No. __-____

IN THE
Supreme Court of the United States

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

v.

IDEAL STEEL SUPPLY CORP.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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November 23, 2011

QUESTION PRESENTED

The Racketeer Influenced and Corrupt Organizations Act ("RICO") prohibits conducting an "enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). It also prohibits the "use or invest[ment]" of any income generated through a pattern of racketeering activity. *Id.* § 1962(a). Violating either prohibition is civilly actionable only if the plaintiff can show that its injuries were proximately caused "by reason of a violation of section 1962." *Id.* § 1964(c).

When this Court first considered this case on the merits, it held that respondent failed to state a claim for violation of § 1962(c) because the connection between petitioners' alleged racketeering activity (underreporting of sales taxes) and respondent's alleged injuries (lost profits from sales to customers who bought petitioners' products) was too "attenuated" to satisfy the proximate-cause standard that applies to all civil RICO claims. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459 (2006). Following further proceedings on remand, the Second Circuit held that the same lost profits that this Court held were too tenuously connected to petitioners' alleged racketeering activity were nonetheless proximately connected to petitioners' alleged reinvestment of racketeering income in violation of § 1962(a). That judgment deepens a 4-to-3 conflict among the federal circuits on the following question:

Whether a civil RICO plaintiff's claim that a corporate defendant reinvested into its business the proceeds of racketeering activity establishes the required element of proximate cause.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, applicant National Steel Supply, Inc. states the following:

National Steel Supply, Inc. is a privately owned entity. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Joseph Anza, Vincent Anza, and National Steel Supply, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

This case presents a question of great significance to the business community. On remand from this Court's decision in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), the Second Circuit held that a civil RICO plaintiff can survive summary judgment based on nothing more than the claim that — but for its corporate competitor's reinvestment of allegedly ill-gotten gains for pro-competitive purposes — the plaintiff would have maintained its dominant position as a monopolist in the relevant steel products market. The court based that holding on its view that RICO's "legislative history does not permit the inference that Congress meant to allow [petitioners], with impunity, to use [allegedly racketeering-tainted] funds to branch out to new locations," to serve new customers, and to offer lower prices. App. 21a.

As Judge Cabranes pointed out in his dissent, however, the panel majority's holding is inconsistent with the proximate-cause principles that this Court enunciated in *Anza*. It provides a roadmap for *in terrorem* suits by inefficient businesses against their more successful competitors. And it undermines the purposes of the federal antitrust laws by allowing competitors to re-dress Clayton Act claims that cannot survive motions to dismiss as civil RICO claims that must go to a jury. Judge Cabranes urged this Court's review in his dissent: "One eventful trip to 1 First Street surely deserves another." App. 35a.

Indeed, the Second Circuit's decision deepens a 4-to-3 circuit conflict regarding whether a civil RICO plaintiff can premise a § 1962(a) claim on the mere reinvestment of alleged racketeering proceeds into a corporate treasury. Since this Court's decision in *Anza*, the Third Circuit and Ninth Circuit have issued well-reasoned opinions barring such claims as a matter of law. Those circuits applied the same "judicial tools" of proximate causation that this Court applied in *Anza* and *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) — including principles of administrability and judicial convenience, *see id.* at 268-69 — and held that the connection between a corporation's reinvestment of profits and a plaintiff's losses allegedly resulting from other acts of the corporation is too tenuous. Relying on RICO's legislative history, the Second Circuit reached the opposite result.

This Court's immediate attention is critical in light of the different liability regimes that now prevail in the circuits and the opportunities for forum-shopping available to plaintiffs in picking the circuit with the most advantageous law.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-44a) is reported at 652 F.3d 310. The decision and order of the district court (App. 45a-60a) is not reported (but is available at 2009 WL 1883272).

JURISDICTION

The court of appeals entered its judgment on June 28, 2011. On September 19, 2011, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including November 25, 2011. App. 69a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, are reproduced at App. 66a-68a.

STATEMENT

A. Statutory Background

Congress enacted RICO in 1970 "for the purpose of 'seek[ing] the eradication of organized crime in the United States.'" *Beck v. Prupis*, 529 U.S. 494, 496 (2000) (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923) (alteration in original). The statute contains four substantive prohibitions, two of which are relevant here. First, RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Second, the Act makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise." *Id.* § 1962(a).

RICO broadly defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4); *see also Boyle v. United States*, 129 S. Ct. 2237, 2243-46 (2009) (addressing the meaning of an "association-in-fact enterprise"). The statute also enumerates an extensive list of acts — commonly referred to as "predicate acts" — that constitute "racketeering activity" under § 1962. *See* 18 U.S.C.

§ 1961(1). That list includes mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. *See id.* The mail and wire fraud statutes prohibit the use of the mail or the wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* §§ 1341, 1343. To constitute a "pattern," there need only be at least two acts of racketeering activity within a 10-year period, *see id.* § 1961(5), that are "related" and that "pose a threat of continued criminal activity," *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

Congress provided severe criminal penalties for violations of RICO, *see* 18 U.S.C. § 1963, and authorized the Attorney General to bring civil actions to "prevent and restrain" RICO violations, *id.* § 1964(a), (b). In addition, the statute created a private right of action for treble damages in favor of any person "injured in his business or property by reason of" a RICO violation. *Id.* § 1964(c). In *Holmes*, this Court held that the phrase "by reason of" in § 1964(c) requires a private plaintiff to prove that the defendant's RICO violation was both a cause in fact and a proximate cause of its claimed injury. *See* 503 U.S. at 265-68. In so holding, this Court relied on its prior decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), which interpreted similar statutory language in § 4 of the Clayton Act, 15 U.S.C. § 15.

As this Court has recognized outside the RICO context:

> The *term* "proximate cause" is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability. What

> we mean by the word "proximate" . . . is simply this: Because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.

CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2637 (2011) (internal quotations, citation, and alterations omitted); *see also Holmes*, 503 U.S. at 268 ("At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'") (quoting W. Page Keeton et al., *Prosser and Keeton on Torts* § 41, at 264 (5th ed. 1984)). Thus, the legal question in every civil RICO case is whether the causal chain alleged by the plaintiff is so administratively difficult, complicated, or otherwise tenuous that it should not "give rise to legal liability." *CSX*, 131 S. Ct. at 2637; *see Anza*, 547 U.S. at 459-60.

B. Factual Background

Petitioners Joseph and Vincent Anza ("Anzas") each own 50% of National Steel Supply, Inc. ("National"). C.A. A515. National sells steel mill products and hardware in New York.

Respondent Ideal Steel Supply Corp. ("Ideal") is National's competitor. Both Ideal and National "sell substantially the same products to essentially the same customer base" — namely, "professional ironworkers, small steel fabricators, and do-it-yourself homeowners in the New York, New Jersey, and Connecticut area." App. 2a-3a.

Between 1996 and 2000, both Ideal and National operated competing retail outlets in Queens. Ideal also operated a retail outlet in the Bronx, but National did not. Due to the lack of competition from

National, Ideal claims that it maintained a "dominant market position" in the Bronx. App. 25a-26a.

In 2000, however, National opened its own retail outlet in the Bronx. App. 26a. The Anzas purchased the Bronx store with $500,000 in cash from National's account. C.A. A376. The Anzas renovated the Bronx store using money from National and labor provided by National employees. *Id.*

The Anzas own the land underneath National's Bronx store through an entity named Easton Development Corp. ("Easton"). App. 11a. As with National, the Anzas each own 50% of Easton. C.A. A74. The Anzas receive no income from Easton; it only exists to hold title to the land on which National's Bronx store sits. C.A. A521. The value of the land is reflected on National's tax returns. *E.g.*, C.A. A961.

National's stores in the Bronx and Queens operate as the same company. Both stores bear National's name; the employees who work at the stores receive paychecks from National; the stores share a single bookkeeper and a single secretary; both use the same computer system to manage inventory and set unit prices; the inventory for both stores is delivered to a single dock in the Bronx; and the Anzas use a common fleet of trucks to transport steel products between the National stores. C.A. A377-78, A405. As Vincent Anza testified regarding the two stores, "[w]e're the same company." C.A. A405.

C. Procedural History

In 2002, Ideal brought a civil RICO suit against National, seeking treble damages and attorneys' fees. Ideal alleged that National engaged in a "pattern of racketeering activity" by submitting fraudulent sales tax returns to the New York State Department of Taxation and Finance in an effort to conceal failures

to charge or pay sales tax for cash sales at its Queens store prior to 2000 and at both its Queens and Bronx stores after 2000. Ideal further alleged that National "use[d] or invest[ed]" income from that racketeering activity in establishing its Bronx store. 18 U.S.C. § 1962(a).

For both of its RICO claims, Ideal alleged one form of injury — lost profits. Specifically, Ideal asserted that it was "injured in [its] business or property" within the meaning of civil RICO's private right of action, *id.* § 1964(c), because National used the proceeds of racketeering activity to cut prices for consumers and to open a new store in the Bronx — both of which (it is alleged) caused customers to purchase from National instead of Ideal. App. 3a.

1. In October 2002, National moved to dismiss Ideal's original complaint under Federal Rule of Civil Procedure 12(b)(6). The district court granted that motion, holding that Ideal had failed to plead that National's alleged racketeering activity was the proximate cause of Ideal's lost sales because it had not alleged that Ideal relied on any misrepresentation made by National. *See Ideal Steel Supply Corp. v. Anza*, 254 F. Supp. 2d 464, 468-69 (S.D.N.Y. 2003).

The Second Circuit vacated and reinstated Ideal's complaint. *See Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251 (2d Cir. 2004). It held that an allegation of racketeering activity "that was intended to and did give the defendant a competitive advantage over the plaintiff" was sufficient to "plead[] proximate cause" and to give the plaintiff "standing to pursue a civil RICO claim" for violation of § 1962(c). *Id.* at 263. The court also reinstated Ideal's claim for violation of § 1962(a), but it did so without considering whether Ideal had alleged a sufficiently direct relationship

between its claimed lost profits and National's alleged reinvestment of racketeering proceeds. *Id.* at 264.

This Court granted certiorari and reversed. The Court's "analysis beg[a]n[] — and . . . largely end[ed] — with *Holmes*." 547 U.S. at 456. The Court emphasized that RICO's private right of action, § 1964(c), does not "'allow all factually injured plaintiffs to recover.'" *Id.* (quoting *Holmes*, 503 U.S. at 266). Rather, a civil RICO plaintiff, like a private antitrust plaintiff seeking treble damages under § 4 of the Clayton Act, must plead and prove that the defendant's unlawful conduct was the "proximate cause" of the plaintiff's injuries. *Id.* at 457-58. One critical aspect of the element of proximate cause, the Court explained, is "the 'demand for some *direct relation* between the injury asserted and the injurious conduct alleged.'" *Id.* at 457 (quoting *Holmes*, 503 U.S. at 268) (emphasis added).

The Court held that Ideal's claim for violation of § 1962(c) could not satisfy that standard because "[t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458. Moreover, the Court emphasized "the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim." *Id.* at 459. The Court explained:

> A court considering the claim would need to begin by calculating the portion of National's price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of Ideal's lost sales attributable to the relevant part of the price drop. The element of proximate causation recognized

> in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.

Id. at 459-60; *see also id.* at 479 (Breyer, J., concurring in part and dissenting in part) ("[T]he civil damages remedy in [RICO] does not cover claims of injury by one competitor where the legitimate procompetitive activity of another competitor immediately causes that injury."). Accordingly, the Court held that Ideal's claim under § 1962(c) must be dismissed.

The Court emphasized that the same directness requirement applies to Ideal's claim for violation of § 1962(a) because "private actions for violations of § 1962(a), like actions for violations of § 1962(c), must be asserted under § 1964(c)," which is the sole source of a private right of action to enforce RICO. *Id.* at 461-62. And, under *Holmes*, "a claim is cognizable under § 1964(c) only if the defendant's alleged violation proximately caused the plaintiff's injury." *Id.* at 462.

Nevertheless, because the Second Circuit had not considered whether Ideal had pleaded proximate cause for its § 1962(a) claim, this Court "decline[d] to consider [that] claim without the benefit of the Court of Appeals' analysis." *Id.* It accordingly vacated and remanded for further proceedings.

2.a. On remand from this Court's *Anza* decision, the Second Circuit called for supplemental briefs regarding whether Ideal's claim for violation of § 1962(a) "satisfies the requirement of proximate causation." App. 61a. National urged the court to

order the dismissal of that claim because Ideal's theory — namely, that its lost profits were caused directly by National's alleged reinvestment of racketeering income into the expansion and operation of National's business — is inconsistent with the proximate-cause requirement of § 1964(c).[1] Without issuing an opinion, however, the Second Circuit remanded the case to the district court for further proceedings. App. 10a-11a.

b. On remand, the district court again dismissed Ideal's § 1962(a) claim on the pleadings and, in the alternative, granted summary judgment to National. App. 45a-60a. The court held that Ideal failed to plead or prove "how [National's] investment of purported racketeering income to establish and operate its Bronx business location proximately caused Ideal to lose sales, profits, and market share." App. 54a. The court further noted numerous potential intervening causes of Ideal's injuries — including the "decisions of customers, poor quality [of Ideal's] merchandise, [Ideal's] poor management decisions, competition from other steel companies, and reasons relating to the strength or weakness of the economy." App. 55a. Parsing how much of Ideal's lost profits should be attributed to those causes, as opposed to competition from National, would run headlong into this Court's prohibition on such "'complex'" and "purely speculative" inquiries. App. 58a-59a (quoting *Anza*, 547 U.S. at 459). Accordingly, the court held

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[1] *See* Supp. Br. for Appellees at 10-11, No. 03-7381 (2d Cir. filed Oct. 13, 2006) (citing, *inter alia*, *Brittingham v. Mobil Corp.*, 943 F.2d 297, 305 (3d Cir. 1991), *overruled in part on other grounds by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1188-89 (3d Cir. 1993); *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889, 896 (8th Cir. 1999)).

that Ideal failed to establish proximate causation and dismissed Ideal's § 1962(a) claim.

c. Ideal again appealed, claiming that it lost its "dominant market position" in the Bronx after National opened its store there, App. 25a-26a, and that a jury should be able to decide whether National caused that loss by using or investing racketeering proceeds in its Bronx store. In urging the Second Circuit to uphold the district court's dismissal, National again cited cases from other courts of appeals holding that, when a plaintiff complains of injuries resulting from acts of a corporation, the defendant's mere reinvestment of income from racketeering activity is not a proximate cause of those injuries.[2]

In a divided opinion, the Second Circuit again overturned the district court and permitted Ideal's civil RICO claim to proceed. App. 1a-44a. The panel majority began its analysis with RICO's "findings and purpose" and its legislative history, which the court read to reflect Congress's intent to protect "'free competition.'" App. 17a (quoting 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska)). It placed emphatic weight on the notion that the language of "*RICO is to be read broadly*." App. 20a (internal quotations omitted).

Turning to Ideal's allegations, the panel majority recognized two different ways in which National allegedly "use[d] or invest[ed]" racketeering proceeds. 18 U.S.C. § 1962(a). First, National opened a new

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[2] *See* Br. for Defendants-Appellees at 18-22 (2d Cir. filed Dec. 10, 2009) (citing, *inter alia*, *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1149 (9th Cir. 2008); *Fogie*, 190 F.3d at 896; *Lightning Lube*, 4 F.3d at 1188-89; *Brittingham*, 943 F.2d at 305).

store in the Bronx, "the mere creation of" which imposed competitive injuries on Ideal. App. 12a. Second, National offered "lower prices" by continuing "in its Bronx store . . . the cash-no-tax scheme conducted in the Queens store." App. 16a.

The panel majority held that § 1964(c)'s proximate-cause requirement does not bar Ideal's claim that National used racketeering proceeds in opening its Bronx store. Nor does the proximate-cause requirement preclude Ideal's claim that, "simply by being [in the Bronx] and offering products and services comparable to those offered by Ideal, the new National store took customers from Ideal." App. 12a; *see also* App. 21a. The panel rejected National's argument that such attenuated causal chains are not, as a matter of law, what Congress intended to be civilly actionable through RICO:

> [E]ven if Congress did not intend [§ 1962](a)'s prohibition to reach the use of RICO tainted funds by the RICO violator in its own ongoing operation, the legislative history does not permit the inference that Congress meant to allow such entities, with impunity, to use those funds to branch out to new locations.

Id.

Rather, according to the court below, to survive summary judgment and reach a jury, a civil RICO plaintiff need only create a factual dispute regarding (i) whether the defendant invested some portion of its racketeering proceeds into its business; (ii) whether that investment was a "but for" cause of the plaintiff's competitive injuries; and (iii) whether alternative potential causes for the plaintiff's injuries (for example, Ideal's practice of selling "bent and rusty" steel products) also were "but for" causes of its

injuries. App. 32a-33a (internal quotations omitted). The panel majority held that the record supported factual disputes on those questions. It therefore reversed the entry of summary judgment for National on Ideal's claim that "the mere creation of" National's Bronx store was the cause of Ideal's competitive injuries. App. 12a-13a; *see* App. 33a-34a.

The panel majority then held that Ideal's second claim — that National allegedly "use[d] or invest[ed]" racketeering proceeds to offer consumers "lower prices" — is "conceptually indistinguishable from the § 1962(c) claim rejected by" this Court in *Anza*. App. 16a. But the panel did not explain how or why it rejected the causal link between National's alleged "use or invest[ment]" of ill-gotten gains to offer low prices at the Bronx store while accepting the causal link between that same "use or invest[ment]" and National's opening of the Bronx store in the first place.

Judge Cabranes dissented. He observed that this case "has already consumed nine years of litigation in the federal courts, including one trip to the Supreme Court. One eventful trip to 1 First Street surely deserves another." App. 35a (citation omitted).

Judge Cabranes concluded that Ideal's § 1962(a) claim should fail for the same reasons that its § 1962(c) claim did: "the relation between the injury asserted and the injurious conduct alleged in Ideal's § 1962(a) claim is . . . too remote and speculative to satisfy the necessary proximate-cause analysis." App. 37a (internal quotations omitted). He explained that "the link between (i) the use of racketeering . . . funds to help establish National's new store in the Bronx, and (ii) the ultimate impact on Ideal's bottom line, is not nearly as direct as Ideal — and

the majority — seems to believe." App. 39a. If asked to determine whether National's Bronx store would exist but for its alleged reinvestment of racketeering proceeds, "it is doubtful that any court could come up with a reasonably certain answer in light of the overwhelming number of variables inherent in this inquiry." *Id.* And, even if the answer to that inquiry were reasonably certain, the court would still have to figure out how "the impact of the ill-gotten investment on the operation of National's Bronx facility . . . 'injured' Ideal (apart from the myriad other factors that may have adversely affected Ideal's business)." App. 40a.

Judge Cabranes also warned that the complexity, speculation, and indeterminacy of the inquiries demanded by the panel majority's holding are particularly troubling where, as here, the civil RICO plaintiff is suing its business competitor. He reasoned "'that the financing of a new store — even with funds generated by unlawful activities — is not sufficient to create a private cause of action as long as the activity funded amounts to legitimate competitive activity.'" App. 43a (quoting *Anza*, 547 U.S. at 487 (Breyer, J., concurring in part and dissenting in part)). The panel majority's contrary conclusion, Judge Cabranes explained, threatens to undermine the pro-competitive purposes of antitrust laws and runs counter to the proximate-cause holdings in both *Holmes* and *Anza*:

> [T]he majority has warped civil RICO into a tool that aggrieved business interests will use to harass and undermine competitors engaged in legitimate, competitive business activities. This in turn will put the courts in the nearly impossible position of having to ascertain which other-

> wise legal marketplace activity can be directly linked to ill-gotten investments and which cannot.

Id.[3]

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION PRESENTED

The Second Circuit's decision deepens an existing circuit conflict over whether civil RICO claims that are premised entirely on a corporation's alleged reinvestment of racketeering proceeds satisfy § 1964(c)'s proximate-cause requirement. The Third, Seventh, Eighth, and Ninth Circuits have held that, when a plaintiff complains of losses resulting from conduct of a corporate enterprise, it cannot establish the proximate-cause element of a civil RICO claim based on the mere reinvestment of racketeering proceeds into that enterprise. The Fourth, Sixth, and now the Second Circuits have reached the opposite result.

A. The Third, Seventh, Eighth, And Ninth Circuits Hold That A Corporation's Reinvestment Of Racketeering Proceeds Does Not Cause Direct Injuries To Civil RICO Plaintiffs

1.a. The leading cases on this issue come from the Third Circuit. In *Brittingham v. Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991), the plaintiffs argued that the defendants committed a pattern of racketeering activity by fraudulently marketing as "degradable" trash bags that were not, in fact, degradable. *Id.* at 299. The plaintiffs argued that they were injured in their business or property by reason of the defen-

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[3] The Second Circuit stayed its mandate pending resolution of this certiorari petition. App. 65a.

dants' "use or investment of income derived from their pattern of racketeering in the enterprise, which use or investment enabled the enterprise to continue its operations, and paid for defendants' perpetuation of their fraudulent activities." *Id.* at 303-04 (internal quotations omitted). And, as a result of those fraudulent activities, the plaintiffs "pa[id] higher prices" for the defendants' mismarketed trash bags than they otherwise would have paid. *Id.* at 304.

"Following traditional concepts of causation," and presaging this Court's opinion in *Holmes*, the Third Circuit held that the plaintiffs' causal theory failed as a matter of law. *Id.* The "by reason of" language in § 1964(c) "involves questions of causation" and requires a civil RICO plaintiff to "allege and prove more than a remote connection between the use or investment of racketeering income and the injury suffered." *Id.* Rather, "to recover under § 1962(a), the plaintiff must demonstrate that his injuries were proximately caused by that violation." *Id.*; *accord Holmes*, 503 U.S. at 268-70.

The Third Circuit held as a matter of law that injuries allegedly caused by "the normal reinvestment of corporate profits" — even ill-gotten ones — are not civilly actionable. *Brittingham*, 943 F.2d at 305. The court reasoned that it was simply too difficult to trace a given dollar of racketeering proceeds into and out of a corporation's coffers, and then to the plaintiff's injuries. The court emphasized:

> If this remote connection were to suffice, the use-or-investment injury requirement would be almost completely eviscerated when the alleged pattern of racketeering is committed on behalf of a corporation. RICO's pattern requirement generally requires long-term continuing criminal

> conduct. Over the long term, corporations generally reinvest their profits, regardless of the source. Consequently, almost every racketeering act by a corporation will have *some* connection to the proceeds of a previous act.

Id. (emphasis added; citation omitted). To prevent such boundless civil RICO claims, the court held that proximate cause bars tracing a plaintiff's injury back to mere reinvestment of a corporation's profits. *Cf. CSX*, 131 S. Ct. at 2642 (plurality) ("To prevent infinite liability, courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim.") (internal quotations and citation omitted).

b. The Third Circuit reaffirmed and extended *Brittingham* in *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993). In the latter case, a quick-lube franchisor (Lightning Lube) alleged that its motor-oil supplier (Witco) stole confidential business information from Lightning Lube and used it to establish a competing quick-lube franchise (Avis). *Id.* at 1161, 1187. Lightning Lube argued that it was injured in its business or property "because Witco used [the proceeds of racketeering activity] to build a competing business which then hurt Lightning Lube's sales." *Id.* at 1188. The district court granted summary judgment to Witco.

The Third Circuit affirmed and held that RICO's proximate-cause requirement barred Lightning Lube's § 1962(a) claim. Lightning Lube could not establish proximate causation as a matter of law by proving that "a fast lube franchisor [used racketeering proceeds] to compete directly against the plaintiff in the fast lube market." *Id.* (internal quotations omitted). Nor could Lightning Lube survive summary

judgment with proof that Witco used or invested racketeering proceeds "to facilitate the growth and success of the enterprises" and to cause "[t]he destruction of the plaintiff as a fast lube competitor." *Id.* (internal quotations omitted).

At bottom, Lightening Lube could show only that "the injury allegedly perpetrated on it would not have occurred without the investment of funds from the initial racketeering activity." *Id.* Proof of but-for causation alone, however, is insufficient. *See*, *e.g.*, *Holmes*, 503 U.S. at 268 (plaintiff must prove RICO violation "not only was a 'but for' cause of his injury, but was the proximate cause as well"). If it were otherwise, civil RICO's "'injury requirement would be almost completely eviscerated when the alleged pattern of racketeering is committed on behalf of a corporation'" because "'corporations generally re-invest their profits regardless of the source,'" and every dollar of corporate income has *some* connection to *every* corporate act. *Lightning Lube*, 4 F.3d at 1188-89 (quoting *Brittingham*, 943 F.2d at 305).

c. The Third Circuit recently reaffirmed and extended *Brittingham* and *Lighting Lube*. In *Kolar v. Preferred Real Estate Investments, Inc.*, 361 F. App'x 354 (3d Cir. 2010), a real estate investor (Kolar) brought a civil RICO suit against a corporate co-investor (PREI, Inc.) for violation of § 1962(a). Kolar owned 30% of an entity (Island View); PREI owned the rest and controlled Island View. *Id.* at 358. PREI fraudulently took $4.5 million from Island View and used those proceeds to purchase a $4.5 million discount for another property (Wheeler Way) in which Kolar owned no interest. *Id.* Kolar argued that he was injured in his business or property because, among other reasons, Island View should

have had the opportunity to purchase Wheeler Way (because Island View provided the money for that transaction); Kolar argued that the loss of that investment opportunity to a competitor constituted a cognizable injury under § 1964(c). *Id.* at 361.

Relying on *Brittingham* and *Lightning Lube*, the Third Circuit held that Kolar's alleged chain of causation failed as a matter of law. Even assuming "that the defendants ultimately purchased the Wheeler Way Property in part through an investment of the fraudulently obtained discount," Kolar failed to plead proximate cause between his injury (a lost business opportunity) and PREI's reinvestment of ill-gotten gains from Island View. *Id.* "Were we to indulge [Kolar's] argument, . . . every investment of fraudulently obtained funds would fall within the ambit of § 1962(a) — a plaintiff could plead that he or she was injured by virtue of the missed opportunity to make the very investment that defendants made with misappropriated monies." *Id.*

2. The Ninth Circuit took a similar approach in *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008). There, a karaoke record producer (Sybersound) alleged that its competitors committed racketeering activity "by copying and distributing karaoke records for which they lacked licenses and did not pay royalties." *Id.* at 1147. Sybersound filed a civil suit under § 1962(a), "alleging that [the defendants] invested the proceeds from these predicate acts to unfairly reduce prices to undercut their competitors" in the karaoke record market, including Sybersound. *Id.*

The Ninth Circuit held that Sybersound's § 1962(a) claim failed as a matter of law. The court concluded that a corporation's mere "[r]einvestment of proceeds

from alleged racketeering activity . . . is insufficient to show proximate causation." *Id.* at 1149; *see also id.* at 1147 (civil RICO plaintiff cannot base § 1962(a) claim on "alleg[ation] that the Corporate Defendants invested the proceeds from [their] predicate acts to unfairly reduce prices to undercut their competitors"). The court further held that Sybersound could not claim that it was "the direct victim of the use of proceeds generated by the predicate acts [because] [i]ts competitors used the proceeds from their copyright infringements and mail fraud to undercut Sybersound's prices." *Id.* Rather, the court held that the proximate cause of Sybersound's injuries was that its competitors had assets — karaoke records — for which they did not have to pay.[4]

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[4] Dictum in *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073 (9th Cir. 2000), *overruled in part on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (en banc), which the Ninth Circuit distinguished in *Sybersound*, is not to the contrary. The defendant health insurance companies in *Simon* had "fraudulently denied health benefit claims and then invested the proceeds to develop a group of preferred medical providers who operated to eliminate outside providers." *Id.* at 1083. The court "[a]ssum[ed] *arguendo*" that the defendants' "conduct constitute[d] an illegal investment of racketeering income." *Id.* In the course of rejecting as too indirect the civil RICO claims of a plaintiff who stood in the shoes of the patients who had been denied benefits, the court suggested that "[a]ny injury caused by the investment was to the outside medical providers who were allegedly driven out of business by the preferred providers." *Id.* But the court did not suggest (even in dicta) that those competitors could directly trace their hypothetical injuries to the defendants' reinvestment and thus satisfy § 1964(c)'s proximate-cause requirement. *See Holmes*, 503 U.S. at 266 (holding that "all factually injured plaintiffs" do not have valid claims under § 1964(c)).

3. In *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889 (8th Cir. 1999), the Eighth Circuit likewise followed the Third Circuit's approach to RICO proximate causation for § 1962(a) claims. The plaintiffs there argued that a rental company for household goods (Rent-A-Center, or "RAC") engaged in a pattern of racketeering activity by engaging in unfair debt-collection practices. 190 F.3d at 893. The plaintiffs argued that they were injured in their business or property "because RAC reinvested the income it obtained from the unlawful debt collection in the operation and maintenance of the rent-to-own business" and that, but for the existence of that business, RAC would not have injured the plaintiffs. *Id.* at 896. The district court granted summary judgment to RAC.

In affirming, the Eighth Circuit held that "[s]uch allegations of reinvestment do not suffice to give the plaintiffs standing under §§ 1962(a) and 1964(c)." *Id.* Were it otherwise, § 1964(c)'s proximate-cause requirement "'would be almost completely eviscerated when the alleged pattern of racketeering is committed on behalf of a corporation [because] [o]ver the long term, corporations generally reinvest their profits, regardless of source.'" *Id.* (quoting *Brittingham*, 943 F.2d at 305). Thus, the court held that it is immaterial whether the plaintiffs could prove, as a matter of fact, that their injuries would not have occurred but for RAC's reinvestment of its racketeering proceeds into the "operation and maintenance" of its business. *Id.*

4. Finally, the Seventh Circuit has adopted a similar interpretation of RICO's proximate-cause requirement. In *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), *rev'd*

on other grounds, 510 U.S. 249 (1994), the plaintiffs claimed that abortion protestors violated § 1962(a) by using high-profile attacks on abortion clinics to solicit donations from their supporters, which the protestors then used or invested in their operations. Relying on *Holmes* and "[b]ased in part upon notions of proximate cause," the court explained that the "alleged relationship between the defendants' criminal acts and their supporters[] voluntary contributions is simply too tenuous" to state a civil RICO claim. *Id.* at 625; *see also Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 779 n.6 (7th Cir. 1994) ("the majority view is that the mere reinvestment of the racketeering proceeds into a business activity is not sufficient for § 1962(a) standing").

5. The decisions discussed above cannot be squared with the Second Circuit's decision here. Each barred civil RICO plaintiffs from attempting to prove a factual link between the generation of racketeering proceeds, the investment of those proceeds into a business, and the use of the business's assets to harm the plaintiff. Under the law prevailing in the majority of circuits, it would not matter that Ideal's lost sales allegedly "would not have occurred without the investment of funds from the initial racketeering activity." *Lightning Lube*, 4 F.3d at 1188; *see also Fogie*, 190 F.3d at 896; *compare* App. 32a-33a (holding the opposite). It also would not matter that National allegedly reinvested racketeering proceeds into a related company that competed more effectively against Ideal. *See Lightning Lube*, 4 F.3d at 1188-89; *Kolar*, 361 F. App'x at 361; *compare* App. 21a (holding the opposite). Nor would it matter that National allegedly used the proceeds of racketeering activity to attract customers from its

competitor. *See Sybersound*, 517 F.3d at 1148-49; *compare* App. 33a-34a (holding the opposite).

Because of the speculative nature of separating corporations' legitimate profits from their ill-gotten ones, and then linking the latter to the plaintiffs' injuries, courts outside the Second Circuit would hold that civil RICO claims based entirely on a corporate defendant's alleged reinvestment of racketeering proceeds do not satisfy § 1964(c)'s proximate-cause requirement.

B. The Fourth, Sixth, And Second Circuits Hold That A Corporation's Reinvestment Of Racketeering Income Can Cause Direct Injuries To Civil RICO Plaintiffs

The Second Circuit below sided with the Fourth and Sixth Circuits in holding that § 1964(c)'s proximate-cause requirement imposes no limit on claims premised on a corporation's reinvestment of racketeering proceeds.

1. In *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989), civil RICO plaintiffs alleged that the defendants fraudulently marketed a tax-avoidance scam involving investments in stamps. The defendants operated the scam over the course of 10 years, continuously reinvesting their proceeds to maintain the fraud. The plaintiffs argued that the fraud in which they invested would not have existed but for the defendants' reinvestment of the proceeds from prior years' racketeering activity. The district court dismissed for failure to state a claim.

The Sixth Circuit reversed. It held that the plaintiffs' claim should be allowed to go forward based exclusively on the defendants' alleged reinvestment of racketeering proceeds in violation of § 1962(a). The court held that, to plead an injury by reason of a

§ 1962(a) violation, civil RICO plaintiffs need only plead "the possibility that the offering of the particular investment plan in which the plaintiffs put their money may have been financed with the proceeds of prior 'racketeering activity.'" *Id.* at 396; *see also St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 444-45 (5th Cir. 2000) (largely agreeing with *Newmyer* and vacating the entry of summary judgment in light of it).

2. In *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990), the Fourth Circuit also allowed a civil RICO claim to proceed based on nothing more than a corporation's reinvestment of ill-gotten gains. There, a class of employees alleged that their employer (Crown) and its parent corporation (Hammermill) committed a pattern of racketeering activity by allegedly underpaying commissions to their salespersons. The plaintiffs alleged that the defendants violated § 1962(a) by "retain[ing] funds which rightfully were payable to the plaintiff Busby and the Class Plaintiffs" and "us[ing] those funds in [Crown's] operations." *Id.* at 840 (internal quotations omitted). The plaintiffs further alleged that Hammermill reinvested the proceeds from the defendants' racketeering "to maintain its ownership of" Crown and "to establish and operate the CDA Division," through which Hammermill operated Crown. *Id.* (internal quotations omitted).

The Fourth Circuit reversed the dismissal of the plaintiffs' complaint. The court held that a civil RICO plaintiff can state a claim for violation of § 1962(a) by alleging that a corporation's reinvestment of racketeering proceeds caused the mere "*operation* of the enterprise," which, in turn, imposed

"a competitive disadvantage" on the plaintiff. *Id.* at 837-38 (internal quotations omitted).

The Fourth Circuit justified that result — as the Second Circuit did below — by relying heavily on RICO's purpose and legislative history. The *Busby* court emphasized that the majority rule "conflicts with the explicit policy that RICO be liberally interpreted." *Id.* at 838. The Fourth Circuit further emphasized that, if the mere reinvestment of racketeering proceeds into a corporation was insufficient to state a claim for violation of § 1962(a), it would be "virtually impossible to prove that the invested income caused the [civil RICO plaintiff's] alleged injury." *Id.* at 839. Whereas the First, Third, Eighth, and Ninth Circuits relied on that same impossibility to hold that a corporation's mere reinvestment of racketeering proceeds is insufficient to satisfy § 1964(c)'s proximate-cause requirement, the Fourth Circuit held that the broad purposes and liberal-construction canon compelled the opposite result. *See id.* at 838 (rejecting interpretation of "the opaquely drafted § 1964(c)" adopted by "our sister circuits").

II. THE SECOND CIRCUIT'S DECISION IS ERRONEOUS

The Second Circuit erred in holding that a private plaintiff can establish an injury proximately caused by a RICO violation based entirely on evidence that the defendant reinvested income derived from racketeering activity.

A. Section 1964(c) creates a private right of action for violations of § 1962 and requires a private plaintiff to plead and prove an injury to its "business or property *by reason of* a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). To show that

its claimed injury was "by reason of" a RICO violation, a plaintiff must demonstrate not only that the defendant's violation was a "but for" cause of its injury but also that it was "'the proximate cause.'" *Anza*, 547 U.S. at 457 (quoting *Holmes*, 503 U.S. at 268). Because the requirement of proximate cause derives from § 1964(c), it applies equally to claims based on violations of § 1962(c) and § 1962(a). *See Anza*, 547 U.S. at 461-62.

One aspect of the proximate-cause requirement in civil RICO cases is "the 'demand for some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* at 457 (quoting *Holmes*, 503 U.S. at 268). "A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 989 (2010) (opinion for the Court in part) (quoting *Holmes*, 503 U.S. at 271) (alteration in original). A necessary first step in applying civil RICO's directness requirement is thus to identify "'the injury asserted'" and "'the injurious conduct alleged.'" *Id.* (quoting *Holmes*, 503 U.S. at 268). When the "injurious conduct alleged" is a violation of § 1962(c), the "proper referent of the proximate-cause analysis" is "the commission of [predicate] acts in connection with the conduct of an enterprise." *Anza*, 547 U.S. at 457-58 (internal quotations omitted). When a private plaintiff bases its claim on a violation of § 1962(a), however, the proper referent of the proximate-cause analysis is "the defendants' investment of income acquired through the alleged pattern of racketeering activity." App. 38a (Cabranes, J., dissenting).

When, as here, a private plaintiff claims that the defendant violated § 1962(a) by investing racketeering income in a business that competes against the

plaintiff, the injury asserted (lost profits) lacks the required causal relationship to the RICO violation. To show proximate cause in such a case, the plaintiff would have to establish a sufficiently "'direct relation,'" *Anza*, 547 U.S. at 457 (quoting *Holmes*, 503 U.S. at 268), between the investment and the lost profits. "The cause of" such a plaintiff's "asserted harms, however, is a set of actions" — competition against the plaintiff — "entirely distinct from the alleged RICO violation" — investing racketeering income in the enterprise. *Id.* at 458. The conduct "directly responsible for" the plaintiff's harm is the decisions of consumers to buy from the enterprise into which racketeering income has been invested, rather than from the plaintiff. *Hemi*, 130 S. Ct. at 990 (opinion for the Court in part). Those consumers' decisions are entirely distinct from the defendant's investment in the enterprise. Although a plaintiff can always allege that an investment of racketeering income into an enterprise enhanced the enterprise's ability to compete and, ultimately, resulted in lost sales and profits for the plaintiff, the "'general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Id.* at 989 (quoting *Holmes*, 503 U.S. at 271-72); *accord Lightning Lube*, 4 F.3d at 1188-89.[5]

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[5] Contrary to the Second Circuit's assertion (App. 32a), dicta in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), does not suggest otherwise. There, the Court suggested that a hypothetical civil RICO plaintiff could establish proximate cause by showing that the defendant mailed fraudulent advertising materials to the plaintiff's customers, who, in turn, choose to shop elsewhere. *Id.* at 649-50. In that case, the alleged fraud — a smear campaign mailed by the plaintiff's competitor to the plaintiff's customers — caused the plaintiff's lost sales. Here, the alleged fraud — National's underreporting

Consideration of the directness requirement's "underlying premises" — in particular, "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action" — confirms the lack of proximate cause in such cases. *Anza*, 547 U.S. at 458. As Judge Cabranes explained, "[a]ny such suit would necessarily require an analysis of (a) the impact of the alleged unlawful [investment] on the [defendant's] legitimate competitive activity . . . and (b) the economic harm to plaintiffs directly attributable to the change in legitimate competitive activity caused by the ill-gotten investment." App. 43a (Cabranes, J., dissenting). Thus, the court would first have to ascertain the impact of the investment on the ability of the enterprise to compete against the plaintiff. Considering "the overwhelming number of variables inherent in this inquiry," it is "doubtful that any court could come up with a reasonably certain answer." App. 39a. And, even if the impact of the defendant's investment on the operation of the enterprise "could be readily ascertained," the court would still "be obliged to determine precisely how this impact 'injured' [the plaintiff] (apart from the myriad other factors that may have adversely affected [the plaintiff]'s business)." App. 40a. In short, ascertaining how the investment of "ill-gotten" funds affected a plaintiff's "bottom line" is exactly the type of "intricate, uncertain inquir[y]" that the proximate-cause requirement was "meant to prevent." App. 39a-40a (internal quotations omitted); *see also Anza*, 547 U.S. at 483 (Breyer, J., concurring in part and dissenting in part) ("[A]n effort to bring harm caused

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of taxes — did no such thing. Rather, Ideal alleges that it lost sales because National opened a new store — an act that was, in and of itself, entirely lawful.

by ordinary competitive activity within the scope of RICO's private treble-damages action provision will raise serious problems of administrability."); *Brittingham*, 943 F.2d at 304-05.

The correctness of that conclusion is supported by this Court's recognition in *Anza* that "claims brought by economic competitors . . . , if left unchecked, could blur the line between RICO and the antitrust laws." 547 U.S. at 460. "'The basic objective of antitrust law is to encourage . . . businesses to compete by offering lower prices, better products, better methods of production, and better systems of distribution.'" App. 41a-42a (Cabranes, J., dissenting) (quoting *Anza*, 547 U.S. at 482 (Breyer, J., concurring in part and dissenting in part)). Although the antitrust laws are not the only federal statutes that regulate competition between businesses, "'there is no sound reason to interpret RICO's treble-damages provision as if Congress intended to set it and its antitrust counterpart at cross-purposes.'" App. 42a. Yet that is exactly the consequence of the three-circuit minority approach represented by the Second Circuit's decision below, which allows a private plaintiff to pursue a civil RICO action to recover losses caused when a competitor expanded output and challenged the plaintiff's "dominant market position." App. 25a-26a.

B. In reaching its contrary conclusion, the Second Circuit reasoned that the relationship between a defendant's investment of racketeering income and a private plaintiff's competitive injury is sufficiently direct at least in cases where that income is used "in the establishment or operation of a store that *simply by its existence* attracts customers away from a competitor." App. 31a-32a (emphasis added); *see*

App. 12a ("simply by being there and offering products and services comparable to those offered by Ideal, the new National store took customers from Ideal"). But "the alleged illegal activity *is not* National's creation of a new store in the Bronx — on its own, a perfectly legitimate, competitive pursuit — but rather, defendants' investment of ill-gotten proceeds." App. 39a (Cabranes, J., dissenting). The link between *that investment* and Ideal's alleged competitive injury is far too indirect to establish proximate cause.

The Second Circuit further held that Ideal is entitled to present its claim to a jury despite the presence of other potential causes of Ideal's injuries — including Ideal's selling of "bent and rusty" products; decisions by third-party steel companies that may have affected the competitive landscape; and Ideal's own business decisions that may have affected its profitability. App. 31a-33a. While the court held that such possibilities raise "question[s] of but-for causation" that are "issue[s] of fact for the jury," App. 32a-33a, precisely the opposite is true. The point of § 1964(c)'s proximate-cause requirement is to prevent courts and juries from being forced to undertake such speculative and uncertain inquiries. *See*, *e.g.*, *Anza*, 547 U.S. at 459-60; *Lightning Lube*, 4 F.3d at 1188-89.

Finally, the Second Circuit worried that, "if defendants' investment of the proceeds of their alleged pattern of mail and wire frauds has not sufficiently directly harmed Ideal to meet the standard of proximate cause, we find it difficult . . . to fathom to whom Congress meant to grant a private right of action under subsection (a)." App. 29a. This case is far from the heartland of § 1962(a) liability, however.

As Justice Breyer noted in *Anza*, RICO was not intended to create treble-damages actions to punish "fair, ordinary competition that an infiltrated business might offer its competitors"; rather, it targets "the risk that such a business would act corruptly, exercising *unfair* methods of competition." 547 U.S. at 484 (Breyer, J., concurring in part and dissenting in part) (internal quotations omitted). It may be that, if a racketeer "'displace[s]' an 'honest investor' when he 'infiltrates and obtains control of a legitimate business . . . through fraud' or the like," the honest investor could have a civil RICO claim based on a violation of § 1962(a). *Id.* at 485 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 522 (1985) (Marshall, J., dissenting)) (alterations in *Anza*); *see also Brittingham*, 943 F.2d at 303 (noting that § 1962(a) targets "money laundering" and things like it).

But the Second Circuit's premise — that for every alleged harm there must be a civil RICO remedy — cannot be squared with this Court's proximate-cause precedents. As this Court has held, civil RICO's proximate-cause requirement means that not "all factually injured plaintiffs" have valid claims under § 1964(c). *Holmes*, 503 U.S. at 266; *see also Anza*, 547 U.S. at 456; *compare* App. 20a-21a (suggesting the opposite). That is particularly true, as here, "where other victims, say, victims of the underlying RICO 'predicate acts' are present." *Anza*, 547 U.S. at 484 (Breyer, J., concurring in part and dissenting in part). There is "no pressing need to provide [Ideal with a treble-damages] action" because "[t]hose alternative victims (here the State of New York) typically could be counted on to bring suit for the law's vindication." *Id.* (internal quotations omitted).

III. THE QUESTION PRESENTED IS AN ISSUE OF RECURRING NATIONAL IMPORTANCE THAT WARRANTS THIS COURT'S IMMEDIATE RESOLUTION

The Second Circuit's holding in this case raises a recurring issue of great practical importance meriting this Court's review.

A. The adverse policy consequences of the Second Circuit's interpretation of civil RICO's proximate-cause requirement are profound. The decision threatens defendants with liability for treble damages based on nothing more than the allegation that, at some point in the past, they invested income derived from racketeering activity in a business whose operations are alleged to have harmed the plaintiff. Under that rule, a civil RICO action can be maintained even when the conduct that directly caused the claimed harm is entirely lawful. Indeed, that is so even when, as here, the conduct that allegedly injured the plaintiff is pro-competitive activity that federal antitrust laws seek to promote.

As applied in cases such as this one, the Second Circuit's holding threatens to undermine congressional policy embodied in the federal antitrust laws, while serving no countervailing policy of the RICO statute. Congress enacted the antitrust laws to encourage competition. *See*, *e.g.*, *Anza*, 547 U.S. at 482 (Breyer, J., concurring in part and dissenting in part). Here, however, petitioners' decision to compete against respondent has given rise to respondent's civil RICO claim. Under the decision below, petitioners face treble liability because they opened a new store and respondent, which "had once enjoyed a dominant market position, with no serious competition from other . . . entities, lost business." App. 26a.

That result enables civil RICO to "be misused as a weapon against competition." App. 40a (Cabranes, J., dissenting). It encourages businesses to attack their competitors in the courts, rather than the marketplace. It also "chill[s] competition" by discouraging businesses from aggressively competing, lest rivals respond with a civil RICO complaint. App. 41a (Cabranes, J., dissenting); *see also Anza*, 547 U.S. at 485-86 (Breyer, J., concurring in part and dissenting in part) ("The ultimate victim of any such tendency to pull ordinary competitive punches of course would be not the competing business, but the consumer."). Although, as this Court and the court below have observed, Congress drafted the RICO statute in broad terms, there is no indication that Congress intended to authorize "companies [to] pursue civil RICO claims against their competitors on the basis of allegations that ill-gotten proceeds have funded perfectly legitimate and competitive pursuits." App. 40a (Cabranes, J., dissenting).

B. Future plaintiffs will have little difficulty stating civil RICO claims under the Second Circuit's theory. Particularly in the case of a large business with substantial operations, a plaintiff should be able to identify with ease alleged misconduct that comes within the "broad reach" of the mail and wire fraud statutes. *Pasquantino v. United States*, 544 U.S. 349, 360 (2005). And it need only allege two such acts to plead a "pattern." *See* 18 U.S.C. § 1961(5); *see also supra* p. 4. The plaintiff can then plead that the defendant violated § 1962(a) by reinvesting income obtained from that pattern of racketeering activity into the operations of any "enterprise" (a term that is, of course, broadly defined, *see* 18 U.S.C. § 1961(4); *Boyle*, 129 S. Ct. at 2245-46). *See*

App. 20a (asserting that "any of dozens of combinations or permutations will constitute a violation of" § 1962(a)); App. 41a (Cabranes, J., dissenting) (noting "the broad scope of RICO (and what might constitute proceeds from a RICO 'predicate act')"). Once the plaintiff has pleaded that the defendant violated § 1962(a), virtually any act by the enterprise that allegedly harms the plaintiff can, under the decision below, provide a basis for a civil RICO action.

Given the relatively liberal rules for venue and service of process in civil RICO cases, *see* 18 U.S.C. § 1965(a)-(b), plaintiffs will frequently be able to take advantage of the favorable proximate-cause standards in the Second, Fourth, and Sixth Circuits to bring civil RICO actions against businesses. To prevent those courts from becoming the forums of choice for RICO claims based on indirect injuries, the Court should grant review and resolve the division of authority deepened by the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

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November 23, 2011

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