No. 22-1159

In the Supreme Court of the United States

TROY NEWMAN,

Petitioner,

v.

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

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents primarily argue that Newman's Petition should be denied because the Ninth Circuit's unpublished RICO decision lacks precedential value. *E.g.*, BIO 15.[1] Parties, *including Respondents in this case*, often rely upon unpublished decisions, and courts often discuss and apply their reasoning. *See, e.g.,* App. 236 (discussing *United States v. Agarwal*, 314 Fed. App'x 473 (3d Cir. 2008), an unpublished decision relied on by Respondents). As such, this Court has stated that certiorari may still be granted "regardless of any assumed lack of precedential effect of a ruling that is unpublished." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987); *Nieves v. Bartlett*, 138 S. Ct. 2709 (2018) (certiorari granted; Ninth Circuit unpublished decision).

Additionally, Respondents rely on misdirection and fail to confront the fact that the Ninth Circuit's decision is in direct conflict with the precedents of this Court and others concerning predicate acts, pattern of racketeering activity, and proximate cause. Review should be granted.

ARGUMENT IN REPLY

I. Mere *use* of an ID is not a *transfer*.

The Ninth Circuit rewrote federal law in a way that expands the scope of civil and criminal RICO.

Respondents assert that there were eleven predicate acts (without specifying them). BIO 21, 23.

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[1] Citations to "Pet.," "App.," "BIO," and "Doc." herein are to Newman's petition and appendix, Respondents' brief in opposition, and the district court's docket entries, respectively.

The lower courts, however, did not accept that assertion. The district court held: "the only remaining predicate acts allowed under 18 U.S.C. §§ 1028 are subsections (a)(1) and (a)(2), which prohibit knowing production or transfer of fake identification." App. 235 n.19. Respondents disclaimed reliance on § 1028(a)(3) (possession with intent to use IDs). App. 432 n.12. Accordingly, the *only* alleged RICO predicate acts at issue are the *production and transfer* of false identifications in, or affecting, interstate commerce under §§ 1028(a)(1)-(2).

As explained in the Petition, those alleged predicates dealt with Daleiden's **intra**state acts of modifying his own driver's license and the production and sharing of two other IDs. Pet. 9-14. To overcome the lack of an **inter**state connection, the Ninth Circuit gave an overly broad interpretation of §§ 1028(a)(1)-(2) by conflating the terms "transfer" and "use" and by relying on *non-predicate acts*, something Respondents try to downplay. BIO 18. The Ninth Circuit wrongly concluded that various *uses* of the IDs, such as briefly showing an ID while picking up a conference badge, were actually "transfers" pursuant to § 1028(a)(2), even though (a)(2) does not deal with "uses" of IDs. App. 35-36.

Under any reasonable construction of the term, "transfer" of IDs does not include briefly *presenting* one. *See Transfer,* BLACK'S LAW DICTIONARY (11th ed. 2019) (to "transfer" is to "dispos[e] of or part[] with property or with an interest in property."). Rather, showing an ID for the purpose of gaining access to a conference is a classic "use" of an object. To "use" is "to put into action or service." *Use,* MERRIAM-WEBSTER,

http://www.merriam-webster.com/dictionary/use (last visited Sept. 1, 2023); *State v. Bowen*, 380 P.3d 1054, 1061-62 (Or. 2016) ("transfer" does not include "use," but means giving over the "possession or control" of an ID to another *for his use*).

By treating "use" as "transfer," the Ninth Circuit eliminated the word "transfer" from § 1028(a)(2) and violated the principle that courts must "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). If Congress had wanted to make a violation of § 1028(a)(1) or (2) contingent upon, or related to, subsequent acts of *possession or use* of the IDs, it would have said so, but it did not. Thus, the eventual *use* of the IDs is irrelevant to whether the acts of *producing and transferring* them were in, or affected, interstate commerce.

Indeed, various subsections of § 1028—not at issue here—employ both "use" and "transfer," and thus differentiate those separate actions. *E.g.*, §§ 1028(a)(3), (a)(7); App. 507-08. Other subsections confirm that making an ID available to *others* for their use is the key to a "transfer." *See* § 1028(d)(10) (stating that a transfer "includes" placing a false document "on an online location where it is available to others"); App. 515. In short, Congress meant what it said by designating "transfer" and not "use" as the main element of a § 1028(a)(2) violation.

Respondents' reliance on decisions involving provisions *other than* § 1028**(a)(1) or (2)** is misplaced. BIO 17. For instance, *United States v. Klopf*, 423 F.3d 1228 (11th Cir. 2005), and *United States v. Jackson*, 155 F.3d 942 (8th Cir. 1998), involved violations of

§ 1028**(a)(3)**, but Respondents disclaimed reliance on (a)(3). App. 432 n.12. In § 1028**(a)(3)** cases, whether the intended use is in, or affects, interstate commerce is relevant because that subsection expressly includes an "intent to use" element. By contrast, §§ 1028**(a)(1)-(2)**—at issue here—do *not* include an intent to use element.

Respondents defend the Ninth Circuit's conflation of the *use* subsection of § 1028 with the *production and transfer* subsections by saying the former is evidence of an interstate commerce effect of the latter. BIO 18. Respondents' construction, however, reads away the differences between the various subsections.

Legislative history confirms the distinction between transfer and use in § 1028. Section 1028's prohibition on identification transfers originated in a predecessor statute, the False Identification Crime Control Act of 1982, which made it a crime to "knowingly transfer[] an identification document . . . knowing that such document was stolen or produced without lawful authority." Pub. L. No. 97–398, 96 Stat. 2009 (1982). The Act's House Report explained that "the intent to *transfer* unlawfully is the intent to sell, pledge, distribute, give, loan or otherwise transfer," whereas the "intent to *use* unlawfully is the intent to . . . *present*, *display*, certify, or otherwise give currency to." H.R. Rep. No. 97–802, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 3519, 3529 (emphasis added). In short, contrary to the Ninth Circuit's "use constitutes transfer" interpretation, "transfer" refers to passing on an ID for someone else's use, whereas "use" refers to utilizing an ID oneself.

Respondents fail to distinguish cases cited in the Petition. BIO 16-17. *United States v. Della Rose*, 278 F. Supp. 2d 928, 933 n.2 (N.D. Ill. 2003), explains that "under the plain language of the statute [§ 1028], it is the production that must be in or affect interstate commerce." The alleged production of the false IDs here occurred **intra**state. Also, *Annulli v. Panikkar*, 200 F.3d 189, 202 (3d Cir. 1999), and the other circuit court cases cited, Pet. 13-14, underscore that the Ninth Circuit improperly went outside the acts listed in § 1961(1) by wrongly considering the "use" of the IDs as predicate acts. The Ninth Circuit's improper reliance upon the *uses* of IDs in a *production/transfer* case is clearly contrary to the statute and to this Court's case law. *See Sedima v. Imrex Co.*, 473 U.S. 479, 495 (1985) (racketeering activity involves committing predicate acts under § 1961(1)).

There was only a single, arguable connection between production/transfer and interstate commerce: one use of the Internet to find one producer of IDs. In *United States v. Sutcliffe*, 505 F.3d 944, 952-53 (9th Cir. 2007)—cited at BIO 16—the court found a link to interstate commerce in a defendant's use of the Internet to *transmit threats*, analogizing it to the use of a telephone. Here, Daleiden's minimal Internet use was akin to reviewing the Yellow Pages: he "located a service" on Craigslist. App. 65. He did not use the Internet to transmit anything, a point not disputed by Respondents. Pet. 12, 15; BIO 16. Merely reading information on the Internet is not an act that is in, or affects, interstate commerce, and is not a violation of §§ 1028(a)(1)-(2). Even if it were, it would be the only such act here, and a RICO violation requires at least two predicate acts. *See* 18 U.S.C. § 1961(5); App. 520.

II. There was no RICO pattern.

Respondents suggest Newman conceded at least two predicate acts. BIO 20-23. Wrong. Newman argued that the alleged predicate acts occurred **intra**state and could not be predicates, Pet. 10-14, and Newman demonstrated that there was no pattern "[e]ven assuming for the sake of argument" that the alleged **intra**state acts could be considered (which they could not). Pet. 17-18. Further, as just discussed, at most there was one predicate act, which is insufficient for a RICO pattern.[2]

Here, the alleged predicate acts of production or transfer of false IDs (again, assuming their validity for the sake of argument) occurred within a six-month period, were not fortuitously interrupted, had a concrete endpoint, and were not Defendants' regular, ongoing way of doing business. Pet. 22-26. The Ninth Circuit's conclusion that such short-term conduct with a defined endpoint established an open-ended pattern of racketeering activity conflicts with *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). The alleged predicate acts here are not the type of conduct "that by its nature projects into the future with a threat of repetition." *Id.* at 241. Rather, over a year before the investigation concluded, Daleiden voluntarily stopped modifying, or transferring to another Defendant any IDs, and CMP's publishing of the videos made it inevitable Respondents would quickly discover they had admitted individuals with

[2] Respondents generally treat the pattern issue as a fact-bound jury question, *e.g.,* BIO 24, but if the pattern claim is *legally* insufficient, as here, a contrary jury finding cannot stand. The Ninth Circuit's RICO errors were errors of law.

false IDs to conferences and meetings. Pet. 14-19. Thus, Daleiden's involvement with ID acquisition was finite in nature and part of a single plan with a definite endpoint.

To establish a pattern, Respondents and the Ninth Circuit incorrectly relied on acts that are *not* predicate acts, *e.g.*, uses of IDs at conferences (as discussed previously) and advocacy of, and engagement in, undercover operations. Respondents continue to rely on such non-predicate acts to establish a pattern where one does not exist. BIO 22. Respondents point to the following:

(a) Daleiden has periodically used pseudonyms since he was in high school, but there is no evidence that Daleiden procured any IDs relating to those pseudonyms. Trial Tr., Doc. 940 at 2048-49; C.A. Supp. ER-311:5-24.

(b) Daleiden stated that he was proud of the work that he did for CMP "[b]ecause we documented and exposed these plaintiffs trafficking in fetal body parts." Trial Tr., Doc. 1020 at 2653:15-20.

(c) Merritt made phone calls to Planned Parenthood facilities while working with a non-party. Although Respondents state that Merritt used a "fake identity" during her calls, their record citations do not support that contention. Trial Tr., Doc. 904 at 487-91.

(d) Newman published a book discussing undercover operations (none of which involved the production, transfer, or even use of IDs); and

(e) CMP may do future investigative reporting "to draw public attention and bring public pressure to

bear for the sort of policy changes that would address criminal fetal trafficking." Trial Tr., Doc. 941 at 2297:12-15, 2299:25, 2300:1-2.

None of these past events constituted racketeering activities, and one cannot establish a continuous, open-ended pattern of *racketeering* activity by pointing to isolated *non-racketeering* activities. The record is devoid of evidence that any Defendant created or acquired additional IDs for use in other projects or intends to do so. Pet. 14-15. Respondents cannot hypothesize a threat of future RICO predicate offenses based on past or hypothetical future *lawful* activities.

Moreover, the Ninth Circuit, by relying on non-predicate acts to find a pattern, conflicts with *Sedima*: "the compensable injury [under RICO] necessarily is the harm caused by *predicate acts* sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." 473 U.S. at 496 (emphasis added).

Respondents fail to distinguish *Food Lion v. Capital Cities/ABC*, 887 F. Supp. 811 (M.D.N.C. 1995), the leading decision on RICO's applicability to investigative journalism. BIO 21. *Food Lion*'s key holding is that there is no RICO pattern where (as here) the alleged predicate acts were connected to *the information collection process of one particular investigation* that has concluded. *Id.* at 818-20. Additionally, ABC planning future undercover investigations, which would include the use of hidden cameras, *did not* transform ABC and its staff into a racketeering enterprise; undercover reporting does

not necessarily entail the commission of RICO predicate acts. *Id.* at 819. Similarly, the mere possibility that a Defendant here might conduct a future investigation is not substantial evidence of a threat that they *will unlawfully produce or transfer IDs* for any such investigation.

Lastly, Respondents cite *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1529-30 (9th Cir. 1995). BIO 24. In that case, extorting kickbacks was two defendants' regular way of doing business, and the predicate acts could have recurred indefinitely. Here, the alleged predicate acts are *not the undercover investigation itself*, but the alleged *production and transfer* of IDs in relation to one investigation. The commission of predicate offenses was not Defendants' regular way of doing business; any activities relating to ID production or transfer ended long before the investigation concluded.

III. There were no proximately caused damages.

Respondents argue that they were direct, and not remote, victims, BIO 24-30, but that is not the relevant question. The question is whether *predicate acts directly and proximately* caused damages. Even a "direct victim" must show proximate cause, which Respondents failed to do.

In *Hemi Group, LLC v. City of New York*, this Court held that the RICO claim was meritless because the plaintiff's financial loss was not caused "by reason of" the alleged RICO violations; rather, there were *multiple causal steps* between any predicate acts and the acts that directly caused the loss. 559 U.S. 1, 4-5,

8 (2010). This Court explained that "'[t]he general tendency of the law'—which "applies with full force to proximate cause inquiries under RICO"—"is not to go beyond the first step," and concluded that "[b]ecause the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement." *Id.* at 10.

Here, the Ninth Circuit incorrectly went *well beyond the first step* to tie the ID production and transfer to Respondents' eventual expenditure of funds in response to the publication of CMP's videos. The **intra**state acquisition of false IDs, however, was an *early step* in a long series of *non-predicate acts* that ultimately led Respondents to decide to make various expenditures they claim as RICO damages. Yet, RICO liability requires that a plaintiff prove the existence of damages proximately caused by *specified* predicate acts, as listed in § 1961(1). That did not occur here. For instance, Respondents do not even address the attenuated sequence of events laid out in the Petition from the production of IDs to the personal security expenses awarded to PPPSGV concerning Dr. Gatter; neither PPPSGV nor Dr. Gatter saw the IDs, was aware of them, or relied on them. Pet. 23-24; *e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (fact that alleged predicate acts did not *directly* injure the plaintiff in its business or property was fatal to RICO claim).

As explained in the Petition, the alleged RICO "damages" (upgrade and security expenditures) would not have been incurred had Defendants merely produced IDs, or merely shown them to Planned Parenthood personnel, without the subsequent and

"entirely distinct" non-predicate act conduct of *entry, misrepresentation, recording, and publication*. It was only through this series of subsequent *non-predicate acts* that Respondents gained any knowledge of security flaws which prompted Respondents' expenditures. Pet. 25. Hence, proximate cause is missing here. *See Anza*, 547 U.S. at 460 ("A RICO plaintiff cannot circumvent the proximate-cause requirement" by asserting that RICO predicate acts bore some causal or schematic relation to *other acts* of the defendant that directly injured plaintiff's business or property).

Furthermore, this Court should reject Respondents' suggestion to consider whether any injury was the "foreseeable and natural consequence" of Defendants' acts. BIO 30 (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008)). In *Hemi Group*, this Court made clear that foreseeability is insufficient to establish RICO proximate cause, 559 U.S. at 12, and explained that "*Bridge* reaffirmed the requirement that there must be 'a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury.'" *Id.* at 14.

Lastly, Respondents fail to distinguish *Beck v. Prupis*, 529 U.S. 494, 495-96, 505, 507 (2000), which held that a person injured in his business or property by an act that is *not* a predicate offense has no cause of action under § 1964(c) even when the injury-causing act is a part of the same plan as the predicate acts. BIO 27 n.3. Also, Respondents unsuccessfully distinguish Newman's cited cases (which conflict with the Ninth Circuit's decision) that correctly hold that a RICO injury must directly flow from the first step in

the causal chain. *See, e.g., Laydon v. Coöperatieve Rabobank U.A.*, 55 F.4th 86, 100-01 (2d Cir. 2022). Pet. 24; BIO 27-28. Here, the long and undisputed chain of events, Pet. 19-26, demonstrates that the alleged predicate acts of producing and transferring IDs were extremely *remote* from the claimed damages and did not *directly* injure Respondents.

IV. This case is a good vehicle for review.

Despite Respondents' contrary position, this case is a good vehicle to review the legal questions Newman presented. BIO 30-31. As discussed previously, it is immaterial to the granting of certiorari that the decision is unpublished. Moreover, even if some *legal* questions like pattern and causation turn on facts, that has not prevented this Court from reviewing the *legal* issues in past RICO cases, including after a jury trial. *E.g., Scheidler v. NOW*, 547 U.S. 9 (2006).

The Ninth Circuit's RICO decision unwarrantedly expands federal RICO, conflicts with decisions of this Court and other circuits on important questions of law, and should be reversed.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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