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2 behalf of the Respondents.

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P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first in Texaco Inc. v. Dagher and Shell Oil v. Dagher. Mr. Nager.

ORAL ARGUMENT OF GLEN D. NAGER
ON BEHALF OF THE PETITIONERS

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

In this case, the Court of Appeals of the Ninth Circuit held that a decision to unify the prices charged for the two branded gasoline products sold by a joint venture created by Shell and Texaco could be deemed a per se violation of section 1 of the Sherman Act.

The Ninth Circuit's decision is plainly wrong. A joint venture has to be able to and is entitled to create and set the prices for the products that it sells.

JUSTICE SOUTER: Mr. Nager, on -- on that point, I have a factual question and I figured I'd get it -- excuse me -- get it out on the table at the beginning so you'd know what at least is bothering me.

The nub -- the nub of your factual argument is, as you just -- just stated it, there's a joint

1 venture here and joint ventures price their products.
2 The factual question that I have is this. This is --
3 or the preface for it is this. This is a joint venture
4 that has continued to market, in effect, the same
5 product that the -- that the two companies marketed
6 beforehand, and it has done so, ostensibly, under the
7 old brand names. Therefore, the fact that there is a
8 joint venture doesn't necessarily disclose that there
9 is a new product as -- as might be the case normally
10 which you would expect the joint venture to set its own
11 price for.

12 Therefore, it seems to me that if the joint
13 venture is clearly going to cover pricing, the joint
14 venture agreements, the documents that indicated the
15 joint venture at the beginning, should have mentioned
16 pricing. And yet, my understanding is that they did
17 not do so, and in fact, the claim on the other side, as
18 I recall the briefs, is that when the Government looked
19 at the joint venture, prior to its going into effect,
20 nothing was said about fixing prices -- setting prices.

21 So my question is, did the joint venture, as
22 indicated by documentation, say in any -- so many words
23 that the joint venture is going to set prices for these
24 two -- or for the -- the -- whatever it -- whatever it
25 sells? And -- and number two, if -- if the answer to

1 that is no, should we regard the joint venture as
2 covering pricing?

3 MR. NAGER: I believe the -- the short answer
4 to your question is -- is yes.

5 JUSTICE SOUTER: There were two questions.
6 Which?

7 (Laughter.)

8 MR. NAGER: The first question.

9 JUSTICE SOUTER: Okay.

10 MR. NAGER: I think it is undeniable -- and
11 Mr. Minear can speak on behalf of the FTC to this. I
12 think it is undisputed that the Government understood
13 that this joint venture was a consolidation of both the
14 refining assets of the two companies, as well as the
15 marketing functions of the two companies, and that it
16 would own the gasoline and it would decide how to sell
17 it and what price to sell it at. I don't --

18 JUSTICE SOUTER: Is there a document that we
19 could look at that -- that says that?

20 MR. NAGER: I don't know off the top of my
21 head, Justice Souter, whether there's a specific
22 document that says marketing includes pricing. But I
23 don't think that anyone had any doubt that this
24 included pricing. And indeed, the respondents, of
25 course, in bringing their challenge, haven't framed

1 this as a challenge to the ability and right of the
2 joint venture to set its prices. What they've
3 challenged is the subsequent decision that was made to
4 sell the Texaco-branded Equilon gasoline and the Shell-
5 branded Equilon gasoline at the same price.

6 JUSTICE KENNEDY: Well, taking that point
7 just a bit further, your reply brief -- the reply brief
8 for -- for Shell says that the respondent has conceded
9 that the pricing decision to sell at the same price was
10 not made till 8 months afterwards. I'm not sure that
11 that's quite a fair statement. That isn't inconsistent
12 with its suggestion that there might have been an
13 agreement even before the joint venture to have single
14 pricing. They just waited until 8 months to do it. So
15 I'm not sure that your yellow brief correctly
16 characterized their position. Tell me if I'm wrong.

17 MR. NAGER: Well, I -- I think that that's a
18 -- a fair interpretation of one possible understanding
19 of their brief, Justice Kennedy. I don't think that it
20 matters for this Court in deciding this case whether
21 there was discussions by the owners of the joint
22 venture earlier than the time of September of 1998
23 whether they were going to unify the prices or not.

24 The -- the important point for this Court is
25 that this was an efficiency-enhancing joint venture.

1 The Ninth Circuit didn't question that. And that in an
2 efficiency-enhancing joint venture, it is entitled to
3 set the prices of its product, whether it decides to do
4 it 8 months after the venture is in operation or 2
5 months before, as long as what they're doing is setting
6 the prices of the products of the venture itself.

7 JUSTICE BREYER: Well, it would depend.
8 That's why -- really it's a question for Mr. Alioto,
9 but I want to know chapter and verse citations.

10 Pan Am and Grace meet before they set up
11 Panagra. Of course, they talk about price. But what
12 do they say? Suppose what they say is you, Panagra,
13 have the power to set price. Normal. You, Panagra,
14 have the power to set price but never below \$14 a
15 ticket. That wouldn't be normal. What are they trying
16 to do there? They're trying to protect Grace.

17 So I think a lot would depend on what they
18 said in the preliminary meeting, and of course, what I
19 want to know is this is a summary judgment motion
20 where, as the other side pointed to particular
21 conversations that they made which would say it's more
22 like the second than the first.

23 MR. NAGER: Well, what I can say to that,
24 Justice Breyer, is our opponents have repeatedly
25 pointed out in their briefs deposition testimony that

1 the parties refused to discuss price with each other
2 before they had an actual memorandum of understanding
3 out of concerns about the antitrust laws.

4 JUSTICE BREYER: It may be, but still at some
5 point they discussed it and I would like to know what
6 they said.

7 MR. NAGER: Well, I'll have to leave that for
8 the respondents to address for you.

9 But what -- what the court below pointed to
10 was conversations that took place in the spring of 1998
11 about a strategic marketing initiative. And this is
12 after the formation of Equilon, after Equilon was
13 operational. And at that point, all you conceivably
14 have at that point with the owners of Equilon having
15 left the market is Equilon subject to the direction of
16 its owners setting the prices for its products, and it
17 could sell them as Shell gasoline, it could sell them
18 as Texaco gasoline, it could choose to sell them as
19 something else.

20 JUSTICE GINSBURG: Then what did it mean -- I
21 think you said it in your brief -- that there -- both
22 brands were sold exclusively by Equilon after the joint
23 venture created -- was created. Each venturer maintains
24 its own marketing strategy. What was the marketing
25 strategy that each venturer, Shell and Texaco,

1 separately maintained?

2 MR. NAGER: I'm not sure what the reference
3 is, Justice Ginsburg. Once the joint venture existed,
4 Equilon had its own marketing strategy, and Motiva, the
5 other joint venturer, had its own marketing strategy.
6 The -- the role of the owners at that point was on a
7 members committee, which -- as a typical board of
8 directors where the -- each CEO of each joint venture
9 had to present a business plan and obtain approval by
10 the owners of the -- of the joint ventures for the
11 upcoming year.

12 JUSTICE KENNEDY: Were the parties
13 indifferent as to how much of each brand was sold?
14 Texaco didn't care if Shell got 90 percent of the
15 sales? It just didn't care?

16 MR. NAGER: Well, I don't think we could say
17 they didn't care because there were, as part of the
18 joint venture agreement, brand management protocols to
19 preserve the equality of the brands. But that was the
20 only limitation, and that's a limitation that could be
21 challenged. Don't misunderstand our position in this
22 case. That was part of the agreement to create the
23 joint venture. That is subject to section 1 of the
24 Sherman Act, but it's challengeable on a rule of reason
25 inquiry because this is an efficiency-enhancing joint

1 venture.

2 JUSTICE KENNEDY: But -- but if they cared,
3 doesn't that show that there was still an element of
4 competition, but the competition is suppressed if the
5 price is the same?

6 MR. NAGER: Not in -- not for -- with regard
7 to Equilon because why they care, Justice Kennedy, is
8 that -- that they licensed these brand names to the
9 joint ventures and they maintained control of the asset
10 that they licensed, their name, because they operated
11 in other markets where they weren't in competition with
12 Equilon and Motiva. They did do business in other
13 countries around the world, selling branded gasoline,
14 unbranded gasoline, and other petroleum products. But
15 as with any licensor, they care that the -- that the
16 goodwill that they're licensing is not impaired. So
17 like any licensor, they put restrictions on the ability
18 of -- of the joint ventures to disparage those names or
19 to undermine those names.

20 But the decisions as to how to market and
21 what to sell and at what price to sell was the single
22 entity Equilon in the western United States, and that's
23 why it's not covered by section 1, much less subject to
24 per se analysis.

25 JUSTICE KENNEDY: One more question and then

1 -- how was it decided how much raw gas would be
2 delivered to the venture by the two parties?

3 MR. NAGER: That was a decision made by
4 Equilon. Equilon would purchase petroleum on the open
5 market. It could purchase it from Shell. It could
6 purchase it from Texaco. It could purchase it from
7 British Petroleum. And it -- the -- the petroleum
8 products are bought on the open market in arm's length
9 transactions, sent to the refineries, and then the
10 managers of Equilon or Motiva would make the decision
11 as to which petroleum products to make out of that
12 crude.

13 What's important to remember here is that
14 Sherman Act doesn't apply to any agreement. Under this
15 Court's decision in Copperweld, it applies to decisions
16 between independent actors, that section 1 applies to
17 concerted activity, not to unilateral activity, so that
18 in Copperweld, a parent could not enter into a
19 conspiracy with its wholly owned subsidiary. In
20 Copperweld, the Court -- the Court points out that the
21 officers of a company may enter into agreements with
22 each other, but they don't enter into agreements
23 covered by section 1. They're agreements within a
24 single entity.

25 And what we have here is the same thing that

1 the Court was talking about in Copperweld in getting to
2 its decision in Copperweld, is you have a agreement of
3 Shell and Texaco, which is plainly subject to section
4 1, to create this joint venture and can be challenged
5 on a rule of reason analysis. But once they have that
6 agreement, you now have the directors of a single
7 entity determining what the prices of its products will
8 be, and that is not subject to further section 1
9 scrutiny.

10 JUSTICE SCALIA: Well, do you acknowledge
11 that the rule of reason analysis of the -- of the
12 initial formation can include a rule of reason analysis
13 of whether it -- it would violate the -- the Sherman
14 Act to -- to have the new entity price both products
15 the same?

16 MR. NAGER: Yes, Justice Scalia, but I don't
17 think that anyone would ever do that in a rule of
18 reason section 1 analysis. What they'd look at in a
19 rule of reason section 1 analysis is whether the
20 combined entity would have the sufficient market power
21 to engage in supracompetitive pricing. This Court has
22 repeatedly said in section 1 cases it doesn't ask
23 whether the specific price set is a reasonable price --

24 JUSTICE BREYER: I mean, that's a surprising
25 concession to me. We -- we found a -- a joint

1 marketing company. All right? And the whole point of
2 this is to set single prices. And you're saying when
3 they -- and the venture, let's say, is approved by the
4 FTC, the joint selling agency. The purpose of it is to
5 set a single price to sell in France or something.

6 MR. NAGER: Correct.

7 JUSTICE BREYER: And you're saying now we're
8 going to go look at their prices that they set and
9 decide if they're reasonable?

10 MR. NAGER: Well, what I -- what I tried to
11 say, Justice Breyer -- maybe I should change my answer
12 to no. What I tried to say is -- is that the facts at
13 the -- at -- that are involved in the creation of the
14 joint venture -- all of them can be considered as part
15 of a rule of reason analysis.

16 But what I tried to go on to say to Justice
17 Scalia was no one doing that rule of reason analysis
18 would care about what the specific price is. That
19 isn't what they would look at. What --

20 JUSTICE SCALIA: You could say you -- you
21 just never get beyond step one. You don't go any
22 further if there's no market power.

23 MR. NAGER: That's correct. And in this --

24 JUSTICE BREYER: Maybe there is.

25 MR. NAGER: In this particular case, the

1 respondents made a conscious litigation choice in the
2 district court to waive a rule of reason claim. And
3 this case proceeded in the court of appeals with the
4 rule of reason challenge to the creation of the joint
5 venture as waived. The court below didn't question
6 that at all. It accepted it. It accepted that there
7 had been a waiver of a rule of reason challenge, that
8 this efficiency-enhancing joint venture had substantial
9 economic justifications, and what it -- and the only --
10 the only rule of reason challenge that could have been
11 brought then was waived by these parties. Another
12 case. That's not this case. Another case, a rule of
13 reason inquiry could be brought.

14 JUSTICE SOUTER: Mr. Nager, what if you had a
15 -- a crazy kind of joint venture -- or maybe it
16 wouldn't be so crazy -- in which it was just like this
17 one? The two companies said we're going to form a
18 joint venture to market these products. You know,
19 we'll use one fleet of trucks and -- and we'll have one
20 computer to determine who needs gas and so on. But
21 each company -- each of the -- the principals forming
22 the venture retained the -- the power to determine the
23 price of the gasoline that is sold under their brand.
24 And then 6 months later, the two companies get together
25 and they decide to fix the price. That decision would

1 be subject either to quick look or per se analysis,
2 wouldn't it?

3 MR. NAGER: I think the answer to your
4 question depends upon facts that you haven't stated.
5 If the original joint venture is a sham for a
6 horizontal arrangement --

7 JUSTICE SOUTER: Well, I'm assuming there --
8 there are, indeed, efficiencies to be attained by it so
9 that it's not a sham. They just retained -- they said,
10 look, we're -- we're still using our old brands,
11 ostensibly, in the market and we're retaining the power
12 to set the price individually with respect to the gas
13 that is sold under those brands. So no sham.

14 MR. NAGER: Well, I'm not sure at that point
15 that they've entered into an agreement to share the
16 risks and loss -- of profit and loss from the assets
17 that they're putting together. I mean, this Court's
18 decision in Maricopa County says that that's the
19 critical test.

20 JUSTICE SOUTER: Well, are you -- are you
21 saying in practical terms that my hypothesis is -- is
22 just a practical impossibility?

23 MR. NAGER: Well, I -- I can't say that
24 because you get to ask the questions.

25 JUSTICE SOUTER: No, no, but -- no.

1 (Laughter.)

2 JUSTICE SOUTER: Beyond -- be candid. I
3 won't get mad.

4 (Laughter.)

5 JUSTICE SOUTER: Is -- is that -- is that
6 really your -- your point that I've come up with a
7 hypothetical which is just a non-real-world
8 hypothetical?

9 MR. NAGER: It's a big country, and there are
10 a lot of things that happen out there and so I can't
11 assume that I want you going back to chambers thinking
12 that it can't happen. I want to answer it even if it
13 can happen --

14 JUSTICE SOUTER: Okay. Assuming it can
15 happen, in -- in that case, would the subsequent
16 agreement as to price be subject to per se or a quick
17 look analysis?

18 MR. NAGER: I don't think so. It's like a
19 law firm. It's like my law firm. When I join
20 together with my partners, we may agree in our
21 partnership agreement that each partner is going to
22 have some control over what their billing rate is. As
23 long as we have thrown our lot in together and as long
24 as we're sharing the risks and loss of that activity --
25 that may be a stupid thing --

1 JUSTICE SOUTER: Yes, but there's -- there's
2 one part of the lot that you haven't thrown in
3 together, and that's the pricing lot. In -- in my
4 example, your -- your law firm agreement would be each
5 partner can decide exactly what he wants to charge. If
6 -- if one wants to charge \$10,000 an hour and another
7 wants to charge \$15 an hour, his choice.

8 MR. NAGER: Well, again, I don't think --
9 it's hard for me to see very many business persons
10 getting together and entering into such an arrangement.

11 JUSTICE SOUTER: I -- I agree.

12 MR. NAGER: But as long as --

13 JUSTICE SOUTER: You said we're going to do
14 it on the hypothesis that it's a big country and
15 somewhere out there somebody might do this. If -- if
16 two oil companies did it, quick -- quick look or per se
17 analysis?

18 MR. NAGER: I -- I think the answer is -- is
19 that if the -- if the -- the joint venture itself was
20 an efficiency-creating joint venture that can survive
21 rule of reason scrutiny, that business has the right to
22 conduct itself subject to the restrictions that were
23 put in the original agreement. That agreement to
24 reserve the power to the parents would be subject to
25 challenge as part of a rule of reason analysis whether

1 they entered into an agreement later or not, but the
2 challenge goes to the terms upon which the venture is
3 created, not to the operational activities of the
4 venture.

5 Mr. Chief Justice, if I could reserve the
6 remainder of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Nager.

8 Mr. Minear, we'll hear from you.

9 ORAL ARGUMENT OF JEFFREY P. MINEAR

10 ON BEHALF OF THE UNITED STATES,

11 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

12 MR. MINEAR: Mr. Chief Justice, and may it
13 please the Court:

14 The court of appeals erred in this case in --
15 in its ruling that a alleged agreement between two
16 noncompeting owners of a joint venture respecting price
17 is a per se violation of the Sherman Act.

18 And this is not a per se violation for two
19 particular reasons. First, the venture in this case is
20 not a sham, but rather a lawful efficiency-enhancing
21 integration of economic activity. And second, the
22 parties in this case do not compete with one another or
23 the joint venture in the selling of the product.

24 CHIEF JUSTICE ROBERTS: Respondents don't
25 concede that the joint venture is lawful, though.

1 MR. MINEAR: As this case comes to this
2 Court, that's a necessary conclusion of the court of
3 appeals determination. In the district court, the
4 parties -- the respondents had argued that this was a
5 patently anticompetitive joint venture, and the
6 district court rejected that, and it said at page 68 of
7 the Texaco petition appendix that no reasonable jury
8 could find that this joint venture is patently
9 anticompetitive. And it further found that respondents
10 did not make a rule of reason challenge to the
11 legitimacy of the joint venture.

12 So as the case came to the court of appeals,
13 it came to it with that ruling, and the court of
14 appeals itself at pages 4a and 5a of the petition
15 appendix --

16 CHIEF JUSTICE ROBERTS: Well, in the Citizens
17 Publishing case, it wasn't a necessary predicate of the
18 Court's ruling there to find that the joint venture was
19 unlawful, was it?

20 MR. MINEAR: No, it wasn't, but we don't
21 think that Citizens Publishing has a direct bearing on
22 the case here. This Court's reasoning with regard to
23 per se analysis and joint ventures have evolved beyond
24 the simple statement that was made in Citizens
25 Publishing. Instead, the Court looks to the question

1 of whether or not the agreement at issue is plainly
2 anticompetitive.

3 And as this Court's decisions in cases such
4 as BMI and NCAA have recognized, the -- simply
5 attaching the moniker of price fixing or price
6 unification is not sufficient to answer the question,
7 the fundamental question here, which is, is there
8 actually a fixing of prices between two parties that
9 are in competition? That's not the case here.

10 The price unification agreement that's
11 alleged in this case is -- arises out of a joint
12 venture in which, by the very nature of the joint
13 venture itself, the two participants no longer compete,
14 and in the absence of such competition, this is much
15 like a merger. And in the same way that if the two
16 parties had merged their downstream operations, they
17 would be able to choose whatever prices that they
18 chose.

19 Likewise, the same applies with regard to the
20 joint venture, and it's particularly true that this
21 cannot be subject to a per se analysis.

22 CHIEF JUSTICE ROBERTS: Well, the two parties
23 obviously don't compete within the terms of the joint
24 venture, but they compete more generally.

25 MR. MINEAR: That's correct. And with regard

1 to --

2 CHIEF JUSTICE ROBERTS: And you couldn't have
3 two companies say we're not going to -- we're going to
4 have a joint venture on this corner, but in -- you
5 know, down the block, we're going to compete, and then
6 it's all right to set prices on this corner but not
7 down the block.

8 MR. MINEAR: That's correct. And so an
9 agreement outside the joint venture to take -- to enter
10 into anticompetitive activity outside the joint venture
11 is subject to further analysis.

12 JUSTICE SOUTER: But didn't we have
13 competition even within the joint venture for a few
14 months? Because -- correct me if I'm wrong on the
15 facts. I thought for a few months the -- the price
16 differential was maintained. I think there was a 2
17 cent price differential or something like that. And so
18 long as that was maintained, weren't they competing?

19 MR. MINEAR: No, Your Honor. The -- the
20 decision, once the joint venture took effect, as to how
21 the products would be priced, was simply an allocation
22 of the profits of the joint venture. There's no actual
23 competition between Texaco and Shell. That was simply
24 the formula for determining --

25 JUSTICE SOUTER: Wasn't there competition in

1 -- in the -- in the retail market? I mean, if I had
2 two stations in front of me and one was selling gas 2
3 cents cheaper, I'd -- I'd go to the one that was 2
4 cents lower. Isn't that competition?

5 MR. MINEAR: Yes, Your Honor. But in -- in
6 that regard, there's competition at the pump, but
7 there's no competition -- as between those two gas
8 stations, but there's no competition between the owners
9 of the joint venture here, Texaco and Shell.

10 JUSTICE SOUTER: Because that differential
11 was not reflected in what their agreement provided that
12 each could respectively take out of the joint venture.

13 MR. MINEAR: That's exactly right.

14 JUSTICE BREYER: That's exactly right. I
15 would have thought there's no competition because there
16 are not two independent decision-makers.

17 MR. MINEAR: That's correct.

18 JUSTICE BREYER: It has nothing to do with
19 the prices that end up.

20 MR. MINEAR: And in fact --

21 JUSTICE BREYER: Maybe you could explain to
22 me how this did work. The -- the -- my understanding,
23 which might be not correct, is we have some facilities
24 that refine gasoline and there are some people who take
25 the gasoline that is refined and they sell it to gas

1 stations. Now, those facilities and those people now
2 work for one hierarchy of officials called Equilon. Is
3 that right?

4 MR. MINEAR: That is all correct.

5 JUSTICE BREYER: All right. So somebody has
6 to say what price it's being sold at. Equilon's gas.
7 Who decides it?

8 MR. MINEAR: Well, that's the factual dispute
9 that the court of appeals recognized in this case.

10 JUSTICE BREYER: All right. What is it?

11 MR. MINEAR: Texaco and Shell take the
12 position that simply this is a decision that's made by
13 the owners of Equilon or Equilon itself --

14 JUSTICE BREYER: No. I imagine there are
15 some human beings in Equilon called marketers, and
16 those human beings in Equilon who work for Equilon
17 would say Equilon will sell the refined gasoline to gas
18 stations at such-and-such prices. That's normally how
19 a company works. Is there something different about
20 this?

21 MR. MINEAR: No, there isn't. And in fact,
22 that is why this cannot be analyzed under the per se
23 rule. This is simply a situation in which a single
24 company is selecting the prices of its -- of its --

25 JUSTICE BREYER: What is their view of it?

1 MR. MINEAR: Respondents' view is that there
2 was an agreement that was entered into, an alleged
3 agreement, at the time of formation of this entity, in
4 which Texaco and Shell agreed to set the Texaco product
5 and the Shell product at the same price. And the
6 United States' response to that is that cannot be a per
7 se violation of the antitrust laws. That is simply --
8 there -- because the parties are not competing with one
9 another, it doesn't make any difference whether or not
10 they've agreed to set it as the same price or different
11 prices. It simply is irrelevant to the anticompetitive
12 --

13 JUSTICE BREYER: The Texaco product being a
14 product that comes out of refineries that previously
15 belonged to Texaco or the Texaco product being gasoline
16 that comes out of either refinery but is sold to
17 stations labeled Texaco, or both? Which?

18 MR. MINEAR: It is more the latter, Your
19 Honor, that what happens in these cases the refineries
20 refine unbranded gasoline. They send it to
21 distribution centers, the terminals, and at that point
22 additives are added and the gasoline then is sold as
23 either Texaco or Shell gasoline.

24 JUSTICE BREYER: All right. I could see how
25 that could be a violation because it's possible that

1 Equilon, if left on its own, would decide that its best
2 marketing strategy was sometimes to set a differential.

3 But now they can't do that because the two parents
4 have agreed that they can't.

5 MR. MINEAR: But that is simply the choice
6 that the owners --

7 JUSTICE BREYER: Is that what happened?

8 MR. MINEAR: That is -- would be the same as
9 if the owners or the shareholders made a decision about
10 how two different products --

11 JUSTICE BREYER: That would be rather like
12 Pan American and Grace saying that, Panagra, charge
13 whatever price you want, but above all, don't go below
14 \$50 because remember, we, Grace, have some ships out
15 there and we want people to take the ships.

16 MR. MINEAR: Well, Your Honor, in that
17 situation there could be an antitrust violation, but it
18 would not be a per se violation. It would be a rule of
19 reason violation.

20 And as this case comes to this Court, the
21 question is whether is there -- there was a per se
22 violation of the antitrust laws, and we cannot say that
23 this agreement, if it exists, was so plainly
24 anticompetitive that it can be condemned without a
25 further inquiry into the nature of the relationship

1 here.

2 I'd like to point out also the court of
3 appeals erred further by trying to limit the effects of
4 its per se ruling by invoking the ancillary restraints
5 doctrine. The ancillary restraints doctrine does not
6 apply here. It applies to a situation that Justice
7 Souter referred to earlier where if the two parties
8 entered into a joint venture and then the owners of the
9 joint venture agreed to some agreement outside of the
10 joint venture -- for instance, to -- to set the price
11 of their products outside the joint venture -- in that
12 situation, under the ancillary restraints doctrine, the
13 question would be, is that particular agreement
14 reasonably necessary for -- to fulfill the purposes of
15 the joint venture?

16 But that's not what we have here. The
17 agreement here goes to the conduct of the venture
18 itself, and even under a rule of reason analysis, the
19 inquiry would be, first, what is the nature of the
20 agreement? Does it have anticompetitive effects? And
21 are those anticompetitive effects outweighed by other
22 procompetitive benefits? That is the type of analysis
23 that would be made in this case if a rule of reason
24 analysis was invoked by respondents. They have not
25 done that in this case, and the same rule -- the same

1 reasoning applies with respect to the quick look
2 doctrine.

3 In both of those cases, there simply is not a
4 basis for finding a antitrust violation, and this Court
5 should reverse the finding of the -- the judgment of
6 the court of appeals and reinstate the judgment of the
7 district court granting summary judgment to
8 petitioners.

9 This case --

10 JUSTICE KENNEDY: Mr. Minear, you've indicated
11 that in the first 8 months, when there was differential
12 pricing, you said that was the way to allocate profits.

13 I thought they shared the profits on some other basis.

14 MR. MINEAR: If I said that, I misspoke. The
15 profits were shared based on a ratio of the
16 contributions of -- of assets that were devoted to the
17 joint venture. What I meant to say, rather, was it
18 could have been more like a performance-based pricing
19 mechanism, but it does -- it had no bearing on the --
20 the relative profits that either firm would make. It
21 was simply a pricing decision.

22 Equilon had to price its products at some
23 price, and so initially it set it at some -- whatever
24 prices they may have been. But ultimately the pricing
25 decision is -- simply does not have anticompetitive

1 significance here.

2 I would like to emphasize this case -- thank
3 you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Minear.

6 Mr. Alioto.

7 ORAL ARGUMENT OF JOSEPH M. ALIOTO

8 ON BEHALF OF THE RESPONDENTS

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

11 Justice Souter, in answer to your question
12 whether or not they advised that they were going to fix
13 the prices when they formed the venture, the answer is
14 no.

15 In answer to your question whether or not
16 they had any document advising the Government that they
17 intended to fix the prices, the answer is no.

18 JUSTICE SCALIA: I don't -- I don't really --
19 who -- who would set the price if it was not -- if it
20 was not the joint venture?

21 MR. ALIOTO: Shell and Texaco fixed the
22 price, if it please -- if it please Your Honor. Under
23 the brand management --

24 JUSTICE SCALIA: The joint venture owns the
25 gasoline. Okay? And it owns the gas stations, those

1 that aren't independent stations. And somebody else is
2 going to set the price for the gas that the joint
3 venture owns? Wouldn't you need some separate
4 agreement that clearly sets that forth?

5 MR. ALIOTO: Yes, Your Honor, and at page 5
6 of our brief, we pointed that out. There were two
7 parts to it. Under the agreement -- and if you'll look
8 at page 5 of our brief, we have both of the agreements.

9 And under those agreements -- under those agreements,
10 it was necessary that the -- I'm sorry. At page 7.
11 Under those agreements, if the Court will look at it,
12 first of all, it says, the company's business shall be
13 conducted by the CEO and other officers of the company,
14 subject to the direction by, and in accordance with the
15 policies, business plans, and budgets approved by Shell
16 and Texaco -- they said the members -- acting by and
17 through the members committee. That's Shell and
18 Texaco. But more importantly --

19 JUSTICE SCALIA: It's the board of directors.
20 Isn't it? Isn't the members committee the board of
21 directors of -- of the joint venture?

22 MR. ALIOTO: If the board of directors are
23 Shell and Texaco and if they are the ones who are --
24 the next statement, Your Honor -- the -- they -- they
25 must -- the company must follow the policies,

1 strategies, and standards established by the members
2 committee. The members committee is Shell and Texaco
3 and Saudi.

4 JUSTICE SCALIA: That's because it's a joint
5 venture.

6 MR. ALIOTO: A joint --

7 JUSTICE SCALIA: That's the nature of a joint
8 venture. The board of directors is composed of people
9 representing the various elements of the joint venture.

10 MR. ALIOTO: The pricing didn't --

11 JUSTICE SCALIA: There's nothing subversive
12 about that.

13 MR. ALIOTO: The pricing didn't have anything
14 to do with -- if it please the Court, the pricing
15 didn't anything to do with the joint venture. On page
16 12 --

17 JUSTICE SOUTER: No, but isn't -- isn't it
18 expectable? I mean -- and this is -- I think this is
19 Justice Scalia's -- isn't it -- isn't it expectable
20 that if you don't have an agreement that clearly says
21 the two -- the two joint venturers, respectively,
22 retain the right to -- to price products sold to the
23 consumer under their brand name, that in fact it is the
24 joint venture that will price the products?

25 MR. ALIOTO: No, Your Honor.

1 JUSTICE SOUTER: And therefore, it is a
2 decision of the joint venture, not of the -- the two
3 original principals.

4 MR. ALIOTO: No, Your Honor, for a couple of
5 reasons.

6 First of all, in Citizens Publishing, that
7 did not exist. This Court did not abolish the joint
8 venture there. What it did was it cut out the price-
9 fixing part of it only. Just as the lower court said,
10 the joint venture there does not depend upon --

11 JUSTICE GINSBURG: Citizens -- Citizens
12 Publishing did not have a joint venture that had
13 advance approval from the FTC. It had --

14 MR. ALIOTO: Correct, Your Honor.

15 JUSTICE GINSBURG: And I think that makes a
16 big difference. I mean, the FTC blessed this and said
17 it was okay. They asked for certain adjustments.
18 Those were made. One of them was not, that you had to
19 maintain a differential in the price between Texaco and
20 Shell.

21 MR. ALIOTO: If it please Your Honor, there
22 are many times in which this Court has said that the
23 FTC does not have the authority or power to grant
24 immunity from antitrust violations. In --

25 JUSTICE GINSBURG: But the FTC, which is the

1 expert agency, said we don't think this joint venture
2 is an antitrust violation. Don't we owe some respect
3 to that determination, which was absent in Citizens
4 Publishing?

5 MR. ALIOTO: Yes, Your Honor, but I believe
6 also that you should have -- give some respect, too,
7 to this Court's prior orders and this Court's prior
8 decisions.

9 In Citizens Publishing, the Court left alone the joint
10 venture, and it separated out the pricing and took it
11 out and cut it out.

12 JUSTICE SCALIA: Yes, but that's because the
13 joint venture did not include -- did not include a
14 merging of the product as it did here. Here, the
15 gasoline from both of them was merged into one
16 gasoline, which was sold and the profit of which was
17 divided between them. In -- in Citizens Publishing,
18 each of the newspapers continued to sell its own
19 newspaper and to -- and to reap whatever profit it
20 could make from its own newspaper. That's
21 fundamentally different from here. There -- there
22 still is competition between the two newspapers.

23 MR. ALIOTO: In all due respect, Justice
24 Scalia, they did not join the gasoline. The gasoline
25 was separate and apart. They -- that was very

1 important. They maintained them separate and apart.
2 They competed separately for at least 8 months.

3 JUSTICE SOUTER: No, but Mr. Minear --

4 CHIEF JUSTICE ROBERTS: So if they had
5 combined and if they had agreed in the joint venture to
6 sell a new brand of gasoline, Equilon gasoline, of
7 course, they would -- the joint venture would be free
8 to set the price of that.

9 MR. ALIOTO: I believe that that's probably
10 correct, Mr. Chief Justice. However, it is not the
11 kind of thing that this Court talked about in BMI and
12 the other cases.

13 CHIEF JUSTICE ROBERTS: So if that's correct
14 -- if -- if that's correct, what is the difference if
15 the joint venture decides that it's going -- they're
16 going to make more money having two separate brands and
17 even though it's Equilon gas, the people are going to
18 think it's different because some people have always
19 bought from Texaco and others from Shell? It's not
20 going to affect how the profits are distributed. It's
21 still going to be the same whether it's Equilon gas or
22 Texaco and Shell. Why does the joint venture lose the
23 authority to set the price of its product?

24 MR. ALIOTO: The reason it loses the
25 authority, Your Honor, is that there has to be some

1 kind of reasonably necessary means so they -- it has to
2 be reasonably necessary that they need to price the
3 products in order to make the joint venture work. On
4 page 12, we gave you the testimony where the chief
5 executive officer of Texaco and others specifically
6 said that the -- that the pricing had nothing to do
7 with the cost savings or the --

8 JUSTICE BREYER: Yes, that's right.

9 JUSTICE SOUTER: Well, that's true, but Mr.
10 Minear had a response to that, it seems to me, a kind
11 of blanket response, and he said that's only relevant
12 unless you are dealing with pricing decisions between
13 competitors. And the one thing, if I understood him
14 correctly, that is clear is that under the undisputed
15 portions of the joint venture agreement, the price at
16 which the products were sold, high, low, differential,
17 no differential, did not affect the distribution of
18 profits as between the two joint venturers. Therefore,
19 they were not competing with respect to the pricing,
20 and therefore, the -- your -- in effect, your whole
21 argument collapses because you don't have, on any
22 analysis, an agreement between two competitors.

23 MR. ALIOTO: But, Justice Souter, Citizens
24 Publishing -- they did exactly the same thing. They
25 pooled their profits under a -- under a formula that

1 was very similar to the formula here.

2 JUSTICE SCALIA: But they were competitors.
3 They were -- each one of them sold its own newspaper.
4 All they merged was -- was their publishing facilities.

5 And when they agreed separately not to -- to charge
6 the same price for the newspaper, that was not part of
7 the joint venture. That was, indeed, an agreement
8 between competitors. There were two separate
9 newspapers selling on the basis of their own
10 distribution system and so forth.

11 MR. ALIOTO: And the same existed here,
12 Justice Scalia. Shell and Texaco were -- operated
13 basically independently for at least 8 months, and
14 certainly before they were major competitors.

15 But look what happened here. All of the
16 costs that were -- all of the cost savings in this
17 situation -- there are -- to show how -- to show the
18 anticompetitive effects of what happened, in this case,
19 the crude oil was down to its lowest since the
20 Depression. The costs were being reduced under the so-
21 called joint venture substantially. Plus, there was
22 excess supply.

23 JUSTICE BREYER: Let me go back for a second.

24 I'm just trying to get it clear.

25 My -- my belief -- I've always thought that

1 Citizens Publishing was a case where the district court
2 said that the formation of the joint operating venture
3 -- the basic formation, which involved a stock
4 acquisition -- violated section 7. And then they
5 created a decree. And the question was -- for the
6 Supreme Court was whether the district court was right
7 in holding there was a section 7 violation. Now --
8 now, maybe I'm wrong on that. I'll go back and look at
9 it.

10 MR. ALIOTO: Yes, Justice Breyer.

11 JUSTICE BREYER: If so, if I'm right on it,
12 then what we're lacking from your point of view here is
13 a claim that this whole joint venture is unlawful. And
14 I agree with you. If you make that claim, I don't
15 think the FTC can insulate it, I guess, unless there's
16 something I don't know about, but you're not making the
17 claim anyway.

18 So here, unlike Citizens Publishing, we're --
19 we have to deal with this on the assumption that the
20 joint venture is lawful.

21 MR. ALIOTO: Even --

22 JUSTICE BREYER: I don't see how to get out
23 of that, but maybe you can tell me I can. But wait.

24 Now, what I'm trying to get at is what
25 precisely is your claim, given the lawfulness of the

1 joint venture?

2 One part I see. One part I see is that the
3 people who are setting the prices are the board of
4 directors of a venture company who represent Shell and
5 Texaco. Now, that might run up against Justice
6 Scalia's objection.

7 But I want to sure -- sure I have all of
8 them. That is, I want to know if there's some other
9 claim you're making here in respect to an agreement
10 between Shell and Texaco as to Equilon's prices. And
11 if so, what is it and where is the reference in the
12 record?

13 MR. ALIOTO: Taking each of the questions
14 that you asked, Justice Breyer, first, Citizens
15 Publishing was section 1 and 2 and subsequently --

16 JUSTICE BREYER: 7.

17 MR. ALIOTO: -- section 7. Okay.

18 Second, in Citizens Publishing, the
19 lawfulness of the joint venture, like here, even if you
20 posit that the joint venture is lawful, it -- the
21 pricing must be -- must be necessary in order to
22 achieve those -- those savings in order to be
23 justified.

24 When there's no connection, it's just a
25 straight, naked restraint, and even if it were -- even

1 if the joint venture were lawful here, even if that
2 were so and they had all these cost savings, in the
3 face of all of those lowered costs and the lowest crude
4 oil and the excess supply, they not only took the price
5 leader and the price cutter, they brought them to the
6 same level, and then they increased the price another
7 67 percent in major markets --

8 CHIEF JUSTICE ROBERTS: I concede that it
9 would have been perfectly legal for them to do that if
10 they called all of their gasoline Equilon gasoline
11 because they owned all the gas and the profits are
12 going to be distributed to the owner the same way
13 whether they call them Texaco or Shell. Why is it
14 suddenly different because they put different labels on
15 the -- keep different labels on the gasoline?

16 MR. ALIOTO: They want to maintain, first of
17 all, their independent identity just like Citizens
18 Publishing. They want to maintain that. They had a
19 standstill agreement you can't merge these. They
20 didn't want to join them. They didn't want to make a
21 new product. They didn't want to do that. All they
22 wanted to do was fix the price of gasoline in the
23 United States.

24 JUSTICE BREYER: That -- that might be. But
25 I don't want you to forget the last part of my

1 question, which for me was the most important, because
2 I can read Citizens Publishing, but it's going to be
3 tough for me to find in the record any claims that you
4 make that the two companies have agreed as to price,
5 like the Panagra example. That's why I gave it, to put
6 it in your mind. So if there's anything like this that
7 you're claiming, I'd like to know, or is your total
8 claim that the activity of Shell and Texaco in setting
9 the price of Equilon is to have their representatives
10 on the Equilon board of directors tell Equilon what
11 price to sell? Or is there something else? I just
12 need to know. Is it just that, or is there something
13 else in this case?

14 MR. ALIOTO: There is more. What the --
15 Okay. What they did is when -- is when the members
16 decided that they wanted a new plan -- this is after 6
17 months that they had been operating their joint venture
18 without fixing the price. They then had a program that
19 they submitted that they required Equilon and Motiva to
20 follow. And this was their so-called strategic price
21 plan.

22 JUSTICE BREYER: Was it the board of
23 directors that did that, or was it something else?

24 MR. ALIOTO: If -- if you want to say that
25 the members committee are the board of directors,

1 Justice Breyer, okay. But in fact and in truth, it is
2 the -- it is Shell and Texaco, independently without
3 any conversation with the representatives of Equilon,
4 who are doing this. What differences this from -- from
5 Northern Securities and -- and any of the other cases
6 in which the board of directors, so-called, were the
7 former major competitors -- what difference what form
8 they take -- and they --

9 JUSTICE SOUTER: I can understand your
10 argument if we were doing a rule of reason analysis.
11 Is that something that can properly be analyzed on
12 quick look or per se?

13 MR. ALIOTO: Absolutely, Your Honor, because
14 first of all -- first of all, with regard to Citizens
15 Publishing, it is per se.

16 Secondly, with regard to quick look, look
17 what you have. First you analyze the -- as we've said
18 -- as you've said before in your decisions, first you
19 analyze the restraint. What is it? It's a restraint
20 directly on price. It's not covered up any way. It's
21 not something doing something like less supply to fix
22 the price. It's directly at the price.

23 The second thing is, in doing that, is this
24 restraint necessary, not less -- not much -- essential
25 -- is it necessary to -- to get the -- what you're

1 saving on the joint venture? Is it necessary to
2 promote the objectives of the joint venture?

3 JUSTICE GINSBURG: May I ask a very naive
4 question? Is -- this is basically the same commodity,
5 gasoline. They have different attitude -- additives,
6 but basically costs the same. Facilities to produce it
7 are the same. Why should they -- should there be from
8 -- now that they're marketing this under one joint
9 venture, why should they make a difference in the price
10 of what is basically the same commodity?

11 MR. ALIOTO: There are two answers to that,
12 Justice Ginsburg. First of all, they are not the same
13 commodity because they said -- they were asked and they
14 said it was different. They maintain the difference.
15 They seem to think that it's different.

16 Secondly --

17 JUSTICE GINSBURG: Well, what difference
18 physically is there other than they have different
19 additive -- additives?

20 MR. ALIOTO: That's what they say, Your
21 Honor.

22 Secondly, if Equilon were given the right to
23 do its own pricing, if they had given all of that right
24 to them, and that they weren't the real puppeteers, as
25 it were, that would -- might be a different situation.

1 JUSTICE BREYER: Well, but that -- that
2 sounds like the complaint that you're making. We have
3 a problem, say, with -- with the newspapers or whatever
4 it is. It's awfully dicey as to whether they should
5 form this joint venture. It's going to eliminate a lot
6 of competition.

7 But now what you're saying is, look, at the
8 very least, they should structure it in a way that the
9 independent pricing decision is made by Equilon. Don't
10 structure the pricing decision so that bit by bit, day
11 by day it's made out by six people, half of whom
12 represent Shell, half of whom represent Texaco. I can
13 see that as an argument. This is more restrictive than
14 necessary.

15 MR. ALIOTO: Of course.

16 JUSTICE BREYER: Now, you get me that far,
17 and now I -- I -- but I say why isn't that a rule of
18 reason because you're really fighting the structure of
19 the venture they come up with.

20 MR. ALIOTO: They come -- then, if it please
21 Your Honor, that after I pointed out that the restraint
22 is directly on price, which should be a red flag to
23 anyone, and also that I pointed out that there is no
24 reasonable relationship between the pricing and the
25 cost, the savings, for the joint venture, the last

1 issue on that is whether there's any justification.

2 And what justification is there? There's none.

3 JUSTICE KENNEDY: But I don't -- I don't
4 understand, Mr. Alioto, if the profits are -- are not
5 traceable to how much of -- of the two products are
6 sold, if the profits aren't divided that way, why
7 should the two lines be continued to be marketed
8 independently? There's no other analog I can think of
9 in -- in the business world for that. There -- there's
10 no motive to make one any cheaper than the other once
11 the profits are shared evenly, and that's the structure
12 of the venture.

13 MR. ALIOTO: Justice Souter -- I believe a
14 number of answers to that, Justice Kennedy.

15 First of all, this is so temporary. They've
16 done this for -- they have the right to get out of this
17 in 5 years. They're already out of it. It doesn't
18 exist anymore. They could do it mutually in 5 years.
19 They could do it by themselves after 5. They haven't
20 done it anywhere else in the world. All they're doing
21 is getting together and being able to fix the price.
22 So it's so temporary. What difference does -- really
23 does that make?

24 But, in addition, it's the profit pooling
25 that was also illegal, declared to be illegal by this

1 Court in its 7 to 1 decision in Citizens.

2 JUSTICE SCALIA: Of course --

3 MR. ALIOTO: The Court didn't like that
4 either.

5 JUSTICE SCALIA: -- they're not able to fix
6 the price unless they have market dominance. I mean,
7 do you think they're just competing with each other?
8 Aren't there other companies selling gasoline?

9 MR. ALIOTO: In all due -- in all --

10 JUSTICE SCALIA: And I don't think that this
11 -- this joint venture would have been allowed if -- if
12 these two companies together dominated the market. Of
13 course, it wouldn't have been allowed.

14 MR. ALIOTO: In all due respect, Justice
15 Scalia, the -- you do not have to have market power to
16 fix prices. That's not a criteria. That is certainly
17 not a predicate. Anybody can fix prices. You fix
18 prices. It's illegal per se. That's the point. And
19 --

20 JUSTICE SCALIA: You mean fix prices
21 successfully.

22 MR. ALIOTO: They did it.

23 (Laughter.)

24 JUSTICE SCALIA: Fix -- fix prices and not be
25 an idiot at the same time.

1 (Laughter.)

2 MR. ALIOTO: It wasn't silly for them to,
3 first of all, change the differential that lasted for
4 years, and it wasn't silly for them to increase the
5 price by 70 percent as soon as they made the agreement.
6 There was nothing silly about that. Many people
7 suffered because of it.

8 JUSTICE GINSBURG: One of the briefs said
9 that the reason for that price hike was that there was
10 an explosion in a refinery in California and outages in
11 others and that there was a market-wide price increase.
12 That was in --

13 MR. ALIOTO: Yes, Justice Ginsburg. If -- if
14 -- in the face of the facts that we have in the record
15 -- and that's not a -- I don't know that that's a fact.
16 Let them present it to a jury if they say that that's
17 the reason.

18 When they have a situation where the crude
19 oil is as low as it's ever been since the Depression,
20 when they say they've saved \$850 million on their joint
21 venture, and when they say there's excess capacity,
22 even -- you don't need to be Adam Smith to know that
23 the prices are supposed to go down. And what happened
24 instead? They went up and they went up dramatically.

25 JUSTICE SCALIA: You don't -- you don't want

1 them to present it to a jury, as I understand it.

2 MR. ALIOTO: Pardon me? Pardon me, Justice?

3 JUSTICE SCALIA: You don't want them to
4 present it to a jury. The whole reason that you're
5 here is that you want us to declare a per se violation.
6 You -- you want to put it to a jury?

7 MR. ALIOTO: Per se -- per se violations are
8 put to juries all the time, Justice Scalia. The
9 question is you have to prove that that's what they
10 did.

11 I agree with the Court in this way. I agree.
12 I don't think it -- I don't think it should go to
13 trial. I think this Court should do as it did in
14 Citizens Publishing and make it very plain to everybody
15 that you're not going to allow them to use a joint
16 venture as a cover, even though it is legal --

17 JUSTICE STEVENS: But, Mr. Alioto --

18 MR. ALIOTO: -- to go do something unlawful.

19 JUSTICE STEVENS: -- Mr. Alioto --

20 MR. ALIOTO: Yes, Justice Stevens.

21 JUSTICE STEVENS: -- is it not correct that
22 in the Citizens Publishing case the agreement itself
23 was invalid?

24 MR. ALIOTO: The -- the joint venture was not
25 declared invalid, Justice. The joint venture was

1 preserved. They were allowed to continue to keep the
2 presses together, to keep the trucks together, to -- to
3 use the joint venture. As the court said below and as
4 this Court said, the -- the pricing didn't depend --
5 depend -- I mean, the joint venture didn't dependent
6 upon the pricing.

7 JUSTICE STEVENS: Why did they get into the
8 discussion of the failing company doctrine in the case?

9 MR. ALIOTO: They've used the failing company
10 doctrine, Your Honor, both in Northern Securities and
11 in Citizens Publishing, and that was the -- that was
12 the reason what -- which they gave initially to join,
13 and that was an issue. And Justice Harlan said, okay,
14 that was an issue. He thought that that should be
15 tried.

16 But that was not pertinent to the question of
17 whether or not the pricing, if it is so divorced -- I
18 -- I must bring -- bring the Court back to this
19 statement by the chief executive officer. He said that
20 the cost savings and all the synergies, the pricing had
21 nothing to do with it. Nothing he said. So if it had
22 nothing to do with it, then what are they doing fixing
23 the price?

24 JUSTICE STEVENS: No, but if the Government
25 and everybody agrees that the joint venture is

1 perfectly lawful, I'm still not quite sure your answer
2 to the Chief Justice's question. If they can fix the
3 price of a single brand, why can't they fix the price
4 of -- of two brands at the same time?

5 MR. ALIOTO: Let me say it in this way, Your
6 Honor. I don't think that Shell and Texaco, if they
7 got together and they say, look it, we'll get rid of
8 both of our gasolines, let's just have one gasoline,
9 and they fixed the price, I think that that would be
10 illegal.

11 JUSTICE STEVENS: Well, of course, that's one
12 --

13 MR. ALIOTO: I thought what the --

14 JUSTICE STEVENS: -- that's one of the ironic
15 things about this aspect of the law. If they just made
16 the agreement by themselves without forming the joint
17 venture, it would be illegal per se, but if they
18 restrain competition even more by forming a joint
19 venture, then it's perfectly okay. But that's
20 apparently what the law provides.

21 MR. ALIOTO: But -- but if the Court --

22 (Laughter.)

23 MR. ALIOTO: If it -- if it please the Court,
24 if Equilon -- if Equilon were supposed to come up with
25 a new -- with a new product itself -- I mean, the --

1 the -- your cases are so clear. BMI was allowed to fix
2 the price because they came up with a product that
3 nobody could do on their own, and that was one of the
4 basic reasons. And even so, the people who made the
5 agreement continued to compete against the -- the so-
6 called product of the -- of the joint venture.

7 CHIEF JUSTICE ROBERTS: I don't understand
8 that. I mean, now you're backing away from your
9 concession. If you have a lawful joint venture that's
10 marketing a product, the joint venture has to be able
11 to set the price of the product.

12 MR. ALIOTO: Only if it is necessary to
13 achieve the objectives of the joint venture.

14 CHIEF JUSTICE ROBERTS: No. No, if it's --
15 if it's a lawful joint venture and it's selling
16 gasoline -- there's no retaining of prior brands -- the
17 joint venture sets the price. And if the -- and all
18 those people you said suffered when Equilon did this,
19 those same number of people would have suffered if
20 they're selling Equilon gasoline at a price determined
21 by the joint venture. It seems to me a very artificial
22 hook that you're trying to hang your case on, which is
23 they retained for presumably legitimate brand
24 competition reasons their separate brands, but that was
25 the decision of the joint venture. And again, the

1 joint venture has to be able to price its product
2 whether it's sold as Equilon or whether it's sold as
3 Texaco or Shell under -- under the same -- same joint
4 venture.

5 MR. ALIOTO: Mr. Chief Justice, I believe
6 this Court has been consistently clear on this topic.
7 You cannot even think about or touch price unless you
8 have some specific, necessary connection to the joint
9 venture.

10 JUSTICE BREYER: Really? Suppose we walk
11 into a department store. In the department store, we
12 see three perfume counters, and there are three
13 salesmen, one behind each. Do they compete in price?
14 The answer is obvious. Of course, not. Of course --

15 MR. ALIOTO: Three sales persons?

16 JUSTICE BREYER: Yes. Three counters. They
17 sell perfume.

18 MR. ALIOTO: Yes.

19 JUSTICE BREYER: Of course, they don't
20 compete. But do we know the department store has to be
21 run that way? I mean, maybe some places it isn't. We
22 can't prove it has to be run that way.

23 MR. ALIOTO: Well, this would be --

24 JUSTICE BREYER: Think of a -- think of a
25 mall. Think of a bunch of shops. Maybe it doesn't.

1 Maybe they could compete.

2 The reason that -- the law says they don't
3 have to compete is because the law thinks in general
4 it's a reasonable way to run a department store without
5 forcing your sales people to compete. And similarly, a
6 joint venture. You can't prove they have to have the
7 price set at a central place, but the reason they set
8 it at a central place, because it's a joint venture.
9 And that's seems to me what the cases are consistent
10 with. You tell me which one is it.

11 MR. ALIOTO: The danger -- the danger,
12 Justice Breyer, is this. Is the Court going to say
13 that two major competitors in a major industry, that if
14 they get together from -- for some joint venture,
15 whatever it is, that they're then allowed to fix the
16 price?

17 JUSTICE BREYER: Oh, the answer is no.
18 You're right.

19 JUSTICE SOUTER: But, Mr. Alioto, your
20 argument, I think, is assuming that the facts in this
21 case are like the facts in what I think I called my --
22 my crazy joint venture hypothetical in which the two
23 principals agreed to a joint venture, but they accept
24 in a clear and unequivocal way the pricing decisions.

25 And -- and it seems to me that the -- two

1 things have come out of this argument.

2 Number one, you don't make that assumption,
3 and that assumption is -- is not supported by the facts
4 of this case.

5 And number two, Mr. Minear comes back and
6 says as long as the division of profits under the joint
7 venture agreement does not depend on these pricing
8 decisions, they are not competitors, and therefore it's
9 irrelevant anyway.

10 Doesn't your argument run against -- crash
11 against one or the other or both of those answers?

12 MR. ALIOTO: I don't think so. The second
13 one made by counsel for the Government runs directly
14 against Citizens Publishing. That was in the case,
15 Your Honor. And no one has suggested that Citizens
16 Publishing be reversed.

17 And the second part is in fact they did that.
18 They did act independently for at least 8 months.

19 JUSTICE SOUTER: Well, they did not change
20 the price for at least 8 months.

21 MR. ALIOTO: No. In between, they didn't --
22 they didn't change the price. They didn't get involved
23 in the price. Then they came up with their program and
24 then they instructed the joint venture to make the
25 prices the same.

1 JUSTICE SCALIA: Mr. Alioto --

2 MR. ALIOTO: Not the joint venture doing

3 that.

4 JUSTICE SCALIA: Who -- who is it that you

5 would have had the price set by?

6 MR. ALIOTO: That would be --

7 JUSTICE SCALIA: I mean, it's their gas.

8 Okay? They're marketing it through their stations.

9 Who -- who would have set the price if -- if we said

10 it's -- it's bad for Equilon to do it?

11 MR. ALIOTO: If they gave them independence

12 and if there were some relationship with the joint

13 venture --

14 JUSTICE SCALIA: Gave whom independence?

15 Gave whom --

16 MR. ALIOTO: Gave Equilon and to Motiva. If

17 they gave them independence to make their own judgment

18 -- maybe Equilon would like to make Texaco a lower

19 price. Maybe it like to make it a -- a discounter.

20 JUSTICE SCALIA: They did give them

21 independence.

22 MR. ALIOTO: No.

23 JUSTICE SCALIA: That is --

24 MR. ALIOTO: Precisely did not.

25 JUSTICE SCALIA: They gave their board of

1 directors independence. Now, the board of directors
2 was composed, as -- as boards of directors of joint
3 ventures are, by the parties to the joint ventures.

4 MR. ALIOTO: I'm not -- I'm not sure how it
5 is in other situations. All I'm saying is when you
6 have these two oil companies who are directing this and
7 pretending that the decisions are being independent,
8 that is not the fact in this case. And there's nothing
9 wrong, Justice Souter, for two of these to read the way
10 they did because they did it in our case.

11 JUSTICE SCALIA: Who -- have you answered my
12 question? Who would you have wanted to set the price
13 in this case?

14 MR. ALIOTO: Shell and Texaco should have
15 done this. They should have said, okay, we're making
16 Equilon for these -- for these cost savings. You,
17 Equilon, can make the price decisions if you want to.
18 Or they could say, you make the gasoline, give it to
19 us, like GM and Toyota, and we will separately price it
20 on our own.

21 JUSTICE SCALIA: But I think they did say the
22 former. You -- you make the price decisions. Equilon.

23 MR. ALIOTO: They did not. Justice --
24 Justice Scalia, they did not.

25 JUSTICE SCALIA: Your -- your complaint is

1 that Equilon is in reality a joint venture of -- of the
2 two -- the two gasoline companies.

3 MR. ALIOTO: My complaint is --

4 JUSTICE SCALIA: That's your complaint.

5 MR. ALIOTO: My complaint is that two
6 gasoline companies controlled the price that they were
7 never able to fix before.

8 JUSTICE BREYER: If that were a real rule of
9 reason argument, did you waive the rule of reason here?

10 MR. ALIOTO: I -- I waived the rule of reason
11 argument with regard to showing market power and -- and
12 impact on the market. I chose NCAA under the footnote
13 -- and under footnote 39 of NCAA. And I chose price-
14 fixing per se on the basis of Citizens Publishing.

15 JUSTICE GINSBURG: So is the answer -- in --
16 in case the Court does not agree with you, can you then
17 say, I would like to resurrect rule of reason or do you
18 agree with your adversary that -- that that's out of
19 the case because you forfeited it?

20 MR. ALIOTO: If you do it, as was noted in
21 California Medical, where you have this whole line from
22 per se to the end on rule of reason, and in between on
23 Misty Flats, no one is sure what they are, but we now
24 know I am getting rid of the final one, the far one.
25 But I am not -- I am not getting rid of -- and I -- and

1 I do not waive the rule of reason based on the so-
2 called quick look doctrine, as announced by this Court
3 on a number of occasions. And we have satisfied all of
4 those requirements. The restraint is on price
5 directly.

6 JUSTICE GINSBURG: The ordinary, routine rule
7 of reason you have waived. Is that so?

8 MR. ALIOTO: Yes, on impact of market.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.
10 Alioto.

11 MR. ALIOTO: If it please the Court, thank
12 you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Mr. Nager, you have 2
14 minutes remaining.

15 REBUTTAL ARGUMENT OF GLEN D. NAGER

16 ON BEHALF OF THE PETITIONERS

17 MR. NAGER: Thank you, Mr. Chief Justice. I
18 have three quick points.

19 One, just to bring us back to the stipulated
20 facts of this case, I'd ask the Court to check the
21 joint appendix, page 78 to 79, stipulated fact number
22 62. The second sentence of that stipulation says,
23 after the formation of Equilon and Motiva, the pricing
24 was consolidated so that one person at Equilon set
25 prices for both the Shell and Texaco brands in any

1 given Equilon pricing area, and one person at Motiva
2 set prices for both brands in any given Motiva pricing
3 area.

4 There's never been any allegation in this
5 case that Shell and Texaco set the actual prices at
6 which this gasoline was sold at. The only claim then
7 that the owners of the joint venture said that the
8 prices had to be the same between the two branded names
9 in any given area.

10 Secondly, with respect to the 8-month period
11 that the respondents keep pointing to, the record
12 reflects testimony that, as with any consolidation of
13 two businesses that have been separate and are coming
14 together, it took them a few months to figure out how
15 to consolidate and unify and save the \$800 million a
16 year that was the purpose of this joint venture in
17 consolidating. No -- no two companies, when they
18 create a joint venture or merge, instantaneously are
19 able to operate as if they didn't previously exist. It
20 takes a while.

21 And the third point -- and this is the point
22 that Justice Breyer has made. When this joint venture
23 was created, it eliminated competition in the United
24 States for branded gasoline between Shell and Texaco.
25 That's a stipulated fact in this case. And when it

1 eliminated competition between Shell and Texaco, there
2 was no further competition to effect. There was no
3 further anticompetitive consequence that could happen
4 from the pricing of the gasoline of that joint venture.

5 It's your three counters in the department store.

6 And if there is no further anticompetitive
7 effect that can happen, there's no quick look reason
8 possible, Justice Souter, for the issue that's been
9 challenged in this case. Your hypothetical goes to the
10 formation which they waived.

11 Thank you very much.

12 JUSTICE BREYER: Well, just as long as you
13 have a minute --

14 (Laughter.)

15 JUSTICE BREYER: -- I take it that their
16 point was, what you sort of said there, that -- that
17 they had agreed -- sorry. Forget it.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 11:17 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25