No. 10-1503

IN THE
Supreme Court of the United States

JOHN C. REZNER,

Petitioner,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner John Rezner, an Internet multimillionaire, and respondent HVB participated in a fraudulent tax shelter designed to enable Rezner to evade millions of dollars in federal taxes. When the IRS uncovered the scheme, Rezner sued HVB under RICO, claiming that he was injured by HVB's efforts to help him defraud the government.

The Ninth Circuit held that Rezner failed to establish proximate cause, which "requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 989 (2010) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

The question presented is whether the Ninth Circuit's application of the well-settled proximate-cause test to the fact-specific context of this case warrants review by this Court.

RULE 29.6 STATEMENT

UniCredit U.S. Finance LLC is wholly owned by UniCredit Bank AG. Unicredito Italiano SpA is the parent corporation of UniCredit Bank AG and is the only publicly held company that owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondents UniCredit Bank AG and UniCredit U.S. Finance LLC (hereinafter "HVB," in accordance with respondents' names at the time of the proceedings below) respectfully submit this brief in opposition to the petition for a writ of certiorari filed by plaintiff John C. Rezner.

STATEMENT

Rezner, a sophisticated multimillionaire businessman, filed a fraudulent tax return with the U.S. government that claimed a fictitious tax loss of millions of dollars. Rezner perpetrated the fraud by using an illegal tax shelter called "CARDS," which gave the illusion of a large tax loss through a complex scheme involving a foreign-owned shell LLC and a circular no-risk loan. Rezner paid approximately $4 million to other participants in the scheme, including respondent HVB (an investment bank), which provided the loan that Rezner needed to make his loss appear legitimate.

In 2006, HVB entered into a deferred prosecution agreement (DPA) with the Department of Justice in which it admitted to defrauding the government by participating in CARDS with Rezner and other wealthy taxpayers. Shortly thereafter, Rezner sued HVB under RICO, claiming that he was entitled to recover the fees he had paid to participate in CARDS, plus treble damages. Both parties moved for summary judgment. To establish the elements of RICO, Rezner relied on HVB's admission in the DPA that HVB, in concert with its clients, had defrauded the federal government. The district court granted Rezner summary judgment, but the Ninth Circuit reversed, holding that Rezner's complaint failed to

satisfy RICO's proximate-cause requirement. "It was the United States," not Rezner, the court explained, "that lost tax revenue as a direct result of HVB's fraud." Pet. App. 16a.

Rezner argues that this case merits further review because it conflicts with decisions of the Second and Seventh Circuits. But in each of the two cases he cites, the court applied in whole or in part a standard for RICO proximate cause — foreseeability — that this Court subsequently overruled in *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010). *See Baisch v. Gallina*, 346 F.3d 366, 373–75 (2d Cir. 2003); *RWB Servs., LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688 (7th Cir. 2008). Moreover, even had those courts applied the correct standard, the outcomes of the cases were fully consistent with the Ninth Circuit's approach. The decision below is a fact-dependent ruling that does not warrant review by this Court.

A. Factual Background

1. Rezner founded GeoCities, a well-known website-building company. GeoCities was one of the Internet's first major success stories, becoming for a time the Web's third most-visited site. In 1998, Rezner took GeoCities public, and in 1999 he sold his stock in the company to Yahoo! for $100 million. He then proceeded to engage in a number of exotic tax strategies, such as "forward purchases" and "collars," to defer taxes on that income for three years.

At that point, Rezner sought a way to permanently and substantially reduce his tax liability on the stock sale. He elected to enter into an illegal tax shelter called CARDS, which was designed by the investment-advisory firm Chenery Associates. Pet. App. 20a–21a. CARDS enabled Rezner to claim

an inflated basis on a sale of assets — that is, to make it appear that he had purchased the assets for far more than he had sold them for. He then used the resulting paper loss to offset the profit from the sale of stock on his federal tax return. *Id.* at 5a.

Rezner paid $4.1 million in fees to participate in CARDS to a number of parties, including Chenery Associates and two law firms, Sidley Austin Brown & Wood LLP and LeBoeuf Lamb Greene & MacRae LLP, that Rezner hired to rubber-stamp the tax write-off. Pet. App. 4a–5a. Those fees were based in part on the tax loss generated by CARDS. *Id.* at 21a. Rezner also selected HVB from among a number of banks that had offered to provide a loan that was a necessary part of the CARDS scheme.

CARDS proceeded through a number of steps. *See* Pet. App. 4a; 21a–22a. First, foreign citizens established an LLC for the sole purpose of completing the transaction. The LLC then took out a loan from HVB for approximately $47 million, but pledged the full amount of the loan back to HVB as a security. (In actuality, no money changed hands.) Rezner assumed joint and several liability for the full amount of the loan in exchange for borrowing approximately $7 million of the LLC's assets. Rezner then immediately sold those assets to a third party. On his tax return, Rezner claimed that the basis for this sale of assets was the entire amount of the loan — $47 million — on the theory that he had acquired the $7 million in assets from the LLC only by assuming joint and several liability on the $47 million loan.

Rezner therefore claimed a nearly $40 million tax loss on his 2001 return, wiping out his gain from the sale of stock to Yahoo!. Pet. App. 5a. And because the LLC was foreign-owned, the IRS did not

look for a concomitant increase in taxes by another U.S. taxpayer to offset Rezner's claimed loss.

One of the agreements necessary for CARDS was a loan agreement between HVB and Rezner. That agreement permitted Rezner or HVB to cancel the loan at each annual "reset date," and it also permitted HVB to increase the interest rate at each reset date. Pet. App. 22a. The loan agreement further provided that the loan would expire automatically after 30 years if neither party exercised its annual right to terminate. *Id.* The effect of these provisions was to make it appear that the loan would last for 30 years (which might conceivably make the enormous fees Rezner paid appear reasonable to the IRS), while in reality permitting either party to terminate the loan after just one year.

In 2002, a year after Rezner claimed the $40 million tax loss, HVB raised the interest rate of the loan. Pet. App. 22a–23a. In 2003, HVB cancelled the loan. *Id.* at 23a.

2. In March 2002, the IRS declared a shelter very similar to CARDS unlawful. Pet. App. 5a. Rezner then disclosed the transaction to the IRS. *Id.* at 23a. He was audited in 2005 and eventually paid $11 million in back taxes and interest. *Id.*

Upon learning of the IRS notice, HVB terminated all CARDS transactions, notified the federal government of its participation, and disbanded the department responsible for entering into the transactions. In 2006, HVB entered into a DPA with the Department of Justice in which HVB admitted to defrauding the U.S. government. Pet. App. 6a. Although HVB had no involvement in creating, marketing, or distributing CARDS, HVB acknowledged that it had "assisted high net worth

United States citizens to evade United States individual income taxes on over $1.8 billion in capital gain and ordinary income by participating in and implementing fraudulent tax shelter transactions, including . . . CARDS." *Id.* at 23a–24a (internal quotation marks omitted; alteration in original). HVB stated that it had made loans with a purported 30-year term, when "all parties involved, *including clients/'borrowers,'* knew that the transactions would be unwound in approximately one year in order to generate phony tax benefits sought by the client participants." *Id.* at 6a (internal quotation marks omitted; emphasis added).

The DPA required HVB to implement a compliance and ethics program. The agreement also required HVB to disgorge fees that it had received from clients, provide additional restitution to the IRS, and pay a large fine.

B. Proceedings Below

1. One month after HVB entered into the DPA, Rezner sued HVB in the U.S. District Court for the Northern District of California, alleging claims under RICO and state law. Pet. App. 6a–7a. Rezner moved for partial summary judgment. D.E. 152. Rezner argued that the fraud against the United States "was the proximate cause of his injury" — namely, the fees he paid. Pet. App. 45a, 50a.

The district court granted Rezner's motion for summary judgment on liability. Pet. App. 19a–57a. The court found that HVB had committed predicate acts of mail and wire fraud by engaging "in a scheme 'directed toward the implementation of . . . tax shelters designed to defraud the United States,'" and that the specific intent required for mail-fraud and wire-fraud liability was satisfied "through Defendant's admission that CARDS was 'designed to

defraud the United States.'" *Id.* at 33a–34a (quoting DPA) (alteration in original; emphasis added). The court concluded that this fraud had resulted in Rezner's payment of $4.1 million in fees. *Id.* at 44a–45a. The court also concluded, contrary to HVB's arguments, that there was no disputed issue of fact about whether Rezner was aware that CARDS was unlawful. *Id.* at 43a.[1]

The parties stipulated to an amount of damages, and HVB appealed the grant of summary judgment.

2. The Ninth Circuit reversed, agreeing with HVB that "the district court erred in granting summary judgment in favor of Rezner because Rezner has failed to establish that HVB's fraud against the United States caused his injury." Pet. App. 14a. The court explained that "under civil RICO, [a plaintiff] is required to show that the racketeering activity was both a but-for and a proximate cause of his injury," citing this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Pet. App. 14a. It explained that under *Holmes* and subsequent cases, proximate cause "requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* The court reviewed this Court's recent cases on RICO proximate cause, including *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), each of which held that a plaintiff "could not show proximate causation

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[1] Because Rezner's theory of liability on his claim under California's Unfair Competition Law was dependent on the presence of a RICO violation, the district court awarded him summary judgment on that claim as well. Pet. App. 54a.

because the [defendant's] fraudulent conduct was directed at a third-party." Pet. App. 15a.

Applying those holdings to the facts of this case, the Ninth Circuit concluded that "HVB's fraudulent activity towards the United States did not cause Rezner's injury." Pet. App. 15a. "It was the United States," the court explained, "that lost tax revenue as a direct result of HVB's fraud." *Id.* at 16a. "Rezner's asserted injury only indirectly resulted from HVB's fraudulent activity against the United States." *Id.* The court noted that "one consideration" in this Court's RICO precedents is "whether a better suited plaintiff would have an incentive to sue," and that in this case "the direct victim of HVB's fraudulent conduct — the United States — did in fact sue." *Id.*

In his briefing to the Ninth Circuit, Rezner placed great reliance on *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), which held that RICO does not require the plaintiff to show that he relied on a misrepresentation; sometimes a misrepresentation to a third party may directly injure a plaintiff. Rezner argued that under *Bridge*, he need not show that he was misled by HVB's representations to prove the elements of his RICO claim. *See* Pet. App. 16a–17a. The Ninth Circuit rejected that reasoning, observing that in *Bridge* this Court found critical that the plaintiffs "'were the *only* parties injured by [the defendants'] misrepresentation" and "that no more immediate victim than the [plaintiffs was] better situated to sue." *Id.* at 17a (quoting *Bridge*, 553 U.S. at 658). In contrast, in this case "the United States, not Rezner, was the immediate victim of HVB's fraud and better situated to sue HVB." *Id.*

The Ninth Circuit unanimously reversed the grant of summary judgment to Rezner and remanded

to the district court. The district court has since dismissed Rezner's RICO claim, while granting leave to file an amended complaint based on his state-law claim. Pet. App. 63a–67a.

Rezner's petition for rehearing en banc was denied. The court did not call for a response. No judge requested a vote.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision was a fact-bound application of this Court's settled test for proximate cause in RICO cases and does not merit further review. The decision below correctly articulated the legal standard set forth in this Court's opinions and applied them to the facts of this case. Rezner relies on two decisions from the Second and Seventh Circuits for an alleged conflict of authority, but he never discloses that each case relied in whole or in part on a "foreseeability" standard for proximate cause that this Court subsequently overruled in *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010). Moreover, even if the Second and Seventh Circuits had applied the correct standard, the outcomes of those decisions were fully consistent with the Ninth Circuit's holding below. The Ninth Circuit's application of the proximate-cause standard has little application beyond the specific facts of this case. Accordingly, the petition for a writ of certiorari should be denied.

I. THE DECISION BELOW COMPORTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The decision below is a fact-bound application of this Court's settled precedents on proximate cause for RICO claims. It does not conflict with any decisions of this Court or other courts of appeals.

A. There Is No Circuit Split.

Rezner contends that the decision below conflicts with decisions of the Second Circuit and Seventh Circuit. Pet. 15–20. There is no conflict of authority that warrants this Court's review. Rezner fails to mention that each of the cases he cites applied in whole or in part a standard for RICO proximate cause — foreseeability — that this Court subsequently overruled in *Hemi Group*. Moreover, even if those courts had applied the correct standard, the outcomes of those cases — which had very different facts and procedural postures from this case — were fully consistent with the decision below. That different courts reached different outcomes on different facts does not create a circuit split. Indeed, as this Court has repeatedly observed, "[p]roximate cause . . . 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. Sec. Investor Prot. Corp.*, 503 U.S. 258, 272 n.20 (1992)).

1. In *Baisch v. Gallina*, 346 F.3d 366 (2d Cir. 2003), the defendants, officers of a construction company and an insurance company, were alleged to have defrauded Nassau County by submitting false reimbursement vouchers and other fraudulent documents related to construction work for the county. *Id.* at 369. The plaintiff had made sizeable loans to the construction company under a "factoring agreement" in exchange for a promise that he would receive the money paid by the county in the amount stated in the vouchers. *Id.* at 370. But because "the vouchers were fraudulent and . . . some of the vouchers were never even submitted to Nassau County," many of the loans made by the plaintiff "could not be repaid." *Id.* The defendants ultimately "failed to repay ten loans from [the plaintiff] and only

partially repaid four more, leaving $306,000 unpaid." *Id.*

The plaintiff sued under RICO. The district court granted summary judgment to the defendants, finding that the fraudulent factoring agreement was not closely related enough to the fraud against Nassau County to constitute part of the RICO scheme. *See* 346 F.3d at 371.

The Second Circuit reversed. The Second Circuit applied a two-part test drawn from its then-governing precedent to determine if proximate cause was satisfied. *See* 346 F.3d at 373 (citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 120–24 (2d Cir. 2003)). The first part of that test precisely tracked the legal standard articulated and applied by the Ninth Circuit below: "a plaintiff does not have standing [under RICO] if he suffered an injury that was indirectly (and hence not proximately) caused by the racketeering activity or RICO predicate acts." *Id.; compare* Pet. App. 14a ("Proximate causation for RICO purposes requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" (quoting *Holmes*, 503 U.S. at 268)).

Applying that standard to the facts of the case, the Second Circuit concluded that the plaintiff's "injury was directly caused by the [defendants'] fraudulent factoring agreement." 346 F.3d at 374. The court then went on to explain that the district court had erred in concluding that the factoring agreement was "'too distinct from the overall . . . scheme'" against the Nassau County government to constitute part of the RICO enterprise. *Id.* (quoting district court opinion) (ellipsis in original). "The mail frauds against [the plaintiff] through the factoring agreement directly promoted the fraud against Nassau County," the court explained, "and the fraud

against Nassau County was the basis for the fraud against [the plaintiff] that led to his injury." *Id.* Because the separate fraud against the plaintiff was "intertwined" with the fraud against the county government, "they formed a 'pattern' of racketeering." *Id.*

The Second Circuit then went on to apply the second part of its two-part test for proximate cause: "the plaintiff must have suffered a direct injury that was foreseeable." 346 F.3d at 373. That foreseeability test was subsequently overruled by this Court in *Hemi Group*. *Hemi Group* explained that while the "concepts of direct relationship and foreseeability are of course two of the many shapes [proximate cause] took at common law, . . . [o]ur precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm." 130 S. Ct. at 991. This Court accordingly rejected the dissent's argument that "RICO's proximate cause requirement [should] turn on foreseeability." *Id.* Applying the now-rejected foreseeability standard, the Second Circuit in *Baisch* found further support for its conclusion that proximate cause was satisfied. *See* 346 F.3d at 374–75.

Thus, the only difference between the legal standard applied below and that applied by the Second Circuit in *Baisch* is that the Second Circuit incorporated the subsequently overruled foreseeability standard as part of its two-part test. That difference does not merit review by this Court now that the standard has been clarified by *Hemi Group*.

Moreover, the Second Circuit's application of the direct-injury standard to the facts of *Baisch* is fully consistent with the Ninth Circuit's reasoning below.

In *Baisch*, the plaintiff alleged a fraud against the county government through the submission of false vouchers, and a fraud against the plaintiff through the factoring agreement, which induced the plaintiff to extend the defendants a loan that could never be repaid. Here, Rezner alleged that the same fraudulent tax shelter had injured both the United States and him. The Ninth Circuit ruled that only the United States had suffered a sufficiently direct injury under this Court's decisions. That does not contradict the Second Circuit's holding on different facts. Rather, it shows that RICO causation is a "flexible concept that does not lend itself to a black-letter rule" and that will produce different results in different cases. *Bridge*, 553 U.S. at 654 (internal quotation marks omitted); *see also Holmes*, 503 U.S. at 268 ("the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient" (internal quotation marks omitted)).

Rezner briefly discusses the Second Circuit's decision in *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001), although he does not state that this decision conflicts with the decision below. *See* Pet. 17–18. In any event, the discussion he cites from the case is inapposite. In *Commercial Cleaning*, the Second Circuit held that a plaintiff had properly alleged RICO proximate cause where the complaint claimed that a competitor's hiring of illegal immigrants (and resulting decrease in labor costs) had hurt the plaintiff's profitability. The defendant had argued that "because other parties, such as state and federal authorities charged with collecting unpaid taxes and workers' compensation fees, may sue to vindicate the statute" prohibiting the hiring of illegal immigrants, proximate cause was not satisfied. 271 F.3d at 385.

The Second Circuit rejected that argument, noting that *every* RICO enterprise is subject to criminal prosecution. *See id.*[2]

In the decision below, the Ninth Circuit did not hold that proximate cause could not be satisfied merely because the government could criminally prosecute HVB for tax fraud. Rather, it held that, unlike in *Commercial Cleaning*, the government was the only direct victim of the fraudulent tax scheme. Accordingly, the Ninth Circuit's reasoning does not conflict with *Commercial Cleaning*. *See* 271 F.3d at 384 (observing that plaintiff was "not alleging an injury that was derivative of injury to others").

2. Rezner also cites the Seventh Circuit's decision in *RWB Services, LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681 (7th Cir. 2008). In *RWB Services*, the Seventh Circuit considered a fraudulent scheme in which the defendants were alleged to have separately defrauded both their customer (Wal-Mart) and their supplier (the plaintiff) through different actions. After Wal-Mart had returned used or malfunctioning cameras to the defendants, the defendants were obligated by contract to return the cameras to the plaintiff. Instead of doing so, the defendants repackaged the cameras and sold them back to Wal-Mart as new. The plaintiff's complaint alleged that this activity constituted a two-part scheme of fraud: "One part of the scheme consisted of defrauding Wal-Mart" by "fraudulently and illegally selling returned, repackaged cameras . . . as new," while "[t]he other part of the scheme consisted of

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2 The holding in *Commercial Cleaning* may not have survived this Court's decision in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), discussed *infra*, which rejected a similar theory of RICO liability on proximate-cause grounds. *See id.* at 458.

obtaining the cameras" by improperly keeping "returned cameras from Wal-Mart rather than send[ing] them back to [the plaintiff]." *Id.* at 687 (internal quotation marks omitted) (ellipses in original).

To determine whether the allegations in the complaint could satisfy RICO's proximate-cause requirement, the Seventh Circuit relied solely on the subsequently overruled "foreseeability" standard from its own precedents. *See RWB Servs.*, 539 F.3d at 688 ("Saying that the injury to the plaintiff is 'direct' is akin to saying that the victim was reasonably foreseeable, the traditional principle for hemming in tort liability."). Applying that since-invalidated test, the Seventh Circuit held that the defendants had "robbed Peter to defraud Paul" and that "the former is as foreseeable a plaintiff as the latter with as direct an injury." *Id.* at 688–89.

Because the Seventh Circuit applied a test for proximate cause that has since been overruled, any conflict of authority created by *RWB Services* in 2008 would be moot. But in any event, even if the Seventh Circuit had applied the correct test for proximate cause, there would be no conflict. The fact that the Seventh Circuit found that there were two direct victims of a very different fraudulent scheme does not conflict with the Ninth Circuit's holding here that the United States was the only direct victim of CARDS.

Rezner offers very little discussion of the holding of *RWB Services* and does not acknowledge that its proximate-cause test has since been overruled. Rezner instead relies on a block quotation, *see* Pet. 19–20, that stands only for the proposition that there can be more than one victim of a RICO scheme. The decision below did not hold otherwise.

B. The Decision Below Faithfully Applies The Standards Set Forth In This Court's Decisions.

Rezner asserts that the decision below is "contrary to the relevant decisions of this Court." Pet. 22–28. But he does not demonstrate any such conflict.

With respect to two of this Court's most recent decisions on proximate cause in the RICO context, *Hemi Group* and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), Rezner argues that "neither case has any application" here. Pet. 25. That fact, if true, would not call for this Court's review. In any event, the Ninth Circuit was correct that the principles articulated in those cases preclude a finding of proximate cause here.

In *Anza*, this Court held that a business's tax fraud against the State of New York did not proximately cause injuries to its competitor, even though the fraud permitted the business to offer customers lower prices. "It was the State that was being defrauded," this Court explained, "and the State that lost tax revenue as a result." 547 U.S. at 458. "The cause of [the competitor's] asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.*

In *Hemi Group*, the City of New York argued that an out-of-state cigarette vendor had proximately caused it to lose tax revenue by failing to file reports with the city identifying city residents who had purchased cigarettes, which would have enabled the city to collect tax revenue from those residents. *See* 130 S. Ct. at 987–88. This Court found that "theory of causation . . . far too indirect" because 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 [the defendant's] failure to file [the] reports." *Id.* at 990.

Here, as in *Anza* and *Hemi Group*, the Ninth Circuit concluded on the facts of the case that "a third-party, the United States, was directly injured by HVB's fraudulent activity" and that "Rezner's asserted injury only indirectly resulted from HVB's fraudulent activity." Pet. App. 15a–16a. The court based that conclusion on a number of considerations, including that "the direct victim of HVB's fraudulent conduct -- the United States — did in fact sue by entering into a deferred prosecution agreement with HVB." *Id.* at 16a. That conclusion does not depart from the standards articulated by this Court.

Because the decision below does not conflict with any holding of this Court, Rezner attempts to manufacture a conflict with general principles set forth in this Court's opinions by misrepresenting the breadth of the Ninth Circuit's holding. Rezner asserts that the decision below held that "injuries suffered by a private plaintiff are indirect as a matter of law where the government is a victim of the RICO conduct." Pet. 23. But the Ninth Circuit said no such thing. What the court held was that on the facts of this case, "[i]t was the United States that lost tax revenue as a direct result of HVB's fraud" and that "Rezner's asserted injury only indirectly resulted from HVB's fraudulent activity against the United States." Pet. App. 16a. The Ninth Circuit articulated no broader holding about RICO cases where the government is an injured party, and it did not remotely suggest that private plaintiffs may never recover when the government is a victim.

Indeed, while Rezner now claims that the Ninth Circuit issued a sweeping ruling that bars RICO

claims by private plaintiffs whenever the government is injured, that is not what he told the district court on remand earlier this year. Instead, he stated that the notion that "a private plaintiff cannot have standing as a matter of law where the overall scheme was intended to defraud the government . . . is not what the Ninth Circuit decided." Rezner Opp. to Mot. to Dismiss, D.E. 469, at 3 (Mar. 18, 2011) (emphasis omitted).

Finally, Rezner appears to claim that the decision below conflicts with the reasoning of *Holmes*, where this Court held that customers of broker-dealers who had been defrauded could not sue because their injury was too remote. *See* 503 U.S. at 274. Rezner analogizes himself to the broker-dealers in *Holmes* (whom this Court acknowledged to have suffered a direct injury). Pet. 25. He claims that he, and not the United States, was the direct victim of the fraud. *See id.* at 24 ("[T]he United States' injury, the loss of tax revenue, was only indirectly caused by HVB under the relevant decisions of this Court."). That puzzling assertion — that the United States Treasury is not a direct victim of a tax fraud — does not merit further consideration by this Court.

II. THIS CASE DOES NOT PRESENT IMPORTANT ISSUES THAT CALL FOR FURTHER REVIEW.

A. Rezner exaggerates the importance of this case by misstating the Ninth Circuit's holding. According to Rezner, the decision below "created a broad exemption from civil RICO liability for (at a minimum) defendants whose conduct harms the government." Pet. 20–21. Rezner misreads the decision. The Ninth Circuit applied this Court's proximate-cause standards to the facts of the case, in which the government was the only party that was directly injured by Rezner's filing of a fraudulent tax

return (and HVB's participation therein). It announced no broader rule. It certainly did not suggest that whenever the government is injured, it is the only party that may bring a RICO action, as Rezner asserts.

Rezner sets forth a parade of horribles that has no basis in the reasoning or holding of the decision below. *See* Pet. 21–22. The Ninth Circuit's fact-bound holding has no application to areas like "government contracting, money laundering, or trading in counterfeit obligations" aside from its summary of the basic standards of proximate cause articulated in this Court's decisions. *Id.* at 21.

B. Rezner also asks this Court to invoke its "supervisory power" to reverse the decision below because it supposedly "deviated from the usual course of judicial proceedings." Pet. 28. Because Rezner had been granted summary judgment by the district court, he argues, it was improper for the Ninth Circuit to issue an opinion that undercut the "viability of [his] claim." *Id.* at 28.

Rezner is incorrect. The Ninth Circuit understood that the district court had granted summary judgment to Rezner and reversed that grant of summary judgment on the ground that Rezner could not satisfy RICO's proximate-cause requirement. *See* Pet. App. 14a ("HVB argues that the district court erred in granting summary judgment in favor of Rezner because Rezner has failed to establish that HVB's fraud against the United States caused his injury."). It is true that the *reasoning* of the Ninth Circuit had the effect of defeating Rezner's RICO claim. But appellate decisions reversing a judgment in favor of a plaintiff routinely require, by their reasoning, dismissal of the

claim. *See, e.g.*, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) (reversing district court's grant of summary judgment to plaintiffs on vagueness challenge to material-support statute and holding that "plaintiffs' vagueness challenge must fail"); *FEC v. Beaumont*, 539 U.S. 146, 163 (2003) (reversing district court's grant of summary judgment to plaintiff on challenge to federal election law and holding that plaintiff could not prevail on claim).

Rezner attempts to analogize this case to this Court's per curiam decision in *Fountain v. Filson*, 336 U.S. 681 (1949). Pet. 29–30. In *Fountain*, the district court had granted the defendant summary judgment on a trust-law claim. *See* 336 U.S. at 682. The court of appeals had reversed, agreeing with the district court's reasoning but finding that the plaintiff had raised other grounds for relief that the district court had not considered. *See id.* Instead of remanding to the district court, however, the court of appeals "proceeded to examine the depositions which had been taken in advance of trial," concluded that the plaintiff was entitled to judgment, and remanded to the district court with instructions to enter the judgment. *Id.* This Court reversed, holding that it was erroneous for the court of appeals to resolve disputed factual issues in that posture. *See id.* at 683.

Fountain has no bearing on this case. The Ninth Circuit did not examine materials like deposition transcripts to resolve disputed factual questions. Rather, the reasoning of its opinion reversing the grant of summary judgment had the consequence of requiring the dismissal of Rezner's claim. There is nothing out of the ordinary about that disposition.

Finally, Rezner asserts that HVB did not raise the issue on which the Ninth Circuit rested its decision. *See* Pet. 28; *see also id.* at 9–10, 12. That is incorrect. As the Ninth Circuit explained, "HVB argue[d] that the district court erred in granting summary judgment in favor of Rezner because Rezner has failed to establish that HVB's fraud against the United States caused his injury." Pet. App. 14a. In any event, to the extent that Rezner contends that the Ninth Circuit erred in reversing the district court's decision on a ground not fairly raised on appeal, his petition presents a case-specific claim of error that does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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