

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: HEMI GROUP, LLC AND KAI GACHUPIN,
Petitioners, v. CITY OF NEW YORK, NEW YORK.
CASE NO: No. 08-969
PLACE: Washington, D.C.
DATE: Tuesday, November 3, 2009
PAGES: 1-60

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

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

19 MR. BARNHOUSE: Well, Justice Alito, the
20 allegations here are not that there's no taxes due.
21 There wasn't someone waving a tea bag and saying, "Don't
22 pay your taxes." What the Website's allegations are is
23 that the sales are tax-free, and the sales were
24 tax-free. As the City points out, they -- it was beyond
25 the power of the City to impose any sales tax on these
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 -
13 -- the
14 intent to injure, even if specific, as the Court held in
15 Associated General Contractors, is not itself sufficient
16 to -- to change -- to give someone standing under RICO.

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

21 MR. BARNHOUSE: No, Your Honor, because I
22 believe that the proximate cause standard that the Court
23 has adopted rests at its core in proximate cause
24 analysis in tort law. When the Court first started
25 applying proximate cause requirements in the antitrust
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 the proximate cause is satisfied only
5 with respect to the person who is supposed to be paying
6 the 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 they want that
5 result?

6 JUSTICE SCALIA: Why would the issue not
7 have been raised?

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

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

20 In addition, the Jenkins Act was passed in
21 1949 precisely for this problem, so it was on
22 congressional minds.

23 JUSTICE GINSBURG: Yes, but Congress said --
24 we were just told by counsel for the Petitioner,
25 Congress said you can -- only -- only the Federal

1 prosecutor can sue for violations of Jenkins --

2 MR. KOERNER: Correct.

3 JUSTICE GINSBURG: -- not New York City, not
4 New York State --

5 MR. KOERNER: Correct.

6 JUSTICE GINSBURG: -- and it's a
7 misdemeanor.

8 MR. KOERNER: Correct.

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

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

24 What Jenkins does, through the cooperation
25 Agreement, is it gives us the mechanism to collect these

1 taxes when they're complied with. If the defendant by
2 active intervention does not file and instead advertises
3 no sales tax required, he is preventing us from --

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

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

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

18 MR. KOERNER: Correct.

19 JUSTICE BREYER: So all of these would be
20 mail fraud. But mail fraud is not a treble damages
21 statute. And therefore the question is who will
22 prosecute, State or Federal? And so normally it's State
23 if it's a State tax. But it's one thing to say Congress
24 didn't care about that and quite another thing to say
25 that Congress didn't care if the States were going to

1 use this in order to collect three times what the taxes
2 are owed. And so they're looking for a way to cut off
3 this tax liability for ordinary, simpleminded tax --
4 failure to pay your State taxes. And that's why they've
5 hit on this idea of the antitrust. I don't know if
6 that's a satisfactory idea. I don't see the solution.
7 I think I see the problem.

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

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

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

20 MR. KOERNER: Correct.

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

24 MR. KOERNER: Because it's -- while the
25 consumer has failed, we are suing the seller because he

1 set up the ambiance, the environment for the consumer
2 not to pay. It is his --

3 CHIEF JUSTICE ROBERTS: You're suing him for
4 setting up the ambiance?

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

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

15 MR. KOERNER: Yes.

16 JUSTICE ALITO: Had -- you would have to
17 prove that?

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

20 JUSTICE ALITO: You think you could
21 prove that?

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

1 JUSTICE ALITO: What -- what percentage of
2 the -- of the residents of New York State or New York
3 City voluntarily pay a use tax on their income tax
4 returns for items that they purchase on the Internet?

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

7 JUSTICE ALITO: Would you make a guess?

8 MR. KOERNER: Probably very low. But in
9 this particular --

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

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

19 MR. KOERNER: But we do have a cooperation
20 agreement.

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

24 But, secondly, after you get the information
25 we have to assume that you're going to move against

1 these people.

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

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

12 MR. KOERNER: No. No.

13 CHIEF JUSTICE ROBERTS: That still creates
14 the ambiance?

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

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

24 JUSTICE KENNEDY: Could you satisfy Justice
25 Breyer's concern -- and maybe the answer is not -- by

1 saying that if there were a corporation that went around
2 to California taxpayers and said, we have a way to avoid
3 taxes, that then there would be a RICO violation, and
4 that would be --

5 MR. KOERNER: It would be --

6 JUSTICE KENNEDY: -- closer to your case?

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

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

14 MR. KOERNER: Yes. That would be even
15 better, in fact -

16 JUSTICE KENNEDY: It would seem to me that
17 I've --

18 MR. KOERNER: Yes.

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

22 MR. KOERNER: Well, I do want to reiterate
23 the fact that, apart from the general language in this
24 case, we do have this Contraband Cigarette Trafficking
25 Act, which I alluded to earlier. That -- that Act

1 precisely deals with the problem of underpayment of
2 taxes for cigarettes. It was passed in 1978 and then
3 amended in 2006 to include localities. It has very
4 severe penalties under RICO criminally. It allows for
5 fines and forfeitures. But more important, you can use
6 RICO civilly, and the only economic injury in that
7 entire legislation is the lost opportunity to collect
8 taxes. So it's difficult to say that Congress was not
9 aware of this problem, aware of its potential scope.

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

17 Yet -
18 --

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

21 MR. KOERNER: It is, but if you look at --
22 Chief Judge, if you look at how you've applied proximate
23 cause in the past in Anza, in Holmes, what you said is
24 that there are other factors that are not associated
25 with the unlawful act, and therefore you didn't want

1 courts or juries to have to parse -- parse out
2 legitimate business problems and illegitimate business
3 problems because they become too complex.

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

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

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

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

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

1 MR. KOERNER: Correct.

2 JUSTICE SCALIA: They may have been the
3 foolish half. Did --

4 (Laughter.)

5 MR. KOERNER: No.

6 JUSTICE SCALIA: Were the other -- were the
7 other half pursued by the City?

8 MR. KOERNER: Not yet, no.

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

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

11 JUSTICE SCALIA: It can't be worth it. It
12 can't possibly be worth it.

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

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

24 MR. KOERNER: Well, I would like to think
25 that those out-of-State sales entities don't exist

1 solely to try to deprive receiving States of tax. The
2 difference here is the entire business plan is based on
3 not paying tax.

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

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

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

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

1 in the lexicon of proximate cause, why is there
2 proximate cause because this was the business model?
3 How do I explain that in terms of proximate cause?
4 There's not specific intent.

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

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

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

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

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

1 the type of injury you don't want to make an inquiry to.
2 So if you have --

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

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

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

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

23 JUSTICE STEVENS: Well, maybe that isn't
24 completely true. Maybe it's a matter of convenience, at
25 least theoretically. You buy stuff over the Internet,

1 you buy these advertised cigarettes, the price seems all
2 right, and you don't -- whether you pay the tax or not
3 is your decision.

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

9 JUSTICE STEVENS: Well, there were no taxes
10 --

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

17 CHIEF JUSTICE ROBERTS: To whom was the
18 affirmative misrepresentation made?

19 MR. KOERNER: The customers.

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

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

2 JUSTICE SCALIA: Really?

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

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

16 (Laughter.)

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

23 JUSTICE STEVENS: But what if the seller
24 didn't make those misstatements but just says -- the
25 whole operation is set up exactly as this one is, but

1 they don't have that statement in there; they just say:
2 Get advice from your lawyer about whether you need to
3 pay taxes or not.

4 (Laughter.)

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

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

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

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

25 (Laughter.)

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

9 MR. KOERNER: Yes.

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

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

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

19 MR. KOERNER: That's correct. It's a
20 question of proof.

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

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

25 JUSTICE SCALIA: Oh, I don't look at

1 legislative history.

2 (Laughter.)

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

4 JUSTICE BREYER: Well, why is it that you
5 haven't argued -- why haven't you --

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

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

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

21 JUSTICE ALITO: But if you -- you have a
22 company that's selling cameras, televisions, whatever,
23 over the Internet, and they -- you know, you put your --
24 you put in your credit card information or whatever, and
25 then it tells you "sales tax due," and if they have no

1 outlet in the State, it says "sales taxes due: Zero."
2 What is the difference between that situation and this
3 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 where you 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 4 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.``

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

5 JUSTICE BREYER: Yes.

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

7 JUSTICE BREYER: Well, why isn't that a
8 direct enough connection -- ``but for`` foreseeable?

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

11 JUSTICE BREYER: Yes. I know, but there's
12 more here. It's 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 Websites.
17 Suppose 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: I don't know. Some pay;

1 some don't. They have the numbers there. They get more
2 than half.

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

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

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

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

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

15 JUSTICE BREYER: I mean, if you push
16 somebody in front of a railroad train and half survive
17 because they jump, that that makes it a speculative
18 cause?

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

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

1 MR. BARNHOUSE: Yes.

2 JUSTICE BREYER: Now, what's the answer to
3 that?

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

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

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

11 JUSTICE BREYER: End of case. Now, we go to
12 the damage section.

13 JUSTICE SCALIA: But for --
14 (Laughter.)

15 JUSTICE SCALIA: No, no, your
16 response is, but for, plus foreseeable, is not a
17 definition of proximate cause.

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

20 JUSTICE SCALIA: You need more than that.

21 MR. BARNHOUSE: It's -- it -- that, itself,
22 is not sufficient --

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

25 MR. BARNHOUSE: What -- what the Court said

1 in Associated General Contractors is, even if it's not
2 only foreseeable, but that's your intent --

3 JUSTICE BREYER: No, no --

4 MR. BARNHOUSE: -- but that's not sufficient
5 --

6 JUSTICE BREYER: There can be other things
7 that cut it off.

8 MR. BARNHOUSE: Yes, Justice.

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

12 MR. BARNHOUSE: But --

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

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

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

25 MR. BARNHOUSE: It -- if we assume that --

1 that the assumption that they will pay their taxes
2 breaks the proximate cause? I'm not -- I'm sorry --

3 CHIEF JUSTICE ROBERTS: No, that you have
4 to -- in order to maintain -- this is a helpful
5 question.

6 In order --

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

9 (Laughter.)

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

14 MR. BARNHOUSE: Yes, Your Honor.

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

21 Now, maybe what you want to argue is that
22 that -- that has never been applied, to my knowledge, to
23 either criminal liability or -- or penal provisions, and
24 that maybe the -- an intervening criminal act does cut
25 off causality, for purposes of penal statute, such as --

1 such as RICO. That would be a reasonable argument.

2 MR. BARNHOUSE: That's a great argument,
3 Justice Scalia. I --

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: And a good place to
6 end.

7 Thank you, counsel.

8 The case is submitted.

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

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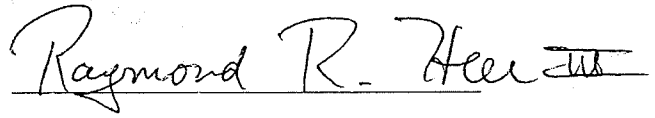
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; HEMI GROUP, LLC AND KAI GACHUPIN, Petitioners, v. CITY OF NEW YORK, NEW YORK.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.


A handwritten signature in cursive script that reads "Raymond R. Heer" followed by a horizontal line and a small flourish.

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