No. 03-1559

In the Supreme Court of the United States

BANK OF CHINA, NEW YORK BRANCH,

Petitioner,

v.

NBM L.L.C., *ET AL.*,

Respondents.

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

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

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QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err when it held that civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish "reasonable reliance" under 18 U.S.C. § 1964(c)?

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation representing an underlying membership of more than three million businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States as well as in many countries around the world. One of the Chamber's central functions is to represent its members' interests in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases raising issues of vital concern to the nation's business community, including cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO").[1]

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy wrongdoing prohibited by the statute. At the same time, there are those who may misuse the statute against businesses and other organizations, in large part because of civil RICO's treble damages provisions. The Court of Appeals' holding in this case, that plaintiffs alleging injury "by reason of" fraudulent conduct must prove reliance on such conduct, provides an important check against such abuse – one that is consistent with Congress' evident purpose and with this Court's precedents – while allowing recovery by those the statute is designed to protect. Requiring reliance as an element in civil RICO cases predicated on mail and wire fraud would preclude parties from abusing RICO, such

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of this Court. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* and its members made a monetary contribution to its preparation.

as by treating it as a form of insurance against ordinary business losses. Accordingly, the Chamber and its members have a strong interest in encouraging this Court to affirm the decision below.

STATEMENT OF THE CASE

This case involves a civil RICO claim brought by petitioner, the Bank of China, New York Branch ("petitioner" or the "Bank"), that is predicated on the federal mail, wire and bank fraud statutes. Petitioner alleges that respondents engaged in a scheme "designed to defraud the Bank by procuring financing under false pretenses." Petitioner's Brief ("Pet. Br.") at 2. According to petitioner, the false pretenses involved "the repeated submission of false and fraudulent documents to the Bank to obtain loans and funds" as well as other "false representations" to Bank management. *Id.* at 2-3. Petitioner claims that all of this conduct was intended "to mislead the Bank," and it caused the Bank to lose more than $34 million. *Id.*

As one of their defenses, respondents argued that the Bank could not have relied on the alleged misrepresentations because officers of the Bank participated in, or at least were aware of, the alleged fraud. According to respondents, as a result of this knowledge or participation (or both), any losses could not have been proximately caused by the alleged misrepresentations. The district court, however, did not allow respondents to present this defense to the jury, which ruled in favor of the Bank. *See Bank of China* v. *NBM LLC*, 359 F.3d 171, 174-76 (2d Cir. 2004).

The U.S. Court of Appeals for the Second Circuit reversed. It held, among other things, that the district court committed reversible error by failing to instruct the jury that, under RICO, the Bank needed to prove, and the jury needed to find, that the Bank "reasonably *relied* on [respondents'] purported misrepresentations–*i.e.*, the representations that the

defendants made to the Bank in order to obtain the loans." *Id.* at 178 (emphasis added). The Court of Appeals explained that, absent a showing of reliance in a civil RICO claim predicated on fraud, "the plaintiff-victim cannot establish that the defendants' actions caused the [alleged] losses" and, under that circumstance, "no recovery is appropriate or warranted." *Id.* The judgment was reversed and the case remanded for a new trial because "there certainly was evidence from which the jury could have inferred that the Bank's employees or agents were aware of the defendants' purportedly fraudulent representations, and that therefore, the Bank did not rely on the representations." *Id.* at 180. The Second Circuit noted that the district court's refusal to acknowledge the reliance element was "particularly troubling in the context of a civil RICO action, where defendants are subject to treble damages." *Id.*

Petitioner filed a petition for a writ of *certiorari* claiming a conflict among the circuits as to whether a civil RICO claim predicated on mail or wire fraud requires a showing of reliance. According to petitioner, the Second Circuit's decision is consistent with holdings of the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, but inconsistent with decisions in the First, Third, Seventh and Ninth Circuits. Pet. for Writ of Certiorari, No. 03-1559, at 13-14 (filed May 17, 2004). On June 25, 2005, the Court granted *certiorari* on this issue.

SUMMARY OF ARGUMENT

The Court of Appeals' holding – that a civil RICO plaintiff cannot recover on a claim predicated on mail or wire fraud without proving that its injury was proximately caused by reliance on the alleged fraud – should be affirmed.

I. Although RICO and the mail and wire fraud statutes do not use the term "reliance," that element of common-law fraud is necessarily incorporated into the statute under "the

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

There is no merit to petitioner's argument that the Court of Appeals erred in extending its ruling to all civil RICO claims predicated on mail and wire fraud, rather than limiting it to a supposed subset of such claims that involve fraudulent misrepresentations or concealments. Pet. Br. at 12; *see also id.* at 24-25. This Court already has made clear in *Neder* that a violation of the mail or wire fraud statutes necessarily "require[s] a misrepresentation or concealment" of a material fact. *Neder*, 527 U.S. at 22. Accordingly, there can be no mail or wire fraud violation without a showing of a fraudulent misrepresentation or concealment. As petitioner concedes, reliance necessarily is part of "a proximate cause analysis" in the civil RICO context when "the alleged fraud is based upon a misrepresentation or omission of fact intended to induce reliant action." Pet. Br. at 14. The Court of Appeals, therefore, was correct in refusing to recognize any subset of civil mail and wire fraud-based RICO claims to which the reliance requirement does not apply.

II. Recognition of a reliance element is also supported by both public policy and common sense. As this Court recognized in *Holmes*, as a matter of policy, treble-damage recovery under RICO should be reserved for those who can show that they were *directly* injured by a violation. *Holmes*, 503 U.S. at 268. Otherwise civil RICO claims would become a

kind of "broad insurance against ... losses," which this Court has warned against. *See, e.g., Dura Pharms., Inc.* v. *Broudo*, -- U.S. --, 125 S. Ct. 1627, 1632 (2005). Petitioner's reading of the statute would provide an incentive for parties to engage in risky transactions they know or suspect to involve fraudulent conduct. These parties would find comfort in the fact that if the transactions went bad, they could resort to civil RICO claims – with potential treble damages recoveries to boot. Requiring a showing of actual reliance in civil claims based on mail or wire fraud helps prevent such abuse of the statute.

A reliance requirement also addresses the concern already identified by the Court in the civil RICO context that "[a]llowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation'" against legitimate businesses. *Holmes*, 503 U.S. at 274. Recognition of a reliance element in civil claims based on mail and wire fraud likely deters many plaintiffs with weak claims from asserting them at all, given the requirement in Rule 11 of the Federal Rules of Civil Procedure ("Rules") that their attorneys have a reasonable, good-faith basis for asserting such a claim. A reliance element also allows courts to weed out weak fraud-based RICO claims on motions for summary judgment. That is because a plaintiff who has not actually relied upon a misrepresentation or omission will not be in a position to present evidence sufficient to defeat a Rule 56 motion for summary judgment based on that element. For all these reasons, the decision below was correct and should be affirmed.

ARGUMENT

The Court of Appeals properly held that civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish reliance to recover treble damages under 18 U.S.C. § 1964(c). As we show in Section I, the Court of Appeals' holding is compelled by this Court's precedents interpreting RICO and the mail and wire fraud statutes. Section II shows

that the Court of Appeals' holding also comports with sound public policy and common sense.

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

RICO is a comprehensive statutory scheme that authorizes civil suits based on a pattern of racketeering activity, which is broadly defined to include more than 100 predicate acts. 18 U.S.C. § 1961(1). To recover treble damages under the civil RICO statute, a plaintiff must prove that he was "injured in his business or property *by reason of*" a violation of RICO's prohibitions against racketeering activity. 18 U.S.C. § 1964(c) (emphasis added). In *Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992), this Court construed the phrase "by reason of" in § 1964(c) to require a showing "that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id.* at 268.

As *Holmes* explained, the concept of "proximate cause" is a "judicial tool[] used to limit a person's responsibility for the consequences of that person's own acts." *Id.* "Justice demands" such a limitation in this context because "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Id.* at 269. Accordingly, a plaintiff cannot recover treble damages under RICO merely by showing that "the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." *Id.* at 265-66 (footnote omitted). Instead, a plaintiff must prove "some *direct relation* between the injury asserted and the injurious conduct alleged." *Id.* at 268 (emphasis added).

Here, the Court of Appeals straightforwardly applied these principles to hold that "the proximate cause element articulated in *Holmes* requires the plaintiff to show

'reasonable reliance'" where the plaintiff's civil RICO claim is predicated on mail or wire fraud. *Bank of China* v. *NBM LLC*, 359 F.3d 171, 176 (2d Cir. 2004).[2] Petitioner attacks this conclusion on two principal grounds. First, petitioner argues that because the term "reliance" does not appear in the mail fraud, wire fraud and RICO statutes, the concept of reliance should not be imported into the elements of a civil RICO claim predicated on mail or wire fraud – even where the claim is based on a fraudulent misrepresentation or concealment. Pet. Br. at 15-28. Second, petitioner asserts that the Court of Appeals' decision "swept far too broadly" by requiring proof of reliance in *all* civil RICO cases predicated on mail or wire fraud. Pet. Br. at 12. As demonstrated below, petitioner is wrong on both counts.

A. The Statute Clearly Requires A Showing Of Reliance Whenever The Claim Involves Fraudulent Misrepresentations Or Concealments.

Petitioner readily concedes that reliance is necessarily part of "a proximate cause analysis" in the civil RICO context when "the alleged fraud is based upon a misrepresentation or omission of fact intended to induce reliant action." Pet. Br. at 14. Petitioner nonetheless argues that it is improper to treat reliance as a necessary *element* of such a claim because "the word 'reliance' does not appear anywhere in the [RICO]

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[2] In *Field* v. *Mans*, 516 U.S. 59 (1995), this Court noted that the "dominant consensus of common-law jurisdictions" identifies "justifiable reliance" (a subjective standard), as opposed to "reasonable reliance" (an objective standard), as the reliance element of common-law fraud. *Id.* at 70-71 & n.9. Petitioner does not argue, however, that the Court of Appeals erred when it referred specifically to *reasonable* reliance. Accordingly, this brief focuses on the general question whether a showing of reliance – whether justifiable or reasonable – is required for civil RICO claims predicated on mail or wire fraud.

statute" or in the mail and wire fraud statutes. *Id.* at 15-28, *see also id.* at 40-42. This argument, however, overlooks a fundamental principle of statutory construction long recognized by this Court – *i.e.*, that Congress is presumed to incorporate the settled meanings of the common-law terms it uses.

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

In applying this "well-established rule of construction," the Court observed that common-law fraud traditionally required a *material* misrepresentation or concealment. *Id.* at 21-22. In light of this common-law requirement, the Court found that it "must presume that Congress intended to incorporate materiality [into the mail and wire fraud statutes] 'unless the statute[s] otherwise dictate[.]'" *Id.* at 23 (quoting *Nationwide Mut. Ins.* v. *Darden*, 503 U.S. 318, 322 (1992)).

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

"failed to show that [the] language [of these statutes] is inconsistent with a materiality requirement." *Id.* at 25.[3]

This well-established rule of construction applies equally when interpreting the RICO statute. *See Beck* v. *Prupis*, 529 U.S. 494 (2000). *Beck* considered whether a person injured by an overt act in furtherance of a RICO conspiracy could recover damages under § 1964(c) if the overt act itself did not satisfy the definition of "racketeering activity" in § 1961(1). Again, the statute's express terms did not answer the question. Accordingly, the Court turned to the "well-established common law of civil conspiracy" to "determine what it means to be 'injured . . . by reason of' a 'conspir[acy.]'" *Id.* at 500. Under the common law, a plaintiff could recover for civil conspiracy only by showing that he was injured by an act that was itself tortious. *Id.* at 504. The Court thus concluded that "injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO . . . is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d)." *Id.* at 501-05.[4]

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

[4] *See also Pasquantino* v. *United States*, -- U.S. --, 125 S. Ct. 1766, 1774 (2005) (looking to common-law to construe wire fraud statute) (citing *Neder*, 527 U.S. at 22-23); *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (When construing the phrase "false pretenses, a false

2. Under the common-law meaning rule applied in *Neder* and *Beck*, the absence of the term "reliance" from the RICO statute does not end the inquiry as to whether reliance is an element of a civil RICO claim predicated on fraudulent misrepresentations or concealments that violate the mail or wire fraud statutes.[5] Instead, the Court must look to the common-law elements of fraud to determine whether a showing of reliance is required in a civil RICO claim based on mail or wire fraud.

By 1970, when RICO was enacted, the common-law elements of fraud – including reliance – had been settled for generations. Indeed, even before the turn of the last century, one of the "essential constituents" for a case of common law fraud was reliance. *See Brackett* v. *Griswold*, 112 N.Y. 454, 455 (1889) ("The essential constituents of [an action for fraud and deceit by means of false pretenses] are a false representation, known to be such, made or authorized or caused to be made by defendant, calculated and intended to influence the action of others, which came to the knowledge of plaintiff and in reliance upon which he, in good faith acted, and thus suffered the injury of which he complains. The absence of any one of these particulars is fatal to a recovery."). Not only was inducement of the plaintiff to act (or to refrain from action) to his detriment "essential throughout the law of

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representation, or actual fraud" in the Bankruptcy Code, 11 U.S.C. § 523(a)(3)(A), the Court held that all of these "operative terms . . . carry the acquired meaning of terms of art. They are common-law terms, and . . . they imply elements that the common law has defined them to include."); *Holmes*, 503 U.S. at 268-69 (relying on the common-law concept of proximate causation to construe the phrase "by reason of" in § 1964(c)).

[5] Indeed, the absence of the term "reliance" from the RICO statute is hardly surprising given that this element applies only to a subset of civil RICO claims, *i.e.*, those predicated on material falsehoods.

torts," common law required that the plaintiff "must of course have relied upon it, and believed it to be true." William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964); *see also id.* ("The false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.") (footnotes omitted); *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322 (1959). As the RESTATEMENT (FIRST) OF TORTS explained, the maker of a fraudulent misrepresentation would be liable only if the recipient relied on "the truth of the matter misrepresented" and the recipient's "reliance upon the misrepresentation [was] a substantial factor in determining the course of conduct which result[ed] in his loss." RESTATEMENT (FIRST) OF TORTS § 546 (1938).

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

Thus, under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder*, 527 U.S. at 23, the Court cannot "infer from the absence of an express reference to [reliance in the RICO statute] that Congress intended to drop that element from [a civil RICO claim predicated on] the fraud statutes," *id.*

To the contrary, Congress' silence on this issue in the context of a civil RICO claim must be interpreted as conveying its satisfaction with the elements of common-law fraud. As this Court held in *Beck*, Congress "presumably knows and adopts the cluster of ideas that were attached to

each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, *absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.*" 529 U.S. at 500-01. (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)) (emphasis added).

In short, because both the mail and wire fraud statutes require a "fraud," and because "fraud" is defined at common law to require reliance – at least where a misrepresentation or concealment is concerned – the "common-law meaning" rule requires the Court to "presume that Congress intended to incorporate" the element of reliance into a civil RICO claim for damages predicated on misrepresentations or concealments that violate the mail or wire fraud statutes. *See Neder*, 527 U.S. at 23. Petitioner has simply failed to rebut this presumption.

B. The Court of Appeals Correctly Held That RICO Requires A Showing Of Reliance In *All* Civil Claims Predicated On Mail Or Wire Fraud Because Such Claims Necessarily Involve Fraudulent Misrepresentations Or Concealments.

Petitioner also argues, in the alternative, that even if plaintiffs must show reliance in civil RICO claims that involve fraudulent misrepresentations or concealments (such as those at issue in this case), reversal of the Court of Appeals' decision below still is required because that decision is too broad. According to petitioner, "a large set of victims of classic 'schemes to defraud'" that violate the mail or wire fraud statutes involve no affirmative misrepresentation or concealment and, therefore, "reliance cannot be proven" in those cases. Pet. Br. at 12; *see also id.* at

24-25.[6] Besides ignoring the fact that many, if not all, of these other offenses are covered by more specific statutes – *see, e.g.*, 18 U.S.C. §§ 201 (bribery), 641 (embezzlement), 1956 (money laundering); 47 U.S.C. § 605(e)(4) (manufacture or sale of devices the unauthorized decryption of satellite cable programming) – petitioner is wrong in contending that the Court of Appeals erred when it required a showing of reliance in *all* civil RICO claims predicated on mail or wire fraud. Pet. Br. at 14.

Once again, petitioner's position is flatly foreclosed by *Neder*, which is not even discussed in the law review article on which petitioner principally relies. *See Id.* at 24-25 (quoting at length Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 Wash. & Lee L. Rev. 83, 86-87 (2002)). The majority in *Neder* emphasized that "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud . . . statute[], actionable 'fraud' had a well-settled meaning at common law" and that meaning "*required* a misrepresentation or concealment of *material* fact." *Neder*, 527 U.S. at 22 (first emphasis added); *see also id.* (quoting *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 579 (1996), in a parenthetical: "[A]ctionable fraud requires a *material* misrepresentation or omission."). Consequently, despite petitioner's assertion to the contrary, there can be no mail or wire fraud violation without a showing of a fraudulent misrepresentation or concealment. As the Seventh Circuit put it in *Perlman* v. *Zell*, 185 F.3d 850, 854 (7th Cir. 1999): "No fraud, no mail fraud."

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[6] Both statutes prohibit fraudulent schemes (or attempted schemes) devised to "obtain[] money or property by means of false or fraudulent pretenses, representations, or promises[.]" 18 U.S.C. §§ 1341, 1343.

Neder's analysis of the common-law element of materiality further buttresses the Court of Appeals' decision. *See Neder*, 527 U.S. at 25. As *Neder* held, for a falsehood (*i.e.*, a fraudulent misrepresentation or concealment) to be material, it must have been devised with an *expectation* that another party will view it as important and rely on it in determining a "choice of action." *Id.* at 22 n.5 (quoting RESTATEMENT (SECOND) OF TORTS § 538 (1977)). To be sure, a prosecutor in a criminal case need not prove that the target of the fraud actually relied on the material falsehood because a criminal violation does not require a showing of a "completed fraud." *Id.* at 25. But a mere attempted fraud is insufficient to give rise to a *civil* RICO claim for damages. As the Fifth Circuit explained in *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), "the government can punish unsuccessful schemes to defraud because the underlying mail fraud violation does not require reliance, but a civil plaintiff 'faces an additional hurdle' and must show an injury caused 'by reason of' the violation." *Id.* at 559 (citation omitted). This "additional hurdle" in the civil context requires not only the showing required by *Neder* that the defendant expected the plaintiff to rely on material misrepresentations or concealments, but also that the plaintiff did, in fact, rely on the falsehoods and such reliance proximately caused damages.

For these reasons, *all* civil RICO claims based on mail or wire fraud necessarily require "misrepresentation[s] or concealment[s]" that were material, *i.e.*, falsehoods devised to induce another party to rely on the falsehood. *Neder*, 527 U.S. at 22. *All* civil RICO claims thus require the plaintiff to show actual reliance on the material falsehoods to prove that such falsehoods proximately caused the damages asserted. Consequently, petitioner's argument that the Court of Appeals' decision sweeps "too broadly" is wide of the mark.

II. Public Policy Confirms The Propriety Of Requiring Reliance To Support Civil RICO Claims Predicated On Mail Or Wire Fraud.

The legal analysis just presented also rebuts petitioner's argument that the Court of Appeals' decision runs counter to a vague public policy favoring a "liberal" or "expansive" construction of RICO in this context. Pet. Br. at 42-49. In any event, as demonstrated below, public policy considerations strongly counsel *in favor* of the Court of Appeals' holding that reliance is an element of a civil RICO claim predicated on mail or wire fraud.

A. A Reliance Element Helps Prevent Parties From Improperly Using The Civil RICO Statute As A Form Of Insurance Against Business Losses.

First, a reliance element helps prevent civil RICO claims from becoming a form of insurance against business losses that would subject legitimate businesses to unjustified and potentially crushing litigation. It makes no sense to allow a lender who, for example, loans money to a risky borrower, with eyes wide open to potential fraudulent conduct, to use a civil RICO claim to recoup its losses – and treble damages to boot – when the lender never actually relied upon any communications from the defendant. Recognizing a reliance element in the context of civil RICO claims predicated on mail or wire fraud would prevent this hypothetical irresponsible lender from recovering under the civil RICO statute. On the other hand, petitioner's reading of the statute would provide an incentive for a party such as this hypothetical lender to engage in a risky transaction because, if the transaction went badly, the party always could resort to a civil RICO claim – with a potential treble damages recovery.

Petitioner's reading of RICO thus undermines and blurs the settled distinction between civil and criminal RICO

claims. *See Summit Props. Inc.*, 214 F.3d at 559. There may be a policy justification for *criminal* prosecutions under the mail and wire fraud statutes in the absence of a completed fraud. But there is no policy reason to allow private plaintiffs to recover treble damages in a *civil* RICO claim predicated on a mere failed attempt by the defendant to defraud the plaintiff, *i.e.*, a claim that does not involve detrimental reliance on the material falsehood. Any policy justification for prohibiting the mere scheme itself, without a showing of damages proximately caused by the scheme, is thus limited to criminal prosecutions.

In the analogous context of securities fraud, this Court has emphasized that the civil securities fraud laws are not intended "to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura Pharms.*, 125 S. Ct. at 1633; *see also Basic Inc.* v. *Levinson*, 485 U.S. 224, 252 (1988) (White, J., concurring) ("allowing recovery in the face of 'affirmative evidence of nonreliance' would effectively convert Rule 10b-5 into a scheme of investor's insurance" (citations omitted)). The same policy considerations apply here. Parties should not be able to use the civil RICO statute as a form of insurance against business losses. An affirmance in this case would significantly reduce the likelihood of such a practice.

B. A Reliance Element Discourages The Filing Of, And Facilitates The Dismissals Of, Frivolous Civil RICO Claims.

Requiring a showing of actual reliance for civil RICO claims predicated on mail or wire fraud also serves the goal of curbing frivolous civil RICO suits. In particular, an affirmance in this case would "forc[e] courts to distinguish bona fide victims from plaintiffs who simply made poor judgments in transactions and should, therefore, suffer their own losses." Mark Moller, *The Rule of Law Problem:*

Unconstitutional Class Actions and Options for Reform, 28 Harv. J.L. & Pub. Pol'y 855, 861 (2005).

The current state of RICO litigation cries out for such a distinction. Because of its attractive treble damages provision, the civil RICO statute has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context." Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 Del. J. Corp. L. 519, 521 (2002). Since 1986, for example, nearly 1,000 civil RICO cases have been filed per year. *See* Hon. Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* § 2.03 at 2-41 (2005). As Chief Justice Rehnquist observed, "there is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 10 (1989).

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

These concerns are hardly novel. In *Holmes*, this Court pointed to a serious "fear" that "[a]llowing [civil RICO] suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burden the courts, but [would] also undermine the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *Assoc. Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U.S. 519, 545 (1983)); *see also Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 487 (1985) (noting that three dissenting members of Congress "feared the treble-damages provision would be used for malicious harassment of business competitors").

That policy concern, which the Court in *Holmes* cited in support of its decision to recognize in civil RICO litigation the common-law limitation of proximate cause, militates strongly in favor of incorporating the common-law limitation of reliance when civil RICO claims are predicated on mail or wire fraud. For one thing, a reliance requirement makes potential RICO plaintiffs consider more carefully whether they can meet the elements of a claim predicated on mail or wire fraud and, in turn, reduces the number of such claims. Moreover, if a plaintiff files a civil RICO claim based on mail or wire fraud without having actually relied upon a fraudulent misrepresentation or concealment, a reliance requirement puts the court in a better position to grant summary judgment on that claim once it becomes apparent that no reliance actually occurred.[7] In both of these ways, a

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[7] *Compare Central Distribs. of Beer, Inc.* v. *Conn.*, 5 F.3d 181, 184 (6th Cir. 1993) (affirming summary judgment in favor of the defendant, in part, because the plaintiff had not "produced a shred of evidence" that the plaintiff "relied on any statement or omission to its detriment"); *Fla. Evergreen Foliage* v. *E.I. DuPont De Nemours & Co.*, 336 F. Supp. 2d 1239, 1279 (S.D. Fla. 2004) ("Summary judgment is also entered in DuPont's favor on Plaintiff-Growers' RICO claims, Counts VI and VII. The undisputed record shows that Plaintiff-Growers cannot prove reasonable reliance or direct

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

* * * * *

In sum, petitioner's attempt to have the Court abolish the reliance requirement in civil RICO suits predicated on mail or wire fraud runs headlong into the "common-law meaning" rule of statutory interpretation. And, if adopted by this Court, petitioner's position would have disastrous consequences. The Second Circuit was right to reject petitioner's arguments, and this Court should do so as well.

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injury."); *Lifschultz Fast Freight, Inc.* v. *Consol. Freightways Corp.*, 805 F. Supp. 1277, 1292 (D.S.C. 1992) (granting summary judgment in favor of the defendant because the plaintiff "presented no evidence" of detrimental reliance); *with Feely* v. *Whitman Corp.*, 65 F. Supp. 2d 164, 174 (S.D.N.Y. 1999) (denying summary judgment to the defendants because "the common law requirement of justifiable reliance is not an element of wire or mail fraud under federal law").

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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