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 Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

PETITIONER CENTER FOR IMMIGRATION STUDIES' REPLY BRIEF IN SUPPORT OF ITS PETITION FOR CERTIORARI

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ARGUMENT

I. THE COURT SHOULD DECIDE THE QUESTION PRESENTED BY CIS, NOT THE DIFFERENT ONE PRESENTED BY RESPONDENTS

Petitioner, Center for Immigration Studies (CIS), submits this Reply Brief, pursuant to Supreme Court Rule 15(6), to respond to the rephrasing of its Question for Certiorari in Respondents' Brief in Opposition to its Petition. The Question Presented in the Petition for Writ of Certiorari is short and concise: "Does [RICO] require a plaintiff or prosecutor claiming an 'open pattern' of racketeering to allege or prove that the defendant has injured other victims or engaged in multiple schemes?" Petition at i. Respondents do not want this Court to consider that Question, so they rephrased it. Now the Question Presented is: "Whether Petitioner could base a claim under the [RICO Act] on being called a 'hate group' by the Southern Poverty Law Center." Brief in Opposition at i. That violates Supreme Court Rule 14.1(a), which states: "Only the questions set out in the Petition, or fairly included therein, will be considered by the Court." The decisions of this Court disapproving of rephrasing Questions or smuggling in new ones are legion. *See*, *e.g.*, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992) (adhering to Supreme Rule 14.1(a)). The focus should be on the Question Presented by CIS in its Petition.

II. RESPONDENTS HAVE NOT EVEN ADDRESSED THE DECISIONS OF THE FOURTH AND FIFTH CIRCUITS WHICH HELPED CREATE THE CIRCUIT SPLIT

Respondents want to avert the Court's attention from the Circuit split on the issue of an "open pattern" in RICO. Does it require a showing of multiple schemes and multiple victims as the D.C. Circuit held, agreeing with the Fourth and Fifth Circuits? Or are the other Circuits which have considered this Question, and found no such requirement, correct? The Brief in Opposition is 23 pages long and only addresses the Question Presented by CIS on pages 15 and 16. And in arguing there is no Circuit split on the Question Presented, it failed to even address the decisions of the Fourth and Fifth Circuits, which created the split on the open pattern, to which the D.C. Circuit has joined. Petition at 13-14 (citing *US Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 318-19 (4th Cir. 2010) and *Malvino v. Delluniversita*, 840 F.3d 223, 233 (5th Cir. 2016)). They conclude their cursory and inadequate discussion of the Question by stating: "Further review on this basis is therefore unnecessary." Brief in Opposition at 17.

If Respondents could simply rephrase the Question Presented in a Petition for Certiorari and ignore the decisions on the minority side of the split, then there would be no need for Respondents to weigh in at all. The Court could simply decide Petitions on the Petitions. By not even discussing *US Airline Pilots Ass'n*, 615 F.3d at 318-19 and *Malvino*, 840 F.3d at 233, both

of which require RICO plaintiffs to allege other victims and schemes in addition to the plaintiff, Respondents have effectively conceded there is a Circuit split on this Question. If they believed otherwise, they would have stated why CIS' analysis of these cases is wrong and that the D.C. Circuit was simply a lone outlier in requiring multiple victims and multiple schemes to state an open pattern RICO claim.

III. CIS CANNOT ESTABLISH THE OPEN PATTERN CRITERIA UNDER THE MINORITY RULE JOINED BY THE D.C. CIRCUIT EVEN THOUGH *H.J. INC.* ALLOWS IT TO PROCEED AS AN OPEN PATTERN

Certainly, Respondents do not disagree with CIS that the D.C. Circuit established this rule in deciding this case. It held: "We've repeatedly said that it's virtually impossible to identify such a pattern by alleging *a single scheme, single injury, and few victims. . . . Here, CIS concedes that it alleges only a single scheme and a single victim.*" Petition Appendix at 2-3 (emphasis added, quotations omitted); Brief in Opposition at 14.[1]

[1] The fact the D.C. Circuit's opinion was unpublished (though it is easily obtainable on Westlaw, *Ctr. for Immigration Studies v. Cohen*, 806 F. App'x 7 (D.C. Cir. April 24, 2020)), does not mean it has not decided an important point of law. The Court selected the case for oral argument on April 15, 2020. The argument was abruptly canceled days earlier, along with many others which had been scheduled, due to the COVID-19 pandemic. The D.C. Circuit appears to issue published opinions only in argued cases. This Court has granted certiorari in cases decided by

There is no doubt that CIS cannot meet these requirements. It contended, however, it did not need to because it was alleging an open pattern under RICO. CIS also argues that requiring multiple schemes and injuries in open pattern cases eliminates the entire concept of the "open pattern," which was created by this Court in *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) to apply RICO to racketeering activity in its incipiency, before it harms others. Petition at 6, 13. Respondents claim this is wrong, requiring plaintiffs alleging an open pattern to show multiple schemes or victims, and that this "does not conflict with *H.J. Inc.* . . . " Brief in Opposition at 14. But, tellingly, it does not explain how the D.C. Circuit's rule is compatible with *H.J. Inc.*, which held that an open pattern of racketeering could be based on any of three criteria, and none of those criteria required a showing of injury to anyone else. Petition at 6-7. And such a requirement of injury to others would be inconsistent with the concept of an open pattern, which was to nip the bud early when RICO violations had "the threat of repetition." Petition at 6-7, 13. So Respondents have failed to show why this Court should not take up the Question as written, because the D.C. Circuit's "rule" eliminates the open pattern concept as conceived by *H.J. Inc.*

The inconsistency of the D.C. Circuit's rule with *H.J. Inc.* is also evident from the reasoning of the decision. Rather than citing *H.J. Inc.* in its open pattern analysis, it cited and followed its "closed pattern" cases,

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unpublished decisions. *See*, *e.g.*, *LaChance v. Erickson*, 522 U.S. 262, 265 (1998).

which require multiple schemes and victims. Petition Appendix at 2-3. The Court should decide the split created by the D.C. Circuit. That the D.C. Circuit's error has been committed by the Fourth and Fifth Circuits is further support for hearing this case and answering the Question CIS has submitted. The split is well-developed.

It is not even necessary to parse over the decisions of the Second, Sixth, Seventh, Eighth, and Tenth Circuits to see if they actually recognize that an open pattern can be pleaded based on a single scheme to a single victim. The need to grant this Petition is clear from the D.C. Circuit's unambiguous rule in this case and the similar decisions from the Fourth and Fifth Circuits. Those three decisions show a conflict with *H.J. Inc.* which make it impossible to follow *H.J. Inc.'s* open pattern criteria.

Nevertheless, CIS will briefly show why Respondents have misinterpreted the decisions from the five Circuits which recognize that an open pattern can be established by a showing of the "threat of repetition" of the RICO violation before that repetition has occurred:

- Respondents argue that *DeFalco v. Bernas*, 244 F.3d 286, 323-24 (2d Cir. 2001) does not support CIS' position because there were multiple plaintiffs and schemes. Response at 15. But that is a hyper-technical parsing of the facts—the Court found a threat of continued criminal activity against the *same set of plaintiffs*, two companies and the individuals who owned/operated both companies. Indeed,

when detailing the evidence that supported a finding of an open pattern, the Court discussed only the threats against Mr. DeFalco. *DeFalco*, 244 F.3d at 323-24. An open pattern was found because there was "sufficient evidence from which a reasonable jury could infer . . . implied a threat of continued criminal activity." *Id.*

- Respondents argue that *Heinrich v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393 (6th Cir. 2012) does not support CIS' position because in that case there were four plaintiffs and four predicate acts. Response at 15. Putting aside that *four* predicate acts hardly constitute multiple schemes, the upshot in *Heinrich* was that finding an open pattern is based on whether the scheme is "inherently terminable," but no strict criteria as to any one factor *(e.g.*, number of victims, schemes, etc.) were used. *Heinrich*, 668 F.3d at 410-11.

- Respondents argue that *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815 (7th Cir. 2016) does not support CIS' position because it was only about one illegal agreement (Response at 16). But even though the Seventh Circuit found no open pattern, the reasoning turned on whether there was a "natural ending point" to the scheme. The Court found there was, which doomed the open pattern claim. *Empress Casino*, 831 F.3d at 829-30. Its conclusion was not based on the number of victims or schemes. Respondents do not argue that there is a natural ending point to the alleged scheme against CIS.

- Respondents' argument regarding *United States v. Hively*, 437 F.3d 752 (8th Cir. 2006) (Response at 16) similarly misses the point—even if there were multiple victims or schemes in that case, that is not how the Court decided the open pattern analysis. The Eighth Circuit's reasoning was based on the fact that the Defendant was still able to carry out the racketeering activity. Petition at 9. No strict criteria as to the number of victims, schemes or injuries was applied. *Id.*

- The Respondents mischaracterize *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017) as involving multiple parties and multiple injuries in an attempt to argue that the Tenth Circuit requires multiple victims/schemes for open patterns. Response at 16. But the "multiple plaintiffs" were a family and their non-profit organization (*Safe Streets Alliance*, 859 F.3d at 879), and the "multiple injuries" were all different measures of damages related to the same property at issue. *Id.* at 889. Thus, the Tenth Circuit found an open pattern based on an ongoing threat of continuation without the presence of other factors required for closed patterns. *Id.* at 884; Petition at 9-10.

Thus, contrary to the Respondents' argument, these five cases support CIS' position that the Second, Sixth, Seventh, Eighth, and Tenth Circuits recognize that an open pattern requires only a showing of a threat of repetition and that the factors used to assess closed patterns are not required or necessary.

IV. THIS CASE CAN EASILY BE DECIDED ON THE QUESTION PRESENTED WITHOUT ADDRESSING THE OTHER ISSUES RAISED BY RESPONDENTS

Respondents assert this case is a "poor vehicle" for addressing the pattern element of the RICO Act. Response Brief at 17-23. They believe if the Court accepts the Question Presented by CIS, it would have to decide all of the other issues raised below. This is wrong. The D.C. Circuit only decided one issue—that the RICO claim did not allege a pattern of racketeering activity. It is well-established that "this Court does not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). The other issues in this case can and should be resolved below. The D.C. Circuit decided this case on one ground. That is all this Court needs to address.

V. THE COURT SHOULD HEAR THIS CASE BECAUSE THE NATION NEEDS TO KNOW IF RICO CAN BE USED AS A REMEDY FOR THE FALSE ALLEGATION OF BEING CALLED A "HATE GROUP"

As the nation currently tackles the difficult issues of race, citizens need to know what remedies exist for the false allegation of being labeled a hate group. Unaddressed, the issue can lead to lost income (such as CIS has suffered), but also societal conflict. This is the moment to decide whether RICO can be used to remedy damage caused by such false allegations. If CIS is allowed to proceed with its RICO case, other victims

can, in appropriate cases, use the law. There are many such cases right now. RICO was intended to provide the victims of racketeering activity with additional remedies above and beyond what was available under the common law. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985). And Congress expressly provided it should be "liberally construed" toward that end. *Id.*; Petition at 13.

As CIS has argued in the Petition, it has no common law tort remedy here. It cannot obtain an injunction in the D.C. Circuit no matter how false or incendiary the "hate group" statement may be. That has been settled since 1962. Petition at 11. So the Respondents' contention that this is really a defamation action rings hollow. Why would CIS bring a defamation action to recover a nominal sum of damages when the remedy it really needs would be unavailable?

But the D.C. Circuit allows for an injunction against false statements as a remedy in civil RICO. Petition at 11. That is why CIS brought this case under RICO, and the courthouse door was incorrectly closed due to the refusal to adhere to *H.J. Inc.* This Court can and should decide whether the courthouse door was correctly closed to CIS because of the misinterpretation of an "open pattern" of RICO violations. It is an easy question of statutory interpretation for the Court to decide.

CONCLUSION

For the reasons stated herein and in CIS' Petition, CIS respectfully requests that this Court issue a writ of certiorari to review the judgment of the D.C. Circuit Court of Appeals.

Respectfully submitted,

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