No. 03-1559

In the Supreme Court of the United States

BANK OF CHINA, NEW YORK BRANCH, PETITIONER

v.

NBM L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether civil RICO plaintiffs alleging mail or wire fraud as predicate acts must establish "reasonable reliance" under 18 U.S.C. 1964(c).

2. Whether civil RICO plaintiffs alleging bank fraud as predicate acts must establish "reasonable reliance" under 18 U.S.C. 1964(c).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and rule:

In the Supreme Court of the United States

No. 03-1559

BANK OF CHINA, NEW YORK BRANCH, PETITIONER

v.

NBM L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. The United States believes that the petition should be denied.

STATEMENT

1. Under 18 U.S.C. 1962(c), it is a crime for a person employed by or associated with an enterprise to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. Under 18 U.S.C. 1962(d), it is a crime to conspire to violate Section 1962(c). The racketeering activity covered by the RICO statute includes acts that can be charged under the federal mail, wire, and bank fraud statutes. 18 U.S.C. 1961(1)(B). Those are the predicate acts at issue here. See Pet. App. 100. Under 18 U.S.C. 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962" may bring a civil action in district court and "recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

2. This is a civil action commenced by petitioner, the New York branch of the Bank of China, in the United States District Court for the Southern District of New York. The complaint asserted a number of causes of action, including common law fraud and RICO violations. In support of those claims, petitioner alleged that, beginning in 1991 and continuing until mid-2000, respondents borrowed large sums from petitioner on the basis of forged documents and other misrepresentations. Various respondents converted the borrowed funds into different currencies and transferred them to accounts held by other respondents. Respondents represented to petitioner that the holders of the accounts were independent businesses, but, in fact, the businesses were controlled by the respondents who obtained the loans. In addition, respondents falsely represented to petitioner that the funds were "trade debt" owed to the borrowing respondents, thereby creating the illusion that those respondents and the "third-party businesses" were thriving enterprises with sufficient cash flow to sustain the borrowing limits approved by petitioner. Respondents also disguised the borrowed funds as collateral for further loans, thereby creating further indebtedness to petitioner. Finally, respondents drew down additional funds against letters of credit by presenting forged and otherwise fraudulent documents reflecting nonexistent transactions. The success of the scheme depended, in part, on bribes paid to defendant Patrick Young, who, as a deputy manager for petitioner, handled respondents' business. Pet. App. 3-5.

3. In its charge on common law fraud, the district court instructed the jury that petitioner was required to show that it reasonably relied on respondents' fraudulent representations. Pet. App. 13, 88, 90-91. Immediately thereafter, however, the jury was informed that a bank may be defrauded "even if its agents and employees permitted or participated in the fraud" and "even if certain officers of the bank knew

the true nature of the transactions." *Id.* at 7, 92-93. The district court did not instruct the jury that reliance is an element of the RICO claim. *Id.* at 13, 95-107. The jury was instead told that petitioner had to prove that its injury was "proximately caused by the defendants in violation of RICO" —*i.e.*, that "a wrongful act played a substantial part in bringing about or actually causing injury or damage" and that "the injury or damage was either a direct result or a reasonably probable consequence of the act." *Id.* at 13 n.6, 105.

The jury found that all respondents were unjustly enriched at petitioner's expense, that all respondents defrauded petitioner, and that all respondents violated the RICO conspiracy provision, 18 U.S.C. 1962(d). The jury also found that various combinations of respondents breached loan agreements with petitioner, aided and abetted an employee of petitioner in breaching his fiduciary duties to petitioner, and violated the substantive RICO provision, 18 U.S.C. 1962(c). The jury awarded more than $35 million in compensatory damages and more than $96 million in punitive damages. After denying respondents' motion to set aside the verdict, the district court entered judgment in favor of petitioner in the amount of $106,361,504.40, which it calculated by trebling, pursuant to 18 U.S.C. 1964(c), the $35,453,834.80 in compensatory damages found by the jury. Pet. App. 3-4.[1]

4. The court of appeals vacated the judgment and remanded the case to the district court. Pet. App. 1-23. The court of appeals held that the district court's instructions were erroneous, because they precluded the jury from considering respondents' defense that petitioner's officers were

---

[1] The district court ruled that this was the maximum amount petitioner could recover on any of the causes of action, because it could not recover both punitive damages and treble damages. Pet. App. 4 n.1.

aware of the actions complained of and that petitioner thus could not have relied to its detriment on any of respondents' representations. *Id.* at 6-17.

The court of appeals explained that, in *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court held that the phrase "by reason of" in 18 U.S.C. 1964(c) means that a civil RICO plaintiff must show that the defendant's violation was the "proximate cause" of the injury. Pet. App. 9. The court of appeals added that it was "well established" in the Second Circuit that, when mail fraud is the predicate act for a civil RICO claim, "the proximate cause element articulated in *Holmes* requires the plaintiff to show 'reasonable reliance.'" *Ibid.* The court noted that "[s]everal of [its] sister Circuits" have reached the same conclusion in cases where common law, wire, or securities fraud is the predicate act for a civil RICO action, but that no court "has explicitly addressed whether the plaintiff must show 'reasonable reliance' where the predicate act alleged is bank fraud." *Id.* at 10-11. The court acknowledged that bank fraud is "a somewhat different type of fraud" than the others, because "the bank fraud statute was designed to protect the integrity of the federally insured banking system." *Id.* at 11. The court nevertheless concluded that that fact "does not affect the *Holmes* 'proximate cause' requirement," because "a *civil RICO* action predicated on bank fraud"—like any other civil RICO action—"is intended to compensate the plaintiff-victim for its losses." *Id.* at 11-12. The court of appeals thus held that, "in order to prevail in a civil RICO action predicated on any type of fraud, including bank fraud, the plaintiff must establish 'reasonable reliance' on the defendants' purported misrepresentations or omissions." *Id.* at 12.

Applying that standard, the court of appeals held that the district court's instructions were erroneous, because they did not inform the jury that, in determining whether respon-

dents violated the RICO statute, "it must consider and determine whether or not [petitioner] reasonably relied on [respondents'] purported misrepresentations." Pet. App. 13 (footnote omitted). The court acknowledged that the district court did instruct the jury that reliance is an element of common law fraud, *ibid.*, but it concluded that that instruction was "essentially eviscerated" by the instruction that immediately followed—namely, that petitioner could be defrauded "even if the officers and employees of [petitioner] knew of and participated in [respondents'] fraudulent activities," *id.* at 14. The court explained that petitioner "acts only through its officers and employees"; that it therefore "cannot rely on misrepresentations unless its agents or employees rely on [them]"; and that its agents and employees could not have relied on the misrepresentations if they "were aware of[] and participated in [respondents'] allegedly fraudulent activities." *Ibid.*

The court of appeals made clear, however, that its holding was "entirely consistent" with the proposition that an agent's actions and knowledge "are not imputed to the principal" when the agent "acts adversely to [the] principal." Pet. App. 15. That "adverse interest exception," the court said, applies only when the agent has "totally abandoned" the interests of the principal. *Ibid.* The court explained that whether petitioner's employees "totally abandoned" petitioner's interests was "an issue of fact for the jury to decide" after receiving "[a]n appropriate instruction, given in conjunction with a 'reasonable reliance' instruction." *Ibid.* (quoting *Wight* v. *BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000), in turn quoting *In re The Mediators, Inc.*, 105 F.3d 822, 827 (2d Cir. 1997)).

The court of appeals concluded that the erroneous instructions may have influenced the jury's verdict, and were therefore not harmless, because there was "evidence from which the jury could have inferred that [petitioner's] employees or

agents were aware of [respondents'] purportedly fraudulent representations." Pet. App. 17. That included evidence that petitioner's officers had "socialized extensively" with respondents and thus were "intimately familiar" with their transactions. *Id.* at 16. The court of appeals accordingly reversed the judgment of the district court and remanded the case for a new trial. *Ibid.*[2]

DISCUSSION

Petitioner contends that, in holding that "reasonable reliance" is required to support a private civil RICO damages action under 18 U.S.C. 1964(c) when mail and wire fraud are the predicate acts, the court of appeals has enlarged a circuit conflict and imposed a burden on RICO plaintiffs not intended by Congress. Petitioner also contends that, in holding that "reasonable reliance" is likewise required when bank fraud is a predicate RICO act, the court of appeals has resolved an issue of first impression that warrants this Court's review. Contrary to petitioner's contention, a "reasonable reliance" requirement, when administered under traditional agency-law principles, is perfectly consistent with the proximate-cause requirement in Section 1962(c), as interpreted by this Court in *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Petitioner also errs in arguing that the court of appeals' adoption of that requirement conflicts with decisions of other courts. Reliance is a well-accepted ingredient of proximate cause in a RICO case based on fraud. The assertedly conflicting decisions for the most part address the separate question whether a RICO

[2] The court of appeals also held that the district court abused its discretion in admitting certain testimony from one of petitioner's employees, but, because it decided that the erroneous jury instructions warranted reversal, the court did not decide whether the evidentiary error was harmless. Pet. App. 17-23. In a summary order filed the same day as its opinion, the court of appeals rejected respondents' other claims. *Id.* at 24-30.

plaintiff may prevail if a third party (rather than the plaintiff itself) relied on the deception. And the court of appeals' first-impression decision correctly requiring reliance when bank fraud is alleged as a predicate RICO act does not merit this Court's review. Accordingly, the petition for a writ of certiorari should be denied.[3]

A. Certiorari Is Not Warranted On The Question Whether Civil RICO Plaintiffs Alleging Mail Or Wire Fraud As Predicate Acts Must Establish "Reasonable Reliance" Under 18 U.S.C. 1964(c)

1. The court of appeals' decision is correct

The court of appeals correctly held that reasonable reliance, established in accordance with ordinary agency principles, is necessary to show proximate cause in a civil RICO damages action under 18 U.S.C. 1964(c) when the racketeering activity is mail or wire fraud.

a. The RICO statute's civil damages provision, 18 U.S.C. 1964(c), affords a private cause of action to a person injured in his business or property "by reason of" a violation of the RICO statute. In *Holmes*, this Court, interpreting the phrase "by reason of," declined to permit recovery on a mere showing that the RICO violation was a "but for" cause of the injury, and instead held that a plaintiff must show that the RICO violation was the injury's "proximate cause." *Id.* at 265-268. The Court explained that proximate cause requires

---

[3] The questions presented in the petition do not directly affect the United States' ability to enforce the RICO statute, because the requirements imposed by 18 U.S.C. 1964(c) do not apply in criminal cases and the United States does not bring civil actions under that provision. See *United States* v. *Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 21-27 (2d Cir. 1989) (holding that United States is not a "person" that can sue under Section 1964(c)).

"some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268.[4]

Petitioner contends that reliance "is not the only way" to establish proximate causation. Pet. 20. But petitioner does not explain how a fraud can proximately cause injury in the absence of reliance on the deception, either by the plaintiff or by some other party. If the recipient of a deceptive statement scheme knew that a representation made to him was false and took the action anyway, or if he did not know that the representation was false but would have taken the action even if he had, there is no "direct relation" between the injury and the misrepresentation, *Holmes*, 503 U.S. at 268, and proximate cause is absent. As the court of appeals recognized (Pet. App. 15), an entity (such as petitioner) may be able to establish causation even if some of its *agents* were aware of, and thus did not rely on, the deception. See pp. 12-14, *infra*. But absent some actual or presumed reliance by someone, it is hard to see how deception can cause any injury. Indeed, reliance can be understood simply as a necessary (but not sufficient) way of showing causation that is specifically tailored to the fraud context. See Restatement (Second) of Torts § 546 (1977). Consistent with this view, not only the Second Circuit but several other courts of appeals have held that a misrepresentation cannot be the proximate cause of injury, such that the defendant is liable under the RICO civil damages provision, unless the misrepresentation was relied upon. See, *e.g.*, *Sikes* v. *Teleline, Inc.*, 281 F.3d 1350, 1360-1361 (11th Cir.) (mail and wire fraud), cert. de-

---

[4] Applying that principle, the Court held that the Securities Investor Protection Corporation (SIPC) could not, as an "indirectly injured victim," 503 U.S. at 274, recover for injuries caused to it by a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thereby triggering SIPC's duty to reimburse the customers. *Id.* at 270-274.

nied, 537 U.S. 884 (2002); *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000) (mail and wire fraud), cert. denied, 531 U.S. 1132 (2001); *Chisolm* v. *Transouth Financial Corp.*, 95 F.3d 331, 337-338 (4th Cir. 1996) (mail fraud); *Appletree Square I, Ltd. P'ship* v. *W.R. Grace & Co.*, 29 F.3d 1283, 1286-1287 (8th Cir. 1994) (mail and wire fraud).

b. Petitioner advances several arguments (Pet. 17-19; Reply Br. 8-9) why a reliance requirement is at odds with the language and intent of the RICO statute. Each argument is without merit.

First, petitioner argues that civil RICO liability is based "simply on the commission of specified criminal acts (here, mail, wire and bank fraud)" that "comprise a 'pattern of racketeering activity.'" Pet. 17. But civil RICO liability is, by statute, not based "simply" on a violation of 18 U.S.C. 1962. Section 1964(c) requires that the violation be the "reason" for the plaintiff's injury, and *Holmes* holds that the "reason" for the injury means its proximate cause.

Second, petitioner points out (Pet. 17) that proof of reliance is not required to establish criminal liability for mail, wire, or bank fraud. But the government can punish those crimes without proving reliance because, as this Court has explained, the criminal statutes, 18 U.S.C. 1341, 1343, 1344, "prohibit[] the 'scheme to defraud[]' rather than the completed fraud." *Neder* v. *United States*, 527 U.S. 1, 25 (1999). Under Section 1964(c), in contrast, a civil plaintiff seeking monetary recovery "'faces an additional hurdle' and must show an injury caused 'by reason of' the violation." *Summit Props.*, 214 F.3d at 559 (quoting *Pelletier* v. *Zweifel*, 921 F.2d 1465, 1498-1499 (11th Cir.), cert. denied, 502 U.S. 855 (1991)).

Third, petitioner points out (Pet. 17; Reply Br. 8) that the RICO statute does not mention reliance. But the statute does require a showing of proximate cause, and reliance can

be understood as simply a way of showing proximate cause specifically tailored to the context of fraud claims. Moreover, given the vast number of crimes that qualify as predicate acts of racketeering, see 18 U.S.C. 1961(1) (2000, Supp. I 2001 & Supp. II 2002), it would have been surprising if Congress had focused exclusively on the fraud predicates and specified only with respect to them the showing necessary to establish the requisite connection between the injury and the RICO violation. Instead, Congress provided generally in Section 1964(c) that the plaintiff must have been injured "by reason of" the violation.

Fourth, petitioner argues (Pet. 18-19) that the reliance requirement contravenes Congress's directive that the RICO statute "be liberally construed to effectuate its remedial purpose," Organized Crime Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. As this Court has observed, however, that clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Reves* v. *Ernst & Young*, 507 U.S. 170, 184 (1993) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 492 n.10 (1985), quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). And for the reasons stated above, "it is clear that Congress did not intend to extend RICO liability," *ibid.*, to those who make misrepresentations on which there was no reliance.

Finally, petitioner argues that, "[i]f reliance were to be a required element of RICO, the proof necessary to establish a civil RICO claim would be the same proof needed to establish a common law fraud claim." Pet. 19. But a reliance requirement, as an element of causation, does not make civil RICO coextensive with common law fraud. In some respects, a RICO claim is more difficult to prove. For example, a RICO claim has many elements—including the requirement that the affairs of an "enterprise" be conducted "through a pattern of racketeering activity," 18 U.S.C. 1962(c)—that a common law claim does not. In other re-

spects, a RICO claim is easier to prove. Most notably, as explained below, the RICO statute's causation requirement is more flexible than that for common law fraud.

c. While it appears that reliance on the defendant's deception *by the plaintiff himself* is an essential element of a common law fraud cause of action, see Restatement (Second) of Torts §§ 537, 546 (1977), such reliance is not required under civil RICO in every case. Civil RICO requires reliance when the predicate offenses involve fraud, but not necessarily reliance *by the plaintiff*. A RICO plaintiff may be able to recover under Section 1964(c) where he was "the target[] of a scheme to defraud accomplished by defrauding others," *Summit Props.*, 214 F.3d at 561—*i.e.*, where a purpose of the scheme was to injure the plaintiff through misrepresentations to third parties. For example, in *Mid Atlantic Telecom, Inc.* v. *Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir.), cert. denied, 513 U.S. 931 (1994), a long-distance company used an inflated billing program to offer artificially low rates to new customers and to lure customers from a competitor. Although the misrepresentations were directed at the customers and the competitor did not rely on them, the Fourth Circuit held that the competitor could recover under Section 1964(c) if it could show that it was a "direct target" of the scheme. *Id.* at 263. As the Second Circuit has explained, *Mid Atlantic Telecom* stands for the proposition that proximate cause is established if "the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activities and that was intended to and did give the defendant a competitive advantage over the plaintiff," even if "the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Ideal Steel Supply Corp.* v. *Anza*, 373 F.3d

251, 263 (2004), petition for cert. pending, No. 04-433 (filed Sept. 28, 2004).[5]

Petitioner, however, cannot benefit from that principle. The theory of petitioner's case was that respondents sought to obtain loans from petitioner through misrepresentations about respondents' financial condition and the intended use of the borrowed funds. Petitioner was both the sole target of the fraudulent scheme and the party to which the misrepresentations were made; there was no allegation of injury resulting from misrepresentations made to and relied on by a third party. In these circumstances, if petitioner itself did not rely on the misrepresentations in making the loans—if it would have made the loans regardless of the misrepresentations—then the misrepresentations could not have proximately caused its loss. As the Fifth Circuit has explained, the *Mid Atlantic Telecom* rule "is of no aid" to plaintiffs when "it is not contended" that they "were the targets of a scheme to defraud accomplished by defrauding others." *Summit Props.*, 214 F.3d at 561.

d. There is, nevertheless, a special rule for agency cases that eases the burden of showing reasonable reliance. It is true that *someone* must rely on fraudulent misrepresentations in order for the fraud to proximately cause damage to a RICO plaintiff, and the court of appeals held that petitioner "cannot rely on misrepresentations unless its agents or employees rely on those misrepresentations." Pet. App. 14. But the court also tempered that rule by agreeing with the district court that, "when an agent acts adversely to its principal, the agent's actions and knowledge are not imputed to

---

[5] While it appears that a plaintiff alleging common law *fraud* would not be able to recover under this theory, it may be a basis for recovery under other common law causes of action. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 130, at 1013-1015 (5th ed. 1984) (discussing various torts falling under heading of "unfair competition").

the principal." *Id.* at 15. Accord, *e.g.*, *Williams Elecs. Games, Inc.* v. *Garrity*, 366 F.3d 569, 575 (7th Cir. 2004) (Posner, J.).[6] The court of appeals thus appears to have recognized a means for petitioner to recover without showing that any of its individual agents or employees in fact relied on the alleged misrepresentations. Specifically, the court allowed petitioner to recover if it could establish that, even if its agents and employees were aware that the alleged misrepresentations were not true, those agents were acting "entirely in [their] own interests and adversely to the interests of the corporation." Pet. App. 15 (quoting *Wight*, 219 F.3d at 87). See *id.* at 5 (noting that "[t]he success of the fraud was dependent, in part, on bribes paid to * * * a deputy manager at [petitioner] who handled defendants' transactions with [petitioner]"). In that event, even if no individual agent of petitioner *actually* relied on the misrepresentations, the bank itself could recover.

Whether that traditional principle of agency law is described as an *exception* to a requirement of actual reliance, or as an *application* of it (under which the principal's reliance is presumed, and the agent's knowledge of the deception cannot be imputed to the principal), it provides a theory of recovery for petitioner in this case. Petitioner does not articulate any competing theory, other than relying on an unspecified form of "traditional proximate cause analysis." Reply Br. 9. That suggests that, at most, petitioner may disagree with the scope of the rule requiring that a corrupt agent "totally abandoned" the principal's interests in order

---

[6] There is, in turn, a caveat to that "adverse interest" exception to imputation rules, known as the "sole actor doctrine." *Grassmueck* v. *American Shorthorn Ass'n*, 402 F.3d 833, 837-838 (8th Cir. 2005). That doctrine permits imputation of an agent's knowledge to the principal, notwithstanding the agent's adverse interests, where "the principal and agent are one and the same." *Id.* at 838 (quoting *In re Mediators, Inc.*, 105 F.3d 822, 827 (2d Cir. 1997)).

for the principal to avoid having the agent's knowledge and actions imputed to it. See Pet. App. 15. A disagreement about the scope of that traditional agency principle, however, would not warrant this Court's review.

2. The court of appeals' decision does not conflict with the decision of any other court of appeals

Contrary to petitioner's contention (Pet. 12-15; Reply Br. 2-6), no court of appeals has held that a civil RICO plaintiff alleging predicate acts of mail or wire fraud may recover under 18 U.S.C. 1964(c) when there was no reliance on the defendant's misrepresentation *by anyone*.

a. Petitioner is mistaken in his contention (Pet. 13) that the decision below conflicts with decisions of the Third, Seventh, and Ninth Circuits. The Third Circuit case cited by petitioner focused on the question whether the defendant had engaged in a pattern of racketeering activity. In addressing that question, the court noted that "the elements of the federal offense of mail fraud" do not require a showing that "the mailings involved" *themselves*, as opposed to a different aspect of the scheme, contained misrepresentations or were "relied upon by the victim of the fraud." *Tabas* v. *Tabas*, 47 F.3d 1280, 1294 n.18 (en banc), cert. denied, 515 U.S. 1118 (1995). The court did not address the question presented here, which is whether reliance is an element of proximate cause under 18 U.S.C. 1964(c). Nor did the Seventh Circuit case hold that reliance is not an element of proximate cause under Section 1964(c). It merely endorsed the *Mid Atlantic Telecom* rule—that the RICO statute "allows suits when the predicate offenses influence customers and, derivatively, injure business rivals." *Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995), cert. denied, 517 U.S. 1220 (1996). As for the two Ninth Circuit cases cited by petitioner, one, *Wilcox* v. *First Interstate Bank*, 815 F.2d 522 (1987), did not ad-

dress any issue of reliance or proximate cause, and the other, *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris Inc.*, 185 F.3d 957 (1999), cert. denied, 528 U.S. 1075 (2000), addressed an issue of proximate cause but did not address the question whether it requires reliance.

That leaves only petitioner's contention (Pet. 13) that the decision below conflicts with the First Circuit's decision in *Systems Management, Inc.* v. *Loiselle*, 303 F.3d 100 (2002). In that case, the owner of a janitorial business falsely told a client that the company was paying its workers the prevailing wage. The misrepresentations enabled the business owner to continue underpaying his workers, since the client would otherwise have insisted on compliance with the prevailing-wage laws. The First Circuit determined that the fact that the workers did not rely on the misrepresentations did not prevent them from recovering under Section 1964(c) for the losses they suffered by being underpaid. *Id.* at 103-104. For three reasons, *Systems Management* does not conflict with the decision below.[7]

First, the First Circuit did not say, as petitioner does, that a plaintiff may recover when *no one* has relied on the defendant's misrepresentations. That issue was not before the court, because the misrepresentations were directed at the client of the defendant's company (not, as in this case, at the plaintiffs themselves), and the client clearly relied on them in deciding to hire the company. Accordingly, while the First Circuit used broad language suggesting that reliance is never required, the decision is essentially an application of

---

[7] For the same reasons, the Ninth Circuit was mistaken when it recently expressed the view that there is a circuit conflict on the question whether "reliance is the *only way* plaintiffs can establish causation in a civil RICO claim predicated on mail fraud," *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 666 (2004), and cited *Systems Management* as the sole court of appeals decision holding that it is not, *id.* at 666 n.3. (The Ninth Circuit itself "decline[d]" to decide the issue. *Id.* at 666.)

the *Mid Atlantic Telecom* rule, in which the client, rather than the plaintiff workers, relied on the deceptive statements. That is to say, the decision permits recovery under Section 1964(c) when the plaintiff is "the target of a scheme to defraud accomplished by defrauding others." *Summit Props.*, 214 F.3d at 561.

Second, the court of appeals' broader statements indicating a refusal to "import[] a reliance requirement into RICO," *Systems Mgmt.*, 303 F.3d at 104, seemed to follow from a mistaken view of the RICO statute's causation requirement. Although *Systems Management* was decided more than a decade after *Holmes*, the First Circuit did not cite this Court's decision, and merely "assume[d]" that "Congress intended to require not only 'but for' but also 'proximate cause.'" *Ibid.* The court then said that proximate cause is "largely a proxy for foreseeability," and concluded that proximate cause had been established in the case before it because "a reasonably predictable consequence of [the defendant's] mailings was, by deceiving [his client], to enable him to continue to underpay his workers." *Ibid.* But *Holmes* requires a "direct relation" between the plaintiff's injury and the defendant's conduct, 503 U.S. at 268, not mere foreseeability. Indeed, if foreseeability were the standard, the result in *Holmes* might well have been different, since Holmes could certainly foresee that the failure of the broker-dealers would trigger SIPC's duty to reimburse their customers. See note 4, *supra*. Because *System Management*'s discussion of reliance rested on an erroneous legal premise, subsequent panels of the First Circuit may not consider themselves bound by the discussion.

Third, after it rejected the claim that the plaintiff workers were required to show that they relied on the defendant employer's misrepresentations, the court of appeals held that the plaintiffs had not shown a "pattern of racketeering activity," and thus that the defendant did not violate the RICO

statute. 303 F.3d at 104-106. The court's discussion of reliance was therefore unnecessary to its decision, and thus may be treated as not controlling the issue if the First Circuit directly confronts a civil RICO case based on fraud in which *no* victim relied on the deception.

b. Petitioner also suggests (Pet. 14, 19) that the decision below conflicts with the Second Circuit's 1990 decision in *Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21. This Court, however, does not grant certiorari to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no intra-circuit conflict, because *Hecht* did not address the question whether reliance is an element of proximate cause under Section 1964(c).

Petitioner is equally mistaken in his contention (Pet. 13-14 & n.1; Reply Br. 5-6) that there is a conflict on that question within the Fifth and Eighth Circuits. The Fifth Circuit's decision in *Summit Properties*, *supra*, which held that reliance is required, does not conflict with *Armco Industrial Credit Corp.* v. *SLT Warehouse Co.*, 782 F.2d 475 (5th Cir. 1986), or *Akin* v. *Q-L Investments, Inc.*, 959 F.2d 521 (5th Cir. 1992). As the court explained in *Summit Properties* itself, *Armco* was decided at a time when the Fifth Circuit did not require a plaintiff to show even proximate cause to recover under Section 1964(c), *Summit Props.*, 214 F.3d at 558-559, and although the law had changed by the time *Akin* was decided, proximate cause "was not at issue" in that case, *id.* at 559 n.14. Nor does the Eighth Circuit's decision in *Appletree Square I*, *supra*, which also held that reliance is required, conflict with *Atlas Pile Driving Co.* v. *DiCon Financial Co.*, 886 F.2d 986 (8th Cir. 1989), *Murr Plumbing, Inc.* v. *Scherer Bros. Financial Services Co.*, 48 F.3d 1066 (8th Cir. 1995), or *United Healthcare Corp.* v. *American Trade Insurance Co.*, 88 F.3d 563 (8th Cir. 1996). Neither *Atlas Pile Driving* nor *Murr Plumbing* addressed reliance, proximate cause, or the

meaning of "by reason of" in Section 1964(c), and *United Healthcare* merely held, correctly, that reliance is not an element of mail or wire fraud, 88 F.3d at 571 & n.5.

c. Petitioner also relies (Reply Br. 2-5) on a number of district court decisions. To the extent that any district court has "rejected the necessity of a reliance requirement," *id.* at 3, however, that is not a basis for certiorari. See Sup. Ct. R. 10. And to the extent that the district court decisions petitioner cites "acknowledged the existence of a circuit split," Reply Br. 3, the decisions are mistaken.

In *New Jersey Carpenters Health Fund* v. *Philip Morris, Inc.*, 17 F. Supp. 2d 324 (D.N.J. 1998), the district court said that "there is a split between various courts as to whether reliance is a necessary ingredient of proximate cause when a RICO violation is predicated on mail or wire fraud." *Id.* at 339 n.19. But the only court of appeals decision that the district court cited as holding that reliance is not required is the Fifth Circuit's decision in *Akin*, *supra*, and, as explained above, the Fifth Circuit has made clear that proximate cause was not at issue in *Akin*. The district court in *Sebago, Inc.* v. *Beazer East, Inc.*, 18 F. Supp. 2d 70 (D. Mass. 1998), also said that there is a circuit split, *id.* at 81-82, on "whether the proximate causation prerequisite requires actual, detrimental reliance in the context of RICO predicate acts of mail and wire fraud," *id.* at 81. But the only court of appeals' decisions that *Sebago* cited as holding that reliance is not required are the Third Circuit's decision in *Tabas*, *supra*, and the Fifth Circuit's decisions in *Akin*, *supra*; *Armco*, *supra*; and *Abell* v. *Potomac Insurance Co.*, 858 F.2d 1104 (1988), vacated *sub nom. Fryar* v. *Abell*, 492 U.S. 914 (1989). As explained above, the question whether reliance is an element of proximate cause was not at issue in *Tabas* or *Akin*, and both *Armco* and *Abell* were decided before a showing of proximate cause was deemed necessary under Section 1964(c), see *Summit Props.*, 214 F.3d at 559 & n.14.

B. Certiorari Is Not Warranted On The Question Whether Civil RICO Plaintiffs Alleging Bank Fraud As Predicate Acts Must Establish "Reasonable Reliance" Under 18 U.S.C. 1964(c)

Petitioner contends (Pet. 15-17; Reply Br. 6-7) that, even if reliance is an element of proximate cause when a civil RICO plaintiff alleges mail or wire fraud predicates, there should be no such requirement when the predicate is bank fraud. Petitioner claims that "this is an issue of first impression that requires resolution by the Supreme Court." Pet. 15. But the fact that, other than the courts below, "no federal court anywhere has addressed this issue" (Reply Br. 7) is a reason to deny certiorari, not a reason to grant it. See Sup. Ct. R. 10.

In any event, the court of appeals correctly rejected petitioner's contention. Petitioner argues that bank fraud differs from mail and wire fraud, because "the bank fraud statute was designed to protect the integrity of the federally insured banking system." Pet. 15 (quoting Pet. App. 11). As the court of appeals explained, however, "the fact that the *criminal* bank fraud statute serves to protect the federal banking system does not affect the *Holmes* 'proximate cause' requirement," because "a *civil RICO* action predicated on bank fraud is intended to compensate the plaintiff-victim for its losses." Pet. App. 11-12. The difference between criminal bank fraud and civil RICO is reflected in 18 U.S.C. 1964(c), which requires "plaintiffs who bring civil actions * * * to establish that the defendants' actions were the proximate cause of plaintiffs' injuries." Pet. App. 11-12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

MAY 2005