No. _____

In the Supreme Court of the United States

TROY NEWMAN,

Petitioner,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, *ET AL.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a classic case of the "abortion distortion," Planned Parenthood repackaged its PR black-eye over selling aborted baby parts into a court-approved RICO victory. This Court should grant review.

Petitioner Troy Newman is a former board member of the Center for Medical Progress (CMP), which conducted an undercover investigation of fetal tissue trafficking. Investigators videotaped conversations at various locations. In July 2015, CMP published a series of videos, spurring two Congressional investigations that resulted in criminal and regulatory referrals concerning the tissue trafficking.

Respondents sued Petitioner and his Co-Defendants, alleging various claims, including civil RICO. A jury found in Respondents' favor, and the district court rejected Petitioners' legal defenses. The Ninth Circuit affirmed the judgment in large part, including as to RICO. The Ninth Circuit's RICO decision conflicts with the precedents of this Court and other courts concerning predicate acts, pattern of racketeering activity, and proximate cause. The questions presented are:

1. Whether Respondents failed to establish a pattern of RICO predicate acts where

    a. the alleged pattern consisted of the production and transfer of false IDs that was completed before the launch of the undercover investigation, and

    b. the false IDs were produced and transferred entirely *intrastate*, while the relevant

predicate violation requires an *interstate* commerce element.

2. Whether Respondents failed to establish a RICO claim when the alleged predicate acts (producing and transferring false IDs) did not proximately cause a direct injury to their business or property.

PARTIES TO THE PROCEEDING

Petitioner (Defendant-Appellant below) is Troy Newman. Newman's Co-Defendants are Center for Medical Progress; BioMax Procurement Services, LLC; David Daleiden; Albin Rhomberg; Susan Merritt; and Gerardo Adrian Lopez.

Respondents (Plaintiffs-Appellees below) are Planned Parenthood Federation of America, Inc.; Planned Parenthood: Shasta-Diablo, Inc., d/b/a Planned Parenthood Northern California; Planned Parenthood Mar Monte, Inc.; Planned Parenthood of the Pacific Southwest; Planned Parenthood Los Angeles; Planned Parenthood/Orange and San Bernardino Counties, Inc.; Planned Parenthood California Central Coast, Inc.; Planned Parenthood Pasadena and San Gabriel Valley, Inc.; Planned Parenthood Center for Choice; Planned Parenthood of the Rocky Mountains; and Planned Parenthood Gulf Coast.

Intervenor National Abortion Federation intervened in the Ninth Circuit for the limited purpose of moving to maintain certain exhibits under seal.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of S. Ct. R. 14.1(b)(iii):

- *Center for Med. Progress, et al. v. Planned Parenthood Fed'n of Am., Inc.,* No. 18-696 (S. Ct.), certiorari denied on April 1, 2019.
- *Planned Parenthood Fed'n of Am., Inc., et al. v. Center for Med. Progress, et al.*, No. 16-16997 (9th Cir.), judgment entered on May 16, 2018.
- *Planned Parenthood Fed'n of Am., Inc., et al. v. Center for Med. Progress, et al.*, No. 17-73313 (9th Cir.), denial of petition for writ of mandamus entered on April 30, 2018.
- *Planned Parenthood Fed'n of Am., Inc., et al. v. Newman*, No. 20-16068 (9th Cir.), judgment entered on October 21, 2022.
- *Planned Parenthood Fed'n of Am., Inc., et al. v. Center for Med. Progress, et al.*, No. 20-16070 (9th Cir.), judgment entered on October 21, 2022.
- *Planned Parenthood Fed'n of Am., Inc., et al. v. Rhomberg*, No. 20-16773 (9th Cir.), judgment entered on October 21, 2022.
- *Planned Parenthood Fed'n of Am., Inc., et al. v. Merritt*, No. 20-16820 (9th Cir.), judgment entered on October 21, 2022.

- *Planned Parenthood Fed'n of Am., Inc., et al. v. Center for Med. Progress, et al.*, No. 21-15124 (9th Cir.), appeal from entry of attorneys' fees and costs; stayed.
- *Planned Parenthood Fed'n of Am., Inc., et al. v. Center for Med. Progress, et al.*, No. 3:16-cv-00236-WHO (N.D. Cal.), judgment entered on April 29, 2020.

RULE 12 STATEMENT

Petitioner Troy Newman anticipates that his Co-Defendants will be filing their own petitions for a writ of certiorari from the underlying judgment of the United States Court of Appeals for the Ninth Circuit, in addition to his own. Petitioner Newman joins those petitions by reference. *See* S. Ct. R. 12.4.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy Newman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decisions of the United States District Court for the Northern District of California in this case are styled *Planned Parenthood Federation of America v. Center for Medical Progress*. The decisions of the United States Court of Appeals for the Ninth Circuit in this case are styled *Planned Parenthood Federation of America v. Newman.* The district court's decisions were published as follows: on the motion to dismiss, at 214 F. Supp. 3d 808 (N.D. Cal. 2016), App. 415;[1] on the summary judgment motions, at 402 F. Supp. 3d 615 (N.D. Cal. 2019), App. 204; on the post-trial motions, at 480 F. Supp. 3d 1000 (N.D. Cal. 2020), App. 146; and the injunction on the California Unfair Competition Law and judgment, at 613 F. Supp. 3d 1190 (N.D. Cal. 2020), App. 55. The Ninth Circuit issued two decisions concerning different aspects of the judgment: one, which affirmed in part and reversed in part, was published at 51 F.4th 1125 (9th Cir. 2022), App. 1, and the other, which affirmed, is unpublished but is available at 2022 U.S. App. LEXIS 29374 (9th Cir. Oct. 21, 2022). App. 28. The Ninth Circuit's order denying rehearing is unpublished but

[1] Citations to "App." and to "Doc." herein are to the appendix to this petition and to the district court's docket entries, respectively.

is available at 2023 U.S. App. LEXIS 5035 (9th Cir. Mar. 1, 2023). App. 503.

JURISDICTION

The Ninth Circuit's decisions were issued on October 21, 2022. App. 1, 28. The circuit court denied a timely petition for rehearing/rehearing en banc on March 1, 2023. App. 503. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The only purported RICO predicate acts at issue in this case were the unlawful *production* and *transfer* of false identifications in or affecting interstate commerce:

> (a) Whoever, in a circumstance described in subsection (c) of this section—
>
> (1) knowingly and without lawful authority *produces* an identification document, authentication feature, or a false identification document; [or]
>
> (2) knowingly *transfers* an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority;
>
> . . .
>
> shall be punished. . . .
>
> (c) The circumstance referred to in subsection (a) of this section is that—

> . . .
>
> (3) . . . (A) *the production, transfer*, possession, or use *prohibited by this section is in or affects* interstate or foreign commerce. . . .

18 U.S.C. §§ 1028(a)(1)-(2), (c)(3)(A) (emphasis added). § 1028 is reproduced in the appendix, App. 507, as are 18 U.S.C. §§ 1961, 1962, 1964. App. 517, 522, 524.

INTRODUCTION

In upholding the RICO verdict in this case, the Ninth Circuit's decision conflicts with the RICO precedents of this Court and other courts concerning predicate acts, pattern of racketeering activity, and proximate cause. This Court should grant review. *See, e.g., Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (granting certiorari where Ninth Circuit decision was inconsistent with Supreme Court precedents).

STATEMENT OF THE CASE

1. Investigative work of the Center for Medical Progress.

Defendant David Daleiden created the Center for Medical Progress (CMP) to investigate and educate the public about fetal organ trafficking and related illegal, unethical, and troubling acts. Petitioner Troy Newman was a CMP board member from its inception until December 2015.

Daleiden led an undercover investigation into the illegal procurement and sale of human fetal tissue and organs after extensive research into the subject. Before going undercover, Daleiden learned, for instance, that researchers had obtained fetal hearts

from StemExpress ("a commercial vendor of fetal tissue") and attempted to keep those hearts beating after they were removed. Trial Tr., Doc. 942 at 2389-92; Trial Ex. 24 at 5. Additionally, Daleiden took a screenshot of

> a drop-down menu order form for fetal organs and tissues [on StemExpress's website]. . . . They had about 50 to a hundred different body parts listed. . . . [Y]ou could get a heart with veins and arteries still attached . . . a brain . . . kidneys. . . . genitals. . . . scalp. Really, anything you could imagine.

Trial Tr., Doc. 942 at 2385-86; Trial Ex. 24 at 4.

Similar to a 20/20 ABC news investigation that aired in 2000,[2] CMP investigators posed as potential business partners from a start-up tissue procurement company called BioMax Procurement Services, LLC (BioMax) while wearing hidden cameras. Investigators attended several abortion-related conferences and had numerous face-to-face meetings to discuss fetal organ procurement.

Beginning in July 2015, CMP released a series of videos as part of its "Human Capital Project,"[3] which exposed alleged criminal and unethical activities within the fetal tissue procurement and abortion industries. For example, "[m]ultiple clips show

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[2] Walter B. Hoye II, *"In 2000 ABC Undercover Reported on the Baby Body Parts Business,"* www.youtube.com/watch?v=rZJ0tKSL6V8 (last visited May 22, 2023).

[3] *Investigative Footage*, THE CENTER FOR MEDICAL PROGRESS, www.centerformedicalprogress.org/cmp/investigative-footage (last visited May 22, 2023).

abortion clinic doctors and executives admitting that their fetal tissue procurement agreements are profitable for clinics and help keep the bottom line healthy" and "that they sometimes changed the abortion procedure in order to obtain a more intact specimen, including relying on the illegal partial-birth abortion procedure." House Rpt., Doc. 303-3 at 1.

The release of the videos drew widespread public interest, including gaining the attention of legislators, law enforcement agencies, candidates for President, and the general public. The videos and the resulting public concern were the impetus for both houses of Congress to conduct their own investigations, which documented extensive evidence suggesting that numerous fetal tissue procurement companies and abortion providers committed an array of illegal and unethical acts. House Rpt., Doc. 303-3; Senate Rpt., Doc. 307 at 1; Daleiden Decl., Doc. 609-1 at 21-23. These investigations resulted in the issuance of numerous criminal and regulatory referrals to federal, state, and local law enforcement entities. House Rpt., Doc. 303-3; Senate Rpt., Doc. 307. One of the House's criminal referrals was successfully prosecuted. Daleiden Decl., Doc. 609-1 at 23-24.

2. District court proceedings.

Respondents, which include entities that Congress determined had committed wrongful acts, brought this lawsuit in January 2016 "to recover damages for the ongoing harm to Planned Parenthood emanating from the video smear campaign." Amend. Comp., Doc.

59 at 4, ¶ 12.[4] By the time this lawsuit was filed, Newman was no longer a CMP board member.

Respondents are Planned Parenthood Federation of America and many of its affiliates. They asserted claims related to the investigation and publication of the videos, such as a RICO violation stemming from the production or transfer of identification documents in or affecting interstate commerce,[5] breach of contract, fraud, trespass, and unfair competition. Some of these claims were asserted against all Defendants (CMP, BioMax, Daleiden, Newman, Rhomberg, Merritt, and Lopez), while others were asserted against only some Defendants.

The district court dismissed wire and mail fraud as predicates for the RICO claim, but otherwise denied Defendants' motions to dismiss. App. 427-31. Although the court denied the parties' motions for summary judgment with respect to most issues and claims, the court granted partial summary judgment

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[4] Despite the claim of a "smear," there was no defamation claim. And although Respondents' lawsuit and claimed damages were premised, in large part, upon *the content and communicative impact of Defendants' publications*, the lower courts did not require Respondents to meet First Amendment standards for publication-based claims and damages, and the district court barred Defendants from obtaining discovery to show their publications were true. Respondents eventually agreed to the following stipulation concerning the CMP videos: "the words used by plaintiffs' personnel and the defendants in videos recorded by the defendants were spoken by those persons." Trial Tr., Doc. 1024 at 3465.

[5] The events concerning these IDs will be discussed in more detail *infra*.

to Respondents on, *inter alia*, the interstate commerce element of the alleged RICO predicate offenses. App. 234-41.

After a six-week trial, the jury found in Respondents' favor on all counts, awarded over $2 million in damages (including trebling under RICO), found Petitioner Newman liable via conspiracy on several counts, and awarded punitive damages against all Defendants.[6] App. 18, 130; Verdict, Doc. 1016. The district court denied Newman's pre-verdict motion for judgment as a matter of law and Newman's post-verdict motions for judgment as a matter of law, new trial, and to alter or amend the judgment. App. 146. The court entered judgment in Respondents' favor on all claims, and issued an injunction under the California Unfair Competition Law claim. App. 55, 130.

3. Ninth Circuit decisions.

After hearing oral argument, the Ninth Circuit largely affirmed the judgment in this case. The circuit court issued two decisions on the same day; the first decision was published and the second was unpublished.

In the first decision, the Ninth Circuit affirmed in part, holding that the compensatory damages were not precluded by the First Amendment. The court also

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[6] The district court also imposed close to $14 million in attorneys' fees and costs against Defendants. Costs, Doc. 1151; Order, Doc. 1154. That award is the subject of a separate appeal that is stayed pending the outcome of this appeal. Order, 9th Cir., No. 21-15124, DktEntry 11; Order, 9th Cir., No. 20-16068, DktEntry 165.

reversed in part the jury's verdict on the Federal Wiretap Act claim, and vacated the related statutory damages. App. 1.

In the second decision, the Ninth Circuit addressed and affirmed the other grounds of appeal, including the civil RICO claim. App. 28. Regarding civil RICO, the circuit court found no error in the district court's rulings concerning the satisfaction of an interstate commerce nexus, a pattern of predicate acts, and proximate cause. App. 35-37.

The Ninth Circuit denied rehearing and rehearing en banc. App. 503.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's RICO decision is in direct conflict with this Court's RICO case law as well as with the case law of other courts. Ensuring that this Court's RICO jurisprudence is applied correctly and consistently is a matter of national importance given that RICO permits the trebling of damages in civil cases as well as other onerous criminal and civil penalties. This Petition should be granted.

I. The Ninth Circuit's RICO decision conflicts with decisions of this Court and other courts.

A. The Ninth Circuit's incorrect interpretation of the predicate statute (18 U.S.C. §§ 1028(a)(1)-(2)) conflicts with the RICO decisions of this Court and other courts.

A central question in any RICO case is what specific acts of the defendants are alleged to constitute *predicate offenses* (*i.e.*, "racketeering activity" as defined by 18 U.S.C. § 1961(1)), as opposed to various other acts that, although related in some way to an overall plan, are *not* predicate offenses. In short, not all acts related to an overall plan are predicate offenses under § 1961(1). 18 U.S.C. § 1961(1) (listing racketeering activities, for example, murder, arson, bribery, etc.); App. 517-20; *e.g., Sedima v. Imrex Co.*, 473 U.S. 479, 495 (1985) ("'[R]acketeering activity' consists of no more and no less than commission of a predicate act [under] § 1961(1).").

Since RICO only provides a cause of action if the plaintiff can show (among other things) that he was directly "injured in his business or property by reason of a [RICO] violation," 18 U.S.C. § 1964(c); App. 524-25, determining the extent to which the defendants committed (or did not commit) violations of the RICO predicate laws is critical. *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 457 (2006) ("[T]he compensable injury flowing from a violation . . . 'necessarily is the harm caused by *predicate acts* sufficiently related to constitute a pattern. . . .'") (emphasis added).

Here, the Ninth Circuit interpreted the predicate statute, § 1028, so broadly that it swept within the statute's scope conduct that cannot serve as the basis for a RICO claim, *i.e.*, conduct not listed in § 1961(1).[7] The predicate statute at issue prohibits the production and transfer of false identifications in, or affecting, interstate commerce. *See* 18 U.S.C. §§ 1028(a)(1), (a)(2), (c)(3)(A) (stating, in relevant part, that one who "knowingly and without lawful authority produces" a false identification document, or "knowingly transfers" such a document knowing that it was "produced without lawful authority," has committed an offense if "the production, transfer, possession, or use prohibited by this section is in or affects interstate or foreign commerce."); App. 507, 511.

Here, the events relevant to the production or transfer of false IDs consisted of purely **intra**state

[7] Although mail and wire fraud are listed as racketeering activities under § 1961(1), the district court dismissed those alleged predicates from this case, App. 427-31, leaving just the alleged production and transfer of false IDs in or affecting interstate commerce as the operative predicate acts.

activity (occurring within California) related to one investigative project: (1) Daleiden modified his own identification at his home; (2) Daleiden "located a service" that could produce the "Tennenbaum" and "Allen" documents by finding a Craigslist listing online; (3) those documents were hand-delivered to Daleiden in exchange for cash; and (4) Daleiden hand-delivered those documents to Defendant Merritt and Brianna Baxter. App. 65, 212, 236; Daleiden Decl., Doc. 609-1 at 29; Trial Trs., Doc. 940 at 2122-24; Doc. 941 at 2154-55; Doc. 1020 at 2645-47, 2652-53.

None of Daleiden's actions constituted an unlawful production or transfer of IDs in, or affecting, **inter**state commerce. The district court concluded that the only instances of ID "production" or "transfer" were Daleiden modifying his own driver's license and arranging for the production of two others, which he provided in person to two investigators, App. 234-41 & n.22; these acts all occurred in **one** State (California).

The Ninth Circuit concluded that "Daleiden's use of the internet to search for and arrange the purchase of two fake driver's licenses was 'intimately related to interstate commerce.'" App. 35-36 (citing *United States v. Sutcliffe*, 505 F.3d 944, 952 (9th Cir. 2007)). In *Sutcliffe*, the court found a link to interstate commerce in a defendant's use of the Internet to *transmit* threats, analogizing it to the use of a telephone. 505 F.3d at 952-53. Here, however, Daleiden's minimal Internet use was akin to reviewing the Yellow Pages: he "located a service" by finding a Craigslist listing. App. 65; Trial Tr., Doc. 941 at 2154-55.

Merely reading information that appears on the Internet is not an act that is in, or affects, interstate commerce, and is certainly not a violation of § 1028(a)(1) or (2). Additionally, *notably absent* from the record is any evidence indicating that Daleiden communicated with this person via the Internet, or sent any payments for IDs via electronic means, or that any component parts of the IDs traveled in interstate commerce. The purely **intra**state production and acquisition of a few IDs does not constitute an unlawful production or transfer of IDs in, or affecting, interstate commerce.

Moreover, the Ninth Circuit concluded that "[t]he production and transfer of the fake driver's licenses affected interstate commerce because Appellants *used* the fake licenses to gain admission to out-of-state conferences and facilities, and then *presented* those licenses at the out-of-state conferences and facilities, which were operating in interstate commerce." App. 35-36 (emphasis added). This holding is wrong.

The predicate statutory provisions at issue in this case (§§ 1028(a)(1)-(2)) are expressly limited to the *production* or *transfer* of IDs, and not the *use* of IDs. App. 507. It is 18 U.S.C. § 1028(a)(3) that prohibits possession of false identifications with intent to *use unlawfully*, but that section was not involved in this case. Respondents disclaimed any reliance on § 1028(a)(3). App. 432 n.12.

Under §§ 1028(a)(1)-(2), a plaintiff must prove that the purportedly unlawful productions or transfers were in, or affected, interstate commerce. *United States v. Della Rose*, 278 F. Supp. 2d 928, 933 n.2 (N.D.

Ill. 2003) (noting that "under the plain language of the statute, it is the production that must be in or affect interstate commerce"). If Congress wanted to make a violation of § 1028(a)(1) or (2) contingent upon, or related to, subsequent acts of *possession or use* of the IDs, it would have said so, but it did not. As such, the eventual use of the IDs is irrelevant to whether the acts of *producing and transferring* them were in or affecting interstate commerce. The lower courts' improper reliance upon the *uses* of IDs in a *production/transfer* case is clearly contrary to the statute.

In sum, the purely **intra**state production and acquisition of a few IDs did not constitute a violation of the predicate statute, and there is no RICO liability. By taking an incorrectly broad view of the conduct encompassed within §§ 1028(a)(1)-(2), the Ninth Circuit incorrectly expanded the definition of "racketeering activity" under § 1961(1) to include offenses not listed in the statute. The circuit court's decision conflicts with *Sedima*, *Anza,* and other decisions that repeatedly emphasize that actions that do not violate the predicate statutes listed in § 1961(1) cannot form the basis of a RICO claim. *See also, e.g., Grow Mich., LLC v. LT Lender, LLC*, 50 F.4th 587, 593-94 (6th Cir. 2022) ("'Racketeering activity' means any of a set of specific state and federal crimes set forth in § 1961(1)"); *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008) (explaining that ordinary theft offenses and conspiracy to commit them are not predicate activities under § 1961(1) and cannot be used to establish a period of racketeering activity); *Annulli v. Panikkar*,

200 F.3d 189, 192, 199-202 (3d Cir. 1999) (explaining that "RICO's list of acts constituting predicate acts of racketeering activity is exhaustive," and that a plaintiff cannot rely on acts that are not listed in § 1961(1) as predicate acts of racketeering activity to support a civil RICO claim).

B. The Ninth Circuit's incorrect interpretation of RICO's pattern requirement conflicts with decisions of this Court and other courts.

The **intra**state acts discussed above relating to the acquisition of a few false IDs for use in an undercover investigation occurred over the course of no more than six months (at the outset of one finite project with a limited timeframe) and concluded long before Respondents filed suit. App. 13-17 (circuit court making clear there was only a single project with a distinct end); *see also* App. 236; Daleiden Decl., Doc. 609-1 at 29. "The law is clear that 'the duration of a pattern of racketeering activity is measured by the RICO predicate acts' that the defendants are alleged to have committed" and "not the time during which the underlying scheme operated or the underlying dispute took place." *Spool*, 520 F.3d at 184.

The Ninth Circuit concluded that Respondents sufficiently established an open-ended pattern of racketeering activity because "various [Defendants] had previously advocated for or used undercover sting operations targeting Planned Parenthood, and CMP and BioMax were still extant and intended to carry out future projects." App. 36. Notably absent from the record, however, is evidence that any Defendant's

prior investigative activities involved the commission of predicate offenses, or that any future activities would involve such offenses. Nor, does the record contain evidence suggesting that Daleiden or other Defendants created or acquired additional IDs for use in other projects, or that Daleiden or other Defendants intended to create or acquire IDs in relation to any other investigative activities.

The Ninth Circuit's holding that any predicate acts committed in relation to the production or transfer of IDs was conduct that "'by its nature project[ed] into the future with a *threat* of repetition,'" App. 36, conflicts with the only decision the court cited in relation to this holding: *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). In *H.J. Inc.*, this Court explained that the statutory requirement of "'at least two acts of racketeering activity'" within a 10-year period to establish a pattern "does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern," as Congress "intend[ed] a more stringent requirement than proof simply of two predicates." 492 U.S. at 237 (quoting 18 U.S.C. § 1961(5)). This Court elaborated on RICO's pattern requirement as follows:

> To establish a RICO pattern it must . . . be shown that the [related] *predicates themselves* amount to, or . . . otherwise constitute a threat of, *continuing* racketeering activity. . . .
>
> [Open-ended continuity refers to] past conduct that by its nature projects into the future with a threat of repetition. . . . [W]hat

> must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. . . . *Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with longterm criminal conduct*.

Id. at 239-42 (emphasis added).

The Ninth Circuit's decision conflicts with *H.J. Inc.* by holding that *short-term* conduct—with a defined endpoint—can establish an open-ended pattern of racketeering activity. *H.J. Inc.* gave two examples of situations in which an open-ended pattern could be established. First, there are situations in which "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future," such as when a criminal threatens to break a store's windows unless a monthly payment is made on an indefinite basis. *Id.* at 242. Second, a pattern may be proven if predicate acts "are part of an ongoing entity's regular way of doing business." *Id.* at 242-43. Here, by contrast, the few acts relating to the acquisition of IDs came to a relatively quick conclusion, were not repeated afterwards, and there was no "regular way of doing business" that includes the commission of predicate offenses.

Additionally, the *H.J. Inc.* Court explained that there is no pattern, and no viable RICO claim, where there are "very short periods of criminal activity that do *not* in any way carry a threat of continued criminal

activity" since the predicate acts do not "amount to or threaten long-term criminal activity." *Id.* at 243, n.4. Even assuming for the sake of argument that Daleiden's intrastate production of IDs violated the federal identity theft statute, a "very short period[] of criminal activity" is exactly the situation in this case. Moreover, there were *no* multiple schemes here that included alleged violations of a predicate statute, which is a "highly relevant" fact that further illustrates that the circuit court's decision conflicts with *H.J. Inc. See id.* at 240.

The Ninth Circuit's decision also conflicts with *Sedima*, where this Court emphasized that it would be exceedingly rare for the commission of just two predicate acts, in relation to one plan, to constitute a "pattern of racketeering activity." This Court noted that "while two acts are necessary, they may not be sufficient. Indeed, *in common parlance two of anything do not generally form a 'pattern.'*" 473 U.S. at 496 n.14 (emphasis added); *id.* ("[T]wo isolated acts of racketeering activity do not constitute a pattern. . . . 'The target of [RICO] is . . . not sporadic activity.'") (citation omitted). Here, the RICO claim is *solely* premised upon one in-home modification of an ID, and one in-state acquisition of two IDs, that occurred over roughly six months, in relation to one project; this is insufficient to establish a pattern under *Sedima.*

Moreover, the *Sedima* Court emphasized that a RICO plaintiff must prove, among other things, that "*the racketeering activities* injure[d] the plaintiff in his business or property," and the Court added that "the compensable injury necessarily is the harm caused by *predicate acts sufficiently related to constitute a*

pattern." *Id.* at 495-97 (emphasis added). Conversely, a defendant is *not* liable under RICO "to everyone he might have injured *by other conduct*. . . ." *Id.* at 496-97 (citation omitted) (emphasis added). The circuit court's decision conflicts with *Sedima* by relying upon acts that are *not* predicate acts—*e.g.*, uses of IDs, previous advocacy of and engagement in undercover operations—to hold that Respondents were injured by a pattern of racketeering activity. App. 35-37.

Here, as noted above, the RICO claim is based only on a one-time in-home modification of an ID and one in-state acquisition of two IDs during a six-month period that related to one undercover investigative project with a limited timeframe, and the alleged predicate acts were not repeated afterwards. The acts involved in this action are insufficient to establish a RICO pattern.

Furthermore, the Ninth Circuit's RICO decision is inconsistent with the reasoning of the leading decision on the issue of RICO's application to investigative journalism: *Food Lion v. Capital Cities/ABC*, 887 F. Supp. 811 (M.D. N.C. 1995). As that decision explained, "undercover reporting [does not] necessarily entail[] criminal conduct which would qualify as a predicate act," and the fact that journalists "regularly use hidden cameras and microphones in their regular business activities" is not evidence that they will commit predicate offenses in the future. *Id.* at 818-20. In *Food Lion*, the commission of a series of predicate acts, within a six-month span, as part of one plan to collect information about the plaintiff's operations for investigative purposes, did not constitute a pattern of racketeering activity. *Id.*

The same holds true here: the fact that some Defendants may do some investigative work in the future *does not* transform an isolated past event into a continuous, open-ended pattern of racketeering activity, especially when the record is devoid of evidence that any Defendant created or acquired additional IDs for use in other projects, or intends to create or acquire IDs in relation to other investigative activities.[8] *See Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684-85 (4th Cir. 1989) (no RICO pattern where defendants' actions were narrowly directed toward a single goal to defraud and did not represent ongoing unlawful activity with a scope and persistence to pose a threat to social well-being).

B. The Ninth Circuit's incorrect interpretation of RICO's proximate cause requirement conflicts with decisions of this Court and other courts.

The Ninth Circuit wrongly adopted a chain-of-events theory of RICO causation: The acquisition of false IDs was an *early step* in a long series of *non-predicate acts* that ultimately led Respondents to decide to make various expenditures that they claim as RICO damages. The court's decision conflicts with this Court's precedents and those of other courts. RICO liability requires that a plaintiff prove the

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[8] Undercover journalistic activities, which provide a public benefit, are not the organized crime that RICO was intended to combat. *See Globe Int'l, Inc. v. Superior Ct.*, 9 Cal. App. 4th 393, 400-01 (1992) (noting, regarding a newspaper's publication of covertly taken photographs, that "RICO was intended to combat organized crime, not to provide triple damages to every tort claimant").

existence of damages proximately caused by specified predicate acts, as listed in § 1961(1). This important check on the breadth of RICO liability was ignored here. It is beyond dispute that no entity or person was injured in their business or property by reason of Daleiden's acts of modifying one ID in his home, acquiring two other IDs, or handing IDs to two fellow investigators.

In *Anza*, this Court reiterated that "a plaintiff may sue under § 1964(c) *only if* the alleged RICO violation"—not other conduct of the defendant or a third party, or any other circumstances—"*was* the proximate cause of the plaintiff's injury." 547 U.S. at 453 (emphasis added). This Court noted that RICO "provides a civil cause of action to persons injured *'by reason of' a defendant's RICO violation*." *Id.* at 456 (emphasis added); *id.* at 457 ("[T]he compensable injury flowing from a violation of that provision 'necessarily is *the harm caused by predicate acts* sufficiently related to constitute a pattern.'") (emphasis added).

Although the alleged predicate offenses in *Anza* (mail and wire fraud) were part of a plan through which the defendants were able to gain market share at the plaintiff's expense, *id.* at 454-55, 457-58, this Court held that the fact that the alleged predicate acts did not *directly* injure the plaintiff in its business or property was fatal to the RICO claim. *Id.* at 461. This Court explained that "[t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) [after failing to charge customers the applicable sales tax] *entirely distinct from* the alleged RICO violation (defrauding the State)." *Id.* at 458 (emphasis added).

"The attenuation between the plaintiff's harms and the claimed RICO violation" meant that the requirement of direct, proximate causation had not been met. *Id.*; *see also Hemi Group*, *LLC v. City of New York*, 559 U.S. 1, 11 (2010) (no RICO liability where "the conduct directly causing the harm was *distinct from* the conduct" making up the RICO predicate acts) (emphasis added).

This Court has made clear that an essential aspect of a RICO claim is the "requirement of directness," *i.e.*, a "'demand for some *direct* relation between the injury asserted and the injurious [racketeering] conduct alleged'" such that "'the link'" between them is not "'too remote.'" *Anza*, 547 U.S. at 457 (citations omitted) (emphasis added); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) ("directness of relationship" is a "central element" of a RICO claim; there must be "some direct relation between the injury asserted and the injurious conduct alleged").

For example, in *Hemi Group*, the plaintiff's RICO theory was "anything but straightforward: Multiple steps . . . separate[d] the alleged [predicate acts] from the asserted injury." 559 U.S. at 15. This Court held that the RICO claim was without merit because the plaintiff's financial loss was not caused "by reason of" the alleged RICO violations; rather, there were *multiple causal steps* between any predicate acts and the acts that directly caused the loss. *Id.* at 4-5, 8. This Court explained that "'[t]he general tendency of the law'—which "applies with full force to proximate cause inquiries under RICO"—"is not to go beyond the first step," and concluded that "[b]ecause the City's

theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement." *Id.* at 10. This Court rejected the plaintiff's attempt to redefine and broaden the alleged RICO violation to encompass related or subsequent acts that were not RICO predicate acts. *Id.* at 13-14.

Here, the Ninth Circuit incorrectly went *well beyond the first step* to tie the ID production and transfer (the alleged predicate acts) to Respondents' eventual expenditure of funds in response to the publication of CMP's videos. As the circuit court itself laid out, Daleiden and others built up the credibility of their pretextual fetal tissue procurement company (BioMax) by first attending conferences that are not the subject of this litigation. App. 15. "Contacts from this meeting vouched for BioMax's *bona fides*, permitting BioMax to register as an exhibitor at the National Abortion Federation ('NAF') 2014 Annual Meeting." App. 15. Daleiden and two others used the false IDs to gain access to the NAF meeting, where they made further contacts with Planned Parenthood personnel. Those contacts eventually led to invitations for BioMax to exhibit at Respondent Planned Parenthood Federation of America (PPFA) conferences, as well as opportunities for one-on-one meetings, both at restaurants and clinics, with several abortion providers. App. 16-17. Daleiden surreptitiously recorded those meetings and, many months later, released recordings of the conversations. The public reacted to what was revealed in the videos, and Planned Parenthood responded by making various expenditures on personal security. App. 16.

Simply recounting this long and undisputed chain of events demonstrates how, rather than being a "proximate" cause, the alleged predicate acts of producing false IDs were extremely *remote* from the claimed damages. The acquisition of IDs was an *early step* in a long series of events that ultimately led Respondents to decide to make various expenditures that they wrongly claimed as RICO damages. The chain of causation here wanders not only through many stages of Defendants' conduct, but also involves the independent, voluntary conduct of third parties, including both Planned Parenthood and members of the public.

To spell out the particulars of just one example: the jury awarded Respondent Planned Parenthood Pasadena San Gabriel Valley (PPPSGV) $9,105 in RICO damages, Verdict, Doc. 1016 at 17, for personal security expenses for Dr. Mary Gatter, who was featured in the second CMP video that was publicly released in July 2015.[9] Neither Dr. Gatter nor anyone else at PPPSGV saw the IDs, was aware of them, or relied on them. Rather, the IDs, produced in 2013, were shown to PPFA staff to gain access to a PPFA conference in October 2014. At that conference, Dr. Deborah Nucatola, whom Daleiden had met at the NAF 2014 Annual Meeting, introduced Daleiden to Dr. Gatter. After the conference, Daleiden e-mailed Dr. Gatter about fetal tissue procurement at PPPSGV. They arranged a lunch meeting, which took place in February 2015. App. 16-17; Trial Tr., Doc. 941 at 2248-58. Five months later, in July 2015, CMP released

[9] The district court trebled those damages under § 1964(c) to $27,315. App. 132; 18 U.S.C. § 1964(c); App. 524.

footage of this meeting. PPPSGV CEO Sheri Bonner reacted by hiring personal security for Dr. Gatter and purchasing a one-year subscription to Reputation.com for Dr. Gatter. Four days later, Bonner discontinued the security detail. *See* Trial Tr., Doc. 907, at 1138, 1141, 1159-61.

The Ninth Circuit's incorrect holding that an alleged predicate act occurring near the *beginning* of this type of long chain-of-events can directly and proximately cause the voluntary expenditures made at the *end* of the series clearly conflicts with the decisions of this Court discussed above. Furthermore, the ruling below conflicts with the decisions of other circuits. *See, e.g., Laydon v. Cooperatieve Rabobank U.A.*, 55 F.4th 86, 100-01 (2nd Cir. 2022) (explaining that, to establish RICO proximate causation, courts rarely go beyond the first step in the causal chain and also concluding that plaintiff's alleged injury did not directly flow from the first step in the causal chain but was several steps removed from the alleged fraud); *Grow Mich., LLC*, 50 F.4th at 594 (explaining that RICO proximate causation requires a direct causal link between the racketeering offense and plaintiff's injuries and noting further that RICO's directness requirement elevates plaintiff's burden by requiring more than showing mere foreseeability); *Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 494 (4th Cir. 2018) (explaining that "RICO causation requires a proximity of statutory violation and injury such that the injury is sequentially the direct result—generally at 'the first step' in the chain of causation").

Moreover, the intervening steps in the chain here involve "entirely distinct" conduct, *Anza*, 547 U.S. at 458, for which Defendants *were found liable* on other claims. The identical damages that the jury awarded under the RICO claim were also awarded variously under the fraud, trespass, unlawful recording, and breach of contract claims. *Compare* Verdict, Doc. 1016 at 17 *with id.* at 1, 3, 6-8, 11, 13, 15, 20, 25, 29, 40. None of these alleged wrongful acts were RICO predicate acts. If, as the jury concluded, the wrongful acts of trespass, breaches of contract, intentional misrepresentations, and/or unlawful recording proximately caused Planned Parenthood's financial injuries, *then the earlier act of producing three IDs could not have directly caused Planned Parenthood these same harms*.

As is clear from the Ninth Circuit's recitation of the facts, the alleged RICO "damages" (upgrade and security expenditures) would not have been incurred had Defendants merely produced IDs, or even at some time shown them to Planned Parenthood personnel, without the subsequent and "entirely distinct" conduct of *entry, misrepresentation, recording, and publication*. It was only through a series of subsequent *non-predicate acts* that Respondents gained any knowledge of, or had any interaction with, those IDs, much less made any expenditures related to Defendants' conduct.

In finding that the "directness" element was met for the RICO claims, the district court adopted but-for causation by calling it a variety of different names, *e.g.*, producing the false IDs was a "crucial act," "a necessary and critical part," and the "crucial

component to achieve their goals." App. 172-73. For the district court, it did not matter how many "stages of defendants' plan" there were between production of the IDs and "achievement of their goal (the surreptitious video recordings)." App. 173. Rather, according to the court, the fact that Defendants would not have achieved their goals but for the production of false IDs meant that the connection between the RICO predicate act and the harm was sufficiently direct. App. 172-73. This ruling, affirmed by the Ninth Circuit, directly contradicts this Court's precedents, as the alleged predicate acts here did not proximately cause injury. *Hemi Group*, 559 U.S. at 9 ("[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense not only was a but for cause of his injury, but was the proximate cause as well.") (simplified).

In sum, as this Court has explained, "[a] RICO plaintiff cannot circumvent the proximate-cause requirement" by asserting that RICO predicate acts bore some causal or schematic relation to *other acts* of the defendant that directly injured plaintiff's business or property, *Anza*, 547 U.S. at 460, but that is what the circuit court wrongly allowed here. *See also Beck v. Prupis*, 529 U.S. 494, 495-96, 505, 507 (2000) (holding that a person injured in his business or property by an act that is *not* a predicate offense has no cause of action under § 1964(c) even when the injury-causing act is a part of the same plan as the RICO predicate acts).

CONCLUSION

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

Respectfully submitted,

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