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 OF THE STATES OF CONNECTICUT, ARIZONA, ILLINOIS, MONTANA, NEW MEXICO, OHIO, OKLAHOMA, TENNESSEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD BLUMENTHAL
Attorney General of Connecticut

* ROBERT B. TEITELMAN
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5020

BARRY C. BARNETT
SUSMAN GODFREY L.L.P.
901 Main Street, Suite 5100
Dallas, TX 75202-3775

**Counsel of Record*
(Additional counsel listed inside cover)

Counsel of Record (continued)

TERRY GODDARD
Attorney General of Arizona
1275 W. Washington
Phoenix, AZ 85007

LISA MADIGAN
Attorney General of Illinois
100 West Randolph St.
12th Floor
Chicago, Illinois 60601

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, Montana 59620

GARY K. KING
Attorney General of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, New Mexico 87501

MARK DANN
Attorney General of Ohio
30 East Broad Street
17th Floor
Columbus, Ohio 43215

W.A. DREW EDMONDSON
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City,
Oklahoma 73105-4894

ROBERT E. COOPER, JR.
Attorney General and Reporter of Tennessee
P.O. Box 2027
Nashville, Tennessee 37202

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

INTEREST OF *AMICI CURIAE*

We represent the people of our respective states. Our responsibilities to them include enforcement of our states' laws as well as, where appropriate, federal law, including the Racketeer Influenced and Corrupt Organizations Act.

The question of whether or not to engraft a reliance element onto the mail fraud predicate act under civil RICO raises a significant public policy issue for us. Civil RICO provides many of our offices with an important law enforcement tool. It allows access to federal court when a federal claim is presented or when a federal forum is desirable in a particular case. And, along with its state counterparts, federal RICO furnishes a potent means for deterring criminal commercial behavior. We believe that an unduly narrow reading of civil RICO would blunt a vital law enforcement instrument.

We also believe that private suits under civil RICO, such as the one before the Court, further congressional intent and promote our law enforcement goals. Resource constraints and enforcement priorities may prevent state and local governments from pursuing meritorious claims, specifically including claims in which commercial actors deceive governmental entities. Private litigants seeking to recover genuine losses under civil RICO help fill the "prosecutorial gap." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985). We submit that Congress intended

RICO to allow appropriate private litigation like this case, and we strongly favor its continuation beyond the motion to dismiss stage.

STATEMENT OF THE CASE

We adopt the Respondents' Statement of the Case. *See* Brief for Respondents at 3-12.

SUMMARY OF ARGUMENT

The text and history of the controlling statutory provisions do not support adding a "reliance" element. Neither statute mentions reliance. Nor has the Court construed "by reason of" to require "reliance" as an element of an antitrust claim. But the Court has upheld Sherman Act claims alleging that persons other than the plaintiff – including governmental entities – relied on false or fraudulent statements by the defendant.

The Petitioners' position also would have the perverse effect of varying what "by reason of" means according to the particular predicate offense at issue. Many instances of "racketeering activity" do not involve any kind of fraud or only a subspecies of it. And the Court has explicitly stated that the mail fraud statute does not require reliance. A "conjunction" of section 1964(c) with the predicate offense statutes thus does not supply the missing "reliance" element.

Policy considerations weigh heavily against an unduly restrictive reading of RICO. Congress intended a broad scope for civil RICO claims under

section 1964(c). Fulfilling the congressional purpose here will help fill "prosecutorial gaps" in the ability of state and local governments to discover and penalize frauds affecting their operations.

Finally, private litigation under civil RICO does not offend us. We have seen no proof that such lawsuits have unduly burdened courts or litigants. Nor do we believe that the possibility of aggregating private claims bears on the issues before the Court or that aggregation of similar claims is undesirable. The Court's decisions in *Illinois Brick* and *Stoneridge* do not support Petitioners' position and, in our view, tend to do the opposite.

ARGUMENT

I. THE INJURY "BY REASON OF" LANGUAGE IN SECTION 1964(c) MEANS INJURY BECAUSE OF THE PREDICATE ACT – NOT BECAUSE OF *RELIANCE* ON THE PREDICATE ACT

As we read their complaint, Respondents lost chances to buy tax liens at Cook County auctions because Petitioners cheated. Petitioners' cheating – what Blackstone called an "Offense Against Public Trade"[1] – consisted of lying about their independence from one another. They in fact ganged up to deprive Respondents of seats at the lien auctions and then to split the profits from

[1] W. Blackstone, *Commentaries on the Laws of England*, book 4, chapter 12.

acquiring extra liens. Petitioners' zero-sum game resulted, as they intended, in wins for them and losses for Respondents.

Section 1964(c) of RICO authorizes civil remedies for injuries that occur "by reason of" serious criminal conduct. The complaint alleges that Petitioners used the mails to facilitate their cheating and so committed a predicate offense under the mail fraud statute. They now deny liability on the ground that Respondents' losses did not result from their reliance on Petitioners' misrepresentations.

But in this Court Petitioners do not contest Respondents' allegation that Petitioners proximately caused Respondents actual injury in their business and property. Petitioners argue instead that the Court – having deemed "by reason of" to incorporate the common law element of "proximate cause" in *Holmes*[2] and *Anza*[3] – ought now to augment those words to mean "by reason of *reliance*" by the plaintiff on the underlying mail fraud.

The "by reason of" phrase itself – which of course says nothing about reliance – will not bear Petitioners' interpretation. As the Court recognized in *Holmes*, the language "can . . . be read to mean that a plaintiff is injured 'by reason of' a RICO violation, and therefore may recover, simply on showing that the defendant violated §

---

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

[3] *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).

1962, that plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." *Holmes*, 503 U.S. at 265-66 (footnote omitted). But the literal construction "is hardly compelled", and it would ignore the "meaning that courts had already given" the same formulation in decades of antitrust decisions. *Id.* at 266 & 268. "Proximate cause is thus required." *Id.* at 268.

No such interpretive history supports adding "reliance by the plaintiff" after "by reason of". Victims of monopolization, boycotting, or price-fixing do not have to show that they suffered injury "by reason of" their reliance on anticompetitive conduct. Many antitrust cases on the contrary arise from openly coercive and predatory behavior – the very opposite of deception. *E.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (involving overt influence on private association whose standards gave defendant competitive advantage). And this Court has expressly recognized that the acquisition of monopoly power through fraud on a governmental entity – but not on the plaintiff – provides a basis for recovery of treble damages under the Sherman Act. *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 176 (1965) (authorizing "recovery of treble damages for fraudulent procurement of the patent [from the U.S. Patent and Trademark Office] coupled with violations of § 2").[4] Reliance by the plaintiff is thus

[4] *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) ("In *Walker Process* . . . , we found that enforcement of a fraudulently obtained patent claim could violate the

a concept alien to the historical meaning of "by reason of".

Nor would engrafting a reliance element onto section 1964(c) make sense with respect to most instances of possible "racketeering activity". Section 1961(1) defines "racketeering activity" to include about 100 indictable offenses, many of which do not involve fraud – things like "sports bribery", "transmission of gambling information", "obscene matter", "murder-for-hire", "infringement of a copyright", "trafficking in contraband cigarettes", and "chemical weapons". 18 U.S.C. § 1961(1). Does "by reason of" shift meaning according to the peculiar common law roots of each different underlying offense – *assumpsit*, deceit, and the like?[5] Does the phrase add an element to the "proximate cause" inquiry for "forgery or false use of passport" in section 1961(1) but not for mere "misuse of passport"? Or does it instead simply signify, as the Court held in *Holmes* and *Anza*, a proximate cause requirement?

But even if section 1964(c) shifts meaning depending on the predicate offense, the path that Petitioners invite the Court to embark upon – "to

---

Sherman Act."). The Court has also upheld liability where the deceptive statements emanated from the defendant's agents and misled the plaintiff's customers rather than the plaintiff. *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) (affirming judgment against standard-setting organization for making statement that "in effect declared Hydrolevel's product unsafe" and caused plaintiff to lose sales to competitor).

[5] *See* W. Blackstone, *Commentaries on the Laws of England*, book 4, chapter 9 (discussing "Injuries to Personal Property").

interpret § 1341 in conjunction with § 1964(c)" – simply does not lead to the conclusion they wish. For nothing in section 1341, either, so much as hints at a reliance element. Yes, the Court in *Neder v. United States*, 527 U.S. 1 (1999), read "scheme or artifice to defraud" in section 1341 to require materiality, but in the same case the Court construed the same language *not* to require reliance, *id.* at 25 ("The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes."). The "conjunction" of one statute – which does not incorporate a reliance element – with another one – which likewise does not incorporate it – cannot generate the absent element. Petitioners do not venture to explain where in the statutory text one finds the reliance element. One must conclude that they cannot.

II. THE NATURAL READING OF SECTION 1964(c) WILL ENHANCE WISE LAW ENFORCEMENT

To us, the dispute between Petitioners and Respondents presents a question of enforcing an important federal statute and, by analogy, its state law offspring. We submit that interpreting RICO not to incorporate a reliance element will promote sound law enforcement without penalizing legitimate business practices.

A. An Unduly Restrictive Construction of Section 1964(c) Would Thwart Congressional Intent and Hinder State Law Enforcement

The Court has noted that "narrow readings" of section 1964(c) ignore the intent of Congress to enact "an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima*, 473 U.S. at 498. RICO thus "is to be read broadly" and "is to be 'liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, § 904(a), 84 Stat. 947." *Id.* at 497 & 498. "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* at 498. "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Id.* at 491 n.10. Curtailing the reach of section 1964(c) by engrafting a "reliance" element on it in 2008 would defeat the mandate of Congress in 1970 just as surely as adding a "racketeering injury" element or a "prior-conviction requirement" to it would have in 1985. *Id.* at 495 & 488 (rejecting both).

As this case demonstrates, state and local governments will not discover and correct all frauds. Indeed, "[p]rivate attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Id.* at 493. True, as Chief Judge Easterbrook noted, "governments always have *some ability* to detect and penalize frauds." Pet. App. at 7a (emphasis added). And, in an ideal world of limitless resources, state and local

governments could "detect and penalize" all of the various "frauds" that may game their normal functions. State and local governments have the legal means and resources to take enforcement action and punish only a fraction of those they do discover. States are not offended when private litigants pursue available remedies.

We respectfully differ with the argument that prosecutorial discretion does not inform our decisions about whether to pursue civil RICO claims. *See* Brief for Petitioners at 37-38; Brief for the Chamber of Commerce at 22. Although the argument may aim at private lawyers, it hits us, too. Trying to cabin civil RICO (unduly, we believe) in hopes of discouraging expensive strike suits would at the same time deprive many states of a tool that we use judiciously in the service of our citizens within the parameters intended by Congress.

B. Other Arguments Do Not Justify Adding a "Reliance" Element

We respectfully disagree with suggestions that declining to impose an extra-statutory condition on RICO claims sounding in fraud would open litigation floodgates. *See* Brief of Washington Legal Foundation at 18 (claiming an "ever-increasing number of civil RICO suits filed each year"). Since 2000, private RICO cases in federal court have averaged 753 annually (and totaled 703 in the year that ended March 31, 2007) – representing less than 0.3 percent of the more than 250,000 average federal filings each year during

that period.[6] Of these, no more than a handful may relate to rigging of auctions or the making of misrepresentations to third parties. In 97 pages of briefs, Petitioners and their supporting *amici* have identified none.

The notion that the Court should bend its statutory construction to create a "reliance" barrier to class actions deserves comment as well. Brief for McKesson Corp. at 29-33. In the first place, this case does not involve class allegations; and we question the appropriateness of bringing class certification issues into the discussion of the questions on which the Court granted review. Second, the point that "class actions that are certified almost always settle", if true, hardly distinguishes class actions from all other civil cases, which likewise "almost always settle"; nor does it say anything about whether the defendants in those cases overpaid, after rationally taking into account the cost of litigating and the probability of losing on the merits. Third, we believe that aggregate litigation, including class actions, more often than not serves the salutary purpose of leveling the parties' respective bargaining positions; absent aggregation, an individual who has lost $5 or even $500 as a proximate result of a company's RICO violation enjoys a purely theoretical right to a civil remedy. We therefore do not see the possibility of thwarting aggregation as a legitimate reason to narrow RICO.

---

[6] Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics* (2001-2007) (available at http://www.uscourts.gov/caseloadstatistics.html).

The concept that the antitrust case of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), provides any help here strikes us as inapposite. *See* Brief of Washington Legal Foundation at 13-15. The Court in *Illinois Brick*, for policy and administrative reasons, limited standing to the first victims of price fixing – the ones who purchased directly from a member of the price fixing conspiracy regardless of whether they passed on the overcharge to their customers. This case of course does not involve price fixing. Nor does it concern any question of whether Cook County, the entity that relied on Petitioners' misrepresentations, suffered pecuniary loss; it manifestly did not. And it therefore, unlike the direct purchasers in *Illinois Brick*, could not possibly have passed its (non-existent) losses on to Respondents, a circumstance that might conceivably raise a question about allocation of damages.

Finally, the suggestive citations to *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), actually underscore the fundamental difference between this case and securities fraud litigation. No one doubted that section 10(b) of the Securities Exchange Act and the Securities and Exchange Commission's Rule 10b-5 required proof of reliance on something fraudulent. The reliance element existed from the moment the cause of action sprang from the Court's brow. *See id.* at 776. In this case, Congress enacted section 1964(c) and defined mail fraud as an instance of "racketeering activity" with knowledge of the distinctive requirements of securities fraud claims and yet chose language that

made "proximate cause" *simpliciter* the test of causation. That, we submit, should end the matter.

CONCLUSION

The Seventh Circuit's sound decision – to permit Respondents the opportunity to prove their allegations that Petitioners' zero-sum gaming of the auction process proximately injured them – should be affirmed.

Respectfully submitted,

RICHARD BLUMENTHAL
Attorney General of Connecticut

* ROBERT B. TEITELMAN
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. No. (860) 808-5355

BARRY C. BARNETT
SUSMAN GODFREY L.L.P.
901 Main Street, Suite 5100
Dallas, TX 75202-3775

*Counsel of Record

March 19, 2008

TERRY GODDARD
Attorney General of Arizona
1275 W. Washington
Phoenix, AZ 85007

LISA MADIGAN
Attorney General of Illinois
100 West Randolph St.
12th Floor
Chicago, Illinois 60601

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, Montana 59620

GARY K. KING
Attorney General of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, New Mexico
87501

MARK DANN
Attorney General of Ohio
30 East Broad Street
17th Floor
Columbus, Ohio 43215

W.A. DREW EDMONDSON
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma
73105-4894

ROBERT E. COOPER, JR.
Attorney General and Reporter of Tennessee
P.O. Box 2027
Nashville, Tennessee 37202