

08 969 JAN 27 2009

No.

~~OFFICE OF THE CLERK~~

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*

PETITION FOR WRIT OF CERTIORARI

RANDOLPH H. BARNHOUSE
Counsel of Record
LUEBBEN JOHNSON & BARNHOUSE LLP
7424 4TH STREET NW
LOS RANCHOS DE ALBUQUERQUE, NM 87107
(505) 842-6123 (TELEPHONE)
(505) 842-6124 (FACSIMILE)

Counsel for Petitioners

January 27, 2009

QUESTION PRESENTED

Whether city government meets the Racketeer Influenced and Corrupt Organizations Act standing requirement that a plaintiff be directly injured in its “business or property” by alleging non commercial injury resulting from non payment of taxes by non litigant third parties.

STATEMENT OF PARTIES

The case in which petitioners are parties in the district court is *City of New York v. Nexicon*, 03 civ. 383 (S.D.N.Y. filed Jan. 17, 2003). It is one of four consolidated cases that were before the Second Circuit Court of Appeals and included in the opinion petitioners ask this Court to review. Although the caption of the Second Circuit Court's opinion includes the parties to the original four lawsuits in the federal district court, most of those parties have, during the course of litigation, been dismissed from the proceedings. As noted by the Second Circuit Court of Appeals,¹ on appeal to the Second Circuit, the only remaining defendants to each of the consolidated cases were:

1. *City of New York v. Nexicon, Inc., et al.*, No. 03 civ. 383 (S.D.N.Y. filed Jan. 17, 2003), appeal docketed, No. 06-1695-cv (2d Cir. Apr. 7, 2006).

Plaintiff-Appellant: City of New York.

Defendants-Appellees: Nexicon, Inc., formerly known as Cyco.net, Inc., Richard A. Urrea, Daniel R. Urrea, Hemi Group, LLC, and Kai Gachupin.

2. *City of New York v. Smokes-Spirits.com, Inc., et al.*, No. 04 civ. 6616 (S.D.N.Y. filed Aug. 16, 2004), appeal docketed, No. 06-1665-cv (2d Cir. Apr. 6, 2006).

¹ *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 432 n. 3 (2d Cir. 2008) (App. A, 6a-7a).

Plaintiff-Appellant: City of New York.

Defendants-Appellees: Smokes-Spirits.com, Inc.
and Michael Klee.

3. *City of New York v. A.E. Sales, LLC, Herring*, doing business as Nccigarettes.com, et al., No. 03 civ. 7715 (S.D.N.Y. filed Sept. 30, 2003), *appeal docketed*, No. 06-1693-cv (2d Cir. Apr. 7, 2006).

Plaintiff-Appellant: City of New York.

Defendants-Appellees: Scott Herring, doing business as NCCigarettes.com, Jeff Reinhardt, Xfire Software LLC.

4. *City of New York v. ESmokes, Inc., Theresa Justice, doing business as eztobacco.com and Theresa Trivett, et al.*, No. 03 civ. 10091 (S.D.N.Y. filed Dec. 19, 2003), *appeal docketed*, No. 06-1694-cv (2d Cir. Apr. 7, 2006).

Plaintiff-Appellant: City of New York.

Defendants-Appellees: Theresa Justice, doing business as Eztobacco.com and Theresa Trivett.

RULE 29.6 STATEMENT

Petitioner Hemi Group, LLC has no parent company, and no public company has any ownership interest in it.

TABLE OF CONTENTS

QUESTION PRESENTED	i
STATEMENT OF PARTIES	ii
RULE 29.6 STATEMENT	iv
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	viii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Background Facts and Issues.	2
II. Decisions of the District Court.	3
III. Decision of the Second Circuit Court of Appeals.	3
REASONS FOR GRANTING THE PETITION ...	4
I. THE CIRCUITS ARE SPLIT.	4
A. The Second Circuit (In the Present Case) and the Seventh Circuit Courts of Appeal Have Held That State	

Government and its Subdivisions Have RICO Standing to Recover Loss of Tax Revenue as “Injury to Business or Property.”	5
B. The Ninth Circuit and Sixth Circuit Courts of Appeal, and District Courts in the Third and Fourth Circuits, Have Held That State Government and its Subdivisions Do Not Have RICO Standing to Recover non Commercial Losses as “Injury to Business or Property.”	6
1. The Circuit Courts of Appeal Decisions.	6
2. District Court Decisions in the Third and Fourth Circuits.	8
C. Failure to Collect Taxes Is Not an Injury to “Business or Property.”	8
II. THE SECOND CIRCUIT COURT OF APPEAL’S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT.	10
A. Supreme Court Precedent Limits RICO Standing To Directly Injured Parties.	10
B. The City Is Not a Directly Injured Party.	11
CONCLUSION	14

APPENDIX

Appendix A: Second Circuit Opinion, dated September 2, 2008	1a
Appendix B: District Court Opinion, dated March 15, 2006	70a
Appendix C: District Court Opinion, dated January 27, 2005	93a
Appendix D: Second Circuit Order, dated October 30, 2008	171a
Appendix E: Statutes	
18 U.S.C. § 1961	173a
18 U.S.C. § 1962	178a
18 U.S.C. § 1964	179a

TABLE OF AUTHORITIES

CASES

<i>Anza v. Ideal Steel Supply Corp.</i> , 547 U.S. 451 (2006)	10, 11, 12, 13, 14
<i>Bridge v. Phoenix Bond & Indem. Co.</i> , 553 U.S. ___, 128 S.Ct. 2131 (2008)	10
<i>Canyon County v. Syngenta Seeds, Inc.</i> , 519 F.3d 969 (9th Cir. 2008), <i>cert. denied</i> , 129 S.Ct. 458 (2008)	4, 6
<i>City of New York v. Cyco.net, Inc.</i> , 383 F. Supp. 2d 526 (S.D.N.Y. 2005)	1
<i>City of New York v. Nexicon, Inc.</i> , 2006 U.S. District LEXIS 10295 (S.D.N.Y. March 13, 2006)	1
<i>City of New York v. Smokes-Spirits.com, Inc.</i> , 541 F.3d 425 (2d Cir. 2008)	1, 5, 8, 9, 11, 12, 13
<i>Hawaii v. Standard Oil Co.</i> , 405 U.S. 251 (1972)	6
<i>Holmes v. Securities Investor Protection Corp.</i> , 503 U.S. 258 (1992)	10, 13, 14
<i>Illinois Dep't of Rev. v. Phillips</i> , 771 F.2d 312 (7th Cir. 1985)	5, 7, 8
<i>Michigan Dep't of Treasury v. Fawaz</i> , 653 F. Supp. 141 (E.D. Mich. 1986), <i>aff'd</i> , 848 F.2d 194 (6th Cir. 1988)	6, 7

<i>Sedima v. Imrex Co.</i> , 473 U.S. 479 (1985)	4
<i>Town of West Hartford v. Operation Rescue</i> , 915 F.2d 92 (2d Cir. 1990)	5, 8, 9
<i>Township of Marlboro v. Scannapieco</i> , 545 F. Supp. 2d 452 (D.N.J. 2008)	8
<i>West Virginia v. Moore</i> , 895 F. Supp. 864 (S.D. W.Va. 1995)	8

STATUTES

15 U.S.C. § 375, <i>et seq.</i>	3, 14
18 U.S.C. § 1961	2
18 U.S.C. § 1962	2
18 U.S.C. § 1964	2
18 U.S.C. § 1964(c)	4
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2101(c)	1

RULES

Sup. Ct. R. 13.1	1
Sup. Ct. R. 13.3	1

PETITION FOR A WRIT OF CERTIORARI

The Hemi Group, LLC and Kai Gachupin respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. A, 1a-69a) is reported at 541 F.3d 425. Petitioners' Motion for Rehearing En Banc was denied by the court of appeals on October 30, 2006 __ F.3d __ (App. D, 171a-172a). Petitioners' case below was one of four consolidated cases. The relevant U.S. District Court, Southern District of New York opinions are:

1. *City of New York v. Nexicon, Inc.*, (App. B, 70a-92a) which is unofficially reported at 2006 U.S. District LEXIS 10295 (S.D.N.Y. March 13, 2006); and
2. *City of New York v. Cyco.net, Inc.*, (App. C, 93a-170a) which is reported at 383 F. Supp. 2d 526 (S.D.N.Y. 2005).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit sought to be reviewed was entered on September 2, 2008, and the order denying the motion for rehearing en banc was entered on October 30, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3, because it is being filed within 90 days of the entry of the order denying rehearing en banc. This Court has

jurisdiction to review the judgment of the U.S. Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 18 U.S.C. § 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The relevant statutory provisions, 18 U.S.C. §§ 1961, 1962 and 1964, are reproduced at Appendix E, 173a-180a.

STATEMENT OF THE CASE

I. Background Facts and Issues.

The Hemi Group, LLC, and Kai Gachupin are two of eleven defendants named by the City of New York ("City") in a second amended complaint raising federal RICO claims and certain state law causes of action. Three of the defendants were unrelated companies that sold cigarettes on the Internet. The remaining defendants, individual natural persons, did not sell cigarettes on the internet, nor did the City specifically allege that they had done so. In three separate contemporaneous actions, the City sued other defendants making similar allegations. The federal district court consolidated the four cases.

To support its RICO claim, the City alleged that each defendant participated in a scheme to defraud New York City of tax revenues by concealing from New York State tax administrators internet sales of cigarettes to New York City residents, primarily by an

alleged failure to file Jenkins Act reports with the State of New York.²

II. Decisions of the District Court.

Following the filing of the City's first amended complaint, the district court denied motions to dismiss based on improper venue and personal jurisdiction, granted motions to dismiss for failure to state a claim under New York's General Business Law § 349 and common law fraud, and granted the defendants' motions to dismiss for failure to state a RICO claim, with leave to file a second amended complaint. The City filed a second amended complaint, which the district court also dismissed upon motion of the defendants.

III. Decision of the Second Circuit Court of Appeals.

The City appealed both district court orders which together dismissed the City's complaints in their entirety. In a 2-1 decision, the Second Circuit Court panel (Judges Straub, Sotomayor, and Winter) vacated and remanded in part with respect to the RICO claims, affirmed the dismissal of the state common law fraud claim, and certified to the New York Court of Appeals the remaining state law claims. Judge Winter dissented as to the civil RICO claims, reasoning that under controlling Supreme Court precedent, the City lacked standing to sue under RICO. He concurred in the disposition of the state law claims. In its decision,

² 15 U.S.C. § 375 et seq., Pub. L. No. 81-363, U.S. Code Congressional Service 894 (1949).

the Second Circuit Court of Appeals rejected an earlier Second Circuit Court of Appeals decision specifically holding that RICO's requirement of injury to business or property did not include non commercial losses to a subdivision of state government. The Second Circuit Court of Appeals denied petitioners' request to review the panel's decision en banc.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully submit that there are two reasons why this Court should grant their petition for writ of certiorari and review the Second Circuit Court of Appeal's decision. First, as the Second Circuit and other courts have recognized, there is a distinct split of opinion among the circuit courts of appeal as to whether state and local governments can use RICO in federal district courts to collect taxes and similar non commercial losses. Second, the ruling by the Second Circuit Court of Appeal's conflicts with this Court's precedent requiring a party to suffer a direct injury to have RICO standing.

I. THE CIRCUITS ARE SPLIT.

Standing to bring a civil RICO claim is specifically limited to "[a]ny person injured in his business or property" 18 U.S.C. § 1964(c) (App. E, 179a-180a); *Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985) ("the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property"); *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008) (same), *cert. denied*, 129 S.Ct. 458 (2008). In determining whether this standing requirement is met, there is an acknowledged split among the Circuits on whether losses suffered by

government acting in its sovereign capacity are injuries to “business or property.”

A. The Second Circuit (In the Present Case) and the Seventh Circuit Courts of Appeal Have Held That State Government and its Subdivisions Have RICO Standing to Recover Loss of Tax Revenue as “Injury to Business or Property.”

In the Second Circuit decision that petitioners ask this Court to review, the court specifically held that “lost taxes can constitute injury to ‘business or property’ for purposes of RICO.” *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 445 (2d Cir. 2008) (App. A at 34a). In doing so, the court expressly rejected the contrary proposition it had earlier adopted in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). *Id.* at 445 (App. A at 33a-34a).

The Seventh Circuit Court of Appeals reached a similar result in *Illinois Dep’t of Rev. v. Phillips*, 771 F.2d 312 (7th Cir. 1985) when it reversed a district court holding that, “RICO should not become a vehicle for federal jurisdiction and treble damages in states sales tax fraud cases.” *Id.* at 316 (quoting district court holding reversed on appeal). In doing so, the Seventh Circuit Court of Appeals stated: “Although we have doubts about the application of RICO to the facts of this case we cannot say that it does not come within the framework of the statute.” *Id.* at 317.

B. The Ninth Circuit and Sixth Circuit Courts of Appeal, and District Courts in the Third and Fourth Circuits, Have Held That State Government and its Subdivisions Do Not Have RICO Standing to Recover non Commercial Losses as “Injury to Business or Property.”

1. The Circuit Courts of Appeal Decisions.

In *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 458 (2008), the court held that a county government did not have RICO standing to recover for injuries it allegedly sustained “in its sovereign and/or quasi-sovereign capacities, and may not claim the costs as damages to its property for purposes of civil RICO standing.” 519 F.3d at 979. In so ruling, the Ninth Circuit Court of Appeals specifically relied on the Supreme Court decision in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). 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”).

In the Sixth Circuit, the district court in *Michigan Dep’t of Treasury v. Fawaz*, 653 F. Supp. 141 (E.D. Mich. 1986), *aff’d*, 848 F.2d 194 (6th Cir. 1988) held that the state’s treasury department was not a

“person” having standing to bring a civil RICO action against a state tax violator. In doing so, the court, “decline[d] to follow the Seventh Circuit’s apprehensive holding” in *Illinois Dep’t of Rev. v. Phillips. Michigan Dep’t of Treasury*, 653 F. Supp. at 143. The court instead held that this Court’s broad interpretation of RICO, “do[es] not stretch so far as to encompass a sovereign’s attempt to prosecute its own citizens in a federal forum for state sales tax violations.” 653 F. Supp. at 142-43. The Sixth Circuit Court of Appeals affirmed the district court in a decision not recommended for full text publication (1998 U.S. App LEXIS 6206 (6th Cir. Mich. May 19, 1988)). However, its reasoning confirms the split among the Circuits and therefore is included here. In its opinion, the Sixth Circuit Court of Appeals rejected the district court’s holding that the State of Michigan is not a “person” under RICO. Nevertheless, the appeals court affirmed the district court’s decision, noting that the state was “asking [the Court of Appeals] to designate the district courts as collection agencies for unpaid state taxes, presumably because [the state] can there pursue treble damages.” *Id.* at page *6. The Sixth Circuit Court of Appeals also rejected the Seventh Circuit Court of Appeal’s reasoning in *Illinois Dep’t of Rev. v. Phillips*, referencing as had the district court the Seventh Circuit Court’s “doubts” about the application of RICO in tax cases, and stating, “[b]ecause our ‘doubts’ have ripened into a conviction that RICO does not apply to the circumstances of this case, we are not persuaded to adopt the reasoning of that opinion.” *Id.* at page *7.

2. District Court Decisions in the Third and Fourth Circuits.

In the Third Circuit, the district court in *Township of Marlboro v. Scannapieco*, 545 F. Supp. 2d 452 (D. N.J. 2008), also quoting *Town of West Hartford v. Operation Rescue*, held that the Third Circuit's "concrete financial loss" requirement precluded a RICO claim by a governmental agency based on losses suffered when Township employees accepted bribes from the defendants. In doing so, the court concluded, "that Marlboro has failed to allege an injury to its business or property such that it may maintain a civil RICO cause of action under sections 1964(c)." 545 F. Supp. at 459.

In the Fourth Circuit, the district court in *West Virginia v. Moore*, 895 F. Supp. 864 (S.D. W.Va. 1995) dismissed the State of Virginia's RICO claim seeking to recover lost tax revenue. In doing so, the district court also rejected the Seventh Circuit Court of Appeal's reasoning in *Illinois Dep't of Rev. v. Phillips*, stating, "Even if it were determined that [the defendant] owed additional tax, the Court is not convinced that civil RICO is an appropriate method for the State to use in recouping that loss." 895 F. Supp. at 872.

C. Failure to Collect Taxes Is Not an Injury to "Business or Property."

The City's only claimed injury in this matter is alleged loss of tax revenues owed by non litigant third parties. *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 432-33 (2d Cir. 2008) (App. A at 7a-8a) ("Out-of-state cigarette sellers, however, are not

responsible for collecting or paying New York State and City sales taxes on cigarettes”). Thus, the City’s complaint is that the Hemi Group and other defendants made it more difficult for the City to carry out one of the City’s most basic functions – tax collection. The City’s claim is not sufficient under RICO because loss of tax revenue owed by non litigant third parties is not “damage to business or property” under RICO. See *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 104 (2d Cir. 1990). In *Town of West Hartford*, the Second Circuit Court of Appeals held that where a municipality sues under RICO, it must allege injury to its business or property in its capacity as a party to a commercial transaction. The *Town of West Hartford* court went on to confirm that “allegations that a municipality is seeking to vindicate its interest in the ‘general economy’ or in its ‘ability to carry out its functions’ do not state a claim under RICO.” *Id.* (citations omitted). Although the Second Circuit decision in *Town of West Hartford* repeatedly has been relied upon by other courts in rejecting RICO claims brought by state government and its subdivisions,³ in the present case the Second Circuit panel elected to reject the Court’s earlier holding in *Town of West Hartford* on this issue. 541 F.3d at 445 (App. A at 33a-34a).

Nevertheless, in the present case it is beyond dispute that the City of New York has not been injured in its capacity as a party to a commercial transaction. The City therefore has not, and cannot, allege any injury to its business or property necessary to support

³ See text at § I(B) above.

a RICO claim against the Hemi Group or Kai Gachupin.

II. THE SECOND CIRCUIT COURT OF APPEAL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT.

A. Supreme Court Precedent Limits RICO Standing To Directly Injured Parties.

Standing under RICO is determined by proximate causation, not actual "but for" causation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Proximate causation exists only where there is a direct relationship between the alleged injurious act and the claimed injury, indirect claims do not confer standing. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). This Court recently confirmed the direct injury requirement in *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. ___, 128 S.Ct. 2131 (2008). Although the primary issue addressed by this Court in *Bridge* was first party reliance, this Court nevertheless reaffirmed the direct injury requirement it had enunciated in *Holmes* and *Anza* noting that the *Bridge* plaintiffs suffered direct, immediate injury, and were in fact the only parties directly injured. 128 S.Ct. at 2144.

In *Anza*, the defendant failed to charge New York sales tax to its customers and filed fraudulent tax returns with the New York State Department of Taxation and Finance, thereby undercutting its competitor, the plaintiff Ideal Steel. This Court held, however, that Ideal Steel lacked standing under RICO:

The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result. ... (547 U.S. at 458) There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly. (547 U.S. at 460), When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. ... (547 U.S. at 461).

B. The City Is Not a Directly Injured Party.

Here, as in *Anza*, the only arguably direct victim was the state taxing authority. The majority decision attempts to distinguish *Anza* and its related cases by arguing variously that:

“Although the State may also seek to sue to vindicate the law, the City should not have to rely on the State to enforce the RICO laws, where the City’s injury in the form of lost taxes is no less direct than any comparable injury of the State.” (541 F.3d at 443) (App. A at 30a); “[T]here are no speculative steps in this chain of causation. When defendants fail to comply with the Jenkins Act, defendants deprive both the City and the State of information needed to collect taxes from the in-State and in-City cigarette purchasers” (541 F.3d at 443) (App. A at 30a); “[T]he predicate racketeering acts in this case are not Jenkins Act violations; rather, ... the predicate acts are wire and mail fraud

violations” (541 F.3d at 444) (App. A, at 31a-32a).

As Judge Winter’s dissent insightfully observes, however, these attempted distinctions make no difference. After noting that, “[t]here is, moreover, a Supreme Court decision in print,” (App. A., 66a) Judge Winter refers to that decision (*Anza v. Ideal Steel Supply Corp.*) stating:

“Appellees owe no taxes to the City. The tax evasion is by the purchasers of the tobacco products. Even with the Jenkins Act, which requires reporting only to state authorities, appellees have no duty to disclose anything to the City.” (App. A, 65a-66a)

“If anything, however, the plaintiff in *Anza* had a stronger case with respect to proximate causation than the plaintiff here. In *Anza*, the defendant was the tax evader and had thereby lowered its costs and gained a competitive advantage over the plaintiff. In the present case, the City lost tax revenue because appellees sold cigarettes to purchasers, but did not report these sales to the State, as required by the Jenkins Act; because of this failure to report, the State was unable to pass on reports of such sales to the City even if it had been inclined to do so; without reports from the State, the City was unable to collect sales taxes from purchasers; concurrently, the purchasers individually opted not to fulfill their tax obligations to the City’s taxing authorities. The City was at best an expectant gratuitous donee of information from the State, and the

suggestion that the City's harm is somehow less attenuated than the plaintiff's in *Anza* seems to me unsustainable." (App. A, 66a-67a)

(541 F.3d at 460) (App. A at 65a-67a). Judge Winter went on to take issue with the majority's misapplication of this Court's decision in *Holmes v. Securities Investor Protection Corp.* Id. at 461.

As noted by Judge Winter, the majority decision conflicts with the directness requirement set out by this Court in *Anza* and *Holmes*. The City's claim is indirect because it depends on at least two intermediate contingencies: 1) State government deciding to exceed its constitutional authority and disseminate proprietary Jenkins Act information in ways that were never permitted by Congress; followed by 2) complete collection of taxes owed the City from third party non litigants.⁴ The City's claims, which depend on these intermediate contingencies, are indirect. A locality cannot, by contracting with the State, make itself anything more than indirectly affected.

Moreover, there can be no mail and wire fraud "in the air;" both mail and wire fraud must be committed on some party. The only thing that makes the Petitioners' alleged actions arguably fraudulent is the nonfiling of Jenkins Act reports, which are owed, at

⁴ There are a number of good reasons for a State *not* to disseminate Jenkins Act reports (e.g., because it reads the Jenkins Act properly; because it respects Congress's exclusive authority over interstate commerce; because it respects the privacy of proprietary business records; or because it wants to avoid imposing undue burdens on interstate commerce).

most, to the *States* for collection of *State* taxes. 15 U.S.C. § 375, 376. Even if one assumes that the failure to file Jenkins Act reports constituted predicate acts of mail or wire fraud on the State, it does not constitute fraud on *localities*. The City has suffered no direct injury under RICO, and the Second Circuit Court of Appeals decision ruling otherwise improperly conflicts with the requirement for direct injury this Court set out in *Anza* and *Holmes*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

RANDOLPH H. BARNHOUSE
Luebben Johnson & Barnhouse LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (telephone)
(505) 842-6124 (facsimile)

Counsel for Petitioners