No. _____

IN THE

Supreme Court of the United States

RIVER BIRCH, INCORPORATED; ALBERT J. WARD, JR.; FREDERICK R. HEEBE; HIGHWAY 90, L.L.C.,

Petitioners,

v.

WASTE MANAGEMENT OF LOUISIANA, L.L.C.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), this Court held that "ambiguous" circumstantial evidence—evidence that is "as consistent with" an innocent explanation as it is with liability—"does not, standing alone, support an inference" of wrongdoing. Instead, to survive summary judgment, a plaintiff must also present "evidence that tends to exclude" the innocent explanation. *Id.* (quotation omitted).

The question presented is whether that holding is limited to the antitrust context (as the court below held), or whether it instead states a general summary judgment standard applicable to all cases under Federal Rule of Civil Procedure 56.

PARTIES TO THE PROCEEDING

Petitioners are River Birch, L.L.C.; Albert J. Ward, Jr.; Frederick R. Heebe; and Highway 90, L.L.C., defendants and appellees below.[1]

Respondent is Waste Management of Louisiana, L.L.C., plaintiff and appellant below.

RULE 29.6 STATEMENT

Petitioner River Birch, L.L.C. is a privately held corporation. No publicly held corporation owns 10% or more of River Birch, L.L.C.'s stock.

Petitioner Highway 90, L.L.C. is a wholly owned subsidiary of River Birch, L.L.C., which is a privately held corporation. No publicly held corporation owns 10% or more of Highway 90, L.L.C's stock.

RULE 14.1 STATEMENT OF RELATED CASES

There are no cases that are directly related to this case.

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[1] Petitioner River Birch, L.L.C. was known as River Birch, Incorporated at the time the lawsuit from which this petition arises was filed—and is accordingly listed as River Birch, Incorporated in the case caption—but that entity has been known as River Birch, L.L.C. since 2013.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's decision is reported at 920 F.3d 958, and is reprinted in the Appendix to the Petition ("App.") at 1a-49a. The Fifth Circuit's order and opinion denying rehearing en banc is reported at 927 F.3d 914, and is reprinted at App. 59a-60a. The district court's order and opinion granting petitioners' motion for partial summary judgment is unreported but available at 2017 WL 5068339, and is reprinted at App. 50a-56a.

JURISDICTION

The Fifth Circuit issued its decision on April 10, 2019, App. 1a, and denied a timely petition for rehearing en banc on June 28, 2019, *see* App. 59a-60a. On September 9, 2019, Justice Alito extended the time within which to file a petition for certiorari to and including October 25, 2019. No. 19A272. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

The full text of Federal Rule of Civil Procedure 56 is reprinted at App. 61a-64a.

INTRODUCTION

This case presents a basic question of summary judgment procedure that has divided courts and commentators. In *Matsushita Electric Industrial Co.*

v. Zenith Radio Corp., 475 U.S. 574 (1986), this Court held that "ambiguous" circumstantial evidence—evidence that is "as consistent with" an innocent explanation as it is with liability—"does not, standing alone, support an inference" of wrongdoing. *Id.* at 588. To survive summary judgment, the Court instructed, a plaintiff must also offer "evidence that tends to exclude" the innocent explanation. *Id.* (quotation omitted). The question presented here is whether that principle applies only in the antitrust context, as the Fifth Circuit majority held below, or is instead a general rule of summary judgment procedure under Rule 56, as Judge Oldham argued in dissent.

The disagreement between the majority and dissent below mirrors broader conflict and confusion in the lower courts regarding *Matsushita*'s reach. Three other courts of appeals have either outright refused to apply *Matsushita* beyond the antitrust context or expressed serious doubts about its broader relevance. By contrast, at least three courts of appeals and numerous district courts reject that approach and apply the *Matsushita* standard outside the antitrust context.

The majority below aligned the Fifth Circuit with the wrong side of the divide, and its error is an exceptionally important one. Insufficiently rigorous enforcement of summary judgment standards imposes significant costs on both courts and litigants. The circumstances of this case—in which Waste Management alleges that petitioners' campaign contributions were actually bribes paid in exchange for official action against its interests—bring the stakes

into especially sharp relief. The prospect of treble damages creates unusually strong incentives for plaintiffs to bring civil RICO suits of dubious merit, making it all the more important to weed out unsupported claims prior to trial. And those concerns are even more pronounced in cases, like this one, that are tied up with politics. If left to stand, the Fifth Circuit's decision threatens to impose liability (and, certainly, burdensome litigation) on ordinary politics, chilling protected political speech.

The Court should grant review to avert these harms and provide much-needed clarity regarding the scope and substance of *Matsushita* and Rule 56.

STATEMENT OF THE CASE

A. Factual Background

1. In the aftermath of Hurricane Katrina, the City of New Orleans was in urgent need of landfill capacity to accommodate waste generated by the storm. To meet that need, Waste Management proposed to open a landfill on Chef Menteur Highway, a site previously rejected by the City Council.

Opening a landfill in New Orleans ordinarily requires (among other things) a conditional use permit from the City Council. *See* D. Ct. Doc. 319-3 at 2-6. Following Hurricane Katrina, however, then-Mayor of New Orleans C. Ray Nagin issued Executive Order CRN 06-03, which suspended for six months the zoning requirements that would otherwise apply for a landfill at the Chef Menteur site. D. Ct. Doc. 319-

4.[2] The executive order was not designed to permanently dispense with zoning laws or permit requirements. Instead, the order expressly stated that it addressed an "immediate" need for "an alternative temporary location" for debris disposal in the City, *id.* at 2, and would be in effect only "for a period of six months unless earlier rescinded," *id.* at 3. The order also noted that Waste Management agreed to "file a conditional use application with the City" and secure "approval" for the landfill from "the City of New Orleans Department of Safety and Permits." *Id.* at 3. As Nagin later explained in a letter to the Louisiana Department of Environmental Quality ("LDEQ"), the intent behind his order was simply to allow Waste Management to begin operations—and meet the City's immediate waste-disposal needs—while it applied for the necessary permits, which Nagin understood would take a minimum of eight to ten weeks to obtain. D. Ct. Doc. 319-8; *see* D. Ct. Doc. 319-6 at 14-16.

Shortly after the executive order was issued, the City signed an agreement with Waste Management

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[2] The order was issued in February 2006 pursuant to La. Rev. Stat. § 29:727, which ostensibly authorizes a mayor to suspend the provisions of any local ordinance where necessary to cope with a declared, local emergency. D. Ct. Doc. 319-4 at 3; *see* La. Rev. Stat. § 29:727(F). Nagin had declared a local state of emergency two days before the storm made landfall in August 2005, D. Ct. Doc. 319-5 at 4-6; *see also* La. Rev. Stat. §§ 29:727(D), 29:723(13), and renewed the emergency declaration thereafter on a monthly basis, *see* D. Ct. Doc. 319-5 at 1-3. The final renewal was issued on November 3, 2006, and expired 30 days later. D. Ct. Doc. 319-5 at 3, 93; *see also* La. Rev. Stat. § 29:727(D).

approving the proposed Chef Menteur landfill as an emergency construction and demolition debris disposal site. D. Ct. Doc. 319-4 at 4-6. The agreement contained no fixed term and no promise that the executive order would remain in effect for any prolonged period of time. *Id.* Rather, consistent with the executive order, it stated that Waste Management was "required" to apply for a conditional use permit. *Id.* at 4.

Separate and apart from local approval and zoning restrictions, establishing a new landfill requires approval from LDEQ. D. Ct. Doc. 335-25 at 6-7; D. Ct. Doc. 362-2 at 11-13. The City submitted a site-request form to LDEQ, which stated that the proposed time span for the landfill was "the duration of the Hurricane Katrina disaster cleanup efforts, at this time estimated to be 12 months." D. Ct. Doc. 319-10. The request, however, did not address zoning issues internal to local government, such as whether and when Waste Management would need a conditional use permit, nor did it purport to modify or repeal the six-month suspension period established by the executive order. *Id.*; D. Ct. Doc. 362-2 at 11-13

2. The New Orleans City Council is the final decision-maker on zoning issues in the City. D. Ct. Doc. 319-3 at 4. And the City Council vigorously opposed the Mayor's executive order, which had been issued without "public input, City Planning Commission analysis, or City Council review and approval." D. Ct. Doc. 319-11 at 2. In April 2006, the Council passed a unanimous resolution "strongly urg[ing]" the Mayor "to immediately rescind Executive Order

CRN 06-03 and to halt any ongoing negotiations" related to opening a landfill at the Chef Menteur site. *Id.* at 3.

The political opposition to the landfill "was so strong it was literally national news." App. 36a. And reports indicated that residents of the area surrounding the landfill were "particularly angry" at Mayor Nagin for his role in allowing Waste Management to temporarily bypass the usual permitting process and open the landfill on an expedited basis without first completing environmental studies and seeking community input. Leslie Eaton, *A New Landfill in New Orleans Sets Off a Battle*, N.Y. TIMES (May 8, 2006). As one Councilwoman explained, she opposed the landfill because it "would harm the environment and lessen the possibility that people would return to New Orleans East." App. 36a. Mayor Nagin, in short, was faced with undeniable community "outrage about the prospect of an eighty-foot trash tower in a poor neighborhood populated predominantly by people of color." App. 36a.

3. Around the same time all of this was happening, Mayor Nagin was also engaged in a runoff election scheduled for May 2006. D. Ct. Doc. 319-6 at 29. About two weeks before the runoff, petitioner Jim Ward, a principal of River Birch, Incorporated—which owns and operates landfills in New Orleans—received a call from someone who identified himself as "Ray," asking for a donation to his campaign. D. Ct. Doc. 319-12 at 2-3. Ward discussed the call with petitioner Fred Heebe, another River Birch principal, and the two ultimately donated $20,000 to

Nagin's campaign through various entities they controlled. *Id.* at 3. Nagin testified that he did not recall speaking with Ward and was not aware that petitioners contributed to his campaign. D. Ct. Doc. 319-6 at 19-21.[3] Nagin also testified that he never discussed the Chef Menteur landfill with Ward, Heebe, or anyone affiliated with River Birch or Highway 90. *Id.* at 20.

4. Waste Management never obtained the required conditional use permit from the City Council. Waste Management claimed that it was only when the executive order was filed in an unrelated civil action in April 2006 that the company learned of its existence, and that Nagin's suspension of the zoning ordinance was limited to six months. D. Ct. Doc. 319-7. Waste Management professed to be "shocked" at this discovery, having instead assumed that Nagin could and would allow it to operate without a conditional use permit throughout the duration of the cleanup from Hurricane Katrina, which might stretch on for years. D. Ct. Doc. 319-9 at 11-12; D. Ct. Doc. 319-7 at 2. No Waste Management witness, however, could identify any City official who ever made such a representation to the company. *See* D. Ct. Doc. 319-9 at 2-3, 8-9, 15; *see also* D. Ct. Doc. 319-14 at 2 (June 2006 draft internal Waste Management meeting agenda asking "How do we keep [the Chef Menteur landfill] open beyond 6 month order?").

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[3] Petitioners' contributions to Nagin's campaign made up only a very small fraction of the total contributions Nagin collected in the period surrounding the runoff election. *See* App. 38a n.1.

In light of Waste Management's failure to timely apply for a permit and the expiration of the executive order, on August 14, 2006, the City Attorney issued a cease-and-desist letter ordering Waste Management to cease operations at Chef Menteur. D. Ct. Doc. 319-4 at 1, 6. The same day, Waste Management for the first time submitted a conditional use permit application. D. Ct. Doc. 319-15; *see* D. Ct. Doc. 319-16. But Waste Management later withdrew its application, as it recognized that there was no City Council support for the project. D. Ct. Doc. 319-9 at 21-23; D. Ct. Doc. 319-16.

B. Procedural History And Decisions Below

1. In September 2011—more than five years after Waste Management was ordered to cease operations at the Chef Menteur site—Waste Management filed a civil RICO action against petitioners. *See* D. Ct. Doc. 1 (asserting, as relevant here, claims under 18 U.S.C. § 1964(c) and (d)). Waste Management's theories of liability evolved over time. Waste Management initially alleged that petitioners had bribed Henry Mouton, a commissioner of the Louisiana Department of Wildlife and Fisheries, and, through him, created the appearance of public opposition to the Chef Menteur landfill, which Waste Management asserted caused its closure. D. Ct. Doc. 1 ¶¶ 37-42, 87-98; D. Ct. Doc. 10 ¶¶ 31-51, 96-101.[4]

[4] Waste Management separately alleged that petitioners interfered with a waste-disposal contract in a neighboring jurisdiction, *see* D. Ct. Doc. 10 ¶¶ 52-73, but its only theory for seeking damages from the closure of Chef Menteur was that Mouton's actions caused Nagin to withdraw the emergency authorization.

The district court dismissed that claim, concluding that Waste Management's allegations did not "satisfy its pleading burden relative to causation, that is, that the alleged RICO predicate offense—bribery of Henry Mouton, a public official—was a 'but for' and the 'proximate cause' of the alleged injury—loss of the emergency authorization for the landfill." D. Ct. Doc. 98 at 6. "In other words," the court explained, Waste Management "ha[d] not alleged sufficient facts to allow a reasonable inference, as opposed to mere speculation, that former Mayor Nagin's withdrawal of Chef Menteur's authorization was *because of* actions by Mouton, taken as a result of bribery allegedly attributable to [petitioners], rather than a mere coincidence." *Id.*

Waste Management then filed a second amended complaint, which not only alleged that petitioners had bribed Mouton, but also for the first time alleged that petitioners had directly bribed Nagin through campaign contributions. D. Ct. Doc. 106 ¶¶ 54-71, 79. Petitioners again moved to dismiss, but while the court held that Waste Management had "failed to cure the 'causation' pleading deficiencies previously identified" with respect to its claims premised on alleged bribery of Mouton, the Court declined to dismiss Waste Management's claims insofar as they were based on alleged bribery of Nagin. D. Ct. Doc. 131 at 4, 6. That ruling was followed by a third amended complaint, again asserting both the Mouton and Nagin bribery theories, D. Ct. Doc. 140 ¶¶ 39-71, which the court declined to dismiss, D. Ct. Doc. 156.

2. Following discovery, petitioners moved for partial summary judgment with respect to the Chef Menteur allegations. Petitioners argued that there was no evidence that petitioners had bribed Nagin or that any alleged bribery caused the closure of the Chef Menteur landfill, which was instead a consequence of the fact that Nagin's executive order had expired according to its own terms after six months. D. Ct. Doc. 319-1. The district court granted the motion, concluding that "the circumstantial evidence" was "far too speculative and conclusory to permit a reasonable trier of fact to find the requisite causal connection" between petitioners' alleged actions and any harm to Waste Management. App. 55a-56a.[5]

3. Waste Management appealed, and a divided panel of the Fifth Circuit vacated the district court's decision.

a. As relevant here, with respect to causation, the majority noted that Nagin had been convicted of bribery in an unrelated scheme (in which petitioners played no part), which would provide "abundant fodder for impeaching his testimony" that he never intended to extend the emergency order beyond its six-month term. App. 20a. The majority also pointed to evidence that it believed supported the inference that Nagin had originally intended to renew the order and then changed his mind. App. 20a-22a. And the Fifth Circuit majority concluded that a jury

[5] Waste Management's remaining claims were later resolved through a pretrial settlement entered November 30, 2017, in which Waste Management preserved its right to appeal the district court's ruling on the Chef Menteur claims. *See* D. Ct. Docs. 443, 445.

could reasonably infer from that same evidence, as well as Nagin's "disregard" of evidence of the landfill's safety and necessity, that petitioners' campaign contributions were the *reason* for Nagin's change of heart. App. 22a-23a. The majority recognized that "this case is a close call," as the evidence "could reasonably show either political pressure or pay-to-play bribes that motivated Nagin to shutter the Chef Menteur landfill." App. 23a. But in the majority's view nothing "preclude[d] the jury from evaluating th[e] evidence and deciding what inferences to draw from the evidence it accepts." App. 23a.

The majority dismissed *Matsushita*, which Judge Oldham argued in dissent dictated a different outcome, as articulating an antitrust-specific rule of no relevance in the civil RICO context. *Matsushita*, the majority asserted, merely "confines courts from drawing inferences in antitrust cases that are at odds with economic theory." App. 25a. Thus, the Fifth Circuit held that Waste Management was not required to offer evidence that "tends to exclude" the possibility that Nagin made an ordinary political decision, rather than one motivated by bribes.

b. Judge Oldham disagreed with the majority's narrow reading of *Matsushita*. As he emphasized in dissent, "summary judgment is appropriate in *any* case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." App. 33a (quotation omitted). Thus, "[b]efore asking a jury to separate official acts motivated by bribery from those motivated by the public interest, [the court] should be quite sure there is *some* evidence that could satisfy

the plaintiff's burden of proof." App. 34a. Here, there was "*zero* evidence of causation." App. 31a. "The evidence of Nagin's political motivations is undisputed and overwhelming," and "[e]vidence that is 'as consistent with' politics as it is with bribes does not suffice [to create a jury question] because it does nothing to help the jury choose between 'competing inferences.'" App. 34a-35a. Waste Management's evidence might reasonably show that Nagin changed his mind about renewing the emergency order, but it was "perfectly consistent with his doing so in response to a bruising political fight." App. 44a. And because *Matsushita* "requires summary judgment *anytime* the evidence is 'as consistent with' lawful conduct as with unlawful conduct," App. 42a, Judge Oldham would have held that the district court properly granted summary judgment for petitioners.

4. Petitioners petitioned for rehearing en banc, which the Fifth Circuit denied. App. 59a-60a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to clear up longstanding confusion about the reach of its decision in *Matsushita*.

Matsushita is one of a trilogy of foundational summary judgment decisions (also including *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)) decided in 1986. Federal courts historically "treated summary judgment warily, perceiving it as threatening a denial of such fundamental guarantees as the right to confront witnesses, the right of the jury to make inferences and determinations of credibility, and the

right to have one's cause advocated by counsel before a jury." Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 77 (1990). *Matsushita*, *Anderson*, and *Celotex* "ushered in a 'new era'" of federal summary judgment procedure, *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1087 (6th Cir. 1996), making clear that summary judgment is "not … a disfavored procedural shortcut," but "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action,'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

The trilogy decisions were based on the now-established principle that, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial" and summary judgment is warranted. *Matsushita*, 475 U.S. at 587 (quotation omitted). The "plain language" of Rule 56, the Court explained, "mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." *Celotex*, 477 U.S. at 322. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48. And while the evidence must be viewed "in the light most favorable to the party opposing the motion," *Matsu-*

shita, 475 U.S. at 587 (quotation omitted), that principle is not without limits.

In particular, *Matsushita* cautioned that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. A plaintiff must also present some *other* evidence—"evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently"—to survive summary judgment. *Id.* (quoting *Monsanto Co. v. Spray-Right Serv. Corp.*, 465 U.S. 752, 764 (1984)). The plaintiff, in other words, must "show that the inference of conspiracy is reasonable in light of the competing inferences" that would not support liability. *Id.* And evidence of purported wrongdoing with respect to some *other* transaction, on its own, does not suffice to close the inferential gap. *Id.* at 595-98.

The question here is whether this aspect of the Court's decision in *Matsushita* is limited to antitrust cases, or instead states a general summary judgment principle applicable in all civil cases, including civil RICO cases like this one. That question, which is self-evidently important, has divided the courts of appeals. And the Fifth Circuit answered the question incorrectly. As Judge Oldham's dissent explained, the rule that summary judgment must be denied when the evidence is as consistent with lawful conduct as with unlawful conduct—absent some evidence that tends to exclude the lawful inference—is a general principle of summary judgment law, not a rule of antitrust litigation.

The petition should be granted and the decision below reversed.

A. Courts Are Divided About Whether And How *Matsushita* Applies Outside The Antitrust Context

Despite its status as one of the Court's landmark decisions, "courts and commentators still struggle to decipher what the *Matsushita* standard requires." Nickolai G. Levin, *The Nomos and Narrative of* Matsushita, 73 Fordham L. Rev. 1627, 1631 (2005).[6] Among the subjects of ongoing debate is the question presented in this case: "Does *Matsushita* apply outside antitrust?" *Id.* A "stalemate has developed" on that issue, with "[m]any commentators and lower courts … cit[ing] *Matsushita* outside of the antitrust context," while others "continue to insist … that *Matsushita* was a product of forces unique to the antitrust context." Luke Meier, *Probability, Confidence, and* Matsushita*: The Misunderstood Summary Judgment Revolution*, 23 J. L. & Pub. Pol'y 69, 75-76 (2014).

1. The Fifth Circuit majority below sided with those courts that read *Matsushita* narrowly, holding that *Matsushita* merely "confines courts from drawing inferences in antitrust cases that are at odds with economic theory (specifically, predatory pric-

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[6] *Matsushita* is among the most frequently cited decisions of this Court on any subject. *See* Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 Wash. & Lee L. Rev. 81, 87 (2006) (*Matsushita* was "the sixth-most-cited case with over 32,000 citations by state and federal courts" as of 2006, with *Anderson* and *Celotex* topping the list).

ing)." App. 25a. The court therefore concluded that *Matsushita*'s "antitrust lesson on summary judgment is not applicable" in this civil RICO case, or in any other context aside from antitrust. App. 26a.

At least two other courts of appeals have charted a similar course. The Seventh Circuit has expressly held that *Matsushita*'s "holding is limited to antitrust law" and on that basis refused to apply it in a case involving a § 1983 claim. *Washington v. Haupert*, 481 F.3d 543, 549 (7th Cir. 2007). The Second Circuit has similarly expressed "considerable difficulty" with a lower court's "reliance on *Matsushita*" in granting summary judgment on trade-secret claims, because *Matsushita* "involved antitrust claims." *In re Dana Corp.*, 574 F.3d 129, 158 (2d Cir. 2009); *see also Williams v. Borough of W. Chester, Pa.*, 891 F.2d 458, 460 n.2 (3d Cir. 1989) ("*Matsushita*'s principles arguably apply only to summary judgment motions in antitrust cases.").

2. Judge Oldham rejected such a limited reading of *Matsushita*, instead interpreting this Court's decision to "require[] summary judgment *anytime* the evidence is 'as consistent with' lawful conduct as with unlawful conduct." App. 42a.

Judge Oldham is far from alone in that view. The Fourth and Sixth Circuits, for example, have recognized that circumstantial evidence that is equally consistent with multiple explanations and provides no basis for choosing between them does not create a genuine factual dispute precluding summary judgment in *any* context, not just the antitrust context. *See, e.g.*, *Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012) (affirming summary judgment on civil

conspiracy claim in § 1983 case where defendants' actions were "just as consistent with independent conduct as [they were] with a conspiracy"); *Houchens v. Am. Home Assurance Co.*, 927 F.2d 163, 167-68 (4th Cir. 1991) (summary judgment appropriate where circumstantial evidence "would not allow a jury to reasonably conclude that it is more likely that Mr. Houchens died from an accident than in some other manner").

The Eleventh Circuit, for its part, has applied the *Matsushita* principle to RICO claims at the pleadings stage, which means it would necessarily do so at summary judgment as well. That court holds that alleged conduct that is equally "indicative of rational independent action" as "concerted, illegitimate conduct" does not state a plausible claim in the civil RICO context, just as it would not in an antitrust case. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1295 (11th Cir. 2010) (citing *In re Managed Care Litigation*, 430 F. Supp. 2d 1336, 1348 (S.D. Fla. 2006), which applied *Matsushita* to civil RICO claims on summary judgment); *see Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1068 (11th Cir. 2017) ("In *American Dental*, we determined that, even though *Twombly* was an antitrust case, *Twombly*'s pleading rule for agreements applied in the RICO context."). *Twombly* and *Matsushita* involve application of the same rule at different stages of the litigation. *See infra* at 22-24 (discussing connection between *Twombly* and *Matsushita*); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (discussing *Matsushita*). If that rule applies outside the antitrust context at the pleading stage, it of ne-

cessity follows that it applies outside the antitrust context at the summary judgment stage. Eleventh Circuit precedent, like Fourth and Sixth Circuit precedent, cannot be reconciled with that of the Seventh, Second, and now Fifth. *See also Emeldi v. Univ. of Or.*, 698 F.3d 715, 720 (9th Cir. 2012) (Kozinski, J., joined by O'Scannlain, Graber, Fisher, Tallman, Bea, & M. Smith, JJ., dissenting from denial of rehearing en banc) (invoking *Matsushita* in arguing that evidence was insufficient to establish causation on Title IX claim).

Finally, district courts frequently apply *Matsushita*'s "tends to exclude" principle outside the antitrust context, including in cases, like this one, involving civil RICO claims. *See, e.g.*, *In re Managed Care Litig.*, 430 F. Supp. 2d at 1345-46 (RICO), *aff'd sub nom. Shane v. Humana, Inc.*, 228 F. App'x 927 (11th Cir. 2007); *State Comp. Ins. Fund v. Khan*, 2016 WL 5886910, at *8 (C.D. Cal. Mar. 8, 2016) (fraud), *aff'd*, 722 F. App'x 628 (9th Cir. 2018); *Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175, 1181-82 (M.D. Ala. 2006) (state-law conspiracy claims); *Badillo v. Playboy Entm't Grp., Inc.*, 2006 WL 785707, at *7 (M.D. Fla. Mar. 28, 2006) (civil conspiracy); *Fowler v. World Sav.*, 2000 WL 1358620, at *3 (N.D. Cal. Sept. 14, 2000) (conspiracy to discriminate on the basis of race).

The Court's intervention is needed to break this entrenched "stalemate," Meier, *supra*, at 75, and bring clarity and uniformity to lower courts' understanding—and application—of *Matsushita* and the core summary judgment principles it reflects.

B. The Fifth Circuit's View That *Matsushita*'s "Tends To Exclude" Principle Applies Only In Antitrust Cases Cannot Be Reconciled With This Court's Precedent Or General Summary Judgment Principles

1. *Matsushita* Reflects General Summary Judgment Principles That Apply In All Civil Cases

The court of appeals' holding that *Matsushita* merely "confines courts from drawing inferences in antitrust cases that are at odds with economic theory," App. 25a, is incompatible with this Court's precedent and established summary judgment principles more generally.

a. The Fifth Circuit believed that *Matsushita* does not apply outside the antitrust context because "[u]sing circumstantial evidence to conclude that a bribe occurred is not at odds with economic theory." App. 27a. But *Matsushita* squarely rejected any suggestion that the Court's application of the "tends to exclude" principle was driven by the absence of a "plausible reason to conspire" in that case. 475 U.S. at 597 n.21. The decision was by its terms based not on economic theory but on a *legal* summary judgment principle—i.e., that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy" in *any* circumstances. *Id.* (citing *Monsanto*, 465 U.S. at 763-64).

Indeed, this Court has expressly stated that *Matsushita* "did *not* introduce a special burden on plaintiffs facing summary judgment in antitrust cas-

es." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468 (1992) (emphasis added). Rather, this Court has read *Matsushita* to stand for the general proposition "that the nonmoving party's inferences [must] be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Id.*

b. As *Eastman Kodak* makes plain, *Matsushita*'s "tends to exclude" requirement "springs from very common-sense concerns about what it means to prove a fact or allegation by a preponderance of the evidence"—concerns that apply equally "outside the context of antitrust conspiracies." *Lynn*, 459 F. Supp. 2d at 1181. It is *always* the case that a "fact that can only be decided by a coin toss has not been proven by a preponderance of the evidence, and cannot be submitted to the jury." *James v. Otis Elevator Co.*, 854 F.2d 429, 432 n.3 (11th Cir. 1988) (tort case); *see also, e.g.*, *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (citing this principle in discussion of *Matsushita*).

To be sure, a claim is properly submitted to the jury where the evidence could support multiple reasonable inferences depending on which evidence the jury credits. *See Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions … ."); *see also, e.g.*, *McDowell v. Krawchison*, 125 F.3d 954, 958 (6th Cir. 1997) ("*testimonial* evidence that is in equipoise as to a material fact precludes summary judgment" (emphasis added)). But there is a critical difference between that scenario and one in which circumstantial

evidence is "as consistent with" lawful conduct as with unlawful conduct, such that there is *no* evidence that makes either of two possible, conflicting inferences more likely than the other. In such a case, the jury would necessarily have to speculate to choose one inference over the other. *See NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804, 809 (4th Cir. 1975) (per curiam) (drawing this distinction).[7]

The problem therefore "cannot be cured by the alleged right of the trier of fact to draw inferences and make selections," *Patrick Plaza Dodge*, 522 F.2d at 809, because "a jury is entitled to draw only those inferences that are legitimate and reasonable," *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 935 (D.C. Cir. 1991); *see Anderson*, 477 U.S. at 255 (non-moving party entitled to "all *justifiable* inferences" from the evidence (emphasis added)). It can be cured only by introduction of *other* evidence that provides a rational basis for deciding the issue. "Juries," that is, "may be permitted to choose from

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[7] *See also, e.g.*, *Harrison v. Edison Bros. Apparel Stores, Inc.*, 151 F.3d 176, 179 (4th Cir. 1998) ("[A]lternative possibilities as to the cause of an event are not enough where the defendant is liable under one and not the others and where no basis for a rational choice among the alternatives is provided." (quotation omitted)); *Siegel v. Mazda Motor Corp.*, 878 F.2d 435, 439 (D.C. Cir. 1989) (when record "contains competing, unrebutted hypotheses" and there is "no basis upon which to say that any one of the possible explanations is 'more probable' than the others," jury would have "to engage in sheer speculation" to choose among them); *Solar v. Kawasaki Motor Corps, U.S.A.*, 221 F. Supp. 2d 967, 971 (E.D. Wis. 2002) ("Speculation and conjecture apply to a choice between liability and nonliability when there is no reasonable basis in the evidence upon which the choice can be made.").

among inconsistent inferences" only "when there is an evidentiary basis for the choice." William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 493 (1992); *cf. United States v. Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (Gorsuch, J.) (reversing conviction where "the jury simply had no non-speculative reason to favor any one of [several competing] explanations over the others").

Matsushita reflects this bedrock principle. The Court recognized that the jury could not draw a reasonable inference of conspiracy where the only evidence—parallel conduct—was equally consistent with independent (and non-culpable) behavior. In those circumstances, a plaintiff must provide other evidence that gives the jury a basis for breaking the tie—i.e., evidence that "tends to exclude" the innocent explanation. *Matsushita*, 475 U.S. at 588. That is a summary judgment rule, not an antitrust one.

c. The Court's decisions in *Twombly* and *Iqbal* underscore the point. In *Twombly*, the Court held that a complaint asserting claims under § 1 of the Sherman Act cannot survive a motion to dismiss based on allegations of "parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." *Twombly*, 550 U.S. at 548-49. The Court noted that it had "previously hedged against false inferences from identical behavior at a number of points in the trial sequence," including by holding in *Matsushita* that "a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that

the defendants were acting independently." *Id.* at 554. *Twombly* "present[ed] the antecedent question of what a plaintiff must plead in order to state a claim under § 1," and the Court answered that question by applying Rule 8's "general standards." *Id.* To state a § 1 claim, the Court concluded, a plaintiff must present "allegations plausibly suggesting (not merely consistent with) agreement," a standard that "reflects the threshold requirement of Rule 8(a)(2) that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief." *Id.* at 557 (alteration in original) (quotations omitted). In other words, *Twombly* held that if a plaintiff only pleads facts that, if true, would nevertheless be insufficient to survive summary judgment under *Matsushita*, the complaint must be dismissed.

If *Matsushita* were limited to antitrust claims, then *Twombly* would be, too. But the Court applied *Twombly* in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which involved *Bivens* claims, not antitrust claims. In *Iqbal*, the Court unequivocally rejected the respondent's contention that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute," dismissing that position as both inconsistent with *Twombly* itself and "incompatible with the Federal Rules of Civil Procedure." 556 U.S. at 684. "Though *Twombly* determined the sufficiency of a complaint sounding in antitrust," the Court explained, "the decision was based on … interpretation and application of Rule 8," which "governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'" *Id.* (quoting Fed. R. Civ. P. 1); *see Twombly*, 550 U.S. at 554 (discuss-

ing Rule 8). *Twombly* accordingly "expounded the pleading standard for 'all civil actions,'" and its reasoning "applie[d] to antitrust and discrimination suits alike." *Iqbal*, 556 U.S. at 684.

There is no logical basis for concluding that although *Twombly* construes the Federal Rules rather than substantive antitrust law, *Matsushita* does exactly the opposite—particularly in light of the "striking resemblance" between the two cases, Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 Wis. L. Rev. 535, 559 (2009). And as *Iqbal* emphasizes, the standards reflected in the Federal Rules apply "in all civil actions," regardless of the underlying substance of the claims. Fed. R. Civ. P. 1; *see also* Meier, *supra*, at 75 ("[V]iewing *Matsushita* as a unique product of antitrust law seems inconsistent with the transsubstantive nature of Rule 56."). *Matsushita*, in short, is a summary judgment case, and the principles it describes apply equally in all cases decided under Rule 56, antitrust or otherwise.[8]

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[8] In its decision denying rehearing, the panel below noted that petitioners did not specifically cite *Matsushita* in their appellate or district court briefing. *See* App. 59a-60a. Even if that were relevant, it would not affect this Court's review, since the court of appeals' decision clearly passed on the question presented. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *United States v. Williams*, 504 U.S. 36, 41-43 (1992). In any event, the panel's criticism is unwarranted precisely because *Matsushita* reflects general summary judgment principles that petitioners *did* rely on below—*viz.*, that "circumstantial evidence [that] suggests only the potential for a causal link is insufficient to survive summary judgment." C.A. Br. 38 (alteration in original) (quotation omitted). And the

2. *Matsushita*'s Reasoning At A Minimum Extends To Civil RICO Cases

Even if *Matsushita* could fairly be read to reflect concerns about the high costs of "mistaken inferences," *Matsushita*, 475 U.S. at 594, in antitrust cases in particular—rather than the more general concern that all inferences must be reasonable—that would not justify limiting its reasoning to the antitrust context alone, as other types of cases present similar concerns.

a. Certainly, the need to "hedge[] against false inferences" from ambiguous evidence, *Twombly*, 550 U.S. at 554, is no less pressing in the RICO context than in antitrust cases. "Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). "The mere assertion of a RICO claim ... has an almost inevitable stigmatizing effect" on the defendants, *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990), and the statute imposes especially "severe" penalties through its "powerful treble damages provision," *Genty v. Resolution Tr. Corp.*, 937 F.2d 899, 908, 910 (3d Cir. 1991).[9] "[T]he allure of treble damages, attorney's

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district court agreed with petitioners that "the circumstantial evidence" on which Waste Management relied was "far too speculative and conclusory" to support a reasonable inference of causation. App. 55a-56a.

[9] RICO's treble damages provision was patterned on the Clayton Act's, a connection that makes "[a]ntitrust cases … particularly instructive in the civil RICO context." *In re Managed Care Litig.*, 430 F. Supp. 2d at 1346 (citing *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150

fees, and federal jurisdiction presents a powerful incentive for plaintiffs" to pursue claims of questionable merit under the Act. *Rosenson v. Mordowitz*, 2012 WL 3631308, at *4 (S.D.N.Y. Aug. 23, 2012); *see Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 444 (5th Cir. 1992) (noting the "proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages" (quotation omitted)). In light of these well-recognized dynamics, "in cases alleging civil RICO violations, particular care is required to balance the liberality of the Civil Rules with the necessity of preventing abusive or vexatious treatment of defendants." *Miranda*, 948 F.2d at 44.

b. These over-reach concerns are compounded in cases, like this one, that venture into the political sphere. "Ingratiation and access ... are not corruption." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality) (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)). "They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Id.* If the mere fact that a constituent has made a campaign contribution, coupled with official action favoring the donor's interests, is taken as evidence sufficient to support a reasonable infer-

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(1987)); *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 510 (1985) (Marshall, J., dissenting) ("the language of the [civil RICO] treble-damages provision … tracks virtually word for word the treble-damages provision of the antitrust laws," leaving "little doubt that the latter served as a model for the former").

ence of RICO liability, "[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016). While "[t]he line between *quid pro quo* corruption and general influence may seem vague at times," "the distinction must be respected in order to safeguard basic First Amendment rights." *McCutcheon*, 572 U.S. at 209. "In drawing that line, the First Amendment requires [courts] to err on the side of protecting political speech rather than suppressing it." *Id.* (quotation omitted); *see Citizens United*, 558 U.S. at 361 ("more speech, not less, is the governing rule").

On the Fifth Circuit's theory, *any* campaign contribution combined with a change in official position would get a plaintiff past summary judgment and to a jury. In this context, requiring a civil RICO plaintiff to provide at least *some* evidence that "tends to exclude" innocent explanations for ambiguous conduct is essential to guard against the risk of a jury drawing "false inferences" of liability based on protected political speech.

C. The Question Presented Is Important And Recurring, And This Case Presents A Suitable Vehicle Through Which To Resolve It

1. As the numerous appellate and district court decisions (and commentator interest) cited above make clear, the question whether *Matsushita* applies outside the antitrust context is oft-recurring. And the question is self-evidently important, since it goes

to fundamental attributes of the summary judgment process that lower courts confront in case after case.

As this Court has observed, summary judgment is "an integral part of the Federal Rules" that functions as the "principal tool[]" for preventing "factually insufficient claims … from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327. Rule 56 therefore "must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* The decision below upsets the balance struck by the Court in *Matsushita*, permitting inadequately supported claims to go to the jury and creating an unacceptable risk that the jury will return a verdict based on speculation—a risk with particularly severe consequences in civil RICO actions generally, and in actions concerning political activity in particular. *See supra* at 25-27.

The need for review is all the more pressing because the question presented concerns interpretation and application of a Federal Rule of Civil Procedure, which by its very nature should mean the same thing in all federal jurisdictions. *See Hanna v. Plumer*, 380 U.S. 460, 472 (1965) ("One of the shaping purposes of the Federal Rules [wa]s to bring about uniformity in the federal courts." (quotation omitted)). Allowing persistent division about the

meaning of those Rules to go uncorrected defeats the purpose of having standardized federal procedures.

The Court frequently grants certiorari to resolve questions about the proper application of the Federal Rules, recognizing their cross-cutting importance. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544; *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 535 (1991). There is a similar need for the Court's intervention here. Given the widespread disagreement and confusion in the lower courts, the error in the Fifth Circuit majority's approach, and the negative consequences that follow from artificially limiting *Matsushita* to the antitrust context, the Court should grant review to definitively dispel any doubt about the proper application of its decision in *Matsushita*—and Rule 56.

2. This case is a suitable vehicle through which to resolve the question. The Fifth Circuit majority expressly held that *Matsushita* does not apply outside the antitrust context, and its decision gave no indication that it would have reversed the district court's grant of summary judgment even if it believed *Matsushita* did apply. Thus, if this Court were to reverse and hold *Matsushita* applicable, the Fifth Circuit would likely affirm the district court's grant of summary judgment for petitioners, as Judge Oldham's dissent—applying *Matsushita*—would have done. At the very least, the panel would have to reassess the undisputed summary judgment record under the *Matsushita* standard, which the panel majority below expressly declined to do.

In denying the petition for rehearing, the panel stated that "the issue in this case is factual, more particularly, what inferences can or will be drawn by the jury from the evidence." App. 60a. But determination of what "a reasonable jury could infer" from particular conduct is a "purely legal question." *Locke v. Haessig*, 788 F.3d 662, 665 (7th Cir. 2015). And the specific legal question here, as the panel majority and dissent explained at length in their original opinions, was whether a jury could reasonably infer that Mayor Nagin's decision not to renew the executive order was motivated by bribes rather than ordinary politics, when the evidence was "as consistent with" an innocent explanation as it was with liability, and when there is no additional "evidence that tends to exclude" the innocent explanation. *Matsushita*, 475 U.S. at 588; *see* App. 20a-30a (majority opinion); App. 30a-49a (dissenting opinion). The majority concluded that the jury was legally authorized to infer causation—and find for Waste Management—in those circumstances. App. 23a, 29a-30a. Judge Oldham, in contrast, believed that no such inference was legally permissible because under *Matsushita*, ambiguous circumstantial evidence "does not, standing alone, support an inference" of wrongdoing. *Matsushita*, 475 U.S. at 588; *see* App. 34a-45a. This dispute over what inferences the jury properly might draw from the evidence, in other words, turned entirely on the legal dispute about whether *Matsushita* applies outside the antitrust context. This Court should grant review to resolve that question.

CONCLUSION

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

Respectfully submitted,

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