No. 21-1608

IN THE

Supreme Court of the United States

MCKINSEY & CO., INC., *et al.*,

Petitioners,

v.

JAY ALIX,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit err in unanimously concluding that Jay Alix's Amended Complaint plausibly alleged that AlixPartners LLP had been directly harmed by McKinsey's bankruptcy fraud and other predicate acts and therefore stated a claim for relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*.?

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Jay Alix states as follows:

Respondent Jay Alix, an individual, is an assignee of AlixPartners LLP's claims against Petitioners McKinsey & Co., Inc.; McKinsey Holdings, Inc.; McKinsey & Company Inc. United States; McKinsey Recovery & Transformation Services U.S., LLC; Dominic Barton; Kevin Carmody; Jon Garcia; Seth Goldstrom; Alison Proshan; Robert Sternfels; and Jared D. Yerian.[1]

AlixPartners LLP is a limited liability partnership that has no parent company. No publicly owned company holds any equity in AlixPartners LLP.

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[1] Alix is also an assignee of AlixPartners LLP's claims against additional defendants named in a Second Amended Complaint that was filed in the district court following the Second Circuit's decision below: Mark Hojnacki and Virginia Molino.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES i

INTRODUCTION 1

STATEMENT OF THE CASE 5

A. The Parties and the High-End Bankruptcy Market 5

B. McKinsey's Pattern of Racketeering Activity 7

C. Alix Commences This Lawsuit 8

D. The District Court Dismisses Alix's RICO Claims for Failure to Allege Proximate Causation..10

E. The Second Circuit Reverses, Concluding That Alix Plausibly Alleges Proximate Causation...11

F. Proceedings on Remand to the District Court 13

REASONS FOR DENYING THE PETITION 15

I. The Second Circuit Articulated And Applied The Correct Standard For RICO Proximate Cause 15

A. The Second Circuit Required Allegations of Direct Injury 15

B. The Second Circuit's Observations Regarding Supervisory Authority Support the Directness of Alix's Alleged Injury.....18

II. The Second Circuit's Decision Is Fully Consistent With This Court's Precedents 20

A. Alix Alleges Direct Injury Because AlixPartners Was a Member of the Only Class of Injured Victims............................21

B. Petitioners Bear the Burden of Proving Intervening Causes, Which Are Irrelevant to Proximate Cause 25

III. There Is No Circuit Split...........................28

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Anza v. Ideal Steel Supply Corp.,
547 U.S. 451 (2006) ..... *passim*

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 16

Astech-Marmon, Inc. v. Lenoci,
349 F. Supp. 2d 265 (D. Conn. 2004) 25

BCS Servs., Inc. v. Heartwood 88, LLC,
637 F.3d 750 (7th Cir. 2011) ..... *passim*

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 16

Bridge v. Phoenix Bond & Indem. Co.,
553 U.S. 639 (2008) ..... *passim*

Bulletin Displays, LLC v. Regency Outdoor Advert., Inc.,
518 F. Supp. 2d 1182 (C.D. Cal. 2007) 25

Empire Merchs., LLC v. Reliable Churchill LLLP,
902 F.3d 132 (2d Cir. 2018) ..... *passim*

Green Leaf Nursery v. E.I. DuPont De Nemours and Co.,
341 F.3d 1292 (11th Cir. 2003) 33, 34

Hemi Grp., LLC v. City of New York,
559 U.S. 1 (2010) 21, 24

Holmes v. Sec. Inv. Prot. Corp.,
503 U.S. 258 (1992) .... *passim*

James Cape & Sons Co. v. PCC Constr. Co.,
453 F.3d 396 (7th Cir. 2006) 32

Lerner v. Fleet Bank, N.A.,
318 F.3d 113 (2d Cir. 2003) 4, 29

Molina-Aranda v. Black Magic Enters.,
983 F.3d 779 (5th Cir. 2020) 30, 31

Phoenix Bond & Indem. Co. v. Bridge,
477 F.3d 928 (7th Cir. 2007) 4, 23, 24

Phoenix Bond & Indem. Co. v. Bridge,
No. 05 C 4095, 2010 WL 3526469
(N.D. Ill. Sept. 1, 2010) 25, 26

Sidney Hillman Health Ctr. v. Abbott Labs.,
873 F.3d 574 (7th Cir. 2017) 31, 32

Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.,
884 F.3d 489 (4th Cir. 2018) 30

Sterling Suffolk Racecourse, LLC v. Wynn Resorts, Ltd.,
990 F.3d 31 (1st Cir. 2021) 29

Sybersound Records, Inc. v. UAV Corp.,
517 F.3d 1137 (9th Cir. 2008) 32, 33

UFCW Loc. 1776 v. Eli Lilly & Co.,
620 F.3d 121 (2d Cir. 2010) 16

United States v. Tsarnaev,
142 S. Ct. 1024 (2022)................................. *passim*

Willie McCormick & Assocs., Inc. v. Lakeshore Eng'g Servs., Inc.,
No. 12-15460, 2015 WL 5093785
(E.D. Mich. Aug. 28, 2015).................................. 25

Statutes

11 U.S.C. § 327(a)....................................... 7, 9, 13, 15

18 U.S.C. § 152(6).. 8

18 U.S.C. § 1962(c) 7

18 U.S.C. § 1962(d).. 7

Other Authorities

Fed. R. Bankr. P. 2014(a)............................. 7, 8, 9, 15

Fed. R. Civ. P. 12(b)(6) 15, 22, 25, 28

Sup. Ct. R. 10... 4

INTRODUCTION

Petitioners solicit this Court's review of the decision below with the false specter of a rogue court. According to Petitioners, the Second Circuit has arrogated to itself the authority to "depart from this Court's controlling decisions and alter the substantive requirements of federal law," thereby inviting "disregard of countless Acts of Congress" based on a court's supervisory powers. The Second Circuit did none of these things.

In a well-reasoned, 31-page opinion by a panel of three of the most experienced and esteemed jurists in the federal judiciary—Judges Jon O. Newman, José A. Cabranes, and Barrington D. Parker—a unanimous Second Circuit carefully reviewed this Court's controlling case law on RICO proximate causation and concluded that "the amended complaint plausibly alleges proximate cause with respect to all 13 bankruptcies in which McKinsey filed false statements as well as the pay-to-play scheme" alleged by Respondent Jay Alix. Pet. App. 2a. As the Court explained, proximate cause under RICO required Alix to allege that AlixPartners LLP ("AlixPartners"), which assigned the claims at issue to Alix, was "directly harmed by McKinsey's conduct." Pet. App. 4a. The Second Circuit held that—for purposes of a pre-answer motion to dismiss—"the loss to AlixPartners and the other large advising firms is plausibly alleged to flow directly from McKinsey's fraud on the Bankruptcy Court." Pet. App. 16a. Further, the district court's analysis improperly "conflated proof of causation and proof of damages and … did not draw all reasonable inferences in Alix's favor." Pet. App. 12a-13a. As for the potential

intervening causes urged by Petitioners, they did not warrant dismissal at the pleading stage, but rather were factual issues, yet to be proven by McKinsey, which "must await summary judgment or trial." Pet. App. 14a-15a.

Nothing in the record supports Petitioners' complaints that the decision below ignored this Court's precedents or invited lawlessness in the name of supervising the bankruptcy courts. The Second Circuit correctly stated the applicable legal standard for RICO proximate cause ("a direct relationship between the plaintiff's injury and the defendant's injurious conduct," Pet. App. 12a), surveyed the controlling case law (including *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), Pet. App. 13a-16a), and applied these precedents to the allegations before it, concluding that "Alix has alleged a sufficiently direct relationship between the asserted injury to AlixPartners and McKinsey's purported racketeering activities in all thirteen bankruptcies," Pet. App. 22a.

While the Second Circuit considered "the integrity of the Bankruptcy Court and its processes," it did so to demonstrate the directness of the harm alleged here. Pet. App. 13a. As the Court explained: "Litigants in all of our courts are entitled to expect that the rules will be followed, the required disclosures will be made, and that the court's decisions will be based on a record that contains all the information applicable law and regulations require." *Id.* Accordingly: "*If McKinsey's conduct has corrupted the process of engaging bankruptcy*

advisors, as Alix plausibly alleges, then the unsuccessful participants in that process are directly harmed." *Id.* (emphasis added). In other words, the relevance of "supervisory responsibilities" in the decision below was the Second Circuit's observation that "fraud on the Bankruptcy Court committed in the manner alleged by Alix causes direct harm to litigants"—such as AlixPartners—"who are entitled to a level playing field." Pet. App. 19a. And there is no dispute that the directness of harm must always be assessed in light of the specific context alleged. Thus, the Second Circuit's discussion of "supervision" only underscores its application of the standard test for RICO proximate cause in the context of the particular facts alleged.

Before seeking this Court's review, McKinsey sought rehearing or rehearing *en banc*. McKinsey made many of the same arguments it raises here, including that the decision below supposedly conflicted with this Court's recent decision in *United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022), which held that a court of appeals' supervisory powers do not permit it to supplant the district court's discretion to manage *voir dire* in a criminal case by prescribing specific lines of questioning. The Second Circuit denied McKinsey's rehearing petition, thereby underscoring that its decision did not rest upon the court's supervisory powers and did not require reevaluation in light of *Tsarnaev*.

In short, this case presents none of the typical considerations warranting this Court's review. Stripped of exaggerated rhetoric, Petitioners assert the purported "misapplication of a properly stated

rule of law" in the context of unique facts that remain to be developed. Sup. Ct. R. 10. Indeed, the Second Circuit expressly remanded the case "in order for a more complete record to be developed: one that will disclose more about who did what, when, and with what reasonably likely consequences." Pet. App. 19a.

Nor is there any divide among the courts of appeals on the standard for RICO proximate causation. The Second Circuit regularly dismisses RICO claims by competitors who—unlike Alix—fail to allege direct harm. *See, e.g.*, *Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003). Equally glaring, the Petition fails to address that the Seventh Circuit has twice analyzed facts materially indistinguishable from those at play here, concluding that proximate cause was satisfied. *See Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928 (7th Cir. 2007), *aff'd*, 553 U.S. 639 (2008); *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750 (7th Cir. 2011). The other court of appeals decisions cited by Petitioners are readily distinguishable and fail to demonstrate any divide of authority warranting this Court's review.

Even if the Court were inclined to take up the thorny issues regarding the existence and scope of supervisory powers that were discussed in the various opinions in *Tsarnaev*, this case would not be an appropriate vehicle for doing so. As McKinsey notes, the issue was not briefed below. Pet. at 8. Nor did the Second Circuit consider it appropriate to grant a rehearing, as McKinsey requested, in response to *Tsarnaev*. The reason is obvious: the decision below

simply does not turn on the supervisory power issue addressed in *Tsarnaev*.[2]

Accordingly, the Petition should be denied.

STATEMENT OF THE CASE[3]

A. The Parties and the High-End Bankruptcy Market

Respondent Jay Alix is the founder and a minority equity holder of AlixPartners, which assigned the claims in the Amended Complaint to Alix. C.A. App. A-52 ¶29. Alix has been involved in restructuring hundreds of companies involved in Chapter 11 bankruptcy proceedings, either directly or indirectly through AlixPartners. C.A. App. A-54 ¶45.

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[2] Indeed, while the decision below stands independently of the Second Circuit's observations regarding the supervision of bankruptcy courts, it is notable that the Second Circuit's discussion of "supervision" is distinct from the type of supervisory powers discussed in *Tsarnaev*. There, this Court addressed appellate supervision of Article III courts' procedures. Here, by contrast, the supervision discussed in the opinion below concerned Article III courts' supervision of Article I bankruptcy courts' substantive rulings, which is a distinct issue. In any event, the Court's decision in *Tsarnaev* adds nothing to the well-established principles of RICO proximate causation that control here. For this reason, the arguments advanced by *amici* regarding the existence and scope of supervisory powers are irrelevant here.

[3] Because the opinion below considered the sufficiency of Alix's allegations at the pleading stage, the facts here are taken from the then-operative Amended Complaint, which appears in the appendix below (cited herein as C.A. App. []).

Petitioner McKinsey & Co., Inc. ("McKinsey & Co." and, together with McKinsey Holdings, Inc.; McKinsey & Company Inc. United States ("McKinsey US"); and McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey RTS"), "McKinsey") is the world's largest consulting firm. C.A. App. A-60 ¶60. It serves most of the world's largest corporations. It has a vast alumni network and a lucrative investment arm that manages a portfolio of over $25 billion in investments and has taken equity positions in many of its consultancy clients. The individual Petitioners are related McKinsey persons. *Id.* ¶¶60-62.

McKinsey is one of four major competitors for consultancy appointments in bankruptcies of companies with over $1 billion in assets. The market for such high-end bankruptcy consulting services is finite—at any given time, these lucrative appointments are limited by the number of billion-dollar businesses that file for bankruptcy. Competition for them is typically intense and requires substantial expertise and resources. AlixPartners, Alvarez & Marsal, and FTI Consulting are McKinsey's top three competitors in the field. Since 2010, excluding cases where McKinsey served as an advisor, these three firms collectively have provided consultancy services in approximately 75% of the Chapter 11 cases involving assets over $1 billion. Of those cases, AlixPartners obtained approximately 24.5% of the engagements. C.A. App. A-55 ¶49.

B. McKinsey's Pattern of Racketeering Activity

Since 2001, Petitioners have conducted a criminal enterprise through a pattern of racketeering activity in violation of RICO, 18 U.S.C. §§ 1962(c) and (d). *See* C.A. App. A-40-41, A-63-81. Chapter 11 bankruptcy professionals must meet the disinterestedness requirements of 11 U.S.C. § 327(a) ("Section 327(a)"). To establish compliance, prospective professionals must submit a declaration disclosing all connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee (collectively, the "Interested Parties"). *See* Fed. R. Bankr. P. 2014(a) ("Rule 2014"). Since 2001, Petitioners have knowingly and intentionally submitted false and materially misleading declarations to support their applications for professional employment in Chapter 11 proceedings, unlawfully concealing McKinsey's substantial connections to Interested Parties and numerous disqualifying conflicts of interest.

Petitioners' racketeering activity harmed AlixPartners by depriving it of valuable consultancy engagements. C.A. App. A-41 ¶4. Because of Petitioners' unlawful conduct, McKinsey was able to obtain lucrative engagements despite its disqualifying conflicts; those engagements would otherwise have gone to un-conflicted competitors, including AlixPartners. Specifically, had McKinsey complied with the law and disclosed all of its connections to Interested Parties, McKinsey would have been

disqualified given its extensive roster of clients and vast alumni and investment connections, which posed disqualifying conflicts in the bankruptcies in which McKinsey sought employment. In at least some cases, AlixPartners would have been retained instead. *Id.*

McKinsey also committed bankruptcy fraud through illegal "pay-to-play" arrangements with attorneys that handle high-stakes bankruptcy matters, whereby McKinsey offered to refer its vast network of consulting clients to those attorneys in exchange for exclusive referrals of bankruptcy clients seeking professional services. C.A. App. A-46 ¶15, A-51, A-82-84. McKinsey thereby avoided competition, including the traditional interview process, sometimes called the "beauty contest," that is used to select professionals. C.A. App. A-46 ¶15. In doing so, it violated 18 U.S.C. § 152(6), a RICO predicate statute that prohibits knowingly and fraudulently offering any advantage or promise of advantage for acting or forbearing to act in any bankruptcy case.

C. Alix Commences This Lawsuit

In May 2018, following an extended but ultimately unsuccessful effort to convince McKinsey to comply voluntarily with the law,[4] Alix, as

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[4] Beginning in September 2014, Alix repeatedly confronted McKinsey's then-Managing Partner, Petitioner Dominic Barton, with evidence of McKinsey's violations of bankruptcy law. C.A. App. A-81-84. Despite making critical admissions during these meetings and committing to bring McKinsey into compliance, Barton failed to do so. C.A. App. A-84-96. To the contrary, during their final meeting in October 2015, Barton tried to buy Alix's silence by offering to introduce AlixPartners to two large

AlixPartners' assignee, sued McKinsey and its co-conspirators, alleging that through numerous RICO predicate acts, including bankruptcy, mail, and wire fraud, McKinsey fraudulently concealed its conflicts and connections with Interested Parties in thirteen Chapter 11 bankruptcies, each involving assets exceeding $1 billion dollars.

In his Amended Complaint, Alix details the Petitioners' various roles in the unlawful conduct, the nature of the conflicts and connections that disqualified McKinsey in each bankruptcy, and how the scheme directly deprived AlixPartners of valuable bankruptcy appointments. *See generally* C.A. App. A-33-263. Alix's Amended Complaint also attached a joint declaration of four leading bankruptcy experts confirming that McKinsey's conflicts in each of the thirteen cases likely would have led to its disqualification if properly disclosed. C.A. App. A-421-466 ¶¶26, 36.

Alix alleged that if McKinsey had fully complied with Section 327(a) and Bankruptcy Rule 2014, it would have been disqualified from at least one (if not all) of its thirteen appointments, and that McKinsey's criminal enterprise deprived AlixPartners of considerable revenue. *See* C.A. App. A-41-42 ¶¶4-5, A-52 ¶28, A-198 ¶381, A-200 ¶384, A-218 ¶449, A-244 ¶537, A-257-258 ¶565. Specifically, given AlixPartners' 25% market share for high-end bankruptcy consulting services, absent Petitioners' misconduct, AlixPartners would have obtained at

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companies that, Barton said, needed restructuring services. Alix declined the proffered bribe. C.A. App. A-86 ¶134.

least 25% of the work on the bankruptcies that McKinsey obtained through racketeering. *See* C.A. App. A-198-199 ¶382, A-216 ¶446, A-243-244 ¶535, A-257 ¶564.

Independent of AlixPartners' substantial market share, Alix alleged case-specific circumstances in nine of the bankruptcies (*Hayes Lemmerz*, *Mirant*, *Lyondell, AMF Bowling, GenOn*, *Alpha Natural Resources*, *Standard Register*, *NII Holdings*, and *Edison Mission*) that made AlixPartners' appointment highly likely had McKinsey been disqualified. C.A. App. A-199-200 ¶383, A-217-218 ¶448, A-244 ¶536.

Alix also alleged that a direct consequence of Petitioners' scheme was that McKinsey obtained more bankruptcy assignments (for which it was unqualified by virtue of its undisclosed conflicts of interests) and AlixPartners received fewer. C.A. App. A-200-201 ¶385, A-218 ¶450, A-244 ¶538. No independent factors account for AlixPartners' injury, nor is that injury derivative of any injury to any Interested Party or the U.S. Trustee. C.A. App. A-244 ¶538. No immediate victim is better situated than Alix, as assignee of AlixPartners, to sue for these injuries, nor is there any risk of duplicative recoveries by differently-situated plaintiffs. *Id.*

D. The District Court Dismisses Alix's RICO Claims for Failure to Allege Proximate Causation

The district court, although "troubl[ed]" by the seriousness of the allegations, held that AlixPartners' alleged injuries were too indirect to establish

proximate causation. Pet. App. 39a, 54a. Alix's allegations, the district court said, would impermissibly require it to predict how a bankruptcy court would exercise its discretion in disqualifying McKinsey and to contend with other factors that might have led a debtor to decline to select AlixPartners as McKinsey's replacement if it were disqualified. Pet. App. 40a-43a. The district court also held that the U.S. Trustee was a "better situated" plaintiff more directly harmed by McKinsey's alleged conduct. Pet. App. 46a-47a. It distinguished this Court's decision in *Bridge*, *supra*, as involving "an unusual degree of predictability over a markedly direct causal chain." Pet. App. 47a-48a.

E. The Second Circuit Reverses, Concluding That Alix Plausibly Alleges Proximate Causation

On January 19, 2022, a unanimous panel for the Second Circuit vacated the district court's dismissal of Alix's RICO claims, holding that "Alix sufficiently alleges proximate cause with respect to the thirteen bankruptcies" in which "McKinsey secured lucrative consulting assignments in [the debtor consultant] market by knowingly and repeatedly filing disclosure statements in the Bankruptcy Court containing incomplete, misleading, or false representations concerning conflicts of interest." Pet. App. 3a-4a, 13a.

Noting that "[t]he dispositive issue here is whether Alix plausibly alleges proximate cause," the Second Circuit concluded that the district court's analysis "conflated proof of causation and proof of

damages and that it did not draw all reasonable inferences in Alix's favor." Pet. App. 12a-13a. Moreover, the court concluded that the district court gave inadequate consideration to the unique facts alleged, in which participants in the bankruptcy restructuring market were "directly harmed" by McKinsey's fraudulent scheme, which "corrupted the process of engaging bankruptcy advisors" by violating the applicable disclosure and conflict-of-interest rules. Pet. App. 13a.

While it acknowledged the possibility that "McKinsey might ultimately prove the existence of intervening factors," the Second Circuit concluded that such a "showing must await summary judgment or trial." Pet. App. 15a. The key point at the motion to dismiss stage, the court reasoned, was the directness of the asserted injury. Pet. App. 16a.

The Second Circuit also found that "McKinsey has not demonstrated that anyone else is 'better situated to sue' than Alix," noting that in this case, unlike in *Anza* and *Empire Merchants*, *supra*, there was no "more immediate victim." Pet. App. 21a-22a.

Finally, the Second Circuit found that Alix's "unusually detailed allegations" regarding McKinsey's pay-to-play scheme (including admissions by Petitioner Barton, McKinsey's former Managing Partner) "easily raise a strong inference of fraud." Pet. App. 23a-24a. Nor did the play-to-play allegations raise proximate cause issues, as "the purported injury is the lost opportunity to compete in an unrigged 'beauty contest,'" and "[w]here this occurs,

competitors who do not pay are *ipso facto* harmed." Pet. App. 25a.[5]

F. Proceedings on Remand to the District Court

McKinsey sought rehearing or rehearing *en banc*, making many of the same arguments it raises here, but the Second Circuit denied McKinsey's rehearing petition on March 30, 2022. Pet. App. 56a-57a; CA2 ECF Nos. 132, 153.[6] McKinsey then asked the Second Circuit to stay the mandate pending the filing and disposition of a petition for writ of certiorari. CA2 ECF No. 156. The Second Circuit denied that

[5] While the Second Circuit held that "Alix sufficiently alleges proximate cause with respect to the thirteen bankruptcies," it noted that "proximate cause is especially conspicuous in the case of" one of those thirteen, the GenOn bankruptcy. Pet. App. 17a. That was because McKinsey had "extensive connections to NRG Energy, GenOn's parent company" (and a McKinsey client), against which GenOn had a "multi-million-dollar fraudulent transfer claim." *Id.* Thus, had McKinsey made truthful disclosures, the bankruptcy court could not have found McKinsey disinterested under Section 327(a) and would not have allowed GenOn to hire McKinsey as an advisor to, *inter alia*, "investigate GenOn's fraudulent transfer claim against NRG Energy, McKinsey's own client," or "negotiate GenOn's separation from NRG Energy" during the bankruptcy. *Id.* Moreover, Alix plausibly alleged that (a) McKinsey "concealed at least 53 other known conflicts and connections, some of which would have revealed that multiple McKinsey clients were GenOn's creditors," and (b) "in order to avoid being listed as a creditor of the estate, McKinsey received avoidable preference payments from GenOn and intentionally concealed an interest adverse to the estate." *Id.*

[6] Citations to "CA2 ECF No. [#]" refer to documents filed in the Second Circuit below. Citations to "Dist. Ct. ECF No. [#]" refer to documents filed in the district court below.

request, but stayed the mandate for seven days to permit McKinsey to seek a stay from this Court. CA2 ECF No. 162.

On April 25, 2022, McKinsey sought a stay of the mandate from this Court, which Justice Sotomayor denied on April 26, 2022.

The mandate issued on April 27, 2022. On July 11, 2022, Alix filed a Second Amended Complaint in the district court. Dist. Ct. ECF No. 177. In addition to allegations concerning the thirteen Chapter 11 bankruptcies at issue in the Amended Complaint considered by the Second Circuit below, the Second Amended Complaint addresses a fourteenth bankruptcy case, *In re Westmoreland Coal Co.*, No. 18-BK-35672 (DRJ) (Bankr. S.D. Tex.), filed on October 9, 2018 ("*Westmoreland*"). In *Westmoreland*, two applications to hire McKinsey were ultimately withdrawn by McKinsey after the false and misleading nature of McKinsey's disclosures was exposed in litigation initiated by Mar-Bow Value Partners, LLC, an entity affiliated with Alix.[7]

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[7] As described in the Second Amended Complaint, McKinsey presented its case-in-chief in *Westmoreland* over eight days of a bench trial held in February 2020. McKinsey called witnesses including, *inter alia*, Petitioners Barton, Carmody, and Sternfels. In December 2020, one month before the *Westmoreland* trial was scheduled to resume following a COVID-induced hiatus, and Mar-Bow's case-in-chief to begin, McKinsey withdrew its employment application with prejudice, thereby ending the trial and forfeiting its ability to seek the estimated $8 million in fees that it would have received for work already performed had the application been approved by the *Westmoreland* court. *See* Dist. Ct. ECF No. 177 ¶¶ 326-379.

The district court will next receive briefing on Petitioners' renewed motions to dismiss on multiple alternative grounds, as well as their forthcoming motion to stay discovery (which has yet to commence).

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT ARTICULATED AND APPLIED THE CORRECT STANDARD FOR RICO PROXIMATE CAUSE

The Petition is based entirely on the false premise that the decision below "applied a relaxed proximate-causation standard" that required only a "'plausibility'-of-harm standard," rather than the plausible allegations of direct harm required under this Court's precedents. Pet. at 1-2. Even a cursory review of the opinion below belies this premise and demonstrates that the Petition should be denied.

A. The Second Circuit Required Allegations of Direct Injury

At the outset, the Second Circuit noted that the "dispositive issue is whether the amended complaint adequately alleges proximate causation under RICO." Pet. App. 5a. The court began by summarizing the relevant factual allegations and legal backdrop to those allegations, including the obligation of bankruptcy advisors to demonstrate their disinterestedness under Section 327 and Rule 2014, as well as McKinsey's alleged fraudulent scheme to violate those requirements and seek additional engagements through its "pay to play" scheme. Pet. App. 2a-9a. The Second Circuit then proceeded to

consider the district court's Fed. R. Civ. P. 12(b)(6) dismissal order *de novo*, noting that Alix's complaint "must meet the plausibility standard" established in this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Pet. App. 9a.

After setting forth the elements of a private cause of action under RICO, the Second Circuit articulated the applicable standards for RICO's causation element:

> This appeal implicates the causation element, pursuant to which a plaintiff must plausibly allege that the RICO violations were (1) "the proximate cause of his injury, meaning there was a direct relationship between the plaintiff's injury and the defendant's injurious conduct"; and that they were (2) "the but-for (or transactional) cause of his injury, meaning that but for the RICO violation, he would not have been injured." *UFCW Loc. 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 132 (2d Cir. 2010). The dispositive issue here is whether Alix plausibly alleges proximate cause.

Pet. App. 12a.

At no time did the Second Circuit state or suggest that it was applying a "relaxed" standard or that it was disregarding the directness requirement. Rather, applying these well-established standards, the Second Circuit concluded that "Alix has alleged a

sufficiently direct relationship between the asserted injury to AlixPartners and McKinsey's purported racketeering activities in all thirteen bankruptcies." Pet. App. 22a. In doing so, the Second Circuit applied this Court's holdings in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), Pet. App. 13a-16a, as well as the Second Circuit's own prior decision in *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018), the primary authority urged by Petitioners below, Pet. App. 16a.

As the Second Circuit noted, the factual allegations at issue here are somewhat unique. Pet. App. 13a (noting the case is "not within the mine-run of civil RICO cases"). "[B]y contrast" to *Anza* and *Empire Merchants*—each of which concluded that proximate cause was lacking because the harm to a competitor was not direct—the Second Circuit concluded that "the loss to AlixPartners and the other large advising firms is plausibly alleged to flow directly from McKinsey's fraud on the Bankruptcy Court." Pet. App. 16a.[8]

Far from disregarding this Court's decision in *Anza*, as the Petition suggests, the Second Circuit concluded that the case is distinguishable. Pet. App. 15a (noting that "this case differs in significant

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[8] As the court explained, damages were also readily calculable: "If the thirteen assignments had not been awarded to McKinsey, it is entirely plausible that they would have been awarded"—as Alix alleged—"to other advising firms" and that "AlixPartners would have received a 24% share of these assignments and resulting revenue." Pet. App. 16a.

respects from *Anza*"). There, the court noted, "the plaintiff claimed it lost sales because the competitor did not pay sales tax and therefore sold product at lower prices." *Id.* In *Anza*, but unlike in this case, "the plaintiff's competitor could have lowered its prices for many reasons, not necessarily because it did not pay sales taxes," and "[t]hese other possible reasons for lowering prices were thought to be the potential intervening events that broke the chain of causation between the tax crime and the plaintiff's alleged injury." Pet. App. 15a-16a. As the Second Circuit explained (and as discussed in greater depth, *infra*, Point II), this case is different, as the harm to AlixPartners flows directly from McKinsey's bankruptcy fraud, and is not caused or explained by any other factors. Pet. App. 16a.

B. The Second Circuit's Observations Regarding Supervisory Authority Support the Directness of Alix's Alleged Injury

Cobbling together out-of-context snippets of the opinion below, the Petition attempts to create the misimpression that the Second Circuit relied upon its supervisory authority as justifying a departure from the RICO statute and this Court's precedents on RICO proximate causation. As just shown, this is not the case. To the contrary, the context in which the Second Circuit referenced the supervisory authority of federal district and appellate courts over Article I bankruptcy courts was to demonstrate the severity of the alleged fraud at issue and how it directly injured AlixPartners.

As the Second Circuit explained, "[l]itigants in all of our courts are entitled to expect that the rules will be followed, the required disclosures will be made, and that the court's decisions will be based on a record that contains all the information applicable law and regulations require." Pet. App. 13a. Accordingly, "[i]f McKinsey's conduct has corrupted the process of engaging bankruptcy advisors, as Alix plausibly alleges, then the unsuccessful participants in that process are directly harmed." *Id.*; *see also* Pet. App. 19a (noting that "fraud on the Bankruptcy Court committed in the manner alleged by Alix causes direct harm to litigants who are entitled to a level playing field").

For these reasons, this Court's recent decision in *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022), has no bearing on the decision below. In that criminal case involving the Boston Marathon bomber, the Court held that courts of appeals' supervisory powers over district court procedures do not authorize them to ignore well-settled precedent and set aside a district court's questioning of jurors in the absence of abuse of discretion. *Id.* at 1036 ("[A] court of appeals cannot supplant the district court's broad discretion to manage *voir dire* by prescribing specific lines of questioning."). Thus, in *Tsarnaev*, the question was whether a court of appeals could use supervisory power to supplant the discretion of a district court. *Id.*

In contrast, the Second Circuit's decision here references the supervisory responsibilities of Article III courts (including the district court in this case) over bankruptcy courts and the federal bankruptcy process. Pet. App. 13a. The Second Circuit did not

usurp the authority of the district court. Nor did *Tsarnaev* involve claims of what amounted to fraud on the court.

Most important (and ultimately, dispositive) is the fact that the Second Circuit simply did not do what McKinsey claims: it did not "relax" or otherwise modify the RICO statute or this Court's precedents pursuant to any supervisory authority.[9] In short, the *only* similarity between this case and *Tsarnaev* is the fact that the word "supervisory" appeared in the appellate decisions.

II. THE SECOND CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS

The foregoing demonstrates that the Second Circuit applied the correct legal standard to the alleged facts before it. And as further addressed below, *infra* Point III, there is no divide of authority among the courts of appeals on these standards or their application to comparable facts. Thus, nothing merits this Court's review of the decision below. Even were the Court inclined, however, to review the merits of the Second Circuit's interlocutory ruling, the decision is fully consistent with this Court's precedents regarding RICO proximate causation.

[9] Nor did the Second Circuit in any way create a new cause of action or remedy, as the Petition seems to suggest, but falls short of actually arguing. *See* Pet. at 19.

A. Alix Alleges Direct Injury Because AlixPartners Was a Member of the Only Class of Injured Victims

The proximate cause principles at issue here are rooted in the common law, which held that "a plaintiff who complained of harm flowing merely from the *misfortunes visited upon a third person* by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268-69, 271 (1992) (emphasis added) (holding proximate cause unsatisfied where harm was derivative of harm to a more directly injured victim: "the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims").

Thus, in this Court's decisions in *Anza*, *supra*, and *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010), as well as the Second Circuit's own prior decision in *Empire Merchants*, *supra*, the alleged frauds in the first instance harmed governmental taxing authorities; the plaintiffs' alleged losses were wholly derivative of and dependent on that predicate injury, and would not have been suffered in its absence. *Holmes* also involved an injury one step removed from, and "purely contingent" upon, the primary injury suffered by the broker-dealers. 503 U.S. at 271. Faced with these ricochet victims in the second tier of injury, the courts in all these cases declined to go beyond the "first step" and deemed the plaintiffs' injuries too attenuated (*i.e.*, derived from

"misfortunes visited upon a third person"). *Id.* at 268, 271.

No such dynamic exists here, as this Court made clear in *Bridge.* There, the defendants engaged in a pattern of racketeering activity by violating a county law restricting bidders at tax lien auctions to one representative. 553 U.S. at 642-44. Using illegal straw bidders, defendants gave themselves a larger presence at the auctions than they would have otherwise had, thereby increasing their odds of obtaining valuable liens at auction at the plaintiffs' (*i.e.*, their competitors') expense. *Id.* at 643-44. The Seventh Circuit reversed the district court's Rule 12(b)(6) dismissal on proximate causation grounds, and the Supreme Court affirmed. *Id.* at 645, 660-61.

After noting that "[p]roximate cause … is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case,'" *id*. at 654, the Court held that the plaintiffs sufficiently pleaded RICO proximate cause: "[Plaintiffs'] alleged injury—the loss of valuable liens—is the direct result of [defendants'] fraud. It was a foreseeable and natural consequence of [defendants'] scheme to obtain more liens for themselves that other bidders would obtain fewer liens." *Id*. at 658. Moreover, the Court reasoned, "here, unlike in *Holmes* and *Anza,* there are no independent factors that account for respondents' injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue." *Id.* Notably, while discussing *Anza* at length, *Bridge* made clear that courts were not at liberty to narrow

artificially the RICO statute to avoid claims brought by competitors. *Id.* at 660.[10]

As the Amended Complaint alleges, and like the bidders at auction in *Bridge*, AlixPartners and the other participants in the narrow pool of providers for high-end bankruptcy services compete in a zero-sum battle for finite assignments, C.A. App. A-55 ¶¶47-49, that are directly analogous to the tax liens in *Bridge*. And like the defendants in *Bridge*, McKinsey stacked the "auction" by cheating the "bidding" process—specifically, securing assignments it knew it was not legally qualified to accept (often obtaining them through a competition-killing pay-to-play scheme) by lying to bankruptcy courts. As all the courts that reviewed the *Bridge* case acknowledged, such activity causes a very real harm, depriving other "bidders" of valuable business opportunities. *E.g.*, *Bridge*, 477 F.3d at 930 ("Extra bids reduce plaintiffs' chance of winning any given auction, and loss of a (valuable) chance is real injury.").

So why did the plaintiffs in *Bridge* pass proximate cause muster while those in the other cases urged by Petitioners failed? The answer is initially supplied by Judge Easterbrook's decision for the

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[10] Specifically, *Bridge* rejected the argument that "[a] first-party reliance requirement … is necessary 'to prevent garden-variety disputes between local competitors (such as this case) from being converted into federal racketeering actions,'" noting instead that "[w]hatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO to reflect their—or our—views of good policy." 553 U.S. at 660 ("We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.").

Seventh Circuit in the case (later confirmed in this Court's decision and *reconfirmed* by Judge Posner when the case returned to the Circuit court). The key to Judge Easterbrook's analysis was that the "*only* injured parties" were the failed bidders, who lost business opportunities because of defendants' conduct. *Id.* at 931. Indeed, the county in *Bridge* "did not lose even a penny." *Id.* In other words, the *Bridge* plaintiffs sat comfortably in the first tier of injury along with the taxing authorities in *Anza*, *Hemi*, and *Empire Merchants*, and the broker-dealers in *Holmes*. They suffered a direct, not "purely contingent," injury. Their injuries did not flow from a "misfortune[] visited on" anyone but themselves. This Court unanimously agreed with Judge Easterbrook, noting that plaintiffs "and other losing bidders were the *only* parties injured by the [defendants'] misrepresentations." 553 U.S. at 658; *see also Hemi*, 559 U.S. at 14-15 (noting that *Bridge* turned on the fact that "[t]he losing bidders … 'were the *only* parties injured….'").

McKinsey never grapples with, or even acknowledges, two critical facts. *First*, the plaintiffs here and in *Bridge* were members of the *only* class of victims monetarily injured; the judicial system is harmed by misrepresentations and fraud, but the competitors who lost a fair playing field and engagements for which McKinsey was unqualified were the ones who lost money. *Second*, the injuries alleged in *Anza, Hemi, Holmes*, and *Empire Merchants* were all "derivative"—without the predicate tax offenses that first harmed tax authorities, none of the plaintiffs even arguably had a case. Those crucial distinctions determine the proximate cause inquiry in this case.

Unlike *Anza*, *Holmes*, *Hemi*, and *Empire Merchants*, moreover, this case and *Bridge* both essentially involve bid-rigging schemes in which market competitors vie to obtain valuable contracts on a zero-sum basis, and one participant gives itself an unfair advantage by violating the law. Because the disappointed bidders in such cases are typically the only victims who lose money, courts almost invariably uphold them over Rule 12(b)(6) proximate cause challenges, as this Court did in *Bridge*.[11]

B. Petitioners Bear the Burden of Proving Intervening Causes, Which Are Irrelevant to Proximate Cause

The subsequent history of *Bridge* further illustrates the fallacy of Petitioners' position that potential intervening causes break the chain of proximate causation in this case.

After this Court's decision in *Bridge*, the case was remanded and the parties conducted discovery. Thereafter, defendants moved for summary judgment on proximate cause grounds, arguing that "'plaintiffs' failure to obtain more liens than they actually won could have been the result of competition from third-party bidders, the auctioneers' subjective perceptions, or failures of Plaintiffs' bidders to keep pace with the auction….'" *BCS*, 637 F.3d at 757-58.

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[11] *See, e.g.*, *Willie McCormick & Assocs., Inc. v. Lakeshore Eng'g Servs., Inc.*, No. 12-15460, 2015 WL 5093785, at *5 (E.D. Mich. Aug. 28, 2015); *Bulletin Displays, LLC v. Regency Outdoor Advert., Inc.*, 518 F. Supp. 2d 1182, 1190-91 (C.D. Cal. 2007); *Astech-Marmon, Inc. v. Lenoci*, 349 F. Supp. 2d 265, 270-71 (D. Conn. 2004).

The district court granted the motion in an opinion that demonstrated that bids were *not* awarded on a "strict rotational basis," *id.* at 753, but rather under "a subjective, contingent, discretionary method of awarding liens that depended on the conduct of other parties." *Phoenix Bond & Indem. Co. v. Bridge*, No. 05 C 4095, 2010 WL 3526469, at *7 (N.D. Ill. Sept. 1, 2010). The court outlined a seemingly insurmountable avalanche of factual obstacles the plaintiffs faced in proving that the defendants' auction misconduct actually caused them injury, noting that "Plaintiffs failed to identify the specific liens on which they bid the 0% penalty rate and lost" and "have not specifically identified any liens that they contend they lost to a Defendant who was bidding in violation of the [bidding rule]." *Id.* at *11. Indeed, plaintiffs could not identify any specific auction that they lost because of defendants' fraud. *Id.*

On appeal, Judge Posner deconstructed the district court's flawed reasoning. He noted that the case had little to do with proximate cause, or any of the RICO cases touted by Petitioners here: "The injection of the term 'proximate cause' into this litigation has muddied the waters. It was injected for no better reason—and it is not a good reason—than that it has figured in several RICO cases decided recently by the Supreme Court, none comparable to this case." *BCS*, 637 F.3d at 754. He once again confirmed (like Judge Easterbrook and this Court before him) that proximate cause existed because plaintiffs were "the only victims of the fraud" (*i.e.*, directly injured), and because "[t]he defendants stole a business opportunity from the plaintiffs by flooding the auction room with raised hands that shouldn't

have been there" (just as McKinsey should not have been in the running with AlixPartners for the thirteen conflicted assignments it obtained). *Id*. at 756-57.

As for all the problems defendants and the district court raised concerning plaintiffs' ability to link causally the racketeering scheme and a monetary loss, Judge Posner noted that they were potential *intervening causes* that defendants bore the burden to prove, and that plaintiffs had no obligation to disprove. *Id*. at 757. He further held that plaintiffs need not prove that they lost any specific auction because of defendants' misconduct; only that it was mathematically probable that they had. *Id*. at 758-59.

All the factual arguments the defendants raised about the plaintiffs' inability to prove a causal link between fraud and monetary loss did not present a *proximate cause* problem, but rather a *proof of damages* problem that had to be resolved at trial but was amenable to probabilistic proof. *Id*.

This Court had already said the same thing in *Bridge*:

> Petitioners object that [plaintiffs'] description [of the auction system] is not supported by the record and inappropriately "inject[s] into the case an element of mathematical certainty that is missing from the complaint itself." ... While a precise understanding of the county's system *may be necessary to calculate respondents' damages*, *nothing in our disposition turns on this issue*. *For*

> *present purposes*, it suffices that respondents *allege* they "suffered the loss of property related to the liens they would have been able to acquire…."

553 U.S. at 644 n.3 (emphasis added).

So it is here. The laundry list of potential intervening causes cited by Petitioners is fodder for discovery and perhaps summary judgment, not a Rule 12(b)(6) motion.

III. THERE IS NO CIRCUIT SPLIT

Petitioners' assertion that there is a "circuit conflict created by the decision below," Pet. at 14, is baseless. Petitioners cite cases from the First, Fourth, Fifth, Seventh, and Ninth Circuits, each of which purportedly dismissed RICO claims "premised on marketplace harm or long causal chains." *Id.* Each of the cited cases is readily distinguishable from the facts addressed below. Indeed, none of the cases cited by Petitioners involved the type of fraud on the court at issue here, which Petitioners claim (without support) is such a routine occurrence that the Second Circuit's decision will open the proverbial floodgates to RICO litigation. More importantly, virtually every case cited by Petitioners involved indirect harm—harm visited upon a third party, not the RICO plaintiff directly. For that reason alone, they are

distinguishable and fully consistent with the Second Circuit's decision below.[12]

1. First Circuit

Sterling Suffolk Racecourse, LLC v. Wynn Resorts, Ltd., 990 F.3d 31 (1st Cir. 2021), supports Alix's position, not McKinsey's. There, the complaint alleged that the defendant, Wynn Resorts, had obtained a gaming license by concealing certain misconduct allegations from the Massachusetts Gaming Commission, thereby preventing a competitor, Mohegan Sun, from obtaining the license. Proximate cause was lacking only because the complaint was filed, not by Mohegan Sun—the competitor analogous to AlixPartners here—but instead by Sterling, the owner of Mohegan Sun's anticipated building site, which hoped to profit in the event that Mohegan Sun's application was approved. As the First Circuit explained, Sterling's claim failed because it was "entirely derivative of Mohegan's injury," meaning Mohegan Sun was the "direct victim of the RICO conspiracy" and the "better situated plaintiff." *Id.* at 36, 36 n.4. Here, McKinsey does not

[12] Notably, the Petition is devoid of any reference to two of the Second Circuit's prior decisions relied upon by McKinsey below—*Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018), and *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003)—each of which found an absence of direct harm under RICO on distinguishable facts. Both cases further demonstrate that the Second Circuit faithfully applies this Court's teachings on proximate causation. Petitioners disagree with the application of those principles to the specific facts of this case, but they cannot show that the Second Circuit disregards those standards or applies them any differently from other Circuits.

(and cannot) claim that the alleged harm to AlixPartners is in any way derivative of harm to any other party.

2. Fourth Circuit

Slay's Restoration, LLC v. Wright National Flood Insurance Co., 884 F.3d 489 (4th Cir. 2018), is similarly inapposite. There, as the Fourth Circuit emphasized, it was a "*subcontractor* hired by a property owner's contractor to repair flood damage to the owner's property" who claimed RICO injury based on "racketeering allegedly carried out by the property owner's *insurance company* and its independent consultants to reduce the amount paid on the property owner's insurance claims." *Id.* at 490-91 (emphasis original). Proximate cause was absent because, again, the harm was derivative—it was the property owner who was directly harmed; the subcontractor could claim only tertiary harm flowing from the insurance company's underpayment of the insured, which harmed the general contractor, which harmed the plaintiff subcontractor. *Id.* at 490-91, 494.

3. Fifth Circuit

Molina-Aranda v. Black Magic Enterprises, 983 F.3d 779 (5th Cir. 2020), is even further afield, as the harm in that case was not caused by the alleged racketeering at all. There, plaintiffs alleged that defendants defrauded the federal government to obtain the visas that brought plaintiffs to the United States by misrepresenting to the Department of Labor the type of work plaintiffs would perform. *Id.* at 783. The alleged harm plaintiffs suffered, however, was entirely separate from the alleged fraud on the

government; specifically, plaintiffs alleged that, once they arrived, defendants underpaid them. *Id.* As the Fifth Circuit recognized, "Plaintiffs' allegations, taken as true, do not support a conclusion that their underpayment injuries were directly caused by [defendants'] alleged fraud in obtaining the H-2B visas"; rather, "their complaint shows that the injury was caused by the alleged underpayments which were not required by the alleged fraud." *Id.* at 784-85.

4. Seventh Circuit

In light of the earlier discussion regarding the Seventh Circuit's two decisions in the *Bridge* litigation, *supra*, Point II, the suggestion that the Seventh Circuit applies a RICO proximate cause standard different from the one applied below does not require extended discussion.

Nonetheless, Petitioners argue that the decision below conflicts with *Sidney Hillman Health Center v. Abbott Laboratories*, 873 F.3d 574 (7th Cir. 2017). There, however, the alleged harm was again derivative. In that case, welfare-benefit plans that paid for off-label uses of a prescription medication sought damages based on the manufacturer's alleged improper marketing. Judge Easterbrook began his opinion by making clear, consistent with the Second Circuit's opinion below, that "[t]o the extent the district judge believed that it is never permissible to base RICO damages on injury to one person caused by wrongs against another, the decision conflicts with *Bridge* …." *Id.* at 576 (noting that "a RICO recovery is possible when a wrong against A directly injures B"). As the court explained, however, the allegations at

issue there did not permit recovery because it was the patients who were improperly prescribed the drug for off-label issues (in some cases, resulting in harmful effects), and not the third-party payers, who were the "initial losers from the promotional scheme" at issue. *Id.*

Ironically, given McKinsey's reliance on *Sidney Hillman* as supposed evidence of a circuit split, the court there expressly relied on the consistent position taken by the Second Circuit—reasoning that "to the extent there is a conflict the Second Circuit has this right." *Id.* at 578.

McKinsey also cites the Seventh Circuit's decision in *James Cape & Sons Co. v. PCC Construction Co.*, 453 F.3d 396 (7th Cir. 2006),[13] which predates *Bridge* and *BCS*. As Judge Posner explained in *BCS*, *James Cape* is distinguishable because there, the state actually suffered monetary loss by overpaying for contracts, whereas the plaintiff "probably hadn't been injured at all and might well have benefited from the conspiracy because the higher his competitors' bids the likelier he was to be the low bidder and win the contract." 637 F.3d at 755. Here, of course, AlixPartners was harmed, not helped, by McKinsey's fraudulent scheme. And here, as in *Bridge*, there was no direct economic harm to the government. Rather, the direct victims of McKinsey's fraud are its competitors, including AlixPartners.

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[13] The plaintiff alleged that defendants improperly learned of plaintiff's bids for construction projects, which allowed them to manipulate the bidding process by underbidding plaintiff by small increments. *James Cape*, 453 F.3d at 398.

5. Ninth Circuit

In *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1147 (9th Cir. 2008), the plaintiff, a karaoke record producer, alleged harm stemming from a two-step scheme in which defendants (i) "engaged in copyright infringement by copying and distributing karaoke records for which they lacked licenses and did not pay royalties," and then (ii) "invested the proceeds from these predicate acts to unfairly reduce prices to undercut their competitors," including Sybersound. As the Ninth Circuit held, the outcome was controlled by *Anza*, because the harm was derivative of the harm to copyright holders, not direct: "the more direct victims of the Corporation Defendants' alleged infringement actions, the copyright holders, can be expected to pursue their own claims" (and in fact had done so). *Id.* at 1149.

6. Eleventh Circuit

Finally, while not explicitly invoking the decision as the basis for a supposed circuit split, Petitioners assert that the Eleventh Circuit's decision in *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292 (11th Cir. 2003), demonstrates the proper approach to RICO claims predicated on allegedly fraudulent activity in litigation. *Green Leaf* is distinguishable.

There, the plaintiffs alleged that they were fraudulently induced to enter into a settlement agreement because the defendant had allegedly concealed evidence in a related case that plaintiffs were monitoring. *Id.* at 1296-97. Rejecting a RICO claim predicated on these allegations, the Eleventh

Circuit noted that, under *Holmes*, plaintiffs' claims failed because they were complaining about harm "flowing merely from the misfortunes visited upon a third person," *i.e.*, the parties to the separate litigation. *Id.* at 1307 (quoting *Holmes*, 503 U.S. at 268-69).

In *Green Leaf*, that meant that the plaintiffs could not seek redress under RICO for the defendant's alleged fraud against other plaintiffs in another case, even if that fraud had indirectly harmed them. *Id.* at 1307-08. Here, by contrast, the direct victims of McKinsey's fraudulent scheme are AlixPartners and McKinsey's other direct competitors in the market for high-end bankruptcy restructuring assignments.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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