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No. _____

**In The
Supreme Court of the United States**

STEPHEN FARMER,

Petitioner,

v.

D&O CONTRACTORS, INC., ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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JULY 18, 2016

QUESTIONS PRESENTED

In reviewing civil RICO statute of limitation issues in *Rotella v. Wood*, 528 U.S. 549, 560-61 (2000), this Court recognized that where basic statute of limitations rules enunciated by the Court do not fit a plaintiff's particular equitable circumstances, "equitable principles of tolling" may apply to resolve the inequity of applying the rule to the plaintiff's circumstances.

As a basic statute of limitations rule for civil RICO cases, the Court in *Rotella* rejected the pattern discovery rule as an appropriate rule for determining the accrual rule for when the civil RICO statute of limitations begins to run. But in rejecting the pattern discovery rule the Court specifically recognized that general equitable principles of tolling may nevertheless prevail to allow a plaintiff to pursue a civil RICO claim. The Court held: "In rejecting pattern discovery as a basic rule we do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling, *see Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1956), and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty. . . ." *Rotella*, 528 U.S. at 560.

Similarly, the Court has repeatedly sought guidance from the analogous Clayton Act for resolution of RICO statute of limitations issues. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997);

QUESTIONS PRESENTED – Continued

Rotella, 528 U.S. 549; *see also*, *Klehr*, 521 U.S. at 198-99, 201 (Scalia, J., concurring).

Finding that Petitioner Stephen Farmer was *not* “*diligent*” in filing his civil RICO claims and there were no “*extraordinary circumstances*” preventing him from filing his claim, the Fifth Circuit inflexibly applied previously enunciated basic equitable tolling rules that do not fit the equitable circumstances of this case. Likewise, the Fifth Circuit declined to apply equitable tolling or to follow the guidance of analogous Clayton Act tolling provisions to toll the civil RICO statute of limitations during the FBI investigation and beyond the investigation to allow Petitioner to secure the evidence he assisted the FBI in uncovering as support for his civil RICO claims.

Under the equitable circumstances of this case, Petitioner Farmer was the victim of an extortionate shakedown for part of his FEMA earnings for assisting the citizens of St. Bernard Parish, Louisiana, in cleaning up debris after Hurricane Katrina. Indeed, Farmer was a hallmark of “*diligence*” in discovering, investigating and uncovering the indisputable extortion by Respondents that is the basis of his civil RICO claims. For example, Farmer immediately reported the extortion to the FBI; he became a Confidential Human Resource throughout the FBI investigation and repeatedly captured the extortion on tape at great risk to himself; he was informed by the FBI that he had been extorted of over \$700,000; he was offered victim

QUESTIONS PRESENTED – Continued

counseling by the FBI and offered entrance into the Witness Protection Program; he informed the FBI he was going to file civil RICO claims based upon the extortion involved in the FBI investigation he was assisting; he was informed by the FBI that filing his civil RICO case at that time would compromise the FBI investigation and he could file it after the investigation was completed; Farmer waited until the FBI investigation was complete over four years later and waited for the FBI to process his request for the FBI tape recordings and transcripts for the necessary evidentiary information and support for his civil RICO claims before filing his action.

Petitioner Farmer respectfully submits that he should be allowed to pursue his civil RICO action through an application of equitable principles of tolling to this case, as well as through guidance from the analogous Clayton Act statute of limitations tolling provisions. Such a resolution of the equitable circumstances of this case is consistent with a proper balance of the interests of the plaintiff, the defendants and society. Moreover, such a resolution is consistent with a proper balance of justice and fairness to the plaintiff, the remedial purposes of the RICO statute, and the purposes of statutes of limitations.

QUESTIONS PRESENTED – Continued

The questions presented are:

- (1) Whether this Courts' adoption in 1987 by analogy to the antitrust four-year period for the statute of limitations for RICO inferentially carried with it a one-year extension from the termination of the government's investigation.
- (2) Whether "due diligence" under equitable tolling includes delay in filing occasioned while a civil RICO plaintiff waits for the government to provide the admissible evidence required for a successful filing of a civil RICO claim for relief.
- (3) Whether the standard for "due diligence" should, not be, in this Petition, as it is, "reasonable," that is, negligence, but rather at least "recklessness," that is, conscious avoiding a known duty of care, and, in particular, by also taking into consideration the injury or prejudice, if any, occasioned by the delay.
- (4) Whether under the different equitable circumstances of this case, the Fifth Circuit's denial of equitable tolling by inflexible adherence to existing case law for lack of "diligence" in filing the RICO claims and lack of "extraordinary circumstances" preventing the filing of the RICO claims is in conflict with this Court's recognition that "equitable principles of tolling" may be employed by the courts to address equitable circumstances that do not fit the basic rules under present case law.

LIST OF PARTIES

- (1) Stephen P. Farmer, Plaintiff and Petitioner.
- (2) D&O Contractors, Inc., Defendant and Respondent.
- (3) John Michael O'Malley, Defendant and Respondent.
- (4) Daniel P. Wagner, Defendant and Respondent.
- (5) Lance Licchiardi, Defendant and Respondent.
- (6) Randy Nunez, Defendant and Respondent.
- (7) Jeff Difatta, Defendant and Respondent.
- (8) Perry M. Nicosia, Defendant and Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	v
TABLE OF APPENDICES.....	vii
TABLE OF AUTHORITIES.....	ix
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	3
A. Pertinent General Statute of Limitations Background.....	4
B. Background Regarding This Court's Civil RICO Statute of Limitations Jurisprudence – Including Guidance From the Analogous Clayton Act, and Statute of Limitations Basic Rules Under Existing Case Law for Various RICO Statute of Limitations Issues and Equitable Tolling	6
C. Facts Giving Rise to this Case.....	11
D. Proceedings Below	15
REASONS FOR GRANTING THE PETITION	22
I. THE COURT SHOULD ADOPT THE CLAYTON ACT TOLLING PROVISIONS BY ANALOGY	25

TABLE OF CONTENTS – Continued

	Page
II. “DUE DILIGENCE” SHOULD INCLUDE THE DELAY IN FILING OCCASIONED WHILE A CIVIL RICO PLAINTIFF WAITS FOR THE GOVERNMENT TO PROVIDE THE EVIDENCE REQUIRED FOR SUCCESSFUL FILING OF A CIVIL RICO CLAIM	28
III. THE STANDARDS FOR “DUE DILIGENCE” SHOULD AT LEAST BE “RECKLESSNESS,” THAT IS, CONSCIOUS AVOIDANCE OF A KNOWN DUTY OF CARE, RATHER THAN NEGLIGENCE AS IT IS NOW – ALSO TAKING INTO CONSIDERATION THE INJURY OR PREJUDICE, IF ANY, OCCASIONED BY THE DELAY	34
IV. THE FIFTH CIRCUIT DECISION CONTRAVENES THIS COURT’S PRECEDENT THAT RECOGNIZES THAT THE COURT MAY FLEXIBLY APPLY “EQUITABLE PRINCIPLES OF TOLLING” WHEN THE BASIC RULES UNDER EXISTING LAW DO NOT FIT THE EQUITABLE CIRCUMSTANCES OF THE CASE ...	37
CONCLUSION.....	41

TABLE OF APPENDICES

Appendix A: Opinion of the United States Court of Appeals for the Fifth Circuit Dated and Decided February 18, 2016.....	App. pp. 1 to 14
--	------------------

TABLE OF CONTENTS – Continued

	Page
Appendix B: Opinion of the United States District Court for the Eastern District of Louisiana Dated and Decided March 13, 2015	App. pp. 15 to 34
Appendix C: Declaration of Stephen P. Farmer	App. pp. 35 to 44
Appendix D: Declaration of Special FBI Agent Todd A. Goodson.....	App. pp. 45 to 46
Appendix E: Declaration of Jerry Marty Baker	App. pp. 47 to 49
Appendix F: Excerpts of Extortionate FBI Recorded Statements from Pages 27-33 of Petitioner's Brief of Appellant.....	App. pp. 50 to 62

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Agency Holding Corp. v. Malley-Duff & Associates, Inc.</i> , 483 U.S. 143 (1987)	2, 7, 26, 31, 32
<i>Bd. of Regents v. Tomanio</i> , 446 U.S. 478 (1980)	27
<i>Bowen v. City of New York</i> , 476 U.S. 467 (1986).....	33
<i>Burnett v. New York Central Railroad Co.</i> , 380 U.S. 424, 85 S.Ct. 1050 (1965).....	<i>passim</i>
<i>Cada v. Baxter Healthcare Corp.</i> , 920 F.2d 446 (7th Cir. 1990).....	39
<i>Ellis v. General Motors Acceptance Corporation</i> , 160 F.3d 703 (11th Cir. 1998).....	5, 32
<i>Farmer v. D&O Contractors, Inc.</i> , 2016 U.S. App. LEXIS 2811 (5th Cir. Feb. 18, 2016).....	1
<i>Farmer v. D&O Contractors, Inc.</i> , 2015 U.S. Dist. LEXIS 31390 (Mar. 13, 2015).....	1
<i>Holmberg v. Armbrecht</i> , 327 U.S. 392 (1946) ...	8, 10, 39
<i>Honda v. Clark</i> , 386 U.S. 484 (1967)	33
<i>Irwin v. Department of Veterans Affairs</i> , 498 U.S. 88 (1990).....	33
<i>Jay E. Hayden Foundation v. First Neighbor Bank, NA</i> , 610 F.3d 383 (7th Cir. 2010).....	35
<i>Johnson v. Ry. Express Agency, Inc.</i> , 421 U.S. 454 (1975).....	5, 27
<i>Klehr v. A.O. Smith Corp.</i> , 521 U.S. 179 (1997) ...	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
<i>Lambert v. United States</i> , 44 F.3d 296 (5th Cir. 1995).....	18
<i>Le Gras v. Bailiff of Bishop of Winchester</i> , Y. B. Mich. 10 Edw. II (C. P. 1316).....	34
<i>Lozano v. Montoya Alvarez</i> , 134 S.Ct. 1224 (2014).....	32, 33
<i>Massiah v. United States</i> , 377 U.S. 201 (1964)	31
<i>Menominee Indian Tribe of Wisc. v. United States</i> , 136 S.Ct. 750 (2016).....	20
<i>Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.</i> , 381 U.S. 311 (1965).....	27
<i>Order of R.R. Telegraphers v. Ry. Express Agency</i> , 321 U.S. 342 (1944)	4
<i>Pension Fund-Mid-Jersey Truck Indus. v. Omni Funding Grp.</i> , 687 F.Supp. 962 (D.N.J. 1988)...	21, 26, 28
<i>Rotella v. Wood</i> , 528 U.S. 549 (2000)	<i>passim</i>
<i>United States v. Reliable Transfer Co.</i> , 412 U.S. 397 (1975).....	35
<i>West v. Conrail</i> , 481 U.S. 35 (1987).....	27
 STATUTES:	
15 U.S.C. §16(i) (Clayton Act tolling provisions).....	<i>passim</i>
18 U.S.C. §§1961 <i>et seq.</i> (civil RICO and criminal RICO).....	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
Pub. L. No. 91-452, §904(a), 84 Stat. 922, 947 (1970) (“The provisions of this title [RICO] shall be liberally construed to effectuate its remedial purposes.”)	31
OTHER AUTHORITIES:	
G. Robert Blakey, <i>Time-Bars: Rico-Criminal and Civil-Federal and State</i> , 88 Notre Dame L. Rev. 1581 (2013) (“Time-Bars”)	4, 5, 25, 31
Carli McNeill, <i>Seeing The Forest: A Holistic View of the Rico Statute of Limitations</i> , 85:3 Notre Dame L. Rev. 1231 (2010) (“Holistic View of the RICO Statute of Limitations”)	5, 6, 10, 39
Andrew E. Kramer, <i>Elected as Reformists, Ukraine’s Leaders Struggle with Legacy of Corruption</i> , N.Y. Times, June 7, 2016	22
Andrew Jacobs and Paula Moura, <i>At Birthplace of Brazil’s Corruption Scandal, Fears About Scraping By</i> , N.Y. Times June 10, 2016	22
Eric Lipton and Julie Creswell, <i>Documents Show How Wealthy Hid Million Abroad</i> , N.Y. Times, June 6, 2016	22
Morton J. Howitz, <i>The Transformation of American Law 1780-1986</i> (1997)	35
<i>The Times-Picayune, Racketeering lawsuit . . . Dismissed by federal judge</i> , March 14, 2015 (Comments)	15, 25

TABLE OF AUTHORITIES – Continued

	Page
Thomas E. Holland, <i>Elements of Jurisprudence</i> 156 (6th ed. 1848).....	35
W. Page Keeton et al. <i>Prosser & Keeton, on the</i> <i>Law of Torts</i> §80 (5th ed. 1984)	35

OPINIONS BELOW

The February 18, 2016 opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's denial of equitable tolling of the civil RICO statute of limitations is reported at 2016 U.S. App. LEXIS 2811 (5th Cir. Feb. 18, 2016), reprinted in Appendix ("App.") A attached hereto, App. A pp. 1 to 14.

The March 13, 2015 opinion of the United States District Court for the Eastern District of Louisiana is reported at 2015 U.S. Dist. LEXIS 31390 (Mar. 13, 2015), reprinted in App. B pp. 15 to 34.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its per curiam opinion and judgment on February 18, 2016. App. A pp. 1-14.

Pursuant to 28 U.S.C. §1254(1), this Court has jurisdiction to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Civil RICO

The civil RICO statute, 18 U.S.C. §1964(c), provides in pertinent part:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee. . . .

This Court adopted a four-year statute of limitations from the analogous Clayton Act in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987).

This Court held in *Rotella v. Wood*, 528 U.S. 549, 560 (2000) that since the civil RICO statute is a federal statute, the civil RICO statute is "generally subject to equitable principles of tolling."

Clayton Act

The statute of limitations tolling provision of the Clayton Act, 15 U.S.C. §16(i) (2006), provides in pertinent part:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof

and for one year thereafter. *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such a cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

STATEMENT OF THE CASE

This Petition turns on whether the Fifth Circuit's inflexible refusal to apply equitable principles of tolling and principles from the analogous Clayton Act tolling provisions to accommodate Petitioner Farmer's assistance to the FBI investigation without filing his civil RICO complaint during the investigation is in conflict with this Court's approach to considering civil RICO statute of limitations issues.

Furthermore, Petitioner respectfully submits that under the principles of equitable tolling, as well as analogous Clayton Act tolling provisions, civil RICO plaintiffs such as Farmer should be allowed to benefit from the government's investigative information that they assisted in securing, along with tolling until the government is able to provide the vital information to the plaintiffs for their civil RICO claims under appropriate procedures.

A. Pertinent General Statute of Limitations Background.

The overarching aim of the statutes of limitations is to balance the needs of the plaintiffs with those of the defendants and society to best achieve justice. Thus, the interests of the parties in considering statutes of limitations issues “are at least triangular: the complaining party, the responding party, and society itself, represented by the legal body that must resolve the dispute.” G. Robert Blakey, *Time-Bars: Rico-Criminal and Civil-Federal and State*, 88 Notre Dame L. Rev. 1581, 1591 (2013) (“*Time-Bars*”).

As a general matter, plaintiffs should be able to sue for compensation when they are injured, but at some point the defendant’s “right to be free of stale claims . . . prevail[s] over the [victim’s] right to prosecute them.” *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944). Since the Respondents’ extortionate conduct that is the basis of Petitioner’s civil RICO claim is fully supported by FBI transcripts of recordings Farmer assisted the FBI in securing as an FBI Confidential Human Resource, there is no issue of staleness in this case.

Moreover, this Court in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 85 S.Ct. 1050, 1055 (1965) reviewed the purposes of the statutes of limitations and found: “This policy of repose, designed to protect defendants, is frequently outweighed, however, where [as here] *the interests of justice* require vindication of the plaintiffs’ rights.” (emphasis added).

Additionally, the context of the underlying statute is critically important, such as the broad remedial purposes of the civil and criminal RICO statute in the instant case. Review of statutes of limitations issues “necessarily require[s] a consideration of the scope of RICO itself, as time-bars receive significant color and shape from their particular legal context.” Blakey, *Time-Bars*, 88 Notre Dame L. Rev. at 1591; *see also*, *Ellis v. General Motors Acceptance Corporation*, 160 F.3d 703 (11th Cir. 1998) (“‘[T]he basic inquiry is whether the Congressional purpose is effectuated by tolling the statutes of limitations in given circumstances.’ *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 427 (1965). To determine whether equitable tolling applies, courts ‘examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the . . . Act.’ *Id.*”

There are three discrete aspects to statutes of limitations: (1) length of the limitations period, (2) accrual, and (3) tolling. Although often overlooked by the courts, these three aspects should work in concert. Carli McNeill, *Seeing the Forest: A Holistic View of the Rico Statute of Limitations*, 85:3 Notre Dame L. Rev. 1231 (2010); *see also*, *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463 (1975) (“Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action.”); *cf.* *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J.,

concurring) (“[A]ny period of limitations is utterly meaningless without specification of the event that starts it running.”).

B. Background Regarding This Court’s Civil RICO Statute of Limitations Jurisprudence – Including Guidance From the Analogous Clayton Act, and Statute of Limitations Basic Rules Under Existing Case Law for Various RICO Statute of Limitations Issues and Equitable Tolling.

When Congress enacted the civil RICO statute in 1970, it did not provide a statute of limitations. As a result, the courts have struggled with RICO statute of limitations issues for forty-six (46) years. Indeed, in the forty-six years since RICO’s enactment, the courts have still not developed a complete and coherent body of law regarding all three time, accrual and tolling aspects of the civil RICO statute of limitations. McNeill, *Holistic View of the RICO Statute of Limitations*, 85:3 Notre Dame L. Rev. at 1232, 1234.

The jurisprudence of this Court summarized below has thus far focused primarily on the time and accrual aspect of the RICO statute of limitations. *Id.* at 1232. While the Court has most assuredly recognized that the principles of equitable tolling are incorporated into the federal RICO statute by a long history of the Court recognizing equitable tolling for federal statutes, the Court, with some limited basic rule exceptions that do not fit the equitable circumstances of this case, has

largely left the contours of such equitable tolling to the courts for further case-by-case decisions.

***Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987).**

This Court granted certiorari in *Malley-Duff* “to resolve the important question of the appropriate statute of limitations for civil enforcement actions brought under RICO.” *Id.* at 146. Thus, the Court in 1987 resolved that the civil RICO statute of limitations is the four year limitations period from the analogous Clayton Act. *Id.* at 152. The Court chose the Clayton Act statute of limitations because RICO is largely modeled after the Clayton Act, and the Court found that the Clayton Act is a far better analogy for RICO than any other federal or state alternative. *Id.* at 150-51.

The Court in *Malley-Duff* specifically reserved judgment on when the new four-year civil RICO statute accrues. *Id.* at 156-57.

***Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997).**

This Court in *Klehr* granted certiorari to address the circuit split that had developed regarding the appropriate statute of limitations accrual rule for civil RICO. At the time, some circuit courts applied the injury and pattern discovery rule, some applied the discovery rule, and the Third Circuit applied the last predicate act rule. *Id.* at 185-86.

In *Klehr*, the Court ejected the last predicate act rule. *Id.* at 179. The Court held that the last predicate act accrual rule is “not a proper interpretation of the law” for “two basic reasons.” *Id.* at 187. First, the accrual rule “lengthens the limitations period dramatically” since a pattern of racketeering “can continue indefinitely.” *Id.* Second, the Court found the last predicate act rule “is inconsistent with the ordinary Clayton Act rule, applicable in private antitrust treble damages actions.” *Id.* at 188.

After the *Klehr* decision that still left the circuit courts split between the discovery rule and the pattern discovery rule. *See Klehr*, 521 U.S. at 185-86.

Citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946), the Court in *Klehr* also found that because RICO is governed by a federal statute of limitations, the tolling doctrine of fraudulent concealment should apply to RICO claims. *Klehr*, 521 U.S. at 194.

The issue in *Klehr* regarding fraudulent concealment was whether a plaintiff pleading fraudulent concealment was required to exercise reasonable diligence in order to benefit from the doctrine. *Id.* The circuit courts were split over this issue.

The Court held that a plaintiff cannot toll the RICO statute of limitations for the defendants’ fraudulent concealment unless the plaintiff exhibits “due diligence” in trying to discover the facts for the unlawful activity supporting his RICO claim for relief. *Id.* at 194-95. The Court found that “due diligence” by the plaintiff in a civil RICO action is required even when

the defendant fraudulently concealed the claim, because RICO “private actions seek not only to compensate the victims but *to encourage those victims themselves diligently to investigate and thereby to uncover unlawful activity*. That being so . . . we conclude that fraudulent concealment in the context of civil RICO embodies a ‘due diligence’ requirement.” *Id.* at 195-96 (emphasis added).

The Court in *Klehr* also reasoned that in the anti-trust Clayton Act context the lower courts had consistently required plaintiffs to exercise reasonable diligence to be able to invoke the fraudulent concealment doctrine.

The Court thus once again relied upon the Clayton Act parallel with civil RICO to resolve a civil RICO statute of limitations issue.

***Rotella v. Wood*, 528 U.S. 549, 555 (2000).**

The Court in *Rotella* granted certiorari to address the conflict in the circuit courts between the discovery rule and the pattern discovery rule. The Court rejected the pattern discovery rule but still did not decide on a definitive accrual rule for civil RICO. *Id.* at 554 & n.2. In rejecting the rule, the Court, among other reasons, again stressed the Clayton Act analogy, finding that the civil RICO pattern discovery rule is inconsistent with the Clayton Act’s injury accrual rule. *Id.* at 557. “Even though the *Rotella* Court refused to designate the discovery rule as the governing rule for civil RICO, it has become just that” with the circuit courts.

McNeill, *Holistic View of the RICO Statute of Limitations*, 85:3 Notre Dame L. Rev. at 1246.

Importantly, the Court held: "In rejecting pattern discovery as a basic rule we do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling, see *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946), and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty, complementing *Federal Rule of Civil Procedure* 11(b)(3). See *ibid.*, see generally *Klehr*, 521 U.S. at 192-193 (noting distinctions between different equitable devices). The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule." *Rotella*, 528 U.S. at 560.

Thus, the Court in *Rotella* suggested that the best way to deal with problems that may arise such as the different equitable circumstances of this case "is to apply [equitable] tolling rules in individual cases to prevent injustice." McNeill, *Holistic View of the RICO Statute of Limitations*, 85:3 Notre Dame L. Rev. at 1252; see also, *Burnett*, 85 S.Ct. 1050, 1055 (1965) ("This policy of repose, designed to protect defendants, is frequently outweighed, however, where [as here] *the interests of justice* require vindication of the plaintiffs' rights.") (emphasis added).

C. Facts Giving Rise to this Case.

This civil RICO case arises out of Petitioner Farmer being extorted for "protection money" payments to the Respondents so he could continue working on FEMA contracts cleaning up debris in St. Bernard Parish, Louisiana after Hurricane Katrina. App. A at 2-3 (Fifth Circuit Opinion).

Petitioner repeatedly protested to the local Respondent coconspirators that he should not be required to pay them part of his FEMA earnings. In response to his protests, Petitioner was repeatedly threatened that he could just shut down his operations in St. Bernard Parish and go back to Mississippi if he did not agree to pay the extortionist coconspirators part of his money he earned in cleaning up debris. App. C at 36, 39 (Declaration of Petitioner Stephen Farmer).

Petitioner approached the FBI in June of 2006 to report that the Respondents "were extorting money from him for his company." App. D at 45 (Declaration of FBI Special Agent Todd A. Goodson).

Thereafter, Petitioner agreed to become a Confidential Human Source for the FBI investigation of the extortion. "During the course of the investigation Mr. Farmer provided assistance to the investigation by providing documents and information and by participating in recorded phone conversation and meetings." *Id.*

Petitioner Farmer's assistance to the FBI investigation was at great risk to himself. In fact, the FBI informed Farmer that he qualified for entrance into the government witness protection program and qualified for counseling as a victim of a crime scheme. App. C at 39.

The FBI also informed Petitioner that he had been extorted of over \$700,000. *Id.*

During Petitioner's assistance as a confidential source to the FBI investigation, Petitioner Farmer "indicated to [FBI Special Agent Todd Goodson] that he intended to file a civil RICO lawsuit." App. D at 45 (Declaration of Special FBI Agent Goodson). FBI agent Goodson "advised him that pursuing a civil action would likely compromise the ongoing investigation." *Id.*

Petitioner and his employee Jerry Marty Baker also recall that the FBI on several occasions informed Petitioner that he would still be able to file his civil case after the investigation was completed. App. C at 37; App. E at 48 (Declaration of Jerry Marty Baker).

"Mr. Farmer concurred [to FBI agent Todd Goodson] that he did not want to compromise the ongoing investigation and indicated he would file a civil complaint after the investigation was complete." App. D at 45 (Declaration of Special Agent Todd Goodson).

Had Petitioner filed his RICO action during the FBI investigation his ability to assist the investigation would have been compromised since he would no

longer have been able to speak to the extortionists to secure recorded information in telephone calls and meetings. App. C at 36-37.

The FBI “investigation was closed on or around October 2010, whereupon Mr. Farmer was informed that the investigation was complete and he could file a ‘Touhy’ request pursuant to 28 CFR 16.1 to request files provided to the FBI during the investigation.” App. D at 46. Petitioner “was informed that the investigation had been completed by November 2010.” App. A at 4; App. C at 39.

In early 2011, Petitioner retained a lawyer for purposes of filing his civil RICO action. App. A at 4. Petitioner’s lawyer initiated a civil RICO due diligence investigation and Petitioner and his lawyer met “with the FBI to request the FBI recorded evidence for use in prosecuting [the] civil RICO claims.” App. C at 40.

After thoughtful consideration to Petitioner’s request through the appropriate channels within the FBI and the New Orleans U.S. Attorney’s Office, the FBI informed Farmer’s lawyer that the FBI taped evidence would be provided in 2012. Many additional months went by, however, during which the FBI conducted its review of the tapes to be turned over to assure that all appropriate government rules for turning over such requested information for evidence in a civil case were met. App. C at 40.

Ultimately, the FBI tape recordings were provided Petitioner’s lawyer for his review for supporting evidence for the civil RICO action and Petitioner filed the

action soon thereafter on July 30, 2012. App. C at 40; *see also*, App. A at 4.

Arrangements were subsequently made with the U.S. Attorney's Office in Oxford, Mississippi to have the FBI tapes transcribed by a government approved reporting service, and the actual transcripts of the recordings were provided Petitioner's lawyer on September 19, 2013. App. C at 40.

Petitioner Farmer utilized many sample excerpts from the FBI transcripts throughout the district court and Fifth Circuit briefing to demonstrate the indisputable evidence of extortion by the Respondent coconspirators that support his civil RICO claims. *See* App. F at 50-62. Petitioner's Brief of Appellant pages 27-33, comprised of extensive excerpts from the FBI tape recording transcripts that indisputably evidence the unabashed extortionate demands to Farmer for part of his post-Hurricane Katrina FEMA cleanup payments.

As relevant to the interest of society's confidence in the justice system, the following sample comments in the New Orleans Times-Picayune are an example of the public's outrage in the justice system's allowing the post-Katrina extortionists to escape from accountability scot-free.

Public Comment One:

Who said crime doesn't pay. White collar crime pays, and pays well. Our justice system should be shipped overseas and replaced. They had these guys on tape. They had cancelled checks. What an effing farce by our justice system.

Public Comment Two:

The pretzel logic that allows criminal activity to go unpunished because of paperwork is not justice . . . it's miscarriage of justice.

The Times-Picayune, Racketeering lawsuit . . . Dismissed by federal judge, March 14, 2015 (Comments).

D. Proceedings Below.

1. The original civil RICO in this action was filed on July 30, 2012 in the U.S. District Court for the Northern District of Mississippi. The case was transferred to the United States District Court for the Eastern District of Louisiana on August 22, 2014, and a second amended complaint was filed on February 18, 2015. App. B, at 18 (District Court March 13, 2015 Opinion).

Defendants-Respondents moved to dismiss the RICO claims as time-barred. The court treated the motions as motions for summary judgment and held the RICO action was barred by the statute of limitations. The court declined to equitably toll the statute of limitations by applying certain previously enunciated basic equitable tolling rules for statutes of limitations, including that Farmer was not "misled" by the defendants; Farmer was not "diligent" in protecting his civil RICO claims, and that there were no "extraordinary circumstances" that prevented Farmer from filing his civil RICO claims within the statute of limitations. *Id.* at 21-31.

With respect to the district court's finding that Farmer was not entitled to equitable tolling for failing to act "diligently," the district court held: "[A]lthough assisting the FBI is commendable, the Court finds that he also failed to act diligently to protect his civil claims." *Id.* at 26.

Similarly, the district court held that even if Farmer acted "diligently," "he was not 'prevented in some extraordinary way from asserting his rights. (citation omitted).'" *Id.* at 28. "[H]e was never *prevented* by the FBI from filing his claims. He participated *voluntarily* in the FBI investigation, and he *chose* to forego pursuing his civil claims in order to protect that investigation. . . . [I]t was still Farmer's choice to delay pursuing his civil claims. Unfortunately, Farmer's choice did not toll the statute of limitations with respect to his causes of action." *Id.* at 29-31.

The district court also indicated in a footnote without making a finding that "Farmer potentially could have timely filed his original complaint under seal and then obtained an extension of time to perfect service pursuant to Rule 4(M), but he never consulted counsel about that possibility." *Id.* at 30, n.40. As discussed below, however, Farmer would have been legally and ethically precluded from further recorded discussions with the extortionists being investigated by the FBI if he filed a civil action under seal during the investigation.

2. The Fifth Circuit affirmed the district court's decision that Petitioner Farmer's civil RICO action was

time barred and that he was not entitled to equitable tolling. App. A, at 2. The Court also declined to utilize the analogous Clayton Act's tolling provisions during the FBI investigation and after the investigation to allow the FBI to provide Farmer the tape-recorded extortion evidence for use in the civil RICO action under appropriate, but time consuming, procedures. *Id.* at 12-13.

The Court initially recognized the factual circumstances of this case, including but not limited to Petitioner's extortion claims underlying the civil RICO complaint, the fact that Farmer approached the FBI and became a confidential source throughout the FBI investigation, the fact that Farmer informed the FBI that he intended to file a civil RICO complaint, the fact that the FBI advised Farmer that such a civil action would compromise the investigation, and "taking Farmer's allegation as true," the fact that "FBI Special Agent Goodson advised [Farmer] that he would have the right to file his lawsuit after the FBI investigation was completed." *Id.* at 2-4 & n.1.

The Court reviewed the district court decision for whether the court abused its discretion through "an erroneous view of the law or a clearly erroneous assessment of the evidence" in determining Farmer was not entitled to equitable tolling of the civil RICO statute of limitations. *Id.* at 6.

The Court recognized that "[t]he doctrine of equitable tolling preserves a plaintiff's claim when strict

application of the statute of limitations would be inequitable. *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995) (citing *Burnett v. N.Y. Cent. Railroad. Co.*, 380 U.S. 424, 428 (1965)).” *Id.* at 7.

Likewise, the Fifth Circuit recognized that “[c]onsistent with this principle civil RICO claims may also be ‘subject to principles of equitable tolling.’ *Rotella v. Wood*, 528 U.S. 549, 560 (2000).” *Id.*

But the Court went on to find: “We have held that ‘[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights’ (non-RICO case citation omitted).” “And we have found ‘no compelling equities to justify tolling’ where a plaintiff ‘could have filed his claim properly with even a modicum of due diligence’ but failed to timely preserve his claim for litigation (non-RICO case citation omitted).” *Id.* at 7-8.

The Fifth Circuit then found: “[T]he district court did not abuse its discretion in denying equitable tolling because Plaintiff failed diligently to preserve their RICO claims and were not prevented in some extraordinary way from asserting their rights. Plaintiffs conduct shows they were not diligent in ‘vigorously pursu[ing] [t]his action’ (non-RICO case citation omitted). . . . Plaintiffs failed to take any action to preserve their civil RICO claims for future litigation until after the end of the limitations period” that ran before the FBI investigation was completed. *Id.* at 8-9. Additionally, the Court found that while Petitioner had

expressed his desire to the FBI to file a civil RICO action, Farmer "waited more than eighteen months after the investigation ended and a full two years after the limitations period ended" to file the civil RICO action. *Id.* at 9. Significantly, however, the Court did not address the fact that Petitioner was required to wait almost eighteen months after the investigation to secure the required vital information and evidence from the FBI tapes to support his civil RICO claims.

The Fifth Circuit also declined to agree with Petitioner's arguments that he had indisputably shown "investigative diligence" in diligently assisting the FBI in uncovering and recording the defendant coconspirators' extortion. But the Court disagreed with Petitioner's analogy to this Court's speaking of diligence in *Klehr* in the RICO context as diligence in investigating and uncovering unlawful activity, concluding that Farmer failed to exercise diligence in preserving his rights through filing the civil RICO action. *Id.* at 9-10.

Significantly, the Court, without any separate consideration of the *Rotella* "equitable principles of tolling" for the different equitable circumstances of this case that may apply regardless of previously enunciated basic statute of limitations tolling rules, held: "[T]his, by itself, was sufficient for the district court to deny equitable tolling (non-RICO case citation omitted)."

Moreover, just as Petitioner maintains the equitable tolling circumstances of this Court's previous basic tolling rules jurisprudence does not fit the equitable

circumstances of this case, the Fifth Circuit also distinguished the *Klehr* decision on the basis that the RICO in *Klehr* was a fraudulent concealment tolling case. *Id.* at 9.

The Fifth Circuit then found that even assuming Petitioner “demonstrated diligence” in preserving the RICO claims, he did not allege he had been actively misled about his rights by the defendants. *Id.* at 10.

Additionally, citing the recent non-RICO decision in *Menominee Indian Tribe of Wisc. v. United States*, 136 S.Ct. 750, 756 (2016), the Court found that Petitioner had not shown “extraordinary circumstance” that prevented him from filing his RICO claims. The Court reasoned that the FBI did not actually prevent Farmer from filing during the investigation. “Agent Goodson advised Farmer that filing suit would have been against the FBI’s interest and, according to Farmer, told him that the RICO claims could be filed after the investigation concluded. Any obstacle to suit was thus the product of Farmer’s mistaken reliance on the FBI. . . .” *Id.* at 11.

The Fifth Circuit also declined to accept Petitioner’s argument that along with an application of equitable tolling principles the Clayton Act tolling provisions that toll the statute of limitations during government litigation and an additional year thereafter should also apply by analogy to toll the civil RICO action during the FBI investigation plus at least an additional year as provided by the Clayton Act. The Court found that even were it to accept Petitioner’s argument

that it should follow *Pension Fund-Mid-Jersey Truck Indus. v. Omni Funding Grp.*, 687 F.Supp. 962 (D.N.J. 1988) that borrowed the Clayton Act tolling provisions for a civil RICO case, that case applied to Clayton Act "litigation" as opposed to Clayton Act "investigations." *Id.* at 13. Additionally, the Court noted without deciding that even if it applied the additional year after the investigation by analogy from the Clayton Act, that would still not resolve Petitioner's diligence in preserving his RICO claims, since the claims were filed more than eighteen months after the conclusion of the investigation. *Id.* at 13, n.6.

Finally, the Fifth Circuit declined to accept Petitioner's argument that the broad remedial purposes of RICO justify equitable tolling. The Court reasoned that "[w]hile we have previously recognized that 'filing deadlines are subject to equitable modification, through tolling or estoppel, where necessary to effect the remedial purposes of [a statute]' (non-RICO case citation omitted), we have repeatedly maintained that the remedy is a 'narrow exception . . . that should be applied sparingly' (non-RICO case citation omitted)." The Court similarly reasoned that "[p]ermitting tolling *solely* based on the remedial purposes of RICO would swallow tolling's status as a narrow exception" (non-RICO case cite omitted) (emphasis added). *Id.* at 13.

REASONS FOR GRANTING THE PETITION

Worldwide, the fabric of trust in our society is today everywhere being ripped asunder by public corruption and its many deleterious consequences. To see this, we have only to look at the recent money laundering scandal revealed in the leaking of the Panama Papers.¹ The United States, hopefully, is not yet, everywhere, though maybe in some places, in the category of the Ukraine² or Brazil,³ where corruption characterizes all aspects of public life. Yet within our common memory, this nation has seen its president resign in disgrace, its vice president convicted of public corruption, and a supreme court justice resign under a cloud of suspicion. Add to these facts the multiple senators and congressmen and members of a president's cabinets who have been convicted of public corruption, as well as governors of states, mayors of major cities, and a seemingly endless string of state

¹ Eric Lipton and Julie Creswell, *Documents Show How Wealthy Hid Million Abroad*, N.Y. Times, June 6, 2016, p. 1 (law firm in Panama worked to shield 2400 United States citizens' wealth as well as that of other major political figures worldwide).

² See, e.g., Andrew E. Kramer, *Elected as Reformists, Ukraine's Leaders Struggle with Legacy of Corruption*, N.Y. Times, June 7, 2016 (reporting I.M.F.'s suspension of necessary aid package in light of continued corruption).

³ Andrew Jacobs and Paula Moura, *At Birthplace of Brazil's Corruption Scandal, Fears About Scraping By*, N.Y. Times, June 10, 2016 p. A4 (reporting story of money man who helped funnel billions of dollars skimmed from Brazil's state oil company and payoffs from construction companies to some of the country's most powerful politicians).

legislators who have been found guilty of public corruption.

Convictions under criminal RICO are well represented in these striking abuses of trust; it is, in fact, a major tool in the Department of Justice's public integrity prosecutions.

Strangely absent in this record, however, is civil litigation by private victims under RICO against these figures involved in public corruption at the federal, state, and local level. Many reasons might account for this absence, but one probable legal answer for this anomaly is the unfortunate interplay of the criminal (five years) and civil (four years) statutes of limitations. The government has vastly superior techniques to marshal compelling evidence of public corruption; that said, it understandably tends to bring its major prosecutions shortly before its criminal statute of limitations runs (five years). On the other hand, civil victims, lacking these sophisticated techniques of investigation, must bring their suits, if at all, after their injury, but before their civil statute of limitation runs (four years); inevitably, the civil period of limitation terminates without the victims obtaining the benefits of the government's investigative work.

This Petition offers this Court an appeal that illustrates this wholly unnecessary legal dilemma in stark, realistic, and too often repeated terms. A victim of a pattern of extortion in the administration of a massive public reconstruction project, which he brought to the attention of the FBI and helped the

Bureau investigate, at a substantial risk of personal injury, could not, through no fault of his own, obtain the essential evidence of his extortion in sufficient time to justify his filing of a civil action. He appealed to the courts for the application of equitable tolling. He found no relief. He is now the public victim of an entrenched scheme of public corruption that calls into question the integrity of multi-billion dollar public cleanup for the victims of hurricane Katarina. He stands without a legal remedy for a manifest legal wrong. Thus, he now calls upon this Court to clear the way for him – *and an untold number of other victims* – to seek such civil relief.

Thus this case presents this Court with a reoccurring question of exceptional importance. The case is important to those untold thousands of extortion victims that act as witnesses and confidential human resources for government extortion and public corruption investigations, but are left without a remedy when it comes to filing their own civil RICO claims contemplated by Congress under RICO's dual criminal and civil RICO statute.

Equally important, this reoccurring question is exceptionally important to society. Just in this case alone, there was significant damage to confidence in our justice system as citizens reacted with comments that speak volumes in themselves about their faith in our justice system when Petitioner's case was dismissed on statute of limitations grounds rather than on the merits.

One of the comments to the New Orleans *Times-Picayune* in this regard bears repeating: "Who said crime doesn't pay. White collar crime pays, and pays well. Our justice system should be shipped overseas and replaced. They had these guys on tape. They had cancelled checks. What an effing farce by our justice system."

Accordingly, this case clearly merits this Court's review and reversal.

I. THE COURT SHOULD ADOPT THE CLAYTON ACT TOLLING PROVISIONS BY ANALOGY.

This Court should finish its project it started in 1987 of doing for RICO what Congress inexcusably failed to accomplish in 1970.⁴ When Congress enacted RICO's private claim for relief, it did not include a period of limitations.⁵ Thus, this Court faced in

⁴ See generally G. Robert Blakey, *Time-Bars*, 88 Notre Dame L. Rev. at 1667-85.

⁵ The legislative forerunners of private civil RICO in the Senate contained a limitation period and its necessary related provisions. The American Bar Association (ABA) endorsed the private claim for relief with these provisions in it. When the Senate reported out the bill, the private claim for relief was not part of the bill, and so it did not deal with a statute of limitations for private civil suits. It passed the Senate. The ABA suggested to the House Committee on the Judiciary that the private claim for relief be restored to the legislation. The Committee begrudgingly did it, but it included only the bare claim for relief; it did not include the necessarily related statute of limitations or tolling provisions. When the Committee reported out the bill, the Committee processed the amended bill under an agreement by the Committee

Malley-Duff, 483 U.S. 143 (1987), what limitations period, if any, it should imply into the statute. The Court had before it a bewildering variety of circuit court decisions valiantly, but hopelessly, trying to make sense out of congressional neglect and prior Court jurisprudence, focusing on state law, that combined in the context of RICO to produce uncertainty, unfairness to similarly situated litigants, lack of uniformity, and unnecessary litigation. Thus, the Court turned away from individual state laws and instead chose for RICO the nearest analogous federal period of limitations, that is, the four year period of limitation for antitrust. 483 U.S. at 150-52, 165.

By analogy – again to the antitrust rules – this Court should now adopt an extension of one year following the period of a government investigation. See the careful and persuasive analysis of Judge Fisher in *Pension Fund-Mid-Jersey Trucking Indus. v. Omni Funding Grp.*, 687 F. Supp. 962, 965 (D.N.J. 1988). There, he aptly reasoned:

There is a clear line of authority which requires that where a statute of limitations is

members that no amendments would be accepted on the floor. On the floor, a fully reticulated amendment to restore the original design, which included the relevant procedural provisions, was withdrawn rather than voted on, so that no adverse inference would be drawn on the merits of the related provisions. The bill passed; the Senate accepted it. On the other hand, the Senate subsequently attempted to add the necessary procedural provisions to RICO's private claim for relief. The House Committee on the Judiciary paid them no heed. See *id.* at 1683 n.236 (forerunner), 237 (House debate), 238 (subsequent Senate action).

borrowed, the tolling and suspension provisions which are part of that statute must likewise be applied. *West v. Conrail*, 481 U.S. 35 (1987); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975); *Bd. of Regents v. Tomanio*, 446 U.S. 478, 484-85 (1980).

The Court in *Johnson*, *supra*, stated:

Any period of limitation . . . is fully understood only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitations period is interrelated with the provisions regarding tolling, revival, and questions of application. 421 U.S. at 463-64. . . .

Courts have recognized that the Clayton Act's tolling provisions plainly reflect Congress's desire to make available to private litigants the benefits of prior Government antitrust litigation. See *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317 (1965). . . .

We could not have stated it more succinctly or more persuasively. In brief, the basic number (four years) is part of a complex of interrelated provisions dealing with limitations, including a public policy postponement (one year), so that private parties have the benefit of the results of the government's investigation. The Fifth Circuit, in its unpublished opinion, assumed without deciding, that the reasoning of *Pension Fund* was persuasive and followed it, but found it unavailing to Petitioner, because, it thought, even with a one-year extension from the end of the government investigation, Petitioner filed his claim for relief too late (more than four years from discovery of injury) for equitable tolling to save him. We turn, therefore, to issue two here, dealing with the unfortunate application of the doctrine of equitable tolling by the Circuit court.

II. "DUE DILIGENCE" SHOULD INCLUDE THE DELAY IN FILING OCCASIONED WHILE A CIVIL RICO PLAINTIFF WAITS FOR THE GOVERNMENT TO PROVIDE THE EVIDENCE REQUIRED FOR A SUCCESSFUL FILING OF A CIVIL RICO CLAIM.

After Petitioner Farmer assisted the FBI investigation in securing tape recorded evidence of the extortion, he was required to wait for almost eighteen months before the tapes were finally cleared through proper government channels and procedures to protect

the privacy of innocent parties for use as evidence supporting the filing of his civil RICO claims.

By inflexibly adhering to tolling jurisprudence that does not fit the equitable circumstances of this case, the Fifth Circuit and district court found that Farmer was not "diligent" in filing even though he diligently assisted the FBI in uncovering the taped evidence of extortion; he indicated to the FBI that he was going to file a civil RICO action; the FBI advised him that filing would compromise the investigation; the FBI advised him he could file after the completion of the investigation; and the FBI agreed to provide Farmer the FBI vital tape information, indisputable evidence (App. F), for evidentiary support for his civil RICO action, albeit it was almost eighteen months before Farmer received the tapes and shortly thereafter filed his civil RICO claims.

The district court inflexibly found, for example: "[A]lthough assisting the FBI is commendable, the Court finds that he also failed to act diligently to protect his civil claims" by failing to file the civil RICO claims. *Id.* at 26.

Similarly, the Fifth Circuit declined to agree with Petitioner's arguments that he had demonstrated "investigative diligence" in diligently assisting the FBI in uncovering and recording the defendant coconspirators' extortion. *Id.* at 9-10.

Based upon prior basic statutes of limitations tolling rule jurisprudence that does not fit the equitable circumstances of this case, the Court also inflexibly

found, for example: “[W]e have found ‘no compelling equities to justify tolling’ where a plaintiff ‘could have filed his claim properly with even a modicum of due diligence’ but failed to timely preserve his claim for litigation (non-RICO case citation omitted)” by filing the civil RICO claims. *Id.* at 8.

The Court further found Farmer was “not diligent” because he “waited more than eighteen months after the investigation ended and a full two years after the limitations period ended” to file the civil RICO action – even though Farmer expeditiously requested the FBI tape recorded evidence to support his civil RICO claims shortly after the FBI investigation was completed, but was required to wait almost eighteen months after the investigation to receive the taped evidence through proper government channels and procedures to protect innocent parties before public filing.

Farmer had a duty to file, but he and his lawyer also had a due diligence duty not to file without the vital evidence to support the underlying civil RICO extortion claims. Without that indisputable taped extortion evidence, Farmer’s civil RICO claims would have degenerated into a classic “he said; they said” case that would not fly before a New Orleans jury where the complaining witness was an outsider. So he had no choice but to wait for his request to be able to use the FBI taped evidence in his civil RICO action.

Nor could Farmer have filed his action under seal, as the district court suggested without ruling on the issues. Had he filed his action under seal he would no

longer have been able to assist the FBI investigation in uncovering the extortion through recorded telephone conversations and meetings. After such a filing Farmer would have fallen within the ethical prohibition against questioning a person without that person's lawyer after a claim for relief is filed. *Cf. Massiah v. United States*, 377 U.S. 201 (1964).

Such inflexible rulings by the Fifth Circuit and district court, ignoring the different equitable circumstances of this case, also ignore the statutory framework and remedial purposes of civil and criminal RICO that envision criminal and civil prosecutions running parallel, complementing each other, not in competition with each other.

Indeed, Congress specifically directed the courts to liberally construe criminal and civil RICO to achieve the statute's remedial purposes: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, §904(a), 84 Stat. 922, 947 (1970).

The two-track system of criminal and civil RICO actions Congress designed to achieve the RICO statute's remedial purposes adapts well into the federal system of justice. Blakey, *Time-Bars*, 88 Notre Dame L. Rev. at 1596-97.

Moreover, this Court recognized in *Malley-Duff*, for example, that the statutory framework of the civil RICO statute as well as the Clayton Act "bring to bear the pressure of 'private attorneys general' on a serious

national problem for which public prosecutorial resources are deemed inadequate. . . .” *Id.*, 483 U.S. at 151. Indeed, with the indisputable extortionate conduct of the defendants captured on the FBI tapes, the FBI was helpful in providing Petitioner support in prosecuting his civil RICO action. That the government itself did not use a grand jury to build and prosecute the case remains strangely unexplained.

By the Fifth Circuit finding that “[p]ermitting tolling *solely* based on the remedial purposes of RICO would swallow tolling’s status as a narrow exception,” the Court ignored the fact that Petitioner did not “solely” raise the remedial purposes of RICO as the only justification for tolling in this case. Rather, the remedial purposes of the statute were raised along with the Court’s duty in considering tolling issues to flexibly balance the equities of the parties and society, the purposes of statutes of limitations, and the remedial purposes of the statute at issue. *See, e.g., Ellis*, 160 F.3d 703 (11th Cir. 1998) (“[T]he basic inquiry is whether the Congressional purpose is effectuated by tolling the statutes of limitations in given circumstances.” *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 427 (1965). To determine whether equitable tolling applies, courts ‘examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the . . . Act.’ *Id.*”); accord, *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224, 1231-32 (2014) (“Because the doctrine [of equitable tolling] effectively extends an otherwise discrete limitations period set by Congress, whether tolling is

available is fundamentally a question of statutory intent. *See, e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 88, 95 (1990); *Bowen v. City of New York*, 476 U.S. 467, 479-80 (1986); *Honda v. Clark*, 386 U.S. 484, 501 (1967).”). *Lozana*, 134 S.Ct. at 1232, also cites *Rotella* RICO decision regarding federal statutes being presumed to incorporate equitable principles of tolling where necessary).

Indeed, this Court in *Burnett*, 85 S.Ct. 1050, 1055 (1965) reviewed the purposes of the statutes of limitations, emphasizing the review is on a case-by-case basis, and found: “This policy of repose, designed to protect defendants, is frequently outweighed, however, where [as here] *the interests of justice* require vindication of the plaintiffs’ rights.” (emphasis added). *See* App. F. (FBI tape transcript excerpts indisputably evidencing extortion of Petitioner’s post-Hurricane Katrina FEMA payments for debris cleanup).

Accordingly, Petitioner Farmer submits the interests of justice and a proper consideration and balance of the parties’ interests and the remedial purposes of the RICO statute warrants the Court’s review to clarify the concept of “due diligence” for the different equitable circumstances existent in cases such as this, including cases in which the plaintiffs were required to wait for the vital government information and evidence necessary to prosecute their civil RICO actions.

III. THE STANDARD FOR "DUE DILIGENCE" SHOULD AT LEAST BE "RECKLESSNESS," THAT IS, CONSCIOUS AVOIDANCE OF A KNOWN DUTY OF CARE, RATHER THAN NEGLIGENCE AS IT IS NOW - ALSO TAKING INTO CONSIDERATION THE INJURY OR PREJUDICE, IF ANY, OCCASIONED BY THE DELAY.

This Court should modify its standard of "due diligence," as a precondition to the application of equitable tolling on the facts of this Petition. The standard should balance the state of mind and conduct of the perpetrator and ensuing harm against the state of mind and conduct of the victim, in particular, by also taking into consideration the injury or prejudice, if any, within the rationale of the statute of limitations (deterioration of evidence, etc.), occasioned by the alleged delay.

A principle of proportionality runs deep in our fundamental conceptions of justice.⁶ Accordingly, something today is manifestly out of kilter when "negligence" ("due diligence") offsets "intentional

⁶ Most often, the issue arises in the application of criminal sanction, but the principle is general. It runs deep. That a punishment should be proportionate to the crime is frequently repeated in common-law jurisprudence. In 1215, three chapters of Magna Carta were devoted to the rule that "amercements" may not be excessive. The principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. [285] (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e.g., *Le Gras v. Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316).

conduct" (intent to extort and a pattern of extortion), which is the effect of the lower courts' decisions in this Petition.⁷ The current rule of "due diligence," of course, arose at a time when contributory negligence precluded entirely a negligent claim for relief. See Thomas E. Holland, *Elements of Jurisprudence* 156 (6th ed. 1848). That indefensible view no longer obtains. It along with "assumption of risk" and the "fellow servant" rules had the effect of shifting the cost of industrial expansion away from the enterpriser to the individual. In the sexist language of the day, Prosser termed them "the three wicked sisters" of 19th Century law. W. Page Keeton et al., *Prosser & Keeton, on the Law of Torts* §80 at 573 (5th ed. 1984). There, the law privileged the interests of capital, in a capital poor, developing society, over the interest of workers. See generally Morton J. Howitz, *The Transformation of American Law 1780-1986* (1997). Today, from our more enlightened perspective, we now deal, generally and fairly, with such issues by doctrines of comparative fault, balancing the perpetrator's conduct against the victim's conduct, and considering the rationale of the rule, that is, the public interest (judicial administration, timeliness and staleness). This Court's work in admiralty reflects a similar modern perspective. See, e.g., *United States v. Reliable Transfer Co.*, 412 U.S. 397, 441 (1975) (allocation of fault in the modern law of admiralty allocation based

⁷ See, e.g., *Jay E. Hayden Foundation v. First Neighbor Bank, NA*, 610 F.3d 383, 585-87 (7th Cir. 2010) (Chief Judge Posner) (recognizing the lack of proportionality in due diligence and statute of limitations in comparison with contributory negligence).

on comparative fault). Here, on the showing of facts in this Petition, the result of such a reformulated rule is manifest. Any even-handed balancing of the conduct of the Respondents against the conduct of the Petitioner – an intentional pattern of extortion, inflicting substantial harm on Petitioner, against his delay and reasons for it (working in the FBI's fight against public corruption, including a risk of personal injury, and seeking reliable proof of wrongdoing at the highest level through appropriate government channels and procedures) and the absence of prejudice, measured by the rationale of the statute of limitation (deterioration, loss of evidence, death of necessary witnesses, etc.) – would reverse the Fifth Circuit's decision and reinstate Petitioner's claim for relief. Crime ought not pay, much less pay so well. Public projects of aid to the victims of natural disasters ought not be "honey pots" for the avaricious to dip their beaks into with impunity. (See App. F. FBI tape transcript excerpts). The supposed fault of the victim's delay pales into insignificance when fairly balanced against the corrupt conduct of the perpetrators and the absence of injury within the rationale of the statute of limitations. These public wrongs cry out for public relief.

IV. THE FIFTH CIRCUIT DECISION CONTRAVENES THIS COURT'S PRECEDENT THAT RECOGNIZES THAT THE COURT MAY FLEXIBLY APPLY "EQUITABLE PRINCIPLES OF TOLLING" WHEN THE BASIC RULES UNDER EXISTING LAW DO NOT FIT THE EQUITABLE CIRCUMSTANCES OF THE CASE.

This Court in *Rotella* found that the best way to deal with equitable circumstances that do not fit an inflexible adherence to existing basic statute of limitations and tolling rules jurisprudence is to flexibly apply "principles of equitable tolling" case by case to prevent injustice. *Rotella*, 528 U.S. at 560; *see also*, *Burnett*, 85 S.Ct. at 1055.

But even though the Fifth Circuit decision cited this Court's recognition of the appropriate applicability of "equitable principles of tolling" in *Rotella*, the Fifth Circuit's consideration of Petitioner's case never once abandoned inflexible adherence to existing basic statute of limitations tolling rules to provide Petitioner a flexibly, balanced and equitable consideration of his case through the prism of the "principles of equitable tolling."

Instead, the Court rigidly applied "diligence" and "extraordinary circumstances" statute of limitations basic tolling rule concepts applicable to plaintiffs not being "diligent" by *not filing* that are not even close to the equitable circumstances of this case in which: (1) Petitioner was a hallmark of diligence in assisting the

FBI in investigating and uncovering evidence of extortion that supports his civil RICO claims, (2) Petitioner informed the FBI he was going to *file* a civil RICO action, (3) the FBI advised Petitioner that *filing* his action would compromise the investigation and that he could *file* after the investigation was complete, and (4) Petitioner was required to wait almost eighteen months after the investigation to secure the vital FBI tapes information and evidence to support *filing* the civil RICO action. (See App. F FBI tape transcript excerpts).

Indeed, some of the lack of "diligence" in filing basic rules relied upon by the Fifth Circuit are largely derivative of fraudulent concealment law that requires a plaintiff to at least be "diligent" in investigating the claims when the plaintiffs are precluded from filing because the defendant "misled" the plaintiffs through fraudulent concealment. See, e.g., *Klehr*, 521 U.S. at 195; App. A at 7-8, 10.

Likewise, none of the other existing basic rule "diligence" cases relied upon by the Fifth Circuit finding that plaintiffs "*could have filed*" their claims involve the entirely different equitable circumstances of this case in which Petitioner wanted to *file*, but was diligent assisting the FBI in uncovering evidence, was advised it would compromise the claims, that he *could file* after the investigation, and that required Petitioner to wait more months after the investigation to secure the vital extortion evidence the FBI agreed to provide him for his civil RICO action before he *could file*. See App. A at 8, 10-11 ("could have filed" rationale).

The Fifth Circuit thus applied an approach to Petitioner's case that contravenes this Court and other courts' decisions that flexibly apply "equitable principles of tolling," as opposed to the Court's rigidly applying basic statute of limitations rules that do not fit the equitable circumstances before the court – much less the inequities and injustice of not applying such equitable principles. As such, it threatens to carry harm into the foreseeable future in an innumerable series of public corruption investigations and prosecutions, criminal and civil.

Judge Posner, for example, in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), recognized the flexibility of equitable tolling in circumstances where plaintiffs, for example, are in need of vital information to file their claims. "It [equitable tolling] permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim. *Holmberg v. Armbrrecht*, *supra*, 327 U.S. at 397; *Mull v. ARCO Durethene Plastics, Inc.*, *supra*, at 291." "It is, after all, an equitable doctrine. It gives the plaintiff extra time if he needs it." *Id.* at 452.

McNeill, *Seeing The Forest: A Holistic View of the RICO Statute of Limitations*, 85:3 Notre Dame L. Rev. at 1259, states it succinctly as well:

Many commentators have complained that statutes of limitations are arbitrary because they apply rigidly and uniformly to every case, sometimes barring claims where [as here] evidence is plentiful and a careful

balancing of the interests at stake weighs in favor of the plaintiff. . . . The doctrine of equitable tolling responds to this criticism at least in part, because it allows federal courts to (in effect) extend the limitations period when the equities weigh in favor of the plaintiff. In doing so, courts are able to add some flexibility to federal statutes of limitations.

This is just the sort of flexible case-by-case approach that federal courts should use when dealing with civil RICO claims.

Likewise, this is exactly what this Court recognized in *Rotella*. The Court found that the best way to deal with basic statute of limitations rules (the accrual rules) that, as here, do not fit the equitable circumstances of the case “is to look to the third aspect of statutes of limitations – tolling.” *Seeing The Forest: A Holistic View of the RICO Statute of Limitations*, 85:3 Notre Dame L. Rev. at 1259.

Similarly, this Court should disavow and clarify that rigid adherence to basic statute of limitations tolling rules do not apply when the rules do not fit the equitable circumstances. This Court should reaffirm that in such circumstances, equitable principles of tolling apply and the “courts have great flexibility to weigh the equities in each case in order to reach an appropriate balance between the plaintiff’s interests and those of the defendants and society.” *Id.*

Under the different equitable circumstances of this case, the existing basic rules for tolling are rendered inflexible and mechanical, since they do not fit

this Court's recognition of the appropriate application of the general "equitable principles of tolling." The law for Farmer and future victims of similar extortions needs this Court's careful attention to a balancing of each of the interests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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