No. 20-16068
(Consolidated with Nos. 20-16070, 20-16773, and 20-16820)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD FEDERATION OF AMERICA, *et al.*,
Plaintiffs-Appellees,
v.
TROY NEWMAN, *et al.*,
Defendants-Appellants.

On Appeal from the U.S. District Court for the Northern District of California,
No. 3:16-cv-00236-WHO, Hon. William H. Orrick

DEFENDANT-APPELLANT TROY NEWMAN'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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First, by affirming judgment on Plaintiffs' RICO claim, the panel's decision[1] conflicts with decisions of the United States Supreme Court and this Court concerning predicate acts, pattern of racketeering activity, and proximate cause: *E.g., Anza v. Ideal Steel Supply Corp*., 547 U.S. 451 (2006); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Sedima v. Imrex Co.*, 473 U.S. 479 (1985); *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010); *Jarvis v. Regan*, 833 F.2d 149 (9th Cir. 1987); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986); *Turner v. Cook*, 362 F.3d 1219 (9th Cir. 2004); *Howard v. America Online, Inc.*, 208 F.3d 741 (9th Cir. 2000).

Second, by affirming the district court's decision to permit the jury to draw twenty adverse inferences based on invocations of Fifth Amendment privilege, the panel's decision conflicts with decisions of this Court, *Doe v. Glanzer*, 232 F.3d 1258 (9th Cir. 2000), and the Second Circuit, *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158 (2d Cir. 2017).

[1] The panel's opinion (App.001) and memorandum (App.026) are attached and will be cited with "App." references. Cir.R. 40-1. Defendant Troy Newman adopts and joins his co-Defendants' petitions filed in Case Nos. 20-16070, 20-16773, and 20-16820. FRAP 28(i).

Rehearing is needed to secure and maintain uniformity of this Court's decisions and to address questions of exceptional importance, that is, the proper application of RICO and the Fifth Amendment in a civil action. FRAP 35, 40; Cir.R. 35-1.

I. Review of the RICO claim is warranted.

Ensuring that this Court's RICO jurisprudence is correct is a matter of exceptional importance given that RICO opens the federal courthouse doors and permits tough penalties.

A. The panel's incorrect interpretation of the predicate statute, 18 U.S.C. §§ 1028(a)(1) & (2), conflicts with RICO precedent.

To establish a RICO claim, a plaintiff must prove that he was directly "injured in his business or property by reason of a [RICO] violation." 18 U.S.C. § 1964(c). Accordingly, a central question in any RICO case is what specific acts of the defendants are alleged to constitute *predicate offenses* (*i.e.*, "racketeering activity" under 18 U.S.C. § 1961(1)). Not all acts related to an overall plan are predicate offenses under Section 1961(1). *See Anza*, 547 U.S. at 457-61.

Here, the panel interpreted the predicate statute so broadly that it swept within the statute's scope conduct that cannot serve as the basis for a RICO claim. The predicate statute prohibits the knowing *production* and *transfer* of false identifications in, or affecting, interstate commerce without lawful authority. *See* 18

U.S.C. §§ 1028(a)(1), (a)(2), (c)(3)(A). Here, the events relevant to the production or transfer of IDs consisted of purely *intrastate* activity (within California) relating to one undercover investigative project: (1) Defendant David Daleiden modified his own ID at home; (2) Daleiden "located a service" that could produce the "Tennenbaum" and "Allen" documents by finding a Craigslist listing online; (3) those documents were hand-delivered to Daleiden in exchange for cash; and (4) Daleiden hand-delivered those documents to two investigators. 1-ER-54 (DCT Order); 2-ER-146-47 (DCT Order); 10-ER-2542-43, 2575-76, 11-ER-3069-71, 12-ER-3077-80, 20-ER-5315.

None of Daleiden's actions constituted an unlawful production or transfer of IDs in, or affecting, interstate commerce. The district court held, however, that these acts constituted an unspecified number of predicate offenses. 2-ER-161-165 & n.22. The panel affirmed, concluding that the ID production and transfer "affected interstate commerce because Appellants *used* the fake licenses to gain admission to out-of-state conferences and facilities, and then *presented* those licenses at the out-of-state conferences and facilities, which were operating in interstate commerce." App.033.[2] This holding is wrong. A plaintiff must prove that the purportedly unlawful *productions or transfers—not* any subsequent *use* of the IDs—were in, or

[2] Quotations herein have citations omitted and emphasis added.

affected interstate commerce. 18 U.S.C. §§ 1028(a)(1), (2); *U.S. v. Della Rose*, 278 F. Supp. 2d 928, 933 n.2 (N.D. Ill. 2003).[3]

Additionally, the panel concluded that "Daleiden's use of the internet to search for and arrange the purchase of two fake driver's licenses was 'intimately related to interstate commerce.'" App.033 (citing *U.S. v. Sutcliffe*, 505 F.3d 944, 952 (9th Cir. 2007)). In *Sutcliffe*, this Court found a link to interstate commerce in a defendant's use of the Internet to *transmit* threats, analogizing it to the *use of a telephone*, 505 F.3d at 952-53, whereas Daleiden's minimal Internet use was akin to *reviewing the Yellow Pages*. 1-ER-54; 10-ER-2575-2576. Reading information that appears on the Internet is not an act that is in, or affects, interstate commerce, and is certainly not a violation of Sections 1028(a)(1) or (2).

In sum, the purely *intrastate* production and acquisition of a few IDs did not constitute a violation of the predicate statute, and there is no RICO liability. By taking an incorrectly broad view of the conduct encompassed within Sections 1028(a)(1)-(2), the panel wrongly broadened the definition of "racketeering activity" under Section 1961(1). This conflicts with *Anza* and other decisions (discussed

[3] The panel relied on *U.S. v. Turchin*, 21 F.4th 1192, 1202-03 (9th Cir. 2022), where interstate commerce was only "modest[ly] and indirect[ly]" affected by producing *actual* licenses to allow interstate driving. Here, the production of *fake* licenses for investigatory purposes lacks even that minimal connection.

below). Actions that do not violate the predicate statutes listed in Section 1961(1) cannot form the basis of a RICO claim.

B. The panel's interpretation of RICO's pattern and proximate cause requirements conflicts with Supreme Court decisions.

The panel erred because there was no *pattern* of racketeering activity, nor was any Plaintiff *directly injured* by such a pattern. The acquisition of a few IDs occurred over six months (at the outset of one finite project with a limited timeframe) and concluded long before this lawsuit was filed. 2-ER-162, 20-ER-5315; *see also* App.011-15 (making clear there was only a single project with a distinct end). There is *no evidence* that Daleiden created or acquired any additional IDs for use in other projects, or that Daleiden or CMP intends to create or acquire IDs in relation to other investigative activities. Further, no Plaintiff was directly injured in its business or property by reason of the modification, acquisition, or transfer of a few IDs.

1. No pattern of racketeering activity

The panel held that Plaintiffs established an open-ended pattern of racketeering activity because "various [Defendants] had previously advocated for or used undercover sting operations targeting Planned Parenthood, and CMP and BioMax were still extant and intended to carry out future projects." App.033-34. Notably absent from the record, however, is evidence that any Defendant's prior investigative activities involved the commission of *predicate offenses*, or that any future activities would involve such offenses. The panel's holding that the few

predicate acts alleged are conduct that "'by its nature project[ed] into the future with a *threat* of repetition,'" App.034, conflicts with *H.J.*, the only decision the panel cited in relation to this holding.

In *H.J.*, the Court explained that the statutory requirement of "'*at least* two acts of racketeering activity'" to establish a pattern "does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern," as Congress "intend[ed] a more stringent requirement than proof simply of two predicates." 492 U.S. at 237. The Court explained that

> [t]o establish a RICO pattern it must . . . be shown that the [related] predicates themselves amount to, or . . . otherwise constitute a threat of, continuing racketeering activity. . . .
>
> [Open-ended continuity refers to] past conduct that by its nature projects into the future with a threat of repetition. . . . [W]hat must be continuous [is] RICO's *predicate acts or offenses*. . . . *Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with longterm criminal conduct*.

Id. at 238-42.

The panel's decision conflicts with *H.J.* by holding that *short-term* conduct—with a defined endpoint—can establish an open-ended pattern. *H.J.* gave two examples of situations in which an open-ended pattern could be established. First, "the racketeering acts themselves [may] include a specific threat of repetition extending indefinitely into the future," such as when a criminal threatens to break a store's windows unless monthly payments are made indefinitely. *Id.* at 242. Second,

a pattern may be proven if predicate acts "are part of an ongoing entity's regular way of doing business." *Id.* at 242-43. Here, by contrast, the few acts relating to ID acquisition came to a relatively quick conclusion, were not repeated afterwards, and there is no "regular way of doing business" that includes the commission of predicate offenses. *See id.* at 243, n.4 (no pattern exists where there are "very short periods of criminal activity that do not in any way carry a threat of continued criminal activity").

Moreover, the Court noted that, although there is no multiple-scheme *requirement*, *id.* at 235, "proof that a RICO defendant has been involved in multiple criminal schemes would certainly be *highly relevant* to the inquiry into the continuity of the defendant's racketeering activity." *Id.* at 240. The instant case did *not* involve multiple schemes that included alleged violations of a predicate statute, which is a "highly relevant" fact that further illustrates the panel decision's conflict with *H.J.*

The panel's decision also conflicts with *Sedima*, where the Court emphasized that the commission of just two predicate acts (*i.e.*, the type of activity alleged here) would rarely constitute a pattern of racketeering activity because "in common parlance two of anything do not generally form a 'pattern.'" 473 U.S. at 496 n.14. Additionally, the Court emphasized that, whereas "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern," a defendant is *not* liable under RICO "to everyone he might have injured

by other conduct. . . .'" *Id.* at 496-97. The panel's decision conflicts with *Sedima* by relying on acts that are *not* predicate acts—*e.g.*, *uses* of IDs, previous advocacy of and engagement in undercover operations—to hold that Plaintiffs were injured by a pattern of racketeering activity. App.034.

2. No proximate causation

The panel adopted a chain-of-events theory of RICO causation: The acquisition of IDs was an *early step* in a long series of events—including attendance at meetings and conferences, the use of recording devices, etc.—that ultimately led Plaintiffs to make various expenditures. App.011-15, 034. The panel's decision conflicts with Supreme Court precedent by upholding a RICO claim that is premised on a handful of alleged predicate acts that did not *directly* harm Plaintiffs in their business or property.

For instance, in *Anza*, the Court reiterated that "a plaintiff may sue under § 1964(c) only if the alleged RICO violation"—*not any other conduct* of the defendant or others—"was the proximate cause of the plaintiff's injury." 547 U.S. at 453 (citing *Holmes*, 503 U.S. at 268). The Court noted that RICO "provides a civil cause of action to persons injured *'by reason of' a defendant's RICO violation*." *Id.* at 456 (quoting Section 1964(c)). An essential aspect of a RICO claim is the "requirement of directness," *i.e.*, a "'demand for some direct relation between the injury asserted

and the injurious [racketeering] conduct alleged'" such that "'the link'" between them is not "'too remote.'" *Id.*; *Holmes*, 503 U.S. at 265-69 (same).

Although the alleged predicate offenses in *Anza* (mail and wire fraud) were part of a plan through which the defendants gained market share at the plaintiff's expense, 547 U.S. at 454-58, the Court held that the fact that the alleged predicate acts did not *directly* injure the plaintiff was fatal to the Section 1962(c) claim. *Id.* at 461. The Court explained that "[t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) *entirely distinct from* the alleged RICO violation (defrauding the State)." *Id.* at 458. "The attenuation between the plaintiff's harms and the claimed RICO violation" meant that the requirement of direct, proximate causation had not been met. *Id.*

The Court also rejected the argument that "it is immaterial whether [the defendants] took an indirect route to accomplish their goal," as "[a] RICO plaintiff cannot circumvent the proximate-cause requirement" by asserting that RICO predicate acts bore some causal or schematic relation to *other* acts that directly injured plaintiff's business or property. *Id.* at 460; *see also Hemi Group*, 559 U.S. at 11. Yet, that is exactly what the panel held here. The production or transfer of three IDs did not *directly* injure anyone; in fact, if CMP had abandoned the investigative project after the IDs were acquired, Plaintiffs would never have even learned of the

IDs' existence. It was only through a series of subsequent *non-predicate acts* that Plaintiffs had any interaction with the IDs. The panel's decision conflicts with *Anza*.

Similarly, the panel's decision conflicts with *Hemi Group*. As here, the plaintiff's theory in *Hemi Group* was "anything but straightforward: Multiple steps . . . separate[d] the alleged [predicate acts] from the asserted injury." 559 U.S. at 15. The Court explained that "'[t]he general tendency of the law"—which "applies with full force to proximate cause inquiries under RICO"—"*is not to go beyond the first step*," and "[b]ecause the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement." *Id.* at 10 (quoting *Holmes*, 503 U.S. at 271-72). The Court rejected the plaintiff's attempt to broaden the alleged RICO violation to encompass subsequent acts that were not RICO predicate acts. *Id.* at 13-14; *City of Oakland v. Wells Fargo & Co.*, 14 F.4th 1030, 1035-41 (9th Cir. 2021) (en banc) (courts should generally not go beyond the first step of proximate causation).

Here, the panel incorrectly went *well beyond the first step*; Plaintiffs were not injured by the production or transfer of IDs; more proximate occurrences—CMP's publication of videos, third-party reactions to the videos, etc.—were *not* predicate offenses. And, as discussed, the panel improperly broadened the alleged RICO violation far beyond the acts of acquiring a few IDs. Plaintiffs' RICO claim is

without merit under *Hemi Group*. *See also Beck v. Prupis*, 529 U.S. 494, 495-96, 505-07 (2000) (no RICO claim for injury caused by non-racketeering act).

C. The panel's decision conflicts with several decisions of this Court.

The petition should be granted to ensure uniformity with this Court's prior RICO decisions:

- In *Jarvis*, opponents of a referendum concerning state tax rates allegedly committed three predicate acts to acquire federal funds. This Court held that no pattern of racketeering activity existed given that this "isolated" and "discreet" activity had "a distinct and easily defined beginning and end." 833 F.2d at 153.

- In *Schreiber*, the defendant fraudulently obtained a single shipment of goods. This Court held that there was no pattern of racketeering activity, as the predicate acts related to one isolated event—obtaining a single shipment—rather being a part of a regular business practice. 806 F.2d at 1399.

- In *Turner*, defendants made false representations to insurance companies concerning the collection process for a tort judgment. This Court held that no pattern of racketeering activity existed because the alleged predicate acts were "finite in nature" and were tied to one specific judgment. 362 F.3d at 1230.

- In *Howard*, the plaintiff alleged that AOL's regular way of doing business included making misleading statements. This Court held that no pattern of racketeering activity existed because the statements at issue stemmed from a one-

time change in pricing policy, and there was no evidence that misleading advertising would continue. 208 F.3d at 750-51.

The instant case is analogous to these cases. Even assuming *arguendo* that a handful of predicate acts were committed, those isolated RICO predicates had a definite endpoint, as the panel made clear. App.011-15. The outcomes of *Jarvis*, *Schreiber*, *Turner*, and *Howard* would have been different had the panel's reasoning been applied; the mere fact that the defendants were still in business would be enough to establish "open-ended continuity." App.034. Such a holding would be incorrect.

Furthermore, unlike the panel's decision, this Court's prior RICO decisions are consistent with the reasoning of the leading decision concerning RICO's application to investigative journalism: *Food Lion v. Capital Cities/ABC*, 887 F. Supp. 811 (M.D.N.C. 1995). As that decision explained, "undercover reporting [does not] necessarily entail[] criminal conduct which would qualify as a predicate act," and the fact that journalists "regularly use hidden cameras and microphones in their regular business activities" is not evidence that they will commit future predicate offenses. *Id.* at 818-20. The commission of predicate acts within a six month span, as part of one plan to collect information for investigative purposes, did not constitute a pattern of racketeering activity. *Id.*

Similarly, the fact that some Defendants may do future investigations *does not* transform a few isolated past acts into a continuous, open-ended pattern of racketeering activity. As this Court held in *Jarvis* and *Schreiber*, the extent to which the defendants intended to oppose future tax cut proposals, or obtain other shipments of goods, was irrelevant because there was no evidence indicating that they would *commit predicate offenses* while doing so; it is possible, and commonplace, to engage in such activities fully within legal bounds. The panel's decision is a glaring outlier that should be corrected.

II. Review of the Fifth Amendment issue is warranted.

The district court instructed the jury (consisting of over 1,250 words) that it could draw fourteen adverse inferences against all Defendants from Defendant Newman's assertion of his Fifth Amendment privilege, and six additional adverse inferences from two non-parties' assertion of the privilege. 14-ER-3889-3896; 1-ER-113-115. This conveyed to the jury the impression that these individuals were likely hiding evidence of criminal activities.

A. Conflict with *Glanzer*

The panel's holding, that all twenty inferences were permissible, conflicts with this Court's *Glanzer* decision. None of the inferences met the constitutional and evidentiary standards for allowing adverse inferences. Some went further, exposing

the jury to irrelevant and inflammatory matter that unfairly prejudiced all Defendants.

Glanzer held that the district court properly prevented the jury from drawing adverse inferences from Elroy's exercise of his Fifth Amendment privilege. 232 F.3d at 1267. The Court noted that "certain sanctions stemming from a party's refusal to answer a question on Fifth Amendment grounds are too costly," and added that, "under certain circumstances, within the civil framework, because of the constitutional nature of the right implicated, an adverse inference from an assertion of one's privilege not to reveal information is too high a price to pay." *Id.* at 1264-65. Additionally, *Glanzer* emphasized that

> "[b]ecause the privilege is constitutionally based, *the detriment to the party asserting it should be no more than is necessary* to prevent unfair and unnecessary prejudice to the other side." . . . In that light, no negative inference can be drawn . . . unless there is a *substantial need* for the information and *there is not another less burdensome way* of obtaining that information.

Id. at 1264-65. For example, where the evidence at issue is irrelevant and/or inadmissible under FRE 403, there is *no* "substantial need" for the information and *no* adverse inference is permissible. *Id.* at 1266-67. In sum, *Glanzer* held that drawing an adverse inference from a witness's invocation of the privilege is improper unless the witness's assertion of privilege "obliterate[s] another party's right to a fair proceeding.'" *Id.* at 1264.

Here, all twenty inferences violated one or more of *Glanzer*'s limitations or principles. For instance, most of the information at issue was *already in the record* via different means as Daleiden and others testified about all aspects of the case, including Newman's knowledge and involvement (or lack thereof). *See, e.g.,* 9-ER-2449 through 10-ER-2547, 10-ER-2574-2725, 10-ER-2775 through 11-ER-2841, 11-ER-2846-2966, 11-ER-2986-3052, 11-ER-3063 through 12-ER-3171.

The panel's suggestion that information concerning all twenty inferences could not have been obtained from other sources is incorrect. App.037. This is not a case where a witness invoking the privilege was in *exclusive possession or control of key information*, and no other witnesses or documents could provide that information, such that permitting inferences was necessary to preserve the right to a fair proceeding. *See, e.g., SEC v. Fujinaga*, 698 Fed. Appx. 865, 867 (9th Cir. 2017) (unpub.); *SEC v. Fujinaga*, 696 Fed. Appx. 203, 206 (9th Cir. 2017) (unpub.). Additionally, several inferences (*e.g.*, Newman Inferences #1, 2, 6, 7, 9, and 16; 14-ER-3891-94) were based on the contents of a document or stipulations. If that content were relevant and admissible, then there was no "need" for an inference based on Fifth Amendment privilege that the document or stipulation says what it says.

Furthermore, Inference #1 was irrelevant to any fact, claim, or defense in this case. It was premised solely on a few sentences from Newman's *two-decade old*

theological study, "Their Blood Cries Out," examining the Bible's relevance to American government concerning abortion. 1-SER-47-50; DCT Dkt.#689-2 at ECF 5-7 (Ex.133). Defendants repeatedly objected to the admission into evidence of any portion of the book, or any inferences based on it, and pointed out that Plaintiffs would likely attempt to make the *demonstrably false* claim to the jury that the book shows that Newman (and other Defendants by association) promotes vigilante acts of violence against abortion providers. *See, e.g.,* 1-SER-47-50; DCT Dkt.#754 at 6-7, 11-12.

The district court properly excluded Plaintiffs' exhibit (the cover page and page 166) under FRE 403. 1-ER-113. Nevertheless, the court instructed the jury that it could draw an adverse inference that Newman co-authored the book and that certain quotes appear in that book. 14-ER-3891. Just as Defendants predicted (1-SER-48-49), Plaintiffs' closing argument incorrectly claimed that "Mr. Newman advocated for [vigilante acts of] violence, according to the adverse inference that you are permitted to draw." 16-ER-4426-4427 (quoting Newman Inference #1). As Plaintiffs' candidly acknowledged, they wanted the jury to "see[] the visceral words," rather than "kind of a sanitized version of it," so that the prejudicial impact of the inference "would [not] be lost." *See* 14-ER-3836.

As *Glanzer* noted, adverse inferences, like Newman Inference #1, that are premised on inadmissible evidence are *invalid and unfairly prejudicial*. 232 F.3d at

1267. Indeed, the fact that a witness's invocation of the Fifth Amendment is mentioned to a jury along with an unfairly prejudicial item of inadmissible evidence *compounds* the unfair prejudice.

Moreover, it appears to be an open question in this Circuit whether, and the extent to which, adverse inferences based on *non-party* invocations of Fifth Amendment privilege are permissible. Under *Glanzer*, however, the non-party inferences *in this case* were problematic for most of the same reasons discussed above and compounded the unfair prejudice on Defendants, *e.g.*, there were alternative sources of the information and/or there was no "substantial need" for the information.

Accordingly, presenting to the jury the fact that Newman and non-parties declined to testify concerning various topics served no practical function other than to unfairly prejudice the jury against Defendants. The panel's decision conflicts with *Glanzer*, and should be reversed. *See* CTA Dkt.#29 at 18-43, Newman Opening Br. (discussing fully how the adverse inferences conflicted with *Glanzer*).

B. The panel's decision created a circuit conflict.

The panel held that, "even assuming *arguendo* that the district court erred in drawing some or all of the adverse inferences, any error was harmless. . . . [N]one of the adverse inferences were so prejudicial as to taint the verdict." App.037. This holding stands in stark contrast with the Second Circuit's *Woods* decision, where the

admission of improper adverse inferences, which were emphasized by counsel during closing argument, *was reversible error*. 864 F.3d at 170-71. The Second Circuit noted that "the danger of unfair prejudice is high when a jury is told that a witness declined to answer a question by invoking the Fifth Amendment; the implication is, at best, that the witness refused to answer because she had something to hide." *Id.* at 171. The court determined that "the unfair prejudice Woods suffered substantially outweighed the minimal, if not immaterial, probative value of Woods's Fifth Amendment invocation." *Id.* The fact that jurors were instructed that they were not *required* to draw the inferences did not negate the danger of unfair prejudice. *See Mitchell v. U.S.*, 526 U.S. 314, 329 (1999) (explaining that many believe only the guilty invoke the Fifth Amendment).

Here, Plaintiffs relied on the adverse inferences during their closing argument to further the inflammatory, false narrative that Defendants called for vigilante criminal acts. 16-ER-4366-68, 16-ER-4427. Plaintiffs also relied on the adverse inferences in their post-judgment filings. 18-ER-4823, 18-ER-4871; DCT Dkt.#1048 at ¶¶ 3, 12, 14, 18, 51-53. The unfair prejudice caused by the twenty inferences was as "acute" and "harsh[]" as the harm imposed in *Woods*. 864 F.3d at 170-71. The twenty cumulative inferences likely "blur[red] into a single inference that the defendants have committed all the acts alleged." *U.S. v. Custer Battles, LLC*,

415 F. Supp. 2d 628, 634-36 (E.D. Va. 2006). The significant constitutional error was not harmless and warrants a new trial.

Conclusion

This Court should grant panel rehearing or rehearing en banc.

Respectfully submitted,

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December 5, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

9th Cir. Case Number(s) 20-16068 (Consolidated with Nos. 20-16070, 20-16773, & 20-16820)

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

[**X**] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words: 4,196.** *(Petitions and responses must not exceed 4,200 words)*

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature: /s/ Edward L. White III **Date:** December 5, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing petition and attached appendix was filed electronically with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit on December 5, 2022, using CM/ECF, which will send notification of such filing to counsel of record.

/s/ Edward L. White III

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