No. 04-433

In the Supreme Court of the United States

JOSEPH ANZA, ET AL.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Must a civil RICO claim based on mail or wire fraud allege reliance on the fraudulent misrepresentations or concealments?

2. If the answer to the first question is in the affirmative, must the plaintiff allege its own reliance, as opposed to reliance by a third party?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy, and transacting business throughout the United States as well as in many countries around the world.

One of the Chamber's central functions is to represent its members' interests in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases raising issues of vital concern to the nation's business community, including cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO").[1]

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy wrongdoing prohibited by the statute. At the same time, there are those who may misuse the statute against businesses and other organizations, in large part because of civil RICO's treble damages provisions. The Court of Appeals' holding in this case, that a plaintiff alleging injury "by reason of" fraudulent conduct need not prove its own reliance on such conduct, extends the RICO statute beyond its intended breadth. Reversing that decision would provide an important check against misuse of the civil RICO statute – a check that is consistent with Congress' evident purpose and with this Court's precedents – while allowing recovery by those the statute is designed to protect. Accordingly, the

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[1] Letters of consent from the parties have been filed with the Clerk of this Court. No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* and its members made a monetary contribution to its preparation.

Chamber and its members have a strong interest in encouraging the Court to reverse the decision below.

STATEMENT OF THE CASE

This case involves a civil RICO claim brought by respondent, Ideal Steel Supply Corp. ("respondent" or "Ideal"), based on the federal mail and wire fraud statutes. Ideal purchases steel mill products from manufacturers and sells those products and related hardware to professional ironworkers, small steel fabricators and homeowners. Ideal's only substantial competitor is National Steel Supply, Inc. ("National"), owned by Joseph and Vincent Anza (collectively, "petitioners"). *Ideal Steel Supply Corp.* v. *Anza*, 373 F.3d 251, 254-55 (2d Cir. 2004).

Ideal alleged, among other things, that National and its owners engaged in a scheme in violation of the civil RICO statute, 18 U.S.C. § 1964(c). The alleged scheme involved failing to charge sales taxes to certain customers residing in New York State ("State"), then submitting false tax reports to the State by mail and wire, in violation of 18 U.S.C. §§ 1341 and 1343. According to Ideal, National's "cash, no tax" sales, along with the fraudulent sales tax reports, were intended to, and did, injure Ideal's business. *Id.* at 255. Specifically, Ideal alleged that it lost profits because "its own list prices were, on average, no higher than those of National and that but for [National's] 'cash, no tax' scheme, National would have had no competitively significant price advantage over Ideal." *Id.*

Petitioners moved to dismiss on the ground that respondent did not, and cannot, satisfy the reliance element of a civil RICO claim based on mail or wire fraud. Petitioners argued that, consistent with RICO's proximate cause requirement, the reliance element required respondent to allege and prove its own reliance on the purported misrepresentations. In response, respondent argued that it satisfied the requisite pleading elements merely by alleging

third-party reliance on petitioners' alleged fraudulent misrepresentations and that these misrepresentations proximately caused harm to Ideal. The district court agreed with petitioners that a plaintiff must show that it actually relied on the alleged misrepresentations, and thus dismissed the complaint. *Ideal Steel Supply Corp.* v. *Anza*, 254 F. Supp. 2d 464, 468-69 (S.D.N.Y. 2003).

The U.S. Court of Appeals for the Second Circuit reversed. It held "that a RICO claim based on mail [or wire] fraud may be proven where the misrepresentations were relied on by a third person [here, the State], rather than by the plaintiff" so long as there is "a causal connection between the prohibited conduct and plaintiff's injury." *Ideal Steel Supply Corp.*, 373 F.3d at 262 (citation omitted). The Court of Appeals further held that respondent sufficiently alleged that it suffered lost profits that were proximately caused by a RICO violation. *Id.* at 263. The Court therefore held that respondent could bring suit for treble damages under RICO despite its failure to allege that it relied on the alleged misrepresentations at issue. *Id.*

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that a plaintiff asserting a civil RICO violation based on mail or wire fraud need not allege or establish that the plaintiff was proximately caused by its own reliance on fraudulent behavior.

I. As a preliminary matter, this Court should resolve a fundamental circuit conflict as to whether a civil RICO claim based on mail or wire fraud requires proof of *any* reliance on the alleged fraudulent misrepresentations or concealments – *i.e.*, reliance by *someone* on the fraudulent behavior. Although RICO and the mail and wire fraud statutes do not use the term "reliance," that element of common-law fraud is necessarily incorporated into the statute under "the rule that Congress intends to incorporate the well-settled meaning of

the common-law terms it uses," including the term "fraud." *Neder* v. *United States*, 527 U.S. 1, 23 (1999). By the time the civil RICO statute was enacted in 1970, reliance was a "well-settled" - indeed, a fundamental - element of a private civil action for fraud. It also was (and still is) a necessary element of the proximate cause showing that this Court has held is required in a civil RICO action. *See Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Consequently, the element of reliance is properly incorporated into civil RICO claims based on mail fraud or wire fraud.

The Court should also hold that this reliance element requires a specific showing of reliance *by the plaintiff* rather than a third party. This is how courts interpreted the reliance element of common-law fraud at the time RICO was enacted. Under the "common-law meaning rule," this settled understanding of fraud is presumed to have been incorporated into civil RICO claims based on mail or wire fraud absent statutory text or structure to the contrary. *See Neder*, 527 U.S. at 23 & n.7. There is no statutory text or structure in the RICO, mail fraud or wire fraud statutes to rebut this presumption.

II. Public policy also supports the recognition of a "plaintiff-reliance" element in civil RICO claims based on mail or wire fraud.

First, recognizing such an element would help limit civil RICO claims to direct victims of the alleged violations. This Court recognized in *Holmes* that, as a matter of policy, treble-damage recovery under RICO should be reserved for those who can show that they were *directly* injured by a violation. *Holmes*, 503 U.S. at 268. Plaintiffs who allege injury based on fraudulent behavior relied on by a third party necessarily allege an injury that flowed only indirectly (at best) from the fraud. As explained in *Holmes*, such claims for indirect injury should be barred, in part, because they create unduly

complicated inquiries about the impact of other causes and the proper apportionment of damages among multiple victims. *Id.* at 269.

Second, recognizing a plaintiff-reliance element would prevent plaintiffs from transforming ordinary business tort claims into complex RICO claims in an effort to obtain treble damages and attorney's fees. There is no basis to conclude that Congress contemplated such a result.

Third, recognizing a plaintiff-reliance element would prevent RICO from becoming a source of additional *qui tam*-type, private-attorney-general litigation. Here again, there is no basis to conclude that Congress intended to authorize the kind of claim at issue here, which amounts to a private attorney general suit based on the alleged submission of false documents to a governmental body.

Finally, recognizing a plaintiff-reliance element would deter many plaintiffs (or potential plaintiffs) who did not actually rely on alleged fraudulent behavior – and therefore have at best a weak case on causation – from filing a civil RICO claim based on fraud. And such an element would allow courts to weed out weak fraud-based RICO claims on motions to dismiss or for summary judgment.

ARGUMENT

RICO is a comprehensive statutory scheme that authorizes civil suits based on a pattern of racketeering activity, which is broadly defined to include more than 100 predicate acts. 18 U.S.C. § 1961(1). To recover treble damages under the civil RICO statute, a plaintiff must prove that he was "injured in his business or property *by reason of*" a violation of RICO's prohibitions against racketeering activity. 18 U.S.C. § 1964(c) (emphasis added). In *Holmes* v. *Securities Investor Protection Corporation*, 503 U.S. 258 (1992), this Court construed the phrase "by reason of" in § 1964(c) to require a showing "that

the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id.* at 268.

As *Holmes* explained, the concept of "proximate cause" is a "judicial tool[] used to limit a person's responsibility for the consequences of that person's own acts." *Id.* "Justice demands" such a limitation in this context because "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Id.* at 269 (citation omitted). Moreover, allowing plaintiffs to recover damages when they suffered only indirect harm "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.*

For these reasons, this Court held that a plaintiff cannot recover treble damages under RICO merely by showing that "the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." *Id.* at 265-66 (footnote omitted). Instead, the plaintiff must prove "some *direct* relation between the injury asserted and the injurious conduct alleged." *Id.* at 268 (emphasis added). As we now show, this proximate cause element requires a showing that the plaintiff himself relied upon the alleged fraud.

I. Under The "Common-Law Meaning" Rule, The RICO Statute Requires Proof Of Plaintiff-Reliance When A Civil RICO Claim Is Based On Mail Or Wire Fraud.

In the decision below, the Court of Appeals implied, but did not expressly hold, that the proximate cause element required by *Holmes* requires a showing of reliance by at least someone in the causal chain when a civil RICO claim is based

on mail or wire fraud. *See Ideal Steel Supply Corp.*, 373 F.3d at 262-64 (discussing State's reliance on alleged false tax reports). This is consistent with Second Circuit precedent holding that reliance is an element of such a claim. *See Bank of China, New York Branch* v. *NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004), *cert. granted in part*, 125 S. Ct. 2956 (Jun. 27, 2005), *cert. dismissed*, 126 S. Ct. 675 (Nov. 15, 2005). Indeed, respondent has conceded that "[t]he federal courts have generally held . . . reliance is required" to state a RICO claim when the alleged predicate act is mail or wire fraud. Br. In Opp'n to Pet. for Writ of Certiorari ("Opp'n"), No. 04-433, at 2 (filed Oct. 29, 2004).

Nevertheless, the circuits are divided on this issue. *See* Pet. for Writ of Certiorari ("Pet. "), No. 04-433, at 6 (filed Sept. 29, 2004).[2] Accordingly, in subsection A, we explain why the Court should resolve this conflict and hold, as a preliminary matter, that the proximate cause element articulated in *Holmes* requires the plaintiff in a civil RICO suit based on mail or wire fraud to show reliance on fraudulent behavior. *See Bank of China*, 359 F.3d at 176. In subpart B, we explain that this reliance element should be understood, consistent with common-law fraud, to require a showing of reliance by the plaintiff himself.

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[2] The Second, Sixth and Eleventh Circuits have held that reliance is an element of a civil RICO claim based on mail or wire fraud. *See Bank of China*, 359 F.3d at 178; *VanDenBroaeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *Sikes* v. *Teleline*, 281 F.3d 1350, 1360 (11th Cir. 2002). The First Circuit has rejected this view. *See Sys. Mgmt., Inc.* v. *Loiselle*, 303 F.3d 100, 103-04 & n.3 (1st Cir. 2002); *see also Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 666 n.3 (9th Cir. 2004) (recognizing circuit split on this issue). This conflict was to be addressed in the *Bank of China* case, but the petition for *certiorari* in that case was dismissed voluntarily by the parties.

A. The Civil RICO Statute Requires A Showing Of Reliance Whenever The Claim Is Based On Mail Or Wire Fraud.

Reliance is a necessary element of the proximate cause analysis in the civil RICO context when the claim is based on mail or wire fraud. This conclusion is compelled by the principle that Congress is presumed to incorporate the settled meanings of the common-law terms it uses.

1. This principle plainly applies when interpreting the mail and wire fraud statutes. That conclusion was established in *Neder* v. *United States*, 527 U.S. 1 (1999), which addressed whether the common-law fraud element of "materiality" should be read into the mail and wire fraud statutes. Neither statute uses the term "material," but this did not end the Court's analysis. Rather, the Court turned to the "well-established rule of construction that 'where Congress uses terms that have accumulated settled meaning under . . . the common law, a court *must* infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Id.* at 21 (quotation and citations omitted) (emphasis added).

In applying this "well-established rule of construction," the Court emphasized that "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud . . . statute[], actionable 'fraud' had a well-settled meaning at common law" and that meaning "required a misrepresentation or concealment of *material* fact." *Id.* at 22; *see also id.* (quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996)). In light of this common-law requirement, the Court found that it "must presume that Congress intended to incorporate materiality [into the mail and wire fraud statutes] 'unless the statute[s] otherwise dictate[.]'" *Id.* at 23 (quoting *Nationwide Mut. Ins.* v. *Darden*, 503 U.S. 318, 322 (1992)).

The Court further held that, once this presumption attaches, the party opposing it bears a heavy burden. *See id.* As the Court explained, any "rebuttal [to this presumption] can only come from the text or structure of the fraud statutes themselves." *Id.* at 23 n.7. Ultimately, the Court found that "materiality of falsehood is an element of the federal mail fraud [and] wire fraud . . . statutes" because the Government "failed to show that [the] language [of these statutes] is inconsistent with a materiality requirement." *Id.* at 25.[3]

2. This well-established rule of construction applies equally when interpreting the RICO statute. That conclusion flows from *Beck* v. *Prupis*, 529 U.S. 494 (2000), which turned to the "well-established common law of civil conspiracy" to "determine what it means to be 'injured . . . by reason of' a 'conspir[acy]'" in the civil RICO context. *Id.* at 500.[4]

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[3] As *Neder* pointed out, in criminal prosecutions brought directly under the mail and wire fraud statutes, the prosecutor needs to show only a "scheme to defraud" - not a "completed fraud," with resulting injury. *Neder*, 527 U.S. at 25. Accordingly, the Court found that Congress did not intend to incorporate the common-law fraud elements of reliance and damages into the requirements for criminal mail and wire fraud. Unlike a criminal mail or wire fraud prosecution, however, a civil RICO claim for treble damages based on mail or wire fraud *does* require a showing of injury to the plaintiff's business or property "by reasons of" - *i.e.*, proximately caused by - the predicate acts. 18 U.S.C. § 1964(c); *see also Holmes*, 503 U.S. at 268-69.

[4] *See also Pasquantino* v. *United States*, -- U.S. --, 125 S. Ct. 1766, 1774 (2005) (looking to common-law to construe wire fraud statute) (citing *Neder*, 527 U.S. at 22-23); *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (When construing the phrase "false pretenses, a false representation, or actual fraud" in the Bankruptcy Code, 11 U.S.C. § 523(a)(3)(A), the Court held that all of these "operative terms . . . carry the acquired meaning of terms of art. They are common-law terms, and . . . they imply elements that the common law has

Thus, under the common-law meaning rule applied in *Neder* and *Beck*, the absence of the term "reliance" does not end the inquiry as to whether reliance is an element of a civil RICO claim based on fraudulent misrepresentations or concealments that violate the mail or wire fraud statutes. Indeed, the absence of the term "reliance" from the RICO statute is hardly surprising given that this element applies only to a subset of civil RICO claims, *i.e.*, those predicated on fraudulent misrepresentations or concealments. Accordingly, the Court must look to the common-law elements of fraud at the time the RICO statute was enacted in 1970 to determine whether a showing of reliance is required in a civil RICO claim based on mail or wire fraud.

3. By 1970, the common-law elements of fraud – including reliance – had been settled for generations. Indeed, even before the turn of the last century, one of the "essential constituents" for a case of common law fraud was reliance.[5] Not only was inducement of the plaintiff to act (or to refrain from action) to his detriment "essential throughout the law of torts," but the common-law also required that the plaintiff "must of course have relied upon it, and believed it to be true." William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964)

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defined them to include."); *Holmes*, 503 U.S. at 268-69 (relying on the common-law concept of proximate causation to construe the phrase "by reason of" in § 1964(c)).

[5] *See Brackett* v. *Griswold*, 112 N.Y. 454, 455 (1889) ("The essential constituents of [an action for fraud and deceit by means of false pretenses] are a false representation, known to be such, made or authorized or caused to be made by defendant, calculated and intended to influence the action of others, which came to the knowledge of plaintiff and in reliance upon which he, in good faith acted, and thus suffered the injury of which he complains. The absence of any one of these particulars is fatal to a recovery.").

("LAW OF TORTS").[6] As the RESTATEMENT (FIRST) OF TORTS explained, the maker of a fraudulent misrepresentation would be liable only if the recipient relied on "the truth of the matter misrepresented" and the recipient's "reliance upon the misrepresentation [was] a substantial factor in determining the course of conduct which result[ed] in his loss." RESTATEMENT (FIRST) OF TORTS § 546 (1938).

When RICO was enacted, therefore, a jury was not left to devise its own definition of proximate cause in the context of common-law fraud. Rather, a jury was required to find that the plaintiff relied on the alleged fraudulent conduct and that such reliance was a substantial factor in causing – *i.e.*, a proximate cause of – the damages asserted. *Id.*

4. Thus, under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder*, 527 U.S. at 23, the Court cannot "infer from the absence of an express reference to [reliance in the RICO statute] that Congress intended to drop that element from [a civil RICO claim predicated on] the fraud statutes," *id.* To the contrary, Congress' silence on this issue in the context of a civil RICO claim must be interpreted as conveying its satisfaction with the elements of common-law fraud. As this Court held in *Beck*, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial

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[6] *See also* LAW OF TORTS, at 729 ("The false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.") (footnotes omitted); *Danann Realty Corp.* v. *Harris*, 5 N.Y.2d 317, 322 (1959).

mind unless otherwise instructed. In such case, *absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.*" 529 U.S. at 500-01 (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)) (emphasis added).

In short, because both the mail and wire fraud statutes require a "fraud," and because "fraud" is defined at common law to require reliance on the alleged misrepresentation or concealment, the "common-law meaning" rule requires the Court to "presume that Congress intended to incorporate" the element of reliance into a civil RICO claim for damages based mail or wire fraud. *See Neder*, 527 U.S. at 23.

B. To Satisfy This Reliance Element, The Civil RICO Plaintiff Must Allege And Prove That It, Not Some Third Party, Relied On The Alleged Fraudulent Behavior.

As indicated above, respondent does not dispute that some showing of reliance is required in a civil RICO suit based on mail or wire fraud. Opp'n at 2. Instead, based on a single recent New York case, respondent argues that "[a] general requirement for reliance is of course broad enough to include third-party reliance." *Id.* at 5. Respondent is mistaken.

1. The "common-law meaning" rule also compels the conclusion that the civil RICO statute requires a specific showing of reliance by the plaintiff ("plaintiff-reliance"), and that a showing of mere third-party reliance is legally insufficient to state a civil RICO claim based on mail or wire fraud. As the RESTATEMENT (FIRST) OF TORTS makes clear, common law fraud required a showing that *the plaintiff*, as opposed to some third party, relied on the alleged misrepresentation in a business transaction:

> The maker of a fraudulent misrepresentation in a business transaction is liable for pecuniary loss caused to its recipient by *his [i.e., the plaintiff's]* reliance upon the truth of the matter misrepresented if *his* justifiable reliance upon the misrepresentation is a substantial factor in determining the course of conduct which results in his loss.

RESTATEMENT (FIRST) OF TORTS § 546 (1938) (emphasis added). Other common law treatises from the time the civil RICO statute was enacted in 1970 similarly refute respondent's theory that a plaintiff need only show third-party reliance to recover on a fraud claim. *See, e.g.*, LAW OF TORTS, at 729 ("The causal connection between the wrongful conduct and the resulting damage, essential throughout the law of torts, take in cases of misrepresentation the form of inducement of *the plaintiff* to act, or to refrain from acting, to his detriment.") (emphasis added); *see also id.* ("The false representation must have played a material and substantial part in leading *the plaintiff* to adopt his particular course.") (emphasis added).

New York common law as of 1970 confirmed that "the traditional elements" of fraud required a showing of plaintiff-reliance. For example, in *Escoett & Co.* v. *Alexander & Alexander, Inc.*, 296 N.Y.S.2d 929 (N.Y. App. Div. 1969), the appellate division ordered a fraud count dismissed because the counterclaimant did "not claim that it was deceived or induced into acting to its detriment, in reliance upon representations made by the [counterclaim defendant]." *Id.* at 929. Rather, "[t]he representations of which the [counterclaimant] complains were made to third parties and not to it, and those representations were relied upon by those third parties and not by it." *Id.*; *see also Ryan Ready Mixed Concrete Corp.* v. *Coons*, 267 N.Y.S.2d 627, 629 (N.Y. App. Div.

1966).[7] Other states adopted a similar interpretation of common-law fraud at this time.[8]

Accordingly, under the common-law meaning rule, Congress is presumed to have intended to incorporate the element of plaintiff-reliance into civil RICO claims based on fraudulent misrepresentations or concealments, such as those proscribed by the mail and wire fraud statutes. *See Neder*, 527 U.S. at 23. Neither "the text [n]or structure of the fraud [and RICO] statutes themselves" can support respondent's effort to rebut this presumption and carve out an exception to the plaintiff-reliance element for certain claims by a competitor. *Id.* at 23 n.7.

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[7] Respondent asserts that New York law is to the contrary and, in support, cites *Ruffing* v. *Union Carbide Corp.*, 764 N.Y.S.2d 462, 465 (N.Y. App. Div. 2003). *See* Opp'n at 5 n.1. This assertion is misplaced. Neither *Ruffing* (decided in 2003) nor any of the cases on which it relied was decided contemporaneously with the civil RICO statute. Therefore, Congress certainly did not intend to incorporate such precedent as part of RICO. *See Neder*, 527 U.S. at 22 (looking to state of law at time of statutes' enactments to discern common-law meaning of statutory terms).

[8] *See, e.g., Schock* v. *Jacka*, 460 P.2d 185, 188 (Ariz. 1969) ("requiring reliance [on the fraud] by plaintiff to his damage"); *Piedmont Trust Bank* v. *Aetna Cas. & Sur. Co.*, 171 S.E.2d 264, 267 (Va. 1969) (holding that "one who seeks to hold another in fraud must clearly show that he relied upon the acts and statements of the other"); *First Credit Corp.* v. *Behrend*, 172 N.W.2d 668, 671-72 (Wisc. 1969) ("[I]n any fraud case, in order to secure relief, the complaining party must honestly confide in the representations or, as has been said, must reasonably believe them to be true."); *State Farm Mut. Auto. Ins. Co.* v. *Wall*, 92 N.J. Super. 92, 97-98 (1966) (holding that plaintiff must show "reliance upon the truth of the representations . . . to warrant recovery of damages in an action for fraud and deceit.").

2. Finally, respondent can find no support for its position in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), which was cited by the Court of Appeals. In *Sedima*, this Court merely held that a civil RICO plaintiff is not limited to redress of a "racketeering injury" but, rather, may recover damages caused by the predicate acts themselves. *Id.* at 495-97. Quoting the dissent in that case, the Court of Appeals cited *Sedima* for the unremarkable proposition that the civil RICO statute was designed to benefit a defendant's competitors "who could '*plead and prove* that they suffered . . . injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business . . . through a pattern of racketeering activity.'" *Ideal Steel Supply Corp.*, 373 F.3d at 260 (quoting *Sedima*, 473 U.S. at 519-20) (Marshall, J., dissenting)) (emphasis added). Putting aside the fact that this quotation is lifted from the dissent, the statement is not inconsistent with a requirement of plaintiff-reliance.

Moreover, the majority in *Sedima* clearly held that competitors who choose to sue under RICO must plead and prove damages that "flow from the commission of the predicate acts." *Sedima*, 473 U.S. at 497. This holding is entirely consistent with petitioners' view that, when the RICO predicate acts are mail or wire fraud, the competitor must plead and prove, consistent with the common-law fraud elements, that it actually relied on the alleged fraudulent misrepresentations or concealments. *Sedima* thus adds nothing to this inquiry.

II. Public Policy Dictates That Civil RICO Claims Based On Mail Or Wire Fraud Satisfy The Element Of Plaintiff-Reliance.

Public policy considerations also strongly favor petitioners' position that civil RICO claims based on mail or wire fraud require a showing of plaintiff-reliance.

A. Adopting The Common-Law Element Of Plaintiff-Reliance Would Help Curb "Massive And Complex Damages Litigation" By Plaintiffs Harmed Only Indirectly By A RICO Violation.

Such a rule is necessary, for example, to ensure that only those *directly* harmed by RICO violations are able to recover under the statute. In *Holmes*, this Court pointed to a serious "fear," grounded in public policy, that "[a]llowing [civil RICO] suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burden the courts, but [would] also undermine the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *Assoc. Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U.S. 519, 545 (1983)); *see also Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 487 (1985) (noting that three dissenting members of Congress "feared the treble-damages provision would be used for malicious harassment of business competitors"). In particular, this Court found that allowing indirectly injured plaintiffs to sue under RICO would force courts to grapple unnecessarily with two problems: (1) difficulties in "ascertain[ing] the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"; and (2) complications in "apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Holmes*, 503 U.S. at 269

(citation omitted). Both of these problems are presented in this case.

First, respondent's allegations, and similar claims, raise complex questions about the amount of damages "attributable to the violation." *Holmes*, 503 U.S. at 269. Respondent alleges that it lost customers, and thus profits, because petitioners did not charge these customers sales tax and submitted false tax reports to the State. *Ideal Steel Supply Corp.*, 373 F.3d at 254-55. But the mere submission of false tax reports to the State, and the State's reliance on those reports, obviously did not itself cause any customer to choose one competitor over the other. Rather, the alleged harm is based on speculation that, but for the alleged fraud, customers themselves would have chosen to purchase steel products from respondent instead of from petitioners. *Id.* at 255.

As predicted in *Holmes*, it would be very difficult to ascertain the amount of respondent's (or a similarly-situated plaintiff's) lost profits attributable to the alleged RICO violation as opposed to ordinary and independent business factors. *Holmes*, 503 U.S. at 269. Customers may have chosen petitioners' products over respondent's products for reasons wholly independent of the alleged "cash, no tax" practice. For example, these customers may have preferred petitioners' service, the location of petitioners' business, or the products offered by petitioners. In fact, some of these customers may not even have been aware that they were not being charged sales tax. And respondent's sales may have waned because of poor marketing or other business decisions unrelated to the alleged fraud.

The *Holmes* Court suggested that such "massive and complex damages litigation" issues be eliminated from RICO litigation by incorporating a strict proximate cause requirement into all RICO claims. *Holmes*, 503 U.S. at 274.

This Court should reaffirm that policy by expressly incorporating the common-law element of plaintiff-reliance into civil RICO claims based on mail or wire fraud.

Second, respondent's allegations, and similar claims, create a serious risk of "multiple recoveries." *Holmes*, 503 U.S. at 269. Any recovery by respondent here would not prevent the direct victim (here, the State) from seeking additional relief, thus resulting in the potential for multiple, non-overlapping recoveries. Specifically, the State arguably could pursue its own RICO claim against petitioners even if petitioner were ordered to pay respondent treble damages in this lawsuit. Such a result could subject petitioners to not one, but two, treble damages awards. *Cf. Carter* v. *Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (noting that RICO allows for "allows for treble, not sextuple damages").

Moreover, under respondent's interpretation of the civil RICO statute, if National Steel had five competitors instead of only one, there would be six viable civil RICO lawsuits (including a potential action by the State). There is no reason to believe that Congress intended RICO to authorize such multiple recoveries. To the contrary, this is the precise kind of situation that the Court hoped to avoid in *Holmes*. *See Holmes*, 503 U.S. at 269.

As *Holmes* recognized, the litigation difficulties that would arise if indirectly injured plaintiffs were allowed to sue under RICO are not counterbalanced by any legitimate public policy benefits. As the Court explained there, "the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269-70.

In short, requiring a plaintiff to show that it and not some third party actually relied upon the alleged fraud will further the sound public policy of avoiding undue burdens on the courts while maintaining "the effectiveness of treble-damages suits.'" *Id.* at 274.

B. Adopting The Common-Law Element Of Plaintiff-Reliance Would Prevent Plaintiffs From Transforming Ordinary Business Tort And Contract Claims Into Complex RICO Claims.

Adopting respondent's interpretation of the civil RICO statute would also vastly multiply the number of RICO claims alleged in ordinary business litigation. Under respondent's broad interpretation of RICO, many ordinary business claims - such as claims for unfair competition, antitrust violations, Lanham Act violations, product liability, misappropriation of trade secrets and accountant liability, to name just a few - also would support a civil RICO claim based on mail or wire fraud so long as a third party relied on the alleged fraudulent behavior and there is some arguable nexus between that behavior and the alleged damages. Such a reading of RICO, if adopted by this Court, would expand the pool of potential RICO plaintiffs and lawsuits, overcomplicate business litigation, and significantly expand the business community's potential liabilities under the statute.

Lower federal courts have already recognized these problems and have sought to preempt them. For example, the Seventh Circuit has held that a civil RICO claim based on mail fraud "does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250,

1258 (7th Cir. 1995). Similarly, the Sixth Circuit has held that civil RICO claims should not be broadly construed to mirror other civil claims: "Although a general fraudulent scheme which incidentally affects a person may support other civil claims against the wrongdoer, the victim cannot assert a RICO claim [based on fraud] absent evidence that the defendant made representations to the victim." *Central Distribs. of Beer, Inc.* v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993).

These holdings make sense as a matter of policy because they help prevent plaintiffs from transforming routine business litigation into complex RICO actions.

C. Adopting The Common-Law Element Of Plaintiff-Reliance Would Prevent RICO From Becoming A General-Purpose Private Attorney General Statute.

The potential for increased RICO litigation is especially apparent in this case, in which the respondent is essentially bringing a private attorney general suit based on the alleged submissions of false documents to the State. Absent a plaintiff-reliance requirement, virtually anyone who believes he has been indirectly injured by mail or wire fraud directed at a governmental agency could bring a civil RICO claim based on that conduct. And that possibility would likely transform RICO into a general-purpose private attorney general or *qui tam*–type statute.

There is no evidence, however, that Congress intended RICO to be read so broadly as to authorize actions similar to those authorized under the False Claims Act. In contrast to RICO, the False Claims Act *expressly* provides that private individuals are permitted, under certain circumstances, to bring actions against persons who have made false or fraudulent claims for payment to the United States. *See* 31 U.S.C. §§ 3729-30. No provision of the civil RICO statute

authorizes such a cause of action, nor should such a provision be read into RICO.

Requiring a plaintiff to show that it rather than a third party actually relied upon the alleged fraud will prevent RICO from becoming a general-purpose private attorney general statute by which private plaintiffs can sue businesses based upon alleged frauds directed at governmental bodies. Such a requirement ensures that such claims, if asserted at all, are asserted by the injured governmental body.

D. Adopting The Common-Law Element Of Plaintiff-Reliance Would Discourage The Filing Of, And Facilitate The Dismissals Of, Frivolous Civil RICO Claims.

Finally, requiring a showing of plaintiff-reliance in civil RICO suits based on mail or wire fraud would serve to curb frivolous civil RICO suits. Such a requirement would "forc[e] courts to distinguish bona fide victims from plaintiffs who simply made poor judgments in transactions and should, therefore, suffer their own losses." Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 861 (2005).

The current state of RICO litigation demands such a distinction. Because of its attractive treble damages provision, the civil RICO statute has "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). Since 1986, for example, nearly 1,000 civil RICO cases have been filed per year. *See* Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* § 2.03 at 2-41 (2005). As Chief Justice Rehnquist observed, "there is no such thing as prosecutorial discretion to limit the use of civil RICO by

plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989).

Civil RICO claims based on mail or wire fraud are particularly subject to abuse given that "[t]he vast majority of civil RICO cases use mail, wire, or securities fraud as the predicate offense." Susan Getzendanner, *Judicial "Pruning" Of "Garden Variety Fraud" Civil Rico Cases Does Not Work: It's Time For Congress To Act*, 43 VAND. L. REV. 673, 678 (1990). Indeed, Chief Justice Rehnquist went so far as to question "[w]hether it is a good idea to have a civil counterpart for wire fraud and mail fraud" at all, given that, "[w]ith the growth of long distance communication and technology, mail fraud and wire fraud - which applies to all telephone calls - have a much wider sweep now than they did when the statutes were enacted." Rehnquist, 21 ST. MARY'S L.J. at 10.

These policy concerns militate strongly in favor of incorporating a plaintiff-reliance element into civil RICO claims based on mail or wire fraud. For one thing, a plaintiff-reliance requirement will reduce the number of plaintiffs who can assert RICO claims consistent with good-faith pleading requirements. Moreover, if a plaintiff files a civil RICO claim based on mail or wire fraud without having actually relied upon a fraudulent misrepresentation or concealment, the plaintiff-reliance requirement puts the court in a better position to dismiss, or grant summary judgment on, that claim once it becomes apparent that no reliance actually occurred.[9] In both of these ways, a plaintiff-reliance

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[9] *Compare Central Distribs. of Beer, Inc.* v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993) (affirming summary judgment in favor of the defendant,

requirement reduces the number of meritless civil RICO claims draining judicial resources from more pressing priorities, and creating needless litigation costs for businesses around the country.

* * * * *

In sum, respondent's attempt to have the Court abolish the common-law element of plaintiff-reliance in civil RICO suits based on mail or wire fraud runs headlong into the "common-law meaning" rule of statutory interpretation. It would also have disastrous consequences. The Court of Appeals erred in adopting respondent's arguments and thereby construing the civil RICO statute well beyond its intended breadth.

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in part, because the plaintiff had not "produced a shred of evidence" that the plaintiff "relied on any statement or omission to its detriment"); *Fla. Evergreen Foliage* v. *E.I. DuPont De Nemours & Co.*, 336 F. Supp. 2d 1239, 1279 (S.D. Fla. 2004) ("Summary judgment is also entered in DuPont's favor on Plaintiff-Growers' RICO claims, Counts VI and VII. The undisputed record shows that Plaintiff-Growers cannot prove reasonable reliance or direct injury."); *Lifschultz Fast Freight, Inc.* v. *Consol. Freightways Corp.*, 805 F. Supp. 1277, 1292 (D.S.C. 1992) (granting summary judgment in favor of the defendant because the plaintiff "presented no evidence" of detrimental reliance), *aff'd without op.* 998 F.2d 1009 (4th Cir. 1993); *with Feely* v. *Whitman Corp.*, 65 F. Supp. 2d 164, 174 (S.D.N.Y. 1999) (denying summary judgment to the defendants because "the common law requirement of justifiable reliance is not an element of wire or mail fraud under federal law").

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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