

| | C O N T E N T S | |
|----|-------------------------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | THEODORE M. BECKER, ESQ. | |
| 4 | On behalf of the Petitioners | 3 |
| 5 | DAVID W. DeBRUIN, ESQ. | |
| 6 | On behalf of the Respondents | 19 |
| 7 | ERIC D. MILLER, ESQ. | |
| 8 | On behalf of the United States, as amicus | |
| 9 | Curiae, supporting the Respondents | 34 |
| 10 | REBUTTAL ARGUMENT OF | |
| 11 | THEODORE M. BECKER, ESQ. | |
| 12 | On behalf of the Petitioners | 40 |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-210, Bridge versus Phoenix Bond & Indemnity.

Mr. Becker.

ORAL ARGUMENT OF THEODORE M. BECKER
ON BEHALF OF THE PETITIONERS

MR. BECKER: Thank you, Mr. Chief Justice, and may it please the Court:

Both parts of the question presented in this case should be answered "yes." For a treble damage civil RICO claim based on fraud, someone must rely on the alleged misrepresentation, and that someone must be the plaintiff. But that's the very nature of a fraud claim. Plaintiffs here claim that they were injured by reason of a RICO violation, the predicate acts of which involved a scheme or artifice to defraud.

But no one in this case is arguing that a civil RICO claim based on fraud can proceed without someone relying. So some reliance is required; the only question is who must rely? And we submit that the natural answer is the plaintiff.

A plaintiff who hasn't relied to his detriment on an alleged misrepresentation hasn't been

1 defrauded; he hasn't been injured by reason of a scheme
2 to defraud. Plaintiffs here haven't alleged that they
3 relied on any misrepresentation; they haven't even
4 alleged that they received a misrepresentation.

5 JUSTICE GINSBURG: So what about a case,
6 say, you've got organized crime wants to get rid of --
7 an organized crime enterprise wants to get rid of
8 rivals, so it makes misrepresentations about those
9 rivals to customers and suppliers, not to the -- to the
10 rival. So there was no -- there is no misrepresentation
11 made to the plaintiff but to the plaintiff's customers
12 and suppliers.

13 So on your theory, is there no RICO claim
14 because the misrepresentation was made to someone other
15 than the plaintiff?

16 MR. BECKER: Yes, that's correct, Justice
17 Ginsburg. There would be a criminal RICO prosecution
18 because, under the Neder case, we know that reliance,
19 justifiable reliance, and injury is not required.

20 JUSTICE GINSBURG: But no civil case in
21 that -- in that situation?

22 MR. BECKER: That's correct, Justice
23 Ginsburg.

24 JUSTICE SCALIA: But that doesn't even
25 comport with common-law civil cases. I mean, for a long

1 time courts have allowed someone who's been euchred by a
2 competitor's misrepresentations to his customers. An
3 old New York case that was discussed in the briefs that
4 I used to teach in contracts class, where he told
5 somebody that the horse was no longer for sale and it
6 was still for sale, and the person who wanted to sell
7 the horse at the higher price should have -- to buy the
8 horse should have had a cause of action, even though the
9 representation was not made to him.

10 MR. BECKER: Justice Scalia, those cases as
11 well as the Rice versus Manley New York case, the cheese
12 buyer's case, similar situation, do exist, but they are
13 really tortious interference with business expectancy
14 cases. And we believe that the law makes that clear.

15 When RICO was enacted in 1970, the law even
16 in New York, as we point out in our reply brief, had
17 evolved to the extent where -- where there were some
18 references to fraud in those early cases in the 19th
19 century.

20 JUSTICE KENNEDY: Suppose in a tortious
21 interference case, the two tort -- there are two tort
22 feasons, and they communicate with each other by mail.
23 Is that a violation of the mail fraud statute?

24 MR. BECKER: It would be a violation of the
25 mail fraud statutes. But I will say, Justice Kennedy,

1 that the government's position here seeks to extend the
2 mail fraud statute far beyond what this Court did in
3 Neder. As a matter of fact, the government made the
4 exact same argument in Neder as it did to this Court,
5 and the Court --

6 JUSTICE KENNEDY: In my -- in my
7 hypothetical, there was no -- there was no reliance on
8 anything said. It was just used to facilitate the
9 scheme. And I assume the plaintiff could recover.

10 MR. BECKER: I think that in criminal mail
11 fraud, reliance is not required, Justice Kennedy. And
12 that's what the Neder Court held. But in doing so, it
13 looked to the common law and imposed a materiality
14 requirement. And the only reason that the Neder case
15 ruled that it's not required in criminal mail fraud is
16 because no one has to be injured; there does not have to
17 be a completed scheme.

18 Civil -- there is, of course, no private
19 right of action in mail fraud. And when we look to
20 whether or not someone has a civil claim under RICO
21 through the predicate act of mail fraud, we have to go
22 through 1964(c), the "injured by reason of" requirement.
23 As this Court found in Holmes, the common-law
24 requirement of proximate cause applies, we submit so
25 does the common-law element of reliance, justifiable

1 reliance, apply in a civil RICO case predicated on mail
2 fraud.

3 JUSTICE SOUTER: Well, isn't -- isn't the
4 difference that, in Holmes, it was the textual basis "by
5 reason of" through which the -- as we read it -- the
6 proximate cause standard was -- was brought into the
7 statute. Here, in fact, there -- there isn't any text,
8 it seems to me, that you can -- can rely on.

9 The fact of fraud itself doesn't do it
10 because the statute speaks in terms of an offense for
11 which an individual should be prosecuted. So it's
12 looking to the criminal rather than the civil model.
13 And isn't that the distinction, in effect, a textual
14 distinction, between Holmes as a means for importing
15 proximate cause and the statute in this case as a means
16 for importing first-party reliance?

17 MR. BECKER: Well, Justice Souter, of
18 course, in Holmes the Court was looking at the "injured
19 by reason of" language and looked to the Clayton Act and
20 looked to the Sherman Act before it, where Congress used
21 precisely the same language. Certainly RICO doesn't
22 have proximate cause in its text at all.

23 The reason -- the very reason that the
24 common law does apply when you are construing a mail
25 fraud predicate act through a civil RICO claim is

1 because Congress has not told us what "defraud" means.
2 It has not defined "scheme to defraud," and of course
3 that's --

4 JUSTICE SOUTER: Why hasn't it done so
5 simply or sufficiently done so by referring to the -- in
6 effect -- the criminal mail fraud violation?

7 MR. BECKER: Because in other cases where
8 this Court has looked at the same type of situation, the
9 Neder case, Field versus Mans, for example, where there
10 is not a definition of a term such as fraud, the Court
11 has looked to the common law to define that term.

12 JUSTICE SOUTER: Yes, but we didn't have --
13 I don't think we had in those cases the phrase that
14 occurs here. I think the phrase here is "could be
15 prosecuted or indicted" for something -- I think it was
16 prosecution -- which tends to narrow it down to the
17 criminal model, rather than allowing us to roam into the
18 civil field.

19 MR. BECKER: Except, Justice Souter, that
20 the -- the requirement that there need to be an
21 indictable offense is not enough to make out a civil
22 fraud because criminal law recognizes a -- an
23 uncompleted fraud, simply a scheme, where here, if
24 you're talking about a completed fraud, for someone to
25 be injured by reason of a fraud, it has to be completed

1 and someone has had to rely on it.

2 JUSTICE SOUTER: Okay. Well, that means
3 that to that extent the criminal -- in effect -- the
4 criminal cause of action is narrowed down. It doesn't
5 follow from that that the statute contemplated adopting
6 a civil model regardless.

7 MR. BECKER: I -- we -- we believe it does.
8 If Your Honor will contrast the Salinas case with the
9 Beck versus Prupis case, we believe it's the similar --

10 JUSTICE SOUTER: You're going to have to
11 help me do that.

12 MR. BECKER: All right. I will. In the
13 Salinas case, which was a criminal RICO case, the Court
14 ruled that it was not necessary to have a wrongful overt
15 act in order to make out a criminal cause of action for
16 conspiracy under the RICO statute. And the reason was
17 because all you need is the agreement and any acts.

18 This was a situation where a sheriff
19 actually was the wrongdoer, but the deputy sheriff took
20 some innocent acts that were in furtherance of
21 conspiracy. The Court said that's conspiracy.

22 However, in the Beck versus Prupis case, the
23 Court said that for civil RICO cause of action based on
24 conspiracy, you need to look at the combination between
25 1964(c), the "injured by reason of" language, and the

1 actual statutory language. And since conspiracy is not
2 defined in the RICO statute, the Court looked to the
3 common law, and the common law requires that there needs
4 to be an unlawful overt act or tortious act in order to
5 make out a common-law cause of action for conspiracy.
6 And the Court ruled that that was necessary.

7 We think it's the exact same relationship
8 Salinas is to Beck as Neder is to this case.

9 JUSTICE GINSBURG: Well, why --

10 JUSTICE SOUTER: No, but --

11 JUSTICE GINSBURG: Why isn't it -- there is
12 reliance on their allegations by the county. The county
13 thinks that each bidder is putting in only one bid. So
14 the county has been deceived, and the plaintiff suffers
15 the effect of that deception. Why doesn't that qualify?

16 MR. BECKER: Because no representation has
17 been made to the plaintiff, and the plaintiff hasn't
18 relied on the misrepresentation that was made to the
19 county.

20 JUSTICE KENNEDY: But without the mail fraud
21 violation -- let's assume -- the tort would have been
22 unsuccessful. It would not have been complete.

23 MR. BECKER: Without the misrepresentation
24 to the county, Justice Kennedy?

25 JUSTICE KENNEDY: Yes. Yes. Let's assume

1 that. And it was directed at this class of persons and
2 it was relied upon by the county. It seems to me that
3 that's certainly sufficient under the -- it's a mail
4 fraud violation.

5 MR. BECKER: Well, I think this --

6 JUSTICE KENNEDY: I mean, refer to the mail
7 -- the civil RICO refers to whether it's a mail fraud
8 violation. You want to assume this additional reliance
9 requirement.

10 MR. BECKER: We think it's necessary, Your
11 Honor. The other aspect, of course, in the hypothetical
12 is that there needs to be some direct injury, and we
13 don't believe that a direct injury is presented here.

14 In order to -- in Anza and, of course,
15 before in Holmes, the Court set forth three basic
16 guidelines in order to determine whether there was
17 sufficient proximate cause to bring a cause of action
18 under civil RICO, and in Anza under mail fraud. We
19 don't think those three are enough in this kind of a
20 situation.

21 JUSTICE SOUTER: But isn't the problem with
22 your argument that if this isn't direct enough, there is
23 no injury at all? The county isn't hurt by this. The
24 county has got its rotational scheme basically to avoid
25 favoring particular bidders who appear in multiple

1 guises, but the county isn't getting hurt. So that if
2 it's not direct enough for -- for the Plaintiffs in this
3 case to sue, then nobody has a direct enough interest or
4 can show direct enough causation for RICO.

5 MR. BECKER: Well, Justice Souter, first, we
6 disagree that the rotational allocation is well pled
7 fact. As we pointed out in our reply brief toward the
8 last several pages and in footnote 7, the actual sale
9 and the bidding is nothing like the concept of
10 rotational allocations.

11 But putting that aside for a moment, the
12 county certainly could be a victim. First of all, the
13 county -- this is a violation of an administrative rule.
14 That's what is at the heart of this case, an alleged
15 violation. The county has made the rule possibly for
16 the purpose that Your Honor just articulated, although
17 there is nothing in the record to let us know that.

18 But what we do know is that these types of
19 rules exist for the benefit of the property owners, and
20 that's because the Illinois Supreme Court in -- the same
21 plaintiff brought a case challenging a very, very
22 similar rule.

23 JUSTICE SOUTER: But how could the property
24 owner be hurt if there is -- if we are dealing in a
25 situation here in -- in which the penalty is zero

1 percent, and everybody is bidding zero percent, then
2 this is a situation in which the property owner isn't
3 going to get hurt no matter who ends up with it.

4 MR. BECKER: Justice Souter, zero percent is
5 by no means guaranteed. That's only been the last three
6 years. In fact, in the 2000 case before the Illinois
7 Supreme Court --

8 JUSTICE SOUTER: Yes, but that's the --
9 that's the case here. So if your direct-injury
10 requirement, as you construe it, applies here, I think
11 we are still left with a situation in which on these
12 facts, nobody would be injured, because nobody -- or
13 nobody would be -- be able to prove injury by a
14 sufficient direct route to establish causation.

15 MR. BECKER: Including the bidders and the
16 Plaintiffs, Your Honor.

17 JUSTICE SOUTER: Yeah. Right.

18 MR. BECKER: Well, I think that they
19 certainly could not prove injury as a matter of proof.
20 The problem with that, of course, is in a RICO case it
21 takes five years to get there. And someone can artfully
22 plead -- use two words with no elaboration at all,
23 "rotational allocation."

24 JUSTICE GINSBURG: Yes, but that's a
25 different point, the point that you made in your reply

1 brief, that maybe there isn't this rotational system,
2 and maybe they can't prove that they were -- that they
3 were injured; that they would have gotten a greater
4 share. But your case is about -- it doesn't matter even
5 if you -- you have to accept the allegations of their
6 complaint as true, even if everything they say in the
7 complaint is true, they have no claim. They have no
8 RICO claim.

9 MR. BECKER: That's correct, Justice
10 Ginsburg.

11 JUSTICE GINSBURG: So we have to assume what
12 they say about the rotational system is right and -- but
13 -- but you are hanging your hat on no misrepresentation
14 was made to them.

15 MR. BECKER: That's correct, Justice. We --
16 we are -- we have raised below, but not in this Court,
17 that there was not sufficient injury, directness of
18 injury; and it can't be proved in this Court. I think
19 it comes into play in the reliance concept under
20 proximate causation.

21 And what we are asking the Court to do is to
22 recognize that, in the context of a civil RICO claim
23 based on fraud, that there is -- there is nothing that
24 is -- that is revolutionary about finding that a
25 reliance requirement should be applied. This case, as

1 the Court knows, was originally dismissed by Chief Judge
2 Holderman on that very basis.

3 If we have -- if we were to accept -- if the
4 Court were to accept our opponents' position, a
5 remarkable array of lawsuits could be brought as RICO
6 actions: Competitor versus competitor for harm that
7 allegedly is caused by false statements to customers,
8 suppliers, distributors, marketing agencies, government
9 entities; consumer or end user versus manufacturer for
10 harm allegedly resulting from false statements to the
11 first buyer in a distribution chain.

12 And the circuit court cases in the Fifth --
13 Fourth and Fifth and Sixth and Eighth and Eleventh
14 circuits have recognized this, and they require reliance
15 as a part of proximate causation, and we believe this
16 Court should do the same.

17 I also wanted to make the point that to
18 elaborate, in the Neder case, the Government -- and this
19 is a case where the Government ostensibly argues that it
20 wants us not to restrict civil RICO claims. But in the
21 Neder case the Government made the very same argument in
22 trying to expand mail fraud claims under the criminal
23 statutes.

24 And I think that's -- that's a sub rosa
25 issue in this case. The Court nine years ago

1 specifically said in a unanimous opinion, with Chief
2 Justice Rehnquist writing for the Court, that the Court
3 disagreed that mail fraud was moored to the common law
4 of fraud, and it is not unmoored in the Neder case.
5 They said it was moored, and even in a criminal
6 prosecution materiality is required. And although
7 justifiable reliance and injury is not required in a
8 criminal prosecution, to unmoor the mail fraud statute
9 in a civil RICO context and to then make the argument
10 that all sorts of other claims can -- can also be
11 included such as tortious interference -- because at its
12 heart this is a tortious interference case. We know
13 that because the Plaintiffs pled it in their complaint.
14 That's their pendant State court action. And that's
15 where this case should be. It should be a tortious
16 interference case.

17 If they can prove that case and if they have
18 pled it, then they have a remedy. If they can't, they
19 don't. But the problem is that to give the civil RICO
20 tool, to call "racketeers" -- to call your competitor a
21 "racketeer" and to seek treble damages and attorney's
22 fees in this kind of such an attenuated situation,
23 should not be something that the Court condones.

24 And it's different; if you Google my
25 clients, you'll come up -- they will come up as

1 racketeers now, and -- and that's the problem that we
2 have. If there were a reliance requirement, you could
3 immediately tell if this was a situation where the
4 common law --

5 JUSTICE GINSBURG: May I just go back to a
6 statement you made? I thought you -- you conceded that
7 on their allegations your client would be indictable for
8 mail fraud?

9 MR. BECKER: Well, I didn't concede that my
10 client would be indictable for mail fraud. I think that
11 there would have to be -- we'd have to take a careful
12 look at the indictment, certainly. But I will say that
13 -- that I do -- I do say that the mail fraud statute
14 does not require justifiable reliance or injury.

15 I think the problem is when you ask the
16 direct -- my client hasn't been indicted for mail fraud,
17 and I don't think it's any -- it's any oversight because
18 this has been a very well known case in Cook County. I
19 think the reason, if one were to ask me why my client
20 hasn't been indicted for mail fraud, is because they
21 didn't commit it, because the county in its own rule --
22 the treasurer wrote the rule and expressly says in the
23 rule that she has the exclusive discretion to determine
24 whether or not there has been a violation of the rule.
25 She has not so determined. And this case has been

1 pending now for close to over three years. The
2 treasurer is aware of it, and we know that, and she
3 still has not determined that there has been a
4 violation. So if there hasn't been a violation of the
5 rule, there is no criminal mail fraud violation either.

6 JUSTICE SOUTER: Is your client still
7 bidding on -- on these --

8 MR. BECKER: Yes, Justice Souter, and also
9 all of the -- all of the plaintiffs -- the Respondents
10 are still bidding, which I think is an interesting fact.
11 And it's not -- it's in the record because they have an
12 amended complaint where they have pled subsequent sales.
13 That's how far afield from the law of fraud this is
14 going.

15 CHIEF JUSTICE ROBERTS: Are all the shell
16 corporations still bidding?

17 MR. BECKER: Mr. Justice -- Mr. Chief
18 Justice, if all of them aren't, it's simply because
19 there may be new corporations that are, and they are
20 formed not for the purpose of defrauding anybody, but
21 for tax purposes.

22 If there are no further questions, I'd --
23 I'd like to reserve the rest of my time for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Becker.

1 MR. BECKER: Thank you, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: Mr. DeBruin.

3 ORAL ARGUMENT OF DAVID W. DeBRUIN

4 ON BEHALF OF THE RESPONDENTS

5 MR. DeBRUIN: Mr. Chief Justice, and may it
6 please the Court:

7 It is presumed true in this case that
8 Petitioners submitted false affidavits, filled the
9 auction room with related entities, and obtained
10 thousands of liens that would have been awarded to
11 Respondents and other bidders, causing them injury in
12 fact. I submit the central issue in this case is
13 whether on those facts Respondents can establish
14 proximate cause, and specifically whether in order to do
15 so they must establish that they personally received and
16 relied upon the false statements at issue.

17 I submit that this Court already has
18 established in its decisions in Holmes and in Anza the
19 proper test for proximate cause. And no claim has been
20 made in this case, at least not until perhaps briefly
21 this morning, that the Respondents cannot establish
22 proximate cause under the standards set forth in those
23 cases. Moreover, no argument is made that the standards
24 articulated in Holmes and in Anza are insufficient to
25 ferret out the appropriate cases that can go forward;

1 that those cases produce anomalous results either here
2 or in any other case that has been decided.

3 JUSTICE KENNEDY: Is -- is it your view that
4 assume -- assuming there is a State law cause of action
5 for tortious interference, that if that tortious
6 interference was effected through the use of the mails
7 by the co-tort features, that that automatically invokes
8 the RICO statute?

9 MR. DeBRUIN: Your Honor, all of the
10 elements of RICO would have to be established. There
11 would have to be predicate acts of mail fraud.

12 JUSTICE KENNEDY: That -- that there are
13 predicate acts, yes.

14 MR. DeBRUIN: And they would have to form a
15 pattern and all the other requirements that were
16 significant would have to be met, but yes.

17 And I submit in this case there is no
18 serious dispute but that the allegations over the course
19 of many years of the complaint established indictable
20 mail fraud. The issue is not whether the fact pattern
21 is under the common law tortious interference or some
22 other common-law tort.

23 The question is: Do the facts as alleged
24 make out indictable mail fraud? There is no question
25 but the mail fraud statute is broad. It prohibits any

1 scheme or artifice to defraud; and I believe that if the
2 facts here were proved, the submission of false
3 affidavits to the county on a regular basis, there is no
4 need under mail fraud to prove reliance.

5 JUSTICE GINSBURG: But those -- those
6 weren't mailed, or at least that's not what you're
7 relying on. You're not relying on the affidavits that
8 make the misrepresentation using the mails. I thought
9 your reliance on the mails is only the tail end of this
10 transaction, the notices that get sent to the property
11 owners.

12 MR. DeBRUIN: That's correct, Justice
13 Ginsburg. The mails here are an essential component to
14 allow this fraud to have any effect. If it weren't for
15 the use of the mail, the Petitioners could never realize
16 the economic value of the liens that they obtained
17 through the fraud. And in that sense the use of the
18 mails are essential to the scheme. And that's what this
19 Court held in the Schmuck decision: That the mails,
20 themselves, don't have to be false so long as the use of
21 the mails is essential to the scheme.

22 Here it clearly is. Absent the notices
23 given to property owners, there would be no way for the
24 Petitioners to realize the value of the liens and obtain
25 the benefit of the fraud by -- by making the false

1 statements to the county and literally obtaining
2 thousands of additional liens that otherwise would have
3 gone to other entities.

4 CHIEF JUSTICE ROBERTS: Counsel, what --
5 would your position be different if the county were, in
6 fact, injured; we didn't have the zero-percent situation
7 but different percentages? Your client would not be
8 able to sue them, right?

9 MR. DeBRUIN: Mr. Chief Justice, I believe
10 the Court has already addressed that in Anza and has
11 made clear that if in an appropriate case the government
12 had been harmed and was in fact -- could be expected to
13 sue, as it was in Anza -- in that case the claim was
14 that the defendant had not paid its taxes to the State
15 of New York. And the Court found that New York was the
16 directly injured party, could be expected to sue, and
17 under Anza there was no proximate cause. We accept that
18 test.

19 CHIEF JUSTICE ROBERTS: Well, what does that
20 do to your statutory argument? In other words under
21 your statutory argument, you still could sue; but
22 because of other considerations you can't?

23 MR. DeBRUIN: Well, we have to establish
24 predicate acts of mail fraud, but we also have to
25 establish proximate cause. And under Anza the failure

1 was an inability to prove proximate cause. In this case
2 it has not been seriously disputed that we satisfy the
3 factors set forth in Anza. The county was not harmed.

4 CHIEF JUSTICE ROBERTS: Well, what happens
5 -- what happens if some of the bids were more than zero,
6 and some weren't? You get to sue for part of the
7 damages, and the county gets to sue for the rest? Or
8 how do you divvy that up?

9 MR. DeBRUIN: Well, the only time that the
10 affidavits and the representations in this case have
11 effect is if all the bids are zero. The county, in
12 order to protect itself from property owners, provides
13 that if there are multiple bids above zero, the county
14 will not issue the lien. It holds the lien itself.

15 The only time that this rule comes into
16 effect where there is a rotational award is if the
17 county is paid its taxes in full, and there are multiple
18 bidders at zero percent.

19 CHIEF JUSTICE ROBERTS: Well, but I suppose
20 since we are talking about a rotational rule, you could
21 have -- what are these, monthly or annually -- one,
22 possibly, cycle where it's all zero percent, and then
23 others where it isn't, and then another where it is.
24 And that would affect the rotation in a way that would
25 injure your client but would also injure the county.

1 MR. DeBRUIN: Not the way the county
2 administers these auctions. If that happened -- and it
3 certainly could happen -- that the bidding process that
4 takes the penalty down stopped at five percent or two
5 percent, the county rules under the program at issue
6 provide the county will not apply the rotational system.
7 It won't award the lien at all.

8 The rotational rule only applies when there
9 are multiple, zero-percent bids. And Respondents will
10 show, as this case goes forward, that they can identify
11 the specific properties on which there were multiple
12 bids; that the Petitioners and the related entities,
13 which they will prove are related, received liens and
14 thereby increased to the thousands the number of
15 valuable liens that the Petitioners got, leaving the
16 Respondents essentially with hundreds of liens.

17 The key is, the central question is, whether
18 Petitioners can show proximate cause under the standards
19 in Holmes and Anza. And under Anza what this Court held
20 is the central question for proximate cause is the
21 directness between the violation alleged and the injury.
22 And in this case there is a direct relation between the
23 violation of mail fraud alleged, the predicate acts, and
24 the injury that Respondents have incurred.

25 JUSTICE ALITO: Would you explain why your

1 argument is consistent with Beck versus Prupis? In that
2 case, couldn't the plaintiff show that it was injured by
3 reason of the criminal violation that was alleged, the
4 RICO conspiracy; and, yet, the Court said something more
5 was required, taking an additional requirement from the
6 law of civil conspiracy? How is your argument here
7 consistent with that?

8 MR. DeBRUIN: Justice Alito, Beck was a
9 completely different case. The issue in Beck was --
10 section 1964(c) says that the plaintiff must prove
11 injury by reason of a violation of the act. And the
12 violation of the act at issue in Beck was 1962(d), which
13 is a conspiracy to violate the other provisions. And so
14 what the Court was looking at was the word "conspiracy,"
15 which was not defined in the statute. And the Court
16 applied the accepted rule that where a word is not
17 defined, the Court can assume that Congress intended its
18 ordinary meaning.

19 JUSTICE ALITO: But -- well, the meaning of
20 a RICO conspiracy in the criminal context is very well
21 known. I don't know why it matters whether it is
22 defined in the statute or not; and there is no
23 requirement in that that anybody be injured by virtue of
24 an unlawful, overt act.

25 MR. DeBRUIN: But the Court looked to --

1 JUSTICE ALITO: Why is it appropriate there
2 to look to the law of civil conspiracy and yet
3 inappropriate here to look to the law of civil fraud?

4 MR. DeBRUIN: Well, it looked to conspiracy
5 to make up the elements of the civil cause of action
6 there. But here the relevant provision that is relied
7 upon is 1962(c), which is a violation of RICO. And we
8 also alleged 16, 1962(c). But in (c) the violation of
9 RICO is to conduct the affairs of an enterprise through
10 a pattern of racketeering activity.

11 None of those words, "conducting the affairs
12 of an enterprise", are words that Petitioners contend
13 you look to the common law to define. There could be a
14 pattern of racketeering activity that would consist of
15 fraud, of violence, of bribery all together.

16 JUSTICE SCALIA: Am I -- am I reading these
17 provisions wrong? I thought you were proceeding in a
18 1961, and that the conspiracy -- the conspiracy
19 provision is 1962(c).

20 MR. DeBRUIN: 1961 is the definitions. We
21 allege a violation of both 1962(c) and 1962(d).

22 JUSTICE SCALIA: That's the conspiracy
23 provision.

24 MR. DeBRUIN: 1962(d) is the conspiracy. We
25 allege a violation of that. We also allege a violation

1 of 1962(c).

2 JUSTICE SCALIA: I'm looking on page 2 of
3 the Petitioner's brief. Have I -- have I been
4 misinformed?

5 The blue brief, page 2, maybe that's wrong,
6 but that's what it says. It says 1962(c), it shall be
7 unlawful for any person to conspire to violate any of
8 the provisions of subsections (a), (b) or (c).

9 MR. DeBRUIN: Your Honor, the citation
10 appears at the bottom of the quote, the way it's set
11 forth on page 2.

12 JUSTICE SCALIA: All right. I understand.

13 MR. DeBRUIN: So if you look at the very
14 first quotation, you'll see where it follows.

15 JUSTICE SCALIA: Oh, I see, I see, I see.
16 Okay.

17 MR. DeBRUIN: So in this case, we allege
18 both a violation of 1962(c) and (d). 1962(c) prohibits
19 conducting the affairs of an enterprise through a
20 pattern of racketeering activity. That pattern may
21 consist of fraud, violence, bribery --

22 JUSTICE ALITO: No, I understand that, but
23 when the pattern of racketeering activity consists of
24 predicate acts of mail fraud, why isn't -- why does not
25 Beck point you to the word "fraud," which like

1 "conspiracy," I don't believe is defined in the RICO
2 statute? So why if you look to civil conspiracy to
3 understand what "conspiracy" means in the RICO statute,
4 why do you not look to "civil fraud" to find out what
5 the word "fraud" means in the RICO statute?

6 MR. DeBRUIN: I would say two things:
7 First, what that argument would do would make
8 essentially common-law fraud the predicate act under
9 RICO, when instead it is indictable mail fraud, not
10 common-law fraud. And --

11 JUSTICE ALITO: But you can say the same in
12 Beck. It would make civil conspiracy the predicate act
13 in RICO, rather than -- the RICO violation, rather than
14 criminal conspiracy.

15 MR. DeBRUIN: Well, the Court, again, in
16 Beck, was looking to the common-law word "conspiracy" to
17 apply it in different contexts. There is not a
18 common-law fraud that is actionable under RICO.

19 But secondly, even if you accept that test,
20 Justice Alito, under the common law of fraud, there is
21 no doubt that claims like ours were actionable and were
22 actionable as fraud. The case that Justice Scalia
23 referenced to, the common-law cases involving the buyer
24 of cheese and other facts, those were actionable as
25 fraud where --

1 JUSTICE GINSBURG: Mr. Becker says they were
2 interference with a business relationship, not fraud.

3 MR. DeBRUIN: Well, under the law of torts
4 as it has evolved, there are different labels that are
5 applied. But what was critical is that that conduct,
6 the interference through fraud with a contract of
7 another, was actionable at the common law. The
8 plaintiff could make out a claim and recover damages,
9 even though the plaintiff had not received the statement
10 at issue and had not relied on the statement at issue.
11 So that even if, under RICO, you were to look for civil
12 purposes to a common-law analogue, the common law made
13 clear that these kinds of claims were actionable,
14 whatever label might be applied to them today in terms
15 of the nature of the -- of the tort.

16 JUSTICE GINSBURG: One concern, because RICO
17 can be a very broad statute, is that if you are right,
18 then any unsuccessful bidder could look through a
19 rival's submission, find a false statement, and sue
20 under RICO.

21 MR. DeBRUIN: Your Honor, I believe that is
22 not true for the reasons this Court set forth in Anza.
23 The standards set forth in Holmes and in Anza are very
24 rigorous tests to establish proximate cause. So the
25 merely assertion of falsity by a competitor -- I mean,

1 Anza involved a competitor situation. There the claim
2 was that had been mail fraud that caused the competitor
3 harm.

4 The Court recognized in Anza that that case
5 was different than Holmes. There was an allegation of a
6 direct injury in Anza, but nevertheless the relation
7 between the violation and the harm was far less direct
8 than it is in this case, as Judge Easterbrook, Chief
9 Judge Easterbrook explained.

10 JUSTICE SCALIA: Why -- why is it -- I
11 really worry about adopting a rule which would produce
12 the result that whenever anyone makes a false statement
13 in an official form, someone who is deprived of a
14 business opportunity, or at least can say so, can bring
15 a RICO action.

16 MR. DeBRUIN: Justice Scalia, I would say
17 two things: First of all, I think it's critical to
18 realize that Congress enacted RICO to protect
19 competitors. One of the principal motivations behind
20 RICO was to protect legitimate businesses that are
21 injured in their business or property by reason of a
22 pattern of racketeering activity as defined under the
23 statute. That's number one.

24 Number two, there are important restrictions
25 that this Court repeatedly has recognized. It's not

1 enough that there be a single act. There must be
2 predicate acts that are a pattern of activity.
3 "Pattern" doesn't just mean two. It means a continuing
4 threat of continuing criminal activity. There must be
5 proximate cause under Holmes and Anza. All of those
6 restrictions exist. And only if the plaintiff can
7 successfully navigate all of those things, proving not
8 common-law fraud but indictable criminal activity,
9 proving a pattern of continuing criminal activity,
10 proving proximate cause, only then can the plaintiff
11 make out a RICO violation.

12 CHIEF JUSTICE ROBERTS: I suppose that every
13 other bidder in this situation is a viable plaintiff.

14 MR. DeBRUIN: In this case, we don't submit
15 that we are the only potential plaintiffs. That there
16 were other bidders -- the bidders at these auctions fall
17 into perhaps two different categories. Many bidders --
18 over 50 percent of all the registered bidders receive
19 fewer than 10 liens. In other words, they are at the
20 auction to bid on a specific property or small number of
21 properties.

22 Then there are other what I would call
23 professional tax buyers, who basically do research,
24 identify the most attractive properties, and we will
25 show, are essentially bidding on the same group of

1 properties. And those are the properties at issue.
2 Those are the bidders at issue. It is more than just
3 the Respondents, but it is a relatively small group --

4 CHIEF JUSTICE ROBERTS: Well, I suppose in
5 other cases where if we adopt the rule you argue for,
6 that wouldn't be confined at all. For example, in a
7 situation where a competitor is defrauding a supplier,
8 every competitor no matter how many there were, could
9 bring a RICO action.

10 MR. DeBRUIN: Well, I think the Court --
11 again, if you look to the Anza case, the Court has made
12 clear that if a RICO defendant takes actions that simply
13 enhance the defendant's own competitive position, which
14 was the allegation in Anza, that that may not be enough
15 to establish proximate cause. But whereas here the
16 foreseeable and clear effect of defendant's actions is
17 to work a direct injury on competitors and, in fact, on
18 no one else, not on the county, not on the property
19 owners, but only on competitors, that was within the
20 ambit of what Congress sought to protect in RICO.

21 CHIEF JUSTICE ROBERTS: Regardless of how
22 many competitors there are?

23 MR. DeBRUIN: Well, yes. As this Court
24 recognized in Storey Parchment and Hazeltine, in
25 antitrust cases as well as RICO cases, damage issues

1 have to be worked out. But the fact that there may be
2 multiple bidders that you may have to award damages to a
3 group does not defeat the claim. The defendant cannot
4 come into court and say because damages here have to be
5 allocated among a larger number of people, you can't
6 establish a claim.

7 JUSTICE KENNEDY: Is it the law generally in
8 the States that an unsuccessful bidder can sue the
9 successful bidder if the successful bidder misstated
10 qualification?

11 MR. DeBRUIN: Justice Kennedy, the
12 common-law rule actually was, I believe, in 27 of 40
13 States -- this unfortunately came up after the
14 briefing -- that a disappointed bidder could bring an
15 action at the common law if the allegation was one of
16 fraud in the procurement. So that the common law did
17 not provide an absolute bar to claims like this.

18 Now, again, the issue is: Will the claims
19 satisfy Holmes and Anza? There is no argument here that
20 that standard, the framework this Court established
21 first in Holmes and then applied in Anza, that that
22 framework is inadequate, that it produces an anomalous
23 result here or will produce an anomalous result in other
24 cases. It's a very rigorous test.

25 This Court looked at directness; it looked

1 to the suitability of other plaintiffs; it looked to
2 whether the harm was derivative. That's a
3 quintessential proximate cause analysis. Proximate
4 cause is, historically through the common law, a very
5 fact-based intensive test. But the Court has made clear
6 that the ability of the RICO plaintiff to overcome that
7 test, it's a significant showing that must be met.

8 Chief Judge Easterbrook, in this case, went
9 through the Anza factors very methodically. He showed
10 that, under each factor, proximate cause clearly can be
11 met under the common law. The Respondents were directly
12 injured in a significant and substantial way, and that
13 is sufficient, I submit, to make out the elements of the
14 RICO claim, assuming all the other elements are also
15 met.

16 If there are no further questions, thank
17 you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. DeBruin.

20 Mr. Miller?

21 ORAL ARGUMENT OF ERIC D. MILLER

22 ON BEHALF OF THE RESPONDENTS

23 MR. MILLER: Mr. Chief Justice, and may it
24 please the Court:

25 RICO provides a cause of action to

1 plaintiffs who have suffered injuries by reason of, that
2 is, proximately caused by, a RICO violation. Now, when
3 the RICO violation is predicated on an act of mail
4 fraud, the plaintiff ordinarily will need to show that
5 somebody relied on the false statements in order to
6 establish that the fraud was even a "but for" cause of
7 injury.

8 A plaintiff who can establish that it was
9 the one who relied on the false statements would be able
10 to show proximate causation. But that's not the only
11 way to establish proximate causation, and there is no
12 basis for this -- for the imposition of a per se rule
13 requiring that the plaintiff be the one who has relied.
14 Instead when a defendant creates a scheme to defraud
15 that induces reliance by one party in order to injure
16 another party, the injured party should have a cause of
17 action under --

18 CHIEF JUSTICE ROBERTS: What is the answer
19 to Justice Kennedy's question with respect to Federal
20 Government contracts?

21 MR. MILLER: My understanding is that the
22 case has established that they can. Again, since this
23 came up after the briefing, one illustrative example is
24 in the Eighth Circuit, Iconco against Jensen
25 Construction Company, which is 622 F.2d 1291. In that

1 case, it was a contract that was set aside for small
2 businesses, and the company got the contract by falsely
3 claiming to be a small business. And then in a
4 diversity case applying Iowa law, the Eighth Circuit
5 held that the disappointed bidder could bring an action
6 for fraud and unjust enrichment against the successful
7 bidder. So I think that -- and that's of a piece with
8 the long common-law tradition, going back to cases like
9 Rice against Manley, where --

10 CHIEF JUSTICE ROBERTS: But what if there
11 are 50 disappointed bidders?

12 MR. MILLER: Well, it would be the burden of
13 the plaintiff to establish that, but for the fraud, it
14 would have gotten the contract. So in most cases of
15 contracting, that's going to be very difficult for a
16 plaintiff to show. This --

17 JUSTICE SCALIA: Wait.

18 MR. MILLER: -- is somewhat usual.

19 JUSTICE SCALIA: Why couldn't you show --
20 why couldn't -- that's like the situation where a
21 company runs a -- runs a lottery and in fact
22 misrepresents what the odds are. And then you mean the
23 people can't recover because they couldn't show that
24 they would have won? It seems to me you can calculate
25 the difference in the odds or something and place some

1 value on that. Is it really painless to say, you know,
2 I'm running a lottery and your chances of winning are
3 one in a thousand, and everybody buys a ticket on that
4 basis, and it turns out that really your chances are one
5 in a million? Nobody has a cause of action because
6 nobody can prove he would have won?

7 MR. MILLER: No, the participants in the
8 lottery in that case would have a cause of action
9 because they have paid money to the person running the
10 lottery.

11 JUSTICE SCALIA: That's all they can get?
12 Just what they paid for the ticket?

13 MR. MILLER: I think -- I think the -- the
14 common-law measure of damages would be -- would be what
15 they paid in that situation. But certainly the recovery
16 for disappointed bidders in cases like this, does have a
17 long common-law tradition, and with the more modern
18 elaboration of tort law, as demonstrated by the
19 secondary statement, it has sometimes been given a
20 different label, and that is either "injurious
21 falsehood" or "intentional interference with a
22 prospective contractual relation," but at its heart, the
23 action that's at issue here is one that's for fraud.

24 But I would like to say in response to some
25 of Justice Alito's questions that, with respect to the

1 Beck case and the relevance of it, that ultimately in
2 our view it doesn't really matter whether the common law
3 would have allowed recovery in this case, and that's
4 because, unlike in Beck where the Court had to consider
5 what is the meaning of -- what does it mean to be
6 injured by reason of a conspiracy? And the Court
7 answered that question by looking at the common law of
8 civil conspiracy. That mode of analysis would be
9 appropriate here if the relevant predicate under 1961
10 were fraud or any conduct involving fraud or otherwise
11 made reference to common-law fraud. But, of course,
12 1961 does not say that; it says "any act which is
13 indictable under section 1341," the mail fraud statute.
14 So under -- given the structure of the statute, the only
15 inquiry is: Is the injury incurred by reason of an act
16 which is indictable under 1341?

17 JUSTICE ALITO: But the RICO statute doesn't
18 say you can recover if you're injured by reason of
19 conspiracy, without any elaboration. It says "by reason
20 of a violation of this statute." And therefore you look
21 to 1962(d), which tells you what the violation is. It's
22 a RICO -- it's a criminal RICO conspiracy. So I just
23 don't see how that argument works.

24 MR. MILLER: Well, 1964(c) refers you, as
25 you noted, to 1962, which simply says "conspiracy." And

1 so the Court in Beck explained that to figure out how
2 you tell when someone has been injured by civil
3 conspiracy, there is a body of law, the common law, that
4 answers that question. There is no corresponding
5 common-law principle of what it means to be injured by
6 an act of mail fraud because there is no common law of
7 mail fraud per se; it's a statutory creation. And so
8 the relevant inquiry is simply: Did the conduct violate
9 the mail fraud statute, section 1341? Not was it common
10 law fraud?

11 JUSTICE BREYER: Well, I don't think it's
12 because there's no common-law equivalent. I think it's
13 simply because the word "conspiracy" is a -- the
14 substantive violation under 19 -- under 1962(c). "It
15 shall be unlawful for any person to conspire." And we
16 have to interpret the word "conspire," and we say we
17 give it its common-law meaning; whereas, for a violation
18 of the general racketeering statute, there's -- there's
19 no equivalent reference to a word that we have to give
20 content to. It just says -- unless it's the word
21 "indictable."

22 MR. MILLER: No. I think that's right. And
23 certainly the "by reason of" requirement in 1964, it
24 does refer to the common-law requirements of proximate
25 cause. But that -- that language -- "by reason of" --

1 does not contain a reliance requirement because it
2 applies to any number of predicate acts, all of the
3 predicate acts under 1961. And in the context of many
4 of those acts, reliance would be completely
5 inappropriate. I would also like to point out that I
6 think the conduct that is alleged here really does go to
7 the core of what RICO is intended to redress. Congress
8 made clear, in the finding that accompanied the statute,
9 that one of its principal concerns was that criminal
10 enterprises could use illegal means to compete unfairly
11 with legitimate businesses. And so if a business -- a
12 criminal business were to use threats of violence
13 directed at its competitor's customers to get them to
14 switch their business to it, the competitor would have a
15 cause of action for that. And then the same should be
16 true, we submit, if the business uses fraud directed at
17 its competitor's customers to induce them to switch
18 their business.

19 If there are no further questions.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Miller.

22 Mr. Becker, 10 minutes remaining.

23 REBUTTAL ARGUMENT OF THEODORE M. BECKER

24 ON BEHALF OF THE PETITIONERS

25 MR. BECKER: Thank you.

1 The difference between this case and what
2 Congress intended is that, yes, in the comments to the
3 enactment of RICO, Congress did say that it was trying
4 to protect legitimate competitors from illegitimate
5 conduct or unlawful conduct. This case has now morphed
6 into a situation where competitors are using RICO as an
7 anticompetitive device, and that's what we believe the
8 reliance requirement will -- will at least rein in,
9 totally consistent with the common law.

10 We are not asking this Court to impose any
11 requirement on RICO that does not already exist by
12 reason of the common-law meaning rule. Actually, we
13 believe our opponents and the S.G. are asking this
14 Court to expand RICO by unmooring it from the common
15 law. We believe that Beck versus Prubis is exactly the
16 same situation and the same analysis. Although 1962(d),
17 which is a substantive conspiracy violation of RICO, was
18 at issue in Beck versus Prupis, you get to the same
19 situation just as an extra step. Here's the -- here's
20 the analysis. You look to 19 -- they have a conspiracy
21 count of course. But you look to 1962(c), and it says
22 that "any person injured by reason of" -- if you read in
23 1964(c) to it -- by reason of a RICO violation or a --
24 or a racketeering activity "shall have a cause of
25 action."

1 Now, you look to racketeering activity in
2 1961, and that has a hundred and something predicate
3 acts, one of which is mail fraud. You look at mail
4 fraud, and it says "a scheme to defraud." It uses the
5 word "defraud." What does that mean? It's the same
6 place; you just -- you just need to take one more step
7 to get there, but it's the same place the Court found
8 itself, we submit, in Beck versus Prupis. If criminal
9 conspiracy means the same thing as civil conspiracy,
10 Beck versus Prupis would not -- the Court would not have
11 held what it did in Beck versus Prupis. And if mail
12 fraud only means an indictable offense and nothing more
13 under the criminal law, it should be the same as the
14 civil law, then there would be no common-law meaning
15 rule. To apply the common-law --

16 JUSTICE SOUTER: Isn't -- isn't the weakness
17 of the argument that you're, in effect, dividing mail
18 and fraud? You're saying there are two requirements,
19 and therefore, fraud here is just like conspiracy in
20 Beck. But in fact, mail fraud is -- is a single term of
21 art. It refers simply to a criminal violation for which
22 there -- there is no exact civil counterpart. And so,
23 if you take mail fraud as being a unified term of art,
24 then it seems to me that your argument falls apart,
25 because you can't treat the fraud in the mail fraud the

1 way you treated the conspiracy standing alone in Beck.

2 MR. BECKER: Justice Souter, we respectfully
3 disagree and refer the Court to Field versus Mans, where
4 it was bankruptcy fraud. And I believe -- the exact
5 same thing. What does bankruptcy mean? What does mail
6 fraud mean? Well, they looked to -- the Court looked to
7 the common law meaning rule, and looked to the elements
8 you need for fraud in order to determine what has to be
9 proved for bankruptcy fraud.

10 JUSTICE SOUTER: But there was no definition
11 of bankruptcy fraud as a separate definition, was there?
12 Whereas in mail fraud, we know what it means.

13 MR. BECKER: Not from the statute we don't,
14 Justice Souter. There is no definition of mail fraud in
15 the statute. The only reason we know what it means is
16 because the Court has construed it over the years. In
17 order to construe it now in a civil context, we are
18 asking the Court to apply the common law meaning rule
19 because that's -- the analog is fraud; that's the
20 obvious source to look to the common law.

21 If I may I'd like to make a few other
22 points.

23 First of all, I cannot leave this podium and
24 leave this Court under the impression that there is
25 directness of injury. There are 195 bidders. The

1 plaintiffs themselves alleged this in paragraph 46, our
2 joint appendix 20 and 21. Without belaboring it, the
3 last few pages of our reply brief show all of the things
4 that would have to be shown in order to have even --
5 even a remote directness of injury in this case.

6 So the -- we have not -- we have not in any
7 way conceded that the requirements of Anza or Holmes
8 have been met. And -- but I think our brief adequately
9 deals with that.

10 I'd also like to point out that RICO and
11 mail fraud don't reach everything actionable at common
12 law. I mean, if there was an argument, that would mean
13 that civil RICO in every case involving a false
14 statement -- every case involving a false statement, no
15 matter to whom it's made, would be a civil RICO case.

16 The general idea of protecting competitors
17 doesn't mean that Congress provided that anything that
18 anyone says to anybody violates civil RICO. That's not
19 the way that this Court interprets statutes; and there
20 is no allegation in the complaint at all as -- that the
21 rotational basis applies only when bids are at zero
22 percent.

23 In the year 2000 the Illinois Supreme Court
24 confronted the same plaintiff in this case, Phoenix
25 Bond, challenging a very similar rule because at that

1 point in time there was collusion including the same
2 plaintiff to keep the penalty rate at 18 percent. And
3 the Illinois Supreme Court said the rule will -- is
4 something that the treasurer has the right to make to
5 try to regulate the bids, and the treasurer certainly
6 can be a victim of this situation. If the bid is not
7 perceived as fair, the treasurer will not have enough
8 bidders in order to sell all the bids, and therefore,
9 the county will not be paid the unpaid taxes.

10 If the treasurer thought that there really
11 was a misrepresentation here made by the Petitioners,
12 the treasurer would have a very great incentive and a
13 very great state in enforcing this rule; and the
14 treasurer did not, we believe because the treasurer
15 doesn't believe there is any violation.

16 The -- the other ways that the county could
17 be injured are that if the -- if the penalty rate goes
18 up beyond zero percent, there is no guarantee that the
19 same number of bidders will -- will come to the sale.

20 There -- I also want to refer the Court to
21 other -- this is not new. In Safeco Insurance just
22 recently, last term, the Court asked -- was asked to
23 define the term "willfulness" in a civil liability
24 provision of the Fair Credit Reporting Act, and the
25 Court observed that there is different meanings in the

1 civil and criminal law to the term "willfulness." In
2 Farmer versus Brennan the Court recognized different
3 uses of the term "recklessness" in the civil and
4 criminal contexts.

5 So once again we are asking this Court to
6 rule consistent with the common law meaning rule that
7 the -- a civil RICO action predicated on mail fraud,
8 where one is -- it has to fulfill the requirement that
9 you have been -- the plaintiff has been injured by
10 reason of mail fraud or racketeering activity. The
11 plaintiff must rely on a misrepresentation or the fraud
12 directly, because that's the essence of civil fraud.

13 If there are no further questions.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
15 The case is submitted.

16 (Whereupon, at 12:05 p.m., the case in the
17 above-entitled matter was submitted.)

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| A | | | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ability 34:6 | additional 11:8 22:2 25:5 | allowed 5:1 38:3 | appropriate 19:25 22:11 26:1 38:9 | 20:7 |
| able 13:13 22:8 35:9 | addressed 22:10 | allowing 8:17 | April 1:10 | avoid 11:24 |
| above-entitled 1:12 46:17 | adequately 44:8 | ambit 32:20 | argue 32:5 | award 23:16 24:7 33:2 |
| Absent 21:22 | administers 24:2 | amended 18:12 | argues 15:19 | awarded 19:10 |
| absolute 33:17 | administrative 12:13 | amicus 1:22 2:8 | arguing 3:19 | aware 18:2 |
| accept 14:5 15:3 15:4 22:17 28:19 | adopt 32:5 | analog 43:19 | argument 1:13 2:2,10 3:3,7 6:4 11:22 15:21 16:9 19:3,23 22:20 22:21 25:1,6 28:7 33:19 34:21 38:23 40:23 42:17,24 44:12 | a.m 1:14 3:2 |
| accepted 25:16 | adopting 9:5 30:11 | analogue 29:12 | array 15:5 | B |
| accompanied 40:8 | affairs 26:9,11 27:19 | analysis 34:3 38:8 41:16,20 | art 42:21,23 | b 27:8 |
| act 6:21 7:19,20 7:25 9:15 10:4 10:4 25:11,12 25:24 28:8,12 31:1 35:3 38:12,15 39:6 45:24 | affect 23:24 | answer 3:23 35:18 | artfully 13:21 | back 17:5 36:8 |
| action 5:8 6:19 9:4,15,23 10:5 11:17 16:14 20:4 26:5 30:15 32:9 33:15 34:25 35:17 36:5 37:5,8,23 40:15 41:25 46:7 | affidavits 19:8 21:3,7 23:10 | answered 3:12 38:7 | articulated 12:16 19:24 | bankruptcy 43:4,5,9,11 |
| actionable 28:18 28:21,22,24 29:7,13 44:11 | affield 18:13 | answers 39:4 | artifice 3:18 21:1 | bar 33:17 |
| actions 15:6 32:12,16 | agencies 15:8 | anticompetitive 41:7 | aside 12:11 36:1 | based 3:13,20 9:23 14:23 |
| activity 26:10,14 27:20,23 30:22 31:2,4,8,9 41:24 42:1 46:10 | ago 15:25 | antitrust 32:25 | asked 45:22,22 | basic 11:15 |
| acts 3:17 9:17 9:20 20:11,13 22:24 24:23 27:24 31:2 40:2,3,4 42:3 | agreement 9:17 | anybody 18:20 25:23 44:18 | asking 14:21 41:10,13 43:18 46:5 | basically 11:24 31:23 |
| actual 10:1 12:8 | al 1:3,7 18:9 | Anza 11:14,18 19:18,24 22:10 22:13,17,25 23:3 24:19,19 29:22,23 30:1 30:4,6 31:5 32:11,14 33:19 33:21 34:9 44:7 | aspect 11:11 | Beck 9:9,22 10:8 25:1,8,9,12 27:25 28:12,16 38:1,4 39:1 41:15,18 42:8 42:10,11,20 43:1 |
| | Alito 24:25 25:8 25:19 26:1 27:22 28:11,20 38:17 | apart 42:24 | Assistant 1:20 | Becker 1:16 2:3 2:11 3:6,7,9 4:16,22 5:10 5:24 6:10 7:17 8:7,19 9:7,12 10:16,23 11:5 11:10 12:5 13:4,15,18 14:9,15 17:9 18:8,17,25 19:1 29:1 40:22,23,25 43:2,13 |
| | Alito's 37:25 | appear 11:25 | assume 6:9 10:21,25 11:8 14:11 20:4 25:17 | behalf 1:16,18 1:22 2:4,6,8,12 3:8 19:4 34:22 40:24 |
| | allegation 30:5 32:14 33:15 44:20 | APPEARAN... 1:15 | assuming 20:4 34:14 | belaboring 44:2 |
| | allegations 10:12 14:5 17:7 20:18 | appears 27:10 | attenuated 16:22 | |
| | allege 26:21,25 26:25 27:17 | appendix 44:2 | attorney's 16:21 | |
| | alleged 3:14,25 4:2,4 12:14 20:23 24:21,23 25:3 26:8 40:6 44:1 | applied 14:25 25:16 29:5,14 33:21 | attractive 31:24 | |
| | allegedly 15:7 15:10 | applies 6:24 13:10 24:8 40:2 44:21 | auction 19:9 31:20 | |
| | allocated 33:5 | apply 7:1,24 24:6 28:17 42:15 43:18 | auctions 24:2 31:16 | |
| | allocation 12:6 13:23 | applying 36:4 | automatically | |
| | allocations 12:10 | | | |
| | allow 21:14 | | | |

| | | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>believe 5:14 9:7 9:9 11:13 15:15 21:1 22:9 28:1 29:21 33:12 41:7,13,15 43:4 45:14,15 benefit 12:19 21:25 beyond 6:2 45:18 bid 10:13 31:20 45:6 bidder 10:13 29:18 31:13 33:8,9,9,14 36:5,7 bidders 11:25 13:15 19:11 23:18 31:16,16 31:17,18 32:2 33:2 36:11 37:16 43:25 45:8,19 bidding 12:9 13:1 18:7,10 18:16 24:3 31:25 bids 23:5,11,13 24:9,12 44:21 45:5,8 blue 27:5 body 39:3 Bond 1:6 3:4 44:25 bottom 27:10 Brennan 46:2 BREYER 39:11 bribery 26:15 27:21 Bridge 1:3 3:4 brief 5:16 12:7 14:1 27:3,5 44:3,8 briefing 33:14 35:23 briefly 19:20</p> | <p>briefs 5:3 bring 11:17 30:14 32:9 33:14 36:5 broad 20:25 29:17 brought 7:6 12:21 15:5 burden 36:12 business 5:13 29:2 30:14,21 36:3 40:11,12 40:14,16,18 businesses 30:20 36:2 40:11 buy 5:7 buyer 15:11 28:23 buyers 31:23 buyer's 5:12 buys 37:3</p> <hr/> <p style="text-align: center;">C</p> <p>c 2:1 3:1 26:8 27:8 calculate 36:24 call 16:20,20 31:22 careful 17:11 case 3:4,12,19 4:5,18,20 5:3 5:11,12,21 6:14 7:1,15 8:9 9:8,9,13,13,22 10:8 12:3,14 12:21 13:6,9 13:20 14:4,25 15:18,19,21,25 16:4,12,15,16 16:17 17:18,25 19:7,12,20 20:2,17 22:11 22:13 23:1,10 24:10,22 25:2 25:9 27:17 28:22 30:4,8 31:14 32:11</p> | <p>34:8 35:22 36:1,4 37:8 38:1,3 41:1,5 44:5,13,14,15 44:24 46:15,16 cases 4:25 5:10 5:14,18 8:7,13 15:12 19:23,25 20:1 28:23 32:5,25,25 33:24 36:8,14 37:16 categories 31:17 causation 12:4 13:14 14:20 15:15 35:10,11 cause 5:8 6:24 7:6,15,22 9:4 9:15,23 10:5 11:17,17 19:14 19:19,22 20:4 22:17,25 23:1 24:18,20 26:5 29:24 31:5,10 32:15 34:3,4 34:10,25 35:6 35:16 37:5,8 39:25 40:15 41:24 caused 15:7 30:2 35:2 causing 19:11 central 19:12 24:17,20 century 5:19 certainly 7:21 11:3 12:12 13:19 17:12 24:3 37:15 39:23 45:5 chain 15:11 challenging 12:21 44:25 chances 37:2,4 cheese 5:11 28:24 Chicago 1:16</p> | <p>Chief 3:3,9 15:1 16:1 18:15,17 18:24 19:1,2,5 22:4,9,19 23:4 23:19 30:8 31:12 32:4,21 34:8,18,23 35:18 36:10 40:20 46:14 circuit 15:12 35:24 36:4 circuits 15:14 citation 27:9 civil 3:13,20 4:20,25 6:18 6:20 7:1,12,25 8:18,21 9:6,23 11:7,18 14:22 15:20 16:9,19 25:6 26:2,3,5 28:2,4,12 29:11 38:8 39:2 42:9,14 42:22 43:17 44:13,15,18 45:23 46:1,3,7 46:12 claim 3:13,16,16 3:20 4:13 6:20 7:25 14:7,8,22 19:19 22:13 29:8 30:1 33:3 33:6 34:14 claiming 36:3 claims 15:20,22 16:10 28:21 29:13 33:17,18 class 5:4 11:1 Clayton 7:19 clear 5:14 22:11 29:13 32:12,16 34:5 40:8 clearly 21:22 34:10 client 17:7,10,16 17:19 18:6 22:7 23:25</p> | <p>clients 16:25 close 18:1 collusion 45:1 combination 9:24 come 16:25,25 33:4 45:19 comes 14:19 23:15 comments 41:2 commit 17:21 common 6:13 7:24 8:11 10:3 10:3 16:3 17:4 20:21 26:13 28:20 29:7,12 33:15,16 34:4 34:11 38:2,7 39:3,6,9 41:9 41:14 43:7,18 43:20 44:11 46:6 common-law 4:25 6:23,25 10:5 20:22 28:8,10,16,18 28:23 29:12 31:8 33:12 36:8 37:14,17 38:11 39:5,12 39:17,24 41:12 42:14,15 communicate 5:22 company 35:25 36:2,21 compete 40:10 competitive 32:13 competitor 15:6 15:6 16:20 29:25 30:1,2 32:7,8 40:14 competitors 30:19 32:17,19 32:22 41:4,6 44:16</p> |
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| <p>competitor's 5:2 40:13,17 complaint 14:6 14:7 16:13 18:12 20:19 44:20 complete 10:22 completed 6:17 8:24,25 completely 25:9 40:4 component 21:13 comport 4:25 concede 17:9 conceded 17:6 44:7 concept 12:9 14:19 concern 29:16 concerns 40:9 condones 16:23 conduct 26:9 29:5 38:10 39:8 40:6 41:5 41:5 conducting 26:11 27:19 confined 32:6 confronted 44:24 Congress 7:20 8:1 25:17 30:18 32:20 40:7 41:2,3 44:17 consider 38:4 considerations 22:22 consist 26:14 27:21 consistent 25:1 25:7 41:9 46:6 consists 27:23 conspiracy 9:16 9:21,21,24 10:1,5 25:4,6</p> | <p>25:13,14,20 26:2,4,18,18 26:22,24 28:1 28:2,3,12,14 28:16 38:6,8 38:19,22,25 39:3,13 41:17 41:20 42:9,9 42:19 43:1 conspire 27:7 39:15,16 Construction 35:25 construe 13:10 43:17 construed 43:16 construing 7:24 consumer 15:9 contain 40:1 contemplated 9:5 contend 26:12 content 39:20 context 14:22 16:9 25:20 40:3 43:17 contexts 28:17 46:4 continuing 31:3 31:4,9 contract 29:6 36:1,2,14 contracting 36:15 contracts 5:4 35:20 contractual 37:22 contrast 9:8 Cook 17:18 core 40:7 corporations 18:16,19 correct 4:16,22 14:9,15 21:12 corresponding 39:4</p> | <p>Counsel 22:4 46:14 count 41:21 counterpart 42:22 county 10:12,12 10:14,19,24 11:2,23,24 12:1,12,13,15 17:18,21 21:3 22:1,5 23:3,7 23:11,13,17,25 24:1,5,6 32:18 45:9,16 course 6:18 7:18 8:2 11:11,14 13:20 20:18 38:11 41:21 court 1:1,13 3:10 6:2,4,5,12 6:23 7:18 8:8 8:10 9:13,21 9:23 10:2,6 11:15 12:20 13:7 14:16,18 14:21 15:1,4 15:12,16,25 16:2,2,14,23 19:6,17 21:19 22:10,15 24:19 25:4,14,15,17 25:25 28:15 29:22 30:4,25 32:10,11,23 33:4,20,25 34:5,24 38:4,6 39:1 41:10,14 42:7,10 43:3,6 43:16,18,24 44:19,23 45:3 45:20,22,25 46:2,5 courts 5:1 co-tort 20:7 creates 35:14 creation 39:7 Credit 45:24</p> | <p>crime 4:6,7 criminal 4:17 6:10,15 7:12 8:6,17,22 9:3,4 9:13,15 15:22 16:5,8 18:5 25:3,20 28:14 31:4,8,9 38:22 40:9,12 42:8 42:13,21 46:1 46:4 critical 29:5 30:17 curiae 1:22 2:9 customers 4:9 4:11 5:2 15:7 40:13,17 cycle 23:22</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d 1:20 2:7 3:1 27:18 34:21 damage 3:12 32:25 damages 16:21 23:7 29:8 33:2 33:4 37:14 DAVID 1:18 2:5 19:3 dealing 12:24 deals 44:9 DeBRUIN 1:18 2:5 19:2,3,5 20:9,14 21:12 22:9,23 23:9 24:1 25:8,25 26:4,20,24 27:9,13,17 28:6,15 29:3 29:21 30:16 31:14 32:10,23 33:11 34:19 deceived 10:14 deception 10:15 decided 20:2 decision 21:19 decisions 19:18</p> | <p>defeat 33:3 defendant 22:14 32:12 33:3 35:14 defendant's 32:13,16 define 8:11 26:13 45:23 defined 8:2 10:2 25:15,17,22 28:1 30:22 definition 8:10 43:10,11,14 definitions 26:20 defraud 3:18 4:2 8:1,2 21:1 35:14 42:4,5 defrauded 4:1 defrauding 18:20 32:7 demonstrated 37:18 Department 1:21 deprived 30:13 deputy 9:19 derivative 34:2 determine 11:16 17:23 43:8 determined 17:25 18:3 detriment 3:25 device 41:7 difference 7:4 36:25 41:1 different 13:25 16:24 22:5,7 25:9 28:17 29:4 30:5 31:17 37:20 45:25 46:2 difficult 36:15 direct 11:12,13 11:22 12:2,3,4 13:14 17:16 24:22 30:6,7</p> |
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| <p>32:17 directed 11:1 40:13,16 directly 22:16 34:11 46:12 directness 14:17 24:21 33:25 43:25 44:5 direct-injury 13:9 disagree 12:6 43:3 disagreed 16:3 disappointed 33:14 36:5,11 37:16 discretion 17:23 discussed 5:3 dismissed 15:1 dispute 20:18 disputed 23:2 distinction 7:13 7:14 distribution 15:11 distributors 15:8 diversity 36:4 dividing 42:17 divvy 23:8 doing 6:12 doubt 28:21 D.C 1:9,18,21</p> <hr/> <p style="text-align: center;">E</p> <p>E 2:1 3:1,1 early 5:18 Easterbrook 30:8,9 34:8 economic 21:16 effect 7:13 8:6 9:3 10:15 21:14 23:11,16 32:16 42:17 effected 20:6 Eighth 15:13 35:24 36:4</p> | <p>either 18:5 20:1 37:20 elaborate 15:18 elaboration 13:22 37:18 38:19 element 6:25 elements 20:10 26:5 34:13,14 43:7 Eleventh 15:13 enacted 5:15 30:18 enactment 41:3 ends 13:3 enforcing 45:13 enhance 32:13 enrichment 36:6 enterprise 4:7 26:9,12 27:19 enterprises 40:10 entities 15:9 19:9 22:3 24:12 equivalent 39:12,19 ERIC 1:20 2:7 34:21 ESQ 1:16,18,20 2:3,5,7,11 essence 46:12 essential 21:13 21:18,21 essentially 24:16 28:8 31:25 establish 13:14 19:13,15,21 22:23,25 29:24 32:15 33:6 35:6,8,11 36:13 established 19:18 20:10,19 33:20 35:22 ET 1:3,7 euchred 5:1</p> | <p>everybody 13:1 37:3 evolved 5:17 29:4 exact 6:4 10:7 42:22 43:4 exactly 41:15 example 8:9 32:6 35:23 exclusive 17:23 exist 5:12 12:19 31:6 41:11 expand 15:22 41:14 expectancy 5:13 expected 22:12 22:16 explain 24:25 explained 30:9 39:1 expressly 17:22 extend 6:1 extent 5:17 9:3 extra 41:19</p> <hr/> <p style="text-align: center;">F</p> <p>facilitate 6:8 fact 6:3 7:7,9 12:7 13:6 18:10 19:12 20:20 22:6,12 32:17 33:1 36:21 42:20 factor 34:10 factors 23:3 34:9 facts 13:12 19:13 20:23 21:2 28:24 fact-based 34:5 failure 22:25 fair 45:7,24 fall 31:16 falls 42:24 false 15:7,10 19:8,16 21:2 21:20,25 29:19</p> | <p>30:12 35:5,9 44:13,14 falsehood 37:21 falsely 36:2 falsity 29:25 far 6:2 18:13 30:7 Farmer 46:2 favoring 11:25 feasors 5:22 features 20:7 Federal 35:19 fees 16:22 ferret 19:25 fewer 31:19 field 8:9,18 43:3 Fifth 15:12,13 figure 39:1 filled 19:8 find 28:4 29:19 finding 14:24 40:8 first 12:5,12 15:11 27:14 28:7 30:17 33:21 43:23 first-party 7:16 five 13:21 24:4 follow 9:5 follows 27:14 footnote 12:8 foreseeable 32:16 form 20:14 30:13 formed 18:20 forth 11:15 19:22 23:3 27:11 29:22,23 forward 19:25 24:10 found 6:23 22:15 42:7 Fourth 15:13 framework 33:20,22 fraud 3:13,15,20</p> | <p>5:18,23,25 6:2 6:11,15,19,21 7:2,9,25 8:6,10 8:22,23,24,25 10:20 11:4,7 11:18 14:23 15:22 16:3,4,8 17:8,10,13,16 17:20 18:5,13 20:11,20,24,25 21:4,14,17,25 22:24 24:23 26:3,15 27:21 27:24,25 28:4 28:5,8,9,10,18 28:20,22,25 29:2,6 30:2 31:8 33:16 35:4,6 36:6,13 37:23 38:10,10 38:11,13 39:6 39:7,9,10 40:16 42:3,4 42:12,18,19,20 42:23,25,25 43:4,6,8,9,11 43:12,14,19 44:11 46:7,10 46:11,12 fulfill 46:8 full 23:17 further 18:22 34:16 40:19 46:13 furtherance 9:20 F.2d 35:25</p> <hr/> <p style="text-align: center;">G</p> <p>G 3:1 general 1:21 39:18 44:16 generally 33:7 getting 12:1 Ginsburg 4:5,17 4:20,23 10:9 10:11 13:24</p> |
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| <p>14:10,11 17:5 21:5,13 29:1 29:16 give 16:19 39:17 39:19 given 21:23 37:19 38:14 go 6:21 17:5 19:25 40:6 goes 24:10 45:17 going 9:10 13:3 18:14 36:8,15 Google 16:24 gotten 14:3 36:14 government 6:3 15:8,18,19,21 22:11 35:20 government's 6:1 great 45:12,13 greater 14:3 group 31:25 32:3 33:3 guarantee 45:18 guaranteed 13:5 guidelines 11:16 guises 12:1</p> <hr/> <p style="text-align: center;">H</p> <p>hanging 14:13 happen 24:3 happened 24:2 happens 23:4,5 harm 15:6,10 30:3,7 34:2 harmed 22:12 23:3 hat 14:13 Hazeltine 32:24 hear 3:3 heart 12:14 16:12 37:22 held 6:12 21:19 24:19 36:5 42:11 help 9:11</p> | <p>higher 5:7 historically 34:4 Holderman 15:2 holds 23:14 Holmes 6:23 7:4 7:14,18 11:15 19:18,24 24:19 29:23 30:5 31:5 33:19,21 44:7 Honor 9:8 11:11 12:16 13:16 20:9 27:9 29:21 horse 5:5,7,8 hundred 42:2 hundreds 24:16 hurt 11:23 12:1 12:24 13:3 hypothetical 6:7 11:11</p> <hr/> <p style="text-align: center;">I</p> <p>Iconco 35:24 idea 44:16 identify 24:10 31:24 Ill 1:16 illegal 40:10 illegitimate 41:4 Illinois 12:20 13:6 44:23 45:3 illustrative 35:23 immediately 17:3 important 30:24 importing 7:14 7:16 impose 41:10 imposed 6:13 imposition 35:12 impression 43:24 inability 23:1</p> | <p>inadequate 33:22 inappropriate 26:3 40:5 incentive 45:12 included 16:11 including 13:15 45:1 increased 24:14 incurred 24:24 38:15 Indemnity 1:6 3:5 indictable 8:21 17:7,10 20:19 20:24 28:9 31:8 38:13,16 39:21 42:12 indicted 8:15 17:16,20 indictment 17:12 individual 7:11 induce 40:17 induces 35:15 injure 23:25,25 35:15 injured 3:16 4:1 6:16,22 7:18 8:25 9:25 13:12 14:3 22:6,16 25:2 25:23 30:21 34:12 35:16 38:6,18 39:2,5 41:22 45:17 46:9 injuries 35:1 injurious 37:20 injury 4:19 11:12,13,23 13:13,19 14:17 14:18 16:7 17:14 19:11 24:21,24 25:11 30:6 32:17 35:7 38:15</p> | <p>43:25 44:5 innocent 9:20 inquiry 38:15 39:8 insufficient 19:24 Insurance 45:21 intended 25:17 40:7 41:2 intensive 34:5 intentional 37:21 interest 12:3 interesting 18:10 interference 5:13,21 16:11 16:12,16 20:5 20:6,21 29:2,6 37:21 interpret 39:16 interprets 44:19 invokes 20:7 involved 3:18 30:1 involving 28:23 38:10 44:13,14 Iowa 36:4 issue 15:25 19:12,16 20:20 23:14 24:5 25:9,12 29:10 29:10 32:1,2 33:18 37:23 41:18 issues 32:25</p> <hr/> <p style="text-align: center;">J</p> <p>Jensen 35:24 JOHN 1:3 joint 44:2 Judge 15:1 30:8 30:9 34:8 Justice 1:21 3:3 3:9 4:5,16,20 4:22,24 5:10 5:20,25 6:6,11</p> | <p>7:3,17 8:4,12 8:19 9:2,10 10:9,10,11,20 10:24,25 11:6 11:21 12:5,23 13:4,8,17,24 14:9,11,15 16:2 17:5 18:6 18:8,15,17,18 18:24 19:1,2,5 20:3,12 21:5 21:12 22:4,9 22:19 23:4,19 24:25 25:8,19 26:1,16,22 27:2,12,15,22 28:11,20,22 29:1,16 30:10 30:16 31:12 32:4,21 33:7 33:11 34:18,23 35:18,19 36:10 36:17,19 37:11 37:25 38:17 39:11 40:20 42:16 43:2,10 43:14 46:14 justifiable 4:19 6:25 16:7 17:14</p> <hr/> <p style="text-align: center;">K</p> <p>keep 45:2 Kennedy 5:20 5:25 6:6,11 10:20,24,25 11:6 20:3,12 33:7,11 Kennedy's 35:19 key 24:17 kind 11:19 16:22 kinds 29:13 know 4:18 12:17 12:18 16:12 18:2 25:21</p> |
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| <p>37:1 43:12,15 known 17:18 25:21 knows 15:1</p> <hr/> <p style="text-align: center;">L</p> <p>label 29:14 37:20 labels 29:4 language 7:19 7:21 9:25 10:1 39:25 larger 33:5 law 5:14,15 6:13 7:24 8:11,22 10:3,3 16:3 17:4 18:13 20:4,21 25:6 26:2,3,13 28:20 29:3,7 29:12 33:7,15 33:16 34:4,11 36:4 37:18 38:2,7 39:3,3,6 39:10 41:9,15 42:13,14 43:7 43:18,20 44:12 46:1,6 lawsuits 15:5 leave 43:23,24 leaving 24:15 left 13:11 legitimate 30:20 40:11 41:4 let's 10:21,25 liability 45:23 lien 23:14,14 24:7 liens 19:10 21:16,24 22:2 24:13,15,16 31:19 literally 22:1 long 4:25 21:20 36:8 37:17 longer 5:5 look 6:19 9:24</p> | <p>17:12 26:2,3 26:13 27:13 28:2,4 29:11 29:18 32:11 38:20 41:20,21 42:1,3 43:20 looked 6:13 7:19 7:20 8:8,11 10:2 25:25 26:4 33:25,25 34:1 43:6,6,7 looking 7:12,18 25:14 27:2 28:16 38:7 lottery 36:21 37:2,8,10</p> <hr/> <p style="text-align: center;">M</p> <p>M 1:16 2:3,11 3:7 40:23 mail 5:22,23,25 6:2,10,15,19 6:21 7:1,24 8:6 10:20 11:3,6,7 11:18 15:22 16:3,8 17:8,10 17:13,16,20 18:5 20:11,20 20:24,25 21:4 21:15 22:24 24:23 27:24 28:9 30:2 35:3 38:13 39:6,7,9 42:3,3,11,17 42:20,23,25 43:5,12,14 44:11 46:7,10 mailed 21:6 mails 20:6 21:8 21:9,13,18,19 21:21 making 21:25 Manley 5:11 36:9 Mans 8:9 43:3 manufacturer 15:9</p> | <p>marketing 15:8 materiality 6:13 16:6 matter 1:12 6:3 13:3,19 14:4 32:8 38:2 44:15 46:17 matters 25:21 mean 4:25 11:6 29:25 31:3 36:22 38:5 42:5 43:5,6 44:12,12,17 meaning 25:18 25:19 38:5 39:17 41:12 42:14 43:7,18 46:6 meanings 45:25 means 7:14,15 8:1 9:2 13:5 28:3,5 31:3 39:5 40:10 42:9,12 43:12 43:15 measure 37:14 merely 29:25 met 20:16 34:7 34:11,15 44:8 methodically 34:9 Miller 1:20 2:7 34:20,21,23 35:21 36:12,18 37:7,13 38:24 39:22 40:21 million 37:5 minutes 40:22 misinformed 27:4 misrepresenta... 3:14,25 4:3,4 4:10,14 10:18 10:23 14:13 21:8 45:11 46:11 misrepresenta...</p> | <p>4:8 5:2 misrepresents 36:22 misstated 33:9 mode 38:8 model 7:12 8:17 9:6 modern 37:17 moment 12:11 Monday 1:10 money 37:9 monthly 23:21 moored 16:3,5 morning 19:21 morphed 41:5 motivations 30:19 multiple 11:25 23:13,17 24:9 24:11 33:2</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 narrow 8:16 narrowed 9:4 natural 3:23 nature 3:15 29:15 navigate 31:7 necessary 9:14 10:6 11:10 Neder 4:18 6:3,4 6:12,14 8:9 10:8 15:18,21 16:4 need 8:20 9:17 9:24 21:4 35:4 42:6 43:8 needs 10:3 11:12 never 21:15 nevertheless 30:6 new 5:3,11,16 18:19 22:15,15 45:21 nine 15:25 noted 38:25</p> | <p>notices 21:10,22 number 24:14 30:23,24 31:20 33:5 40:2 45:19</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 observed 45:25 obtain 21:24 obtained 19:9 21:16 obtaining 22:1 obvious 43:20 occurs 8:14 odds 36:22,25 offense 7:10 8:21 42:12 official 30:13 Oh 27:15 Okay 9:2 27:16 old 5:3 once 46:5 opinion 16:1 opponents 15:4 41:13 opportunity 30:14 oral 1:12 2:2 3:7 19:3 34:21 order 9:15 10:4 11:14,16 19:14 23:12 35:5,15 43:8,17 44:4 45:8 ordinarily 35:4 ordinary 25:18 organized 4:6,7 originally 15:1 ostensibly 15:19 overcome 34:6 oversight 17:17 overt 9:14 10:4 25:24 owner 12:24 13:2 owners 12:19</p> |
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| 21:11,23 23:12 32:19 | 19:8 21:15,24 24:12,15,18 26:12 40:24 45:11 | 20:11,13 22:24 24:23 27:24 28:8,12 31:2 38:9 40:2,3 42:2 | prospective 37:22 protect 23:12 30:18,20 32:20 41:4 protecting 44:16 prove 13:13,19 14:2 16:17 21:4 23:1 24:13 25:10 37:6 proved 14:18 21:2 43:9 provide 24:6 33:17 provided 44:17 provides 23:12 34:25 proving 31:7,9 31:10 provision 26:6 26:19,23 45:24 provisions 25:13 26:17 27:8 proximate 6:24 7:6,15,22 11:17 14:20 15:15 19:14,19 19:22 22:17,25 23:1 24:18,20 29:24 31:5,10 32:15 34:3,3 34:10 35:10,11 39:24 proximately 35:2 Prubis 41:15 Prupis 9:9,22 25:1 41:18 42:8,10,11 purpose 12:16 18:20 purposes 18:21 29:12 putting 10:13 12:11 p.m 46:16 | <hr/> Q <hr/> qualification 33:10 qualify 10:15 question 3:11,22 20:23,24 24:17 24:20 35:19 38:7 39:4 questions 18:22 34:16 37:25 40:19 46:13 quintessential 34:3 quotation 27:14 quote 27:10 <hr/> R <hr/> R 3:1 racketeer 16:21 racketeering 26:10,14 27:20 27:23 30:22 39:18 41:24 42:1 46:10 racketeers 16:20 17:1 raised 14:16 rate 45:2,17 reach 44:11 read 7:5 41:22 reading 26:16 realize 21:15,24 30:18 really 5:13 30:11 37:1,4 38:2 40:6 45:10 reason 3:17 4:1 6:14,22 7:5,19 7:23,23 8:25 9:16,25 17:19 25:3,11 30:21 35:1 38:6,15 38:18,19 39:23 39:25 41:12,22 41:23 43:15 46:10 |
| <hr/> P <hr/> P 3:1 page 2:2 27:2,5 27:11 pages 12:8 44:3 paid 22:14 23:17 37:9,12,15 45:9 painless 37:1 paragraph 44:1 Parchment 32:24 part 15:15 23:6 participants 37:7 particular 11:25 parts 3:11 party 22:16 35:15,16,16 pattern 20:15,20 26:10,14 27:20 27:20,23 30:22 31:2,3,9 penalty 12:25 24:4 45:2,17 pendant 16:14 pending 18:1 people 33:5 36:23 perceived 45:7 percent 13:1,1,4 23:18,22 24:4 24:5 31:18 44:22 45:2,18 percentages 22:7 person 5:6 27:7 37:9 39:15 41:22 personally 19:15 persons 11:1 Petitioners 1:4 1:17 2:4,12 3:8 | Petitioner's 27:3 Phoenix 1:6 3:4 44:24 phrase 8:13,14 piece 36:7 place 36:25 42:6 42:7 plaintiff 3:15,23 3:24 4:11,15 6:9 10:14,17 10:17 12:21 25:2,10 29:8,9 31:6,10,13 34:6 35:4,8,13 36:13,16 44:24 45:2 46:9,11 plaintiffs 3:16 4:2 12:2 13:16 16:13 18:9 31:15 34:1 35:1 44:1 plaintiff's 4:11 play 14:19 plead 13:22 please 3:10 19:6 34:24 pled 12:6 16:13 16:18 18:12 podium 43:23 point 5:16 13:25 13:25 15:17 27:25 40:5 44:10 45:1 pointed 12:7 points 43:22 position 6:1 15:4 22:5 32:13 possibly 12:15 23:22 potential 31:15 precisely 7:21 predicate 3:17 6:21 7:25 | predicated 7:1 35:3 46:7 presented 3:11 11:13 presumed 19:7 price 5:7 principal 30:19 40:9 principle 39:5 private 6:18 problem 11:21 13:20 16:19 17:1,15 proceed 3:20 proceeding 26:17 process 24:3 procurement 33:16 produce 20:1 30:11 33:23 produces 33:22 professional 31:23 program 24:5 prohibits 20:25 27:18 proof 13:19 proper 19:19 properties 24:11 31:21,24 32:1 32:1 property 12:19 12:23 13:2 21:10,23 23:12 30:21 31:20 32:18 prosecuted 7:11 8:15 prosecution 4:17 8:16 16:6 16:8 | | |

| | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>reasons 29:22 rebuttal 2:10 18:23 40:23 receive 31:18 received 4:4 19:15 24:13 29:9 recklessness 46:3 recognize 14:22 recognized 15:14 30:4,25 32:24 46:2 recognizes 8:22 record 12:17 18:11 recover 6:9 29:8 36:23 38:18 recovery 37:15 38:3 redress 40:7 refer 11:6 39:24 43:3 45:20 reference 38:11 39:19 referenced 28:23 references 5:18 referring 8:5 refers 11:7 38:24 42:21 regardless 9:6 32:21 registered 31:18 regular 21:3 regulate 45:5 Rehnquist 16:2 rein 41:8 related 19:9 24:12,13 relation 24:22 30:6 37:22 relationship 10:7 29:2 relatively 32:3 relevance 38:1 relevant 26:6</p> | <p>38:9 39:8 reliance 3:21 4:18,19 6:7,11 6:25 7:1,16 10:12 11:8 14:19,25 15:14 16:7 17:2,14 21:4,9 35:15 40:1,4 41:8 relied 3:24 4:3 10:18 11:2 19:16 26:6 29:10 35:5,9 35:13 rely 3:13,22 7:8 9:1 46:11 relying 3:21 21:7,7 remaining 40:22 remarkable 15:5 remedy 16:18 remote 44:5 repeatedly 30:25 reply 5:16 12:7 13:25 44:3 Reporting 45:24 representation 5:9 10:16 representations 23:10 require 15:14 17:14 required 3:21 4:19 6:11,15 16:6,7 25:5 requirement 6:14,22,24 8:20 11:9 13:10 14:25 17:2 25:5,23 39:23 40:1 41:8,11 46:8 requirements 20:15 39:24 42:18 44:7</p> | <p>requires 10:3 requiring 35:13 research 31:23 reserve 18:23 respect 35:19 37:25 respectfully 43:2 Respondents 1:19,23 2:6,9 18:9 19:4,11 19:13,21 24:9 24:16,24 32:3 34:11,22 response 37:24 rest 18:23 23:7 restrict 15:20 restrictions 30:24 31:6 result 30:12 33:23,23 resulting 15:10 results 20:1 revolutionary 14:24 Rice 5:11 36:9 RICO 3:13,17 3:20 4:13,17 5:15 6:20 7:1 7:21,25 9:13 9:16,23 10:2 11:7,18 12:4 13:20 14:8,22 15:5,20 16:9 16:19 20:8,10 25:4,20 26:7,9 28:1,3,5,9,13 28:13,18 29:11 29:16,20 30:15 30:18,20 31:11 32:9,12,20,25 34:6,14,25 35:2,3 38:17 38:22,22 40:7 41:3,6,11,14 41:17,23 44:10 44:13,15,18</p> | <p>46:7 rid 4:6,7 right 6:19 9:12 13:17 14:12 22:8 27:12 29:17 39:22 45:4 rigorous 29:24 33:24 rival 4:10 rivals 4:8,9 rival's 29:19 roam 8:17 ROBERTS 3:3 18:15,24 19:2 22:4,19 23:4 23:19 31:12 32:4,21 34:18 35:18 36:10 40:20 46:14 room 19:9 rosa 15:24 rotation 23:24 rotational 11:24 12:6,10 13:23 14:1,12 23:16 23:20 24:6,8 44:21 route 13:14 rule 12:13,15,22 17:21,22,23,24 18:5 23:15,20 24:8 25:16 30:11 32:5 33:12 35:12 41:12 42:15 43:7,18 44:25 45:3,13 46:6,6 ruled 6:15 9:14 10:6 rules 12:19 24:5 running 37:2,9 runs 36:21,21</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Safeco 45:21</p> | <p>sale 5:5,6 12:8 45:19 sales 18:12 Salinas 9:8,13 10:8 satisfy 23:2 33:19 saying 42:18 says 17:22 25:10 27:6,6 29:1 38:12,19,25 39:20 41:21 42:4 44:18 Scalia 4:24 5:10 26:16,22 27:2 27:12,15 28:22 30:10,16 36:17 36:19 37:11 scheme 3:18 4:1 6:9,17 8:2,23 11:24 21:1,18 21:21 35:14 42:4 Schmuck 21:19 se 35:12 39:7 secondary 37:19 secondly 28:19 section 25:10 38:13 39:9 see 27:14,15,15 27:15 38:23 seek 16:21 seeks 6:1 sell 5:6 45:8 sense 21:17 sent 21:10 separate 43:11 serious 20:18 seriously 23:2 set 11:15 19:22 23:3 27:10 29:22,23 36:1 share 14:4 shell 18:15 sheriff 9:18,19 Sherman 7:20 show 12:4 24:10</p> |
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| <p>24:18 25:2 31:25 35:4,10 36:16,19,23 44:3 showed 34:9 showing 34:7 shown 44:4 significant 20:16 34:7,12 similar 5:12 9:9 12:22 44:25 simply 8:5,23 18:18 32:12 38:25 39:8,13 42:21 single 31:1 42:20 situation 4:21 5:12 8:8 9:18 11:20 12:25 13:2,11 16:22 17:3 22:6 30:1 31:13 32:7 36:20 37:15 41:6,16,19 45:6 Sixth 15:13 small 31:20 32:3 36:1,3 Solicitor 1:20 somebody 5:5 35:5 somewhat 36:18 sorts 16:10 sought 32:20 source 43:20 Souter 7:3,17 8:4,12,19 9:2 9:10 10:10 11:21 12:5,23 13:4,8,17 18:6 18:8 42:16 43:2,10,14 speaks 7:10 specific 24:11 31:20 specifically 16:1</p> | <p>19:14 standard 7:6 33:20 standards 19:22 19:23 24:18 29:23 standing 43:1 state 16:14 20:4 22:14 45:13 statement 17:6 29:9,10,19 30:12 37:19 44:14,14 statements 15:7 15:10 19:16 22:1 35:5,9 States 1:1,13,22 2:8 33:8,13 statute 5:23 6:2 7:7,10,15 9:5 9:16 10:2 16:8 17:13 20:8,25 25:15,22 28:2 28:3,5 29:17 30:23 38:13,14 38:17,20 39:9 39:18 40:8 43:13,15 statutes 5:25 15:23 44:19 statutory 10:1 22:20,21 39:7 step 41:19 42:6 stopped 24:4 Storey 32:24 structure 38:14 sub 15:24 submission 21:2 29:19 submit 3:22 6:24 19:12,17 20:17 31:14 34:13 40:16 42:8 submitted 19:8 46:15,17 subsections 27:8</p> | <p>subsequent 18:12 substantial 34:12 substantive 39:14 41:17 successful 33:9 33:9 36:6 successfully 31:7 sue 12:3 22:8,13 22:16,21 23:6 23:7 29:19 33:8 suffered 35:1 suffers 10:14 sufficient 11:3 11:17 13:14 14:17 34:13 sufficiently 8:5 suitability 34:1 supplier 32:7 suppliers 4:9,12 15:8 supporting 1:23 2:9 suppose 5:20 23:19 31:12 32:4 Supreme 1:1,13 12:20 13:7 44:23 45:3 switch 40:14,17 system 14:1,12 24:6 S.G 41:13</p> <hr/> <p>T</p> <p>T 2:1,1 tail 21:9 take 17:11 42:6 42:23 takes 13:21 24:4 32:12 talking 8:24 23:20 tax 18:21 31:23</p> | <p>taxes 22:14 23:17 45:9 teach 5:4 tell 17:3 39:2 tells 38:21 tends 8:16 term 8:10,11 42:20,23 45:22 45:23 46:1,3 terms 7:10 29:14 test 19:19 22:18 28:19 33:24 34:5,7 tests 29:24 text 7:7,22 textual 7:4,13 thank 3:9 18:24 19:1 34:16,18 40:20,25 46:14 THEODORE 1:16 2:3,11 3:7 40:23 theory 4:13 thing 42:9 43:5 things 28:6 30:17 31:7 44:3 think 6:10 8:13 8:14,15 10:7 11:5,10,19 13:10,18 14:18 15:24 17:10,15 17:17,19 18:10 30:17 32:10 36:7 37:13,13 39:11,12,22 40:6 44:8 thinks 10:13 thought 17:6 21:8 26:17 45:10 thousand 37:3 thousands 19:10 22:2 24:14 threat 31:4 threats 40:12</p> | <p>three 11:15,19 13:5 18:1 ticket 37:3,12 time 5:1 18:23 23:9,15 45:1 today 29:14 told 5:4 8:1 tool 16:20 tort 5:21,21 10:21 20:22 29:15 37:18 tortious 5:13,20 10:4 16:11,12 16:15 20:5,21 torts 29:3 tortuous 20:5 totally 41:9 tradition 36:8 37:17 transaction 21:10 treasurer 17:22 18:2 45:4,5,7 45:10,12,14,14 treat 42:25 treated 43:1 treble 3:12 16:21 true 14:6,7 19:7 29:22 40:16 try 45:5 trying 15:22 41:3 turns 37:4 two 5:21,21 13:22 24:4 28:6 30:17,24 31:3,17 42:18 type 8:8 types 12:18</p> <hr/> <p>U</p> <p>ultimately 38:1 unanimous 16:1 uncompleted 8:23 understand</p> |
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-------------------------------------------------------------------------------------------|
| <p>27:12,22 28:3 understanding 35:21 unfairly 40:10 unfortunately 33:13 unified 42:23 United 1:1,13,22 2:8 unjust 36:6 unlawful 10:4 25:24 27:7 39:15 41:5 unmoor 16:8 unmoored 16:4 unmooring 41:14 unpaid 45:9 unsuccessful 10:22 29:18 33:8 use 13:22 20:6 21:15,17,20 40:10,12 user 15:9 uses 40:16 42:4 46:3 usual 36:18</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 valuable 24:15 value 21:16,24 37:1 versus 3:4 5:11 8:9 9:9,22 15:6 15:9 25:1 41:15,18 42:8 42:10,11 43:3 46:2 viable 31:13 victim 12:12 45:6 view 20:3 38:2 violate 25:13 27:7 39:8 violates 44:18</p> | <p>violation 3:17 5:23,24 8:6 10:21 11:4,8 12:13,15 17:24 18:4,4,5 24:21 24:23 25:3,11 25:12 26:7,8 26:21,25,25 27:18 28:13 30:7 31:11 35:2,3 38:20 38:21 39:14,17 41:17,23 42:21 45:15 violence 26:15 27:21 40:12 virtue 25:23</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>W 1:18 2:5 19:3 Wait 36:17 want 11:8 45:20 wanted 5:6 15:17 wants 4:6,7 15:20 Washington 1:9 1:18,21 way 21:23 23:24 24:1 27:10 34:12 35:11 43:1 44:7,19 ways 45:16 weakness 42:16 went 34:8 weren't 21:6,14 23:6 We'll 3:3 willfulness 45:23 46:1 winning 37:2 won 36:24 37:6 word 25:14,16 27:25 28:5,16 39:13,16,19,20 42:5 words 13:22</p> | <p>22:20 26:11,12 31:19 work 32:17 worked 33:1 works 38:23 worry 30:11 wouldn't 32:6 writing 16:2 wrong 26:17 27:5 wrongdoer 9:19 wrongful 9:14 wrote 17:22</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,8</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yeah 13:17 year 44:23 years 13:6,21 15:25 18:1 20:19 43:16 York 5:3,11,16 22:15,15</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero 12:25 13:1 13:4 23:5,11 23:13,18,22 44:21 45:18 zero-percent 22:6 24:9</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>07-210 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10 31:19 40:22 11:10 1:14 3:2 12:05 46:16 1291 35:25 1341 38:13,16 39:9 14 1:10 16 26:8 18 45:2 19 2:6 39:14</p> | <p>41:20 19th 5:18 195 43:25 1961 26:18,20 38:9,12 40:3 42:2 1962 38:25 1962(c) 26:7,8 26:19,21 27:1 27:6,18,18 39:14 41:21 1962(d) 25:12 26:21,24 38:21 41:16 1964 39:23 1964(c) 6:22 9:25 25:10 38:24 41:23 1970 5:15</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 27:2,5,11 20 44:2 2000 13:6 44:23 2008 1:10 21 44:2 27 33:12</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 34 2:9</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>40 2:12 33:12 46 44:1</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 31:18 36:11</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>622 35:25</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 12:8</p> |
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