No. 22-1159

In the Supreme Court of the United States

TROY NEWMAN, PETITIONER

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

After a six-week trial, a jury found that petitioner's co-conspirators lied their way into private medical conferences and healthcare clinics and surreptitiously recorded respondents' doctors and staff without consent. In furtherance and as a critical part of this scheme, petitioner's co-conspirators produced and transferred multiple fake IDs. Petitioner's co-conspirators used the internet to procure some of the fake IDs, the fake IDs were integral to a nationwide scheme, and the goal of producing and transferring the fake IDs was to harm respondents and their interstate operations. Petitioner and his co-conspirators also had advocated or perpetrated sting operations using false identities against respondents in the past, and they intended to carry out similar projects in the future. Respondents were the direct, intended victims of petitioner's scheme, and there were no more directly harmed victims.

The jury found petitioner liable for fraud, trespass, breach of contract, unlawful recording, and violations of civil RICO, awarding compensatory and punitive damages. A unanimous panel of the court of appeals affirmed the jury's verdict on respondents' RICO claim in a nonprecedential, unpublished memorandum disposition.

The questions presented are:

1. Whether, on the facts of this case, petitioner's co-conspirators committed predicate acts of producing or transferring fake IDs "in or affect[ing] interstate … commerce" in violation of 18 U.S.C. § 1028(c)(3)(A).

2. Whether, on the facts of this case, a reasonable jury could find that petitioner violated RICO by conducting an enterprise through a "pattern" of predicate acts under 18 U.S.C. § 1962(a).

3. Whether, on the facts of this case, a reasonable jury could find that respondents were injured "by reason of" petitioner's RICO violations under 18 U.S.C. § 1964(c).

RULE 29.6 STATEMENT

Respondents Planned Parenthood Federation of America, Inc., Planned Parenthood Shasta-Diablo, Inc. (DBA Planned Parenthood Northern California), Planned Parenthood Mar Monte, Inc., Planned Parenthood of the Pacific Southwest, Planned Parenthood Los Angeles, Planned Parenthood/Orange and San Bernardino Counties, Inc., Planned Parenthood California Central Coast, Inc., Planned Parenthood Pasadena and San Gabriel Valley, Inc., Planned Parenthood Center for Choice, Planned Parenthood of the Rocky Mountains, and Planned Parenthood Gulf Coast have no parent corporations, and no publicly held corporation owns ten percent or more of their stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–27a) is reported at 51 F.4th 1125. The memorandum disposition of the court of appeals (Pet. App. 28a-54a) is unpublished but available at 2022 WL 13613963. The order of the court of appeals denying rehearing en banc (Pet. App. 503a–506a) is unreported. The opinion of the district court on petitioners' posttrial motions (Pet. App. 146a-203a) is reported at 480 F. Supp. 3d 1000. The opinion of the district court on injunctive relief is reported at 613 F. Supp. 3d 1190. The opinion of the district court on summary judgment (Pet. App. 204a-414a) is reported at 402 F. Supp. 3d 615. The opinion of the district court on petitioner's motion to dismiss (Pet. App. 415a-502a) is reported at 214 F. Supp. 3d 808.

INTRODUCTION

In an unpublished, nonprecedential memorandum disposition, the court of appeals affirmed the district court's holding that, on the facts of this case, respondents established three basic elements of a civil RICO claim. First, the district court held on summary judgment that

the production and transfer of fake IDs by petitioner's co-conspirators was "in or affect[ing] interstate … commerce" in violation of 18 U.S.C. § 1028(c)(3)(A), and therefore constituted RICO predicate acts. Second, after a six-week trial, the district court upheld the jury's finding that petitioner conducted an enterprise through a "pattern" of predicate acts under RICO. Third, the district court also upheld the jury's finding that respondents' damages were proximately caused by petitioner's RICO violations. In a nonbinding decision, a unanimous panel of the court of appeals affirmed on all three issues, and the full court denied rehearing without any noted dissent.

As to the interstate nexus requirement under § 1028, the court of appeals noted that petitioner's co-conspirator used the internet—an instrumentality and channel of interstate commerce—to arrange the purchase of two fake IDs. The court further explained that petitioner's co-conspirators produced and transferred three fake IDs in order to gain admission to out-of-state medical conferences and healthcare clinics, and did so for the specific purpose of harming respondents, which operate in interstate commerce. As to RICO's "pattern" requirement, the court of appeals explained that petitioner and his co-conspirators had advocated or perpetrated similar sting operations using false identities against respondents in the past, and they intended to carry out similar projects in the future. Finally, as to RICO's proximate causation requirement, the court explained that a reasonable jury could find the requisite "direct relationship" between petitioner's violation of RICO and the narrow categories of damages the district court had permitted respondents to recover.

Those holdings do not warrant this Court's review. Petitioner fails to identify any split of authority, and the judgment of the court of appeals is correct. The decision below is nonprecedential, and petitioner does not even claim that this case involves a fact pattern that is likely to

recur in the future. Petitioner's arguments ultimately are limited to the facts of this case—and even then, his factual descriptions fail to account for the full six-week trial record and the deference due to the findings of the jury. In any event, all three questions presented implicate unresolved disputes that this Court would have to address in the first instance, severely complicating the Court's ability to resolve the questions presented—which do not merit this Court's attention in the first place.

The petition should be denied.

STATEMENT[1]

A. Factual Background

1. Respondents are Planned Parenthood Federation of America, Inc. ("PPFA") and a number of its affiliates. PPFA's affiliates provide reproductive healthcare services—including safe, legal abortions—to millions of patients annually at clinics around the country.

To strengthen professional relationships and facilitate candid discussions among its doctors and staff, PPFA holds several national conferences each year. These conferences take place in secure, private event spaces, are not open to the public, and are limited to pre-registered invitees who have been vetted by PPFA or other conference co-sponsors. See Pet. App. 33a-35a, 44a-46a. Respondents' doctors and staff also attend conferences held by other organizations, including the National Abortion Federation ("NAF"). PPFA "is a member of NAF, as are many of PPFA's affiliates, providers, and staff." *Id.* at 15a. NAF's conferences likewise are held in secure, private spaces, are not open to the public, and are limited to pre-registered invitees. See *id.* at 33a-35a, 44a-46a.

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[1] A substantially similar Statement is contained in the Briefs in Opposition filed contemporaneously in Nos. 22-1147, 22-1160, and 22-1168.

2. David Daleiden is a longtime anti-abortion activist, and "his name was on 'no access' lists of individuals barred from entering Planned Parenthood conferences and affiliated health centers." *Id.* at 13a. In early 2013, Daleiden circulated a proposal to petitioner Troy Newman and Albin Rhomberg—also longtime anti-abortion activists—"outlining an undercover operation to infiltrate organizations, especially Planned Parenthood and its affiliates, involved in producing or procuring fetal tissue and to expose alleged wrongdoing through the release of 'gotcha' undercover videos." *Id.* at 14a. In March 2013, Daleiden, petitioner, and Rhomberg formed the Center for Medical Progress ("CMP") "to oversee their operation." *Ibid.* Daleiden served as CMP's CEO, petitioner as its Secretary, and Rhomberg as its CFO. *Ibid.*

"To carry out their operation," Daleiden formed BioMax Procurement Services, LLC—"a fake tissue procurement company." *Ibid.* "BioMax had a website, business cards, and promotional materials, but was not in fact involved in any business activity." *Ibid.* "Daleiden filed BioMax's articles of incorporation with the State of California in October 2013, signing the fictitious name 'Susan Tennenbaum.'" *Ibid.* "Daleiden used the false name 'Robert Sarkis' while posing as BioMax's Procurement Manager and Vice President of Operations." *Ibid.*

"Daleiden then recruited additional associates to participate in the scheme." *Id.* at 15a. Susan Merritt, another anti-abortion activist "who had previously participated in an undercover operation targeting abortion providers, posed as BioMax's CEO 'Susan Tennenbaum.'" *Ibid.* "Brianna Baxter, using the alias 'Brianna Allen,' posed as BioMax's part-time procurement technician." *Ibid.*

"To further the subterfuge, Daleiden created or procured fake driver's licenses for himself, Merritt, and Baxter." *Ibid.* "Daleiden modified his expired California driver's license, typing 'Robert Daoud Sarkis' over his

true name." *Ibid.* "Using the internet, he paid for a service to produce fake driver's licenses for 'Susan Tennenbaum' (Merritt) and 'Brianna Allen' (Baxter)." *Ibid.* "Daleiden also had bank cards issued for the aliases Sarkis and Tennenbaum." *Ibid.*

3. In 2013 through 2015, Daleiden, Merritt, Baxter, and another co-conspirator attended numerous abortion-related conferences while posing as representatives of BioMax. First, "[t]o establish their credentials, BioMax 'employees' attended several entry-level conferences." *Ibid.* In particular, "[i]n June 2013, 'Robert Sarkis' attended the International Society of Stem Cell Research Annual Meeting in Boston." *Ibid.* Then, "[i]n September of that same year, 'Susan Tennenbaum' and 'Brianna Allen' attended the Association of Reproductive Health Professionals conference in Colorado." *Ibid.*

"Contacts from this meeting vouched for BioMax's *bona fides*, permitting BioMax to register as an exhibitor" for NAF's 2014 Annual Meeting in San Francisco. *Ibid.* "Daleiden, using Merritt's alias 'Susan Tennenbaum,' signed Exhibitor Agreements for the 2014 NAF conference on behalf of BioMax." *Id.* at 16a. "Daleiden, Merritt, and Baxter all attended NAF's 2014 Annual Meeting … on behalf of BioMax, presenting their fake California driver's licenses at check-in and posing as Sarkis, Tennenbaum, and Allen." *Ibid.* "All signed confidentiality agreements, that among other things, prohibited them from recording." *Ibid.* Nevertheless, "they covertly recorded during the entire conference." *Ibid.*

Petitioner's co-conspirators then attended four additional conferences held by PPFA or NAF—PPFA's North American Forum on Family Planning, held in Miami; PPFA's Medical Directors' Conference, held in Orlando; PPFA's 2015 National Conference, held in Washington, D.C.; and NAF's 2015 Annual Meeting, held in Baltimore. See *ibid.* "At these conferences, [petitioner's

co-conspirators] often signed additional exhibitor or confidentiality agreements and secretly recorded persons with whom they spoke." *Ibid.*

4. In addition to infiltrating conferences, petitioner's co-conspirators also arranged lunch meetings and site visits, where they made further surreptitious recordings.

"Daleiden … repeatedly sought a meeting with Dr. Deborah Nucatola," who "was then the Senior Director of Medical Services at PPFA and an abortion provider in California." *Ibid.* "She eventually agreed to meet, and Daleiden and Merritt secretly recorded Dr. Nucatola throughout a two-hour lunch." *Ibid.* "Daleiden and Merritt repeated this same strategy with Dr. Mary Gatter, the Medical Director of Planned Parenthood Pasadena and San Gabriel Valley, Inc. …." *Ibid.*

"Daleiden and Merritt also used their conference contacts to secure visits to Planned Parenthood clinics in Texas and Colorado. At both, they posed as Sarkis and Tennenbaum and wore hidden cameras that recorded the entire time." *Id.* at 17a.

5. "On July 14, 2015, CMP started releasing videos that included footage from the conferences, lunches, and clinic visits [petitioner's co-conspirators] had secretly recorded." *Ibid.* Thereafter, respondents "provided temporary bodyguards to several of the recorded individuals and even relocated one of the recorded individuals and her family." *Ibid.* Respondents "also hired security consultants to investigate [the] infiltration and enhance the security of [respondents'] conferences." *Ibid.*

B. Proceedings Below

1. In January 2016, respondents brought this lawsuit against petitioner and his co-conspirators, asserting common-law claims for fraud, trespass, and breach of contract, as well as statutory claims for violating civil RICO, the federal eavesdropping statute, and the state

eavesdropping statutes of California, Florida, and Maryland. See *ibid.*

Petitioner moved to dismiss under Rule 12(b)(6) and to strike under California's anti-SLAPP statute. Among other things, petitioner argued that respondents sought "damages resulting from the publication of the recordings" and therefore "must satisfy the First Amendment requirements for defamation claims." *Id.* at 467a. The district court disagreed, explaining that "the First Amendment does not impose heightened standards on [respondents'] tort claims as long as [respondents] do not seek reputational damages (lost profits, lost vendors) stemming from the publication conduct of [petitioner]." *Id.* at 470a (emphasis omitted).

Petitioner also argued under RICO that "the causal nexus between [petitioner's] conduct and the harm alleged … is too distant." *Id.* at 437a. But the district court rejected that argument as well. The court acknowledged that respondents "may not be able to recover for damages that were not *directly* caused by the actions of [petitioner]"—"[f]or example, the damages [respondents] incurred because their website was hacked by a third party would appear to be too distant, too far down the causal chain." *Id.* at 439a (footnote omitted). "But other damages alleged—including the increase in security costs at conferences, meetings, and clinics that [respondents] incurred when *they learned* about [the] infiltration of their conferences, meetings, and clinics—are much more directly tied to [petitioner's] conduct and do not raise the problem of intervening actions of third-parties." *Ibid.*

Petitioner's co-conspirators took an interlocutory appeal, and the court of appeals affirmed. *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 890 F.3d 828 (9th Cir. 2018), *amended*, 897 F.3d 1224 (9th Cir. 2018); *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 735 F. App'x 241 (9th Cir. 2018).

Petitioner's co-conspirators filed a petition for certiorari, which this Court denied. *Ctr. for Med. Progress* v. *Planned Parenthood Fed'n of Am.*, 139 S. Ct. 1446 (2019).

2. After discovery, the parties filed "seven motions for summary judgment, one special motion to strike the complaint, a *Daubert* motion, and a motion to strike an expert." Pet. App. 205a. As relevant here, petitioner again argued that respondents' damages were barred by the First Amendment, but the district court again disagreed. The court acknowledged that respondents "cannot recover for reputational damages or 'publication' damages under the First Amendment," and it drew "the line for compensable damages between those caused by … direct conduct and those caused by third parties." *Id.* at 206a.

The court accordingly allowed respondents to seek just two narrow categories of damages. In particular, the court allowed respondents to seek damages *only* "[1] for personal security costs for individuals targeted by [petitioner's co-conspirators] and [2] for measures to investigate the intrusions and upgrade the security measures meant to vet and restrict future access to the conferences and facilities." *Id.* at 206a-207a. The court did *not* allow respondents to seek damages for "more general expenses to upgrade physical security at Planned Parenthood facilities," for example, nor for "the time and expense [respondents] incurred in responding to the threats and acts of third parties following release of the videos." *Id.* at 207a.

The court thus held that "some of the damages [respondents] s[ought] here are more akin to publication or reputational damages that would be barred by the First Amendment," but "[o]thers … are economic damages that are not categorically barred." *Id.* at 228a. "Those that fall in the latter category," the court explained, "result *not* from the acts of third parties who were motivated by the contents of the videos, but from the *direct* acts of

[petitioner's co-conspirators]—their intrusions, their misrepresentations, and their targeting and surreptitious recording of [respondents]' staff." *Id.* at 228a-229a. "[Petitioner and his co-conspirators] are not immune from the damages that their intrusions into the conferences and facilities directly caused, nor from the damages caused by their direct targeting of [respondents]' staff …." *Id.* at 229a.

The district court rejected petitioner's argument seeking "to preclude [respondents] categorically from seeking damages covering 'increased security.'" *Id.* at 232a. "That the systems implemented by [respondents] following the intrusions were new or improved," the court explained, "does not make them unrecoverable as a matter of law." *Id.* at 233a. But the court allowed petitioner to "argue to the jury that they were unreasonable, unnecessary, or speculative." *Ibid.*

The district court also rejected petitioner's arguments under RICO. Petitioner first argued that his co-conspirators did not commit any predicate act of producing or transferring fake IDs in violation of 18 U.S.C. § 1028 because there was no evidence that "the production[or] transfer … [wa]s in or affect[ed] interstate … commerce." 18 U.S.C. § 1028(c)(3)(A). But the court held that respondents had established that interstate-commerce element as a matter of law. As the court explained, "only a 'minimum nexus' with interstate commerce is required under this statute," and "Daleiden admitted that he used the internet to secure two of the IDs, [petitioner and his co-conspirators] intended to affect interstate commerce in creating the false IDs, and [petitioner's co-conspirators] used those IDs across state lines." Pet. App. 240a.

Petitioner next argued that respondents had not adequately established the requisite "pattern of racketeering activity," 18 U.S.C. § 1962(a), because their scheme

"'came to fruition'" with the publication of the videos, such that their "work … [wa]s 'complete' and 'finished.'" Pet. App. 244a. Petitioner did not dispute, however, that their "zealous activism against [respondents]" is *not* "over." *Ibid.* And the court concluded that there was "evidence from which a reasonable juror could conclude that [petitioner] will attempt similar tactics … again in the future." *Ibid.*

Petitioner finally argued that there was insufficient evidence of proximate causation. But the court had already held that "certain categories of damages sought by [respondents] are not recoverable." *Id.* at 247a. "For the damages that are allowable," the court found "sufficient evidence … for a reasonable juror to conclude that those damages were directly caused by [petitioner's] actions." *Ibid.*

3. After a six-week trial, "the jury found for [respondents] on all counts." *Id.* at 18a. "The jury awarded … compensatory and punitive damages, and the district court later awarded nominal and statutory damages, resulting in a total damages award of $2,425,084." *Ibid.*

"The compensatory damages were divided into two categories: infiltration damages and security damages." *Ibid.* "The infiltration damages, totaling $366,873, related to [PPFA]'s costs to prevent a future similar intrusion." *Ibid.* "The security damages, totaling $101,048, related to [certain respondents'] costs for protecting their doctors and staff from further targeting …." *Ibid.* While these costs directly compensated respondents for concrete out-of-pocket expenses, respondents argued—and the jury found—that the expenses were reasonable and necessary to restore "confidence" and a "sense of trust and faith" in the physical security of respondents' conferences, clinics, and staff, which petitioner's actions had "broken." C.A. E.R. 3601-02.

The district court entered limited injunctive relief, *Planned Parenthood Fed'n of Am., Inc.* v. *Ctr. for Med. Progress*, 613 F. Supp. 3d 1190 (N.D. Cal. 2020), and denied petitioner's posttrial motions, Pet. App. 146a-147a.

3. On appeal, a unanimous panel of the court of appeals affirmed in part and reversed in part.

a. In a published opinion, the panel affirmed the district court's conclusion that the compensatory damages award is consistent with the First Amendment, but reversed the verdict under the federal eavesdropping statute.

As to the First Amendment, the panel "express[ed] no view on whether [petitioner's] actions here were legitimate journalism … because even accepting [their] framing, the First Amendment does not prevent the award of the challenged damages." *Id.* at 19a n.4. The panel noted that "[g]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 19a (quoting *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991). "Invoking journalism and the First Amendment," the panel explained, "does not shield individuals from liability for violations of laws applicable to all members of society." *Id.* at 21a. And here, "[n]one of the laws [petitioner] violated was aimed specifically at journalists or those holding a particular viewpoint." *Ibid.* Rather, "[t]he two categories of compensatory damages permitted by the district court[] … were awarded by the jury to reimburse [respondents] for losses caused by [petitioner's] violations of generally applicable laws." *Id.* at 21a-22a. Petitioner "ha[s] no special license to break laws of general applicability in pursuit of a headline." *Id.* at 22a. The jury's compensatory damages award merely reflects that petitioner "ha[s] been held to the letter of the law, just like all other members of our society." *Ibid.*

The panel rejected petitioner's argument "that the infiltration and security damages … are impermissible publication damages" under *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988). *Ibid.* The panel explained that this case is "distinguishable from *Hustler*" because "[t]he jury awarded damages for economic harms …, not the reputational or emotional damages sought in *Hustler*." *Ibid.* Furthermore, "[petitioner's] argument that, absent a showing of actual malice, all damages related to truthful publications are necessarily barred by the First Amendment cannot be squared with *Cohen*." *Id.* at 23a. In *Cohen*, after all, this Court "upheld an economic damage award reliant on publication—damages related to loss of earning capacity—even though the publication was truthful and made without malice." *Ibid.*

In the alternative, the panel held that even if all damages resulting from a publication were automatically unrecoverable absent actual malice, the damages here *still* pass muster. That is because respondents "would have been able to recover the infiltration and security damages even if [petitioner and his co-conspirators] had never published videos of the[] surreptitious recordings." *Id.* at 22a. As the panel explained, "[r]egardless of publication, … [respondents] would have protected [their] staff who had been secretly recorded and safeguarded [their] conferences and clinics from future infiltrations." *Id.* at 22a-23a.

The panel emphasized that its decision "does not impose a new burden on journalists or undercover investigations using lawful means." *Id.* at 23a. "Journalism and investigative reporting have long served a critical role in our society," but they "do not require illegal conduct." *Ibid.* "In affirming [respondents'] compensatory damages from [petitioner's] First Amendment challenge," the panel "simply reaffirm[ed] the established principle that the pursuit of journalism does not give a license to break laws of general applicability." *Ibid.*

As to the federal eavesdropping statute, the panel held that there was insufficient evidence that petitioner's co-conspirators recorded communications "for the purpose of committing any criminal or tortious act," as the statute requires where one party to a recorded communication consents. 18 U.S.C. § 2511(2)(d). The panel accordingly vacated the statutory damages awarded under the federal eavesdropping statute. Pet. App. 24a-27a & nn.7, 9.

b. In a separate, unpublished, nonprecedential memorandum disposition, the panel rejected all of petitioner's remaining arguments.

As to RICO, the panel held that respondents' claim "satisfied the minimal interstate commerce nexus requirement under 18 U.S.C. § 1028(c)(3)(A)." *Id.* at 35a. As the panel explained, petitioner's co-conspirators "used the fake licenses to gain admission to out-of-state conferences and facilities, and then presented those licenses at the out-of-state conferences and facilities, which were operating in interstate commerce." *Id.* at 35a-36a. "[F]urther, Daleiden's use of the internet to search for and arrange the purchase of two fake driver's licenses was intimately related to interstate commerce." *Id.* at 36a (quotation marks omitted).

The panel also held that respondents presented sufficient evidence "regarding the required *pattern* of predicate acts necessary to violate RICO." *Ibid.* "A pattern may be established," the court explained, "by proof that defendants' conduct possessed 'open-ended continuity,' *i.e.*, that their conduct 'by its nature project[ed] into the future with a *threat* of repetition.'" *Ibid.* (quoting *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)) (emphasis by court of appeals). Here, "[t]he evidence showed that various [co-conspirators] had previously advocated for or used undercover sting operations targeting Planned

Parenthood, and CMP and BioMax were still extant and intended to carry out future projects." *Ibid.*

The panel also found sufficient evidence regarding "RICO proximate cause." *Ibid.* As the panel explained, "[t]here was a direct relationship between [petitioner's co-conspirators'] production and transfer of the fake driver's licenses and the alleged harm." *Id.* at 36a-37a. And this case implicates none of the concerns animating this Court's proximate cause precedents. "The district court permitted only infiltration damages and security damages, limiting any difficulty in determining what damages were attributable to [petitioner's] RICO violation; there [wa]s no risk of [respondents] recovering duplicative damages; holding [petitioner] liable discourages illegal behavior; and there are no more directly injured victims." *Id.* at 37a.

Finally, as to punitive damages, the panel found "no error in the award of punitive damages." *Id.* at 47a. As the panel explained, "[t]here was indeed overwhelming evidence to support the punitive damages award based on the fraud and findings that Daleiden, Merritt, Rhomberg, [petitioner], CMP, and BioMax committed fraud or conspired to commit fraud through intentional misrepresentation." *Id.* at 47a-48a. Moreover, petitioner and his co-conspirators "waived any challenge to their liability for fraud by failing to properly raise the issue in their opening briefs." *Id.* at 48 n.9. And "[e]ven if the argument were not waived," it was "meritless." *Ibid.*

4. Petitioner and his co-conspirators filed four separate petitions for panel rehearing or rehearing en banc. After calling for a response, the panel denied panel rehearing, and the full court denied rehearing en banc without any noted dissent. *Id.* at 503a–506a.

REASONS TO DENY THE PETITION

Petitioner seeks review of three questions related to his liability under RICO. In particular, petitioner challenges whether, on the facts of this case, the evidence established (1) an interstate nexus under 18 U.S.C. § 1028, (2) a "pattern" of predicate acts under 18 U.S.C. § 1962(a), and (3) proximate causation under 18 U.S.C. § 1964(c). On all three issues, the decision below is correct and conflicts with no decision of this Court or another court of appeals. In any event, the unpublished, nonprecedential memorandum disposition below is of limited significance and a poor vehicle to address the questions presented. Further review is not warranted.

A. The Court of Appeals' Holding That There Is An Interstate Nexus Under § 1028 Does Not Warrant Further Review

Petitioner first seeks review of the court of appeals' holding that petitioner's co-conspirators committed predicate acts of producing or transferring fake IDs "in or affect[ing] interstate … commerce" in violation of 18 U.S.C. § 1028 Pet. 9-14. That holding does not implicate any split of authority and is correct on the merits.

1. Petitioner identifies no split of authority on the interstate nexus requirement under § 1028. To begin with, the decision below upholding petitioner's RICO liability in this case is unpublished and nonprecedential. As the decision states, it is "not appropriate for publication and is not precedent." Pet. App. 31a n.*. The decision below thus is not binding authority, within the Ninth Circuit or anywhere else. If a future Ninth Circuit panel or a district court within that circuit confronts a case with similar or analogous facts and determines that the decision here is erroneous, it is free to disregard it.

Petitioner asserts that the decision below conflicts with *United States* v. *Della Rose*, 278 F. Supp. 2d 928

(N.D. Ill. 2003). But that district court decision is not binding precedent in any jurisdiction either. Regardless, in *Della Rose*, "there [wa]s no evidence of any out-of-state involvement." *Id.* at 932. The defendant drafted a legitimate check against funds belonging to his in-state client and had a third party use a fake ID to cash the check at an in-state bank. *Id.* at 930-31. Moreover, the government "did not solicit any testimony about the nature and extent of the bank's business" out of state. *Id.* at 931. The court thus concluded that the government "failed to offer any positive proof of even a minimal nexus." *Id.* at 932.

The facts here are entirely different. Petitioner's co-conspirator "use[d] … the internet to search for and arrange the purchase of two fake driver's licenses." Pet. App. 36a. Petitioner's co-conspirators also used and presented fake licenses at "out-of-state conferences and facilities, which were operating in interstate commerce." *Ibid.*

Petitioner also cites the Ninth Circuit's decision in *United States* v. *Sutcliffe*, 505 F.3d 944 (9th Cir. 2007), but that case just underscores that the decision below has no significance beyond this case. *Sutcliffe* is published and precedential, and the decision below is not. Accordingly, to the extent there is any conflict between *Sutcliffe* and the decision below, district courts and future Ninth Circuit panels are free—indeed, bound—to follow *Sutcliffe* and disregard the decision below. In any event, *Sutcliffe* held that "use of the internet is intimately related to interstate commerce," and thus found an interstate nexus where the defendant "electronically sent threats and social security numbers to internet servers located across state lines." *Id.* at 952-53. To the extent petitioner's co-conspirator here used the internet to *obtain* information rather than to send it, that distinction makes no difference under § 1028, which requires only that the relevant acts be "in or affect[ing] interstate … commerce." 18 U.S.C. § 1028(c)(3)(A).

Finally, petitioner cites various cases for the proposition that "actions that do not violate the predicate statutes listed in § 1961(1) cannot form the basis of a RICO claim." Pet. 13. But the decision below did not hold otherwise. The court of appeals held that petitioners violated § 1028, which is one of the predicate statutes listed in § 1961(1). Petitioner's cited cases thus do not show any split.

2. The decision below also is correct. This Court has held that "[t]he phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause." *Cir. City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001). At least three other courts of appeals have held § 1028 requires only a "minimal" nexus to interstate commerce. *United States* v. *Klopf*, 423 F.3d 1228, 1239 (11th Cir. 2005); *United States* v. *Pearce*, 65 F.3d 22, 24 (4th Cir. 1995); see *United States* v. *Jackson*, 155 F.3d 942, 947 (8th Cir. 1998) (holding that § 1028 "is not as stringent as [the defendant] would have [the court] believe" and citing *Pearce*, 65 F.3d at 24).

Here, the court of appeals held that petitioners' "use of the internet to search for and arrange the purchase of two fake driver's licenses was intimately related to interstate commerce." Pet. App. 36a (quotation marks omitted). That holding is consistent with a wealth of caselaw. "[S]tatutes with language such as 'affecting commerce' or 'any facility of interstate commerce' require proof only that the criminal activity involved an instrumentality or channel of interstate commerce." *United States* v. *Haas*, 37 F.4th 1256, 1264 (7th Cir. 2022). As "an international network of interconnected computers," *Reno* v. *Am. Civ. Liberties Union*, 521 U.S. 844, 849 (1997), "[t]he Internet is an instrumentality and channel of interstate commerce." *United States* v. *Havlik*, 710 F.3d 818, 824 (8th Cir. 2013); see also, *e.g.*, *United States* v. *Carroll*, 105 F.3d 740, 742 (1st Cir. 1997); *United States* v. *Runyan*, 290 F.3d 223, 239 (5th Cir. 2002); *United States* v. *Horne*, 474

F.3d 1004, 1006 (7th Cir. 2007). Indeed, "it is difficult to find an act more intertwined with the use of the channels and instrumentalities of interstate commerce than that of downloading [information] from the Internet." *United States* v. *MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006).

Petitioner downplays the internet's role in the scheme here by claiming that Daleiden used it more like "the Yellow Pages" than like "a telephone." Pet. 11. That does not matter. Using the internet either way employs an instrumentality and channel of interstate commerce. Even if Daleiden's use of the internet was "minimal," as petitioner claims, *ibid.*, that is enough. See, *e.g.*, *Klopf*, 423 F.3d at 1239.

Petitioner also has no real answer to the court of appeals' holding that his co-conspirators "used the fake licenses to gain admission to out-of-state conferences and facilities, and then presented those licenses at the out-of-state conferences and facilities, which were operating in interstate commerce." Pet. App. 35a-36a. Petitioner argues that the court of appeals conflated "the *production* or *transfer* of IDs" with "the *use* of IDs," Pet. 12, but he cites no authority holding that the production or transfer of a fake ID cannot affect interstate commerce through the ID's subsequent interstate use. Indeed, that is the most natural way in which a production or transfer that is not "in" interstate commerce could nevertheless "affect[]" interstate commerce. 18 U.S.C. § 1028(c)(3)(A). By suggesting that a production or transfer cannot satisfy § 1028's interstate nexus requirement without being "in" interstate commerce, petitioner would effectively read the words "or affects" out of the statute.

B. The Court of Appeals' Holding That The Jury Reasonably Found A Pattern Of Predicate Acts Does Not Warrant Further Review

Petitioner next seeks review of the court of appeals' holding that the jury reasonably found that petitioner

conducted an enterprise through a "pattern" of predicate acts. Pet. 14-19. That holding also does not implicate any split of authority and is correct.

1. Petitioner first claims that the decision below conflicts with this Court's decision in *H.J.* Pet. 16-17. There, customers asserted RICO claims against a telephone company, members of the state utility commission, and others, alleging that the company sought to influence the commission through bribes and other unlawful acts. See *H.J.*, 492 U.S. at 233-34. The court of appeals affirmed the dismissal of those claims for failure to allege a RICO "pattern," but this Court reversed. See *id.* at 234-35, 250. The Court explained that, "to prove a pattern of racketeering activity[,] a plaintiff … must show that the racketeering predicates [1] are related, *and* [2] that they amount to or pose a threat of continued criminal activity." *Id.* at 239. As to the latter "continuity" aspect of the pattern requirement, the Court explained that "'[c]ontinuity' 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." *Id.* at 241. The Court then held that the plaintiffs' allegations sufficed at the pleading stage to show relatedness and closed- or open-ended continuity. *Id.* at 250.

The decision below is entirely consistent with *H.J.* The court of appeals quoted *H.J.* directly, explaining that "[a] pattern may be established by proof that defendants' conduct possessed 'open-ended continuity,' *i.e.*, that their conduct 'by its nature project[ed] into the future with a *threat* of repetition.'" Pet. App. 36a (quoting *H.J.*, 492 U.S. at 241) (emphasis by court of appeals). And petitioner does not suggest that the decision below conflicts with the actual holding of *H.J.*, which—as just explained—allowed RICO claims to survive a motion dismiss.

Petitioner places great weight on "two examples" *H.J.* gave "in which an open-ended pattern could be

established"—in particular, where "'the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future,'" or where "predicate acts 'are part of an ongoing entity's regular way of doing business.'" Pet. 16 (quoting *H.J.*, 492 U.S. at 242-43). But those are just "some examples of how this element might be satisfied." *H.J.*, 492 U.S. at 242. Nothing in *H.J.* suggests that they are exhaustive. Moreover, the court of appeals concluded that a reasonable jury could and did find that producing and transferring fake IDs was "part of [petitioners'] regular way of doing business," which *H.J.* expressly holds is sufficient. See Pet. App. 36a.

Petitioner also asserts that the decision below conflicts with *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985). There, the court of appeals had affirmed the dismissal of a RICO claim on the grounds that the defendants had not been convicted of any predicate act and the plaintiff had not suffered a "racketeering injury," meaning an injury "caused by an activity which RICO was designed to deter." *Id.* at 485. This Court reversed, holding that RICO does not require a prior conviction or a "racketeering injury." *Id.* at 481. In addressing the injury issue, the Court observed in a footnote that, because RICO provides that a "'pattern of racketeering activity' requires at least two acts of racketeering activity," 18 U.S.C. § 1961(5), "[t]he implication is that while two acts are necessary, they may not be sufficient," *Sedima*, 473 U.S. at 496 n.14. But that observation played no role in the Court's ultimate disposition.

Petitioner suggests that the decision below conflicts with *Sedima* because respondents' RICO claim rested on only two predicate acts. *See* Pet. 17. But as petitioner appears to concede, *Sedima* does not hold that two predicate acts are always insufficient. *See ibid.* Indeed, *H.J.*—which postdates *Sedima*—expressly holds that "Congress envisioned circumstances in which no more than two

predicates would be necessary to establish a pattern." *H.J.*, 492 U.S. at 237.

Furthermore, the decision below did *not* hold that petitioner's co-conspirators committed only two predicate acts. The court of appeals expressly held that petitioner's co-conspirators produced or transferred "*three* fake driver's licenses." Pet. App. 24a n.6 (emphasis added). And while the court of appeals did not state precisely how many predicate acts the jury could reasonably find were committed, respondents argued that the true number totaled 11. See C.A. Br. of Appellees at 37, 53-55.

Finally, petitioner points to *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, 887 F. Supp. 811 (M.D.N.C. 1995). But that district court decision is nonbinding and distinguishable. In *Food Lion*, a supermarket chain brought a RICO claim against a television network that planted reporters as employees in the chain's stores, where they recorded videos later aired on a news program. See *id.* at 813-16. The chain alleged an unspecified number of predicate acts of mail and wire fraud over a six-month span when the reporters misrepresented their identities and intentions to the chain in order to gain employment at the chain's stores. *Id.* at 818. Holding that those allegations failed to show a RICO "pattern," the district court rejected the chain's suggestion that "undercover reporting necessarily entails criminal conduct which would qualify as a predicate act." *Id.* at 819. While the chain alleged that the television network "regularly use[d] hidden cameras and microphones," the chain "d[id] not allege that [the network] regularly engage[d] in mail and wire fraud." *Ibid.* And the court "decline[d] to equate the use of hidden cameras and microphones with mail and wire fraud." *Ibid.*

Here, nothing in the decision below improperly equates all uses of hidden cameras and microphones with fraud. Moreover, petitioner and his co-conspirators are activists, not professional journalists with a long track

record of conducting undercover reporting without committing predicate acts. Daleiden has used fake names to target respondents since high school, C.A. E.R. 2467-68, and is "proud" of his conduct here, C.A. E.R. 3078. Merritt, too, previously used a fake identity to target respondents. C.A. E.R. 893-97. Petitioner himself has advocated sting operations similar to the scheme here—he even wrote a book that "described an elaborate hoax scenario to send a team with a hidden video camera into clinics." Pet. App. 52a. Moreover, CMP and BioMax have never done *any* "investigative work," Pet. 19, without producing and transferring fake IDs, and they are "still extant and intend[] to carry out future projects," Pet. App. 36a.[2]

2. The decision below is correct. Petitioner does not dispute that the predicate acts here were related, and the jury reasonably found open-ended continuity because, as the court of appeals explained, petitioner and his co-conspirators "had previously advocated for or used undercover sting operations targeting [respondents], and CMP and BioMax were still extant and intended to carry out future projects." *Ibid.* That, along with other evidence presented at the six-week trial, provided ample grounds for the jury to conclude that "a threat of continuing activity exist[ed] at some point during the racketeering activity." *Ibid.* (quotation marks omitted). Indeed, in granting limited injunctive relief, the district court agreed with the

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[2] In passing, petitioner cites *Menasco, Inc.* v. *Wasserman*, 886 F.2d 681 (4th Cir. 1989), and *Globe International, Inc.* v. *Superior Court*, 12 Cal. Rptr. 2d 109 (Ct. App. 1992), but those cases are plainly inapposite. *Menasco* held that a plaintiff failed to adequately allege open-ended continuity because the relevant allegations "fail[ed] to supply *any* details" and thus "fail[ed] to satisfy Fed. R. Civ. P. 9(b)'s requirement that averments of fraud be stated with particularity." 886 F.2d at 684. *Global International* did not even involve RICO's pattern requirement—it held that the relevant conduct, while potentially tortious under state law, did not constitute a criminal predicate act under RICO. See 12 Cal. Rptr. 2d at 112-13.

jury—in a finding the court of appeals later affirmed—that "[t]he evidence demonstrates a strong likelihood of future violations by [petitioner and his co-conspirators] themselves or by [them] working in active concert with others." *Id.* at 96a; see *id.* at 49a.

Petitioner mainly argues that the predicate acts here did not exhibit open-ended continuity because they were too few in number and occurred over too short a period of time. See Pet. 16-18. But this Court has explained that a plaintiff may establish open-ended continuity even "[t]hough the number of related predicates may be small and they may occur close together in time," so long as they reflect "the requisite threat of continuity." *H.J.*, 492 U.S. at 242. Following that teaching, other lower-court decisions have found open-ended continuity based on patterns that were quite compressed. *E.g.*, *United States* v. *To*, 144 F.3d 737, 747 (11th Cir. 1998) (three predicate acts in several hours); *Heinrich* v. *Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 409-10 (6th Cir. 2012) (four predicate acts in two months); *SolarCity Corp.* v. *Pure Solar Co.*, No. CV 16-01814-BRO, 2016 WL 11019989, at *6 (C.D. Cal. Dec. 27, 2016) (collecting cases where the Ninth Circuit has found open-ended continuity based on "(1) four predicate acts spanning two months, (2) two predicate acts over a twelve-month period, and[] (3) three predicate acts within a thirteenth-month time frame" (citations omitted)). Here, petitioner's co-conspirators committed at least 11 predicate acts over a multi-year period.

Petitioner also asserts that the predicate acts here had "a defined endpoint." Pet. 16. But petitioner made that argument to the jury, and the jury reasonably found otherwise. Petitioner does not dispute that he may pursue similar projects in the future; instead, he asserts that future projects will not involve producing or transferring fake IDs. See Pet. 14-15, 19. But because respondents will not allow known anti-abortion activists into their facilities,

see C.A. E.R. 3528-29, 2015-18, a reasonable jury could find that carrying out similar projects in the future will require fake IDs. Moreover, the jury was not required to credit petitioner's self-serving assertion—made *after* respondents filed a RICO suit—that future projects will differ fundamentally from what petitioner and his co-conspirators and have done and advocated in the past. Courts have recognized that, while continuous criminal conduct "may be interrupted, *inter alia*, by … the commencement of the RICO action," such "fortuitous interruption of criminal acts does not preclude a finding of open-ended continuity." *Allwaste, Inc.* v. *Hecht*, 65 F.3d 1523, 1529 (9th Cir. 1995) (citing *United States* v. *Busacca*, 936 F.2d 232, 238 (6th Cir.1991)).

In any event, the court of appeals' factbound holding about the sufficiency of the evidence in this case does not warrant this Court's review. As this Court emphasized in *H.J.*, "[w]hether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case." 492 U.S. at 242.

C. The Court of Appeals' Holding That The Jury Reasonably Found Proximate Causation Does Not Warrant Further Review

Petitioner finally seeks review of the court of appeals' holding that the jury reasonably found that respondents were injured "by reason of" petitioner's RICO violations. 18 U.S.C. § 1964(c). That holding, again, is splitless and correct.

1. Petitioner argues that the decision below conflicts with three decisions of this Court and three decisions by other courts of appeals. Not so. In *all* of petitioner's cited cases, the plaintiffs were remote, indirect victims of the defendants' RICO violations. Here, respondents were petitioner's *direct*, intended victims.

a. The first case in this Court's RICO proximate-causation trilogy is *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992). There, the Securities Investor Protection Corporation ("SIPC") asserted RICO claims against dozens of market manipulators based on a lengthy causal theory. According to SIPC, the defendants (1) made "unduly optimistic statements" about certain stocks, (2) causing broker-dealers to buy "substantial amounts of the stock," after which (3) "the stocks plummet[ed]," causing (4) the broker-dealers to suffer "financial difficulties resulting in their eventual liquidation," which (5) caused SIPC to advance funds to cover customer claims against the broker-dealers. *Id.* at 262-63. While the court of appeals allowed such a claim to proceed, this Court reversed. See *id.* at 263-65.

The Court held that RICO requires "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. In other words, "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [i]s generally said to stand at too remote a distance to recover." *Id.* at 268-69. The Court found this "directness of relationship" to be a "central element[]" of RICO for three reasons. *Id.* at 269. First, "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Ibid.* Second, "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury …, to obviate the risk of multiple recoveries." *Ibid.* And third, "the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law." *Id.* at 269.

Applying those principles, the Court emphasized that SIPC was asserting the rights of indirectly injured customers, not directly injured broker-dealers. See *id.* at 272-74. And the Court rejected SIPC's invitation to "[a]llow[] suits by those injured only indirectly." *Id.* at 274. Asserting the rights of "secondary victims," the Court held, "run[s] afoul of proximate-causation standards." *Ibid.*

Anza v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), is similar. There, a steel company brought a RICO suit alleging that a competitor "harmed it by defrauding the New York tax authority and using the proceeds from the fraud to offer lower prices designed to attract more customers." *Id.* at 457-58. While the court of appeals allowed that claim to survive a motion to dismiss, this Court reversed. *Id.* at 462. The Court's "analysis beg[an]—and … largely end[ed]—with *Holmes*." *Id.* at 456. The Court explained that "[t]he direct victim of [the competitor's] conduct was the State of New York, not [the plaintiff]." *Id.* at 458. The Court further explained that "[t]he attenuated connection between [the plaintiff]'s injury and [the defendant's] injurious conduct" implicated all three of the "underlying premises" for the direct relation requirement articulated in *Holmes*. *Id.* at 458-59; see *id.* at 458-60. The Court concluded: "There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." *Id.* at 460.

Hemi Group, LCC v. *City of New York*, 559 U.S. 1 (2010), follows the same basic script. There, New York City asserted a RICO claim against a New Mexico retailer that sold cigarettes to city residents but failed to submit required customer information to New York State. *Id.* at 5-6. That failure prevented the state from passing the customer information along to the city, which in turn made it more difficult for the city to collect sales tax from resident purchasers. *Ibid.* The court of appeals allowed the city's

RICO claim to survive a motion to dismiss, but this Court again reversed. The Court held that "[t]he City's causal theory [wa]s far more attenuated than the one [the Court] rejected in *Holmes*." *Id.* at 9. And "*Anza* … confirm[ed] that the City's theory of causation [wa]s far too indirect." *Id.* at 10. "The City's theory," the Court explained, would require "extend[ing] RICO liability to situations where the defendant's fraud on [a] third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.* at 11.[3]

The decision below is fully consistent with these cases. In each case, plaintiffs were injured only indirectly, suffering harms "flowing … from the misfortunes visited upon a third person by the defendant's acts," *Holmes*, 503 U.S. at 268. Here, by contrast, respondents were petitioners' direct, intended victims. Indeed, petitioner's and his co-conspirators' avowed goal was to destroy respondents' "evil … empire." C.A. Supp. E.R. 386-89; C.A. E.R. 1160-61. As the court of appeals explained, "there are no more directly injured victims" than respondents. Pet. App. 37a.

b. The court of appeals decisions petitioner cites also all involve indirect victims. In *Laydon* v. *Coöperatieve Rabobank U.A.*, 55 F.4th 86 (2d Cir. 2022), a commodities trader brought RICO claims against various banks and brokers, alleging that they made false submissions to the British Bankers Association, which changed a benchmark interest rate, which in turn changed another benchmark rate, which in turn reduced the value of securities held by

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[3] In passing, petitioner also cites *Beck* v. *Prupis*, 529 U.S. 494 (2000), but that case, too, is plainly inapposite. This Court held that a plaintiff may not bring a civil RICO conspiracy claim based on an injury caused by an overt act in furtherance of the conspiracy that was not a predicate act listed in § 1961. *Id.* at 500, 504-07. Here, petitioner contends that the causal chain connecting the predicate acts and the injury is too "long." Pet. 24. *Beck* has nothing to say about a causal chain's permissible length.

the trader. *Id.* at 93. Affirming the dismissal of those claims, the Second Circuit explained that the trader's "asserted injury" was "several steps removed from [the banks' and brokers'] alleged conduct" and that the trader did not "allege any direct dealings with" the defendants. *Id.* at 101.

Similarly, in *Grow Michigan, LLC* v. *LT Lender, LLC*, 50 F.4th 587 (6th Cir. 2022), a creditor brought RICO claims against alleged fraudsters for driving its debtor into default. *Id.* at 590. The Sixth Circuit affirmed the dismissal of those claims, holding that the creditor experienced losses "derivative" of its debtor, which was the "immediate victim of defendant's alleged violations." *Id.* at 596 (cleaned up).

Finally, in *Slay's Restoration, LLC* v. *Wright National Flood Insurance Co.*, 884 F.3d 489 (4th Cir. 2018), a subcontractor hired to repair flood damage asserted RICO claims against the property owner's insurer, alleging that the insurer and its consultants conspired to defraud the property owner out of insurance proceeds, thereby impairing the property owner's ability to pay the subcontractor in full. *Id.* at 491. The Fourth Circuit affirmed the dismissal of that circuitous claim. The subcontractor's injury, the court explained, "proceeded from the consulting firms' fraudulent conduct, through … [the insurer] to [the property owner], then to [the contractor], and ultimately to [the subcontractor]." *Id.* at 494. Accordingly, the asserted injury "was not the *direct* result of the defendant's fraudulent conduct." *Ibid.*

All of these cases are distinguishable on the same grounds as *Holmes*, *Anza*, and *Hemi*. The plaintiffs in petitioner's cited cases were secondary and tertiary victims harmed by ricochet effects. Respondents are immediate, intended victims who were harmed directly.

2. The decision below is not just reconcilable with the caselaw; it is correct. As the court of appeals explained,

"[t]here was a direct relationship between [petitioners]' production and transfer of the fake driver's licenses and the alleged harm." Pet. App. 36a-37a. Indeed, it is difficult to imagine a more immediate connection between a production and transfer of fake IDs and an injury. Petitioners produced and transferred the fake IDs for the specific purpose of infiltrating *respondents'* facilities, with the goal of destroying *respondents*' operations.

Furthermore, as the court of appeals explained, this case does not implicate any of the three concerns underlying the "direct relation" requirement articulated in *Holmes*. First, respondents recovered only narrow categories of readily ascertainable damages, eliminating "any difficulty in determining what damages were attributable to [petitioner's] RICO violations," as opposed to other causes. *Id.* at 37a. Second, because there was only one level of injury, there was no need to apportion damages between victims injured at different levels, and "no risk of [respondents] recovering duplicative damages." *Ibid.* Finally, "holding [petitioners] liable" upholds the general interest in "discourag[ing] illegal behavior," as "there are no more directly injured victims" who would be more appropriate plaintiffs. *Ibid.*

Petitioner asserts that the court of appeals "wrongly adopted a chain-of-events theory of RICO causation" in place of the direct relation requirement. Pet. 19. But the court of appeals expressly found a "direct relationship," citing *Hemi*—this Court's most recent direct-relation precedent. Pet. App. 22a. Petitioner also exaggerates the number of steps in the causal chain. Respondents' damages were an immediate response to the fake IDs, without which petitioner's co-conspirators never could have infiltrated respondents' conferences and targeted their doctors and staff. See C.A. E.R. 1785-89, 2015-18, 2170-9, 2226, 2038-40, 3528-29, 3558-71; C.A. Supp. E.R. 586-94.

Furthermore, this Court has never held that RICO bars plaintiffs from recovering injuries suffered through a causal chain with more than one link—so long as the chain does not include victims more directly harmed than the plaintiff. Indeed, this Court expressly upheld a multi-step causal theory in *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). There, RICO defendants sent fraudulent mailings to the organizer of an auction, which in turn resulted in harm to other bidders. *Id.* at 642-44, 647-48. Because the organizer was not harmed—its profits were the same either way—this Court allowed the bidders' claims to proceed, finding that their injury was "the direct result of [the defendants]' fraud" and "a foreseeable and natural consequence of [defendants]' scheme." *Id.* at 658. So too here.

Finally, petitioner invokes this Court's observation that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Holmes*, 503 U.S. at 271 (citation omitted). But a "general tendency" is not an iron requirement, and "the reason for that general tendency is that there ordinarily is a discontinuity between the injury to the direct victim and the injury to the indirect victim." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 139-40 (2014) (quotation marks omitted). The "first step" limitation accordingly is restricted to cases involving "indirect victim[s]." *Fields* v. *Twitter, Inc.*, 881 F.3d 739, 745 (9th Cir. 2018) (citation omitted). Here, again, respondents were petitioner's *direct, intended* victims.

D. The Decision Below Is Of Limited Significance And A Poor Vehicle To Resolve The Questions Presented

In any event, this case is an exceedingly poor candidate for this Court's review.

1. The decision below is unpublished, nonprecedential, and factbound. The court of appeals applied settled

legal principles, and its analysis of each question presented spans no more than a few sentences. Petitioner does not contend that this case presents a common fact pattern that has arisen in other cases or is likely to arise again in the future. This is not a case of national importance.

2. Furthermore, all three questions presented implicate unresolved complexities that would seriously complicate this Court's review. In particular, the Court cannot sensibly answer any of the questions presented without first identifying the number of predicate acts a reasonable jury could find that petitioner's co-conspirators committed.

Below, the parties disputed how many predicate acts were committed, see p. 21, *supra*, but the court of appeals never definitively resolved that dispute. To be clear, there was nothing improper about the court declining to specify in its nonprecedential memorandum disposition whether petitioner's arguments failed because he defined the relevant predicate acts too narrowly or for other reasons. But the upshot is that this Court, if it were to grant review, would have to delve into the six-week trial record to identify how many times a reasonable jury could find that petitioner's co-conspirators violated § 1028—and only *then* turn to the actual questions presented.

As this Court often observes, it is "a court of review, not of first view." *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176, 1183 (2023) (citation omitted). In addition to being nonprecedential, splitless, factbound, and correct, the decision below involves unresolved issues that this Court would have to address in the first instance. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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