IN THE SUPREME COURT OF THE UNITED STATES

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CREDIT SUISSE SECURITIES :

(USA) LLC, FKA CREDIT :

SUISSE FIRST BOSTON LLC, :

ET AL., :

Petitioners :

v. : No. 05-1157

GLEN BILLING, ET AL. :

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Washington, D.C.

Tuesday, March 27, 2007

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

APPEARANCES:

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

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

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

C O N T E N T S

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

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

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

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

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

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

MR. SHAPIRO: The SEC regulates the -- the

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

JUSTICE STEVENS: And laddering, for example?

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

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

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

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

JUSTICE GINSBURG: How about in this case?

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: But do they have to?

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

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

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

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

MR. SHAPIRO: Pardon me?

JUSTICE SCALIA: Did we mention them in those cases?

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

JUSTICE SCALIA: Well, maybe we just forgot.

(Laughter.)

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

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

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

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

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

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

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

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

position today.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Yes, but one of the key

allegations is the agreement include an agreement not to disclose.

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

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

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

JUSTICE STEVENS: Because of agreeing on what the --

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

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

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

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

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

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

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

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

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

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

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

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

MR. SHAPIRO: Well, the Government says --

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

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

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

And there --

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Shapiro.

General Clement.

ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,

SUPPORTING PETITIONERS

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

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

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

impermissible market manipulation.

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: But the problem you address

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

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

GENERAL CLEMENT: Well, Justice Scalia --

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

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

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

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

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

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

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

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

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

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

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

GENERAL CLEMENT: Well, I think if you draw

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

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

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

The language the Court used on page 733

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

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

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

JUSTICE GINSBURG: What happens when it goes back?

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General Clement.

Mr. Lovell.

ORAL ARGUMENT OF CHRISTOPHER LOVELL

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

MR. LOVELL: Right.

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

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

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

MR. LOVELL: Your Honor, sorry for

interrupting.

JUSTICE SCALIA: I'm done.

MR. LOVELL: Okay.

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

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

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

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

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

What's your view?

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

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

MR. LOVELL: No. No, Your Honor.

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

MR. LOVELL: Yes, yes.

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

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

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

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

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

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

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

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

It wouldn't matter to our case at all.

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

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

MR. LOVELL: No.

CHIEF JUSTICE ROBERTS: No.

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

JUSTICE BREYER: What about an agreement

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

MR. LOVELL: No problem.

JUSTICE BREYER: No problem?

MR. LOVELL: Never.

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

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

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

MR. LOVELL: Yes. Yes, but --

JUSTICE BREYER: What's the answer?

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

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

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

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

MR. LOVELL: No problem.

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

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

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

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

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

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

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

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

MR. LOVELL: Yes.

JUSTICE BREYER: Where?

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

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

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

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

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

JUSTICE SCALIA: Right, right.

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

JUSTICE SCALIA: They have chosen not to.

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

JUSTICE SCALIA: No, but --

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

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

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

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

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

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

JUSTICE SCALIA: Why?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: What do you say to

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

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

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

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

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

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

(Laughter.)

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

(Laughter.)

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

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

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

public, would satisfy any test.

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

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

JUSTICE SCALIA: You want the discovery. Right?

MR. LOVELL: Yes. Sure.

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

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

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

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

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

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

MR. LOVELL: Oh, I'm sorry.

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

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

MR. LOVELL: Well --

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

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

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

savings clause that says all rights and remedies are preserved.

CHIEF JUSTICE ROBERTS: How did they applaud them?

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

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

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

MR. LOVELL: No -- no.

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

Nonetheless, we could live with that, if it

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

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

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

JUSTICE GINSBURG: You didn't have a chance

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

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

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

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

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

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

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

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

MR. LOVELL: Yes, Your Honor.

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

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

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

MR. LOVELL: I agree, Your Honor.

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

uniformity was desired.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Lovell.

Mr. Shapiro, you have four minutes remaining.

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

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

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

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

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

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

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

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

MR. SHAPIRO: Well, it --

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Shapiro.

MR. SHAPIRO: We thank the Court.

CHIEF JUSTICE ROBERTS: The case is submitted.

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

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