No. _____

In The

Supreme Court of the United States

CENTER FOR IMMIGRATION STUDIES,

Petitioner,

v.

RICHARD COHEN AND HEIDI BEIRICH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Racketeer Influenced and Corrupt Organizations Act ("RICO")* require a plaintiff or prosecutor claiming an "open pattern" of racketeering to allege or prove that the defendant has injured other victims or engaged in multiple schemes?

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* Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970), codified at 18 U.S.C. §§1961-1968.

CORPORATE DISCLOSURE STATEMENT

Center for Immigration Studies is a non-profit corporation incorporated in the District of Columbia. There is no parent corporation and there is no corporation that holds more than 10% of its stock.

LIST OF RELATED CASES

Center for Immigration Studies v. Richard Cohen and Heidi Beirich, No. 19-0087 (ABJ), United States District Court for the District of Columbia. Judgment entered September 13, 2019.

Center for Immigration Studies v. Richard Cohen and Heidi Beirich, No. 19-7122, United States Court of Appeals for the District of Columbia. Judgment entered April 24, 2020.

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PETITION FOR CERTIORARI

Center for Immigration Studies respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

CITATIONS OF OPINIONS ENTERED IN THIS CASE

The District Court issued an order on September 13, 2019 granting Defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss the Complaint with prejudice. *See Center for Immigration Studies v. Cohen*, No. CV 19-0087 (ABJ), 410 F.Supp.3d 183 (D.D.C. Sept. 13, 2019). The D.C. Circuit Court of Appeals affirmed the District Court's judgment. *See Center for Immigration Studies v. Cohen and Beirich*, No. 19-7122, at 2 (D.C. Cir. April 24, 2020) ("*Center for Immigration Studies v. Cohen*").[1]

JURISDICTIONAL STATEMENT

Petitioner, Center for Immigration Studies, a non-profit research organization, filed this one-count action alleging violations of the RICO statute in 2019 in the U.S. District Court for the District of Columbia. The District Court dismissed the case for failure to state a RICO claim. The District of Columbia Circuit affirmed

[1] These decisions can be found in the appendix at App. 5-23 and App. 1-4.

the dismissal in April 2020 on the sole basis that Petitioner's Complaint did not allege an "open pattern" of RICO violations. The judgment of dismissal was entered April 24, 2020. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

18 U.S.C. §1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1962(d):

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. §1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals,

> pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

This is a case about the damages caused by the false allegation of racism. Petitioner, Center for Immigration Studies ("CIS"), a nationally prominent research organization located in Washington, D.C., is critical of current U.S. immigration policy. It favors lower levels of immigration. It brought this RICO case against defendants Richard Cohen and Heidi Beirich, employees of the Southern Poverty Law Center ("S.P.L.C.").

S.P.L.C. is also a prominent non-profit organization dedicated to what it describes as a mission of battling "hate groups" throughout the nation. Cohen and Beirich decide which groups to so designate. They are guided by S.P.L.C.'s "hate group" definition, which applies to organizations which "attack or malign" people

based on their race, religion, sexual orientation or gender. Immigration status is not one of these criteria.

At Cohen and Beirich's behest, S.P.L.C. designated CIS a hate group in 2016 because, in its view, CIS is a racist organization dedicated "to preserving a white majority in America." In so doing, they equated CIS with the Ku Klux Klan and American Nazi party. S.P.L.C.'s hate group designations are influential in the philanthropic community. Any group so designated is blacklisted from participating in Amazon's "smile program," which enables purchasers to give to a favorite non-profit while paying. This happened to CIS. Since designating CIS a hate group, Cohen and Beirich have issued an ongoing series of blog posts on the S.P.L.C. website highlighting CIS' activities and repeating the hate group and/or racist slur. S.P.L.C.'s stated goal is not merely to expose but also to "destroy" hate groups. This is an allegation in the complaint that has not been denied or contested by either defendant at any point.

CIS disputes that it is a hate group. The expulsion from the Amazon "smile program" has cost CIS $10,000 in lost donations, and these lost donations will continue as long as CIS remains backlisted. These false statements constitute violations of the federal wire fraud statute, 18 U.S.C. §1343, a RICO predicate offense. CIS' RICO Complaint alleged that this met this Court's definition of an "open pattern" of criminal conduct as enunciated in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989) ("*H.J. Inc.*") (holding a RICO claim could be shown by alleging "a specific

threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity"). CIS seeks damages and an injunction against further calling it a hate group.

Cohen and Beirich brought a motion to dismiss the one-count RICO claim on the basis it did not state a RICO claim for numerous reasons, one of which was that the series of wire fraud violations did not constitute an "open pattern" of racketeering activity. The District Court granted their motion on that ground.

CIS appealed to the D.C. Circuit, which affirmed the judgment on the sole basis that the Complaint did not allege an "open pattern" of RICO violations. By so ruling, it joined the minority side of the circuit split on the issue of pleading an open pattern of racketeering. It held that to plead an open pattern of racketeering, CIS would have to meet the requirements for a *closed* pattern of racketeering (that is racketeering which has ended): multiple schemes, multiple victims and multiple injuries. *Center for Immigration Studies v. Cohen*, at App. 2-3. In so ruling, it rejected this Court's holding in *H.J. Inc.*, which had established different criteria depending on whether an open or closed pattern was alleged. Joining two other circuits, the D.C. Circuit has effectively conflated the two types of patterns and eliminated the entire concept of an open pattern.

Thus, this case presents the important question of whether this Court's concept of an "open pattern" under RICO can exist as enunciated in *H.J. Inc.* or whether it has been subsumed by the closed continuity

analysis. This circuit split is well-established and ripe for resolution. This Court has not addressed the issue since *H.J. Inc.* in 1989.

REASONS FOR GRANTING THE PETITION

1. The D.C. Circuit Completely Ignored This Court's Open Pattern Analysis

In *H.J. Inc.*, this Court rejected the requirement that a RICO plaintiff must allege "multiple schemes" in order to state a pattern of racketeering. It held no such requirement could be found in the text or original meaning of the statute, and sided with those circuits which rejected such "rigidity." *H.J. Inc.*, 492 U.S. at 240.[2] Instead, the lower courts were required to decide the pattern requirement by viewing the allegations through the prism of either a "closed" or "open" series of predicate acts. The closed pattern applied to long-term racketeering. *Id.* at 241-242. The open pattern applied to racketeering which was still in progress and evidenced a threat to continue. *Id.* at 242-243. With respect to open patterns, the Court stated: "Often a RICO action will be brought before [closed] continuity can be established in this way. In such cases liability depends on whether the *threat* of continuity is demonstrated." *Id.* at 242 (emphasis in original).

[2] *H.J. Inc.'s* analysis of the elements of a "pattern" of racketeering consists of two parts: relatedness of the predicate acts and their "continuity." *See*, *e.g.*, *H.J. Inc.*, 492 U.S. at 239. Relatedness was not raised in the proceedings below.

The Court went on to describe three broad categories of cases which would meet the open pattern concept: cases alleging a "distinct threat of long-term racketeering activity, either implicit or explicit"; cases alleging an "ongoing entity's regular way of doing business"; and cases alleging the "regular way of conducting defendant's ongoing legitimate business." *Id*. at 242-243. CIS alleged the first type. The threat of ongoing wire fraud violations to harm it was made explicit in its Complaint which quoted S.P.L.C.'s mission to "destroy" it by continuous falsehoods.

2. Most Circuits Adhere To *H.J. Inc.'s* Open Pattern Criteria

CIS' allegations would have satisfied the first open pattern category under *H.J. Inc.* in the Second, Sixth, Seventh, Eighth, and Tenth Circuits, faithfully applied. A brief overview of those decisions illustrates their conception of an open pattern.

The Second Circuit's decision in *DeFalco v. Bernas*, 244 F.3d 286, 324 (2d Cir. 2001), concluded that the plaintiff stated an open pattern based on the ongoing threat to the plaintiff, not to other victims, because the defendant's scheme "would have continued extorting plaintiffs into the future . . . [and] was [therefore] not inherently terminable." The finding in *DeFalco* that an open pattern existed did not require multiple victims or multiple schemes.

The Sixth Circuit's decision in *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393 (6th Cir.

2012) found an open-ended pattern in a scheme that lasted only two months because the Court believed that scheme would "extend[] beyond the period in which the predicate acts were performed" and had no "built in ending point." *Id*. at 410.

The Seventh Circuit succinctly stated what the *H.J. Inc.* standard is, specifically identifying the three categories stated above:

> Our circuit has noted three situations that satisfy open-ended continuity: when (1) a specific threat of repetition exists, (2) the predicates are a regular way of conducting [an] ongoing legitimate business, or (3) the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.

Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., 831 F.3d 815, 828 (7th Cir. 2016) (quotations omitted). Though in that case the Court found that there was no open pattern, it was based purely on a finding that there was no threat of repetition. *Id.* ("The evidence here does not demonstrate a threat of repetition. This case is about one *quid pro quo* agreement to exchange one campaign contribution for Blagojevich's signature on one bill. Once Blagojevich signed the bill, the scheme was over."). It had nothing to do with the absence of different victims or schemes.

The Eighth Circuit in *United States v. Hively*, 437 F.3d 752 (8th Cir. 2006) found an open pattern of racketeering in a public corruption case based on the threat

of repetition. Specifically, the Court found that there was a threat that the racketeering activity would continue as long as Hively still held office:

> Even if the predicate acts had not extended over a period of at least one year, there was also a sufficient threat of repetition in connection to the DTF scheme to show open ended continuity. At the time the search warrant was executed on his firm, Hively was still in office and still receiving DTF grant money from Ketz on a monthly basis (he had deposited the most recent check the prior week). A reasonable jury could therefore have found that a distinct threat of long-term racketeering activity remained.

Id. at 761-762 (quotations omitted). Again, no strict criteria as to the number of victims, schemes or injuries was applied. Rather, the court believed as long as the status quo continued, the defendant could commit more predicate acts.

And lastly, in *Safe Streets All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2019), a case involving an ongoing marijuana business, the Tenth Circuit found that the plaintiff—an adjacent property owner—would continue to be damaged by the loss in value of its property even though it was not for sale. There were no other victims, schemes, or separate injuries. The Court stated: "When coupled with the Reillys' [plaintiffs] assertion that the Marijuana Growers began cultivating marijuana at their facility, we conclude these allegations plausibly state the requisite pattern of predicate

acts that present a threat of ongoing criminal activity." *Id.* at 884.

3. The Scheme CIS Alleges Is The Prototypical Never-Ending Criminal Endeavor

It is hard to imagine a scheme more likely to continue indefinitely and cause ongoing damages than what CIS has detailed in this case. S.P.L.C. has vowed to continue to denounce CIS as a racist hate group until it is destroyed, which may never happen. It has not happened up until to now, after almost four years. But as it continues, it will continue to cost CIS additional lost donations. This is not a "garden variety business dispute" or fraud which belongs in state court. Typically, such cases involve contract disputes or frauds which have come to fruition. *See*, *e.g.*, *Daedalus Capital LLC v. Viresombe*, No. 14-1557, 625 Fed. Appx. 973, 977 (11th Cir. Sept. 4, 2015) (holding no open pattern alleged because defendant's "goal has been realized . . . and there is no longer a working relationship between the two companies giving rise to the opportunity for defendants pattern of predicate acts to persist into the future.") (quotations omitted); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273-1274 (10th Cir. 1989) ("[Plaintiff] has not alleged a scheme continuously to defame him, nor has he alleged any future activity. . . . At most, plaintiff has alleged a scheme to accomplish one discrete goal, which he says was accomplished.") (quotations omitted).

CIS cannot bring a common law fraud lawsuit because it has not relied on any false statements by the defendants. The federal wire fraud statute, however, does not require first party reliance. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008). Moreover, the closest applicable common law remedy it could seek would be defamation. But that is not a good fit either. CIS is not seeking reputational damage, the typical defamation remedy. (Nor has CIS brought a claim for defamation—as stated above, it has brought a single count claim under RICO). And the D.C. Circuit has found that injunctions cannot be issued in defamation cases. *See Kukatush Min. Corp., (N.P.L.) v. Securities and Exchange Commission*, 309 F.2d 647, 651 n.2 (D.C. Cir. 1962) (citing authority). But injunctive relief is available under RICO to stop false statements. *See United States v. Philip Morris USA Inc.*, 855 F.3d 321, 325 (D.C. Cir. 2017). So RICO is the appropriate cause of action in this case.

The decisions detailed above do not require multiple schemes, victims or injuries to allege an open pattern. Yet the D.C. Circuit would not accept that CIS faces an ongoing threat of further RICO violations here. And if this case does not present such a threat—where the defendants have announced their intention to fight to the death, and have the resources and means to do so—then one wonders if any plaintiff could have a such a claim. The D.C. Circuit would not even accept that CIS faces the threat of further damages from the scheme. In its view, the $10,000 in damages CIS alleged to have incurred since the hate group

designation in 2016 is deemed to be the extent of its potential loss. *See Center for Immigration Studies v. Cohen*, at App. 3-4. And the D.C. Circuit required CIS to show the threat of future harm to another victim. No other circuit has such a blackletter rule.

4. The D.C. Circuit Did Not Even Consider The *H.J. Inc*. Open Pattern Factors, Confirming They No Longer Exist

Rather than apply the established *H.J. Inc*. open pattern criteria, the D.C. Circuit required CIS to meet its *closed* pattern requirements: separate schemes, other victims, and injuries. It held: "CIS does not allege that SPLC will engage in a separate 'scheme,' that SPLC will find other 'victims,' or that CIS will suffer a distinct future 'injury.'" *Center for Immigration Studies v. Cohen*, at App. 3.

This analysis, as the Court stated, is derived from its closed pattern cases. *Id.* It did not attempt to determine if the complaint alleged the threat of ongoing racketeering. Thus, the D.C. Circuit has effectively eliminated *H.J. Inc.'s* open pattern as grounds for a RICO claim. In the Court's view, a RICO plaintiff must meet the closed pattern criteria, which CIS cannot do. CIS did not allege that the scheme to wrongly call it a racist hate group was also done to other groups, or that there were other injuries. These are the essential criteria for alleging a closed pattern. *See*, *e.g.*, *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995). The upshot

of the D.C. Circuit's ruling is that CIS simply cannot assert a RICO claim until S.P.L.C. has harmed other groups, stripping RICO of its prospective application to stop racketeering in its incipiency. *See*, *e.g.*, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-498 (1985). Nobody who reads *H.J. Inc.* would believe that the D.C. Circuit's reasoning is consistent with this Court's analysis.

Moreover, this Court has held RICO is to be "liberally construed." *Sedima*, 473 U.S. at 498 (citing Pub. L. No. 91-452, §904(a), 84 Stat. 947). And one goal of civil RICO is "suppressing racketeering activity, an object pursued the sooner the better." *Rotella v. Wood*, 528 U.S. 549, 558 (2000). But if the D.C. Circuit is correct, then no plaintiff facing an ongoing pattern of racketeering will be able to bring a RICO case until other victims are harmed. That may not happen until more than four years after it was harmed, beyond the statute of limitations. What possible sense does that make? It is antithetical to liberal construction.

5. Other Circuits Have Also Merged The Open And Closed Pattern Analysis

The Fourth and Fifth Circuits reached the same conclusion as the D.C. Circuit, requiring multiple goals and/or multiple victims in their assessment of whether an open pattern exists. *See US Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 318-319 (4th Cir. 2010) ("USAPA's claim fails [open-ended continuity] because it alleges that the defendants have engaged in

racketeering activity in order to achieve a single goal . . . "); *Malvino v. Delluniversita*, 840 F.3d 223, 233 (5th Cir. 2016) (concluding there was no open pattern of racketeering because "there was no evidence of other victims . . .").

Therefore, there is a clear and profound circuit split on the issue of whether a plaintiff alleging an open pattern of racketeering must satisfy the closed pattern criteria, multiple victims, multiple schemes, and multiple injuries to state a RICO claim. The Court should now resolve this long-running disagreement.

CONCLUSION

For the foregoing reasons, CIS respectfully requests that this Court issue a writ of certiorari to review the judgment of the D.C. Circuit Court of Appeals.

Respectfully submitted,

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