No. 09-980

IN THE

Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

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

PETITION FOR REHEARING

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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PETITION FOR REHEARING

Petitioner British American Tobacco (Investments) Limited ("BATCo") respectfully requests rehearing of the Court's order dated June 28, 2010, denying the petition for a writ of certiorari in this case. It is unusual for this Court to grant rehearing and grant plenary review, but it is far more common for this Court to grant rehearing and then grant certiorari, vacate the judgment below, and remand (a "GVR order") for consideration of an intervening decision of this Court. *E.g.*, *Melson* v. *Allen*, No. 09-5373 (June 21, 2010); *Hawkins* v. *United States*, 543 U.S. 1097 (2005); *Lauersen* v. *United States*, 543 U.S. 1097 (2005). See generally E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 15.1, at 807 n.5, § 15.6(b) at 819 (9th ed. 2007) (citing additional cases). That would be the appropriate disposition in this case.

On June 24, 2010, the same day the petition was conferenced, this Court issued its opinion in *Morrison* v. *National Australia Bank Ltd.*, No. 08-1191. As explained below, *Morrison* thoroughly invalidates the reasoning on which the D.C. Circuit based its holding in this case – namely, that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*. (RICO), reaches BATCo's conduct outside the United States under the so-called "effects" test. Accordingly, the Court should grant rehearing, vacate the order denying certiorari, and enter a GVR order so that the D.C. Circuit may consider *Morrison*'s impact in the first instance.

A. BATCo's certiorari petition presented the following questions:

> 1. Whether the D.C. Circuit correctly held * * * that the traditional presumption against extraterritoriality is completely irrelevant to determining whether Congress intends a statute to reach the wholly foreign conduct of a foreign corporation, if such foreign conduct is alleged to have had a direct and substantial effect within the United States.
>
> 2. Whether the D.C. Circuit, in concluding that * * * RICO[] regulates petitioner's wholly foreign conduct, improperly (a) ignored the presumption against extraterritoriality and affirmative evidence that Congress never intended RICO to apply extraterritorially; (b) borrowed from federal securities and antitrust cases the ill-suited "effects" test as a measure of RICO's extraterritorial reach; (c) approved a watered-down version of that test that conflicts with the test used by other circuits; and (d) relied on the U.S. "effects" of the U.S. conduct of *other co-defendants* and of the "overall" alleged RICO scheme.

Pet. i. As the petition explained (at 11-17, 32-33), the D.C. Circuit's decision created a flawed "exception" to the traditional presumption against extraterritoriality for cases where the "effects" test is satisfied. The D.C. Circuit held that RICO could properly be applied to BATCo's foreign conduct based on that novel theory, and on its twin conclusions that the "effects" test could be properly transplanted from securities and antitrust law to RICO and that a severely watered-down version of the "effects" test was satisfied here.

B. In *Morrison*, this Court addressed the extra-territorial reach of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). At the outset, the Court examined the genesis of both the "conduct" and the "effects" tests as supposed measures of Section 10(b)'s extraterritorial reach. Slip op. 5-11. The Court held that both tests were legally invalid for two independent reasons.

First, the Court condemned both tests as "judicial-speculation-made-law" that impermissibly "excised," "ignored," or "disregard[ed] the presumption against extraterritoriality." Slip op. 6, 8, 12, 24. When a statute is silent about extraterritorial reach, the Court explained, judges have no business "divining what Congress would have wanted." *Id.* at 6. "Rather than guess anew in each case," the Court explained, "we apply the presumption *in all cases*, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 12 (emphasis added). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 6. Accordingly, the Court rejected the "effects" and "conduct" tests as illegitimate end runs around the presumption against extraterritoriality, which applies "in all cases." *Id.* at 11-12.

Second, the Court condemned the "effects" and "conduct" tests as "vague," "not easy to administer," and wholly "unpredictable." Slip op. 6, 9. "There is no more damning indictment of the 'conduct' and 'effects' tests," the Court explained, "than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases * * * is not necessarily

dispositive in future cases.'" *Id.* at 9 (quoting *IIT* v. *Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980)).

C. This Court's "broad power to GVR" (*Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam)) is derived from 28 U.S.C. § 2106, which authorizes this Court to "vacate * * * any judgment," "remand the cause," and "require such further proceedings * * * as may be just under the circumstances." A GVR order is appropriate "[w]here [(i)] intervening developments * * * reveal a *reasonable probability* that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and [(ii)] * * * it appears that such a redetermination may determine the ultimate outcome of the litigation." *Chater*, 516 U.S. at 167 (emphasis added).[1] Both parts of that standard are easily satisfied here.

(i) *There is more than a "reasonable probability" that the decision below rests on a premise that the lower court would reject in light of* Morrison. The D.C. Circuit's decision rested on several related premises, each of which was invalidated by *Morrison*. First and most obviously, the D.C. Circuit, like the district court, concluded that the "effects" test was properly borrowed from securities and antitrust law and applied to RICO as a measure of RICO's reach. Pet. 1 n.2; App. 57a-60a, 1931a-1933a. This Court in

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[1] Even those Justices who have objected to certain GVRs have acknowledged that such relief is appropriate "'where an intervening factor has arisen [such as new legislation or a recent decision of this Court] that has a legal bearing on the decision.'" *Webster* v. *Cooper*, 130 S. Ct. 456, 456 (2009) (Scalia, J., dissenting) (citation omitted). See generally E. GRESSMAN ET AL., *supra*, § 5.12(b), at 345-49.

Morrison, however, rejected the "effects" test as both fundamentally inconsistent with the presumption against extraterritoriality *and* hopelessly vague and indeterminate in application.

Second, the D.C. Circuit's decision rested squarely on the premise that the traditional presumption against extraterritoriality "does not apply" if the "effects" test can be satisfied. App. 58a. In *Morrison*, however, this Court held that courts must "apply the presumption *in all cases*," thereby "preserving a stable background against which Congress can legislate with predictable effects." Slip op. 12 (emphasis added). The D.C. Circuit's use of the "effects" test to avoid the presumption against extra-territoriality is *precisely* what this Court disapproved in *Morrison*. After *Morrison*, the presumption must be applied "in all cases" and is not subject to exceptions – least of all an exception defined by the vague and illegitimate "effects" test, which swallows the presumption whole.

For the same reasons, the D.C. Circuit's novel definition of "true extraterritorial reach" (App. 58a) does not survive *Morrison*. According to the D.C. Circuit, "Congress's regulation of foreign conduct meeting th[e] 'effects' test is *not* an *extraterritorial* assertion of jurisdiction" *at all*. App. 58a (internal quotation marks omitted). But that merely accomplishes through a stilted and erroneous definition of "extraterritorial" the same impermissible result (and end run around the presumption) rejected in *Morrison*. And it is far worse than what happened in *Morrison*, because the D.C. Circuit's novel definition applies *across the board* to *every* federal statute (and thus has no connection, presumed or otherwise,

to what Congress actually intended). If the D.C. Circuit were correct about when a statute has "true extraterritorial reach," then *Morrison* necessarily would have come out the other way.[2]

Not only does *Morrison* invalidate the rationales underlying the D.C. Circuit's extraterritoriality decision, but it also repudiates the legal authorities on which the lower courts relied. See *Lords Landing Village Condo. Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam) (entering GVR order where an intervening judicial decision included "explicit disapproval of the cases on which the Court of Appeals based its decision"). In explaining that the "effects" test "asks whether conduct has a substantial, direct, and foreseeable effect within the United States" (App. 59a), the D.C. Circuit relied on *Consol. Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989), which discussed and applied the "effects" test as developed in the securities context by a line of Second Circuit cases (including *Schoenbaum* and *Leasco*) that has now been explicitly repudiated by *Morrison*. See slip op. 6-8. The district court likewise relied on *Minorco* and other securities cases involving the "effects" test. See App. 1932a; see also *United States* v. *Philip Morris USA, Inc.*, 477 F. Supp. 2d 191, 197 (D.D.C.

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[2] In any event, the D.C. Circuit's novel definition of "extra-territorial" is inconsistent with this Court's definition in *Morrison*, which focused on "whether a statute applie[d] abroad" (whether or not the foreign conduct it reached caused domestic effects). Slip op. 16; see also *id.* at 15 ("[I]t would be odd for Congress to indicate the *extraterritorial application* of the whole Exchange Act by means of a provision imposing a condition precedent to its *application abroad*.") (emphasis added).

2007) (indicating that court would be "guided by the two alternative tests used [in] * * * anti-trust and securities fraud cases").

Finally, at least in the view of two concurring Justices in *Morrison*, the Court's decision represents the adoption of a more stringent version of the presumption against extraterritoriality. See slip op. 6 (Stevens, J., joined by Ginsburg, J., concurring in the judgment) (suggesting that Court's opinion "seeks to transform the presumption from a flexible rule of thumb into something more like a clear statement rule"). Under that view, *Morrison* changes the law with respect to the presumption, which further increases the likelihood of a different outcome following this Court's remand. Tellingly, the concurring Justices cited *Environmental Defense Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993), as an example of the more "flexible" approach to the presumption that they favored but that the majority rejected in *Morrison*. In the decision below, the D.C. Circuit cited *Massey* as the source for its holding that, "when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply." App. 58a.

For all of these reasons, in light of *Morrison*, there is a virtual certainty – far more than merely the requisite "reasonable probability" – that the D.C. Circuit would reject the premises underlying its decision to use the "effects" test (a) to measure RICO's extraterritorial reach, and more generally (b) to disregard the presumption against extraterritorial application of U.S. laws.

(ii) *A redetermination of the extraterritoriality issue following a GVR "may determine the ultimate*

outcome" of the litigation against BATCo. As explained in the petition (at 15-17, 23-27, 32-35), the D.C. Circuit's use of the "effects" test to measure RICO's extraterritorial reach (and its recognition of a novel exception to the presumption against extraterritoriality where the "effects" test is satisfied) were dispositive to the outcome of the government's case against BATCo. The D.C. Circuit provided no alternative grounds for affirmance. If, as explained above, *Morrison* means that the D.C. Circuit, on remand, would conclude that it must apply the presumption "in all cases" and would reject the "effects" test as a measure of RICO's extraterritorial reach, then the court of appeals would also necessarily conclude that RICO has no extraterritorial reach at all. As noted in the petition (at 15), the United States has never disputed the district court's conclusion that RICO is at best "silent as to its extraterritorial application." 477 F. Supp. 2d at 197 (citation and internal quotation marks omitted). Under *Morrison*, that silence is dispositive. See slip op. 6 ("When a statute gives no clear indication of an extraterritorial application, it has none.").

Here, of course, there is even more than mere silence. There is substantial evidence in RICO's text, structure, and legislative history suggesting that Congress did *not* intend RICO to extend beyond the Nation's borders. See Pet. 16-17, 19, 29-30 & nn.6-7 (discussing service-of-process provision, Congress's declaration of its exclusively domestic purpose, and other evidence); Reply Br. 10. This evidence, which neither the government nor the D.C. Circuit has ever addressed, would also require the D.C. Circuit on

remand to reverse its holding concerning RICO's worldwide reach.

Finally, although the government tellingly devoted most of its brief in opposition to advancing several alternative grounds for affirmance, BATCo has demonstrated that those arguments were not preserved in the lower courts and are in any event meritless. Reply Br. 1-7. Even if they were preserved (and they were not), these arguments are of no help to the government. Unless it can overcome the strong presumption against extraterritoriality recognized in *Morrison*, which it cannot, the government cannot prevail in its arguments that RICO has a global reach *whether or not* any substantial and direct U.S. effects are felt so long as the RICO plaintiff alleges a conspiracy, invokes the presence of *some* U.S. contacts, or includes wire fraud as part of the RICO claim.[3]

D. This Court has frequently granted rehearing of an order denying a petition for certiorari based on the intervening circumstance of a new and controlling

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[3] *Morrison* itself reaffirmed that domestic conduct must be the "'focus' of congressional concern" (slip op. 17) for it to render an otherwise extraterritorial application of a U.S. statute domestic in nature. Indeed, the Court in *Morrison* recognized that "[i]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Ibid*. (emphasis in original). At a minimum, therefore, the D.C. Circuit should be allowed to address the purported alternative arguments predicated on BATCo's U.S. contacts – and BATCo's responses to them and *Morrison*'s teachings – in the first instance.

Supreme Court decision. See page 1, *supra*. In *Chater*, the Court explained the systemic virtues of its standard practice of entering a GVR order where, as here, an intervening decision of this Court has cast serious doubt on a court of appeals' decision:

> In an appropriate case, a GVR order * * * alleviates the "[p]otential for unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues, see *United States* v. *Johnson,* 457 U.S. 537, 555, n. 16 (1982); cf. *Griffith* v. *Kentucky,* 479 U.S. 314, 323 (1987) ("[W]e fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final").

516 U.S. at 167. The Court's standard GVR practice ensures that litigants obtain the benefit of changes in the law that occur after a decision by a court of appeals but before a judgment becomes final.

E. In *Chater*, this Court suggested that, even if a GVR order is "potentially appropriate," the Court might elect not to grant such relief if (i) an "intervening development, such as a confession of error * * * is part of an unfair or manipulative litigation strategy," or (ii) "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court." 516 U.S. at 167-68. Neither of these considerations supports withholding a GVR order in this case.

First, there is no issue of unfair or manipulative litigation strategy on BATCo's part. On the contrary, throughout this long litigation, at every level, BATCo has consistently and vigorously maintained that RICO has *no* extraterritorial reach and thus may not

be applied to BATCo based on its foreign conduct. BATCo has done everything it could to preserve its legal position on this issue. See also Pet. 28 n.11 (noting connection between pending decision in *Morrison* and this case). It would be manifestly *inequitable* to deny BATCo the full benefit of a decision of this Court, issued the very day that this case was conferenced, that makes it clear that the decision below was incorrect. See *Johnson*, 457 U.S. at 555 n.16 ("[I]nequity * * * results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retroactively applied rule.") (emphasis omitted).

Nor is there any plausible argument that the Court should withhold a GVR order here because the resulting costs and delays outweigh the potential benefits. The potential benefits are significant: the strong likelihood that the D.C. Circuit would correct its own serious error, conform its decision concerning RICO's extraterritorial reach to *Morrison*, restore the presumption against extraterritoriality to its proper function in the D.C. Circuit, and confine RICO to its proper domestic limits. Moreover, a GVR order would expedite rather than delay the remand proceedings. It would allow the D.C. Circuit to address *Morrison*'s impact in the first instance, rather than relegate that issue to the district court, which has already been directed on remand to "reformulate" its injunction on the use of low-tar descriptors outside the United States "to exempt foreign activities that have no substantial, direct and foreseeable domestic effects" (App. 74a-75a). A GVR order could avoid the need for another time-consuming round of trial (and appellate) litigation over the binding effect of the D.C. Circuit's extraterritoriality rulings – as to

BATCo's liability *and* the geographic reach of the district court's injunction banning the use of low-tar descriptors – under the law-of-the-case doctrine.

CONCLUSION

The Court should grant the petition for rehearing, vacate the order denying certiorari, and enter an order that grants the petition for certiorari, vacates the portion of the D.C. Circuit's decision that concerns the extraterritorial reach of RICO, and remands for consideration of *Morrison*.

Respectfully submitted.

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JULY 2010

CERTIFICATE OF COUNSEL

As counsel of record for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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Counsel for Petitioner