No. 23-365

In The

SUPREME COURT OF THE UNITED STATES

Medical Marijuana, Inc., *et al.*,

Petitioners,

v.

Douglas J. Horn,

Respondent.

Amicus Brief in Support of Respondent
Petition Improvidently Granted

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Interests of Amicus Curiae, Thomas Fuller Ogden

I know neither party nor have any financial stake in the outcome. I am a member of this Court's bar and, since 2014, recognized by the California bar as one of less than 200 lawyers designated Certified Appellate Law Specialist. I have been involved in numerous federal appellate matters, including ones involving Civil RICO.[1]

Summary of Argument

The 2nd Cir. creates a new paradigm in RICO by acknowledging the obvious, through Clayton Act analogy, that "business" and "property" are separate and independent terms. The 2nd Cir.'s opinion strictly regards an antecedent personal injury applicable to "business." Petitioner's authorities, however, involve antecedent personal injuries applicable to "property." A DIG seems proper here as no split exists, and this is not a recurring issue as this is the first occurrence. Respondent's opposition to cert., furthermore, was articulated differently.

Argument.

Noting "business or property" is disjunctive, the 2nd Cir. hair-splits what RICO's "business" term means. The 2nd Cir. concludes, via Clayton Act analogy, the terms are separate and do not modify the other. *Horn*, 135-37. The 2nd Cir. nowhere parses what "property" means like it did with "business."

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from Thomas Fuller Ogden, made any monetary contribution intended to fund the preparation or submission of this brief.

The thought of "property" was not important in *Horn*.

The granular approach on the "business" term is unusual as all of petitioner's supposed split-authorities conflate "business or property" into effectively a single elemental RICO injury term that nowhere suggests "business" and "property" are different. It seems RICO's vernacular has evolved in a way that "business or property" is the customary way to refer to injury. Note that *Horn* still concludes, at p. 142, stating "[RICO] does not bar…suing for injuries to business **or property** simply because those injuries flow from…an antecedent personal injury." Given *Horn's* in-depth analysis only dealt with "business," the reference to "property" should properly be read as *dicta* in *Horn*. The 2nd Cir.'s opinion should be narrowly read that *Horn's* unique facts implicate injury to "business" and not "business or property," and that "business" is not the same as "property."

Petitioner's split-authorities also assess injury under the conflated "business or property" term. But, on closer inspection, all RICO injury analysis in the split-authorities occur through the prism of "property" as defined by state law despite those opinions referring to "business or property" in the vernacular way. None of those cases express any indication, like *Horn*, that "business or property" are actually separate and independent RICO gateway injuries.

Whether or not the 2nd Cir. is correct that "business" is not exactly the same as "property" is

besides the point. What's important is the 2nd Cir. places RICO on a new plane as *Horn* traverses RICO's injury element via the "business" gateway, while every split-authority petitioner identifies traverses it through the "property" gateway.

Petitioner claims *Jackson v. Sedgwick*, 731 F. 3d 556 (6th Cir. 2013) conflicts. It does not as *Jackson* involved plaintiffs' allegations conduct during a worker's comp. proceeding diminished the value of essentially a judicial/quasi-judicial judgment. A "property" injury was at-issue in *Jackson* as judgments are property.

Petitioner next claims *Evans v. City of Chicago*, 434 F.3d 916, (7th Cir. 2006) conflicts. It does not as the "property" gateway was in-play. ("Illinois law also does not recognize the right to seek out employment opportunities as a cognizable property right." *Id.*, 929.) Interestingly, Petitioner's claim *Diaz v. Gates*, 420 F. 3d 897 (9th Cir. 2005) somehow conflicts with cases like *Evans* is peculiar. Both *Diaz* and *Evans* regard RICO's "property" gateway. However, Plaintiff Diaz, unlike plaintiff Evans, had state-law recognized "property" supporting his RICO injury. ("Diaz alleges that his lost employment is an injury to a property interest as defined by state law." *Diaz*, fn. 2)

Petitioner then claims *Doe v. Roe*, 958 F. 2d 763 (7th Cir. 1992) conflicts. It does not as Doe's RICO claim was grounded in two specific theories of injury to "property." ("Doe concludes that the district court erroneously determined that she suffered no property deprivation." *Id.*, at 768.) *Doe*,

moreover, is dubious authority to claim a split as *Horn* concerns lawful "business." *Doe* concerns whether criminal conduct can create a "property" interest under state law. ("[Doe's] "sexual labor" has no legal value in Illinois, where the courts have long held that contracts [i.e., property] for sexual services are unenforceable..." *Id.* at 769.)

Petitioner incorrectly claims *Ryder v. Hyles*, 27 F. 4th 1253 (7th Cir. 2022), creates a split. ("Ryder and Lee… claim[] they have suffered two injuries to identifiable **property** ..." *Id.*, at 1257, my emphasis.)

Grogan v. Platt, 835 F.2d 844 (11th Cir. 1988), also does not work. *Diaz* observes:

> The Eleventh Circuit does not tell us how the claim for lost employment opportunities was raised in *Grogan…* Grogan, unlike Diaz, failed to allege a right to employment that was recognized as property under state law… the Eleventh Circuit does not expressly address the situation where a plaintiff actually alleges a state-protected property interest, as Diaz does here. 420 F. 3d 897, fn. 2.

Diaz's critique is amplified even by *Grogan as* "appellants argue …a common-sense interpretation of the words "business or property." *Grogan*, at 847. Appellants, seemingly, did not present robust argument to the 11th Cir., choosing, instead, to present "common-sense." Nonetheless, even if the matter was adequately presented, *Grogan* would clearly be based on RICO's "property," and not "business," gateway. The *Diaz* dissent, at 913, notes

"the majority should concede [regarding *Grogan*] that FBI employment would qualify as a state-protected property interest."

Petitioner's reliance on *Pilkington v. United Airlines*, 112 F. 3d 1532 (11th Cir. 1997) as a split-authority is dubious. *Pilkington* is simply *Grogan's* divided-cell progeny sharing the same DNA. It simply cites *Grogan* for a basic point authority that personal injuries are not injuries to "business or property." *Pilkington*, 1536. *Pilkington* nowhere engages in nuanced analysis that "business" and "property" are separate gateways for RICO injuries. *Pilkington* nowhere indicates analysis of injury is done by something other than analysis via the "property" gateway.

Finally, *Blevins v. Aksut*, 849 F. 3d 1016, 1021 (11th Cir. 2017), though suggested in the cert. petition, at 14, as creating conflict, involves a "property" gateway injury. ("In the context of unnecessary medical treatment, payment for the treatment may constitute an injury to property.")

Conclusion

The cert. petition, at 16, states:

> Legions of commentators acknowledge that the "circuits are currently split as to whether civil RICO grants standing to those who have suffered a property harm derived from a personal injury."

The cert. petition is confusing and not squarely presented as *Horn's* RICO injury traversed the "business," and not the "property," gateway. Accordingly, *Horn* is not part of any split concerning

property harm from personal injury. *Horn*, currently, stands alone as a business harm derived from a personal injury. *Horn* is not in conflict with any other circuit. As *Horn* seemingly is RICO's first business harm connected to an antecedent personal injury, in 50+ years *Horn* does not encapsulate an important recurring question. The cert. petition was improvidently granted and the Court should give some leeway to allow this "business" gateway to develop more. But, to suggest *Horn* somehow conflicts as a "property" gateway matter misses *Horn's* nuanced and sophisticated analysis.

Respectfully Submitted,

Thomas Ogden, Esq.