No. 21-1608

In the Supreme Court of the United States

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; JARED D. YERIAN; ROBERT STERNFELS,

Petitioners,

v.

JAY ALIX,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Rather than defend the decision below, Respondent tries to rewrite it. His opposition is premised on the false contention that the decision below did "not turn on the supervisory power issue" but instead applied "the standard test for RICO proximate cause." Br. in Opp. 3–5. That ignores the plain text of the decision, which could not have been clearer: "[T]his case invokes our supervisory responsibilities." App. 13a. "[I]ts proximate cause analysis differs somewhat from the analysis" in controlling decisions because "none" of them "involved allegations of fraud on a court whose operations we superintend." App. 13a, 16a–17a. "[I]n light of these special considerations, we hold that Alix has plausibly alleged proximate cause," and "[i]n light of our supervisory responsibilities, we remand." App. 13a, 19a. The Second Circuit repeatedly and unequivocally demonstrated its intent to diverge from this Court's precedent by relying on supervisory power.

The reason that the Second Circuit applied an "analysis [that] differs" from the decisions of this Court—and of other circuits—is that Respondent's complaint does not allege proximate causation under controlling law. His multistep causal theory, requiring separate actions by separate actors, does not show the "direct" harm this Court's precedent requires.

Respondent's assertion that he nonetheless pleads proximate causation relies on arguments that find no support in this Court's decisions. His argument that only derivative harms are indirect is contradicted by *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Hemi Group, LLC v. City of New*

York, 559 U.S. 1 (2010), neither of which involved derivative harm. And his contention that Petitioners must prove intervening causes is a red herring; the many steps in Respondent's causal theory are ones he himself pleads.

Having devoted his opposition to mischaracterizing the decision below, Respondent makes no effort to defend the actual decision. Nor does he contest that a court's reliance on "supervisory" power to deviate from this Court's precedent on a statutory requirement conflicts with decisions of this Court. The petition presents an important issue worthy of certiorari and should be granted.

I. In Direct Conflict with This Court's Decisions, the Second Circuit Relied on Supervisory Power to Deviate from RICO's Proximate-Cause Requirement.

The Second Circuit could not have been clearer that it was invoking supervisory power to apply a proximate-cause analysis different from that required by this Court's precedent. Whereas Judge Furman held that controlling law "compelled" the dismissal of Respondent's RICO claims, App. 39a, the decision below opined that Judge Furman "gave insufficient consideration to the fact that McKinsey's alleged misconduct targeted the federal judiciary." App. 13a.

Reasoning that "this case invokes our supervisory responsibilities," the Second Circuit held that it could resolve it differently than "'ordinary' RICO cases where these responsibilities are not front and center." *Ibid.* It then expressly deviated from this Court's precedent because "none of [those] prior cas-

es involved allegations of fraud on a court whose operations we superintend." App. 16a–17a; *see also* App. 16a (*Anza* would "be more like this case if the defendants had allegedly defrauded one of the courts we oversee"); App. 19a ("The congruence of these concerns has not been at play in any … relevant authority.").

The Second Circuit thus openly applied a "proximate cause analysis [that] differs somewhat from the analysis in" this Court's decisions. App. 13a. Under that analysis, Respondent had adequately alleged proximate causation so long as it was not "implausible or speculative" that the alleged harm "flow[ed]" from the alleged wrongdoing. App. 16a, 18a. Nowhere did the court assess whether Respondent's alleged harm occurred at the first causal step or was attributable to independent factors, as required in *Anza*, *Hemi*, and *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008). If that were not clear enough, the Second Circuit held that proximate cause was adequately alleged "in light of these special considerations" and remanded "[i]n light of our supervisory responsibilities." App. 13a, 19a.

Commentators have correctly read the decision as "endors[ing] an altered causation standard" that "would hold a defendant liable for harm indirectly caused by his or her conduct if the case involves certain 'special considerations.'"[1] Echoing this, other

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[1] Reid J. Schar & Philip B. Sailer, *The Impact of "Special Considerations" on a New Civil RICO Causation Standard: The Second Circuit's Decision in* Alix v. McKinsey (Aug. 18, 2022), https://tinyurl.com/Jenner-Article (Second Circuit's "new causation standard" "expand[s] notions of causation" and "eases the

commentators have explained that the Second Circuit "opted for a more flexible application of the proximate causation requirement" based on "the integrity of the Bankruptcy Court."[2] Amici agree, stating that the Second Circuit "invoked its supervisory power to depart from this Court's interpretation of the substantive elements of a statute" and that the "clarity and categorical nature of the Second Circuit's decision makes this case an attractive vehicle to address these important issues." Profs. Jordan & Pushaw Amicus 9–10.

Respondent's argument—that the decision below did not rely on supervisory power to deviate from this Court's authority—simply ignores what the decision says. Br. in Opp. 15–20. All that Respondent cites in support is the Second Circuit's remark that "[l]itigants" are "entitled to expect that the rules will be followed," "corrupt[ion]" of the court's "process of engaging bankruptcy advisors" harms "unsuccessful participants," and "fraud on the Bankruptcy Court"

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burden on plaintiffs by eliminating the need, at least in some cases, to show direct harm from the defendant's conduct").

[2] Callan G. Stein & Stephen G. Rinehart, *Second Circuit Decision Potentially Broadens RICO Proximate Cause Element* (Feb. 14, 2022), https://tinyurl.com/Troutman-Article; *see also* 2 The Law of Debtors and Creditors § 11:20 (Sep. 2022) (decision suggests that those "who otherwise might not have standing would have standing to pursue litigation 'to ensure the integrity of the Bankruptcy Court'" (quoting App. 13a)); 2022 No. 3 Bankruptcy Service Current Awareness Alert NL 3 (decision "suggests that when the misconduct alleged implicates the integrity of the bankruptcy process, the Second Circuit is willing to relax the requirements for establishing causation").

causes "direct harm to litigants who are entitled to a level playing field." Br. in Opp. 19 (quoting App. 13a, 19a). From there, Respondent makes the perplexing suggestion that the decision's repeated reference to "supervisory" power was merely "to demonstrate the directness of the harm alleged here." Br. in Opp. 2, 18.

Even putting aside that the Second Circuit explicitly "differ[ed]" from controlling authority in its "analysis" and remanded "in light of [its] supervisory responsibilities," App. 13a, 19a, Respondent's argument makes no sense. Allegations of harm to the "integrity of the Bankruptcy Court," App. 13a, no more directly caused harm to AlixPartners than harm to the even-handed enforcement of taxes directly caused harm to a competitor in *Anza*. *See* 547 U.S. at 458–60 (competitor's injury "not the direct result" of actions to defraud tax authorities). And, even if a "level playing field" for disclosures might have led a bankruptcy court to disqualify McKinsey, that does not address whether a debtor would select AlixPartners for any work, much less whether a bankruptcy court would approve such a retention. Nor does harm to a court "process" constitute "business or property" harm to AlixPartners, as required for a private RICO claim under 18 U.S.C. § 1964(c). Rather, as commentators have noted, the Second Circuit "identified the negative impact the alleged fraud had on the judiciary's credibility as a 'special consideration[]' that was independent of the typical causation analysis that controls civil RICO cases."[3]

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[3] Schar & Sailer, *supra* n.1.

Having tried to recast the decision below as not about supervisory power, Respondent makes little attempt to square the Second Circuit's reliance on "supervisory" power with that purported power's "clear limits." *United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022). Indeed, Respondent concedes that *Tsarnaev* "held that courts of appeals' supervisory powers … do not authorize them to ignore well-settled precedent," Br. in Opp. 19—exactly what the Second Circuit did here. Pet. 17–18. Yet Respondent then half-heartedly attempts to distinguish *Tsarnaev* by noting that the Second Circuit "did not usurp the authority of the district court" and that *Tsarnaev* did not involve "fraud on the court." Br. in Opp. 19–20. But *Tsarnaev*'s instruction is much broader. Supervisory power does not give courts license to "circumvent or supplement legal standards set out in decisions of this Court," 142 S. Ct. at 1036, whether those standards govern "the discretion of a district court," Br. in Opp. 19, or any other issue. And this Court's precedent holds that alleged "fraud on the court," whether in Article III or bankruptcy courts, does not permit departure from controlling law on the basis of supervisory power. Pet. 20. *Tsarnaev* also reinforced that supervisory power "cannot conflict with or circumvent" a "federal statute," 142 S. Ct. at 1036, which is likewise what the Second Circuit did when it applied a different standard than required for an element of a statutory claim. Pet. 18–21. Respondent does not even try to address those points.

II. Under This Court's Precedent, Respondent Does Not Plead Proximate Causation.

The Second Circuit invoked supervisory power to apply a relaxed proximate-causation standard for the simple reason that this Court's precedent bars Respondent's claims. Indeed, if the decision below were not based on supervisory power, as Respondent argues, it would conflict even more with this Court's and other circuits' decisions on RICO's proximate-causation requirement.

1. Respondent's causal theory "move[s] well beyond the first step." *Hemi*, 559 U.S. at 10. As he acknowledges, it requires "separate actions carried out by separate parties," *id.* at 11 (emphasis omitted), including that "McKinsey would have been disqualified" by bankruptcy courts but for the alleged fraud and that, "[i]n at least some instances, AlixPartners would have been retained instead" by debtors. Br. in Opp. 7–8. And, whereas the key consideration in *Anza*, 547 U.S. at 458, and *Hemi*'s plurality opinion, 559 U.S. at 11, was the causal disconnect between harm and wrongdoing, Respondent does not dispute Judge Furman's conclusion that the direct cause of the alleged harm was "the decisions of [debtors] not to hire AlixPartners" as one of their many advisors, which was many steps removed from McKinsey's alleged predicate acts. App. 39a–40a.

Underscoring the "intricate, uncertain inquiries," *Anza*, 547 U.S. at 460, required to connect the alleged fraud to the alleged harm here is Respondent's speculation on how bankruptcy courts might have ruled on the alleged undisclosed connections, and whom debtors might have chosen in counterfactual circumstances. And Respondent's claims are

"brought by [an] economic competitor[]," for which these concerns have "particular resonance." *Ibid.*

Nor does any court "need to grapple" with these problems. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 269–70 (1992). In the billion-dollar bankruptcies to which Respondent limits his claim, Br. in Opp. 9, the parties allegedly defrauded by McKinsey's disclosures had highly sophisticated counsel. The disclosures were also served on the U.S. Trustee, who is required to "monitor[]" them, 28 U.S.C. § 586(a)(3)(I), and did so here; the trustee's office entered a settlement with McKinsey relating to McKinsey's disclosures in each bankruptcy case at issue in Respondent's complaint, App. 46a–47a.[4]

2. Respondent all but ignores this reasoning in contending that he adequately alleged proximate causation, instead making two assertions that lack any basis in this Court's precedent.

First, Respondent argues that only "derivative" harms are indirect, and that the injuries in *Anza* and *Hemi* were "derivative," Br. in Opp. 21–24, but he is incorrect. This Court addressed derivative harm only in *Holmes*, where the plaintiff was an insurer whose loss was tied to whether its insureds were harmed. 503 U.S. at 271. By contrast, as even the Second Circuit acknowledged in *Hemi*, "the City's alleged injury [was] not derivative of the State's injury." *City of New York v. Smokes-Spirits.com, Inc.*,

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[4] And Respondent cannot dispute that the allegedly defrauded bankruptcy courts could have addressed the alleged wrongdoing, having brought his claims to them on that basis. Pet. 21 n.3.

541 F.3d 425, 443 (2d Cir. 2008), *rev'd, Hemi*, 559 U.S. at 11. Had the State collected its cigarette tax despite the alleged fraud, the City's harm would fully remain. Likewise, in *Anza*, "the plaintiff's injury was not derivative." *Id.* at 441; *Anza*, 547 U.S. at 465 & n.2 (Thomas, J., dissenting) (stating that it was defendant's conduct, "not *New York's injury*[,] that caused [plaintiff's] damages"). The plaintiff's alleged competitive harm was "not contingent" on whether the taxing authority was made whole. *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 983 (9th Cir. 2008) (rejecting "attempt to distinguish *Anza* as a 'derivative'" case).

Respondent's contention proves too much. Harm can be "attenuated" without being derivative. *Anza*, 547 U.S. at 459. Respondent shows merely that the injuries in *Anza* and *Hemi* sequentially followed wrongdoing to someone else. And that is precisely what he alleges: that McKinsey defrauded the court and parties in bankruptcy cases, without which courts and debtors might have made different choices that might have eventually resulted in more revenue for AlixPartners.

Respondent further argues that he has alleged direct injury because AlixPartners was a member of "the *only* class of victims monetarily injured." Br. in Opp. 24. This contention contradicts his claims, which allege that the purported fraud financially harmed the parties to the bankruptcy cases. *E.g.*, C.A. App. A-125 (alleging that McKinsey concealed payments "to gain a $10,645,166.78 advantage over [] other creditors"); A-55 (alleging that debtors paid "over $100 million in fees" to McKinsey that should not have been awarded). Indeed, Respondent claims

that McKinsey violated bankruptcy disclosure rules that protect debtors and creditors, who have obvious financial interests in bankruptcy cases. In any event, harm can be indirect even if the plaintiff claims that he was in the only class of victims financially injured. Under Respondent's view, because defrauded courts do not "los[e] money," nonparties that can trace loss to judicial fraud are directly harmed. Br. in Opp. 24. That conflicts with this Court's instruction that direct causation is lacking where "[m]ultiple steps … separate the alleged fraud from the asserted injury." *Hemi*, 559 U.S. at 15.

Second, Respondent argues that the steps in his causal chain are "potential intervening causes" that cannot be considered on the pleadings. Br. in Opp. 25–28. But unlike the "implausible" and "beyond unlikely" breaks in the chain "conjectured" by the defendants in *BCS Services v. Heartwood 88 LLC*, 637 F.3d 750, 757 (7th Cir. 2011), the steps in Respondent's causal theory—such as bankruptcy courts choosing to disqualify McKinsey and debtors choosing to hire AlixPartners instead—are inescapable actions that Respondent himself pleads. Br. in Opp. 7–8. Indeed, this Court has found proximate causation lacking at the pleading stage where common sense indicated that the claimed harm "could have resulted from factors other than [the] alleged acts of fraud," because "[b]usinesses lose and gain customers for many reasons." *Anza*, 547 U.S. at 459 (reinstating grant of motion to dismiss); *Hemi*, 559 U.S. at 11 (same).

Underpinning Respondent's reasoning is his outlandish assertion that his allegations are "indistinguishable" from those in *Bridge*, Br. in Opp. 4, where

the defendant's wrongdoing "necessarily" caused the plaintiff to receive fewer tax liens in a zero-sum auction that awarded them "on a rotational basis." *Hemi*, 559 U.S. at 14–15 (no "independent factors … account[ed] for" the injury (quoting *Bridge*, 553 U.S. at 658)). Even the Second Circuit disagreed with Respondent's contention and distinguished *Bridge*. App. 13a, 19a. And Judge Furman explained that the alleged fraud to "obtain[] approval to work on behalf of a bankruptcy estate" did not "'necessarily' deprive[] AlixPartners of that, or any, business." App. 48a. The "unusual degree of predictability" and "markedly direct causal chain" in *Bridge* "highlight the relative complexities and indirectness of the causal chain alleged in this case." *Ibid.*

3. If Respondent's view of proximate causation and the decision below were correct, it would be just as much in conflict with decisions of this Court and other circuits. (And Respondent's contention that the Seventh Circuit is in accord, Br. in Opp. 31, would only deepen the split.) Still, Respondent's attempt to paper-over the conflict between the decision below and that of other circuits, Br. in Opp. 28–34, rests on his misunderstanding of derivative harm and falls flat. Other circuits require direct harm at the "first step." Pet. 14–15. None have suggested that a plaintiff can allege proximate causation so long as it was "entirely plausible" that its harm "flow[ed]" from the wrongdoing, App. 16a, and Respondent does not say otherwise. Indeed, after the Petition was filed, the Sixth Circuit affirmed the dismissal of RICO claims where, even though an alleged causal theory "clear[ed] the plausibility bar," it "had to pass through the independent actions of at

least two independent parties." *GM v. FCA*, 44 F.4th 548, 562–63 (6th Cir. 2022).

III. The Question Presented Is Important and Worthy of Certiorari.

Respondent does not dispute that the question presented is important and worthy of certiorari. The decision below not only conflicts with this Court's decisions on supervisory power and RICO proximate causation, but it also provides a framework for courts to conclude that "special considerations" and their "supervisory" power, App. 13a, permit departure from this Court's jurisprudence and statutory limits on private claims. Pet. 22–26. And, as Amici emphasize, the Second Circuit's "unequivocal[]" reliance on supervisory power makes this case "a good vehicle to provide guidance on the contours" of its use. Amicus 3. Those contours are "poorly defined," and the "existence and scope of courts of appeals' supervisory power are important," affecting "all types of cases" and raising "separation-of-powers and intra-judiciary concerns." Amicus 4, 14–15.

CONCLUSION

The petition for a writ of certiorari should be granted. Although plenary review would be appropriate, the Court may wish to consider summary reversal.

Respectfully submitted,

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