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

BRIEF FOR PETITIONERS

RANDOLPH H. BARNHOUSE
Counsel of Record
LUEBBEN JOHNSON & BARNHOUSE LLP
7424 4TH STREET NW
LOS RANCHOS DE ALBUQUERQUE, NM 87107
(505) 842-6123
dbarnhouse@luebbenlaw.com
Counsel for Petitioners

July, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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.

PARTIES TO THE PROCEEDINGS

Petitioners are parties in the federal district court proceeding captioned *City of New York v. Nexicon, Inc.*, No. 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 on which this Court granted its writ of certiorari. 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, *City of New York v. Smoke-Spirits.com, Inc.,* 541 F.3d 425, 432 n.3 (2d Cir. N.Y. 2008), the only remaining defendants on appeal 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) (lead case)

   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.

By order entered November 18, 2008, the United States Federal District Court for the Southern District of New York, upon stipulation of counsel for the City of New York and Smokes-Spirits.com, dismissed Smokes-Spirits.com from the second action listed above. In the stipulated order, counsel for New York City represented that it has resolved its claims against Michael Klee. (*Case 1:04-cv- 06616-DAB* Document 25)

RULE 29.6 STATEMENT

The corporate disclosure statement at page iv of the Petition for Writ of Certiorari remains accurate.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

I. Federal Court Opinions 1

II. State of New York Court of Appeals' Opinion 1

JURISDICTION 2

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 4

IV. Decision of the State of New York Court of Appeals 4

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. Introduction 8

II. RICO's "Injury to Business or Property" Limitation Precludes Recovery for Injury to a Sovereign Tax Collection Interest 9

A. The historic context and legislative history of RICO's "injury to business or property" limitation confirms its restrictive significance 9

B. Antitrust case law guides RICO interpretation 15

C. A sovereign interest in uncollected taxes owed by non-litigant third parties is neither "business" nor "property." 18

1. The phrase "business or property" must be read in the disjunctive 18

2. Uncollected taxes owed by third parties are not an injury to business 19

3. Uncollected taxes owed by third parties are not an injury to property 22

D. A municipality is not a "person" as defined by RICO when the municipality seeks to recover for injury not to "business or property," but instead to a sovereign interest 27

III. New York City Does Not Have RICO Standing Because Its Alleged Injury Is Indirect 30

A. Only directly injured parties have civil RICO standing 30

B. Injury to government in its sovereign capacity is always indirect 32

C. New York City's derivative injuries are too indirect to meet RICO standing requirements 35

D. The New York Court of Appeals' has confirmed that New York City's alleged injuries are indirect 39

IV. Conclusion 41

TABLE OF AUTHORITIES

CASES

Agency Holding Corp. v. Malley-Duff & Assoc.'s Inc., 483 U.S. 143 (1987) 9, 15

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) . . . . . *passim*

Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519 (1983) 11

Beck v. Prupis, 529 U.S. 494 (2000) 11, 21

Blue Shield of Va. v. McCready, 457 U.S. 465 (1982) 14

Brewer v. Quarterman, 474 F.3d 207 (5th Cir. 2006), *rev'd* 550 U.S. 286 (2007) 6

Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008) 11, 19, 30, 31, 33

Brown v. Gardner, 513 U.S. 115 (1994) 24

Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969 (9th Cir. 2008), *cert. denied,* 129 S. Ct. 458 (2008) 13, 17, 23

Case of the State Freight Tax, 82 U.S. 232 (1873) 8, 22

Chattanooga Foundry & Pipe Works v. Atlanta,
203 U.S. 390 (1906) 20

City of New York v. Cyco.net, Inc.,
383 F. Supp. 2d 526 (S.D.N.Y. 2005) 1

City of New York v. Nexicon, Inc.,
2006 U.S. Dist. LEXIS 10295 (S.D.N.Y. March 13, 2006) 1

City of New York v. Smokes-Spirits.com,
11 N.Y. 3d 800; 897 N.E. 2d 1061; 868 N.Y.S. 2d 580 (2008) 1

City of New York v. Smoke-Spirits.com, Inc.,
541 F.3d 425 (2d Cir. 2008) . . . . . *passim*

City of New York v. Smokes-Spirits.com, Inc.,
No. 92, 2009 slip op. 4699
(N.Y. June 9, 2009) 2, 6, 39, 40

Davis v. Mich. Dep't of the Treasury,
489 U.S. 803 (1989) 10

Diaz v. Gates,
420 F.3d 897 (9th Cir. 2005) (en banc) 17

Evans v. City of Chicago,
434 F.3d 916 (7th Cir. 2006) 17

FCC v. Pacifica Found.,
438 U.S. 726 (1978) *reh'g denied*, 439 U.S. 883 (1978) 18

Georgia v. Evans,
316 U.S. 159 (1942) 28

Georgia v. Pennsylvania R.R. Co.,
324 U.S. 439 (1945) 28

Hawaii v. Standard Oil Co.,
301 F. Supp. 982 (D. Haw. 1969) 26

Hawaii v. Standard Oil Co.,
431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972) . . . . . *passim*

Heinold v. Perlstein,
651 F. Supp. 1410 (E.D. Pa. 1987) 26

Hemi Group, LLC v. City of New York,
129 S. Ct. 2159 (2009) 4

Holmes v. Sec. Investor Prot. Corp.,
503 U.S. 258 (1992) . . . . . *passim*

Int'l Primate Prot. League v. Administrators of Tulane Ed. Fund, 500 U.S. 72 (1991) 27

J.M. Muniz, Inc. v. Mercantile Texas Credit Corp.,
833 F.2d 541 (5th Cir. 1987) 40

Kaufman v. Seidman,
984 F.2d 182 (6th Cir. 1993) 40

Lorillard v. Pons,
434 U.S. 575 (1978) 10

Magnum v. Archdiocese of Phila.,
253 Fed. Appx. 224 (3d Cir. 2007) 17

Massachusetts v. Envtl. Prot. Agency,
549 U.S. 497 (2007) 32

McCurry v. Allen,
688 F.2d 581 (8th Cir. 1982) 6

McLaughlin v. Am. Tobacco Co.,
522 F.3d 215 (2d Cir. 2008) 25

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 22

Michigan, Dep't. of Treasury v. Fawaz,
653 F. Supp. 141 (E.D. Mich. 1986), *aff'd on other grounds*, 848 F.2d 194 (6th Cir. 1988) . . 28

Michigan, Dep't. of Treasury v. Fawaz,
No. 86-1809, 1988 U.S. App. LEXIS 6206 (6th Cir. May 19, 1988) 24

Miller Bros., Co. v. Maryland,
347 U.S. 340 (1954) 7, 22, 38

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) . . . 29

Morissette v. United States,
342 U.S. 246 (1952) 10

Orth v. Steger,
258 F. 625 (S.D.N.Y. 1919) 5

Oscar v. Univ. Students Coop. Ass'n,
965 F.2d 783 (9th Cir. 1992)(en banc) 25

Reiter v. Sonotone Corp,
442 U.S. 330 (1979) 14, 16, 18, 20, 23

Roseland v. Phister Mfg. Co.,
125 F.2d 417 (7th Cir. 1942) 19

Sedima v. Imrex Co.,
473 U.S. 479 (1985) . . . . . *passim*

State v. Barclays Bank of N.Y., N.A.,
76 N.Y.2d 533 (1990) 24

Town of W. Hartford v. Operation Rescue,
915 F.2d 92 (2d Cir. 1990) 17, 23

Township of Marlboro v. Scannapieco,
545 F. Supp. 2d 452 (D.N.J. 2008) 24

United States v. Menasche,
348 U.S. 528 (1955) 18

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) . . . 27

Vicon Fiber Optics Corp. v. Scrivo,
201 F. Supp. 2d 216 (S.D.N.Y. 2002) 37

West Virginia v. Moore,
895 F. Supp. 864 (S.D. W. Va. 1995) 24

Waldron v. British Petroleum Co.,
231 F. Supp. 72 (S.D.N.Y. 1964) 20

Waskey v. Hammer,
179 F. 273 (9th Cir. 1910) 5

White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1985); *cert. denied*, 479 U.S. 1060 (1987) 29

STATUTES

5 U.S.C. § 12 28

15 U.S.C. §§ 1-7 (1890) 9

15 U.S.C. § 7 . . . . . 15, 28

15 U.S.C. §§ 12-27 (1914) 9

15 U.S.C. § 15(a) 13

15 U.S.C. § 375 3

18 U.S.C. § 1961 2

18 U.S.C. § 1961(3) 24, 28

18 U.S.C. § 1962 2

18 U.S.C. § 1964 2

18 U.S.C. § 1964(c) 7, 8, 9

28 U.S.C. § 1254(1) 2

91 Cong. Rec. 116, 25190 (July 21, 1970) 9, 10

91 Cong. Rec. 116, 27738 (Aug. 6, 1970) 9, 10

91 Cong. Rec. 116, 35227 (Oct. 6, 1970) 9

91 Cong. Rec. 116, 35295 (Oct. 7, 1970) 9

N.Y. Public Health Law § 1399-II 2, 3, 6, 39

N.Y.C. Admin. Code § 11-1302(a)(3) 22, 36

N.Y.C. Admin. Code § 11-1302(b)(1) 37

N.Y.C. Admin. Code § 11-1306 37

New York General Business Law § 349 . 2, 3, 6, 39, 40

Pub. L. No. 81-363, 63 Stat. 884, 1949 U.S.C.C.A.N. (63 Stat.) 894 3

OTHER

William Henry Burroughs, *Law of Taxation*, § 6 (Baker, Voorhis & Co., 1877) 32

Thomas M. Cooley, *Law of Taxation* (Gallaghan and Co., 3d Ed. 1903) 23

RULES

Fed. R. Civ. P. 12(b)(6) 3, 4

OPINIONS BELOW

I. Federal Court Opinions.

The decision of the United States Court of Appeals for the Second Circuit is reported at 541 F.3d 425 (2nd Cir. 2008). Petitioners' Motion for Rehearing En Banc was denied by the Second Circuit Court of Appeals on October 30, 2008 (Appendix to Petition for Writ of Certiorari ("Pet. 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.*, (Pet. App. B, 70a-92a) which is unofficially reported at 2006 U.S. Dist. LEXIS 10295 (S.D.N.Y. March 13, 2006); and

2. *City of New York v. Cyco.net, Inc.* (Pet. App. C, 93a-170a) reported at 383 F. Supp. 2d 526 (S.D.N.Y. 2005).

II. State of New York Court of Appeals' Opinion.

In its decision, the Second Circuit Court of Appeals certified two state law questions to the State of New York Court of Appeals. 541 F.3d at 458. The State of New York Court of Appeals accepted the certified state law questions on October 16, 2008. *City of New York v. Smokes-Spirits.com*, 11 N.Y. 3d 800; 897 N.E. 2d 1061; 868 N.Y.S. 2d 580 (2008). On June 9, 2009, the New York State Court of Appeals issued its decision on the state law questions, unanimously holding: (1) that the City of New York's alleged damages are derivative and therefore the City lacks standing to bring a state

law consumer claim under New York General Business Law § 349; and (2) that the City cannot assert a common law public nuisance claim predicated on N.Y. Public Health Law § 1399-II. *City of New York v. Smokes-Spirits.com, Inc.*, No. 92, 2009 slip op. 4699, (N.Y. June 9, 2009).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision on September 2, 2008, and denied a motion for rehearing en banc on October 30, 2008. Petitioners filed their petition for writ of certiorari on January 27, 2009, which this Court granted on May 4, 2009. This Court has jurisdiction to review the judgment of the United States 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 sections of those statutory provisions, 18 U.S.C. §§ 1961, 1962 and 1964, are reproduced at Joint Appendix ("JA") 22-29.

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

(2nd Cir. Ct. App. Jt. Apx. A1007). 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.[1]

II. Decisions of the District Court.

Following the filing of the City's first amended complaint (2nd Cir. Ct. App. Jt. Apx. A889), the district court denied motions to dismiss based on improper venue and personal jurisdiction, and granted motions to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim under: (1) New York's General Business Law § 349; (2) public nuisance predicated on New York Public Health Law § 1399-II; and (3) common law fraud. The federal district court also granted the defendants' motions to dismiss for failure to state a RICO claim, with leave to file a second amended complaint (2nd Cir. Ct. App. Sp. Apx.

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[1] 15 U.S.C. § 375 *et seq*., Pub. L. No. 81-363, 63 Stat. 884, 1949 U.S.C.C.A.N. (63 Stat.) 894.

A1136). The City filed a second amended complaint, which the federal district court subsequently dismissed upon motion of the defendants, again pursuant to *Fed. R. Civ. P. 12(b)(6)* (2nd Cir. Ct. App. Sp. Apx. A1256).

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 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 two 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, 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 municipality. The Second Circuit Court of Appeals denied petitioners' request to review the panel's decision en banc. This Court granted certiorari. *Hemi Group, LLC v. City of New York*, 129 S. Ct. 2159 (2009).

IV. Decision of the State of New York Court of Appeals.

As noted, in addition to deciding the federal law issue now before this Court, the Second Circuit Court of Appeals certified two state law questions to the New

York Court of Appeals. *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 458 (2d Cir. 2008)("We retain jurisdiction over those [two certified state law] claims pending the New York Court of Appeal's disposition"). This Court issued its writ of certiorari to the Second Circuit Court of Appeals the day before argument was scheduled before the New York State Court of Appeals on the two certified state law questions.

The New York Court of Appeals, by faxed letter, instructed counsel to "be prepared to address at argument any implications arising from today's grant of certiorari by the Supreme Court of the United States to Hemi-Group LLC and Kai Gachupin." At argument, counsel for the City of New York and the petitioners both confirmed their position that this Court's writ did not affect the authority of the State Court to determine the two certified state law questions. Thereafter, the parties submitted letters to the court on the issue. In its letter, the City of New York referred to the "necessity" for the Court of Appeals to decide the state law issues and expressed the view that because this Court's resolution of the federal issue would not decide the two certified state law issues, the New York Court of Appeals should proceed. In their letter, the Hemi Group and Kai Gachupin did not object to the New York Court of Appeals proceeding to determine the two certified state law questions, and cited the following cases as providing guidance on the issue: *Waskey v. Hammer*, 179 F. 273 (9th Cir. 1910)(because writ of certiorari is in effect a supersedeas, it suspends the execution of, but does not vacate, the order being challenged); *Orth v. Steger*, 258 F. 625, 626 (S.D.N.Y. 1919)(granting stay pending resolution of petition for writ of

certiorari, noting that if petition were to be granted it would act as a stay of proceedings, "unless the judgment or order complained of has begun to be executed." (citation omitted)); *McCurry v. Allen*, 688 F.2d 581, 587 (8th Cir. 1982)(holding statute of limitations was not tolled by Supreme Court's grant of petition for writ of certiorari as "filing of an amended complaint would have been in no way incompatible with the Supreme Court's review" of other issue); *Brewer v. Quarterman*, 474 F.3d 207 (5th Cir. 2006) *rev'd* 550 U.S. 286 (2007)(Dennis, J., dissenting) (lengthy dissent criticizing panel's decision to act on pending motion for reconsideration *en banc* notwithstanding United States Supreme Court's issuance of writ of certiorari).

Following presentation of argument to the court, on June 9, 2009, the New York State Court of Appeals issued its decision on the state law questions. The New York Court of Appeals unanimously held on the first question that the City of New York's claimed injury is "entirely derivative of injuries" to others, and that therefore the City lacks standing to bring a state law consumer claim under New York General Business Law § 349. *City of New York v. Smokes-Spirits.com, Inc.*, No. 92, 2009 slip op. 4699 at 6, (N.Y. June 9, 2009).

The New York State Court of Appeals also answered the second certified question in the negative, holding that the City cannot assert a common law public nuisance claim predicated on N.Y. Public Health Law § 1399-II. *Id.* at 11.

SUMMARY OF ARGUMENT

Standing to bring a civil RICO claim is limited to "any person injured in his business or property by reason of a violation of" RICO's criminal prohibitions. 18 U.S.C. § 1964(c) (JA 25-26); *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. . . ."). In the case before this Court, New York City claims to have RICO standing based on its alleged inability to collect taxes owed by non-litigant third parties. *E.g.*, City of New York Br. Opp'n to Petition for Writ of Certiorari at 15 ("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"); *City of New York v. Smoke-Spirits.com, Inc.*, 541 F.3d 425, 432-33 (2d Cir. 2008)("Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes."); *cf. Miller Bros., Co. v. Maryland*, 347 U.S. 340, 346 (1954)("It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself").

At its core 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 sovereign functions – tax collection. However, the City does not have standing to bring this claim because damage to a sovereign interest is not "injury to business or property" and therefore is not cognizable under RICO. Specifically, failure to collect taxes owed by non-litigant third parties: (1) is not an "injury to business" under RICO; (2) is not an "injury to property" under RICO; (3) does not provide standing

because a municipality is not a "person" under RICO when pursuing injury to its sovereign interests; and (4) is not a proximate injury, but rather indirect and too speculative to support a civil RICO claim.

ARGUMENT

I. Introduction.

The power of taxation is an incident of sovereignty and not a property right. *Case of the State Freight Tax*, 82 U.S. 232, 278 (1873)("A tax is a demand of sovereignty; a toll is a demand of proprietorship. . . . [A state] may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach").

This concept was well established when Congress enacted RICO and in doing so limited the class of plaintiffs who can access RICO's potent civil remedies to "any person injured in his business or property by reason of a violation" of the Act's criminal prohibitions. 18 U.S.C. § 1964(c) (JA 25-26). In addition to the common law meanings of the individual words "business" and "property," when enacting RICO Congress had available and drew upon a history of the phrase "business or property" dating to the late 1800s when Congress first combined those words as a standing requirement in antitrust law.

Not only is injury to a city's ability to collect taxes owed by non-litigant third parties too remote to recover under RICO, the historic context in which Congress adopted the "injury to business or property" standing limitation confirms that the limitation

excludes standing for a municipality alleging injury to its sovereign interests.

II. RICO's "Injury to Business or Property" Limitation Precludes Recovery for Injury to a Sovereign Tax Collection Interest.

A. The historic context and legislative history of RICO's "injury to business or property" limitation confirms its restrictive significance.

RICO's requirement that one be "injured in his business or property" to have standing under the Act was taken by Congress directly from the Sherman and Clayton Antitrust Acts.[2] *Agency Holding Corp. v. Malley-Duff & Assoc.'s Inc.*, 483 U.S. 143 (1987)(RICO's legislative history reveals that Congress relied on the Clayton Act model); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (discussing RICO's roots in antitrust law).[3] The civil remedy provision in RICO Section 1964(c) and its limiting standing requirement were amended into the pending legislation to "make applicable those provisions granting antitrust type remedies to deal with

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[2] 15 U.S.C. §§ 1-7 (1890) and 15 U.S.C. § 12-27 (1914), respectively; *see* 91 Cong. Rec. 116, 25190 (July 21, 1970); 91 Cong. Rec. 116, 27738 (Aug. 6, 1970) (statement of Rep. Steiger); 91 Cong. Rec. 116, 35227 (Oct. 6, 1970) (statement of Rep. Steiger); 91 Cong. Rec. 116, 35295 (Oct. 7, 1970) (statement of Rep. Poff).

[3] There is extensive discussion of RICO's legislative history in Justice White's decision, and the dissents of Justice Marshall and Justice Powell, in *Sedima*.

organized crime, the parallel private anti-trust type remedies available now to private persons under the anti-trust law."[4] The amendment was described as "a provision authorizing private damage suits based upon the concept of Section 4 of the Clayton Antitrust Act."[5]

Where, as here, "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). When borrowing terms for use in a statute, 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 unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Additionally, when Congress adopts language in a setting where the courts have defined the adopted concept, "it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 813 (1989). As Justice Souter noted in addressing Congress' reliance on antitrust law when it adopted RICO:

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[4] 91 Cong. Rec. 116, 27738 (Aug. 6, 1970) (statement of Rep. Steiger).

[5] 91 Cong. Rec. 116, 25190 (July 21, 1970).

> [C]ongressional use of the [Sherman Act] § 7 language in § 4 [of the Clayton Act] presumably carried the intention to adopt 'the judicial gloss that avoided a simple literal interpretation,' . . . The reasoning applies just as readily to § 1964(c). We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's §4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes v. Sec. Investor Prot. Corp., 503 US 258, 268 (1992) *citing Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983); *see Beck v. Prupis*, 529 U.S. 494, 504 (2000)("Congress meant to incorporate common-law principles when it adopted RICO."); *see also Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2140 (2008)(noting the general "presumption that Congress intends to adopt the settled meaning of common-law terms" in RICO).

In October 1970, when Congress passed its RICO legislation, "sovereign interests" were not understood to be included in the phrase "business or property" for antitrust standing purposes. Indeed, one month earlier, in September 1970, the Ninth Circuit Court of Appeals entered its decision in *Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970), which this Court subsequently affirmed. 405 U.S. 251 (1972). In its decision, the Ninth Circuit Court of Appeals held that even if Hawaii's general economy could suffer an injury from antitrust violations independent of the injuries suffered by private persons or by the state in

its proprietary role, "[a]n injury to the general economy of the state is not an injury to the business or property of the state or its people." 431 F.2d at 1285. In so holding, the court reasoned that, "[u]nless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly." *Id.*

This Court affirmed the Ninth Circuit Court of Appeal's decision, ruling 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 damage to sovereign interests. *Hawaii*, 405 U.S. at 264. In discussing the need for explicit statutory language to support the conclusion that standing exists to recover damages for sovereign interests, Justice Marshall, writing for the majority, stated:

> Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State. At the very least, if the latter type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act.

405 U.S. at 264. The Ninth Circuit Court of Appeals, addressing the same considerations in RICO, noted:

> Congress could have used its powers to do so, enabling local governments to pursue treble damages under RICO for injuries arising from their provision of governmental services. But had Congress intended such a result, we believe that Congress would have been more explicit; the term "business or property" does not readily connote a government's interest in the services it provides in its sovereign or quasi-sovereign capacity.

Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 980 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 458 (2008).

In *Hawaii*, this Court reviewed the legislative history of the phrase "business or property" as it is used in § 15(a) of the Clayton Act (the provision that allows the United States to recover for damages to its "business or property"). In doing so, the Court stated, "[t]he legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services." *Id.* at 265. The Court found that "[i]n light of the language used as well as the legislative history of 15 U.S.C. § 15(a), it is manifest that the United States cannot recover for economic injuries to its sovereign interests, as opposed to its proprietary functions. And the conclusion is nearly inescapable that § 4, which uses identical language, does not authorize recovery for economic injuries to the sovereign interests of a State."

Id.[6] The Court recognized that, "[i]n enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected." *Id.* at 262.

Seven years later this Court again confirmed that, as used in the Clayton Act, "[t]he phrase 'business or property' also retains restrictive significance." *Reiter v. Sonotone Corp*, 442 U.S. 330, 339 (1979). Chief Justice Burger, writing for a unanimous Court, again discussed the legislative histories of Section 4 of the Clayton Act and its predecessor, Section 7 of the Sherman Act.[7] In doing so he noted that the legislative history of the Sherman Act revealed that Congress designed the Act as a consumer welfare prescription, and that Section 4 of the Sherman Act is primarily a remedy for the people of the United States as individuals, especially consumers. *Id.* at 343.[8]

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[6] *See also Blue Shield of Va. v. McCready,* 457 U.S. 465, 475 n.11 (1982)("§ 4 [of the Clayton Act] plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm").

[7] Justice Rehnquist writing in concurrence stated: "I fully agree that we must take the statute as Congress wrote it, and I also fully agree with the Court's construction of the phrase 'business or property.'" 442 U.S. at 346 (Rehnquist, J., concurring).

[8] Section 7 of the Sherman Act, as originally introduced authorized "any person or corporation injured or damnified by [an unlawful] arrangement, contract, agreement, trust, or combination" to sue for damages thereby sustained." *Reiter*, 442

B. Antitrust case law guides RICO interpretation.

This Court consistently has looked to the Clayton Act for guidance when addressing RICO issues. For example, in *Holmes*, 503 U.S. at 272, Justice Souter writing for the majority referred to the Clayton Act's proximate cause requirement in holding that a RICO plaintiff must have suffered a direct injury in order to have RICO standing. The Court rejected the notion that RICO provides standing to all parties able to demonstrate that a defendant's violation was a "but for" cause of the party's injury. In doing so, the Court noted the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover . . . ." *Id*. at 266. *See also Anza*, 547 U.S. at 477 (Thomas, J., dissenting in part)("We also decided *Holmes* in light of Congress' decision to use the same words to impose civil liability under RICO as it had in § 7 of the Sherman Act, 26 Stat. 210, into which federal courts had implied a proximate-cause limitation").

Similarly, in *Agency Holding Corp. v. Malley-Duff & Assoc's Inc*., 483 U.S. 143, 150 (1987), Justice O'Conner writing for the Court analogized to the Clayton Act in holding that a uniform statute of limitations exists for civil RICO claims. In doing so, Justice O'Conner recognized that, "[t]he close similarity of the two provisions is no accident. The 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.'" *Id.* at 151

U.S. at 343 n.5. Prior to passage, Congress changed the standing requirement by substituting the phrase "business or property" for the language originally proposed.

quoting Sedima, 473 U.S. at, 489. *See also Anza*, 547 U.S. at 457 (discussing RICO's roots in antitrust law and confirming that RICO was not meant to allow all factually injured plaintiffs to recover).

Antitrust precedent confirms that injuries to sovereign interests fall outside the "zone of interest" Congress sought to protect, and outside the range of injuries that Congress included as cognizable, under RICO.[9] As stated by Justice Marshall in writing for the majority in *Hawaii*: "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." *Hawaii*, 405 U.S. at 264; *accord Reiter*, 442 U.S. at 339 (in the antitrust laws, "[t]he phrase 'business or property' also retains restrictive significance. . . . Congress must have intended to exclude some class of injuries by the phrase 'business or property.'").

The Circuit Courts of Appeals have relied upon and applied the antitrust analysis in both *Hawaii* and *Reiter* to RICO standing issues, using both as support in denying standing for plaintiffs alleging certain classes of RICO injury. For example, last year the Ninth Circuit Court of Appeals held that RICO's "injury to business or property" standing requirement excludes a state's claim for damages based on injury to

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[9] *Holmes*, 503 U.S. at, 287 (Scalia, J., concurring in the judgment)("another element of statutory standing is compliance with what I shall call the 'zone-of-interest' test, which seeks to determine whether, apart from the directness of the injury, the plaintiff is within the class of persons sought to be benefited by the provision at issue.").

the state in its sovereign or quasi-sovereign capacity. *Canyon County*, 519 F.3d at 978-979. In so holding, the court acknowledged that the Supreme Court has interpreted the model Clayton Act provision to exclude these same types of claims, citing this Court's decision in *Hawaii*. Similarly, in *Town of W. Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990) the court affirmed dismissal of the City's RICO claim seeking costs of police and other emergency services. In doing so, the court recognized:

> *Hawaii* refers not only to injuries to a governmental entity's "general economy," but also to its "ability to carry out its functions," as falling outside the concepts of statutory injury to its "business or property." The subsequent gloss in *Reiter v. Sonotone*, allowing a governmental entity to recover for such injury only when it functions "as a party to a commercial transaction," makes the point even clearer. Injuries of the sort asserted by the Town do not fall within the ambit of section 1964(c).

915 F.2d 92, 104 (2d Cir. 1990) (citations omitted).

Circuit Courts of Appeals have relied on this Court's antitrust precedent to reject RICO-based personal injury claims. *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir. 2006); *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005) (*en banc*). Similarly, the Third Circuit Court of Appeals relied on this Court's antitrust precedent in rejecting a RICO claim based on lost opportunity to bring a state law personal injury claim. *Magnum v. Archdiocese of Phila.*, 253 Fed. Appx. 224 (3d Cir. 2007).

This Court has itself recognized that personal injuries ("injury to person") are not cognizable under the Clayton Act as they are not "injury to business or property." *Reiter*, 442 U.S. at 339 ("The phrase 'business or property' also retains restrictive significance. It would, for example, exclude personal injuries suffered").[10] Similarly, "injury to government *qua* government" is not "injury to business or property" and cannot provide the requisite injury necessary for RICO standing.

C. A sovereign interest in uncollected taxes owed by non-litigant third parties is neither "business" nor "property."

1. The phrase "business or property" must be read in the disjunctive.

As this Court held in *Reiter*, 442 U.S. at 338-39, the disjunctive "or" in the phrase "business or property" in the Clayton Act requires both "business" and "property" to be given their independent and ordinary significance. In so holding, the Court noted that "Congress' use of the word 'or' makes plain that 'business' was not intended to modify 'property,' nor was 'property' intended to modify 'business.'" *Id*. at 339. *See United States v. Menasche*, 348 U.S. 528, 538-539 (1955)(the courts are obliged to give effect, if possible, to every word Congress used); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-740 (1978) *reh'g denied*, 439 U.S. 883 (1978)(canons of construction suggest that terms connected by a disjunctive be given

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[10] *See also* cases collected by the Court in *Hawaii*, 405 U.S. at 262 n.4.

separate meanings, unless the context dictates otherwise). That same analysis applies to the identical language Congress adopted from the Clayton Act into RICO.

2. Uncollected taxes owed by third parties are not an injury to business.

Federal courts consistently have held that the word "business" as used to limit standing under both the antitrust acts and RICO is more restrictive than the word "property" and applies solely to economic and commercial interests. For example, in *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942) the Seventh Circuit Court of Appeals held that a sales agent's loss of his exclusive sales territory was an injury to his business sufficient to support his claims under the Clayton Act. In so holding, the court stated:

> We assume that the word business was used in its ordinary sense and with its usual connotations. It signifies ordinarily that which habitually busies, or engages, time, attention or labor, as a principal serious concern or interest. In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit, - persistent human efforts which have for their end pecuniary reward. It denotes "the employment or occupation in which a person is engaged to procure a living."

125 F.2d at 419 (citation omitted); *cf. Bridge*, 128 S. Ct. at 2139 (where business competitors lose money as

a result of misrepresentation, "it would certainly seem that they were injured in their business").

This Court in *Reiter* cited with approval *Waldron v. British Petroleum Co*., 231 F. Supp. 72 (S.D.N.Y. 1964) for the proposition that the phrase "business or property" "retains restrictive significance."[11] In *Waldron*, the court held that "business" is a more restrictive term than "property" as those words are used to limit standing in the antitrust laws. The plaintiff in *Waldron* was a party to a contract that gave him certain oil importation rights. In his lawsuit, he alleged that an illegal conspiracy prevented his importation of the oil. Because his enterprise was only potential, the court found that no "business" existed within the meaning of the Clayton Act. 231 F. Supp. at 86. However, the court did find that the plaintiff had been injured in his "property." *Id.* at 87. In doing so, the court recognized that, "[t]he word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.'" *Id.* at 86; *accord Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906)(upholding right of municipality to bring action under antitrust law where the city "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe").

Moreover, and in direct relation to RICO's "injury to business" requirement, perhaps nowhere is the threat to American business warned against by Justice Breyer in his concurring opinion in *Anza* more

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[11] 442 U.S. at 339.

apparent than in the context of this case. *Anza*, 547 U.S. at 479 (Breyer, J., concurring in part and dissenting in part). Here, a municipality seeks to use RICO to collect taxes from a business that offered lower prices and better distribution through the Internet. Yet the taxes the municipality wants to be paid were never owed by that business. Instead they were owed, if at all, by non-litigant third party customers. In his concurring opinion in *Anza,* Justice Breyer discusses at length the legal principles encouraging businesses to compete, and then goes on to explain that:

> [T]hese principles suggest that RICO does not permit private action based solely upon this competitive type of harm, *i.e.*, harm a plaintiff suffers only because the defendant was able to attract customers through normal competitive methods, such as lower prices, better products, better methods of production, or better systems of distribution. In such cases, the harm falls outside the limits that RICO's private treble-damages provision's "proximate-cause" requirement imposes. In such cases the distance between the harm and the predicate acts that funded (or otherwise enabled) such ordinary competitive activity is too distant. The harm is not "direct."

547 U.S. at 482-483. *Cf. Beck*, 529 U.S. at 505 (injury caused by an act that is not itself wrongful is not actionable under RICO).

In the case now before this Court, petitioners offered lower prices to consumers and easy distribution through Internet sales. There were no sales taxes or

tobacco taxes on these purchases.[12] However, New York City *consumers*, once possessing and using the product they had purchased over the Internet, owed a tax obligation to New York City.[13] Now New York City wants to collect those taxes, trebled no less, from a business that never owed them in the first instance. As recognized in *Miller Bros. Co.*, 347 U.S. at 346, "[i]t would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself."

New York City's alleged inability to collect taxes, having nothing to do with its participation in a commercial venture or enterprise, does not qualify as an injury to "business," and does not provide the City standing to pursue its RICO claims in this case.

3. Uncollected taxes owed by third parties are not an injury to property.

The power of taxation is an incident of sovereignty and not a property right. *Case of State Freight Tax*, 82 U.S. 232, 278 (1873)("A tax is a demand of sovereignty; a toll is a demand of proprietorship"); *accord Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-138 (1982)(an Indian tribe's power to tax does not arise from its power to exclude non-Indians from its land, but instead "is a fundamental attribute of sovereignty

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[12] *City of New York*, 541 F.3d at 432-33 ("Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes").

[13] The City's tax regulation could hardly be more emphatic: "It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer." N.Y.C. Admin. Code § 11-1302(a)(3).

. . . .").[14] Because the power of taxation is not a property right, a municipality's failure to collect taxes allegedly owed by non-litigant third parties is at best an injury to a sovereign interest, and not an injury to "property" for purposes of RICO standing. *Canyon County*, 519 F.3d at 977 (injury to sovereign interests is not "injury to business or property" and therefore not cognizable as a civil RICO claim, recognizing that "the ordinary meaning of the term 'property' does not include the interests of local governments in performing functions such as policing, caring for the indigent sick, and otherwise protecting the well being of the public").[15]

This Court in *Reiter* recognized that "in its dictionary definitions and in common usage 'property' comprehends anything of material value *owned or possessed*." *Reiter*, 442 U.S. at 338-39 (emphasis supplied)(declining to limit the word "property" in the Clayton act solely to "business" interests). This "owned or possessed" limitation on the word "property" as used in RICO is confirmed in RICO's definition of "person" as "any individual or entity capable of holding

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[14] *See also* Thomas M. Cooley, *Law of Taxation* at 7 (Gallaghan and Co., 3d Ed. 1903)("The power of taxation is an incident of sovereignty . . . .").

[15] *See also Town of W. Hartford* 915 F.2d at 104 (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 because 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).

a legal or beneficial interest in property." § 1961(3)(JA 22).[16]

Because the sovereign interest in collecting taxes is not something "owned or possessed," an impairment of that sovereign interest is not an injury to "property" and therefore cannot provide RICO standing. *State v. Barclays Bank of N.Y., N.A.*, 76 N.Y.2d 533, 540-541 (1990)(where taxpayer's accountant misappropriated checks payable to State of New York for payment of state taxes, "the checks were never actually or constructively delivered to plaintiff [State of New York], it, therefore never acquired a property interest in them and cannot be said to have suffered a loss"). *See also Michigan, Dep't. of Treasury v. Fawaz*, No. 86-1809, 1988 U.S. App. LEXIS 6206 (6th Cir. May 19, 1988)(rejecting state RICO claim in tax collection case where 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"); *West Virginia v. Moore*, 895 F. Supp. 864, 872 (S.D. W. Va. 1995)(dismissing RICO claim seeking to recover lost tax revenue, 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"); *cf. Township of Marlboro v. Scannapieco*, 545 F. Supp. 2d 452, 459 (D.N.J. 2008)(dismissing RICO claim by a governmental agency based on losses suffered when Township employees accepted bribes, concluding the

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[16] *See Brown v. Gardner*, 513 U.S. 115, 118 (1994)(recognizing the "presumption that a given term is used to mean the same thing throughout a statute").

Township "failed to allege an injury to its business or property such that it may maintain a civil RICO cause of action").

Moreover, and as the City readily concedes, the City's alleged injury here is not to the public fisc, but instead is an alleged injury to an "opportunity" the City claims it would have had to collect taxes from other, non-litigant parties. *E.g.,* City of New York Br. Opp'n to Petition for Writ of Certiorari at 15 ("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"). *See City of New York*, 541 F.3d at 432-33 ("Out-of-state cigarette sellers, however, are not responsible for collecting or paying New York State and City sales taxes on cigarettes"). The "opportunity to collect taxes from those who did owe them," falls within a class of "expectation" interests that do not qualify as injury to "business or property" and therefore do not confer civil RICO standing. *E.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008)("the rule of general unavailability follows from the text of RICO, which compensates only for 'injury to business or property.' Indeed, plaintiffs have not explained how a party's 'expectation' can constitute 'business or property'" (citations omitted)); *Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992)(en banc)("a showing of 'injury' requires proof of concrete financial loss, and not mere 'injury to a valuable intangible property interest'" (citation omitted)). *See also Holmes*, 503 U.S.at 279 (O'Connor, J., concurring in part)("We have already remarked that the requirement of injury in one's 'business or property' limits the availability of RICO's civil remedies to those who have suffered injury in fact" (*citing Sedima*, 473

U.S. at 496)). Such "expectation" interests are particularly unavailing where, as here, the City's expectation would not even exist but for the allegedly wrongful conduct of the petitioners. In other words, the non-litigant customers themselves would not have owed taxes had they not purchased cigarettes from petitioner Hemi Group. *Heinold v. Perlstein*, 651 F. Supp. 1410, 1412 (E.D. Pa. 1987)(a plaintiff does not have standing to sue under RICO when "the only property to which a plaintiff alleges injury is an expectation interest that would not have existed but for the alleged RICO violation").

The analysis by these lower courts regarding RICO's "injury to property" standing limitation is in accord with this Court's treatment of the issue under antitrust law. In *Hawaii*, this Court specifically held that injury to sovereign interests is not an injury to "property" for purposes of standing under the Clayton Act.[17] In that case, the State of Hawaii sought to recover antitrust damages in three distinct capacities: in its proprietary capacity for overcharges for petroleum products sold to the State itself; as *parens patriae* for similar overcharges paid by the citizens of the State; and as the representative of the class of all purchasers in Hawaii for identical overcharges. The district court granted motions to dismiss the class action claims but denied motions to dismiss the State's *parens patriae* claim. *Hawaii v. Standard Oil Co.*, 301 F. Supp 982 (D. Haw. 1969). On interlocutory appeal,

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[17] *Compare* 405 U.S. at 253 (Hawaii's third amended complaint, "charged [defendants] with violating the Sherman Act") *with* 405 U.S. at 260 ("Hawaii grounds its claim for treble damages in § 4 of the Clayton Act").

the Ninth Circuit Court of Appeals reversed the district court and directed that the *parens patriae* claim be dismissed. 431 F.2d 1282 (9th Cir. 1970). This Court affirmed the Ninth Circuit Court of Appeals' determination of this issue. In doing so, the Court stated that if damage to quasi-sovereign interests of the State "is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act." 405 U.S. at 264.

No matter how valuable the City's sovereign interest in recovering tax payments from non-litigant third parties may be in the City's eyes, it is nothing more than an expectation of possible collection through sovereign authority from taxpayers who are not parties to this litigation. It is at best a sovereign, not "property," injury that does not provide the City RICO standing.

D. A municipality is not a "person" as defined by RICO when the municipality seeks to recover for injury not to "business or property," but instead to a sovereign interest.

This Court consistently has recognized the "longstanding interpretive presumption that 'person' does not include the sovereign." See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000) and cases cited therein. Although the presumption is not a hard and fast rule of exclusion, it "may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Id*. at 781 *citing Int'l Primate Prot. League*

v. Administrators of Tulane Ed. Fund, 500 U.S. 72, 83 (1991).

States have been recognized by this Court to have standing to sue as a "person" under the Clayton Act. E.g., *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Georgia v. Evans*, 316 U.S. 159 (1942). However, because the definition of the word "person" differs substantially between the antitrust and RICO statutes, simple reference to antitrust precedent is unavailing.[18]

RICO defines person as any individual or entity "capable of holding a legal or beneficial interest in property."[19] The antitrust laws make no mention of the ability to hold an interest in property and instead provide that the word "person" shall "include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." Clayton Act, 15 U.S.C. § 12; Sherman Act, 15 U.S.C. § 7. Thus, while Congress adopted much of the civil remedy provisions in RICO from the antitrust statutes, it specifically did

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[18] *Cf., Michigan, Dep't. of Treasury v. Fawaz*, 653 F. Supp. 141, 142-43 (E.D. Mich. 1986)(state treasury department is not a "person" having standing to bring a civil RICO action against a state tax violator, noting that the Supreme 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") *aff'd on other grounds*, 848 F.2d 194 (6th Cir. 1988).

[19] "'person' includes any individual or entity capable of holding a legal or beneficial interest in property;" 18 U.S.C. § 1961(3).

not adopt into RICO the definition of "person" in the antitrust statutes.[20]

Instead, when drafting RICO, Congress elected to define "person" as individuals or entities "capable of holding a legal or beneficial interest in property." Because Congress used the word "property" in the ownership context to define "person" in RICO, standing to recover for an injury to "business or property" under RICO must likewise be limited to the commercial ownership context, and not expanded to include injury to sovereign interests. This is so because "[t]he source of parties' standing to bring the actions must coincide with the basis on which subject-matter jurisdiction is asserted." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n. 16 (9th Cir. 1985); *cert. denied*, 479 U.S. 1060 (1987), *citing Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.7 (1976). In other words, because Congress elected to limit RICO's private civil remedies to a "person" holding a legal or beneficial interest in property, a municipality does not have standing when acting in some other manner, such as its non-proprietary, sovereign capacity.

Because the City owns no "legal or beneficial interest" in its sovereign authority to collect taxes, but

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[20] Not referring to antitrust precedent regarding the definition of "person" is in no way inconsistent with referring to such precedent when interpreting the meaning of the phrase "injured in his business or property." The word "person" is defined in both antitrust statutes in a completely different manner than the definition in RICO. Moreover, the phrase "business or property" in RICO was taken directly from the antitrust laws, whereas the definition of "person" in RICO was not.

instead collects taxes pursuant to its sovereign power, the City does not qualify as a "person" under RICO's definition of the word when suing to recover for injury to its sovereign interests.

III. New York City Does Not Have RICO Standing Because Its Alleged Injury Is Indirect.

A. Only directly injured parties have civil RICO standing.

Standing under RICO is determined by proximate causation, not actual "but for" causation. *Holmes*, 503 U.S. 265-266. 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*, 547 U.S. at 460. Just last year, Justice Thomas, speaking for a unanimous Court, confirmed this direct injury requirement, explaining that a finding of proximate causation for RICO claims requires that a "particular emphasis" be placed on the "demand" for a direct relation between the asserted injury and the alleged RICO violation. *Bridge*, 128 S. Ct. at 2142 (*citing Holmes*, 503 U.S. at 268). In *Bridge*, the Court reaffirmed the need to assess at the pleading stage whether the complaint alleges "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury." *Id.,* 128 S. Ct. at 2144.[21]

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[21] See also *Holmes*, 503 U.S. at 287 (Scalia, J., concurring in the judgment)("Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith").

This Court's recent decision in *Anza* is particularly instructive. 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. Justice Kennedy, writing for the majority, concluded that Ideal's injuries were not proximately caused by the defendants' actions because "[t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id*. at 458.

Unlike in *Bridge* (where the plaintiff and other losing bidders were the only injured parties (128 S. Ct. at 2144)), and just as in *Anza* (where nonpayment of taxes resulted in direct injury only to non-litigant third parties), if the City's allegations are true then either the customers themselves or the State of New York are the directly injured parties, with any injury to the City flowing from their misfortune.[22] *Compare Bridge*, ("here, unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue") *with Holmes*, 503 U.S. at 268 (upholding dismissal of plaintiff's RICO claim as indirect because it "complained of harm flowing merely

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[22] *City of New York*, 541 F.3d at 460 (Winter, J., dissenting)("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").

from the misfortunes visited upon a third person by the defendant's acts . . . .").

New York City has suffered no direct injury, proximate or otherwise, and therefore lacks standing to bring a civil RICO claim against petitioners.

B. Injury to government in its sovereign capacity is always indirect.

In many ways the question of whether a municipality has standing to recover alleged damage to its sovereign interests is simply the other side of the proximate injury coin. That is so because sovereign power derives from the citizens of the realm – and injury to that derivative interest must, by definition, be derivative as well. *E.g.,* William Henry Burroughs, *Law of Taxation*, § 6 (Baker, Voorhis & Co., 1877) ("The power of taxation, being an incident of sovereignty, is co-extensive with that of which it is an incident"); *accord Hawaii*, 405 U.S. at 258 ("The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act"); *and see Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 539 (2007)(Roberts, C.J., dissenting)(noting the distinction between "a State's standing to assert a quasi-sovereign interest – as opposed to a direct injury . . . .").

RICO's proximate cause requirement is particularly compelling in connection with claims based on alleged injury to sovereign interests, as such claims are inherently speculative, remote and by their very nature risk multiple recoveries at numerous levels.

Cf., Hawaii, 405 U.S. at 262 n.14 ("Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health – a task extremely difficult in the real economic world rather than an economist's hypothetical model" (internal quotations and citation omitted)). As noted by the Court in *Anza*, one role of the proximate cause requirement is to minimize "the speculative nature" of the proceedings needed to assess damages. 547 U.S. at 459-460 (the direct injury requirement prevents "intricate, uncertain inquiries from overrunning RICO litigation"). In *Bridge*, Justice Thomas similarly recognized that:

> The direct-relation requirement avoids the difficulties associated with attempting "to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors," prevents courts from having "to adopt complicated rules of apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries," and recognizes the fact that "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."

Bridge, 128 S. Ct. at 2142, *citing and quoting Holmes*, 503 U.S. at 269-270.

Moreover, RICO's exclusion of standing for plaintiffs seeking to recover for injury to sovereign interests falls squarely within the "zone of interest"

analysis articulated by Justice Scalia in his concurring opinion in *Holmes*, 503 U.S. at 286. In that opinion, Justice Scalia notes:

> The phrase "any person injured in his business or property by reason of" the unlawful activities makes clear that the zone of interests does not extend *beyond* those injured in that respect – but does not necessarily mean that it includes *all* those injured in that respect. Just as the phrase does not exclude normal judicial inference of proximate cause, so also it does not exclude normal judicial inference of zone of interests.

503 U.S. at 288 (Scalia, J., concurring in the judgment)(emphasis in original). *See also id*. at 287 n. * ("It may be that proximate causality is *itself* an element of the zone-of-interests test as that phrase has ordinarily been used" (emphasis in original)).

Even if this Court concludes that Congress, in limiting RICO standing to a person injured "in his business or property," did not intend to adopt a blanket prohibition on claimed injury to sovereign interests, those claims are nevertheless barred because injuries suffered by government in its sovereign capacity, by their very nature, are indirect. Therefore, the "sovereign capacity" standing question also is susceptible to resolution through application of RICO's proximate cause standing requirement.

C. New York City's derivative injuries are too indirect to meet RICO standing requirements.

The facts alleged by the City in this case demonstrate on a specific level how injuries to sovereign interests in general are too remote to satisfy RICO's proximate cause standing requirement. In the instant case, as in *Anza*, the City's injuries are not only speculative but also indirect. In the dissent authored by Judge Winter to the Second Circuit Court of Appeal's two-judge majority decision now before this Court, Judge Winter explains why New York City's claimed injuries cannot be proximately caused by the appellants' alleged activity. In doing so Judge Winter notes (referring to this Court's decision in *Anza*):

> 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.

City of New York, 541 F.3d at 460 (Winter, J., dissenting); *cf. Anza*, 547 U.S. at 462, 126 S. Ct. at 1999 (Scalia, J., concurring)("it is inconceivable that the injury alleged [by Ideal Steel] in the 18 U.S.C. § 1962(c) claim at issue here is within the zone of interests protected by the RICO cause of action for fraud perpetrated upon [non-litigant] New York State").[23]

Through better distribution (using the Internet) and better pricing, petitioner the Hemi Group was able to attract customers. That "the purchasers individually opted not to fulfill their tax obligations to the City's taxing authorities" does not make the City's resulting losses a direct injury to its "business or property."[24] Indeed, the City's failure to collect taxes

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[23] In his dissent, Judge Winter also warned of the inappropriate expansion of mail and wire fraud jurisprudence, noting "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." 541 F.3d at 460. *See also Sedima*, 473 U.S. at 502 (Marshall, J., dissenting)("The effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because in recent years the Courts of Appeals have 'tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution of conduct that some had thought was subject only to state criminal and civil law'" (internal quotations and citations omitted)).

[24] "It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer." N.Y.C. Admin. Code § 11-1302(a)(3).

"could have resulted from factors other than petitioners' alleged acts of fraud." *Anza*, 547 U.S. at 459. Citizens do not pay taxes "for many reasons, and it would require a complex assessment to establish what portion of" the plaintiff's damages were the product of petitioners' alleged actions. *Id.* Indeed, in a remarkable admission the City concedes that its injury is due to "the individual taxpayers' failure to voluntarily pay use taxes to the City." City of New York's Br. Opp'n to Petition for Writ of Certiorari at 7; *see also* Br. Opp'n to Petition for Writ of Certiorari at 2 ("such use taxes typically go unpaid"). *Vicon Fiber Optics Corp. v. Scrivo*, 201 F. Supp. 2d 216, 219 (S.D.N.Y. 2002)("A predicate act does not proximately cause an injury if it merely furthers, facilitates, permits or conceals an injury that happened or could have happened independently of the act").

Moreover, it is beyond dispute that some unknown and indeterminate portion of the New York City resident customers who purchased cigarettes from the petitioner Hemi Group never owed any taxes to begin with. This is so because the City exempts from its tax the possession or use "of four hundred cigarettes or less brought into the city." N.Y.C. Admin. Code § 11-1302(b)(1); *see also* N.Y.C. Admin. Code § 11-1306. Furthermore, just as in *Holmes*, if allowed to continue its lawsuit, "the district court would first need to determine the extent to which their inability to collect . . . was the result of the alleged conspiracy . . . as opposed to, say, . . . poor business practices . . . ." 503 U.S. at 272-273.

Under the circumstances, allowing the City to pursue RICO claims against a business that offered lower prices and better distribution would result in

exactly the type of harm, yet even one level further removed, as that cautioned against by Justice Breyer in his concurring opinion in *Anza*. There, although the complaint alleged the RICO defendant, "did not 'charge' or 'pay' sales taxes or accurately 'report' sales to the State" and in so doing offered a lower price and "funded the price cut from the savings," Justice Breyer nevertheless noted that "the source of the savings is, in my view, beside the point as long as the price cut itself is legitimate." 547 U.S. 487-488. *See also id*. at 486 ("I would read into the private treble-damages provision a 'proximate-cause' limitation that places outside the provision harms that are traceable to an unlawful act only through a form of legitimate competitive activity"); *cf., Sedima*, 473 U.S. at 520 (Marshall, J., dissenting)(RICO cases against legitimate businesses, "take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels"); *and* at 526 (Powell, J., dissenting)("RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute").

Justice Thomas' partial concurrence in *Anza* is apposite. As Justice Thomas notes: "it was petitioners' own conduct – namely, their underpayment of tax – that permitted them to undercut respondent's prices and thereby take away its business." That distinction further demonstrates the indirect nature of New York City's alleged injury in this case because petitioners here owed no taxes. *Miller Bros. Co.*, 347 U.S.at 346 ("It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself").

As recognized by Judge Winter, the majority decision under review by this Court conflicts with the directness requirement set out by the Court in *Anza* and *Holmes*. The City's claim is indirect because it depends on a string of intermediate contingencies, and its theory of harm – with a lengthy causal chain and numerous intervening causes – satisfies no theory of causation that could be deemed proximate.

D. The New York Court of Appeals' has confirmed that New York City's alleged injuries are indirect.

In addition to deciding the federal law issue now before this Court, the Second Circuit Court of Appeals certified two state law questions to the New York Court of Appeals.[25] The day after this Court issued its writ of certiorari to the Second Circuit Court of Appeals, the New York State Court of Appeals heard argument on the two certified state law questions. On June 9, 2009, the New York State Court of Appeals issued its unanimous decision holding that the City of New York: (1) lacks standing to bring a state law consumer claim under New York General Business Law ("G.B.L.) § 349; and (2) cannot assert a common law public nuisance claim predicated on New York Public Health Law § 1399-II. *City of New York v. Smokes-Spirits.com, Inc.*, No. 92, 2009 slip op. 4699 (N.Y. June 9, 2009).

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[25] *City of New York*, 541 F.3d at 458 ("We retain jurisdiction over those [two certified state law] claims pending the New York Court of Appeal's disposition.").

Of particular importance to the proceedings before this Court is the State Court of Appeal's decision regarding the City's claims under GBL § 349. Specifically, in ruling on that issue the New York Court of Appeals held that the City, "has failed to establish standing here because its claimed injury, in the form of lost tax revenue, is entirely derivative of injuries that it alleges were suffered by misled consumers who purchased defendants' cigarettes over the Internet." *City of New York v. Smokes-Spirits.com*, No. 92, 2009 slip op. 4699 at 4 (N.Y. June 9, 2009).

The City's lack of proximate cause to support its federal RICO action is confirmed by the rejection of its claim on the almost identical issue which it argued unsuccessfully before the New York Court of Appeals: whether the City's claims are derivative of the claims of others. The City's proximate cause argument in both actions is based on exactly the same set of alleged facts. Those facts, as confirmed by the New York State Court of Appeals, show that the City at most has alleged only indirect, derivative injury. *Cf. Kaufman v. Seidman*, 984 F.2d 182 (6th Cir. 1993) (barring RICO claims where the issue of causation was essentially the same as issue of causation decided in state court action); *J.M. Muniz, Inc. v. Mercantile Texas Credit Corp.*, 833 F.2d 541 (5th Cir. 1987)(barring RICO claim based upon the same facts as usury counterclaim previously litigated in state court proceeding).

This Court should confirm, as did the New York Court of Appeals, that the City's alleged injuries are derivative, not proximately caused by the alleged actions of the petitioners, and therefore not cognizable under RICO.

IV. Conclusion.

The holding of the Second Circuit Court of Appeals that the City of New York has standing to pursue its RICO claims should be reversed.

Respectfully Submitted,

RANDOLPH 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