No.

IN THE
Supreme Court of the United States

CANYON COUNTY,
Petitioner,

v.

SYNGENTA SEEDS, INC., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the phrase "business or property" in the civil damages provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), exclude a government entity's costs of providing services?

2. May a court dismiss a RICO complaint for lack of proximate causation without determining if the plaintiff alleges an injury directly caused by the RICO violations?

LIST OF PARTIES

Petitioner:

Canyon County, a political subdivision of the State of Idaho.

Respondents:

1. Syngenta Seeds, Inc., a Delaware corporation;

2. Sorrento Lactalis, Inc., a Delaware corporation;

3. Swift Beef Company, a Delaware corporation;

4. Harris Moran Seed Co., a California corporation;

5. Alberto Pacheco, an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Canyon County, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting Respondents' Motion to Dismiss Canyon County's Complaint for failure to state a claim was not reported and is reproduced in the appendix (Pet. App.) at 38a. The opinion of the Ninth Circuit affirming the dismissal of the district court was published at 519 F.3d 969 (9th Cir. 2008) and is reproduced at Pet. App. 3a. The Ninth Circuit's order denying rehearing *en banc* was not reported and is reproduced at Pet. App. 1a.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on March 21, 2008. An order denying Petitioner's petition for rehearing *en banc* was entered on May 1, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1964(c) of Title 18 of the United States Code provides, in pertinent part, that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

STATEMENT OF THE CASE

This Petition arises from an action by Canyon County, Idaho (hereafter "the County") to recover costs it has expended providing services to illegal immigrants.[1] Canyon County sued four large employers for knowingly hiring many illegal immigrants who, during their employment, committed crimes in the County, thereby costing the County money for criminal justice services including incarcerating them in its jail.[2] Many other of these illegal immigrants wrongfully obtained health and welfare services from the County.[3] Overall, the County has paid millions of dollars in services for

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[1] See Pet. App. 55a (First Amended Complaint (hereafter "Complaint") at ¶1-2).
[2] Id.
[3] Id. at ¶¶ 26, 32, 38-40, 43.

these illegal immigrants in the four years prior to filing the action in 2005 pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO").[4]

In 1996, Congress amended RICO to add certain immigration law offenses as RICO "predicate acts" (racketeering activity).[5] The County's action, filed in 2005, sought damages caused by the Respondents' knowing employment of illegal immigrants. The district court, without permitting the County to take any discovery, dismissed the suit with prejudice, for failure to state a RICO claim, concluding that the damages the County sought to recover, the costs of providing municipal services, were not "business or property" within the meaning of 18 U.S.C. § 1964(c), RICO's civil damages provision (hereafter § 1964(c)).

The Ninth Circuit affirmed this conclusion, refusing to construe RICO as written. It held: "We simply do not think the term 'business or property' can be interpreted to encompass the sorts of interests

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[4] Id. at ¶ 2; 18 U.S.C. §§ 1961-1968.

[5] These violations were added to RICO's list of state common law and federal statutory violations enumerated at 18 U.S.C. § 1961. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 433. 110 Stat. 1214. The new RICO provisions were codified at 18 U.S.C. § 1961(1)(F), making violations of section 274 of the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.), "racketeering activity" (also referred to in case law as "predicate acts"). Section 274 of the Act is codified at 8 U.S.C. § 1324. The County's suit asserted that Respondents violated 8 U.S.C. § 1324(a)(3)(A) (prohibiting the employment of ten or more illegal aliens per year).

that the County relies on in this case." Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 980 (9th Cir. 2008). This conclusion, that a government entity cannot sue to recover damages unless it is acting as "an ordinary marketplace actor" under RICO, conflicts with the Seventh and Eighth Circuits' conclusions which have rejected the need for any such marketplace or commercial injury.[6]

The Ninth Circuit also impermissibly refused to adhere to this Court's unanimous instruction that the lower courts not read limitations into RICO.[7] Thus, the first question is whether the Ninth Circuit was correct in interpreting the phrase "business or property" in RICO so as to exclude the County's costs of providing services.

The Ninth Circuit also concluded, based solely on the County's Complaint, that its injury was not "proximately" caused by the Respondents' RICO violations. The Ninth Circuit did so by disregarding the first step in the proximate causation analysis:

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[6] Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 314 (7th Cir. 1985)(rejecting the contention that the state could not sue for enforcement of unpaid taxes under RICO because it was not injured in its business or property); Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982)(rejecting the argument that RICO requires a "commercial or competitive injury").

[7] Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 170 L. Ed. 2d 1012, 1028 (2008)("[W]e are not at liberty to rewrite RICO to reflect their--or our--views of good policy. We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe").

determining if some other party was more directly injured by the alleged RICO violations.[8] Every other Circuit analyzes proximate causation by first determining if the plaintiff's alleged injury flows directly from the RICO violation, or is derivative of an injury to another party.[9] In light of this Court's decision in Anza v. Ideal Steel Supply Corp., where it held direct injury was "the central question" in the proximate causation analysis, the Ninth Circuit's decision must be reversed.[10]

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[8] Canyon County, 519 F.3d at 983 ("[W]e need not inquire into the question of whether there are more immediate victims of the defendants' alleged RICO violations who are likely to sue").

[9] See Laborers Local 17 Health & Benefit Fund v. Philip Morris, 191 F.3d 229, 238-39 (2d Cir. 1999)("As these cases demonstrate, the critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct"); New West, L.P. v. City of Joliet, 491 F.3d 717, 721 (7th Cir. 2007)("For some statutes it matters whether the injuries are direct or derivative," *citing* Anza v. Ideal Steel Supply Corp., 547 U.S. 451(2006), Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992)); V-Tech Servs. v. Street, 215 Fed. Appx. 93, 96 (3d Cir. 2007)("V-Tech's RICO claims do not satisfy the requirement of proximate causation because the direct victim of the defendant's fraudulent conduct was the federal, state, and local government entities that awarded and thereafter funded the contract with V-Tech"); In the Matter of Seven Seas Petroleum Inc., 522 F.3d 575, 586 (5th Cir. 2008)(direct injury equated with being not derivative of an injury to another party); Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 614 (6th Cir. 2004)("RICO not only imposes a statutory standing limitation on claimants who seek recovery for derivative or indirect injuries...").

[10] Anza, 547 U.S. 451, 461 (2006)(hereafter "Anza").

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AS TO WHETHER "BUSINESS OR PROPERTY" SHOULD BE READ BROADLY OR WITH JUDGE-MADE RESTRICTIONS.

A. RICO's Plain Language Supports the County.

The question presented here is whether § 1964(c) should be interpreted according to its plain and ordinary meaning or, rather, that judge-made restrictions should be read into it. The Ninth Circuit has interpreted the phrase so as to exclude the County's claim. It did so primarily because it found nothing in the legislative history of RICO to indicate Congress intended for this type of claim to be asserted. And absent that express authorization, it concluded there was no such intent. "But had Congress intended such a result, we believe that Congress would have been more explicit; the term business or property does not readily connote a government's interest in the services it provides in its sovereign or quasi-sovereign capacity." Canyon County, 519 F.3d at 980.[11]

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[11] There is no dispute that the County is a "person" within the meaning of RICO, and thus may assert a claim. 18 U.S.C. § 1961(3), defining "person" as including "any individual or entity capable of holding a legal or beneficial interest in property." RICO cases have been successfully prosecuted by governmental entities in all circuits. See, e.g., County of Oakland v. City of

The Second Circuit has taken the same approach, choosing to give the 'business or property' language a narrow interpretation because of its quite candid hostility to novel uses of civil RICO. It held: "We have stated our own views that the RICO provisions cast too wide a net with respect to civil actions that may be brought." Town of W. Hartford v. Operation Rescue, 915 F.2d 92, 104 (2d Cir. 1990).

By contrast, the Seventh Circuit interpreted 'business or property,' without second-guessing Congress' language:

> Limitations on the type of injury, such as requiring a 'racketeering injury' have been rejected . . . . While the Supreme Court held that 'business or property' phrase in the Clayton Act refers only to commercial interests and competitive injuries, this is not the case under RICO, although a few courts have attempted to draw such a line. In this case the Illinois Department of Revenue has been injured in its property to the extent that it has been defrauded out of $14,500 in unpaid taxes.

Detroit, 866 F.2d 839 (6th Cir. 1989); Carter v.Berger, 777 F.2d 1173 (7th Cir. 1985)(holding that Cook County, Illinois was the proper party to sue under RICO for unpaid taxes); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988).

Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 314 (7th Cir. 1985) (internal citations omitted).[12] The Court thus rejected the policy-driven argument, accepted by the district court that "RICO should not become a vehicle for federal jurisdiction and damages in state sales tax cases." Id.

This is precisely the view taken here by the Ninth Circuit. The Court was simply unconvinced that in enacting RICO, "Congress meant to disrupt settled expectations and alter the legislatively-chosen system of funding local government services." Canyon County, 519 F.3d at 980. But in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), this Court dispatched the notion that judges must search RICO's sparse legislative history to pinpoint evidence that its intent matches up with the implications of a particular case. "Given the plain words of the statute, we cannot agree with the court below that Congress could have had no inkling of § 1964(c)'s implications. Congress inkling's are best determined by the statutory language that it chooses . . . ." Sedima, 473 U.S. at 495 n. 13 (internal citation and punctuation omitted).

Thus, the Ninth Circuit was not writing on a blank slate. If it were, this Court might allow the conflict to develop further. But this Court resolved

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[12] See also Carter v. Berger, 777 F.2d 1173, 1176 (7th Cir. 1985)("RICO applies to tax frauds, and a government may recover losses from the underpayment of taxes," holding that Cook County, Illinois, not its taxpayers was the proper plaintiff in an action to collect unpaid taxes).

this issue in 1985 and just reaffirmed that interpretation last term, rejecting the argument that § 1964(c) requires "reliance." Again, adhering to the unambiguous language of § 1964(c), it held that no such limitation was to be read into that provision:

> We are not at liberty to rewrite RICO to reflect their - or our - views of good policy. We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.

Bridge v. Phoenix Bond & Indem., Co., 128 S. Ct. 2131, 170 L. Ed. 2d 1012, 1028 (2008). More than two decades ago, this Court rejected the arguments that § 1964(c) required either a prior criminal conviction or a "racketeering injury." Sedima, 473 U.S. at 488, 495. The Court refused to read those concepts into the unambiguous wording Congress chose to use in §1964(c) because "RICO is to be read broadly." Id. at 498.[13] And the Court held that was particularly so with regard to § 1964(c). Id. at 492 n. 10 ("Indeed, if Congress' liberal-construction mandate

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[13] The Court reviewed the legislative history of § 1964(c) in Sedima, 473 U.S. at 486-87, and found no support for either of the judicially-created limitations on damages at issue. In doing so, it was unconvinced by the dissenting justices that the Court "should be reluctant to displace the well-entrenched federal remedial schemes absent clear direction from Congress." Id., at 507 (Marshall, J., dissenting).

is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident").[14]

B. The Ninth Circuit's Antitrust Injury Requirement Is Erroneous.

The Court should also accept the Petition to resolve the Circuit split as to whether the phrase "business or property" requires an antitrust injury. The Ninth Circuit, following the Second Circuit, construed "business or property" in § 1964(c) in the same manner as in the Clayton Antitrust Act, i.e., to require injury from the loss of competition.[15] It held:

> As used in the Clayton Act's private right of action, then, the phrase business or property excludes states' interests in their sovereign or quasi-sovereign capacities, but does include states' interests as ordinary marketplace actors. We believe that this interpretation of the phrase business or property should apply in the context of a civil RICO claim as well.

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[14] RICO is to be "liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947. Id., at 498. The Court has adhered to this view ever since. See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989)("We begin, of course with RICO's text, in which Congress followed a pattern of utilizing terms and concepts of breadth")(internal citation and quotations omitted); Bridge, 170 L. Ed. 2d at 1028.

[15] 15 U.S.C.§ 15.

Canyon County, 519 F.3d at 978 (internal quotations omitted). Therefore, the Ninth Circuit, following the reasoning of the Second Circuit, would permit the County to assert a claim under § 1964(c) if it paid supra-competitive prices in a commercial transaction, i.e., as "an ordinary marketplace actor[]." Id.[16] Under this reasoning both Circuits would deny the County the right to sue for damages caused by the immigration predicate acts Congress expressly added to RICO, but would permit the County to sue for an amorphous "competitive injury" which Congress did not add to the statute.[17] This is absurd.

The Seventh and Eighth Circuits have correctly rejected this antitrust injury requirement in civil RICO because it makes no sense. The statutes have different "objectives." Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir. 1983):

> [T]o the extent that antitrust law and policy are increasingly concerned primarily with market efficiency rather than the deleterious efforts of concentrated market power itself," analogies to that body of law [to RICO] become increasingly irrelevant, since

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[16] It cited with approval the Sixth Circuit's decision in County of Oakland v. City of Detroit, 866 F.2d 839, 847 (6th Cir. 1989), which permitted the County's RICO claim for overpayment for sewer services to proceed. Canyon County, 519 F.3d at 976.

[17] Moreover, this "competitive injury" requirement would only apply to government entities, creating a classification which Congress did not enact.

> the exercise of social power by organized crime is thought to be *malim in se*.

Id. (rejecting the argument that § 1964(c) required "competitive injury" as unsupported by RICO's legislative history or plain language).[18] The Eighth Circuit has reached the same conclusion, rejecting the requirement of an antitrust injury in § 1964(c)

> In other words, although RICO borrowed the tools of antitrust law to combat organized criminal activity, we do not believe the RICO Act was limited to the antitrust goal of preventing interference with free trade. Congress did not see the objectives of RICO and the antitrust laws as coterminous. We conclude that an allegation of commercial or competitive injury is not required by the RICO Act.

Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982)(internal citations omitted).

This Court agrees with the view of the Seventh and Eighth Circuits. It noted that the requirement of some circuits of a "racketeering injury" was a concept improperly imported from the Clayton Act. Sedima, 473 U.S. at 499 ("In borrowing its racketeering injury requirement from *antitrust*

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[18] See also Illinois Dep't of Revenue, 771 F.2d at 315.

standing principles, the court below created exactly the problems Congress sought to avoid") (emphasis added); Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 270 (noting the rejection "of the concept of antitrust injury to RICO")(internal quotations omitted); c*f.* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 166 (2001)(noting that the intracorporate conspiracy doctrine does not apply under RICO because it "turns on specific antitrust objectives").

Even in the Clayton Act context, this Court has refused to require a "commercial injury" in construing "business or property" as "strained." Reiter v. Sonotone Corp., 442 U.S. 330, 338-339 (1979). And if no commercial injury is required under the Clayton Act, then the Ninth Circuit's requirement of one in § 1964(c) is indefensible.

II. THE PROXIMATE CAUSATION ANALYSIS REQUIRES THAT THE COURT DETERMINE IF THE PLAINTIFF ALLEGES A DIRECT INJURY.

The Ninth Circuit's dismissal of the County's claim, for lack of proximate causation at the pleading stage, where no more direct victim of the RICO violation was identified, conflicts with the proximate causation analysis of every other Circuit and this Court. This Court requires a "direct" relationship between the RICO defendant and the plaintiff's injury. Anza, 547 U.S. at 461 ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged

violation led directly to the plaintiff's injuries").[19] In Anza, the Plaintiff's complaint made it clear that the State of New York, not Ideal Steel, was the directly injured party. And so Ideal Steel pled itself out of court.

Canyon County did not plead itself out of court. Its Complaint does not identify a more directly injured victim of the alleged RICO violations. And the Ninth Circuit did not identify one either. It held the directness of the injury was irrelevant ("we need not inquire into the question whether there are more immediate victims of the defendants' alleged RICO violations who are likely to sue").[20]

No other court has read the direct injury requirement out of RICO.[21] Thus, its conclusion that

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[19] See also Sosa v. Alvarez-Machain, 542 U.S. 692, 704 (2004) ("Proximate causation is causation substantial enough and close enough to the harm to be recognized by law, but a given proximate cause need not be, and frequently is not, the exclusive proximate case of harm")(internal citation omitted).

[20] Canyon County, 519 F.3d at 983.

[21] See, e..g., Bridge, 170 L. Ed. 2d at 1027 (noting that "no more immediate victim is better suited to sue."); Laborers Local 17 Health & Benefit Fund v. Philip Morris, 191 F.3d 229, 238-39 (2d Cir. 1999)("As these cases demonstrate, the critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct"); Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1289-90 (11th Cir. 2007)(concluding that dismissal in Holmes and Anza was appropriate "because a more direct victim could bring suit" and without such a finding, the plaintiff is the proper party to sue).; Loeb v. Sumitomo Corp.,

Anza applies "fully to cases like this one, where the harm to the plaintiff from the defendant's RICO violation *does not flow through any intervening victims"* is flatly wrong and must not be allowed to persist.[22]

Thus, because the Complaint does not indicate a more immediate victim of the RICO violations, the dismissal for lack of proximate causation was erroneous. And this is confirmed by well-established tort principles which make an employer liable for torts committed by its employees in cases such as this one, where the employer disregarded the risk of employing known criminals. RESTATEMENT (THIRD) OF AGENCY, § 7.05(1).[23]

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306 F.3d 469, 484 (7th Cir. 2002)("The directness inquiry further focuses on the presence of more immediate victims of an antitrust violation in a better position to maintain a treble damages action"); Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 614 (6th Cir. 2004)("RICO also not only imposes a statutory standing limitation on claimants who seek recovery for derivative or indirect injuries, but also incorporates other traditional proximate-cause limitations on claimants," including foreseeability).

[22] Canyon County, 519 F.3d at 983 (emphasis added)

[23] See, e.g., Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 750 (Fla. App. Ct. 1991)("Most jurisdictions, including Florida, recognize that independent of the doctrine of respondeat superior, an employer is liable for the willful tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others"); accord, 10 LABOR AND EMPLOYMENT LAW, § 270.03[3][a] (Matthew Bender 2007).

> A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.

RESTATEMENT (SECOND) OF TORTS § 307:

> It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others.

RESTATEMENT (SECOND) OF TORTS §§ 302(B) (Risk of Intentional or Criminal Conduct), 317 (Duty of Master to Control Conduct of Servant), and 449 (Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent).

Accordingly, the Idaho Supreme Court has held an employer liable for the harm caused to third parties by an employee with known criminal tendencies. Thus, the foreseeability of harm, which is ordinarily a jury question,[24] should not have been

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[24] See, e.g., Bliss v. Franco, 446 F.3d 1036, 1047 (10th Cir. 2006); Fithian v. Reed, 204 F.3d 306, 309 (1st Cir. 2000); Schultz v.

decided in this case at the pleading stage.[25] As this Court has held, it is inappropriate to substitute the defendant's speculative notions of foreseeability for the harm alleged.[26] And the leading treatise on torts concludes that the foreseeability of harm is perhaps the most controversial question in the entire field.[27] Moreover, it "never arises until causation has been established."[28] Thus, it should not even have been addressed in determining whether the County's alleged injury was proximately caused by the RICO violations.

For these reasons, this Court should accept this Petition to determine if the Ninth Circuit's unprecedented approach to RICO proximate causation, in which the directness of the injury is disregarded, is correct.

Eslick, 788 F.2d 558, 560 (9th Cir. 1986); Cullen v. BMW of North Am., Inc., 691 F.2d 1097, 1103 (2d Cir. 1982).

[25] Canyon County, 519 F.3d at 982 (speculating on "numerous other factors that could lead to higher expenditures by the County").

[26] Bridge, 170 L.Ed. 2d at 1027 ("But that eventuality, in contrast to respondents' direct financial injury, seems speculative and remote").

[27] PROSSER AND KEETON ON TORTS at 280 (5th ed. 1984)("There is perhaps no other one issue in the law of torts over which so much controversy has raged, and concerning which there has been so great a deluge of legal writing")

[28] Id. at 281.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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