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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-1005, United States versus Santos.

Mr. Roberts.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

The Seventh Circuit has seriously misconstrued the Federal money laundering statute by interpreting the term "proceeds" to mean profits. The statute prohibits the laundering of all the gross receipts of a crime, not just its profits. The primary meaning of "proceeds" is gross receipts, and the statutory context makes clear that's the meaning Congress intended here. The statute is structured to prevent criminals from using the fruits of their crimes to promote or to conceal their illegal activities. But a profits definition of "proceeds" would constrict the statute in ways that can't be squared with that statutory objective.

Because the word "proceeds" appears in the introductory section of the statute, those kinds of restrictions would apply to both concealment and promotion cases.

1 For example, the statute wouldn't cover
2 expense payments that are structured to conceal the
3 unlawful nature and source of the funds involved. That
4 means that if an illegal gambling operator recorded the
5 compensation that he paid his collectors as salary
6 payments by a legitimate business that he owned, that
7 that would not be covered under the statute.

8 JUSTICE SCALIA: Well, I mean -- so what?

9 MR. ROBERTS: Well, Congress was trying --

10 JUSTICE SCALIA: Is there some rule up there
11 that says every criminal statute has to cover as much as
12 possible?

13 MR. ROBERTS: No, Your Honor. That's not
14 what we're arguing. What we're arguing is that there is
15 no reason that Congress wouldn't have covered these
16 transactions and that they implicate the objectives of
17 the statute as revealed by its text, just as much as the
18 transactions that are clearly covered.

19 JUSTICE SCALIA: I think it -- I think it
20 much more remarkable than that, more extraordinary than
21 that, that Congress would want to make all -- all
22 betting operations like this a violation automatically
23 of two criminal statutes.

24 MR. ROBERTS: Well, Your Honor --

25 JUSTICE SCALIA: I find that sort of, you

1 know, very strange.

2 MR. ROBERTS: -- it is certainly true that
3 illegal gambling and money laundering are frequently
4 going to occur together, but that isn't a cause for
5 concern. It just reflects the fact that certain
6 businesses, certain illegal businesses like gambling
7 operations, like drug dealing, frequently generate
8 large amounts of cash and they need to launder that
9 cash in order to survive and to prosper.

10 JUSTICE GINSBURG: It is hard to see this --
11 that, just in the sense of laundering, nothing is being
12 concealed. They're not -- the money that's being paid
13 to the runners and the collectors, it is an ordinary and
14 necessary expense of the illegal business.

15 So I think Justice Scalia was emphasizing
16 that this is, for the very same conduct two discrete
17 statutes, one with much heavier penalties. That makes
18 it odd, too, that the basic gambling statute has a lower
19 penalty than this money laundering statute, and yet it's
20 the same conduct that's violating both.

21 MR. ROBERTS: Well, it's not the same
22 conduct in that the conduct here, the paying the winners
23 and paying the collectors is not a required element of
24 the gambling offense.

25 JUSTICE SCALIA: Oh well, I mean -- come on.

1 Nobody -- nobody runs a gambling operation without
2 paying off the winners. It's not going to last very
3 long.

4 MR. ROBERTS: It's true --

5 JUSTICE SCALIA: To make the paying off of
6 the winners a separate crime from running the gambling
7 operation seems to me quite extraordinary.

8 MR. ROBERTS: It -- it -- it's true, Your
9 Honor, that they're not going to last very long.
10 They're not going to survive. They're not going to
11 grow. That's because they need to commit money
12 laundering in different ways to do that.

13 JUSTICE ALITO: Even if --

14 JUSTICE KENNEDY: Can you tell me what
15 happens if there's a -- two bank robbers, the one's in
16 the getaway car; the other goes in to the bank
17 teller, and the robber that goes into the bank gets
18 \$1,000 and he comes out and gives \$500 to the getaway
19 guy. Is that a violation of the statute?

20 MR. ROBERTS: That is, if the -- if the
21 payment would promote the continuing -- if they've got a
22 continuing robbery operation and by paying him he's
23 going to say -- he's saying, you know, keep on continuing
24 in the operation and let's expand it further. Yes, that
25 would -- that would --

1 JUSTICE SOUTER: Well, in your theory,
2 wouldn't it -- I mean, the employee who gets paid shows
3 up for work the next morning; and so, of course, under
4 your theory it would be promotion.

5 MR. ROBERTS: Your Honor, your question and
6 a lot of the questions I'm getting, I think express
7 concern about treating these transactions as promotion
8 under the statute. But the question --

9 JUSTICE SOUTER: I would have the same
10 concern if we were dealing with concealment.

11 MR. ROBERTS: Well I don't --

12 JUSTICE SOUTER: If the robbery takes place
13 in a dark alley, is that automatically concealment?

14 MR. ROBERTS: No, because what needs to be
15 concealed, what there needs to be is a financial
16 transaction that's designed, the transaction itself, to
17 conceal the nature and source of the proceeds.

18 JUSTICE SOUTER: That's going into the alley
19 instead of doing it out on the --

20 MR. ROBERTS: I don't think that doing a
21 robbery in the alley would be a financial transaction --
22 would be designing a financial transaction to conceal
23 the unlawful nature and source of the proceeds.

24 But if I can give you an example of --

25 JUSTICE ALITO: Mr. Roberts, isn't it true

1 that the problems that are being highlighted are
2 problems that result from expansive interpretations of
3 other concepts that are not before us here, expansive
4 interpretation of promotion, expansive interpretation of
5 concealment?

6 The Seventh Circuit, in the first appeal in
7 this case, interpreted promotion very broadly. And then,
8 I guess it felt that it had boxed itself in and that's
9 what led to this interpretation of proceeds. But if you
10 interpret those other concepts more narrowly, you don't
11 have the same kind of overlap.

12 MR. ROBERTS: I agree with that, Your Honor.
13 I was going to try to say to Justice Souter's question
14 before that if you have concerns that these kind of
15 expense payments should not be treated as promotional
16 money laundering, the way to address those is not by
17 adopting a profit construction of "proceeds", because that
18 would do tremendous violence to the statute in other
19 ways.

20 And I do think that there are --

21 JUSTICE GINSBURG: What about the
22 qualification that Judge Easterbrook made that he said,
23 at least where the crime is a business-like operation?
24 He gave the example of gambling, he gave the example of
25 selling contraband.

1 And it seems to me that he was narrowing his
2 definition of "proceeds" to cases where the crime is not
3 robbery or a one-time event, but a business-like
4 operation.

5 MR. ROBERTS: Well, I think it's difficult
6 to interpret the proceeds, the term "proceeds," to mean
7 something different for business operations than for
8 other crimes because it's the same word. But even so,
9 Your Honor, there are other ways --

10 CHIEF JUSTICE ROBERTS: Why don't you
11 continue. I'm sorry. I didn't know you weren't done.

12 MR. ROBERTS: Okay. I'm sorry.

13 Even so, there are other ways in which a
14 profits definition just makes no sense under this
15 statute, besides the numerous concealment transactions
16 that would be excluded that Congress would have no
17 reason not to cover. It also would make no sense as
18 applied to professional money launderers. Those are
19 people who are hiding money for criminals as a matter of
20 their business. Because they wouldn't be guilty of
21 money laundering, even if they knew that they were
22 concealing money that was generated by a Federal felony,
23 unless they also knew that the money was profits.

24 CHIEF JUSTICE ROBERTS: I thought your
25 answer to the line of questioning that we've -- having

1 is that the problem would still be there, even if you
2 limited this statute to profits. You take the two bank
3 robbers in Justice Kennedy's hypothetical, the one that
4 robs the bank, the other in the getaway car. If before
5 the robber gave the money to the person in the getaway
6 car, he said, now, you know, I'm keeping \$100 because I
7 had to buy the gun and that was \$100, so you only get
8 \$400, so it's only the profits that they're splitting,
9 you'd have the same problem, wouldn't you?

10 MR. ROBERTS: That's right. That's another
11 point, Your Honor, that a profits definition itself
12 isn't going to solve the problem of where the underlying
13 crime and the money laundering --

14 JUSTICE SCALIA: It will solve a lot them.
15 And unless you're willing to come in and say, yes, do it
16 to us, give us a narrower definition of concealment and
17 a narrower definition of what's a transaction, but
18 you're not willing to do that. You're going to stretch
19 that as broadly as you can.

20 MR. ROBERTS: It's not going to -- it's
21 not -- first of all, this case doesn't present the
22 interpretation of promotion and the Court would be free
23 to address that in --

24 JUSTICE STEVENS: -- the case doesn't present
25 it. Maybe the question presented doesn't present it --

1 the case doesn't present it.

2 MR. ROBERTS: Yes.

3 JUSTICE STEVENS: -- but the facts of
4 the case do present it. I mean, it seems to me it's
5 theoretically possible we could agree with you on the
6 profits issue, but nevertheless say this doesn't fit
7 the promotion.

8 MR. ROBERTS: You certainly could, Your
9 Honor. But that would not be an alternative ground that
10 would be appropriate for you to rule on in this case,
11 because that issue was raised on direct appeal. It was
12 decided against Respondents by the --

13 JUSTICE STEVENS: I understand all that, but
14 we can still do it if it's perfectly obvious that that's
15 the right way to dispose of the case.

16 MR. ROBERTS: You can obviously address any
17 issue that you want to, Your Honor. But the ordinary
18 rule is that issues that have been decided on direct
19 review shouldn't be relitigated on collateral attack.
20 The issue wasn't addressed by either of the courts below
21 in these collateral proceedings.

22 JUSTICE GINSBURG: Wouldn't it be --

23 MR. ROBERTS: We do submit that it was
24 resolved correctly in this case, because, as the Seventh
25 Circuit held and as all the other courts of appeals have

1 held about promotion, the payments to the winners and
2 the payments to the collectors encourage the continued
3 participation of the collectors and encourage the
4 increased participation by gamblers.

5 JUSTICE GINSBURG: Mr. Roberts, the Seventh
6 Circuit in this case was following a precedent in
7 another case and it thought that the defendant would
8 prevail under its theory.

9 If this Court should say that that theory,
10 that it's profits and not gross receipts that matter,
11 wouldn't it be appropriate for us, if we don't decide
12 the question ourselves, to remand and say, Seventh
13 Circuit, your precedent was wrong; but you could
14 consider a question that was not necessary for you to
15 reach because you had your precedent on the profits
16 issue?

17 MR. ROBERTS: You could do that, but the
18 question that I think that is concerning the Court was
19 resolved by the Seventh Circuit in this very case on
20 direct appeal. So on direct appeal, the argument was
21 made by Mr. Santos that these transactions can't count
22 as promotional money laundering because they're
23 essential transactions of the business and that they
24 don't promote the carrying on of the business, and the
25 court of appeals rejected those arguments.

1 JUSTICE SCALIA: You might well reject it if
2 you're going to have a narrow definition of "proceeds." I
3 mean, that rejection was connected with its acceptance
4 of a narrow definition of "proceeds." And if you're
5 asking us to obliterate the latter, I don't know why it
6 isn't reasonable to send it back to the Seventh Circuit
7 and say, well, you still said the same thing if you came
8 out differently on the "proceeds" question.

9 MR. ROBERTS: Well, we certainly would
10 prefer that you did that than that you interpreted
11 proceeds to mean profits because of the violence that it
12 would do to the remainder of the statute, Your Honor.

13 I was talking about professional money
14 launderers before and how they wouldn't be guilty of
15 money laundering if they were concealing money that they
16 knew that was generated by a crime. And Congress --
17 there's no reason that Congress would have considered
18 those professional money launderers to be less culpable
19 merely because they might be laundering only illicit
20 receipts.

21 And it would be very difficult for the
22 government to prove that professional money launderers
23 knew that they were laundering profits because they
24 haven't participated in the predicate crime.

25 JUSTICE BREYER: I've got that point, but

1 what is your suggestion as to how to deal with what is
2 underlying disturbing me and it seems like a lot of
3 others; if prima facie Congress did not intend that you
4 launder money where the activity is an essential part of
5 the underlying crime itself. And there are three ways
6 of dealing with that:

7 One is this gross receipts method, which has
8 the defects you mentioned.

9 The second is a definition of "promotion"
10 which says when you promote a crime that's different
11 from engaging in the crime.

12 And the third is sentencing; because it's a
13 real offense sentencing method and where what you've
14 done is nothing more than the underlying crime, the
15 sentence should be nothing more than the underlying
16 crime. I see three ways to get to the same problem, and
17 you're asking us to decide them piecemeal, yet they're
18 related. What do I do?

19 MR. ROBERTS: Well, I think you decide the
20 question presented here and you decide that "proceeds"
21 means that -- that "proceeds" means gross receipts,
22 because that's the only meaning that makes sense with
23 the statute.

24 But the sentencing point you make is a very,
25 very good one, Your Honor. And the fact is that the

1 Sentencing Guidelines were changed in 2001 to align the
2 punishment for money laundering when people participate
3 in the underlying crime much more with the punishment
4 level for the underlying crime.

5 And -- you know, in addition, as we know,
6 the Sentencing Guidelines are advisory, and so courts
7 could certainly take into account concern about
8 overlap --

9 JUSTICE BREYER: But still your answer
10 leaves me -- and I have no answer to this; I want yours.
11 I want you to see that I'm in -- at risk here as a judge
12 of getting whipsawed, that I first decide this case for
13 you; and the next case, all kinds of arguments appear
14 that I hadn't thought of; and then the third case,
15 again. But if I could have them somehow together, I
16 could look at the least evil way or the most efficient
17 way of achieving the congressional objective.

18 MR. ROBERTS: Well, I think that you can't
19 have all of them together, Your Honor, unfortunately.
20 But I do think that we would say that out of the three
21 that you raised, the best way to deal with concerns
22 about this would be in the sentencing context.

23 JUSTICE SCALIA: I find that extraordinary.
24 You really come in and say yes, two crimes, assume that
25 Congress meant ordinary gambling crime to carry with it

1 this other extraordinarily high penalty for the same
2 activity that involves the gambling, but don't worry
3 about it, we'll even it out in the sentencing.

4 I mean -- that's no way to run a railroad.

5 MR. ROBERTS: It's not -- Your Honor, it's
6 just not exactly the same activity, because people can
7 commit gambling without commit money laundering. They
8 can be guilt of illegal gambling without being guilty of
9 money laundering --

10 JUSTICE SCALIA: Straighten that out in the
11 definition of the crime, rather than in the --

12 MR. ROBERTS: But they can be -- even under
13 this definition, Your Honor. In this very case there
14 were restaurant and tavern owners that permitted the
15 gambling bets to be taken on their premises because it
16 increased their -- the patronage of their businesses.
17 And they were convicted of participating in illegal
18 gambling operations. They didn't commit money
19 laundering, because they didn't engage in a financial
20 transaction that's not an element of the gambling
21 offense, that involves the proceeds of the offense, and
22 that's intended either to conceal the proceeds --

23 JUSTICE STEVENS: But it is important, is it
24 not, Mr. Roberts that the gambling offense is conducting
25 a gambling business, so it makes it -- it is not just

1 the gambling itself, it's conducting -- really a
2 similarity between the two.

3 MR. ROBERTS: It is -- but the statute
4 defines what the three -- the statute defines what the
5 three elements of the gambling business are, Your Honor.
6 That it's illegal -- gambling that's illegal under State
7 law, that involves 5 or more persons, that it has --
8 continues for more than 30 days or has more than \$2,000
9 in gross revenues in a day.

10 JUSTICE SCALIA: What continues? The
11 business has to continue. You are not engaging in a
12 gambling business if you're not paying off the winners.
13 That's fraud. That's not a good decent honest gambling
14 business.

15 (Laughter.)

16 MR. ROBERTS: The gambling business -- it
17 might be gambling and fraud, Your Honor. But the
18 gambling business can continue for more than 30 days
19 without having paid the winners if they had a lottery
20 every month, and it was at the end of the month -- they
21 hadn't paid the winners yet, it would have gone for the
22 30 days, in a 31-day month without -- without having
23 paid the winners.

24 JUSTICE KENNEDY: And -- if your definition
25 of "proceeds" is problematic, it is something like an

1 abstract question you're asking us to answer. If this
2 -- if we say well, we're not sure this is proceeds but
3 if it is "proceeds", it is defined as gross receipts.

4 That's an artificial context in which to
5 address the issue.

6 MR. ROBERTS: Yes. I think that what
7 they're asking you to do is to interpret -- and what the
8 Seventh Circuit has done, is to interpret proceeds in a
9 way that makes no sense for the statute in order to deal
10 with these concerns about promotion cases that can be
11 dealt with in the other ways that Justice Breyer raised.
12 And there are really four --

13 JUSTICE GINSBURG: Mr. Roberts, may I go back
14 to something you said about -- of the options that
15 Justice Breyer mentioned.

16 You said the way to handle it is in
17 sentencing.

18 Santos was sentenced to 60 months on the
19 gambling counts and 210 months on the laundering. You
20 said the statute has been changed. So what would be the
21 sentence under the statute as it now exists? And this
22 is vastly disproportionate. 60 months for gambling, and
23 210 for money laundering.

24 MR. ROBERTS: I'm sorry, Your Honor. I
25 probably should know the answer to what the precise

1 range would be under the Guidelines. Now, I don't. But
2 what I do know is before, the way the Guidelines worked
3 was that the base offense level for a money laundering
4 crime was not tied to the offense level for the
5 underlying offense. So it was set I think starting at
6 23 for promotional money laundering.

7 But what happened in 2001 is that the
8 Commission changed the rules so that when you -- when
9 the money laundering involves the person who
10 participated in the underlying offense and has also done
11 the money laundering, you start with the offense level
12 for the underlying offense and then you make some minor
13 increases depending upon the type and the --

14 JUSTICE BREYER: I have it in front of me
15 actually. I was looking at it. And it seems to me what
16 it assumes is that the underlying offense is different
17 from the money laundering. And do you have any
18 rationale at all as to why this individual, if it's true
19 that he did nothing more than engage in the underlying
20 offense, why should he receive one day more than 60
21 months?

22 MR. ROBERTS: Well, because he does engage
23 in something more than what he needs to do to be
24 punished for the underlying offense, and that conduct is
25 -- and that conduct is -- promotes ongoing crime or can

1 conceal ongoing crime in ways that are just what
2 Congress was getting at in the statute. And --

3 JUSTICE SCALIA: Because gambling under the
4 definition has the three elements that do not include
5 paying off the winners. That's what it all represents
6 --

7 MR. ROBERTS: Because -- well, that's one
8 thing, but the other thing is, Your Honor, if I could
9 talk about the ways that the proceeds definition just
10 doesn't make sense here. If these expense payments --
11 the expense payments for instance, the payments of the
12 salary that Mr. Santos made to Mr. Diaz -- it happens in
13 this very case, although we didn't prosecute it as
14 concealment money laundering -- that he recorded those
15 payments as salary payments by a printing business that
16 he owned.

17 And he's doing that to conceal the activity,
18 to enable it to keep going. And that's just what
19 Congress was trying to get in the statute. Wouldn't be
20 covered under a profits definition. If criminals
21 concealed the gross receipts temporarily until they pay
22 the expenses -- for instance, if a gambling operator
23 takes the money that -- his illicit receipts from the
24 gambling, and he puts it in the bank account of the
25 printing business. And then later he uses it to pay the

1 winning betters, he's doing that to hide it so the
2 gambling operation can keep going. That's what Congress
3 was trying to get at here. That wouldn't be covered.

4 That -- that evades detection just as much
5 as transactions that hide profit.

6 JUSTICE STEVENS: But you are saying it would
7 not be covered as money laundering, but nevertheless it
8 would be illegal and be punished as gambling.

9 MR. ROBERTS: Yes, it would, Your Honor.
10 But the conduct, the concealment conduct --

11 JUSTICE STEVENS: And everything they've
12 done here would be punished as gambling --

13 MR. ROBERTS: -- the concealment conduct is
14 additional conduct, and it is what Congress wanted to
15 get at here, and a profits definition would mean that it
16 is excluded from the statute.

17 And it would exclude the professional money
18 launderers too.

19 JUSTICE KENNEDY: Well, you see the problem
20 we have is we're not sure that it is within the statute.
21 So then you're asking us to say how to make the statute
22 work when we don't think the statute's applicable at
23 all.

24 MR. ROBERTS: Well, I guess if you don't
25 think that concealing expense payments should be

1 covered, that you don't think that concealing money that
2 is --

3 JUSTICE STEVENS: Can you imagine running an
4 illegal gambling business and advertising your expenses?
5 I mean, you are going to conceal these things, that's
6 part of what you do.

7 MR. ROBERTS: It's not a question of
8 advertising them, Your Honor. It's not a question of
9 advertising them, but it is a question of taking
10 additional conduct to conceal them.

11 JUSTICE STEVENS: But it's not additional
12 conduct. That's the point.

13 MR. ROBERTS: It is additional conduct. He
14 didn't need to record it on the books of the -- on the
15 books of his printing business.

16 JUSTICE SOUTER: What if he puts it in a tin
17 can and buries it in the garden? Is that additional
18 conduct?

19 JUSTICE SCALIA: Of course it is.

20 MR. ROBERTS: It's additional conduct, but
21 it's not designed to conceal the unlawful nature --

22 JUSTICE SOUTER: Why isn't it? Do you put
23 your salary in tin cans in the garden?

24 MR. ROBERTS: I might like to keep my money
25 in the cookie jar -- and it's perfectly legitimate

1 money, Your Honor -- because I don't want when someone
2 comes into my house to -- for them to steal the cash.

3 JUSTICE SOUTER: I just don't see how you
4 can make the distinction you're making, and therefore I
5 don't see how you can avoid Justice Stevens's problem.

6 MR. ROBERTS: If he takes the money, Your
7 Honor, and he structures his payments to his employees
8 by making them -- or to his suppliers, by making them in
9 \$9,000 increments in order to evade transaction
10 reporting requirements, that wouldn't be covered either
11 under this interpretation of the statute.

12 JUSTICE ALITO: Mr. Roberts, isn't it true
13 that the Seventh Circuit's interpretation of "proceeds"
14 doesn't really solve these problems except in the case
15 of an unprofitable business? In the case of a
16 profitable illegal enterprise, all of the same problems
17 exist.

18 MR. ROBERTS: I think that there are many
19 situations, as the Chief Justice pointed out, in which a
20 profits definition isn't going to be enough to solve it.
21 For instance, just a drug dealer accepts payment for the
22 drugs. If that money exceeds the cost of the business,
23 it would presumably be profits and without some other
24 requirement in the statute, it would count as money
25 laundering. And for instance, when street-level dealers

1 that are employed by a drug kingpin turn the receipts
2 over to the kingpin even after they take out their
3 share, let's say -- under a profits definition if those
4 receipts exceeded the costs of the business that would
5 also be covered as money laundering. So I think it's
6 very true that the profits definition isn't going to
7 solve all the problems as well.

8 That's a -- you know -- another point about
9 it.

10 It also means that what we have to prove
11 profits that that's going to be very difficult for us to
12 do even in cases that don't involve these expense
13 payments because criminals often don't keep accounting
14 records. They certainly don't keep records that are
15 accurate and complete and decipherable by law
16 enforcement. And Congress recognized the lack of hard
17 evidence of criminal profits, and for that reason
18 Congress provided for the forfeiture of proceeds rather
19 than profits in the RICO and drug forfeiture statutes.
20 And there's no reason to think that Congress took a
21 different approach here in the money laundering statute,
22 two years later, when it used the same term "proceeds."

23 There's also -- there's the issue of the
24 uncertainty that would be created by a profits
25 definition, because it would raise all these questions,

1 and there are no accounting rules to resolve them.

2 And even the court below acknowledged that
3 it's difficult to determine what is and isn't net
4 income, and that the line between paying expenses and
5 reinvesting that income is murky.

6 And I don't think the Court should lightly
7 assume that Congress intended a definition of an element
8 of the offense that's going to raise these numerous
9 issues about the scope of that essential element of the
10 offense. And the Court is going to have to resolve them
11 all without any guidance from Congress.

12 So if I could reserve the remainder of my
13 time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. ROBERTS: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Vare.

17 ORAL ARGUMENT OF TODD G. VARE

18 ON BEHALF OF THE RESPONDENTS

19 MR. VARE: Thank you, Mr. Chief Justice, and
20 may it please the Court:

21 Justice Ginsburg, you have suggested
22 correctly that the only conduct in this case was the
23 payment of ordinary and necessary expenses of the
24 business.

25 Justice Scalia, you correctly suggested that

1 paying off winners is necessary to every gambling
2 operation.

3 Justice Breyer, you have correctly suggested
4 that -- and stated that the money laundering statute is
5 intended to punish different conduct, different criminal
6 activity than the underlying criminal activity.

7 CHIEF JUSTICE ROBERTS: Didn't Justice Alito
8 correctly suggest that these merger problems would still
9 persist even under your definition of "proceeds"?

10 MR. VARE: I think that that is not
11 necessarily true. The merger problems would -- would
12 exist except for the "profits" definition, certainly on
13 the facts of these cases -- on this case.

14 On this case the only facts that were
15 presented by the Government -- and they have conceded
16 that they did not present any evidence of profits.

17 CHIEF JUSTICE ROBERTS: No, but I mean if
18 you have a "profits" definition and the enterprise has
19 profits, all of these problems we've been talking about
20 in terms of the merger, as I call it, between the money
21 laundering and the underlying offense would still be
22 there, right?

23 MR. VARE: Yes, Your Honor. There would.
24 There would. And, in fact, Justice Alito also correctly
25 suggested that the reason why the Scialabba panel

1 decided the "proceeds" definition is profits was because
2 of the expansive interpretation and application of the
3 other aspects of the statute, and that they were left
4 with essentially no choice.

5 JUSTICE SCALIA: So why are you urging us to
6 create two problems, to drag along all of the problems
7 that you object to with -- with interpreting proceeds to
8 include simply covering your expenses? You acknowledge
9 that the problems you point out would continue to exist
10 if we accept your definition.

11 On the other hand, I think you have to
12 acknowledge that accepting your definition creates other
13 problems of its own, such as the difficulty in every
14 case of showing that an illegal operation made a profit,
15 such as the difficulty of deciding what kind of criteria
16 you use for determining what are the -- what are the
17 ordinary and necessary expenses of a criminal
18 enterprise.

19 Why should we -- why should we choose to get
20 the worst of both worlds? And why isn't the proper way
21 to attack the difficulty to focus in on what constitutes
22 a transaction and what constitutes concealment --
23 something other than the "proceeds" definition?

24 MR. VARE: I think you're absolutely
25 correct, Justice Scalia. And, in fact, in our

1 opposition to the petition for cert in this case, we
2 made this very point as to why this was not the right
3 case to determine all of these issues, and particularly
4 the burdens that have been presented by the government.

5 JUSTICE KENNEDY: Did you argue at any point
6 that these were not proceeds?

7 MR. VARE: Yes, Your Honor, we did.
8 Justice Kennedy, in the briefing in the opposition to
9 cert and in our response brief, we have set forth
10 distinct arguments that there are not separate
11 transactions distinct and different from the underlying
12 criminal activity.

13 JUSTICE KENNEDY: Did you argue that in the
14 court of appeals?

15 MR. VARE: That was presented as -- that was
16 presented as part of the Febus decision as an argument
17 that those transactions did not constitute distinct and
18 separate transactions from gambling. That was presented
19 in the pro se petition and acknowledged by the
20 government in responding to the pro se petition below.

21 The government acknowledged that the
22 question in Febus, the question in Scialabba, the
23 question in this case on habeas are legally and
24 factually indistinguishable. And I think Justice
25 Stevens has suggested that all of this is inherent in

1 the question presented.

2 A fair -- it is fairly included because to
3 look at the statutory context of the word "proceeds" is
4 necessary for an intelligent resolution of the meaning
5 of that word as well as how it plays throughout the rest
6 of the statute.

7 JUSTICE BREYER: The question is can you
8 violate the statute by financial transactions which --
9 have you promoted the crime, when those transactions are
10 no more than part of the crime itself?

11 That's basically the question. And I think
12 Justice Kennedy is asking if, in fact, we wanted to
13 reach that question, is this a case in which we could do
14 it, through reargument or in some other way?

15 MR. VARE: I think that that is a question
16 that this Court could resolve on the facts of this case,
17 or in a different case --

18 JUSTICE BREYER: Was it raised in the
19 court below?

20 MR. VARE: It was -- it was raised in the
21 court below as -- as inherent in the -- well, it was
22 certainly raised in the Febus, in the direct appeal.

23 It is inherent in the 2255 petition filed
24 pro se by my client, Mr. Santos. It was acknowledged by
25 the government that these issues are not legally or

1 factually distinguishable.

2 And again, it is inherent in the question
3 that's presented. The money laundering statute requires
4 conducting a financial transaction involving the
5 proceeds of the specified unlawful activity with the
6 intent to promote the --

7 JUSTICE KENNEDY: Well, I think it is a
8 stretch so far as the question presented. The question
9 presented is very clear whether or not it is gross
10 receipts or net profits. That's what we're asked to
11 resolve.

12 JUSTICE GINSBURG: That's not your question
13 presented.

14 MR. VARE: Absolutely not, Justice Ginsburg.
15 It is not our question presented, but we do feel that,
16 even in answering that question, whether or not it is
17 net or gross does require looking at the term in
18 context. And -- and the context -- and we're not looking at a
19 different statute.

20 CHIEF JUSTICE ROBERTS: I didn't see that
21 you presented a separate question presented in your
22 opposition.

23 MR. VARE: We did, Your Honor.

24 CHIEF JUSTICE ROBERTS: Where is that?

25 MR. VARE: In the -- Mr. Chief Justice --

1 CHIEF JUSTICE ROBERTS: Not at page ii --
2 not at page I, which is --

3 MR. VARE: In Mr. Santos' brief. And the
4 question presented there was --

5 JUSTICE KENNEDY: It's not in the BIO.

6 CHIEF JUSTICE ROBERTS: Brief in opposition
7 --

8 MR. VARE: In the brief of the opposition --
9 the very first page, i.

10 CHIEF JUSTICE ROBERTS: Oh, but I am looking
11 at the orange one, not the red one. The orange one is
12 what we have before us when we decide whether or not to
13 grant certiorari. And there you don't have a different
14 question presented.

15 MR. VARE: No, we did not -- in the
16 opposition to the cert petition we did not present a
17 different question presented as a question presented.

18 But we did present the argument --
19 Mr. Santos did and Mr. Diaz did -- that there were no
20 separate transactions that promoted the carrying on of
21 the specified unlawful activity. Rather, all that the
22 government had presented in this case was merely
23 conducting the illegal gambling business.

24 CHIEF JUSTICE ROBERTS: If we adopt your
25 position, we will have to decide a question like, for

1 example, if the argument is I didn't have any profits
2 because I had to pay \$10,000 for a hit man to kill
3 somebody, we would have to have a judicial decision
4 that, yes, paying hit men is the ordinary and necessary
5 business expense in carrying out an illegal gambling
6 operation, right?

7 MR. VARE: I think, Mr. Chief Justice, in
8 any case you're going to have to look at what the
9 specified unlawful activity is in the context of a money
10 laundering prosecution, because that is part of the
11 context.

12 And so in this case you have to look at what
13 is the ordinary conduct of an illegal gambling business.
14 And I would suggest that paying off a hit man most
15 likely would not fall into that category. But,
16 certainly, as many of the Justices, including Justice
17 Scalia and Justice Stevens and others have suggested,
18 that when a gambling business pays off its winners, that
19 is inherent -- that is integral -- to conducting a
20 gambling business. It is not --

21 CHIEF JUSTICE ROBERTS: Let's take two
22 illegal gambling operations that are identical in every
23 way except that the one pays the runners, you know, \$200
24 a week. The other pays the runners \$500 a week. And
25 the one that pays \$500 doesn't make any profits because

1 he's paying too much to the runners.

2 The first one, the more successful
3 operation, you say, can be prosecuted for money
4 laundering because it has profits. The other one
5 doesn't. Incompetence is rewarded.

6 MR. VARE: No, Mr. Chief Justice. I would
7 say that neither one could be prosecuted for money
8 laundering because in both situations --

9 CHIEF JUSTICE ROBERTS: But the --

10 MR. VARE: -- when in both situations the
11 gambling operator is simply paying off ordinary business
12 expenses. Just the collectors who are part and parcel
13 of running the illegal gambling business, they're one of
14 the participants. And that's part of the illegal
15 gambling statute, is that you have to have five or more
16 participants.

17 CHIEF JUSTICE ROBERTS: Well, I'm focusing on
18 the question presented -- that was the only question
19 presented when we considered whether to grant certiorari
20 by either of the parties, and that focuses solely on the
21 question of whether "proceeds" is considered gross
22 revenues or profits.

23 MR. VARE: Well, Mr. Chief Justice, what I
24 -- what I believe is the answer to your question is --
25 is you cannot look at the term "proceeds" in isolation.

1 And Justice Breyer, you know, suggested that the reason
2 why we're even here today, arguing about what I believe
3 is just absurd and unwarranted results on the facts of
4 this case, is because the courts below -- and the
5 government has proposed expansive interpretations -- the
6 courts below have adopted, in some cases and not in
7 others, these expansive interpretations.

8 JUSTICE ALITO: But this doesn't --
9 "proceeds" must mean the same thing in every money
10 laundering case, doesn't it? And every money laundering
11 case is not based on a gambling business. There are
12 drug businesses and all sorts of other predicates.

13 MR. VARE: Well --

14 JUSTICE ALITO: Can it mean something
15 different in -- depending on the underlying illegal
16 activity?

17 MR. VARE: I think there is certainly a
18 suggestion, but that this Court itself has made recently
19 in the Duke Energy case, that a term can have multiple
20 meanings, multiple shades of meanings, and that will
21 depend upon the context. So you have to look at the
22 context and the specified unlawful activity is context.

23 Now, I'm not suggesting that we adopt a
24 definition of "proceeds" as net profits in one case for
25 one unlawful activity or gross profits for another

1 unlawful activity or gross receipts for another one.

2 But the problem that we have presented to us
3 today is due to the piecemeal construction and
4 application of this statute and --

5 JUSTICE SCALIA: Mr. Vare, you know, I'm --
6 I'm unwilling to decide the definition of transaction
7 question in the present case because, frankly, I think
8 that's a -- in itself, a very difficult question which
9 we haven't had adequately argued. For example, while I
10 believe, as I've indicated earlier, that paying off the
11 winners is -- is an essential part of a gambling
12 operation, I don't believe that paying off runners
13 necessarily is. You can have a gambling operation
14 without runners, can't you? You can --

15 MR. VARE: You could have --

16 JUSTICE SCALIA: You can -- you can view
17 that as something beyond the mere -- the mere gambling
18 crime. I don't -- I don't think you can view that
19 paying off the winners is beyond the gambling crime, but
20 I do think having a bunch of runners and paying off each
21 of them is not necessarily part of gambling.

22 MR. VARE: Well, you can have a gambling
23 business without runners per se.

24 JUSTICE SCALIA: Exactly.

25 MR. VARE: But you do need, Justice Scalia,

1 you do need five or more participants. And the courts
2 below have defined participants as -- as owners or
3 partners, bartenders, cocktail waitresses, doormen,
4 employees of the business.

5 And if those are qualifying participants to
6 even establish the -- the predicate for an illegal
7 gambling business, then those participants are most
8 likely going to get paid, and if they get paid, then
9 that is simply part of conducting the illegal gambling
10 business.

11 I think the fact -- I mean, the fact that
12 the runner in this case, the bet collector, Mr. Diaz, is
13 probably -- you know, illustrates best the unwarranted
14 result in this case. Mr. Diaz did nothing more in this
15 case than collect wages of about \$150 a month or a week,
16 something along those lines, for simply collecting
17 bets, and he was convicted of money laundering and
18 sentenced to 9 years in jail.

19 Mr. Santos, my client, all he did was pay
20 winners and pay those bet collectors to collect bets,
21 and he -- his sentence was nearly quadrupled.

22 CHIEF JUSTICE ROBERTS: So someone who
23 simply paid off whoever it is that ships in, you know, a
24 ton of heroin, you'd say is not guilty then? Same
25 thing. I mean, you're just paying off the people who

1 engage in the activities that are necessary for the
2 continuation and promotion of the illegal enterprise.

3 MR. VARE: Well, I -- I think in that case,
4 Mr. Chief Justice, I would -- I would suggest it might
5 be an incomplete hypothetical, because simply paying the
6 expenses of a crime or simply buying more drugs is not
7 in and of itself -- and I think the government has
8 conceded that in their opening -- that's not in and of
9 itself money laundering. There has to be a transaction
10 that is conducted with the intent to promote the
11 carrying on or separately a transaction that is designed
12 to conceal the legitimate or the illegitimate source of
13 -- of the funds received.

14 So simply receiving proceeds from an
15 unlawful activity is not enough. And that's clear on
16 the statutory language. You either have to have some
17 promotion element or some concealment element.

18 JUSTICE ALITO: Well, if we go back to the
19 question of the definition of "proceeds."

20 Isn't it very unlikely that Congress would
21 have wanted -- wanted to adopt the net income definition
22 in light of the legal issues and the problems of proof
23 that that would involve?

24 Let's take the example of an international
25 drug ring that has assets in a foreign country. They

1 may have crops. They may have processing plants,
2 warehouses, trucks, airplanes, et cetera. They ship
3 millions of dollars of drugs into the United States.
4 They get millions of dollars in gross revenue here every
5 year. They hire a professional money launderer to
6 launder the money here. Now, the Government wants to
7 prosecute the money -- the person they hired plus
8 members of the organization.

9 The person they hired may not know and may
10 not care whether the money that was being laundered was
11 profits or not. And how are you going to prove what --
12 whether this enterprise was a profitable enterprise or
13 not? They may have -- and they may have enormous gross
14 revenue, but they may have -- they may have enormous
15 expenses overseas. They may have bought a lot of
16 warehouses and equipment. They may have lost a lot of
17 things because they were raided by the government,
18 destroyed the factory, killed the plants.

19 It becomes an impossible situation, and why
20 would Congress ever have adopted a definition like that?

21 MR. VARE: Well, Justice Alito, I don't
22 think it's an impossible situation, number one, and I'll
23 get to that in a second. To address your first
24 question, could Congress have intended this to mean
25 profits knowing that the burdens were so difficult?

1 To answer that question, then you must look
2 at what else Congress intended, and there's no question
3 that Congress intended to punish different conduct than
4 the underlying criminal activity.

5 And then you have to look at what Congress
6 intended to get at when they wanted to fill the gap in
7 criminal law, when they wanted to punish crimes
8 that were not previously punished.

9 They focused on getting at ill-gotten gains
10 of criminal enterprises. They focused -- and our
11 briefs, you know, set forth the statements that are
12 replete through the debates on the floor, that the
13 Congress was focused on profits of criminal enterprises.

14 Congress was not focused on the unprofitable
15 criminal enterprise because --

16 JUSTICE ALITO: I'm sure that's true. They
17 wouldn't be that worried about the unprofitable criminal
18 enterprises because they wouldn't last very long. But
19 there's the -- there still is the problem of proof --

20 MR. VARE: Absolutely, Justice Alito.

21 JUSTICE ALITO: -- proving that it's
22 profitable.

23 MR. VARE: And the proof problem --

24 JUSTICE SCALIA: Not just proving that it's
25 profitable; proving that the person laundering it knew

1 that it was profits because that's part of the
2 definition of the crime, that scienter. And how can you
3 prove that the fellow knew that it was profits? He
4 would very rarely know whether it was or wasn't. So he
5 skips off scot-free of the laundering crime.

6 MR. VARE: Well, Justice Scalia, the intent
7 or the knowledge or the scienter requirement is going to
8 be present. It's going to be a burden on the government
9 to prove, no matter what definition of proceeds is.

10 But in terms of proving profits, the
11 government is able to prove profits in other criminal
12 financial transaction-type cases in a number of ways.
13 They're not limited to a particular accounting method.
14 They can choose the accounting method that they want.
15 They're not limited to looking at day after day after
16 day, week after week after week of financial records.
17 They can aggregate records that are selected from
18 particular points in time. And even in --

19 CHIEF JUSTICE ROBERTS: Well, how do they
20 know even what the fiscal year of these enterprises is?
21 I mean let's suppose you have some costs. They have to
22 buy the poppy field wherever, but, you know, over 3
23 years, they're going to make a lot of money. You're
24 saying you can't prosecute them in year 2?

25 MR. VARE: No, I'm not saying that at all,

1 Mr. Chief Justice, and I think my point would be the
2 government would not even need to look at a fiscal year
3 to prove profits. They would be able to look at a
4 period of time and through their extensive search and
5 seizure efforts --

6 CHIEF JUSTICE ROBERTS: My point is the
7 profits may not come in immediately, even though the
8 underlying activity is exactly the same.

9 MR. VARE: That may be the case. They may
10 have a difficult burden of proving profits in the early
11 stages, but most of these prosecutions practically occur
12 after a period of time.

13 JUSTICE SCALIA: And what -- what's the
14 total stage you look at? Suppose it's profitable one
15 month and not profitable the next month, and the loss
16 the second month more than undoes the profits of the
17 first month. Can you still prosecute them for the
18 profits in the first month?

19 MR. VARE: Certainly, based upon the profits
20 in the first month. They're not limited to that. I
21 mean --

22 JUSTICE SCALIA: One day they could pick
23 then, they have one good day. And they could --

24 MR. VARE: And they could prosecute on that one
25 good day if there are the transactions involved in the

1 profits.

2 JUSTICE KENNEDY: What about the bank robber
3 hypo -- there's just one bank robbery. They spend \$500 to
4 each, to people for their airfare and car rental. They
5 rob the bank. They only get \$800. They lost \$200.
6 They then give the \$800 to the attorney to please -- or
7 to somebody to please launder the money. No profits?

8 MR. VARE: I don't think that that --

9 JUSTICE KENNEDY: That would be a very silly
10 result.

11 MR. VARE: Well, I -- I don't think that,
12 under that hypothetical, even the government would
13 charge those criminals with money laundering.

14 JUSTICE KENNEDY: No. They gave it to a
15 third person to conceal it, \$800.

16 MR. VARE: Well, if there's --

17 JUSTICE KENNEDY: 8,000, 8 million.

18 MR. VARE: Simply giving money to somebody
19 else does not meet the concealment and disguise
20 element. I mean, there has to be an effort made to
21 disguise the source of the income as being illegitimate.

22 JUSTICE KENNEDY: Assume that it's proceeds.
23 Assume that they have a money launderer. Under your
24 definition there's still no violation.

25 MR. VARE: I suppose I would say no. And

1 I'm going to explain why I have to say no, and I'm going
2 to give you a mea culpa. The profits construction is
3 not perfect. There's no question about that.

4 But we're here today because it's the only
5 way to resolve the case that came up to this Court based
6 upon the expansive interpretations of the rest of the
7 money laundering statute.

8 CHIEF JUSTICE ROBERTS: Well that's -- but
9 we don't try to solve every case. We look at particular
10 questions presented. And maybe there's going to be
11 another case coming up in which the issue of how broadly
12 you should construe promotion is, or whether you should
13 have a different definition when the offenses are merged
14 or not. And we'll confront that when it gets here.

15 It seems to me that your argument is --
16 maybe your best argument, but your argument, anyway -- is
17 let's avoid this question because of these other
18 mistakes that have been made, mistakes which are not
19 presented to us on the question on which we granted
20 cert.

21 MR. VARE: I think, Mr. Chief Justice, I'm
22 not asking this Court to avoid any question. What I am
23 saying is that there is a profits construction that if
24 you apply the traditional rules of statutory
25 construction, if you look at the text -- the word

1 itself, "proceeds," does not have a single plain meaning
2 as gross receipts. It is ambiguous. And it has
3 multiple shades of meaning depending upon the context.

4 If you look at the term "proceeds" in
5 context then, then it will depend upon how one is using
6 it. If I were selling a house, and I asked somebody on
7 the street what would be my proceeds from the sale of my
8 house, in that -- and only in that context, some would
9 say it is the gross. Some would say it is the net.
10 Some would say it depends.

11 Well, it depends upon what? It depends upon
12 context. That is included in the question presented.

13 JUSTICE GINSBURG: Well, let's take this
14 context.

15 There is, if you are going to go with
16 profits, a question of what expenses? That's one of the
17 difficulties of working with a net proceeds, because we
18 don't know what are the expenses that you would deduct,
19 and the hit man was given as one example. You would
20 say, no, not that one. But, the salaries to the runners,
21 yes.

22 To figure out what would count to come up
23 with a net figure is the least difficult, is it not?

24 MR. VARE: Justice Ginsburg, I think that it
25 is slightly more difficult in the case the government

1 has now, which is really no difficulty at all. I think
2 that it would depend upon the unlawful activity, the
3 specified unlawful activity, what would be the ordinary
4 expenses associated with doing that crime.

5 And lower courts are well equipped and
6 juries are well equipped to hear evidence, direct and
7 circumstantial, and make inferences and decide those
8 issues.

9 JUSTICE SCALIA: Why does it have to be the
10 ordinary expense of that? I mean, let's assume the
11 charge is murder, and I happen to use a hit man for the
12 murder. That's proven and whatnot.

13 Why -- you mean, that isn't part of the
14 murder conviction, simply because I could have done it
15 without a hit man, I could have done it myself?

16 MR. VARE: No, I don't think so at all,
17 Justice Scalia.

18 JUSTICE SCALIA: You think paying the hit
19 man would be part of the murder transaction?

20 MR. VARE: Absolutely. But I don't think
21 that that necessarily parlays into whether or not it
22 is money laundering or not.

23 JUSTICE SCALIA: No, I understand.

24 MR. VARE: If, for example, the murderer
25 paid the hit man with money to kill somebody and then

1 paid -- you know, used proceeds from the insurance
2 premium that somebody might have been his wife or her
3 husband, and used the proceeds to pay off the money --
4 the hit man for the next crime or to reward him or
5 something else, to promote the carrying on of the
6 business or used the insurance proceeds to conceal
7 where they came from, then I think you could create
8 a hypothetical situation of money laundering.

9 CHIEF JUSTICE ROBERTS: I thought it would
10 depend on whether or not the insurance proceeds exceeded
11 how much he had to pay the hit man, right? Let's say
12 he's not doing it to get the insurance money. It just
13 so happens he had a \$50,000 policy on the victim, and
14 he had to pay \$100,000 --

15 JUSTICE SCALIA: He wanted to kill his wife,
16 right?

17 CHIEF JUSTICE ROBERTS: Yes. He just wanted
18 to commit the murder, not get the money. And so he pays
19 the hit man \$100,000, he gets the \$50,000, and then uses
20 it for all these other activities, you'd say no money
21 laundering there, because no profits?

22 MR. VARE: If we assume the expansive
23 interpretations of a transaction promoting the
24 underlying crime that have been presented in this case
25 and then we apply the profits definition, that might not

1 be money laundering. But, the money laundering statute
2 is not designed to cure that evil. That evil is
3 punished and punished severely by the murder statute.
4 It is punished as the underlying crime.

5 And so in this case, Mr. Santos and
6 Mr. Diaz -- or Mr. Santos was punished up to the maximum
7 of five years for running an illegal gambling business.
8 He didn't do anything else other than run a gambling
9 business.

10 And so I think the point is at the end of
11 the day, there are certainly a lot of hypothetical
12 situations that suggest a profits construction might
13 pose some burdens, might not make sense. But if you're
14 going to look at the burdens on the government in terms
15 of construing the term "proceeds," then you also must
16 look at the consequences of accepting the gross receipts
17 construction. And I think at the outset, nearly every
18 justice up here suggested -- well, that turns every
19 illegal gambling business into a money laundering
20 violation.

21 The government has no answer to that. Under
22 their interpretation as applied today, then every
23 illegal gambling operator will be guilty of money
24 laundering.

25 CHIEF JUSTICE ROBERTS: I thought their

1 answer was the money laundering statute covers a whole
2 waterfront of activities besides illegal gambling. And
3 the question is, what did Congress intend when they
4 passed the money laundering statute?

5 And you're sort of -- this is kind of the
6 tail wagging the dog. The tail is, well, it presents
7 these problems when you're talking about gambling
8 operations, but there's a whole rest of the dog area
9 where it doesn't present a problem.

10 MR. VARE: Well, I think what the money
11 laundering statute was intended to do was punish
12 different conduct, separate and distinct from the
13 underlying crime. And that different conduct is
14 inherent in conducting a financial transaction with the
15 intent to promote the carrying on of the unlawful
16 activity.

17 I do not think that you can parse the
18 statutory language and only address the term "proceeds"
19 irrespective of its consequences.

20 In fact, I think the questions directed to
21 me as to the harsh consequences on the government
22 approving profits shows that you have to look at the
23 term "proceeds" in its context. In its context includes
24 not only the burdens on the one hand, but it certainly
25 includes the situation we have here, that every illegal

1 gambling business is automatic money laundering. And
2 that is not what money laundering statute was enacted,
3 it's not what it was written or intended to address.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr. Vare.

6 Mr. Roberts, you have four minutes
7 remaining.

8 REBUTTAL ARGUMENT OF MATTHEW D. ROBERTS

9 ON BEHALF OF THE PETITIONER

10 MR. ROBERTS: Thank you.

11 If I could first address the reasons why
12 this Court should not decide the separate transaction
13 issue itself in this case.

14 First of all, it's not the question
15 presented here which is limited to the meaning of the
16 statutory term "proceeds." Respondents didn't present
17 any alternative question presented in their briefs in
18 opposition. And, in fact, they don't present an
19 alternative question presented even in their briefs
20 on the merits. They're just using the concern about
21 merger as a reason to decide that "proceeds" means
22 profits.

23 The separate transaction issue was decided
24 against Respondents adversely on direct appeal in the
25 Febus case, as my brother on the other side

1 acknowledged. And those kinds of issues that are
2 decided adversely on direct appeal shouldn't be
3 relitigated.

4 The issue wasn't raised in the separate
5 transaction issue, it wasn't raised in the Section 2255
6 issues, and it wasn't addressed by the courts below in
7 these collateral proceedings.

8 At most, we say it should be left open for
9 another case that presents -- that presents the issue.
10 Beyond that, if this Court thought that something should
11 be left open for the court below to address, the court
12 below could address a range of possible ways to deal
13 with ensuring a separation, for example, Justice
14 Stevens's suggestion that an illegal gambling business
15 under the statute itself entails the payment of winners
16 and the payment of employees, although we don't think
17 that it does.

18 But a profits definition is not the way to
19 address concerns about overlap for the underlying
20 offense, because it makes no sense in the broader
21 context of the statute.

22 It would create significant uncertainty
23 about the scope of the statute because of the absence of
24 accounting rules. It would make proof very difficult as
25 a general matter because of the absence of those rules

1 and because criminals often don't keep accounting
2 records. It would exclude numerous concealment
3 transactions that Congress had no reason not to cover,
4 and it would cripple the government's ability to
5 prosecute professional money launderers, which are
6 really a significant part of the problem that Congress
7 was addressing.

8 If the Court has no further questions, we
9 would ask that the judgments of the court of appeals be
10 reversed.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

13 (Whereupon at 12:00 p.m., the case in the
14 above-entitled matter was submitted.)

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