MEMBER SILVERSTEIN: It may seem  
8 unfair to the individuals.

9 CHAIRPERSON MILLER: Okay.

10 MEMBER SILVERSTEIN: That is what  
11 I meant.

12 CHAIRPERSON MILLER: Right.

13 MEMBER SILVERSTEIN: I apologize.

14 CHAIRPERSON MILLER: Right.

15 Written designations are very important,  
16 otherwise, people can just say anything.

17 MEMBER SILVERSTEIN: Exactly.

18 CHAIRPERSON MILLER: Okay. Any  
19 other comments? All Right. Then there is a  
20 Motion to Dismiss that has been seconded to  
21 dismiss the protest that has been seconded.

22 All those in favor say aye.

1 ALL: Aye.

2 CHAIRPERSON MILLER: All those  
3 opposed? All those abstaining? The motion  
4 passes 5-0-0 and the protest is dismissed.

5 MR. O'BRIEN: Thank you.

6 CHAIRPERSON MILLER: Thank you.  
7 Do you have a question?

8 MS. MUELLER: If I could make  
9 another comment or two for the record? Given  
10 the fact that -- I understand that you voted  
11 and you have dismissed the protest.

12 Given the fact that there are  
13 important property rights and individual  
14 rights at stake here, we are talking about  
15 some Watergate owners who have been residents  
16 for 30 years, the people in the protest are  
17 aged between 70 and 90 on average, and given  
18 the fact that you have not been able to point  
19 to a regulation that gives you authority to  
20 dismiss individuals from a protest, I  
21 understand you have made the decision that you  
22 do, but I have not seen you point to any

1 authority saying that you can dismiss an  
2 individual from a protest, particularly given  
3 the provisions of 1602.1, we ask for a cause  
4 that you -- we ask that we have a Cause  
5 Hearing to show that there has been good cause  
6 why certain individuals were unable to appear  
7 at the protest for reasons such as illness,  
8 this is an older group of individuals and we  
9 would like to be heard on those issues.

10 MR. O'BRIEN: Madam Chair, the  
11 time for that was before the Protest Hearing  
12 was supposed to start. Standing having been  
13 determined not to exist.

14 CHAIRPERSON MILLER: So this order  
15 is going to be written, a written decision and  
16 you will be able to ask for a Motion for  
17 Reconsideration at that time, if you would  
18 like. That seems the appropriate time to  
19 raise your concern.

20 MS. MUELLER: Well, we would like  
21 the hearing then continued, because if the  
22 burden is on the Board to notify the

1 individuals who have been dismissed, and I  
2 spoke with the individuals who are here, and  
3 none of them have had received notice from any  
4 of you that they had been dismissed from the  
5 protest.

6 And so we are -- we waited until  
7 the hearing, the Protest Hearing to notify  
8 these individuals that they had been dismissed  
9 from the protest and I don't think having a  
10 transfer for the hearing is sufficient notice  
11 for them.

12 If they had received notice that  
13 they had been dismissed from the protest two  
14 months ago, we could have moved for  
15 reinstatement timely and had these issues  
16 resolved prior to getting to the hearing.

17 CHAIRPERSON MILLER: Okay. I  
18 don't want to keep this going too much longer.  
19 Okay. Mr. Alberti read from a letter that Ms.  
20 Fashbaugh sent to everyone who had signed that  
21 protest that said failure to appear --

22 PARTICIPANT: No, no, no, no, no,

1 I didn't get it.

2 CHAIRPERSON MILLER: Okay.

3 PARTICIPANT: It was emailed.

4 CHAIRPERSON MILLER: All Right.

5 PARTICIPANT: I don't have it.

6 CHAIRPERSON MILLER: 1602.3, I  
7 think that if you -- I think the correct  
8 recourse again, is what I said, is to file a  
9 Motion for Reconsideration.

10 MS. MUELLER: I understand that,  
11 but just for the record, I would like to say  
12 that many of the individuals who signed the  
13 protest don't have email. This was not a  
14 letter that was mailed to them. My  
15 understanding is this was emailed to them.

16 Email when that person -- does not  
17 constitute sufficient notice if you have got  
18 an older individual who doesn't use email.

19 MEMBER ALBERTI: I'm confused.

20 CHAIRPERSON MILLER: Yes.

21 MEMBER ALBERTI: I see you've got  
22 here --

1 PARTICIPANT: Why is the  
2 proceeding going on?

3 MEMBER ALBERTI: Yes.

4 CHAIRPERSON MILLER: I don't  
5 understand what you guys think --

6 MEMBER ALBERTI: I won't ask my  
7 question.

8 CHAIRPERSON MILLER: Actually, we  
9 can't reargue. We are not going to reargue  
10 the point.

11 MS. MUELLER: I understand, but  
12 this is pursuant to Regulation 1602.1, which  
13 requires the Board to notify you of the  
14 dismissal of -- I'm looking at 1602.1.

15 CHAIRPERSON MILLER: I understand  
16 that. But what are you asking the Board to do  
17 right now?

18 MS. MUELLER: I'm saying that the  
19 -- we need to have a hearing on this. These  
20 individuals were never notified --

21 CHAIRPERSON MILLER: You are  
22 asking for a hearing pursuant to what

1 provision?

2 MS. MUELLER: For a hearing  
3 pursuant to 1602.3, which is that --

4 CHAIRPERSON MILLER: Okay.

5 MS. MUELLER: -- "The Board has  
6 discretion on this issue and the protesters  
7 can show cause for failure to appear,  
8 including death, illness."

9 CHAIRPERSON MILLER: Okay.

10 MS. MUELLER: So this is the first  
11 time we heard that this protest is going to be  
12 dismissed.

13 CHAIRPERSON MILLER: At this  
14 point, I would ask that you or suggest that  
15 you put that in writing and the Board will  
16 take that under advisement and deal with that  
17 as a separate issue.

18 MS. MUELLER: And I would also  
19 like to make the point that I had named  
20 earlier, which is that Roll Call Hearing or  
21 this hearing that is currently happening, the  
22 Board actually doesn't have authority to

1 pursue the application, for the liquor license  
2 was incomplete.

3 And pursuant to the Board's own  
4 regulations, "The Board shall not accept as  
5 filed until" --

6 CHAIRPERSON MILLER: Okay.

7 MS. MUELLER: -- "no actions  
8 were" --

9 CHAIRPERSON MILLER: This was a  
10 Protest Hearing scheduled for today and the  
11 issue of standing was germane to that.

12 If you have other issues, I think  
13 you need to submit them in writing and the  
14 Board will take them up at another time.

15 MS. MUELLER: Let me submit them  
16 right now, because, as I said, I don't think  
17 these are isolated to the protest. I think  
18 these are procedural issues that goes to the  
19 Board's authority and whether they are  
20 exceeding the scope of the authority if they  
21 hear the license, at this point in time.

22 MEMBER ALBERTI: But we are not

1 going to --

2 MS. MUELLER: And I'm happy to  
3 submit this into the record now and we will do  
4 it in writing later as well.

5 CHAIRPERSON MILLER: Okay. Okay.  
6 I would say that we have concluded this  
7 hearing, so anything else that you want to  
8 submit, you are welcome to submit, but it  
9 won't be in this record. Okay.

10 MEMBER ALBERTI: Ms. Mueller, you  
11 can give those documents to our general  
12 counsel and she will make sure that they go on  
13 the Board's agenda, our weekly agenda and we  
14 will consider them as part of our agenda.

15 MS. MUELLER: I would also like  
16 to get them in the record as part of this  
17 hearing, even if they're not considered a part  
18 of this hearing, because there are regulations  
19 that state that you need to submit all  
20 documentation no later than the date of the  
21 hearing. I want to make sure this is in the  
22 record.

1 CHAIRPERSON MILLER: Oh, all right.

2 MR. O'BRIEN: Madam Chair, this  
3 is, I've got to say, ridiculous.

4 CHAIRPERSON MILLER: Yes, I  
5 haven't seen this before.

6 MR. O'BRIEN: The Board has ruled  
7 they don't have standing. You invited them to  
8 file a Motion for Reconsideration, if they  
9 think that you are wrong. They don't have  
10 standing to submit anything. The Board has  
11 ruled.

12 MS. MUELLER: Sorry. I don't  
13 think the board, respectfully, has the  
14 authority to conduct this hearing. I would  
15 like to submit this to the record. I will  
16 also submit this in writing as part of the  
17 Motion for Reconsideration, but I would like  
18 this to be considered a part of the record  
19 that is here.

20 CHAIRPERSON MILLER: I don't even  
21 know what it is, at this point, but you want  
22 to submit it today, submit it, but it's not a

1 part of the Protest Hearing, is what we are  
2 saying.

3 MS. MUELLER: All I can say is I'm  
4 just going to read this in right now. "The  
5 Board shall not schedule any hearing until the  
6 applicant has submitted in writing to the  
7 Board all information and documents required  
8 by the actual" -- this is DCMR 23-1710.1.

9 CHAIRPERSON MILLER: Okay.

10 MS. MUELLER: So that is this  
11 hearing is invalid because all the requests  
12 for documentation has not been submitted.

13 CHAIRPERSON MILLER: Okay. I  
14 think that I'm going to conclude this hearing,  
15 at this point, and the Board will adjourn.

16 Thank you very much everyone for  
17 coming down.

18 MS. MUELLER: Thank you.

19 (Whereupon, the Protest Hearing  
20 was concluded at 6:28 p.m.)

21  
22

A				B	
<b>ABC</b> 85:13 86:18 86:20	79:4 <b>agenda</b> 100:13,13 100:14	85:2,7 86:6,7 90:18 95:19 96:19 96:21 97:3,6 99:22 100:10	51:5 52:11 58:4 63:20 66:12	<b>aye</b> 92:22 93:1 <b>A-N</b> 11:11	
<b>able</b> 21:18 44:9,10 93:18 94:16	<b>agent</b> 88:4 <b>ago</b> 35:21 76:9 95:14	<b>Alcoholic</b> 1:2,13,13 85:9	<b>appearing</b> 69:7 <b>appears</b> 74:7 75:19 86:17		
<b>ABRA</b> 24:13 74:3	<b>agree</b> 47:3 86:5,7 86:11,15 90:21	<b>allowed</b> 49:21 76:3 77:19	<b>applicant</b> 2:19 102:6	<b>back</b> 3:13 35:5 39:7 63:12,17 84:18	
<b>absolutely</b> 17:20 27:11	<b>agreement</b> 4:1 18:9 31:5 33:3,13,21 34:13,17 35:14,18 54:16	<b>alluded</b> 76:8 77:4 <b>Amendment</b> 85:12 85:17,20 86:21	<b>applicant's</b> 2:20 <b>application</b> 1:10 19:15 21:4 81:21 82:2,5 99:1	<b>base</b> 78:20 <b>based</b> 26:22 90:3 <b>basis</b> 20:5 27:11 <b>beginning</b> 54:13 87:15	
<b>abstaining</b> 93:3	<b>agreements</b> 56:15 56:22	<b>amorphous</b> 78:21	<b>applied</b> 29:8 <b>appoint</b> 12:4,7 <b>appropriate</b> 94:18	<b>begs</b> 13:2 <b>behalf</b> 3:7 4:12 5:4 7:8,21 8:18 14:18 19:8 28:9 30:11 31:17 33:22 40:15 41:9 48:14 69:7	
<b>abutting</b> 9:5 10:3 32:4 35:11	<b>agrees</b> 86:9 <b>ahead</b> 57:12 73:18	<b>amount</b> 75:17 <b>ANC</b> 3:22 9:7 10:1 10:1 91:10	<b>arcane</b> 56:12 <b>area</b> 48:20 <b>argue</b> 23:9 43:4 48:22 50:15	<b>believe</b> 2:4 4:4,15 7:22 11:18 17:6 29:2 31:16 37:5,6 37:7 64:22 72:4 74:1,19 82:14 90:2	
<b>accept</b> 99:4	<b>Alberti</b> 1:19 11:8 34:20 35:2,8 36:8 36:14 37:16,19 38:7,10,14,17,21 39:3,6,17 40:5,10 40:16 41:12,17 42:3,7,18 44:6,17 44:19 45:6,12,18 48:4,7,19 49:10 50:1,4,14 51:8 52:17 56:4 57:10 57:11,13 58:5,7 58:16,20 59:2,6 59:10,13,18 60:4 60:10,13,17 61:1 61:6,14,20 62:1,6 62:9,11,16,20 63:1,4,7,10,12,16 64:4,6,11,18 65:6 65:9,12,21 66:1,4 66:9,14,18,22 67:3,12,15,18,22 68:5,8,16,20 69:1 69:4,8,15,20 70:3 70:7,13 71:1,10 71:15 72:3,18 73:5,15,18 74:16 74:20 75:4,9 78:4 78:7,13,18 79:1,7 80:15 81:13 83:4 83:12 84:13,20	<b>Ann</b> 12:11 29:2 61:22 <b>announced</b> 27:18 27:19 <b>answer</b> 43:16 48:2 58:15 <b>answering</b> 32:15 <b>anybody</b> 28:7,18 30:18 52:12,18 82:19 <b>anyway</b> 82:19 <b>apologize</b> 92:13 <b>apparent</b> 72:8 <b>appealed</b> 17:12 <b>appear</b> 6:9 7:4,21 12:3,6 17:7,14 19:4,7,12,18,19 25:12 28:9 29:13 32:8 36:17,19 37:11 46:14,16 47:12,15 48:11,13 49:4,7,19 50:9,12 50:19 53:16 54:2 54:5,7 64:20,22 67:7,18 70:16,17 71:14 80:11,21 81:7 89:8 94:6 95:21 98:7	<b>arcane</b> 56:12 <b>area</b> 48:20 <b>argue</b> 23:9 43:4 48:22 50:15 <b>argued</b> 52:17 91:7 <b>arguing</b> 55:5 <b>argument</b> 5:16 36:10 51:12 53:2 55:20 70:14 81:20 <b>arguments</b> 82:12 82:16 87:8,16 90:20 <b>aside</b> 43:4 <b>asking</b> 22:14 97:16 97:22 <b>associated</b> 82:5 <b>association</b> 9:6 <b>assume</b> 2:10 <b>attend</b> 24:16 77:16 <b>attended</b> 6:16 7:18 20:4 24:17 66:15 <b>attending</b> 41:9 <b>attention</b> 18:22 73:7,9,11 <b>authority</b> 29:19 44:3 47:11 81:22 88:5 89:4 93:19 94:1 98:22 99:19 99:20 101:14 <b>Avenue</b> 1:7 2:12 <b>average</b> 93:17 <b>avoid</b> 12:12 <b>aware</b> 60:4 72:12	<b>applied</b> 29:8 <b>appoint</b> 12:4,7 <b>appropriate</b> 94:18 <b>arcane</b> 56:12 <b>area</b> 48:20 <b>argue</b> 23:9 43:4 48:22 50:15 <b>argued</b> 52:17 91:7 <b>arguing</b> 55:5 <b>argument</b> 5:16 36:10 51:12 53:2 55:20 70:14 81:20 <b>arguments</b> 82:12 82:16 87:8,16 90:20 <b>aside</b> 43:4 <b>asking</b> 22:14 97:16 97:22 <b>associated</b> 82:5 <b>association</b> 9:6 <b>assume</b> 2:10 <b>attend</b> 24:16 77:16 <b>attended</b> 6:16 7:18 20:4 24:17 66:15 <b>attending</b> 41:9 <b>attention</b> 18:22 73:7,9,11 <b>authority</b> 29:19 44:3 47:11 81:22 88:5 89:4 93:19 94:1 98:22 99:19 99:20 101:14 <b>Avenue</b> 1:7 2:12 <b>average</b> 93:17 <b>avoid</b> 12:12 <b>aware</b> 60:4 72:12	<b>believed</b> 30:11 67:9 67:20 69:6 78:10 <b>belong</b> 57:17 64:21 <b>belongs</b> 63:19 <b>Beverage</b> 1:2,13,13 85:10 <b>bigger</b> 75:19 <b>bionic</b> 13:5 <b>black</b> 48:21 <b>blown</b> 5:16 <b>board</b> 1:2,13 2:4 3:20 4:16 6:8 8:22 9:12,21 10:20 18:6 21:19 22:20 23:17 25:11 25:12 29:9 30:15 35:11 36:7 54:17 70:21 75:13 77:21 78:2 79:4 80:21 80:22 81:15,22 82:14 85:10,13 86:19,20 87:7 88:8 89:9,20 91:9 91:14 94:22 97:13
<b>accompanied</b> 2:19		<b>appearance</b> 27:1 62:18			
<b>acknowledged</b> 31:1 53:5		<b>appeared</b> 6:12 7:7 21:9,10 23:12			
<b>Act</b> 85:12,17,20 86:22					
<b>acted</b> 30:7 31:5					
<b>acting</b> 40:9					
<b>action</b> 82:1					
<b>actions</b> 99:7					
<b>active</b> 59:12					
<b>actual</b> 102:8					
<b>add</b> 28:20 82:8 90:19					
<b>added</b> 28:14 59:20 60:9 69:14					
<b>adding</b> 13:7 72:1					
<b>addition</b> 35:9					
<b>additional</b> 71:6 81:19					
<b>address</b> 85:5 89:11					
<b>addressed</b> 48:9					
<b>addressing</b> 5:18					
<b>adjourn</b> 102:15					
<b>administrative</b> 72:11					
<b>admit</b> 76:14					
<b>advance</b> 74:2					
<b>advice</b> 85:14					
<b>advisement</b> 98:16					
<b>advisor</b> 19:2					
<b>afternoon</b> 2:9 3:4 55:22 73:22					
<b>aged</b> 93:17					
<b>Agency</b> 15:22 16:5					

97:16 98:5,15,22 99:4,14 101:6,10 101:13 102:5,7,15 <b>Board's</b> 6:10 49:3 76:15,22 88:4 99:3,19 100:13 <b>bona</b> 44:22 <b>bother</b> 51:19 55:14 <b>bottom</b> 62:15 <b>brand</b> 56:1 <b>break</b> 26:16 82:20 87:3 <b>bring</b> 18:21 26:4 <b>Brooks</b> 1:20 85:22 86:1,4,5 90:14,16 <b>brought</b> 39:4 <b>Building</b> 1:14 35:7 <b>burden</b> 94:22 <b>burdensome</b> 89:15 <b>Burney</b> 5:12 8:14 52:10 60:20 61:3 63:6 68:15 <b>B-U-R-N-E-Y</b> 61:4	87:20 88:3,9,13 88:14 89:16 90:9 98:20 <b>called</b> 22:5,6 52:9 <b>calling</b> 57:15 59:9 65:17,18 <b>capacity</b> 60:3 89:9 <b>care</b> 5:18 <b>Carrie</b> 12:15 <b>carry</b> 3:17 <b>case</b> 1:9 2:11 22:2 35:22 36:18 46:21 51:6,15 52:9 55:14 76:19 82:3 85:15 <b>cases</b> 54:18 <b>cause</b> 19:16 94:3,4 94:5 98:7 <b>certain</b> 3:21 6:15 8:2 15:6 41:18 43:22 75:16 94:6 <b>certainly</b> 79:21 <b>certified</b> 25:4 27:7 41:22 42:4,6,8 43:20 <b>certify</b> 41:21 <b>CH</b> 1:8 <b>chair</b> 3:9 27:14 86:12 91:3,20 94:10 101:2 <b>Chairperson</b> 1:15 1:18 2:3,8,22 3:3 3:5,8,11 4:17 5:5 5:7,15,22 6:4 8:19 15:5,9,18,21 16:2 16:6 17:3,11,16 17:22 18:14,20 20:7,17,21 21:14 22:3,10,14,22 23:2,8 24:3,7 25:8 26:3,7,10 27:13 27:15,21 30:2,8 30:16,21 32:14,19 33:14 34:1,5,9,22 35:16 36:6 45:19 46:10,20 47:4,19 48:3,6 49:13 51:9	54:9 56:5,9 57:11 57:22 59:3,21 60:6,18 61:11 71:3 72:17 73:1,6 73:10,14 75:1,6 75:10 78:6 80:16 81:14 82:10 83:1 83:5,9,13,16 84:1 84:5,17,22 85:4,8 85:9 86:1,6,8,13 86:16 87:6 90:15 91:1,4,21 92:6,9 92:12,14,18 93:2 93:6 94:14 95:17 96:2,4,6,20 97:4,8 97:15,21 98:4,9 98:13 99:6,9 100:5 101:1,4,20 102:9,13 <b>challenge</b> 78:3 80:5 <b>challenging</b> 17:4 <b>chance</b> 61:15 <b>charitably</b> 28:14 72:1 <b>choice</b> 91:20 <b>circular</b> 51:13 <b>cited</b> 9:2 37:11 77:14 85:18 <b>citizens</b> 9:6 <b>claim</b> 57:14 <b>cleaner</b> 46:21 <b>clear</b> 4:18 35:22 46:22 50:16,17,19 79:20 90:1 <b>clearly</b> 50:18,21 88:17 <b>client</b> 79:15 <b>clients</b> 5:10 <b>closed</b> 13:15 82:15 84:18 85:13 86:20 <b>cobble</b> 57:6 <b>coddling</b> 70:10 <b>Code</b> 6:5 9:2,16 25:15,16 77:15 81:3 <b>Cohen</b> 2:20 <b>coin</b> 44:7	<b>colleague</b> 3:2 <b>Columbia</b> 1:1 27:7 85:11 <b>come</b> 2:15 3:12,22 20:10,13 24:5,11 31:7 54:14,15 56:6 63:12,17 76:5,12 83:2 91:9 <b>coming</b> 31:9 39:9 102:17 <b>comment</b> 93:9 <b>comments</b> 90:17 92:19 <b>Commissioner</b> 91:10 <b>committed</b> 26:12 <b>common</b> 8:17 21:3 25:19 27:5 <b>community</b> 19:1 <b>concern</b> 94:19 <b>concerned</b> 64:7 <b>concerns</b> 6:10 <b>conclude</b> 102:14 <b>concluded</b> 100:6 102:20 <b>conclusion</b> 12:8 <b>conduct</b> 101:14 <b>conducted</b> 10:13 <b>confer</b> 28:17 82:15 87:8 <b>conference</b> 86:20 <b>conferring</b> 7:1 <b>confident</b> 42:14 <b>confused</b> 96:19 <b>confusion</b> 12:12 <b>consequence</b> 51:1 <b>consequences</b> 50:6 50:18 <b>consider</b> 10:15 82:16 100:14 <b>considered</b> 88:11 90:21 100:17 101:18 <b>considering</b> 53:7 65:7 <b>consist</b> 12:11 <b>consisted</b> 10:19	14:22 52:1 <b>consistent</b> 51:16 <b>consists</b> 16:22 <b>constitute</b> 96:17 <b>constitution</b> 35:6 <b>containing</b> 89:11 <b>continue</b> 21:18 24:22 26:22 45:10 49:22 64:17 78:17 80:12 81:11 90:13 <b>continued</b> 94:21 <b>continuing</b> 18:10 43:3,5 52:16 53:4 64:15 <b>contrary</b> 17:2 <b>Control</b> 1:2,13,13 85:10 <b>convene</b> 82:14 <b>conversation</b> 87:14 90:13 <b>copies</b> 10:20 22:19 36:4 70:20,22 71:2 <b>copy</b> 26:5 71:8 <b>correct</b> 34:8 35:20 39:1,2 42:16 46:3 49:9 59:17 64:11 78:12 96:7 <b>correctly</b> 49:7 <b>counsel</b> 9:2 11:3,4 51:13 52:5 71:5 82:15 85:15 87:9 100:12 <b>counsel's</b> 55:19 <b>count</b> 52:6 <b>counted</b> 11:17 55:16 62:7 63:14 <b>couple</b> 13:6,7,20 29:1 39:15 <b>course</b> 12:9 13:1 28:17 <b>create</b> 13:5,13 55:22 <b>criteria</b> 84:16 <b>critical</b> 46:19 49:16 <b>crowd</b> 53:21 <b>current</b> 78:15,17
<b>C</b>				
<b>call</b> 6:9,12,16,17 7:3,8 8:3 10:9,13 11:19 12:3,6,9 13:5,10 14:1,4,9 15:17 16:10,15 17:4 18:15 19:5 19:22 21:6 23:10 23:20,21 24:14,18 25:21 26:14 27:1 27:2 28:10 31:3 31:12,13 32:2,22 33:1,5 37:3,8,18 37:20,21 39:11,20 41:10,19,22 42:21 42:22 45:3,22 47:15 48:11 51:14 51:19 52:14,21 53:10 59:20 60:8 66:12,16 69:12 70:5 75:20 76:5 77:6,8,10,16 80:12 82:4 86:3				

<b>currently</b> 98:21	19:6 23:14 48:13	95:13 98:12	<b>either</b> 4:5 7:4,18,20	<b>exists</b> 27:4 77:11
<b>Cynthia</b> 5:10 8:13	55:15 67:6 68:4	<b>dismissing</b> 20:6	11:19 33:21 42:11	<b>expect</b> 76:12
28:15 69:9	70:8	<b>distinction</b> 46:19	55:14 59:14 71:19	<b>experience</b> 76:9
<b>C-O-H-E-N</b> 2:20	<b>designation</b> 11:20	<b>District</b> 1:1 25:19	76:20 77:14 82:1	<b>expired</b> 9:21
	28:6 46:3,22	27:6 85:10	<b>eligible</b> 76:17	<b>explain</b> 74:6,12
<b>D</b>	59:16 62:18 65:1	<b>districts</b> 27:6	<b>email</b> 30:14 53:20	<b>explained</b> 85:2
<b>Daniel</b> 12:13	65:5 68:1,19	<b>diverged</b> 33:18	73:21 74:5 96:13	<b>explicit</b> 10:13
<b>darkened</b> 52:8	<b>designations</b> 29:1	<b>divide</b> 57:19 58:10	96:16,18	<b>explicitly</b> 30:15
<b>date</b> 100:20	30:19 55:17 72:2	<b>documentation</b>	<b>emailed</b> 96:3,15	<b>express</b> 30:11
<b>dated</b> 19:1	92:15	100:20 102:12	<b>en</b> 53:16	
<b>dates</b> 39:8 74:12	<b>despite</b> 29:9,16	<b>documents</b> 100:11	<b>ended</b> 55:16 59:22	<b>F</b>
<b>day</b> 9:16,20 13:4,15	<b>determination</b> 14:4	102:7	<b>ensure</b> 6:19 14:1	<b>fact</b> 39:19 73:9
14:20	14:7 17:1 21:17	<b>Doe</b> 40:18,19 41:2	19:22 27:3 31:13	82:3 89:14 93:10
<b>days</b> 9:20 39:16	<b>determine</b> 3:16	<b>Doe's</b> 41:4	31:21 41:10	93:12,18
<b>DC</b> 6:5 9:2,16	6:21 16:11,16	<b>doing</b> 31:9 45:3	<b>enter</b> 34:12	<b>facto</b> 40:12
25:15,16 47:14	21:7,19 23:20,22	51:18 56:16	<b>entered</b> 33:3,12	<b>facts</b> 72:21
77:15,15 81:3	24:19,21 26:17,21	<b>DONALD</b> 1:20	34:17	<b>fail</b> 50:11
<b>DCMR</b> 87:18 102:8	38:22 43:1,8 44:9	<b>doorway</b> 52:9	<b>entering</b> 18:8	<b>failed</b> 52:6 79:19
<b>de</b> 40:12	44:11 50:10 57:2	<b>Dr</b> 6:14 7:7,20	<b>entire</b> 54:13	<b>failure</b> 19:8,12,18
<b>deadline</b> 74:3	87:21	11:20 14:16 17:14	<b>entitled</b> 4:9 11:15	19:19 32:8 46:14
<b>deal</b> 98:16	<b>determined</b> 43:22	17:19 24:15 29:13	77:3	46:16 47:12,15
<b>dealing</b> 18:6	44:8 45:11 53:10	30:14 33:10 34:11	<b>entries</b> 55:4	48:14 49:7 77:16
<b>death</b> 98:8	69:13 94:13	34:13,15 35:5,13	<b>Erica</b> 3:2 4:11	80:1 81:7 95:21
<b>decades</b> 76:15	<b>determining</b> 25:13	37:7 40:3,7 41:5,8	<b>error</b> 17:2 26:12	98:7
<b>deciding</b> 29:17	45:3,8 81:1	43:6 48:1 67:10	27:9 33:10 46:4,7	<b>fair</b> 43:13 79:8
<b>decision</b> 85:3 92:5	<b>difference</b> 18:12	67:20 68:18 69:6	72:11	<b>falls</b> 77:2
93:21 94:15	72:16,20	74:4,8,14,19	<b>essentially</b> 10:2	<b>far</b> 31:18
<b>defined</b> 9:15	<b>different</b> 24:4,10	78:11 79:14,16	51:13	<b>Fashbaugh</b> 73:21
<b>deliberating</b> 85:18	33:7 60:15 87:17	<b>drop</b> 20:9 41:14,15	<b>establish</b> 37:8	95:20
<b>Deming</b> 12:13,15	<b>difficult</b> 56:13	<b>drops</b> 38:2	51:14,21 77:10	<b>favor</b> 92:22
<b>denial</b> 19:14 32:10	<b>directors</b> 35:11	<b>duty</b> 47:21	<b>event</b> 24:19 79:22	<b>February</b> 7:19 9:22
32:11	<b>disclosing</b> 27:17	<b>Dymowski</b> 3:4,6,6	<b>eventuality</b> 54:19	10:10 13:15 19:1
<b>denied</b> 13:9	<b>discretion</b> 98:6	3:10 10:19	<b>eventually</b> 55:16	58:4
<b>description</b> 63:19	<b>discussing</b> 13:3	<b>D.C</b> 1:14	<b>everybody</b> 2:10	<b>feel</b> 8:22 92:1
<b>designate</b> 14:14	<b>dismiss</b> 29:18 46:1		38:1 84:10	<b>fewer</b> 6:7 25:18
28:8 29:12 37:2,6	46:7,8,13 90:11	<b>E</b>	<b>evidence</b> 42:10,11	53:9
40:7 47:8 54:7	92:20,21 93:20	<b>earlier</b> 98:20	42:13	<b>fide</b> 44:22
67:7,11 69:6	94:1	<b>effectively</b> 77:6	<b>exactly</b> 4:22 55:4,5	<b>figure</b> 4:20 52:14
<b>designated</b> 4:2 7:5	<b>dismissal</b> 19:9,15	<b>eight</b> 7:11,13,15	92:17	<b>file</b> 3:20 9:3,4,19
7:19 14:17 17:8	19:20 32:10,12	8:16 10:19 11:1	<b>exceeding</b> 99:20	28:13 75:7 88:6
18:2,4 19:13	46:15,17 48:15	12:17,19 15:1	<b>excuse</b> 61:5 83:14	96:8 101:8
21:10 24:15 29:2	49:8,15,18 51:2,3	23:4 25:4 33:10	<b>exist</b> 24:20 25:14	<b>filed</b> 9:18 10:7
30:3 32:9,20 33:2	81:9 97:14	34:15 35:14 43:12	80:14 81:2 87:22	11:16 13:14 15:15
37:7 40:3 47:6,20	<b>dismissed</b> 17:9	43:15,19 52:7	90:5 94:13	15:19 28:15 35:10
52:12 63:20 67:5	22:1 28:10,19	57:22 58:6,7,8	<b>existed</b> 27:19 42:1	35:13 56:21 61:21
76:21 81:8 88:18	47:22 49:20 60:8	59:5,8 64:1,2	51:22 53:11	99:5
<b>designating</b> 18:17	93:4,11 95:1,4,8	69:17 70:9 74:3,8	<b>existence</b> 51:15	<b>files</b> 88:10

<b>find</b> 21:21 51:5 89:6	60:14,15,16 61:17	<b>granted</b> 16:7,21 17:5 29:5 88:19	59:5,8,9 60:9,16 60:21,22 61:8,8 62:17,17 64:15,21 65:17,18 66:7,13 66:17 67:2 69:14 69:19,21,22 70:9 71:17,18,20,20 72:9 75:15,18 76:4,19 77:2,3,11 77:18,19 79:18,20 80:2,3,9 81:12 84:10 88:18,20,22 90:9 94:8	42:22 47:15 48:12 48:14 53:11,16 54:14,20 58:4 69:12 71:16 77:16 80:12 81:19 82:1 84:7,8 87:11,16 87:20 88:3 94:5 94:11,21 95:7,7 95:10,16 97:19,22 98:2,20,21 99:10 100:7,17,18,21 101:14 102:1,5,11 102:14,19
<b>fine</b> 3:10 6:4 67:15	<b>free</b> 73:3	<b>granting</b> 16:18,19 44:15,16,20	<b>groups</b> 10:6,14,16 12:13 55:21 58:10 58:15 59:1 60:15 70:1 90:3,4,7	<b>hearings</b> 57:1 84:7 89:5
<b>first</b> 4:7,18,21 5:18 5:21 13:9,22 37:17 50:6 61:22 64:20 70:20 71:21 98:10	<b>full</b> 2:9 5:16	<b>gray</b> 48:20	<b>GS</b> 66:10	<b>hearsay</b> 74:15
<b>five</b> 6:7,20 8:6 9:6,8 9:11 10:6 11:13 11:14 12:17,21 13:5,11 14:2 20:1 20:3,15 21:2,20 22:5 23:6 24:8 25:18,21 27:4 31:19 32:3 37:14 38:6,12,18,22 44:22 49:16 51:4 51:16 53:9 55:18 57:7,16 62:3,3 76:1,19 77:2 84:14 90:8	<b>function</b> 16:15 18:3	<b>grounds</b> 8:17 9:13 25:19 51:3	<b>guess</b> 46:20	<b>held</b> 12:10 54:20
<b>Fletcher</b> 10:12 17:4 22:11 27:19 28:2 29:16 43:21 45:2 51:22 52:17 71:19 72:8,11 74:7 88:16	<b>functioning</b> 14:16	<b>group</b> 4:1,4,5,14 5:3 6:6,12,13,19 6:22 7:1,2,9,12,13 7:15,22 8:2,4,8,15 8:17 9:5,8,11 10:15,17,17,18 11:13,17,22 12:9 12:9,10,20,21 13:5,6,7,11,13,13 14:1,6,8,10,17,19 14:21 15:3,4,10 15:11,12,14,15 16:8,12,19,21,22 17:5 18:4,13 20:1 20:4,8 21:2,7,11 21:11,22 22:5,6 22:11,16 23:19,19 24:1,5,11,15 25:1 25:3,17 26:1,17 26:17 27:3,8,20 28:3,4,4,12,13,15 28:20 29:6,6,8,15 29:21 30:1,10,10 30:22 31:3,5,10 31:11,11,15,18,22 31:22 32:1,2,3,21 32:22 33:7,19,22 34:2,12,13,14 35:6,12,15 36:15 37:1,15 38:6,12 38:18 39:22 40:15 40:22 41:11 42:1 42:4,5,6,8 43:2,10 43:20,20 44:16,18 44:22 45:10 46:2 46:11,13 47:9 49:17,20 50:13 51:6,16 53:4,6,8 53:11,14 55:22 56:1,3 57:6,15	<b>guys</b> 97:5	<b>help</b> 70:17
<b>Fletcher's</b> 10:12	<b>future</b> 82:7		<b>GS</b> 70:4,5,6	<b>helpful</b> 26:2
<b>floating</b> 78:21	<b>G</b>			<b>Herbert</b> 5:11 8:13 67:16
<b>focus</b> 15:6	<b>general</b> 89:6 100:11		<b>H</b>	<b>HERMAN</b> 1:21
<b>focused</b> 57:13	<b>germane</b> 99:11		<b>hand</b> 8:10 34:8	<b>her's</b> 69:11
<b>folks</b> 56:13	<b>getting</b> 66:2 73:16 95:16		<b>happen</b> 44:5	<b>hit</b> 23:7
<b>following</b> 9:4 22:8 53:7	<b>give</b> 29:20 65:4 86:18 100:11		<b>happened</b> 51:7	<b>hold</b> 85:13 86:19
<b>forced</b> 11:5	<b>given</b> 15:11,13 20:8 20:11 31:2 88:12 90:4,5 93:9,12,17 94:2		<b>happening</b> 98:21	<b>honestly</b> 53:12
<b>forget</b> 42:9	<b>gives</b> 20:18 88:16 93:19		<b>happy</b> 10:15 100:2	<b>hope</b> 40:17 79:8
<b>form</b> 71:11,12	<b>go</b> 4:21 5:20 35:5 37:19 38:3 39:7 39:20 48:6 57:12 63:21 64:19 66:3 71:13 73:18 77:19 84:18 100:12		<b>hate</b> 76:14	<b>hopefully</b> 36:11 54:15
<b>forth</b> 84:8	<b>Goda</b> 5:12 8:14 12:5 52:10 60:20 61:1 62:13 67:16		<b>hear</b> 8:20 41:1 45:20 83:1 99:21	<b>hopes</b> 54:18
<b>forward</b> 39:9 41:14 77:19 87:12	<b>goes</b> 5:18 87:11 89:14 99:18		<b>heard</b> 49:6 63:18 82:12 84:13 94:9 98:11	<b>Hotel</b> 1:6,6 2:12 19:4 85:16
<b>found</b> 8:1 14:9,12 14:21 20:4 21:12 22:11	<b>going</b> 26:16 30:6 36:10 41:8,14 56:14 58:14 61:15 68:10,21 81:16 82:17 83:3 89:18 94:15 95:18 97:2 97:9 98:11 100:1 102:4,14		<b>hearing</b> 1:7,14 2:4 2:11 3:15 4:10 6:9,12 7:8 8:3 10:9 11:19 13:4 14:1,5,9 15:17 16:10,15 17:5 18:15 19:5,7,22 21:6 23:20,21 24:14,16,18 25:21 26:11,14,15 27:1 27:3 28:10 29:17 31:12,13 32:2 37:18 41:10 42:21	<b>house</b> 2:9
<b>four</b> 7:9 10:21 11:1 11:2,4,13 12:17 40:1,6 52:8 60:12	<b>good</b> 3:4 19:16 87:16 94:5			<b>Hughes</b> 5:12 8:14 52:11 60:20 61:4 61:6 63:6 69:2
	<b>grant</b> 48:20 50:15 50:15			<b>huh-uh</b> 39:17
				<b>hundreds</b> 56:20,21
				<b>hypothetical</b> 38:8
				<b>H-U-G-H-E</b> 61:4
				<b>I</b>
				<b>idea</b> 84:9
				<b>identified</b> 8:9
				<b>identify</b> 2:16 80:8 84:2 88:5
				<b>illness</b> 94:7 98:8

<p><b>illustrate</b> 52:4</p> <p><b>impaired</b> 53:19</p> <p><b>important</b> 88:8 92:15 93:13</p> <p><b>inability</b> 81:11</p> <p><b>included</b> 11:22</p> <p><b>including</b> 7:9 55:17 71:22 98:8</p> <p><b>incomplete</b> 81:21 99:2</p> <p><b>incorrect</b> 14:10</p> <p><b>indicated</b> 14:8 15:1</p> <p><b>indicating</b> 88:10</p> <p><b>indication</b> 19:3 47:13 79:16</p> <p><b>individual</b> 6:11 7:4 7:21 16:16,17,20 21:17 23:18 24:22 26:21 27:10 28:16 29:11,18,22 32:12 37:9,10 43:2 44:15 46:8,13 54:5 77:17 80:10 93:13 94:2 96:18</p> <p><b>individually</b> 33:22 55:11 69:12</p> <p><b>individuals</b> 2:14 5:8,13 6:16,22 7:2 8:7 10:20 14:5 17:7,13 18:16 20:13 21:8,8,9 24:1,11,20 25:6 25:14 30:4 31:4,7 31:9,10 32:1 33:11 34:2,4,14 37:13 40:2,6 43:12,22 44:20 45:15 46:1 47:14 49:16 52:1 64:10 64:13 75:17 81:2 87:22 88:17 89:5 90:4,6 92:8 93:20 94:6,8 95:1,2,8 96:12 97:20</p> <p><b>individual's</b> 47:10</p> <p><b>information</b> 64:20 65:10,13 68:9</p>	<p>73:16 102:7</p> <p><b>initially</b> 5:14</p> <p><b>insisted</b> 52:5</p> <p><b>instance</b> 75:20</p> <p><b>insufficient</b> 80:3</p> <p><b>intend</b> 81:20</p> <p><b>Intent</b> 89:2</p> <p><b>intention</b> 9:12</p> <p><b>interchange</b> 76:3</p> <p><b>interest</b> 21:3 33:18 55:14</p> <p><b>interested</b> 39:12,21 41:18 42:14 43:3 43:5 45:1,4 52:18 53:3 64:15</p> <p><b>interests</b> 30:12 67:21 79:17</p> <p><b>interpretation</b> 37:21 91:15</p> <p><b>interrupt</b> 15:6</p> <p><b>invalid</b> 102:11</p> <p><b>invitation</b> 10:14</p> <p><b>invited</b> 56:8 101:7</p> <p><b>involve</b> 91:11</p> <p><b>in-person</b> 11:19</p> <p><b>isolated</b> 99:17</p> <p><b>issuance</b> 9:17</p> <p><b>issue</b> 5:19 38:16 87:9,10 89:15 98:6,17 99:11</p> <p><b>issues</b> 15:7 82:13 88:6 94:9 95:15 99:12,18</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>Jacques</b> 2:19</p> <p><b>Jennifer</b> 48:10</p> <p><b>Jerry</b> 5:12 8:14 69:18</p> <p><b>John</b> 40:18,18,19 41:2,3</p> <p><b>join</b> 8:18</p> <p><b>Jones</b> 1:21 86:14 86:15</p> <p><b>judge</b> 5:9 8:12 65:14 66:6</p> <p><b>judgment</b> 44:13</p>	<p>68:6</p> <p><b>Julie</b> 3:6</p> <p><b>June</b> 5:11 52:10 60:19 61:1 63:1,2 66:16,19,20,22 67:7</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>keep</b> 52:3 71:16 78:8 95:18</p> <p><b>Kel</b> 12:14</p> <p><b>Kelly</b> 12:14,14</p> <p><b>kind</b> 4:20 64:19 75:13</p> <p><b>kindly</b> 71:6</p> <p><b>knew</b> 41:8</p> <p><b>know</b> 3:18 18:19 28:17 30:3 32:16 39:8,11,21 40:10 40:13,16,18,20 41:3,5 43:4 47:1 47:21 50:14 52:17 54:22 55:1 58:22 64:6,6 71:14,17 72:18,19 74:13 75:11,20 76:7 78:13,19 79:11 83:6 89:15 92:1 101:21</p> <p><b>known</b> 4:2</p> <p><b>knows</b> 89:20</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>laid</b> 6:18 42:22 90:20</p> <p><b>larger</b> 33:22</p> <p><b>late</b> 13:12</p> <p><b>law</b> 47:14 54:3 80:18 87:8</p> <p><b>lay</b> 51:1</p> <p><b>leader</b> 30:9 40:13 40:14,15</p> <p><b>leading</b> 18:13</p> <p><b>leaves</b> 40:7</p> <p><b>leaving</b> 11:2</p> <p><b>led</b> 35:12 42:13</p> <p><b>left</b> 3:16,21 4:9 29:4 43:16 90:8</p>	<p><b>legal</b> 17:2 26:12 27:11 46:4,7 85:14</p> <p><b>Lessee</b> 1:6 2:12</p> <p><b>letter</b> 3:19 18:22 36:16 39:9 41:14 43:7,15 46:2 50:5 59:16 60:1 62:18 65:1,4 67:5,6,8,11 67:22 68:2,3,18 73:20 74:17 88:10 89:2 95:19 96:14</p> <p><b>letters</b> 18:16 42:12 48:8</p> <p><b>let's</b> 37:19 39:7 55:8 64:18</p> <p><b>license</b> 1:8 2:13 19:14 99:1,21</p> <p><b>line</b> 28:3</p> <p><b>liquor</b> 99:1</p> <p><b>list</b> 39:14 40:18 41:4 53:22 62:14 63:5,6,9,21 64:17 64:19 67:17 68:11 68:15 69:3 70:12 70:18,22 75:8 78:21</p> <p><b>listened</b> 83:12</p> <p><b>lists</b> 74:22</p> <p><b>live</b> 60:8</p> <p><b>LLC</b> 1:6</p> <p><b>located</b> 2:12</p> <p><b>long</b> 22:4 24:5 47:7</p> <p><b>longer</b> 8:5 11:14 12:21 15:3 33:19 65:16 77:3 90:5 95:18</p> <p><b>longstanding</b> 91:14</p> <p><b>look</b> 65:12 80:19 87:8</p> <p><b>looking</b> 25:9,10 41:13 61:18 65:16 65:19 81:5 87:19 97:14</p> <p><b>lost</b> 43:22</p> <p><b>lot</b> 11:7,11 46:21 75:21 84:9 87:17</p>	<p style="text-align: center;"><b>M</b></p> <hr/> <p><b>Madam</b> 27:14 86:12 91:3,20 94:10 101:2</p> <p><b>Madeline</b> 12:15</p> <p><b>mailed</b> 96:14</p> <p><b>majority</b> 20:9</p> <p><b>managing</b> 2:21</p> <p><b>Marcus</b> 3:1,1</p> <p><b>Maria</b> 5:12 8:14 69:2</p> <p><b>mass</b> 53:16</p> <p><b>match</b> 55:21 58:13</p> <p><b>matter</b> 1:5 22:4,7 53:13 56:12 73:8 75:3,17</p> <p><b>matters</b> 4:21</p> <p><b>mean</b> 8:4 15:3 16:7 31:1 44:12 45:20 48:22 55:10 61:14 73:11 75:18 78:20 79:7 80:7</p> <p><b>meaning</b> 49:15</p> <p><b>meaningless</b> 77:6,9</p> <p><b>meant</b> 92:11</p> <p><b>meeting</b> 1:3 7:19 29:13 85:13 86:20</p> <p><b>Meetings</b> 85:12,17 85:19 86:21</p> <p><b>member</b> 1:19,20,21 1:22 2:21 11:8 12:13 23:18 29:18 29:22 34:20 35:2 35:8 36:8,14 37:16,19 38:7,10 38:14,17,21 39:3 39:6,17 40:5,10 40:16 41:12,17 42:3,7,18 43:2 44:6,17,19 45:6 45:12,18 48:4,7 48:19 49:10 50:1 50:4,14 51:8 53:14 54:1,11,21 55:7 56:4,7,11 57:10,13 58:5,7 58:16,20 59:1,2,5</p>
---	---	---	--	---

59:6,7,8,10,13,18 60:4,10,13,17 61:1,6,14,20 62:1 62:6,9,11,16,20 63:1,4,7,10,12,16 64:4,6,11,14,18 65:6,9,12,21 66:1 66:4,9,14,18,22 67:3,12,15,18,22 68:2,5,8,12,16,20 69:1,4,8,15,20 70:3,7,13 71:1,10 71:15 72:3,18 73:15,18 74:16,20 75:4,9 76:18 78:4 78:7,13,18 79:1,7 80:15 81:13 83:4 84:20 85:2,7,22 86:5,7,11,15 90:14,18 91:3,6 92:4,7,10,13,17 96:19,21 97:3,6 99:22 100:10	2:8,22 3:3,5,8,11 4:17 5:5,7,15,22 6:4 8:19 15:5,9,18 15:21 16:2,6 17:3 17:11,16,22 18:14 18:20 20:7,17,21 21:14 22:3,10,14 22:22 23:2,8 24:3 24:7 25:8 26:3,7 26:10 27:13,15,21 30:2,8,16,21 32:14,19 33:14 34:1,5,9,22 35:16 36:6 45:19 46:10 46:20 47:4,19 48:3,6 49:13 51:9 54:9 56:5,9 57:11 57:22 59:3,21 60:6,18 61:11 71:3 72:17 73:1,6 73:10,14 75:1,6 75:10 78:6 80:16 81:14 82:10 83:1 83:5,9,13,16 84:1 84:5,17,22 85:4,8 86:1,6,8,8,13,16 87:6 90:15 91:1,4 91:21 92:6,9,12 92:14,18 93:2,6 94:14 95:17 96:2 96:4,6,20 97:4,8 97:15,21 98:4,9 98:13 99:6,9 100:5 101:1,4,20 102:9,13	<b>months</b> 13:4,12 95:14 <b>motion</b> 86:2,17 90:16 92:20 93:3 94:16 96:9 101:8 101:17 <b>move</b> 85:13 88:22 90:11 <b>moved</b> 95:14 <b>Mueller</b> 3:2,18 4:11,12,22 5:2,6,8 5:20 6:5 13:17 15:8,14,20 16:1,3 16:9 17:10,13,17 18:3,18 19:17 20:12,20 21:1,15 22:8,13,17 23:1,3 23:15 24:6,9 25:10 26:4,9,13 29:7 30:5,9 31:8 32:18 33:9,16 34:3,19 35:20 36:10,13 37:5,17 38:5,8,11,15,20 39:2,4,13 40:1,9 40:12 41:7,16,21 42:5,20 44:14,18 45:5,8,13 46:6,12 47:3,5 48:1,7,18 49:5,11,14 50:2,8 50:20 53:1 57:20 58:1,6,11 61:15 63:8,17,18 64:3,5 64:9,12 65:2,8,11 65:15,22 66:3,6 66:11,15,20 67:1 67:9,13,16,20 68:3,7,10,14,17 68:21 69:2,5,9,16 69:22 70:5,10,19 72:10 74:10,18 77:7 78:5,12,15 78:22 79:6,13 80:19 81:18 87:19 91:6 93:8 94:20 96:10 97:11,18 98:2,5,10,18 99:7	99:15 100:2,10,15 101:12 102:3,10 102:18 <b>Municipal</b> 6:18 14:3,13 16:11,13 44:3 50:21,22 77:15 80:20 81:6	41:1 52:8,11,11 72:7 82:4 97:20 <b>new</b> 1:10 20:10,12 55:22 56:1 <b>Newman</b> 5:9 8:12 11:5,6 12:12,12 66:7 <b>NICK</b> 1:19 <b>nine</b> 12:17 28:5,5 28:12,13,20 71:22 <b>nominated</b> 30:20 <b>non-issue</b> 69:13 <b>nose</b> 52:20 76:11 <b>note</b> 30:13 74:2 <b>notice</b> 19:10 28:10 44:5 48:16 52:15 86:18 95:3,10,12 96:17 <b>notification</b> 47:11 <b>notified</b> 49:2,3 97:20 <b>notify</b> 9:12 94:22 95:7 97:13 <b>notwithstanding</b> 10:11 <b>number</b> 6:20 23:11 24:20 25:13 31:14 31:18 37:12,22 38:4 41:11 42:9 42:10 45:9 51:12 53:18,19 55:17 71:14 77:1 78:9 81:1 87:21 89:12 <b>numbers</b> 43:9 47:8 80:3,8 <b>NW</b> 1:7 <b>N.W</b> 1:14 2:13
<b>members</b> 6:20 8:2 8:7,22 14:2,5,19 14:22 15:1 20:1,3 20:10,12 22:16 24:4,7,10,14,17 25:22 27:4,6 31:11 33:5 36:7 43:20 44:22 60:21 60:22 61:5 70:12 81:15 <b>memory</b> 80:17 <b>merely</b> 8:2 33:17 51:17 <b>merge</b> 10:15 <b>met</b> 1:13 <b>Michael</b> 5:11 8:13 12:14 66:8,12 84:3 <b>Michaels</b> 12:15 <b>Michelle</b> 12:15 <b>microphone</b> 83:2 83:17,19 <b>mike</b> 1:22 82:22 <b>Miller</b> 1:15,18 2:3	<b>minds</b> 45:7 <b>minute</b> 35:21 76:9 87:2 <b>minutes</b> 82:19 <b>miscounted</b> 22:19 <b>missed</b> 27:22 <b>misspeaking</b> 66:21 <b>misstating</b> 13:19 <b>mix</b> 55:21 58:13 <b>mixing</b> 58:17 <b>mobility</b> 53:19 <b>moment</b> 55:6	<b>named</b> 57:20 98:19 <b>names</b> 7:12,14 10:22 11:17 12:19 16:4,22 22:21 23:6 25:3,4,5 26:5 34:15 36:2,17,19 39:14 43:19 58:9 64:17 65:20 66:2 71:21 74:11 76:7 90:7 <b>naming</b> 52:2 <b>nature</b> 89:12 <b>necessarily</b> 44:20 <b>need</b> 3:12,15 10:22 14:14 21:2 23:7 38:12 54:22 55:1 76:1 83:17,18,20 97:19 99:13 100:19 <b>needs</b> 54:2,5 <b>negotiate</b> 56:14 <b>negotiated</b> 35:19 55:11 <b>negotiates</b> 31:4 <b>negotiating</b> 40:15 56:17 <b>negotiations</b> 18:7 <b>neighbor</b> 52:19 76:10 <b>Neither</b> 13:11 <b>never</b> 7:14 13:8	<hr/> <b>N</b> <hr/> <b>nail</b> 79:3,10 <b>nailed</b> 79:5 <b>name</b> 4:11 11:9 16:16 39:15 40:17 41:4,7 47:16 57:21 61:22 77:17 84:3 89:11 <b>named</b> 57:20 98:19 <b>names</b> 7:12,14 10:22 11:17 12:19 16:4,22 22:21 23:6 25:3,4,5 26:5 34:15 36:2,17,19 39:14 43:19 58:9 64:17 65:20 66:2 71:21 74:11 76:7 90:7 <b>naming</b> 52:2 <b>nature</b> 89:12 <b>necessarily</b> 44:20 <b>need</b> 3:12,15 10:22 14:14 21:2 23:7 38:12 54:22 55:1 76:1 83:17,18,20 97:19 99:13 100:19 <b>needs</b> 54:2,5 <b>negotiate</b> 56:14 <b>negotiated</b> 35:19 55:11 <b>negotiates</b> 31:4 <b>negotiating</b> 40:15 56:17 <b>negotiations</b> 18:7 <b>neighbor</b> 52:19 76:10 <b>Neither</b> 13:11 <b>never</b> 7:14 13:8	<hr/> <b>O</b> <hr/> <b>object</b> 9:13 <b>objecting</b> 9:10 <b>objection</b> 6:3 9:13 9:17 <b>objections</b> 10:7 <b>occupation</b> 89:12 <b>occurred</b> 10:10 <b>oh</b> 3:5 33:14 34:9

40:21 83:14 101:1 <b>okay</b> 2:8,22 3:3,11 3:14 4:17,17 5:15 6:4 8:19,22 15:5,9 15:18 16:2 25:8 26:9 27:13 28:3 30:16,22 32:15,18 34:1,5,22 35:8,16 36:6,13 37:16 38:14,17 39:3 40:6 42:18 43:15 45:12 47:4 48:3 51:8 54:10 55:8 56:1,10 58:5,18 59:2,6,10,18 60:10,17 61:11,13 61:14,16 62:1,6,9 62:21,22 63:4,7 63:10,18 64:18 65:21 66:14 67:4 67:12,12,15,22 68:1,1,5,20 69:4,8 70:3,13 71:10,15 72:17,21 73:8 80:16 81:14,16 82:10,11 84:5,17 85:8 86:16 87:1,6 90:15 91:1,21 92:6,9,18 95:17 95:19 96:2 98:4,9 99:6 100:5,5,9 102:9,13 <b>older</b> 53:18,21,21 94:8 96:18 <b>once</b> 43:14 <b>ones</b> 59:12 <b>Open</b> 85:12,17,19 86:21 <b>opinion</b> 5:17 6:1 18:12 <b>opportunity</b> 87:7 <b>opposed</b> 93:3 <b>opted</b> 33:19 <b>order</b> 29:12 51:21 54:5,21 80:12 94:14 <b>organization</b> 75:16	<b>original</b> 11:1 12:5 14:11 20:15 45:17 57:7 58:2 63:8 64:14 70:12 71:20 76:7 78:9,19 <b>originally</b> 6:13 8:15 35:10 39:10 62:14 69:19 74:17 <b>outcome</b> 77:5 <b>owner</b> 9:5 10:3 35:12 <b>owners</b> 6:8 25:18 25:22 32:4 93:15 <b>O'Brien</b> 2:18,18 6:1,2 8:21 9:1 11:10 15:1 21:12 27:14,16,22 30:13 30:17 34:6,7,11 34:21 35:1,4,9,17 40:14 42:17 47:18 51:10,11 53:4 54:7,12,17 55:3,8 57:14 58:8,14,19 58:22 59:4,7,11 59:17,19,22 60:7 60:11,14,19 61:3 61:18,21 62:2,7 62:10,13,19,22 63:2,5,11,14 66:4 70:15,17 71:5,11 71:16 72:6,15 73:1,4,8,12,17,20 75:2,10 76:8 77:13 78:1 91:8 93:5 94:10 101:2 101:6 <b>O'Brien's</b> 53:1 <hr/> <b>P</b> <hr/> <b>page</b> 28:2 62:2,5,10 65:19 70:20 71:6 71:9 72:5,12 74:11 <b>pages</b> 61:19 65:20 <b>paper</b> 51:17 52:19 <b>paragraph</b> 48:10 56:20	<b>part</b> 5:7 7:2,14 8:15 11:12 16:8 25:1 33:20 34:21 35:3 36:22 39:22 44:11 46:1 54:6 56:2 66:10,13,16 67:1,17 69:18 70:4 74:1 76:4 80:12 81:11 88:8 88:20 100:14,16 100:17 101:16,18 102:1 <b>PARTICIPANT</b> 61:7,9 95:22 96:3 96:5 97:1 <b>participants</b> 45:1 <b>participate</b> 32:13 44:1 52:16 76:13 <b>participating</b> 76:20 <b>particular</b> 88:14 <b>particularly</b> 33:1 94:2 <b>parties</b> 3:16,21 4:7 4:8 61:13 88:5 <b>party</b> 75:14 88:17 <b>passed</b> 86:17 <b>passes</b> 93:4 <b>passing</b> 68:6 69:10 <b>passionately</b> 91:7 <b>Pauline</b> 5:9 8:12 12:11,12 66:7 <b>people</b> 6:21 14:11 18:2 21:20 23:5 30:18 31:14,16 37:14 38:1,4 39:1 39:8 41:4,11,14 41:15,18 42:8,15 42:17,18,19 43:15 43:17,17 47:1,1 48:21 49:1,1 50:10 51:4 52:5 52:16 55:9,11,13 56:16,18 57:17,19 57:20 59:14,15 61:17 64:1,2 70:11,15 76:10 78:8 79:12 84:9	84:14 88:22 89:16 92:1,16 93:16 <b>period</b> 9:14,15,16 <b>permitted</b> 91:15 <b>person</b> 7:4 9:9,10 9:11,19 10:13 11:14 12:21 13:13 13:14 16:17 17:7 19:5,13,20 21:9 21:11 23:6,13 24:17 28:5 32:8 46:14,16 48:12 51:15,15,19,22 52:1 53:5 74:21 76:20 77:3 80:9 81:7 89:8,20 96:16 <b>personal</b> 60:2 <b>personally</b> 7:18 <b>persons</b> 9:4 35:15 53:3,8 <b>person's</b> 9:19 89:11 <b>persuasively</b> 91:7 <b>pertinent</b> 74:1 <b>petition</b> 12:2,6 14:11 15:15,19 16:3 17:1 22:20 26:5 32:3,5 36:19 39:14 41:8 45:17 47:17 49:2 53:15 54:14 55:9 56:18 58:2,3 64:13 69:11 72:13 78:10 78:16 <b>piece</b> 51:17 52:19 <b>place</b> 13:9 <b>players</b> 52:14 <b>please</b> 2:17 71:2 <b>plus</b> 76:15 <b>point</b> 8:20 9:2 35:12 37:20 42:20 52:4 72:19 77:21 78:20 79:2,2 81:17,19 82:8,13 93:18,22 97:10 98:14,19 99:21 101:21 102:15	<b>pointed</b> 21:12 <b>points</b> 13:20 15:10 <b>population</b> 53:17 <b>portions</b> 10:8 <b>position</b> 20:8 22:4 <b>possibility</b> 18:8 <b>posted</b> 29:9 <b>practical</b> 55:12 <b>practice</b> 49:4 76:15 76:16,22 89:5 91:8,14,17 <b>practicing</b> 75:12 <b>prefer</b> 5:20 <b>prepare</b> 54:19 <b>present</b> 1:16 8:11 21:21 28:8 30:6 42:12 69:10 72:1 81:20 <b>president</b> 8:11 <b>presiding</b> 1:15 <b>pretty</b> 83:21 87:14 <b>prior</b> 89:10 95:16 <b>probably</b> 2:15 82:18 <b>procedural</b> 53:13 99:18 <b>proceed</b> 4:16 <b>proceeding</b> 4:9 54:13 76:13 81:20 86:19 97:2 <b>process</b> 18:5 57:1 88:9 <b>prolong</b> 78:7 <b>property</b> 6:7 9:5 10:3 25:18,22 32:4 35:11 93:13 <b>protest</b> 1:6 2:10 3:15,17 4:10 5:14 7:14 8:17 9:3,5,14 9:15,20 11:16 12:2 13:4,14 16:12,17 18:10,13 19:3,9,15,21 20:6 20:15,18,22 21:4 21:18 22:1,20 24:12,13 25:20 26:22,22 28:13,16
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29:18 32:10,13 33:11,17,19,20 34:16 35:5,10,13 36:1,3,3,16 37:10 38:3 41:19 43:3,6 44:1,12 46:8,9,11 46:13,15,17 47:17 48:15 49:8,15,18 49:20,21 50:12 51:2,4 53:8,22 54:2,6,14 56:22 57:5 61:19 65:17 70:12 74:3 76:7 76:13 77:18 80:11 80:13 81:9,12 87:11 88:6,11 89:2 90:5,10,12 92:21 93:4,11,16 93:20 94:2,7,11 95:5,7,9,13,21 96:13 98:11 99:10 99:17 102:1,19 <b>protestant</b> 23:18 31:2 34:18 55:21 60:1 76:17,18 88:12 <b>protestants</b> 3:2 4:13,15 5:3 6:8,14 7:15,17 13:1,2 23:12 25:11 26:18 29:22 36:16 39:12 49:1 57:8 74:2 77:1 79:15 80:21 90:6 91:12 <b>protested</b> 10:1,4 <b>protesters</b> 24:22 42:1 98:6 <b>protesting</b> 53:15 <b>protestor</b> 21:17 <b>protestors</b> 44:4 <b>protests</b> 56:21 70:2 <b>provide</b> 19:5 25:2 48:12 <b>provision</b> 77:14 81:4 98:1 <b>provisions</b> 80:18 94:3	<b>pull</b> 3:9 <b>purports</b> 11:3 <b>purpose</b> 6:17 13:22 15:17 16:9 19:21 23:21 24:18 25:12 25:20 26:14,15 27:2,5 31:13 37:8 41:9 42:21 43:8 45:2 47:9 50:9 51:14,20 52:13,21 53:6 54:12 77:9 80:22 85:14 87:20 88:3 <b>purposes</b> 9:9 64:16 <b>pursuant</b> 16:10 25:14 44:3 47:14 81:2 86:21 97:12 97:22 98:3 99:3 <b>pursue</b> 4:10 99:1 <b>put</b> 36:11 51:18 76:6 79:15 98:15 <b>puts</b> 76:10 <b>P-R-O-C-E-E-D-...</b> 2:1 <b>p.m</b> 2:2,6,7 87:4,5 102:20 <hr/> <b>Q</b> <hr/> <b>question</b> 13:2 24:4 32:15,20 43:14 58:15 73:2 75:11 78:5 83:8 84:12 84:13 93:7 97:7 <b>questions</b> 8:21 36:7 45:20 <b>quick</b> 83:21 <b>quickly</b> 84:8 <b>quite</b> 76:11 <b>quote</b> 24:19 <hr/> <b>R</b> <hr/> <b>raise</b> 8:10 94:19 <b>raising</b> 34:7 <b>read</b> 12:20 15:12 23:9 32:7 42:8 45:6 49:6 88:15 95:19 102:4 <b>reading</b> 10:8 36:1	<b>ready</b> 85:1 <b>reaffirming</b> 39:16 <b>really</b> 40:19 74:20 90:18,20 91:19 <b>reargue</b> 97:9,9 <b>reason</b> 31:20 70:14 90:2 <b>reasons</b> 56:19 85:18 94:7 <b>recall</b> 27:16 <b>receive</b> 43:14 <b>received</b> 95:3,12 <b>recess</b> 2:5,6 86:19 87:4 <b>recognize</b> 23:17,19 <b>recognized</b> 22:16 32:22 33:1,8 90:9 <b>recognizes</b> 88:8 <b>recognizing</b> 23:11 <b>Reconsideration</b> 94:17 96:9 101:8 101:17 <b>record</b> 2:17 10:12 18:1 22:12 26:8 48:5,8 61:12 80:1 82:6 83:6 90:1,3 93:9 96:11 100:3 100:9,16,22 101:15,18 <b>recourse</b> 96:8 <b>Reeves</b> 1:14 <b>referred</b> 4:5 8:16 36:18 68:18 <b>referring</b> 15:16 19:18 53:6 <b>reflected</b> 75:7 <b>refresh</b> 80:17 <b>regardless</b> 23:3 37:1 <b>regret</b> 79:20 <b>regs</b> 89:17,17 <b>regulation</b> 18:22 19:12 25:9 80:20 81:6 89:3 93:19 97:12 <b>regulations</b> 6:18 14:3,14 16:11,14	17:20 21:16 23:16 25:2 26:20 27:12 29:11,20 42:22 44:4 50:22 51:1 77:15 87:18 99:4 100:18 <b>reinstatement</b> 95:15 <b>reiterate</b> 65:3 <b>reliance</b> 34:16 35:17 79:16 <b>rely</b> 88:3 <b>relying</b> 80:18 <b>remain</b> 54:6 <b>remainder</b> 29:14 40:3 77:18 <b>remaining</b> 11:4 13:12 39:1 <b>remains</b> 38:13,19 <b>removed</b> 50:12 <b>render</b> 77:5,8 <b>renewals</b> 9:17 <b>renouncing</b> 30:15 <b>repeated</b> 62:4 <b>represent</b> 9:21 11:4 11:5 18:17 40:20 40:21 41:5 45:14 54:8 75:21 89:4 <b>representation</b> 42:12 89:13,22 <b>representative</b> 4:3 7:6,20 11:21 12:4 12:7 14:15,17 17:8,14,15,19 18:2,4 19:7,13 21:10 23:14 24:16 28:9 29:3,12,14 30:4 32:9,21 33:2 37:2,6 40:4,8 47:6 47:21 48:13 55:15 67:6 76:21 79:12 81:8 89:9 <b>represented</b> 6:14 10:19 11:18 30:18 31:1,3 47:1 67:10 75:15 78:11 92:2 <b>representing</b> 4:19	5:1,2 41:2 67:21 79:17 80:2 89:21 89:22 <b>request</b> 46:3 <b>requests</b> 102:11 <b>require</b> 6:8 10:8 25:11 29:11 31:21 37:9 53:13 80:21 89:17,18 <b>required</b> 6:6 17:18 18:19,21 21:2 25:17 49:4 50:9 53:2 54:3 67:13 77:2 80:7 102:7 <b>requirement</b> 14:2 14:13 17:20 50:7 50:17,19,21 65:4 80:10 <b>requirements</b> 37:13 <b>requires</b> 97:13 <b>requiring</b> 91:13 <b>resident</b> 7:5 61:10 70:1 84:6 <b>residents</b> 6:7 14:10 21:3 25:18,22 27:5 32:3 35:7 53:9,18,20 93:15 <b>resolution</b> 10:7 <b>resolved</b> 95:16 <b>resource</b> 19:2 <b>respect</b> 5:17 51:12 82:12 87:9 <b>respectfully</b> 22:18 23:15 46:6 49:6 65:15 77:7,12 79:13 101:13 <b>respond</b> 13:18 58:11 61:16 66:5 73:4 <b>response</b> 78:3 <b>rest</b> 33:18 <b>result</b> 19:8,14,20 32:9,11 44:5 46:14,16 47:16 48:15 49:8,14,17 49:19 60:9 77:17
--	---	---	---	---

79:22 81:8,10 <b>Retailer</b> 1:8 <b>return</b> 57:9 87:1 <b>reversing</b> 91:17 <b>review</b> 3:20 27:17 87:7 <b>ridiculous</b> 101:3 <b>right</b> 3:12 16:6 22:22 33:6 36:20 38:1 39:6,6,7,10 42:3 44:1 49:10 49:13 54:9 55:15 58:18,19 60:5,13 60:18 64:2,8,16 66:9 69:1,15 72:22 73:12,13 75:9 77:22 80:5 81:13,15 82:8 83:19 85:9 91:2 92:12,14,19 96:4 97:17 99:16 101:1 102:4 <b>rights</b> 29:21 32:12 47:10 57:7 93:13 93:14 <b>risk</b> 22:1 <b>Robert</b> 5:12 8:14 68:15 <b>role</b> 59:12 60:1 <b>roll</b> 6:9,12,16,17 7:3,8 8:3 10:9,13 11:19 12:3,6,9 13:5,10,22 14:4,9 15:17 16:10,15 17:4 18:15 19:5 19:22 21:6 23:10 23:20,21 24:14,18 25:21 26:14 27:1 27:2 28:10 31:3 31:12,13 32:2,22 33:1,5 37:2,8,18 37:20,21 39:11,20 41:10,19,22 42:21 42:21 45:3,22 47:15 48:11 51:14 51:19 52:13,21 53:10 59:20 60:8	66:12,16 69:12 75:20 76:5 77:6,8 77:10,16 80:11 82:4 86:2 87:20 88:3,9,13,14 89:16 90:9 98:20 <b>room</b> 1:14 86:21 <b>rule</b> 91:16 <b>ruled</b> 101:6,11 <b>Ruthanne</b> 1:15,18 <hr/> <b>S</b> <b>S</b> 61:5 <b>satisfied</b> 24:2 43:11 <b>satisfy</b> 4:14 23:6 37:11,13 49:16 <b>saw</b> 74:6,7 <b>saying</b> 13:19 14:3 17:18 19:18 22:9 31:6 32:6,17 36:15,21 37:4 38:5 45:21 46:4,5 60:2 64:14 72:3,6 72:7 78:8,16 87:14 94:1 97:18 102:2 <b>says</b> 9:4,10 19:4 25:16 26:20 28:2 28:7 40:21 48:11 50:3,16 57:5 74:1 74:4 80:20 81:6 89:8,20 <b>schedule</b> 102:5 <b>scheduled</b> 3:14 99:10 <b>scope</b> 99:20 <b>second</b> 11:9,16 65:19 71:8 72:12 74:11 85:21,22 90:12,14 <b>seconded</b> 86:2 90:16 92:20,21 <b>section</b> 9:9 77:20 85:11,16,19 <b>see</b> 2:14 15:12 26:16 28:1 36:5 41:15 51:22 52:22	53:3 58:12 63:3,6 63:16 71:12 74:12 88:19 89:6 96:21 <b>seeing</b> 70:16 <b>seeking</b> 6:19 85:14 <b>seen</b> 71:7 72:7,8 76:2 78:1 93:22 101:5 <b>sense</b> 53:12 <b>sent</b> 19:2 30:14 36:16 48:9 95:20 <b>sentence</b> 50:6 <b>separate</b> 28:16 69:19,20 75:8 98:17 <b>serious</b> 52:22 <b>session</b> 82:15 84:19 <b>settled</b> 54:18 <b>settlement</b> 4:1 31:5 33:3 54:15,22 55:10 <b>seven</b> 12:17 20:13 25:6 39:5 45:15 52:5 58:1 69:17 70:11 <b>shared</b> 71:6 <b>Sharie</b> 12:14 <b>sharing</b> 25:19 <b>sheet</b> 71:21 <b>show</b> 8:10 32:7 37:2 40:2 62:19 62:20 75:22 89:16 89:18 94:5 98:7 <b>showed</b> 13:8 28:5 59:14,15 <b>showing</b> 55:14 76:19 <b>shown</b> 19:16 <b>shows</b> 18:1 32:1 <b>side</b> 18:8 44:7 57:5 57:15 91:11 <b>sides</b> 57:6 <b>sign</b> 20:22 35:14 52:19 62:17 76:10 <b>signal</b> 78:2 <b>signatories</b> 7:16 20:14,18 26:21	<b>signatures</b> 62:3,4 71:7 74:3 <b>signed</b> 2:16 5:13 12:2,5 16:17,22 24:12 33:21 39:15 43:6 45:17 47:17 49:2 53:14 55:9 56:18 58:2,3 64:13 72:14 74:2 74:22 78:9,16 80:11 89:10 95:20 96:12 <b>significance</b> 22:15 <b>significantly</b> 53:21 <b>signing</b> 51:17 54:13 76:17 <b>Silverstein</b> 1:22 54:10,11,21 55:7 56:7,11 68:2,12 86:10,11 91:3,5,6 92:4,7,10,13,17 <b>simple</b> 36:12 <b>simply</b> 54:2 <b>single</b> 37:9,10 43:1 45:16 53:13 54:1 77:14 <b>sir</b> 35:1 56:4 82:21 83:10,13 <b>sit</b> 83:19 <b>sitting</b> 25:7 45:15 <b>situation</b> 4:20 38:9 43:18 75:14 76:2 <b>six</b> 12:17 38:6 <b>smaller</b> 42:10 <b>smallest</b> 84:10 <b>Smith</b> 4:3 6:15 7:7 7:20 11:20 12:11 12:11 14:16 17:15 17:19 18:1 24:15 27:18 28:20,22 29:2,13 30:3,14 32:20 33:2,10 34:15 35:6,13,15 37:7 40:3,7,18,19 40:21 41:5,8 46:22 47:20 48:1 48:10 56:3 59:9	60:9,21 61:7,8,22 62:17 66:16,19 67:10,21 68:18 69:6 73:22 74:4,8 74:19 78:11 79:14 79:16 <b>Smith's</b> 34:11,13 43:7 74:15 <b>solid</b> 42:11 <b>somebody</b> 67:7 <b>sorry</b> 11:6,9 27:18 33:15 50:13 56:3 66:21 70:8 73:19 78:7 83:15 101:12 <b>sort</b> 36:10 <b>speak</b> 3:12 4:8 56:17 <b>Speaking</b> 82:22 <b>speaks</b> 55:1 <b>specifically</b> 40:22 88:16 <b>spelled</b> 61:4 <b>spend</b> 11:7,11 <b>spoke</b> 91:8 95:2 <b>staff</b> 73:21 <b>stake</b> 93:14 <b>stand</b> 83:20 <b>standing</b> 4:16 6:19 6:22 7:1 8:1,5 9:3 9:9 11:15 13:9 14:8,12,22 15:3 15:11,13 16:8,13 16:18,18,19,21 17:5 20:2,5,8,11 20:19 21:1,8,13 21:22 24:1,21 25:4,14,16,17 26:18 27:8 28:12 28:18 29:5,8,20 31:2,15 42:2 43:10 44:8,10,15 44:16,21 45:10 50:11 51:6 53:7 57:18 77:4 80:3,9 81:2 82:13 84:7,8 84:15 87:10,22 88:6,12,16 90:5
--	--	---	---	--

94:12 99:11 101:7 101:10 <b>start</b> 87:13 94:12 <b>started</b> 28:4 60:1 <b>starting</b> 9:2 28:2 82:11 <b>state</b> 75:2 80:1 82:6 100:19 <b>stated</b> 50:18,21 <b>statement</b> 19:6 35:3 48:12 89:10 <b>states</b> 16:14 26:15 28:11 <b>stating</b> 3:19 <b>status</b> 62:12 88:19 <b>statute</b> 49:12 91:16 <b>step</b> 35:5 39:10 <b>Stephen</b> 2:18 3:1 <b>sticks</b> 52:19 <b>Street</b> 1:14 <b>stuff</b> 74:13 <b>submission</b> 89:10 <b>submit</b> 17:18 21:4 89:19 99:13,15 100:3,8,8,19 101:10,15,16,22 101:22 <b>submits</b> 32:2,4 <b>submitted</b> 3:19 16:4,12 18:16 19:2 22:21 23:13 24:13 34:15 36:2 69:11 70:2 72:13 74:17,18 76:6 89:1 102:6,12 <b>sufficient</b> 6:20 23:6 23:22 24:20 25:13 31:14 37:12,22 38:4 41:11 43:9 45:9 47:8 50:10 80:8 81:1 87:21 95:10 96:17 <b>suggest</b> 98:14 <b>suggesting</b> 54:1 <b>suggests</b> 14:12 54:4 <b>Suite</b> 1:14 <b>supply</b> 11:1	<b>support</b> 15:2 74:14 <b>supposed</b> 94:12 <b>sure</b> 15:8 44:21 58:16 80:19 85:6 100:12,21 <hr/> <b>T</b> <hr/> <b>table</b> 2:15 56:6 61:13 <b>take</b> 2:5 29:21 33:20 37:21 47:10 55:19 82:1,17,20 86:2 87:2 98:16 99:14 <b>taken</b> 57:8 <b>talk</b> 83:17 <b>talking</b> 31:22 53:17 61:12 64:1,2 72:9 93:14 <b>talks</b> 71:19 88:4 89:4 <b>tardy</b> 74:9 <b>teaches</b> 76:9 <b>team</b> 41:22 55:2 <b>teams</b> 57:3,3 <b>telephone</b> 89:12 <b>tell</b> 40:22 50:5 57:16 58:9 64:19 65:11 66:1 79:5 <b>tells</b> 50:6,8 <b>ten</b> 12:18 <b>tenants</b> 75:21 <b>term</b> 13:1 <b>thank</b> 2:5 3:13 28:3 33:15 34:9 45:18 51:8 80:15 85:7 87:3 90:22 93:5,6 102:16,18 <b>thing</b> 21:19 56:13 68:18 69:5 <b>things</b> 37:3 51:11 <b>think</b> 8:20 11:6,11 11:22 12:16 13:18 17:1 18:20 19:11 19:17 20:18,20 22:13,15,17,18 24:6 26:7,10,11	26:14 27:9 30:14 32:14 33:9 34:14 36:14 38:11 42:7 42:15 43:13 44:12 45:22 46:5,18,21 47:5,7,20 48:17 52:6,7 53:22 54:17 55:16 57:17 57:18 58:10 61:3 65:16,18 70:19 71:18 72:21 74:11 75:22 77:8 79:14 81:16 87:18 88:7 88:21 89:7 90:20 91:22 92:5 95:9 96:7,7 97:5 99:12 99:16,17 101:9,13 102:14 <b>third</b> 48:10 62:4,10 <b>thought</b> 30:5 92:2 <b>three</b> 11:5 12:17 29:1 30:19 60:12 61:19 72:2 76:14 <b>threshold</b> 23:7 49:17 87:10 <b>threw</b> 41:7 <b>throw</b> 77:4 <b>tied</b> 19:11 <b>time</b> 8:1 11:7,12 12:16 30:6 39:18 41:15 46:9 53:16 54:2 78:18 79:3 94:11,17,18 98:11 99:14,21 <b>timely</b> 95:15 <b>today</b> 5:9,11 6:11 7:10,18 8:8 20:14 25:7 28:8 30:14 39:5 40:2 52:6,15 64:5 69:17 74:5 77:13 84:15 87:10 99:10 101:22 <b>total</b> 58:6,8 <b>track</b> 52:3 <b>tracking</b> 24:10 <b>tracks</b> 49:11 <b>transcript</b> 10:9	15:12 23:10 27:17 28:1 41:1 42:9 71:13 72:5 73:16 88:15 <b>transfer</b> 95:10 <b>treated</b> 40:13,14 <b>trial</b> 52:9 56:1 <b>true</b> 47:18 63:9 <b>try</b> 58:14 <b>trying</b> 13:3 36:8 57:2 58:12 <b>twice</b> 52:7 <b>two</b> 10:6 11:6,12 12:16 37:7 51:11 58:10,15 60:12,15 65:19 70:1,15 93:9 95:13 <b>t/a</b> 1:6 <hr/> <b>U</b> <hr/> <b>unable</b> 14:19 94:6 <b>understand</b> 3:22 7:11 12:22 18:15 18:18 32:16 36:9 36:9 41:12 56:14 68:7,14 75:4 79:9 93:10,21 96:10 97:5,11,15 <b>understanding</b> 6:10 56:16 96:15 <b>unfair</b> 91:19,22 92:5,8 <b>uniform</b> 76:16 77:1 <b>universe</b> 75:19 <b>unnecessary</b> 47:7 <b>unusual</b> 4:20 <b>use</b> 13:1 96:18 <hr/> <b>V</b> <hr/> <b>verified</b> 37:22 <b>view</b> 72:19 <b>viewed</b> 36:22 <b>Virginia</b> 1:7 2:12 <b>voluntary</b> 18:9 33:12,21 34:12,17 35:14,18 54:16 56:15,22 <b>vote</b> 82:17,18 86:17	<b>voted</b> 93:10 <hr/> <b>W</b> <hr/> <b>wait</b> 26:11 66:18,18 66:18 73:7 <b>waited</b> 95:6 <b>Waldman</b> 5:13 8:15 11:6,10 56:2 59:4,6 69:18 <b>Walker</b> 5:10 8:13 28:15,19 59:19,22 69:9 72:1 <b>Walsh</b> 5:11,11 8:13 12:1,1,14 52:10 56:3,9 59:8 60:20 61:1 63:1,2 66:8 66:13,20,22 67:4 67:7 82:22 83:8 83:11,14,22 84:3 84:4,6 85:6 <b>Walshes</b> 52:7 <b>want</b> 3:8 4:13,18,19 10:14 18:21 23:9 34:8 45:21 57:16 57:19 58:21 65:9 68:8 72:20 73:7,9 78:2 79:3 83:19 88:11 90:17 95:18 100:7,21 101:21 <b>wanted</b> 19:3 75:11 82:6,8 84:11 <b>wants</b> 40:19 41:5 82:19 90:12 <b>Washington</b> 1:14 <b>wasn't</b> 44:9,10 57:4 72:12 79:17 80:6 <b>Watergate</b> 1:6,6 2:11 3:7 4:6 10:2 10:3,4 19:4 29:10 34:18 35:7,10 85:16 93:15 <b>way</b> 36:12 52:2 55:20 57:1 70:8 <b>weekly</b> 100:13 <b>welcome</b> 87:2 100:8 <b>went</b> 27:9 43:21
--	---	--	--	--

<b>weren't</b> 33:5 43:5	<hr/> <b>#</b> <hr/>	43:17	<b>70</b> 93:17
<b>West</b> 3:7 4:6 10:2,3	<b>#13-PRO-00005</b>	<b>25</b> 6:5 10:10	<hr/> <b>8</b> <hr/>
10:4 34:18 35:7	1:9	<b>25th</b> 7:19 58:4	<b>8</b> 1:12 4:5
35:10,18	<hr/> <b>1</b> <hr/>	<b>25-601</b> 9:3 25:15,16	<hr/> <b>9</b> <hr/>
<b>we'll</b> 37:21 63:17	<b>10</b> 28:21 43:19 72:2	81:3	<b>90</b> 93:17
<b>We're</b> 68:12	74:10 82:19 87:2	<b>2650</b> 1:7 2:12	<b>91162</b> 1:8 2:13
<b>white</b> 48:22	<b>100</b> 47:1	<b>28</b> 40:7	
<b>wife</b> 30:20	<b>101(41)</b> 9:16	<b>29</b> 28:2	
<b>William</b> 4:3 6:15	<b>11</b> 7:12 11:18 12:1	<hr/> <b>3</b> <hr/>	
73:22	<b>11th</b> 9:22 13:16	<b>3:59</b> 2:2,6	
<b>window</b> 9:21 13:15	<b>12</b> 28:3	<b>30</b> 93:16	
<b>withdraw</b> 7:17	<b>13</b> 19:1 29:3 42:17	<b>32</b> 6:13 7:15 14:10	
35:22 36:2	42:18,19 55:16	14:11,22 15:10,13	
<b>withdrawal</b> 10:21	<b>13-PRO-00005</b>	15:15 16:4,22	
43:14 47:16	2:11 85:15	18:2 21:7 22:21	
<b>withdrawing</b> 43:7	<b>14</b> 4:1 22:6 31:3,11	23:4 24:11 25:3	
<b>withdrawn</b> 7:13	31:16 88:17,17,18	26:5 27:20 29:6,8	
8:3 10:2,5,22 11:2	<b>14th</b> 1:14	31:10 39:8,21	
12:20 15:2 23:5	<b>150</b> 55:9,11	41:4 42:6 43:19	
25:5,6 33:11,17	<b>1601.9</b> 88:4	65:17 66:7,13,17	
34:2,3 36:3 38:6	<b>1602.1</b> 37:14 94:3	67:2,17 68:15	
43:13 77:17 90:6	97:12,14	69:3,14 71:14,17	
<b>withdrew</b> 7:16	<b>1602.3</b> 19:12,19	71:18	
18:11 34:16 35:3	32:8 81:6 96:6	<hr/> <b>4</b> <hr/>	
35:4,15 43:19	98:3	<b>4:30</b> 2:4,5	
<b>witness</b> 83:20	<b>1605.4</b> 25:11 80:20	<b>4:36</b> 2:7	
<b>wonder</b> 90:12	87:19 88:1	<b>400S</b> 1:14	
<b>words</b> 36:11	<b>1707.1</b> 89:7	<b>405</b> 85:11	
<b>works</b> 57:1	<hr/> <b>2</b> <hr/>	<b>405(b)(13)</b> 85:19	
<b>wouldn't</b> 45:14	<b>2</b> 62:2	<b>405(b)(4)</b> 85:16	
<b>writing</b> 14:15	<b>20</b> 75:22	<b>45</b> 9:16,20,20 13:15	
17:18 23:13 29:12	<b>2000</b> 1:14	<hr/> <b>5</b> <hr/>	
60:2 69:6 89:19	<b>20009</b> 1:15	<b>5-0-0</b> 86:17 93:4	
98:15 99:13 100:4	<b>2010</b> 85:12,17,20	<b>5:20</b> 55:22	
101:16 102:6	86:22	<b>5:44</b> 87:4	
<b>written</b> 11:20	<b>2013</b> 1:12 19:1	<b>5:45</b> 83:21	
18:16 19:6 28:6	<b>22</b> 11:17 14:10 17:6	<b>50</b> 22:6 47:1 89:16	
29:1 46:3 48:12	22:11,16 23:1,4	<hr/> <b>6</b> <hr/>	
92:15 94:15,15	23:11 28:4 29:6	<b>6:15</b> 87:5	
<b>wrong</b> 101:9	31:18 42:15 62:7	<b>6:28</b> 102:20	
<b>W-A-L-D-M</b> 11:10	63:15 65:18 71:20	<b>601</b> 6:6 9:10	
<hr/> <b>Y</b> <hr/>	71:20,21 72:9	<b>602</b> 9:9	
<b>years</b> 91:18 93:16	74:1,7,7	<hr/> <b>7</b> <hr/>	
<hr/> <b>P</b> <hr/>	<b>23-1710.1</b> 102:8		
<b>p</b> 1:4,10	<b>24</b> 7:16 25:5 43:16		