RICO at the Border: Interpreting *Anza v. Ideal Steel Supply Corp.* and its Effect on Immigration Enforcement

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I. Introduction

Living the American dream, Mark Gould began his career digging ditches and now owns Gould Construction in Glenwood Springs, Colorado. Gould Construction installs sewer systems, sidewalks, foundations, and waste-water treatment plants. Mr. Gould struggles to employ enough unskilled laborers for this dirty and back-breaking work without employing unauthorized aliens. Even Mr. Gould understands: "Every kid coming out of school feels they're entitled to a job other than digging a ditch for Gould Construction. And there's nothing wrong with that. I mean I grew up digging ditches, but the bottom line is we all want better for our children." Even paying twice the minimum wage, Gould Construction, like many companies in low-skilled industries, is in constant search for new workers and worries that the increasingly tough immigration laws will prevent work completion.

2. Id.
3. Id.
4. Id.
Imagine Melissa, a lifelong resident of a small midwestern city.5 After dropping out of high school, Melissa has worked cleaning houses, stocking stores, and waiting tables for the last twenty years.6 Life is an ongoing struggle to make ends meet despite receiving an hourly wage well above minimum wage.7 An increase of a mere dollar an hour would raise her annual income by at least $2,000 a year.8

Then there is Veronica Rodriguez Pérez, a U.S. citizen who works on a production line at the Swift beef processing plant in Greeley, Colorado.9 During the workplace raids targeting six Swift & Company meat processing plants across the country, Immigration and Customs Enforcement (ICE) arrested and took into custody her husband, Roberto Pérez García, who is in the United States illegally.10 Veronica worried about their future, as well as the fate of their six-month-old Colorado-born son. She was also angry at the way ICE officials treated them: "They made him and myself seem like criminals. He tried to give me a kiss on the forehead, but they would not let us talk to each other."11

In low-skilled industries, both the employers' and the legal employees' difficulties arise from the supply and demand of unskilled labor. Although the employee is easier to empathize with on a personal level, the low-skilled industries produce many of the goods and services that are central to the U.S. economy and create jobs that everyone is qualified to fill. The U.S. government therefore struggles to balance the competition of a global market, the needs of the country's poorest citizens, and the political consequences of immigration enforcement.

Private enforcement of immigration laws creates implementation without government officials suffering the political wrath of competing interest groups. As of late, the civil Racketeer Influenced Corrupt Organization (RICO) Act,12

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5. For similar stories, see BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 154 (2001).
6. Id.
7. Id.
10. See id. (detailing the Pérez's story); see also Julia Preston, U.S. Raids 6 Meat Plants in ID Case, N.Y. TIMES, Dec. 13, 2006, at A1 (describing six national workplace raids).
traditionally a method to fight organized crime, has emerged as the private method of choice for employees to force employers to face the consequences of knowingly hiring unauthorized aliens.\textsuperscript{13} It does so, however, by embracing a theory of causation that is tenuous, without a limiting principle, and, recently, inconsistent with Supreme Court precedent.\textsuperscript{14} Although the lower courts have not yet embraced this narrowing of standing,\textsuperscript{15} bringing suits that are contrary to Supreme Court precedent is an inefficient and undesirable method of enforcing immigration law. Nonetheless, the "private attorney general" vision of RICO enforcement is not without some advantages, and with proper congressional legislation, the strengths of civil RICO can be maintained without RICO’s threat of treble damages or the stigma of suit under an organized crime statute.

This Note explains how \textit{Anza v. Ideal Steel Supply Corp.},\textsuperscript{16} a recent Supreme Court decision, should preclude legal employees from bringing suit under civil RICO when employers knowingly hire unauthorized workers. Part II of the Note describes the nature of unauthorized aliens and how their presence especially challenges the legal, unskilled workforce. Part II also explains past legislation and its relative ineffectiveness in addressing the problem. Part III probes the most recent method for legal workers to challenge the hiring of unauthorized aliens: civil RICO, a statute traditionally used to fight organized crime.\textsuperscript{17} As Part III explains, the standing provision of civil RICO, specifically § 1964(c), has proved most challenging to plaintiffs due to its "by reason of" proximate causation requirement. Part IV surveys past civil RICO cases brought against employers for hiring unauthorized aliens and analyzes how these courts applied the proximate cause requirement of standing.

Part V presents the most recent Supreme Court case, \textit{Anza v. Ideal Steel Supply Corp.}, that addresses the issue of proximate cause under the civil RICO standing provision, § 1964(c). This Note then applies \textit{Anza}’s proximate causation requirement to legal employees’ civil RICO suits

\textsuperscript{13} See infra Part V (explaining recent cases legal employees brought under RICO).
\textsuperscript{14} See Part V.A–B (interpreting the effect of \textit{Anza v. Ideal Steel Supply Corp.}).
\textsuperscript{15} See Part V.C (explaining \textit{Williams v. Mohawk Indus., Inc.}).
\textsuperscript{16} See \textit{Anza v. Ideal Steel Supply Corp.}, 126 S. Ct. 1991, 1997 (2006) (holding that the defendant lacked standing to bring suit under 18 U.S.C. § 1964(c) because the defendants’ RICO predicate act did not directly harm the plaintiff).
\textsuperscript{17} See Michael Goldsmith & Evan S. Tilton, \textit{Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance}, 59 WASH. & LEE L. REV. 83, 88 (2002) (stating that RICO was "conceived in a context principally concerned with organized crime").
against employers for knowingly hiring unauthorized aliens. It argues that
Anza imposes a higher proximate cause burden than previously applied for
standing under § 1964(c) because Anza defines direct causation as
requiring that the RICO violation automatically inflict the injury.18
Furthermore, Part V shows that legal employee plaintiffs can no longer
establish standing because the hiring of unauthorized immigrants does not
automatically lead to depressed wages. It explains that the hiring of
unauthorized aliens does not necessarily lead to the depression of wages
and that such depression requires the additional legal act of the employer
choosing to decrease the wage rate. Because choosing to change the wage
rate is a necessary intermediate act for the hiring of unauthorized aliens to
cause wage depression, legal employees lack proximate causation for
standing under civil RICO.

This Note explains that thus far the lower courts have applied the
proximate causation requirement in an overly lenient manner and
contemplates that the Supreme Court may address the standing issue again
in order to clarify its position. Part VI explains that Anza is consistent with
the judicial trend of limiting civil RICO and, therefore, concludes that a
new legislative solution is desired to capture the political attractiveness
of third party enforcement with the needed government oversight that is
currently lacking. This Note proposes that such a solution is achievable
through legislation that includes a provision similar to the qui tam
 provision in the False Claims Act, a sliding scale of fines, and a properly
funded electronic verification system.

II. Background: The Problem of Unauthorized Aliens

Since the 1800s, the United States has struggled with the amount and
the type of immigration that is best for the country.19 Regulation of legal
immigration has created a black market for those unable to remain legally
documented.

required it to defraud the state tax authority. Likewise, the fact that a company commits tax
fraud does not mean the company will lower its prices . . . ."); see also id. at 2004 (Thomas, J.,
concurring in part and dissenting in part) (stating that the majority's theory of proximate
causation permits a defendant to evade liability for intentional foreseeable harms "by concocting
a scheme under which a further, lawful and intentional step by the defendant is required to
inflict the injury").

19. See United States v. Wong Kim Ark, 169 U.S. 649, 701–02 (1898) (describing the
Chinese Exclusion Act of 1882, which suspended immigration of Chinese laborers for ten
years).
in the country. Despite various attempts, the problem of unauthorized aliens has remained largely unresolved.

A. Characteristics of Unauthorized Aliens

Unauthorized aliens are foreign-born noncitizens who are not legal residents. Unauthorized aliens can be divided into two categories of roughly equal size: aliens who enter legally but overstay or violate the provisions of their visa and aliens who enter the country illegally. In 2005, approximately 10.5 million unauthorized aliens resided in the United States. An estimated 2.8 million unauthorized aliens live in California with recent and significant increases occurring in Texas, California, Georgia, Arizona, Nevada, and North Carolina.

As a general proposition, both unauthorized and legal aliens have less education than native-born citizens. Although aliens comprised only 13% of the working age population in 2000, they made up 28% of the population with less than a high school diploma, and over half of them had less than 8 years of education. This contrasts sharply with native-born citizens, who are more likely to have completed high school or college.

20. See Eduardo Porter, Illegal Immigrants Are Bolstering Social Security With Billions, N.Y. TIMES, Apr. 5, 2005, at A1 (describing how the Immigration Reform and Control Act resulted in a black market for fake paperwork and as a result an estimated 75% of unauthorized workers pay payroll taxes).


23. See id. (defining unauthorized residents as "foreign-born persons who entered the United States without inspection or who were admitted temporarily and stayed past the date they were required to leave"); see also James G. Gimpel & James R. Edwards, The Congressional Politics of Immigration Reform 12–13 (1999) (estimating that about half of unauthorized aliens overstayed legal visas).

24. See Hoefer, supra note 22, at 1 ("DHS estimates that the unauthorized immigrant population in the United States increased 24 percent from 8.5 million on January 1, 2000 to 10.5 million on January 1, 2005.").

25. See id. at 7 (describing increases in unauthorized aliens per state).

schooling. Due to their comparably low education levels, unauthorized migrants primarily compete in the low-skilled labor market. With approximately 7.2 million unauthorized workers out of a 148 million worker labor force, unauthorized aliens compromise 5% of the civilian labor force. Although employed in a variety of occupations, unauthorized aliens make up a significant portion of the labor force in such fields as farming, janitorial services, construction, and food preparation.

B. The Most Affected Group: Low-Skilled Workers

Low-skilled Americans, including many members of minority groups, compete most directly with unauthorized aliens for jobs. Low-skilled jobs typically have dangerous or undesirable characteristics that make the jobs less appealing to the labor market. These undesirable characteristics cause a lower
number of workers to choose to apply for and remain at such jobs; the demand for labor creates a premium, which requires employers to pay higher wages. 34 Without unauthorized aliens, the restricted supply of legal workers in this market would command a relatively higher wage. 35 Notably, however, fewer total workers would be employed because the employer’s labor demand decreases as wages increase. 36 Therefore, even if the government deported all unauthorized aliens and each company remained in business, legal employees would not fill these jobs on a one-to-one basis. 37

C. Resulting Legislation

Before 1986, employers could legally hire unauthorized aliens; however, unauthorized aliens were subject to arrest and deportation, and the Immigration and Naturalization Service (INS) 38 conducted worksite raids as part of its broader interior enforcement strategy. 39 In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which imposed penalties upon private employers in an effort to control illegal immigration. 40 The sanctions

34. See id. at 249–50 (describing how wage differentials serve to compensate for the relative attractiveness among jobs).
35. See Borjas & Katz, supra note 26, at 39 (stating that the real wages of high school dropouts would have increased by up to 8% without the Mexican immigration influx between 1980 and 2000).
36. See RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 336 (9th ed. 2006) (explaining that if unauthorized aliens enter the labor market, the labor supply curve shifts outward and results in a lower equilibrium wage; however, at the lower wage rate, employers are willing to hire more workers).
37. See id. (explaining that a higher wage rate results in decreased employment).
40. See 8 U.S.C. § 1324(a) (2000) ("Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both."); see also S. REP. NO. 98-62, at 7–8 (1983) (stating that reducing the incentives to enter the United States is a more cost effective and less intrusive means to decrease illegal immigration); Kathleen M. Johnson, Coping with
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included fines ranging from $250 to $10,000 per unauthorized alien, with penalties escalating for repeat offenses. Jail terms were prescribed for "pattern and practice" offenders. In practice, however, the INS rarely imposed or collected civil penalties from employers, and criminal prosecutions were extraordinarily rare—many employers were not even aware of their obligations under this law.

D. The Largely Unsolved Problem

Current enforcement is largely ineffective at decreasing the number of unauthorized aliens entering the United States. The current enforcement policy involves heavy patrols in major cities along the Mexican border, light patrols in unpopulated zones along the same border, and minimum presence in the U.S. interior. Worksite raids account for less than 1% of apprehensions. Since 1986, fewer than two dozen employers have paid fines in excess of $75,000 for hiring illegal aliens, and in 2003 only 72 employers were convicted for employing unauthorized aliens. In comparison, a


41. See 8 U.S.C. § 1324(a) (describing punishment for hiring ten or more illegal aliens); see also 8 C.F.R. § 274a.10(b)(1) (2005) (listing current fines for employing unauthorized aliens).

42. See 8 U.S.C. § 1324(a) (permitting jail terms for repeat offenders).


44. See Peter Andreas, *Border Games: Policing the U.S.-Mexico Divide* 106–12 (2000) (describing the ineffectiveness of the high profile border enforcement in reducing unauthorized aliens and stating that border enforcement has merely made enforcement visible to benefit politicians).


46. See Tito Boeri et al., *Immigration Policy and the Welfare System* 17 (2002) (stating that 5,800—0.6% of Border Patrol apprehensions—occurred at farms or other worksites).

47. See id. (describing the enforcement of the government fine structure).
watchdog website currently lists over 3,000 employers who hire unauthorized aliens.\textsuperscript{48} Attempts to increase interior enforcement have been met with fierce political opposition.\textsuperscript{49} Following raids of Georgia onion fields during the 1998 harvest, the U.S. Attorney General, both Georgia Senators, and members of the Georgia Congressional Delegation criticized the INS for injuring Georgia farmers; shortly thereafter, the raids ended.\textsuperscript{50} On December 12, 2006, the Department of Homeland Security (DHS) raided six Swift & Company facilities, which constituted the "largest-ever workplace crackdown on illegal immigration."\textsuperscript{51} After the meatpacking raids in Marshalltown, Iowa, both Senator Harkin and Governor Vilsack expressed their displeasure to DHS Chairman Michael Chertoff.\textsuperscript{52} In addition to political opposition, a lack of funding also prevents widespread enforcement efforts.\textsuperscript{53} Because of this void in government enforcement, concerned parties have turned to a private means of enforcing immigration law—civil RICO.


\textsuperscript{49} See Vernon M. Briggs, Jr., Reining-in a Rogue Policy: The Imperative of Immigration Reform, 30 U. MIAMI INTER-AM. L. REV. 611, 626–27 (1999) ("Immigration policy has been captured by an unholy alliance that links religious organizations, ethnic groups, libertarian economists, and the powerful American Immigration Lawyers Association, who all have self interests and financial interests in maintaining the status quo, with corporate America which has a vested interests in cheap labor policies.").

\textsuperscript{50} See Mark Krikorian, Lured by Jobs, Illegal Immigrants Risk Death at Border Crossings, SANTA BARBARA NEWS-PRESS, Apr. 25, 1999, available at http://www.cis.org/articles/1999/msk4-25-99.html ("During last year’s Vidalia onion harvest in Georgia, for instance, most workers fled after INS raids. Within days, both Georgia senators and three representatives wrote to Attorney General Janet Reno fiercely criticizing the INS for 'lack of regard for farmers.'") (on file with the Washington and Lee Law Review).


III. The Use of Civil RICO to Privately Enforce Immigration Laws

Civil RICO allows private parties to recover treble damages for predicate acts incorporated into criminal RICO. Private parties filing under civil RICO, however, must meet the stringent standing provision of § 1964(c) to sue in federal court.

A. Civil RICO Background

In 1996, Congress added violations of the Immigration and Naturalization Act (INA) to a long list of acts that qualify as predicate acts under RICO. Although Congress added the predicate acts hoping to aid prosecutors in combating human smuggling, the same predicate acts have created the newest private method to fight illegal immigration through its application of civil RICO. The civil RICO provision of § 1964 allows private parties to recover damages that occur as a result of violations of criminal RICO. Section 1962, better known as criminal RICO, incorporates four separate prohibitions: first, subsection (a) prohibits investing any income derived from a "pattern of racketeering activity" in any enterprise that affects interstate commerce; second, subsection (b) prohibits acquiring or maintaining any interest in or control of any enterprise affecting interstate commerce through a pattern of racketeering activity; third, subsection (c) prohibits conducting or participating in an enterprise's affairs through a


59. Id. § 1962(b).
pattern of racketeering activity; and fourth, subsection (d) prohibits conspiracy to violate any of the previous three provisions.

Because of its breadth, most RICO claims are brought under the participation racketeering provision of § 1962(c). A "pattern of racketeering activity" is at least two acts of racketeering activity within a ten year period, and "racketeering activity" is any of a number of predicate acts defined in § 1961 from murder to passport fraud. In the immigration context, a pattern of racketeering activity encompasses a violation of INA § 274 (codified at 8 U.S.C. § 1324), which includes knowingly hiring ten or more unauthorized aliens for employment during a twelve month period, concealing or harboring unauthorized aliens, or encouraging an unauthorized alien to enter the United States. In theory, each suit arising under criminal RICO § 1962(c) can be brought under civil RICO § 1964(c), which creates a private right of action for "[a]ny person injured in his business or property by reason of a violation" of RICO's substantive provisions.

B. Standing to Sue Under Civil RICO § 1964(c)

Standing poses a great challenge to civil RICO plaintiffs. Standing determines whether the litigant is entitled to have the court decide the merits of its dispute and consists of both constitutional and prudential requirements. Every federal case must satisfy the constitutional Article III standing requirements of injury-in-fact, traceability, and redressability. Prudential

60. Id. § 1962(c).
61. Id. § 1962(d).
66. Id. § 1324(a)(1)(A)(iii).
67. Id. § 1324(a)(1)(A)(iv).
68. See 18 U.S.C. § 1962(c) (granting standing to recover treble damages for a violation of § 1962); id. § 1963(a) (providing the criminal punishment for a violation of § 1962).
69. See Allen v. Wright, 468 U.S. 737, 750–51 (1984) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.").
70. See Bennett v. Spear, 520 U.S. 154, 162 (1997) (evaluating three components to
standing, articulated in the underlying statute and judge-made doctrines, determines additional limitations on each right of action. 71 Section 1964(c) creates a private civil cause of action providing that "[a]ny person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damage he sustains and the cost of the suit, including a reasonable attorney's fee . . . ."72 Hence, four criteria are required for the case to satisfy prudential standing: (1) the plaintiff must be a person who has (2) suffered injury to (3) his or her business or property (4) by reason of the defendant's violation of § 1962.

The Court has interpreted the "by reason of" requirement as the most limiting element of standing under RICO. 73 In Holmes v. Securities Investor Protection Corp., 74 the Supreme Court addressed the question of whether a plaintiff who had suffered damages as a result of harm done to a third party had standing to recover damages under civil RICO. 75 Securities Investor Protection Corporation (SIPC) brought suit in federal district court against seventy-five defendants, including officers and directors of six different companies, 76 to recover treble damages under § 1964(c) of civil RICO for securities fraud. 77 SIPC, a congressional nonprofit organization, had instituted liquidation proceedings against two failing securities brokerage houses, First State Securities Corporation (FSSC) and Joseph Sebag, Inc. (Sebag) 78 and later advanced $13 million to FSSC and Sebag's customers because the brokerages' assets were inadequate to cover all of the claims. 79 The defendant's stock
manipulation resulted in injury to the broker-dealers, which consequently left the broker-dealers insolvent and unable to pay the plaintiff's claims. 80

The Holmes Court interpreted the phrase "by reason of" in § 1964(c) to imply a proximate cause requirement for standing under civil RICO because this language had been borrowed from antitrust legislation, which the Court had previously interpreted to include a proximate cause requirement. 81 The proximate cause requirement demands "some direct relation between the injury asserted and the injurious conduct alleged." 82 The Court held that SIPC's injuries were not direct because its customers' injuries resulted from the defendants' harm to third parties, the broker-dealers, which consequently left the broker-dealers insolvent and unable to pay SIPC's claims. 83

The Supreme Court reasoned that standing should be limited to direct victims based on three justifications: (1) the difficulty in ascertaining the damages attributable to the violation as opposed to independent factors; (2) the difficulty in apportioning damages that would force the court to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury to obviate the risk of multiple recoveries; and (3) the presence of more direct victims of the alleged violation who can be counted on to vindicate the law. 84 The Holmes Court deduced that it would be difficult to ascertain the amount of harm the stock manipulation scheme caused the plaintiffs because the broker-dealers' insolvency could be due to a variety of factors other than the alleged manipulation scheme, such as poor business practices or market developments. 85 This would likely involve the need for complicated rules to allocate damages among the various levels of injury caused. 86 Furthermore, providing the indirectly injured party with standing does not advance the statute's deterrence effect because the directly injured victims can be relied upon to bring suit. 87 In fact, the broker-dealers had

81. Id. at 265–66.
82. Id. at 266.
83. Id. at 271–73.
84. See id. at 269–70 (explaining the rationale behind the directness requirement); see also Ryan C. Morris, Comment, Proximate Cause and Civil RICO Standing: The Narrowly Restrictive and Mechanical Approach in Lerner v. Fleet Bank and Baisch v. Gallina, 2004 BYU L. REV. 739, 777–78 (2004) (stating that the Holmes Court "makes clear that its 'directness' admonition consists of analyzing proximate cause standing based on ... those factors laid out in the majority opinion and not general notions of directness").
86. Id. at 265–66.
87. Id. at 269–70.
already brought suit through an appointed trustee.\textsuperscript{88} The Supreme Court emphasized the fear that permitting indirectly injured victims to bring suit would open the door for "massive and complex damages litigation, which would not only burden the courts, but would also undermine the effectiveness of treble-damages suits."\textsuperscript{89} Although not a rigid test of directness, the \textit{Holmes} three-part justification guides the lower courts in determining the relation between the conduct and the injury.\textsuperscript{90}

\textbf{IV. Applying Standing Doctrine Under Civil RICO Before Anza}

Since the 1996 RICO amendment, several plaintiffs have brought suit against companies for knowingly hiring unauthorized aliens. Civil RICO appeared to be a method for those most hurt to privately enforce immigration law and receive treble damages. Most importantly, before \textit{Anza v. Ideal Steel Supply Corp.}, these types of cases seemed cognizable.

\textbf{A. The First Use of Civil RICO for an Immigration Violation}

In 2000, a group of competitors became the first plaintiffs to utilize the new predicate immigration acts under civil RICO.\textsuperscript{91} In \textit{Commercial Cleaning Services L.L.C. v. Colin Service Systems},\textsuperscript{92} a group of office cleaning

\textsuperscript{88} \textit{Id.} at 273–74.


\textsuperscript{90} See \textit{id.} at 274 ("[O]ur use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text. We do not necessarily use it in the same sense as courts before us have . . . ."); see also Morris, \textit{supra} note 84, at 741 ("[Holmes] set forth three factors, none of which are rigid or per se rules, to determine whether a plaintiff satisfies the proximate cause requirement of civil RICO standing.").


\textsuperscript{92} See \textit{Commercial Cleaning}, 271 F.3d at 383–84 (holding that plaintiff met the causation requirements as stated in \textit{Holmes}). On a motion to dismiss, the Second Circuit considered whether alleging that a defendant engaged in a pattern of racketeering activity by hiring unauthorized aliens for profit was sufficient to meet the \textit{Holmes} direct causation test. \textit{Id.} at 379. Defendant allegedly underbid competitor Plaintiff for cleaning contracts by means of an illegal immigrant hiring scheme that allowed Defendant "a virtually limitless pool of workers on short notice" at significantly lower prices than possible by operating lawfully. \textit{Id.} The Second Circuit found that Plaintiff met the three-part test to determine direct causation because if Plaintiff’s claims were substantiated: (1) Plaintiff could establish attributable damages through
companies sued a competitor for lost profit from the defendant’s underbidding, which was possible because of the lower labor costs of employing unauthorized aliens. The district court dismissed the case because it determined damages would be too difficult to calculate in light of the multitude of factors reflected in bid prices; however, the Second Circuit reversed, holding that the plaintiff was directly injured because the very purpose of the unauthorized hiring scheme was to undercut its business rivals. After reinstatement, the parties reached a settlement favorable to the plaintiff. The Second Circuit’s decision and the subsequent favorable settlement encouraged analogous lawsuits in other jurisdictions.

B. Legal Employees’ Subsequent RICO Cases

After Commercial Cleaning, similar cases arose in the Sixth, Seventh, Ninth, and Eleventh Circuits. In the Sixth and Ninth Circuits, legal
employees filed class actions against large, agriculturally-based companies for depressing their wages by employing unauthorized aliens. Each district court initially dismissed the case against the agricultural companies due to the second Holmes justification of speculative damages, but both the Sixth and Ninth Circuits reinstated the cases, holding that the suit did not consist of a passed-on harm and that other alleged weaknesses in the chain of causation were matters for summary judgment, not dismissal on the pleadings.

The Ninth Circuit Court of Appeals evaluated Mendoza v. Zirkel Fruit Co. under the framework announced in Holmes. First, the court considered whether there were more direct victims of the alleged wrongful conduct who could bring suit. It found that the legal employees were the most direct victims because "[unauthorized] workers cannot 'be counted on to bring suit for the law's vindication." Second, the court assessed the difficulty in ascertaining damages attributable to the defendants' wrongful actions. Specifically, the court found that the plaintiffs had stated a plausible claim that their wages were indeed lowered because of the defendants' scheme, and that

(holding that causation was adequately pled), vacated, 126 S. Ct. 2016 (2006), modified, 2006 U.S. App. LEXIS 24306 (11th Cir. 2006).

99. See Trollinger v. Tyson Foods, Inc., 214 F. Supp. 2d 840, 843–44 (E.D. Tenn. 2002) (finding that plaintiffs lacked standing because plaintiffs only made a "conclusory allegation that they ha[ ]d been damaged, and ha[d] not backed that allegation up with any assertion as to how that damage ha[d] occurred"), rev’d, 370 F.3d 602 (6th Cir. 2004); Mendoza v. Zirkle Fruit Co., 2000 U.S. Dist. LEXIS 21126, at *24–30 (D. Wash. 2000) (finding plaintiffs lacked standing to bring RICO claims because their damages were too speculative), rev’d, 301 F.3d 1163 (9th Cir. 2002).

100. See Trollinger, 214 F. Supp. at 843 (evaluating plaintiffs’ allegation under the second Holmes justification and concluding that the finding that the hiring of illegal aliens depressed the plaintiffs’ wages requires sheer speculation); Mendoza, 2000 U.S. Dist. LEXIS 21126, at *28–29 (describing how plaintiffs’ allegations were too speculative for standing because of the wide range of factors that influence wages).

101. See Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 614–15 (6th Cir. 2004) (stating that a RICO case with a traditional proximate cause problem such as a lack of foreseeability or a speculative theory of damages is more appropriately dismissed on summary judgment than on a motion to dismiss); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1171 (9th Cir. 2002) ("It is inappropriate at this stage to substitute speculation for the complaint’s allegations of causation . . . . The workers must be allowed to make their case through presentation of evidence, including experts who will testify about the labor market, the geographic market, and the effect of the illegal scheme.").

102. See Mendoza, 301 F.3d at 1169 (focusing on the three justifications from Holmes).

103. See id. at 1170 (evaluating the case to determine if there was a more direct victim).


105. See id. at 1170–71 (evaluating the "speculative measure of harm" and distinguishing between "uncertainty in the fact of damage and in the amount of damage").
they should be given a chance to make their case through expert testimony.\footnote{106} Third, the Ninth Circuit decided there was little risk of multiple recoveries against the defendants because no other plaintiffs had been identified and the defendants did not argue that such a risk existed.\footnote{107}

Mendoza was the first RICO immigration suit to survive discovery and summary judgment motions; on the brink of trial, however, the parties reached a $1.3 million settlement.\footnote{108} This substantial recovery was widely reported and suggested that a rising tide of additional lawsuits would be filed against similar employers nationwide.\footnote{109}

In Trollinger v. Tyson Foods, Inc.,\footnote{110} the Sixth Circuit found that the plaintiffs alleged a direct injury because expert testimony could substantiate the causal connection at a later stage of litigation.\footnote{111} Based on the direct

\begin{footnotes}
\item[106]See id. at 1171 ("It is inappropriate at this stage to substitute speculation for the complaint's allegations of causation . . . . The workers must be allowed to make their case through presentation of evidence, including experts who will testify about the labor market, the geographic market, and the effect of the illegal scheme.").

\item[107]See id. at 1171–72 (evaluating the risk of multiple recovery and finding that no other plaintiff had yet emerged and, furthermore, that this factor does not limit multiple groups of plaintiffs when they each have concrete injury).


\item[110]See Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 605 (6th Cir. 2004) (holding that causation was adequately pled for the early stages of litigation). In Trollinger, the Sixth Circuit considered whether alleging that a defendant engaged in a pattern of racketeering activity by hiring unauthorized aliens for profit was sufficient to meet the Holmes direct causation test on a motion to dismiss for failure to state a claim. Id. at 605. The court also considered whether the National Labor Recovery Act (NLRA) preempted legal employees' RICO claims. Id. The legal employees alleged that the employer violated RICO by engaging in a scheme to depress the wages paid to its hourly legal employee by knowingly hiring unauthorized aliens in violation of 8 U.S.C. § 1324. Trollinger, 370 F.3d at 605. A federal grand jury had previously indicted Tyson for conspiring to smuggle and employ unauthorized aliens. Id. The Trollinger court found the fact that the union negotiated plaintiffs' wages did not alter the more critical fact that Tyson directly employed and paid the plaintiffs; and hence, finding a direct injury in this case was consistent with the privity-of-contract roots of the direct-injury requirement. Id. at 616. Furthermore, the NLRA did not preempt the legal employees' claims because the legal employees did not need to prove a violation of the NLRA in order to establish violations of the federal-law predicate act. Id. at 609.

\item[111]See Trollinger, 370 F.3d at 619 (describing how plaintiffs could establish causation). The court explained:

It remains possible that plaintiffs may prove the following allegations in their complaint: (1) that Tyson hired sufficient numbers of illegal aliens to impact the legal employees' wages; (2) that each additional illegal worker hired into the
\end{footnotes}
employment relationship between the defendant and plaintiffs, the *Trollinger* court differentiated the case from the *Holmes* line of cases, where the plaintiffs had no relationship with the defendants except through intermediaries. It also rejected the claim that the allegations were merely speculative on the grounds that facts need only be alleged, not proven, to withstand dismissal on the pleadings.

A similar case in the Eleventh Circuit, *Williams v. Mohawk Industries*, proved significant because of its eventual certiorari to the Supreme Court. In *Williams*, the plaintiffs were Georgia carpet and rug factory workers alleging depressed wages from Mohawk Industries's hiring of unauthorized aliens. When Mohawk Industries hired unauthorized aliens, Mohawk Industries decreased the number of legal workers it hired and the labor pool increased, which permitted it to depress the wages of legal workers. The district court denied Mohawk Industries's motion to dismiss the federal civil RICO claim. Using the reasoning of the Sixth and Ninth Circuit cases, the Eleventh Circuit affirmed the decision. The Eleventh Circuit found that direct causation existed because Mohawk Industries's illegal conduct was allegedly aimed primarily at depressing the plaintiff's wages. The court reasoned that the

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112. See id. at 615–16 (differentiating the case from *Holmes* and stating that the fact that the union merely negotiated the plaintiffs' wages did not alter the critical fact that Tyson employed and paid plaintiffs directly).

113. See id. at 618–19 (finding that the plaintiffs' allegations were not speculative because the plaintiffs alleged sufficient aliens in the workforce to lower the wage scale).


115. Id. at 1255.

116. Id. at 1256.


118. See *Williams*, 411 F.3d at 1259 (using the reasoning of *Mendoza* and *Tyson* to explain why plaintiffs have alleged direct causation as required under § 1964(c)).

119. See id. at 1263–64 (finding that the purpose of the defendant's scheme was to depress the wages of legally documented employees).
"fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one."^{120}

The Seventh Circuit’s decision in *Baker v. IBP*^{121} is the lone exception in interpreting civil RICO’s direct causation requirement. Judge Easterbrook,^{122} writing for the court, applied the direct causation requirement rigorously in a case factually similar to other RICO immigration cases. In *Baker*, a group of employees sued IBP for depressing wages by hiring unauthorized aliens.^{123} Although *Baker* was disposed of on separate grounds,^{124} the causation analysis reveals that the legal employees’ injury was too remote to establish damages.^{125} The *Baker* court found that the legal employees could not establish that the hiring of unauthorized aliens directly caused their diminished wages because the hiring of unauthorized aliens created an increase in the labor supply.^{126} As supply increases and wages decrease, the court reasoned, workers will leave the defendant’s plant for higher wages elsewhere, which causes an equilibration

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120. *Id.* at 1263.

121. See *Baker v. IBP*, Inc., 357 F.3d 685, 692 (7th Cir. 2004) (finding that the hiring of illegal aliens did not directly diminish the employees’ wages, which made the employees’ injury too remote to establish damages under RICO). In *Baker*, the Seventh Circuit considered three distinct issues: (1) whether legal employees represented by a union had subject matter jurisdiction under the NLRA; (2) whether the employer was operating an "enterprise" as required for treble damages under § 1964; and (3) whether the unlawful hiring of aliens was sufficient to have directly caused legal employees’ diminished wages. *Id.* at 686–92. According to the *Baker* court, the NLRA did not apply to this case because the predicate offenses under RICO are federal crimes apart from labor laws. *Id.* at 689. The *Baker* court stated that IBP was legally required to pay the collective bargain wage rate; therefore, without the union as a party, the plaintiffs could not settle the suit for higher hourly pay. *Id.* at 691. However, even if the union was joined, the complaint failed to state a claim under RICO. *Id.* The legal employees did not establish a pattern of racketeering activity because the employer was the enterprise; and without a difference between the alleged operator of the enterprise and the "enterprise," there was no violation of RICO. *Id.* at 691–92. Furthermore, even if the enterprise requirement was met, the *Baker* court stated that the legal employees could not establish that the hiring of illegal aliens directly diminished their wages, making their injury too remote to establish damages under RICO. *Id.* at 692.


124. See *id.* at 691 (holding that the defendant was entitled and legally required to pay the collective bargain wage rate; therefore, without the union as a party, plaintiffs could not settle this suit for higher hourly pay).

125. See *id.* at 692 (explaining that the legal employees could not establish direct causation between the hiring of illegal aliens and their diminished wages, making their injury too remote to establish damages under RICO).

126. *Id.*
throughout the labor market. Although this equilibrium wage could be marginally lower, the widespread effect of an increase in labor would make the individual impact insignificant, and the court found it unrealistic to apportion such vast consequences to particular violations of the immigration statutes. Furthermore, the court reasoned that even if the defendant was paying unauthorized aliens less, and hence saving money, the plaintiffs had no right to this cost savings because the plaintiffs had been paid all to which they were entitled. Although distinctive from the prior RICO immigration cases, Baker is the first immigration RICO case that approaches the Supreme Court's reasoning in Anza.

V. Legal Employees' Use of Civil RICO Should Cease Under Anza's New Standard

The tables appeared to turn for employers after the Supreme Court's decision in Anza v. Ideal Steel Supply Corp. on June 5, 2006, and the Court's subsequent dismissal of certiorari as improvidently granted in Mohawk Industries v. Williams. Following Mohawk's failure to obtain an order of dismissal in the Eleventh Circuit, Mohawk filed a petition with the Supreme Court regarding: (1) whether a defendant corporation and its agents can constitute an enterprise and (2) whether the plaintiffs had shown that the defendant proximately caused injury to the plaintiffs' businesses or properties by alleging that the hourly wages the plaintiffs voluntarily accepted were too low. The Supreme Court initially granted certiorari limited to the enterprise question, but after the parties gave oral arguments, the Supreme Court dismissed its previous grant of certiorari as improvidently granted.

127. Id.
128. Id.
129. See id. ("Suppose that plaintiffs believed that IBP has violated the Fair Labor Standards Act by failing to calculate other workers' overtime premium; could plaintiffs obtain damages from IBP even though it had paid them all that the FLSA requires?").
130. See Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991, 1997 (2006) (holding that the defendant lacked standing because the plaintiff was not a direct victim of the defendant's RICO predicate act of mail fraud); see also infra Part V.A (discussing Anza in detail).
131. See Mohawk Indus., Inc. v. Williams, 126 S. Ct. 2016, 2016 (2006) (dismissing certiorari as improvidently granted, vacating the judgment, and remanding to the Eleventh Circuit for further consideration in light of Anza v. Ideal Steel Supply Corp.).
133. Mohawk Indus., 126 S. Ct. at 2016.
the Eleventh Circuit's decision and remanded the case back to the Eleventh Circuit for reconsideration in light of Anza.\footnote{134}

Given the circumstances surrounding the Supreme Court's dismissal of \textit{Mohawk Industries v. Williams} as improvidently granted, the Supreme Court seemed to suggest that the Eleventh Circuit's prior ruling contradicted \textit{Anza}. Typically, the Court will not dismiss a petition absent intervening factors that were not known or appreciated at the time it was granted.\footnote{135} The Supreme Court does, however, remand cases for further consideration when the Justices have found enough similarity between the case before them and the intervening decision to denote that the judgment below is in error, and yet the Court is not prepared to reverse such a decision outright because of other aspects of the case.\footnote{136} This type of remand is used to "improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal."\footnote{137} Because the Supreme Court was well aware of the facts of \textit{Williams} after oral arguments,\footnote{138} the remand indicates that the Eleventh Circuit's earlier decision needed to be carefully reexamined to determine whether the employer's alleged RICO violations directly harmed the legal employees.\footnote{139}

\footnote{134. Id.}
\footnote{135. See Michael E. Solimine \& Rafael Gely, \textit{The Supreme Court and the DIG: An Empirical and Institutional Analysis}, 2005 WIS. L. REV. 1421, 1424 (2005) (explaining the significance of the Court's dismissing a case as improvidently granted due to the Court's limited case docket and the inherent importance of any case in which certiorari is granted); see also id. at 1434 (stating that from 1954 to 2005, the Court only dismissed as improvidently granted 155 cases, averaging about three per term).}
\footnote{136. See Arthur D. Hellman, \textit{The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's}, 91 HARV. L. REV. 1709, 1720–21 (1978) ("The Court said that remand orders do not amount to a final determination on the merits, but that they do 'indicate that we [find the intervening precedent] sufficiently analogous and, perhaps, decisive to compel re-examination of the case.'" (quoting Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964))).}
\footnote{137. Lawrence v. Chater, 516 U.S. 163, 168 (1996); see also, e.g., Sharpe v. United States, 712 F.2d 65, 67 (4th Cir. 1983) (Russell, J., dissenting) ("The Supreme Court was seeking to be gentle with us but there is ... no mistaking what they expected us to do. The Supreme Court thought [the intervening decision] both relevant and dispositive . . . ."), rev'd, 470 U.S. 675 (1985)).}
\footnote{139. See Mohawk Indus., Inc. v. Williams, 126 S. Ct. 2016, 2016 (2006) (holding certiorari improvidently granted, vacating the judgment, and remanding to the U.S. Court of Appeals for the Eleventh Circuit for further consideration in light of \textit{Anza v. Ideal Steel Supply Corp}); see Marie Coyle, \textit{High Court Reins In RICO: Anti-civil RICO Forces Get a Win—But It's Not Over, NAT'L LAW J.}, June 12, 2006, at 1 ("[T]he high court delivered a blow to a RICO class action . . . vacat[ing] the workers' favorable judgment by the 11th U.S. Circuit Court of
A. The Determinative Case: Anza v. Ideal Steel Supply Corp.

Although Anza v. Ideal Steel Supply Corp. is not a civil RICO case based on immigration, the ruling rests on the issue of proximate causation under § 1964(c). Because Anza further restricts standing based on a redefined theory of direct causation, Anza should play a determinative role in deciding employees' RICO immigration cases.

In Anza, Ideal Steel brought a civil suit under § 1964(c) against its competitor, National Steel Supply, Inc., alleging that National Steel engaged in the RICO predicate act of mail fraud to conceal not charging sales tax on cash sales.140 According to Ideal Steel, National Steel implemented the scheme to lower its prices and gain a competitive advantage.141 Ideal Steel’s argument failed in district court, where its case was dismissed,142 but the Second Circuit adopted Ideal Steel’s theory of the case, holding that where a complaint alleges a pattern of racketeering activity "that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim."143

The Supreme Court reversed, finding that Ideal Steel’s complaint lacked the directness requirement of Holmes144 because § 1964(c) requires proof of "some direct relation between the injury asserted and the injurious conduct alleged."145 Using the rationale behind the Holmes decision, the Anza court noted the difficulty of determining damages because National Steel’s decreased prices and Ideal Steel’s lost sales could be attributed to numerous causes.146 Additionally, the state of New York, as the immediate victim, could vindicate

141. Id.
142. See id. at 1995 (stating that the district court granted the petitioners' motion to dismiss because the plaintiff had not shown reliance on the petitioners' misrepresentations, as required in RICO mail and wire fraud claims).
144. See supra Part II.B (discussing standing requirements of Holmes, the case that first limited standing).
145. See Anza, 126 S. Ct. at 1997–98 (using the three-prong rationale of Holmes to explain why Ideal Steel’s injury is not sufficiently direct).
146. See id. at 1997 (explaining that National Steel "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud" and Ideal Steel’s "lost sales could have resulted from factors other than petitioners’ alleged acts of fraud").
the tax laws through its own claims. In reaching its decision, the Court emphasized that the directness requirement prevents "intricate, uncertain inquiries from overrunning RICO litigation." This requirement cannot be met when the immediate victim of the alleged unlawful conduct is a party other than the plaintiff, and where the cause of the plaintiff's injuries is a set of actions entirely distinct from the RICO violation.

B. Anza's Higher Standard

After Anza, the new proximate cause standard should prevent legal employees from bringing suit under civil RICO. Although Anza begins and largely ends with Holmes, its redefinition of a "direct relation between the harm and the injury" under § 1964(c) deliberately restricts previous lower courts' applications of Holmes.

During oral arguments of Anza, the Supreme Court highlighted its intent to reevaluate past circuit court decisions applying § 1964(c). When questioning National Steel about whether there was a more direct victim of its RICO violation, which would be a reason to deny direct causation under Holmes, Justice Ginsburg asked Ideal Steel about the Second Circuit's reliance on Commercial Cleaning. Of course, Ideal Steel also relied heavily on

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147. See id. at 1998 ("If the allegations are true, the State can be expected to pursue appropriate remedies.").
148. See id. (describing why the damages would be too complicated to calculate). The court stated:

A court considering the claim would need to begin by calculating the portion of National’s price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of Ideal’s lost sales attributable to the relevant part of the price drop. The element of proximate causation recognized in Holmes is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.

Id.
149. See id. at 1997 ("The cause of Ideal’s asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State).")
150. See id. at 1995 ("Our analysis begins—and, as will become evident, largely ends—with Holmes.").
151. For an example of the Supreme Court applying a past precedent in a more restrictive manner, see, e.g., Rakas v. Illinois, 439 U.S. 128, 140 (1978).
153. See id. (question of Justice Ginsberg) (asking the petitioner to address the holding of
Commercial Cleaning’s reasoning in its appellate brief to establish causation. Rather than distinguishing Commercial Cleaning from its case, National Steel replied that the Second Circuit decision was incorrect because Commercial Cleaning’s injury was indirect and hence, it lacked standing under civil RICO.

In Anza, the Supreme Court accepted Ideal Steel’s reasoning that the government was the most direct victim, an option that the Second Circuit’s Commercial Cleaning decision never considered when it found that "there [was] no class of potential plaintiffs who ha[d] been more directly injured by the alleged RICO conspiracy." National Steel’s reliance on, and Ideal Steel’s unqualified rejection of Commercial Cleaning supports the conclusion that the Supreme Court was consciously considering the appropriate standard for standing under § 1964(c). Ultimately, the Anza Court rejected the theory that National Steel’s failure to pay sales tax directly caused Ideal Steel’s lost sales and with it rejected the Second Circuit’s finding of direct causation in Commercial Cleaning. The Supreme Court’s rejection of Commercial Cleaning is significant because Commercial Cleaning was the first immigration case brought under RICO, and each subsequent RICO immigration case relied directly or indirectly upon the Second Circuit’s reasoning in Commercial Cleaning to determine whether the plaintiffs had a "direct relation between the harm and the injury."

Anza requires a higher level of causation at an earlier stage than previously employed in civil RICO cases. Under Anza, § 1964(c) stipulates: (1) directness cannot occur if an additional lawful act is necessary in order for

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154. See Answer at 23–24, Anza, 126 S. Ct. 1991 (No. 04 Civ. 433), 2006 WL 448207 (citing Commercial Cleaning to explain why the Second Circuit opinion in Anza was correct).

155. See Transcript of Oral Argument, supra note 152, at 12–13 (statement of Mr. Frederick, petitioner for National Steel) (asserting that knowingly hiring unauthorized aliens is only indirectly linked to creating a competitive edge over rivals).


158. See Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1169 (9th Cir. 2002) (stating that Commercial Cleaning was one of two cases that the Court was relying on to decide the case); see also Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 619 (6th Cir. 2004) (stating that the Mendoza Court reached the same result on similar facts). But see Baker v. IBP, Inc., 357 F.3d 685, 692 (7th Cir. 2004) (acknowledging that the Mendoza court found direct causation on similar facts but explaining why the Mendoza court’s finding was incorrect).
the RICO violation to inflict plaintiff’s injury and (2) this directness must be shown at the pleading stage, instead of at the summary judgment stage. 159

1. The Heightened Pleading Requirement

Section 1964(c) defines the standing requirements for civil plaintiffs under RICO. In *Holmes* the "by reason of" language was interpreted to require "some direct relation between the injury asserted and the injurious conduct alleged." 160 Standing requirements are normally addressed through 12(b)(1) motions, but as in *Holmes*, courts have traditionally addressed questions of civil RICO standing on 12(b)(6) motions. 161 After *Holmes* but before *Anza*, many circuit courts interpreted narrowly the "by reason of" standing requirement of § 1964(c) to require only dismissal of claims that resulted from harm caused to a third party. 162 The *Anza* Court, however, imposed a higher pleading standard 163 than a "set of facts that could be proved consistent with the allegations." 164

Under *Anza*, a mere explanation of a possible direct injury is not sufficient, even at the motion to dismiss stage; the direct injury must be substantiated. In fact, the Supreme Court dismissed Ideal Steel’s case on its pleadings, despite Ideal Steel’s specifically pleading that "the purpose and

159. See Coyle, supra note 139, at 1 ("Although the U.S. Supreme Court last week ducked the questions everyone expected it to answer in two unrelated challenges under RICO, the justices did tighten the reins on the law generally viewed by the business community as a legal plague.").


161. See *Assoc. Gen. Contractors.*, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529 (1983) (explaining that the "by reason of" language of the Clayton Act explains the proximate causation requirement as a necessary element of antitrust standing, despite being addressed in a Rule 12(b)(6) motion); see also *Maio v. Aetna, Inc.*, 221 F.3d 472, 481 n.7 (3d Cir. 2000) (explaining that a motion to dismiss under RICO § 1964(c) is a motion to dismiss under Rule 12(b)(6), rather than a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), even though the proximate cause requirements are considered aspects of the plaintiffs’ standing to sue under § 1964(c)).

162. See *Trollinger*, 370 F.3d at 614–15 (stating that a RICO case with a derivative-injury problem is better suited to dismissal on the pleadings than a RICO case with a traditional proximate-cause problem such as a lack of foreseeability or a speculative theory of damages); *Mendoza*, 301 F.3d at 1171 ("Questions regarding the relevant labor market and power . . . are exceedingly complex and best addressed by economic experts and other evidence at a later stage in the proceedings.").

163. See *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 2003 n.5 (2006) (Thomas, J., concurring in part and dissenting in part) (dissenting from the majority by stating that it is not fair to require a plaintiff to prove proximate causation at the motion to dismiss stage).

"direct effect" of National Steel's RICO violation was to cause Ideal Steel to lose business, and despite Ideal Steel's explanation that in its highly competitive market, the failure to charge sales tax allowed National Steel to drop its prices by 8.25%. The Anza Court's finding of a lack of direct causation, despite Ideal Steel's specificity in pleading, confirms that plaintiffs must diligently establish, not merely allege, direct causation in their complaint in order to avoid a motion to dismiss.

Standing under § 1964(c) requires a direct relationship between the hiring of unauthorized aliens and the legal employees' depressed wages. Because direct causation is an element of standing under civil RICO, legal employees bear the burden of establishing direct causation when filing a complaint. With legal employees bearing the burden of establishing direct causation at the pleading stage, courts cannot speculate whether the legal employees could show direct causation with the help of expert witnesses or discovery. Legal employees' unsubstantiated causation analysis will not satisfy Anza's directness requirement. In essence, the plaintiffs must prove standing in the complaint—a nearly impossible task for legal employees.

2. The Stricter Direct Relation Test

The directness standard for standing under § 1964(c) is significantly more restrictive under Anza than previously applied under Holmes. In Holmes, the defendants' stock manipulation resulted in injury to the broker-dealers, which consequently left the broker-dealers insolvent and unable to pay the plaintiff's claims; therefore, the injury was not sufficiently direct for standing under § 1964(c). After Holmes, courts interpreted the directness requirement to deny standing to plaintiffs harmed as a result of a third party injury.


166. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (stating that a plaintiff invoking federal jurisdiction bears the burden of establishing all elements of standing).

167. See Anza, 126 S. Ct. at 1999 (Thomas, J., dissenting in part and concurring in part) (stating that the majority's "theory of proximate causation . . . is supported neither by the Act nor by our decision in Holmes").

168. See Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 271–73 (1992) (finding that the plaintiffs' harm was indirect because the harm occurred due to a third party's injury); see also supra subpart III.B (detailing the facts of Holmes).

169. See, e.g., Trollinger, 370 F.3d at 615–16 (6th Cir. 2004) (differentiating the case from Holmes because the employees' injury was not the result of a third party's injury); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1170 (9th Cir. 2002) ("The documented employees here do not
an analogous level of directness would result if Ideal Steel was injured when New York was unable to give Ideal Steel some payment or benefit because New York did not have enough tax revenue. Therefore, Ideal Steel was alleging a more direct injury than the Holmes scenario because the defendant’s underpayment of taxes allowed the defendant, not a third party, to lower its prices to injure Ideal Steel.\(^{170}\)

In Anza, however, the Supreme Court expanded the application of indirectness to include plaintiffs harmed by a defendant’s legal acts, even where a RICO predicate act facilitates the legal act.\(^{171}\) In Anza, the Court stated that an indirect injury includes Ideal Steel’s injury from National Steel’s legal act of lowering its prices, despite the fact that mail fraud to avoid taxes, a RICO predicate act, facilitated the price drop.\(^{172}\) Hence, the Anza Court requires a more direct injury than previously applied in Holmes.

\[\text{a. The Additional Requirements of Anza}\]

Under Anza, the question of whether an injury is sufficiently related to the RICO violation is based on two fundamental questions. A court should ask, first, whether a lawful act is necessary for the RICO violation to inflict the injury\(^{173}\) and, second, whether defendant could commit the predicate act without hurting the plaintiff.\(^{174}\) In Anza, a legal act breaks the causation chain and denies plaintiff standing. First, National Steel defrauded New York through mail fraud—the RICO predicate act—which provided National Steel with tax savings and extra cash.\(^{175}\) National Steel then used the savings to lower its prices—the lawful act.\(^{176}\) Ideal Steel could not compete with these

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170. See Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991, 1997 (2006) (stating that Ideal Steel alleged that National Steel used the proceeds from the tax fraud to offer lower prices designed to attract more customers from Ideal Steel).

171. See id. at 2004 (Thomas, J., concurring in part and dissenting in part) (stating that the majority’s theory of proximate causation permits a defendant to evade liability for intentional foreseeable harms “by concocting a scheme under which a further, lawful and intentional step by the defendant is required to inflict the injury”).

172. Id. at 1997 (majority opinion).

173. Id. (explaining that tax fraud on New York was necessary to cause Ideal Steel’s harm).

174. See id. at 1997 (“[National Steel’s] lowering of prices in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices . . . ”).

175. Id. at 1994.

176. Id.
lowered prices and, as a result, lost sales.\footnote{See id. (stating that Ideal Steel alleged a competitive disadvantage from National Steel’s tax fraud).} The Court determined that this lawful act of lowering prices broke the direct chain of causation between the RICO violation of mail fraud for tax evasion and lost sales.\footnote{See id. at 1997 (finding a lack of direct causation because defendant’s set of actions of offering lower prices was entirely distinct from the alleged RICO violation of defrauding the state).}

\textit{b. Applying Anza in Employees’ RICO Immigration Cases}

Legal employee plaintiffs should no longer be able to overcome a motion to dismiss based on \textit{Anza’s} direct relation test and its corresponding justifications because the hiring of unauthorized immigrants only hurts employees if the employer chooses to use the increase in the labor supply to lower wages. This prerequisite of choice illustrates that the act of choosing to lower wages, not the act of hiring unauthorized aliens, is the direct cause of employees’ injury—notably, choosing to change the wage rate is not a RICO predicate act.

The causation chain in employee RICO immigration cases is similar to \textit{Anza’s}. An employer hires unauthorized aliens—the RICO predicate act—which provides the employer with an enlarged labor supply.\footnote{See \textit{SAMUELSON \\& NORDHAUS}, supra note 33, at 58 (describing how immigration increases the labor supply).} To impact the wage rate, the employer must then use this increased labor supply from the RICO act to decrease its wage rate—a lawful act.\footnote{See, e.g., Idaho Commerce \\& Labor, Frequently Asked Questions, \url{http://cl.idaho.gov/Portal/ICL/alias_jobservice/tabID_5582/Default.aspx} (last visited Feb. 20, 2007) (stating that an employer can change or reduce an employee’s rate of pay at any time as long as it remains above minimum wage) (on file with the Washington and Lee Law Review).} Legal employees accept this wage rate and are thus injured. In neither \textit{Anza} nor the employees’ case does the predicate act automatically result in the plaintiff’s injury—neither cash savings from tax fraud nor extra labor from hiring unauthorized aliens automatically results in harm to the plaintiff.\footnote{See supra note 170 and accompanying text.} The hiring of unauthorized aliens does not necessarily lead to the depression of wages because (1) unauthorized aliens may equally affect the supply and demand of labor, which causes no effect in the wage rate, and (2) even when there is a greater effect on labor supply than labor demand, employers must choose to use the increase in labor supply to decrease the wage rate instead of pursuing other options, such as increasing production.\footnote{See \textit{SAMUELSON \\& NORDHAUS}, supra note 33, at 58–59 (describing how immigration shifts the supply curve for labor).}
The supply and demand of labor determines the wage rate. For the additional influx of unauthorized alien labor to affect the wage rate, the influx must shift the supply of labor and the influx must not be offset with a subsequent shift in the demand of labor.

In order for the hiring of unauthorized aliens to increase the supply of labor, there must be a net increase in the supply of labor. For any given economic area, the supply of labor only increases when the number of workers entering the labor market exceeds the number of workers leaving the labor market. Although a number of factors cause workers to leave a given labor market, the American economy is highly mobile and employees tend to migrate when a higher wage rate is available elsewhere. All other things being equal, wage rates will decrease as the labor supply increases; however, as wage rates decrease within a given economic area or industry, both legal and unauthorized employees migrate in search of available opportunities in other economic areas or industries, and the supply of labor decreases. The migration effect lessens the impact of an increase of labor in a single economic area.

Even assuming that the labor supply does not constrict to its pre-increase position, the increase in the supply of labor will affect the wage rate only if a subsequent shift in the demand of labor does not offset the shift in the supply of labor. Additional people—whether immigrants or youths entering the labor force—not only take jobs but also make new jobs because they spend their earnings on the output of other workers, thereby supporting additional employment. A
lower wage rate from a shift in the labor supply increases the potential return of capital investment, which makes it more profitable to build new factories, and in so doing, employers create additional demand for workers.\textsuperscript{191} As shown in Figure 1, when the supply in labor increases from \( S \) to \( S_1 \), the wage rate decreases from \( A \) to \( E \).\textsuperscript{192} However, when an increase in the demand of labor accompanies the increase in the supply of labor, with a shift from \( D \) to \( D_1 \), the wage rate remains the same, with a mere shift from \( A \) to \( B \).\textsuperscript{193}

\textbf{Figure 1}

\begin{figure}[h]
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\includegraphics[width=\textwidth]{figure1.png}
\caption{Diagram illustrating the effects of supply and demand shifts on wage rates.}
\end{figure}

\textsuperscript{191} See id. (describing how additional labor creates greater returns on capital and hence creates greater demand for labor); see also SAMUELSON & NORDHAUS, supra note 33, at 564–65 (explaining the positive returns to labor as capital increases).

\textsuperscript{192} See SAMUELSON & NORDHAUS, supra note 33, at 59 fig.3-10(a) (graphing the shift in labor supply).

\textsuperscript{193} See id. at 59 fig.3-10(b) (graphing a shift in labor supply with a corresponding shift in demand).
Therefore, when capital expenditures fully adjust to increases in labor, there is no long term impact on wages because the demand of labor increases with the supply labor. On an aggregate labor scale, even anti-immigration economists agree that when capital adjustments are taken into account, immigration affects wages very little.

In situations where there is a greater effect on labor supply than on labor demand, employers must choose to decrease wages instead of pursuing other options, such as increasing production that would increase labor demand. Since the decision to lower wages is a legal act and the decision is a prerequisite for the hiring of unauthorized aliens to cause depressed wages, employees are not direct victims under Anza.

This presence of an intermediate legal act is reflected when the defendant is able to commit the predicate act without hurting the plaintiff and the defendant could cause the injury without committing a predicate act. In Anza, National Steel’s "lowering of prices in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts. The tax fraud only hurts Ideal Steel when National Steel uses the savings to engage in direct price competition.

These considerations are also present in RICO immigration cases. Hiring unauthorized aliens does not mean that an employer can necessarily decrease wages. In fact, the hiring of unauthorized aliens may have equal

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194. See Myths and Migration, supra note 190, at Finance & Economics (explaining that as capital adjusts to increased labor, the wage rate readjusts).

195. See Borjas & Katz, supra note 26, at 39–40 (stating that immigration does not affect the average American when capital adjustments are taken into account, but maintains that wages of high school drop outs are decreased by five percent); see also Gianmarco I.P. Ottaviano & Giovanni Peri, Rethinking the Effects of Immigration on Wages 26–31 (Nat’l Bureau of Econ. Research, Working Paper No. 12,497, July 2006) (finding that when capital adjustments are taken into account, immigration has a positive effect on native citizen’s wages, and has only accounted for a small percent in the increase in the college to high school dropout wage gap).

196. See, e.g., Idaho Commerce & Labor, supra note 180 (stating that an employer can change or reduce an employee’s rate of pay at any time as long as it remains above minimum wage).

197. See Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991, 1997 (2006) ("The cause of Ideal’s asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State").)

198. Id.

199. Transcript of Oral Argument, supra note 152, at 29 (statement of Justice Souter) (explaining to respondent that Ideal’s injury is indirectly caused as a result of the fraud committed against New York).
effects on the supply and demand of labor, which would cause no effect on the wage rate.\textsuperscript{200} Even when there is a greater effect on labor supply than on labor demand, the additional legal act of choice breaks the direct causation chain because employers must choose to use the increase in labor supply to decrease the wage rate instead of pursuing other options, such as increasing production.\textsuperscript{201} Although it may seem harsh to deny standing to low-skilled employees, \textit{Anza} justifies such a finding.

3. Justifications for Denying Standing

In \textit{Holmes} and \textit{Anza}, the Supreme Court defended its findings of lack of standing based on three justifications.\textsuperscript{202} Based on the same reasoning, legal employees should not have standing under § 1964(c) because of (1) the difficulty in asserting damage, (2) the presence of a more direct victim to vindicate the law, and (3) the difficulty in asserting complicated rules to apportion damages for plaintiffs removed at different levels of injury.\textsuperscript{203}

Courts would have difficulty in calculating damages in these types of cases because of the variety of factors that impact labor supply and demand. Although the supply and demand of labor determines wages, factors such as labor force participation, worker productivity, education level, technology, job preferences, and migration impact the supply and demand of labor.\textsuperscript{205} Even though migration is one factor that impacts the supply and demand of labor, the impact of legal and unauthorized migration would have to be further differentiated for the purposes of determining damages.\textsuperscript{206} Additionally, independent factors, such as capital

\begin{itemize}
\item \textsuperscript{200} See supra notes 189–93 (describing the effect of equal shifts in labor demand and labor supply).
\item \textsuperscript{201} See \textsc{Samuelson \\& Nordhaus}, supra note 33, at 58–59 (describing how immigration shifts the supply curve for labor).
\item \textsuperscript{202} See supra Part III.B (describing the three justifications for denying standing to indirect victims).
\item \textsuperscript{204} See \textsc{Samuelson \\& Nordhaus}, supra note 33, at 245 (graphing wage rates as represented by labor supply and demand).
\item \textsuperscript{205} Id. at 244–61.
\item \textsuperscript{206} See id. at 248 ("[T]he overall effect of recent has been an increase in the supply of low-skilled workers."); see also supra notes 186–88 and accompanying text (describing the
investments to decrease the need for labor or good management to maintain workers, also allow some employers to better influence wage rates. As the Supreme Court explained in *AnzA*, the vast number of factors that contribute to a given injury justifies denying standing in such cases.  

Despite the ability of economic experts to isolate individual factors, determining the extent of unauthorized aliens’ offsetting impact on the demand and supply curves is a matter of considerable economic debate. Furthermore, once determined, the degree of impact is likely unrealistic. Even if legal employees would have received a higher wage but for the hiring of unauthorized aliens, a higher relative wage rate raises costs, which can result in business closure, factory relocation, or a production shift to another facility. When any of the latter occurs, there is decrease in the demand for labor. As shown in Figure 2, decreased demand for labor causes the demand curve to shift to the left from D to D2 and wages decrease from C to A. Therefore, an increase in wages may lead to massive job losses when an employer goes out of business or decreased labor demand, which is a much more significant injury than a marginally lower wage.

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207. See *AnzA* v. Ideal Steel Supply Corp., 126 S. Ct. 1991, 1997 (2006) (stating that National Steel could have lowered its prices for any number of reasons unconnected to the alleged fraud, such as simply concluding that the additional sales would justify a smaller profit margin); see also *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 770–72 (2d Cir. 1994) (finding a lack of causation because the plaintiff could not prove that but for the defendant’s false property appraisals, plaintiff would not have lost money when loans secured by the property went into default).

208. Compare generally Card, *supra* note 27, (finding that immigrants have a slight positive impact), with *Borjas, supra* note 27 (detailing the negative effects of immigration).

209. See *Samuelson & Nordhaus, supra* note 33, at 309–10 ("Having shown that the nation gains from importing the goods produced by cheap foreign labor in which it has a comparative advantage, we should not ignore the costs this strategy may temporarily impose on affected workers and firms."); see also *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 681–83 (1981) (stating that employers have the ability to expand the effective size of the labor pool by closing plants or moving operations to places where labor is cheaper).

The conflicting effects of the economic factors affecting local wages would subject the judicial system to the same type of speculative proof that the Supreme Court rejected in *Anza*.211 Although the presence of an immediate victim justifies the denial of standing to the indirect victim, not all RICO predicate acts have a direct victim.212 Congress formulated many of RICO’s predicate acts with only criminal RICO in mind, including the predicate acts based on immigration violations.213 For this

211. See *Anza*, 126 S. Ct. at 1998 ("A court considering the claim would need to begin by calculating the portion of National Steel’s price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of Ideal’s lost sales attributable to the relevant part of the price drop.").

212. See *id.* at 1998 ("The requirement of direct causal connection is especially warranted where the immediate victims of the alleged RICO violation can be expected to vindicate the laws by pursuing their own claim.").

reason, several predicate acts are unlikely to enable a private party to sue under § 1964(c) such as transporting obscene material or making a false statement on a passport application. The inclusion of some predicate acts that do not allow civil standing is not superfluous because the U.S. government has the ability to use all predicate acts to prosecute parties civilly and criminally. Courts consider immigration violations to be victimless crimes, which supports the notion that the immigration RICO predicate act lacks a direct victim. Immigration violations are crimes against the United States, similar to Anza where the state of New York was the direct victim of state tax violations.

The difficulty in creating complicated rules to apportion damages for plaintiffs removed at different levels of injury and its risk of duplicative recovery is particularly troubling in these cases because of the ripple effect of additional labor. When an additional worker enters a worksite, the increased supply of labor shifts the supply curve. Assuming the demand for workers remains constant, the wage rate will decrease until it meets the demand. For example, when a factory needs 100 qualified workers and 120 qualified workers want the job at $10 per hour, wages will decrease to $9.50 per hour so only 100 workers want the job. The labor supply model grows with a larger and more complex economy. Like a stone thrown into the middle of a lake, each additional worker produces a ripple effect: In the immediate area, the labor supply is affected foremost, but as workers migrate in search of available

(remarks of Sen. Simpson) ("I support using [RICO] to prosecute organized smuggling gangs.").

214. See 18 U.S.C. § 1961(1) (2000) (listing predicate acts to include § 1542 (false statement in an application for a passport) and § 1465 (transportation of obscene material)).


216. See United States v. Boos, 127 F.3d 1207, 1210 (9th Cir. 1997) (describing immigration violations as victimless crimes); see also Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (asserting a sovereign nation’s power to control immigration).

217. See U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 cmt. 2 (describing society as the victim of immigration offenses); see also United States v. Gastelum-Almedia, 298 F.3d 1167, 1175 (9th Cir. 2002) (describing the government as the direct victim of immigration violations for sentencing purposes).


219. See Transcript of Oral Argument, supra note 152, at 32–40 (statements of Justices Scalia, Stevens, Alito, and Chief Justice Roberts) (expressing their concern about a rule of causation that would allow an unlimited number of plaintiffs to have standing under civil RICO).

220. See SAMUELSON & NORDHAUS, supra note 33, at 58–59 (depicting how an increase in the supply of labor shifts the supply curve to the right and decreases the equilibrium wage rate).

221. See id. (demonstrating that the wage rate is determined by the intersection of the supply and demand curves).
opportunities, labor supply will also increase in the surrounding area and in similar industries. Due to this ripple effect, any increase in the supply of labor affects a potentially unlimited pool of uniquely injured plaintiffs. As every low-skilled worker is at least marginally affected in an economy where unauthorized aliens are hired, Anza sensibly eliminates the possibility of an unlimited number of plaintiffs with standing to sue under civil RICO.

Using the reasoning and black letter law announced in Anza, legal employees are not able to establish standing under § 1964(c) of civil RICO. Although the hiring of unauthorized aliens arguably affects unskilled legal employees most significantly, their injury is the indirect result of the labor market. Such indirect injuries need to rely on the relief from those directly injured, in this case—the U.S. government. Because immigration law enforcement is the responsibility of the U.S. government, political means are best able to give relief. However, the Anza precedent needs consistent implementation in the lower courts before political pressure forces legislative change.

C. Are the Lower Courts Following Anza?

Although a relatively new case, several courts have had the opportunity to apply the new standard of Anza. Lower courts have not yet embraced this narrowing of standing; however, their misinterpretations can guide other courts in implementing the Supreme Court precedent.

1. Williams II

Following the Supreme Court’s remand, the Eleventh Circuit issued its second opinion in Williams (Williams II), finding that the plaintiffs alleged a sufficiently direct injury for standing under § 1964(c) because of a "direct correlation between illegal hiring and lower wages." However, the Eleventh

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222. Supra note 188 and accompanying text.
At its broadest, the holding of a case can be said to be the analytical principle that produced the judgment. . . . In the narrowest sense, however (and courts will squint narrowly when they wish to avoid an earlier decision), the holding of a case cannot go beyond the facts that were before the court.
Id.
224. See Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1289 (11th Cir. 2006) (stating
Circuit's reasoning erroneously applied Anza in evaluating the directness requirement as a mere direct correlation requirement instead of analyzing whether any lawful act interrupted the causal chain.\(^{225}\)

\[ \text{a. Heightened Pleading Requirement Ignored} \]

In interpreting the "by reason of" language of § 1964(c), the Anza Court emphasized that a "direct relation between the injury asserted and the injurious conduct alleged" was required for standing.\(^{226}\) Although Anza clarifies that courts should scrutinize proximate causation at the pleading stage,\(^ {227}\) the Williams II court restated that the pleadings were sufficient to deny a motion to dismiss because the employer had allegedly "engaged in widespread and knowing hiring and harboring of illegal aliens with the express purpose and direct result of lowering the wages of legal workers."\(^{228}\) A finding that merely alleging a direct result is sufficient to overcome a motion to dismiss is inconsistent with Anza, as shown by the dismissal of Ideal Steel's case despite a similar pleading.\(^{229}\)

The Williams II court relied on two pre-Anza decisions in reaching its decision to allow discovery. Quoting the Trollinger and Mendoza decisions, the court emphasized the potential benefits of economic experts.\(^ {230}\) The Williams II court admitted that the case "may not ultimately prove the proximate-cause requirement," but decided that the direct relation was that employing unauthorized aliens lowers legal employees' wages).

\(^{225}\) See Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991, 1997 (2006) ("The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State.).").

\(^{226}\) See id. at 1997–98 (explaining the requirement of proximate cause for standing under RICO); see also id. at 2003 n.5 (2006) (Thomas, J., concurring in part and dissenting in part) (dissenting from the majority by stating that it is not fair to require a plaintiff to prove proximate causation at the motion to dismiss stage).

\(^{227}\) See Williams, 465 F.3d at 1287 ("Anza makes clear that courts should scrutinize proximate causation at the pleading stage and carefully evaluate whether the injury pled was proximately caused by the claimed RICO violations.").

\(^{228}\) See id. at 1292 ("Given this stage of the litigation, we conclude that the plaintiffs have sufficiently alleged that Mohawk's illegal conduct was aimed primarily at them.").

\(^{229}\) See Joint Appendix, supra note 165, at 11–13 (providing Ideal Steel's complaint in the Southern District of New York). The complaint plead that "the purpose and direct effect" of National Steel's RICO violation was to cause Ideal Steel to lose business and explained that Ideal Steel and National Steel were in a highly competitive market where the failure to charge sales tax allowed a 8.25% drop in National Steel's prices. Id.

\(^{230}\) See Williams v. Mohawk Indus., Inc. 465 F.3d 1277, 1292 (11th Cir. 2006) (describing how the Trollinger and Mendoza courts found direct injury based on similar facts).
sufficient to withstand a motion to dismiss. 231 Under Anza, the court must find a direct relationship on a motion to dismiss, not hypothesize that a direct relationship could be found after discovery.

b. Misinterpretation of Anza’s Directness Requirement

In Williams II, the Eleventh Circuit found direct causation on the basis that depressing wages was Mohawk’s direct purpose and intent. 232 The Eleventh Circuit’s equating of purpose to causation contradicts Anza. The Anza Court highlighted this mistake by stating that the Second Circuit contradicted Holmes in finding that the defendant’s route was immaterial if the defendant’s purpose was to harm the plaintiff. 233 The Eleventh Circuit mistook Anza’s directness requirement with a mere finding of “direct correlation.” 234 Although the Eleventh Circuit specially noted the Supreme Court’s finding of a direct correlation between unauthorized aliens and lower wages, 235 a direct correlation is not synonymous with Anza’s finding of direct causation. In Anza, the Supreme Court found no direct causation between not paying taxes and increased sales, despite the correlation of increased sales on tax-free weekends. 236 For example, assuming all else remains equal, if two stores are charging a dollar for a widget and store A does not charge the 6% sales tax, store A’s price will be 6% lower than store B’s price. 237 However, under Anza, the fact that there is an economic correlation is

231. Id. at 1291.
232. See id. at 1289 ("[I]t is clear that the plaintiffs have alleged a sufficiently direct relation . . . [because] Mohawk’s widespread scheme of knowingly hiring and harboring illegal workers has the purpose and direct result of depressing the wages paid to the plaintiffs.").
233. See Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991, 1998 (2006) ("The Court of Appeals reached a contrary conclusion, apparently reasoning that because the Anzas allegedly sought to gain a competitive advantage over Ideal, it is immaterial whether they took an indirect route to accomplish their goal. This rationale does not accord with Holmes.").
234. See Williams, 465 F.3d at 1289 (describing the direct correlation between the employment of unauthorized aliens and lower wages for legal employees).
235. See id. (noting that the Supreme Court has already recognized a direct correlation between illegal hiring and lower wages).
236. See Paul Duggan, Tax-Holiday Weekend in Texas A Hit With Families, Retailers; Malls Are Jammed With Back-to-School Clothing Shoppers, WASH. POST, Aug. 8, 1999, at A3 (stating that average sales were 65% higher than normal on the weekend that allowed retailers not to pay sales tax).
237. See Samuelson & Nordhaus, supra note 33, at 148 (stating that in a perfectly competitive market, prices will be equal between stores); Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 254 (2d Cir. 2004) (stating that Ideal Steel and National Steel have substantially the same products and compete on the basis of price).
not enough because store $A$ could fail to charge the sales tax and use the savings for research and development, or store $A$ could lower its prices by 6% even if it were paying its taxes. The direct correlation test is insufficient to determine a direct relationship because a direct correlation can occur even with multiple independent steps required for the occurrence. For example, there is a direct correlation between the occurrence of heart attacks and obesity. However, it is not obesity that causes heart attacks but the excess consumption of trans and saturated fats, which have to clog the heart’s arteries before a heart attack occurs. The direct correlation test reflects the concept of foreseeability (i.e., a heart attack is foreseeable based on obesity), which was previously rejected as too lenient.

The Williams II Court attempted to validate its position through the three justifications asserted in Anza and Holmes. The court used its lack of finding a more direct victim to justify finding that the legal employees were the direct victim. Even if the court wanted to reject the United States as the most direct victim, although this seems closely analogous to the state of New York as the most direct victim of state tax fraud, the court’s reasoning assumed that every RICO predicate act has a direct victim who can bring suit under RICO. Anza did not find that the state of New York was the most direct victim because every RICO predicate requires a direct victim; the Supreme Court merely named the state of New York as the direct victim to better explain why Ideal Steel was an indirect victim. The directness requirement for standing under

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238. See Anza, 126 S. Ct. at 1997 (noting that businesses lose customers and lower prices for many reasons).
239. See Ron Winslow, WHO Seeks Global Action On Spread of Heart Disease, WALL ST. J., Oct. 18, 2002, at B6 (discussing the connection between heart attacks and obesity).
240. See Bill Marsh, A Primer on Fat, Some of It Good for You, N.Y. TIMES, Sept. 10, 2002, at F7 (stating that trans and saturated fats clog arteries, which is linked to heart disease).
241. See Holmes v. Sec. Investor Prot. Corp., 503 U.S. 248, 268–69 (1991) (explaining that harm flowing from the misfortunes of a third person is too remote to allow recovery); see also Bivens Gardens Office Bldg. v. Barnett Banks, Inc., 140 F.3d 898, 908 (11th Cir. 1998) ("[T]he test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable.").
242. See Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1292 (11th Cir. 2006) (finding that the legal employees were the most direct victim of the immigration violations (citing Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1170 (9th Cir. 2002))).
243. See id. at 1290 (rejecting the United States as the most direct victim because the United States' responsibility of enforcing all criminal law).
245. See id. (describing the direct causal connection as especially warranted when another party is expected to vindicate the law).
civil RICO standing is not satisfied on the sole basis that the court finds the plaintiff to be the best possible plaintiff.

The *Williams II* court also rejected the argument that damages were speculative or difficult to ascertain because, as opposed to Ideal Steel’s lost sales, wages are received directly from the employer. However, this reasoning is unconvincing because decreased wages are attributable to numerous reasons, just as Ideal Steel’s lost sales were attributable to numerous reasons. Unfortunately, thus far, the reasoning of *Williams II* has influenced other circuits’ interpretation of *Anza* in RICO immigration cases.

2. Implications of *Williams II*

As a result of the Supreme Court remand in *Williams*, the Eleventh Circuit was the first lower court to interpret *Anza* in a case where legal employees alleged that an employer depressed wages by hiring unauthorized aliens. Relying on *Williams II*, the Sixth Circuit denied an interlocutory appeal in *Trollinger* despite the new direct causation standard announced in *Anza*. Notwithstanding these initial contrary rulings, *Anza* eradicates the means for legal employees to have standing under civil RICO to obtain damages for employers’ hiring of unauthorized aliens.

There is little doubt that the employer defendants in *Williams II* will again petition the Supreme Court to seek review of the Eleventh Circuit’s decision. But even if they do not, the Supreme Court could address this issue again shortly. When it does, the Supreme Court should confirm that legal employees are unable to use civil RICO as a means to curb the employment of unauthorized aliens. Without this avenue of attack, Congress should consider implementing a new means to enforce its immigration law and adopt a new strategy to help those most affected.

246. *See Williams*, 465 F.3d at 1290 (stating that the fear of speculative damages is not a concern given the facts of the case).

247. *See Anza*, 126 S. Ct. at 1998 (finding that damages were too speculative because National’s decreased prices and Ideal’s lost sales are attributable to numerous reasons); *see also* SAMUELSON & NORDHAUS, *supra* note 33, at 243–60 (describing the numerous factors that impact wages).

248. *See supra* notes 110–11 (explaining the facts of *Trollinger v. Tyson Foods, Inc.*).

249. *See Trollinger v. Tyson Foods, Inc.*, 2006 U.S. Dist. LEXIS 71500, *13 (D. Tenn. 2006) (stating that the Eleventh Circuit panel had the benefit of *Anza* when it analyzed and rejected the same arguments that Tyson has made).

250. *See Solimine & Gely, supra* note 135, at 1464 (stating that the average number of years that it takes the Court to revisit an issue from a case dismissed as improvidently granted has declined from 9.19 years between 1954 and 1969 to about two years since 1992).
VI. The Need for Change

In light of *Anza* and the Supreme Court’s distaste for RICO plaintiffs, Congress needs to take the challenge of creating a statute that highlights the strengths of civil RICO and minimizes its greatest drawbacks. Legislation that provides for the private monitoring of employers with the advantage of prosecutorial discretion would benefit all parties in the immigration debate.

A. *Anza* is Consistent with the Judicial Trend

Since civil RICO’s enactment, the judiciary has lamented its broad grant of standing in federal court.251 Despite years of judicial complaint and suggested reform, Congress has only limited the use of civil RICO for securities fraud.252 *Anza* is consistent with the judiciary’s trend toward decreased tolerance for civil RICO as evidenced by the fact that most civil RICO claims have been dismissed pre-trial for failure to state a claim, which stands in stark contrast to the relatively rare dismissals of general civil litigation.253 If properly evaluated, the direct causation standard announced in *Anza* should effectively preclude the use of civil RICO as a backdoor approach to enforcing U.S. immigration law. Regardless of whether this violates the congressional intent

251. See, e.g., William J. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY’S L.J. 5, 13 (1989) (“I think that the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court.”); David B. Sentelle, *Civil RICO: The Judges’ Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 CAMPBELL L. REV. 145, 148 (1990) (emphasizing judges’ dislike of RICO cases); see also L. Gordon Crovitz, *RICO: The Legalized Extortion and Shakedown Racket*, in THE RICO RACKET 15, 15 (Samuel A. Alito, Jr. et al. eds., 1989) (“It is one of the great virtues of the American system of justice that most legal abuses are committed in violation of the law, not in the name of the law. The Racketeer Influenced and Corrupt Organizations law is a leading exception to the rule.”).


for RICO,\textsuperscript{254} \textit{Anza} should encourage Congress to find a better method to implement immigration law.

The United States has continuously struggled with enforcing its immigration policy.\textsuperscript{255} Because of the economic impetus of unauthorized migration, employers are in a unique position to monitor its status.\textsuperscript{256} Regardless of the efficiency of enlisting employers to enforce immigration law as "gatekeepers," an employer's own best interest is served by an increase in the labor supply to permit lower wages.\textsuperscript{257} On the other hand, low-skilled legal employees are the most negatively impacted by unauthorized aliens and hence have the most incentive to ensure the enforcement of U.S. immigration law.\textsuperscript{258} Although in theory, civil RICO would allow legal employees to enforce the employer's gatekeeping function, legal employees are not directly harmed by the hiring of unauthorized aliens, as previously discussed,\textsuperscript{259} and it is difficult for legal employees, as well as employers for that matter, to establish with certainty whether unauthorized aliens are even being hired.\textsuperscript{260}

\textbf{B. An Opportunity for a New Solution}

Since \textit{Anza} should shut the door on private immigration enforcement, new legislation that capitalizes on the strengths of civil RICO and minimizes its weaknesses is needed for a better approach to immigration enforcement. The main advantage of civil RICO is its creation of a "private attorney general" to

\begin{itemize}
\item \textsuperscript{254} See generally H.R. REP. NO. 104-22 (1995) (making no mention of the immigration predicate acts' possible use under civil RICO and instead focusing on how these provisions will help federal law enforcement officials use RICO to combat alien smuggling operations); see also Crovitz, supra note 251, at 16 (stating that standing under civil RICO was broadly crafted because Congress wanted to ensure that the Supreme Court would not invalidate the entire law due to the unconstitutionality of prohibiting status crimes).
\item \textsuperscript{255} See supra Part II.D (detailing enforcement problems).
\item \textsuperscript{256} See BORJAS, supra note 27, at 204 (describing economic incentives as the primary factor of unauthorized aliens remaining in the United States).
\item \textsuperscript{257} See Manns, supra note 53, at 932 (describing how both employers of low-wage workers and unauthorized aliens share a strong mutual economic interest in evading in substantive compliance with immigration law).
\item \textsuperscript{258} See supra Part II.B (describing how unauthorized aliens compete most directly with low-skilled natives).
\item \textsuperscript{259} See supra Part V.B.2.b (detailing legal employees' indirect injury of wage depression).
\item \textsuperscript{260} See Porter, supra note 20, at A1 (describing the widespread use of fake papers).
\end{itemize}
monitor compliance with federal law. In civil RICO, however, the gatekeepers are over-penalized:

There is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorneys' fees which civil RICO holds out.

As a result, deal legislation would (1) provide a provision similar to the *qui tam* provision in the False Claims Act, (2) create a sliding scale of fines, and (3) properly fund an electronic verification system in order to allow an efficient method to enforce and defend litigation.

As Jeffrey Manns suggests, a *qui tam* provision in the Immigration and Naturalization Act may provide a suitable vehicle for interconnection of private and public enforcement. The *qui tam* provision confers standing on third parties to allow them to sue on behalf of the government where otherwise only the government, as the injured party, would have standing to sue. In the False Claim Act, the *qui tam* provision seeks to recover money that has been defrauded from the government; however, a similar provision would allow employers of unskilled employees to be monitored as gatekeepers without the ongoing threat of class action treble damages. *Qui tam* litigants disclose all material evidence about the claims to the government, and, for a statutory period of time, the government has the option to assume control of the case. If the government chooses to assume control of the case, the government awards the party costs plus a percentage of the penalty imposed, but if the government chooses not to assume control, the *qui tam* litigants have the option

261. See *Sedima v. Imrex Co.*, 473 U.S. 479, 493 (1985) ("Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps.").


263. See Aaron R. Petty, *Note, How Qui Tam Actions Could Fight Public Corruption*, 39 U. Mich. J. L. Reform 851, 863 (2006) (explaining that *qui tam* provisions confer standing on third parties to allow them to sue on behalf of the government, where otherwise only the government, as the injured party, would have standing to sue).

264. See Manns, supra note 53, at 952–59 (discussing the use of a *qui tam* provision to enforce immigration law).

265. See Petty, supra note 263, at 863 (explaining the justification for standing in *qui tam* litigation).


of continuing the action with the incentive of a higher percent of the penalties if they prevail. The government can practice prosecutorial discretion and guard against unreasonable damages because it controls the incentive to litigate by increasing or decreasing related fines. A qui tam provision maintains the inherent efficiency of the employer as the gatekeeper, as well as provides the benefit of prosecutorial discretion without the stigma of a mob statute or the ongoing threat of treble damages of RICO.

A new structure for fines is needed to provide litigants the incentive to file suit as well as to provide a reasonable deterrent to employers. The current government fine structure has not produced results due to a lack of enforcement and the inconsequential nature of the fines to large companies. A sliding scale of fines based on size and profit would provide an incentive for legal employees to file qui tam actions as well as provide a reasonable deterrent to companies of all sizes.

Employers need a viable verification system to determine work eligibility. This system would allow legal employees to sue employers without unreasonable cost and permit employers to successfully defend their employment practices. Currently, unauthorized aliens need only give some form of facially valid paperwork in order to receive employment because, as long as the unauthorized aliens furnish a readily available false document, the employer does not "know" that they are employing unauthorized aliens. A means to resolve this problem is already in place—the Basic Pilot Program, a

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268. See id. (describing the award procedure under the qui tam provision of the False Claims Act); see also 31 U.S.C. § 3730(d) (providing a qui tam provision).

269. See ABC News: Antimob Law Pursued in Immigration Case (ABC television broadcast Apr. 26, 2006) (stating that the U.S. Chamber of Commerce filed an amicus brief on behalf of the employer to argue that the statute threatens legitimate businesses that cannot risk "the reputational injury of being sued in federal court under a statute associated with racketeers and mobsters") (transcript on file with the Washington and Lee Law Review).

270. See supra Part II.D (describing the current fines and the lack of enforcement); see also Manns, supra note 53, at 943 n.250 (noting that Wal-Mart's fine of $11 million will serve as little deterrent because the fine "appears so miniscule to a $220 billion corporation").

271. See Manns, supra note 53, at 956–57 (arguing that the current penalties for employing unauthorized workers are inconsequential and proposing a fine structure ranging from $15,000 for employers of one to fifteen workers to $75,000 for employers of more than 200 workers with additional fines for repeat offenders).

272. See Briggs, supra note 49, at 626 (describing how immigration legislation failed to include a viable verification system for employers to ascertain work eligibility, which is the most important means needed to curb abuse).

273. See Porter, supra note 27, at A1 (describing the use of fake IDs to obtain jobs); see also 8 U.S.C. § 1324(a) (2000) (requiring the mens rea of knowledge to convict an employer of hiring unauthorized aliens); BORJAS, supra note 22, at 204 (stating that the employers must merely review facially valid documents in order to be in compliance).
voluntary electronic verification program. The Basic Pilot Program is a computer program that allows employers to check all prospective legal employees' social security numbers against an electronic Social Security Administration database and a U.S. Citizenship and Immigration Services database. If the data is not found in either database after a manual check and the employee does not file an appeal, the employee is presumed to be an unauthorized worker. With proper funding to alleviate the program's technical glitches, all employers could guarantee that they were in conformity of the law. By creating the presumption of a violation if employees were not verified in the Basic Pilot Program, the process and the burden of bringing a *qui tam* action would be severely decreased and employers could more easily defend such actions by mere participation in the Basic Pilot Program.

**VII. Conclusion**

Private enforcement allows legal enforcement without government officials having to suffer the political wrath of appeasing competing interest groups. In theory, civil RICO provided employees with the power to force employers' compliance when the government was unable or unwilling to do so. However, employees did so by embracing a theory of causation that is tenuous, without a limiting principle, and which is presently inconsistent with Supreme Court precedent. Hencefar, lower courts have been unwilling to embrace the narrowing of standing, but bringing suits that are contradictory to precedent is not an efficient method to enforce immigration law. Nonetheless, the "private attorney general" vision of RICO enforcement is not without advantages, and, with proper congressional legislation, the strengths of civil RICO can be maintained without civil RICO's threat of treble damages or the stigma of suit under an organized crime statute.


276. *Id.*