No. 19-1324

IN THE

Supreme Court of the United States

CENTER FOR IMMIGRATION STUDIES,

Petitioner,

v.

RICHARD COHEN AND HEIDI BEIRICH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

Chad R. Bowman
Counsel of Record
Maxwell S. Mishkin
BALLARD SPAHR LLP
1909 K Street NW, 12th Floor
Washington, DC 20006
Telephone: (202) 508-1120
bowmanchad@ballardspahr.com

Counsel for Respondents

QUESTION PRESENTED

Whether Petitioner could base a claim under the Racketeer Influenced and Corrupt Organizations Act on being called a "hate group" by the Southern Poverty Law Center.

PARTIES TO THE PROCEEDING

Petitioner the Center for Immigration Studies is a non-profit corporation incorporated in the District of Columbia.

Respondent Richard Cohen is a citizen of Alabama.

Respondent Heidi Beirich is a citizen of Georgia.

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INTRODUCTION

Petitioner the Center for Immigration Studies ("CIS") seeks review of an unpublished decision by the D.C. Circuit affirming the dismissal of its claim under the Racketeer Influenced and Corrupt Organizations ("RICO") Act. The RICO Act claim by CIS was premised entirely upon a publication by the Southern Poverty Law Center ("SPLC") labeling it a "hate group." Respondents Richard Cohen and Heidi Beirich formerly worked at SPLC.

The Petition should be denied because the D.C. Circuit applied settled law in concluding that CIS failed to allege a "pattern of racketeering activities," and neither created a Circuit split nor conflicted with any ruling of this Court. Moreover, this case is a poor vehicle for addressing the definition of a "pattern of racketeering activities" under the RICO Act because (1) as the District Court concluded, CIS also and independently failed to allege the commission of any RICO predicate offenses; and (2) a "hate group" designation is constitutionally protected speech.

STATEMENT OF THE CASE

A. The Parties

Petitioner CIS purports to provide "information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States." *See About the Center for Immigration Studies*, CIS, https://cis.org/Center-For-Immigration-Studies-Background. In its view, the data it has collected show that "current, high levels of immigration are

making it harder to achieve such important national objectives as better public schools, a cleaner environment, homeland security, and a living wage for every native-born and immigrant worker." *Id.*

Respondent Richard Cohen is the former president of the SPLC, a non-profit organization whose stated mission is fighting hate and bigotry and seeking justice for the most vulnerable members of society. A.6 ¶ 10.[1] Among his other work at the SPLC, Cohen led a trial team that won a $37.8 million judgment against a Ku Klux Klan group for its role in the burning of a South Carolina church. *See Richard Cohen: Former President*, SPLC, https://www.splcenter.org/about/staff/richard-cohen.

Respondent Heidi Beirich is the former director of SPLC's Intelligence Project, which publishes news reports about domestic hate groups, extremists, and others who, in SPLC's opinion, espouse or support hatred or bigotry. A.5-6 ¶¶ 8, 13; *Hatewatch*, SPLC, https://www.splcenter.org/hatewatch. SPLC also researches, monitors, and publishes reports on organizations and individuals that the SPLC believes may be—or are—hate groups or extremists. A.6 ¶ 11; https://www.splcenter.org/fighting-hate; *see also, e.g.*, *Toston v. Thurmer*, 689 F.3d 828, 831 (7th Cir. 2012) (citing affidavit testimony that "[i]n the United States, [the] two main organizations that monitor intolerance and hate groups are the Anti-Defamation

[1] Citations to "A._" refer to the Joint Appendix filed in *Center for Immigration Studies v. Cohen*, No. 19-7122 (D.C. Cir. Jan. 13, 2020).

League (ADL) and the Southern Poverty Law Center (SPLC)" (citation omitted)).

B. The Challenged Publications

SPLC designates certain organizations as "hate groups," and currently identifies more than 900 groups as such. *See Hate Map by Ideology*, SPLC, https://www.splcenter.org/hate-map/by-ideology. SPLC defines a "hate group" as follows:

> **What is a hate group?**
>
> The Southern Poverty Law Center defines a hate group as an organization that – based on its official statements or principles, the statements of its leaders, or its activities – has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics. We do not list individuals as hate groups, only organizations.
>
> The organizations on our hate group list vilify others because of their race, religion, ethnicity, sexual orientation or gender identity – prejudices that strike at the heart of our democratic values and fracture society along its most fragile fault lines.
>
> The FBI uses similar criteria in its definition of a hate crime:

> *[A] criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.*
>
> We define a "group" as an entity that has a process through which followers identify themselves as being part of the group. This may involve donating, paying membership dues or participating in activities such as meetings and rallies. Individual chapters of a larger organization are each counted separately, because the number indicates reach and organizing activity.

A.6 ¶ 14; *see also Frequently asked questions about hate groups*, SPLC, https://www.splcenter.org/20200318/frequently-asked-questions-about-hate-groups. SPLC categorizes hate groups into the following ideologies: Anti-Immigrant, Anti-LGBTQ, Anti-Muslim, Black Separatist, Christian Identity, General Hate, Hate Music, Holocaust Denial, Ku Klux Klan, Male Supremacy, Neo-Confederate, Neo-Nazi, Neo-Volkisch, Racist Skinhead, Radical Traditional Catholicism, and White Nationalist. *See* https://www.splcenter.org/hate-map/by-ideology.

In 2016, SPLC designated CIS an anti-immigrant hate group. A.6 ¶ 13. SPLC published a lengthy online report—fourteen single-spaced pages when printed—explaining the many reasons for its

decision to so label CIS. *See Center for Immigration Studies*, SPLC, https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies. The report opens:

> Founded in 1985 by John Tanton, the Center for Immigration Studies (CIS) has gone on to become the go-to think tank for the anti-immigrant movement with its reports and staffers often cited by media and anti-immigrant politicians. CIS's much-touted tagline is "low immigration, pro-immigrant," but the organization has a decades-long history of circulating racist writers, while also associating with white nationalists.
>
> While CIS and its position within the Tanton network has been on the Southern Poverty Law Center's (SPLC) radar for years, what precipitated listing CIS as an anti-immigrant hate group for 2016 was its repeated circulation of white nationalist and antisemitic writers in its weekly newsletter and the commissioning of a policy analyst who had previously been pushed out of the conservative Heritage Foundation for his embrace of racist pseudoscience. These developments, its historical associations, and its record of publishing reports that hype the

criminality of immigrants, are why CIS is labeled an anti-immigrant hate group.

CIS reports have been widely criticized and debunked by groups such as the Immigration Policy Center and the CATO Institute. Alex Nowasteh, an Immigration Policy Analyst at CATO said in early 2017, "Oh, I'm convinced that [CIS executive director Mark Krikorian is] wrong about all the facts and issues. They're wrong about the impact of immigrants on the U.S. economy and on U.S. society." Speaking about CIS to Univision in August of 2017, Illinois Rep. Luis Gutierrez stated, "Their research is always questionable because they torture the data to make it arrive at the conclusion they desire, which is that immigrants are criminals and a burden on the U.S. and our economy. It is the worst kind of deception, but politicians, the conservative media and some Americans eat it up because it always looks somewhat legitimate at first glance." CIS has also defended the usage of "anchor babies" and released a report on "terror babies," popular concepts among the nativist movement.

> While capable of appearing as a sober-minded policy analyst in some settings, longtime CIS executive director Mark Krikorian's contributions to the immigration policy debate rarely rise above petulant commentary dashed with extremist statements. Often, these statements are highly revealing.
>
> At his perch at the *National Review* and on Twitter Krikorian has asked[2] "How many rapists & drug-dealers are the anti-deportation radicals protecting?" and argued that Mexico's "weakness and backwardness has been deeply harmful to the United States." Krikorian has called Mexican-American journalist Jorge Ramos a "white-Hispanic ethnic hustler" and riffed that if the U.S. was a police state, as Chelsea Manning claimed, then "this mentally ill traitor would have been dumped in a shallow grave years ago." In one exchange on Twitter, Krikorian tried to whitewash the role eugenicists played in the 1924 Immigration Act only to stop responding when Harry H. Laughlin's role in advancing the legislation was mentioned. Laughlin was the most

[2] Since SPLC's publication, this link has been taken down. The article can now be found at https://perma.cc/2SBF-5D65.

> prominent eugenics advocate prior to WWII and went on to co-found the racist pseudoscience promoting Pioneer Fund, which Tanton had close ties to through the 90s. . . .

Id.[3]

The report goes on to detail the history of CIS and its close links to individuals and organizations who advocate that immigration be curtailed to preserve a white majority in America or who espouse white nationalist, racist, and anti-Muslim or anti-Semitic views. *Id.* It analyzes CIS's reports and public statements, including racist and anti-Muslim statements made by individuals in leadership positions at CIS. *Id.* The report discusses CIS's debunked anti-immigrant research and controversial assertions, including publications stating that refugees have "contribut[ed] to the burgeoning street gang problem in the United States," that immigrants are "Third-World gold-diggers," that "[t]he use of fraudulent marriage petitions is prevalent among international terrorists," that illegal immigrants are a contributing cause to American teenage obesity, and that illegal immigration was a contributing cause of the Deepwater Horizon oil spill. *Id.*

The report also analyzes CIS's publications, finding that CIS circulated hundreds of articles published by racist, anti-Semitic, and anti-Muslim websites and authors. *Id.* The report also explains

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[3] Each underlined phrase is a hyperlink to supporting information.

that CIS hired a controversial researcher with a history of claiming that white Americans have higher IQs than non-whites. *Id.* In each instance, the report hyperlinks to supporting materials. *See id.* As set out in the Complaint, since the initial 2016 designation of CIS as a hate group, SPLC has published more than a dozen additional articles regarding CIS's activities. A.8-9 ¶ 19.[4]

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[4] These articles, cited in the Complaint, remain available online. *See* Swathi Shanmugasundaram, *Center for Immigration Studies hypes chain migration to fit narrative,* SPLC Hatewatch (Oct. 2, 2017), https://perma.cc/YQM3-W3GF; Swathi Shanmugasundaram, *Flyers targeting undocumented immigrants came from org with ties to racist architect of anti-immigrant movement*, SPLC Hatewatch (Nov. 3, 2017), https://perma.cc/KH3A-RTPB; Stephen Piggott, *Anti-immigrant groups decry Trump's "amnesty" plan, but have pushed for many of its tenets for decades*, SPLC Hatewatch (Jan. 31, 2018), https://perma.cc/C9M5-W8HY; Swathi Shanmugasundaram, *The anti-immigrant movement's dishonest portrayal of Barbara Jordan*, SPLC Hatewatch (Feb. 9, 2018), https://perma.cc/2UT7-BJK2; Stephen Piggott, *Jessica Vaughan, staffer with anti-immigrant hate group Center for Immigration Studies (CIS), to testify in the House tomorrow*, SPLC Hatewatch (Feb. 14, 2018), https://perma.cc/8QS4-3TWU; *U.S. Immigration and Customs Enforcement acting director to speak at hate group event tomorrow*, SPLC Hatewatch (June 4, 2018), https://perma.cc/2N5A-KCM2; Hatewatch Staff, *Anti-immigrant roundup: 6/13/18*, SPLC Hatewatch (June 13, 2018), https://perma.cc/WC67-C7JU; Hatewatch Staff, *Stephen Miller: a driving force behind the Muslim ban and family separation policy*, SPLC Hatewatch (June 21, 2018), https://perma.cc/U23R-Z5RB; Swathi Shanmugasundaram, *Anti-immigrant roundup: 7/6/18*, SPLC Hatewatch (July 6, 2018), https://perma.cc/6SCX-JBGL; Hatewatch Staff, *Francis Cissna, head of USCIS, to address anti-immigrant hate group Center for Immigration Studies today*, SPLC Hatewatch (Aug.

C. CIS's Civil RICO Claim

CIS filed a single-count Complaint against Cohen and Beirich in January 2019. A.4-12. The Complaint alleged that Cohen and Beirich (the "SPLC Defendants") engaged in a conspiracy with each other to commit racketeering acts, in violation of 18 U.S.C. § 1962(d). A.10-11 ¶¶ 28-31. Specifically, those alleged racketeering acts amounted to a "scheme to falsely designate CIS a hate group and destroy it." A.10 ¶ 28. CIS alleged that the SPLC Defendants pursued this scheme by SPLC's publication of blog articles in which SPLC referred to CIS as a "hate group." A.6, 8-9 ¶¶ 13, 19, 21. CIS contended that the publication of those articles by SPLC constituted wire fraud pursuant to 18 U.S.C. § 1343. A.9 ¶¶ 20-21.

CIS alleged that, as a result, online retailer Amazon terminated CIS's ability to solicit charitable donations through the AmazonSmile Program, resulting in at least a $10,000 decline in charitable donations to CIS through that channel. A.10 ¶¶ 23-24. CIS also alleged that it has needed to "diver[t]

15, 2018), https://perma.cc/NY6L-5E2J; Hatewatch Staff, *ACT for America to again descend on nation's capital for annual anti-Muslim conference*, SPLC Hatewatch (Aug. 31, 2018), https://perma.cc/F8CH-RGT6; Rachel Janik & Swathi Shanmugasundaram, *The Trump administration's 'public charge' policy is the latest of many that reflect the playbook of anti-immigrant hate groups*, SPLC Hatewatch (Oct. 1, 2018), https://perma.cc/CUQ3-WQ94; Hatewatch Staff, *ACT for America sets its sights on college campuses with upcoming speaking tour*, SPLC Hatewatch (Oct. 9, 2018), https://perma.cc/6Q3H-CG8T.

resources from [its] mission" to persuade GuideStar USA Inc., "an information service specializing in reporting on nonprofit companies," not to republish SPLC's designation of CIS as a hate group. A.10 ¶ 25.

CIS sought treble damages, plus attorneys' fees. A.11 ¶ 32. It also sought a prior restraint: "an injunction prohibiting Defendants from again calling CIS a hate group and requiring Defendants to state on the SPLC website that CIS is not a hate group, pursuant to 18 U.S.C. § 1964(a)." *Id.* ¶ 33.

D. The District Court's Dismissal

The SPLC Defendants moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, A.3 (Dkt. 11), arguing that CIS failed to state a claim under RICO for multiple reasons and that any claim arising solely from the publication of SPLC's opinions was barred by the First Amendment, A.18. The SPLC Defendants also moved for Rule 11 sanctions, citing extensive authority that alleged defamation is not a predicate act under the RICO statute, A.3 (Dkt. 15). CIS opposed dismissal and the District Court stayed briefing on the Rule 11 motion.

The District Court dismissed the Complaint. A.13. In a memorandum opinion, the District Court set out two separate and independent grounds for dismissal. First, the District Court concluded that CIS had failed to allege a predicate offense under RICO, because there was no "fraud" in a hate group designation that represented a matter of opinion. App. 14-16. The District Court also recognized that

"plaintiff has clearly tried to shoehorn a defamation claim into the RICO framework"—a tactic foreclosed in that Circuit. *Id.* 16-17. Second, the District Court determined that, "[e]ven if plaintiff stated a predicate offense," the Complaint failed to state a pattern of racketeering activity. *Id.* 19-23. A single alleged scheme "'to falsely designate CIS a hate group and destroy it'" was insufficient in this regard. *Id.* 21. (quoting Complaint). Because the District Court ruled on these bases, it did not formally reach the SPLC Defendants' arguments under the First Amendment. *Id.* 14 n.1.

The District Court separately denied the SPLC Defendants' sanctions motion, stating in a Minute Order that it "did not find the complaint to be completely frivolous, although it found plaintiff's reliance on RICO to be misplaced in what was essentially a defamation case." A.3 (Sept. 13, 2019 Minute Order).

CIS appealed the dismissal. A.29. The SPLC Defendants did not file a cross-appeal.

E. The D.C. Circuit's Affirmance

The D.C. Circuit, in an unpublished *per curiam* opinion, affirmed the District Court's dismissal of CIS's Complaint under Rule 12(b)(6). App. 1-4. That decision addressed only the "second ground" for dismissal—*i.e.*, that CIS's Complaint "failed to allege 'a pattern of racketeering activity.'" *Id.* 4. As the D.C. Circuit observed, "CIS concedes that it alleges only a 'single scheme and a single victim,'" and that its "only alleged 'injury' is its loss of charitable

donations," which all does not "add up to a pattern of racketeering activity." *Id.* 2-3.

REASONS FOR DENYING THE PETITION

CIS's Petition asserts that the D.C. Circuit's ruling conflicts with this Court's definition of an "open pattern" of racketeering activity under the RICO Act, and that in doing so it exacerbates a Circuit split on that issue. These assertions are wrong. The ruling below does not conflict with this Court's decisions on the RICO Act's "pattern" element, and there is no such conflict among the Circuits. Moreover, this case represents a poor vehicle for addressing that issue because (1) as the District Court recognized, CIS's claim fails for the separate and independent reason that the SPLC Defendants did not commit any predicate racketeering acts in labeling CIS as a "hate group," and (2) the "hate group" label is constitutionally protected speech. There is accordingly no reason, let alone a compelling one, to grant the Petition.

I. The D.C. Circuit's Ruling Does Not Conflict With The Decisions Of This Court

The RICO Act provides that "[i]t shall be unlawful for any person . . . associated with any enterprise engaged in . . . interstate . . . commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). In *H.J. Inc. v. Northwestern Bell Telephone Co.*, this Court held that identifying such a "pattern" requires proof "that the racketeering predicates are related, *and* that

they amount to or pose a threat of continued criminal activity." 492 U.S. 229, 239 (1989). The Court further clarified that "'[c]ontinuity'" in this regard "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition," and that "[w]hether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case." *Id.* at 241-42.

CIS rests its theory of a conflict on the premise that, in affirming dismissal of its RICO claim for failure to show a "pattern of racketeering activity," the D.C. Circuit "eliminated the entire concept of an open pattern." Pet. 5. It did no such thing. The D.C. Circuit has articulated a general principle that it is "'virtually impossible' to identify such a pattern by alleging a 'single scheme, single injury, and few victims.'" App. 2-3 (quoting *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995)). But the appellate court still reviewed the specific facts as pleaded and concluded that they simply do not "add up to a pattern of racketeering activity." App. 3. Indeed, this conclusion was so clear, and the reasoning to reach it so straightforward, that the ruling is unpublished. App. 4. Because that decision does not conflict with *H.J. Inc.* or any other ruling from this Court, there is no reason to grant the Petition and engage in further review in this matter.

II. There Is No Circuit Split On What Constitutes An "Open Pattern" Of Racketeering Activity Under The RICO Act

CIS next argues that this Court should resolve a supposed conflict among the Circuits regarding the definition of an "open pattern" of racketeering activity. Pet. 7-10. This split has not been noted by any Circuit, and indeed does not exist. That is made clear by the very cases that CIS cites:

- CIS argues that, in *DeFalco v. Bernas*, 244 F.3d 286 (2d Cir. 2001), the Second Circuit "did not require multiple victims or multiple schemes" to establish "that an open pattern existed." Pet. 7. That case, however, involved multiple plaintiffs who proved at trial that they were the victims of multiple extortion schemes. 244 F.3d at 323-24.

- CIS states that, in *Heinrich v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393 (6th Cir. 2012), the Sixth Circuit "found an open-ended pattern in a scheme that lasted only two months." Pet. 8. But the court held that such a pattern plausibly arose out of four alleged predicate acts of racketeering perpetrated against four separate sets of plaintiff victims. 668 F.3d at 409-11.

- CIS acknowledges that, in *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815 (7th Cir. 2016), the Seventh Circuit did not identify an "open pattern" of racketeering activity, but it claims this "had nothing to do with the absence of different victims or schemes." Pet. 8. That is impossible to square with the

Seventh Circuit's express statement that the case did not present an open pattern because it "is about one *quid pro quo* agreement to exchange one campaign contribution for [the governor's] signature on one bill." 831 F.3d at 829.

- CIS contends that, in *United States v. Hively*, 437 F.3d 752 (8th Cir. 2006), the Eighth Circuit did not apply "strict criteria as to the number of victims, schemes, or injuries." Pet. 9. That case, however, involved multiple schemes injuring multiple victims—specifically, two separate schemes to defraud different grant programs, as well as "three separate attempts at extortion" of multiple individuals. 437 F.3d at 757-60.

- CIS maintains that, in *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017), "the Tenth Circuit found that the plaintiff . . . would continue to be damaged by the loss in value of its property even though it was not for sale," and that "[t]here were no other victims, schemes, or separate injuries." Pet. 9. In fact, that case involved multiple plaintiffs, and the court identified "three types of property injuries" at issue. 859 F.3d at 889.

These cases thus do not reveal a previously hidden conflict among the Circuits as to the definition of an "open pattern" of racketeering activity, and they in fact refute CIS's argument that, outside of the D.C. Circuit, its allegations "would have satisfied" to plead an "open pattern" RICO

claim. Pet. 7. Further review on this basis is therefore unnecessary.

III. This Case Is A Poor Vehicle For Addressing The "Pattern" Element Of The RICO Act.

Even if the Court were inclined to consider the definition of an "open pattern" of racketeering activity under the RICO Act, notwithstanding the absence of a Circuit split or any conflict with a ruling from this Court, this case would be a poor vehicle for doing so because there are alternate bases for affirmance. First, as the District Court recognized, CIS's RICO Act claim fails for lack of a *single* predicate act, in addition to a pattern thereof. Second, and aside from the statutory failings of the claim by CIS, the First Amendment protects a characterization of an organization as a "hate group," regardless of how a claim arising out of that characterization may be styled.

A. The SPLC Defendants did not commit any predicate acts of racketeering

CIS's RICO claim fails for the independent reason that the SPLC Defendants did not commit *any* predicate acts of racketeering. Indeed, the only "predicate act" that CIS alleges is the publication of articles and reports labelling CIS a "hate group," which CIS contends amount to wire fraud under 18 U.S.C. § 1343. A.9 ¶ 20. The District Court correctly rejected this argument on three grounds.

First, the District Court observed that designating CIS as an anti-immigrant hate group

"does not concern a 'fact'" but rather "is an entirely subjective inquiry." App. 14. In other words, "when SPLC designated CIS a hate group according to its own definition—and not some legal or government definition—it was announcing that, *in its view*, CIS is a hate group." *Id.* Because statements "can be actionable fraud" only if they are "intentionally misleading as to *facts*," *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1128 (D.C. Cir. 2009) (emphasis added), the application of a subjective "hate group" label cannot possibly amount to wire fraud. App. 15-16. Any finding to the contrary would convert all manner of garden-variety defamation tort claims into federal racketeering lawsuits.

Second, the District Court noted that CIS "has clearly tried to shoehorn a defamation claim into the RICO framework," and that this approach cannot succeed because "the law is clear that defamation is not a predicate act under RICO." App. 16-17 (citing *Hourani v. Mirtchev*, 796 F.3d 1, 10 n.3 (D.C. Cir. 2015), and *Teltschik v. Williams & Jensen, PLLC*, 748 F.3d 1285, 1288 (D.C. Cir. 2014)). Indeed, CIS practically admits that it would have brought a defamation claim outright, rather than a RICO Act claim arising from the same conduct, but for the fact that "injunctions cannot be issued in defamation cases." Pet. 11.

Even if CIS could assert a viable defamation claim here—and it cannot—federal courts have held universally for more than 30 years that alleged instances of defamation *cannot* support a RICO

claim.[5] These principles are so well established that more than a quarter-century ago a federal court

[5] *Hourani*, 796 F.3d at 10 n.3; *see also, e.g.*, *Wegner v. Wells Fargo Bank, N.A.*, 791 F. App'x 669, 671 (9th Cir. 2020) ("RICO cause of action was properly dismissed because it is based on defamation, which is not a predicate act under RICO"); *Monterey Plaza Hotel Ltd. P'ship v. Local 483 Hotel Emps. Union*, 215 F.3d 923, 926-27 (9th Cir. 2000) ("The purpose of the mail fraud and wire fraud proscriptions is to punish wrongful transfers of property from the victim to the wrongdoer, not to salve wounded feelings."); *Michalak v. Edwards*, 124 F.3d 198 (Table), 1997 U.S. App. LEXIS 23928, at *11 (6th Cir. Sept. 9, 1997) ("conspiracy to defame cannot serve as the predicate criminal act necessary for the imposition of civil RICO liability"); *Kimberlin v. Nat'l Bloggers Club*, No. GJH-13-3059, 2015 U.S. Dist. LEXIS 32528, at *25 (D. Md. Mar. 17, 2015) ("Courts . . . are universally hostile" to "attempt[s] to 'spin an alleged scheme to harm a plaintiff's professional reputation into a RICO claim.'" (citation omitted) (collecting cases)); *Mack v. Parker Jewish Inst. for Health Care & Rehab.*, No. CV 14-1299, 2014 U.S. Dist. LEXIS 154577, at *11-12 (E.D.N.Y. Oct. 30, 2014) ("defamatory statements . . . cannot form the basis of a RICO claim"); *Ritchie v. Sempra Energy*, No. 10-cv-1513-CAB (KSC), 2013 U.S. Dist. LEXIS 195688, at *11 n.2 (S.D. Cal. Oct. 15, 2013) ("It is well-established that defamation does not meet the definition of a RICO predicate act." (citation omitted)); *Kimm v. Lee*, No. 04 Civ. 5724 (HB), 2005 U.S. Dist. LEXIS 727, at *16 (S.D.N.Y. Jan. 13, 2005) ("it is firmly established that defamation and many other similar allegations do not provide the requisite predicate for RICO violations" (collecting cases)); *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 169 n.19 (E.D.N.Y. 2010) ("it is well-established that defamation does not meet the definition of a RICO predicate act"), *aff'd sub nom. Curtis v. Law Offices of David M. Bushman, Esq.*, 443 F. App'x 582 (2d Cir. 2011); *Lathrop v. Juneau & Assocs., Inc.*, No. 03-CV-0194-DRH, 2005 U.S. Dist. LEXIS 40925, at *24 (S.D. Ill. Apr. 25, 2005) ("defamation cannot constitute a predicate offense" under RICO); *Mansmann*

warned a plaintiff like CIS that it had come "perilously close to violating Rule 11" by attempting to construe defamation as wire fraud in order to assert a RICO claim. *Creed Taylor, Inc. v. CBS*, 718 F. Supp. 1171, 1180 (S.D.N.Y. 1989). Other courts similarly have cautioned against litigants abusing RICO to seek treble damages for what are plainly state-law defamation claims. *See, e.g.*, *Chovanes v. Thoroughbred Racing Ass'n*, No. 99-185, 2001 U.S. Dist. LEXIS 375, at *32 (E.D. Pa. Jan. 17, 2001) ("The RICO statute, which serves a vital role in some situations, should not be used to federalize routine state matters or to award treble damages."); *Kimm*, 2005 U.S. Dist. LEXIS 727, at *17 ("It is unfortunate—to say nothing of expensive and time consuming—to have watched the proliferation of alleged RICO claims. While some show a degree of creativity, they are more frequently an effort to construct a treble damage suit from what, at best, is a civil wrong, something that was never the intention of those who drafted the statute . . . ."). CIS's attempt to spin a RICO conspiracy out of a fatally flawed defamation claim is merely the latest example of this trend.

Third, CIS contends that SPLC's "hate group" label is actionable because, according to CIS, it does not fit the definition of a "hate group" that SPLC has adopted. Pet. 3-4. In advancing this argument here,

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v. Smith, No. 96-5768, 1997 U.S. Dist. LEXIS 3411, at *16-19 (E.D. Pa. Mar. 20, 1997) (same); *Manax v. McNamara*, 660 F. Supp. 657, 660 (W.D. Tex. 1987) (defamatory mailings are "in no way a 'fraud'" that can support a RICO claim), *aff'd*, 842 F.2d 808 (5th Cir. 1988).

as it did below, CIS shamelessly mischaracterizes that definition, suggesting that it applies only "to organizations which 'attack or malign' people based on their race, religion, sexual orientation or gender," and that "[i]mmigration status is not one of these criteria." *Id.* But SPLC defines a hate group as "an organization that – based on its official statements or principles, the statements of its leaders, or its activities – has beliefs or practices that attack or malign an entire class of people, *typically* for their immutable characteristics." App. 6 ¶ 14 (emphasis added); *see also id.* 15 ("Plaintiff asserts that being an immigrant is not an immutable characteristic, but the SPLC definition does not require the presence of an immutable characteristic.").

B. The First Amendment protects SPLC's speech at issue

Finally, while neither court below directly addressed the constitutional infirmity of CIS's claim, it provides yet another reason to deny CIS's petition. Recognizing a viable RICO Act claim over core political speech, such as the "hate group" designation at issue here, would necessarily require a court to reach otherwise avoidable constitutional questions.

As this Court has explained, the First Amendment expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The issue of "immigration policies and practices" in particular "is at the heart of current political debate among American citizens and other

residents," such that speech addressing that issue "'occupies the highest rung of the hierarchy of First Amendment values.'" *Ragbir v. Homan*, 923 F.3d 53, 69-70 (2d Cir. 2019) (quoting *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011)), *petition for cert. filed*, No. 19-1046 (Feb. 21, 2020).

SPLC's labelling of CIS as an "anti-immigrant hate group" is a matter of core political speech deserving the First Amendment's utmost protection. Yet CIS filed its Complaint with the stated aim of infringing on the First Amendment rights of a nonprofit organization that tracks hate groups: The Complaint seeks an injunction prohibiting the Respondents (and, presumably, non-party SPLC) from characterizing CIS as a hate group in the future, and compelling a statement "that CIS is not a hate group." A.11 ¶ 33. But "prior restraints" on political speech and orders compelling speakers to assert the views of others are both presumptively unconstitutional. *See, e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976) (prior restraints are one of "the most serious and the least tolerable infringement on First Amendment rights"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (rejecting as unconstitutional statutory requirement for newspapers to publish replies by candidates). If CIS disagrees with SPLC's speech, therefore, "'the remedy to be applied is more speech, not enforced silence.'" *United States v. Alvarez*, 567 U.S. 709, 727-28 (2012) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

In short, there is no reason to grant this Petition, and it would in any event be an inappropriate vehicle to consider the RICO Act issue that CIS seeks to raise.

CONCLUSION

For the reasons discussed above, the Petition should be denied.

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Respectfully submitted,

/s/ Chad R. Bowman
Chad R. Bowman
Counsel of Record
Maxwell S. Mishkin
BALLARD SPAHR LLP
1909 K Street NW, 12th Floor
Washington, D.C. 20006
Telephone: (202) 508-1120
bowmanchad@ballardspahr.com

Counsel for Respondents