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 RESPONDENT

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COUNTER-QUESTION PRESENTED

Does the City of New York have standing under RICO because lost tax revenue constitutes a direct injury to the City's "business or property" in accord with the statute, 18 U.S.C. § 1964(c), and this Court's authority?

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COUNTER-STATEMENT OF THE CASE

Respondent, the City of New York ("the City"), respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-69a).[1] Petitioners, the Hemi Group and Kai Gachupin (hereafter "Hemi"), engage in mail and wire fraud, 18 U.S.C. §§ 1341, 1343, in violation of section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 *(*hereafter "RICO").[2] Hemi's systematic business scheme defrauds the City by evasion of the City's cigarette excise tax, including by Hemi's failing to report its Internet cigarette sales made to New York residents as required by the Jenkins Act, *see* 15 U.S.C. § 375 *et seq.*, and by affirmative misrepresentations, such as that sales are "tax-free," causing the City to lose millions of dollars of cigarette excise tax revenues. The tax losses that flow directly from Hemi's conduct constitute an injury to the City's business or property within the meaning of 18 U.S.C. § 1964(c).

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1. "Pet. App." refers to Hemi's Appendix filed with the petition for a writ of certiorari.

2. RICO is one of twelve substantive titles of the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. No. 91-452, 84 Stat. 922 (1970). Section 1962(c) of the RICO Act provides, in relevant part, that: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c) (Pet. App. 178a-79a).

A. Background.

Tax evasion is the economic foundation of Hemi's business. Taking advantage of New York City's legislative decisions to maintain high cigarette prices through imposed cigarette taxes, Hemi, situated in a jurisdiction where negligible taxation yields low cigarette prices, advertises and sells its low-priced cigarettes over the Internet to consumers in "high-tax" jurisdictions, such as New York City.

To offset the loss of taxes caused by interstate taxing discrepancies on cigarettes, in 1949, Congress enacted the Jenkins Act, 15 U.S.C. § 375 *et seq*., requiring out-of-state cigarette sellers to register and file a monthly report with the tobacco tax administrator of each state where the seller ships cigarettes to consumers. The report identifies the name, address, and quantity of cigarettes purchased by the consumers. 15 U.S.C. § 376. Although the cross-border purchaser must actually pay the taxes, the Jenkins Act assures that taxing authorities have the information necessary to collect such taxes.

The legislative history of the Jenkins Act shows that it

> was enacted for three major reasons: (1) the large and increasing loss of revenue to the States caused by the evasion of sales and excise 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.

See S. Rep. No. 84-1147 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2883, 2883-84 (quoting from Committee on Ways and Means report); *see also* S. Rep. No. 644 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2158, 2159-60.

The Jenkins Act requirements reflect "Congress' recogni[tion] . . . that interstate sales of cigarettes could be a form of tax evasion when the transactions were accomplished by practices that deliberately enabled the purchasers to escape taxes." *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975).[3]

New York State law authorizes the City of New York to impose its own excise tax on cigarettes and authorizes collection and administration by the fiscal officers of the City. *See* N.Y. Unconsol. Law § 9436(1). New York State also imposes a tax on all cigarettes used or sold in the State. *See* N.Y. Tax Law §§ 471, 471-a.

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3. In 1978, Congress enacted the Contraband Cigarette Trafficking Act, 62 Stat. 2465 18 U.S.C. § 2341 *et seq.* (the "CCTA"), which, *inter alia*, makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes" [later defined as a quantity in excess of 10,000 cigarettes, which bear no evidence of payment of applicable State or local cigarette taxes]. 18 U.S.C. § 2342(a). The CCTA's legislative history, like that of the Jenkins Act, shows congressional recognition of the inherent profitability of shipping cigarettes from low tax to high tax states, the massive tax losses caused by such shipments and the ill-effects of those multi-million dollar revenue losses. *See, e.g.*, H.R. 95-1269, 95th Cong., 2nd Sess. 4 (1978) (34 states losing $400 million each year).

As codified in the New York City Administrative Code ("N.Y.C. Admin. Code"), Ch. 13, Title 11, the City imposes a tax on all cigarettes possessed in the City for sale or use. *See* N.Y.C. Admin. Code § 11-1302. Most cigarette taxes are collected by the City and State through their respective sales of tax stamps, which are required on all cigarettes sold in the State. *See* N.Y. Tax Law § 471. Under federal law, sellers located out-of-state may not be required to purchase and apply New York tax stamps, but they are required to file Jenkins Act reports so that the City and the State are able to identify resident purchasers of out-of-state cigarettes from whom to collect excise taxes.

The City collects its cigarette excise taxes directly, or, alternatively, a purchaser can pay the State and City cigarette excise taxes together and the State remits the revenue to the City. *See* N.Y.C. Admin. Code § 11-1302(f); *see also id.* § 11-1310 (description of statutory remedies available to the City's Department of Finance). The payment of cigarette excise taxes is generally credited to and deposited in the general fund of the City. *See* N.Y. Unconsol. Law § 9437 ("Revenues resulting from the imposition of taxes authorized by this act [] shall be paid into the treasury of any such city and shall be credited to and deposited in the general fund of any such city"); N.Y.C. Admin. Code § 11-1318 (same).

B. Litigation History.

In the second amended complaint, dated February 8, 2005, the City alleges that Hemi commits mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343,[4] by its scheme to defraud the City of cigarette excise tax revenues (*City v. Nexicon* 2d Am. Complaint, dated 2/28/05 (reproduced in Circuit Joint App. A1007-39)). Hemi: (1) advertises the cigarettes over the Internet to City residents, (2) ships the orders by common carrier or the United States Postal Service into New York City, (3) refuses to comply with the Jenkins Act's registration or reporting requirements, and (4) affirmatively states on its websites that it is not required to report the sales and that the sales are "tax-free" (*id.* at A1029-35). The City further alleges that Hemi's failure to comply with the Jenkins Act is an essential part of its business model because the savings that customers obtain from buying cigarettes online from a business in a low-tax jurisdiction are entirely attributable to the New York State and City taxes that are not included in the cigarettes' sales price (*id.* at A1008-12).[5]

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4. The mail and wire fraud statutes prohibit the use of the mails or interstate wires to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . . ." 18 U.S.C. §§ 1341, 1343.

5. The enterprises are described in the Circuit's opinion (Pet. App. 12a-15a). The Circuit held that the City's main alleged Hemi enterprise, the Hemi Group, LLC, and Kai Gachupin, as owner or officer, met the standards in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161-62 (2001) (*see* Pet. App. 14a-15a). However, the Court found that the alternate association-in-fact enterprise failed to plead sufficient facts to support the requisite continuity of structure and personnel and consensual decision-making (*id.*).

The Second Amended Complaint further pleads that New York State and New York City have entered into agreements for the administration and sharing of information with respect to the collection of cigarette taxes (*id.* at A1021-22). The City alleges, consistent with the language of the latest such agreement, 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" (*id.* at A1021).[6]

Hemi affirmatively advertised its tax evasion scheme by assuring potential customers that Hemi "do[es] not

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6. The latest such agreement, dated June 28, 2002, provides (Jt. Tax Agreement, Circuit Jt. App. A1000-04; *see also* Pet. App. 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.

report any sales" to the State taxing authorities and by falsely assuring them that Hemi is "not required to do so," that there is "no tobacco tax," and by falsely asserting that Hemi's cigarettes are "tax-free" (*id.* at A1032-35; *see* Ex. A to RICO Statement, dated 1/17/03, Circuit Jt. App. A844-67, attaching printouts from enterprise websites owned or controlled by Hemi; *see also* Pet. App. 9a-11a).

For example, the CigaretteSpecials.com's website proclaimed that "All sales are tax free!!" and had a flashing banner stating "No tobacco tax" (Circuit Jt. App. A814, A856, A852). The buydiscountcigarettes.com website had a flashing banner stating "No tobacco tax" and also made false statements that it does not have to file Jenkins Act reports (*id.* at A814, A856, A852).[7]

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7. Hemi Group owns or controls the following retail cigarette outlets: "Cigarettespecials," "BuyDiscount Cigarettes," "FreeCigs4u," "Cyber Cigarettes," "Adobe Cigarettes" and "A1Cigs." The outlets' websites made the following statements (Circuit Jt. App. A1013-14, A1033-34, A844-A856):

> CigaretteSpecials.com does not share your personal information with *any* third party, including State taxing authorities. [www.cigarettespecials.com, "Privacy Policy" (emphasis in original)]
>
> CigaretteSpecials.com does not report any sales activity to any State taxing authority and is not required to do so. [www.cigarettespecials.com, "Legal Notices"]
>
> No tobacco tax (flashing banner)
>
> **All sales are tax free!!** (boldface emphasis in original) [www.cigarettespecials.com, "Home Page"]

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Hemi so advertised because collection of the cigarette excise tax from Hemi's customers would wipe out virtually all of the customers' "savings," made by purchasing from Hemi, and, so, any incentive for customers to continue patronizing Hemi's businesses. Notably, Hemi's brief fails to acknowledge its Jenkins Act obligations and its acknowledged, indeed, flagrant and willful, failure to comply with the Act and its misrepresentations on its websites (Pet. Br., *passim*).

The City thus alleged that Hemi's acts of mail and wire fraud — including the failure to file Jenkins Act reports and the fraudulent misrepresentations on its websites in furtherance of the scheme to defraud the City of excise tax payments — injured the City in its "business and property." By failing to file the required reports, Hemi conceals from the City taxable sales to City residents, making it impossible for the City to collect its cigarette excise taxes and resulting in lost tax revenue. The City alleges that it has lost "tens[,] if not hundreds[,] of millions of dollars a year in cigarette excise tax revenue" (3rd Am. RICO Statement, 2/8/2003, Circuit Jt. App. A996).[8]

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> No tobacco tax [flashing banner] [www.buydiscount cigarettes.com, "Home Page"]
>
> FreeCigs4u.com does not report any sales activity to any State taxing authority and is not required to do so. [www.FreeCigs4u.com, "Legal Notices"].

8. The City also alleged that, in instances when the City had received information that identified Internet cigarette purchasers, the City sought and received substantial payments of the taxes owed and that there was some correspondence from

(Cont'd)

As relief, the City seeks to: (1) recover three times the amount of the tax revenue lost as a result of Hemi's scheme; (2) require prospective compliance with the Jenkins Act; (3) require Hemi to inform customers that taxes are owed on purchases from Hemi's websites and that Hemi will file Jenkins Act reports; (4) enjoin claims that the cigarettes sold to City residents are "tax-free"; and (5) recover attorneys' fees (*City v. Nexicon* 2d Am. Complaint, Circuit Jt. App. A1012, ¶17; *see* Pet. App. 11a-12a). The Hemi action was later consolidated with three others by the Second Circuit.

C. The District Court's Orders.

In its 2005 opinion, upon motions to dismiss by Hemi and other defendants, the U.S. District Court for the Southern District of New York (Batts, D.J.) rejected most of defendants' challenges (Pet. App. 93a-170a), including as to alleged lack of an injury to "business or property" and alleged lack of proximate causation (*id.* 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

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consumers indicating that they were misled by the websites (Circuit Jt. App. A1022 ¶¶ 59-60; *see also* A118-25, A645). In addition, although the District Court had stayed discovery, the City had cited as an example its March 25, 2005 RICO Statement in the companion *Esmokes* case, where, after obtaining information from two settling defendants, the City had forwarded letters to 3100 purchasers, demanding payment of approximately $1.2 million in taxes owed, and had received payment of $651,438.83 from 2091 such purchasers, as of March 25, 2005 (Circuit Jt. App. A594).

from the respective "enterprises," but afforded the City the opportunity to file an amended complaint on the federal claims only (*id.* 93a-170a).

Following the Second Amended Complaint, the various defendants again moved to dismiss for lack of subject matter jurisdiction and personal jurisdiction, and for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6) (*see* Circuit Jt. App. A219-33, A425-27, A675-77, A1040-72).

In its 2006 opinion, the District Court dismissed the Second Amended Complaint for failure to state a claim. It found 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 (Pet. App. 70a-92a).

D. The Order of the Circuit Court of Appeals.

By opinion and order dated September 2, 2008, authored by Judge Straub, joined by former Circuit Judge Sotomayor, the Second Circuit vacated in large part the District Court's judgment and reinstated the majority of the federal RICO claims, severing the state claims and remanding the RICO claims for immediate further proceedings (Pet. App. 1a-69a).

Discussing whether the City suffered an injury to its "business or property" as required by 18 U.S.C. § 1964(c), the Circuit held (Pet. App. 33a-34a):

> 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 [the Second Circuit'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); . . . . 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 Circuit also held that the City had standing under RICO because it had suffered a direct injury, stating (Pet. App. 26a):

> The principles outlined in [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*, 473 U.S. at 496. 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 Circuit found that the City's claims were easily distinguishable from the ones found insufficient in *Holmes* [*v. Securities Investor Protection Corp.*], 503 U.S. 258, 271 (1992), because (Pet. App. 26a-27a):

> 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.

The Circuit's opinion then details all the further reasons for its proximate causation finding (Pet. App. 27a-33a; *see post*, Pt. II).

In an opinion dissenting in part and concurring in part, Judge Winter opined that the alleged RICO violation was not the proximate cause of the City's injuries, and therefore the City had no standing to bring the RICO action (Pet. App. 62a-69a). In his view, 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" (Pet. App. 67a).[9]

The Second Circuit denied Hemi's petition for rehearing and rehearing *en banc* on October 30, 2008 (Pet. App. 171a-72a). This Court granted certiorari on May 4, 2009. *Hemi Group, LLC v. City of New York*, 129 S. Ct. 2159 (2009).

SUMMARY OF ARGUMENT

In bringing this action, the City fulfils Congress' vision that directly-injured parties protect their business or property interests by acting as civil enforcers of the RICO statute, complementing RICO's criminal enforcement provisions. *See*, *e.g.*, *Rotella v. Wood*, 528 U.S. 549, 557 (2000) (quotation omitted).

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9. The Circuit unanimously affirmed the dismissal of the state common law fraud claim, but certified two state law questions as to the City's standing to sue under the State's consumer protection statute, N.Y. Gen. Bus. Law § 349, and to bring a public nuisance claim predicated on N.Y. Public Health Law § 1399-II (Pet. App. 55a-62a). The New York Court of Appeals answered those questions in the negative on June 9, 2009, although it recognized that the City could potentially replead its public nuisance claim based upon alleged unauthorized shipments to minors. 12 N.Y.3d 616 (N.Y. 2009). Subsequently, on August 10, 2009, the Second Circuit affirmed the dismissal of the Gen. Bus. Law claim, but remanded the public nuisance claim to the District Court with directions to consider whether leave to amend should be granted (8/10/09 Order). By further order entered August 26, 2009, the Circuit recalled the mandate and retained jurisdiction pending this Court's decision (8/26/09 Order).

The Second Circuit employed a principled analysis of the RICO statute and this Court's precedent in holding that the City has standing to bring this action under 18 U.S.C. § 1964(c). Based upon RICO's express language, as well as its history and underlying policy, the Court correctly held that the City's lost cigarette excise tax revenues constitute an injury to its property. That injury was the direct consequence of Hemi's systematic mail and wire fraud schemes to defraud the City of cigarette excise tax revenue, through its violations of the Jenkins Act, *see* 15 U.S.C. § 375 *et seq.*, and through its misrepresentations and advertisements that Internet cigarette sales were tax-free and that there was no obligation to report purchase information to the state taxing authorities. The City's injury from Hemi's conduct is no different than the loss of tax revenue caused by other schemes to conceal taxable transactions, where losses of taxes are "property" for purposes of the mail and wire fraud statutes. *Pasquantino v. United States*, 544 U.S. 349, 355 (2005) (wire fraud arising from failure to declare liquor imports into Canada). *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (recognizing that State of New York, as the party directly-injured by the non-collection of sales tax, could properly bring RICO action based upon mail fraud).

The Circuit's opinion accords with: 1) the plain language of the RICO statute, *see*, *e.g.*, *Russello v. United States*, 464 U.S. 15, 20 (1983); *United States v. Turkette*, 452 U.S. 576, 580 (1981); 2) Congress' express liberal construction mandate and this Court's ample precedent indicating RICO's broad reach, *see*, *e.g.*, *Boyle v. United States*, 129 S. Ct. 2237 (2009), citing § 904(a),

84 Stat. 947; and 3) RICO's underlying policy to eradicate enterprise crime in all forms, a purpose distinct and apart from the marketplace concerns present in antitrust law. As a result, this Court's construction of the parallel Clayton Act provision in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), is not controlling, and indeed, when properly understood, *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), supports the finding that the City has suffered an injury to its property under RICO.

Ample federal law recognizes that tax revenue, and the ability to collect such revenue, is the City's property. *See*, *e.g.*, *Pasquantino*, 544 U.S. at 355 (using the common law definition of property for purposes of the mail and wire fraud statutes, the predicate offenses upon which these RICO actions are based). Indeed, Congress has virtually directed that lost tax revenue be treated as an injury to property under RICO in enacting the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.*, which almost exclusively targets lost tax revenues resulting from cigarette trafficking, and upon enactment, including that newly-minted crime within RICO's predicate offenses. *See* 18 U.S.C. § 1961(1).

Both New York common law, *see*, *e.g.*, *Village of Kenmore v. County of Erie*, 252 N.Y. 437, 442, 169 N.E. 637, 639 (1930), and statute, *see* N.Y. Gen. Constr. Law §§ 38, 39, also support the City's position.

The City's injury is direct because it is the immediate victim of the alleged RICO violation (the mail and wire fraud based upon the scheme to evade taxes) and its injury is not derivative of an injury to any other entity. The City seeks to recover for only its own injury, which is measured by the lost cigarette excise tax revenue that results from the fraudulent scheme. Under *Anza*, *supra*, the City has standing to bring such a RICO claim. Moreover, the underlying policies of RICO are served by holding Hemi liable for its fraudulent conduct.

As the only entity that imposes the City's cigarette excise tax, there can be no duplicative recoveries of damages and the measure of the damages is easily quantifiable and ascertainable. *Anza*, 547 U.S. at 458-59; *cf. Hawaii*, 405 U.S. at 264. The City's excise cigarette taxes are owed directly to it. *See*, *e.g.*, N.Y. Unconsol. Law § 9437. As a directly injured victim that loses millions of dollars in City cigarette excise tax revenues, which are integral to its fiscal well-being, the City has standing to bring this RICO action.

POINT I

THE CITY HAS STANDING TO BRING THIS RICO ACTION BASED ON DIRECT INJURY TO ITS "BUSINESS OR PROPERTY" CAUSED BY HEMI'S MAIL AND WIRE FRAUD PERPETRATED IN FRAUDULENT BUSINESS SCHEMES DESIGNED TO DEFRAUD THE CITY OF TAX REVENUE AND RESULTING IN SUCH LOST TAX REVENUE.

A. The City Has Suffered An Injury to Its "Business or Property" under 18 U.S.C. § 1964(c). Pursuant to Both Federal and State Statutory and Common Law, The City's Tax Revenues Constitute Its Property.

(1)

With its purposefully broad definition of "racketeering activity," RICO acknowledges the "breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate wholly within legitimate enterprises." *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989). The statute is "broad[] enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *Id.* at 248-49. RICO thus does not apply only to "organized crime" in the classic "mobster" sense. *Sedima, S. P. R. L. v. Imrex Co.*, 473 U. S. 479, 495 (1985). *See also Turkette*, 452 U.S. at 590, 591. RICO "was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its

economic roots." *Russello*, 464 U.S. at 26, 28 (citing with approval G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982)). *See* Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

As Congress directed, the RICO statute therefore contains an express mandate that its terms are to be "liberally construed to effectuate its remedial purposes." *Boyle*, 129 S. Ct. at 2243, citing § 904(a), 84 Stat. 947, note following 18 U. S. C. § 1961; *see also*, *Sedima*, 473 U. S. at 498 ("RICO is to be read broadly. . . . This is the lesson not only of Congress' self-consciously expansive language and overall approach but also of its express admonition"); *Russello*, 464 U.S. at 21 (noting "the pattern of the RICO statute in utilizing terms and concepts of breadth"). The statute's wide reach is "inherent in the statute as written, and [any] correction must lie with Congress." *Sedima*, 473 U.S. at 499.

Accordingly, this Court has generally refused to adopt narrowing constructions at odds with RICO's express broad language. *See Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008) ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it."), and cases cited therein. Congress has never amended RICO to cut back or constrain the breadth of the statute following any decision by this Court.[10]

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10. Tellingly, however, Congress did amend RICO in 1995 to eliminate securities fraud as a predicate act of racketeering

(Cont'd)

(2)

In the instant case, the question posed in the petition for certiorari was: "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" (Pet. for Cert., i).

This Court turns first to the language of the statute and its plain meaning. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2128 (2008); *Russello*, 464 U.S at 21; *Turkette*, 452 U.S. at 580. The Court's duty is to interpret a statute "so as to effect its purpose." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 793 (1952).

Section 1964(c) of the RICO Act provides that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962] may sue therefor 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). Thus, to have standing under section

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(Cont'd)
for a civil RICO action. *See* S. Rpt. No. 104-98, 104th Cong., 1st Sess., *reprinted in* 1995 U.S.C.C.A.N. 679, 698 (discussing the Private Securities Litigation Reform Act of 1995 and the amendment to 18 U.S.C. § 1964(c), supported by the Securities & Exchange Commission because the securities laws generally provide adequate remedies for those injured).

1964(c), a civil RICO plaintiff must show: (1) that his harm qualifies as injury to his business or property; and (2) that his or her harm was "by reason of" the RICO violation, which requires the plaintiff to establish proximate causation. *See*, *e.g.*, *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992).

Giving the statutory terms their ordinary natural meaning, *see*, *e.g.*, *Pasquantino*, 544 U.S. at 355, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), the City's right to its lost cigarette excise tax revenues is "property" and a valuable legal entitlement under the RICO statute, just as in *Pasquantino*, where the defendants failed to report liquor imports subject to tax. In considering the definition of property for purposes of the wire fraud statute, this Court looked to the common law definition of property, as it has consistently done in construing other terms in the RICO statute. *Pasquantino*, 544 U.S. at 356, citing *Black's Law Dictionary* 1382 (4th ed. 1951) (defining "property" as "extend[ing] to every species of valuable right and interest"). *See also Webster's Third New International Dictionary*, p. 1818 ("property"—definitions 2(a), (b)). This Court held that "the right to tax revenue is property in Canada's hands." *Pasquantino*, 544 U.S. at 356.[11]

In *Pasquantino*, this Court explained why lost tax revenue qualifies as "property" by contrasting such

11. Although this Court did not express a view on the related question of whether a foreign government, based on wire or mail fraud offenses, may bring a civil action under RICO for a scheme to defraud it of taxes, *Pasquantino*, 544 U.S. at 356 n.2, the ability of a foreign government to bring a RICO action is not at issue here.

losses with losses addressed in its decision in *Cleveland v. United States*, 531 U.S. 12 (2000). In *Cleveland*, this Court held that a State's interest in an unissued video poker license was not "property" because the interest was "'purely regulatory'" and "[could not] be economic." *Id.* at 22-23. But in *Pasquantino*, 544 U.S. at 357:

> Unlike a State's interest in allocating a video poker license to particular applicants, Canada's entitlement to tax revenue is a straightforward "economic" interest. There was no suggestion in *Cleveland* that the defendant aimed at depriving the State of any money due under the license; quite the opposite, there was "no dispute that [the defendant's partnership] paid the State of Louisiana its proper share of revenue" due . . . . [citation omitted]. Here, by contrast, the Government alleged and proved that petitioners' scheme aimed at depriving Canada of money to which it was entitled by law. Canada could hardly have a more "economic" interest than in the receipt of tax revenue. *Cleveland* is therefore consistent with our conclusion that Canada's entitlement is "property" as that word is used in the wire fraud statute.

Here, too, the City has alleged that Hemi's scheme aims at depriving the City of money to which it is entitled by law. The City "could hardly have a more 'economic' interest than in the receipt of tax revenue." *Id.* at 357. Indeed, in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), this Court expressly recognized that a State

would have a recoverable injury where the allegations were that the defendants defrauded the State out of tax revenues. *Id.* at 460. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (money "of course, is a form of property.").

Furthermore, in *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561 (1950), this Court, in considering the extent to which a taxpayer was obliged to pay interest on an assessed tax deficiency, determined that, "from the date the original return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States: a duty to pay its tax." *Id.* at 555-56 (citations omitted). Thus, "in the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government." *Id.* at 555-56 (citations omitted).

In addition, in enacting the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 *et seq.* ("CCTA"), Congress made a violation of that statute a RICO predicate. 18 U.S.C. § 1961(1). RICO thus provides a civil cause of action against trafficking in cigarettes "which bear no evidence of the payment of applicable State or local cigarette taxes." *See* 18 U.S.C. § 2342(a) (*see ante*, p. 3 n.3). Virtually the only injury that could result from that offense would be a loss of tax revenue. By making the offense a RICO predicate, Congress has indicated that tax losses should be treated as "injury to business or property."

It is also well-recognized that "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See also Butner v. United States*, 440 U.S. 48, 55 (1979).

Under New York State statutory and common law, tax revenues are property because money is property by definition. *See* N.Y. Gen. Constr. Law §§ 38, 39 (the term property includes personal property and personal property includes money).[12] "A city or village holds the proceeds of taxation as its corporate property. It may use the moneys received as it pleases for purposes of local government or for any other purpose within its corporate powers." *Village of Kenmore v. County of Erie*, 252 N.Y. 437, 442, 169 N.E. 637, 639 (1930); *see also Little Falls v. State*, 266 App. Div. 87, 41 N.Y.S.2d 882 (App. Div. 1943), *aff'd*, 291 N.Y. 755, 52 N.E.2d 963 (N.Y. 1943).

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12. In full, N.Y. Gen Constr. Law § 38 provides: "The term property includes real and personal property" and N.Y. Gen. Const. Law § 39 provides: "The term personal property includes chattels, *money*, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership." (emphasis added).

Notably, Hemi does not cite *Pasquantino*, nor other relevant federal or state common and statutory law (Pet. Br., *passim*). Hemi offers no reasoned basis why lost tax revenue and the legal entitlement to collect such revenue does not constitute "property" for purposes of a RICO action alleging mail and wire fraud violations.

Hemi's repeated argument that the authority to tax is a sovereign power or interest (Pet. Br., p. 7 & *passim*) confuses sovereign and proprietary interests. While the power to tax may be a sovereign one, the tax revenue itself and the right to collect such tax revenue is a proprietary interest of the government. *See Pasquantino*, 544 U.S. at 357 and cases cited *ante*, pp. 21-24; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 448-49 (1992) (in original jurisdiction case between states, this Court distinguished between *parens patriae* sovereign actions and those which involve proprietary direct injuries such as the loss of specific tax revenues).[13]

Such cases as *Case of the State Freight Tax*, 82 U.S. 232, 15 Wall 232, 21 L. Ed. 146, 4 Brewster's Reports 202 (1873) (Pet. Br., pp. 8, 22), which primarily dealt with

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13. *See generally Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-02 (1982) (this Court reviewed the differences among State governmental interests, including two "easily identified" sovereign interests, the exercise of sovereign power over individuals and entities within the relevant jurisdiction (involving power to create and enforce a legal code, both civil and criminal) and the demand for recognition from other sovereigns (most frequently involving the maintenance and recognition of borders); non-sovereign interests, which include proprietary interests and interests pursued on behalf of a private party; and quasi-sovereign interests).

the interplay of state taxing powers with the Commerce Clause, are not relevant to the issue at hand — whether a State or City defrauded of tax revenue and the ability to collect such revenue suffers an "injury to business or property" within the meaning of the RICO statute.

Finally, Hemi not only ignores the express language of the statute, but also RICO's fundamental mandate requiring that the statute be liberally construed to achieve its purposes (Pet. Br., *passim*). As this Court has held, if that "mandate is to be applied anywhere, it is in section 1964, where RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 491 n.10. The Second Circuit's ruling that the City has suffered a direct "injury to [its] business or property" under 18 U.S.C. § 1964(c) in the form of lost tax revenues caused by Hemi's scheme to defraud is a correct application of the statute, which accords with its language, legislative history, and this Court's precedent.

B. Hemi's Reliance on Inapplicable Antitrust Principles is at Odds With the Congressional Policy Underlying RICO and Its Legislative History.

Hemi unsuccessfully attempts to avoid RICO's text through a convoluted description of its legislative history and a strained statutory construction argument. It uses a flawed analysis to argue that this Court's construction of the phrase "injury to business or property" for purposes of the Clayton Antitrust Act in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), should be found controlling for RICO (Pet. Br., pp. 9-18).

Although "Congress modeled § 1964(c) [in the RICO statute] on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," *Anza*, 547 U.S. at 457, notwithstanding, there are major differences between the two statutes. The antitrust laws are concerned exclusively with marketplace misconduct, while RICO is much broader, reaching, *inter alia*, wire fraud, mail fraud, embezzlement, counterfeiting, robbery, and extortion. 18 U.S.C. § 1961(1).

Thus, the relevant legislative history suggests that, unlike the market competition concerns of the antitrust laws, *see*, *e.g.*, *Reiter*, 442 U.S. at 342, Congress gave RICO an expansive reach to penetrate all levels of crime with its multifold adverse effects on society. *See Holmes*, 503 U.S. at 270 (noting Congress' rejection "of the concept of antitrust injury to RICO") and cases cited above, *ante*, pp. 18-19. *See also H.J., Inc.*, 492 U.S. at 246 ("Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime."); *Sedima*, 473 U.S. at 499. *See generally* 115 Cong. Rec. 6994, 6995 (March 20, 1969) (Report of Antitrust Section of the American Bar Association on S. 2048 and S. 2049) (indicating that not all the accoutrements of the antitrust laws should be imported into RICO and noting concerns with respect to creating "inappropriate and unnecessary obstacles" to those injured by organized crime who might seek treble damage recovery); S. Rep. No. 91-617, p. 76 (1969).

Ignoring the above legislative history, Hemi claims that Congress did not contemplate that an injury to the City's "sovereign tax collection interests" would

constitute an injury to its property (Pet. Br., Pt. II). Hemi thus proposes a limitation not present in RICO itself. *Compare Bridge*, 128 S. Ct. at 2138 ("If petitioners' proposed requirement of first-party reliance seems to come out of nowhere, there is a reason: Nothing on the face of the relevant statutory provisions imposes such a requirement.").

Hemi also suggests that just one month before passage of the mammoth OCCA, of which RICO was but one title and which was years in the making, Congress became aware of the Ninth Circuit's decision in *Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972), and accepted the Ninth Circuit's construction of the antitrust term as limited to commercial interests for purposes of RICO (Pet. Br., pp. 11-12). Hemi's pure speculation does not consider Congress' express liberal construction or the different purposes served by RICO.

Then, Hemi attempts to rely on the construction of the phrase "injury to business or property" for purposes of the Clayton Act, citing this Court's decision rejecting the State of Hawaii's *parens patriae* action in *Hawaii*, *supra*, but without considered analysis of the case and its subsequent clarification in *Reiter*, 442 U.S. at 339. When analyzed in light of the RICO statutory scheme, and the *Pasquantino* and *Anza* decisions, there is no question that the City has suffered an injury to its property under RICO.

In *Hawaii*, the state brought a case in its capacity as a *parens patriae* on behalf of its citizens to recover

for damages to its "general economy," claiming violations of the antitrust laws, including section 4 of the Clayton Act, 15 U.S.C. § 15.[14] Hawaii claimed *parens patriae* injuries to the state's "general economy," including extracting its citizens' revenues, increased taxes to offset this loss, curtailment of manufacturing, shipping, and commercial opportunities, injury to the competitive position of Hawaiian goods vis-à-vis other states, and the general frustration of the state's efforts to promote the welfare of its citizens. *Id.*, 405 U.S. at 254.

This Court rejected Hawaii's action, holding that injury to a state's total economy, for which the state sought redress in its *parens patriae* capacity, was not cognizable under section 4 of the Clayton Act. This Court noted that the words "business or property" referred to "commercial interests or enterprises," and reasoned that Hawaii could not recover on its claim for damage done to its "general economy" because such injury did not harm Hawaii's "commercial interests." *Id.*, 405 U.S. at 264. In its decision, this Court largely expressed concern about the specter of duplicative recoveries. *Id.* at 262, 264.

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14. Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

However, in *Reiter*, this Court subsequently clarified its *Hawaii* decision, emphasizing that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Id.* at 341. Recognizing the narrowness of the definition of property employed in *Hawaii*, in *Reiter*, this Court expressly held: ". . . the word 'property' has a naturally broad and inclusive meaning . . . comprehend[ing] anything of material value owned or possessed" and that money itself qualifies as a form of "property." *Id.* at 338.

Reiter thus recognizes not only that money such as tax revenue is property, but also this Court's obligation to give effect, if possible, to every word Congress uses and every provision of the statute. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1066, 1068 (2009) (quoting *Reiter*, 442 U.S. at 339, with approval).

Additionally, the concerns expressed in *Hawaii* are not present here, in that: 1) as to the City's tax, the City is the only target of the harm and there will be no proliferation of actions, such as with potential business competitors, because the only victim of the harm is seeking redress; and 2) the measure of damages is easily ascertainable and quantifiable. *See Anza*, 547 U.S. at 458-59, and discussion *post*, Pt. II.

Hemi's proposed commercial injury requirement conflicts with this Court's precedent and the purposes of RICO. Although RICO borrowed tools of antitrust law to combat criminal activity by enterprises, Congress "nowhere suggested that actual anti-competitive effect is required for suits under [RICO]," as evidenced by the language it chose, allowing recovery to "any person

injured in his business or property," which is "not so limited." *Sedima*, 473 U.S. at 497 n.15 (in borrowing racketeering injury requirement from antitrust standing principles, "the court below created exactly the problems Congress sought to avoid"); *Holmes*, 503 U.S. at 270 (noting the rejection of the concept of antitrust injury to RICO); *Cedric Kushner*, 533 U.S. at 166 (noting that the intracorporate conspiracy doctrine does not apply under RICO because it "turns on specific antitrust objectives"). Even in the Clayton Act context, this Court has refused to require a "commercial injury" in construing "business or property" as "strained." *Reiter*, 442 U.S. at 338-39.

Here, construction of the RICO statute to include tax revenue as property serves the purpose of helping curb enterprise criminal activity and the resulting economic injuries. For, just as RICO's legislative history forewarned, Hemi's racketeering scheme has helped to "drain[] millions from the American economy," *see* 84 Stat. at 922. Indeed, the City is fulfilling the RICO Act's central purpose "not merely . . . [to] compensate victims but to turn them into prosecutors, 'private attorneys general,'" *Rotella*, 528 U.S. at 557 (quotation omitted) and "to divest the association of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585. *See generally* Paul A. Hoffman, Comment, *Standing And Liability Of State And Local Government Under The Civil RICO Statute*, BYU L. Rev., 1 Winter 174, 202-203 (1989) ("The use of federal civil RICO is a valuable tool for state and local governments to recover their losses from illegal business or taxpayer practices, to effectively and less expensively deter illegal activities and to overcome the prosecutorial inadequacies of state and federal criminal laws."). As

Internet businesses proliferate and are able to start up with very little cost, it is critical that they not advocate or employ business models that promote cigarette tax evasion.[15]

Hemi does not mention its mail and wire fraud, including Jenkins Act violations and active misrepresentations and advertisements. Yet, Hemi has engaged in precisely the conduct that Congress has consistently tried to end – a deliberate and systematic business plan to conceal and perpetuate cigarette tax evasion. In this regard, Judge Winter's dissent, which attempts to narrowly parse out the acts of fraudulent conduct in this fraudulent business scheme (Pet. App. 64a-66a), is unavailing. Among other things, it fails to liberally construe the complaint, as required by RICO (*see* 2d Am. Complaint, Circuit Jt. App. A1029-35, which describes a pattern of ongoing unlawful activity through a scheme to defraud the City of tax revenues, by repeatedly using the mails and wires to ship, sell and

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15. *See* GAO-04-641, a Report to the Chairman and Ranking Minority Member, Committee on Government Reform, House of Representatives, entitled "*CIGARETTE SMUGGLING Federal Law Enforcement Efforts and Seizures Increasing*" (May 2004), *available at www.gao.gov/cgi-bin/getrpt?GAO-04-641*, which states that "As cigarette taxes increase so do the incentives for criminal organizations to smuggle cigarettes into the United States. Cigarette smuggling results in lost tax revenues, undermines government health policy objectives, can attract sophisticated and organized criminal groups, and could be a source of funding for terrorists." *Id.*, Highlights page. *See also id.*, pp. 6-7 (citing July 22, 2003 Report of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Illicit Cigarette Trafficking and the Funding of Terrorism*).

distribute cigarettes to City residents while concealing the sales from tax authorities and website statements that sales are tax-free and not required to be reported to any taxing authority).

Given that it cannot rely on the language of RICO or its relevant legislative history and public policy, Hemi is reduced to reliance on inapposite case law, arguing that the injury must relate to a commercial transaction. The cases cited by Hemi are largely distinguishable on the critical ground that they involve alleged injury to government public services or more amorphous, less directly quantifiable claimed losses in the form of additional government expenditures or lost employee salaries.

For example, in the primary case relied upon, *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 458 (2008), the Ninth Circuit ruled 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 18 U.S.C. § 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.[16] The Court then rejected a county's claim

16. Significantly, *Canyon County* recognizes the import of *Reiter* in clarifying the *Hawaii* decision, 519 F.3d at 978, but then looks to admitted *dicta* in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), for a commercial injury requirement, which has been repeatedly disavowed by the Second Circuit (*see* Pet. App. 33a-34a, citing *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 (2002)).

against companies which allegedly hired illegal aliens and thereby increased 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 health care services that it provides to the public." *Id.* at 977. *See also Town of West Hartford*, 915 F.2d at 98 (claimed injuries were interference with normal police duties, as well as the cost of increased manpower and equipment needed to respond to the illegal activities).[17]

Finally, Hemi also points to *Michigan, Dep't of Treasury, Revenue Div. 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).[18] In that case, following the defendant's gasoline station operator underreporting his gross income by $6 million, with resulting $240,000 sales tax underpayment, he was criminally prosecuted and convicted in state court and he subsequently complied with court-ordered payment of restitution, plus interest. The Sixth Circuit held that

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17. The District Court cases, *Twp. 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. Br., p. 24), are also inapposite because the claimed injuries, stemming from a right to employees' honest services, were not found to be "concrete financial loss[es]." *See* 545 F. Supp. 2d at 458-59. The present injuries are obviously "concrete financial losses."

18. 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, but 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).

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 to address the threat posed to the country's economy by organized crime. The Court also emphasized 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). *Fawaz*, 1988 U.S. App. LEXIS 6206 at **3-6. *Anza* recognized, however, that a State may pursue appropriate remedies, including a possible RICO action for lost tax revenue due to mail fraud. *Anza*, 547 U.S. at 458, 460.

In *Illinois Dep't of Revenue*, the Seventh Circuit held that state governmental units can sue under RICO's civil damages provision noting that RICO makes no distinction between state governments, consumers, competitors or other victims in determining who qualifies as a person under the Act. *Id.*, 771 F.2d at 314, 316. The Court also held that the government's loss of money (tax revenue) constituted an injury to property under section 1964. *Id.* While the Court hoped that its decision would appear to Congress as a signal to act to limit RICO, *id.* at 317, Congress declined to do so.[19]

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19. *See generally* T. Todd Tumbleson, Comment, *Tax Fraud and Civil RICO: Implications for Business and Governmental Entities*, 21 U.C. Davis L. Rev. 1233 (Summer, 1988) (comparing the *Phillips* and *Fawaz* decisions and noting that the Seventh Circuit's expressed fear of inundation of civil RICO tax fraud actions had not come to pass).

In contrast to the cases relied upon by Hemi, the instant allegations relate to an enterprise business scheme that expressly defrauds the State and City from tax revenue on a mass basis. Whether government services or salaries constitute "business or property" has no relevance to this case, in which the injury alleged is cognizable as identifiable, quantifiable dollar losses. A construction of the RICO statute which leaves States and localities powerless to recover for such injury when caused by systematic mail and wire fraud schemes would be antithetical to Congress' intention in enacting RICO.

C. Contrary to Hemi's Belated New Argument, the City is a Person Under RICO.

Finally, Hemi raises a new argument that the City is not a person as defined in RICO under 18 U.S.C. § 1961(3) (Pet. Br., Pt. II(C)(3)). That was not a part of the question in the petition for certiorari nor raised below. Accordingly, as a new question, it should not be considered. *See*, *e.g.*, Supreme Court Rule 14.1(a) (only allowing a "subsidiary question fairly included therein"); *Pasquantino*, 544 U.S. at 372 n.14 (citing *Lopez v. Davis*, 531 U.S. 230, 244 (2001) and declining to address "matter . . . not raised or decided below, or presented in the petition for certiorari").

In any event, 18 U.S.C. § 1961(3) provides that a "person" "includes any individual or entity capable of holding a legal or beneficial interest in property." The City, just as the State and other non-federal governmental entities, is an entity capable of holding a legal or beneficial interest in property, and certainly has

such interest in its tax revenue, for all the reasons discussed above. Furthermore, the term "includes" is an expansive term, not one of limitation. *See Webster's Third New International Dictionary*, p. 1818 ("include"—definition 2(a)); *see also Boyle*, 129 S. Ct. at 2243. Nor has any Circuit agreed with Hemi's position on this issue, including the Sixth Circuit in *Fawaz*, *supra*.

In *Anza*, this Court indicated that the State would be a proper party to sue under RICO, which comports with the underlying policy of RICO to authorize private attorneys generals to vindicate their interests. 547 U.S. at 460 (citing *Holmes*, at 269-70); *see also* 547 U.S. at 469 (Thomas, J., concurring in part and dissenting in part) ("Certainly, New York can sue here and vindicate the law, . . ." but also noting that if multiple plaintiffs are direct victims of a tort, "it would be unjust to declare some of their lawsuits unnecessary"); *cf. Georgia v. Evans*, 316 U.S. 159, 162-63 (1942) (including a State as a "person" within section 4 of the Clayton Act); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906) (the city was a person within the meaning of the Antitrust Act and 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). *See generally* Hoffman, *supra*, at 180-85 (summarizing the legislative history and reasons supporting why state and local governments are included in the RICO "person" including to rid government, as well as business of corrupt influences, and the existence of RICO's liberal construction clause, purpose clause and broad statutory language, which all

indicate that it should not be limited to private plaintiffs, and the antitrust laws' similar inclusion).

For all these reasons, therefore, Hemi's arguments fail.

POINT II

HEMI'S FRAUDULENT SCHEMES CAUSE DIRECT INJURY TO THE CITY, AS RECOGNIZED IN *ANZA v. IDEAL STEEL SUPPLY CORP.*, 547 U.S. 451 (2006).

Hemi's secondary argument is that the City is not a directly injured party (Pet. Br., Pt. III). Hemi is wrong. The City's injury does not derive from an injury to another and the City suffers injuries for which only it can recover.

(1)

In *Anza*, this Court rejected extension of RICO standing to a corporation which alleged that a business competitor did not charge New York State sales tax to cash-paying customers. Although *Anza* does not require plaintiffs to show that the injurious conduct is the sole cause of the injury asserted, *Anza* held that proximate cause considerations require "some direct relation" between the injury alleged and the injurious conduct. *Anza*, 547 U.S. at 456 (quoting *Holmes*, 503 U.S. at 269). In addition to finding that the lowering of prices by the business competitor was distinct from the alleged RICO violation (defrauding the State, the direct victim), this Court also pointed to the difficulty of ascertaining

damages caused by some remote action and the possibility of other factors contributing to the competitor's lower prices and the plaintiff's lost sales. *Id.*, 547 U.S. at 458.

In contrast to the indirect nature of the injury to the business competitor, the *Anza* Court recognized that the State of New York was "[t]he direct victim" which was being defrauded and that the State lost tax revenue as a result. *Id.* at 458, 460 (citing *Holmes*, *supra*).

Here, the City stands in the same position as the State did in *Anza*. In particular, as this Court stated (547 U.S. at 460):

> The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims (citation omitted). . . . If the allegations [of defrauding the State of New York out of a substantial amount of money] are true, the State can be expected to pursue appropriate remedies. The adjudication of the State's claims, moreover, would be relatively straightforward; while it may be difficult to determine facts such as the number of sales Ideal lost due to National's tax practices, it is considerably easier to make the initial calculation of how much tax revenue the Anzas withheld from the State. There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.

See also Sedima, 473 U.S. at 496.

In this case, 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). Accordingly, as the Circuit recognized, 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, which is at the heart of the alleged predicate acts of mail and wire fraud (Pet. App. 26a, citing *Sedima*, 473 U.S. at 497).

Notwithstanding the above, Hemi argues that the only directly injured parties are either the customers or the State, "with any injury to the City flowing from their misfortune" (Pet. Br., p. 31 & n.22, citing the dissenting opinion which characterized the City as, "at best[,] an expectant gratuitous donee of information from the State" (Pet. App. 66a-67a)).

By citing Judge Winter's dissent, Hemi reveals that it has confused two issues — the dissent was concerned with whether the omissions or misrepresentations were made directly to the City, not with whether the City was directly injured. As detailed above, the City imposes its own cigarette excise tax and the tax is owed directly to it (*see* N.Y. Unconsol. Law § 9437; N.Y.C. Admin. Code § 11-1302(f)). Hemi's argument that only the State, and not the City, is harmed is simply wrong on the facts.

The fact that the State may also be injured by the loss of its tax does not change the analysis. As the Circuit

recognized, "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" (Pet. App. 26a-27a); *see also Anza*, 547 U.S. at 469 (Thomas, J., concurring in part and dissenting in part) (indicating that New York could sue, but also noting that if multiple plaintiffs are direct victims of a tort, "it would be unjust to declare some of their lawsuits unnecessary").[20]

Hemi is intermingling an entirely different concern, *i.e.*, the issue of reliance, or to whom a misrepresentation or omission is made. The dissent below focused on the fact that Jenkins Act reports were, under the language of the Act, provided to a "State," not the City, so that in the dissent's view any omissions were omissions or misrepresentations made to New York State. Apart from the fact that the City pleaded the existence of a joint agreement with the State for administering tobacco taxes, the question of to whom a misrepresentation must be directed to support a mail fraud claim has been resolved in the City's favor by the unanimous decision in *Bridge*, *supra*, contrary to Hemi's claims (Pet. Br., p. 31).

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20. *See also RWB Servs., LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688 (7th Cir. 2008) ("existence of multiple victims with different injuries does not foreclose a finding of proximate cause"; nor is it dispositive that the scheme envisioned defrauding another entity as well, who could also potentially bring a RICO claim).

In *Bridge*, this Court clarified that "a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations." *Bridge*, 128 S. Ct. at 2145. This Court explained that, not only is reliance not an element of a civil RICO claim based on mail fraud, but also reliance may not be brought in through the back door in a proximate cause analysis under RICO because establishing reliance on fraudulent misrepresentations "has no place in a remedial scheme keyed to the commission of mail fraud, a statutory offense that is distinct from common-law fraud and that does not require proof of reliance." *Id.* at 2142.

Hemi's argument that "injury to government in its sovereign capacity is always indirect" (Pet. Br., pp. 32-34) is essentially a rehash of its arguments that the City has not suffered an injury to its business or property. That argument fails for all the reasons discussed above (*ante*, Pt. I).

Hemi's brief fails to mention its acts of mail and wire fraud. Not only does a violation of the Jenkins Act, by itself, constitute mail fraud, but the systematic scheme to defraud the City of tax revenue encompassed numerous other actions, including affirmative representations and advertisements promoting tax evasion and concealment, *e.g.*, the statements that Hemi was not required to file purchase information with any taxing authority and that all sales were "tax-free," and the shipments of the

cigarettes (*cf. Anza*, 547 U.S. at 487 (Breyer, J., concurring in part and dissenting in part) (marking as relevant distinction that National did not tell its customers, "We shall not pay sales taxes."). *Cf. Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) (in antitrust case, "Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.'").

Furthermore, contrary to Hemi's and the dissent's misapprehension, the predicate racketeering acts in this case are not the Jenkins Act violations, but rather the mail and wire fraud (Pet. App. 31a-32a). *See*, *e.g.*, *Pasquantino*, *supra*; *Fountain v. United States*, 357 F.3d 250, 255-60 (2d Cir. 2004), *cert. denied*, 544 U.S. 1017 (2005); *Porcelli v. United States*, 303 F.3d 452 (2d Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003); *see also United States v. Melvin*, 544 F.2d 767 (5th Cir. 1977) (Jenkins Act violations constitute mail fraud); *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975) (same). Simply stated, the harm does not turn on the State allegedly "gratuitously" giving the City information about the sales, rather the harm is predicated on the acts of mail and wire fraud.[21]

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21. In any event, the underlying premise of the "gratuitous" characterization is wrong – the State and City have entered into ongoing agreements for the administration and collection of cigarette taxes through the sharing of information (Circuit Jt. App.

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Thus, as the Circuit found, the City's alleged injury is not derivative of the State's injury because "Though the City and State are injured by the same activity, the City's injury does not depend on the State being injured" (Pet. App. 31a). The City is alleged to be the target of the scheme because Hemi's business plan was to sell cigarettes in such a way as to allow consumers to evade New York City's taxes. "That the State may also have been targeted by defendants' schemes does not change the result because there is no precedent suggesting that a racketeering enterprise may have only one 'target,' or that only a primary target has standing" (Pet. App. 31a). "The fact that defendants have no statutory duty to the City under the Jenkins Act does not make the City's alleged harm from the mail and wire fraud violations derivative, unforeseeable, or any less direct" (Pet. App. 31a).

In *Anza*, this Court also directed the courts to consider the "motivating principle[s]" behind the directness component of the proximate-cause standard in RICO cases. *Anza*, 547 U.S. at 458. These include "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.* at 458. Stated another way, "the less direct an injury

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A1000-04, reproduced *ante*, p. 6 n.6). The Joint Tax Agreement obligates the City and the State to provide each other with all information relevant to the collection of cigarette taxes, including "information . . . which may result in additional cigarette tax revenue to the State or City" and "all violations of Article 20 of the [State] Tax Law or Chapter 13 of title 11 of the [City Administrative] Code" (*id.*).

is, the more difficult it becomes to ascertain the amount of plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269. This remoteness concern is heightened when RICO suits are brought by economic competitors seeking damages for lost sales because those types of claims, "if left unchecked, could blur the line between RICO and the antitrust laws." *Anza*, 547 U.S. at 460. *See also Holmes*, 503 U.S. at 269-70 ("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.").

No such remoteness concerns are present here. There is no more directly injured party who could bring suit as to the fraud to evade the City's cigarette excise tax, although the State may, as noted, have its own action for its own tax. Nor is there a risk of duplicative recovery, another of the concerns expressed in *Anza*. *See also Bridge*, 128 S. Ct. at 2144 (noting that "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").

Indeed, the Second Circuit's opinion contains a thorough examination of proximate causation and its findings fully comport with the "underlying premises" set forth in *Holmes* and *Anza* (Pet. App. 28a). With respect to "the factual difficulty of measuring indirect damages and distinguishing among distinct independent causal factors, in this case, measuring the

damages is as simple as counting the number of cigarette packs sold by defendants to New York City residents without complying with the Jenkins Act" (Pet. App. 28a).

"Moreover, the fact that the cigarette purchasers may be partially to blame - either because they were not aware of their reporting duties or because, as part of the alleged RICO conspiracy, they were intentionally hiding the fact of their purchases - does not defeat proximate causation," given that defendants were "a substantial factor in the sequence of events that caused the loss" (Pet. App. 28a-29a). The Circuit aptly recognized:

> A contrary rule would effectively require that a plaintiff's injury be caused by only one source, and, as this is often not the case, it would operate to insulate from liability defendants who scheme with others in violation of RICO [a result clearly not envisioned by Congress]. Here, defendants' actions are clearly alleged to be a substantial factor in the City's loss.

(Pet. App. 29a-30a).

The Circuit also recognized that the *Holmes* factor of the complexity of apportioning damages among plaintiffs was not implicated here, because "[o]nly the City can claim loss of the City's use taxes. To the extent that the State of New York is also aggrieved by defendants' actions, it would have separate damages because it charges separate taxes. *See* N.Y. Tax Law §§ 471, 471-a" (Pet. App. 30a). Moreover, another reason highlighted by *Holmes* for requiring a direct injury is

the expectation that those directly injured will litigate their claims in order to vindicate the law. 503 U.S. at 269. In the instant case, although the State may also seek to sue to vindicate the law, the City should not have to rely on the State to enforce the RICO laws, where the City's injury in the form of lost taxes is just as direct as any comparable injury of the State (Pet. App. 30a).

Additionally, as alleged in the complaint, which must be accepted as true for purposes of this dismissal motion, *see Bridge*, 128 S. Ct. at 2135 n.1, "there are no speculative steps in [the] chain of causation" (Pet. App. 30a). Thus, when defendants fail to comply with the Jenkins Act, defendants deprive both the City and the State of information needed to collect taxes from the in-State and in-City cigarette purchasers. The City has alleged that, based on its agreement with the State, it "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" (Pet. App. 30a-31a).

The direct injury finding is consistent with RICO's purposes - to expand enforcement beyond federal prosecutors with limited public resources - to turn victims (here, the City) into prosecutors as private attorneys general seeking to eliminate illegal activity by parties who engage in mail and wire fraud by blatantly violating the Jenkins Act. *See Rotella*, 528 U.S. at 557 (acknowledging that the very "object of civil RICO is . . . to turn [victims] into prosecutors, private attorneys general dedicated to eliminating racketeering

activity" (quotation marks and citation omitted)).[22] It is also consistent with Congress' intentions to stop cigarette tax evasion and smuggling through mail and wire fraud, purposes consistently evinced not only in RICO, but also in the Jenkins Act and the CCTA.[23]

Allowing this RICO action to go forward, moreover, will not just affect the City of New York, but all localities who may have more limited resources and who need the benefit of RICO to pursue fraudulent systematic tax evasion schemes. Congress clearly directed expansive remedial relief in the form of treble damages.

In attempting to fall within the concerns expressed in *Anza* and *Holmes* about speculative damages and unwieldy apportionment issues in cases involving indirect injuries, Hemi makes several new, misleading arguments (Pet. Br., pp. 35-38).

First, Hemi argues for the first time in this case that, through "better distribution (using the Internet) and better pricing" (Pet. Br., p. 36), it was able to attract

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22. *See also Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (holding that Cook County, not a group of taxpayers, was directly injured by bribery scheme where individual paid money to employees in order to obtain lower property tax assessments for his clients); *City of Chicago Heights v. LoBue*, 841 F. Supp. 819 (N.D. Ill. 1994) (City of Chicago Heights, the injured party whose funds allegedly were used to garner bribes and kickbacks for the defendants, was the proper party to bring RICO suit).

23. While New York State has its own RICO statute, *see* N.Y. Penal Law §§460.00-460.80, it does not include mail fraud as a predicate offense and does not contain a treble damage remedy.

customers. Indeed, the brief repeats these phrases constantly (*id.*, *see also* pp. 21, 31, 36, 37), as if repeating the phrases makes them true on this 12(b) pleading motion. In any event, the City is not Hemi's business competitor – it is a taxing authority.

Moreover, unlike in *Anza*, where this Court reasoned that competitive factors other than price may have contributed to the plaintiff's injury, the record here is clear, as evidenced by Hemi's own statements: Hemi affirmatively advertised that there is "no tobacco tax," that it did not report sales to the State taxing authorities and was "not required to do so," and that its cigarettes are "tax-free" (*see ante*, pp. 7-8). Accordingly, Hemi has admitted that prices are lower because State and City taxes are not and will not be included in the price.

Hemi's further argument that the measure of damages is speculative because N.Y.C. Admin. Code, § 11-1302(b)(1) contains an exception for sales of less than 400 cigarettes (*i.e.*, about two cartons) (Pet. Br., p. 37) is specious. Like N.Y. Tax Law § 471-a, the exception provides that the taxes imposed do not apply to the "the use, otherwise than for sale, of four hundred cigarettes or less brought into the city, on or in the possession of, any person." N.Y.C. Admin. Code, § 11-1302(b)(1). That exemption only applies to cigarettes purchased in person, not if they are shipped into the City by mail.

In sum, had Hemi chosen to conduct its business in compliance with its statutory obligations and not premised its business plan on a scheme to defraud and tax evasion, this RICO case would not have been necessary. However, as this Court recognized with

respect to the State in *Anza*, here, the City has stated a claim against Hemi for its blatant scheme to defraud the City of its cigarette excise tax revenue and RICO provides the only remedy available to the City.[24]

(2)

Hemi's final argument is that the New York Court of Appeals has determined that the City has only sustained indirect derivative injuries and that such holding should influence this Court (Pet. Br., Pt. III(D)). Hemi's argument lacks merit.

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24. Hemi contends that the City made a "remarkable concession" in its brief opposing certiorari that "its injury is due to the individual taxpayers' failure to voluntarily pay use taxes to the City" (Pet. Br. p. 37). Hemi takes the quotation out-of-context, given that the City was simply quoting the Second Circuit's opinion, as the City's record citation indicates, which opinion initially cited a number of other factors (Pet. App. 11a). In any event, the City has never disputed that it is the purchaser who owes the tax, but that is not the point. As discussed above, this Court recognizes that the right to collect tax revenue is property in the government's hands, regardless of whether it has yet been collected. *See Manning v. Seeley Tube & Box Co.*, *supra*. Hemi's mail and wire fraud, including its failure to file Jenkins Act reports and affirmative misrepresentations, has injured the City directly by the City's lost cigarette excise tax revenue. In both federal RICO and antitrust cases, "proximate cause is not . . . the same thing as a sole cause," and it is enough for the plaintiff to plead and prove that the defendant's tortious or injurious conduct was a "substantial factor in the sequence of responsible causation." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (RICO), *modified on other grounds by* 30 F.3d 1347 (11th Cir. 1994; *see also Anza*, 547 U.S. at 456. Finally, as noted above, the City alleged that some purchasers had stated they were misled by the claims of "tax-free" cigarettes (*ante*, p. 8 n.8, Circuit Jt. App. A1022, *see* A118-25, A645).

After the Circuit had ruled on the RICO issues, including the ones at issue now, the Circuit, *sua sponte*, certified two pure state law questions. Insofar as is relevant here, the New York Court of Appeals considered a pure state law issue under a specific state consumer protection statute, *i.e.*, did the City have standing to bring a claim under N.Y. Gen. Bus. Law § 349(h), New York's consumer protection statute which governs "Deceptive Acts and Practices." That statute requires that a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice. *City v. Smokes-Spirits.com*, 12 N.Y.3d 616, 621 (N.Y. 2009).

Relying on its recent precedent holding that the consumer protection statute must be narrowly construed under state law, *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 N.Y.3d 200, 207, 818 N.E.2d 1140, 1144 (N.Y. 2004), to bar derivative actions "when the loss arises solely as a result of injuries sustained by another party," the New York Court of Appeals held that the City failed to establish standing 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." 12 N.Y.3d at 622. The Court of Appeals emphasized its findings in the *Blue Cross* decision as to: the lack of any clear indication from the Legislature that derivative injuries were actionable under Gen. Bus. Law § 349(h); its concern with expanding section 349 to permit "a tidal wave of litigation against businesses that was not

intended by the Legislature"; and that its ruling was "in accord with several other courts that recognize a remoteness bar to recovery under their state consumer protection statutes" (12 N.Y.3d at 622, citations omitted).

The New York State Court of Appeals did not consider RICO nor the City's direct injury in the form of lost cigarette excise tax revenue arising from the systematic deliberate business scheme to defraud the City of tax revenue by the alleged criminal acts of predicate mail and wire fraud. Such revenues are owed directly to the City, not to the State or to the consumer, neither of whom could sue for the City's injuries. Furthermore, under Hemi's theory, if, *arguendo*, there was no provision in the Gen. Bus. Law authorizing the State Attorney General to sue, then the New York Court of Appeals' decision would also effectively bar the State from suing for its injury under RICO, a proposition directly belied by this Court's *Anza* decision.

Finally, in light of RICO's broad language, liberal construction and distinct purposes to combat organized crime in all its forms and to foster enforcement by private attorneys general, Hemi's reliance on a state law decision, which at the Circuit's request considered City standing under a narrow state consumer protection statute, is unavailing. *See Bridge*, 128 S. Ct. at 2143 (reliance is not an element of a civil RICO claim based on mail fraud; furthermore, it may not be brought in through the back door in a proximate cause analysis under RICO because establishing reliance on fraudulent misrepresentations "has no place in a remedial scheme keyed to the commission of mail fraud, a statutory

offense that is distinct from common-law fraud and that does not require proof of reliance.")[25]

CONCLUSION

For all the above reasons, the order below should be affirmed. In accord with the statute and this Court's precedent, the City has stated a RICO claim sufficient to withstand the motion to dismiss and this action should proceed.

Respectfully submitted,

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25. The only authority cited by Hemi are two inapposite Circuit cases which apply claim preclusion in the classic situation of a full adjudication of a state law claim which rests upon the same facts and, where following full opportunity to litigate, reaches a conclusion which is given binding effect in the federal courts. Hemi does not contend that such is the case here, as evidenced by its *cf.* citation.