

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EDMUND BOYLE, :

4 Petitioner :

5 v. : No. 07-1309

6 UNITED STATES. :

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8 Washington, D.C.

9 Wednesday, January 14, 2009

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11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:16 a.m.

14 APPEARANCES:

15 MARC FERNICH, ESQ., New York, N.Y.; on behalf of

16 the Petitioner.

17 ANTHONY YANG, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on

19 behalf of the Respondent.

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C O N T E N T S	
	PAGE
1	
2	ORAL ARGUMENT OF
3	MARC FERNICH, ESQ.
4	On behalf of the Petitioner
5	ANTHONY YANG, ESQ.
6	On behalf of the Respondent
7	REBUTTAL ARGUMENT OF
8	MARC FERNICH, ESQ.
9	On behalf of the Petitioner
10	
11	
12	
13	
14	
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P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument in Case 07-1309, Boyle v. United States. Mr. Fernich.

ORAL ARGUMENT OF MARC FERNICH
ON BEHALF OF THE PETITIONER

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

This is a case about a defendant's right to an independent jury determination of each essential element of a RICO offense, specifically a pattern of racketeering and a separate enterprise that is more than just a duplication of the pattern.

To keep the elements apart, ensure their distinct consideration, and give the enterprise independent meaning, juries must be instructed, as in the Seventh Circuit and elsewhere, that an "enterprise" requires a structure separate from the commission of the predicate acts forming the pattern.

JUSTICE GINSBURG: Mr. Fernich --

MR. FERNICH: Yes, Your Honor.

JUSTICE GINSBURG: -- are we talking just about the instruction to the jury? I know you think that the instruction given here was incorrect. But is

1 it just a question of charge error or are you saying
2 that there was insufficient evidence of enterprise for
3 this case to go to the jury?

4 MR. FERNICH: I am not suggesting, Your
5 Honor, that there was insufficient evidence of -- of
6 enterprise to go to the jury. My primary point is with
7 respect to the charge. We do contend --

8 JUSTICE GINSBURG: You're saying if a proper
9 charge had been given, this jury on this evidence still
10 could have convicted the defendant?

11 MR. FERNICH: We contend, to be sure, that
12 the evidence was legally insufficient under Rule 29.
13 But we are pressing principally the first -- the jury-
14 argument claim here in this Court. We do contend that
15 the evidence was legally insufficient.

16 JUSTICE GINSBURG: Did you make that -- did
17 you make that objection in the trial court?

18 MR. FERNICH: Yes, we did, and we preserved
19 it in the court of appeals as well. And there was, as
20 Your Honor knows, no published opinion with respect to
21 either issue, so both issues are preserved.

22 Now, Your Honor, under the Second Circuit
23 rule that functionally conflates the two elements, that
24 is enterprise and pattern, the jury in this case was not
25 so instructed as to the need for an enterprise with an

1 existence separate and apart from the racketeering acts
2 forming the pattern. For that reason we contend that
3 the judgment below must be vacated.

4 JUSTICE ALITO: The -- the error was the
5 failure to give the instruction that appears on page 95
6 of the joint appendix? Is that the error that you are
7 complaining about?

8 MR. FERNICH: Not merely so, Justice Alito.
9 That is why the entire relevant excerpts from the jury
10 charge are included in the joint appendix. We objected
11 to the entirety of the charge, in addition to requesting
12 specific language of our own. To be sure, the principal
13 error of which we complain in this Court is the failure
14 of that instruction anywhere to require, as this Court
15 required in the United States v Turkette, and as 18
16 U.S.C. 1962(c) itself requires, an entity with a
17 structure separate and apart from the pattern of
18 racketeering.

19 JUSTICE SCALIA: What -- what do you mean by
20 that precisely? Suppose you have a group of people, the
21 ringleader goes and gets a safecracker, he gets a
22 wheelman, and so forth, all the people he needs for the
23 crime; and he says we are going to call this the -- the
24 Brinks Job Group, okay? We are the Brinks Job Group.
25 But that's the only thing that he has put the group

1 together in order to do. But it's still a group. He
2 calls it a group and he gets all these guys together and
3 they -- they meet and have lunch together, and do a lot
4 of stuff together.

5 Would that meet your -- your condition of a
6 separate association from the predicate acts?

7 MR. FERNICH: To be sure, we would contend
8 that it would be a question in the first instance for a
9 properly instructed jury, but without more on the
10 hypothetical that Your Honor has posited, the answer to
11 that question is no. There is no ongoing decisional
12 apparatus, no continuing directional mechanism.

13 JUSTICE SCALIA: Except insofar as it is
14 directed to the Brinks job.

15 MR. FERNICH: Except the degree of
16 organization, I should say, inherent in each individual
17 predicate act.

18 JUSTICE KENNEDY: But you -- you imported --
19 I'm looking at your quotation from Turkette, at page 5
20 of your brief. It doesn't seem to me conclusive of your
21 point. In order to answer Justice Scalia, you had to
22 interpolate, to add various words. You had to say --
23 you said an ongoing organization with directions or
24 something to that effect. That is not what Turkette
25 says. Turkette says "as proven by evidence of an

1 ongoing organization, formal or informal, that is
2 continuing." That's all it says.

3 MR. FERNICH: To be sure, Your Honor, we
4 don't contend that Turkette is directly controlling of
5 the issue and we go through a lengthy textual exegesis
6 in our brief of why we think that implicit in the
7 factors of ongoing organization and continuing unit is a
8 structure requirement. But what Turkette did
9 unequivocally say is that there must be an entity
10 existing separate and apart from the pattern of
11 racketeering activity. There was no such instruction
12 given in this case -- and the word "entity," which
13 appears in section 1961(4) itself and appears twice in
14 the Turkette decision, surely connotes an ascertainable
15 structure with an existence separate and apart from the
16 pattern of racketeering.

17 JUSTICE GINSBURG: What does "structure"
18 mean? I think you said it doesn't mean that this has to
19 be an organization with a president, a treasurer; it
20 doesn't mean that.

21 MR. FERNICH: It could mean that in an
22 appropriate case, Your Honor. It surely would be
23 probative --

24 JUSTICE GINSBURG: What is -- what is the
25 minimum to qualify as having a structure?

1 MR. FERNICH: The minimum is a separate,
2 ongoing, continuing existence apart from the commission
3 of the predicate acts themselves, and the members
4 necessary to commit those predicate acts, because that
5 by definition, I should say, is the pattern of
6 racketeering activity; and moreover, it is also inherent
7 in any criminal conspiracy that extends over time.

8 To be more specific, the bare minimum
9 requisites for a structure would be: an ongoing
10 directional mechanism; a continuing decisional-making
11 unit -- decisionmaking unit, I should say -- and some
12 sort of coherent existence between the commission of the
13 racketeering acts themselves. Those are the main
14 ingredients.

15 CHIEF JUSTICE ROBERTS: So all you have to
16 do, to pick up on Justice Scalia's hypothetical, is just
17 not the Brinks job, but you have to have one more crime,
18 and that's it; then everything you've talked about is
19 satisfied?

20 MR. FERNICH: No, that is, respectfully, not
21 what we contend, although in an appropriate case it is
22 conceivable that a properly instructed jury may find
23 structure on those facts. The point that we are
24 conveying here is that this is principally a jury
25 question, and a jury that is properly instructed will

1 make findings, presumably, as to what the -- whether the
2 structure was extant, and those findings would command
3 substantial deference on appeal, as they do in the
4 circuits that have applied a structure requirement; and
5 it would be a relatively easy task for an appellate
6 court to defer to the jury's findings in such a case.
7 There is a --

8 JUSTICE GINSBURG: The jury -- the words
9 that you asked for, what was it? "Ascertainable
10 structural hierarchy." And suppose the judge gets
11 questions from the jury: "Your Honor, what do you mean
12 by ascertainable structural hierarchy?"

13 MR. FERNICH: I'm -- I'm sorry,
14 Justice Ginsburg.

15 JUSTICE GINSBURG: Those are the words that
16 you wanted the judge to include in the charge --

17 MR. FERNICH: To be sure.

18 JUSTICE GINSBURG: -- and it's your
19 requested charge, as to say to have an enterprise you
20 need to have -- the group has to have an ascertainable
21 structural hierarchy. Those are the three words in your
22 requested charge.

23 MR. FERNICH: Well, respectfully, Your
24 Honor, it goes beyond that, because the end of --

25 JUSTICE GINSBURG: But those -- but you did

1 ask for those.

2 MR. FERNICH: I did, and --

3 JUSTICE GINSBURG: And now I'm asking you,
4 what does that mean? The judge gives your charge, the
5 jury is puzzled: Your Honor, we don't understand what
6 you mean by "ascertainable structural hierarchy"; would
7 you please tell us specifically?

8 MR. FERNICH: Yes, Your Honor. First of
9 all, the charge that we are asking for specifically is a
10 charge that is given in the Seventh and Eighth Circuits
11 which says a structure separate from the commission of
12 the predicate acts themselves. If a jury were puzzled,
13 in that instance the judge could, as spelled out in
14 pages 31 through 35 of our reply brief, give examples,
15 any number of examples that have been spelled out by the
16 lower courts in -- that have adopted a structure
17 requirement.

18 JUSTICE GINSBURG: And some of those
19 examples it seems are present here. One you gave was
20 longevity, well, this has been going on for 10 years;
21 another was a unique way of operating, and they are
22 specialists in deposit boxes and they have look-out
23 people and they have people who actually break into the
24 bank, and they have a certain amount of skill.

25 So we have longevity, modus operandi, and a

1 division of labor. They have some people being their
2 lookouts and other people doing other things. So I was
3 looking at your list in the reply brief, and it seems to
4 me that this organization, this association of
5 individuals, has some of those characteristics.

6 MR. FERNICH: Your Honor, first of all, to
7 get right down to the nitty-gritty of the verdict in the
8 case, it's important to focus on what the jury actually
9 found. The enterprise as charged was a 10-year
10 enterprise. There were three predicate acts found by
11 the jury ranging in date from late December of 1998
12 through early January of 1999. So the longevity aspect
13 is certainly something that we dispute here.

14 Again, to answer Your Honor, to go back to
15 the beginning of our argument, to be sure the thrust of
16 our argument in this Court is directed to the jury
17 instruction in this case. It may be conceivable, we
18 don't for a minute concede that the evidence was legally
19 sufficient under rule 29. That said, had a jury been
20 properly instructed and made such a finding, i.e., to
21 find a separately structured enterprise, that would be a
22 finding that would command significant deference, and
23 I'd be hard-pressed --

24 JUSTICE SCALIA: Why -- why do you need a
25 hierarchy? Why do you need a boss? Why can't it be a

1 democratic mob? I mean, there is no boss and they agree
2 that all of their decisions will be taken unanimously?

3 MR. FERNICH: We don't contend before this
4 Court that it must be hierarchical per se. Certainly --

5 JUSTICE SCALIA: Well, that's what you
6 requested. Isn't -- isn't that the instruction you
7 requested?

8 MR. FERNICH: On the facts of this case,
9 consistent with the examples that are spelled out
10 comprehensively in both the opening brief and the reply
11 brief, that is the one that we focused on. But to be
12 sure -- to be sure, I also objected to the charge as
13 given in its entirety. In this Court we don't press the
14 contention that a hierarchical structure -- hierarchical
15 structure is an irreducible minimum. We do --

16 JUSTICE SOUTER: Well, you couldn't, could
17 you, because the -- an organization can consist of an
18 individual. And it seems to me that all of the
19 requirements that you have been specifying would in an
20 individual case be met simply by showing that there was
21 -- there was an individual in business who had a brain.

22 MR. FERNICH: An individual, Your Honor, is
23 -- is a legal entity under the first clause of 1961(4).
24 It means a sole proprietorship in this context. And an
25 individual, a legal entity, as set forth in the first

1 clause of 1961(4), by definition --

2 JUSTICE SOUTER: Well, but, if I set up a
3 newsstand, it's a sole proprietorship and that's all I
4 have to do. And if I have a functioning brain, I have a
5 decisionmaking mechanism. I remember from day-to-day
6 what I did, so I have continuity. And -- and it seems
7 to me that all of these requirements are -- are
8 virtually satisfied as a matter of course by an
9 individual who engages in any kind of business that
10 might have interstate-commerce implications.

11 MR. FERNICH: And that is not an absurd
12 result. It is a -- and it is a result that squares with
13 the primary purpose of the statute as enacted, which was
14 to prevent the subversion and infiltration of legitimate
15 business by criminal elements.

16 JUSTICE SOUTER: Oh, absolutely. But it
17 seems to me that it -- it puts you in sort of a -- a
18 difficult position to -- to be calling for or -- or
19 requiring jury instructions that call for, as necessary
20 conditions, findings of structure, continuity, decision-
21 making, capacity and so on, when in fact on -- on at
22 least one variety of enterprise, these conditions are --
23 are met virtually automatically simply by having
24 somebody doing business in any way.

25 MR. FERNICH: To be sure, Your Honor, we are

1 only calling -- and the problem only arises in the
2 context of an association-in-fact enterprise. The great
3 weight of authority and the plain language of 1961(4)
4 does not define an individual as an association-in-fact
5 enterprise. And it does not square with the plain
6 language of the statute to call an individual an
7 association-in-fact enterprise. And, moreover, doing so
8 would create a whole set of other problems,
9 distinctly --

10 JUSTICE SOUTER: Oh, I agree, but an
11 individual can be an -- an enterprise.

12 MR. FERNICH: A legal enterprise.

13 JUSTICE SOUTER: And -- and an association,
14 in fact, can be an enterprise. And if we accept those
15 two propositions, then I think you've got a tough row to
16 hoe in saying that any enterprise which is not an
17 individual has got to have all the formal
18 characteristics that you talk about, given the fact that
19 those characteristics are automatically satisfied by an
20 individual.

21 MR. FERNICH: We don't -- we don't press
22 that contention, Your Honor. We specifically press it
23 for the phrase "any union or group of individuals
24 associated in fact, although not a legal entity." The
25 "individual" portion appears in the first clause of the

1 statute. The distinctness problem simply does not arise
2 in the context of a legal-entity enterprise.

3 And it's important to note, as this Court
4 said in Salinas -- recognized in Salinas ---virtually
5 every criminal prosecution that is brought under 1962(c)
6 is brought against an illicit association-in-fact
7 enterprise. The -- the scenario of an individual being
8 an association-in-fact enterprise, I don't think it's a
9 valid association-in-fact enterprise as a matter of law.
10 There is a line of cases from the Seventh Circuit that
11 says it's not.

12 And this structural problem, having a
13 structure that is distinct from the pattern of
14 racketeering activities so that the two elements, I
15 should say, are kept separate and apart, only arises in
16 the context of an association-in-fact enterprise, which
17 is, of course, a very, very wide swath.

18 JUSTICE GINSBURG: Would it include, let's
19 say, a street gang? How about -- this may be before
20 your time, but "The Lavender Hill Mob"?

21 MR. FERNICH: I'm sorry, Your Honor?

22 JUSTICE GINSBURG: The Alec Guinness movie,
23 "The Lavender Hill Mob."

24 MR. FERNICH: Oh, well, certainly we don't
25 have any quarrel with the proposition of street gangs,

1 and many of them are cited in our briefs. The great
2 preponderance of typical RICO prosecutions are
3 hierarchical, drug-type street gangs which have
4 regimented structures. And again, to answer
5 Justice Scalia's question, we don't contend that that is
6 a strict necessity, but certainly they are not going to
7 have a problem establishing a structured enterprise with
8 a regimented drug gang.

9 JUSTICE ALITO: If hierarchy is not
10 required, then I'm not clear what more -- what you think
11 needs to be shown beyond the fact that there was an
12 association in fact and whatever continuity needs to be
13 shown in order to establish the pattern. What -- what
14 needs to be shown beyond that?

15 MR. FERNICH: Well, Your Honor --

16 JUSTICE ALITO: What needs to be charged to
17 the jury that they must find beyond that?

18 MR. FERNICH: We contend that they must be
19 charged that there has to be a structure separate from
20 the commission of the predicate acts themselves. The
21 Seventh and Eighth Circuits use pattern jury
22 instructions that give that precise charge. And there
23 has been, to my knowledge, no reported difficulties --

24 JUSTICE ALITO: But What does that mean?

25 MR. FERNICH: It means -- and -- and I would

1 take the test most prominently from Your Honor's own
2 home circuit as spelled out in the Riccobene case: A --
3 an ongoing decisional-making apparatus to guide the
4 affairs of the enterprise, a directional mechanism.

5 The Third Circuit in Riccobene said an
6 overseeing, clearinghouse and coordination function, and
7 -- and a cohesive existence between predicate acts.

8 JUSTICE ALITO: I -- I just --

9 JUSTICE KENNEDY: Basically, you described
10 this -- this gang. One -- one person is a guard. The
11 other person brings the hook to pull the -- the box off.
12 Another person scouts it out. Another person's got the
13 scanner. It seems to me to fit precisely what you have
14 just described.

15 MR. FERNICH: The gang has no structure
16 aside from that which is a necessary incident to the
17 commission of each racketeering act. We don't contend
18 there has to be a formal organization, but there is no
19 evidence of any continuing, ongoing organization other
20 than that when they get together to commit the predicate
21 crimes.

22 JUSTICE KENNEDY: Isn't it pretty clear that
23 if the -- the person who is supposed to be the lookout
24 doesn't perform his job, he is not going to be included
25 in that next heist?

1 MR. FERNICH: There is no evidence of that
2 in the record to my knowledge, Your Honor.

3 JUSTICE GINSBURG: Isn't there a record that
4 this is a more or less steady group that hangs out
5 together, except when one of them gets caught and put in
6 jail, and then they replace him with someone? But this
7 is -- this was explained as a group that meets regularly
8 in the Brooklyn Social Club?

9 MR. FERNICH: Your Honor, the testimony
10 about the Brooklyn Social Club is -- is a little bit
11 overdrawn, I would say. And I would direct the Court to
12 pages 58 and 74 through 75 of the joint appendix, and
13 this is the testimony of the witness Gerard Bellafiore,
14 whose testimony, by the way, is the only testimony we
15 know for a fact that the jury credited. Quote: "Just a
16 club to hang out in, not for any type of anything."

17 JUSTICE GINSBURG: But one of the members
18 owned the club, right?

19 MR. FERNICH: Yes. That -- that's true.
20 But that -- there is no evidence in the record that they
21 would do anything other than, for example -- and this is
22 not in the record -- for example, shoot pool at the
23 club. And -- and Bellafiore himself was careful to
24 qualify it in that way so that he wasn't gilding the
25 lily.

1 JUSTICE ALITO: Suppose you have a gang that
2 gets together every Friday afternoon and by democratic
3 means they decide what crime they are going to commit
4 that weekend. And they are multi-talented so they --
5 they look at the whole list of RICO predicates, and they
6 choose a different one each -- you know, each weekend to
7 commit. And they do that over some period of time, and
8 in doing that they perform different roles at different
9 times. Is -- is that an enterprise?

10 MR. FERNICH: It sounds to me like a jury
11 could -- if they are having regular Friday meetings and
12 they are using sophisticated means to canvas the RICO
13 statute with a degree of complexity and sophistication
14 to figure out what they are going to do or maybe even
15 try to evade the statute, it probably --

16 JUSTICE ALITO: We will take that part out
17 of it. They don't look at the statute. They just --
18 whatever crime comes to somebody's mind. They -- they
19 want to commit a crime every weekend to -- to make some
20 money. But it is a different thing, done by different
21 means, different roles.

22 MR. FERNICH: If the jury --

23 JUSTICE ALITO: Does that have an
24 ascertainable structure?

25 MR. FERNICH: If the jury were properly

1 instructed that there had to be a structure separate and
2 apart from just that which is inherent in the commission
3 of each act, a properly instructed jury probably could
4 well find the requirements satisfied on -- on the
5 hypothetical that Your Honor has posited.

6 The cases say -- the cases out of the
7 Seventh Circuit say it is not a high hurdle. They say
8 it's a low hurdle, and there has to be some structure,
9 but not much -- not much to distinguish between --

10 JUSTICE ALITO: Well, what structure would
11 there be there? What characteristics of that group
12 would satisfy the structural requirement?

13 MR. FERNICH: The ongoing existence, the
14 regular meetings, and the degree of sophistication
15 employed. And it implies that they are not just sort of
16 getting together on an impromptu basis as opportunities
17 arise, but they are sitting around on a regular basis
18 for a -- a continuing period of time and planning things
19 out. What are we going to do this weekend? What are we
20 going to do next weekend?

21 Let's twist the hypothetical a little bit.
22 Maybe they project our three or four weeks ahead of
23 time. That's what RICO is -- is getting after, some
24 kind of sophistication, some kind of coordination. This
25 is the crux of the statute.

1 JUSTICE GINSBURG: How about during the
2 period that this man -- what was his name, Mangia --

3 MR. FERNICH: Mangiavillano, Your Honor.

4 JUSTICE GINSBURG: Yes. When he was running
5 the show, it seems that he was a leader, and that the --
6 and that the group wasn't quite as democratic before he
7 got sent to prison.

8 MR. FERNICH: Your Honor, the testimony in
9 the record is that -- again, what was found by the jury
10 here. The testimony is that Mangiavillano and Boyle and
11 Bellafiore never committed any crimes together. It is
12 -- it is very extensively briefed in -- in the lower
13 court. The Second Circuit never addressed it. There is
14 a long multiple-conspiracies argument. We are not going
15 to get into that in this Court.

16 The fact is that Mangiavillano had nothing
17 to do, nothing to do with the bank burglaries found in
18 this case. There were three burglaries found as RICO --
19 I shouldn't say "burglaries" --

20 JUSTICE GINSBURG: That wasn't what I meant.

21 MR. FERNICH: Okay.

22 JUSTICE GINSBURG: I meant, would the
23 organization, as it was described to exist at the time
24 Mangiavillano was there, would that have satisfied the
25 definition of "structure" because it had a leader?

1 MR. FERNICH: It may have at that point, but
2 there was no evidence -- and -- and because it's outside
3 of the time frame of what the jury has found, there is a
4 lot more diversity in the criminality that was alleged
5 during that period.

6 A properly instructed jury may have found
7 that there was an enterprise existing at that time,
8 Although I'm not even sure a jury could so find under
9 Turkette because the core of the membership changed very
10 dramatically over a period of time. But the leadership
11 would be one -- to be sure, leadership is something that
12 a jury could take into account and could permissibly
13 find if they were properly instructed. On the facts of
14 this case, I cannot answer that question definitively.

15 JUSTICE BREYER: Could you try something out
16 in your mind, and maybe you can't react to it. I'm
17 trying to figure out how the structure requirement, what
18 to say, and a thought was occurring to me which I am not
19 wedded to, I would like some reactions to it: Is to say
20 that there is a structure means that among this
21 association of people there must be rules,
22 understandings, or behavior that tend to keep the
23 association together over time, other than those which
24 would be essential to allow them to commit the
25 particular crimes at issue.

1 MR. FERNICH: Certainly the defense would
2 take a ruling like that, but what --

3 JUSTICE BREYER: Well, I know, but I'm
4 trying to work out in my mind, is that a sensible thing
5 to say? The trouble with the word "structure" is
6 everything in the universe has a structure, and so it's
7 awfully vague? I'm trying to make it a little bit more
8 specific.

9 MR. FERNICH: A structure -- the structure I
10 don't think entails necessarily rules, regulations, et
11 cetera. I don't think the word "structure" --

12 JUSTICE BREYER: That isn't what I said. I
13 said: Rules, understandings, forms of behavior that
14 tend to keep the association together over time, other
15 than those rules, understandings and associations and
16 behaviors that would be necessary -- "necessary" meant
17 strongly -- to commit the particular crimes at issue.

18 MR. FERNICH: Is Your Honor's question is
19 that a sensible definition of "structure"?

20 JUSTICE BREYER: Yes.

21 MR. FERNICH: Yes, it is a sensible
22 definition of "structure."

23 And if there are no further questions, I
24 would like to reserve the rest of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Fernich.

2 Mr. Yang.

3 ORAL ARGUMENT OF ANTHONY YANG

4 ON BEHALF OF THE RESPONDENT

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

7 An association-in-fact enterprise need not
8 have an ascertainable structure distinct from the
9 predicate act of racketeering committed by one of its
10 associates, whatever that means. RICO's statutory text,
11 its surrounding context, and this Court's construction
12 of the statute show that RICO's definition of
13 "enterprise" is broad and contains no such limitation.

14 Petitioner's primary argument, that the term
15 "enterprise" is rendered superfluous and merges with the
16 charged pattern of racketeering acts, is wrong for at
17 least three reasons: First, it's wrong as a formal
18 matter. The enterprise is a group of individuals. The
19 pattern is a series of acts. Second, it fails to
20 account for the fact that the relevant pattern of --

21 JUSTICE SCALIA: Wait, wait, wait, wait,
22 wait. I assume that he was responding to the argument
23 that you can establish the enterprise from the mere
24 existence of the pattern of the acts, from the separate
25 acts. And if indeed it takes nothing more than the acts

1 to constitute the enterprise, it seems to me he has a
2 point.

3 MR. YANG: That goes to my second reason.

4 JUSTICE SCALIA: Oh, so we'll forget about
5 your first one.

6 MR. YANG: Well, let me go to -- which I
7 think it addresses the second reason. It's distinct as
8 a formal matter, which is that have you to have find a
9 group of individuals versus a series of facts. You can
10 infer the group from their actions, just as can you
11 infer, you know, a relationship between individuals by
12 the way they act together. But --

13 JUSTICE SCALIA: So --

14 MR. YANG: My first point is a formal one.
15 The second point goes straight to the statute: That the
16 relevant pattern of racketeering acts that is at issue
17 in RICO -- this is 1962(c) -- is a pattern of acts
18 committed by an individual defendant, not a group. In
19 fact, in H.J. this Court explained that the premise that
20 the pattern has to be performed by a group or an
21 association -- this is at page 244 of the Court's
22 opinion there -- was wrong and that the pattern can be
23 fully the work of an individual acting alone.

24 It's also wrong because an enterprise
25 remains wholly distinct and pertinent in numerous RICO

1 contexts under the government's interpretation.

2 JUSTICE BREYER: When you say "individual,"
3 the first part of the definition of "enterprise" speaks
4 about any individual partnership, corporation,
5 association, or other legal entity.

6 MR. YANG: That's correct.

7 JUSTICE BREYER: So then, I've read
8 somewhere that people feel that where that individual is
9 involved, the individual is acting as an -- a legal
10 entity such as a sole proprietorship. Is that right?

11 MR. YANG: An individual can be an
12 enterprise as a sole proprietorship, if that's the
13 question.

14 JUSTICE BREYER: I'm talking about a legal
15 entity. And in the second clause, what we are talking
16 about here, specifically, it is "a corporation, a union,
17 or a group of individuals associated in fact although
18 not a legal entity."

19 MR. YANG: That's correct. I think there
20 may be some miscommunication on my part. I would direct
21 the Court to page 5a of the appendix which reproduces
22 section 1962(c). It states: "It shall be unlawful for
23 any person" -- it doesn't say "group," "enterprise" or
24 an "association" -- "that is employed or associated with
25 an enterprise" --

1 JUSTICE SCALIA: What appendix? Not the
2 joint appendix?

3 MR. YANG: Excuse me. The appendix to our
4 brief. I'm sorry.

5 JUSTICE SCALIA: All right.

6 MR. YANG: The gray brief. So what's
7 relevant for purposes of showing an element of a 1962(c)
8 violation is that the defendant alone, perhaps with
9 others, but the element is the defendant has to commit a
10 pattern of racketeering. There are other elements. For
11 instance, the defendant has to do so in a manner that
12 participates in the conduct of the affairs of the
13 enterprise. But, of course, that embraces a wholly
14 distinct concept, that is the enterprise.

15 Now, in many cases, as you have here, the
16 pattern of racketeering activity of this defendant is
17 proved by evidence that that defendant was also working
18 in concert with others. And so in that case, the
19 pattern element, which, again, is the individual's
20 pattern of acts, is proved by the same type of evidence
21 that would prove the --

22 CHIEF JUSTICE ROBERTS: So then you'd have
23 an easy time before the jury. And same thing with
24 respect to the individual. All that's saying is that
25 when you are dealing with one person, it's pretty easy

1 to prove that he, you know, directs himself or, you
2 know, has an ongoing plan, but that doesn't mean that
3 it's not a separate element that the jury should have to
4 find.

5 MR. YANG: We don't say that it's not a
6 separate element, and we also don't say that a pattern
7 necessarily would --

8 CHIEF JUSTICE ROBERTS: Well, you say that
9 it's not distinct from the underlying offenses.

10 MR. YANG: No, I don't believe so. I think
11 what we have said is that the evidence regarding the
12 pattern of activity allows the jury to infer the
13 existence of an enterprise because an enterprise --

14 CHIEF JUSTICE ROBERTS: But they don't have
15 to be separately instructed that they have to find that,
16 do they?

17 MR. YANG: No, they do. And in fact the
18 jury can --

19 CHIEF JUSTICE ROBERTS: What is the
20 instruction that the Seventh Circuit and the Eighth
21 Circuit give that you don't think is necessary?

22 MR. YANG: The instruction is pertaining to
23 an ascertainable structure distinct from the pattern of
24 racketeering. Here you still have to show an
25 enterprise, and the jury may not infer an enterprise

1 from the pattern, but certainly it's open to the jury.
2 When that pattern -- again, a pattern is an individual's
3 conduct -- but when that pattern is shown through
4 evidence that the individual is acting with others over
5 a long period of time -- to either establish that it's a
6 pattern of racketeering activity, if that same evidence
7 not only shows that the individual committed a pattern
8 of racketeering activity, but it was done in concert
9 with others and that the -- that evidence shows that a
10 group of individuals had associated in fact for the
11 common purpose of engaging in criminal conduct.

12 JUSTICE ALITO: Would you agree there could
13 be a situation in which an individual engages in a
14 pattern of racketeering activity together with other
15 people and yet is not participating in the affairs of an
16 enterprise through the pattern of racketeering activity?

17 MR. YANG: Well, I think that's the case
18 that we gave -- an example that we gave in our brief,
19 which is saying an individual commits a very long string
20 of bank burglaries and -- actually, make it robberies.
21 Robbery is a predicate act; burglary is not. Bank
22 burglaries with individuals, but each time he does it,
23 it's with a different group of individuals. There you
24 -- the individual would be established -- you could
25 establish a pattern from, say, the relatedness of the

1 crimes to an M.O. or a -- and in the long continuous
2 string of crimes, more than a few months, perhaps years.
3 But it would not establish an enterprise.

4 JUSTICE ALITO: And what is -- why would it
5 not? What --

6 MR. YANG: Because there would be -- you
7 would --

8 JUSTICE ALITO: What's lacking there?

9 MR. YANG: What would show is that the
10 individual is not working in concert with others to
11 achieve an end. There's no parallel identity between
12 any two of the crimes except for the individual acting
13 alone.

14 CHIEF JUSTICE ROBERTS: I thought an
15 individual -- I thought an individual could be the
16 enterprise?

17 MR. YANG: One -- he could be --

18 CHIEF JUSTICE ROBERTS: An independent
19 contractor rather than an employee.

20 MR. YANG: He could be an enterprise but not
21 one -- when an individual acts an alone as an
22 enterprise, the individual is not liability for
23 racketeering acts under 1962(c) under this Court's
24 decision in Cedric Kushner, because there's a
25 requirement in 1962(c) that the individual has to be

1 employed by or associated with the enterprise. And this
2 Court has explained that you have to have some
3 distinctiveness between the enterprise itself and the
4 individual.

5 So with respect to the individual, there
6 would be no -- there might be an enterprise. It is
7 conceivable that he could be deemed an enterprise, but
8 not one that has any relevance for RICO purposes under
9 1962(c).

10 JUSTICE ALITO: What if he has a list of 25
11 people who may, on various occasions, want to
12 participate with him in bank robberies? So whenever he
13 gets the urge to commit a bank robbery, he gets out his
14 rolodex and he picks one or more of them and calls them
15 up and they commit the bank robbery?

16 MR. YANG: I guess it's unlikely that the
17 government, if that were the only fact, could show an
18 enterprise. If there was some additional evidence that
19 the individuals had gotten together and said, yeah, you
20 know what, call me, let's work together, when I'm
21 available call me, but it just happens he never called
22 me twice.

23 JUSTICE ALITO: What is the element, then,
24 that is missing?

25 MR. YANG: Well, what's required under this

1 Court's decision in *Turkette*, which we think flows
2 directly from the language, any group of individuals
3 associated in fact, is that the group of persons must be
4 associated together for a common purpose of engaging in
5 a course of conduct. And that could be shown, as
6 *Turkette* explained, by evidence of some kind of ongoing
7 organization, formal or informal, that -- whose
8 associates function as an ongoing unit.

9 And in order to prove through one's actions
10 with others that there is an entity -- some agreement
11 and continuing unit behind it, you are going to have to
12 show some identity in the group. If there is no
13 identity except for one person, it would be very
14 difficult to show an enterprise.

15 JUSTICE SOUTER: Why -- I guess that's where
16 I'm losing the argument. Why is it difficult?

17 MR. YANG: It would be difficult to prove an
18 association in fact. I'm sorry. It would be difficult
19 to prove an association in fact of more than one person
20 as the enterprise in that context, because it would be
21 difficult to show that that person had joined with
22 others for the common purpose of engaging in a course of
23 common conduct. It would just be a series of distinct
24 crimes.

25 JUSTICE SOUTER: Then why don't you dispense

1 with the association-in-fact category and simply go with
2 the individual?

3 MR. YANG: That was my answer to the Chief
4 Justice's question, because under 1962(c), there has to
5 be distinctiveness in that context.

6 JUSTICE BREYER: Two people -- two people
7 walk along the street and know each other, suppose
8 that's the example, and one of them says I have a great
9 idea. Let's go in and take some money out of the post
10 office. The other says, what happens if a policeman
11 comes? The first one says, we'll bribe him. Okay.
12 Then they do it. That's it. Period.

13 Now, of course that's illegal. But is RICO
14 supposed to catch that?

15 MR. YANG: No.

16 JUSTICE BREYER: What is it that keeps them
17 out of it?

18 MR. YANG: Well, RICO requires, among other
19 things, a pattern of racketeering.

20 JUSTICE BREYER: Well, here we have two --
21 two -- two related crimes.

22 MR. YANG: Well, they can be related, but
23 under this Court's decision in H.J. you also have to
24 show continuing criminal conduct.

25 JUSTICE BREYER: There was between the two.

1 MR. YANG: Well, no. That has a particular
2 meaning under H.J., which is that it has to extend over
3 an extended period of time.

4 JUSTICE BREYER: That is the bribery. What
5 happens if three months from now the postal inspector
6 comes to catch us, we will bribe him.

7 MR. YANG: Well, again, I'm not sure that
8 that would meet the continuing aspect, either because
9 it's a threat of continuing activity or because it would
10 satisfy the closing continuity.

11 JUSTICE BREYER: You are quite right, I
12 agree with you that these are different efforts to try
13 to catch the same problem. And the problem is that I
14 don't think anyone sees that the simple conspiracy in
15 carrying out of two criminal offenses by several people
16 together without more -- without something more should
17 violate RICO. I think your answer to that would be you
18 agree with that, but tell me if you don't.

19 And then if you do agree with it, the very
20 difficult problem is to figure out how to get the people
21 to clearly show a pattern or not.

22 MR. YANG: I think I agree with that
23 proposition. But what needs to be shown is that there
24 needs to be an enterprise. Sometimes the enterprise in
25 cases are lawful enterprises; sometimes in cases it

1 involves an unlawful organization or unlawful
2 association in fact, like we have here. And that is
3 shown -- the statutory requirement, as explained in
4 Turkette, is simply that this group of people associate
5 together for a common purpose of engaging in a course of
6 conduct.

7 Now, when you have a long -- a series, like
8 we have here of racketeer -- of crimes. These sets of
9 crimes went on for almost a decade, involved dozens and
10 dozens of bank heists.

11 CHIEF JUSTICE ROBERTS: In fact, your friend
12 said that the period the jury found was just a couple of
13 months.

14 MR. YANG: Yes, that concerns the predicate
15 acts of racketeering. This is -- this raises another
16 important issue, which is, the group largely was
17 committing bank burglaries. Those are not predicate
18 acts. The predicate acts here under RICO involve the
19 interstate transportation of stolen funds. There were
20 three of those that were charged as the predicate act,
21 and the jury found those to constitute a pattern.

22 But what this group of individuals were
23 doing, is they were associating in fact for a very long
24 period of time, committing dozens of bank -- bank
25 burglaries, and did so sometimes with the interstate

1 transportation -- that's what brought --

2 JUSTICE SCALIA: And -- and were they shown
3 to the jury, all of those bank burglaries?

4 MR. YANG: Oh, there were many things shown
5 to the jury.

6 JUSTICE SCALIA: So it is not at issue in
7 this case whether -- whether the entity can be --

8 MR. YANG: I have to say --

9 JUSTICE SCALIA: -- derived simply from the
10 predicate acts?

11 MR. YANG: I have to say I'm a little
12 perplexed at this stage in the litigation based -- how
13 we got here based on the objection that was made to the
14 district court. The objection that was made, which was
15 a J.A. 95, was that there was an ascertainable
16 structural hierarchy which seems to be abandoned at this
17 point, distinct from the charged predicated acts of
18 racketeering, that was repeated at 103, 108, and 109.
19 And then there was also an objection that the entity has
20 to have a particular or formed structure, and that has
21 been abandoned and also inconsistent with Turkette,
22 which recognized that this could be an informal
23 association.

24 And, in fact, there was not an objection to
25 the entire charge. Counsel at page J.A. 97, after --

1 when the court explained that it was going to address
2 his proposed charge at J.A. 95 said, you know, I have
3 some specific objections to the charges written, and
4 then went through them, and raising those two objections
5 as we've just discussed here.

6 So, we've kind of evolved in terms of what
7 this case is all about. And even if the Petitioner were
8 right, I don't think he could prevail, even under the
9 charge he wants in this case.

10 But let me turn to a few anomalies with
11 respect to Petitioner's interpretation of a structure.

12 JUSTICE GINSBURG: Before you do that, Mr.
13 Yang, could you give us a sense, if you know it, about
14 the practical results of the different formulas that --
15 there are at least three formulas, I take it that the
16 different circuits have approved. In the result of the
17 RICO prosecution, does it really make a difference which
18 one of these is charged or do they could out the same
19 way, anyway?

20 MR. YANG: It will make a difference in some
21 cases. There is a case called Bagaric that this Court
22 cited in its National Organization for Women Against
23 Scheidler. In there, there was a -- the -- involved a
24 group of Croation nationalists, loosely knit, who agreed
25 to promote their anti-Yugoslavian through a series of

1 acts they committed over a series of years, extortion,
2 murder, bombings. There was no structure, it would be
3 very difficult to fit into the ascertainable structure
4 distinct from the predicate act of racketeering that
5 Petitioner espouses.

6 There are other cases involving loosely knit
7 gangs such as neighborhood thugs. The Nascimento case
8 involved a neighborhood group of thugs that protected
9 each other, and that was their common -- common bonding
10 element through killing rivals or intimidating
11 witnesses. There's no hierarchy there. There were no
12 colors, no initiation rights. But this went on for over
13 a long period of time.

14 But beyond the classic cases that might fall
15 outside RICO, if the Court were to adopt an
16 ascertainable structure requirement, I think as
17 Petitioner's laundry list of -- of examples -- unless
18 my -- his reply brief illustrates, that is going to
19 involve a long course of case-by-case adjudication.

20 JUSTICE BREYER: What did you think -- what
21 did you think of the -- probably not much of it, but
22 what did you think of my effort there? And I am trying
23 to point out, as you see, I am open to anything that
24 will deal with what I think of as a functional problem
25 and the functional problem is exhibited by that Posner

1 example I gave you or by two investment companies that
2 decide, what we will do is we will issue a letter that
3 is going to be shown to two different people; that is
4 their only association; or maybe 100 people, but they
5 know who they are, and they are going to be shown this
6 letter over a period of five or 10 years, and someone
7 later comes back and says there is a false statement in
8 the letter. Well, they shouldn't issue a false
9 statement, but is that RICO?

10 I mean, so -- so the object -- the object is
11 to find a way of not overextending RICO where there is
12 nothing there but a conspiracy to commit two crimes.
13 Pattern is one help. The pattern is pretty vague, so
14 all the courts but one have come along, I take it, with
15 this other help, which is playing on the word structure.

16 Now you have heard what I said as a weak
17 effort to try to do something. What is your best effort
18 to do something to deal with the problem? Or what's
19 wrong with my effort? Whatever you want to say.

20 MR. YANG: Let me first address what is your
21 underlying concern, that there is a problem. Turkette
22 addressed that; Turkette addressed that it doesn't
23 matter that the evidence used to establish these
24 separate elements may in case of --

25 JUSTICE BREYER: That's different.

1 That's -- of course the same evidence can establish two
2 separate elements.

3 MR. YANG: The --

4 JUSTICE BREYER: The problem will be
5 conflating the elements so that every single case that
6 you have the first set, you also have the second set.

7 MR. YANG: That problem does not exist as
8 well, because the relevant pattern of racketeering
9 activity that is the element of the crime is something
10 committed by individuals.

11 For instance, let's take a group of
12 individuals who commit a long string, of, for instance,
13 burglaries, they do so over a series of years. Bank
14 burglary is not a predicate act of racketeering; it's a
15 wholly criminal organization; all they do is commit bank
16 burglaries. One individual is given the money at the
17 end of the -- of each burglary. What we would have
18 there is a RICO violation after the individual, because
19 the individual, the element is that the individual has
20 transported the money in interstate transportation -- or
21 across State lines, and that is a RICO predicate; but
22 the other things that the group was doing, those are not
23 RICO predicates.

24 JUSTICE BREYER: No, no.

25 MR. YANG: So the -- so the element, it

1 doesn't change, if the individual then does it with some
2 other people -- let's say he brings his buddy along, two
3 of them do it, that just shows the evidence necessary to
4 show that the individual -- the evidence showed that the
5 individual committed a pattern of racketeering, also
6 happens to show he did it with a group, but it's the
7 evidence, not the element. The element of the crime in
8 section 1962(c) always turns on the defendant.

9 JUSTICE BREYER: Always, in a case where you
10 sue the investment company because of their one letter
11 used four times, it's the act of the individual. In the
12 case that Posner used, it's always the act of the
13 individual. There's always a criminal act of an
14 individual.

15 MR. YANG: But if you have --

16 JUSTICE BREYER: And he has to be
17 associated, however, with an enterprise for it to fall
18 within RICO, and there also has to be a pattern.

19 MR. YANG: If we take --

20 JUSTICE BREYER: That's going back --

21 MR. YANG: -- my hypothetical with the
22 individual transporting the money alone across State
23 lines, you have a pattern. If you just looked at that,
24 individual taking money across State lines, by himself,
25 that doesn't establish enterprise. What would -- so the

1 pattern exists independently.

2 What would show the enterprise is the fact
3 that the evidence might also show that he is doing it
4 with other people. That would show that he -- the
5 element that is, that he is committing a pattern of
6 racketeering activity and he is doing it in concert with
7 others, but that goes to the separate element of
8 enterprise. That is --

9 JUSTICE BREYER: That's right, and our
10 problem is he is doing it with one other person whom he
11 met once, and they agreed to do it, and it's a common
12 law conspiracy; and now suddenly he has done it twice
13 with another person who helped him and they said they
14 would do it, and now we have RICO; and my belief is --
15 which you may not agree with -- that that common
16 garden-variety conspiracy to say, rob a bank and then
17 transport the money a few months later, that that's all
18 that's at issue. That shouldn't be within RICO.

19 MR. YANG: Let me --

20 JUSTICE BREYER: You might come back and
21 tell me it should be.

22 MR. YANG: Let me try to approach that in
23 two separate ways. One, Turkette in footnote 5 was very
24 clear. The Court explained even if the pattern of
25 racketeering activity and the enterprise are established

1 the same way, it doesn't matter, if enterprise has
2 function -- some function, there is no such thing as, in
3 other words, partial superfluidities of an element, or
4 partial superfluidity of a word.

5 Secondly, the concern about conspiracy
6 exists in any conspiracy. Conspiracy is an inchoate
7 act. You are liable for conspiracy as soon as you made
8 the agreement, and under 371 commit an overt act or
9 under RICO conspiracy agree to all the necessary
10 elements of a substantive RICO offense.

11 Congress has -- and not only that, you can
12 be charged for conspiracy and charged for completing the
13 conspiracy as separate crimes. That's the normal rule.
14 That's the normal rule here. You can be charged for a
15 conspiracy to commit RICO offenses, and RICO offenses,
16 the pattern element I don't think can be overestimated
17 here.

18 The pattern element is where RICO has --
19 plus the list of predicate acts of racketeering -- is
20 really where RICO gets most of its limiting structure,
21 and I think the Court recognized that in H.J.

22 It's the pattern which requires related
23 criminal acts that can be related in a number of ways,
24 and the -- the Court gave kind of a list of that in
25 H.J., which I think I won't go through now, but as well

1 as continuity, and that could be long-term criminal
2 activity, not just a single or two, but long-term
3 criminal activity, or the threat of criminal activity.

4 Interestingly enough --

5 JUSTICE SCALIA: I am -- I am really
6 confused now. I don't -- I am not sure I know what your
7 answer to the question presented is, which is quite
8 simply must an association-in-fact enterprise under RICO
9 have some ascertainable structure beyond that inherent
10 in the commission of predicate crimes by its members and
11 associates?

12 And you -- your answer is no?

13 MR. YANG: No. I mean, I guess it depends
14 on what you mean -- ascertainable structure --

15 JUSTICE SCALIA: Yes.

16 MR. YANG: It's very -- I have to say it's
17 difficult for me to understand what is being proposed by
18 the other side, particularly once you have lost
19 hierarchy. Hierarchy is something which is an
20 understandable term.

21 JUSTICE SCALIA: Right.

22 MR. YANG: But if you are talking about
23 structure, structure could mean relationship between
24 individuals that enable them to --

25 JUSTICE SCALIA: Right, right.

1 MR. YANG: -- commit their crimes. If that's
2 the case --

3 JUSTICE SCALIA: Yes.

4 MR. YANG: -- I don't see why a jury cannot
5 infer from the fact that over a long period of time the
6 alleged members of this group have operated as a unit
7 and have committed acts of racketeering, from that
8 coordinating conduct that you were not able to infer
9 that they had a means of acting as a group.

10 JUSTICE SCALIA: Yes, but you would have to
11 tell the jury -- you would have to tell the jury you
12 would have to find it. Of course the jury can find it,
13 but the issue is must the jury be told that it has to
14 find it? I think he's conceding --

15 MR. YANG: Must the jury --

16 JUSTICE SCALIA: Be told it's not enough,
17 ladies and gentlemen of the jury, for you to find that
18 these predicate acts occurred; you must find -- and you
19 can find it just from the predicate acts, if you think
20 the evidence will justify that -- you must find an
21 organization separate from the mere commission of the
22 predicate acts.

23 MR. YANG: What does that mean?

24 JUSTICE SCALIA: I don't know.

25 (Laughter.)

1 MR. YANG: Because Turkette makes very clear
2 that an association-in-fact enterprise can exist for
3 wholly criminal acts. So if for instance, take a few
4 hypotheticals. Let's say a group forms for the basis of
5 committing just only predicate acts of racketeering,
6 they do that. Nothing else, just predicate acts, over a
7 10-year period.

8 JUSTICE SCALIA: Right.

9 MR. YANG: All right? One formulation of
10 petitioners is you have to look at the charged pattern
11 of racketeering acts, presumably because then the jury
12 has to find the charged pattern and then that has to be
13 distinct from the enterprise. If that is the case --
14 let's say there is 100 predicate acts of racketeering.
15 All that does is say that the government has to show 99
16 and leave the last one uncharged. That makes no sense.

17 To the extent that Petitioners say that
18 okay, there has got to be some -- something other than
19 racketeering activity, take for instance, the group that
20 does wholly legal, but does criminal non-racketeering
21 acts as well as racketeering acts; that's in fact this
22 case. Bank robberies and -- excuse me, bank burglaries,
23 which is not a predicate act, and interstate
24 transportation of funds. It would be wholly anomalous
25 to exclude a group that only did bank robberies, which

1 are predicate acts, but include a group that was only
2 partially racketeering but wholly criminal.

3 CHIEF JUSTICE ROBERTS: Not at all; not at
4 all. That would make a lot of sense, because RICO is
5 not intended just to bring in the crimes. They are look
6 for something else. They are looking for an
7 organization that is involved in these types of things.

8 MR. YANG: But there is nothing -- there's
9 -- in order to find an organization, you are not going
10 to see any more from criminal acts that are not
11 racketeering versus criminal acts that are. Both of
12 them show --

13 JUSTICE KENNEDY: But -- but you -- you
14 would instruct the jury that if these three thefts that
15 are covered by RICO occurred over a period of a year,
16 and they involved lookouts and scanners and so forth,
17 you may infer from these acts an enterprise as defined
18 by the statute?

19 MR. YANG: They might.

20 JUSTICE KENNEDY: You would allow that
21 instruction?

22 MR. YANG: You -- yes, but there would have
23 to be more. You have to explain what would be necessary
24 to show an enterprise. And in fact the -- the
25 appendix to the --

1 JUSTICE KENNEDY: Where -- where in your
2 briefs or in the materials do we find the definition of
3 what the enterprise is, other than in the statute, other
4 than the terms of the statute itself?

5 MR. YANG: I believe page 17.

6 JUSTICE KENNEDY: I mean, in other -- what
7 do I refer to in order to supplement the instruction
8 that I just noted -- that I just suggested?

9 MR. YANG: Page 17 of our brief reiterates
10 the standard, I believe it's Turkette, it comes from
11 Turkette and in the appendix to petition -- or excuse
12 me, to the joint appendix, the charge is at pages 111
13 through 113. That's the charge.

14 JUSTICE KENNEDY: That's at the bottom of
15 111 where it said you can look to see what it does and
16 make the inference rather than have -- I forget -- an
17 abstract analysis?

18 MR. YANG: But it goes on to say that you
19 must -- the government must prove that there is an
20 ongoing organization with some similar framework, formal
21 and informal, for carrying out its objectives and
22 various members and associations of the association
23 function as a continuing unit to achieve a common
24 objective.

25 The government must prove that in every

1 case. In this case, this is not in the J.A., but it is
2 in the court of appeals appendix at page 8770, the
3 district court specifically charged the jury that they
4 must find five separate elements of a RICO offense,
5 including the existence of an enterprise as one; two,
6 that the enterprise engaged in or its activity affected
7 interstate or foreign commerce; three, that the
8 defendant was associated in it.

9 Eventually you get down to five, that the
10 defendant knowingly participated in the conduct of the
11 affairs of the enterprise through a pattern of
12 racketeering.

13 So the district court explained you have to
14 define an enterprise. And to find an enterprise, what's
15 a necessary element, it said you may infer an enterprise
16 from what the --

17 CHIEF JUSTICE ROBERTS: You say enterprise.
18 I mean, the objection is that the enterprise is no
19 different than the various predicate acts.

20 MR. YANG: It is different in the sense that
21 you can have a series of predicate acts without an
22 enterprise, you can have an enterprise without a series
23 of predicate acts. Now what, the objection seems to be
24 ultimately that the evidence needs to show the predicate
25 acts of racketeering may also prove that the enterprise

1 exists, because when you show predicate acts of a
2 defendant, which is the only element, he doesn't have to
3 work in concert with others to commit the predicate acts
4 of racketeering, but when you show the predicate acts
5 with evidence that individual is acting with others, you
6 can also show that they have -- there is an association
7 in fact of individuals who joined together to pursue a
8 common course of conduct. Thank you, Your Honors.

9 CHIEF JUSTICE ROBERTS: Thank you Mr. Yang.

10 Mr. Fernich, you have four minutes
11 remaining.

12 REBUTTAL ARGUMENT OF MARC FERNICH

13 ON BEHALF OF THE PETITIONER

14 MR. FERNICH: Thank you, Your Honor.

15 Very briefly, nobody disputes the
16 proposition that a properly instructed jury would be
17 able to find that racketeering acts committed by an
18 individual is a distinct element from the
19 association-in-fact enterprise. The government is
20 absolutely right and we agree on that score. The
21 problem is the lower courts have misread Turkette. They
22 are not focusing on the pattern of activity committed by
23 the individual; they have -- and the instruction as
24 Justice Kennedy himself quoted in this case encapsulate
25 it -- encapsulates the problem.

1 Comments -- and this is at the bottom of
2 J.A. 1111. Common sense suggests that the existence of
3 an association in fact is oftentimes more readily proven
4 by what it does -- it does, not rather than what an
5 individual member does -- rather than by abstract
6 analysis of its structure.

7 So it only raises a further vagueness
8 problem. We agree that patterns of racketeering
9 activity are properly committed by individuals. If you
10 are going to define the enterprise solely or principally
11 by virtue of the pattern, whose pattern would you define
12 it by? It doesn't even make any sense. And in
13 Turkette, it -- with respect to what occurred in
14 Turkette -- and this is at page 5 of my brief, the
15 latter -- and this is a quote from Turkette, and it is
16 referring to a pattern: "The latter is proved by
17 evidence of the requisite number of acts of racketeering
18 committed by the participants in the enterprise."

19 We agree in the abstract that a properly
20 instructed jury, that the pattern and the enterprise are
21 totally different things. The problem is it's a giant
22 circular argued by the government. Juries are not being
23 properly instructed in that regard, and that only
24 compounds the vagueness of the statute.

25 The second point I would like to make: the

1 government presses its principal definition of an
2 enterprise in its brief, and what I hear here from the
3 government is its common purpose. Common purpose. And
4 I would like to direct the Court to the Salinas opinion
5 which discussed RICO conspiracy. It's at 522 U.S. --
6 well, I will give you the -- let's try 118 S. Court 477.

7 It looks like common purpose is the hallmark
8 of a conspiracy. This is in the discussion of a
9 conspiracy: "We rejected argument X because it would
10 erode the common law principle that so long as they
11 share a common purpose, conspirators are liable for the
12 acts of their co-conspirators, which is the Pinkerton
13 doctrine which collapses 1962(c) into a general
14 conspiracy statute, if you are going to define an
15 enterprise principally by virtue of its common purpose.
16 My second point.

17 As far as the claim that somehow we didn't
18 object sufficiently to a charge, I am not going to
19 address that in any depth. I would just direct the
20 Court to pages 97 through 109 of the joint appendix. It
21 -- it spells out exactly what we objected to, and we
22 objected to virtually every sentence of the instruction
23 that defines or purports to define an
24 association-in-fact enterprise.

25 As far as the definition of the enterprise,

1 we would certainly agree with Justice Breyer's
2 formulation that something to differentiate it as a
3 long-term, goal-directed, decisionmaking apparatus that
4 continues in the intervals between the predicate acts
5 would do it, but we contend that structure is largely,
6 it's a plain English word, it's not
7 antidisestablishmentarianism or something like that; the
8 jury should be instructed as in the Seventh and Eighth
9 Circuits that there has got to be a structure separate
10 from the pattern. If the jury has questions, we have
11 lots of faith in district judges, as Justice Ginsburg
12 pointed out; that if the jury comes back with a question
13 the judge could list examples tailored to the
14 appropriate case.

15 And I just want to hit the common -- the
16 purpose underlying RICO here. It's very significant in
17 my view that bank burglaries are not in fact RICO
18 predicate acts, and if you were to look -- if this Court
19 were to look at my court of appeals brief in this case,
20 bank burglary is not a RICO predicate act for a reason.
21 Congress made the judgment that bank burglaries are
22 adequately handled by the States, that the States can
23 prosecute them. And the reason why the three bank
24 burglaries had to be addressed up as interstate
25 transportation of stolen money is this is not really a

1 case in which RICO is properly invoked.

2 It's fully briefed in my court of appeals
3 submission. These are State crimes that a State is
4 perfectly capable -- capable of handling on its own.
5 And unless there are any further questions, I would
6 waive any further rebuttal.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel,
8 the case is submitted.

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

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A				B
abandoned 36:16,21	45:18,19,22	allows 28:12	21:14 24:3,14	awfully 23:7
able 45:8 50:17	46:3,5,6,11,14	amount 10:24	24:22 32:16	a.m 1:13 3:2
above-entitled 1:11 54:10	46:21,21 47:1	analysis 48:17	50:12 52:9	
absolutely 13:16	47:10,11,17	51:6	arises 14:1	
50:20	49:19,21,23,25	anomalies 37:10	15:15	back 11:14 39:7
abstract 48:17	50:1,3,4,17	anomalous	ascertainable	41:20 42:20
51:5,19	51:17 52:12	46:24	7:14 9:9,12,20	53:12
absurd 13:11	53:4,18	answer 6:10,21	10:6 19:24	Bagaric 37:21
accept 14:14	add 6:22	11:14 16:4	24:8 28:23	bank 10:24
account 22:12	addition 5:11	22:14 33:3	36:15 38:3,16	21:17 29:20,21
24:20	additional 31:18	34:17 44:7,12	44:9,14	31:12,13,15
achieve 30:11	address 37:1	ANTHONY	aside 17:16	35:10,17,24,24
48:23	39:20 52:19	1:17 2:5 24:3	asked 9:9	36:3 40:13,15
act 6:17 17:17	addressed 21:13	antidisestablis...	asking 10:3,9	42:16 46:22,22
20:3 24:9	39:22,22 53:24	53:7	aspect 11:12	46:25 53:17,20
25:12 29:21	addresses 25:7	anti-Yugoslav...	34:8	53:21,23
35:20 38:4	adequately	37:25	Assistant 1:17	bare 8:8
40:14 41:11,12	53:22	anyway 37:19	associate 35:4	based 36:12,13
41:13 43:7,8	adjudication	apart 3:15 5:1	associated 14:24	Basically 17:9
46:23 53:20	38:19	5:17 7:10,15	26:17,24 29:10	basis 20:16,17
acting 25:23	adopt 38:15	8:2 15:15 20:2	31:1 32:3,4	46:4
26:9 29:4	adopted 10:16	apparatus 6:12	41:17 49:8	beginning 11:15
30:12 45:9	affairs 17:4	17:3 53:3	associates 24:10	behalf 1:15,19
50:5	27:12 29:15	appeal 9:3	32:8 44:11	2:4,6,9 3:7
actions 25:10	49:11	appeals 4:19	associating	24:4 50:13
32:9	afternoon 19:2	49:2 53:19	35:23	behavior 22:22
activities 15:14	agree 12:1 14:10	54:2	association 6:6	23:13
activity 7:11 8:6	29:12 34:12,18	APPEARAN...	11:4 14:13	behaviors 23:16
27:16 28:12	34:19,22 42:15	1:14	16:12 22:21,23	belief 42:14
29:6,8,14,16	43:9 50:20	appears 5:5 7:13	23:14 25:21	believe 28:10
34:9 40:9 42:6	51:8,19 53:1	7:13 14:25	26:5,24 32:18	48:5,10
42:25 44:2,3,3	agreed 37:24	appellate 9:5	32:19 35:2	Bellafiore 18:13
46:19 49:6	42:11	appendix 5:6,10	36:23 39:4	18:23 21:11
50:22 51:9	agreement	18:12 26:21	48:22 50:6	best 39:17
acts 3:20 5:1 6:6	32:10 43:8	27:1,2,3 47:25	51:3	beyond 9:24
8:3,4,13 10:12	ahead 20:22	48:11,12 49:2	associations	16:11,14,17
11:10 16:20	Alec 15:22	52:20	23:15 48:22	38:14 44:9
17:7 24:16,19	Alito 5:4,8 16:9	applied 9:4	association-in...	bit 18:10 20:21
24:24,25,25	16:16,24 17:8	approach 42:22	14:2,4,7 15:6,8	23:7
25:16,17 27:20	19:1,16,23	appropriate	15:9,16 24:7	bombings 38:2
30:21,23 35:15	20:10 29:12	7:22 8:21	33:1 44:8 46:2	bonding 38:9
35:18,18 36:10	30:4,8 31:10	53:14	50:19 52:24	boss 11:25 12:1
36:17 38:1	31:23	approved 37:16	assume 24:22	bottom 48:14
43:19,23 45:7	alleged 22:4	argued 51:22	authority 14:3	51:1
	45:6	argument 1:12	automatically	box 17:11
	allow 22:24	2:2,7 3:4,6	13:23 14:19	boxes 10:22
	47:20	4:14 11:15,16	available 31:21	Boyle 1:3 3:4

<p>21:10 brain 12:21 13:4 break 10:23 BREYER 22:15 23:3,12,20 26:2,7,14 33:6 33:16,20,25 34:4,11 38:20 39:25 40:4,24 41:9,16,20 42:9,20 Breyer's 53:1 bribe 33:11 34:6 bribery 34:4 brief 6:20 7:6 10:14 11:3 12:10,11 27:4 27:6 29:18 38:18 48:9 51:14 52:2 53:19 briefed 21:12 54:2 briefly 50:15 briefs 16:1 48:2 bring 47:5 brings 17:11 41:2 Brinks 5:24,24 6:14 8:17 broad 24:13 Brooklyn 18:8 18:10 brought 15:5,6 36:1 buddy 41:2 burglaries 21:17 21:18,19 29:20 29:22 35:17,25 36:3 40:13,16 46:22 53:17,21 53:24 burglary 29:21 40:14,17 53:20 business 12:21 13:9,15,24</p>	<p>C</p> <hr/> <p>C 2:1 3:1 call 5:23 13:19 14:6 31:20,21 called 31:21 37:21 calling 13:18 14:1 calls 6:2 31:14 canvas 19:12 capable 54:4,4 capacity 13:21 careful 18:23 carrying 34:15 48:21 case 3:4,10 4:3 4:24 7:12,22 8:21 9:6 11:8 11:17 12:8,20 17:2 21:18 22:14 27:18 29:17 36:7 37:7,9,21 38:7 39:24 40:5 41:9,12 45:2 46:13,22 49:1 49:1 50:24 53:14,19 54:1 54:8,9 cases 15:10 20:6 20:6 27:15 34:25,25 37:21 38:6,14 case-by-case 38:19 catch 33:14 34:6 34:13 category 33:1 caught 18:5 Cedric 30:24 certain 10:24 certainly 11:13 12:4 15:24 16:6 23:1 29:1 53:1 cetera 23:11 change 41:1</p>	<p>changed 22:9 characteristics 11:5 14:18,19 20:11 charge 4:1,7,9 5:10,11 9:16 9:19,22 10:4,9 10:10 12:12 16:22 36:25 37:2,9 48:12 48:13 52:18 charged 11:9 16:16,19 24:16 35:20 36:17 37:18 43:12,12 43:14 46:10,12 49:3 charges 37:3 Chief 3:3,8 8:15 23:25 24:5 27:22 28:8,14 28:19 30:14,18 33:3 35:11 47:3 49:17 50:9 54:7 choose 19:6 circuit 3:18 4:22 15:10 17:2,5 20:7 21:13 28:20,21 circuits 9:4 10:10 16:21 37:16 53:9 circular 51:22 cited 16:1 37:22 claim 4:14 52:17 classic 38:14 clause 12:23 13:1 14:25 26:15 clear 16:10 17:22 42:24 46:1 clearinghouse 17:6 clearly 34:21 closing 34:10</p>	<p>club 18:8,10,16 18:18,23 coherent 8:12 cohesive 17:7 collapses 52:13 colors 38:12 come 39:14 42:20 comes 19:18 33:11 34:6 39:7 48:10 53:12 command 9:2 11:22 Comments 51:1 commerce 49:7 commission 3:19 8:2,12 10:11 16:20 17:17 20:2 44:10 45:21 commit 8:4 17:20 19:3,7 19:19 22:24 23:17 27:9 31:13,15 39:12 40:12,15 43:8 43:15 45:1 50:3 commits 29:19 committed 21:11 24:9 25:18 29:7 38:1 40:10 41:5 45:7 50:17,22 51:9 51:18 committing 35:17,24 42:5 46:5 common 29:11 32:4,22,23 35:5 38:9,9 42:11,15 48:23 50:8 51:2 52:3 52:3,7,10,11 52:15 53:15</p>	<p>companies 39:1 company 41:10 complain 5:13 complaining 5:7 completing 43:12 complexity 19:13 compounds 51:24 comprehensiv... 12:10 concede 11:18 conceding 45:14 conceivable 8:22 11:17 31:7 concept 27:14 concern 39:21 43:5 concerns 35:14 concert 27:18 29:8 30:10 42:6 50:3 conclusive 6:20 condition 6:5 conditions 13:20 13:22 conduct 27:12 29:3,11 32:5 32:23 33:24 35:6 45:8 49:10 50:8 conflates 4:23 conflating 40:5 confused 44:6 Congress 43:11 53:21 connotes 7:14 consideration 3:16 consist 12:17 consistent 12:9 conspiracy 8:7 34:14 39:12 42:12,16 43:5 43:6,6,7,9,12</p>
--	--	--	---	---

43:13,15 52:5 52:8,9,14 conspirators 52:11 constitute 25:1 35:21 construction 24:11 contains 24:13 contend 4:7,11 4:14 5:2 6:7 7:4 8:21 12:3 16:5,18 17:17 53:5 contention 12:14 14:22 context 12:24 14:2 15:2,16 24:11 32:20 33:5 contexts 26:1 continues 53:4 continuing 6:12 7:2,7 8:2,10 17:19 20:18 32:11 33:24 34:8,9 48:23 continuity 13:6 13:20 16:12 34:10 44:1 continuous 30:1 contractor 30:19 controlling 7:4 conveying 8:24 convicted 4:10 coordinating 45:8 coordination 17:6 20:24 core 22:9 corporation 26:4,16 correct 26:6,19 counsel 36:25 54:7 couple 35:12	course 13:8 15:17 27:13 32:5,22 33:13 35:5 38:19 40:1 45:12 50:8 court 1:1,12 3:9 4:14,17,19 5:13,14 9:6 11:16 12:4,13 15:3 18:11 21:13,15 24:6 25:19 26:21 31:2 36:14 37:1,21 38:15 42:24 43:21,24 49:2,3,13 52:4 52:6,20 53:18 53:19 54:2 courts 10:16 39:14 50:21 Court's 24:11 25:21 30:23 32:1 33:23 covered 47:15 co-conspirators 52:12 create 14:8 credited 18:15 crime 5:23 8:17 19:3,18,19 40:9 41:7 crimes 17:21 21:11 22:25 23:17 30:1,2 30:12 32:24 33:21 35:8,9 39:12 43:13 44:10 45:1 47:5 54:3 criminal 8:7 13:15 15:5 29:11 33:24 34:15 40:15 41:13 43:23 44:1,3,3 46:3 46:20 47:2,10	47:11 criminality 22:4 Croatia 37:24 crux 20:25 <hr/> D <hr/> D 3:1 date 11:11 day-to-day 13:5 deal 38:24 39:18 dealing 27:25 decade 35:9 December 11:11 decide 19:3 39:2 decision 7:14 13:20 30:24 32:1 33:23 decisional 6:11 decisional-ma... 8:10 17:3 decisionmaking 8:11 13:5 53:3 decisions 12:2 deemed 31:7 defendant 4:10 25:18 27:8,9 27:11,16,17 41:8 49:8,10 50:2 defendant's 3:10 defense 23:1 defer 9:6 deference 9:3 11:22 define 14:4 49:14 51:10,11 52:14,23 defined 47:17 defines 52:23 definition 8:5 13:1 21:25 23:19,22 24:12 26:3 48:2 52:1 52:25 definitively 22:14	degree 6:15 19:13 20:14 democratic 12:1 19:2 21:6 Department 1:18 depends 44:13 deposit 10:22 depth 52:19 derived 36:9 described 17:9 17:14 21:23 determination 3:11 difference 37:17 37:20 different 19:6,8 19:8,20,20,21 29:23 34:12 37:14,16 39:3 39:25 49:19,20 51:21 differentiate 53:2 difficult 13:18 32:14,16,17,18 32:21 34:20 38:3 44:17 difficulties 16:23 direct 18:11 26:20 52:4,19 directed 6:14 11:16 directional 6:12 8:10 17:4 directions 6:23 directly 7:4 32:2 directs 28:1 discussed 37:5 52:5 discussion 52:8 dispense 32:25 dispute 11:13 disputes 50:15 distinct 3:16 15:13 24:8	25:7,25 27:14 28:9,23 32:23 36:17 38:4 46:13 50:18 distinctiveness 31:3 33:5 distinctly 14:9 distinctness 15:1 distinguish 20:9 district 36:14 49:3,13 53:11 diversity 22:4 division 11:1 doctrine 52:13 doing 11:2 13:24 14:7 19:8 35:23 40:22 42:3,6,10 dozens 35:9,10 35:24 dramatically 22:10 drug 16:8 drug-type 16:3 duplication 3:14 D.C 1:8,18 <hr/> E <hr/> E 2:1 3:1,1 early 11:12 easy 9:5 27:23 27:25 EDMUND 1:3 effect 6:24 effort 38:22 39:17,17,19 efforts 34:12 Eighth 10:10 16:21 28:20 53:8 either 4:21 29:5 34:8 element 3:12 27:7,9,19 28:3 28:6 31:23 38:10 40:9,19
--	--	---	---	--

<p>40:25 41:7,7 42:5,7 43:3,16 43:18 49:15 50:2,18 elements 3:15 4:23 13:15 15:14 27:10 39:24 40:2,5 43:10 49:4 embraces 27:13 employed 20:15 26:24 31:1 employee 30:19 enable 44:24 enacted 13:13 encapsulate 50:24 encapsulates 50:25 engaged 49:6 engages 13:9 29:13 engaging 29:11 32:4,22 35:5 English 53:6 ensure 3:15 entails 23:10 enterprise 3:13 3:16,18 4:2,6 4:24,25 9:19 11:9,10,21 13:22 14:2,5,7 14:11,12,14,16 15:2,7,8,9,16 16:7 17:4 19:9 22:7 24:7,13 24:15,18,23 25:1,24 26:3 26:12,23,25 27:13,14 28:13 28:13,25,25 29:16 30:3,16 30:20,22 31:1 31:3,6,7,18 32:14,20 34:24 34:24 41:17,25 42:2,8,25 43:1</p>	<p>44:8 46:2,13 47:17,24 48:3 49:5,6,11,14 49:14,15,17,18 49:22,22,25 50:19 51:10,18 51:20 52:2,15 52:24,25 enterprises 34:25 entire 5:9 36:25 entirety 5:11 12:13 entity 5:16 7:9 7:12 12:23,25 14:24 26:5,10 26:15,18 32:10 36:7,19 erode 52:10 error 4:1 5:4,6 5:13 espouses 38:5 ESQ 1:15,17 2:3 2:5,8 essential 3:11 22:24 establish 16:13 24:23 29:5,25 30:3 39:23 40:1 41:25 established 29:24 42:25 establishing 16:7 et 23:10 evade 19:15 Eventually 49:9 evidence 4:2,5,9 4:12,15 6:25 11:18 17:19 18:1,20 22:2 27:17,20 28:11 29:4,6,9 31:18 32:6 39:23 40:1 41:3,4,7 42:3 45:20 49:24 50:5</p>	<p>51:17 evolved 37:6 exactly 52:21 example 18:21 18:22 29:18 33:8 39:1 examples 10:14 10:15,19 12:9 38:17 53:13 excerpts 5:9 exclude 46:25 excuse 27:3 46:22 48:11 exegesis 7:5 exhibited 38:25 exist 21:23 40:7 46:2 existence 5:1 7:15 8:2,12 17:7 20:13 24:24 28:13 49:5 51:2 existing 7:10 22:7 exists 42:1 43:6 50:1 explain 47:23 explained 18:7 25:19 31:2 32:6 35:3 37:1 42:24 49:13 extant 9:2 extend 34:2 extended 34:3 extends 8:7 extensively 21:12 extent 46:17 extortion 38:1</p>	<p>31:17 32:3,18 32:19 35:2,11 35:23 36:24 42:2 45:5 46:21 47:24 50:7 51:3 53:17 factors 7:7 facts 8:23 12:8 22:13 25:9 fails 24:19 failure 5:5,13 faith 53:11 fall 38:14 41:17 false 39:7,8 far 52:17,25 feel 26:8 Fernich 1:15 2:3 2:8 3:5,6,8,21 3:22 4:4,11,18 5:8 6:7,15 7:3 7:21 8:1,20 9:13,17,23 10:2,8 11:6 12:3,8,22 13:11,25 14:12 14:21 15:21,24 16:15,18,25 17:15 18:1,9 18:19 19:10,22 19:25 20:13 21:3,8,21 22:1 23:1,9,18,21 24:1 50:10,12 50:14 figure 19:14 22:17 34:20 find 8:22 11:21 16:17 20:4 22:8,13 25:8 28:4,15 39:11 45:12,12,14,17 45:18,19,20 46:12 47:9 48:2 49:4,14 50:17 finding 11:20,22</p>	<p>findings 9:1,2,6 13:20 first 4:13 6:8 10:8 11:6 12:23,25 14:25 24:17 25:5,14 26:3 33:11 39:20 40:6 fit 17:13 38:3 five 39:6 49:4,9 flows 32:1 focus 11:8 focused 12:11 focusing 50:22 footnote 42:23 foreign 49:7 forget 25:4 48:16 formal 7:1 14:17 17:18 24:17 25:8,14 32:7 48:20 formed 36:20 forming 3:20 5:2 forms 23:13 46:4 formulas 37:14 37:15 formulation 46:9 53:2 forth 5:22 12:25 47:16 found 11:9,10 21:9,17,18 22:3,6 35:12 35:21 four 20:22 41:11 50:10 frame 22:3 framework 48:20 Friday 19:2,11 friend 35:11 fully 25:23 54:2 function 17:6 32:8 43:2,2</p>
<p>F</p>				
<p>fact 13:21 14:14 14:18,24 16:11 16:12 18:15 21:16 24:20 25:19 26:17 28:17 29:10</p>				

48:23 functional 38:24 38:25 functionally 4:23 functioning 13:4 funds 35:19 46:24 further 23:23 51:7 54:5,6	53:3 goes 5:21 9:24 25:3,15 42:7 48:18 going 5:23 10:20 16:6 17:24 19:3,14 20:19 20:20 21:14 32:11 37:1 38:18 39:3,5 41:20 47:9 51:10 52:14,18 gotten 31:19 government 31:17 46:15 48:19,25 50:19 51:22 52:1,3 government's 26:1 gray 27:6 great 14:2 16:1 33:8 group 5:20,24 5:24,25 6:1,2 9:20 14:23 18:4,7 20:11 21:6 24:18 25:9,10,18,20 26:17,23 29:10 29:23 32:2,3 32:12 35:4,16 35:22 37:24 38:8 40:11,22 41:6 45:6,9 46:4,19,25 47:1 guard 17:10 guess 31:16 32:15 44:13 guide 17:3 Guinness 15:22 guys 6:2	hang 18:16 hangs 18:4 happens 31:21 33:10 34:5 41:6 hard-pressed 11:23 hear 3:3 52:2 heard 39:16 heist 17:25 heists 35:10 help 39:13,15 helped 42:13 hierarchical 12:4,14,14 16:3 hierarchy 9:10 9:12,21 10:6 11:25 16:9 36:16 38:11 44:19,19 high 20:7 Hill 15:20,23 hit 53:15 hoe 14:16 home 17:2 Honor 3:22 4:5 4:20,22 6:10 7:3,22 9:11,24 10:5,8 11:6,14 12:22 13:25 14:22 15:21 16:15 18:2,9 20:5 21:3,8 50:14 Honors 50:8 Honor's 17:1 23:18 hook 17:11 hurdle 20:7,8 hypothetical 6:10 8:16 20:5 20:21 41:21 hypotheticals 46:4 H.J 25:19 33:23 34:2 43:21,25	<hr/> I <hr/> idea 33:9 identity 30:11 32:12,13 illegal 33:13 illicit 15:6 illustrates 38:18 implications 13:10 implicit 7:6 implies 20:15 important 11:8 15:3 35:16 imported 6:18 impromptu 20:16 inchoate 43:6 incident 17:16 include 9:16 15:18 47:1 included 5:10 17:24 including 49:5 inconsistent 36:21 incorrect 3:25 independent 3:11,17 30:18 independently 42:1 individual 6:16 12:18,20,21,22 12:25 13:9 14:4,6,11,17 14:20,25 15:7 25:18,23 26:2 26:4,8,9,11 27:24 29:4,7 29:13,19,24 30:10,12,15,15 30:21,22,25 31:4,5 33:2 40:16,18,19,19 41:1,4,5,11,13 41:14,22,24 50:5,18,23 51:5	individuals 11:5 14:23 24:18 25:9,11 26:17 29:10,22,23 31:19 32:2 35:22 40:10,12 44:24 50:7 51:9 individual's 27:19 29:2 infer 25:10,11 28:12,25 45:5 45:8 47:17 49:15 inference 48:16 infiltration 13:14 informal 7:1 32:7 36:22 48:21 ingredients 8:14 inherent 6:16 8:6 20:2 44:9 initiation 38:12 insofar 6:13 inspector 34:5 instance 6:8 10:13 27:11 40:11,12 46:3 46:19 instruct 47:14 instructed 3:17 4:25 6:9 8:22 8:25 11:20 20:1,3 22:6,13 28:15 50:16 51:20,23 53:8 instruction 3:24 3:25 5:5,14 7:11 11:17 12:6 28:20,22 47:21 48:7 50:23 52:22 instructions 13:19 16:22 insufficient 4:2 4:5,12,15
<hr/> G <hr/> G 3:1 gang 15:19 16:8 17:10,15 19:1 gangs 15:25 16:3 38:7 garden-variety 42:16 general 1:18 52:13 gentlemen 45:17 Gerard 18:13 getting 20:16,23 giant 51:21 gilding 18:24 Ginsburg 3:21 3:23 4:8,16 7:17,24 9:8,14 9:15,18,25 10:3,18 15:18 15:22 18:3,17 21:1,4,20,22 37:12 53:11 give 3:16 5:5 10:14 16:22 28:21 37:13 52:6 given 3:25 4:9 7:12 10:10 12:13 14:18 40:16 gives 10:4 go 4:3,6 7:5 11:14 25:6 33:1,9 43:25 goal-directed	<hr/> H <hr/> hallmark 52:7 handled 53:22 handling 54:4			

<p>intended 47:5 Interestingly 44:4 interpolate 6:22 interpretation 26:1 37:11 interstate 35:19 35:25 40:20 46:23 49:7 53:24 interstate-co... 13:10 intervals 53:4 intimidating 38:10 investment 39:1 41:10 invoked 54:1 involve 35:18 38:19 involved 26:9 35:9 37:23 38:8 47:7,16 involves 35:1 involving 38:6 irreducible 12:15 issue 4:21 7:5 22:25 23:17 25:16 35:16 36:6 39:2,8 42:18 45:13 issues 4:21 i.e 11:20</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jail 18:6 January 1:9 11:12 job 5:24,24 6:14 8:17 17:24 joined 32:21 50:7 joint 5:6,10 18:12 27:2 48:12 52:20 judge 9:10,16</p>	<p>10:4,13 53:13 judges 53:11 judgment 5:3 53:21 juries 3:17 51:22 jury 3:11,24 4:3 4:6,9,13,24 5:9 6:9 8:22,24,25 9:8,11 10:5,12 11:8,11,16,19 13:19 16:17,21 18:15 19:10,22 19:25 20:3 21:9 22:3,6,8 22:12 27:23 28:3,12,18,25 29:1 35:12,21 36:3,5 45:4,11 45:11,12,13,15 45:17 46:11 47:14 49:3 50:16 51:20 53:8,10,12 jury's 9:6 Justice 1:18 3:3 3:8,21,23 4:8 4:16 5:4,8,19 6:13,18,21 7:17,24 8:15 8:16 9:8,14,15 9:18,25 10:3 10:18 11:24 12:5,16 13:2 13:16 14:10,13 15:18,22 16:5 16:9,16,24 17:8,9,22 18:3 18:17 19:1,16 19:23 20:10 21:1,4,20,22 22:15 23:3,12 23:20,25 24:5 24:21 25:4,13 26:2,7,14 27:1 27:5,22 28:8 28:14,19 29:12</p>	<p>30:4,8,14,18 31:10,23 32:15 32:25 33:6,16 33:20,25 34:4 34:11 35:11 36:2,6,9 37:12 38:20 39:25 40:4,24 41:9 41:16,20 42:9 42:20 44:5,15 44:21,25 45:3 45:10,16,24 46:8 47:3,13 47:20 48:1,6 48:14 49:17 50:9,24 53:1 53:11 54:7 Justice's 33:4 justify 45:20 J.A 36:15,25 37:2 49:1 51:2</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keep 3:15 22:22 23:14 keeps 33:16 Kennedy 6:18 17:9,22 47:13 47:20 48:1,6 48:14 50:24 kept 15:15 killing 38:10 kind 13:9 20:24 20:24 32:6 37:6 43:24 knit 37:24 38:6 know 3:24 18:15 19:6 23:3 25:11 28:1,2 31:20 33:7 37:2,13 39:5 44:6 45:24 knowingly 49:10 knowledge 16:23 18:2 knows 4:20</p>	<p>Kushner 30:24</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>labor 11:1 lacking 30:8 ladies 45:17 language 5:12 14:3,6 32:2 largely 35:16 53:5 late 11:11 Laughter 45:25 laundry 38:17 Lavender 15:20 15:23 law 15:9 42:12 52:10 lawful 34:25 leader 21:5,25 leadership 22:10,11 leave 46:16 legal 12:23,25 14:12,24 26:5 26:9,14,18 46:20 legally 4:12,15 11:18 legal-entity 15:2 legitimate 13:14 lengthy 7:5 letter 39:2,6,8 41:10 let's 15:18 20:21 31:20 33:9 40:11 41:2 46:4,14 52:6 liability 30:22 liable 43:7 52:11 lily 18:25 limitation 24:13 limiting 43:20 line 15:10 lines 40:21 41:23,24 list 11:3 19:5 31:10 38:17</p>	<p>43:19,24 53:13 litigation 36:12 little 18:10 20:21 23:7 36:11 long 21:14 29:5 29:19 30:1 35:7,23 38:13 38:19 40:12 45:5 52:10 longevity 10:20 10:25 11:12 long-term 44:1 44:2 53:3 look 19:5,17 46:10 47:5 48:15 53:18,19 looked 41:23 looking 6:19 11:3 47:6 lookout 17:23 lookouts 11:2 47:16 looks 52:7 look-out 10:22 loosely 37:24 38:6 losing 32:16 lost 44:18 lot 6:3 22:4 47:4 lots 53:11 low 20:8 lower 10:16 21:12 50:21 lunch 6:3</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>main 8:13 making 13:21 man 21:2 Mangia 21:2 Mangiavillano 21:3,10,16,24 manner 27:11 MARC 1:15 2:3 2:8 3:6 50:12 materials 48:2</p>
--	--	--	--	---

matter 1:11 13:8 15:9 24:18 25:8 39:23 43:1 54:10	missing 31:24 mob 12:1 15:20 15:23 modus 10:25 money 19:20 33:9 40:16,20 41:22,24 42:17 53:25	non-racketeer... 46:20 normal 43:13,14 note 15:3 noted 48:8 number 10:15 43:23 51:17 numerous 25:25 N.Y 1:15	opening 12:10 operandi 10:25 operated 45:6 operating 10:21 opinion 4:20 25:22 52:4 opportunities 20:16 oral 1:11 2:2 3:6 24:3 order 6:1,21 16:13 32:9 47:9 48:7	partially 47:2 participants 51:18 participate 31:12 participated 49:10 participates 27:12 participating 29:15 particular 22:25 23:17 34:1 36:20 particularly 44:18 partnership 26:4 pattern 3:12,14 3:20 4:24 5:2 5:17 7:10,16 8:5 15:13 16:13,21 24:16 24:19,20,24 25:16,17,20,22 27:10,16,19,20 28:6,12,23 29:1,2,2,3,6,7 29:14,16,25 33:19 34:21 35:21 39:13,13 40:8 41:5,18 41:23 42:1,5 42:24 43:16,18 43:22 46:10,12 49:11 50:22 51:11,11,16,20 53:10
mean 5:19 7:18 7:18,20,21 9:11 10:4,6 12:1 16:24 28:2 39:10 44:13,14,23 45:23 48:6 49:18	months 30:2 34:5 35:13 42:17 movie 15:22 multiple-cons... 21:14 multi-talented 19:4 murder 38:2 M.O 30:1	<hr/> O <hr/> O 2:1 3:1 object 39:10,10 52:18 objected 5:10 12:12 52:21,22 objection 4:17 36:13,14,19,24 49:18,23 objections 37:3 37:4 objective 48:24 objectives 48:21 occasions 31:11 occurred 45:18 47:15 51:13 occurring 22:18 offense 3:12 43:10 49:4 offenses 28:9 34:15 43:15,15 office 33:10 oftentimes 51:3 Oh 13:16 14:10 15:24 25:4 36:4	operating 10:21 opinion 4:20 25:22 52:4 opportunities 20:16 oral 1:11 2:2 3:6 24:3 order 6:1,21 16:13 32:9 47:9 48:7 organization 6:16,23 7:1,7 7:19 11:4 12:17 17:18,19 21:23 32:7 35:1 37:22 40:15 45:21 47:7,9 48:20 outside 22:2 38:15 overdrawn 18:11 overestimated 43:16 overextending 39:11 overseeing 17:6 overt 43:8 owned 18:18	participated 49:10 participates 27:12 participating 29:15 particular 22:25 23:17 34:1 36:20 particularly 44:18 partnership 26:4 pattern 3:12,14 3:20 4:24 5:2 5:17 7:10,16 8:5 15:13 16:13,21 24:16 24:19,20,24 25:16,17,20,22 27:10,16,19,20 28:6,12,23 29:1,2,2,3,6,7 29:14,16,25 33:19 34:21 35:21 39:13,13 40:8 41:5,18 41:23 42:1,5 42:24 43:16,18 43:22 46:10,12 49:11 50:22 51:11,11,16,20 53:10
meaning 3:17 34:2 means 12:24 16:25 19:3,12 19:21 22:20 24:10 45:9 meant 21:20,22 23:16 mechanism 6:12 8:10 13:5 17:4 meet 6:3,5 34:8 meetings 19:11 20:14 meets 18:7 member 51:5 members 8:3 18:17 44:10 45:6 48:22 membership 22:9 mere 24:23 45:21 merely 5:8 merges 24:15 met 12:20 13:23 42:11 mind 19:18 22:16 23:4 minimum 7:25 8:1,8 12:15 minute 11:18 minutes 50:10 miscommunic... 26:20 misread 50:21	<hr/> N <hr/> N 2:1,1 3:1 name 21:2 Nascimento 38:7 National 37:22 nationalists 37:24 necessarily 23:10 28:7 necessary 8:4 13:19 17:16 23:16,16 28:21 41:3 43:9 47:23 49:15 necessity 16:6 need 4:25 9:20 11:24,25 24:7 needs 5:22 16:11 16:12,14,16 34:23,24 49:24 neighborhood 38:7,8 never 21:11,13 31:21 New 1:15 newsstand 13:3 nitty-gritty 11:7	Oh 13:16 14:10 15:24 25:4 36:4 okay 5:24 21:21 33:11 46:18 once 42:11 44:18 one's 32:9 ongoing 6:11,23 7:1,7 8:2,9 17:3,19 20:13 28:2 32:6,8 48:20 open 29:1 38:23	overdrawn 18:11 overestimated 43:16 overextending 39:11 overseeing 17:6 overt 43:8 owned 18:18 <hr/> P <hr/> P 3:1 page 2:2 5:5 6:19 25:21 26:21 36:25 48:5,9 49:2 51:14 pages 10:14 18:12 48:12 52:20 parallel 30:11 part 19:16 26:3 26:20 partial 43:3,4	participated 49:10 participates 27:12 participating 29:15 particular 22:25 23:17 34:1 36:20 particularly 44:18 partnership 26:4 pattern 3:12,14 3:20 4:24 5:2 5:17 7:10,16 8:5 15:13 16:13,21 24:16 24:19,20,24 25:16,17,20,22 27:10,16,19,20 28:6,12,23 29:1,2,2,3,6,7 29:14,16,25 33:19 34:21 35:21 39:13,13 40:8 41:5,18 41:23 42:1,5 42:24 43:16,18 43:22 46:10,12 49:11 50:22 51:11,11,16,20 53:10 patterns 51:8 people 5:20,22 10:23,23 11:1 11:2 22:21 26:8 29:15 31:11 33:6,6 34:15,20 35:4 39:3,4 41:2 42:4

perfectly 54:4	8:23 22:1 25:2	presses 52:1	12:24 13:3	51:15
perform 17:24	25:14,15 36:17	pressing 4:13	26:10,12	quoted 50:24
19:8	38:23 51:25	presumably 9:1	prosecute 53:23	
performed	52:16	46:11	prosecution	<hr/>
25:20	pointed 53:12	pretty 17:22	15:5 37:17	R
period 19:7	policeman 33:10	27:25 39:13	prosecutions	R 3:1
20:18 21:2	pool 18:22	prevail 37:8	16:2	racketeer 35:8
22:5,10 29:5	portion 14:25	prevent 13:14	protected 38:8	racketeering
33:12 34:3	posited 6:10	primary 4:6	prove 27:21	3:13 5:1,18
35:12,24 38:13	20:5	13:13 24:14	28:1 32:9,17	7:11,16 8:6,13
39:6 45:5 46:7	position 13:18	principal 5:12	32:19 48:19,25	15:14 17:17
47:15	Posner 38:25	52:1	49:25	24:9,16 25:16
permissibly	41:12	principally 4:13	proved 27:17,20	27:10,16 28:24
22:12	post 33:9	8:24 51:10	51:16	29:6,8,14,16
perplexed 36:12	postal 34:5	52:15	proven 6:25	30:23 33:19
person 17:10,11	practical 37:14	principle 52:10	51:3	35:15 36:18
17:12,23 26:23	precise 16:22	prison 21:7	published 4:20	38:4 40:8,14
27:25 32:13,19	precisely 5:20	probably 19:15	pull 17:11	41:5 42:6,25
32:21 42:10,13	17:13	20:3 38:21	purports 52:23	43:19 45:7
persons 32:3	predicate 3:20	probative 7:23	purpose 13:13	46:5,11,14,19
person's 17:12	6:6,17 8:3,4	problem 14:1	29:11 32:4,22	46:21 47:2,11
pertaining	10:12 11:10	15:1,12 16:7	35:5 52:3,3,7	49:12,25 50:4
28:22	16:20 17:7,20	34:13,13,20	52:11,15 53:16	50:17 51:8,17
pertinent 25:25	24:9 29:21	38:24,25 39:18	purposes 27:7	raises 35:15
petition 48:11	35:14,17,18,20	39:21 40:4,7	31:8	51:7
Petitioner 1:4	36:10 38:4	42:10 50:21,25	pursue 50:7	raising 37:4
1:16 2:4,9 3:7	40:14,21 43:19	51:8,21	put 5:25 18:5	ranging 11:11
37:7 38:5	44:10 45:18,19	problems 14:8	puts 13:17	react 22:16
50:13	45:22 46:5,6	project 20:22	puzzled 10:5,12	reactions 22:19
petitioners	46:14,23 47:1	prominently	p.m. 54:9	read 26:7
46:10,17	49:19,21,23,24	17:1		readily 51:3
Petitioner's	50:1,3,4 53:4	promote 37:25	<hr/>	really 37:17
24:14 37:11	53:18,20	proper 4:8	Q	43:20 44:5
38:17	predicated	properly 6:9	qualify 7:25	53:25
phrase 14:23	36:17	8:22,25 11:20	18:24	reason 5:2 25:3
pick 8:16	predicates 19:5	19:25 20:3	quarrel 15:25	25:7 53:20,23
picks 31:14	40:23	22:6,13 50:16	question 4:1 6:8	reasons 24:17
Pinkerton 52:12	premise 25:19	51:9,19,23	6:11 8:25 16:5	rebuttal 2:7
plain 14:3,5	preponderance	54:1	22:14 23:18	50:12 54:6
53:6	16:2	proposed 37:2	26:13 33:4	recognized 15:4
plan 28:2	present 10:19	44:17	44:7 53:12	36:22 43:21
planning 20:18	presented 44:7	proposition	questions 9:11	record 18:2,3,20
playing 39:15	preserved 4:18	15:25 34:23	23:23 53:10	18:22 21:9
please 3:9 10:7	4:21	50:16	54:5	refer 48:7
24:6	president 7:19	propositions	quite 21:6 34:11	referring 51:16
plus 43:19	press 12:13	14:15	44:7	regard 51:23
point 4:6 6:21	14:21,22	proprietorship	quotation 6:19	regarding 28:11
			quote 18:15	regimented 16:4

<p>16:8 regular 19:11 20:14,17 regularly 18:7 regulations 23:10 reiterates 48:9 rejected 52:9 related 33:21,22 43:22,23 relatedness 29:25 relationship 25:11 44:23 relatively 9:5 relevance 31:8 relevant 5:9 24:20 25:16 27:7 40:8 remaining 50:11 remains 25:25 remember 13:5 rendered 24:15 repeated 36:18 replace 18:6 reply 10:14 11:3 12:10 38:18 reported 16:23 reproduces 26:21 requested 9:19 9:22 12:6,7 requesting 5:11 require 5:14 required 5:15 16:10 31:25 requirement 7:8 9:4 10:17 20:12 22:17 30:25 35:3 38:16 requirements 12:19 13:7 20:4 requires 3:19 5:16 33:18 43:22</p>	<p>requiring 13:19 requisite 51:17 requisites 8:9 reserve 23:24 respect 4:7,20 27:24 31:5 37:11 51:13 respectfully 8:20 9:23 Respondent 1:19 2:6 24:4 responding 24:22 rest 23:24 result 13:12,12 37:16 results 37:14 Riccobene 17:2 17:5 RICO 3:12 16:2 19:5,12 20:23 21:18 25:17,25 31:8 33:13,18 34:17 35:18 37:17 38:15 39:9,11 40:18 40:21,23 41:18 42:14,18 43:9 43:10,15,15,18 43:20 44:8 47:4,15 49:4 52:5 53:16,17 53:20 54:1 RICO's 24:10 24:12 right 3:10 11:7 18:18 26:10 27:5 34:11 37:8 42:9 44:21,25,25 46:8,9 50:20 rights 38:12 ringleader 5:21 rivals 38:10 rob 42:16 robberies 29:20 31:12 46:22,25</p>	<p>robbery 29:21 31:13,15 ROBERTS 3:3 8:15 23:25 27:22 28:8,14 28:19 30:14,18 35:11 47:3 49:17 50:9 54:7 roles 19:8,21 rolodex 31:14 row 14:15 rule 4:12,23 11:19 43:13,14 rules 22:21 23:10,13,15 ruling 23:2 running 21:4</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 52:6 safecracker 5:21 Salinas 15:4,4 52:4 satisfied 8:19 13:8 14:19 20:4 21:24 satisfy 20:12 34:10 saying 4:1,8 14:16 27:24 29:19 says 5:23 6:25 6:25 7:2 10:11 15:11 33:8,10 33:11 39:7 Scalia 5:19 6:13 6:21 11:24 12:5 24:21 25:4,13 27:1,5 36:2,6,9 44:5 44:15,21,25 45:3,10,16,24 46:8 Scalia's 8:16 16:5</p>	<p>scanner 17:13 scanners 47:16 scenario 15:7 Scheidler 37:23 score 50:20 scouts 17:12 se 12:4 second 4:22 21:13 24:19 25:3,7,15 26:15 40:6 51:25 52:16 Secondly 43:5 section 7:13 26:22 41:8 see 38:23 45:4 47:10 48:15 sees 34:14 sense 37:13 46:16 47:4 49:20 51:2,12 sensible 23:4,19 23:21 sent 21:7 sentence 52:22 separate 3:13,19 5:1,17 6:6 7:10 7:15 8:1 10:11 15:15 16:19 20:1 24:24 28:3,6 39:24 40:2 42:7,23 43:13 45:21 49:4 53:9 separately 11:21 28:15 series 24:19 25:9 32:23 35:7 37:25 38:1 40:13 49:21,22 set 12:25 13:2 14:8 40:6,6 sets 35:8 Seventh 3:18 10:10 15:10 16:21 20:7 28:20 53:8</p>	<p>share 52:11 shoot 18:22 show 21:5 24:12 28:24 30:9 31:17 32:12,14 32:21 33:24 34:21 41:4,6 42:2,3,4 46:15 47:12,24 49:24 50:1,4,6 showed 41:4 showing 12:20 27:7 shown 16:11,13 16:14 29:3 32:5 34:23 35:3 36:2,4 39:3,5 shows 29:7,9 41:3 side 44:18 significant 11:22 53:16 similar 48:20 simple 34:14 simply 12:20 13:23 15:1 33:1 35:4 36:9 44:8 single 40:5 44:2 sitting 20:17 situation 29:13 skill 10:24 Social 18:8,10 sole 12:24 13:3 26:10,12 solely 51:10 Solicitor 1:17 somebody 13:24 somebody's 19:18 soon 43:7 sophisticated 19:12 sophistication 19:13 20:14,24 sorry 9:13 15:21</p>
---	--	--	---	---

27:4 32:18	strongly 23:17	24:15	thefts 47:14	53:25
sort 8:12 13:17	structural 9:10	supplement	thing 5:25 19:20	transported
20:15	9:12,21 10:6	48:7	23:4 27:23	40:20
sounds 19:10	15:12 20:12	suppose 5:20	43:2	transporting
SOUTER 12:16	36:16	9:10 19:1 33:7	things 11:2	41:22
13:2,16 14:10	structure 3:19	supposed 17:23	20:18 33:19	treasurer 7:19
14:13 32:15,25	5:17 7:8,15,17	33:14	36:4 40:22	trial 4:17
speaks 26:3	7:25 8:9,23 9:2	Supreme 1:1,12	47:7 51:21	trouble 23:5
specialists 10:22	9:4 10:11,16	sure 4:11 5:12	think 3:24 7:6	true 18:19
specific 5:12 8:8	12:14,15 13:20	6:7 7:3 9:17	7:18 14:15	try 19:15 22:15
23:8 37:3	15:13 16:19	11:15 12:12,12	15:8 16:10	34:12 39:17
specifically 3:12	17:15 19:24	13:25 22:8,11	23:10,11 25:7	42:22 52:6
10:7,9 14:22	20:1,8,10	34:7 44:6	26:19 28:10,21	trying 22:17
26:16 49:3	21:25 22:17,20	surely 7:14,22	29:17 32:1	23:4,7 38:22
specifying 12:19	23:5,6,9,9,11	surrounding	34:14,17,22	Turkette 5:15
spelled 10:13,15	23:19,22 24:8	24:11	37:8 38:16,20	6:19,24,25 7:4
12:9 17:2	28:23 36:20	swath 15:17	38:21,22,24	7:8,14 22:9
spells 52:21	37:11 38:2,3		43:16,21,25	32:1,6 35:4
square 14:5	38:16 39:15	T	45:14,19	36:21 39:21,22
squares 13:12	43:20 44:9,14	T 2:1,1	Third 17:5	42:23 46:1
stage 36:12	44:23,23 51:6	tailed 53:13	thought 22:18	48:10,11 50:21
standard 48:10	53:5,9	take 17:1 19:16	30:14,15	51:13,14,15
State 40:21	structured	22:12 23:2	threat 34:9 44:3	turn 37:10
41:22,24 54:3	11:21 16:7	33:9 37:15	three 9:21 11:10	turns 41:8
54:3	structures 16:4	39:14 40:11	20:22 21:18	twice 7:13 31:22
statement 39:7,9	stuff 6:4	41:19 46:3,19	24:17 34:5	42:12
states 1:1,6,12	submission 54:3	taken 12:2	35:20 37:15	twist 20:21
3:4 5:15 26:22	submitted 54:8	takes 24:25	47:14 49:7	two 4:23 14:15
53:22,22	54:10	talk 14:18	53:23	15:14 30:12
statute 13:13	substantial 9:3	talked 8:18	thrust 11:15	33:6,6,20,21
14:6 15:1	substantive	talking 3:23	thugs 38:7,8	33:21,25 34:15
19:13,15,17	43:10	26:14,15 44:22	time 8:7 15:20	37:4 39:1,3,12
20:25 24:12	subversion	task 9:5	19:7 20:18,23	40:1 41:2
25:15 47:18	13:14	tell 10:7 34:18	21:23 22:3,7	42:23 44:2
48:3,4 51:24	suddenly 42:12	42:21 45:11,11	22:10,23 23:14	49:5
52:14	sue 41:10	tend 22:22 23:14	23:24 27:23	type 18:16 27:20
statutory 24:10	sufficient 11:19	term 24:14	29:5,22 34:3	types 47:7
35:3	sufficiently	44:20	35:24 38:13	typical 16:2
steady 18:4	52:18	terms 37:6 48:4	45:5	
stolen 35:19	suggested 48:8	test 17:1	times 19:9 41:11	U
53:25	suggesting 4:4	testimony 18:9	told 45:13,16	ultimately 49:24
straight 25:15	suggests 51:2	18:13,14,14	totally 51:21	unanimously
street 15:19,25	superfluidities	21:8,10	tough 14:15	12:2
16:3 33:7	43:3	text 24:10	transport 42:17	uncharged
strict 16:6	superfluidity	textual 7:5	transportation	46:16
string 29:19	43:4	Thank 3:8 23:25	35:19 36:1	underlying 28:9
30:2 40:12	superfluous	50:8,9,14 54:7	40:20 46:24	39:21 53:16

<p>understand 10:5 44:17 understandable 44:20 understandings 22:22 23:13,15 unequivocally 7:9 union 14:23 26:16 unique 10:21 unit 7:7 8:11,11 32:8,11 45:6 48:23 United 1:1,6,12 3:4 5:15 universe 23:6 unlawful 26:22 35:1,1 urge 31:13 use 16:21 U.S 52:5 U.S.C 5:16</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 5:15 vacated 5:3 vague 23:7 39:13 vagueness 51:7 51:24 valid 15:9 variety 13:22 various 6:22 31:11 48:22 49:19 verdict 11:7 versus 25:9 47:11 view 53:17 violate 34:17 violation 27:8 40:18 virtually 13:8,23 15:4 52:22 virtue 51:11 52:15</p>	<hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 24:21,21,21 24:21,22 waive 54:6 walk 33:7 want 19:19 31:11 39:19 53:15 wanted 9:16 wants 37:9 Washington 1:8 1:18 wasn't 18:24 21:6,20 way 10:21 13:24 18:14,24 25:12 37:19 39:11 43:1 ways 42:23 43:23 weak 39:16 wedded 22:19 Wednesday 1:9 weekend 19:4,6 19:19 20:19,20 weeks 20:22 weight 14:3 went 35:9 37:4 38:12 we'll 25:4 33:11 we've 37:5,6 wheelman 5:22 wholly 25:25 27:13 40:15 46:3,20,24 47:2 wide 15:17 witness 18:13 witnesses 38:11 Women 37:22 word 7:12 23:5 23:11 39:15 43:4 53:6 words 6:22 9:8 9:15,21 43:3 work 23:4 25:23 31:20 50:3</p>	<p>working 27:17 30:10 written 37:3 wrong 24:16,17 25:22,24 39:19</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7 52:9</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yang 1:17 2:5 24:2,3,5 25:3,6 25:14 26:6,11 26:19 27:3,6 28:5,10,17,22 29:17 30:6,9 30:17,20 31:16 31:25 32:17 33:3,15,18,22 34:1,7,22 35:14 36:4,8 36:11 37:13,20 39:20 40:3,7 40:25 41:15,19 41:21 42:19,22 44:13,16,22 45:1,4,15,23 46:1,9 47:8,19 47:22 48:5,9 48:18 49:20 50:9 yeah 31:19 year 47:15 years 10:20 30:2 38:1 39:6 40:13 York 1:15</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>07-1309 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10 10:20 39:6 10-year 11:9 46:7 100 39:4 46:14 103 36:18 108 36:18</p>	<p>109 36:18 52:20 11:16 1:13 3:2 111 48:12,15 1111 51:2 113 48:13 118 52:6 12:17 54:9 14 1:9 17 48:5,9 18 5:15 1961(4) 7:13 12:23 13:1 14:3 1962(c) 5:16 15:5 25:17 26:22 27:7 30:23,25 31:9 33:4 41:8 52:13 1998 11:11 1999 11:12</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2009 1:9 24 2:6 244 25:21 25 31:10 29 4:12 11:19</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 31 10:14 35 10:14 371 43:8</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>477 52:6</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 6:19 42:23 51:14 5a 26:21 50 2:9 522 52:5 58 18:12</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>74 18:12</p>	<p>75 18:12</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8770 49:2</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>95 5:5 36:15 37:2 97 36:25 52:20 99 46:15</p>
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