No. 21-6054

IN THE

Supreme Court of the United States

BENJAMIN KOZIOL,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF DEREK SMITH LAW GROUP, LLP IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the Derek Smith Law Group, LLP (hereinafter "DSLG") respectfully submits this *amicus curiae* brief in support of Petitioner Benjamin Koziol.[1]

The decision below by the United States Court of Appeals for the Ninth Circuit will undo most, if not all, of the progress our nation has made in the past decade in encouraging victims of sexual assault and sexual harassment to come forward with their claims. DSLG takes great honor in having represented thousands of victims of sexual harassment and sexual assault (including rape) over the past twenty-six years. These representations have included pre-litigation proceedings, litigation, trials, and appeals. DSLG currently represents hundreds of victims of sexual harassment and sexual assault located throughout the country, from DSLG's offices in California, and its affiliated offices in New York, New Jersey, Florida, and Pennsylvania.[2] As a direct result of the decision below,

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1. Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented in writing to the filing of this brief. Counsel of record for all listed parties received written notice of DSLG's intention to submit this brief at least ten days prior to its due date.

Pursuant to Rule 37.6, DSLG affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the partners or employees of DSLG made any monetary contribution to its preparation or submission.

2. Derek Smith Law Group, LLP is the California entity affiliated with Derek Smith Law Group, PLLC, a New York entity.

United States v. Koziol, 993 F.3d 1160 (9th Cir. 2021), our firm now fears engaging in pre-litigation settlement discussions, lest such discussions result in criminal extortion charges against our firm, our attorneys, and our clients under the Hobbs Act. As a result, the Ninth Circuit's decision, if not reversed, will lead our firm, and other plaintiff-side firms like us, to file *more* lawsuits, rather than giving parties the pre-litigation opportunity to resolve their disputes. And that will have an obviously adverse effect on the already burdened dockets of courts across the country.

More critically, the Ninth Circuit's ruling will deter untold numbers of sexual assault victims from seeking justice at all. Based on our experience in thousands of representations – and as more recently publicized during public discussions surrounding the "Me Too" movement, sexual assault victims are often terrified to come forward and pursue legal claims. They fear shaming and other forms of retaliation from their harassers.

It is repugnant that sexual harassers often already re-victimize their victims with counterclaims of defamation or civil extortion when those victims complain of sexual harassment. But if the Ninth Circuit's decision were to stand, the Hobbs Act will give those accused of sexual harassment a far deadlier weapon with which to re-victimize their victims: charging them with criminal extortion. As a law firm of approximately thirty attorneys, we can state from personal observations that we fear the possibility of a criminal extortion charge for simply

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Derek Smith Law Group, LLP and Derek Smith Law Group, PLLC are collectively referred to herein as "DSLG."

trying to settle a client's case. While it may indeed be extortion for a plaintiff to explicitly threaten a defendant with criminal charges unless he settles a case, the Ninth Circuit's decision makes the mere threat of bringing civil litigation grounds for a criminal extortion conviction. That possibility will deter many attorneys from pursuing (or trying to settle) legitimate cases, and will deter many clients from moving forward with their meritorious claims of sexual assault or sexual harassment.

As explained in this brief, the Ninth Circuit's decision casts aside important constitutional implications and serious public policy considerations, with its draconian criminalization of threats to sue as "extortion." And this decision will invariably have a significant chilling effect on sexual assault victims, deterring them from seeking justice and pursuing their rightful legal claims, and also deterring attorneys from representing such victims. That *cannot* have been Congress's intent in enacting the Hobbs Act, and the Ninth Circuit's decision does not comport with decisions by other circuits or this Court's precedent.

Clients frequently ask us how their harassers may seek to retaliate against them. Prior to the Ninth Circuit's decision, we would advise our clients of the possibility of a defamation action or other counterclaims, and we could often assuage their fears with the assurance that we would represent them against such defamation actions or any counterclaims. But, until now, we have never had to advise a client of the possibility that her harasser may simply go to the district attorney and claim that a threat to sue (or an actual suit) was a criminal "sham," such that our client – the sexual assault victim – might have to hire a criminal defense attorney, and ultimately face imprisonment for

"extortion." As a result of the Ninth Circuit's decision, we must now advise our clients of this risk, and it is something that already has, and will have in the future, a significant chilling effect on already terrified sexual assault victims.

Indeed, the Ninth Circuit's decision has already emboldened Defendants and their Counsel to threaten to go to the district attorney in their defense of egregious sexual harassment claims. Since that decision, our firm has encountered Defendants doing exactly that in response to rape and sexual assault claims. We, as a society, simply cannot risk chilling a sexual assault victim's First Amendment right to freedom of speech and freedom of petition. The mere threat of criminal prosecution in such a case has the potential to eviscerate these constitutional rights.

Simply put, the Ninth Circuit's decision deters sexual assault victims and their attorneys from seeking justice. Again, this cannot be what Congress intended. Rather, as numerous other circuits have held, threats to sue or lawsuit filings cannot be "wrongful" under the Hobbs Act, and therefore can never constitute extortion under the Hobbs Act (or under a Civil RICO cause of action, for that matter). In light of our Firm's significant interest in this case, we feel it imperative, on our behalf and on behalf of all sexual harassment victims and their attorneys nationwide, to provide this *amicus curiae* brief in support of the Petitioner.

SUMMARY OF THE ARGUMENT

With great respect, we do not believe the Ninth Circuit foresaw the broad and far-reaching negative

effects of their decision at issue in the present case. The Ninth Circuit's decision will have, and already has had, a catastrophic and irreversible chilling effect on victims of rape, sexual assault, and sexual harassment, deterring them from seeking justice and pursuing their claims. Moreover, this chilling effect does not end with the victims of sexual assault. The attorneys who represent sexual assault victims, such as our firm, are now more fearful of representing victims of any sort, because they themselves risk going to prison for extortion if a jury finds that the claim underlying a threat to sue is a "sham." This decision will have the same chilling effect on attorneys representing clients with any type of claim, be it for sexual assaults, racial discrimination, general torts, or otherwise. The fear of prosecution for assisting victims in seeking justice will have a major chilling effect across our legal system.

This brief seeks to demonstrate that the Ninth Circuit's decision infringes upon the significant First Amendment guarantees of freedom of petition afforded to these victims and their attorneys. The brief also seeks to demonstrate that the Ninth Circuit's decision reads the language of the Hobbs Act in a way that Congress could never have intended, disregarding long-standing cannons of statutory interpretation. Finally, this brief seeks to demonstrate that the Ninth Circuit's decision departs from numerous cases in other circuits, creating a significant circuit split that this Court should resolve.

Mr. Koziol was certainly wrong in lying about the underlying facts forming the basis for his threatened lawsuit. However, his mere threat to sue is not wrongful and never should be under any circumstances. The far-reaching consequences are just too great.

As such, we respectfully submit that this Court should grant the Petitioner's Petition for a Writ of *Certiorari*, resolve the current circuit split by finding that a threat to sue can never serve as the basis for criminal or civil liability under the Hobbs Act or under the RICO law, and reverse the Ninth Circuit's decision.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. SEXUAL HARASSERS ALREADY ACCUSE THEIR VICTIMS OF DEFAMATION AND CIVIL EXTORTION WHICH DETERS MANY VICTIMS FROM COMING FORWARD. WE SHOULD NOT ADD THE THREAT OF ACTUAL, CRIMINAL CHARGES TO THEIR ARSENAL.

A. Sexual Harassers Frequently Accuse Their Victims Of Extortion

False accusations of extortion against victims of sexual harassment have, unfortunately, become all too common in recent years. When a sexual harassment or assault victim demands money to settle a dispute, a common strategy is for the wealthy harasser to claim "extortion" and retaliate with a pre-emptive lawsuit or even a criminal charge or complaint. This has become so commonplace that the National Employment Lawyers Association's (NELA) recent continuing legal education series about "The Vengeful Adversary: Dirty Tactics and How to Fight Them Off" featured a program titled: "Aggressive Negotiation is NOT extortion. What REALLY is extortion?" NELA's promotion of the session notes: "Some defense attorneys' favorite tactic is to

respond to an aggressive demand by accusing your client, and sometimes you, of extortion."

Prominent veteran employment lawyer Alan L. Sklover writes: "As I have noted many times in [my] blog, in my experiences as a zealous advocate for employees for over 30 years, barely a single week has gone by without some law firm or some corporation calling me an 'extortionist.' . . . To protect yourself from allegations of extortion, when you raise and request resolution of legal claims for such things as sexual harassment, it is wise to limit your communications to written ones . . . because I raise legal claims on my clients' behalf almost every day, I am called an "extortionist" by opposing attorneys quite often."[3]

In our practice, we frequently see and experience sexual harassers accusing their victims of extortion as well as countersuits claiming defamation and/or extortion. These accusations of "extortion" already have a significant chilling effect on the desire of sexual harassment victims to come forward against their harassers. Opening the floodgates for alleged sexual harassers to present criminal extortion charges will prevent all but the most courageous and risk-tolerant victims from pursuing their claims.

Demonstrative of the frequency of the practice, some noteworthy examples of sexual harassers **re-**victimizing their victims by accusing them of extortion after they attempt to resolve their cases are:

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3. https://skloverworkingwisdom.com/is-threatening-to-file-a-sexual-harassment-complaint-equal-to-extortion/.

- **Harvey Weinstein:** he was accused of sexual assault by Ambra Battilana Gutierrez, who reported to the NYPD that he had grabbed her breasts and put his hands up her skirt. Weinstein *accused her* of trying to "extort" money from him. The charges against him were dropped, despite the Manhattan District Attorney's Office possessing an audio recording where Weinstein admitted to the sexual assault.[4]

- **Steve Wynn:** the Las Vegas casino and real estate mogul was accused of sexual assault and then accused his victim of "extortion."[5]

- **Bill O'Reilly:** the famous Fox News talk show host was accused of sexually harassing comments. The victim's attorney provided Fox News lawyers with a draft complaint and a settlement demand. In a pre-emptive strike, Bill O'Reilly and Fox News sued their victim for "extortion" before she could file her suit.[6]

- **Benjamin Wey:** the CEO of financial entity New York Global Group was sued for demanding non-consensual sex. Wey accused his victim of "extortion." A jury awarded the victim $18 million—$2 million in compensatory damages and $16 million in punitive damages, primarily as "payback" for Wey's wrongly

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4. https://www.nytimes.com/2017/10/15/nyregion/harvey-weinstein-new-york-sex-assault-investigation.html.

5. https://www.npr.org/2020/10/21/925827821/gop-welcomes-steve-wynns-millions-despite-rape-and-harassment-allegations.

6. https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html; *see also* https://www.legalrightsadvice.com/for-extortion-oreillys-suit-might-not-fit/.

accusing the victim of extortion. *See Bouveng v. NYG Capital LLC*, 175 F. Supp. 3d 280, 339 (S.D.N.Y. 2016). Moreover, the Court found that her lawyer's pre-suit demand letter and draft complaint were entitled to protection from accusations of extortion.

- **Alan Dershowitz:**, Virginia Giuffre said she was forced to have sex with the famed law professor and attorney by Ghislaine Maxwell and Jeffrey Epstein. Dershowitz asked federal prosecutors in Manhattan to investigate Giuffre's lawyers for "extortion."[7]

- **Howie Rubin:** the prominent money manager was accused of sexual assault and then accused his victim of "extortion." His lawyer called the victim's lawsuit "a web of lies intended to extort Mr. Rubin."[8]

- **Joe Rogers, Jr.:** the CEO of Waffle House, whose estimated net worth is $400 million, was accused of sexual harassment by his housekeeper. When her attorney offered to settle her claims for $12 million, Rogers filed a lawsuit claiming "extortion" *and* convinced a district attorney's office in Georgia to indict the victim's lawyers for criminal extortion. The Supreme Court of Georgia affirmed dismissal of the indictment, holding that any threats made were part of a threat to sue, and "a threat of litigation, by itself,

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7. https://www.palmbeachpost.com/news/20190809/jeffrey-epstein-victim-he-farmed-me-out-to-ex-senator-governor-for-sex; *see also* https://www.wsj.com/articles/alan-dershowitz-accuses-david-boies-of-extortion-in-defamation-suit-11581447127.

8. https://www.cnbc.com/2017/11/09/millionaire-accused-of-raping-models-its-a-web-of-lies.html.

is not unlawful. *See State v. Cohen*, 302 Ga. 616, 807 S.E.2d 861 (2017).

- **R. Kelly:** the R&B star was accused of sexual assault and then accused his accuser of "extortion."[9]

- **Ed Butowsky:** Prominent employment attorney Douglas Wigdor sued Fox News for gender and race discrimination on behalf of twenty victims. The case was later settled for $10 million. But investment adviser and former Fox News Channel contributor Ed Butowsky sued Attorney Douglas Wigdor, claiming "extortion" and defamation.[10]

- **Paul Haggis**: the Oscar-winning director and screenwriter was accused of sexual assault in a draft complaint sent to him by the victim's attorney. Hours before the victim's lawsuit was filed, Haggis preemptively sued his victim for trying to "extort" $9 million from him. That action for extortion was dismissed and three additional women have come forward with allegations of sexual misconduct against Haggis.[11]

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9. *See* https://www.npr.org/2019/01/11/683936629/r-kelly-allegations-an-abridged-history.

10. https://www.hollywoodreporter.com/thr-esq/fox-settles-workplace-claims-20-individuals-1111963; and https://fortune.com/2018/05/16/fox-news-racial-gender-discrimination-settlements/; and https://www.law360.com/articles/1184528/ex-fox-commentator-slaps-atty-with-118m-defamation-suit?copied=1:.

11. See court transcript, available at https://nwlc.org/wp-content/uploads/2018/12/Haggis-v-Breest.pdf; *see also* https://www.latimes.com/local/lanow/la-me-paul-haggis-20180105-story.

- Russell Abrams: founder and owner of the Titan Capital Group, a hedge fund with over $1 billion in assets, was accused of sexual harassment. The harassers brought a separate lawsuit accusing the victims' attorneys of "extortion" The harassers' law firm, Epstein Becker and Green, was later sanctioned for bringing the "extortion" lawsuit, which was dismissed.

- **Rich Rodriguez:** the University of Arizona's head football coach was accused in a lawsuit of sexual harassment and then accused his accuser of "extortion."[12]

- **Luke Walton:** the Sacramento Kings basketball coach was accused of sexual assault and sexual harassment and then accused his accuser of "extortion."[13]

    - Tom Ganley:, a multi-millionaire businessman, turned local politician, he was accused of sexual assault and then accuser his accuser of "extortion."[14]

    - Isiah Thomas and Madison Square Garden: the New York Knicks coach and former NBA all-star was accused of sexual harassment by employee

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html#:~:text=Haggis%20preemptively%20sued%20Breest%20hours,attorneys%20with%20allegations%20against%20Haggis.

12. https://arizonasports.com/story/1367681/rich-rodriguezs-attorneys-prepping-sue-accuser-attempted-extortion/.

13. *See* https://www.si.com/nba/2019/04/29/luke-walton-kelli-tennant-sexual-assault-lawsuit-lakers-warriors-kings.

14. https://www.cleveland.com/metro/2010/09/car_dealer_and_congressional_c.html.

Anucha Sanders. Her lawyer, Anne Vladeck, sent Thomas and Madison Square Garden (MSG) a draft complaint and demanded $6.5 million to settle the case. MSG called this demand "extortionate" and made in bad faith, and fired Sanders. Then-District Judge Gerard Lynch concluded that Sanders' attempt to settle the case was a protected activity and that she could then sue MSG for retaliating against her, even if MSG believed in good faith that her settlement demand was extortion. See Sanders v. Madison Square Garden, L.P., 525 F. Supp. 2d 364 (S.D.N.Y. 2007).

- **The Source Magazine and Raymond Scott**: Scott, owner of The Source, was accused by its Editor-in-Chief, Kim Osorio, of sexual harassment. The Source publicly accused Ms. Osorio of attempted "extortion." A jury awarded Ms. Osorio $3.5 million for defamation, namely accusing her of attempted extortion. The jury further awarded Ms. Osorio an additional $4 million for her emotional distress, which the Court upheld. *See Osorio v. Source Enterprises, Inc.*, No. 05 Civ. 10029 (JSR), 2007 WL 683985 (S.D.N.Y. Mar. 2, 2007).

- **Eddy Curry:** the New York Knicks center was accused of sexual harassment by his former personal chauffeur, David Kuchinsky. Curry's lawyer accused the victim of "extortion." Kuchinsky sought $5 million in damages.[15]

15. https://www.nytimes.com/2009/01/13/sports/basketball/13eddy.html.

- **Matt Gaetz**: the United States Congressman was been accused of having sex with a 17 year old girl. In response, he accused the victim of "extortion."[16]

- **James McGreevey**: the New Jersey Governor was accused of sexual harassment. The victim's attorney reached out to McGreevey's attorney and offered to settle for $20 million. McGreevey claimed this was "extortion," and filed a criminal complaint with the FBI. The FBI found no evidence of actual extortion, concluding that "resolving the case through negotiations between lawyers is a long way from extortion."[17]

- **Ravi Zacharias**: the multi-millionaire evangelical minister was accused of sexual harassment by Lori Anne Thompson. Her lawyer tried to resolve her case pre-litigation. In response, Zacharias accused her of "extortion" and brought a civil RICO extortion action against her. An independent report later confirmed Zacharias' sexual harassment and his ministry apologized to Ms. Thompson for accusing her of extortion. The lawsuit and Ms. Thompsons's claims were eventually settled.[18]

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16. https://www.nytimes.com/2021/03/30/us/politics/matt-gaetz-sex-trafficking-investigation.html.

17. *See* https://nypost.com/2004/08/25/mcgreevey-extortion-just-a-distortion-fed-probers/, *and* https://abcnews.go.com/Politics/story?id=123479&page=1.

18. *See* https://www.washingtonpost.com/religion/2021/02/11/ravi-zacharias-report-rape-misconduct-thompson/, *and* https://www.rzim.org/read/rzim-updates/board-statement.

- **Leon Black:** the billionaire Apollo Global Management hedge fund CEO was accused of sexual harassment by Guzel Ganieva. When she and her lawyers tried to settle her case, Black responded with a RICO lawsuit against Ganieva and her lawyers, claiming extortion.[19] The lawsuit is ongoing.

The above examples clearly suggest that these harassers would likely pursue criminal charges were that avenue available to them; it will be, if the Court of Appeals' decision is allowed to stand. This will have a disastrous effect on a victim's desire to move forward with her claims of sexual assault or sexual harassment.

B. Ten Federal Circuits Have Held That A Threat To Sue Can Never Be Extortion, Whether Made In Bad Faith, Meritless, Or Otherwise.

As noted at the outset of this brief, every other federal appellate court to have addressed the issue has firmly rejected the notion that threats of litigation or demands to settle a dispute can constitute criminal extortion. Numerous lower federal courts have too. Specifically:

- First Circuit: *Gabovitch v. Shear*, 70 F.3d 1252 (1st Cir 1995). The Court agreed that "[i]f a suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary." *Id.*

19. https://www.law.com/newyorklawjournal/2021/10/29/leon-black-accuses-wigdor-of-aiding-accusers-alleged-extortion-scheme-in-civil-rico-suit/?slreturn=20211012133001.

- Second Circuit: *Kim v. Kimm*, 884 F.3d 98, 104 (2d Cir. 2018). The Second Circuit "conclude[d] that allegations of frivolous, fraudulent, or baseless litigation activities – without more – cannot constitute a RICO predicate act." The Second Circuit also noted the "compelling policy arguments supporting this rule":

> First, if litigation activity were adequate to state a claim under RICO, every unsuccessful lawsuit could spawn a retaliatory action, which would inundate the federal courts with procedurally complex RICO pleadings. Furthermore, permitting such claims would erode the principles undergirding the doctrines of res judicata and collateral estoppel, as such claims frequently call into question the validity of documents presented in the underlying litigation as well as the judicial decisions that relied upon them. Moreover, endorsing this interpretation of RICO would chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts because any litigant's or attorney's pleading and correspondence in an unsuccessful lawsuit could lead to drastic RICO liability.

Id. (citations and internal quotations omitted).[20]

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20. See also *G.I. Holdings, Inc. v. Baron & Budd,* 179 F. Supp. 2d 233, 259 (S.D.N.Y. 2001). ("Threats of litigation, even economically ruinous litigation, even unmeritorious litigation, do not constitute extortion."); *Elektra Entmt. Group, Inc. v. Santangelo*, No. 06 Civ. 11520 (SCR) (MDF), 2008 WL 4452393, at *8 (S.D.N.Y. Oct. 1, 2008); *Bouveng v. NYG Capital LLC*, 175 F. Supp. 3d 280, 323-24 (S.D.N.Y. 2016) (e-mail and draft complaint from lawyer "do not constitute

- Third Circuit: There has been no appellate decision yet, but in *Winters v. Jones*, No. 16 Civ. 9020, 2018 WL 326518, at *10 (D.N.J. Jan. 8, 2018) the Court agreed that "even meritless litigation does not constitute extortion under Section 1951. It cited *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) ("extortion is the *antithesis of litigation* as a means of resolving disputes . . . [and] recognizing abusive litigation as a form of extortion would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim (emphasis added)); *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002) (defendants' "threat to file litigation against Marion County, even if made in bad faith and supported by false affidavits" is not extortion as a matter of law)."

- Fourth Circuit: There has been no appellate decision yet, but in *Kimberlin v. National Bloggers Club*, No. 13 Civ. 3059, 2015 WL 1242763, at *8 (D. Md. Mar. 17, 2015), the District of Maryland concluded that "the threat and use of litigation was not 'wrongful.' "

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criminal extortion as defined under federal or New York law."). In the latter case the draft complaint stated that Wey "forced [plaintiff] to have sexual intercourse with him." However, at trial, the plaintiff testified that "none of these sexual interactions involved Wey's use of "physical force." *Id*. Thus, even false statements in the draft Complaint were found not to be extortion under New York law. *See also Morin v. Trupin,* 711 F. Supp. 97, 106 (S.D.N.Y. 1989) ("[T]he threat by an attorney to bring a lawsuit is not a predicate RICO act," and "if we were to hold that two threats to file a civil action, or ... one threat to file a civil action and one instance of travel for the purpose of making such a threat, constituted a 'pattern of racketeering activity,' citizens and foreigners alike might feel that their right of access to the courts of this country had been severely chilled.")

- Fifth Circuit: In *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016), the Fifth Circuit, quoting *Pendergraft*, 297 F.3d 1198, stated: "In the absence of corruption, we agree with our sister circuit that "prosecuting litigation activities as federal crimes would undermine the policies of access and finality that animate our legal system. Moreover, allowing such charges would arguably turn many state-law actions for malicious prosecutions into federal RICO actions."

- Sixth Circuit: In*Vemco., Inc. v. Carmardella*, 23 F.3d 129, 134 (6th Cir. 1994), the Court held that "[a] threat of litigation if a party fails to fulfill even a fraudulent contract . . . does not constitute extortion."

- Seventh Circuit: There has been no appellate decision yet, but in *Edelson PC v. Bandas Law Firm PC*, No. 16 Civ. 11057, 2018 WL 723287, at *5 (N.D. Ill. Feb. 6, 2018), the Northern District of Illinois "decline[d] to depart from the long line of precedent under which demanding payment while threatening to bring or continue litigation does not constitute a predicate act of extortion." (Citing *Pendergraft*, 297 F.3d at 1208 .

- Eighth Circuit: In *I.S. Joseph Co. v. J. Lauritzen A/S*, 751 F.2d 265, 267 (8th Cir. 1984), the Court "assum[ed] for purposes of argument (though the state court has found otherwise) that the threat to sue was groundless and made in bad faith." But this made no difference. "Such conduct may be tortious under state law, but we decline to expand the federal extortion statute to make it a crime," or else "citizens and foreigners alike might feel that their right of access to the courts in this country had been severely chilled"; while "[j] udges and lawyers often complain that the courts are

inundated with a flood of litigation, . . . litigation is as American as apple pie. If the suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary." Id. at 267-68.

- Tenth Circuit: In *Deck v. Engineered Laminates*, 349 F.3d at 1258, the Court "recognize[d] that litigation can induce fear in a defendant; and it would be fair, at least in other contexts, to characterize as 'wrongful' the filing of a groundless lawsuit, particularly when the plaintiff resorts to fraudulent evidence. *But we join a multitude of other courts in holding that meritless litigation is not extortion.*" (Emphasis added.) The Court further held:

> Extortion is the antithesis of litigation as a means of resolving disputes. To promote social stability, we encourage resort to the courts rather than resort to force and violence. Yet recognizing abusive litigation as a form of extortion would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim. Whenever an adverse verdict results from failure of the factfinder to believe some evidence presented by the plaintiff, the adverse party could contend that the plaintiff engaged in extortionate litigation. Comfortable that the adjective "wrongful" in the extortion statute was not intended to apply to litigation, we hold that Plaintiff's allegations of bad-faith litigation do not state the predicate act of extortion.

Id.

- Eleventh Circuit: In *Pendergraft*, 297 F.3d at 1205-06, the Court held that threats to sue cannot constitute criminal extortion, and the litigation threat made in that case was not "wrongful" within the meaning of the Hobbs Act "*even if made in bad faith and supported by false affidavits*." (Emphasis added). It reasoned:

> After all, under our system, parties are encouraged to resort to courts for the redress of wrongs and the enforcement of rights. For this reason, litigants may be sanctioned for only the most frivolous of actions. These sanctions include tort actions for malicious prosecution and abuse of process, and in some cases recovery of attorney's fees, but even these remedies are heavily disfavored because they discourage the resort to courts.
>
> > History has taught us that, if people take the law into their own hands, an endless cycle of violence can erupt, and we therefore encourage people to take their problems to court. We trust the courts, and their time-tested procedures, to produce reliable results, separating validity from invalidity, honesty from dishonesty. While our process is sometimes expensive and occasionally inaccurate, we have confidence in it.

Id. at 1206-07 (citations omitted).

II. THE SAME POLICY CONSIDERATIONS APPLICABLE IN THE CIVIL RICO CONTEXT, WHERE NO THREAT TO LITIGATE IS EXTORTION, ARE EQUALLY APPLICABLE IN THE CRIMINAL CONTEXT.

Logically, the same public policy considerations that counsel against allowing civil RICO suits to be weaponized against opposing litigants are present in the criminal context, and there are additional policy considerations unique to the criminal context as well. Yet the Ninth Circuit's decision essentially concluded the contrary, without offering any actual explanation as to why the policy considerations raised by courts evaluating civil RICO claims under the Hobbs Act should not apply in the criminal context. This is a further reason to grant the petition at bar, and reverse the Ninth Circuit's decision.

The Ninth Circuit states: "In rejecting RICO liability based on litigation activities, these courts expressed policy concerns relating to ensuring access to the courts, promoting finality, and avoiding collateral litigation" but "the policy concerns asserted in these cases are not implicated when a defendant, who has no relationship with his alleged extortion victim, including any prior or pending litigation, threatens sham litigation to obtain property to which he knows he has no lawful claim." *United States v. Koziol*, 993 F.3d 1160, 1174 (9th Cir 2021) (internal citation omitted). However, the decision does not provide any explanation as to why those same policy considerations do not apply in the present case, or in criminal cases generally. And in fact, each of these public policy considerations *does* apply to the present case, and others like it.

The Ninth Circuit's Decision eviscerates the progress our nation has made in recent years in encouraging sexual assault victims to come forward. If any suit or threat of suit, even one that is later determined to be a "sham," is criminalized, it will strike further fear into victims of sexual assault. This will have, and indeed already has had, a significant chilling effect on these victims seeking justice and pursuing their rightful legal claims. Indeed, even if the Court might express "distaste for the type of acts alleged by Defendant, . . . the fact remains that a threat to sue cannot constitute extortion." *Access for the Disabled, Inc. v. EDZ, Inc.*, No. 13 Civ. 3158, 2014 WL 3925228, at *3 (M.D. Fla. Aug. 11, 2014) (citing *Pendergraft,* 297 F.3d at 1205). *See also Edelson*, 2018 WL 723287, at *8 (citing *Deck*, 349 F.3d at 1259; *Pendergraft*, 297 F.3d at 1208; *Vemco*, 23 F.3d at 134; and *I.S. Joseph*, 751 F.2d at 267).

Simply put, the Ninth Circuit defied common sense in recognizing that a threat to sue cannot be extortion in a civil RICO case, yet it *can* constitute criminal extortion. The threat of a felony conviction with prison time self-evidently has a much greater chilling effect than the threat of a civil lawsuit. Yet the Ninth Circuit has effectively concluded that individuals who threaten others with meritless, baseless lawsuits are fully protected from civil extortion but *not* criminal extortion—even though the public policy reasons for protecting accusers from civil extortion claims apply even more forcefully in the criminal context.

To the extent this Court is concerned about what protections an accused has from baseless, frivolous lawsuits without a criminal extortion option, both federal and state court systems already have ways to penalize such threats. There are sanctions available under Federal

Rule of Civil Procedure 11 and its state law counterparts. There are also causes of action in tort, such as abuse of process and malicious prosecution, or even intentional infliction of emotional distress. There is no need to chill efforts to settle disputes prior to litigation with the additional threat of criminal prosecution. Simply put, a threat to sue should never be extortion, criminal or civil.

The *Koziol* Court reasoned that, with regard to extortion, a threatened lawsuit should be viewed differently than an actual, filed lawsuit. The Court stated,

> These cases also suggest that the victim of bad faith litigation tactics may have remedies and protections in state tort law through claims of malicious prosecution, wrongful use of civil proceedings, and abuse of process, and that wrongful litigation conduct will be deterred by the penalties for perjury, obstruction of justice, and witness tampering. *See Snow*, 833 F.3d at 525; *Pendergraft*, 297 F.3d at 1207–08; *I.S. Joseph Co.*, 751 F.2d at 267. But these remedies and penalties will rarely, if ever, protect the victim of extortionate threats of sham litigation when, as in this case, the sham lawsuit is threatened but not filed.

Koziol, 993 F.3d at 1175. [9th Cir 2021]

This reasoning, however, ignores the fact that if one who threatens sham litigation actually files the lawsuit, he or she would likewise be punished through "claims of malicious prosecution, wrongful use of civil proceedings, and abuse of process, and that wrongful litigation conduct

will be deterred by the penalties for perjury, obstruction of justice, and witness tampering." *Id*. Victims of threats of sham litigation do have remedies because of the deterrence and punishment available if the lawsuit is actually filed. They need not fear a sham lawsuit. Those threatened with sham lawsuits that are never actually filed do not need a remedy, because they know that if the lawsuit is ever filed, it was fail, and there will be consequences for the accuser. Our justice system has ample rules and procedures for dealing with sham lawsuits. Any inconvenience to someone threatened with a sham lawsuit should not, under any circumstance, warrant a criminal conviction for extortion.

If a party or her attorneys risk criminal extortion charges for merely trying to resolve a case pre-litigation, they will simply start the lawsuit rather than giving the parties a chance to resolve the claims without the expense and burden of litigation. Plaintiffs' attorneys will be strongly incentivized to no longer engage in pre-lawsuit negotiations with putative defendants; instead, they will simply file every single case. That will be detrimental to *all* parties, because early resolution of a dispute prior to its progression into a lawsuit is often in the best interest of all involved. This outcome will inevitably flood the courts and further burden them with many more active cases – to the obvious detriment of court systems, litigants, and society as a whole. *See State v. Rendelman*, 404 Md. 500, 512 (2008) ("[t]o render a *threat* of civil action as a potential criminal offense, when the actual filing of a meritless civil action is not unlawful, will only serve to stifle our judicial system and overwhelm the courts with excessive litigation between feuding parties") (emphasis in original).

CONCLUSION

For all of the foregoing reasons, this Court should grant the Petitioner a writ of *certiorari*, and determine that a threat to sue or the filing of a lawsuit can never constitute criminal extortion under the Hobbs Act or the RICO law.

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Respectfully submitted,

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