No. 22-1160

In the Supreme Court of the United States

ALBIN RHOMBERG, *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 FOR UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, KNIGHTS OF COLUMBUS, MARCH FOR LIFE, AND ETERNAL WORD TELEVISION NETWORK, INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The Ninth Circuit's decision in this case reflects an all-too-familiar pattern of (some) lower courts engaging in what Justice O'Connor famously called "ad hoc nullification" of settled legal rules—simply because they would thwart a desired result in a case involving abortion.

In this case the "nullified" rule concerns damages available under the federal RICO statute. As every first-year law student learns, the purpose of compensatory damages is to make a plaintiff whole for harms actually inflicted by a defendant's conduct. Their purpose is not to enrich the plaintiff at the defendant's expense, to punish disfavored litigants, or to safeguard a plaintiff against speculative future harms not resulting from the defendant's past acts. That fundamental principle is no different for RICO's treble damages, which can be awarded only where a plaintiff is "injured in his business or property *by reason of* a [RICO] violation." 18 U.S.C. § 1964(c) (emphasis added).

Yet when pro-life advocates embarrassed Planned Parenthood with undercover reporting on its sale of fetal tissue, Respondents asked the courts to make the advocates pay for Respondents' voluntary expenditures to protect themselves from potential

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. All parties were notified by *amici curiae* of their intent to file this brief at least 10 days prior to its due date.

future harm, whether it might be inflicted by the advocates or by unknown third parties. The Ninth Circuit was happy to oblige. It upheld a multimillion-dollar damages award based on two categories of damages, neither of which satisfies RICO's statutory requirements or basic common law principles. First, the lower court reasoned that the pro-life advocates must pay for Planned Parenthood's security upgrades—even though it was undisputed that the advocates had done no harm to any Planned Parenthood property. Second, the court made the advocates pay for Planned Parenthood's provision of personal security measures for certain employees—even though the security was implemented because the employees feared harm from third parties, unaffiliated with the advocates.

The pattern is familiar: when abortion is involved, all bets are off. And here, as in *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), "this case departs so far from the established course of our jurisprudence that in any other context" it is unimaginable that a court would have upheld the damages award. See *id.* at 785 (Scalia, J., concurring in the judgment in part and dissenting in part). "But the context here is abortion." *Ibid.* And so the lower courts have once again distorted fundamental principles of common law and ignored statutory text to force a victory for the pro-abortion camp.

This erosion of fundamental legal principles poses a grave danger to many potential defendants, but especially to expressive organizations like *amici*, whose First Amendment rights will be chilled if the Ninth Circuit's ruling is permitted to stand. Indeed, all of the *amici* share a commitment to the pro-life

cause and believe that individuals and organizations that support the right to life and oppose abortion—like all other individuals and organizations—should be treated fairly under the law.

Amicus United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. The USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, the importance of education, and the sanctity of life.

Amicus Knights of Columbus is a Catholic fraternal benefit society with more than two million members worldwide. As part of its charitable mission, the Knights of Columbus respects, defends, and promotes the dignity of every human person, at every moment and in every condition. To that end, through charitable giving, volunteering, and prayer, its members provide support to mothers in need and advocate for the lives of the unborn.

Amicus March for Life is a pro-life, non-religious non-profit advocacy organization that has existed for over 50 years to defend and protect life from the moment of conception.

Amicus Eternal Word Television Network, Inc. (EWTN) is a nonprofit public charity and the largest Catholic media network in the world. Since its founding in 1981, its television and radio broadcasting has played an important role in educating others about the Catholic faith. EWTN frequently reports on pro-life issues and news.

In short, *amici* support the petition of Albin Rhomberg because the Ninth Circuit's decision "makes it painfully clear that"—even after *Dobbs*—"no legal rule or doctrine is safe from ad hoc nullification *** when an occasion for its application arises" in an abortion case. *Thornburgh* v. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). This Court should grant the petition and summarily reverse.

STATEMENT

Petitioner Albin Rhomberg, along with three other individuals who also have petitions pending before this Court (collectively, "Defendants"), engaged in an undercover project examining Planned Parenthood and its involvement in sales of fetal tissue. Pet. App. 14.[2] Defendants went undercover and secretly made video recordings of Planned Parenthood officials and eventually published footage from those meetings. Pet. App. 16-17.

Planned Parenthood sued and was awarded, as "compensatory" damages, costs it incurred to upgrade its security systems to prevent future trespasses and to provide security for the subjects of the videos. Pet. App. 18. Those damages were trebled under RICO and accompanied by punitive damages and attorney's fees, resulting in a multimillion-dollar award. Pet. App. 18. Rhomberg and his co-defendants appealed, arguing that the damages were not compensable or proximately caused by their actions. But the Ninth

[2] References herein to the Petition Appendix ("Pet. App.") and Newman Petition ("Newman Pet.") are to the Petition and Appendix filed with Troy Newman's Petition for a Writ of Certiorari in *Troy Newman* v. *Planned Parenthood Federation of America, Inc., et al.* (No. 22-1159) on May 26, 2023.

Circuit upheld the damages, flouting RICO's text and common-law precedent. Pet. App. 27.

REASONS FOR GRANTING THE PETITION

As Petitioner explains, the lower courts in this case ignored common-law principles limiting compensatory damages—and did so in an all-too-apparent effort to favor one side in the ongoing national political and moral debate over abortion. Pet. 18-23. *Amici* write to highlight two additional errors in the Ninth Circuit's damages theory. First, both types of damages upheld by the lower court conflict with RICO's text, which awards damages only when a defendant's RICO violation causes "injury to plaintiff's business or property" interest. On this point the Ninth Circuit's damages award is in tension with Seventh Circuit precedent recognizing that forward-looking expenses based on a fear of future harm do not constitute an injury to business or property. Second, the Ninth Circuit held Defendants responsible for the costs imposed by potential future crimes committed by individuals unknown to and uncontrolled by Defendants, drastically lowering the bar for what constitutes "foreseeable" harm.

These errors pose a serious threat to expressive organizations like *amici*, which may find themselves liable for limitless voluntary expenditures by plaintiffs seeking to protect themselves against speculative future harm by unknown third parties. This Court should grant review to prevent the Ninth Circuit, in its transparent effort to punish pro-life advocates, from chilling the First Amendment rights of expressive organizations of all ideologies and creeds.

I. The Ninth Circuit's Theory of Damages Is Inconsistent with Statutory Text and Common Law Precedent.

Congress spoke plainly on the damages question presented here: Only one "injured in his business or property *by reason of* a violation" of RICO may recover under that statute. 18 U.S.C. § 1964(c) (emphasis added). As this Court has long recognized, that requires a plaintiff to prove that (1) it has suffered an injury to its business or property and (2) that the injury was proximately caused by a RICO violation. *Holmes* v. *Securities Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). All of the damages awarded to Respondents failed at least one of these prongs. Yet the Ninth Circuit upheld a multimillion-dollar damages award through a tortuous theory of damages with no support in text or precedent—in an apparent attempt to punish Defendants for their pro-life advocacy.

That damages award was based on two categories of damages: (1) Respondents' voluntary decision to upgrade their security systems to prevent *future* undercover activities, whether conducted by Defendants or others, and (2) personal security for some of Respondents' staff members in response to potential third-party threats. Pet. App. 46-47. Both expenses plainly fall outside the scope of compensable damages.

1. As Petitioner explains, Respondents' voluntary security system expenses are not compensable under well-settled principles of common law. In fact, they enrich Respondents by giving them upgrades to prevent speculative *future* investigations, including investigations by unrelated third parties, while forcing Defendants to foot the bill. Pet. 18-21. But the security

enhancements are not compensable damages for another reason: they do not constitute an "injury to business or property," which is a necessary element to sustain a RICO award. 18 U.S.C. § 1964(c).

On this point the Ninth Circuit's decision is in substantial tension with Seventh Circuit precedent recognizing that RICO does not permit plaintiffs to voluntarily incur economic losses to transform their distress about potential *future* torts or crimes into trebled damages based on a defendant's past actions. In *Doe* v. *Roe* the plaintiff sought RICO damages for enhanced security systems she purchased for her car and garage because of the defendant's acts of harassment and intimidation, including direct threats of violence. 958 F.2d 763, 766 (7th Cir. 1992). But, as the Seventh Circuit recognized, Doe's security upgrades were a result of her fear of *future* harm, not any damage the defendant inflicted on her property interests. *Id.* at 770. Those upgrades thus did not constitute an injury to business or property sufficient to sustain a trebled RICO award. *Ibid.*

A district court within the Ninth Circuit reached the same conclusion when plaintiffs sought to recover damages for enhanced security they purchased due to the safety risks imposed by "the presence of a drug trafficking operation in their neighborhood." *Ainsworth* v. *Owenby*, 326 F. Supp. 3d 1111, 1117 (D. Or. 2018). The court recognized that forward-looking security expenses are not recoverable under RICO because they stem, not from any damage to a business or property interest inflicted by the defendants, but from the plaintiffs' fear of future intrusions. *Id.* at 1123.

Like the plaintiffs in *Doe* and *Ainsworth,* Respondents voluntarily chose to upgrade their security because of their fear of future harm, not to rectify any damage inflicted by Defendants. Indeed, "[i]t is undisputed that Defendants did not damage, steal, displace, or disrupt anything" during their investigatory activities. Pet. 11. The lack of concrete damage to Respondents' business and property, including their security systems, forecloses damages under RICO. The Ninth Circuit's decision to the contrary is one more instance, among many, of courts deviating from text and precedent to uniquely punish pro-life advocates.

2. Respondents' expenses to provide security for some of the subjects of Defendants' videos are likewise derivative of emotional distress, not a business injury inflicted (or even threatened) by Defendants. See *Ainsworth*, 326 F. Supp. 3d at 1123. But even if these expenses did constitute an injury to a business interest, they still would not be recoverable under RICO because they were not proximately caused by Defendants' actions. See *Holmes*, 503 U.S. at 268.

The Ninth Circuit erroneously held that the costs of increased employee security were recoverable because "[g]iven the history of violence against abortion providers, it was a foreseeable and natural consequence of Appellants' actions that the recorded individuals would be subject to threats and reasonably fear for their safety." Pet. App. 47. For that proposition the Ninth Circuit relied exclusively on this Court's decision in *Bridge* v. *Phoenix Bond & Indemnity Company*, 553 U.S. 639 (2008). But that case is inapposite. *Bridge* dealt with third-party reliance on a fraudulent misrepresentation, not the commission of

third-party crimes. See *id.* at 656-657. In holding that first-party reliance was not required to sustain the claim in that case, the Court looked to common law principles of foreseeability. *Ibid.*

But in the case here, well-established common law principles make clear that the potential third-party crimes Respondents sought to guard against were *not* a "foreseeable and natural consequence" of Defendants' own actions. At common law, courts presume that "a person usually has no reason to foresee the criminal acts of another," and thus third-party crimes "generally break[] the chain of causation," and the original tortious conduct of the defendant "cannot be the proximate cause of the injury resulting from the intervening criminal act." *E.g.*, *Sosa* v. *Coleman*, 646 F.2d 991, 993–994 (5th Cir. June 1981).

To be sure, there is an exception when a defendant's conduct foreseeably increases the risk of a third party's crimes. *Ibid.* But foreseeability requires more than the vague possibility that any unknown party might become angry with the subjects of Defendants' undercover recordings and threaten them.[3] Nor is the mere fact that some people have committed crimes against other members of a population (in this case, abortion providers) sufficient to make Defendants

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[3] And, as Center for Medical Progress (CMP) explains in its own petition, Respondents' claims "were allowed to proceed to trial only because [Defendants] chose to publish [their] findings for public consumption." CMP Pet. 20, *Center for Med. Progress* v. *Planned Parenthood Federation of America, Inc., et al.,* No. 22-1168 (June 2, 2023). Because the *only* connection between Defendants' actions and third-party threats is the publication, the First Amendment bars the security damages. *Ibid.*

liable for any and all threats or crimes against them in the future. Unsurprisingly, the lower courts identified no authority to support this novel theory of foreseeability.

In short, neither the costs of upgrading security systems nor the expense of providing security for certain individuals are business injuries caused by Defendants' actions. That fact alone bars recovery under RICO. Additionally, criminal threats by unknown third parties are not a foreseeable consequence of Defendants' investigatory activities, and Defendants thus cannot be held liable for the cost of providing personal security to guard against such crimes.

This Court should grant certiorari to make clear that, even when a case concerns abortion, Respondents "cannot transform their apprehension of third-party prowlers into a compensable RICO injury simply by reaching for their wallets." *Ainsworth*, 326 F. Supp. 3d at 1124.[4] There should be no special rules for abortion-related advocacy, on either side.

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[4] That the security system here was installed on business property does not render the expenses an "injury" to a business interest. It is not the location that determines the nature of an injury. If that were so, the *Doe* and *Ainsworth* plaintiffs would have been entitled to damages merely because they were threatened on their property. *Doe*, 958 F.2d at 766; *Ainsworth*, 326 F. Supp. 3d at 1117. Rather, courts must examine whether expenses incurred were a result of damage done to a property or business, or were instead an optional forward-looking expense based on plaintiffs' fear of future harm.

II. This Theory of Damages Is Likely to Be Weaponized Against All Manner of Expressive Organizations, Jeopardizing Important First Amendment Interests.

As Petitioner correctly cautions, abandoning fundamental damages principles to punish pro-life advocates "comes at a steep price." Pet. 21. Specifically, the Ninth Circuit has now opened the courtroom doors to floods of plaintiffs seeking to enrich themselves at defendants' expense. And all a plaintiff need do to recover such ostensible damages is to identify the possibility that someone *might* repeat a defendant's tortious behavior, or point to a past history of crimes committed against a class of individuals to which the plaintiff belongs—even if those crimes were committed by and against individuals with whom neither the plaintiff nor the defendant is connected.

The threat of this flawed theory of damages is particularly acute for expressive organizations like *amici*, which often seek to publish information about their own activities and those of others to effect change. That public profile makes it all the easier for a plaintiff to argue that any past trespass by such an organization could be repeated in the future, and that the plaintiff is therefore entitled to recoup the costs of improving its security, or other future forward-looking expenses, on defendants' dime. For expressive groups that are often already strapped for cash, such damages will be crippling—particularly if a plaintiff can find a predicate RICO offense (however tenuous[5]) and reap treble the damages of their voluntarily-incurred costs.

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[5] See Newman Pet. 9-14.

And if the Ninth Circuit's ruling stands, expressive organizations will be held responsible, not only for their own conduct, but also for that of third parties the organization neither knows nor controls. Under the lower court's convoluted reasoning, any time an expressive organization's activities are directed at individuals who belong to a group that has at times been subject to noted crimes, that expressive organization should foresee that its actions might inspire *future* torts and crimes by third parties over whom the organization has no control.

As this Court has recognized, moreover, expressive organizations' constitutionally protected activities are often intertwined with unprotected conduct for which they may face liability. *N.A.A.C.P.* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915-916 (1982). When faced with that situation, courts must consider whether the liability for elements of the defendant's unprotected conduct is limited by the defendant's constitutionally protected interests, because "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 915-917.

Yet the Ninth Circuit's decision ignored those restraints, contravening statutory text and fundamental common-law principles to punish Defendants for their pro-life views and advocacy. That decision has in the process chilled constitutionally protected speech, association, and publication of myriad expressive organizations. This Court should grant review to correct the lower courts' grave error and protect the rights of expressive organizations like *amici.*

CONCLUSION

The Ninth Circuit's decision to uphold the damages in this case conflicts with RICO's text, settled common-law principles, and Seventh Circuit precedent. Departures from long established rules in abortion-related cases are far too common. But this Court should not allow this instance of that "abortion distortion" to slip through the cracks. *Amici* urge the Court to grant certiorari and summarily reverse—thereby signaling to the Ninth Circuit and other courts across the country that this Court will no longer tolerate special rules judicially created just for cases related to abortion.

Respectfully submitted,

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