

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BOB REVES, ET AL., Petitioners v. ERNST & YOUNG

CASE NO: 91-886

PLACE: Washington, D.C.

DATE: October 13, 1992

PAGES: 1-58

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOB REVES, ET AL., :

4 Petitioners :

5 v. : No. 91-886

6 ERNST & YOUNG :

7 - - - - - X

8 Washington, D.C.

9 Tuesday, October 13, 1992

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 GARY M. ELDEN, ESQ., Chicago, Illinois; on behalf of the
15 Petitioners.

16 MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae,
19 supporting the Petitioners.

20 KATHRYN A. OBERLY, ESQ., Washington, D.C.; on behalf of
21 the Respondent.

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5	MICHAEL R. DREEBEN, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the	
8	Petitioners	17
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first today in No. 91-886, Bob Reves v. Ernst & Young.

5 Now Mr. Elden.

6 ORAL ARGUMENT OF GARY M. ELDEN

7 ON BEHALF OF THE PETITIONERS

8 MR. ELDEN: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 This case involves RICO and, in particular, it
11 involves what does it mean to participate in the conduct
12 of the affairs of an enterprise.

13 The case is here on writ of certiorari from the
14 Eighth Circuit which affirmed the summary judgment for an
15 accounting firm on the ground that they did not
16 participate in the conduct of the affairs of the Farmer's
17 Co-op. The only relevant fact the Court needs to know I
18 think about the Farmer's Co-op is that it financed itself
19 by selling demand notes to its members. They --the Eighth
20 Circuit held that the proper test was whether the
21 accounting firm engaged in the operation or management of
22 the co-op, but to understand the test I think it's
23 necessary to keep three facts in mind. There's an
24 enormous number of facts. I'm just going to stress three.
25 I think without it, it's not possible to fully appreciate

1 how restricted the test is.

2 All courts agree -- and I'm going to use the
3 language of the courts. So, this is not my version of
4 things. The courts who gave the summary judgment agreed
5 that these facts a jury could have found: first, that
6 Arthur Young "created" the financial statements of the co-
7 op, not audited them -- not audited them, but created
8 them. And the district court explained in detail what he
9 meant.

10 Arthur Young invented the cost figures. Arthur
11 Young, according to the district court, engaged in a
12 blatant fiction. The records of the co-op showed that a
13 sale had occurred. A multi-million dollar transaction had
14 occurred. A self-dealing transaction that rendered the
15 co-op insolvent was a sale. All the records showed that:
16 tax returns, minutes, court decrees. They chose
17 themselves, consulting no one, to ignore that fact, and
18 numerous other points that the district court made. They
19 created the financial statements, and they created
20 financial statements, basically on their own without
21 consulting very much anyone else, which concealed the
22 insolvency of the co-op and concealed the self-dealing and
23 even crimes of the principals.

24 Second, the courts agreed that Arthur Young took
25 the financial statements it had created and used those

1 affirmatively to mislead the investors and the buyers of
2 the demand notes. They did this by participating --
3 that's the court's word -- participating in the creation
4 of condensed financial statements, which everybody admits
5 were fraudulent and misleading. Even Arthur Young makes
6 no attempt to defend those.

7 And they attended annual meetings where both
8 courts, Eighth Circuit and the district court, agreed they
9 lied in response to direct questions. They deliberately
10 concealed facts from the investors. The jury found --
11 there was not even appeal on the weight of the evidence.
12 So, it has become final -- that they did this with the
13 actual intent to mislead and deceive investors. And the
14 Eighth Circuit said that everybody knew that if the
15 investors were not told of the insolvency, they'd continue
16 to buy demand notes, and if they were told, there would
17 have been a run on the co-op.

18 QUESTION: Was this in cooperation with any
19 particular officer of the company who was doing the same
20 thing?

21 MR. ELDEN: Your Honor, in this case, the
22 principal wrongdoer was already in jail when this
23 happened. There were nine directors, five of whom
24 remained in office and who were at least guilty of
25 negligence if not collusion. There were four reform

1 directors who were trying to get to the bottom of things
2 and tell the truth to people.

3 QUESTION: You see, I'd find it easier to say
4 that they participated in the conduct of the company's
5 business if they were acting jointly with one of the
6 managers or directors, or at least an employee of the
7 company who was conducting the company's business. Then I
8 could say they participated in the conduct. But as you
9 describe it, anybody that they would have made common
10 cause with was gone, and they were just acting on their
11 own.

12 MR. ELDEN: I would like to make it as easy as
13 possible for Your Honor to agree with me, but the truth is
14 that they basically did it -- they did 95 percent of this
15 themselves. No one -- there's no proof anyone even knew
16 what they were doing. They pulled off the fraud to cover
17 up themselves, to protect their friends who were by then
18 gone.

19 Now, Kirit Goradia did pull together some of the
20 financial data. I mean, there was a lot of financial data
21 in the financial statements. It wasn't all cooked. Some
22 of it was straight. Kirit Goradia pulled that together.
23 But I think essentially the creation of the false
24 financial statements was virtually totally the work of
25 Arthur Young.

1 QUESTION: But their friends stood to be harmed
2 or to be hurt when the extent of their derelictions came
3 out. Is that fair to say? So that there was a motive I
4 guess is what I'm saying --

5 MR. ELDEN: Correct.

6 QUESTION: -- for the accountant to do what it
7 did even though it may not have been in a literal --
8 jointly sense -- literally jointly participating at the
9 time it committed the acts that you complained of.

10 MR. ELDEN: Correct. Your Honor, our view that
11 we presented to the jury was that the motive was to cover
12 up what amounted to crimes not only by Jack White who was
13 on his way to jail or in jail by then, but the lawyers for
14 Jack White who had suborned perjury who had put this whole
15 crooked deal together and could themselves been disbarred
16 or who knows what. Those were the people. The people who
17 needed the coverup were the people who changed orders to
18 Arthur Young. Nothing wrong with the old auditor. He had
19 done it the right -- he had recorded it as not being owned
20 by the co-op the previous year. The people who needed the
21 coverup brought in Arthur Young and they got it.

22 In terms of participation, if I could address
23 Justice Scalia's point, because I would like to make it
24 easy for everyone to agree with me, I think that there's a
25 lot of things Arthur Young did not do. They didn't sell

1 the grain. They didn't do the lease. They didn't hire
2 and fire employees. They participated in the conduct of
3 the affairs by participating in the conduct of the
4 creation of the financial statements.

5 The third fact which I'll allude to only briefly
6 is that everyone admits they used the financial --

7 QUESTION: May I just ask on that question?

8 MR. ELDEN: Yes.

9 QUESTION: Do you take the position that
10 whenever an auditing firm creates financial statements,
11 that it has engaged in the pattern of racketeering
12 activity?

13 MR. ELDEN: No. In fact, I tried my best not
14 -- that -- Arthur Young tries to portray our position as
15 applying to the typical auditor. It does not. This was
16 an extreme fact situation. If an -- there are two things
17 an auditor can do that are perfectly proper. One is it
18 can audit books prepared by others. If the others created
19 a fraud and the auditor misses it, it may be negligence,
20 but it's not RICO. We never contended it was RICO.

21 Second thing, he can go farther. He can help
22 them. He can help them put the books together. You can
23 out-source your accounting function. You can hire Arthur
24 Young to do all your accounting work. There's nothing
25 wrong with that, but once they've gone to a certain point

1 of putting the books together, they can't audit
2 themselves. If they want a certified audit, they need to
3 bring someone new in. I'm in complete agreement that
4 Arthur Young's statement of that in their briefs is the
5 proper role of the auditor. Arthur Young went far beyond
6 the proper role of the auditor here.

7 QUESTION: By creating the books. Is that --

8 MR. ELDEN: By creating the books, doing it
9 fraudulently, and then auditing themselves, and not
10 catching themselves.

11 QUESTION: Well, you say they can create the
12 books so long as they don't then audit themselves.

13 MR. ELDEN: Your Honor, I think it is --

14 QUESTION: It's sort of retroactively taken out
15 of RICO when somebody else later does an audit?

16 MR. ELDEN: Your Honor, I'm not actually
17 speaking of a legal principle here. I'm speaking of the
18 accounting rules that the accountants set for themselves.
19 They allow themselves, to a small degree, to help the
20 client put the books together even though they audit.

21 QUESTION: Yes, but I don't think RICO was
22 intended to codify general rules of accounting practice,
23 was it?

24 MR. ELDEN: No.

25 QUESTION: I have no indication of that.

1 MR. ELDEN: It plainly was not. It plainly was
2 not, Your Honor.

3 QUESTION: I thought this provision here in
4 particular was meant to prevent a company from becoming an
5 evil mechanism, a company becoming a law-breaking company
6 as an enterprise. And when you're not working with
7 someone in the company, you continue to work as an outside
8 auditor, I don't see how that comes about.

9 MR. ELDEN: Well, in terms of whether outsiders
10 are covered, a point which Arthur Young has conceded -- so
11 have all the amicus -- the proceeding language in section
12 1962(c) talks about people employed by or associated with.

13 The classic RICO case, numerous predicate acts,
14 concerned bribers. Bribers are normally outsiders who are
15 influencing only some aspect of the business, not
16 controlling the whole business.

17 QUESTION: Well, that's true, but they are
18 working with someone who is a manager of the business or
19 an employee of the business with authority to conduct the
20 business' affairs. So, you can say it is the business
21 that is corrupted.

22 MR. ELDEN: Your Honor, in that case, I now have
23 an answer to Your Honor's question. Sorry I'm so slow.

24 The board of directors had to adopt the report
25 of Arthur Young, and Arthur Young had to persuade them to

1 do that at meetings by misleading them and not telling
2 them the entire truth. Arthur Young could not single-
3 handedly have set up the meetings and promulgated a final
4 report.

5 QUESTION: Well, misleading them isn't the same
6 thing as making common cause with them. I mean, when you
7 bribe one of them, the two of you make common cause to
8 conduct the business in a -- an evil, unlawful fashion.

9 MR. ELDEN: That's true with bribery, but not
10 with fraud. With fraud, you might be deceiving them into
11 doing. If you're bribing them, you're persuading them to
12 do what you want them to do. Fraud you might be deceiving
13 them into doing what you want them to do.

14 QUESTION: Well, that's unlawful. No doubt.
15 But I don't see why that becomes a RICO violation under
16 this section of RICO anyway.

17 MR. ELDEN: Well, the -- taking 1962 as a whole,
18 all three sections refer to pattern of racketeering acts.
19 That's the prohibited thing. If you do the prohibited
20 thing to invest in a company, that's A. If you do it to
21 control a company, that's B. But if -- but C covers
22 merely participating in the conduct of the affairs or
23 conducting the affairs. Even if you conduct all the
24 affairs, you're still covered under C.

25 QUESTION: Well, Mr. Elden, in interpreting that

1 language, would you think the night watchman might be
2 covered or the elevator operator or anybody who committed
3 a pattern of unlawful acts?

4 MR. ELDEN: No. No, Your Honor. In fact, the
5 word "participate," which has a half-century tradition
6 behind it and which was a word well-known to Congress at
7 the time they used it, plainly excludes people who are not
8 materially involved in furthering something. Participate
9 has been used throughout all the -- all 50 States.
10 Numerous Federal statutes have participants as people who
11 materially aid or assist someone else who could be the
12 primary wrongdoer or could just be equal with them in
13 accomplishing something. So, a participant is not someone
14 who -- just a person who goes out for coffee while they're
15 committing the fraud is not a participant under the
16 securities laws. You don't even get to a predicate act
17 that way. It's only when you materially aid and assist.

18 QUESTION: But it could be at any level of
19 involvement, and you'd say that's involved in the conduct
20 of the enterprise's affairs?

21 MR. ELDEN: I would say not the very lowest
22 level, but not necessarily confined to the highest level.
23 A person who effects a purchasing decision, bribes the
24 purchasing agent, is covered even though he doesn't also
25 handle marketing.

1 QUESTION: Well, we're dealing with some pretty
2 fuzzy language here I suppose, and the courts are all over
3 the lot in giving meaning to it.

4 Let me ask you this. Do you think that the rule
5 of lenity should apply in our interpretation of the
6 statute --

7 MR. ELDEN: Your Honor, I --

8 QUESTION: -- and where it is fuzzy, maybe we
9 should err on the side of being careful before we extend
10 liability?

11 MR. ELDEN: Your Honor, the rule of lenity is to
12 some extent at tension with the statutory command to give
13 liberal construction. I think the way I reconcile them is
14 if by giving a liberal construction to certain words, a
15 person is able to come to a sensible meaning of them, then
16 it's not ambiguous and the rule of lenity -- in other
17 words, using Congress' guideline of liberality, if a
18 person is able to understand the words, then the rule of
19 lenity would not apply. If it's still ambiguous, it
20 would.

21 QUESTION: Well, I'm not sure how anyone would
22 understand these words just reading them.

23 MR. ELDEN: Your Honor, I think unlike the
24 pattern of racketeering concept, which is a novel concept
25 in RICO and which is very difficult to understand, these

1 words all have been interpreted by courts in the same way
2 dictionaries interpret them, in the same way laymen use
3 them, and they're used in many other statutes. The
4 concept of participating in the conduct of affairs is used
5 in the FIRREA statute that was just adopted. A similar
6 concept has been used in the securities laws with no
7 problems, no one claiming it's unconstitutional.
8 Participate in the conduct of the affairs is fairly
9 straightforward English prose.

10 And I think that RICO as a whole is a very
11 complicated statute because of the pattern of racketeering
12 concept, and through the pattern to racketeering language,
13 which fortunately I don't think is before the Court today
14 -- and I agree that that makes the entire sentence very
15 complicated.

16 But assume for the moment we know -- let's say
17 it's stipulated that there's a pattern of racketeering
18 acts. Once that's stipulated, I think the rest of the
19 sentence is not hard to parse relative to other Federal
20 statutes.

21 QUESTION: But doesn't the notion of
22 participation require at some kind of minimum level an
23 action with other members of the management? And at the
24 point that the accountants were doing things dirty, the
25 other members of the management who would have been aware

1 of this and whom they might have been acting with were
2 gone. So that weren't they in the position, as you
3 describe the facts, not of acting with the management, but
4 of duping the management, as well as borrowers and so on
5 for the benefit of their friends who were in jail? They
6 weren't participating; they were deceiving both the
7 management and the buyers of the notes.

8 MR. ELDEN: Your Honor, I agree with the first
9 comment Your Honor made, that at a certain very low level
10 of participation, I would agree it is not covered, and I
11 think that that is not simply a preference or -- I think
12 that is -- in the word "participate," as it has been used
13 for half a century, but it is sufficient. It is
14 sufficient. To drive the getaway car is sufficient even
15 if you drive the getaway car all by yourself and you're
16 the only one who drives the getaway car. If you --

17 QUESTION: But you are also acting in concert
18 with the people who have robbed the bank, and that analogy
19 doesn't hold here because they're not acting in concert
20 with the remaining members of the management. They are,
21 in fact, acting for the sake of helping members of the
22 management who used to be there, but were gone by the time
23 they can -- gone by the time the auditors committed their
24 wrongs.

25 MR. ELDEN: Your Honor, I think there's a

1 distinction between conspiracy and participate in the
2 conduct of the affairs. Other people were also
3 participating in the conduct of the affairs, the salesmen,
4 the people who were making the demand notes available, the
5 board of directors which was continuing to run the co-op,
6 calling the meetings. There was a lot of things going on
7 at the co-op that Arthur Young had nothing to do with, and
8 without the co-op being an ongoing enterprise -- it was
9 functioning in many other respects -- Arthur Young's fraud
10 would not have succeeded.

11 QUESTION: Mr. Elden, let me give you a
12 hypothetical which I think will highlight what's troubling
13 Justice Souter and me as well. What if the offense here
14 were selling -- fraudulently selling defective parts to a
15 corporation which then sold a -- an instrument that
16 incorporated those defective parts to the public. Would
17 that be -- which is the conduct of the corporation's
18 business. Would that be participating in the conduct of
19 the affairs of the corporation?

20 MR. ELDEN: I think -- no. I think a person who
21 merely is engaged in transactions with the company is not
22 conducting its affairs.

23 QUESTION: Well, why is that any different from
24 what we have here?

25 MR. ELDEN: That person merely sells defective

1 parts to the company. That's all he does?

2 QUESTION: Fraudulently. Fraudulently.

3 MR. ELDEN: Commits a fraud on the company.

4 QUESTION: Yes.

5 MR. ELDEN: That's all --

6 QUESTION: Just as the accountant firm pawned

7 off on the company a fraudulently defective financial

8 statement, this person pawns off on the company

9 fraudulently defective parts.

10 MR. ELDEN: As I read the word "conduct," it

11 requires some carrying on of the actual business of the

12 company, not merely selling it to them.

13 QUESTION: Well, I don't see that in either case

14 you have an actual carrying on of the business.

15 MR. ELDEN: Thank you, Your Honor. I would like

16 to save the rest of my time for reply if I may.

17 QUESTION: Very well, Mr. Elden.

18 QUESTION: Whoops, whoops.

19 MS. OBERLY: I'm sorry, Your Honor.

20 QUESTION: We'll get to you in a minute, Ms.

21 Oberly.

22 (Laughter.)

23 QUESTION: You're eager.

24 QUESTION: Mr. Dreeben, we'll hear from you now.

25 ORAL ARGUMENT OF MICHAEL R. DREEBEN

1 ON BEHALF OF THE UNITED STATES

2 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

3 MR. DREEBEN: Thank you, Mr. Chief Justice, and
4 may it please the Court:

5 Now, the issue before the Court today is whether
6 the Eighth Circuit was correct in holding that the RICO
7 statute requires that a defendant operate or manage the
8 business in order to be held liable under section 1961(c).
9 That holding, we submit, is wrong for several reasons.

10 First, it departs from the text of the statute
11 which does not use the words "operate" or "manage" to
12 describe the requirements for liability.

13 Second -- and I think this goes to Justice
14 O'Connor's question about the application of the rule of
15 lenity in this case -- the Eighth Circuit's holding
16 ignores that Congress used the words "operate," "control,"
17 "manage," "supervise," and "direct" in other parts of RICO
18 and in other contemporaneous laws, and I will detail those
19 laws in a minute. When Congress wished to impose the
20 requirements of operation or management for liability, it
21 did so explicitly, not as the Eighth Circuit did through
22 the back door by a gloss on words that do not contain that
23 sense.

24 QUESTION: To manage is one thing, but to act
25 authoritatively on behalf of the company is something

1 else, isn't it? Couldn't we impose that minimal
2 requirement and find that even that requirement was not
3 met here? You don't have to be top dog, but you have to
4 be an agent who can act authoritatively on behalf of the
5 company in order to conduct its business.

6 MR. DREEBEN: Well --

7 QUESTION: And there's nobody here who meets
8 that qualification, who was participated with by the
9 accountants.

10 MR. DREEBEN: Well, first, Justice Scalia, the
11 statute covers two different ways of engaging the
12 enterprise in this pattern of racketeering activity.
13 First, it covers people who conduct the enterprise's
14 affairs.

15 QUESTION: Right.

16 MR. DREEBEN: Second, it covers people who
17 participate in the conduct of the affairs. If, by
18 hypothesis, the accounting firm had become, in effect, the
19 chief financial officer for the company and was given by
20 the board the authority to create its financial
21 statements, which in effect happened in this case because
22 there was no one within the company to do that, the
23 accounting firm can be said to have conducted this limited
24 aspect of the company's affairs. Even if you turn to the
25 second aspect of the statute --

1 QUESTION: What aspect of the affairs did they
2 conduct?

3 MR. DREEBEN: They conducted, in essence, the -

4 - QUESTION: Not participated in the conduct, but
5 they conducted.

6 MR. DREEBEN: That's correct.

7 QUESTION: Why?

8 MR. DREEBEN: I'm focusing now on their creation
9 of the financial statements of the company in which they
10 made fundamental accounting decisions about the valuation
11 of assets and then gave those to the company.

12 QUESTION: That's not the company's affairs any
13 more than my keeping a diary could seriously be considered
14 my affairs. Unless that's presented to someone with the
15 objective of raising money from that person or some other
16 objective --

17 MR. DREEBEN: Well --

18 QUESTION: -- there are no -- there's no
19 business being conducted.

20 MR. DREEBEN: Well, of course, in this case, the
21 financial statements were integral to the money-raising
22 functions that the co-op was carrying out, but --

23 QUESTION: Exactly. Now, who was cooperating
24 with the accountant in raising that money, in conducting
25 that affair of raising money?

1 MR. DREEBEN: It is the co-op's affairs to
2 present its financial data. There's -- this case doesn't
3 involve the construction of the concept of the affairs of
4 the enterprise. It has been taken for granted not only in
5 this case, but in all other cases that have considered
6 this issue, that part of the affairs of a business
7 enterprise consists of fairly presenting its financial
8 data to people who rely on it, which would include in
9 public companies the Securities and Exchange Commission
10 and investors and in this case covers the farmers who
11 invested in the demand notes. And all of the --

12 QUESTION: Just presenting it? Just generally
13 presenting it? Gee, I --

14 MR. DREEBEN: Well, it's --

15 QUESTION: Raising money is part of its affairs,
16 but I don't think developing and writing out a financial
17 statement --

18 MR. DREEBEN: Well, I think that all companies
19 which maintain accounting staffs and financial departments
20 view it as part of their affairs. This is not a narrow
21 term in the RICO statute. This is a statute that's
22 designed to cover comprehensively enterprise criminality,
23 and the concept of affairs has never been given a narrow
24 reading.

25 QUESTION: May I ask you a question on this

1 second category that you described? Do you think the
2 statute has a different meaning when it refers to conduct
3 of such enterprise's affairs through, so forth, than if it
4 simply said, participate in such enterprise's affairs?

5 MR. DREEBEN: Yes. I think that is a narrower
6 reading.

7 QUESTION: It does require some level of
8 seniority in the company. Is that right?

9 MR. DREEBEN: No. I'm not sure that seniority
10 in the company is the issue. I think what the issue is is
11 that it has to be some direct participation in the conduct
12 of the affairs, and I can give an example.

13 QUESTION: Give me an example. The difference
14 between participation in the conduct of the affairs and,
15 on the other hand, participation in the affairs.

16 MR. DREEBEN: Well, for example, we have a
17 number of RICO cases that cover bribery of court officials
18 to obtain official action. That I believe is
19 participating in the conduct of the affairs of the
20 enterprise because it induces official action. Merely
21 filing a fraudulent pleading with a court, a false
22 pleading that misrepresents facts, would be participating
23 in the affairs of the court generally, but would not be
24 participating in the conduct of the affairs.

25 Similarly, there are cases in which people have

1 been conducting gambling enterprises on corporate
2 property, not involving really the resources or any of the
3 prestige of the company, but simply using it as a location
4 for doing it. Generally, that could be viewed as
5 participating in the affairs of the company, but it's
6 certainly not participating in the conduct of the affairs
7 of the company.

8 QUESTION: Yes, but if you apply that analogy
9 here, what happened here is exactly what happened in your
10 court case; that is to say, the company itself was misled
11 just as the court was misled.

12 MR. DREEBEN: No. I think the analogy to this
13 case would be if somebody were drafting opinions for the
14 court fraudulently and the court was then issuing them.
15 Here you have financial statements that were prepared
16 fraudulently and issued by the company with the accounting
17 firm serving as the creator and the explicator of the
18 fraud. All --

19 QUESTION: And that's different from presenting
20 facts to the court fraudulently which the court then
21 adopts.

22 MR. DREEBEN: Well, if the court then adopts
23 them, then you have a different kind of question I
24 believe.

25 QUESTION: Oh, I see.

1 MR. DREEBEN: But if you have --

2 QUESTION: If it's successful, it's covered by
3 RICO. If it's unsuccessful, it's not.

4 MR. DREEBEN: Well, if the court, for example,
5 invited the parties to prepare findings of fact and they
6 were done with the knowledge that they would be used as
7 the basis for the court's submissions, and they were done
8 fraudulently, this would be a different case. Of course,
9 we're not talking here about examples that are actually
10 covered by the RICO statute unless you have the requisite
11 pattern of predicate crimes, and in this case, of course,
12 we do have a pattern of predicate mail fraud and
13 securities fraud crimes.

14 The Eighth Circuit's test is wrong most
15 fundamentally because RICO itself uses the terms that the
16 Eighth Circuit read into section 1962(c) in other places.
17 Section 1962(a) prohibits operation of the enterprise with
18 racketeering proceeds. Section 1962(b) prohibits
19 acquiring control over the enterprise through racketeering
20 acts. The D.C. Circuit said that section 1962(c) requires
21 control, but it's quite clear that Congress imposed that
22 requirement on a different section of RICO, not on this
23 section.

24 The gambling statute, 18 U.S.C., section
25 1955(a), applies to whoever conducts, finances, manages,

1 supervises, directs, or owns an illegal gambling business,
2 and that statute was passed as another title of the same
3 act of which RICO was a title. Using standard principles
4 of statutory construction, it would be very difficult to
5 say that Congress intended the same limitation in RICO
6 that it explicitly passed in another title of the same
7 act.

8 And 2 weeks after passing RICO, Congress enacted
9 the continuing criminal enterprise statute which applies
10 to a position -- a person in the position of organizer, a
11 supervisory position, or any other position of management
12 in a group engaging in narcotics activities.

13 And against the background of those statutes,
14 section 1962(c) must be read as Congress wrote it, to
15 cover generally persons who participate through usurping
16 the enterprise's activities, corrupting the enterprise's
17 activities, or using the enterprise's activities to
18 enhance their ability to commit criminal acts.

19 QUESTION: Assume a construction company -- is
20 it your position that a worker, the lowest paid worker who
21 digs ditches for this construction company -- is he
22 conducting the affairs of the company within the meaning
23 of this statute?

24 MR. DREEBEN: No, he's not conducting the
25 affairs.

1 QUESTION: He's not.

2 MR. DREEBEN: He may very well be --

3 QUESTION: So, there is some direction element
4 to it, some --

5 MR. DREEBEN: He may very well --

6 QUESTION: -- supervisory, some authoritative
7 element somehow?

8 MR. DREEBEN: I don't think there's an
9 authoritative element, Justice Scalia. It does speak to
10 people who participate in the conduct of the affairs even
11 indirectly, and although obviously the Government is not
12 seeking to use RICO against ditch diggers or secretaries
13 or people without some level of involvement in the
14 enterprise so that they can inflict the sorts of harms
15 that RICO is designed to cure, the statute as written
16 refers to people who participate in carrying out the
17 affairs of the enterprise. And if they are able to do
18 that --

19 QUESTION: But that doesn't include ditch
20 diggers --

21 MR. DREEBEN: I think it --

22 QUESTION: -- or secretaries.

23 MR. DREEBEN: I would not say as a matter of law
24 that it excludes anybody --

25 QUESTION: It does include ditch diggers.

1 MR. DREEBEN: As a matter of law, the statute
2 doesn't exclude them, no, but the statute --

3 QUESTION: Which means it does include them.

4 MR. DREEBEN: Yes, it does, Justice Scalia.

5 Thank you.

6 QUESTION: Thank you, Mr. Dreeben.

7 Ms. Oberly, your turn has been reached.

8 (Laughter.)

9 ORAL ARGUMENT OF KATHRYN A. OBERLY

10 ON BEHALF OF THE RESPONDENT

11 MS. OBERLY: Thank you, Your Honor. Thank you,
12 Mr. Chief Justice, and may it please the Court:

13 The Court's task in this case is just -- is,
14 obviously, to decide what Congress meant when it included
15 the conduct requirement in section 1962(c), and the Court
16 needs to approach that task by choosing, from among all
17 the possible meanings that are set forth in the briefs and
18 the arguments, the one that most fits with a common sense,
19 logical understanding of what Congress had in mind.

20 Our position is that the Eighth Circuit's
21 operation or management test meets that requirement.

22 At least we seem to agree with the Government,
23 that the place to start here is with the language of the
24 statute itself, but in fact, the Government's approach and
25 the petitioners' approach I think, as Justice Stevens

1 points out, has the tendency to completely read out of the
2 statute the conduct requirement altogether because it's
3 very difficult for them to articulate a distinction
4 between participate in the affairs, which is not what the
5 statute says, and participate in the conduct of the
6 enterprise's affairs, which is what the statute says.

7 Conduct is there for a reason. This Court has
8 already said in Sedima that conduct is one of the elements
9 that a RICO plaintiff has to prove. So, we're talking
10 about words of limitation, and they mean that you can't
11 prove a RICO violation simply by showing --

12 QUESTION: Does a lawyer -- is the outside
13 general counsel to a concern -- is it -- whether that's an
14 enterprise or not is beside the point, but would the
15 lawyer be considered to be participating in the conduct of
16 the business when he gives advice as to whether this
17 conduct is legal or not?

18 MS. OBERLY: Not in my opinion, Your Honor, when
19 he gives advice, which when he gives advice, the company,
20 the enterprise, is free to accept it or reject it. The
21 company is still making its business decisions about how
22 to conduct --

23 QUESTION: Is the inside general counsel in the
24 same position?

25 MS. OBERLY: If he gives -- if the inside

1 general counsel -- if he or she gives advice to
2 management, again it's advice which management can accept
3 or reject. If, on the other hand, management delegates to
4 either inside or outside general counsel the power to make
5 decisions and, for example, appoints the lawyer as agent
6 to conduct the corporation's legal affairs, then that
7 would be a different question.

8 QUESTION: But it doesn't say conduct. It says
9 conduct or participate in the conduct. What if an officer
10 of the corporation comes to a lawyer and says, look it, we
11 want to run this scam on the public? I'd like your advice
12 as to how it can be conducted in a way that is least
13 likely to be detected by the bank auditors or whoever.
14 And the lawyer says, okay, this is how you do it.

15 MS. OBERLY: Ultimately, Your Honor, I --

16 QUESTION: Wouldn't he be participating in the
17 conduct of the affairs?

18 MS. OBERLY: It depends I think, Your Honor, on
19 whether that lawyer is given -- if he doesn't have control
20 himself, which I don't think he necessarily has to have,
21 is he operating under the control of the CEO or someone
22 who can direct the affairs of the enterprise?

23 QUESTION: He's not controlled by him, but he's
24 helping him. He's participating with him in the scam.

25 MS. OBERLY: Then he's participating in the

1 affairs of the enterprise, which is --

2 QUESTION: But not in the conduct of the
3 affairs --

4 MS. OBERLY: Not in the conduct.

5 QUESTION: I don't see that.

6 MS. OBERLY: To me conduct imparts some notion
7 which we get from the statute, its language, and its
8 legislative history and RICO's purpose -- conduct imparts
9 some notion of management or direction of the affairs.
10 Participate --

11 QUESTION: In helping somebody who manages,
12 aren't you participating in the management by helping
13 someone else who manages?

14 MS. OBERLY: If you're operating under their
15 direction. If you are just giving them advice, even if
16 it's advice about how to commit an illegality, ultimately
17 the decision making authority still resides with whoever
18 it is that is running, operating, or managing the
19 business. You're an outside advisor. You may be an
20 inside advisor. I don't think the outsider-insider
21 distinction makes that much difference. The question is
22 who is calling the shots, and if you're doing -- if you're
23 acting for the company with authority to make those
24 decisions, then you may be participating in the conduct of
25 the affairs.

1 QUESTION: What if it's -- what if a certificate
2 of counsel were required by law?

3 MS. OBERLY: Well --

4 QUESTION: And -- or what if they -- what if a
5 certified audit is required by law?

6 MS. OBERLY: It is.

7 QUESTION: And without it the business can't go
8 forward.

9 MS. OBERLY: It is required by law for SEC
10 traded companies, for example --

11 QUESTION: Yes.

12 MS. OBERLY: -- that you have an accountant's -

13 - QUESTION: Yes.

14 MS. OBERLY: -- report every year, but that
15 conduct of the business' affairs --

16 QUESTION: You say that would not qualify
17 either.

18 MS. OBERLY: No, Your Honor, because what the
19 outside accountant is doing is expressing a professional
20 opinion on how the client conducted its financial affairs.
21 The outside auditor is not making business decisions for
22 the client. The outside auditor is not deciding whether
23 to make particular investments. The outside auditor isn't
24 deciding whether this co-op should advance initially \$4.1
25 million and later up to \$5.8 million --

1 QUESTION: Well, yes, but the --

2 MS. OBERLY: -- to the gasohol plant. What the
3 outside auditor is doing is coming in and recording in
4 financial statement form decisions already made --

5 QUESTION: Well, that may be so --

6 MS. OBERLY: -- by the people running the
7 enterprise.

8 QUESTION: -- of the honest -- it may be so of
9 the honest auditor. But what if he's a crooked auditor
10 and he wants to further the affairs of the business end.
11 Without a crooked, dishonest statement, the enterprise
12 can't go forward.

13 MS. OBERLY: Your Honor, what you're suggesting
14 I think is something akin to a bribery case where the
15 company bribes the auditor and says we know we have no
16 basis for --

17 QUESTION: No, I didn't say that at all. I just
18 -- the auditor is acting in its self-interest. He wants
19 to keep a good client.

20 MS. OBERLY: Well, let's take this case as an
21 example, Your Honor. That's the theory in this case, that
22 the scheme was to keep the co-op afloat even though it was
23 insolvent and that Arthur Young was somehow instrumental
24 in that scheme.

25 QUESTION: You don't think that's participating

1 in the conduct of the business?

2 MS. OBERLY: No. I think --

3 QUESTION: Without it, the business wouldn't
4 have been conducted.

5 MS. OBERLY: Your Honor, with the opinions that
6 Arthur Young issued in this case, which were qualified
7 opinions on whether the co-op would ever be able to
8 recover the money it had invested in the gasohol plant,
9 which showed the co-op to be losing \$100,000 a month,
10 showed a 6 point -- almost a \$6 million advance to the co-
11 op --

12 QUESTION: So, you just want to -- I suppose you
13 want to win this case on any ground that you want to win
14 on, but you want to win it -- you submit that you want the
15 general that no accountant who does no more than jigger
16 with a financial statement -- no accountant is
17 participating in the conduct of the business.

18 MS. OBERLY: When an accountant acts as auditor,
19 I would say it is very rare that he is participating in
20 the conduct of his client's affairs. I can conceive of
21 and will give you situations in which an accountant goes
22 beyond that, although they're not this case. But suppose
23 that the accountant is not only auditing the client's
24 financial statements, but is sitting on the client's board
25 of directors, for example. He is then conducting or

1 participating with the other directors in the conduct of
2 the --

3 QUESTION: And so you -- and you say even if the
4 president of the company says, look, we're in trouble, can
5 you jigger up the -- our financial statements, your
6 certificate, and the auditor says sure.

7 MS. OBERLY: I think the auditor then clearly
8 has committed the predicate acts of securities fraud, but
9 is he conducting --

10 QUESTION: Well --

11 MS. OBERLY: -- is he conducting --

12 QUESTION: That isn't what the question is
13 either.

14 MS. OBERLY: Precisely. He -- the predicate
15 acts alone are not enough to establish a RICO violation.

16 QUESTION: Even if he acts, A, at the direction
17 or at the request of.

18 MS. OBERLY: If he acts at the direction or at
19 the request of, then I agree he's participating in the
20 conduct, but that isn't --

21 QUESTION: Well, that was my hypothetical.

22 MS. OBERLY: Well, Your Honor, then I'm
23 perfectly prepared to agree, that an auditor who acts at
24 the direction of his client, as opposed to an independent
25 outside auditor who makes mistakes who does even terribly

1 substandard work, but is still doing his work, not the
2 client's --

3 QUESTION: What if --

4 QUESTION: You said "or request" a minute ago.

5 MS. OBERLY: Pardon?

6 QUESTION: You said "or request" a minute ago.
7 Just direction or is it direction or request?

8 QUESTION: That was my --

9 MS. OBERLY: A request that the auditor can't
10 refuse basically is --

11 (Laughter.)

12 QUESTION: He can't refuse without losing a
13 client.

14 MS. OBERLY: It's -- the way I would
15 characterize the test, the operation or management test,
16 is control or under the control of, and if the president
17 of the company either gives a directive to the auditors or
18 makes a "request" in a way that the auditor can't exercise
19 independent judgment, then he may well be participating in
20 the conduct of the client's affairs.

21 QUESTION: Well, you mean he can't exercise his
22 independent judgment without losing the client. Is that
23 what the test is?

24 MS. OBERLY: Pardon? No. I think he --

25 QUESTION: Because that I'm sure happens once in

1 a while.

2 MS. OBERLY: That -- Your Honor, I think you
3 could easily have what the accounting profession calls an
4 independence violation, which is a violation of
5 professional standards without necessarily having a RICO
6 violation. You can have situations where the auditor, for
7 whatever reason, any number of reasons, gets too close to
8 the situation, but is still not conducting his client's
9 affairs. He may be violating his own professional
10 standards. He may be committing predicate acts, but he's
11 not managing or operating the business.

12 QUESTION: Of course, in any event, if I
13 understand your opponent's position, that's not this case
14 because the wrong here is that the auditors acted too
15 independently. They created everything, if I understand
16 their theory, rather than did something at the direction
17 of somebody in management.

18 MS. OBERLY: As I understand it this morning,
19 virtually the entire theory here of what Arthur Young
20 supposedly did wrong -- we have a concession I think that
21 normal auditing does not implicate RICO, and this case
22 seems from petitioners' point of view to turn on whether
23 on the facts of this case, which by the way is not even a
24 question they presented to you or on which the Court
25 granted cert, they asked you to decide the legal test.

1 They didn't ask you to apply it.

2 I'm not saying the Court can't consider the
3 facts. I'm just saying it suggests that perhaps when two
4 lower courts have already looked at these facts and found
5 no RICO issue, that it maybe doesn't warrant reexamination
6 by this Court.

7 But still, focusing on the creation of the
8 factual -- of the financial statements is what they say
9 Arthur Young did wrong. What Arthur Young did here was
10 take the client, the co-op's books and records, turn those
11 numbers that reflected completed transactions that the
12 client had already decided to engage, and to turn those
13 numbers into financial statement form.

14 Let's talk about the gasohol plant for a minute.
15 This started off as a \$4.1 million --

16 QUESTION: Well, they just didn't do it on their
17 own. They were the accountants for the firm?

18 MS. OBERLY: No, Your Honor. They were the
19 auditors for the firm.

20 QUESTION: All right, for -- the auditors for
21 the firm. And they just didn't do it -- they just
22 wouldn't do it for nothing. They must have been hired.

23 MS. OBERLY: They were hired.

24 QUESTION: They were retained as auditors?

25 MS. OBERLY: They were retained as auditors.

1 QUESTION: And then so they're -- please do our
2 books.

3 MS. OBERLY: No. Excuse me, Your Honor. But
4 auditors --

5 QUESTION: I mean, please do our -- please audit
6 our books.

7 MS. OBERLY: That's a critical --

8 QUESTION: Please audit -- now, there's a
9 request.

10 MS. OBERLY: That is a critical distinction.

11 QUESTION: There's a request.

12 MS. OBERLY: That's a -- and it says to the
13 auditor please come in and conduct your affairs, which is
14 auditing. We, the co-op, the client, have already made
15 decisions about our business affairs and our financial
16 affairs, and we want you to come in and look at our books
17 and records, put them in financial statement form for us,
18 because that's not something we're very good at.

19 QUESTION: Well, what -- suppose the -- I don't
20 suppose Arthur Young did what it did without some kind of
21 a motive.

22 MS. OBERLY: The suggestion here -- the motive
23 is supposed to be keep a client on whom Arthur Young is
24 losing money because we're having to spend far more time
25 than our fees will ever compensate us for. That's part of

1 the motive.

2 The second part of the motive suggested is help
3 Jack White.

4 QUESTION: You'll soon be out of business if
5 that's the way you do business.

6 MS. OBERLY: This turned out to be an audit that
7 took a whole lot more time that -- the firm, nevertheless,
8 went ahead and put in the time necessary to complete it.
9 But the notion that we were doing this to keep a client is
10 at odds with the facts.

11 QUESTION: Well, then what --

12 MS. OBERLY: The other --

13 QUESTION: Why did they do it? Why did they do
14 it?

15 MS. OBERLY: I don't think they did it in the
16 sense you're talking about.

17 QUESTION: I guess it isn't in the --

18 MS. OBERLY: But the other motive attributed to
19 Arthur Young by the petitioners is that Jack White, the
20 convicted felon, prior general manager of the co-op, was
21 Arthur Young's friend, that we were trying to protect him,
22 that we were trying to keep -- and the ultimate motive is
23 that we were trying to keep our client, the co-op, appear
24 solvent when, in fact, we knew it wasn't solvent.

25 If you look, Your Honor, at again -- at our

1 report which was qualified to say that we cannot tell
2 either the board of directors or any members of the
3 public, who might want to look at these financial
4 statements, whether the co-op will ever recover its
5 investment in this gasohol plant -- what we can tell you
6 is that you've already sunk nearly \$6 million in it. You
7 may never see it again. You're losing \$100,000 a month as
8 you continue to operate this plant.

9 And frankly, Your Honor, had anyone cared to
10 read those financial statements, they would have known
11 that the co-op was hemorrhaging red ink all over the place
12 based on the report we did issue. Their complaint is we
13 should have said more. Maybe we should have. Maybe
14 that's an auditing mistake that we should have said even
15 more, but there's enough in there to --

16 QUESTION: But do you think that Arthur Young
17 was attempting to -- perhaps attempting to keep -- by its
18 financial -- by its auditing report attempting to keep the
19 company afloat?

20 MS. OBERLY: If we were trying to do that, we
21 failed miserably at it.

22 QUESTION: Well, I know, but -- you -- were they
23 trying to do that?

24 MS. OBERLY: No, Your Honor. But there's no
25 support for that notion. When we issue a qualified

1 opinion --

2 QUESTION: Well, what if they were trying to
3 keep it afloat and without it, without this effort, it
4 would have been really a dead fish --

5 MS. OBERLY: Let's change the enterprise for a
6 minute because there could be --

7 QUESTION: Well, let's don't change the
8 enterprise. Just how about my question?

9 MS. OBERLY: Okay. I think the answer to your
10 question is no. That doesn't mean that I think auditors
11 are always off the hook. I think that it's very possible
12 to suggest that auditors are, under the situation you
13 posed, conducting their own affairs, in other words, the
14 affairs of Arthur Young --

15 QUESTION: Well, there's no doubt about that,
16 but how about the -- also the affairs of the company?

17 MS. OBERLY: When they don't make the business
18 decisions for the client, when those decisions are already
19 made before the auditors arrive on the scene and whether
20 they're good decisions or bad decisions, fraudulent
21 decisions or not, the auditors come in. And the most that
22 you can say about the auditors' conduct is that it's
23 substandard, and it may be so substandard as to amount to
24 securities fraud. That still does not turn it into
25 conducting the client's affairs. You have to draw a

1 distinction.

2 QUESTION: Ms. Oberly, I have trouble going
3 along with the notion that you have to be subject to the
4 direction of somebody in the corporation as opposed to
5 merely acting pursuant to request by or in cooperation
6 with. The beginning of this provision is so broad. It
7 says it shall be unlawful for any person employed by or
8 associated with an enterprise.

9 Now, what time is it up there?

10 If that language -- if what was intended is what
11 you suggested, it seems to me that they would not have
12 said something as broad as "or associated with". They
13 would have just simply said any person employed by or
14 directed by.

15 MS. OBERLY: I agree with you that associated
16 with is quite broad, and it brings in outsiders --

17 QUESTION: Does it mean people who are directed,
18 who are subject to direction?

19 MS. OBERLY: No. Your Honor, I don't think
20 that's the function of associated by. I think the
21 function of associated by brings in people who are not
22 employees of the enterprise that they are -- they may be
23 independent contractors. They may be lawyers who are
24 outside the enterprise. And I think the statute does
25 apply to outsiders as well as to insiders.

1 But I think our focus here today is what did
2 Congress mean on the one word of limitation it put in
3 there, not the broad words, but the word of limitation,
4 which is you have to participate in the conduct.

5 QUESTION: And you say what they meant by it was
6 to cancel out associated with.

7 MS. OBERLY: No. I think associated with, as I
8 said, would bring in an outsider who, if you just had
9 employed, no matter what the lawyer or the accountant or
10 the outsider did, it wouldn't be covered if you just -- if
11 it were just limited to employees. So, associated --

12 QUESTION: (Inaudible) strange to use for
13 someone who is subject to direction. He is someone
14 associated with the enterprise. You would say employed by
15 or directed by or something other than associated with.
16 That's a very loose connection.

17 MS. OBERLY: I think -- I agree with you. I can
18 only repeat that I agree with you that associated is broad
19 enough and serves a broad function of bringing into the
20 statute's coverage people who are not necessarily within
21 the enterprise. But I think all of those broad words in
22 the statutes, "associated with," "participated
23 indirectly," all of the broad words, are still modifiers
24 of conduct, and our focus here has to be on what does
25 conduct mean.

1 And the difference between this case and the
2 Court's prior RICO cases is you had parties before you
3 urging restrictive interpretations of RICO based on
4 language that wasn't there.

5 QUESTION: What would be your position if an in-
6 house accountant, a full-time employee of the company, did
7 everything Arthur Young did here? Now the hypothetical
8 gets a little strange because he has to say I certify as
9 the company accountant that or I advise you, but he did no
10 more. But he was an -- let's say that he was an officer
11 of the company, but that's all he did. Same result?

12 MS. OBERLY: No, Your Honor. He -- as you point
13 out, he can't do that. The in-house accountant who
14 attempts to audit the company's own financial statements
15 is I think participating in the conduct of the company's
16 affairs. The outside advisor --

17 QUESTION: Well, but suppose he says as in-
18 house accountant I have attempted an audit of the
19 company's affairs, and my results are as follows? And he
20 does exactly what Arthur Young did here.

21 MS. OBERLY: I would say he is participating in
22 the conduct of the company's affairs, but I would say the
23 distinction -- and I'm not ever saying in this argument
24 that outsiders are automatically exempt just because
25 they're outsiders, but the inherent role of the outside

1 accountant, the outside auditor, is to come in and conduct
2 the auditor's affairs expressing a professional opinion on
3 how the client conducted the client's financial affairs.
4 And your internal accountant is conducting the client's
5 internal financial affairs. The outside auditor, on the
6 other hand, comes in several steps removed, looks at
7 transactions the client has already done, whether they're
8 good transactions, bad transactions that happened.
9 They're a done deal before the auditor gets there.

10 QUESTION: But in a very real sense, the outside
11 auditor lends more credence, more weight, to the
12 disclosures and to the statements than would the in-house
13 accountant in my hypothetical example --

14 MS. OBERLY: Well, certainly, Your Honor --

15 QUESTION: -- and, therefore, even -- and,
16 therefore, furthers the enterprise in a greater degree.

17 MS. OBERLY: Furthers the enterprise I don't
18 think is the test for conduct of the enterprise's affairs.

19 QUESTION: Well, it seems to me relevant in
20 deciding what conduct is.

21 MS. OBERLY: I -- what Congress was concerned
22 about, as the Court has noted over and over again in its
23 RICO opinions, was the infiltration of legitimate
24 businesses by organized crime or by people committing
25 patterns of racketeering activity. When you're talking

1 about the outsider who is brought in to express a
2 professional opinion on what the client has already done
3 and who has no power to direct or control or run those
4 decisions by the client, the danger of infiltration by the
5 outsider is just simply not there.

6 Now, that's not to say all outsiders aren't
7 covered. The bribery cases that the Government discusses
8 at length in its brief -- I agree outsiders can in -- by
9 paying a bribe, in effect, take over the decision making
10 authority of the enterprise by paying the bribe, and now
11 the people who are supposed to be making the decisions
12 inside the enterprise aren't. They're ceding their
13 authority to the outside briber. I'm not saying outsiders
14 are out of the statute.

15 QUESTION: Which way does the -- in your --
16 which way does the bribe run between the outsider --

17 MS. OBERLY: From -- in this example from the
18 outsider to someone in the enterprise who would normally
19 be conducting its affairs, but who has now effectively
20 ceded his decision making authority to the briber.

21 QUESTION: And so, your position would remain
22 the same if the company actually paid a bribe, I mean,
23 more than what the auditor would usually charge, to
24 falsify the books.

25 MS. OBERLY: I think it probably would, Your

1 Honor, although it might then be --

2 QUESTION: Probably would what? You --

3 MS. OBERLY: My position would remain the same,
4 although it might be that I would look at it as a
5 different enterprise. I would then look at the accounting
6 firm as the potential enterprise.

7 QUESTION: And you take the position the in-
8 house counsel would be liable, bribe or no.

9 MS. OBERLY: Yes, because he either controls the
10 legal affairs of the company. You said counsel.

11 QUESTION: No. The hypothetical is all he has
12 done is exactly what the accountants did here and no more.

13 MS. OBERLY: But he controls the financial
14 affairs of the company or he operates under the direction
15 of the board of directors --

16 QUESTION: Well, why does he do it any more than
17 Arthur Young did?

18 MS. OBERLY: Pardon?

19 QUESTION: Why does he do it any more than the
20 accountants did?

21 MS. OBERLY: The outside auditor has no
22 authority to come in and tell the client what to do. The
23 outside auditor comes in and makes recommendations about
24 how the client's financial affairs look, how they should
25 be presented on financial statements, but the client is

1 free to accept or reject those -- the advice of the
2 outside auditor. The decisions cannot be made and are not
3 made by the outside auditor. I know we have a fact
4 dispute here where petitioners contend that the decisions
5 were made by the outside auditors, but we've got --

6 QUESTION: Well, I suppose in the my
7 hypothetical the directors could have rejected what the
8 in-house accountant said.

9 MS. OBERLY: That's correct, and in that event
10 they would have taken away from the in-house accountant
11 the ability to make decisions in the financial sphere of
12 the enterprise's affairs.

13 In this case the board of directors actually
14 affirmatively adopted the financial statements that Mr.
15 Elden makes the centerpiece of his argument about what
16 Arthur Young did that constituted conducting the co-op's
17 affairs. It's true. We drafted those financial
18 statements. That is common professional practice for
19 auditors, but after drafting them, we sat down with the
20 board of directors and met at length, went over the
21 financial statements with the board, and at the end of
22 that meeting, the -- several meetings, the board members
23 had no further questions. And the testimony in the record
24 is that they then voted to adopt those financial
25 statements as their own. What we did was an express --

1 express an opinion on their financial statements, which is
2 conducting our affairs, but which is not conducting the
3 client's affairs.

4 I'd like to note on the legislative history and
5 what is it that Congress had in mind here on the use of
6 the word "conduct" that the -- every synonym that Congress
7 ever used for the word "conduct" in the legislative
8 history is operate, manage, or run. It's -- they're all
9 Eighth Circuit synonyms. There is absolutely nothing in
10 the legislative history to suggest that Congress meant the
11 conduct requirement to be something less than operation or
12 management, to be just mere participation in the affairs,
13 as Justice Stevens asked a little while earlier. In the
14 Senate and House report both, Congress described 1962(c)
15 as prescribing the operation of a business through a
16 pattern of racketeering activity.

17 I'd also like to note that using the Eighth
18 Circuit's operation or management test, there has been no
19 explanation really from the Government about why the
20 catalog of RICO cases that they give us in their brief
21 would not fit -- every single one of them would not fit
22 -- under the Eighth Circuit's operation or management
23 test.

24 We've already talked about the bribers. Whether
25 they're insiders or outsiders, I think they definitely

1 would be covered by the Eighth Circuit's test because they
2 are either operating or managing the business or operating
3 under the control of a higher-up who tells them what to
4 do.

5 The Government is also concerned about the low
6 level defendants, although Mr. Dreeben acknowledges that
7 the Justice Department doesn't bring RICO prosecutions at
8 some de minimis level, but they have nevertheless
9 expressed concern about the small fry as the case is
10 referred to in criminal enterprises. But there's no
11 reason that those defendants as well would not be covered
12 by the Eighth Circuit's operation or management test
13 because even if they are not themselves operating or
14 managing or conducting because they're not at the top of
15 the hierarchy or anywhere near the top of the hierarchy,
16 they are operating under the direction of the people who
17 do run the enterprise, and they therefore participate
18 indirectly in the conduct of the enterprise's affairs.
19 And as I said, the Government really has not given us any
20 examples of RICO prosecutions that they bring or that they
21 even want to bring that would not be covered by the Eighth
22 Circuit's operation or management test.

23 Earlier it was questioned whether the rule of
24 lenity ought to be applied in this case. It's clear I
25 think to everybody that the statute is not a model of

1 clarity. If there's any doubt about the Eighth Circuit's
2 test, then I do suggest that the rule of lenity is the
3 appropriate way to resolve that ambiguity in favor of the
4 Eighth Circuit's test.

5 This case is very similar to what the Court did
6 last term in Thompson Center Arms, construing a civil tax
7 case that had criminal implications, couldn't find a way
8 to resolve the ambiguity from either the legislative
9 history or the statutory language, and it used the rule of
10 lenity as a tie-breaker. The situation is the same here.
11 If the Court is unable to conclude from the language,
12 purpose, legislative history of RICO, then the rule of
13 lenity ought to still lead to the same result as the
14 Eighth Circuit applied here.

15 QUESTION: Don't you think that the provision of
16 the statute requiring a liberal construction trumps the
17 rule of lenity?

18 MS. OBERLY: No, Your Honor.

19 QUESTION: If it doesn't, what does it mean?

20 MS. OBERLY: I think the Court addressed that in
21 a footnote in Sedima where it said that you can harmonize
22 strict and liberal construction in -- even within the
23 context of RICO by applying strict construction to
24 sections 1961 and 1962, which are the statutes -- the
25 sections that have criminal applications, and liberal

1 construction to section 1964, which is RICO's civil
2 remedies provision. And this, of course, is a case
3 involving section 1962. I think if you --

4 QUESTION: You have different results that the
5 same transaction can be a civil violation and not a
6 criminal --

7 MS. OBERLY: No, no. I'm not saying that. I'm
8 saying the provision we're construing here has both
9 criminal and civil applications.

10 QUESTION: Right.

11 MS. OBERLY: Therefore, the rule of lenity is
12 applicable. Where liberal construction would apply is,
13 for example, in Sedima where you were construing 1964
14 itself, RICO's civil remedies provision. You weren't
15 construing the criminal applications of the same
16 provision. Here we're construing a statute that has both
17 criminal and civil applications which calls for the rule
18 of lenity.

19 QUESTION: Ms. Oberly, what if Congress passed a
20 strictly criminal statute and said it shall be liberally
21 construed?

22 MS. OBERLY: At some point, Your Honor, I think
23 the Court runs into constitutional problems of vagueness
24 and due process concerns because if you -- if the Court is
25 unable to --

1 QUESTION: Yes, but the rule of lenity --

2 MS. OBERLY: -- give the statute a construction
3 that people can understand, the potential criminal
4 defendants can understand, then I don't think liberal
5 construction can be used to save a construction that
6 defendants don't know how to conform their conduct to.

7 QUESTION: But the rule of lenity has been
8 thought to extend further than just a constitutional
9 prohibition against vague criminal statutes.

10 MS. OBERLY: That's right, but in answer to
11 Justice Scalia's question about how do you reconcile what
12 Congress put in here about construing RICO liberally,
13 reconcile it by -- you can -- you'll do that as far as you
14 can, but at some point if you reach an ambiguity that's
15 going to put criminal defendants in a position of not
16 knowing what their conduct should be in order to escape
17 criminal prosecution, then that rule of liberal
18 construction is going to have to give way to giving
19 criminal defendants clear and understandable notice of how
20 to conform their conduct.

21 QUESTION: No, but you don't -- you wouldn't
22 disagree with the proposition that Congress could say in a
23 statute the rule of lenity shall not apply to this statute
24 even though it's a criminal statute.

25 MS. OBERLY: No, I wouldn't disagree with that,

1 but I would still think it's important.

2 QUESTION: The question then is whether the
3 general comment on liberal construction is equivalent to
4 that or is limited to the civil context.

5 MS. OBERLY: I --

6 QUESTION: Limited to the provisions that are
7 entirely civil in their application.

8 MS. OBERLY: I think the sensible way to
9 interpret is limited to civil, but even if you gave it the
10 broader interpretation, then I think the Court has to
11 still ask itself are we giving this statute a construction
12 that potential criminal defendants can understand. And we
13 can't invoke liberal construction and remedial
14 construction principles to come up with an interpretation
15 that potential defendants can't conform their conduct.

16 QUESTION: Well, I assume we should apply the
17 rule of lenity to this provision instructing us not to
18 apply the rule of lenity.

19 (Laughter.)

20 QUESTION: And if we apply the rule of lenity to
21 that, we would come out applying it to the civil
22 provisions and not to the criminal provisions.

23 MS. OBERLY: Thank you, Your Honor.

24 QUESTION: Thank you, Ms. Oberly.

25 Mr. Elden, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF GARY M. ELDEN

2 ON BEHALF OF THE PETITIONERS

3 MR. ELDEN: Thank you, Your Honor.

4 I'm going to limit myself to answering questions
5 posed by Justice White and Justice Scalia. That's all I
6 have to add.

7 Justice White asked about whether there was
8 evidence of keeping it afloat by fraud. The point is
9 because of the novel way this case proceeded, we have a
10 final jury verdict that they originated the fraud --
11 that's right from the jury instructions -- with an actual
12 intent to defraud, that they deliberately concocted phony
13 statements with no actual belief in their truth. Arthur
14 Young did not appeal that on the weight of the evidence.
15 They conceded. Motive, intent, all those things are
16 established conclusively at this point.

17 QUESTION: So?

18 MR. ELDEN: So, the question that Your Honor put
19 -- Ms. Oberly responded by going into what happened at the
20 board meeting, all sorts of factual things. The point is
21 that is all over. We know that Arthur Young deliberately
22 set out to mislead people and created the financial
23 statements to do so. That is taken as given at this point
24 in the case.

25 QUESTION: Well, why is that participating in

1 the conduct of the business?

2 MR. ELDEN: It's not -- it does not necessarily
3 dispose of the entire case, Your Honor, but I thought it
4 was responsive to Your Honor's question. If I'm wrong,
5 I'm sorry.

6 QUESTION: May I ask this one question just --
7 was this motion for summary judgment granted before or
8 after the jury trial?

9 MR. ELDEN: The -- it was granted before. It
10 was renewed at the close of all the evidence. The judge
11 agreed to reconsider, and then reaffirmed his previous
12 decision.

13 QUESTION: So, the record that we look at is the
14 entire record or the record at the time of the original
15 motion?

16 MR. ELDEN: Frankly, Your Honor, the records are
17 essentially the same, but we have cited to the trial
18 record for convenience all throughout the case, and we did
19 it again in this brief. It's a -- it's certainly proper
20 to confine the Court's attention, as far as I'm concerned,
21 to just the trial record. It's also proper to consider
22 just the pretrial record. They're essentially the same.

23 QUESTION: Okay.

24 MR. ELDEN: I'd like to answer Justice Scalia's
25 very first question. Should we limit RICO's scope to

1 people who can act authoritatively on behalf of the
2 company? I think there's three reasons why we can't.

3 The predicate acts, bribers and extortionists
4 ordinarily do not act authoritatively on the company.

5 Justice Scalia in a later question pointed out
6 people can merely be associated with the company. They
7 can be outsiders. That's conceded.

8 And we have the word "participate" which
9 fortunately in RICO, for a change, is a word with well-
10 settled, very precise meanings, fully covered in the
11 securities laws and aiding and abetting law. And it means
12 it gets us off the ditch digger problem. Ditch diggers
13 aren't covered by the securities laws either. No one has
14 had problems in a half century of construing these
15 statutes. Very low level, ministerial people, file
16 clerks, receptionists, are not considered participants.
17 They're not considered aider and abettors. A person must
18 do something, must materially aid, must materially assist,
19 must engage in some significant act, but does not have to
20 be running the show, does not have to be the primary
21 wrongdoer, does not have to do everything.

22 QUESTION: Well, that's fine when you're talking
23 about securities fraud, but RICO doesn't just apply to
24 securities fraud. It applies to all sorts of misdoings by
25 corporations, breaking people's legs, a lot of things. A

1 ditch digger could be involved in some of those things.

2 MR. ELDEN: Your Honor, I'm focusing on the fact
3 that Congress chose a word "participate" which helps
4 lawyers and judges understand what Congress meant to do
5 because it was a word that even in 1970 had such a well-
6 settled meaning as striking a middle road.

7 Thank you, Your Honor.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Elden.

9 The case is submitted.

10 (Whereupon, at 11:02 a.m., the case in the
11 above-entitled matter was submitted.)
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CERTIFICATION

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Bob Reves, et al., Petitioners, v. Ernst & Young

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BY *Lona M. May*
(REPORTER)