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.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in holding that petitioner was required to establish "reasonable reliance" under 18 U.S.C. 1964(c) for its civil RICO claim alleging mail and wire fraud as predicate acts?

RULE 29.6 STATEMENT

Respondents NBM L.L.C., Non-Ferrous BM Corp., Yang Mei Corp., GEG International, Inc., BOC Co., CBL Ltd., Century Ltd., and RCHFINS, Inc., have no corporate parents, are not publicly traded, and no publicly held company owns ten percent or more of any of their stock. NBM L.L.C. is partially owned by Non-Ferrous Corp.

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BRIEF FOR THE RESPONDENTS

Respondents NBM, L.L.C. et al. respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in an appendix to this brief.

STATEMENT

The Second Circuit held in this case that petitioner Bank of China (Bank) could recover under the civil remedy provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, only if it proved that it reasonably relied upon the allegedly fraudulent misrepresentations that the Bank alleged constituted RICO predicate acts of mail and wire fraud. Petitioner challenges that ruling, arguing that it should recover treble damages under RICO even if it was fully aware that the purportedly fraudulent statements were false.

1. Under RICO, it is "unlawful for any person employed by or associated with any enterprise * * * to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity * * *." 18 U.S.C. 1962(c). The statute lists various predicate offenses that constitute "racketeering activity," including mail, wire, and bank fraud. *Id.* § 1961(1)(B). A "pattern of racketeering activity" requires at least two predicate acts within a ten-year period. *Id.* § 1961(5). The statute includes a detailed enforcement scheme, providing for criminal penalties (Section 1963), criminal forfeiture (*ibid.*), and civil suits for injunctive relief by the Attorney General (Section 1964(b)).

The statute also provides a civil damages remedy for plaintiffs who meet an additional requirement. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chap-

ter may sue therefor * * * and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee * * *." 18 U.S.C. 1964(c). This provision requires a civil plaintiff to establish that the defendant's conduct was the proximate cause of his or her injuries. *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

2. During the 1990s, respondent NBM L.L.C. obtained a series of loans from petitioner, the New York branch of the Bank of China. Pet. App. 4-5. The loan agreements provided that the funds would be used to finance metal and other trade transactions. Much of the funds, however, were used instead for other purposes, including speculation in foreign currencies. Some of the funds also were transferred among the several corporations owned and controlled in various capacities by respondents Chou, Liu, and their family members and associates.[1] Some of those funds were listed as "trade debt" and used as collateral in subsequent loan applications to the Bank. *Ibid.*

At trial, respondents presented evidence that the Bank was well aware of the relationship among respondents' various corporations, knew that the loan applications contained false information, and understood that the proceeds from the loans were being used to finance ventures other than trade transactions. See Pet. App. 16-17; see also, *e.g.*, Tr. 1434-40, 1444-50, 1588-92, 1597-99, 1606-20, 1667-70. In fact, respondents' evidence suggested that Bank officials had actively encouraged false representations in the loan documents to assist the Bank in avoiding regulatory restrictions on its financing activities. See Tr. 1606-20. Thus, for almost a decade, the Bank was aware of respondents' activities and raised no objection, all the while receiving millions of dollars in fees and interest. However, in 2000, the Bank asserted for

[1] These firms include respondents NBM L.L.C., Non-Ferrous BM Corp, Yang Mei Corp., and RCHFINS, Inc.

the first time that respondents had engaged in fraud in obtaining their loans and demanded immediate payment of all outstanding debt. See, *e.g.*, Tr. 1703-13. In the aftermath of the ensuing collapse of respondents' businesses, the Bank was unable to collect a portion of the funds it was owed under the loan agreements.

3. In February 2001, the Bank filed suit against respondents, asserting state common law claims of breach of contract, fraud, and unjust enrichment.[2] But the Bank also sought to make out a federal case under RICO, claiming under that statute treble the unpaid balance of its loans. As predicate offenses, the Bank asserted that respondents engaged in a pattern of mail, wire, and bank fraud. Compl. ¶ 283. Significantly, the Bank's mail and wire fraud claims rested on alleged false misrepresentations – in contrast to, for example, extortion – as the Bank alleged that respondents used the mails and wires to obtain loans from the Bank "by false and fraudulent pretenses or promises." *Ibid.*

At trial, respondents attempted to defend against the Bank's RICO and common law fraud claims by showing that the Bank knew that the purported fraudulent statements were false and therefore could not have relied upon them. See Tr. 1533-35. As the court of appeals later explained, respondents put on evidence that respondents "socialized extensively with officers" of the Bank – who, "[a]ccording to defendants," "were intimately familiar with the defendants' transactions." Pet. App. 16. Moreover, respondents presented evidence that "essentially every manager and deputy manager with whom the defendants dealt at the New York Branch was terminated, demoted or transferred out of that Branch following the Bank's internal investigation of defendants' transactions." *Ibid.* Tellingly, none of these officials were called as wit-

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[2] The Bank also alleged that respondents aided and abetted the breach of the fiduciary duties owed to the Bank by a former employee, Patrick Young, who allegedly took money from respondents in connection with the approval of their loans. Pet. App. 4-5.

nesses for the Bank or otherwise made available to respondents for their defense. *Ibid.* (noting that by the time of trial "all of the employees [were] outside the District Court's subpoena power"). Instead, the only bank employee available at trial had not worked at the New York branch during the relevant period and therefore "had no knowledge of the various meetings regarding the transactions that defendants contend they had with the New York Branch officers." *Id*. 16-17. [3]

Respondents thus asked the court to instruct the jury that "if senior management knew of the activities of Mr. Chou or the other defendants, then that knowledge must be imputed to the bank itself." Pet. App. 66. The district court denied the motion. *Id*. 71. Citing two *criminal* RICO cases (which did not involve the "by reason of" requirement of Section 1964(c), the court instead concluded that knowledge by the bank officials was not a defense to a civil RICO claim predicated on mail, wire, or bank fraud. *Id*. 66-72.

Accordingly, in charging the jury on the Bank's RICO count, the district court did not instruct the jury that it was required to find that the Bank relied upon the alleged misrepresentations. Instead, the court simply instructed the jury that the Bank was required to prove that it was injured by the fraud and that its injury was "proximately caused by defen-

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[3] Respondents further presented evidence that one of the shell companies involved in the scheme was incorporated by the Bank's own lawyers, that one of the Bank's general managers was an officer for that company, see Tr. 1673-79, and that the Bank even sent respondent John Chou a document to be notarized on behalf of one of the shell companies, belying any claim that the Bank was unaware of who really controlled the company, see *id.* 1585-90. Moreover, respondents presented evidence that the Bank's management not only knew that respondents' loans were not backed by metals trades, but in fact created and structured the currency arbitrage transactions while – to appease regulators – fabricating documents to make the transactions look like metals trades. See, *e.g.*, *id.* 1606-20.

dants in violation of RICO," Pet. App. 105 – that is, 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," *ibid*.

By contrast, the court *did* instruct the jury that reliance was an element of a common law fraud claim. Pet. App. 90-91. But the court immediately clouded that instruction by charging the jury that "even if certain officers of the bank knew the true nature of the transactions, the bank nevertheless could have been defrauded." *Id*. 92-93.

The jury returned a verdict in petitioner's favor on numerous claims, including the civil RICO counts. Pet. App. 45-57. It awarded more than $35.4 million in compensatory damages and $96.4 million in punitive damages. *Id*. 4. Pursuant to Section 1964(c)'s treble damages clause, the district court entered a judgment in favor of the Bank in the amount of $106,361,504.40, three times the RICO compensatory damages. *Ibid*. [4]

4. Respondents appealed, arguing that the jury instructions "precluded the jury from considering their defense that the actions complained of were sanctioned and authorized by the Bank's officers, and that therefore the Bank could not have detrimentally relied on any of the [respondents'] representations." Pet. App. 8.

The Second Circuit agreed. Section 1964(c), it noted, permits suits only by entities "injured * * * by reason of a violation of" RICO. The court recognized that this provision requires civil RICO plaintiffs to prove that defendants' actions were the proximate cause of their injuries. Pet. App. 9 (citing *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258

[4] The court held that this was the maximum amount the Bank could recover on any of the causes of action and that the Bank could not recover both punitive and treble damages. Pet. App. 4 n.1.

(1992)). Prior circuit precedent had moreover established that "[i]n the context of an alleged RICO predicate act of *mail* fraud * * * to establish the required causal connection, the plaintiff [is] required to demonstrate that the defendant's misrepresentations were relied on." *Ibid*. (quoting *Metromedia Co.* v. *Fugazy*, 983 F.3d 350 (CA2 1992) (emphasis added) (first alteration in original)). Other courts had reached the same conclusion with respect to RICO claims predicated on wire fraud. *Id.* 10 (citing *Summit Props. Inc*. v. *Hoechst Celanese Corp.*, 214 F.3d 556, 562 (CA5 2000); *Appletree Square I, Ltd. P'ship* v. *W.R. Grace & Co.*, 29 F.3d 1283, 1286 (CA8 1994); *Caviness* v. *Derand Res. Corp.*, 983 F.2d 1295, 1305 (CA4 1993)). Finding no reason to reach a different result for RICO claims arising under the bank fraud statute either, the Second Circuit thus held that "to prevail in a civil RICO action predicated on any type of fraud, including bank fraud, the plaintiff must establish "reasonable reliance" on the defendants' purported misrepresentations or omissions." *Id*. 12.

The court acknowledged that under principles of agency law, the knowledge of a corporation's officers that certain representations were false will not always be attributed to the corporation itself. Pet. App. 15. The court explained that "when an agent acts adversely to its principal, the agent's actions and knowledge are not imputed to the principal." *Ibid*. The court noted, however, that this exception is "narrow and applies only when the agent has 'totally abandoned' the principal's interests." *Ibid.* (citations omitted). In any event, the jury was not asked to apply these agency principles. *Ibid*. Indeed, it was not asked to consider the question of reliance at all. [5] Thus, the failure to give an "appropriate instruction" on

[5] The court observed that the only instruction regarding reasonable reliance was given as part of the common law fraud instruction rather than the RICO charge. Pet. App. 13. That instruction, however, was immediately followed by the statement that the Bank could be defrauded even if its management was aware of the

agency law principles "in conjunction with a 'reasonable reliance' instruction for both the common law and civil RICO claims," *ibid.*, resulted in a charge that "misstated the law," *id*. 16.

This error, the court of appeals held, was not harmless. The court reviewed the record and found that "there certainly was evidence from which the jury could have inferred that the Bank's employees or agents were aware of the defendants' purportedly fraudulent representations, and that therefore, the Bank did not rely on the representations." Pet. App. 17. See *supra* at 3-4. In light of this evidence, the court vacated the judgment and remanded the case for a new trial. *Ibid*.

5. On June 27, 2005, this Court granted the Bank's petition for certiorari, limited to the question whether a civil RICO plaintiff alleging mail and wire fraud as predicate acts must establish reasonable reliance to recover under 18 U.S.C. 1964(c). It did not agree to review the Second Circuit's holding that claims resting on a predicate act of bank fraud require proof of reliance as well.

After the petition for certiorari was granted, respondents asked the district court to stay proceedings on any retrial pending this Court's disposition of the case. The district court denied that request on July 11, 2005. Respondents' subsequent request for a stay from the Second Circuit was denied on August 16, 2005. On August 19, 2005, respondents requested a stay from this Court. Justice Ginsburg denied the motion on August 22, 2005. See App. No. 05A176 (Ginsburg, J., in chambers).

Accordingly, while the case has been pending in this Court, the district court conducted a second trial under new instructions purporting to incorporate the reliance requirement the Bank has challenged in its briefs to this Court. On Sep-

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fraud. The Second Circuit concluded that "[t]hese two instructions are at best confusing, and at worst irreconcilable." *Id*. 14. Petitioner does not challenge that holding in this Court.

tember 20, 2005, the jury returned a verdict in the Bank's favor, although for approximately $1.1 million less than the original verdict. Petitioner has moved for treble damages pursuant to Section 1964(c), while respondents have moved for a judgment notwithstanding the verdict and for a new trial on various grounds. Those post-trial motions are currently pending.

SUMMARY OF THE ARGUMENT

As a preliminary matter, because a ruling in the Bank's favor would neither result in a reinstatement of the jury verdict in its favor nor affect the retrial of the case, the petition for certiorari should be dismissed as improvidently granted. The judgment now before the Court rests on a general verdict predicated on claims of mail, wire, and bank fraud. That verdict is incontestably invalid under the Second Circuit's holding that bank fraud requires proof of reliance, a holding this Court declined to review. Nor would reversal with respect to the mail and wire fraud predicate acts have a consequence in the sense of affecting the terms of a retrial of the case. The retrial has already concluded with a judgment in the Bank's favor under jury instructions that purport to comport with the Second Circuit's decision favoring respondents. Indeed, the new judgment in the Bank's favor is almost identical to the judgment it is asking this Court to reinstate. Because the case has taken on a wholly hypothetical air, with no genuine prospect that the outcome will have any consequence for the parties, the petition should be dismissed.

If the Court does proceed to consider the merits of petitioner's claims, it should affirm the decision of the Second Circuit. The court of appeals correctly held that to qualify for treble damages under the civil RICO provision, petitioner was required to prove that it reasonably relied on respondents' allegedly fraudulent misrepresentations.

The statute provides a remedy only for those "injured * * * by reason of" a RICO violation. 18 U.S.C 1964(c). The parties agree that to satisfy this requirement, a plaintiff must

show that its injury was proximately caused by the predicate offense. See *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992). Hence, the Bank acknowledges that it must show that respondents' misrepresentations – which are the basis of the claimed violations of the mail and wire fraud statutes – were the proximate cause of any injuries it suffered.

The Bank challenges the Second Circuit's determination that proximate cause in this context requires proof that it relied on respondents' misrepresentations. But the holding of the court of appeals is compelled by settled precedent. In *Beck* v. *Prupis*, 529 U.S. 494 (2000), this Court held that the rules for recovery under Section 1964(c) are to be derived from the rules governing analogous civil claims at common law. The most direct analogue to the Bank's claims in this case is a common law action for fraud. Proximate cause is established in a common law fraud action through proof of reliance upon the defendant's misstatements. That common law principle has been settled for centuries. And it is dispositive of this case. The Second Circuit was accordingly correct in reversing the judgment for failure to instruct the jury that respondents were not liable if the Bank did not rely on the alleged misrepresentations in question.

The common law requirement of reliance is consistent with the plain text of the statute. As a simple matter of logic and experience, it is impossible for a fraudulent misrepresentation to be the "reason of" an injury unless the victim believes and relies upon it. It is thus unsurprising that petitioner has yet to explain how respondents' false statements could have been the cause of its injuries if it did not believe the statements and did not act in reliance upon them.

Moreover, permitting recoveries in misrepresentation cases without proof of reliance would create a range of ill effects Congress could not have intended. Among other things, it would permit recoveries even if the plaintiff was fully aware that a misrepresentation was not true and even if the plaintiff incurred the loss solely to recover treble damages

under RICO. Even less strategic plaintiffs would be given a strong incentive to transform ordinary state law tort and contract claims into federal RICO cases to take advantage of the more lenient standard of causation and the possibility of a treble damage award.

The Bank's arguments to the contrary are unpersuasive. It argues principally that reliance is not required for a *criminal* conviction under the mail and wire fraud statutes. That is true but irrelevant. The reliance requirement arises out of Section 1964(c)'s limitation of civil recoveries to those injured "by reason of" a RICO violation. That "by reason of" limitation has no application to a criminal prosecution. Congress gave the Government a considerably freer hand in employing the criminal laws, in no small part to permit it to bring a criminal prosecution before anyone has been victimized by the fraud. The *civil* RICO provision, on the other hand, is clearly directed at compensating victims; without reliance, there can be no victim in a case alleging fraudulent misrepresentation.

Petitioner next argues that reliance should not be required in this case because there are *other* kinds of schemes to defraud that do not necessarily involve a misrepresentation (including, for example, schemes to embezzle). But that is no reason to excuse proof of reliance in a case that *does* involve a claim of fraudulent misrepresentation. This Court has repeatedly interpreted the mail and wire fraud statutes, as well as Section 1964(c), in accordance with the particular type of fraudulent scheme at issue. The alternative – leaving juries to decide whether reliance should be required in any particular case – serves no legitimate purpose and risks arbitrary results in factually indistinguishable cases. It is precisely for these reasons that the common law developed the reliance requirement for fraudulent misrepresentation cases in the first place. There is no evidence that Congress intended a different result under RICO.

ARGUMENT

I. The Court Should Dismiss The Writ of Certiorari As Improvidently Granted In Light Of Intervening Developments.

As a result of events subsequent to the filing of the petition, a ruling in the Bank's favor no longer will have any practical effect on the outcome of this case. Accordingly, the writ should be dismissed as improvidently granted.

First, given the limited questions upon which certiorari has been granted, the judgment of the district court that the Bank seeks to reinstate would be invalid even if the Bank prevailed. If this Court were to conclude that the Second Circuit erred in holding that reliance is required in a civil RICO case alleging mail and wire fraud, the district court's judgment would nonetheless remain fatally flawed. The jury in this case returned a verdict on a single RICO count alleging predicate acts of mail, wire, and/or bank fraud. Because the jury rendered a general verdict on that count, see Pet. App. 55-56, it is impossible to tell whether the jury found that the Bank proved its allegations of mail and wire fraud, or whether the Bank succeeded only in demonstrating bank fraud. It is thus entirely possible that the jury found in petitioner's favor solely on the basis of the bank fraud claims under an instruction that erroneously failed to inform the jury that reliance is an element of a bank fraud claim. This Court notably declined to review whether reliance is a required element of a civil RICO claim predicated on bank fraud. Compare Pet. i (requesting review of bank fraud holding in second question presented) with *Bank of China* v. *NBM L.L.C.*, 125 S. Ct. 2956 (June 27, 2005) (No. 03-1559) (granting certiorari limited to mail and wire fraud question). Thus, this Court's decision in this case will leave undisturbed the Second Circuit's holding that the jury instructions leading to the RICO verdict were in error at least to the extent they permitted recovery under a bank fraud theory without proof of reliance. Under these circumstances, a retrial would be required even if this

Court reversed the Second Circuit on the mail and wire fraud question. See, *e.g.*, *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 30 (1962) (holding that in the case of a general verdict, if "upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld") (quoting *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884)); cf. *Griffin* v. *United States*, 502 U.S. 46, 59 (1991) (reaffirming rule that when general verdict in criminal trial may rest on erroneous instruction, retrial is required).[6]

Nor would this Court's decision on the mail and wire fraud question have any practical effect on the retrial in this case as to those predicate acts. The retrial has already taken place and petitioner has already prevailed under a RICO instruction requiring reliance. It thus appears that this Court's disposition of the question presented will be of no consequence to this case. Although it is true that petitioner obtained a somewhat larger verdict in the first trial, there is nothing to suggest that the three-percent difference in damage awards is attributable to the jury instructions on reliance rather than the ordinary variability of damage awards among different juries. At the same time, this difference in damages is exceedingly unlikely to have any practical effect, as the respondents are in bankruptcy proceedings and unable to satisfy either judgment.[7] The difference in damage awards, along with the possibility of a subsequent reversal of the second judgment on other grounds, may prevent the case from being

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[6] In addition, even if this Court reversed the RICO holding in its entirety, the Second Circuit could yet determine that a retrial was necessary because of the erroneous admission of unqualified expert testimony. See Pet. App. 23 (declining to decide whether error was harmless in light of conclusion that retrial was required because of erroneous RICO instructions).

[7] See *In re: N.B.M. L.L.C., John Chou, Sherry Ping Liu, and John Chou*, No. 01-38345 (Bankr. D.N.J.); *In re: John Q. Chou and Sherry P. Liu*, No. 01-38346 (Bankr. D.N.J.).

moot. But the lack of any foreseeable practical consequence for this Court's judgment counsels strongly in favor of dismissal. See *Ticor Title Ins. Co*. v. *Brown*, 511 U.S. 117, 121 (1994).

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). In light of developments that have made a decision on the question presented "quite unnecessary in law, and of virtually no practical consequence in fact," the petition should be dismissed as improvidently granted. *Ticor Title Ins. Co*., 511 U.S. at 121.

II. The Second Circuit Correctly Required Petitioner To Demonstrate That It Reasonably Relied Upon Respondents' Alleged Misrepresentations.

This case presents the question whether a plaintiff can recover treble damages under RICO on the basis of misrepresentations amounting to wire and mail fraud when the plaintiff did not rely on those misrepresentations.

Although the question presented is broadly worded, this Court need not decide whether reasonable reliance[8] is required in every case predicated upon acts of wire or mail fraud. The scope of these statutes is a matter of dispute and may include forms of fraud that are quite different than the conduct at issue here. See, *e.g.*, *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987) (mail fraud statute encompasses embezzlement). This case, however, presents a traditional case of fraud by misrepresentation. See Compl. ¶ 283 (alleging violations arising from "false or fraudulent pretenses, presen-

[8] This Court also need not decide whether the statute requires "reasonable" or "justifiable" reliance, see *Field* v. *Mans*, 516 U.S 59, 69-76 (1995) (discussing distinction), as in this case the Bank was not required to prove even *actual* reliance. Respondents use the phrase "reasonable reliance" in this brief simply because it is the phrase used in the question presented.

tations or promises"); Pet. App. 5 ("In sum, Bank of China claimed that various defendants borrowed huge sums from the Bank through false and misleading representations, and in many cases, forged documents.").

Although the parties ultimately disagree whether reliance is required in a misrepresentation case, at the outset at least, they share considerable common ground. The Bank accepts for present purposes that the knowledge of its officials was attributable to the Bank under ordinary principles of agency law. See Pet. Br. 9 n.5 (noting that agency holding "is not the issue before this Court"). The Bank's position is that even if it knew, through its officials, that respondents' representations were fraudulent, it could nonetheless recover treble damages under RICO because Section 1964(c) does not require reliance.[9]

The parties also agree on the elements of the predicate acts underlying the Bank's RICO claim and the common law analogue to that claim. The Bank argues, and respondents agree, that reliance is not an element of the predicate acts of the crimes of mail and wire fraud. See Pet. Br. 22-28. The Bank also acknowledges that, by contrast, reliance *is* an element of a common law misrepresentation claim. *Id.* 21; see also *infra* at 17-18.

The question presented by this case, at bottom, is the significance of that distinction. The Bank recognizes that in order to show that its injury was "by reason of" respondents' violation, it must prove that the alleged fraud was the proximate cause of its losses. Pet. Br. 32. But in the Bank's view, the Second Circuit erred in construing this requirement in light of the common law of fraud and holding that the Bank could not prove causation in this case without first proving that it relied on the alleged misrepresentations. On that criti-

[9] Thus, the Bank does not dispute the Second Circuit's conclusion that if reliance is properly required, the jury instructions were erroneous and a retrial was required. See Pet. App. 12-17.

cal point, the Bank is wrong and for that reason the decision below should be affirmed.

A. Reasonable Reliance Is An Element Of A Civil RICO Claim Predicated On Fraudulent Misrepresentations.

In enacting RICO, Congress provided a treble damages remedy only to those "injured * * * by reason of" a RICO violation. 18 U.S.C. 1964(c). In a case predicated on allegations of misrepresentation, this requirement can be satisfied only by showing that the plaintiff relied on the fraudulent statements to its detriment.

1. The Bank acknowledges that in order to show that it suffered an "injury * * * by reason of" a RICO violation, it must show that the violation proximately caused its losses. See Pet. Br. 32. Indeed, this Court so held in *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 266-68 (1992). In so doing, the Court recognized that the content of the proximate cause requirement can vary for different types of predicate acts, as it does at common law depending on the type of tortious conduct alleged. See *id.* at 268 (noting the "many shapes this concept took at common law"); *id*. at 288 (Scalia, J., concurring in judgment) (finding it "obvious that the proximate-cause test * * * that will be applied to the various causes of action created by 18 U.S.C. § 1964 [is] not uniform, but [will] vary according to the nature of the criminal offenses upon which those causes of action are based").

In deciding what proximate cause requires in the context of a particular type of claim, this Court has turned to the common law. See *Holmes*, 503 U.S. at 268; *Beck* v. *Prupis*, 529 U.S. 494, 500 (2000). The decision in *Beck* is especially instructive. The question in that case was "whether a person injured by an overt act done in furtherance of a RICO conspiracy has a cause of action under § 1964(c), even if the overt act is not an act of racketeering." *Beck*, 529 U.S. at 495-96. The answer to that question, this Court explained, turned on an interpretation of the combination of Section

1964(c)'s "by reason of" requirement and the underlying predicate offense of conspiracy. *Id*. at 500-01.[10] To "determine what it means to be 'injured * * * by reason of' a 'conspir[acy],'" the Court held, "we turn to the well-established common law of civil conspiracy." *Id*. at 500 (alteration in original). This was so, the Court explained, because "when Congress uses language with a settled meaning at common law, 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 mind unless otherwise instructed.'" *Id*. at 500-01. Thus, when Congress provided a cause of action to recover for injuries by reason of a RICO conspiracy, it intended courts to employ the same rules of recovery long established at common law for civil conspiracy claims. *Ibid*. Accordingly, in *Beck*, this Court examined the prerequisites at common law for a civil recovery on a conspiracy claim and held that a plaintiff must prove not only a violation of the RICO criminal conspiracy provision, but also that it suffered an injury arising from an act of racketeering (rather than an injury arising solely from an act in furtherance of the conspiracy). *Id*. at 572.

The analysis of this case is dictated by *Beck*. In this case, as in *Beck*, the plaintiff seeks to recover for injuries allegedly suffered "by reason of" a RICO violation. And, as in *Beck*, that claim requires an interpretation of the combined effect of Section 1964(c)'s "by reason of" causation requirement and the underlying predicate offenses. In *Beck*, this Court held that Congress intended courts to construe the provisions together by reference to the common law of civil conspiracy. In this case, Congress just as clearly intended courts to apply the

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[10] For the same reason, this Court has likewise relied upon the common law to interpret the requirements of the underlying mail and wire fraud statute. See *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1774 (2005); *Neder* v. *United States*, 527 U.S. 1, 24-25 (1999).

rules for recovery in civil cases alleging common law frauds. And in *Beck*, the common law of conspiracy excluded damages for overt acts that were merely in furtherance of the conspiracy. In this case, the common law of frauds excludes recovery for damages that are not caused by the plaintiff's reasonable reliance on the defendant's fraudulent misrepresentation.

2. Petitioner acknowledges that "common law fraud * * * has traditionally included a requirement that a plaintiff must show reasonable reliance upon some misrepresentation." Pet. Br. 21. This requirement has been firmly established for more than one hundred years. See, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 70 (1995) (at common law "fraudulent misrepresentation" requires "both actual and 'justifiable' reliance"); *Ming* v. *Woolfolk*, 116 U.S. 599, 602-03 (1886) (collecting authorities).[11] Thus, the *Restatement (Second) of Torts* defines the tort of "fraudulent misrepresentation" to include the element of reliance:

> One who fraudulently makes a misrepresentation of fact * * * is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

RESTATEMENT (SECOND) OF TORTS § 525 (1977).[12] The *Restatement* further elaborates that

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[11] Cf. also 1 JOSEPH STORY, EQUITY JURISPRUDENCE § 199 (10th ed. 1870) ("Nor is it every wilful [original spelling] misrepresentation even of a fact, which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it * * *.").

[12] This Court has repeatedly turned to the *Restatement* in discerning the content of the common law. See, *e.g.*, *Dura Pharms. Inc.* v. *Broudo*, 125 S. Ct. 1627, 1633 (2005); *Doe* v. *Chao*, 540 U.S. 614, 621 n.3, 625 (2004); *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 448 (2003); *Neder*, 527 U.S. at 22; *Field*, 516 U.S. at 70.

> The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if,
>
> (a) he relies on the misrepresentation in acting or refraining from action, and
>
> (b) his reliance is justifiable.

Id. § 537.

This requirement of actual and justifiable reliance, the *Restatement* makes clear, is simply an elaboration of the general requirements of actual and proximate cause in the specific context of a claim of fraud. Thus, the *Restatement* defines "causation in fact" to require *actual* reliance in a case of fraud:

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss.

Id. § 546. The *Restatement* further provides that reliance is required to establish proximate (or "legal") cause:

> A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance.

Id. § 548a. See also *id.* § 541 (stating that a party cannot reasonably rely on a fraudulent misrepresentation that the party knows to be false).[13]

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[13] The version of the *Restatement* in effect at the time of the enactment of RICO was materially indistinguishable. See RESTATEMENT OF THE LAW OF TORTS §§ 525, 537, 541, 546 (1938).

B. The Common Law Requirement Of Reasonable Reliance In Misrepresentation Cases Is Consistent With The Language And Purposes Of RICO.

The common law requirement of reasonable reliance in cases alleging fraudulent misrepresentation is entirely consistent with the language of the statute, common sense, and the purposes animating RICO.

1. As a matter of plain language and common sense, petitioner could not have been "injured * * * by reason of" respondents' purportedly fraudulent statements if it did not, in fact, believe or rely upon them. Quite simply, a lie that is not believed is not the cause of any harm. If, as respondents argue, the Bank was fully aware of the true nature of their businesses and activities, but nonetheless chose to take on the risk of the loans in the hopes of attaining millions of dollars in fees and interest, the Bank cannot plausibly claim that the falseness of respondents' representations was the cause of its losses; the Bank would have loaned respondents the money even if the paperwork reflected what the Bank already knew to be the actual facts of the situation.

Petitioner insists that "reliance is one way to prove proximate causation, but not the only way." Pet. Br. 40.[14] But in all its briefing before the Second Circuit and this Court, the Bank has yet to articulate how it could have proven that it was injured by respondents' misrepresentations without

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[14] The jury instructions in this case were inconsistent even with the Bank's erroneous view of the law. That is, petitioner seems to acknowledge that in a given case, including this one, it may be that the only plausible proof of causation is through reliance. Yet in this case, the jury was essentially instructed that the Bank could prevail on its RICO claim even if it could not prove reliance because its employees were aware of the falsity of respondents' representations. See Pet. App. 7. Accordingly, even if this Court accepted petitioner's view of the statute, a retrial would still be necessary in this case under a proper agency law instruction.

establishing that it relied on them.[15] It is thus unsurprising that courts have long required plaintiffs seeking to recover for fraudulent misrepresentations to demonstrate that they reasonably relied on the defendants' false statements to show that their losses were caused by the fraud. See *supra* at 17.

2. Construing the statute in accordance with the common-sense meaning of its provisions and the common law meaning of its terms is also consistent with the principal purpose of the civil RICO damages remedy: to provide a remedy for those who have been actually injured by reason of the defendant's conduct. See *Shearson/American Express* v.

[15] It is no answer to assert that the Bank was injured because it, as an institution, did not know the truth of the matter, even though its employees did. The Bank does not dispute in this Court the Second Circuit's obviously correct conclusion that, as a matter of settled agency principles, the Bank can only know things through its employees and that the employees' knowledge in this case was properly attributable to the Bank unless the Bank proved to the jury that an agency law exception applies. See Pet. App. 15; RESTATEMENT (SECOND) OF AGENCY § 272 (1958). As the court of appeals noted, an agent's knowledge is not imputed to the principal when the agent acts adversely to the principal's interests. See Pet. App. 15; RESTATEMENT (SECOND) OF AGENCY § 282 (1958). As a result, the Bank officials' knowledge of respondents' activities would not be imputed to the Bank if petitioner could show that the employees "totally abandoned" the interests of their employer. Pet. App. 15 (citation omitted); RESTATEMENT (SECOND) OF AGENCY § 282 (1958) (with certain exceptions, "[a] principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal *and entirely for his own or another's purposes*") (emphasis added). In this case, however, the jury was never asked to determine whether the adverse interest exception applied. Pet. App. 15. Accordingly, petitioner assumes – as it must – for the purposes of this petition that it was aware, through its officials, of respondents' activities. As a result, this case is no different in principle from a case between two individuals, one of whom made a misrepresentation that the other did not believe or rely upon.

McMahon, Inc., 482 U.S. 220, 240-41 (1987) A plaintiff who did not rely upon (or even believe) a misrepresentation has not been injured by the fraud. "To enjoin a swindle before it succeeds is highly desirable, and to punish the would-be swindler is wholly just, even if few are taken in. But to award damages to investors who were never fleeced is to provide them with an unwarranted windfall." Jed S. Rakoff, *Is Reliance Required Under RICO?*, N.Y.L.J., Mar. 14, 1991, at 3, col. 1. Permitting claims without proof of reliance would "transform[] liability for fraud into a kind of investor insurance. * * * [A]nyone who made a bad investment decision could recover his loss merely by ferreting out, after-the-fact, any misrepresentation made at any earlier point in the commercial chain, regardless of whether it had any impact on his investment decision." *Ibid.* Worse still, the Bank's view would permit an investor knowingly to undertake a poor investment in a case like this with the specific intent of suing for treble damages, believing that the return on a RICO claim would far exceed any return the plaintiff might receive from a prudent investment. Cf. RESTATEMENT (SECOND) OF TORTS § 541 (1977) (plaintiff may not recover for fraudulent misrepresentation that the plaintiff knows to be false or is "obviously false" because reliance would not be justified).

Requiring actual reliance thus ensures that only true victims are compensated. Requiring reasonable or justifiable[16] reliance furthers Congress's additional intent "not only to compensate victims but also to encourage those victims themselves diligently to investigate and thereby to uncover unlawful activity," *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 195 (1997). The reasonable reliance requirement promotes this end by refusing recovery to those who have not exercised the reasonable care that would have detected and promptly put an end to the kinds of racketeering activities Congress meant

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[16] As noted *supra* n.8, it is not necessary in this case to resolve whether the reliance required under RICO must be "reasonable" or instead "justifiable."

RICO to eradicate. See also, *e.g.*, *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000) (rejecting liberal statute of limitations accrual rule on grounds that it would "patently disserve the congressional objective of a civil enforcement scheme * * * aimed at rewarding the swift who undertake litigation in the public good"). Under the Bank's view of the statute, there is no penalty for a lack of diligence in detecting and avoiding fraud. To the contrary, a person who relies without taking due care would often be better off than a person who took reasonable precautions and prevented the fraud altogether. For example, an investor who unreasonably accepted a defendant's extravagant promises of certain returns on a speculative venture would be entitled to recover three times her investment under RICO, while a reasonable investor would be left to the more limited rewards of a prudent investment. Congress surely did not intend to create such unfair and perverse incentives.

These types of incentives would threaten to transform RICO into a federal alternative to ordinary tort and contract litigation in state court. As this case demonstrates, removing the element of reliance from RICO misrepresentation suits often would "create the anomaly of making it easier to bring a fraud suit for treble damages (under RICO) than for single damages (under common law fraud)." Rakoff, *supra*, at 3; see Pet. Br. 21 (acknowledging that reliance was required for Bank's common law fraud claim). This combination of a lower standard of proof and an enhanced prospect of recovery would create a nearly irresistible incentive for plaintiffs in garden-variety tort and contract cases to seek out a false statement related in some way to their dispute in order to convert the cause into a civil RICO case. See *Summit Props., Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 557 (CA5 2000) (noting that abdication of reliance requirement would, in effect, "establish[] a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality"). This Court should not lightly presume that Congress intended to

create such a burden on the federal courts or such an extreme alteration of the traditional state and federal balance. See, *e.g.*, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940) ("The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress."); *Fed. Trade Comm'n* v. *Bunte Bros.*, 312 U.S. 349, 354 (1941).

RICO "has already 'evolv[ed] into something quite different from the original conception of its enactors,' warranting 'concern[s] over the consequences of an unbridled reading of the statute.'" *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 412 (2003) (Ginsburg, J., concurring) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 481, 500 (1985)) (alterations in original). The unbridled reading the Bank proposes warrants grave concerns, for it would encourage even greater resort to the federal courts to resolve ordinary commercial disputes in the hopes of obtaining vast awards under lenient standards of recovery eschewed for generations under state and common law.

3. Congress's instruction that RICO "shall be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947 (1970), provides no justification for departing from the established principles of the common law. Contra Pet. Br. 28-32. As this Court explained in *Reves* v. *Ernst & Young*, RICO's liberal construction provision

> is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. The clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one."

507 U.S. 170, 183-84 (1993) (citation omitted).

Thus, in *Holmes*, this Court made clear that the liberal construction clause does not apply when, as here, the terms of the civil RICO statute can be construed using common law rules of proximate causation. *Holmes* acknowledged that the language of the civil RICO provision could be interpreted to allow for liability based merely on a showing of "but for" causation alone. *Holmes*, 503 U.S. at 265-66. That construction would have been more "liberal" in the sense the Bank uses the term here – it would have expanded liability and removed an impediment to RICO prosecutions by "private attorneys general." Pet. Br. 31. But this Court nonetheless held that Section 1964(c) should be read to incorporate the proximate cause requirement established in the common law and did not permit the plaintiff's invocation of the liberal construction clause to "deflect [its] analysis." *Holmes*, 503 U.S. at 274. See also *Beck* v. *Prupis*, 529 U.S. 494 (2000) (rejecting expansive interpretation of Section 1964(c) in light of common law principles); cf. *Neder* v. *United States*, 527 U.S. 1, 23 (1999) (rebuttal of presumption that Congress intended to incorporate common law meaning "can only come from the text or structure of the fraud statutes themselves").

In any case, the Bank's interpretation of the Act does not "effectuate its remedial purposes," for it was not within Congress's purposes to subject RICO defendants to unconstrained liability, particularly on such garden-variety tort and contract claims. Congress did not intend that "[a] defendant who violates [RICO would be] liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Sedima*, 473 U.S. at 496-97 (citation omitted). Plaintiffs who cannot show that they relied on allegedly fraudulent statements are among those "who have not been injured" by the fraud. *Ibid*. Permitting suits by such parties would "open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (alterations in original; citations omitted). As this Court held

in *Holmes*, there is "nothing illiberal in [a] construction" that avoids such consequences. *Ibid.*

C. Petitioner Identifies No Reason That Would Justify A Departure From Common Law Rules For Recovery.

Petitioner identifies no legitimate reason for departing from established common law principles of recovery in this case.

1. The bulk of petitioner's brief is devoted to establishing that reliance is not an element of a *criminal* mail or wire fraud offense. See Pet. Br. 19-21, 28-32. That is true, but irrelevant. As discussed above, the reasonable reliance requirement arises principally out of the *civil* remedy provision's requirement of an injury "by reason of" a RICO violation, not out of the elements of the predicate offenses.[17] And this Court established in *Beck* that Congress intended the additional requirements for a civil recovery under Section 1964(c) to be derived from the civil common law analogues to the predicate offenses, not from the elements of the criminal offense standing alone. See 529 U.S. at 500-01.

Indeed, in *Beck* this Court specifically rejected the argument that courts "should look to criminal, rather than civil, common-law principles to interpret the statute." 529 U.S. at 501 n.6. While acknowledging that it had looked to criminal common law analogues to interpret the criminal RICO conspiracy provision, 18 U.S.C. 1962(d), this Court emphasized that

> This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation. In other

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[17] The decision of the court of appeals thus did not "graft[] an additional element of proof onto * * * the mail and wire fraud statutes." Contra Pet. Br. 26. Indeed, the court's decision has no effect whatsoever on the elements of proof in a criminal prosecution.

> words, our task is to interpret § 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone. The obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy.

Ibid. So, too, in this case, the question presented is not simply whether respondents' acts violated the criminal mail and wire fraud statutes, but rather whether the Bank is entitled to recover treble damages under Section 1964(c). That question requires an interpretation of Section 1964(c) in conjunction with the wire and mail fraud statutes, not simply an interpretation of the predicate act provisions standing alone.

The "obvious source in the common law for the combined meaning of these provisions," *Beck*, 529 U.S. 501 n.6, is the *civil* common law of frauds. The criminal law simply does not address questions of damages and recovery, the traditional province of civil law. Indeed, because of their preventative purposes, the criminal mail and wire fraud statutes do not require that the fraudulent scheme actually be completed or succeed in inflicting any injury at all. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 25 (1999); *United States* v. *Allard*, 926 F.2d 1237, 1242 (CA1 1991). It was for this very reason that this Court declared in *Neder*, 527 U.S. at 24-25, that "common-law requirements of 'justifiable reliance' and 'damages,' for example, have no place" in the elements of the criminal mail and wire fraud statutes.

But even the Bank acknowledges that the common law requirement of "damages" – as well as the related requirement of proximate cause – has a place in a civil RICO suit under Section 1964(c). As discussed above, the common law has long employed the "reasonable reliance" requirement to determine what injuries are properly attributed to an act of fraudulent misrepresentation. See *supra* at 17-18.

2. Petitioner nonetheless argues that federal courts have abandoned the common law requirement of reliance in mis-

representation claims under RICO. See Pet. Br. 8-9 n.4, 20, 24-25. That assertion is incorrect.

As an initial matter, even petitioner admits that at least six courts of appeals have squarely held that reliance is an element of a civil RICO claim alleging misrepresentations in violation of the mail and wire fraud statutes. See Pet. Br. 8-9 n.4 (citing *Sikes* v. *Teleline, Inc.*, 281 F.3d 1350, 1360 (CA11 2002); *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 562 (CA5 2000); *Chisolm* v. *TransSouth Fin. Corp.*, 95 F.3d 331, 337 (CA4 1996); *Appletree Square I* v. *W.R. Grace & Co.*, 29 F.3d 1283, 1286 (CA8 1994); *Cent. Distribs. of Beer, Inc.* v. *Conn*, 5 F.3d 181, 184 (CA6 1993); *Flowers* v. *Cont'l Grain Co.*, 775 F.2d 1051, 1054 (CA8 1985)); see also *County of Suffolk* v. *Long Island Lighting Co.*, 907 F.2d 1295, 1311-13 (CA2 1990).

The cases that petitioner claims are to the contrary are not. Many of the cases on which the Bank relies are criminal prosecutions in which the court had no occasion to decide whether reliance is required to support a civil recovery under Section 1964(c). See Pet. Br. 20, 24-25. As discussed above, the reasonable reliance requirement arises out of that provision's requirement of an injury "by reason of" a RICO violation, not because reliance is itself an element of the predicate offense.

The few civil misrepresentation cases cited by petitioner are inapposite. Most involve claims by a plaintiff seeking to recover damages indirectly caused by a *third party's* reliance on the defendant's fraudulent misrepresentations. In *Systems Management, Inc.* v. *Loiselle*, 303 F.3d 100 (CA1 2002), for example, a contractor misrepresented to a community college that he was complying with a state wage law in compensating his employees. The workers sued to recover unpaid wages, alleging mail and wire fraud under RICO. The First Circuit permitted the suit to proceed even though the plaintiffs had not themselves relied on the misrepresentations. It was enough that the defendant's statements deceived the college,

thereby enabling the employer to continue to underpay the workers and causing the plaintiffs' injuries. 303 F.3d at 104. Other cases cited by the Bank involve similar third-party complaints seeking to recover damages caused by a fraud committed against someone else.[18]

This Court has never held that such indirect injuries are redressable under Section 1964(c). Cf. *Holmes*, 503 U.S. at 268-69 (noting that at common law "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover").[19] But the Court need not resolve that question here, for this case does not present a third-party claim, and the third-party cases are entirely consistent with the reliance requirement adopted by the Second Circuit. These cases do not reject the view that reliance is required in order to establish a causal connection between a misrepresentation and the plaintiff's injury. They simply permit a recovery by some plaintiffs who have been injured by a third party's reliance indirectly (*i.e.*, injured because the recipient of the misrepresentation relied upon the fraud to the plaintiff's detriment). None of the third-party misrepresentation cases permit a plaintiff to pursue a RICO fraud claim when *no one* was deceived by, or relied upon, a false state-

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[18] See, *e.g.*, *United HealthCare Corp.* v. *Am. Trade Ins. Co.*, 88 F.3d 563 (CA8 1996) (involving plaintiff insurance purchaser injured by defendant's fraud against the insurance "purchase group" plaintiff employed); *Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257-58 (CA7 1995) (involving plaintiff corporation injured by competitor's fraud on prospective customers); *Sebago, Inc.* v. *Beazer East, Inc.*, 18 F. Supp. 2d 70 (D. Mass. 1998) (involving plaintiff homeowners injured by material supplier's fraud upon homebuilder).

[19] See also, *e.g.*, *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 558-59 (CA5 2000) (rejecting third-party claim); *Appletree Square I* v. *W.R. Grace & Co.*, 29 F.3d 1283, 1286-87 (CA8 1994) (same).

ment. And neither the Second Circuit nor respondents insist that a plaintiff must prove that it relied on the fraudulent misrepresentation in a third-party suit. See *Ideal Steel Supply Corp.* v. *Anza*, 373 F.3d 251, 262-63 (CA2 2004) (permitting third-party suit).

Petitioners' remaining cases either do not involve misrepresentations,[20] say nothing about reliance,[21] or have been overruled.[22]

3. Unable to explain why reasonable reliance should not be required in misrepresentation cases under RICO, petitioner is forced to argue that reliance should not be required in this case because it would be inappropriate to require reliance in *other* types of cases involving *different* types of fraud. "The concept of reliance has no place in a proximate cause analysis

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[20] See, *e.g.*, *Murr Plumbing, Inc.* v. *Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 (CA8 1995) (stating, in dicta, that civil RICO claim "does not require an allegation of misrepresentation or common law fraud"); *McClendon* v. *Cont'l Group, Inc.*, 602 F. Supp. 1492, 1507 (D.N.J. 1985) ("A course of conduct may comprise a scheme or artifice to defraud, even absent particular fraudulent statements or omissions."). These decisions do not purport to dispense with the requirement of reliance in fraudulent misrepresentation cases.

[21] See *Tabas* v. *Tabas*, 47 F.3d 1280, 1294 n.18 (CA3 1995) (holding only that the mailing that triggers coverage of the mail fraud statute need not itself have been fraudulent, so long as it was part of a scheme to defraud); *Oregon Laborers-Employers Health & Welf. Trust Fund* v. *Philip Morris*, 185 F.3d 957, 963-66 (CA9 1999) (holding only that plaintiff health and welfare funds' alleged injury from frauds perpetrated by the tobacco industry against smokers was too remote to support proximate cause).

[22] See *Armco Indus. Credit Corp.* v. *SLT Warehouse Co.*, 782 F.2d 475 (CA5 1986), overruled by *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 558-59 (CA5 2000). See also *Wilcox* v. *First Interstate Bank of Ore.*, 815 F.2d 522, 531 n.7 (CA9 1987) (mentioning *Armco* holding in passing but without addressing reliance issue).

unless the fraud is based upon a misrepresentation or omission of fact intended to induce reliant action," petitioner asserts, Pet. Br. 14, essentially conceding that proof of reliance was required to establish proximate cause in this case. Nonetheless, petitioner argues, the decision of the court of appeals "swept far too broadly, removing from the protection of RICO a large set of victims of classic 'schemes to defraud' where no misrepresentation is made and therefore reliance cannot be proven." *Id*. 12. This includes, petitioner says, claims ranging from embezzlement to "unauthorized selling of satellite broadcast descrambling devices" and check kiting. *Ibid*. To avoid precluding such claims, petitioner urges this Court to hold that reliance is *never* required as an element in *any* case, even in cases that raise traditional claims of fraudulent misrepresentation. Instead, the Bank argues, juries should be provided only with a proximate cause instruction general enough to accommodate every scheme to defraud; they should then be left to determine for themselves whether reliance should or should not be required in any particular case. Pet. Br. 40-42. This argument should be rejected.

This Court need not decide whether reasonable reliance is required in every case predicated upon acts of wire or mail fraud. This case presents a traditional case of fraud by misrepresentation, see *supra* at 13-14, for which the common law clearly requires proof of reliance. Whether the criminal mail and wire fraud statutes extend to "conduct that common law fraud does not reach," Pet. Br. 22-23, or to cases in which "no misrepresentation is made," *id*. 12, is a matter of dispute, see Chamber Of Commerce *Amicus* Br. § I(B). In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court specifically rejected the Government's argument that "Congress chose to unmoor the mail fraud statute from its common-law analogs." *Id*. at 23-24. While the Court acknowledged that its prior cases had refused to limit the statutes to the narrow class of fraud described by the tort of "false pretenses," it nonetheless rejected the Government's assertion that the Court's prior

precedent had found that "the statute encompasses more than common-law fraud." *Id*. at 24.

That said, it is nonetheless true that some courts have interpreted the mail fraud statute to encompass more than cases of straightforward fraudulent misrepresentation. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), for instance, this Court held that under the mail fraud statute the "concept of 'fraud' includes the act of embezzlement." *Id*. at 27. And in response to a decision of this Court, *McNally* v. *United States*, 483 U.S. 350 (1987), Congress amended the statute in 1988 to define "scheme to defraud" to reach acts of bribery. See 18 U.S.C. 1346.

Nonetheless, this Court need not decide whether reliance is a proper element in a civil RICO case predicated on acts of bribery, embezzlement, or any other unrelated species of fraud. For even if reliance is not properly required in *some* cases, that is no reason to excuse petitioner from establishing reliance in *this* case. [23]

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[23] While the Bank alleged that one of its employees accepted a bribe to overlook some of the alleged misrepresentations, the Bank never argued below that the damages it was seeking arose from that isolated incident of bribery. See Compl. ¶ 283 (alleging only that RICO violation arose from respondents' "false or fraudulent pretenses, presentations or promises"). Indeed, although the jury ultimately entered judgment against the employee for breach of fiduciary duty and against certain respondents for aiding and abetting that breach, it awarded only $300,000 – less than one percent of the amount awarded on the RICO count – in damages on that claim Pet. App. 51. Accordingly, the jury verdict on the RICO claim could not be supported even if this Court were to consider whether reliance is required in a case alleging bribery in violation of the mail or wire fraud statutes. Moreover, because petitioner never pointed to the bribery allegation as a reason to excuse proof of reliance in the Second Circuit, the court of appeals never considered the question. See Pet. App. 5 (regarding case as arising from "false and misleading representations, and in many cases, forged documents"). Accordingly, there is no need for this Court to consider

Petitioner identifies no legal or practical reason that requires this Court to establish a single reliance rule to cover every type of fraud actionable under the mail and wire fraud statutes. Indeed, this Court's prior cases have not done so. In *Holmes*, for instance, this Court did not purport to create a proximate cause test that would be applied, without any further elaboration, directly by juries in every civil RICO case. As Justice Scalia rightly observed in his concurrence, it seems "obvious that the proximate-cause test * * * that will be applied to the various causes of action created by 18 U.S.C. § 1964 [is] not uniform, but will vary according to the nature of the criminal offenses upon which those causes of action are based." 503 U.S. at 288. Thus, when the Court considered what types of injuries were redressable in civil RICO conspiracy cases in *Beck*, it looked to the common law and created a rule of recovery specific to civil RICO conspiracy cases. 529 U.S. at 500-01.

Indeed, petitioner itself seems to urge this Court to adapt the requirements of RICO and the mail and wire fraud statutes to the type of fraud alleged in particular cases. A major premise of petitioner's argument in this case is that the mail and wire fraud statutes reach "'schemes to defraud' where no misrepresentation is made." Pet. Br. 19. But petitioner must acknowledge that in *Neder* v. *United States*, this Court held that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." 527 U.S. at 25. Petitioner presumably believes that there is no conflict between *Neder* and its view of the scope of the mail and wire fraud statutes because it views *Neder*'s requirement of a material falsehood as limited to cases involving fraudulent misrepresentation. But petitioner identifies no reason why the Court should not also apply a reliance rule particular to misrepresentation claims as well.

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anything other than whether reliance is required in a case alleging fraudulent misrepresentation.

Consistent with these precedents, to the extent that the mail and wire fraud statutes encompass schemes to defraud falling beyond the scope of common law fraudulent misrepresentation, courts should look first to the common law rules of recovery for analogous claims. A claim of embezzlement, thus, should be governed by the traditional standards for civil recovery in cases of embezzlement. If reliance is not a traditional element of such a recovery, it need not be required in an embezzlement case under Section 1964(c) and a general proximate cause instruction may be appropriate.[24] However, when, as in this case, the plaintiff's claim is grounded in allegations of misrepresentation, reliance is appropriately required.

This approach is eminently sensible. While "[a]pplication of the legal cause standard to the circumstances of a particular case" may be a job for the jury, Pet. Br. 41 (citation omitted), defining the proper legal standard for the jury to apply has always been the responsibility of the courts. That is precisely what happened in the common law. Proximate cause is an element of every common law tort. See RESTATEMENT (SECOND) OF TORTS § 9 & cmt. a (1977). But the common law courts long ago determined that juries should be provided with more explicit instruction on how that general principle applies in the specific context of a fraud claim. *Id*. § 537.

The Bank's alternative proposal – letting individual juries decide whether reliance is required in particular cases of misrepresentation – serves no legitimate purpose and risks arbitrary results. As discussed above, in the absence of reliance there is simply no way a jury can rationally conclude that a

[24] It is quite possible that reliance, or its equivalent, is a proper element of every mail and wire fraud claim. All of the acts of actionable fraud identified by petitioner involve an element of dishonesty. It may be that in every instance, a plaintiff's injuries are not "by reason of" the fraud if the defendant's dishonesty was known and tolerated.

misrepresentation is the cause of any injury. Thus, the lack of a reliance instruction serves only to create the risk of an erroneous verdict.[25] The lack of a reliance instruction further poses the risk of arbitrary differences in outcome in factually indistinguishable cases resulting solely from different juries' conclusions about whether reliance was required to establish proximate cause. Indeed, petitioner itself urged this Court to grant certiorari in this case to resolve a purported circuit split over whether proximate cause requires proof of reliance in a case such as this. See also *Fields* v. *Mans*, 516 U.S. at 63 & n.4 (certiorari granted to resolve entrenched circuit split "over the level of reliance" required to establish fraud claim in under bankruptcy provision). If federal courts of appeals are unable to apply consistent rules in this area without intervention by this Court, it is exceedingly unlikely that juries will be able to achieve fair and consistent results without the guidance that has been provided to juries in common law fraud cases for generations.

[25] That error, moreover, would not be susceptible to easy correction by the trial court or a court of appeals. For example, in a case in which the plaintiff presents some evidence of reliance, a reviewing court would be unable to determine whether the jury found in the plaintiff's favor because it wrongly concluded that reliance is not required, or because it believed that reliance was required but proven in the case before it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

18 U.S.C. 1961 Definitions.

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and

use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons) , sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud con-

nected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole

or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. 1962 Prohibited Activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. 1964 Civil Remedies.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. 1341 Frauds and Swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of

wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.