

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WISCONSIN DEPARTMENT OF REVENUE, Petitioner

v. WILLIAM WRIGLEY, JR., CO.

CASE NO: 91-119

PLACE: Washington, D.C.

DATE: January 22, 1992

PAGES: 1 - 50

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 WISCONSIN DEPARTMENT OF :

4 REVENUE, :

5 Petitioner :

6 v. : No. 91-119

7 WILLIAM WRIGLEY, JR., CO. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, January 22, 1992

11 The above-mentioned matter came on for oral
12 argument before the Supreme Court of the United States at
13 12:59 p.m.

14 APPEARANCES:

15 F. THOMAS CREERON, III, ESQ., Assistant Attorney General
16 of Wisconsin, Madison, Wisconsin; on behalf of the
17 Petitioner.

18 E. BARRETT PRETTYMAN, JR., ESQ., Washington, D.C.; on
19 behalf of the Respondent.

20
21
22
23
24
25

1 CONTENTS

| | | |
|---|---------------------------------|------|
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | F. THOMAS CREERON, III, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | E. BARRETT PRETTYMAN, JR., ESQ. | |
| 6 | On behalf of the Respondent | 24 |
| 7 | REBUTTAL ARGUMENT OF | |
| 8 | F. THOMAS CREERON, III, ESQ. | |
| 9 | On behalf of the Petitioner | 48 |

1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 91-119, the Wisconsin Department of Revenue v.
5 William Wrigley, Jr., Co.

6 Mr. Creeron, is it?

7 MR. CREERON: Yes, Mr. Chief Justice.

8 QUESTION: Mr. Creeron, you may proceed.

9 ORAL ARGUMENT OF F. THOMAS CREERON, III

10 ON BEHALF OF THE PETITIONER

11 MR. CREERON: Mr. Chief Justice, and may it
12 please the Court:

13 The question presented in this case is whether
14 for the 6-year period at issue the respondent engaged in
15 activities other than those expressly permitted by Public
16 Law 86-272, thereby forfeiting the limited immunity from
17 State taxation measured by income, which is accorded by
18 that statute. It is Wisconsin's position that the
19 respondent did engage in activities other than those
20 expressly permitted, that its assessment covering that
21 period is valid, and that the judgment of the Wisconsin
22 Supreme Court should therefore be reversed.

23 This case arose as a result of a franchise tax
24 assessment made by the Wisconsin Department of Revenue
25 against the William Wrigley, Jr., Company, which is the

1 largest manufacturer of chewing gum in the world. The
2 franchise tax is a fairly apportioned tax imposed only
3 upon income attributable to business activities within
4 Wisconsin. During these years, Wrigley's Wisconsin sales
5 ranged from \$2.8 million to \$4.4 million, while its total
6 sales ranged from \$140 million to \$230 million. The tax
7 itself, exclusive of interest, is slightly in excess of
8 \$120,000, an amount which is not in dispute.

9 The Wisconsin Supreme Court reversed the
10 Wisconsin Tax Appeals Commission solely on the legal
11 question of how it construed the provisions of Public Law
12 86-272, and agreed with the construction of that statute
13 that Wrigley continues to advocate here.

14 QUESTION: Was that a unanimous opinion?

15 MR. CREERON: Yes, it was.

16 This Court's decision in Heublein established
17 two firm tenets for construing Public Law 86-272. First,
18 Congress must speak clearly when it chooses to abridge the
19 State's taxing powers, which of course are fundamental to
20 their very existence. If Congress does not speak clearly,
21 ambiguous terms in the statute will be construed in favor
22 of the preexisting authority to tax. Second, clarity that
23 would remove uncertainty was Congress' primary goal in
24 enacting Public Law 86-272.

25 While any of the activities listed by the

1 Wisconsin Tax Appeals Commission would probably be
2 sufficient to support taxation under the principles set
3 forth by the Court in Heublein, the major activities
4 engaged in by Wrigley, which we claim exceeded those
5 listed in the statute, are maintaining stocks of goods in
6 rented warehouse space in Wisconsin and in its employees'
7 homes in Wisconsin; replacing stale or damaged product
8 from that stock of goods; direct agency stock check sales
9 and direct delivery of product from that stock of goods;
10 and personnel management and similar activities engaged in
11 by Wrigley's resident regional manager, which did not
12 involve any customer participation.

13 QUESTION: How long does it take for gum to get
14 stale? What's its shelf life?

15 MR. CREERON: I do not know.

16 QUESTION: It's 6 months. I do not chew gum.

17 (Laughter.)

18 MR. CREERON: The statute at issue is a minimum
19 activity statute. It was enacted to assure continued
20 entry by small businesses into new markets so that they
21 could compete with large, multistate corporations like
22 Wrigley that had already established themselves in those
23 markets. Under the statute, a seller of tangible personal
24 property is permitted to engage in three activities if
25 they originate outside the taxing State. It may approve

1 orders, it may fill orders, and it may deliver goods to
2 the customer.

3 Wrigley shipped fresh gum, carried on its books
4 as inventory, to a warehouse and to its employees' homes
5 in Wisconsin. That gum was not shipped to the customer,
6 and most of it remained in storage at these locations.
7 Once that gum was in Wisconsin, it is our position that it
8 became a stock of goods within the State.

9 QUESTION: That was the only instance, wasn't
10 it?

11 MR. CREERON: The only shipment of goods other
12 than to the customer was to the warehouse and to its
13 employees' homes, yes.

14 QUESTION: That's the only warehousing instance
15 that the record discloses?

16 MR. CREERON: Yes, but that instance continued
17 through all six of the tax years at issue.

18 QUESTION: Wasn't much of a warehousing, was it?

19 MR. CREERON: No, it was -- they rented
20 warehouse space, but gum isn't, and the space was not --

21 QUESTION: How large a space?

22 MR. CREERON: Excuse me?

23 QUESTION: How large a space?

24 MR. CREERON: I do not know how large the space
25 was, but I believe the record indicates that during this

1 time period the annual cost was no more than \$300 a month.

2 QUESTION: When you say they did, I thought it
3 was one salesman did, right? Do we know that other
4 officers of the company knew about that?

5 MR. CREERON: Yes, the record clearly reflects
6 that the regional manager in 1973 obtained permission from
7 Wrigley to rent the warehouse, and was assured by Wrigley
8 that he would in fact be reimbursed for those warehouse
9 costs. Then when an employee was finally hired and the --
10 he lived in an apartment, the stock of gum would not fit
11 within his apartment, he continued that arrangement, and
12 he also was assured by Wrigley that he would be reimbursed
13 for those costs. So I don't think Wrigley can say that it
14 did not approve of this particular activity.

15 Once the gum was in these in-State locations,
16 Wrigley's sales representatives would use that gum, travel
17 around to dealer locations, and would fill display stands
18 at the retailer's location. If the retailer did not have
19 the correct sizes of product, the sales representative
20 would swap product with the retailer, and place the
21 different sizes of product in the display stand. It's our
22 position that that activity constituted delivery of goods
23 from within the State.

24 On occasion, approximately once per month per
25 sales representatives, the retailer would not have the

1 correct size of product, the sales representative could
2 not do the necessary product swapping, and the sales
3 representative would then provide gum to the retailer
4 through a device known as an agency stock check. The way
5 that would work was that the stock check would be given to
6 the retailer as a receipt, the wholesaler would bill the
7 retailer, and Wrigley would then bill the wholesaler.
8 Since billing did occur in these situations, it's our
9 position that a sale did take place. Therefore, both
10 approval and delivery of these agency stock check
11 transactions occurred in Wisconsin. The plain and
12 unambiguous meaning of the statutory terminology prohibits
13 this product swapping and these agency stock check
14 transactions.

15 The statute does permit certain business
16 activity within a State that would otherwise have
17 jurisdiction to tax, but its language immediately limits
18 the phrase "business activity" in such a way that the only
19 activity of that kind that may originate within the State
20 must constitute solicitation of orders. The plain and
21 unambiguous meaning of the term "only" is that nothing
22 else may occur. And the Wisconsin Supreme Court's
23 decision, with which Wrigley appears to agree in every
24 respect, holds that the ordinary and accepted meaning of
25 the term "solicit" is to make a plea. The ordinary and

1 accepted meaning of the term "solicitation of orders"
2 therefore, is simply requesting orders.

3 Even if solicitation were determined to be an
4 ambiguous term, its possible meanings can be placed on a
5 spectrum. At one end, simply requesting and receiving
6 orders within the State would be permissible, and any
7 other activity would result in payment of a fairly
8 apportioned tax.

9 At the other end of that spectrum, lease or
10 ownership of physical facilities or the presence of a
11 stock of goods would be prohibited, and every other
12 activity conducted within a State which would otherwise
13 have jurisdiction to tax, would nevertheless be tax
14 exempt.

15 Every presumption in Heublein is in favor of
16 that end of the spectrum, where only requesting orders is
17 permissible. Under the Court's decision in that case,
18 Wrigley's burden to establish that the court should move
19 away from that end of the spectrum any distance at all is
20 enormous. Yet Wrigley's redefinition of the term
21 "solicitation" to include what it claims are incidental
22 activities is at the exact opposite end of the spectrum
23 from its ordinary and accepted meaning.

24 QUESTION: Well, Mr. Creeron, I think Wrigley's
25 in their brief say that even you, your side, the State,

1 doesn't insist that it be only solicitation, only would
2 you like to buy, period. That even you concede there may
3 be some incidental conversation and so forth in connection
4 with that. They say you don't really limit it to the
5 actual narrowest meaning you could, either.

6 MR. CREERON: We, the Wisconsin Department of
7 Revenue, did not apply the narrowest test that is applied
8 in some States, but it is our position that the activity
9 must be part and parcel of the sales pitch. That may be
10 slight -- a slightly different definition than saying that
11 all you can do is ask for the order, but --

12 QUESTION: How about restocking the gum at
13 the -- you know, at the same call would you ask him to buy
14 some more?

15 MR. CREERON: It's our position that you can't
16 do that. That serves another purpose. It serves a
17 quality control purpose of the company, which is other
18 than solicitation.

19 QUESTION: Well, it could be seen as part of the
20 overall solicitation, saying this is the kind of service
21 that we routinely perform and therefore you ought to deal
22 with us.

23 MR. CREERON: Well, the statute, first of all,
24 only protects the sale of tangible personal property. It
25 does not protect the provision of services.

1 QUESTION: No, of course. But it's the sale
2 that we're talking about that would be the measure of the
3 tax. But presumably do you take the position that nothing
4 that enhances the chances of making the sale can be done
5 and fall within the exemption?

6 MR. CREERON: Not at all. We take the position
7 that if the activity is part and parcel of, inextricably
8 bound, whatever terminology along those lines you chose to
9 use, part of the sales pitch itself, that the activity is
10 permissible. The pre-sale/post-sale test, I think, is
11 useful in regard to the replacement of damaged goods
12 because I think what that test is trying to get at is that
13 you can't do more simply because the first sale or many
14 sales have taken place. The first time you approach a
15 customer who had never done business with you before, you
16 would not be in a position to replace damaged goods, which
17 I think indicates that that activity is something that is
18 beyond the sales pitch itself.

19 QUESTION: Mr. Creeron, suppose you have a
20 salesman who makes his presentation to the customer, the
21 customer buys some gum, and then the customer says, but
22 I'm telling you now, I'm not going to place another order
23 unless you forward to the company and support these
24 complaints that I have about the company -- about the last
25 shipment. Now I want you do that for me.

1 And he says, okay, I'll do it. And he does it.
2 He writes to the company and supports the customer's
3 complaints. Is that activity -- I don't see how that
4 comes within your definition. That would render the
5 company liable?

6 MR. CREERON: I don't believe that activity does
7 come within our definition. I don't believe complaint
8 handling is something that would occur the first time that
9 you approach the customer. So that activity does not fit
10 within our definition.

11 QUESTION: Meaning that it renders the company
12 taxable?

13 MR. CREERON: Yes.

14 QUESTION: But surely solicitation includes not
15 just the first time you approach the company, but
16 approaches thereafter to keep their sales going?

17 MR. CREERON: Absolutely. You can do the same
18 things the second time, the third time.

19 QUESTION: And if you're back the third time,
20 and the customer said I've really got these complaints
21 about the first two batches that I bought, forward them to
22 the manufacturer, the salesman cannot do that without
23 going beyond solicitation in your view?

24 MR. CREERON: Again, it's our position that's a
25 quality control service, and that that is -- that is not

1 part and parcel of the sales pitch.

2 QUESTION: May I ask about the storage? How
3 long -- one salesman was it rented the space for a while
4 and then used the gum. And the answer of the Wisconsin
5 Supreme Court as I remember it was it was de minimis, that
6 it if it had been a routine -- major part of the, you
7 know, regular storage of stuff that's delivered, it would
8 be different. Do you recognize any de minimis exception?
9 And if you don't -- or if you do, why doesn't this come
10 within it?

11 MR. CREEERON: We absolutely do not recognize any
12 de minimis exception. We feel that that's inconsistent
13 with the word "only" that Congress used in this particular
14 statute. And if you look in the legislative history,
15 Senator Byrd, the sponsor of the bill, in the
16 Congressional Record at 16355 says that the sale of a
17 single sample within the State would result in a
18 forfeiture of immunity under the bill. It seems that if
19 you're going to apply that logic to warehouse rental, the
20 rental of a single warehouse or a small amount of
21 warehouse space would also result in a forfeiture of
22 immunity under the statute.

23 QUESTION: Maybe Senator Byrd was wrong.

24 MR. CREEERON: He may have been, but if we look
25 simply to the unambiguous language itself --

1 QUESTION: (Inaudible) Byrd.

2 MR. CREERON: Excuse me?

3 QUESTION: Senator Byrd.

4 QUESTION: But all that the statute says that
5 only these activities. And whenever you have a de minimis
6 exception from anything, it's a de minimis exception from
7 some categorical prescription, otherwise you wouldn't need
8 a de minimis exception. You'd have a regular exception.

9 MR. CREERON: Well.

10 QUESTION: So all you say is this is
11 categorical. But every prescription is categorical and
12 you have de minimis exceptions from all prescriptions, or
13 almost all, anyway.

14 MR. CREERON: The plain an unambiguous meaning
15 of the term "only" means that, and it's our position,
16 anyway, that Congress did not want a de minimis exception
17 with respect to this particular statute. You do have in
18 various aspects of the law de minimis exemptions created,
19 but I have not seen one with respect to a taxing statute
20 that uses the word "only."

21 QUESTION: I don't know another taxing statute
22 that uses the word "only," do you?

23 MR. CREERON: Perhaps that's all the more
24 reason --

25 QUESTION: (Inaudible) then.

1 MR. CREERON: -- why this statute should not be
2 construed to have de minimis exemption.

3 QUESTION: What if the salesman is seeking new
4 customers, and he wants some samples. Here is some great
5 Wrigley gum, why don't you try it out for a week, see if
6 you can sell it. So he gives him a few samples hoping
7 that he'll get an order next week. And he does. The guys
8 says, gee, pretty good gum, sells well. And he -- if he
9 has to have samples at his house or in a warehouse, is
10 that too much?

11 MR. CREERON: If he gives the -- a prospective
12 customer samples, it would be our position that that would
13 be permissible because it has no other purpose other than
14 solicitation of orders. If you rent a warehouse for a
15 bunch of samples --

16 QUESTION: Well, you got to put them somewhere,
17 and your wife doesn't like them in your house.

18 (Laughter.)

19 QUESTION: So what are you going to do? You go
20 to some locker somewhere. Now are you out of bounds then?

21 MR. CREERON: Well, first of all, that's not
22 what happened here. I mean, most of this gum was used to
23 replace product. But the --

24 QUESTION: It's what? It's used to --

25 MR. CREERON: Replace stale product. Very

1 little of it was used as free samples. But the act of
2 renting the warehouse itself, it's our position, would not
3 be solicitation. You cannot have rental of a warehouse
4 full of samples. And if you look at the bills that --

5 QUESTION: Well, you can have a locker 2 feet
6 square.

7 MR. CREERON: If you're renting physical plant
8 within a State, it's our position that that is not
9 permissible with any unambiguous language of the statute.

10 QUESTION: Can you pay a taxicab to carry these
11 samples? I mean, let's say a taxicab charges for
12 suitcases, and you put the samples of suitcases in the
13 trunk of the cab to show it. That's out, too?

14 MR. CREERON: No, absolutely you can do that.

15 QUESTION: Well, why can you do it? Why is that
16 any different from storing the samples? I mean, it seems
17 to me everything that you would reasonably be expected to
18 do with samples ought to be okay if the samples -- if
19 giving the samples are okay. Otherwise, that's silliness.
20 You say, well, you can give him samples, but you can't
21 carry it in a cab.

22 MR. CREERON: I didn't say that you couldn't
23 carry them in a cab.

24 QUESTION: I know you didn't, but you ought to
25 if you're going to say you can't put it in a locker.

1 (Laughter.)

2 MR. CREERON: I'm saying you can't put it in a
3 warehouse, which is what happened here.

4 QUESTION: Can you engage in activities to
5 stimulate sales, since the ultimate purpose of doing that
6 is of course to stimulate orders?

7 MR. CREERON: You can engage in the sales pitch
8 itself. If by that you mean that is any activity which
9 would generate additional profits permissible, we take the
10 position that that activity is not allowed under the
11 unambiguous language of the statute.

12 QUESTION: If the salesman arrives for the first
13 time at a store and says we'll give you all of these
14 posters to display in the store that advertise the virtues
15 of the gum, pictures of the twins, and so on, is that
16 impermissible?

17 MR. CREERON: No, I believe you can do that. I
18 don't see what other purpose that activity would have,
19 that that activity would be inextricably bound up in the
20 sales pitch itself.

21 QUESTION: What about renting newspaper space
22 for advertising in local papers or renting radio time? Is
23 that like the posters?

24 MR. CREERON: If the term "solicitation" is
25 determined to -- is given its ordinary and accepted

1 meaning, then I believe that would be permissible.

2 QUESTION: What about a warehouse to store the
3 posters in?

4 MR. CREERON: I don't -- again, I don't think
5 you can do that. The bills that were -- that did not pass
6 indicated that if you had warehouse space or anything of
7 that nature within the State, that those activities were
8 not permissible. So the act of --

9 QUESTION: But the cab's okay?

10 MR. CREERON: The cab's okay.

11 (Laughter.)

12 QUESTION: If you just have them driven around
13 constantly you'll be all right.

14 (Laughter.)

15 MR. CREERON: Probably an unlikely scenario, but
16 transportation to and from the customer is a necessary
17 consequence of solicitation. There is a suggestion in the
18 respondent's brief that we take the position that you
19 can't even drive away from the customer in your
20 automobile, that you have to walk home, and that's
21 absolutely not true.

22 QUESTION: Haven't you slipped pretty far down
23 the slope when you let the -- when you let the salesman go
24 out and start renting or buying radio time and taking out
25 newspaper ads? In the case of giving him the posters, you

1 can say, well that is -- he's only dealing with the person
2 from whom he wants to solicit the order. But when you let
3 him start going out to address the world in general, that
4 is no longer true. And why on your view doesn't that
5 cross the line from what is integrally related to an
6 entirely separate activity, and therefore subject to tax?

7 MR. CREERON: Well, I don't know if I would look
8 at it in those terms. If there is a problem with
9 advertising, it would be, I think, that the statute only
10 allows solicitation of the customer and the customer's
11 customer. And advertising might be construed as what
12 would be called third-tier solicitation where you're
13 soliciting --

14 QUESTION: I think that's what I was assuming in
15 my question, yeah. That's why I -- your answer surprised
16 me somewhat.

17 MR. CREERON: That is a problem. You -- your
18 first question, I assumed, just asked about is advertising
19 solicitation, not whether advertising was permitted under
20 this particular statute. Apparently I misunderstood your
21 first question.

22 QUESTION: I probably wasn't clear. In any
23 case, you're receding from the answer that I thought you
24 were giving.

25 QUESTION: I think he is, yes.

1 QUESTION: What if the customer says, gosh, I'll
2 order a lot of this gum, but how do I know I can sell it.
3 Will you agree to take a space in the Denver Post and help
4 me sell this gum. And he says, sure.

5 QUESTION: Make it the Milwaukee Journal.

6 (Laughter.)

7 QUESTION: That's all right, too.

8 So I mean, his order -- his order is conditioned
9 on your agreeing to take out the ad. And you say sure,
10 and he gives you an order.

11 MR. CREERON: Well, if the ad does in fact
12 involve third-tier solicitation, which is -- I take it
13 your question assumes that, then -- I mean, you can't do
14 it simply because the customer imposes it as a condition.

15 QUESTION: All right. So he can't do that and
16 stay within the statute.

17 MR. CREERON: I don't think so.

18 QUESTION: All right. Well, you're the Attorney
19 General.

20 QUESTION: Well, what if Wrigley simply
21 advertises over WGM and WB -- are those television
22 stations as well as railroad -- as well as radio stations
23 in Chicago? Well, whatever the corresponding television
24 stations are in Chicago, and those are beamed into
25 Wisconsin. Does that render him -- does that render

1 Wrigley liable?

2 MR. CREERON: Again, with advertising you have a
3 difficult problem. We're not relying on the advertising
4 that occurred in this case. But it depends, I think,
5 under the statute, on what audience you're reaching. If
6 you're reaching the customer or the customer's customer,
7 you can do it.

8 QUESTION: What's a customer's customer? I
9 don't understand what you mean. Wholesalers or retailers,
10 is that what you're talking about?

11 MR. CREERON: Right.

12 QUESTION: But not the consumer.

13 MR. CREERON: Well, you see in this case, the
14 problem with that is, and why advertising really is a
15 difficult issue here and why we're not relying on it, is
16 in this case some retailers were Wrigley's customers. So
17 you're reaching a mixed audience with the advertising.

18 QUESTION: I don't know why you concede
19 customer's customer. I would think the line would end at
20 customer.

21 MR. CREERON: I believe section (e)(2), which
22 refers to missionary activities, does permit solicitation
23 of the customer's customer.

24 QUESTION: Well, if the advertising -- if just
25 advertising in the State from out of State would give you

1 jurisdiction to tax, why you would just be home free and
2 so would every other State because there -- national
3 advertising.

4 MR. CREERON: Well, that -- that's the next
5 case.

6 QUESTION: (Inaudible).

7 (Laughter.)

8 MR. CREERON: Jurisdiction to tax --

9 QUESTION: Not if you lose this one.

10 (Laughter.)

11 MR. CREERON: Jurisdiction to tax is present is
12 this case. We're not claiming and it's not an issue in
13 this case that advertising itself creates jurisdiction to
14 tax. The question is if there is otherwise jurisdiction
15 to tax, what activities are exempt solicitation?

16 In conclusion, it's our position that the
17 Wisconsin -- the --

18 QUESTION: Can I just ask one other
19 little -- maybe this is stupid, but supposing we could
20 identify the percentage of Wrigley's business that was
21 done in the ways that you say established something more
22 than solicitation in the State. Would that, in your view,
23 entitle Wisconsin to tax the portion of their income
24 attributable to those activities, or would it then allow
25 you to tax all the income they've gotten from everything

1 else they've done?

2 MR. CREERON: It's our position that it's an all
3 or nothing statute. Once you engage in activities beyond
4 those expressly permitted by the statute, you're taxable
5 for the whole tax year.

6 QUESTION: Has anybody passed -- have courts
7 passed on that particular point I've raised? You see, the
8 text of the statute, I think, is somewhat ambiguous on
9 that point.

10 MR. CREERON: I'm not aware of any court which
11 has taken a contrary position and required some kind of a
12 percentage apportionment based on what activities are
13 solicitation and what are not.

14 QUESTION: So that if 99 percent of their sales
15 and solicitations were exempt under the statute, but they
16 have 1 percent that is generated by an -- by a taxable
17 method, the whole 100 percent becomes taxable.

18 MR. CREERON: Well, some courts have accepted
19 the de minimis argument, but I'm not aware of any --

20 QUESTION: But it's either all -- it's always an
21 all or none proposition.

22 MR. CREERON: As far as I know, there's no court
23 that's held to the contrary.

24 In conclusion, we urge reversal of the judgment
25 of the Wisconsin Supreme Court.

1 QUESTION: Thank you, Mr. Creeron.

2 Mr. Prettyman, we'll hear from you.

3 ORAL ARGUMENT OF E. BARRETT PRETTYMAN

4 ON BEHALF OF THE RESPONDENT

5 MR. PRETTYMAN: Mr. Chief Justice, and may it
6 please the Court:

7 General Creeron has touched upon a number of
8 activities that he says that we engaged in, and I'm going
9 to deal with those in just a moment. But I thought it
10 might be helpful in starting just to focus on some of the
11 things that we didn't do in Wisconsin in an effort to
12 comply with this statute.

13 We were not, for example, licensed within the
14 State. We didn't have a bank account there. We didn't
15 invoke the jurisdiction of any Wisconsin court. We didn't
16 own real estate or a manufacturing plant or a sales office
17 or a warehouse. We didn't collect delinquent accounts or
18 investigate credit-worthiness or grant credit or handle
19 complaints. We didn't approve or accept orders. We
20 didn't hire or fire within the State. We didn't even have
21 a listing in the phone book. And when the salesman gave
22 out cards, they had --

23 QUESTION: How did you check credit?

24 MR. PRETTYMAN: Pardon me?

25 QUESTION: Didn't you even check credit?

1 MR. PRETTYMAN: Illinois did. The office
2 in -- the Wrigley office, but it was not done in
3 Wisconsin.

4 QUESTION: You mean they did it on the phone to
5 Wisconsin?

6 MR. PRETTYMAN: Well, the Wisconsin office,
7 whenever a prospective customer came in, the name was
8 forwarded to Illinois for a number of reasons, among them,
9 to make sure that they could pay their bills. And
10 Wisconsin -- I'm sorry, Illinois --

11 QUESTION: So they corresponded or used the
12 telephone to check the credit.

13 MR. PRETTYMAN: Yes, they would either send in a
14 written notice --

15 QUESTION: Into Wisconsin.

16 MR. PRETTYMAN: No, to Illinois.

17 QUESTION: Well, I know but what would
18 Illinois -- how would Illinois check the credit?

19 MR. PRETTYMAN: I have no idea how they checked
20 the credit. I assume they looked up --

21 QUESTION: Well, I assume they communicated with
22 somebody.

23 MR. PRETTYMAN: Well, there's no evidence in
24 this record that --

25 QUESTION: Well, you mean they just sat in

1 Illinois and said, gee, here's this name, and it must be
2 good?

3 (Laughter.)

4 MR. PRETTYMAN: Well, the --

5 QUESTION: They must have written into
6 Wisconsin.

7 MR. PRETTYMAN: What this record reflects,
8 Justice White, is that credit matters were handled out of
9 Chicago.

10 QUESTION: Yes, I know.

11 (Laughter.)

12 MR. PRETTYMAN: That's what the record reflects.
13 As I was about to say --

14 QUESTION: All right. Go ahead.

15 MR. PRETTYMAN: -- the cards that the salesmen
16 gave out didn't even have a Wisconsin address or telephone
17 number on it. I touch on that because we were making
18 obviously an honest effort to comply with this statute.

19 Now, General Creeron has focused on the word
20 "solicitation," but I would remind you that that's not
21 what that statute talks about. The statute talks about
22 business activities within the State, which are the
23 solicitation of orders. It's the business activities that
24 we're trying to determine the meaning of here.

25 I would further point out that he said that this

1 statute abridged the State's taxing authority. In fact,
2 this statute is an allocation statute, because what you
3 have here is all of Wrigley's orders or business in
4 Wisconsin is presently taxed in Illinois -- 100 percent of
5 it. So what this statute does is say that that is where
6 it should be taxed.

7 On the other hand, if Wisconsin was going to tax
8 some of these activities, then under the so-called reverse
9 nexus rule, Illinois would not tax so -- those particular
10 activities. So this doesn't take power away from the
11 States to tax, what it does is to allocate power between
12 the States that can tax. What we --

13 QUESTION: Well, I think it's an overstatement,
14 Mr. Prettyman, to say it doesn't take power away from
15 States to tax. Because in the absence of this statute,
16 don't you think that Wisconsin would have a better case
17 for taxing?

18 MR. PRETTYMAN: Absolutely. And in fact I -- we
19 don't contest that there's nexus in this case. This is
20 not a Quill case. It has nothing to do with nexus. We
21 would concede immediately that there's nexus to tax. What
22 I meant by that was it isn't as if it was telling the
23 States you cannot tax this activity. What it is is saying
24 that Illinois can tax it, but Wisconsin can't. It
25 allocates that power between the States.

1 Now, General Creeron, if I understood him, in
2 answer to a question from Justice Souter, conceded that
3 dropping off posters would be part of the business
4 activities that was covered here. And he said because
5 that's inextricably bound up in the solicitation process.
6 That is our case. That is our position, that everything
7 that we did was either inextricably bound up in the
8 solicitation process or it was of a de minimis nature.

9 Now let me go to the four or five points that he
10 mentioned that he thought went too far. And the first was
11 what he called the agency stock transfers. This was not
12 a --

13 QUESTION: The what?

14 MR. PRETTYMAN: The agency stock transfers.

15 This is not a sale. There was no price
16 involved, no billing, no money accepted, no invoice. What
17 this was was really an internal check of the company to
18 make sure that there was no sale. And it was also de
19 minimis. And it was established that it represented
20 7/100,000 of 1 percent of the business done there.

21 And what this process was, it was very simple.
22 If you went in, for example, to a new customer, say a
23 retailer, and he's found that he didn't have any gum on
24 his shelf. You said -- and you want to get him as a
25 customer and you want to solicit his sales, you took out

1 some gum from your car, and you put it on the shelf, and
2 you said, look, try this and, you know, we'll get some
3 orders from you.

4 Then you made out one of these agency stock
5 transfers and you sent it either to the wholesaler or to
6 the company, which in turn would bill. That's all it was.
7 It represented, it was estimated, like 5 percent of the
8 gum that was carried in the car.

9 QUESTION: Who was billed for what?

10 MR. PRETTYMAN: Either the wholesaler billed
11 that -- retailer, or if it was a large account, Wrigley
12 billed the whole -- the retailer.

13 QUESTION: But de minimis or not, it was a sale
14 of gum.

15 MR. PRETTYMAN: No, it was not -- it was not a
16 sale -- I don't think it was a sale in the normal sense,
17 Your Honor, because --

18 QUESTION: Well, it was not a sale to a
19 consumer, but neither was it a gift to the retailer as an
20 inducement. It was in fact a sale to the retailer.

21 MR. PRETTYMAN: If it will help move us along, I
22 will say it's a sale because it was totally de minimis. I
23 -- when I said it wasn't a sale, I meant it wasn't in the
24 normal sense of a sale where you go and tell the fellow
25 the price and you haggle with him. And then you -- he

1 pays you the money and you give him the gum. That isn't
2 how it happened. But I would concede that if this was the
3 way that the company did business on a regular basis with
4 all of its people, it could possibly go beyond
5 solicitation. But what I'm saying is that when you have
6 an activity that is 7/100,000 of 1 percent of your
7 business, surely, once you accept the de minimis concept,
8 you would have to say that that's it.

9 QUESTION: Well, is there a de minimis concept
10 that we should accept here? It certainly isn't reflected
11 in the text of the statute.

12 MR. PRETTYMAN: I don't think most statutes that
13 have a de minimis exception to them express language in
14 that way, Justice O'Connor. I would point out that not
15 only has this Court recognized a de minimis exception in
16 numerous cases, but Congress itself in the legislative
17 history of this act referred to de minimis exceptions.
18 Petitioner's own regulations implicitly recognize have
19 been de minimis exceptions. Some of the State --

20 QUESTION: Well, do we have to worry about the
21 word "only" that appears in the statute?

22 MR. PRETTYMAN: You know it's interesting, Your
23 Honor, if you look at the statute and take out the word
24 "only," I think the statute would mean exactly the same
25 thing. "Only," I think is a matter of emphasis. I would

1 certainly agree with you on that. But if it said no State
2 shall have power to impose a net income tax if the
3 business activities are the solicitation of orders, it
4 would mean exactly the same thing. So I take the word
5 "only" to be a matter of emphasis, but I don't see that it
6 does away with a de minimis exception at all.

7 Some of the amici in this very case that support
8 petitioner agree that there is a de minimis exception.
9 And I would remind you, for example, of the Abbott Labs
10 case, which we cite in our brief. There you have a -- it
11 was a Robinson-Patman exemption for sales to nonprofit
12 hospitals that used the goods for their own use.

13 And the question came up, well, what about
14 purchases for walk-ins? And you said, well, walk-ins
15 wouldn't be for the hospital's use, and then somebody
16 said, yeah, but what about emergencies where the walk-ins
17 are connected with the hospital. And you said, well,
18 that's de minimis. Now, you carved that right off the
19 statute.

20 So I don't think there can be any question that
21 there has to be a de minimis exception because look,
22 you're dealing with companies large and small here. And
23 to say that the taxing authority can kind of peek around
24 the corner and find in an exigent circumstance some
25 exception during the course of an entire tax year, where

1 somebody went a bit too far, and that brings me to the
2 warehouse situation --

3 QUESTION: Before you get to the warehouse, what
4 is the relationship that renders something de minimis or
5 not? You gave a very tiny percentage of Wrigley's total
6 sales --

7 MR. PRETTYMAN: In Wisconsin. No, only in
8 Wisconsin.

9 QUESTION: Of their total sales in Wisconsin?

10 MR. PRETTYMAN: Yes.

11 QUESTION: You think that's the way to decide
12 it?

13 MR. PRETTYMAN: Yes. I think it relates either
14 -- can relate either to the size of the sales or to kind
15 of a minor exception to your normal practice. And if I
16 can move logically then to the warehouse situation.

17 QUESTION: But may I just interrupt there?

18 MR. PRETTYMAN: Certainly.

19 QUESTION: You said minor exception to the
20 normal practice, but we're talking about a normal
21 practice, aren't we, the replacing of stale gum and doing
22 this delivery and having this billing you described here?

23 MR. PRETTYMAN: Well, there's a big difference
24 between replacement of stale gum and the agency stock.

25 QUESTION: Well, aren't they both normal

1 practices?

2 MR. PRETTYMAN: Well, the agency stock is a
3 normal practice, but it's de minimis because it
4 constitutes such a tiny percentage of what we do.
5 Replacement of stale gum is as inextricably bound up in
6 solicitation as anything you can possibly conceive.

7 QUESTION: Does the retailer pay for the fresh
8 gum that's used to replace the stale gum?

9 MR. PRETTYMAN: No, he's already paid for it.
10 You see, the sale has been made, the shipment has been
11 made. It's on his shelf. The salesman goes in and he
12 finds it's over 6 or 8 months old, and he says this is out
13 of date.

14 Now why does he do that? Because he knows that
15 if that salesman gets caught with stale gum and his
16 customers tell him, we'll never get another order. A
17 salesman will tell you that there's nothing more
18 inextricably bound up in solicitation than replacing stale
19 gum. He's not going to get any orders unless he's got --

20 QUESTION: This is gum that has not gone stale
21 on the retailer's shelf. It is gum that is stale when
22 delivered to the retailer?

23 MR. PRETTYMAN: No, no, no. It would normally
24 have gone stale on his shelf, Your Honor. I hope we don't
25 deliver stale gum.

1 QUESTION: And he doesn't pay for this new gum?

2 MR. PRETTYMAN: No. It's exchanged free. He's
3 not charged for it.

4 QUESTION: So he only pays for the gum that he
5 either sells, or that stays perpetually fresh?

6 MR. PRETTYMAN: If he --

7 (Laughter.)

8 MR. PRETTYMAN: It's not in the contract, but
9 that's what we do as part of our solicitation. Because if
10 we put packs on his shelf and then a customer comes in and
11 says, you know, that stuff I chewed the other day was hard
12 as a board, he's not going to put any more orders with us.

13 QUESTION: (Inaudible) wasn't gum. Suppose it's
14 a very expensive piece of machinery, and all you do -- the
15 only thing you do besides solicitation, and you're going
16 to claim that it's solicitation, is that you service that
17 engine. He calls you up and says this engine won't --
18 isn't running. And so you rush out there. You have a
19 mechanic or the same salesman, he's a serviceman, and he
20 goes out and services the engine. That's part of his
21 regular duties. Why? He'll never get another order from
22 that company if he doesn't service that engine.

23 Now, do -- is that in the same category?

24 MR. PRETTYMAN: Your Honor, I think you make a
25 very good point. And that is, what you look to --

1 QUESTION: What point was I making?

2 (Laughter.)

3 QUESTION: I was asking a question.

4 (Laughter.)

5 MR. PRETTYMAN: The fact that there are some
6 duties that can go beyond solicitation depending what is
7 customary in the industry. If -- you said technical
8 people who may go out -- you said two things. You said,
9 first of all, technical people, and secondly, you said
10 salesmen. If they're technical people, they're not
11 salesmen and they're not soliciting. When you look at
12 what a salesman ordinarily does within the industry --

13 QUESTION: Say the salesman is a qualified
14 technician and he -- part of his duties is regularly
15 answering customers whose engines won't run.

16 MR. PRETTYMAN: I think, Your Honor, that you'd
17 look at what was customary in the industry.

18 QUESTION: Well, say it is customary in the
19 industry.

20 MR. PRETTYMAN: Well, if it's customary in the
21 industry, and in fact he's doing most of his time selling,
22 and as -- he also spends a portion of his time doing
23 something which he thinks he has to do in order to get the
24 next order, then I would say that it's covered here. It's
25 inextricably bound up in solicitation. But if he's

1 primarily a repairman, and we use in our brief the example
2 of the 60-ton generator, if somebody's going to go out and
3 fix that, that's not a solicitation of orders.

4 If I could move then to the warehouse because
5 something has been made of that. I mentioned a few
6 minutes ago the exigencies of a given situation, and
7 surely that was this one. What happened was somebody was
8 fired and we were stuck with his gum that he had in his
9 car. And so it was temporarily put into a warehouse.

10 But then the next fellow who came along had an
11 apartment. He couldn't get it in his apartment
12 apparently. I don't know whether they wouldn't allow it
13 in or he didn't have room, or what.

14 QUESTION: It was his wife.

15 (Laughter.)

16 MR. PRETTYMAN: I'm not going to touch that one.

17 But -- so they kept the warehouse on for the
18 period when he was aboard because they didn't have any
19 place else to put it. Now, that is not the kind of
20 warehouse that was referred to in the legislative history,
21 that Congress didn't want you to have a plant or a sales
22 office or a warehouse. This was an exigent circumstance
23 demanded by the -- because you couldn't leave stuff out on
24 the street. And that again was a de minimis situation
25 under the view of the Wisconsin Supreme Court, and I would

1 suggest to you, fully supported here.

2 QUESTION: Are there any cases that you rely on
3 for the proposition that there's a de minimis exception in
4 this kind of tax situation?

5 MR. PRETTYMAN: Well, I don't have a tax case
6 for you, but I gave the example, Your Honor, of the Abbott
7 Labs case, where you did carve a diminishment -- de
8 minimis exception right out of the statute itself.

9 QUESTION: Yeah, but the argument is that you
10 have different presumptions that play when it's a tax case
11 and when it is restricting the State's otherwise existent
12 jurisdiction to tax.

13 MR. PRETTYMAN: Your Honor, I think you have
14 to look, if I may suggest it, at Congress really had in
15 mind with this statute because I don't think you give it
16 the most conceivably restrictive interpretation that you
17 possibly could.

18 Congress here was worried about the fact that
19 you have over 6,000 taxing jurisdictions. They have all
20 kinds of different bases and rates and timing and all the
21 rest of it. And compliance with this kind of local
22 taxation was so onerous that in some cases it was pointed
23 out that the cost of compliance was more than the tax. So
24 that was number one that they were worried about.

25 Number two, they were worried about the

1 possibility of double taxation. In the situation here,
2 Illinois would continue to tax and Wisconsin taxes, and
3 you've got double taxation.

4 Because of that, this statute was overwhelmingly
5 passed. The House passed it 359 to 31, the Senate did it
6 on House vote. It's been in effect for 30 years and more,
7 since 1959. Congress has had at least one complete report
8 on it, the so-called Willis Report in 1962, where they
9 essentially approved of how it was being carried out.

10 QUESTION: Well, there's a wide variety, is
11 there not, among the States as to what exemptions they say
12 are covered and what aren't?

13 MR. PRETTYMAN: The language in some of the
14 decisions is widely varying, Your Honor, but I would
15 suggest to you I do not -- I think I can honestly say I do
16 not know of a single State decision that I would disagree
17 with the result in, because in every one of those cases,
18 they were doing something which we would concede is beyond
19 solicitation. So, although the language --

20 QUESTION: You concede it's all or nothing?

21 MR. PRETTYMAN: In answer to Justice Stevens'
22 question it was -- that's an interesting question. I'm
23 not sure what the answer of that is. It has not been
24 raised. I can assure you that I go back and lose this
25 case I will argue that it's not all or nothing. But what

1 the result would be, Your Honor, I honestly --

2 QUESTION: Have you covered all the four things
3 that --

4 MR. PRETTYMAN: Let's see. I have covered the
5 agency stock. I haven't covered personnel or home
6 offices.

7 QUESTION: But you've covered the stale gum.

8 MR. PRETTYMAN: Replacement of stale and
9 warehouse.

10 QUESTION: And the warehouse.

11 MR. PRETTYMAN: Yes.

12 QUESTION: All right.

13 MR. PRETTYMAN: Shall I touch briefly, then,
14 on --

15 QUESTION: Can I ask one other question about
16 the stale gum? What did your figure of 7/100,000 of
17 1 percent pay into? Of all of these activities or the
18 smallest of the group?

19 MR. PRETTYMAN: It covered some \$600 worth of
20 sales divided into the total sales in the State.

21 QUESTION: I understand. But that's just the
22 agency stock.

23 MR. PRETTYMAN: Yes.

24 QUESTION: That didn't include, for example,
25 replacing the stale gum.

1 MR. PRETTYMAN: No. And the agency stock --

2 QUESTION: How big a percentage is that?

3 MR. PRETTYMAN: Pardon me?

4 QUESTION: Do you know how big a percentage that
5 is?

6 MR. PRETTYMAN: No, but that was -- the salesman
7 testified that it was 85 percent of the stock that they
8 kept on hand. And the 10 percent was samples, and then
9 the 5 percent was the agency stock.

10 QUESTION: Eighty-five percent is used to
11 replace stale gum.

12 MR. PRETTYMAN: Yes. So that ought to give you
13 some idea of it.

14 QUESTION: Would the case be different if
15 instead of replacing stale gum, you bought it back?

16 MR. PRETTYMAN: I think if you make an actual
17 sales, as a --

18 QUESTION: I'm -- not sale. If you bought from
19 the retailer his stale inventory, you paid him for it, and
20 then sold him, would that be a different case?

21 MR. PRETTYMAN: You mean you buy back what
22 you've sold him?

23 QUESTION: Well, because you don't want him to
24 sell that. He's got some merchandise that you think is
25 going to hurt the goodwill of your company.

1 MR. PRETTYMAN: Oh, I see. In other words you
2 buy -- the salesman on the spot buys back the -- I think
3 that could well go beyond the statute because --

4 QUESTION: What do you do with the stale gum you
5 take off the shelf? Throw it in the wastebasket?

6 MR. PRETTYMAN: No.

7 QUESTION: It's really a trade, isn't it?

8 MR. PRETTYMAN: Well, first of all --

9 QUESTION: You take it and you replace it.
10 That's a trade.

11 MR. PRETTYMAN: Back during this period, most of
12 it was packaged and sent back to Chicago. A little bit of
13 it --

14 QUESTION: So it's a trade. It's a trade.

15 MR. PRETTYMAN: A little bit of it was thrown
16 into the local dumps.

17 QUESTION: So instead of money, you give them
18 new gum. So it's sort of a sale.

19 MR. PRETTYMAN: It's an exchange.

20 QUESTION: It's sort of a sale.

21 QUESTION: But he's billed for it. That's what
22 he was billed for.

23 MR. PRETTYMAN: No, not for the stale gum. No,
24 no. Let's distinguish now between the agency stock, which
25 is a tiny little percentage, and the replacement of stale

1 gum, which is completely free.

2 QUESTION: Mr. Prettyman, why did they send it
3 back to Chicago? Can't they dump it in the Wisconsin
4 landfill?

5 MR. PRETTYMAN: Your Honor, the reason it is
6 sent back to Chicago is that in those days it could become
7 part of new gum. It could become a base for new gum.
8 That is not longer done.

9 QUESTION: Recycled.

10 (Laughter.)

11 QUESTION: So when you chew gum, you're chewing
12 stale gum, too.

13 (Laughter.)

14 MR. PRETTYMAN: Well, they treat it.

15 If I can deal with the personnel matter that he
16 mentioned. Personnel decisions were made in Chicago. The
17 final decisions were all made in Illinois. The local man,
18 of course, had to do some things and make recommendations.
19 But it's interesting that there are instances in the
20 record where the local man made recommendations about
21 raises, for example, which were turned down by Chicago.

22 In one instance where they were going to fire
23 someone, the regional manager, who was in Wisconsin, got
24 permission ahead of time. He said if the facts prove
25 true, do I have permission to fire him, and they said yes,

1 and he fired him. So the personnel decisions, I think,
2 are well taken care of. They're outside the State.

3 In so far as the home offices, which I believe
4 is the last thing that General Creeron mentioned as
5 concern, we did not have a sales office. There was no
6 evidence whatever that Wrigley knew about the fact that
7 this gum was kept in the home. It didn't pay for it. The
8 use was strictly incidental. You had a file cabinet here
9 for your normal reports, or you used the kitchen table or
10 a part of the basement.

11 You had one or two meetings a year of the sales
12 personnel, and in one case they were sent -- they were in
13 the home. They were usually in a home. But the sales
14 meetings were completely taken up with solicitation. That
15 is, how are we going to sell more gum. And even the
16 manager, the regional manager who was within Wisconsin,
17 his chief job was solicitation. He spent from 80 to 95
18 percent of his time in soliciting orders.

19 I think that's all that the -- that my opponent
20 has mentioned, but I do want to talk about the pre-
21 sale/post-sale test for just a moment. If you look on
22 page 2 of his reply brief, something that I had noticed
23 before in his main brief, he says that you don't have to
24 have a sale in order for you to be covered under the pre-
25 sale/post-sale test.

1 Now if that's true, it seems to me we fit his
2 test. If you don't have to have a sale, and all you have
3 to do is the activities that would lead up to a sale, or
4 if you have a sale, then you keep going to try to get the
5 next sale, why, I think we meet the pre-sale/post-sale
6 test. Or to put it another way, I don't thing the
7 so-called pre-sale/post-sale test makes any sense.

8 Because certainly in the gum industry, and
9 Justice Blackmun, you put your finger on it, was that you
10 not only have a short shelf life, but you have, you know,
11 95 percent of it is impulse buying -- 95 percent is
12 impulse buying. And so you -- when you put those two
13 together, what you have there is activity that is ongoing
14 in every sense. The gum industry is different from that
15 60-ton generator that I mentioned to you.

16 QUESTION: That's one of the things that
17 troubles me. I can't believe that Congress enacted a
18 statute that would be almost impossible of application,
19 and I'm looking for a criterion that would be readily
20 applicable. And maybe the categorical solicitation test
21 is easier than what you're proposing. The State
22 authorities, under your test, would really have to know
23 each individual industry. If servicing normally goes
24 along with solicitation for this industry, it's okay. If
25 it doesn't normally go along with solicitation for that

1 industry, although it does for another one, then it's not
2 okay. That makes life very complicated. Why should we
3 buy in to that kind of difficulty?

4 MR. PRETTYMAN: Your Honor, I don't think it is
5 at all. I think it -- first of all, you're looking for a
6 criteria. I would say that the business activities -- and
7 don't forget I go back to that. It's just not
8 solicitation. It is the business activities that are
9 solicitation. The business activities that are covered
10 are those which are directed toward achieving an immediate
11 or a future sale, and which is normally done by a salesman
12 or a supervising salesman in that industry.

13 Now, that is not different than the kinds of
14 determinations that have to be made all the time, based on
15 custom and usage in an industry -- in tax matters. For
16 example, section 482 of the Internal Revenue Code, where a
17 company's lending money to a foreign sub, says you can
18 charge the interest rate that's customary in the industry.
19 And the IRS --

20 QUESTION: But it says that. I mean, it goes to
21 the trouble of saying that. And this doesn't say what's
22 considered solicitation in the industry, it says
23 solicitation, as though that's something everybody
24 understands and it's the same everywhere.

25 MR. PRETTYMAN: Well, don't we have to be

1 practical about this, Your Honor, and --

2 QUESTION: I'm trying to be.

3 MR. PRETTYMAN: -- try to make sense out of what
4 Congress did. They obviously intended something by this
5 statute, and I think what they intended was that whatever
6 you normally do for -- to solicit orders is what is
7 covered. And what salesmen do not ordinarily do is not
8 cover it, absent a de minimis exception.

9 QUESTION: Well, that would make me think that
10 maybe carrying your samples around in the taxicab, yes, is
11 part of solicitation, but I don't know why replacing stale
12 gum is.

13 MR. PRETTYMAN: Well, I can only tell you that
14 the evidence in this case, Your Honor, is that there is
15 nothing more inextricably bound up in a salesman's mind
16 and in common usage and practice than replacing stale gum.
17 Because you're not -- look, if you go to a retail store,
18 and you're selling \$10 worth of gum, that's not going to
19 do anything for you. But if he's a regular --

20 QUESTION: May I interrupt you right there?

21 MR. PRETTYMAN: Certainly.

22 QUESTION: I take it a regular practice of
23 delivering gum by the salesman would not constitute
24 solicitation. And I would -- the problem I have with your
25 example is I wouldn't -- it would fit perfectly if he took

1 away the stale gum and then said I'll give you a free
2 order and have the wholesaler ship it into you. So
3 that -- but he is doing the delivering himself, on a
4 regular basis, of a portion of the inventory sold by the
5 retailer. And that's the question that troubles me the
6 most.

7 MR. PRETTYMAN: Well, Your Honor, I will submit
8 to you that it is not delivery, that's -- that it's an
9 exchange. And what the statute contemplates is a delivery
10 order sent for approval outside the State. And that's not
11 this. That order has been sent from outside the State.
12 It's in the store. That has been completed.

13 QUESTION: No, what's in the store is the gum
14 that's being exchanged. The stuff he's delivered hasn't
15 been ordered. Do you -- it would be -- see, what I'm
16 saying is it would be a quite different case if the
17 replacement gum were shipped by the wholesaler -- free.
18 But he just takes away the old. And taking away the old
19 gum, no problem. But delivering the new gum, that's what
20 troubles me.

21 MR. PRETTYMAN: Well, that's funny. I don't
22 look at it that way because I don't think that's what the
23 statute is talking about when it means delivery. I think
24 this is a simple exchange for gum which has been
25 delivered, and he's going to get further deliveries in the

1 future. And all he's doing is he's taking a gum which is
2 really no longer what the man bargained for, what he paid
3 for, and just saying, we'll give you what you originally
4 paid for and what was originally delivered to you.

5 If there are no further questions, we would
6 strongly urge that the Wisconsin Supreme Court, which as I
7 think Justice Blackmun pointed out, was an unanimous view,
8 and which ordinarily you would not expect from the taxing
9 State, be affirmed in this case.

10 Thank you.

11 QUESTION: Thank you, Mr. Prettyman.

12 Mr. Creeron, you have 2 minutes remaining.

13 REBUTTAL ARGUMENT OF F. THOMAS CREERON

14 ON BEHALF OF THE PETITIONER

15 MR. CREERON: On the de minimis exemption, the
16 word "only" is what gives the statute its character
17 protecting small business. If you make \$600 of sales, and
18 you say that's de minimis, a small business who comes into
19 the State and makes that same \$600 of sales, and it's
20 their total sales, loses out under the statute. That's
21 totally at odds with the statutory purpose of protecting
22 small business.

23 The de minimis exemption also hasn't been
24 defined in any way --

25 QUESTION: I don't know if I understand that

1 argument. Because a small business could make de minimis
2 mistakes, too, and be protected. I mean, a small business
3 isn't one that has only \$600 of sales. That can have a
4 couple hundred thousand and still be a small business.

5 MR. CREERON: Well, even if --

6 QUESTION: What I'm saying is if there's a de
7 minimis exception, the small business will get the benefit
8 of it as much as the big business.

9 MR. CREERON: But how do you determine what the
10 de minimis exemption is? I mean, they have no definition
11 --

12 QUESTION: Well, that's another problem. But I
13 just don't buy your argument that it's loaded one way or
14 another based on the size of the company. At least I
15 don't understand it on that basis.

16 MR. CREERON: But I mean, a small business
17 couldn't claim a de minimis exemption if all its \$600 of
18 sales involve direct delivery. You know I -- it seems to
19 me that that removes the character of the statute of
20 protecting small business.

21 Also, the statute was designed to protect those
22 corporations that couldn't afford attorneys and
23 accountants to examine the tax laws of other States. I
24 think there's a certain irony in this case, if you just
25 look at the front of Wrigley's brief, that they're

1 claiming the benefit of the statute in light of the great
2 number of able counsel that they're able to employ.

3 QUESTION: Just because you're such a worthy
4 opponent.

5 (Laughter.)

6 MR. CREERON: Thank you very much.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
8 Creeron.

9 The case is submitted.

10 (Whereupon, at 1:57 p.m, the case in the
11 above-entitled matter was submitted.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 91-119 - WISCONSIN DEPARTMENT OF REVENUE, Petitioner V.
WILLIAM WRIGLEY, JR., CO.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sanders

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

*92 JAN 24 P 3:22