

For opinion see [126 S.Ct. 1045](#)

Briefs and Other Related Documents

Supreme Court of the United States.
THE EUROPEAN COMMUNITY, et al., Petitioners,
v.
RJR NABISCO, INC., et al., Respondents.
Departments of the Republic of Colombia, Petitioners,
v.
Philip Morris Companies, Inc., et al., Respondents.
No. 05-549.
October 28, 2005.

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

Petition for a Writ of Certiorari
Of Counsel: [Kevin A. Malone](#), [Carlos A. Acevedo](#), Krupnick Campbell Malone, Buser Slama Hancock, Liberman & McKee.

[John J. Halloran](#), Jr., Counsel of Record, [John F. Schutty III](#), Speiser, Krause, Nolan, & Granito, Two Grand Central Tower, 140 East 45th Street, New York, NY 10017, (212) 661-0011, Attorneys for Petitioners.

***i QUESTIONS PRESENTED**

In [European Community v. RJR Nabisco, Inc., 125 S. Ct. 1968 \(2005\)](#), this Court vacated the judgment of the Second Circuit, which had applied a broad version of the "revenue rule" to bar "smuggling" claims. This Court remanded the case to the Second Circuit for reconsideration in light of [Pasquantino v. United States, 125 S. Ct. 1766 \(2005\)](#), which recognized that modern courts have applied the revenue rule in "traditional" circumstances, specifically where the claim seeks to collect an unpaid foreign tax debt from a tax debtor. On remand, the Second Circuit "reinstated" its prior decision, effectively following the *dissenting* opinion in *Pasquantino*.

The questions presented are:

1. Whether the Second Circuit, on remand, failed to comply with this Court's mandate, [Pasquantino v. United States, 125 S. Ct. 1766 \(2005\)](#), and settled law by applying its broad version of the "revenue rule" to bar claims under U.S. domestic law to enjoin and deter domestic tortious conduct.
2. Whether the Second Circuit correctly held, in conflict with the decisions of this Court, the Fourth and Eleventh Circuits, and the [Restatement \(Third\) of Foreign Relations Law § 483 \(1987\)](#), that the revenue rule is a mandatory doctrine akin to a jurisdictional bar, and not a discretionary abstention doctrine.

***ii PARTIES TO THE PROCEEDING**

The Petitioners in the case of the European Community ("EC") and Member States are the EC, Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, and Kingdom of Spain. The action was originally brought against RJR Nabisco, Inc., R.J. Reynolds Tobacco Company,

R.J. Reynolds Tobacco International, Inc., RJR Acquisition Corp. (formerly known as Nabisco Group Holdings Corp.), and R.J. Reynolds Tobacco Holdings, Inc. [FN1] In the Second Circuit, on the original appeal, the World Health Organization, the Federal Law Enforcement Officers Association, and the National Campaign for Tobacco Free Kids all appeared as *amici* supporting the principle that foreign governments should be permitted to avail themselves of the U.S. courts in this case.

FN1. Philip Morris International, Inc., Philip Morris Companies, Inc., Philip Morris Incorporated (doing business as Philip Morris Products, Inc.), and Philip Morris Duty Free, Inc. were parties to the action on the original petition to this Court; however, on motion of the EC and the Member States in the Court of Appeals, the Philip Morris entities were dismissed as parties to the EC case. See App. 6a n.5.

The Petitioners in the case of the Departments of the Republic of Colombia are the Departments of Amazonas, Antioquia, Atlantico, Bolivar, Boyaca, Caqueta, Casanare, Cesar, Choco, Cordoba, Cundinamarca, Huila, La Guajira, Magdalena, Meta, Narino, Norte de Santander, Putamayo, Quindio, Risaralda, Santander, Sucre, Tolima, Valle del Cauca, and Vaupes, and Santa Fe de Bogota, D.C. The case was brought against British American Tobacco (Investments) Limited, BAT ~~*iii~~ Industries plc, Brown & Williamson Tobacco Corporation, BATUS Tobacco Services, Inc., and British American Tobacco (South America) Ltd.; and Philip Morris Companies, Inc., Philip Morris Incorporated d/b/a Philip Morris USA, Philip Morris International, Inc., Philip Morris Products, Inc., Philip Morris Latin America Sales Corporation, and Philip Morris Duty Free, Inc. [FN2]

FN2. The EC and Member States commenced a separate action against Japan Tobacco, Inc., JT International Manufacturing America, Inc., JTI Duty Free USA, Inc., JT International S.A., Japan Tobacco International U.S.A. and Premier Brands, Ltd. The District Court dismissed that action, and the Court of Appeals vacated that judgment. On September 13, 2005, on remand from this Court, the Court of Appeals adhered to its prior decision "because the district court prematurely dismissed the action before an adverse party was joined." See App. 5a n.4.

CORPORATE DISCLOSURE STATEMENT

The Member States are sovereign states. The EC is a governmental body created as a result of collaboration among the majority of the nations of Western Europe, presently, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. The EC possesses the most extensive legal capacity accorded to legal persons under the laws of the Member States, and it may, in particular, be a party to legal proceedings. In such instances, the EC is represented by the European Commission.

The Departments of the Republic of Colombia and Santa Fe de Bogota, D.C., are political subdivisions of a sovereign state.

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***1** The EC and ten of its Member States, as well as the Departments of the Republic
of Colombia, respectfully petition for a writ of certiorari to review the judgment
of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, on remand, is reported at [424 F.3d 175](#) (App.
A, *infra*, 1a-14a). The opinion of this Court vacating the judgment of the Court of
Appeals is reported at [125 S. Ct. 1968](#) (App. B, *infra*, 15a). The first opinion of the
Court of Appeals is reported at [355 F.3d 123](#) (App. C, *infra*, 16a-45a). The
opinion of the District Court dismissing the smuggling claims is reported at [150 F.
Supp. 2d 456](#) (App. D, *infra*, 46a-76a). The District Court amended its judgment
(App. E, *infra*, 77a-79a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 2004. On remand,
the opinion and judgment of the Court of Appeals were reinstated on September 13,
2005. The jurisdiction of this Court is invoked under [28 U.S.C. § 1254\(1\)](#) or,
alternatively, [28 U.S.C. § 1651](#),

STATEMENT OF THE CASE

For the first time, the European Community and ten of its then fifteen Member
States joined together to commence a civil action in a United States court. They
brought this action to enjoin and deter tortious conduct, committed by U.S.
defendants on U.S. soil, that facilitates and expedites ongoing schemes to smuggle
cigarettes. In light of the seriousness of ***2** the problem, and the location of the
tortious conduct, the EC and its Member States took the necessary step of pursuing
this civil case in the courts of the United States. The U.S. courts are empowered
and uniquely well-situated to enjoin conduct within U.S. borders which, as alleged
in detail and demonstrated in the courts below, fuels organized crime and narcotics
trafficking, supports rogue states, and finances terrorist groups.

The Departments of the Republic of Colombia seek similar relief and have made a

powerful case that cigarette smuggling schemes - directed and managed from the United States - facilitate narcotics trafficking and terrorism in Colombia.

These are not actions to collect unpaid foreign taxes from tax debtors. These actions were brought under U.S. domestic common law to enjoin and deter tortious domestic conduct that poses a continuing threat to Petitioners and the United States.

The Complaint of the EC and Ten Member States

The EC and ten of its then fifteen Member States asserted common law claims sounding in fraud, public nuisance, unjust enrichment, negligence, and negligent misrepresentation that are predicated on diversity jurisdiction. [FN3] The Complaint alleged *3 that U.S. tobacco companies knowingly sold cigarettes to smugglers and, indeed, directed and managed cross-border smuggling schemes. The tobacco companies' domestic tortious conduct caused, and continues to cause, substantial harm to the EC, the Member States, and their citizens, as well as to the United States.

FN3. The Amended Complaint of the EC and Member States is included in the Joint Appendix in the Court of Appeals. C.A. App. 309-509. See also EC and Col. C.A. Br. at 10-18. The Amended Complaint seeks several forms of relief under statutory, common law and equitable theories including common law claims for damages and injunctive and other equitable relief; and civil RICO claims for damages and injunctive relief. A main focus of this action is to seek injunctive and other equitable relief to enjoin and deter domestic tortious conduct and, therefore, this petition will focus upon such claims.

The Complaint of the Departments of the Republic of Colombia

The Departments of the Republic of Colombia are the functional equivalent of the states of the United States and they separately brought suit to enjoin and deter the tobacco companies' domestic conduct that facilitates and expedites smuggling activities. [FN4] In this action, it is alleged that the tobacco companies, particularly the BAT Group and Brown & Williamson, caused their products to be smuggled into Colombia, fueled narcotics trafficking, and facilitated organized crime in the United States and Colombia - all to the detriment of the Departments. The BAT Group (including *4 B&W) directed and controlled every aspect of the smuggling operation into Colombia, including selection of customers, setting prices for the products, controlling the supply of products to the smugglers, and regulating the smuggled market by granting or denying favorable financing terms. In the 1990s, ninety-five percent of BAT products sold in Colombia were smuggled.

FN4. The Second Amended Complaint of the Departments of the Republic of Colombia is included in the Joint Appendix in the Court of Appeals. C.A. App. 1931-2089. See also EC and Col. C.A. Br. at 18-24. As in the EC case, the Second Amended Complaint seeks several forms of relief under statutory, common law and equitable theories. See *supra* n.3. A main focus of this action is to seek injunctive and other equitable relief to enjoin and deter domestic tortious conduct and, therefore, this petition will focus upon such claims.

Petitioners' Common Law Claims for Injunctive and Other Equitable Relief

The Complaints set forth five claims, under U.S. domestic common law, for which the Petitioners seek injunctive and other equitable relief:

Public Nuisance. The defendants' activities constitute and contribute to a public nuisance. C.A. App. 487-492, 2074-2077. The defendants facilitated the smuggling of cigarettes by means of a variety of acts and omissions conducted in or directed from the United States, including, for example, selling cigarettes into smuggling

channels and managing smuggling schemes in a manner that facilitated organized crime on a massive scale; creating secret payment mechanisms for smugglers; providing marketing information to smugglers; falsely stating the value and destination of the products; imposing record-keeping requirements on the smugglers to allow defendants to monitor and direct the smuggling schemes; failing to act reasonably when put on notice of involvement with smugglers; and conspiring with third parties to smuggle products. The defendants' conduct created a public nuisance because it substantially and unreasonably interfered with, offended, injured and endangered the public health, morals, safety, convenience and well-being of the general public and operation of the market for tobacco products.

***5 Unjust Enrichment.** The defendants were unjustly enriched through their schemes. C.A. App. 492-495, 2078-2079. The defendants conspired with third parties to commit tortious acts and smuggle cigarettes into the European Community, the Member States, and the Republic of Colombia. "[T]he receipt and retention of the money derived from smuggling operations are such that, as between Plaintiffs and Defendants, it is unjust for Defendants to retain [such proceeds]." C. A. App. 494, 2079.

Common Law Fraud. The defendants falsified documents to mislead the Petitioners as to the destination of the smuggled cigarettes, provided false information, and concealed material information. C. A. App. 483-486, 2071-2074.

Negligence. The defendants owed a duty of reasonable care to refrain from causing foreseeable loss to the plaintiffs. C.A. App. 495-499, 2079-2082. Among other things, the defendants negligently failed to "terminate sales of their tobacco products to or through persons or entities known to be engaged, directly or indirectly, in smuggling" and failed to "comply with federal and state statutes and the standards of care reflected therein." C.A. App. 497, 2080. Defendants also failed to "produce, market and distribute their cigarette products lawfully and with due care," or otherwise "use proper practices and procedures in the hiring, selection, approval, instruction, training, supervision, and discipline of employees and agents engaged in the production, marketing and distribution of their products, some of whom the defendants knew, or reasonably should have known, were assisting and otherwise engaged in the smuggling of cigarettes." C.A. App. 496, 2080.

***6 Negligent Misrepresentation.** The defendants made misrepresentations to the Petitioners concerning the payment and value of cigarettes, the tobacco companies' activities, the destination of cigarettes, and the nature, extent, and causes of smuggling. This conduct amounts to a fraud on the plaintiffs and a fraud on the public. C.A. App. 500-502, 2083-2085.

For each of the above claims, the Complaints seek "Common Law Injunctive and Equitable Relief" including, among other things, prohibitory and mandatory injunctions and disgorgement of ill-gotten gains. C.A. App. 417-20, 2024-2026. Petitioners request an order enjoining the defendants and their co-conspirators from "selling cigarettes to smugglers or to distributors who sell cigarettes to smugglers or otherwise engaging in conduct that violates any common law, statutory or equitable standard." C.A. App. 418, 2024. The Complaints seek injunctive relief to end the tobacco companies' management of cross-border smuggling schemes. The injunctive relief would not apply, execute or enforce foreign tax law; it is predicated solely on U.S. domestic "common law, statutory, and equitable standard[s]" (C.A. App. 418, 2024) and seeks to enjoin and deter tortious conduct occurring in the United States.

Proceedings in the District Court

The tobacco companies moved to dismiss the Complaints, under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), on the basis of the "revenue rule." App. 49a.

During the course of the proceedings in the District Court, the District Judge enquired whether the smuggling alleged in the Complaints was linked to terrorism. In *7 response, the EC and Member States, as well as the Departments, submitted evidence linking the misconduct alleged in the Complaints to terrorism. See EC and Col. C.A. Br. at 24-26.

The EC demonstrated, for example, that since August 1999, approximately 570,000 master cases (or 5.7 billion cigarettes) of RJR-brand cigarettes were distributed to Iraq. RJR's scheme to ship cigarettes from the United States, through the ports of the EC and into Iraq, involved the Kurdistan Workers' Party, the PKK. The PKK is considered by the United States to be a foreign terrorist organization, and has been placed on the EC's list of proscribed persons and entities. The Iraqi scheme was conducted with the complicity of the former regime of Saddam Hussein and for its benefit. In a separate submission, the Departments demonstrated the relationship between cigarette smuggling and terrorism. See EC and Col. C.A. Br. at 24 n.8.

On February 19, 2002, the District Court granted the motions to dismiss the Complaints. App. 46a-76a. Applying the Second Circuit's broad "version" of the revenue rule (App. 51a-54a), the District Court dismissed the "smuggling" claims with prejudice. The District Court dismissed the heart of this case - claims for injunctive relief under U.S. domestic common law - even though these claims do not seek unpaid foreign taxes from a tax debtor.

The District Court treated the revenue rule as akin to a jurisdictional bar and not as an "abstention doctrine." App. 51a-52a & n.1. The District Court held that the revenue rule is a mandatory "federal rule of common law" that divests courts of the power and "discretion" to entertain "smuggling" claims. App. 51a-52a & n.1.

*8 Proceedings in the Court of Appeals

On January 14, 2004, the Second Circuit affirmed, in relevant part, the judgment of the District Court dismissing the Complaints under [Fed. R. Civ. P. 12\(b\)\(6\)](#), and barred the "smuggling" claims under the "revenue rule." App. 16a-46a. The Court of Appeals felt that its decision was compelled by its prior decision in [Attorney General of Canada v. R.J. Reynolds Tobacco Co.](#), 268 F.3d 103 (2d Cir. 2001), cert. denied, 537 U.S. 1000 (2002) ("Canada"). App. 31a. According to the Second Circuit, Canada "foreclosed" all of the "smuggling" claims in this case. App. 39a. Canada, however, did not extend the revenue rule to claims for injunctive relief under domestic common law; moreover, Canada applied the revenue rule in a limited manner to encompass claims for certain forms of money damages (specifically, "lost tax revenue" and related "law enforcement costs"). See [Canada](#), 268 F.3d at 105-06. In the instant case, in contrast, the Court of Appeals took the unprecedented step of extending the revenue rule beyond the holding in *Canada* to bar claims for injunctive relief brought under U.S. common law to enjoin tortious conduct allegedly committed in the United States by U.S. companies.

The Second Circuit affirmed the dismissal of the Petitioners' claims for injunctive and other equitable relief under U.S. common law with virtually no discussion. App. 42a. For example, without reference to the Complaints, the Second Circuit held that the claims for injunctive relief under domestic common law have the "same implications as plaintiffs' claims for damages" and are "barred by the revenue rule." *Id.* This holding is both unprecedented and erroneous.

*9 The Second Circuit affirmed the District Court's holding that the revenue rule

is not a discretionary abstention doctrine. In holding that the courts "may not" entertain smuggling claims (App. 43a), the panel concluded that the federal courts lacked the power or "discretion" to "order the defendants to cease their smuggling operations" or otherwise deter such schemes. App. 42a-43a. The Court of Appeals did not cite any authority for this holding and, indeed, it is contrary to settled law.

One panel member, Judge Guido Calabresi, voiced his belief that *Canada* was "wrongly decided." App. 31a n.4. Nonetheless, he concurred with the panel's ruling on the basis of *stare decisis*. *Id.* In *Canada*, Judge Calabresi had filed a dissent stating that the revenue rule had no application to a civil claim predicated on the "domestic law" of the United States. See [Canada, 268 F.3d at 136](#) (Calabresi, J., dissenting).

Petition for a Writ of Certiorari (No. 03-1427)

On April 12, 2004, the EC, ten of its then fifteen Member States, and the Departments of the Republic of Colombia filed a petition for a writ of certiorari. See Petition, [2004 WL 831362 \(U.S.\)](#) (No. 03-1427). The petition presented one question for review: "Whether the Court of Appeals erred in extending the 'revenue rule' to bar claims brought under U.S. domestic law seeking equitable relief to enjoin and remedy smuggling schemes based in the United States." *Id.* at i. This Court held the petition pending the outcome in *Pasquantino v. United States*, No. 03-725.

***10** *Pasquantino v. United States*

In *Pasquantino*, on April 26, 2005, this Court addressed the scope of the revenue rule and declined to follow the Second Circuit's reasoning in *Canada*. This Court recognized that, in modern times, the courts have applied the revenue rule in "traditional" circumstances, to bar claims seeking to recover unpaid foreign taxes from tax debtors. This Court ruled that the revenue rule does not apply to an action, predicated on *domestic* law (like the wire fraud statute), that addresses *domestic* conduct, in order to vindicate a substantial *domestic* interest in combating fraud. [Pasquantino, 125 S. Ct. at 1775-77](#). This Court determined that the revenue rule does not bar "indirect" or "attenuated" or "incidental" enforcement of foreign tax laws, such as may occur in cases brought under domestic law. *Id.* at 1777-78. "[T]he revenue rule never proscribed all enforcement of foreign revenue law." *Id.* at 1778.

This Court Vacated the Second Circuit's Judgment: "GVR" Order

Following submission of Supplemental Briefs by the parties, this Court granted the initial petition in this case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Pasquantino v. United States*, 544 U.S. ____ (2005).

See [European Community v. RJR Nabisco, Inc., 125 S. Ct. 1968 \(2005\)](#). In according the petition "GVR" treatment, this Court, consistent with its stated practice, effectively ***11** concluded that *Pasquantino* was an "intervening development" giving rise to a "reasonable probability" that the Second Circuit's decision "rests upon a premise" that the Second Circuit "would reject if given the opportunity for further consideration," and "such a redetermination may determine the ultimate outcome of the litigation." See [Lawrence v. Chater, 516 U.S. 163, 167 \(1996\)](#). This Court entered its Judgment in this case on June 3, 2005.

Proceedings in the Court of Appeals on Remand

On remand, the Second Circuit "reinstated" its prior decision (App. 3a, 7a, 14a), holding that "*Pasquantino* casts no doubt on the reasoning or result in *EC I*." App. 14a. Without reference to the pleadings or the record, the panel aggregated and

recharacterized the dozens of claims in the Complaints, labeling the entire case as one "to collect tax revenue" that is "barred under any of the available formulations of the revenue rule." App. 13a. With virtually no discussion, the Second Circuit reinstated its previous decision to affirm the District Court's dismissal of the claims for injunctive and other equitable relief under U.S. common law. App. 14a n.10. Without comment, the panel denied Petitioners' requests to remand the case to the District Court for a claim-by-claim analysis and the exercise of discretion, to amend the pleadings, to consider the evidence, and to have full briefing and oral argument. Judge Calabresi expressed his continuing view that *Canada* was "wrongly decided." App. 7a n.6.

REASONS FOR GRANTING THE PETITION

This is not a tax collection case. The defendants are not alleged to be tax debtors. The defendants are not alleged to have violated foreign law. This case falls outside the purview of the revenue rule.

***12** This is a case to enjoin and deter domestic conduct of the most serious nature, which facilitates organized crime, narcotics trafficking and terrorism. The Second Circuit's unprecedented decision to extend the judge-made revenue rule to immunize such conduct raises an issue of national significance - whether the U.S. courts are powerless to *enjoin* domestic conduct that poses an ongoing threat to the Petitioners and the United States. The decision below warrants review and summary reversal by this Court for two reasons.

First, the Second Circuit failed to comply with this Court's mandate and *Pasquantino*. The Second Circuit did not follow the majority opinion in *Pasquantino* (which had declined to follow the Second Circuit's reasoning in *Canada*). Instead, it applied the standards embodied in Part I of the *dissenting* opinion in *Pasquantino* (which had embraced the Second Circuit's reasoning in *Canada*). Applying an incorrect legal standard, the Second Circuit reached an incorrect result. It used the revenue rule to bar claims that do *not* seek recovery of unpaid foreign taxes from a tax debtor, such as claims for injunctive relief under *domestic* common law to enjoin *domestic* conduct committed by *domestic* companies. This decision conflicts with this Court's mandate (as set forth in the GVR Order of May 2, 2005), *Pasquantino*, the decisions of the Fourth and Ninth Circuits, the decisions of the highest courts of the United Kingdom, Canada, and Ireland, and the Restatement (Third) of Foreign Relations Law § 483 (1987). Finally, the Second Circuit misapprehended the claims as pled and imputed to Petitioners claims that were never made. The Second Circuit has extended the revenue rule in an unprecedented manner.

Second, the holding of the Court of Appeals, that the revenue rule is akin to a jurisdictional bar and is not a discretionary abstention doctrine, conflicts with the decisions ***13** of this Court, the Fourth and Eleventh Circuits, the House of Lords, and the Restatement (Third) of Foreign Relations Law § 483 (1987). The District Court and the Court of Appeals held that the revenue rule is a mandatory rule that divests the federal courts of their equitable power and discretion in this case. This view is contrary to settled, modern law recognizing that domestic courts are open, and should remain open, to the equitable claims of foreign States. The Second Circuit effectively has converted a discretionary rule of abstention into a jurisdictional bar and has closed the courts to the equitable claims of the Petitioners in this case.

On remand, the Second Circuit was bound to follow this Court's mandate, as reflected in this Court's GVR Order of May 2, 2005. See, e.g., Gulf Refining Co. v. United States, 269 U.S. 125, 135 (1925) ("the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the

mandate, as though it had been therein set out at length"); Rogers v. Hill, 289 U.S. 582, 587 (1933) (same). A court addressing a case on remand must act "scrupulously" to ensure that the mandate is "fully carried out." United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316, 325 (1961).

Summary reversal is appropriate to correct a lower court's failure to heed this Court's guidance in the form of a GVR order. See, e.g., Rhodes v. Stewart, 488 U.S. 1, 3 (1988) (*per curiam*) (summarily reversing decision on remand from GVR where Court of Appeals had "misapprehended our holding"); Powell v. Texas, 492 U.S. 680, 681 (1989) (*per *14 curiam*) (summarily reversing where, on remand from GVR, state court reinstated its prior decision on waiver rationale); INS v. Miranda, 459 U.S. 14, 19 (1982) (*per curiam*) (summarily reversing where Court of Appeals distinguished decision forming basis for GVR in a way that was "unpersuasive"); Hutto v. Davis, 454 U.S. 370, 374-75 (1982) (*per curiam*) (summarily reversing Court of Appeals' decision on remand from GVR where "the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress"); Arnold Tours, Inc. v. Camp, 400 U.S. 45, 46 (1970) (*per curiam*) (summarily reversing where, on remand from GVR, Court of Appeals reaffirmed prior decision to deny standing). See Sumner v. Mata, 455 U.S. 591, 596-97 (1982) (*per curiam*) (granting certiorari and vacating where the Court of Appeals on remand "reinstated" its prior conclusion, followed the "dissenting opinion" in the prior case before this Court, and "apparently misunderstood the terms of [this Court's] remand"). [FN5]

FN5. When an order issued by a lower court that takes the form of an appealable order fails to comply with this Court's mandate, "the aggrieved parties may file the ordinary petition for certiorari." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 585 (8th ed. 2002). Because the present case was "in the court of appeals," it falls clearly within the Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). See Hohn v. United States, 524 U.S. 236, 241-42 (1998). There is thus no jurisdictional impediment to bringing the Second Circuit into compliance with the mandate of May 2, 2005, by granting certiorari and reversing the Court of Appeals' judgment. See Perkins v. Fourniquet, 55 U.S. 328, 330 (1852). In an abundance of caution, however, Petitioners also request (in the alternative) that the Court, if necessary, construe this petition as one for a writ of mandamus under 28 U.S.C. § 1651. See United States v. Fossatt, 62 U.S. 445, 446 (1858) ("And if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction"); Stern *et al.*, *Supreme Court Practice*, *supra*, at 585 ("One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court").

***15 A.** *Pasquantino* Superseded the Second Circuit's Reasoning and Result On remand, the Second Circuit held that "*Pasquantino* casts no doubt on the reasoning or result in *EC I*." App. 14a. This conclusion is not supportable. The Second Circuit's decision to reinstate a decision directly at odds with *Pasquantino*, and effectively follow the dissent in *Pasquantino*, fails to comply with this Court's mandate and *Pasquantino*.

1. This Court Supplanted the Second Circuit's Definition of the Revenue Rule

In *Canada*, the Second Circuit adopted a "version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement." Canada, 268 F.3d at 128. Its "version" was grounded upon the view that, under U.S. tax treaties, "the political branches of

our government have *clearly expressed* their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Id.* at 119 (emphasis added). [FN6] *16 This "version" of the revenue rule was the centerpiece of the *Canada* opinion (*id.* at 115, 119, 128), and it was specifically applied to bar the "smuggling" claims in this case. App. 51a; see also App. 7a, 14a.

FN6. On remand, the Second Circuit stated that U.S./Canada tax treaties "hardly formed the basis of the opinion in *Canada*." App. 13a n.9. However, *Canada* itself repeatedly emphasized that its result was based on the specific facts and context of the case, particularly these tax treaties. See, e.g., [*Canada*, 268 F.3d at 113, 125](#).

Pasquantino recognized that modern courts have applied the revenue rule in "traditional" circumstances, where the claim seeks to collect an unpaid foreign tax debt from a tax debtor. [*Pasquantino*, 125 S. Ct. at 1775](#) (claims for "the collection of tax obligations of foreign nations"); *id.* (claims for "collection of foreign tax claims"); *id.* (enforcement of a "'tax judgment' ") (citation omitted); *id.* ("a suit that recovers a foreign tax liability, like a suit to enforce a judgment"). Accord [*Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 272-75 \(1935\)](#) (the revenue rule is implicated, if at all, only in "a suit to recover taxes due to another [government] or upon a judgment for such taxes" under foreign law that would cause the courts "to scrutinize the relations of a foreign state with its own citizens").

This Court considered, debated, and squarely declined to follow *Canada*'s expansive view of the revenue rule. Specifically addressing *Canada*, this Court held that "U.S. tax treaties" and the "antismuggling statute" do not limit the reach of otherwise applicable domestic law, such as the wire fraud statute. [*Pasquantino*, 125 S. Ct. at 1773](#). In contrast, Part I of the dissent advocated the broad version of the revenue rule established in *Canada*, stating: "Congress has actively indicated, through both domestic legislation and treaties, that it intends 'strictly [to] limit the parameters of any assistance given' to foreign nations." [*Pasquantino*, 125 S. Ct. at 1785](#) (Ginsburg, J., dissenting) (quoting *Canada*).

*17 On remand from this Court, the Second Circuit did not follow *Pasquantino*. The Second Circuit effectively followed the dissent in *Pasquantino*. The Court of Appeals achieved this result by reaffirming *Canada*'s (and *EC I*'s) overly broad approach to the revenue rule - an approach that was embraced only by Part I of the dissent in *Pasquantino*. The Second Circuit's reaffirmation of *Canada* - in the face of *Pasquantino*'s decision not to follow *Canada*'s expansive view of the revenue rule - directly conflicts with this Court's mandate and the majority view in *Pasquantino*. Under these circumstances, summary reversal is appropriate. See [*Sumner*, 455 U.S. at 596](#) (summarily reversing Court of Appeals' decision that followed the "dissenting opinion" in the case previously before this Court).

This Court's decision not to follow *Canada* was not, as the Second Circuit asserted on remand, an inconsequential "passing comment." App. 13a n.9. *Pasquantino*'s rationale is to be accorded the utmost respect because, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." [*Seminole Tribe v. Florida*, 517 U.S. 44, 67 \(1996\)](#). See also [*County of Allegheny v. ACLU*, 492 U.S. 573, 668 \(1989\)](#) (Kennedy, J., concurring in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law"); [*Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 490 \(1986\)](#) (O'Connor, J., concurring) ("Although technically dicta, *** an important part of

the Court's rationale for the result [that] it reach[ed] *** is entitled to greater weight").

***18 2. This Court Supplanted the Second Circuit's Reasoning**

On remand, the Second Circuit did not take account of the following elements of *Pasquantino*:

- This Court held that the revenue rule "has ... always been unclear" and "uncertain[]" in scope. [*Pasquantino*, 125 S. Ct. at 1778](#). On remand, the Second Circuit restated its contrary view that the revenue rule is "long-standing." App. 7a. This perpetuates the basic error in *Canada*, in which the Second Circuit considered the revenue rule to be a "centuries-old" ([*Canada*, 268 F.3d at 134](#)), and clearly understood, doctrine. *Id.* at 130.

- This Court held that whether a claim is based on U.S. "domestic" law is directly relevant to a revenue rule analysis. [*Pasquantino*, 125 S. Ct. at 1776](#) (emphasis in original). On remand, the Second Circuit reinstated its mistaken view that the "domestic" legal basis of a claim is irrelevant to a revenue rule analysis. App. 40a n. 8; App. 13a.

- This Court held that "indirect" or "incidental" or "attenuated" assistance in foreign tax matters, such as may occur in connection with claims brought under domestic law, is permissible. [*Pasquantino*, 125 S. Ct. at 1775-77](#). On remand, the Second Circuit reinstated its contrary view that the revenue rule bars claims that are said to "indirectly" assist foreign governments in tax matters. App. 7a, 12a; App. 27a-28a.

- *19** • This Court held that the "domestic" nature of the fraudulent conduct underlying the claim weighs against application of the revenue rule. [*Pasquantino*, 125 S. Ct. at 1777](#). On remand, the Second Circuit reinstated its contrary view that the "operation of the [revenue] rule does not depend on the type of conduct alleged." App. 32a.

- This Court held that claims under domestic law addressing domestic conduct serve to enforce *domestic* law, not foreign law. [*Pasquantino*, 125 S. Ct. at 1775-77](#). Despite this holding, the Second Circuit, on remand, continued to hold that claims under domestic law seeking to enjoin domestic conduct are categorically barred as "extraterritorial[]" efforts to enforce foreign tax laws. App. 14a n.10.

In sum, the Second Circuit plainly erred in concluding on remand that "*Pasquantino* casts no doubt on the reasoning or result in *EC I*." App. 14a. The Second Circuit's decision to reinstate an opinion at odds with the majority in *Pasquantino* (and effectively follow the *dissent* in *Pasquantino*) conflicts with both this Court's mandate and *Pasquantino*. Review and summary reversal of the judgment below are warranted.

***20 3. The Second Circuit's "Version" of the Revenue Rule Conflicts With the Decisions of the Fourth and Ninth Circuits and Other Authorities**

The Second Circuit's overly broad "version" of the revenue rule conflicts not only with *Pasquantino*, but it also conflicts with the decisions of the Fourth and Ninth Circuits. See [*United States v. Pasquantino*, 336 F.3d 321, 329 & n.3 \(4th Cir. 2003\)](#) (*en banc*) (revenue rule only "pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws"), *aff'd*, [*125 S. Ct. 1766 \(2005\)*](#); *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1165 (9th Cir. 1979) (foreign tax judgment); see also [*Restatement \(Third\) of Foreign Relations Law* § 483 \(1987\)](#) (revenue rule does not require, but allows, courts to refuse enforcement of foreign tax judgments).

The Second Circuit's "version" of the revenue rule also conflicts with the decisions of the courts of Canada and Ireland, which this Court recognized in

Pasquantino. Peter Buchanan L. D. v. McVey, [1955] A. C. 530, 533 (Ir. Sup. Ct. 1951) (Maguire, C.J.) (revenue rule implicated because "the *sole object* [of proceedings in Scotland] was to collect a revenue debt" but noting that "if the payment of a revenue claim was *only incidental* and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance") (emphasis added); *United States v. Harden*, [1963] S.C.R. 366, 372-73 (Can.) ("when it appears to the court that the *whole object* of the suit is to collect tax for a foreign revenue, and that this will be the *sole result* of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction") (emphasis added). *Accord State of Norway (Nos. 1 and 2)*, [1990] A.C. 723, *21 807-08 (H.L.) (revenue rule covers a " 'claim for taxes' " and does not bar Norway's request for "assistance of the English courts" in obtaining evidence in a "fiscal" or tax case) (citation omitted).

The Second Circuit is thus out of step with settled law.

B. The Second Circuit Applied an Incorrect Legal Standard

On remand, the Second Circuit reinstated and applied its superseded version of the revenue rule. The Second Circuit's failure to apply the correct legal standard alone warrants review and summary reversal.

The Second Circuit's most prejudicial error was the application of its superseded legal standard to bar claims for injunctive relief under domestic law. In addressing these claims, the Second Circuit did not apply the revenue rule as recognized in *Pasquantino* and modern courts. Instead, the Court of Appeals applied its impermissibly broad version of the revenue rule as formulated in *Canada* and embodied in *EC I*. On remand, the Second Circuit incorrectly concluded in a footnote that the revenue rule bars the claims for "injunctive relief" because, in the panel's view, they "would have the effect of extraterritorially enforcing plaintiffs' tax laws." App. 14a n.10 citing [EC I, 355 F.3d at 138](#).

The Second Circuit applied an incorrect legal standard and reached an incorrect result. A claim for injunctive relief under domestic law (against domestic defendants which are not alleged to owe foreign taxes) falls well outside the traditional ambit of the revenue rule. The Second Circuit overlooked this Court's view that claims under domestic law addressing*22 domestic conduct serve to enforce domestic law, not foreign tax law. [Pasquantino, 125 S. Ct. at 1775-77](#). However formulated, the revenue rule was not designed to exempt domestic companies from domestic law, or deprive the courts of their power to enjoin tortious domestic conduct.

C. The Second Circuit Misapprehended the Claims as Pled

The Second Circuit not only applied an incorrect legal standard, but it also misapprehended the claims as pled in the Complaints, and indeed, imputed to Petitioners claims that were never made and were specifically disavowed.

On remand, the Second Circuit based its holding upon the premise that "the substance of the claim is that the defendants violated foreign tax laws." App. 14a. This premise is demonstrably incorrect. The Complaints allege violations of U.S. domestic law. As Petitioners made clear in their briefs before the Second Circuit:

The factual predicate for application of the revenue rule is not present here because this is not "a suit to recover taxes due to another [government] or upon a judgment for such taxes" under foreign law that would cause the courts "to scrutinize the relations of a foreign state with its own citizens." See [Milwaukee County, 296 U.S. at 272, 275](#); see also [Restatement \(Third\) of Foreign Relations Law § 483 \(1987\)](#). The smuggling claims are not "revenue claims" because the Defendants

themselves are not alleged to owe taxes. The duties and taxes generally are owed by the smugglers. The tobacco companies' *23 liability does not arise by virtue of "tax debtor" status under foreign law; rather, it arises under U.S. laws designed to eradicate and remedy racketeering activity.

Even if some claims were considered to be "tax collection" claims, there is no basis to find, particularly on this record, that *all* of the claims in the complaint are "tax-collection" claims. The district court failed to consider each claim, its legal basis, the nature of the defendant, the manner of proof, and the relief sought. This failure resulted in the impermissible expansion of the revenue rule to "preempt" claims that do not involve, much less turn upon, foreign tax law.

EC and Col. C.A. Br. at 77-78 (emphasis added). See also EC and Col. C.A. Reply Br. at 14 n.6 ("Defendants' civil liability does not turn on foreign tax law; their civil liability is based upon conduct that is violative of U.S. statutory and common law ...") (citation omitted).

The Second Circuit disregarded or overlooked the pleadings and Petitioners' representations to the Court. The panel imputed claims to Petitioners that were never made and which were, in fact, specifically disavowed by Petitioners. The panel then barred such reformulated claims under the revenue rule. The Second Circuit, in disregarding or overlooking the pleadings, and attributing to Petitioners claims that were never made, far exceeded the permissible scope of review under [Fed. R. Civ. P. 12\(b\)\(6\)](#). See [Conley v. Gibson](#), 355 U.S. 41, 45-46 (1957) (complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support *24 of his claim which would entitle him to relief"); [Dye v. Hofbauer](#), 126 S. Ct. 5 (*per curiam*) (2005) (judgment of Court of Appeals summarily reversed where the court simply overlooked properly presented claim).

The Second Circuit's error was highly prejudicial. The Court of Appeals concluded, incorrectly, that the claims for injunctive relief under domestic common law sought merely to compel defendants to "obey [foreign] tax laws." App. 14a n.10. Petitioners never made such a claim. In fact, the Complaints plainly state that they seek to compel the defendants to comply with U.S. domestic "common law, statutory or equitable standard[s]," not foreign tax laws. See, e.g., C.A. App. 418, 2024. The Complaints do not seek to collect unpaid taxes from defendants because, as noted above, "Defendants themselves are not alleged to owe taxes." EC and Col. C.A. Br. at 77. The claims for injunctive relief, as actually pled, should not be barred by the revenue rule.

On remand, Petitioners requested that the Second Circuit itself remand the case to the District Court, to allow a claim-by-claim review, particularly with respect to claims for injunctive and other equitable relief. The Second Circuit summarily denied this request without explanation, even though a claim-specific evaluation is clearly required. See [Pasquantino](#), 125 S. Ct. at 1777 (courts conducting a revenue rule analysis should consider the "purpose" of the claim, the "domestic" nature of the "conduct," and the "interest" vindicated by the claim); see also [Exxon Mobil Corp. v. Allapattah Services, Inc.](#), 125 S. Ct. 2611, 2620 (2005) ("When the well-pleaded complaint contains at least one [cognizable] claim ... the district court, beyond all question, has jurisdiction over that claim"); [Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.](#), 760 F.2d 1347, 1352 (2d Cir.) *25 (Friendly, J.) (judgment granting motion to dismiss reversed in part; abstention doctrine barred claims seeking a particular form of damages, but not claims for injunctive relief and other forms of damages), *aff'd*, [476 U.S. 409](#) (1986).

In sum, the Second Circuit's decision to bar claims that were not made in the Complaints (and were explicitly disavowed by Petitioners), makes clear the need for further consideration by the District Court.

The District Court held that the "common law revenue rule" was not an "abstention doctrine," but rather, a mandatory "federal rule of common law" that divests federal and state courts of the power and "discretion" to entertain "smuggling" claims. App. 51a-52a & n.1. The Court of Appeals affirmed. In holding that the courts "may not" entertain the "smuggling" claims brought by Petitioners (App. 27a-28a), the Court of Appeals held that the courts lack the power or "discretion" to enjoin or deter domestic conduct that facilitates smuggling schemes and other serious wrongdoing. App. 42a-43a. On remand, the Court of Appeals reinstated this view, and summarily denied Petitioners' request to remand the case to the District Court for the exercise of discretion.

***26** The Second Circuit's decision - that federal courts lack the equitable power or discretion to enjoin or otherwise address domestic conduct that facilitates a "smuggling" scheme - clearly conflicts with settled law. Even if the revenue rule were implicated by a particular claim, the revenue rule is a discretionary doctrine rather than a mandatory limit on the courts' jurisdiction. This Court, as well as the Fourth and the Eleventh Circuits, and the House of Lords, have held that the revenue rule is, at most, a discretionary abstention doctrine, pursuant to which a court may, "on the principle of comity," hear a case if appropriate, even if the case presents a foreign tax element. See, e.g., Milwaukee County, 296 U.S. at 272 (revenue rule "is not rightly addressed to any want of judicial power in the courts" and is not a matter of "jurisdiction") (inter-state dispute); Massachusetts v. Missouri, 308 U.S. 1, 20 (1939) (same); United States v. Pasquantino, 336 F.3d 321, 329 (4th Cir. 2003) (en banc) (revenue rule is "permissive"), *aff'd*, 125 S. Ct. 1766 (2005); *id.* at 340 (Gregory, J., dissenting) ("revenue rule ... is a discretionary doctrine"); Ecuador v. Philip Morris Cos., 188 F. Supp. 2d 1359, 1369 (S.D. Fla. 2002) ("the revenue rule is a rule of abstention"), *aff'd sub nom. Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003), *cert. denied*, 540 U.S. 1109 (2004); see also Restatement (Third) of Foreign Relations Law § 483 (1987) (revenue rule is discretionary, not mandatory); State of Norway (Nos. 1 and 2), [1990] A.C. 723, 808 (H.L.) (revenue rule does not "go to the jurisdiction of the English court"; court "declines" jurisdiction as a matter of judicial discretion).

The Second Circuit's decision, to divest the federal courts of their historic power to entertain equitable claims brought by U.S. allies in this case, conflicts with settled law. ***27** See, e.g., Republic of the Philippines v. Marcos, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc) (injunctive relief awarded to foreign State to preserve the possibility of equitable remedies); see also United States of America v. Levy, [1999] CarswellOnt 926 (Ont. Gen. Div.) (granting motion of the U.S. and FTC to trace and freeze assets connected to a telemarketing scheme); Kingdom of Spain v. Christie Ltd., [1986] 1 W.L.R. 1120 (Eng. Ch. D.) (Spain stated an equitable cause of action arising from the smuggling of a Goya oil painting out of Spain based upon forged export documents); Republic of Haiti v. Duvalier, [1990] QB 202, 217 (Eng. C. A.) (affirming injunction sought by Republic of Haiti, holding "[t]his case demands international co-operation between all nations"); Statement of Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice, Hearing Before the U.S. Senate Special Committee on Aging, Medicare Enforcement Actions: The Federal Government's Anti-Fraud Efforts, Serial No. 107-11, at 49, 62 (July 26, 2001) ("In appropriate civil cases [in foreign courts], [the United States] can seek to shut down boiler rooms, enjoin con-artists from telemarketing into the United States, and freeze corporate and individual assets for eventual restitution to victims of the fraud"). [FN7]

FN7. Foreign courts have been open to foreign governments, including the United States, seeking injunctive and other equitable relief since at least

the 19th century. See *United States of America v. Prioleau*, 2 H. & M. 559 (1865) (U.S. permitted to seek injunction and receiver to restrain and recover government property derived from taxes assessed by the Confederate States of America); *United States of America v. Wagner*, [1866-67] L.R. 2 Ch. App. 582, 584, [1866 WL 8317 \(CA in Chancery\)](#) (U.S. sought an accounting and recovery of money and property; counsel observed that a suit instituted by the President of the United States was pending in France); *King of Two Sicilies v. Willcox*, 1 Sim. (N.S.) 301 (1851) (King of Two Sicilies may seek equitable relief before the courts of England to recover proceeds of "Royal revenues"); *Emperor of Austria v. Day* (1861), 3 de G. F. & J. 217, 253 (1861) (Emperor of Austria may seek injunctive relief in the courts of England to restrain cross-border counterfeiting scheme; plaintiff is "entitled" to act to prevent "wrongful" and "civilly unlawful" conduct that harms "the public revenues, the fiscal resources [or] the pecuniary means of the realm") (per Knight Bruce, L.J.); *Hullet v. King of Spain*, 1 Dow & Clark 488, 491 (H.L.) (1828) (foreign sovereign is entitled to sue in the courts of England in equity; rejecting argument that an English court of equity should not be made instrumental in enforcing the prerogative of a foreign sovereign).

***28** The legal issue of whether the revenue rule is a mandatory, rigid rule akin to a jurisdictional bar or a discretionary abstention doctrine warrants review by this Court. The Second Circuit has imposed an absolute bar on "smuggling" claims brought by foreign States in U.S. courts and has held that, regardless of the facts and circumstances, the federal courts are utterly powerless to entertain such claims in this case. The District Court did not exercise its discretion, and the Second Circuit held that the District Court had no discretion. This holding is contrary to settled law, and warrants review and reversal by this Court.

On remand from this Court, the Second Circuit should have granted Petitioners' request to remand the case to the District Court for a claim-by-claim review and the exercise of discretion. This is particularly true with respect to the claims for injunctive and other equitable relief, which invoke the discretionary power of the courts. See [Meredith v. Winter Haven](#), 320 U.S. 228, 235-36 (1943). Where, as here, the Petitioners seek to *enjoin* domestic conduct that facilitates terrorism and other serious wrongdoing, it is entirely ***29** appropriate to allow the District Court to balance all relevant factors and entertain the case, even if a claim is said to incidentally advance the interests of a foreign State in tax matters.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Court of Appeals.

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- [2005 WL 3438567](#) (Appellate Petition, Motion and Filing) Reply Brief (Dec. 14, 2005)
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- [05-549](#) (Docket) (Nov. 01, 2005)

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