

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	SARAH E. HARRINGTON, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	PAUL D. CLEMENT, ESQ.	
10	On behalf of the Petitioner	57
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning first in Case 12-357, Sekhar v. United
5 States.

6 Mr. Clement?

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and may it
10 please the Court:

11 The crime of extortion under the Hobbs Act,
12 like the related crimes of larceny, burglary and
13 embezzlement, is at bottom a property crime.
14 Accordingly, understanding the scope of obtainable
15 property under the Hobbs Act is critical to deciding the
16 scope of the basic criminal prohibition.

17 The Government has offered you a definition
18 of property that only a prosecutor could love: Any
19 intangible right with economic value, but that
20 definition is fundamentally incompatible with this
21 Court's precedence and with Congress's conscious
22 decision in the Hobbs Act to criminalize the State --
23 New York State crime of extortion, but not the New York
24 crime of coercion.

25 JUSTICE KENNEDY: If the jury had -- had

1 returned the verdict which is at JA142, and it had
2 marked that the attempt to extort was to extort the
3 commitment, you might still maybe have some causation
4 arguments, but I assume the property argument you're
5 about to make is just irrelevant.

6 MR. CLEMENT: Well, I don't think it's
7 irrelevant, Justice Kennedy. I would have a different
8 argument. I think that I would stand first and foremost
9 on this Court's decision in Cleveland, where it
10 recognized that something like, I think the commitment,
11 certainly the video poker license was at issue there,
12 the Court also referenced an unissued patent.

13 And it recognized that there are things that
14 have value once they're issued, but in the hands of the
15 Government, they don't have value, and therefore don't
16 qualify as property.

17 JUSTICE KENNEDY: Could -- could the case
18 have been indicted -- has it been charged as one in
19 which what they were taking was the commissions that
20 would ultimately have been generated?

21 MR. CLEMENT: Well, Justice Kennedy, it
22 might have been possible to say that what was obtained
23 here was money, but I think if the Government had
24 prosecuted it under that theory, it would have to prove
25 that somehow the Government paid too much. I don't

1 think it can point just to the commissions.

2 And I would analogize it to the McNally
3 case. In the McNally case, you know, there was this
4 scheme in which various sort of friends of government
5 officials were getting the commissions from a workmen's
6 compensation policy. And what this Court said is, well,
7 it would have been one thing if the Government had come
8 in and said that the Government paid commissions that
9 were too high, or the Government had received inferior
10 quality insurance.

11 But what the Government did there instead
12 was sort of take the shortcut and plead that what had
13 happened is, the Government had been deprived of its
14 interest in having the honest services --

15 JUSTICE KENNEDY: Well, here, what the
16 Petitioner wanted were the commissions, ultimately. And
17 you can't commit extortion in order to get -- and that's
18 real money. It's for the Government to answer, not you,
19 but can -- do you have any idea why they didn't charge
20 that?

21 MR. CLEMENT: Well, I think the reason that
22 they didn't charge that is probably practically twofold.
23 One is that a commitment under New York law and practice
24 is not quite as what it sounds; it's not really a
25 commitment. And the best evidence of that is with the

1 last fund for this particular management company, they
2 got a commitment from the State and there was no
3 ultimate investment made.

4 So there's a subsequent step down the road.

5 JUSTICE KENNEDY: I see. I see.

6 MR. CLEMENT: So I think that's part of it.

7 The other thing I would say is as in
8 McNally, I think they would have had to prove that the
9 management fees were somehow excessive or something like
10 that, so they didn't do that. They focused on this
11 recommendation.

12 JUSTICE KAGAN: Mr. Clement --

13 JUSTICE KENNEDY: Well, I took you away from
14 your argument about intangible property.

15 JUSTICE KAGAN: Mr. Clement, just along the
16 same lines. What you're saying is that it still would
17 not be extortion -- let's say somebody in your client's
18 position runs an investment company, wants an
19 investment, wants the fees that come along with that
20 investment. Goes to -- let's say that there's a single
21 person who gets to decide whether to make that
22 investment, and so to pay those fees, goes to that
23 person, threatens that person with something terrible
24 happening to him.

25 You're saying that that does not count as

1 extortion, that there's a reason that the Government
2 didn't charge it like that?

3 MR. CLEMENT: I would say that that -- I
4 would say a couple of things. I would say that's a
5 harder case than the one I have before you today. I
6 would say that I don't think that's actually extortion
7 if what they charge is the commitment, not the money
8 that goes -- that flows from the Government. And then
9 what I would say -- and the reason I would say that is
10 because of Cleveland.

11 JUSTICE KAGAN: Well, they want the
12 investment with -- and the fees that come with the
13 investment. So -- and that's why they're threatening
14 the person.

15 MR. CLEMENT: Right. And I would say that
16 under McNally, in that kind of case, what the Government
17 has to prove is that if they want to make the property
18 the money interest that the Government is paying out and
19 the person is obtaining, they have to show that there's
20 some sort of excessive commission or excessive sort of
21 management fee.

22 JUSTICE KAGAN: Even -- even though they
23 wouldn't have gotten the investment and they wouldn't
24 have gotten the fees absent the -- the threat of force
25 or -- or violence?

1 MR. CLEMENT: Again, that would be my
2 position. And I think it would follow from this Court's
3 decisions in cases like Cleveland and McNally, because
4 in McNally, of course, the people who were part of that
5 fraudulent scheme, they were getting commissions from
6 the workmen comp program.

7 And the Government's theory was that just
8 interfering with the Government's decision about who to
9 give the workmen -- where to place the workmen's comp
10 policies was enough of an interference to support a
11 fraud conviction. And this Court said no. And one of
12 the things it then said is well, it would be different
13 if -- if the Government went in and proved that the
14 commissions that were paid were too high, or that the
15 Government somehow got inadequate insurance.

16 But if all they're doing is saying that
17 what's going on here is sort of the interest of the
18 Government in having its employees serve them honestly
19 and in their best interest, and not in some third
20 party's best interest, that brings you squarely into
21 honest services. And nobody's saying that doing that's
22 a good thing, but it's -- it's the traditional office of
23 the State law crime of coercion. It's --

24 JUSTICE GINSBURG: But it's -- the coercion
25 crime, at least under New York's definition, requires

1 force. And -- and here, it's a threat of exposure of an
2 embarrassing fact.

3 So, what -- am I right about that, that the
4 coercion, which is not a Federal crime but is a State
5 crime, requires a threat of force to restrict him of his
6 freedom?

7 MR. CLEMENT: I don't believe that's
8 correct, Justice Ginsburg.

9 This was charged by New York State
10 authorities as coercion. So the very crime that
11 Congress didn't incorporate into the Hobbs Act, the New
12 York crime of coercion, was charged here, and it's my
13 understanding that the New York crime of coercion, like
14 the earlier version of coercion in the racketeer- -- in
15 the Anti-Racketeering Act of 1934, like the traditional
16 model penal code definition of coercion -- it's the --
17 the threat part of it is the same as extortion.

18 So it covers a threat to a person or to
19 property. And it's been interpreted certainly to
20 include threats to disclose information like this.

21 So I think the real difference between the
22 crime of extortion and the crime of coercion, both as a
23 general matter and under New York law, is whether or not
24 property is obtained. And that's ultimately what's so
25 problematic about the Government's definition here,

1 because their definition is essentially the property
2 includes the autonomy interest of a business to operate
3 free from coercion.

4 JUSTICE ALITO: What is your definition
5 of -- of property? In your reply brief, you begin by
6 saying that you're -- you are not arguing that the
7 property has to be tangible and includes some forms of
8 intangible property.

9 How would you draw the line?

10 MR. CLEMENT: I would say that for property
11 to come within the terms of the Hobbs Act prohibition on
12 obtaining property, it has to be alienable,
13 transferable, moveable. That's the critical thing. So
14 the distinction is not between alienable and
15 inalienable.

16 A patent is an inalienable -- I mean,
17 rather, a patent is an intangible property right, but
18 it's transferable, it's obtainable, it is sellable, and
19 so it has the characteristics of things that I think
20 come within the traditional definition.

21 JUSTICE BREYER: What about -- what about
22 the mob goes to a grocer and says, you know, you're dead
23 or something if you sell Cheerios, and the reason is
24 because they have a monopoly, some other grocery who's
25 connected has a monopoly. And they threaten him. Now,

1 does that violate Hobbs Act?

2 MR. CLEMENT: I think --

3 JUSTICE BREYER: What he did was -- and

4 he's -- he's not going to sell Cheerios.

5 MR. CLEMENT: Right. I -- I would say that

6 that hypothetical THAT you've given me would be

7 coercion; it would not be extortion under the Hobbs Act.

8 JUSTICE BREYER: Now -- now, in fact,

9 they're doing it to get money, and they do get money,

10 but via the means of the other grocer. And there is

11 nothing in the words of this Act that says that the

12 property has to be taken from the individual whom you

13 coerce.

14 It's easy to imagine situations where the

15 coerced individual has a relationship, direct, special

16 and so forth, with the person who has the money. So

17 what happens when, say, the mob coerces the person

18 without the property so that he will do a thing such

19 that the person with the property gives them the

20 property?

21 MR. CLEMENT: I think, at least as I

22 understand your hypothetical, where the relationship

23 between the two parties, basically the competitors, I

24 would say that that's two distinct relationships.

25 JUSTICE BREYER: All right. Now just make

1 it different. What they do is they get the assistant
2 bank employee and they threaten him to do such a thing
3 such as shout at a certain time where they know that
4 that shouting will lead them to be able to rob the bank.
5 I mean, you know, it's easy to think up.

6 What I can't figure out here is, is there
7 some requirement that the person who is coerced has to
8 be the same person as the person who gives them the
9 property. If the answer to that's no, then none of the
10 Government's chamber of horrors is horrible, because
11 there's a way around it.

12 MR. CLEMENT: Well, I think the answer to it
13 is, it depends. I don't think I can give you a
14 definitive that the --

15 JUSTICE BREYER: And you haven't found
16 anything on this. You'd be making it up now, is that
17 basically it?

18 MR. CLEMENT: Well, what -- what I would
19 tell you is I think the assumption of most of the cases
20 is that the person that is the pressure of --

21 JUSTICE BREYER: Is the -- is the one?

22 MR. CLEMENT: Is the person who's offering
23 up the property. This Court's --

24 JUSTICE SCALIA: Isn't that what the word
25 "extort" means? You extort something from someone? It

1 means you get it from him, you don't get it from some
2 third party.

3 MR. CLEMENT: I think that's basically
4 right, Justice Scalia. What I would say, though, is I
5 think there's an exception to the -- at least to the
6 following extent, which I think it would be open to the
7 Government, to basically say that within an entity, if
8 you sort of put the pressure on one agent of the
9 corporation and you actually get the money from another
10 agent of the same corporation, that that's probably
11 close enough.

12 And so in this case, if the pressure was put
13 on a particular individual and they obtained like actual
14 cash from the Government, that might be a different
15 case. But, of course, here what they received was this
16 commitment, which I think is analogous to the video
17 poker license in the Cleveland case, so I don't think
18 that's --

19 JUSTICE KAGAN: But if you think the
20 commitment is real cash, is a real contract, real cash,
21 real property, right, then it wouldn't matter under
22 that -- under what you just said, that the threat was
23 made to the general counsel rather than to the final
24 person who issued the money, isn't that right?

25 MR. CLEMENT: I -- I don't disagree with

1 that, Justice Kagan, but I think that's because they're
2 all sort of agents to the same principal. And I'm not
3 sure you get all the way to what Justice Breyer was
4 suggesting, which you can sort of run it through
5 competitors or something like that.

6 JUSTICE KAGAN: Right. But you wouldn't
7 say, well, we're dealing with an organization, so it's
8 only extortion if you threaten the person who writes the
9 check?

10 MR. CLEMENT: No. I --

11 JUSTICE KAGAN: If you threaten the person
12 who makes a recommendation to the person who writes the
13 check, that's good enough.

14 MR. CLEMENT: Exactly, Your Honor. But what
15 I would also say is, you know, this is a real case and
16 there are real jury findings, and as Justice Kennedy
17 alluded to, there were a variety of theories of property
18 put in front of the jury. They were invited to circle
19 as many of them as they could, as many as they found
20 satisfied, and the only one they circled was the
21 recommendation.

22 JUSTICE SOTOMAYOR: Mr. Clement, what is --
23 I'm sort of trying to figure out why you're trying to
24 get the word "property" to do the work of the "obtain"
25 part of the statute, because when you answered

1 Justice Alito you were using the terms of "obtain" to
2 define property, which is in my mind a sort of strange
3 way to do things, okay? Property generally means value
4 of some sort and you don't use any of those words in
5 your definition.

6 So, what you're using in my mind, and not
7 illogically, is to say that the second part of the
8 statute has to do some work, so it has to mean that
9 you're taking something of value away from someone else.
10 That makes logical sense to me. And I understand the
11 second piece of your argument, which is the
12 recommendation -- not the recommendation, but his honest
13 services wasn't being given to your client, it was being
14 given to the employer.

15 So your client obtained nothing of value for
16 himself. He didn't get anything transferred to him.
17 And that -- that argument makes eminent sense to me.
18 And I tease it out of your brief, but I don't know why
19 you're trying to get our definition of "property" to do
20 that work.

21 MR. CLEMENT: Well --

22 JUSTICE SOTOMAYOR: Why isn't the work in
23 the "obtain" part?

24 MR. CLEMENT: Justice Sotomayor, I'm happy
25 to have you rule in favor of my client on "obtained" or

1 "property" and, as Scheidler II demonstrates, those
2 terms are really kind of married together. And I guess
3 the reason I sort of think that the "obtained" and the
4 "property" should be construed together is twofold.
5 One, structurally that's what the statute does. So when
6 you're talking about in the statute property that can be
7 obtained, I think that's a clue that you're not talking
8 about property in its broadest manifestation.

9 And you contrast that with, say, the Clayton
10 Act that talks about disjunctively property and -- or
11 property rights, and there you have a clue that Congress
12 means a very broad conception. When it's talking about
13 it in conjunction with "obtained," I think it has a
14 narrower ambit in mind.

15 JUSTICE SOTOMAYOR: So take the Government's
16 definition that property is anything of value.

17 MR. CLEMENT: Right.

18 JUSTICE SOTOMAYOR: All right. And let's
19 assume, because it -- as I said, that seems to have some
20 sort of conceptual appeal. Then make the argument for
21 me.

22 MR. CLEMENT: Well --

23 JUSTICE SOTOMAYOR: Then make your argument
24 for me why this isn't an obtaining.

25 MR. CLEMENT: Well, what I would say is

1 obtaining, as this Court made clear in Scheidler II, is
2 not some metaphysical obtaining. I mean, the argument
3 was made to this Court that the abortion protesters
4 obtained the autonomy interest of the business in -- the
5 clinics, in deciding whether -- who to serve and when to
6 serve and when to be open and when to be closed.

7 And this Court said no, and it said
8 principally that that's not obtaining, but it's -- but
9 it also noted, I guess you'd call it dictum, that
10 what -- what -- obviously, what the Hobbs Act, based on
11 its common law roots in extortion, is talking about is
12 the kind of property that can be deprived, it can then
13 be transferred, sold, exercised.

14 And I do think. Just to get the second part
15 of my answer out if I could, it's just -- the common law
16 roots here are also where you see the definition of
17 property can't be as broad as the Government suggests.
18 Because extortion is one of the classic common law
19 property crimes. The definition of property for
20 purposes of extortion ought to be the same as the
21 definition of property for larceny, embezzlement,
22 burglary.

23 You can't go into somebody's house and steal
24 their honest services or their autonomy interests. So
25 the kind of property you can obtain for purposes of the

1 Hobbs Act is that same kind of alienable, transferable,
2 moveable property.

3 JUSTICE SCALIA: Suppose -- suppose that the
4 person coerced here was a -- was a corrupt person and
5 had put his recommendation out for bids. Okay? He
6 said, you know, I'll -- I'll recommend whoever pays me
7 the most money. Would that alter this case?

8 MR. CLEMENT: I don't --

9 JUSTICE SCALIA: If -- if then somebody
10 comes in and says, well, I'm not going to pay you the
11 money, but I'll -- I'll break your knees if you don't
12 recommend me, would that be extortion?

13 MR. CLEMENT: It would not, Justice Scalia,
14 and I would say because -- the State of Louisiana in the
15 Cleveland case, if there was a corrupt official who was
16 putting those video poker licenses on sale on the on the
17 sly, I don't think that would change the result there.
18 This Court said that those kind of government things do
19 not have value in the hands of the government. The fact
20 that somebody, you know, could sort of be corrupt and
21 therefore have a little auction on the side I don't
22 think changes that basic fact.

23 I would say, too, that there's an important
24 difference here between a hypothetical case where what
25 somebody's trying to do is kind of get something for

1 nothing and essentially get the benefit of the work of a
2 government official. But that's not what's at issue
3 here.

4 This is not a client who's trying to get --
5 like, you know, they wanted an opinion on how to
6 incorporate in the State of New York and they thought,
7 well, the lawyers are kind of expensive in the private
8 sector, so I'm just going to coerce it from this
9 government official. All they care about in this case
10 is the bottom line, thumbs up, thumbs down
11 recommendation.

12 I don't think this case would be any
13 different if there were an investment committee within
14 the State government and you had to get unanimous assent
15 to an investment and there was one holdout.

16 CHIEF JUSTICE ROBERTS: Why isn't that --
17 you focused on transferability when you began. Why
18 isn't that completely transferable? I have leverage
19 against this official and if you want him to recommend
20 yes on your investment, you have to pay me a certain
21 amount of money. And you can transfer that. You've got
22 everybody in, say, you know, the association or whatever
23 and you can auction that off. It seems to me it's
24 perfectly transferable from the defendant to anyone
25 else.

1 MR. CLEMENT: With respect,
2 Mr. Chief Justice, I wouldn't think so. Now, there are
3 some voting rights that are transferable in that sense.
4 I mean, if you have a stock -- a proxy in a stock, or
5 something like that, that may well come within the
6 definition. But when you have these essentially voting
7 or autonomy interests that are really -- you know,
8 they're -- they're sort of inherently inalienable,
9 because this recommendation matters because it's the
10 general counsel and the Comptroller's Office
11 recommendation. And --

12 CHIEF JUSTICE ROBERTS: Well, but the
13 lawyer's going to make recommendations in many other
14 cases as well. And if you have an application coming up
15 and you want a favorable recommendation, you can go to
16 the -- the individual that has the leverage and say, I
17 will pay you this much money if you can get the person
18 to give me a favorable recommendation. And that's
19 transferable from the person with the -- the leverage
20 to -- to someone else.

21 MR. CLEMENT: Well, the confident -- I may
22 not be understanding the hypothetical. Certainly, the
23 confidential information that the potential coercer has
24 may be transferable, and under this Court's decision in
25 Carpenter, that may be property. But the voting right

1 within the State government or the role within the State
2 government's internal deliberative process, that really
3 belongs to the general counsel, and he can't --

4 JUSTICE KENNEDY: Well, just let me make
5 sure that I understand your position. Suppose roughly
6 these facts: The general counsel is threatened with
7 something very serious, let's say violence, unless he
8 makes a favorable recommendation. He does. They act on
9 that recommendation, it's -- it's a substantial cause in
10 making the investment, and the investment is made and
11 they get the money. Violation?

12 MR. CLEMENT: I would say no, but I would
13 say it's a much more difficult case. And the reason I
14 would say no is because the Government -- or I'd say
15 potentially no. I would still say that the Government
16 has to prove something more, which is that it's an
17 investment where there either was not the optimal
18 investment or they paid too high a commission. And --
19 and I take that from McNally.

20 JUSTICE KENNEDY: Well, but -- but that's a
21 causation argument, not whether or not you received
22 property.

23 MR. CLEMENT: Right, because -- but my point
24 is simply that if the Government --

25 JUSTICE KENNEDY: But so far as the property

1 point in my hypothetical, if the recommendation leads to
2 the contract and the contract leads to the commission
3 and the commission means money in your pocket, that's
4 property.

5 MR. CLEMENT: Yes.

6 JUSTICE KENNEDY: And so then we just have a
7 causation argument, not a property argument.

8 MR. CLEMENT: I think that's right. If
9 what's obtained is money, and that's what the Government
10 focuses its prosecution on, then that is -- that
11 satisfies the property requirement of the Hobbs Act.

12 JUSTICE BREYER: It has to be more property,
13 more money, more money in return for less services or
14 something than otherwise. That's what you're saying.
15 But I don't think that's -- I mean, right. But the
16 answer -- go ahead, because I -- that's the
17 qualification you're making, the McNally qualification.

18 MR. CLEMENT: Right, exactly. Exactly,
19 exactly. So you obtained the property, so that box is
20 checked, but the -- sorry.

21 JUSTICE GINSBURG: What about -- you said
22 transfer, sell, but there's also exercise. And the
23 theory is that the defendant sought to take away the
24 officer's right to make this recommendation, take it
25 away from the officer, exercise it himself. So why

1 doesn't it fit -- why isn't this an intangible right
2 taken from one and exercised by another?

3 MR. CLEMENT: Justice Ginsburg, I would say
4 that what you've just articulated is exactly the
5 Government's theory, and the problem is that I can use
6 that same theory to take any autonomy interest and turn
7 it into property that can be exercised, it can be
8 obtained by somebody and then exercised by them in a way
9 different from the way that the person would otherwise
10 exercise it.

11 And whatever -- I mean, you know, we're
12 talking about one word in a three-word phrase in
13 Scheidler II. And the first thing I would say is I
14 think it's a mistake to read that phrase the way you
15 would read a statute.

16 But the second thing I would say is the one
17 thing the Chief Justice did not mean with respect to the
18 word "exercise" is it meant that it opened up a big gap
19 so you could take every coercion case and turn it into
20 an extortion case.

21 JUSTICE GINSBURG: Is this -- there is, I
22 take it, no Federal crime that this conduct would fit?
23 You said New York State has a coercion crime which you
24 say this conduct might fit. But there's no Federal
25 crime.

1 MR. CLEMENT: There's -- there's no Federal
2 crime and that's the result of a very deliberative
3 decision by Congress in 1946 in enacting the Hobbs Act.
4 Of course, they had in front of them the model of the
5 Anti-Racketeering Act of 1934 that prohibited both
6 coercion and extortion. Congress made a conscious
7 decision to, in the Hobbs Act, prohibit robbery and
8 extortion, but not pick up the prohibition on coercion.

9 And so there isn't a Federal crime directly
10 on point, but it's a very conscious decision by
11 Congress. And, of course, the New York crime on point
12 is exquisitely on point, because not only is there a
13 coercion offense under New York statute, but it is an
14 aggravated offense if the victim is a government
15 official discharging their public duty.

16 And so this is really a situation where the
17 State courts have a crime that directly fits. It's
18 as -- I mean, it's almost amazing, because it's not just
19 any State; it's the State of New York. And Congress, in
20 passing the Hobbs Act, was looking at New York law. And
21 they looked at New York law and they said, New York has
22 a coercion prohibition and extortion prohibition.

23 JUSTICE GINSBURG: And why did -- why did
24 New York -- was the New York case dropped and the State
25 officials urged the Government, the Federal Government,

1 to make this a Federal case?

2 MR. CLEMENT: Well, I'd be happy to address
3 that. What happened is there were some pretrial
4 rulings. And one of the pretrial rulings gave the
5 defendant an opportunity to do some discovery on the
6 State government to figure out whether this was really
7 done in the discharge of public duties or maybe this was
8 sort of a political thing that was going on.

9 And once that State law discovery happened
10 into the government of Albany, all of a sudden the State
11 prosecution didn't seem like such a great idea anymore.
12 And the Federal prosecutors are just down the street, so
13 they were very happy to lateral it to the Federal
14 prosecutors and have them take it over. And because the
15 Federal offense doesn't have an element of interfering
16 with the public duty, they didn't have to worry about
17 the discovery.

18 And that is just a very concrete
19 illustration of the problem of over-federalizing crime,
20 because this -- we're talking -- this is the opposite of
21 the typical public corruption case where you think,
22 well, maybe there are people in the State government who
23 aren't going to -- State prosecutors won't be willing to
24 prosecute one of the bigs in the State government, so we
25 need the Federal Government to step in.

1 The one thing a State doesn't need extra
2 incentive to do is to protect the integrity of its
3 internal deliberative process from coercion or
4 extortion, for that matter. But the -- the real cost
5 then to having these duplicative Federal crimes, and
6 they were front and center in this case -- if I may
7 reserve the remainder of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Ms. Harrington.

10 ORAL ARGUMENT OF SARAH E. HARRINGTON
11 ON BEHALF OF THE RESPONDENT

12 MS. HARRINGTON: Thank you,
13 Mr. Chief Justice, and may it please the Court:

14 I'd like to start, if I could, where Justice
15 Kennedy began and ended, which is asking whether there
16 would have been extortion if the jury had found here
17 that what -- that the property that was obtained was the
18 commissions at the end of the day after the investment.
19 My friend Mr. Clement says no, no, no, McNally says no.

20 But what McNally actually said was the case
21 would have come out differently if the property that had
22 been alleged to be deprived was either money or
23 property, but it also said it would have come out
24 differently if the Commonwealth had been deprived of
25 control over how its money was spent. And that's the

1 type of property that's at issue here, control over a
2 property right.

3 Now --

4 JUSTICE KAGAN: Ms. Harrington, just to go
5 back to Justice Kennedy's -- I mean, suppose -- was
6 there a reason why it wasn't charged in what seems to me
7 to be the simpler way, which is a threat was made in
8 order to get an investment and in order to get fees to
9 put in your pocket and -- and go away with, and that's
10 extortion. So why wasn't it -- why wasn't that the
11 theory of the case?

12 MS. HARRINGTON: Well, he was charged with
13 attempting to obtain the commitment, which in most cases
14 ends up being the investment itself. That's not what
15 the jury found was the property that was obtained, so
16 it's not the verdict that we are here defending today.

17 JUSTICE KAGAN: Do you think there's an
18 obstacle to charging a case that way? Mr. Clement seems
19 to think that there's an obstacle, that even though
20 there's property in that case, there's some other
21 problem with charging the case that way.

22 MS. HARRINGTON: No, that's what I'm saying.
23 What he's saying is that the obstacle is you'd have to
24 prove that the State was out more money than it would
25 have been if it had invested in the company it wanted to

1 invest in. What I'm saying is no, McNally said the
2 result would have been different if the State had been
3 deprived of control, of the ability to control its
4 money, and that's the property that would have been
5 obtained in that kind of a case. Because property and
6 control of property are just -- are just different
7 aspects of the same property.

8 This Court has said repeatedly that
9 exclusive control of property is one vital aspect of
10 private property. And that's the -- that's the type of
11 property that was charged, that was -- that was obtained
12 in this case.

13 JUSTICE BREYER: The obvious problem, which
14 you might want to address at some point, is that -- that
15 if you take your definition that this recommendation,
16 legal recommendation, is property and the fellow said,
17 you know, I'm going to fix you if you don't do it, if
18 that's property, we're back to the honest services
19 statute, because anyone in government and anyone in
20 business, indeed everybody, has a job and those jobs
21 always require you to do things.

22 So if every time somebody threatens a person
23 and says, we don't want you to do the thing you're
24 supposed to do, we want you to do the thing like this,
25 well, then you're violating this property statute.

1 MS. HARRINGTON: But --

2 JUSTICE BREYER: Now, that seems very far-
3 reaching, hard to reconcile with the abortion case --
4 the abortion clinic case, etcetera, and it is easy to
5 reconcile with the honest services case.

6 MS. HARRINGTON: Well, I guess I would have
7 two points. The first is that this is not about honest
8 services, because the victim here is not the State of
9 New York, it wasn't the citizenry of New York. That's
10 the kind of --

11 JUSTICE BREYER: Well, I mean, that sounds
12 technical. You see, the problem I'm interested in is,
13 by accepting your definition do we suddenly throw within
14 the statute, which speaks of property, any time there is
15 an appropriate threat which has as a condition the
16 person doing the job differently? That's true of
17 whether it's a postman, you know, any public official,
18 any private official, anybody.

19 MS. HARRINGTON: Whatever --

20 JUSTICE BREYER: That seems very
21 far-reaching. So --

22 JUSTICE KENNEDY: Just to add to
23 Justice Breyer's question, it's -- suppose the
24 secretary/typist is -- the stenographer is charged with
25 typing the letter "I do not recommend" and they bribe

1 her and she says "I recommend." She has an interest in
2 her integrity to give an honest transcription. Under
3 your view, and this is what Justice Breyer is getting
4 at, I think, that -- that secretary has property that
5 you are taking. That's very far-reaching.

6 MS. HARRINGTON: Well, I want to separate
7 again the question of what is property and when property
8 is obtained. Under the Hobbs Act -- the Hobbs Act
9 absorbed the New York State extortion law. And in
10 that -- in the -- in the cases construing that law, they
11 had construed the word "property" to include the running
12 of a business, the engagement of a person in their
13 occupation, and the doing of a job. People have
14 property interests in doing those things because those
15 are the source of economic wealth for those people.
16 They generate a stream of revenue for people to live
17 their lives on.

18 Now, it's a different question -- not every
19 time you interfere with someone's doing of their job are
20 you obtaining that property. Here, what Petitioner was
21 trying to do was not keep the general counsel from
22 making a recommendation; he was attempting to dictate
23 the substance of what the recommendation was.

24 JUSTICE BREYER: Yes, I understand that.
25 But I still would like an answer to my question, and

1 it's well-phrased with an example by Justice Kennedy.

2 Every secretary in the United States who is
3 about to write a recommendation for somebody to go to
4 college or some other thing then is faced with a threat,
5 you put in name such-and-such or put in yes instead of
6 no, and is under your definition that person's property,
7 that what she does the taking of property? The answer
8 is either you think yes, in which case I would like you
9 to defend it --

10 MS. HARRINGTON: Yes.

11 JUSTICE BREYER: Or the -- yes. Okay. Then
12 what conceivable ground? I'm not -- I don't want to --
13 that sounds a little pejorative, but I'll say: What
14 ground is there for a definition that is so broad that
15 it sweeps within it all working people in the United
16 States in the performance of their ordinary jobs?

17 MS. HARRINGTON: The ground is the general
18 particularized meaning that the word "property" has
19 obtained in the law, and including in New York cases
20 construing the very law on which the Hobbs Act was
21 based.

22 A person has a property interest in running
23 their business. They also have a property interest in
24 doing their job. When -- when someone comes along and
25 uses threats of harm or threats of force or violence to

1 try to get them to do their job in a different way, what
2 they are doing is they are taking control of that
3 property interest that the person has.

4 JUSTICE SCALIA: What -- what is -- I have a
5 property interest in doing my job? I don't know what
6 that means. I mean, just throwing words around. You
7 are calling doing a job a property interest. Normally
8 when I think of property, I think of something that can
9 be conveyed. Can I convey the -- the doing of my job to
10 somebody else?

11 MS. HARRINGTON: Well, you can convey your
12 labor to your employer in that sense. When you enter an
13 employment contract, you are selling your labor to your
14 employer. And the -- the extent of your right to do
15 that job is then defined by the parameters of your job.

16 JUSTICE SCALIA: But I'm not talking about
17 my labor. I'm talking about my doing the job that the
18 employer has assigned to me.

19 MS. HARRINGTON: But that is your labor.

20 JUSTICE SCALIA: It's not my -- not my labor
21 in the abstract. Nobody is taking my labor away from
22 me.

23 MS. HARRINGTON: But in this case what
24 Petitioner was trying to take was the fruits of the
25 general counsel -- counsel's labor. His job was to give

1 his recommendation to his client about what was in
2 keeping with the client's --

3 JUSTICE SCALIA: Can you cite me one -- one
4 extortion case at common law -- or let me put it another
5 way. What is the closest extortion case at common law
6 that you can allude to?

7 MS. HARRINGTON: I can't, because at common
8 law the person --

9 JUSTICE SCALIA: We -- we are using a common
10 law term here, "extortion."

11 MS. HARRINGTON: Yes, but it was a different
12 crime at common law, because it only involved public
13 officials taking money or other thing of value in
14 exchange for doing something --

15 JUSTICE SCALIA: Whatever. What's the
16 closest that comes to this abstract "the doing of my job
17 is property"?

18 MS. HARRINGTON: I don't have an example of
19 that, but what I do have are examples from the New York
20 cases which were construing the New York State extortion
21 law, and this Court has noted again and again that
22 that's the basis for the Hobbs Act. Congress was
23 explicitly trying to evoke that law.

24 JUSTICE SCALIA: What -- what's the closest
25 New York case?

1 MS. HARRINGTON: So I think there are two
2 cases. The Barondess case and the Short case are the
3 best cases. And in the Barondess case, which is from
4 1893, I think, the -- the Court said that the running of
5 a business was property. And in the Short case the
6 Court said that, just the same way that the running of a
7 business is property, a person's doing their job is
8 property, and that that can be damaged --

9 JUSTICE GINSBURG: How was it -- could you
10 tell us a little more? How was it taken?

11 MS. HARRINGTON: Well, in those cases the
12 property wasn't taken. Under the New York extortion
13 law, the law used "property" in two different places,
14 and this is noted in our brief. First, it was something
15 that could be taken, that could be obtained through
16 extortion; and second, it was -- one of the means of
17 committing extortion with doing violence to property, it
18 was harming property. And the court was construing
19 property -- in those cases, it was -- it was in the
20 latter sense of what qualified as harm to property.

21 But the court said in the Short case, which
22 is from 1911 -- the court noted that property is used
23 in -- in both provisions, Section 850 and Section 851,
24 and said it was construing it as it was used in both of
25 those sections. And in that -- that was the case that

1 said doing a person's job, the person has a property
2 interest in doing their job.

3 JUSTICE KAGAN: Ms. Harrington, go back to
4 the Scheidler example, because that was a case where we
5 said there was not extortion when there were threats of
6 violence meant to close down an abortion clinic's
7 operations. What you are suggesting is that if those
8 threats of violence had been targeted at the abortion
9 clinic's lawyer in order to get him to tell the clinic
10 to shut down their operations because they were a
11 violation of law, that it would be an entirely different
12 case. Now, how could that be?

13 MS. HARRINGTON: We -- that's absolutely
14 what we are saying, in the same way that we said that if
15 the target of the -- if the -- if the protesters, excuse
16 me, had been trying to get the clinics, if they had been
17 trying to take over the clinics and get them to provide
18 a different type of service, to get them to be a
19 restaurant or to provide a different type of medical
20 service, then they would have been obtaining the right
21 of the -- of the clinic the right to run -- to operate
22 their business.

23 JUSTICE KAGAN: So -- so you think if -- if
24 they targeted the -- the clinic's lawyer or the -- if
25 the threats were, Don't shut down the clinic; instead,

1 start delivering babies, that that would be extortion,
2 whereas in the real case it wasn't?

3 MS. HARRINGTON: Yes, because Scheidler came
4 out the way it did not because there wasn't property at
5 issue, but because there wasn't an obtaining. And I do
6 think it's important to try to keep those two things
7 separate.

8 JUSTICE KAGAN: Well, because there
9 wasn't -- and there's nothing obtained either way. I
10 mean, you are trying to change what the person is doing,
11 but you are not getting anything from it.

12 MS. HARRINGTON: But you are dictating the
13 substance of what they are doing, and so you are
14 obtaining their right to exercise their property right.

15 JUSTICE SCALIA: Well, that -- that's the
16 problem with your New York cases as well. You -- you
17 are focusing on property in another context, where the
18 property is harmed, not whether property is taken.
19 You -- you have neither a New York case nor any other
20 common law case involving extortion where the property
21 taken consists of somebody's doing his job.

22 MS. HARRINGTON: It's true, but the New
23 York courts -- the New York cases said that they were
24 construing the word "property" to mean the same thing as
25 used -- used in both places in the statute.

1 And there is no reason to -- to define the
2 word "property" to include the concept of being
3 obtainable, because the statute already separately
4 requires that property be obtained before there is
5 extortion.

6 Just, if I can just note that --

7 JUSTICE SCALIA: I'm not sure that
8 obtainable property and -- and harmable property are one
9 and the same thing, I'm really not.

10 MS. HARRINGTON: They might not be, but they
11 are both -- but property is property. That's our
12 position, that there is a legal meaning of property, it
13 includes the right to run a business, the right to -- to
14 engage in an occupation. In a particular instance that
15 property may not be obtainable and then there won't be a
16 Hobbs Act violation. But you don't have to read the
17 obtainability into the definition of "property."

18 It's the same thing. The Hobbs Act also
19 says that you can commit a violation by committing
20 physical violence against property. Now, in their
21 opening brief, Petitioner said, well, if something can't
22 be physically harmed, it can't be property. We are
23 happy to see in the reply brief they sort of gave that
24 up by saying, "Okay, yeah. Well, business secrets are
25 property. A patent is property. Those things can't be

1 physically harmed.

2 But there is no reason to read "property"
3 means different things. If something can't be
4 physically harmed, it won't be the basis for liability
5 under that provision of the Hobbs Act.

6 JUSTICE SCALIA: You are -- you are
7 contradicting what you yourself said a little bit
8 before, which is that property means the same thing for
9 both provisions --

10 MS. HARRINGTON: No, that's exactly what I'm
11 saying.

12 JUSTICE SCALIA: -- for both the obtaining
13 and the harming.

14 MS. HARRINGTON: That's exactly --

15 JUSTICE SCALIA: But it doesn't mean the
16 same thing for the harming, because there is some
17 property that can't be harmed.

18 MS. HARRINGTON: Right. But that doesn't
19 mean that property means something different. It just
20 means if it's property that can't be harmed, then it --
21 it won't be a basis for liability under that provision.

22 I'm just saying you don't want to give a
23 different definition to the same word used different
24 times in the same statute, when the concept is -- is --
25 where the work is carried by other words in the statute.

1 I think if I could point to --

2 JUSTICE SOTOMAYOR: I -- I -- going back a
3 little bit to Justice Breyer's question, how do you gain
4 possession of someone's advice or how they do their job
5 when it's not giving you a direct benefit; it's
6 something that belongs to someone else?

7 MS. HARRINGTON: What you are doing is --
8 what happened in this case is Petitioner was attempting
9 to obtain control over the fruits of the general
10 counsel's labor.

11 JUSTICE SOTOMAYOR: That's the problem, this
12 obtaining controlled concept.

13 MS. HARRINGTON: Right, so what --

14 JUSTICE SOTOMAYOR: Because you're -- you're
15 equating taking control with possession. And that's
16 where I'm having difficulty.

17 MS. HARRINGTON: Well, this Court has
18 repeatedly said that property and exclusive control of
19 property are just different aspects of the same thing.
20 They're different sticks in the bundle that make up the
21 property.

22 Here, what Petitioner was trying to do was
23 he was trying to dictate the substance of the
24 recommendation, and in doing so, he was trying to
25 exorcise the General Counsel's right to make the

1 recommendation, his right to do his job, and that was
2 his property. He wasn't just trying to keep him from
3 going to work; he was trying to literally dictate what
4 the recommendation was. And that's how it was charged
5 in the indictment, that's what the jury found. That was
6 where the obtaining came in.

7 The -- the concept of property and control
8 of property is well illustrated by this Court's decision
9 in Carpenter. There the property -- one of the pieces
10 of property at issue was confidential business
11 information, which was taken from The Wall Street
12 Journal.

13 But it wasn't -- it wasn't really taken from
14 The Wall Street Journal because The Wall Street Journal
15 still had the information at the end of the day. What
16 the Court found was taken from The Wall Street Journal
17 was the ability to control, to have the exclusive
18 control over the information.

19 JUSTICE BREYER: As I think about it in
20 terms of the New York cases, as you write them up here,
21 it sounds as if someone was trying to get control of a
22 business. So I think business, land, labor, and
23 capital. All right. I can see why somebody who's
24 trying to get control of a whole business is trying to
25 take land, labor and capital. There may be no land

1 there, but so what. And -- but a person's trying to
2 take control of another's job by just telling him what
3 to do 2 percent of the time seems well across some kind
4 of line.

5 MS. HARRINGTON: Well, I mean, you might
6 have an obtaining question if it's only 2 percent of the
7 time.

8 JUSTICE BREYER: No, no. No attaining
9 question. I'm just thinking is it reasonable to call a
10 secretary doing one job which takes 3 percent of her
11 time that hour property, in a way is that different from
12 taking control of Macy's --

13 MS. HARRINGTON: Well, you should --

14 JUSTICE BREYER: -- and -- and it seems to
15 me that probably it is.

16 MS. HARRINGTON: Well, I guess -- I mean,
17 it's sort of two -- two different kinds of responses.
18 One is that when you're asking if something is property,
19 you want to look at it sort of on a class-wide or
20 aggregate basis. If you have one, single unauthorized
21 download of a copyrighted song, that's not necessarily
22 going to cause harm to the record company --

23 JUSTICE BREYER: No, no, I'm not worried
24 about copyrights or other intangibles.

25 MS. HARRINGTON: No, I understand.

1 JUSTICE BREYER: That's not the issue.

2 MS. HARRINGTON: But I'm just saying you
3 want to look at something in the aggregate on a
4 class-wide basis, and persons doing their job on a
5 class-wide basis is something that is economically
6 valuable to them. And therefore, it's property.

7 I lost track of what my second response was
8 going to be.

9 So anyway, the -- the Hobbs Act clearly was
10 targeted -- was trying to get at racketeering activity;
11 it was trying to get at organized crime families. And
12 Congress knew that one of the main means that organized
13 crime families use was taking control of businesses.

14 Now, those cases might seem easier, because
15 taking control of a brick and mortar business may seem
16 more obviously like property than taking control of a
17 person's occupation or their job. But a person's right
18 to labor is economically valuable to them and is
19 property to them in the same way that the running of a
20 business is.

21 Now, Petitioner's view would -- if it -- I
22 mean, his real view is that he'd want to wipe out the
23 heartland of Hobbs Act organized crime prosecutions, but
24 I think his fallback position is that he would want to
25 wipe out any extortion of a business that provides

1 services instead of providing a tangible good. But that
2 doesn't make sense either.

3 If Petitioner had threatened harm to a
4 plumber if the plumber didn't come and -- and fix his
5 leaky faucet, he would have been extorting that
6 plumber's labor, and the same thing for a gardener, if
7 he tried to get a gardener to come and mow his lawn.
8 Now, he wouldn't end up with anything tangible at -- at
9 the back end, but what he would have taken from those
10 laborers would be their right to labor, their right
11 to --

12 JUSTICE KAGAN: Well, yes, he would have
13 ended up with something intangible in those
14 hypotheticals. He would have ended up with the mowed
15 lawn. He would have ended up with the thing that the
16 service was providing them.

17 MS. HARRINGTON: But he wouldn't --

18 JUSTICE KAGAN: The -- the problem here is
19 that there is no obtaining of anything that the person
20 is getting from your theory.

21 MS. HARRINGTON: It's the same kind of
22 obtaining here, because he wouldn't take the mowed lawn
23 from the -- from the gardener, he wouldn't take a lack
24 of leaking from the plumber. What he's taking from them
25 is their services in order to get a particular result.

1 It's the same thing here; he's trying to
2 take from the General Counsel his service of making a
3 recommendation that's in his client's best interest and
4 he's trying to dictate the substance of the
5 recommendation to try to get him to give a particular
6 recommendation, a positive recommendation.

7 JUSTICE SCALIA: Why is that valuable to me?
8 Why is it valuable to me -- I can see how the job is
9 valuable to me. I get paid to do the job. But why
10 making one recommendation rather than another is
11 valuable to me? I don't think it's valuable to me.

12 MS. HARRINGTON: Well, that's what I'm
13 saying --

14 JUSTICE SCALIA: It's only because I'm an
15 honest person that I want to make the proper
16 recommendation, but to say that it has any economic
17 value that I recommend A rather than B? It's -- it's
18 totally neutral whether one is -- is more economically
19 valuable than the other.

20 MS. HARRINGTON: It has economic value
21 because the lawyer's job is to give his advice in
22 keeping with his client's best interest. It's the same
23 thing as the record company. A single unauthorized
24 download --

25 JUSTICE SCALIA: That's all very true and an

1 honest lawyer should do that, but that doesn't prove
2 that it's economically valuable for the lawyer to give
3 the right advice rather than the wrong advice.

4 MS. HARRINGTON: It is. If Petitioner had
5 tried to blackmail the General Counsel every week to
6 give a different recommendation than what he wanted, the
7 result would have been the General Counsel would have
8 lost his job. He would have lost his stream of revenue.
9 He might have been disbarred.

10 JUSTICE SCALIA: Oh, I see. I see.

11 MS. HARRINGTON: That's economically
12 valuable to him. It's the same thing as a single
13 download of a -- of a record that might not cause
14 economic harm to a record company, but it's still taking
15 property, because in the aggregate, the rights of that
16 copyright or trademark have -- the property right has
17 value to the record company.

18 It's important to keep in mind the factual
19 scenario here. Here, Petitioner was trying to use
20 blackmail to coerce a State agent into doing something
21 that was against his -- his will in order to get a
22 \$35 million investment from the State. Now, again, this
23 might seem like a harder case than if he was trying to
24 coopt the running of a brick and mortar business, but
25 what he was trying to do is coopt an individual's doing

1 of his job. He's trying to dictate the substance of the
2 recommendation. In doing that, he's obtaining property
3 from the victim.

4 JUSTICE KAGAN: Ms. Harrington, I guess I'm
5 just confused, and this goes back again to
6 Justice Kennedy's initial question, why it wasn't
7 charged in a much simpler way where the property is not
8 a right by a lawyer to do his job, which seems no other
9 person can get, but where the property was the contract,
10 was the -- was the investment and the fees, and the
11 theory was that a threat was used in order to get that
12 investment and fees.

13 And why wasn't -- why isn't that just -- you
14 know, I look at the facts here and I say extortion, but
15 not on your theory, on my theory. And why wasn't that
16 simple theory used?

17 MS. HARRINGTON: Well, it was charged on
18 several different theories, and one of the theories was
19 that he was trying to gain the commitment to the
20 investment. Now, the jury was given choices. The jury
21 circled the lawyer's positive recommendation as the
22 property that was obtained. I assume that's because the
23 evidence in the case, the e-mails from Petitioner to
24 General Counsel talked about the recommendation and so
25 that was a tangible thing in the jury's mind.

1 It was sort of that there was a really
2 direct connection between what Petitioner was saying,
3 what he was trying to do, and the recommendation.

4 JUSTICE SCALIA: Is what --

5 JUSTICE KAGAN: But you don't think that
6 there's any reason why it, in a future case, it couldn't
7 be charged just the way I said it?

8 MS. HARRINGTON: I don't think -- I think it
9 could have been charged that he was trying to get the
10 money here.

11 JUSTICE SCALIA: Was that one of the choices
12 the jury had?

13 MS. HARRINGTON: That he was trying to get
14 commitment; that was one of the choices. What they
15 circled was the recommendation. Now, who knows why a
16 jury does anything. I assume, like I said, it's because
17 that was what the e-mails were about, they were about
18 the recommendation.

19 JUSTICE SOTOMAYOR: I didn't think they
20 circled recommendation. They circled his honest advice,
21 didn't they?

22 MS. HARRINGTON: No, they circled -- it says
23 the General Counsel's recommendation -- this is on the
24 JA 142. That's where it --

25 JUSTICE SOTOMAYOR: I'm sorry.

1 MS. HARRINGTON: JA 142. What they circled
2 was the General Counsel's recommendation to approve the
3 commitment. And I think that wording is very helpful to
4 us, because it's not just that he's trying to obtain a
5 recommendation from the General Counsel. He's trying to
6 obtain a particular recommendation, the recommendation
7 to approve the commitment. I think that encapsulates
8 both the property and the obtaining that is the theory
9 of our case.

10 The General Counsel's job was to give his
11 legal advice. The Petitioner was trying to dictate the
12 substance of that legal advice. His property interest
13 was in doing his job. The General Counsel -- the
14 Petitioner was trying to take control of the doing of
15 the job, and therefore trying to take the General
16 Counsel's property.

17 JUSTICE KENNEDY: It -- it does seem to me
18 important that you can't give us a common law case
19 because common law is extortion -- at common law is
20 extortion, it's usually the other way around. It's
21 usually the official who's doing the extorting.

22 MS. HARRINGTON: It was always the official
23 who was doing the extorting.

24 JUSTICE KENNEDY: At -- at common law, could
25 anyone ever extort an official, or we just don't have

1 those cases?

2 MS. HARRINGTON: No. At common law, it was
3 only limited to acts by an official. There was no --
4 and -- and the Court has recognized that when Congress
5 enacted the Hobbs Act, it expanded the -- the reach of
6 extortion in that sense, in the same way that New York
7 did when it enacted the State extortion law.

8 And I do think it's important to keep in
9 mind that the -- the Hobbs Act is based on the New York
10 law and we don't want to just ignore the New York cases
11 that construe the word "property" to mean the running of
12 a business and the doing of a job.

13 JUSTICE SCALIA: But not the obtaining of
14 property.

15 MS. HARRINGTON: But it wasn't -- I mean,
16 it's true there weren't cases --

17 JUSTICE SCALIA: That's true. Not the
18 obtaining the property, right?

19 MS. HARRINGTON: I concede that point. I
20 concede that point. But it was -- it was defining the
21 word "property" and that property is used twice. And
22 so, again, it's a separate question here whether the
23 property was obtained. We think it's clear that there
24 was property. We think it's clear the property was
25 obtained as well, but those are two separate questions.

1 CHIEF JUSTICE ROBERTS: You -- you point
2 out, of course, that it was based on the New York law,
3 but what do you do with the point that they did not
4 carry forward the separate crime of coercion, which was
5 in the New York law but not in the Hobbs Act?

6 MS. HARRINGTON: That's true -- I mean, it
7 was a separate crime of coercion. There was a separate
8 crime of coercion under New York law. I think, you
9 know, the Congress conceived of the Hobbs Act as a
10 property -- as a crime of -- against property, and so it
11 didn't want to include coercion. It included extortion
12 and robbery.

13 Of course, every extortion crime --

14 CHIEF JUSTICE ROBERTS: What do you do with
15 the fact that the State authorities did charge it under
16 coercion?

17 MS. HARRINGTON: In this case. Well, I
18 think it's important to note, and Petitioner doesn't
19 mention this, that the attempted extortion charge he was
20 initially charged with was a misdemeanor and the
21 attempted coercion charge he ultimately ended up being
22 charged with in State law was a felony. So I think that
23 explains what was going on there.

24 And it's a good example -- it's a good
25 illustration of why it's hard to judge ex-post what

1 happened, you know, what was motivating different
2 charging decisions.

3 JUSTICE SCALIA: What do you think would be
4 covered by coercion that wouldn't be covered by the
5 Government's extortion theory here?

6 Give me an example of -- of coercion?

7 MS. HARRINGTON: Anything that doesn't
8 involve property. So if you're trying to coerce --

9 JUSTICE SCALIA: Well, for example --

10 MS. HARRINGTON: So, trying to coerce
11 someone to marry someone they don't want.

12 I think, in the Scheidler case --

13 JUSTICE SCALIA: Why -- why isn't that
14 property? Why. You know, my -- my choice of marrying
15 whom I want, why isn't that as much property as -- as my
16 ability to -- to perform my job the way I want?

17 MS. HARRINGTON: Because it's -- I think
18 it's more properly viewed as a liberty interest. It's
19 not a source of economic value in the sort of
20 traditional sense. I think if you take the Scheidler
21 case --

22 JUSTICE SCALIA: A lot of people marry for
23 money.

24 (Laughter.)

25 MS. HARRINGTON: It's true. I walked into

1 that one.

2 I think -- so let's take the Scheidler case
3 for an example. There were different types of property
4 that were initially alleged in that case. One of them
5 was the right of women to access the services of the
6 clinic.

7 This Court -- this Court distinguished that
8 from the other alleged property interests, which were
9 the running of the business that was the clinic. And
10 the Court said that the right of women to access the
11 services of the clinic was really more of a liberty
12 interest and the running of a business was really more
13 of -- it didn't say it was property because it didn't
14 have to decide that, but it said that's really more in
15 the nature of property. That was the property
16 right alleged.

17 CHIEF JUSTICE ROBERTS: It seems to me you
18 could characterize the right to work as more of a
19 liberty interest than a property interest.

20 MS. HARRINGTON: I think it's both. And
21 so someone -- the general counsel could have been
22 coerced in this case if he had been prevented from going
23 to jobs, to his job. But here what Petitioner was
24 trying to do again was to -- to take the substance of
25 the job, where he was trying to take the fruits of the

1 labor of the general counsel by trying to dictate the
2 substance of the recommendation.

3 CHIEF JUSTICE ROBERTS: So you draw a
4 distinction between extorting someone not to go to work
5 and extorting him how to do his job once he's at work?

6 MS. HARRINGTON: Not on the basis of
7 property, but on the basis of obtaining. The former
8 is -- there's no obtaining and in the latter there's
9 obtaining because what you're doing is you are
10 exercising the person's right to do their job.

11 And the Court has said again and again that
12 exclusive control of property is an essential element of
13 all personal property, of all private property.

14 JUSTICE BREYER: Why -- why, just as long as
15 we are idly speculating, didn't you use 18 U.S.C. 875,
16 "Whoever with intent to extort from any person anything
17 of value"?

18 MS. HARRINGTON: Well, we did use it, and he
19 was -- I mean, there are five convictions under 875.
20 What happened is in this case we conceded that Section
21 875 uses the word "extort." We conceded in the court of
22 appeals that "extort" has the same meaning as
23 "extortion" under the Hobbs Act.

24 And so if there wasn't extortion under the
25 Hobbs Act, there wouldn't be --

1 JUSTICE BREYER: You don't have -- you don't
2 have property in there. You have a thing of value --

3 MS. HARRINGTON: That's --

4 JUSTICE BREYER: -- is there some -- I mean,
5 it just seems obvious you'd be in a much stronger
6 position when you say that the recommendation not to buy
7 or to buy a particular service from somebody is a thing
8 of value.

9 MS. HARRINGTON: That's true. In this case,
10 again, we have treated them as the same. But I think
11 you would want to reserve for another case the question
12 whether Section 875 --

13 JUSTICE BREYER: Have they in the Court been
14 treated as a thing of value means property?

15 MS. HARRINGTON: I think "thing of value" is
16 a broader term than "property."

17 JUSTICE BREYER: So no.

18 MS. HARRINGTON: Right. So we haven't made
19 an argument about 875 here. We've conceded that
20 whatever the result is as to the Hobbs Act would control
21 as to 875. But I do think that's a question for another
22 case if we don't prevail in this case.

23 JUSTICE SCALIA: Well, it -- it at least
24 makes available the argument that you don't have to go
25 this far, that there are other provisions that would

1 enable you to get to this person.

2 MS. HARRINGTON: Well, again, I don't think
3 we are going too far --

4 JUSTICE SCALIA: So why -- instead of
5 inducing us to define property so broadly that it's
6 unrecognizable, as far as I am concerned --

7 MS. HARRINGTON: But, Justice Scalia, you
8 have already defined it this broadly in cases dealing
9 with Section 20 of the Clayton Act, the Due Process
10 Clause, the scope of a court's equity jurisdiction. The
11 Court has said that the running of a business is
12 property. The Court has also said that pursuit of an
13 occupation is property.

14 JUSTICE SCALIA: We're talking about
15 property for purposes of extortion, the common law crime
16 of extortion.

17 MS. HARRINGTON: I hear what you're saying.
18 But what I am saying is that property is property. And
19 it's true that in extortion the property has to be
20 obtained for there to be a crime. That work is done by
21 the word "obtained."

22 JUSTICE SCALIA: I don't think property is
23 property. I think property can -- can have a -- a
24 different meaning with -- with regard to various
25 provisions of the law. And -- and the provision of the

1 law defining extortion brings with it a whole baggage
2 of -- of common law cases. And that may well be
3 different from the word "property" used in some other
4 Federal statute that does not invoke the common law of
5 extortion.

6 MS. HARRINGTON: But this Federal crime of
7 extortion brings with -- brings with it the baggage of
8 the New York State extortion law, and the New York cases
9 said in that law the word "property" includes the
10 running of a business and doing a job.

11 It's true that that wasn't the property
12 being extorted in those cases, but that's what they said
13 property means. And if you are worried that those
14 things can't be obtained, you don't need to worry -- you
15 don't need to have a special definition of property to
16 take care of that, because the Hobbs Act already
17 requires that property be obtained before there is
18 extortion, so there is no need to have a redundancy
19 built in for that.

20 Again, I can understand how -- how the main
21 Hobbs Act, sort of heartland cases which involve the
22 co-opting of a brick and mortar businesses, seem like
23 easier cases. And you might want to draw a line between
24 the running of a business and the doing of labor.

25 But a person has a property interest in

1 doing their job the same way that they have a property
2 interest in running a business. The fact that they work
3 for someone else shouldn't mean that they have less of
4 an interest in doing their job than if they run their
5 own business.

6 Doing a job is a source of economic value to
7 a person and the Court should construe it as property,
8 and the right to exercise control over doing their job
9 is also property.

10 If the Court has no questions?

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Clement, 5 minutes.

13 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

14 ON BEHALF OF THE PETITIONER

15 MR. CLEMENT: Thank you, Mr. Chief Justice.

16 A couple of points in rebuttal.

17 Ms. Harrington started by pointing to the
18 language in McNally. And she is absolutely correct that
19 at the same time that McNally got rid of the honest
20 services prosecution that was brought there, they
21 reserved two possible prosecutions. One would be the
22 obtaining of money, where there was a difference in what
23 the government paid for and what the government got.

24 The other thing that she alludes to is
25 there -- the Court did say, well, maybe there's a

1 possibility that you could prosecute based on the
2 government's loss of control over its allocation of
3 these workman's comp policies.

4 The problem is, of course, that McNally
5 precedes Cleveland. And in Cleveland, the government
6 seized on that language and said, well, even if the
7 video poker license isn't property, the right to control
8 who gets it is property, and that got exactly zero votes
9 from this Court. So I think that argument is no longer
10 viable.

11 Ms. Harrington also points to these New York
12 cases about the scope of property for purposes of 851 of
13 the New York Penal Code. But of course, what we're
14 talking about is 850 of the New York Penal Code, the
15 kind of property that can be obtained. I think it's
16 common ground that -- they are not co-extensive. There
17 are -- there is property that you can obtain that you
18 can't threaten.

19 Indeed, the classic thing you obtained in --
20 in an extortion case is money, and I'm not sure how you
21 really threaten money. You can threaten to take money
22 from someone, but you don't really threaten the money.
23 So these are different terms.

24 So relying on the Barondess case, which is
25 the same case that Justice Stevens relied on in dissent

1 in Scheidler II just doesn't work.

2 Now, she's also absolutely correct that
3 extortion at common law only involved official
4 extortion, but that doesn't mean that there aren't
5 common law places to look for a relevant definition of
6 property. Because the same basic concept was in the
7 larceny statutes, the -- not statutes, the common law
8 crime of burglary, larceny, and embezzlement.

9 And indeed to this very day, New York refers
10 to extortion as larceny by extortion. And if you go to
11 those New York cases, the place I would point you to is
12 the Ashworth case, which is cited in both of our briefs.
13 This is a case that makes very clear that under New York
14 law, they didn't even think that services at all were
15 property.

16 This is a case where the foreman of a mill
17 gets the bright idea that he's going to do some work for
18 his own company using the mill's facilities. And he's
19 charged with larceny.

20 And the court in that case says: No, that's
21 not larceny, you didn't obtain any goods. Classic sort
22 of common law property is in order to be the kind of
23 property that you can steal or extort it has to be
24 moveable. One of the elements of the common law crime
25 is exportation, removing it --

1 JUSTICE SOTOMAYOR: Mr. Clement, when you
2 finish --

3 MR. CLEMENT: And if I can just sort of put
4 the point: They say all of that and they reject that
5 argument. And they use a line which I think really
6 captures what's going on here. They say, well, maybe
7 you can conceive of such a conception of property, but
8 they say to conceive this requires a certain
9 intellectual flexibility which is probably not possessed
10 by the average person. And I would simply submit it
11 also is not the kind of flexibility that should be
12 possessed by the average judge in a criminal case.

13 JUSTICE SOTOMAYOR: Let -- look, I think if
14 we take your argument to its logical conclusion, what
15 you are telling us is, do away with the Second Circuit's
16 Tropiano decision, and the large progeny of cases that
17 come from it.

18 The most common is the threat to a business
19 that says pull out of this market because we don't want
20 you in it. And we want all the customers. And courts
21 routinely have said that's a Hobbs Act violation.
22 You're using the threat of force to tell people to keep
23 out of a particular market.

24 Today you are telling us that under your
25 theory of the Hobbs Act and your definition of property,

1 that doesn't count as a Hobbs Act violation.

2 MR. CLEMENT: Well, a couple of things,
3 Justice Sotomayor. I went back to the Tropiano case,
4 because it is sort of the progenitor of this whole line
5 of Second Circuit cases, and I noticed two things.

6 One, I noticed it was written by a district
7 court sitting by designation. So, I mean, I -- I don't
8 mean anything by that other than this is not Marbury.

9 Second, I would say that the second thing I
10 noticed is that the debt --

11 JUSTICE SOTOMAYOR: Oh, I think when I sat
12 as a district court judge, I would have been insulted by
13 that.

14 MR. CLEMENT: Well, it's not -- it's a good
15 thing you're no longer sitting in that capacity, Your
16 Honor --

17 JUSTICE SOTOMAYOR: Okay. It's really --

18 MR. CLEMENT: -- because I -- I certainly
19 mean you no offense. You could write Marbury here.

20 So the -- the difference is, Your Honor,
21 that that could have also been, I think, actually
22 prosecuted as a property crime, because in that case,
23 there were customer accounts that were obtained, and
24 those customer accounts, as the facts of Tropiano
25 discussed it, actually had value; they could have been

1 transferred from one business to another.

2 So I think what would happen in the Second
3 Circuit, if you decide this case the way we would like
4 you to, is the Government's going to have to be careful.
5 They're going to have to write their indictments to
6 focus on things like money or obtainable property, and
7 they can't get sloppy and put together these autonomy
8 interests and call them property.

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

12 (Whereupon, at 11:09 a.m., the case in the
13 above-entitled matter was submitted.)
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A	aggregate 41:20 42:3 45:15 ahead 22:16 Albany 25:10 alienable 10:12 10:14 18:1 Alito 10:4 15:1 alleged 26:22 52:4,8,16 allocation 58:2 allude 33:6 alluded 14:17 alludes 57:24 alter 18:7 amazing 24:18 ambit 16:14 amount 19:21 analogize 5:2 analogous 13:16 another's 41:2 answer 5:18 12:9 12:12 17:15 22:16 30:25 31:7 answered 14:25 Anti-Racketee... 9:15 24:5 anybody 29:18 anymore 25:11 anyway 42:9 appeal 16:20 appeals 53:22 APPEARANC... 1:14 application 20:14 appropriate 29:15 approve 48:2,7 April 1:9 arguing 10:6 argument 1:12 2:2,5,8 3:3,7 4:4,8 6:14 15:11,17 16:20 16:23 17:2	21:21 22:7,7 26:10 54:19,24 57:13 58:9 60:5 60:14 arguments 4:4 articulated 23:4 Ashworth 59:12 asking 26:15 41:18 aspect 28:9 aspects 28:7 39:19 assent 19:14 assigned 32:18 assistant 1:17 12:1 association 19:22 assume 4:4 16:19 46:22 47:16 assumption 12:19 attaining 41:8 attempt 4:2 attempted 50:19 50:21 attempting 27:13 30:22 39:8 auction 18:21 19:23 authorities 9:10 50:15 autonomy 10:2 17:4,24 20:7 23:6 62:7 available 54:24 average 60:10 60:12 a.m 1:13 3:2 62:12	back 27:5 28:18 35:3 39:2 43:9 46:5 61:3 baggage 56:1,7 bank 12:2,4 Barondess 34:2 34:3 58:24 based 17:10 31:21 49:9 50:2 58:1 basic 3:16 18:22 59:6 basically 11:23 12:17 13:3,7 basis 33:22 38:4 38:21 41:20 42:4,5 53:6,7 began 19:17 26:15 behalf 1:15,19 2:4,7,10 3:8 26:11 57:14 believe 9:7 belongs 21:3 39:6 benefit 19:1 39:5 best 5:25 8:19,20 34:3 44:3,22 bids 18:5 big 23:18 bigs 25:24 bit 38:7 39:3 blackmail 45:5 45:20 bottom 3:13 19:10 box 22:19 break 18:11 Breyer 10:21 11:3,8,25 12:15 12:21 14:3 22:12 28:13 29:2,11,20 30:3 30:24 31:11 40:19 41:8,14	41:23 42:1 53:14 54:1,4,13 54:17 Breyer's 29:23 39:3 bribe 29:25 brick 42:15 45:24 56:22 brief 10:5 15:18 34:14 37:21,23 briefs 59:12 bright 59:17 brings 8:20 56:1 56:7,7 broad 16:12 17:17 31:14 broader 54:16 broadest 16:8 broadly 55:5,8 brought 57:20 built 56:19 bundle 39:20 burglary 3:12 17:22 59:8 business 10:2 17:4 28:20 30:12 31:23 34:5,7 35:22 37:13,24 40:10 40:22,22,24 42:15,20,25 45:24 49:12 52:9,12 55:11 56:10,24 57:2,5 60:18 62:1 businesses 42:13 56:22 buy 54:6,7
	B		C	
	B 44:17 babies 36:1		C 1:3 2:1 3:1 call 17:9 41:9 62:8 calling 32:7 capacity 61:15	

capital 40:23,25	21:21 22:7	Circuit's 60:15	closed 17:6	common 17:11
captures 60:6	cause 21:9 41:22	cite 33:3	closest 33:5,16	17:15,18 33:4,5
care 19:9 56:16	45:13	cited 59:12	33:24	33:7,9,12 36:20
careful 62:4	center 26:6	citizenry 29:9	clue 16:7,11	48:18,19,19,24
Carpenter 20:25	certain 12:3	classic 17:18	code 9:16 58:13	49:2 55:15 56:2
40:9	19:20 60:8	58:19 59:21	58:14	56:4 58:16 59:3
carried 38:25	certainly 4:11	class-wide 41:19	coerce 11:13	59:5,7,22,24
carry 50:4	9:19 20:22	42:4,5	19:8 45:20 51:8	60:18
case 3:4 4:17 5:3	61:18	Clause 55:10	51:10	Commonwealth
5:3 7:5,16	chamber 12:10	Clayton 16:9	coerced 11:15	26:24
13:12,15,17	change 18:17	55:9	12:7 18:4 52:22	comp 8:6,9 58:3
14:15 18:7,15	36:10	clear 17:1 49:23	coercer 20:23	company 6:1,18
18:24 19:9,12	changes 18:22	49:24 59:13	coerces 11:17	27:25 41:22
21:13 23:19,20	characteristics	clearly 42:9	coercion 3:24	44:23 45:14,17
24:24 25:1,21	10:19	Clement 1:15 2:3	8:23,24 9:4,10	59:18
26:6,20 27:11	characterize	2:9 3:6,7,9 4:6	9:12,13,14,16	compensation
27:18,20,21	52:18	4:21 5:21 6:6	9:22 10:3 11:7	5:6
28:5,12 29:3,4	charge 5:19,22	6:12,15 7:3,15	23:19,23 24:6,8	competitors
29:5 31:8 32:23	7:2,7 50:15,19	8:1 9:7 10:10	24:13,22 26:3	11:23 14:5
33:4,5,25 34:2	50:21	11:2,5,21 12:12	50:4,7,8,11,16	completely 19:18
34:2,3,5,21,25	charged 4:18 9:9	12:18,22 13:3	50:21 51:4,6	Comptroller's
35:4,12 36:2,19	9:12 27:6,12	13:25 14:10,14	college 31:4	20:10
36:20 39:8	28:11 29:24	14:22 15:21,24	come 5:7 6:19	concede 49:19
45:23 46:23	40:4 46:7,17	16:17,22,25	7:12 10:11,20	49:20
47:6 48:9,18	47:7,9 50:20,22	18:8,13 20:1,21	20:5 26:21,23	conceded 53:20
50:17 51:12,21	59:19	21:12,23 22:5,8	43:4,7 60:17	53:21 54:19
52:2,4,22 53:20	charging 27:18	22:18 23:3 24:1	comes 18:10	conceivable
54:9,11,22,22	27:21 51:2	25:2 26:19	31:24 33:16	31:12
58:20,24,25	check 14:9,13	27:18 57:12,13	coming 20:14	conceive 60:7,8
59:12,13,16,20	checked 22:20	57:15 60:1,3	commission 7:20	conceived 50:9
60:12 61:3,22	Cheerios 10:23	61:2,14,18	21:18 22:2,3	concept 37:2
62:3,11,12	11:4	Cleveland 4:9	commissions	38:24 39:12
cases 8:3 12:19	Chief 3:3,9 19:16	7:10 8:3 13:17	4:19 5:1,5,8,16	40:7 59:6
20:14 27:13	20:2,12 23:17	18:15 58:5,5	8:5,14 26:18	conception 16:12
30:10 31:19	26:8,13 50:1,14	client 15:13,15	commit 5:17	60:7
33:20 34:2,3,11	52:17 53:3	15:25 19:4 33:1	37:19	conceptual 16:20
34:19 36:16,23	57:11,15 62:10	client's 6:17 33:2	commitment 4:3	concerned 55:6
40:20 42:14	choice 51:14	44:3,22	4:10 5:23,25	conclusion 60:14
49:1,10,16 55:8	choices 46:20	clinic 29:4 35:9	6:2 7:7 13:16	concrete 25:18
56:2,8,12,21	47:11,14	35:21,25 52:6,9	13:20 27:13	condition 29:15
56:23 58:12	circle 14:18	52:11	46:19 47:14	conduct 23:22,24
59:11 60:16	circled 14:20	clinics 17:5 35:16	48:3,7	confident 20:21
61:5	46:21 47:15,20	35:17	committee 19:13	confidential
cash 13:14,20,20	47:20,22 48:1	clinic's 35:6,9,24	committing	20:23 40:10
causation 4:3	Circuit 61:5 62:3	close 13:11 35:6	34:17 37:19	confused 46:5

Congress 9:11 16:11 24:3,6,11 24:19 33:22 42:12 49:4 50:9	copyrights 41:24 corporation 13:9 13:10 correct 9:8 57:18 59:2 corrupt 18:4,15 18:20 corruption 25:21 cost 26:4 counsel 13:23 20:10 21:3,6 26:8 30:21 32:25 44:2 45:5 45:7 46:24 48:5 48:13 52:21 53:1 57:11 62:10 counsel's 32:25 39:10,25 47:23 48:2,10,16 count 6:25 61:1 couple 7:4 57:16 61:2 course 8:4 13:15 24:4,11 50:2,13 58:4,13 courses 36:23 court 1:1,12 3:10 4:12 5:6 8:11 17:1,3,7 18:18 26:13 28:8 33:21 34:4,6,18 34:21,22 39:17 40:16 49:4 52:7 52:7,10 53:11 53:21 54:13 55:11,12 57:7 57:10,25 58:9 59:20 61:7,12 courts 24:17 60:20 court's 3:21 4:9 8:2 12:23 20:24 40:8 55:10 covered 51:4,4	covers 9:18 co-extensive 58:16 co-opting 56:22 crime 3:11,13,23 3:24 8:23,25 9:4,5,10,12,13 9:22,22 23:22 23:23,25 24:2,9 24:11,17 25:19 33:12 42:11,13 42:23 50:4,7,8 50:10,13 55:15 55:20 56:6 59:8 59:24 61:22 crimes 3:12 17:19 26:5 criminal 3:16 60:12 criminalize 3:22 critical 3:15 10:13 customer 61:23 61:24 customers 60:20	defend 31:9 defendant 19:24 22:23 25:5 defending 27:16 define 15:2 37:1 55:5 defined 32:15 55:8 defining 49:20 56:1 definition 3:17 3:20 8:25 9:16 9:25 10:1,4,20 15:5,19 16:16 17:16,19,21 20:6 28:15 29:13 31:6,14 37:17 38:23 56:15 59:5 60:25 definitive 12:14 deliberative 21:2 24:2-26:3 delivering 36:1 demonstrates 16:1 Department 1:18 depends 12:13 deprived 5:13 17:12 26:22,24 28:3 designation 61:7 dictate 30:22 39:23 40:3 44:4 46:1 48:11 53:1 dictating 36:12 dictum 17:9 difference 9:21 18:24 57:22 61:20 different 4:7 8:12 12:1 13:14 19:13 23:9 28:2 28:6 30:18 32:1 33:11 34:13	35:11,18,19 38:3,19,23,23 39:19,20 41:11 41:17 45:6 46:18 51:1 52:3 55:24 56:3 58:23 differently 26:21 26:24 29:16 difficult 21:13 difficulty 39:16 direct 11:15 39:5 47:2 directly 24:9,17 disagree 13:25 disbarred 45:9 discharge 25:7 discharging 24:15 disclose 9:20 discovery 25:5,9 25:17 discussed 61:25 disjunctively 16:10 dissent 58:25 distinct 11:24 distinction 10:14 53:4 distinguished 52:7 district 61:6,12 doing 8:16,21 11:9 29:16 30:13,14,19 31:24 32:2,5,7 32:9,17 33:14 33:16 34:7,17 35:1,2 36:10,13 36:21 39:7,24 41:10 42:4 45:20,25 46:2 48:13,14,21,23 49:12 53:9 56:10,24 57:1,4
---	--	--	---	---

57:6,8 download 41:21 44:24 45:13 draw 10:9 53:3 56:23 dropped 24:24 Due 55:9 duplicative 26:5 duties 25:7 duty 24:15 25:16 D.C 1:8,15,18	enacted 49:5,7 enacting 24:3 encapsulates 48:7 ended 26:15 43:13,14,15 50:21 ends 27:14 engage 37:14 engagement 30:12 enter 32:12 entirely 35:11 entity 13:7 equating 39:15 equity 55:10 ESQ 1:15,17 2:3 2:6,9 essential 53:12 essentially 10:1 19:1 20:6 etcetera 29:4 everybody 19:22 28:20 evidence 5:25 46:23 evoke 33:23 exactly 14:14 22:18,18,19 23:4 38:10,14 58:8 example 31:1 33:18 35:4 50:24 51:6,9 52:3 examples 33:19 exception 13:5 excessive 6:9 7:20,20 exchange 33:14 exclusive 28:9 39:18 40:17 53:12 excuse 35:15 exercise 22:22	22:25 23:10,18 36:14 57:8 exercised 17:13 23:2,7,8 exercising 53:10 exorcise 39:25 expanded 49:5 expensive 19:7 explains 50:23 explicitly 33:23 exportation 59:25 exposure 9:1 exquisitely 24:12 extent 13:6 32:14 extort 4:2,2 12:25,25 48:25 53:16,21,22 59:23 extorted 56:12 extorting 43:5 48:21,23 53:4,5 extortion 3:11,23 5:17 6:17 7:1,6 9:17,22 11:7 14:8 17:11,18 17:20 18:12 23:20 24:6,8,22 26:4,16 27:10 30:9 33:4,5,10 33:20 34:12,16 34:17 35:5 36:1 36:20 37:5 42:25 46:14 48:19,20 49:6,7 50:11,13,19 51:5 53:23,24 55:15,16,19 56:1,5,7,8,18 58:20 59:3,4,10 59:10 extra 26:1 ex-post 50:25 e-mails 46:23	47:17 <hr/> F <hr/> faced 31:4 facilities 59:18 fact 9:2 11:8 18:19,22 50:15 57:2 facts 21:6 46:14 61:24 factual 45:18 fallback 42:24 families 42:11,13 far 21:25 29:2 54:25 55:3,6 far-reaching 29:21 30:5 faucet 43:5 favor 15:25 favorable 20:15 20:18 21:8 Federal 9:4 23:22,24 24:1,9 24:25 25:1,12 25:13,15,25 26:5 56:4,6 fee 7:21 fees 6:9,19,22 7:12,24 27:8 46:10,12 fellow 28:16 felony 50:22 figure 12:6 14:23 25:6 final 13:23 findings 14:16 finish 60:2 first 3:4 4:8 23:13 29:7 34:14 fit 23:1,22,24 fits 24:17 five 53:19 fix 28:17 43:4 flexibility 60:9	60:11 flows 7:8 focus 62:6 focused 6:10 19:17 focuses 22:10 focusing 36:17 follow 8:2 following 13:6 force 7:24 9:1,5 31:25 60:22 foreman 59:16 foremost 4:8 former 53:7 forms 10:7 forth 11:16 forward 50:4 found 12:15 14:19 26:16 27:15 40:5,16 fraud 8:11 fraudulent 8:5 free 10:3 freedom 9:6 friend 26:19 friends 5:4 front 14:18 24:4 26:6 fruits 32:24 39:9 52:25 fund 6:1 fundamentally 3:20 future 47:6 <hr/> G <hr/> G 3:1 gain 39:3 46:19 gap 23:18 gardener 43:6,7 43:23 general 1:18 9:23 13:23 20:10 21:3,6 30:21 31:17
---	--	---	---	---

32:25 39:9,25 44:2 45:5,7 46:24 47:23 48:2,5,10,13 48:15 52:21 53:1 generally 15:3 generate 30:16 generated 4:20 genitor 61:4 getting 5:5 8:5 30:3 36:11 43:20 Ginsburg 8:24 9:8 22:21 23:3 23:21 24:23 34:9 GRIDHAR 1:3 give 8:9 12:13 20:18 30:2 32:25 38:22 44:5,21 45:2,6 48:10,18 51:6 given 11:6 15:13 15:14 46:20 gives 11:19 12:8 giving 39:5 go 17:23 20:15 22:16 27:4,9 31:3 35:3 53:4 54:24 59:10 goes 6:20,22 7:8 10:22 46:5 going 8:17 11:4 18:10 19:8 20:13 25:8,23 28:17 39:2 40:3 41:22 42:8 50:23 52:22 55:3 59:17 60:6 62:4,5 good 8:22 14:13 43:1 50:24,24 61:14 goods 59:21	gotten 7:23,24 government 3:17 4:15,23,25 5:4 5:7,8,9,11,13 5:18 7:1,8,16 7:18 8:13,15,18 13:7,14 17:17 18:18,19 19:2,9 19:14 21:1,14 21:15,24 22:9 24:14,25,25 25:6,10,22,24 25:25 28:19 57:23,23 58:5 government's 8:7,8 9:25 12:10 16:15 21:2 23:5 51:5 58:2 62:4 great 25:11 grocer 10:22 11:10 grocery 10:24 ground 31:12,14 31:17 58:16 guess 16:2 17:9 29:6 41:16 46:4 <hr/> H <hr/> hands 4:14 18:19 happen 62:2 happened 5:13 25:3,9 39:8 51:1 53:20 happening 6:24 happens 11:17 happy 15:24 25:2 25:13 37:23 hard 29:3 50:25 harder 7:5 45:23 harm 31:25 34:20 41:22 43:3 45:14 harmable 37:8 harmed 36:18	37:22 38:1,4,17 38:20 harming 34:18 38:13,16 Harrington 1:17 2:6 26:9,10,12 27:4,12,22 29:1 29:6,19 30:6 31:10,17 32:11 32:19,23 33:7 33:11,18 34:1 34:11 35:3,13 36:3,12,22 37:10 38:10,14 38:18 39:7,13 39:17 41:5,13 41:16,25 42:2 43:17,21 44:12 44:20 45:4,11 46:4,17 47:8,13 47:22 48:1,22 49:2,15,19 50:6 50:17 51:7,10 51:17,25 52:20 53:6,18 54:3,9 54:15,18 55:2,7 55:17 56:6 57:17 58:11 hear 3:3 55:17 heartland 42:23 56:21 helpful 48:3 high 5:9 8:14 21:18 Hobbs 3:11,15 3:22 9:11 10:11 11:1,7 17:10 18:1 22:11 24:3 24:7,20 30:8,8 31:20 33:22 37:16,18 38:5 42:9,23 49:5,9 50:5,9 53:23,25 54:20 56:16,21 60:21,25 61:1	holdout 19:15 honest 5:14 8:21 15:12 17:24 28:18 29:5,7 30:2 44:15 45:1 47:20 57:19 honestly 8:18 Honor 14:14 61:16,20 62:9 horrible 12:10 horribles 12:10 hour 41:11 house 17:23 hypothetical 11:6,22 18:24 20:22 22:1 hypotheticals 43:14 <hr/> I <hr/> idea 5:19 25:11 59:17 idly 53:15 ignore 49:10 II 16:1 17:1 23:13 59:1 illogically 15:7 illustrated 40:8 illustration 25:19 50:25 imagine 11:14 important 18:23 36:6 45:18 48:18 49:8 50:18 inadequate 8:15 inalienable 10:15 10:16 20:8 incentive 26:2 include 9:20 30:11 37:2 50:11 included 50:11 includes 10:2,7 37:13 56:9	including 31:19 incompatible 3:20 incorporate 9:11 19:6 indicted 4:18 indictment 40:5 indictments 62:5 individual 11:12 11:15 13:13 20:16 individual's 45:25 inducing 55:5 inferior 5:9 information 9:20 20:23 40:11,15 40:18 inherently 20:8 initial 46:6 initially 50:20 52:4 instance 37:14 insulted 61:12 insurance 5:10 8:15 intangible 3:19 6:14 10:8,17 23:1 43:13 intangibles 41:24 integrity 26:2 30:2 intellectual 60:9 intent 53:16 interest 5:14 7:18 8:17,19,20 10:2 17:4 23:6 30:1 31:22,23 32:3,5,7 35:2 44:3,22 48:12 51:18 52:12,19 52:19 56:25 57:2,4 interested 29:12 interests 17:24
---	---	--	--	---

20:7 30:14 52:8 62:8 interfere 30:19 interference 8:10 interfering 8:8 25:15 internal 21:2 26:3 interpreted 9:19 invest 28:1 invested 27:25 investment 6:3 6:18,19,20,22 7:12,13,23 19:13,15,20 21:10,10,17,18 26:18 27:8,14 45:22 46:10,12 46:20 invited 14:18 invoke 56:4 involve 51:8 56:21 involved 33:12 59:3 involving 36:20 irrelevant 4:5,7 issue 4:11 19:2 27:1 36:5 40:10 42:1 issued 4:14 13:24	44:21 45:8 46:1 46:8 48:10,13 48:15 49:12 51:16 52:23,25 53:5,10 56:10 57:1,4,6,8 jobs 28:20 31:16 52:23 Journal 40:12,14 40:14,16 judge 50:25 60:12 61:12 jurisdiction 55:10 jury 3:25 14:16 14:18 26:16 27:15 40:5 46:20,20 47:12 47:16 jury's 46:25 Justice 1:18 3:3 3:9,25 4:7,17 4:21 5:15 6:5 6:12,13,15 7:11 7:22 8:24 9:8 10:4,21 11:3,8 11:25 12:15,21 12:24 13:4,19 14:1,3,6,11,16 14:22 15:1,22 15:24 16:15,18 16:23 18:3,9,13 19:16 20:2,12 21:4,20,25 22:6 22:12,21 23:3 23:17,21 24:23 26:8,13,14 27:4 27:5,17 28:13 29:2,11,20,22 29:23 30:3,24 31:1,11 32:4,16 32:20 33:3,9,15 33:24 34:9 35:3 35:23 36:8,15 37:7 38:6,12,15	39:2,3,11,14 40:19 41:8,14 41:23 42:1 43:12,18 44:7 44:14,25 45:10 46:4,6 47:4,5 47:11,19,25 48:17,24 49:13 49:17 50:1,14 51:3,9,13,22 52:17 53:3,14 54:1,4,13,17 54:23 55:4,7,14 55:22 57:11,15 58:25 60:1,13 61:3,11,17 62:10	knees 18:11 knew 42:12 know 5:3 10:22 12:3,5 14:15 15:18 18:6,20 19:5,22 20:7 23:11 28:17 29:17 32:5 46:14 50:9 51:1 51:14 knows 47:15	lawyer 35:9,24 45:1,2 46:8 lawyers 19:7 lawyer's 20:13 44:21 46:21 lead 12:4 leads 22:1,2 leaking 43:24 leaky 43:5 legal 28:16 37:12 48:11,12 letter 29:25 let's 6:17,20 16:18 21:7 52:2 leverage 19:18 20:16,19 liability 38:4,21 liberty 51:18 52:11,19 license 4:11 13:17 58:7 licenses 18:16 limited 49:3 line 10:9 19:10 41:4 56:23 60:5 61:4 lines 6:16 literally 40:3 little 18:21 31:13 34:10 38:7 39:3 live 30:16 lives 30:17 logical 15:10 60:14 long 53:14 longer 58:9 61:15 look 41:19 42:3 46:14 59:5 60:13 looked 24:21 looking 24:20 loss 58:2 lost 42:7 45:8,8 lot 51:22
<hr/> J <hr/> JA 47:24 48:1 JA142 4:1 job 28:20 29:16 30:13,19 31:24 32:1,5,7,9,15 32:15,17,25 33:16 34:7 35:1 35:2 36:21 39:4 40:1 41:2,10 42:4,17 44:8,9		<hr/> K <hr/> Kagan 6:12,15 7:11,22 13:19 14:1,6,11 27:4 27:17 35:3,23 36:8 43:12,18 46:4 47:5 keep 30:21 36:6 40:2 45:18 49:8 60:22 keeping 33:2 44:22 Kennedy 3:25 4:7,17,21 5:15 6:5,13 14:16 21:4,20,25 22:6 26:15 29:22 31:1 48:17,24 Kennedy's 27:5 46:6 kind 7:16 16:2 17:12,25 18:1 18:18,25 19:7 28:5 29:10 41:3 43:21 58:15 59:22 60:11 kinds 41:17	<hr/> L <hr/> labor 32:12,13 32:17,19,20,21 32:25 39:10 40:22,25 42:18 43:6,10 53:1 56:24 laborers 43:10 lack 43:23 land 40:22,25,25 language 57:18 58:6 larceny 3:12 17:21 59:7,8,10 59:19,21 large 60:16 lateral 25:13 Laughter 51:24 law 5:23 8:23 9:23 17:11,15 17:18 24:20,21 25:9 30:9,10 31:19,20 33:4,5 33:8,10,12,21 33:23 34:13,13 35:11 36:20 48:18,19,19,24 49:2,7,10 50:2 50:5,8,22 55:15 55:25 56:1,2,4 56:8,9 59:3,5,7 59:14,22,24 lawn 43:7,15,22	

Louisiana 18:14	34:16 38:3,8,19	narrower 16:14	15:15,25 16:3,7	53:5
love 3:18	38:20 42:12	nature 52:15	16:13 17:4 22:9	open 13:6 17:6
<hr/> M <hr/>	54:14 56:13	necessarily	22:19 23:8	opened 23:18
Macy's 41:12	meant 23:18 35:6	41:21	26:17 27:15	opening 37:21
main 42:12 56:20	medical 35:19	need 25:25 26:1	28:5,11 30:8	operate 10:2
making 12:16	mention 50:19	56:14,15,18	31:19 34:15	35:21
21:10 22:17	metaphysical	neither 36:19	36:9 37:4 46:22	operations 35:7
30:22 44:2,10	17:2	neutral 44:18	49:23,25 55:20	35:10
management 6:1	mill 59:16	New 3:23,23	55:21 56:14,17	opinion 19:5
6:9 7:21	million 45:22	5:23 8:25 9:9	58:15,19 61:23	opportunity 25:5
manifestation	mill's 59:18	9:11,13,23 19:6	obtaining 7:19	opposite 25:20
16:8	mind 15:2,6	23:23 24:11,13	10:12 16:24	optimal 21:17
Marbury 61:8,19	16:14 45:18	24:19,20,21,21	17:1,2,8 30:20	oral 1:11 2:2,5
marked 4:2	46:25 49:9	24:24,24 29:9,9	35:20 36:5,14	3:7 26:10
market 60:19,23	minutes 57:12	30:9 31:19	38:12 39:12	order 5:17 27:8,8
married 16:2	misdemeanor	33:19,20,25	40:6 41:6 43:19	35:9 43:25
marry 51:11,22	50:20	34:12 36:16,19	43:22 46:2 48:8	45:21 46:11
marrying 51:14	mistake 23:14	36:22,23 40:20	49:13,18 53:7,8	59:22
matter 1:11 9:23	mob 10:22 11:17	49:6,9,10 50:2	53:9 57:22	ordinary 31:16
13:21 26:4	model 9:16 24:4	50:5,8 56:8,8	obvious 28:13	organization
62:13	money 4:23 5:18	58:11,13,14	54:5	14:7
matters 20:9	7:7,18 11:9,9	59:9,11,13	obviously 17:10	organized 42:11
McNally 5:2,3	11:16 13:9,24	nobody's 8:21	42:16	42:12,23
6:8 7:16 8:3,4	18:7,11 19:21	Normally 32:7	occupation 30:13	ought 17:20
21:19 22:17	20:17 21:11	note 37:6 50:18	37:14 42:17	over-federalizi...
26:19,20 28:1	22:3,9,13,13	noted 17:9 33:21	55:13	25:19
57:18,19 58:4	26:22,25 27:24	34:14,22	offense 24:13,14	<hr/> P <hr/>
mean 10:16 12:5	28:4 33:13	noticed 61:5,6,10	25:15 61:19	P 3:1
15:8 17:2 20:4	47:10 51:23	<hr/> O <hr/>	offered 3:17	PAGE 2:2
22:15 23:11,17	57:22 58:20,21	O 2:1 3:1	offering 12:22	paid 4:25 5:8
24:18 27:5	58:21,22 62:6	obstacle 27:18	office 8:22 20:10	8:14 21:18 44:9
29:11 32:6	monopoly 10:24	27:19,23	officer 22:25	57:23
36:10,24 38:15	10:25	obtain 14:24 15:1	officer's 22:24	parameters
38:19 41:5,16	morning 3:4	15:23 17:25	official 18:15	32:15
42:22 49:11,15	mortar 42:15	27:13 39:9 48:4	19:2,9,19 24:15	part 6:6 8:4 9:17
50:6 53:19 54:4	45:24 56:22	48:6 58:17	29:17,18 48:21	14:25 15:7,23
57:3 59:4 61:7	motivating 51:1	59:21	48:22,25 49:3	17:14
61:8,19	moveable 10:13	obtainability	59:3	particular 6:1
meaning 31:18	18:2 59:24	37:17	officials 5:5	13:13 37:14
37:12 53:22	mow 43:7	obtainable 3:14	24:25 33:13	43:25 44:5 48:6
55:24	mowed 43:14,22	10:18 37:3,8,15	Oh 45:10 61:11	54:7 60:23
means 11:10	<hr/> N <hr/>	62:6	okay 15:3 18:5	particularized
12:25 13:1 15:3	N 2:1,1 3:1	obtained 4:22	31:11 37:24	31:18
16:12 22:3 32:6	name 31:5	9:24 13:13	61:17	parties 11:23
			once 4:14 25:9	

party 13:2	2:4,10 3:8 5:16	46:21	properly 51:18	52:13,15,15,19
party's 8:20	30:20 32:24	possessed 60:9	property 3:13,15	53:7,12,13,13
passing 24:20	37:21 39:8,22	60:12	3:18 4:4,16	54:2,14,16 55:5
patent 4:12	43:3 45:4,19	possession 39:4	6:14 7:17 9:19	55:12,13,15,18
10:16,17 37:25	46:23 47:2	39:15	9:24 10:1,5,7,8	55:18,19,22,23
PAUL 1:15 2:3,9	48:11,14 50:18	possibility 58:1	10:10,12,17	55:23 56:3,9,11
3:7 57:13	52:23 57:14	possible 4:22	11:12,18,19,20	56:13,15,17,25
pay 6:22 18:10	Petitioner's	57:21	12:9,23 13:21	57:1,7,9 58:7,8
19:20 20:17	42:21	postman 29:17	14:17,24 15:2,3	58:12,15,17
paying 7:18	phrase 23:12,14	potential 20:23	15:19 16:1,4,6	59:6,15,22,23
pays 18:6	physical 37:20	potentially 21:15	16:8,10,11,16	60:7,25 61:22
pejorative 31:13	physically 37:22	practically 5:22	17:12,17,19,19	62:6,8
penal 9:16 58:13	38:1,4	practice 5:23	17:21,25 18:2	prosecute 25:24
58:14	pick 24:8	precedence 3:21	20:25 21:22,25	58:1
people 8:4 25:22	piece 15:11	precedes 58:5	22:4,7,11,12	prosecuted 4:24
30:13,15,16	pieces 40:9	pressure 12:20	22:19 23:7	61:22
31:15 51:22	place 8:9 59:11	13:8,12	26:17,21,23	prosecution
60:22	places 34:13	pretrial 25:3,4	27:1,2,15,20	22:10 25:11
percent 41:3,6	36:25 59:5	prevail 54:22	28:4,5,6,7,9,10	57:20
41:10	plead 5:12	prevented 52:22	28:11,16,18,25	prosecutions
perfectly 19:24	please 3:10	principal 14:2	29:14 30:4,7,7	42:23 57:21
perform 51:16	26:13	principally 17:8	30:11,14,20	prosecutor 3:18
performance	plumber 43:4,4	private 19:7	31:6,7,18,22	prosecutors
31:16	43:24	28:10 29:18	31:23 32:3,5,7	25:12,14,23
person 6:21,23	plumber's 43:6	53:13	32:8 33:17 34:5	protect 26:2
6:23 7:14,19	pocket 22:3 27:9	pro 61:4	34:7,8,12,13	protesters 17:3
9:18 11:16,17	point 5:1 21:23	probably 5:22	34:17,18,19,20	35:15
11:19 12:7,8,8	22:1 24:10,11	13:10 41:15	34:22 35:1 36:4	prove 4:24 6:8
12:20,22 13:24	24:12 28:14	60:9	36:14,17,18,18	7:17 21:16
14:8,11,12 18:4	39:1 49:19,20	problem 23:5	36:20,24 37:2,4	27:24 45:1
18:4 20:17,19	50:1,3 59:11	25:19 27:21	37:8,8,11,11	proved 8:13
23:9 28:22	60:4	28:13 29:12	37:12,15,17,20	provide 35:17,19
29:16 30:12	pointing 57:17	36:16 39:11	37:22,25,25	provides 42:25
31:22 32:3 33:8	points 29:7 57:16	43:18 58:4	38:2,8,17,19	providing 43:1
35:1 36:10	58:11	problematic 9:25	38:20 39:18,19	43:16
43:19 44:15	poker 4:11 13:17	process 21:2	39:21 40:2,7,8	provision 38:5
46:9 53:16 55:1	18:16 58:7	26:3 55:9	40:9,10 41:11	38:21 55:25
56:25 57:7	policies 8:10	progeny 60:16	41:18 42:6,16	provisions 34:23
60:10	58:3	program 8:6	42:19 45:15,16	38:9 54:25
personal 53:13	policy 5:6	prohibit 24:7	46:2,7,9,22	55:25
persons 42:4	political 25:8	prohibited 24:5	48:8,12,16	proxy 20:4
person's 31:6	position 6:18 8:2	prohibition 3:16	49:11,14,18,21	public 24:15 25:7
34:7 35:1 41:1	21:5 37:12	10:11 24:8,22	49:21,23,24,24	25:16,21 29:17
42:17,17 53:10	42:24 54:6	24:22	50:10,10 51:8	33:12
Petitioner 1:4,16	positive 44:6	proper 44:15	51:14,15 52:3,8	pull 60:19

purposes 17:20 17:25 55:15 58:12	21:13 27:6 37:1 38:2 47:6	relied 58:25	49:18 52:5,10	says 10:22 11:11
pursuit 55:12	reasonable 41:9	relying 58:24	52:16,18 53:10	18:10 26:19,19
put 13:8,12 14:18	rebuttal 2:8	remainder 26:7	54:18 57:8 58:7	28:23 30:1
18:5 27:9 31:5	57:13,16	removing 59:25	rights 16:11 20:3	37:19 47:22
31:5 33:4 60:3	received 5:9	repeatedly 28:8	45:15	59:20 60:19
62:7	13:15 21:21	39:18	road 6:4	Scalia 12:24 13:4
putting 18:16	recognized 4:10	reply 10:5 37:23	rob 12:4	18:3,9,13 32:4
	4:13 49:4	require 28:21	robbery 24:7	32:16,20 33:3,9
	recommend 18:6	requirement	50:12	33:15,24 36:15
Q	18:12 19:19	12:7 22:11	ROBERTS 3:3	37:7 38:6,12,15
qualification	29:25 30:1	requires 8:25 9:5	19:16 20:12	44:7,14,25
22:17,17	44:17	37:4 56:17 60:8	26:8 50:1,14	45:10 47:4,11
qualified 34:20	recommendation	reserve 26:7	52:17 53:3	49:13,17 51:3,9
qualify 4:16	6:11 14:12,21	54:11	57:11 62:10	51:13,22 54:23
quality 5:10	15:12,12 18:5	reserved 57:21	role 21:1	55:4,7,14,22
question 29:23	19:11 20:9,11	respect 20:1	roots 17:11,16	scenario 45:19
30:7,18,25 39:3	20:15,18 21:8,9	23:17	roughly 21:5	Scheidler 16:1
41:6,9 46:6	22:1,24 28:15	Respondent 1:19	routinely 60:21	17:1 23:13 35:4
49:22 54:11,21	28:16 30:22,23	2:7 26:11	rule 15:25	36:3 51:12,20
questions 49:25	31:3 33:1 39:24	response 42:7	rulings 25:4,4	52:2 59:1
57:10	40:1,4 44:3,5,6	responses 41:17	run 14:4 35:21	scheme 5:4 8:5
quite 5:24	44:6,10,16 45:6	restaurant 35:19	37:13 57:4	scope 3:14,16
	46:2,21,24 47:3	restrict 9:5	running 30:11	55:10 58:12
	47:15,18,20,23	result 18:17 24:2	31:22 34:4,6	second 15:7,11
	48:2,5,6,6 53:2	28:2 43:25 45:7	42:19 45:24	17:14 23:16
R	54:6	54:20	49:11 52:9,12	34:16 42:7
R 3:1	recommendati...	return 22:13	55:11 56:10,24	60:15 61:5,9,9
racketeer 9:14	20:13	returned 4:1	57:2	62:2
racketeering	reconcile 29:3,5	revenue 30:16	runs 6:18	secretary 30:4
42:10	record 41:22	45:8		31:2 41:10
reach 49:5	44:23 45:13,14	rid 57:19	S	secretary/typist
reaching 29:3	45:17	right 3:19 7:15	S 2:1 3:1	29:24
read 23:14,15	redundancy	9:3 10:17 11:5	sale 18:16	secrets 37:24
37:16 38:2	56:18	11:25 13:4,21	SARAH 1:17 2:6	Section 34:23,23
real 5:18 9:21	referenced 4:12	13:24 14:6	26:10	53:20 54:12
13:20,20,20,21	refers 59:9	16:17,18 20:25	sat 61:11	55:9
14:15,16 26:4	regard 55:24	21:23 22:8,15	satisfied 14:20	sections 34:25
36:2 42:22	reject 60:4	22:18,24 23:1	satisfies 22:11	sector 19:8
really 5:24 16:2	related 3:12	27:2 32:14	saying 6:16,25	see 6:5,5 17:16
20:7 21:2 24:16	relationship	35:20,21 36:14	8:16,21 10:6	29:12 37:23
25:6 37:9 40:13	11:15,22	36:14 37:13,13	22:14 27:22,23	40:23 44:8
47:1 52:11,12	relationships	38:18 39:13,25	28:1 35:14	45:10,10
52:14 58:21,22	11:24	40:1,23 42:17	37:24 38:11,22	seized 58:6
60:5 61:17	relevant 59:5	43:10,10 45:3	42:2 44:13 47:2	Sekhar 1:3 3:4
reason 5:21 7:1,9		45:16 46:8	55:17,18	sell 10:23 11:4
10:23 16:3				

22:22	54:7	25:6,9,10,22	support 8:10	terms 10:11 15:1
sellable 10:18	somebody's	25:23,24 26:1	suppose 18:3,3	16:2 40:20
selling 32:13	17:23 18:25	27:24 28:2 29:8	21:5 27:5 29:23	58:23
sense 15:10,17	36:21	30:9 33:20	supposed 28:24	terrible 6:23
20:3 32:12	someone's 30:19	45:20,22 49:7	Supreme 1:1,12	Thank 26:8,12
34:20 43:2 49:6	39:4	50:15,22 56:8	sure 14:3 21:5	57:11,15 62:9
51:20	song 41:21	States 1:1,6,12	37:7 58:20	62:10
separate 30:6	sorry 22:20	3:5 31:2,16	sweeps 31:15	theories 14:17
36:7 49:22,25	47:25	statute 14:25		46:18,18
50:4,7,7	sort 5:4,12 7:20	15:8 16:5,6	T	theory 4:24 8:7
separately 37:3	7:20 8:17 13:8	23:15 24:13	T 2:1,1	22:23 23:5,6
serious 21:7	14:2,4,23 15:2	28:19,25 29:14	take 5:12 16:15	27:11 43:20
serve 8:18 17:5,6	15:4 16:3,20	36:25 37:3	21:19 22:23,24	46:11,15,15,16
service 35:18,20	18:20 20:8 25:8	38:24,25 56:4	23:6,19,22	48:8 51:5 60:25
43:16 44:2 54:7	37:23 41:17,19	statutes 59:7,7	25:14 28:15	thing 5:7 6:7 8:22
services 5:14	47:1 51:19	steal 17:23 59:23	32:24 35:17	10:13 11:18
8:21 15:13	56:21 59:21	stenographer	40:25 41:2	12:2 23:13,16
17:24 22:13	60:3 61:4	29:24	43:22,23 44:2	23:17 25:8 26:1
28:18 29:5,8	Sotomayor 14:22	step 6:4 25:25	48:14,15 51:20	28:23,24 31:4
43:1,25 52:5,11	15:22,24 16:15	Stevens 58:25	52:2,24,25	33:13 36:24
57:20 59:14	16:18,23 39:2	sticks 39:20	56:16 58:21	37:9,18 38:8,16
Short 34:2,5,21	39:11,14 47:19	stock 20:4,4	60:14	39:19 43:6,15
shortcut 5:12	47:25 60:1,13	strange 15:2	taken 11:12 23:2	44:1,23 45:12
shout 12:3	61:3,11,17	stream 30:16	34:10,12,15	46:25 54:2,7,14
shouting 12:4	sought 22:23	45:8	36:18,21 40:11	54:15 57:24
show 7:19	sounds 5:24	street 25:12	40:13,16 43:9	58:19 61:9,15
shut 35:10,25	29:11 31:13	40:11,14,14,16	takes 41:10	things 4:13 7:4
side 18:21	40:21	stronger 54:5	talked 46:24	8:12 10:19 15:3
simple 46:16	source 30:15	structurally 16:5	talking 16:6,7,12	18:18 28:21
simpler 27:7 46:7	51:19 57:6	submit 60:10	17:11 23:12	30:14 36:6
simply 21:24	speaks 29:14	submitted 62:11	25:20 32:16,17	37:25 38:3
60:10	special 11:15	62:13	55:14 58:14	56:14 61:2,5
single 6:20 41:20	56:15	subsequent 6:4	talks 16:10	62:6
44:23 45:12	speculating	substance 30:23	tangible 10:7	think 4:6,8,10,23
sitting 61:7,15	53:15	36:13 39:23	43:1,8 46:25	5:1,21 6:6,8 7:6
situation 24:16	spent 26:25	44:4 46:1 48:12	target 35:15	8:2 9:21 10:19
situations 11:14	squarely 8:20	52:24 53:2	targeted 35:8,24	11:2,21 12:5,12
sloppy 62:7	stand 4:8	substantial 21:9	42:10	12:13,19 13:3,5
sly 18:17	start 26:14 36:1	such-and-such	tease 15:18	13:6,16,17,19
sold 17:13	started 57:17	31:5	technical 29:12	14:1 16:3,7,13
Solicitor 1:17	State 3:22,23 6:2	sudden 25:10	tell 12:19 34:10	17:14 18:17,22
somebody 6:17	8:23 9:4,9	suddenly 29:13	35:9 60:22	19:12 20:2 22:8
18:9,20 23:8	18:14 19:6,14	suggesting 14:4	telling 41:2 60:15	22:15 23:14
28:22 31:3	21:1,1 23:23	35:7	60:24	25:21 27:17,19
32:10 40:23	24:17,19,19,24	suggests 17:17	term 33:10 54:16	30:4 31:8 32:8

32:8 34:1,4 35:23 36:6 39:1 40:19,22 42:24 44:11 47:5,8,8 47:19 48:3,7 49:8,23,24 50:8 50:18,22 51:3 51:12,17,20 52:2,20 54:10 54:15,21 55:2 55:22,23 58:9 58:15 59:14 60:5,13 61:11 61:21 62:2 thinking 41:9 third 8:19 13:2 thought 19:6 threat 7:24 9:1,5 9:17,18 13:22 27:7 29:15 31:4 46:11 60:18,22 threaten 10:25 12:2 14:8,11 58:18,21,21,22 threatened 21:6 43:3 threatening 7:13 threatens 6:23 28:22 threats 9:20 31:25,25 35:5,8 35:25 three-word 23:12 throw 29:13 throwing 32:6 thumbs 19:10,10 time 12:3 26:7 28:22 29:14 30:19 41:3,7,11 57:19 times 38:24 today 7:5 27:16 60:24 totally 44:18 track 42:7	trademark 45:16 traditional 8:22 9:15 10:20 51:20 transcription 30:2 transfer 19:21 22:22 transferability 19:17 transferable 10:13,18 18:1 19:18,24 20:3 20:19,24 transferred 15:16 17:13 62:1 treated 54:10,14 tried 43:7 45:5 Tropiano 60:16 61:3,24 true 29:16 36:22 44:25 49:16,17 50:6 51:25 54:9 55:19 56:11 try 32:1 36:6 44:5 trying 14:23,23 15:19 18:25 19:4 30:21 32:24 33:23 35:16,17 36:10 39:22,23,24 40:2,3,21,24 40:24 41:1 42:10,11 44:1,4 45:19,23,25 46:1,19 47:3,9 47:13 48:4,5,11 48:14,15 51:8 51:10 52:24,25 53:1 Tuesday 1:9 turn 23:6,19 twice 49:21	two 11:23,24 29:7 34:1,13 36:6 41:17,17 49:25 57:21 61:5 twofold 5:22 16:4 type 27:1 28:10 35:18,19 types 52:3 typical 25:21 typing 29:25 <hr/> U ultimate 6:3 ultimately 4:20 5:16 9:24 50:21 unanimous 19:14 unauthorized 41:20 44:23 understand 11:22 15:10 21:5 30:24 41:25 56:20 understanding 3:14 9:13 20:22 unissued 4:12 United 1:1,6,12 3:4 31:2,15 unrecognizable 55:6 urged 24:25 use 15:4 23:5 42:13 45:19 53:15,18 60:5 uses 31:25 53:21 usually 48:20,21 U.S.C 53:15 <hr/> V v 1:5 3:4 valuable 42:6,18 44:7,8,9,11,11 44:19 45:2,12 value 3:19 4:14 4:15 15:3,9,15	16:16 18:19 33:13 44:17,20 45:17 51:19 53:17 54:2,8,14 54:15 57:6 61:25 variety 14:17 various 5:4 55:24 verdict 4:1 27:16 version 9:14 viable 58:10 victim 24:14 29:8 46:3 video 4:11 13:16 18:16 58:7 view 30:3 42:21 42:22 viewed 51:18 violate 11:1 violating 28:25 violation 21:11 35:11 37:16,19 60:21 61:1 violence 7:25 21:7 31:25 34:17 35:6,8 37:20 vital 28:9 votes 58:8 voting 20:3,6,25 <hr/> W walked 51:25 Wall 40:11,14,14 40:16 want 7:11,17 19:19 20:15 28:14,23,24 30:6 31:12 38:22 41:19 42:3,22,24 44:15 49:10 50:11 51:11,15 51:16 54:11 56:23 60:19,20	wanted 5:16 19:5 27:25 45:6 wants 6:18,19 Washington 1:8 1:15,18 wasn't 15:13 27:6,10,10 29:9 34:12 36:2,4,5 36:9 40:2,13,13 46:6,13,15 49:15 53:24 56:11 way 12:11 14:3 15:3 23:8,9,14 27:7,18,21 32:1 33:5 34:6 35:14 36:4,9 41:11 42:19 46:7 47:7 48:20 49:6 51:16 57:1 62:3 wealth 30:15 week 45:5 well-phrased 31:1 went 8:13 61:3 weren't 49:16 We'll 3:3 we're 14:7 23:11 25:20 28:18 55:14 58:13 We've 54:19 willing 25:23 wipe 42:22,25 women 52:5,10 word 12:24 14:24 23:12,18 30:11 31:18 36:24 37:2 38:23 49:11,21 53:21 55:21 56:3,9 wording 48:3 words 11:11 15:4 32:6 38:25 work 14:24 15:8 15:20,22 19:1
---	---	---	---	--

38:25 40:3	\$			
52:18 53:4,5	\$35 45:22			
55:20 57:2 59:1				
59:17	1			
working 31:15	10:10 1:13 3:2			
workman's 58:3	11:09 62:12			
workmen 8:6,9	12-357 1:4 3:4			
workmen's 5:5	142 47:24 48:1			
8:9	18 53:15			
worried 41:23	1893 34:4			
56:13	1911 34:22			
worry 25:16	1934 9:15 24:5			
56:14	1946 24:3			
wouldn't 7:23,23				
13:21 14:6 20:2	2			
43:8,17,22,23	2 41:3,6			
51:4 53:25	20 55:9			
write 31:3 40:20	2013 1:9			
61:19 62:5	23 1:9			
writes 14:8,12	26 2:7			
written 61:6				
wrong 45:3	3			
	3 2:4 41:10			
X				
x 1:2,7	5			
	5 57:12			
Y	57 2:10			
yeah 37:24				
York 3:23,23	8			
5:23 9:9,12,13	850 34:23 58:14			
9:23 19:6 23:23	851 34:23 58:12			
24:11,13,19,20	875 53:15,19,21			
24:21,21,24,24	54:12,19,21			
29:9,9 30:9				
31:19 33:19,20				
33:25 34:12				
36:16,19,23,23				
40:20 49:6,9,10				
50:2,5,8 56:8,8				
58:11,13,14				
59:9,11,13				
York's 8:25				
Z				
zero 58:8				