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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this afternoon in Case 08-969, Hemi Group v. The City of New York.

Mr. Barnhouse.

ORAL ARGUMENT OF RANDOLPH H. BARNHOUSE

ON BEHALF OF THE PETITIONERS

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

Possessory and use taxes are extremely difficult to collect, even under the best of circumstances. Indeed, here the City alleges in its second amended complaint that it only collected 40 cents on the dollar, and its response claims a collection rate of 55 cents on the dollar. Yet it wants to collect 300 cents on the dollar from my clients, who never owed these taxes in the first place.

The Respondent City of New York alleged two RICO claims and pendent State law violations that the City said resulted in a lost sovereign opportunity to collect cigarette possessory taxes from its city residents. The alleged lost opportunity to tax was based on claims that my clients and 50 other defendants in four consolidated cases did not send names of

1 customers to the State of New York and had statements on  
2 their Website saying sales were tax-free and no tobacco  
3 taxes applied.

4 The Federal district court dismissed all  
5 claims. The Second Circuit Court of Appeals reinstated  
6 one of the City's RICO claims against the Petitioners,  
7 the Hemi Group and its sole owner, Kai Gachupin, and  
8 affirmed dismissal of the City's other RICO and its  
9 common law fraud claims.

10 Yet, reinstating the one RICO claim was  
11 improper because the City does not have standing to sue,  
12 based on the injuries that it has alleged. It does not  
13 have standing because the City's claim that it lost the  
14 sovereign opportunity to tax is not an injury to -- to  
15 business, and it's not an injury to property. And --

16 CHIEF JUSTICE ROBERTS: Why -- why isn't the  
17 money property?

18 MR. BARNHOUSE: Money in the bank would be  
19 property, Mr. Chief Justice Roberts, but an opportunity  
20 to collect money is an inchoate interest, and so it  
21 would not be property at that point. It would be the  
22 opportunity to collect it.

23 CHIEF JUSTICE ROBERTS: Well, isn't a  
24 lawsuit with a potential recovery regarded as property  
25 of an individual?

1 MR. BARNHOUSE: The lawsuit would be -- the  
2 lawsuit itself would be property, but the -- but any  
3 recovery would not be property until it became choate,  
4 until there was an amount of money assigned to it. And  
5 so --

6 JUSTICE SCALIA: There is no such  
7 adjective -- I know we have used it, but there is no  
8 such adjective as "choate." There is "inchoate," but  
9 the opposite of "inchoate" is not "choate."

10 MR. BARNHOUSE: All right.

11 JUSTICE SCALIA: Any more than the -- I  
12 don't know.

13 (Laughter.)

14 MR. BARNHOUSE: Well, I'm wrong on the -- on  
15 the "choate" --

16 JUSTICE SCALIA: Yes. It's like  
17 "gruntled."

18 MR. BARNHOUSE: -- but I think I am right on  
19 the law, Your Honor.

20 JUSTICE SCALIA: Exactly. "Disgruntled" and  
21 the opposite of "disgruntled" is "gruntled."

22 MR. BARNHOUSE: Is "gruntled."

23 (Laughter.)

24 MR. BARNHOUSE: Well, it would -- it would  
25 be inchoate at the time the -- the City was just

1 exercising its opportunity to tax, but had not -- or  
2 exercising its sovereign right to tax, but had not yet  
3 assessed the tax and made it property --

4 JUSTICE GINSBURG: I thought that the -- the  
5 status of taxes owing for wire fraud purposes was  
6 settled in Pasquantino. There it was a question of  
7 alcohol taxes owed to Canada.

8 There were taxes due, but not paid. So why  
9 doesn't Pasquantino settle at least the property  
10 question that taxes owed to a sovereign qualify as  
11 property?

12 MR. BARNHOUSE: Justice Ginsburg,  
13 Pasquantino -- the holding there was -- it was a  
14 criminal prosecution by the U.S. Government, and it  
15 dealt with the term "property" in the -- in the mail and  
16 wire fraud statute, not the overlying 1964(c)  
17 requirement of injury to business or property.

18 Moreover, it was the taxpayer who was being  
19 prosecuted, the person who actually had taken the liquor  
20 into Canada, not some third party that said, let me sell  
21 you the liquor.

22 JUSTICE GINSBURG: Oh, there are certainly  
23 differences from this case, and it wasn't a RICO case,  
24 either. But why would the determination of what --  
25 whether an amount owed to a government qualifies as

1 property, why wouldn't -- why would that answer differ?

2 MR. BARNHOUSE: Justice Ginsburg, once the  
3 amount owed is assessed, once there's a determination of  
4 the amount owed --

5 JUSTICE GINSBURG: There was no assessment  
6 by Canada in the Pasquantino case.

7 MR. BARNHOUSE: There was --

8 JUSTICE GINSBURG: They said the -- the  
9 defendant was smuggling liquor into Canada and getting  
10 it there without paying the Canadian exorbitant taxes.

11 MR. BARNHOUSE: The prosecution on the mail  
12 and wire fraud criminal -- well, criminal standing was  
13 not an issue there. It was the U.S. Government --

14 JUSTICE GINSBURG: But we're talking  
15 about -- only about property, not standing or anything  
16 else. And in Pasquantino, the Court said that a scheme  
17 aimed -- aimed at depriving Canada of money to which it  
18 was entitled by law qualifies as property for wire fraud  
19 purposes.

20 MR. BARNHOUSE: Yes, Your Honor, for wire  
21 fraud purposes. And the Court took a very expansive  
22 view of property in Pasquantino.

23 JUSTICE SCALIA: So why is this different?  
24 I mean, it's clear that "property" can mean that. You  
25 acknowledge that it can mean the government's

1 entitlement to money from taxes.

2 MR. BARNHOUSE: For purposes of the -- of  
3 the mail and wire fraud statute, this Court has held  
4 that property can be for purposes of --

5 JUSTICE SCALIA: So it can mean that. Now  
6 why -- why should we say it doesn't mean that here?

7 MR. BARNHOUSE: At the time, because of the  
8 overlying standing requirement Congress placed in RICO  
9 of injury to a person's business or property, and  
10 because of Congress's reliance at that time on the  
11 antitrust laws and the general understanding at that  
12 time that business or property did not include the type  
13 of sovereign interest in an opportunity to collect tax,  
14 as confirmed by the Ninth Circuit and this Court in  
15 Hawaii v. Standard Oil of California that this Court  
16 affirmed, where the sovereign opportunity to tax is much  
17 difference -- different from the actual collection of a  
18 -- of a set amount of tax that the government knows it  
19 has coming.

20 JUSTICE SCALIA: Is the word "property" used  
21 in the antitrust laws?

22 MR. BARNHOUSE: Yes, Your Honor. In fact,  
23 the --

24 JUSTICE SCALIA: What --

25 MR. BARNHOUSE: The -- I'm sorry.

1 JUSTICE SCALIA: What does it say?

2 MR. BARNHOUSE: The standing for purposes of  
3 the antitrust laws is injury. A person has standing who  
4 has been injured in his business or property. It's  
5 exactly the same as in RICO. In fact, Congress took the  
6 language from the antitrust laws, Justice Scalia, and  
7 placed it into RICO unchanged.

8 JUSTICE SCALIA: And it -- and it's clear  
9 that, for purposes of the antitrust laws, property does  
10 not include the government's entitlement to income from  
11 taxes?

12 MR. BARNHOUSE: Yes, Your Honor. In Hawaii,  
13 this Court made it clear that --

14 JUSTICE STEVENS: The Hawaii case didn't  
15 involve a claim to taxes.

16 MR. BARNHOUSE: Justice Stevens, it was a  
17 claim of injury to the general economy, which included  
18 --

19 JUSTICE STEVENS: Right, and *parens patriae*  
20 for the community at large.

21 MR. BARNHOUSE: Yes, Your Honor. And the  
22 State of Hawaii brought three claims. One was its  
23 injury to itself; one was the potential class action;  
24 and then the *parens patriae* claim.

25 JUSTICE STEVENS: But none of them involved

1 a claim to taxes.

2 MR. BARNHOUSE: It was my understanding that  
3 the injury to the general economy, the underlying claim  
4 was that by losing that economic engine, that the State  
5 itself would be injured because of the loss to the  
6 economy and in its governmental functions. The actual  
7 --

8 JUSTICE SCALIA: Yes, but that -- that's  
9 something different. This isn't just a general, you  
10 know, you hurt the economy and therefore you hurt the  
11 State. Here, what they're saying is: You caused people  
12 who owed me taxes not to pay taxes, an identified sum of  
13 money.

14 MR. BARNHOUSE: Justice Scalia, it's not an  
15 identified sum of money. They don't know -- they can't  
16 tell who owed the taxes, in what amount, whether any of  
17 those people were eligible for the exemption under the  
18 law. It was inchoate. It was not known. It was not  
19 known who owed it or --

20 JUSTICE SCALIA: Well, it might have been  
21 inchoate but still -- they would have to be prove that,  
22 I assume, in the litigation here, wouldn't they? I  
23 mean, let's assume we let the litigation go forward.  
24 Wouldn't they have to prove what taxes were not paid?

25 MR. BARNHOUSE: They would have to -- they

1 would absolutely have to prove that for purposes of  
2 damages.

3 JUSTICE SCALIA: So worry about that later.  
4 I mean, just because some of them might be difficult to  
5 prove or not provable doesn't mean that the rest that  
6 are very clear do not constitute property.

7 MR. BARNHOUSE: The -- the -- what they've  
8 alleged here is not that they've lost the taxes, but  
9 that they've lost the opportunity to tax. Moreover,  
10 they should not be able to reach that point because the  
11 allegations themselves are that the injury is not  
12 proximate. It's the City itself --

13 JUSTICE SCALIA: That's a different issue.

14 MR. BARNHOUSE: It is a different issue.

15 JUSTICE SCALIA: You're going to talk about  
16 that one, aren't you?

17 MR. BARNHOUSE: That -- I was hoping for a  
18 smooth transition, Justice Scalia.

19 JUSTICE SCALIA: You've got it.

20 (Laughter.)

21 MR. BARNHOUSE: The -- the injury to the  
22 City is much like the injury in Holmes, where the City  
23 claims to be at the tail end of the chain of causation.  
24 They allege two injuries, sources of their injury. One  
25 was that statements made on an Internet Website somehow

1 caused people who purchased cigarettes in New York City  
2 not to pay. The district court described that source of  
3 injury as "farfetched." Those were Judge Batts's words.

4 The second source of injury they claim is  
5 that by not reporting to the State of New York, the City  
6 then did not receive information about which city  
7 residents purchased cigarettes, and the City could then  
8 not go to those residents who had not self-assessed, and  
9 --

10 JUSTICE ALITO: Well, putting -- putting  
11 aside the fact that the Jenkins Act information would be  
12 sent to the State rather than the City, why -- how can  
13 you -- how can it be said that at this stage of the  
14 litigation that it's farfetched that having a statement  
15 on the Website "No taxes due" is -- doesn't cause people  
16 to purchase those cigarettes for the very purpose of  
17 avoiding the taxes?

18 MR. BARNHOUSE: Well, Justice Alito, the  
19 allegations here are not that there's no taxes due.  
20 There wasn't someone waving a tea bag and saying, "Don't  
21 pay your taxes." What the Website's allegations are is  
22 that the sales are tax-free, and the sales were  
23 tax-free. As the City points out, they -- it was beyond  
24 the power of the City to impose any sales tax on these  
25 transactions which occurred on the Jemez Pueblo in New

1 Mexico.

2 JUSTICE SCALIA: What is it, a user tax once  
3 it gets into the city?

4 MR. BARNHOUSE: Exactly, Justice Scalia.  
5 It's a possessory tax --

6 JUSTICE SCALIA: Like automobiles.

7 MR. BARNHOUSE: Pardon me.

8 JUSTICE SCALIA: Just like automobiles. If  
9 you buy a car out of the State, you haven't paid the  
10 State sales tax, but if you bring it into the State, you  
11 have to pay a use tax.

12 MR. BARNHOUSE: That's right. That's right,  
13 Justice Scalia, and the obligation to pay that tax is on  
14 the person that brings the car into the State. The  
15 obligation to pay the possessory use tax is on the  
16 citizens of the City of New York.

17 JUSTICE SCALIA: And that's all it was  
18 alleged that these -- that these Websites said, "tax-  
19 free"? They said "tax-free"?

20 MR. BARNHOUSE: "Sales are tax-free."

21 JUSTICE SCALIA: "Sales are tax-free."  
22 That's very clever.

23 MR. BARNHOUSE: And "no tobacco tax." Those  
24 are the two allegations.

25 JUSTICE SCALIA: No -- "no tobacco tax"?

1 MR. BARNHOUSE: Yes, Your Honor. And --

2 JUSTICE SCALIA: But there is a tobacco tax,  
3 isn't there? Don't you -- wouldn't you call that use  
4 tax a tax on tobacco?

5 MR. BARNHOUSE: No, Your Honor, it's  
6 specifically not a tax on tobacco. It's a tax on the  
7 possession of cigarettes, and there are exemptions to  
8 it.

9 JUSTICE ALITO: Why isn't that just a  
10 question -- a substantive fraud question, rather than a  
11 proximate cause question?

12 MR. BARNHOUSE: The --

13 JUSTICE ALITO: Is it -- is it fraudulent to  
14 say "sales are tax-free" as opposed to, you know, saying  
15 "no taxes are due"?

16 MR. BARNHOUSE: Well, it has to do with the  
17 intervening -- Justice Alito, with -- with intervening  
18 causes of the City's failure to collect these taxes.

19 The -- RICO requires someone who has been  
20 injured in their business or property by reason of the  
21 alleged proximate act, and the fact is the City here was  
22 injured in its -- was injured, if at all, by reason of  
23 its citizens' failure to self-assess and pay their  
24 taxes.

25 JUSTICE GINSBURG: It was injured because it

1 couldn't find its citizens because it didn't know who  
2 they were. And that was the whole idea of the Jenkins  
3 Act, was to help States find the people who were evading  
4 the payment of the use tax on the cigarettes.

5 MR. BARNHOUSE: Yes, Justice Ginsburg. The  
6 Jenkins Act was -- was focused on allowing States to  
7 help find those, and the city is therefore outside the  
8 zone of interest.

9 JUSTICE KENNEDY: Well, suppose -- suppose  
10 you had a case in which an individual that lives in New  
11 York goes to a person with a supply of cigarettes  
12 outside the State and says: I want to buy a lot of  
13 cigarettes and I don't want to pay taxes; can you help  
14 me? And they agree on an arrangement to ship -- to ship  
15 the cigarettes.

16 Is there proximate cause? Is it there if  
17 the City sues for injury in that hypothetical case?  
18 Would you say there's no proximate cause?

19 MR. BARNHOUSE: I would say that there was  
20 no proximate cause for a lawsuit under RICO against the  
21 seller who the person went to and said: My goal here is  
22 not to pay taxes; can you help me figure out a way to  
23 get them into the city in a way that I don't have to?

24 JUSTICE KENNEDY: And you think the --  
25 and you think the City cannot show proximate cause in a

1 suit for its injury against the seller of the  
2 cigarettes? You think there's no proximate cause in  
3 that hypothetical case?

4 MR. BARNHOUSE: Yes, Your Honor, I would say  
5 that there would be an intervening -- Justice Kennedy,  
6 there would be the intervening cause of the person's  
7 decision. It's -- it's beyond the first step --

8 JUSTICE KENNEDY: Even though those were the  
9 only two people that have made the arrangement and that  
10 was the whole purpose and intent of the arrangement?  
11 And you still say there's no proximate cause?

12 MR. BARNHOUSE: Your Honor, the -- the  
13 intent to injure, even if specific, as the Court held in  
14 Associated General Contractors, is not itself sufficient  
15 to -- to change -- to give someone standing under RICO.

16 CHIEF JUSTICE ROBERTS: Does your answer to  
17 Justice Kennedy depend upon a notion that the causation  
18 standard as -- in RICO is different than general  
19 proximate cause standards in tort law?

20 MR. BARNHOUSE: No, Your Honor, because I  
21 believe that the proximate cause standard that the Court  
22 has adopted rests at its core in proximate cause  
23 analysis in tort law. When the Court first started  
24 applying proximate cause requirements in the antitrust  
25 law and in RICO, it was looking at, as I understand it,

1 the -- the common law analysis of proximate cause,  
2 and -- and it really discussed the elements of that  
3 quite clearly in the Associated General Contractors  
4 case, where it talks about five or six factors that the  
5 Court has to look at, those factors being the nature of  
6 the plaintiff's alleged injury, is it -- whether it was  
7 the type of -- that the antitrust laws were intended to  
8 forestall, or here the RICO laws. We would submit that  
9 it is not. It's an injury to a sovereign interest.

10 The directness of the injury -- here the  
11 injury is indirect. It either comes -- flows through  
12 the citizens who didn't pay their taxes or through the  
13 State that didn't get the reports of customers in the  
14 city.

15 JUSTICE GINSBURG: Can we go back to the  
16 question I had asked you and was not finished getting  
17 your position on. Jenkins requires a report to the  
18 State. You say the city was not within the zone of  
19 interest. But from the point of view of the sellers,  
20 the out-of-State sellers of cigarettes, my goodness,  
21 would they really want not only to have the burden of  
22 sending a list of names to the State but to every county  
23 and municipality? Isn't it the -- just as it is in New  
24 York, there is a working relationship. The State gets  
25 all the names, and then it sends the names to the

1 cities.

2           You -- you're suggesting that it  
3 would be okay if the Jenkins Act had made it even more  
4 burdensome to the cigarette sellers by saying not only  
5 do you have to disclose to the State but also to any  
6 municipality that independently taxes cigarettes?

7           MR. BARNHOUSE: Justice Ginsburg, Congress  
8 could have given the States power to share those lists,  
9 but it did not under the Jenkins Act. And it's not  
10 clear that -- that -- even the agreement --

11           JUSTICE GINSBURG: Is it -- we're told that  
12 New York City and New York State have a tax information-  
13 sharing agreement pursuant to which the State does share  
14 this information with the City.

15           MR. BARNHOUSE: The -- the agreement, and  
16 it's quoted on page 6 of the response -- and I want to  
17 get this right -- says, Justice Ginsburg, in paragraph 1  
18 of the quote, in footnote 6: "Provided that the  
19 disclosure of that information is permissible under  
20 existing laws and agreements." And this is proprietary  
21 information. These are customer lists.

22           JUSTICE KENNEDY: Well, what do you do  
23 with -- what do you do with Justice Ginsburg's  
24 hypothetical? I mean, she can pursue her own question,  
25 but I'm interested in the answer.

1           Her question is, suppose the statute were  
2 amended so that the information had to be given to the  
3 City as well as to the State; would the case then be  
4 different, hypothetical case?

5           MR. BARNHOUSE: Yes, it would be different,  
6 because in that instance the City would be the --  
7 would -- would as -- would -- would be the direct  
8 victim, would be within the zone of interest of the  
9 statute.

10           JUSTICE SCALIA: Are there any sanctions for  
11 failing to comply with the Jenkins Act, just on its own,  
12 without having to go through RICO?

13           MR. BARNHOUSE: Justice Scalia, it's a  
14 misdemeanor violation, and it has to be prosecuted by  
15 the U.S. Government. Those -- that's the extent of the  
16 Jenkins Act. And -- and the -- and what the City has  
17 done here, as Judge Winter noted in his dissent, is take  
18 that misdemeanor Federal criminal law and bootstrap it  
19 into RICO, seeking 300 cents on the dollar through mail  
20 and wire fraud.

21           These sales occurred on the Jemez Pueblo in  
22 New Mexico. And it's my client's position, and it's no  
23 secret, he says on his Websites that he doesn't -- that  
24 the Jenkins Act, the scope of the Jenkins Act does not  
25 include his sales. There -- there's a dispute with the

1 City on that, but it's not even clear that the State had  
2 a right to get these names, much less the City.

3 Yet, the city is claiming because it didn't  
4 get the names -- and if it had the names it claims a  
5 recovery rate of between 40 cents and 55 cents on the  
6 dollar -- it should be able to collect 300 cents on the  
7 dollar from a business that didn't owe them in the first  
8 place.

9 Because the civil RICO has a separate  
10 standing requirement separate from mail and wire fraud,  
11 as Justice O'Connor discussed in Holmes, that it's not  
12 just the predicate act's standing requirement, but --  
13 but the -- a person injured in his business or property  
14 by reason of -- because Congress took this "business or  
15 property" language right out of the antitrust laws  
16 unchanged. The Court in Hawaii interpreted that  
17 language. The Court drew a bright line. It was a  
18 pragmatic line, a workable line, an important line, that  
19 that business or property did not include injury to a  
20 sovereign interest.

21 The opportunity to collect taxes is a  
22 sovereign interest. The taxes themselves, once  
23 collected or assessed, could be property, but not the  
24 opportunity. The injury flows either through the States  
25 or consumers and, therefore, is not proximate. These

1 Websites were not State-specific, much less  
2 city-specific.

3 CHIEF JUSTICE ROBERTS: But you don't -- you  
4 don't think that proximate cause is satisfied only with  
5 respect to the person who is supposed to be paying the  
6 taxes? If there's some way in which someone else  
7 contributes or makes it feasible or makes it more likely  
8 that the person is not going to pay his taxes, that's  
9 not automatically outside the scope of proximate cause,  
10 is it?

11 MR. BARNHOUSE: It wouldn't automatically be  
12 outside the scope of proximate cause, but if -- if it  
13 was action that made it more or less feasible. But it  
14 would be unreasonable under this Court's decision in  
15 U.S. v. Boyle, where you -- where the Court held that  
16 you cannot rely even on an agent for purposes of not  
17 filing taxes -- it would be unreasonable for anyone to  
18 rely on language on a vendor's Internet -- commercial  
19 language on a vendor's Internet Website to -- to  
20 decide that for some reason they didn't have an  
21 obligation to pay.

22 And these Websites had language that said --  
23 the City attached the -- the pages from the Websites  
24 themselves to the -- they were part of the record, the  
25 RICO record. I had those just a second ago and I can't

1 seem to find them.

2 But the -- the Website pages for my client  
3 specifically had language as noted in the briefs that  
4 said these are not city-specific or State-specific, that  
5 -- that you need to contact -- you should contact your  
6 State officials for purposes of determining what your  
7 individual obligations are regarding possession and tax.

8 JUSTICE GINSBURG: How many people who buy  
9 cigarettes out of State come back to their home State  
10 and voluntarily pay the use tax?

11 MR. BARNHOUSE: In the response to the  
12 petition, the City said it's a fraction, I believe, of  
13 the people. They have also --

14 JUSTICE SCALIA: Isn't there some exemption,  
15 anyway, for a couple of cartons?

16 MR. BARNHOUSE: There is an exemption, yes,  
17 Justice Scalia.

18 JUSTICE SCALIA: For what, two cartons?

19 MR. BARNHOUSE: Two cartons of cigarettes.

20 JUSTICE SCALIA: Yes.

21 MR. BARNHOUSE: And -- but -- but it's clear  
22 that possessory and use taxes are a bear to collect for  
23 any government. And the City here, as I -- as stated in  
24 the record, says even under the best of circumstances,  
25 Justice Ginsburg, it collects only 40 cents on the

1 dollar, perhaps as much as 55 cents.

2 JUSTICE GINSBURG: But it needs the names so  
3 it can collect anything. Otherwise, how is it -- how --  
4 how would it ever know?

5 MR. BARNHOUSE: It would rely on its  
6 citizens to step forward and pay it.

7 JUSTICE GINSBURG: And they don't.

8 MR. BARNHOUSE: And they don't. And that's  
9 the intervening cause of the -- that's --

10 JUSTICE SCALIA: It would probably cost them  
11 more to collect than -- than it's worth the money, don't  
12 you think, to sue individual citizens after they get the  
13 names?

14 MR. BARNHOUSE: It's a very expensive  
15 process, Your Honor --

16 JUSTICE SCALIA: Yes.

17 MR. BARNHOUSE: -- Justice Scalia, and it --  
18 it's tedious. You get the names. You have to go  
19 through the names and write. There's a cost involved in  
20 all that. There's a lot of friction in that entire  
21 process. There -- there are lots of reasons that, even  
22 when the city gets the names and even under its  
23 allegations of collection rates, Justice Ginsburg, very  
24 small -- 40 cents to 55 cents on the dollar.

25 JUSTICE GINSBURG: Do we know if these

1 Jenkins Act lists -- are they in fact maintained by the  
2 State?

3 MR. BARNHOUSE: It -- it's my understanding,  
4 Justice Ginsburg, that the State would receive Jenkins  
5 Act reports from some vendors. Those can come in all  
6 sorts of different formats, some of it just stacks of  
7 paper perhaps. And it would be the State's  
8 responsibility then to go through those, select which  
9 ones were residents of the City of New York, and then  
10 decide whether under existing laws it was even permitted  
11 to share this proprietary information with the City,  
12 before giving those to the City.

13 It would then be the City's responsibility  
14 to take the list given to it by the State and decide who  
15 hasn't paid. Then there's the exemption issue that  
16 comes on top of that. And then go out and try to  
17 collect these amounts, which they allege to have done in  
18 at least two instances.

19 Finally, the policy -- I'm sorry. The  
20 policy that this Court adopted in Hawaii makes a --  
21 makes very much sense, as recognized by courts who have  
22 looked at issues such as additional fire protection,  
23 payment of -- of public benefits, other instances where  
24 governments have come forward and, under RICO, tried to  
25 bring a claim to recover actual out-of-pocket expenses,

1 overtime that was paid to police that had to monitor  
2 protests against abortion clinics, public benefits paid  
3 to people who were not legally in the country and  
4 working in agriculture.

5 Governments have brought those, and the  
6 circuit courts of appeals in both of those instances  
7 said those are injury to sovereign interests, citing  
8 Hawaii, and not the kind of injury to business or  
9 property that Congress intended when it adopted RICO.

10 If there are no further questions, I'll  
11 reserve the rest of my time for rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Koerner.

14 ORAL ARGUMENT OF LEONARD J. KOERNER

15 ON BEHALF OF THE RESPONDENT

16 MR. KOERNER: Mr. Chief Justice, and may it  
17 please the Court:

18 With respect to the definition of property,  
19 this goes back to Wyoming v. Oklahoma, where in an  
20 original jurisdiction case, Wyoming sued the State of  
21 Oklahoma on the ground that the State's regulation which  
22 attempted to require Oklahoma coal-fired generation  
23 plants to use 10 percent of Oklahoma coal. And prior to  
24 the legislation all of Wyoming coal was used in the  
25 generation plant.

1 Wyoming sued in this Court, and the defense  
2 was that Wyoming didn't have an interest because it lost  
3 the opportunity to collect taxes. This Court found  
4 standing and allowed them to sue and successfully  
5 challenge under the interstate commerce rule. That was  
6 before we get to Pasquantino. Justice Ginsburg is quite  
7 right --

8 JUSTICE SCALIA: Excuse me. Did -- was  
9 there some statute at issue in that case which required  
10 not just an interest, but an interest in property?

11 MR. KOERNER: No. The --

12 JUSTICE SCALIA: Well --

13 MR. KOERNER: It was just -- I was  
14 just going to -- yes, it was just a discussion of what  
15 was the nature of Wyoming's interest. Was it  
16 substantial enough to allow them to sue, challenging the  
17 Oklahoma statute?

18 In Pasquantino, though, the issue was  
19 foreclosed. In that particular case, the issue of  
20 definition of property was the exact same issue that you  
21 have in the RICO case. Indeed, mail and wire fraud is a  
22 predicate for RICO. In that case, there was, as Justice  
23 Ginsburg noted, a criminal prosecution based on the  
24 importation of alcohol into Canada from Maryland. The  
25 charge was wire fraud.

1           And, first -- there were two issues: One,  
2 the revenue rule, which is not relevant here. But the  
3 first issue was whether or not the opportunity to  
4 collect taxes which Canada lost, whether that was an  
5 injury to property. And there was a long discussion by  
6 this Court equating the lost opportunity with  
7 embezzlement from the Canadian Treasury and pointing out  
8 in the definition of Black's and the Webster's  
9 definition that property includes not only that which  
10 you actually have, but that which you were denied the  
11 opportunity.

12           In this particular case, the reason we don't  
13 have the taxes is because of the act of fraud as we  
14 allege of the defendant. It's a little tough --

15           CHIEF JUSTICE ROBERTS: I'm sorry, because  
16 of -- because of what?

17           MR. KOERNER: The fraud of the defendant.  
18 It's a little hard to argue when you've created the  
19 situation so we can't collect that an inability to  
20 collect then becomes no property. After Pasquantino,  
21 this Court decided the Anza case, which I'll discuss for  
22 both issues.

23           JUSTICE BREYER: Before you get to Anza,  
24 this might be a good time to ask because I don't think  
25 we focused on this in Pasquantino. But if in fact the

1 failure of a State to collect a tax is property, then  
2 why isn't every corporation that files an income tax  
3 return and makes two false statements automatically  
4 liable for RICO? I mean --

5 MR. KOERNER: As long as they meet the  
6 definition of --

7 JUSTICE BREYER: Well, that would mean the  
8 States have a new method, which I don't think they use,  
9 a new method of collecting treble taxes from anyone who  
10 makes two false statements or a false statement in two  
11 income tax returns, and it would seem to me that would  
12 have vast repercussions. I mean, it might be very  
13 beneficial; the States are having a deficit crisis;  
14 but --

15 MR. KOERNER: If people --

16 JUSTICE BREYER: How -- how -- why would it  
17 not be --

18 MR. KOERNER: Well, this is --

19 JUSTICE BREYER: And -- but they left --  
20 they don't have the RICO predicate, not paying your  
21 State taxes. But in effect you would read into the RICO  
22 predicate protecting States.

23 MR. KOERNER: But it's not -- this is  
24 precisely what happened in Anza.

25 JUSTICE BREYER: That may be, but nobody

1 focused on this issue. So -- so that's what's bothering  
2 me. What is the -- what is the stopping place?

3 MR. KOERNER: If you're --

4 JUSTICE BREYER: Or is there one? And if  
5 there is none, how do we reconcile this view of --  
6 they're suggesting a stopping place, Anza and  
7 Pasquantino to the contrary. Right. But they're  
8 suggesting a stopping place on a matter that hasn't come  
9 up.

10 MR. KOERNER: But they're suggesting --

11 JUSTICE BREYER: Or focused on. It's come  
12 up but not focused on.

13 MR. KOERNER: But they're suggesting a  
14 stopping place which is inconsistent with the actual  
15 language of the RICO law.

16 JUSTICE BREYER: So in your view --

17 MR. KOERNER: No --

18 JUSTICE BREYER: -- California --

19 MR. KOERNER: Well, may I --

20 JUSTICE BREYER: -- which has a \$10 billion  
21 deficit, could go through, find every instance where a  
22 corporation made two false statements, in two tax  
23 returns, one in each, and collect treble what they're  
24 owed.

25 MR. KOERNER: If there is a systematic

1 understatement under the statute, that's exactly --

2 JUSTICE BREYER: It doesn't say systematic  
3 understatement.

4 MR. KOERNER: It says --

5 JUSTICE BREYER: It says two --

6 MR. KOERNER: Correct.

7 JUSTICE BREYER: -- predicate acts.

8 MR. KOERNER: And in these --

9 JUSTICE BREYER: And the predicate acts are  
10 a deliberate false statement. Didn't they --

11 MR. KOERNER: And indeed that -- that is  
12 what Congress intended. If you look --

13 JUSTICE BREYER: If they did, then why  
14 didn't they put in not paying your State tax returns as  
15 a predicate act?

16 MR. KOERNER: Well, in fact what they put in  
17 in 1978 was the Contraband Cigarette Trafficking --

18 JUSTICE BREYER: Oh, well, that cuts against  
19 you.

20 MR. KOERNER: No.

21 JUSTICE BREYER: Because if they put in one,  
22 your theory -- they don't even need, whether they need  
23 that or not. Your theory applies to every tax, every  
24 tax.

25 MR. KOERNER: Well, the reason they put it

1 in was to increase the criminal penalties as well as  
2 recognize the civil penalties.

3 JUSTICE BREYER: No, but go back to my  
4 question.

5 MR. KOERNER: The importation -- yes.

6 JUSTICE BREYER: My question is, forget the  
7 cigarette taxes. If I accept your argument, am I then  
8 saying that California, New York, and every other State  
9 that's owed money by corporations in their taxes can go  
10 through, look for two tax returns that have a false  
11 statement in them that were mailed in, and thereby  
12 collect RICO damages?

13 MR. KOERNER: Yes, that's correct. And  
14 indeed --

15 JUSTICE BREYER: Well, that's a pretty  
16 far-reaching --

17 MR. KOERNER: Well --

18 JUSTICE BREYER: Do you know anybody, any  
19 court has ever said that?

20 MR. KOERNER: Well, the issue hasn't been  
21 raised. But the -- but the -- the RICO has been  
22 consistently interpreted by this Court in an  
23 expansionist mode, and despite that, Congress has not  
24 truncated it except in the one area of securities  
25 violation and only because they found that there were

1 ample remedies in securities law and because they  
2 thought it was inappropriate to use exclusively mail and  
3 wire fraud.

4 JUSTICE BREYER: Why would --

5 JUSTICE SCALIA: Why should that help?

6 JUSTICE BREYER: If Congress wanted that  
7 result, why didn't they put in as a predicate act, not  
8 paying your income tax or not paying your State tax?

9 MR. KOERNER: Because they had a more  
10 general definition, and they wanted the broadest  
11 possible interpretation. But the Cigarette Contraband  
12 Trafficking Act was put into RICO as a predicate crime.  
13 The sole economic injury in that Act is lost taxes to  
14 the State and the city. It's the only economic injury.  
15 It's hard to say that Congress didn't contemplate this  
16 when, in addition to the general definition, they put  
17 this in.

18 In addition, the Jenkins Act was passed in  
19 1949 precisely for this problem, so it was on  
20 congressional minds.

21 JUSTICE GINSBURG: Yes, but Congress said --  
22 we were just told by counsel for the Petitioner,  
23 Congress said you can -- only -- only the Federal  
24 prosecutor can sue for violations of Jenkins --

25 MR. KOERNER: Correct.

1 JUSTICE GINSBURG: -- not New York City, not  
2 New York State --

3 MR. KOERNER: Correct.

4 JUSTICE GINSBURG: -- and it's a  
5 misdemeanor.

6 MR. KOERNER: Correct.

7 JUSTICE GINSBURG: And now you -- you are  
8 saying the Jenkins Act gives you a basis to go after  
9 what are basically aiders and abettors of use tax  
10 violations?

11 MR. KOERNER: No. What we're saying is the  
12 Jenkins Act is some evidence of the state of mind of the  
13 defendant when he commits this fraud. What we are  
14 saying is he is aware that he has an obligation to file  
15 reports with the State indicating both the identity of  
16 the seller and the identity of the purchaser. Our  
17 predicate act is not Jenkins. Our predicate act is wire  
18 and mail fraud. Even if Jenkins did not exist, we would  
19 still have a wire and mail fraud cause of action based  
20 on the representations of the seller, which is that all  
21 the sales are tax-free.

22 What Jenkins does, through the cooperation  
23 Agreement, is it gives us the mechanism to collect these  
24 taxes when they're complied with. If the defendant by  
25 active intervention does not file and instead advertises

1 no sales tax required, he is preventing us from --

2 JUSTICE GINSBURG: But do you know -- do we  
3 know that? Do we know whether the Petitioner has in  
4 fact filed the Jenkins Act reports with New York State?

5 MR. KOERNER: No. We have -- we have  
6 alleged that he has not -- not filed one report with New  
7 York State. Indeed, he has actively represented in the  
8 Website that he has no obligation to file the report  
9 and that any information that he obtains from the  
10 purchaser is confidential.

11 JUSTICE BREYER: All right. So I think that  
12 their response to the mail and fraud is, you're right,  
13 it is all mail -- it is all mail fraud. All these tax  
14 violations, in fact every one -- you mail in your tax  
15 return normally.

16 MR. KOERNER: Correct.

17 JUSTICE BREYER: So all of these would be  
18 mail fraud. But mail fraud is not a treble damages  
19 statute. And therefore the question is who will  
20 prosecute, State or Federal? And so normally it's State  
21 if it's a State tax. But it's one thing to say Congress  
22 didn't care about that and quite another thing to say  
23 that Congress didn't care if the States were going to  
24 use this in order to collect three times what the taxes  
25 are owed. And so they're looking for a way to cut off

1 this tax liability for ordinary, simpleminded tax --  
2 failure to pay your State taxes. And that's why they've  
3 hit on this idea of the antitrust. I don't know if  
4 that's a satisfactory idea. I don't see the solution.  
5 I think I see the problem.

6 MR. KOERNER: But in the antitrust case in  
7 the State of Hawaii, the reason there that the State was  
8 not allowed to sue was not because of the injury. It  
9 was not -- it was the directness of the injury. This  
10 Court pointed out the fact that there was the  
11 possibility of duplicative recoveries, and the State of  
12 Hawaii was acting on behalf of the consumers.

13 Here, we have a direct injury. The City was  
14 the only one injured as a --

15 CHIEF JUSTICE ROBERTS: But it was injured  
16 by the consumers' failure -- it was injured by the  
17 consumers' failure to pay the taxes.

18 MR. KOERNER: Correct.

19 CHIEF JUSTICE ROBERTS: That is an  
20 intervening cause. Now, why shouldn't that be the end  
21 of the causation chain?

22 MR. KOERNER: Because it's -- while the  
23 consumer has failed, we are suing the seller because he  
24 set up the ambiance, the environment for the consumer  
25 not to pay. It is his --

1 CHIEF JUSTICE ROBERTS: You're suing him for  
2 setting up the ambiance?

3 MR. KOERNER: Yes. He is the one who  
4 created the fraud, by leading the consumer to believe  
5 they didn't have an obligation to pay. We are suing  
6 based on impedance with the opportunity to collect  
7 taxes, where there are three parties to this  
8 transaction --

9 JUSTICE ALITO: In order to -- in order  
10 to -- to prevail on that theory, would you have to prove  
11 that these -- these alleged misrepresentations in fact  
12 caused people not to pay taxes?

13 MR. KOERNER: Yes.

14 JUSTICE ALITO: Had -- you would have to  
15 prove that?

16 MR. KOERNER: Yes, and that's something we  
17 could establish at trial, Your Honor.

18 JUSTICE ALITO: And you think you could  
19 prove that?

20 MR. KOERNER: Absolutely, because the  
21 response rate of individuals on their own when the  
22 Jenkins report is not filed is extremely low. Yes.  
23 When the Jenkins report is filed, they do --

24 JUSTICE ALITO: What -- what percentage of  
25 the -- of the residents of New York State or New York

1 City voluntarily pay a use tax on their income tax  
2 returns for items that they purchase on the Internet?

3 MR. KOERNER: I don't know the answer to  
4 that. I know with respect to --

5 JUSTICE ALITO: Would you make a guess?

6 MR. KOERNER: Probably very low. But in  
7 this particular --

8 JUSTICE SCALIA: So how can you call it -- I  
9 mean, part of the problem with calling it property is  
10 there -- there is such a low chance of recovery of the  
11 amount owed here.

12 Even if the Jenkins Act filing had been  
13 made, you still have to -- have to assume that this --  
14 number one, you have to assume that the State would turn  
15 the list over to the City, which the State isn't  
16 required to do.

17 MR. KOERNER: But we do have a cooperation  
18 agreement.

19 JUSTICE SCALIA: Well, that may be, but the  
20 State isn't required to, and the State can terminate  
21 that agreement whenever it likes.

22 But, secondly, after you get the information  
23 we have to assume that you're going to move against  
24 these people.

25 MR. KOERNER: If you look in footnote 8 of

1 our brief, we point out, even in this case, when we've  
2 settled with parties and they've turned over the  
3 information, we have been able to recover significant  
4 amounts of the taxes owed.

5 CHIEF JUSTICE ROBERTS: Does it -- does it  
6 affect your ambiance theory that the Website has the  
7 language that your friend told us is on it, that you  
8 have to -- you know, this is -- viability varies from  
9 State to State, or whatever the exact language is?

10 MR. KOERNER: No. No.

11 CHIEF JUSTICE ROBERTS: That still creates  
12 the ambiance?

13 MR. KOERNER: When you look at the Website  
14 and you have flashing lights that say "No taxes  
15 required," indeed we allege in the complaint that the  
16 entire business model is predicated on the fact that  
17 they don't have to pay State and city taxes.

18 The wide difference allows for the profit  
19 for the seller and a savings for the buyer. That is  
20 what we allege and, given the opportunity, we can prove  
21 that. Yes.

22 JUSTICE KENNEDY: Could you satisfy Justice  
23 Breyer's concern -- and maybe the answer is not -- by  
24 saying that if there were a corporation that went around  
25 to California taxpayers and said, we have a way to avoid

1 taxes, that then there would be a RICO violation, and  
2 that would be --

3 MR. KOERNER: It would be --

4 JUSTICE KENNEDY: -- closer to your case?

5 MR. KOERNER: It would be easier to prove,  
6 but I can't dispute Justice Breyer's fact pattern, that  
7 if you had an underpayment through a fraudulent return  
8 that it may be a predicate for RICO, and indeed --

9 JUSTICE KENNEDY: Well -- well, you're  
10 certainly consistent and persistent on that point, but  
11 it would seem to me --

12 MR. KOERNER: Yes. That would be even  
13 better, in fact --

14 JUSTICE KENNEDY: It would seem to me that  
15 I've --

16 MR. KOERNER: Yes.

17 JUSTICE KENNEDY: I gave you a way to  
18 differentiate this case. And isn't that consistent with  
19 RICO because we have a very specific enterprise here?

20 MR. KOERNER: Well, I do want to reiterate  
21 the fact that, apart from the general language in this  
22 case, we do have this Contraband Cigarette Trafficking  
23 Act, which I alluded to earlier. That -- that Act  
24 precisely deals with the problem of underpayment of  
25 taxes for cigarettes. It was passed in 1978 and then

1 amended in 2006 to include localities. It has very  
2 severe penalties under RICO criminally. It allows for  
3 fines and forfeitures. But more important, you can use  
4 RICO civilly, and the only economic injury in that  
5 entire legislation is the lost opportunity to collect  
6 taxes. So it's difficult to say that Congress was not  
7 aware of this problem, aware of its potential scope.

8           And while I understand this Court's  
9 frustration, it seems to me, as this Court has said in  
10 many cases, including the last one, Boyle, it resides  
11 with Congress to change it. If they feel there is a  
12 misuse of this legislation and suits are exploding out  
13 of context in terms of what they contemplated, then they  
14 should change it.

15           Yet --

16           CHIEF JUSTICE ROBERTS: Well, but the  
17 definition and giving scope and meaning to the concept  
18 of proximate cause is one that's in our bailiwick.

19           MR. KOERNER: It is, but if you look at --  
20 Chief Judge, if you look at how you've applied proximate  
21 cause in the past in Anza, in Holmes, what you said is  
22 that there are other factors that are not associated  
23 with the unlawful act, and therefore you didn't want  
24 courts or juries to have to parse -- parse out  
25 legitimate business problems and illegitimate business

1 problems because they become too complex.

2           You don't have that here. Here, you have  
3 direct injury to the City, and it's an easy calculation.

4           JUSTICE GINSBURG: Do we know -- you gave an  
5 instance in your brief or two instances of successful  
6 attempts to recoup from the taxpayer, that is the  
7 cigarette buyer. Did those come about because the City  
8 received the Jenkins Act list from the State? How did  
9 the City get to --

10           MR. KOERNER: In the particular cases that  
11 we mentioned in footnote 8, they were parts of  
12 settlements for the people who had, similar to this  
13 particular defendant, had advertised as tax-free, and we  
14 had settled with those people to get the reports, and  
15 then, based on the reports, we were able to track them  
16 down.

17           Where we get the Jenkins -- where people  
18 voluntarily disclose the Jenkins Act reports, we do  
19 follow up aggressively, but the --

20           JUSTICE SCALIA: Well, you follow up by  
21 writing them a letter, and what your footnote 8 says is,  
22 when you wrote them a letter, about half of them  
23 coughed -- coughed up the tax.

24           MR. KOERNER: Correct.

25           JUSTICE SCALIA: They may have been the

1 foolish half. Did --

2 (Laughter.)

3 MR. KOERNER: No.

4 JUSTICE SCALIA: Were the other -- were the  
5 other half pursued by the City?

6 MR. KOERNER: Not yet, no.

7 JUSTICE SCALIA: Not yet. I don't --

8 MR. KOERNER: But that -- but --

9 JUSTICE SCALIA: It can't be worth it. It  
10 can't possibly be worth it.

11 MR. KOERNER: Here's what would be worth it:  
12 If we can stop the fraudulent practices that these  
13 sellers represent, through the treble damages. The only  
14 benefit that these Internet sellers have is the cost  
15 saving as a consequence of the tax saving.

16 JUSTICE GINSBURG: Why is what they're doing  
17 any different from what out-of-State mail order houses  
18 have done in -- they set -- they set up in States  
19 without a sales tax, they ship into a State that has a  
20 compensating use tax, that, apart from automobiles, I  
21 don't know is ever collected.

22 MR. KOERNER: Well, I would like to think  
23 that those out-of-State sales entities don't exist  
24 solely to try to deprive receiving States of tax. The  
25 difference here is the entire business plan is based on

1 not paying tax.

2 Now, RICO has been in business since 1970.  
3 Your decisions have expanded its use. As I indicated,  
4 there has been no attempt to restrict it in any way,  
5 and, indeed, despite --

6 CHIEF JUSTICE ROBERTS: Well, but that's  
7 because in every one of those cases, or at least in many  
8 of them, we kind of wring our hands and say, well, we  
9 don't have any choice, this is what Congress did, and  
10 we're faithful to that intent.

11 But I guess, as I tried to point out  
12 earlier, this is a different question. This is the  
13 usual judicial application of concepts of proximate  
14 cause, and I would have thought concern about how broad  
15 RICO was written and how broadly it has been interpreted  
16 would cause us to look very carefully to the proximate  
17 cause question.

18 MR. KOERNER: But in the proximate cause  
19 equation, as you yourself have defined it, meaning the  
20 Court, you have talked about unlawful issues and lawful  
21 issues. And as I indicated, where there's a  
22 combination, you don't want a Court to weigh what's  
23 lawful and unlawful.

24 But here our injury is solely the  
25 result of an unlawful use. There are no intervening

1 factors.

2 CHIEF JUSTICE ROBERTS: No -- I don't  
3 understand that. The injury is directly caused by the  
4 consumers who don't pay the taxes.

5 MR. KOERNER: And I -- that -- that's the  
6 way you frame it, I understand, but it can be equally  
7 framed by saying the injury is caused by the seller's  
8 misrepresentation, which encourages the purchasers not  
9 to pay taxes.

10 And if you look at the Websites, there is no  
11 doubt about what this --

12 JUSTICE KENNEDY: So do you say then that  
13 proximate cause is in part established because of a  
14 specific intent? I mean, is that --

15 MR. KOERNER: No. I'm saying --

16 JUSTICE KENNEDY: Well, I'm glad -- I'm glad  
17 you said that, because Associated Contractors said  
18 specific intent is not --

19 MR. KOERNER: I know. What I am -- what I  
20 am saying is, if given the opportunity to prove this, we  
21 can show that the entire business model was intended  
22 never to have any taxes paid on these transactions.

23 JUSTICE KENNEDY: But in -- in the world and  
24 in the lexicon of proximate cause, why is there  
25 proximate cause because this was the business model?

1 How do I explain that in terms of proximate cause?

2 There's not specific intent.

3 MR. KOERNER: There are no other intervening  
4 causes between the fraud and the injury to the City. It  
5 is -- we lost an opportunity. Look --

6 JUSTICE KENNEDY: I know. But there is no  
7 other -- but take a case which was put to you as the  
8 seller who has many reasons for selling from out of  
9 State. They have a good catalog business, it's a  
10 well-established name, and so it's not just to avoid  
11 taxes. How is that different from what happened here?

12 MR. KOERNER: Because in this case, they  
13 don't have any other reason, except --

14 JUSTICE KENNEDY: Okay, and in terms of  
15 proximate -- the universe of the law that we call  
16 proximate cause, how do you explain that? It's not  
17 specific intent.

18 MR. KOERNER: The law of proximate cause in  
19 the case you described, you would have to consider all  
20 of the issues, some related to the transaction that  
21 you're suing on, some not. If the mail order catalog  
22 could show there were other reasons for their sales, not  
23 attributable to the unlawful RICO definition, then it's  
24 the type of injury you don't want to make an inquiry to.  
25 So if you have --

1 JUSTICE SCALIA: Reason on whose part? Some  
2 reason on whose part? On the seller's part or on the  
3 New York buyers' part? It will be the New York  
4 buyer is doing it because it's cheaper because he is not  
5 going to pay taxes on it. But it seems to me the seller  
6 couldn't care less whether the buyer pays taxes on it or  
7 not. So long as he pays the money for the cigarettes,  
8 the seller has gotten what the seller wanted.

9 MR. KOERNER: Except that the buyer -- the  
10 seller is advertising it as tax-free. He's not --

11 CHIEF JUSTICE ROBERTS: So if it's a mail  
12 order house and they put a little line on and say, by  
13 the way, if you live out of State, no taxes, no sales  
14 taxes, then they're also subject to RICO prosecution?

15 MR. KOERNER: As I said, it's a harder case  
16 because there may be other reasons why that mail order  
17 house is -- is successful, just like you said in Anza,  
18 just like you said in Holmes. But in this case, there's  
19 only -- it's the whole model. There's only one reason  
20 why they're successful.

21 JUSTICE STEVENS: Well, maybe that isn't  
22 completely true. Maybe it's a matter of convenience, at  
23 least theoretically. You buy stuff over the Internet,  
24 you buy these advertised cigarettes, the price seems all  
25 right, and you don't -- whether you pay the tax or not

1 is your decision.

2 MR. KOERNER: Except that the seller --  
3 see, that's not the facts in this case. The seller  
4 affirmatively represented that there are no taxes. He  
5 told the consumer, and then kept the consumer's identity  
6 unknown --

7 JUSTICE STEVENS: Well, there were no taxes  
8 --

9 MR. KOERNER: -- by deliberately not filing  
10 as required by Federal statute, and places us in a -- in  
11 the position in the circle of having no knowledge of who  
12 the buyer is, having affirmative misrepresentation, and  
13 we are the only one in this transaction who are directly  
14 injured.

15 CHIEF JUSTICE ROBERTS: To whom was the  
16 affirmative misrepresentation made?

17 MR. KOERNER: The customers.

18 JUSTICE SCALIA: Usually you're not liable  
19 for misrepresentation unless it causes -- it's relied  
20 on. You really think that the -- that a large  
21 percentage of the people who were getting this stuff  
22 really, really were gulled into believing that New York  
23 State was somehow being done out of taxes?

24 MR. KOERNER: Yes, because of the --

25 JUSTICE SCALIA: Really?

1 MR. KOERNER: -- representation that they  
2 would never contact the State with any information  
3 concerning the transaction. That's exactly what they  
4 did. Everybody understands in the nature of these  
5 purchases exactly what it's about. In --

6 JUSTICE SCALIA: No, I am sure the purchaser  
7 knows: I'm not going to pay taxes, even though I should  
8 pay taxes. But you're -- you're telling me that the  
9 only reason the purchaser doesn't pay taxes is because  
10 of this misrepresentation that you don't have to  
11 purchase -- you don't have to pay taxes. I've known a  
12 lot of New Yorkers, and not many of them are that  
13 gullible.

14 (Laughter.)

15 MR. KOERNER: What I'm telling you, that  
16 it's probably easier to go to the corner store and  
17 obtain a package of cigarettes than order it over the  
18 Internet, that -- and what I'm saying, you have to look  
19 at the context of the facts. The facts were affirmative  
20 misstatements by the seller.

21 JUSTICE STEVENS: But what if the seller  
22 didn't make those misstatements but just says -- the  
23 whole operation is set up exactly as this one is, but  
24 they don't have that statement in there; they just say:  
25 Get advice from your lawyer about whether you need to

1 pay taxes or not.

2 (Laughter.)

3 JUSTICE STEVENS: And what if that was the  
4 -- that was exactly the -- and then they all got the  
5 advice, and the lawyer says: They'll never catch you if  
6 you don't pay it.

7 MR. KOERNER: I think it's a question of  
8 proof, and if we're able to show that these individuals  
9 thought it was tax-free, then we should be able to  
10 pursue -- let me just say, forget the Jenkins Act. You  
11 have the Cigarette Trafficking Act. That is within  
12 RICO. That sole economic injury is loss of revenue to  
13 the State and the City.

14 So if we allege the Cigarette Trafficking  
15 Act -- it was not applicable at the time of this case;  
16 it was amended to apply to localities slightly after.  
17 But if we predicated the case on that, would you still  
18 say there's a proximate cause issue when you have  
19 Congress's express intent to allow that to be a  
20 predicate to the RICO count?

21 CHIEF JUSTICE ROBERTS: I don't want silence  
22 to be interpreted as acquiescence, but --

23 (Laughter.)

24 MR. KOERNER: No, no, no. I'm just -- it  
25 was rhetorical. I wasn't --

1 CHIEF JUSTICE ROBERTS: Yes.

2 MR. KOERNER: I'm just trying to --

3 CHIEF JUSTICE ROBERTS: Just to get back at  
4 maybe the same point Justice Kennedy was raising, which  
5 is you're focusing on -- you keep saying: The whole  
6 purpose of this, look at their Website.

7 But the issue is proximate cause, and if  
8 you've got to go through the individual consumer, it's  
9 either proximate cause or not. And if the -- if the  
10 indirect nature of what they're doing -- because the  
11 direct cause is the consumer's failure to pay - it  
12 doesn't seem to me that their intent is pertinent.

13 MR. KOERNER: But we're seeking -- the  
14 injury is the opportunity to collect, which we've been  
15 denied, which is what the Cigarette Traffic Act  
16 contemplates. Indeed, if you look at the legislative  
17 history of that Act, the sole purpose was to make it a  
18 very, very serious felony, and with civil undertones, in  
19 order to discourage -- the Act is a disincentive -- so  
20 that this trafficking, which is a major problem, started  
21 to be reduced.

22 CHIEF JUSTICE ROBERTS: Well, why not --

23 JUSTICE SCALIA: I'm not sure. Let's talk  
24 about the Contraband Cigarette Trafficking Act.

25 I'm not sure that these people would be in violation of

1 it. It makes it unlawful for any person knowingly to  
2 ship or transport, also receive, possess, sell,  
3 distribute, or purchase, cigarettes which bear no  
4 evidence of payment of applicable State or local  
5 cigarette taxes.

6 MR. KOERNER: Yes.

7 JUSTICE SCALIA: But there is no applicable  
8 State or local cigarette tax upon the shipment of these  
9 cigarettes.

10 MR. KOERNER: But if the shipment is done  
11 with the intent of avoiding taxes, which was  
12 contemplated by this statute --

13 JUSTICE SCALIA: That's not what it says.  
14 It makes it unlawful to knowingly ship it when they bear  
15 no evidence of payment of applicable taxes --

16 MR. KOERNER: That's correct. It's a  
17 question of proof.

18 JUSTICE SCALIA: -- and there is no  
19 applicable taxes at the time that they ship it.

20 MR. KOERNER: But if you look at the  
21 legislative history, it was directly --

22 JUSTICE SCALIA: Oh, I don't look at  
23 legislative history.

24 (Laughter.)

25 MR. KOERNER: May I address the rest of you?

1 JUSTICE BREYER: Well, why is it that you  
2 haven't argued -- why haven't you --

3 JUSTICE ALITO: I -- I don't see a  
4 difference -- I'd appreciate if you would tell me the  
5 difference between your argument as to this situation  
6 and the typical Internet site where I think a lot of  
7 people buy goods on the Internet, because they're  
8 convenient and also because they know that they're not  
9 going to have to pay State sales tax when they make  
10 those purchases.

11 MR. KOERNER: In those cases, you have  
12 established companies, and you may have to look behind  
13 to see what is the reason; why are they advertising. I  
14 assume they have other businesses that are legitimate.  
15 This particular enterprise has no legitimate aspect.

16 JUSTICE BREYER: Why is that relevant as far  
17 as this cause is concerned?

18 JUSTICE ALITO: But if you -- you have a  
19 company that's selling cameras, televisions, whatever,  
20 over the Internet, and they -- you know, you put your --  
21 you put in your credit card information or whatever, and  
22 then it tells you "sales tax due," and if they have no  
23 outlet in the State, it says "sales taxes due: Zero."  
24 What is the difference between that situation and this  
25 situation?

1 MR. KOERNER: Well, first of all, in time,  
2 the Internet has raised many issues. It's unclear how  
3 Congress feels about this where you have legitimate  
4 enterprise.

5 But cigarettes have been a particular focus,  
6 and I think, in effect, you cannot use the general  
7 argument as to the Internet, when you have congressional  
8 legislation which, one, under the Jenkins Act, was  
9 specifically passed in 1949 because of transactions like  
10 this, where States were -- were being deprived of the  
11 revenues through the interstate shipments.

12 And you have the traffic -- the Cigarette  
13 Trafficking Act which is, again, an expression by  
14 Congress that they want these individuals to be put out  
15 of business. That's exactly what RICO is about.

16 JUSTICE GINSBURG: Judge Winter in the  
17 Second Circuit said the State appears uninterested in  
18 enforcing the Jenkins Act and may not collate or  
19 maintain accurate records of reports from out-of-State  
20 vendors. What -- what was the basis for his statement  
21 that the State appears uninterested?

22 MR. KOERNER: The State has records, but  
23 they -- they've been uninterested in this issue for  
24 political reasons.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1                   Mr. Barnhouse, you have 4 minutes  
2 remaining.

3                   REBUTTAL ARGUMENT OF RANDOLPH H. BARNHOUSE

4                   ON BEHALF OF THE PETITIONERS

5                   MR. BARNHOUSE: Thank you, Mr. Chief  
6 Justice.

7                   Justice Stevens, the City brought exactly  
8 that case, where one of the 50 defendants here was a  
9 defendant that didn't say sales are tax-free, and that  
10 case was similarly dismissed by the district court, and  
11 that dismissal was affirmed by the Second Circuit.

12                  Justice Breyer, in Illinois v. Fawaz, the  
13 States was going after \$14,500 in back sales and  
14 gasoline taxes. After having prosecuted the individual,  
15 they were seeking civil RICO damages in that Seventh  
16 Circuit case, when the Seventh Circuit became the first  
17 circuit to say, we -- we hesitantly believe that the  
18 case could go forward beyond a motion to dismiss.

19                  JUSTICE BREYER: On cause, why isn't it a  
20 causal connection for them to say, look, your clients  
21 don't tell them who's bought it. They're supposed to,  
22 but they don't. And if we got the information, we go  
23 write a letter to the people, and half of them would  
24 pay.

25                  MR. BARNHOUSE: That would be "but for."

1 But for your failure to give us the names --

2 JUSTICE BREYER: Yes.

3 MR. BARNHOUSE: -- we would have collected.

4 JUSTICE BREYER: Well, why isn't that a  
5 direct enough connection -- "but for" foreseeable?

6 MR. BARNHOUSE: Because this Court said, in  
7 Holmes, that but for is insufficient.

8 JUSTICE BREYER: Yes. I know, but there's  
9 more here. It's also foreseeable proximate cause. I  
10 mean, it is absolutely foreseeable, not just but for.

11 MR. BARNHOUSE: This was an Internet  
12 Website, Justice Breyer, that --

13 JUSTICE BREYER: Forget the Websites.  
14 Suppose there had been no Website.

15 MR. BARNHOUSE: Was it foreseeable --

16 JUSTICE BREYER: Is it foreseeable that,  
17 when they don't know who owes the money, that the people  
18 won't pay, but when they know who owes the money, they  
19 can write them a letter, and half pay?

20 MR. BARNHOUSE: And is it foreseeable that  
21 no one will pay or that some will pay? Some will pay.

22 JUSTICE BREYER: I don't know. Some pay;  
23 some don't. They have the numbers there. They get more  
24 than half.

25 MR. BARNHOUSE: It's -- it's foreseeable

1 that some won't pay. That's foreseeable, but --

2 JUSTICE SCALIA: So as you get half-treble  
3 damages. What is that? One-and-a-half damages.

4 MR. BARNHOUSE: But, at that point, it  
5 becomes speculative, Justice Scalia, and it's -- it's  
6 foreseeable that some won't pay, but it's also  
7 foreseeable that some people won't pay --

8 JUSTICE BREYER: And, if you put people in  
9 front of railroad trains and half survive, then it's  
10 speculative?

11 MR. BARNHOUSE: I'm sorry. I didn't --

12 JUSTICE BREYER: I mean, if you push  
13 somebody in front of a railroad train and half survive  
14 because they jump, that that make it a speculative  
15 cause?

16 MR. BARNHOUSE: No, Your Honor, but, in that  
17 instance, I would be the one pushing the person, and not  
18 the one that -- I would be the person, as in  
19 Pasquantino, who did not pay his taxes.

20 JUSTICE BREYER: And you say it's  
21 foreseeable that they won't get a lot of money. And  
22 that's what they're arguing.

23 MR. BARNHOUSE: Yes.

24 JUSTICE BREYER: Now, what's the answer to  
25 that?

1 MR. BARNHOUSE: That it's foreseeable that  
2 they won't get a lot of money.

3 JUSTICE BREYER: The reason is because of  
4 what your clients did, so it's but for and foreseeable.

5 MR. BARNHOUSE: It's but for, and it is  
6 foreseeable that some -- some taxpayers in New York will  
7 not pay. Yes, Your Honor.

8 JUSTICE BREYER: End of case. Now, we go to  
9 the damage section.

10 JUSTICE SCALIA: But for --  
11 (Laughter.)

12 JUSTICE SCALIA: No, no, your  
13 response is, but for, plus foreseeable, is not a  
14 definition of proximate cause.

15 MR. BARNHOUSE: But it's not a definition of  
16 proximate cause. That's right.

17 JUSTICE SCALIA: You need more than that.

18 MR. BARNHOUSE: It's -- it -- that, itself,  
19 is not sufficient --

20 JUSTICE BREYER: I took torts a long time  
21 ago. I thought that was part of it.

22 MR. BARNHOUSE: What -- what the Court said  
23 in Associated General Contractors is, even if it's not  
24 only foreseeable, but that's your intent --

25 JUSTICE BREYER: No, no --

1 MR. BARNHOUSE: -- but that's not sufficient  
2 --

3 JUSTICE BREYER: There can be other things  
4 that cut it off.

5 MR. BARNHOUSE: Yes, sir.

6 JUSTICE BREYER: Proximate cause.  
7 Foreseeable. No kind of an event that would cut the  
8 causal chain like some odd fluke or something.

9 MR. BARNHOUSE: But --

10 JUSTICE BREYER: No policy reason or others  
11 for cutting that chain. I mean, it's Torts 1 in 1962,  
12 okay?

13 CHIEF JUSTICE ROBERTS: Isn't it -- you  
14 know, well, I don't know, maybe it's more -- but isn't  
15 it a proposition that you don't rely on illegal conduct,  
16 that the -- the assumption of illegal conduct cuts the  
17 chain?

18 In other words, there's only proximate cause  
19 if you assume people are going to not pay taxes that  
20 they're due, contrary to law, and that that breaks the  
21 proximate cause chain.

22 MR. BARNHOUSE: It -- if we assume that --  
23 that the assumption that they will pay their taxes  
24 breaks the proximate cause? I'm not -- I'm sorry --

25 CHIEF JUSTICE ROBERTS: No, that you have

1 to -- in order to maintain -- this is a helpful  
2 question.

3 In order --

4 MR. BARNHOUSE: Yes, sir. That's why --  
5 that's why I'm trying to understand it.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: In order to maintain  
8 the chain of connection, I thought you cannot rely, for  
9 one of those links in the chain, that a party is going  
10 to commit illegal action.

11 MR. BARNHOUSE: Yes, Your Honor.

12 JUSTICE SCALIA: Well, that's wrong. I  
13 mean, at least for civil torts, you can -- there are a  
14 lot of cases where the landlord leaves out the bulb  
15 in the -- in the stairway, and one of the residents gets  
16 mugged and he sues the landlord and wins, even though  
17 there is an intervening criminal act.

18 Now, maybe what you want to argue is that  
19 that -- that has never been applied, to my knowledge, to  
20 either criminal liability or -- or penal provisions, and  
21 that maybe the -- an intervening criminal act does cut  
22 off causality, for purposes of penal statute, such as --  
23 such as RICO. That would be a reasonable argument.

24 MR. BARNHOUSE: That's a great argument,  
25 Justice Scalia. I --

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(Laughter.)

CHIEF JUSTICE ROBERTS: And a good place to  
end.

Thank you, counsel.

The case is submitted.

(Whereupon, at 2:01 p.m., the case in the  
above-entitled matter was submitted.)

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