No. ____

IN THE

Supreme Court of the United States

KAN-DI-KI, LLC,

Petitioner,

v.

JOHN SORENSEN & TIMOTHY PAULSEN,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To plead a "pattern of racketeering" under Title XI of the Organized Crime Control Act of 1970 (also called the Racketeer Influenced and Corrupt Organizations Act (RICO)), a plaintiff must allege that the racketeering acts have "continuity" in that they either "amount to or pose a threat of continued criminal activity." *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). This "fairly flexible concept" can be satisfied with allegations of "closed-ended" continuity, that is a closed period of repeated conduct that is sufficiently substantial by itself, or "open-ended" continuity, that is "past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 239, 241–42. The complaint in this case alleged that Defendants perpetrated a mail and wire fraud scheme that was active for at least ten months, targeted at numerous victims, abetted by other related racketeering activity, and threatened to continue into the future. The Ninth Circuit concluded the allegations did not satisfy continuity. The question presented is:

Whether the Ninth Circuit erred in applying a rigid, minimum time requirement for continuity instead of the flexible, multi-factor analysis employed by other circuits.

PARTIES TO PROCEEDINGS BELOW

Petitioner, who was plaintiff-appellant below, is Kan-Di-Ki, LLC, which does business as Diagnostic Labs. To satisfy this Court's Rule 29.6, petitioner states that the parent company of Kan-Di-Ki, LLC, is Diagnostic Lab Holdings, LLC. No other publicly held corporation owns 10% or more of its stock.

Respondents, who were defendants-appellees below, are Timothy Paulsen and John Sorensen.

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The court of appeals' opinion is unreported, but available at 2018 WL 832865, and reprinted at Appendix A, 1a–5a. The district court's opinion is unreported, but is reprinted at Appendix B, 6a–27a.

JURISDICTION

The court of appeals entered judgment on February 13, 2018. 1a. On May 8, 2018, Justice Kennedy extended the time in which to file a petition for certiorari until June 28, 2018. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

RICO is reproduced in Appendix C, 28a–54a.

STATEMENT OF THE CASE

The Ninth Circuit has deepened an acknowledged circuit split over one of the basic requirements for pleading a RICO claim. Thirty years ago, this Court held that, to plead "pattern" under RICO, a plaintiff must allege that the racketeering acts were continuous. *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). One way to show continuity, the Court explained, is to demonstrate closed-ended continuity, which is a substantial period of racketeering activity. But lower courts are intractably divided over what that means. Some courts look to a number of factors to determine whether allegations amount to closed-ended continuity. Other courts—like the Ninth Circuit here—apply a rigid time requirement, summarily rejecting anything under a year. Without this Court's intervention, plaintiffs will continue to be at sea over how to plead their claims. The Court should grant certiorari.

A. Legal Background

1. RICO provides a civil cause of action for persons whose business or property is injured by a violation of RICO's substantive offenses. 18 U.S.C. § 1964(c). RICO prohibits persons from conducting (or participating in the conduct of) an enterprise through a "pattern of racketeering activity," or conspiring to do so. § 1962(c)–(d).

"Racketeering activity" is defined as a list of offenses, § 1961(1), including: federal mail or wire fraud, §§ 1341, 1343; federal Hobbs Act extortion, § 1951(a),(b)(2); and California commercial bribery (that is, soliciting money as an employee from a third party, corruptly and without the employer's consent, in return for agreeing to use the employment position for the third party's benefit), Cal. Penal Code § 641.3.

2. As for when racketeering activity constitutes a "pattern," RICO expressly requires "at least two acts of racketeering activity" committed within a ten-year period, 18 U.S.C. § 1961(5), and this Court has interpreted the statute to further require that the racketeering acts have "continuity plus relationship," *H.J.*, 492 U.S. at 239 (emphasis omitted). "Relationship" means that the predicates must "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240. "Continuity" means that the predicate acts either "themselves amount to, or … otherwise constitute a threat of, continuing racketeering activity." *Id.* (emphasis omitted).

Continuity, *H.J.* explained, is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Closed-ended continuity can be pled by alleging "a series of related predicates extending over a substantial period of time." *Id.* at 242. Open-ended continuity can be pled by alleging that the predicates demonstrated "a threat of continued racketeering activity." *Id.*

B. Facts

1. Defendants John Sorensen and Timothy Paulsen ran North American Health Care, Inc., a company that was affiliated with dozens of patient-care facilities, such as nursing homes and rehabilitation centers. 63a (¶28). North American assisted its facilities in selecting, negotiating with, and paying for service providers (for example, x-ray or laboratory services). *Id.* (¶29).

Plaintiff Diagnostic Labs provides, among other things, x-ray and laboratory services to patient-care facilities. 61a (¶18). As of late 2011, Diagnostic Labs had contracts with twenty-seven North American facilities. 66a (¶39).

Sometime in late 2011 or early 2012, Defendants decided to have North American facilities terminate their contracts with existing service vendors and replace them with new vendors under cheaper contracts. *See* 56a–57a, 71a (¶2, ¶55). Rather than simply terminate the vendors, however, Defendants took the opportunity to fraudulently extract payments from the soon-to-be terminated vendors and

induce them to provide uncompensated services. *See* 233a (¶572).

The scam was simple. Defendants would fraudulently tell a vendor that an audit of the vendor's invoices had unearthed overbilling, when in fact Defendants had not conducted a good-faith audit nor found any legitimate errors. 57a (¶4). Citing overbilling, Defendants would demand compensation and withhold payment for ongoing services. 58a (¶6). Also, to pressure the vendor to pay up or at least to continue providing services for free, Defendants would threaten to terminate the vendor's contract, but then fraudulently imply that the contract would not be terminated if the billing dispute was resolved, when in fact Defendants had already decided to terminate the contract regardless. 57a–58a (¶5). Then, once the vendor acquiesced or made clear that it would not, Defendants would have the contract terminated. 56a–57a (¶2).

To execute their scheme, Defendants enlisted Robert Suer. 232a (¶568). Suer had long worked for Diagnostic Labs, and he had signed agreements that prohibited him from competing or interfering with Diagnostic Labs' business. 67a–68a (¶¶42–45). Nevertheless, while Suer was still on Diagnostic Labs' payroll, Defendants hired him as a "consultant." 67a (¶42), 71a–72a (¶58). Given Suer's vendor-side knowledge gained through his work at Diagnostic Labs, Defendants believed he could provide valuable assistance, both in concocting overbilling claims after purportedly reviewing the vendors' invoices and in finding replacement vendors who would agree to cheaper contracts. 72a (¶59), 106a–07a (¶154), 112a

(¶170), 151a (¶¶295-97), 153a–54a (¶¶305–07). With Suer on board, Defendants launched their scheme.

2. Defendants' exploitation of Diagnostic Labs illustrates their scheme.

First, between March 22, 2012, and October 1, 2012, Paulsen sent (or caused to be sent) several emails and letters asserting that North American had discovered "overcharges" and other billing "errors" during an "audit" of Diagnostic Lab's invoices. *See, e.g.*, 74a–75a (¶65), 77a–78a (¶73), 79a–80a (¶79), 82a–83a (¶90), 85a–86a (¶¶100–03). Though Diagnostic Labs knew the claims were false, Paulsen's communications only "se[t] forth generalities about the … overcharges." 165a (¶353). He was "not interested in clarifying" the basis of his assertions despite Diagnostic Labs' showing that its "practices [were] supported by [its] contract[s], by the market, and by [North American's] years of clear acceptance of the terms in practice and payment." 86a (¶104). Nevertheless, Paulsen demanded a credit of $400,000–$650,000 and withheld payment on services received. *See, e.g.*, 74a–75a (¶65), 79a–80a (¶79), 85a–86a (¶¶100–03).

Paulsen's assertions of "overcharges" and other billing "errors" were false. Although "it is impossible to set forth each and every reason" why in light of Paulsen's own lack of specificity, the First Amended Complaint provided several examples. 165a–68a (¶353). Most starkly, an email from Paulsen on March 22, 2012, asserted that "we are not receiving our contractual discounts in some of the facilities per our contracts," but, in fact, no facility was denied a contractual discount that was owed, and Diagnostic

Labs discovered it had underbilled the North American facilities by about $80,000. *Id.* (¶353).

The same email also asserted that "[certain x-ray procedure] codes are not included in any of our contracts with your company as a billable event" for ultrasound procedures. *Id.* In fact, Diagnostic Labs' contracts specifically stated that those codes would be used for billing transportation and setup for ultrasound. *Id.*

Paulsen knew his overbilling claims were false. Tellingly, when Kelly McCullum of Diagnostic Labs met with Paulsen to "explai[n] the contractual bases for Diagnostic Labs' charges," Paulsen refused to "engage on the specifics [and] instead said that he just wanted money." 164a–65a (¶352); *see also id.* (noting a similar exchange). Likewise revealing is that no audit documents have been provided or identified to Diagnostic Labs. *Id.* In related litigation, neither Paulsen nor Suer could explain that failure. *Id.* Indeed, Suer has testified that no audits had even been conducted for 2008 or 2009, thus revealing the flagrant falsity of Paulsen's representation in the March 2012 email that the asserted overcharges were discovered in audits going back to "12/2009 in laboratory and 12/2008 in radiology." 168a (¶353).

Second, Paulsen sent (or caused to be sent) emails and letters implying that Diagnostic Labs' contracts would not be terminated if the billing dispute was fairly resolved. For example, on April 30, 2012, Paulsen had an administrator at one of the North American facilities send an email to Diagnostic Labs saying that the administrator was "willing to push back the cancellation letter for lab for 30 days in good faith" because he "heard our people are talking." *See*

76a–77a, 78a–79a (¶72, ¶¶76–77); *see also* 84a (¶94) (similar exchange).

Likewise, a month later, Paulsen himself sent a similar letter to Diagnostic Labs. He wrote, "Unless I receive confirmation … that the [North American facilities] will receive credit for the [Diagnostic Labs] billing errors, these facilities may be cancelling their service contracts with [Diagnostic Labs]." *See* 82a–83a (¶90); *see also* 85a–86a (¶101) (similar exchange). These representations lulled Diagnostic Labs into continuing to provide services even though North American was withholding payment. *See* 76a (¶69).

Paulsen's unmistakable suggestion that Diagnostic Labs' contracts would be maintained so long as there was a good-faith resolution to the billing dispute was knowingly false. As a Delaware court found in related litigation, "[d]ocumentary evidence from the end of March 2012 indicates that [North American] was planning to cancel contracts with [Diagnostic Labs]." 73a (¶61). Indeed, in March 2012, Paulsen had already informed facilities administrators that new contracts for x-ray and laboratory vendors would be rolled out soon. *Id.* (¶63).

Finally, Defendants' fraudulent representations injured Diagnostic Labs. Once Diagnostic Labs refused to succumb to Paulsen's demand for compensation, Paulsen emailed North American facilities administrators to instruct them to terminate Diagnostic Labs' contracts. *See, e.g.*, 87a–88a (¶106), 92a–94a (¶115). Then, from August through October, Paulsen caused each facility to mail Diagnostic Labs a final payment reconciliation letter and check, which subtracted asserted overcharges from the payment due

for services that Diagnostic Labs had been lulled into providing. *See* 83a–84a (¶93), 94a–95a (¶120).

Moreover, although Paulsen's emails instructing the North American facilities to terminate Diagnostic Labs' contracts emphasized that the replacement vendors would be cheaper (which, of course, was one of Paulsen's motives for the switch), the emails falsely pinned the blame for the termination squarely on Diagnostic Labs' asserted "over billing." *See, e.g.*, 87a–88a (¶106), 92a–94a (¶115). And that falsehood hindered Diagnostic Labs' ability to regain contracts when certain replacement vendors later had quality problems or stopped performing the services. *See, e.g.*, 110a–12a (¶¶165–69), 124a–27a (¶¶209–16).

3. Defendants' predicate offenses constituted a substantial amount of racketeering. Several factors demonstrate the broad sweep of their scheme.

First, Defendants targeted multiple victims in 2012. For example, they ran the same scam against Schryver Medical Sales and Marketing, Inc., another mobile x-ray and laboratory service provider. 62a (¶¶22–23). As with Diagnostic Labs, Paulsen emailed Schryver, falsely asserting that "overcharges" had been discovered through "auditing." 96a–99a (¶¶124–29). He demanded "reimbursement" and falsely implied that "terminati[on]" would be reconsidered in the event of "a mutually agreeable resolution." *Id.*

Like Diagnostic Labs, Schryver responded that the overbilling "argument[s]" did not "hol[d] water." 97a–98a (¶126). Unlike Diagnostic Labs, though, Schryver Medical provided a "credit" in the hope of

"press[ing] on … with the business relationship." 100a–01a (¶133). Nevertheless, Schryver Medical met the same fate as Diagnostic Labs: its contracts with North American facilities were terminated. 101a (¶134).

Schryver's owner later referred to Defendants as "the guys that tried to extort us" because they were just trying "to extract discounts" even though their "intention all along" was to terminate the contracts. 101a–02a (¶¶136–37); *see also* 61a (¶20), 103a–06a (¶¶141–51) (detailing the same scam against First Choice Mobile Radiology Services, LLC).

Indeed, the evidence strongly suggests that Defendants victimized all their existing x-ray and laboratory vendors in 2012. By late October 2012, each of those vendors had been terminated and replaced. 106a (¶152). And a spreadsheet prepared by Suer for Defendants listed the amount credited for each vendor. *Id.*; *see also* 62a (¶¶24–25), 72a–73a (¶60) (describing an invoice from Suer listing credits provided by Pacific Cost Laboratories and West Valley Radiology). Revealingly, Suer's spreadsheet identified the "*Total so far*." This confirmed the ongoing threat posed by the scam, as did Defendants' decision to have Suer turn to other categories of ancillary service vendors. 106a–07a (¶¶152–54) (emphasis added).

Second, Defendants' fraudulent efforts were protracted and constant in 2012. Defendants' use of the mails or wires in connection with their scheme to defraud x-ray and laboratory vendors spanned at least ten months: from telephone calls to First Choice in January 2012 to reconciliation letters to Diagnostic Labs in October 2012. 103a–04a (¶141), 94a–95a

(¶120). Moreover, over that ten-month period, Defendants' use of these channels for fraudulent ends was frequent rather than sporadic, as demonstrated by the First Amended Complaint's lengthy enumeration of communications. 74a–106a (¶¶65–151), 177a–87a (¶¶383–408).

Third, Defendants bolstered their fraud scheme with extortion and bribery. As for extortion, in proposed "settlements" with Diagnostic Labs and Schryver, Paulsen volunteered to include nondisclosure provisions that would keep the overbilling secret—an uninvited "offer" through which Defendants threatened to publicly disclose the false claims unless their victims paid up. *See* 86a (¶103), 96a–97a (¶124). As for bribery, Suer accepted kickbacks from companies vying to be replacement vendors, and Defendants approved of his misconduct. *See* 112a–16a (¶¶170–82), 221a (¶¶524–25).

C. Proceedings Below

1. Diagnostic Labs brought suit against Sorensen and Paulsen and asserted claims for RICO violations. Defendants filed a motion to dismiss, which the district court granted on narrow grounds. The court held that Diagnostic Labs failed to plead "continuity." In particular, the court held that a ten-month racketeering period is insufficient to satisfy closed-ended continuity unless it also "threaten[s] … future criminal conduct" (which is the standard for open-ended continuity). 21a (emphasis omitted).

2. The Ninth Circuit affirmed, even though it recognized that Diagnostic Labs had alleged "a fraud scheme that lasted ten months." 2a. The Court noted, as the district court had, that the Ninth Circuit had

previously "declined to adopt a bright-line rule for how long an alleged scheme must last to establish closed-ended continuity." 3a. Nonetheless, the Court concluded that "the alleged scheme was too limited and short in duration to sufficiently establish closed-ended continuity." *Id.*

REASONS FOR GRANTING THE PETITION

I. Federal courts are deeply divided on the meaning of closed-ended continuity

In *H.J.*, this Court held that RICO's "pattern" element required a showing of "continuity" though no such requirement is explicit in the statute's text. 492 U.S. at 242. The Court then left it to the lower courts to determine the requirement's parameters. Thirty years into that effort, lower courts have diverged wildly, resulting in a clear, acknowledged split. *See State* v. *Bruun*, 405 P.3d 905, 929 (Utah Ct. App. 2017); *Efron* v. *Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 19 (CA1 2000). Some courts measure closed-ended continuity by weighing an assortment of non-dispositive factors, including length of time, variety and regularity of predicates, and number of victims. *E.g.*, *GICC Capital Corp.* v. *Technology Finance Group, Inc.,* 67 F.3d 463, 467 (CA2 1995). In other courts, however, length of time is the decisive measure. *E.g.*, *Vicom, Inc.* v. *Harbridge Merchant Services, Inc.*, 20 F.3d 771, 780 (CA7 1994).

This Court's review is needed to resolve this discord over an important, recurring statutory question.

A. *H.J.* attempted to clarify "pattern"

H.J. itself was borne from a division over what sufficed for a "pattern" of racketeering. Before *H.J.*,

some courts held that predicate acts formed a pattern only when they were part of separate schemes. *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 829 F.2d 648 (CA8 1987). Other courts, however, held that all that was required (as the text of RICO suggests) were two predicate acts. *United States* v. *Jennings*, 842 F.2d 159, 163 (CA6 1988).

This Court rejected both extremes. It instead concluded that "Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." *H.J.*, 492 U.S. at 238.

The Court, however, did not stop at relatedness. "RICO's legislative history tells us," the Court wrote, "that the relatedness of racketeering activities is not alone enough to satisfy § 1962's pattern element." *Id.* at 240. In addition, "it must … be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." *Id.* (emphasis omitted). Thus, "what a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, simpliciter." *Id.* at 241. Because this showing "may be done in a variety of ways," the Court found it "difficult to formulate in the abstract any general test for continuity." *Id.*

The Court nonetheless offered some guideposts. Foremost, the Court explained that "continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. For closed-ended continuity, the Court said what is needed is a

"series of related predicates extending over a substantial period of time." *Id.* at 242. While the Court recognized that continuity was "centrally a temporal concept," it set any temporal threshold extremely low: "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *Id.*

Writing for four justices, Justice Scalia criticized the majority for offering mere "hints as to what RICO means." *Id.* at 251 (Scalia, J., concurring in the judgment). The Court had previously called upon the lower courts "to develop a meaningful concept of 'pattern,'" an effort that "produced the widest and most persistent Circuit split on an issue of federal law in recent memory." *Id.* But given that the *H.J.* majority's discussion was "about as helpful" to lower courts "as 'life is a fountain,'" there was "no reason to believe that the Courts of Appeals will be any more unified in the future, than they have in the past, regarding the content of this law." *Id.* at 252, 255.

B. Federal appellate courts are split over how to measure closed-ended continuity

Justice Scalia proved prescient. Despite *H.J.*'s effort to clarify what constitutes pattern under RICO, the Court merely shifted the confusion. Courts are now intractably divided over what suffices for closed-ended continuity. The results of the nearly three decades of opinions in this "volatile" area are decisions that "cannot all be reconciled." *Efron*, 223 F.3d at 19. As courts have recognized, "it does not appear that the federal circuits are in full agreement about whether it is appropriate to impose a specific minimum durational requirement that, as matter of law, will preclude the continuity element from being met

for alleged patterns failing to meet the minimum duration." *Bruun*, 405 P.3d at 929.

The courts divide into two camps. One group uses a multi-factor balancing test, which reflects a "flexible approach" that can be tailored to the facts of particular cases. *See H.J.*, 492 U.S. at 238. The other group looks to one factor: time.

1. The Second, Fourth, Fifth, Sixth, Eighth, Tenth and D.C. Circuits use a flexible, multi-factor approach. *Abraham* v. *Singh*, 480 F.3d 351, 356 (CA5 2007); *Western Assocs.* v. *Market Square Assocs.*, 235 F.3d 629, 633 (CADC 2001); *GICC*, 67 F.3d at 467; *Resolution Tr. Corp.* v. *Stone*, 998 F.2d 1534, 1543 (CA10 1993); *Fleischhauer* v. *Feltner*, 879 F.2d 1290, 1298 (CA6 1989); *Atlas Pile Driving Co.* v. *DiCon Financial Co.*, 886 F.2d 986, 990, 995 (CA8 1989); *Menasco, Inc.* v. *Wasserman*, 886 F.2d 681, 690 (CA4 1989).

These "courts of appeals … have attempted to measure whether closed-ended continuity exists by weighing a variety of non-dispositive factors," such as "length of time," "number and variety of acts," and "number of victims." *GICC*, 67 F.3d at 467. Critically, these factors are considered collectively, and "weakness in one area" may be "balanced by the strength presented in other areas." *Columbia Natural Resources, Inc.* v. *Tatum*, 58 F.3d 1101, 1111 (CA6 1995).

Time. While length of time is an important factor, it is not dispositive. It is the starting point, but it is not the end. *See Spool* v. *World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (CA2 2008) ("We have not viewed two years as a bright-line requirement."); *Western Assocs.*, 235 F.3d at 636 ("Even if temporal

length was supposed to be the most heavily weighted factor in the … analysis … it may be trumped by other factors.").

As *H.J.* itself recognized, the minimum time for closed-ended continuity is somewhere around the few-month mark. 492 U.S. at 242. Courts using the flexible approach have thus recognized that periods of less than a year can amount to closed-ended continuity. *United States* v. *Nabors*, 45 F.3d 238 (CA8 1995) (7 months); *Polycast Tech. Corp.* v. *Uniroyal, Inc.*, 728 F. Supp. 926, 948 (S.D.N.Y. 1989) (8.5 months); *Resolution Tr.*, 998 F.2d at 1544 ("The scheme lasted from *seven or eight months* to perhaps … eighteen months. We find that this is a sufficient duration to support … continuity."); *Fleischhauer*, 879 F.2d at 1298 (finding continuity even though "the [racketeering] acts occurred" only between October "1980 and early 1981").

Indeed, as then-Judge Alito explained, "closed-ended continuity should not require racketeering activity extending over a longer period of time than Congress felt would normally be required for the infiltration of a legitimate business by means of the various RICO predicates, such as murder, kidnapping, arson, bribery, or fraud." *Kehr Packages, Inc.* v. *Fidelcor, Inc.*, 926 F.2d 1406, 1422 (CA3 1991) (Alito, J., concurring in part and dissenting in part). "It would be anomalous" he observed, "to construe the concept of closed-ended continuity so narrowly that efficient campaigns to infiltrate legitimate businesses—the heart of congressional concern when RICO was originally enacted—are excluded from the coverage of that concept." *Id.*

Courts following the multi-factor approach thus do not impose a rigid time requirement. They balance the length of time with other factors. Conversely, these courts also recognize that "the mere longevity of a scheme or schemes does not necessarily mean that a 'pattern of racketeering activity' is present." *Western Assocs.*, 235 F.3d at 264. In other words, "even if temporal length was supposed to be the most heavily weighted factor in the multi-faceted … analysis (an assumption that is not necessarily mandated by *H.J. Inc.*), it may be trumped by other factors." *Id.* Time is thus but one factor in the mix.

Frequency. Besides the length of the racketeering period, these courts focus on the frequency of racketeering activity within the period. After all, the more numerous the predicates were, the more "substantial" the closed-ended "period" of racketeering was for purposes of *H.J.*

Thus, for example, the Sixth Circuit upheld a complaint in part because it "list[ed] dozens of examples of [alleged] mail and wire fraud." *Tatum*, 58 F.3d at 1110. The same was true in *Atlas Pile Driving Co.*, 886 F.2d at 990, 995. *See also Toto* v. *McMahan, Brafman, Morgan & Co.*, 1995 WL 46691, at *9 (S.D.N.Y. Feb. 7, 1995) (finding continuity where "plaintiffs allege multiple acts of mail and securities fraud").

Variety. Also relevant to the analysis is the variety of racketeering acts alleged, because the more different types of related predicates there were, the more the closed-ended "period" amounted to a "substantial" criminal undertaking. Thus, for example, the Sixth Circuit in *Tatum* emphasized that the complaint "allege[d] various kinds of predicate acts" that

"were the foundation for various schemes" to impose "various injuries" on the plaintiff. 58 F.3d at 1110.

Victims. Last but not least, the greater the number of victims, the more the predicates represent a "substantial period" of racketeering. Thus, when a scheme is directed at more than one identifiable victim, the existence of closed-ended continuity is more likely. *Fleischhauer*, 879 F.2d at 1298 (a single class of victims, but multiple individuals); *Abraham*, 480 F.3d at 356 ("Unlike our precedents identifying a single illegal transaction, there are multiple victims.").

The courts on this side of the split analyze these factors (and others as the case requires) to reach "a natural and commonsense result" when it comes to closed-ended continuity. *Resolution Tr. Corp*. v. *Stone*, 998 F.2d 1534, 1544 (CA10 1993).

2. Meanwhile, "other circuits" have held "that the substantial period of time requirement for establishing close-ended continuity cannot be met with allegations of schemes lasting less than a year." *Jackson* v. *BellSouth Telecommunications*, 372 F.3d 1250, 1266 (CA11 2004) (emphasis omitted). These circuits—the First, Third, Seventh, Ninth, and Eleventh Circuits—reject the multi-factor analysis and instead apply a minimum time requirement. *Id.*; *Tabas* v. *Tabas*, 47 F.3d 1280, 1294–95 (CA3 1995) (en banc) ("We find, from the strictly durational aspect of the scheme, that plaintiffs … made a sufficient showing … on the 'continuity' prong."); *Uni*Quality, Inc.* v. *Infotronx, Inc.*, 974 F.2d 918, 922 (CA7 1992) (holding that a scheme that lasted seven to eight months was "precisely the type of short-term, closed-ended fraud that, subsequent to *H.J.,* this circuit consistently has held does not constitute a pattern."); *Fleet*

Credit Corp. v. *Sion*, 893 F.2d 441, 445–47 (CA1 1990) (finding a multi-factor analysis was no longer viable after *H.J.*, and directing courts to focus on duration).

These Courts have read *H.J.* as putting a "special emphasis [on] the sheer duration of criminal activity," *Walk v. Baltimore & Ohio R.R.*, 890 F.2d 688, 690 (CA4 1989), and eschewing any other factors, *Swistock* v. *Jones*, 884 F.2d 755, 758 (CA3 1989) (the "Supreme Court made no explicit reference in *H.J. Inc.* to the number of victims or the number of perpetrators as relevant factors in its discussion of continuity, despite the fact that all of Northwestern Bell's customers were arguably victims of the alleged scheme to raise rates."). The result is that "duration" has become "the closest thing we have to a brightline continuity test." *Vicom, Inc.* v. *Harbridge Merchant Services, Inc.*, 20 F.3d 771, 780 (CA7 1994).

"Consequently, in determining whether or not continuity has been established in the present case," these courts reason they "must focus on the duration of the underlying scheme." *Tabas*, 47 F.3d at 1294. These courts thus reflexively reject any allegations that do not involve at least a year-long scheme. E.g., *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 (CA3 1991) ("We hold that twelve months is not a substantial period of time."); *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1024 (CA7 1992) (finding a nine-month scheme insubstantial); *Menasco, Inc.* v. *Wasserman*, 886 F.2d 681, 684 (CA4 1989) (holding that predicate acts occurring over one-year period do not form pattern); *Tabas*, 47 F.3d at 1293 ("Since *H.J. Inc.*, this court has faced the question of continued racketeering activity in several cases, each time finding that conduct lasting no more than twelve months

did not meet the standard for closed-ended continuity."). The inverse is also true. If a long period of time is alleged where related racketeering acts occur, closed-ended continuity has been established "irrespective of the other … factors." *Fleet Credit Corp.*, 893 F.2d at 446.

It is true that these courts occasionally discuss other factors, but those factors only come into play if the plaintiff satisfies the minimum time requirement. *Id.* ("We find, from the strictly durational aspect of the scheme, that plaintiffs in the present case have made a sufficient showing to survive summary judgment on the 'continuity' prong of the pattern analysis."); *Jennings* v. *Auto Meter Prod., Inc.*, 495 F.3d 466, 475 (CA7 2007) ("The short duration alone might be enough to dispose of this case. The other factors identified in *Morgan* also favor dismissal, however, and so we address them briefly." (citation omitted)).

In this case, the Ninth Circuit joined this approach, rejecting the allegations solely on the basis of time. The court did not consider any of the factors courts on the other side of the split discuss. Instead, it merely concluded that the "the alleged scheme was too limited and short in duration to sufficiently establish closed-ended continuity." 2a–3a. The court did hint at some factors, but a closer look shows the court did not actually apply a multi-factor test.

First, the court said the allegations did not involve "multiple schemes." That requirement is what this Court rejected in *H.J.* 492 U.S. at 240. Whether there were multiple schemes is thus irrelevant.

Second, the court said there were a limited number of participants and victims. 2a–3a. That is decidedly not true. There were multiple victims. The complaint identified three by name and even more by class of vendor. And the participants in the scheme were not just low-level employees. Two were the CEO and COO of the company, and the third was their right-hand man. *Supra* 4. These considerations thus weigh in favor of continuity, not against it.

Third, the court failed to consider any of the other factors that inform a closed-ended continuity analysis. In reality, the court imposed a rigid time requirement. In the Ninth Circuit now, ten months is too little time to satisfy closed-ended continuity. Indeed, Petitioner is unaware of any Ninth Circuit case ever accepting allegations of less than a year. *See Allwaste Inc.* v. *Hecht*, 65 F.3d 1523, 1528 (CA9 1995) (discussing *Religious Technology Center* v. *Wollersheim*, 971 F.2d 364 (CA9 1992). The court thus deepened an entrenched circuit split over how to measure closed-ended continuity.

3. Finally, a review of the criminal side of RICO reveals even more division. Foremost, some courts that have applied a minimum time requirement to civil RICO complaints have balked at that approach when it comes to indictments. *United States* v. *Palumbo Brothers, Inc.*, 145 F.3d 850, 878 (CA7 1998) ("[Continuity] is not an essential element of a RICO offense."); *United States* v. *Boylan*, 898 F.2d 230, 250 (CA1 1990) (applying the multi-factor test).

Going even further, some courts have held that continuity does not have to be alleged in a criminal indictment, *Boylan*, 898 F.2d at 250, nor does the jury even need to be instructed on continuity, *United*

States v. *Kotvas*, 941 F.2d 1141, 1144–45 (CA11 1991); *United States* v. *Celestine*, 43 F. App'x 586, 591 (CA4 2002). *But see H.J.*, 492 U.S. at 239 ("A plaintiff or prosecutor must show that the racketeering predicates … amount to or pose a threat of continued criminal activity."). Elements common to both civil and criminal RICO should have the same meaning. *See Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 240 (1987). But while prosecutors appear free to leave out any allegation of continuity, civil plaintiffs continue to lose in courts that require a minimum time frame that is absolutely not statutorily required.

* * *

This acknowledged circuit split, which has festered for decades and which continues to crop up today, has shown no signs of resolution absent this Court's intervention. *See Bruun*, 405 P.3d at 929 (collecting cases). The Court should thus grant review to determine how to measure closed-ended continuity, whether through a flexible, multi-factor approach, or through a myopic focus on time.

II. The question presented is sufficiently important to warrant this Court's review

The question presented is important. Three decades ago, this Court granted certiorari to clarify what "pattern" meant. But the element still remains opaque. The fact that courts diverge over how to assess a basic requirement of a federal statute is concern enough for this Court to weigh in, but the interpretation of RICO is of unusual importance. Not only

is it a key tool for rooting out corruption, it also carries criminal penalties. Litigants and criminal defendants deserve clarity on the elements of RICO.

1. RICO is an important federal law. It "was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima, S.P.R.L.* v. *Imrex Co, Inc.*, 473 U.S. 479, 498 (1985). Congress stated that "the purpose of this Act to seek the eradication of organized crime in the United States ... by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Pub. L. No. 91-452, 84 Stat. 922 (1970). To ensure RICO achieves its important purpose, both Congress and this Court have recognized that the statute must "be read broadly." *Sedima*, 473 U.S. at 497; *see also* Pub. L. No. 91-452, § 904(a) (RICO "shall be liberally construed to effectuate its remedial purposes").

As a result, this Court "has consistently struck down efforts by the courts of appeals to narrow RICO's scope." *Tabas*, 47 F.3d at 1297; *e.g.*, *NOW Inc.* v. *Scheidler*, 510 U.S. 249, (1994); *H.J. Inc.*, 492 U.S. at 250; *Sedima*, 473 U.S. at 495.

The issue presented in this case falls squarely within the class of cases where this Court has granted review. The court below, along with a number of other courts, have adopted a "pinched construction" of RICO. *H.J.*, 492 U.S. at 249. Requiring a minimum time period for closed-ended continuity undermines RICO's purpose and runs counter to the liberal construction this Court has repeatedly endorsed. Courts on the rigid-time-requirement side of the split essentially hold that a year of racketeering

"is generally for free, as far as RICO is concerned." *Id.* at 254 (Scalia, concurring in the judgment).

There is more. The circuit courts' disagreement over how to analyze closed-ended continuity creates confusion and inequitable results. Plaintiffs who have suffered at the hands of criminals do not know how to sufficiently plead closed-ended continuity. In some courts they can merely allege two predicate acts separated by a few years and qualify for closed-ended continuity. In other courts, plaintiffs must allege a sufficient variety of predicates, victims, along with a substantial time period.

The fact that RICO carries criminal penalties makes the question presented even more important. *See FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954). Though this case is a civil one, because RICO "is a criminal statute that [this Court] must interpret" there "cannot be one construction for" the private plaintiff and "another for the Department of Justice." *Id.* The degree of uncertainty over what constitutes closed-ended continuity (or whether it is even an element in a criminal charge, *see Kotvas*, 941 F.2d at 1144), makes this question exceptionally important.

2. In addition, the question presented arises repeatedly and proves decisive in many cases. The number of circuit court decisions dealing with closed-ended continuity alone shows how frequently this issue arises. *Supra* 14–17. Casting a broader net, a Westlaw search reveals that in 2017, federal district courts addressed closed-ended continuity in over three dozen cases. And there is no sign that the pace is letting up. *See, e.g.*, *Swallow* v. *Torngren*, 2018 WL 2197614, at *12 (N.D. Cal. May 14, 2018); *Lederhouse*

v. *Landau Arnold Laufer LLP*, 2018 WL 1635030, at *3 (S.D.N.Y. Apr. 4, 2018); *Armutcuoglu* v. *Lev*, 2018 WL 1474386, at *3 (S.D.N.Y. Mar. 23, 2018); *Yagman* v. *Kelly*, 2018 WL 2138461, at *16 (C.D. Cal. Mar. 20, 2018); *Nelson* v. *Nelson*, 2018 WL 1392885, at *6 (E.D. Cal. Mar. 20, 2018); V*an Galder* v. *Clark*, 2018 WL 1071708, at *4 (S.D. Cal. Feb. 27, 2018).

Finally, a number of states have their own versions of RICO, and look to this Court's interpretation of federal RICO as a guide, meaning this Court's answer to the question presented will have an impact beyond the particular federal statute at issue. *E.g.*, *New Crawford Valley, Ltd.* v. *Benedict*, 877 P.2d 1363, 1371 (Colo. App. 1993) ("Colorado has adopted the 'pattern' analysis applied by the United States Supreme Court in *H.J. Inc.*"); *Brown* v. *State*, 652 So. 2d 877, 879 (Fla. Dist. Ct. App. 1995).

This issue is undoubtedly important. It falls within the class of RICO cases where this Court has granted review before; it involves the interpretation of a statute carrying criminal penalties; and it arises frequently with no end in sight. The question thus warrants this Court's attention.

III. The decision below is wrong

The Ninth Circuit applied a rigid standard, rejected by a number of circuit courts and at odds with this Court's precedent. It erred in affirming the district court's dismissal of Diagnostic Labs' complaint.

A. The Ninth Circuit should have applied the multi-factor test

The Ninth Circuit should have applied the multi-factor test for closed-ended continuity, because that

is the approach that gives effect to RICO's purpose and this Court's interpretation of "pattern."

H.J. defined closed-ended continuity as a "closed period of repeated conduct" that "extend[ed] over a substantial period of time." 492 U.S. at 241–42. Although the Court announced that "[p]redicate acts extending over a few weeks or months" do not satisfy the substantiality standard, it did not specify what more is necessary. *Id.* at 242. To the contrary, *H.J.* emphasized that, given the requisite flexibility of the continuity requirement, "the precise methods by which [it] may be prove[d] cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." *Id.* at 243. A rigid time requirement is thus anathema to the flexible approach this Court endorsed, especially "in light of the liberal pleading standard with which the Plaintiffs' allegations must be viewed." *Abraham*, 480 F.3d at 355.

Courts should instead use "a flexible guide for analyzing RICO allegations on a case by case basis." *Western Associates*, 235 F.3d at 634. Had the Ninth Circuit done so here, it would have allowed Diagnostic Labs' complaint to go forward.

B. Diagnostic Labs' allegations satisfy the multi-factor approach

Under the proper test, Diagnostic Labs sufficiently alleged that there was closed-ended continuity. Diagnostic Labs alleged that over a ten-month period Defendants engaged in a persistent racketeering scheme targeting multiple victims through the use of mail and wire fraud augmented by acts of bribery

and extortion. Taken together these allegations satisfy the flexible approach to closed-ended continuity. Had Diagnostic Labs been able to file suit in a circuit that uses that test, the complaint would still be alive.

Time. As established above, a "commonsense" approach to closed-ended continuity does not support a rigid time requirement. *Resolution Trust*, 998 F.2d at 1544. That can obviously be a short period of time. *Polycast*, 728 F. Supp. at 948 (8 and a half months); *Nabors*, 45 F.3d 238 (7 months).

Diagnostic Labs' allegations on this score support closed-ended continuity. Diagnostic Labs alleged the 2012 racketeering spanned at least a ten-month period, because fraudulent communications were sent from January to October. 2a–3a. That is certainly long enough time for an "efficient campaigns to infiltrate legitimate businesses." *Kehr Packages*, 926 F.2d at 1422 (Alito, J., concurring in part and dissenting in part). It is longer than other schemes that have been found to amount to closed-ended continuity. *Polycast*, 728 F. Supp. at 948; *Nabors*, 45 F.3d 238. It well exceeds the hypothetical "few weeks or months" rejected by this Court in *H.J.*, 492 U.S. at 242. And even if there is "weakness in [this] one area" it is "balanced by the strength presented in other areas." *Tatum*, 58 F.3d at 1111.

Frequency. Diagnostic Labs also alleged that Defendants engaged in persistent acts of racketeering. The 2012 racketeering entailed constant use of the mails and wires in furtherance of the fraudulent scheme. *Supra* 9. This factor clearly supports finding closed-ended continuity because it is well in line with the "dozens of examples of…mail and wire fraud" in

other cases that found closed-ended continuity. *Tatum*, 58 F.3d at 1110 ("dozens of examples of…mail and wire fraud"); *Atlas Pile Driving Co.*, 886 F.2d at 990, 995 (multiple instances of mail fraud).

Variety. Diagnostic Labs also alleged that Defendants bolstered the core fraud scheme through both extortion (which increased pressure on defrauded vendors to pay) and bribery (which increased profits from replacement vendors). *Supra* 10. Because Diagnostic Labs "allege[d] various kinds of predicate acts" that "were the foundation" for their scheme to defraud service providers, this factor weighs in favor of finding closed-ended continuity. *Tatum*, 58 F.3d at 1110–11. Indeed, these allegations present a stronger case for continuity than many of the cases finding continuity based solely on mail and wire fraud. *Atlas Pile Driving Co.*, 886 F.2d at 990, 995; *Fleischhauer*, 879 F.2d at 1298.

Victims. Finally, the number of victims supports closed-ended continuity. Defendants had three confirmed targets (Diagnostic Labs, Schryver, and First Choice), and Suer's "so far" chart strongly suggests that Defendants targeted all other x-ray and laboratory vendors (such as Pacific Coast and West Valley). *Supra* 8–9. This factor thus supports closed-ended continuity. *Compare Western Associates*, 235 F.3d at 635; *Fleischhauer*, 879 F.2d at 1298.

In sum, these factors taken together show that the racketeering allegations occurred over a "substantial period" that easily satisfies the "flexible" closed-ended continuity requirement, *H.J.*, 492 U.S. at 239, 242, especially at the pleading stage. A persistent ten-month scheme to defraud vendors that involved varied predicates and targeted multiple victims is

well within the plausible scope of the "expansive language and overall approach" of RICO as construed by the courts. *Sedima*, 473 U.S. at 498. The Ninth Circuit's contrary decision is plainly wrong.

IV. This case is a good vehicle

This case is an ideal vehicle for answering the question presented. The allegations in Diagnostic Labs' complaint present the precise scenario that implicates the split in the lower courts over what constitutes closed-ended continuity. The time period for the scheme sits right under the minimum that some courts impose, yet it also alleges a substantial scheme with multiple and varied predicates and many victims. In other words, the case presents this Court with the clear choice: is there a rigid threshold for closed-ended continuity, or should courts follow a flexible approach?

This case also comes to the Court in a good procedural posture. Just as *H.J.* was decided on a motion to dismiss, this case was as well. 492 U.S. at 234–35; *see also Sedima*, 473 U.S. at 484–85 (also on a motion to dismiss). It is crucial for potential victims to know how to plead their case. Waiting for a case that comes up on a full record after discovery and trial will not serve that purpose. Indeed, since many courts impose a minimum time requirement at the pleading stage, a case may never reach this Court after a trial.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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