No. 04-433

IN THE

# Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND NATIONAL STEEL SUPPLY, INC.,
*Petitioners*,

v.

IDEAL STEEL SUPPLY CORPORATION,
*Respondent*.

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

## REPLY BRIEF FOR PETITIONERS


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## RULE 29.6 STATEMENT

Petitioners' 29.6 Statement was set forth at page ii of petitioners' opening brief, and there are no amendments to that Statement.

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## INTRODUCTION

This Court has held that civil RICO plaintiffs must plead and prove proximate causation – including a direct relationship between the harm claimed by the plaintiff and the alleged illegal conduct of the defendant. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Additionally, civil RICO, understood in light of its common law background, requires plaintiffs seeking to recover for economic harm caused by intentional misrepresentations to prove their reliance on those misrepresentations. Ideal has not adequately alleged either element, and the district court's dismissal of this suit must therefore be reinstated.

Ideal's rejoinder is both incomplete in its recitation of the applicable principles and sweeping in its policy implications. In Ideal's view, any civil plaintiff who can allege an injury bearing some causal relationship to a misrepresentation arguably in violation of the very broad mail or wire fraud statutes can assert RICO claims, threatening the alleged entity making those misrepresentations – typically a legitimate business – with liability for treble damages and attorneys' fees. Ideal's theory has no logical stopping point. It makes no difference how indirect or tangential is the causal link between the misrepresentation and the harm – all remote consequences are actionable and reliance by the plaintiff should never be required. *See*, *e.g.*, Resp. Br. 32 ("nothing more than the criminal violation and resulting harm is required"). Neither this Court's precedents nor the common-law moorings of the civil RICO action, however, permit Ideal's theory.

## I. IDEAL'S ALLEGED LOST PROFITS ARE NOT AN INJURY "BY REASON OF" NATIONAL'S ALLEGED MISREPRESENTATIONS

RICO provides a private right of action for damages to "[a]ny person injured in his business or property by reason of " a violation of the statute. 18 U.S.C. § 1964(c). Under *Holmes*, a civil RICO plaintiff must show that its claimed injury was both factually caused and proximately caused by the defendant's illegal conduct. *See* 503 U.S. at 265-68.

Ideal's complaint fails to allege proximate causation for two independent reasons: (1) the connection between the alleged illegal conduct of National and Ideal's claimed injury is too attenuated; and (2) Ideal was not defrauded and therefore cannot recover damages resulting from National's alleged fraud against New York.[1]

### A. Ideal Failed To Plead A "Direct Relation Between The Injury Asserted And The Injurious Conduct Alleged"

As Ideal concedes (at 22), *Holmes* demands a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268-69. But Ideal would confine that holding of *Holmes* to a rigid formalism – so-called "proper" plaintiffs can sue, but their creditors cannot. *See* Resp. Br. 23 ("Ideal is the proper plaintiff to sue Petitioners, and *Holmes* would only defeat its RICO claims if the plaintiff was one of Ideal's **creditors** (banks, vendors, employees, etc.) that Ideal could not pay because it had been economically injured by Petitioners' racketeering scheme.") (underscoring added). But Ideal fails to explain both why it is the proper plaintiff and what limiting principle enables the court to draw the line allowing Ideal to benefit while excluding Ideal's creditors and suppliers.

Significantly, Ideal never comes to grips with two key facts: National is alleged to have defrauded the State of New York (not Ideal); and the harm claimed by Ideal (lost profits) directly resulted (on Ideal's version of the facts) from *legal* conduct, namely, the charging of lower prices by National. *See* Pet. Br. 15-17. Ideal offers no explanation for why it should be allowed to sue under these circumstances, and this

[1] Ideal asserts violations of both § 1962(c) and § 1962(a), *see* JA 14-18, but it does not contend that the proximate-cause analysis applies differently to those two claims, *see* Resp. Br. 29 n.20. Thus, the two civil RICO counts in Ideal's amended complaint stand or fall together. Additionally, Ideal's assertion (*id.*) that § 1962(a) "was primarily directed" at practices like "money laundering" further underscores the confused nature of its claim, because Ideal did not allege money laundering as a predicate act in its amended complaint. *See* JA 15. Both civil RICO counts in Ideal's amended complaint fail to plead reliance.

Court has already rejected a similar argument in analogous circumstances. *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983) ("Even though coercion directed by defendants at third parties in order to restrain the trade of 'certain' contractors and subcontractors may have been unlawful, it does not, of course, necessarily follow that still *another* party – the Union – is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.") (emphasis added).

Additionally, for the three reasons the *Holmes* Court gave for refusing to permit recovery by the indirect plaintiff, the district court's dismissal of Ideal's suit should be reinstated.

**1.** The *Holmes* Court explained that the primary reason for requiring a "direct relation between the injury asserted and the injurious conduct alleged" is that, "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." 503 U.S. at 269 (citing *Associated Gen. Contractors*, 459 U.S. at 542-43). The difficulties of such proof are manifest here.

It would be extraordinarily difficult for a fact-finder to determine whether Ideal was made worse off by National's alleged misrepresentations. *See* Pet. Br. 17-18. First, the trier of fact would have to determine the extent to which National's tax underpayments were actually reflected in the overall price paid for National's products. Second, it would have to judge the impact of National's prices on Ideal's sales, considering the variety of other factors that could have caused Ideal to lose sales, such as the superiority of National's products and service, competition from other suppliers, or performance issues that uniquely affected Ideal. Indeed, considering the myriad factors that affect a particular consumer's decision to make a particular purchase, the only way for Ideal to prove factual causation would be on a customer-by-customer basis, yet such an effort would transform this lawsuit into a difficult exploration of minute micro-economic data. Third, the jury would have to evaluate

the effect of Ideal's lost sales on its profitability. There are many other factors to which a drop in Ideal's profits could be attributed – including, potentially, poor business practices.[2] Thus, proving that Ideal would not have lost profits without National's alleged misrepresentations would be an unduly speculative exercise. *See Associated Gen. Contractors*, 459 U.S. at 542 ("Partly because it is indirect, and partly because the alleged effects on the [plaintiff ] may have been produced by independent factors, the [plaintiff 's] damages claim is also highly speculative.").

Ideal claims (at 24-25) that factual causation is not a problem in this case, however, because its clever pleading has eliminated all potential causes of its lost profits other than National's alleged misconduct. But Ideal's argument ignores *Holmes*. There, the Court was concerned with the "problems of *proving*" – not simply alleging – "factual causation." 503 U.S. at 269 (emphasis added). Accordingly, in concluding that the Ninth Circuit erred in reversing a grant of summary judgment for the defendant, the Court looked beyond the plaintiff 's allegations to determine whether it would be sensible to require a trial court to sort through the various potential causes of the claimed loss to determine for what portion the defendant ought to be held responsible. *See id.* at 272-73 ("If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets.").

Thus, Ideal's allegations that "Ideal and National are **direct competitors**" (at 11) in a "zero-sum game" (at 18 n.13) cannot sweep away the leaps of faith that Ideal would ask a jury to make in awarding it damages. *Holmes* estab-

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[2] Given this Court's consideration of the plaintiff 's possible "poor business practices" in *Holmes*, Ideal's assertion (at 25 n.17) – relying on cases from the Ninth Circuit – that such factors have no place in the proximate-cause analysis under civil RICO is particularly misplaced.

lished that trial judges are not required to shut their eyes to the complexities of the world in determining whether it would be " 'administratively possible and convenient,' " 503 U.S. at 268 (quoting W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* 264 (5th ed. 1984) ("*Prosser & Keeton on Torts*")), to let the claim of an indirect plaintiff go forward.

Ideal also incorrectly claims (at 25) that it is "no less directly injured than the insolvent broker-dealers in *Holmes*." The broker-dealers in *Holmes* went bankrupt because they bought "*with their own funds*" substantial amounts of manipulated securities that dramatically decreased in value when the defendants' fraud was discovered. 503 U.S. at 262 (emphasis added). Thus, in *Holmes*, the broker-dealers were the defrauded parties and therefore the proper plaintiffs – just like New York would be here if the Attorney General thought the State had a case.

**2.** In *Holmes*, this Court bolstered its conclusion that the plaintiff could not show proximate cause by noting that, "[a]ssuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages." 503 U.S. at 273. Ideal concludes that this Court was concerned exclusively with avoiding the possibility that "any plaintiff will have been twice benefited." Resp. Br. 26.

But Ideal's theory of *Holmes* cannot be squared with the facts of that case. Both the customers (in the form of the SIPC) and the broker-dealers (in the form of the trustees) were parties to the litigation. *See* 503 U.S. at 262, 265 n.8. Presumably, it would have been fairly simple to differentiate what was lost by the customers (their stock and cash in their accounts) from what was lost by the broker-dealers (the value of their businesses). *See* Resp. Br. 6 & nn.23-25, 36-38 & n.179, *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (No. 90-727) (explaining the Securities Investor Protection Act scheme and the various items of

damages sought by SIPC and trustees in that case). Thus, *Holmes* did not present a serious risk that plaintiffs would be compensated multiple times for the same loss.

Instead, *Holmes* presented a complication similar to the one here – that a court might have to attempt to apportion damages so that a defendant would not be forced to pay treble damages to various plaintiffs at different levels removed from the same underlying wrong. Significantly, Ideal does not dispute that, under its theory of proximate cause, the claims can get much more attenuated and the case can become even more complex. *See* Resp. Br. 27-28. In Ideal's view, nothing would prevent Ideal's suppliers from suing, claiming that they lost sales because of Ideal's lost sales attributable to the indirect effects of National's alleged tax fraud. Although Ideal offers an unprincipled and arbitrary limitation to deny recovery to its creditors, *see id.* at 26, its theory would force courts to try the claims of any other party that could claim injury from National's alleged tax fraud – no matter how remote and indirect.[3]

**3.** The third consideration informing *Holmes*'s directness requirement is that there is no need to "shoulder[ ]" the difficulties of adjudicating the claims of indirect plaintiffs when there is a direct victim "to bring suit for the law's vindication." 503 U.S. at 273. Although Ideal asserts (at 17) that it "is best equipped to serve as 'private attorney general' and effectively prosecute" National's alleged misconduct, New York is the direct victim of National's alleged misrepresentations. Even more so than the defunct broker-dealers in *Holmes*, the State can "be counted on to bring suit for the law's vindication." *Holmes*, 503 U.S. at 273. Thus, as in *Holmes*, there is no need to conscript trial courts to disentan-

[3] In any event, even if this case does not present precisely the risk of multiple recoveries that this Court identified in *Holmes*, "the remote and obviously speculative character" of the harm that Ideal alleges is nonetheless "plainly sufficient to place it beyond the reach of " civil RICO. *Associated Gen. Contractors*, 459 U.S. at 545 n.52.

gle the causal and remedial complications presented by suits like Ideal's.[4]

Ideal misunderstands this Court's point when it claims (at 28-29) that the third *Holmes* reason does not apply here because recovery by New York would not remedy its lost profits. The issue is not whether recovery by the directly injured party will make the indirect plaintiff whole. Rather, direct plaintiffs "can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." 503 U.S. at 269-70. Thus, dismissing Ideal's suit does not threaten the public interest because New York can enforce the law against National, if state officials deem the law to need enforcing through this mechanism.[5]

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[4] Neither New York nor anyone else has brought an action arising from the conduct alleged here – a fact that does not support letting this suit go forward, as Ideal suggests (at 28 n.19). If anything, that fact casts doubt on the merits of Ideal's allegations. *See Associated Gen. Contractors*, 459 U.S. at 542 n.47 (observing that, "if there is substance to the [plaintiff 's] claim, it is difficult to understand why [the] direct victims of the conspiracy have not asserted any claim in their own right"). Additionally, *Baisch v. Gallina*, 346 F.3d 366 (2d Cir. 2003), on which Ideal relies (at 36), is fundamentally different from this case. There, the plaintiff 's injury was direct: the defendants defrauded the plaintiff by causing him to loan money under false pretenses. *See* 346 F.3d at 375.

[5] In footnote 19 of the *Holmes* opinion, the Court said only that customers of the broker-dealers who purchased the manipulated securities – and thus were themselves defrauded – "may" be able to sue. *See* 503 U.S. at 272 n.19. Additionally, the Court declined to "rule out" that a securities "parking" scheme "might [have] proximately injured" the broker-dealers' customers. *Id.* "Parking" refers to sham transactions in which broker-dealers move securities from the firm's inventory to the accounts of customers to circumvent the net capital requirements of 17 C.F.R. § 240.15c3-1. *See In re Applications of W.N. Whelen & Co.*, 50 S.E.C. 282 (1990). The connection between the parking scheme in *Holmes* and the customers' loss of property in their accounts was much more direct, in part because the purpose of prohibiting evasion of net capital requirements through "parking" is to protect customers by ensuring the solvency of broker-dealers.

### B. Ideal Cannot Establish Proximate Causation Because It Was Not The Party Defrauded

It is well-settled that a plaintiff seeking to recover for a defendant's violation of a statute must be a member of the class of individuals that the statute was intended to protect. *See Prosser & Keeton on Torts* at 224-25; 1 J. G. Sutherland, *A Treatise on the Law of Damages* § 32, at 124 (4th ed. 1916). Here, Ideal seeks to recover for National's alleged violations of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. The purpose of those laws was to prevent wrongdoers from depriving persons of money or property by fraud. *See Cleveland v. United States*, 531 U.S. 12, 18-19 (2000); *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (mail and wire fraud statutes prohibit "scheme[s] to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises"); *see also* 18 U.S.C. § 1346 (deprivation of another's "intangible right of honest services"). Consequently, because National is alleged to have defrauded New York – and not Ideal – Ideal is not among those that the mail and wire fraud statutes are intended to protect. For that reason, Ideal has not alleged proximate causation, and it cannot recover. It is simply not "administratively possible and convenient," *Holmes*, 503 U.S. at 268, to hold violators of the mail and wire fraud statutes liable to parties that may have been harmed as a consequence of their actions when the parties themselves were not defrauded. *See* Pet. Br. 21-23.

The only response that Ideal can muster is to observe in a footnote (at 36 n.26) that a concurring opinion in *Holmes* would have held "that a plaintiff need not be a purchaser or a seller to assert RICO claims predicated on violations of fraud in the sale of securities." 503 U.S. at 276-77 (O'Connor, J., concurring in part and concurring in the judgment). But nothing in that opinion is inconsistent with the established common-law rule restricting recovery for violation of a statute to individuals the statute intended to protect. Rather, that opinion accords with the view that the securities laws were intended to protect all investors injured

by securities fraud, not just purchasers or sellers entitled to sue under the private right of action implied from § 10(b) of the Securities Exchange Act of 1934, *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 (1975).

To say that civil RICO does not incorporate the "standing" rules of the predicate statutes means little, as Justice O'Connor pointed out, *see Holmes*, 503 U.S. at 280, because most of those statutes are criminal laws, under which only the government has "standing" to sue directly. RICO indisputably gave to private parties the right to sue for violations of many criminal statutes. *See* 18 U.S.C. § 1961(1) (listing predicate acts that constitute "racketeering activity" under § 1962). But that does not mean that RICO abrogated the traditional common-law rule that a plaintiff cannot seek damages from a defendant who has violated a statute when the plaintiff is outside the class of individuals whom the legislature intended to benefit. Because Ideal has made no attempt to demonstrate that it suffered the type of harm that the mail and wire fraud statutes were intended to prevent, its suit must fail. *See Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995) (Easterbrook, J.); *cf. Holmes*, 503 U.S. at 286-90 (Scalia, J., concurring in the judgment).

### C. Ideal's Responses Are Unpersuasive

**1.** Ideal asserts (at 11, 45-47) that it satisfied the proximate-cause requirement imposed by § 1964(c) as the alleged "target" and "victim" of National's alleged tax fraud. Under Ideal's view, any clever civil RICO plaintiff can include those labels in its complaint and thereby survive a motion to dismiss. But *Holmes*' requirement of a direct connection between the violation and injury cannot be circumvented so easily.

*First*, this Court has already rejected the claim that an allegation of intent to harm short-circuits the normal proximate-cause analysis. *See Associated Gen. Contractors*, 459 U.S. at 537 (passage cited to underpin civil RICO's proximate-cause requirement, *see Holmes*, 503 U.S. at 268-71); *see also* Pet. Br. 23-24. Establishing an objective

analysis, the Court refused to allow the indirect plaintiff's claim to proceed, even though it alleged "that the defendants intended to cause" the harm that it suffered. *Associated Gen. Contractors*, 459 U.S. at 537. "[A]n allegation of improper motive, although it may support a plaintiff's damages claim under § 4 [of the Clayton Act], is not a panacea that will enable any complaint to withstand a motion to dismiss." *Id.* (footnote omitted). *See also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) (holding that "[t]he availability of the §4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators"). Ideal cannot reconcile its intent-based approach with *Associated General Contractors*.

*Second*, Ideal cannot sweep away with mere pleading labels the difficulties in determining what, if any, portion of its lost profits can be fairly attributed to National's illegal conduct. Although a district court generally accepts the plaintiff's factual allegations when considering a motion to dismiss, "it is clear that the district judge does not have to accept each and every allegation in the complaint as true." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 463 (3d ed. 2004). In particular, "the district court is not bound by a pleading's . . . sweeping legal conclusions cast in the form of factual allegations." *Id.* at 521-40 (internal quotation marks omitted). Thus, this Court is not required to ignore the difficulties of proving factual causation here merely through Ideal's artful pleading to label itself the "target" and "victim" of National's conduct.

**2.** Perhaps recognizing that *Holmes* and *Associated General Contractors* are fatal to its claim, Ideal instead invokes (at 15-19) two other civil RICO decisions of this Court. Neither case supports Ideal.

***Sedima***. Ideal misleadingly suggests (at 16) that *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), authorizes recovery any time a defendant's racketeering activity injures a person's business or property – no matter how attenuated the connection between conduct and injury. That case did not so hold. There, the plaintiff's harm flowed *directly* from

the defendant's unlawful conduct. Two businesses entered into a joint venture; one company marketed the goods and the other procured and shipped them. The marketer alleged that the shipper repeatedly overcharged it, "cheating [it] out of a portion of its proceeds by collecting for nonexistent expenses." *Id.* at 484. *Sedima* is thus fundamentally different from this case – the direct effect of the alleged illegal conduct harms New York, not Ideal.

Ideal (at 35) and its amicus (at 21) are similarly misguided in contending that *Sedima* supports the view that a plaintiff claiming injury to its business resulting from alleged racketeering activity of a competitor has automatically established proximate causation. Rather than authorizing recovery for the type of indirect "competitive" injury at issue here, the majority in *Sedima* indicated that the proper civil RICO plaintiff is one who has been directly injured by a predicate act. After rejecting the court of appeals' "racketeering injury" requirement, the Court explained that "[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow *from the commission of the predicate acts*." 473 U.S. at 497 (emphasis added).[6]

Although *Sedima* suggested that some "sort of competitive injury" might be compensable under civil RICO when the injury "flow[s] from the commission of the predicate acts," *id.* at 497 & n.15, it expressed skepticism that indirect competitive injuries were cognizable, *see id.* at 497 n.15. "Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that [harm] ultimately and indirectly flowing therefrom is." *Id.* Reject-

[6] Ideal is similarly mistaken in asserting (at 13 n.10) that *United States v. Porcelli*, 865 F.2d 1352 (2d Cir. 1989), "recognized" the "competitive advantage gained by National." That case in fact supports *National's* position and not Ideal's. The Second Circuit there upheld a RICO conviction of an individual who defrauded New York of state sales taxes. *See id.* at 1360-61 & n.2. Each of the defendant's state sales tax filings was considered a predicate violation of the mail fraud statute. *See id.* at 1356. *Porcelli*, however, provides no support for the notion that indirectly affected competitors can sue for treble damages under RICO when the State has been defrauded of tax revenues.

ing that "topsy-turvy approach," the Court found "no warrant in the language or the history of the statute for denying recovery thereunder to the direct victims of" the predicate acts, "while preserving it for the indirect." *Id.* (internal quotation marks omitted). Foreshadowing *Holmes* – where this Court closed the book on claims of indirect injury – *Sedima* thus strongly indicated that only direct victims of the predicate acts of racketeering activity are proper civil RICO plaintiffs.

Other statements in *Sedima* cast further doubt on Ideal's argument. The Court cautioned that a RICO violator "is not liable for treble damages to everyone he might have injured *by other conduct*." *Id.* at 496-97 (internal quotation marks omitted; emphasis added). Rather, the plaintiff "can only recover to the extent that[ ] he has been injured in his business or property *by the conduct constituting the violation*." *Id.* (emphasis added). Thus, when, as here, "the conduct constituting the [alleged] violation" directly harms a third party and the plaintiff claims an injury resulting directly from "other conduct" (here, the charging of lower prices), recovery under civil RICO is not appropriate.

***National Organization for Women ("NOW")***. Ideal erroneously claims (at 18) that its suit should proceed because it "satisfies the pleading standard for RICO standing reiterated in [*National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) ("*NOW*")]." But *NOW* addressed only standing under Article III. *See* 510 U.S. at 255-56. That case provides no guidance on pleading requirements for proximate cause in a civil RICO action. *See Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 122 n.8 (2d Cir. 2003) (plaintiffs had "alleged an injury 'fairly traceable' to defendants' conduct, and therefore [met] the lesser burden for constitutional standing," even though their civil RICO claims failed for lack of proximate cause).

In any event, even if proximate cause had been at issue in *NOW*, that case, like *Sedima*, is quite unlike this one. The plaintiffs in *NOW*, women's health care centers, alleged that the defendant anti-abortion protestors "conspired to use

threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." 510 U.S. at 253. That case thus alleged a campaign of violence and threats of violence – constituting predicate violations of the Hobbs Act, 18 U.S.C. § 1951 – directed at the constituent parts of the plaintiffs' businesses.[7] This Court was not presented with anything resembling the present case, where a business seeks recovery for lost profits that it claims were indirectly facilitated by misrepresentations allegedly made to a third party in violation of the mail and wire fraud statutes.[8] No case cited by Ideal from this Court, therefore, supports the proposition that a plaintiff satisfies proximate-causation pleading requirements on such attenuated allegations. *Holmes* controls the result here: indirect plaintiffs such as Ideal cannot satisfy civil RICO's proximate-cause requirement.

**3.** Nor can Ideal draw support (at 16) from § 1964(c)'s use of the word "[a]ny" in the phrase "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue." 18 U.S.C. § 1964(c). The statute does not permit *any person* to sue. It provides a cause of action to "[a]ny person injured" "*by reason of*" a RICO violation. *Id.* (emphasis added). Under the statute's plain terms, persons who cannot show proximate cause cannot sue. *See Holmes*, 503 U.S. at 265-68. Nothing about the use of the word "[a]ny" suggests otherwise.

**4.** Ideal's resort (at 19-21) to legislative history also fails. This Court has "repeatedly held [that] the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v.*

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[7] In *Scheidler v. NOW*, 126 S. Ct. 1264, 1274 (2006), this Court recently remanded the cases for entry of judgment for the defendants.

[8] Notably, the indirect plaintiff in that case, the National Organization for Women, did not bring a civil RICO claim. *See NOW*, 510 U.S. at 255. NOW's injury, presumably, would have been more remote, and (like Ideal) it could not have pleaded proximate causation.

*Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2626 (2005); *see Holmes*, 503 U.S. at 269 n.15 (RICO's legislative history is "background noise drowned out by the statutory language").

Dispositively, Ideal identifies no ambiguity in § 1964(c)'s language. That is unsurprising, considering that the relevant interpretive question was definitively resolved by this Court in *Holmes* when it held that, for a plaintiff to allege an injury "by reason of " a RICO violation, it must plead that the violation was both a cause in fact and a proximate cause of the claimed injury. *See* 503 U.S. at 265-68. By establishing that proximate cause for civil RICO requires a "direct relation between the injury asserted and the injurious conduct alleged," *id.* at 268, this Court set forth the governing legal standard.

In any event, Ideal's snippets from the legislative record reflect nothing more than bromides about RICO's primary purpose of defeating "organized crime" and "racketeer businessm[e]n." Resp. Br. 19-21 & nn.14, 16. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 245 (1989) ("Congress focused on, and the examples used in the debates and reports to illustrate the Act's operation concern, the predations of mobsters"; "[o]rganized crime was without a doubt Congress' major target"). Nothing in those vague quotations indicates that Congress enacted RICO to create actions such as Ideal's.

Nor is Ideal aided by an isolated statement from a sole legislator that a predecessor to the bill that became RICO would have " 'create[d] civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman.' " Resp. Br. 20 & n.16 (quoting 115 Cong. Rec. 6993 (1969) (Sen. Hruska)). Notably, that bill did not include mail or wire fraud as a predicate act. *See* G. Robert Blakey, *The RICO Civil Fraud Action in Context*, 58 Notre Dame L. Rev. 237, 261 n.66 (1982).[9] Thus, Senator

[9] Also unhelpful to Ideal is the observation of a Presidential Commission that "organized crime" " 'employs illegitimate methods' " like " 'tax evasion' " " 'to extract illegal profits *from the public*.' " Resp. Br. 19 n.14 (quoting President's Commission on Law Enforcement and Administra-

Hruska's statement says nothing about what Congress might have intended for misrepresentation-based civil RICO claims.[10] Ideal's failure to cite any legislative history endorsing a civil recovery in circumstances analogous to those of this case belies its remarkable claim (at 20-21) that "Ideal represents the kind of business Congress intended to protect" when it enacted RICO.

**5.** Ideal (at 21) and its amicus (at 6-7) invoke a familiar refuge: RICO's "liberal construction" clause, *see* Pub. L. No. 91-452, Tit. IX, § 904(a), 84 Stat. 922, 947. But that clause does not help Ideal for the same reason that RICO's legislative history is irrelevant – there is no statutory ambiguity to resolve here. *See Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993) (the clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one") (internal quotation marks omitted). This case involves only the proper application of *Holmes*' proximate-cause requirement.

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tion of Justice, *The Challenge of Crime in a Free Society* 187 (1967)) (emphasis added). Ideal does not dispute that the New York taxing authorities could vindicate public interests by enforcing any law that has been broken here, and nothing in the quotation contemplates a private civil action in favor of a third party to the tax evasion.

[10] Elsewhere, Senators offered examples of conduct they sought to redress. *See* 116 Cong. Rec. 602 (1970) (Sen. Hruska) (organized crime "employs *physical brutality, fear and corruption* to intimidate competitors and customers to achieve increased sales and profits") (emphasis added); *see also id.* at 607 (Sen. Byrd) (endorsing RICO and lamenting an instance in which a racketeer gained control of a detergent company and then used arson and murder to coerce another firm to buy the company's detergent). This case does not require the Court to determine how the directness requirement of *Holmes* would apply when a plaintiff claims harm resulting from predicate acts other than misrepresentation in violation of the mail and wire fraud statutes – *e.g.*, acts of violence (*see* Resp. Br. 34 n.25; Amicus Br. 5, 19-20), bribery (*see* Amicus Br. 11), extortion (*see* Resp. Br. 42 & n.31), or employing undocumented aliens (*see id.* at 35-36). *See Holmes*, 503 U.S. at 272 n.20 (declining to announce a "black-letter rule that will dictate the result in every case") (internal quotation marks omitted); *id.* at 288 (Scalia, J., concurring in the judgment) (it is "obvious that the proximate-cause test . . . that will be applied to the various causes of action created by 18 U.S.C. § 1964 [is] not uniform, but var[ies] according to the nature of the criminal offenses upon which those causes of action are based").

Moreover, in *Holmes*, this Court explained that there was nothing illiberal in interpreting the statute to authorize recovery only by directly injured plaintiffs. The result is not "that RICO cannot serve to right the [defendant's] wrongs," 503 U.S. at 274, but merely that indirectly injured persons are limited to traditional remedies under state law and cannot seek treble damages and attorneys' fees under federal law. Here, too, if National in fact violated the law, New York is fully capable of righting that wrong, and Ideal still has resort to its breach of contract claim even without its fanciful RICO theory.

The *Holmes* Court also cautioned against any purported liberal construction that would force the federal judiciary to undertake the arduous task of adjudicating claims of the indirectly injured: "RICO's remedial purposes would more probably be hobbled than helped by [such a] version of liberal construction" because "[a]llowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits.'" *Id.* (quoting *Associated Gen. Contractors*, 459 U.S. at 545) (third through sixth alterations in original).[11]

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[11] Ideal repeatedly references (at 9, 14, 25) material that was not before the district court when it granted National's motion to dismiss and therefore cannot be considered here. *See*, *e.g.*, *Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851). In any event, Ideal does not tell the full story. National is cooperating with an audit by the New York sales tax authorities. *See* Docket Entry No. 45, No. 02 Civ. 4788 (S.D.N.Y.) (Endorsed Letter from Marshall Beil to Judge Richard M. Berman (Mar. 28, 2005)). Further, evidence from discovery casts doubt on Ideal's causation theory: Ideal and National were not the only players in the relevant market, *see id.*, Docket Entry No. 83 (Giacomo Brancato Dep. 70-72 (Jan. 4, 2005), attached as Exhibit 4 to Declaration of Marshall Beil in Support of Opposition to Summary Judgment Motion (filed Oct. 24, 2005)); and the quality of National's product exceeded that of Ideal's, *see id.*, Docket Entry No. 7 (Declaration of Richard L. Huffman in Support of Motion To Dismiss, Exhs. A (¶¶ 40, 41, 44, 51, 52), B (¶¶ 7, 8, 11, 22, 24, 41, 52), C (¶¶ 16, 17) (filed Oct. 21, 2002)). Discovery has produced no direct evidence that any individual customer switched from Ideal to National to obtain a lower price on a cash transaction.

## II. IN A MISREPRESENTATION-BASED RICO SUIT, A PLAINTIFF MUST SHOW THAT IT RELIED

This Court looks to the common law in fashioning the contours of the RICO private action. *See*, *e.g.*, *Beck v. Prupis*, 529 U.S. 494 (2000); *Holmes*, 503 U.S. at 268; *see also* Pet. Br. 25-27. At common law, intentional misrepresentations causing economic harm were generally actionable under the tort of deceit. *See Prosser & Keeton on Torts* at 725-29. That tort required the plaintiff to prove its own reliance on the defendant's misrepresentation. *See id.* at 728. Thus, consistent with this Court's instruction to follow the common law, nearly every circuit to have considered the question has concluded that civil RICO plaintiffs seeking to recover for harm caused by misrepresentations must establish the element of reliance. *See* Pet. Br. 29-30.

Nevertheless, Ideal contends (at 30-32) that no showing of reliance *by anyone* should be required because the government need not prove reliance in criminal cases. But reliance is not required in criminal cases because the government can prosecute inchoate frauds. *See Neder v. United States*, 527 U.S. 1, 25 (1999). When a private plaintiff seeks to recover damages under § 1964(c), however, it must prove injury resulting from the defendant's conduct, and that requires proof of reliance. *See* Pet. Br. 27-29.

Ideal also argues (at 43-45) that reliance by a third party should suffice because sporadic decisions have allowed recovery in such circumstances. Dispositively, however, the sources to which this Court looks in determining the content of the common law – respected treatises and the Restatement, *see*, *e.g.*, *Field v. Mans*, 516 U.S. 59, 70 & n.9 (1995) – uniformly confirm that a plaintiff seeking damages for harm caused by an intentional misrepresentation must prove its own reliance on that misrepresentation. *See Prosser & Keeton on Torts* at 728; *Restatement (First) of Torts* §§ 525,

537, 546 (1938); *Restatement (Second) of Torts* §§ 525, 537(a), 546; *see also* Pet. Br. 31-32 & n.8.[12]

Finally, Ideal's assertion (at 32-42) that reliance is merely a way to establish causation cannot be squared with *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005).[13] There, this Court reiterated that the implied right of action under § 10(b), which "resembles" the "common-law tort actions for deceit and misrepresentation," requires proof of *both* "loss causation" *and* "reliance" or "transaction causation." *Id.* at 1631; *see id.* at 1632 ("The common law of deceit subjects a person who 'fraudulently' makes a 'misrepresentation' to liability 'for pecuniary loss caused' to one who

[12] The six cases cited by Ideal (at 43-45) that were decided before civil RICO was enacted are off-point: one was cited in our opening brief (at 33 n.9) as an example where the plaintiff relied on misrepresentations communicated to it by a third party, *see Eaton, Cole & Burnham Co. v. Avery*, 83 N.Y. 31, 33-34 (1880); one did not involve third-party reliance at all in that the plaintiff relied on misrepresentations that the defendants made to the market at large, *see Bruff v. Mali*, 36 N.Y. 200, 204-05 (1867); three fall under exceptions referenced in our opening brief (at 34) involving cases in which the parent relied on behalf of the child, *see Piper v. Hoard*, 107 N.Y. 73 (1887), and cases in which the defendant deceived a neutral arbitrator, *see Rosenbluth v. Sackadorf*, 76 N.Y.S.2d 447 (Sup. Ct. 1947), *rev'd*, 79 N.Y.S.2d 524 (App. Div.), *aff'd*, 298 N.Y. 761 (1948); *Cooper v. Weissblatt*, 277 N.Y.S. 709 (App. Term 1935). And *Rice v. Manley*, 66 N.Y. 82 (1876), was decided before the common law allowed recovery for tortious interference with a contract for the sale of goods. *See Hornstein v. Podwitz*, 254 N.Y. 443, 447 (1930) (tortious-interference doctrine confined to contracts for personal services until 1893).

[13] Ideal relies heavily (at 33-34) on an amicus brief filed by the Solicitor General in *Bank of China v. NBM LLC*, *cert. dismissed*, 126 S. Ct. 675 (2005) (No. 03-1559). The Solicitor General did not endorse the view that "the common law consistently recognized the doctrine of third-party reliance." Resp. Br. 34 n.24. Rather, that brief explained that "reliance on the defendant's deception *by the plaintiff himself* was an essential element of a common law fraud cause of action." U.S. Br. at 21.

Additionally, Ideal selectively quotes (at 32) *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004). Rather than indicating that reliance was sometimes unnecessary, that case merely noted that it did not reach the question of whether reliance was required in every case. *See id.* at 666 ("it is neither necessary nor prudent to reach the issue of whether reliance is the *only way* plaintiffs can establish causation in a civil RICO claim predicated on mail fraud").

justifiably relies upon that misrepresentation.") (quoting *Restatement (Second) of Torts* § 525). The Court defined "loss causation" as "a causal connection between the material misrepresentation and the loss." *Id.* at 1631; *see Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (Posner, J.) (" 'Loss causation' is an exotic name . . . for the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains."). Thus, even if a plaintiff establishes that its loss was caused by the defendant's misrepresentation, it *still* must prove reliance to recover. *See Dura Pharms.*, 125 S. Ct. at 1632 ("[T]he common law has long insisted that a plaintiff in [an action for deceit] show not only that had he known the truth he would not have acted but also that he suffered actual economic loss.").[14]

## III. UPHOLDING SUITS LIKE THIS ONE WOULD INAPPROPRIATELY EXPAND RICO LIABILITY

The far-reaching consequences of Ideal's position can be illustrated easily. In 2004, the Internal Revenue Service assessed 355,477 net civil penalties for underpayment of excise tax, 555,193 net civil penalties for faulty corporate income tax returns, and 6,361,649 net civil penalties for

[14] This case does not require the Court to determine whether a consumer can state a claim based on a company's misrepresentation to a regulator that enables the firm to inflict harm on the consumer. *See Holmes*, 503 U.S. at 272 n.19 (citing *Taffet v. Southern Co.*, 930 F.2d 847, 856-57 (1991), *vacated*, 958 F.2d 1514, *on reh'g en banc*, 967 F.2d 1483 (11th Cir. 1992); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2d Cir. 1990)). The misstatements in such cases are not intended to deprive the regulatory bodies of money or property, *see Cleveland*, 531 U.S. at 18-19, or honest services, *see* 18 U.S.C. § 1346. Rather, to the extent that the regulators rely on the defendants' misrepresentations, they act on behalf of the customers, who bear the brunt of the misconduct in the form of excessive prices. *See County of Suffolk v. Long Island Lighting Co.*, 685 F. Supp. 38, 39 (E.D.N.Y. 1988); *see also* Pet. Br. 34 (recognizing agency exception to requirement of reliance by the plaintiff ). Here, New York was allegedly defrauded and, as the directly injured party, is thus positioned to vindicate the law. New York was in no sense acting as Ideal's agent in satisfaction of the reliance requirement.

problems relating to employment taxes filed with the IRS. *See* U.S. Dep't of the Treasury, *Internal Revenue Service Data Book 2004*, at 45, Table 27 (2005). Under Ideal's theory, each one of those actions (which could easily be pleaded as mail or wire fraud violations) would provide the basis for a treble-damages suit by a competitor, and that suit would be immune from a motion to dismiss so long as the competitor labeled itself the "target" of the defendant's conduct.[15] Moreover, as evidenced by this case, a competitor would not need to wait for the IRS to take any action – it could simply allege noncompliance and proceed with its civil RICO suit. And the odds of there being tax noncompliance would be good; in a recent empirical study, 55 percent of the corporate tax returns reviewed appeared deficient. *See* Michelle Hanlon, *et al.*, *An Empirical Examination of Corporate Tax Noncompliance* 10, 36, Table 3 (June 24, 2005) (rev'd draft). Given the attenuated damages claims in such civil RICO cases and the existence of a directly injured entity, the Court should not expose businesses to the enormous burdens of defending such suits.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the district court's judgment dismissing the complaint.

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[15] Ideal's data from the Administrative Office of the United States Courts understates the number of RICO filings because it is derived from a form that permits a plaintiff to select only one "nature of suit" label to describe its case. *See* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275, 1286 & n.37 (2005). And the impact of civil RICO on the federal courts cannot be measured simply by the number of suits filed. A recent study showed that civil RICO cases had the third highest case weight – which measures "the judicial work required by cases of different types" – behind only death-penalty habeas corpus actions and environmental suits. *See* Patricia Lombard & Carol Krafka, *2003-2004 District Court Case-Weighting Study*: *Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States* 1, 4-5 (Fed. Judicial Ctr. 2005).

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