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P R O C E E D I N G S

OCTOBER 11, 2024

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COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

All right. Good morning. Thank you all for being here. This is Case No. 4:21-CR-5.

We're here to hear oral arguments on the parties' briefing. And so we will start with the government.

MR. TONOLLI: Good morning, Your Honor. Sean Tonolli for the United States.

THE COURT: Very good.

MR. TONOLLI: Joining me at counsel table is Chad Meacham and Jon Haray.

THE COURT: Thank you both for being here.

MR. HARAY: Morning, sir.

MR. TONOLLI: May it please the Court.

This plea agreement is a strong and in-the-public-interest resolution. The plea agreement convicts Boeing of the felony crime it is charged with and compels the company to pay the maximum legal fine, the most the government could achieve if this case went to trial and Boeing were convicted.

It ensures that the Court can order Boeing to pay all lawful restitution to the families of the crash victims,

1 the same as if Boeing were convicted at trial.

2 It requires Boeing to continue to improve its
3 compliance and ethics program, to better integrate that with
4 its safety and quality, while respecting the jurisdiction of
5 the FAA in that space and to have a monitor to oversee the
6 improvements to compliance and ethics and to back up these
7 efforts with an investment of almost half a billion dollars.

8 Were this case to go to trial, there's no
9 guarantee that the Court could or would impose these
10 conditions or similar ones, but this agreement guarantees
11 them.

12 The government acknowledges the deep disagreement
13 that the families have with the plea agreement, though we
14 endeavor through our conferrals to incorporate their voices
15 and their views as much as was appropriate and feasible in
16 the document.

17 And we recognize the more fundamental disagreement
18 the families have with the government over the scope of our
19 case. But in the exercise of our prosecutorial discretion,
20 we are bound by the facts and the law and also by our
21 respect for the congressionally mandated role of the FAA to
22 oversee and to regular how Boeing builds and designs its
23 aircraft.

24 For the case that the government has charged and
25 can prove, and recognizing the important but limited role

1 that the criminal justice system has in addressing all that
2 ails Boeing, we respectfully submit that this plea agreement
3 is fair and just, and we ask the Court to accept it.

4 I welcome any questions the Court has about the
5 agreement, but otherwise I can proceed to address three
6 points.

7 THE COURT: Yeah. Go ahead.

8 MR. TONOLLI: The first would be about the
9 statutory maximum fine in the guidelines. Southern Union
10 does control the fine in this case, as it does in all
11 criminal cases, as recognized by the Fifth Circuit in the
12 Elliott case.

13 The Court in Southern Union, the Supreme Court,
14 did not cabin its ruling to the statute before it or the
15 particular facts, but rather said that with respect to all
16 sentencing statutes that require a factual finding, the
17 Court can only impose a sentence if the jury finds that fact
18 beyond a reasonable doubt or the defendant admits it in a
19 guilty plea.

20 And in announcing that broad holding, the Court
21 specifically cited the Alternative Fines Act, Section 3571,
22 and said it was an example of the type of statute that
23 requires a factual finding.

24 The Court rejected the argument of the government
25 in that case saying that fines that deprive liberty less

1 than an incarceration, and so shouldn't be subject to
2 Apprendi.

3 And the Court specifically cited again the
4 Alternative Fines Act as saying, in fact, there are fine
5 provisions that imposes substantial financial burden and
6 cited a fraud section case, a guilty plea, with \$450 million
7 fine against the Siemens Corporation.

8 The families invite the Court to ignore the
9 holding of Southern Union by saying that you can either
10 provide notice to Boeing that it's subject to an enhanced
11 fine, but that's not enough under the Court's holding.

12 The families also say it's enough to use
13 statements of the company outside the context of a guilty
14 plea, whether in an SEC filing or a statement in the
15 deferred prosecution agreement. But again, neither of those
16 are valid under Southern Union in its clear holding.

17 So Southern Union governs the plea of the
18 statutory maximum fine in this case whether the Court
19 accepts the plea agreement or not and that's because, as the
20 government has explained in its declaration, a company, our
21 brief, the only theory of loss or gain that we will proceed
22 on in this case is about the training-related costs that
23 Boeing saved through its deception of the FAA, that was
24 \$283.6 million, which the company has admitted in the
25 Statement of Facts, and that creates a statutory max of

1 \$487.2 million, which the company has agreed to pay under
2 the plea agreement and is the best the government could do
3 if we went to trial and the company was convicted.

4 Though, of course, it would be the prerogative of
5 the jury to find a lower amount. And if it was lower than
6 500,000, then that would be the statutory maximum.

7 And because Southern Union governs the statutory
8 maximum, regardless of how the Court resolves the issue
9 before it, that statutory maximum also applies to the
10 guideline range.

11 Under Section 8C3.1 of the guidelines, whether the
12 Court is inclined to agree with the families or the
13 government and Boeing about the offense level and
14 culpability score under the guidelines, that section
15 requires that, if the statutory maximum is below what the
16 guideline range would otherwise be, then the guideline fine
17 and the range is the statutory maximum.

18 The Court could disagree with the guidelines under
19 the plea agreement. The plea agreement in paragraph 23 says
20 it commits to the Court. And the parties agree that under
21 Booker, it's the Court's responsibility to assess the
22 guidelines for itself.

23 But under the agreement, if the Court accepts it,
24 it would be bound to impose the sentencing provisions
25 provided in 25 -- paragraph 25 of the agreement.

1 Paragraph 25 of the agreement, subsection (a) says
2 that the Court would impose the statutory maximum fine of
3 the 487.2 million, which is also the top end or the high
4 point of the guideline range.

5 That statement is true regardless of how the Court
6 views the guidelines, whether it agrees with the parties or
7 with the families. Because, again, of Section 8C3.1 and the
8 statutory maximum.

9 Moving then on to restitution, unless the Court
10 has questions on the statutory maximum?

11 THE COURT: No.

12 MR. TONOLLI: And focusing specifically on LOT
13 Airlines. As we explain in our briefs and in the plea
14 agreement, LOT is not entitled to restitution whether the
15 Court believes it to be a crime victim under the CVRA or not
16 and restitution is discretionary.

17 Now, we agree with LOT that the Fifth Circuit
18 opinion in Hagen applies and that the Fifth Circuit directs
19 courts not to engage in the categorical analysis of whether
20 a fraud offense is an offense against property.

21 The plea agreement acknowledges that. In
22 paragraph 25C, it says that "The parties agree that
23 restitution is discretionary based on the charged offense
24 and the factual allegations supporting that charged offense
25 in the Statement of Facts."

1 And what Hagen says, importantly, is that, as the
2 Court analyzes those facts, is to look at how the offense is
3 "committed" and that may bring it within the meaning of the
4 offense against property.

5 And in adopting that view, the Court cited three
6 cases from out of the circuit. From the Eleventh Circuit,
7 the Collins case; from the Second Circuit, the Razzouk case,
8 and from the Fourth Circuit, the Ritchie case. All of which
9 support the Court's conclusion there.

10 If you look at the Collins case, the Eleventh
11 Circuit was very clear. And it said, when you look at
12 offense against property, the word "against" is not the same
13 as "relating to" or "concerning."

14 "The latter two sweep much more broadly and would
15 encompass offenses with little more than some connection to
16 property."

17 It said, "We believe instead that a more faithful
18 reading respects the connotation of directedness engendered
19 by the word 'against.'" And you can see that in the cases
20 and in Hagen.

21 In Collins, the defendant was a bank employee who
22 engaged in a scheme to cash stolen checks. She was
23 directing her conduct, as were her accomplices, to steal
24 from the account holders.

25 In the Razzouk case in the Second Circuit, the

1 defendant was an employee of a company. He caused that
2 company to enter into sham contracts with his friend so that
3 he and his friend could split the proceeds. They were
4 stealing from the company.

5 And in Ritchie, the defendant submitted a HUD-1
6 form as part of a real estate deal in order to get a bank to
7 finance the transaction. They directed their conduct, or he
8 did, at the bank to steal from the bank.

9 And in Hagen, of course, the two defendants
10 submitted false claims for payment to Medicare and Medicaid
11 to steal from those federal health care programs.

12 Those are all clear examples of an offense against
13 property which fits in the Fifth Circuit's view and those of
14 the other circuits that it joined, but that's not the case
15 with the conduct alleged in the Statement of Facts here.

16 The Statement of Facts establishes, as does the
17 charge, that Boeing's conduct was directed at the regulatory
18 authority of the FAA, not at a property interest.

19 And that's why we cite in our brief the Supreme
20 Court cases Cleveland and Kelly, which talk about similar
21 circumstances about fraudulent conduct directed toward
22 government agencies.

23 In the first instance with Cleveland, to obtain a
24 video poker license, and then in Kelly, the Bridgegate
25 scandal, to get an agency to shut down lanes of traffic.

1 In both cases the Court said, "While fraudulent
2 and directed at the agencies, that was not directed at a
3 property interest." We believe that also applies here. It
4 is instructive in how the Court should view the conduct.

5 But even if the Court agrees with LOT, that
6 restitution is mandatory, of course, both the mandatory and
7 discretionary statutes provide an exception for the Court to
8 not grant restitution if it would be too complex and too
9 time-consuming to resolve the restitution issues as weighed
10 against the interest of the victim in receiving restitution.

11 And here we submit that it is clear that LOT's
12 claims are too complex and too time-consuming whether the
13 Court accepts the plea agreement or not.

14 It is the only one of the dozens of airline
15 customers of Boeing to object to this agreement, which in
16 and of itself is not a reason not to assign restitution, but
17 it is indicative that two sophisticated customers -- excuse
18 me, corporations with a commercial relationship have not
19 been able to resolve their differences over these claims,
20 and that's borne out by the civil case that we directed the
21 Court's attention to in our pleading, whereby LOT's own
22 words, the case involves hundreds of thousands, if not
23 millions, of pages of discovery, the deposition of dozens of
24 witnesses, and up to ten expert witnesses, a trial that I
25 believe they've estimate would last up to 14 days and at the

1 earliest would not be until next July.

2 It's also confirmed if you look at what we
3 submitted to the Court in Exhibit 26, LOT's submission to
4 the government of what it styled as "preliminary damages
5 information." It used that same term in a footnote in its
6 reply brief to the Court, "preliminary."

7 We're four years out from when the European
8 regulator lifted the grounding order, three years out from
9 when LOT filed its civil suit. And still at this stage, it
10 qualifies its damages as preliminary.

11 Again, we submit it's too complex and too
12 time-consuming, particularly when weighed against the
13 interest of LOT and restitution. It is a profitable State
14 One company. It is not a standard victim in a -- whether
15 the families or in another case of someone of lesser means.
16 And it can vindicate its right to compensation, if it has
17 them, through a civil case.

18 Again, as I said earlier, that's true whether or
19 not the Court assumes for the purposes of resolving this
20 issue that LOT is a crime victim. Under the CVRA, you still
21 would have the discretion under either of the restitutions
22 statutes not to award restitution.

23 And we make the point in our brief it's factual,
24 and LOT does take exception, but it's true that this
25 agreement guarantees restitution, that the Court can order

1 it to the families; but if it were to reject the agreement
2 based on LOT's claim, that would place at risk both LOT's
3 ability to gain restitution, which for the reasons I've said
4 are not guaranteed, and certainly would place at risk the
5 restitution for the families because it would invite the
6 litigation risk that would happen if this case proceeded to
7 trial.

8 And briefly, on the restitution for the families,
9 we submit that it's the same for the families whether the
10 Court accepts the plea or not. It's the same way in which
11 the Court would address it under either scenario.

12 The government has said in the plea agreement and
13 in its filing that we will support the lawful claims of the
14 families and we will do so. That's a commitment we've made,
15 and we will honor that.

16 We've also flagged in our brief that there are
17 likely places where we will not agree. Unfortunately, we
18 might have different views than the families', but that
19 doesn't mean they won't find common ground and we can agree,
20 and we'll have to hash out those differences as the
21 restitution proceedings take place, whether the Court
22 accepts the plea or not.

23 So as I come to my last point, what the government
24 submits is that the fine, the charge, or the conviction, and
25 the restitution issues don't change whether the Court

1 accepts the plea or not.

2 Really, we submit what is at issue are the
3 remedial measures of the monitorship and the compliance
4 investment.

5 And again, as I said earlier, there's no guarantee
6 that if the Court rejects the agreement that it would or
7 could impose either of those. And these provisions in the
8 plea agreement are reasonable and in the public interest.

9 The monitorship provisions are consistent with how
10 the criminal division has handled monitorships over decades;
11 60 monitorships in the past decade alone. These are
12 procedures that work and that produce highly effective and
13 qualified monitors.

14 But even still, we listen to the families, and we
15 modified our traditional approach to take into account where
16 we could their views.

17 First, in having a public monitor application
18 process rather than having the company select the
19 candidates, although that process works, it will be public.

20 To have the Court -- we will provide the Court
21 notice 10 days before we appoint the monitor that we would
22 like to select. We have no interest in selecting a monitor
23 that the Court has no confidence in or has questions about.

24 And we'll, of course, engage with the Court as
25 much or as little as the Court would like about that

1 candidate or the other candidates we're considering.

2 We also modified our approach to require the
3 monitor to file executive summaries on the public docket of
4 his or her annual reports to the department, which is a
5 departure from traditional practice, so that there's more
6 transparency to the families and the public about Boeing's
7 progress and the monitor's work.

8 When it comes to the scope of the monitorship, we
9 submit that it is -- it properly balances by focusing on
10 compliance and ethics between the criminal conduct at issue
11 in this case and addressing those risks going forward, and
12 also the prudent and practical need not to overstep the
13 bounds of the FAA's jurisdiction on the design and safety of
14 aircraft.

15 The criminal conduct at issue in this case, as the
16 Court knows, does not concern the design and manufacturer of
17 MCAS or the aircraft, it's about lies to the FAA. And
18 consistent with the guidelines when it talks about probation
19 for corporations, the monitorship is focused on compliance
20 and ethics.

21 We think it would invite friction, confusion, and
22 be counterproductive to have a monitor with a jurisdiction
23 that would sweep into design and safety. The families in
24 the reply brief don't define the boundaries of what they
25 would like to see of a monitorship, though the Court has

1 some sense from their motions earlier in this case asking
2 for a monitor to be appointed.

3 One of the requests, as we flagged in our response
4 earlier this summer, was to have the monitor have the
5 authority to direct design changes to aircraft. And again,
6 we think that's imprudent and impractical and not productive
7 given the FAA.

8 So for all these reasons, Your Honor, and those
9 with cite in our brief, we respectfully ask the Court to
10 accept the plea agreement and to schedule a Rule 11 hearing
11 to take Boeing's plea.

12 Thank you.

13 THE COURT: Thank you.

14 MR. FILIP: Good morning, Your Honor. Mark Filip
15 here on behalf of the Boeing Company. At counsel table with
16 me are Michael Heiskell and Ben Hatch.

17 THE COURT: Thank you both for being here.

18 MR. FILIP: May it please the Court. I'm here
19 respectfully, Your Honor, to ask you to accept the proposed
20 plea agreement.

21 A lot has been written by the parties in this case
22 by the Department of Justice and by Boeing, as well as by
23 representatives of the crash victim families and others
24 related to the proposed plea agreement.

25 Boeing, in asking you to accept the proposed plea,

1 will rely primarily on its briefing which addresses the
2 various issues in much greater detail than I can cover
3 orally today. Boeing is happy to answer any questions, of
4 course. But in my time this morning, there are a few
5 points, please, that Boeing respectfully hopes to emphasize.

6 First, as Boeing has said throughout these
7 proceedings, Boeing profoundly regrets the unspeakable
8 losses that the crash victim representatives and families
9 have suffered in connection with the MCAS accidents.

10 I believe some of these family members are here
11 today. And on behalf of 170,000 men and women of the Boeing
12 company, I want to again apologize to you and to express
13 deep sympathy for your losses.

14 The women and men of Boeing carry the memory of
15 these accidents and of your loved ones with them every day,
16 and Boeing has made sweeping and comprehensive changes as a
17 result of these accidents in an effort to strengthen its
18 safety and compliance programs, and Boeing intends to do
19 more.

20 Second, Your Honor, Boeing is prepared to plead
21 guilty to the crimes stated in the criminal information
22 initially filed in 2021. And in that regard, Boeing agrees
23 with the DOJ that the proposed plea agreement is a tough
24 punitive resolution of that charge.

25 The proposed plea agreement is significantly more

1 punitive than the DPA previously entered into by Boeing in
2 2021. The additional punishments imposed by this agreement,
3 on top of the commitments already fulfilled by Boeing under
4 the DPA, are, first, a felony conviction.

5 Second, an additional \$243 million fine, doubling
6 the financial punishment in this criminal case up to the
7 maximum fine allowed under the statute.

8 And third, new compliance requirements involving
9 three more years of oversight via an independent compliance
10 monitor that Boeing must pay for, as well as of hundreds of
11 millions of dollars, nearly a half billion dollars in
12 mandated compliance programs expenditures.

13 The proposed plea agreement, sir, comes to this
14 Court with a long and complex history. As you know, the
15 department first charged Boeing in early 2021 based on
16 alleged insufficient disclosure to a component of the FAA
17 responsible for pilot training determination related to the
18 737 MAX's MCAS system.

19 The prior DPA acknowledged Boeing's responsibility
20 based on the conduct of two 737 MAX flight technical pilots,
21 as well as the fact in the DPA that other Boeing employees
22 disclosed relevant MCAS characteristics to the responsible
23 FAA officials.

24 Entry of the proposed plea agreement will result
25 in the resolution of this long-pending matter before Your

1 Honor in commencement of the monitorship period.

2 Importantly, the proposed plea agreement would
3 impose on Boeing the most serious financial penalties
4 possible under the statute.

5 The maximum fine based on twice the gross gain
6 from the offense is based on the most serious set of facts
7 that DOJ says it can prove beyond a reasonable doubt is
8 noted in both Boeing's and the DOJ's filings.

9 So put another way, please, as noted by the
10 Department in its brief, the pending criminal information
11 and the underlying facts that support it compromise the most
12 serious provable case the department can bring.

13 And under the Supreme Court's decision in Apprendi
14 and its progeny, which we also respectfully believe and
15 submit clearly control, the fine related to this offense
16 cannot be higher than the one Boeing has agreed to pay and
17 will pay.

18 Any efforts by nonparties to supplement the
19 agreed-upon Statement of Facts supporting the criminal
20 information charge with an alternative proposed set of
21 proffered facts respectfully is not only unprecedented but
22 would violate the constitutional space reserved for
23 Article II, prosecutorial discretion, in the DOJ and
24 Boeing's Fifth and Sixth Amendment rights.

25 As set forth in the briefing, after extensive

1 investigation, the department has assessed that this
2 Statement of Facts reflects what it can prove beyond a
3 reasonable doubt.

4 Third, sir, it's worth noting that, outside of
5 this criminal proceeding and long before the government
6 sought a guilty plea in 2024, Boeing has separately accepted
7 responsibility for the MAX crashes publicly and in civil
8 litigation because the design of MCAS, as opposed to the
9 criminal offense that is subject to the proposed plea,
10 contributed to these accidents.

11 In doing so, Boeing has paid billions of dollars
12 to the crash victim families and their lawyers in connection
13 with civil litigation in the funds established by Boeing
14 voluntarily and under the DPA for the benefit of the
15 victims.

16 This is in addition to the criminal fines and
17 other payments Boeing made under the DPA and the additional
18 criminal fines and other payments that Boeing's prepared to
19 make under the proposed plea agreement.

20 To be clear, Boeing acknowledges that money can
21 never replace a loved one, of course, but Boeing has
22 accepted responsibility in extensive civil litigation.

23 The vast majority of those civil cases, over
24 90 percent, have settled. Some are ongoing, to be sure, but
25 the key point is that Boeing has publicly accepted

1 responsibility to pay full compensatory damages in all of
2 the civil actions.

3 Finally, while Boeing substantially enhanced its
4 compliance program under the DPA, the additional requirement
5 involving the imposition of an independent compliance
6 monitor provides an opportunity to make the company even
7 stronger.

8 Importantly, the independent compliance monitor
9 obligation set forth in the proposed plea carefully and
10 directly addresses the unique circumstances of this case.

11 It's a monitorship tailored to address a specific
12 conduct set forth in the plea agreement Statement of Facts,
13 as well as the remaining concerns the department has about
14 the company's antifraud compliance program after the
15 three-year DPA term as described in the department's papers.

16 The monitorship's purpose is the essence of any
17 monitorship, to address the future detection and prevention
18 of the type of misconduct at issue in the prosecution.

19 To impose monitorship requirements beyond those
20 factors would ignore Boeing's good-faith compliance progress
21 to date and supplant the department's work as well.

22 The identified gaps and the specific facts and
23 circumstances at issue in the prosecution will be addressed
24 by the monitorship going forward.

25 When coupled with compliance obligations that

1 Boeing was subject to under the DPA, the additional
2 three-year monitorship requirement will effectively stretch
3 DOJ's oversight over Boeing to nearly seven years' time,
4 from January 2021 to likely 2027, depending on when the
5 monitorship begins.

6 That length may be unprecedented in the history of
7 the department's corporate prosecutions. Moreover, and
8 critically important, Boeing continues to actively work with
9 its primary congressionally authorized safety regulator, the
10 FAA, to enhance the safety of its products and services.

11 The proposed plea agreement recognizes the
12 centrality of the FAA's role as the company's primary
13 regulator in the American aviation safety system and the
14 need to mitigate any interference with that vital role,
15 including that Boeing is currently subject to robust and
16 heightened oversight by the FAA in the aftermath of the
17 Alaska 1282 accident.

18 This regulatory backdrop, respectfully, is
19 important because the insertion of a monitor with the
20 "broader mandate" than the one set forth in the proposed
21 plea agreement as proposed by Mr. Cassell, runs the risk of
22 affirmatively harming aviation safety.

23 Any divergence between the directives of the FAA
24 and a punitive monitor of the sort requested by Mr. Cassell,
25 for example, would leave Boeing in the untenable position of

1 deciding between dissident signals about safety, between
2 compliance with the Congressionally mandated aviation safety
3 experts, that is the FAA, and compliance with the plea
4 agreement's conditions.

5 The FAA is responsible for regulating aviation
6 safety, and it would be counterproductive to have an
7 independent safety monitor directing measures different from
8 those mandated by the FAA.

9 And the scope of the independent compliance
10 monitorship set forth in the proposed plea recognizes the
11 potential for this problematic conduct and instead has the
12 monitor focus on the antifraud compliance program areas
13 identified by the department as of concern.

14 In short, Your Honor, while Boeing intends to
15 improve further, it has substantially strengthened and
16 increased its investment in its compliance and safety
17 functions under the ongoing oversight of the department and
18 FAA over the past three years. And it will continue those
19 efforts under the proposed plea agreement.

20 If accepted, by the end of probationary period,
21 Boeing will have been under the department's supervision for
22 at least six, and likely somewhat of seven years, and under
23 the supervision of an independent monitor for three.

24 Boeing will have paid billions in compensation
25 both to the crash victims' representatives and its airline

1 customers through compensation provided pursuant to the DPA
2 and through civil settlements. Boeing will have paid nearly
3 a half a billion dollars in collective criminal fines.

4 I'm happy to answer any questions, of course, Your
5 Honor, but Boeing would respectfully ask for you to accept
6 the proposed plea agreement and set a Rule 11 hearing as
7 suggested by the government.

8 THE COURT: Thank you.

9 MR. CASSELL: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. CASSELL: Paul Cassell for 15 victims'
12 families, and I'm proud to introduce the other members of
13 our pro bono legal team. Seated with me at counsel table is
14 Tracy Brammeier, Erin Applebaum, and Chase Hilton from the
15 local law firm of Burns Charest.

16 THE COURT: Thank you all for being here.

17 MR. CASSELL: Also have seated in the courtroom a
18 number of victims' family members. They very much
19 appreciated your accommodation in allowing two weeks for
20 them to travel. Sometimes these and other arrangements are
21 difficult to make.

22 THE COURT: Thank you all for being here.

23 MR. CASSELL: Let me just briefly state our eight
24 objections, and I would be glad to focus my argument on any
25 of those that Your Honor would be most interested in.

1 But for the record, there are eight reasons, any
2 one of which would be enough to reject this rotten plea
3 deal.

4 The first is that it ties the Court's hands. It's
5 part of a forbidden two-tier system of justice where rich
6 corporations like Boeing can specify their punishment in
7 advance, where other defendants are not allowed those
8 concessions.

9 Secondly, it rests on an air-brushed set of facts
10 that conceals the truth about this case.

11 Third, most notably, it ignores the truth that
12 dare not speak its name, 346 people died because of the lies
13 that the Boeing Company told.

14 The fourth thing that it does is it pins the blame
15 on some mid-level test pilots for what was a long-running
16 corporate conspiracy that ran all the way to the top of the
17 Boeing C-suite, all the way to the CEO, Dennis Muilenburg,
18 and that is buried in the Statement of Facts and the
19 guideline calculation that the parties asked you to bless.

20 The fifth thing that this plea agreement does is
21 impose an inadequate fine resting on a calculation of a cap
22 that is not legally well-founded.

23 In fact, we just heard the Justice Department cite
24 an unpublished Fifth Circuit decision on restitution as
25 authority for that. When, of course, there's a separate

1 issue involved today.

2 The sixth thing we would ask this Court to do is
3 to bless a Department of Justice monitor, rather than having
4 the Court independently select it.

5 I think one thing everyone in this courtroom can
6 agree on is that this has been a case where there has been
7 considerable doubts cast upon whether the Justice Department
8 can effectively monitor a corporation like Boeing.

9 The seventh thing that this plea agreement would
10 ask the Court to accept is remedial measures. And remedial
11 measures not based on the harm that Boeing caused, but
12 rather, the Justice Department takes the \$486 million fine
13 and says, well, by golly, we can't have any remedial measure
14 higher than that. So we'll peg it at 450 million, rather
15 than coming up with something that's appropriate to the harm
16 that was caused here. And the 450 million, by the way, is
17 completely unenforceable since there's no effective
18 baseline.

19 And then, the last point, again, an independent
20 reason to reject this is that we have no certainty that
21 restitution would be paid to the families. Justice
22 Department tells us they will support lawful restitution.

23 Of course, the adjective "lawful" leaves a lot to
24 be interpreted. And we've already been told that the
25 Justice Department disagrees with some of the important

1 assertions of the victims' families.

2 So any one of those reasons would be enough to
3 reject this rotten plea deal. But taken together, we
4 believe that the Court has a straightforward choice to make,
5 whether to bless a deal that is not justice; or to reject
6 the deal, set the case for trial; or, if the parties would
7 propose an alternative plea, that would be a possibility as
8 well.

9 I would be happy to focus on any of those points,
10 or I could proceed to elaborate on them.

11 THE COURT: So I want to give all of you the
12 opportunity to say anything that you want to say that maybe
13 you're worried doesn't stand out in the briefs or needs
14 additional emphasis. So I'm just going to listen, and then
15 I will have some follow-up questions later, if my questions
16 aren't already answered.

17 MR. CASSELL: All right. I know my clients would
18 like for me to press several points on Your Honor. So let
19 me.

20 We've already talked briefly about the fact that
21 this is a "C" plea that Boeing is getting. I think that's
22 highly unusual. Your Honor could simply reject it on those
23 procedural grounds.

24 Let me go straight to the heart of the matter,
25 which is that the parties are swallowing the gun in this

1 case; that is, they are concealing, through legal
2 maneuvering, essentially, the truth of the case.

3 Now, it's a well-established principle that in
4 sentencing the Justice Department is supposed to provide the
5 Court all relevant facts, but they failed to do that here.

6 We provided Your Honor -- and I know that I'm
7 making a strong assertion there and sometimes attorneys come
8 in and make assertions that they can't back up -- but see,
9 right here on the table is our 44-page Statement of Facts
10 with redlining for the convenience of Your Honor and for the
11 parties, showing exactly the facts that the Justice
12 Department and Boeing are leaving out. And those are facts
13 that go directly to the culpability of this company for the
14 deadliest corporate crime in U.S. history.

15 And indeed, let's talk specifically about the
16 deaths. Your Honor has already found that Boeing's crime
17 directly and proximately caused the deaths of 346 people,
18 making it the deadliest corporate crime in U.S. history.

19 You would think that that fact would somewhere
20 show up in the plea agreement that the parties are asking
21 you to bless, but it doesn't. That is the fundamental
22 reason why the families are here today asking you to reject
23 this plea.

24 It would be one thing if the parties said, 346
25 people died and now let's discuss with Judge O'Connor what

1 the appropriate response is in terms of a criminal sentence.

2 But they want you to go to sentencing in this case
3 as though 346 people did not die. And you would see that
4 directly in the sentencing guideline calculation.

5 As you know, the very leading point that we made
6 in our brief about the guidelines was that there is an
7 enhancement when a defendant's crime results in death. And
8 that's an enhancement that should be added in this
9 particular case.

10 What does the other side say about that? What
11 they say is, well, we can't prove that beyond a reasonable
12 doubt.

13 But as we cite with multiple Fifth Circuit cases
14 for support, the standard at sentencing is preponderance of
15 the evidence. And Your Honor has already found by a
16 preponderance of the evidence that 346 people died because
17 of what Boeing did.

18 Let me give you one example of the facts they're
19 asking you to ignore, and they've asked you to ignore it for
20 the last couple of years. A couple of months ago -- I guess
21 a couple of weeks ago when we filed our brief, we had to
22 redact certain pieces of information because Boeing had put
23 them under a protective order in their civil cases.

24 One of those pieces of information was emails from
25 Ethiopian airline pilots, after the Indonesian air crash and

1 before the Ethiopian crash, asking questions. What do we do
2 if we get uncommanded activation of this system here? How
3 are we supposed to respond? And rather than responding with
4 life-saving information, Boeing chose not to answer those
5 questions.

6 Why didn't they answer those questions? We think
7 it's obvious. Because to put on the table for the Ethiopian
8 airline pilots what was going on with MCAS would unveil what
9 the conspiracy had been doing for years: Concealing the
10 power of that system within the Boeing aircraft.

11 So those documents were put under seal in
12 Illinois. After four motions, from my colleague
13 Ms. Brammeier, ultimately, those were released to me. We
14 could provide them under seal to you.

15 And then the New York Times said, well, why are
16 these under seal? And Boeing agreed to make them public.

17 So for the first time this week, I could share
18 with my clients the fact that Boeing refused to answer
19 questions from Ethiopian airline pilots, questions that
20 tragically, several weeks later, came to play out in the
21 airspace over Addis Ababa when MCAS activated uncommanded.

22 And if those questions had been answered by
23 Boeing, we believe that the evidence is clear that that
24 flight would have landed safely.

25 That is the kind of case that Your Honor is

1 sentencing here. And that is the kind of information that
2 the parties are asking you to ignore.

3 For that reason alone, regardless of what number
4 you end up with on a fine or what the guideline range is
5 under Section 8 of the guidelines, that fact alone should
6 lead to this Court rejecting the plea.

7 But let me say a few words about this supposed
8 constitutional cap that would limit Your Honor's ability to
9 impose a fine that's commensurate with a crime that killed
10 346 people.

11 We're told that the Southern Union case from the
12 U.S. Supreme Court places this limit on the Court. We have
13 cited the fact that, first of all, the statute in play,
14 3571, envisions the Court ultimately determining the size of
15 the fine.

16 And if you look at 3572, the very next provision,
17 it says right in there, "The Court shall determine the size
18 of the fine."

19 And the Fifth Circuit in two cases that we cite,
20 published decisions, U.S. vs. Wilder from 1994, and U.S. vs.
21 Beard from 1990, has said, yes, the Court gets to determine
22 the size of the fine, whether there was a gain or a loss
23 that would mean an appropriate enhancement.

24 Now, what we're told by the parties is, well, the
25 Southern Union case somehow, I guess, renders the

1 application of that statute unconstitutional in this case
2 and implicitly overrules those earlier Fifth Circuit
3 decisions, although, actually, neither party has discussed,
4 either today or in their briefing, the Wilder case and the
5 Beard case.

6 So the ultimate question for Your Honor is whether
7 Southern Union, according to the rule of orderliness,
8 unequivocally overruled prior Fifth Circuit precedent. I
9 don't think there's any basis for saying it unequivocally
10 overruled those prior precedents.

11 And what does that mean? That means there's no
12 cap. And what that means is it's obvious that this plea
13 deal rests on false premises.

14 How much are the losses in this case? Again,
15 we've been asking the government -- maybe in rebuttal or
16 something they can answer this question, if Your Honor would
17 permit -- what is the government's view as to what the loss
18 was in this case?

19 We believe that if they are pushed, they will say
20 the loss is zero dollars, which is, not to mince words, a
21 morally offensive position to say that Your Honor should
22 proceed to sentencing on this case on the assumption that
23 there were no losses whatsoever. But that is the ultimate
24 reasoning that the Justice Department submits and that
25 Boeing ducks behind.

1 We suggest there are multiple ways to see what the
2 loss was in this case. If you use a standard figure for the
3 cost of a homicide crime, the losses in this case were
4 1.9 billion to the families. And then, if you look at what
5 airline customers lost, you have another \$9.2 billion.

6 And I know sometimes attorneys may come in front
7 of Your Honor and throw out numbers with no basis
8 whatsoever. Where did I get those numbers? I got those
9 numbers from Boeing's Form 10-K submitted to the Securities
10 and Exchange Commission.

11 And in 2019 and 2020, Boeing put in those
12 government-required forms that there were \$9.2 billion in
13 losses to its aircraft customers.

14 So how they can come in front of Your Honor say,
15 well, look, it's just a couple hundred million dollars here
16 in losses, that contradicts what is happening in formal,
17 official, under-penalty-of-perjury filings made with the
18 Securities and Exchange Commission.

19 What else should I say about the guidelines? I
20 mean, I'm gobsmacked, as you can tell, that the United
21 States Department of Justice is coming in front of Your
22 Honor and saying, well, you know, maybe there's some
23 problems with the guideline. There are five things that are
24 demonstrably wrong with the guideline.

25 First, they want to treat this as a victimless

1 crime. They don't add the enhancement for 10 or more
2 victims.

3 Second, there is an enhancement under this
4 guideline for reckless risk of death. There wasn't a risk
5 of death. There was the actuality of 346 people dying
6 ignored by their guideline calculations.

7 There is the possibility of an upward departure.
8 Your Honor is familiar, of course, with that provision. If
9 you have a crime that somehow leads to a death, you're not
10 going to treat that as a run-of-the-mill fraud case, which
11 is what their guideline calculation does.

12 And then again, something of great interest to my
13 families, buried in the middle of their guideline
14 calculation, they pin the blame on midlevel employees for
15 Boeing, not taking account of the fact that Boeing's C-suite
16 was directly involved in these lies.

17 And again, I'm not making up things that lack
18 support. What I am doing is recounting Securities and
19 Exchange Commission findings that fined Boeing and also
20 fined, by the way, their CEO Dennis Muilenburg for
21 submitting false information while they knew that they had a
22 problem with their MCAS situation -- with their MCAS system.

23 Acceptance of responsibility, yet another problem.
24 We're told that Boeing should get credit for being contrite.
25 But under the guidelines, as we point out in our briefs, a

1 corporation is required to make timely cooperation with the
2 government when the issue is presented to them.

3 What do we know about Boeing's cooperation? In
4 the DPA, both the government and Boeing said that Boeing's
5 cooperation was delayed for six months, which frustrated the
6 fraud section's investigation.

7 Now, what happens when they present the plea
8 agreement to you three years later? That fact seems to be
9 missing. And that's exactly the kind of fact that is
10 important to reaching an appropriate sentence in this case
11 that the parties are leaving out.

12 Another example, where are we? They gave Boeing
13 credit in the DPA three years ago for accepting
14 responsibility. What's happened in those past three years?

15 Sadly, we know. We know that they breached their
16 obligation under the sweetheart deferred prosecution
17 agreement to get their house in order.

18 And so, once again, we have a calculation that
19 rests on fictitious premises that they're asking you to
20 bless.

21 The corporate monitor. Let me say a few words
22 about that. We're told, this is the way we do business
23 around here in the Justice Department. We pick the monitor.
24 Well, if there was ever a case where business as usual
25 should not happen, this is the one.

1 Because we know what happened for the last three
2 years on the Justice Department's watch. We know that for
3 the last three years Boeing had a chance to get its house in
4 order, and they failed to do so.

5 One of the things that I remember vividly was that
6 I was here in front of you in January of 2023 making,
7 essentially, the same argument. Let's have an independent
8 monitor, a transparent monitor. Let's get to the bottom of
9 this.

10 Let's do that so that Boeing, one of America's
11 historically greatest companies, can get its house in order.
12 And you remember what happened at that hearing. We all do.

13 The Justice Department and Boeing stood up and
14 told you, Your Honor, we've got this. Everything is cool.
15 We're supervising them. And then the Boeing attorney came
16 up and said, they're really tough, Your Honor.

17 And now we know what was the result of that
18 three-year monitorship. That three-year monitorship failed.
19 The Justice Department let Boeing continue to breach its
20 obligations. And now they want you to do the same thing
21 over again. My clients are calling this DPA 2.0.

22 The Justice Department is going to, you know, look
23 at everything. It's a public process, they say. Even
24 though we won't know exactly who the names are. They will
25 send you secretly the name. And they'll maybe take your

1 views into account when they finally pick the monitor.

2 That process is not going to command respect from
3 the victims' families or the public. The only process for
4 selecting the monitor that would command respect is if you
5 select the monitor. You can certainly get information from
6 the government and Boeing. We will be happy to provide
7 information as well.

8 But any other process is going to fail at the
9 outset regardless of what the monitor does. So don't follow
10 business as usual, if that's the case. We actually cited
11 some counterexamples in our briefing, but don't follow
12 business as usual in this case because business as usual has
13 not worked.

14 The next question, remedial measures. How did
15 they get the \$450 million? It's less than 486, but that
16 doesn't solve what they're supposed to be solving.

17 They're supposed to be remedying the harm from
18 Boeing's crime. I guess if your view is that the harm from
19 the crime is zero, 450 million seems fine. And then 450
20 million, where did they come up with that number?

21 We cite in our briefs, the Justice Department's
22 press release. The press release from the Justice
23 Department says, "Look, this is 75 percent above Boeing's
24 previously planned expenditures for compliance."

25 I was trying to figure out what the right analogy

1 is here. 75 percent above what? If I was a sixth-grade
2 student, said 75 percent is going to be an investment in
3 three programs, and that's 75 percent more than an
4 investment in one program. That's apples to oranges.

5 They don't even give you, as a reference point,
6 the investment that Boeing made in the three programs to
7 then compare to what supposedly was going to be this new and
8 additional investment.

9 And then, it turns out -- actually, in the
10 response brief from the government, they said, "Well, what
11 we're trying to do is to make sure" -- and I'm quoting the
12 government's brief at page 17 -- make sure that the
13 compliance efforts expenditures "remain at or above."

14 "At or above."

15 So all they wanted to do with these supposed
16 remedial measures is maintain Boeing's spending at the
17 current level. That's not a response to harm. That's
18 something that, essentially, asks you to bless business as
19 usual. And there is some restitution problems as well, but
20 I know that Your Honor's been very patient.

21 Let me just conclude by pointing to what I think
22 is ultimately the issue in front of Your Honor. Your Honor
23 is well familiar with the 3553(a) factors when you have a
24 defendant, a criminal, come in front of you for sentencing.

25 Those factors involve the nature and circumstances

1 of the offense, the need for the sentence to reflect the
2 seriousness of the crime, promote respect for the law,
3 provide just punishment.

4 I mean, Your Honor knows the list. You could go
5 down every one of those, and you would find, I think, very
6 quickly that this plea deal flunks on every measure.

7 Let me just close with these words. It cannot
8 promote respect for the law if this Court blesses a plea
9 agreement that ignores 346 deaths, but that's what they're
10 asking you to do. We ask you to reject this plea agreement.

11 THE COURT: Let me just ask you a question. Just
12 a few questions.

13 So one of the arguments you make in your brief is
14 that the plea agreement implicitly exonerates higher level
15 executives, senior management.

16 And then the effect of -- implicitly exonerates it
17 by its calculation of the guidelines. By the parties'
18 calculation of the guidelines, not including the agreement,
19 and then there were a couple of other points that you made.

20 But my question to you is, on those points, and
21 overall, on the request for me to accept the plea agreement,
22 what level of deference is afforded to the government in
23 making these decisions as the executive branch in charge of
24 prosecuting criminal cases generally, this one specifically?

25 What level of deference is afforded to the

1 government in making this determination about whether this
2 is in the interest of justice, fair and adequate justice?

3 MR. CASSELL: All right. Thank you, Your Honor.
4 Let me focus on the specific point that you started with,
5 because I think it will illustrate the broader message here.

6 So you have to decide were the executives at the
7 top level of Boeing involved or not in making that guideline
8 calculation.

9 Now, you wonder what is the appropriate level of
10 deference to be given to the government? On a guideline
11 calculation, none whatsoever. The parties can't come in and
12 swallow the gun and say, oh, I know all the tellers at the
13 bank said he had a machinegun but pay no attention to that.

14 You have to make your own independent
15 determination ultimately of what is the right sentence.
16 But, obviously, if you have to make the determination about
17 the sentence, you need to determine what the underlying
18 facts are.

19 And the Justice Department's guidance to
20 prosecutors is that they should be disclosing everything to
21 you. We cite a Northern District of Texas decision which
22 says that, yes, under the guidelines, there's an independent
23 obligation of the Court to determine what is going on.

24 So that means you're going to have to decide, did
25 this reach Boeing's C-suite or not? And then you say -- I'm

1 sorry, then you ask the question, well, what is the level of
2 deference I should give to the Justice Department?

3 They presented this plea deal to you that had kind
4 of, buried in the middle of it, this calculation. We called
5 them on it. We said, you, Justice Department, have lots of
6 evidence that will show that that's false. Why don't you
7 simply present your evidence to Judge O'Connor so he can
8 make his own determination? And their response is nothing.

9 So it would be one thing if they said, here's our
10 evidence, Judge, your call. Or, here's the evidence, Judge.
11 We read it a certain way.

12 But they're saying, don't look at the evidence and
13 just trust us, because either way, you won't get reversed in
14 the Fifth Circuit on a harmless error analysis if your
15 guideline calculations are messed up.

16 Again, it's gobsmacking that the first thing the
17 Justice Department says, when we pushed them on their
18 guidelines calculation is, it's going to end of being
19 harmless error because, you know, it's not going to play out
20 in the fine.

21 I always thought that truth in sentencing and
22 truth in the courtroom is a fundamental value. But before
23 we start debating what's the fine, or how does the guideline
24 calculation apply, everybody gets to a core set of facts
25 that reflect the truth. But that's not what's happening

1 here.

2 So if they had told you the truth is one thing and
3 the victims are telling you it's another thing, that might
4 be one circumstance. But that's not what they're doing
5 here.

6 They're saying, we can't prove certain facts by
7 proof beyond a reasonable doubt. And, therefore, you
8 shouldn't fine them by a preponderance of the evidence at a
9 sentencing proceeding.

10 THE COURT: What do you say on that point, on
11 proof beyond a reasonable doubt that, to the extent that you
12 increase the statutory maximum, that it has to be proof
13 beyond a reasonable doubt, as opposed to a guideline
14 calculation on C-suite --

15 MR. CASSELL: Right.

16 THE COURT: -- employees and how the enhancement
17 applies or on the acceptance of responsibility -- on the
18 acceptance of responsibility argument that you made?

19 What about that distinction?

20 MR. CASSELL: So, first, let me point out that
21 that's among our eight arguments is one argument. So if you
22 conclude that there is a problem with my position on
23 Argument No. 5, I certainly hope that you would rule in our
24 favor on the other seven arguments, but we think there's no
25 problem with going beyond the 243 million that that the

1 government has come up with.

2 Their argument rests on Southern Union, obviously.
3 Southern Union is a decision that focused on a very unusual
4 statute.

5 The RCRA statute there says every day that the
6 company committed the crime, there's an additional fine
7 amount.

8 And the U.S. Supreme Court with that, I think,
9 admittedly unusual statute in front of it said, under the
10 Apprendi line of cases, the jury has to decide how many days
11 went by because that's part of the crime.

12 Now, we have a very different situation though.
13 We have, under the plea agreement, or after what would be an
14 inevitable guilty verdict at trial, we have Boeing lying to
15 the FAA.

16 And then the question is, let's see if we can
17 quantify the harm that resulted from that crime. We would
18 commend to your Court's attention, you know that we've
19 highlighted page 359 of the Southern Union case repeatedly
20 in our briefing.

21 It says that, look, this finding about how many
22 days long the RCRA violation went, that isn't "not fairly
23 characterized as merely quantifying the harm."

24 Let me repeat that phrase, because it's extremely
25 important to our argument. "Not fairly characterized as

1 merely quantifying the harm." Because there you had to
2 figure out -- the jury had to figure out how long did the
3 crime go on?

4 Here, we've got Boeing lying to the FAA, and we're
5 here merely quantifying the harm. We fit squarely within
6 that language in Southern Union.

7 But even if you were uncertain about whether we
8 fit under that language, we certainly fit under the language
9 of the alternative fines provision in U.S. vs. Beard and
10 U.S. vs. Wilder that says you get to make the determination.

11 And when you make determinations, of course, you
12 don't make determinations by proof beyond a reasonable
13 doubt. You make them by the conventional standard at
14 sentencing, a preponderance of the evidence.

15 So we're not asking for anything unusual here.
16 We're simply asking for you to apply the normal burden of
17 proof on disputed facts at sentencing which is preponderance
18 of the evidence.

19 THE COURT: All right. Just a couple of other
20 questions.

21 One of the arguments you make in your briefing is
22 that the government continues to not comply with crime
23 victim statute by discussing specific provisions of the plea
24 agreement with your clients in their conferral setting.

25 And the government provided a big binder. I

1 didn't bring it in this morning. It's a binder full of
2 documents where they go through, and at a high level, have
3 considered comments from the victims. Of course, the plea
4 agreement and the board meeting as an example that the
5 government highlights.

6 Tell me, as probably the foremost expert on this
7 statute in the country, tell me your view as to what level
8 of detail the government has to engage in in conferring with
9 your clients about plea agreements.

10 MR. CASSELL: Right.

11 THE COURT: Their argument is we have conferred.

12 MR. CASSELL: Right.

13 THE COURT: We've let them know. We've heard
14 their objections and suggestions and we've adopted some and
15 we have not adopted others. But at the end of the day -- it
16 came back to the deference. At the end of the day, we are
17 in charge of this.

18 And our view is this is the proper agreement to
19 reach in this case with Boeing. But you're saying there
20 were some provisions in it that they never talked to your
21 clients about. So I'm just wondering what your assessment
22 is or your interpretation is on the statute as it relates to
23 facts in the trenches.

24 MR. CASSELL: Let me make two points on that, a
25 narrower point, and then a broader point. The narrow point

1 is, as you noticed in our reply brief, we initially were
2 saying, look, let's just let Judge O'Connor get to the heart
3 of this thing. Let's not wrestle over procedural issues.

4 But then we learned, when we got the government's
5 brief in response to our opening brief, we had been told --
6 you know, these families were on the Zoom call on Sunday
7 afternoon -- this is the deal. It's nonnegotiable. And
8 then they describe the terms in various ways. And so, off
9 they ran.

10 And it seemed to us they were taking a long time.
11 And sure enough, what was going on in the proverbial back
12 room was negotiations between high-powered legal teams over
13 what the plea agreement should look like.

14 We learned in the government's briefing -- in
15 fact, Mr. -- I hope I'm pronouncing it correctly -- Tonolli.
16 Is that correct?

17 MR. TONOLLI: Yes.

18 MR. CASSELL: His brief said, yes, there were
19 material changes made during those negotiations.

20 Well, we were deceived. We were told that the
21 deal was nonnegotiable. So we sat back and started prepping
22 our arguments to present to you. If we had been told they
23 were negotiating, we would have knocked on the door, and
24 said, hey, we've got a few observations to make here too.

25 That violates the CVRA's right to be treated with

1 fairness. I mean, you know, you can have an interesting
2 debate about how broadly should fairness be interpreted and
3 so forth. But the one thing it's got to mean is the
4 government can't tell the victims this is nonnegotiable and
5 then walk out the door to a back room and start negotiating.
6 So that's a violation of the CVRA's provision promising us a
7 right to be treated with fairness.

8 Now, you know, we would prefer that you throw the
9 plea agreement out because it's a rotten deal, rather than
10 send us back to what we think, frankly, would be another
11 meaningless Zoom session with the government, but there we
12 are.

13 The broader point is an interesting one that you
14 raise. I am just smiling because I'm just revising our case
15 book on crime victims' rights, and I may need to think about
16 that a little bit more. I think the answer is they have to
17 at least show the terms to the victims and get their
18 feedback on it before they present it to a judge.

19 I mean, one of the things, as you mentioned,
20 there's a big stack of binders about -- well, they've got
21 all these government meetings, and they sure created a paper
22 record that they sat there and listened to us for a while.

23 But the one thing we wanted to know is, well, what
24 are you going to extend to Boeing as your deal? They never
25 told us that.

1 They finally, at that last meeting, they said,
2 here's the deal. They described the terms. Why couldn't
3 they have said, even an hour before that meeting, well,
4 here's the terms we're getting ready to extend. So what do
5 you think about them?

6 We could have then worked with the government and
7 explained to them, we think you're misinterpreting Southern
8 Union. We think that your remedial measure is pegged below
9 the fine inaccurately.

10 We think your monitorship needs some additional
11 changes to it. But we didn't have an opportunity to work on
12 those specifics with the government, because they never
13 showed us what was there.

14 To get right to the point, is that a violation of
15 CVRA? I think it is. The CVRA was initially enacted in
16 2004. It was amended in 2015.

17 And there's a little bit of history here. The
18 2015 amendment was designed to codify the Fifth Circuit's
19 decision *In re Dean*, where the government had failed to
20 confer with the victims.

21 So the 2015 amendment is found in 3771(a)(9). It
22 says the CVRA gives right for victims "to be informed in a
23 timely manner of any plea bargain."

24 So that, then, raised the question, well, what
25 does it mean to be timely informed? We submit that that

1 language means you get to see the deal. And that would be
2 the being timely informed about the terms of the deal.

3 And the reason that we read the language as
4 including getting the details of the plea agreement is, if
5 you go back to In re Dean, the 2008 Fifth Circuit codified
6 in the later amendment, the Fifth Circuit said prosecutors
7 should develop, "a reasonable way to ascertain the victims'
8 views on the possible details of a plea bargain." Possible
9 details of a plea bargain.

10 So if you simply follow Fifth Circuit law, they
11 should have told us the possible details of the plea
12 bargain. They never did that. And we think that's a
13 violation.

14 So, again, we're not -- I understand your point
15 about deference. Certainly, the executive branch is
16 entitled to deference in some areas. Why couldn't they just
17 Xerox the thing and say, hey, we're thinking about this.
18 Got any comments?

19 That's all we were asking for. That's all these
20 victims were asking for. And the government, I don't know,
21 out of some, you know, we don't do it that way, that's not
22 business as usual around here, kept it under wraps. I think
23 that violates the CVRA. It violates Section (a)(9).

24 THE COURT: Thank you.

25 Let me ask you just a couple of other questions

1 quickly, because we have to get other arguments.

2 But one of the arguments or assertions from both
3 the government and Boeing is that the objection that you
4 have to the corporate monitor would -- the way you describe
5 it at least, would encroach on the FAA's responsibilities.

6 And I'm trying to find it here in the plea
7 agreement, but in Footnote No. 1 of the plea agreement,
8 there's a reference to the FAA's obligation.

9 So what do you say to that? That the corporate
10 monitor that you have proposed would improperly and perhaps
11 compromise safety because of its interaction with the FAA?
12 Yeah, what's your take on that? I'm trying to find it here.
13 I've got my notes here.

14 MR. CASSELL: Yeah. No, I'm familiar with the
15 argument. I'm sorry, Your Honor is too.

16 THE COURT: Yeah.

17 MR. CASSELL: I think it's sort of setting up the
18 proverbial strawman. We've certainly proposed to Your Honor
19 suggested ways that you might formulate the monitor, but
20 it's not our job to spell out precisely what the monitor
21 would look like.

22 We have simply criticized the monitor that the
23 government is proposing and Boeing has accepted in the plea
24 deal. So you wouldn't have to find to reject this monitor
25 arrangement that the victims' families have come up with a

1 better monitor plan. All you have to say is that the
2 monitor they're proposing is inadequate.

3 Now we -- again, this is one -- to piggyback off
4 of your last question about the possible details, if we had
5 seen the details of the monitor arrangement, we could have
6 said, hey, we don't think you've gone quite far enough.

7 Could you change this, and maybe add this over
8 here? And they might have said, well, we like your first
9 suggestion, but the second one butts up against the FAA.
10 And then we might have said, let's change some language
11 here.

12 If we had had an opportunity to reasonably
13 confer -- to pull a phrase from the CVRA -- with the
14 government, I think we could have crafted something that
15 would have avoided the problems with the FAA.

16 We certainly would have had no objection to, if
17 our monitor would have been adopted, to put in language that
18 says nothing in this monitorship arrangement would supersede
19 what the FAA is doing.

20 I mean, I think, their -- you know, this is the
21 proverbial parade of horrors. If you give them an inch,
22 Your Honor, the FAA's rules will get overridden, and planes
23 will start crashing. That's not what's going to happen if
24 you accept our proposal.

25 It is potentially, unfortunately, what might

1 happen if you accept their proposal, because they're putting
2 in a monitorship arrangement that, I think we all have to
3 agree, is going to be suspicious from the outset, because
4 the Justice Department, one of Boeing's major customers, is
5 going to be the one selecting the monitor.

6 And then you get into these things too -- I don't
7 know. I was preparing for the argument this morning, trying
8 to make sure, if you asked me a question about what the
9 nonconditioned conditions were, how that worked.

10 I spent an hour this morning trying to figure out,
11 okay, if they violate something that's not a condition of
12 probation, then they get to make a decision, but they bring
13 it back to you.

14 And if you agree that they violated, then what
15 they can do is file new charges against Boeing that are
16 somehow, what -- but we're now past the statute of
17 limitations.

18 I mean, the whole thing is jerry-rigged or
19 whatever the right metaphor. You can't -- why isn't there
20 just a standard, these are the conditions of release, you
21 got to follow them?

22 Instead, what they're doing, these are the
23 conditions of release, and the Justice Department and Boeing
24 will sit down behind closed doors and figure out whether
25 there is anything to bring to your attention. That's, you

1 know, I think the fundamental problem with the monitor.

2 THE COURT: And then on page 37 of your brief, you
3 talk about, I guess, it's a -- they've got this DEI
4 language --

5 MR. CASSELL: Yes.

6 THE COURT: -- for the monitor? Have you found
7 that? Is that new?

8 MR. CASSELL: I think in the current
9 administration, it's been added in.

10 I guess our point of mentioning that is you would
11 think that the monitor would be focused solely on
12 compliance. But instead, the way they're setting up the
13 monitor program -- and I'm not the only one to have made
14 this criticism, I think other judges have commented on
15 this -- other judges evaluating pleas have commented on this
16 as well. It seems like there are other agendas that are at
17 work there apart from trying to enforce compliance with the
18 agreement.

19 THE COURT: Okay. Okay. Anything else that you
20 haven't had time to address or came to mind as I was asking
21 you these questions?

22 MR. CASSELL: Well, I will resist the temptation.

23 THE COURT: Okay.

24 MR. CASSELL: We just ask on behalf of my
25 families --

1 THE COURT: Yes.

2 MR. CASSELL: -- strongly urge you to reject this
3 plea.

4 THE COURT: Very good. Thank you. Okay.

5 MR. VUCKOVICH: Good morning, Your Honor. Adrian
6 Vuckovich. I represent the crime victims starting with
7 Arfiyandi name which you placed in the order.

8 THE COURT: Okay. Would you introduce anyone else
9 who came with you?

10 MR. VUCKOVICH: Sure. I have Manuel Ribbeck with
11 me. Mr. Ribbeck represented approximately 60 families who
12 were crime victims in the Lion Air crash.

13 THE COURT: Thank you for being here.

14 MR. VUCKOVICH: Thank you for allowing us to
15 appear this morning and address the plea agreement, Your
16 Honor.

17 We are asking you to reject the plea agreement.
18 In doing that, I want to be clear because it -- in order to
19 try to have you accept the plea agreement, both the
20 government and Boeing intimate that the arguments made are
21 stepping on prosecutorial discretion and at some point
22 violated the due process of Boeing.

23 We are not trying to do any of that and we're not
24 doing that. We are not asking that a different charge be
25 made against Boeing. Even though there are other charges

1 that should have been made, we're not asking that.

2 And we're not asking that other parties be
3 included in the criminal case even though they should have
4 been.

5 Where we are is just where you ordered us to be is
6 to take a position on the plea agreement and whether we
7 accept it -- or why you should accept it or reject it. You
8 also have the choice of deferring under Rule 11.

9 But fundamentally, this agreement is really a
10 recast of the deferred prosecution agreement. And when that
11 failed -- and it only failed because the government was
12 forced to find that Boeing violated it after the door fell
13 off the Alaska airplane. Otherwise, I don't think we'd be
14 here.

15 You have the ability, the authority, to reject
16 this agreement if it is not consistent with the sentencing
17 guidelines or it doesn't reflect the seriousness of the
18 conduct at issue.

19 And that's just it here. How you can have a plea
20 agreement where when you have already determined that the
21 fraud was a proximate cause of 346 deaths and yet the plea
22 agreement completely ignores that, for that reason alone,
23 the seriousness of the conduct is not acknowledged,
24 addressed in this plea agreement, and on that basis alone it
25 should be rejected. It also is not consistent with the

1 sentencing guidelines.

2 But I will start with the monitor, I think,
3 because that was the last topic that you left off with. So
4 we've advocated a monitor that you pick and only you pick.

5 Now, maybe there are other circumstances where the
6 government should recommend somebody and you could evaluate
7 it, but this is not that circumstance.

8 Why? Because these parties, the government and
9 Boeing, they're in an ongoing business relationship. I
10 reference that in our submission that, really, is this just
11 an arm's length transaction? And I don't think it is.

12 But if you focus only on the monitorship issue,
13 why should two parties that are in an ongoing business
14 relationship have any role in determining somebody, the
15 identity of a person, who is supposed to monitor the
16 relationship between the government and Boeing, because
17 that's what this monitor is supposed to do. And we've
18 already seen that when, left to their own devices, it
19 doesn't work.

20 So whether it was the process set up with the
21 deferred prosecution agreement, that didn't work. As
22 pointed out by Professor Cassell, even in the first deferred
23 prosecution agreement, we saw that Boeing continued making
24 misrepresentations in between the airline crash and the
25 Ethiopian crash.

1 So the process that's been in place, the same old
2 thing, where the Justice Department gets to decide who the
3 monitor is, they give you 10 days to object. I've never
4 seen a provision which gives the right to the judge to
5 object as if they're the creditor and you are the debtor.
6 It's your authority. You should decide on this critical
7 issue of safety, when 346 people have died, who is the
8 monitor.

9 And then from there, all of the role of the
10 monitor can be determined. But there is nothing wrong with
11 appointing. And it's going to have to be somebody with
12 technical expertise. It's not going to just be a retread,
13 like a baseball manager, who just keeps getting renamed.

14 It has to be a qualified person who has technical
15 expertise who can actually monitor safety. We've suggested
16 a former military person, but that's beside the point.

17 The agreement should be rejected because the
18 monitorship, as advocated and as contained in the proposed
19 agreement, it does not work and will not work because of the
20 existing relationship between the government and Boeing.

21 Number two, okay, accepting that this is a fraud
22 case. You have already ruled that the victims of this fraud
23 include the families. And, yet, when you look at the
24 proposed plea agreement, this \$243 million, completely
25 ignores these victims.

1 Where does that number come from, 243,600,000?
2 First of all, it only considers gain. They never looked at
3 loss. I think, as Professor Cassell wisely pointed out,
4 they don't want to look at loss because that would mean
5 looking at the fact that 346 people died.

6 But the reason -- just taking the number as it is,
7 the reason the 243,600,000 should be rejected is because
8 that number comes from the deferred prosecution agreement at
9 page 10. Same number, exact same number.

10 And in the deferred prosecution agreement, it
11 says, that number represents Boeing's cost savings based on
12 Boeing's assessment of the costs associated with the
13 implementation of full-flight simulator training for the
14 736 MAX [sic]. No investigation of what the real numbers
15 are.

16 We're relying on the defendant, who's admitted to
17 engaging in fraud? That cannot be a proper basis for
18 calculating a fine in this extremely serious case.

19 So why didn't the government, if you're going to
20 even use gain as a basis, why would they rely only on
21 Boeing's figures. It makes no sense. So for that reason,
22 the agreement should be rejected.

23 Should Boeing and -- listen, you have to ask
24 yourself, should Boeing be given any deference on the issue
25 of the information it provides?

1 Well, yes, it's a defendant that has admitted
2 engaging in fraud which has caused 346 deaths, but it's not
3 the only fraud.

4 Even in the deferred prosecution agreement, the
5 government highlights prior instances of fraud engaged in by
6 Boeing. So this fine is completely inadequate, and the
7 basis for it, Boeing's uninvestigated financial information,
8 is another reason to reject the agreement.

9 But they should have considered loss. This is a
10 fraud case, and it is a sentencing issue. For whatever
11 reason, they completely ignored the loss calculation.

12 And we've given you different numbers. We are not
13 suggesting a particular number today, because that's not the
14 purpose of this exercise.

15 We agree. You are not supposed to go through this
16 document and veto one line but accept another. It's an
17 all-or-nothing proposition. But the simple fact that the
18 gain number, the fine number, is only based upon financial
19 information from Boeing is a basis to reject it.

20 The second basis is they never considered loss.
21 Because if they considered loss, they would have had to
22 consider the deaths of 346 people. And it only needs to be
23 considered on beyond a reasonable -- you know, it is a
24 sentencing issue, as Mr. Cassell pointed out, and,
25 therefore, it is not a beyond a reasonable doubt standard.

1 So one issue you could -- one consideration here
2 is you could reject this agreement and consider a
3 presentencing investigation and have somebody actually
4 consider loss and maybe talk to the families and evaluate
5 what a proper fine would be here. In terms of the cap and
6 that issue, we defer to Professor Cassell.

7 With respect to the conduct, now Professor Cassell
8 raised the issue of all of the misconduct has not been
9 presented. And that gets into an issue of whether it's
10 prosecutorial discretion or whether more facts should be
11 presented.

12 This has to do with whether there should be a
13 mid-level executive charged or a higher-level executive
14 charged. That's fine. But it seems to me we have
15 admissions in the record. The deferred prosecution
16 agreement, which was approved by the upper management of
17 Boeing, is an admission. It says it is.

18 So why would that admission, where the upper
19 management of Boeing has acknowledged that there was fraud,
20 would we only use a mid-level management basis for
21 sentencing. On that basis alone, the agreement could be
22 rejected.

23 There are other admissions. Boeing attached the
24 civil plea agreement in which there's an admission of
25 liability. That's an admission that can be used in a

1 criminal case, and it's also an admission that can be used
2 in sentencing.

3 So, it is not accurate based on the admissions to
4 only have a mid-level management factor in calculating the
5 sentence here.

6 Last, on the issue of restitution. Restitution is
7 a great idea. The Crime Victims' Act provides for it. But
8 the procedure for restitution that's in the agreement
9 essentially provides for no restitution because it allows
10 basically for a setoff for the civil lawsuits. It only
11 requires Boeing to pay after appeal.

12 So what that does is, it involves this Court with
13 potentially 346 restitution cases. And it doesn't require
14 Boeing to do anything until after an appeal, which should be
15 about five to seven years from now.

16 It's a separate remedy from a civil remedy.
17 Restitution in a criminal case is a remedy that the Court
18 can impose in sentencing. There's no basis to automatically
19 have language in the agreement which requires a setoff for
20 the civil case.

21 It doesn't take into consideration that, at least
22 on the Lion Air case, when some of those -- right after that
23 occurred, Lion Air sought releases from victims for
24 approximately \$80,000, and that became a factor in
25 settlements with Boeing.

1 And so, because a civil settlement is never the
2 full value of a case, there's -- the language that's
3 contained in the agreement concerning restitution is not
4 going to provide full restitution to the crime victims. So
5 we ask that the agreement be rejected. Thank you.

6 THE COURT: Thank you.

7 Give me one second. Come on up.

8 My notes are incomplete on something, so I'm not
9 able to find the provision that I'm looking for.

10 With that said, introduce yourself, whoever is
11 appearing here with you that should be introduced, and then
12 the floor is yours.

13 MS. DOW: Yes. May it please the Court. Good
14 morning, Your Honor. My name is Mary Dow. I'm here with my
15 co-counsel Jeff Hellberg.

16 THE COURT: Thank you.

17 MS. DOW: And we are here on behalf of LOT Polish
18 Airlines.

19 THE COURT: Thank you.

20 MS. DOW: And just to begin with, this is my first
21 time before Your Honor and also in a room with the families
22 who are present here today.

23 I just want to take a moment to personally, and
24 also on behalf of LOT, recognize the families and extend our
25 condolences and deepest sympathies to them.

1 We certainly recognize that LOT's -- the damages
2 that LOT has sustained as a result of Boeing's crimes are in
3 no way comparable to the immeasurable pain and suffering and
4 the other losses that the families have suffered and are
5 continuing to suffer as a result of Boeing's crime.

6 But, Your Honor, by objecting to the plea, which
7 is LOT's right to do, we don't -- there's no intention to
8 take away or jeopardize any rights that the families have to
9 the relief that they are seeking.

10 This is something that the government has
11 insinuated in their briefs and also has brought up today as
12 well. This idea that by LOT asserting its right to
13 restitution, we are somehow taking away the families'
14 ability to recover restitution for themselves. That just
15 simply is not true, Your Honor.

16 First of all, Mr. Cassell, and just now
17 Mr. Vuckovich, pointed out that, even as the plea is
18 currently written, while there's a recognition of the
19 families' right to restitution, it's not guaranteed.

20 There are a lot of questions there that still, I
21 think, leave a lot to be desired when it comes to the
22 families' right to restitution.

23 But kind of on a broader point, when it comes to
24 the CVRA recognizing LOT's rights as a crime victim does not
25 in any way take away from recognizing the families' rights.

1 The statute recognizes multiple types of victims who have
2 suffered different types of losses.

3 And this idea that, I think, the government has
4 presented today that there has to be some either/or choice
5 between recognizing LOT's rights to restitution and the
6 families' rights to restitution, it's just simply not true.

7 And to be clear, Your Honor, LOT's position is, as
8 is stated in the briefing, LOT is a crime victim under the
9 CVRA. And we think that Your Honor's, I believe its
10 October 21, 2022, opinion recognizing the families' rights
11 under the CVRA -- excuse me -- equally applies to LOT. The
12 direct and proximate cause analysis that Your Honor laid out
13 in your opinion gets LOT there as well.

14 The idea that there's -- the MAX crashes are
15 somehow -- you know, there's an intervention between the MAX
16 crashes the MAX grounding, I think, is somewhat
17 preposterous.

18 I don't need to waste your time to go over the
19 words that you wrote and the explanation that you gave in
20 your opinion. We will leave that to the brief on that
21 issue.

22 That kind of gets the bigger point and the reason
23 that LOT is objecting to the plea is what government and
24 Boeing have proposed, Your Honor, is essentially taking away
25 Your Honor's obligations under the CVRA and its

1 discretionary authority under the restitution statutes to
2 enforce LOT's rights. There are essentially trying to do
3 that themselves and that's improper.

4 I think, on that reason alone, the plea needs to
5 be rejected at least when we're talking about LOT. I mean,
6 Mr. Cassell and Mr. Vuckovich have laid out numerous other
7 reasons why the plea should be rejected, and we agree that
8 each of those reasons is sufficient enough for your court to
9 reject it.

10 I just wanted to turn now to the government's
11 argument regarding LOT's right to restitution. As Your
12 Honor is aware, we are asserting that, under the facts of
13 the case, under the factual admissions that Boeing has made
14 in this proceeding, the Mandatory Victim Restitution Act
15 applies.

16 It sounds like the government and LOT are in
17 agreement that Hagen controls here when it comes to
18 determining whether the offense against property provision
19 of the MVRA applies here.

20 And Your Honor heard from the government this
21 morning about the various cases that Hagen relied on when
22 talking or when discussing how you know or how you determine
23 whether a crime that's been pled guilty to is an offense
24 against property under the MVRA.

25 But I think what the government -- in talking

1 about the cases that the Fifth Circuit relied upon, it kind
2 of has ignored what the Fifth Circuit actually said. And I
3 will just read from the case a statement that's made with
4 respect to Hagen, which were the defendants in that case.

5 "The trial court heard sufficient evidence to find
6 that the Hagen used fraud to derive an unlawful benefit in
7 the amount of 27 million, approximately, from the Medicare
8 program. This is enough to establish an offense against
9 property committed by fraud or deceit under the MVRA."

10 The Fifth Circuit says fraud or deceit and an
11 unlawful benefit is what you need for a crime against
12 property.

13 Here, we have factual admissions by Boeing that
14 their crime, conspiracy to defraud the U.S. government, the
15 FAA AEG, was committed by fraud or deceit, and they
16 unlawfully benefited to the tune of -- whether it's the
17 correct amount or not, at least \$243 million.

18 From our perspective, Your Honor, under Hagen, we
19 have a crime against property. And with respect to LOT, we
20 have an identifiable victim that has sustained almost
21 \$200 million in losses.

22 In this circumstance, our position is that the
23 mandatory restitution provision applies. The fact that the
24 plea expressly writes out that from the agreement is the
25 reason -- a reason it should be rejected.

1 And just another point that the government raised
2 in terms of discussing Hagen. The idea that it's not a
3 crime against property because it was aimed at a regulatory
4 agency and the effect was to obstruct the agency's
5 functioning.

6 In the briefing that the government submitted in
7 Hagen, they argued against that exact point that the
8 defendants were making. That it was -- they were just -- I
9 can even point to the briefing. The Hagen surmised that
10 they are impairing the operation of a government agency,
11 according to the government.

12 That argument misses the point. The Hagens' whole
13 reason for impairing government operations and paying
14 kickbacks for doctors' orders was to obtain unlawful
15 benefits. In other words, to obtain property. That's what
16 we have here, Your Honor.

17 But, Your Honor, even if the -- you determine --
18 and it's your decision, it's not the government's. If you
19 decide that what Boeing has -- or may plead guilty to is not
20 a crime against property, your Honor still has the
21 obligation to determine LOT's right to restitution under the
22 Victim and Witness Protection Act, which gives the right to
23 award discretionary restitution to LOT.

24 And you heard from the government this morning
25 that Your Honor shouldn't -- you know, shouldn't award

1 discretionary restitution because LOT's damages are too
2 complex, and I believe they said in their brief, there's too
3 many -- it would open the door to too many other victims.

4 But, Your Honor, that kind of gets back to the
5 broader point of that's not for the government to decide.
6 It's Your Honor's authority and discretion to decide those
7 points.

8 And we have not had an opportunity to present
9 evidence, Your Honor, as to LOT's damages. And while the
10 government has made a point of referencing prior submissions
11 that LOT made regarding preliminary damages, just three
12 weeks ago LOT produced to Boeing an expert report laying out
13 all the economic losses they sustained.

14 We would be happy to present that to Your Honor
15 and present evidence. And we just want the opportunity to
16 be heard so that Your Honor can make that decision and that
17 Boeing, and the government can't essentially just write out
18 LOT from the agreement.

19 So unless Your Honor has any questions, I will
20 just close by saying LOT is objecting to the plea because it
21 essentially prohibits Your Honor from exercising your
22 authority under the CDA and your discretion to determine
23 LOT's rights as a crime victim of Boeing.

24 THE COURT: Thank you.

25 MS. DOW: Thank you, Your Honor.

1 MR. TONOLLI: Thank you, Your Honor. I will be
2 brief. But if the Court has questions, I'm happy to
3 entertain them.

4 THE COURT: Go ahead and rebut what you heard.

5 MR. TONOLLI: Just starting with the last argument
6 from counsel for LOT. Just to clarify what the Hagen
7 decision said. The unlawful benefit that the Hagen sought
8 was stealing money from Medicare and Medicaid.

9 So it's not that they profited on their own, but
10 rather, they took it from another party. And that's why
11 that was an offense against property and why that doesn't
12 apply here for Boeing.

13 Going back to -- briefly with Southern Union.
14 Respectfully, the Court did not limit its holding to the
15 RCRA statute, the R-C-R-A that was at issue. And, in fact,
16 the Court said there could be no more mechanical than
17 applications of \$50,000 per day when the indictment said
18 what the days were that the violations occurred between, the
19 jury verdict form listed those same dates, and the jury
20 checked guilty.

21 Even then the Court said a simple mathematical
22 equation was not good enough. The trial court should have
23 only taken from that the one day a violation was established
24 because the jury had not found how many total days.

25 And here in this case, it would be anything but a

1 mechanical application, as you've heard, although we all --
2 we respectfully disagree with their views. It is clearly
3 not something that could be easy, and even if it was,
4 Southern Union would preclude unless Boeing admitted it in a
5 guilty plea, or a jury found it beyond a reasonable doubt.

6 As to those other theories of gain or loss, the
7 government has spoken to that in our declaration in prior
8 litigation in this case. We've made clear, we've analyzed
9 those different theories, it is our assessment in our
10 prosecutorial discretion that the evidence we had, the best
11 case we can make, the highest amount is the 243.6 million on
12 the gains side related to training-related costs. We have
13 analyzed that, and that is our assessment.

14 And the Court asked what is -- asked of
15 Mr. Cassell: What is the difference owed to the government?
16 And we will get the name right. It's in our brief. But the
17 Lefebure case in the Fifth Circuit explained it clearly.

18 That's L-e-f-e-b-u-r-e.

19 It is a bedrock principle of our system of
20 government that the decision to prosecute is made, not by
21 judges or crime victims, but by officials in the executive
22 branch.

23 The executive branch has exclusive authority and
24 absolute discretion to decide whether to prosecute a case.
25 We have exercised that discretion in good faith after an

1 exhaustive investigation over years.

2 And the case we can prove is the case we have
3 charged. And for that case, this resolution is just and
4 fair, and we ask the Court to accept it.

5 Regarding the conferrals with the families, I
6 think the record speaks for itself. We respectfully
7 disagree with Mr. Cassell. We have gone, frankly, above and
8 beyond what a reasonable interpretation of the CVRA could
9 expect of the government.

10 We did tell the families what the terms of the
11 proposed plea agreement were. And after we told them, we
12 heard from them for another hour and 45 minutes on their
13 views and objections to the agreement.

14 And when we extended the offer to Boeing, we did
15 make changes to make them more favorable in the favor of the
16 families, to further incorporate their views. We did not
17 water down the deal after speaking to the families. We took
18 the feedback during that conversation and further
19 incorporated it in.

20 Specifically, we had told the families that we
21 would not -- that we would stay neutral on restitution
22 because of what we expected to be disagreements, not over
23 everything but over certain issues, so that they could have
24 free and clear argument with the Court and with Boeing and
25 would not have the government objecting at least to certain

1 portions of their argument.

2 They vociferously told us they wanted us to
3 support them. So we changed the offer to Boeing and said
4 that we would support all lawful claims, and we will.

5 We also changed -- with respect to the application
6 for monitor candidates. Mr. Cassell and cocounsel and the
7 family have been consistent with us throughout our
8 conferrals about their views on the monitorship process the
9 department typically uses, and they share those again when
10 we conveyed the plea offer terms, which was to use our
11 standard process.

12 But after hearing them, we changed it when we made
13 the offer to Boeing and said that, instead of the company
14 picking its own monitor, we would do a public application
15 process.

16 So we've conferred. We've conferred extensively.
17 And we've heard and we've appreciated the viewpoints of the
18 victims, and we've done what we can to incorporate them
19 where appropriate.

20 So again, we ask the Court respectfully to accept
21 the plea agreement. I'll step down.

22 THE COURT: Let me ask you a few questions.

23 MR. TONOLLI: Sure.

24 THE COURT: Why the 11(c) plea in this case?

25 MR. TONOLLI: So 11(c)(1)(C) pleas are a standard

1 practice used in corporate criminal cases that have been
2 accepted by many courts as an appropriate and effective way
3 to resolve these cases.

4 Particularly here where the Court has had the
5 benefit of almost four years of presiding over this case and
6 the related case of the former chief technical pilot where
7 the Court has had extensive briefing, both in the CVRA
8 context and now in this plea agreement.

9 The Court is well aware of the factual scenarios
10 and the parties' positions on what is appropriate. The plea
11 agreement presents a statutory maximum fine and the plea to
12 the only charge in the Information.

13 Whether the Court accepts the plea or not, that
14 will be the charge. And so, in these circumstances, a
15 (c) (1) (C) plea with a full package for the Court to consider
16 and exercise your discretion, we believe, is appropriate.

17 THE COURT: Why is that?

18 I understand that you say that is commonplace --

19 MR. TONOLLI: Certainly.

20 THE COURT: -- or however you said it, in
21 corporate cases. But why is that?

22 I mean, if you have -- if you have a lot of these
23 disputed issues and you have Boeing willing to plead guilty,
24 why a (c)? Why a binding plea agreement on the Court?

25 MR. TONOLLI: Again, we are informed by our

1 experience in the criminal division, in the fraud section in
2 particular, of handling dozens of corporate criminal cases
3 over the years and probably the most of any other department
4 component.

5 And that when it comes to companies, particularly
6 large publicly traded companies that have a significant
7 number of shareholders and stakeholders, whether that's
8 people in the supply chain, customers, their employees,
9 millions of shareholders here and abroad, that the certainty
10 that comes with a board of directors which have legal
11 liability for the decisions they make and need to make a
12 fully informed decision, that this -- these 11(c)(1)(C)
13 pleas, which are negotiated hard at arm's length, provide a
14 corporation the ability to understand what the potential
15 collateral consequences are, again, to thousands -- hundreds
16 of thousands of people and in the economy.

17 And so, again --

18 THE COURT: What is the difference as far as those
19 collateral consequences?

20 Can you give me some examples? What would be
21 something that's different for an 11(b) plea, as opposed to
22 an 11(c) plea, that would justify the (c) plea for the board
23 of directors?

24 MR. TONOLLI: Certainly.

25 THE COURT: What are these collateral consequences

1 you're talking about?

2 MR. TONOLLI: So first, as a matter of process, as
3 Your Honor knows, the 11, the (b) plea would not be -- it
4 would be a party's recommendation, but it would not provide
5 the certainty. So it still would leave it up in the air
6 about what the Court would decide in its discretion.

7 So in terms of the collateral consequences that
8 could flow, as we cite in our brief, there's potentially,
9 for a company that is a government contractor that could be
10 debarred, so it could be impaired in its ability to do its
11 business or do it to the same extent, and it could otherwise
12 lead to debt covenant issues about their ability to pay or
13 have to pay back banks that have loaned them money.

14 So there are a lot of consequences that can happen
15 and impact throughout the company and beyond. Thousands or,
16 again, hundreds of thousands of folks who are not involved
17 in the criminal conduct had no idea what was going on.

18 THE COURT: And so, one of the collateral
19 consequences -- let me ask it this way. Is one of the
20 collateral consequences that the (c) plea in this case gives
21 certainty to Boeing on is the risk that I may order as a
22 condition of probation that they be debarred?

23 MR. TONOLLI: Not --

24 THE COURT: Whereas the "C" plea that you propose
25 doesn't have as a condition that they be debarred, it says

1 that they risk being debarred, and that they can seek these
2 exceptions, if the government wants to grant these
3 exceptions.

4 Is that what you are saying a consequence is?

5 MR. TONOLLI: No, Your Honor. Not that the Court
6 would have the authority to debar, that would be with the
7 debarment officials of the agencies that deal with Boeing.
8 But that is --

9 THE COURT: Which is what you are setting out
10 here?

11 MR. TONOLLI: Correct. Right.

12 THE COURT: Because if they're being convicted of
13 a felony, so the law sort of defaults to not doing contracts
14 with them anymore?

15 MR. TONOLLI: And that's certainly one aspect, but
16 not the only. The one front and center --

17 THE COURT: Right. But I'm just trying -- and I'm
18 just trying to understand why the "C" plea here.

19 I mean, I've got some other questions about the
20 plea agreement that I want to get into with you, but just I
21 want to start kind of at the top level here.

22 Really, the only reason it seems to me that we are
23 dealing with this is that you've entered into a "C" plea.
24 Had you not entered into a "C" plea, a "B" plea, or just an
25 open plea A, 1, whatever it is, maybe they would have

1 objected to that as well, I don't know, but part of the
2 reason for the objection -- you know, my notes, I don't know
3 if it corresponds with his list, but there are eight reasons
4 that I have in reading the briefing that -- at least the
5 first set of victims who appeared had for the objection -- a
6 lot of it stems from the "C" plea, the corporate monitor,
7 the safety investment, things of that -- a lot of that is
8 because it is a "C" plea. So I have no discretion. I
9 either accept it and impose those things or I don't, and
10 that's why they object.

11 So I'm trying to get from you an understanding,
12 other than this is the way we plea in all corporate cases,
13 why you used the "C" plea.

14 And I understand you to say because it's
15 hard-fought and there needs to be certainty because it helps
16 address for the board of directors collateral consequences.

17 So I'm trying to understand, what are these
18 collateral consequences?

19 Maybe these collateral consequences are enough to
20 persuade me that I should accept a "C" plea. But if it's
21 just debarment, or if it's just they got some lenders out
22 there who want a "C" plea, I'm not sure that that pushes the
23 ball over the line for me.

24 MR. TONOLLI: Sure. Understood. Thank you for
25 the feedback.

1 And, certainly, if you look at the monitor
2 provision, one of the hotly contested issues here is the
3 scope of the monitorship and how that interplays with the
4 FAA.

5 And while Mr. Cassell says it's not the families'
6 obligation to propose what that monitorship would look like
7 in the absence of this plea agreement, you do know from what
8 they've submitted earlier in this case about their view on
9 that, to include having the authority to dictate changes to
10 aircraft.

11 Now, I can't speak for Boeing. So I'm not trying
12 to do that. But I am speaking from the perspective of the
13 Department of Justice in thinking about the interplay of the
14 monitorship with the lawful role of the FAA.

15 And certainly, that is a big area of concern, as
16 you heard from Boeing. And they can speak to it better.
17 But that is a significant, not just on the business impact,
18 but about how they build and design their aircraft and
19 having to interface, not just with the FAA, the NTSB, any
20 foreign regulators.

21 And so, the Department of Justice, the
22 monitorship, should be narrow and tailored to the crime with
23 the sentencing guidelines that focus on compliance and
24 ethics.

25 Mr. Cassell said earlier in the discussion about

1 conferrals, well, if we had only known that the government
2 was thinking about a monitorship of this scope, we would
3 have spoken up and said, well, you should do it this way or
4 that way.

5 They have been speaking frankly about the
6 monitorship, Mr. Cassell in particular, throughout our whole
7 time conferring. In fact, there are letters that
8 Mr. Cassell submitted about the scope of the monitor and
9 also to the Court in their request to appoint one.

10 And so, that is a significant area where certainty
11 matters, not just to Boeing, but to the flying public and to
12 the -- respecting the integrity and the lawful role of other
13 government agencies.

14 THE COURT: So why do you need a "C" plea for
15 that?

16 In other words, all of those concerns that you
17 legitimately have as a representative of the Department of
18 Justice and that Boeing legitimately has because it's
19 inherent in their business and the interplay between what
20 you propose in your plea agreement and what the FAA does by
21 statute, why is that a reason for the "C" plea?

22 MR. TONOLLI: Because if Your Honor did not agree
23 with that, right, if we presented a "B" plea where we agreed
24 that the parties would suggest that to Your Honor, but Your
25 Honor would have the discretion to impose a monitorship with

1 a broader mandate or scope, then that is not a deal, so far
2 as I understand, that Boeing would accept. And it's not
3 something that the government would be comfortable with
4 either.

5 So we are presenting to the Court with full
6 reasoning and the benefit of full briefing about why in
7 exercising your discretion this makes sense.

8 THE COURT: Your concern then is, without a "C"
9 plea, I may not accept the concern that the language that
10 Mr. Cassell has been pushing, may encroach on the FAA's
11 statutory mandate and, therefore, cause significant
12 confusion for Boeing?

13 MR. TONOLLI: Not just for Boeing, but from the
14 interest of the government in thinking about the flying
15 public.

16 THE COURT: The public?

17 MR. TONOLLI: Yes. Yes.

18 THE COURT: Okay. So that's a reason for the "C"
19 plea. What else?

20 MR. TONOLLI: I think I've expressed the reasons
21 that we have for doing those and that speaks to it.

22 There also -- related to the monitorship, the
23 compliance investment. The 455 million. I said in my
24 opening, and I can point Your Honor to case law, that there
25 is a significant risk, a litigation issue around the

1 remedial measures the Court can order in a sentence, putting
2 restitution aside, but to address the harm or risk of future
3 harm.

4 If you look at Southern Union, the case when it
5 was remanded from the Supreme Court at the district court
6 level, I can cite to the Court -- the case cite is
7 942 F.Supp. 2d 235. It's the District of Rhode Island.

8 The Court had imposed, as part of its sentence, a
9 \$12 million community service requirement. And when the
10 case came back from the Supreme Court saying that the
11 statutory maximum could be only \$50,000, the Court on its
12 own observed that the \$12 million community service
13 requirement was not -- could not stand in the Court's view,
14 and said, "Courts have consistently held that combination of
15 the fine imposed under the statute setting forth the offense
16 and any conditions of probation cannot exceed the statutory
17 maximum penalty."

18 And cited to include a case from the Southern
19 District of Texas, United States vs. Citgo Petroleum, where
20 a court had found similarly.

21 And so, in the absence of Boeing's agreement here,
22 and the Court's willingness to impose as a requirement the
23 \$455 million compliance investment, that is another benefit
24 to the "C" plea to ensure that that investment is there,
25 which matters a great deal to the government, and we think

1 to the public, to ensure that that payment is ordered and is
2 a condition of probation.

3 THE COURT: And so, a "C" plea is needed on that
4 issue because I may not have the authority, depending upon
5 how you read the punishment portion of your plea, to impose
6 the \$400-plus-million over the term of probation?

7 MR. TONOLLI: Or may disagree and find a lower
8 amount or a higher amount. But the point is that a
9 substantial -- quite substantial, almost half a
10 billion-dollar investment, if the Court approves and we
11 present is guaranteed to inure to the benefit of the public
12 and to Boeing.

13 THE COURT: Let me ask you about the concern about
14 the monitor and the FAA.

15 So in paragraph 6A of the plea agreement, you say
16 that, "Boeing breached the DPA by failing to sufficiently
17 integrate its ethics and compliance program with its safety
18 and quality programs in a way that's necessary to detect the
19 fraud loss."

20 And then, in paragraph -- on page 21, looks like
21 paragraph 26, there's a footnote there, where you say that
22 "Nothing in the agreement can be construed as establishing,
23 interpreting, or modifying any aviation standard or
24 requirement applicable to defendants' operations or products
25 that exist under federal law, regulation, and guidance or as

1 otherwise established and overseen by the FAA."

2 So my question to you on this, as I've been
3 reading through the document itself and through the briefing
4 on this issue and the objections back and forth between what
5 Mr. Cassell is proposing, what Boeing and the government are
6 asserting, how do you draw that line?

7 How do you draw the line?

8 What is an encroachment to the FAA's jurisdiction
9 as it relates to integrating ethics and compliance programs
10 with safety and quality programs?

11 MR. TONOLLI: So to answer that I think it helps
12 to look at the Attachment D to the plea agreement, and
13 specifically paragraph 4 on page D2. I can wait until Your
14 Honor has turned to the page.

15 THE COURT: Yes. Thank you.

16 MR. TONOLLI: That paragraph sets forth the
17 proposed definition of the monitor's mandate. And as you
18 read there -- I can read it through, but I'll read the last
19 part.

20 "As a result, the independent compliance monitor's
21 mandate does not include substantive review of the company's
22 design, engineering, or manufacturing processes and
23 decisions, or of the correctness of any of the company's
24 decisions relating to compliance with the FAA's regulatory
25 regime."

1 How does that work in practice? We have an
2 example of this in the statement of briefs that Your Honor
3 pointed to about why we found the company violated the DPA.

4 It was not because it was based on a government
5 finding about the engineering or what happened with the door
6 plug blowout in terms of how that was handled by the
7 mechanics.

8 Rather, it was about compliance and ethics. Not
9 second guessing the judgment of the safety and quality folks
10 but being aware of the risks so they can design controls to
11 make sure that the information, when it goes to the FAA, is
12 truthful and accurate.

13 So, for instance, that when Boeing prioritized
14 moving airplanes through the production line over getting
15 work done on the plane at the time it was supposed to be and
16 where it was supposed to be done, instead they would push
17 the planes forward, and they would have to have
18 out-of-sequence work.

19 If something wasn't right at Point A, then they
20 would wait until Point D to fix it. That creates a risk
21 that not the right personnel in the right way are fixing it.

22 That's not for compliance and ethics to say you
23 need to make sure that the right personnel do it, but we
24 need to know about the risk so we can design a control, a
25 way to understand who did the work, how did they do it, and

1 that can be checked before certification goes to the FAA.

2 So not second-guessing the substantive and
3 mechanical and engineering call of that side, which is the
4 FAA's province.

5 The same is true on the document of removals.
6 When you talk about the door plug and you look at the
7 statement of breach, there's an issue about whether people
8 were appropriately writing down whether they had removed.

9 So an accurate record so that, when the
10 certification goes to the FAA, that people can know, was
11 something done here that we need to give a second look to?

12 It's not a compliance and ethics role, and we're
13 not trying to second guess the FAA on how the removal is
14 done or who does it, but if it happens, is it documented so
15 that people know?

16 And then, the last one was stamping in the
17 Charleston facility. The issue there was as an engineering
18 and manufacturing process, are the workers stamping that as
19 certifying that they did the work they were assigned to in
20 the right way? Again, that's on that side of the house so
21 to speak.

22 But compliance and ethics, we determined, was not
23 doing a sufficient job to find out if the workers understood
24 that obligation or trained enough on it so that they could
25 do it right so that as a process matter, those stamps were

1 valid and could be relied upon down the line in
2 certifications to the FAA.

3 So this language in paragraph 4 carefully
4 calibrates the focus on compliance and ethics, as it does
5 controls and policies and procedures, to ensure accuracy
6 without second-guessing the underlying engineering and
7 manufacturing judgment.

8 THE COURT: And on the stamping, I don't know -- I
9 didn't write it down as a quote, but it seems to me on
10 page 8, 1 through 8 of 1-A in paragraph 16, you said it was
11 false.

12 So what you just described there sounded more like
13 it wasn't done properly. But it sounded like, when I read
14 it, that whatever had happened was done falsely?

15 MR. TONOLLI: No, that's correct. I did not mean
16 to suggest otherwise.

17 THE COURT: Okay.

18 MR. TONOLLI: In other words, people saying they
19 had done the work when they hadn't --

20 THE COURT: I see.

21 MR. TONOLLI: -- or had done the work in the way
22 they were supposed to have and had not.

23 THE COURT: I see.

24 MR. TONOLLI: Or stamping for someone -- stamping
25 as if they were the person who had done the work. So in

1 either way not accurate, not correct, false.

2 THE COURT: I see. Okay. All right.

3 And so, that's how you draw the line, is that,
4 regardless of what the engineering does require or does not
5 require, it is only the reporting of that as it relates to
6 compliance and that necessarily includes ethics since you do
7 it honestly?

8 MR. TONOLLI: Yes. And "only" is doing a lot of
9 work there because that matters. That work, in terms of
10 making sure what the FAA gets is truthful and accurate, is a
11 substantially important part of the company's efforts and
12 the government's interest in the monitorship.

13 So it's not just a matter of paperwork. It's
14 ensuring that compliance and ethics knows about what the
15 risks are on the safety and quality side.

16 Because one of the points we make in the breach
17 discussion is that, while the safety and quality side of the
18 house knew about the risks from travel or out-of-sequence
19 work, that compliance and ethics weren't plugged in on that,
20 and weren't also side by side in how they could address the
21 risk, not from an engineering perspective, but from an
22 accuracy in truth and documentation perspective.

23 THE COURT: Okay.

24 MR. TONOLLI: So it's about bringing them to
25 together so there's visibility, and then compliance and

1 ethics can do their part, and let safety and quality
2 continue to do what they do, as overseen and regulated by
3 the FAA.

4 THE COURT: Now, Mr. Cassell, well, all of the
5 victims, the four victims who argued today object to the
6 fact of the independent monitor not being a condition of
7 probation.

8 Why is that? Why is your position that it should
9 not be a condition of probation?

10 MR. TONOLLI: So the retention of the monitor is a
11 condition of probation. What the Court is referring to is
12 the company's obligation to abide by the compliance
13 provisions in Attachment C to the plea agreement. And also,
14 to implement the recommendation of the monitor.

15 And again, because the -- as the agreement
16 proposes, the government will be overseeing the monitor, the
17 monitor will report to us. We have a large, well-resourced
18 and expert team of folks on the compliance side who that's
19 what they do.

20 They've worked with many monitors over the years.
21 They know how to do it successfully. Because we're on the
22 ground and working close side by side with the monitor, the
23 best position to make an assessment about whether the
24 company is meeting its obligations either under compliance
25 or implementing the recommendations of the monitor.

1 If the Court's concern is that there's no
2 accountability if Boeing doesn't do that, of course, the
3 agreement does provide accountability. Paragraph 38
4 provides that the government, in its discretion, if it
5 determines that Boeing is not meeting its obligations under
6 those provisions, can extend the term and the monitorship
7 for up to a year.

8 So by Mr. Filip's calculation, that could extend
9 the government's total oversight of Boeing up to seven or
10 eight years in total.

11 Of course, if the company failed to abide by its
12 obligations under the agreement, the government could also
13 seek to have the agreement vitiated and to have the company
14 resentenced for the crime it pled guilty to.

15 THE COURT: And so, why wouldn't -- let me ask it
16 this way. What is the harm of having Boeing comply with the
17 monitor's recommendation a condition of probation?

18 MR. TONOLLI: I don't know that there's a harm.
19 There certainly is a substantial cost that could be imposed
20 on the probation office or the Court if it's going to be
21 overseeing the monitor in the way that the government does,
22 and we have a whole team of people who do.

23 And so, this has been a process that other courts
24 have said yes to and has worked, in terms of our ability
25 because we're the ones on the ground with the monitor. And

1 so, we know the facts best and are able to make that
2 assessment.

3 So again, it's not a statement that it would be a
4 harm if it was a probation condition, but it's something
5 that the government in its assessment is comfortable with
6 and that Boeing is. And there is meaningful accountability
7 if they don't meet their obligations.

8 You need only look at the DPA, where it was the
9 government's discretion to decide whether the company
10 satisfied its obligations there. And we made a decision in
11 our discretion that the company did not. The only reason
12 we're here today is because the government decided to
13 prosecute Boeing for failing to live up to its obligation.

14 THE COURT: Have there been courts that you are
15 aware of that have rejected this monitorship that occurs
16 outside of the -- including it as a condition of probation?

17 MR. TONOLLI: Yes.

18 THE COURT: Do you have any feel for why those
19 courts rejected that process?

20 MR. TONOLLI: So my knowledge is not as extensive
21 as other's might be.

22 THE COURT: Right.

23 MR. TONOLLI: But I do know at least one court, I
24 believe, in the Southern District of Florida expressed
25 concern --

1 THE COURT: Is that Carnival Cruise?

2 MR. TONOLLI: Pardon?

3 THE COURT: Is that the Carnival Cruise case?

4 MR. TONOLLI: No, it wasn't Carnival. It was a
5 recent resolution with the fraud section on the criminal
6 side. I'm familiar with the Carnival Cruise case.

7 But the Court expressed, you know, the desire to
8 be able to exercise probation oversight or revocation if the
9 company didn't live up to its obligation.

10 THE COURT: And so, if I were to accept the plea
11 agreement and it's not -- compliance with the monitor is not
12 a condition of probation, then the remedy, if you determined
13 that they didn't -- you extended it, and they continued to
14 not comply, would be not to revoke their probation, but to
15 declare the plea agreement breached, and then to prosecute
16 them --

17 MR. TONOLLI: Correct.

18 THE COURT: -- on the underlying case?

19 MR. TONOLLI: Correct. Or seek resentencing on
20 the guilty plea that is for not -- for the company not
21 living up to its bargain under the deal.

22 THE COURT: Yeah. Okay.

23 And then, what is your position on this DEI
24 provision that you are applying to the monitor?

25 MR. TONOLLI: That is a -- Mr. Cassell's correct,

1 that that is a policy position of the Department of Justice.
2 It does not put at stake or risk the quality and the
3 capability of the monitor, but it is something that the
4 department takes into account as it assesses the totality of
5 an application for a particular person or monitor team.

6 THE COURT: So what does that mean in practice?

7 MR. TONOLLI: To my knowledge, it doesn't mean in
8 practice that we select less qualified. We think they're
9 not mutually exclusive. It's just something that, and
10 particularly here where we have a public monitor application
11 process, it's even less of a concern than a company that is
12 proposing monitor candidates and only three. Here, we're
13 going to hear from anybody who can submit from all over the
14 country or elsewhere.

15 So, again, that policy perspective really comes
16 from -- it matters in its own right to the department.
17 However, in the standard process where it's the company
18 proposing the candidates and people can apply on their own,
19 it certainly is an expression to the company of what the
20 department -- one of the things it is looking for.

21 THE COURT: And when you use the word "diversity"
22 in this context, that means what?

23 MR. TONOLLI: I think that in all manner that
24 diversity means these days, both about race, gender,
25 background, any number of factors. Just so it's not --

1 Again, to address what might have been perceived
2 as maybe a lack of any of those factors in the prior
3 candidates that were submitted before the policy was put
4 into place.

5 THE COURT: Did the department used to exclude
6 certain people on race, gender, and other things?

7 MR. TONOLLI: Not to my knowledge. Again, it
8 wouldn't be that we were excluding if the --

9 THE COURT: Not considering, I guess.

10 MR. TONOLLI: Right. Well, it would be the
11 company proposing the candidates that the government would
12 then select from.

13 THE COURT: So the reason for this policy is you
14 were worried that companies excluded or did not include --

15 Tell me again. Diversity means what again? It's
16 race, gender? What is it?

17 MR. TONOLLI: I might not get all the different
18 facets of what it means. So I don't want to pretend to be
19 exhaustive, but I think certainly those are part of it.

20 THE COURT: Yeah.

21 MR. TONOLLI: Nor was I a part of formulating the
22 policy or had the viewpoint at the time. But again, I think
23 I've expressed --

24 THE COURT: I just need to know why you are
25 insisting on that. So I need to understand the definition

1 of that.

2 MR. TONOLLI: Sure. Yes.

3 THE COURT: That's why I'm asking.

4 Again, just give me the definition.

5 MR. TONOLLI: I think I've done as well as I can.

6 THE COURT: The race and gender?

7 MR. TONOLLI: Well, and any other characteristics.

8 Background. You know, type of background and experience.

9 Maybe not just from a major firm or a smaller firm or
10 wherever. Regional diversity. I don't know what all the
11 factors would be, but certainly it is a consideration.

12 THE COURT: Okay. And inclusion means what?

13 MR. TONOLLI: I think probably the same. It's
14 another way of maybe saying the same thing and not excluding
15 people because of any characteristic that would be included
16 in diversity. So just being inclusive in who we consider.

17 And again here, in this particular case, I think
18 the decision the Court has to make, where we have a public
19 application process and not the company driving that, we'll
20 have the full range of folks who choose to apply to pick
21 from.

22 THE COURT: So, in your view, diversity,
23 inclusion, they're redundant?

24 MR. TONOLLI: I don't know that they're redundant.

25 Again, I'm not an expert. I would not be on the committee

1 analyzing these. But certainly, I think they're
2 complementary, the definitions of those terms.

3 THE COURT: And remind me again the reason that
4 you've started including this as a term.

5 MR. TONOLLI: Again, I wasn't a part of the policy
6 that that was decided. I just know that it is department
7 policy. When it comes to monitorships that this is
8 something that the department looks at.

9 THE COURT: And when did they start?

10 MR. TONOLLI: So far as I understand, as
11 Mr. Cassell said, with the new administration -- with the
12 administration in 2021, or at least after that started.

13 THE COURT: Anything else on this DEI context? So
14 we've included diversity.

15 Is there equity involved in this as well?

16 MR. TONOLLI: It's certainly a word within it,
17 DEI --

18 THE COURT: What does that mean in connection with
19 the selection of an appropriate safety -- compliance and
20 ethics monitor?

21 MR. TONOLLI: Yeah. Again, I don't know how it
22 would play out. I don't know that it's much different or
23 just complementary and expressed in the same view that the
24 department is open to all candidates. It doesn't want to be
25 exclusionary based on certain factors.

1 Again, I'm confident, as we have in other cases,
2 that we will find a qualified monitor who's capable and that
3 the department will present to the Court someone who the
4 Court will have confidence in.

5 THE COURT: Have you reached out to potential
6 monitors?

7 MR. TONOLLI: No.

8 THE COURT: Do you know if Boeing has?

9 MR. TONOLLI: I don't know if Boeing has, no.

10 THE COURT: Okay. Mr. Cassell wants to know, does
11 the department consider that there's been any loss in
12 connection with the crime?

13 MR. TONOLLI: The government has, as I've said,
14 and in the declaration, we made clear, considered all
15 avenues in the evidence that could establish either a gain
16 or a loss --

17 THE COURT: Right.

18 MR. TONOLLI: -- beyond a reasonable doubt, which
19 is the standard.

20 THE COURT: Right.

21 MR. TONOLLI: And we've made the determination
22 that the highest between those categories that we could
23 establish --

24 THE COURT: Is the gain?

25 MR. TONOLLI: Correct.

1 THE COURT: So you do agree that there has been
2 loss?

3 MR. TONOLLI: Yes.

4 THE COURT: Okay. And how much loss, do you
5 think?

6 MR. TONOLLI: I don't have a number, other than to
7 say our assessment of what we can prove would not be higher
8 than the 243.6 million.

9 THE COURT: Let me ask you this. In your
10 briefing -- several times you mention in your briefing in
11 opposition to the objections to accepting the plea agreement
12 that the government is entitled to deference because of the
13 prosecutorial discretion, and that the government, the
14 executive branch, is in the best position to determine what
15 may happen at a trial in this case. And you referenced the
16 one test pilot that was at trial.

17 In terms of the trial aspect, the guilt or
18 innocence, or the guilt or not guilt of Boeing and the risk
19 of a trial, does that really have merit in this case given
20 that Boeing has filed a stipulation of facts?

21 And as the objectors note, paragraph 2 of the
22 deferred prosecution agreement says that Boeing agrees that
23 those stipulation of facts can be used against them if the
24 DPA was breached?

25 MR. TONOLLI: So certainly, two things. I didn't

1 mean to convey, and I don't know that we did in the brief,
2 that we're better positioned than anybody to assess what the
3 risk would be at trial.

4 But it is our obligation as a litigant to assess
5 that risk as we make the decision whether the plea agreement
6 makes sense and to propose it to the Court.

7 And our view is, as we explained in the
8 declaration, that there is litigation risk in any case that
9 goes to trial. We don't take for granted the prerogative of
10 the jury or the Court at the pretrial stage to rule against
11 us on an evidentiary matter or on the ultimate question.

12 Boeing has certainly said and made clear in their
13 pleading that they would challenge vigorously, if this case
14 were set for litigation and trial, several aspects of the
15 case, including the Statement of Facts under the DPA.

16 And we can't presume how the Court would turn out
17 on that because Boeing would have to advance its arguments
18 as would we.

19 We're confident in our case, but we don't take for
20 granted that we might not win. And we have the history of
21 what happened with the former chief technical pilot. But
22 there's also the pretrial litigation risk which Boeing
23 highlights as well.

24 So getting to trial as soon as we get past the
25 initial phase that they would challenge our decision that

1 they breached the DPA.

2 And as they've said, they would bring to the Court
3 a motion to say that they substantially complied, and that
4 the Castaneda case in the Fifth Circuit compels us to
5 dismiss the case.

6 Of course, this plea agreement, if the Court takes
7 it now, removes that risk, and Boeing would be held fully
8 accountable, and all the other benefits of the agreement
9 will inure.

10 THE COURT: Okay. Thank you for that.

11 I don't know if you characterize it this way, but
12 there is an anti-disparagement clause in paragraph 44, that
13 is, Boeing or any of its agents will not contest that it was
14 guilty to this.

15 Is that in perpetuity or during the term of
16 probation? How long does that last?

17 And my question to you is, is that constitutional?

18 MR. TONOLLI: Constitutional certainly, because
19 they're agreeing to it voluntarily.

20 THE COURT: Right.

21 MR. TONOLLI: So they're proposing to the Court
22 that the Court do this. It was true under the DPA as
23 well --

24 THE COURT: Right.

25 MR. TONOLLI: -- the standard corporate

1 enforcement provision in these agreements, not just from the
2 fraud section.

3 THE COURT: Well, the only reason I bring it up is
4 I have that same issue in these SEC cases where there's an
5 anti-disparagement, what I call, and I think the circuit
6 calls an anti-disparagement clause.

7 I've had it challenged under Rule 60 years later.
8 And at least one or two of the circuit judges say that it
9 violates the First Amendment.

10 MR. TONOLLI: I don't know that I'm
11 well-positioned to litigate that.

12 THE COURT: Okay.

13 MR. TONOLLI: What I will say is, I think in terms
14 of a risk in this case, it's hard to imagine that that's a
15 reason to reject the plea agreement for Boeing's counsel and
16 the company itself, while not in the context of the criminal
17 case overall, has acknowledged its responsibility for the
18 crashes and the deaths and is admitting to its criminal
19 culpability and the lies to the FAA.

20 It's hard to imagine that, in this case and with
21 Boeing, that they would turn around, even after the term of
22 the agreement was over, and then deny those things.

23 THE COURT: Well, I've kept you here too long.
24 Anything else you want to say --

25 MR. TONOLLI: I'm happy to stay.

1 THE COURT: -- either in response to what you
2 heard or in the briefing that you don't feel like you have
3 been able to express this morning?

4 MR. TONOLLI: No. You've certainly been more than
5 generous with everyone in allowing us to speak and we
6 appreciate it.

7 THE COURT: Well, thank you.

8 MR. TONOLLI: Thank you.

9 MR. HATCH: Good morning, Your Honor. Ben Hatch
10 on behalf of the Boeing Company. May it please the Court.

11 THE COURT: It's good to see you again.

12 MR. HATCH: Thank you, Your Honor.

13 I'm happy to address any question the Court would
14 have. If the Court doesn't have any immediately, I might
15 start with Boeing's perspective on a couple of questions the
16 Court asked of Mr. Tonolli.

17 THE COURT: I think that would be very good.

18 MR. HATCH: And I'm mindful of the Court's order
19 not to repeat. So I'll just try to add, I agree with what
20 Mr. Tonolli argued, but I'll try to add a couple of elements
21 from Boeing's perspective that I think are additional.

22 The Court's first question was about why the "C"
23 plea. I would just start -- I will speak very specifically
24 about this case -- but I just want to note that, of course,
25 (c) (1)(C) pleas are within the rule. They're available.

1 I've seen them given to corporations. I've seen
2 them given to individual defendants. It's an assessment
3 that the government makes in its plea offer on the
4 circumstances of the case. Obviously, subject to the
5 Court's review and acceptance.

6 And they're also commonly given, in my experience,
7 in corporate cases for a lot of the reasons Mr. Tonolli
8 talked about.

9 I want to talk about, particularly with respect to
10 Boeing's perspective and the Court's question why a "C"
11 plea, and what it accomplishes.

12 So, as the Court may know, the Boeing Company is a
13 pillar of the American economy and a pillar of the national
14 defense. The Boeing Company employs 170,000, approximately,
15 people. And it is not subdivided.

16 In other words, the Boeing defense business is
17 within the same company as Boeing commercial airplanes and
18 Boeing global supply. It's all within one business that
19 provides commercial airplanes, but also defense platforms.

20 And so, as the Court already said and knows and
21 any guilty plea resulting in a felony offense, obviously,
22 the DOD relevant personnel would review that.

23 But it certainly has, under the federal
24 regulations, debarment consequences. And that will be for
25 the DOD programs to decide.

1 But what the "C" plea advances and accomplishes
2 here is setting forth the record, if the Court accepts it,
3 that those officials would have and can proceed to make
4 their decisions on that record.

5 I would submit that's important, not just for
6 Boeing, but for the national defense, because it will enable
7 to them to proceed with their decisions.

8 Whereas, if you went with an "A" or a "B" plea,
9 that would hold open the case until the subsequent
10 sentencing by the Court.

11 Within that period of time, there would be
12 uncertainty as to what the facts and the outcomes would be.
13 I would expect the DOD programs would hold open their
14 decisions, I don't want to speak for them, but I would
15 expect they would hold open their decisions until the
16 conclusion of that.

17 I know the Court can move quickly here. But often
18 that can be a matter of many months before that would all be
19 resolved. And there's uncertainty around what the ultimate
20 contours would be. The Court's heard many objections about
21 what the scope of facts would be.

22 I think that allowing those DOD officials to make
23 their decisions quickly so that the national defense
24 programs that Boeing supports, which I believe it supports
25 every single branch of the U.S. military with different

1 platforms for their needs, as well as NASA and the space
2 agencies and that sort of thing, really advances that.

3 Now, obviously, the Court wants to evaluate
4 whether this is an appropriate resolution. I think that
5 that's where also, of course, the Court has the benefit of
6 having presided over the trial of the former chief technical
7 pilot.

8 So I think the Court is very familiar with the
9 facts. And Mr. Tonolli has indicated that, if we were to
10 proceed to trial in this case, it would essentially be that
11 same case over again.

12 And that segues to, a lot of the objections I
13 think that the Court has heard are really objections, in my
14 view, about what a different crime or what a different case
15 could have been.

16 I don't in any way doubt the sincerity and the
17 strongly held views that are behind those objections, but
18 the fact is, and the Court asked about, what's the law and
19 scope of authority.

20 I think the Crime Victims' Rights Act and 3771, I
21 believe, it's (d)(6) is very clear that, while the victims
22 have rights to be heard and considered, ultimately, it's the
23 attorney general and the Department of Justice that decides
24 what the appropriate prosecution of a case is here.

25 And what the Court has the benefit of as we arrive

1 at this stage is really years of Department of Justice
2 prosecutors. This is an entirely different team here, from
3 our perspective, than the one that did the original DPA
4 case, that took a fresh look at the case.

5 And, ultimately, all of those prosecutors have
6 determined that the only prosecutable case is the one that's
7 in the criminal information to which Boeing is proposing to
8 plead guilty.

9 So suggestions that at a sentencing there would be
10 information about the former CEO of the company, about some
11 other individual within the company, those are all facts
12 related to, you know, respectfully and strongly held view
13 about what a crime could have been, but not the crime that's
14 been charged and that's presented and before the Court.
15 They would not be, in my view, appropriate sentencing
16 considerations if the case got held off.

17 I don't want to -- if the Court had any other
18 questions about the "C" plea, I do want to make sure I'm
19 addressing them, because it is very important.

20 And we respect that it is a decision the Court has
21 to make in its judgment now, but I think the record is ripe.
22 And for all the reasons that Mr. Tonolli and Mr. Filip have
23 addressed, it is an appropriate plea considering all the
24 circumstances.

25 I would just say, behind the national defense

1 aspect of it as well is, of course, you know, all the
2 employees of the company, the shareholders of the company,
3 and a global and national supply chain for both the
4 commercial business and the defense business, all of those
5 are affected.

6 If decisions about debarment and that sort of
7 thing are held open, all of those are put into doubt if
8 even -- if a trial or a sentencing is set off and what
9 that's going to be. And so, there's a lot of value to many,
10 many stakeholders not here before the Court and the
11 certainty of that resolution.

12 Mr. Cassell referenced some recent email that had
13 been unsealed. I just wanted to touch on that briefly, Your
14 Honor, because the Court may not have background on that.
15 That was an email -- we agreed to have it unsealed. It is
16 not news.

17 This email was produced to the Department of
18 Justice in the original case. It was produced to the
19 accident investigators in the Ethiopian case. So the
20 Ethiopian authorities and the NTSB.

21 So it's nothing new whatsoever to this case. The
22 NTSB ultimately issued a press release recognizing that the
23 information provided, you know, within that email, that
24 Boeing had already provided the fleet with the information
25 on MCAS is important.

1 As the Court knows from the prior hearing, after
2 the Lion Air accident, there was regulatory approved notices
3 to the fleet, lots of information went out to the fleet.
4 And the NTSB recognized that all that information was
5 provided.

6 So this is not a new aspect. It was produced, I
7 believe, some time ago in the civil case. That is
8 ultimately how it was provided to Mr. Cassell and given to
9 the Court. I'm happy to address any questions if the Court
10 has any on that?

11 With regard to the monitor, just a couple comments
12 Your Honor has asked about that. First off, the plea
13 recognizes, and I think this is critically important,
14 there's some suggestion that, you know, the DPA didn't work
15 and Boeing, you know, didn't comply with it.

16 The plea recognizes that Boeing's compliance
17 program took considerable steps in good faith in support of
18 those obligations under the DPA.

19 And so, I think that's very important as the Court
20 just evaluates Boeing as a company and how it approached
21 that DPA term. And then, also why the -- and this is a
22 shared view between Boeing and the Department of Justice --
23 why the proposed monitor is set up the way they are.

24 They're set up the way they are because there's
25 only certain aspects, in the department's view, that Boeing

1 didn't get there to during the term. And those aspects
2 would be the focus of the monitor.

3 It doesn't need some safety monitor, as
4 Mr. Cassell proposes, that would invade the sphere of the
5 FAA. The FAA is doing its work. In fact, Boeing did a very
6 strong job on compliance, even in the department's view.

7 So you only need a monitor to ensure those
8 aspects, which in the department's view, fell short, can be
9 accomplished satisfactorily over the next three-year term of
10 the deal.

11 With regard to the 450 million commitment that
12 Mr. Cassell talked about, I would just say, first off,
13 there's been some suggestion on the consultation in the plea
14 evolution. And that, of course, is between the department
15 and the crash victims.

16 But just to note, the crash victims were provided
17 the terms of the plea before Boeing was. I think that's in
18 Mr. Tonolli's affidavit. So they were provided those terms,
19 then we got them.

20 And ultimately, this \$450 million commitment was
21 something the department asked of Boeing, and Boeing readily
22 agreed to as a commitment to continue that compliance
23 program, to grow that compliance program, and as part of
24 this, integrating it with quality and improving safety.

25 It's a meaningful commitment that the department

1 secured that -- and look, no one is suggesting that, but for
2 this commitment, Boeing wouldn't have spent any money on
3 quality and safety and compliance.

4 I mean, those are massive programs at the company
5 that have driven real results and without in any way
6 detracting from the loss of these accidents. They were
7 something that Boeing really learned from, has invested
8 substantially in safety, to the point where not just Boeing,
9 but the whole aviation industry is at its safest point in
10 history in the last several years.

11 That's not just Boeing. That's Boeing, that's
12 other industry participants. That's the FAA and foreign
13 regulators. Just demonstrably on the facts, the airplane --
14 aviation industry is the safest it's ever been in history.

15 And so, the monitor is, I think, appropriately
16 scoped on the compliance side and not interfering with that
17 ongoing work. There's room for improvement. And Boeing's
18 goal is perfection, but that work is being done through the
19 FAA side to Boeing.

20 Just briefly with regard to the objections from
21 LOT's counsel. Your Honor, as Mr. Tonolli said, there is a
22 pending civil case between LOT and Boeing that has been
23 going on for many years. The sole focus of that is whether
24 LOT's claims have merit. And if they do have merit, what
25 the appropriate damages are.

1 I believe this is from the government's side of
2 this case, but it's a very good case, the Cones case from
3 the Third Circuit, 77 F.3d. It's at 69. That says:
4 "Nothing in the legislative history of the Victim and
5 Witness Protection Act evinces an expectation that a
6 sentencing judge will adjudicate in the course of a Court's
7 sentencing proceeding all civil claims against a criminal
8 defendant arising from conduct related to that offense."

9 And that is, essentially, in our view, what LOT is asking
10 the Court to do through this case.

11 I will pause if the Court has any questions for
12 me --

13 THE COURT: No.

14 MR. HATCH: -- and otherwise thank the Court for
15 its time and ask the Court to accept the proposed plea.

16 THE COURT: Okay. Since you're done, what -- this
17 DEI language for the monitor, what does that mean?

18 What are you-all going to do in evaluating these
19 candidates?

20 That mandate, I guess, or that agreement with the
21 government, tell me what all that means.

22 MR. HATCH: Your Honor, I don't want to avoid the
23 Court's question. I will say my understanding, as

24 Mr. Tonolli said, that's a policy of the Department of
25 Justice that the Department of Justice would use as it

1 evaluates the candidates.

2 As Mr. Tonolli indicated, they changed the process
3 here. Typically, a defendant would propose three monitor
4 candidates and the department would select from among that
5 group. Here, that is not going to occur. The department's
6 going to do an open solicitation, and it will select from a
7 pool of candidates within that.

8 And so, my understanding is they would use that
9 policy to make their selections within it. I don't see an
10 aspect that it involves Boeing's participation.

11 THE COURT: So you have no concern with that
12 provision?

13 MR. HATCH: We would ask the Court to accept the
14 proposed plea agreement. And for what it's worth, in our
15 view, we're comfortable that the primary considerations will
16 be selecting an appropriate meritorious monitor by the
17 department, as Mr. Tonolli said, they have a lot of
18 experience with this, who will perform the work that's set
19 forth in the agreement. So we ask the Court to accept it.

20 THE COURT: Have you-all reached out to anybody as
21 potential monitors?

22 MR. HATCH: Not to my knowledge. Because, again,
23 Your Honor, it's not --

24 THE COURT: To encourage them to apply, I guess?

25 MR. HATCH: Not to my knowledge, Your Honor. You

1 know, obviously, the plea is proposed. And we'll -- I'm
2 sure, if the Court sets it for a hearing, we can proceed.

3 THE COURT: Anything else?

4 MR. HATCH: No. Thank you, Your Honor, for your
5 time.

6 THE COURT: All right. Well, thank you--all very
7 much.

8 Anything else?

9 MR. CASSELL: Could I have just five minutes, Your
10 Honor?

11 THE COURT: Yes. Okay.

12 MR. CASSELL: And then, I will try to make it
13 actually five minutes, not a lawyer's five minutes.

14 THE COURT: Yes.

15 MR. CASSELL: On the Department of Defense issue,
16 let me just be clear. The families are not asking that
17 Boeing be debarred from providing for America's national
18 defense.

19 And there's no suggestion the Department of
20 Defense is withholding any contracts now. I think that's a
21 phantom that's being introduced into the proceedings here.
22 Boeing is going to continue to provide for America's defense
23 regardless of what you do.

24 The question, though, is about -- a legitimate
25 one -- what is the scope of this monitor? Essentially, the

1 parties are telling you that the families are going to
2 propose something inappropriate, and then we are going to
3 pull the wool over your eyes and you are going to do
4 something inappropriate with the monitor.

5 I mean, there's going to be an elaborate process
6 here if you reject the plea, where we'll have an
7 opportunity, now that we know exactly what their monitor
8 looks like, to maybe shape the terms of that, be presented
9 to you, you would have to give a thumbs up or thumbs down on
10 it.

11 I think a monitor can be crafted that would work
12 well with the FAA. In fact, if you go back to just the last
13 month, the FAA chief, Michael Whitaker, testified, "Boeing
14 still has to make significant changes and improve the safety
15 and quality of its airplanes." And he talked about this
16 being a multi-year process.

17 So I think there would be ways of crafting the
18 monitor that obviously wouldn't interfere with the FAA and
19 would be complementary.

20 In fact, we have some late-breaking news. I guess
21 this morning the Department of Transportation's Office of
22 Inspector General said that the FAA's current audit
23 processes are not comprehensive enough to adequately
24 identify key discrepancies.

25 So you can see that this would be a situation

1 where a monitor that can be crafted in this case could
2 improve the regulatory regime that currently exists.

3 One other quick point about the monitor as well.
4 I mean, the process that they proposed would have you bless
5 a backroom deal for what the monitor looks like.

6 The advantage of the public process that I'm
7 describing, where we would be making proposals and where
8 Your Honor would eventually decide the scope of the
9 monitors, the public can have confidence in it.

10 I think that's the point Senator Cruz was hitting
11 at in his amicus brief a couple years ago. It doesn't need
12 to be about what the monitor looks like. You might end up
13 in exactly the same place that the parties are.

14 But if it's your decision, rather than the
15 parties', the public is going to have significantly more
16 confidence in that.

17 Two last points here. This issue about the
18 450 million. We're told there's some kind of litigation
19 risk that can't go above the fine. And we're cited the
20 decision of some district court in Rhode Island that decided
21 a community service requirement wasn't appropriate. The
22 community service requirement would not have been, as far as
23 I know, tailored to try to remedy the harm.

24 What we're proposing here is more than 450 million
25 and better targeted at a loss that Boeing has caused. If

1 you want to see the controlling precedent on that, we
2 submitted to you U.S. vs. Caudill. That's a Fifth Circuit
3 decision from August 7th of this year. U.S. vs. Caudill is
4 C-a-u-d-i-l-l. And that's a restitution case.

5 And the Fifth Circuit said this whole Apprendi
6 line of cases, which, of course, includes Southern Union,
7 that's about punishment. That's about giving a jury a right
8 to review issues before a defendant is punished.
9 Restitution is a remedial measure that's not punishment. So
10 Apprendi doesn't apply.

11 So the point being, the 450 million isn't capped
12 by some kind of jury determination as to what the
13 appropriate punishment is. That's up to you to figure out
14 after hearing from the loss.

15 And I'm smiling a little bit because I appreciated
16 you asking the Department of Justice, and I had thought, to
17 be candid, you got the same runaround that we did. We know
18 the number is somewhere less than 243 million, but they
19 wouldn't commit to a particular number. That's the point.

20 How could the losses of those families,
21 collectively, 346 of them, amount to less than 243 million?
22 We've been asking for months. You asked today. No one
23 knows.

24 One last point. You asked, I thought, the key
25 question on this issue about, why are these nonconditions of

1 conditions of probation or whatever the right formulation
2 is? And they told us there would be no harm in making them
3 conditions of probation.

4 So why are we doing it in this, you know,
5 cockamamie way where it departs from the conventional
6 approach of Your Honor?

7 What we're basically saying, and I will close with
8 this is, at the front end of this plea deal, they're trying
9 to tie your hands so that you have to take the whole package
10 as they present it.

11 And even at the back end of the deal, if Boeing
12 starts to violate what's going on -- going -- the
13 obligations they've undertaken, they want to be the final
14 decision-makers.

15 At both the front end and the back end. This is a
16 bad deal. And the reason they are spending so much time and
17 arguing on the front and the back end is, in the middle of
18 all, it's 346 people who died. And we've never heard from
19 either of the parties here of how this plea agreement
20 recognizes that.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Okay. Very good.

24 Did you want to respond? Because I did want you
25 and Boeing to have the last word, because you both are what

1 I see as the movants. You are moving me to accept the plea
2 agreement. They're objecting to it. So I figure you and
3 Boeing, your arguments should have the last word.

4 MR. TONOLLI: And I appreciate the Court's
5 perspective.

6 We, obviously, agreed with the families to allow
7 them to have the two briefs and us just one out of courtesy,
8 so they could be fully expressed in their views, but I agree
9 with the Court's view as to who the movant is here.

10 Just one brief point on the law on the restitution
11 and remedial side. Restitution is a creature of statute.
12 It is correct in the Fifth Circuit that Apprendi does not
13 apply because restitution is to make whole or address the
14 loss. And that can't be capped except by the finding of
15 what the loss is in restitution.

16 The case I cited was not a random case in a
17 district court. It was Southern Union. And it was on
18 remand from the Supreme Court in talking about putting
19 restitution aside.

20 The Court's authority to order a remedial
21 condition that requires the expenditure of money as part of
22 probation. That's distinct from restitution. I provided
23 the cite so the Court could see that further.

24 But other than that, thank you.

25 THE COURT: Okay.

1 MR. FILIP: Nothing further, Your Honor.

2 THE COURT: Okay. Well, then thank you-all.
3 You've given me a lot of think about. I will get a ruling
4 out just as soon as I can.

5 COURT SECURITY OFFICER: All rise.

6 (The proceedings concluded at 11:30 a.m.)

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REPORTER'S CERTIFICATE

I, ZOIE WILLIAMS, RMR, RDR, FCRR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter to the best of my ability to hear.

Further, due to the COVID-19 pandemic, some participants are wearing masks, and/or appeared via videoconferencing, so proceedings were transcribed to the best of my ability.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 11th day of October, 2024.

_____/s/ Zoie Williams_____
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COURT SECURITY

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MR. CASSELL: [22] 27/9
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MR. FILIP: [3] 19/14
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MR. HARAY: [1] 6/16
MR. HATCH: [9] 104/9
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MR. TONOLLI: [75] 6/10
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MR. VUCKOVICH: [3]
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MS. DOW: [4] 65/13
65/17 65/20 71/25
THE COURT: [113] 6/5

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