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 OF THE STATES OF INDIANA, ALABAMA, FLORIDA, HAWAII, IDAHO, ILLINOIS, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, NEBRASKA, NEW JERSEY, NEW MEXICO, OHIO, PENNSYLVANIA, SOUTH CAROLINA, UTAH, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether city government meets the Racketeer Influenced and Corrupt Organizations Act requirement that a plaintiff be injured in its "business or property" by alleging injury resulting from non-payment of taxes.

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Florida, Hawaii, Idaho, Illinois, Louisiana, Maryland, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, Ohio, Pennsylvania, South Carolina, Utah, West Virginia, and Wyoming are interested in civil liability under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as 18 U.S.C. §§ 1961-1968 (2006)), because they and their subdivisions have been or may be parties in a variety of civil RICO actions seeking to redress monetary and other injuries to government entities. Corrupt public officials and their cronies sometimes loot state and local government agencies through racketeering activity. The federal civil RICO statute provides an important, albeit limited, tool to seek redress for losses associated with such corruption. State and local governments, through the actions of responsible government officials, resort to RICO only infrequently when all other options have been exhausted.

For example, the State of Indiana, both on its own behalf and as relator for the City of East Chicago, has recently used the federal RICO statute to sue former East Chicago Mayor Robert Pastrick and his associates for losses they inflicted on city government by running the city as a corrupt enterprise. A limited example of this was the illegal "sidewalks-for-votes" scheme where Pastrick and others converted millions of dollars of city funds to pay for new sidewalks and driveways and tree

trimming for their political supporters prior to the 1999 mayoral primary. Investigations of the rampant corruption led to successful federal prosecutions of various actors,[1] but not of Pastrick or his closest allies, James Fife and Timothy Raykovich. Indiana's RICO lawsuit against those three and many other individuals and companies not only brought in settlements (including with Raykovich) totaling $1,438,025, but also led, on the eve of trial, to default judgments against Pastrick and Fife. *Indiana v. Pastrick*, No. 04-CV-506 (N.D. Ind. June 1, 2009) (Docket No. 559, 561). The case remains pending for the district court to determine remedies. Under RICO's treble damages provision, Indiana has requested judgment against Pastrick and Fife for all their wrongdoing in the amount of $108,998,876.30.

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[1] Edwardo Maldonado, City Controller, convicted of 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 2; Randall Artis, Third District Councilman, convicted of 18 U.S.C. § 666(a)(1)(A),(B) and 18 U.S.C. § 2; Frank Kollintzas, Fourth District Councilman, convicted of 18 U.S.C. § 666(a)(1)(A), 18 U.S.C. § 2 and 18 U.S.C. § 1001; Adrian Santos, Fifth District Councilman, convicted of 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 2, 18 U.S.C. § 1343 and 18 U.S.C. § 2, and 18 U.S.C. § 371; Joe De La Cruz, At-Large Councilman, convicted of 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 2; Jose Valdez, Jr., General Foreman, East Chicago Parks Department, convicted of 18 U.S.C. § 1343, 18 U.S.C. § 371, 18 U.S.C. § 666(a)(1)(A) and 18 U.S.C. § 2, Pedro Porras, City Engineer, convicted of 18 U.S.C. § 1343, 18 U.S.C. § 371, 18 U.S.C. § 1503 and 18 U.S.C. § 1623.

Regardless of how much Indiana ultimately collects on behalf of the government and citizens of East Chicago, without civil RICO available as a federal court cause of action, Pastrick and Fife may never have faced justice of any sort. And critical to Indiana's use of the federal RICO statute was the principle that all government money constitutes "property," the loss of which can constitute injury under the RICO statute. If "property" under RICO is limited to commercial injuries, Indiana's judgments against Pastrick and Fife would be vulnerable to attack, and states and localities would lose a useful tool in the fight against corruption.

When corrupt actors—wayward government officials and tax evaders alike—abscond with government property, responsible officials should be able to turn to the federal RICO laws for relief, both as a matter of seeking full recovery and of deterring future would-be wrongdoers.

SUMMARY OF THE ARGUMENT

Petitioner's business model, which it shamelessly defends, requires it to ignore federal and state tax reporting laws and thereby defraud the City of New York of tax revenues. While Hemi writes as if its tax-dodge-scheme earns itself no particular benefit, Pet. Br. at 21, surely Hemi would not bother to break the law otherwise. In truth, failing to report to New York officials cigarette sales to New York consumers has the effect of shifting what ought to be tax payments from those consumers to the pockets of

Petitioners, whose cigarettes will, sans any realistic possibility of tax consequences, cost consumers marginally less than those of law-abiding manufacturers. So, by illegally defrauding the City of taxes owed to it, Hemi can increase its earnings. This business model is not a triumph of free-market ingenuity as suggested by the Petitioners, Pet. Br. at 36, but is instead nothing more than free-rider trickery that the Court should not validate.

That said, the interest of the amici states is not the specific issue of whether tax revenue is "property" under RICO. Instead, the amici states focus this brief on the reasons why RICO should not be read to require a "commercial" injury.

By explicit Congressional directive, courts must read and apply the RICO statute broadly. There is simply no requirement for a "commercial" injury in the text of the statute. Further, the argument that the meaning of RICO's "business or property" language is identical to the meaning of the same text in the Clayton Act ignores the substantially different contexts of the statutes. The Clayton Act is aimed relatively narrowly at monopolistic businesses, while RICO is intended to combat general corruption and is not narrowly targeted at "traditional" organized crime such as La Cosa Nostra. What is more, the Court's interpretations of the Clayton Act requiring losses to occur in a business's mercantile activities arose *after* Congress passed RICO, so while Congress modeled RICO on the Clayton Act in some ways, it is

not reasonable to infer that Congress intended such a narrow application of RICO's civil remedies.

Nor is there any danger that a holding in favor of New York will open the floodgates and overwhelm federal courts with civil RICO cases. In nearly every civil RICO case that comes before the Court, the defendant makes this argument, but the Court has nonetheless read the statute broadly and ruled for the RICO plaintiff in each of those cases. At the same time, over the past 20 years, the number of RICO cases in federal courts has steadily declined. Even as broad as it is and is intended to be, RICO remains a challenging statute to enforce, not because "business or property" injury is difficult to prove, but principally because establishing an "enterprise" or a "pattern of racketeering activity" often requires proof of intricate personal relationships that do not exist or that may not be revealed through discovery. In any event, even if the fear of open floodgates were legitimate, it is a policy concern more appropriately addressed to Congress.

Ultimately, even if the Court is persuaded that unpaid tax revenues do not constitute "business or property" losses under RICO, its holding should not venture as far as Petitioner urges—to the point of excluding *all* non-commercial losses from civil RICO recovery. Rather, the Court should reserve for another day the issue whether non-commercial losses to state bank accounts, such as through misappropriation, conversion and embezzlement, constitute recoverable RICO injuries.

ARGUMENT

I. The RICO Statutory Text Does Not Include a "Commercial" Injury Requirement

Proper application of RICO, or any other statute, begins with understanding the "language of the statute" which is "the most reliable evidence of its intent[.]" *United States v. Turkette*, 452 U.S. 576, 593 (1981). The importance of reading the statute cannot be overstated. *See* Henry Friendly, *Benchmarks* 202 (1967) (quoting the three rules of Justice Frankfurter for interpreting statutes, "(1) read the statute, (2) read the statute, (3) read the statute"); *see also Felix Frankfurter*, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration."). Roscoe Pound noted the danger of interpreting statutes based on judges' policy preferences, stating that "specious construction tends to bring law in to disrespect; . . . subjects courts to political pressures; invites an arbitrary personal element in judicial administration; [it threatens to make] laws. . . worth little [and to] break down [the] legal order." Roscoe Pound, *III Jurisprudence*, 488-90 (1959). Justice Cardozo also put it well: "[A court's] duty is done when [it] enforce[s] the law as it is written." *Techt v. Hughes*, 128 N.E. 185, 186 (N.Y. 1920).

With those underlying principles as a starting point, applying the relevant operational text of civil RICO in this case is an unremarkable task. RICO authorizes persons to sue for appropriate redress, including equity relief, treble damages and attorney's fees, when they are "injured" in their "business or property" "by reason of" a RICO "violation" that includes, *inter alia,* the elements of "enterprise" and "pattern of racketeering." 18 U.S.C. § 1964(a), (c). There is no magic to understanding the key text in this petition—"business or property" means just what it says, and nothing more or less.

A. Governments are injured in their "business" and when their bank accounts are improperly depleted

By any ordinary understanding, a party's fraudulent conduct that ultimately deprives a state or local government of money injures the government in its "business or property." 18 U.S.C. § 1964. "Business" means "occupation," "work," "concern," or "activity," *Oxford English Dictionary* at 110 (Paperback ed. 2001), or even "enterprise," "transactions," or "matters," *Oxford English Dictionary* 211 (8th ed. 2004). Thus, a governmental entity engages in "business" when it performs its ordinary work, such as collecting taxes and providing services to its residents. Corrupt actors harm a government's "business" when their activities funnel money away from government services and activities.

B. The concept of "property" is broad enough to include money and the intangible right to uncollected debts

The meaning of "property" in this context is no more elusive than "business." "Property" means "belonging" or "right." *Oxford English Dictionary* at 669 (Paperback ed. 2001) ("belonging"); *Oxford English Dictionary* 1252 (8th ed. 2004) ("right" "ownership," or "bundle of rights"). Fittingly, the Court has observed that "'[p]roperty' denotes a broad range of interests." *Russello v. United States*, 464 U.S. 16, 21 (1983) (construing RICO and quoting *Perry v. Sinderman*, 408 U.S. 593, 601 (1972)). And there can be no question that "[m]oney . . . is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979) (construing the Clayton Act); *see also Phillips v. Wash. Legal Found.,* 524 U.S. 156, 160 (1998) (holding that interest on client funds kept in lawyers' accounts is client property under the Takings Clause). That should end any debate over whether the word "property" inherently suggests only that which is derived from some commercial activity.

Petitioner, however, argues that "property" in the civil RICO context is limited to traditional 19th century notions of property, which (they say) did not include such things as unpaid taxes or, more broadly, an intangible right to collect unpaid debts. Pet. Br. at 22. First, however, there is no basis—even under 19th century law—for driving a wedge

between money as property (a concept indisputably recognized in the 19th century) and the right to collect money as property. In fact, "a 'chose in action'—an interest in property not immediately reducible to possession (which, over time, came to include a financial interest such as a debt, a legal claim for money, or a contractual right)"—was recognized as assignable property by the Court in 1816. *Sprint Commc'ns Co., L.P. v. APCC Services, Inc.*, -- U.S. --, 128 S.Ct. 2531, 2536, 2538 (2008) (citing *Welch v. Mandeville*, 14 U.S. 233, 236 (1816)).

Second, concepts of "property" changed dramatically during the 20th century. *See generally Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972) ("the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."). By 1970 it was well-established that property rights extended well beyond traditional Hohfeldian bundles and could even be found in expectations of government employment, government benefits, unemployment compensation, and tax exemptions. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (withdrawal of public assistance benefits); *Sherbert v. Verner*, 374 U.S. 398 (1963) (disqualification for unemployment compensation); *Speiser v. Randall*, 357 U.S. 513 (1958) (denial of a tax exemption); *Slochower v. Bd. of Higher Educ. of New York*, 350 U.S. 551 (1956) (discharge from public employment); *see also United States v. Ivezai*, 568 F.3d 88 (2d Cir. 2009) (construing RICO).

Accordingly, a much broader idea of property prevailed by the time Congress considered and passed RICO, which is the date as of which it must be construed. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that "unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning") (emphasis added). Several RICO cases have recognized predicate property interests that likely would not have been found to exist in the 19th century. *See, e.g.*, *Brown v. Cassens Transp. Co.*, 546 F.3d 347 (6th Cir. 2008) (concluding that mail and wire fraud relating to a scheme to deny workers' compensation benefits is a proper predicate offense under RICO); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 n.4 (9th Cir. 2002) (holding that parties who show "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes" have shown a property interest sufficient to provide standing under RICO).

Petitioners offer no reason for inferring that Congress intended to invoke outworn 19th century notions of property when it enacted RICO. What is more, even if Congress did so intend, traditional property rights did not refer exclusively to rights gleaned from commercial activity. Indeed, in the 19th century property included not only money derived from any source but also the right to collect unpaid debts that were owed for any reason.

C. Statutory text commands that RICO be construed broadly

If the statutory text "business or property" is not clear enough, Congress provided an interpretive guide specifically for RICO. Congress was well aware that, with RICO, it was enacting a broad statute with broad remedies. Rather than risk judicial uncertainty about whether Congress really intended that breadth, Congress made the critical decision to mandate liberal construction of the statute, inserting text directing that "[t]he provision of [RICO] shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, 84 Stat. 922, 947 (1970).

RICO is not ambiguous and clearly does not require "commercial" injury. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (RICO "demonstrate[s not] ambiguity[, but] breadth") (citation omitted); *see also Boyle v. United States*, -- U.S. --, 129 S.Ct. 2237, 2246-47 (2009) (text of the RICO statute is "clear but expansive"). If doubt exists, however, the proper course is to resolve any ambiguity in RICO according to its construction clause. Requiring a showing of a "commercial" injury would hardly give RICO a liberal construction.

II. The History and Underlying Policy of the Civil RICO Statute Demonstrate that Courts Should Use it to Afford Broad Relief Unencumbered by Limits on Antitrust Actions

Petitioners' central thesis is that, because the civil RICO statute was patterned after the antitrust laws, it comes bound with the same limits to the meaning of "business or property" that have hemmed the Clayton and Sherman Acts. Examining another statute to determine meaning, however, is traditionally improper absent an initial showing of ambiguity of the statute before the court. *Hamilton v. Rathbone,* 175 U.S. 414, 421 (1899) (finding "that prior acts may be resorted to, to solve, but not to create an ambiguity."). Because Petitioners have not shown ambiguity, their discussion of the antitrust acts is irrelevant.

Indeed, the Petitioners acknowledge that superficial textual similarity to the antitrust laws gets you only so far in understanding civil RICO. Pet. Br. at 28. The history of the statute and the policy objectives giving rise to it are crucial for a proper appreciation of the Act's breadth. This Court and others have long recognized as much and applied the Act broadly. Meanwhile, Congress, despite many opportunities to do so, has declined to narrow, in response to the Court's decisions, the circumstances under which the Act affords relief. Accordingly, there is no reason to change course and

apply a non-textual restrictive understanding of "business or property."

A. RICO's history points in the direction of a broader meaning of "business or property" than prevails in antitrust

1. Congress enacted RICO to deal with "enterprise criminality," which consists of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors." *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (citations omitted). Initial versions of the statute proposed in 1967 would have used antitrust theories as a way to combat organized crime by inserting new language into the Sherman Act. *See Sedima,* 473 U.S. at 498-99. The ABA studied the proposed statutes and suggested that a statute separate from the antitrust laws should be created so that private litigants would not "have to contend with a body of precedent—appropriate in a purely antitrust context[.]" *Id.* at 498; *see also* 115 Cong. Rec. 6995 (1969) (ABA Report).

As the ABA urged, Congress enacted a separate statute. Therefore, any suggestion that RICO actions be limited by antitrust-type limitations—including "commercial" injuries—should be rejected. RICO was created as a separate statute precisely so that narrowing considerations would not limit its scope.

Although the occasion for drafting the statute was to facilitate the prosecution of organized crime, "Congress for cogent reasons chose to enact a more general statute" and "drafted RICO broadly 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." *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 248-49 (1989). Indeed, included within RICO's operative notion of "racketeering activity" are (1) violence, such as organized crime hits, hate crimes, and terrorism; (2) the provision of illegal goods, services, and people, such as drugs, prostitution, and illegal aliens; (3) corruption in unions and government entities, federal and state, such as fraud, bribery, and extortion; and (4) commercial and other frauds characteristic of white-collar offenders.[2] "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Sedima,* 473 U.S. at 499 (citation omitted).

2. Furthermore, the "commercial injury" gloss that Petitioner seeks to add did not exist when RICO was enacted. Rather, it comes from the language of

[2] *See* G. Robert Blakey, *The RICO Civil Fraud Action in Context*, 58 Notre Dame L. Rev. 237, 300-06 (1982).

an antitrust case, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972), decided two years *later*.[3]

While it is generally true that when "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), that does not mean that the latter statute carries the post-enactment interpretive baggage of the former. An interpretation of the first statute that takes place after the second statute is drafted cannot possibly reflect the intent of the legislature that drafted the second statute. *See Stutsman County v. Wallace,* 142 U.S. 293, 312 (1892). And, when looking to antitrust laws for guidance concerning RICO, the Court has been careful to note that the relevant interpretation arose before Congress enacted RICO. *See Rotella v. Wood,* 528 U.S. 549, 557 (2000) (relying on Clayton Act precedent because "the Clayton Act's injury-focused accrual rule was well established by the time civil RICO was enacted[,]" thus, suggesting that the

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[3] Petitioners' argument that the Court must assume that Congress was aware of, and intended to engraft onto RICO, an obscure Ninth Circuit opinion released a month before RICO was passed, but three years after Congress began debating RICO, smacks of playing "gotcha" with Congressional intent rather than a serious effort to discern Congress's original understanding of RICO. *See* Pet. Br. at 11.

timing is important); *see also Lorillard*, 434 U.S. at 580 (finding it relevant that the underlying statute had been interpreted "long before Congress enacted" the new statute).

Furthermore, the Court has marginalized the importance of its decision in *Hawaii* even as far as it goes. In *Reiter*, the Court explained that even though in *Hawaii* it had "noted that the words 'business or property' refer to 'commercial interests or enterprises,'" that language of the opinion was not meant to "suggest[] that *only* injuries to a business entity are within the ambit of [the antitrust statutes.]" *Reiter*, 442 U.S. at 341 (emphasis added). Particularly since the ambit of "business or property" in antitrust may not be limited to mercantile interests, it would be reckless to limit those terms in a statute such as RICO that is intended to reach harms well beyond the narrow focus of the antitrust laws.

3. In the end, unlike antitrust laws, RICO exists, in part, as a tool to fight corruption in government entities. *See* Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). Non-commercial losses to government accounts, through misappropriation, conversion, embezzlement, kickbacks, and other means, constitute the types of injuries that Congress generally tried to reach through RICO. *Id.*

Criminal RICO cases make this clear. For example, in *United States v. Emond*, 935 F.2d 1511,

1512 (7th Cir. 1991), the village manager of Streamwood, Illinois used his official position "to extort money from persons with business before the village government, and engaged in a separate scheme to defraud the government of the local county." He and his wife failed to report their ill-gotten gains on their tax returns and were subsequently convicted of tax evasion. *Id.* Edward Emond was also convicted of RICO violations, mail fraud and extortion. *Id.* at 1513. When governments are defrauded, RICO is a useful tool.

Meanwhile, "[t]he essence of the antitrust laws is to ensure fair price competition in an open market." *Reiter*, 442 U.S. at 342. It therefore makes sense to limit the range of compensable injuries to mercantile harms (if in fact that is what the Clayton Act does).

Thus, "although RICO borrowed the tools of antitrust law . . . . the objectives of RICO and the antitrust laws [are not] coterminous[:]" RICO "was [not] limited to the antitrust goal of preventing interference with free trade." *Bennett v. Berg,* 685 F.2d 1053, 1059 (8th Cir. 1983). For that reason, "[t]he same words, *in different settings*, may not mean the same thing." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950) (emphasis added).

Congress used words in RICO that were very general and adaptable. In fact, RICO fits well into the traditional pattern of federal legislation aimed at a particular problem, but drafted in all-purpose

language. The Ku Klux Klan Act of 1871 (18 U.S.C. §§ 241-42 (criminal sanctions) and 42 U.S.C. § 1981 *et seq*. (civil sanctions)) is a classic example. Congress aimed the 1871 Act at the Klan in the South after the Civil War. *See Virginia v. Black*, 538 U.S. 343, 353-58 (2003). But its criminal and civil sanctions apply to "any person" who deprives another of rights guaranteed under the Constitution or other federal law. Thus, it applies today to the unlawful conduct of police officers in all regions of the country, as the infamous Rodney King incident in Los Angeles well illustrates. *See Koon v. United States*, 518 U.S. 81, 85-88 (1996) (reviewing the prosecution of the Los Angeles police officers under 18 U.S.C. § 242 for beating Rodney King); *see also* Charlie LeDuff, *12 Years After the Riots, Rodney King Gets Along,* N.Y. Times, Sept. 19, 2004, at 18 (King subsequently obtained a $3.8 million settlement of his civil rights claim under 42 U.S.C. § 1983).[4]

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[4] For other examples of statutes that were drafted using all-purpose language and have been interpreted by courts to effectuate such language *see Garcia v. United States*, 469 U.S. 70, 72-80 (1984) (law prohibiting assault on a custodian of U.S. property, 18 U.S.C. § 2114, is not limited to postal carriers); *Bell v. United States,* 462 U.S. 356, 358-62 (1983) (law regarding bank robbery, 18 U.S.C. § 2113(b), is not limited to gangsters); *Perrin v. United States*, 444 U.S. 37, 46 (1979) (the Travel Act, 18 U.S.C. § 1952, is not limited to organized crime bribery); *United States v. Culbert*, 435 U.S. 371, 373-74 (1978) (extortion under 18 U.S.C. § 1951 is not limited to racketeering); *United States v. Fabrizio*, 385 U.S. 263,

In light of this general language and the broad range of wrongs that RICO addresses, limiting damages to market injuries does not make sense the way it does in the antitrust context, where the actionable wrongs relate only to market manipulation. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950). Because of the very different policies that underlie RICO and antitrust law, there are "few countervailing reasons to lessen the impact of RICO remedies by importing the limitations" of antitrust law. *Bennett*, 685 F.2d at 1059 (rejecting antitrust competitive injury limitation in RICO context). In fact, because RICO's predicate offenses criminally protect a broad meaning of "property," it makes little sense for RICO to civilly protect only a narrow subset of the concept of property. *See* Jacob Poorman, *Exercising the Passive Virtues in Interpreting Civil RICO "Business or Property,"* 75 U. Chi. L. Rev. 1773, 1797 (2008) ("[N]othing in the Act's purposes, functions, or language indicate that civil RICO 'business or property' must have some special significance beyond what those two terms might have meant in the predicate act statutes.").

265-67 (1966) (law regulating lottery tickets, 18 U.S.C. § 1953, is not limited to organized crime); *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917) (law prohibiting white slave traffic, 18 U.S.C. §§ 2421-2424, is not limited to commercial prostitution).

B. The Court has long interpreted RICO expansively, in accord with Congress's expressly stated intent

RICO's construction clause requires a "liberal" interpretation of the statute. This Court and lower federal courts have taken heed of this congressional directive, generally adhering to the notion that "RICO is to be read broadly," *Sedima*, 473 U.S. at 497-98, so that it may combat not only organized crime, but also as many other corrupt enterprises as possible. *See also Diaz v. Gates*, 420 F.3d 897, 901 (9th Cir. 2005) (even if the court's "approach would confer standing on any plaintiff RICO-suave enough to allege lost employment, . . . these policy consequences, assuming they are undesirable, cannot blind us to the statutory language. . . . The statute is broad, but that is the statute we have.").

This Court has explicitly stated that maxims of statutory construction are "not to be used in complete disregard of the purpose of the legislature[,]" and are only useful when the statute's meaning is unclear. *United States v. Culbert*, 435 U.S. 371, 379 (1978) (internal quotation omitted). In contrast, as in the case of RICO, when "Congress has conveyed its purpose clearly, [the Court will] decline to manufacture ambiguity where none exists." *Id.* (refusing to add "racketeering" to the unadorned text of the Hobbs Act, the current version of the "Anti-Racketeering Act of 1934").

The Court has "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Bridge v. Phoenix Bond & Indem. Co.*, -- U.S. --, 128 S.Ct. 2131, 2145 (2008). In *Bridge*, the issue was whether RICO "require[s] first-party reliance for fraud-based claims." *Id.* None of the common-law rules and policy arguments proposed by the petitioner in that case "persuaded [the Court] to read a first-party reliance requirement into a statute that by its terms suggests none." *Id.* at 2139. Similarly, just last term, the Court rejected an argument that a RICO "enterprise" is limited to a "business-like entit[y,]" stating that "[w]e see no basis to impose such an extratextual requirement." *Boyle v. United States*, -- U.S. --, 129 S.Ct. 2237, 2243 (2009).

Nor is the Court's resistance to non-textual restrictions of RICO liability of particularly recent vintage. Cases going back more than a quarter century have done the same. *See Russello v. United States*, 464 U.S. 16, 22 (1983) (rejecting the notion that the "interest" subject to forfeiture under RICO is limited to an interest in an "enterprise" itself); *see also Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 165 (2001) (rejecting argument that there be a more formal legal distinction between "person" and "enterprise" than incorporation); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 261 (1994) (rejecting demand for proof of defendant's economic motive); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 278-79 (1992) (O'Connor, J., concurring)

(rejecting the addition of a purchaser/seller standing requirement where the predicate crime is securities fraud); *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990) (rejecting argument that state courts have no jurisdiction to consider federal civil RICO claims); *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (rejecting the idea that "predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (rejecting requirement that civil RICO requires a previous criminal conviction on the predicate offenses). Petitioner offers no reason to deviate from this course.

III. Floodgates Arguments Are Both Specious and Misdirected

Petitioners suggest that allowing the City to bring this case will lead to an "inappropriate expansion of mail and wire fraud jurisprudence." Pet. Br. at 36 n.23. This is a variation on the "floodgates" argument, some version of which arises in nearly every RICO case that comes before the court. *See, e.g.,* Brief of Petitioners at 14, *Bridge v. Phoenix Bond & Indem. Co.*, -- U.S. --, 128 S.Ct. 2131 (2008) (No. 07-210); Brief for Respondents at 30, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (No. 00-549); Brief of Respondent Timothy Murphy at 21, *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (No. 92-780); Petitioners Brief at 36, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) (No. 90-727); Brief of

Respondent at 42, *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) (No. 87-1252); Brief for Petitioners Crown Life Insurance Company at 12, *Agency Holding Corp., v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987) (Nos. 86-497, 86-531); Brief for Respondents at 7, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (No. 84-648).

Notwithstanding the steady drumbeat of floodgates arguments, the Court adopted liberal interpretations of the civil RICO statute in each of these cases, as Congress directed. RICO cases remain a minute percentage of federal dockets, but even if that were not true, the question whether there are too many RICO lawsuits is for Congress, not the Court.

1. Some lower courts have feared civil RICO proliferation and have sought to limit it by imposing the same "commercial" injury requirement that Petitioners urge here. *See e.g., Canyon County v. Syngenta Seeds*, 519 F.3d 969, 976 (9th Cir. 2008) (holding that a commercial limitation prevents state governments from suing because of "any RICO predicate act" that "provoked any sort of government response"); *Michigan Dep't of Treasury v. Fawaz*, 848 F.2d 194, *2 (6th Cir. 1988) (unpublished) (allowing taxes as property under civil RICO would make "district courts as collection agencies for unpaid taxes").

As it happens, however, the data simply does not support floodgates prognostications. In 2008, the

United States filed 68,582 criminal cases, 18 (0.00026) of which were criminal RICO. Meanwhile, plaintiffs filed 245,427 civil cases in federal court, only 640 (0.0026) of which were civil RICO. *See Federal Judicial Caseload Statistic* (March 31, 2008), Tables D-2, C-2, *available at* http://www.uscourts.gov/caseload2008/contents.html.

Furthermore, in the last 15 years, the number of civil RICO filings has *declined.* Between 1993 and 2008, the number of civil filings in federal district courts *increased* from 229,850 to 245,247, whereas the number of civil RICO cases filed *decreased* from 903 to 640. *See Judicial Business of the United States Courts 1997*, Table C-2A, *available at* http://www.uscourts.gov/judicial_business/contents.html; *Federal Judicial Caseload Statistic* (March 31, 2008), Table C-2, *available at* http://www.uscourts.gov/caseload2008/contents.html.

One of the reasons for this decline may be the increased difficulty in proving a "pattern of racketeering activity." In fact, after *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), lower courts treat "pattern" as a substantial—and legitimate—limiting factor on the use of RICO in ordinary or routine disputes, that is, "garden-variety" disputes, whether commercial fraud, the collection of taxes, or limited instances of State or local governmental corruption. District courts regularly grant dismissals for a failure to show a "pattern," and the circuits regularly affirm the decision on appeal. *See, e.g., Schultz v. R.I.*

Hospital Trust Nat'l Bank, 94 F.3d 721, 732 (1st Cir. 1996) (single episode not "pattern"); *Tabas v. Tabas*, 47 F.3d 1280, 1296-97 (3d Cir. 1995) (en banc) (requiring continuity (or threat) or regular way of doing business; other factors less significant); *Religious Tech. Center v. Wollersheim,* 971 F.2d 364, 366-67 (9th Cir. 1992) (same); *Aldridge v. Lily-Tulip, Inc.,* 953 F.2d 587, 593-94 (11th Cir. 1992) (same); *Pyramid Secur., Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1116-20 (D.C. Cir. 1991) (same); *Am. Eagle Credit Corp. v. Gaskins,* 920 F.2d 352, 354-55 (6th Cir. 1990) (same); *United States Textiles, Inc. v. Anheuser-Busch Cos.,* 911 F.2d 1261, 1266-69 (7th Cir. 1990) (same); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 190-93 (5th Cir. 1990) (same); *Lane v. Peterson,* 899 F.2d 737, 744-45 (8th Cir. 1990) (same); *Menasco, Inc. v. Wasserman,* 886 F.2d 681, 684 (4th Cir. 1989) (same); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273-74 (10th Cir. 1989) (same).

"Pattern" (and the similarly esoteric concept of "enterprise") works as a gatekeeper, keeping civil RICO litigation well within Congressional intent that it be a remedy for major problems. Thus, litigation involving only, for example, a single commercial dispute, no longer troubles the district courts, and when such cases do appear, district courts quickly and legitimately dismiss them. Because this Court construed RICO's *substantive* provisions to reflect Congress' vision of an important, albeit limited, claim for relief, no need exists now to narrow RICO by narrowing its

remedial aspects, a limitation that will apply to the core RICO cases as well as the marginal RICO cases.

While civil RICO remains an important tool to combat corruption, litigants, including state and local governments that, as the record low filings show, circumscribe their filings by exacting standards of litigation discretion, are not abusing the statute by bringing large numbers of frivolous claims. Sophisticated litigators use RICO only in systemic patterns of unlawful conduct, and when others attempt to use RICO improperly—a tiny minority of the filings—such claims are quickly dismissed. As the Court increases the plausibility demands on plaintiffs for surviving motions to dismiss, *see, e.g., Ashcroft v. Iqbal*, -- U.S. --, 129 S.Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the threat of unfounded RICO claims shrinks even further.

2. In any event a court may not properly use fear of "excessive" litigation to curtail congressional express claims for relief. Floodgates fears, even if valid, "are policy considerations more properly addressed to Congress than to this Court." *Reiter,* 442 U.S. at 344-45 ("We must take the statute as we find it. Congress created the treble damage remedy. . . precisely for the purpose of encouraging *private* . . . [litigation.] These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the . . . [law] and deterring violations.") (emphasis in original). As the Court has recognized, "[t]hat our citizens have access

to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985).

The Court has specifically stated that, even if refusing to narrow the statute "leads to the undue proliferation of RICO suits, the correction must lie with Congress." *Bridge,* -- U.S. --, 128 S. Ct. at 2145 (internal quotations omitted). Further, the Court stressed, "[w]hatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO [to include a reliance requirement] to reflect their—or our—views of good policy." *Id. See also H.J. Inc.,* 492 U.S. at 249 ("[R]ewriting it is a job for Congress, if it is so inclined, and not for this Court."); *United States v. Turkette*, 452 U.S. 576, 587 (1981) ("There is no argument that Congress acted beyond its power. . . . That being the case, the courts are without authority to restrict the application of [RICO.]").

If RICO needs to be reformed, the changes must come from Congress. Yet after ample time, and in full possession of the facts, Congress has not acted to limit in any general way RICO's broad civil enforcement provisions. When Congress *has* determined that RICO should be limited, it has acted narrowly, such as to preclude the application of RICO to securities fraud cases. *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107 (1995) (amending 18 U.S.C. § 1964(c)).

Furthermore, Congress has acted to *expand* application of civil RICO, such as when it passed the Comprehensive Forfeiture Act of 1984 and thereby amended RICO to specify that property subject to forfeiture for racketeering activity includes all proceeds obtained directly or indirectly from racketeering activity and real and tangible and intangible personal property. *See* S.Rep. No. 225, 98th Cong., 2d Sess. 191-92, reprinted in 9A U.S. Code Cong. & Ad. News (Nov. 1984). Also, after the decision in *McNally v. United States*, 483 U.S. 350 (1987), Congress expressly defined mail fraud, the key predicate offense here and in many civil RICO actions, to include defrauding another of the intangible right of honest services. *See* 18 U.S.C. § 1346.[5]

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[5] The *Sedima* Court noted that the predicate offenses for RICO prosecution are very broad. *Sedima*, 473 U.S. at 500. The mail fraud statute is one example of this breadth. In the Court's concurrent review of the conviction of media mogul Conrad Black it may determine whether § 1346 was impermissibly applied to the conduct of a private individual who did not intend economic or other property harm to the private party to whom the honest services were owed. *See United States v. Black*, 530 F.3d 596, 599-601 (7th Cir. 2008), *cert. granted*, 129 S.Ct. 2379 (2009) (No. 08-876). We take no position on the merits of that case, but even if the Court does so find, it would be a narrowing of *substance*, not an improper narrowing of the *remedy*.

Most importantly, however, Congress has not generally limited RICO—and has certainly not limited RICO to the role of redressing liabilities for marketplace injuries. *See, e.g.*, H.R. 5111, 101st Cong., 2nd Sess. (1990) (unsuccessfully proposing to eliminate RICO's private right of action). The Court should not assume the responsibility for doing so here.

IV. Civil RICO Is an Important Tool for Combating Public Corruption, and the Court Should Do Nothing Here to Jeopardize Uses in that Context

As recent events remind us, local and state official corruption continues to be an unfortunate characteristic of modern-day political culture. *See United States v. Blagojevich et al.*, 2009 WL 2601326, No. 08 CR 888 (N.D. Ill. Aug. 21, 2009); *United States v. Cammarano III et al.*, No. 09-8128 (D.N.J. July 23, 2009); *see also* United States Department of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2007*, Table-1 (2007) (documenting 360 convictions of corrupt state or local officials in 2007).

As Indiana has demonstrated with its case against former East Chicago Mayor Pastrick, civil RICO can be an important tool in the fight against public corruption. *Indiana v. Pastrick*, No. 04-CV-506 (N.D. Ind. June 1, 2009) (Docket No. 559, 561). No matter the outcome of this case, the Court should avoid undermining Indiana's and potential similar

efforts to use civil RICO to combat graft by public servants.

1. The details of the *Pastrick* case warrant a brief review. In an effort to win the 1999 East Chicago Democrat Party mayoral primary, Pastrick and his cronies illegally spent approximately $24 million of public money to pay contractors who poured concrete, trimmed trees, and provided other services for political supporters. The damages caused by Pastrick's and his associates' unlawful operation and management of the City as a racketeering enterprise, including ostensible salaries and similar payments made to Pastrick, Fife and Raykovich, was $32,187,242. This scheme nearly bankrupted the city and led to several federal prosecutions. Former mayor Pastrick, however, was not criminally prosecuted. Indiana brought a civil RICO suit against Pastrick and James Fife, one of his closest allies, and the two ultimately accepted default judgments.

Because these thefts and conversions of East Chicago's money injured the City's "business or property," the State (as relator for the City) has requested treble damages, plus pre-judgment interest, of $108,998,876.30. The City's injuries plainly are not mercantile in nature. East Chicago does not sell its sidewalk and tree-trimming services—at least not legally. Neither, however, are East Chicago's losses either speculative or inchoate, the way Petitioners have characterized (fairly or not) the unpaid taxes at issue here.

The point is that, even if the Court is not persuaded that unpaid tax revenues constitute "business or property" losses under RICO, it should refrain from imposing a broad rule that civil RICO standing requires *commercial* losses. Such an expansive holding would threaten public corruption cases, including *Indiana v. Pastrick*, and curbing efforts to fight racketeering in government would seem to run counter to Congress's entire motivation for enacting RICO.

2. Along the same lines, Petitioners argue not only that non-mercantile losses do not count as "business or property" under RICO, but also that cities are not "persons" who may sue to recover non-mercantile funds under RICO. This theory, too, threatens Indiana's efforts to use RICO to combat public corruption through civil lawsuits. When a city's money is used unlawfully for private ends, the city should be permitted to act (either on its own or through a relator such as the State) as a "person" and bring suit to redress the injury to its business or property.

Petitioners prove too much with their theory that government interests in protecting sovereign responsibilities are too remote and indirect for a civil RICO claim because all power derives from the people. While it is true that sovereignty derives from the people, it does not follow that civil claims by the government should be rejected simply because the interests of any given citizen are too indirect or

remote on their own. Governments have identities distinct from the people to whom they are accountable. *See, e.g.*, *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 451 (1945) ("Georgia as a representative of the public . . . has an interest apart from that of particular individuals who may be affected.").

Whether government bank accounts are characterized as "sovereign interests," "property," "business" or something else, the fact remains that they belong to an entity capable of personhood under the law. *See generally* 42 U.S.C. § 9601(21) ("The term 'person' means an individual, . . . United States Government, State, municipality, commission, political subdivision of a State, or any interstate body"). And while governments are not "persons" for *all* circumstances, *see, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989), that does not mean they are not persons under *any* circumstances.

Besides, the American legal tradition does not generally treat municipalities such as New York City or the City of East Chicago as sovereigns. *See Lincoln County v. Luning*, 133 U.S. 529 (1890). Rather, they are a sub-species of corporations, indistinct in their "personhood" from other sub-species of corporations, such as publicly held companies, privately held companies, and non-profits. *See Will*, 491 U.S. at 70 n.9 ("public corporation, in ordinary usage, was another term for a municipal corporation, and included towns, cities, and counties").

Again, regardless of how it comes out in this case, the Court should avoid circumscribing civil RICO claims so broadly that it precludes state and local governments from using it to redress corruption. Adopting Petitioners' anti-sovereign view of RICO personhood would surely do that.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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