No. 07-___

IN THE

Supreme Court of the United States

IKON OFFICE SOLUTIONS, INC., AND
GENERAL ELECTRIC CAPITAL CORPORATION,
Petitioners,

v.

NEWCAL INDUSTRIES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff can define a valid antitrust market or submarket as the class of customers who have term contracts with the plaintiff's business rival.

2. Whether a plaintiff can satisfy RICO's proximate-cause requirement by alleging that a business rival defrauded its own customers when those customers—who are not parties—are the ostensible victims of the alleged fraud.

3. Whether, to satisfy RICO's "enterprise" requirement, a plaintiff can allege an "association in fact" without alleging that this "association" had any discrete organizational structure.

4. Whether a plaintiff may invoke the Declaratory Judgment Act to void contracts between the plaintiff's business rival and the rival's customers when those customers are not parties to the suit.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals were:

NewCal Industries, Inc.; CPO, Ltd.; Pinnacle Document Systems, Inc.; and Kearns Business Solution, Inc. (plaintiffs-appellants); and

IKON Office Solutions, Inc., and General Electric Capital Corporation (defendants-appellees).

RULE 29.6 STATEMENT

No publicly held corporation owns 10% or more of Petitioner IKON's stock. All of General Electric Capital Corporation's outstanding common stock is owned by General Electric Capital Services, Inc. All of the common stock of General Electric Capital Services, Inc., is owned, directly or indirectly, by General Electric Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. NewCal's Claims 4

B. The District Court's Orders 8

C. The Ninth Circuit's Decision 10

REASONS FOR GRANTING THE PETITION 13

I. THE NINTH CIRCUIT'S RELIANCE ON "CONTRACTUAL RELATIONSHIPS" TO DEFINE ANTITRUST MARKETS IS WRONG AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS 14

II. THE NINTH CIRCUIT'S PERMISSIVE VIEW OF RICO'S PROXIMATE-CAUSE REQUIREMENT IS WRONG, IGNORES THIS COURT'S DECISION IN *ANZA*, AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS 24

TABLE OF CONTENTS—Continued

Page

III. THE NINTH CIRCUIT'S CONCLUSION THAT A RICO PLAINTIFF NEED NOT ALLEGE ANY "SEPARATE ORGANIZATIONAL STRUCTURE" FOR AN ASSOCIATION-IN-FACT ENTERPRISE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS 28

IV. THE DECISION BELOW UNLAWFULLY CONVERTS THE DECLARATORY JUDGMENT ACT INTO A SURROGATE FOR RULE 23 31

CONCLUSION 33

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit, reported at 513 F.3d 1038 ..... 1a

APPENDIX B: Order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and suggestions for rehearing en banc, filed March 7, 2008 ..... 33a

APPENDIX C: Order of the United States District Court for the Northern District of California granting motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), filed May 16, 2005 ..... 35a

APPENDIX D: Order of the United States District Court for the Northern District of California granting motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), filed December 23, 2004 ..... 45a

APPENDIX E: Statutory provisions 69a

TABLE OF AUTHORITIES

CASES

Page(s)

Algrant v. *Evergreen Valley Nurseries Ltd.*, 126 F.3d 178 (3d Cir. 1997) 33

Anza v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) 3, 16, 22, 24, 25, 26

Asa-Brandt, Inc. v. *ADM Investor Services, Inc.*, 344 F.3d 738 (9th Cir. 2003) 29

Bell Atlantic Corp. v. *Twombly*, 127 S. Ct. 1955 (2007) 21, 22

Bridge v. *Phoenix Bond & Indemnity Co.*, No. 07-210 (arg. Apr. 14, 2008) 27

Brown Shoe v. *United States*, 370 U.S. 294 (1962) 22

Byrne v. *Nezhat*, 261 F.3d 1075 (11th Cir. 2001) 10

Central Distributors of Beer, Inc. v. *Conn*, 5 F.3d 181 (6th Cir. 1993) 27

Colsa Corp. v. *Martin Marietta Services*, 133 F.3d 853 (11th Cir. 1998) 20

Diamond Shamrock Corp. v. *Lumbermens' Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969) 32

Eastman Kodak Co. v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992) 2, 10, 11, 14

Geneva Pharmaceuticals Technology Corp. v. *Barr Laboratories, Inc.*, 386 F.3d 485 (2d Cir. 2004) 23

Gilbert v. *City of Cambridge*, 932 F.2d 51 (1st Cir. 1991) 32

TABLE OF AUTHORITIES—Continued

Page(s)

Hack v. *President & Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000) 16, 17, 18

Holmes v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992) 24

Israel Travel Advisory Service, Inc. v. *Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) 10, 26, 27

Limestone Development Corp. v. *Village of Lemont*, 520 F.3d 797, 2008 WL 852586 (7th Cir. 2008) 29, 30

Maris Distributing Co. v. *Anheuser-Busch, Inc.*, 302 F.3d 1207 (11th Cir. 2002) 17

Nynex Corp. v. *Discon, Inc.*, 525 U.S. 128 (1998) 20

Odom v. *Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) 13, 28, 29

Orangetown v. *Gorsuch*, 718 F.2d 29 (2d Cir. 1983) 33

Queen City Pizza, Inc. v. *Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997) 3, 5, 9, 11, 16, 19

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 23

Schlotzsky's, Ltd. v. *Sterling Purchasing & National Distribution. Co.*, 520 F.3d 393 (5th Cir. 2008) 17

Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Sikes v. *Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002) 27

Twombly v. *Bell Atlantic Corp.*, 425 F.3d 99 (F.3d 2005), *rev'd*, 127 S. Ct. 1955 (2007) 22

United Farmers Agents Ass'n, Inc. v. *Farmers Insurance Exchange*, 89 F.3d 233 (5th Cir. 1996) 17

United States v. *Bagaric*, 706 F.2d 42 (2d Cir. 1983) 29

United States v. *Cagnina*, 697 F.2d 915 (11th Cir. 1983) 29

United States v. *E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956) 6

United States v. *Patrick*, 248 F.3d 11 (1st Cir. 2001) 29

United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988) 29

United States v. *Riccobene*, 709 F.2d 214 (3d Cir. 1983) 29

United States v. *Sanders*, 928 F.2d 940 (10th Cir. 1991) 29

United States v. *Tillett*, 763 F.2d 628 (4th Cir. 1985) 29

United States v. *Turkette*, 452 U.S. 576 (1981) 29, 30

VanDenBroeck v. *CommonPoint Mortgage Co.*, 210 F.3d 696 (6th Cir. 2000) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) 21

Walker Process Equipment, Inc. v. *Food Machine & Chemical Corp.*, 382 U.S. 172 (1965) 18

STATUTES

Sherman Act, 15 U.S.C. §§ 1, 2 1

Lanham Act, 15 U.S.C. § 1125(a)(1)(B) 8

18 U.S.C. § 1262(c) 7

The Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* 1
§ 1961(4) 28
§ 1964(c) 24

28 U.S.C. § 1254(1) 1

Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* 1, 8

Fed. R. App. P. 28(j) 13

OTHER AUTHORITIES

Areeda & Hovenkamp, *Antitrust Law* (3d ed. 2007) 3, 6, 20, 23

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TABLE OF AUTHORITIES—Continued

Page(s)

Goldfine, David A.J. & Vorrasi, Kenneth M., *The Fall of the Kodak Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 Antitrust L.J. 209 (2004) 15

Hovenkamp, Herbert, *The Antitrust Enterprise: Principle and Execution* (2005) 15

Hovenkamp, Herbert, *Antitrust Policy After Chicago*, 2001 Colum. Bus. L. Rev. 257 ..... 14, 21

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OPINIONS BELOW

The court of appeals' opinion is reported at 513 F.3d 1038 (9th Cir. 2008) and is reproduced at App. 1a-31a. The district court's opinions are unpublished and are reproduced at App. 35a-43a, 45a-67a.

JURISDICTION

The court of appeals entered its judgment on January 23, 2008. App. 1a. A timely petition for rehearing was denied on March 7, 2008. App. 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, are set forth at App. 69a. The Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, *et seq.*, is set forth at App. 70a-75a. The Declaratory

Judgment Act, 28 U.S.C. § 2201, is set forth at App. 76a.

STATEMENT

The Ninth Circuit's decision below entitles any corporate plaintiff to bring federal antitrust and racketeering claims against a business rival merely by alleging that the rival deceived its customers (who are not parties to the suit) into accepting contractual commitments that impede the plaintiff's efforts to win the customers' business. That holding is as far-reaching as it is wrong, and it conflicts in several independent respects with the decisions of other courts of appeals.

First, relying on *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Ninth Circuit held that a plaintiff may sue a rival under the Sherman Act, even though the defendant has no market power under any conventional definition, on the theory that the defendant fraudulently enticed its customers to extend their term contracts with it. The court reached that result by defining the relevant market not in terms of interchangeable *products* or *services*, but much more narrowly in terms of the defendant's own *customer base*. Under the Ninth Circuit's reasoning, even if Company X is one of twenty equal competitors in the market for providing some service, the relevant market for antitrust purposes can be the market for providing those services *to the contractually bound customers of Company X*—a market in which Company X has "monopoly" power by definition.

In so ruling, the Ninth Circuit created a sharp conflict with several other courts of appeals. For example, the Third Circuit has held—correctly—that a "court making a relevant market determination looks not to the *contractual* restraints assumed by a particular

plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general." *Queen City Pizza, Inc.* v. *Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) (emphasis added). The Ninth Circuit's contrary approach inappropriately "turn[s] antitrust into an engine for resolving contract disputes generally" and a "substitute for the law of fraud, misrepresentation, or unfair dealing." Areeda & Hovenkamp, *Antitrust Law* ¶ 519a, at 192 (3d ed. 2007). Worse, that approach converts what should be ordinary common law disputes between a company *and its customers* into treble-damages antitrust disputes between the company *and its competitors*.

Second, the Ninth Circuit held that, in these same circumstances, a business competitor may sue the defendant company for treble damages under RICO as well—again, on the basis of alleged acts by the company *against its customers* (who are not parties to the suit) rather than against the plaintiff competitor. That position contradicts the holding of this Court and several courts of appeals that, for standing purposes, a "RICO plaintiff cannot circumvent the [statutory] proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006). Inexplicably, the Ninth Circuit did not even cite *Anza*.

Third, the Ninth Circuit compounded that error, and deepened yet another circuit split, by holding that a plaintiff can state a RICO claim without alleging any "separate organizational structure" for the purported RICO "enterprise." That holding conflicts with the decisions of several other courts of appeals. Finally, in perhaps its strangest holding of all, the Ninth Circuit

converted the Declaratory Judgment Act into a surrogate for the Rule 23 class action mechanism by holding that a corporate plaintiff may seek to void thousands of contracts between a business rival and that rival's customers—even though, again, those customers are not parties to the suit.

In short, the Ninth Circuit's decision is irreconcilable in multiple respects with the decisions of this Court and other courts of appeals. It also has troubling and far-reaching implications for any company that seeks to capitalize on relationships with its contractual partners and does business in the Ninth Circuit. This Court's review is amply warranted.

A. NewCal's Claims

Petitioner IKON, respondent NewCal, and many other companies compete to provide copier equipment, parts, and maintenance services to sophisticated commercial customers. App. 2a; 36a. These companies do not generally manufacture copier equipment themselves. Instead, they purchase such equipment from a wide range of independent manufacturers and sell it to their customers or arrange for it to be leased to them. The equipment manufacturers—Xerox, Ricoh, Canon, and others—sell equipment both to independent distributors such as IKON and also directly to end users (in competition with the independent distributors). It is undisputed that the equipment-supply and maintenance market in which IKON participates is highly competitive. App. 13a.

Customers in this market enter into non-exclusive term contracts—generally for a term of five years—with one or more equipment-supply companies. App. 36a. As a given customer's contract approaches the end of its term, rival companies often compete to win the

customer's business from the incumbent. To that end, a rival may offer to cover the "buy-out" or "lease-end" charge that the customer would otherwise have to pay the incumbent in order to exit the contract before its scheduled termination. App. 36a-37a. The amount of that charge increases with the amount of time left in the contractual term.

For their part, incumbents try to maintain their existing business by giving their customers incentives to enter into extended ("flex") contracts. In this case, NewCal and several other equipment-supply companies (collectively, "NewCal") allege that IKON defrauded its customers by tricking them into extending the terms of their contracts. App. 37a. None of these allegedly defrauded customers joined NewCal's complaint, and none is a party to this case. Nevertheless, NewCal claims that IKON's supposed "fraud" harmed NewCal and IKON's other rivals by making it more difficult and costly to win the business of IKON's existing customers. That allegation of indirect harm is the basis for the antitrust and RICO claims at issue here.[1]

1. *Antitrust claims.* NewCal asserts a variety of antitrust theories under Sections 1 and 2 of the Sherman Act, including unlawful monopolization, exclusive dealing, and tying. App. 19a-20a. To state a claim under any of these theories, NewCal had to define, as a threshold matter, the "markets" in which it alleges that IKON possessed and abused market power. *See, e.g.*, *Queen City*, 124 F.3d at 436-437; *see also* App. 5a; 51a-

[1] NewCal has also named co-petitioner General Electric Capital Corporation ("GE")—which had purchased some of IKON's existing contracts—as a codefendant and co-conspirator. For simplicity, we refer to IKON and GE in the aggregate as "IKON."

52a. For antitrust purposes, a "market" is "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States* v. *E.I. Du-Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

NewCal proposed four alternative market definitions. Two of them—"copier equipment" and "copier service for Canon and Ricoh brand copier equipment"—are potentially valid definitions under existing law. But as the Ninth Circuit recognized, these definitions could not "support Newcal's claims because Newcal nowhere alleged that IKON holds market power in the nationwide market for copier equipment leases or in the nationwide market for Canon and Ricoh-brand copier equipment service." App. 7a.

NewCal thus proposed the alternative market definitions at the core of this case: "replacement copier equipment for IKON and GE customers *with flexed IKON contracts*" and "copier service for IKON and GE customers *with flexed IKON contracts*." App. 6a-7a (emphasis added; some capitalization altered).[2] In each case, NewCal sought to define the relevant market in terms of customers who already had contractual obligations to IKON. And NewCal contended that IKON had harmed competition within this "market" by improp-

[2] NewCal and the Ninth Circuit referred to these two constructs sometimes as "markets" and sometimes as "submarkets." That terminological distinction has no analytical significance. Because "the identification of a submarket is in principle no different than the identification of a relevant market, . . . nothing would be lost by deleting the word 'submarket' from the antitrust lexicon." Areeda & Hovenkamp, *supra*, ¶ 533, at 257 (internal quotation omitted). *See* pp. 22-23, *infra*. We therefore refer to these simply as NewCal's proposed "markets."

erly extending its customers' contracts and thereby frustrating the efforts of rivals to win their business. NewCal labeled this type of conduct "installed base opportunism." C.A. E.R. 226 ¶ 83. Significantly, NewCal has not alleged that any factor *other than* the contractual commitments of IKON's customers makes it difficult for those customers to switch to another supplier.

2. *RICO claims.* NewCal separately alleged that IKON violated RICO by engaging in a "pattern of racketeering activity." To state a RICO claim under 18 U.S.C. § 1262(c), a plaintiff must allege, among other things, "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). As to the third and fourth prongs, NewCal alleged, as predicate acts, that IKON had used the mail and wires to "defraud" its customers into extending their IKON contracts. App. 57a. NewCal did not argue that IKON had defrauded *it* or any other business rival. Instead, NewCal claimed that, by defrauding its own customers into extending their contracts, IKON made it more difficult and costly for NewCal to win the business of those customers for itself. App. 26a; *see* C.A. E.R. 250 ¶ 159.

As to the second *Sedima* prong, NewCal did not allege that IKON itself is an "enterprise"; indeed, it alleged that "[t]he defendants, IKON and GE, are persons distinct from the enterprise[.]" C.A. E.R. 241 ¶ 145. NewCal instead defined the "enterprise" as a nebulous "association in fact" that encompasses IKON, various equipment manufacturers, various financing companies, and "entities which assist in administering the IKON Contracts," including two law firms. *Id.* at 241-242 ¶ 146. NewCal noted that many of these entities are bound through bilateral contractual relationships in the ordinary course of business, *id.* at 242 ¶ 147,

but it did not describe any coherent structure for the allegedly criminal "association in fact," such as a system of authority or a decisionmaking apparatus.

3. *Declaratory Judgment Act.* Invoking the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, NewCal also sought a judicial declaration that thousands of contracts between IKON and its customers are void and unenforceable. App. 28a; IKON C.A. Br. 4-5. As noted, none of those customers is a party to this suit.[3]

B. The District Court's Orders

1. IKON moved to dismiss NewCal's complaint for failure to state a valid claim. In its initial order, the district court granted that motion but allowed NewCal to replead all of its claims, except for the claim under the Declaratory Judgment Act. App. 62a-63a. As to that claim, the district court held that (i) "NewCal lacks standing to seek declaratory judgment regarding the rights and obligations of customers subject to IKON Contracts" and (ii) prudential considerations would justify denying the requested relief in any event, given

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[3] NewCal also claimed that IKON had violated the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), by making false and misleading statements in its promotional activities. The district court dismissed that claim for failure to allege actionable "false statements," but the court of appeals reversed and "remanded for evidentiary development." App. 25a. Because these Lanham Act issues are fact-bound, this petition does not challenge the Ninth Circuit's disposition of them. Nonetheless, this Court routinely grants certiorari to consider antitrust and RICO claims at interlocutory stages of litigation, and it should do so here as well. *See* note 10, *infra*.

that "the IKON customers under such contracts are not parties to this case." App. 60a-62a.

As the district court had permitted, NewCal filed an amended complaint, and IKON moved again to dismiss all claims. The district court granted the motion, this time with prejudice.

The district court first held that NewCal's antitrust claims were invalid because IKON "has no . . . market power" in any properly defined market. App. 39a. As the court observed, the IKON-specific "markets" NewCal proposed to get around this problem were "defined solely in terms of IKON customers that have contracts with IKON." App. 38a. Relying on the Third Circuit's decision in *Queen City*, 124 F.3d at 438, the district court held that such contractual relationships cannot serve as a basis for defining a valid antitrust market. App. 38a-39a; *see also* App. 38a ("power under a contract does not create market power in the antitrust sense"), 52a-56a (preliminary district court order).[4] The court thus concluded that "[a]ny hypothetical claims that might arise from the alleged injuries of IKON customers in this case would be problems of con-

[4] In *Queen City*, franchisees of Domino's Pizza had contractually committed to purchase certain supplies exclusively from Domino's or an "approved" supplier. The franchisees alleged that Domino's had market power in what they characterized as a "market" for Domino's-approved supplies, and they alleged that Domino's had abused that market power through anticompetitive practices designed to crush the franchisees' efforts to purchase from independent suppliers. The Third Circuit rejected plaintiffs' claim because it rested on an inappropriately contract-based market definition and because Domino's lacked any market power in the properly defined market for pizza supplies generally. 124 F.3d at 437-441.

tract law and negotiation, not antitrust problems." App. 39a.

The district court rejected NewCal's argument that this Court's decision in *Kodak* requires a contrary result. In *Kodak*, the Court held that it can sometimes be appropriate to define an antitrust product market in terms of a single brand: in that case, the "aftermarket" for providing parts and service to users of Kodak-brand copying equipment. *See* 504 U.S. at 481-482. The district court explained, however, that "the relevant product market [in *Kodak*] was not defined in terms of consumers who had *contracts* with Kodak, but rather in terms of the service and replacement parts required by Kodak equipment owners and controlled by Kodak." App. 39a (emphasis added). Here, in contrast, NewCal's market definition *is* explicitly framed in terms of customers who have contracts with IKON.

The district court also dismissed NewCal's RICO claim on the ground that a RICO plaintiff must "show that his injury was proximately caused by the defendant's wrong," and "[t]his requires . . . a direct relationship between the injury asserted and the injurious conduct alleged." App. 41a-42a. As the court explained, "[c]ourts regularly dismiss fraud-based RICO claims in which the alleged misrepresentations were directed at third parties rather than at the plaintiff," and here "NewCal is not the proper party to assert this RICO claim." *Id.* (*citing Byrne* v. *Nezhat*, 261 F.3d 1075, 1110 (11th Cir. 2001); *Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995)).

C. The Ninth Circuit's Decision

The Ninth Circuit reversed and reinstated all claims.

1. On the antitrust claim, the court described its task as "determining whether this case is more like *Queen City Pizza* . . . or more like *Eastman Kodak*." App. 13a. The Ninth Circuit did not contest that, as the district court had found, this case is more like *Queen City* in at least one important respect. In *Queen City*, as here, the plaintiff sought to define the market in terms of *contractual relationships*—specifically, products used by pizza stores that had entered into franchise agreements with Domino's. 124 F.3d at 437. In *Kodak*, by contrast, the market definition at issue did not refer to any contractual relationships between Eastman Kodak and its customers. Instead, it defined the relevant markets as the provision of parts and services to customers with Kodak machines, whether they had contracts with Kodak or not.[5]

The Ninth Circuit nonetheless found that "Newcal's allegations are more like the allegations at issue in *Eastman Kodak* than those at issue in *Queen City Pizza*," and it concluded that those allegations state a cognizable antitrust claim. App. 17a-18a. The Ninth Circuit reasoned that the pizza franchisees in *Queen City* "knowingly and voluntarily gave" their contractual consent to purchase products on the defendant's terms, whereas here NewCal alleges that IKON defrauded its customers into extending their contracts unwittingly. App. 13a, 16a. The court added: "The al-

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[5] Kodak was accused of leveraging its monopoly over replacement parts for those Kodak machines to suppress competition in the market for servicing them. *See* 504 U.S. at 464-465. No analogous claim is presented here: IKON does not manufacture the equipment, replacement parts, or supplies that it provides to its customers, and that is why NewCal advocated a market definition based on contractual relationships rather than products.

legation here is that IKON is . . . exploiting its unique position—its unique contractual relationship—to gain monopoly power in a derivative aftermarket" for the provision of copier equipment, parts, and services to customers that have such "contractual relationship[s]" with IKON. App. 15a. And the court concluded that "Newcal's complaint sufficiently alleges that IKON customers constitute" a contractually defined market within which IKON has "market power." App. 17a. The court rejected IKON's argument, based on *Queen City* and other cases, that antitrust markets must be defined by reference to products rather than "contractual relationship[s]." App. 17a; *see* IKON C.A. Br. 18-30.

2. The Ninth Circuit also reversed the district court's dismissal of NewCal's RICO claim. First, the court concluded that a corporate plaintiff can satisfy RICO's proximate-cause requirement, and thus establish standing to sue a business rival under that statute, by alleging that the rival "defrauded" its own (non-party) customers into extending their contracts. App. 27a. The court concluded that satisfaction of the proximate-cause requirement in this context must be assessed on a case-by-case basis, and it therefore remanded for further factual development. *Id.* The Ninth Circuit did not cite, much less grapple with, this Court's recent holding that a "RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Anza*, 547 U.S. at 460.[6]

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[6] *Anza* was decided on June 5, 2006, several months after the parties here had filed their appellate briefs. On March 30, 2007,

The Ninth Circuit further rejected IKON's alternative basis for affirming the district court's dismissal of the RICO claim: namely, NewCal's failure to allege any meaningful organizational structure for the alleged "enterprise." The Ninth Circuit noted simply that "[w]e recently held in *Odom* v. *Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007), that RICO's enterprise element does not require the allegation or proof of any separate organizational structure." App. 28a. As the Ninth Circuit had acknowledged in *Odom*, this is the subject of a longstanding circuit conflict that involves almost all of the federal courts of appeals. *See* 486 F.3d at 549-52.

3. Finally, the Ninth Circuit reinstated NewCal's Declaratory Judgment Act claim seeking invalidation of thousands of contracts between IKON and its non-party customers. The court reasoned that, because IKON had allegedly "threatened to sue NewCal for interfering with its existing and potential business relationships, . . . NewCal had a stake in the controversy even though it was not a party to the relevant contracts." App. 29a (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

Three themes unite the Ninth Circuit's antitrust and RICO holdings in this case: they conflict with decisions of other courts of appeals; they are wrong on the merits; and they convert what should be (at most) common law claims brought by a business's *customers* into federal claims for treble damages brought by the

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several weeks before argument, IKON's counsel brought *Anza* to the Ninth Circuit's attention in a letter filed under Fed. R. App. P. 28(j). IKON's counsel further discussed the significance of *Anza* at the argument itself.

business's *commercial rivals*. Each of these holdings poses serious concerns for any company that can be sued in the Ninth Circuit and that seeks to renew term contracts with its customers or otherwise "leverag[es] a special relationship with its contracting partners" (App. 17a).

I. THE NINTH CIRCUIT'S RELIANCE ON "CONTRACTUAL RELATIONSHIPS" TO DEFINE ANTITRUST MARKETS IS WRONG AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

a. In *Kodak*, a majority of this Court broke new ground by holding that an antitrust market can be defined in terms of a single company's products. That approach to market definition is not nearly as radical as the Ninth Circuit's approach here, which defines antitrust markets in terms of a defendant's *contractual relationships* with particular customers. Even as far as it went, however, the majority's holding in *Kodak* has spawned sixteen years of controversy.

That controversy began on the day *Kodak* was decided, with the dissent's observation that "the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts." 504 U.S. at 489 (Scalia, J., dissenting). As the dissent added, "the Court's opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good[.]" *Id.* A decade later, Professor Hovenkamp confirmed the prescience of this warning. In implementation, "[t]he difficulties of *Kodak* are numerous, systematic, [and] incapable of correction, and have wasted untold amounts of litigation and judicial resources." Hovenkamp, *Antitrust Policy After Chicago*, 2001 Colum. Bus. L. Rev. 257, 299. And he has recently concluded that

"the time has come for the Supreme Court to recognize that *Kodak* was a failed experiment in a type of economic engineering where antitrust has no place." Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, 309-310 (2005); *see also* Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *are Misguided*, 68 Antitrust L.J. 659, 679 (2000-2001).

Quite apart from this controversy about whether *Kodak* was rightly decided, that decision has now also given rise to an entrenched circuit conflict between the Ninth Circuit, which construes *Kodak* very expansively, and several other courts of appeals, which apply it cautiously. That conflict had begun to take shape even before the decision below. As two commenters observed in 2004, "[t]he Ninth Circuit offers by far the most favorable jurisdiction for plaintiffs bringing *Kodak*-style lock-in claims." Goldfine & Vorrasi, *The Fall of the* Kodak *Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 Antitrust L.J. 209, 226 (2004-2005).

The Ninth Circuit's decision here removes any doubt that this circuit conflict concerning the meaning of *Kodak* is real, deep, and ripe for this Court's resolution. The Ninth Circuit ruled for NewCal on its antitrust claims only because it accepted NewCal's proposal to define the relevant antitrust markets in terms of "contractual relationship[s]" (App. 15a (emphasis removed)): as "replacement copier equipment for IKON and GE customers *with flexed IKON contracts*" and "copier service for IKON and GE customers *with flexed IKON contracts*." App. 6a-7a (emphasis added; some capitalization altered). Even if the concerns about *Kodak* itself are placed aside, nothing in *Kodak* remotely supports the Ninth Circuit's novel *contract-*

based approach to market definition. That approach would have been rejected, and NewCal's antitrust claims would have been dismissed, if NewCal had sued in the Second, Third, Fifth, or Eleventh Circuits.

First, as discussed, the Third Circuit held in *Queen City* that a "court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general." 124 F.3d at 438. The court added:

> Were we to adopt plaintiffs' position that contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition, any exclusive dealing arrangement, output or requirement contract, or franchise tying agreement would support a claim for violation of antitrust laws. Perhaps for this reason, *no court has defined a relevant product market with reference to the particular contractual restraints of the plaintiff.*

Id. (emphasis added). The Second Circuit reached a similar conclusion in *Hack* v. *President & Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000), in which a group of undergraduates challenged a university policy requiring them to live in dorms during their first two years of college. The Second Circuit dismissed the plaintiff's antitrust challenge after rejecting their proposed market definitions, which were based on "a contractually created class of consumers." *Id.* at 85. Like the Third Circuit, the court reasoned that "[e]conomic power derived from contractual arrangements affecting

a distinct class of consumers cannot serve as a basis for a monopolization claim." *Id.*

Similarly, in a dispute between an insurance company (Farmers) and its independent agents about access to the company's database, the Fifth Circuit held that the "relevant market" is "insurance sales" generally rather than the company- and contract-specific definition the plaintiffs had proposed ("electronic access to Farmers policy information"). *United Farmers Agents Ass'n, Inc.* v. *Farmers Ins. Exch.*, 89 F.3d 233, 236-37 (5th Cir. 1996). The Fifth Circuit explained that "[e]conomic power derived from contractual agreements such as franchises or in this case, the agents' contract with Farmers, has nothing to do with market power, ultimate consumers' welfare, or antitrust." *Id.* (internal quotation marks omitted); *accord Schlotzsky's, Ltd.* v. *Sterling Purchasing & Nat'l Distrib. Co.*, 520 F.3d 393 (5th Cir. 2008) (reaffirming this core holding of *United Farmers Agents*). And the Eleventh Circuit has held likewise.[7]

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[7] In *Maris Distributing Co.* v. *Anheuser-Busch, Inc.*, 302 F.3d 1207 (11th Cir. 2002), the Eleventh Circuit rejected antitrust claims brought by a wholesale beer distributor against its associated brewing company, Anheuser-Busch. It reasoned that courts must "distinguish[] between contract power and market power," and "[t]he fact that Anheuser-Busch had considerable power over many aspects of [the plaintiff's] business by virtue of the provisions of the contract . . . reveals little about the issue of whether Anheuser-Busch had market power in the broader, relevant market" for equity interests in beer distributorships. *Id.* at 1222. The Eleventh Circuit distinguished *Kodak* on the ground that it "did not address at all the issue in this case" (*id.* at 1223)—the role of contractual relationships in antitrust analysis.

Each of these courts' holdings flatly contradicts the Ninth Circuit's reliance on IKON's "unique contractual relationship[s]" with particular customers (App. 15a) as its basis for defining the relevant antitrust markets. The Ninth Circuit nonetheless sought to distinguish *Queen City* on the ground that the pizza franchisees there "knowingly and voluntarily" entered into valid contracts to buy products from their franchisor; that "contractual obligations [are] not a cognizable source of market power" if they are knowingly and voluntarily undertaken; that IKON is alleged here to have deceived its customers into assuming contractual obligations; and that such alleged deceit *can* be a cognizable source of market power. App. 10a-17a (emphasis removed).

But that rationale for distinguishing *Queen City* simply ignores the threshold question of *market definition*, a mandatory first step in any Sherman Act case involving single-firm conduct, and a logical antecedent to any examination of "market power." Indeed, "[w]ithout a definition of th[e] market there is no way to measure [a defendant's] ability to lessen or destroy competition." *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965); *accord Hack*, 237 F.3d at 85 ("When we speak of monopolization or attempted monopolization, we necessarily are talking about monopoly power within a relevant market."). Fraudulent conduct in any market may give rise to liability under various causes of action. But it has no *antitrust* significance unless it harmed competition in some properly defined antitrust market.[8] And, as the

[8] For the same reason, there is no merit to the Ninth Circuit's efforts to distinguish *Queen City* on the ground that in this case,

Second, Third, Fifth, and Eleventh Circuits recognize, no valid antitrust market can be defined in terms of individual parties' "contractual restraints." *Queen City*, 124 F.3d at 438. In particular, a defendant in those jurisdictions cannot face antitrust liability if, like IKON here, it lacks power in any market defined independently of its contractual relationships.

That is why, for example, the Third Circuit ordered the dismissal of the antitrust claims in *Queen City* even though the plaintiffs there alleged that the defendant had engaged in conduct that presumably would have violated the antitrust laws *if* it were appropriate to define the market in terms of contractual relationships. *See* 124 F.3d at 436. Under Third Circuit law, therefore, NewCal's antitrust claims would have been dismissed, because here, as in *Queen City*, the defendant lacks power in any market that is defined without reference to its own contractual arrangements. The Ninth Circuit reached the opposite conclusion below only be-

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unlike that one, "[t]he contractual relationship (not any contractual provision) gives [the defendant] special access to its consumers," which the defendant "leverages" into an expanded contractual relationship. App. 16a. Such "leveraging" can be an antitrust violation only if, as a threshold matter, the plaintiff has defined a proper market in which it claims that the leveraging harmed competition. Again, however, NewCal cannot establish that IKON harmed competition in any market except the "markets" NewCal tries to define in terms of IKON's contracts with its own customers. As discussed in the text, NewCal's antitrust theory would have been rejected in the Third Circuit and elsewhere at that threshold step. The Third Circuit is plainly correct: "contractual relationships" are ubiquitous throughout the economy, and the Ninth Circuit's logic threatens to characterize all such relationships as monopolies.

cause it concluded that it *is* permissible to define antitrust markets in terms of contractual arrangements.

On that critical issue, the Ninth Circuit is a minority of one, and its position is untenable on the merits. As the leading antitrust treatise explains, even when a class of customers is subject to "unfavorable contract lock-in . . . because of sellers' fraud or misrepresentation," any remedy "would be in contract law . . . or perhaps the law of fraud or misrepresentation or consumer protection; it would not be antitrust law." Areeda & Hovenkamp, *supra*, ¶ 519a, at 190; *see also id.* ¶ 519b, at 195 ("When fraud or other significant misrepresentation exists, . . . then a case for intervention can be made, but it would be intervention under the common law of fraud or a statute covering such contract misrepresentations."); *Colsa Corp.* v. *Martin Marietta Servs.*, 133 F.3d 853, 856 n.8 (11th Cir. 1998) (rejecting antitrust characterization of what was "really a breach of contract claim").[9]

If left uncorrected, the decision below would subject companies to treble antitrust damages in a potentially limitless range of circumstances that are properly addressed instead in ordinary common law actions between those companies and their customers. Like IKON, innumerable companies have renewable term

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[9] Indeed, this Court has rejected the proposition that a conceded monopolist in a *properly* defined market incurs antitrust liability simply because it employs fraudulent means to increase consumer prices. *See Nynex Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136 (1998). As the Court explained, an expansive view of antitrust liability in such circumstances would improperly "transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases." *Id.* at 136-137.

contracts or other "special relationship[s]" (App. 17a) with their customers. Under Ninth Circuit precedent, any such company now faces antitrust liability whenever its rivals can allege that it has "exploit[ed] its unique position—its unique contractual relationship" with those customers—even if, as here, the customers themselves have not even joined the suit. App. 15a.

There are enormous costs to superimposing such antitrust liability on top of any common law remedies for the (non-party) customers:

> Antitrust as an institution loses its credibility when market power is found too readily. Antitrust remedies are draconian, ranging from highly punitive treble damages and attorney fees in private actions to divestiture or dissolution in some suits. . . . Treble damages are particularly draconian and economically harmful in a case like *Kodak*[.]

Hovenkamp, *Antitrust Policy After Chicago*, *supra*, 2001 Colum. Bus. L. Rev. at 298. This Court has likewise held that the high cost even of "proceeding to antitrust discovery" justifies enforcement of rigorous limits on private antitrust litigation. *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966 (2007). Here, too, this Court should intervene to prevent overuse of the antitrust laws from inflicting needless costs on the economy and deterring efficient economic behavior.[10]

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[10] After resolving the central legal issue posed by the antitrust claims, the Ninth Circuit noted that "factual question[s]" might nonetheless warrant summary judgment for IKON on remand. App. 18a. In *Twombly*, the Second Circuit had similarly ruled for the plaintiffs at the motion-to-dismiss stage and had assured the defendants that "[w]hether the plaintiffs will be able to

b. Certiorari is separately warranted to confirm that courts may not invoke the "submarket" locution to avoid rigorous analysis of a plaintiff's proposed market definition. Citing *Brown Shoe* v. *United States*, 370 U.S. 294 (1962), the Ninth Circuit described plaintiffs' proposed market definitions—based on customers with IKON flex contracts—as *"Eastman Kodak* submarket[s]" within a larger equipment-supply and maintenance market. App. 17a. The term "submarket" does not appear in *Kodak* itself, however. And the Ninth Circuit did not explicitly contend that the concept of a "submarket" allowed it to base antitrust liability on a defendant's exercise of power in anything other than a properly defined *market*, whether or not that market is a "submarket" of some more general market.

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prevail in response to a motion for summary judgment after discovery or at trial is, of course, an entirely different matter. We have and express no view as to the merits of the plaintiffs' underlying claims[.]" *Twombly* v. *Bell Atl. Corp.*, 425 F.3d 99, 119 (F.3d 2005), *rev'd, Twombly, supra.* This Court promptly granted certiorari and reversed on the ground that the prospect of *in terrorem* strike suits and "the potentially enormous expense of discovery" warrant dismissing groundless antitrust claims early in litigation under Rule 12(b)(6). 127 S. Ct. at 1966-1967. As in *Twombly*, this Court routinely grants certiorari to review interlocutory decisions in antitrust cases where the court of appeals has ruled for the plaintiff on discrete legal issues and has remanded for further proceedings. *See, e.g., Verizon Commcn's Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (reviewing Second Circuit decision that had reversed order dismissing complaint and remanded for further proceedings); *Nynex* v. *Discon, supra* (same); *Kodak, supra* (reviewing Ninth Circuit decision that had reversed grant of summary judgment for defendant and remanded for further proceedings). The same is true of interlocutory RICO decisions. *See, e.g., Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (reviewing Second Circuit decision that had reversed dismissal of RICO count and remanded for further proceedings).

To the extent that the Ninth Circuit did view the "submarket" locution as an invitation for sloppy market definition, however, that aspect of the decision would be erroneous as well and flatly at odds with the decisions of other courts of appeals. As the leading antitrust treatise explains, many courts have

> defined "submarket" in a way that made the term identical with the term "relevant market," even though the former term then became superfluous. . . . [For example, the D.C. Circuit] concluded that "submarket indicia" are best viewed as "proxies for cross-elasticities [of supply and demand], and thus the identification of a submarket is in principle no different than the identification of a relevant market."

Areeda & Hovenkamp, *supra*, ¶ 533c, at 257 (quoting *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987)); *see also Geneva Pharms. Tech. Corp.* v. *Barr Labs., Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) ("The term 'submarket' is somewhat of a misnomer, since the 'submarket' analysis simply clarifies whether two products are in fact 'reasonable' substitutes and are therefore part of the same market."). As a result, "[s]peaking of submarkets is both superfluous and confusing in an antitrust case," Areeda & Hovenkamp, *supra*, ¶ 533c, at 254, because a group of products is either a "relevant market" in an antitrust sense or it is not. Certiorari is warranted to provide greater clarity on this issue as well.

II. THE NINTH CIRCUIT'S PERMISSIVE VIEW OF RICO'S PROXIMATE-CAUSE REQUIREMENT IS WRONG, IGNORES THIS COURT'S DECISION IN *ANZA*, AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The decision below allows a plaintiff to seek treble damages not just under the Sherman Act, but also under RICO, simply by alleging that a corporate rival defrauded its customers into extending their contracts at the purported expense of the plaintiff's commercial ambitions. App. 25a-28a. The Ninth Circuit concluded that analysis of RICO's proximate-cause requirement involves detailed "factual questions" in these circumstances that foreclose any motion to dismiss and thus inflict costly discovery burdens on defendants—factual questions concerning "whether the direct victims of the [defendant's] fraud would be likely to sue [the defendant], whether the existence of those victims would make it difficult to apportion damages, and whether the existence of those victims would create a risk of multiple recovery[.]" App. 27a. That holding directly conflicts with *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), in which this Court confirmed that the proximate-cause standard requires courts to dismiss RICO claims in these circumstances *as a matter of law.*

RICO confers a civil cause of action only on those injured "by reason of" a defendant's RICO violation. 18 U.S.C. § 1964(c). To satisfy that causation requirement, a plaintiff must "show[] that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Thus, unlike the government—which may bring RICO claims to remedy wrongdoing against the public at large—private plaintiffs must plead and prove that the RICO violations they allege caused *them* direct injury.

In *Anza*, the Court construed this proximate-cause requirement to bar RICO claims like NewCal's. It held, without qualification, that "[a] RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." 547 U.S. at 460. In *Anza* itself, the plaintiff alleged that the defendant had undersold it in the market, and had thus reduced the plaintiff's market share, by fraudulently failing to collect the requisite state sales tax from its own customers. This Court held that such fraud-based claims could be brought only by the direct victim of the alleged fraud—the state tax authority—and not by a business rival that was, at most, only secondarily harmed. *Id.*

That holding precludes NewCal's RICO claim. NewCal alleges that IKON defrauded third parties—IKON's customers—and that this purported fraud victimized not just those customers, but also, derivatively, NewCal and IKON's other competitors. But like the state tax authority in *Anza*, IKON's customers are perfectly capable of pursuing in their own right any "fraud" claims that NewCal seeks to raise here on their behalf. *Anza* holds that such derivative fraud theories categorically fail the proximate-cause requirement for civil RICO claims, and the motion to dismiss therefore should have been granted.

The policy concerns that motivated the Court's holding in *Anza* are even more pronounced in this case than in *Anza* itself. As the Court noted there, "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of [the plaintiff's] lost sales were the product of [the defendant's] decreased prices." 547 U.S. at 459. That observation barely scratches the sur-

face of the implementation problems the Ninth Circuit's approach would pose in this case alone. NewCal claims (among other things) that IKON improperly deprived its rivals of profits by fraudulently retaining existing customers. Resolving that "lost profits" claim would require a court to determine precisely what percentage of IKON's customers would have extended their contracts with IKON anyway in the absence of the alleged "fraud"; precisely which customers would not have done so; and, of those, how many would have signed up instead with one of the potentially dozens of commercial alternatives to IKON, each of which could assert some entitlement to a small share of the total damages if NewCal's claims were to prevail on the merits. Similarly, the fact that none of the *direct* "victims" of IKON's alleged "fraud"—*i.e.*, IKON's actual customers—is even a party to this suit underscores the "appreciable risk of duplicative recoveries" (*id.*) within the universe of potential claimants under the Ninth Circuit's approach. Indeed, this case presents a textbook example of "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.*

Although IKON highlighted *Anza* in a Rule 28(j) letter and then at argument, *see* note 6, *supra*, the Ninth Circuit inexplicably failed even to cite that case. Because the decision below is at odds with *Anza*, this is reason enough for the Court to grant certiorari and reverse.

Finally, certiorari would be warranted even if *Anza* had never been decided, because the decision below also conflicts with the Seventh Circuit's pre-*Anza* decision in *Israel Travel Advisory Service, Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995) (Easterbrook, J.). There, relying on standing rather

than proximate-cause grounds, the Seventh Circuit held that "business rivals may not use RICO to complain about injuries derivatively caused by mail frauds perpetrated against customers." *Id.* at 1258. The court added that "firms suffering [such] derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Id.* That holding would have required the dismissal of this RICO claim if NewCal had sued in the Seventh Circuit.[11]

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[11] Quite apart from the conflicts discussed in the text, the Ninth Circuit's decision is independently at odds with the position adopted by some courts of appeals on a separate issue: whether a civil RICO plaintiff alleging mail or wire fraud as predicate acts must prove that it detrimentally relied on misrepresentations the defendant directed at it, the plaintiff. *See, e.g., Central Distribs. of Beer, Inc.* v. *Conn*, 5 F.3d 181, 184 (6th Cir. 1993) ("[T]he defendant must make a false statement or omission of fact *to the plaintiff* to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim."); *Sikes* v. *Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir. 2002) ("[W]hen a plaintiff brings a civil RICO case predicated upon mail or wire fraud, he must prove that *he* was a target of the scheme to defraud and that he relied to his detriment on misrepresentations made in furtherance of that scheme." (internal quotation marks omitted) (emphasis added)). This Court is expected to address that reliance issue in *Bridge* v. *Phoenix Bond & Indemnity Co.*, No. 07-210 (arg. Apr. 14, 2008). But *Bridge* does not present the distinct proximate-cause and standing questions presented here.

III. THE NINTH CIRCUIT'S CONCLUSION THAT A RICO PLAINTIFF NEED NOT ALLEGE ANY "SEPARATE ORGANIZATIONAL STRUCTURE" FOR AN ASSOCIATION-IN-FACT ENTERPRISE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

NewCal's RICO claim also deepens an independent circuit conflict relating to RICO's "enterprise" element—and would have been dismissed for failure to allege that element if suit had been brought in any of five other circuits instead of the Ninth Circuit.

RICO defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). NewCal has never alleged that IKON itself is a RICO enterprise. To the contrary, it has insisted that the relevant "enterprise" is a vaguely defined "association-in-fact" that is "distinct from" IKON and encompasses not just that company and GE, but also equipment manufacturers, financing companies, two law firms, and other "entities which assist in administering the IKON Contracts." C.A. E.R. 241-242 ¶¶ 145-46.

IKON argued below that the Ninth Circuit should affirm the dismissal of NewCal's RICO claim not just on the proximate-cause issue discussed above, but also on the independent ground that NewCal has never pleaded a coherent RICO "enterprise." IKON argued that NewCal had not described any meaningful structure for the alleged "association in fact" it posited, such as a system of authority or a decisionmaking apparatus, beyond the ordinary bilateral contractual relationships these companies had formed in the ordinary course of business. The Ninth Circuit rejected this argument on the sole ground that it had "recently held in *Odom* v. *Microsoft Corp*, 486 F.3d 541 (9th Cir. 2007), that

RICO's enterprise element does not require the allegation or proof of any separate organizational structure." App. 28a.

In *Odom*, the Ninth Circuit observed that this Court's decision in *United States* v. *Turkette*, 452 U.S. 576 (1981), which addressed the "association in fact" language, "has not been clearly understood in the lower courts, including our own." 486 F.3d at 549. Indeed, the Ninth Circuit observed that *Turkette* has spawned a massive circuit conflict and concluded: "Four circuits have read the language in *Turkette* to require that an associated-in-fact enterprise have some kind of ascertainable separate structure,"[12] whereas "four [other] circuits have rejected any requirement that there be an 'ascertainable structure,' separate or otherwise, for an associated-in-fact enterprise."[13] In line with its liberal pleading standards for RICO plaintiffs, the Ninth Circuit chose the latter approach. App. 27a-28a.

In April 2008, in an opinion written by Judge Posner, the Seventh Circuit explicitly repudiated *Odom* and sided with those circuits that, unlike the Ninth Cir-

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[12] *Odom*, 486 F.3d at 549-550 (citing *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (9th Cir. 2003); *United States* v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *United States* v. *Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983)); *see also VanDenBroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 699-700 (6th Cir. 2000).

[13] *Id.* at 550 (citing *United States* v. *Patrick*, 248 F.3d 11, 19 (1st Cir. 2001); *United States* v. *Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States* v. *Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983); *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983)); *see also Limestone Dev. Corp.* v. *Village of Lemont*, 520 F.3d 797, 804-805 (7th Cir. 2008) (discussing circuit conflict).

cuit, require RICO plaintiffs to plead a separate organizational structure for the posited "enterprise." *Limestone Dev. Corp.* v. *Village of Lemont*, 520 F.3d 797 (7th Cir. 2008). Citing *Odom*, the Seventh Circuit reasoned that, although "some courts believe" that "no structure is necessary," that view is wrong because it

> truncates the critical statutory language—"associated in fact *although not a legal entity*"—misleadingly. The juxtaposition of the two phrases suggests that "associated in fact" just means structured without the aid of legally defined structural forms such as the business corporation. The inference is reinforced by the fact that before "any union or group of individuals associated in fact" in the statute appears a list of legal entities. Without a requirement of structure, "enterprise" collapses to "conspiracy."

Id. at 804-805. The Seventh Circuit thus affirmed the dismissal of a RICO count for failure to allege a separate organizational structure. *Id.*

For the reasons identified by Judge Posner, the Seventh Circuit's disposition of the "enterprise" issue is correct and is necessary to honor *Turkette*'s requirement that the "enterprise" asserted in a RICO claim be "separate and apart from the pattern of activity in which it engages." 452 U.S. at 583. This Court should grant certiorari to resolve this entrenched circuit conflict about the bounds of RICO liability.

IV. THE DECISION BELOW UNLAWFULLY CONVERTS THE DECLARATORY JUDGMENT ACT INTO A SURROGATE FOR RULE 23

NewCal's original complaint asserted a stand-alone claim under the Declaratory Judgment Act for a judicial declaration that thousands of IKON's contracts with its customers are invalid for various reasons, even though none of those customers is a party here. App. 29a; *see* C.A. E.R. 36-38; IKON C.A. Br. 4-5. The district court properly dismissed that claim on two alternative grounds: (i) "NewCal lacks standing to seek declaratory judgment regarding the rights and obligations of customers subject to IKON Contracts" and (ii) prudential considerations warrant denying the relief in any event, given that "the IKON customers under such contracts are not parties to this case." App. 60a-61a.

The Ninth Circuit reversed this holding too. App. 28a-31a. As to standing, the court reasoned that IKON had opened the door to sweeping judicial intervention in thousands of private contractual relationships by sending a letter complaining to NewCal about its tortious interference with some of those relationships. App. 29a. And the court ventured that "even a broad declaration that IKON's fraudulent conduct has rendered invalid all of its fraudulently procured contracts ... would not be inadvisable under the identified prudential considerations." App. 30a. That outcome comports with the court's more general view, implicit in the antitrust and RICO sections of its opinion, that NewCal is a proper party to vindicate the interests of IKON's non-party customers.

This ruling untenably compels the district court to treat the Declaratory Judgment Act as a substitute for the Rule 23 class action mechanism even though the re-

quirements of Rule 23 have not been satisfied. NewCal has never proposed notifying the thousands of affected IKON customers that the validity of their contracts is at issue in this proceeding, as Rule 23 would require. By ignoring this concern, the Ninth Circuit brought itself into conflict with the Seventh, which has ruled that "all persons who have an interest in the determination of the questions raised in a declaratory judgment suit should be before the court." *Diamond Shamrock Corp.* v. *Lumbermens' Mut. Cas. Co.*, 416 F.2d 707, 710 (7th Cir. 1969).

Just as important, construing the Declaratory Judgment Act as a substitute for the class action mechanism in this context would subvert the core purposes of Rule 23. NewCal itself has conceded that "consumer class actions based on fraud face the hurdle that fraud claims are largely individualized and usually not susceptible [to] resolution by consumers except on a one-by-one basis." NewCal C.A. Reply Br. 29-30. And NewCal defends its own standing in this case on the ground that, "[b]ut for competitors like [NewCal], few if any IKON and GE customers[] would vindicate the raft of fraudulent practices." *Id.* at 29. But NewCal has it exactly backwards. Precisely *because* Rule 23 embodies a policy judgment that courts should not generally certify a class of allegedly defrauded customers, it would impermissibly defeat Rule 23's purposes to permit the functional equivalent of such class actions anyway under the Declaratory Judgment Act.[14] That is

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[14] *See generally Gilbert* v. *City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991) (if a declaratory relief claim "could have been resolved through another form of action" that has a "specific limitations period," the statute of limitations will constrain the declaratory relief claim as well; a court must "focus upon the substance of

particularly true where, as here, the parties purporting to "vindicate" the interests of the supposedly defrauded customers have no fiduciary obligations to those customers and may indeed have widely divergent interests from them. The Ninth Circuit's contrary conclusion is as wrong as it is strange, and it warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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an asserted claim as opposed to its form," because otherwise plaintiffs could "mak[e] a mockery" of applicable legal requirements like the statute of limitations "by the simple expedient of creative labeling—styling an action as one for declaratory relief") (quoting *Orangetown* v. *Gorsuch*, 718 F.2d 29, 42 (2d Cir. 1983)); *accord Algrant* v. *Evergreen Valley Nurseries Ltd.*, 126 F.3d 178, 184-185 (3d Cir. 1997).