No. 07-210

In the Supreme Court of the United States

JOHN BRIDGE, ET AL., PETITIONERS

v.

PHOENIX BOND & INDEMNITY CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
DAVID E. HOLLAR
Attorney

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

QUESTION PRESENTED

The Court granted certiorari on the following question: Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

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INTEREST OF THE UNITED STATES

The question in this case implicates the relationship between the provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) that permits a party injured by a RICO violation to bring a civil action to recover damages, 18 U.S.C. 1964(c), and the federal mail fraud statute, 18 U.S.C. 1341 (Supp. V 2005), which prohibits acts that are included among the predicate acts that may constitute a pattern of racketeering activity under RICO. Because the United States enforces the federal criminal laws, it has a substantial interest in the proper interpretation and application of the mail fraud statute.[1] The United States filed an amicus brief in *Bank of China, New York Branch* v. *NBM L.L.C.*, No. 03-1559, a case raising a similar question, at the petition stage by invitation of the Court and again at the merits stage.

STATEMENT

Respondents brought this civil action under RICO seeking damages allegedly caused by petitioners' violations of the mail fraud statute, 18 U.S.C. 1341 (Supp. V 2005), in submitting collusive bids in a county's sale of tax liens on properties with delinquent taxes. The district court dismissed the complaint because it concluded that respondents, competitive bidders in the tax-lien sale, were not the recipients of the allegedly false representations to the county and were at best indirect victims of the fraud. Pet. App. 9a-21a. The court of appeals reversed, holding that respondents' allegations established proximate cause and that a civil RICO plaintiff who can establish proximate cause need not also establish that it was a recipient of a false statement. *Id.* at 1a-8a.

1. In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, Tit. IX, 84 Stat. 941 (18 U.S.C. 1961 *et seq.*), to combat the growing influence of organized crime over the national economy. RICO contains both criminal

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[1] The United States does not bring civil actions under 18 U.S.C. 1964(c), see *United States* v. *Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 21-27 (2d Cir. 1989) (holding that the United States is not a "person" who can sue under Section 1964(c)), and the causation requirements imposed by Section 1964(c) do not apply in criminal cases or in civil RICO actions for injunctive relief that the United States brings under Section 1964(a) and (b).

sanctions and civil remedies. 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. The racketeering activity covered by the RICO statute includes "any act which is indictable under" the federal mail fraud statute. 18 U.S.C. 1961(1)(B) (Supp. V 2005). 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 three-fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

2. This is a civil action commenced by respondents, Phoenix Bond & Indemnity Co. and BCS Services, Inc., in the United States District Court for the Northern District of Illinois. The complaint alleged that petitioners had violated the RICO statute based on predicate acts of mail fraud that formed a pattern of racketeering activity, and that petitioners had suffered injury by reason of that violation. The complaint also alleged a claim under Illinois law for tortious interference with prospective business advantage. Pet. App. 9a-10a, 15a.

Respondents alleged that they regularly buy property tax liens at a competitive auction in Cook County, Illinois. Cook County sells the liens to bidders who pay the delinquent taxes owed on the property. After the lien is sold, the property owners then have the opportunity to redeem the property by paying the delinquent taxes and any statutory penalties assessed. The bidders compete on the basis of the statutory penalty that will be assessed to the owner and result in compensation for the bidders. The penalty rates may range from 0% to 18%, and the winner of the auction is the bid with the lowest penalty rate. If the property owner does not pay after he is mailed the requisite notices, the lienholder can obtain the deed to the property. Because the potential value of the properties often exceeds the amount of unpaid taxes, multiple bidders routinely submit bids of a 0% penalty. To resolve ties, the County awards liens among those bidders on a rotating basis. To thwart unfair collusion, the County requires all bidders to comply with the "Single, Simultaneous Bidder Rule," which prohibits related entities from submitting bids on the same property at the same auction, and to file an affidavit stating that they are not "related" to any other party, meaning that no other bidder has a "contractual relationship with" the bidder, or has a "shareholder, partner, principal, or officer in common." Pet. App. 1a-3a, 9a-12a.

According to respondents, the petitioners (Sabre Group, LLC, through its principal Barrett Rochman and its tax-sale bidder John Bridge) engaged in a fraudulent scheme, indictable under the federal mail fraud statute, to obtain auctioned liens that otherwise would have been awarded to respondents. The alleged scheme proceeded as follows: petitioners, in violation of the single-bidder rule, created shell companies (some renamed or added over time) that bid at four consecutive auctions. Petitioners and their shell entities misrepresented in their affidavits to the County that they were unrelated entities. As a result, when the County allocated on a rotating basis the liens where a tie had resulted, it treated petitioners and its shell affiliates as independent bidders. Petitioners thus received not only their rightful share of liens but also those awarded to its shell entities, leaving respondents (which had submitted the same 0% bid on those liens) with disproportionately fewer. Petitioners then prepared notices for the County to mail to property owners to enable petitioners to realize the value of the liens (by obtaining either payment or the deed). Pet. App. 2a-3a, 9a n.1, 12a-14a.

Respondents sought damages equal to the value of the liens they would have received had petitioner and its affiliates complied with the single-bidder rule. Pet. App. 3a, 12a-14a.

3. On petitioners' motion, the district court dismissed the complaint. The district court ruled that because respondents were not the recipients of any of petitioners' misrepresentations, they lacked standing to bring the complaint. Pet. App. 17a-18a. It therefore dismissed respondents' RICO claims with prejudice and declined to exercise supplemental jurisdiction over the state law tort claim. *Id.* at 20a.

4. The court of appeals reversed. Pet. App. 1a-8a. In a unanimous opinion by Chief Judge Easterbrook, joined by Judges Posner and Evans, the court noted that respondents had suffered an "injury in fact" that was redressable by damages, and thus had "standing," because the alleged scheme deprived respondents of liens they otherwise would have received. *Id.* at 3a. The court of appeals then turned to the requirement that a civil RICO plaintiff establish that its injuries were proximately caused by the defendants' violation. *Id.* at 4a (citing *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992)).

The court recognized that proximate causation turns on the answers to "a set of questions," rather than an "algorithm[]." Pet. App. 4a. It asked whether there was a more immediate victim better positioned to sue, whether the existence of an immediate victim would unduly complicate the calculation of damages, and whether the compensation of respondents would deprive a more deserving victim of recompense. The only such candidate was the County; yet, since the fraud affected only which bidder received individual tax liens, and not how much overall revenue the auction generated, the County suffered no financial loss from the scheme. *Id.* at 5a. Thus, the court concluded, the County could recover no damages and had no incentive to bring suit. Consequently respondents, the "*only* injured parties," were the better enforcer and thus satisfied the proximate cause standard. *Id.* at 5a-6a.

The court of appeals rejected petitioners' claim that respondents could not recover because "no false statements were made to [respondents]." Pet. App. 7a. It reasoned: "A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." *Ibid.* The court determined that respondents had sufficiently alleged that they had suffered such an injury, *i.e.*, "direct rather than derivative." *Id.* at 8a. The court also rejected the argument that respondents were outside the "zone of interests" protected by RICO or the mail fraud statute, concluding that argument was "just a different take on the proposition that only recipients of the untruth have a remedy." *Ibid.* The court concluded that "[w]hen the injury satisfies the requirements of *Holmes* and *Anza*, it cannot be knocked out by a zone-of-interests requirement that has no purchase in the text of either § 1341 or RICO." *Ibid.*

SUMMARY OF ARGUMENT

In a civil RICO claim predicated on mail fraud, the plaintiff cannot logically establish causation without showing that *someone* relied on the misrepresentations in furtherance of the fraud. There is no textual, common law, or policy basis, however, for a requirement that reliance in all cases must be by the *plaintiff* itself. As the facts of this case demonstrate, and consistent with traditional proximate cause principles, a plaintiff's injury can result proximately from a defendant's fraud, even when only a third party has relied on the false representations.

A. Under 18 U.S.C. 1964(c), a civil RICO plaintiff may recover damages if it is injured in its business or property "by reason of" a RICO violation. In *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court construed Section 1964(c)'s "by reason of" requirement and held that a civil RICO plaintiff must prove that a RICO violation proximately caused its injury. Proximate cause, the Court explained, means a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. As a general matter, a plaintiff alleging a RICO violation based on mail fraud must show reliance on the defendant's misrepresentations to establish that the RICO violation proximately caused its injury. It is a matter of basic logic that a misrepresentation cannot cause—much less proximately cause—injury, unless *someone* (either the plaintiff or a third party) relies upon it.

B. Neither logic nor law supports petitioners' contention that the *plaintiff* itself must rely on the misrepresentations to state a civil RICO claim predicated on mail fraud. It is undisputed that the federal mail fraud statute, 18 U.S.C. 1341 (Supp. V 2005), does not require proof of any reliance. See *Neder* v. *United States*, 527 U.S. 1, 24-25 (1999). Nor does the text of the relevant RICO provisions. Mail fraud constitutes "racketeering activity," 18 U.S.C. 1961(1) (Supp. V 2005), and "a pattern of racketeering activity" with the requisite relationship to an enterprise violates RICO, 18 U.S.C. 1962. Nothing in the linkage of mail fraud to RICO's liability provisions imports a reliance requirement that neither of those provisions contains separately.

That leaves only the "by reason of" language in Section 1964(c)'s authorization of a civil action for damages. But that language does not provide any textual basis for a requirement of reliance by the plaintiff in a civil RICO action that is predicated on fraud. The "by reason of" connotes a requirement of proximate cause. As a general matter, when a defendant's misrepresentations to a third party cause direct damages to a plaintiff that are neither speculative nor duplicative, the plaintiff has been proximately injured "by reason of" the fraud. Section 1964(c) provides an express cause of action to "[*a*]*ny* person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c) (emphasis added). A plaintiff-reliance requirement finds no support in that broad language.

C. The common law should not be invoked to read into the mail fraud statute or Section 1964(c) the element of reliance by the plaintiff. First, the requirements for recovering damages in a common law fraud action have no application to the criminal prohibition in the mail fraud statute. Unlike in *Beck* v. *Prupis*, 529 U.S. 494 (2000), where Congress used the common-law term of conspiracy as the basis for RICO liability, here Congress chose not common law fraud but statutory mail fraud as the predicate acts for a civil RICO action. Second, while this Court in *Holmes* interpreted Section 1964(c)'s "by reason of" language to incorporate common-law principles of proximate causation generally applicable to all torts, it would not make sense to construe

Section 1964(c) to incorporate common-law requirements (such as reliance by the plaintiff) that are specific to just one tort. Third, in any event, it is well-established under the common law that a plaintiff *can* recover for injuries resulting from a competitor's misrepresentations to a third party (*i.e.*, that reliance by the plaintiff is *not* required). See, *e.g.*, *Rice* v. *Manley*, 66 N.Y. 82 (1876); Restatement (Second) of Torts 766B(a) at 20 (1979) (Restatement).

D. A strict and universal plaintiff-reliance requirement does not further the purposes of traditional proximate cause principles, as applied in *Holmes* and *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). As this case demonstrates, a plaintiff in a Section 1964(c) action predicated on mail fraud can allege a direct causal connection between its injury (fewer liens) and the defendant's fraud (lying to the County to acquire more liens) and, as the most immediate victim, avoid the danger of speculative or duplicative damages – even if only a third party (which itself suffered no injury) relied on the fraud.

E. Petitioners' policy concerns do not justify judicial imposition of a plaintiff-reliance requirement that is found nowhere in RICO's text and that contradicts its broad remedial purposes. It is up to Congress, not this Court, to restrict RICO's civil coverage if the legislature believes that the textually broad remedy may be applied too expansively. See, *e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499-500 (1985). In any event, more sensible limitations—the traditional proximate cause principles articulated in *Holmes* and *Anza*; RICO's other elements; Federal Rule of Civil Procedure 9(b)'s requirement of pleading fraud with particularity; and the more generalized reliance requirement inherent in proximate cause—already function to limit Section 1964(c) suits predicated on mail fraud. If additional limits are warranted, they should not originate in judicially fashioned rules that would arbitrarily exclude a class of the most-directly injured victims of a scheme.

ARGUMENT

A CIVIL RICO PLAINTIFF WHO CAN ESTABLISH DAMAGES PROXIMATELY CAUSED BY THE DEFENDANT'S FRAUD NEED NOT ALSO SHOW THAT THE PLAINTIFF ITSELF RELIED ON THE DEFENDANT'S FRAUDULENT CONDUCT

RICO imposes three requirements that a plaintiff must meet to bring a civil action: (1) "injur[y] in his business or property" (2) "by reason of" (*i.e.*, proximate cause) (3) "a violation of section 1962" (*i.e.*, the underlying RICO violation). 18 U.S.C. 1964(c). When the underlying RICO violation consists of acts of mail fraud, general causation principles logically require that *someone* (either the plaintiff or a third party) have relied on the misrepresentations. But petitioners contend that Section 1964(c) imposes an additional requirement that the *plaintiff* itself must have been the one who relied. That contention finds no support in the text of the mail fraud statute or RICO, the common law, traditional proximate cause principles, or policy concerns.

A. Reliance *By Someone* Is Necessary To Establish Causation In A Civil RICO Action Predicated On Mail Fraud

The civil RICO 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 RICO violation. In *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), 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 plaintiff's injury. Instead, the Court held that a plaintiff must also show that the RICO violation was the injury's "proximate cause." *Id.* at 265-268. The Court explained that Section 1964(c) was modeled on the federal antitrust laws, which had been read to incorporate common-law principles of proximate causation. *Id.* at 267-268. The Court further explained that "among the many shapes this concept [of proximate cause] took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268 (citation omitted).[2] In *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), this Court, again considering causation in a civil RICO action, held that proximate cause principles prevented "broaden[ing] the universe of actual harms to permit RICO suits by parties who have been injured only indirectly." *Id.* at 460.[3]

Holmes, *Anza*, and this case all involve plaintiffs claiming that defendants caused them injury by conducting the affairs of an enterprise through a pattern of mail (or wire) fraud. A plaintiff cannot establish *any* causal relationship between its asserted injury and

[2] Applying that principle, the Court held that the Securities Investor Protection Corporation (SIPC) could not, as an "indirectly injured victim," *Holmes*, 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 their customers. *Id.* at 270-274.

[3] Applying that principle, the Court in *Anza* concluded that the plaintiff—a company claiming that its business rival was defrauding state tax authorities and using the ill-gotten proceeds to undercut its prices—failed to establish proximate cause where the "set of actions (offering lower prices) [was] entirely distinct from the alleged RICO violation (defrauding the State)." 547 U.S. at 460.

a pattern of fraud, much less the "direct relation" that *Holmes* and *Anza* require, absent proof that *someone* (either the plaintiff or a third party) relied on the misrepresentations made in furtherance of the fraud. For example, if the recipient of a misrepresentation in a fraudulent scheme knew that it was false and took an action anyway, the misrepresentation was not the cause (let alone a proximate cause) of any injury resulting from that action. Similarly, if the recipient did not know that a misrepresentation was false but would have taken the same injury-producing actions even had he known, there is no causal connection (let alone "direct relation") between the injury and the misrepresentation. Absent reliance by someone, it is hard to see how deception can cause any injury.[4]

As an analytical matter, reliance does not constitute an independent element of the RICO cause of action; rather, it functions as a logically necessary (though not always sufficient) way of establishing causation specif-

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[4] Reliance may in some circumstances be presumed rather than actual. For example, if a plaintiff's agent or employee is aware of the deception but out of bribery or malice "acts adversely to its principal, the agent's actions and knowledge are not imputed to the principal." *Bank of China, New York Branch* v. *NBM LLC*, 359 F.3d 171, 179 (2d Cir. 2004), cert. dismissed, 546 U.S. 1026 (2005). Likewise, if a defendant makes misrepresentations to an unwitting third party, as by spreading false rumors about a plaintiff's products, see, *e.g.*, *Proctor & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539 (5th Cir.), cert. denied, 534 U.S. 945 (2001), a plaintiff reasonably fearing that those falsehoods would lure away its customers could "recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened." Restatement § 919, at 507. Under such circumstances, reliance can be presumed even if no customer in fact relies on the statements because of the corrective actions.

ically tailored to the fraud context. See *Anza*, 547 U.S. at 478 (Thomas, J., concurring in part and dissenting in part) ("the reliance requirement simply functions as a necessary prerequisite to establishing the causation required by the language of 1964(c)" (quoting Brief for Petitioners 29)); cf. *Field* v. *Mans*, 516 U.S. 59, 66 (1995) ("No one, of course, doubts that some degree of reliance is required to satisfy the element of causation inherent in" bankruptcy code provision that prohibits the discharge of debts for money or property "obtained by" fraud.). Given the vast array of criminal acts that qualify as racketeering activity, see 18 U.S.C. 1961(1) (Supp. V 2005), reliance cannot be understood as a general prerequisite to recovery. Instead, it comes into play only when the nature of the underlying racketeering activity makes reliance relevant in the causation analysis under Section 1964(c). That is the case when the RICO violation involves mail fraud. See *Holmes*, 503 U.S. at 288 (Scalia, J., concurring in the judgment) (observing that the proximate-cause test under 18 U.S.C. 1964(c) will "vary according to the nature of the criminal offenses upon which those causes of action are based").

While the causation element naturally entails that *someone* rely on a defendant's misrepresentations in a Section 1964(c) suit predicated on mail fraud, petitioners' contention that *the plaintiff* itself must have been the one who relied on the misrepresentations lacks any similar logical foundation. A defendant can, as this case amply demonstrates, inflict harm on a plaintiff through a third party's reliance on false representations. And, as discussed below, no relevant factor warrants judicial imposition of a "plaintiff-reliance" requirement.

B. Neither The Text Of The Mail Fraud Statute Nor The Text Of RICO Supports Imposition Of A Plaintiff-Reliance Requirement

This case concerns civil RICO claims predicated on acts of mail fraud, indictable under 18 U.S.C. 1341 (Supp. V 2005), as the underlying pattern of racketeering activity. 18 U.S.C. 1961(1)(B) (Supp. V 2005); 18 U.S.C. 1962(c), 1964(c). It is clearly established law that reliance is *not* an element the government must prove to indict or convict a defendant for violating the mail fraud statute. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 24-25 (1999) (stating that requiring proof of reliance to establish a "'scheme to defraud' * * * would clearly be inconsistent with the statutes Congress enacted" and thus "the common-law requirement[] of 'justifiable reliance' * * * plainly has no place in the federal fraud statutes"). Even petitioners concede this point. Pet. Br. 18 ("prosecutions under the mail fraud statute require proof of neither reliance nor damages"). Nor do petitioners seriously dispute that the conduct alleged in this case could be charged as a scheme to defraud in violation of the mail fraud statute.[5]

[5] Petitioners point out that respondents did not receive or rely on any of the specific mailings alleged in the complaint as predicate acts; that those mailings did not include any misrepresentations; and that petitioners themselves did not directly mail anything. Pet. Br. 8, 36. These facts are of no moment. The mailing requirement of the mail fraud statute is satisfied even when the mailed material has not "contributed directly to the duping" of any victim, so long as the use of the mails is "essential to the perpetuation of [the defendant's] scheme." *Schmuck* v. *United States*, 489 U.S. 705, 712 (1989). Routine or innocent mailings "that contain no false information" are more than adequate to satisfy the mailing requirement. *Id*. at 715; *Carpenter* v. *United States*, 484 U.S. 19, 28 (1987); *Parr* v. *United States*, 363 U.S. 370,

Petitioners nevertheless contend that "pleading a violation of the criminal mail fraud statute is not sufficient to establish a predicate act in a civil RICO case." Pet. Br. 17. The text of the relevant RICO provisions does not support that contention. An act indictable under the mail fraud statute is "racketeering activity." 18 U.S.C. 1961(1) (Supp. V 2005). If in addition to proving acts of mail fraud, a plaintiff proves the other elements of Section 1962 (which are not in dispute here), then the plaintiff has established a violation of that section. That, in turn, satisfies the RICO "violation" requirement of the civil provision. 18 U.S.C. 1964(c) (requiring "a violation of section 1962"). There is simply no textual basis for introducing a reliance requirement into Section 1964(c)'s requirement of a RICO violation.

Turning to the causation element of Section 1964(c), the phrase "by reason of" does logically require that *someone* have relied on misrepresentations in a civil RICO action predicated on mail fraud. See Part A, *supra*. Petitioners attempt to use that phrase as the textual hook for a plaintiff-reliance requirement. But the words "by reason of," which have been interpreted to require proximate cause between the plaintiff's injury and the underlying RICO violation, in no way suggest that the plaintiff itself must be the one who relied on the misrepresentations in order to state a claim. On the contrary, when a defendant's fraudulent representations to an innocent third party cause direct damages to a prospective plaintiff that are neither speculative nor

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390 (1960). And the statute requires only that the defendant "cause[]" the mails to be used. 18 U.S.C. 1341 (Supp. V 2005). That petitioners prepared notices of their lien acquisition and provided them to the County for mailing to the property owners thus satisfies the mailing requirement.

duplicative, that plaintiff has, as a general matter, been injured "by reason of" the fraud and thus RICO's plain language generally offers a right of recovery.

Other language in Section 1964(c) supports this conclusion. The statute provides a cause of action for "[*a*]*ny* person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c) (emphasis added). As this Court has explained, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Thus, a plaintiff who can otherwise meet the requirements of proximate causation cannot be disqualified, consistent with Section 1964(c)'s textual breadth, solely because the pattern of misrepresentations that directly injured him was directed to a third party. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495 (1985) ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).").

Contrary to petitioners' suggestion, this Court's recent decision in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), does not support a plaintiff-reliance requirement under RICO. In *Stoneridge*, the Court held that plaintiff-investors could not maintain an action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), because they did not rely on the conduct of defendants, who were outside suppliers of the investors' company and who facilitated the company's actions, but who lacked control over the company's fraudulent accounting practices and representations to the market. 128 S. Ct. at 770. *Stoneridge* arose not in a statutory context permitting an express right of recovery for damages caused "by reason of" wrongful conduct, but instead in the context of the *implied* private right of action read into Section 10(b), whose judicially-created nature "caution[s] against its expansion." *Id.* at 773. This Court has long held that a Section 10(b) implied action requires proof of reliance and has interpreted it in parallel with the cause of action Congress provided in 15 U.S.C. 78r(a), which grants recovery only to one "who, in *reliance* upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such *reliance*." 15 U.S.C. 78r(a) (emphases added); see *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988). Section 1964(c), in contrast, has no such language.

In addition, *Stoneridge* construed Section 10(b) in light of its earlier holding that no implied right of action exists against aiders and abettors, see *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and Congress's later provision of a right of action against aiders and abettors only for the Securities and Exchange Commission (SEC), not private parties. *Stoneridge*, 128 S. Ct. at 771. The Court expressed concern that recognition of "scheme" liability that dispensed with proof of direct reliance would undermine *Central Bank*'s holding and Congress's limitation of aiding and abetting liability to the SEC. *Ibid*. No similar concern exists here.

Finally, as a matter of proximate causation, *Stoneridge*'s facts differ critically from the facts in this case. In that case, "[i]t was [the issuer], not [the outside supplier defendants], that misled its auditor and filed fraudulent financial statements; nothing [the defendants] did made it necessary or inevitable for [the issuer] to record the transactions as it did." 128 S. Ct. at 770. Here, in contrast, no such intervening act of wrongdoing is present. There is no distance between petitioners and the fraud. Petitioners, not anyone else, were the principals in the fraudulent scheme. The only question is whether the fact that the respondents—though the primary targets of the fraudulent scheme—were not the direct targets of the fraudulent statements, makes them too far removed to recover. It does not. Petitioners' deception of the County led directly and predictably to the award of tax liens to petitioners at the expense of respondents.

C. The Common Law Does Not Support Imposition Of A Plaintiff-Reliance Requirement

Lacking a textual basis, petitioners nonetheless ask this Court to read into either the mail fraud statute or Section 1964(c) the element of reliance by the plaintiff from what they narrowly construe to be common law fraud. Pet. Br. 25-37. For a variety of reasons, that request should be rejected.

1. The mail fraud statute cannot be interpreted to encompass a common-law requirement of plaintiff-specific reliance. The Court has expressly rejected the proposition that reliance is an element of 18 U.S.C. 1341 (Supp. V 2005) in a criminal case, and the mail fraud statute does not take on a different meaning simply because a plaintiff alleges mail fraud as a predicate racketeering act under RICO. See pp. 14-15, *supra*. To be sure, when the underlying predicate offense itself is interpreted in light of the common law, the same common law analysis applies to construing the predicate act in the RICO context. See *Wilkie* v. *Robbins*, 127 S. Ct.

2588, 2605-2607 (2007) (turning to the common law of extortion in construing the Hobbs Act, 18 U.S.C. 1951, as an alleged predicate act under RICO, because of a presumption that Congress meant to incorporate the common law when passing the Hobbs Act); *Scheidler* v. *NOW*, 537 U.S. 393, 400 (2003) (same). But RICO does not justify turning to the common law to overlay further requirements on the meaning of the various predicate acts if the common law does not play that role when the underlying predicate offense stands alone. Here, the mail fraud statute contains no reliance requirement, and the mail fraud statute does not have a different meaning when it is incorporated by reference into RICO.

Beck v. *Prupis*, 529 U.S. 494 (2000), does not suggest otherwise. In *Beck*, this Court interpreted Section 1964(c) in conjunction with 18 U.S.C. 1962(d), which prohibits one from "conspir[ing] to violate" other provisions of 18 U.S.C. 1962. The Court concluded that RICO's reference to conspiracy in the independent substantive prohibitions of the statute should be interpreted in light of common-law conspiracy principles. *Beck*, 529 U.S. at 500-501. But 18 U.S.C. 1961(1) (Supp. V 2005) does not refer to common law fraud as a predicate act; rather, it refers to specific federal fraud statutes, including (but not limited to) 18 U.S.C. 1341 (Supp. V 2005), violations of which constitute racketeering activity. If Congress had wanted to incorporate the limitations of common law fraud, then it presumably would have substituted common law fraud for the federal fraud statutes as a RICO predicate. See 18 U.S.C. 1961(1)(A) (Supp. V 2005) (listing as predicate acts state felony crimes of "murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical"); cf. *Field*, 516

U.S. at 69-75 (noting that Congress's use of common-law term "actual fraud" in bankruptcy code provision indicated its intent to incorporate common-law requirement of justifiable reliance). Accordingly, *Beck* does not support importation of additional limiting principles unique to common law fraud when federal mail fraud is the predicate for a Section 1964(c) suit. See *Anza*, 547 U.S. at 475-478 (Thomas, J., concurring in part and dissenting in part) (refusing to read a common law reliance requirement into civil RICO actions predicated on mail fraud).

2. Section 1964(c) of the RICO statute also does not incorporate any common law requirement of reliance by the plaintiff. It is true that the Court looks to the common law to inform its interpretation of that provision and has adopted common law principles of proximate causation in that endeavor. See *Holmes*, 503 U.S. at 268 (interpreting "by reason of" to incorporate common law principles of proximate causation). But it has done so only in interpreting textual requirements and nothing in the relevant text provides a hook for importing a categorical plaintiff-reliance requirement into Section 1964(c).

At the time of RICO's passage, proximate cause was understood to be an "essential element" of any common law tort. William L. Prosser, *Handbook on the Law of Torts* § 41, at 236 (4th ed. 1971). Reliance (let alone reliance by the plaintiff), however, is not an element of all torts. It seems unlikely that Congress intended civil RICO courts to have to search for the best analogy to a single common law tort in order to frame causation rules under Section 1964(c). RICO's predicate acts are crimes that often may have no single or precise common law analog. And it would undercut RICO's broad remedial aims in dealing with structured criminal activity that caused private harm to tie RICO's remedy exclusively to the common law. It is thus implausible that Congress intended to incorporate common law requirements (such as reliance by the plaintiff), tailored to each individual tortious act, as part of the statute's general proximate cause standard.

Even if this Court were inclined to incorporate new tort-specific requirements from the common law into Section 1964(c)'s causation element, it is well established under the common law that third-party reliance suffices in this context. The proper point of reference when mail fraud is the predicate is not what petitioners narrowly consider to be common law fraud, but rather the related group of common law torts that capture the broader range of conduct proscribed by 18 U.S.C. 1341 (Supp. V 2005). The federal mail fraud statute has long been interpreted to extend beyond common law fraud or its criminal counterpart, false pretenses. See, *e.g.*, *Neder*, 527 U.S. at 25; *Durland* v. *United States*, 161 U.S. 306, 313 (1896). Consequently, the common law analogs to mail fraud include not only common law fraud but also related torts sounding in fraud, such as tortious interference, where the only requirement is that someone have relied on the misrepresentation.

Common law courts recognized no gap in protection that left plaintiffs who were directly victimized by fraudulent conduct without a remedy simply because the misrepresentations were made to a third party. To the contrary, common law courts have long permitted such suits. For example, in *Rice* v. *Manley*, 66 N.Y. 82 (1876), the defendant learned that the plaintiff had made an oral agreement to buy a "large quantity of cheese" from a third party. *Id.* at 84. The defendant sent a telegraph in the plaintiff's name that fraudulently represented that the plaintiff no longer wanted the cheese, thereby inducing the third party to sell his cheese to the defendant instead. *Ibid.* The Court of Appeals of New York, in what the syllabus called "an action for fraud," found the defendant liable. *Id.* at 83. The court reasoned that "it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce injury." *Id*. at 87. This case—where petitioners' false statements were made to the County, with the intention to influence it to produce injury to rival bidders—represents the twenty-first century version of *Rice*.

Nor is *Rice* by any means an outlier. See Resp. Br. 26-29 (discussing numerous common law cases granting relief where plaintiff was injured as a result of misrepresentations to third parties); see also, *e.g., Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 151 U.S. 1 (1894) (plaintiff entitled to damages where defendant interfered with its contract through wrongful conduct, including misrepresentations to a third party (the state legislature)).

Whether modern treatises label such conduct as fraud, tortious interference, or some other tort, there is no question that the common law provided a cause of action to redress the defendant's obtaining of business at the expense of another through a fraudulent misrepresentation to an innocent third party. See Restatement § 766B(a) at 20 (imposing liability for "intentionally and improperly interfer[ing] with another's prospective contractual relation" even if conduct directed at "a third person"); *id.* § 767, cmt. c at 30 (noting that "[f]raudulent misrepresentations" are "a wrongful means of interference," specifically the "inducing [of] a third person by fraudulent misrepresentation not to do business with the" injured party). Related, overlapping torts also cover misrepresentations directed at third parties. See *id.* § 623A & cmt. a at 334-335 (defining "injurious falsehood" as publication of "a false statement harmful to the interest of another," including misstatements made to governmental third parties); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 130, at 1013-1015 (5th ed. 1984) (discussing various torts covering such conduct under heading of "unfair competition"). Indeed, the common law provided that any "intentional causing of damage is a tort unless justified." Charles E. Carpenter, *Interference with Contract Relations*, 41 Harv. L. Rev. 728, 731 n.13 (1927-1928); see Restatement § 870, at 279; *id.* § 435A, cmt. a at 454 (1965) (recognizing residual tort liability for anyone "who intentionally causes injury to another," including "where a person defrauds another for the purpose of causing pecuniary harm to a third person"). The type of fraudulent conduct at issue therefore falls comfortably within the scope of common law tort liability.

In sum, by the time of RICO's enactment in 1970, it was well established that a plaintiff could recover in tort where, like here, it was directly injured by misrepresentations made to and relied upon solely by a third party. There is thus no reason to presume that Congress intended to import a nontextual and novel plaintiff-reliance requirement into Section 1964(c) actions predicated on mail fraud.

D. Traditional Proximate Cause Principles, As Applied In *Holmes* and *Anza*, Do Not Support Imposition Of A Plaintiff-Reliance Requirement

The common law requirement of proximate cause ensures that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct." 1 J. G. Sutherland, *Law of Damages* 57 (1882). A plaintiff-reliance requirement is a poor proxy for proximate cause: taking this very case, it is plain that respondents' injury was the "natural, ordinary, and reasonable consequence" of petitioners' fraudulent scheme. *Holmes* and *Anza* bar a plaintiff from recovering when the defendant's pattern of racketeering activity may be the but-for cause of its injury but when independent factors make it difficult to determine factual causation, it would be too complicated to ascertain or apportion the damages, or a more immediate victim can be expected to sue. *Anza*, 547 U.S. at 458-460; *Holmes*, 503 U.S. at 269-270. Consistent with traditional proximate cause principles, those factors function to limit any RICO action, and thus will screen out some suits involving third-party reliance. None of those potential bars applies here, however, and a *per se* bar to third-party reliance conflicts with the general principle that a directly injured party may invoke RICO's protections.[6]

First, despite the fact that petitioners directed their misrepresentations at the County, the causal chain between petitioners' misrepresentations and respondents' injury here is quite direct. Respondents allege that petitioners, by falsely representing to the County that

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[6] Petitioners have not sought review of the court of appeals' proximate cause analysis (applying *Holmes* and *Anza*), apart from the issue of reliance by the plaintiff.

they were in compliance with the single-bidder rule, received more tax liens and respondents thus received fewer tax liens than they otherwise would have received from the auction. No other intervening factors are at play. While the County was the target of the misrepresentation, there is little doubt that competitors like respondents were the direct target of petitioners' scheme. By contrast, the causal chains between the alleged RICO violations and plaintiff's injury in both *Holmes* and *Anza* were far more attenuated. In *Holmes*, the plaintiff-insurer was injured "only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims," leaving a court to discern whether other factors (such as poor business practices) affected the broker-dealers' insolvency. 503 U.S. at 271-273. In *Anza*, a court would have been called on to speculate to what extent withheld sales taxes allowed one party to undercut another's prices, and to what extent that caused consumers to prefer the defrauder's products. 547 U.S. at 458-459. No such speculative economic leaps are needed here because "the relationship between the alleged RICO violation and the alleged injury is clear." *Id.* at 467 (Thomas, J., concurring in part and dissenting in part).

Second, and relatedly, the damages in this case are not speculative or unascertainable. There is no reason to believe that with proper discovery an expert could not determine how many of the liens awarded to petitioners would have been awarded to respondents absent the fraud, and the expected profit from those additional liens. See Washington Legal Foundation Amicus Br. 14 n.4 ("The unique bidding system allegedly employed by the Treasurer's Office means that one can accurately predict how tax liens will be allocated among bidders based on an examination of all bids."). Courts have been making such estimates for over a century. See *Rice*, 66 N.Y. at 87-88 (estimating based on market rate plaintiff's profits on cheese he was unable to purchase due to defendant's misrepresentation to third party). Potential damages determinations in *Holmes* and *Anza* were not nearly so straightforward. 503 U.S. at 273; 547 U.S. at 458-459.[7]

Finally, because no other party has been injured here, no other party is better positioned to sue. Although the County was the recipient of petitioners' misrepresentations, it cannot sue under Section 1964(c) because it has not been injured in its business or property. Because the complaint alleges that all parties submitted the same bid (0% penalty) on the liens at issue, the County generates the same revenue and the taxpayer seeking to redeem his property pays the same amount, regardless of who is awarded the lien. Accordingly, there is no danger of duplicative recovery or complex apportionment issues either. In *Holmes*, by contrast, another group of plaintiffs—the more directly injured broker-dealers—had in fact filed suit. 503 U.S. at 273. In *Anza*, the State of New York would have had substantial incentive to sue because it "was being de-

[7] If petitioners and respondents were the only bidders and petitioners employed a single front company (such that all three bidders offered a 0% penalty on the same tax liens), it would be clear that petitioners received two-thirds of the liens when they should have received only one-half. Injecting additional bidders and additional front companies complicates the math only a bit. It certainly does not involve the complicated or speculative damages theories that proximate cause requirements seek to root out.

frauded and * * * lost tax revenue as a result." 547 U.S. at 458.

In sum, despite their lack of personal reliance, respondents, more than any other potential plaintiff, suffered a clear and ascertainable injury as a direct result of petitioners' alleged scheme. Traditional proximate cause principles, as applied in *Anza* and *Holmes*, require nothing more.

E. Policy Concerns Do Not Support Imposition Of A Plaintiff-Reliance Requirement

Petitioners (and their amici) essentially ask this Court to write into RICO a plaintiff-reliance requirement, found nowhere in the statute or the relevant common law, out of concern for the purported proliferation of civil RICO suits. That request disregards RICO's broad purposes and fails to distinguish between meritorious and meritless suits in any sensible way.

As an initial matter, such a request is properly directed to Congress, and not to this Court. In *Sedima*, the Court addressed the very concerns raised here by petitioners: that, due primarily to the breadth of predicate offenses such as mail fraud, civil RICO had become "a tool for everyday fraud cases brought against respected and legitimate 'enterprises'" and "evolv[ed] into something quite different from the original conception of its enactors." 473 U.S. at 499-500. The Court nevertheless made clear that, even assuming the validity of those concerns, the "correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Ibid.*; see, *e.g.*, *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) ("[R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for this Court."). Moreover, Congress has shown itself perfectly capable of restricting civil RICO when it so desires. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 758 (amending RICO to prohibit use of Section 1964(c) based upon a defendant's "conduct that would have been actionable as fraud in the purchase or sale of securities" unless a defendant has been criminally convicted in connection with the fraud).

Absent a reason in the statute for withholding relief, this Court should give effect to Congress's intent that RICO's "self-consciously expansive language * * * 'be liberally construed to effectuate its remedial purposes.'" *Sedima*, 473 U.S. at 498 (quoting RICO, Pub. L. No. 91-452, § 904(a), 84 Stat. 947). Congress through RICO intended to strike broadly against corrupt business practices. In particular, "competing organizations"—"both 'legitimate' and 'illegitimate'"—were among the victims explicitly intended as beneficiaries of the statute's protections. *Beck*, 529 U.S. at 496 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923); *Sedima*, 473 U.S. at 499. "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498. It was "in part designed to fill prosecutorial gaps." *Id.* at 493. There is thus no reason to believe that Congress would have intended to exempt from RICO's broad reach suits like this one—targeted at a "competing organization" engaged in fraudulent "racketeering activity" that caused direct business injury, yet escaped criminal prosecution.[8]

[8] Petitioners' theory would bar relief if organized crime took over a small trash-hauling company and sought to expand its business at the

In any event, petitioners' policy concerns do not warrant a categorical plaintiff-reliance requirement for Section 1964(c) suits predicated on mail fraud. Several limitations already prevent far-flung plaintiffs from transforming any and all misrepresentations into a civil RICO suit.

First, as discussed above in Part D, *Holmes* and *Anza* articulate traditional proximate cause principles that function rationally and directly to limit RICO suits predicated on mail fraud involving third-party reliance that involve remote or speculative injuries. In many cases, a plaintiff who did not himself receive or rely on misrepresentations will be unable to show that the defendant's scheme to defraud proximately caused his injuries. See, *e.g.*, *Anza*, *supra*; *Holmes*, *supra*; *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 558-562 (5th Cir. 2000) (home purchasers not directly injured by misrepresentations of manufacturers of building materials), cert. denied, 531 U.S. 1132 (2001); *Appletree Square I, Ltd. P'ship* v. *W.R. Grace & Co.*, 29 F.3d 1283, 1285-1286 (8th Cir. 1994) (same for purchaser of building containing asbestos). A plaintiff-reliance requirement, by contrast, is an exceptionally blunt tool for limiting suits by remote plaintiffs and an inadequate substitute for the proximate cause analysis.

Second, not just any violation of the mail fraud statute entitles a party—even one directly injured through someone's reliance on the fraud—to bring a Section

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expense of a rival trash hauling firm by mailing disparaging statements about that firm to its customers, or by calling those customers and falsely representing that the incumbent trash hauler was going out of business or raising its rates. It is difficult to imagine why Congress would have wanted to prevent recovery by firms injured through such activity.

1964(c) claim. The potential plaintiff must satisfy all the other elements of a RICO violation: participation through "a pattern of racketeering activity" in an "enterprise" "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(c). A single fraud, even one designed to injure a competitor, thus cannot establish a RICO violation. See, *e.g.*, *Systems Mgmt., Inc.* v. *Loiselle*, 303 F.3d 100, 105 (1st Cir. 2002); *Skycom Corp.* v. *Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987).

Third, Federal Rule of Civil Procedure 9(b) requires that all civil pleadings containing "averments of fraud" be stated with "particularity." The courts of appeals have uniformly read this provision to require that civil RICO claims based on violations of federal fraud statutes be pleaded with particularity. See *Odom* v. *Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir.), cert. denied, 128 S. Ct. 464 (2007); *Tal* v. *Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006), cert. denied, 127 S. Ct. 1334 (2007); *Figueroa-Ruiz* v. *Alegria*, 896 F.2d 645, 648 n.3 (1st Cir. 1990); *Old Time Enters., Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989). That requirement provides yet another means for courts to winnow meritless Section 1964(c) claims at the earliest stages of litigation. Cf. *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007).

In light of these limitations, a judicially-inferred plaintiff-reliance requirement—on top of the textually-grounded generalized reliance requirement inherent in the element of proximate cause for Section 1964(c) claims predicated on mail fraud (see Part A, *supra*)—would accomplish little beyond eliminating suits, like the present one, that fall well within both the broad terms and purposes of RICO.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PRATIK A. SHAH
Assistant to the Solicitor General

DAVID E. HOLLAR
Attorney

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