No. 98-1480

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT A. BECK, II,
Petitioner

v.

RONALD M. PRUPIS, *ET AL*,
Respondent

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS LEONARD BELLEZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., AND HARRY OLSTEIN

Filed September 17, 1999

QUESTION PRESENTED

Whether Congress intended to federalize traditional state law breach of contract and wrongful termination claims by allowing a plaintiff to maintain a civil Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy claim for treble damages despite the lack of any evidence that plaintiff's alleged harm was proximately caused by a pattern of racketeering.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

INTEREST OF *AMICI CURIAE**

The American Tort Reform Association ("ATRA"), founded in 1986 and based in Washington, D.C., is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability

* Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no persons or entities, other than the *amici*, have made a monetary contribution to preparation or submission of this brief.

in civil litigation. For over a decade, ATRA has filed principal *amicus curiae* briefs in cases before this Court that have addressed important liability issues, including the Court's recent "expert opinion" decisions in *Kumho Tire Co. v. Carmichael,* 119 S. Ct. 1167 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Court's rejection of medical monitoring claims in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the landmark punitive damages decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and the Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), regarding federal preemption of state tort law.

The Health Insurance Association of America ("HIAA"), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is a leading advocate for the private, market-based health insurance system. Its more than 260 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 123 million people – one out of two non-elderly Americans. HIAA develops and advocates federal and state policies which build upon our health care system's quality, affordability, accessibility, and responsiveness.

Amici submit this brief to indicate their strong support for the holdings of the majority of the federal courts of appeals, including the Eleventh Circuit Court of Appeals in the instant case, which have wisely held that a plaintiff alleging a civil Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy claim under must show that his or her injury proximately resulted from a pattern of racketeering. *Amici* are concerned that the minority position, which Petitioner asks this Court to adopt, would create a new and unfair "federal tort" with potential treble damages liability for garden-variety breach of contract and wrongful termination claims that should be a matter of state law and have been since the time of the Founding Fathers. Finally, as a matter of public policy, this approach flies in the face of principles of federalism and respect for States' rights.

Petitioner's construction goes far beyond what Congress has authorized under RICO and is inconsistent with the Court's prior rulings. This Court does not need to adopt Petitioner's construction of RICO either to deter racketeering activity or to compensate persons for harms allegedly incurred as a result. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

For these reasons, *amici* urge this Court to affirm the decision of the Eleventh Circuit Court of Appeals.

STATEMENT OF THE CASE

Amici adopt Respondents' summary of the dispute in question.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Permitting civil RICO conspiracy claims despite any evidence that a plaintiff has been harmed as the proximate result of a pattern of racketeering would create a new federal cause of action: (1) inconsistent with Congressional intent; (2) inconsistent with the Court's prior rulings; (3) that violates principles of federalism and States' rights; and (4) that would be both unsound and unnecessary. This Court should not rewrite the RICO statute to provide remedies that are not grounded in the statute itself; it should be left to Congress, if it desires to do so, to change the law.

ARGUMENT

I. BOTH THE INTENT AND PLAIN MEANING OF RICO ARE BEST SERVED BY AFFIRMING THE COURT OF APPEALS' DECISION THAT PETITIONER FAILED TO ESTABLISH A CIVIL RICO CONSPIRACY CLAIM.

Congress intended for plaintiffs alleging civil Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy claims to prove that their injuries were proximately caused by a pattern of racketeering. *See* 18 U.S.C. 1964(c) (permitting recovery for injury "by reason of a violation of section

1962"). This conclusion is supported by a majority of the federal courts of appeal that have ruled on the issue. *See Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.), *cert. denied*, 508 U.S. 957 (1993); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Reddy v. Litton Industries, Inc.*, 912 F.2d 291, 294-95 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990); *Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561-62 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). As set out below, there is sound support for this conclusion.

A. A Contrary Reading Would Be Inconsistent With The Court's Prior Rulings.

Section 1964(c) of RICO creates a federal private right of action and the potential recovery of treble damages for anyone injured "by reason of a violation of section 1962." Section 1962 consists of three substantive subsections, 18 U.S.C. § 1962(a)-(c),[1] and a subsection concerning conspiracy to violate any of the three substantive provisions, 18 U.S.C. § 1962(d).

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[1] Section 1962(a) prohibits the investment of proceeds derived from a pattern of racketeering activity in any enterprise involving interstate commerce. Section 1962(b) prohibits acquisition through a pattern of racketeering activity of any interest in an enterprise involving interstate commerce. Section 1962(c) prohibits participation in the conduct of an enterprise involving interstate commerce through a pattern of racketeering activity.

To prove a RICO violation under any of the three substantive provisions, a plaintiff must show that he or she suffered injury as a result of a "pattern of racketeering activity." 18 U.S.C. § 1961(5) (defining "pattern" as at least two acts of racketeering activity within ten years of one another). To prove a violation of the conspiracy provision requires only proof of an agreement to violate a substantive section of 1962; there is no separate overt act requirement. *See Salinas v. United States*, 522 U.S. 52 (1997).

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the Court established a limitation upon civil RICO recoveries under 18 U.S.C. § 1964(c). The case concerned the claim of a federally created corporation, the Securities Investor Protection Corp. ("SIPC"), which was acting to protect the rights of customers of a brokerage firm who suffered indirect harm as a result of a stock-manipulation scheme directed against the firm.

The Court in *Holmes* said that, while a literal reading of the statute would permit a recovery based on mere "but for" factual causation, that construction was "hardly compelled." *Id.* at 266. The Court found that it was very unlikely that this was the result intended by Congress. *Id.* Consequently, the Court held that the phrase "by reason of" in Section 1964(c) of RICO meant not merely factual causation, but also imposed the additional requirement of proximate cause stemming from a violation of

section 1962. *Id.* at 268.[2] The Court then ruled that the losses for which the SIPC sought recovery were too remote. *See id.* at 270. The proximate cause requirement is a significant barrier that prevents a deluge of claims by parties potentially indirectly injured in a wide variety of circumstances (*e.g.*, stockholders, policyholders, union members, customers, and employees).

B. Requiring Injury Proximately Resulting From A "Pattern of Racketeering" Is Proper In Civil RICO Cases.

The effect of the *Salinas* decision on cases such as Petitioner's case is that a mere agreement to conspire to violate one of the substantive provisions of 18 U.S.C. § 1962 constitutes a RICO violation. A different agreement, such as an agreement to discharge an employee, is not in itself a conspiracy to violate one of the three substantive provisions and, therefore, is not a RICO violation.

The Court's holding in *Salinas* impacts criminal and civil cases differently. In criminal law cases, where the purpose of the conspiracy charge is to punish the act of agreement itself, the prosecutor does not need to prove that the agreement to engage in criminal activity resulted in an injury-causing

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2 The Court was guided by the fact that the federal antitrust statutes which served as a model for RICO had been read to incorporate common law principles of causation. *See Associated Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

event. *See* Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 6.4(d) (2d ed. 1986).

For example, if a group of individuals takes steps to commit a bank robbery that is foiled by police before the robbery is committed, the would-be bank robbers are subject to prosecution for conspiracy to commit bank robbery. The agreement is punishable as a crime by itself, because of "the special danger [to society] incident to group activity." *Id.* at § 6.4(c).

In a civil context, however, as *Holmes* makes clear, a mere agreement "in the air" to conspire does not proximately cause any direct injury. Thus, in the example, while the would-be bank robbers could be subject to criminal prosecution for conspiring to rob the bank, they could not be subject to a civil conspiracy claim by the bank, because it never suffered a direct harm. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (recognizing the break in the chain of causation flowing from a mere agreement in the context of RICO).

This distinction reflects a fundamental difference between traditional tort law and criminal law. Tort law requires that the plaintiff suffered a harm proximately caused by a defendant's conduct; criminal law requires a wrongful act that has been deemed by a legislature to be against public policy. *See generally* W. Page Keeton *et al., Prosser and Keeton on the Law Of Torts* § 46 (5th ed. 1984); Restatement (Second) of Torts § 491.

Consequently, plaintiffs such as Petitioner cannot establish proximate cause as required by *Holmes*,

because their injuries are too remote. The civil RICO conspiracy claim still serves a purpose, however, because claimants that can prove direct injury through one of RICO's substantive provisions may hold any one of the alleged conspirators jointly liable for the entire harm.

C. Petitioner Failed To Prove Injury Proximately Resulting From A Pattern Of Racketeering.

Petitioner has resorted to trying to prove a violation of RICO's conspiracy provision because he has failed in his effort to prove a violation of one of RICO's three substantive provisions. *See Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 2046 (1999). He is left arguing conspiracy "in the air." His claim should be barred based on remoteness. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). *Cf. Associated Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

II. FINDING THAT RICO COVERS PETITIONER'S CLAIM WOULD CREATE A NEW FEDERAL TORT FOR EMPLOYMENT-BASED DISPUTES THAT ARE GOVERNED BY STATE LAW AS WELL AS INTRODUCE A MAJOR NEW FACTOR INTO EMPLOYMENT AND LABOR RELATIONS.

A. Congress Did Not Intend To Federalize Well-Established State Law Remedies.

Petitioner's construction of the civil RICO conspiracy provision would create a new federal tort

with potential treble damages liability for many ordinary state breach of contract, wrongful termination, and fraud claims.

It also would allow plaintiffs to circumvent the requirements of the three substantive subsections of RICO, *see* 18 U.S.C. § 1962(a)-(c), simply by alleging a conspiracy. Congress could not have intended to create such a gaping loophole. While Congress may have wanted the RICO statute to be liberally construed to effectuate its remedial purposes – *i.e.*, to address the influences of organized crime and acts of racketeering – this Court itself has recognized the key practical difference between liberally construing the RICO statute and giving it a content that was never intended by Congress. *See Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258 (1992).

If Congress had intended to enact a statutory scheme that would, in effect, largely displace an area of law that has been left to the States, one would find evidence of that intent. *Cf. Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 333 (1994) ("Principles of federalism compel this view, for a statute is interpreted to pre-empt traditional state powers only if that result is the clear and manifest purpose of Congress."). There is no such meaningful evidence in the statute or RICO's legislative history.

This is not surprising. As a general matter, it has been ATRA's experience, for more than two decades of direct work on federal liability reform initiatives that Congress is very hesitant to "federalize" state tort law unless there is a

compelling justification to do so. That justification does not exist in the present case.

B. Petitioner's Construction Is Unnecessary.

Permitting recovery through the civil RICO conspiracy provision for claims such as Petitioner's is unnecessary. As the Supreme Court noted in *Holmes*, recoveries by directly injured plaintiffs provide adequate deterrence against harmful conduct. *See Holmes*, 503 U.S. at 269-70. There is also the possibility of criminal liability, if the requisite elements are met.

The circuit courts have been a good laboratory in this regard. Racketeering activity has not notably increased in the circuits that are in accord with the Eleventh Circuit's decision below.

Furthermore, with respect to persons such as Petitioner, who allege indirect harm as a result of a conspiracy resulting in direct harm to others, a federal cause of action is not needed. State statutory and common law tort and other claims are generally available to such plaintiffs and have been used both prior to and after RICO's enactment.

C. An Expansive Reading of RICO Will Only Aggravate RICO's Deleterious Impact On The Legislatively-Established Balance Governing Labor And Employment Issues.

With its expansive growth and encroachment upon traditional areas of labor and employment relations, the developing RICO jurisprudence poses a distinct threat to the delicate balance of factors that state legislatures and Congress have established. Commentators have noted that as a consequence of broader-than-broad interpretations by the courts, "RICO is upsetting the rules of the game in the areas of labor and employment law." Thomas F. Harrison, *Look Who's Using RICO*, 75 A.B.A. J. 56, 56 (Feb. 1989).

Petitioner's claims are representative of a particular class of these cases. Indeed, the area of employee discharges has been identified as the one most affected by the trend of RICO jurisprudence. *See* Laura Ginger, *Employers' RICO Liability for the Wrongful Discharge of Their Employees*, 68 Neb. L. Rev. 673, 673 (1989). The possibility of treble damages provides a strong incentive for discharged employees to convert simple employment disputes into allegations that aggressive business practices constitute racketeering activity for RICO purposes, significantly raising the nuisance value of such suits. The terminated worker's employer is then faced with the decision to defend a much more expensive suit with the potentially significant reputation-damaging publicity that accompanies racketeering accusations, or to accede to an aggrieved former employee's demand for settlement.

As time has passed, sweeping interpretations o RICO have even become an unwelcome factor in th more structured area of labor-management relations *See* Raymond P. Green, *The Application of RICO t Labor-Management and Employment Disputes*, 7 St Thom. L. Rev. 309, 309 (1995) (noting that RIC "has disrupted the labor-management relationship and can now be used "to upset the tenuous balance o power that is the hallmark of labor-managemen relations").

For example, in the area of labor-managemen relations, Congress has already specifically designe a framework to address such issues in the Nationa Labor Relations Act, 29 U.S.C. §§ 141 *et seq.*, an related statutes. Through the expansive growth o RICO, plaintiffs from both sides of the labor management equation are now attempting to brin issues related to striking and picketing or plan closures and corporate reorganizations under RICO' hammer as opposed to resorting to the statutor devices already in place to address these matters.

Novel or strained interpretations of RICO thu promote the abuse of RICO as a bargaining tool an pose the risk of causing significant an unpredictable shifts in the carefully establishe balance of labor and employment interests unde existing legislative schemes. The presence of thes additional consequences flowing from an expansiv reading of RICO in the context of this case counsel against resorting to such a reading unnecessarily.

III. THE COURT SHOULD DEFER TO CONGRESS AS THE APPROPRIATE BRANCH TO CONSIDER ANY EXPANSION OF RICO'S REACH.

Petitioner's desire to obtain a new federal tort remedy that is not grounded in the RICO statute should be addressed by Congress, not judicially created by courts. This is particularly the case where, as here, the cause of action is not a development of the common law but is statutorily-based. *See generally* Roger S. Fine, *A Personal Perspective from the "Manufacturer,"* 55 Brook. L. Rev. 899, 903 (1989) ("[L]et us go back to the days when there was a real difference between the judicial and legislative branches. When a court is faced with a problem that is a social one rather than a legal one, we defer to the legislature, which has far more flexibility and power to mold solutions that match our problems").

As this Court has stated, when "[m]any groups of persons with varying interests are vitally concerned . . . . We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups." *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1951). *See also Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1138 (5th Cir. 1995) ("[T]he Congress is in a better position than a court to evaluate various policy objectives. We are persuaded that deferring to congressional action here is the wiser course.").

CONCLUSION

For these reasons, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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