No. 11-659

In the Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND
NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORP.,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America respectfully moves for leave to file the following *amicus* brief in support of the petition for certiorari.

Petitioner has consented to the filing of this brief, and its consent letter is on file with the Court. *Amicus* sought consent from Respondent Ideal Steel Supply Corp. on December 14, 2011. Counsel for Respondent, however, informed *amicus* by email that he opposes the filing of this brief because he did not "think the Chamber's prior amicus brief in this case" in 2006 was helpful to the Court. Respondent's opposition necessitates the Court's consideration of this motion.

The Chamber of Commerce of the United States of America is uniquely positioned to provide a helpful perspective on the issues raised in the petition. The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. Many of the Chamber's members have experienced misuse of the civil RICO statute firsthand, suffering the disruption and expense of defending against unfounded claims for treble damages. For this reason, the Chamber has filed *amicus* briefs in numerous cases before this Court addressing important questions regarding RICO's proper scope and application.

The unique perspective and arguments of the Chamber, as reflected above and as further set forth in the following brief, demonstrate that this brief will

be "of considerable help to the Court" by "bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties." Rule 37.1.

For these reasons, the motion for leave to file the following brief should be granted.

Respectfully submitted.

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QUESTION PRESENTED

Whether a civil RICO claim by a company against its competitor, alleging injury from the competitor's reinvestment of racketeering proceeds into its business, establishes the required element of proximate cause.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

When Congress originally enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO"), it declared its purpose to combat "organized crime activities" that "interfere with free competition." Pub. L. 91-452, 84 Stat. 922-23 (1970). In the years since, however, RICO's use has swelled far beyond those original aims. No longer limited to organized crime, RICO's broad and malleable prohibitions have been leveled against all manner of perceived corporate ills. And RICO's civil enforcement remedy, with its promise of treble damages and attorneys' fees, has become a favorite tool of plaintiffs seeking payouts.

A reasonable and consistent interpretation of the RICO statute is thus of great concern to American businesses, and *amicus*—the Chamber of Commerce of the United States of America—is uniquely positioned to advise the Court on these important issues. The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country.

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[*] Counsel for all parties received timely notice of the filing of this brief. Counsel for Petitioners have consented to its filing, and their letter of consent is on file with the Clerk. Counsel for Respondent did not consent. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

Many of the Chamber's members have suffered the expense and disruption of defending against abusive lawsuits by plaintiffs in pursuit of treble damages. If civil RICO is to advance its purpose of "free competition" without impeding the legitimate activities of American businesses, the Chamber and its members believe that RICO must be subject to careful restraints.

As this Court has held, one of those restraints is the requirement of proximate cause, which ensures that a plaintiff's claimed injuries are the direct result of the RICO violation alleged. The decision below, however, substantially weakens that requirement by enabling a business to claim lost profits from the choice of its competitor to open a competing business with proceeds allegedly derived from racketeering activity. Not only are such claims of lost profits too remote and speculative to establish proximate cause under this Court's precedents and the decisions of other circuits, but allowing such claims would enable competitors to punish pro-competitive activity that the law otherwise should and does encourage. Allowing such claims would also permit competitors who do not succeed in the marketplace to harass their rivals with RICO lawsuits in the courtroom—impairing the very "free competition" RICO was intended to protect. This Court should grant certiorari and reverse the decision below.

STATEMENT

1. This litigation involves a civil RICO lawsuit brought by Respondent Ideal Supply Corp. against its competitor, Petitioner National Steel Supply, Inc. For many years, Ideal and National operated competing retail outlets in Queens, New York, where they

sold steel mill products and hardware to professional ironworkers, small steel fabricators, and homeowners.

Ideal also had a retail outlet in the Bronx, though National did not. And with no competition in the Bronx, Ideal enjoyed a "dominant market position" there during the late 1990s. *Ideal Steel Supply Corp.* v. *Anza*, 652 F.3d 310, 323 (2d Cir. 2011). In 2000, however, National decided to open its own retail outlet in the Bronx, subjecting Ideal to competition.

2. In 2002, after National decided to open a retail outlet in the Bronx, Ideal sued National, alleging that it had violated the civil RICO statute by underreporting sales tax on certain sales at its Queens and Bronx stores. Ideal alleged two specific civil RICO violations.

First, Ideal alleged that National violated 18 U.S.C. § 1962(c), which prohibits engaging in a "pattern of racketeering activity." Although this provision was originally intended to combat organized crime, its definition of "racketeering activity" sweeps broadly. And among the many predicate acts that the statute identifies as "racketeering activity" are mail and wire fraud in violation of § 1341 and § 1343. Those provisions prohibit use of the mail or wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Ideal thus alleged that filing a false tax return was a "scheme to defraud" constituting "racketeering activity" under the RICO statute, and that the filing of more than one tax return constituted the requisite "pattern."

Second, in addition to § 1962(c), Ideal also alleged a violation of § 1962(a), which makes it unlawful for any person who has received income derived from racketeering activity "to use or invest" that income "in acquisition of any interest in, or the establishment or operation of," an enterprise. Ideal alleged that National retained the funds generated from its failure to pay taxes by reinvesting them in its business, and then used funds from its business to open its new retail outlet in the Bronx.

Based on its two allegations of "racketeering activity" and "reinvestment," Ideal sought treble damages and attorneys' fees under RICO's civil remedy provision. That provision creates a private right of action for "[a]ny person injured in his business or property by reason of a violation" of the RICO statute. 18 U.S.C. § 1964(c). Ideal had obviously not been the direct victim of National's alleged tax fraud. That was the State of New York. But Ideal nevertheless claimed that it was injured "by reason of" National's activity because National used its untaxed profits to cut prices for consumers and to open its new store in the Bronx. With respect to the new store, Ideal further alleged that this increased competition eroded its own "dominant market position," thereby reducing the sales, profits, and local market share of its Bronx store.

3. The district court dismissed Ideal's complaint, holding that Ideal had not shown National's activity was the proximate cause of Ideal's lost sales revenue. The Second Circuit disagreed, but this Court ultimately reversed the Second Circuit.

This Court held that a civil plaintiff alleging injury "by reason of" a RICO violation must prove that

the violation was the "proximate cause" of its injuries. *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 457-58 (2006). Summarizing its prior decision in *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the Court explained: "Proper interpretation of § 1964(c) required consideration of the statutory history, which revealed that 'Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act.'" *Id.* at 457 (quoting *Holmes*, 503 U.S. at 268). That provision had been understood to contain a proximate-cause requirement, and so the Court held that the requirement "'applies just as readily'" to the civil RICO statute. *Id.* at 457 (quoting *Holmes*, 503 U.S. at 268).

The Court further explained that the proximate-cause standard requires a "'*direct relation* between the injury asserted and the injurious conduct alleged.'" *Ibid.* (quoting *Holmes*, 503 U.S. at 268) (emphasis added). Applying that standard, the Court turned to Ideal's first claim, under § 1962(c), that National had engaged in "racketeering activity" by underreporting its taxes. The Court observed that the "*direct* victim of [National's] conduct was the State of New York, not Ideal," and thus that "Ideal's alleged injury was not the direct result of a RICO violation" *Id.* at 458, 459. The Court noted that "Ideal's lost sales could have resulted from factors other than [National's] alleged acts of fraud." *Id.* at 459. Because "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices," Ideal's economic injuries were too remote. *Ibid.*

Although the Court held that Ideal could not establish proximate-cause for its "racketeering activity"

claim, the Court remanded Ideal's "reinvestment" claim. The latter claim, which alleged injury from National's reinvestment of its profits back into its business, had not been addressed by the Second Circuit. So this Court remanded for the lower courts to "determine whether petitioners' alleged violation of § 1962(a) proximately caused the injuries Ideal asserts." *Id.* at 462.

4. On remand, the district court again dismissed Ideal's § 1962(a) claim, holding that National's reinvestment of proceeds in its business did not proximately cause Ideal's lost sales. But the Second Circuit, again, disagreed. In a divided opinion, the panel majority emphasized that "*RICO is to be read broadly.*" *Ideal*, 652 F.3d at 322 (quotation omitted). Attempting to distinguish Ideal's "reinvestment" claim from the "racketeering activity" claim this Court previously rejected, the panel asserted that "the use or investment of the funds derived from the pattern of mail and wire frauds to establish and operate the Bronx store is both the violation and the cause of Ideal's lost sales." *Id.* at 327. The majority reasoned that National had used "all or part of the income derived directly or indirectly" from tax fraud to establish a store in the Bronx; that the store "simply by its existence attracts customers away from a competitor"; and that the opening of the store was the "direct cause" of Ideal's lost sales. *Ibid.*

In so holding, the majority dismissed the district court's observation that there were many possible intervening causes of Ideal's injuries—including decisions of customers, poor quality of Ideal's merchandise, Ideal's poor management decisions, competition from other steel companies, and reasons relating to the strength or weakness of the economy. With re-

spect to the decisions of customers, the majority remarked that "only district court cases" had held "that decisions of individual purchasers are an intervening cause that defeats proximate cause." *Ideal*, 652 F.3d at 327.

Judge Cabranes dissented, noting that "[o]ne eventful trip to 1 First Street surely deserves another." *Id.* at 329. Relying on this Court's prior ruling in this case, he explained that a plaintiff must show a more direct injury than the one Ideal claims here in order to "deploy the heavy legal armaments of RICO in a civil action against its chief rival." *Ibid.* Judge Cabranes pointed out that "the alleged illegal activity *is not* National's creation of a new store in the Bronx—on its own, a perfectly legitimate, competitive pursuit—but rather, defendant's investment of ill-gotten proceeds" into its business. *Id.* at 331. And the chain of causation from National's investment of its proceeds to Ideal's lost sales "is not nearly as direct as Ideal—and the majority—seems to believe." *Ibid.* Both National's "pro-competitive" decision to open a competing store in the Bronx and the "overwhelming number of variables" affecting Ideal's lost sales stand in the way. *Id.* at 331-332. For this reason, Judge Cabranes concluded that Ideal's "reinvestment" claim did not satisfy the proximate-cause requirement.

SUMMARY OF ARGUMENT

The Second Circuit's decision to reach an opposite conclusion on Ideal's "reinvestment" claim under § 1962(a) than this Court previously reached on Ideal's § 1962(c) claim warrants review and reversal for two significant reasons.

First, as we explain below in Part I, the Second

Circuit's decision encourages plaintiffs to use civil RICO for anti-competitive purposes, in conflict with the antitrust laws. By permitting a company to bring suit against its competitor based on the competitor's choice to engage in ordinary, pro-competitive activity, the Second Circuit's decision deters robust competition, to the ultimate detriment of consumers.

Second, as we explain below in Part II, the Second Circuit's decision applies a lower standard of proximate cause to Ideal's "reinvestment" claim under § 1962(a) than the standard this Court applied to Ideal's § 1962(c) claim. Deepening a circuit conflict, the Second Circuit's decision treats the reinvestment claim's elimination of one link in the causal chain as though it eliminated all of those links. Unless reversed by this Court, that approach will invite plaintiffs to circumvent proximate-cause requirements merely by pleading reinvestment.

ARGUMENT

I. The Second Circuit's Decision Discourages Beneficial Competition By Imposing Civil RICO Liability Where A Competitor's Injury Arises In Part From Pro-Competitive Activity.

When this Court previously found Ideal unable to establish proximate cause for its allegation of "racketeering activity," it expressed concern that a more lenient causation standard could be put to anticompetitive use. The need for a strict proximate-cause requirement "has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws." *Anza*, 547 U.S. at 460. But, as Justice Breyer explained, the risk of blurring those lines can be avoided by holding that a RICO violation does

not proximately cause a competitor's lost profits where the direct cause of the lost profits is ordinary competition in the marketplace, rather than the RICO violation itself. *Id.* at 479 (Breyer, J., concurring in part). As we explain below, that is the right test to apply when a business seeks to wield RICO's treble-damages remedy against a competitor.

The Second Circuit, however, declined to apply that test. Nor did it appear to heed this Court's antitrust concerns when it held that Ideal could claim RICO injury from National's decision to open a competing store—a manifestly pro-competitive activity. Although this Court did not previously reach that "reinvestment" claim, Justice Breyer indicated that it raises *even stronger* antitrust concerns than the claim this Court previously addressed. *Id.* at 486-87 (Breyer, J., concurring in part) (observing that § 1962(c) presents "a more difficult question" than § 1962(a)). Review is thus necessary to ensure that civil RICO claims based on a reinvestment of proceeds, no less than claims based on racketeering activity, do not undermine the purposes of the antitrust laws.

A. The Second Circuit's decision punishes pro-competitive activity.

This Court's concern about potential conflict between RICO and the antitrust laws is well-founded—particularly in "reinvestment" cases such as this one. The injury Ideal alleges from National's reinvestment of racketeering proceeds arises from a quintessentially pro-competitive activity: National's decision to open a rival store in a location where Ideal had previously enjoyed a geographic monopoly. Contrary to the Second Circuit's assumption, the direct cause of

Ideal's lost profits was *not* National's mere reinvestment or use of racketeering proceeds in its business. After all, once reinvested, those proceeds and National's other revenues could have been used in any number of ways. The actual activity from which Ideal claims injury is thus National's *subsequent* choice of *how* to use those proceeds—*i.e.*, the choice to open a store in the Bronx that forced Ideal to compete. Such market entry by a competitor is precisely the kind of robust competition that the antitrust laws aim to encourage. Competition benefits consumers (including but obviously not limited to other businesses), who gain greater choice and lower prices. And it spurs businesses to more efficiently serve their customers (including other businesses), benefiting those businesses that do. As Justice Breyer observed, National's "opening of a distribution outlet is a legitimate competitive activity" that "mak[es] it more convenient for customers to purchase from that supplier." *Anza*, 547 U.S. at 486 (Breyer, J. concurring in part).

By failing to distinguish between the reinvestment of proceeds and the pro-competitive decision to open the Bronx store, the Second Circuit turns civil RICO into a deterrent of beneficial competition. Indeed, the Second Circuit's failure to apply a strict proximate cause requirement singles out pro-competitive activity for treble-damages liability, to perverse effect.

If, for example, National had reinvested its racketeering proceeds in its existing store or in a new market where Ideal had no presence, Ideal would have had no claim against National. *See Ideal*, 652 F.3d at 320 (holding that National's reinvestment of proceeds in its existing store could not be basis for liability). But only because National chose instead to

compete with Ideal by opening a rival store, the Second Circuit holds that Ideal can subject National to suit for treble damages. Both of those choices involve reinvestment of proceeds in violation of § 1962(a), but the practical results are drastically different: Under the Second Circuit's rule, only the choice to engage in competition would subject National to liability. It is easy to see how the Second Circuit's approach will have a chilling effect, encouraging potential RICO defendants to avoid opening new stores, lowering prices, or engaging in any pro-competitive activity that would threaten the economic power of their rivals.

Moreover, the consequences of the Second Circuit's decision go far beyond cases in which a business has engaged in serious racketeering activity. The ease with which businesses could bring treble-damages suits against their competitors would chill competition by all legitimate businesses, ultimately harming consumers. To quote Justice Breyer, "[f]irms losing the competitive battle might find bases for a RICO attack on their more successful competitors in claimed misrepresentations or even comparatively minor misdeeds by that competitor." *Id.* at 485. This is particularly likely in light of the notorious malleability and breadth of RICO's predicate acts and the fact that nearly every business reinvests the proceeds of its operations.

A competitor's mere threat of a RICO suit may thus deter businesses from engaging in healthy competitive activity. And the "ultimate victim of any such tendency to pull ordinary competitive punches of course would be not the competing business, but the consumer." *Id.* at 486.

Because of the attractiveness of treble damages and attorneys fees, civil RICO has already "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context." Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 Del. J. Corp. L. 519, 521 (2002). The Second Circuit's decision will only compound the problem by enabling RICO to be "misused as a weapon against competition in the marketplace." *Ideal*, 652 F.3d at 331 (Cabranes, J., dissenting).

In sum, civil RICO provides a strong deterrent by enabling those who have suffered *directly* from racketeering to avail themselves of a treble-damages remedy. But enabling competitors to claim *indirect* injury arising from competitive activity is more likely to do harm by deterring that competitive activity than to do good by adding some small measure of deterrence for the underlying racketeering. This is particularly true, moreover, when the party directly injured by the alleged RICO violation—here, the State—is perfectly capable of bringing its own suit. As this Court previously explained, the "requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." *Anza*, 547 U.S. at 460. The State of New York can easily do so here. *Ibid.* But the Second Circuit ignored that possibility and neglected the serious costs of the unnecessary remedy it enabled.

B. By punishing pro-competitive activity, the Second Circuit has put civil RICO at cross-purposes with the antitrust laws.

This Court has expressed similar concern about the misuse of treble-damages remedies in the antitrust context, and those decisions underscore the conflict between the antitrust laws and the Second Circuit's approach to civil RICO. Indeed, this Court has spent decades ensuring that Section 4 of the Clayton Act does not become a tool for the harassment of competitors, and those advances would be undermined if the provision's close cousin in the RICO statute were permitted to work at cross-purposes.

Under Section 4 of the Clayton Act, this Court has long prevented competitors from claiming "competitive injury" that results from pro-competitive actions that the antitrust laws are designed to encourage. As the Court explained in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, it is "inimical to the purposes" of the antitrust laws to permit plaintiffs to complain of injury from actions of a competitor that "preserved competition"—even though a competitor may have been injured "by reason of" such action within the meaning of the Clayton Act. 429 U.S. 477, 488 (1977).

Indeed, *Brunswick* involved pro-competitive activity strikingly similar to the activity in this case. A bowling alley operator sued a rival bowling alley chain for acquiring competing bowling alleys that would otherwise have gone out of business. The plaintiff alleged injury because "competitors were continued in their business, thereby denying [the plaintiff] an anticipated increase in market shares" that would have resulted from the disappearance of a

competitor. *Id.* at 484. As in this case, the plaintiff sought to use a treble-damages suit to prop up a geographic monopoly by driving out (or keeping out) nearby competitors. And as in this case, that use of the treble-damages remedy was "inimical" to the antitrust laws. *Id.* at 488.

To avoid those perverse results, this Court has required plaintiffs to prove not just any injury, but "*antitrust* injury" before availing themselves of the Clayton Act's treble-damages remedy. And "injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is *attributable* to an anti-competitive aspect of the practice under scrutiny." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (emphasis added); *accord Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986). Because the "antitrust laws were enacted for the protection of *competition*, not *competitors*," this doctrine "prevents losses that stem from competition from supporting suits by private plaintiffs." *Atlantic Richfield*, 495 U.S. at 338, 342 (quotation omitted).

Although the Court has declined to fashion a RICO analogue to the "antitrust injury" rule, it has declined to do so chiefly because requiring an affirmative showing of "racketeering injury" would be unintelligible in light of the variety and breadth of RICO's predicate acts and the absence of a coherent definition of "racketeering." *Sedima* v. *Imrex Co.*, 473 U.S. 479, 495 (1985). But even if one cannot determine if injury is in some sense "caused by an activity which RICO was designed to deter," it is easy to determine whether injury is caused by activity the antitrust laws were designed to *encourage*. *Id.* at 493-94. After all, courts have applied just such analysis in anti-

trust cases ever since *Brunswick*. And "there is no sound reason to interpret RICO's treble-damages provision as if Congress intended to set it and its antitrust counterpart at cross-purposes." *Anza*, 547 U.S. at 486 (Breyer, J., concurring in part).

C. The Second Circuit's decision conflicts with decisions of the Third and Ninth Circuits that have rejected competitors' claims of indirect injury.

In addition to conflicting in spirit with this Court's antitrust precedents, the Second Circuit's decision also conflicts with decisions of the Third and Ninth Circuits holding that competitors alleging injury from reinvestment of racketeering proceeds could not establish proximate cause where the reinvestment merely enabled ordinary competition.

For example, in *Lightning Lube, Inc.* v. *Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), the Third Circuit rejected a quick-lube franchisor's RICO claim against a competitor who allegedly used stolen trade secrets "to build a competing business which then hurt [the plaintiff's] sales." *Id.* at 1188. Because "the real injury to the plaintiff is the theft of its property . . . and not the investment of that property in an otherwise legitimate business," the investment could not be a proximate cause of the competitor's injury. *Id.* at 1189; see also *Kolar* v. *Preferred Real Estate Investments, Inc.*, 361 F.App'x 354, 361-62 (3d Cir. 2010) (rejecting real estate investor's claim that co-investor stole money and reinvested it in competing venture). Similarly, in *Sybersound Records, Inc.* v. *UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008), the Ninth Circuit rejected a karaoke record producer's claim that proceeds from competitors' failure to pay copyright

royalties enabled them to "reduce prices to undercut their competitors." *Id.* at 1147.

The Third and Ninth Circuits in those cases applied strict proximate-cause requirements to "reinvestment" claims brought by competitors, but the Second Circuit here has not done the same. Review is necessary to resolve this conflict and, in so doing, to ensure that civil RICO does not deter procompetitive activity.

II. Deepening A Circuit Split, The Second Circuit's Decision Effectively Eliminates The Requirement Of Direct Injury For Reinvestment Claims.

In addition to special concerns over claims brought by economic competitors, this Court has also expressed "fundamental concerns" with all civil RICO claims that depend on "attenuated" theories of injury. *Anza*, 547 U.S. at 459; see also *Holmes*, 503 U.S. at 269-70. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation *led directly* to the plaintiff's injuries." *Anza*, 547 U.S. at 461 (emphasis added). Although this Court previously found that National's alleged tax fraud did not lead directly to Ideal's lost profits, the Second Circuit held that National's reinvestment of proceeds did. As we explain below, those two decisions are incompatible. And the effect of the Second Circuit's decision is to all but eliminate the requirement of direct injury for "reinvestment" claims.

In doing so, the Second Circuit deepens a circuit split. As the petition explains in more detail, the Fourth and Sixth Circuits join the Second Circuit in holding that reinvestment of racketeering proceeds makes speculative chains of causation sufficiently

less so. See *Newmyer* v. *Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989); *Busby* v. *Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990). In contrast, the Third, Seventh, Eighth, and Ninth Circuits, hold that the mere reinvestment of racketeering proceeds does not convert an otherwise indirect claim of injury into a direct one. See *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 304 (3d Cir. 1991); *Lightning Lube*, 4 F.3d at 1188; *Kolar*, 361 F. App'x at 361; *Sybersound*, 517 F.3d at 1149; *Fogie* v. *THORN Americas, Inc.*, 190 F.3d 889, 896 (8th Cir. 1999); *Nat'l Organization for Women, Inc.* v. *Scheidler*, 968 F.2d 612, 625 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994). This Court's review is needed to resolve that conflict, and as we explain below, to ensure that plaintiffs cannot circumvent the directness requirement merely by alleging reinvestment of proceeds.

A. The Second Circuit's decision implausibly assumes that removing one small link from a long, speculative causal chain is enough to make the reinvestment of proceeds a proximate cause of a plaintiff's injury.

When this Court previously rejected Ideal's "racketeering activity" claim, one main reason was the long and speculative chain of causation between National's alleged tax fraud and Ideal's lost profits. Ideal had claimed that National's tax fraud caused it to lower its prices and that National's lower prices caused more customers to buy from National, reducing Ideal's profits. *Anza*, 547 U.S. at 458-59. This chain of causation, however, suffered from two "discontinuit[ies]." *Id.* at 459. First, National "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud." *Id.* at 458. Further, "the fact that a company commits tax

fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts." *Id.* at 459. Second, "Ideal's lost sales could have resulted from factors other than petitioners' alleged acts of fraud." *Ibid.* As the Court put it, "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices." *Ibid.*

Both of those discontinuities in the chain of causation likewise doom Ideal's reinvestment theory. First, the fact that a company retains the proceeds of its fraud does not mean that it will open a new store in the Bronx, and National could have opened—and likely did open—a new store for any number of reasons unconnected to the fraud. Second, Ideal's lost sales could have resulted from factors other than the new store, and it would likewise require a "complex assessment" to establish what portion of Ideal's lost sales were the product of National's new store.

Despite those discontinuities, the Second Circuit distinguished this Court's prior decision by emphasizing that the "different referent" here was reinvestment of proceeds—which supposedly makes all the difference. *Ideal*, 652 F.3d at 327. But the fact that National retained and reinvested its proceeds rather than paying them out in dividends removes only one small link from what remains a long and speculative causal chain. By emphasizing reinvestment and ignoring the parts of the causal chain this Court previously found too remote, the Second Circuit's decision permits plaintiffs to circumvent this Court's directness requirement simply by alleging the reinvestment of proceeds. The Second Circuit's approach

turns proximate cause into nothing more than a weak pleading rule.

The Second Circuit's own decision shows this starkly. Although Ideal had alleged under § 1962(a) that National used its reinvested proceeds to lower prices as well as to open its store in the Bronx, the Second Circuit was obliged to find the lower-prices allegation "conceptually indistinguishable from the § 1962(c) claim rejected by the Supreme Court." *Id.* at 320. Yet the claim that proceeds are used to open a store is no more "conceptually distinguishable" from this Court's prior decision than the claim that they are used to lower prices. This is evident from the fact that the conceptual distinction the Second Circuit has adopted—the use of reinvested proceeds—*does not distinguish* the two claims. If the mere use of proceeds is not enough to save a claim based on lowered prices, it cannot somehow be enough to save a claim based on opening a new store. The lost profits alleged to result from both remain too indirect and remote.

B. Contrary to the Second Circuit's decision, this Court has long held that the intervening choices of purchasers defeat proximate cause.

Even if it were appropriate to remove a significant link in the chain—by assuming that National's reinvestment of proceeds directly caused it to open the store in the Bronx—the Second Circuit also ignored a substantial intervening cause: the independent purchasing decisions of customers. Those decisions make it extremely difficult to trace the amount of Ideal's lost profits attributable to the existence of National's store—as opposed to those attributable to other factors motivating purchasers. The Second Circuit,

however, assumed that the new store "simply by its existence attracts customers away from a competitor." *Id.* at 327. The court reasoned that "only district court cases" had held "that decisions of individual purchasers are an intervening cause that defeats proximate cause." *Ibid.* But *this Court* has not permitted plaintiffs to assume away the actions of individual purchasers from the causation analysis, and *this Court* has in fact repeatedly held that independent purchasers defeat proximate cause.

Most significantly, that was this Court's holding when it previously rejected Ideal's § 1962(c) claim. The Court did not assume, as the Second Circuit has now done, that lower prices "simply by their existence" attract customers away from a competitor. To the contrary, the Court emphasized the intervening decisions of purchasers when it explained that "it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices." *Anza*, 547 U.S. at 459. The proximate-cause requirement "is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Id.* at 460. In rejecting the causal link between lower prices and lost profits, this Court held at least implicitly that intervening decisions of independent purchasers defeat proximate cause.

Moreover, the Court has made that principle explicit in many decisions limiting standing in the antitrust context. In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), for example, the Court held that an indirect purchaser cannot bring a claim against a manufacturer on the theory that an intermediary in the chain of distribution "passed on" a manufacturer's overcharge. Even though the indirect purchaser may

suffer actual economic injury, there are too many "difficulties and uncertainties involved in determining how the relevant market variables" affect the impact of the overcharge to establish injury. *Id.* at 743.

Ideal's claim suffers from a similar defect here: Ideal effectively alleges that the consequences of National's entering the new market were "passed on," through the decisions of consumers, to Ideal in the form of lost sales. Here, as in the indirect purchaser context, the intervening actions of individual purchasers introduce far too many "difficulties and uncertainties" to establish proximate causation of economic injury.

For similar reasons, this Court has also prevented unions from bringing antitrust claims against an association of employers alleging that they coerced third parties to do business with non-union firms. *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519 (1983). The union's claim that coercion caused third parties to divert business from union to non-union firms was "highly speculative" given that the union's loss of business "may have been produced by independent factors." *Id.* at 542.

Ideal's claim in this case is again similar in that Ideal alleges that its sales were diverted to National through the actions of third-party purchasers. Indeed, it is a good deal more speculative because Ideal alleges that customers were diverted by National's mere *existence* in the market, not by any coercion or other conduct.

As in the antitrust context, demonstrating that a competitor's actions "caused a plaintiff to lose customers (or profits) requires the plaintiff to show what

would have happened in its absence." *Anza*, 547 U.S. at 483 (Breyer, J. concurring in part). Would customers have departed for a different competitor? Would larger economic factors have caused customers to demand less? How much less? Would the market have attracted entry from other competitors? Would the geographic scope of the relevant market have changed? As this Court's antitrust cases demonstrate, "to answer such questions based on actual market circumstances and to apportion damages among the various competitors harmed is difficult even for plaintiffs trying to trace harm caused by a defendants' *anti*-competitive behavior." *Id.* at 484. And outside the antitrust context, "[t]o answer such questions in the context of better functioning markets, where prices typically reflect competitive conditions, would likely prove yet more difficult." *Ibid.*

All of these difficulties are rooted in the fact that independent customers make the decisions about who to purchase from, how much to purchase, and at what price. Those intervening decisions, and the many uncertain factors that influence them, are the key link in the causal chain between National's new store and Ideal's lost profits. But the Second Circuit's decision avoided all of these difficulties by simply assuming them out of existence. And in that respect as well, the Second Circuit's analysis sharply conflicts with this Court's traditional approach to proximate cause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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