No. 10- 101503

IN THE

Supreme Court of the United States

JOHN C. REZNER,

Petitioner,

v.

UNICREDIT BANK AG AND
UNICREDIT U.S. FINANCE LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an individual plaintiff, who paid money to defendants in reliance on mail and wire fraud directed to him, nevertheless lacks standing to bring a civil RICO claim because the racketeering conduct was in furtherance of a scheme intended to defraud the government.

PARTIES TO THE PROCEEDINGS

Petitioner is John C. Rezner. Other parties in the court of appeals were Defendants-Appellants Bayerische Hypo-Und Vereinsbank AG and HVB U.S. Finance, Inc., who are now known and doing business as UniCredit Bank AG and UniCredit U.S. Finance LLC, respectively.

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JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was issued on December 28, 2010. On February 10, 2011, the court of appeals denied Petitioner's request for rehearing en banc. (App. D, 68a-69a.) On April 29, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 10, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

> As used in this chapter – (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . .

18 U.S.C. § 1961.

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

> enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(d).

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964(c).

STATEMENT OF THE CASE

This is a civil action brought by Petitioner John Rezner under the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"). Defendants-Appellants Bayerische Hypo-Und Vereinsbank AG and HVB U.S. Finance, Inc. (collectively "HVB") have admitted their criminal conduct, and it is undisputed that Petitioner established each and every element of substantive RICO violations under both Section 1962(c) and Section 1962(d) of Title 18 of the United States Code. The only issue is one of statutory standing under RICO: can a private plaintiff ever have a remedy under RICO where the defendant's criminal

conduct has defrauded the government? Under the Ninth Circuit's analysis in this case, the answer is no. Even though Petitioner paid millions of dollars directly to HVB and its co-conspirators as a result of HVB's racketeering activities, the court held that the government was a "direct victim" and best situated to vindicate the law, thereby depriving Petitioner standing under civil RICO.

A. HVB's Fraudulent Tax Shelter Scheme And Admission Of Criminal Conduct

HVB participated in a number of unlawful tax shelter schemes. App. 6a. Between 1996 and 2002, HVB, in conjunction with attorneys and investment advisors, sold scores of these shelters, collecting millions of dollars in fees from taxpayers and investors. App. 5a; 30a-31a; 35a; 44a-45a. One of these tax shelters was a complex loan transaction known as Custom Adjustable Rate Debt Structure ("CARDS"), which was supposed to provide long-term financing and tax advantages. App. 21a-22a. However, HVB offered CARDS without any intention of providing long-term financing and with knowledge that the purported tax advantages were not legitimate. App. 24a. Ultimately, transactions structured similarly to CARDS were listed by the Internal Revenue Service ("IRS") as abusive tax shelters. App. 5a.

On February 13, 2006, HVB entered into a Deferred Prosecution Agreement with the United States Attorney for the Southern District of New York admitting its criminal conduct. App. 6a. HVB confessed its role in more than 80 illegal tax shelter schemes, including 29 CARDS transactions. For each CARDS transaction, the Bank admitted that it made CARDS loans "with a purported

30-year term" but those loans had been "prearranged by the promoters to be unwound within one year and had no purpose other than generating tax benefits . . . ." App. 6a; 24a. The fraudulent nature of the transactions was disguised by false documentation created by HVB. App. 24a; 42a. HVB now admits that it conspired to commit these frauds with the law firm of Sidley Austin Brown & Wood LLP ("Sidley Austin") and an investment advisor, Chenery Associates ("Chenery"), both of which advised Petitioner regarding the transaction. App. 30a, 48a.

B. The Predicate Acts Underlying Petitioner's RICO Claim

HVB conducted its fraudulent tax shelter scheme through racketeering activity, including numerous predicate acts of mail and wire fraud.[1] App. 33a-34a. Among other things:

> [T]he documentation used to implement CARDS, including documentation created and executed by HVB, falsely stated that the loans were 30-year loans whereas, in truth and fact, as HVB and other participants knew and

1. Petitioner also alleged other predicate acts as additional bases for his RICO claim, including commercial bribery and money laundering. Because of the unusual procedural posture of this case, Petitioner was never permitted to present evidence supporting those allegations for adjudication. This appeal arises from Petitioner's motion for summary judgment, which focused naturally on predicate acts established by undisputed evidence. Because Petitioner's RICO claim was dismissed pursuant to the Ninth Circuit's opinion, however, Petitioner will never have an opportunity to demonstrate all of the facts that support his claim, as he would have had under normal procedures.

> understood, they were loans of approximately one year in duration. The CARDS transactions also involved false representations . . . on behalf of the clients/"borrowers," that the transactions were being entered for legitimate business purposes and that the material terms of the loan agreements had been negotiated at arms length. In fact, these representations were untrue, and the transactions were prearranged by the promoters to be unwound within one year.

App. 24a. As to the CARDS transaction sold to Petitioner, HVB admits not only that the documentation was fraudulent, but also that it was transmitted by interstate wire and/or mail. 24a; 33a-34a; 42a. Those fraudulent wires and mails were not sent to the federal government: they were sent to Petitioner, both directly and through his advisors.

C. The Injuries To Petitioner And The United States Government

Defrauding government taxing authorities was not an end in itself for HVB: it reaped millions of dollars in fees from client-taxpayers. *See* App. 5a; 49a. Petitioner John Rezner was one of the investors to whom HVB and its co-conspirators sold a CARDS transaction. In total, he paid roughly $4 million in fees to participate in the CARDS financing transaction, including $1,692,829 paid directly to HVB. App. 5a.

It is undisputed that every single one of the numerous financial and legal professionals advising Petitioner regarding CARDS told him that it was a legitimate

transaction. Sidley Austin provided Petitioner with an opinion letter supporting the legality of CARDS' tax consequences. App. 4a; 20a-21a. Another highly regarded law firm, LeBoeuf Lamb Greene & MacRae LLP ("LeBoeuf") joined Sidley Austin in blessing the transaction and providing supporting opinion letters. *Id.* Petitioner's financial advisors at myCFO, Inc. ("myCFO") concluded that it was the most cost-effective financing for Petitioner, and that it had economic substance independent of any potential tax savings. App. 42; 1 SER 221; 3 SER 775-76.

After the IRS issued its notice regarding CARDS, Petitioner disclosed his transaction to the IRS. App. 23a. The IRS disallowed his CARDS-related deduction, and he paid all taxes and interest due. App. 5a-6a; 23a.

Rezner alleges that he was injured in the amount of the fees he paid out-of-pocket to HVB and other promoters of the CARDS scheme. App. 44a-47a. Petitioner alleged and presented evidence below that this injury was directly caused by HVB's racketeering activity: he did not know that CARDS was a fraudulent tax shelter, and had he known of the fraudulent nature of CARDS and HVB's undisclosed intent that the loan be terminated within a year, he would not have entered into the transaction or incurred millions of dollars in out-of-pocket fees. App. 42a-43a. Petitioner's injury was direct result of HVB and its co-conspirators' racketeering conduct, including their use of mails and wires to induce him to purchase CARDS, to implement and execute the fraudulent transaction, and to collect and distribute his monies.

As a consequence of HVB's fraudulent scheme, the United States government also suffered an injury: it lost

tax revenue. However, that injury was not only distinct from Petitioner's, it was contingent: the government only lost tax revenue if and when the taxpayers claimed deductions on their tax returns based upon the fraudulent shelters designed and promoted by HVB and its co-conspirators. The injury to the taxpayer is both the logical and temporal antecedent to any injury sustained by the government. Petitioner's payment of CARDS-related fees not only occurred before the injury to the government, but was in no way contingent upon it.

D. Procedural History

1. Petitioner was granted summary judgment on RICO liability in the district court.

On March 17, 2006, Rezner filed a complaint in the United States District Court for the Northern District of California against HVB and others. On May 29, 2007, Rezner filed a second amended complaint asserting three causes of action against HVB for: 1) RICO violations; 2) fraud; and, 3) violations of the California Unfair Competition Law ("UCL"). App. 6a-7a.

On December 19, 2007, HVB filed a motion for summary judgment arguing that Rezner's RICO claim was preempted by Section 107 of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The district court denied HVB's motion on August 13, 2008. App. 7a.

On February 3, 2009, Petitioner filed a motion for partial summary judgment on the issue of HVB's liability under RICO and the UCL. HVB asserted only a single defense: that a material issue of fact existed as to whether Petitioner was a knowing participant in HVB's

fraudulent scheme. App. 8a; 35a-36a. HVB conceded that the undisputed evidence and its own conclusive admissions established each element of sections 1962(c) and 1962(d) of Title 18 of the United States Code. App. 28a-35a.

The district court found that there was no disputed issue of material fact with respect to whether Petitioner suffered an injury proximately caused by the RICO conduct. First, the district court found that no other entity was better situated to remedy the specific harm to Petitioner, namely the fees paid to directly to defendants in order to participate in what turned out to be a fraudulent tax shelter:

> As discussed above, Plaintiff paid millions of dollars in fees in order to participate in the CARDS facility. As such, there is no more direct victim than Plaintiff. Certainly there is no other entity or individual that is better situated to remedy the financial harm specifically visited upon Plaintiff.

App. 46a. The district court next assessed factors that might weigh against a finding of proximate causation and concluded that none applied:

> [T]he Court finds that there would be little difficulty in ascertaining the damages suffered by Plaintiff and there is no risk of adopting "complicated rules apportioning damages to obviate the risk of multiple recoveries."

Id.

Finally, the district court noted that after this Court's holding in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), it was unclear that Petitioner even needed to demonstrate reliance on the false and misleading documentation prepared by HVB and its co-conspirators in order to establish proximate causation. App. 46a. Nevertheless, the district court went on to find that, to the extent Petitioner was required to do so, he had proved such reliance and HVB had failed to create any material issue of fact:

> To the extent required by the Supreme Court in *Phoenix Bond*, there is sufficient evidence to satisfy the reliance component of proximate cause. At the very least, the Court does not find that any pieces of evidence offered by Defendant are sufficient to defeat summary judgment on the basis of reliance.

App. 50a. Having found that Petitioner established each and every element of his claims, the district court granted summary judgment. App. 51a.

Following this ruling, the parties stipulated to the amount of damages for each claim for relief, and the Court entered final judgment on June 16, 2009. App. 9a; 2 ER-59-61. HVB appealed.

2. The Ninth Circuit reversed, finding that Petitioner "cannot show" proximate causation because the federal government was the only "direct victim" of HVB's fraudulent scheme.

In its appeal to the Ninth Circuit, HVB raised two issues. First, HVB argued that Petitioner's RICO claim

was barred by the PSLRA. Second, HVB argued that "the circumstantial evidence it presented demonstrates that a reasonable jury could find that Rezner was a co-conspirator in the tax shelter scheme." App. 3a.

The Ninth Circuit affirmed the district court's conclusion that the PSLRA does not apply to Petitioner's RICO claim. App. 14a. It did not, however, address the second question raised by HVB. Instead, it reversed the district court's grant of summary judgment to Petitioner on a different ground, *sua sponte* concluding that under RICO, "Rezner cannot show proximate causation based on HVB's fraud against the United States." App. 17a.

The Ninth Circuit reasoned as follows:

> [A] third-party, the United States, was directly injured by HVB's fraudulent activity. It was the United States that lost tax revenue as a direct result of HVB's fraud. Rezner's asserted injury only indirectly resulted from HVB's fraudulent activity against the United States. *See Holmes*, 503 U.S. at 271, 112 S.Ct. 1311 (holding that where a fraudulent scheme directly harmed stockbrokers by causing stock prices to plummet, creditors to the stockbrokers could not show proximate causation because their injury was "purely contingent" on the harm to the brokers).
>
> In analyzing proximate causation, one consideration is whether a better suited plaintiff would have an incentive to sue. *See Hemi*, 130 S.Ct. at 990. Here, the direct victim of HVB's fraudulent conduct—the United States—did in

> fact sue by entering into a deferred prosecution agreement with HVB. The United States, not Rezner, was best situated to recover for fraud against it.

App. 15a-16a.

The Ninth Circuit then distinguished this Court's holding in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), which held that reliance was not a necessary element of a RICO claim predicated on acts of wire or mail fraud. The Ninth Circuit noted that in *Bridge* the plaintiffs were the only victims and that the government had not been injured. App. 17a. The Ninth Circuit found that, in this case, the United States was an "immediate victim of HVB's fraud and better situated to sue HVB." App. 17a. For that reason, the Ninth Circuit found that Petitioner "cannot show proximate causation based on HVB's fraud against the United States." *Id.*

Although it concluded that Petitioner's injury was not direct, the Ninth Circuit failed to analyze or even describe the causal chain between Petitioner's alleged injury and the pattern of RICO conduct or predicate acts of wire and mail fraud. Indeed, the opinion does not even identify Petitioner's claimed injury in concluding that the injury was "indirect." The Ninth Circuit did not describe how the harm to Plaintiff was in any way contingent on harm to the United States. Nor did the Ninth Circuit identify any intervening acts that were a more immediate cause of Petitioner's injury.

In sum, the nature of Petitioner's injury and its relationship to the RICO conduct of HVB and its co-conspirators were irrelevant to the Ninth Circuit: under

its analysis, because the tax shelter transaction at issue had as its object defrauding the United States government of tax revenue, Petitioner had no standing to bring a civil RICO claim to recover the monies he personally paid to directly to HVB.

The Ninth Circuit's decision that Petitioner's injury was not sufficiently "direct" was made without the benefit of briefing or argument on this issue. First, whether Petitioner had sufficient evidence to go to a jury was never put at issue before the courts below: the motion giving rise to the appeal sought instead to determine whether Petitioner's evidence was undisputed such that judgment should be entered in *his* favor. Petitioner never had a chance to brief or submit evidence to prove the sufficiency of his claim. Second, HVB did not raise the "direct injury" issue on appeal, and, in fact, explicitly waived it. Specifically, HVB told the Ninth Circuit that analysis of the "directness of the injury" irrelevant on appeal because its sole challenge to the summary judgment order was that a reasonable jury could find that Rezner knew CARDS was a fraud. Appellants' Reply Brief ("ARB"), p. 9 n.2.

3. On remand, the district court dismissed Petitioner's RICO claim under the rule of mandate.

After remand to the district court, HVB moved to dismiss Petitioner's RICO claim based on the Ninth Circuit's decision. On April 14, 2011, the district court found that the Ninth Circuit's opinion mandated dismissal, and dismissed Petitioner's RICO claim with prejudice. App. 58a-67a.

REASONS FOR GRANTING THE PETITION

As this Court has repeatedly emphasized, proximate causation in civil RICO cases "is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 272 n.20 (1992) (internal quotations and citations omitted). Ignoring this caution, the Ninth Circuit has adopted an inflexible approach that will exempt a broad class of criminal actors from civil RICO liability whenever the government is an intended or victim of their criminal conduct.

In doing so, the Ninth Circuit is in direct conflict with the Second and Seventh Circuits on an important question regarding the intersection of civil RICO and criminal law. The Second Circuit has held that where a defendant took a private plaintiff's funds under false pretenses as part and parcel of a scheme to defraud the government, the plaintiff has been directly injured and has standing, even though the government is a direct victim of the defendant's fraudulent activities. *Baisch v. Gallina*, 346 F.3d 366, 374 (2d Cir. 2003). The Seventh Circuit has also recognized that a RICO scheme is likely to have multiple victims with distinct injuries, and has held that each of the directly harmed victims has standing regardless of whether a third party is the "better" plaintiff. *RWB Services, LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688-89 (7th Cir. 2008).

In addition, the approach of the Ninth Circuit, as well as the result it reached, is inconsistent with the

relevant decisions of this Court. As this Court has recently reiterated, the proximate causation analysis in civil RICO cases focuses "on the directness of the relationship between the conduct and the harm." *Hemi Group, LLC v. City of New York*, 130 S.Ct. 983, 991 (2010). But proximate cause is not a judgment call made on a hunch. Rather, "[t]he proximate-cause inquiry ... requires careful consideration of the 'relation between the injury asserted and the injurious conduct alleged.' " *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 462 (2006) (quoting *Holmes, 503 U.S. at* 268). The Ninth Circuit failed to perform the careful analysis required of it. *See Holmes*, 503 U.S., at 268-69; *Bridge*, 553 U.S. 639, 654-55. None of this Court's decisions support the conclusion that a plaintiff has no remedy under RICO where he was defrauded into paying money directly to a defendant as part of a RICO scheme.

Finally, review should be granted because the procedure by which Petitioner's RICO claim has been summarily dismissed has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Aside from HVB's PSLRA defense, the viability of Petitioner's cause of action was not before the Ninth Circuit: it was reviewing an order granting summary judgment in Petitioner's favor. The issue that the Ninth Circuit found dispositive was never argued by HVB, and was in fact explicitly waived. The Ninth Circuit's decision, made without any notice or opportunity to brief a dispositive issue which HVB had specifically disclaimed, violates concepts of fundamental fairness and due process.

I. The Ninth Circuit Decision Creates A Conflict With The Second And Seventh Circuit Courts Of Appeal.

As discussed above, the Ninth Circuit has concluded that as a matter of law, Petitioner lacked standing under RICO where the United States government was a direct victim of the defendant's scheme. The nature and directness of the causal chain between Petitioner's injury and the HVB's conduct was not considered. The fact that the injury was personal to Petitioner and distinct from the injury to the government was immaterial to the Ninth Circuit's analysis. The fact that Petitioners' injury was not contingent upon the injury to the government was not a factor. Instead, because HVB's scheme was intended to defraud the government, and the government was entitled to criminally prosecute that misconduct, only the government's injury was considered "direct."

A. The Second Circuit

In *Baisch v. Gallina*, 346 F.3d 366 (2d Cir. 2003), the Second Circuit addressed a fraud that, like this case, impacted both the government and a private individual who was misled by the defendants into giving them money. The Second Circuit reached the opposite conclusion than the Ninth Circuit did. The Second Circuit held that even where defendants' scheme defrauded the government, a private plaintiff who paid money directly to the defendants after being misled as part of the RICO scheme has standing to sue. *Baisch*, 346 F.3d at 374. *See also Commercial Cleaning Servs., L.L.C. v. Colin Service Sys., Inc.*, 271 F.3d 374, 383-84 (2d Cir. 2001) ("If a defendant's illegal acts caused direct injury to more than one category of plaintiffs, the defendant may well be

obligated to compensate different plaintiffs for different injuries").

In *Baisch*, several of the defendants owned a construction company. *Baisch*, 346 F.3d at 369. They were hired to perform construction contracts for Nassau County, and were required to maintain specified insurance policies and post bonds ensuring the performance of their contracts. *Id.* The defendants defrauded Nassau County by submitting falsified construction documents, payroll forms, and other documents. *Id.* Baisch, relying upon misrepresentations made by defendants, entered into a factoring agreement with defendants, agreeing to advance payment for work performed for Nassau County. *Id.* at 370. Baisch would be repaid under the agreement when defendants were paid by the county. *Id.* These funds were used to further the fraudulent scheme against the county. *Id.* Defendants failed to repay several of the loans to the plaintiff. *Id.*

The district court held that there was no proximate causation. *Id.* at 371. The Second Circuit reversed, concluding that "RICO standing extends to all directly injured parties, not just the most directly injured among them." *Id.* at 374. Therefore, in contrast to the Ninth Circuit, the court found that even though the fraud on Baisch was intertwined with a scheme to defraud the county government, Baisch had standing:

> The mail frauds against Baisch through the factoring agreement directly promoted the fraud against Nassau County, and the fraud against Nassau County was the basis for the fraud against Baisch that led to his injury. The frauds against Baisch and those against

> Nassau County were not just linked; they were intertwined as coordinated parts of one racketeering enterprise, and they formed a "pattern" of racketeering. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989).

Baisch, 346 F.3d at 374.

In the earlier *Commercial Cleaning* case, the Second Circuit presaged the unacceptable impact of a rule such as the one applied by the Ninth Circuit. There, the defendant engaged in a scheme to gain a competitive advantage by hiring low-wage illegal immigrants. *Commercial* Cleaning, 271 F.3d at 378-79. The defendant argued that the plaintiff lacked standing because, among other things, government authorities could (and had) pursued actions to vindicate the immigration laws. Specifically, the defendants argued that the plaintiff lacked standing because:

> [O]ther parties, such as state and federal authorities charged with collecting unpaid taxes and workers' compensation fees, may sue to vindicate the statute. Moreover, the INS, which enforces § 1324(a), has already obtained Colin's agreement to pay $1 million for violations of the immigration laws.

Id. at 385. The Second Circuit rejected this argument because adopting the result urged by defendant would eviscerate civil RICO:

> If the existence of a public authority that could prosecute a claim against putative RICO

> defendants meant that the plaintiff is too remote under *Holmes*, then no private cause of action could ever be maintained, for every RICO predicate offense, as well as the RICO enterprise itself, is separately prosecutable by the government. In *Holmes*, those directly injured could be expected to sue, and their recovery would redound to the benefit of the plaintiffs suing for indirect injury. Here, in contrast, suits by governmental authorities to recover lost taxes and fees would do nothing to alleviate the plaintiffs' loss of profits.

Id.

The Ninth Circuit's analysis does precisely what the Second Circuit refused to do, and its potential impact on other cases is immense. As pointed out by the Second Circuit, if the primary consideration is upholding the law, a governmental entity is always better situated to vindicate the underlying statutes regardless of whether it chooses to do so. But if the focus remains where it should, on the remedial purpose of the statute, the ability of the government to prosecute has no place in the analysis of civil RICO standing.

Thus, the Ninth Circuit is in direct conflict with the Second. In *Baisch*, the nature of the plaintiff's injury and its relationship to the overall pattern of RICO activity is virtually identical to what the Ninth Circuit addressed here, yet the courts reached opposite conclusions based on inconsistent analyses. Like Baisch, Petitioner lost money when, based on misrepresentations made to him, he paid it to criminals engaged in a RICO scheme that defrauded

he government. Such a plaintiff may sue in the Second Circuit, but not the Ninth.

B. The Seventh Circuit

The Ninth Circuit decision also conflicts with the Seventh Circuit's decision in *RWB Services, LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681 (7th Cir. 2008), which held that where there are multiple "direct" victims of a fraudulent scheme with distinct injuries, each has standing to recover under RICO notwithstanding the fact that a party other than the plaintiff was intended to be the primary victim. *Id.* At 688-89.

In that case, RWB Services alleged that the defendant misappropriated used cameras belonging to the plaintiff, and fraudulently sold them to Wal-Mart as new cameras. *Id.* at 683-84. The defendants engaged in wire and mail fraud in furtherance of its scheme. *Id.* at 685. The district court dismissed the complaint based, in part, on its conclusion that RWB Services could not establish proximate causation since it was not the direct victim of the scheme to defraud Wal-Mart, and that Wal-Mart (or its customers who purchased the purportedly new cameras) would be better situated to sue because the alleged scheme was primarily to defraud them. *Id.* at 686. The Seventh Circuit reversed, explaining that "RWB Services was a direct victim of the alleged scheme, even if Wal-Mart was one as well." *Id.* at 688. It found that "[t]he existence of multiple victims with different injuries does not foreclose a finding of proximate cause." *Id.* Finally, it concluded:

> Nor is it dispositive that the scheme envisioned defrauding Wal-Mart as well, who could also

> potentially bring a RICO claim. The existence of a "better" plaintiff is most relevant where the plaintiff alleges only an indirect injury. It will not otherwise be grounds for denying a claim to a plaintiff directly injured by one predicate act in the hopes that a different one will emerge. As alleged, the defendants robbed Peter to defraud Paul; the former is as foreseeable a plaintiff as the latter with as direct an injury. As a result, RWB Services properly alleged that the "violation of section 1962" proximately caused the loss of its cameras.

Id. at 688-89.

By contrast, the Ninth Circuit's opinion excludes other plaintiffs from recovering where a fraudulent scheme victimizes a third party, in this case, the government. It is flatly inconsistent with the Seventh Circuit's decision in *RWB Services*, which would extend standing to all directly injured victims regardless of whether the defendants intended to defraud a third party or whether there was a favored plaintiff.

II. This Case Presents An Issue Of National Importance That Is Likely To Recur.

HVB was not the first entity to engage in a RICO scheme that harms the government, nor will it be the last. Thus, this case presents an important issue in which the courts are defining the interplay between criminal law and civil RICO liability, and it should be resolved now. The Ninth Circuit decision has created a broad exemption from civil RICO liability for (at a minimum)

defendants whose conduct harms the government. In such cases, civil RICO plaintiffs in the Ninth Circuit will have their claims dismissed, regardless of the injury they suffer, regardless of the distinctness of that injury from that suffered by the government, and regardless of the relationship between the injury and the unlawful RICO activity of the defendants.

Many permutations of schemes to defraud the government are possible. In addition to this case, the Ninth Circuit's decision would exclude civil RICO liability for any criminal promoter of a tax shelter, since an abusive tax shelter is by its nature designed and intended to have the ultimate affect of defrauding the government. Fraud against the government occurs in many other contexts where private individuals are also harmed, such as government contracting, money laundering, or trading in counterfeit obligations. These are but examples of the types of cases that would be impacted by the far-reaching decision below.

More than twenty-five years ago, this Court rejected an attempt by lower courts to limit the availability of civil RICO remedies to cases where the defendant was already been criminally convicted. The Court rejected this and other judicially imposed limitations on the availability of relief under RICO because they infringed on the important and broad remedial purpose of the civil RICO statute. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 491-93 (1985). The concerns raised by the Court in *Sedima*, including the "peculiar incentives for plea bargaining ... so as to ensure immunity from a later civil suit," are similarly applicable here. *See id.* at 491, n.9. Under the Ninth Circuit's analysis, by admitting it

intended to defraud the government, a defendant can help insulate itself from civil RICO suits through carefully crafted plea agreements.

The question presented by this Petition is properly resolved on the record here. The relevant facts are entirely undisputed. Petitioner lost money when he paid over $1.5 million in fees directly to HVB (and millions more to HVB's co-conspirators and others) as a result of their racketeering conduct, including their use of mails and wires to induce him to purchase CARDS, to implement and execute the fraudulent transaction, and to collect and distribute his monies. The only question is whether HVB's intent to defraud the government operates as a bar to Petitioner's claim and exempts HVB from civil RICO liability.

III. The Ninth Circuit Decision Is Contrary To The Relevant Decisions Of This Court And Misconstrues Both The Meaning And Purpose Of The Direct Injury Requirement.

In civil RICO cases, courts rarely "go beyond the first step" in the causal chain in analyzing whether a plaintiff's injuries are compensable. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992); *Hemi Group, LLC v. City of New York*, 130 S.Ct. 983, 992 (2010). Where the causal chain involves more steps, however, this Court has identified three policy considerations that justify the direct injury rule, and which guide the analysis of whether a more attenuated injury is nonetheless sufficiently direct under the flexible concept of proximate causation:

> The direct-relation requirement avoids the difficulties associated with attempting to

> ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors, prevents courts from having to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries, and recognizes the fact that directly injured victims 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.

Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654-655 (2008) (internal citations and quotations omitted). These additional considerations thus do not function as a measuring stick used to determine whether an injury is separated from RICO conduct by an additional link in the causal chain. Rather, they help answer the question of whether a plaintiff's injury is sufficiently direct to justify recovery notwithstanding the presence of an additional link in the causal chain. Thus, the policy considerations identified in *Holmes* have no application where a plaintiff is injured at the first step. *RWB Services, LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688 (2008); *Commercial Cleaning Servs., L.L.C. v. Colin Service Sys., Inc.*, 271 F.3d 374, 383-84 (2d Cir. 2001).

Despite this, the Ninth Circuit dispensed with the need to analyze the claimed injury or its relationship to the wrongful conduct, instead seizing upon a bastardized version of the third *Holmes* factor to conclude that injuries suffered by a private plaintiff are indirect as a matter of law where the government is a victim of the RICO conduct. But the fact a third party — government or otherwise —

has also been injured does not render a plaintiff's claim derivative, contingent, or otherwise "indirect."[2] Rather, whether an injury is contingent or derivative of an injury to a third party depends on a "careful analysis" of the specific relationship between the respective injuries and the illegal conduct of the defendants. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 462 (2006). The Ninth Circuit's holding eliminates the need for any such careful analysis.

Proper application of this Court's prior decisions reveal that the Ninth Circuit's analysis got it backwards. HVB's RICO conduct directly caused Petitioner's injury, the loss of fees. By contrast, the United States' injury, the loss of tax revenue, was only indirectly caused by HVB under the relevant decisions of this Court.

In *Holmes*, the defendants were accused of RICO violations that involved the manipulation of stock prices. *Holmes*, 503 U.S. at 262. The plaintiffs included (1) trustees for broker-dealers who purchased the stock, and subsequently went bankrupt when prices of the stock fluctuated, and (2) non-purchasing customers of those broker-dealers who lost money when the broker-dealers went bankrupt. *Id.* at 262-63. The Court held that customers of broker-dealers, who did not themselves purchase the stocks that defendants were alleged to have

2. Moreover, as formulated by this Court, the third *Holmes* factor would not on its face be implicated by actual or potential criminal prosecution by governmental authorities, such as the one that occurred in this case. Rather, the consideration comes into play where there is a directly injured third party that can vindicate the law as a "private attorney[] general," separate and apart from criminal enforcement. *Holmes*, 503 U.S. at 269-70. *See also Commercial Cleaning*, 271 F.3d at 383.

fraudulently manipulated, had not shown a sufficiently direct injury. *Id.* at 272-74. Rather, their injury was indirect because it was derivative of the injury to the broker-dealers: the customers lost money because the broker-dealers went bankrupt and could not pay their debts to the plaintiffs. *Id.* By contrast, the bankruptcy trustee for the broker-dealers who had purchased the manipulated stock was able to sue and pursue the claims on their behalf, because their injury as purchasers was direct. *See id.* at 273-74.

Petitioner is situated like the broker-dealers in *Holmes*, who purchased stocks in reliance on the false and misleading statements by the defendants. Unlike the non-purchasing customers in *Holmes* who suffered only a derivative harm, Petitioner purchased a CARDS loan developed, marketed and sold by HVB and its co-conspirators. He paid them approximately $4 million in fees and other costs. Petitioner's claims are not derivative in any way of harm visited on the IRS, i.e., lost tax revenues. He is out millions of dollars in fees and costs regardless of whether the IRS collects the tax revenue. And in Petitioner's case, the IRS did: he paid his taxes and interest in full. App. 5a-6a; 23a. And although it is unclear whether Petitioner even needs to show reliance under these circumstances, *Bridge*, 553 U.S. at 654-57, he submitted copious evidence of his reliance, which the district court found sufficient to enter summary judgment in his favor. App. 47a-50a.

The Court's decisions subsequent to *Holmes* do not affect this analysis. Although the Ninth Circuit relied (without analysis) on *Anza* and *Hemi*, neither case has any application to the direct injury shown here. In *Anza*,

the plaintiff claimed that its principal competitor violated RICO by defrauding the New York tax authority. The plaintiff argued it was injured because it lost sales when its competitor used the proceeds of that fraud to offer lower prices to customers. *Anza*, 547 U.S. at 457-58. The Court found that plaintiff's injury was indirect for two reasons. First, the direct cause of plaintiff's injury was the defendant's decision to offer lower prices, an act separate and distinct from the alleged RICO conduct. *Id.* at 458. The "second discontinuity between the RICO violation and the asserted injury" was that the plaintiff's injury "could have resulted from factors other than [defendants'] alleged acts of fraud." *Id.* at 459. Both bases are inapplicable here, where HVB engaged in RICO conduct, including acts of mail and wire fraud, directed at Petitioner and as a result, he paid monies directly to HVB.

The indirect causal chain rejected by this Court in *Hemi* is also easily distinguished. That case involved cigarette sales to New York City residents, who are required by law to pay a tax of $1.50 for each pack of cigarettes purchased. *Hemi*, 130 S. Ct. at 987. Although in-state cigarette vendors are required to collect this tax from purchasers and remit it to the City, out-of-state vendors are not. Out-of-state vendors are, however, required by the Jenkins Act to file a report on customer purchases with the State of New York. *Id.* The City of New York alleged that the defendant — an out-of-state cigarette vendor — violated RICO by selling cigarettes to New York City residents without providing the required report. The City alleged it was injured because some customers failed to pay cigarette taxes to it, and it could not determine which customers had failed to pay the tax because it lacked the customer information that defendant should have supplied to the State. *Id.* at 989. A plurality

of the Court found that "the conduct directly responsible for the City's harm was the customers' failure to pay their taxes [while] the conduct constituting the alleged fraud was Hemi's failure to file Jenkins Act reports." *Id.* at 990. The plurality opinion also noted that:

> [T]he City's theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties*. [¶] The City's theory thus requires that we extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City).

Id. (emphasis in original).

Applying *Hemi* to this case, it is the injury to the United States, rather than Petitioner's, that is indirect. The immediate cause of the government's lost tax revenue was not the false and misleading statements of HVB and its co-conspirators. The government was directly harmed by the failure of taxpayers to pay their taxes, which was in turn caused by the actions of HVB and its co-conspirators in developing, marketing and selling fraudulent tax shelters to taxpayers. It is hard to fathom how the causal chain could go the other way given the temporal relationship at work here, as the relevant tax returns were not filed by taxpayers until (at the earliest) the year after the transaction.

There are no intervening causes, contingencies, or derivative harms between Petitioner's injury and HVB's RICO conduct. The Ninth Circuit's conclusion that Petitioner's injury was nevertheless "indirect" because

the government was the intended victim of HVB's fraud is flatly inconsistent with this Court's prior decisions.

IV. The Ninth Circuit Decision So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power.

A case that further deviated from the usual course of judicial proceedings could scarcely be imagined. This appeal arose from a motion for summary judgment by Petitioner. The only defense argued by HVB was that there was sufficient circumstantial evidence to create a material issue of fact on whether Petitioner was a knowing participant in HVB's admitted fraud. The standard at issue was whether Petitioner had established every element of his claim by undisputed evidence. The viability of Petitioner's claim was never put at issue in this case (aside from HVB's unrelated preemption argument under the PSLRA), and was not at issue before the Ninth Circuit.

In fact, the sole error asserted by HVB concerning the district court's order granting summary judgment on RICO liability was: "Did the district court err when it found that there was no disputed issue of material fact as to whether Rezner had knowledge of the fraud and granted him summary judgment on liability." Appellant's Opening Brief, 1-2; see also id. at 15 & Part I. HVB explicitly disclaimed and waived the argument that Petitioner's injury was indirect, arguing that analysis of the "directness of the injury" (which it did not dispute) was not relevant to this appeal because its challenge to the summary judgment order was based only on the claim that Rezner knew CARDS was a fraud. ARB 9 n.2.

Despite this, the Ninth Circuit ruled *sua sponte* that Petitioner "cannot show" proximate causation based on the reasoning discussed above. On remand, the district court dismissed Petitioner's RICO claim with prejudice pursuant to the rule of mandate. Thus, Petitioner's entire RICO claim was dismissed without any notice, and without any opportunity to brief the factual and legal issue upon which the Ninth Circuit disposed of this claim. Petitioner was never given an opportunity to present evidence to show that he was entitled to a trial, including on alternate theories that were not the subject of the appellate briefing, as would be permitted if HVB had moved for summary judgment in the district court. Compounding this inequity, the fact that this issue was addressed *sua sponte* by the Ninth Circuit means that Petitioner's only hope for any meaningful review is to seek discretionary review by this Court.

This Court has previously held that such deviation from procedural rules requires reversal. In *Fountain v. Filson*, 336 U.S. 681 (1949), the Court held that the court of appeals erred by ordering judgment in favor of the non-moving party. It did so because the moving party never had an opportunity to brief or present evidence to support the viability of its claim. *Id.* at 682-83. Moreover, because of concerns with fundamental unfairness that naturally arise when an appellate court determines issues *sua sponte*, this Court has held that appellate courts should only do so where "exceptional circumstances" are present. *United States v. Atkinson*, 297 U.S. 157, 160 (1936). HVB's intentional and tactical decision to waive the issue of direct injury does not qualify as "exceptional circumstances." And even where exceptional circumstances are present, it would be error to decide a dispositive issue without notice

and an opportunity to fully meet the issue through briefing and evidence. *Fountain,* 336 U.S. at 682-83.

Ignoring basic procedural requirements, as did the Ninth Circuit, undermines judicial efficiency, violates precepts of fundamental fairness, and creates the potential for unjust or erroneous decisions. That the Ninth Circuit failed to seek additional briefing on what it viewed as a dispositive issue, raised *sua sponte* and without advance notice or opportunity for Petitioner to defend the viability of his claim, directly implicates these concerns. The proceedings below so far departs from the ordinary course of judicial proceedings as to warrant the intervention of this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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