No. 23-365

In The Supreme Court of the United States

MEDICAL MARIJUANA, INC., ET AL.,

Petitioners,

v.

DOUGLAS J. HORN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION & DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SARAH ELIZABETH SPENCER
CHRISTENSEN & JENSEN
257 East 200 South,
Suite 1100
Salt Lake City, UT 84111
(801) 323-5000

JOE G. HOLLINGSWORTH
WILLIAM J. COPLE III
ELYSE A. SHIMADA
HOLLINGSWORTH LLP
1350 I Street, NW
Washington, DC 20005
(202) 898-5800

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Racketeer Influenced and Corrupt Organizations Act (RICO)

Other Authorities

INTEREST OF THE *AMICI CURIAE* [1]

Established in 1977, the **Atlantic Legal Foundation** (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

The **DRI Center for Law and Public Policy** is the public policy "think tank" and advocacy voice of DRI, an international organization of approximately 16,000 attorneys who represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating

---

[1] Petitioners' and Respondent's counsel were provided timely notice in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as an *amicus curiae* in this Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system. *See* dri.org.

* * *

Amici are steadfast advocates for a civil justice system that is fair to all parties, including corporate defendants confronted with individual, mass-action, or class-action product liability litigation. The question presented here—whether "civil RICO" extends to claims for economic harm resulting directly from personal injuries—has enormous implications for the manner in which a broad variety of product liability suits are framed, where they are filed, how they are litigated, and the potential damages that can be awarded. The Court should grant certiorari to address this important and recurring question, and then hold that civil RICO cannot be exploited by personal injury plaintiffs and their attorneys to circumvent state-law product liability limitations and other tort reform measures.

SUMMARY OF ARGUMENT

The Court should grant certiorari to resolve a deep divide among federal circuits concerning the meaning of "business or property" in the civil remedies section of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c). This section allows treble damages in a civil action filed by "[a]ny person injured in his business or property by

reason of" certain offenses. *Id.* Contrary to the Second Circuit's holding, civil RICO does not allow a plaintiff who suffers a personal injury and consequently loses employment or wages to state a treble-damages "business or property" economic injury claim under civil RICO.

The certiorari petition arises from a civil RICO claim alleged alongside commonplace state-law product liability claims. Respondent saw an advertisement for a nutritional supplement product containing legally consumable CBD (cannabidiol), a cannabis-derived product. Pet.App.4a. He purchased and ingested the product and later failed an employer drug test, testing positive for THC (tetrahydrocannabinol), the active ingredient in marijuana. Pet.App.87a. Respondent was fired from his job as an interstate truck driver. *Id.* He suffered past and future lost wages because of his employment termination. *Id.*

Respondent sued in federal court, alleging state-law product liability claims and a civil RICO claim. Pet.App.2a-3a. The district court found that because Respondent's lost wages "were derivative of, or flowed from, an antecedent personal injury" (consumption of THC allegedly in the product), his civil RICO claim was barred by 18 U.S.C. § 1964(c), which by its plain language, excludes recovery for damages resulting from personal injuries. Pet.App. 87a.

The Second Circuit reversed, joining the Ninth Circuit in holding that civil RICO can compensate personal-injury plaintiffs who lose wages, or whose future ability to work is impaired. According to the

court of appeals, "the term 'business' [in § 1964(c)] encompasses employment." Pet.App.10a.

The Second Circuit held, in effect, that a civil RICO claim can be pleaded alongside state-law claims in any tort case in which a plaintiff suffers past or future lost wages, or even an impaired earning capacity, if other elements of civil RICO liability allegedly are satisfied. In so holding, the court of appeals rejected well-reasoned authority of other circuits interpreting the statute as excluding civil RICO liability if the harm originates with and results from an underlying personal injury. *See* Pet. at 11-17; *see also*, Pet.App.18a-19a (holding there is "no basis" to bar recovery for employment-related damages solely because of "an antecedent personal injury").

As discussed in the certiorari petition, the Second Circuit's interpretation not only is wrong, Pet. at 20-25, but also significantly broadens the scope of civil RICO liability. *See id.* at 17-20. The court's holding allows plaintiffs who claim personal injuries by a product, and as a result, suffer lost wages or impaired future earning capacity, to allege a civil RICO claim under § 1964(c)—doing so in the name of obtaining a remedy, but lured by the prospect of treble damages and attorney fees while avoiding state tort reform laws, such as compensatory damages-related caps on punitive damages.

The Second Circuit's holding not only makes forum shopping easy, but also financially rewarding to plaintiffs—and their contingency-fee attorneys—who seek a "nuclear" verdict. Because of the expansive, nationwide venue and personal jurisdiction provisions

of civil RICO, *see* 18 U.S.C. §§ 1965(a) & (b), it is much easier for a plaintiff to file a case against multiple defendants in a preferred, "plaintiff-friendly" State than it would be if the case were pleaded only as a normal product liability case. Civil RICO bestows district courts with nationwide jurisdiction, and jurisdiction over one defendant has been held enough to cover alleged co-conspirator defendants with no forum contacts. *See* 18 U.S.C. § 1965(a); *Laurel Gardens, LLC v. McKenna*, 948 F.3d 105 (3d Cir. 2020).

The Second Circuit's holding encourages forum shopping also because of substantial variations in various States' product liability laws. The typical chain of commerce involves many intermediary parties: Products are routinely sold in one State, delivered in another, and cause injury somewhere else, often after being originally designed, manufactured, and assembled overseas. For this reason, choice-of-law disputes are common in product liability litigation. But there is inherent uncertainty in such disputes, and the risk is large. The outcome of an unclear choice-of-law question turning on multiple States with relevant relationships and huge variations in state law can mean the difference between a defendant winning summary judgment or being hit with a nuclear jury verdict for tens of millions of dollars in punitive damages.

The mindset of mass tort litigators is "move us to friendly territory." Plaintiffs' lawyers already know what is at stake with choice of law. They realize that if product liability claims can be cast as civil RICO claims, choice-of-law questions (which often remain

undecided until just before trial), as well as state tort reform measures, can be avoided.

Civil RICO's allowance of treble damages and attorney fees in product liability injury cases tips the balance in favor of plaintiffs. Absent this Court's intercession, a plaintiff in a product liability suit filed in a district court encompassed by the Second or Ninth Circuit (a simple feat under civil RICO) has a shot at winning three times compensatory damages for personal injury-caused lost wages and impaired earning capacity. With that, it does not matter if state-law product liability claims fail on summary judgment, like Respondent's product liability claims did in the district court. He lost those claims for insufficient evidence of product liability under state law. Pet.App.96a-100a, 111a-113a. But who cares? The real win is trebling and fees. His civil RICO claim is enough, unless this Court intervenes.

The Second and Ninth Circuits encompass American mega-cities and economic hubs located in New York and California. Given the number of companies that do business in the Second or Ninth Circuits, and civil RICO's expansive venue and jurisdictional provisions—by which practically any product liability case could be filed there—those circuits' plaintiff-friendly civil RICO rule could become the nationwide norm. The extensive nature of the U.S. economy's distribution and supply chains means that every product liability case with a connection to one of the States in the Second or Ninth Circuits can be filed

in district courts in those States in the form of a civil RICO suit. This is not what Congress intended.

Federal courts are already overwhelmed with product liability litigation. Interpreting "business" as "employment" makes this problem much worse. Without this Court's intercession, district courts in the Second and Ninth Circuits will see a spike in filing of civil RICO claims, and in newfound contexts and fact patterns, all directly related to alleged personal injuries. This could include, for example, alleging civil RICO claims to recover employment damages of individuals aggregately, in enormous mass tort class-action and multidistrict litigation. If that happens, the already-crushing costs of product liability litigation will increase even more. This threatens the economy, burdening American businesses, which even now—without the threat of treble damages and fees—already face substantial costs to insure against product liability claims. Something will have to give. Procuring insurance for civil RICO exposure could be impossible, despite the fundamental allegations being product defects and hazards—such as manufacturing and design defects, failure to warn, and breach of warranty normally well within a general liability policy. When businesses cannot obtain insurance, innovation and the public will suffer.

These predictions are not imaginary or remote. "If you build it, they will come." The plaintiffs' bar now has a foothold for pleading civil RICO in class-action and multidistrict litigation as a way of forum shopping and avoiding States that have imposed tort-reform measures. Granting certiorari will enable the Court to resolve this important federal-law question that

potentially affects mass product liability litigation, increasingly notorious for generating nuclear verdicts, to the detriment of the economy and the public.

ARGUMENT

A. The Court should grant certiorari and reverse the Second Circuit to deter forum-shopping plaintiffs from circumventing state tort reform laws by transforming ordinary product liability suits into civil RICO treble-damages actions

Forum shopping under civil RICO stems from a desire to recover treble damages in run-of-the-mill product liability cases while avoiding state tort reform laws. Federal statutes such as RICO, however, do not "federalize" state-law tort claims in the way that civil RICO is now applied in the Second and Ninth Circuits.

Ponder: Which case is easier to forum shop? A state-law product liability case, or a civil RICO personal injury claim masquerading as a claim for lost wages and impaired earning capacity?

The latter, by far, is easier to pursue. Under the Second Circuit's (and Ninth Circuit's) expansive interpretation, plaintiffs can sue under civil RICO for economic losses caused by personal injuries. Nationwide venue and concurrent personal jurisdiction under 18 U.S.C. § 1965 are more than enough. And even if § 1965 somehow were to fall short, existing and expansive Second Circuit "conspiracy jurisdiction" precedent, however questionable as sound jurisprudence, provides a how-

to manual for alleging concerted action to get a preferred venue for a civil RICO claim.

1. Civil RICO's expansive venue provision allows plaintiffs to sue practically anywhere

Civil RICO suits can be filed by anyone for "domestic injury" sustained in the United States. *See Yegiazaryan v. Smagin*, 143 S. Ct. 1900, 1912 (2023). Civil RICO claims are properly venued in any district where a defendant "resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a). Defendants with no connection to the forum may be joined when "the ends of justice" so require. *Id.* § 1965(b). Process may "be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." *Id.* § 1965(d); *see also* Fed. R. Civ. P. 4(k)(1)(C).

For example, in *Laurel Gardens*, the Third Circuit held that § 1965(a) permits nationwide service of process, if justice requires it. *See* 948 F.3d at 114, 118-19, 121-22. Civil RICO's "Venue and Process" provisions, 18 U.S.C. §§ 1965(a)-(d), provide for nationwide service of process in civil RICO actions. This means that all federal district courts can exercise personal jurisdiction over all RICO defendants under Rule 4(k)(1)(C) as long as personal jurisdiction exists over at least one defendant and the ends of justice require it. The court in *Laurel Gardens* held that the "ends of justice" required exercising jurisdiction. *See* 948 F.3d at 122.

The civil RICO venue provision's language has clear import for product businesses. For enterprises

involved in bringing products to market, "transacting affairs" means conducting business across state lines and via relationships with others. Most products sold in the U.S. flow through multiple intermediaries before reaching the end user. Goods are made overseas and then brought to market and sold in the United States by a chain of distribution involving parties acting together (product inventors/designers, manufacturers, raw material suppliers, component part suppliers, shippers, cosigners, brokers, importers, wholesalers, distributors, sellers, retailers, etc.). All such parties "transact[] [their] affairs," § 1965(a), in connection with making and selling goods to end users. These relationships in the chain of commerce are inherent to selling products. They necessarily lend themselves to allegations of concerted action: a conspiracy to sell a knowingly defective good.

In short, under civil RICO's expansive venue and jurisdiction, plaintiffs can freely pick and choose where to sue. Anywhere and everywhere are fine as long as some concerted action in the forum by any one defendant is pled and complies with pleading rules. Allegations need only be made on information and belief as long as applicable notice or particularity pleading rules are satisfied. That is enough to hale a corporation into court in a district where it has no connection at all. This is the broadest kind of federal venue provision: It allows suit to be filed in districts where service of process could not be completed under normal venue and jurisdictional rules—and then expressly allows the plaintiff to effect nationwide service of process. *See, e.g.,* Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 Fla. L. Rev.

1153, 1193-97 (2015); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U. L. Rev. 1, 39-60 (1984).

This is a far cry from a product liability case pleaded under standard theories. Plaintiffs who do not plead civil RICO must always prove general or specific personal jurisdiction to file in federal court, or to maintain actions removed to federal court. Nonetheless, this Court's longstanding requirements for exercising personal jurisdiction over corporations appear to be eroding. *See, e.g.*, *Mallory v. Norfolk Southern Ry. Co.*, 600 U.S. 122 (2023) (affirming consent to a State's general jurisdiction by registering to do business in the State). Some lower courts too are expanding theories of personal jurisdiction. *See, e.g.*, *BASF Metals Ltd. v. KPFF Inv., Inc.*, No. 23-232, petition for certiorari filed, Sept. 11, 2023 (urging the Court to review the theory of "conspiracy jurisdiction").[2] Lax personal jurisdiction rules over corporate defendants make it even easier to establish personal jurisdiction and venue in district courts encompassed by circuits that now—or absent this Court's intercession, may in the future—allow product liability and other tort claims to be transformed into civil RICO treble-damages claims. State tort reform laws limiting available remedies in product liability cases (including caps or bars on damages) encourage forum shopping.

---

[2] The Atlantic Legal Foundation has filed an amicus brief in *BASF Metals* supporting the granting of the petition, in part to clarify *Mallory*'s practical effect on special personal jurisdiction.

2. Unless this Court intercedes, plaintiffs will try to avoid state product liability reforms by filing in circuits that allow civil RICO claims for personal injury-related economic harms

The ease of forum shopping alone is not the problem. The incentives to do so are also the problem, and there are many such incentives. The best way to consider these incentives is to compare how a plaintiff is situated in district court on diversity jurisdiction and how he is situated—under the same facts—in a cherry-picked Second or Ninth Circuit district court currently allowing trebling of personal injury-related lost wages or other economic harms under civil RICO.

State tort reform legislation includes statutes of repose and caps and exclusions of damages. Such laws were enacted in the 1980s and 1990s to rein in product liability claims. *See* Gary L. Wilson, et al., *The Future of Products Liability in America*, 27:1 Wm. Mitchell L. Rev. 85 (2000) (outlining from the plaintiff bar's perspective on major areas of tort reform, including statutes of repose, caps on damages, and their effects).

Tort reform laws remain in play in most American jurisdictions. Some States' laws are better for plaintiffs, some for defendants. Choice-of-law issues commonly arise because products are routinely sold in one State, delivered in another, cause injury somewhere else, and were originally designed and manufactured in another place, perhaps overseas. *See* William L. Prosser, *The Assault upon the Citadel* (*Strict Liability to the Consumer*), 69 Yale L.J. 1099, 1116–17 (1960). Choice-of-law victories bestow

winners with game-changing advantages in connection with applying or avoiding state law. *See* David Neal Allen et al. *Which Parts of Tort Reform Apply When an Injury Occurs Outside the Forum State,* DRI For the Defense (April 2018) (analyzing how state law mass tort reform variations affect litigants in choice of-law disputes).

Under diversity jurisdiction, a plaintiff must live with state laws barring or limiting recovery of compensatory or punitive damages. This is because under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), tort reform laws are substantive—they define tort plaintiffs' right to a particular legal remedy, and thus, federal courts are bound to apply them. So for example, some States grant passive retailers immunity from strict liability, but others say the opposite, holding them liable in full. As another example, in some States like Michigan, Washington, Louisiana, and New Hampshire, punitive damages are contrary to public policy with few statutory exceptions. But in Utah, there are no caps on punitive damages—the sky is the limit. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (reversing the Utah Supreme Court's upholding of a jury award of $145 million in punitive damages when the compensatory damages awarded were $1 million); Utah Code Ann. 78B-8-201.

State tort reform laws already are gamed by plaintiffs' lawyers. But unless this Court intercedes, tort reform measures now might just be avoided because an entirely different and liberal set of rules

applies under civil RICO, where a winner gets trebling of compensatory damages under § 1964(c). In product liability cases where there are significant ties to a State with major tort reform in place, the availability of treble damages makes civil RICO claims very appealing. The upside of forum shopping is too rich to pass up. This is a perfect storm of limitless personal jurisdiction, treble damages and fees, and the understandable desire to escape the strictures of tort reform. An influx of filings in the Second and Ninth Circuits of routine product liability injury cases couched as civil RICO claims asking for trebling of wage losses is highly foreseeable.

B. Allowing civil RICO suits for personal injury-related economic harms would greatly exacerbate the already skyrocketing costs of product liability litigation, and adversely affect product innovation and the public

Since the advent of strict product liability in the mid-Twentieth Century, product liability claims have been flourishing. Consumer products are entrenched in American society. The average American household spends thousands of dollars on consumer products each year and possesses thousands of discrete products, each individually designed, manufactured, brought to market, and eventually sold to the user. As one familiar example, there are more than 600 million products listed on the Amazon marketplace. It makes sense then, that product liability cases also are proliferating. This includes, of

course, product liability-related multidistrict litigation, which collectively encompasses class actions, mass actions, and individual suits involving millions of parties seeking billions of dollars.

Being able to pursue treble-damages civil RICO claims in such litigation would be a bonanza for the plaintiffs' contingency-fee bar. To the extent prior attempts to do so have failed, that does not foretell the future, especially if this Court were to deny certiorari here and allow well-funded plaintiffs' attorneys to take advantage of expansive lower court interpretations of civil RICO's scope. That in turn also would impair the availability, and increase the cost, of product liability insurance—a cost that would be passed on to consumers. And the threat of civil RICO liability also would stifle innovation and impede new products from reaching relevant markets and consumers.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

SARAH ELIZABETH SPENCER
CHRISTENSEN & JENSEN, P.C.
257 East 200 South, Suite 1100
Salt Lake City, UT 84111
(801) 323-5000

JOE G. HOLLINGSWORTH
WILLIAM J. COPLE III
ELYSE A. SHIMADA
HOLLINGSWORTH LLP
1350 I Street, NW
Washington, DC 20005
(202) 898-5800

November 2023