No. 23-365

IN THE

Supreme Court of the United States

MEDICAL MARIJUANA, INC.; DIXIE HOLDINGS, LLC, AKA DIXIE ELIXIRS; RED DICE HOLDINGS, LLC,

Petitioners,

v.

DOUGLAS J. HORN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

18 U.S.C. § 1964(c), commonly known as the civil RICO statute, allows suit by "[a]ny person injured in his business or property by reason of" various predicate offenses. Douglas J. Horn was a commercial truck driver. He was fired from his job when a drug test detected THC (tetrahydrocannabinol) in his system. That THC came from his ingestion of a product known as Dixie X that petitioners had fraudulently marketed as free of THC.

The question presented is: Is Mr. Horn foreclosed from suing under Section 1964(c) because, in addition to causing Mr. Horn to be fired (an injury to his business), petitioners' fraud also resulted in a change to Mr. Horn's urine chemistry?

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INTRODUCTION

18 U.S.C. § 1964(c), commonly known as civil RICO, allows "[a]ny person injured in his business or property by reason of" various prohibited racketeering acts to file suit. Petitioners ask this Court to craft an atextual restriction on the scope of that provision. Under their proposed antecedent personal injury bar, a plaintiff would be barred from recovery where a personal injury occurs in the chain of causation between the prohibited racketeering activity and an otherwise compensable business or property injury.

But no circuit has adopted such a rule. What's more, such a rule would not govern this case, because—as petitioners argued in seeking and receiving dismissals of various state-law claims—Mr. Horn has not suffered a personal injury. In any event, petitioners' proposed antecedent personal injury bar is meritless: It would override the statute's text, undermine its purpose, and afford a windfall to criminal enterprises across the country. And the petition resurrects stale debates over civil RICO's scope that have little to do with this case.

This Court should deny the petition.

STATEMENT OF THE CASE

A. Legal background

The federal RICO statute targets criminal enterprises that operate under the guise of "legitimate business." Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (Statement of Findings and Purpose). To accomplish that goal, the statute created "enhanced sanctions and new

remedies," *id.*, for conduct that was already prohibited by state or federal law. *See* 18 U.S.C. § 1961(1).

One innovation was a new form of criminal liability for those engaged in racketeering activity. 18 U.S.C. § 1962. Racketeering activity includes crimes that run the gamut from murder and dealing controlled substances to mail and wire fraud and "trafficking in counterfeit labels for phonorecords." 18 U.S.C. § 1961(1).

The RICO statute also created a civil remedy for victims of racketeering activity. 18 U.S.C. § 1964(c). That provision—known colloquially as civil RICO—provides, in pertinent part, that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor." *Id.* The civil provision was crafted to fill "prosecutorial gaps" in the enforcement of federal criminal laws by giving private litigants a cause of action. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985); *see also United States v. Turkette*, 452 U.S. 576, 585 (1981). The statute permits civil suit regardless of whether the Department of Justice brings criminal charges. *Sedima*, 473 U.S. at 493. And it offers prevailing litigants treble damages and attorneys' fees. *Id.*

Since the statute's adoption over half a century ago, this Court has repeatedly rebuffed efforts to narrow civil RICO's scope. *See, e.g.*, *Sedima*, 473 U.S. at 499; *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 243-44 (1989). For example, defendants in civil RICO suits have long suggested the statute should apply only to "the archetypal, intimidating mobster," not to other organizations engaged in racketeering activity. *Sedima*, 473 U.S. at 499. But RICO's text mandates

that it "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). And this Court has affirmed that "[t]he statute's 'remedial purposes' are nowhere more evident than in the provision of a private right of action," *Sedima*, 473 U.S. at 498, for those injured by enterprises be they "ostensibly legitimate or admittedly criminal," *Turkette*, 452 U.S. at 585.

B. Factual background

1. Petitioners in this case are Medical Marijuana, Inc., Dixie Holdings, LLC, and Red Dice Holdings, LLC.

Medical Marijuana, Inc. Observers have long speculated that the first petitioner, Medical Marijuana, Inc., began as "nothing more than a stock scam." *Chronically Criminal: Shielding the Public from Medical Marijuana*, Seeking Alpha (Feb. 15, 2013), https://perma.cc/8PU2-7LJK. It was founded by Donald Steinberg and Bruce Perlowin—two felons convicted of federal drug-trafficking crimes. *See* Nathan Vardi, *Inside the Pot Stock Bubble*, Forbes (Mar. 26, 2014) (hereinafter *Pot Stock Bubble*); Eric Malnic, *Drug Entrepreneur Tells His Story from Jail*, L.A. Times (Nov. 28, 1985), https://perma.cc/F7K5-JRNP (hereinafter *Drug Entrepreneur*).

Before founding a company to sell the "new avocado toast," Pet. 6 (citation omitted), Steinberg ran a criminal enterprise that "imported one-sixth of all marijuana entering the country," *Life in the Drug Trade*, Time (Nov. 23, 1981), https://perma.cc/527F-CEFE. He "siphoned money through a yacht broker in

Miami to a bank in the Caymans, thence to Hong Kong, and ultimately to Thailand." *Id.*

For his part, Perlowin, a self-described "drug kingpin," *An Unusual Entrepreneur*, Bruce Perlowin https://perma.cc/QN2X-G46L, "haul[ed] about 340,000 pounds of marijuana into California over a five-year period, with sales totaling $120 million," Malnic, *Drug Entrepreneur*. Perlowin used that money to construct a mansion "complete with bullet-proof walls lined with steel, a stairway that could be electrified to repel invaders and a complex communications center that tied him to the disparate operations of his international drug-smuggling ring." *Id.*

Michael Llamas succeeded Steinberg and Perlowin as the head of Medical Marijuana. Vardi, *Pot Stock Bubble*. Around the time of the events giving rise to this case, Llamas was indicted for an extensive fraud scheme. *Id.* He eventually pleaded guilty. Plea Agreement, *United States v. Llamas*, No. 12-cr-315 (E.D. Cal. Aug. 9, 2016) (ECF No. 401).

Dixie Holdings, LLC. The second petitioner, Dixie Holdings (a/k/a "Dixie Elixirs and Edibles" or "Dixie LLC") partnered with Medical Marijuana. Pet. App. 83a. Dixie Holdings sells marijuana-infused products like "Berry Blaze" gummies. *Signature Berry Blaze Gummies*, Dixie Elixirs, https://perma.cc/5AJ6-VQGJ. Because "marijuana is a prohibited substance under federal law," Pet. 7, "banks cannot accept for deposit funds from businesses" like Dixie Holdings. Dixie Brands, Inc., & Subsidiaries, *Condensed Interim Consolidated Statements of Financial Position* 16 (2018), https://perma.cc/JQ5S-YJ9Y. As a result, "[g]iant safes full of cash and pickups by armored cars

are the norm." Julie Weed, *Marijuana Company Prepares to Cross State Lines, as Legally as Possible*, N.Y. Times (Nov. 9, 2016).

Red Dice, LLC. Red Dice was a joint venture formed by the other two petitioners in 2012 to market and sell a product called "Dixie X." Pet. App. 83a-84a. At the time of the events giving rise to this case, Red Dice was run by Vincent "Tripp" Keber III and Michael Mona. *Id.*; Vardi, *Pot Stock Bubble.* Keber pleaded guilty to drug charges in Alabama a year after Dixie X was released. *See* John Ingold, *Colorado Marijuana Mogul Tripp Keber Arrested for Pot Possession in Alabama*, Denver Post (June 9, 2013), https://perma.cc/9JTD-FN2N. Mona entered the cannabis business after the Nevada Gaming Control Board denied him a license to operate a casino because of his "ties to shady telemarketers." Vardi, *Pot Stock Bubble*. When Mona eventually left Red Dice, he took a Medical Marijuana subsidiary with him, violating the Securities Exchange Act in the process. *See* Final Judgment, *SEC v. Cannavest Corp.*, No. 17-cv-01681 (D. Nev. June 1, 2018) (ECF No. 38).

2. Respondent is Douglas J. Horn. For fourteen years, Mr. Horn and his wife, Cindy Harp-Horn, worked as a "team of over-the-road truckers" to support themselves and their five daughters. Pl. Stmnt. Undisp. Facts ¶ 1, ECF No. 60-1. Their employer relied on them to haul high-value, high-risk loads such as "expedited food, pharmaceuticals and liquid chemicals." *Id.*

That work required the Horns to undergo random drug tests. *See* Pl. Stmnt. Undisp. Facts ¶¶ 11, 14, ECF No. 60-1. Neither of the Horns had ever used

marijuana or any other controlled substance. Pl. Aff. ¶ 18, ECF No. 60-6; Tr. 144-45, ECF No. 61-6.

In February 2012, Mr. Horn was in a serious trucking accident. Pl. Stmnt. Undisp. Facts ¶ 2, ECF No. 60-1. He suffered "severe shoulder and back injuries" and experienced chronic pain. *Id.* Neither pain medications nor physical therapy alleviated Mr. Horn's symptoms. *Id.*

Later that year, Mr. Horn investigated whether medicinal marijuana could help his mother-in-law, who was battling cancer. Pl. Aff. ¶ 6, ECF No. 60-6. In the course of his research, he came across petitioners' advertisement for a "new CBD-rich medicine" called Dixie X that according to the advertisement "contain[ed] 0% THC." Pl. Mot. Summ. J., Ex. 1, at 2, ECF No. 60-7. THC is the psychoactive ingredient in marijuana, and at the time, as little as 0.3% THC could make a product a Schedule I drug. *See FDA Regulation and Quality Considerations for Cannabis and Cannabis-Derived Compounds*, FDA, https://perma.cc/X9X6-G6FV. Advertising "0% THC" assured customers Dixie X was non-psychoactive and legal under federal law. Pl. Aff. ¶ 8, ECF No. 60-6.

Although Mr. Horn thought Dixie X might be able to help him manage his chronic pain, he was initially wary. After all, he had never used marijuana, and he was subject to regular drug testing, including testing for THC. Pl. Aff. ¶¶ 16, 18, ECF No. 60-6. But after watching videos where Keber stated Red Dice's products "did not contain THC," reading on Red Dice's website that "our hemp contains no THC," and speaking to a customer service representative who confirmed that Dixie X contained "zero percent THC,"

Mr. Horn decided Dixie X might alleviate his pain without compromising his employment. Pet. App. 85a-87a. He purchased and consumed Dixie X in September 2012. *Id.* 87a.

A few weeks later, Mr. Horn submitted to a routine random drug screening. Pl. Stmnt. Undisp. Facts ¶ 14, ECF No. 60-1. His test came back positive for THC, and his employer immediately fired him. *Id.* ¶¶ 14-15.

Shocked by the test result, Mr. Horn could think of only one possible source of the THC: Dixie X. He ordered another package of the product and sent it to a lab for testing. Pl. Stmnt. Undisp. Facts ¶¶ 16-17, ECF No. 60-1. The lab confirmed that, contrary to the company's repeated assurances, Dixie X did, in fact, contain THC. *Id.* ¶ 19. Indeed, because of the THC in Dixie X, the lab refused to mail the product back to Mr. Horn for fear of violating federal law. *See id.*

As a result of petitioners' misrepresentations, Mr. Horn "lost his career and income," plunging his "family into financial ruin." Pl. Aff. ¶¶ 29-30, ECF No. 60-6. As he stated in an affidavit, "I would never have taken this product [Dixie X] if Defendants' advertising was truthful and said even 'trace amounts of THC.'" *Id.* ¶ 30.

After the events giving rise to this lawsuit, petitioners modified Dixie X's advertising to discourage customers who are subject to random drug testing from using their products. Pl. Aff., ¶ 14, ECF No. 60-6.

3. In 2015, Mr. Horn filed this suit in the U.S. District Court for the Western District of New York.

See Pet. App. 87a. Mr. Horn brought a number of state-law tort claims. *See id.* 87a-88a. He also sought relief under civil RICO. *Id.* 88a. To that end, he alleged that petitioners had violated the Controlled Substances Act and engaged in mail and wire fraud—predicate offenses under RICO—and that, as a result, he suffered a compensable business or property injury in the form of lost employment. Compl. ¶¶ 20-21, 46-47, ECF No. 1.

The district court resolved petitioners' motions for summary judgment in 2019. *See* Pet. App. 68a, 80a. As part of that resolution, the district court rejected a number of Mr. Horn's state-law claims on the grounds that Mr. Horn had not suffered a cognizable personal injury—an essential element of those claims. *Id.* 111a. (The district court also rejected Mr. Horn's civil RICO claim based on a violation of the Controlled Substances Act. *Id.* 74a.) This left two remaining claims for trial: a state-law fraudulent-inducement claim and a civil RICO claim based on petitioners' mail and wire fraud. *Id.* 79a. Up until that point, petitioners had not challenged Mr. Horn's claim that he had suffered an injury to business or property under Section 1964(c).

Trial was set for Monday, July 26, 2021. Final Pretrial Order 17, ECF No. 174. The Friday before trial was set to begin, petitioners moved in limine to exclude the testimony of one of Mr. Horn's expert witnesses. Mot. Preclude Test. 2, ECF No. 194. That motion argued, for the first time, that Mr. Horn could not recover under civil RICO because a personal injury existed in the causal chain between petitioners' racketeering activity and Mr. Horn's firing. *See* Pet.

App. 39a. Although petitioners asked only to exclude the expert testimony and did not ask that the civil RICO claim be dismissed, *see* Mot. Preclude Test. 3, ECF No. 194, the court granted summary judgment sua sponte under Federal Rule of Civil Procedure 56(f), Pet. App. 58a. The court also granted partial final judgment under Rule 54(b) to allow for interlocutory review. *Id.* 7a.

On appeal, the Second Circuit vacated the district court's grant of summary judgment and remanded the case for further proceedings. Pet. App. 2a. The Second Circuit concluded that the plain meaning of the word "business" in the phrase "injured in his business or property" covered Mr. Horn's termination. It rejected petitioners' proposed antecedent personal injury bar as an "atextual" and unjustifiably "restrictive" interpretation of the civil RICO statute. *Id.* 11a, 22a. The Second Circuit found it unnecessary to address whether Mr. Horn had in fact suffered a personal injury. *Id.* 7a n.2.

Petitioners now seek certiorari.

REASONS FOR DENYING THE WRIT

I. This case does not implicate any split.

At its most modest—and petitioners articulate their proposed rule in a number of ways—petitioners' rule would deny recovery whenever a personal injury exists somewhere in the chain of causation between predicate racketeering activity and an otherwise compensable business or property injury. *See, e.g.*, Pet. 11-16 (arguing that recovery under 18 U.S.C. § 1964(c) is barred when a business or property injury "result[s] from," "arise[s] from," or "flow[s] from" an

antecedent personal injury). But no circuit has adopted that rule, let alone the broader rule that some of petitioners' formulations suggest (e.g. denying recovery for any harm "associated with" a personal injury, Pet. 13). And petitioners' ruckus about a split obscures the widespread agreement among the courts of appeals about how to interpret civil RICO.

1. Even petitioners' most modest proposed rule is the law in zero circuits.

a. First, petitioners mistakenly read the Seventh Circuit's decision in *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir. 2006), as adopting their proposed rule. *See* Pet. 15. But as the Second Circuit explained, *Evans* did not adopt petitioners' rule. Quite the contrary: The Seventh Circuit's decision in *Evans* did not "place[] decisive weight on the presence of an antecedent personal injury." Pet. App. 12a n.5.

In *Evans*, an unemployed plaintiff who was falsely imprisoned (a personal injury) sought to recover for the deprivation of the opportunity to seek employment while imprisoned. 434 F.3d at 926. The Seventh Circuit rejected his claim. *Id.* But it explicitly declined to extend its holding to people who, instead of claiming damages for the inability to seek potential future employment, claim damages for the deprivation of "promised or contracted for wages." *Id.* at 928. That carveout is flatly inconsistent with petitioners' argument that an antecedent personal injury always bars recovery in civil RICO cases, regardless of the type of business or property injury alleged. Even more to the point, the *Evans* carveout would cover this very case: Mr. Horn was deprived of his "contracted for

wage" at a job he already had, not of the opportunity to seek future employment.

District courts in the Seventh Circuit do not read *Evans* to adopt petitioners' antecedent personal injury bar either. To the contrary, they read *Evans* to allow plaintiffs like Mr. Horn to recover for the deprivation of "promised or contracted for wages." *See, e.g.*, *Engel v. Buchan*, 778 F. Supp. 2d 846, 854-55 (N.D. Ill. 2011), *aff'd*, 710 F.3d 698 (7th Cir. 2013); *Hill v. City of Chicago*, 2014 WL 1978407, at *4 (N.D. Ill. May 14, 2014); *Triumph Packaging Grp. v. Ward*, 877 F. Supp. 2d 629, 641 (N.D. Ill. 2012).

b. Next, petitioners contend that the Eleventh Circuit has adopted an antecedent personal injury bar that would apply here. That's wrong, as the Second Circuit explained. *See* Pet. App. 12a n.5. Although the Eleventh Circuit sometimes uses petitioners' "flows from" language, its cases make clear that the presence of a personal injury in the chain of causation does not foreclose recovery.

For instance, in *Blevins v. Aksut*, 849 F.3d 1016, 1018 (11th Cir. 2017), a class of plaintiffs was falsely induced (racketeering activity) to undergo unnecessary open-heart surgeries (personal injuries), which in turn required the payment of exorbitant sums. The plaintiffs then sued to recover their payments. The Eleventh Circuit permitted recovery because the payments were "injuries to 'business or property.'" *Id.* at 1021. Under petitioners' rule, the Eleventh Circuit should have parsed whether the personal injury was in the chain of causation between the racketeering activity and the business or property injury. That is, plaintiffs who paid their bills before

surgery would have recovered, while those who were personally injured first would not. But the Eleventh Circuit didn't view that as a relevant consideration, let alone a dispositive one.

District courts in the Eleventh Circuit also reach conclusions wholly inconsistent with petitioners' antecedent personal injury bar. *See, e.g.*, *Murphy v. Farmer*, 176 F. Supp. 3d 1325, 1337, 1343-46 (N.D. Ga. 2016) (permitting suit where kidnapping caused a business or property injury).

Petitioners quote *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988), which precedes these cases by nearly thirty years, for the proposition that Section 1964(c) "excludes personal injuries, including the pecuniary losses therefrom" in the Eleventh Circuit. Pet. 14. But *Blevins* quotes precisely the same language, 849 F.3d at 1021, and, as just explained, does not understand it to establish petitioners' rule.

In any event, petitioners misconstrue the facts underlying *Grogan.* In that case, the Eleventh Circuit rejected civil RICO claims by the estates and surviving spouses of three murdered FBI agents. *Grogan*, 835 F.2d at 845-48. Petitioners suggest that the plaintiffs in *Grogan* sought recovery for "lost income." *See* Pet. 14. But, as the Ninth Circuit has pointed out, the Eleventh Circuit did not actually specify the nature of the alleged business or property injury. *See Diaz v. Gates*, 420 F.3d 897, 902 n.2 (9th Cir. 2005) (en banc) (discussing *Grogan*). The civil RICO claims in the complaint allege, in conclusory fashion, that the plaintiffs suffered business or property injuries and request at least $1 million per plaintiff. *See* Complaint at 14, *Grogan v. Platt*, No. 86-1224 (S.D. Fla. June 6,

1986). That failure to actually identify what sort of business or property injury the plaintiffs suffered would doom a claim in any circuit.

c. The Sixth Circuit's decision in *Jackson v. Sedgwick Claims Management Services*, 731 F.3d 556 (6th Cir. 2013) (en banc), would not foreclose recovery here either. In *Jackson*, plaintiffs alleged that their employer conspired with physicians to fraudulently interfere with state workers' compensation procedures. *Id.* at 558. The Sixth Circuit adopted a version of an antecedent personal injury bar but only in the distinctive context of workers' compensation.

Under Michigan law, workers' compensation is an employee's "exclusive remedy" against her employer for any personal injury. *Jackson*, 731 F.3d at 559 (quoting Mich. Comp. Laws § 418.131). All common law claims or private rights of action are foreclosed by statute. *Id.* As the Sixth Circuit explained, "the employee's promise to forsake other remedies" is necessary to "ensure[] recovery for injured employees while creating greater certainty for employers." *Id.* Greenlighting employer-employee suits under federal statutes would "collaterally attack" Michigan's workers' compensation scheme and short-circuit the remedial balance struck by state law. *Id.* at 567.

In addition, the Sixth Circuit explained that if Congress intended to "plac[e] federal courts in the position of reviewing a state agency's handling of charges of impropriety by parties appearing in front of it, we would expect a clear statement of Congress's intent to achieve such a result." *Jackson*, 731 F.3d at 567. The Sixth Circuit found no such clear statement in the civil RICO statute. But the Sixth Circuit did not

extend its holding to cases like Mr. Horn's that are entirely divorced from the workers' compensation context and its attendant federalism concerns.

Workers' compensation is unique for yet another reason. Workers' compensation systems like Michigan's bundle compensation benefits together, including some—like reimbursements for medical expenses and rehabilitation services—that no court treats as compensable under civil RICO because they are not injuries to business or property. *See, e.g.*, *Gotlin v. Lederman*, 483 Fed. Appx. 583, 586 (2d Cir. 2012). Because there is no way of disaggregating monies that are clearly not recoverable under RICO from the monies that are, it makes sense to foreclose recovery altogether.

Petitioners and the Second Circuit are thus mistaken in thinking that the Sixth Circuit's holding in *Jackson* extends outside the context of workers' compensation. Judge Clay's concurrence in the judgment makes this point explicitly: *Jackson*'s rule would be "imprecise and atextual" in any other context. *Jackson*, 731 F.3d at 570. Mr. Horn's case raises none of the concerns animating *Jackson*: It doesn't implicate a state scheme that is designed to be an "exclusive remedy"; it doesn't raise the kinds of federalism concerns that would trigger a clear statement rule; and his lost income isn't bundled together with non-recoverable benefits.

Indeed, the Sixth Circuit has never applied *Jackson* to deny a civil RICO claim outside of the workers' compensation context. *See* Pet. 12 (citing only workers' compensation cases). And leading treatises describe *Jackson* as turning on the peculiarities of

workers' compensation. *See, e.g.*, 1 Peter Henning, *Corporate Criminal Liability* § 7:65 (3d ed. 2023).

Moreover, district courts in the Sixth Circuit routinely reach results outside the workers' compensation context that cannot be squared with petitioners' rule. For example, in *In re National Prescription Opiate Litigation*, 2018 WL 4895856, at *6-7 (N.D. Ohio Oct. 5, 2018), Purdue Pharma's alleged racketeering activity inflicted personal injuries on thousands of individuals, reducing tax revenues and increasing medical expenditures by county governments. Under petitioners' rule, recovery for those tax revenues and medical expenditures should be denied: There were personal injuries in the chain of causation between the predicate racketeering activity and the business injuries. But—citing *Jackson*—the court held that the plaintiff counties could recover under civil RICO. *Id.*[1]

Similar cases abound. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Pointe Physical Therapy, LLC*, 107 F. Supp. 3d 772, 783-84 (E.D. Mich. 2015) (allowing recovery for a property interest in casualty insurance); *Allstate Ins. Co. v. Med. Evaluations, P.C.*, 2014 WL 2559230, at *1-2 (E.D. Mich. June 6, 2014) (same).

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[1] To be sure, the personal injury in the chain of causation in *National Prescription Opiate Litigation* was not to the plaintiff counties themselves. But petitioners' rule does not turn on whether the personal injury is suffered by the plaintiff or by a third party. For instance, one of petitioners' hypotheticals contemplates a CEO suffering a personal injury, in turn harming his company's bottom line. Pet. 22. Petitioners explain that their rule would preclude recovery by the company, even though the company did not suffer the personal injury. *Id.*

2. The courts of appeals broadly agree about the scope of civil RICO's injury requirement.

The courts of appeals on both sides of petitioners' purported split all recognize that lost jobs and depressed wages are business injuries under Section 1964(c). *See Com. Cleaning Servs., L.L.C. v. Solin Serv. Sys., Inc.*, 271 F.3d 374, 382-83 (2d Cir. 2001); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615-18 (6th Cir. 2004); *Evans*, 434 F.3d at 928; *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 709 (11th Cir. 2014); *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1286-87 (11th Cir. 2006).

The courts of appeals on both sides of petitioners' purported split also agree that personal injuries are not cognizable under Section 1964(c). *See Jackson*, 731 F.3d at 564 n.4 (6th Cir. 2013) (collecting cases). A plaintiff cannot recover under Section 1964(c) in any circuit for pain and suffering, emotional or mental distress, embarrassment, wrongful death, or loss of consortium. *See, e.g.*, Gregory P. Joseph, Civil RICO: A Definitive Guide 53-54 (5th ed. 2018); *Jackson*, 731 F.3d at 564 & n.4; *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986); *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992). As petitioners admit, the Second Circuit is part of that consensus. *See* Pet. 14.

Finally, the courts of appeals, including all the courts in petitioners' purported split, are also in accord that "property" under Section 1964(c) is defined according to state law. *See Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2d Cir. 1994); *Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397 (6th Cir. 1999); *Doe*, 958 F.2d at 768; *Diaz*, 420 F.3d at 899;

Taffet v. Southern Co., 967 F.2d 1483, 1490 (11th Cir. 1992).

That consensus makes clear why petitioners are wrong to allege that the Seventh and Ninth Circuits "reached a different conclusion on materially identical facts," Pet. 16, in *Evans v. Chicago* and *Diaz v. Gates*. Under civil RICO, there *was* a material difference between the two cases: *Evans* arose in Illinois, where state law does not recognize a property interest in the opportunity to seek employment, 434 F.3d at 929, while *Diaz* arose in California, where state law does, 420 F.3d at 900. The difference in outcome reflects an agreement that state law determines the scope of property injuries. *See Evans*, 434 F.3d at 930 n.26. Indeed, the Ninth Circuit in *Diaz* emphasized that "the best-reasoned approach" to Section 1964(c) is the Seventh Circuit's. 420 F.3d at 899.

II. This case is a poor vehicle for considering petitioners' proposed antecedent personal injury bar.

1. Petitioners ask this Court to decide whether "economic harms resulting from personal injuries" are compensable under Section 1964(c). Pet. I. But it's far from clear that Mr. Horn suffered a personal injury in the first place.

Petitioners now argue that the alteration of Mr. Horn's urine chemistry by the THC in Dixie X is a cognizable personal injury, even though Mr. Horn did not feel any of the drug's psychoactive effects. *See* Pet. 9-10; Petr. C.A. Br. 9. Prevailing tort law principles suggest that's wrong. As the Third Restatement's latest draft makes clear, the "mere existence of

subcellular changes to, or the presence of toxins in, the plaintiff's body traditionally do not qualify as injuries." Restatement (Third) of Torts: Miscellaneous Provisions § Medical Monitoring cmt. b n.1 (Am. L. Inst., Tentative Draft No. 2, 2023). In fact, even early signs of a lethal disease—a "substantial change[] to one's physiology"—generally do not suffice to establish a personal injury. *Id.* The presence of THC in Mr. Horn's urine—a far lesser intrusion than the early stages of a lethal disease—is not a personal injury under that standard.

Indeed, at summary judgment, petitioners argued repeatedly that Mr. Horn's consumption of Dixie X could *not*, as a matter of law, constitute a personal injury. Petitioners asked the district court to reject Mr. Horn's strict product-liability claim on the ground that he had "failed to produce any evidence or testimony that [he] suffered any bodily injury from Dixie X." Def. Mot. Summ. J. 19, ECF No. 62-1. Rather, said petitioners, "the only loss" Mr. Horn even "attempted to establish" was "that consuming Dixie X caused [him] to lose [his] job[] and source of income." *Id.* Petitioners also argued Mr. Horn's negligent infliction of emotional distress claim could not proceed because he "offered no proof of any physical or emotional injury." *Id.* at 24. And Mr. Horn's fraudulent-inducement claim was worthy of summary dismissal, per petitioners, because he "offered no evidence of any physical harm or detrimental effect from using Dixie X." *Id.* at 15.

Relying on petitioners' arguments at summary judgment, the district court held that Mr. Horn had not "suffered any personal injury," Pet. App. 111a, and

that his purely "economic loss is not recoverable" under New York tort law, *id.* (citation omitted). As a result, the district court granted summary judgment to petitioners on several of Mr. Horn's state-law claims, including those for negligence, strict product liability, and negligent infliction of emotional distress. *Id.* 113a.

On the eve of trial, petitioners changed tacks and argued that Mr. Horn *had*, in fact, suffered a personal injury. Faced with petitioners' new arguments, the district court reversed course, holding that Mr. Horn's civil RICO claim should be dismissed because his "loss of earnings flows from, and is derivative of, a personal injury." Pet. App. 46a. The court did not attempt to reconcile that holding with its earlier conclusion that Mr. Horn had not "suffered any personal injury." *Id.* 111a. And its analysis went no further than describing Mr. Horn's ingestion of Dixie X as a "bodily invasion." *Id.* 42a. The Second Circuit declined to clear matters up, "expressly sidestep[ping]" the question whether Mr. Horn had suffered a personal injury. Pet. 20.

Petitioners' shifting positions provide ample ground for this Court to deny certiorari. Indeed, petitioners may well be judicially estopped from now arguing that Mr. Horn suffered a personal injury. Judicial estoppel is warranted when a party takes "a position clearly inconsistent with an earlier position that was accepted by a tribunal in circumstances that would create an unfair advantage." 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4477 (3d ed. 2023). It "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to

prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted). That's exactly what happened here: Petitioners prevailed on several claims at summary judgment on their argument that Mr. Horn suffered no personal injury. They should now be prevented from "relying on a contradictory argument to prevail in another phase." *See id.*

Finally, even if Mr. Horn's change in urine chemistry is a cognizable personal injury, it is surely an atypical one. Unlike the mine-run of personal injury cases, Mr. Horn did not discover his "personal injury" until after he suffered his business injury. And per the petition, a more representative test case is not far out of reach. Petitioners marshal a parade of horribles, wherein the Second Circuit will convert "[c]ountless" ordinary slip-and-fall cases into civil RICO claims. *See* Pet. 22. If petitioners' dramatic predictions turn out to be even partially correct, this Court can grant certiorari in one of those cases, which will allow this Court to craft a decision attuned to the concerns the petition raises.

2. Certiorari is also inappropriate because the petition arises on an interlocutory appeal. This Court has long recognized that lack of finality in the judgment may "of itself alone" furnish "sufficient ground" for the denial of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). That principle has endured to this day. *See Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (Kavanaugh, J., statement respecting denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. 612,

613 (2017) (Roberts, C.J., statement respecting denial of certiorari).

And that principle is particularly salient in this case, which comes to the Court in an extraordinary procedural posture. Recall that the district court chose to dismiss Mr. Horn's civil RICO claim sua sponte, after more than six years of proceedings during which petitioners breathed not a word about their antecedent personal injury bar. Pet. App. 58a. The district court then entered a Rule 54(b) partial judgment so Mr. Horn could appeal "whether [his] theory for damages is legally cognizable." *Id.* 29a. The Second Circuit held that it was, vacated the district court's order, and remanded for further proceedings. *Id.* 3a. In short, with trial on Mr. Horn's civil RICO and fraudulent-inducement claims again set to begin, petitioners seek review of an order vacating a partial final judgment issued following a sua sponte grant of partial summary judgment on the basis of a motion in limine to exclude expert testimony.

Because of this "unusual procedural history," Pet. App. 26a, this Court's review may not wind up being outcome-determinative. The upcoming jury trial could obviate the need for this Court to address the question presented—if, for example, the jury were to return a verdict for petitioners on the ground that Mr. Horn did not satisfy one of the other elements of his civil RICO claim. For instance, at summary judgment, petitioners argued Mr. Horn should lose because he had not shown a pattern of racketeering activity. *See* Def. Mot. Summ. J. 9-13, ECF No. 62-1.

Conversely, even if this Court were to agree with petitioners with regard to the existence of an

antecedent personal injury bar as a substantive matter, there is good reason to believe that petitioners were not entitled to dismissal of Mr. Horn's civil RICO claim as a procedural matter.

First, the district court's sua sponte dismissal of Mr. Horn's claim failed to comply with the strictures of Rule 56(f). *See* Fed. R. Civ. P. 56(f)(3). That rule requires the district court to issue a notice that identifies "for the parties the material facts that may not be genuinely in dispute" and to give both sides "a reasonable time to respond." *Id.* In this case, the district court did neither.

Second, petitioners' motion was untimely. The proper way to raise petitioners' antecedent personal injury bar was in a dispositive motion, not in a motion in limine to exclude expert testimony. *See* Pet. App. 6a. Six years after answering the complaint (Answer, ECF No. 9), three years after the deadline to move for summary judgment (Min. Order, ECF No. 58), and one business day before trial (Min. Entry, ECF No. 168), the appropriate procedural mechanisms for making a dispositive motion were long foreclosed. *See* Fed. R. Civ. P. 12(b)(6), 8(c), 56(a), 12(c).

III. Petitioners' proposed antecedent personal injury bar lacks merit.

A. The text of Section 1964(c) cannot support petitioners' rule.

1. Section 1964(c) reads: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . ." 18 U.S.C. § 1964(c). The cause of action is thus comprised of three elements: (1) an injury to business or property

(2) by reason of (3) a violation of Section 1962. Each element is satisfied here. Mr. Horn alleges he (1) lost his job (2) by reason of (3) petitioners' pattern of mail and wire fraud.

Mr. Horn's firing falls squarely within the meaning of "business." As the Second Circuit explained, at the time of Section 1964(c)'s codification, the term "business" embraced concepts like "employment, occupation or profession." Pet. App. 9a. Indeed, the term was defined to include "any particular occupation or employment." *Business*, *Black's Law Dictionary* (rev. 4th ed. 1968). That definition is sound. "A person does not have to wear a suit and tie to be engaged in 'business.'" *Diaz v. Gates*, 420 F.3d 897, 905 (9th Cir. 2005) (en banc) (Kleinfeld, J., concurring). Rather, business "is a very comprehensive term and embraces everything about which a person can be employed." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 171 (1911). Thus, Mr. Horn's job loss constitutes an "injur[y] in his business." 18 U.S.C. § 1964(c).

That should resolve the question: "If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019).

2. Nevertheless, petitioners argue that the "business or property" element encompasses an additional, atextual restriction: There cannot be a personal injury anywhere in the chain of causation between the prohibited racketeering activity and the otherwise compensable business or property injury.

Petitioners attempt to derive their restriction from the negative-implication canon—that is, from the

fact that the statute references business and property injuries but does not mention personal injuries. *See* Pet. 23. Properly applied, however, the negative-implication canon only narrows the class of compensable injuries to business and property injuries. But the negative-implication canon cannot exclude business or property injuries simply because there is a personal injury somewhere in the chain of causation.

To see why, imagine an emergency room triage policy that admits those with "injuries to the head or chest" before all others. The negative-implication canon narrows the class of high-priority admissions to those with head or chest injuries—someone with a foot injury should wait their turn. But it wouldn't justify turning away the patient whose sprained ankle caused her to fall down a flight of stairs and crack her skull simply because there was a foot injury somewhere in the chain of causation leading to the head wound.

3. Petitioners argue that without their proposed antecedent personal injury bar, Section 1964(c) would lack "restrictive significance," Pet. 23-24 (citation omitted), and "[c]ountless state-law tort claims could be repleaded" under civil RICO, Pet. 22. But the plain text of the statute resolves their concerns.

Beyond the business or property requirement, Section 1964(c) imposes two additional barriers to converting garden-variety tort claims into civil RICO claims. First, defendants must engage in a pattern of racketeering activity. 18 U.S.C. §§ 1962, 1964(c). That means committing at least two crimes enumerated in Section 1961 within a ten-year period. *Id.* § 1961(5). Second, a plaintiff's injury to business or property

must be "by reason of" that pattern of racketeering. *Id.* § 1964(c). This imposes a proximate-causation requirement. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). And that requirement is more stringent than the common-law doctrine of the same name. *See* Gregory P. Joseph, *Civil RICO: A Definitive Guide* 69-71 (5th ed. 2018) (collecting cases).

Petitioners' floodgate concerns ignore the force of those two requirements. Indeed, there is nary a predicate RICO act to be found in some of petitioners' hypotheticals, let alone one that proximately caused the business injuries in question. *E.g.*, Pet. 22 ("slippery casino floor causes customers to break bones in a slip and fall").

4. Finally, recall that civil RICO authorizes claims for those injured by a long list of predicate racketeering activities. *See* 18 U.S.C. §§ 1961-1962, 1964(c). Petitioners' rule effectively reads out all predicate racketeering activities that necessarily inflict personal injury, like murder, kidnapping, or enslavement. But "it is no more the court's function to revise by subtraction than by addition." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 175 (2012). Indeed, when Congress wants to carve out predicate activities, it does so explicitly: In 1995, Congress amended Section 1964(c) to carve out predicate activities involving securities fraud. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 737, 758 (amending 18 U.S.C. § 1964(c)). Congress did not do the same for predicate activities that inflict personal injury, and petitioners' bar cannot do so for it. "Where Congress explicitly

enumerates certain exceptions" to a statute's general functioning, "additional exceptions are not to be implied." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

B. Petitioners' rule defies precedent, common sense, and civil RICO's design.

1. Petitioners' rule is inconsistent with this Court's caselaw regarding Section 1964(c). For example, in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) ("*NOW*"), this Court allowed a civil RICO complaint to proceed in a case alleging that racketeering activity inflicted mental distress on an employee, which caused her to leave her job, thereby harming her plaintiff employer's bottom line. *Id.* at 256. As petitioners recognize, mental distress is a quintessential personal injury. *See* Pet. 13, 21, 24. Were a personal injury in the chain of causation fatal to a Section 1964(c) claim, this Court would not have allowed the claim in *NOW*.

Moreover, this Court has already rebuffed attempts to tack on atextual restrictions to the injury requirement in Section 1964(c). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Court declined to import a "racketeering injury" requirement into Section 1964(c). *Id.* at 495. The Court emphasized that "[t]here is no room in the statute for an additional, amorphous" restriction on the types of cognizable injuries under civil RICO. *Id.* Petitioners' similarly "amorphous" antecedent personal injury bar should be rejected for the same reason.

2. Petitioners' reliance on civil RICO's "provenance" in the Clayton Act to justify their

proposed antecedent personal injury bar is unavailing, Pet. 22. As this Court has recognized, the injury requirements in the Clayton Act and civil RICO don't move in tandem. *See Sedima*, 473 U.S. at 489-95. For instance, while the former has an "antitrust injury" requirement, the latter has "no analogue." *Holmes*, 503 U.S. at 269 n.15.

In any event, it is not clear the Clayton Act has an antecedent personal injury bar. Petitioners cite two cases for that proposition. Pet. 22-23. But both discuss the specter of an antecedent personal injury bar only in hypothetical dicta. *See Or. Laborers-Emps. Health & Welfare Tr. Fund v. Phillip Morris Inc.*, 185 F.3d 957, 964 (9th Cir. 1999); *Iron Workers Loc. Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 771, 785 (N.D. Ohio 1998).

3. Petitioners at various points suggest that RICO is not supposed to extend beyond the Mafia. *See, e.g.*, Pet. 17. That misunderstands the statute.

This Court has already made clear that civil RICO applies to organized criminal organizations that don't look like the Corleone family as well as those that do. *See, e.g.*, *Sedima*, 473 U.S. at 495. That breadth is a feature, not a bug. Congress surely intended RICO to target organizations like the Mafia. But it also recognized that "[t]oday's corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition and earlier eras." 115 Cong. Rec. 5874 (1969) (statement of Sen. McLellan). Congress thus "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many

different ways." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989). Petitioners are a perfect example of the kinds of perpetrators Congress was worried about: Their businesses systematically shipped large amounts of THC across state lines, violating federal law and effectively drugging unwitting individuals like Mr. Horn.

Even if petitioners were correct that civil RICO—notwithstanding its text and history—is limited to cases arising out of Mafia activities, petitioners' rule would still make no sense. It would perversely move the statute further away from stereotypical mobster activities. Many of the predicate offenses most closely associated with the mob—battery, kidnapping, assault, and the like—inflict economic harm only through an antecedent personal injury. Yet on petitioners' reading, the civil RICO statute would not allow recovery for harms to business that result from "the murder of a business owner who resists paying a demand for protection money; the kidnapping of a bar owner who refuses to sell his property to the mafia; [or] the extortionate battery of a carwash owner who refuses to launder money." Pet. App. 16a-17a. That cannot be right.

To put a finer point on it, imagine Tony Soprano commits identity theft—a RICO predicate offense—then drains a company's bank account. Everyone would agree that draining the bank account amounts to an injury to "business or property" that is recoverable under civil RICO. Now imagine Tony Soprano drains exactly the same bank account but does so by beating the company's owner until he hands over the password. *Cf. The Sopranos: Bust Out* (HBO

television broadcast Mar. 19, 2000). Under petitioners' rule, the same losses are somehow no longer "business or property" injuries because the accountholder was beaten rather than swindled. An interpretation that leaves the accountholder worse off because he was physically harmed has got to be wrong.

Indeed, this very case makes clear the odd outcomes that petitioners' rule demands. If Mr. Horn had been fired because his employer found Dixie X in his locker, petitioners would presumably agree that he suffered a compensable business or property injury. But because Mr. Horn was fired when his employer performed a test that found THC in his urine, petitioners argue he did not. That conclusion makes no sense.

IV. The question presented is unimportant.

Lacking any true conflict here or legal basis for their arguments, petitioners resort to histrionic claims about civil RICO in general and the consequences of allowing claims like Mr. Horn's to go forward. None of these arguments has force.

1. Petitioners claim that because the Ninth Circuit has a broader definition of injury under Section 1964(c) than the Sixth Circuit, it attracts more civil RICO litigation. *See* Pet. 19. But any difference between the Sixth and Ninth Circuits' precedent has had no effect on where civil RICO claims are filed. Sure, the Central District of California has more total civil RICO cases than the Sixth Circuit's largest district, the Eastern District of Michigan. *Anti-Racketeering Civil Suits Jump in 2018*, TRAC Reports (Oct. 30, 2018), https://tinyurl.com/3akvkcvu

(hereinafter TRAC Reports). But that's hardly surprising, given that the Central District has four times the population of the Eastern District. *Compare District Population*, U.S. Att'y Off. C.D. Cal. (last updated Oct. 10, 2023), https://perma.cc/YVR3-NQ39 (over 25 million), *with About the District*, U.S. Att'y Off. E.D. Mich., https://perma.cc/EBH3-SRRB (6.5 million). Per capita, there are far more civil RICO cases in the Eastern District of Michigan. The other Ninth Circuit jurisdiction petitioners cite, the Northern District of California, had, at most, five more cases than the Eastern District of Michigan. *See* TRAC Reports. And districts in the Seventh and Eleventh Circuits—which supposedly adopt petitioners' antecedent personal injury bar—round out the top ten civil RICO fora. *See id.*

2. Petitioners also suggest that, absent their antecedent personal injury bar, plaintiffs will file federal civil RICO suits rather than state-law suits. *See* Pet. 18. There's no evidence for that assertion. Since 2005—when the Ninth Circuit rejected the antecedent personal injury bar—state courts in the Ninth Circuit have seen hundreds of thousands of tort claims. *See Civil Statistics: Tort*, Ct. Stat. Project (last updated Oct. 9, 2023), http://tinyurl.com/59j3fh55 (8,307 tort cases filed during FY 2022 in Nevada alone). But petitioners do not point to a single Ninth Circuit case where a product-liability, slip-and-fall, or ordinary negligence action has been successfully converted into a civil RICO claim.

3. Petitioners bluster that civil RICO claims are increasing. *See* Pet. 18. Not so. Civil RICO claims are getting rarer. Petitioners' own statistics show that the

number of civil RICO cases decreased by 9% between 1995 and 2022, even as the number of civil cases grew by 10%. *See* Admin. Off. of the U.S. Cts., *U.S. District Courts—Civil Cases Filed, by Nature of Suit* tbl.4.4 (2022), https://tinyurl.com/bd8pc86p.

The proliferation of state civil RICO statutes helps explain the dearth of federal civil RICO claims. Many states have their own civil RICO statutes that are as favorable—and in some cases more favorable—than their federal counterpart. A "substantial majority" of state civil RICO statutes mandate treble damages to successful plaintiffs. *See* ABA Section of Antitrust Law, *RICO State by State: A Guide to Litigation Under the State Racketeering Statutes* 71 (John E. Floyd ed., 2d ed. 2011). At the same time, "[m]any state RICO statutes have significantly broader civil and criminal applications" and "fewer essential elements than the federal statute" and "allow the recovery of a broader range of damages in civil actions, such as damages for personal injury and punitive damages." *Id.* at 1-2. With state courts offering plaintiffs the prospect of both treble damages and recovery for personal injuries, petitioners' predicted flood of thinly disguised personal injury claims in federal court is unlikely to materialize.

4. Finally, petitioners claim "legions of commentators" are weighing in on civil RICO. Pet. 16. Their evidence? A handful of student notes. Pet. 16-18.

It's true that scholars have raised concerns that civil RICO reaches beyond organized crime. But those pieces date to the early 1980s. *See* Joan G. Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 Rutgers L.

Rev. 285 (1982). And since this Court's decision in *Sedima*, whatever concern there was has dissipated. By 1988, civil RICO was discussed a third as frequently in printed sources as it had been in 1985; by 2000, that number was down to one-tenth. *See Civil RICO*, Google nGrams, https://perma.cc/W47N-VW72 (to locate, search "civil RICO").

In sum, civil RICO is operating just as Congress and this Court have long intended. There is no reason for this Court to step in.

CONCLUSION

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

Respectfully submitted,

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