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

REPLY BRIEF FOR PETITIONERS

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As the Second Circuit acknowledged, the circuits are squarely divided 3-2 over whether economic harms resulting from personal injuries meet civil RICO's "business or property" requirement. Pet.App.11a-12a & n.5. The Sixth, Seventh, and Eleventh Circuits forbid RICO claims based on such injures, but the Second and Ninth Circuits permit them. After two warring en bancs reaching opposite outcomes, only this Court can restore uniformity on this important and recurring issue of federal law.

Horn (at 14) insists the Second Circuit was "mistaken" about the split. But three circuits on both sides of the divide, numerous commentators, and lower courts acknowledge the plain-as-day conflict.

That split warrants certiorari given its "enormous implications for the manner in which a broad variety of product liability suits" are litigated. ALF Br. 2. Civil RICO's "business or property" requirement excludes harms that are part of a personal injury. The Second and Ninth Circuit's contrary rule lets plaintiffs replead plain-vanilla personal-injury suits into federal treble-damages actions, inviting "easy," "financially rewarding" forum-shopping. ALF Br. 4. Horn downplays RICO's importance. But RICO is obviously important. Cases are ubiquitous, and the personal-injury exclusion is one of the few meaningful guardrails standing between RICO and an über federal tort statute.

Horn's other broadsides against review lack merit. Petitioners are multi-million-dollar global companies selling an unquestionably lawful product. Horn's tawdry attacks rest on dubious internet research and treat race-to-the-bottom mudslinging as a legitimate tactic to defeat review. Horn also presses myriad alternative arguments, including that he never suffered any personal injury. To the extent Horn made these arguments below, the Second Circuit was unpersuaded. That court decided just one, outcome-determinative issue: whether section 1964(c) bars recovery for injuries that "flow from, or are derivative of, an antecedent personal injury." Pet.App.22a. That squarely presented, "narrow, dispositive," and "discrete question of statutory interpretation," Pet.App.29a, cries out for resolution.

I. The Circuits Are Deeply Split

Undisputedly, the Second and Ninth Circuits hold that economic harms arising from personal injuries are cognizable under civil RICO. Pet. 14-15. Horn contests whether the Sixth, Seventh, and Eleventh Circuits reject personal-injury-related harms. They do.

Sixth Circuit: Horn (at 13) portrays the en banc Sixth Circuit as "adopt[ing] a version of an antecedent personal injury bar" limited to "the distinctive context of workers' compensation."

That limitation defies the court's categorical holding: "[B]oth personal injuries and pecuniary losses flowing from those personal injuries fail to confer relief under § 1964(c)." *Jackson v. Sedgwick Claims Mgmt. Servs.*, 731 F.3d 556, 565-66 (6th Cir. 2013) (en banc). The workers' compensation context merely "confirmed" that holding. *Id.* at 566-67.

Horn (at 14) invokes Judge Clay's solo concurrence in the judgment, which only underscores the breadth of the majority's rule. Judge Clay would have limited the holding to "workers' compensation regimes." *Id.* at 572. He "c[ould] not endorse" the majority's "broad" rule, which "categorically disclaim[ed] the potential for RICO liability based on the mere fact that Plaintiffs were personally injured." *Id.* at 571. Horn's treatise (at 14-15) also does not limit the Sixth Circuit's rule to workers' compensation, instead endorsing petitioners' position: "[E]conomic injury that is derivative of personal injury is not within" RICO's purview. Peter J. Henning, *Corporate Criminal Liability* § 7:65 & n.5 (3d ed. May 2023 update).

Later cases reinforce that the Sixth Circuit's rule extends beyond workers' compensation. The Sixth Circuit has rejected a RICO money-damages claim based on "physical injury in the form of a torn aorta." *Otworth v. Budnick*, 594 F. App'x 859, 861-62 (6th Cir. 2014). District courts routinely apply the Sixth Circuit's categorical no-RICO-harms-arising-from-personal-injuries rule across contexts. *E.g.*, *Doe v. Varsity Brands, LLC*, 2023 WL 4931929, at *11 (N.D. Ohio Aug. 2, 2023) (sexual abuse);

Short v. Janssen Pharms., 2015 WL 2201713, at *3-4 (W.D. Mich. May 11, 2015) (products liability); *Arnold v. Alphatec Spine, Inc.*, 2014 WL 2896838, at *7 (S.D. Ohio June 26, 2014) (medical malpractice).

Horn's purported counterexamples (at 15) support petitioners. *In re National Prescription Opiate Litigation* recognizes that Sixth Circuit law "bars losses flowing from … personal injuries." 2018 WL 4895856, at *11 (N.D. Ohio Oct. 5, 2018). The defendants simply failed to demonstrate the plaintiffs' damages were "purely derivative of personal injuries." *Id.* Horn's other cases apply the Sixth Circuit's rule outside workers' compensation, but hold for plaintiffs because their "alleged injury derives not from personal injury but from business transactions." *State Farm Mut. Auto. Ins. v. Pointe Physical Therapy, LLC*, 107 F. Supp. 3d 772, 783 (E.D. Mich. 2015); *see Allstate Ins. v. Med. Evaluations, P.C.*, 2014 WL 2559230, at *1 (E.D. Mich. June 6, 2014).

Seventh Circuit: The Seventh Circuit also squarely holds that civil RICO excludes "personal injuries and the pecuniary losses incurred therefrom." *Doe v. Roe*, 958 F.2d 763, 767 (7th Cir. 1992). Horn claims the Seventh Circuit later limited its no-personal-injury-recoveries rule to "potential future employment" with a "carveout" for "promised or contracted for wages." BIO 10-11 (citing *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir. 2006)); *accord* Pet.App.12a n.2. But *Evans* simply observed that "courts have been amenable to classifying the loss of those wages as injury to 'business or property'"—in cases *not* involving personal injuries. 434 F.3d at 928 (citing *Williams v. Mohawk Indus.*, 411 F.3d 1252, 1260 (11th Cir. 2005)). The Seventh Circuit did not hold that lost wages stemming from personal injuries are actionable—which

would have contravened *Doe*'s earlier holding that a plaintiff could not recover for a "loss of earnings" when she "missed work for several days" due to harassment. 958 F.2d at 766, 770. The Seventh Circuit has since restated its no-pecuniary-harms-from-personal-injuries rule without Horn's carveout. *Ryder v. Hyles*, 27 F.4th 1253, 1257 (7th Cir. 2022).

Horn identifies no Seventh Circuit decision permitting civil RICO claims based on lost wages from personal injuries. His district-court citations (at 11) involve drive-by remarks in cases *rejecting* RICO claims. *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); *Engel v. Buchan*, 778 F. Supp. 2d 846, 855 (N.D. Ill. 2011). Other district courts in the Seventh Circuit reject RICO claims for "lost wages" without parsing whether plaintiffs had existing employment contracts. *E.g.*, *Almaraz v. Haleas*, 2008 WL 4547222, at *7-8 (N.D. Ill. Apr. 25, 2008); *Thompson v. City of Chicago*, 2008 WL 780631, at *1-2 (N.D. Ill. Mar. 20, 2008).

The Seventh and Ninth Circuits have reached diametrically opposite results in materially identical RICO cases where plaintiffs lost potential wages (an economic harm) due to false imprisonment (a personal injury). *Compare Evans*, 434 F.3d at 926-27, *with Diaz v. Gates*, 420 F.3d 897, 898-902 (9th Cir. 2005) (en banc). Horn (at 17) attributes that divergence to state-law nuances, claiming that both circuits define "property" injuries using state law and Illinois, unlike California, "does not recognize a property interest in the opportunity to seek employment." But the Seventh Circuit relied on RICO's text and circuit precedent; Illinois law merely "bolstered" its conclusion. *Evans*, 434 F.3d at 927-28. Accordingly, the Seventh Circuit

declared itself "at odds" with the en banc Ninth Circuit's not "persuasive" "mischaracterization of the RICO statute." *Id.* at 930-31 n.26. While the Ninth Circuit previously considered the Seventh Circuit's approach "the best-reasoned," *Diaz*, 420 F.3d at 899; BIO 17, the Seventh Circuit's subsequent repudiation of the Ninth Circuit confirms the split.

Eleventh Circuit: The Eleventh Circuit precludes RICO "recovery for the economic aspects of personal injuries." *Grogan v. Platt*, 835 F.2d 844, 845 (11th Cir. 1988). Horn (at 12) says the claims in *Grogan*—pecuniary harms from murder—failed because the complaint was "conclusory." But the Eleventh Circuit excluded the plaintiffs' injuries because they "result[ed] from injury to the person." *Id.* at 847. The court entertained the "hypothetical" that some unspecified "injuries resulting from murder" might proceed, but emphasized that a "loss of earnings" (like Horn's) could not. *Id.* at 848; *see* Pet.App.12a n.2. *Pilkington v. United Airlines*, 112 F.3d 1532, 1536 (11th Cir. 1997)—which Horn ignores—thus rejected RICO claims for severe harassment necessitating unpaid leave, confirming that the Eleventh Circuit bars recovery for lost wages arising from personal injuries. Pet. 14.

Horn's cases (at 11-12) do not hold otherwise. In *Blevins v. Aksut*, a doctor committed health-care fraud by billing patients for unnecessary surgeries. 849 F.3d 1016, 1018 (11th Cir. 2017). But the patients' harm—payments for unnecessary procedures—did "not flow from any personal injuries." *Id.* at 1021. The RICO claim did not depend on the doctor actually operating; patients were charged all the same. By contrast, Horn's injury flows solely from his alleged personal injury of ingesting THC.

The RICO claims in *Murphy v. Farmer* rested on myriad harms—not just personal injuries—and defendants did not challenge the "business or property" requirement. 176 F. Supp. 3d 1325, 1339, 1343 (N.D. Ga. 2016). As another court observed: "Eleventh Circuit precedent bars lost wages ancillary to a claim for personal injury." *Spence-Jones v. Rundle*, 991 F. Supp. 2d 1221, 1255 (S.D. Fla. 2013).

In short, Horn's lost-wages claim would have failed in three circuits, governing ten States. But his claim is proceeding in the Second Circuit, and similar cases can proceed in the Ninth Circuit, where millions of businesses operate. Horn (at 14) calls the Second Circuit "mistaken" to concede a split, yet ignores the many circuits and lower courts recognizing the conflict. Pet. 15-16 & n.2. Horn (at 31) belittles student commentators highlighting the split, yet ignores prominent authorities, like Judge Rakoff, noting the same. Pet. 16 & n.4. And Horn (at 16-17) distracts by observing that courts agree on other, irrelevant aspects of civil RICO. The circuits remain deeply and intractably divided over the question presented that the Second Circuit held was case-dispositive here.

II. The Question Presented Is Important and Squarely Presented

1. Whether civil RICO covers economic harms arising from personal injuries is a recurring, exceptionally important issue. Horn (at 29-31) accuses petitioners of "histrionic claims" and "bluster," but does not contest that the Second and Ninth Circuits are prominent RICO fora or that RICO's expansive venue provision invites forum-shopping. Pet. 17-19. Plaintiffs need find only one defendant that does some business in the Second or Ninth Circuit to bring personal-injury RICO claims there. 18

U.S.C. § 1965(a). Plaintiffs injured in Michigan (where such claims are barred) could sue in New York (where they are not) if one defendant does business in New York. The Second Circuit's rule thus creates "a perfect storm" of liability, risking "nuclear jury verdict[s]" whose costs manufacturers will inevitably pass on to consumers. ALF Br. 5, 8, 14-15.

Rather than engaging, Horn diminishes RICO's importance generally. He (at 30-31) says that "[c]ivil RICO claims are getting rarer" and many plaintiffs file tort or state-law RICO claims. But the data show that plaintiffs bring hundreds or thousands of RICO claims annually. Pet. 18. State tort and RICO statutes do not present the same forum-shopping risks because—unlike federal RICO—plaintiffs cannot sue anywhere defendants do business. Moreover, only about half of the States have RICO statutes and many exclude private lawsuits or otherwise limit claims. *See* John E. Floyd, *RICO State by State* 45 (2d ed. 2011). While Horn (at 29-30) notes that one district in the Sixth Circuit sees more RICO claims per capita than two districts in the Ninth, that statistic says nothing about the magnitude of *personal-injury* suits that plaintiffs have every incentive to repackage as RICO claims in the Second and Ninth Circuits.

Horn (at 31-32) bizarrely contends that RICO "operat[es] just as Congress … intended" because usage of the phrase "civil RICO" in print books has declined. But jurists' and scholars' consternation over "RICO's runaway expansion" remains emphatic. *E.g.*, John K. Cornwell, *RICO Run Amok*, 71 SMU L. Rev. 1017, 1020 (2018); Pet. 17-18.

2. The question presented was outcome-determinative here. Pet. 20. Horn's contrary vehicle objections (at

17-20) are meritless. Horn asserts that "it's far from clear that [he] suffered a personal injury." Horn speculates petitioners "may" be estopped from arguing that he suffered a personal injury. And Horn says any injury he suffered is "atypical."

The Second Circuit cut through that noise, declining to address whether Horn suffered a personal injury and instead resolving the "logically antecedent legal question" of whether civil RICO permits recovery for harms "derivative of[] a personal injury." Pet.App.7a n.2. Horn can argue on remand that he did not suffer a personal injury, although his estoppel argument is long forfeited. But in this Court, the only issue is whether the Second Circuit's *legal* rule is correct—a question on which "[t]he underlying factual record is largely irrelevant." Pet.App.31a.

Regardless, the district court correctly determined that Horn's harm resulted from a personal injury—the alleged "bodily invasion" that occurred "when THC was introduced into his system." Pet.App.39a-46a. Such an "invasion of a personal right" is by definition a "personal injury." *Black's Law Dictionary* 939 (11th ed. 2019). Petitioners never argued otherwise. One petitioner simply argued that Horn had not adequately established harm for his state-law claims. Dixie Mot. for Summ. J. 16, 19, 24, D. Ct. Dkt. 62-1.

Horn (at 20-21) objects to the interlocutory posture. But the district court entered partial—not complete—summary judgment only because Horn has a fraudulent-inducement claim unrelated to the question presented. Pet.App.29a-30a. As the district court emphasized, this appeal turns on "a narrow, dispositive issue" governing Horn's "primary cause of action" that "could dramatically alter the potential damages." Pet.App.29a, 33a-34a.

Horn (at 21) notes that petitioners might prevail on other theories at trial. That is always true when appellate courts reverse the grant of summary judgment. This Court routinely grants certiorari in that posture.[1]

Horn (at 21-22) asserts that the district court erred procedurally when dismissing his RICO claim. Those arguments have no bearing on the question presented, and were forfeited below.

Finally, Horn (at 3-5) levels decades-old allegations against petitioners' former officers, including that one trafficked marijuana in the 1970s and another was arrested eleven years ago for misdemeanor marijuana possession. Horn's accusations have nothing to do with this case—which involves a ubiquitous, undisputedly legal CBD product. The only conceivable reason to level these irrelevant allegations is the cynical hope that fearmongering might defeat review. Medical Marijuana, Inc. is an SEC-regulated, publicly traded company with $46.9 million in 2020 revenue and products sold in 40 countries. *About Us*, Medical Marijuana Inc., https://tinyurl.com/ycy3ne7d; *Medical Marijuana Inc.*, EDGAR, https://tinyurl.com/ms38nyzm. Horn's only source impugning a company—versus long-departed individuals—is a ten-year-old investing blog whose pseudonymous author discloses that he shorted petitioner's stock. Infitialis, *Chronically Criminal*, Seeking Alpha (Feb. 15, 2013), https://perma.cc/8PU2-7LJK.

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[1] *E.g.*, *Helix Energy Sols. Grp. v. Hewitt*, 598 U.S. 39, 48 (2023); *Egbert v. Boule*, 596 U.S. 482, 507 (2022); *Brownback v. King*, 592 U.S. 209, 213-14 (2021).

III. The Decision Below Is Incorrect

Horn (at 16) accepts "that personal injuries are not cognizable under Section 1964(c)." But Horn resists the logical conclusion: Plaintiffs cannot recast economic harms resulting from personal injuries as injuries to "business or property." Any other result would eviscerate civil RICO's "business or property" limitation. Pet. 20-22.

Lower courts interpret the Clayton Act's identical "business or property" limitation to exclude economic aspects of personal injuries. Pet. 22-23. Horn (at 26-27) says that RICO and the Clayton Act "don't move in tandem." But this Court usually gives the two statutes' identically worded injury requirements the "same meaning," diverging only where the Clayton Act's requirements have "no analogue in the RICO setting." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268-69 & n.15 (1992). Horn (at 27) dismisses lower courts' Clayton Act decisions as dicta, yet identifies no Clayton Act cases adopting his rule.

Horn's counterarguments rehash the Second Circuit's flawed reasoning below. *See* Pet. 23-25. Horn (at 26) calls the antecedent-personal-injury exclusion "atextual." But RICO's "business or property" requirement is right there in the text and undisputedly excludes personal injuries. Horn (at 23) says that his lost job fits the ordinary meaning of "business," making it irrelevant whether that harm flows from personal injury. By that logic, *all* economic damages, *i.e.*, money, resulting from everything from mental anguish to pain and suffering would be cognizable injuries to "property." Pet. 24. Yet Horn (at 16) agrees RICO excludes those injuries.

Horn (at 24-25) urges that RICO's racketeering-activity and proximate-causation requirements limit claims.

But those other limitations are no excuse to ignore the "business or property" requirement.

Horn (at 25-26, 28) asserts that petitioners' rule would "read[] out" some predicate acts, like murder. As explained, Pet. 25, these acts do meaningful work under *criminal* RICO, which has no "business or property" requirement. Horn (at 29) decries the "odd outcome[]" that losses could or could not be covered depending on the harm's source. But Congress made that choice in RICO's text by including "business or property" injuries only.

Horn (at 26) suggests that this Court implicitly endorsed his rule in *National Organization for Women, Inc. v. Scheidler* (*NOW*), 510 U.S. 249 (1994). Horn characterizes *NOW* as permitting a RICO claim "alleging that racketeering activity inflicted mental distress on an employee, which caused her to leave her job." *NOW* never mentions mental distress—the employee was threatened "with reprisals if she refused to quit." *Id.* at 256. Regardless, *NOW* decided whether the plaintiffs' injury was "fairly traceable" to the defendant's conduct, *id.* at 255 (citation omitted), without addressing the "business or property" requirement.

Finally, Horn (at 27-28) accuses petitioners of limiting RICO to "the Mafia." The petition says no such thing. Under this Court's precedent, RICO unquestionably reaches ordinary businesses, not just organized crime. That breadth confirms the stakes. Plaintiffs now have every incentive to manufacture venue in the Second or Ninth Circuit to turn countless personal-injury claims into federal RICO suits with treble damages—even though such claims are nonstarters in circuits covering much of the country. Only this Court can resolve that

troubling disuniformity in a constantly litigated, far-reaching federal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 3, 2024