

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CREDIT SUISSE SECURITIES :

4 (USA) LLC, FKA CREDIT :

5 SUISSE FIRST BOSTON LLC, :

6 ET AL., :

7 Petitioners :

8 v. : No. 05-1157

9 GLEN BILLING, ET AL. :

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11 Washington, D.C.

12 Tuesday, March 27, 2007

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:15 a.m.

17 APPEARANCES:

18 STEPHEN M. SHAPIRO, ESQ., Washington, D.C.; on behalf of
19 the Petitioners.

20 GEN. PAUL D. CLEMENT, ESQ., Solicitor General,
21 Department of Justice, Washington, D.C.; for the
22 United States as amicus curiae, supporting the
23 Petitioners.

24 CHRISTOPHER LOVELL, ESQ., New York; on behalf of the
25 Respondents.

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

2 [10:15 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in case 05-1157, Credit Suisse Securities
5 versus Billing, et al.

6 Mr. Shapiro.

7 ORAL ARGUMENT OF STEPHEN M. SHAPIRO,

8 ON BEHALF OF PETITIONERS

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

11 The pivotal question in this case is whether
12 this Court's decisions in Gordon and NASD require
13 implied antitrust immunity as the district court
14 believed. And we submit that the answer is yes. The
15 '33 and '34 acts were of course passed for the very
16 purpose of regulating IPOs and alleged market
17 manipulation. And this Court has referred to these laws
18 as the anchor of Federal economic policy in the
19 securities field. And under these laws the SEC has laid
20 down detailed regulations applicable to the very
21 practices that are at issue in this case with active
22 supervision by the SEC and the NASD.

23 And it has done this with full understanding
24 that syndicated underwriting is inherently concerted
25 action. An underwriting requires joint action in

1 accumulating information and setting the price of the
2 offering along with allotting shares to customers.

3 Now the Gordon and NASD cases apply directly
4 here because of the danger of inconsistency and conflict
5 which the SEC cited. As in cases of this Court in the
6 past, like NASD and Gordon and later Trinko, Congress
7 required this expert administrative agency to take
8 competition into account when issuing its standards.
9 And review in antitrust courts across the country would
10 once again raise the danger of false positives and
11 conflicts and wasteful redundancy.

12 JUSTICE SCALIA: Did it, did it specifically
13 state that, or is it that or just the principle that all
14 Federal agencies have an obligation to --

15 MR. SHAPIRO: Oh, no, Your Honor, it is very
16 express in 75 and then again in the 96. Capital
17 formation, investor protection and competition have to
18 be weighed against each other by the SEC, and in Gordon
19 this Court attached great importance to that standard,
20 which differs from the competition first standard of,
21 the antitrust laws impose.

22 JUSTICE STEVENS: Mr. Shapiro, to what
23 extent has the SEC regulated the specific
24 vertical restraints that are alleged here?

25 MR. SHAPIRO: The SEC regulates the -- the

1 alleged tie-ins and it regulates the alleged excessive
2 compensation claims.

3 JUSTICE STEVENS: And laddering, for
4 example?

5 MR. SHAPIRO: Laddering, tying, and
6 excessive compensation. And it's had a number of
7 enforcement actions. Its regulation M is focused
8 exactly on those practices. It's issued very detailed
9 guidance in a document that we attach to our petition
10 appendix on what constitutes --

11 JUSTICE STEVENS: And are we to assume that
12 if the allegations are true, which they of course may
13 not be, that this is a violation of the -- of the
14 securities laws?

15 MR. SHAPIRO: Well the SEC has said it
16 depends on the circumstances. And they draw very fine
17 lines in this area, Your Honor.

18 And if, in fact, the SEC concludes it is a
19 tie-in under its finely calibrated standards, then yes.
20 But that's the critical issue here. It is very easy to
21 term these things excessive compensation or tie-ins, but
22 when the NASD looked at a real complaint of this sort in
23 the Invemed case it found that there was no excessive
24 compensation and no commercial bribery. And --

25 JUSTICE GINSBURG: How about in this case

1 Did the SEC examine that question at all in this case?
2 And did it take any position?

3 MR. SHAPIRO: In this case it took no
4 position on the merit of the underlying claims, but it
5 said that there would be serious problems if antitrust
6 law were applied to these allegations. It would
7 interfere with the agency's ability to define what is
8 manipulation and to amend its definitions. It has
9 ongoing rulemaking proceedings right now addressed to
10 this issue; and it said further that it would discourage
11 underwriters from going up to the line of prohibition,
12 which is very important in this area.

13 Because if they don't step over the line and
14 they engage in book building conversations, that's
15 critical to setting the right price for the IPO. And so
16 --

17 JUSTICE GINSBURG: How should we, we
18 weigh -- Congress is asking with respect to securities,
19 private securities litigation, Congress looked at that
20 and thought some restraint had to be placed on private
21 actions, but it didn't do anything with respect to
22 antitrust private action.

23 MR. SHAPIRO: We think part of the
24 repugnance analysis here should focus on the fact that
25 these securities claims have simply been repleaded as

1 antitrust claims. Congress wasn't aware of any problem
2 of this sort; nobody had attempted to replead securities
3 violations like tie-ins and excessive compensation as
4 antitrust claims. And Congress of course relied --

5 JUSTICE SOUTER: Doesn't, doesn't the
6 statute specifically provide for -- for exactly this
7 possibility? Doesn't both the '33 and the '34 act have
8 a saving other remedies clause?

9 MR. SHAPIRO: It doesn't refer to antitrust
10 cases. Those were references to state law remedies that
11 Congress later contracted with the --

12 JUSTICE SOUTER: Was it -- were those two
13 clauses expressly limited to state law remedies?

14 MR. SHAPIRO: No. They referred to other
15 claims, Your Honor, but they don't refer to antitrust.
16 So we don't believe --

17 JUSTICE SOUTER: But do they have to?

18 MR. SHAPIRO: We don't believe --

19 JUSTICE SOUTER: None of the claims includes
20 an antitrust claim on its face.

21 JUSTICE SOUTER: Well, we think -- we think
22 they don't apply to antitrust, and in Gordon and NASD
23 those same provisions were in place but that didn't
24 deter the Court from finding them --

25 JUSTICE SCALIA: I don't even think we

1 mentioned them. Did we mention them?

2 MR. SHAPIRO: Pardon me?

3 JUSTICE SCALIA: Did we mention them in
4 those cases?

5 MR. SHAPIRO: I don't believe the Court did.

6 JUSTICE SCALIA: Well, maybe we just forgot.

7 (Laughter.)

8 MR. SHAPIRO: They -- well, they -- they
9 don't pertain to antitrust. If you look at the history
10 of those provisions they are talking about state causes
11 of action and there's no reference to antitrust as such
12 in them.

13 That's quite different from Trinko where
14 there was an antitrust savings clause that went on in
15 detail about saving the antitrust cause of action.

16 The danger of conflict that the SEC is
17 talking about here is an acute danger to its ability to
18 --

19 JUSTICE BREYER: What happened in respect to
20 the SEC? What about primary jurisdiction? That's what
21 I wondered as I read this. Nobody mentions it. But
22 there's certainly a lot of precedent in the area in this
23 kind of thing. You ask the agency, have to go to the
24 agency, see what they say.

25 MR. SHAPIRO: Well, Your Honor, the reason

1 it doesn't get mentioned is in that Gordon the Court
2 held primary jurisdiction was not a fix for this kind of
3 conflict. And here the SEC has expressed its opinion in
4 its amicus briefs already. The Court is aware of those
5 positions laid out in our cert petition --

6 JUSTICE STEVENS: The allegations in this
7 are quite different from Gordon. There you have got a
8 horizontal -- allegedly horizontal agreement. Here you
9 have got a vertical agreement which it seems to me
10 depends on non-disclosure for it work at all. If there
11 been full disclosure of all these laddering and
12 flippings I don't see how in the world you would ever
13 get a -- an antitrust violation.

14 MR. SHAPIRO: Well, Your Honor, the conflict
15 is different, but it's really quite a more serious
16 conflict than it was in Gordon. In Gordon the only
17 concern was the SEC might reinstitute fixed rates in the
18 future, and it never did that in 30 years. Here the SEC
19 says the conflict goes to our ability to define
20 manipulation and to amend our rules which we're in the
21 process of doing and we can't have conduct deterred.

22 CHIEF JUSTICE ROBERTS: Well, Mr. Shapiro,
23 you're doing a good job of defending the SEC's interests
24 but your position goes considerably beyond their
25 position today.

1 MR. SHAPIRO: Well, the SEC in the lower
2 courts advocated dismissal of the complaints; and in the
3 Supreme Court, of course, they've -- they've urged for a
4 vacator of the lower court decision. And the brief of
5 the SG echoes many of the concerns that the SEC
6 expressed in the lower courts.

7 JUSTICE BREYER: That's why I wonder about
8 primary jurisdiction. You put a burden on the, on the
9 plaintiffs to go to the agency and the agency could take
10 a range of positions. It might say this is absolutely
11 unlawful, BUT it's close enough we think an antitrust
12 court has no business mucking around in this. Or it's
13 unlawful and we don't care. Or, it's not -- in which
14 case they could bring their suit. Or it's -- it's not
15 unlawful but we don't care, or it's not unlawful and we
16 do care.

17 I mean, there is a range of positions they
18 could take which was the purpose of the primary
19 jurisdiction doctrine, to see in the context of the
20 particular conduct, not general but in the context of
21 the particular conduct, what the agency thought about
22 this in terms of its regulatory mission.

23 MR. SHAPIRO: Well, I think Gordon is very
24 informative on that point. It rejected primary
25 jurisdiction because the agency's views were already

1 known to the Court. Here the SEC has filed a 40-page
2 submission in the district court explaining that the
3 suit has to be dismissed because of conflict with the
4 administrative scheme.

5 JUSTICE BREYER: That's in respect to the
6 particular conduct at issue here.

7 MR. SHAPIRO: Absolutely. The particular
8 conduct at issue --

9 JUSTICE BREYER: Of course the Petitioners
10 have not had an opportunity, I would think -- they filed
11 a complaint. But they've not had an opportunity to
12 argue this out in front of the SEC with particular
13 evidence, with particular witnesses, et cetera.

14 MR. SHAPIRO: Well, what this Court said in
15 Gordon was that it's a legal question whether there is
16 potential interference with the administrative scheme
17 for us to decide the SEC's views are entitled to
18 considerable deference, the Court said. But if they've
19 been submitted in the form of amicus briefs, that is
20 sufficient to demonstrate the repugnance.

21 JUSTICE SCALIA: I suppose if primary
22 jurisdiction were a cure-all, there would never be any
23 cases in which the regulatory scheme did not displace
24 the antitrust laws.

25 MR. SHAPIRO: That's absolutely right. In

1 that case, where the Court did refer an antitrust issue,
2 the agency declined to take the reference. And
3 here there there was a factual issue the agency was
4 supposed to opine on. Here we have a pure legal
5 question, the Court has held, of potential repugnance
6 with the SEC scheme. That's for the Court to decide.

7 JUSTICE STEVENS: The difference between
8 this case and Gordon is that this case, the heart of
9 their allegations are failure to disclose which is
10 quintessentially the SEC's business, making sure
11 disclosures are right. I don't think if there were
12 disclosure, they would have a problem in this case. Am
13 I missing something on that?

14 MR. SHAPIRO: Well, what the SEC says is
15 that if the conduct is ordinary book building,
16 communications about future transactions, at future
17 prices, there's no misconduct to be disclosed. It is
18 perfectly permissible.

19 JUSTICE STEVENS: The allegation in the
20 complaint is there was no disclosure.

21 MR. SHAPIRO: The complaint alleges an
22 antitrust violation. Just that there was agreement to
23 engage in tie-ins, and an agreement not to --

24 JUSTICE STEVENS: The allegation is the
25 agreement -- the agreement not to disclose.

1 MR. SHAPIRO: That certainly highlights why
2 this is an SEC case and not an antitrust case, it seems
3 to me, because that -- disclosure is for this
4 administrative agency to wrestle with, and it has made
5 clear that investor welfare will be harmed and issuer
6 welfare will be harmed if these sensitive questions are
7 taken from it and are frozen by antitrust judgments.
8 That was the problem the Court faced in NASD and it was
9 the problem the Court faced in Gordon.

10 JUSTICE STEVENS: Let me just ask one more
11 question, Mr. Shapiro. Supposing there had been full
12 disclosure here. Do you think there would be an
13 antitrust violation?

14 MR. SHAPIRO: Well, in part, I would say
15 yes, there was an agreement in restraint of trade --

16 JUSTICE STEVENS: Agreeing on what the --

17 MR. SHAPIRO: Yeah, that's their theory.

18 JUSTICE STEVENS: The preliminary before the
19 IPO. But what they did after the IPO, would that
20 violate the antitrust laws?

21 MR. SHAPIRO: Really what they are alleging
22 is a conspiracy to violate the securities laws here,
23 that had some -- what they claim, a market effect. And
24 it is the agreement that they contend is an unreasonable
25 restraint of trade or they refer to the compensation

1 payments as excessive commercial bribes. They say that
2 violates the Robinson-Patman Act.

3 The trouble is no matter how you phrase
4 this, no matter how they could amend their pleading,
5 inherent in the case are challenges to tie-ins and
6 alleged excessive compensation payments that under the
7 securities laws have to be regulated by the SEC. The
8 Government has to speak with one voice on this issue
9 under one set of standards, or administrative law gets
10 frozen. And there's a huge deterrent effect on
11 underwriters.

12 JUSTICE GINSBURG: Are there many situations
13 in which a particular industry is subject to regulators
14 and they sometimes conflict? Like EPA and OSHA?

15 MR. SHAPIRO: Oh, yes. Under these two
16 decisions of the Court, NASD and Gordon, there has to be
17 active supervision or pervasive regulation by the
18 agency, and then a direct conflict with what the SEC is
19 trying to accomplish.

20 There are a number of things that can be
21 regulated even under the antitrust laws under those
22 standards. NASD and Gordon didn't stop all antitrust
23 litigation in its tracks. Only things that were within
24 the agency's supervisory jurisdiction to present --

25 JUSTICE SCALIA: The EPA is not a hands-on

1 regulatory agency the way the SEC is. It has not been
2 given an entire industry to regulate.

3 MR. SHAPIRO: I think that's right, Your
4 Honor. The '33 Act, if you look at the Act, every
5 provision in it is focused on IPOs. It is state of the
6 art comprehensive legislation. The '34 Act in three
7 separate provisions gives the SEC power to define
8 manipulation. Then it has rulemaking power and then it
9 has exemption power. This is comprehensive. It is far
10 more pervasive than the kind of regulation that was
11 before the Court in NASD. In that case, there was just
12 unexercised rulemaking power. Here we have got
13 voluminous regulations, we have interpretations, we have
14 many enforcement actions aimed at this very same
15 conduct.

16 JUSTICE SCALIA: Well, the Government says
17 that's fine where the regulations have been issued, and
18 where they -- where they render the action here lawful.
19 There's no -- no problemo. What's wrong with that?

20 MR. SHAPIRO: Well, the Government says --

21 JUSTICE SCALIA: The Government's willing,
22 in other words, to give the SEC carte blanche. Whatever
23 you say is lawful is lawful that won't violate the
24 antitrust laws.

25 MR. SHAPIRO: We think immunity extends

1 beyond what is expressly permitted by the SEC. The way
2 the Court phrased it in NASD was things that are
3 connected to the agency's regulatory responsibility have
4 to be immunized to allow the agency to do its task. And
5 that extends a little bit further than the permission
6 standard that the Government has given.

7 And there --

8 JUSTICE SCALIA: Extends a lot further, I
9 would think.

10 MR. SHAPIRO: I would think it does. I
11 would think the NASD case would come out the other way
12 under the standard the SG is using today. But we think
13 we win under the inextricably intertwined standard,
14 because all of this conduct is closely connected to what
15 is permissible. There's a very fine line between what
16 is forbidden and what is permitted. They can ask about
17 future market prices. They can give the IPOs to their
18 best customers, but they can't solicit a transaction in
19 the immediate aftermarket while the IPO is still --

20 JUSTICE SCALIA: So we could decide that
21 way. We could say, we don't have to decide what the
22 standard is, even if it is inextricably intertwined as
23 the Government does, you would win, you would be
24 happy --

25 MR. SHAPIRO: We would win under either of

1 these standards. But what we advocate is dismissal with
2 prejudice, which is the relief the Court gave in the
3 NASD case, and not a shapeless remand of the case for
4 further pleading. And the reason for that is that the
5 interference would overhang the market. The
6 interference would affect the SEC's ability to lay down
7 the standards and encourage conduct going up to the line
8 of prohibition.

9 And the remedy that the Court approved in
10 NASD is exactly appropriate here, dismissal with
11 prejudice. These plaintiffs did not even seek to amend
12 their complaints in the lower courts. Under Second
13 Circuit law, they've waived their right to seek an
14 amendment. So we, in sum, urge the Court to stick with
15 its own standards in NASD and Gordon. The standards are
16 not broken. They don't need to be fixed. Nobody has
17 pointed to any changed circumstances that would warrant
18 a change in this Court's decisions, and those decisions
19 require dismissal with prejudice.

20 If there are no further questions, we'd
21 reserve the balance of our time.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Shapiro.

24 General Clement.

25 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

1 ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING PETITIONERS

3 GENERAL CLEMENT: Mr. Chief Justice, and may
4 it please the Court:

5 The United States has responsibility for
6 enforcing both the securities laws through the SEC and
7 the antitrust laws through the Justice Department and
8 the FTC. It thus has a critical interest in ensuring
9 that these laws can be reconciled in a manner that gives
10 effect to both, and completely ousts neither. Any
11 effort to try to reconcile those laws in the specific
12 context of the underwriting of IPOs has to begin with an
13 understanding of the particular regulatory context and
14 scheme. The SEC obviously carefully regulates both the
15 registration and the underwriting process for individual
16 IPOs.

17 There are two aspects of that regulatory
18 regime that are particularly important: First, the
19 approval for all sorts of collaborative conduct that is
20 the hallmark of the underwriting syndicate. And second,
21 the very fine nature of the distinctions that the SEC
22 draws between permissible book building activity and
23 impermissible market manipulation.

24 And in that regulatory context, the kind of
25 collaborative conduct that would in many other contexts

1 raise yellow or red flags of an antitrust violation is
2 innocuous, because it's a hallmark of the underwriting
3 process.

4 Equally important, the SEC does make certain
5 conduct like tie-ins and laddering unlawful, but very
6 closely related conduct is not only permissible, but is
7 considered beneficial to the capital formation process.

8 JUSTICE STEVENS: May I ask this question
9 about the laddering and so forth? If it were fully
10 disclosed, would it be unlawful under either statute.

11 GENERAL CLEMENT: I think it might, Justice
12 Stevens. The prohibitions on laddering and tie-ins are
13 not just disclosure provisions. And I think as a
14 practical matter, if these kind of things were
15 disclosed, they probably wouldn't happen. So it's a
16 little hard to --

17 JUSTICE STEVENS: I can see how they would
18 affect the market if they were disclosed.

19 GENERAL CLEMENT: That may be true, but the
20 way the regulation approaches that conduct is a little
21 bit more of a prophylactic approach. It's not just a
22 disclosure approach, and it does say that there's
23 conduct that is forbidden. But I think it is important
24 to recognize just how fine the lines that are drawn here
25 become, because, to give you a real world example, the

1 guidance document that's at page 216A of the petition
2 appendix makes clear that it is permissible for the lead
3 underwriter, when talking to customers, to gauge their
4 interest at various price points in the initial
5 offering.

6 JUSTICE ALITO: In light of the very fine
7 line, how is the Court to distinguish between --
8 determine whether what's alleged is inextricably
9 intertwined with authorized conduct?

10 GENERAL CLEMENT: Well, I think if you were
11 looking at a challenge that took place solely within the
12 context of a single IPO, it would probably be so
13 difficult that I think we would concede that you can't
14 practically separate the two. What I think is important
15 from the standpoint of the Justice Department and its
16 antitrust responsibilities is you don't want to sweep an
17 immunity so broad that it would, say, give cover to a
18 conspiracy that cut across IPOs, and was an effort to
19 fix commission rates, or to make territorial agreements,
20 or exclude a rival investment bank from the underwriting
21 process.

22 JUSTICE SCALIA: But the problem you address
23 has been a problem of strike suits. And it is the
24 problem that Congress addressed in its legislation.
25 Shake downs. It just is less expensive to pay off the

1 suitor than it is to litigate it to a final conclusion,
2 where that conclusion is highly uncertain.

3 And I don't see how your -- your solution of
4 inextricably intertwined, where there's a penalty of
5 treble damages if you guess wrong about that line, I
6 don't see how that's going to stop the strike suits any
7 more than the current situation does.

8 GENERAL CLEMENT: Well, Justice Scalia --

9 JUSTICE SCALIA: I wouldn't want to roll the
10 dice on whether something is inextricably intertwined,
11 with treble damages at the end.

12 GENERAL CLEMENT: Well, Justice Scalia, I
13 think that you could certainly perform this test and
14 make the test protect conduct sufficient to protect
15 against that threat. We are certainly sensitive to the
16 threat that a regulatory agency is trying to draw a fine
17 line between two closely related areas of conduct.
18 They're not going to be able to enforce that line as a
19 practical matter if the regulated community knows that
20 the consequence of having a foot fault in crossing that
21 line will be treble damages in a class action suit.

22 On the other hand, we would caution against
23 adopting some sort of broad immunity that would
24 preclude, say, the Justice Department from investigating
25 and prosecuting an antitrust conspiracy that cut across

1 IPOs. And of course, the Congress has addressed the
2 problem of treble damages directly in a number of areas.
3 And I suppose, if they were to address the area in the
4 antitrust context, they might draw a distinction between
5 private treble damages suits and Government enforcement
6 efforts. Now, that's a little hard to do --

7 CHIEF JUSTICE ROBERTS: They might, but they
8 haven't yet. A couple of times you've used this phrase
9 cutting across IPOs. Are you saying there should be an
10 absolute immunity from antitrust prosecution within a
11 single IPO?

12 GENERAL CLEMENT: Mr. Chief Justice, I mean,
13 I would warn you off of sort of saying absolutely no. I
14 think as a practical matter, though, it is going to be
15 -- I mean, I can't conceive of a ready example of where
16 an allegation that is specific to an internal single IPO
17 would really be practically inseparable. So I think the
18 role of the antitrust laws will largely be in
19 allegations that cut across IPOs.

20 JUSTICE BREYER: And even then, why do you
21 take the other position? It is pretty easy to imagine
22 the SEC, under some circumstances, deciding that's a
23 proper way to market securities, to have some kinds of
24 agreements between IPOs or something like that. I don't
25 see why not.

1 GENERAL CLEMENT: Well, I suppose it's
2 possible, Justice Breyer.

3 JUSTICE BREYER: It is possible. I'm back
4 to Justice Alito's question. I mean, if you're worried
5 about taking authority from the Department to prosecute
6 territorial restrictions as some kind of blatant price
7 fix, that's not in front of us. So this doesn't have to
8 be precedent for that.

9 You're talking about this case. And there,
10 I think the Respondent -- the Petitioners here say that
11 my goodness, we don't see any way that a district court
12 is going to be able to start talking about whether this
13 evidence is protected. What does that mean, protected?
14 Maybe protected here, because they have thought about
15 it, but there will be a lot of cases where the SEC
16 hasn't thought about the particular conduct. We don't
17 know what they're going to prove.

18 I'm back to Justice Alito. How is anybody
19 going to administer the standard that you are asking the
20 Court to enunciate?

21 GENERAL CLEMENT: Well, I think if you draw
22 a distinction between intraIPO allegations and interIPO
23 allegations, you go a long way towards doing it. And I
24 should note, that's basically the line this Court drew
25 in NASD.

1 If you look particularly at the part of the
2 decision that deals with count 1 of the Government's
3 complaint, that was a horizontal allegation. And it was
4 all in the context of vertical agreements that were
5 specific to a particular mutual fund.

6 And in that context, this Court said that
7 with respect to the horizontal agreement, there's
8 nothing in the SEC regulations that specifically
9 addresses that, but the SEC specifically blesses the
10 vertical agreements, so we're going to give additional
11 immunity to that horizontal agreement. That same page,
12 page 733 of the opinion, they say, what we don't have
13 before us is an allegation by the government that there
14 is a scheme here to reduce competition between mutual
15 funds. There is no allegation that they were trying to
16 cut down, there was an agreement that would cut down
17 competition between Fidelity and Wellington, for
18 example. It was all in the context of individual funds
19 and retarding the secondary market for individual funds.

20 The language the Court used on page 733
21 of that opinion seems to us a perfectly reasonable test.
22 The Court said, quote: "The close relationship is
23 fatal" the close relationship between what the SEC had
24 prohibited in the vertical context and what was sought
25 to be gone after in the context of the horizontal

1 restraints, those are too closely related. I don't
2 think that test has caused the undue confusion. And I
3 think what it does it makes a reasonable balance between
4 a ruling that on the one hand preserves a great deal of
5 immunity, but on the other hand doesn't give a kind of
6 blanket immunity that would basically completely oust
7 the antitrust laws. And I think that's the balance we
8 hope to --

9 JUSTICE GINSBURG: What happens on remand in
10 this very case based on your theory? You are not
11 adopting the district judge's position that this case
12 should be dismissed outright.

13 GENERAL CLEMENT: That's right,
14 Justice Ginsburg, and --

15 JUSTICE GINSBURG: What happens when it goes
16 back?

17 GENERAL CLEMENT: Well, I think this Court
18 could do one of two things. I mean, the Petitioners for
19 their part have pointed to in footnote 6 of the blue
20 briefs, to a variety of Second Circuit precedents about
21 the standards for repleading. Perhaps the easiest
22 course for this Court would be to just vacate and let
23 the Second Circuit apply its own law of repleading.
24 That would be one option. The other option would be --

25 JUSTICE GINSBURG: But why, if this is a

1 sprawling complaint and if the problem is that it says
2 too much or too vaguely? A district court doesn't have
3 to leave the pleader to its own devices. It can have a
4 pretrial conference and say, now let's get this whole
5 thing in order, and it's not that the pleader is left
6 alone to do what he or she will.

7 But in complex cases like this, the district
8 judge will often assert control from the beginning and
9 not leave the parties to do what they want.

10 GENERAL CLEMENT: We would have no objection
11 to that, Justice Ginsburg. And I would say, you know,
12 you might say that, particularly based on the guidance
13 this Court gives in this case and the guidance this
14 Court gives perhaps in the Twombly case, that it might
15 be fair to let the plaintiffs have a crack at making a
16 new complaint in this area. Oh the other hand, as I
17 say, we would have no objection to just allowing the
18 Second Circuit to sort it out based on Second Circuit
19 pleading law. I think the important thing from our
20 perspective --

21 JUSTICE GINSBURG: What would, what would a
22 satisfactory complaint for this party look like?

23 GENERAL CLEMENT: Well, Justice Ginsburg,
24 it's a little hard for me to frame that complaint. I
25 think if it focused on inter-IPO allegations and,

1 contrary to this complaint, paragraph 42 of this
2 complaint, actually alleges that there were a variety of
3 different mechanisms that were used, that doesn't sound
4 like what you would expect from a disagreement that cut
5 across IPOs. You'd expect uniform conduct to be
6 alleged. And if there was that sort of conduct and it
7 was alleged to violate both regulatory regimes in a
8 clear way, then maybe it could go forward.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 General Clement.

12 Mr. Lovell.

13 ORAL ARGUMENT OF CHRISTOPHER LOVELL

14 ON BEHALF OF THE RESPONDENTS

15 MR. LOVELL: Thank you, Mr. Chief Justice,
16 and may it please the Court:

17 This Court's decisions in NASD and National
18 Gerimedical determined that implied immunity is not
19 favored, is justified only by a, quote, "convincing
20 showing of clear repugnancy," and then, quote, "only to
21 the minimum extent necessary," close quote. It is not
22 necessary to make the securities laws work to permit a
23 conspiracy to engage in conduct that the securities laws
24 have been trying to stop since their inception.

25 JUSTICE BREYER: Well, it might well be,

1 because the reasoning would be, which I find very
2 strong, is that as soon as you make an, bring an
3 antitrust court in, you're talking about juries and
4 treble damages. And as soon as that happens, the people
5 who are subject to it stay miles away from the conduct
6 that, in fact, would subject them to liability. And yet
7 staying miles away, they will not engage in conduct
8 that, A, the SEC might believe is permissible, or, B,
9 actually favor.

10 Where you get a complex complaint like
11 yours, that begins to ring true, that argument. And
12 that's what's concerning me.

13 MR. LOVELL: I totally disagree, with great
14 respect. Our complaint is that the conspiracy was to
15 require laddering in order to develop pools of orders
16 right after the stock began trading.

17 JUSTICE BREYER: What they say in respect to
18 that is the other side says it's common to try to what's
19 called make a book or something. I don't know these
20 terms.

21 MR. LOVELL: Right.

22 JUSTICE BREYER: And when they do, what
23 happens is that the marketer goes out and he asks
24 people: What's your plan? What are you thinking of
25 doing next month? What's your plan for this stock?

1 Hold it? Not? It doesn't require much imagination to
2 see how certain answers to that kind of question could
3 be brought by a plaintiff in perfectly good faith as
4 evidence that there's an agreement that next month they
5 will pay more for the stock and next month they'll pay a
6 lot more.

7 MR. LOVELL: That's not this case, Your
8 Honor. That's not this case. We say that the
9 underwriters made a horizontal conspiracy to inflate the
10 prices and to inflate their charges as a result by
11 requiring these laddering orders and jointly negotiating
12 together the amounts of the laddering.

13 JUSTICE SCALIA: He's not saying that that's
14 this case. He's just saying that it's so easy to make
15 allegations that action which was perfectly legitimate
16 amounted to action that was illegitimate. And that
17 question ultimately gets thrown into the laps of the
18 jury; and if the jury comes out the wrong way, you get
19 hit with treble damages.

20 MR. LOVELL: Your Honor, sorry for
21 interrupting.

22 JUSTICE SCALIA: I'm done.

23 MR. LOVELL: Okay.

24 It's like a lawyer knows what to say and
25 knows what not to say. This has been established for

1 years. You cannot say in the securities business, Your
2 Honor -- and we don't know this; we know what to do as
3 lawyers. You cannot say it's a quid pro quo, I'm going
4 to negotiate with you how much you have to purchase.
5 That type of conduct created pools during the 1920s and
6 the early 30s which manipulated prices to unsustainable
7 levels that led to the great stock market crash and
8 maybe the depression. The legislative history said: We
9 want to stop pools. In section 982 of the Securities
10 and Exchange Act it says, quote, "One person or more
11 cannot work together to raise prices."

12 We allege that the first part of this
13 horizontal conspiracy, across underwriters and across
14 IPOs, was to require the laddering in order to raise
15 prices.

16 JUSTICE BREYER: The problem -- I'd be
17 repeating it. we're not talking about, say, your case.
18 I don't know what your evidence is. But let's imagine a
19 case where the evidence of just what you said consists
20 of some rather ambiguous discussions which might be
21 characterized in a variety of ways, including the way
22 the way the plaintiff wants to characterize it, who
23 would repeat the very words you just said.

24 Now, the issue, it seems to me here, is in
25 light of that possibility, do we want an antitrust judge

1 to say whether that's so? I know you do. Or do you
2 want the SEC to say whether that's so in the particular
3 case? Or that's why I thought of primary jurisdiction:
4 Maybe first send it to the SEC.

5 What's your view?

6 MR. LOVELL: Well, I'll do primary
7 jurisdiction last, Your Honor. My view is that to bring
8 in the other case is, in effect, to exculpate antitrust
9 violations. On this narrow case that we've alleged,
10 under Connelly versus Gibson there is no other case.
11 Anybody who's charged with murder or any serious conduct
12 could say: Well, you can't really apply that because
13 this is the other case.

14 JUSTICE STEVENS: May I ask you if your
15 conspiracy allegation would be the same if there were
16 only one underwriter?

17 MR. LOVELL: No. No, Your Honor.

18 JUSTICE STEVENS: It is critical to your
19 case that there are multiple underwriters?

20 MR. LOVELL: Yes, yes.

21 JUSTICE STEVENS: What if we thought that
22 the activities of the multiple underwriters were
23 Comparable to a single joint venture? In many respects
24 they're like a joint venture. Would that mean your
25 whole case could collapse? In other words, I'm really

1 wondering to what extent you're depending on your
2 horizontal agreement as opposed to the vertical
3 arrangements like laddering and flipping and that sort
4 of thing.

5 MR. LOVELL: We totally depend on the
6 horizontal agreement, Your Honor. The case rises or
7 falls on the horizontal agreement among underwriters to
8 require that which the securities law --

9 JUSTICE STEVENS: If there had just been the
10 vertical agreements and if they had been fully
11 disclosed, there would no antitrust violation, would
12 there? If there had just been publicly disclosed
13 agreement by one underwriter with the purchasers to
14 engage in these activities, there would be no violation,
15 would there?

16 MR. LOVELL: If there's no market power,
17 we're not alleging that, and we wouldn't try to bring
18 that case, Your Honor. Where the antitrust laws, as
19 General Clement says, have their reach is that they get
20 the whole elephant. If we prove that the underwriters
21 conspired as we alleged, and there's five administrative
22 complaints here -- it's not something where it's is a
23 strike suit. There's five administrative complaints
24 finding this parallel unlawful conduct, which would work
25 best through a conspiracy.

1 And we have our allegations in the complaint
2 that they worked jointly together to do in this case
3 what's always been prohibited under the securities laws.

4 CHIEF JUSTICE ROBERTS: What about the
5 Solicitor General's suggestion about extending antitrust
6 immunity to a single IPO? In other words, what's wrong
7 with that? That's where the SEC's regulation seems to
8 be most pervasive, and what you can do in the context of
9 an IPO if your allegations cut across IPOs that might be
10 different.

11 MR. LOVELL: It's a hypothetical. We're not
12 trying to do an individual case. I don't have a strong
13 position on it. There is a case called Roth berg in the
14 Eastern District of New York -- the Eastern District of
15 Pennsylvania, a district court case, that recognized an
16 antitrust violation in a single stock manipulation.
17 There are other cases called Shumway and -- and I forget
18 the other case -- that said, no, you can't have it.
19 They've gone both ways.

20 It wouldn't matter to our case at all.
21 We're trying to get at -- the securities laws are
22 transactional. They can't get at a big wrong like this.
23 They only get their own part of the elephant. The
24 antitrust laws, this is business as usual, step into my
25 office. As General Clement says, the antitrust laws

1 come if we prove that there was a horizontal agreement.
2 Then all of these individual efforts --

3 CHIEF JUSTICE ROBERTS: What are you talking
4 about when you say a horizontal agreement? Are you
5 talking about a group of underwriters in the context of
6 a single IPO?

7 MR. LOVELL: No.

8 CHIEF JUSTICE ROBERTS: No.

9 MR. LOVELL: No, Your Honor. It's across
10 IPOs and across underwriters. They changed their
11 business. They all changed the business at about the
12 same time: This is the way we're going to operate.
13 We're going to require the laddering orders. That moves
14 the price up. And we're going to require another type
15 of tie-in agreement that allows the underwriters to
16 participate in the customer's profits from the
17 difference between the IPO price and the inflated prices
18 at which transaction sales were made right after the
19 IPO.

20 JUSTICE BREYER: What about an agreement
21 among underwriters, among underwriters, which says the
22 following: We agree that we go -- when we go on our
23 tour, we will be certain to ask the potential purchasers
24 whether they plan to hold this stock for at least a
25 month.

1 MR. LOVELL: No problem.

2 JUSTICE BREYER: No problem.

3 MR. LOVELL: Never.

4 JUSTICE BREYER: How do you know that isn't
5 a disguise when they say --

6 MR. LOVELL: We wouldn't bring the case,
7 Your Honor.

8 JUSTICE BREYER: Ah, ah. What they've said
9 was -- you see, they have the same allegations. I don't
10 know how to -- you see what I'm driving at?

11 MR. LOVELL: Yes. Yes, but --

12 JUSTICE BREYER: What's the answer?

13 MR. LOVELL: I don't think it fits into the
14 way of this narrow case and the facts that are presented
15 for immunity here, which the Congress has been trying to
16 stop forever, and the conduct's spread between 1997 and
17 2001 and was a massive violation that the securities
18 laws really aren't cut out to address. I know I'm
19 getting off your question a little bit, but in the
20 NASDAQ antitrust litigation these defendants and their
21 predecessors agreed to keep the spreads wide in
22 the over-the-counter market. There were rules about
23 maximum spreads. There were many rules, many
24 regulations.

25 However, it was never permitted in the

1 securities markets for all the underwriters across 5,000
2 stocks -- we only proved it out to 1600 -- to widen
3 their spreads, to keep their bids and offers wide.
4 Billions of dollars -- the Justice Department after we
5 brought the case, the Justice Department brought a case.
6 The entire industry was changed. You can now trade a
7 million dollars worth of stock for less than it costs to
8 change your tire or something. And it's all due to the
9 antitrust -- I'm sorry, Your Honor.

10 CHIEF JUSTICE ROBERTS: I'm trying to grasp
11 the difference between the single IPO and multiple. So
12 in response to Justice Breyer's hypothetical, they all
13 agree in the context of a single IPO, let's make sure
14 everyone's going to hold the stock for a month, and you
15 say no problem.

16 MR. LOVELL: No problem.

17 CHIEF JUSTICE ROBERTS: Well, if the same
18 underwriters get together the next month, they've got a
19 different IPO and they say, you know, let's do the same
20 thing we did last time because seemed to work well in
21 terms of the issuance and the capital formation. All of
22 a sudden that's an antitrust problem?

23 MR. LOVELL: No. The basis for my answer is
24 two levels of no problem. There's not a problem as to
25 the single deal and there's not a problem as to saying

1 you have to hold the stock. That's not at issue. We
2 have no problem with that.

3 What's always been prohibited is to create
4 pools of orders to drive up the price of the stock. If
5 you work to raise the price of the stock, which this was
6 all geared to do, after it came public, it drives prices
7 to unsustainable levels. It creates a lot of action in
8 the stock. People come in and buy. Our clients buy
9 directly from the defendants who are driving the stock
10 up. And yes, there was no disclosure. As with any
11 antitrust conspiracy, if there was disclosure there
12 could have been --

13 JUSTICE BREYER: Can you get damages for
14 that from the SEC? I mean, it sounds like bad conduct.

15 MR. LOVELL: The SEC refers the customers to
16 the private lawyers if you complain. The securities
17 laws are totally different from the ICC, from the common
18 carrier case.

19 JUSTICE BREYER: Suppose you lose, your
20 client -- suppose all these bad things happen and you
21 don't have an antitrust claim. Is there somewhere in
22 the law that you can get damages?

23 MR. LOVELL: Yes.

24 Where?

25 MR. LOVELL: The specific intent of Congress

1 in creating the securities laws was to create private
2 remedies which are available, and to preserve all other
3 remedies, including --

4 JUSTICE BREYER: So what's at issue here is
5 not whether you get a remedy. It's whether you get
6 treble damages.

7 MR. LOVELL: No. Theoretically, there are
8 other remedies as to each individual client for what
9 each individual client did. No one can address in a
10 securities case the wrong that happens here. The
11 agreement. That can only be addressed as
12 General Clement says at page 22 of the brief, through an
13 antitrust case.

14 JUSTICE SCALIA: Why is that? I don't
15 understand why the SEC could not -- they can make rules
16 for a single IPO; it seems to me they can make rules for
17 coordination of IPO. Why can't they do that?

18 MR. LOVELL: Well, the SEC could make a rule
19 to prohibit -- to further supplement the protections.

20 JUSTICE SCALIA: Right, right.

21 MR. LOVELL: Yes, Your Honor. They could
22 supplement the prohibitions --

23 JUSTICE SCALIA: They have chosen not to.

24 MR. LOVELL: Well, it -- it -- I think it's
25 more institutional that the focus has always been

1 transactional, Your Honor. And the Congress clearly in
2 982 of the Securities and Exchange Act of 1934 clearly
3 prohibits individual or joint efforts to raise prices,
4 empowers private investors to sue, empowers the SEC to
5 sue --

6 JUSTICE SCALIA: No, but --

7 MR. LOVELL: There could have been a suit by
8 now but it has never happened.

9 JUSTICE SCALIA: But you -- you could regard
10 the activity of laddering and of making a book on a
11 stock when the -- in the case of a single offering. You
12 could -- you could look upon that as, as an attempt to
13 raise the price. That's what it is, isn't it? An
14 attempt to make sure there's going to be a high enough
15 price for the stock so that it won't flop once it's out
16 there?

17 MR. LOVELL: In the -- there's huge
18 qualitative differences between certain types of conduct
19 which has always been accepted and was not prohibited in
20 the securities laws and laddering or pools of orders to
21 raise prices and tie-in agreements. The only metaphor I
22 can throw out, Your Honor, is that we know how far we
23 can say and what we can't say, the brokers always know
24 this, until 1997 to 2001 when they -- they changed their
25 underwriting businesses to go -- and we, we allege that

1 they required, induced, solicited -- not that they did
2 things on the way -- close to the line or -- in the,
3 what had always been the accepted area, the world
4 changed. And that change moved into the territory that
5 had -- sorry for hurrying -- that had always been
6 prohibited.

7 JUSTICE SCALIA: Yeah. And you're saying
8 they did this just -- not in the context of just single
9 IPOs, but that they agreed across IPOs that they would
10 all do this.

11 MR. LOVELL: Yes, Your Honor, across IPOs
12 and across underwriters, so that --

13 JUSTICE SCALIA: Why?

14 MR. LOVELL: So that a customer couldn't go
15 to another underwriter for a different deal.

16 JUSTICE SCALIA: Uh-huh. The customer being
17 the issuer?

18 MR. LOVELL: No, no. The public customers
19 who have accounts with the underwriters; they're also
20 brokerage firms. If they wanted to get an IPO in what
21 we call class security, the technologies securities,
22 they had to pay --

23 JUSTICE SCALIA: They'd have to pay the
24 premium.

25 MR. LOVELL: Yeah. They had to pay these

1 unlawful charges under securities laws, no matter where
2 they went. And in terms of the inextricably
3 intertwined, it is the qualitative difference that stops
4 that.

5 I think behind the Solicitor General and the
6 SEC's proposal is a fear that the syndicates, the
7 underwriters are vulnerable to an antitrust case because
8 they operate together. That's not true. There's never
9 been a case precisely like this; and the underwriters as
10 brokers, as market makers, they operate together and
11 cooperatively all the time. Five years goes by. Seven
12 years goes by. There's no antitrust case --

13 JUSTICE BREYER: All right. So what are the
14 words you use in the opinion, that would separate your
15 case, where it is like price fixing and so forth, to
16 charge them, from the case that they're worried about,
17 which is where the evidence is, to prove the allegation
18 is, really involves activity that could be quite
19 legitimate?

20 Now, now -- what words would I write in the
21 opinion that in your opinion would separate the sheep
22 from the goats?

23 MR. LOVELL: They agreed to inflate prices
24 in precisely the way the securities laws have always
25 prohibited. They agreed to inflate prices and they

1 agreed to make tie-in agreements that have always been
2 prohibited under the securities laws, to participate in
3 the profits from the inflated prices, which they were
4 not permitted to participate in.

5 CHIEF JUSTICE ROBERTS: So your test is it
6 has to be prohibited by the securities laws?

7 MR. LOVELL: No. But in this narrow case,
8 it happens to be that the method that they went to,
9 which was always a guaranteed method to drive up prices
10 and to participate, was -- had always been prohibited by
11 the securities laws.

12 It is not the test. The test for the
13 antitrust claim is merely this: they wanted to make an
14 agreement to inflate prices and they wanted to make an
15 agreement to inflate their charges. And if a customer
16 came to this underwriting trust at the time to deal with
17 them, they had to do this type of transaction to inflate
18 the price, and they had to pay the underwriting extra --

19 CHIEF JUSTICE ROBERTS: What do you say to
20 the -- sort of stepping back from the trees to the
21 forest, to the general suggestion that Congress has been
22 tightening up the requirements for private securities
23 litigation over the past few years; and you're bringing
24 this now as antitrust claims as a way to circumvent
25 Congress's regulation.

1 MR. LOVELL: That the actual facts show that
2 Congress wanted this claim to be brought. Certain --
3 Congress is well aware of the NASDAQ antitrust
4 litigation and of the Salomon Brothers antitrust
5 litigation, both antitrust claims in the securities
6 markets. Both situations where the diligent
7 professionals at the SEC were criticized by the
8 congressional oversight people for not finding out what
9 was going on, perhaps, and that the antitrust bar did
10 and brought the case, and then the DOJ brought it and
11 then there was questions.

12 JUSTICE BREYER: What about -- what about --
13 listen to what I'm about to say. I'm thinking of the
14 standard.

15 The standard would be where the allegations
16 are such, where the case is such that -- to go
17 further -- that, one, it is an allegation of a claim of
18 illegality; is price fixing, in price fixing; and it is
19 of longstandingly prohibited under the securities law;
20 and there is evidence to support that, of -- strong
21 evidence to support it, or the evidence in support
22 thereof is not primarily evidence simply of asking the
23 jury to draw inferences from conduct that is protected.
24 Under those circumstances there is no immunity.

25 MR. LOVELL: Bingo. That -- we live with

1 all that, Your Honor. To quote -- sorry, sorry.

2 (Laughter.)

3 JUSTICE BREYER: I don't know if it's -- I
4 mean, you know --

5 (Laughter.)

6 MR. LOVELL: No, no - but we agree on every
7 one. But to go back --

8 JUSTICE ALITO: How could the Court -- how
9 could a court enforce that at the 12(b)(6) stage?
10 Determining whether there's strong evidence of one type
11 or another.

12 MR. LOVELL: Well, in this particular case,
13 Your Honor, there's five administrative proceedings that
14 have, that have come forth since we -- we filed first,
15 and there was nothing. And -- but since then there have
16 been a lot of administrative proceedings. I would say
17 that the fact that parallel unusual -- unlawful conduct
18 is occurring in a way that the horizontal people who are
19 doing it inflate their prices at the expense of the
20 public, would satisfy any test.

21 JUSTICE SCALIA: Look, the question isn't
22 whether it satisfies it. The question is whether you
23 can get rid of this suit at the outset or do you have to
24 go through enormously expensive discovery, which --
25 which isn't worth the candle.

1 MR. LOVELL: Your Honor, I think you have --
2 for the good of the country, I think you have to follow
3 the facts and find out if these people conspired as
4 alleged.

5 JUSTICE SCALIA: -- discovery? Right?

6 MR. LOVELL: Yes. Sure.

7 CHIEF JUSTICE ROBERTS: But the problem --
8 the problem is that, of course, these people are to some
9 extent under the securities laws in the business of
10 fixing prices. They get together as a syndicate, a
11 syndicate, and say well, you have to figure out what
12 price we're going to charge for this initial public
13 offering. It looks, if you didn't understand the
14 context, it would look an awful lot like an antitrust
15 violation.

16 And the problem is, I guess, that -- that
17 when you take that type of evidence, the type of
18 evidence you're going to be relying on to show that
19 there's price fixing, it is exactly what the SEC wants
20 the people to do. They want them to get together. They
21 want them to agree on an appropriate IPO price that's
22 going to contribute to capital formation and everything
23 else.

24 And how do you at, as Justice Alito pointed
25 out, at the 12(b)(6) stage, how is a district court

1 supposed to say well, this is the bad price fixing, this
2 isn't the good price fixing?

3 MR. LOVELL: Again it is the qualitative
4 difference. Everybody knows -- and the SEC does want
5 IPO prices to be fixed, just like in the NASD case, they
6 only wanted one price for the mutual fund shares because
7 people could be disadvantaged. However, everybody also
8 knows under Section 982 and Section 17 of the Securities
9 Act, that you don't go over and rig the after market,
10 not even in one stock, let alone what we allege, across
11 stocks. And with regard to the question earlier, Your
12 Honor, about how Congress --

13 JUSTICE SCALIA: I don't think you've
14 answered his question.

15 MR. LOVELL: Oh, I'm sorry.

16 JUSTICE SCALIA: I think that you've said
17 that the two were different. His question was how can
18 you tell at the outset, at the 12(b)(6) stage, the
19 difference between those two things that you've
20 mentioned? Sure they're different but -- but the
21 evidence that is only evidence of the one also looks
22 like evidence of the other.

23 MR. LOVELL: Well --

24 JUSTICE SOUTER: What is the particular
25 difference between supporting the price and rigging the

1 aftermarket? I mean, how do we tell that at the
2 12(b)(6)?

3 MR. LOVELL: You look, you compare the cases
4 to the language in the complaint. In paragraphs 4 and 5
5 of the complaint we say that they agreed to require
6 laddering, they agreed to require this. We don't say
7 that they made any -- any hints or legitimate activity.
8 We're held to that burden of proof. You look at the
9 cases, required has always been unlawful. To require a
10 pool of orders to drive up the prices -- always
11 unlawful.

12 And Congress during the 1990s did narrow the
13 securities laws; and they took away treble damages as to
14 RICO, and they stopped resorting to state court, where
15 the standards weren't as stringent as under the PS law
16 -- for class action. However, they knew about these
17 antitrust cases that had saved billions of dollars for
18 consumers. They applauded them. And they reenacted the
19 savings clause that says all rights and remedies are
20 preserved.

21 CHIEF JUSTICE ROBERTS: How did they applaud
22 them?

23 MR. LOVELL: Well, they just said that they
24 -- Congress -- that's too strong a statement. The
25 specific Congress people involved were glad that the --

1 the wrongdoing was uncovered and said as much and wrote
2 to the Attorney General, and the SEC, and said why --
3 why wasn't it found sooner?

4 But they did not touch these antitrust
5 actions. Number one, they come very infrequently.
6 Number two, they've done great benefit for the
7 securities markets and for the participants in the
8 securities markets, and even for the defendants
9 themselves. They forced the defendants to operate by
10 talent and bring out their best, and not resort to what
11 the problems for the public always is --

12 CHIEF JUSTICE ROBERTS: The SEC which is the
13 agency charged with supervising those markets, thinks
14 otherwise.

15 MR. LOVELL: No -- no.

16 CHIEF JUSTICE ROBERTS: They don't think
17 these, the antitrust actions are good for the securities
18 markets.

19 MR. LOVELL: The SEC -- and this is the
20 first immunity case before the court where the SEC and
21 the DOJ both are in favor of not having substantive
22 immunity. They both oppose immunity.

23 JUSTICE SCALIA: But that wasn't the SEC's
24 position below, was it?

25 MR. LOVELL: No. No, it was not, Your

1 Honor.

2 JUSTICE SCALIA: And the Justice Department
3 was on one side, the SEC was on the other. Right?

4 MR. LOVELL: Yes, Your Honor. And --

5 JUSTICE SCALIA: It looks to me like they
6 split the baby up here.

7 (Laughter.)

8 MR. LOVELL: I -- I -- that's the only way I
9 can see it. But if Your Honor looks at the questions
10 that the SEC answered to Second Circuit, the SEC said
11 they couldn't say how the current laws couldn't work on
12 the facts of this case, but future cases might present a
13 closer case, Your Honor.

14 JUSTICE BREYER: I would always -- I think
15 the standard I was more or less talking about is pretty
16 close to what the SG says. And I think he says that --
17 that -- that Justice Alito's point, which is certainly a
18 good point, is that you would have to allege facts such
19 that it was clear from the face of the complaint that
20 you weren't resting your case on the conduct that was --
21 that's what he means by protected -- and there's an
22 ongoing obligation, it says, on the part of the district
23 judge to be sure that the case isn't really growing out
24 of this conduct that is arguably okay.

25 MR. LOVELL: Protected conduct. And we

1 could live with --

2 JUSTICE BREYER: You, you could live with
3 the SG --

4 MR. LOVELL: We could live with that. On
5 the other hand, applied immunity is an affirmative
6 defense. It was held in Cantor versus Detroit Edison,
7 428 US 579, which didn't make it into our brief, that
8 applied antitrust immunity is an affirmative defense.
9 As we brief, there's a long line of cases from Your
10 Honors that say that you don't have to plead in the
11 complaint to negate an affirmative defense.

12 I don't think that unlawful conduct under
13 the securities laws is entitled to more protection than
14 free speech or some of the conduct in these other cases;
15 and I -- and we've opposed the inextricably intertwined
16 standard as particularly inappropriate where an
17 affirmative defense is involved.

18 Nonetheless, we could live with that, if it
19 came down. And we think the complaint already lives
20 with it. The complaint has, from paragraph 53 through
21 paragraph 63, a number of allegations of joint conduct
22 to do things which are clearly unlawful under the
23 securities laws. It does have one allegation about
24 holding road shows. On its own, that's permissible. We
25 don't have a footnote that says this is permissible on

1 its own. That may have caused somewhat of the problem
2 for -- for people.

3 But reading the complaint as a whole,
4 paragraph 5 says that these later paragraphs I just
5 referred to show how the time in the syndicates was
6 abused.

7 And I'm going back to this vulnerability
8 point. The defendants are vulnerable to an antitrust
9 class action plaintiffs saying, you conspired. Yes.
10 But it only happens -- it only happens once in a while.
11 And think about it. If they abuse their time in the
12 syndicates to create a conspiracy of this nature, to do
13 something that's always been prohibited under the
14 securities laws, and it's clearly prohibited under the
15 antitrust laws, why should we bend over backwards to
16 protect that every five years or seven years? The
17 normal --

18 JUSTICE GINSBURG: You didn't have a chance
19 to answer Justice Breyer's question about primary
20 jurisdiction. Let's get the SEC's views first of
21 whether there is any interference with securities law
22 enforcement.

23 MR. LOVELL: The public carrier cases, the
24 Interstate Commerce Commission, the sea carriers and the
25 air carriers have had primary jurisdiction as an

1 approach. In order to keep it uniform, they kept the
2 rate and then there would be questions on the rate. So
3 both for administrative discretion and factfinding, the
4 Court said that's their baby, we're going to stay out.

5 The securities laws have always been totally
6 different. The antitrust laws - it was a little bit
7 patterned after the antitrust laws. Section 9(e) is
8 like the antitrust laws, 15 U.S.C. 15. the antitrust
9 laws said we want private attorney generals to go out
10 and sue. The securities laws said we want to give the
11 remedies under this act, new remedies. We want to
12 preserve -- preserve all other remedies, any and all
13 other remedies.

14 The single damages point raised by the
15 defendants in the same section is only a limit on
16 recovery. It's not a limit on the rights and remedies.
17 So the answer to primary jurisdiction is that it's
18 always worked this way, that the private plaintiff is
19 supposed to sue in court. He's expressly empowered
20 under securities laws to sue in court, As he's expressly
21 empowered under the antitrust laws, and the courts have
22 always resolved the issue.

23 JUSTICE SOUTER: No, but we haven't had this
24 problem focus before, and isn't primary jurisdiction the
25 most efficient answer to the problem that we've got? In

1 other words, isn't it time to do something different?

2 MR. LOVELL: No, I don't believe so, Your
3 Honor. The times that it's come up before in the NASDAQ
4 case, United States versus Morgan, the courts have said
5 business as usual. They used the usual implied immunity
6 standard and they resolve it, as usually happens. In
7 Richey, the Richey case and a few other cases we've
8 either said -- not implied immunity, but we've either
9 said we're not going to get involved, it's the agency's,
10 it's the ICC's responsibility, or it was referred one
11 time in the Richey case to the old Commodity Exchange
12 Commission, which then declined to take the referral
13 because -- that was an appropriate referral because it
14 had to do with the exchange rules.

15 JUSTICE SCALIA: I don't understand what
16 happens with this primary jurisdiction in the context of
17 an antitrust suit. You're entitled to a jury trial in
18 the antitrust suit, right?

19 MR. LOVELL: Yes, Your Honor.

20 JUSTICE SCALIA: And in primary
21 jurisdiction, would we refer it to the SEC and accept
22 the SEC's fact determinations and then instruct the jury
23 that --

24 MR. LOVELL: Never happened before, and it's
25 contrary to the -- what Congress wants. In a different

1 statutory context, it was what Congress wanted for
2 uniformity.

3 JUSTICE SCALIA: And it is really the
4 factual determination that is the hang-up, that you
5 don't want things that are innocent and that the SEC
6 would know are innocent to be taken as evidence of
7 guilty by the jury. So you really haven't accomplished
8 a whole lot if you just send it over to the SEC for
9 rulings on the law as opposed to rulings on whether this
10 particular conduct violated the law.

11 MR. LOVELL: I agree, Your Honor.

12 I think that the presence here of the SEC
13 complaints, the SEC's fact-finding, saying that things
14 got out of hand during this time and the law was broken
15 on a widespread basis, indicate that we are not coming
16 forth with weak facts. And I also agree that in the
17 securities context, primary jurisdiction has not had the
18 basis it's had in other legislative contexts where
19 uniformity was desired.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Lovell.

23 Mr. Shapiro, you have four minutes
24 remaining.

25 STATEMENT OF STEPHEN M. SHAPIRO

1 ON BEHALF OF THE PETITIONERS

2 MR. SHAPIRO: Thank you, Mr. Chief Justice.

3 The key question in this litigation is who's
4 going to design what a tie-in is and who's going to
5 decide what constitutes unreasonable compensation. The
6 plaintiffs say quite overtly in their briefs these
7 issues can't be left in the hands of the SEC. Well,
8 Congress put these issues in the hands of the SEC.
9 There are three separate provisions that give the SEC
10 power to define what is forbidden manipulation, what is
11 a forbidden tie-in, and what is excessive compensation.

12 The SEC this Court has said is an agency
13 that Congress had considerable confidence in in the
14 Gordon case and that confidence is well justified here.

15 JUSTICE SCALIA: What's your test,
16 Mr. Shapiro?

17 MR. SHAPIRO: Our test is the one the Court
18 laid down in those two cases: Is there active
19 supervision or is there pervasive regulation? If the
20 answer is yes to either of those, you ask, is there a
21 potential conflict, and if so immunity applies and the
22 complaint has to be dismissed. And this is true whether
23 you're talking about one IPO or an agreement that cuts
24 across several IPOs, because even in the multiple IPO
25 situation the jury would still have to decide, was that

1 a tie-in or was it something innocent; was it
2 unreasonable compensation or was it something that was
3 proper?

4 JUSTICE BREYER: We all agree, say a group
5 of underwriters, that for the next we will insist that
6 every customer, whatever price we charge, will pay 30
7 percent more for 50 percent more shares next month.
8 Absolutely illegal, isn't it?

9 MR. SHAPIRO: Well --

10 JUSTICE BREYER: They write it down, just
11 what I said.

12 MR. SHAPIRO: The same circumstances were
13 presented very similar to the NASD in the Invemed case.
14 They had a Three-week trial, 17 experts, and they
15 concluded that those charges were quite permissible
16 considering the whole range of services that were given.
17 Now, if this occurred with concerted action the SEC has
18 power to deal with concerted action. Congress said that
19 they could deal with multiple party manipulations. They
20 have many cases where they proceeded against multiple
21 parties.

22 In the NASD case the claim was that there
23 was a horizontal conspiracy involving many brokers and
24 many underwriters, it was industrywide, it went on for
25 years and years. And the Government argued there it was

1 improper, it was contrary to the SEC's policies this.
2 This Court held squarely that that is within the SEC's
3 power to regulate and if something of that sort is
4 occurring the SEC can deal with it.

5 The test there wasn't whether it was
6 connected to something that was permissible. The test
7 was whether it was connected to the SEC's regulatory
8 responsibilities and the SEC could deal with that sort
9 of concerted action on an industrywide basis.

10 Now, Mr. Lovell has argued that the conduct
11 has always been forbidden. He labels it that way.
12 There are many case from this Court that we cite in our
13 reply brief holding that that labeling does not defeat
14 immunity because it's always possible to characterize
15 conduct in that fashion. But the agency has to apply
16 its expertise to decide what is forbidden and to change
17 its rules over time, which the SEC is now doing. And it
18 has to be able to prevent, deterring conduct that comes
19 up to the line of prohibition. Here that conduct is
20 essential to protect investors and to protect issuers.
21 The markets couldn't function efficiently if
22 underwriters could not engage freely in the kinds of
23 conversations that get twisted in this litigation into
24 something characterized as tie-ins.

25 Now, there are 310 private suits now pending

1 under the securities laws brought by many of these same
2 lawyers, making the same claims of concerted action to
3 manipulate the stock market. Those suits are subject to
4 a panoply of safeguards that Congress has prescribed,
5 including single damages, restrictions on class action
6 abuse, serious loss causation requirements.

7 The only purpose for stretching the
8 antitrust laws here is to evade all of the safeguards
9 that Congress has passed, each and every one of them.
10 We think NASD and Gordon are very important in
11 preventing that kind of a pleading tactic.

12 And of course, when counsel talks about
13 concerted action and manipulating the stock market, what
14 did Congress pass the '34 Act for if it wasn't that?
15 There were extensive hearings about concerted
16 manipulation involving pools and groups that were
17 manipulating the market. That's why there are several
18 anti-manipulation provisions in the '34 Act that give
19 Power to define the misconduct and to deal with it
20 effectively. And this is the toughest cop in
21 Washington, the SEC. They're perfectly capable of
22 dealing with this.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Shapiro.

25 MR. SHAPIRO: We thank the Court.

1 CHIEF JUSTICE ROBERTS: The case is now
2 submitted.

3 [Whereupon, at 11:16 a.m. the case in the
4 above entitled matter is submitted.]

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