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No. 07-210

IN THE
Supreme Court of the United States

SABRE GROUP, LLC, ET AL.,
PETITIONERS,
v.
PHOENIX BOND & INDEMNITY CO., ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff who is the direct and immediate target of a fraudulent scheme involving false statements to a third party with whom the plaintiff deals may establish the proximate cause necessary to maintain a claim under civil RICO, even though the plaintiff itself did not receive the false statements.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Sabre Group, LLC; Barrett Rochman; and John Bridge. Petitioners are defendants in this case.

Respondents are Phoenix Bond & Indemnity Company and BCS Services, Inc. Respondents are plaintiffs in the action.

Other parties in the Court of Appeals were defendants Robert Jensen; Joseph Varan; Jeffrey Bridge; Francis Alexander; Jesse Rochman; Douglas Nash; Cronus Projects, LLC; Gregory Ellis; GJ Venture, LLC; L.C.C. Venture, LLC; Regal One, LLC; Jason Baumbach; Optimum Financial, Inc.; Carpus Investments, LLC; DRN II, Inc.; Jeshay, LLC; Mud Cats Real Estate, LLC; Georgetown Investors, LLC; Corinne Rochman; Christopher Rochman; BRB Investments, LLC; and CCJ Investments, LLC. The Court of Appeals dismissed plaintiff Oak Park Investments, Inc. as a party.

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

Phoenix Bond & Indemnity Company has no parent corporation, and there is no publicly held company that owns 10% or more of its stock. BCS Services, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Introduction

This case presents no issue worthy of this Court's review. Respondents, plaintiffs below, allege that petitioners lied under oath to officials of Cook County, Illinois, and thereby stole valuable tax liens the County otherwise would have awarded to respondents. As the Court of Appeals found, because petitioners and respondents offered the County the identical price for the tax liens, the County did not suffer injury as a result of the misrepresentations. Indeed, "Cook County did not lose even a penny. . . . The *only* injured parties are the losing bidders, who acquire fewer tax liens than they would" absent defendants' fraudulent scheme. Pet. App. 5a (emphasis in original). Based on these facts, the court held that respondents could establish the proximate cause required under RICO consistent with this Court's decisions in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). The decision of the Court of Appeals is correct, does not conflict with any other case presenting the same issue, and warrants no action by this Court.

The question on which petitioners would have this Court grant review is not the question decided by the Seventh Circuit. Petitioners contend that the question here is whether "a plaintiff asserting a civil RICO claim predicated on acts of mail fraud must plead and prove reliance on alleged

misrepresentations by the defendant," Pet. at (i), a question on which, according to petitioners, the circuits are sharply split. *Id.* at 6-7. But the Court of Appeals had no occasion to discuss whether respondents "must plead and prove reliance," in part because petitioners themselves argued that the issue of reliance was "largely academic" in that the district court "did not discuss reliance as a standing requirement at all." *See* Br. of Appellees Bridge, *et al.* at 14 (7th Cir. filed Oct. 6, 2006), *available at* 2006 WL 2967014.[1]

Rather, the question addressed by Judges Easterbrook, Posner, and Evans below is whether it is necessary in a RICO action predicated on fraud "to show that the false statement was made to the victim." Pet. App. 7a. On that question, the court unanimously concluded that "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." *Id.* (emphasis in original). Thus, the sole issue in this case is whether reliance *by the plaintiff itself* is necessary to establish proximate cause under RICO, or whether reliance by a third party with whom the plaintiff deals suffices *where the plaintiff is the immediate target and victim of the fraudulent scheme.*

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[1] Although the issue of reliance (by someone) was not squarely presented to the Seventh Circuit, the parties have never disputed that the County Treasurer did in fact rely on petitioners' false certifications in allowing petitioners' entry to the auction. *See, e.g.*, Compl. ¶¶ 47-48, 50-56, 59, 61, 63-65 (N.D. Ill. filed Jul. 15, 2005).

On that issue, there is no circuit split requiring this Court's attention. *Every* circuit to consider the issue in a case presenting it – the Second, Fourth, Fifth and Seventh – has held that reliance by a third party with whom the plaintiff deals can be sufficient under RICO when the plaintiff is the direct and immediate target of the fraud. Only the Sixth Circuit has suggested otherwise, and the continuing vitality of the Sixth Circuit's position on the issue is open to doubt. Although other circuits have required "reliance," they have never considered whether reliance by a third party may suffice where the plaintiff is the immediate target of the fraud and has been directly injured thereby.

Because the decision of the Court of Appeals does not conflict with other courts and is correct, the petition should be denied.

B. Factual Background

This case arises on a motion to dismiss, so respondents' allegations are presumed to be true.

A property owner's failure to pay taxes creates a tax lien in favor of the County. Pet. App. 1a. Instead of pursuing its rights as the holder of such tax liens, Cook County annually sells the liens at auction. *Id.* at 1a, 10a. To purchase the lien, a bidder must pay the County the taxes due. In addition, the holder of a tax lien has the right to receive a statutory penalty assessed upon the property owner, up to a maximum of 18%. However, bidders at the County's tax lien auctions compete

against each other by identifying the penalty that will be imposed upon the property owner to clear the lien, and the bidder willing to accept the *lowest* penalty wins the auction. *Id.* at 1a-2a. The new lien holder then may assert its rights under the lien. If the property owner redresses the lien by paying the back taxes and statutory penalty (in the amount established through the auction), the owner may retain the property. If the owner does not pay, the lien holder can obtain a tax deed and thus become the parcel's new owner. *Id.* at 1a.

Because many of the parcels at issue have economic value beyond the amount of the unpaid taxes, most parcels at the County's tax lien auctions attract multiple bidders willing to accept a 0% penalty. *Id.* at 2a. Bidders expect to make their profits not by collecting penalties from property owners, but primarily from reselling the properties of owners who do not pay. *Id.* As described by the Court of Appeals: "Vigorous competition among bidders has driven the winning penalty down to the floor, and from the County's perspective this is all to the good: it recovers the taxes, and owners need not pay extra." *Id.*

The County then must address a different issue: how to choose among multiple, identical bids. *Id.* The County's regulations prohibit bids proposing a "negative" penalty, because property owners then would have an incentive not to pay their taxes at the originally assessed full value. *Id.* Instead, the County assigns parcels among identical bidders on a rotational basis. Critically, to prevent a party from

increasing its chances in this allocation process, each "tax buying entity" must certify that it has bid in its own name, and no "related entity" may bid. *Id.* The County calls this rule the "Single, Simultaneous Bidder Rule." *Id.*

Respondents are two regular participants in Cook County's tax lien sales. *Id.* at 3a. Respondents contend that petitioners Sabre Group, LLC and its principal Barrett Rochman regularly arrange for related firms to participate in the tax lien auctions in violation of the Single Simultaneous Bidder Rule and that they disguise this fact by submitting false affidavits to the County, a potentially criminal offense. *Id.* Respondents contend that the County Treasurer relies on those false affidavits to award more parcels to petitioners than they otherwise would win, at respondents' expense. *See* n. 1, *supra.* Because petitioners' fraudulent scheme involves the use of the mail, and involves a regular pattern of mail fraud, respondents sought damages from petitioners under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964.

C. Proceedings Below

Petitioners moved to dismiss under Rules 12(b)(1) and 12(b)(6). They argued the case should be dismissed under Fed. R. Civ. P. 12(b)(1) because respondents lacked "standing" and, therefore, the District Court lacked subject matter jurisdiction. Petitioners also argued the complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) because

respondents failed adequately to allege a RICO enterprise and to plead fraud with particularity.

The District Court granted petitioners' motion under Rule 12(b)(1). At bottom, the court held that respondents lacked standing to sue under RICO because they "were not recipients of the alleged misrepresentations." Pet. App. 18a.

Respondents appealed, contending in part that the District Court improperly incorporated into civil RICO a requirement of reliance *by the plaintiff* on defendants' false statements. On that point, petitioners responded that the issue of reliance was "largely academic" because "the district court did not discuss reliance as a standing requirement at all." *See* Br. of Appellees Bridge, *et al.* at 14 (7th Cir. filed Oct. 6, 2006), *available at* 2006 WL 2967014. Petitioners argued, however, that respondents could not establish proximate cause. *Id.* at 25. Neither in their brief nor at oral argument did petitioners ask the Court of Appeals to affirm on the ground that respondents had not pled, and could not prove, reliance.

The Court of Appeals reversed in a unanimous opinion written by Chief Judge Easterbrook. The court first concluded that "standing" was not a problem in the suit: "Plaintiffs suffer injury in fact, and that injury can be redressed by damages. Extra bids reduce plaintiffs' chance of winning any given auction, and loss of a (valuable) chance is real injury." Pet. App. 3a. Because plaintiffs suffer an actual (and substantial) reduction in the number of

liens they take away, "[n]o more need be said about standing." *Id.* at 4a.

The court then addressed the issue of proximate cause. Applying the causation analysis this Court outlined in *Holmes* and developed further in *Anza*, the Court of Appeals assessed whether respondents were the direct victims of petitioners' alleged fraud:

> Defendants maintain that Cook County is the victim of their fraud (supposing, as they must at the pleading stage, that they have committed fraud). Yet Cook County did not lose even a penny: each winning bidder always pays all back taxes and interest. The bidding at these auctions concerns how much the owners must pay in penalties, not how much the County receives. And as long as competition drives the bidding down to 0% penalty, property owners are indifferent to who acquires the tax lien. The *only* injured parties are the losing bidders, who acquire fewer tax liens than they would if the Single, Simultaneous Bidder Rule were followed.

Id. at 5a (emphasis in original). These facts, the court emphasized, were sufficient to establish proximate cause. The court noted that the County doubtless could enforce its own rule, but it had no financial incentive to do so. Moreover, "[i]f a

government's ability to penalize fraud knocked out private litigation, then § 1964 would no longer apply when the predicate act is fraud, for governments always have some ability to detect and penalize frauds." *Id.* at 6a-7a.

The Court of Appeals also declined to accept petitioners' argument that respondents could not sue because "no false statements were made to plaintiffs." *Id.* at 7a. Relying on its own precedent as well as decisions in several other circuits, the court held that "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." *Id.* (emphasis in original). Thus, "[a] scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." *Id.* The court thus emphasized that "injury must be direct rather than derivative," but found that requirement to be satisfied here. *Id.* at 8a.

REASONS FOR DENYING THE WRIT

To bolster their petition, petitioners mischaracterize the positions of the circuits on the issue presented in this case, making claims at odds even with the position they took in the Court of Appeals. As set forth below, the result in this case would be the same in every other circuit to have considered the issue presented here except perhaps the Sixth – and *every* member of the Sixth Circuit's most recent panel decision addressing the issue suggested that the position of the Sixth Circuit was

wrong. This case simply does not present the issue whether "reliance" generally is required in RICO actions based on fraud. Rather, the issue here is whether it always must be the *plaintiff* that has received and relied upon the false statements at issue. And every circuit to have considered that issue in a case that presented it has concluded that such reliance *by the plaintiff* is not always required.

The petition should be denied. There is a pending petition for rehearing *en banc* from the most recent panel decision in the Sixth Circuit, and the Sixth Circuit may reconsider its outlier position in that case (or in another case that squarely presents the issue whether reliance *by the plaintiff* always is required in RICO cases involving fraud). In any event, because the decision of the Seventh Circuit here is correct and in line with all other circuits that have considered the issue in a case that presented it, this Court should wait to consider the issue until it is squarely presented in a conflicting decision from the Sixth. In addition, further factual development in the instant case may show that reliance even *by the plaintiff* is present here. Thus, this case is not yet in a posture where an appropriate assessment of the issues of reliance and proximate cause may be made.

A. No Ripe Conflict Exists.

Cases brought under RICO have been assessed under a variety of analytical frameworks to determine whether the plaintiff is an appropriate person to bring a RICO claim. The issue has been considered at times as one of "standing," as one

involving the "zone of interests" defined by the statute, as one involving the "directness" or "proximate causality" between the plaintiff's injury and the challenged conduct, and as one of "reliance." In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court granted certiorari to resolve a conflict among the circuits whether a civil RICO plaintiff that had not purchased or sold a security had "standing" to sue based upon a predicate act of alleged securities fraud. Instead of deciding that issue, however, the Court ruled that the plaintiff could not establish proximate cause, and it observed that "[a] review of the conflicting cases shows that all could have been resolved on proximate-causation grounds." *Id.* at 276.

The Court's decision in *Holmes* is instructive because it establishes the context for the circuit split alleged to exist here. The Court held that the statutory language in RICO creating a civil claim for "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter," 18 U.S.C. § 1964(c) (emphasis added), requires a plaintiff to prove that its injury was proximately caused by the violation of the Act. 503 U.S. at 268. The Court explained that it used the term "proximate cause" in the broad common law sense, which included "a demand for *some direct relation between the injury asserted and the injurious conduct alleged.* Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third party by the defendant's acts was *generally* said to stand at too remote a distance to

recover." *Id.* at 268-69 (emphasis added). The Court emphasized that among the reasons for this rule were: the difficulty of ascertaining the plaintiff's damages as its injury became less direct; the difficulty of apportioning damages among plaintiffs removed at different levels of injury; and the lack of any *need* for such claims in deterring injurious conduct "since directly injured victims can generally be counted on to vindicate the law as private attorneys general." *Id.* at 269-70.[2] In finding no proximate cause in the case, the Court emphasized that the plaintiff's injury was indirect and flowed from factors unrelated to the defendant's alleged wrongdoing, and that other directly injured private parties "could be counted on to bring suit for the law's vindication" (and had, in fact, already sued). *Id.* at 273.

The decision of the Seventh Circuit in the instant case is squarely in line with *Holmes*, and virtually all other circuits, in recognizing that *proximate cause* is the statutory touchstone in civil RICO cases. Moreover, every circuit to consider the issue but possibly the Sixth has ruled, like the Seventh here, that a showing of proximate cause may be made where a RICO plaintiff is a direct *victim* or *target*, but not necessarily the *recipient*, of

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[2] The Court has recognized that by including a private right of action in RICO, Congress intended to bring "the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources [were] deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987).

acts of mail or wire fraud by defendants. *That* was the issue in this case – *not* whether "reliance by someone" is required to establish the requisite causal link between the plaintiff's injury and the defendant's alleged RICO violations.

Judge Easterbrook's conclusion that proximate cause could be established on the facts of this case is fully consistent with *Holmes*. The fraudulent scheme at issue here led directly to plaintiffs' injuries: defendants did not seek to harm the County or property owners, but rather sought to inflate their own share of valuable tax liens at the direct expense of plaintiffs and other bidders who otherwise would have been awarded those liens at the auction. Moreover, because liens were allocated on a rotational basis to bidders making the identical bid (a 0% penalty to property owners), plaintiffs' injuries could not have resulted from factors other than defendants' alleged acts of fraud. Finally, this is not a case where any other entity has an economic incentive, and necessarily could be expected, to sue (or already had sued).

Petitioners allege that the decision below conflicts with decisions of the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits. Pet. at 6-7. That is incorrect. In ruling that plaintiffs need not have been the recipient of the false statements at issue to establish proximate cause, the Seventh Circuit

agreed with virtually every other circuit that has considered that issue.[3]

An early decision after *Holmes* was *Mid Atlantic Telecom, Inc. v. Long Distance Services., Inc.*, 18 F.3d 260 (4th Cir. 1994). In that case, a RICO plaintiff contended that defendant, a competitor, had engaged in a fraudulent scheme involving mail and wire fraud directed at plaintiff's *customers*, thereby injuring plaintiff. The district court granted summary judgment for defendant. On appeal, the Fourth Circuit reversed even though it recognized that plaintiff did not allege it had received the mailings or telephone calls at issue. *Id.* at 263. The court emphasized it had not intended in its previous decisions "to establish a rule that only injuries suffered by the immediate victim of a predicate act satisfied the 'by reason of' requirement of § 1964(c)." *Id.* Here, "[g]iven the opportunity to engage in discovery," plaintiff Mid Atlantic "may be able to show that while the scheme was initially aimed only at defrauding LDS customers, Rice

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[3] It is significant that in their petition for rehearing *en banc* below, petitioners acknowledged that the Fourth and Fifth Circuits "recognize a very narrow exception where a third party (not the plaintiff) relies on a fraudulent misrepresentation but the plaintiff was, in fact, the intended target of the scheme." *See* Pet. for Reh'g *En Banc* of Appellees Bridge, *et al.*, at 9 (7th Cir. filed Mar. 5, 2007) (citing *Sandwich Chef of Texas* and *Mid Atlantic*, discussed *infra*). Petitioners also acknowledged that the Seventh Circuit may have viewed the instant case as falling within "the narrow confines of the 'target' exception to the reliance requirement." *Id.* In their petition for certiorari, however, petitioners make no reference to that issue, which is in fact the very issue in this case.

broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers)." *Id.* The court concluded that "[a] finding of proximate cause in such a situation would not be at odds with the Supreme Court's holding in *Holmes*, since Mid Atlantic is not seeking to vindicate the rights of its former customers . . . " *Id.* at 264.

Although petitioners now count the Fourth Circuit as one of the circuits requiring "reliance," *see* Pet. at 6 (*but see* n. 3, *supra*), it is apparent the Fourth Circuit does *not* always require that the *plaintiff* have received and relied upon the fraudulent statements at issue. Just as the Seventh Circuit recognized here that plaintiffs were the *only* parties injured by the fraudulent scheme at issue, Pet. App. at 5a, the Fourth Circuit allowed a RICO claim to proceed where the plaintiff was the "direct target" of the fraudulent predicate acts.[4]

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[4] In the concluding portion of its opinion, the Fourth Circuit commented that if Mid Atlantic "was aware" of defendant's use of the fraudulent billing program, then Mid Atlantic could not have "relied" on defendant's proffered lower rates in setting its own rates. 18 F.3d at 264. This is a different issue than whether the plaintiff must have received and relied upon the false statements at issue. A party's knowledge of the defendant's fraud before it was injured may, depending on the facts, foreclose recovery. However, to the extent respondents here must prove they acted reasonably in reliance on petitioners' compliance with the Single, Simultaneous Bidder Rule, their reasonable reliance has not been challenged and remains an issue for trial. *See supra* n. 1; *infra* at 28-29. It

The Fifth Circuit – another one of the circuits now claimed by petitioners, *see* Pet. at 6 (*but see* n. 3, *supra*) – later decided a case on all fours with *Mid Atlantic*. In *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), plaintiff P&G brought RICO and other claims, contending defendants had sent false and disparaging statements about P&G to consumers. The district court dismissed the RICO claim because P&G had not alleged it relied on the false statements. The Fifth Circuit reversed. It explained that *generally* in "civil RICO claims in which fraud is alleged as a predicate act, reliance on the fraud must be shown," *id.* at 564, but that there also was "a narrow exception to this rule." *Id.* Relying on its earlier decision in *Summit Properties Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000), which in turn had relied on *Mid Atlantic*, the Fifth Circuit ruled that "a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present." *Proctor & Gamble*, 242 F.3d at 564-65.

That is precisely what the Seventh Circuit ruled here. Moreover, just like respondents' claim here, P&G's claim fell squarely within this narrow

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also was in this same sense that the court in *Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331 (4th Cir. 1996) – a case relied on by petitioners – required "reliance" by the plaintiff. *See id.* at 339 (remanding to allow RICO claim to go forward so long as plaintiffs amended their complaint to plead what they had argued in the case, which was simply that they had acted in "*reliance* on the apparent legitimacy and legality of the operation") (emphasis in original) (internal citations omitted).

exception: "if P&G's customers relied on the fraudulent rumor in making decisions to boycott P&G products, this reliance suffices to show proximate causation." *Id.* at 565; *see also Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir. 2003) (noting narrow exception to the requirement that a RICO plaintiff prove direct reliance on the fraudulent predicate act, which "only comes into play when the plaintiff can demonstrate injury as a direct and contemporaneous result of fraud committed against a third party").

In *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251 (2d Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 1991 (2006), the Second Circuit agreed that a civil RICO plaintiff need not always prove his *own* reliance on predicate acts of mail or wire fraud to establish the necessary element of proximate cause. Rather, as in *Mid Atlantic* and *Proctor & Gamble*, the court held that "where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff," the complaint adequately pleads proximate cause, "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Id.* at 263.

This Court reversed, although not because of plaintiff's undisputed inability to prove his own reliance on the defendant's misrepresentations. Rather, the Court held that plaintiff could not

establish proximate cause because the alleged violation did not lead directly to plaintiff's injuries. 126 S. Ct. at 1997-98. Rather, plaintiff's lost sales readily could have resulted from factors other than defendants' alleged acts of fraud, and direct victims had been defrauded and could be expected to sue for damages. *Id.* In a separate opinion, Justice Thomas disagreed with the Court's proximate cause analysis and thus reached, but rejected, the contention that "reliance" was an independent element required under RICO. Justice Thomas emphasized that "the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action." *Id.* at 2008 (Thomas, J., concurring in part and dissenting in part).[5]

Finally, although the Ninth Circuit has not decided whether reliance by the plaintiff is always required in civil RICO actions, it too has been careful to frame the controlling issue as one of *causation*, not *reliance*. In *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), the court emphasized that "[c]ausation lies at the heart of a civil RICO claim" and that, "[i]n some cases, reliance may be a 'milepost on the road to causation.'" *Id.* at 664

[5] Justice Breyer also dissented in part in *Anza* and explained that claims based on "illegitimate competitive means" could be actionable; thus, "[c]laims involving RICO violations that *objectively target a particular competitor*, *e.g.*, bribing an official to harass a competitor, could also be actionable." 126 S. Ct. at 2011 (Breyer, J., concurring in part and dissenting in part) (emphasis added).

(internal citation omitted). In the case before it, the court held that "reliance provides a key causal link" between the defendants' alleged misrepresentations and the plaintiffs' injury. *Id.* at 665. But it emphasized that it had not decided "whether reliance is the *only way* plaintiffs can establish causation in a civil RICO claim predicated on mail fraud" and that "we have been careful to frame the controlling issue in terms of causation, not reliance." *Id.* at 666 (emphasis in original). Similarly, in *Living Designs, Inc. v. E.I. DuPont de Nemours and Co.*, 431 F.3d 353 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2861 (2006), the court did not address the issue, because it found that plaintiffs had adequately pleaded that they "reasonably relied on [DuPont] to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by [DuPont]'s officers and agents." *Id.* at 363 (quoting complaint; alteration in original).[6]

Indeed, only one circuit – the Sixth – appears to hold that a civil RICO claim may be established only upon a showing in every case that *plaintiff itself*

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[6] The First Circuit has broadly refused to "depart from RICO's literal language by importing a reliance requirement into RICO," *Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 104 (1st Cir. 2002), and thus has viewed the issue just as Justice Thomas did in his later opinion in *Anza*. Even so, the First Circuit has agreed that "[r]eliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way." *Id.*

relied on defendant's false statements.[7] In its most recent decision on the issue, however, all three judges of the panel questioned this position. *Brown v. Cassens Transp. Co.*, 492 F.3d 640 (6th Cir. 2007). Judge Gibbons, writing for the court, noted that "we may quarrel with the soundness of [the] conclusion" that reliance is required under civil RICO when it is not required as an element of criminal mail and wire

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[7] In its decision below, the Seventh Circuit also identified the Eleventh as requiring reliance by the plaintiff in RICO cases involving fraud, citing *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002). It does not appear, however, the Eleventh Circuit has ever considered a RICO case in which the plaintiff was the direct target of a fraudulent scheme involving statements made to and relied on by others. Certainly, *Sikes* was not such a case. *Sikes* was a consumer class action in which all members of the purported plaintiff class had, in fact, personally received the false statements at issue. *Id.* at 1355, 1362. Nor was a question of third party reliance presented in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), relied on by petitioners. Moreover, in *Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998), *aff'd*, 529 U.S. 494 (2000), the Eleventh Circuit stated that a RICO claim *could* be established "if the plaintiff has alleged an injury proximately caused by the defendants' acts of racketeering *that target the plaintiff*." *Id.* at 1096 n.10 (emphasis added). And in its most recent RICO jurisprudence, the Eleventh Circuit has moved away from any reliance analysis and, in keeping with this Court's decision in *Anza*, has instead focused on proximate cause. *See Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007). Similarly, although the Eighth Circuit generally requires "detrimental reliance" in RICO actions, *see Appletree Square I Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994), it is not clear whether it would recognize the narrow "target" exception found by other circuits in a case that presented the issue.

fraud. *Id.* at 644. Judge Gibbons also described as "legitimate" the conclusion of the First Circuit that RICO's terms do not require reliance. *Id.* at 646 n.3. Nevertheless, she explained that "[e]ven if we accept plaintiffs' view that our RICO jurisprudence has gone astray in imposing a reliance requirement on plaintiffs pursuing private actions under § 1964(c), our mere belief that a prior case was wrongly decided is insufficient to permit reversal of the decision of a previous panel." *Id.* at 646. Judge Ackerman concurred but emphasized that "RICO, properly construed, does *not* require that a plaintiff plead or demonstrate reliance in a civil RICO case based upon the predicate acts of mail or wire fraud." *Id.* at 651 (emphasis added) (Ackerman, J., concurring). Judge Moore dissented in part and urged that "we should convene the en banc court to reexamine . . . whether a civil-RICO claim incorporates the element of reliance." *Id.* at 651 (Moore, J., concurring in part and dissenting in part). Such a petition for *en banc* review is, in fact, still pending in the case.[8]

Thus, petitioners simply are wrong in contending in this Court there is a 5-3 split, in favor of *petitioners*, on the issue decided by the Seventh Circuit. Pet. at 6-7. To be sure, *all* the circuits appear to agree that reliance generally is a "milepost on the road to causation," *Poulos*, 379 F.3d at 664 (internal quotation marks omitted), and also that reliance is "doubtless the most obvious way in which

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[8] *See Brown v. Cassens Transport Co.*, No. 05-2089 (6th Cir.) (petition for *en banc* rehearing filed July 24, 2007; response directed by court Aug. 24, 2007; response filed Sept. 7, 2007).

fraud can cause harm," *Loiselle*, 303 F.3d at 104. But of all the circuits that have considered the issue presented here, only the Sixth Circuit has potentially rejected (as foreclosed by earlier decisions) the proposition that, in narrow circumstances such as those presented in this case, in *Mid Atlantic*, and in *Proctor & Gamble*, proximate cause can be established by the direct *target* or *victim* of a fraudulent scheme, even where the false statements at issue were sent to and relied on by a third party.[9]

In sum, the circuit cases taken together are consistent on several key points. Where the plaintiff is the *recipient* of the alleged false statements (as indeed most often is the case), the plaintiff generally must have relied on those statements to be able to establish proximate cause. This simply is an adjunct of the logical proposition, discussed further below, that if the *recipient* did not rely on the false statements at issue, it is difficult to prove that those statements caused any injury. *See infra* at 27. In addition, a plaintiff's *knowledge* of the fraud may foreclose recovery, either because as the recipient plaintiff cannot reasonably rely on statements it knew to be false, or possibly because with knowledge of the fraud plaintiff may have been able to avoid its injury. Stated more generally, in an appropriate case the plaintiff may be required to show that it acted reasonably in reliance upon a perceived

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[9] As explained *infra* at 22, although the Sixth Circuit rejected the proposition as foreclosed by its earlier decisions, it also noted that the issue was not actually presented in the case before it.

absence of fraud. But the cases that have considered the issue also have consistently held that the *plaintiff itself* need not always be the party that received and relied on the false statements at issue, so long as its injury is direct and not derivative. As a result, there is no ripe conflict among the circuits, and the Court need not intervene.

B. The Court Should Deny the Petition.

There are at least three reasons why the petition in this case should be denied.

1. First, even accepting that one circuit has indicated its position is in conflict with the decisions in *Mid Atlantic*, *Proctor & Gamble*, and other cases, this acknowledged "conflict" may well resolve itself. As noted above, a petition for *en banc* consideration is presently pending in the Sixth Circuit, with judges openly calling for the case to be reheard.

Further, even if the Sixth Circuit were to deny the pending petition for *en banc* review, the conflict might still resolve itself. The Sixth Circuit could well decide that the issue is not properly presented in that pending case. *See Brown*, 492 F.3d at 645 n.2 (noting that the "reliance by a third party" allowed in *Mid Atlantic* and *Proctor & Gamble* would not change the result in the case before it, because plaintiffs conceded that "their original complaint contained no allegations of reliance by a third party," plaintiffs had been denied leave to amend, and plaintiffs had not appealed that decision). Given the express call in *Brown* that the circuit address the

issue *en banc*, the Sixth Circuit might accept *en banc* review in another case when the issue is squarely presented.

2. Second, the decision below is correct, consistent with the language of the RICO statute, and supported by substantial other authority. The Court should wait to consider the issue until it is squarely presented in a conflicting decision from the Sixth Circuit – the only circuit with a potentially inconsistent position on this issue.

As the Court recognized in *Holmes* and *Anza*, the touchstone of the inquiry of who may bring claims under RICO is proximate cause. That requirement of proximate cause, which imposes "a demand for some direct relation between the injury asserted and the injurious conduct alleged," *Holmes*, 503 U.S. at 268, flows directly from the statutory language that a RICO plaintiff must be injured "by reason of" an unlawful predicate act. 18 U.S.C. § 1964(c). As Justice Thomas – the only Justice to reach and consider the issue – explained in his separate opinion in *Anza*, however, "[b]ecause an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of § 1962, without proof of reliance." *Anza*, 126 S. Ct. at 2007 (Thomas, J., concurring in part and dissenting in part). Justice Thomas recognized that "reliance" is a "specialized condition" required for common law fraud, but one that finds no place in the language of RICO:

> [T]here is no language in § 1964(c) that could fairly be read to add a reliance requirement in fraud cases only. Nor is there any reason to believe that Congress would have defined 'racketeering activity' to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only when those acts would have been actionable under the common law.

Id. at 2008. Thus, although Justice Thomas recognized that proof of reliance often could be used to prove the element of *causation*, that fact "does not transform reliance itself into an element of the cause of action." *Id.*

Although Justice Thomas is the only Justice to have considered the issue directly, his conclusion is consistent with the Court's RICO jurisprudence and the views of other Justices. The Court repeatedly has focused on proximate cause as the touchstone determining who may bring claims under RICO, even when it was apparent in *Anza* that the plaintiff had not "relied" on the fraudulent statements at issue. Moreover, as noted above, in his separate opinion in *Anza*, Justice Breyer would have found proximate cause present for "[c]laims involving RICO violations that objectively target a particular competitor" through "illegitimate" means. 126 S. Ct. at 2011 (Breyer, J., concurring in part and dissenting in part).

Justice O'Connor's concurrence in *Holmes*, joined by Justices White and Stevens, also is significant. Justice O'Connor would have reached the question presented in the case and would have ruled that although plaintiff had not established proximate cause, it *did* have "standing" to bring a RICO claim, despite the fact it had not purchased or sold a security in reliance upon the defendants' fraudulent conduct. Justice O'Connor emphasized that the RICO statute "sweeps broadly, authorizing '*any* person' who is injured by reason of a RICO violation to sue," 503 U.S. at 278-79 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original), and she would have made clear that "the words 'any person' cannot reasonably be read to mean only purchasers and sellers of securities." *Id.* at 279.

So long as the plaintiff could establish proximate cause, Justice O'Connor would have rejected the effort to narrow the scope of civil RICO, just as the Court had refused to narrow it in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), explaining: "If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962's] provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional . . . requirement." *Id.* at 495. Justice Scalia also concurred in *Holmes*, and he too would have held that a RICO plaintiff alleging a predicate act of securities fraud need *not* prove it was a purchaser or

seller of the securities in question – but must nevertheless establish proximate cause. *Holmes*, 503 U.S. at 286-87 (Scalia, J., concurring in the judgment).

The consistent theme of the Court and the Justices writing separately in these cases is that although the RICO statute requires a direct relation between the plaintiff's injury and the defendant's racketeering activity, there is no place in the statute for additional elements that would bar a person directly injured by unlawful racketeering activity from pursuing a RICO claim. The same is true for a "reliance" requirement that is divorced from, or in addition to, the statutory requirement of proximate cause.

As the Solicitor General argued recently in a brief for the United States in *Bank of China v. NBM L.L.C.*, No. 03-1559: "Civil RICO requires reliance by someone when the predicate offenses involve fraud in order to establish the requisite causal link between the injury and the RICO violation, but not necessarily reliance *by the plaintiff*. An examination of the language of the statute bears this out." Brief for the United States as *Amicus Curiae* at 21, *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005) (No. 03-1559) (emphasis in original), *available at* 2005 WL 2875061.[10] Noting that § 1964(c) provides a

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[10] This Court granted a petition for certiorari in *Bank of China* to consider a related question of reliance under RICO under different facts. The case involved allegedly false statements made *to the plaintiff*, the Bank of China, and the Second Circuit held that the plaintiff recipient must have reasonably relied on

cause of action for "any person" injured by reason of a violation of § 1962, the Solicitor General argued that "to the extent that a plaintiff can show a 'direct relation' between its injury and misrepresentations directed to a third party, see *Holmes*, 503 U.S. at [269], a rule barring recovery on a third-party reliance theory would be inconsistent with Section 1964(c)'s evidence breadth." *Id.* at 22 (citing *Sedima*, the decision of the Second Circuit in *Anza*, and *Mid Atlantic*).

To be sure, to establish proximate cause in a RICO case involving mail or wire fraud, *someone* typically must have relied upon the false statements at issue. If the false statements were not relied upon by the recipient, it would be difficult to prove that the plaintiff's injuries were proximately caused (or indeed caused at all) by those false statements. But there is no reason under RICO why the false statements need to be received and relied on *by the plaintiff* in every case.

That is precisely the point of the *Mid Atlantic* and *Proctor & Gamble* cases, and it was precisely the point of Judge Easterbrook in his opinion for the

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the statements. *Bank of China v. NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004) ("Bank of China was required to prove that it reasonably relied on defendants' purported misrepresentations – i.e., the representations that the defendants made *to the Bank* in order to obtain the loans.") (emphasis added), *cert. granted*, 545 U.S. 1138 (2005). Although the issue whether such reliance was required was fully briefed in this Court, the petition for certiorari was dismissed when the case settled. *Bank of China v. NBM L.L.C.*, 546 U.S. 1026 (2005).

Seventh Circuit below. The allegations in this case, properly presumed to be true, are that defendants used the mail and wires to engage in a fraudulent scheme to take business away from the plaintiffs. The County was not harmed, because both plaintiffs and defendants offered the County the same price. Property owners were not harmed, because both plaintiffs and defendants agreed not to impose on them any penalty, i.e., the same 0% rate. *Only* plaintiffs were harmed financially, and only plaintiffs had an economic incentive to sue, by reason of conduct that was the direct and immediate cause of plaintiffs' loss of valuable tax lien properties. To the extent that plaintiffs' financial harm was directly caused by a fraudulent scheme involving use of the mail or wires as part of a pattern of racketeering activity by the defendants, plaintiffs have stated a claim for relief under RICO.

Thus, there is no reason for the Court to consider this case, which is consistent with the Court's proximate cause jurisprudence under RICO and with the decisions of all other circuits to consider the issue, except possibly the Sixth. If the Court ever needs to address the issue of "plaintiff reliance" under RICO, it should do so only if and when a conflicting decision presenting that issue arises from the Sixth Circuit.

3. Third, this case is not an appropriate vehicle to resolve the issue in any event. The Seventh Circuit has ruled only that respondents have stated a claim. Proceedings on remand may develop further the manner in which respondents

themselves relied on petitioners' alleged false statements: for instance, respondents may develop proof that their very decision to participate in the auction, and to incur specific costs in connection with that participation, was made in reliance on the integrity of the allocation process used by the County to award parcels to identically situated bidders. *See, e.g.*, *Living Designs*, 431 F.3d at 363 (reliance by plaintiff adequately based on claims plaintiff "reasonably relied on [DuPont] to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by [DuPont]'s officers and agents"); *Chisolm*, 95 F.3d at 339 (allegation that plaintiff relied "on the apparent legitimacy and legality of the operation" sufficient under RICO) (internal citation omitted).

In addition, the overarching issue of proximate cause, and the factors identified by this Court in *Holmes* and *Anza*, also will be further developed. The complaint alleges a fraudulent scheme in which defendants manipulated and inflated the number of tax liens they were able to secure at the direct expense of other, identically situated bidders. Before this Court considers the issues of proximate causation and reliance in this case, further factual development concerning those allegations would be valuable.[11]

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[11] It also is significant that the issue of "reliance" was not the specific focus of the proceedings below, and thus inevitably will

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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be developed further on remand. As noted above, *supra* at 6, the district court ruled that respondents lacked "standing" to sue under RICO. On appeal, petitioners argued that the issue of reliance was "largely academic." *Supra* at 6. Because of the way the issue was presented below, the Court of Appeals principally analyzed this case in terms of *standing* and *proximate cause*, rather than "reliance." See Pet. at 3a-8a. Thus, although the litigation below clearly focused on the fact that respondents had not been recipients of the misrepresentations at issue, there has been minimal consideration of whether respondents nevertheless could prove reliance "qua reliance," to the extent that "reliance" is an independent requirement under RICO.

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