No. 06-1648

IN THE

Supreme Court of the United States

NDS GROUP PLC; NDS AMERICAS, INC.,
Petitioners,

v.

SOGECABLE, S.A.; CANALSATÉLITE DIGITAL, S.L.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Court has already decided that the first question presented by this petition warrants review. The question is whether for purposes of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), an "enterprise" may consist solely of a corporate defendant (the "person") and its subsidiaries or agents. Two terms ago, this Court granted certiorari and heard argument on this issue, but ultimately dismissed the writ. *Mohawk Indus. v. Williams*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted, Williams v. Mohawk Indus.*, 546 U.S. 1075 (2005), *writ dismissed as improvidently granted, Williams v. Mohawk Indus.*, 126 S. Ct. 2016 (2006). This case provides an excellent vehicle finally to resolve the *Mohawk* issue and, at the same time, provides this Court with an opportunity to resolve a second closely related issue on which the courts of appeals are also deeply divided. Certiorari is warranted. Moreover, as we detail in III below, summary reversal is warranted on the statute of limitations ruling.

I. THE FEDERAL COURTS OF APPEALS ARE DEEPLY DIVIDED ON WHETHER A RICO "ENTERPRISE" CAN CONSIST OF ONLY THE RICO PERSON AND ITS SUBSIDIARIES OR AGENTS

A. This Court's Established Practice Is To Grant Review Promptly After A Case Is Dismissed Post-Argument

The Court has a well-established practice of granting prompt review when it has heard argument on an issue but, for case-specific reasons, has not been able to resolve it. Just last term, for example, this Court heard argument on a criminal sentencing issue in *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (2007). After argument, however, petitioner died and the Court vacated the writ. 127 S. Ct. 2245. The Court promptly granted certiorari in another case presenting the same issue. *United*

States v. Gall, 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (2007). Other examples abound.[1]

B. This Case Is An Excellent Vehicle To Resolve The *Mohawk* Issue

As with *Claiborne* and the other cases noted, review here is appropriate to resolve the important and recurring issue left unresolved by the post-argument dismissal in *Mohawk*. In a startling omission, respondents do not even cite this Court's grant and subsequent dismissal in *Mohawk*, even though *Mohawk* was featured prominently in our petition. *See* Pet. 3 & n.1, 11 & n.3, 12-13, 18. Instead, respondents attempt to cast doubt on whether this case is a suitable vehicle for this Court to consider the question presented. It is.

1. Respondents' primary argument is that the decision below is unpublished. (Opp. 1, 13.) The panel's decision to denote its disposition as unpublished indicates that it was applying settled circuit law. *See* 9th Cir. R. 36-2 ("A written, reasoned disposition shall be designated as an OPINION only if it: (a) Establishes, alters, modifies or clarifies a rule of law."). This Court routinely grants review in unpublished dispositions precisely because of its role in reviewing settled circuit law.[2] The unpublished character of the decision be-

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[1] *See, e.g., Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 543 U.S. 1032 (2004), *dismissed post-argument by Medellin v. Dretke*, 544 U.S. 660, 663 (2005), *cert. granted on same issue in Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), *cert. granted*, 534 U.S. 1054 (2001), *dismissed post-argument by Adams v. Florida Power Corp.*, 535 U.S. 228 (2002), *cert. granted on same issue in Smith v. City of Jackson*, 544 U.S. 228 (2005); *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *dismissed post-argument by Lewis v. Brunswick Corp.*, 523 U.S. 1113 (1998), *cert. granted on same issue in Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

[2] Last term alone involved numerous grants from unpublished cases. *See, e.g., Teleflex, Inc. v. KSR Int'l Co.*, No. 04-1152, 119 Fed. App'x 282 (Fed. Cir. Jan. 06, 2005), *cert. granted*, 126 S. Ct. 2965 (June 26,

low indicates at most that the Ninth Circuit's views on the *Mohawk* issue are settled; it certainly is no bar to review here.

In a related vein, respondents correctly note (at 1, 13) that in other litigation we have suggested that the unpublished decision below did not change Ninth Circuit law. But there is no tension between that commonplace observation about unpublished decisions and our suggestion here that review is warranted. For purposes of trial court litigation in the Ninth Circuit, the decision below is of no value but, at the same time, the settled legal rule applied here warrants this Court's attention because the Ninth Circuit's rule is in conflict with the views of other circuits. Likewise, we have never suggested that this is a "*case* of national importance." ((Opp. 13) (emphasis added).) Instead, the case presents an issue on which the circuits are divided, and it is the circuit division presented here that warrants this Court's attention.

2. Although respondents (at 12) emphasize that the decision below "was at the pleading stage," the procedural posture counsels in favor of review. The legal question here is cleanly presented because all the facts relevant to the legal question are contained in the complaint. Indeed, this Court's

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2006) (No. 04-1350); *PSKS, Inc, v. Leegin Creative Leather Prods.*, No. 04-41243, 171 Fed. App'x 464 (5th Cir. Mar. 20, 2006), *cert. granted*, 127 S. Ct. 763 (Dec. 7, 2006) (No. 06-480), *rev'd*, 127 S. Ct. 2705 (2007); *In re Request of Gov. Camacho Relative to the Interpretation and Application of S. 11 of the Organic Act of Guam*, No. CRQ03-001, 2003 WL 21697180 (Guam July 23, 2003), *cert. granted, Moylan v. Camacho*, 127 S. Ct. 36 (Sept. 26, 2006) (No. 06-116); *MedImmune, Inc. v. Genentech, Inc.*, 427 F.3d 958 (Fed. Cir. 2005), *cert. granted*, 546 U.S. 1169 (Feb. 21, 2006) (No. 05-608); *United States v. Rita*, No. 05-4674, 177 Fed. App'x 357 (4th Cir. May 1, 2006), *cert. granted*, 127 S. Ct 551 (Nov. 3, 2006) (No. 06-5754); *Spano v. Safeco Corp.*, No. 04-35313, 140 Fed. App'x 746 (9th Cir. Aug. 4, 2005), *cert. granted, Safeco Ins. Co. of America v. Burr*, 127 S. Ct 36 (Sept. 26, 2006) (No. 06-84), *rev'd, Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201 (2007).

grant in *Mohawk* itself was at the same pleading stage as this case. There, the defendant moved to dismiss the RICO claims, the district court denied that motion but certified the question for immediate review, and the circuit court affirmed. *Mohawk Indus. v. Williams*, 411 F.3d 1252, 1266 (11th Cir. 2005). Thus, the record before the Court in *Mohawk*, like the record here, was limited to the allegations in the complaint. *See also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (reviewing district court's dismissal of RICO claims at motion to dismiss stage). Thus, the procedural posture *supports* a grant of certiorari.

3. Contrary to respondents' suggestion, the issue presented has ample practical consequences in this case to warrant review. (Opp. 1.) Resolution of the question presented will determine whether trial will proceed on the Technology Enterprise. That RICO question requires factual discovery on a host of allegations in the respondents' complaint, discovery that will not be necessary should petitioners prevail here.[3] Accordingly, there is no question that the issue has significant practical consequences for the parties. Nothing more is required for an issue to be properly presented. *See* Robert C. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) ("If the resolution of a clear conflict is *irrelevant* to the ultimate outcome of the case before the Court, certiorari may be denied.") (emphasis added).

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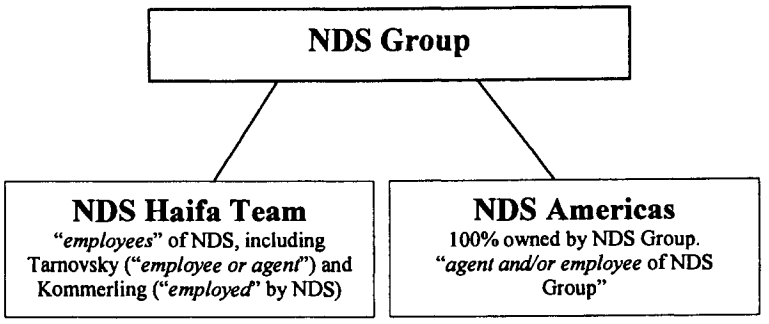
[3] For example, the parties will no longer need to investigate the existence and role of the Haifa Team, including the set-up of the high-tech lab for legitimate purposes and recruitment of the alleged hackers. *See* 2d Am. Compl. ¶¶ 74, 75, 76, 108, 109, 167. Nor would investigation be needed about the alleged efforts of NDS to hack the MediaGuard conditional access system, download the UserROM, create a digital archive file, and transfer this information to NDSA and Tarnovsky with instructions to publish it on the internet. *See* 2d Am. Compl. ¶¶ 80, 81, 82, 85, 92, 130, 173.

4. Respondents suggest that the Technology Enterprise allegations would suffice to state a distinct RICO enterprise under the law of any circuit. (Opp. 2, 7.) To the extent that respondents are attempting to reconcile the circuit law on the *Mohawk* issue, this Court's decision to grant certiorari on the issue provides a complete rejoinder to that claim. In places, however, respondents suggest that the allegations here sufficiently state a RICO claim even if the standards among the circuits diverge. (Opp. 7.) Not so.

In this case, the allegation is that that NDS Group, along with its employees and agents (a.k.a., the Haifa Team)[4] and its wholly owned subsidiary NDS Americas (also labeled an agent or employee of NDS),[5] constitute the Technology Enterprise. For ease of reference, here is an image of the alleged Technology Enterprise:



[4] The Ninth Circuit characterizes the Haifa Team as "independent contractors." (Opp. 10.) The complaint alleges that the Haifa Team members worked for NDS as "employees" or "agents." (2nd Am. Compl. ¶¶ 78, 92, 96 (Tarnovsky was NDS's "employee or agent"); ¶¶ 76, 79, 109 (Kommerling was "hired and paid" by NDS; "work[ed] for" NDS; NDS "employed" Kommerling); ¶ 8 (Haifa Team was "carefully selected employees.").) Independent contractors can of course be agents, even if they are not employees. Restatement (Third) of Agency § 1.01 cmt. c (2006) (finding the term "independent contractor" "equivocal in meaning and confusing in usage" because "some termed independent contractors are agents while others are nonagent service providers.").

[5] *See* 2nd Am. Compl. ¶ 129.

Respondents suggest that the Technology Enterprise allegations can state a RICO claim even in the four circuits—the Third, Fourth, Fifth, and Seventh—that hold a corporation generally cannot be a RICO "person" for conducting an "enterprise" consisting of its own subsidiaries or agents. *See* Pet. 16-18. To be sure, these circuits generally allow that in a "'narrow,' 'theoretical,' and 'rare'" case a corporation may be charged as a RICO person acting through an enterprise of its subsidiaries or agents.[6] But this case is unexceptional, and there is nothing unusual about NDS's activities to warrant applying a narrow exception here. Respondents point to nothing that shows that the enterprise components are any more "distinct" or "separate" from NDS than any other employees, agents or subsidiaries are from a defendant corporation. The case below is a quintessential example of identity of person and enterprise—it is all NDS. The fact that NDSA and the Haifa Team had different functions from NDS is routine in any corporation and does not make this a "'narrow,' 'theoretical,' and 'rare'" case. Indeed, as construed by respondents, the "exception" would become the rule as almost all alleged enterprises would meet this broad exception. The law in these four circuits says otherwise.

II. THE FEDERAL COURTS OF APPEALS ARE DIVIDED 5 TO 4 ON WHETHER "ENTERPRISE" INCLUDES A STRUCTURE REQUIREMENT

1. This case also raises an independent but closely related question about the scope of the "enterprise" requirement in the RICO statute. In *United States v. Turkette*, 452 U.S. 576 (1981), this Court distinguished the "pattern of racketeering activity" from the "enterprise" engaging in that activity. Respondents argue that this "separate structure"

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[6] *See, e.g., Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143 (5th Cir. 1997) (holding that it might be "theoretically possible" for a corporation to play a "separate, active role" than its agents or employees).

requirement does not "matter in the context of this case." (Opp. 11.) But as we explained at length (Pet. 8-10), the question of whether or not respondents need to allege a structure separate from the alleged racketeering activity is presented here.

In dismissing respondents' first amended complaint, the district court expressly held, citing both *Turkette* and then-controlling Ninth Circuit law, *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996), *overruled by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007), that respondents' Technology Enterprise allegations failed to allege a "higher criminal structure." (Pet. App. 36a.) So too, in dismissing the second amended complaint—a complaint that added nothing to the separate structure allegations (*see* 1st Am. Compl. ¶ 94)—the district court explained that "the only structure that the Technology Enterprise is alleged to have is that of NDS Group itself." (Pet. App. 28a.)

Defending the district court's dismissal of the RICO allegations, petitioners argued to the Ninth Circuit that the Technology Enterprise lacked the necessary separate structure allegations. *See, e.g.*, Ct. App. Br. 45 ("Sogecable's inability to allege the required independent decision-making structure within the purported 'Technology Enterprise' provides a separate and independent reason its RICO claim fails.").[7] Although the Ninth Circuit, as we noted (Pet. 9), did not expressly rule on the separate structure requirement, it allowed a RICO claim to proceed without meeting that re-

[7] Respondents are correct that our appellate brief (at 45) stated that the second district court order did not reach the *Turkette* issue. The confusion is caused by an ambiguity in the district court's second ruling that collapses the separate structure requirement with the separate identity requirement. *See* Pet. App. 27a. But there is no question that the first district court ruling squarely addresses the *Turkette* issue, no question that our appellate brief preserved the *Turkette* issue, and no question that the decision below finds these allegations sufficient to state a RICO "enterprise."

quirement. (Pet. App. 5a.) This Court reviews judgments, and the separate structure issue is resolved adversely to petitioners by the judgment here. It is necessarily before this Court.

2. Respondents next suggest (at 11) that the allegations in Paragraph 167 of the Second Amended Complaint satisfy the separate structure requirement imposed by five circuits. To be sure, that paragraph includes the words "separate structure." But reciting the words is not what matters. As the district court explained, the substance of this "separate structure" allegation is simply the structure of NDS Group itself. (Pet. App. 28a; *see also* Pet. App. 37a ("absolutely no alleged facts that, if true, would show an overarching control structure").) Respondents write that "NDS organized and managed each member of the Technology Enterprise" (Opp. 11), but that does nothing to show that the Technology Enterprise itself has a structure apart from the alleged racketeering activity. Without any structure separate from the alleged racketeering acts themselves, the Technology Enterprise cannot satisfy the "separate structure" requirement where it is imposed.

3. As the Ninth Circuit recently noted, there is a deep circuit split on whether this Court's decision in *Turkette* requires a RICO plaintiff to allege that the "enterprise" has a structure that is separate from that necessary to accomplish the alleged pattern of racketeering activity. *Odom,* 486 F.3d at 549-51. *See* Pet. 18-24 (describing five to four circuit split). Respondents do not dispute the circuits are severely divided on this statutory interpretation question. (Opp. 2 ("assuming a debate over the separate structure requirement").)

The interests of judicial economy warrant considering together the first and second questions presented by this petition. The statutory relationship between "person" and "enterprise" and "enterprise" and "pattern of racketeering activ-

ity" both turn, critically, on the meaning and purpose behind Congressional use of "enterprise" in the RICO statute. Resolving together the circuit court disarray on both questions conserves judicial resources while providing much needed guidance on the scope of the RICO statute.

III. THE NINTH CIRCUIT'S ADOPTION OF AN IDENTITY DISCOVERY RULE SHOULD BE SUMMARILY REVERSED

Our opening petition explained that the Ninth Circuit's statute of limitations ruling is so directly contrary to this Court's decision in *United States v. Kubrick,* 444 U.S. 111 (1979), that summary reversal is warranted. *See* Pet. 24-26. Respondents' two efforts to distinguish the decision below fail.

First, the purported "concession" at oral argument emphasized by respondents (at 14) is irrelevant to this case. The opinion states that counsel "conceded that, under both federal and California law, equitable tolling protects a plaintiff who does not know, and even exercising reasonable diligence could not know, who caused the harm that is the subject of the complaint." Pet. App. 2a-3a. The opinion omits, however, counsel's next sentence: "What distinguishes this case from [that] general statement of the law is that [Sogecable] unquestionably knew [the identity of NDS] within the statute of limitations." Nov. 14, 2006 Tr. at 25:40. Equity may indeed protect a plaintiff who cannot reasonably identify the defendant *before* the limitations period expires and thus does not have any prospects for bringing a timely suit. But that principle has no application here where the plaintiff identified the defendant well within the statutory period and thus had ample time to bring suit.

Second, the panel's resort to the "equitable tolling" nomenclature does not distinguish the case from *Kubrick. See* Opp. 14-15. In the panel's words, "the period of time" "is equitably tolled and added to the end of the limitations pe-

riod." (Pet. App. 3a.) But the panel's ruling delays the start of the entire statute of limitations period.[8] (Pet. App. 4a.) Accordingly, it is the panel that "confuse[d] the accrual of a claim, which begins the statute of limitations, and the tolling of the limitations period, which suspends it." (Opp. 14.) In substance, the panel's ruling is undeniably contrary to *Kubrick*'s holding that statutes of limitations begin to run from the time that the injury is discovered. Summary reversal is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Specifically, the panel held that the statute of limitations did not *begin* to run until March 2002, when respondents learned that petitioners were allegedly behind the 1999/2000 distribution of counterfeit smartcards. In the panel's view, the three-year federal limitations period for circumvention claims ran from March 2002 to March 2005, and the two-year state limitations period ran from March 2002 to March 2004. (Pet. 3a.)