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No. 07-210

In The
Supreme Court of the United States

JOHN BRIDGES, *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 AMICUS CURIAE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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I. INTEREST OF AMICUS CURIAE[1]

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization whose member law firms litigate antitrust, commercial, civil racketeering, consumer protection, employee benefit, pension and securities fraud claims in federal and state courts. NASCAT's members represent victims of corporate abuse, schemes to defraud and white-collar criminal activity. In civil actions, NASCAT's members not only secure compensation for victims, but also deter wrongdoers, modify corporate behavior and improve access by victims to justice. NASCAT's members advocate effective enforcement of state and federal laws to prevent wrongful, fraudulent and manipulative business practices, including the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968.[2]

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[1] The parties consent to the filing of this brief. Counsel for NASCAT represent that they authored this brief and that no counsel for the parties authored this brief, in whole or in part. No other party made a monetary contribution to the preparation or submission of this brief.

[2] NASCAT has filed amicus curiae briefs in this Court in six RICO cases: *Mohawk Indus., Inc. v. Williams,* 547 U.S. 516 (2006)("enterprise"); *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451 (2006)(proximate causation); *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158 (2001)(liability of corporate officers); *Klehr v. A.O. Smith Corp.,* 521 U.S. 179 (1997)(statute of limitations); *Reves v. Ernst & Young,* 507 U.S. 170 (1993) (liability of professional advisors); *Holmes v. Securities Inv. Protection Corp.,* 503 U.S. 258 (1992)(proximate causation).

II. INTRODUCTION

This case concerns the scope of "scheme to defraud"[3] and "by reason of" in RICO cases based on violations of the mail fraud statute, 18 U.S.C. § 1341.[4] As the court below elucidated the issue now before this Court:

> According to defendants, the suit should be dismissed even if plaintiffs are the immediate and principal (if not the only) losers. That's so, defendants say, for two reasons: first, no false statements were made to plaintiffs; the affidavits were filed with [Cook] County. Second, plaintiffs are not in the "zone of interests" protected by the statute making mail fraud a federal crime. These

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[3] First enacted in 1872, the mail fraud statute is the progenitor of the federal fraud statutes codified in Title 18 in 1948. Congress added wire fraud, modeled on mail fraud, as a separate crime in 1952. 18 U.S.C. § 1343. Decisions under the two statutes treat key issues identically. *Carpenter v. United States,* 484 U.S. 19, 25 n.6 (1987). The phrase "scheme to defraud" now appears in up to 500 federal statutes, as well as 50 sections of Title 18. *Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.,* 100th Cong. 2nd Sess. 17 (1988)(Testimony of Acting Ass't Atty. Gen'l John C. Keeney). Thus, "scheme to defraud" is a crucial concept in federal fraud law, civilly and criminally. Moreover, "[these statutes] have been regularly enforced by the executive officers and the courts for more than half a century. They are now a part and parcel of our governmental fabric." *Donaldson v. Read Magazine, Inc.,* 333 U.S. 178, 190 (1948).

[4] In *Holmes,* 503 U.S. at 265-68, this Court held that the phrase "by reason of" in § 1964(c) of RICO meant "proximate cause," which included among its elements "directness."

come to largely the same thing, and the argument is not sound whichever way it is put.

The mail fraud statute ... defines a fraudulent ***scheme***, rather than a particular false statement, as the crime. It is illegal to obtain money by a scheme that entails fraud, if use of the mail is integral to the scheme. That's why it is unnecessary to show that the false statement was made to the victim. A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's....

Defendants say that [plaintiffs] are not in the zone of interests protected by the mail fraud statute because they weren't taken in by any false statement. That's just a different take on the proposition that only recipients of the untruth have a remedy. When we articulated a zone-of-interests approach ... , it was to drive home the point that the ***injury*** must be direct rather than derivative.... We summed up: "firms suffering derivative injury from business torts ... must continue to rely on the common law ... rather than resorting to RICO" ... Because a zone-of-interests approach so closely overlaps the law as developed [by the Supreme Court] in *Holmes* and *Anza,* it serves no independent role. When the injury satisfies the requirements of *Holmes* and *Anza,* it cannot be

> knocked out by a zone-of-interests requirement that has no purchase in the text of either § 1341 or RICO.

Phoenix Bond & Indem. Co. v. Bridges, 477 F.3d 928, 932 (7th Cir. 2007)(emphasis in original; citations omitted).

This Court granted review limited to the question: "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." *Bridge v. Phoenix Bond & Indem. Co.*, ___ U.S. ___, 128 S. Ct. 829 (2008); Brief for Petitioners ("Pet. Br.") at i. As so granted, the construction of two statutes is before this Court: Mail fraud, 18 U.S.C. § 1341, and RICO, 18 U.S.C. § 1964(c). As the court below observed, *see Phoenix Bond,* 477 F.3d at 932, the circuit courts conflict among themselves and between each other on the requirement of "convergence" in the mail fraud statute and "reliance/proximate cause" under RICO. Pet. Br. at 29-34.

NASCAT asserts that "scheme to defraud" does not require "convergence." In addition, if a private victim brings a civil suit under § 1964(c) of RICO for injury caused by mail fraud, plaintiff need only show proximate cause between the fraud and his injury, ***not*** his reliance on a false statement; thus, although reliance is ***sufficient***, it is not always ***necessary*** to show proximate cause.

III. SUMMARY OF ARGUMENT

Petitioners ask this Court to limit "scheme to defraud" in the federal fraud statutes by requiring a "convergence" between the victim to whom a perpetrator makes a misrepresentation and the victim from whom property is obtained, and to require reliance as a *per se* requirement for proximate cause under RICO.[5] Their arguments threaten to preclude ***all*** "third-party" frauds under the federal fraud statutes – criminal ***and*** civil – and sharply curtail the class of victims who may seek appropriate relief under civil RICO, reversing well-established law.

The "convergence" rule Petitioners propose, which finds no support in the text of the federal fraud statutes or RICO, little or no support in the common law, and no support in sound legal policy, finds only contradictory support in decisions of four circuits,[6]

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[5] The term "convergence" is sometimes used in the lower courts' decisions; it is only a shorthand way of referring here to limiting "scheme to defraud" to face-to-face transactions involving perpetrators and victims. *United States v. Christopher*, 142 F.3d 46, 52-54 (1st Cir. 1998), noted the issues, the use of the term and the conflicts between the circuits, before concluding: "Nothing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived." *Id.* at 54.

[6] *See, e.g., Mylan Labs., Inc., v. Matkari*, 7 F.3d 1130, 1137 (4th Cir. 1993); *Brown v. Cassens Transp. Co.,* 492 F.3d 640, 643-46 (6th Cir. 2007); *Vandenbroeck v. CommonPoint Mortg. Co.,* 210 F.3d 696, 701 (6th Cir. 2000); *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989)(citing *United States v. Lew,* 875 F.2d 219, 222 (9th Cir. 1989)("from the victim of the deceit"));

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while the decisions of six circuits flatly reject it, but with contradictory decisions in their jurisprudence.[7]

Johnson Enters. of Jacksonville v. FPL Group, Inc., 162 F.3d 1290, 1318 (11th Cir. 1998); *see also Monterey Plaza Hotel Ltd. P'ship v. Local 483 of the Hotel Ees. & Restaurant Ees. Union, AFL-CIO*, 215 F.3d 923, 926 (9th Cir. 2000)(RICO predicated on extortion and mail fraud dismissed under *Lew*); *see also* Pet. Br. at 29-34 (discussing cases). *But see, contra, Mid Atlantic Telecom, Inc. v. Long Distance Svcs., Inc.,* 18 F.3d 260, 263-64 (4th Cir. 1994)(RICO claim upheld based upon injury of lost customers inflicted by competitor's fraud on third parties); *cf. Living Designs, Inc. v. E.I. DuPont de Nemours & Co.,* 431 F.3d 353, 363 (9th Cir. 2005)("Although, in some cases, reliance may be a milepost on the road to causation, ... we have ... declined to announce a black-letter rule that reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail or wire fraud....")(citations and internal quotations omitted), *cert. denied,* 547 U.S. 1192 (2006)(citing *Poulos v. Caesars World, Inc.,* 379 F.3d 654, 664 (9th Cir. 2004)(citing *Blackie v. Barrack,* 524 F.2d 891, 906 n.22 (9th Cir. 1975)(fraud-on-the-market presumption of reliance)).

[7] *See, e.g., Christopher*, 142 F.3d at 52-54; *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004), *rev'd on other grounds, Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451 (2006); *Environmental Tectonics v. W. S. Kirkpatrick, Inc.,* 847 F.2d 1052, 1055 (3d Cir. 1988), *aff'd on other grounds,* 493 U.S. 400 (1990); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001); *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir. 1983); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 n.4 (8th Cir. 1993); *accord, Systems Mgmt., Inc. v. Loiselle,* 303 F.3d 100, 103-04 (1st Cir. 2002)(decisions from other circuits on "convergence" rejected; defendant lost "reliance" issue but won "pattern of racketeering activity" argument; "Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way...."); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989)(RICO fraud theory upheld because it is broader than common law fraud); *contra, United States v. Walters,* 997 F.2d 1219, 1227 (7th Cir. 1993)(Easterbrook,

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Petitioners' *per se* reliance requirement for proximate cause under RICO is inconsistent because misrepresentation or omission under "scheme to defraud" is not necessarily required under the mail fraud statute. Nor is its analogue required for injury caused to intended victims or competitors "by reason of" other predicate offenses under RICO (*e.g.,* murder, arson, extortion, bribery, money laundering, etc.). Simply stated, Petitioners confuse what may be sometimes ***sufficient*** for what is always ***necessary***. Reliance (or its absence) may in some situations establish (or not establish) the proximate cause nexus between a violation of RICO and the injury to the victim's business or property, but it is plainly not necessary in ***every*** situation, as the facts of this case amply establish and numerous lower court decisions unequivocally illustrate.[8]

J.)("only a scheme to obtain money or other property from the victim by fraud violates § 1341"); *Appletree Square I, Ltd. P'shp v. W.R. Grace & Co*., 29 F.3d 1283, 1287 (8th Cir. 1994)("to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts"); *Armco Indus. Credit Corp. v. SLT Warehouse Co.,* 782 F.2d 475, 482 (5th Cir. 1986)(distinguishing mail fraud from common law fraud; "[t]o find a violation of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentations").

[8] Commentators agree with the positions asserted by NASCAT. *See* Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims Under 18 U.S.C. § 1962(c),* 39 U.S.F. L. Rev. 319 (2005); Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering*

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IV. ARGUMENT

A. RICO's Deliberately Broad Reach

In 1970, Congress enacted RICO, modeled on the antitrust statutes, to deal with "enterprise criminality," which consists of "***all*** types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors." *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983)(emphasis added; citations omitted). As in the antitrust statutes, in crafting RICO Congress used "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933)(antitrust). Thus, Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 248-49 (1989). "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute." *Id*. at 248. Any construction or application of RICO must take into account its deliberately broad reach.

Claims: The Misplaced Role of Victim Reliance, 59 WASH. & LEE L. REV. 83 (2002).

B. RICO's Civil Remedy and Private Enforcement

As in the antitrust statutes, RICO creates "a private enforcement mechanism that ... deters[s] violators[;] deprives them of the fruits of their illegal actions[;] and ... provide[s] ample compensation to the victims of [RICO] violations." *Blue Shield of Va. v. McCready,* 457 U.S. 465, 472 (1982)(antitrust)(citing *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 313-14 (1978)); *accord*, *Rotella v. Wood,* 528 U.S. 549, 558 (2000)(RICO authorizes "'private attorneys general' dedicated to eliminating racketeering activity....The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering.") Congress not only created civil and criminal remedies, it instructed the courts not to limit RICO's deliberately broad reach. RICO makes its principle of liberal construction a matter of ***express*** statutory language to achieve its remedial purposes. P.L. No. 91-452, 84 Stat. 923, 947 (1970); *see also PacifiCare Health Sys., Inc. v. Book,* 538 U.S. 401, 406 (2003)("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature....[W]e stated that 'both RICO and the Clayton Act are designed *to* ***remedy*** economic injury by providing for the recovery of treble damages, costs, and attorney's fees'....[We have also taken] note of the 'remedial function' of RICO's treble-damages provision.")(emphasis in original; citations omitted). As the antitrust statutes are, "RICO is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473

U.S. 479, 497-98 (1985); *see also American Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp*., 456 U.S. 556, 568-69 (1982)(antitrust). This Court has repeatedly recognized this principle, rejecting all attempts to limit RICO by constricted readings of its provisions.

In line with Congress' explicit mandate, RICO's causation element is simply stated. Section 1964(c) authorizes persons "injured" in their "business or property" "***by reason of***" RICO's "violation" to sue for appropriate redress, including equity relief, treble damages and attorneys' fees. 18 U.S.C. § 1964(a), (c)(emphasis added). A "violation" of RICO is committed if a "person," defined to include "individuals and entities," *id.,* § 1961(3), under appropriate circumstances, uses the mails or interstate wire facilities in the execution of "any scheme to defraud." 18 U.S.C. §§ 1341, 1343, 1961(1)(B), 1962. Thus, RICO expressly envisions that individual ***and*** corporate criminal ***and*** civil responsibility attaches to those who engage in "schemes to defraud." *Sedima,* 473 U.S. at 499 ("Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises....The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."). The statute affords to victims appropriate civil redress.

C. *Holmes* and Proximate Cause

Following RICO's antitrust parentage, in *Holmes* this Court read "by reason of" in § 1964(c) to embody traditional notions of "proximate cause" on the issue

of relative remoteness. 503 U.S. at 265-69 (citing *Associated Gen'l Contractors of Calif., Inc. v. Calif. State Counsel of Carpenters,* 459 U.S. 519, 530 (1983)(antitrust)("*AGC*")). *Holmes* applied modified antitrust remoteness factors to RICO; the modification occurred because RICO does not have an "antitrust injury" analogue. *Id.* at 259 n.15. This Court reformulated the five *AGC* antitrust factors into a three-factor standard to fit RICO: the relative "difficult[y]" of "ascertain[ing]" the plaintiff's damage "attributable to the violation" between him and other more immediate victims; the danger that recognizing the less immediate victim's claim would require the "adopt[ion of] complicated rules apportioning damages among [claimants] ... removed at different levels of injury ... to obviate the risk of multiple recoveries"; and the absence of a "need to grapple with the problems" because more immediate "victims ... [could] be counted on to vindicate the law as private attorneys general...." *Holmes*, 503 U.S. at 269-70 (citing *AGC*, 459 U.S. at 541-42). This case meets each of these standards: Damage to the victims may be mathematically "ascertained"; it is unique to the victims so no "complicated rules of apportioning" are at issue; and no other can be counted on "to vindicate the law as a private attorneys general" for these unique damages. *Id.*

Holmes did not announce a "black letter" rule that would "dictate the result in every case," but reformulated the 19th Century "remoteness" rule of

the common law (that turned on an analytical analysis of "direct or indirect" injury, that is, a formal "rule") into a 20th Century "standard." *See Holmes,* 503 U.S. at 274 n.20 ("Thus, our use of ... 'direct' should ... be understood as a reference to the proximate-cause enquiry ... informed by the ... [three factors] set out in the text. We do not necessarily use it in the same sense as courts before us have ... ").[9]

Under this Court's proximate cause jurisprudence, "labels," which substitute for reasons, merely tagging outcomes without giving the true criteria for decision (that is, "direct or indirect"), were no longer to obtain to determine "remoteness." *AGC* specifically rejected labels of "target" and "zone of interests" because the use of "labels [as a techniques of making decisions] may lead to contradictory and inconsistent results." 459 U.S. at 537 n.33.[10]

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[9] The distinction between a "rule" (drive 55 miles per hour) and a "standard" (drive reasonably) is brought out by Professor Cass Sunstein in LEGAL REASONING AND POLITICAL CONFLICTS 106-08, 110-15, 130-35 (1993). Roscoe Pound in *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482-83, 485-86 (1933), provides the classic formulation of the distinction.

[10] *See also Henneford v. Silas Mason Co., Inc.,* 300 U.S. 577, 586 (1937)(Cardozo, J.)("labels ... are subject to the dangers that lurk in metaphors ... and must be watched ... lest they put us off our guard"); *Techt v. Hughes*, 229 N.Y. 222, 244, 128 N.E. 185, 189 (1920)(Cardozo, J.)("To determine whether ... [a treaty] has ... [a] character, it is not enough to consider its ... label. No general formula suffices. We must consult in each case the ... purpose of the specific articles [of the treaty] involved.").

Because "scheme to defraud" encompasses more than face-to-face transactions or misrepresentations or omissions (as noted in more detail below), a *per se* "convergence" rule and a universal requirement of "reliance" for proximate cause should be rejected. The only legally acceptable way to determine the issue of remoteness is to use the *Holmes* factors, as the Seventh Circuit properly did, and to use the normal tools of proximate cause. Reliance is surely ***sufficient*** to demonstrate causation in certain RICO cases, but it is hardly universally ***necessary***, as Petitioners would have it. The element of reliance was ***not*** essential to the decision of the court below; "proximate cause" was necessary and properly found.[11] Far from departing from *Holmes,* the Seventh Circuit followed this Court's teachings and the path charted by a majority of the courts.

D. Scheme to Defraud

"Scheme to defraud" is ***not*** limited to misrepresentations or fraud-by-omission; it extends, for example, to a fraud worked through bribery that need not

[11] Courts find "proximate cause" in a variety of ways in a variety of factual situations. *See, e.g., Basic, Inc. v. Levinson,* 479 U.S. 1083, (1987)(securities fraud case recognizing fraud-on-the-market doctrine: "There is ... more than one way to demonstrate ... [a] causal connection."); *Klay v. Humana, Inc.,* 382 F.3d 1241, 1259 (11th Cir. 2004)(recognizing "circumstantial evidence" of reliance).

involve misrepresentations.[12] *See, e.g., United States v. Caldwell,* 544 F.2d 691, 695 (4th Cir. 1976)(mail fraud conviction resulting from scheme to use bank funds to bribe state officials). "Scheme to defraud" may also involve a third-party fraud, where the fraud (*e.g.,* a misrepresentation or a bribe) victimizes one entity, say, a rate-setting commission that may or may not itself suffer a property loss, where a loss is then suffered by a third person, say, a ratepayer; a gain inures to the perpetrator, say, a utility, a result that is intended. The loss and the gain need not be identical; they need only be related; and no "convergence" is required between the principal victim (the rate-setting commission) and secondary victims (ratepayers) of the fraud. Indeed, in *Holmes,* 503 U.S. at 279 n.19, this Court recognized the acceptability under proximate cause standards of this configuration of facts.

Here, a "convergence" requirement – that is, a misrepresentation made to the victim who suffers the loss (*see* note 5, *supra*) – would preclude recovery under RICO. Instead, a showing that plaintiff satisfies the usual standards of "proximate cause" ought to suffice. As in this case, third-party frauds may

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[12] *See Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941)("A scheme to get money unfairly by obtaining and the betraying the confidence of another, or by corrupting one who acts for another ... would be a scheme to defraud though no lies were told."), *overruled on other grounds, United States v. Cruz*, 478 F.2d 408, 412 n.8 (5th Cir. 1973).

involve a fraud on a governmental entity, *see, e.g., Bieter,* 987 F.2d at 1325 n.4 (RICO bribery; zoning board); *Environmental Tectonics,* 847 F.2d at 1055 (RICO bribery; foreign government), where it is not necessary to make misrepresentations or an omission and so "convergence" is not present, yet a violation of mail fraud is committed and RICO authorizes recovery. Thus, Petitioners' arguments would undermine one of RICO's ***explicit*** statutory purposes; namely, control of "public corruption."[13]

Under this Court's jurisprudence, "scheme to defraud" is broad, and it extends "to a great variety of transactions." *Fasulo v. United States*, 272 U.S. 620, 628 (1926). It "usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching." *Carpenter,* 484 U.S. at 27 (citations omitted). "Scheme to defraud" extends beyond frauds accomplished by misrepresentations or omissions, *Grin v. Shine*, 187 U.S. 181, 189 (1902)(embezzlement), and reaches beyond face-to-face transactions to include third-party frauds. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 649-58 (1997)(misappropriation

[13] *See Statement of Findings and Purpose*, P.L. No. 91-452, 84 Stat. 922 (1970)(Congress found that "organized crime ... drain[s] billions of dollars from America's economy ... by the illegal use of force, fraud, and ***corruption***" and Congress attacked the problem "by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and ***new remedies*** to deal with ... organized crime.")(emphasis added).

and use of confidential information to trade on securities); *accord, Carpenter*, 484 U.S. at 25-29 (insider trading viewed as misappropriation).

E. The Common Law and Federal "Fraud"

Although Petitioners urge this Court to follow "the common law," they grossly mischaracterize it. Pet. Br. at 22-24. The roots of Petitioners' errors lie in their confusing various kinds of "fraud," a term, as Dean Prosser teaches, that is "so vague that it requires definition in nearly every case." William Prosser *et al.,* LAW OF TORTS 727 (5th ed. 1984) ("Prosser"). Petitioners erroneously equate "scheme to defraud" under federal law with common law "obtaining money by false pretenses" (a crime) and common law "deceit" (a tort), each of which contain misrepresentation and reliance elements, with common law "cheat," a crime that required an "intent to defraud" and a false symbol or token, but neither misrepresentation, nor "convergence," nor face-to-face transactions, and "conspiracy to defraud" (another crime). Decisions and legal treatises of the time referred to the common law action for misrepresentation not as "fraud" but "deceit." *See, e.g.,* Joel Bishop, COMMENTARIES ON THE NON-CONTRACT LAW 132-44 (1889); Frederick Pollock, A TREATISE ON THE LAW OF TORTS 348-88 (1894). When the treatises used the term "fraud," it signified a much broader range of overreaching conduct. *See, e.g.,* Melville Bigelow, THE LAW OF FRAUD 3-4 (1877); William Anderson, A DICTIONARY OF LAW 474-78 (1889).

"Scheme to defraud" in federal fraud law stems from a careful statutory blend of common law "cheat" and "conspiracy to defraud." As explained in the student note, Courtney Chetty Genco, Note, *Whatever Happened to Durland: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 337-64 (1992):

> [M]ail fraud is the culmination of a long historical progression. Seen in the light of ... history, the congressional drafters purposely took elements from older offenses, while purposely leaving other elements out. The victim of larceny, embezzlement, or false pretense had to suffer a property loss. Mail fraud does not require such loss. Common-law cheat required a token ... [M]ail fraud does not require such a token....The requirements of common law cheat could be met [without a token] by a conspiracy to defraud. The congressional drafters of mail fraud deliberately substituted the concept of "scheme." The drafters also retained the element of 'intent to defraud' required by false pretenses....Accordingly, mail fraud is best seen as a modern form of common-law cheating.

Thus, cheating, without misrepresentation, omission, "convergence," or a face-to-face transaction, now properly suffices under mail fraud to establish a "scheme to defraud." *See, e.g., Murr Plumbing, Inc. v. Scherer Bros. Fin. Svcs. Co.*, 48 F.3d 1066, 1069 n.6 (8th Cir. 1995); *Formax, Inc. v. Hostert,* 841 F.2d 388,

390 (Fed. Cir. 1988). In brief, "scheme to defraud" in federal fraud statutes is ***not*** limited to the elements of common law's "false pretenses" and "deceit." Rather, it includes making promises with an intent not to perform, *United States v. Comyns*, 248 U.S. 349, 353 (1919), and embezzlement, *Grin,* 187 U.S. at 189. *See generally* Rollin M. Perkins, *et al.,* CRIMINAL LAW 292-342, 351-388 (6th ed. 1982); Clark & Marshall, LAW OF CRIMES 706-80, 795-840 (6th ed. 1958)(Melvin F. Wingersky ed.). The federal fraud statutes proscribe schemes involving false representations and schemes to defraud that do not. *See United States v. Falcone*, 934 F.2d 1528, 1539 n.28 (11th Cir. 1991). Petitioners offer no valid reasoning to overrule this settled body of law that vindicates the right of victims of different types of "schemes to defraud." Pet. Br. at 19-22.

F. Principles of Construction

The traditional elements of "scheme to defraud" may be simply set out. Defendant(s) must act with "intent to defraud." *Durland v. United States*, 161 U.S. 306, 312-14 (1896). The perpetrator must formulate a "scheme," which refers to "the overall design to defraud one or many by means of a common plan or technique." *United States v. Massey,* 48 F.3d 1560, 1566 (10th Cir. 1995). "Scheme to defraud" is "sufficiently general" to reach a broad range of illicit activity. *United States v. Maze,* 414 U.S. 395, 399 n.4 (1974)(mail fraud: "scheme to defraud" broad enough to be applicable to modern day credit card scam, despite its not being within contemplation of statute's

drafters). The perpetrator must intend to deprive another of something of value, or to gain a benefit for himself or herself by means of deprivation or gain. *Carpenter*, 484 U.S. at 27. "Intent ... make[s] an otherwise innocent act criminal, if it is a step in a plot." *Badders v. United States*, 240 U.S. 391, 394 (1916)(Holmes, J.)(mail fraud). Apart from the jurisdictional elements (*e.g.*, U.S. mails or interstate carrier), "scheme to defraud" requires nothing else. A "scheme to defraud" may be implemented through a variety of techniques including, but not limited to, material misrepresentations or omissions. A comprehensive definition of "scheme to defraud" "need not be undertaken," *Fasulo*, 272 U.S. at 628, and it has not been.[14]

Petitioners' arguments are inconsistent with not only the text and common law history (rightly understood) behind the mail fraud statute, but also modern conceptions of "fraud." Reading RICO, or any other statute (including the mail fraud statute) is a question of the "language of the statute [...] – the most reliable evidence of its intent." *United States v. Turkette*, 452 U.S. 576, 493 (1981).[15] An article written

[14] The classic decision declining to offer such a definition of "fraud" is *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941)("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.").

[15] *See* Henry Friendly, BENCHMARKS 202 (1976)("(1) read the statute, (2) read the statute, (3) read the statute")(quoting Justice Frankfurter's three rules for interpreting statutes); *accord Central Bank of Denver v. First Interstate Bank of Denver,* 511

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by the co-authors of this amicus brief, G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernest & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability,* 33 AM. CRIM. L. REV. 1345, 1460 n.441 (1996), summarizes the basic principles followed by this Court as of 1996 in construing RICO; they run straight and true. So, too, do the decisions handed down since 1996: *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999); *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella,* 528 U.S. 549; *Cedric Kushner Promotions,* 533 U.S. 158; *PacifiCare Health Sys.,* 538 U.S. 401; *Willkie v. Robbins*, ___ U.S. ___, 127 S. Ct. 2588 (2007). Petitioners offer no convincing reason to abandon these sound principles today.

The mail fraud statute says "any" fraud. "Any" means "all" not "some, but not others." *Mobil Oil Explor. & Producing Southeast, Inc. v. United Distrib. Cos.,* 498 U.S. 212, 223 (1991); *see also Central Bank,* 511 U.S. at 175 ("statutory text covers the definition

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U.S. 164, 173-75 (1994); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947)("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration."); Roscoe Pound, III, JURISPRUDENCE 488-90 (1959)("specious construction [of statutes] tends to bring law in to disrespect; ... subjects courts to political pressures; [and] invites an arbitrary personal element in judicial administration; [it threatens to make] laws ... worth little [and to] break down [the] legal order.").

of conduct covered"). No convincing policy justification in text, history, or contemporary events has been offered to support inserting into the text of the statute an extra-statutory-based requirement of "convergence" of the perpetrator and his victim, particularly in a society that is often characterized by complex, multiple-party frauds.

Petitioners' arguments represent an unwise effort to return to the discredited philosophy of *caveat emptor,* where courts externalized the costs of fraud from entrepreneurs to hapless victims in an effort to conserve scarce capital in a developing economy in the early 19th Century. *See generally* Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, 253-66 (1977)(tracing rise of "legal formalism," which weighted law differently and narrowed damage claims to shift "political and economic power ... to merchant and entrepreneurial groups"). RICO, however, squarely stands in the tradition of congressional legislation that rejects the philosophy of *caveat emptor*. *See, e.g., Central Bank,* 511 U.S. at 171 (federal securities statutes were designed to curtail "philosophy of caveat emptor")(citations omitted); Max Radin, THE LAWFUL PURSUIT OF GAIN 54 (1931) ("[C]aveat Emptor ... is bad Latin, and from the Roman point of view, worse law."). That day is over. Petitioners' "convergence" rule is without a justifiable textual, common law historical, or contemporaneous policy grounds to support it.

Fundamentally, Petitioners misunderstand *Holmes.* Factual ("but for") cause is, of course, insufficient. 503

U.S. at 265. In each instance, an examination of other considerations is required to determine the proper extent of liability. *Id.* at 266. But no "black-letter rule ... will dictate the result in every case." *Id.* at 274 n.20 (citing *AGC,* 459 U.S. at 536). "Schemes to defraud" may involve simple, face-to-face misrepresentation or fraud-by-omission. Even so, "proximate cause" may require an analysis not only of the transaction ("How did you get into the relationship?"), but also of loss causation ("Why did you suffer the loss?"). *See, e.g., Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir. 1990)(RICO; while transaction causation and loss causation may merge, each must be shown; fraud that induced entry into oil and gas partnership established transaction causation, but where fraud is unrelated to decline in market value, loss causation was not established: "If the plaintiffs would have lost their shirts in the oil and gas business regardless of the defendants' violations of RICO, they have incurred no loss for which RICO provides a remedy."). Thus, proof of "convergence" and reliance may or may not show transaction and loss causation. *Compare Metromedia Co. v. Fugazy,* 983 F.2d 350, 368 (2d Cir. 1992)(RICO; reliance in face-to-face misrepresentation fraud shows proximate cause between fraud and injury) *with Ideal Dairy Farms, Inc. v. John Labatt, Ltd.,* 90 F.3d 737, 746-47 (3d Cir. 1996)(RICO; where plaintiff knew of overcharges, no proximate cause between face-to-face misrepresentation fraud and injury).

Antitrust "proximate cause" is also instructive in construing RICO's proximate cause requirement because the federal antitrust laws were RICO's model.[16] When this Court, in *AGC*, took up "proximate cause" in antitrust litigation, it rejected the use of "labels" to decide remoteness questions. *See AGC,* 459 U.S. at 528-35 & n.33 (discussing "directness," "zone of interests" and "target"). Instead, this Court instructed the lower courts to "analyze each situation in light of the factors" identified in its opinion. *Id.* RICO and the federal antitrust laws share many concepts. *See, e.g., Environmental Tectonics*, 847 F.2d at 1067 (recovery for antitrust and RICO claims upheld in action alleging bribery by bidder of foreign government). Apart from special antitrust requirements that are not applicable to RICO, "proximate cause," is the same under RICO and antitrust. *Holmes*, 503 U.S. at 269-70. Yet third-party recovery without "convergence" or "reliance" clearly meets the test of proximate cause in antitrust litigation.[17] Thus, Petitioners'

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[16] RICO's legislative history is traced in G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg,* 58 NOTRE DAME L. REV. 237, 249-280 (1982)("Blakey, *RICO Civil Fraud Action*").

[17] *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988)(manufacturer of plastic conduit properly permitted to sue manufacturer of steel conduit that improperly influenced trade association, which, in turn, promulgated safety code that contained false product safety information about plastic conduit, which, in turn, influenced market participants either not to use plastic conduit or to disapprove its use by others).

per se approach for "convergence" and "reliance" is unsupportable in light of the text of RICO and its antitrust parentage.

G. Reliance Alone

Petitioners confuse "sufficient" with "necessary." Respondents have shown a ***sufficient*** connection between Petitioner's alleged violations of RICO and its injuries using traditional proximate cause tools ***without*** having to show reliance by anyone. In fact, Cook County, Illinois, relied upon the false statement by Petitioners of no third-party interest in permitting various bidders, including Petitioners, to participate in the tax lien pool.[18] In fact and in law, Respondents' injuries, easily calculated, to its business and property followed, as sunrise follows sunset,

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[18] Here, too, this Court cannot take guidance from "analogous express right of action" in Title 18 that requires reliance. *Central Bank,* 511 U.S. at 178 (citations omitted). When Congress wants an element of reliance (or, for that matter, "convergence") to play a role in an express claim for relief under Title 18, it has "little trouble in doing so." *Id.* (citations omitted). *See, e.g.,* 18 U.S.C. §§ 2510(d), 2707(e), 3124(e), providing for good faith reliance on judicial process as defense to civil liability. "Reliance" nowhere else appears in Title 18. Nevertheless, should this Court decide to imply a reliance element, it should be "justifiable" reliance, rather than "reasonable" reliance. *See Field v. Mans,* 516 U.S. 59, 70-77 (1995)(proper test of reliance in fraud case is not "reasonable" reliance, it is "justifiable" reliance); *Gordon & Co. v. Ross,* 84 F.3d 542, 546 (2d Cir. 1996) (same); RESTATEMENT (SECOND) OF TORTS § 525 (1976)("justifiable reliance upon the misrepresentation"). Negligence ought not offset an intentional tort.

when Petitioners intentionally made the illegal bids in the confined lien pool, knowing and intending the necessary consequence of their illegal bid to dilute the proper share of the other participants in the pool that played by the rules. Respondents should be able to convince a jury, under these well-pled facts, of the proximate relation under RICO between the illegal bids of Petitioners and the financial losses suffered by Respondents.[19]

H. Remoteness and RICO

Remoteness is another matter, an issue of weighing factors in choosing between victims to select the one in the "best position" to enforce ***federal*** law, not state law. *Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 541-45; *Kansas v. UtiliCorp United, Inc.,* 497 U.S. 199, 214 (1990)(antitrust); *California v. ARC America Corp.,* 490 U.S. 93, 102 n.6 (1989)("*ARC*")(antitrust); *see Sports Racing Svcs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 889 n.15 (10th Cir. 1997) (antitrust)("best position to identify ... [a violation]

[19] An argument for reliance as the ***sole*** means to show proximate cause under RICO would not be seriously entertained had Petitioners burned down Respondent's store or shot its president. Remoteness would, of course, not be an issue, but why should "reliance" either be raised? *See Jerry Kubecka, Inc. v. Avellino*, 898 F. Supp. 963, 969 (E.D.N.Y. 1995)(corporation, but not personal estates, permitted to sue under RICO for economic injury to its business and property flowing from mob hit on its president by hitmen connected to rival garbage collection companies; reliance neither raised nor considered).

and the most incentive to bring an action"). No plaintiff's claim should be (as argued by Petitioners) denied under a "remoteness" analysis when the denial is "likely to leave a significant ... violation [of federal law] undetected or unremedied." *AGC*, 459 U.S. at 542. Petitioners complain about the overlap between RICO and state law and crowded court dockets,[20] but the issue of court dockets may not properly play a role in construing a statute. *Reiter v. Sonotone Corp.* 442 U.S. 330, 344-45 (1979).[21]

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[20] RICO's legislative history makes clear that "Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud." Blakey, *RICO Civil Fraud Action,* 58 NOTRE DAME L. REV. at 280.

[21] Writing for a unanimous Court, Chief Justice Burger made the following observations about the "crowded docket" argument in the antitrust context, but his comments are equally applicable to RICO today:

> Respondents also argue that allowing class actions to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts. That may well be true but cannot be a controlling consideration here. We must take the statute as we find it. Congress created the treble-damages remedy of § 4 [of the Clayton Act] precisely for the purpose of encouraging ***private*** challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations. Indeed, nearly 20 times as many private antitrust actions are currently pending in the federal courts as actions filed by the Department of Justice....

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Nevertheless, "undetected and unremedied" is an issue of federal law. *See ARC*, 490 U.S. at 104-05 (antitrust; duplication under federal and state law permissible); *Turkette*, 452 U.S. at 587 n.9; P.L. No. 91-452, 84 Stat. 923, 947 (1970)(duplication under RICO and state law preserved). Members of Congress raised similar questions in the floor debates on RICO. *See Turkette,* 452 U.S. at 586-87 ("In the face of these objections, Congress nonetheless proceeded to enact the measure."); Blakey, *RICO Civil Fraud Action,* 58 NOTRE DAME L. REV. at 249-80 (tracing legislative history). Petitioners should take their complaints about RICO to Congress, not this Court.

> Finally, respondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court. However accurate respondents' arguments may prove to be – and they are not without substance – they cannot govern our reading of the plain language in § 4 [of the Clayton Act]....
>
> Recognition of the plain meaning of the statutory language "business or property" need not result in administrative chaos, class-action harassment, or "windfall" settlements if the district courts exercise sound discretion and use the tools available. (italics in original; citations and text omitted.)

Reiter, 442 U.S. at 344-45.

I. Competitive Injury

When a third-party fraud results in a competitive injury, no one else ***can*** sue for that injury under RICO. *See, e.g., Procter & Gamble*, 242 F.3d at 565. But competitive injury is clearly compensable under RICO. *Sedima*, 473 U.S. at 497 & n.15 ("Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts. Such damages include, but are not limited to, ... competitive injury...."). The majority and minority opinions in *Sedima* were unanimous on the recovery of competitive injuries. Petitioners do not mention this aspect of *Sedima* in their arguments. In short, no suit under RICO brought by Cook County – which was not injured in its business or property by Petitioners' scheme – can recover the separate losses of the pool participants that played by the rules.

J. Intentional Torts

Traditionally, foreseeability plays a diminished role in "proximate cause" determinations where the "tort" is, as here, intentional. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 435 (1976). RICO is a "tort," *Mid Atlantic Telecom,* 18 F.3d at 263-64, and its predicate offenses require a state of mind, met here by a showing of "intentional" conduct under circumstances where the perpetrator is certain of the consequences of its behavior on the other pool players; in fact, the consequences were its intent. Thus, causation for damages under RICO properly extends further than

negligent torts. *See, e.g., Roma Constr. Co. v. aRusso*, 96 F.3d 566, 576 (1st Cir. 1996)(RICO; succumbing to governmental extortion by victim does not break causation), *reversing,* 906 F. Supp. 78 (D.R.I. 1995)(holding that person who pays extortionist is cause of his own injury). Here, the tort is both intentional and specifically designed to impact on Petitioners' competitor. No provision of the RESTATEMENT, rightly understood, counsels against Respondents having standing to sue under a proximate cause analysis.

K. *Peek* and Petitioners

Petitioners' *per se* preclusion of recovery for injury suffered by a third party whose injury was an objective of the scheme, where the fraud is directed at another party, particularly a government agency, is a misguided effort to import a discredited 19th Century *laissez faire* limitation in English law on civil "deceit" into the modern American statutory law of "scheme to defraud" and RICO, an express claim for relief. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (1975)("[I]f Congress ... legislate[s] the elements of a private cause of action for damages, the duty of the Judicial Branch ... [is] to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.") Petitioners' argument implicitly adopts the wholly discredited common law limitation imposed in

Peek v. Gurney, L.R., 6 Eng. & In. App. 377 (1873). Lord Cairns, reflecting the narrow views of his day, held that a speaker who makes a misrepresentation is civilly liable only to the one whom he "desired" to influence (the principal listener) by the representation in the fashion that occasioned the injury; absent extraordinary circumstances, third parties were not entitled to recover. *Peek* is ably criticized in W. Page Keeton, *The Ambit of Responsibility for Fraud: Representator's Liability*, 17 TEX. L. REV. 1 (1938).

Any *Peek*-type limitation imported from English law for federal fraud statutes or RICO finds no traction in the plain text of those statutes – that, as noted above, affords "any person" the right to sue, by the common law history of the provisions (rightly understood) or by any justifiable grounds of public policy in a modern society. Limitations on civil "deceit" "plainly have no place" in establishing a "violation" of a "scheme to defraud." *Neder v. United States,* 527 U.S. 1, 23 (1999). Nor should they affect civil liability. *Am. Society of Mech. Eng'rs*, 456 U.S. at 568-69 (antitrust; "Victorian" common law limitations inappropriate on private enforcement of antitrust statutes).

In fact, American common law decisions abound that are inconsistent with the British court's decision in *Peek. See, e.g., Bohannon v. Wachovia Bk. & Trust Co.*, 210 N.C. 679, 683, 188 S.E. 390, 394 (1936) (testator deceived into disinheriting plaintiff; plaintiff had claim for relief against perpetrator); *accord* RESTATEMENT (SECOND) OF TORTS § 774B (1976); *Mitchell v. Langley*, 143 Ga. 827, 831, 85 S.E. 1050,

1051 (1915)(holder of life insurance policy defrauded into switching beneficiary; beneficiary has claim for relief against perpetrator). Based on his review of the American common law cases, J.G. Sutherland observed in his treatise, LAW OF DAMAGES (1916), that "where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote ... ***unless the wrongful conduct is willful for that purpose***." *Id.* at 55 (emphasis added). Respondents do not urge that the factor of intent alone suffices for proximate cause, because it does not. *See Blue Shield of Va.,* 457 U.S. at 479 ("The availability of the [private antitrust] remedy to some person who claims its benefit is not a question of the specific intent of the conspirators.") Nevertheless, this Court ought not to ignore entirely the role that intent plays, if properly placed in the context of the *Holmes* factors. Thus, common law history does not support Petitioners' arguments.

L. The "Floodgates" Myth

Finally, Petitioners posit the thoroughly refuted opening the "litigation floodgates" myth of civil RICO litigation. Pet. Br. at 37-40. It does not stand the light cast by data, which is singularly missing from Petitioners' brief. Between 1960 and 1980, of the 22,585 civil and criminal cases brought under the federal antitrust laws by the government or private parties, private plaintiffs instituted 84 percent. *U.S. Dep't of Justice,* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981). No one seriously suggests that private

antitrust litigation is at floodgate proportions. Since RICO's enactment in 1970, the number of criminal to civil RICO suits has run at approximately the same ratio. G. Robert Blakey & Thomas Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God – Is this the End of RICO?,"* 43 VAND. L. REV. 851, 1020 (1990). These authors refuted the "litigation floodgates" myth, *see id.* at 869-73, while more recent data confirms their analysis.

According to the Administrative Office, during 2006 criminal case filings totaled 66,365 cases, of which just 28 (0.042% of the total) were criminal RICO. In the same year, civil filings totaled 259,541 cases, of which 687 (0.26% of the total) were civil RICO cases. U.S. Admin. Office of Courts, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS, Tables C-2 (civil cases) and D-2 (criminal cases), at 162-64, 229-31 (March 31, 2006), available at http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf (last visited Mar. 12, 2008).[22] Thus, empirical data expose as fanciful the urban legend that civil RICO cases overburden federal circuit or district courts.

[22] By way of comparison, the 986 private civil antitrust actions filed in 2006 far outnumbered the 687 private civil RICO actions filed in the same year. *Id.,* Table C-2 at 163-64.

M. RICO's Role

RICO is broad – not, as some argue, ambiguous. *Sedima*, 473 U.S. at 499 (RICO "demonstrate[s not] ambiguity[, but] breadth")(citation omitted); *Russello v. United States*, 464 U.S. 16, 21-22 (1983)("Congress selected ... ['interest'] apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are 'enterprise' ... ; 'racketeering activity' ... ; and 'participate'."). Nor may a court, in any event, properly use a fear of "excessive" litigation to curtail congressional express claims for relief. *Reiter*, 442 U.S. at 344 (antitrust). Fears that a decision of this Court will open proverbial "floodgates" of RICO litigation, even if valid, "are policy considerations more properly addressed to Congress than to this Court." *Id*. at 345. But apart from the raw numbers, determining the volume of cases is pointless until the litigation is itself characterized because, as this Court recognizes, "[t]hat our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985).

RICO's effectiveness – in both criminal and civil cases – as one legal guarantor of the integrity of the nation's marketplace, an issue sadly in the headlines every day in the context of corporate fraud, is crucial. The litany of major company names facing fraud charges in the news is dizzying. *See, e.g.,* Lynnley

Browning, *Prosecutor Say Ex-A.I.G. Executives Created A Fraud*, N.Y. TIMES, Feb. 12, 2008, at C2 (reporting prosecution of former executives of American International Group, major insurance company, for manipulation of its financial statements); Tim Arango, *Black Given Prison Term Over Fraud,* N.Y. TIMES*,* Dec. 10, 2007 at C1 (reporting that Conrad M. Black, former executive of Hollinger International, world's third-largest newspaper empire, sentenced to more than six years imprisonment); *The Economist,* June 28, 2003 (Special Ed.) at 7 (reporting major corporations, including Enron, WorldCom, Tyco, Adelphia, HealthSouth, ImClone and Global Crossing, under investigation for fraud)("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed.").[23] "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." Carl Kaysen *et al.,* ANTITRUST POLICY 17 (1959); *accord, American Column & Lumber Co. v.*

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[23] While headlines about corporate fraud tell one story, other headlines tell the story of dwindling federal resources to fight fraud or other pressing matters in light of the terrorist attacks on September 11, 2001. *FBI Shift Crimps White-Collar Crime Probes; With more agents moved to anti-terrorism duty, corporate fraud cases are routinely put on hold, prosecutors say.*, L.A. TIMES, Aug. 13, 2004, at C1. The need for private actions as a supplement to federal law enforcement is manifest. Respondents here, of course, do not offer civil RICO as a panacea for the issues presented by the current epidemic of corporate fraud, but ask only is it wise to restrict it in the light of contemporaneous events.

United States, 257 U.S. 377, 414 (1921)(Brandeis, J., dissenting)("Restraint may be exerted through force or fraud or agreement"). Antitrust focuses on the third; federal "scheme to defraud" statutes focus on the second; RICO focuses on the first and second. Together, they seek a national market place characterized by integrity, both fiscal and physical.

If the federal fraud statutes and RICO are to be limited, as attempted here by Petitioners, that reform ought, if at all, to come from Congress. *H.J. Inc.,* 492 U.S. at 249. Congress still sits and it can amend RICO if it sees fit. *See, e.g.,* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107, *amending,* 18 U.S.C. § 1964(c)(conduct actionable as securities fraud may not be grounds for civil recovery under RICO).

After ample time, and in full possession of the facts, Congress has ***not*** enacted ***general*** limitations on mail fraud or on RICO's civil enforcement of its "scheme to defraud" provisions. Indeed, Congress expanded them after this Court's restrictive decision in *McNally*, 483 U.S. 350, by enacting 18 U.S.C. § 1346 ("honest services" fraud restored to mail and wire fraud statutes). Absent constitutional considerations, which are not present here, that ought to be the end of the matter judicially. *Turkette*, 452 U.S. at 587 ("There is no argument that Congress acted beyond its power.... That being the case, the courts are without authority to restrict the application of ... [RICO]"). Justice Cardozo put it well in *Techt,* 229 N.Y. at 228-29: "[A court's] duty is done when ... [it]

enforce[s] the law as it is written." NASCAT seeks no more than the enforcement of the statutes as written.

V. CONCLUSION

For these reasons, NASCAT respectfully urges this Court to reject the arguments of Petitioners and affirm the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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