No. 07-210

In the Supreme Court of the United States

JOHN BRIDGE, ET AL.,

Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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

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QUESTION PRESENTED

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case presents the question of whether civil claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") based on mail fraud should be easier to plead and prove than analogous claims under state common law.[1] The defendants correctly ask the Court to interpret mail fraud claims under RICO in accordance with the common law, which requires a plaintiff to prove detrimental reliance on a misrepresentation of the defendant. The plaintiffs, by contrast, ask the Court to dispense with the common-law requirement of reliance, thereby making it easier to prove the fraud element of a RICO claim than to prove common-law fraud. The implications of this position are sweeping: if fraud were easier to prove under RICO than under the common law, defendants would face an avalanche of treble-damages suits at the hands of plaintiffs far removed from any alleged misrepresentation, and RICO would federalize another vast swath of ordinary state tort and contract law.

This Court has already held that both RICO and the federal mail fraud statute must be interpreted in light of the common-law meaning of the terms they employ. For example, in *Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992), the Court held that a plaintiff must satisfy the common-law standard of

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, the *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to preparation or submission of this brief.

proximate cause to establish injury "by reason of" a RICO violation—even though "[t]his language c[ould], of course, be read to mean that . . . the defendant's violation was [merely] a 'but for' cause of [the] plaintiff's injury." *Id.* at 265-66. Similarly, in *Neder* v. *United States*, 527 U.S. 1, 23 (1999), the Court held that the federal mail fraud statute incorporated the common-law requirement of a *material* misrepresentation—even though the statute never mentions materiality. Finally, in the analogous context of federal securities fraud, the Court has consistently looked to the common law of civil fraud and required a showing of reliance. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231, 243 (1988). All of these decisions are supported by "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Neder*, 527 U.S. at 23; see also *Beck* v. *Prupis*, 529 U.S. 494, 500 (2000) (noting that RICO is interpreted in light of the settled meaning of the common-law terms it employs).

The Court should follow the same approach here. Although neither RICO nor the mail fraud statute *expressly* mentions reliance, reliance has long been an established element of a common-law civil fraud claim. See, e.g., *Brackett* v. *Griswold*, 112 N.Y. 454, 455 (1889) (noting the requirement of reliance). Under the "common-law meaning" rule, then, the Court "must presume that Congress intended to incorporate [reliance]" as an element of a civil RICO claim based on mail fraud. *Neder*, 527 U.S. at 23.

This conclusion also makes sense as a matter of policy. First, as noted, absent a reliance requirement, RICO claims based on mail and wire fraud would rapidly federalize a large segment of ordinary state tort and contract law. Moreover, a reliance requirement would prevent plaintiffs from using RICO as a form of insurance against ordinary business losses or as an additional (and unnecessary) source of private-attorney-general litigation. Such litigation is especially unnecessary where, as here, the government is perfectly capable of punishing the alleged fraud. Finally, recognizing a reliance element would prevent plaintiffs from using questionable fraud claims, along with the threat of immense liability through treble damages, as a means of harassing their legitimate business competitors.

Such a limit on the scope of fraud claims under RICO is especially important to the Chamber of Commerce of the United States of America (the "Chamber") which, as the world's largest business federation, represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy, and transacting business throughout the United States as well as in many countries around the world. While consistent and disciplined application of RICO is important to deter and remedy the wrongdoing prohibited by the statute, there are some who would misuse the statute against businesses and other organizations, in large part because of civil RICO's treble damages provisions.

The Court of Appeals' holding in this case—that a plaintiff alleging injury "by reason of" fraudulent conduct need not prove his own reliance on such conduct—extends RICO far beyond its intended breadth as well as the limits of sound policy. Reversing that decision will provide an important check against misuse of the civil RICO statute—a check that is consistent with congressional purpose and this Court's precedents—while allowing recovery by those the statute is designed to protect. Accordingly, the Chamber and its members have a strong interest in seeing the decision below reversed.

STATEMENT

The issues in this case are best understood in light of RICO's history and purposes, as well as the events leading up to the decision below.

1. Congress enacted RICO in 1970 to protect legitimate businesses against competitive injury at the hands of organized crime. *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 494-500 (1985); *H.J. Inc.* v. *Northwestern Bell Tele. Co.*, 492 U.S. 229, 245 (1989) ("Organized crime was without a doubt Congress' major target" in enacting RICO). As the Senate Judiciary Committee Report on the bill explained, RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures." S. Rep. No. 91-617 at 76 (1969).

One of those remedies is a civil damages provision, which allows a party "injured in his business or property by reason of" racketeering activity to bring a private suit for treble damages and attorneys fees. 18 U.S.C. § 1964(c). The purpose of this provision is, as this Court recently observed, to encourage private parties to investigate potential RICO violations and compensate those parties that suffer injury as "the *direct* result of" racketeering activity. *Anza* v. *Ideal*

Steel Supply Corp., 126 S. Ct. 1991, 1998 (2006) (emphasis added).

2. This case involves a suit for alleged racketeering activity that was neither directed to, nor directly harmed, a private party. It arises from a dispute over tax sales in Cook County, Illinois.

When property owners in Cook County fail to pay their property taxes, the County acquires a tax lien on the property. Rather than attempt to collect the tax directly from the property owner, the County sells the tax lien to third parties at an auction. The winning bidder pays the delinquent taxes to the County and acquires the right to collect the amount paid, plus interest and a penalty, from the property owner. If the owner is unable to pay, the lien holder can obtain a tax deed and thus becomes the property's new owner. See *Phoenix Bond & Indem. Co.* v. *Bridge*, 477 F.3d 928, 929 (7th Cir. 2007).

The auctions for tax liens are highly competitive. The bids are stated as percentage penalties that the property owner must pay (on top of taxes and interest) to the winning bidder to clear the lien, and the winner is the bidder who is willing to accept the smallest penalty. Many bidders submit offers at the statutorily imposed minimum of 0%, expecting to make a profit not by collecting a penalty, but by taking title to (and eventually selling) a certain percentage of the properties for which they purchase the liens. *Ibid.*

Because the County typically receives multiple bids at a 0% penalty, it allocates tax liens equally among the low bidders. This creates an incentive for single entities to submit multiple bids for each property, either on their own or through an agent. To prevent bidders from doing so (and thus receiving a disproportionate share of liens), the County promulgated the "Single, Simultaneous Bidder Rule" (or "SSB Rule"), which requires each bidder to submit an affidavit declaring that it is not related to any other entity participating in the auction. *Id.* at 929-30.

3. Phoenix Bond & Indemnity Co. and BCS Services, Inc. ("plaintiffs") filed this suit against a variety of corporate and individual defendants, alleging that they violated the SSB Rule by agreeing to submit multiple bids in the auctions and later transfer the liens they acquired to a single entity. As part of this scheme, the defendants allegedly submitted false affidavits to the County asserting their compliance with the SSB Rule and thus received a disproportionate share of tax liens—harming their competitors, including the plaintiffs. The plaintiffs asserted that the false affidavits presented to the County, along with letters sent to property owners notifying them that the liens had been sold, constituted mail fraud—a form of "racketeering activity" for purposes of RICO. 18 U.S.C. § 1961(1)(B). According to the plaintiffs, because they had been harmed "by reason of" the defendants' mail fraud, they were entitled to treble damages and attorneys fees under RICO. *Id.* § 1964(c).

The district court dismissed the complaint for lack of standing, 2005 U.S. Dist. LEXIS 34912 (N.D. Ill. Dec. 21, 2005). According to the district court, because the plaintiffs "were not recipients of the alleged misrepresentations," they were only "*indirect* victims of the alleged fraud . . . and therefore . . . lack[ed] standing to bring the alleged RICO claims." *Id.* at *17-18 (emphasis added).

The Seventh Circuit reversed, concluding that the plaintiffs did not need to prove that they received or relied on a misrepresentation of the defendants. 477 F.3d at 932. According to the Court of Appeals, the plaintiffs, as "losing bidders, . . . acquire fewer tax liens than they would if the [SSB] Rule were followed." 477 F.3d at 931. According to the Seventh Circuit, this was sufficient to demonstrate that the plaintiffs were injured "by reason of" the defendants' mail fraud, even if the plaintiffs never received or relied on a misrepresentation of the defendants. *Id.* at 932.

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that a plaintiff's reliance is not an element of a civil RICO claim predicated on mail fraud.

I. Although neither RICO nor the mail fraud statute uses the term "reliance," RICO necessarily incorporates an element of reliance under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses"—including the element of "proximate cause" and the term "fraud." *Neder* v. *United States*, 527 U.S. 1, 23 (1999). By the time the civil RICO statute was enacted in 1970, reliance was a "well-settled" element of a private civil action for fraud. It also was (and is) a necessary element of the proximate cause showing that this Court has required under RICO. *See Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). Consequently, the element of general reliance is properly incorporated into civil RICO claims based on mail fraud.

The Court should also hold that RICO requires a specific showing of reliance *by the plaintiff* rather than a third party. This is how courts interpreted the reliance element of common-law fraud at the time RICO was enacted, and it remains so today. And, under the "common-law meaning rule," absent text or structure to the contrary (of which there is none), this settled understanding of proximate cause in the fraud context is incorporated into civil RICO claims based on mail fraud. *See Neder*, 527 U.S. at 23 & n.7.

Finally, analogous decisions interpreting Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and SEC Rule 10b-5—which have language indistinguishable from that of the federal mail fraud statute—have also incorporated the common-law element of reliance. As the Court recently explained in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 128 S. Ct. 761 (2008), "[r]eliance by the plaintiff upon the defendant's deceptive acts . . . ensures that, for liability to arise, *the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability*." *Id.* at 769 (emphasis added) (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988)). The same is true in the context of a civil RICO claim based on mail fraud.

II. Public policy also supports the recognition of reliance as an element of civil RICO claims based on mail fraud. First, rejecting the common-law element of reliance would federalize a vast swath of ordinary state tort and contract law. A wide variety of state-law claims—such as claims for unfair competition, tortious interference with contract, commercial disparagement, products liability, misappropriation of trade secrets, and breach of fiduciary duty, to name just a few—could be brought instead as a civil RICO claim based on mail fraud, along with the powerful threat of treble damages and attorneys fees. This Court has repeatedly warned against interpreting federal statutes in a manner that intrudes "in[to] areas already governed by functioning and effective state-law guarantees." E.g., *Stoneridge*, 128 S. Ct. at 770-71.

Second, recognizing the element of reliance would prevent plaintiffs from using RICO as a form of "broad insurance against [business] losses"—a practice this Court has condemned in similar contexts. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005). The plaintiffs' reading of the statute would provide an incentive for parties to engage in risky transactions they know or suspect to involve fraud, safe in the knowledge that, if the transactions go badly, they can always resort to broad civil RICO claims based on mail or wire fraud—along with the prospect of treble damages. Requiring a showing of actual reliance in fraud claims would help prevent this statutory abuse.

Third, recognizing the element of reliance would help prevent RICO from becoming an additional source of private-attorney-general, *qui tam*–type litigation. Under the plaintiffs' reading of the statute, virtually anyone who can allege injury by mail or wire fraud directed at a governmental agency could bring a civil RICO claim based on that conduct—regardless of the government's interest in enforcing its own laws. Here, however, there is no basis to conclude that Congress intended to authorize such a claim, and no reason to think that the County is unable to enforce its own regulations.

Finally, recognizing the element of reliance would prevent plaintiffs (or potential plaintiffs) from using questionable RICO fraud claims—together with the threat of treble damages and attorneys fees—to extort settlements from legitimate businesses. Unlike the government, RICO plaintiffs are not constrained by prosecutorial accountability and have every incentive to push civil mail and wire fraud claims to the limit. A reliance requirement would allow courts to weed out weak claims on motions to dismiss or summary judgment and reduce undue pressure on innocent defendants to settle.

ARGUMENT

RICO is a comprehensive statutory scheme that authorizes civil suits based on a pattern of "racketeering activity," 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 plead and prove that it was "injured in his business or property *by reason of*" a violation of RICO's prohibitions on racketeering activity, including, as in this case, mail fraud. 18 U.S.C. § 1964(c) (emphasis added); §§ 1341, 1961(1).

This Court has consistently and correctly refused to give the phrase "by reason of" its broadest possible meaning. For example, in *Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258 (1992), the Court construed that phrase 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; see also *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). The application of this common-law requirement in the civil RICO context is designed to ensure "some *direct relation* between the injury asserted and the injurious conduct alleged." *Id.* at 1996 (emphasis added).

In the civil fraud context, the same need for a "direct relation between the injury asserted and the injurious conduct alleged" has long been embodied in the common-law requirement that a plaintiff demonstrate its own reliance on the defendant's alleged misrepresentation. As we now show, this common-law requirement should apply equally to civil RICO claims predicated on mail fraud. That conclusion is compelled by the "common-law meaning" rule as well as pertinent policy considerations.

I. Under The "Common-Law Meaning" Rule, A Civil RICO Claim Predicated On Mail Fraud Requires Proof Of The Plaintiff's Own Reliance.

In the decision below, the Seventh Circuit held that the proximate cause element required by *Holmes* and *Anza* does not require a showing of reliance by the plaintiff. As the court acknowledged, however, the circuits are divided on this issue. 477 F.3d at 932-33.[2] In subsection A, we explain why the proxi-

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[2] The Court noted that the Sixth and Eleventh Circuits have held that reliance is an element of a civil RICO claim predicated on mail fraud, while the First, Second, and Fourth Circuits have rejected that view. Compare *Vandenbroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); and *Sikes* v. *Teleline*, 281 F.3d 1350, 1360 (11th Cir. 2002); with *Sys. Mgmt.*,

mate cause element articulated in *Holmes* and *Anza* requires a showing of reliance on the defendant's fraudulent misrepresentation. In subsection B, we explain why the reliance element must be understood, consistent with the concept of proximate cause in the context of common-law fraud, to require a showing of reliance *by the plaintiff*. And in subsection C, we explain why analogous cases from the federal securities fraud context support this requirement of reliance.

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

Reliance is a necessary element of the proximate cause analysis in the civil RICO context when the claim is based on mail fraud. This conclusion follows from the principle that Congress is presumed to incorporate the settled meanings of the common-law terms it uses—a principle that governs the interpretation of both the mail fraud statute and RICO.

1. This Court applied the common-law meaning rule in *Neder* v. *United States*, 527 U.S. 1 (1999), which addressed whether the federal mail and wire fraud statutes incorporated the common-law fraud element of "materiality." Neither statute uses the term "material," but this did not end the Court's analysis. Rather, the Court turned to the "well-

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Inc. v. *Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002); *Ideal Steal Supply Corp.* v. *Anza*, 373 F.3d 251, 263 (2d Cir. 2004); *Atlantic Telecom, Inc.* v. *Long Distance Services, Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994). As the Petitioner's Brief points out (at 29-33), however, more recent cases from the Fourth, Fifth, and Eighth Circuits have required reliance.

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).

Applying this "well-established rule of construction," the Court emphasized that "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud . . . statute[], actionable 'fraud' had a well-settled meaning at common law" and that meaning "required a misrepresentation or concealment of *material* fact." *Neder*, 527 U.S. at 22 (emphasis in original). In light of this common-law requirement, the Court held that it "must presume that Congress intended to incorporate materiality [into the mail fraud statute] 'unless the statute otherwise dictates.'" *Id.* at 23 (quoting *Nationwide Mut. Ins.* v. *Darden*, 503 U.S. 318, 322 (1992)).

Once this presumption attaches, the Court explained, the party opposing it bears a heavy burden. Specifically, any "rebuttal [to this presumption] can only come from the text or structure of the fraud statutes themselves"—not by implication from other statutes. *Id.* at 23 n.7. Ultimately, the Court held 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 (emphasis added).[3]

2. The same rule of "common-law meaning" applies when interpreting RICO. In *Beck* v. *Prupis*, 529 U.S. 494, 500 (2000), the Court confronted the question of "what it means to be 'injured . . . by reason of' a 'conspir[acy]'" in the civil RICO context. Although it was undisputed that the plaintiff had suffered an injury proximately caused by an overt act in furtherance of the conspiracy—namely, termination of his

[3] As *Neder* pointed out, in criminal prosecutions brought directly under the mail fraud statute, the prosecutor need not show a "completed fraud" with resulting injury, but only a "scheme to defraud." *Neder*, 527 U.S. at 24-25. Accordingly, the Court found that Congress did not intend to incorporate the common-law fraud elements of reliance and damages into the *criminal* mail fraud statute. *Ibid.* This case, however, presents a *civil* RICO claim for treble damages under 18 U.S.C. § 1964(c), which requires not only a showing of injury, but also an injury proximately caused by a predicate act of mail fraud. *Holmes*, 503 U.S. at 268-69. In such a case, the Court has held that it "should look to . . . civil, [not criminal,] common-law principles to interpret [§ 1964(c)]." *Beck* v. *Prupis*, 529 U.S. 494, 501 n.6 (2000). Thus, the fact that *criminal* mail fraud under 18 U.S.C. § 1341 does not require reliance is irrelevant. Rather, "[t]he obvious source in the common law for the . . . meaning of [§ 1964(c)] is the law of civil [fraud]," *ibid.*—which, as we explain below, unequivocally requires reliance. See also *Summit Props. Inc.* v. *Hoechst Celanese Corp.*, 214 F.3d 556, 559 (5th Cir. 2000) ("[T]he 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."); *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir. 1932) (L. Hand, J.) ("Civilly of course the action [for fraud] would fail without proof of damage, but that has no application to criminal liability.").

employment in an effort to cover up the scheme—the Court held that this was not enough. Rather, the "well-established common law of civil conspiracy" required not just any overt act, but "an act that was itself tortious." *Id.* at 500-01. The source of this requirement was not the express text of RICO, but the fact that "when Congress uses language with a settled meaning at common law [i.e., 'conspiracy'], 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.'" *Ibid.* (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)).[4]

Thus, under the common-law meaning rule applied in *Neder* and *Beck*, the absence of the term "reliance" does not end the inquiry as to whether reliance is an element of a civil RICO claim based on mail fraud. Indeed, the absence of the term "reliance" from RICO is hardly surprising given that this element would be relevant only to a small subset of civil RICO claims, *i.e.*, those predicated on fraudulent misrepresentations or concealments. Accordingly, the Court must look to the common-law elements of

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[4] See also *Pasquantino* v. *United States*, 544 U.S. 349, 359-60 (2005) (looking to common-law to construe wire fraud statute) (citing *Neder*, 527 U.S. at 22-23); *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (When construing the phrase "false pretenses, a false representation, or actual fraud" in the Bankruptcy Code, 11 U.S.C. § 523(a)(3)(A), 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)).

civil fraud at the time RICO was enacted in 1970 to determine whether a showing of reliance is required. See *Beck*, 529 U.S. at 501-04 (examining common-law elements of civil conspiracy at the time of RICO's enactment).

3. Such an analysis shows beyond cavil that reliance *is* required here. By 1970, the common-law elements of civil fraud—including reliance—had been settled for generations. Indeed, even before the turn of the last century, one of the "essential constituents" for a case of common law fraud was reliance.[5] Not only was inducement of the plaintiff to act (or to refrain from action) to his detriment "essential throughout the law of torts," but the common law also required that the plaintiff "must of course have relied upon it, and believed it to be true." William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964).[6] As the

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[5] See *Brackett* v. *Griswold*, 112 N.Y. 454, 455 (1889) ("The essential constituents of [an action for fraud and deceit by means of false pretenses] are a false representation, known to be such, made or authorized or caused to be made by defendant, calculated and intended to influence the action of others, which came to the knowledge of plaintiff *and in reliance upon* which he, in good faith acted, and thus suffered the injury of which he complains. The absence of any one of these particulars is fatal to a recovery.") (emphasis added); *Foster* v. *Oberreich*, 230 Ill. 525, 527 (1907) (quoting *Brackett* and noting the requirement of reliance).

[6] See also William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964) ("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 (N.Y. 1959).

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, then, a jury was not left to devise its own definition of proximate cause in the context of common-law civil fraud. Rather, a jury was required to find that the plaintiff relied on the alleged fraudulent conduct and that the reliance itself was a proximate cause of the damages asserted. *Ibid.*

4. Thus, under "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Neder*, 527 U.S. at 23, the Court cannot "infer from the absence of an express reference to [reliance] that Congress intended to drop that element from [a civil RICO claim predicated on] the fraud statutes," *ibid.* To the contrary, Congress' silence on this issue in the context of a civil RICO claim must be interpreted as "satisfaction with [the] widely accepted definitions" of common-law civil fraud. *Beck*, 529 U.S. at 501. And, because common-law civil "fraud" was defined to require reliance on the defendant's alleged misrepresentation or concealment, the Court must "presume [that Congress] . . . meant to adopt" the element of reliance into a civil RICO claim for damages based on mail fraud. *Id.* at 504.

B. To Satisfy The Requirement of Reliance, A Civil RICO Plaintiff Must Allege And Prove His Own Reliance, Not That Of A Third Party.

The "common-law meaning" rule also compels the conclusion that a RICO claim predicated on mail fraud requires a showing of reliance *by the plaintiff*. This too was and is a well established requirement of common law fraud. As the RESTATEMENT (FIRST) OF TORTS explains, common law fraud required a showing that the plaintiff itself, not just a third party, relied on the defendant's alleged misrepresentation in a business transaction:

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

RESTATEMENT (FIRST) OF TORTS § 546 (1938) (emphasis added). Other common law treatises from the time of RICO's enactment in 1970 similarly refute the notion that a plaintiff need only show third-party reliance to recover on a civil fraud claim. See, e.g., William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964) ("The causal connection between the wrongful conduct and the resulting damage, essential throughout the law of torts, takes in cases of misrepresentation the form of inducement of *the plaintiff* to act, or to refrain from acting, to his detriment.") (emphasis added).[7] Finally, a host of state court cases confirm that the common law of civil fraud requires the plaintiff to demonstrate his own reliance. See, e.g., *Edwards* v. *Chicago & N. W. Ry. Co.*, 223 N.E.2d 163, 166 (Ill. App. 1967) ("The essential elements of an action for fraud are that the defendant made representations that were false; that they were known by the defendant to be false and made with the intent to deceive the plaintiffs; and that *the plaintiffs, believing the representations, relied upon them* to their damage or injury.") (emphasis added).[8] And neither "the text

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[7] See also William L. Prosser, LAW OF TORTS at 729 (3d ed. 1964) ("The false representation must have played a material and substantial part in leading *the plaintiff* to adopt his particular course.") (emphasis added); RESTATEMENT (SECOND) OF TORTS § 546 (1977) ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered *by one who justifiably relies upon the truth of the matter misrepresented,* if his reliance is a substantial factor in determining the course of conduct that results in his loss.") (emphasis added).

[8] See also *Escoett & Co.* v. *Alexander & Alexander, Inc.*, 296 N.Y.S.2d 929, 929 (N.Y. App. Div. 1969) (dismissing a fraud claim because "[t]he representations of which the [claimant] complains were made to third parties and not to it, and those representations were relied upon by those third parties and not by it"); *Schock* v. *Jacka*, 460 P.2d 185, 188 (Ariz. 1969) (requiring reliance [on the fraud] by plaintiff to his damage"); *Piedmont Trust Bank* v. *Aetna Cas. & Sur. Co.*, 171 S.E.2d 264, 267 (Va. 1969) (holding that "one who seeks to hold another in fraud must clearly show that he relied upon the acts and statements of the other"); *First Credit Corp.* v. *Behrend*, 172 N.W.2d 668, 671-72 (Wisc. 1969) ("[I]n any fraud case, in order to secure relief, the complaining party must honestly confide in the representations or, as has been said, must reasonably believe them to be true."); *State Farm Mut. Auto. Ins. Co.* v. *Wall*, 222 A.2d 282, 286 (N.J. Super. 1966) (holding that plaintiff must show "reliance upon the truth of the representations . . . to warrant recovery of damages in an action for fraud and deceit").

[n]or structure" of the mail fraud or RICO statutes suggests a different rule in that context. *Neder,* 527 U.S. at 23 n.7.

Accordingly, under the common-law meaning rule, the Court must presume that Congress intended to incorporate into civil RICO claims predicated on mail fraud the common-law requirement that a plaintiff demonstrate its *own* reliance on the defendant's misrepresentation. See *Beck*, 529 U.S. at 504; *Neder*, 527 U.S. at 23. And that presumption is dispositive here.

C. Analogous Decisions From The Securities Fraud Context Support The Requirement of Reliance.

Analogous decisions interpreting the private right of action for securities fraud under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, have adopted the same approach. When interpreting Section 10(b), this Court has consistently looked to the common law of civil fraud and required a showing of reliance. See, e.g., *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231, 243 (1988) (discussing the "various . . . common-law requirements for a violation of § 10(b) or of Rule 10b-5" and noting that "reliance is an element of a Rule 10b-5 cause of action").[9] As the Court re-

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[9] See also *id.* at 253 (White, J., dissenting) ("In general, the case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on doctrines with which we, as judges, are familiar: common-law doctrines of fraud and deceit."); *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta,* 128 S. Ct. 761, 768 (2008) (listing "reliance upon the misrepresentation or omission" as an element of a private action for securities fraud); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 744 (1975) (examining the "common law" "tort of misrepresentation and deceit, to

cently explained in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 128 S. Ct. 761 (2008), "[r]eliance by the plaintiff upon the defendant's deceptive acts . . . ensures that, for liability to arise, *the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability*." *Id.* at 769 (emphasis added) (quoting *Basic*, 485 U.S. at 243). Adopting the same requirement in the context of civil RICO would make fraud claims under that body of case law consistent with—rather than substantially broader than—the federal securities laws.

II. Public Policy Dictates That Civil RICO Claims Predicated On Mail Fraud Satisfy The Element Of Reliance.

Multiple policy considerations and practical concerns also strongly favor the requirement that a plaintiff demonstrate its own reliance on the defendant's alleged misrepresentation.

A. Applying The Common-Law Element Of Reliance Prevents Plaintiffs From Transforming Ordinary State Tort And Contract Claims Into Federal RICO Claims.

First, adopting the plaintiffs' interpretation of the civil RICO statute would federalize a wide variety of ordinary state tort and contract claims. Indeed, in the absence of the traditional reliance requirement, many ordinary business claims—such as claims for

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which a claim under Rule 10b-5 certainly has some relationship").

unfair competition, tortious interference with contract, commercial disparagement, antitrust violations, products liability, misappropriation of trade secrets and breach of fiduciary duty, to name just a few—would merely duplicate a civil RICO claim based on mail fraud (only without the added benefit of treble damages and attorneys fees). See, e.g., *Summit Props. Inc.*, 214 F.3d at 562 (noting that rejection of a reliance requirement would allow RICO "to infiltrate garden variety products liability cases whenever marketing promotions touted the merits of the products"). And, unlike federal prosecutors, private litigants are not subject to "the restraining influence of prosecutorial discretion." *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 503 (1985) (Marshall, J., dissenting). "Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud." *Id.* at 504. Rejecting the common-law reliance requirement, then, would "stretch[] the mail and wire fraud statutes to their absolute limits and federalize[] important areas of civil litigation that until now were solely within the domain of the States." *Ibid.*

This is not a result the Court should reach lightly, for "[e]stablished canons of statutory interpretation counsel against . . . [inferring] a congressional intention to upset the federal-state balance in the provision of civil remedies." *Id.* at 507. In *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 473-74 (1977), for example, the Court held that a claim of fraud under Section 10(b) of the Securities and Exchange Act of 1934 required not just a showing of a breach of fiduciary duty, but conduct "fairly viewed as 'manipulative or deceptive' within the meaning of the statute." Of particular concern was the risk that the federal securities laws would displace existing state law. As the Court explained, "Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the [state] law of corporations that deals with transactions in securities." *Id.* at 479.

Similarly, in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 128 S. Ct. 761 (2008), the Court refused to impose liability for securities fraud in the absence of reliance. In so holding, the Court noted that "[o]ur precedents counsel against th[e] extension" of the federal securities laws "in[to] areas already governed by functioning and effective state-law guarantees." *Id.* at 770-71.

The same concerns are even more present here. An expanded cause of action for civil fraud under RICO would trench upon not only the state law of corporations dealing with securities (as in *Santa Fe*), but also "garden-variety fraud and breach of contract cases," *Sedima*, 473 U.S. at 525 (Powell, J., dissenting), "garden variety products liability cases," *Summit Props. Inc.*, 214 F.3d at 562, and a host of other state-law causes of action. Here, for example, the plaintiffs have already asserted a state-law cause of action for tortious interference with prospective business advantage. 2005 U.S. Dist. LEXIS 34912 at *2. There is simply no need—let alone textual warrant—for inferring a congressional intent to cover the same ground as these causes of action.

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

A reliance element would also prevent plaintiffs from using civil RICO claims as a form of insurance against business losses and subjecting legitimate businesses to unjustified and potentially crushing liability. 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 on any communications from the defendant. See *Bank of China, New York Branch* v. *NBM LLC*, 359 F.3d 171 (2d Cir. 2004). Recognizing a reliance element in the context of civil RICO claims predicated on mail fraud would prevent such an irresponsible plaintiff from recovering under the civil RICO statute. On the other hand, the plaintiffs' reading of the statute would provide an incentive for parties 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.

The plaintiffs' reading of RICO also blurs the settled distinction between civil and criminal RICO claims. See *Beck*, 529 U.S. at 501 n.6; *Summit Props. Inc.*, 214 F.3d at 559. There may be legitimate policy reasons for authorizing *criminal* RICO prosecutions under the mail fraud statute in the absence of a completed fraud—for example, broad liability might enable the government (exercising prosecutorial discretion) to reach organized criminal enterprises it otherwise could not. But there are no similar policy reasons to allow private plaintiffs to recover treble damages in a *civil* RICO claim predicated on a mere failed attempt to defraud, *i.e.*, a claim that does not involve detrimental reliance on the material falsehood. Such damages represent a windfall to the plaintiff without serving the purposes RICO was designed to achieve.

In the analogous context of securities fraud, the Court has emphasized that civil fraud liability is 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.*, 544 U.S. at 345; *see also Basic*, 485 U.S. at 252 (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 ordinary business losses.

C. Recognizing The Common-Law Element Of Reliance Prevents RICO From Becoming A General-Purpose Private Attorney General Statute.

The common-law element of reliance is especially important in a case like this, in which the plaintiff is essentially bringing a private attorney general suit based on the alleged submission of false documents to a governmental body. Absent a requirement of reliance, virtually any party that believes it has been injured by mail or wire fraud directed at a governmental agency could bring a civil RICO claim based on that conduct. That possibility would transform RICO into a general-purpose private attorney general or *qui tam*–type statute.

There is no evidence, however, that Congress intended RICO to be read so broadly as to authorize actions similar to, for example, those authorized under the False Claims Act. In contrast to RICO, the False Claims Act expressly provides that private individuals are permitted, under certain circumstances, to bring actions against persons who have made false or fraudulent claims for payment to the United States. *See* 31 U.S.C. §§ 3729-30. No provision of the civil RICO statute authorizes such a cause of action, nor should the Court read such a provision into RICO. Indeed, the Court has repeatedly emphasized its "reluctan[ce] to displace . . . well-entrenched federal remedial schemes absent clear direction from Congress." *Sedima*, 473 U.S. at 507 (Marshall, J., dissenting) (citing cases).

Requiring a plaintiff to demonstrate its own reliance upon the alleged fraud will thus prevent RICO from becoming a general-purpose private attorney general statute. Such a requirement will ensure that, where genuine injury has occurred, such claims for relief will be asserted by the injured governmental body—which "can be expected to vindicate the laws by pursuing [its] own claims." *Anza*, 126 S. Ct. at 1998.[10]

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[10] In this case, the Seventh Circuit concluded that Cook County was not the victim of the fraud, and thus would be unlikely to enforce its own rule, because "each winning bidder always pays all back taxes and interest" and "Cook County did not lose even a penny." 477 F.3d at 931. This, however, ignores the fact that the County's interest in the auction process is not merely finan-

D. Recognizing The Common-Law Element Of Reliance Discourages The Filing Of, And Facilitates The Dismissals Of, Frivolous And Extortive Civil RICO Claims.

Finally, requiring a showing of reliance in civil RICO suits predicated on mail fraud will help curb frivolous and extortive civil RICO suits. Such a requirement will "forc[e] courts to distinguish bona fide victims from plaintiffs who simply made poor judgments in transactions and should, therefore, suffer their own losses." Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855, 861 (2005).

The current state of RICO litigation demands such a distinction. Because of its attractive treble damages provision, the civil RICO statute has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context." Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 Del. J. Corp. L. 519, 521 (2002). And, as Chief Justice

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cial (receiving back taxes) but also equitable (ensuring a fair distribution of tax liens)—otherwise there would be no reason for the Single, Simultaneous Bidder Rule. Moreover, as *Anza* and many other cases demonstrate, most cases involving fraud against a governmental entity will involve some form of financial loss by the government. See, e.g., *Anza*, 126 S. Ct. at 1998 (loss of state sales tax revenue); *United States* v. *Ali*, 493 F.3d 387, 390 (3d Cir. 2007) (loss of city revenues); *United States* v. *Spano*, 476 F.3d 476, 478 (7th Cir. 2007) ($10.6 million loss in scheme to defraud town); *United States* v. *Gardiner*, 463 F.3d 445 (6th Cir. 2006) (scheme to defraud city on construction contracts).

Rehnquist observed, "there is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 10 (1989). Moreover, "[m]any a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit." *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting). RICO has thus been used against legitimate businesses for the very extortive purposes it was designed to combat. *Ibid.*; see also *Stoneridge*, 128 S. Ct. at 772 (noting the problem of allowing "plaintiffs with weak claims to extort settlements from innocent companies").

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

These policy concerns militate strongly in favor of recognizing a plaintiff's own reliance as an element of civil RICO claims based on mail fraud. For one thing, a reliance requirement will reduce the number of plaintiffs who can assert RICO claims consistent with good-faith pleading requirements. Moreover, if a plaintiff files a civil RICO claim based on mail fraud without having actually relied upon a fraudulent misrepresentation or concealment, the reliance requirement puts the court in a better position to dismiss, or grant summary judgment on, that claim once it becomes apparent that no reliance actually occurred.[11] This, in turn, reduces undue pressure on innocent defendants to settle weak claims.

A reliance requirement is thus doubly beneficial: it not only reduces the number of meritless civil RICO claims draining judicial resources, it also prevents RICO from "be[ing] used for extortive purposes [and] giving rise to the very evils that it was designed

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[11] 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 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").

to combat." *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting).

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In sum, both the "common-law meaning" rule and sound policy reasons compel the conclusion that a plaintiff's own reliance on a defendant's misrepresentation is a required element of a civil RICO claim predicated on mail fraud. The Court of Appeals erred in adopting the plaintiffs' contrary arguments and thereby construing the civil RICO statute well beyond its intended breadth.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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