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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND 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

JONATHAN L. MARCUS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

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

QUESTION PRESENTED

This Court granted a writ of certiorari limited to the following question:

> Did the Court of Appeals for the Second Circuit err when it held that civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish "reasonable reliance" under 18 U.S.C. § 1964(c)?

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
Reliance on misrepresentations is a necessary component of causation in Section 1964(c) actions alleging injury from RICO violations predicated on mail or wire fraud 11
A. RICO's general requirement of proximate cause implies a reliance requirement in cases involving injury caused by fraud 11
B. A reliance requirement is consistent with RICO's text and purposes 14
1. A reliance requirement in civil RICO actions does not conflict with RICO's text or with the absence of a reliance requirement in the criminal fraud statutes 14
2. A reliance requirement does not frustrate RICO's purposes or collapse a RICO action into common law fraud 21
3. A proper application of reliance principles permits recovery in meritorious cases 23
C. The jury instructions did not adequately address the element of causation 28
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 26

Cases–Continued: Page

Appletree Square I, Ltd. P'ship v. *W.R. Grace & Co.*, 29 F.3d 1283 (8th Cir. 1994) 13

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 25

Beck v. *Prupis*, 529 U.S. 494 (2000) 16, 17, 28

Carpenter v. *United States*, 484 U.S. 19 (1987) 20

Cement Workers Dist. Council Welfare Fund v. *Lollo*, 148 F.3d 194 (2d Cir. 1998) 21

Chisolm v. *Transouth Fin. Corp.*, 95 F.3d 331 (4th Cir. 1996) 13

Cleveland v. *United States,* 531 U.S. 12 (2000) 19

FDIC v. *Shrader & York*, 991 F.2d 216 (5th Cir. 1993), cert. denied, 512 U.S. 1219 (1994) 25

Field v. *Mans*, 516 U.S. 59 (1995) 10, 13, 26, 27, 28

Grassmueck v. *American Shorthorn Ass'n*, 402 F.3d 833 (8th Cir. 2005) 24

Hammerschmidt v. *United States*, 265 U.S. 182 (1924) 19

Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258 (1992) . . . . *passim*

Ideal Steel Supply Corp. v. *Anza*, 373 F.3d 251 (2d Cir. 2004), petition for cert. pending, No. 04-433 (filed Sept. 28, 2004) 22

McNally v. *United States,* 483 U.S. 350 (1987) 18

Mid Atlantic Telecom, Inc. v. *Long Distance Servs. Inc.*, 18 F.3d 260 (4th Cir.), cert. denied, 513 U.S. 931 (1994) 22

Neder v. *United States*, 527 U.S. 1 (1999) 15, 17

Pelletier v. *Zweifel*, 921 F.2d 1465 (11th Cir.), cert. denied, 502 U.S. 855 (1991) 15

Cases—Continued: Page

Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 22

Sikes v. *Teleline, Inc.*, 281 F.3d 1350 (11th Cir.), cert. denied, 537 U.S. 884 (2002) 13

Silverman v. *United States*, 213 F.2d 405 (5th Cir.), cert. denied, 348 U.S. 828 (1954) 17, 18, 19

Steamfitters Local Union No. 420 Welfare Fund v. *Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), cert. denied, 528 U.S. 1105 (2000) 21

Stewart v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888) 18

Summit Props. Inc. v. *Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), cert. denied, 531 U.S. 1132 (2001) 13, 15

Systems Mgmt., Inc. v. *Loiselle*, 303 F.3d 100 (1st Cir. 2002) 13, 15, 16

The Mediators, Inc., *In re*, 105 F.3d 822 (2d Cir. 1997) 24

United States v. *Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20 (2d Cir. 1989) 1

United States v. *Coffman*, 94 F.3d 330 (7th Cir. 1996), cert. denied, 520 U.S. 1165 (1997) 27

United States v. *Colton*, 231 F.3d 890 (4th Cir. 2000) 18

United States v. *Gonzales*, 520 U.S. 1 (1997) 22

United States v. *Hasner*, 340 F.3d 1261 (11th Cir. 2003), cert. denied, 125 S. Ct. 38 (2004) 19

United States v. *Rowe*, 56 F.2d 747 (2d Cir.), cert. denied, 286 U.S. 554 (1932) 15

Cases—Continued: Page

United States v. *Thomas*, 377 F.3d 232 (2d Cir. 2004) 10, 27

Wight v. *BankAmerica Corp.*, 219 F.3d 79 (2d Cir. 2000) 24

Williams Elecs. Games, Inc. v. *Garrity*, 366 F.3d 569 (7th Cir. 2004) 24

Statutes and rule:

Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, Tit. IX, 84 Stat. 941 (18 U.S.C. 1961 *et seq.*) 2

18 U.S.C. 1961(1) (Supp. II 2002) 8, 14

18 U.S.C. 1961(1)(B) (Supp. II 2002) 2

18 U.S.C. 1962(c) 2, 4, 17

18 U.S.C. 1962(d) 2, 4, 16

18 U.S.C. 1964(a) 2

18 U.S.C. 1964(b) 2

18 U.S.C. 1964(c) . . . . *passim*

18 U.S.C. 1341 (Supp. II 2002) 15

18 U.S.C. 1343 (Supp. II 2002) 15

18 U.S.C. 1346 19

SEC R. 10b-5 25

Miscellaneous:

1 J.G. Sutherland, *A Treatise on the Law of Damages* (4th ed. 1916) 21

1 Joseph Story, *Commentaries on Equity Jurisprudence* (13th ed. 1886) 15, 28

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 23

Miscellaneous: Page

Restatement (Second) of Torts
(1977) 13, 18, 21, 26, 27

Webster's Third New International Dictionary
(1976) 21

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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 and wire fraud statutes, which prohibit acts that may constitute a pattern of racketeering activity under RICO and thus form the basis for a civil action. Because the United States enforces the federal criminal laws, it has a substantial interest in the proper interpretation and application of the mail and wire fraud statutes.[1] At the

[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

petition stage in this case, the United States filed an amicus brief at the invitation of the Court.

STATEMENT

1. In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act, 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 sanctions and civil remedies to accomplish its objective. 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 and wire fraud statutes. 18 U.S.C. 1961(1)(B) (Supp. II 2002). Those are the predicate acts at issue here. See Pet. App. 100; 125 S. Ct. 2956 (2005).[2] 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."

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 that the United States brings under Section 1964(a) and (b).

[2] Petitioner also alleged that respondents engaged in predicate acts of bank fraud, see Pet. App. 100, but this Court declined to review that part of the court of appeals' decision holding that petitioner had to establish that it relied on respondents' misrepresentations made in connection with their alleged acts of bank fraud. See 125 S. Ct. 2956 (2005).

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 borrowed 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 justifiably relied on respondents' fraudulent representations. Pet. App. 88, 90-91; see *id.* at 13. Im-

mediately 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 92-93; see *id*. at 7 (citation omitted). In its charge on RICO, the district court did not instruct the jury that reliance is an element of petitioner's claim. *Id.* at 95-107; see *id*. at 13. 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 105; see *id*. at 13 n.6 (citation omitted).

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 & n.1.[3]

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 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 observed 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 explained that the "required causal connection" in a Section 1964(c) claim predicated on mail fraud is absent unless "the defendant's misrepresentations were relied on." *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. *Id.* at 10 (citing cases).[4] The court of appeals thus held

---

[3] 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. 42-43.

[4] The court concluded that the same reliance requirement applies to a civil RICO claim predicated on bank fraud because such an action,

that, "in order to prevail in a civil RICO action predicated on any type of 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 "it must consider and determine whether or not [petitioner] reasonably relied on [respondents'] purported misrepresentations," Pet. App. 13, in rendering its verdict on petitioner's civil RICO claim. The court of appeals 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 of appeals 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

like any other civil RICO action, "is intended to compensate the plaintiff-victim for its losses," Pet. App. 12, only to the extent that "the defendants' [fraudulent] actions caused the losses," *ibid.*

"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.* (citation omitted).

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. The court cited evidence that petitioner's officers had "socialized extensively" with respondents and thus were "intimately familiar" with their transactions. *Id.* at 16. The court cited further evidence "that essentially every manager and deputy manager with whom [respondents] dealt at the New York Branch was terminated, demoted or transferred out of that Branch following the Bank's internal investigation of [respondents'] transactions." *Ibid.* The court of appeals accordingly reversed the judgment of the district court and remanded the case for a new trial. *Ibid.*[5]

[5] On June 27, 2005, this Court granted a petition for a writ of certiorari limited to the question presented at page (I), *supra*. The district court entered an order setting the case for trial on August 29, 2005. Subsequently, respondents unsuccessfully moved the district court, the court of appeals, and this Court for a stay of the trial pending resolution of proceedings in this Court. See No. 05A176 (Ginsburg, J., in chambers). The trial ended on September 20, 2005, when the jury returned a verdict in petitioner's favor in the amount of $34,312,794.56. Post-trial motions are pending.

SUMMARY OF ARGUMENT

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 RICO plaintiff alleging a RICO violation based on mail or wire fraud must show reliance on the defendants' misrepresentations in order 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 relies upon it.

Petitioner challenges the reliance requirement on multiple grounds. Each of those challenges lacks merit. First, petitioner contends (Pet. Br. 16-18) that the court of appeals erred in imposing a reliance requirement for fraud-based RICO claims because the word "reliance" does not appear in the RICO statute. Petitioner, however, does not dispute that, as the Court held in *Holmes*, Section 1964(c) contains a proximate cause standard. The reliance requirement is merely a specific application of proximate cause to the context of fraud. Given the extensive list of acts that may qualify as predicate acts of racketeering under RICO, see 18 U.S.C. 1961(1) (Supp. II 2002), it is not surprising that the causation analysis in Section 1964(c) cases will vary depending on the specific type of predicate violation alleged.

Second, petitioner contends (Pet. Br. 19-26) that proof of reliance should not be required because the mail and wire fraud statutes do not require such proof. But there is a fundamental difference between a criminal prosecution for mail or wire fraud violations and a Section 1964(c) civil action based on the same underlying violations. Unlike the government in a criminal case, a civil RICO plaintiff must establish that the pattern of mail or wire fraud activity caused injury. And a pattern of mail or wire fraud will not cause injury unless someone relied on the misrepresentations or omissions made to accomplish the fraud.

Third, petitioner mistakenly claims (Pet. Br. 28-32) that the reliance requirement contravenes Congress's intent to create a cause of action distinct from common law remedies. In Section 1964(c), Congress created a cause of action for injuries caused by RICO violations, not common law torts. But this Court held in *Holmes* that RICO contains a proximate cause standard that ultimately derives from the common law. It is therefore consistent with Congress's intent to look to common law standards on causation in analogous common law torts in fashioning a body of law under RICO. In any event, the application of a reliance requirement does not make RICO coextensive with the common law. Section 1964(c)'s language makes clear that there are real differences between a fraud-based RICO action and common law fraud. Among the most salient is that a plaintiff at common law could not normally recover on a theory of third-party reliance. There is nothing in the language of RICO that precludes the assertion of such a theory.

While some form of reliance is necessary to establish the causal link between the injury and the fraud-based

RICO violation, petitioner need not show that some individual at the bank actually relied on the false documents that respondents allegedly submitted with their loan applications. That is because under well-established principles of agency law, petitioner is presumed to have relied on the false documents if the agent or agents of the bank who handled them were participants in the fraud. RICO is appropriately read to incorporate those settled agency principles.

Similarly, RICO is appropriately read to incorporate the common law's justifiable reliance standard. While the court of appeals stated that petitioner must establish "reasonable reliance," the more precise formulation of the prevailing common law standard is "justifiable reliance." See *Field* v. *Mans*, 516 U.S. 59, 64-75 (1995). While the two formulations are often used interchangeably, a justifiable reliance test does not require that the victimized party act as a reasonably prudent person would. Particularly because the federal fraud statutes protect the gullible as well as the savvy, see *United States* v. *Thomas*, 377 F.3d 232, 242-243 (2d Cir. 2004), the justifiable-reliance approach to fraud-based RICO claims properly implements the requirement that a plaintiff must show injury "by reason of" the RICO violation.

The jury in this case was not properly instructed on the proximate cause requirement applicable to petitioner's RICO claim, because the instructions did not adequately address the causation issues raised by respondents' allegation that petitioner was effectively complicit in the fraud. In particular, the jury instruction on agency law principles incorrectly suggested that knowledge of the fraud by petitioner's agents could not provide a defense, and the general proximate cause instruction on the RICO claim which did not address reliance did not cure the error.

ARGUMENT

RELIANCE ON MISREPRESENTATIONS IS A NECESSARY COMPONENT OF CAUSATION IN SECTION 1964(c) ACTIONS ALLEGING INJURY FROM RICO VIOLATIONS PREDICATED ON MAIL OR WIRE FRAUD

The question in this case is whether a civil RICO plaintiff that asserts that it has suffered an injury to its business or property "by reason of" the RICO defendants' predicate acts of mail fraud or wire fraud must establish reasonable reliance. See 18 U.S.C. 1964(c). The answer is that the plaintiff must show that either it or a third party justifiably relied on the misrepresentations or omissions made to accomplish the fraud. That requirement of reliance flows from a civil RICO plaintiff's need to establish that its injury was "by reason of" the asserted RICO violation, and from common law principles of proximate causation that this Court has held are embedded in the phrase "by reason of."

A. RICO's General Requirement Of Proximate Cause Implies A Reliance Requirement In Cases Involving Injury Caused By Fraud

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* 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, and instead 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).[6]

In cases such as this one, where the plaintiff claims that the defendants caused it injury by conducting the affairs of an enterprise through a pattern of mail fraud or wire fraud, the plaintiff cannot establish *any* causal relationship between its asserted injury and the fraud, much less the "direct relation" that *Holmes* requires, in the absence of proof of reliance on the misrepresentations made in furtherance of the fraud.[7] If the target of a fraudulent 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 same 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.

---

[6] 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 the customers. *Id.* at 270-274.

[7] In most cases, it will be the plaintiff's own reliance that provides the requisite causal link. There may also be circumstances in which a plaintiff can establish the requisite causation by proof that a third party relied on the defendants' misrepresentations. See Part B(2), *infra*.

15), an entity (such as petitioner) may be able to establish causation even if some of its *agents* were aware of the deception. See Part B(3)(a), *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 always sufficient) way of showing causation that is specifically tailored to the fraud context. See Restatement (Second) of Torts § 546 (1977) (Restatement) ("causation in fact" for fraudulent misrepresentations shown when recipient "justifiably relies" on them); 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.).

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. denied, 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 Fin. 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); but see *Systems Mgmt., Inc.* v. *Loiselle*, 303 F.3d 100, 104 (1st Cir. 2002) ("There is no good reason here to depart from RICO's literal language by importing a reliance requirement into RICO."). Given the vast array of criminal acts that qualify as racketeering activity, see 18 U.S.C. 1961(1) (Supp. II 2002), there is nothing anomalous about reliance playing an essential role in the causation analysis under Section 1964(c) only in some circumstances, such as when the RICO violation involves 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").

B. A Reliance Requirement Is Consistent With RICO's Text And Purposes

Petitioner advances several arguments in an effort to overcome the logically necessary role of reliance in establishing a causal link between the injury asserted and a fraud-based RICO violation. None of these arguments has merit.

1. A reliance requirement in civil RICO actions does not conflict with RICO's text or with the absence of a reliance requirement in the criminal fraud statutes

Petitioner first argues (Pet. Br. 16-18) that a civil RICO plaintiff should not be required to demonstrate reliance because the RICO statute does not mention any reliance requirement. While petitioner is correct that the word "reliance" cannot be found in the RICO statute, Section 1964(c) does require that the plaintiff demonstrate that it was injured "by reason of" the RICO violation. And, as explained above, when the RICO violation involves a pattern of mail fraud or wire fraud, a RICO plaintiff cannot establish that it was injured "by reason of" that racketeering activity unless there was reliance on the deception inherent in the fraud.

Petitioner challenges that line of reasoning by pointing out that the "elements of proof required to establish the federal offenses of mail and wire fraud have long been settled" and do not require a showing of reliance. Pet. Br. 19. But the government can prove those crimes without showing reliance because, as this Court has explained, the criminal fraud statutes, 18 U.S.C. 1341 and 1343 (Supp. II 2002), "prohibit[] the 'scheme to defraud[]' rather than the completed fraud." *Neder* v. *United States*, 527 U.S. 1, 25 (1999) (holding that requiring proof of reliance to establish a "'scheme to defraud' * * * would clearly be inconsistent with the statutes Congress enacted"). A defendant can violate the criminal law even if no victim ever receives the fraudulent materials generated by the scheme. 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)); see *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir.) (L. Hand, J.) ("Civilly of course the action would fail without proof of damage, but that has no application to criminal liability."), cert. denied, 286 U.S. 554 (1932); 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 203, at 227 (13th ed. 1886) (civil fraud plaintiff "must have been misled to his prejudice or injury"). Petitioner points out that "the federal mail and wire fraud statutes are designed to punish the scheme to defraud itself rather than the end result" (Pet. Br. 25), but petitioner does not explain how it could establish injury, much less proximate cause, if the mail fraud or wire fraud scheme was never consummated.[8]

[8] The First Circuit made the same mistake in *Systems Management, Inc.* v. *Loiselle*, 303 F.3d 100, 103-104 (2002), relying on the

Petitioner's emphasis on the elements of the federal crimes of mail fraud and wire fraud also cannot be squared with this Court's decision in *Beck* v. *Prupis*, 529 U.S. 494 (2000). There, this Court addressed the question whether a Section 1964(c) plaintiff asserting an injury "by reason of" a violation of Section 1962(d) (the conspiracy provision) has a cause of action when the overt act alleged to have proximately caused the injury is not an act of racketeering. In concluding that the plaintiff had no cause of action, the Court "turn[ed] to the well-established common law of civil conspiracy," *id.* at 500, because the law of civil conspiracy, rather than criminal conspiracy, provided "[t]he obvious source * * * for the combined meaning," of Sections 1964(c) and 1962(d), *id.* at 501 n.6. The Court went on to conclude that because "a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious," *id.* at 501, a RICO conspiracy plaintiff must "allege injury from an act that is analogous to an

---

elements of the mail and wire fraud statutes to conclude that a civil RICO plaintiff need not prove reliance. In that case, employees of a company providing janitorial services brought a civil RICO action against the company's owner for paying below the prevailing wage that the company was required to pay pursuant to a contract with a state college. Without citing *Holmes*, the First Circuit concluded that proximate cause is "largely a proxy for foreseeability" and that it was foreseeable that the owner's false representations that he was complying with the wage statute would "enable him to continue to underpay his workers." *Id.* at 104. *Holmes* held, however, that Section 1964(c)'s causation requirement, embodied in the phrase "by reason of," requires a "direct relation" between the plaintiff's injury and the RICO violation, not mere foreseeability. 503 U.S. at 268. In any event, as explained in greater detail below, see Part B(2), the employees' RICO claim (which failed RICO's pattern requirement, see 303 F.3d at 105-106) would not have been foreclosed by RICO's causation requirement, which does not demand proof of reliance by the plaintiff, as opposed to a third party.

act of a tortious character, meaning an act that is independently wrongful under RICO," *id.* at 505-506 (internal quotation marks, citation, and brackets omitted).

It follows from *Beck* that the absence of a reliance requirement in the criminal mail and wire fraud statutes does not support petitioner's position that a Section 1964(c) plaintiff need not demonstrate reliance. The "obvious source" to consult here to assist in determining the content of Section 1964(c)'s "by reason of" requirement is the common law dealing with causation.

Petitioner maintains that the court of appeals "disregarded *Holmes*" (Pet. Br. 32) in requiring proof of reliance when the RICO violation involves mail and wire fraud, because *Holmes* only requires a civil RICO plaintiff to establish proximate causation, and reliance is "not the only way" (Pet. Br. 40) to prove it. But petitioner never identifies any other way that a plaintiff can show that its claimed losses were caused by the defendants' conduct of an enterprise through a pattern of mail fraud or wire fraud, see 18 U.S.C. 1962(c). Petitioner suggests (Pet. 19-25) that, because a scheme to defraud under the mail and wire fraud statutes need not involve misrepresentations or omissions, reliance on such misrepresentations or omissions cannot be the *sine qua non* of causation. Although petitioner's description of the sweep of the federal fraud statutes is correct, his conclusion about reliance is not.

The mail and wire fraud statutes do prohibit fraudulent schemes even when those schemes involve no misrepresentations or omissions in violation of a duty to speak.[9] For example, in *Silverman* v. *United States*, 213

[9] *Neder* v. *United States*, 527 U.S. at 20-25, which held that the federal mail, wire, and bank fraud statutes contain a materiality re-

F.2d 405 (5th Cir.), cert. denied, 348 U.S. 828 (1954), the defendant schemed to defraud persons and businesses listed in the yellow pages by sending them slips similar to those used by the telephone company "with the intention of deceiving such persons and causing them to remit money to the defendant by mail under the misapprehension that they were paying for renewals." *Id.* at 406. Although the defendant "did not make any false statements" in his solicitations, and indeed disclosed that his proposed publication was not affiliated with the telephone company, the deceptive scheme was still punishable under the mail fraud statute. *Id.* at 407.[10]

But that principle does not argue against a reliance requirement under RICO. The essence of fraud is the defendant's use of deception to enrich himself or to deprive someone else of something of value. See *McNally* v. *United States*, 483 U.S. 350, 358 (1987) ("the

---

quirement, does not require a contrary conclusion. A scheme to defraud that involves a deceptive course of conduct can violate those federal fraud statutes so long as the deceptive conduct is material. Cf. Restatement § 525 cmt. b at 56 (explaining that a "misrepresentation * * * denote[s] not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth").

[10] The fraudulent concealment of information can also violate the federal fraud statutes. See *United States* v. *Colton*, 231 F.3d 890, 898 (4th Cir. 2000) (applying in federal fraud prosecutions the following rule: "[E]ven in the absence of a fiduciary, statutory, or other independent legal duty to disclose material information, common-law fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to 'prevent[] the other [party] from acquiring material information.'") (quoting Restatement § 550, at 118). Cf. *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388 (1888) ("The gist of the [fraud] is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts.").

words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching'") (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)).[11] In order for any such scheme to succeed in its aim, and give rise to an actionable civil RICO claim, it is necessary that the victim of the deception take action (or refrain from taking action) in reliance on the deception. A misleading impression can induce action just as successfully as an outright lie, as the facts of *Silverman* illustrate. 213 F.2d at 406 (hundreds of the recipients of the solicitation remitted funds). But without reliance, neither the misleading impression nor the outright lie gives rise to a civil RICO claim. Thus, the absence of a requirement of express misrepresentation does not defeat the conclusion that reliance is a core component of

[11] In response to *McNally*'s limitation of the mail fraud statute to the protection of property rights, Congress amended the law to define a scheme to defraud to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Contrary to petitioner's suggestion (Pet. Br. 24 & n.8), honest services frauds do require an element of reliance to succeed, *e.g.*, the reliance of victims on the defendant's false pretense of his honesty or on material information that the defendant concealed in violation of a duty to disclose. See, *e.g.*, *United States* v. *Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (upholding honest services fraud convictions because "[a] reasonable jury could conclude that [the defendant] breached his fiduciary duties by voting on [the] consulting contract without disclosing the agreement he had * * * to receive a referral fee"), cert. denied, 125 S. Ct. 38 (2004). Of course, the scheme need not succeed in order to violate the criminal laws.

any *successful* (and therefore actionable) fraudulent endeavor.[12]

In any event, here, petitioner's theory of the case was that respondents violated RICO by seeking to obtain loans from it by "the repeated submission of false and fraudulent documents." Pet. Br. 3; see Pet. App. 36-37, 96 (RICO jury charge informs jury that "[t]he bank further alleges that the [respondents] presented numerous falsified documents to it to obtain money"). Thus, the only way petitioner could possibly establish that respondents' RICO violation proximately caused its damages—the money it lost by loaning respondents money that was not repaid—was by demonstrating that it relied on respondents' misrepresentations in approving the loans.

---

[12] Petitioner cites *Carpenter* v. *United States*, 484 U.S. 19 (1987) (Pet. Br. 24 n.9), as an example of a mail and wire fraud case that, he claims, did not involve reliance on fraudulent misrepresentations. In *Carpenter*, a writer for the *Wall Street Journal* who wrote an investment advice column provided advance information about the timing and contents of his column to two brokers, who made prepublication trades on the basis of the information. This Court held that the writer and the brokers engaged in a scheme to defraud the *Journal* in violation of the mail and wire fraud statutes, concluding that the writer knowingly and deceitfully violated his duty to safeguard the Journal's confidential business information. 484 U.S. at 27-28. Petitioner's argument suggests that a reliance requirement would preclude the *Journal* from establishing causation in a civil RICO action. That is not so. The *Journal* clearly relied on the writer's material nondisclosures in violation of his known duty to protect confidential business information (or on his implicit misrepresentation that he was "perform[ing] his duty of safeguarding it.") *Id.* at 28. Had the writer disclosed his material breach, the *Journal* presumably would have put a stop to the scheme.

2. A reliance requirement does not frustrate RICO's purposes or collapse a RICO action into common law fraud

Petitioner argues that a reliance requirement (Pet. Br. 28-32) frustrates Congress's intent to combat racketeering activity by providing a cause of action distinct from common law remedies. Petitioner is incorrect, because a reliance requirement, as a logically necessary component of causation in fraud-based RICO cases, does not limit civil RICO plaintiffs to the remedy available at common law for fraud. Most notably, it appears that reliance on the defendant's deception *by the plaintiff himself* was an essential element of a common law fraud cause of action, see Restatement §§ 537, 546; *Cement & Concrete Workers Dist. Council Welfare Fund* v. *Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) (New York law does not permit third-party reliance theory of recovery for fraud claim).[13] Such reliance, however, is not required under civil RICO in every case. Civil RICO requires reliance by someone when the predicate offenses involve fraud in order to establish the requisite causal link between the injury and the RICO violation, but not necessarily reliance *by the plaintiff*. An examination of the language of the statute bears this out.

---

[13] But see *Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912, 935 n.19 (3d Cir. 1999) ("[A] common-law fraud claim might succeed despite the fact that the fraudulent misrepresentation was made to a third party."), cert. denied, 528 U.S. 1105 (2000); 1 J.G. Sutherland, *A Treatise on the Law of Damages* § 33, at 126-128 (4th ed. 1916) (discussing general rule that a plaintiff's injury stemming from the defendant's tortious conduct toward a third party "is too remote" to be compensated, but recognizing exception where the defendant "acted with a malicious and fraudulent design to injure the plaintiff").

Section 1964(c) 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, to the extent that a plaintiff can show a "direct relation" between its injury and misrepresentations directed to a third party, see *Holmes*, 503 U.S. at 26, a rule barring recovery on a third-party reliance theory would be inconsistent with Section 1964(c)'s evident breadth. 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)."). Many courts of appeals, including the court below, have recognized that third-party reliance is a viable avenue of causation, at least where the plaintiff is the "direct target" of the defendant's scheme. See, *e.g.*, *Ideal Steel Supply Corp.* v. *Anza*, 373 F.3d 251, 263 (2d Cir. 2004) (holding that plaintiff-competitor of company that allegedly targeted it for competitive injury by submitting fraudulent sales tax reports to the State has standing to assert RICO claims based on predicate acts of mail and wire fraud), petition for cert. pending, No. 04-433 (filed Sept. 28, 2004); *Mid Atlantic Telecom, Inc.* v. *Long Distance Servs., Inc.*, 18 F.3d 260, 263-264 (4th Cir.) (holding that a plaintiff-competitor of a long-distance telephone company that made misrepresentations to customers of the plaintiff to lure them away could recover under Section 1964(c) if it could show that it was a "direct target" of the fraud), cert. denied, 513 U.S. 931 (1994).[14] Recognizing that reliance is an essential component of causation in fraud based RICO claims thus does not prevent the real targets of RICO violations from obtaining compensation for their injuries.[15]

3. A proper application of reliance principles permits recovery in meritorious cases

A rule providing that reliance is a necessary component of causation for private RICO claims alleging violations involving predicate acts of fraud does not impose an unworkable or onerous burden on plaintiffs. Rather, a proper conception of reliance in this context balances the interests in precluding relief where the fraud did not cause the damages with the interest in protecting injured victims. Thus, the court of appeals correctly concluded that petitioner should not be able to recover "regardless of whether its officers and employees are aware of, and participate in the fraud." Pet. App. 12. If the bank's officials were well aware that "the representations that [respondents] made to the Bank in order to obtain the loans" (*ibid.*) were false, recovery under RICO should not be automatic, because the requisite

---

[14] While it appears that a plaintiff alleging common law *fraud* would not be able to recover under this theory in some jurisdictions, see p. 21 & n.13, *supra*, 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").

[15] Petitioner, however, cannot benefit from a third-party reliance theory. The theory of petitioner's case was that respondents sought to obtain loans from petitioner by misrepresenting to petitioner their financial condition and the intended use of the borrowed funds.

causal link between the fraud and the damage may be absent.

a. There is, nevertheless, a special rule for agency cases that eases the burden of showing reliance in a case like this. As noted, *someone* must rely on fraudulent misrepresentations in order for the fraud to cause damage to a RICO plaintiff, and the court of appeals correctly held that petitioner "cannot rely on misrepresentations unless its agents or employees rely on those misrepresentations." Pet. App. 14. But the court of appeals also correctly 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 the principal." *Id.* at 15. Accord, *e.g.*, *Williams Elecs. Games, Inc.* v. *Garrity*, 366 F.3d 569, 575 (7th Cir. 2004) (Posner, J.).[16]

The court of appeals thus recognized a means for petitioner to recover even if its individual agents or employees who dealt with respondents did not, in fact, rely on the alleged misrepresentations. Specifically, the court allowed petitioner to recover if it could establish that the relevant agents and employees who knew that the representations were false were acting "entirely in [their] own interests and adversely to the interests of the corporation." Pet. App. 15 (quoting *Wight* v. *BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000)). See *id.* at 5 (noting that "[t]he success of the fraud was de-

[16] 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 The Mediators, Inc.*, 105 F.3d 822, 827 (2d Cir. 1997)).

pendent, in part, on bribes paid to * * * a deputy manager at [the Bank] who handled [respondents'] transactions with the Bank"). In that event, even if no individual agent of petitioner *actually* relied on the misrepresentations, the Bank itself could recover. That is because the knowledge of the faithless agents that the loan documents were false would not be imputed to the Bank, and it would be appropriate to presume that the Bank relied on the false representations in granting the loans. A presumption of reliance by the principal in those circumstances makes sense because it may be difficult for the principal to show actual reliance when the only persons who reviewed the documents were involved in the fraud and because, having already established the applicability of the adverse interest exception, it stands to reason that the principal would have acted contrary to the agent had it known what the agent concealed. See, *e.g.*, *FDIC* v. *Shrader & York*, 991 F.2d 216, 223-224 (5th Cir. 1993) (adverse-interest exception applicable when "the agent's interests are so incompatible with the interests of his principal" that he "will neither act in behalf of his principal upon his so acquired knowledge, nor disclose that knowledge to his principal, but, because of such incompatibility in interests, will withhold knowledge from the principal"), cert. denied, 512 U.S. 1219 (1994).[17]

---

[17] In other situations in which reliance is a component of causation, this Court has held that it may be appropriate in some circumstances to presume it. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243-247 (1988) (observing that "[r]eliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury" in a SEC Rule 10b-5 securities fraud action, but permitting rebuttable presumption that the investor relied on any public material misrepresentations because "most publicly available information is reflected in

Thus, the traditional principles of agency law governing imputation of an agent's knowledge provide petitioner with a theory of recovery in this case that satisfies a reliance requirement. Moreover, that doctrine addresses the adverse agent problem directly, rather than indirectly by eliminating the reliance requirement. There is no reason to eliminate the reliance requirement across the board when adverse agent principles address the particular concern potentially implicated in this case directly.

b. The court of appeals held that petitioner had to show not only that it relied on respondents' purported misrepresentations, but also that its reliance was "reasonable." See Pet. App. 12. The court of appeals did not explain what it meant by "reasonable" reliance. A more precise formulation for RICO purposes would require "justifiable" reliance. Although courts often use the terms interchangeably, they have different meanings. The common law draws a distinction between "reasonable" and "justifiable" reliance. As this Court has explained, reasonable reliance means "conduct [that] must conform to the standard of the reasonable man." *Field* v. *Mans*, 516 U.S. at 71 (quoting Restatement § 545A cmt. b at 101). In contrast, justifiable reliance "is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case." *Ibid.* (quoting Restatement § 545A cmt. b at 101). Under that standard, the plaintiff is "required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent

market price"); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 153-154 (1972) (establishing presumption in Rule 10b-5 case that investor relied on material facts that were withheld by the defendant in violation of duty to disclose).

to him if he had utilized his opportunity to make a cursory examination or investigation." *Ibid.* (quoting Restatement 541 cmt. a at 89).[18] But the plaintiff has no duty to investigate as a reasonable person would. *Id.* at 77. A common law action for fraud (the tort most analogous to the RICO violation at issue here) required proof only of "justifiable" reliance, the less onerous standard of causation. See *id.* at 70-74; Restatement §§ 537-545A at 80-102.

As *Holmes* makes clear, RICO's proximate cause standard draws on common law concepts, and a requirement of justifiable reliance is compatible with the protection extended by federal fraud laws to gullible and naive victims as well as prudent or sophisticated ones. See, *e.g.*, *United States* v. *Thomas*, 377 F.3d 232, 242-244 (2d Cir. 2004) (rejecting "unreasonable victim" defense); *United States* v. *Coffman*, 94 F.3d 330, 333-334 (7th Cir. 1996) (Posner, J.) (same), cert. denied, 520 U.S. 1165 (1997). Indeed, causation rules under RICO should be tailored to ensure protection of gullible victims who are preyed on by fraud artists. Thus, the standard of causation under RICO should be no more restrictive than that of the common law.[19]

---

[18] To illustrate the application of the justifiable reliance standard, the *Mans* Court provided the example on the one hand of the one-eyed horse the sale of which would not be fraudulent "if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect." 516 U.S. at 71 (quoting Restatement 541, cmt. a at 89). On the other hand, if the horse had a less obvious defect, recovery under the justifiable reliance standard would depend on whether the buyer was an "experienced horseman." *Ibid.* (quoting Restatement § 541, cmt. a at 89).

[19] One could argue that a more permissive "reliance in fact" standard should govern RICO cases, cf. *Mans*, 516 U.S. at 72-73 & n.11 (identifying handful of States that apply "reliance in fact" standard to

C. The Jury Instructions Did Not Adequately Address The Element Of Causation

The court of appeals correctly held that the jury instructions in this case did not adequately address the element of causation. As the court of appeals explained, a significant problem in this case is that the agency instruction issued by the district court "essentially eviscerated the reliance requirement" because it did not explain that, to the extent petitioner's agents had knowledge of the fraudulent nature of the scheme, that knowledge may be imputed to the bank in certain circum-

fraud actions), but the justifiable reliance standard reflects the better view. First, when RICO was enacted, the vast majority of jurisdictions required something more than "reliance in fact" in common law fraud cases, and this Court has made clear that the common law is an important source in discerning the pleading and proof requirements for a civil RICO action. See *Holmes* and *Beck*, *supra*. Second, when reliance is neither reasonable nor justifiable, it could be said that the defendant's conduct is not the proximate cause of the plaintiff's asserted injury. Finally, there is no apparent reason why the equitable notion that underlies the common law's justifiable reliance standard—that courts "do not aid parties who will not use their own sense and discretion," *Commentaries on Equity Jurisprudence*, *supra*, § 199, at 223; see also Restatement § 541 cmt. a at 89 (stating that a plaintiff "cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination")—should have no application to RICO. See *Beck*, 529 U.S. at 504 ("Congress meant to incorporate common-law principles when it adopted RICO."). Indeed, given that a RICO plaintiff may recover treble damages, see 18 U.S.C. 1964(c), it does not seem inappropriate to incorporate that settled equitable principle into RICO. And while a justifiable reliance standard is less permissive, it does not present a substantial obstacle to recovery. As explained above, the standard contains a subjective component, and "[n]aifs may recover." *Mans*, 516 U.S. at 76.

stances.[20] Pet. App. 14. Instead, the agency instruction erroneously left the impression that the agents' alleged knowledge of the fraudulent nature of the scheme was a categorically improper basis for concluding that petitioner's injury was not proximately caused by the fraud. See *id.* at 92-93. Because the proximate cause instruction given in the context of the RICO charge did nothing to cure the problem created by the flawed agency instruction, see *id.* at 105, the court of appeals correctly called for a retrial on petitioner's RICO claim.[21]

[20] The erroneous agency instruction was given as part of the instructions on common law fraud. See Pet. App. 92-93. The court of appeals concluded that a correct instruction on agency law should have been given as part of the civil RICO charge so that the jury could have properly evaluated whether petitioner relied on respondents' purported misrepresentations. *Id.* at 12-15.

[21] Petitioner contends (Pet. Br. 39) that, under the instruction on proximate cause that was given, "[t]he jury was free to consider, among other things, whether the Bank reasonably relied on some misrepresentation." That observation would have more force had the jury been properly instructed on the agency law issues. In fraud-based RICO cases that, unlike this one, do not implicate complex agency issues, juries may be able to evaluate causation properly without an express instruction on the role of reliance, because reliance can generally be regarded as implicit in proximate cause. Nevertheless, because reliance plays an integral role in the causation analysis in civil fraud cases, and because the nature of the reliance required may not be self-evident, a specific instruction on reliance ought to be given.

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

JONATHAN L. MARCUS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

OCTOBER 2005