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.
December 1, 2005.

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

Brief in Opposition

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QUESTION PRESENTED

In *Pasquantino v. United States*, 125 S. Ct. 1766 (2005), this Court held that the Revenue Rule does not bar the *United States* from enforcing its *criminal* wire fraud laws in U.S. courts even where the wire fraud relates to smuggling activities that deprive a foreign sovereign of tax revenue.

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The question presented here is: Whether *Pasquantino* alters the uniform holdings of the lower federal courts, including two circuit courts addressing the exact issues presented here, that the Revenue Rule does bar *foreign governments* from bringing *civil* actions to enforce their revenue laws in U.S. courts.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

Respondents R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., and RJR Acquisition Corp. have the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc., f/k/a RJR Nabisco, Inc. Reynolds American Inc., a publicly traded company, is the parent of R.J. Reynolds Tobacco Holdings, Inc. Brown & Williamson Holdings, Inc. owns 42% of the Reynolds American Inc. stock and is, in turn, an indirect subsidiary of British American Tobacco p.l.c.

With respect to Respondents British American Tobacco (Investments) Limited, British American Tobacco (South America) Limited, B.A.T Industries p.l.c., BATUS Tobacco Services, LLC, and Brown & Williamson Tobacco (n/k/a Brown & Williamson Holdings, Inc.), no publicly held company directly owns 10% or more of the stock of any of these Respondents, but 10% or more of each of their stock is indirectly held by British American Tobacco p.l.c., which is a publicly held company. British American Tobacco p.l.c. indirectly through Brown & Williamson Holdings, Inc. owns 42% of Reynolds American Inc., a publicly traded company that is the parent of R.J. Reynolds Tobacco Holdings, Inc. and R.J. Reynolds Tobacco Company. In addition, the Respondents' parent corporations that are not Respondents are: British American Tobacco p.l.c., British American Tobacco (1998) Limited, British American Tobacco (Holdings) Limited, Louisville Securities Limited, BATUS Holdings, Inc. and BATIC, Inc. [FN1]

> FN1. B.A.T Industries p.l.c., British American Tobacco (South America) Ltd., and BATUS Tobacco Services, LLC, join this Opposition subject to, and without waiver of, their defenses, including the lack of personal jurisdiction.

Respondent Altria Group, Inc., f/k/a Philip Morris Companies Inc., does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondents Philip Morris USA Inc., f/k/a Philip Morris Incorporated, and Philip Morris International Inc., have the following parent corporation: Altria Group, Inc. No other publicly held company owns 10% or more of their stock.

Respondents Philip Morris Products Inc. and Philip Morris Duty Free Inc. have the following parent corporation: Philip Morris International Inc. No other publicly held company owns 10% or more of their stock.

Respondent Philip Morris Latin America Sales Corporation has the following parent corporation: Philip Morris LA Holding Inc., f/k/a Philip Morris Latin America Inc. No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

Nothing in *Pasquantino v. United States*, 125 S. Ct. 1766 (2005) - which addressed solely the application of the Revenue Rule in a *criminal* wire fraud prosecution by the *United States* - provides any reason to grant review here. The United States Court of Appeals for the Second Circuit anticipated *Pasquantino* as early as 1997 in recognizing that the Revenue Rule does not bar such criminal prosecutions. App. 12a (citing *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997)). In applying the

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Revenue Rule here, the Second Circuit distinguished the criminal context from this case, where *foreign governments* have brought *civil lawsuits* to collect foreign taxes and obtain related relief. App. 11a-12a. The United States recognized this same critical distinction between criminal and civil cases when it expressly argued in *Pasquantino* that the Revenue Rule does not apply in the criminal context but does bar civil cases identical to those here. Brief for the United States at 15 n.4, *Pasquantino v. United States*, 125 S. Ct. 1766 (2005) (No. 03-725); *accord* Brief for the United States As Amicus Curiae at 6-7, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 537 U.S. 1000 (2002) (No. 01- 1317).

The Second Circuit's ruling applying the Revenue Rule in the civil context is consistent not only with *Pasquantino*, but with more than 200 years of case law from around the world and with every state and federal decision in this country, including two recent circuit decisions addressing the exact issues presented here. *See Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1256 (11th Cir. 2003); *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 E3d 103, 106 (2d Cir. 2001). The Court denied certiorari in both of these cases. *See Honduras*, 540 U.S. 1109 (2004); *Canada*, 537 U.S. 1000 (2002). The Court should do the same here.

In *Pasquantino*, this Court recognized that the Revenue Rule serves important separation-of-powers interests by avoiding judicial interference in the political branches' determination of whether, when, and how to allow a foreign government to enforce its tax laws in U.S. courts. *See Pasquantino*, 125 S. Ct. at 1779-80. In the context of federal prosecutions, however, these separation-of-powers interests are not implicated because such prosecutions "embod[y] the policy choice of" the Executive and Legislative branches of government - and therefore "pose[] no risk of advancing the policies" of a foreign government illegitimately. *Id.* at 1780. By contrast, where, as here, a foreign government brings a civil action to vindicate its foreign tax laws, there is no Executive Branch "safeguard," *id.* at 1779, and the Rule applies to prevent a foreign government from circumventing the treaty process and obtaining greater assistance than it has negotiated for and greater assistance than the United States would receive in foreign courts. Indeed, applying the Revenue Rule is especially necessary here because petitioners assert *state law* claims that, if upheld, would allow fifty separate state law regimes to inject themselves into matters of foreign relations, compounding exponentially the very problems that the Rule is designed to prevent.

In view of the unanimity of the federal circuit courts, the United States's agreement with these decisions, the reasoning of *Pasquantino*, and this Court's two prior denials of certiorari, this Court should deny the Petition.

STATEMENT OF THE CASE

I. These Actions Involve Efforts By Foreign Governments To Enforce Their Revenue Laws in U.S. Courts

In these consolidated lawsuits, several Departments of the Republic of Colombia ("Colombian Departments"), the European Community ("EC"), and ten of the EC's member states ("Member States") sought to recover unpaid foreign taxes and obtain related relief arising from alleged cigarette smuggling schemes. Petitioners alleged, among other things, that the respondent companies "facilitated the smuggling of cigarettes illegally" into their countries. CA App. A-311; [FN2] *accord* CA App. 1944; App. 4a, 21a-22a.

> FN2. "CA App." refers to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit.

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In their complaints, petitioners sought principally to recover taxes lost by reason of the alleged schemes. CA App. A-312-13, A-1934; App. 8a. Specifically, petitioners sought to recover as monetary damages: SU• "[E]xcise taxes that would have been paid on the cigarettes in question absent the wrongful activities of the Defendants";

- "Customs duties";
- "Value-added tax levied on cigarettes"; and
- "Derivative costs such as law enforcement and other governmental expenses incurred "to fight against cigarette smuggling."

CA App. A-409-11; *accord* CA App. A-2021-26; App. 5a, 23a. Petitioners' complaints also sought injunctive and equitable relief, including orders to "disgorge" proceeds from the smuggling scheme and court-ordered protocols that would help petitioners "track and monitor the movement of cigarettes into and within" their foreign territories to assist in their enforcement of foreign revenue and customs laws. CA App. A-419-20, A-2025-26; *accord* App. 5a, 23a.

Petitioners sued under the civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), and brought state common law claims based on diversity jurisdiction. [FN3] App. 3a, 19a.

> FN3. Diversity jurisdiction, however, is lacking in the Colombian Departments' action because there is no complete diversity - there are foreign parties on both sides of the case. *See* *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 569 (2004) (diversity is absent where "aliens [are] on both sides of the case") (citing *Mossman v. Higginson*, 4 Dall. 12, 14 (1800)).

Despite the focus of their complaints, petitioners now, as in their previous petition for certiorari, abandon their federal RICO claims and their claims for damages, apparently in an attempt to make these cases appear less like *Canada* and *Honduras*, where certiorari was denied. Instead, they assert that the "main focus" of these actions is state tort law, specifically, state common law claims seeking injunctive and equitable relief. *See* Pet. 2-3 nn.3-4.

II. Other Circuit Court Decisions Concerning Identical Civil Actions By Other Foreign Governments

While these consolidated actions were pending in the district court, the Second Circuit decided *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002). There, Canada filed a civil RICO and state common law action in New York federal court alleging that several tobacco companies had engaged in a scheme to smuggle cigarettes into Canada. *Id.* at 105-06. Like petitioners here, Canada sought to recover unpaid taxes, treble damages related to these taxes, and injunctive relief designed to enforce its tax laws. *Id.*

The Second Circuit held that the Revenue Rule - a "common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns" - barred all of Canada's claims. *Id.* at 109. The court explained that the Rule had "continuing vitality" in modern times because it serves important separation-of-powers interests. *Id.* For instance, it avoids judicial scrutiny of another nation's tax policies, which prevents "embroil[ing] United States courts in delicate issues in which they have little expertise or capacity." *Id.* at 113. The Rule also ensures that the judiciary will not interfere with foreign tax matters and be "drawn into issues and disputes of foreign relations policy that are assigned to - and better handled by - the political branches of government." *Id.* at 114. The court recognized, for instance, that

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allowing civil tax-based actions would undercut the Executive Branch's ability to negotiate treaties, since nations would know they could obtain tax enforcement without providing the U.S. reciprocal rights simply by filing a lawsuit in U.S. courts. *Id.* at 119, 122.

Finally, the Second Circuit explained why the Revenue Rule barred Canada's civil action, despite its prior ruling in *Trapilo* that the Rule was no bar to *criminal* wire fraud prosecutions based on a scheme to smuggle liquor from the U.S. into Canada: "When the United States prosecutes a criminal action ... the foreign relations interests of the United States may be accommodated throughout the litigation." *Id.* at 123.

Canada subsequently filed a petition for a writ of certiorari, and the Court invited the Solicitor General to express the views of the United States. On behalf of the United States, the Acting Solicitor General - in a joint submission with the Departments of State and Treasury - opposed the granting of certiorari and supported the Second Circuit's application of the Revenue Rule based on "important separation-of-powers interests." Brief for the United States As Amicus Curiae at 6, *Canada*, 537 U.S. 1000 (No. 01-1317). This Court denied certiorari. *Canada*, 537 U.S. 1000.

After *Canada* was filed, but before the Second Circuit issued its decision, various Central and South American countries brought a series of actions modeled after *Canada* in Florida federal court, seeking to recover lost foreign taxes and various forms of injunctive relief from purported smuggling schemes. Like the Second Circuit, the Eleventh Circuit affirmed the dismissal of these suits based on the Revenue Rule. *Republic of Honduras v. Philip Morris Cos.*, 341 E3d 1253 (11th Cir. 2003). The plaintiff-governments there also filed a petition for a writ of certiorari, which this Court denied. *Honduras*, 540 U.S. 1109.

III. The Initial Proceedings Below

A. The District Court's Decision

After the Second Circuit issued its decision in *Canada*, the district court dismissed petitioners' complaints based on the Revenue Rule. App. 47a. The court considered both petitioners' demands for lost tax revenue as well as the claims for injunctive and equitable relief. App. 57a-58a. Noting that petitioners' requested injunctive relief was "designed to impede smuggling, improve future defenses against smuggling, and recoup monies lost to smuggling," the court determined that this relief also triggered the Revenue Rule. App. 58a.

Although the district court dismissed with prejudice petitioners' RICO and common law claims predicated on smuggling, App. 68a-69a, the court dismissed their "money laundering" claims without prejudice on other grounds, allowing petitioners to bring new money laundering allegations to the extent that the claims had no nexus to foreign tax enforcement. App. 76a. [FN4]

> FN4. The court dismissed the "money laundering" claims because they lacked a "causal connection to the harm alleged, once the money laundering allegations are removed from the context of the smuggling scheme...." App. 73a. The claims were dismissed without prejudice, allowing petitioners to refile. App. 76a, 78a-79a. Petitioners subsequently have refiled those claims against certain defendants.

B. The Second Circuit's Initial Decision

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In its initial opinion, the Second Circuit affirmed the dismissal of the present cases. App. 45a. The court found that petitioners' allegations were "markedly similar to those at issue in *Canada*." App. 30a. Like the Canadian government, the court noted, petitioners premised their complaints on various tax-related injuries. App. 30a-31a. Accordingly, the court found its decision controlled by *Canada*. App. 31a.

The Second Circuit rejected petitioners' argument that the foreign policy concerns underlying the Revenue Rule were not implicated in these cases. App. 3 la. First, the court reiterated that enforcement of foreign tax laws is a question of " 'foreign relations policy ... assigned to - and better handled by - the political branches of government.' " App. 28a (quoting *Canada, 268 F.3d at 123).* Thus, "the modern revenue rule is rooted in both our perception that the branches of government responsible for conducting foreign affairs wish to uphold the rule, and our reluctance to intrude upon the greater expertise of the political branches...." App. 29a. Like the Eleventh Circuit, the court found that over 50 tax treaties between the United States and other nations "reflected the political branches' continuing recognition of the revenue rule." App. 29a.

Second, the court rejected the argument that petitioners' claims for injunctive relief fell beyond the scope of the Revenue Rule. App. 42a. The court found that, where a foreign sovereign seeks to enforce foreign tax laws, the same separation-of-powers problems arise irrespective of whether the remedy sought is compensation or an injunction. App. 42a.

Finally, as in *Canada*, the court reiterated the fundamental distinction between civil and criminal cases when it comes to the Revenue Rule:

> [W]here the executive branch has "expressed its consent to adjudication by the courts," the institutional and separation of powers concerns behind the rule are mitigated, because the branch with primary responsibility for conducting foreign relations has indicated that extraterritorial enforcement of the foreign tax laws at issue is in the interests of the United States.

App. 29a (quoting *Canada,* 268 E3d at 123 n.25).

IV. *Pasquantino*, the Remand, and the Second Circuit's Decision on Remand

In May 2005, the Court granted, vacated, and remanded these cases to the Second Circuit "for further consideration in light of *Pasquantino v. United States,*" App. 15a, a decision that held that the Revenue Rule did not bar the United States from bringing a criminal wire fraud prosecution based on a scheme to smuggle liquor from the U.S. into Canada.

A. *Pasquantino v. United States*

In *Pasquantino*, the Court addressed two principal questions: (1) whether the smuggling scheme at issue fell within the "literal terms of the wire fraud statute"; and (2) if so, whether the Revenue Rule still barred such a prosecution. *Pasquantino, 125 S. Ct. at 1771, 1773*.

After finding that the smuggling scheme fell within the language of 18 U.S.C. § 1343, the Court addressed whether the Revenue Rule nevertheless barred the prosecution. The Court first looked at whether, when the wire fraud statute was enacted, the Revenue Rule precluded the government from prosecuting a defendant under its own domestic laws for an attempted smuggling scheme. 125 S. Ct. at 1774. The Court found no precedent applying the Revenue Rule to preclude a sovereign from enforcing its penal laws. *Id.*

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Turning then to the purposes of the Revenue Rule, the Court recognized that the Rule serves separation-of-powers interests, but held that the special characteristics of criminal prosecutions brought by the Executive Branch rendered the Revenue Rule inapplicable. *Id.* at 1779. For example, the Court recognized that the Revenue Rule was designed to prevent the judiciary from becoming embroiled in a foreign nation's social policies, but found that this purpose had little application to the prosecution before the Court: "[T]his prosecution poses little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns." *Id.* Federal criminal prosecutions do not pose such a risk, the Court reasoned, because of the active participation of the Executive Branch in enforcing its domestic criminal laws. *Id.* at 1777 ("The present prosecution creates little risk of causing international friction.... This action was brought by the Executive to enforce a statute passed by Congress").

While finding the Revenue Rule inapplicable to the criminal prosecution in *Pasquantino*, the Court "express[ed] no view" on "whether a foreign government ... may bring a civil action under the Racketeer Influenced and Corrupt Organizations Act for a scheme to defraud it of taxes. See *Attorney General of Canada v. R.J. Reynolds*[]; *Republic of Honduras v. Philip Morris Cos.*" *Id.* at 1771 n. 1.

B. The Second Circuit's Decision on Remand

In September 2005, the Second Circuit issued its remand decision affirming the dismissal of petitioners' complaints under the Revenue Rule. App. 3a. The court held that "*Pasquantino* casts no doubt on the reasoning or the result" of its initial decision. App. 14a.

As a threshold matter, the court noted that *Pasquantino* expressly declined to state a view on the Revenue Rule's application to civil cases like those here. App. 6a. The court then addressed whether the reasoning of *Pasquantino* in any way altered its decision. The court concluded that it did not.

The court reiterated its view that the Revenue Rule is "designed to address two concerns: first, that policy complications and embarrassment may follow when one nation's courts analyze the validity of another nation's tax laws; and second, that the executive branch, not the judicial branch, should decide when our nation will aid others in enforcing their tax laws." App. 8a. The Second Circuit explained why these policy concerns are not implicated in criminal prosecutions: "when the executive branch affirmatively consents to litigation (e.g., by initiating it in a criminal prosecution), there is little reason to worry about infringing on the executive's sphere of decision-making, and the rule will not be applied." App. 9a.

The court then concluded that *Pasquantino* recognized the same principles. Specifically, the Second Circuit found that "the involvement of the United States government was a key factor in determining the outcome of *Pasquantino*." App. 11a. The absence of the United States in the present cases, therefore, was critical: "The present civil lawsuit, on the other hand, is brought by foreign governments, not by the United States." App. 11a. Indeed, "in *Pasquantino*, as well as in *Canada*, the United States government argued that the revenue rule does not apply to criminal prosecutions, but agreed that the rule applies to civil cases brought by foreign governments involving any direct or indirect attempt to enforce their tax laws." App. 11a n.8.

Finally, the court addressed and rejected petitioners' arguments, identical to those here, that (a) the Revenue Rule applies only to suits where the "whole object" is the collection of taxes; (b) the Rule does not apply to domestic law

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claims for injunctive and equitable relief; and (c) the discussion of tax treaties in *Pasquantino* conflicts with the *Canada* decision. App. 12a-14a.

In sum, the Second Circuit, after a thorough analysis that considered all of petitioners' arguments, held that "*Pasquantino* casts no doubt on the reasoning or the result of" its initial decision. App. 14a. 12

REASONS FOR DENYING THE PETITION

Rather than grant petitioners' request for "summary reversal," [FN5] this Court should deny review because the Second Circuit correctly determined that *Pasquantino* is entirely consistent with the lower courts' grounds for dismissal of these civil cases under the Revenue Rule. Moreover, that determination does not conflict with any federal or state court ruling. Denial of review also is consistent with the views of the United States, which support the dismissal below.

> FN5. Given that the Court in *Pasquantino* "express[ed] no view" on cases like these, the request for summary reversal is absurd. *Pasquantino*, 125 S. Ct. at 1771 n.1. Summary reversal is an extraordinary remedy appropriate only when "the lower court result is ... clearly erroneous" and contrary to "a controlling Supreme Court precedent." Robert L. Stern et al., Supreme Court Practice 316 (8th ed. 2002); *Maryland v. Dyson*, 527 U.S. 465, 467 n. 1 (1999) ("[S]ummary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law."). That petitioners disagree with the Second Circuit's remand opinion is hardly grounds for such extraordinary relief.

A. *Pasquantino* Validated, Not Superseded, the Second Circuit's Approach to the Revenue Rule.

The Court's analytical framework, reasoning, and holding in *Pasquantino* fully support the dismissal of these cases under the Revenue Rule.

First, *Pasquantino* confirmed the analytical framework used by the Second Circuit. Specifically, in *Pasquantino*, the Court began its analysis of the Revenue Rule with an inquiry into whether, at the time the criminal wire fraud statute was enacted, the Revenue Rule was a well-established bar to the federal government prosecuting a defendant under its domestic laws for an attempted smuggling scheme. *Pasquantino*, 125 S. Ct. at 1774 & n.5 (following *Texas* and *Astoria* cases). The Court found no precedent applying the Revenue Rule to preclude a domestic criminal prosecution. *Id.* at 1774. In the decisions below and in *Canada*, the Second Circuit applied the same framework, concluding that the Revenue Rule always applied in *civil* actions brought by *foreign governments*, including when RICO was enacted. *Canada*, 268 F.3d at 126-29 (following *Texas* and *Astoria* cases); *accord* App. 30a, 7a-8a.

Second, *Pasquantino* identified the same purposes underlying the Revenue Rule relied upon by the Second Circuit. For example, the Court recognized that the Revenue Rule was designed to prevent the judiciary from becoming embroiled in a foreign nation's social policies and served separation-of-powers purposes. *Compare* *Pasquantino*, 125 S. Ct. at 1779-80 *with* App. 8a-9a (decision below on remand); App. 28a-30a (original decision).

Third, *Pasquantino* recognized that the sovereignty and separation-of-powers purposes underlying the Rule are not implicated in criminal prosecutions because of the control of the Executive Branch in enforcing its domestic criminal laws:

> [W]e may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. We know of

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no common-law court that has applied the revenue rule to bar an action accompanied by such a safeguard, and neither petitioners nor the dissent directs us to any. *Pasquantino*, 125 S. Ct. at 1779.

This, as the remand decision below recognized, "actually affirm[ed] the prior law of [the Second] Circuit, under which the revenue rule was held inapplicable to § 1343 smuggling prosecutions" in *United States v. Trapilo*. *See* App. 12a; *accord Pasquantino*, 125 S. Ct. at 1771 (noting that Court was resolving conflict between *Trapilo* and other cases). Indeed, in *Canada*, the Second Circuit expressly explained the fundamental difference between criminal and civil cases in this context:

> [W]ith regard to the revenue rule, there is a critical difference between this civil suit brought by a foreign sovereign and the criminal actions previously considered by panels of this court. In *Trapilo* ... the executive branch of the United States brought the case, while here, Canada is the plaintiff. When the United States prosecutes a criminal action ... the foreign relations interests of the United States may be accommodated throughout the litigation. In contrast, a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interests, may be, but is not necessarily, consistent with the policies and interests of the United States.

Canada, 268 F.3d at 123-24 (footnotes omitted); *see also* App. 29a. This distinction also was central in the remand decision: "In *Pasquantino*, [the separation-of-powers] concern was alleviated by the direct participation of the political branches in the litigation. Here we have no such assurance. We therefore see no reason why *Pasquantino*'s analysis should disturb our conclusion that the revenue rule bars" the present cases. App. 14a (citations omitted).

Thus, though *Pasquantino* expressly stated "no view" on civil cases like these, the decision was fully consistent with the rulings below and certainly presents no ground for review. Indeed, even Judge Calabresi, who dissented in *Canada*, recognized that "*Pasquantino* does not cast doubt on the holding in *EC I*." App. 7a n.6.

B. There Is Complete Unanimity Among this Court's Decision in *Pasquantino*, the Views of the United States, and the Decisions of the Second Circuit and Other Federal Courts.

The decision below does not conflict with any decision of this Court, any Court of Appeals, or for that matter, any court anywhere in the world. Both the Second Circuit and Eleventh Circuit have now squarely considered the Revenue Rule's application to civil suits to vindicate foreign revenue laws, and both have reached the same conclusion: as a matter of foreign relations and separation-of-powers, civil actions by foreign governments seeking to enforce their revenue laws in U.S. courts are barred by the Revenue Rule. That includes not only actions seeking to collect foreign taxes, but also those seeking common law claims for injunctive relief designed to enforce foreign tax laws. App. 14a, 42a; *Honduras*, 341 E3d at 1257-59; *Canada*, 268 E3d at 118-19. Within the last three years, the Court twice has refused to grant certiorari in these cases to review this long-settled principle. The Court should reach the same result here.

Petitioners erroneously claim that the holding below "conflicts" with the holdings of the Fourth and Ninth Circuits that application of the Revenue Rule is limited to tax judgments. Pet. 20. No such conflict exists. The Fourth Circuit's *Pasquantino* decision addressed a criminal prosecution, not a civil judgment. And nothing in *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 E2d 1161 (9th Cir. 1979), suggests that the Rule was limited to tax judgments. This Court's decision in *Pasquantino* itself recognized that courts addressing the Revenue Rule in civil cases have considered not the form of the action, but the "

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'substance of the claim.' " *Pasquantino*, 125 S. Ct. at 1776 (quotation source omitted). [FN6]

> FN6. Petitioners also erroneously claim that the decision below "conflicts" with the laws of Ireland and Canada because, they say, those countries apply the Revenue Rule only when the "whole object" of the claims are to enforce foreign revenue laws. Pet. 20. As a threshold matter, a conflict with foreign law is no grounds for review. S. Ct. R. 10(a). Furthermore, even if Ireland and Canada applied the Rule more restrictively, that would not be grounds for U.S. courts to follow suit, particularly when doing so would be contrary to the views of the political branches. In any event, the cases cited by petitioners expressly recognize that the Revenue Rule applies to direct and *indirect* enforcement of foreign revenue laws. *See* *Canada*, 268 F.3d at 130-32 (discussing *Peter Buchanan* and *Harden* foreign cases cited in Pet. 20). Finally, even under petitioners' view of those cases, there would be no conflict with the decision below since the Second Circuit found that "the '*whole object*' of the present suit is to collect tax revenue and costs associated with its collection." App. 13a (emphasis added).

Further, the Second Circuit's holding not only is consistent with the holdings of every other federal court, but is also fully in accord with the views of the United States. As noted, in *Canada*, the Acting Solicitor General - at the invitation of the Court in the context of the Canadian government's petition for *certiorari* - expressed the views of the United States that the Second Circuit "correctly held that the revenue rule precludes a foreign government from bringing a civil RICO claim where its alleged injury is lost tax revenue." Brief for the United States As Amicus Curiae at 6, *Canada*, 537 U.S. 1000 (No. 01-1317). The United States recognized that the Revenue Rule serves important separation-of-powers interests in the civil context. *Id.* at 6- 7. At the same time, the United States recognized that these interests are not implicated in criminal prosecutions, where the Revenue Rule should not apply:

> The distinction between a criminal prosecution brought by the United States and a civil action for the recovery of tax revenue brought by a foreign sovereign is critical, and it precisely aligns with the policies underlying the revenue rule. As the court of appeals explained, criminal prosecutions vindicate the interests of the United States, and they are subject to Executive Branch control. In contrast, a foreign sovereign brings a civil RICO action to further its own interest in collecting taxes, and that interest is not in all circumstances necessarily consistent with the interests of the United States.

Id. at 16 (citations omitted). In *Pasquantino*, the Acting Solicitor General, again expressing the views of the United States, confirmed the United States' position in *Canada* that the Revenue Rule does not apply to criminal prosecutions, but does apply to civil suits brought by foreign governments to vindicate foreign tax laws. Brief for the United States at 15 n.4, *Pasquantino*, 125 S. Ct. 1766 (No. 03-725).

The present cases aptly illustrate the concerns underlying the United States' views. For instance, the United States negotiated an agreement with the national Colombian government, which provides for limited information sharing on tax issues. *See* Agreement for the Exchange of Tax Information, U.S.-Colom., Mar. 30, 2001, 2001 WTD 88-16. Petitioners cannot explain why the Colombian Departments - political subdivisions of the Republic of Colombia that do not have any tax treaty with the United States - should have *greater* rights to tax enforcement assistance than those the United States agreed to give the national Colombian government. Nor, for that matter, can petitioners explain why the Colombian Departments should be entitled to greater rights in American courts than the United States would receive in Colombian courts. [FN7]

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FN7. Indeed, the sovereigns here follow the Revenue Rule. *See, e.g., QRS 1 ApS v. Frandsen,* [1999] 3 All E.R. 289 (C.A. 1999) (Revenue Rule " 'is deeply embedded not only in the common law, but also in the law of civil law countries' ") (citation omitted); *accord Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.,* [1986] A.C. 368, 428 (H.L.) ("[A]t present the international rule with regard to the non-enforcement of revenue and penal laws is absolute."). The Member States in fact have executed a multilateral treaty, in which they retain the Revenue Rule in their own jurisdictions. *See* European Communities: Convention On Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters art. 1, July 28, 1990, 29 I.L.M. 1413, 1418.

Similarly, the *EC* case, if allowed to proceed, would provide the Member States with tax assistance *denied* to them by treaty. The United States has separate treaties with each of the Member States in this suit "providing for limited extraterritorial tax enforcement assistance but stopping well short of the assistance requested here." *Canada,* 268 F.3d at 113; *accord id.* at 115-19. These tax treaties with the Member States are not uniform, but reflect U.S. foreign policy and reciprocity considerations unique to each country. Not one of those treaties authorizes enforcement of the claims in this case.

Petitioners nowhere address the United States' concerns that allowing the present suits could undercut its ability to negotiate future treaties. In the end, petitioners' proper recourse is to the political branches or their own courts.

C. Petitioners' Arguments That *Pasquantino* Mandates Reversal Are Meritless

1. *Pasquantino* Did Not "Supplant" the Revenue Rule's Longstanding Bar to Foreign Tax Enforcement Claims Brought Under U.S. Domestic Law

Pasquantino recognized that the purpose of the federal government's criminal prosecutions is not enforcing a foreign nation's interests, but protecting domestic interests. *Pasquantino,* 125 S. Ct. at 1776. But such is *not* the case where, as here, a foreign government brings a civil suit. The clear purpose of such a suit is the vindication of the foreign government's tax laws. Petitioners thus err in attempting to stretch *Pasquantino* beyond the criminal context to "supplant" the bar on efforts by foreign governments to enforce foreign revenue laws in U.S. courts using U.S. domestic law. Pet. 18- 19, 21-22.

The complaints in these actions illustrate this distinction. Petitioners sought to recover as damages unpaid taxes and derivative costs such as foreign law enforcement and other governmental expenses incurred "to fight against cigarette smuggling." CA App. A-409-14; *accord* CA App. A-2021-26, App. 5a, 23a. The claims for equitable relief sought, among other things, to require respondents to create "protocols" that would help petitioners combat smuggling and "track and monitor the movement of cigarettes into and within" their foreign territories. CA App. A-419-20, A-2025-26. By any measure, the purpose of these suits is to vindicate and enforce foreign tax laws and the various foreign social policies embodied therein.

Nor does the fact that plaintiffs no longer wish to "focus," Pet. 2-3 nn.3-4, on their federal RICO claims and now assert only state law claims allow them to circumvent the Revenue Rule. *See* Pet. 2-6, 22-23. In fact, if anything, *Pasquantino* suggests that there is a *heightened* need to apply the Revenue Rule to state common law claims. The Court held that federal prosecutions "embod[y] the policy choice of" the Executive and Legislative branches of government. 125 S. Ct. at 1780. Here, by contrast, *neither* the Executive nor Legislative branch has allowed these plaintiffs to assert *state* claims to vindicate foreign tax laws. Allowing such claims would not only undermine the Rule; it also would trigger federalism concerns

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because it would inject fifty separate state law regimes into matters of foreign relations, compounding exponentially the very problems that the Rule is designed to prevent. Thus, the Second Circuit's application of the Revenue Rule to common law claims is in no way contrary to *Pasquantino*.

Finally, simply because petitioners "disavowed" that their domestic law claims involve foreign tax enforcement does not make it so, and the Second Circuit did not "misapprehend the claims as pled." Pet. 22. Petitioners cannot evade the Revenue Rule by recharacterizing their claims. As the United States itself recognized in *Canada*:

> If foreign sovereigns could avoid the revenue rule by recharacterizing a foreign tax claim as a cause of action based on domestic law, such as common law fraud, or unjust enrichment, or breach of contract, or injury from a pattern of racketeering, the revenue rule would lose much of its force. Many, if not most, schemes to avoid the payment of taxes can be recharacterized in such terms.

Brief for the United States As Amicus Curiae at 13, *Canada*, 537 U.S. 1000 (No. 01-1317). Because the complaints here facially seek lost taxes and equitable relief aimed at enforcing foreign revenue laws, the Revenue Rule bars these claims.

2. The Revenue Rule Applies to Claims Seeking Injunctive Relief

Petitioners assert that the Second Circuit "applied an incorrect legal standard" because a "claim for injunctive relief under domestic law ... falls well outside the traditional ambit of the revenue rule." Pet. 21.

Nothing in *Pasquantino* limits the reach of the Revenue Rule only to cases involving attempts to collect damages. On the contrary, this Court recognized the traditional definition of the Rule, which forbids "enforcing" foreign tax laws in the courts of another sovereign, not just suits to collect money. *Pasquantino*, 125 S. Ct. at 1770 ("At common law, the revenue rule generally barred courts from enforcing the tax laws of foreign sovereigns."); *accord id.* at 1779 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448 (1964) (White, J., dissenting) ("[C]ourts customarily refuse to enforce the revenue rule and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign.")).

That is consistent with the purposes of the Rule. Whether petitioners seek damages or equitable relief, the granting of any relief would be to permit exactly what the Revenue Rule was designed to prevent: allowing the judiciary to provide a foreign government greater enforcement assistance than that which the United States was willing to grant by treaty. As the United States stated in *Canada*, "claims for equitable relief seek to vindicate the same interest in avoiding tax loss and increased law enforcement costs as do petitioner's claims for damages." Brief for the United States As Amicus Curiae at 14 n.1, *Canada*, 537 U.S. 1000 (No. 01-1317). Indeed, the extensive equitable relief requested by petitioners would require the district court to become even more embroiled in foreign affairs, on a more on-going basis, than would an award of monetary damages. Every court to address this issue agrees that the Revenue Rule applies to such equitable claims. *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1365 n.4 (S.D. Fla. 2002), *affd*, 341 E3d 1253 (11th Cir. 2003), *cert. denied*, 540 U.S. 1109 (2004); *Canada*, 268 F.3d at 135 (dismissing all monetary and injunction claims).

3. *Pasquantino's* Mention of Tax Treaties Provides No Basis For Reversal or Review

Although this Court stated in *Pasquantino* that it "expess[ed] no view" on the *Canada* case and whether a foreign government may bring a RICO action for a scheme to defraud it of taxes, *Pasquantino*, 125 S. Ct. at 1771 n.1, petitioners now claim

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that this Court in *Pasquantino* "considered, debated, and squarely declined to follow *Canada's* ... view of the revenue rule." Pet. 16.

Specifically, petitioners rely on the following single sentence in *Pasquantino* to argue that the holding below must be reversed (Pet. 12, 15- 17): "Neither the antismuggling statute, 18 U.S.C. § 546, nor U.S. tax treaties, see [*Canada*], convince us that petitioners' scheme falls outside the terms of the wire fraud statute." *Pasquantino*, 125 S. Ct. at 1773.

The quoted sentence has nothing to do with the issue of whether the Revenue Rule applies in this case. As noted, in *Canada*, the Second Circuit discussed treaties to assess whether allowing civil cases to proceed would result in improper judicial interference in foreign tax matters. The Second Circuit found that the political branches negotiated tax treaties against the backdrop of the Revenue Rule and that allowing a foreign government to bring a civil cause of action to vindicate and enforce foreign tax laws would put the courts in the position of giving foreign governments greater tax assistance than they have negotiated (or could negotiate) with the Executive Branch. *Canada*, 268 F.3d at 118-21. That analysis simply was not implicated in *Pasquantino*, where the Executive Branch decided to bring a criminal prosecution under U.S. law - an issue that would hardly be subject to treaty negotiations with another country.

Rather, in *Pasquantino*, this Court addressed treaties not in connection with its discussion of the Revenue Rule (in Part III of its opinion), but in connection with the *threshold question* of whether the smuggling scheme at issue fell within the "literal terms of the wire fraud statute" in Part II of the opinion. 125 S. Ct. at 1771. There, all this Court did was state that the existence of tax treaties did not limit the plain meaning of the wire fraud statute or limit the Executive Branch's ability to prosecute someone for violating the statute. The sentence in *Pasquantino*, therefore, did not address the Revenue Rule at all; rather, it addressed the extent to which the Court deemed "overlapping" laws, such as treaties or other statutes, to be significant in construing the scope of the wire fraud statute. *Compare id.* at 1773 & n.4 *with id.* at 1785-86 (Ginsburg, J., dissenting).

Petitioners' only other basis for review asserts another straw man conflict, claiming that the Second Circuit erred on whether the Revenue Rule is a "jurisdictional" or discretionary doctrine. Pet. 25-28. Petitioners misstate the Second Circuit's ruling. The Second Circuit did not hold that the Revenue Rule "divests" the federal courts of their jurisdiction. Pet. 25. In fact, the court consistently has held the opposite, recognizing that the Rule is "not absolute." App. 29a; *accord* App. 9a. The court explained that "the revenue rule will not be triggered where the sovereignty and extraterritoriality concerns that inform the rule's application are not present." App. 29a. But, "once the sovereignty and separation of powers concerns that inform the rule are implicated by the substance of a plaintiff's claims, the court may not hear those claims absent evidence that the rule has been abrogated." App. 43a. Thus, there is no conflict with the cases cited by petitioner stating that the Rule is not jurisdictional. Pet. 26. [FN8]

> FN8. Petitioners also suggest that the Second Circuit's holding conflicts with the general rule that U.S. courts are "open to foreign governments." Pet. 27 & n.7. However, the Revenue Rule represents a well-established exception in both this country and abroad. *See generally* William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161 (2002).

In any event, petitioners' alleged desire to grant courts discretion to permit "U.S. allies," Pet. 26, access to our courts to vindicate foreign revenue laws only underscores the need to leave such decisions to the political branches. To allow

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courts to decide which foreign government is an "ally" and which is not (or which foreign revenue laws deserve enforcement and which do not) would interject the judiciary into sensitive diplomatic issues better left to the political branches.

Finally, petitioners' suggestion that the Second Circuit erred in failing to remand the cases to the district court for a "claim-by-claim" review ignores the opinions below. Pet. 28-29. The Second Circuit twice engaged in its own *de novo* review of petitioners' complaints. App. 27a; *see also* App. 3a. Each time it found that the Revenue Rule applied to each claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Briefs and Other Related Documents **(Back to top)**

• 2005 WL 3438567 (Appellate Petition, Motion and Filing) Reply Brief (Dec. 14, 2005)

• 05-549 (Docket) (Nov. 01, 2005)

• 2005 WL 2875039 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari (Oct. 28, 2005)

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