

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CREDIT SUISSE SECURITIES :

4 (USA) LLC, FKA CREDIT :

5 SUISSE FIRST BOSTON LLC, :

6 ET AL., :

7 Petitioners :

8 v. : No. 05-1157

9 GLEN BILLING, ET AL. :

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11 Washington, D.C.

12 Tuesday, March 27, 2007

13

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

17 APPEARANCES:

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

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

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

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4	On behalf of the Petitioners	3
5	GEN. PAUL D. CLEMENT, ESQ.,	
6	For the United States as amicus curiae,	
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P R O C E E D I N G S

[10:15 a.m.]

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

Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO,
ON BEHALF OF PETITIONERS

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

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

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

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

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

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

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

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

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

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

3 JUSTICE STEVENS: And laddering, for
4 example?

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

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

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

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

25 JUSTICE GINSBURG: How about in this case?

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

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

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

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

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

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

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

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

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

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

17 JUSTICE SOUTER: But do they have to?

18 MR. SHAPIRO: We don't believe it's an
19 antitrust --

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

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

1 JUSTICE SCALIA: I don't even think we
2 mentioned them. Did we mention them?

3 MR. SHAPIRO: Pardon me?

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

6 MR. SHAPIRO: I don't believe the Court did.
7 I don't think it did.

8 JUSTICE SCALIA: Well, maybe we just forgot.

9 (Laughter.)

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

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

17 The danger of conflict that the SEC is
18 talking about here is an acute danger to its ability to
19 --

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

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

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

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

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

1 position today.

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

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

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

24 MR. SHAPIRO: Well, I think Gordon is very
25 informative on that point. It rejected primary

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

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

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

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

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

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

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

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

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

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

22 MR. SHAPIRO: The complaint alleges an
23 antitrust violation. Just that there was agreement to
24 engage in tie-ins, and an agreement to charge too much.

25 JUSTICE STEVENS: Yes, but one of the key

1 allegations is the agreement include an agreement not to
2 disclose.

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

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

16 MR. SHAPIRO: Well, plaintiffs would say yes,
17 that it was an agreement in restraint of trade even --

18 JUSTICE STEVENS: Because of agreeing on what
19 the --

20 MR. SHAPIRO: Yes, that's their theory.

21 JUSTICE STEVENS: The preliminary before the
22 IPO. But what they did after the IPO, would that
23 violate the antitrust laws?

24 MR. SHAPIRO: Really what they are alleging
25 is a conspiracy to violate the securities laws here,

1 that had some -- what they claim, a market effect. And
2 it is the agreement that they contend is an unreasonable
3 restraint of trade or they refer to the compensation
4 payments as excessive commercial bribes. They say that
5 violates the Robinson-Patman Act.

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

15 JUSTICE GINSBURG: Aren't there many situations
16 in which a particular industry is subject to two regulators
17 and that they sometimes conflict? Like EPA and OSHA?

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

23 There are a number of things that can be
24 regulated even under the antitrust laws under those
25 standards. NASD and Gordon didn't stop all antitrust

1 litigation in its tracks. Only things that were within
2 the Agency's supervisory jurisdiction to present --

3 JUSTICE SCALIA: The EPA is not a hands-on
4 regulatory Agency the way the SEC is. It has not been
5 given an entire industry to regulate.

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

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

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

24 JUSTICE SCALIA: The Government's willing,
25 in other words, to give the SEC carte blanche. Whatever

1 you say is lawful is lawful that won't violate the
2 antitrust laws.

3 MR. SHAPIRO: We think immunity extends
4 beyond what is expressly permitted by the SEC. The way
5 the Court phrased it in NASD was things that are
6 connected to the Agency's regulatory responsibility have
7 to be immunized to allow the Agency to do its task. And
8 that extends a little bit further than the permission
9 standard that the Government has given.

10 And there --

11 JUSTICE SCALIA: Extends a lot further, I
12 would think.

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

23 JUSTICE SCALIA: So maybe we could decide the
24 case that way. We could say, we don't have to decide what
25 the standard is, even if it is inextricably intertwined as

1 the Government does, you would win, would you be happy
2 for us --

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Shapiro.

2 General Clement.

3 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

4 ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING PETITIONERS

6 GENERAL CLEMENT: Mr. Chief Justice, and may
7 it please the Court:

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

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

1 impermissible market manipulation.

2 And in that regulatory context, the kind of
3 collaborative conduct that would in many other contexts
4 raise yellow or red flags of an antitrust violation is
5 innocuous, because it's a hallmark of the underwriting
6 process.

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

11 JUSTICE STEVENS: May I ask this question
12 about the laddering and so forth? If it were fully
13 disclosed, would it be unlawful under either statute?

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

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

22 GENERAL CLEMENT: That may be true, but the
23 way that regulation M approaches that conduct is a little
24 bit more of a prophylactic approach. It's not just a
25 disclosure approach, and it does say that there is

1 conduct that is forbidden. But I think it is important
2 to recognize just how fine the lines that are drawn here
3 become, because, for -- just to give you a real world
4 example, the guidance document that's at page 216a of the
5 petition appendix makes clear that it is permissible for
6 the lead underwriter, when talking to customers, to gauge
7 their interest at various price points in the initial
8 offering.

9 JUSTICE ALITO: Well, in light of this very --
10 in light of the very fine line, how is a court to
11 distinguish between -- determine whether what's alleged
12 is inextricably intertwined with authorized conduct?

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

25 JUSTICE SCALIA: But the problem you address

1 has been a problem of strike suits. And it is the
2 problem that Congress addressed in its legislation.
3 Shake downs. It just is less expensive to pay off the
4 suitor than it is to litigate it to a final conclusion,
5 where that conclusion is highly uncertain.

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

11 GENERAL CLEMENT: Well, Justice Scalia --

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

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

1 On the other hand, we would caution against
2 adopting some sort of broad immunity that would
3 preclude, say, the Justice Department from investigating
4 and prosecuting an antitrust conspiracy that cut across
5 IPOs. And of course, the Congress has addressed the
6 problem of treble damages directly in a number of areas.
7 And I suppose, if they were to address the area in the
8 antitrust context, they might draw a distinction between
9 private treble damages suits and Government enforcement
10 efforts. Now, that's a little hard to do as a matter --

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

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

24 JUSTICE BREYER: And even then, why do you
25 take the other position? It is pretty easy to imagine

1 the SEC, under some circumstances, deciding that's a
2 proper way to market securities, to have some kinds of
3 agreements between IPOs or something like that. I don't
4 see why not.

5 GENERAL CLEMENT: Well, I suppose it's
6 possible, Justice Breyer. I would say --

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

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

22 I'm back to Justice Alito. How is anybody
23 going to administer the standard that you are asking the
24 Court to enunciate?

25 GENERAL CLEMENT: Well, I think if you draw

1 a distinction between intra-IPO allegations and inter-IPO
2 allegations, you go a long way towards doing it. And I
3 should note, that's basically the line this Court drew
4 in NASD.

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

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

25 The language the Court used on page 733

1 of that opinion seems to us a perfectly reasonable test.
2 The Court said, quote: "The close relationship is
3 fatal." The close relationship between what the SEC had
4 prohibited in the vertical context and what was sought
5 to be gone after in the context of the horizontal
6 restraints, those are too closely related. I don't
7 think that test has caused undue confusion. And I
8 think what it does is it makes a reasonable balance between
9 a ruling that on the one hand preserves a great deal of
10 immunity, but on the other hand doesn't give a kind of
11 blanket immunity that would basically completely oust
12 the antitrust laws. And I think that's the balance we
13 hope to --

14 JUSTICE GINSBURG: What happens on remand in
15 this very case based on your theory? You are not
16 adopting the district judge's position that this case
17 should be dismissed outright.

18 GENERAL CLEMENT: That's right,
19 Justice Ginsburg, and --

20 JUSTICE GINSBURG: What happens when it goes
21 back?

22 GENERAL CLEMENT: Well, I think this Court
23 could do one of two things. I mean, the Petitioners for
24 their part have pointed to in footnote 6 of the blue
25 brief, to a variety of Second Circuit precedents about

1 the standards for repleading. Perhaps the easiest
2 course for this Court would be to just vacate and let
3 the Second Circuit apply its own law of repleading.
4 That would be one option. The other option would --

5 JUSTICE GINSBURG: But why, if this is a
6 sprawling complaint and if the problem is that it says
7 too much or too vaguely, a district court doesn't have
8 to leave the pleader to its own devices. It can have a
9 pretrial conference and say, now let's get this whole
10 thing in order, and it's not that the pleader is left
11 alone to do what he or she will.

12 But in complex cases like this, a good district
13 judge will often assert control from the beginning and
14 not leave the parties to do what they want.

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

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

3 GENERAL CLEMENT: Well, Justice Ginsburg,
4 it's a little hard for me to frame that complaint. I
5 think if it focused on inter-IPO allegations and,
6 contrary to this complaint, footnote -- paragraph 42 of
7 this complaint actually alleges that there were a variety
8 of different mechanisms that were used, that doesn't sound
9 like what you would expect from an agreement that cut
10 across IPOs. You'd expect uniform conduct to be
11 alleged. And if there was that sort of conduct and it
12 was alleged to violate both regulatory regimes in a
13 clear way, then maybe it could go forward.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 General Clement.

17 Mr. Lovell.

18 ORAL ARGUMENT OF CHRISTOPHER LOVELL

19 ON BEHALF OF THE RESPONDENTS

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

22 This Court's decisions in NASD and National
23 Gerimedical determined that implied immunity is not
24 favored, is justified only by a, quote, "convincing
25 showing of clear repugnancy," and then, quote, "only to

1 the minimum extent necessary," close quote. It is not
2 necessary to make the securities laws work to permit a
3 conspiracy to engage in conduct that the securities laws
4 have been trying to stop since their inception.

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

15 Where you get a complex complaint like
16 yours, that begins to ring true, that argument. And
17 that's what's concerning me.

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

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

1 MR. LOVELL: Right.

2 JUSTICE BREYER: And when they do, what
3 happens is that the marketer goes out and he asks
4 people: What's your plan? What are you thinking of
5 doing next month? What's your plan for this stock?
6 Hold it? Not? It doesn't require much imagination to
7 see how certain answers to that kind of question could
8 be brought by a plaintiff in perfectly good faith as
9 evidence that there's an agreement that next month they
10 will pay more for the stock and next month they'll pay
11 -- more.

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

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

25 MR. LOVELL: Your Honor, sorry for

1 interrupting.

2 JUSTICE SCALIA: I'm done.

3 MR. LOVELL: Okay.

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

17 We allege that the first part of this
18 horizontal conspiracy, across underwriters and across
19 IPOs, was to require the laddering in order to raise
20 prices.

21 JUSTICE BREYER: The problem -- I'd be
22 repeating it. We're not talking about, say, your case.
23 I don't know what your evidence is. But let's imagine a
24 case where the evidence of just what you said consists
25 of some rather ambiguous discussions which might be

1 characterized in a variety of ways, including the way
2 the plaintiff wants to characterize it, who would repeat
3 the very words you just said.

4 Now, the issue, it seems to me here, is in
5 light of that possibility, do we want an antitrust judge
6 to say whether that's so? I know you do. Or do you
7 want the SEC to say whether that's so in the particular
8 case? Or that's why I thought of primary jurisdiction:
9 Maybe first send it to the SEC.

10 What's your view?

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

19 JUSTICE STEVENS: May I ask you if your
20 conspiracy allegation would be the same if there were
21 only one underwriter?

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

23 JUSTICE STEVENS: It is critical to your
24 case that there are multiple underwriters?

25 MR. LOVELL: Yes, yes.

1 JUSTICE STEVENS: What if we thought that
2 the activities of the multiple underwriters were
3 comparable to a single joint venture? In many respects
4 they're like a joint venture. Would that mean your
5 whole case would collapse? In other words, I'm really
6 wondering to what extent you're depending on your
7 horizontal agreement as opposed to the vertical
8 arrangements like laddering and flipping and that sort
9 of thing.

10 MR. LOVELL: We totally depend on the
11 horizontal agreement, Your Honor. The case rises or
12 falls on the horizontal agreement among underwriters to
13 require that which the securities law has always prohibited.

14 JUSTICE STEVENS: If there had just been the
15 vertical agreements and if they had been fully
16 disclosed, there would no antitrust violation, would
17 there? If there had just been publicly disclosed
18 agreement by one underwriter with the purchasers to
19 engage in these activities, there would be no violation,
20 would there?

21 MR. LOVELL: If there's no market power,
22 we're not alleging that, and we wouldn't try to bring
23 that case, Your Honor. Where the antitrust laws, as
24 General Clement says, have their reach is that they get
25 the whole elephant. If we prove that the underwriters

1 conspired as we alleged, and there's five administrative
2 complaints here -- it's not something where it's is a
3 strike suit. There's five administrative complaints
4 finding this parallel unlawful conduct, which would work
5 best through a conspiracy.

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

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

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

25 It wouldn't matter to our case at all.

1 We're trying to get at -- the securities laws are
2 transactional. They can't get at a big wrong like this.
3 They only get their own part of the elephant. The
4 antitrust laws, this is business as usual, step into my
5 office. As General Clement says, the antitrust laws
6 come if we prove that there was a horizontal agreement.
7 Then all of these individual efforts --

8 CHIEF JUSTICE ROBERTS: What are you talking
9 about when you say a horizontal agreement? Are you
10 talking about a group of underwriters in the context of
11 a single IPO?

12 MR. LOVELL: No.

13 CHIEF JUSTICE ROBERTS: No.

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

25 JUSTICE BREYER: What about an agreement

1 among underwriters, among underwriters, which says the
2 following: We agree that we go -- when we go on our
3 tour, we will be certain to ask the potential purchasers
4 whether they plan to hold this stock for at least a
5 month.

6 MR. LOVELL: No problem.

7 JUSTICE BREYER: No problem?

8 MR. LOVELL: Never.

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

11 MR. LOVELL: We wouldn't bring the case,
12 Your Honor.

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

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

17 JUSTICE BREYER: What's the answer?

18 MR. LOVELL: -- I don't think it gets into the
19 way of this narrow case and the facts that are presented
20 for immunity here, which the Congress has been trying to
21 stop forever, and the conduct's spread between 1997 and
22 2001 and was a massive violation that the securities
23 laws really aren't cut out to address. I know I'm
24 getting off your question a little bit, but in the
25 NASDAQ antitrust litigation these defendants and their

1 predecessors agreed to keep the spreads wide in
2 the over-the-counter market. There were rules about
3 maximum spreads. There were many rules, many
4 regulations.

5 However, it was never permitted in the
6 securities markets for all the underwriters across 5,000
7 stocks -- we only proved it out to 1600 -- to widen
8 their spreads, to keep their bids and offers wide.
9 Billions of dollars -- the Justice Department after we
10 brought the case, the Justice Department brought a case.
11 The entire industry was changed. You can now trade a
12 million dollars worth of stock for less than it costs to
13 change your tire or something. And it's all due to the
14 antitrust -- I'm sorry, Your Honor.

15 CHIEF JUSTICE ROBERTS: I'm trying to grasp
16 the difference between the single IPO and the multiple.
17 So in response to Justice Breyer's hypothetical, they all
18 agree in the context of a single IPO, let's make sure
19 everyone's going to hold the stock for a month, and you
20 say no problem. Or across all IPOs --

21 MR. LOVELL: No problem.

22 CHIEF JUSTICE ROBERTS: Well, if the same
23 underwriters get together the next month, they've got a
24 different IPO and they say, you know, let's do the same
25 thing we did last time because that seemed to work well in

1 terms of the issuance and the capital formation. All of
2 a sudden that's an antitrust problem?

3 MR. LOVELL: No. The basis for my answer is
4 two levels of no problem. There's not a problem as to
5 the single deal and there's not a problem as to saying
6 you have to hold the stock. That's not at issue. We
7 have no problem with that.

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

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

20 MR. LOVELL: The SEC refers the customers to
21 the private lawyers if you complain. The securities
22 laws are totally different from the ICC, from our common
23 carrier.

24 JUSTICE BREYER: Suppose you lose this case,
25 your client -- suppose all these bad things happen and you

1 don't have an antitrust claim. Is there somewhere in
2 the law you can get damages?

3 MR. LOVELL: Yes.

4 JUSTICE BREYER: Where?

5 MR. LOVELL: Yes, the specific intent of
6 Congress in creating the securities laws was to create
7 private remedies which are available, and to preserve all
8 other remedies, including through today --

9 JUSTICE BREYER: Okay. So what's at issue here
10 is not whether you get a remedy. It's whether you get
11 treble damages.

12 MR. LOVELL: Well no. Theoretically, there are
13 other remedies as to each individual client for what
14 each individual client did. No one can address in a
15 securities case the wrong that happened here. The
16 agreement. That can only be addressed as
17 General Clement says at page 22 of the brief, through an
18 antitrust case.

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

23 MR. LOVELL: Well, the SEC could make a rule
24 to prohibit -- to further supplement the prohibitions.

25 JUSTICE SCALIA: Right, right.

1 MR. LOVELL: Yes, Your Honor. They could
2 supplement the prohibitions.

3 JUSTICE SCALIA: They have chosen not to.

4 MR. LOVELL: Well, it -- it -- I think it's
5 more institutional that the focus has always been
6 transactional, Your Honor. And the Congress clearly --
7 in 982 of the Securities and Exchange Act of 1934 clearly
8 prohibits individual or joint efforts to raise prices,
9 empowers private investors to sue, empowers the SEC to
10 sue --

11 JUSTICE SCALIA: No, but --

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

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

22 MR. LOVELL: In the -- there's huge
23 qualitative differences between certain types of conduct
24 which has always been accepted and was not prohibited in
25 the securities laws and laddering or pools of orders to

1 raise prices and tie-in agreements. The only metaphor I
2 can throw out, Your Honor, is that we know how far we
3 can say and what we can't say, the brokers always knew
4 this, until 1997 to 2001 when they -- they changed their
5 underwriting businesses to go -- and we, we allege that
6 they required, induced, solicited -- not that they did
7 things on the way -- close to the line or -- in the,
8 what had always been the accepted area, the world
9 changed. And that change moved into the territory that
10 had -- sorry for hurrying -- that had always been
11 prohibited.

12 JUSTICE SCALIA: Yes. And you're saying
13 they did this just -- not in the context of just single
14 IPOs, but that they agreed across IPOs that they would
15 all do this.

16 MR. LOVELL: Yes, Your Honor, across IPOs
17 and across underwriters, so that --

18 JUSTICE SCALIA: Why?

19 MR. LOVELL: -- a customer couldn't go
20 to another underwriter for a different deal.

21 JUSTICE SCALIA: Uh-huh. The customer being
22 the issuer?

23 MR. LOVELL: No, no. The public customers
24 who have accounts with the underwriters; they're also
25 brokerage firms. If they wanted to get an IPO in what

1 we call class security, the technologies securities,
2 they had to pay --

3 JUSTICE SCALIA: They'd have to pay the
4 premium.

5 MR. LOVELL: Yes. They had to pay these
6 unlawful charges under securities laws, no matter where
7 they went. And in terms of the inextricably
8 intertwined, it is the qualitative difference that stops
9 that.

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

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

25 Now, now -- what words would I write in the

1 opinion that in your opinion would separate the sheep
2 from the goats?

3 MR. LOVELL: They agreed to inflate prices
4 in precisely the way the securities laws have always
5 prohibited. They agreed to inflate prices and they
6 agreed to make tie-in agreements that have always been
7 prohibited under the securities laws, to participate in
8 the profits from the inflated prices, which they were
9 not permitted to participate in the customer's --

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

12 MR. LOVELL: No. But in this narrow case,
13 it happens to be that the method that they went to,
14 which was always a guaranteed method to drive up prices
15 and to participate, was -- had always been prohibited by
16 the securities laws.

17 It is not the test. The test for the
18 antitrust claim is merely this: They wanted to make an
19 agreement to inflate prices and they wanted to make an
20 agreement to inflate their charges. And if a customer
21 came to this underwriting trust at the time to deal with
22 them, they had to do this type of transaction to inflate
23 the price, and they had to pay the underwriter extra
24 underwriting charges.

25 CHIEF JUSTICE ROBERTS: What do you say to

1 the -- sort of stepping back from the trees to the
2 forest -- to the general suggestion that Congress has been
3 tightening up the requirements for private securities
4 litigation over the past few years; and you're bringing
5 this now as antitrust claims as a way to circumvent
6 Congress's regulation.

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

18 JUSTICE BREYER: What about -- what about --
19 listen to what I'm about to say. I'm thinking of a
20 standard.

21 The standard would be where the allegations
22 are such, where the case is such that -- to go
23 further -- that, one, it is an allegation of a claim of
24 illegality; is price fixing, in price fixing; and it is
25 of longstandingly prohibited under the securities law;

1 and there is evidence to support that, of -- strong
2 evidence to support it, or the evidence in support
3 thereof is not primarily evidence simply of asking the
4 jury to draw inferences from conduct that is protected.
5 Under those circumstances there is no immunity.

6 MR. LOVELL: Bingo. That -- we live with
7 all that, Your Honor. To quote -- sorry, sorry.

8 (Laughter.)

9 JUSTICE BREYER: I don't know if it's -- I
10 mean, you know --

11 (Laughter.)

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

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

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

1 public, would satisfy any test.

2 JUSTICE SCALIA: Look, the question isn't
3 whether it satisfies it. The question is whether you
4 can get rid of this suit at the outset or do you have to
5 go through enormously expensive discovery, which --
6 which isn't worth the candle.

7 MR. LOVELL: Your Honor, I think you have --
8 for the good of the country, I think you have to follow
9 the facts and find out if these people conspired as
10 alleged.

11 JUSTICE SCALIA: You want the discovery.
12 Right?

13 MR. LOVELL: Yes. Sure.

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

23 And the problem is, I guess, that -- that
24 when you take that type of evidence, the type of
25 evidence you're going to be relying on to show that

1 there's price fixing, it is exactly what the SEC wants
2 the people to do. They want them to get together. They
3 want them to agree on an appropriate IPO price that's
4 going to contribute to capital formation and everything
5 else.

6 And how do you at, as Justice Alito pointed
7 out, at the 12(b)(6) stage, how is a district court
8 supposed to say well, this is the bad price fixing, this
9 isn't the good price fixing?

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

20 JUSTICE SCALIA: I don't think you've
21 answered his question.

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

23 JUSTICE SCALIA: I think that you've said
24 that the two were different. His question was how can
25 you tell at the outset, at the 12(b)(6) stage, the

1 difference between those two things that you've
2 mentioned? Sure they're different but -- but the
3 evidence that is only evidence of the one also looks
4 like evidence of the other.

5 MR. LOVELL: Well --

6 JUSTICE SOUTER: In other words, what is the
7 difference between supporting the price and rigging the
8 aftermarket? I mean, how do we tell that at the
9 12(b)(6)?

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

19 And Congress during the 1990s did narrow the
20 securities laws; and they took away treble damages as to
21 RICO, and they stopped resorting to State court, where
22 the standards weren't as stringent as under the PS law
23 -- for class actions. However, they knew about these
24 antitrust cases that had saved billions of dollars for
25 consumers. They applauded them. And they reenacted the

1 savings clause that says all rights and remedies are
2 preserved.

3 CHIEF JUSTICE ROBERTS: How did they applaud
4 them?

5 MR. LOVELL: Well, they just said that they
6 -- Congress -- that's too strong a statement. The
7 specific Congress people involved were glad that the --
8 the wrongdoing was uncovered and said as much and wrote
9 to the Attorney General, and the SEC, and said why --
10 why wasn't it found sooner?

11 But they did not touch these antitrust
12 actions. Number one, they come very infrequently.
13 Number two, they've done great benefit for the
14 securities markets and for the participants in the
15 securities markets, and even for the defendants
16 themselves. They forced the defendants to operate by
17 talent and bring out their best, and not resort to what
18 the problem for the public always is --

19 CHIEF JUSTICE ROBERTS: The SEC which is the
20 Agency charged with supervising those markets, thinks
21 otherwise.

22 MR. LOVELL: No -- no.

23 CHIEF JUSTICE ROBERTS: They don't think
24 these, the antitrust actions are good for the securities
25 markets.

1 MR. LOVELL: The SEC -- and this is the
2 first immunity case before the Court where the SEC and
3 the DOJ both are in favor of not having substantive
4 immunity. They both oppose immunity. And in the --

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

7 MR. LOVELL: No. No, it was not, Your
8 Honor.

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

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

12 JUSTICE SCALIA: It looks to me like they
13 split the baby up here.

14 (Laughter.)

15 MR. LOVELL: I -- I -- that's the only way I
16 can see it. But if Your Honor looks at the questions
17 that the SEC answered to the Second Circuit, the SEC said
18 they couldn't say how the securities laws couldn't work on
19 the facts of this case, but future cases might present a
20 closer case, Your Honor.

21 JUSTICE BREYER: I would always -- I think
22 the standard I was more or less talking about is pretty
23 close to what the SG says. And I think he says that --
24 that -- that Justice Alito's point, which is certainly a
25 good point, is that you would have to allege facts such

1 that it was clear from the face of the complaint that
2 you weren't resting your case on the conduct that was --
3 that's what he means by "protected" -- and then there's an
4 ongoing obligation, it says, on the part of the district
5 judge to be sure that the case isn't really growing out
6 of this conduct that is arguably okay.

7 MR. LOVELL: Protected conduct. And we
8 could live with --

9 JUSTICE BREYER: You, you could live with
10 the SG --

11 MR. LOVELL: We could live with that. On
12 the other hand, applied immunity is an affirmative
13 defense. It was held in Cantor versus Detroit Edison,
14 428 U.S. 579, which didn't make it into our brief, that
15 applied antitrust immunity is an affirmative defense.
16 As we brief, there's a long line of cases from Your
17 Honors that say that you don't have to plead in the
18 complaint to negate an affirmative defense.

19 I don't think that unlawful conduct under
20 the securities laws is entitled to more protection than
21 free speech or some of the conduct in these other cases;
22 and I -- and we've opposed the inextricably intertwined
23 standard as particularly inappropriate where an
24 affirmative defense is involved.

25 Nonetheless, we could live with that, if it

1 came down. And we think the complaint already lives
2 with it. The complaint has, from paragraph 53 through
3 paragraph 63, a number of allegations of joint conduct
4 to do things which are clearly unlawful under the
5 securities laws. It does have one allegation about
6 holding road shows. On its own, that's permissible. We
7 don't have a footnote that says this is permissible on
8 its own. That may have caused somewhat of the problem
9 for -- for people.

10 But reading the complaint as a whole,
11 paragraph 5 says that these later paragraphs I just
12 referred to show how the time in the syndicates was
13 abused.

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

25 JUSTICE GINSBURG: You didn't have a chance

1 to answer Justice Breyer's question about primary
2 jurisdiction. Let's get the SEC's views first of
3 whether there is any interference with securities law
4 enforcement.

5 MR. LOVELL: The public carrier cases, the
6 Interstate Commerce Commission, the sea carriers and the
7 air carriers have had primary jurisdiction as an
8 approach. In order to keep it uniform, they'd set the
9 rate and then there would be questions on the rate. So
10 both for administrative discretion and factfinding, the
11 Court said that's their baby, we're going to stay out.

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

21 The single damages point raised by the
22 defendants in the same section is only a limit on
23 recovery. It's not a limit on the rights and remedies.
24 So the answer to primary jurisdiction is that it's
25 always worked this way, that the private plaintiff is

1 supposed to sue in court. He's expressly empowered
2 under securities laws to sue in court, as he's expressly
3 empowered under the antitrust laws, and the courts have
4 always resolved the issue.

5 JUSTICE SOUTER: No, but we haven't had this
6 problem focused before, and isn't primary jurisdiction the
7 most efficient answer to the problem that we've got? In
8 other words, isn't it time to do something different?

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

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

1 MR. LOVELL: Yes, Your Honor.

2 JUSTICE SCALIA: And in primary
3 jurisdiction, would we refer it to the SEC and accept
4 the SEC's fact determinations and then instruct the jury
5 that --

6 MR. LOVELL: It's never happened before, and
7 it's contrary to the -- what Congress wants. In a
8 different statutory context, it was what Congress wanted
9 for uniformity.

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

18 MR. LOVELL: I agree, Your Honor.

19 I think that the presence here of the SEC
20 complaints, the SEC factfinding, saying that things
21 got out of hand during this time and the law was broken
22 on a widespread basis, indicate that we are not coming
23 forth with weak facts. And I also agree that in the
24 securities context, primary jurisdiction has not had the
25 basis it's had in other legislative contexts where

1 uniformity was desired.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Lovell.

5 Mr. Shapiro, you have four minutes
6 remaining.

7 REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO
8 ON BEHALF OF THE PETITIONERS

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

10 The key question in this litigation is who's
11 going to decide what a tie-in is and who's going to
12 decide what constitutes unreasonable compensation. The
13 plaintiffs say quite overtly in their briefs these
14 issues can't be left in the hands of the SEC. Well,
15 Congress put these issues in the hands of the SEC.
16 There are three separate provisions that give the SEC
17 power to define what is "forbidden manipulation," what is
18 a "forbidden tie-in," and what is "excessive compensation."

19 The SEC this Court has said is an Agency
20 that Congress had considerable confidence in in the
21 Gordon case and that confidence is well justified here.

22 JUSTICE SCALIA: What's your test,
23 Mr. Shapiro?

24 MR. SHAPIRO: Our test is the one the Court
25 laid down in those two cases: Is there active

1 supervision or is there pervasive regulation? If the
2 answer is yes to either of those, you ask, is there a
3 potential conflict, and if so immunity applies and the
4 complaint has to be dismissed. And this is true whether
5 you're talking about one IPO or an agreement that cuts
6 across several IPOs, because even in the multiple IPO
7 situation the jury would still have to decide, was that
8 a tie-in or was it something innocent; was it
9 unreasonable compensation or was it something that was
10 proper?

11 JUSTICE BREYER: We all agree, say a group
12 of underwriters, that for the next year we will insist
13 that every customer, whatever price we charge, will pay
14 30 percent more for 50 percent more shares next month.
15 Absolutely illegal, isn't it?

16 MR. SHAPIRO: Well, it --

17 JUSTICE BREYER: They write it down, just
18 what I said.

19 MR. SHAPIRO: The same circumstances were
20 presented very similar to the NASD in the Invemed case.
21 They had a three-week trial, 17 experts, and they
22 concluded that those charges were quite permissible
23 considering the whole range of services that were given.
24 Now, if this occurred with concerted action the SEC has
25 power to deal with concerted action. Congress said that

1 they could deal with multiple-party manipulations. They
2 have many cases where they proceeded against multiple
3 parties.

4 In the NASD case the claim was that there
5 was a horizontal conspiracy involving many brokers and
6 many underwriters, it was industrywide, it went on for
7 years and years. And the Government argued there it was
8 improper, it was contrary to the SEC's policies.
9 This Court held squarely that that is within the SEC's
10 power to regulate and if something of that sort is
11 occurring the SEC can deal with it.

12 The test there wasn't whether it was
13 connected to something that was permissible. The test
14 was whether it was connected to the SEC's regulatory
15 responsibilities and the SEC could deal with that sort
16 of concerted action on an industrywide basis.

17 Now, Mr. Lovell has argued that the conduct
18 has always been forbidden. He labels it that way.
19 There are many case from this Court that we cite in our
20 reply brief holding that that labeling does not defeat
21 immunity because it's always possible to characterize
22 conduct in that fashion. But the Agency has to apply
23 its expertise to decide what is forbidden and to change
24 its rules over time, which the SEC is now doing. And it
25 has to be able to prevent, deterring conduct that comes

1 up to the line of prohibition. Here that conduct is
2 essential to protect investors and to protect issuers.
3 The markets couldn't function efficiently if
4 underwriters could not engage freely in the kinds of
5 conversations that get twisted in this litigation into
6 something characterized as tie-ins.

7 Now, there are 310 private suits now pending
8 under the securities laws brought by many of these same
9 lawyers, making the same claims of concerted action to
10 manipulate the stock market. Those suits are subject to
11 a panoply of safeguards that Congress has prescribed,
12 including single damages, restrictions on class action
13 abuse, serious loss causation requirements.

14 The only purpose for stretching the
15 antitrust laws here is to evade all of the safeguards
16 that Congress has passed, each and every one of them.
17 We think NASD and Gordon are very important in
18 preventing that kind of a pleading tactic.

19 And of course, when counsel talks about
20 concerted action and manipulating the stock market, what
21 did Congress pass the '34 Act for if it wasn't that?
22 There were extensive hearings about concerted
23 manipulation involving pools and groups that were
24 manipulating the market. That's why there are several
25 anti-manipulation provisions in the '34 Act that give

1 power to define the misconduct and to deal with it
2 effectively. And this is the toughest cop in
3 Washington, the SEC. They're perfectly capable of
4 dealing with this.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Shapiro.

7 MR. SHAPIRO: We thank the Court.

8 CHIEF JUSTICE ROBERTS: The case is
9 submitted.

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

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