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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH ANZA, ET AL., :

Petitioners :

v. : No. 04-433

IDEAL STEEL SUPPLY CORP. :

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Washington, D.C.

Monday, March 27, 2006

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:06 a.m.

APPEARANCES:

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf  
of the Petitioners.

KEVIN P. RODDY, ESQ., Woodbridge, New Jersey; on behalf  
of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in 04-433, Anza v. Ideal Steel Supply Corporation.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE PETITIONERS

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

This case concerns use of alleged fraud in the underpayment of taxes as the predicate for a treble damages civil RICO action. Respondent Ideal Steel concedes that it was not defrauded, but it, nonetheless, claims lost profits when National failed to pay State sales taxes and thereby offered a lower overall price to consumers. Our position is that Ideal's injury is too indirect as a matter of law under RICO.

In reinstating Ideal's RICO claims against National, however, the Second Circuit committed two errors. First, it substituted a direct targeting test that credited the plaintiff's allegations of intent instead of applying this Court's test for proximate causation in the Holmes case. And second, the Second

1 Circuit permitted Ideal to satisfy the reliance  
2 requirement by invoking the State of New York's  
3 reliance on the truth of National's allegedly false tax  
4 returns. Both errors transformed civil RICO into a  
5 litigation weapon of great destructive force for  
6 defendants who will be forced to defend, beyond the  
7 pleading stages, damages claims of the most attenuated  
8 and indirect character.

9           With respect to our first argument, proximate  
10 cause, the court below erred by not applying this  
11 Court's test in Holmes and also by failing to take into  
12 account the fact that fraud is a statutory violation  
13 that -- for which the plaintiff needs to be within the  
14 zone of interest. Quite simply, because Ideal was not  
15 the defrauded party, it is not within the zone of  
16 interest protected by the fraud statute.

17           With respect to the Holmes factors, for three  
18 reasons the -- Ideal Steel is unable to plead proximate  
19 cause.

20           First, in Holmes, this Court made clear that  
21 where there's an indirect plaintiff, the claims are  
22 difficult to prove in terms of ascertaining what the  
23 level of damages is. That is particularly true in this  
24 case because of the highly attenuated chain of  
25 causation that allege -- that Ideal alleges as a

1 factual matter.

2 JUSTICE SOUTER: Well, isn't there something  
3 different here? Because in -- in Holmes, the -- the  
4 party that was claiming the -- sort of the ultimate  
5 damage was damaged because other people up the line  
6 were damaged, the -- the shareholders and then the  
7 broker-dealers and so on. There was a kind of a direct  
8 line of -- of causation. But the people who were  
9 claiming were at the tail end of it.

10 Here, the causation between the -- or the --  
11 or the cause of the harm to -- to the clients on -- on  
12 the other side was -- was direct. It was direct  
13 competition harm. So we are in a different situation  
14 from Holmes. In other words, they -- they weren't --  
15 the -- the plaintiffs in this case were not injured  
16 simply because New York lost some money. They were  
17 injured in -- in their own right by -- by the  
18 competition between them and your client.

19 MR. FREDERICK: I don't agree, Justice  
20 Souter, and here's why. In Holmes, the customers were  
21 the ones who were denied proximate cause in this  
22 decision -- in -- in the Court's decision. They stood  
23 in a direct line from the harm that was caused when the  
24 companies were defrauded and the stock value caused the  
25 brokerage to go down. It was completely foreseeable

1     that customers that owned the shares in those firms  
2     would also suffer direct harm.

3             JUSTICE SOUTER:  Sure, but they suffered the  
4     harm because the firm suffered the harm.  There was --  
5     there was -- there's a word there.  There was -- there  
6     was a victim in -- in the direct line of causation, if  
7     you will, between them and -- and the -- and the  
8     offending RICO party.  Here, there's -- there's nobody  
9     in between the two of them.

10            MR. FREDERICK:  That -- that's not so.  There  
11     is, and New York is in between them in this respect.  
12     If -- Ideal is asserting that because the taxes had not  
13     been charged and then paid to the State of New York,  
14     that National gained a competitive advantage.  But I  
15     think the Court has been clear that the competitive  
16     harms -- and this was true in the Associated General  
17     Contracting case in which the Court in Holmes relied  
18     directly -- is not going to be sufficient when there  
19     are multiple steps in the chain.

20            Here, as a factual matter, Justice Souter,  
21     they have to be able to link every individual sale for  
22     which there was not a tax paid, assert that that person  
23     was wrongfully not charged a tax.  Under New York law,  
24     under certain circumstances, if a contractor has a  
25     certificate, it's not appropriate for the vendor in

1     this case to charge the sales tax. And then they have  
2     to be able to show that they would have gotten the sale  
3     --

4                 JUSTICE KENNEDY: Well, why -- why is that  
5     true? Let's assume that they could establish that  
6     there was a purpose and an intent to adopt this -- this  
7     tax evasion scheme and that the whole object was to  
8     undermine and -- and injure the competitor, and they  
9     show that this scheme began to work and that their  
10    reputation as a lower-cost competitor was -- was well  
11    established. Why -- why isn't that enough?

12                MR. FREDERICK: Because this Court rejected a  
13    similar theory in section 4 of the Clayton Act context  
14    where it held that a specific intent to injure is not  
15    sufficient as a pleading matter. The Court in that  
16    case held that where an association had a -- an -- a  
17    specific intent to harm the unions, that that was not  
18    sufficient for invoking section 4 of the Clayton Act.

19                The same analysis applies here because what  
20    Ideal is attempting to do is to use artful pleading as  
21    a way to get around the proximate cause requirement  
22    through their simple assertions that there are no, in  
23    fact, other competitors within a three-State area and  
24    that National was targeting them for competitive harm.  
25    They're attempting to evade the normal requirements

1 for proximate cause that look to whether or not the  
2 direct injury is suffered by the plaintiff.

3 JUSTICE GINSBURG: Mr. Frederick, you -- you  
4 started by saying how difficult this would be to prove,  
5 but could the plaintiff piggyback on New York? If New  
6 York was the defrauded party and taxes are owed to the  
7 State, has the State had no proceeding in this?

8 MR. FREDERICK: Well, as the briefs indicate  
9 -- and we're somewhat outside the record. As the case  
10 comes to this Court, it's on the pleadings. But the  
11 footnotes in the brief give a little bit of a flavor of  
12 what has happened since then, and there are audit  
13 proceedings that the State of New York has commenced.  
14 It has not commenced any kind of civil or criminal  
15 proceeding against National, nor has it brought a RICO  
16 action against National. But there are discussions  
17 with the State at the level of the auditors as to  
18 whether or not any back tax is owed and, if so, in what  
19 amount.

20 JUSTICE GINSBURG: Do I understand correctly  
21 that the complaint has since been amended to assert a  
22 Federal income tax shortfalls?

23 MR. FREDERICK: That's correct, Justice  
24 Ginsburg. And as we pointed out in our reply brief,  
25 there are in excess of 500,000 corporate income tax



1 statements that are issued by the IRS for underpayment  
2 each year and in excess of 6 million unemployment  
3 underpayment notices sent out. And under Ideal's  
4 theory, each of those would be a predicate act for a  
5 RICO case, asserting treble damages where one  
6 competitor could use the in terrorem effect of a RICO  
7 claim simply because of an underpayment of tax notice.

8 JUSTICE STEVENS: Well, but this is a little  
9 more focused than that, I think. There's only one  
10 competitor here, isn't there?

11 MR. FREDERICK: We have to assume that for  
12 purposes of this pleading except insofar as it  
13 acknowledges whether or not a legal requirement is  
14 satisfied, and I think that the cases of this Court and  
15 certainly the commentators have been clear the Court  
16 does not need to assume a fact for purposes of a legal  
17 conclusion. As the -- as the footnotes indicate, that  
18 has not been borne out by discovery, and there are, in  
19 fact, multiple competitors.

20 JUSTICE STEVENS: But do you think it's fair  
21 to interpret the Second Circuit as having, in effect,  
22 held that every competitor of anybody who cheats on his  
23 taxes has a RICO claim?

24 MR. FREDERICK: What the Second Circuit held  
25 was that if the plaintiff pleads that they were a

1 direct target -- and here, other competitors in the  
2 market like Colonial, Alimar, Friedel, and Easton  
3 Steel, could plead exactly the same thing that they, in  
4 fact, were the direct target. And under the Second  
5 Circuit's test, that would be sufficient to override a  
6 motion to dismiss and proceed the parties into  
7 protracted discovery. And what the Court in Associated  
8 General Contracting and in Holmes made clear was that  
9 the courts were not designed to be the forums for this  
10 kind of long, arduous fact-finding mission in order to  
11 determine whether or not indirect injuries should be  
12 compensable with treble damages under the RICO statute.

13 CHIEF JUSTICE ROBERTS: Mr. Frederick, I  
14 understand how your arguments work under section  
15 1962(c), but how -- how do they work under 1962(a)? It  
16 seems that that gets around many of the causation and  
17 reliance arguments that you make.

18 MR. FREDERICK: Mr. Chief Justice, the way we  
19 get to the proximate cause requirement through Holmes  
20 is through 1964(c)'s use of by reason of a violation of  
21 1962. We submit that the proximate cause inquiry is  
22 the same whether it's a 62(a) violation or a 62(c)  
23 violation. And in fact, Ideal has not advanced really  
24 any argument to the contrary. They sued under 1962(a)  
25 in order to get a deeper pocket, National, which they

1 would not be able to get under 1962(c). Corporations  
2 are not persons.

3 CHIEF JUSTICE ROBERTS: But 62(a) gets to the  
4 reinvestment of the illicit proceeds in a -- in an  
5 enterprise, and here you have the opening of the  
6 facility right next -- not right next door -- nearby  
7 the other facility. And it seems to me all they have  
8 to show is that the proceeds used for that were  
9 illicitly procured.

10 MR. FREDERICK: They -- that's not their  
11 allegation, though, in this sense. The theory that  
12 your hypothesis is postulating is a money laundering  
13 predicate act, but they don't assert money laundering  
14 as the predicate act. They assert fraud. And it's  
15 exactly the same conduct, the alleged underpayment of  
16 taxes that is fraudulently sent to the State of New  
17 York, and through that, an indirect injury. So their  
18 theory under (a) and under (c) of section 1962  
19 factually is exactly the same. The only reason that  
20 they brought in an (a) claim is, as I pointed out, to  
21 get at the pocket with suing National as a corporate  
22 defendant.

23 But I would point out here, in further answer  
24 to your question, Justice Ginsburg, the State of New  
25 York, under the Holmes test, is the proper plaintiff

1 for purposes of vindicating the law's purposes, which  
2 after all, is to negate the activity of fraud.

3 JUSTICE GINSBURG: Is there any impediment to  
4 New York suing him? This would be -- it's kind of strange.  
5 New York has its tax scheme. It has penalties for  
6 failure to pay tax. And then it could go into the  
7 Federal court and say RICO is better than our penalties.  
8 RICO has treble damages.

9 MR. FREDERICK: There are cases that have so  
10 held, and I think this Court's decision in Pasquantino,  
11 which holds that the tax revenue from a governmental  
12 entity can be property within the meaning of the fraud  
13 statutes, would support a general notion that a State  
14 could, in fact, if it believed that that was necessary  
15 to vindicate the law's purposes would be appropriate.  
16 Of course, here, the State of New York has got to get  
17 to that level through a very long series of steps, and  
18 it hasn't even approached, you know, the initial steps  
19 in terms of even bringing civil claims against  
20 National.

21 JUSTICE GINSBURG: The -- the Second Circuit  
22 seemed to rely on an earlier case that is much featured  
23 in Respondent's brief, but I don't recall your dealing  
24 with it. Is that Commercial Cleaning case of the  
25 knowingly hiring undocumented aliens and paying them

1 less than the minimum wage, which gave that person a  
2 competitive edge over rivals who -- who paid what the  
3 law required?

4 MR. FREDERICK: That, Justice Ginsburg, may  
5 give rise to certain legal remedies and certain harms,  
6 but we submit it would be too indirect for a RICO treble  
7 damages claim. There certainly could be an unfair  
8 competition claim under State law, perhaps a tortious  
9 interference with business advantage.

10 But the purpose of RICO is not to federalize  
11 unfair competition law. And this point, we submit is  
12 very important because they could not bring a fraud  
13 claim under State law. It's not in their complaint,  
14 but --

15 JUSTICE ALITO: Suppose -- suppose the  
16 company gets a competitive advantage by engaging in the  
17 sort of activity that's would be traditionally be  
18 associated with organized crime, let's say, extortion  
19 or labor offenses. Would your causation argument be  
20 any different in that situation if a competitor filed a  
21 civil RICO action?

22 MR. FREDERICK: It could, Justice Alito, in  
23 this way. Congress has certainly announced, through a  
24 variety of statutes, a congressional policy of trying  
25 to deter and to minimize the use of violence and force

1     against individuals. And the Hobbs Act is quite  
2     broadly worded in the context of robbery and extortion,  
3     certainly. The question, though, of whether or not an  
4     indirectly sustained injury -- in your hypothetical,  
5     something like competitive advantage -- would be  
6     sustainable -- I think would be looked at through the  
7     Holmes inquiry whether or not the damages that are  
8     asserted are too attenuated to be readily ascertained.

9             JUSTICE SCALIA: Well, I don't understand  
10    your answer then. I mean -- I mean, does the fact that  
11    -- that there was classic mob violence involved make a  
12    difference or not?

13            MR. FREDERICK: It can --

14            JUSTICE SCALIA: Why? I -- your answer  
15    didn't -- didn't tell me why.

16            MR. FREDERICK: Because if -- depending on  
17    the exact facts of how the violence was done, whether  
18    or not the injury that is sustained is direct within  
19    the Holmes factors --

20            JUSTICE SCALIA: Well, that has nothing to do  
21    with violence or not. It has to do with directness or  
22    not. You're saying you would apply the same directness  
23    test.

24            MR. FREDERICK: That's correct, although  
25    there is -- Justice Scalia, I don't want -- I don't

1 think that it should be foreclosed that as your opinion  
2 in Holmes and as footnote 20 of the majority opinion in  
3 Holmes pointed out, how those proximate cause factors  
4 get analyzed with the different predicate acts may vary  
5 slightly, but we think --

6 JUSTICE SOUTER: Well, may -- may I ask you  
7 to focus this way, just going one step further than the  
8 hypo you've got? Let's assume that the -- that the  
9 defendant engages in extortion against A and makes a  
10 lot of money doing it. As a result of that, in -- in  
11 dealing with B, the defendant, in fact, can -- can  
12 offer -- offer goods for sale to B's customers at a  
13 lower price simply because he's getting all this income  
14 from the extortion. In that case, wouldn't your  
15 analysis be the same as your analysis in this case?

16 MR. FREDERICK: Yes, it would because there  
17 is a better defendant A which got extorted for purpose  
18 of vindicating the extortion --

19 JUSTICE SOUTER: But -- but if that's the  
20 case, then -- if -- if the relationship between the  
21 parties is the same, then the presence of violence or  
22 nonviolence has nothing to do with your -- your  
23 position. Does it?

24 MR. FREDERICK: It -- it does in this extent.

25 I can't think of a hypothetical, off the top of my

1 head or after some consideration, of where the violence  
2 would have been such that there would have been a less  
3 indirect injury than the one in your hypothetical,  
4 Justice Souter. But I would not want to foreclose the  
5 possibility, as this Court did not foreclose in  
6 footnote 20 of the Holmes opinion, that there could be  
7 such a case. It's not necessary for us to prevail here  
8 because the mail and wire fraud predicate acts are very  
9 close to the securities fraud that this Court  
10 considered in the Holmes case.

11 I would acknowledge that in the extortion and  
12 robbery and other carjacking and violence type acts,  
13 there could be congressional policies that would be  
14 taken into account. And certainly the legislative  
15 history of RICO points to a concern that persons would  
16 be using violence in a way that would cause harms. But  
17 I don't think the Court needs to go there in order to  
18 rule in our favor in this case.

19 JUSTICE STEVENS: May I ask this? I assume  
20 you would agree that if the defendant had -- had hired  
21 a thug to go out and beat up his competitor, the  
22 competitor would have a cause of action.

23 MR. FREDERICK: Yes.

24 JUSTICE STEVENS: And what if the defendant  
25 bribed a -- an official of the New York revenue



1 department to impose unnecessarily high taxes on the  
2 competitor?

3 MR. FREDERICK: That is starting to get more  
4 indirect, but I think that that probably would be  
5 sufficient to show injury because the State of New York  
6 is not suffering any kind of property loss or any other  
7 kind of harm other than honest services.

8 JUSTICE STEVENS: And what if they -- what if  
9 they somehow or other fraudulently persuaded the  
10 revenue agents of the State to impose higher taxes and  
11 penalties on the competitor?

12 MR. FREDERICK: I -- I don't think that that  
13 hypothetical in any substantive way is different from  
14 the second one, Justice Stevens.

15 JUSTICE STEVENS: So you think there would be  
16 recovery in that scenario.

17 MR. FREDERICK: No. I -- I think -- I think  
18 that the -- the question of how government behaves, for  
19 purposes of its discharge of public responsibilities,  
20 you know, is treated through a lens that goes to  
21 whether or not the law can be properly vindicated  
22 there. And I assume that the State of New York has  
23 various laws that can be enforced in a way --

24 JUSTICE STEVENS: Well, supposing we've got a  
25 license inspector or somebody every Monday night to go

1 out and -- and inspect very heavily the competitor and  
2 cause all sorts of nuisance values and so forth. But  
3 he's a State official, induced to do that by some kind  
4 of bribery or fraud on the part of the defendant.  
5 Would there be a cause of action there or not?

6 MR. FREDERICK: Not under -- well, I don't  
7 think there would be a cause of action by the  
8 competitor under RICO because, again, those damages are  
9 too indirect. That's not very different from the  
10 Associated General Contracting case where there were --  
11 there was thought to be coercion on the part of the  
12 association against the labor unions, and this Court  
13 held that that was insufficient for proximate cause.

14 JUSTICE BREYER: I'm rather surprised at your  
15 answers because I was thinking you want to draw a  
16 rather clear line between where fraud is at issue, and  
17 only fraud. Proximate cause, case A, the fraud does  
18 nothing but lowers the cost of the firm; case B, the  
19 fraud is something that directly is aimed to raise the  
20 cost of a particular specified competitor. I see a  
21 clear difference between those two cases, but you  
22 apparently don't.

23 MR. FREDERICK: Well, I think, Justice  
24 Breyer, it depends on how the fraud plays out, and --  
25 and I would acknowledge that this is a -- a somewhat

1     nebulous area when you --

2                 JUSTICE BREYER:  No, no, it's not nebulous.  
3     It's absolutely clear.  In the one hand, you are  
4     targeting a particular defendant to raise -- a  
5     particular competitor to raise his costs.  In the other  
6     hand, you are taking an action that simply lowers your  
7     own and, therefore, equally will hurt any competitor,  
8     whether there's one or a million.

9                 MR. FREDERICK:  The difficulty, Justice  
10    Breyer, as -- as that series of hypotheticals plays out  
11    in the real world is that defendants who have to defend  
12    against actions are forced to deal with the truth of  
13    pleadings for purposes of 12(b)(6).  And as happened in  
14    this case, where the plaintiff can, through artful  
15    pleading, you know, navigate through these series of  
16    proximate cause issues, can plead facts that courts  
17    have to be assuming as true, reach a legal conclusion  
18    that there is, in fact, proximate cause --

19                JUSTICE BREYER:  No.  If you had my test,  
20    you'd win this case.

21                MR. FREDERICK:  But, Justice Breyer, I guess  
22    my point is that I think that there -- with all candor  
23    to the Court, there are some difficulties in handling  
24    that as a pleading matter.  And yes, I'll accept the  
25    win if that's how that's the Court wants to read the

1 case.

2 JUSTICE BREYER: No, no. I don't want to  
3 give you a win --

4 MR. FREDERICK: But --

5 (Laughter.)

6 JUSTICE BREYER: on a theory that --

7 MR. FREDERICK: But -- but I would submit  
8 that the rule as articulated is one that would have  
9 some administration issues. I think it is certainly an  
10 easier case where there is a broad-spread competitive  
11 harm as a result of a lowering of a particular  
12 competitor's costs or a particular defendant's costs  
13 and one where there is a fraud that is specifically  
14 directed at a piece of property for which --

15 CHIEF JUSTICE ROBERTS: But it's not --

16 MR. FREDERICK: -- the plaintiff asserts a  
17 claim.

18 CHIEF JUSTICE ROBERTS: I think the reason  
19 Justice Breyer's test is a little more administrable  
20 than you're willing to admit is that it's not a  
21 question of motive. You're not asking why they did it.  
22 You're asking where the predicate act is directed, and  
23 if the predicate act is directed to lowering the -- the  
24 firm's taxes so that it can compete more aggressively,  
25 that's one thing. If the -- the predicate act is

1 directed to, you know, blowing up the other firm's  
2 warehouse or -- or, you know, something like that, it's  
3 a different matter altogether.

4 MR. FREDERICK: That's correct, Mr. Chief  
5 Justice. But under the Holmes test, that becomes much  
6 easier to ascertain because you know where the damages  
7 are. You don't have to worry about apportioning  
8 damages among multiple plaintiffs, and there may not be  
9 a better plaintiff. So I think if you applied the  
10 Holmes factors in this test here and to the example  
11 that you gave, the answer is a fairly straightforward  
12 one.

13 If I could turn to the second point of  
14 proximate cause that we have raised, it's that as a  
15 matter of zone of interest standing, because Ideal is  
16 not the defrauded party, they fall outside the zone of  
17 interests protected by the fraud statutes. It's been  
18 well accepted at common law and through this Court's  
19 incorporation of common law principles as a means of  
20 interpreting the RICO statute, that the predicate act  
21 should be viewed in terms of who is designed to be  
22 protected.

23 Here, because of the allegations of fraud  
24 against the State of New York, the State of New York is  
25 within the zone of interest that the -- of the fraud

1 provisions. Ideal is not. Ideal falls outside the  
2 zone, and under the way that some courts have viewed  
3 proximate cause analysis, that would be sufficient.

4 The second large point that I came here to  
5 argue today was that reliance was improperly analyzed  
6 by the court below. At common law, reliance is a  
7 necessary element of fraud. Ideal, for similar reasons  
8 to the zone of interest analysis, is not the party that  
9 relied on any misrepresentations by my client, National  
10 and the Anzas. And therefore, it cannot assert a fraud  
11 claim because of that absence of reliance.

12 JUSTICE SCALIA: I'm -- I'm impressed by one  
13 of the cases cited in the brief, in which someone  
14 causes a person who has a contract with a third party  
15 to believe that the third party has repudiated the  
16 contract, and thereby gets that person to give the  
17 contract to himself. Now, in that case, the person  
18 defrauded is the other party to the contract, not the  
19 -- not the third party. And yet, I suspect the third  
20 party would -- would be direct enough to be -- to be  
21 within the protected scope, don't you think?

22 MR. FREDERICK: I do, Justice Scalia, and --

23 JUSTICE SCALIA: And yet, he's not defrauded.

24 MR. FREDERICK: Well, but common law cases  
25 have carved out a very narrow exception where there is

1 a relationship between the defrauded party and the  
2 entity that is injured. Usually it's an agency  
3 relationship. Sometimes it's a trustee or fiduciary  
4 relationship, but that is a very narrow exception that  
5 would fall within your hypothetical and would fall  
6 outside this case because Ideal cannot plead or prove  
7 any reliance whatsoever on the misrepresentations --

8 JUSTICE SCALIA: All right. But it -- it at  
9 least contradicts your assertion that you have to be  
10 the defrauded party. You acknowledge that sometimes  
11 you don't have to be the defrauded party.

12 MR. FREDERICK: Our briefs make that  
13 concession clear, I think, Justice Scalia.

14 If I could reserve the balance of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
16 Frederick.

17 Mr. Roddy.

18 ORAL ARGUMENT OF KEVIN P. RODDY

19 ON BEHALF OF THE RESPONDENT

20 MR. RODDY: Mr. Chief Justice, and may it  
21 please the Court:

22 Ideal Steel asks this Court to affirm the  
23 decision of the Second Circuit, send this case back for  
24 trial in the Southern District of New York. The case  
25 is ready to be tried. We ask you to do this for four

1 reasons.

2 First, the Second Circuit's decision in this  
3 case is consistent with this Court's decisions in  
4 Sedima in 1985 and National Organization for Women in  
5 1994.

6 Second, the Second Circuit's decision is  
7 entirely consistent with this Court's decision in  
8 Holmes in 1992.

9 Third, we submit that reliance is not an  
10 element of a civil RICO claim based on predicate acts  
11 of mail and wire fraud.

12 But fourth, if reliance is an element, then  
13 we agree with the Solicitor General that reliance by a  
14 third party not only suffices under RICO, but sufficed  
15 at common law. That should be the end of the matter.  
16 The decision should be affirmed. The case should go  
17 back for trial.

18 JUSTICE GINSBURG: Are you for relaying --  
19 relating the position of the United States -- are you  
20 relying on that brief in the Bank of China case that  
21 was filed --

22 MR. RODDY: I am. Justice Ginsburg, I am. 5  
23 months ago, as you know, when --

24 JUSTICE GINSBURG: Which -- which was kind of  
25 said in passing to say that there was no -- that the --



1     that the court below was right and we shouldn't take  
2     the case.

3             MR. RODDY: Your Honor, the -- Justice  
4     Ginsburg, the Solicitor General filed its amicus brief  
5     here 5 months ago when this Court had accepted the case  
6     for review. In its brief, the Solicitor General said  
7     no fewer than seven times, not just as a passing aside,  
8     that third party reliance, what the Solicitor General  
9     called reliance by someone, not only suffices under  
10    RICO, but sufficed at common law. We agree with the  
11    Solicitor General's position. Here, we have that  
12    reliance by a third party, what the Government called  
13    someone, the State of New York.

14            JUSTICE GINSBURG: Being -- is there any  
15    other case where the defendant is charged with not  
16    paying tax either to the Federal Government or the  
17    State? Now you have it both because you --

18            MR. RODDY: Yes.

19            JUSTICE GINSBURG: -- you said they haven't  
20    paid tax for this -- their income -- Federal income tax  
21    either. This seems to be a novel claim, and I don't  
22    know of another where failure to pay tax owed to a  
23    State or the Federal Government is the basis for a RICO  
24    claim.

25            MR. RODDY: Justice Ginsburg, as you

1 correctly pointed out, Ideal's second amended  
2 complaint, which is not before this Court in this  
3 proceeding, alleged an income tax scheme. And -- and  
4 Judge Berman in the Southern District of New York  
5 permitted that amendment.

6 I am not aware of another case involving a  
7 competitor bringing a claim on these set of facts.  
8 However, as we pointed out in our brief on the merits,  
9 there is a discrete set of RICO cases involving  
10 competitors as plaintiffs who either allege  
11 misrepresentations to third parties, whether customers  
12 or government agencies, bribes, or violence and threats  
13 of violence.

14 I submit to you that this Court's decision in  
15 National Organization for Women in 1994 presents a  
16 variation on the theme. You will recall that in that  
17 case the anti-abortion protestors, the defendants,  
18 engaged in violence or threats of violence directed at  
19 customers, and the injury was to the health care  
20 clinics, the plaintiffs. And -- and I wish to say that  
21 -- that Petitioners --

22 JUSTICE SCALIA: The customers, employees,  
23 and doctors, as I recall. It was --

24 MR. RODDY: Yes.

25 JUSTICE SCALIA: -- not just customers.

1 MR. RODDY: It was.

2 Petitioners --

3 JUSTICE SCALIA: So there is that kind of  
4 connection that -- that your -- your colleague was --  
5 was referring to.

6 MR. RODDY: Yes. They try to distinguish  
7 National Organization for -- for Women in two ways,  
8 Justice Scalia. First, they say that in National  
9 Organization for Women, the potential patients, the  
10 customers, were a constituent part of the -- of the  
11 health clinic's business. That's true here also.

12 But more important, they say in their reply  
13 brief that this Court only decided that case on Article  
14 III standing. That is not correct. If you look at  
15 Respondent's brief on the merits filed in that case in  
16 September 1993, both issues were raised, Article III  
17 standing and RICO standing, meaning injury plus  
18 proximate cause.

19 JUSTICE GINSBURG: You're getting away from  
20 --

21 JUSTICE SCALIA: But here -- here, the  
22 intimidation was -- was not directed to your customers.

23 I mean, it seems to me that's a -- that's a totally  
24 different situation. Had -- had your customers been  
25 defrauded, that would be a -- your customers, but you

1     -- there -- there was nothing directed specifically at  
2     the customers of your store.

3             MR. RODDY: Certainly -- certainly, Justice  
4     Scalia, there was.

5             JUSTICE SCALIA: What was it?

6             MR. RODDY: In a --

7             JUSTICE SCALIA: I thought they were just  
8     cheating the State. What was specifically directed at  
9     the customers of your store?

10            MR. RODDY: These are inappropriate financial  
11     inducements. They are offered a lesser price. It's a  
12     -- it's a -- it's an underbidding --

13            JUSTICE SCALIA: Oh, that's -- that's good,  
14     not bad. I mean, you know.

15            JUSTICE SOUTER: Isn't -- isn't the problem  
16     with your answer to Justice Scalia and -- and a problem  
17     which -- which is bothering you with your case this?  
18     We're talking here about two different lines of  
19     causation? And each of them, to some degree,  
20     contributes to the ultimate result which you claim,  
21     which is a loss of business and -- and business harm.

22            One line of causation is -- is competitive.  
23     It's price competition. They charge less. They lure  
24     the customers away. The other line of competition is  
25     fraud on the State of New York which makes it easier

1 for them to engage in price competition.

2 So far as the fraud on the State of New York  
3 is concerned, its effect on your client's business is  
4 indirect. In other words, they can defraud New York  
5 without hurting your client. They might simply have  
6 pocketed all the money they saved, but the -- the only  
7 way that the fraud on New York hurts your client is  
8 that it puts them in a better position to engage in the  
9 second line of causation that hurts your client and  
10 that is direct price competition.

11 If you accept the fact that there are two  
12 different lines of causation here, don't we have to  
13 say, under the Holmes direct analysis, that so far as  
14 the fraud on New York, which is the RICO violation, the  
15 consequence is an indirect one, the consequence to your  
16 client, but so far as the price competition is  
17 concerned, the consequence is a direct one, but price  
18 competition isn't a RICO violation, which leaves us  
19 saying, so far as the RICO violation is concerned, it's  
20 indirect?

21 Now, if -- if I have gone astray, tell me  
22 where.

23 MR. RODDY: Justice Souter, respectfully I --  
24 I disagree that the two parts of the -- that the two  
25 parts of the sphere of the scheme can be broken apart

1     like that.  It's one scheme.  They have -- the -- the  
2     Petitioners have to defraud the State of New York.  
3     They have to not only mislead the State of New York,  
4     but fend off the State of New York, which frees up the  
5     cash which, as the Chief Justice pointed out, enables  
6     them to do two things.  First, it enables them to offer  
7     lower prices, which does competitively injure my  
8     client.  Second, as we allege in the complaint, in the  
9     amended complaint, they took all those cash proceeds  
10    and they took them to the Bronx and they opened up a  
11    competing location where they did not previously have  
12    one.

13                 JUSTICE GINSBURG:  Can we go back to the  
14    question that I was trying to ask you before with  
15    relation to the novelty of this because it involves  
16    fraud on the -- a government that's a tax assessor and  
17    collector?  It seems to me that the taxing authorities,  
18    both State and Federal, might have some genuine concern  
19    with a potential plaintiff's examining to see, gee, has  
20    my -- has my rival, my competitor cheated on his or her  
21    tax.  That -- that could be pretty disruptive of the  
22    State or the Federal Government's administering their  
23    tax systems.

24                 MR. RODDY:  Justice Ginsburg, I don't see  
25    that.  That's certainly not true in this case.  What I

1 believe is true in this case is that but for my  
2 client's proactive litigation, this never would have  
3 come to the taxing authorities' attention. The taxing  
4 authorities are free to bring their own case. In our  
5 brief on the merits, in fact, we -- we cited one case  
6 where the City of New York suing a different set of  
7 defendants over unpaid cigarette taxes.

8           The point I want to make is that let us  
9 assume that the State of New York intervened in this  
10 case, which is always a possibility -- perhaps it's a  
11 bit late now -- or brought its own case. My clients  
12 and the State of New York are chasing two different  
13 piles of money, two separate measures of damages. In  
14 our brief on the merits, we set forth a hypothetical, a  
15 \$100 cash transaction, to illustrate that. My clients  
16 cannot recover the lost taxes that were taken from the  
17 State of New York. The State of New York cannot  
18 recover the lost profits that my client suffered. So  
19 in -- in the Holmes sense, we're not dealing here with  
20 an apportionment problem because --

21           JUSTICE GINSBURG: But I wasn't concerned  
22 about that problem. I was concerned about people  
23 setting themselves up as private enforcers of tax  
24 liability as kind of a surrogate for the government out  
25 there detecting who's violated the tax laws.

1           MR. RODDY: Not as a surrogate, Justice  
2   Ginsburg. The -- the fact of the matter is that  
3   wrongdoers act in a variety of ways.

4           JUSTICE STEVENS: Of course, you are claiming  
5   a different amount of damages, entirely different.

6           MR. RODDY: Yes.

7           JUSTICE STEVENS: But I'd like to ask you  
8   supposing there were two competitors in the market  
9   instead of just the one --

10          MR. RODDY: Right.

11          JUSTICE STEVENS: -- and they did it just to  
12   get at -- at the competitor A and didn't care about B,  
13   but B suffered exactly the same harm, would B have a  
14   cause of action?

15          MR. RODDY: If B could pass through the  
16   Holmes wicket of causation, Justice Stevens --

17          JUSTICE STEVENS: Well, he has exactly the  
18   same causation as A, but he just didn't happen to be a  
19   target in the -- in the mind of the defendant. Would  
20   he --

21          MR. RODDY: The -- the answer -- the answer  
22   would be yes. Where I believe --

23          JUSTICE STEVENS: And it'd be true if there  
24   were 20 competitors too?

25          MR. RODDY: Twenty competitors becomes a bit



1 more difficult to get --

2 JUSTICE STEVENS: Why?

3 MR. RODDY: -- to get them all through the  
4 Holmes --

5 JUSTICE STEVENS: I imagine the damages would  
6 be less, but why would it be any different  
7 analytically?

8 MR. RODDY: Analytically on a motion to  
9 dismiss, if there were 20, I agree that all should be  
10 -- if all suffered the exact same competitive injury  
11 and the set of factors --

12 JUSTICE STEVENS: And then change it one  
13 other way. Say, instead of defrauding New York, they  
14 defrauded the landlord and -- and got a rent-free  
15 office space, and that cut down their costs. Would the  
16 competitors have a cause of action then?

17 MR. RODDY: Assuming that defrauding the  
18 landlord, Justice Stevens, involves predicate acts of  
19 mail and wire fraud or some other variety --

20 JUSTICE STEVENS: Yes, it did.

21 MR. RODDY: -- of -- of predicate act --

22 JUSTICE STEVENS: They're sending out thugs  
23 to beat them up or something like that.

24 MR. RODDY: Yes. Then the -- the answer  
25 would be yes.

1                   And if you look at -- if you look at the  
2 competitor cases, what I call the competitor cases,  
3 there's a very discrete body of law we're talking  
4 about. They're cited in our brief. There's fewer than  
5 a dozen cases around the country from the circuit and  
6 district courts. And what they show is that there's  
7 only three ways you -- there's only several ways you  
8 can do this. You can -- you can make a  
9 misrepresentation to a regulator or to a customer. We  
10 have those cases. You can bribe a customer or a  
11 regulator, or you can engage in violence directed at a  
12 -- at a regulator or at a customer. There's only three  
13 variations.

14                   JUSTICE ALITO: Is there -- is there any  
15 limit on the number of competitors who would have  
16 standing? You mentioned cigarette taxes. Suppose one  
17 newsstand in New York City is not collecting the  
18 cigarette tax. Does that mean that everybody else  
19 who's selling cigarettes in New York would be able to  
20 bring a claim?

21                   MR. RODDY: Justice Alito, we -- we don't  
22 have those -- those facts here.

23                   JUSTICE ALITO: Well, I know, but where would  
24 the line be drawn?

25                   MR. RODDY: I don't think it -- every --

1 every competitor in the State of New York could sue  
2 because, as a practical matter, I -- I submit to you  
3 that someone who lives in Manhattan is probably not  
4 going to go to Queens to buy their cigarettes. There  
5 are much --

6 CHIEF JUSTICE ROBERTS: But if they're tax-  
7 free they might.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: I mean, that's the  
10 whole point is that the --

11 MR. RODDY: Yes.

12 CHIEF JUSTICE ROBERTS: -- the fraud gives  
13 him a competitive advantage not just over the, you know  
14 -- his -- his brother-in-law's company that he's trying  
15 to get at, but over everybody who's in the business.

16 MR. RODDY: In that factual scenario, yes.

17 JUSTICE BREYER: I mean, if that's so, then  
18 go back for a minute, please, to Justice Souter's  
19 question. It doesn't concern violence. I'm --  
20 certainly if violence is involved or a direct action  
21 against an employee or the competitor himself, then  
22 I'll assume you'd win.

23 But the line I think that he drew very  
24 clearly and I think Justice Stevens picked up on, as I  
25 heard it, is a -- a fraud where the person defrauded is

1 not the competitor and the only effect of the fraud is  
2 to lower the cost of the person who is doing the fraud.

3 Now, if that's so, you either draw Justice  
4 Souter's line or you don't. If you do draw Justice  
5 Souter's line, then you stay out of the thicket. If  
6 you don't, you'll have all the problems that were  
7 mentioned, that there is no way to distinguish between  
8 one person, two persons, 100 people. There is no way  
9 to know whether the lower cost of the defrauding person  
10 did or did not lead to the shift of sales. There is no  
11 way to know, indeed, whether it's a rent, in which case  
12 prices didn't fall, or whether it's actually some kind  
13 of ability of the competitor -- of the defrauding  
14 person to take over the market.

15 All those things that are issue in antitrust  
16 cases and totally unsolvable are suddenly imported into  
17 RICO, where if you really want to bring a case, bring  
18 an antitrust case, and at least people know how to face  
19 it there. That's -- that's the -- that's the kind of  
20 claim -- that's the kind of problem that I think you're  
21 facing, and I'd like you to have the chance to respond  
22 to it.

23 MR. RODDY: Yes. Thank you, Justice Breyer.

24 The purpose of the scheme, the purpose of  
25 defrauding the State of New York was not just to fend

1 off the State of New York, but to free up the cash to  
2 be able to offer a price discount. As -- as the Second  
3 Circuit found, relying on the Commercial Cleaning case,  
4 which we think is very much on point, that is the  
5 reason why they did it. You can't separate them apart  
6 like that.

7 JUSTICE SCALIA: Mr. Roddy, I thought that  
8 the way you got out of this problem was what your  
9 opponent has called careful pleading. I thought that  
10 -- that what you were saying was that your client was  
11 targeted, that other competitors were not targeted,  
12 that this is something of a family -- both of these  
13 companies are owned by the same family and there's some  
14 bad blood. Is -- is that part of the background of  
15 this?

16 MR. RODDY: They say that's part of the  
17 background, Justice Scalia.

18 JUSTICE SCALIA: Okay.

19 MR. RODDY: It's not our position.

20 JUSTICE SCALIA: I thought it was part of  
21 your complaint that -- that the business here was going  
22 after your client in particular.

23 MR. RODDY: Yes, that is correct.

24 JUSTICE SCALIA: And other competitors might  
25 have been hurt, but -- but the whole purpose of it was

1 to get your client. That is to say, your client was in  
2 some special way a target. Wasn't that part of your  
3 complaint?

4 MR. RODDY: That is -- that is part of --

5 JUSTICE SCALIA: Are you abandoning it?

6 MR. RODDY: No.

7 JUSTICE SCALIA: I mean, if -- if you're  
8 abandoning it --

9 MR. RODDY: No.

10 JUSTICE SCALIA: -- then you're -- then  
11 you're in the soup --

12 (Laughter.)

13 JUSTICE SCALIA: -- with -- with all --

14 MR. RODDY: Justice Scalia --

15 JUSTICE SCALIA: -- you know, all the  
16 competitors are going to be covered. But if you're not  
17 abandoning it, then -- then -- you know, then maybe we  
18 can talk further.

19 MR. RODDY: The complaint --

20 (Laughter.)

21 MR. RODDY: Justice Scalia, the amended  
22 complaint alleges that my client, Ideal Steel, was the  
23 target, was the intended victim of this scheme.

24 JUSTICE BREYER: So what does that mean?

25 Then that means you have like the family vendetta

1 exception to the RICO --

2 (Laughter.)

3 MR. RODDY: Your Honor, Justice Breyer, they  
4 raised the family feud. We explained it in a footnote.  
5 That's not what this case is about.

6 JUSTICE BREYER: But, I mean, you see the  
7 point. The point is I don't see how it's administrable  
8 in a law, particularly in an economic context --

9 JUSTICE SCALIA: Right.

10 JUSTICE BREYER: -- where people who are  
11 interested in making money are prepared to say, look,  
12 we want to make the money. We'd like to get rid all  
13 our competitors, and then we start distinguishing  
14 between they'd like to get rid of all of them. No,  
15 only five. No, one. And does that make a difference  
16 in whether you can bring a case or not? I frankly  
17 don't see --

18 JUSTICE SCALIA: Or, in -- in other words,  
19 your -- your targeted argument doesn't really make  
20 sense unless there is a family vendetta. I mean, I --  
21 I want to make money. I don't care --

22 MR. RODDY: Justice --

23 JUSTICE SCALIA: -- which of my competitors  
24 I'm -- I'm hurting unless I have some special reason to  
25 get one -- to get one -- one. Now, I thought that was

1 your case.

2 MR. RODDY: Justice Scalia --

3 JUSTICE SCALIA: But maybe it's not.

4 MR. RODDY: -- what is alleged in the amended  
5 complaint is that in the Burroughs of Queens and the  
6 Bronx, these are the only two competitors. Only two.  
7 They are head-to-head competitors. We allege in the --

8 JUSTICE SCALIA: Okay. That is the only  
9 basis on which they're targeted. So if there had been  
10 18 competitors in -- in the Bronx and Queens, then  
11 there would have been 18 targets. Right?

12 MR. RODDY: Theoretically, yes.

13 JUSTICE SCALIA: Okay. Then we're back in  
14 the soup.

15 MR. RODDY: Theoretically.

16 (Laughter.)

17 MR. RODDY: Well, Justice Posner, in a case  
18 we cited in the footnote, talks about the concept of  
19 the intended victim where you blow up -- where the  
20 defendant blows up the airplane to kill A and he also  
21 kills B who's sitting next to him on the plane. That's  
22 the EDC case. We allege that the plane, so to speak,  
23 was blown up here specifically to get my client.  
24 That's the reason why they used the proceeds to open  
25 the competing location in the Bronx.



1 JUSTICE GINSBURG: How about your client's  
2 supplier? If your client -- if Ideal is selling less,  
3 then it's going to buy less from its supplier. So  
4 would the supplier also have a RICO claim?

5 MR. RODDY: Justice Ginsburg, I believe that  
6 when we begin talking about suppliers and creditors and  
7 bankers and employees, creditors, so to speak, they're  
8 one step removed. They are, respectfully, I believe in  
9 the position of SIPC in the Holmes case. We -- we  
10 don't have to go to that level in this case.  
11 Creditors, suppliers -- let's suppose that Ideal  
12 becomes insolvent as a result of this scheme. The  
13 creditors may step forward and believe that they have a  
14 RICO claim against the Anzas and National. I believe  
15 that they have to pass through the Holmes causation  
16 test, and it would be difficult based on the SIPC  
17 analysis.

18 CHIEF JUSTICE ROBERTS: They're -- they're  
19 one more step removed. I don't know if they're one  
20 step removed. I mean, if there were no allegations of  
21 motive or family feud or targeting and all we know is  
22 that there are two competitors there and the one  
23 underpaid its taxes, is your case still viable?

24 MR. RODDY: Yes. Yes, it is.

25 CHIEF JUSTICE ROBERTS: So it doesn't depend

1 on motive or targeting or anything at all. It just  
2 depends on the fortuity of there being two competitors  
3 in a particular area.

4 MR. RODDY: The lower Federal courts after  
5 Holmes have used the target concept and the intent  
6 concept to -- to inform, for lack of a better word, the  
7 Holmes analysis. They -- and the Second Circuit in  
8 this case used that as a shorthand to inform one of the  
9 three policy factors that this Court set forth in  
10 Holmes, which I believe was the third factor, which is  
11 the proper plaintiff. And the lower Federal courts, in  
12 these discrete body of cases involving competitors,  
13 like the Second Circuit in Commercial Cleaning, have  
14 looked to see whether the plaintiff is an intended  
15 victim of the scheme, a target, for lack of a better  
16 word.

17 This is -- let me -- let me speak about the  
18 question of reliance, if I may. We don't see how  
19 reliance is an element of a civil RICO claim. It has  
20 no basis in law. We can't just pull it out of the air.

21 It's not in 1964(c). It's not in 1962, which is the  
22 substantive violation. It's not in 1961, which defines  
23 racketeering activity and pattern. It's not in the  
24 mail and wire fraud statutes.

25 CHIEF JUSTICE ROBERTS: Well, you've cited

1 the Solicitor General's brief --

2 MR. RODDY: Yes.

3 CHIEF JUSTICE ROBERTS: -- earlier. The  
4 Solicitor General says it's inherent in the concept of  
5 proximate cause. In the absence of reliance, you don't  
6 have proximate cause.

7 MR. RODDY: That -- yes, the Solicitor  
8 General said that. We happen to disagree with that  
9 part of it because they don't tell us where the  
10 reliance requirement comes from either.

11 JUSTICE BREYER: Where it would come from  
12 would be it would be an alternative way of getting to,  
13 say, Justice Souter's test, and it couldn't -- I agree  
14 with you -- depend upon whether these are within the  
15 realm of people who are relying. But suppose you had a  
16 fraud where nobody had relied. You see, it was really  
17 a failed fraud, and you can get that under Federal law.

18 MR. RODDY: Correct.

19 JUSTICE BREYER: Or suppose you have a fraud  
20 where the only party that had relied was the  
21 government, in which case you don't need them for civil  
22 RICO. And the strong argument, I think, would be where  
23 that's the case, cut it off because of all the indirect  
24 problems that Holmes goes into. I'm not -- I'm not  
25 accepting it. I'm just trying --

1 MR. RODDY: Right.

2 JUSTICE BREYER: -- to put it in what I think  
3 of as a strong form.

4 MR. RODDY: I understand.

5 Here, we -- we clearly allege and the Second  
6 Circuit found sufficient that there was third party  
7 reliance, mainly reliance by the New York Department of  
8 Taxation. That sufficed at common law. We have New  
9 York cases going back to the time of the Civil War, the  
10 treatise writers, the Restatement, the case from Maine  
11 involving -- that Justice Scalia mentioned involving  
12 the ship captain. This has been well settled for --  
13 for many years.

14 JUSTICE GINSBURG: What -- what is New York  
15 relying? I mean, they -- somebody -- does -- does the  
16 State or the Federal taxpayer rely on everybody who  
17 files a return that they -- they filed it honestly? Is  
18 that -- that -- I don't understand the sense in which a  
19 taxing authority relies on the return that's been  
20 filed.

21 MR. RODDY: Justice Ginsburg, I believe the  
22 law is it's either actual reliance or presumptive  
23 reliance. The taxing authorities actually rely or they  
24 are presumed to rely on the validity of the -- of the  
25 tax returns. The fact of the matter is that's what's

1     alleged in our amended complaint and that is what the  
2     facts are in this case. It is -- and -- and if you  
3     look at the Solicitor General's brief in Bank of China,  
4     the Government cited this case with approval as an  
5     example of an appropriate use of third party reliance.

6             And -- and I -- I submit to you that, while I  
7     disagree with the Solicitor General that reliance is an  
8     element whenever mail or wire -- I mean, for example,  
9     if the predicate acts here involved extortion, a Hobbs  
10    Act violation, violence in some form, we wouldn't be  
11    here talking about reliance. If it involved the  
12    payment of a bribe, we wouldn't be here talking about  
13    reliance. What is it about mail fraud and wire fraud  
14    that springs from the ground this concept of reliance?

15            My point is I don't believe it has any basis  
16    in law, and I think this Court should say so. That's  
17    -- that's why we're here on the question presented. I  
18    think that this notion should be swept away because it  
19    has no basis in law. It's not in the statute. And  
20    this Court has found on several occasions that where  
21    someone seeks to raise a requirement, the organized  
22    crime requirement, the prior conviction requirement,  
23    this Court has said it's not in the statute. We can't  
24    engraft it onto the statute.

25            JUSTICE SCALIA: Gee, I -- I find that

1 extraordinary that -- I claim to have been defrauded by  
2 somebody. He makes a representation to me about the  
3 value of stock. I don't believe it. I really think  
4 it's ridiculous. Of course, the stock is not worth  
5 that. Okay? I buy it anyway, and I can sue even  
6 though I didn't believe him?

7 MR. RODDY: Under securities fraud, I believe  
8 that's different because in this case it's not a --  
9 when you're dealing with competitors, you're not  
10 dealing with face-to-face misrepresentations.

11 JUSTICE SCALIA: Well, I -- I'm just talking  
12 about what the understood requirements of a fraud  
13 action were at common law. Mail fraud, any kind of  
14 fraud. Surely there has to be some reliance upon the  
15 fraud.

16 MR. RODDY: At common law, there was a  
17 reliance requirement. When the mail fraud statute was  
18 written in 1872, it's an amalgamation of various common  
19 law crimes, some of which required reliance, some of  
20 which clearly did not. When we bring the mail fraud  
21 statute into RICO, it does not bring with it the  
22 baggage of a reliance requirement. And -- and  
23 securities fraud is gone as a predicate act for RICO.  
24 It's been gone for 11 years. Where does the reliance  
25 -- our point is the reliance requirement doesn't come

1 from anywhere. It -- it's simply being engrafted onto  
2 the statute, and it doesn't belong there. That's --  
3 that's our position. It must have some basis in law.  
4 It doesn't.

5 JUSTICE SCALIA: Why -- why do you say mail  
6 fraud does -- does not have with it the normal common  
7 law fraud requirement of reliance?

8 MR. RODDY: The case -- the cases are  
9 uniform, including decisions from this Court, that a  
10 mail fraud case does not require the element of  
11 reliance. It doesn't exist in the statute. The --  
12 it's the same mail fraud statute that's a predicate act  
13 for -- for RICO under section 1961.

14 JUSTICE BREYER: The place where it comes  
15 from is the idea that if, in fact, you have these  
16 monetary crimes, white collar kinds of crimes, money is  
17 at issue, and no one is hurt. You can proceed against  
18 a person under Federal law --

19 MR. RODDY: Yes.

20 JUSTICE BREYER: -- where no one is hurt.  
21 You catch it in the bud, for example, where no one is  
22 hurt. You don't want the possible class of plaintiffs  
23 to spread out into every competitor, into competitors'  
24 suppliers. It's a way of cutting off the potential  
25 class to people who are closer to any possible injury

1     where, for example, there really wasn't any injury at  
2     all.  So, I mean, that's the kind of argument being  
3     made for it, not that you find the word reliance  
4     somewhere in the statute.

5             MR. RODDY:  But, Justice Breyer, there has to  
6     be a place in the law for the three-party scheme.

7             JUSTICE BREYER:  Well, I just tried to say  
8     where -- where it was.  It's a -- it's a way of -- with  
9     proximate cause, and that's how I think you have to  
10    deal with it.  You have a case where there was  
11    reliance.

12            MR. RODDY:  Yes.

13            JUSTICE BREYER:  The government.

14            MR. RODDY:  That's right.

15            JUSTICE BREYER:  So what you'd have to say is  
16    why that's good enough.

17            MR. RODDY:  I think it is good enough because  
18    it is -- it is a sufficient way to show causation.  It  
19    is not necessary.  It's one way to show causation.  I  
20    agree with you.  Third-party reliance is one way.  That  
21    happens to be the way we will do it here at trial, if  
22    given the opportunity.

23            Unless there are no questions, thank you.

24            CHIEF JUSTICE ROBERTS:  Thank you, counsel.

25            Mr. Frederick, you have 4 minutes remaining.



1 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

2 ON BEHALF OF THE PETITIONERS

3 MR. FREDERICK: I'd like to return to Justice  
4 Souter's hypothetical because I think that the point of  
5 price competition fits squarely within the Holmes case.

6 If you were to take the fact of bankruptcy, the mere  
7 going bankrupt of the brokers in that case, the -- the  
8 effect of that on the customers who are attempting to  
9 bootstrap in the securities fraud fits perfectly here  
10 because the fraud here against the State of New York  
11 enables National allegedly to engage in price  
12 competition.

13 But as you pointed out in your hypothetical,  
14 price competition is not a RICO violation. And using  
15 1964(c)'s by reason of, the injury has to be by the  
16 RICO violation. Simply lowering prices or making their  
17 goods more economically affordable does not cause -- is  
18 not a RICO violation. The -- the RICO violation, if  
19 there is one here, is in the fraudulent underpayment of  
20 taxes to the State of New York.

21 The SG's brief in the Bank of China case  
22 does, we acknowledge, make the suggestion about  
23 possible third party reliance, but it does not cite any  
24 decision of this Court. It cites two court of appeals  
25 cases, one of which is the decision below, which we

1     argue was wrongly decided.

2             The point that the SG, I think, was making  
3     was acknowledging that there are these circumstances,  
4     and I would advert to my earlier colloquy with Justice  
5     Scalia in which there are limited circumstances in  
6     which a third party can invoke the reliance. But that  
7     is ordinarily done through a relationship among the  
8     parties.

9             The breadth of the Respondent's position here  
10    should not go uncommented upon. RICO is not an unfair  
11    competition statute. Yet, the answers to the  
12    hypotheticals about how many competitors would be able  
13    to bring and whether or not they were directly targeted  
14    and the cigarette hypothetical all point to the fact  
15    that, at bottom, their theory is that any action on the  
16    part of a defendant that leads to an indirect ability  
17    to engage in price competition would give rise to a  
18    RICO claim. And as we point out in our reply brief,  
19    there are literally millions -- just on taxes alone,  
20    millions -- of submissions by corporations that could  
21    be used by competitors if the direct targeting test is  
22    accepted by this Court as the predicate for a RICO  
23    claim. We submit that the floodgates should not be  
24    opened in that way, particularly given the fact that  
25    the difficulties of proving harm and damages are

1 especially present here and that antitrust cases should  
2 not be shoehorned under the RICO statute. That is not  
3 what Congress intended.

4 Finally, with respect to reliance, this Court  
5 in Beck v. Prupis held that civil conspiracy principles  
6 should be imported into the understanding of what a  
7 civil action under RICO should be permitted. And the  
8 common law is well settled that reliance is an element  
9 that is appropriate for it to be imported into the mail  
10 fraud predicate act here because the damages have to be  
11 shown by some type of relationship between the  
12 defrauded party and the defendant.

13 If the Court has no further questions.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
15 Frederick.

16 The case is submitted.

17 (Whereupon, at 11:04 a.m., the case in the  
18 above-entitled matter was submitted.)  
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