No. 23-365

IN THE

Supreme Court of the United States

MEDICAL MARIJUANA, INC., ET AL.,
Petitioners,

v.

DOUGLAS J. HORN,
Respondent.

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

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

LORI ANDRUS
President
AMERICAN ASSOCIATION FOR JUSTICE
JEFFREY R. WHITE
Sr. Assoc. Gen. Counsel
777 6th Street NW, #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

ROBERT S. PECK
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1901 Connecticut Ave. NW, Suite 1101
Washington, DC 20009
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that Petitioners have advanced a theory that would limit the availability of civil RICO by reading into the statute a rule without textual support. Equally problematic is Petitioners' failure to appreciate that those seeking compensation often present with multiple injuries. The existence of a preexisting or concurrent injury, however, does not change the calculus about when a business injury remains compensable through civil RICO. RICO's requirement of an injury to business or property is not altered or abridged if a plaintiff also has a personal injury that is not pleaded as a RICO claim. AAJ files this brief to

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

highlight these concerns, anchored in text, precedent, and the reality of how injuries occur.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plain language of 18 U.S.C. § 1964(c), which provides the operative language for a civil RICO claim, authorizes a cause of action and remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962." It does not exclude from that cause of action those with qualifying business or property injuries even if they may have suffered a personal injury from the same nucleus of operative facts as long as their concurrent personal injury is not part of their civil RICO claim. Instead, § 1964(c) straightforwardly provides a cause of action for a qualifying injury, regardless of other claims they may or may not have. Mr. Horn's injury plainly qualifies for a civil RICO claim because it is incontrovertible that he has suffered a business injury that flowed directly from the predicate acts' direct impact on his ability to pursue his profession and continue in this employment.

A plain reading of civil RICO's text and Congress's instruction to read it broadly confirm the propriety of Horn's business injury claim. The Petitioners' actions comprise precisely the type of misconduct that Congress intended to reach in enacting civil RICO. Congress purposely excluded any text that would exempt those activities when they may also have caused a personal injury.

At bottom, this case requires this Court to determine a simple issue that it has answered before:

whether the plain language of the statute answers the question presented. Here, the answer is yes. The text makes that clear and provides no reason to go beyond a review of the plain language. Moreover, in the case of civil RICO, a purely textual approach accords with legislative intent and the concerns that animated passage of the statute.

Moreover, this Court should reject Petitioners' conceit, by which they seek to transmogrify Horn's claim into a personal injury. Instead, at this stage of the litigation, it must accept Horn's well-pleaded allegations as constituting the basis for his claim, for it meets all the requisite elements of such a cause of action. This Court should also reject Petitioners' related attempt to treat Horn's business injury in the form of his job loss as "damages," a label that is insensible and is asserted only to avoid their civil RICO liability. Horn has not claimed personal injuries from ingestion of Petitioners' product; nor is his business injury derivative of a personal injury so as to break the chain of causation. Moreover, this Court's precedents support treating Horn's loss of employment as a direct injury that flows from the identified predicate acts that make this a legitimate civil RICO claim.

To the extent that Petitioners invite this Court to superimpose additional limits upon the statutory language and assert policy justifications for doing so, they have petitioned the wrong branch of government. Our constitutional system assigns Congress with the policymaking function in our government. As this Court has recognized, its role is to follow the policy Congress has prescribed. There is no room for judicial amendment of statutory language, regardless of the rationale

behind it. Therefore, this Court should affirm the Second Circuit's decision.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE REACHES HORN'S ALLEGED INJURY.

A. As with Every Statute, Civil RICO Should Be Understood by Examining Its Text.

This case requires nothing more than a straightforward application of the statutory text. When embarking on the interpretative task, the "starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). To that end, the words of a statute are read "in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)). This Court sometimes describes that task as an effort to discern legislative intent. *See, e.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Still, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

Because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992), it follows that a statute's "legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S.

1, 9 (1962). Put differently, the text supplies the best evidence of legislative intent. *W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991); *see also Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) ("[T]he text of a law controls over purported legislative intentions unmoored from any statutory text."); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent . . . is the existing statutory text") (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)).

Where, as here, the text is clear, this Court "must enforce plain and unambiguous statutory language according to its terms," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010), which "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also Rotkiske v. Klemm*, 589 U.S. 8, 13 (2019) ("If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last."). An application of these principles leads inexorably to the conclusion that Horn's claim fits within the ambit of civil RICO.

B. By Its Plain Terms, Civil RICO Includes Horn's Claim.

The plain language of 18 U.S.C. § 1964(c) provides a cause of action and remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962." No party questions that the statutory text establishes a cause of action and remedy for injuries to a person's business or property. And no party questions this Court's reading of those words to hold, by implication from its exclusion, that the enactment

necessarily "cabin[ed] RICO's private cause of action to particular kinds of injury—excluding, for example, personal injuries." *RJR Nabisco v. Eur. Cmty.*, 579 U.S. 325, 350 (2016).

The text of § 1964(c) constitutes a broad authorization for causes of action that arise from injury to business or property, sufficient to confer standing to qualifying plaintiffs. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). It "is to be read broadly" with an eye toward "effectuat[ing] its remedial purposes." *Id.* at 497, 498 (quoting Pub. L. 91-452, § 904(a), 84 Stat. 941, 947 (1970)).

Horn's allegations fit comfortably within 18 U.S.C. § 1964(c). The statutory language, requiring a business or property injury by reason of predicate acts, were fully met. Consider the underlying facts. Horn was seriously injured in an accident in February 2012. Pet. App. 4a. He has made no claims related to these injuries or this incident, which are accurately described as personal injuries.

After a period of healing and rehabilitation, Horn was able to return to work as a truck driver, his profession of twenty-nine years, while making use of various types of relief from the lingering pain he suffered. Pet. App. 2a, 4a; JA 3–4, 60, 68. He understood that his job, hauling "high-value, high-risk loads such as 'expedited food, pharmaceuticals and liquid chemicals,'" required him to be tested for drug use periodically, and that a positive test would disqualify him from continuing in his profession under rules promulgated by the United States Department of Transportation. BIO 5; Pet. App. 5a.

Seven months after his accident, Horn happened upon an advertisement for Dixie X, a cannabidiol (CBD) product offered by Petitioners that promised significant pain relief while containing "0% THC" (Delta-9-tetrahydrocannabinol). Pet. App. 4a. Horn diligently researched the product and separately received assurances from Dixie's customer-service representatives that Dixie X did not contain THC. *Id.* at 5a. He subsequently failed his employer's random drug test and a subsequent test, resulting in his firing. *Id.* at 5a. His "termination cost him current and future wages, as well as his insurance and pension benefits." *Id.* at 10a. Suspecting that Dixie X was the culprit, he purchased more Dixie X and sent it to an independent laboratory for testing, which confirmed the product contained THC. *Id.* at 6a.

Horn's subsequent lawsuit contained allegations under civil RICO that relevantly focused on allegations of mail and wire fraud, 18 U.S.C. §§ 1341, 1343, and other unlawful activities, 18 U.S.C. § 1957, which are predicate acts under RICO, 18 U.S.C. § 1962(d). *See* Pet. App. 6a. His alleged injury, the loss of his job and ability to continue to engage in his profession, was a business injury that qualifies for the relief that civil RICO establishes.

As required by the text of 18 U.S.C. § 1964(c), he alleged: (1) a business injury; (2) by reason of; and (3) a qualifying predicate act. That was all he was required to do to survive Petitioners' opposition, as the court below held. *See* Pet. App. 7a–8a.

The Second Circuit devoted considerable space to explaining why Horn's injury qualified as a business injury, a holding that Petitioners do not contest here.

Still, it is useful to explain briefly why there is no error in that holding, as it undermines the distinction that Petitioners seek to draw here.

Civil RICO does not define what constitutes a "business injury." When Congress does not supply a definition, this Court considers the statutory term's ordinary meaning, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011), because it is fair to "assum[e] that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

In addressing this question, the Second Circuit followed this Court's recent decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537 (2021) (citation omitted), for its guidance that it should "apply the ordinary meaning of its terms at the time of their adoption." Pet. App. 8a. It noted that contemporaneous to § 1964(c)'s codification, the dictionary definition of business "embraced concepts like 'employment, occupation, or profession engaged in for gain or livelihood,' and 'commercial or industrial establishment or enterprise.'" *Id.* at 9a (quoting *Business*, Black's Law Dictionary (4th ed. 1968)).

The Second Circuit also consulted a standard dictionary to find that it included "commercial or mercantile activity customarily engaged in as a means of livelihood and typically involving some independence of judgment and power of decision," and as "a commercial or industrial enterprise." *Id.* at 9a–10a (quoting Webster's Third New Int'l Dictionary 302 (1971) (cleaned

up)). The court also found comfort in this Court's explanation of the Tariff Act of 1909 that business is a "very comprehensive term and embraces everything about which a person can be employed." *Id.* at 9a (quoting *Flint v. Stone Tracy Co.*, 220 U.S. 107, 171 (1911) (cleaned up)).

Judges generally agree. For example, in the Ninth Circuit, one judge explained that the "distinction between 'business' and employment is so tenuous and uncertain that it is hard to see why we should attribute to Congress a purpose of making it, especially since they did not make it expressly." *Diaz v. Gates*, 420 F.3d 897, 906 (9th Cir. 2005) (en banc) (Kleinfeld, J., concurring).

Although Petitioners interpose a Sixth Circuit decision to assert a different analysis, the case is inapposite. In *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556 (6th Cir. 2013) (en banc), cited in Pet. Br. 25, 35, the "plaintiffs claim[ed] that they were legally entitled to receive certain benefits mandated by statute *as a consequence* of their personal injuries, and that they received less than they were entitled to under that system because of the defendants' racketeering conduct." 731 F.3d at 566. Plainly, the RICO violations that constituted the predicate acts were a response to the personal injury, not to any independent actions that caused the RICO-qualifying injury, as here.

Further support can be found in our antitrust laws, which are relevant because Congress patterned "RICO's civil enforcement provision on the Clayton Act." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152 (1987); *see also Holmes v. Sec.*

Inv. Prot. Corp., 503 U.S. 258, 267 (1992) ("Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws."). Indeed, *Holmes* further cemented the connection when it quoted "§ 4 of the Clayton Act . . . [which] reads in relevant part that

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. (quoting 15 U.S.C. § 15).

That provision authorizes the recovery of treble damages by any person who is injured in his "business" or "property" by reason of anything forbidden by the antitrust laws. Civil RICO authorizes the recovery of treble damages by any person who is injured in his "business" or "property" by reason of certain predicate acts. 18 U.S.C. § 1964(c). Both statutes therefore contain identical remedies for injuries to business or property. And "[b]oth statutes share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices." *Rotella v. Wood*, 528 U.S. 549, 557 (2000); *cf. Sedima*, 473 U.S. at 498 (emphasizing that RICO's "'remedial purposes' are nowhere more evident than in the provision of a private right of action").

Because civil RICO was modeled on the Clayton Act, harm that it treats as a business injury consti-

tutes injury under civil RICO as well. Thus, it is significant that "[l]oss of employment may be an injury to business or property within the meaning of Section 4 of the Clayton Act." *Kinzler v. New York Stock Exch.*, 62 F.R.D. 196, 200 (S.D.N.Y. 1974). Cases applying that approach are legion. *See, e.g.*, *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 744 (9th Cir. 1984), *cert. dismissed at request of parties*, 469 U.S. 1200 (1985) (holding that an employee subjected to retaliatory discharge for refusing to cooperate with a price-fixing conspiracy in violation of the Sherman Act has standing under § 4 of the Clayton Act); *Dailey v. Quality Sch. Plan, Inc.*, 380 F.2d 484, 487 (5th Cir. 1967) (holding that "agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public"); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 336 (7th Cir. 1967) (holding a former sales supervisor of an acquired corporation had a qualifying business injury from loss of employment in connection with an alleged conspiracy to restrain interstate commerce); *Vines v. Gen. Outdoor Advert. Co.*, 171 F.2d 487, 491 (2d Cir. 1948) (holding a sales employee could have valid Clayton Act claim if he could show that defendant deprived him of an opportunity to earn by shifting a potential customer to another firm pursuant to an agreement that violated the antitrust laws).

The bottom line is that loss of employment can be a business injury under the Clayton Act. It then follows, *a fortiori*, that loss of employment can also be a business injury for purposes of civil RICO.

II. PETITIONERS' ATTEMPT TO RECAST HORN'S INJURY IS UNAVAILING.

Petitioners seek to avoid the straightforward application of 18 U.S.C. § 1964(c) by transmogrifying Horn's injury into the personal-injury category and thus outside the coverage of civil RICO. They assert that Horn's injury was the "unwitting ingestion of THC." Pet. Br. 14; *see also id.* at 20 (calling Horn's ingesting "an unwanted substance (THC)" a "quintessential personal injury"). It accuses Horn of "semantic legerdemain" and "repackag[ing] a tort case" as a civil RICO case. *Id.* at 14. It further asserts that because "where the injury arose," is what counts, it treats Horn's job loss as though it were damages suffered from the ingestion. *Id.* at 16 (quoting *Yegiazaryan v. Smagin*, 599 U.S. 533, 545 (2023)).

This Court should reject Petitioners' conceit for two essential reasons. First, Horn made no civil RICO claim for any injury to his body from ingestion of THC. Instead, he made a claim for job loss, a well-accepted business injury, that flowed directly from Petitioners' misrepresentation of the chemical content of its product and the resultant destruction of Horn's professional standing and his employment. That is a purely economic injury of the kind that RICO is designed to remedy. *Agency Holding*, 483 U.S. at 151.

Second, in making the argument, Petitioners conflate injury with damages. They treat Horn's job loss as the damage, but it is indisputably an injury that warrants the award of damages.

A. Petitioners Cannot Redefine Horn's Claim.

Petitioners assert that Horn's injury is not what he pleaded as the basis for his civil RICO claim but something else—the ingestion of an unwanted substance. Pet. Br. 20. In redefining the complained-of injury, Petitioners seek to put the cause of action outside of civil RICO's reach. One problem with Petitioners' approach is that a plaintiff is the "master of the claim," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), or as it is sometimes put, "master of the complaint." *Holmes*, 503 U.S. at 831; *see also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.) ("Of course, the party who brings a suit is master to decide what law he will rely upon."). A plaintiff's authority over the complaint and its claims means that the plaintiff chooses what causes of action to bring and which to allow to lie fallow. *Caterpillar*, 482 U.S. at 398–99.

Just as "he or she may avoid federal jurisdiction by exclusive reliance on state law," *id.* at 392, he or she may avoid and choose the claims to be made in order to litigate a cause of action under a particular federal law. And, just as a "*defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated," *id.* at 399, Petitioners cannot recast Horn's injury to render it an ineligible personal injury. As *Caterpillar* observed, rather than be the master of the complaint, "[i]f a defendant could do so, the plaintiff would be master of nothing." *Id.*

It is possible that Petitioners might seek to justify their own attempt at "semantic legerdemain" by casting Horn's allegations as a form of artful pleading. The artful pleading doctrine applies when a plaintiff purposely avoids a necessary and unavoidable federal question to defeat removal. *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998). It does not apply here. It is not as though Horn has failed to disclose necessary facts. It is not as though Horn's injury in the form of loss of his profession and employment does not stand as an independent injury. Instead, the claim made by Petitioners is that there are different allegations Horn might have made that would have foreclosed pleading a civil RICO claim. This Court rejected a substantially similar argument in *Caterpillar* and should do so here as well.

In *Caterpillar*, this Court found that the defendant had

> impermissibly attempt[ed] to create the prerequisites to removal by ignoring the set of facts (*i.e.,* the individual employment contracts) presented by respondents, along with their legal characterization of those facts, and arguing that there are different facts respondents might have alleged that would have constituted a federal claim.

Caterpillar, 482 U.S. at 397. It concluded that the "'artful pleading' doctrine cannot be invoked in such circumstances." *Id.* (footnote omitted).

While, as *amicus* has demonstrated, the loss of employment equally meets the requirements of civil

RICO and the Clayton Act's business-injury requirement, *see supra* Part I.B., the ingestion of an unwanted substance as an injury can be eschewed and may not cause a cognizable injury until it manifests in some harmful way. *See, e.g.*, *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 112 (D.C. Cir. 1982) (holding that ingestion of asbestos particles is not actionable until each separate and distinct disease it caused becomes manifest); *Hamilton v. Asbestos Corp.*, 998 P.2d 403, 409 (2000) (holding that for latent diseases, such as asbestos-related diseases, the cause of action does not accrue until the occurrence of a disability or proves symptomatic).

Petitioners' preferred claim based on ingesting an unwanted substance caused no illness in Horn or provided no distinct and sufficiently ripe injury of its own, rendering it not an actionable injury. Horn's loss of employment, however, *was* an actionable direct injury.

B. Petitioners Conflate Injury with Damages.

Although Petitioners accuse Horn of conflating injury with damages, it is *Petitioners* who do so. Pet. Br. 23 (saying that Horn "confuses the operative injury with the ensuing *damages*"). In their unanchored view, Horn's loss of employment constitutes damages because it results in the loss of past and future wages. *Id.* Damages, however, have a clear meaning. When RICO was enacted in 1970, Black's Law Dictionary defined "actual damages" as "the amount awarded to a complainant in compensation for his actual and real

loss or injury" and as "[s]ynonymous with 'compensatory damages.'" *Actual Damages*, Black's Law Dictionary (4th ed. 1968). Consistently with that definition, the Internal Revenue Service has long defined "damages" as "an amount received (other than workers' compensation) through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution." 26 C.F.R. § 1.104-1(c) (2012); *see also United States v. Burke*, 504 U.S. 229, 253 (1992) (citing the 1991 version of the regulation, which defined damages the same way although specifying that it was for a "legal suit or action based *upon tort or tort type rights*") (quoting 26 CFR § 1.104-1(c) (1991)) (emphasis added by court).

Loss of employment is a cognizable *injury*. *See, e.g.*, *Dailey*, 380 F.2d at 487, and cases cited *supra* pp. 14–15. The *damages* that flow from that injury depend on proof of current and future wages, the amount of which are intended to compensate the plaintiff. Those damages will vary depending on the job loss and the length of time that applies. The loss itself is not the damage. In *Sedima*, this Court made clear that Petitioners' formulation fails. It held that the compensable *injury* "necessarily is the harm caused by predicate acts." 473 U.S. at 497. Here, the harm or injury is the loss of employment, which was caused by Petitioners' false representations about the THC content of their product. It is then Petitioners, rather than Horn, who has engaged in what Petitioners assert is "semantic legerdemain" and "repackag[ing]." *See* Pet. Br. 14.

By conflating the injury and damage, Petitioners seem to instead raise an issue of causation, that is, whether the predicate acts are sufficiently part of the

causal chain to satisfy RICO's proximate cause requirement. That, however, is a separate question, answered in the next section of this brief.

III. PETITIONERS RAISE A CAUSATION ISSUE THAT LACKS MERIT.

Petitioners make the assertion that the "conduct directly responsible for [Horn's] harm" was his employer's decision to fire him, not petitioners' alleged mislabeling of a CBD supplement." Pet. Br. 31 (suggesting the issue is similar to what this Court addressed in *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 11 (2010)). Somewhat differently, but still connected to the causation issue, the district court ruled that Horn's lost earnings "flow[] from, and [are] derivative of, a personal injury," bodily absorption of THC, although it used that determination to question whether a recoverable business injury existed. Pet. App. 41a. Either view, however, lacks merit.

Civil RICO requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. The connection here satisfies that proximate-cause requirement. It is not attenuated or speculative in the sense that this Court identified in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459 (2006). Nor is it remote in the way that this Court found disqualifying in *Hemi Group*.

In *Anza*, an entrepreneur sued a competitor under civil RICO, alleging that the competitor's failure to pay sales taxes and its fraudulent sales tax reports allowed it to undercut the plaintiff's prices and create a competitive advantage. This Court, however, found

that the fraud was committed against the State, which lost sales tax revenue, while the harm suffered by the RICO plaintiff, consisting of lost sales, which was indirect and speculative because of the difficulty of ascertaining which losses were attributable to the competitor's decreased prices and the extent to which the competitor reduced its prices because of its sales tax savings. *Id.* at 458–59. This Court also suggested that the plaintiff's lost sales "could have resulted from factors other than petitioners' alleged acts of fraud." *Id.* at 459. It was these "discontinuit[ies] between the RICO violation and the asserted injury" that doomed the cause of action. *Id.*

Unlike in *Anza*, Petitioners' fraud was committed against Horn, not a third party, and there was no discontinuity between it and his business injury.

Horn's injury is also not too remote as was the case in *Hemi Group*. There, New York City sued an online cigarette retailer for lost tax revenue. Under the City's tax scheme, residents who purchased cigarettes were responsible for paying tax for the *possession* of cigarettes, rather than for the purchase. The seller, Hemi, was only responsible under federal law for filing reports with the State of New York that provided information about the customers it served. New York City charged that Hemi's failure to file those reports with the State were predicate offenses that made the City's tax collection efforts impossible. 559 U.S. at 5–7.

This Court disagreed and found the City could not satisfy RICO's causation requirement because the

causal chain required the inclusion of actions too remote and attenuated to provide a direct effect. As in *Anza*, New York City's fraud claim was on behalf of a third party, the State, which is where the customer information reports were to be filed. *Id.* at 11. The unavailability of the reports, which the City intended to use to track down tax truants, enabled a fourth party, cigarette purchasers, to avoid the tax. *Id.* Essentially, too many others were involved to make treat causation as direct. This Court noted that an additional consideration was whether there was a better party to sue, which in this case it found was the State, which had its own cigarette tax that was being evaded. *Id*. at 12. The State's interest was more direct.

Here, no better plaintiff exists for the harm caused than Horn. Did Petitioners' false claims cause Horn's job loss? The answer, at least at this stage of the litigation, is unquestionably "yes". Horn took every logical step to assure himself that Petitioners were providing truthful information about the contents of their product. Their false representation on that led him to use it and, had its representation been truthful, would not have affected his ability to continue in his job. Its falsity, however, caused him to fail the drug test that resulted in loss of his job.

The causal chain here fits well within the type discussed and approved by this Court in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). In that case, Static Control sued Lexmark for a deceptive practice under the Lanham Act because Lexmark told its customers to return, ra-

ther than sell ink cartridges after use in order to prevent competitors from enticing customers to purchase from them by refilling empty cartridges and offering them for sale. Static Control, however, was neither a customer of nor a competitor with Lexmark. Instead, it made a component part, a computer chip, that allowed competitors to render the refurbished cartridges useable. If the competitors could not obtain the used cartridges, then Static Control's sales would dry up. Because its causal connection was seemingly far down the stream of commerce, Lexmark asserted that Static Control's effect was too remote. *Id.* at 120–23.

This Court recognized that the Lanham Act, like civil RICO here, had direct causation requirements, but held they were met even though the injury was not a literal "first step" in the causal chain. *Id.* at 139 (citations omitted). What counted was that liability in that case aligned with statutory purposes and that there was no "discontinuity" between the wrongful conduct and the injury. *Id.* at 140. That finding of continuity was informed by the existence of "something very close to a 1:1 relationship" between the false advertising at issue (the requirement to return cartridges) in that case and the harm it caused to Static Control's business (thinning out its customers). *Id.* at 139. Every cartridge returned to Lexmark under its false requirement became unavailable for the computer chip that Static Control manufactured. And no intervening third party was better situated to sue.

That same type of connection exists here between the false advertising that constituted Petitioners' predicate acts and Horn's job loss, for there is no discontinuity, no third party involved, and close to a 1:1

relationship between the false advertising and Horn's injury. Proximate cause, at least at this stage of the litigation, is satisfied.

IV. CIVIL RICO'S STATUTORY TEXT LEAVES NO ROOM FOR PETITIONERS' EXTRA-TEXTUAL APPROACH OR POLICY ARGUMENTS.

A. As in *Sedima*, This Court Should Reject an Invitation to Limit the Scope of Civil RICO Beyond Its Plain Text.

Petitioners assert that affirming the Second Circuit in this case will result in an expansion of civil RICO lawsuits that Congress never intended to encourage. Pet. Br. 14 (speculating that "innumerable plaintiffs could repackage innumerable state tort cases" if the Second Circuit is affirmed). Petitioners demonstrate no basis in text or otherwise to assign that intention to Congress. Instead, "RICO is to be read broadly." *Sedima*, 473 U.S. at 497. Congress "self-consciously [chose] expansive language." *Id.* And to make that purpose abundantly clear, it included an "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Id.* (quoting § 904(a), 84 Stat. at 947).

Petitioners' plea that this Court rewrite the statute mirrors a similar entreaty rejected in *Sedima*. There, this Court spurned the circuit court's atextual attempt to confine the reach of civil RICO for the same reason Petitioners argue here; that is, to avoid a proliferation of civil RICO litigation. *Id.* at 488–90. In *Sedima*, it was the Second Circuit that expressed its

"distress at the 'extraordinary, if not outrageous,' uses to which civil RICO has been put." *Id.* at 499. This Court reacted to that characterization by saying the uses were consistent with the congressional design, which established the "breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud." *Id.* at 500.

Consistent with that ruling, this Court should reject the current invitation to revise the statute to limit its reach. Petitioners' "[p]olicy arguments are properly addressed to Congress, not this Court," because "[i]t is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018).

Because Horn has pleaded a qualifying business injury, the loss of his employment, based on properly pleaded predicate acts, and sought a remedy addressed solely to that injury, Congress's prescribed policy here is clear: civil RICO supplies a cause of action and a remedy. No language indicates a congressional purpose to withdraw eligibility for a civil RICO lawsuit if the business injury was somehow tangentially related to an earlier personal injury that manifested itself at the same time as Horn's business injury. *Cf.* Pet. App. 3a ("[N]othing in § 1964(c)'s text, or RICO's structure or history, supports an amorphous RICO standing rule that bars plaintiffs from suing simply because their otherwise recoverable economic losses happen to have been connected to or flowed from a non-recoverable personal injury").

After all, this Court has admonished litigants that "it cannot limit a cause of action that Congress has created merely because 'prudence' dictates.'" *Lexmark*, 572 U.S. at 128. Nor can it engage in the fundamentally legislative act of limiting a statute's reach when there exists "no justification in the statutory language" or the Court's precedents for such a limitation. *Oncale*, 523 U.S. at 79.

Notably, Horn's claimed injury is not about an adverse bodily reaction to the CBD product he purchased. If it were, that certainly would be a personal injury. His claim is that by misrepresenting the content of their product, Petitioners foreseeably and directly injured him in his profession and his employment. By including an ingredient that they calculatedly declared was 100-percent absent, they lured Horn into purchasing and using the product so that, when drug tested, he would lose his profession and his job, thereby creating a cognizable business injury. They fully understood that it would be used by those who faced adverse consequences for ingesting any amount of THC and would be attracted to their product because of the false claim that it was 100-pecent THC-free.

Even if, *arguendo*, there were some relationship between Petitioners' identified personal injury (ingesting an unwanted substance) and Horn's legitimate business injury, civil RICO contains no language that would exclude the business injury from its ambit simply because that injury emerges from a common nucleus of operative facts. In fact, the statute contains no language that excludes a business injury for a

plaintiff who has either a preexisting or concurrent personal injury.

Consider this scenario that unquestionably fits Congress's vision for civil RICO. Imagine persons engaged in a protection racket rough up a restaurant owner for failing to pay his tribute. The owner is knocked out. While unconscious and because he could not attend to the ovens, they catch fire and burn the restaurant down. Even if the owner awakes in time to avoid being killed in the fire, he would have a personal injury from the beating, which would have a causal link to the business and property injuries that put the store out of business. Yet, Congress's clear and explicit intention that RICO "be liberally construed to effectuate its remedial purposes," § 904(a), 84 Stat. at 947, supports the owner's civil RICO claim for the consequential damages of his loss of business and property, even if he cannot make a civil RICO claim for his personal injuries that precipitated the RICO injury. The personal injuries he suffered do not cancel out his civil RICO claims, even though it might be asserted that the nature of his injury was a contributing cause of his subsequent business and property loss.

The connection between Petitioners' view of a personal injury and Horn's business injury is actually more attenuated than the hypothetical just described. Horn's business injury flows directly from Petitioners' misrepresentation of its product's THC content. Without it, Horn's employment would have remained unaffected. The ingestion of THC, undiscovered *until after he lost his job*, is, if anything, a separate injury, even

if had not yet accrued, that is, at best, concurrent with his business injury.

The inescapable conclusion is that, by its terms, civil RICO still straightforwardly provides a cause of action for the qualifying business and property injuries, both in the hypothetical and under the facts of Horn's allegations. Horn's business injury plainly qualifies, regardless of whether he also suffered a personal injury, because the statute was "designed to remedy economic injury" resulting from predicate acts. *Agency Holding*, 483 U.S. at 151.

In *Sedima*, this Court was asked to require a criminal conviction as a prerequisite to a civil RICO action. Instead, it held that the "language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction." 473 U.S. at 488. By the same token, its text gives no obvious indication that a civil action for a business injury cannot proceed if it was preceded by or occurred concurrently with a personal injury that forms no part of the prayed-for RICO damages.

Horn meets the elements for a civil RICO claim. *Sedima* confirms that "the statute requires no more than this." *Id.* at 497; *see also id.* at 480 ("Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.").

B. Petitioners Wrongly Suggest That Plaintiffs Will Use Civil RICO to Avoid an Imaginary State Hostility to Personal Injury Actions.

Petitioners wrongly invoke various state laws, claiming that "States do not universally welcome personal-injury lawsuits," Pet. Br. 30, as additional reasons to cabin RICO lawsuits, suggesting that RICO would provide a basis for suit that no longer exists or is otherwise limited under state law. That assertion makes no sense.

Petitioners point to the existence of statutes of repose in products liability cases because they limit causes of action after a fixed period of time as a prime example of why plaintiffs would prefer RICO. Pet. Br. 30. However, statutes of repose applicable to products cases are lengthier than the statutes of limitations applicable in civil RICO. Typically, a statute of repose places a time limit based on a legislative judgment about the "useful life" of a product. *See, e.g.*, Kan. Stat. Ann. § 60-3303 (establishing a "useful life ten-year statute of repose," with exceptions for latent diseases and manufacturer warranties that go beyond ten years); Conn. Gen. Stat. § 52-577a(a) (establishing a ten-year statute of repose unless the product had a longer useful life); Wash. Rev. Code § 7.72.060(2) (creating a presumption that a product has a useful life of twelve years). In contrast to those decade-long or longer time periods, this Court has applied the Clayton Act's four-year statute of limitations to civil RICO actions. *Agency Holding*, 483 U.S. at 156. RICO's

shorter statute of limitations provides no rational basis to believe statutes of repose would encourage plaintiffs to avoid state tort law as too limiting.

Similarly unavailing is Petitioners' claim that some states have limited joint and several liability. Pet. Br. 30. Petitioners presume that plaintiffs would rather utilize that common-law doctrine through RICO than bring a state tort action. Yet, if that were true, there would be existing evidence of that phenomenon today. The shift in state statutes away from pure joint and several liability took place in the 1980s and early 1990s. *See* Restatement (Third) of Torts: Apportionment of Liability, § B18 cmt. a, reporters' note at 170–71. Surely, if Petitioners' speculation were valid, there would be empirical support for their assertion—but there is none.

Petitioners also claim that some states have abrogated the collateral source rule and a few cap "all damages in personal-injury cases." Pet. Br. 30. These types of limitations, to the extent they still exist, date back to the mid-1970s. *See* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. Rev. 391, 393 (2005) (describing the 1975 California damage cap as the "progenitor" of these laws). Most state legislative limits, whether through change to the collateral source rule or limiting damages with a cap, apply only to medical-malpractice cases. *See* Lee Harris, *Tort Reform As Carrot-and-Stick*, 46 Harv. J. on Legis. 163 (2009). It is difficult to imagine that category of lawsuit's overlap with a civil RICO case.

Yet, the existence of limitations in some states hardly provides a reason for plaintiffs to seek to shift their claims to RICO. If any incentive existed, it would be because of the availability of treble damages through RICO. Plaintiffs would always prefer treble damages to a single award, even without other limitations. Because there has been no rush to opt for treble damages, this argument should receive no traction.

Still, Petitioners ignore the substantial evidence that the States display solicitude, rather than hostility, to personal injury actions. Take, for example, the increasing State use of tort cases against harmful industries while wearing their *parens patriae* hat to vindicate their residents' personal injuries. They have brought important actions over misrepresentations for tobacco products,[2] opioids,[3] toxic mortgages and foreclosures,[4] and other products. The States plainly do not disfavor tort lawsuits.

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[2] The States' Master Tobacco Settlement "was the result of nearly two years of litigation brought by forty-six state Attorneys General . . . for the health care injury inflicted by tobacco consumption." Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 Am. J.L. & Med. 187, 188 (2000) (footnote omitted).

[3] *See In Re: Nat'l Prescription Opiate Litig.*, 1:17-md-02804-DAP (N.D. Ohio).

[4] Lawsuits over robo-signed foreclosure documents were settled by the nation's largest mortgage servicers with forty-nine state Attorneys General, the District of Columbia, and the federal government in February 2012. Consumer Financial Prot. Bur., *What*

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Moreover, the vast majority of states have explicit constitutional provisions that recognize access to the courts and a right to a remedy, putting a constitutional imprimatur on assuring that injured persons can seek redress through the courts. As the then-Chief Justice of Texas wrote,

> Of all the rights guaranteed by state constitutions but absent from the federal Bill of Rights, the right to a remedy through open access to the courts may be the most important. The remedy clause . . . appears in the constitutions of forty states.

Hon. Thomas R. Phillips, *The Constitutional Right to A Remedy*, 78 N.Y.U. L. Rev. 1309 (2003).

Some states have construed these provisions to protect access and/or remedies available at common law unless an adequate *quid pro quo* provides a reasonable substitute.[5] In addition, five states have explicit constitutional provisions prohibiting limitations on damages.[6] Other state constitutions prohibit damage caps in wrongful death cases.[7] State supreme

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Was the National Mortgage Settlement (Sept. 8, 2020), https://tinyurl.com/v78psk3a.

[5] *See, e.g.*, *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

[6] Ariz. Const. art. 2, § 31; Ark. Const. art. 5, § 32; Ky. Const. § 54; Pa. Const. art. 3, § 18; Wyo. Const. art. 10, § 4.

[7] N.Y. Const. art. 1, § 16; Ohio Const. art. I, § 19a; Okla. Const.

Footnote continued on next page.

courts also have held a variety of damage limits unconstitutional, either on their face[8] or as applied.[9]

Petitioners' claims about state treatment of personal injury cases have no basis in the real world and cannot justify limiting the reach of civil RICO. Nor do Petitioners' claims about tort cases suggest that they can be reconfigured into RICO cases. To give one example, Petitioners flag a fact pattern where "loss of consortium, loss of guidance, mental anguish, and pain and suffering" provide the pecuniary injury that allows a tort claim to be "refashioned into supposed injuries to business or property." Pet. Br. 25-26. Petitioner bases that speculation on *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992), cited at Pet. Br. 26, in which the plaintiff brought a civil RICO action in which "she

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art. 23, § 7.

[8] *See, e.g.*, *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019) (holding damage cap violated right to trial by jury); *Beason v. I. E. Miller Servs., Inc.*, 441 P.3d 1107 (Okla. 2019) (declaring cap on noneconomic damages in personal-injury cases an unconstitutional special law under the state constitution); *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49 (Fla. 2017) (holding damage cap violated state equal protection guarantee); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,* 691 S.E.2d 218 (Ga. 2010) (holding cap violated jury-trial right); *Lebron v. Gottlieb Mem. Hosp.,* 930 N.E.2d 895 (Ill. 2010) (holding cap violated separation of powers).

[9] *Brandt v. Pompa*, 220 N.E.3d 703 (Ohio 2022) (holding statutory cap's exemption for catastrophic physical injuries had to be extended to catastrophic psychological injuries as a matter of due process).

alleges that her divorce attorney defrauded her into having sexual relations with him in lieu of payment for his legal services." 958 F.2d at 765. The Seventh Circuit had no difficulty finding that her alleged property injuries, "loss of earnings, her purchase of a security system and her employment of a new attorney," were "plainly derivatives of her emotional distress—and therefore reflect personal injuries which are not compensable under RICO." *Id.* at 770.

Affirming the Second Circuit in Horn's case would not change the result in *Doe*. The costs to Doe that she alleged as property injuries were actions she took herself, not in reliance on her lawyer's misrepresentations. *See id.* at 769. Horn, on the other hand, relied upon Petitioners' portrayal of their product with a sufficiently direct consequence of losing his employment, not by his choice, but because the misrepresentation doomed his continued employment. Horn had a "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 n.4 (9th Cir. 2002). Petitioners violated that promise, and RICO provides the appropriate remedy

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Second Circuit in this case.

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Respectfully submitted,

ROBERT S. PECK
Counsel of Record

CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
1901 Connecticut Ave. NW,
Suite 1101
Washington, DC 20009
(202) 944-2874
robert.peck@cclfirm.com

LORI ANDRUS
President
JEFFREY R. WHITE
Sr. Assoc. Gen. Counsel
AMERICAN ASSOCIATION
FOR JUSTICE
777 6th Street NW, #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae