No. 08-969

In The
Supreme Court of the United States

HEMI GROUP, LLC, and KAI GACHUPIN,
Petitioners,

v.

CITY OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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The City of New York's brief in opposition fails to confront the central issue presented by the divided court of appeals decision in this case: Whether government has standing under the Racketeer Influenced and Corrupt Organizations Act to seek recovery for non commercial injury. Unable to deny that a split in the circuits exists on this important issue, and ignoring this Court's interpretation of "business or property" under the Clayton Act (from which Congress adopted the term in the RICO statute), the City instead distorts the pertinent case law in an attempt to show that the Second Circuit panel's decision does not conflict with decisions in other circuits. The City does not contest that a uniform, national answer to this question is of vital importance, and instead merely argues that a writ of certiorari should not issue because of the City's desire to collect taxes (trebled under RICO) from parties who never owed the taxes to begin with.

I. The Decision Below Is In Conflict With Decisions In Other Circuits.

The Second Circuit's decision is in conflict with this Court's precedent, two other circuit courts, and district courts in an additional two circuits.[1] Respondent's

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[1] As noted in the petition, the Ninth and Sixth Circuit Courts of Appeal, and federal district courts in the third and fourth circuits have held state and local government do not have standing to bring non commercial claims, as did the Second Circuit in a case overruled by the instant decision. The Seventh and now the

primary distinction of the conflicting decisions in other circuits is the unfounded assertion that this split is somehow remedied because "the purported split of authority petitioners rely on essentially rests upon case law endorsing previous Second Circuit dicta." (Br. In Opp. at 12). Whether the Second Circuit's prior position that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO") standing does not exist for government recovery of non commercial damages is dicta (which petitioners dispute) simply has no bearing on the conceded split in the circuits on the issue. Indeed, to the extent the divided Second Circuit panel's decision to reverse an earlier panel's holding has any bearing on the existence of a split in the circuits, it is only because it confirms the conflict on the issue within the Second Circuit itself, and underscores the lack of clarity on the issue which has led to the split within the circuits. Given the potency of the RICO remedy, this split on the "business or property" issue warrants review of the Second Circuit's decision on writ of certiorari. *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998) ("[Civil RICO] is an unusually potent weapon – the litigation equivalent of a thermonuclear device").

Similarly, respondent's one sentence assertion, in passing, that a writ of certiorari should not issue because "the order is interlocutory" [Br. In Opp. at 18] ignores this Court's consistent practice of issuing writs of certiorari to consider such issues, even where the case below has been remanded by the circuit court or

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Second Circuit Courts of Appeal have ruled state and local government do have standing to bring such claims. (Petition at 4-8).

further proceedings are otherwise pending before the district court. *E.g., Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 128 S.Ct. 2733, 2751 (2008)(Ginsberg, J., concurring)(petition for writ of certiorari granted notwithstanding respondent's argument that issue appealed was interlocutory); *Scott v. Harris*, 550 U.S. 372, 376 (2007)(reversing Eleventh Circuit Court of Appeals decision affirming denial of summary judgment motion); *Hartman v. Moore*, 547 U.S. 250 (2006)(on writ of certiorari, reversing circuit court decision that remanded case to district court for further proceedings).

Indeed, if the City does not have standing, the district court does not have jurisdiction to hear the case, on remand or otherwise. As the issue goes directly to the jurisdiction of the federal courts, it should be decided now. *Warth v. Seldin,* 422 U.S. 490, 498-99 (1975)("In its constitutional dimension, standing imports justiciability . . . . [Standing] is the threshold question in every federal case, determining the power of the court to entertain the suit"); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)(writ of certiorari granted to consider circuit court reversal and remand of district court grant of motion to dismiss).

The two cases cited by respondent are not to the contrary. One dealt not with denial of a petition for writ of certiorari, but instead confirmed that denial of a petition for writ of certiorari does not preclude later review of the issue by this Court. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)("It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree

that is sought to be reviewed.") The second case involved the situation, unlike here, where additional factual development was necessary before this Court could address the issue. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967)(denying petition as not ripe where case was remanded to district court "to consider whether there had in fact been a contempt" and if so, whether it was of a magnitude to warrant a coercive fine).

If RICO does not provide standing to governments to pursue non commercial losses, this case is at an end. Not only is it proper for this Court to resolve the split in the circuits and in doing so clarify this important RICO issue, it is important to do so now as resolution is likely to terminate the proceedings below. There is nothing to be gained by postponing review of the court of appeal's decision on RICO standing until the district court addresses factual issues that do not impact the pure issue of law sought to be reviewed. To the contrary, postponing review would only exacerbate the adverse consequences of the decision both within the circuits and for the parties in this case.

II. Mail And Wire Fraud Standing Is Not At Issue In This Petition.

Recognizing the weakness in the divided Second Circuit panel's decision to reverse an earlier panel and allow government non commercial losses to qualify as damages to "business or property" for RICO standing, respondent turns to criminal mail and wire fraud prosecutions to argue that certiorari is not appropriate in this case. Tellingly, however, in claiming there is no split in the circuits on the "business or property"

standing issue, respondent ignores this Court's decision addressing the definition of the phrase in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972)(cited in petition at 6; ignored in response). In *Hawaii*, this Court ruled that the state of Hawaii lacked standing under the Clayton Act because the phrase "business or property" refers "to commercial interests or enterprises," and does not include loss of tax revenues. 405 U.S. at 264 ("When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act"). Unable to address this Court's specific holding in *Hawaii,* the City elected not to even cite the case in its response.

Instead, the City urges the court to turn to criminal mail and wire fraud prosecutions in which losses of taxes were treated as "property" for purposes of that federal criminal statute. Not only does the City's suggestion underscore the need for clarification by this Court of this important RICO standing issue, it ignores the source of the "business or property" language adopted by Congress in RICO. *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 977 (9th Cir. 2008)("the Supreme Court has interpreted the statutory provision that served as a model for § 1964(c) to exclude claims for damages to governments' non - proprietary interests"), *cert. denied,* 129 S.Ct. 458 (2008); *see Beck v. Prupis*, 529 U.S. 494, 501-02 (2000)("Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind" (internal quotations and citation omitted)). Moreover, respondent's request that this Court rely on

criminal mail and wire fraud jurisprudence ignores the Court's precedent on this very question. *Beck v. Prupis*, 529 U.S. 494, 501 n. 6 (2000)(rejecting suggestion that in civil RICO matter the Court look to criminal, rather than civil, principles to interpret the statute). The City's suggestion also confirms a critical flaw in the decision petitioners ask this Court to review. As noted by Judge Winter in his dissent, "this case is a further major expansion of mail fraud doctrine by allowing suits against defendants who owed no duty to provide information to the plaintiffs." *City of New York v. Smokes-Spirits.com*, 541 F.3d 425, 440, 460 (2d Cir. 2008)(Winter, J., dissenting).

III. The Decision Below Is Inconsistent With This Court's Precedent.

The issue of the City's standing to bring a RICO claim is clearly framed by the question presented in the petition. As the Second Circuit itself recognized, to have standing, the City must allege it has suffered a direct injury. *City of New York v. Smokes-Spirits.com*, 541 F.3d 425, 440 (2d Cir. 2008)(*citing Sedima v. Imrex Co.*, 473 U.S. 479, 496-97 (1985) for the proposition that causation is an element of standing). Respondent's assertion that the direct injury issue is not properly framed in the question presented by the petition (Br. In Opp. at 18) is without merit. See Br. In Opp. at 4 (recognizing that RICO standing requires both an injury to business or property and proximate causation of the injury "by reason of" the RICO violation).

As set forth in detail in the petition, because it has not alleged a direct injury as required by this Court's precedent, the City lacks standing, and this second

standing question provides additional grounds supporting issuance of a writ of certiorari in this case. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006)(indirect claims do not confer RICO standing); *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992)(RICO standing is determined by proximate causation). Compare Br. In Opp. at 2 ("the City is unable to collect use taxes" and "[o]ut-of-state cigarettes sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes"). The City cannot allege a direct injury because petitioners owed no duty to the City upon which a direct injury could be based. Br. In Opp. at 3 ("information provided by out-of-state cigarette sellers to *state* taxing authorities under the Jenkins Act provides *states* the information necessary to collect the payment of cigarette taxes directly from the purchasers" (emphasis added)).[2] The only injury the City has alleged (Br. In Opp. at 2) is that it "is unable to collect use taxes owed" by its citizens; an indirect injury at best.

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[2] The response contains a number of incorrect assertions, most of which do not impact the merits of the issue raised by the petition for writ of certiorari. However, petitioners note that the assertion (Br. In Opp. at 3-4) that "Petitioners have never disputed that they concealed sales or failed to file Jenkins Act reports" is simply untrue.

CONCLUSION

For these reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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