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 DRI CENTER FOR LAW AND PUBLIC POLICY AND ATLANTIC LEGAL FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONERS


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Other Authorities**

**Rules**

## INTEREST OF THE *AMICI CURIAE* [1]

The DRI Center for Law and Public Policy is the public policy arm of DRI Inc., an international organization of civil defense attorneys who represent businesses in civil litigation. DRI enhances the skills, effectiveness, and professionalism of its nearly 16,000 members. DRI's mission includes addressing substantive and procedural issues affecting its members, their clients, and the judicial system. The Center participates as *amicus curiae* in this Court to promote fairness, consistency, and efficiency in cases affecting industries which DRI members represent.

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as amicus curiae in carefully selected appeals before the Supreme Court, federal

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

courts of appeals, and state supreme courts. See atlanticlegal.org.

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DRI and ALF are directly interested in the proper interpretation and application of the Racketeer Influenced and Corrupt Organizations Act (RICO).

DRI represents civil defense attorneys who advocate for businesses in product liability and commercial litigation. An expansive interpretation of civil RICO threatens to increase litigation costs and liabilities for product manufacturers and affiliated businesses and industries represented by DRI members. This undermines the consistency and efficiency which DRI seeks in the judicial system.

ALF, with its commitment to advancing civil justice and free enterprise, is concerned that misuse of civil RICO in unintended cases will lead to excessive litigation, higher insurance costs, stifled technological innovation, impaired scientific progress, and otherwise harm U.S. businesses and the economy.

## SUMMARY OF ARGUMENT

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) allows the recovery of treble damages in civil actions filed by any plaintiff "injured in his business or property by reason of a" violation of § 1962 and one of its predicate acts of racketeering. RICO prohibits organized crime-related offenses like "receiv[ing] any income … from a pattern of racketeering activity" or "participat[ing] … in the conduct of [an] enterprise's affairs through a pattern

of racketeering activity." 18 U.S.C. § 1962(a)-(d). Those acts are federal felonies. *Id.* § 1963(a).

This case hinges on the interpretation of "business or property" in 18 U.S.C. § 1964(c). Economic harm caused by racketeering is actionable. But what about economic harm caused by bodily injuries in turn caused by racketeering in violation of § 1962 and its broad range of predicate acts of organized crime? "RICO covers a wide range of predicate acts and is notoriously 'expansive' in scope." *Yegiazaryan v. Smagin,* 599 U.S. 533, 545 (2023). "[T]he focus of § 1964(c) is injuries in 'business or property by reason of a violation of [RICO's substantive provisions].'" *Id.* (quoting § 1964(c)) (alteration in original).

The Second and Ninth Circuits hold that civil RICO allows a plaintiff who suffers a bodily injury because of a RICO violation and consequently loses money from a business at which he was employed or from which he received ownership distributions, to state a civil RICO claim for relief.

This Court should reverse the incorrect and dangerous precedents of the two circuits which have extended civil RICO far beyond its plain language and Congressional intent. Special damages for personal injuries cannot be claimed and trebled under civil RICO just because the injured person happens to work for or own a business the revenues of which are decreased by a person's physical inability to work.

Respondent Douglas J. Horn took a nutritional supplement and later failed a drug test. He was fired from his job as a truck driver. He sued the supplement manufacturer asserting state law product liability

claims—and a civil RICO claim. All claims are premised on false advertising. Mr. Horn claims that the product sellers deceived him about the product ingredients, specifically that it contained only CBD and was THC-free. Pet.App.2a-3a. The district court dismissed the civil RICO claim, ruling that Mr. Horn's lost wages stemmed from a personal injury, which 18 U.S.C. § 1964(c) excludes from civil RICO damages.

The Second Circuit reversed, aligning with the Ninth Circuit, and ruled that civil RICO compensates for lost wages or impaired ability to work due to bodily injury. The Second Circuit's interpretation broadens civil RICO's scope and allows almost any plaintiff with a job and a bodily injury to state a civil RICO claim. To the Second Circuit, an injured person who loses wages because he cannot work is a person injured in his "business or property." If racketeering in violation of § 1962 caused the personal injury which caused the pecuniary losses, then in plaintiff-friendly districts, the amounts are recoverable and can be trebled.

Plaintiffs looking for a way in to one of these favorable circuits can sue multiple defendants based on the "conspiracy" theory of jurisdiction which is well rooted in both the Second and Ninth Circuits. Additionally, civil RICO's venue provisions are the broadest of federal law. These factors along with the Second and Ninth Circuits' expansive interpretations of the "business or property" language of § 1964(c), motivate plaintiffs to sue in favorable districts.

But these are not the only motivating factors. Avoiding state tort reform laws limiting remedies in product liability cases also motivates plaintiffs.

Federal "racketeering" claims are well suited to product liability cases which lend themselves to allegations of concerted action (chain of commerce) and societal harms (widespread product distribution). The Second and Ninth Circuits' interpretation of §1964(c) could transform civil RICO into a common component of mass tort and product liability litigation.

Allowing civil RICO claims for personal injury-related economic harms will lead to an explosion of litigation, inflate insurance costs, and reduce technological innovation. The adverse economic consequences extend far beyond these parties, affecting many industries, businesses, and consumers.

This Court's precedent establishes clear limits on the application of civil RICO. There must be a direct connection between the RICO violation and the plaintiff's business or property injury. *See Reves v. Ernst & Young*, 507 U.S. 170 (1993); *Holmes v. Securities Inv. Prot. Corp.*, 503 U.S. 258 (1992). The lower court's ruling deviates from these standards by opening the courts to receiving and remedying personal, bodily injury-related economic harm alleged under the guise of civil RICO and racketeering.

The term "business or property" in § 1964(c) does not encompass economic harm (such as lost wages) directly caused by a personal injury rendering an individual unable to work. Even where the physical injury is itself caused by a RICO violation and a predicate act of racketeering under § 1962, the connection between the racketeering and the injury-caused economic harm is indirect; the injury is the direct cause. That is not enough for civil RICO.

This Court should reverse the Second Circuit, both to correct the misapplication of RICO and to ensure RICO is not used as a procedural play for treble damages in inapposite cases that do not belong. RICO remedies economic harm to business or property, not to human beings for physical injuries to their bodies.

## ARGUMENT

### The Court should hold that civil RICO excludes personal injury-related economic harm

RICO was originally enacted to dismantle the far-reaching structures of organized crime, not to amplify damages in civil disputes over product liability. The Second and Ninth Circuits' expansive interpretation stretches RICO's application far beyond its intended scope. This sets a dangerous precedent that encourages the misuse and misapplication of civil RICO in scenarios it was never meant to address.

"RICO takes aim at 'racketeering activity,' which it defines as any act 'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985) (quoting 18 U.S.C. § 1961(1)).

"Section 1962, entitled 'Prohibited Activities,' outlaws the use of income derived from a 'pattern of racketeering activity' to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance

of any interest in an enterprise 'through' a pattern of racketeering activity; conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions." *Id.* at 482-483 (quoting 18 U.S.C. § 1962(a)-(d)). Committing one of the specified Prohibited Activities is a federal felony. *Id.* § 1963(a).

Section 1964(c) remedies violations of § 1962, granting a private right of action and awarding treble damages in civil actions filed by a plaintiff "injured in his business or property by reason of a" violation of § 1962 and one of its predicate acts.

The fundamental misapplication of RICO in product liability cases, particularly those involving lost wages and other economic harms caused by personal injuries, deviates markedly from the legislative intent. This is exemplified in this Court's decision in *Sedima,* 473 U.S. 479, which observes that RICO is intended to punish criminal conduct and the operation of criminal enterprises, not to function as a tool for enhancing civil tort claims. Allowing civil RICO claims for indirect business-related economic losses caused by personal injury effectively converts an anti-organized crime statute into a general tort enhancer. That dilutes its potency and purpose.

In *Holmes v. Securities Inv. Prot. Corp.*, 503 U.S. 258 (1992), this Court addressed the proximate cause requirement for civil RICO claims. The Court held that to establish standing under civil RICO, a plaintiff must show that the defendant's violation was the but for and proximate cause of the injury. This means that the injury must result from the predicate acts

constituting the RICO violation. Speculative claims must be dismissed to ensure that damages are attributable to the defendant's conduct. The illegal acts must be the cause of the plaintiff's harm.

In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), the Court clarified the "operation and management" test for determining liability under civil RICO. To be liable, a defendant must participate in the operation or management of the RICO enterprise. Participation must involve direction or control over the enterprise. The case sets a high threshold for liability, so only those who are key to directing the enterprise's illegal activities are subject to RICO's severe penalties.

Civil RICO claims in garden-variety product liability contexts is not only legally incorrect, but it also undermines RICO's intent and integrity and invites a flood of litigation seeking to exploit this expanded interpretation. This has the potential to severely impact the federal judicial system. This Court should correct these misinterpretations to preserve the original statutory purpose and prevent its application in unintended, inappropriate contexts.

## I. Unless this Court reverses, plaintiffs will flock to the Second and Ninth Circuits to take advantage of lax personal jurisdiction rules and to try their luck at winning trebled "nuclear" verdicts under civil RICO

Civil RICO's broad venue provisions and the well-recognized conspiracy-based personal jurisdiction enable plaintiffs to sue in favorable districts in the Second and Ninth Circuits. This encourages forum-shopping by plaintiffs seeking to recover treble

damages on bodily injury-caused pecuniary loss, while simultaneously avoiding well-known, plaintiff-hostile state tort reform laws which apply in diversity cases.

### A. RICO's nationwide venue and jurisdiction rules liberally facilitate choice of forum.

Civil RICO allows plaintiffs to sue in almost any district and thus choose favorable circuits. Civil RICO's venue provisions are the broadest under federal law, allowing suits where normal venue rules would not. Peter L. Markowitz and Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1193-97 (2015); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 39-60 (1984).

Civil RICO remedies any "domestic injury" suffered in the U.S. *See Yegiazaryan v. Smagin,* 599 U.S. 533, 543-544 (2023). Suits can be brought where a defendant "resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a). Defendants can be joined when justice requires it. *Id.* § 1965(b). Process can be served in any judicial district. *Id.* § 1965(d). In *Laurel Gardens, LLC v. McKenna*, 948 F.3d 105, 120-22 (3rd Cir. 2020), the Third Circuit held that § 1965(a) permits nationwide service of process if justice requires it and there is personal jurisdiction over at least one defendant.

By contrast, in typical product liability cases arising under federal court diversity jurisdiction, district courts apply the forum State's long-arm statute to determine personal jurisdiction. *See* Fed. R. Civ. P. 4(k)(1)(a). If the state court has personal jurisdiction, the federal court in the state does too.

Product liability plaintiffs must show general or specific personal jurisdiction. General jurisdiction is when a defendant is "at home" in a state. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty.*, 582 U.S. 255, 262, (2017). Specific jurisdiction arises when a defendant acts in the forum state and the suit relates to those activities. *Ford Motor Co. v. Mont. Eighth Jud. District Court*, 592 U.S. 351, 358 (2021). Without proof of either form of personal jurisdiction, a defendant cannot be brought before the court and the case will be dismissed.[2]

### B. Conspiracy personal jurisdiction is firmly rooted in the Second and Ninth Circuits.

Plaintiffs have options when it comes to haling their target defendants into the courts that they consider to be the friendliest.

In the Second and Ninth Circuits, so-called "conspiracy" personal jurisdiction dovetails with civil RICO. Under that doctrine, personal jurisdiction of an alleged coconspirator arises from contacts of another

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[2] But this could change. This Court's decision in *Mallory Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), makes clear that the States are free to legislatively mandate that foreign-state business entities doing business in their borders consent to personal jurisdiction in their courts. In *Mallory*, this Court left undisturbed Pennsylvania's statute requiring out-of-state business entities to consent to general personal jurisdiction as a condition for registering to do business in Pennsylvania, finding it to be constitutional under the Due Process Clause. If states in the Second and Ninth Circuits enact similar statutes, every registered foreign business in those states will be subject to personal jurisdiction there.

alleged co-conspirator; only one co-conspirator must have contacts with the forum state.

Proving conspiracy jurisdiction "is not a difficult requirement[.]" *In re Platinum and Palladium Antitrust Litigation*, 61 F.4th 242, 271 (2d Cir. 2023), cert. denied, 144 S.Ct. 681 (2024). Conspiracy personal jurisdiction is allowed even without any agency relationship (no control or supervision) between alleged co-conspirators. *See Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 85-87 (2d Cir. 2018) (it is "'a co-conspirator's minimum contacts . . . in furtherance of the conspiracy' fulfills the requirement that the 'defendant must have purposefully availed itself of the privilege of doing business in the forum'").

The Ninth Circuit in *Giusti v. Pyrotechnic Indus.*, 156 F.2d 351 (9th Cir. 1946) held that conspiracy personal jurisdiction applied in California. The "continued acts of the conspirators in California" were sufficient to establish personal jurisdiction over the foreign entity, notwithstanding the foreign entity's lack of direct contacts with California. *Id.* at 353-54. The court compared the actions of co-conspirators to the actions of employed agents that could be imputed to the out-of-state entity. *See id.* at 354.

### C. State tort reform laws, together with civil RICO treble damages and attorney fees, invite forum-shopping.

Most States have caps on punitive damages in product liability cases. These caps stem from tort reform laws enacted in the 1980s and 1990s, making it harder for plaintiffs to prove their claims. *See* Gary

L. Wilson, et al., *The Future of Products Liability in America*, 27:1 Wm. Mitchell L. Rev. 85 (2000).

Tort reform laws still exist in most states, some favoring plaintiffs, others defendants. Choice of law issues often arise in product liability cases—goods are sold, delivered, and hurt people. Goods are manufactured in various places, sometimes overseas, and this is rife for disagreement.[3] Favorable state laws can afford advantages for litigants.[4]

The available categories of damages recoverable (such as general damages for pain and suffering, or punitive damages), or the existence of caps on damages in one State and not in another, are case-changing differences, especially in class-action and multi-district litigation. Civil RICO's allowance of treble damages and attorney fees in product liability injury cases tips the balance in favor of plaintiffs because it motivates and countenances strategic manipulation of core principles of controlling law.

## II. Mass tort and product liability plaintiffs with negligible damages will aggregate civil RICO claims, seeking treble damages for personal injury-related economic harms in privately funded, multi-district and class-action cases

Since the advent of strict product liability in the mid-twentieth century, product liability claims have

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[3] *See e.g.,* William L. Prosser, *The Assault upon the Citadel* (*Strict Liability to the Consumer*), 69 YALE L.J. 1099, 1116–17 (1960).

[4] *See* David Neal Allen, et al., *Which Parts of Tort Reform Apply When an Injury Occurs Outside the Forum State?*, FOR THE DEFENSE, April 2018.

flourished. Products are entrenched in American society. The average American household spends thousands of dollars on consumer products each year, each individually designed, manufactured, brought to market, and eventually sold to the user.

Buying things is easier now than it has ever been. As one familiar example, there are over 600 million products listed on the online Amazon marketplace, and 12 million of these items are sold by Amazon itself. In 2021, U.S.-based Amazon sellers sold "more than 4.1 billion products—an average of 7,800 products sold every minute in Amazon's store."[5]

Some of the most notorious and substantial litigation in the U.S.—in terms of damages, and the number of claims, parties, and exposure—are class-action product liability suits in multidistrict litigation. "[T]he number and size of MDLs have grown considerably. There were 73 active MDLs in 2013—now there are 300, and 90% involve mass tort cases. Where earlier MDLs had a few dozen or hundreds of claimants, MDLs now regularly have thousands."[6] These numbers show that "[m]ass tort litigation is entering a dangerous new phase" entailing pay-for-

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[5] *See* Dharmesh Mehta, *8 top takeaways from Amazon's 2022 Small Business Empowerment Report*, May 22, 2023, available at https://bit.ly/466Ei4g.

[6] *See* Phil Goldberg, *How Mass Tort Litigation is Gaming the Judicial System*, BLOOMBERG LAW, July 13, 2024, available at https://bit.ly/4cG21KO; *see also*, United States Judicial Panel on Multidistrict Litigation, MDL Statistics Report (Docket Type Summary), October 16, 2023, available at https://bit.ly/3Y2aUdb.

client lead generation and "massive numbers of highly questionable claims against companies to force huge settlements, and now some companies are filing for bankruptcy to cap liability and manage the claims."[7]

The multidistrict problem is real. "[I]n the last 10 years, multidistrict litigation has come to dominate the world of mass torts and the federal civil docket, accounting, by some estimate, for more than half the civil cases currently pending in federal court."[8]

Representative cases include the following:

- More than 100,000 plaintiffs allege they developed non-Hodgkin's lymphoma from exposure to herbicide Roundup. Manufacturer Bayer/Monsanto has set aside $11 billion to fund numerous confidential settlements.[9]

- Multiple massive opioid-related MDLs have generated more than $54 billion in settlements. In 2021 major pharmaceutical manufacturers and distributors paid approximately $26 billion to state and local governments for opioid abatement.[10]

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[7] *Id.*

[8] Tim Peters, *Multidistrict Litigation: Experts Look at the Controversial World of Mass Torts*, TEXAS LAW NEWS, March 30, 2023, available at https://bit.ly/4bK5mXU.

[9] *Id.*

[10] *Id.*

- In the Camp Lejeune toxic waste MDL, 93,000 cases have been filed. Plaintiff lawyers stand to make more than $10 billion in fees.[11]

- More than 40,000 lawsuits are asserted against Johnson & Johnson in the baby powder lawsuits where a $9 million settlement was rejected by a U.S. bankruptcy court.[12]

"MDL significantly lowers barriers to entry for mass tort claims. By consolidating similar cases filed all over the country in front of a single judge for coordinated pretrial proceedings, MDL creates huge efficiencies for parties and courts."[13] "And the aggregation of otherwise nuisance value claims, along with consolidation of proceedings and reduction of administrative burdens such as in multi-district litigation, allows plaintiffs and their lawyers to take

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[11] *Camp Lejeune Water Litigation v. U.S.*, 7:23-cv-00897 (E.D.N.C. Oct. 27, 2023) (U.S. Dept. of Justice argued that if only a mere 1% payment of demands were paid, that would result in $33 billion in settlement payments and the plaintiffs' attorneys pocketing around $10 billion); *see also*, Courtney Kube and Michael Kosnar, *Navy and Justice Department to offer expedited payouts to victims of Camp Lejeune water contamination*, NBC NEWS, September 6, 2023, available at https://nbcnews.to/3LnhS5a.

[12] Jef Feeley, *Johnson & Johnson hit by 11,000 more lawsuits linking Baby Powder to cancer after judge throws $9 billion settlement case*, Fortune, September 28, 2023, available at https://bit.ly/4cYMZQd.

[13] D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEXAS LAW REVIEW 1595 (2023).

advantage of economies of scale."[14] "The marginal cost of filing another tagalong claim in an MDL is much lower than the cost of filing an individual lawsuit that will be litigated on its own."[15]

Aggregating more claims—tens of thousands of otherwise nuisance-value ones—is the golden ticket to cost-efficiently merging civil RICO (with the treble damages Holy Grail) and mass torts. Before now, even in standalone cases, the plaintiffs' bar has not found a workable hook for alleging civil RICO liability in mass tort class-action and multidistrict litigation. Most courts evaluating civil RICO liability in product liability cases have held there is no concrete RICO injury where an alleged product defect has not actually manifested for a particular plaintiff.[16]

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[14] *Id.*

[15] *Id.*

[16] *See e.g., In re: Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543, 2016 WL 3920353, at *1, 16 (S.D.N.Y. July 15, 2016) (rejecting claim of latent ignition switch defect as "speculative" and "incompatible with RICO"); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1090-91, 1093-95 n.29 (S.D. Ind. 2001) (dismissing RICO claim as "speculative" when plaintiffs alleged that product contained inherent defects that might manifest in the future); *see also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228-29 (2d Cir. 2008) (cleaned up) (rejecting benefit of the bargain damages based on plaintiffs' expectation regarding "light" cigarettes) (abrogated on other grounds by *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990) ("Even if the directors had incurred pecuniary losses from emotional distress, they would not be compensable under RICO.")

Allegations about the "marketing, and sale of legal goods by legitimate businesses" have been held insufficient grounds for a RICO claim.[17] That has not stopped plaintiffs' lawyers from pushing to expand the applicability of RICO to regular tort cases. *See, e.g., Aaron v. Durrani, et al.*, No. 1:13-cv-202, 2014 WL 996471 (S.D. Ohio March 12, 2014) (granting motion to dismiss; plaintiff cannot "repackage medical malpractice and product liability claims" into civil RICO liability; "RICO is not a means for federalizing personal injury tort claims arising under state law.").

Civil RICO claims have been attempted in class-action and MDL litigation to no avail. One example is the Zantac MDL against defendants involved in the chain of commerce for Zantac, a heartburn medication. The plaintiffs allege that Zantac causes cancer. Along with garden-variety state law product liability claims the plaintiffs alleged civil RICO liability: that the defendants "engaged in . . . a pattern of racketeering activity or collection of unlawful debt" and conspired with each other to do so under §1962(d) by "deliberately and unlawfully misrepresent[ing] the safety risks" of the drug though a "decades-long

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[17] *See Bitton v. Gencor Nutrientes, Inc.*, 654 Fed. Appx. 358, 363 (9th Cir. June 28, 2016) ("Taken as a whole, the complaint's allegations are insufficient to allow us to 'infer reasonably' that the conduct at issue—the purchase, marketing, and sale of legal goods by legitimate businesses—'is plausibly part of a fraudulent scheme.'"; *Gomez v. Guthy-Renker, LLC*, No. 14-CV-01425, 2015 WL 4270042, at *8 (C.D. Cal. July 13, 2015) ("Courts have overwhelmingly rejected attempts to characterize routine commercial relationships as RICO enterprises.").

marketing and promotional campaign to mislead the public," "misleading communications with federal regulators," and "efforts to manipulate key opinion leaders and industry groups." *See In re Zantac (Ranitidine) Prod. Liab. Litig.*, 546 F. Supp. 3d 1216, 1220 (S.D. Fla. 2021).[18]

Past failures do not dictate future outcomes—especially where there is money to be made. The future in this context is written by powerful lawyers supported by billion-dollar hedge funds. Those power players now have a new angle entirely: recovering

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[18] The Zantac MDL connects the alleged conspiracy with the end-user's purchase (and consumption) of the drug. Other examples of civil RICO in product liability MDL litigation exemplify more limited claims alleging business losses not attributable to bodily injury. *See e.g., In re: Testosterone Replacement Therapy Prod. Liab. Lit.*, MDL No. 2545, Nos. 14-C-1748, 14-C-8857, 2019 WL 652217 (N.D. Ill., Feb. 14, 2019) (civil RICO claims against manufacturers, promoters, and sellers of testosterone replacement therapy drugs alleged to cause "cardiovascular and venous thromboembolic injuries."); *In re: Insulin Pricing Litigation*, No. 3:17-cv-0699, 2019 WL 643709 (D.N.J. Feb. 15, 2019) (civil RICO claims alleging the defendants conspired to inflate the price of insulin products); *Hu v. BMW of North America, LLC*, Civ. No. 18-4363, 2021 WL 346974 (D.N.J. Feb. 2, 2021) (putative class plaintiffs claimed civil RICO arising from fraudulent marketing materials published by BMW of North America, LLC which induced them to purchase their vehicles from "dealerships or third parties" containing defeat devices intended to conceal unlawful emissions in certain vehicle) ("…alleg[ing] that the BMW and Bosch defendants coordinated their operations through the design, manufacture, distribution, testing process, and sale of the vehicles with defeat devices.").

injury-caused lost wage damages for normal, everyday product liability claims of individuals.

"Investors" in litigation have taken note. And they are hungry for a return on their investments. A 2021 report by Swiss Re Group, one of the world's largest insurers, concluded that in the year 2020 alone, around $8 billion was invested by third-party litigation funders (including hedge funds and global financiers) to prop up and continue class-action and multidistrict litigation in ongoing cases in America.[19]

Mass tort claims garnered the biggest sums of litigation loans in 2021 and are a "main area[] of focus" of litigation funding companies. "Large lenders prefer these segments because the potential awards are large enough to motivate the expensive due diligence needed to invest successfully in complex cases."[20]

"Funders are dedicating increasing amounts of capital to law firm lending, which typically provides a law firm with a full recourse loan for a fixed and/or performance-based return, for general business purposes (operating capital)."[21] "Law firm portfolios are attractive to fund since (1) loans are often backed by personal guarantees, (2) case collateral is highly

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[19] Thomas Holzheu, et al., *US litigation funding and social inflation: The rising costs of legal liability*, SWISS RE INSTITUTE, December 2021, available at https://bit.ly/3S741Dw ("More than half of the USD 17 billion investment into litigation funding globally in 2020 was deployed in the US.").

[20] *Id.* at p. 5.

[21] *Id.*

diversified, and (3) many law firms' cases tend to be seasoned or have established precedents [and] bellwethers."[22]

With some States now allowing non-lawyers to own law firms (*sxee, e.g.,* UTAH R. PROF. COND. 5.4; Arizona Supreme Court Rule 33.1; ARIZONA CODE OF JUD. ADMIN. § 7-209), it seems likely this trend will continue, with more direct equity investment in plaintiff mass tort law firms by non-lawyer profiteers seeking to reap financial rewards from the U.S. tort system. Allowing civil RICO into the mix will cause the availability of litigation financing to skyrocket.

## III. The adverse economic and technological consequences of civil RICO mega-litigation, with its potential for trebling of mass tort pecuniary harms, could be dire

Of all personal injury litigation in 2020, product liability cases procured the largest average and median value jury verdicts—more than $7 million on average. A May 2024 study by the Institute for Legal Reform found that nuclear verdicts exceeding $10 million were most frequently found in product liability (23.3%) cases above all others.[23]

Legal changes and upward trends in jury verdicts cause product liability cases to proliferate, not the

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[22] *Id.*

[23] Cary Silverman & Christopher E. Appel, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions*, U.S. CHAMBER OF COMMERCE, INSTITUTE FOR LEGAL REFORM, May 2024, available at https://bit.ly/4f5GeOd.

introduction of "more unsafe products." Richard J. Mahoney and Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395–99 (1989). This leads to "social inflation," the phenomenon by which insurance claims costs are increasing at a rate which exceeds general economic inflation.[24] Social inflation is caused by increased costs of litigation, nuclear verdicts, lawsuit delay, and tort reform rollbacks overturning prior statutory limits on non-economic damages.[25]

Exposure to treble and punitive damages and fee awards in garden-variety product liability cases will cause a huge uptick in the cost of liability insurance for American businesses and workers, significantly worsening the social inflation problem.

Additionally, if civil RICO is used to impose liability for injury-caused economic harms in product liability cases, technological and scientific innovation will be stifled. It will impede new products from reaching markets and users. Inventors will fear liability.

There is a causal relationship between slowed innovation and increased product liability lawsuits. *See* W. Kip Viscusi and Michael Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, TORT LAW AND THE PUBLIC INTEREST 125 (Peter H. Schuck ed., 1991). For example, requiring the pharmaceutical industry to pay civil RICO treble-damage jury verdicts could have "grave health policy

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[24] *See* Holzheu, *US litigation funding and social inflation*, SWISS RE INSTITUTE, at 15.

[25] *Id.*

consequences," including "higher priced name brand drugs" and "fewer innovative drugs." *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 946 (6th Cir. 2014).

If more plaintiffs pursue product liability claims through the lens of civil RICO, then over time and as verdicts accrue, American innovators will simply be unwilling to take on the risk associated with marketing new technologies. The U.S. needs more innovation and fewer product lawsuits—not the other way around. The Court should hold that civil RICO plaintiffs cannot claim damages for personal injury-related economic harms under §1964(c). That will protect the growth of the U.S. economy.

## CONCLUSION

Civil RICO bars plaintiffs from recovering for personal injuries. The Second and Ninth Circuits wrongly interpret civil RICO by allowing plaintiffs to recover indirectly for personal injuries resulting in employment-related—and possibly additional types of personal injury-related— economic losses.

This not only is incorrect, but also sets a dangerous precedent that could impact a large swath of cases routinely filed in federal district courts across America. Product liability and mass tort cases are already notorious for generating nuclear verdicts and crippling class action and multi-district litigation.

Injecting treble damages and statutory fee awards into the mix will make the situation even worse for American product manufacturers and businesses. The Court should hold that civil RICO does not cover

economic-loss claims relating to personal injuries like Mr. Horn's and reverse the Second Circuit.

Respectfully submitted,

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