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

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Does State government and its subdivisions have standing under RICO because lost tax revenue may constitute an injury to "business or property" in accord with the statute and relevant authority?

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COUNTER-STATEMENT OF THE CASE

Respondent, the City of New York ("the City"), brought four civil actions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), against various defendant out-of-state cigarette retailers, including the instant petitioners, the Hemi Group and Kai Gachupin ("petitioners"). The City alleges that petitioners actively schemed to defraud the City of tax revenues through the sale of cigarettes to City residents over the Internet. By refusing to

report purchases by City residents as required under the Jenkins Act, *see* 15 U.S.C. § 375 *et seq.*, and advertising that concealment and representing the cigarettes as "tax-free," petitioners commit mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343. As a result, the City is unable to collect use taxes owed on the sales and petitioners have thus injured the City of New York through lost tax revenues.

Background & Litigation History.

Taking advantage of New York City's legislative decisions to maintain high cigarette prices through imposed cigarette taxes, petitioners, situated in jurisdictions where negligible taxation yields low cigarette prices, use the Internet to sell their low-priced wares to consumers in "high-tax" jurisdictions, including New York City. In essence, the economic foundation of petitioners' business operations rests on tax evasion.

Specifically, New York State imposes a tax on all cigarettes used or sold in the State. *See* N.Y. Tax Law §§ 471, 471-a. New York State law also authorizes the City of New York to impose its own tax on cigarettes. *See* N.Y. Unconsol. Law § 9436(1). Pursuant to this authority, the City imposes a tax on all cigarettes possessed in the City for sale or use. *See* N.Y.C. Admin. Code § 11-1302. In-state, these taxes are collected through the sale of tax stamps to in-state vendors. *See* N.Y. Tax Law § 471. Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes.

Because such use taxes typically go unpaid, to offset the loss of state taxes caused by the

interstate taxing discrepancies, in 1949, Congress enacted the Jenkins Act, 15 U.S.C. §§ 375-78, to require out-of-state cigarette sellers to file a report with the tobacco tax administrator of each state into which the seller ships cigarettes to non-distributors. The report identifies the name, address, and quantity of cigarettes purchased by the non-distributor state residents. 15 U.S.C. § 376; *see also* S. Rep. No. 84-1147 (1955), reprinted in 1955 U.S.C.C.A.N. 2883, 2883-84 (explaining that the Jenkins Act "was enacted for three major reasons: (1) the large and increasing loss of revenue to the States caused by the evasion of sales and use taxes on cigarettes shipped in interstate commerce to consumers; (2) the discrimination caused by this evasion against sellers of cigarettes in States having a higher tax than the tax of the seller States; and (3) the fact that this evasion was accomplished through the use of the United States mail." (quoting from the report of the Committee on Ways and Means)). The 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.

In this case, petitioners advertised to cigarette purchasers that they "do not share your personal information with any third-party, including State taxing authorities" and refused to file Jenkins Act reports (9a). Petitioners do so because collection of the use tax by New York City from petitioners' customers would have wiped out virtually all of their customers' "savings," and, so, any incentive to continue patronizing petitioners' businesses. Petitioners have never disputed that

they concealed sales or failed to file Jenkins Act reports.

Under RICO's civil enforcement mechanism, "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962] may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." 18 U.S.C. § 1964(c). To have standing under § 1964(c), a civil RICO plaintiff must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his harm was "by reason of" the RICO violation, which requires the plaintiff to establish proximate causation. *See, e.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

Relying on ample case law holding that the intentional failure to file Jenkins Act reports amounts to a violation of the mail and wire fraud statues by depriving the affected states of the ability to collect cigarette excise taxes, the City commenced this RICO action against petitioners and other Internet cigarette sellers, which action was later consolidated with three others on appeal.[1]

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[1] The specific descriptions of the defendants and the makeup of the enterprises are detailed in the Circuit's opinion (12a-15a). As to petitioners, the City alleges that the Hemi Group, LLC ("Hemi Group"), incorporated in New Mexico, is an enterprise and that the person associated with it is Kai Gachupin, the owner or officer of Hemi Group (14a-15a). The City also alleges an alternative

The City alleges that petitioners: (1) advertise their cigarettes over the Internet to City residents, (2) ship the orders by common carrier or the United States Postal Service into New York City, and (3) refuse to comply with the Jenkins Act registration or reporting requirements (10a). The City further alleges that petitioners' failure to comply with the Jenkins Act is an essential part of their business model because the savings that customers obtain from buying the cigarettes online are almost entirely attributable to the fact that the New York State and City taxes are not included in the cigarettes' sales price (10a).

As alleged, petitioners not only fail to inform customers of the use tax obligations, but also make false representations to customers concerning the tax. Among other things, the City contends that petitioners affirmatively advertise their cigarettes as "tax-free" and assure customers that sales would not be reported to the New York State tax authorities (11a).

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association-in-fact enterprise consisting of the Hemi Group and Al Enterprises, Inc. ("Al Enterprises"), a New Mexico corporation, which sells cigarettes over the Internet (14a-15a). According to the allegations, "A1 Enterprises works with the Hemi Group to conceal from New York City cigarette sales made by Hemi Group to New York City residents." The persons alleged to be associated with the Hemi Group association-in-fact enterprise are Gachupin and the Hemi Group (15a).

Furthermore, New York State and New York City have entered into various agreements for the administration and collection of cigarette taxes (9a-10a).[2] In light of the agreements, the City alleges that "with respect to the collection of cigarette taxes, New York City will be 'fully and promptly' informed by the New York State Department of Taxation and Finance of any information relevant to the collection of cigarette taxes, including Jenkins Act reports" (10a).

The City's pleadings thus alleged that petitioners' predicate acts of mail and wire fraud -- the non-filing of Jenkins Act reports -- injured the City in its business and property: by withholding

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[2] The latest such agreement, dated June 28, 2002, provides (10a n.6):

"It is agreed that Taxation [the New York State Department of Taxation and Finance] and Finance [the New York City Department of Finance] shall cooperate fully with each other and keep each other fully and promptly informed with reference to any person or transaction subject to both State and City cigarette taxes as follows:

(1) Information obtained which may result in additional cigarette tax revenue to the State or City provided that the disclosure of that information is permissible under existing laws and agreements; . .

(3) All violations of Article 20 of the Tax Law or Chapter 13 of Title 11 of the [Administrative Code of the City of New York] and all facts or information tending to indicate any such violation."

the required Jenkins Act reports, petitioners conceal taxable sales to City residents, making it impossible for the City to collect its cigarette excise taxes and resulting in lost tax revenue.

Finally, the City alleges that it has lost "tens[,] if not hundreds[,] of millions of dollars a year in cigarette excise tax revenue" due to the combination of the withholding of sales information, failure to register as cigarette sellers, and the individual taxpayers' failure to voluntarily pay use taxes to the City (11a). As relief, the City seeks to: (1) recover three times the amount of the tax revenue lost as a result of petitioners' violations; (2) require prospective compliance with the Jenkins Act; (3) require informing customers that taxes are owed on purchases from their websites and that petitioners file Jenkins Act reports; and (4) recover attorneys' fees (11a-12a).

The District Court's Orders.

In its 2005 opinion, the U.S. District Court for the Southern District of New York (Batts, D.J.) rejected most of petitioners' numerous challenges to the complaints, including arguments concerning the alleged lack of an injury to business or property and causation (144a-148a). The District Court nonetheless dismissed pursuant to Fed.R.Civ.P. 12(b)(6), finding that the City failed to sufficiently plead individual "persons" distinct from the respective "enterprises," but afforded the City the opportunity to file an amended complaint (Appen. C, 93a-170a; *City of New York v. Cyco.net, Inc.*, 383 F.Supp.2d 526 (S.D.N.Y. 2005)).

In its subsequent 2006 opinion, the Court dismissed the second amended complaints for failure to state a claim, finding that the two alternative forms of RICO enterprises were insufficiently pled, including because the alleged RICO persons (employees and/or officers of the businesses) did not have individual duties to file Jenkins Act reports (Appen. B, 70a-92a; *City of New York v. Nexicon, Inc.*, 2006 U.S. Dist. LEXIS 10295 (S.D.N.Y. 2006)).[3]

The Order of the Circuit Court of Appeals.

By opinion issued September 2, 2008, the Second Circuit vacated in large part the District Court's judgment and reinstated the majority of the federal RICO claims, severing them from the state claims and remanding for immediate further proceedings (Appen. A, 1a-69a; *City v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008), *reh. & reh. en banc denied*, __F.3d__ (2d Cir. 2008)).

In relevant part, with respect to the issue of injury to "business or property," the Circuit held (33a-34a):

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[3] In addition, the Court dismissed all the State law claims without leave to file an amended complaint (158a-168a, *City of New York v. Cyco.net, Inc.*, 383 F.Supp.2d 526, 561-66 (S.D.N.Y. 2005), *vacated in part by City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008); *NCCigarettes*, No. 03 Civ. 7715, 2005 U.S. Dist. LEXIS 2794, **9-10 (S.D.N.Y. Feb. 9, 2005)).

As noted above, one of the requirements for a civil RICO claim is that plaintiff be injured in its "business or property." 18 U.S.C. § 1964(c). Defendants argue that the City's allegations of lost taxes do not allege an injury to the City's "business or property" because that injury was not one the City incurred as a party to a commercial transaction. This argument finds support in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103-04 (2d Cir. 1990), where we suggested that a municipality must have sustained its injury as a party to a commercial transaction to have standing under RICO. However, we have since explained that our statements to that effect in *Town of West Hartford* were merely *dicta*. *See Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 132 n.40 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000, 123 S. Ct. 513, 154 L. Ed. 2d 394 (2002).

We see no reason to import an additional standing requirement on municipalities for RICO claims, and thus expressly reject our *dicta* to the contrary in *Town of West Hartford*. *See Sedima [S.P.R.L. v. Imrex Co.]*, 473 U.S. [479], 495, 497-500 [1985] (noting that "RICO is to be read broadly," and overruling our Court's engrafting of a "racketeering injury"

requirement which found no support in the statute or legislative history). We have consistently held that tax losses from unpaid taxes are "property" for purposes of the mail and wire fraud statutes. *See, e.g.*, *Fountain v. United States*, 357 F.3d 250, 255-60 (2d Cir. 2004), *cert. denied*, 544 U.S. 1017 (2005); *United States v. Porcelli*, 865 F.2d 1352, 1355 (2d Cir.) (affirming mail fraud and RICO convictions for fraudulent under-reporting of taxes to State), *cert. denied*, 493 U.S. 810 (1989); [*United States v.*] *DeFiore*, 720 F.2d 757, 761 (2d Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984)]. Moreover, in *Anza*, the Supreme Court suggested that a State would have a recoverable injury where the allegations are that the defendants defrauded the State out of tax revenues. *See* 547 U.S. at 460. Thus, we hold that lost taxes can constitute injury to "business or property" for purposes of RICO, and conclude that the City has adequately met this requirement notwithstanding that its injury did not arise from its participation in a commercial transaction. *See Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 314-16 (7th Cir. 1985) (rejecting the notion that a State government unit suing under RICO is limited to competitive or commercial injuries); *but see Canyon County v. Syngenta Seeds,*

Inc., 519 F.3d 969, 977-80 (9th Cir. 2008) (endorsing the *dicta* in *Town of West Hartford*).

The Second Circuit denied petitioners' petition for rehearing or, alternatively, for rehearing *en banc* by order entered October 30, 2008 (App. D, 171a-172a).[4]

REASONS FOR DENYING THE PETITION

THE SECOND CIRCUIT CORRECTLY DETERMINED THAT THE CITY HAS STANDING TO BRING A RICO CLAIM BASED ON DIRECT INJURY TO "BUSINESS OR PROPERTY" DUE TO FRAUDULENT BUSINESS SCHEMES DESIGNED TO DEPRIVE THE CITY OF TAX REVENUES AND RESULTING IN SUCH LOST TAXES.

THE CASES PETITIONERS RELY ON INVOLVE DIFFERENT FACTUAL BASES OF AMORPHOUS INJURIES SUCH AS ADDITIONAL PUBLIC EXPENDITURES OR LOST EMPLOYEE SALARIES.

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[4] The Circuit affirmed the dismissal of the state common law fraud claim, but certified two questions to the New York Court of Appeals as to the N.Y. York General Business Law § 349 and public nuisance claims (55a-62a). The argument is scheduled on May 5, 2009.

A. This Case is Not Certworthy.

Petitioners' primary argument is that the Circuit Courts are split as to whether state and local governments have RICO standing to recover loss of tax revenue as an "injury to business or property" (Pet., Pt. I). However, the Second Circuit's ruling in this case was correct and a proper application of the statute. Furthermore, the purported split of authority petitioners rely on essentially rests upon case law endorsing previous Second Circuit *dicta*, which has been repeatedly disavowed by the Court, and upon cases involving inapposite factual situations. In addition, the order appealed is interlocutory. For all these reasons, the issue is not certworthy.

Petitioners primarily rely on *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 458 (2008), which relied on *dicta* in the expressly-disavowed decision in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), as well as an unpublished opinion 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) (unpublished).

Canyon County was not only decided before the decision herein, but also it pointed to *dicta* in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), which was expressly disavowed in the instant case as well as previously (33a-34a, citing *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., supra*), for a commercial injury requirement for governments (Pet., p. 9). More crucially, in *Town of West Hartford*, the

Second Circuit simply never had occasion to address lost taxes, because lost taxes were never at issue in the case (*id.*, 915 F.2d at 98):

> The primary injuries caused to the plaintiff by the enterprise is the hinderance [sic] of normal routine police activities within the Town of West Hartford as well as the cost of increased manpower and equipment needed to respond to the illegal activities conducted by the enterprise within the Town of West Hartford.

Similarly, *Canyon County* involved very different factual circumstances, with the Ninth Circuit ruling that a governmental entity's expenditure of money to enforce laws or promote the public well-being does not constitute a "property" interest within the ambit of section 1964(c), particularly where the provision of additional public services is based on legislative mandates and intended to protect the public interest. *Canyon County*, 519 F.3d at 976. Accordingly, the Ninth Circuit rejected a county's claim against defendant companies who allegedly hired illegal aliens, thereby increasing the county's expenditures for law enforcement and publicly funded health care, holding that a government "does not possess a property interest in the law enforcement or heath care services that it provides to the public." *Id.* at 977.

Hemi also cites an unpublished Sixth Circuit opinion, *Michigan Dep't of Treasury v. Fawaz*, 653 F.Supp. 141 (E.D. Mich. 1986), *aff'd*, 848 F.2d 194,

1988 U.S. App. LEXIS 6206 (6th Cir. 1988) (unpublished).[5] In that case, the RICO complaint alleged that the defendant, an operator of a number of gasoline stations, mailed monthly sales tax returns, which underreported his gross income by $6 million, resulting in a tax underpayment of sales tax liability by $240,000. Prior to the RICO action, he was criminally prosecuted and convicted in state court and had already complied with court-ordered payment of restitution, plus interest. *Id.* at **2-3.

The Court held that the State was a person with RICO standing, but then found that applying the RICO statute to an individual sales tax cheater would not fit the purposes and intent behind the RICO statute to address the threat posed to the country's economy by organized crime, and also stressed that the State had already proceeded against the defendant taxpayer in the state criminal proceeding, which was unlike the situation in *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985). *Id.*, 1988 U.S. App. LEXIS 6206 at **3-6. In contrast, in this case, the allegations relate to an organized business scheme expressly intended to defraud the State and City from its ability to collect taxes on a mass basis, and which

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[5] At the time it was issued in 1988, the Sixth Circuit's practice was to discourage citation of unpublished opinions which were not recommended for publication. In 2007, following the enactment of Fed.R.App.P. 32.1(b), the Sixth Circuit rule was amended to permit citation of such opinions. Sixth Circuit Rule 28(g).

succeeds in so doing by impeding the ability to collect such taxes.

In this regard, petitioners' attempt to characterize this case as presenting a split of authority as to whether state and local governments can use RICO to "collect taxes" (Pet., p. 4) is unavailing. Rather, the instant RICO complaint is based on the well-recognized bases of mail and wire fraud. Petitioners did not owe the City taxes, rather, they defrauded the City out of an opportunity to collect taxes from those who did owe them.

In this respect, the injury to the City is no different than mail and wire fraud prosecutions by the United States of those who defraud governments of tax revenue, where losses of taxes are "property" for purposes of the mail and wire fraud statutes. *See, e.g., Fountain v. United States*, 357 F.3d 250, 255-60 (2d Cir. 2004) (taxes owed to governments, the object of defendant's scheme to defraud, are "property" within the meaning of the mail and wire fraud statutes); *United States* v. *Dale*, 991 F.2d 819, 849 (D.C. Cir.) (federal tax revenues), *cert. denied*, 510 U.S. 906 *and* 510 U.S. 1030 (1993); *United States* v. *Helmsley*, 941 F.2d 71, 93-95 (2d Cir. 1991) (state income taxes), *cert. denied*, 502 U.S. 1091 (1992); *United States v. Dray*, 901 F.2d 1132, 1142 (1st Cir.), *cert. denied*, 498 U.S. 895 (1990) ("We think it obvious that a governmental agency is deprived of 'money or property' when persons attempt to evade, or divert, the payment of legally required fees and taxes."); *United States v. Porcelli*, 865 F.2d 1352, 1361 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989); *United*

States v. *Bucey*, 876 F.2d 1297, 1309-1310 (7th Cir.) (federal income taxes), *cert. denied*, 493 U.S. 1004 (1989); *DeFiore*, 720 F.2d at 761-62 (explaining that "four circuits before us have squarely applied the federal fraud statutes to state tax law violations") (citing, *inter alia*, *United States* v. *Brewer*, 528 F.2d 492, 496 (4th Cir. 1975) (scheme to sell cigarettes into another state without filing Jenkins Act reports is mail fraud)).

Petitioners suggest no basis why taxes owed to governments, which are the government's "property" for purpose of the mail and wire fraud statutes, should not constitute "property" for purposes of a RICO action alleging mail and wire fraud violations, just as the Circuit held. Moreover, in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), this Court suggested that a State would have a recoverable injury where the allegations are that the defendants defrauded the State out of tax revenues. *See* 547 U.S. at 460. *Cf. Pasquantino v. United States*, 544 U.S. 349, 355 (2005) (holding that a scheme to defraud a foreign government of tax revenue violates the wire fraud statute because Canada's right to uncollected excise taxes is "property" in its hands, but not expressing a view on the related question of whether a foreign government, based on wire or mail fraud predicate offenses, may bring a civil action under RICO for a scheme to defraud it of taxes).

Furthermore, petitioners' reliance on two district court decisions, *see Township of Marlboro v. Scannapieco*, 545 F.Supp.2d 452 (D.N.J. 2008) and *West Virginia v. Moore*, 895 F.Supp. 864 (S.D. W. Va. 1995) (Pet., p. 8) also demonstrates that the

proposed issue is not certworthy. In fact, similar to *Canyon County*, those cases involve not a tax owed to a governmental subdivision but rather substantially more amorphous claims. In *Marlboro*, the claimed injuries and losses included the total sum of all bribes, gratuities and profits illegally obtained and received by former Marlboro officials from various developers. *Marlboro*, 545 F.Supp.2d at 454-56. Citing, *inter alia*, the Second Circuit *dicta* in *Town of West Hartford*, the district court held that a governmental agency's allegations that it suffered amorphous injuries to a right to its employees honest services are not "concrete financial loss[es]" recoverable under RICO. *Id.* at 458-59.

In *West Virginia v. Moore*, 895 F.Supp. 864 (S.D. W.Va. 1995), the complaint against the State's former Governor Arch Moore rested on allegations that Moore accepted cash contributions in violation of state election laws and that he did not report the windfall on several tax returns. *Id.* at 867. The District Court accepted Moore's argument that the State suffered no injury to its business or property as a result of his alleged racketeering activity because his retention of a bribe payment, following a $2 million refund of Black Lung premiums which was legislatively passed, did not divert money from the State. The District Court also chose not to recognize the broader view that RICO encompasses salary payments to a corrupt employee. *Id.* at 868.

In sum, the decisions relied upon by petitioners do not undermine the persuasive rationale of the Second Circuit in this case, and

should not be considered a sufficient basis for finding that there is a conflict among the Circuits that must be resolved by this Court.

A final reason for denial is that the order is interlocutory, directing a remand for reinstatement of a complaint following a 12(b)(6) motion to dismiss and thus the case may be resolved on other grounds. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bagnor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967).

B. There is No Conflict with this Court's Precedent.

Petitioners' secondary argument is that the Circuit's decision conflicts with this Court's precedent, specifically *Anza, supra,* claiming that there is no proximate causation because the City allegedly is not a directly injured party (Pet. Pt. II, pp. 10-14). This issue is not framed in the petition's question presented, but, regardless, petitioners' argument lacks merit.

The Circuit's opinion recognizes that the predicate racketeering acts in this case are not Jenkins Act violations, but rather are the wire and mail fraud violations and that the City's injury is direct in the form of lost taxes (App. A. at 31a-32a). Although petitioners quote from the Circuit's detailed opinion on this issue (*id.*, pp. 11-12), they then rely on Judge Winter's dissent which characterizes the City as, "at best[,] an expectant gratuitous donee of information from the State" (App. A, 66a-67a).

However, the majority opinion correctly held to the contrary, aptly holding (26a):

> The principles outlined in [the Supreme Court] decisions, as applied to the City's allegations, support a finding that the City has standing. Comporting with *Sedima*, the City alleges that it has been injured (the loss of tax revenues) by defendants' RICO violations (the predicate acts of mail and wire fraud in furtherance of a scheme to defraud the City of taxes). *See Sedima* [*S.P.R.L. v. Imrex Co.*], 473 U.S. [479], 496 (1985). Any recoverable damages occurring by reason of a violation of § 1962(c) (a specific dollar amount for each pack of cigarettes sold without complying with the Jenkins Act) flow from the scheme to defraud the City of use taxes at the heart of the alleged predicate acts of mail and wire fraud. *See id.* at 497.
>
> The City's claims are easily distinguishable from the ones found to be insufficient in *Holmes*, 503 U.S. at 271. Specifically, unlike in *Holmes* where the plaintiff's injury was derivative, the City's alleged injury of lost tax revenue is directly caused by defendants' alleged schemes. That New York State may also have been injured by defendants' alleged schemes does not make the City's injury any less direct; the City is owed

> a certain amount of taxes independent of any amount owed to or collected by the State.

See also Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. ___, 128 S.Ct. 2131 (2008).

Finally, petitioners' argument is also belied by the record. First, as the Circuit noted, the State and City have entered into ongoing agreements for the administration and collection of cigarette taxes through the sharing of joint information (9a-10a & n.6). Petitioners' claim that such agreements represent the "State government deciding to exceed its constitutional authority and disseminate proprietary Jenkins Act information in ways that were never permitted by Congress" (Pet., p. 13) is a new and totally unsupported assertion.

Furthermore, while petitioners speculate that the collection of the taxes from the customers is an "intermediate contingenc[y]" (Pet., p. 13), that also is not borne out by the record. Although the District Court did not allow the City any discovery during the pendency of these actions, enough facts were established on this record during the pendency of the actions that dispelled any question of causation. In particular, the City showed that when it obtained Jenkins Act reports from Internet cigarette sellers, it was able to collect millions of dollars in cigarette taxes from City residents who had made Internet purchases (*see, e.g.*, Circuit Joint Appendix at A113, A594).

For all the above reasons, the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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