

1 defendant and saying, we believe you are violating U.S.
2 law and we seek redress for that, that is perfectly
3 appropriate.

4 If I could turn to the injury question, the
5 RICO statute incorporated language of the Clayton Act
6 which, before 1970, had been construed to permit foreign
7 plaintiffs to come into the United States and obtain
8 foreign damages as a result of U.S. violations by the
9 company in the United States.

10 The Continental Ore case, which was decided
11 by this Court in 1962, is directly on point. That case
12 holds that injury suffered by Canadian entities could
13 come in and come into the United States and get damages
14 as a result of the violation of the Clayton Act.

15 In Pfizer, the government of India, coupled
16 with governments in Iran and the Philippines, came to
17 the United States and alleged that Pfizer owned --

18 JUSTICE BREYER: I'm -- just a moment. I
19 know this. You're absolutely right on that. The -- the
20 question that -- can you, when -- when you sue -- the EU
21 sues, A, an American company. Now, it's been in league
22 with six foreign countries, and they have agreements.
23 And what the crime is, is money laundering, and the
24 money laundering took place in Belgium, and you win.
25 Now, can you go to Belgium and get the damages? You

1 see?

2 There are six Belgium banks. They are not
3 accused. They are unindicted co-conspirators.
4 And under this -- does this statute allow a -- the EU to
5 come to Philadelphia, find RJR, accuse them of money
6 laundering with unindicted co-conspirators in Brussels,
7 get damages, and then go to Brussels and collect them
8 from the other banks?

9 MR. FREDERICK: I -- I would assume that the
10 Belgium courts -- and I'm not going to profess to be an
11 expert on the enforceability of judgments in Belgium,
12 Justice Breyer, and so I give you that answer.

13 JUSTICE BREYER: But do they get a judgment
14 against the foreign bank?

15 MR. FREDERICK: To get a -- well, presuming
16 that there was personal jurisdiction in the United
17 States, assume --

18 JUSTICE BREYER: The EU -- the jurisdiction
19 only against RJR unindicted co-conspirators or helpers,
20 whatever.

21 MR. FREDERICK: I -- I don't know the answer
22 to your question.

23 JUSTICE BREYER: I think they are worried
24 about something like this. I think that's what the
25 State Department is worried about.

1 MR. FREDERICK: Here is the answer, though.
2 The answer is that if those Belgium banks are in a
3 conspiracy with RJR, it surely cannot be the case that
4 U.S. law does not cover RJR.

5 If there is a question about the
6 enforceability of a judgment against the Belgium banks,
7 presumably the Belgium banks will make that argument,
8 and they will claim in Belgium that -- that somehow a
9 suit prosecuted in the United States in which they were
10 co-conspirators is somehow not going to cover their
11 activity.

12 Our point is that it can't be the case
13 where, for centuries, the United States courts have been
14 open to allow foreign plaintiffs to come in alleging
15 injury caused by U.S. actors under U.S. law, that
16 somehow we're going to read the Morrison principle as a
17 way of constricting the available remedies. Nothing in
18 Morrison suggests that you would do that kind of
19 extraterritorial slicing and dicing, where once you had
20 concluded that the underlying action here was one that
21 observed and respected international norms and went to
22 extraterritorial lengths provided in this case, that
23 there is a tie to the United States. And whatever
24 remedies are available are available.

25 And after Pfizer, a number of U.S. companies

1 were concerned about it, and they went to Congress and
2 they asked Congress to restrict it. And the hearings
3 that we have laid out in our brief -- and this is page
4 45, note 11 -- goes into the legislative history of
5 this. And the State Department, Justice Breyer, took
6 exactly the opposite position, because the State
7 Department said, reciprocity demands that we be allowed
8 to go into other nations' courts and the availability of
9 our courts for foreign nations to come in for violations
10 of the U.S. And if you look at footnote 13, which is on
11 page 55, the State Department testified to Congress that
12 the United States had brought more than 50 actions in
13 nations around the world.

14 So the idea about comity is one that,
15 respectfully, is a decision that is made by Congress,
16 and it is not for the executive branch to change its
17 position for the purpose of trying to snuff out a remedy
18 that otherwise would be available to a foreign
19 plaintiff.

20 JUSTICE KAGAN: Well, Mr. -- Mr. Frederick,
21 I understand that argument with respect to what's the
22 ordinary remedial provision of a statute. But this is
23 something a little bit more than that, right? Because
24 this statute also -- this provision also includes
25 substantive elements that don't apply except in the

1 civil suit for damages. Isn't that right?

2 MR. FREDERICK: That's true.

3 JUSTICE KAGAN: So why doesn't that make the
4 difference?

5 MR. FREDERICK: It could. And, Justice
6 Kagan, if you were to decide that the three verbs that
7 are in 1962(a), (b) and (c), which are influencing,
8 buying, or investing in, had to have a domestic
9 component, we still would satisfy that, because our
10 allegations in the complaint are that RJR from its
11 corporate headquarters in New York and Winston-Salem was
12 engaging in those conducts to effect and corrupt the
13 foreign enterprise, or the domestic enterprise, as was
14 the case with Brown & Williamson.

15 JUSTICE ALITO: Well, if we look just at
16 1964(c) and apply the Morrison analysis in a
17 straightforward way, would that analysis work in this
18 way? There isn't any reference in 1964(c) to
19 extraterritorial application. And where would be the
20 focus of 1964(c)? Would it be the injury to business or
21 property?

22 MR. FREDERICK: So, Justice Alito, I would
23 have two responses. '64, 1964, incorporates directly
24 1962. So there is a direct reference to the definition
25 of "racketeering" that has the some 46 predicate acts

1 that have a clearly textual extraterritorial effect. So
2 I think that by incorporation, you would interpret it
3 that way.

4 And the second thing is that when Congress
5 used that language in 1964, it was tracking the Clayton
6 Act. And the Clayton Act had a -- a predetermined and
7 pre-understood meaning as to what those words meant.

8 JUSTICE ALITO: But at that time, RICO would
9 not have an extraterritorial application, would it?

10 MR. FREDERICK: No. My position is that the
11 -- the extraterritorial application has gotten stronger
12 over time, but if you were to adopt the normal canon of
13 construction, which is that when Congress adopts words
14 in a statute, they carry with it the meaning that this
15 Court has given those words. The same words are in the
16 Clayton Act as they were adopted in 1970, and as Justice
17 Kagan pointed out, the case has only become stronger
18 with the Money Laundering and post-PATRIOT Act additions
19 of those predicate acts.

20 But the third answer I would give you,
21 Justice Alito, is that even in Morrison itself, the
22 Court's opinion says once we have found there to be
23 extraterritorial application, it's not for us to be
24 deciding that there are different provisions that
25 shouldn't have that. And that's essentially the

1 argument that is being made as to take an extension of
2 Morrison beyond where the Court was --

3 JUSTICE BREYER: But there is a problem with
4 the Clayton Act, even at this time. It's been a
5 nightmare for foreign countries, and there has always
6 been controversy around it. And there were cases called
7 Tamburlaine and others which, you know, led -- led to
8 the kind of thing that the SG has described in his
9 brief. So the Clayton Act is helpful in one respect,
10 but not helpful in the other respect.

11 MR. FREDERICK: And my answer is, Congress
12 has addressed some of those concerns in the antitrust
13 area with various amendments that affect -- that -- that
14 only go to conduct.

15 And classically, what Congress is getting at
16 is conduct, not remedy. But in the conduct area, what
17 Congress has done in one of the antitrust amendments for
18 the Sherman Act was to say, we are only going to affect
19 foreign conduct if it has a domestic effect, but it is
20 still a focus on conduct and not on remedy. Congress is
21 very well-equipped to deal with this issue should it
22 proceed that -- there to be a concern, but Justice
23 Breyer, I would point out that it would be odd to
24 suppose that Congress is intending to turn the United
25 States into a place where criminal activities could

1 occur from the United States that was affecting our
2 closest allies and there was nothing those allies could
3 do about it by going into the United States and trying
4 to vindicate and -- and seek redress for those harms.
5 That would be a very, very stark departure from this
6 country's long history of having respect and -- and
7 provide a remedy for foreigners who are harmed by
8 actions of the United States and its citizens.

9 If I could just address the -- I think I've
10 addressed the Empagran question, because that's the
11 statute that was affected. And if I could just note
12 that the PATRIOT Act -- footnote 10 of our brief points
13 out that then-Senator John Kerry, now Secretary of
14 State, was very conscious of the effect that this would
15 have on foreign nations and foreign litigants. And when
16 the PATRIOT Act extended certain of these predicate acts
17 into RICO, he stated on the floor -- we cited the
18 provision in our brief -- the reason for doing that was
19 to give foreign nations that had been affected and who
20 were treaty allies an opportunity to come and seek
21 redress in our courts.

22 The last point is that Mr. Katsas noted the
23 choice-of-law principle, where there is a foreign injury
24 and there is a decision to apply foreign law, and he
25 says, why shouldn't that apply here? That only applies

1 where there is a conflict between the laws that would
2 apply here -- we are asserting that there is a U.S.
3 statutory violation by a U.S. company for actions that
4 it committed in part in the United States. There's no
5 reason to apply a choice of law, because you have a
6 foreign company that is -- or foreign interests that are
7 asserting a violation of U.S. domestic law.

8 In every instance where Congress made the
9 decision to apply RICO extraterritorially, it imposed
10 important domestic proof requirements. That is the
11 limiting principle on which the Court ought to decide
12 this case.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Katsas, you have four minutes remaining.

16 REBUTTAL ARGUMENT OF GREGORY G. KATSAS

17 ON BEHALF OF THE PETITIONERS

18 MR. KATSAS: Justice Breyer, you asked about
19 government's positions.

20 The United States is the party that has to
21 live with the consequences of your decision one way or
22 the other. They are telling you here that there is a
23 comity problem with respect -- there is no inconsistency
24 with what they said before. In *Empagran*, they told you
25 the same thing: That providing remedies for foreign

1 injuries caused by largely foreign conduct would be a
2 problem.

3 The EU is here as a party in this case, but
4 take a look at what they said in many other cases where
5 they were in the more detached position: As an amicus
6 in OBB, in Kiobel, in Sosa, and most importantly, in
7 Empagran itself, which is the case involving foreign
8 injuries caused by largely foreign conduct. They said
9 in that case there would be a huge comity problem with
10 extending American law.

11 With regard to comity, Justice Kagan, you
12 asked is it -- is it too policy-ish. It's not because
13 you have all of these background presumptions and
14 principles. I spoke about the presumption against
15 extraterritoriality and about the common law background
16 rule of *lex loci delicti*.

17 A third principle is the Charming Betsy
18 canon, that you construe Federal statutes not to violate
19 international law absent a very clear statement to the
20 contrary, and that's what we have here, because Empagran
21 says that applying U.S. law to provide redress for
22 foreign injuries caused by largely foreign conduct would
23 be unreasonable, and therefore, a violation of customary
24 international law.

25 You also ask why draw the line at injury?

1 Once you established the underlying, the underlying
2 predicate applies extraterritorially.

3 First reason is that the decision to create
4 a private right of action is -- is different from the
5 decision to criminalize the conduct. The money
6 laundering statute applies extraterritorially, but
7 there's no private right of action for people injured by
8 money laundry.

9 The second reason is that Empagran applies
10 that principle to the question of injury, and
11 specifically does so with regard to the very antitrust
12 provisions that were in effect pre-1982, in effect when
13 RICO was enacted to say there's this category of cases
14 involving foreign injury where the government can
15 prosecute but the private party cannot bring an action
16 for civil redress.

17 And that's an important distinction
18 precisely because private parties are not constrained by
19 prosecutorial discretion. It is aggressive to apply
20 American criminal law, but at least the government --
21 the Justice Department has to talk to the State
22 Department and take into account any comity concerns,
23 any problems that particular prosecutions might bring.
24 That is not the case with respect to private plaintiffs.

25 JUSTICE BREYER: Okay. Go ahead.

1 MR. KATSAS: Mr. Frederick said that the
2 underlying predicates here track international law.
3 That is true to -- in the sense that they are written to
4 be consistent with Section 402 of the third restatement
5 of Foreign Relations, but there is an independent
6 requirement that the application in a particular case
7 must be reasonable under Section 403. That is the
8 provision that you invoked in Empagran. That is the
9 position -- that is the problem with this case here.

10 Finally, Mr. Frederick said this case
11 involves United States conduct. Petitioners are four
12 transactions removed from the original problem in
13 Europe, and two transactions removed from the cigarette
14 sales. All of -- all of those involve European
15 transactions. And Reynolds' alleged conduct involves
16 transactions in Europe, Central and South America.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 The case is submitted.

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

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A				
a.m 1:14 3:2	21:5 46:25	30:22	6:22 9:5,7,11	attach 39:19
abandoned 3:20	activity 20:5	allegations 39:2	9:14 10:19	attacks 12:23
ability 19:25	36:10 42:11	44:10	11:2 12:11,13	audiences 38:20
23:2,12	actor 15:5 35:19	alleged 20:9	44:19 45:9,11	authorized
able 8:2,17	actors 42:15	40:17 51:15	45:23 51:6	38:10
26:23	acts 7:19 12:24	alleging 42:14	applications	automatically
above-entitled	14:3 17:2 37:3	allies 47:2,2,20	20:6,7	5:7
1:12 51:20	44:25 45:19	allow 41:4 42:14	applied 11:3	availability 43:8
abroad 10:16	47:16	allowed 43:7	19:4	available 42:17
13:21,25 20:22	actual 25:23	ambassadors	applies 13:13	42:24,24 43:18
20:22,23 23:23	addition 28:2,23	25:5,14	17:24 33:16	aware 32:15
27:9	additional 5:21	amendment	47:25 50:2,6,9	33:9,11
absent 4:6 11:13	additions 45:18	12:5,14	apply 9:20 17:25	
15:24 49:19	address 47:9	amendments	27:17 33:12	B
absolutely 40:19	addressed 16:1	12:1 46:13,17	43:25 44:16	b 7:18 32:5 44:7
accept 38:9	18:5 46:12	America 51:16	47:24,25 48:2	background
accident 9:23	47:10	American 11:21	48:5,9 50:19	11:6,9,11 29:2
10:1,3	addresses 10:16	32:6,6 33:25	applying 49:21	49:13,15
account 23:3	adopt 45:12	34:1,12 38:13	appreciative	bad 14:13,14,19
35:22 50:22	adopted 45:16	40:21 49:10	26:22	15:5 18:20
accountable	adopts 45:13	50:20	approach 22:1	balance 19:14
15:16	advance 26:13	amicus 1:20 2:7	appropriate	banc 15:14
accuse 41:5	advantages 22:8	19:18 49:5	27:9 40:3	bank 41:14
accused 41:3	advice 35:7	analysis 5:18	appropriately	banks 41:2,8
act 4:22 8:9 12:5	advisor 30:7,10	44:16,17	35:7	42:2,6,7
14:22 17:25	affairs 18:24	analytical 5:12	approximate	based 19:12
40:5,14 45:6,6	21:8	analyzing 4:21	11:11	35:25
45:16,18 46:4	affect 46:13,18	answer 6:1,3 7:7	area 31:6 46:13	basically 24:14
46:9,18 47:12	afterthought	9:22,24 23:18	46:16	basis 10:25
47:16	25:12	26:8 27:4	argument 1:13	beginning 11:25
action 3:15,22	aggressive 50:19	41:12,21 42:1	2:2,5,9,12 3:3	behalf 1:16,21
4:19,24,25 5:4	ago 39:22,23	42:2 45:20	3:7 5:13,21	2:4,11,14 3:8
5:9 7:14 11:6	agree 24:8	46:11	19:17 29:8	29:9 48:17
11:10,23 23:1	agreements	antitrust 46:12	42:7 43:21	Belgium 40:24
23:4 27:8,15	40:22	46:17 50:11	46:1 48:16	40:25 41:2,10
30:23 35:2,23	ahead 50:25	anybody 24:25	aside 39:13	41:11 42:2,6,7
42:20 50:4,7	aircraft 13:1	25:2	asked 25:6 43:2	42:8
50:15	20:23	APPEARAN...	48:18 49:12	believe 40:1
actionable 15:11	airport 7:20 8:7	1:15	asking 31:13	best 26:8
actions 20:1	8:13,14	appendix 7:18	aspect 25:11	Betsy 49:17
23:10,13 29:14	AL 1:3,6	9:4,9 32:5	asserted 36:1	better 27:13
32:23 35:16	Alien 24:9 35:1	33:20	asserting 48:2,7	beyond 22:17
43:12 47:8	Alito 29:18	applicability	assets 39:18	36:23 46:2
48:3	30:12,18 39:4	21:14,17 22:21	Assistant 1:18	binder 33:21
activities 20:19	39:8,15 44:15	30:8	assume 5:7 41:9	bit 16:10 23:16
	44:22 45:8,21	application 4:3	41:17	43:23
	allegation 3:20	4:6,8,11 6:16	astonish 15:20	blanket 27:14

<p>blew 8:13 blowing 8:14 bore 25:24 branch 43:16 break 21:24 Breyer 7:16 8:1 8:6,12,20,24 9:21 10:2,7,12 10:24 23:15 24:1,4,17 25:20 26:6 31:1,3,11,12 33:6 40:18 41:12,13,18,23 43:5 46:3,23 48:18 50:25 brief 7:19 9:13 20:21 24:2 31:19 33:13 43:3 46:9 47:12,18 briefs 5:15 24:12 bring 19:25 23:1 27:19,21 33:7 33:7 50:15,23 bringing 23:4,9 23:13 Britain 24:13,24 broad 39:11 broadly 19:13 brought 29:13 29:17 30:11,24 32:24 38:7 43:12 Brown 44:14 Brussels 25:25 41:6,7 built 37:16 burdensome 27:12 business 8:11,12 28:19 29:22 44:20 buying 44:8</p> <hr/> <p style="text-align: center;">C</p>	<p>c 1:21 2:1,10 3:1 29:8 44:7 call 21:24 called 46:6 camp 21:11 Canadian 40:12 Candidly 38:3 canon 45:12 49:18 careful 35:8 carries 7:11 carry 45:14 carrying 21:8 cartel 38:23 case 3:4,21 7:12 17:16 18:16,21 19:5,11 20:9 24:9 25:7,8 26:10,13,14,17 29:13,17 32:21 33:13 38:1,7 38:17 40:10,11 42:3,12,22 44:14 45:17 48:12 49:3,7,9 50:24 51:6,9 51:10,18,19 case-by-case 27:11 cases 17:1 30:11 31:23 35:1 46:6 49:4 50:13 category 50:13 cause 3:15 11:10 11:11,23 22:19 23:5 27:15 28:21 35:2 caused 19:5 42:15 49:1,8 49:22 causes 11:6 27:1 causing 22:9 centered 27:6 Central 51:16 centuries 42:13 certain 5:2</p>	<p>47:16 certainly 11:22 36:25 cetera 25:14 change 43:16 channels 38:21 Charming 49:17 Chief 3:3,9 19:15,20 22:11 29:6,10 34:9 34:14,15,19 35:14,25 36:4 36:7,9,13 37:2 48:14 51:17 child 10:16,16 choice 48:5 choice-of-law 47:23 choices 6:10 choose 39:5,13 choosing 22:25 chose 28:18 cigarette 51:13 cigarettes 36:11 36:15,18 38:18 Circuit 3:11 cited 12:5 47:17 cites 9:4 citing 34:16 citizens 13:22 14:1,15 20:23 47:8 civil 3:11,14 4:19 20:1 23:1 44:1 50:16 civily 14:7 claim 27:20 42:8 claims 3:12 27:21 classically 46:15 Clayton 40:5,14 45:5,6,16 46:4 46:9 clear 4:6,21,25 5:2 6:13 11:13 11:14,16,22 13:17 15:24</p>	<p>20:7 21:1,12 35:13 49:19 clearly 6:17,17 12:2 16:12 45:1 clients 38:10 closed 27:19 closest 47:2 co-conspirators 41:3,6,19 42:10 co-extensive 28:18 collect 41:7 come 26:23 30:9 39:17 40:7,13 40:13 41:5 42:14 43:9 47:20 coming 26:12 39:25 comity 19:4 22:20 23:5,7 23:10 26:16 27:12,14 28:2 28:6,24 34:7 34:25 35:4,17 35:21 43:14 48:23 49:9,11 50:22 commercial 13:1 commits 17:21 18:7 committed 17:23 29:14 48:4 committing 12:19 common 11:6,10 11:11 29:2 49:15 Community 1:6 3:5 34:10 companies 42:25 company 38:13</p>	<p>39:3 40:9,21 48:3,6 compared 31:22 complaint 19:9 38:17 44:10 completely 24:14 29:16 component 37:4 44:9 components 32:3,9 comprehensiv... 31:19 concern 11:20 17:15 18:5 46:22 concerned 17:6 22:19 43:1 concerns 23:3,5 23:7,10 26:16 27:12,14 28:2 28:6,24 35:18 35:21 46:12 50:22 concluded 42:20 conclusion 7:1 conduct 5:3,8,23 5:24,25 12:2 12:19 15:7 16:9,9,13 18:6 18:23,25 19:6 19:9 20:10,16 20:20 21:15 26:19,21 27:6 32:8,21 34:1,7 34:12,22 46:14 46:16,16,19,20 49:1,8,22 50:5 51:11,15 conducting 18:23 conducts 44:12 confirms 22:8 conflict 48:1 confused 5:14 confusing 24:8 Congress 4:11</p>
--	---	---	---	--

5:8 6:15 8:16 11:9,20 12:14 15:20 17:4,4 18:16 20:17 22:4 28:18 32:2,14 33:23 35:3 36:24 43:1,2,11,15 45:4,13 46:11 46:15,17,20,24 48:8 Congress's 12:17 17:15 connection 21:5 conscious 47:14 consequences 38:2 48:21 consideration 25:12 considered 35:11 considering 32:15 consistency 31:24 consistent 17:7 51:4 conspiracy 42:3 consternation 27:2 constrained 23:4 50:18 constricting 42:17 construction 45:13 construe 49:18 construed 40:6 consult 25:20 26:6 consultations 26:3 consulting 25:25 context 15:2 22:13 Continental 40:10	contradictory 24:21 contrary 4:7 11:13,16 13:18 15:25 49:20 controversy 46:6 conveniens 27:4 27:7 32:23 corporate 44:11 corporation 29:14 correct 14:9 23:25 32:24 37:17,22 corrupt 44:12 corrupting 15:7 15:10 17:11 18:25 corruption 3:17 16:4 17:6,10 17:17 counsel 19:15 29:1,6 48:14 51:17 countries 24:11 24:20 25:13 27:1 29:20 30:9 38:22 39:11 40:22 46:5 country 26:20 33:4 34:8 38:20 39:6,14 country's 47:6 coupled 40:15 course 22:3 27:16 court 1:1,13 3:10 5:19,23 6:13 19:21 22:23 26:25 27:10,16 29:11 30:5 31:18 33:8 35:6 40:11 45:15 46:2 48:11	Court's 4:9,25 19:3 30:7 45:22 courts 27:13,18 29:21,23 30:9 32:24,25 33:2 33:12 39:5,14 41:10 42:13 43:8,9 47:21 cover 14:6 42:4 42:10 create 50:3 crime 7:24 8:18 14:16 22:5 36:14,21 38:22 40:23 crimes 12:10,11 15:17 16:1 17:22 18:5 20:11 21:21 22:3,5,10 32:16 33:25 36:1 37:6,10 37:19 criminal 4:18 16:2 18:23 23:21 38:14 46:25 50:20 criminalize 18:6 50:5 criminalized 5:8 criminally 14:3 14:8 criticism 24:18 curiae 1:20 2:7 19:18 customary 19:7 49:23 cut 14:24 cutouts 38:14 cuts 13:22 <hr/> D <hr/> D 3:1 D.C 1:9,16,19,21 damage 38:5 damages 8:3,17	9:1 10:13 23:9 23:14,23 25:23 26:24 27:20 35:23 38:6,9 40:8,13,25 41:7 44:1 DAVID 1:21 2:10 29:8 deal 13:19 23:5 25:15 27:2 46:21 death 14:19 deception 6:11 6:13 16:17 decide 5:24 16:11 44:6 48:11 decided 5:19 40:10 deciding 45:24 decision 4:9 5:2 5:3 19:3 30:8 32:15 43:15 47:24 48:9,21 50:3,5 defend 33:13 defendant 15:9 30:20 32:6 34:1,11,23 40:1 definition 20:4 44:24 delicti 11:12 49:16 demands 43:7 Department 1:19 24:5 25:13,21 26:4 31:5 41:25 43:5,7,11 50:21,22 departments 25:22 departure 47:5 described 15:11 46:8 designed 15:3	destruction 13:1 detached 49:5 detailed 38:18 determination 35:4 dicing 42:19 difference 4:23 44:4 different 4:19 4:20 5:3,6 17:8 25:6 31:9 35:10 45:24 50:4 difficult 27:13 direct 37:5 44:24 direction 28:4 directly 19:24 40:11 44:23 discrete 7:1 discretion 50:19 discussing 13:15 dismiss 27:8 39:23 distinct 15:8 distinction 4:14 4:17 50:17 documents 38:25 39:3 doing 8:15,25 14:12,14 15:10 17:10 24:24 47:18 domestic 3:20 3:22,25 4:6,11 5:23,24 6:9,12 6:21 9:6,11 10:20,21 11:3 11:18 12:11,13 12:24 15:24 17:7,17 18:15 21:6,25 22:12 32:18 33:23 36:14 44:8,13 46:19 48:7,10 domestically 36:23
---	--	--	---	---

<p>drafted 35:3 draw 28:11 49:25 drawing 28:11 28:14 drug 38:23</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 20:14 34:16 easily 35:15,15 economy 11:21 effect 7:3 25:23 32:7 35:4 37:25 44:12 45:1 46:19 47:14 50:12,12 effects 11:18 29:16 efficiency 39:25 either 13:13,14 14:7 21:25 23:3 elaborating 23:16 ELAINE 1:18 2:6 19:17 element 6:10,11 6:19 7:11 elements 22:18 34:4 43:25 emanating 34:8 embassies 25:21 Embassy 25:3 emerges 6:8 Empagran 19:3 19:12 22:23 26:25 27:11 47:10 48:24 49:7,20 50:9 51:8 en 15:14 enacted 50:13 enforce 39:17 enforceability 30:2 41:11</p>	<p> 42:6 engaging 44:12 England 25:5 33:7 English 33:8,12 enterprise 13:15 14:11,12 15:1 15:4,6,8,16,23 15:24 16:4,10 16:14 17:9,9 17:14,14,18 18:13 19:22,24 20:11 21:6,8 21:15,25 28:10 35:18 36:16,21 37:1 44:13,13 enterprises 3:12 3:18 10:20,22 17:7 18:16 20:19 38:16 entities 35:17 40:12 entity 35:19 envision 35:15 errand 16:11 ESQ 1:16,18,21 2:3,6,10,13 essentially 45:25 established 50:1 et 1:3,6 25:14 EU 24:6,7,11 25:1,1,24 26:4 26:16 31:8,21 31:24 38:4 40:20 41:4,18 49:3 Europe 29:16,20 29:23,25 37:10 38:15,22 39:19 51:13,16 European 1:6 3:4 29:12,20 30:14,24 34:10 35:17 37:11 38:16 39:10,16 51:14 evaluate 15:2</p>	<p>event 13:12 events 13:11 eventually 39:16 evidence 30:20 38:24 exactly 19:8 43:6 example 7:17 8:21 13:20 14:15 17:20 18:24 20:25 examples 20:20 exclusive 11:18 exclusively 9:17 Excuse 7:16 executive 43:16 exercise 31:19 expands 12:6 experience 36:23 expert 41:11 explain 10:3 explains 13:10 express 15:19 extend 11:22 23:23 32:16 35:9 extended 3:11 32:2 47:16 extending 49:10 extends 9:12 20:8 extension 9:13 33:24 46:1 extent 5:10 20:8 21:16 extort 18:20 extraterritorial 5:25 6:16 9:5,7 9:14,17 15:19 20:5,6 21:13 21:16 22:21 28:9 35:12 37:4,15,20,25 38:1 42:19,22 44:19 45:1,9 45:11,23</p>	<p>extraterritori... 4:4 5:20 7:2,4 11:5 28:25 32:11 33:24 37:16 49:15 extraterritori... 9:12 20:8 32:3 32:16 33:16 48:9 50:2,6 extremely 22:16</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 14:19 28:16 faced 31:4 fact 8:16 16:19 21:9 24:8 29:24 31:1 38:8 39:7 family 17:23,24 far 22:13,14,17 27:9 35:8 36:23 fatal 3:21 Federal 15:18 15:18 27:23 37:6 49:18 figure 6:18 12:16 filed 26:5 31:15 39:22 Finally 51:10 find 11:16,16 41:5 findings 11:17 17:5,18 first 3:14,19 7:17 12:25 23:18 29:24 50:3 five 10:4 floor 47:17 foci 4:20 focus 4:5,10 5:7 5:16,17,23,25 6:9,19,20 7:5 7:10,14 11:18 12:2 13:17</p>	<p> 14:11 15:22 16:11 44:20 46:20 follow 5:9 followed 35:7 fool's 16:11 footnote 43:10 47:12 foreign 3:12,12 3:13,15,17 6:12,22 8:7,16 11:8,23 12:2,2 12:3,18,19 13:4,8,20,24 14:5,12,25 15:15 19:5,6 19:11 20:19,19 21:2,8,9,14 26:10 27:1 30:9 32:21,21 32:24,25 33:2 33:4,4 35:8,21 38:20 40:6,8 40:22 41:14 42:14 43:9,18 44:13 46:5,19 47:15,15,19,23 47:24 48:6,6 48:25 49:1,7,8 49:22,22 50:14 51:5 foreigners 47:7 forfeiture 23:19 forum 27:3,7,9 32:22 39:25 found 7:21 36:6 36:8 45:22 foundation 17:3 four 9:23 31:25 32:3,9 34:4,18 34:21 48:15 51:11 Frederick 1:21 2:10 25:19 29:7,8,10,19 29:24 30:18 31:2,11,13</p>
---	--	---	---	---

<p>32:18,25 33:3 33:9,11,17 34:11,18,20 35:24 36:6,8 36:12 37:2,17 37:22 38:6 39:7,15 41:9 41:15,21 42:1 43:20 44:2,5 44:22 45:10 46:11 51:1,10</p> <p>Frederick's 23:17</p> <p>fundamentally 5:3</p> <p>Furthermore 31:17</p> <hr/> <p style="text-align: center;">G</p> <p>G 1:16 2:3,13 3:1,7 48:16</p> <p>General 1:19 32:5</p> <p>General's 9:4 33:20</p> <p>Germany 24:12 24:24 25:5,22 26:1</p> <p>getting 46:15</p> <p>Ginsburg 3:24 4:3,13 13:19 13:25 14:14,21 15:13 17:19 18:2,8 27:3 37:14,18 38:3</p> <p>give 12:22 28:13 41:12 45:20 47:19</p> <p>given 20:20 45:15</p> <p>go 12:9 21:4 25:21 33:19 40:25 41:7 43:8 46:14 50:25</p> <p>goes 9:15 36:10 43:4</p>	<p>going 6:18 17:1 21:7,7 24:15 26:7,13,18,18 27:11,17,17 28:2 29:3,3 37:12 39:16 41:10 42:10,16 46:18 47:3</p> <p>Goldenberg 1:18 2:6 19:16 19:17,20 22:22 23:25 24:3 25:17 26:2,9 27:10 28:1,15</p> <p>gotten 45:11</p> <p>govern 29:4</p> <p>governed 11:7</p> <p>government 4:14 14:18 21:20 22:6,7 22:16,25 23:1 23:6,19 33:4 35:20,22 36:17 36:18 39:5 40:15 50:14,20</p> <p>government's 7:18 9:9,13 19:25 48:19</p> <p>government-t... 23:6</p> <p>governments 40:16</p> <p>granted 9:22</p> <p>great 27:1</p> <p>greater 23:11</p> <p>GREGORY 1:16 2:3,13 3:7 48:16</p> <p>guess 5:14 6:24 8:14</p> <p>guidance 35:7</p> <hr/> <p style="text-align: center;">H</p> <p>hand 24:23,24</p> <p>happen 31:7</p> <p>happened 12:1 31:3</p>	<p>happens 25:25</p> <p>hard 12:16 15:3 35:24</p> <p>harm 12:3</p> <p>harmed 47:7</p> <p>harms 11:23 47:4</p> <p>headquarters 44:11</p> <p>heads 12:16,18 13:22 14:24</p> <p>hear 3:3</p> <p>heard 21:18</p> <p>hearings 43:2</p> <p>heartland 11:1</p> <p>held 15:16</p> <p>helpers 41:19</p> <p>helpful 46:9,10</p> <p>history 43:4 47:6</p> <p>holding 3:13 21:10</p> <p>holds 40:12</p> <p>home 39:25</p> <p>hostages 20:22</p> <p>huge 49:9</p> <p>human 10:9</p> <p>hundred 14:24 17:2</p> <p>hurt 8:2,5,12,14 8:17</p> <p>hypothesizing 37:9</p> <p>hypothetical 14:5,12 15:2,3 15:8,10 35:25</p> <hr/> <p style="text-align: center;">I</p> <p>idea 25:10 43:14</p> <p>identified 11:20</p> <p>identify 4:10 13:17</p> <p>illegal 36:10 38:14,21</p> <p>imagine 36:18 39:24</p> <p>impact 11:21</p>	<p>22:13 35:12</p> <p>impacts 18:13</p> <p>impermissibly 6:23</p> <p>implicate 35:17</p> <p>implicated 21:17</p> <p>import 10:17</p> <p>important 6:4 7:5 16:24 22:7 24:20 25:11 28:7,24 31:24 31:25 32:10 33:18 34:3 36:17 48:10 50:17</p> <p>importantly 49:6</p> <p>imposed 33:23 48:9</p> <p>imposes 22:11</p> <p>incentive 23:2 23:12</p> <p>include 12:7</p> <p>includes 43:24</p> <p>including 9:7</p> <p>inconsistency 48:23</p> <p>incorporated 12:24 20:4,15 37:4,24 40:5</p> <p>incorporates 44:23</p> <p>incorporation 13:10 45:2</p> <p>incorrect 21:20</p> <p>independent 51:5</p> <p>India 40:15</p> <p>indication 4:7 6:14 11:13,14 11:16,22 13:17 15:24 20:7</p> <p>individual 18:9</p> <p>infiltrate 18:17</p> <p>infiltration 3:17 16:3 17:6,17</p>	<p>influencing 44:7</p> <p>information 31:14</p> <p>informed 26:4</p> <p>injured 19:10 33:7 50:7</p> <p>injuries 3:12,16 3:23 10:20 11:3,7,9 19:5 29:22 32:22 49:1,8,22</p> <p>injury 3:20,25 4:3,4,5 7:13 8:5,6,9 11:8,15 13:14 19:2,23 26:19,21 28:19 28:20,22 29:2 29:4 40:4,12 42:15 44:20 47:23 49:25 50:10,14</p> <p>inquiry 5:18</p> <p>instance 18:10 48:8</p> <p>intend 8:16</p> <p>intended 5:8</p> <p>intending 46:24</p> <p>intent 10:17</p> <p>interest 26:22 34:3</p> <p>interests 22:20 29:22 32:7 35:5 48:6</p> <p>intermelded 16:23</p> <p>internal 39:3</p> <p>international 7:20 19:8 31:7 32:10 34:6,24 42:21 49:19,24 51:2</p> <p>internationally 22:14 35:5</p> <p>interpret 45:2</p> <p>interpretation 15:15</p> <p>interrupt 28:5</p>
---	---	---	--	--

introduction 38:18	10:2,7,12,23 11:24 12:12	14:17,25 15:22 16:6,15 17:4	39:10 40:2 42:4,15 47:24	31:4 34:13,21 37:3 43:10
invest 17:14	13:2,4,7,19,25	18:1,4,12	48:5,7 49:10	44:15 49:4
investing 44:8	14:7,14,21	47:22 48:15,16	49:15,19,21,24	looked 38:25
invoke 33:8	15:13 16:5,7	48:18 51:1	50:20 51:2	looking 5:16
invoked 51:8	16:19 17:19	Kennedy 14:7	law-like 28:14	lot 14:12 18:11
involve 5:22	18:2,8 19:15	32:17,20 33:2	laws 30:16 37:11	28:12 36:3,22
51:14	19:20 22:11	33:10,13,15,18	48:1	39:10
involved 20:16	23:15 24:1,4	Kerry 47:13	lawyer 25:1	lots 11:2,2,2
24:10	24:17 25:2,20	kill 20:21	league 40:21	Lynch 15:13
involves 36:25	26:4,6 27:3,25	kind 21:24 23:4	led 46:7,7	Lynch's 13:20
39:1 51:11,15	28:5 29:6,11	30:23 42:18	left 24:24 35:5	
involving 3:12	29:18 30:12,18	46:8	legal 25:22 30:6	M
19:5 49:7	31:1,3,11,12	kinds 16:14	30:10	Mafia 17:21,23
50:14	32:17,20 33:2	20:12,21 23:2	legally 15:8	17:24 18:6
Iran 40:16	33:6,10,13,15	27:11,12,21	legislates 11:9	majority 10:6
issue 7:13 18:15	33:18 34:9,14	Kiobel 49:6	legislative 35:4	making 4:13,16
30:2 46:21	34:15,19 35:14	know 7:6 12:21	35:11 43:4	March 1:10
issues 32:14	35:25 36:4,7,9	16:10 24:5	legitimate 37:1	marketed 36:15
	36:13 37:2,14	25:11 26:15	lengths 42:22	38:19
J	37:18 38:3	30:20 31:6,10	let's 10:7,14,14	matter 1:12 5:15
J 1:18 2:6 19:17	39:4,8,15	36:16,16,17	33:6	25:24 51:20
job 31:7	40:18 41:12,13	39:16 40:19	lex 11:12 49:16	matters 24:20
John 47:13	41:18,23 43:5	41:21 46:7	limit 4:11	mean 10:3 12:15
Judge 13:20	43:20 44:3,5	knowing 24:23	limitation 35:12	12:17 16:7,20
15:13	44:15,22 45:8	knowledge 26:2	limited 3:22 4:6	17:1,20 24:17
judge-made	45:16,21 46:3		8:10	25:9 26:1 28:7
35:6,9	46:22 48:14,18	L	limiting 48:11	36:13
judgment 27:14	49:11 50:21,25	laid 43:3	line 28:11,14	meaning 45:7,14
35:11 39:18	51:17	language 40:5	31:22 49:25	meaningful
41:13 42:6		45:5	links 16:9	10:18 11:2
judgments 30:2	K	largely 11:25	list 8:21 12:6,9,9	means 13:2
41:11	Kagan 5:11 6:24	38:13 49:1,8	12:25 13:1	meant 45:7
jurisdiction 7:19	7:18 11:24	49:22	Listen 10:7	Mediterranean
29:5 30:1,13	12:12 13:2,4,7	Laughter 24:16	litigants 47:15	38:15
30:17 32:22	16:5,7,19	laundering	litigation 39:25	melds 16:12
39:9,12 41:16	27:25 28:5	24:11 34:13,22	little 16:10	member 29:12
41:18	43:20 44:3,6	40:23,24 41:6	43:23	29:20 30:3,14
jurisdictions	45:17 49:11	45:18 50:6	live 48:21	30:19,24 31:22
30:11	Katsas 1:16 2:3	laundry 50:8	loci 11:12 49:16	37:11
jurisprudence	2:13 3:6,7,9	law 5:5 11:6,7	logical 29:16	members 18:20
5:1	4:2,16 5:11 6:7	11:10,11 19:8	30:4	mentioned 9:19
Justice 1:19 3:3	7:8,25 8:4,8,19	27:17 28:12	long 47:6	10:15 12:25
3:9,24 4:3,13	8:23 9:2,25	29:2,4,5 30:13	look 6:5 7:17,17	middlemen
5:11 6:24 7:16	10:5,11,14	30:22 32:10	8:12 9:9 10:7	38:14
7:17 8:1,6,12	12:4,21 13:3,6	33:5 34:6,24	11:14 19:9	military-type
8:20,24 9:21	13:9,23 14:2,9	35:6,9 37:7	20:12 25:22	21:2,10

<p>mind 12:23 17:17 18:17 36:24 Ministries 25:2 minutes 48:15 misconduct 39:1 missile 20:24 moment 12:14 12:18 40:18 Monday 1:10 money 18:20 24:10 34:13,22 40:23,24 41:5 45:18 50:5,8 Morrison 4:9,21 5:17 6:8,9,22 13:16 15:23 16:16 42:16,18 44:16 45:21 46:2 motion 27:7 39:23 mutually 3:23</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 Nabisco 1:3 3:4 national 20:22 34:24 nationality 32:11 nations 24:7 34:6 35:8 39:16 43:9,13 47:15,19 nations' 43:8 natural 20:16 21:6 29:17 necessarily 5:13 need 13:17 16:16 Netherlands 24:13 25:5 neutral 31:16 never 25:1 New 17:23,24 44:11</p>	<p>nightmare 46:5 non 27:4,7 32:22 normal 34:6 45:12 norms 42:21 note 43:4 47:11 noted 47:22 null 37:9 number 20:3,20 28:15 42:25</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 OBB 49:6 object 17:15 observed 20:14 22:12,23 42:21 obtain 40:7 obvious 17:12 obviously 6:15 22:16 occur 34:2 47:1 occurred 34:22 occurring 34:12 37:10 occurs 32:8 odd 46:23 offender 7:21 offense 13:3 offenses 10:16 22:15 officials 31:15 31:21 oh 5:22 34:19 Okay 8:13,24 9:21 24:15 50:25 once 5:19 28:8 28:10 42:19 45:22 50:1 one-step 39:21 ones 10:8 open 42:14 operate 6:18 20:17 operates 13:21 operating 13:25</p>	<p>38:13 operation 21:6 operatives 15:15 operators 38:15 38:23 opinion 15:14 45:22 opportunity 28:13 47:20 opposite 43:6 oral 1:12 2:2,5,9 3:7 19:17 29:8 order 9:3 16:17 22:8 ordinary 43:22 Ore 40:10 organization 12:3 13:21,24 14:5 21:3,9 organizations 12:19 13:4,8 organized 36:21 38:14,22 original 51:12 ought 24:5 48:11 outside 7:21 owned 40:17</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 p.m 51:19 page 2:2 43:3,11 pages 25:9,10 Panama 38:21 paradigmatic 18:16 part 8:5 34:5 48:4 particular 12:14 27:23 50:23 51:6 particularly 17:12 26:24 parties 23:9,11 35:16 50:18 party 26:18</p>	<p>48:20 49:3 50:15 pass 12:14 passive 32:12 Patriot 12:5 47:12,16 pattern 13:16 14:23 15:11,17 15:17 16:3,8,9 16:13 18:8,10 18:13 20:10 21:14 28:9 36:2 patterns 3:13 22:4,9 penalties 22:17 penalty 14:20 people 10:19,19 14:18 21:23 50:7 people's 12:16 perfectly 10:18 40:2 permissible 27:24 permit 40:6 perpetrator 32:7 person 7:20 8:4 8:4,8,8,17 15:9 15:9,9 17:10 33:6 personal 28:20 28:21 30:1,13 30:16 32:22 39:9,12 41:16 personality 32:12,13 perspective 39:24 Petitioner's 29:1 Petitioners 1:4 1:17 2:4,14 3:8 21:18 48:17 51:11 Pfizer 30:7 40:15,17 42:25</p>	<p>Philadelphia 41:5 Philippines 40:16 picks 11:11,12 place 11:8 26:1 26:20,21 29:2 29:3,17 30:4 40:24 46:25 plain 37:13 plaintiff 26:17 26:18 43:19 plaintiffs 26:11 26:23 27:19 40:7 42:14 50:24 please 3:10 19:21 27:25 29:11 point 3:19 9:21 11:4 16:7 19:2 19:24 22:3 28:3 37:3 39:9 40:11 42:12 46:23 47:22 pointed 20:2 26:25 29:1 45:17 points 19:23 47:12 policy-ish 49:12 policyish 28:12 pornography 10:16 posed 32:18 position 14:10 18:2 23:24 25:7 31:9 43:6 43:17 45:10 49:5 51:9 positions 24:22 31:22,25 48:19 possibility 12:22 possible 16:21 21:4 37:12 possibly 12:12 post-PATRIOT</p>
--	---	---	--	--

45:18 practicing 31:18 pre-1982 50:12 pre-understood 45:7 precisely 30:6 50:18 predetermined 45:6 predicate 9:3 12:7,10 15:17 15:17 16:1 17:2 21:16 36:1 44:25 45:19 47:16 50:2 predicates 9:18 13:10 15:21 20:3,9,12 28:21 36:15 51:2 present 32:4 presented 31:14 presumably 42:7 presuming 41:15 presumption 4:4 5:20 6:2,5,18 11:5 13:13 19:4 28:8,25 49:14 presumptions 49:13 prevail 32:20 previously 31:10 primarily 19:6 principle 32:10 32:11,12,12 35:10 42:16 47:23 48:11 49:17 50:10 principles 19:4 32:1 34:6,25 49:14 prior 16:24 private 3:14,21	4:19,24,25 5:4 5:9 7:14 11:7 23:8,9,11 26:11,18 27:20 33:6 35:16,22 50:4,7,15,18 50:24 probably 14:19 problem 46:3 48:23 49:2,9 51:9,12 problems 50:23 proceed 46:22 proceeds 17:14 18:18 process 39:21 products 36:19 profess 41:10 prohibit 5:2 6:16 16:3 prohibition 4:18 4:24 prohibitions 3:16 prohibits 16:3 proof 33:23 48:10 property 8:11 28:20 44:21 prosecutable 14:18 prosecute 21:21 22:25 50:15 prosecuted 14:3 42:9 prosecuting 22:2,5 35:16 prosecution 22:15 prosecutions 20:1 50:23 prosecutorial 4:15 22:17 50:19 protective 32:12 32:13 proved 39:2	provide 3:15 5:4 6:15 27:5 28:19 47:7 49:21 provided 42:22 provides 22:16 providing 48:25 provision 4:10 9:12 10:18,22 10:24 12:7 21:7,13 37:20 38:5 43:22,24 47:18 51:8 provisions 4:20 7:1,9 17:8 20:17,21 23:20 23:21 28:17 33:19 45:24 50:12 punishable 37:19 punished 14:4 purpose 24:5 43:17 Pursuant 8:11 put 8:1 23:20,21 puts 32:5 putting 39:12,12	racketeer 17:13 18:22 racketeering 3:13 11:19,22 12:24 18:18,22 20:5 28:10 35:18 36:2,5 36:10,22,25 44:25 racketeers 10:21 18:17 raised 29:25 reach 3:17 15:19 22:17 reaches 36:23 read 9:8 42:16 reading 23:17 37:13 really 5:22 7:2 27:6 31:6 39:9 reason 30:6 31:23 38:7 47:18 48:5 50:3,9 reasonable 51:7 reasons 3:14 21:19 REBUTTAL 2:12 48:16 rebutted 5:21 6:2 28:9 receive 21:4 receiving 21:2 reciprocity 30:8 43:7 recognizing 12:15 recover 8:9 recovery 8:10 27:23 28:19 redress 3:15 11:7 40:2 47:4 47:21 49:21 50:16 reference 12:8 44:18,24 regard 17:16	18:15 49:11 50:11 regulate 23:3,12 regulating 26:22 regulations 34:7 related 3:23 7:9 11:4 19:4 relates 16:13 relations 31:7 51:5 relative 13:11 relevant 25:2 remaining 48:15 remedial 43:22 remedies 26:24 26:24 42:17,24 48:25 remedy 27:5 43:17 46:16,20 47:7 removed 51:12 51:13 repeat 10:4 repeated 11:17 repeatedly 13:22 representing 31:8 required 34:4 requirement 32:19 33:24 51:6 requirements 48:10 reserve 19:14 resolve 19:11 respect 11:15 13:12 17:12 21:14,15 22:2 22:19 27:15 33:14 34:7 37:8 38:18 43:21 46:9,10 47:6 48:23 50:24 respected 42:21 respectfully
		Q		
		question 5:12,12 6:1,3,4,5,25 7:7,9,10,12 8:15,25 9:15 9:23 10:3,4,10 11:15 13:13,14 13:15 16:21 18:15 23:16,18 27:5,22 29:25 31:14 40:4,20 41:22 42:5 47:10 50:10 questions 20:2 quoted 9:13		
		R		
		R 3:1		

43:15 Respondents 1:7 1:22 2:11 3:19 19:10 29:9 responses 44:23 responsibility 25:24 restatement 51:4 restrict 43:2 rests 31:25 result 5:13 25:11 40:8,14 Reynolds' 51:15 RICO 3:11,22 4:14,15 8:2,10 8:10,16,19,25 9:3,18,19 10:12 11:10,17 12:6 14:4,6,22 15:3,12,16,20 16:2,8,12,22 17:3,22,24 18:10 19:25 20:1,4,7,15 21:22 22:3,8 22:11 26:11 27:19 32:2,24 33:3,8,12 35:16 37:12,13 37:19,24 38:1 38:5 40:5 45:8 47:17 48:9 50:13 RICO's 3:14,16 right 3:22 4:19 4:24,25 5:4,9 7:14 8:23 13:12 15:1 17:13 18:3,4 23:22 24:23 25:10 36:11 40:19 43:23 44:1 50:4,7 RJR 1:3 3:4 29:25 30:17 38:25 39:19	41:5,19 42:3,4 44:10 ROBERTS 3:3 19:15 22:11 29:6 34:9,15 34:19 35:14 36:4,7,9,13 48:14 51:17 root 22:8 roughly 37:23 rule 6:7 11:6,10 11:12 13:16 26:12,13 29:2 49:16 rules 11:11 <hr/> S S 2:1 3:1 sales 51:14 satisfied 32:23 34:24,25 satisfy 44:9 saying 9:25 10:25 14:22 24:13 30:12,19 33:15 34:20 40:1 says 4:2,9,11 6:13 16:8,13 18:10,12,12 45:22 47:25 49:21 second 3:11,16 5:18 45:4 50:9 Secretary 47:13 section 3:21 4:5 4:17,18,22,22 5:6 6:5,6,9 7:13 14:10,15 15:6,23 16:18 17:8 19:24 21:1,13 22:1 22:24,24 23:8 27:20 28:17,18 51:4,7 Sections 17:13 securities 4:22	6:11 16:17 see 20:11 26:7 28:17 35:24 41:1 seek 40:2 47:4 47:20 seeking 38:11,12 seen 38:24 sells 36:18 sense 51:3 separated 16:20 16:21 separately 4:21 September 12:23 13:11 series 17:21 19:10 serious 22:5 35:17 39:1,2 set 37:9 seven 9:6,17 10:8 severely 14:4 SG 46:8 Sherman 46:18 shooting 20:23 shores 34:8 show 25:18 Sicilian 17:21 18:6 Sicilian-based 17:25 side 23:8 24:15 significant 22:13,14 similar 30:14 simplest 39:20 simply 22:15 24:10 single 31:18,21 32:4 33:21 sit 19:2 situation 26:19 31:4 35:5 37:9 38:12 situations 21:23 35:15,21	six 40:22 41:2 slicing 42:19 smoothed 23:7 snuff 43:17 soil 12:20 sold 38:20 solely 20:6 Solicitor 1:18 9:4 32:5 33:20 somebody 8:2,6 8:15 9:1 21:4 somewhat 31:9 sorry 13:6 27:25 32:19,25 34:15 sort 36:21 Sosa 49:6 South 51:16 sovereigns 26:10 special 22:8 26:16 specific 11:17 specifically 9:19 50:11 spoke 24:25 25:1 49:14 stage 39:24 stake 22:20 34:4 35:10 stark 47:5 start 19:23 state 24:4 25:12 25:21 27:7 31:4 37:6,11 41:25 43:5,6 43:11 47:14 50:21 State-owned 35:19 stated 47:17 statement 49:19 States 1:1,13,20 2:7 7:21,22 10:17,20,21 17:22 19:18 21:24 26:23 27:18 29:13,13 29:14,15,15,20	29:21 30:3,5,9 30:10,14,15,19 30:21,23,24 31:23 32:8 33:1 34:2,3,13 34:23,23 35:13 37:5 38:8,19 39:17 40:7,9 40:13,17 41:17 42:9,13,23 43:12 46:25 47:1,3,8 48:4 48:20 51:11 statute 3:24,25 4:2,2 5:16 6:1 6:6,19,23 7:5 7:11 9:10,11 9:19 11:1 12:8 12:9,25 13:18 18:9 24:9 27:23 33:19,19 34:5,14,22 35:1 36:22 37:13,15,21 40:5 41:4 43:22,24 45:14 47:11 50:6 statutes 4:20 9:3 9:6,10,16 12:7 15:18,18 16:2 18:5 32:5 37:18,23 49:18 statutory 6:9 11:17 17:5 48:3 stay 24:13 step 5:18 stipulate 38:9 straight 17:18 straightforward 4:8 44:17 strange 29:19 39:4,13 strong 22:6,16 stronger 45:11 45:17 strongly 35:19
--	---	---	--	--

structure 17:8	taken 31:22	21:20,25 22:22	treaty 47:20	unindicted 41:3
stuff 24:14	35:22	23:10 24:12,19	treble 23:9,13	41:6,19
subject 37:25	talk 10:14 19:22	24:19,20 25:14	26:24 27:20	union 18:17,19
submitted 51:18	21:18 24:22,22	25:17,18 26:9	35:22 38:5,6,9	18:21,24 29:12
51:20	28:6 31:10	26:11 28:3,16	true 11:25,25	29:21 30:14
subsidiaries	50:21	28:23 33:4	20:10 21:19	United 1:1,13,20
39:20	talked 25:4	35:6 37:8	26:12 44:2	2:7 7:21,22
subsidiary	talking 7:18	41:23,24 45:2	51:3	10:17,20,21
29:25	20:13 22:21,23	47:9	try 23:6	17:22 19:18
substantive 3:16	27:16 29:4	third 45:20	trying 6:4 23:13	21:23 26:23
4:24 5:5 22:18	Tamburlaine	49:17 51:4	43:17 47:3	27:18 29:13,14
43:25	46:7	thought 6:25	turn 40:4 46:24	29:15,15,21
sue 29:23 39:5	targeted 38:19	19:1 22:4	turning 14:10	30:5,9,10,15
39:13 40:20	targets 14:1	23:15,18 34:9	two 3:14,23 6:10	30:21,23 32:8
sues 40:21	Tasmania 8:13	34:16 36:2,24	16:12 21:18	33:1 34:2,3,12
suffer 10:19,19	tell 7:3 24:7	three 9:22 10:9	34:21 44:23	34:22,23 35:13
suffered 40:12	31:17 38:25	17:8 24:11	51:13	37:5 38:8,19
suffers 8:9	telling 31:5	26:7 44:6	typical 17:16	39:17 40:7,9
suggested 27:10	48:22	three-quarters		40:13,17 41:16
suggests 13:7	terrorism-rela...	37:23	U	42:9,13,23
15:15 42:18	12:10	tie 35:13 37:5,12	U.S 13:22 14:1	43:12 46:24
suing 29:21 38:4	terrorist 12:18	42:23	14:15 20:22,22	47:1,3,8 48:4
suit 31:15 33:8	12:19 13:20,24	time 12:15,18	20:23 30:22	48:20 51:11
39:22 42:9	20:16 21:3,9	19:14 45:8,12	31:14,16 32:7	unreasonable
44:1	test 5:23	46:4	40:1,8 42:4,15	19:7 49:23
superimpose	testified 30:7,10	times 10:4 17:2	42:15,25 43:10	unusual 26:10
14:22	43:11	told 17:5 31:15	48:2,3,7 49:21	26:14
supported 35:20	textual 45:1	48:24	U.S.C 7:19	use 10:21,24
supporting 1:20	Thank 19:15	tool 4:15,15 22:6	10:15	18:17,19 21:22
2:8 19:19	29:6,10 31:13	Tort 24:9 35:1	underlying 4:18	uses 17:13
suppose 21:3	48:13,14 51:17	torture 24:10	5:2 14:2 16:2	usual 26:13,17
46:24	then-Senator	total 25:24	19:9 21:21	usually 26:11
Supreme 1:1,13	47:13	tougher 18:11	22:3,15 36:1	
sure 7:25 12:21	thing 12:6 16:16	track 34:5 51:2	37:21 42:20	V
23:7 28:15	31:5 39:20	tracking 45:5	50:1,1 51:2	v 1:5 3:4
surely 42:3	45:4 46:8	tracks 32:9	underpinning	vacatur 1:20 2:8
sustained 29:22	48:25	trafficking	28:24	19:19
swept 20:18	things 14:13,14	36:11	understand 7:23	varies 30:19
systems 20:24	14:19 16:20,23	training 21:2,5	14:4,11 16:22	various 16:14
	18:10,20 22:9	21:10,11	26:3 28:7	46:13
T	23:22 28:3,16	transaction 6:12	43:21	vast 10:5
T 2:1,1	32:14	6:12,20,22	understanding	vehicle 18:22
table 18:14 19:2	think 6:3,7 8:21	16:17	5:17 39:10,11	verbs 44:6
take 9:10 18:18	9:15 10:24	transactions	understood	versus 13:15
23:2 25:6 33:7	12:17 13:12	19:11 51:12,13	20:18	vetted 31:19
46:1 49:4	14:2 16:6	51:15,16	unindictable	victim 15:7
50:22	20:25 21:12,19	travels 7:15	37:6	17:10,15 18:23

<p>32:6 33:25 34:9,16 view 14:5 views 26:16 vindicate 47:4 violate 10:22 15:18 17:22 19:7 49:18 violated 30:22 violating 38:16 40:1 violation 5:4 8:9 16:18 18:19 40:14 48:3,7 49:23 violations 15:20 40:8 43:9 violence 7:20 violent 17:21</p> <hr/> <p style="text-align: center;">W</p> <p>want 9:1 10:4,8 10:13 23:23 25:6 28:13 31:10 38:8 wanted 8:2 23:19 Washington 1:9 1:16,19,21 way 7:1 18:24 20:16 36:21 42:17 44:17,18 45:3 48:21 ways 16:14 We'll 3:3 we're 27:16 42:16 we've 17:1 20:20 22:12 33:20 well-equipped 46:21 went 25:4 42:21 43:1 Williamson 44:14 win 40:24 Winston-Salem</p>	<p>44:11 wish 19:12 witnesses 30:21 wondering 22:18 word 9:22 36:25 words 5:19 9:22 9:23 36:20 45:7,13,15,15 work 11:3 25:10 26:1 31:12 44:17 workable 22:1 working 30:4 works 36:22 world 30:11 43:13 worried 41:23 41:25 wouldn't 37:12 write 19:12 24:18 written 51:3 wrong 3:14 5:14 8:21 10:23 wrote 24:1</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,8</p> <hr/> <p style="text-align: center;">Y</p> <p>Yeah 36:7 years 5:1 30:25 31:17 39:22,23 York 44:11 York-based 17:23,24</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p style="text-align: center;">1</p> <p>10 47:12 10(b) 4:22 6:10 16:18 11 12:23 13:11 43:4</p>	<p>11:17 1:14 3:2 12:16 51:19 13 43:10 15 39:22 15-138 1:4 3:4 16 39:22,23 18 10:15 1837 7:19 19 2:8 1962 4:17 14:10 15:23 17:8 19:24 21:13 22:1,24,24 28:18 40:11 44:24 1962(a) 17:13 44:7 1962(b) 17:13 1962(c) 15:6 1964 44:23 45:5 1964(a) 18:19 1964(c) 3:21 4:5 4:18 5:6 7:13 17:16 18:15 23:8 27:20 28:17 44:16,18 44:20 1970 40:6 45:16 1982 30:7</p> <hr/> <p style="text-align: center;">2</p> <p>20 31:17 200 9:3,18 10:25 2016 1:10 21 1:10 2230 12:7 2260 10:15 2332(a)(1) 14:16 14:17 2332b(g)(5)(B) 12:8 2339D 21:1 26 29:12 30:3 27 24:7 29 2:11</p> <hr/> <p style="text-align: center;">3</p>	<p>3 2:4 30 4:22 5:1 34 4:22 37(b) 7:19</p> <hr/> <p style="text-align: center;">4</p> <p>40 5:1 40-some 32:4 402 51:4 403 51:7 45 43:4 46 9:5 44:25 48 2:14</p> <hr/> <p style="text-align: center;">5</p> <p>50 8:22 30:11 43:12 55 43:11 58 12:10</p> <hr/> <p style="text-align: center;">6</p> <p>60 12:10 64 44:23</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p style="text-align: center;">9</p> <p>9/11 12:1 20:15</p>
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