

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROCKWELL INTERNATIONAL CORP., :

4 ET AL., :

5 Petitioners :

6 v. : No. 05-1272

7 UNITED STATES, ET AL. :

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9 Washington, D.C.

10 Tuesday, December 5, 2006

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12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:09 a.m.

15 APPEARANCES:

16 MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on
17 behalf of Petitioners.

18 MARIA T. VULLO, ESQ., New York, N.Y.; on behalf of
19 Respondent Stone

20 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.;
22 on behalf of Respondent United States

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	MAUREEN E. MAHONEY, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	MARIA T. VULLO, ESQ.	
7	On behalf of Respondent Stone	24
8	ORAL ARGUMENT OF	
9	MALCOLM L. STEWART, ESQ.	
10	On behalf of Respondent United States	37
11	REBUTTAL ARGUMENT OF	
12	MAUREEN E. MAHONEY, ESQ.	
13	On behalf of the Petitioners	52
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3
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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in 05-1272, Rockwell International Corporation versus United States.

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF PETITIONERS

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

The Tenth Circuit in this case correctly held that Stone could not share in the award given by the jury unless he was an original source of pondcrete allegations. But it then went on to find that he was an original source based upon a misinterpretation of the core requirements of the statutory definition.

JUSTICE SCALIA: Ms. Mahoney, let me ask you a question. Am I wrong about this? It seems to me that if he was not an original source, not only shouldn't he get any money, but neither should the Government. Isn't that the way the statute reads?

MS. MAHONEY: Your Honor, that is one possible interpretation of the statute.

JUSTICE SCALIA: How is there any other possible one? It says there's no jurisdiction in this

1 situation.

2 MS. MAHONEY: I think that the way that the
3 courts have handled it below is that it says that
4 there's no jurisdiction unless it is a claim brought by
5 a relator who is an original source or if it's brought
6 by the United States. And if the relator drops out, I
7 think courts deem it to at that point be viewed as a
8 claim brought by the United States. It's sort of a
9 retroactive amendment of the pleadings.

10 JUSTICE SCALIA: It's not brought by the
11 United States as long as he's still there.

12 MS. MAHONEY: That's correct.

13 JUSTICE SCALIA: That's your argument.

14 MS. MAHONEY: Well, it can't be, Your Honor,
15 because under the statutory terms, under section 3720(a)
16 the Attorney General has the authority to bring a claim
17 on behalf of the United States. There is no authority
18 for the United States to bring a claim on behalf of the
19 relator. Instead there is a second type of claim under
20 section 3730, and that's a section (b) claim, which
21 authorizes a relator to bring a claim on behalf of
22 himself and the United States.

23 Similarly, Your Honor, if you look at the
24 provisions in section (d), which authorize an award to a
25 relator, it requires that the action be one brought

1 under section (b), that is in other words it be an
2 action brought by the relator, in which the United
3 States then proceeds on for (d)(1).

4 JUSTICE SCALIA: It is -- it really depends
5 on whether you think the language "if the Government
6 proceeds with an action" is equivalent to the
7 Government's bringing the action.

8 MS. MAHONEY: Well, I don't think it can be,
9 Your Honor, because if you look at the language
10 throughout these sections, it differentiates between two
11 kinds of actions, actions brought by the United States
12 or the Attorney General and actions brought by the
13 relator. And it is only an action brought by the
14 relator under section (b) that authorizes an award under
15 section (d). And it consistently talks about that.

16 What they're really arguing, Your Honor, is
17 that --

18 JUSTICE SCALIA: Well, wait. It says under
19 3, what is it, (c)(3) I guess, "if the Government elects
20 not to proceed with the action, the person who initiated
21 the action shall have the right to conduct the action."
22 Now, that suggests that if the Government intervenes the
23 Government is proceeding with the action, right?

24 MS. MAHONEY: That's correct.

25 JUSTICE SCALIA: But you say that's

1 different from the Government bringing the action.

2 MS. MAHONEY: Absolutely. If you look at,
3 if you look at the language in section (d), for
4 instance, it says if the Government proceeds with an
5 action brought by a person under section, subsection
6 (b). In other words, it has to be an action under
7 subsection (b) in order to authorize an award at all.
8 The Government has -- has authority under subsection (a)
9 to bring an action, but it has no authority to bring it
10 on behalf of the relator.

11 The statute consistently uses these same
12 terms, and this Court in Graham County, which was a
13 decision dealing with the statute of limitations,
14 actually described this section in the same way, saying
15 that there are two kinds of actions, those that are
16 brought by the Attorney General under subsection (a) and
17 those that are brought by a relator under subsection
18 (b), which the United States can then proceed with.

19 What the relator is really arguing here is
20 that if you look at the -- at subsection (e)(4), they're
21 adding a phrase that's not there. They're saying that
22 there's no jurisdiction over an action under this
23 section if it is brought by the Attorney General or
24 brought by a relator who is an original source or the
25 United States intervenes and proceeds with the action.

1 And that's not in here.

2 JUSTICE SCALIA: You're being very
3 picky-picky with this text, considering that you're
4 willing to swallow whole the notion that so long as
5 the -- so long as the original party, so long as the
6 nongovernment plaintiff drops out, all of a sudden it
7 become as action brought by the United States. That's a
8 very, very expansive notion of what "brought by the
9 United States" means.

10 What I'm saying is or, to put it another
11 way, if you take your picky-picky notion of being
12 brought by the United States, to be logical about it you
13 must reach the conclusion that if you defeat the
14 private -- plaintiff under -- under he's not original
15 source, the whole thing is thrown out, not just his
16 recovery but the Government's recovery.

17 MS. MAHONEY: Your Honor, of course that
18 would be great for Rockwell, and so --

19 JUSTICE SCALIA: I know, but it would be so
20 extreme that we're not likely to buy it.

21 MS. MAHONEY: Well, we don't argue for that
22 because I think that the courts have said that the
23 Government's intervention does not cure defects with
24 respect to the relator, and therefore, if the relator
25 didn't have -- doesn't have standing -- you

1 know, part of this goes to the issue of the Stevens
2 assignment. If they don't have an assignment, then they
3 don't even have standing to be in the action, they have
4 no right to recover.

5 And so if you're correct that it can't be
6 cured, in effect, through a procedure like, say, 28
7 U.S.C. section 1653, which allows amendments to
8 defective jurisdictional allegations where I think that,
9 while the courts don't technically require it, they
10 could say that really this, while it was pled as a
11 section (b) action, when the relator drops out we could
12 treat it as a section (a) action, because --

13 JUSTICE GINSBURG: Otherwise, the Attorney
14 General could just bring it all over again, could file a
15 fresh complaint, and that would be wasted motion?

16 MS. MAHONEY: That's correct, Your Honor. I
17 think it is a pragmatic rule. But again, if the rule is
18 that they lose as well, then so be it. The fact is this
19 statute uses the term that is used in section (a), which
20 is "brought by the United States." And it makes perfect
21 sense because otherwise think of what the consequences
22 are if the relator can simply copy an indictment, file a
23 complaint, and say -- and the Government intervenes
24 because it's a major action, and then they say, aha,
25 you're stuck with me because you've intervened and now

1 there's jurisdiction and there's no problem, I don't
2 have to be an original source.

3 JUSTICE SCALIA: They don't have to give
4 them any money, though. The court doesn't have to.

5 MS. MAHONEY: Your Honor, I think that you
6 could say that they don't have to give them money.

7 JUSTICE SCALIA: But you do. You have to
8 pay his attorneys' fees. That's what really this is
9 about, isn't it?

10 MS. MAHONEY: Well, it is about that, but we
11 don't have to pay his attorneys' fees, Your Honor, if he
12 doesn't get a share, because the way that section (d) is
13 written is it says that a relator who is paid a share of
14 the proceeds shall also be entitled to attorneys' fees.
15 So this is not just an issue between the United States
16 and Stone. The statute controls the award of fees based
17 upon whether he's entitled to a share. So even if this
18 weren't an issue of jurisdiction, if he's not entitled
19 to a share under a section (d)(1), then he's also not
20 entitled to attorneys' fees. And therefore, we would
21 win. He would still need to -- whether it's a
22 jurisdictional rule or a substantive rule, if he's not
23 an original source he's out.

24 But the share is not the only issue that
25 makes the Government's -- or that makes Stone's argument

1 implausible here. That is that once the relator is in
2 the action, the United States can't get them out of the
3 action. Even if they don't have to pay them money,
4 under subsection (c) they have a whole range of rights
5 to participate in the action. They can't dismiss the
6 relator. So it makes no sense to read this statute to
7 say that someone who copies an indictment, files a
8 complaint, the Government intervenes, they're in there
9 forever. It instead makes much more sense to read the
10 terms the way they're used elsewhere in the statute, to
11 mean that there is only jurisdiction if it is a section
12 (a) claim brought by the United States on behalf of
13 itself or if it is a section (b) claim by a relator that
14 is an original source. That's what makes sense of the
15 statute as a whole.

16 If I could turn to the issue of whether or
17 not the Tenth Circuit correctly held that Stone had
18 direct and independent knowledge of the information on
19 which his allegations were based. It bears emphasis
20 that every act that he had to prove in order to recover
21 on the pondcrete allegations -- whether they're measured
22 at the beginning of the case or the end of the case
23 doesn't matter -- every single act occurred after he
24 left the plant, after he had left his job. And we
25 can see that from the outset of the case. If you look

1 at his Responses to Interrogatories at JA-189 to 190, he
2 identifies the factual basis for the pondcrete
3 allegations that he is asserting. And that factual
4 basis is described as Rockwell's knowing storage of
5 pondcrete on outdoor pads at the plant in violation of
6 RCRA with false certifications from 1987 to 1989.

7 Now, he left his job in March of 1986. How
8 could he possibly have direct and independent knowledge
9 of those predicate acts?

10 JUSTICE KENNEDY: Well, suppose a company
11 has a plan to defraud the Government and it use a
12 certain chemical mix to save money and that's what the
13 real fraud is. And it puts it in place and it puts it
14 in place in 1988. And the -- and it has just two
15 containers full of this. And the relator knows about
16 it. The relator then quits. Then for 10 years the
17 company does the same thing, following the same
18 patterns, same method, same improper formula.

19 And he then rings -- he then brings this to
20 the attention of the Government in the proper way and
21 files a suit. He cannot recover for the later action
22 which was the same pattern, practice?

23 MS. MAHONEY: Perhaps, Your Honor, in
24 certain circumstances. I think the key question is
25 what's the standard, and he has to have substantial

1 knowledge about core fraudulent acts. And it may be
2 reasonable in your hypothetical or some others to infer
3 that he knew plenty about this fraudulent conduct and
4 had plenty of reason to conclude that it was continuing
5 on.

6 But here, Your Honor, nothing of the kind
7 happened. He didn't know about any fraudulent conduct
8 pertaining to pondcrete before he left. And in fact,
9 his allegations start in 1987. He does not say that
10 there were pondcrete violations before then and indeed
11 there were not.

12 The reason there weren't is because when he
13 was at the plant Rockwell was producing hard pondcrete,
14 hard pondcrete, and it wasn't storing it on site, it was
15 shipping it to Nevada. So he couldn't -- and it wasn't
16 even clear that it was subject to RCRA because DOE
17 didn't enter into a RCRA compliance agreement until
18 after he left.

19 He also concedes in his deposition that he
20 was not -- except with one exception -- he was not aware
21 of any time when, quote, "Rockwell affirmatively
22 represented that it was in compliance with environmental
23 safety and health provisions when it was not." That's
24 JA-106. So he didn't -- unlike your hypothetical, he
25 didn't know anything about there being a pondcrete fraud

1 prior to the time of his departure and doesn't even allege
2 one. Instead, what the Tenth Circuit rested upon was the
3 fact that he had reviewed a design for making pondcrete
4 five years -- in fact, not for making pondcrete; it was
5 actually a design for removing sludge from the ponds --
6 five years before any of the events at issue here, and he
7 said he predicted there would be a design problem.

8 CHIEF JUSTICE ROBERTS: What does he have to
9 have anything to do with pondcrete at all? The statute
10 just says the information on which his allegations are
11 based. They don't say the allegations that eventually
12 give rise to a recovery.

13 MS. MAHONEY: Your Honor, every court that
14 has considered that question has said that it has to be
15 analyzed on what they call a claim by claim basis. Let
16 me explain the reason. First of all, let me explain
17 what they mean by claim by claim. They really mean a
18 factual theory of falsity, and that it has to be done on
19 a claim by claim basis, and here's why --

20 JUSTICE SCALIA: Factual theory of falsity,
21 that doesn't mean anything to me.

22 MS. MAHONEY: A theory of falsity. In other
23 words, a claim, what is called a claim in these cases in
24 the claim by claim analysis. It is a theory of falsity.
25 In other words, it's why were -- why was the fraudulent

1 claim false? Because there may be a certification, for
2 instance, of compliance with let's say all laws and
3 there could be five different, completely different fact
4 patterns as to why that was false, and the damages might
5 be completely different as well.

6 So all of the courts have said that's really
7 the way that FCA cases are litigated, that's really what
8 we call a claim.

9 And then, moving back, if you didn't do it
10 on a claim by claim basis, you would allow a relator to
11 copy an indictment that he knows nothing about, come to
12 court, file it, add one theory that he does know about,
13 an overcharge for five dollars on a hammer, say that,
14 I'm now entitled to proceed on the whole thing and if
15 the Government doesn't intervene I get a minimum of 25
16 percent of the --

17 CHIEF JUSTICE ROBERTS: That's one way to
18 look at it. Another way would be you would allow a
19 relator in a situation who alleges a particular fraud
20 that causes the Government to examine the books and
21 uncovers a different fraud to recover on that basis.
22 It's an unusual situation to have a jurisdictional
23 prerequisite determined only after the case is over.

24 MS. MAHONEY: But, Your Honor, it doesn't
25 have to be determined after the case is over. These

1 inquiries should -- it should have been determined here
2 as well at the very outset of the case. And it was. It
3 was just determined wrong.

4 We do not have to show that it was wrong at
5 the end of the trial in order to prevail in this case.
6 It was wrong at the beginning. The interrogatories --

7 CHIEF JUSTICE ROBERTS: If you only show
8 that it's wrong at the end, you still say that they
9 should be thrown out.

10 MS. MAHONEY: Yes, we do, Your Honor but it
11 is not by any means necessary to the outcome in this
12 case. And the reason why I think that you do have to at
13 least allow for the possibility of looking at the end of
14 the case, whether there is jurisdiction or not, is
15 because of the nature of this particular jurisdictional
16 bar. This is a jurisdictional bar that turns on the
17 nature of the allegations at issue in the case.

18 Much like -- I think the Foreign Sovereign
19 Immunities Act is a perfect example because it too talks
20 about jurisdiction being predicated on, for instance,
21 commercial -- claims that are based upon commercial
22 activity. Suppose that the plaintiff at the outset of
23 the case when the 12(b)(1) motion is filed posits one
24 theory of the case that involves a predicate commercial
25 act. But when it gets to trial he's abandoned that

1 theory and now he doesn't have any commercial act.
2 Surely the Court would say you have to satisfy
3 jurisdiction over the theory that has actually gone to
4 trial.

5 This statute is very much the same. And it
6 should not be read in a way that allows relators to
7 simply disguise the true basis of their claims, hide the
8 relevance of the public information, and then just shift
9 gears when you get to trial.

10 But here again, if we just look at the very
11 beginning of the case, he does identify in those
12 interrogatory responses, for instance, what the factual
13 basis for the pondcrete allegations are. And that
14 factual basis is all identified as -- as core acts that
15 occurred after he left the plant. So we can look back
16 in this case and say that the trial court erred at the
17 outset by not dismissing this portion of his claim as
18 well as, in fact, should have dismissed the whole thing,
19 Your Honor.

20 CHIEF JUSTICE ROBERTS: Well, his allegation
21 was that this, the design is not going to work.

22 MS. MAHONEY: But Your Honor --

23 CHIEF JUSTICE ROBERTS: That's not an
24 allegation that's -- I mean, it is either true or it's
25 not true. The fact that you find out after he's left,

1 after he's been terminated, that it doesn't work, I
2 don't see how that should affect the validity of his
3 allegations.

4 MS. MAHONEY: Because, Your Honor, this,
5 this is a statute about fraud. It's not a statute
6 that's violated because Rockwell may have had a
7 suboptimal pipe. That's not, that's not even a RCRA
8 violation. That's not -- and it is certainly not a
9 False Claims Act violation. They weren't selling
10 pondcrete to the United States. He didn't know about a
11 plan to defraud the United States.

12 CHIEF JUSTICE ROBERTS: They were certifying
13 their compliance with the applicable laws --

14 MS. MAHONEY: At that, at the time --

15 CHIEF JUSTICE ROBERTS: -- based upon their
16 pondcrete design.

17 MS. MAHONEY: At the time that he was there
18 that was not actually -- he didn't even allege that he
19 knew that they were doing that with respect to pondcrete.
20 He didn't allege that there were any problems with
21 respect to the pondcrete production or, or certifications
22 during his tenure. From -- they began producing
23 pondcrete in 1985, Your Honor. And there were no
24 problems that were alleged with respect to that pondcrete.

25 His claim by his own admission starts in

1 1987, after he was gone. And again, the mere fact that
2 there may have been a defective pipe wouldn't establish
3 the RCRA violation, because what they had to show by
4 their owning pleading here was that they were storing it
5 on site, that it was actually leaking, and, of course,
6 the mere fact there may have been a problem with the
7 pipe doesn't mean it is actually going to leak, because
8 they can fix it in a variety of ways. They can add more
9 cement, they can put it in metal containers, they can do
10 a myriad of things.

11 He didn't even say he knew know that there
12 was a plan to not remedy any problems in the design that
13 he had identified if and when there became a problem
14 with it.

15 JUSTICE SCALIA: Am, am I correct that they
16 were, in fact, using that same pipe or that same pipe
17 system during a period when perfectly fine cement blocks
18 were being produced?

19 MS. MAHONEY: We think that's correct, Your
20 Honor.

21 JUSTICE SCALIA: Is that true, is that
22 conceded?

23 MS. MAHONEY: Well, I think that it's
24 conceded that -- well, their own counsels told the jury
25 that they were making it wrong, they weren't adding

1 enough cement, that that was the reason that it was
2 failing; and the Government told the jury that they were
3 making it fine until they reduced the ratio of cement.
4 So yes, I think it is correct that it has been conceded
5 at trial that the system was working fine as long as
6 they were adding enough cement.

7 But instead what happened after he left --

8 CHIEF JUSTICE ROBERTS: The whole purpose,
9 the whole purpose of this legislation is to ferret out
10 fraud on the Government. I mean, if he makes an
11 allegation that this design is not going to work, the
12 pondcrete is not going to work, and the Government,
13 prompted by his lawsuit, investigates it and finds out
14 that because of human error they're not making it the
15 right way, even if the design does work, he gets no
16 credit for that?

17 MS. MAHONEY: Well, Your Honor, the statute
18 isn't written in that way. But let me also call your
19 attention to some facts. And that is that a year before
20 he brought this claim --

21 CHIEF JUSTICE ROBERTS: Well, what about the
22 hypothetical? Are you suggesting that in a situation
23 like that -- we'll talk about whether the facts comport
24 with it later -- but in a situation like that, he's not
25 entitled to share in the recovery that the Government

1 eventually receives?

2 MS. MAHONEY: If -- the mere fact that he is
3 a trigger for the Government discovery of a different
4 problem, no, that is not a basis for recovery. The
5 statute says that if there has been a public disclosure,
6 if -- let's assume there was a public disclosure. If
7 there's no public disclosure it is no problem. He can
8 bring whatever claim he wants. He doesn't have to have
9 direct knowledge of it. But if there has been a public
10 disclosure at that point he has to have direct
11 knowledge of the information on which the allegations
12 are based. And that has to be a substantial standard.
13 Direct knowledge is one of the key things that the Tenth
14 Circuit just did not --

15 CHIEF JUSTICE ROBERTS: You would, you would
16 change that to say direct knowledge of the information
17 not on which the allegations are based, but on which
18 recovery is eventually -- eventually ordered?

19 MS. MAHONEY: On which the allegations of
20 the claim is based. In other words, it, it's not -- it
21 has to be -- and the Government says this as well --
22 they say that under section (d)(1), the relator isn't
23 entitled to share in the proceeds of anything that the
24 jury gives. The relator is only entitled to share in
25 the proceeds of a claim for which they were an original

1 source or for which they brought the -- brought the
2 action under, under section (b).

3 Sometimes the Government intervenes and adds
4 its own claims not on behalf of the relator, because it
5 doesn't have authority on behalf of the relator, and it
6 takes the position, I think correctly, that the relator
7 isn't entitled to a share in those circumstances.

8 And Your Honor, this -- the courts have
9 identified all the ways in which this statute doesn't
10 make any sense if it is looked at on --

11 CHIEF JUSTICE ROBERTS: You think they've
12 got them all?

13 MS. MAHONEY: -- on a global basis. Excuse
14 me?

15 CHIEF JUSTICE ROBERTS: They've identified
16 them all already?

17 (Laughter.)

18 MS. MAHONEY: No, I don't think they have
19 identified them all. But I --

20 JUSTICE SCALIA: You may find another one.

21 MS. MAHONEY: I, I would also -- again, it
22 would allow the relator to get, you know, a share of,
23 when the Government doesn't intervene, a minimum of 25
24 percent of a billion dollar recovery after a public
25 disclosure that he knew nothing about, if he just knew

1 one little piece of a separate theory of fraud.

2 JUSTICE GINSBURG: But the theory is not
3 necessarily bad. The, the relator has to cooperate with
4 the Government, ideally he should. And if the
5 Government says we prefer a variant of your theory, and
6 the relator said "fine, I don't want to put competing
7 theories before the jury, so I'll surrender my first
8 theory and go with the Government's," -- why should the
9 relator be penalized for that good litigation practice?
10 It doesn't necessarily mean that the original complaint
11 is no good or even that it might not have been proved,
12 if the Government had preferred another route.

13 MS. MAHONEY: Well if there, if there's a
14 minor variation, you know, something like that, I
15 certainly don't think that disqualifies the relator
16 from, from being an original source. And again, here he
17 wasn't an original source even under his own theory at
18 the outset of the case.

19 What happened at trial is the one little
20 thing that he knew or claimed to know, his prediction
21 that a pipe would have a problem five years before, was
22 dropped completely from the case. So he went from being
23 a relator who knew something very small about the case
24 or about the theories to nothing at all. It was never
25 good enough, but certainly once, once that theory was --

1 once that piece of information dropped out, it just
2 demonstrated, it just highlights that he's not an
3 original source.

4 And Your Honor, here it wasn't just that
5 they didn't want to use that bit of evidence. It was
6 actually inconsistent with the theory that they, that
7 they pressed with the jury. They said the equipment was
8 fine. Rockwell was making pondcrete just fine from 1985
9 forward until it stopped adding the cement.

10 And that's what they -- that's the theory
11 they went with. But again, measure it at the outset of
12 the case, and he still wasn't an original source.

13 If I could save the remainder of my time?

14 JUSTICE STEVENS: May I ask just one quick
15 question?

16 MS. MAHONEY: Yes, Your Honor.

17 JUSTICE STEVENS: What was the public
18 disclosure of the claim that ultimately prevailed?

19 MS. MAHONEY: The public -- there -- the
20 public disclosure was in 19 -- it can be from several
21 pieces. But in 1988, there were widely covered stories
22 of the fact that pondcrete was being stored at Rocky
23 Flats on outdoor pads, that it was leaking and that the
24 reason it was occurring was because the employees had
25 reduced the ratio of cement.

1 And then you couple that with the disclosure
2 --

3 JUSTICE STEVENS: And the public disclosure
4 was made in the newspapers rather than in an official
5 Government proceeding?

6 MS. MAHONEY: That's correct. It was in the
7 newspapers. But that's definitely covered, Your Honor.
8 And that was more than a year before he brought his
9 action. And then in addition, there were disclosures of
10 allegations of performance bonuses being paid based upon
11 falsified evaluations. That's JA 143.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Ms. Mahoney.

15 Ms. Vullo.

16 ORAL ARGUMENT OF MARIA T. VULLO,
17 ON BEHALF OF RESPONDENT STONE

18 MS. VULLO: Mr. Chief Justice, and may it
19 please the Court:

20 The Court should affirm the decision of the
21 court of appeals because as the Government recognizes,
22 Mr. Stone is an original source. And it is important to
23 the look at the statute and its purpose. The original
24 source provision is intended to determine who may bring
25 a claim on behalf of the United States Government. And

1 the recovery provision, 3730(d)(1), determines how much
2 if anything a relator may share in the Government's
3 recovery. In this case, where the Government
4 fully supports the relator, I would submit that the
5 interests of the statute and the interests of the United
6 States are fully satisfied.

7 And that is because Mr. Stone is the
8 paradigm not parasitic relator. He had knowledge
9 firsthand from his six years at Rockwell of a pattern,
10 Justice Kennedy, a pattern of criminal conduct and a
11 pattern of Rockwell concealing that information.

12 JUSTICE SCALIA: Unfortunately, it was not
13 the criminal conduct that was ultimately -- it was not
14 the manner of criminal conduct that was ultimately the
15 basis on which the Government proceeded? He knew about
16 this bad pipe, right? Or he said that this was a bad
17 pipe system? He didn't say anything as I understand it
18 about their not adding enough cement which is the theory
19 that went to the jury.

20 MS. VULLO: Justice Scalia, I would beg to
21 differ on that. Mr. Stone in his affidavit at 179 in
22 the joint appendix and also in his disclosure statement,
23 which is at 29 -- I'm sorry, 174 and 175 of the joint
24 appendix, and the disclosure statement at 290, what he
25 described was a defective design of a system for

1 taking the sludge out of the pond. And what he
2 specifically said -- and this is very important -- what
3 he specifically said was that when you took the sludge
4 out of the ponds in that manner, it was going to have
5 too much liquid, and it was going to lead to
6 deterioration of the environment. He said that in the
7 very beginning of the case. And at trial, what the
8 testimony was -- and I would direct the Court to Mr.
9 Fryback's testimony at joint appendix 522, as well as at
10 the trial transcript at 987. The issue there was the
11 variability of the sludge which may have caused greater
12 inspection and may have required additional cement.

13 And what is very important is even
14 Mr. Freibach who is the first foreman, on whom
15 Petitioners rely, he testified that during his tenure,
16 the variation of the sludge required between 200 and 350
17 pounds of cement. That's at the trial transcript at 987
18 and the joint appendix at 522.

19 JUSTICE SCALIA: Yes. Let me -- let me
20 look at what -- let me look at 175. This is, this what
21 he says. "After careful study, I concluded that the
22 suggested process" -- this means of piping the sludge
23 out -- "would result in an unstable mixture that would
24 later deteriorate and cause unwanted release of toxic
25 wastes to the environment. I also noted based on my

1 knowledge of the chemical processes at Rocky Flats that
2 the sludge and liquid present in the -- present in the
3 evaporation ponds contained some of the most toxic and
4 radioactive substances at Rocky Flats."

5 I mean, that's all very good, but it has
6 nothing to do with what this company was convicted of,
7 which is not -- cutting down on the amount of cement it
8 was adding.

9 MS. VULLO: That's --

10 JUSTICE SCALIA: During a certain period
11 after this it was creating perfectly good blocks by
12 adding more cement. Then they got a new manager who
13 said let's use less cement. And that's when they
14 started producing the defective blocks. It has nothing
15 to do with his allegations.

16 MS. VULLO: Justice Scalia, two important
17 points. First is that neither the criminal conviction
18 nor the jury's verdict determined the cause of the
19 insolidity. The issue in the criminal case and the
20 issue in the False Claims Act case as to pondcrete was
21 that the pondcrete was insolid and they were lying to
22 the -- the Government about that.

23 JUSTICE SCALIA: And why did the Government
24 claim it was insolid? What was the claim made for -- as
25 to the reason for the insolidity?

1 MS. VULLO: Your Honor, one of the pieces of
2 evidence -- and I would -- out of 55 witnesses and 500
3 documents, was that there were certain people who were
4 using too little cement. There was also evidence --

5 JUSTICE SOUTER: No, but is the reason they
6 were using too little cement, the reason that there was
7 a variation in the amount of liquid being taken out with
8 the sludge as you've described to us that he had
9 claimed, or was the reason simply that there was a kind
10 of standard ratio of cement to sludge and -- that
11 standard ratio was not followed in the later cases?

12 In other words, is it because there was such
13 a tremendous variation in the liquid in the sludge or
14 simply because there was a standard formula having no
15 particular relationship to the liquid in the sludge, and
16 they simply didn't follow the standard formula? I
17 thought the Government's theory was the latter, and if
18 it was the latter, it has nothing to do with the claim
19 that he was making that there was too much variation in
20 the amount of liquid in the sludge.

21 MS. VULLO: That's not correct,
22 Justice Souter. The reason for the variation and the
23 need for additional cement was because the sludge had
24 variations and there was too much liquid in it, which
25 was precisely what Mr. Stone said. And every one of the

1 witnesses testified to huge variation of the liquid
2 content in the sludge which required more cement, and
3 even the amount of cement that was required was very
4 variable.

5 JUSTICE SOUTER: But if they had followed
6 the formula that they followed at the beginning, isn't
7 it true that there's no evidence that even these
8 variations in the liquid in the sludge would have
9 resulted in instable or insolid pondcrete?

10 MS. VULLO: No. That's not correct,
11 Justice Souter. In fact, there was no particular ratio
12 that had to be followed of cement to sludge. There was
13 testimony that different individuals who worked on the
14 pondcrete used different amounts of cement. And as I
15 said --

16 JUSTICE SOUTER: This was truly even before
17 the troubles started, even before the insolid pondcrete?

18 MR. STEWART: Yes, Your Honor. Yes,
19 Justice Souter. Mr. Freibach, who was the earlier
20 foreman, testified that under his watch, he needed
21 between 200 and 350 pounds of cement, and that there was
22 a constant inconsistency in the sludge content coming
23 out of the ponds.

24 JUSTICE SCALIA: Was -- here's an easy
25 question. Was this evidence that we read, his testimony

1 on 175 of the joint appendix, was that introduced at
2 the trial?

3 MS. VULLO: Mr. Stone did not testify at
4 trial.

5 JUSTICE SCALIA: Was this evidence
6 introduced from some other source? Was the jury told
7 there was this piping that was taking out too much
8 liquid with the sludge? Was the jury told that?

9 MS. VULLO: The jury -- Mr. Freibach
10 described the process. We did not get into the
11 engineering detail, Your Honor, of it.

12 JUSTICE SCALIA: So his central allegation
13 was not even placed before the jury?

14 MS. VULLO: Your Honor, I would submit to
15 you, Justice Scalia, that that wasn't required. What we
16 needed to prove --

17 CHIEF JUSTICE ROBERTS: But it is worse than
18 that, though.

19 His information was not even provided to
20 the Government, which the statute requires. He not only
21 has to have direct and independent knowledge, he has to
22 voluntarily provide that to the Government. And I
23 understand that the Tenth Circuit, to have relied solely
24 on the document at joint appendix page 605, that's the
25 only thing he provided to the Government. And all it

1 says is that this design will not work. There are a lot
2 of things that don't work, but that doesn't mean there's
3 fraud on the Government. You don't know if they're
4 going to fix it, they're going to change it, use a
5 different design, not make a claim based on that design.
6 Why is that enough to satisfy the statute?

7 MS. VULLO: Mr. Chief Justice, the
8 voluntarily provides prong requires the relator to be
9 honest and truthful and submit all the information he
10 has. And Mr. Stone did that and the Government has
11 never said otherwise. In fact, he met with the FBI
12 agent --

13 CHIEF JUSTICE ROBERTS: But he has to -- if
14 the information that he provides isn't direct and
15 independent information of the allegations, it would
16 seem that the statute is not satisfied.

17 MS. VULLO: That is correct, Your Honor, but
18 Mr. Stone did have direct and independent knowledge of
19 his allegations. And I'd like to go back to the
20 discussion with Petitioner's counsel as to the
21 jurisdictional provision in this statute. There is no
22 question that --

23 CHIEF JUSTICE ROBERTS: I don't want to get
24 off my question here but did you -- do you agree that
25 this page JA 605 was the only information that he

1 provided to the Government?

2 MS. VULLO: No, Your Honor.

3 CHIEF JUSTICE ROBERTS: Well, maybe I'd
4 better phrase it differently. Do you agree that that is
5 the only information on which the Tenth Circuit relied?

6 MS. VULLO: The -- the Tenth Circuit did
7 rely on that document and did not consider any other
8 information as a result of its ruling with respect to
9 that document. The Tenth Circuit also had before it the
10 awards fee documents which Mr. Stone provided to the
11 Government, and those are at joint appendix 247 to 249.
12 It also had Mr. Stone's affidavit when he testified in
13 his affidavit as to his meetings with the Government,
14 and also had additional affidavits --

15 CHIEF JUSTICE ROBERTS: Well, but this -- he
16 has to provide this information before filing an action.

17 MS. VULLO: That's correct, Your Honor. And
18 his affidavit describes his meetings with the FBI and
19 the EPA beginning in 1986, and that's at joint appendix
20 180 through 181.

21 JUSTICE STEVENS: May I ask -- this is
22 probably a stupid question.

23 MS. VULLO: Yes, Justice Stevens.

24 JUSTICE STEVENS: As I understand the
25 statute, you hit the first round; it has to be an

1 action based on public disclosure of information, which
2 you agree it was; is that right?

3 MS. VULLO: Justice Stevens, we in the
4 courts below agreed for purposes of the original source
5 provision that there was a public disclosure. I think
6 what's important following up on the question --

7 JUSTICE STEVENS: You agree that it's within
8 (4)(a), that it was an action based on a public disclosure
9 of information disclosed in newspapers; is that right?

10 MS. VULLO: In newspapers and also the
11 criminal investigation, but I think what's important is
12 that the standard that Rockwell seeks to have this Court
13 adopt would actually require such a great level of
14 specificity that is not in the public disclosure at all.
15 And I think, Justice Stevens, you asked that precise
16 question. The public disclosure was very general. And
17 the Tenth Circuit --

18 JUSTICE STEVENS: I am asking you, really
19 what I'm seeking to find out is what is the scope of the
20 public disclosure that everyone agrees was made? Was it
21 all newspapers?

22 MS. VULLO: It was newspapers, and the FBI
23 agents' search warrant affidavit was also publicly
24 disclosed prior to Mr. Stone's filing of the action.

25 JUSTICE STEVENS: If it was publicly

1 disclosed in the newspapers, does that fit into one of
2 the categories of public disclosure mentioned in (4)(a)?

3 MS. VULLO: Yes. It says news reports in
4 that provision of the statute.

5 JUSTICE STEVENS: And everybody agrees on
6 what those news reports contained?

7 MS. VULLO: Well, I'm not sure what Rockwell
8 agrees, but I could tell Your Honor what I believe those
9 news reports said, and they said that there were
10 environmental violations. There were some news reports
11 in June of 1988 about a spill on the pondcrete pads.
12 Not a single one of the news reports about the spill on
13 the pondcrete pads described at all any false claim or
14 false statement, and neither did the agents' search
15 warrant affidavit.

16 JUSTICE STEVENS: But you're client must be
17 an original source of the information that was published.

18 MS. VULLO: I don't believe that that's the
19 appropriate test. It's not before this Court, but I
20 believe that the direct and independent knowledge
21 requirement is information on which the allegations are
22 based, and the allegations refer to Mr. Stone's
23 allegations at the commencement of the action. After
24 all, it's a jurisdictional provision, and it should be
25 determined at the outset of the action.

1 CHIEF JUSTICE ROBERTS: I would have thought
2 the allegations referred to the public disclosure. It
3 talks about public disclosure of allegations, and then
4 says he has to have direct and independent knowledge of
5 the allegations. So I would assume that's the important
6 linkage.

7 MS. VULLO: Mr. Chief Justice, there is a
8 split in the circuits on that issue. The issue was not
9 decided by the court of appeals and as I understand even
10 Rockwell's position, that is not Rockwell's position,
11 that Rockwell's position is like our position, that it's
12 information in the allegations of the complaint.

13 But I would submit that that would make no
14 difference in this case because Mr. Stone's knowledge is
15 direct and independent of the information in his
16 complaint as well as the information in the public
17 disclosure. And what is important is that Rockwell is
18 asking this Court to adopt the quick trigger that the
19 court of appeals adopted because that was the Tenth
20 Circuit's law on public disclosure. Yet in this case,
21 say that Mr. Stone's direct and independent knowledge
22 has to be very, very specific. It has to be of the
23 particular false statements, and that would eviscerate
24 the entire original source rule.

25 And if I could just get to the point of the

1 jurisdictional issue and why Rockwell's position as to
2 the trial evidence is wrong, it's wrong for two reasons.
3 The first is that the statute speaks in terms of
4 allegations. It does not speak in terms of evidence.
5 In fact, in the provision (e)(2), which is a provision
6 regarding bringing claims against members of the
7 judiciary and members of Congress, Congress said
8 information or evidence, but in this provision (e)(4),
9 Congress only said information. So looking at the trial
10 evidence would be wrong by virtue of the plain language
11 of the statute.

12 It also would be wrong as, Mr. Chief
13 Justice, you pointed out. Since 1824, I believe this
14 Court has held that jurisdiction is determined at the
15 time of commencement as of the state of things at that
16 time. And as, Justice Ginsburg, you pointed out, it
17 would be an inappropriate rule to say that if the
18 Government decides to refine the allegation, after all,
19 it is still a concrete allegation.

20 JUSTICE SCALIA: We've also said that
21 jurisdiction must be maintained throughout the case.
22 Something like standing. We say standing is examined
23 throughout the trial. There's an easier standard at the
24 beginning, and then for the complaint; and then for a
25 motion to dismiss, a somewhat higher standard; and

1 finally, if the facts of -- involving standing are
2 tried, there's the highest standard at the end of the
3 trial.

4 I mean, it seems to me jurisdiction has to
5 be assured throughout.

6 MS. VULLO: Justice Scalia, I think this is
7 a jurisdictional provision that Congress created. We're
8 not talking about the Federal question jurisdictional
9 statute. But in this provision, just like in the Clean
10 Water Act in the Walton case, the statute uses the word
11 allegations. As in that case, the statute used the word
12 alleged. And the Court held very clearly that you look
13 at it as of commencement.

14 Now it might be a different case if we had a
15 Federal question case and the relator or the plaintiff
16 withdrew the Federal claim. Then there would be a loss
17 of jurisdiction. Here of course, the amended complaint
18 satisfied jurisdiction when the Government adopted the
19 relator's claim.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Ms. Vullo.

23 Mr. Stewart.

24 ORAL ARGUMENT OF MALCOLM L. STEWART
25 ON BEHALF OF RESPONDENT UNITED STATES

1 MR. STEWART: Thank you, Mr. Chief Justice,
2 and may it please the Court:

3 One of the features of this case that may
4 appear anomalous is the fact that the Government is
5 aligned with Stone. That is, it's Rockwell's position
6 that the entire recovery in this case should go to the
7 United States. It is Stone's position that the recovery
8 should be shared with the relator, and the Government
9 agrees with Stone.

10 It might be natural for the Court to wonder,
11 why would it be in the Government's interest to advocate
12 that a share of the money damages in this case should be
13 given to a private party. And the reason is that the
14 Government believes that there are three systemic
15 Government interests that are implicated by this case
16 and that would be endangered if Rockwell's position
17 prevailed.

18 First, in our view, Stone is precisely the
19 type of relator that Congress intended to encourage.
20 Stone was somebody who had substantial firsthand
21 knowledge of Rockwell's environmental practices and of
22 its billing practices, and moreover, Stone was somebody
23 who didn't conceal his information from the Government.

24 JUSTICE SCALIA: Well, that's all very nice,
25 but Congress didn't leave it up to you to decide who

1 ought to get rewarded or not. It laid down some textual
2 conditions in the statute. And unless they are complied
3 with, the fact that you think this is the kind of person
4 that ought to get the money is really totally irrelevant.

5 MR. STEWART: We agree. And as to Stone's
6 original complaint, the statute frames the inquiry as
7 whether Stone had direct and independent knowledge of
8 the information on which the allegations were based.
9 And we agree with Rockwell and with Stone that that
10 refers to the allegations in his complaint.

11 Now the allegations were fairly generalized.
12 They didn't refer specifically to pondcrete, and they
13 covered a wide range of time, from 1980 through to the
14 present, which was 1989 as of the filing of the
15 complaint. Stone subsequently submitted a lengthy
16 affidavit in which he explained what had led him to the
17 conclusion that Rockwell was engaged in a systematic
18 practice of violating the environmental laws and
19 misrepresenting the nature of its compliance to the
20 Government. That information --

21 JUSTICE ALITO: What if the defect that he
22 identified turns out to be entirely different? What if
23 there is no dispute, it's completely different from the
24 defect that led to the false claims on which there were
25 recovery?

1 MR. STEWART: I mean, there certainly could
2 be a situation in which the Government intervenes in a
3 suit but files what can be regarded as a substantially
4 different claim. For instance, if the Government had
5 intervened in this suit and had claimed that Rockwell's
6 requests for payment were fraudulent because Rockwell
7 had misrepresented its compliance with the
8 antidiscrimination laws, that would be an example of a
9 fundamentally different fraudulent scheme and --

10 JUSTICE SCALIA: Let's take this case. Did
11 the Government use any of the evidence that Stone
12 produced? Did it introduce that affidavit which said
13 the pipe wasn't working right? Was that part of the
14 evidence?

15 MR. STEWART: It didn't introduce the
16 engineering report. And I do want to focus on --

17 JUSTICE SCALIA: Well, what else had he
18 provided beyond -- did you use anything that came from
19 him?

20 MR. STEWART: He had provided substantial
21 information about a pattern of concealment of
22 environmental violations generally. That at least to
23 some extent was responsible for an FBI investigation
24 which uncovered further --

25 JUSTICE SCALIA: But did you use at trial

1 anything that he provided you?

2 MR. STEWART: We proved essentially the
3 state of affairs that he predicted would occur.

4 JUSTICE SCALIA: Did you use anything that
5 he provided you in order to prove it?

6 MR. STEWART: I'm not aware of anything
7 that --

8 JUSTICE SCALIA: No, neither am I.

9 MR. STEWART: But nevertheless, the relator
10 had direct and independent knowledge of the information
11 on which his allegations were based.

12 And I'd like to focus on this question of
13 the cause of the insolidity of the pondcrete because I
14 think to regard that as the theory of the Government's
15 liability really reflects a misunderstanding of the
16 False Claims Act. For purposes of the False Claims Act
17 counts in this case, it was sufficient for the
18 Government to prove that the pondcrete in fact failed,
19 leaked hazardous substances into the environment, that
20 Rockwell was aware that the pondcrete was failing, and
21 that Rockwell nevertheless continued to represent that
22 it was in compliance with the environmental laws.

23 For purposes of proving those allegations,
24 it was not necessary for the Government to offer any
25 hypothesis as to why the pondcrete failed. It would

1 have been sufficient to prove that the pondcrete failed
2 and that Rockwell knew about it. In fact, I wouldn't
3 encourage the Court to read the whole trial transcript,
4 but I think if the Court reads the plaintiff's statement
5 of claims, which is about 30 pages of the joint appendix
6 beginning at JA-463, that summarizes the events that
7 Rockwell -- I mean, I'm sorry, that Stone and the United
8 States intended to prove at trial, and by far the
9 predominant focus is on the fact of pondcrete failures
10 and Rockwell's awareness that they had -- that pondcrete
11 had failed.

12 There were a couple of paragraphs in
13 those 30 pages that alluded to the supposition that the
14 cause of the failure was inadequate cement content.
15 There were also isolated references to that theory at
16 trial. But to characterize that as the theory of
17 liability I think would be a misconception. The
18 Government didn't have to persuade the jury one way or
19 the other as to why the pondcrete failed.

20 JUSTICE SCALIA: How is it possible to say
21 that he had direct knowledge of events that occurred
22 after he had left Rockwell? I mean, all of this failure
23 occurred after he was gone.

24 MR. STEWART: But again --

25 JUSTICE SCALIA: Not only not because of

1 this pipe thing that he predicted would cause a failure,
2 not only it was not because of that. But he was gone.

3 MR. STEWART: Again, the statute doesn't
4 require direct and independent knowledge of the fraud.
5 It requires direct and independent knowledge of the
6 information on which the allegations were based.

7 JUSTICE SCALIA: That's right. And how
8 would he know except from published reports that these
9 blocks were failing?

10 MR. STEWART: His basis for making that
11 prediction was that he believed that the process would
12 malfunction. He was also aware --

13 JUSTICE SCALIA: But prediction is not
14 knowledge. Prediction is not direct knowledge.

15 MR. STEWART: I think independent of whether
16 there had every been a public disclosure, it would have
17 been open to Rockwell to argue in response to the
18 original complaint that Stone couldn't, consistent with
19 rule 11, make allegations as to what had happened at the
20 plant after he left because he no longer had an
21 evidentiary basis for doing so. Rockwell could have
22 made that argument, again regardless of whether a public
23 disclosure had occurred, and the question whether it is
24 a permissible inference for a plaintiff to say, I saw
25 them committing systematic environmental violations

1 while I was there and I inferred that the same thing
2 would go on after I left -- the question whether that's
3 a permissible inference for a plaintiff in a Federal
4 civil action to make is a question to be decided under
5 the Federal Rules of Civil Procedure. The public
6 disclosure provision serves a different purpose
7 entirely. It's designed for those cases in which the
8 relator has sufficient information to file a complaint
9 that complies with the Federal Rules of Civil
10 Procedure, but that information overlaps substantially
11 with information in the public domain.

12 JUSTICE SCALIA: And his sufficient
13 information you assert is his prediction that these
14 blocks would fail for a reason that turned out not to be
15 the reason for their failure. That is what you say is
16 his direct knowledge.

17 MR. STEWART: That knowledge, but I think
18 it's also important to recognize that the original
19 complaint was not focused on pondcrete specifically.
20 The original complaint alleged more generally that
21 Rockwell was engaged in widespread environmental safety
22 and health violations and was consistently
23 misrepresenting to the Government that it was in
24 compliance and -- even though it knew that it was not
25 doing so.

1 JUSTICE SCALIA: So you think relators can
2 get part of the Government's recovery even where their
3 initial allegations before the Government intervenes
4 have nothing whatever to do with the reason the
5 Government is ultimately giving money? You think they
6 are still entitled to a piece of the pie?

7 MR. STEWART: I guess I would -- I would
8 disagree with the premise that his reasons had nothing
9 whatever to do with why the Government is getting money.
10 Again to return to the hypothetical I suggested earlier,
11 if the Government then filed --

12 JUSTICE SCALIA: So you don't believe that,
13 then. You think that indeed the reason the Government
14 was given the money has to be connected with, with his
15 allegations? Right?

16 MR. STEWART: It has to be connected with
17 his allegations. And certainly, if you look at the
18 theory of liability that prevailed at trial, namely that
19 pondcrete blocks were leaking hazardous substances into
20 the environment and Rockwell was nevertheless asking for
21 Government funds based on misrepresentations that it was
22 in compliance, if you look at that theory of liability
23 and then examine Stone's original complaint, clearly
24 that theory is logically encompassed within the more
25 generalized --

1 CHIEF JUSTICE ROBERTS: What do you mean by
2 connected? Is it -- I got -- I'm getting the sense that
3 you think it's enough if he says, look, Rockwell is
4 just lying to the Government in this area, and you say
5 well -- what if you added a count in your complaint when
6 you intervene on tax fraud? You found out there also
7 they didn't pay taxes. Would he be able to recover
8 for that, because, you know, if they're going to lie
9 about pondcrete they're going to lie on their taxes.
10 Is that sufficiently connected?

11 MR. STEWART: No, and I think I would put
12 that with the hypothetical that I offered about the
13 Government adding a claim that Rockwell had
14 misrepresented its compliance with the
15 antidiscrimination laws. And I think there won't be a
16 clear dividing line, but I think this is a line that
17 courts have to draw for other purposes as well.

18 CHIEF JUSTICE ROBERTS: And it doesn't
19 matter to you if he just, if he's completely wrong?
20 Let's say he says -- you have special interrogatories to
21 the jury and his allegation has always been the
22 pondcrete's going to fail because you're putting in the
23 wrong kind of cement. And it turns out it has nothing
24 to do with that at all. The jury says, no, that's not
25 the reason it failed, it failed for another reason. Is

1 that a sufficient connection?

2 MR. STEWART: I think we would -- I think
3 there could still be a sufficient connection even if his
4 reason for thinking the pondcrete failed, they all
5 turned out to be correct. And again, we would emphasize
6 that that's particularly so here because the reason for
7 the pondcrete failure was not an element of the claim.
8 I mean, imagine if this case had been tried to the jury
9 and there had been an established rule in place that if
10 the pondcrete was shown to have failed because of a
11 defect in the machinery, Stone would get a share, but if
12 it was shown to have failed because the human operator
13 added too little cement Stone wouldn't get a share. If
14 that had been the rule there would have been a clear
15 potential for disharmony between the Government and the
16 relator. It would have raised exactly the specter that
17 Justice Ginsburg alluded to, where the Government
18 prefers to emphasize one view of the facts rather than
19 another and the defendant is getting in the way by
20 suggesting that the relator will be deprived of a share.

21 JUSTICE SCALIA: Try this hypothetical. The
22 relator says: I know that they've been cheating the
23 Government because I, I observed the president of the
24 company going into a meeting with the chief engineer and
25 another person, and at that meeting I suspect they were

1 devising this scheme to defraud the Government.

2 It turns out there was indeed a scheme to
3 defraud the Government, but that meeting never occurred.
4 It wasn't the president of the company who went into the
5 meeting. It was Charlie Chaplin. And the facts are
6 totally, totally wrong. Does he get money?

7 MR. STEWART: Well, I think --

8 JUSTICE SCALIA: Does he get money just
9 because he came out with the same charge that the
10 Government ultimately proves? Simply because he said
11 the company is guilty of cheating the Government, even
12 though the facts on which he bases it are entirely
13 wrong?

14 MR. STEWART: I mean, I need to know more
15 about the hypothetical, but my initial reaction is
16 that's a complaint that's easily dismissed based on rule
17 11, leaving aside the question of any public disclosure.
18 And I can imagine extreme hypotheticals --

19 JUSTICE SCALIA: Well, assume one that just
20 gets over the line.

21 MR. STEWART: I think if the complaint just
22 gets over the line, that is if the evidence in the
23 relator's possession is just barely good enough to
24 sustain the allegation of fraud or at least to allow the
25 suit to go forward, there's no reason to read the public

1 disclosure --

2 JUSTICE SCALIA: It turns out to be entirely
3 wrong. Turns out to be entirely wrong, so that the only
4 reason he believed this company was defrauding the
5 Government was absolutely wrong.

6 MR. STEWART: I think we would still want to
7 compare the nature of the fraud that the Government
8 alleged with the nature of the fraud that the relator
9 alleged. And obviously this is a question in which the
10 Court is going to have to balance competing interests.
11 It's possible to come up with hypotheticals in which it
12 seems as though the relator has no equitable entitlement
13 to a share. The two things we want to emphasize are,
14 first, in terms of the way that the lawsuit progresses
15 even when the Government doesn't intervene, relators
16 once they file suit, if they are allowed to proceed on
17 their own, they presumably can take advantage of all of
18 the rules of civil procedure. And those include the
19 discovery provisions of the Federal Rules.

20 And it would obviously be self-defeating to
21 tell the relator: You can invoke discovery and you can
22 learn relevant information from the defendant, but if
23 you didn't know it already you can't use it at trial,
24 because if you use something that you didn't have direct
25 and independent knowledge of before the complaint was

1 filed and it turns out to be persuasive to the jury you
2 can be kicked for not being an original source.

3 I don't think Congress can be said to have
4 had that intention.

5 Second, in cases where the Government and
6 the relator intervenes -- where the Government
7 intervenes in the relator's suit and the two prosecute
8 the suit together, we would want the Court to avoid a
9 rule that would create artificial disincentives to
10 cooperation between the two plaintiffs. And the idea
11 that relatively minor variations in factual assertions
12 that are ultimately not necessary to the establishment
13 of False Claims Act liability, if those carried the day
14 then relators in future circumstances would have a
15 strong disincentive to accede to the Government's
16 request that one view of the evidence be emphasized
17 rather than another.

18 If the Court has nothing, no further
19 questions --

20 JUSTICE GINSBURG: Explain why it would be a
21 minor variation if what he has identified as a defect in
22 the pipe system and what turns out to be the --
23 situation that was covered up is the inadequate cement
24 that caused these blocks?

25 MR. STEWART: It's a minor variation in the

1 sense that it's not relevant to the defendant's ultimate
2 liability. That is, if we had proved that the pondcrete
3 leaked hazardous substances into the environment and
4 that Rockwell knew that it was having that effect and
5 that it nevertheless represented to the Government that
6 it was in compliance, that would be enough to establish
7 the knowing submission of a false claim even if we had
8 no idea what was the reason for the pondcrete failure.

9 And even if Rockwell had taken the most
10 Herculean measures to produce good pondcrete and had not
11 departed from standards of care in any respect, if
12 nevertheless they knew that the pondcrete was in fact
13 failing despite their best efforts and they represented
14 that it was succeeding, they would be liable under the
15 False Claims Act.

16 JUSTICE STEVENS: May I ask this question:
17 Supposing he is the only source of the information
18 that's publicly disclosed on which precipitated the
19 filing of the complaint, and after the complaint is
20 filed discovery reveals other violations of law on which
21 the Government prevails, but they do not prevail on the
22 theory of the original complaint. Would he be -- come
23 within the statute or without? The statute focuses on
24 the information that gave rise to the suit, not on
25 what's found by way of discovery.

1 MR. STEWART: I mean, my instinct would be
2 that probably he could still recover. I think the
3 question then would boil down to whether the discovery
4 responses are themselves public disclosures such that
5 they would trigger a new original source.

6 JUSTICE STEVENS: Assuming we only look at
7 the public information at the time the complaint is
8 filed.

9 MR. STEWART: I mean, probably that question
10 would raise no public disclosure issue to begin with,
11 because if there had been no -- at least if there had
12 been no public disclosure of the fraudulent conduct that
13 was revealed through discovery, there would be no need
14 for him to satisfy the original source test with respect
15 to those new allegations.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Stewart.

18 Ms. Mahoney, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY

20 ON BEHALF OF THE PETITIONER

21 MS. MAHONEY: I would like to first just
22 address, the Government's suggested that he could be an
23 original source because he had knowledge of false
24 representations and concealments derived throughout his
25 employment. I just want to emphasize that the Tenth

1 Circuit did not rely on that theory, said that he did
2 not have to have knowledge of any fraudulent acts. It
3 was just enough that he knew something that might be
4 relevant to the proof of an environmental violation.
5 And the reason that the Tenth Circuit said that was
6 because Stone had conceded in his deposition at pages
7 JA-106 and 112 that he did not know about any false
8 representations and he did not know whether DOE was
9 aware of any of the environmental problems.

10 JUSTICE SCALIA: What is your response to
11 the Government's assertion, which seems to me quite
12 true, that in order to -- in order to prevail it did not
13 have to show why these blocks were not solidified?

14 MS. MAHONEY: I think what --

15 JUSTICE SCALIA: It just had to show that
16 they weren't. So it doesn't matter whether they were
17 using his theory or too little cement. It doesn't
18 matter.

19 MS. MAHONEY: Your Honor, the point is that
20 Mr. Stone wasn't there when the manufacturing problems
21 occurred, so he didn't actually have direct knowledge
22 that pondcrete was leaking. That's the real point.
23 What they're really saying is that his theory about why
24 it might leak some day didn't turn out to be important
25 to the gravamen of the claim. This is a fraud claim.

1 He didn't know anything about fraud and he couldn't have
2 known they were leaking at the time, five years later
3 because he wasn't there.

4 And the statute requires direct knowledge.
5 The Government's suggestion that somehow rule 11 will be
6 the basis on which we can sort out who's an original
7 source and who's not strikes me as rather odd. First of
8 all, nothing hardly ever gets dismissed on rule 11
9 grounds. And this is a jurisdictional statute that
10 requires direct knowledge. A relator could read an
11 indictment and satisfy rule 11 just by copying the
12 allegations. Does that count?

13 I think that direct knowledge means there
14 can't be undue conjecture. The only thing that he said
15 he knew, even though it wasn't the gravamen of the
16 claim, was clearly based upon conjecture, a belief that
17 in his opinion this pipe would not work.

18 And then when we get to the trial, there
19 were 55 witnesses. Stone had not identified a single
20 one of them as a person with relevant knowledge at the
21 outset of the case when he answered his interrogatory
22 responses. In addition, every person -- no person he
23 identified testified at the case. He identified four
24 documents that he said were key. None of them were
25 introduced. He knew nothing about what went to trial.

1 In addition, I'd like to focus on the
2 "voluntarily provide". That is a separate ground for
3 reversal in this case, and would emphasize that the
4 Tenth Circuit said the engineering order that refers to
5 removal of sludge and says in my opinion this won't
6 work, that's all it says -- the Tenth Circuit says
7 that's fine. The district court made a factual finding
8 that Stone had not communicated his concerns to the
9 Government about pondcrete, saltcrete, or spray
10 irrigation, the three theories issues at issue at trial
11 here.

12 JUSTICE GINSBURG: There were other
13 documents. He said there were other documents and the
14 district court said sorry, you came up with that too
15 late, I'm not going to look at the other documents.

16 MS. MAHONEY: Your Honor, what they're
17 referring to is the affidavit, I think. He filed an
18 affidavit at the outset of the case when Rockwell filed
19 the motion to dismiss and then tried to do a new one 10
20 years later that was rejected.

21 Thank you very much.

22 CHIEF JUSTICE ROBERTS: Thank you
23 Ms. Mahoney.

24 The case is submitted.

25 (Whereupon, at 12:11 p.m., the case in the

1 above-entitled matter was submitted.)

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A				
abandoned 15:25	advantage 49:17	17:18,20	artificial 50:9	balance 49:10
able 46:7	advocate 38:11	alleged 17:24	aside 48:17	bar 15:16,16
above-entitled 1:12 56:1	affairs 41:3	37:12 44:20	asked 33:15	barely 48:23
absolutely 6:2 49:5	affect 17:2	49:8,9	asking 33:18	based 3:15 9:16
accede 50:15	affidavit 25:21	alleges 14:19	35:18 45:20	10:19 13:11
act 10:20,23	32:12,13,18	allow 14:10,18	assert 44:13	15:21 17:15
15:19,25 16:1	33:23 34:15	15:13 21:22	asserting 11:3	20:12,17,20
17:9 27:20	39:16 40:12	48:24	assertion 53:11	24:10 26:25
37:10 41:16,16	55:17,18	allowed 49:16	assertions 50:11	31:5 33:1,8
50:13 51:15	affidavits 32:14	allows 8:7 16:6	assignment 8:2	34:22 39:8
action 4:25 5:2,6	affirm 24:20	alluded 42:13	8:2	41:11 43:6
5:7,13,20,21	affirmatively 12:21	47:17	Assistant 1:20	45:21 48:16
5:21,23 6:1,5,6	agent 31:12	amended 37:17	assume 20:6	54:16
6:9,22,25 7:7	agents 33:23	amendment 4:9	35:5 48:19	bases 48:12
8:3,11,12,24	34:14	amendments 8:7	Assuming 52:6	basis 11:2,4
10:2,3,5 11:21	agree 31:24 32:4	amount 27:7	assured 37:5	13:15,19 14:10
21:2 24:9	33:2,7 39:5,9	28:7,20 29:3	attention 11:20	14:21 16:7,13
32:16 33:1,8	agreed 33:4	amounts 29:14	19:19	16:14 20:4
33:24 34:23,25	agreement 12:17	analysis 13:24	Attorney 4:16	21:13 25:15
44:4	agrees 33:20	analyzed 13:15	5:12 6:16,23	43:10,21 54:6
actions 5:11,11	34:5,8 38:9	anomalous 38:4	8:13	bears 10:19
5:12 6:15	aha 8:24	answered 54:21	attorneys 9:8,11	beg 25:20
activity 15:22	AL 1:4,7	antidiscrimin... 40:8 46:15	9:14,20	begun 17:22
acts 11:9 12:1	aligned 38:5	appeals 24:21	authority 4:16	beginning 10:22
16:14 53:2	ALITO 39:21	35:9,19	4:17 6:8,9 21:5	15:6 16:11
add 14:12 18:8	allegation 16:20	appear 38:4	authorize 4:24	26:7 29:6
added 46:5	16:24 19:11	APPEARAN... 1:15	6:7	32:19 36:24
47:13	30:12 36:18,19	appendix 25:22	authorizes 4:21	42:6
adding 6:21	46:21 48:24	25:24 26:9,18	5:14	behalf 1:17,18
18:25 19:6	allegations 3:14	30:1,24 32:11	avoid 50:8	1:22 2:4,7,10
23:9 25:18	8:8 10:19,21	32:19 42:5	award 3:12 4:24	2:13 3:8 4:17
27:8,12 46:13	11:3 12:9	applicable 17:13	5:14 6:7 9:16	4:18,21 6:10
addition 24:9	13:10,11 15:17	appropriate 34:19	awards 32:10	10:12 21:4,5
54:22 55:1	16:13 17:3	area 46:4	aware 12:20	24:17,25 37:25
additional 26:12	20:11,17,19	argue 7:21	41:6,20 43:12	52:20
28:23 32:14	24:10 27:15	43:17	53:9	belief 54:16
address 52:22	31:15,19 34:21	arguing 5:16	awareness 42:10	believe 34:8,18
adds 21:3	34:22,23 35:2	6:19	a.m 1:14 3:2	34:20 36:13
admission 17:25	35:3,5,12 36:4	argument 1:13		45:12
adopt 33:13	37:11 39:8,10	2:2,5,8,11 3:4	B	believed 43:11
35:18	39:11 41:11,23	3:7 4:13 9:25	b 4:20 5:1,14 6:6	49:4
adopted 35:19	43:6,19 45:3	24:16 37:24	6:7,18 8:11	believes 38:14
37:18	45:15,17 52:15	43:22 52:19	10:13 21:2	best 51:13
	54:12		back 14:9 16:15	better 32:4
	allege 13:1		31:19	beyond 40:18
			bad 22:3 25:16	billing 38:22
			25:16	billion 21:24

<p>bit 23:5 blocks 18:17 27:11,14 43:9 44:14 45:19 50:24 53:13 boil 52:3 bonuses 24:10 books 14:20 bring 4:16,18,21 6:9,9 8:14 20:8 24:24 bringing 5:7 6:1 36:6 brings 11:19 brought 4:4,5,8 4:10,25 5:2,11 5:12,13 6:5,16 6:17,23,24 7:7 7:8,12 8:20 10:12 19:20 21:1,1 24:8 buy 7:20</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c 2:1 3:1 5:19 10:4 call 13:15 14:8 19:18 called 13:23 care 51:11 careful 26:21 carried 50:13 case 3:11 10:22 10:22,25 14:23 14:25 15:2,5 15:12,14,17,23 15:24 16:11,16 22:18,22,23 23:12 25:3 26:7 27:19,20 35:14,20 36:21 37:10,11,14,15 38:3,6,12,15 40:10 41:17 47:8 54:21,23 55:3,18,24,25 cases 13:23 14:7</p>	<p>28:11 44:7 50:5 categories 34:2 cause 26:24 27:18 41:13 42:14 43:1 caused 26:11 50:24 causes 14:20 cement 18:9,17 19:1,3,6 23:9 23:25 25:18 26:12,17 27:7 27:12,13 28:4 28:6,10,23 29:2,3,12,14 29:21 42:14 46:23 47:13 50:23 53:17 central 30:12 certain 11:12,24 27:10 28:3 certainly 17:8 22:15,25 40:1 45:17 certification 14:1 certifications 11:6 17:21 certifying 17:12 change 20:16 31:4 Chaplin 48:5 characterize 42:16 charge 48:9 Charlie 48:5 cheating 47:22 48:11 chemical 11:12 27:1 chief 3:3,9 13:8 14:17 15:7 16:20,23 17:12 17:15 19:8,21 20:15 21:11,15 24:13,18 30:17</p>	<p>31:7,13,23 32:3,15 35:1,7 36:12 37:21 38:1 46:1,18 47:24 52:16 55:22 Circuit 3:11 10:17 13:2 20:14 30:23 32:5,6,9 33:17 53:1,5 55:4,6 circuits 35:8 Circuit's 35:20 circumstances 11:24 21:7 50:14 civil 44:4,5,9 49:18 claim 4:4,8,16 4:18,19,20,21 10:12,13 13:15 13:15,17,17,19 13:19,23,23,24 13:24 14:1,8 14:10,10 16:17 17:25 19:20 20:8,20,25 23:18 24:25 27:24,24 28:18 31:5 34:13 37:16,19 40:4 46:13 47:7 51:7 53:25,25 54:16 claimed 22:20 28:9 40:5 claims 15:21 16:7 17:9 21:4 27:20 36:6 39:24 41:16,16 42:5 50:13 51:15 Clean 37:9 clear 12:16 46:16 47:14 clearly 37:12 45:23 54:16</p>	<p>client 34:16 come 14:11 49:11 51:22 coming 29:22 commencement 34:23 36:15 37:13 commercial 15:21,21,24 16:1 committing 43:25 communicated 55:8 company 11:10 11:17 27:6 47:24 48:4,11 49:4 compare 49:7 competing 22:6 49:10 complaint 8:15 8:23 10:8 22:10 35:12,16 36:24 37:17 39:6,10,15 43:18 44:8,19 44:20 45:23 46:5 48:16,21 49:25 51:19,19 51:22 52:7 completely 14:3 14:5 22:22 39:23 46:19 compliance 12:17,22 14:2 17:13 39:19 40:7 41:22 44:24 45:22 46:14 51:6 complied 39:2 complies 44:9 comport 19:23 conceal 38:23 concealing 25:11 concealment</p>	<p>40:21 concealments 52:24 conceded 18:22 18:24 19:4 53:6 concedes 12:19 concerns 55:8 conclude 12:4 concluded 26:21 conclusion 7:13 39:17 concrete 36:19 conditions 39:2 conduct 5:21 12:3,7 25:10 25:13,14 52:12 Congress 36:7,7 36:9 37:7 38:19,25 50:3 conjecture 54:14,16 connected 45:14 45:16 46:2,10 connection 47:1 47:3 consequences 8:21 consider 32:7 considered 13:14 considering 7:3 consistent 43:18 consistently 5:15 6:11 44:22 constant 29:22 contained 27:3 34:6 containers 11:15 18:9 content 29:2,22 42:14 continued 41:21 continuing 12:4 controls 9:16 convicted 27:6</p>
---	---	---	--	---

<p>conviction 27:17 cooperate 22:3 cooperation 50:10 copies 10:7 copy 8:22 14:11 copying 54:11 core 3:16 12:1 16:14 CORP 1:3 Corporation 3:5 correct 4:12 5:24 8:5,16 18:15,19 19:4 24:6 28:21 29:10 31:17 32:17 47:5 correctly 3:11 10:17 21:6 counsel 31:20 counsels 18:24 count 46:5 54:12 counts 41:17 County 6:12 couple 24:1 42:12 course 7:17 18:5 37:17 court 1:1,13 3:10 6:12 9:4 13:13 14:12 16:2,16 24:19 24:20,21 26:8 33:12 34:19 35:9,18,19 36:14 37:12 38:2,10 42:3,4 49:10 50:8,18 55:7,14 courts 4:3,7 7:22 8:9 14:6 21:8 33:4 46:17 covered 23:21 24:7 39:13 50:23 create 50:9</p>	<p>created 37:7 creating 27:11 credit 19:16 criminal 25:10 25:13,14 27:17 27:19 33:11 cure 7:23 cured 8:6 cutting 27:7</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d 3:1 4:24 5:3,15 6:3 9:12,19 20:22 damages 14:4 38:12 day 50:13 53:24 dealing 6:13 December 1:10 decide 38:25 decided 35:9 44:4 decides 36:18 decision 6:13 24:20 deem 4:7 defeat 7:13 defect 39:21,24 47:11 50:21 defective 8:8 18:2 25:25 27:14 defects 7:23 defendant 47:19 49:22 defendant's 51:1 definitely 24:7 definition 3:16 defraud 11:11 17:11 48:1,3 defrauding 49:4 demonstrated 23:2 departed 51:11 Department 1:21</p>	<p>departure 13:1 depends 5:4 deposition 12:19 53:6 deprived 47:20 derived 52:24 described 6:14 11:4 25:25 28:8 30:10 34:13 describes 32:18 design 13:3,5,7 16:21 17:16 18:12 19:11,15 25:25 31:1,5,5 designed 44:7 despite 51:13 detail 30:11 deteriorate 26:24 deterioration 26:6 determine 24:24 determined 14:23,25 15:1 15:3 27:18 34:25 36:14 determines 25:1 devising 48:1 differ 25:21 difference 35:14 different 6:1 14:3,3,5,21 20:3 29:13,14 31:5 37:14 39:22,23 40:4 40:9 44:6 differentiates 5:10 differently 32:4 direct 10:18 11:8 20:9,10 20:13,16 26:8 30:21 31:14,18 34:20 35:4,15 35:21 39:7 41:10 42:21</p>	<p>43:4,5,14 44:16 49:24 53:21 54:4,10 54:13 disagree 45:8 disclosed 33:9 33:24 34:1 51:18 disclosure 20:5 20:6,7,10 21:25 23:18,20 24:1,3 25:22 25:24 33:1,5,8 33:14,16,20 34:2 35:2,3,17 35:20 43:16,23 44:6 48:17 49:1 52:10,12 disclosures 24:9 52:4 discovery 20:3 49:19,21 51:20 51:25 52:3,13 discussion 31:20 disguise 16:7 disharmony 47:15 disincentive 50:15 disincentives 50:9 dismiss 10:5 36:25 55:19 dismissed 16:18 48:16 54:8 dismissing 16:17 dispute 39:23 disqualifies 22:15 district 55:7,14 dividing 46:16 document 30:24 32:7,9 documents 28:3 32:10 54:24 55:13,13,15</p>	<p>DOE 12:16 53:8 doing 17:19 43:21 44:25 dollar 21:24 dollars 14:13 domain 44:11 draw 46:17 dropped 22:22 23:1 drops 4:6 7:6 8:11 D.C 1:9,16,21</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>e 1:16 2:1,3,12 3:1,1,7 6:20 36:5,8 52:19 earlier 29:19 45:10 easier 36:23 easily 48:16 easy 29:24 effect 8:6 51:4 efforts 51:13 either 16:24 elects 5:19 element 47:7 emphasis 10:19 emphasize 47:5 47:18 49:13 52:25 55:3 emphasized 50:16 employees 23:24 employment 52:25 encompassed 45:24 encourage 38:19 42:3 endangered 38:16 engaged 39:17 44:21 engineer 47:24 engineering 30:11 40:16</p>
--	---	--	--	---

55:4 enter 12:17 entire 35:24 38:6 entirely 39:22 44:7 48:12 49:2,3 entitled 9:14,17 9:18,20 14:14 19:25 20:23,24 21:7 45:6 entitlement 49:12 environment 26:6,25 41:19 45:20 51:3 environmental 12:22 34:10 38:21 39:18 40:22 41:22 43:25 44:21 53:4,9 EPA 32:19 equipment 23:7 equitable 49:12 equivalent 5:6 erred 16:16 error 19:14 ESQ 1:16,18,20 2:3,6,9,12 essentially 41:2 establish 18:2 51:6 established 47:9 establishment 50:12 ET 1:4,7 evaluations 24:11 evaporation 27:3 events 13:6 42:6 42:21 eventually 13:11 20:1,18,18 everybody 34:5 evidence 23:5	28:2,4 29:7,25 30:5 36:2,4,8 36:10 40:11,14 48:22 50:16 evidentiary 43:21 eviscerate 35:23 exactly 47:16 examine 14:20 45:23 examined 36:22 example 15:19 40:8 exception 12:20 Excuse 21:13 expansive 7:8 explain 13:16,16 50:20 explained 39:16 extent 40:23 extreme 7:20 48:18	51:13 failure 42:14,22 43:1 44:15 47:7 51:8 failures 42:9 fairly 39:11 false 11:6 14:1,4 17:9 27:20 34:13,14 35:23 39:24 41:16,16 50:13 51:7,15 52:23 53:7 falsified 24:11 falsity 13:18,20 13:22,24 far 42:8 FBI 31:11 32:18 33:22 40:23 FCA 14:7 features 38:3 Federal 37:8,15 37:16 44:3,5,9 49:19 fee 32:10 fees 9:8,11,14,16 9:20 ferret 19:9 file 8:14,22 14:12 44:8 49:16 filed 15:23 45:11 50:1 51:20 52:8 55:17,18 files 10:7 11:21 40:3 filing 32:16 33:24 39:14 51:19 finally 37:1 find 3:14 16:25 21:20 33:19 finding 55:7 finds 19:13 fine 18:17 19:3,5 22:6 23:8,8 55:7 first 13:16 22:7	26:14 27:17 32:25 36:3 38:18 49:14 52:21 54:7 firsthand 25:9 38:20 fit 34:1 five 13:4,6 14:3 14:13 22:21 54:2 fix 18:8 31:4 Flats 23:23 27:1 27:4 focus 40:16 41:12 42:9 55:1 focused 44:19 focuses 51:23 follow 28:16 followed 28:11 29:5,6,12 following 11:17 33:6 Foreign 15:18 foreman 26:14 29:20 forever 10:9 formula 11:18 28:14,16 29:6 forward 23:9 48:25 found 46:6 51:25 four 54:23 frames 39:6 fraud 11:13 12:25 14:19,21 17:5 19:10 22:1 31:3 43:4 46:6 48:24 49:7,8 53:25 54:1 fraudulent 12:1 12:3,7 13:25 40:6,9 52:12 53:2 Freibach 26:14	29:19 30:9 fresh 8:15 Fryback's 26:9 full 11:15 fully 25:4,6 fundamentally 40:9 funds 45:21 further 40:24 50:18 future 50:14
G				
G 3:1 gears 16:9 general 1:21 4:16 5:12 6:16 6:23 8:14 33:16 generalized 39:11 45:25 generally 40:22 44:20 getting 45:9 46:2 47:19 Ginsburg 8:13 22:2 36:16 47:17 50:20 55:12 give 9:3,6 13:12 given 3:12 38:13 45:14 gives 20:24 giving 45:5 global 21:13 go 22:8 31:19 38:6 44:2 48:25 goes 8:1 going 16:21 18:7 19:11,12 26:4 26:5 31:4,4 46:8,9,22 47:24 49:10 55:15 good 22:9,11,25 27:5,11 48:23				

51:10	happened 12:7 19:7 22:19 43:19	ideally 22:4	information 10:18 13:10 16:8 20:11,16 23:1 25:11 30:19 31:9,14 31:15,25 32:5 32:8,16 33:1,9 34:17,21 35:12 35:15,16 36:8 36:9 38:23 39:8,20 40:21 41:10 43:6 44:8,10,11,13 49:22 51:17,24 52:7	49:15
Government 3:20 5:5,19,22 5:23 6:1,4,8 8:23 10:8 11:11,20 14:15 14:20 19:2,10 19:12,25 20:3 20:21 21:3,23 22:4,5,12 24:5 24:21,25 25:3 25:15 27:22,23 30:20,22,25 31:3,10 32:1 32:11,13 36:18 37:18 38:4,8 38:14,15,23 39:20 40:2,4 40:11 41:18,24 42:18 44:23 45:3,5,9,11,13 45:21 46:4,13 47:15,17,23 48:1,3,10,11 49:5,7,15 50:5 50:6 51:5,21 55:9	hard 12:13,14 hazardous 41:19 45:19 51:3 health 12:23 44:22 hear 3:3 held 3:12 10:17 36:14 37:12 Herculean 51:10 hide 16:7 higher 36:25 highest 37:2 highlights 23:2 hit 32:25 honest 31:9 Honor 3:22 4:14 4:23 5:9,16 7:17 8:16 9:5 9:11 11:23 12:6 13:13 14:24 15:10 16:19,22 17:4 17:23 18:20 19:17 21:8 23:4,16 24:7 28:1 29:18 30:11,14 31:17 32:2,17 34:8 53:19 55:16	identified 16:14 18:13 21:9,15 21:19 39:22 50:21 54:19,23 54:23 identifies 11:2 identify 16:11 imagine 47:8 48:18 Immunities 15:19 implausible 10:1 implicated 38:15 important 24:22 26:2,13 27:16 33:6,11 35:5 35:17 44:18 53:24 improper 11:18 inadequate 42:14 50:23 inappropriate 36:17 include 49:18 inconsistency 29:22 inconsistent 23:6 independent 10:18 11:8 30:21 31:15,18 34:20 35:4,15 35:21 39:7 41:10 43:4,5 43:15 49:25 indictment 8:22 10:7 14:11 54:11 individuals 29:13 infer 12:2 inference 43:24 44:3 inferred 44:1	insolid 27:21,24 29:9,17 insolidity 27:19 27:25 41:13 inspection 26:12 instable 29:9 instance 6:4 14:2 15:20 16:12 40:4 instinct 52:1 intended 24:24 38:19 42:8 intention 50:4 interest 38:11 interests 25:5,5 38:15 49:10 International 1:3 3:4 interpretation 3:23 interrogatories 11:1 15:6 46:20 interrogatory 16:12 54:21 intervene 14:15 21:23 46:6	interven 8:25 40:5 intervenes 5:22 6:25 8:23 10:8 21:3 40:2 45:3 50:6,7 intervention 7:23 introduce 40:12 40:15 introduced 30:1 30:6 54:25 investigates 19:13 investigation 33:11 40:23 invoke 49:21 involves 15:24 involving 37:1 irrelevant 39:4 irrigation 55:10 isolated 42:15 issue 8:1 9:15,18 9:24 10:16 13:6 15:17 26:10 27:19,20 35:8,8 36:1 52:10 55:10 issues 55:10
Government's 5:7 7:16,23 9:25 22:8 25:2 28:17 38:11 41:14 45:2 50:15 52:22 53:11 54:5	huge 29:1 human 19:14 47:12 hypothesis 41:25 hypothetical 12:2,24 19:22 45:10 46:12 47:21 48:15 hypotheticals 48:18 49:11	inappropriate 36:17 include 49:18 inconsistency 29:22 inconsistent 23:6 independent 10:18 11:8 30:21 31:15,18 34:20 35:4,15 35:21 39:7 41:10 43:4,5 43:15 49:25 indictment 8:22 10:7 14:11 54:11 individuals 29:13 infer 12:2 inference 43:24 44:3 inferred 44:1	insolid 27:21,24 29:9,17 insolidity 27:19 27:25 41:13 inspection 26:12 instable 29:9 instance 6:4 14:2 15:20 16:12 40:4 instinct 52:1 intended 24:24 38:19 42:8 intention 50:4 interest 38:11 interests 25:5,5 38:15 49:10 International 1:3 3:4 interpretation 3:23 interrogatories 11:1 15:6 46:20 interrogatory 16:12 54:21 intervene 14:15 21:23 46:6	issues 55:10
<hr/> H <hr/> hammer 14:13 handled 4:3	<hr/> I <hr/> idea 50:10 51:8			<hr/> J <hr/> JA 24:11 31:25 JA-106 12:24 53:7 JA-189 11:1 JA-463 42:6 job 10:24 11:7 joint 25:22,23 26:9,18 30:1 30:24 32:11,19 42:5 judiciary 36:7 June 34:11 jurisdiction 3:25 4:4 6:22 9:1,18 10:11

<p>15:14,20 16:3 36:14,21 37:4 37:17,18 jurisdictional 8:8 9:22 14:22 15:15,16 31:21 34:24 36:1 37:7,8 54:9 jury 3:13 18:24 19:2 20:24 22:7 23:7 25:19 30:6,8,9 30:13 42:18 46:21,24 47:8 50:1 jury's 27:18 Justice 1:21 3:3 3:9,17,24 4:10 4:13 5:4,18,25 7:2,19 8:13 9:3 9:7 11:10 13:8 13:20 14:17 15:7 16:20,23 17:12,15 18:15 18:21 19:8,21 20:15 21:11,15 21:20 22:2 23:14,17 24:3 24:13,18 25:10 25:12,20 26:19 27:10,16,23 28:5,22 29:5 29:11,16,19,24 30:5,12,15,17 31:7,13,23 32:3,15,21,23 32:24 33:3,7 33:15,18,25 34:5,16 35:1,7 36:13,16,20 37:6,21 38:1 38:24 39:21 40:10,17,25 41:4,8 42:20 42:25 43:7,13 44:12 45:1,12 46:1,18 47:17</p>	<p>47:21 48:8,19 49:2 50:20 51:16 52:6,16 53:10,15 55:12 55:22</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kennedy 11:10 25:10 key 11:24 20:13 54:24 kicked 50:2 kind 12:6 28:9 39:3 46:23 kinds 5:11 6:15 knew 12:3 17:19 18:11 21:25,25 22:20,23 25:15 42:2 44:24 51:4,12 53:3 54:15,25 know 7:19 8:1 12:7,25 14:12 17:10 18:11 21:22 22:14,20 31:3 43:8 46:8 47:22 48:14 49:23 53:7,8 54:1 knowing 11:4 51:7 knowledge 10:18 11:8 12:1 20:9,11 20:13,16 25:8 27:1 30:21 31:18 34:20 35:4,14,21 38:21 39:7 41:10 42:21 43:4,5,14,14 44:16,17 49:25 52:23 53:2,21 54:4,10,13,20 known 54:2 knows 11:15 14:11</p>	<hr/> <p style="text-align: center;">L</p> <hr/> <p>L 1:20 2:9 37:24 laid 39:1 language 5:5,9 6:3 36:10 late 55:15 Laughter 21:17 law 35:20 51:20 laws 14:2 17:13 39:18 40:8 41:22 46:15 lawsuit 19:13 49:14 lead 26:5 leak 18:7 53:24 leaked 41:19 51:3 leaking 18:5 23:23 45:19 53:22 54:2 learn 49:22 leave 38:25 leaving 48:17 led 39:16,24 left 10:24,24 11:7 12:8,18 16:15,25 19:7 42:22 43:20 44:2 legislation 19:9 lengthy 39:15 let's 14:2 20:6 27:13 40:10 46:20 level 33:13 liability 41:15 42:17 45:18,22 50:13 51:2 liable 51:14 lie 46:8,9 limitations 6:13 line 46:16,16 48:20,22 linkage 35:6 liquid 26:5 27:2 28:7,13,15,20 28:24 29:1,8</p>	<p>30:8 litigated 14:7 litigation 22:9 little 22:1,19 28:4,6 47:13 53:17 logical 7:12 logically 45:24 long 4:11 7:4,5,5 19:5 longer 43:20 look 4:23 5:9 6:2 6:3,20 10:25 14:18 16:10,15 24:23 26:20,20 37:12 45:17,22 46:3 52:6 55:15 looked 21:10 looking 15:13 36:9 lose 8:18 loss 37:16 lot 31:1 lying 27:21 46:4</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>machinery 47:11 Mahoney 1:16 2:3,12 3:6,7,9 3:17,22 4:2,12 4:14 5:8,24 6:2 7:17,21 8:16 9:5,10 11:23 13:13,22 14:24 15:10 16:22 17:4,14,17 18:19,23 19:17 20:2,19 21:13 21:18,21 22:13 23:16,19 24:6 24:14 52:18,19 52:21 53:14,19 55:16,23 maintained 36:21</p>	<p>major 8:24 making 13:3,4 18:25 19:3,14 23:8 28:19 43:10 MALCOLM 1:20 2:9 37:24 malfunction 43:12 manager 27:12 manner 25:14 26:4 manufacturing 53:20 March 11:7 MARIA 1:18 2:6 24:16 matter 1:12 10:23 46:19 53:16,18 56:1 MAUREEN 1:16 2:3,12 3:7 52:19 mean 10:11 13:17,17,21 16:24 18:7 19:10 22:10 27:5 31:2 37:4 40:1 42:7,22 46:1 47:8 48:14 52:1,9 means 7:9 15:11 26:22 54:13 measure 23:11 measured 10:21 measures 51:10 meeting 47:24 47:25 48:3,5 meetings 32:13 32:18 members 36:6,7 mentioned 34:2 mere 18:1,6 20:2 met 31:11 metal 18:9 method 11:18</p>
---	---	--	---	---

<p>minimum 14:15 21:23 minor 22:14 50:11,21,25 minutes 52:18 misconception 42:17 misinterpreta... 3:15 misrepresenta... 45:21 misrepresented 40:7 46:14 misrepresenting 39:19 44:23 misunderstan... 41:15 mix 11:12 mixture 26:23 money 3:20 9:4 9:6 10:3 11:12 38:12 39:4 45:5,9,14 48:6 48:8 motion 8:15 15:23 36:25 55:19 moving 14:9 myriad 18:10</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 natural 38:10 nature 15:15,17 39:19 49:7,8 necessarily 22:3 22:10 necessary 15:11 41:24 50:12 need 9:21 28:23 48:14 52:13 needed 29:20 30:16 neither 3:20 27:17 34:14 41:8 Nevada 12:15</p>	<p>never 22:24 31:11 48:3 nevertheless 41:9,21 45:20 51:5,12 new 1:18 27:12 52:5,15 55:19 news 34:3,6,9,10 34:12 newspapers 24:4,7 33:9,10 33:21,22 34:1 nice 38:24 nongovernment 7:6 noted 26:25 notion 7:4,8,11 N.Y 1:18</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 observed 47:23 obviously 49:9 49:20 occur 41:3 occurred 10:23 16:15 42:21,23 43:23 48:3 53:21 occurring 23:24 odd 54:7 offer 41:24 offered 46:12 official 24:4 once 10:1 22:25 22:25 23:1 49:16 open 43:17 operator 47:12 opinion 54:17 55:5 oral 1:12 2:2,5,8 3:7 24:16 37:24 order 6:7 10:20 15:5 41:5 53:12,12 55:4</p>	<p>ordered 20:18 original 3:13,15 3:19 4:5 6:24 7:5,14 9:2,23 10:14 20:25 22:10,16,17 23:3,12 24:22 24:23 33:4 34:17 35:24 39:6 43:18 44:18,20 45:23 50:2 51:22 52:5,14,23 54:6 ought 39:1,4 outcome 15:11 outdoor 11:5 23:23 outset 10:25 15:2,22 16:17 22:18 23:11 34:25 54:21 55:18 overcharge 14:13 overlaps 44:10 owning 18:4</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 pads 11:5 23:23 34:11,13 page 2:2 30:24 31:25 pages 42:5,13 53:6 paid 9:13 24:10 paradigm 25:8 paragraphs 42:12 parasitic 25:8 part 8:1 40:13 45:2 participate 10:5 particular 14:19 15:15 28:15 29:11 35:23</p>	<p>particularly 47:6 party 7:5 38:13 pattern 11:22 25:9,10,11 40:21 patterns 11:18 14:4 pay 9:8,11 10:3 46:7 payment 40:6 penalized 22:9 people 28:3 percent 14:16 21:24 perfect 8:20 15:19 perfectly 18:17 27:11 performance 24:10 period 18:17 27:10 permissible 43:24 44:3 person 5:20 6:5 39:3 47:25 54:20,22,22 persuade 42:18 persuasive 50:1 pertaining 12:8 PETITIONER 52:20 Petitioners 1:5 1:17 2:4,13 3:8 26:15 Petitioner's 31:20 phrase 6:21 32:4 picky-picky 7:3 7:11 pie 45:6 piece 22:1 23:1 45:6 pieces 23:21 28:1 pipe 17:7 18:2,7</p>	<p>18:16,16 22:21 25:16,17 40:13 43:1 50:22 54:17 pipng 26:22 30:7 place 11:13,14 47:9 placed 30:13 plain 36:10 plaintiff 7:6,14 15:22 37:15 43:24 44:3 plaintiffs 50:10 plaintiff's 42:4 plan 11:11 17:11 18:12 plant 10:24 11:5 12:13 16:15 43:20 pleading 18:4 pleadings 4:9 please 3:10 24:19 38:2 pled 8:10 plenty 12:3,4 point 4:7 20:10 35:25 53:19,22 pointed 36:13 36:16 points 27:17 pond 26:1 pondcrete 3:13 10:21 11:2,5 12:8,10,13,14 12:25 13:3,4,9 16:13 17:10,16 17:19,21,23,24 19:12 23:8,22 27:20,21 29:9 29:14,17 34:11 34:13 39:12 41:13,18,20,25 42:1,9,10,19 44:19 45:19 46:9 47:4,7,10 51:2,8,10,12</p>
--	--	--	---	---

<p>53:22 55:9 pondcrete's 46:22 ponds 13:5 26:4 27:3 29:23 portion 16:17 position 21:6 35:10,10,11,11 36:1 38:5,7,16 posits 15:23 possession 48:23 possibility 15:13 possible 3:23,25 42:20 49:11 possibly 11:8 potential 47:15 pounds 26:17 29:21 practice 11:22 22:9 39:18 practices 38:21 38:22 pragmatic 8:17 precipitated 51:18 precise 33:15 precisely 28:25 38:18 predicate 11:9 15:24 predicated 15:20 predicted 13:7 41:3 43:1 prediction 22:20 43:11,13,14 44:13 predominant 42:9 prefer 22:5 preferred 22:12 prefers 47:18 premise 45:8 prerequisite 14:23 present 27:2,2 39:14</p>	<p>president 47:23 48:4 pressed 23:7 presumably 49:17 prevail 15:5 51:21 53:12 prevailed 23:18 38:17 45:18 prevails 51:21 prior 13:1 33:24 private 7:14 38:13 probably 32:22 52:2,9 problem 9:1 13:7 18:6,13 20:4,7 22:21 problems 17:20 17:24 18:12 53:9,20 procedure 8:6 44:5,10 49:18 proceed 5:20 6:18 14:14 49:16 proceeded 25:15 proceeding 5:23 24:5 proceeds 5:3,6 6:4,25 9:14 20:23,25 process 26:22 30:10 43:11 processes 27:1 produce 51:10 produced 18:18 40:12 producing 12:13 17:22 27:14 production 17:21 progresses 49:14 prompted 19:13 prong 31:8 proof 53:4</p>	<p>proper 11:20 prosecute 50:7 prove 10:20 30:16 41:5,18 42:1,8 proved 22:11 41:2 51:2 proves 48:10 provide 30:22 32:16 55:2 provided 30:19 30:25 32:1,10 40:18,20 41:1 41:5 provides 31:8,14 proving 41:23 provision 24:24 25:1 31:21 33:5 34:4,24 36:5,5,8 37:7,9 44:6 provisions 4:24 12:23 49:19 public 16:8 20:5 20:6,7,9 21:24 23:17,19,20 24:3 33:1,5,8 33:14,16,20 34:2 35:2,3,16 35:20 43:16,22 44:5,11 48:17 48:25 52:4,7 52:10,12 publicly 33:23 33:25 51:18 published 34:17 43:8 purpose 19:8,9 24:23 44:6 purposes 33:4 41:16,23 46:17 put 7:10 18:9 22:6 46:11 puts 11:13,13 putting 46:22 p.m 55:25</p>	<p style="text-align: center;">Q</p> <p>question 3:18 11:24 13:14 23:15 29:25 31:22,24 32:22 33:6,16 37:8 37:15 41:12 43:23 44:2,4 48:17 49:9 51:16 52:3,9 questions 50:19 quick 23:14 35:18 quite 53:11 quits 11:16 quote 12:21</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 radioactive 27:4 raise 52:10 raised 47:16 range 10:4 39:13 ratio 19:3 23:25 28:10,11 29:11 RCRA 11:6 12:16,17 17:7 18:3 reach 7:13 reaction 48:15 read 10:6,9 16:6 29:25 42:3 48:25 54:10 reads 3:21 42:4 real 11:13 53:22 really 5:4,16 6:19 8:10 9:8 13:17 14:6,7 33:18 39:4 41:15 53:23 reason 12:4,12 13:16 15:12 19:1 23:24 27:25 28:5,6,9 28:22 38:13 44:14,15 45:4</p>	<p>45:13 46:25,25 47:4,6 48:25 49:4 51:8 53:5 reasonable 12:2 reasons 36:2 45:8 REBUTTAL 2:11 52:19 receives 20:1 recognize 44:18 recognizes 24:21 recover 8:4 10:20 11:21 14:21 46:7 52:2 recovery 7:16 7:16 13:12 19:25 20:4,18 21:24 25:1,3 38:6,7 39:25 45:2 reduced 19:3 23:25 refer 34:22 39:12 references 42:15 referred 35:2 referring 55:17 refers 39:10 55:4 refine 36:18 reflects 41:15 regard 41:14 regarded 40:3 regarding 36:6 regardless 43:22 rejected 55:20 relationship 28:15 relatively 50:11 relator 4:5,6,19 4:21,25 5:2,13 5:14 6:10,17 6:19,24 7:24 7:24 8:11,22 9:13 10:1,6,13</p>
--	--	---	--	--

11:15,16 14:10 14:19 20:22,24 21:4,5,6,22 22:3,6,9,15,23 25:2,4,8 31:8 37:15 38:8,19 41:9 44:8 47:16,20,22 49:8,12,21 50:6 54:10 relators 16:6 45:1 49:15 50:14 relator's 37:19 48:23 50:7 release 26:24 relevance 16:8 relevant 49:22 51:1 53:4 54:20 relied 30:23 32:5 rely 26:15 32:7 53:1 remainder 23:13 remaining 52:18 remedy 18:12 removal 55:5 removing 13:5 report 40:16 reports 34:3,6,9 34:10,12 43:8 represent 41:21 representations 52:24 53:8 represented 12:22 51:5,13 request 50:16 requests 40:6 require 8:9 33:13 43:4 required 26:12 26:16 29:2,3 30:15 requirement 34:21	requirements 3:16 requires 4:25 30:20 31:8 43:5 54:4,10 respect 7:24 17:19,21,24 32:8 51:11 52:14 Respondent 1:19,22 2:7,10 24:17 37:25 response 43:17 53:10 responses 11:1 16:12 52:4 54:22 responsible 40:23 rested 13:2 result 26:23 32:8 resulted 29:9 retroactive 4:9 return 45:10 revealed 52:13 reveals 51:20 reversal 55:3 reviewed 13:3 rewarded 39:1 right 5:21,23 8:4 19:15 25:16 33:2,9 40:13 43:7 45:15 rights 10:4 rings 11:19 rise 13:12 51:24 ROBERTS 3:3 13:8 14:17 15:7 16:20,23 17:12,15 19:8 19:21 20:15 21:11,15 24:13 30:17 31:13,23 32:3,15 35:1 37:21 46:1,18 52:16 55:22	Rockwell 1:3 3:4 7:18 12:13 12:21 17:6 23:8 25:9,11 33:12 34:7 35:17 39:9,17 40:6 41:20,21 42:2,7,22 43:17,21 44:21 45:20 46:3,13 51:4,9 55:18 Rockwell's 11:4 35:10,10,11 36:1 38:5,16 38:21 40:5 42:10 Rocky 23:22 27:1,4 round 32:25 route 22:12 rule 8:17,17 9:22,22 35:24 36:17 43:19 47:9,14 48:16 50:9 54:5,8,11 rules 44:5,9 49:18,19 ruling 32:8 <hr/> S S 2:1 3:1 safety 12:23 44:21 saltcrete 55:9 satisfied 25:6 31:16 37:18 satisfy 16:2 31:6 52:14 54:11 save 11:12 23:13 saw 43:24 saying 6:14,21 7:10 53:23 says 3:25 4:3 5:18 6:4 9:13 13:10 20:5,21 22:5 26:21 31:1 34:3 35:4	46:3,20,24 47:22 55:5,6,6 Scalia 3:17,24 4:10,13 5:4,18 5:25 7:2,19 9:3 9:7 13:20 18:15,21 21:20 25:12,20 26:19 27:10,16,23 29:24 30:5,12 30:15 36:20 37:6 38:24 40:10,17,25 41:4,8 42:20 42:25 43:7,13 44:12 45:1,12 47:21 48:8,19 49:2 53:10,15 scheme 40:9 48:1,2 scope 33:19 search 33:23 34:14 second 4:19 50:5 section 4:15,20 4:20,24 5:1,14 5:15 6:3,5,14 6:23 8:7,11,12 8:19 9:12,19 10:11,13 20:22 21:2 sections 5:10 see 10:25 17:2 seeking 33:19 seeks 33:12 self-defeating 49:20 selling 17:9 sense 8:21 10:6 10:9,14 21:10 46:2 51:1 separate 22:1 55:2 serves 44:6 share 3:12 9:12 9:13,17,19,24 19:25 20:23,24	21:7,22 25:2 38:12 47:11,13 47:20 49:13 shared 38:8 shift 16:8 shipping 12:15 show 15:4,7 18:3 53:13,15 shown 47:10,12 Similarly 4:23 simply 8:22 16:7 28:9,14,16 48:10 single 10:23 34:12 54:19 site 12:14 18:5 situation 4:1 14:19,22 19:22 19:24 40:2 50:23 six 25:9 sludge 13:5 26:1 26:3,11,16,22 27:2 28:8,10 28:13,15,20,23 29:2,8,12,22 30:8 55:5 small 22:23 solely 30:23 Solicitor 1:20 solidified 53:13 somebody 38:20 38:22 somewhat 36:25 sorry 25:23 42:7 55:14 sort 4:8 54:6 source 3:13,15 3:19 4:5 6:24 7:15 9:2,23 10:14 21:1 22:16,17 23:3 23:12 24:22,24 30:6 33:4 34:17 35:24 50:2 51:17 52:5,14,23
---	---	--	--	---

<p>54:7 Souter 28:5,22 29:5,11,16,19 Sovereign 15:18 speak 36:4 speaks 36:3 special 46:20 specific 35:22 specifically 26:2 26:3 39:12 44:19 specificity 33:14 specter 47:16 spill 34:11,12 split 35:8 spray 55:9 standard 11:25 20:12 28:10,11 28:14,16 33:12 36:23,25 37:2 standards 51:11 standing 7:25 8:3 36:22,22 37:1 start 12:9 started 27:14 29:17 starts 17:25 state 36:15 41:3 statement 25:22 25:24 34:14 42:4 statements 35:23 States 1:1,7,13 1:22 2:10 3:5 4:6,8,11,17,18 4:22 5:3,11 6:18,25 7:7,9 7:12 8:20 9:15 10:2,12 17:10 17:11 24:25 25:6 37:25 38:7 42:8 statute 3:21,23 6:11,13 8:19 9:16 10:6,10</p>	<p>10:15 13:9 16:5 17:5,5 19:17 20:5 21:9 24:23 25:5 30:20 31:6,16,21 32:25 34:4 36:3,11 37:9 37:10,11 39:2 39:6 43:3 51:23,23 54:4 54:9 statutory 3:16 4:15 Stevens 8:1 23:14,17 24:3 32:21,23,24 33:3,7,15,18 33:25 34:5,16 51:16 52:6 Stewart 1:20 2:9 29:18 37:23,24 38:1 39:5 40:1 40:15,20 41:2 41:6,9 42:24 43:3,10,15 44:17 45:7,16 46:11 47:2 48:7,14,21 49:6 50:25 52:1,9,17 Stone 1:19 2:7 3:12 9:16 10:17 24:17,22 25:7,21 28:25 30:3 31:10,18 32:10 38:5,9 38:18,20,22 39:7,9,15 40:11 42:7 43:18 47:11,13 53:6,20 54:19 55:8 Stone's 9:25 32:12 33:24 34:22 35:14,21 38:7 39:5</p>	<p>45:23 stopped 23:9 storage 11:4 stored 23:22 stories 23:21 storing 12:14 18:4 strikes 54:7 strong 50:15 stuck 8:25 study 26:21 stupid 32:22 subject 12:16 submission 51:7 submit 25:4 30:14 31:9 35:13 submitted 39:15 55:24 56:1 suboptimal 17:7 subsection 6:5,7 6:8,16,17,20 10:4 subsequently 39:15 substances 27:4 41:19 45:19 51:3 substantial 11:25 20:12 38:20 40:20 substantially 40:3 44:10 substantive 9:22 succeeding 51:14 sudden 7:6 sufficient 41:17 42:1 44:8,12 47:1,3 sufficiently 46:10 suggested 26:22 45:10 52:22 suggesting 19:22 47:20 suggestion 54:5</p>	<p>suggests 5:22 suit 11:21 40:3,5 48:25 49:16 50:7,8 51:24 summarizes 42:6 supports 25:4 suppose 11:10 15:22 Supposing 51:17 supposition 42:13 Supreme 1:1,13 sure 34:7 Surely 16:2 surrender 22:7 suspect 47:25 sustain 48:24 swallow 7:4 system 18:17 19:5 25:17,25 50:22 systematic 39:17 43:25 systemic 38:14</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 1:18 2:1,1,6 24:16 take 7:11 40:10 49:17 taken 28:7 51:9 takes 21:6 talk 19:23 talking 37:8 talks 5:15 15:19 35:3 tax 46:6 taxes 46:7,9 technically 8:9 tell 34:8 49:21 Tenth 3:11 10:17 13:2 20:13 30:23 32:5,6,9 33:17 35:19 52:25</p>	<p>53:5 55:4,6 tenure 17:22 26:15 term 8:19 terminated 17:1 terms 4:15 6:12 10:10 36:3,4 49:14 test 34:19 52:14 testified 26:15 29:1,20 32:12 54:23 testify 30:3 testimony 26:8,9 29:13,25 text 7:3 textual 39:1 Thank 24:12,13 37:20,21 38:1 52:16 55:21,22 theories 22:7,24 55:10 theory 13:18,20 13:22,24 14:12 15:24 16:1,3 22:1,2,5,8,17 22:25 23:6,10 25:18 28:17 41:14 42:15,16 45:18,22,24 51:22 53:1,17 53:23 thing 7:15 11:17 14:14 16:18 22:20 30:25 43:1 44:1 54:14 things 18:10 20:13 31:2 36:15 49:13 think 4:2,7 5:5,8 7:22 8:8,17,21 9:5 11:24 15:12,18 18:19 18:23 19:4 21:6,11,18 22:15 33:5,11</p>
--	---	--	--	---

<p>33:15 37:6 39:3 41:14 42:4,17 43:15 44:17 45:1,5 45:13 46:3,11 46:15,16 47:2 47:2 48:7,21 49:6 50:3 52:2 53:14 54:13 55:17 thinking 47:4 thought 28:17 35:1 three 38:14 55:10 thrown 7:15 15:9 time 12:21 13:1 17:14,17 23:13 36:15,16 39:13 52:7 54:2 told 18:24 19:2 30:6,8 totally 39:4 48:6 48:6 toxic 26:24 27:3 transcript 26:10 26:17 42:3 treat 8:12 tremendous 28:13 trial 15:5,25 16:4,9,16 19:5 22:19 26:7,10 26:17 30:2,4 36:2,9,23 37:3 40:25 42:3,8 42:16 45:18 49:23 54:18,25 55:10 tried 37:2 47:8 55:19 trigger 20:3 35:18 52:5 troubles 29:17 true 16:7,24,25 18:21 29:7</p>	<p>53:12 truly 29:16 truthful 31:9 Try 47:21 Tuesday 1:10 turn 10:16 53:24 turned 44:14 47:5 turns 15:16 39:22 46:23 48:2 49:2,3 50:1,22 two 5:10 6:15 11:14 27:16 36:2 49:13 50:7,10 type 4:19 38:19</p> <hr/> <p style="text-align: center;">U</p> <p>ultimate 51:1 ultimately 23:18 25:13,14 45:5 48:10 50:12 uncovered 40:24 uncovers 14:21 understand 25:17 30:23 32:24 35:9 undue 54:14 Unfortunately 25:12 United 1:1,7,13 1:22 2:10 3:5 4:6,8,11,17,18 4:22 5:2,11 6:18,25 7:7,9 7:12 8:20 9:15 10:2,12 17:10 17:11 24:25 25:5 37:25 38:7 42:7 unstable 26:23 unusual 14:22 unwanted 26:24 use 11:11 23:5 27:13 31:4</p>	<p>40:11,18,25 41:4 49:23,24 uses 6:11 8:19 37:10 U.S.C 8:7</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:6 validity 17:2 variability 26:11 variable 29:4 variant 22:5 variation 22:14 26:16 28:7,13 28:19,22 29:1 50:21,25 variations 28:24 29:8 50:11 variety 18:8 verdict 27:18 versus 3:5 view 38:18 47:18 50:16 viewed 4:7 violated 17:6 violating 39:18 violation 11:5 17:8,9 18:3 53:4 violations 12:10 34:10 40:22 43:25 44:22 51:20 virtue 36:10 voluntarily 30:22 31:8 55:2 Vullo 1:18 2:6 24:15,16,18 25:20 27:9,16 28:1,21 29:10 30:3,9,14 31:7 31:17 32:2,6 32:17,23 33:3 33:10,22 34:3 34:7,18 35:7</p>	<p>37:6,22</p> <hr/> <p style="text-align: center;">W</p> <p>wait 5:18 Walton 37:10 want 22:6 23:5 31:23 40:16 49:6,13 50:8 52:25 wants 20:8 warrant 33:23 34:15 Washington 1:9 1:16,21 wasn't 12:14,15 22:17 23:4,12 30:15 40:13 48:4 53:20 54:3,15 wasted 8:15 wastes 26:25 watch 29:20 Water 37:10 way 3:21 4:2 6:14 7:11 9:12 10:10 11:20 14:7,17,18 16:6 19:15,18 42:18 47:19 49:14 51:25 ways 18:8 21:9 went 3:14 22:22 23:11 25:19 48:4 54:25 weren't 9:18 12:12 17:9 18:25 53:16 we'll 19:23 we're 7:20 37:7 We've 36:20 wide 39:13 widely 23:21 widespread 44:21 willing 7:4 win 9:21 withdrew 37:16</p>	<p>witnesses 28:2 29:1 54:19 wonder 38:10 word 37:10,11 words 5:1 6:6 13:23,25 20:20 28:12 work 16:21 17:1 19:11,12,15 31:1,2 54:17 55:6 worked 29:13 working 19:5 40:13 worse 30:17 wouldn't 18:2 42:2 47:13 written 9:13 19:18 wrong 3:18 15:3 15:4,6,8 18:25 36:2,2,10,12 46:19,23 48:6 48:13 49:3,3,5</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,8</p> <hr/> <p style="text-align: center;">Y</p> <p>year 19:19 24:8 years 11:16 13:4 13:6 22:21 25:9 54:2 55:20 York 1:18</p> <hr/> <p style="text-align: center;">0</p> <p>05-1272 1:6 3:4</p> <hr/> <p style="text-align: center;">1</p> <p>1 5:3 9:19 20:22 10 11:16 55:19 11 43:19 48:17 54:5,8,11 11:09 1:14 3:2 112 53:7 12(b)(1) 15:23 12:11 55:25</p>
---	--	---	--	--

<p>143 24:11 1653 8:7 174 25:23 175 25:23 26:20 30:1 179 25:21 180 32:20 181 32:20 1824 36:13 19 23:20 190 11:1 1980 39:13 1985 17:23 23:8 1986 11:7 32:19 1987 11:6 12:9 18:1 1988 11:14 23:21 34:11 1989 11:6 39:14</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 36:5 200 26:16 29:21 2006 1:10 24 2:7 247 32:11 249 32:11 25 14:15 21:23 28 8:6 29 25:23 290 25:24</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 5:19,19 30 42:5,13 350 26:16 29:21 37 2:10 3720(a) 4:15 3730 4:20 3730(d)(1) 25:1</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 6:20 33:8 34:2 36:8 52:18</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 1:10 500 28:2</p>	<p>52 2:13 522 26:9,18 55 28:2 54:19</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>605 30:24 31:25</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>987 26:10,17</p>			
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