

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HEMI GROUP, LLC AND KAI :

4 GACHUPIN, :

5 Petitioners :

6 v. : No. 08-969

7 CITY OF NEW YORK, NEW :

8 YORK. :

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10 Washington, D.C.

11 Tuesday, November 3, 2009

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 1:00 p.m.

16 APPEARANCES:

17 RANDOLPH H. BARNHOUSE, ESQ., Los Ranchos de Albuquerque,
18 N.M.; on behalf of the Petitioners.

19 LEONARD J. KOERNER, ESQ., Chief Assistant Corporation
20 Counsel, New York, N.Y.; on behalf of the
21 Respondent.

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

2 (1:00 p.m.)

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

6 Mr. Barnhouse.

7 ORAL ARGUMENT OF RANDOLPH H. BARNHOUSE

8 ON BEHALF OF THE PETITIONERS

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

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

19 The Respondent City of New York alleged two
20 RICO claims and pendent State law violations that the
21 city said resulted in a lost sovereign opportunity to
22 collect cigarette possessory taxes from its city
23 residents. The alleged lost opportunity to tax was
24 based on claims that my clients and 50 other defendants
25 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.

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.

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

9 MR. BARNHOUSE: All right.

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

12 (Laughter.)

13 MR. BARNHOUSE: Well, I'm wrong on the -- on
14 the --

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

17 MR. BARNHOUSE: But I think I am right on
18 the law, Your Honor.

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

21 MR. BARNHOUSE: Is "gruntled."

22 (Laughter.)

23 MR. BARNHOUSE: Well, it would -- it would
24 be inchoate at the time the -- the city was just
25 exercising its opportunity to tax, but had not -- or

1 exercising its sovereign right to tax, but had not yet
2 assessed the tax --

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

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

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

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

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

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

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

6 MR. BARNHOUSE: There was --

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

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

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

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

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

1 MR. BARNHOUSE: For purposes of the -- of
2 the Mail and Wire Fraud Statute, this Court has held
3 that property can be for purposes of --

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

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

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

21 MR. BARNHOUSE: Yes, Your Honor. In fact,
22 the -- I'm sorry.

23 JUSTICE SCALIA: What does it say?

24 MR. BARNHOUSE: The standing for purposes of
25 the antitrust laws is injury. A person has standing who

1 has been injured in his business or property. It's
2 exactly the same as in RICO. In fact, Congress took the
3 language from the antitrust laws, Justice Scalia, and
4 placed it into RICO unchanged.

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

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

11 JUSTICE STEVENS: The Hawaii case didn't
12 involve a claim to taxes.

13 MR. BARNHOUSE: Justice Stevens, it was a
14 claim of injury to the general economy, which included
15 --

16 JUSTICE STEVENS: Right, and parens patriae
17 for the community at large.

18 MR. BARNHOUSE: Yes, Your Honor. The State
19 of Hawaii brought three claims. One was its injury to
20 itself; one was the potential class action; and then the
21 parens patriae claim.

22 JUSTICE STEVENS: But none of them involved
23 a claim to taxes.

24 MR. BARNHOUSE: It was my understanding that
25 the injury to the general economy, the underlying claim

1 was that by losing that economic engine, that the State
2 itself would be injured because of the loss to the
3 economy and in its governmental functions. The actual
4 --

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

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

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

22 MR. BARNHOUSE: They would have to -- they
23 would absolutely have to prove that for purposes of
24 damages.

25 JUSTICE SCALIA: So worry about that later.

1 I mean, just because some of them might be difficult to
2 prove or not provable doesn't mean that the rest that
3 are very clear do not constitute property.

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

10 JUSTICE SCALIA: That's a different issue.

11 MR. BARNHOUSE: It is a different issue.

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

14 MR. BARNHOUSE: I was hoping for a smooth
15 transition, Justice Scalia.

16 JUSTICE SCALIA: You've got it.

17 MR. BARNHOUSE: The -- the injury to the
18 city is much like the injury in Holmes, where the city
19 claims to be at the tail end of the chain of causation.
20 They allege two injuries, sources of their injury. One
21 was that statements made on an Internet website somehow
22 caused people who purchased cigarettes in New York City
23 not to pay. The district court described that source of
24 injury as farfetched. Those were Judge Batts' words.

25 The second source of injury they claim is

1 that by not reporting to the State of New York, the city
2 then did not receive information about which city
3 residents purchased cigarettes, and the city could then
4 not go to those residents who had not self-assessed, and
5 --

6 JUSTICE ALITO: Putting aside the fact that
7 the Jenkins Act information would be sent to the State
8 rather than the city, why -- how can you -- how can it
9 be said that at this stage of the litigation that it's
10 farfetched that having a statement on the website "No
11 taxes due" is -- doesn't cause people to purchase those
12 cigarettes for the very purpose of avoiding the taxes?

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

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

24 MR. BARNHOUSE: Exactly, Justice Scalia.
25 It's a possessory tax --

1 JUSTICE SCALIA: Like automobiles.

2 MR. BARNHOUSE: Pardon me?

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

7 MR. BARNHOUSE: That's right. That's right,
8 Justice Scalia, and the obligation to pay that tax is on
9 the person who brings the car into the State. The
10 obligation to pay the possessory use tax is on the
11 citizens of the city of New York.

12 JUSTICE SCALIA: And that's all it was
13 alleged that these websites said, "tax-free"? They said
14 "tax-free"?

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

16 JUSTICE SCALIA: "Sales are tax-free."
17 That's very clever.

18 MR. BARNHOUSE: And "no tobacco tax." Those
19 are the two allegations.

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

21 MR. BARNHOUSE: Yes, Your Honor.

22 JUSTICE SCALIA: But there is a tobacco tax,
23 isn't there? Don't you -- wouldn't you call that use
24 tax a tax on tobacco?

25 MR. BARNHOUSE: No, Your Honor, it's

1 specifically not a tax on tobacco. It's a tax on the
2 possession of cigarettes and there are exemptions to it.

3 JUSTICE ALITO: Why isn't that just a
4 question -- a substantive fraud question, rather than a
5 proximate cause question?

6 MR. BARNHOUSE: The --

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

10 MR. BARNHOUSE: Well, it has to do with the
11 intervening, Justice Alito, with -- with intervening
12 causes of the city's failure to collect these taxes.

13 The -- RICO requires someone who has been
14 injured in their business or property by reason of the
15 alleged proximate act, and the fact is the city here was
16 injured in its -- was injured, if at all, by reason of
17 its citizens' failure to self-assess and pay their
18 taxes.

19 JUSTICE GINSBURG: It was injured because it
20 couldn't find its citizens because it didn't know who
21 they were. And that was the whole idea of the Jenkins
22 Act, was to help States find the people who were evading
23 the payment of the use tax on the cigarettes.

24 MR. BARNHOUSE: Yes, Justice Ginsburg. The
25 Jenkins Act was -- was focused on allowing States to

1 help find those, and the city is therefore outside the
2 zone of interest.

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

10 Is there proximate cause? Is it there if
11 the city sues for injury in that hypothetical case?
12 Would you say there's no proximate cause?

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

18 JUSTICE KENNEDY: And you think the city --
19 and you think the city cannot show proximate cause in a
20 suit for its injury against the seller of the
21 cigarettes? You think there's no proximate cause in
22 that hypothetical case?

23 MR. BARNHOUSE: Yes, Your Honor, I would say
24 that there would be an intervening, Justice Kennedy,
25 there would be the intervening cause of the person's

1 decision. It's -- it's beyond the first step.

2 JUSTICE KENNEDY: Even though those are the
3 only two people that have made the arrangement, and that
4 was the whole purpose and intent of the arrangement?
5 And you still say there's no proximate cause?

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

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

14 MR. BARNHOUSE: No, Your Honor, because I
15 believe that the proximate cause standard that the Court
16 has adopted rests at its core in proximate cause
17 analysis in tort law. When the Court first started
18 applying proximate cause requirements in the antitrust
19 law and in RICO, it was looking at, as I understand it,
20 the -- the common law analysis of proximate cause,
21 and -- and it really discussed the elements of that
22 quite clearly in the Associated General Contractors case
23 where it talks about five or six factors that the Court
24 has to look at, those factors being the nature of the
25 plaintiff's alleged injury, is it -- whether it was the

1 type that the antitrust laws were intended to forestall,
2 or here the RICO laws. We would submit that it is not.
3 It's an injury to a sovereign interest.

4 The directness of the injury. Here the
5 injury is indirect. It either comes -- flows through
6 the citizens who didn't pay their taxes or through the
7 State that didn't get the reports of customers in the
8 city.

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

21 You -- you -- I -- you're suggesting that it
22 would be okay if the Jenkins Act had made it even more
23 burdensome to the cigarette sellers by saying not only
24 do you have to disclose to the State but also to any
25 municipality that independently taxes cigarettes?

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

5 JUSTICE GINSBURG: Is it -- we're told that
6 New York City and New York State have a tax information-
7 sharing agreement pursuant to which the State does share
8 this information with the city.

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

16 JUSTICE KENNEDY: Well, what do you do
17 with -- what do you do with Justice Ginsburg's
18 hypothetical? I mean, she can pursue her own question,
19 but I'm interested in the answer.

20 Her question is, suppose the statute were
21 amended so that the information had to be given to the
22 city as well as to the State; would the case then be
23 different, hypothetical case?

24 MR. BARNHOUSE: Yes, it would be different,
25 because in that instance the city would be the --

1 would -- would as -- would -- would be the direct
2 victim, would be within the zone of interest of the
3 statute.

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

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

15 These sales occurred on the Jemez Pueblo in
16 New Mexico. And it's my client's position, and it's no
17 secret, he says on his websites that he doesn't -- that
18 the Jenkins Act, the scope of the Jenkins Act does not
19 include his sales. There -- there's a dispute with the
20 city on that, but it's not even clear that the State had
21 a right to get these names, much less the city.

22 Yet the city is claiming because it didn't
23 get the names -- and if it had the names it claims a
24 recovery rate between 40 cents and 55 cents on the
25 dollar -- it should be able to collect 300 cents on the

1 dollar from a business that didn't owe them in the first
2 place.

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

15 The opportunity to collect taxes is a
16 sovereign interest. The taxes themselves, once
17 collected or assessed, could be property, but not the
18 opportunity. The injury flows either through the States
19 or consumers and, therefore, is not proximate. These
20 websites were not State-specific, much less
21 city-specific.

22 CHIEF JUSTICE ROBERTS: But you don't -- you
23 don't think that proximate cause is satisfied only with
24 respect to the person who is supposed to be paying the
25 taxes? If there's some way in which someone else

1 contributes or makes it feasible or makes it more likely
2 that the person is not going to pay his taxes, that's
3 not automatically outside the scope of proximate cause,
4 is it?

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

16 And these websites had language that said --
17 the city attached the -- the pages from the websites
18 themselves to the -- they were part of the record, the
19 RICO record. I had those just a second ago and I can't
20 seem to find them.

21 But the -- the website pages for my client
22 specifically had languages noted in the briefs that said
23 these are not city-specific or State-specific, that --
24 that you need to contact -- you should contact your
25 State officials for purposes of determining what your

1 individual obligations are regarding possession and tax.

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

5 MR. BARNHOUSE: In the response to the
6 petition, the city said it's a fraction, I believe, of
7 the people. They've also --

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

10 MR. BARNHOUSE: There is an exemption, yes,
11 Justice Scalia.

12 JUSTICE SCALIA: For what, two cartons?

13 MR. BARNHOUSE: Two cartons of cigarettes.
14 And -- but -- but it's clear that possessory and use
15 taxes are a bear to collect for any government. And the
16 city here, as I -- as stated in the record, says even
17 under the best of circumstances, Justice Ginsburg, it
18 collects only 40 cents on the dollar, perhaps as much as
19 55 --

20 JUSTICE GINSBURG: But it needs the names so
21 it can collect anything. Otherwise, how is it -- how --
22 how would it ever know?

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

25 JUSTICE GINSBURG: And they don't.

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

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

7 MR. BARNHOUSE: It's a very expensive
8 process, Your Honor, Justice Scalia, and it -- it's
9 tedious. You get the names. You have to go through the
10 names and write. There's a cost involved in all that.
11 There's a lot of friction in that entire process.
12 There -- there are lots of reasons that, even when the
13 city gets the names and even under its allegations of
14 collection rates, Justice Ginsburg, very small, 40 cents
15 to 55 cents on the dollar.

16 JUSTICE GINSBURG: Do we know if these
17 Jenkins Act lists -- are they in fact maintained by the
18 State?

19 MR. BARNHOUSE: It -- it's my understanding,
20 Justice Ginsburg, that the State would receive Jenkins
21 Act reports from some vendors. Those can come in all
22 sorts of different formats, some of it just stacks of
23 paper perhaps. And it would be the State's
24 responsibility then to go through those, select which
25 ones were residents of the city of New York, and then

1 decide whether under existing laws it was even permitted
2 to share this proprietary information with the city,
3 before giving those to the city.

4 It would then be the city's responsibility
5 to take the list given to it by the State and decide who
6 hasn't paid. Then there's the exemption issue that
7 comes on top of that. And then go out and try to
8 collect these amounts, which they allege to have done in
9 at least two instances.

10 Finally, the policy -- I'm sorry. The
11 policy that this Court adopted in Hawaii makes a --
12 makes very much sense, as recognized by courts who have
13 looked at issues such as additional fire protection,
14 payment of -- of public benefits, other instances where
15 governments have come forward and under RICO tried to
16 bring a claim to recover actual out-of-pocket expenses,
17 overtime that was paid to police that had to monitor
18 protests against abortion clinics, public benefits paid
19 to people who were not legally in the country and
20 working in agriculture.

21 Governments have brought those and the
22 circuit courts of appeals in both of those instances
23 said those are injury to sovereign interests, citing
24 Hawaii, and not the kind of injury to business or
25 property that Congress intended when it adopted RICO.

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

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Koerner.

5 ORAL ARGUMENT OF LEONARD J. KOERNER

6 ON BEHALF OF THE RESPONDENT

7 MR. KOERNER: Mr. Chief Justice, and may it
8 please the Court:

9 With respect to the definition of property,
10 this goes back to Wyoming v. Oklahoma, where in an
11 original jurisdiction case Wyoming sued the State of
12 Oklahoma on the ground that the State's regulation which
13 attempted to require Oklahoma coal-fired generation
14 plants to use 10 percent of Oklahoma coal, and prior to
15 the legislation all of Wyoming coal was used in the
16 generation plant.

17 Wyoming sued in this Court and the defense
18 was that Wyoming didn't have an interest because it lost
19 the opportunity to collect taxes. This Court found
20 standing and allowed them to sue and successfully
21 challenge under the interstate commerce rule. That was
22 before we get to Pasquantino. Justice Ginsburg is quite
23 right --

24 JUSTICE SCALIA: Excuse me. Did -- was
25 there some statute at issue in that case which required

1 not just an interest, but an interest in property?

2 MR. KOERNER: No.

3 JUSTICE SCALIA: Well --

4 MR. KOERNER: The -- it was just -- I was
5 just going to -- yes, it was just a discussion of what
6 was the nature of Wyoming's interest. Was it
7 substantial enough to allow them to sue, challenging the
8 Oklahoma statute.

9 In Pasquantino, though, the issue was
10 foreclosed. In that particular case the issue of
11 definition of property was the exact same issue that you
12 have in the RICO case. Indeed, mail and wire fraud is a
13 predicate for RICO. In that case there was, as Justice
14 Ginsburg noted, a criminal prosecution based on the
15 importation of alcohol into Canada from Maryland. The
16 charge was wire fraud.

17 And first, there were two issues: One, the
18 revenue rule, which is not relevant here. But the first
19 issue was whether or not the opportunity to collect
20 taxes which Canada lost, whether that was an injury to
21 property. And there was a long discussion by this Court
22 equating the lost opportunity with embezzlement from the
23 Canadian treasury and pointing out in the definition of
24 Black's and the Webster's definition that property
25 includes not only that which you actually have, but that

1 which you were denied the opportunity.

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

5 CHIEF JUSTICE ROBERTS: I'm sorry, because
6 of -- because of what?

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

13 JUSTICE BREYER: Before you get to Anza,
14 this might be a good time to ask because I don't think
15 we focused on this in Pasquantino. But if in fact the
16 failure of a State to collect a tax is property, then
17 why isn't every corporation that files an income tax
18 return and makes two false statements automatically
19 liable for RICO? I mean --

20 MR. KOERNER: As long as they meet the
21 definition of --

22 JUSTICE BREYER: Well, that would mean the
23 States have a new method, which I don't think they use,
24 a new method of collecting treble taxes from anyone who
25 makes two false statements or a false statement in two

1 income tax returns, and it would seem to me that would
2 have vast repercussions. I mean, it might be very
3 beneficial; the States are having a deficit crisis;
4 but --

5 MR. KOERNER: If people --

6 JUSTICE BREYER: How, how -- why would it
7 not be --

8 MR. KOERNER: Why would --

9 JUSTICE BREYER: But they left -- they don't
10 have the RICO predicate, not paying your State taxes.
11 But in effect you would read into the RICO
12 predicate protecting States.

13 MR. KOERNER: This is precisely what
14 happened in Anza.

15 JUSTICE BREYER: That may be, but nobody
16 focused on this issue. So -- so that's what's bothering
17 me. What is the -- what is the stopping place?

18 MR. KOERNER: If you're --

19 JUSTICE BREYER: Or is there one? And if
20 there is none, how do we reconcile this view of --
21 they're suggesting a stopping place, Anza and
22 Pasquantino to the contrary. Right. But they're
23 suggesting a stopping place on a matter that hasn't come
24 up.

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

1 JUSTICE BREYER: Or focused on. It's come
2 up but not focused on.

3 MR. KOERNER: But they're suggesting a
4 stopping place which is inconsistent with the actual
5 language of the RICO --

6 JUSTICE BREYER: So in your view
7 California --

8 MR. KOERNER: Well, may I --

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

14 MR. KOERNER: If there is a systematic
15 understatement under the statute, that's exactly --

16 JUSTICE BREYER: It doesn't say systematic
17 understatement.

18 MR. KOERNER: It says --

19 JUSTICE BREYER: It says two --

20 MR. KOERNER: Correct.

21 JUSTICE BREYER: -- predicate acts.

22 MR. KOERNER: And in these --

23 JUSTICE BREYER: And the predicate acts are
24 a deliberate false statement.

25 MR. KOERNER: And indeed that -- that is

1 what Congress intended. If you look --

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

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

7 JUSTICE BREYER: Oh, well, that cuts against
8 you.

9 MR. KOERNER: No.

10 JUSTICE BREYER: Because if they put in one,
11 your theory -- they don't even need, whether they need
12 that or not. Your theory applies to every tax, every
13 tax.

14 MR. KOERNER: Well, the reason they put it
15 in was to increase the criminal penalties as well as
16 recognize the civil penalties.

17 JUSTICE BREYER: No, but go back to my
18 question.

19 MR. KOERNER: The importation -- yes.

20 JUSTICE BREYER: My question is, forget the
21 cigarette taxes. If I accept your argument, am I then
22 saying that California, New York, and every other State
23 that's owed money by corporations in their taxes can go
24 through, look for two tax returns that have a false
25 statement in them that were mailed in, and thereby

1 collect RICO damages?

2 MR. KOERNER: Yes, that's correct.

3 JUSTICE BREYER: Well, that's a pretty
4 far-reaching --

5 MR. KOERNER: Well --

6 JUSTICE BREYER: Do you know anybody, any
7 court that has ever said that?

8 MR. KOERNER: Well, the issue hasn't been
9 raised. But the -- but the -- RICO has been
10 consistently interpreted by this Court in an
11 expansionist mode, and despite that Congress has not
12 truncated it except in the one area of securities
13 violation and only because they found that there were
14 ample remedies in securities law, and because they
15 thought it was inappropriate to use exclusively mail and
16 wire fraud.

17 JUSTICE BREYER: Why would --

18 JUSTICE SCALIA: Why should that help?

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

22 MR. KOERNER: Because they had a more
23 general definition, and they wanted the broadest
24 possible interpretation. But the Cigarette Contraband
25 Trafficking Act was put into RICO as a predicate crime.

1 The sole economic injury in that act is lost taxes to
2 the State and the city. It's the only economic injury.
3 It's hard to say that Congress didn't contemplate this
4 when, in addition to the general definition, they put
5 this in.

6 In addition, the Jenkins Act was passed in
7 1949 precisely for this problem, so it was on
8 congressional minds.

9 JUSTICE GINSBURG: Yes, but Congress said --
10 we were just told by counsel for the Petitioner,
11 Congress said you can only -- only the Federal
12 prosecutor can sue for violations of Jenkins --

13 MR. KOERNER: Correct.

14 JUSTICE GINSBURG: -- not New York City, not
15 New York State --

16 MR. KOERNER: Correct.

17 JUSTICE GINSBURG: -- and it's a
18 misdemeanor.

19 MR. KOERNER: Correct.

20 JUSTICE GINSBURG: And now you -- you are
21 saying the Jenkins Act gives you a basis to go after
22 what are basically aiders and abettors of use tax
23 violations?

24 MR. KOERNER: No. What we're saying is the
25 Jenkins Act is some evidence of the state of mind of the

1 defendant when he commits this fraud. What we are
2 saying is he is aware that he has an obligation to file
3 reports with the State indicating both the identity of
4 the seller and the identity of the purchaser. Our
5 predicate act is not Jenkins. Our predicate act is wire
6 and mail fraud. Even if Jenkins did not exist, we would
7 still have a wire and mail fraud cause of action based
8 on the representations of the seller, which is that all
9 the sales are tax-free.

10 What Jenkins does through the cooperation
11 agreement is it gives us the mechanism to collect these
12 taxes when they're complied with. If the defendant by
13 active intervention does not file and instead advertises
14 no sales tax required, he is preventing us from --

15 JUSTICE GINSBURG: But do you know -- do we
16 know that? Do we know whether the Petitioner has in
17 fact filed the Jenkins Act report with New York State?

18 MR. KOERNER: No. We have -- we have
19 alleged that he has not -- not filed one report with New
20 York State. Indeed, he has actively represented in the
21 website that he has no obligation to file the report,
22 and that any information that he obtains from the
23 purchaser is confidential.

24 JUSTICE BREYER: All right. So I think that
25 their response to the mail and fraud is, you're right,

1 it is all mail -- it is all mail fraud. All these tax
2 violations, in fact every one, you mail in your tax
3 return normally.

4 MR. KOERNER: Correct.

5 JUSTICE BREYER: So all of these would be
6 mail fraud. But mail fraud is not a treble damages
7 statute. And therefore the question is who will
8 prosecute, State or Federal? So normally it's State if
9 it's a State tax. But it's one thing to say Congress
10 didn't care about that and quite another thing to say
11 that Congress didn't care if the States were going to
12 use this in order to collect three times what the taxes
13 are owed. And so they're looking for a way to cut off
14 this tax liability for ordinary, simpleminded tax --
15 failure to pay your State taxes. And that's why they've
16 hit on this idea of the antitrust. I don't know if
17 that's a satisfactory idea. I don't see the solution.
18 I think I see the problem.

19 MR. KOERNER: But in the antitrust case in
20 the State of Hawaii, the reason there that the State was
21 not allowed to sue was not because of the injury. It
22 was not -- it was the directness of the injury. This
23 Court pointed out the fact that there was the
24 possibility of duplicative recoveries, and the State of
25 Hawaii was acting on behalf of the consumers.

1 Here, we have a direct injury. The city was
2 the only one injured as a --

3 CHIEF JUSTICE ROBERTS: But it was injured
4 by the consumer's failure -- it was injured by the
5 consumer's failure to pay the taxes. That is an
6 intervening cause.

7 MR. KOERNER: Correct.

8 CHIEF JUSTICE ROBERTS: Now, why shouldn't
9 that be the end of the causation chain?

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

14 CHIEF JUSTICE ROBERTS: You're suing him for
15 setting up the ambiance?

16 MR. KOERNER: Yes. He is the one who
17 created the fraud, by leading the consumer to believe
18 they didn't have an obligation to pay. We are suing
19 based on impudence with the opportunity to collect
20 taxes, where there are three parties to this
21 transaction --

22 JUSTICE ALITO: In order to -- in order
23 to -- to prevail on that theory, would you have to prove
24 that these -- these alleged misrepresentations in fact
25 caused people not to pay taxes?

1 MR. KOERNER: Yes.

2 JUSTICE ALITO: You would have -- you would
3 have to prove that?

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

6 JUSTICE ALITO: And you think you could
7 prove that?

8 MR. KOERNER: Absolutely, because the
9 response rate of individuals on their own when the
10 Jenkins report is not filed is extremely low. Yet when
11 the Jenkins report is filed they do --

12 JUSTICE ALITO: What -- what percentage of
13 the -- of the residents of New York State or New York
14 City voluntarily pay a use tax on their income tax
15 returns for items that they purchase on the Internet?

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

18 JUSTICE ALITO: Would you make a guess?

19 MR. KOERNER: Probably very low. But in
20 this particular --

21 JUSTICE SCALIA: So how can you call it -- I
22 mean, part of the problem with calling it property is
23 there -- there is such a low chance of recovery of the
24 amount owed here.

25 Even if the Jenkins Act filing had been

1 made, you still have to -- have to assume that this --
2 number one, you have to assume that the State would turn
3 the list over to the city, which the State isn't
4 required to do.

5 MR. KOERNER: But we do have a cooperation
6 agreement.

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

10 But, secondly, after you get the information
11 we have to assume that you're going to move against
12 these people.

13 MR. KOERNER: If you look in footnote 8 of
14 our brief, we point out, even in this case, when we've
15 settled with parties and they've turned over the
16 information we have been able to recover significant
17 amounts of the taxes owed.

18 CHIEF JUSTICE ROBERTS: Does it -- does it
19 affect your ambience theory that the website has the
20 language that your friend told us is on it, that you
21 have to -- you know, this is -- viability varies from
22 State to State or whatever the exact language is?

23 MR. KOERNER: No. No.

24 CHIEF JUSTICE ROBERTS: That still creates
25 the ambience?

1 MR. KOERNER: When you look at the website
2 and you have flashing lights that say "No taxes
3 required," indeed we allege in the complaint that the
4 entire business model is predicated on the fact that
5 they don't have to pay State and city taxes.

6 The wide difference allows for the profit
7 for the seller and a savings for the buyer. That is
8 what we allege and, given the opportunity, we can prove
9 that.

10 CHIEF JUSTICE ROBERTS: Yes.

11 JUSTICE KENNEDY: Could you satisfy Justice
12 Breyer's concern -- and maybe the answer is not -- by
13 saying that if there were a corporation that went around
14 to California taxpayers and said, we have a way to avoid
15 taxes, that then there would be a RICO violation, and
16 that would be closer to your case?

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

22 JUSTICE KENNEDY: Well -- well, you're
23 certainly consistent and persistent on that point.

24 MR. KOERNER: Yes. That would be a better
25 factor --

1 JUSTICE KENNEDY: But it -- it would seem to
2 me -- it would seem to me that I gave you a way to
3 differentiate this case. And isn't that consistent with
4 RICO because we have a very specific enterprise here?

5 MR. KOERNER: Well, I do want to reiterate
6 the fact that, apart from the general language in this
7 case, we do have this Contraband Cigarette Trafficking
8 Act, which I alluded to earlier. That -- that Act
9 precisely deals with the problem of underpayment of
10 taxes for cigarettes. It was passed in 1978 and then
11 amended in 2006 to include localities. It has very
12 severe penalties under RICO criminally. It allows for
13 fines and forfeitures. But more important, you can use
14 RICO civilly, and the only economic injury in that
15 entire legislation is the lost opportunity to collect
16 taxes. So it's difficult to say that Congress was not
17 aware of this problem, aware of its potential scope.

18 And while I understand this Court's
19 frustration, it seems to me, as this Court has said in
20 many cases, including the last one, Boyle, it resides
21 with Congress to change it. If they feel there is a
22 misuse of this legislation and suits are exploding out
23 of context in terms of what they contemplated, then they
24 should change it.

25 Yet --

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

4 MR. KOERNER: It is, but if you look at --
5 Chief Judge, if you look at how you've applied proximate
6 cause in the past in Anza, in Holmes, what you said is
7 that there are other factors that are not associated
8 with the unlawful act, and therefore you didn't want
9 courts or juries to have to parse -- parse out
10 legitimate business problems and illegitimate business
11 problems because they become too complex.

12 You don't have that here. Here, you have
13 direct injury to the city, and it's an easy calculation.

14 JUSTICE GINSBURG: Do we know -- you gave an
15 instance in your brief or two instances of successful
16 attempts to recoup from the taxpayer, that is the
17 cigarette buyer. Did those come about because the city
18 received the Jenkins Act list from the State? How did
19 the city get --

20 MR. KOERNER: In the particular cases that
21 we mentioned in footnote 8, they were parts of
22 settlements for the people who had, similar to this
23 particular defendant, had advertised as tax-free, and we
24 had settled with those people to get the reports, and
25 then, based on the reports, we were able to track them

1 down.

2 Where we get the Jenkins -- where people
3 voluntarily disclose the Jenkins Act reports, we do
4 follow up aggressively, but the --

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

9 MR. KOERNER: Correct.

10 JUSTICE SCALIA: They may have been the
11 foolish half. Did --

12 (Laughter.)

13 MR. KOERNER: No.

14 JUSTICE SCALIA: Were the other -- were the
15 other half pursued by the city?

16 MR. KOERNER: Not yet, no.

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

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

19 JUSTICE SCALIA: It can't be worth it. It
20 can't possibly be worth it.

21 MR. KOERNER: Here's what would be worth it:
22 If we can stop the fraudulent practices that these
23 sellers represent through the treble damages. The only
24 benefit that these Internet sellers have is the cost
25 saving as a consequence of the tax saving.

1 JUSTICE GINSBURG: Why is what they're doing
2 any different from what out-of-State mail order houses
3 have done in -- they set -- they set up in States
4 without a sales tax, they ship into a State that has a
5 compensating use tax, that, apart from automobiles, I
6 don't know is ever collected.

7 MR. KOERNER: Well, I would like to think
8 that those out-of-State sales entities don't exist
9 solely to try to deprive receiving States of tax. The
10 difference here is the entire business plan is based on
11 not paying tax.

12 Now, RICO has been in business since 1970.
13 Your decisions have expanded its use. As I indicated,
14 there has been no attempt to restrict it in any way,
15 and, indeed, despite --

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

21 But I guess, as I tried to point out
22 earlier, this is a different question. This is the
23 usual judicial application of concepts of proximate
24 cause, and I would have thought concern about how broad
25 RICO was written and how broadly it has been interpreted

1 would cause us to look very carefully to the proximate
2 cause question.

3 MR. KOERNER: But in the proximate cause
4 equation, as you yourself have defined it, meaning the
5 Court, you've talked about unlawful issues and lawful
6 issues. And as I indicated, where there's a combination
7 you don't want a Court to weigh what's lawful and
8 unlawful.

9 But here our injury -- injury is solely the
10 result of an unlawful use. There are no intervening
11 factors.

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

15 MR. KOERNER: And I -- that's -- that's the
16 way you frame it, I understand, but it can be equally
17 framed by saying the injury is caused by the seller's
18 misrepresentation, which encourages the purchasers not
19 to pay taxes.

20 And if you look at the websites, there is no
21 doubt about what this --

22 JUSTICE KENNEDY: So do you say then that
23 proximate cause is in part established because of the
24 specific intent? Is that --

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

1 JUSTICE KENNEDY: Well, I'm glad -- I'm glad
2 you said that, because the Associated Contractors said
3 specific intent is not --

4 MR. KOERNER: I know. What I am saying is
5 that, given the opportunity to prove this, we can show
6 that the entire business model was intended never to
7 have any taxes paid on these transactions.

8 JUSTICE KENNEDY: But in -- in the world and
9 in the lexicon of proximate cause, why is there
10 proximate cause because this was the business model?
11 How do I explain that in terms of proximate cause?
12 There's not specific intent.

13 MR. KOERNER: There are no other intervening
14 causes between the fraud and the injury to the city. It
15 is -- we lost an opportunity. Look --

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

22 MR. KOERNER: Because in this case, they
23 don't have any other reason --

24 JUSTICE KENNEDY: Okay, and in terms of
25 proximate -- the universe of the law that we call

1 proximate cause, how do you explain that? It's not
2 specific intent.

3 MR. KOERNER: The law of proximate cause in
4 the case you described, you would have to consider all
5 of the issues, some related to the transaction that
6 you're suing on, some not. If the mail order catalog
7 could show there were other reasons for their sales, not
8 attributable to the unlawful RICO definition, then it's
9 the type of injury you don't want to make an inquiry to.
10 But if you have --

11 JUSTICE SCALIA: Reason on whose part? Some
12 reason on whose part? On the seller's part or on the
13 New York buyers' part? They will be -- the New York
14 buyer is doing it because it's cheaper because he is not
15 going to pay taxes on it. But it seems to me the seller
16 couldn't care less whether the buyer pays taxes on it or
17 not. So long as he pays the money for the cigarettes,
18 the seller has gotten what the seller wanted.

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

21 CHIEF JUSTICE ROBERTS: So it's a mail order
22 house and they put a little line on it, says: By the
23 way, if you live out of State, no taxes, no sales taxes.
24 Then they're also subject to RICO prosecution?

25 MR. KOERNER: As I said, it's a harder case

1 because there may be other reasons why that mail order
2 house is -- is successful, just like you said in Anza,
3 just like you said in Holmes. But in this case there's
4 only -- it's the whole model. There's only one reason
5 why they're successful.

6 JUSTICE STEVENS: Well, maybe that isn't
7 completely true. Maybe it's a matter of convenience, at
8 least theoretically. You buy stuff over the Internet,
9 you buy these advertised cigarettes, the price seems all
10 right, and you don't -- whether you pay the tax or not
11 is your decision.

12 MR. KOERNER: Except that the seller --
13 that's not the facts in this case. The seller
14 affirmatively represented that there are no taxes. He
15 told the consumer, and then kept the consumer's identity
16 unknown --

17 JUSTICE STEVENS: Well, we were --

18 MR. KOERNER: -- by deliberately not filing
19 as required by Federal statute, and places us in a -- in
20 the position in the circle of having no knowledge of who
21 the buyer is, having affirmative misrepresentation, and
22 we are the only one in this transaction who are directly
23 injured.

24 CHIEF JUSTICE ROBERTS: To whom was the
25 permanent misrepresentation made?

1 MR. KOERNER: The customers.

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

8 MR. KOERNER: Yes, because of the
9 representation that --

10 JUSTICE SCALIA: Really?

11 MR. KOERNER: -- they would never contact
12 the State with any information concerning the
13 transaction. That's exactly what they did. Everybody
14 understands in the nature of these purchasing exactly
15 what it's about.

16 JUSTICE SCALIA: No, I am sure the purchaser
17 knows: I'm not going to pay taxes, even though I should
18 pay taxes. But you're -- you're telling me that the
19 only reason the purchaser doesn't pay taxes is because
20 of this misrepresentation that you don't have to
21 purchase -- you don't have to pay taxes. I've known a
22 lot of New Yorkers, and not many of them are that
23 gullible.

24 MR. KOERNER: What I'm telling you, that
25 it's probably easier to go to the corner store and

1 obtain a package of cigarettes than order it over the
2 Internet. What I'm saying, you have to look at the
3 context of the facts. The facts were affirmative
4 misstatements by the seller.

5 JUSTICE STEVENS: But what if the seller
6 didn't make those misstatements but just says -- the
7 whole operation is set up exactly as this one is, but
8 they don't have that statement in there; they just say:
9 Get advice from your lawyer about whether you need to
10 pay taxes or not.

11 And what if that was the -- that was exactly
12 the -- and then they all got the advice, and the lawyer
13 says: They'll never catch you if you don't pay it.

14 MR. KOERNER: I think it's a question of
15 proof, and if we're able to show that these individuals
16 thought it was tax-free, then we should be able to
17 pursue -- let me just say, forget the Jenkins Act. You
18 have the Cigarette Trafficking Act. That is within
19 RICO. That sole economic injury is loss of revenue to
20 the State and the city.

21 So if we allege the Cigarette Trafficking
22 Act -- it was not applicable at the time of this case;
23 it was amended to apply to localities slightly after,
24 but if we predicated the case on that, would you still
25 say there's a proximate cause issue when you have

1 Congress's express intent to allow that to be a
2 predicate to the RICO count?

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

5 MR. KOERNER: No, no, no. It was
6 rhetorical. I wasn't --

7 CHIEF JUSTICE ROBERTS: Yes.

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

9 CHIEF JUSTICE ROBERTS: Just to get back at
10 maybe the same point Justice Kennedy was raising, which
11 is you're focusing on -- you keep saying: The whole
12 purpose of this, look at their website.

13 But the issue is proximate cause, and if
14 you've got to go through the individual consumer, it's
15 either proximate cause or not. And if the -- if the
16 indirect nature of what they're doing because the direct
17 cause is the consumer's failure to pay, it doesn't seem
18 to me that their intent is pertinent.

19 MR. KOERNER: But we're seeking -- the
20 injury is the opportunity to collect, which we've been
21 denied, which is the Cigarette Traffic Act contemplates.
22 Indeed, if you look at the legislative history of that
23 Act, the sole purpose was to make it a very, very
24 serious felony, and with civil undertones, in order to
25 discourage the act as a disincentive, so that this

1 trafficking, which is a major problem, started to be
2 reduced.

3 JUSTICE SCALIA: Well, I'm -- I'm not sure.
4 Let's talk about the contraband cigarette trafficking.
5 I'm not sure that these people would be in violation of
6 it. It makes it unlawful for any person knowingly to
7 ship or transport, also receive, possess, sell,
8 distribute, or purchase, cigarettes which bear no
9 evidence of payment of applicable State or local
10 cigarette taxes.

11 MR. KOERNER: Yes.

12 JUSTICE SCALIA: But there is no applicable
13 State or local cigarette tax upon the shipment of these
14 cigarettes.

15 MR. KOERNER: But if the shipment is done
16 with the intent of avoiding taxes, which was
17 contemplated by this statute --

18 JUSTICE SCALIA: That's not what it says.
19 It makes it unlawful to knowingly ship it when they bear
20 no evidence of payment of applicable taxes, and --

21 MR. KOERNER: That's correct. There's a
22 question of proof.

23 JUSTICE SCALIA: -- there is no applicable
24 taxes at the time that they ship it.

25 MR. KOERNER: But if you look at the

1 legislative history, it was directly --

2 JUSTICE SCALIA: Oh, I don't look at
3 legislative history.

4 (Laughter.)

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

6 JUSTICE BREYER: Well, why is it that you
7 haven't argued -- why haven't you --

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

15 MR. KOERNER: In those cases, you have
16 established companies and you may have to look behind to
17 see what is the reason; why are they at -- I assume they
18 have other businesses that are legitimate. This
19 particular enterprise has no legitimate aspect.

20 JUSTICE BREYER: Why is that relevant as far
21 as cause is concerned?

22 JUSTICE ALITO: You have a company that is
23 selling televisions, cameras, whatever over the Internet
24 and they -- you know, you put your -- you put in your
25 credit card information or whatever, and then it tells

1 you, "sales tax due," and if they have no outlet in the
2 State, it says "sales taxes due: Zero." What is the
3 difference between that situation and this situation?

4 MR. KOERNER: Well, first of all, in time,
5 the Internet has raised many issues. It's unclear how
6 Congress feels about this. We have legitimate
7 enterprise.

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

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

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

25 MR. KOERNER: The State has records, but

1 they -- they've been uninterested in this issue for
2 political reasons.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Barnhouse, you have four minutes
5 remaining.

6 REBUTTAL ARGUMENT OF RANDOLPH H. BARNHOUSE

7 ON BEHALF OF THE PETITIONERS

8 MR. BARNHOUSE: Thank you, Mr. Chief
9 Justice.

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

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

22 JUSTICE BREYER: On cause, why isn't it a
23 causal connection for them to say, look, your clients
24 don't tell them who's bought it. They're supposed to,
25 but they don't. And if we got the information, we go

1 write a letter to the people, and half of them would
2 pay.

3 MR. BARNHOUSE: That would be but for; But
4 for your failure to give us the names --

5 JUSTICE BREYER: Yeah.

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

7 JUSTICE BREYER: But why isn't that a direct
8 applicant action, but for foreseeable?

9 MR. BARNHOUSE: This Court said, in Holmes,
10 that but for is insufficient.

11 JUSTICE BREYER: Yeah. I know, but there is
12 more here. It is also foreseeable proximate cause. I
13 mean, it is absolutely foreseeable, not just but for.

14 MR. BARNHOUSE: This was an Internet
15 website, Justice Breyer, that --

16 JUSTICE BREYER: Forget the website. What
17 if there had been no website?

18 MR. BARNHOUSE: Was it foreseeable --

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

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

25 JUSTICE BREYER: Some pay. Some don't.

1 They have the numbers there. They get more than half.

2 MR. BARNHOUSE: It's -- it's foreseeable
3 that some won't pay. That's foreseeable, but --

4 JUSTICE SCALIA: So you get half-treble
5 damages. What is that? One-and-a-half damages.

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

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

13 MR. BARNHOUSE: I'm sorry? I didn't --

14 JUSTICE BREYER: I mean, if you put somebody
15 in front of a railroad train and half survive because
16 they jumped, does that make it a speculative cause?

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

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

24 MR. BARNHOUSE: Yes.

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

1 that?

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

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

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

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

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

14 MR. BARNHOUSE: But it's not a definition of
15 proximate cause.

16 JUSTICE SCALIA: You need more than that.

17 MR. BARNHOUSE: That, itself is not --

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

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

23 JUSTICE BREYER: No, no. There can be other
24 things that cut it off. Proximate cause. Foreseeable.
25 No kind of an event that would cut the causal chain,

1 like some odd fluke or something.

2 MR. BARNHOUSE: But --

3 JUSTICE BREYER: No policy reason or others
4 for cutting the chain. I mean, it's Torts 1 in 1962,
5 okay?

6 CHIEF JUSTICE ROBERTS: Isn't it -- well, I
7 don't know, maybe it's more -- but isn't it a
8 proposition that you don't rely on illegal conduct, that
9 the -- the assumption of illegal conduct cuts the chain?
10 In other words, there's only proximate cause
11 if you assume people are going to not pay taxes that
12 they're due, contrary to law, and that that breaks the
13 proximate cause chain?

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

17 CHIEF JUSTICE ROBERTS: No, that you have
18 to -- in order to maintain -- this is a helpful
19 question.

20 In order --

21 MR. BARNHOUSE: Yes, sir. That's why --
22 that's why I'm trying to understand.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: In order to maintain
25 the chain of connection, I thought you cannot rely, for

1 one of those links in the chain, that a party is going
2 to commit illegal action.

3 MR. BARNHOUSE: Yes, Your Honor.

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

10 Now, maybe what you want to argue is that
11 that -- that has never been applied, to my knowledge, to
12 either criminal liability or -- or penal provisions, and
13 that maybe the -- an intervening criminal act does cut
14 off causality, for purposes of penal statute, such as --
15 such as RICO. That would be a reasonable argument.

16 MR. BARNHOUSE: That's a great argument,
17 Justice Scalia.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: And a good place to
20 end.

21 Thank you, counsel.

22 The case is submitted.

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

25

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