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IN THE SUPREME COURT OF THE UNITED STATES

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SAMUEL OCASIO, :

Petitioner : No. 14-361

v. :

UNITED STATES OF AMERICA. :

- - - - - x

Washington, D.C.

Tuesday, October 6, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

ETHAN P. DAVIS, ESQ., San Francisco, Cal.; on behalf of Petitioner.

ALLON KEDEM, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ETHAN P. DAVIS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ALLON KEDEM, ESQ.	
7	On behalf of the Respondent	27
8	REBUTTAL ARGUMENT OF	
9	ETHAN P. DAVIS, ESQ.	
10	On behalf of the Petitioner	52
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-361, Ocasio v.
5 United States.

6 Mr. Davis.

7 ORAL ARGUMENT OF ETHAN P. DAVIS

8 ON BEHALF OF THE PETITIONER

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

11 The Hobbs Act requires that a defendant
12 obtain property from another. In this case, Mr. Ocasio
13 was charged with conspiring with the owners of a repair
14 shop not to obtain property from another, but from the
15 owners themselves.

16 The plain language of the Hobbs Act resolves
17 this case. When two people agree that one will pay the
18 other a bribe, they have merely agreed to exchange
19 property between themselves, not to obtain property from
20 another. The historical background, the statutory
21 structure, and basic criminal -- principles of criminal
22 law all point in the same direction. There are no old
23 English or State cases involving conspiracies to extort
24 property from a co-conspirator.

25 JUSTICE GINSBURG: Does that mean that you

1 would have to -- in order to get at this -- this
2 venture, you would have to bring two separate
3 prosecutions, one against your client for the extortion,
4 and then a separate crime -- a separate prosecution in
5 State court against the body shop owners?

6 MR. DAVIS: Yes, Justice Ginsburg, I think
7 that is correct. Maryland has a bribery statute that
8 might apply in a situation like this. And Congress has
9 passed a bribery statute targeted to bribery of State
10 and local officials, 18 U.S.C. 666, that may or may not
11 apply to the repair shop owners. But we don't think
12 they could be convicted of --

13 JUSTICE SCALIA: Is it -- is it well
14 established, or even not well established, that you are
15 obtaining property under color of law when you give
16 somebody a bribe?

17 MR. DAVIS: Your Honor --

18 JUSTICE SCALIA: It seems to me -- what that
19 means to me under color of law is you -- you pretend to
20 have a legal right to it, which in fact you don't have.

21 MR. DAVIS: Justice Scalia, until 1992, I
22 think that was an open question, but this Court decided
23 in *Evans v. United States* in '92 that Hobbs Act
24 extortion encompasses the paying of -- of bribes.

25 JUSTICE SCALIA: I dissented, I assume.

1 (Laughter.)

2 MR. DAVIS: You did. But, Your Honor, I
3 think that that -- the decision in Evans was really the
4 high-water mark of this Court's Hobbs Act jurisprudence.
5 And since then the Court has been careful not to expand
6 the Hobbs Act --

7 JUSTICE KENNEDY: Well, we have stated that
8 a person may be liable for conspiracy even though he was
9 incapable of committing the substantive offense. Does
10 that carry the day for the government's argument here,
11 or is that distinguishable at principle?

12 MR. DAVIS: I think that's distinguishable
13 in principle, Justice Kennedy.

14 JUSTICE KENNEDY: And why?

15 MR. DAVIS: Well, certainly not every
16 conspirator must personally commit every element of the
17 substantive offense.

18 JUSTICE KENNEDY: But he might not even be
19 capable of it, must not even be capable of it, as I
20 understand what we've said.

21 MR. DAVIS: That's correct, Your Honor.
22 Must -- need not even be capable of committing every
23 element of the substantive offense, but each conspirator
24 must specifically intend that someone commit every
25 element of the substantive offense. And --

1 JUSTICE KAGAN: Well, why isn't that test
2 satisfied here, because the shop owners agreed that
3 Mr. Ocasio would commit every element of the substantive
4 offense?

5 MR. DAVIS: The shop owners, Your Honor,
6 agree that Mr. Ocasio would obtain property from
7 another, not from themselves. So I think that --

8 JUSTICE KAGAN: Well, the -- the --
9 Mr. Ocasio is committing every element of the
10 substantive offense. He is obtaining property from
11 another; that is, he's obtaining property from the body
12 shop owners. And the body shop owners agreed that he
13 would do so.

14 So it seems to me that in the normal way
15 that conspiracy law works, there is a conspiracy here.

16 MR. DAVIS: Justice Kagan, I don't think
17 that's quite right. I think that there must be a unity
18 of purpose in conspiracy law. And the -- Mr. Ocasio may
19 have agreed to obtain property from another, but the
20 body shop owners agreed to obtain property from
21 themselves; so there's no unity of purpose.

22 JUSTICE KAGAN: They only need to agree that
23 he should obtain property from another, and that is
24 exactly what they agreed to.

25 MR. DAVIS: Justice Kagan, I think the best

1 way to approach your question is through imagining how
2 this would happen in ordinary English. The government
3 has a John and Susan -- has its response to our John and
4 Susan hypothetical in its brief. It says, John would go
5 to Susan and say, let us agree that I will obtain
6 property from another, namely, you. And you notice how
7 much work the words "namely you" are doing in the
8 government's hypothetical. They're redefining the word
9 "another" to mean the opposite of its ordinary meaning,
10 not --

11 JUSTICE ALITO: Is that any stranger than
12 the Mann Act situation, where the woman who is being
13 transported across State lines for immoral purposes,
14 conspires with the person who is transporting her across
15 State lines? That's permissible, isn't it?

16 MR. DAVIS: Justice Alito, I think yes, it
17 is. And two distinctions from the Mann Act cases: The
18 first is that the Mann Act used the phrase "any woman,"
19 not "another woman." I think that case would have been
20 different if it had used the phrase "another woman."

21 JUSTICE ALITO: Well, "any woman" is broader
22 than "another woman." "Any woman" means any of
23 3.5 billion-plus women in the world, and that subsumes
24 "another woman," doesn't it?

25 MR. DAVIS: I don't think so, Your Honor. I

1 mean, I think that if a woman agreed to transport any
2 woman, it makes sense to think that she could transport
3 herself across State lines, but if the statute had said
4 "another woman," it doesn't make sense to say that she
5 could have transported another woman when she was merely
6 transporting herself.

7 JUSTICE KAGAN: Well, they're two different
8 words, but the syntactical problem seems to me to be
9 identical, which is that it's just not natural to say
10 that the transported woman is herself transporting any
11 woman, right? I mean, the transported woman is not
12 transporting any woman.

13 But the reason the Court said that a
14 conspiracy was possible there was because the
15 transported woman could agree with another person, let's
16 say, the man, that the man would transport any woman,
17 namely, herself. It's -- it's an almost identical
18 syntactical issue.

19 MR. DAVIS: I don't think so, Your Honor. I
20 think that transporting another woman would create a
21 much bigger textual issue than transporting any woman.

22 If the woman goes to the man who is
23 transporting her and says, I'd like to help you
24 transport another woman, he would think that she is
25 talking about someone else, not about herself. It's

1 much more natural in the context of "any woman."

2 The other reason those cases are
3 distinguishable, Your Honor, is because they use the
4 verb "transport" instead of "obtain." It's -- it's
5 conceivable to transport yourself; it's not really -- it
6 doesn't really make sense to obtain property from
7 yourself.

8 So I think those are distinguishable on
9 those grounds.

10 JUSTICE GINSBURG: What difference did it
11 make in this -- you're -- you're not contesting the
12 extortion convictions, right? You -- it's only the
13 conspiracy; is that right?

14 MR. DAVIS: That's correct, Your Honor, with
15 an asterisk, and that is if we were to prevail here, we
16 would go back to the Fourth Circuit and ask to vacate
17 the substantive convictions also on the basis of
18 spillover prejudice.

19 But for purposes of this appeal, you're
20 correct.

21 JUSTICE GINSBURG: And did the addition of
22 the conspiracy conviction affect the sentence?

23 Would it have been different if there had
24 been no conspiracy charge.

25 MR. DAVIS: Your Honor, the sentences ran

1 concurrently. The difference it made was \$600 in
2 restitution payments that were attributable to two acts
3 of extortion that were not charged as substantive counts
4 in the indictment.

5 JUSTICE SOTOMAYOR: I have a small question,
6 but not unimportant, which is: Who paid the bribe,
7 Majestic or the brothers?

8 MR. DAVIS: The brothers paid the bribes,
9 Your Honor, out of --

10 JUSTICE SOTOMAYOR: Out of their own
11 pockets, or did they --

12 MR. DAVIS: Out of the --

13 JUSTICE SOTOMAYOR: -- Majestic, issue a
14 check?

15 MR. DAVIS: Out of the Majestic bank
16 account, Your Honor.

17 JUSTICE SOTOMAYOR: So why isn't Majestic
18 the other person here?

19 MR. DAVIS: Your Honor, the government
20 forfeited any argument that Majestic is the "another" by
21 not raising it at any -- at any stage in this Court,
22 in -- either in its cert stage briefing or in the --

23 JUSTICE KENNEDY: Was Majestic a separate
24 corporation or was it just the proprietorship-owned?

25 MR. DAVIS: The record is a little unclear

1 on that point. The testimony, to the extent it shows
2 anything, shows that Majestic was an LLC and then it
3 became a corporation at some point later. It's not
4 clear when.

5 But I think the government didn't raise that
6 argument for a good reason, and that's because the
7 testimony also showed that Moreno and Mejia were the
8 sole owners of Majestic, and that there was no
9 difference between them in practical effect.

10 So in -- in practice, the money really came
11 from the -- from Moreno and Mejia, not from --

12 JUSTICE ALITO: Well, Moreno and Mejia are
13 two -- are two people; they're not the same person,
14 right? So I assume even if it was -- let's say it was a
15 partnership, they each would be entitled to half of the
16 money, right?

17 MR. DAVIS: I think that's -- that's
18 correct.

19 JUSTICE ALITO: So Moreno could conspire
20 with Ocasio to obtain money from Mejia and Mejia
21 could conspire with Ocasio to obtain money from Moreno.

22 MR. DAVIS: Your Honor, I don't think that
23 that theory works in this case because the bribes came
24 from them jointly. The payments came from them
25 together. They -- they were both aware of what each

1 other were doing and I think that they're
2 indistinguishable for purposes of this.

3 JUSTICE KENNEDY: Did this government argue
4 this proposition as its theory of the case in the trial
5 court or here?

6 MR. DAVIS: No, not that theory of the case,
7 Your Honor.

8 JUSTICE SCALIA: You -- you acknowledge that
9 the -- that the police officer is -- is guilty of a
10 violation of the Hobbs Act, never mind the conspiracy,
11 but just the Hobbs Act violation.

12 MR. DAVIS: We're not directly challenging
13 that here, Your Honor.

14 JUSTICE SCALIA: Well, if you don't -- if
15 you don't challenge that here, I -- as I recall, your
16 briefs say that to disagree with you in this case is to
17 establish a Federal law of bribery for the whole
18 country. But it seems to me you -- you have that once
19 you -- once you acknowledge that, never mind the
20 conspiracy charge, but just the substantive Hobbs Act
21 charge. That's a national bribery law, isn't it?

22 MR. DAVIS: Justice Scalia, on one side of
23 the transaction, yes, on the public official side of the
24 transaction. But this Court in Evans did not --

25 JUSTICE SCALIA: Well, that's all you need

1 to have a national law against bribery, it seems to me.
2 You just get one of the two, I don't think you have to
3 get both.

4 MR. DAVIS: Well, Your Honor, if -- if this
5 Court were to extend Evans in this case to cover not
6 only the public official side of the transaction but
7 also the private citizen side of the transaction, that
8 would be a dramatic expansion of the law of bribery. I
9 mean, Evans may or may not have been -- have been
10 correct, but I think it was the high-water mark, and the
11 Court has been careful not to -- not to extend it even
12 further in the years since.

13 CHIEF JUSTICE ROBERTS: What about -- what
14 do you do with the government's argument that Ocasio was
15 conspiring with other police officers to get the money
16 from another? In other words, that conspiracy got money
17 from another, the -- the two individuals.

18 MR. DAVIS: Two responses to that, Your
19 Honor. The first is that under the jury instructions,
20 the jury could have convicted Ocasio based on a
21 conspiracy solely between him and the repair shop
22 owners, and under this Court's decision in Skilling, if
23 a -- if the jury could have returned a legally-invalid
24 verdict, the conviction has to be reversed.

25 And I think that's a sufficient answer to

1 the question, but my second answer is that we disagree
2 with the government that there was sufficient evidence
3 in the record linking Ocasio with other police officers.
4 The evidence showed only that these police officers were
5 generally aware of what each other were doing. It
6 didn't show that they formed an agreement to work
7 together. And under this Court's decision in *Kotteakos*,
8 it was a hub-and-spokes conspiracy without the rim
9 enclosing the spokes.

10 CHIEF JUSTICE ROBERTS: I think if I'm
11 remembering the government's response to your first
12 point, is that it certainly would have been harmless
13 error in this case.

14 MR. DAVIS: Your Honor, I find that response
15 a little difficult to understand. The -- the trial
16 overwhelmingly focused on linking Ocasio with Moreno and
17 Mejia, not with other police officers. The vast
18 majority of the testimony was about Moreno and Mejia
19 forming an agreement with Ocasio.

20 The government's whole case went through
21 Moreno and Mejia. And the government would have had a
22 much more difficult case if it had to prove an agreement
23 between police officers to obtain property from Moreno
24 and Mejia. There just wasn't that much evidence of such
25 an agreement.

1 Everything, again, went through that, hub of
2 Moreno and Mejia. So it's hard for me to imagine that
3 it would have been harmless error, let alone that the
4 jury would even have convicted if it had been instructed
5 that it had to find an agreement between multiple police
6 officers.

7 JUSTICE SOTOMAYOR: Is there any difference
8 to your argument based on the government's position that
9 your client was charged under the general conspiracy
10 statute and not the Hobbs Act statute?

11 MR. DAVIS: Justice Sotomayor, no, I don't
12 think it makes a difference. The general conspiracy
13 statute just leads -- just leads the government straight
14 back to the Hobbs Act. It punishes each person who
15 conspires to commit an offense against the
16 United States. The offense gets against the
17 United States here is Hobbs Act extortion. One of its
18 elements is obtaining the property from another, so I
19 think the general conspiracy statute it leads right back
20 to the Hobbs Act in just maybe an extra step.

21 JUSTICE SOTOMAYOR: That's my problem, which
22 is it's not an extra step. You can conspire, if not
23 every -- you started by saying that not every
24 conspirator has to be -- commit the -- of every element
25 of the crime. So why can't the general conspiracy

1 statute do the work?

2 MR. DAVIS: Well, under the general
3 conspiracy statute, just like under the Hobbs Act, Your
4 Honor, every conspirator has to specifically intend that
5 someone commit every element of the crime. I think
6 that's been --

7 JUSTICE SOTOMAYOR: Well, is that -- that
8 begs Justice Kagan's question, which is they wanted
9 Ocasio -- they wanted the police officer to act under
10 color of right and to take the bribe.

11 MR. DAVIS: And I think the key problem with
12 that, Your Honor, is that the repair shop owners did not
13 intend to help Ocasio obtain property from another.
14 They intended to help Ocasio obtain property from
15 themselves. And I think that's why there's not a unity
16 of purpose here.

17 I mean, all -- everyone may have agreed on
18 the same course of conduct, like the government says.
19 And I think the only way the government can make its
20 interpretation sound plausible is by obscuring the words
21 "from another."

22 JUSTICE KAGAN: No, I don't think that's
23 right. The "from another" is clearly an element of the
24 substantive offense. But you're saying it should also
25 be a freestanding limit on the conspiracy offense, and

1 there's no reason for that to be true. It is, of
2 course, right that somebody has to obtain property from
3 another, but the conspiracy offense is made out if two
4 people agree that somebody should obtain property from
5 another. And that's exactly the situation here.

6 MR. DAVIS: Your Honor, I think that, again,
7 the repair shop owners did not intend to obtain property
8 from another. And -- and I think the way that --

9 JUSTICE KAGAN: They intended and they
10 agreed that Mr. Ocasio should obtain property from
11 another. And that's all they have to do.

12 MR. DAVIS: Your Honor, I think going back
13 to how that kind of conversation would happen in
14 ordinary English is a way to see why it's not plausible
15 to read the statute like that.

16 If the repair shop owners go to Ocasio and
17 say, I want to help you obtain property from another,
18 Ocasio would think that they're talking about someone
19 else. I think the government's interpretation is much
20 more formalistic.

21 JUSTICE KAGAN: It's a statute, and the
22 statute just says the other has to be somebody different
23 from Ocasio himself. So in this particular case, the
24 somebody other is the people who are in the agreement.
25 In another case, the somebody other might be somebody

1 who is outside the agreement. The statute just --
2 the -- the substantive law says it has to be from
3 another.

4 The conspiracy -- and this is just -- it's
5 consistent with Salinas, it's consistent with Holt, it's
6 consistent with everything we've ever said about
7 conspiracy law -- is that it just has to be an agreement
8 for somebody to do that substantive offense even if the
9 people agree and can't do it themselves.

10 And it's true, the people agreeing can't do
11 it themselves. They can't obtain property from another.
12 But Mr. Ocasio can, and they're agreeing that he should.

13 MR. DAVIS: Your Honor, even if that's a
14 plausible interpretation of the statute, which we don't
15 think it is, it's definitely not the most natural way to
16 read it. If you talk to any -- any nonlawyer about the
17 statute, they would -- they would say that if you agree
18 to form -- if you agree to obtain property from another,
19 you'd be talking about someone outside the conspiracy.

20 And, you know, the government's
21 interpretation also requires you to figure out how
22 someone can conspire to obtain their own consent. It
23 requires shifting perspectives as you navigate your way
24 through the statute. And I think that our
25 interpretation is -- is much more consistent with the

1 way people would actually talk about this offense.

2 I mean, in some form --

3 JUSTICE GINSBURG: What about aiding and
4 abetting? Could the brothers who own the body shop,
5 could they -- could they be charged with aiding and
6 abetting --

7 MR. DAVIS: Justice Ginsburg --

8 JUSTICE GINSBURG: -- the extortion?

9 MR. DAVIS: Justice Ginsburg, I don't think
10 that they could. I think the same textual problem would
11 exist for aiding and abetting liability. 18 U.S.C. 2 is
12 the general aiding and abetting statute, and it leads
13 you straight back to the Hobbs Act in the same way that
14 the general conspiracy statute does. So I don't -- I
15 don't think so.

16 JUSTICE BREYER: Is it -- is it extortion or
17 attempted extortion? If two brothers, as here, try to
18 get money from a third party and the third party really
19 wants to give them the money -- say, for example, he
20 wants to give them the money because he's going to
21 illustrate how awful the police are in that town. Or he
22 gives them the money because he thinks it's funny. Or
23 he gives them the money -- is that extortion?

24 Because I'm having trouble distinguishing
25 between why it should be extortion but not conspiracy

1 for extortion, because that's what you're aiming at.
2 You're prepared to say, okay, it's extortion. Well, if
3 it's extortion, you've heard all the arguments and why
4 can't these other people commit it and you're simply
5 helping them. But is it extortion?

6 MR. DAVIS: Your Honor, this Court has
7 defined extortion in Evans to mean -- to basically mean
8 when a public official takes a bribe, and, you know, we
9 take that holding as a given.

10 JUSTICE BREYER: He takes a bribe, all
11 right? Is it -- is it a bribe when the person just
12 showers him with money, hoping for nothing illegal?

13 MR. DAVIS: No.

14 JUSTICE BREYER: He might think it's a
15 bribe, but -- but is it?

16 MR. DAVIS: Well, Your Honor, there has --

17 JUSTICE BREYER: He voluntarily gives him
18 the money expecting joy and happiness. I mean, you see,
19 that's where it seems to me the odd part of the case
20 lies.

21 MR. DAVIS: Well, Your Honor, I think if he
22 just gave him -- showered him with gifts not expecting
23 anything, it would not be extortion because there has to
24 be a quid pro quo. The money has to be paid in return
25 for specific official acts. So that would not be an act

1 of --

2 JUSTICE BREYER: All right. So if bribe,
3 then we're back -- if bribery is extortion, then why
4 isn't conspiracy to commit bribery conspiracy to commit
5 extortion? We're back where we began. The odd thing is
6 in calling bribery extortion. Once you cross that
7 bridge -- that's where we started. But we're back -- in
8 my mind, it sort of got back where we started. And
9 you're trying to drive a wedge there, and all your
10 arguments seem to be me, really, to be aimed at why are
11 we calling bribery extortion?

12 MR. DAVIS: I don't --

13 JUSTICE BREYER: Because they are showering
14 with money. They love it.

15 MR. DAVIS: Your Honor, we're not taking
16 direct aim at Evans. And I don't --

17 JUSTICE BREYER: I know that, but, I mean,
18 how you're asking me to make that distinction, how do I
19 do it?

20 MR. DAVIS: Well, Your Honor, I think Evans
21 dealt with a substantive offense, and this case deals
22 with conspiracy. And when you overlay a conspiratorial
23 agreement on top of a substantive offense, it just stops
24 making sense grammatically to talk about the offense the
25 way the government does.

1 Again, when two people reach an agreement
2 that one will pay the other one a bribe, it just -- it
3 doesn't make sense of ordinary English to say that
4 they're agreeing to obtain property from someone else,
5 from another.

6 I also think -- you know, I don't want the
7 phrase "with his consent" to get lost here also. The
8 Hobbs Act punishes the obtaining of property with his --
9 from another with his consent. And as Judge Sutton
10 explained in -- in the Brock decision, how can someone
11 conspire -- how would or why -- how could or why would
12 someone conspire to obtain their own consent? So even
13 if you don't agree with us on the -- on the "from
14 another" language, I think the "with his consent"
15 language does it as well.

16 And then the other textual point --

17 CHIEF JUSTICE ROBERTS: Well, before -- I
18 mean, the government says, of course, is there's --
19 there's consent and there's consent, and they suggest
20 that there's a difference between consent and
21 conspiracy. Right?

22 MR. DAVIS: Right.

23 CHIEF JUSTICE ROBERTS: Well, what's your
24 answer to that?

25 MR. DAVIS: Well, we agree with that,

1 Your Honor. We think that there are plenty of instances
2 of consent under the Hobbs Act that would not be a
3 conspiratorial agreement. But it's hard to see what
4 payment of a bribe would not be a conspiratorial
5 agreement under the government's theory. Maybe there's
6 some narrow category of cases where the bribe pair is
7 just acquiescing to an official demand as it --

8 JUSTICE BREYER: And what payment of a bribe
9 is not extortion?

10 MR. DAVIS: I -- I agree, Your Honor. I
11 think --

12 JUSTICE BREYER: All right. So the only
13 ground, then, we could say is say, well, they went just
14 up to the limit of the logic in the other case, and
15 we're just not going to be logical to extend it further.

16 MR. DAVIS: I think --

17 JUSTICE BREYER: Is that --

18 MR. DAVIS: I don't think that's quite
19 right, Your Honor.

20 JUSTICE SCALIA: Works for me.

21 (Laughter.)

22 MR. DAVIS: I -- I think that is a ground,
23 Your Honor. I don't think it's the only ground.

24 I think the other ground would be the plain
25 text of the statute. I mean, Evans -- in Evans, the --

1 the government didn't have the same textual problem that
2 it has in this case. The government didn't have to
3 grapple with the "from another" language. And in this
4 case, "from another" most naturally means someone
5 outside the -- the conspiracy.

6 The other point -- textual point I'd like
7 to --

8 JUSTICE KAGAN: Mr. Davis, if you could go
9 back to what you just said about the consent. I mean,
10 look, I mean, Evans makes perfectly clear that bribes
11 and kickbacks are included in this statute. And -- and
12 there is a difference between -- there -- there are
13 cases in which somebody participates in a kickback
14 scheme and does not consent.

15 I mean, suppose some public official comes
16 in and says, in order for me to give you a license to do
17 something, to be, you know, a member of some profession,
18 let's say a cosmetologist, you need to pay me \$20 as a
19 kickback. And the person, you know, pays him \$20
20 because you've got to get your license. But there's no
21 way in the world in which that would count as a
22 conspiratorial agreement. It would count as consent
23 under the Hobbs Act.

24 So there's a big gap between consent and a
25 conspiratorial agreement, even in the context of bribes.

1 MR. DAVIS: Justice Kagan, I don't disagree
2 with you, but with an asterisk. I think there is a gray
3 area there where someone just acquiesces to an official
4 demand like you're saying. Those may not be
5 conspiratorial agreements. But I think still, there is
6 a large category of bribery cases that would -- would
7 still be conspiratorial agreements under the
8 government's theory, anytime someone, like in Salinas,
9 pays a bribe in exchange for official action and wasn't
10 required to do so.

11 So I think still the government's theory
12 would render some of the language in 666 unnecessary.
13 You know, 18 U.S.C. 666 has specific monetary thresholds
14 put on when a bribe is a Federal crime. And the -- and
15 none of -- the bribe has to be over \$5,000. The State
16 official has to work for an agency that receives \$10,000
17 or more in Federal funds. And I think in a lot of those
18 cases, the government could just avoid those limitations
19 by charging the case as a conspiracy to commit extortion
20 under the Hobbs Act.

21 And that's even though there may be a
22 category of cases that would not be a conspiratorial
23 agreement, but that would be consent under the Hobbs
24 Act.

25 On one more textual point, Your Honors, the

1 statute also punishes whoever conspires to obtain
2 property from another, which, I think, reinforces our
3 reading that the "whoever" who obtains the property has
4 to be a different person from the "another" from whom
5 property is obtained.

6 And I think the general conspiracy statute
7 gets to the same place by just a slightly more
8 circuitous route. It punishes each person who conspires
9 to commit any offense against the United States.

10 JUSTICE ALITO: Is it fair to say that you
11 are advancing an argument that is limited to the precise
12 language of the Hobbs Act? You -- you are not taking
13 issue with the proposition that a person can conspire to
14 commit offense that the person could not personally
15 commit. And you distinguish the Hobbs Act from the
16 Mann Act because one refers to "any" and another refers
17 to "another."

18 So is it fair to say that what you want is a
19 special conspiracy rule that applies only in cases of
20 Hobbs Act conspiracies?

21 MR. DAVIS: No, Your Honor. I think that
22 what we're asking for is just to apply the language of
23 the general conspiracy statute in light of the words
24 from another in the Hobbs Act. And when you put the two
25 together --

1 JUSTICE ALITO: And if another substantive
2 offense doesn't have the word "obtain property from" --
3 the phrase "obtain property from another," then your --
4 your rule doesn't apply?

5 MR. DAVIS: I think that's generally right,
6 Your Honor. Our textual arguments would not apply. I
7 think there would still be an issue of, you know,
8 there's a -- there's a principle that when the
9 substantive offense requires the -- necessarily requires
10 agreement, you're not supposed to add a conspiracy
11 charge on that, but that's just a presumption. I think
12 you're right that our -- our textual argument would
13 not -- would not apply in the absence of the words
14 "another," "with his consent," and "whoever."

15 I'd like -- if there are no further
16 questions, I'd like to reserve my time for rebuttal.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Kedem.

19 ORAL ARGUMENT OF ALLON KEDEM

20 ON BEHALF OF THE RESPONDENT

21 MR. KEDEM: Mr. Chief Justice, and may it
22 please the Court:

23 A conspiracy is an agreement to commit an
24 offense against the United States, that is, a joint
25 commitment to a plan that, if completed, would satisfy

1 all elements of the substantive offense. And while all
2 conspirators must agree on that goal, no particular
3 member of the conspiracy must agree that he, himself,
4 will commit all or even any of the substantive elements
5 of the offense.

6 And so you don't ask whether all
7 conspirators or the conspiracy as a whole agreed to
8 obtain property from another any more than you would ask
9 whether the conspiracy as a whole acted under color of
10 official right.

11 JUSTICE KENNEDY: Do -- do you agree that
12 under your approach, every private individual who seeks
13 to bribe a State official is liable for conspiracy to
14 commit Hobbs Act extortion?

15 MR. KEDEM: We don't. And that's because of
16 active participation.

17 Let me explain where that comes from and
18 then how it applies to this case.

19 Holte and Gebardi concerned the Mann Act,
20 which prohibited the transportation of a woman across
21 State lines for immoral purposes. And the question was
22 whether a woman who was transported could conspire to
23 violate the Act.

24 In answering that question, the Court
25 focused on two things. First of all, although the Act

1 contemplates the involvement of the woman, it doesn't
2 impose substantive criminal liability on her. And,
3 second, some minimal form of agreement is an inherent
4 feature of most instances of the offense.

5 Based on those two factors, the Court said,
6 if that's all there is, if the only thing that the woman
7 agrees to is to the transportation itself, that is, the
8 bare outlines of the crime, that by itself would be
9 insufficient to make her a conspirator. But if she were
10 to agree to do more -- if, for instance, she were to
11 purchase the tickets or to arrange the transportation in
12 some other way -- then she could be a conspirator.

13 And so in this case, with respect to a bribe
14 pair, if all the bribe pair agrees to do is turn over
15 money in return for official acts, that by itself would
16 be insufficient to make the bribe pair a conspirator.

17 JUSTICE KENNEDY: Well, suppose he arranges
18 to meet on the park bench at 2:00 o'clock, and has a
19 follow-up call to the official to please be there. Is
20 that -- does that suffice?

21 MR. KEDEM: I think that would be incidental
22 to the one thing that they're really agreeing to do,
23 which is to turn over the money.

24 But contrast that with what happened in this
25 case. Because Moreno and Mejia didn't just hand over an

1 envelope with \$100 bills in it. They worked closely in
2 conjunction with police officers, including Petitioner.

3 For instance, when Petitioner went to the
4 scene of an accident, he would call Moreno, and they
5 would talk about what cars were involved: The make,
6 model, the year, what extent of damage was involved.
7 And then Moreno would consult with Petitioner about
8 which cars would be most lucrative to have in the shop.

9 And so it wasn't simply a case of agreeing
10 to the bare outlines of the crime. He agreed to
11 facilitate it in additional ways.

12 JUSTICE SOTOMAYOR: How do you charge that
13 to a jury?

14 MR. KEDEM: Pardon?

15 JUSTICE SOTOMAYOR: How do you charge it to
16 a jury?

17 MR. KEDEM: I think you would tell the jury
18 two things.

19 First, in order for a bribe pair to be a
20 conspirator, they have to agree to actively participate
21 in the plan.

22 And second --

23 JUSTICE SOTOMAYOR: Well, I mean, I'm a
24 juror and I say, I -- police officer came to me, asked
25 me for 20 bucks, and he'll let me go for my ticket. I'm

1 active participation. That's what I'm thinking.

2 MR. KEDEM: The second one is that you would
3 have to tell the jury that if all you've agreed to do is
4 to turn over money in return for official acts, then
5 that by itself is insufficient.

6 JUSTICE SCALIA: Okay. That's lovely. And
7 that -- you know, that prevents this law from -- Federal
8 law from hitting anybody who pays a bribe, which is
9 certainly a desirable result.

10 But I don't see how it comports with your
11 theory of the case. I mean, there is just as much of an
12 agreement between the two people to obtain money from
13 another, whether that other actively participates or
14 not.

15 Where -- where do you get this active
16 participation requirement from?

17 MR. KEDEM: Well --

18 JUSTICE SCALIA: Except to make it up to
19 sweeten the deal, so that -- so that we -- we don't
20 extend this -- this law too far.

21 MR. KEDEM: Active participation comes from
22 Holte and Gebardi, and it's also notable that the
23 government didn't make up the requirement for purposes
24 of this case. The First, Second, Fourth, and Fifth
25 Circuits have used active participation in the context

1 of Hobbs Act extortion --

2 JUSTICE SCALIA: And where did they get it
3 from?

4 MR. KEDEM: They get it from --

5 JUSTICE SCALIA: And where did Holte and
6 Gebardi get it from?

7 MR. KEDEM: I think Holte and Gebardi see it
8 as a gloss on the type of agreement that's necessary to
9 make a particular person a conspirator.

10 JUSTICE SCALIA: But that's not what
11 conspiracy law says. It's any agreement. If -- if you
12 agree, you're -- you're liable to conspiracy. Where --
13 where do -- can -- can you hang on this active -- is
14 there an active participation requirement for other
15 conspiracies?

16 MR. KEDEM: In this -- in this Court's case
17 in Abuelhawa, which is cited at footnote 8 in our brief,
18 the Court also relied on Gebardi to raise the level of
19 facilitation that would be required for a drug purchaser
20 to be held liable for facilitating the sale of a drug.

21 JUSTICE KAGAN: But I -- I --

22 CHIEF JUSTICE ROBERTS: Where is the -- the
23 active participation point in the jury instructions?

24 MR. KEDEM: It's not in the jury
25 instructions because Petitioner never requested it,

1 despite the fact that active participation was already
2 the law in the Fourth Circuit.

3 I would also point out that it was
4 Petitioner's argument that it simply doesn't matter how
5 actively a bribe pair facilitates the extortion.
6 Moreover, there was no dispute in this case that Moreno
7 and Mejia made an active role. In fact, it was
8 Petitioner's contention at trial that they were, in
9 fact, the masterminds of this scheme.

10 Justice Scalia, if you don't like active
11 participation, then you would simply revert to the
12 common law standard in which agreeing to the outlines of
13 the crime would be sufficient, even if you were a bribe
14 pair.

15 JUSTICE KAGAN: So if --

16 JUSTICE SCALIA: That makes sense to me.

17 JUSTICE KAGAN: If -- if I could just
18 understand what you're saying, you think active
19 participation is more than an agreement along the
20 typical conspiracy lines.

21 MR. KEDEM: I think normally agreeing to the
22 bare outlines of the crime would be sufficient for most
23 conspirators. I think --

24 JUSTICE KENNEDY: Would -- would?

25 MR. KEDEM: Would, that's correct.

1 But I think active participation is a way to
2 raise the threshold --

3 JUSTICE KAGAN: Right. But --

4 MR. KEDEM: -- certain types of crimes.

5 JUSTICE KAGAN: -- this does sound more like
6 an aiding and abetting standard than it does a
7 conspiracy standard, because typically in conspiracy we
8 say it doesn't really matter if you actively
9 participate, as long as you reach an agreement.

10 MR. KEDEM: I --

11 JUSTICE KAGAN: Now that agreement is more
12 than acquiescence, right? It's more than I reluctantly
13 give you the bribe that you're demanding of me.

14 MR. KEDEM: That's right.

15 JUSTICE KAGAN: But -- but I guess I'm with
16 Justice Scalia that I don't really quite understand how
17 to get from the typical real agreement that we require
18 in conspiracy cases to some higher standard with respect
19 to this crime of active participation.

20 MR. KEDEM: I think it's a gloss on what you
21 have to agree to do in order to be considered a
22 conspirator. So it's true that the agreement itself is
23 what's criminal when it comes to a conspiracy, whereas
24 with aiding and abetting, it's acts. And I think it's a
25 similar inquiry. With aiding and abetting, you act --

1 you ask: Did you actively participate in the crime?

2 And with conspiracy, you ask: Did you agree to actively
3 participate in the crime?

4 If I could attack -- if I could refer to my
5 friend's argument about unity of purpose, he's correct
6 that there does need to be a unity of purpose, but he's
7 incorrect as to what that purpose needs to be.

8 Under Salinas, all members of the conspiracy
9 must agree on a plan that is an offense against the
10 United States; that is, an offense, a plan that, if
11 completed, would satisfy all elements of the substantive
12 offense.

13 And Petitioner says Evans was the high-water
14 mark in interpreting the Hobbs Act. But the --

15 JUSTICE BREYER: The -- the answer, as I
16 understand this now, the purpose of this active
17 participation doctrine is let's look at the substantive
18 offense. And all of a sudden we're saying every
19 policeman, every State official, everyone in the country
20 who goes to any person and says, give me some money for
21 my position, they're already guilty. That already is
22 extortion on this case that we've been talking about
23 before, right?

24 MR. KEDEM: That's right.

25 JUSTICE BREYER: Okay.

1 MR. KEDEM: But --

2 JUSTICE BREYER: So now what you're going to
3 do is you're going to make not only them guilty of the
4 Federal crime, you're going to make anybody who pays
5 them guilty of the Federal crime. That's the purpose of
6 this case.

7 Now you say don't worry about it, because
8 there's situation A and situation B.

9 In situation A, the policeman is the heavy,
10 and all the victim's done is stop at the traffic light.
11 He says, give me the money, and that's a bribe, all
12 right? He's a bad guy, the policeman; the victim is not
13 so bad.

14 But in the other case, the victim says, I
15 love it, like these people, because we're really getting
16 money from the public. That's what they're trying to
17 do -- who are the real victims here, but they're not --
18 that's not charged that way.

19 And that's what the active participation
20 thing is designed to do, separate the -- the sort of
21 innocent victims who aren't policemen from the
22 cooperating victims who love the policemen to take the
23 money because they want the result; is that right?

24 MR. KEDEM: I think that's correct. I
25 think --

1 JUSTICE BREYER: Okay. I've got it right so
2 far.

3 MR. KEDEM: That's --

4 JUSTICE BREYER: The argument on his side is
5 don't make a bad situation worse.

6 MR. KEDEM: Well --

7 JUSTICE BREYER: We already are federalizing
8 vast numbers of State crimes, which really are the
9 States' business. And now you're not necessarily
10 doubling the number, but you're increasing it by about
11 80 percent. Now that -- that's what I've got as a
12 practical argument that he's making. And -- and your
13 answer to that is, don't worry it's not your business.
14 It's just follow the logic.

15 MR. KEDEM: I think under active
16 participation, you wouldn't be doing that.

17 JUSTICE BREYER: I understand.

18 MR. KEDEM: I would also point --

19 JUSTICE BREYER: What I'm interested in is
20 if I understand it correctly.

21 MR. KEDEM: I think you do, Your Honor.

22 I would also point out that the argument he
23 makes with regard to "from another" has nothing in
24 particular to do with the Hobbs Act. It would apply any
25 time a statute uses phrases like "from another" or "to

1 another." And let me give you an example.

2 CHIEF JUSTICE ROBERTS: Well, before you do,
3 I'm still stuck on the jury instructions. You cite in
4 your brief language on Joint Appendix page 195 where the
5 judge says -- I think these are the instructions. Maybe
6 I'm wrong, but you cite them, where the judge says mere
7 knowledge or acquiescence without participation in the
8 unlawful plan is not sufficient.

9 Is that -- that's the language, I take it,
10 you're talking about with --

11 MR. KEDEM: That's --

12 CHIEF JUSTICE ROBERTS: -- "the jury was
13 instructed."

14 MR. KEDEM: That was given -- given the
15 jury, but I think that's the standard conspiracy
16 instruction.

17 CHIEF JUSTICE ROBERTS: Well, on page 194,
18 it says, "The extent of a defendant's participation has
19 no bearing on the issue of his guilt." And I just
20 wondered whether your -- it's active participation.
21 That suggests to me something that goes to the extent of
22 the defendant's participation.

23 MR. KEDEM: That's right. A different
24 instruction would be given, but it's important to
25 emphasize that Petitioner did not appeal the failure to

1 give a specific jury instruction. He didn't request
2 one, and that was not the basis for appeal. He had a
3 sufficiency of the evidence challenge on appeal, and
4 that's what's before this Court.

5 Moreover, there is overwhelming evidence
6 that Moreno and Mejia did, in fact, actively
7 participate. In fact, that was Petitioner's very theory
8 at trial.

9 But let me give you an example of how
10 Petitioner's argument with regard to "from another" does
11 not necessarily only focus on the Hobbs Act. Imagine
12 the for instance, there was a statute that said if you
13 steal from a bank while pointing a gun at another, it's
14 aggravated bank robbery. And imagine a robber says to
15 his friend, you go into the bank ahead of me. I'll run
16 in, point a gun at your head, and say, cashier give me
17 all of your money.

18 According to Petitioner, that would not be
19 conspiracy, because judged -- from the perspective of
20 the conspiracy as a whole, no gun was pointed at
21 another. And at base, Petitioner's argument is that
22 every element of the substantive offense has to be
23 judged in a conspiracy from the perspective of the
24 conspiracy as a single, undifferentiated whole.

25 A couple responses to that. First of all,

1 it's not even clear what that means; for instance, how
2 it could be that a conspiracy as a whole obtains
3 property under color of official right.

4 Second of all, it contradicts the very
5 premise behind conspiracy liability, which is that
6 different members of the conspiracy agree to play
7 different roles, and it's only when you add those
8 various roles together that you get the completed
9 offense.

10 JUSTICE SCALIA: I'm afraid you haven't
11 scared me. I don't -- I don't think that in the
12 situation you posit where -- where the -- the two gunmen
13 say you come into the bank with me and I'll point the
14 gun at your head and say, what, unless you cough up the
15 money, I'm going to shoot my friend. I don't see why
16 that would be a conspiracy --

17 MR. KEDEM: I don't --

18 JUSTICE SCALIA: -- to point a gun at
19 another.

20 MR. KEDEM: I don't think, Justice Scalia,
21 you would say, give me the money or I'll kill my friend.
22 I think the friend would pretend to be a customer in the
23 bank.

24 JUSTICE SCALIA: Sure. But -- well --

25 MR. KEDEM: And I think the two of them

1 would have formed the plan in order to accomplish the
2 aggravated robbery.

3 JUSTICE SCALIA: And I would not think that
4 that's a conspiracy to point a gun at another.

5 MR. KEDEM: Well, Justice --

6 JUSTICE SCALIA: It's a conspiracy to point
7 a gun between themselves.

8 MR. KEDEM: Justice Scalia, I think that
9 only is true if you judge each element of the offense --

10 JUSTICE SCALIA: No, I understand --

11 MR. KEDEM: -- with regard to the
12 conspiracy.

13 JUSTICE SCALIA: -- but you were trying to
14 present a clear example.

15 MR. KEDEM: Sure.

16 JUSTICE SCALIA: And it doesn't seem to me
17 very clear at all.

18 MR. KEDEM: Justice Scalia, we cite about a
19 half dozen other Federal statutes that also similarly
20 use phrases like "from another" and "to another" that
21 would be similarly affected by Petitioner's argument.

22 I would also like to --

23 JUSTICE KENNEDY: But the other reason your
24 hypothetical doesn't work too well is we know that he's
25 not going to pull the gun because he's his friend, but

1 in this case the money is going to be given. So it
2 doesn't work.

3 MR. KEDEM: Well, Justice Kennedy, I would
4 point you then to the statute that we cite that talks
5 about someone who is a government official who receives
6 coded, secret information from another and provides it
7 to another. Petitioner's only response is there may be
8 some other statute that you could prosecute under in the
9 case in which the "from another" and "to another" are
10 both officials of other governments. But what if there
11 are not? What if they're officials -- what if they're
12 members of a terrorist organization, for instance?

13 I'd like to also address my friend's
14 argument with respect to the word "whoever" in
15 Subsection A. I don't think it works for a couple
16 reasons.

17 First of all, the word "whoever" in
18 Subsection A -- and this is best addressed if looking
19 directly at the words of the statute at page 2a to the
20 appendix to our brief. "Whoever," in Subsection (a), is
21 not the subject of the phrase "obtaining of property
22 from another" in Subsection (b) (2). If it were, then no
23 private citizen could ever be member of a conspiracy
24 because no private citizen can obtain property from
25 another under color of official right.

1 Instead, the word "whoever" is the subject
2 of the phrase "obstructs, delays, or affects commerce"
3 by extortion or agrees or conspires so to do. And to
4 give you an example of how that can be affected, even if
5 you yourself are not the person who commits the
6 extortion, imagine a case of robbery in which there is a
7 central organizer who brings together robbers who have
8 various skills and gives them a plan but doesn't himself
9 intend to participate in the robbery. In that case, he
10 would have conspired to obstruct, delay, or affect
11 commerce by robbery, even though he himself would not be
12 committing robbery.

13 And the same is true with respect to
14 extortion. Moreno and Mejia were part of a plan which
15 they actively facilitated that obstructed, delayed, and
16 affected commerce by extortion.

17 JUSTICE BREYER: Well, is it -- if --
18 what -- I'm still -- a crime requires that the victim
19 give consent. Now, what kind of -- it could be
20 obtaining consent to do something. Smith obtains
21 consent to do something. The victim agrees with Smith
22 to participate in that crime. But in agreeing to do it,
23 he is giving consent. So from that point on, there is
24 no further consent to be given. So it's like robbing
25 the pocket of a stone idol or some -- what used to be

1 called in law school -- once the consent is given.

2 So maybe he is agreeing to participate in a
3 conspiracy to attempt to get the consent. But he's
4 agreeing to the -- he gives the consent at the moment he
5 agrees.

6 MR. KEDEM: Justice Breyer --

7 JUSTICE BREYER: So how can you be
8 conspiring to -- to do something to get a consent that
9 was already given?

10 MR. KEDEM: Justice Breyer --

11 JUSTICE BREYER: You could conspire to
12 attempt to get it, but not to get it, if you're being
13 really picky on these words.

14 MR. KEDEM: The issue of consent is really a
15 red herring in this case, because as my friend just
16 stated, consent from the common law for extortion falls
17 well below the meeting of the minds that you would need
18 for conspiratorial agreement. And that much is made
19 clear by the fact that even in cases of corrosive
20 extortion, that is extortion induced by wrongful use of
21 actual or threatened force, violence, or fear, you would
22 still need consent.

23 And so the type of agreement that we're
24 talking about, with or without the active participation
25 requirement, is well above the threshold for consent

1 under the common law.

2 CHIEF JUSTICE ROBERTS: You haven't talked
3 about Majestic yet, and your friend said that's maybe
4 because you had never raised that below. Is that -- is
5 that true? In other words, the Majestic is the other
6 from which the funds are going to be obtained?

7 MR. KEDEM: That's not accurate. It was
8 raised in the trial court. The trial court made a
9 ruling that Majestic was also another, and the court of
10 appeals decided not to adopt that argument. We haven't
11 pursued it in this Court.

12 I would also point out --

13 CHIEF JUSTICE ROBERTS: Was that just -- was
14 that in your brief in opposition to certiorari?

15 MR. KEDEM: We talked about the fact that in
16 this case you could look at Majestic as another, and we
17 talked about that in the context of the Brock case out
18 of the Sixth Circuit, but we're not --

19 JUSTICE KENNEDY: Is Majestic a sole
20 proprietorship?

21 MR. KEDEM: It started out as an LLC, but
22 became a corporation, as cited in footnote 1 of our
23 brief.

24 JUSTICE SOTOMAYOR: Was it indicted as part
25 of this crime?

1 MR. KEDEM: It wasn't indicted, but it was
2 in the indictment stated that money came from Majestic.

3 JUSTICE SOTOMAYOR: You do say in your brief
4 that if we adopt the Petitioner's argument, that
5 basically you would never have any cases. But I'm not
6 sure that's right. For example, the most common
7 situation is the New York City permitting official.
8 Generally, they agree with developers to have
9 contractors pay them a bribe to expedite their work.
10 That, you could prosecute because two people are
11 agreeing to get money from another, the contractors.
12 Those situations are not so unusual.

13 MR. KEDEM: I don't --

14 JUSTICE SOTOMAYOR: I think, as one of my
15 colleagues said, there was a conspiracy here to get
16 money from the victims.

17 MR. KEDEM: I don't think, Justice
18 Sotomayor, that our argument is you would never have
19 instances in which the conspiracy provision would apply.
20 I think what we're saying is, this is precisely the type
21 of scenario in which conspiracy liability should attach.
22 And I think there may be a sense by some that clever
23 prosecutors, maybe in some cases, are pushing the bounds
24 of conspiracy law beyond where they're -- traditionally
25 have gone, and using it in ways that perhaps are not

1 warranted.

2 Whatever the merits of that criticism as a
3 general matter, this is not that case. The criminal
4 conspiracy in this case was a durable, multifaceted,
5 criminal enterprise that had a division of labor and
6 succeeded over the course of several years in committing
7 not only numerous acts of extortion, but other forms of
8 illegality as well.

9 JUSTICE KAGAN: You had no other substantive
10 crime to charge against the brothers?

11 MR. KEDEM: The brothers also pled guilty to
12 aiding and abetting extortion which, under Petitioner's
13 theory, would not have been possible.

14 JUSTICE BREYER: Why didn't you just charge
15 them with getting money from the customers? I mean,
16 that's who -- they're conspiring -- after all, they're
17 giving \$150 to the policeman. They aren't
18 philanthropists. They think they're going to get that
19 money back from the people whose cars are wrecked.

20 MR. KEDEM: That's correct. They could
21 also --

22 JUSTICE BREYER: So those are the other
23 people. I mean, this is really a conspiracy on behalf
24 of the policeman and the -- and the owner of the repair
25 shop to get money from a customer, a person whose car

1 was wrecked. That's why they do it; isn't it?

2 MR. KEDEM: That is true, Justice Breyer,
3 but they didn't necessarily commit a crime against the
4 customer if all they did is repair the customer's car.
5 Now, they did also commit various forms of insurance
6 fraud, but put that to the side.

7 In this scheme, if all they did was get
8 money from a customer and fix the car as promised, then
9 they would not have committed a crime necessarily
10 against the customer.

11 JUSTICE KAGAN: And, indeed, isn't it right
12 that what Justice Breyer is saying was the very theory
13 behind Evans, why this was extortion, is because the
14 real crime was to the public at large, not to any
15 particular customer. But yes, there was a crime to
16 the -- the general public.

17 MR. KEDEM: That's correct. The victim in
18 cases of extortion is not necessarily the person who
19 pays the bribe, who might do so willingly and might do
20 so in order to get something from the public official.

21 JUSTICE SCALIA: And the Federal
22 government's interest in this case, right, the
23 reason is -- is, what?

24 MR. KEDEM: Well, Justice Scalia --

25 JUSTICE SCALIA: That automobiles are

1 instruments of interstate commerce?

2 MR. KEDEM: Justice Scalia, I think Evans
3 settled that the mere receipt of a bribe in return for
4 performing officials acts is, in fact, extortion. And I
5 don't think that's at issue here.

6 JUSTICE SCALIA: Oh, oh, it doesn't have to
7 be any -- any Federal constitutional authority, just --

8 MR. KEDEM: There does have the to be
9 constitutional authority.

10 JUSTICE SCALIA: Well, what is it? I mean,
11 here, it is -- I assume that it's automobiles.

12 MR. KEDEM: That's -- well, Justice Scalia,
13 it's affecting commerce and there was evidence at trial
14 that, for instance, insurance payments came from out of
15 State. And that was specifically used to -- to show the
16 affecting commerce element.

17 I would also point out that if you were
18 simply to charge Petitioner with three isolated
19 instances of extortion, of the substantive act of
20 extortion, it would not reflect the full range of his
21 misconduct because, again, he didn't simply receive
22 money and then refer cars for it. He worked closely in
23 conjunction with Moreno and Mejia.

24 CHIEF JUSTICE ROBERTS: You -- you agree
25 with your friend's point, though, that charging the

1 conspiracy gives the prosecutor considerably broader
2 range in the evidence that he wants to admit at trial?

3 MR. KEDEM: I think that that does sometimes
4 happen, but that's a general principle that has no
5 specific relation to the argument that Petitioner is
6 making in this case.

7 JUSTICE ALITO: What is the relationship
8 between that argument and the question of whether
9 there's a conspiracy between Ocasio and Moreno and
10 Mejia? It might apply to the conspiracy between -- the
11 alleged conspiracy between Ocasio and the other police
12 officers because it -- although it could allow the --
13 make it easier to admit evidence of what the other
14 police officers did.

15 MR. KEDEM: That's right.

16 JUSTICE ALITO: But what -- it has no --
17 whether or not there was a conspiracy between Ocasio and
18 Moreno and Mejia doesn't seem to me to have anything --
19 anything to do with what evidence would be admissible at
20 trial.

21 MR. KEDEM: That's right, Justice Alito.

22 CHIEF JUSTICE ROBERTS: Well, I thought you
23 told me that was wrong. I thought you told me you
24 agreed with your friend that it gives broader scope to
25 the range of evidence that could be admitted beyond

1 charging simply the substantive offense.

2 MR. KEDEM: It does -- it does,
3 Mr. Chief Justice, but that would still have been true
4 even if Moreno and Mejia were not charged as
5 co-conspirators because there was voluminous evidence --
6 and we cited in the last portion of our brief -- that
7 Petitioner conspired with other police officers as well.
8 For instance, he was recruited into the scheme by
9 another police officer, probably Officer Rodriguez, who
10 was indicted along with him.

11 CHIEF JUSTICE ROBERTS: Do you -- do you
12 agree that the most that that gets you is a remand to
13 address the Skilling question?

14 MR. KEDEM: We don't. We don't. Skilling
15 was an issue about jury instructions. And, again,
16 Petitioner's challenge in the court of appeals as it --
17 and as it comes to this Court is not about the jury
18 instructions.

19 I would point you instead to Griffin v.
20 United States, 502 U.S. 46, which talks about
21 sufficiency challenges, which is what this is.

22 And if you look at that evidence, not only
23 was Petitioner recruited by other officers, he himself
24 tried to recruit other officers into this scene. For
25 instance, trying to set up his own referral network.

1 Moreover, there was evidence that he and
2 Officer Rodriguez worked together on at least one
3 occasion to bring a car into Majestic.

4 CHIEF JUSTICE ROBERTS: And -- and is it a
5 sufficiency -- I would have thought it's a statutory
6 interpretation challenge and not simply a sufficiency of
7 the evidence challenge.

8 MR. KEDEM: Well, Mr. Chief Justice, I don't
9 think there was a specific instruction to the jury one
10 way or another about whether they either could or
11 couldn't find it just based on Moreno and Mejia. And as
12 a result, because there was a general verdict, you don't
13 know specifically whether the jury relied on Moreno and
14 Mejia alone or whether they also relied on other
15 officers.

16 And under that circumstance, I think Griffin
17 says it's a -- just a general sufficiency challenge.

18 CHIEF JUSTICE ROBERTS: Well, on that I
19 guess your -- your friend says that the whole thrust of
20 the case you presented was based on the conspiracy
21 between the two brothers and the officer rather than the
22 spokes, I guess is the jargon, involving the different
23 officers with Ocasio. Is that true?

24 MR. KEDEM: We don't think that's true. I
25 would refer you to all of the evidence we cite in the

1 last section of our brief. This was the way it was
2 indicted. The indictment itself said that Petitioner
3 conspired with other officers.

4 It was also specifically cited in the
5 closing argument to the jury, that they were able to
6 find that he had conspired with other officers. And
7 there was a great deal of evidence that he did so.

8 JUSTICE SOTOMAYOR: Isn't that just harmless
9 error, assuming we agree with your -- your -- with the
10 Petitioner and say the other has to be somebody else?

11 MR. KEDEM: We don't think that it's
12 harmless error, but I do take your point that it's an
13 alternative grounds for holding for the government.

14 JUSTICE SOTOMAYOR: So you think it's
15 sufficiency?

16 MR. KEDEM: I do. I think that's what
17 Griffin v. United States says.

18 If there are no further questions.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Davis, you have four minutes remaining.

21 REBUTTAL ARGUMENT OF ETHAN P. DAVIS

22 ON BEHALF OF THE PETITIONER

23 MR. DAVIS: Thank you. I'll start with my
24 friend's Griffin point. We directly challenged the jury
25 instructions in our brief in this Court and the

1 government did not raise any sort of argument that this
2 was just a sufficiency case there, so I think that is
3 water under the bridge. But --

4 JUSTICE KENNEDY: But did you challenge the
5 instructions in the district court as well?

6 MR. DAVIS: We challenged the jury
7 instructions in the district court, yes, Your Honor.
8 There was an objection raised to the government's
9 proposed instructions there.

10 I'd like to turn to the active participant
11 standard. We agree with Justice Scalia that the active
12 participant standard doesn't come from anything in the
13 statute or anything in basic principles of conspiracy
14 law. Conspiracy just requires an agreement and
15 sometimes an overt act, and this active participant
16 standard doesn't map on well to that at all.

17 The government -- the cases that the
18 government cites that supposedly apply, Holte and
19 Gebardi to -- to Hobbs Act prosecutions really dealt
20 with aiding and abetting, not with conspiracy. And it's
21 much easier to see how the active participant standard
22 applies in the context of aiding and abetting, which
23 requires acts beyond mere agreement.

24 But in the context of conspiracy, the only
25 court really to have applied the active participant

1 standard to conspiracy in any, in any significant way
2 was the Fourth Circuit in the Spitler decision.

3 JUSTICE BREYER: Will you, in your answer,
4 get to what I think is the main point; the main point
5 being, look, two policemen and a shop owner. The
6 policemen say, give us money and we'll help you out
7 later. That's extortion. All right.

8 If that's extortion, then why isn't it
9 conspiracy when, three weeks before they meet and bit by
10 bit say, we will do that very thing which is
11 extortion --

12 MR. DAVIS: I think --

13 JUSTICE BREYER: -- the shopkeeper is
14 helping the policemen do what is the thing that counts
15 as extortion and, therefore, he's conspired with them.
16 That's their very simple argument. A simple answer is?

17 MR. DAVIS: The simple answer is that's not
18 consistent with how -- with ordinary English, Your
19 Honor. When two people -- when the repair shop owners
20 go to the public official and say, I'd like to help you
21 obtain property from another --

22 JUSTICE BREYER: Yes. The "other" --
23 "another" means another other than the two policemen.

24 MR. DAVIS: Only if --

25 JUSTICE BREYER: That's -- that's what this

1 other case says. And the law says that it's another --
2 another other than them.

3 MR. DAVIS: I think the only way the
4 government can make that sound plausible is by adding
5 words to the statute --

6 JUSTICE BREYER: No, no, no words. Another.
7 Another. Joe and Bill are the policemen; Sam is the
8 shopkeeper. In the substantive crime, the other,
9 another, means not the two policemen; it means Sam. And
10 Sam, two weeks earlier, helped and conspired with the
11 two policemen to get money from another; namely, Sam.

12 MR. DAVIS: And --

13 JUSTICE BREYER: Odd, but English.

14 MR. DAVIS: Justice Breyer, I think the
15 words "namely Sam" are doing all the work there. If you
16 cut out the words "namely Sam," all of a sudden it
17 doesn't make sense. If he goes to the police officers
18 and says, let me help you obtain property from another,
19 you need to add words to the statute in order for that
20 to make sense.

21 JUSTICE KAGAN: Mr. Davis, I don't think you
22 need to add words. What you need is to shift
23 perspective. There is a difference here, but that's the
24 difference, that the government is insisting that you
25 look at it from the perspective of the person who, in

1 this case, is doing the acts of obtaining property from
2 another. And you are insisting that it be looked at
3 from the perspective of the person who has agreed to
4 help him do that.

5 But there's no reason under standard
6 conspiracy law that we would use the perspective of the
7 agreeer rather than the perspective of the perpetrator.

8 MR. DAVIS: Justice Kagan, with respect, I
9 don't agree with that. I think that under standard
10 conspiracy law, you look at the perspective of both.
11 You have to have a unity of purpose with each
12 conspirator to do the same thing.

13 JUSTICE KAGAN: There absolutely is a unity
14 of purpose, that one person should do the crime.

15 MR. DAVIS: Your Honor --

16 CHIEF JUSTICE ROBERTS: Go ahead.

17 MR. DAVIS: With the unity of -- there
18 may -- that obscures the words "from another" from the
19 statute. There may be a unity of purpose that they all
20 do something, but it begs the question about whether the
21 something that they're doing violates every element of
22 the offense.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 11:02 a.m., the case in the

1 above-entitled matter was submitted.)
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18
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24
25

A				
\$10,000 25:16	action 25:9	34:21 35:2,9	2:6 27:19	arrange 29:11
\$100 30:1	active 28:16	40:6 46:8	allow 50:12	arranges 29:17
\$150 47:17	31:1,15,21,25	49:24 51:12	alternative	asked 30:24
\$20 24:18,19	32:13,14,23	53:9 54:11	53:13	asking 21:18
\$5,000 25:15	33:1,7,10,18	57:9	AMERICA 1:6	26:22
\$600 10:1	34:1,19 35:16	agreed 3:18 6:2	answer 13:25	Assistant 1:17
a.m 1:13 3:2	36:19 37:15	6:12,19,20,24	14:1 22:24	assume 4:25
57:25	38:20 44:24	8:1 16:17	35:15 37:13	11:14 49:11
abetting 19:4,6	54:10,11,15,21	17:10 28:7	55:3,16,17	assuming 53:9
19:11,12 34:6	54:25	30:10 31:3	answering 28:24	asterisk 9:15
34:24,25 47:12	actively 30:20	50:24 57:3	anybody 31:8	25:2
54:20,22	31:13 33:5	agreeing 18:10	36:4	attach 46:21
able 53:5	34:8 35:1,2	18:12 22:4	anytime 25:8	attack 35:4
above-entitled	39:6 43:15	29:22 30:9	appeal 9:19	attempt 44:3,12
1:11 58:1	acts 10:2 20:25	33:12,21 43:22	38:25 39:2,3	attempted 19:17
absence 27:13	29:15 31:4	44:2,4 46:11	appeals 45:10	attributable
absolutely 57:13	34:24 47:7	agreement 14:6	51:16	10:2
Abuelhawa	49:4 54:23	14:19,22,25	APPEARAN...	authority 49:7,9
32:17	57:1	15:5 17:24	1:14	automobiles
accident 30:4	actual 44:21	18:1,7 21:23	appendix 38:4	48:25 49:11
accomplish 41:1	add 27:10 40:7	22:1 23:3,5	42:20	avoid 25:18
account 10:16	56:19,22	24:22,25 25:23	applied 54:25	aware 11:25
accurate 45:7	adding 56:4	27:10,23 29:3	applies 26:19	14:5
acknowledge	addition 9:21	31:12 32:8,11	28:18 54:22	awful 19:21
12:8,19	additional 30:11	33:19 34:9,11	apply 4:8,11	
acquiescence	address 42:13	34:17,22 44:18	26:22 27:4,6	B
34:12 38:7	51:13	44:23 54:14,23	27:13 37:24	b 36:8 42:22
acquiesces 25:3	addressed 42:18	agreements 25:5	46:19 50:10	back 9:16 15:14
acquiescing 23:7	admissible	25:7	54:18	15:19 17:12
act 3:11,16 4:23	50:19	agreer 57:7	approach 7:1	19:13 21:3,5,7
5:4,6 7:12,17	admit 50:2,13	agrees 29:7,14	28:12	21:8 24:9
7:18 12:10,11	admitted 50:25	43:3,21 44:5	area 25:3	47:19
12:20 15:10,14	adopt 45:10	ahead 39:15	argue 12:3	background
15:17,20 16:3	46:4	57:16	argument 1:12	3:20
16:9 19:13	advancing 26:11	aiding 19:3,5,11	2:2,5,8 3:3,7	bad 36:12,13
20:25 22:8	affect 9:22 43:10	19:12 34:6,24	5:10 10:20	37:5
23:2 24:23	afraid 40:10	34:25 47:12	11:6 13:14	bank 10:15
25:20,24 26:12	agency 25:16	54:20,22	15:8 26:11	39:13,14,15
26:15,16,20,24	aggravated	aim 21:16	27:12,19 33:4	40:13,23
28:14,19,23,25	39:14 41:2	aimed 21:10	35:5 37:4,12	bare 29:8 30:10
32:1 34:25	agree 3:17 6:6	aiming 20:1	37:22 39:10,21	33:22
35:14 37:24	6:22 7:5 8:15	Alito 7:11,16,21	41:21 42:14	base 39:21
39:11 49:19	17:4 18:9,17	11:12,19 26:10	45:10 46:4,18	based 13:20
54:15,19	18:18 22:13,25	27:1 50:7,16	50:5,8 53:5,21	15:8 29:5
acted 28:9	23:10 28:2,3	50:21	54:1 55:16	52:11,20
	28:11 29:10	alleged 50:11	arguments 20:3	basic 3:21 54:13
	30:20 32:12	ALLON 1:17	21:10 27:6	basically 20:7

<p>46:5 basis 9:17 39:2 bearing 38:19 began 21:5 begs 16:8 57:20 behalf 1:15,18 2:4,7,10 3:8 27:20 47:23 53:22 bench 29:18 best 6:25 42:18 beyond 46:24 50:25 54:23 big 24:24 bigger 8:21 Bill 56:7 billion-plus 7:23 bills 30:1 bit 55:9,10 body 4:5 6:11,12 6:20 19:4 bounds 46:23 Breyer 19:16 20:10,14,17 21:2,13,17 23:8,12,17 35:15,25 36:2 37:1,4,7,17,19 43:17 44:6,7 44:10,11 47:14 47:22 48:2,12 55:3,13,22,25 56:6,13,14 bribe 3:18 4:16 10:6 16:10 20:8,10,11,15 21:2 22:2 23:4 23:6,8 25:9,14 25:15 28:13 29:13,14,16 30:19 31:8 33:5,13 34:13 36:11 46:9 48:19 49:3 bribery 4:7,9,9 12:17,21 13:1 13:8 21:3,4,6</p>	<p>21:11 25:6 bribes 4:24 10:8 11:23 24:10,25 bridge 21:7 54:3 brief 7:4 32:17 38:4 42:20 45:14,23 46:3 51:6 53:1,25 briefing 10:22 briefs 12:16 bring 4:2 52:3 brings 43:7 broader 7:21 50:1,24 Brock 22:10 45:17 brothers 10:7,8 19:4,17 47:10 47:11 52:21 bucks 30:25 business 37:9,13</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 Cal 1:15 call 29:19 30:4 called 44:1 calling 21:6,11 capable 5:19,19 5:22 car 47:25 48:4,8 52:3 careful 5:5 13:11 carry 5:10 cars 30:5,8 47:19 49:22 case 3:4,12,17 7:19 11:23 12:4,6,16 13:5 14:13,20,22 17:23,25 20:19 21:21 23:14 24:2,4 25:19 28:18 29:13,25 30:9 31:11,24 32:16 33:6</p>	<p>35:22 36:6,14 42:1,9 43:6,9 44:15 45:16,17 47:3,4 48:22 50:6 52:20 54:2 56:1 57:1 57:24,25 cases 3:23 7:17 9:2 23:6 24:13 25:6,18,22 26:19 34:18 44:19 46:5,23 48:18 54:17 cashier 39:16 category 23:6 25:6,22 central 43:7 cert 10:22 certain 34:4 certainly 5:15 14:12 31:9 certiorari 45:14 challenge 12:15 39:3 51:16 52:6,7,17 54:4 challenged 53:24 54:6 challenges 51:21 challenging 12:12 charge 9:24 12:20,21 27:11 30:12,15 47:10 47:14 49:18 charged 3:13 10:3 15:9 19:5 36:18 51:4 charging 25:19 49:25 51:1 check 10:14 Chief 3:3,9 13:13 14:10 22:17,23 27:17 27:21 32:22 38:2,12,17 45:2,13 49:24 50:22 51:3,11</p>	<p>52:4,8,18 53:19 57:16,23 Circuit 9:16 33:2 45:18 55:2 circuitous 26:8 Circuits 31:25 circumstance 52:16 cite 38:3,6 41:18 42:4 52:25 cited 32:17 45:22 51:6 53:4 cites 54:18 citizen 13:7 42:23,24 City 46:7 clear 11:4 24:10 40:1 41:14,17 44:19 clearly 16:23 clever 46:22 client 4:3 15:9 closely 30:1 49:22 closing 53:5 co-conspirator 3:24 co-conspirators 51:5 coded 42:6 colleagues 46:15 color 4:15,19 16:10 28:9 40:3 42:25 come 40:13 54:12 comes 24:15 28:17 31:21 34:23 51:17 commerce 43:2 43:11,16 49:1 49:13,16 commit 5:16,24 6:3 15:15,24 16:5 20:4 21:4</p>	<p>21:4 25:19 26:9,14,15 27:23 28:4,14 48:3,5 commitment 27:25 commits 43:5 committed 48:9 committing 5:9 5:22 6:9 43:12 47:6 common 33:12 44:16 45:1 46:6 completed 27:25 35:11 40:8 comports 31:10 conceivable 9:5 concerned 28:19 concurrently 10:1 conduct 16:18 Congress 4:8 conjunction 30:2 49:23 consent 18:22 22:7,9,12,14 22:19,19,20 23:2 24:9,14 24:22,24 25:23 27:14 43:19,20 43:21,23,24 44:1,3,4,8,14 44:16,22,25 considerably 50:1 considered 34:21 consistent 18:5 18:5,6,25 55:18 conspiracies 3:23 26:20 32:15 conspiracy 5:8 6:15,15,18 8:14 9:13,22</p>
--	--	--	---	---

<p>9:24 12:10,20 13:16,21 14:8 15:9,12,19,25 16:3,25 17:3 18:4,7,19 19:14,25 21:4 21:4,22 22:21 24:5 25:19 26:6,19,23 27:10,23 28:3 28:7,9,13 32:11,12 33:20 34:7,7,18,23 35:2,8 38:15 39:19,20,23,24 40:2,5,6,16 41:4,6,12 42:23 44:3 46:15,19,21,24 47:4,23 50:1,9 50:10,11,17 52:20 54:13,14 54:20,24 55:1 55:9 57:6,10 conspirator 5:16 5:23 15:24 16:4 29:9,12 29:16 30:20 32:9 34:22 57:12 conspiratorial 21:22 23:3,4 24:22,25 25:5 25:7,22 44:18 conspirators 28:2,7 33:23 conspire 11:19 11:21 15:22 18:22 22:11,12 26:13 28:22 44:11 conspired 43:10 51:7 53:3,6 55:15 56:10 conspires 7:14 15:15 26:1,8 43:3</p>	<p>conspiring 3:13 13:15 44:8 47:16 constitutional 49:7,9 consult 30:7 contemplates 29:1 contention 33:8 contesting 9:11 context 9:1 24:25 31:25 45:17 54:22,24 contractors 46:9 46:11 contradicts 40:4 contrast 29:24 conversation 17:13 convicted 4:12 13:20 15:4 conviction 9:22 13:24 convictions 9:12 9:17 cooperating 36:22 corporation 10:24 11:3 45:22 correct 4:7 5:21 9:14,20 11:18 13:10 33:25 35:5 36:24 47:20 48:17 correctly 37:20 corrosive 44:19 cosmetologist 24:18 cough 40:14 counsel 27:17 53:19 57:23 count 24:21,22 country 12:18 35:19 counts 10:3 55:14</p>	<p>couple 39:25 42:15 course 16:18 17:2 22:18 47:6 court 1:1,12 3:10 4:5,22 5:5 8:13 10:21 12:5,24 13:5 13:11 20:6 27:22 28:24 29:5 32:18 39:4 45:8,8,9 45:11 51:16,17 53:25 54:5,7 54:25 Court's 5:4 13:22 14:7 32:16 cover 13:5 create 8:20 crime 4:4 15:25 16:5 25:14 29:8 30:10 33:13,22 34:19 35:1,3 36:4,5 43:18,22 45:25 47:10 48:3,9 48:14,15 56:8 57:14 crimes 34:4 37:8 criminal 3:21,21 29:2 34:23 47:3,5 criticism 47:2 cross 21:6 customer 40:22 47:25 48:4,8 48:10,15 customer's 48:4 customers 47:15 cut 56:16</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 D.C 1:8,18 damage 30:6</p>	<p>Davis 1:15 2:3,9 3:6,7,9 4:6,17 4:21 5:2,12,15 5:21 6:5,16,25 7:16,25 8:19 9:14,25 10:8 10:12,15,19,25 11:17,22 12:6 12:12,22 13:4 13:18 14:14 15:11 16:2,11 17:6,12 18:13 19:7,9 20:6,13 20:16,21 21:12 21:15,20 22:22 22:25 23:10,16 23:18,22 24:8 25:1 26:21 27:5 53:20,21 53:23 54:6 55:12,17,24 56:3,12,14,21 57:8,15,17 day 5:10 deal 31:19 53:7 deals 21:21 dealt 21:21 54:19 decided 4:22 45:10 decision 5:3 13:22 14:7 22:10 55:2 defendant 3:11 defendant's 38:18,22 defined 20:7 definitely 18:15 delay 43:10 delayed 43:15 delays 43:2 demand 23:7 25:4 demanding 34:13 Department 1:18</p>	<p>designed 36:20 desirable 31:9 despite 33:1 developers 46:8 difference 9:10 10:1 11:9 15:7 15:12 22:20 24:12 56:23,24 different 7:20 8:7 9:23 17:22 26:4 38:23 40:6,7 52:22 difficult 14:15 14:22 direct 21:16 direction 3:22 directly 12:12 42:19 53:24 disagree 12:16 14:1 25:1 dispute 33:6 dissented 4:25 distinction 21:18 distinctions 7:17 distinguish 26:15 distinguishable 5:11,12 9:3,8 distinguishing 19:24 district 54:5,7 division 47:5 doctrine 35:17 doing 7:7 12:1 14:5 37:16 56:15 57:1,21 doubling 37:10 dozen 41:19 dramatic 13:8 drive 21:9 drug 32:19,20 durable 47:4</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 56:10</p>
---	--	---	---	---

easier 50:13 54:21	41:14 43:4 46:6	failure 38:25	friend 39:15 40:15,21,22	44:4 50:1,24
effect 11:9	exchange 3:18	fair 26:10,18	41:25 44:15	giving 43:23
either 10:22 52:10	25:9	falls 44:16	45:3 50:24	47:17
element 5:16,23	exist 19:11	far 31:20 37:2	52:19	gloss 32:8 34:20
5:25 6:3,9	expand 5:5	fear 44:21	friend's 35:5	go 7:4 9:16
15:24 16:5,23	expansion 13:8	feature 29:4	42:13 49:25	17:16 24:8
39:22 41:9	expecting 20:18	Federal 12:17	53:24	30:25 39:15
49:16 57:21	20:22	25:14,17 31:7	full 49:20	55:20 57:16
elements 15:18	expedite 46:9	36:4,5 41:19	funds 25:17 45:6	goal 28:2
28:1,4 35:11	explain 28:17	48:21 49:7	funny 19:22	goes 8:22 35:20
emphasize 38:25	explained 22:10	federalizing	further 13:12	38:21 56:17
enclosing 14:9	extend 13:5,11	37:7	23:15 27:15	going 17:12
encompasses	23:15 31:20	Fifth 31:24	43:24 53:18	19:20 23:15
4:24	extent 11:1 30:6	figure 18:21		36:2,3,4 40:15
English 3:23 7:2	38:18,21	find 14:14 15:5	G	41:25 42:1
17:14 22:3	extort 3:23	52:11 53:6	G 3:1	45:6 47:18
55:18 56:13	extortion 4:3,24	first 3:4 7:18	gap 24:24	good 11:6
enterprise 47:5	9:12 10:3	13:19 14:11	Gebardi 28:19	government 7:2
entitled 11:15	15:17 19:8,16	28:25 30:19	31:22 32:6,7	10:19 11:5
envelope 30:1	19:17,23,25	31:24 39:25	32:18 54:19	12:3 14:2,21
error 14:13 15:3	20:1,2,3,5,7,23	42:17	general 1:17	15:13 16:18,19
53:9,12	21:3,5,6,11	fix 48:8	15:9,12,19,25	21:25 22:18
ESQ 1:15,17 2:3	23:9 25:19	focus 39:11	16:2 19:12,14	24:1,2 25:18
2:6,9	28:14 32:1	focused 14:16	26:6,23 47:3	31:23 42:5
establish 12:17	33:5 35:22	28:25	48:16 50:4	53:13 54:1,17
established 4:14	43:3,6,14,16	follow 37:14	52:12,17	54:18 56:4,24
4:14	44:16,20,20	follow-up 29:19	generally 14:5	government's
ETHAN 1:15	47:7,12 48:13	footnote 32:17	27:5 46:8	5:10 7:8 13:14
2:3,9 3:7 53:21	48:18 49:4,19	45:22	getting 36:15	14:11,20 15:8
Evans 4:23 5:3	49:20 55:7,8	force 44:21	47:15	17:19 18:20
12:24 13:5,9	55:11,15	forfeited 10:20	gifts 20:22	23:5 25:8,11
20:7 21:16,20	extra 15:20,22	form 18:18 19:2	Ginsburg 3:25	48:22 54:8
23:25,25 24:10		29:3	4:6 9:10,21	governments
35:13 48:13	F	formalistic	19:3,7,8,9	42:10
49:2	facilitate 30:11	17:20	give 4:15 19:19	grammatically
evidence 14:2,4	facilitated 43:15	formed 14:6	19:20 24:16	21:24
14:24 39:3,5	facilitates 33:5	41:1	34:13 35:20	grapple 24:3
49:13 50:2,13	facilitating	forming 14:19	36:11 38:1	gray 25:2
50:19,25 51:5	32:20	forms 47:7 48:5	39:1,9,16	great 53:7
51:22 52:1,7	facilitation	four 53:20	40:21 43:4,19	Griffin 51:19
52:25 53:7	32:19	Fourth 9:16	55:6	52:16 53:17,24
exactly 6:24	fact 4:20 33:1,7	31:24 33:2	given 20:9 38:14	ground 23:13,22
17:5	33:9 39:6,7	55:2	38:14,24 42:1	23:23,24
example 19:19	44:19 45:15	Francisco 1:15	43:24 44:1,9	grounds 9:9
38:1 39:9	49:4	fraud 48:6	gives 19:22,23	53:13
	factors 29:5	freestanding	20:17 43:8	guess 34:15
		16:25		52:19,22

guilt 38:19	24:23 25:20,23	incidental 29:21	16:13 17:7	3:9,25 4:6,13
guilty 12:9	26:12,15,20,24	included 24:11	43:9	4:18,21,25 5:7
35:21 36:3,5	28:14 32:1	including 30:2	intended 16:14	5:13,14,18 6:1
47:11	35:14 37:24	incorrect 35:7	17:9	6:8,16,22,25
gun 39:13,16,20	39:11 54:19	increasing 37:10	interest 48:22	7:11,16,21 8:7
40:14,18 41:4	holding 20:9	indicted 45:24	interested 37:19	9:10,21 10:5
41:7,25	53:13	46:1 51:10	interpretation	10:10,13,17,23
gunmen 40:12	Holt 18:5	53:2	16:20 17:19	11:12,19 12:3
guy 36:12	Holte 28:19	indictment 10:4	18:14,21,25	12:8,14,22,25
	31:22 32:5,7	46:2 53:2	52:6	13:13 14:10
	54:18	indistinguishable...	interpreting	15:7,11,21
H	Honor 4:17 5:2	12:2	35:14	16:7,8,22 17:9
half 11:15 41:19	5:21 6:5 7:25	individual 28:12	interstate 49:1	17:21 19:3,7,8
hand 29:25	8:19 9:3,14,25	individuals	involved 30:5,6	19:9,16 20:10
hang 32:13	10:9,16,19	13:17	involvement	20:14,17 21:2
happen 7:2	11:22 12:7,13	induced 44:20	29:1	21:13,17 22:17
17:13 50:4	13:4,19 14:14	information	involving 3:23	22:23 23:8,12
happened 29:24	16:4,12 17:6	42:6	52:22	23:17,20 24:8
happiness 20:18	17:12 18:13	inherent 29:3	isolated 49:18	25:1 26:10
hard 15:2 23:3	20:6,16,21	innocent 36:21	issue 8:18,21	27:1,17,21
harmless 14:12	21:15,20 23:1	inquiry 34:25	10:13 26:13	28:11 29:17
15:3 53:8,12	23:10,19,23	insisting 56:24	27:7 38:19	30:12,15,23
he'll 30:25	26:21 27:6	57:2	44:14 49:5	31:6,18 32:2,5
head 39:16	37:21 54:7	instance 29:10	51:15	32:10,21,22
40:14	55:19 57:15	30:3 39:12		33:10,15,16,17
hear 3:3	Honors 25:25	40:1 42:12	J	33:24 34:3,5
heard 20:3	hoping 20:12	49:14 51:8,25	jargon 52:22	34:11,15,16
heavy 36:9	hub 15:1	instances 23:1	Joe 56:7	35:15,25 36:2
held 32:20	hub-and-spokes	29:4 46:19	John 7:3,3,4	37:1,4,7,17,19
help 8:23 16:13	14:8	49:19	joint 27:24 38:4	38:2,12,17
16:14 17:17	hypothetical 7:4	instructed 15:4	jointly 11:24	40:10,18,20,24
55:6,20 56:18	7:8 41:24	38:13	joy 20:18	41:3,5,6,8,10
57:4		instruction	judge 22:9 38:5	41:13,16,18,23
helped 56:10	I	38:16,24 39:1	38:6 41:9	42:3 43:17
helping 20:5	identical 8:9,17	52:9	judged 39:19,23	44:6,7,10,11
55:14	idol 43:25	instructions	jurisprudence	45:2,13,19,24
herring 44:15	illegal 20:12	13:19 32:23,25	5:4	46:3,14,17
high-water 5:4	illegality 47:8	38:3,5 51:15	juror 30:24	47:9,14,22
13:10 35:13	illustrate 19:21	51:18 53:25	jury 13:19,20,23	48:2,11,12,21
higher 34:18	imagine 15:2	54:5,7,9	15:4 30:13,16	48:24,25 49:2
historical 3:20	39:11,14 43:6	instruments	30:17 31:3	49:6,10,12,24
hitting 31:8	imagining 7:1	49:1	32:23,24 38:3	50:7,16,21,22
Hobbs 3:11,16	immoral 7:13	insufficient 29:9	38:12,15 39:1	51:3,11 52:4,8
4:23 5:4,6	28:21	29:16 31:5	51:15,17 52:9	52:18 53:8,14
12:10,11,20	important 38:24	insurance 48:5	52:13 53:5,24	53:19 54:4,11
15:10,14,17,20	impose 29:2	49:14	54:6	55:3,13,22,25
16:3 19:13	incapable 5:9	intend 5:24 16:4	Justice 1:18 3:3	56:6,13,14,21
22:8 23:2				

57:8,13,16,23	43:19	25:18	34:8 47:3 58:1	21:14 29:15,23
K	know 18:20 20:8	limited 26:11	mean 3:25 7:9	31:4,12 35:20
Kagan 6:1,8,16	21:17 22:6	lines 7:13,15 8:3	8:1,11 13:9	36:11,16,23
6:22,25 8:7	24:17,19 25:13	28:21 33:20	16:17 19:2	39:17 40:15,21
16:22 17:9,21	27:7 31:7	linking 14:3,16	20:7,7,18	42:1 46:2,11
24:8 25:1	41:24 52:13	little 10:25	21:17 22:18	46:16 47:15,19
32:21 33:15,17	knowledge 38:7	14:15	23:25 24:9,10	47:25 48:8
34:3,5,11,15	Kotteakos 14:7	LLC 11:2 45:21	24:15 30:23	49:22 55:6
47:9 48:11		local 4:10	31:11 47:15,23	56:11
56:21 57:8,13	L	logic 23:14	49:10	Moreno 11:7,11
Kagan's 16:8	labor 47:5	37:14	meaning 7:9	11:12,19,21
Kedem 1:17 2:6	language 3:16	logical 23:15	means 4:19 7:22	14:16,18,21,23
27:18,19,21	22:14,15 24:3	long 34:9	24:4 40:1	15:2 29:25
28:15 29:21	25:12 26:12,22	look 24:10 35:17	55:23 56:9,9	30:4,7 33:6
30:14,17 31:2	38:4,9	45:16 51:22	meet 29:18 55:9	39:6 43:14
31:17,21 32:4	large 25:6 48:14	55:5 56:25	meeting 44:17	49:23 50:9,18
32:7,16,24	Laughter 5:1	57:10	Mejia 11:7,11	51:4 52:11,13
33:21,25 34:4	23:21	looked 57:2	11:12,20,20	morning 3:4
34:10,14,20	law 3:22 4:15,19	looking 42:18	14:17,18,21,24	multifaceted
35:24 36:1,24	6:15,18 12:17	lost 22:7	15:2 29:25	47:4
37:3,6,15,18	12:21 13:1,8	lot 25:17	33:7 39:6	multiple 15:5
37:21 38:11,14	18:2,7 31:7,8	love 21:14 36:15	43:14 49:23	
38:23 40:17,20	31:20 32:11	36:22	50:10,18 51:4	N
40:25 41:5,8	33:2,12 44:1	lovely 31:6	52:11,14	N 2:1,1 3:1
41:11,15,18	44:16 45:1	lucrative 30:8	member 24:17	narrow 23:6
42:3 44:6,10	46:24 54:14		28:3 42:23	national 12:21
44:14 45:7,15	56:1 57:6,10	M	members 35:8	13:1
45:21 46:1,13	leads 15:13,13	main 55:4,4	40:6 42:12	natural 8:9 9:1
46:17 47:11,20	15:19 19:12	Majestic 10:7,13	mere 38:6 49:3	18:15
48:2,17,24	legal 4:20	10:15,17,20,23	54:23	naturally 24:4
49:2,8,12 50:3	legally-invalid	11:2,8 45:3,5,9	merely 3:18 8:5	navigate 18:23
50:15,21 51:2	13:23	45:16,19 46:2	merits 47:2	necessarily 27:9
51:14 52:8,24	let's 8:15 11:14	52:3	mind 12:10,19	37:9 39:11
53:11,16	24:18 35:17	majority 14:18	21:8	48:3,9,18
Kennedy 5:7,13	level 32:18	making 21:24	minds 44:17	necessary 32:8
5:14,18 10:23	liability 19:11	37:12 50:6	minimal 29:3	need 5:22 6:22
12:3 28:11	29:2 40:5	man 8:16,16,22	minutes 53:20	12:25 24:18
29:17 33:24	46:21	Mann 7:12,17	misconduct	35:6 44:17,22
41:23 42:3	liable 5:8 28:13	7:18 26:16	49:21	56:19,22,22
45:19 54:4	32:12,20	28:19	model 30:6	needs 35:7
key 16:11	license 24:16,20	map 54:16	moment 44:4	network 51:25
kickback 24:13	lies 20:20	mark 5:4 13:10	monetary 25:13	never 12:10,19
24:19	light 26:23	35:14	money 11:10,16	32:25 45:4
kickbacks 24:11	36:10	Maryland 4:7	11:20,21 13:15	46:5,18
kill 40:21	limit 16:25	masterminds	13:16 19:18,19	New 46:7
kind 17:13	23:14	33:9	19:20,22,23	nonlawyer
	limitations	matter 1:11 33:4	20:12,18,24	18:16

<p>normal 6:14 normally 33:21 notable 31:22 notice 7:6 number 37:10 numbers 37:8 numerous 47:7</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 o'clock 29:18 objection 54:8 obscures 57:18 obscuring 16:20 obstruct 43:10 obstructed 43:15 obstructs 43:2 obtain 3:12,14 3:19 6:6,19,20 6:23 7:5 9:4,6 11:20,21 14:23 16:13,14 17:2 17:4,7,10,17 18:11,18,22 22:4,12 26:1 27:2,3 28:8 31:12 42:24 55:21 56:18 obtained 26:5 45:6 obtaining 4:15 6:10,11 15:18 22:8 42:21 43:20 57:1 obtains 26:3 40:2 43:20 Ocasio 1:3 3:4 3:12 6:3,6,9,18 11:20,21 13:14 13:20 14:3,16 14:19 16:9,13 16:14 17:10,16 17:18,23 18:12 50:9,11,17 52:23 occasion 52:3</p>	<p>October 1:9 odd 20:19 21:5 56:13 offense 5:9,17 5:23,25 6:4,10 15:15,16 16:24 16:25 17:3 18:8 19:1 21:21,23,24 26:9,14 27:2,9 27:24 28:1,5 29:4 35:9,10 35:12,18 39:22 40:9 41:9 51:1 57:22 officer 12:9 16:9 30:24 51:9,9 52:2,21 officers 13:15 14:3,4,17,23 15:6 30:2 50:12,14 51:7 51:23,24 52:15 52:23 53:3,6 56:17 official 12:23 13:6 20:8,25 23:7 24:15 25:3,9,16 28:10,13 29:15 29:19 31:4 35:19 40:3 42:5,25 46:7 48:20 55:20 officials 4:10 42:10,11 49:4 oh 49:6,6 okay 20:2 31:6 35:25 37:1 old 3:22 once 12:18,19 21:6 44:1 open 4:22 opposite 7:9 opposition 45:14 oral 1:11 2:2,5</p>	<p>3:7 27:19 order 4:1 24:16 30:19 34:21 41:1 48:20 56:19 ordinary 7:2,9 17:14 22:3 55:18 organization 42:12 organizer 43:7 outlines 29:8 30:10 33:12,22 outside 18:1,19 24:5 overlay 21:22 overt 54:15 overwhelming 39:5 overwhelmingly 14:16 owner 47:24 55:5 owners 3:13,15 4:5,11 6:2,5,12 6:12,20 11:8 13:22 16:12 17:7,16 55:19</p> <hr/> <p style="text-align: center;">P</p> <p>P 1:15 2:3,9 3:1 3:7 53:21 page 2:2 38:4,17 42:19 paid 10:6,8 20:24 pair 23:6 29:14 29:14,16 30:19 33:5,14 Pardon 30:14 park 29:18 part 20:19 43:14 45:24 participant 54:10,12,15,21 54:25 participate</p>	<p>30:20 34:9 35:1,3 39:7 43:9,22 44:2 participates 24:13 31:13 participation 28:16 31:1,16 31:21,25 32:14 32:23 33:1,11 33:19 34:1,19 35:17 36:19 37:16 38:7,18 38:20,22 44:24 particular 17:23 28:2 32:9 37:24 48:15 partnership 11:15 party 19:18,18 passed 4:9 pay 3:17 22:2 24:18 46:9 paying 4:24 payment 23:4,8 payments 10:2 11:24 49:14 pays 24:19 25:9 31:8 36:4 48:19 people 3:17 11:13 17:4,24 18:9,10 19:1 20:4 22:1 31:12 36:15 46:10 47:19,23 55:19 percent 37:11 perfectly 24:10 performing 49:4 permissible 7:15 permitting 46:7 perpetrator 57:7 person 5:8 7:14 8:15 10:18 11:13 15:14 20:11 24:19</p>	<p>26:4,8,13,14 32:9 35:20 43:5 47:25 48:18 56:25 57:3,14 personally 5:16 26:14 perspective 39:19,23 56:23 56:25 57:3,6,7 57:10 perspectives 18:23 Petitioner 1:4,16 2:4,10 3:8 30:2 30:3,7 32:25 35:13 38:25 39:18 49:18 50:5 51:7,23 53:2,10,22 Petitioner's 33:4 33:8 39:7,10 39:21 41:21 42:7 46:4 47:12 51:16 philanthropists 47:18 phrase 7:18,20 22:7 27:3 42:21 43:2 phrases 37:25 41:20 picky 44:13 place 26:7 plain 3:16 23:24 plan 27:25 30:21 35:9,10 38:8 41:1 43:8,14 plausible 16:20 17:14 18:14 56:4 play 40:6 please 3:10 27:22 29:19 pled 47:11 plenty 23:1 pocket 43:25</p>
---	---	---	--	--

pockets 10:11	40:22	provides 42:6	reach 22:1 34:9	remand 51:12
point 3:22 11:1	prevail 9:15	provision 46:19	read 17:15	remembering
11:3 14:12	prevents 31:7	public 12:23	18:16	14:11
22:16 24:6,6	principle 5:11	13:6 20:8	reading 26:3	render 25:12
25:25 32:23	5:13 27:8 50:4	24:15 36:16	real 34:17 36:17	repair 3:13 4:11
33:3 37:18,22	principles 3:21	48:14,16,20	48:14	13:21 16:12
39:16 40:13,18	54:13	55:20	really 5:3 9:5,6	17:7,16 47:24
41:4,6 42:4	private 13:7	pull 41:25	11:10 19:18	48:4 55:19
43:23 45:12	28:12 42:23,24	punishes 15:14	21:10 29:22	request 39:1
49:17,25 51:19	pro 20:24	22:8 26:1,8	34:8,16 36:15	requested 32:25
53:12,24 55:4	probably 51:9	purchase 29:11	37:8 44:13,14	require 34:17
pointed 39:20	problem 8:8	purchaser 32:19	47:23 54:19,25	required 25:10
pointing 39:13	15:21 16:11	purpose 6:18,21	reason 8:13 9:2	32:19
police 12:9	19:10 24:1	16:16 35:5,6,7	11:6 17:1	requirement
13:15 14:3,4	profession 24:17	35:16 36:5	41:23 48:23	31:16,23 32:14
14:17,23 15:5	prohibited	57:11,14,19	57:5	44:25
16:9 19:21	28:20	purposes 7:13	reasons 42:16	requires 3:11
30:2,24 50:11	promised 48:8	9:19 12:2	rebuttal 2:8	18:21,23 27:9
50:14 51:7,9	property 3:12	28:21 31:23	27:16 53:21	27:9 43:18
56:17	3:14,19,19,24	pursued 45:11	recall 12:15	54:14,23
policeman 35:19	4:15 6:6,10,11	pushing 46:23	receipt 49:3	reserve 27:16
36:9,12 47:17	6:19,20,23 7:6	put 25:14 26:24	receive 49:21	resolves 3:16
47:24	9:6 14:23	48:6	receives 25:16	respect 29:13
policemen 36:21	15:18 16:13,14	Q	42:5	34:18 42:14
36:22 55:5,6	17:2,4,7,10,17	question 4:22	record 10:25	43:13 57:8
55:14,23 56:7	18:11,18 22:4	7:1 10:5 14:1	14:3	Respondent
56:9,11	22:8 26:2,3,5	16:8 28:21,24	recruit 51:24	1:19 2:7 27:20
portion 51:6	27:2,3 28:8	50:8 51:13	recruited 51:8	response 7:3
posit 40:12	40:3 42:21,24	57:20	51:23	14:11,14 42:7
position 15:8	55:21 56:18	questions 27:16	red 44:15	responses 13:18
35:21	57:1	53:18	redefining 7:8	39:25
possible 8:14	proposed 54:9	quid 20:24	refer 35:4 49:22	restitution 10:2
47:13	proposition 12:4	quite 6:17 23:18	52:25	result 31:9
practical 11:9	26:13	34:16	referral 51:25	36:23 52:12
37:12	proprietorship	quo 20:24	refers 26:16,16	return 20:24
practice 11:10	45:20	R	reflect 49:20	29:15 31:4
precise 26:11	proprietorshi...	R 3:1	regard 37:23	49:3
precisely 46:20	10:24	raise 11:5 32:18	39:10 41:11	returned 13:23
prejudice 9:18	prosecute 42:8	34:2 54:1	reinforces 26:2	reversed 13:24
premise 40:5	46:10	raised 45:4,8	relation 50:5	revert 33:11
prepared 20:2	prosecution 4:4	54:8	relationship	right 4:20 6:17
present 41:14	prosecutions 4:3	raising 10:21	50:7	8:11 9:12,13
presented 52:20	54:19	ran 9:25	relied 32:18	11:14,16 15:19
presumption	prosecutor 50:1	range 49:20	52:13,14	16:10,23 17:2
27:11	prosecutors	50:2,25	reluctantly	20:11 21:2
pretend 4:19	46:23	prove 14:22	34:12	22:21,22 23:12
			remaining 53:20	23:19 27:5,12

28:10 34:3,12 34:14 35:23,24 36:12,23 37:1 38:23 40:3 42:25 46:6 48:11,22 50:15 50:21 55:7 rim 14:8 robber 39:14 robbers 43:7 robbery 39:14 41:2 43:6,9,11 43:12 robbing 43:24 ROBERTS 3:3 13:13 14:10 22:17,23 27:17 32:22 38:2,12 38:17 45:2,13 49:24 50:22 51:11 52:4,18 53:19 57:16,23 Rodriguez 51:9 52:2 role 33:7 roles 40:7,8 route 26:8 rule 26:19 27:4 ruling 45:9 run 39:15	says 7:4 8:23 16:18 17:22 18:2 22:18 24:16 32:11 35:13,20 36:11 36:14 38:5,6 38:18 39:14 52:17,19 53:17 56:1,1,18 Scalia 4:13,18 4:21,25 12:8 12:14,22,25 23:20 31:6,18 32:2,5,10 33:10,16 34:16 40:10,18,20,24 41:3,6,8,10,13 41:16,18 48:21 48:24,25 49:2 49:6,10,12 54:11 scared 40:11 scenario 46:21 scene 30:4 51:24 scheme 24:14 33:9 48:7 51:8 school 44:1 scope 50:24 second 14:1 29:3 30:22 31:2,24 40:4 secret 42:6 section 53:1 see 17:14 20:18 23:3 31:10 32:7 40:15 54:21 seeks 28:12 sense 8:2,4 9:6 21:24 22:3 33:16 46:22 56:17,20 sentence 9:22 sentences 9:25 separate 4:2,4,4 10:23 36:20 set 51:25	settled 49:3 shift 56:22 shifting 18:23 shoot 40:15 shop 3:14 4:5,11 6:2,5,12,12,20 13:21 16:12 17:7,16 19:4 30:8 47:25 55:5,19 shopkeeper 55:13 56:8 show 14:6 49:15 showed 11:7 14:4 showered 20:22 showering 21:13 showers 20:12 shows 11:1,2 side 12:22,23 13:6,7 37:4 48:6 significant 55:1 similar 34:25 similarly 41:19 41:21 simple 55:16,16 55:17 simply 20:4 30:9 33:4,11 49:18 49:21 51:1 52:6 single 39:24 situation 4:8 7:12 17:5 36:8 36:8,9 37:5 40:12 46:7 situations 46:12 Sixth 45:18 Skilling 13:22 51:13,14 skills 43:8 slightly 26:7 small 10:5 Smith 43:20,21 sole 11:8 45:19 solely 13:21	Solicitor 1:17 somebody 4:16 17:2,4,22,24 17:25,25 18:8 24:13 53:10 sort 21:8 36:20 54:1 Sotomayor 10:5 10:10,13,17 15:7,11,21 16:7 30:12,15 30:23 45:24 46:3,14,18 53:8,14 sound 16:20 34:5 56:4 special 26:19 specific 20:25 25:13 39:1 50:5 52:9 specifically 5:24 16:4 49:15 52:13 53:4 spillover 9:18 Spitler 55:2 spokes 14:9 52:22 stage 10:21,22 standard 33:12 34:6,7,18 38:15 54:11,12 54:16,21 55:1 57:5,9 start 53:23 started 15:23 21:7,8 45:21 State 3:23 4:5,9 7:13,15 8:3 25:15 28:13,21 35:19 37:8 49:15 stated 5:7 44:16 46:2 States 1:1,6,12 3:5 4:23 15:16 15:17 26:9 27:24 35:10	37:9 51:20 53:17 statute 4:7,9 8:3 15:10,10,13,19 16:1,3 17:15 17:21,22 18:1 18:14,17,24 19:12,14 23:25 24:11 26:1,6 26:23 37:25 39:12 42:4,8 42:19 54:13 56:5,19 57:19 statutes 41:19 statutory 3:20 52:5 steal 39:13 step 15:20,22 stone 43:25 stop 36:10 stops 21:23 straight 15:13 19:13 stranger 7:11 structure 3:21 stuck 38:3 subject 42:21 43:1 submitted 57:24 58:1 Subsection 42:15,18,20,22 substantive 5:9 5:17,23,25 6:3 6:10 9:17 10:3 12:20 16:24 18:2,8 21:21 21:23 27:1,9 28:1,4 29:2 35:11,17 39:22 47:9 49:19 51:1 56:8 subsumes 7:23 succeeded 47:6 sudden 35:18 56:16 suffice 29:20
<hr/> S <hr/> S 2:1 3:1 sale 32:20 Salinas 18:5 25:8 35:8 Sam 56:7,9,10 56:11,15,16 SAMUEL 1:3 San 1:15 satisfied 6:2 satisfy 27:25 35:11 saying 15:23 16:24 25:4 33:18 35:18 46:20 48:12				

sufficiency 39:3 51:21 52:5,6 52:17 53:15 54:2	24:1,6 25:25 27:6,12 Thank 27:17 53:19,23 57:23	56:14,21 57:9 thinking 31:1 thinks 19:22 third 19:18,18 thought 50:22 50:23 52:5	trying 21:9 36:16 41:13 51:25 Tuesday 1:9 turn 29:14,23 31:4 54:10	25:12 unusual 46:12 use 9:3 41:20 44:20 57:6 uses 37:25
sufficient 13:25 14:2 33:13,22 38:8	theory 11:23 12:4,6 23:5 25:8,11 31:11 39:7 47:13 48:12	threatened 44:21 three 49:18 55:9 threshold 34:2 44:25 thresholds 25:13 thrust 52:19 ticket 30:25 tickets 29:11 time 27:16 37:25	two 3:17 4:2 7:17 8:7 10:2 11:13,13 13:2 13:17,18 17:3 19:17 22:1 26:24 28:25 29:5 30:18 31:12 40:12,25 46:10 52:21 55:5,19,23 56:9,10,11	<hr/> V <hr/> v 1:5 3:4 4:23 51:19 53:17 vacate 9:16 various 40:8 43:8 48:5 vast 14:17 37:8 venture 4:2 verb 9:4 verdict 13:24 52:12 victim 36:12,14 43:18,21 48:17 victim's 36:10 victims 36:17,21 36:22 46:16 violate 28:23 violates 57:21 violation 12:10 12:11 violence 44:21 voluminous 51:5 voluntarily 20:17
supposed 27:10 supposedly 54:18 Supreme 1:1,12 sure 40:24 41:15 46:6 Susan 7:3,4,5 Sutton 22:9 sweeten 31:19 syntactical 8:8 8:18	thing 21:5 29:6 29:22 36:20 55:10,14 57:12 things 28:25 30:18 think 4:6,11,22 5:3,12 6:7,16 6:17,25 7:16 7:19,25 8:1,2 8:19,20,24 9:8 11:5,17,22 12:1 13:2,10 13:25 14:10 15:12,19 16:5 16:11,15,19,22 17:6,8,12,18 17:19 18:15,24 19:9,10,15 20:14,21 21:20 22:6,14 23:1 23:11,16,18,22 23:23,24 25:2 25:5,11,17 26:2,6,21 27:5 27:7,11 29:21 30:17 32:7 33:18,21,23 34:1,20,24 36:24,25 37:15 37:21 38:5,15 40:11,20,22,25 41:3,8 42:15 46:14,17,20,22 47:18 49:2,5 50:3 52:9,16 52:24 53:11,14 53:16 54:2 55:4,12 56:3	top 21:23 town 19:21 traditionally 46:24 traffic 36:10 transaction 12:23,24 13:6 13:7 transport 8:1,2 8:16,24 9:4,5 transportation 28:20 29:7,11 transported 7:13 8:5,10,11 8:15 28:22 transporting 7:14 8:6,10,12 8:20,21,23 trial 12:4 14:15 33:8 39:8 45:8 45:8 49:13 50:2,20 tried 51:24 trouble 19:24 true 17:1 18:10 34:22 41:9 43:13 45:5 48:2 51:3 52:23,24 try 19:17	type 32:8 44:23 46:20 types 34:4 typical 33:20 34:17 typically 34:7	<hr/> U <hr/> U.S 51:20 U.S.C 4:10 19:11 25:13 unclear 10:25 understand 5:20 14:15 33:18 34:16 35:16 37:17,20 41:10 undifferentiat... 39:24 unimportant 10:6 United 1:1,6,12 3:5 4:23 15:16 15:17 26:9 27:24 35:10 51:20 53:17 unity 6:17,21 16:15 35:5,6 57:11,13,17,19 unlawful 38:8 unnecessary
<hr/> T <hr/> T 2:1,1 take 16:10 20:9 36:22 38:9 53:12 takes 20:8,10 talk 18:16 19:1 21:24 30:5 talked 45:2,15 45:17 talking 8:25 17:18 18:19 35:22 38:10 44:24 talks 42:4 51:20 targeted 4:9 tell 30:17 31:3 terrorist 42:12 test 6:1 testimony 11:1,7 14:18 text 23:25 textual 8:21 19:10 22:16				<hr/> W <hr/> want 17:17 22:6 26:18 36:23 wanted 16:8,9 wants 19:19,20 50:2 warranted 47:1 Washington 1:8 1:18 wasn't 14:24 25:9 30:9 46:1 water 54:3 way 6:14 7:1 16:19 17:8,14 18:15,23 19:1 19:13 21:25

24:21 29:12	11:23 23:20	<hr/> 4 <hr/>		
34:1 36:18	42:15	46 51:20		
52:10 53:1	world 7:23	<hr/> 5 <hr/>		
55:1 56:3	24:21	502 51:20		
ways 30:11	worry 36:7	52 2:10		
46:25	37:13	<hr/> 6 <hr/>		
we'll 3:3 55:6	worse 37:5	6 1:9		
we're 12:12 21:3	wouldn't 37:16	666 4:10 25:12		
21:5,7,15	wrecked 47:19	25:13		
23:15 26:22	48:1	<hr/> 7 <hr/>		
35:18 36:15	wrong 38:6	<hr/> 8 <hr/>		
44:23 45:18	50:23	8 32:17		
46:20	wrongful 44:20	80 37:11		
we've 5:20 18:6	<hr/> X <hr/>	<hr/> 9 <hr/>		
35:22	x 1:2,7	92 4:23		
wedge 21:9	<hr/> Y <hr/>			
weeks 55:9	year 30:6			
56:10	years 13:12 47:6			
went 14:20 15:1	York 46:7			
23:13 30:3	<hr/> Z <hr/>			
willingly 48:19	<hr/> 0 <hr/>			
woman 7:12,18	<hr/> 1 <hr/>			
7:19,20,21,22	1 45:22			
7:22,24 8:1,2,4	10:05 1:13 3:2			
8:5,10,11,11	11:02 57:25			
8:12,15,16,20	14-361 1:4 3:4			
8:21,22,24 9:1	18 4:10 19:11			
28:20,22 29:1	25:13			
29:6	194 38:17			
women 7:23	195 38:4			
wondered 38:20	1992 4:21			
word 7:8 27:2	<hr/> 2 <hr/>			
42:14,17 43:1	2 19:11 42:22			
words 7:7 8:8	2:00 29:18			
13:16 16:20	20 30:25			
26:23 27:13	2015 1:9			
42:19 44:13	27 2:7			
45:5 56:5,6,15	2a 42:19			
56:16,19,22	<hr/> 3 <hr/>			
57:18	3 2:4			
work 7:7 14:6	3.5 7:23			
16:1 25:16				
41:24 42:2				
46:9 56:15				
worked 30:1				
49:22 52:2				
works 6:15				