Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

JAMES ODOM *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), must be an organization with an ascertainable structure separate and apart from that inherent in the alleged pattern of racketeering activity.

2. Whether a group of corporations can constitute an association-in-fact RICO enterprise.

STATEMENT REQUIRED BY RULE 14.1

In addition to the parties listed in the caption, the following was a defendant below and is a petitioner in this case:

Best Buy Stores, L.P.;

and the following was a plaintiff below and is a respondent in this case:

Katherine Moureaux-Maloney

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioner Microsoft Corporation states that there is no parent corporation or publicly held corporation that owns 10% or more of its stock.

Petitioner Best Buy Stores, L.P. (erroneously sued as Best Buy Co., Inc.) states that Best Buy Co., Inc. is the parent company of Best Buy Stores, L.P. As a limited partnership, Best Buy Stores, L.P. does not issue stock, so there is no publicly held corporation that owns 10% or more of its stock. There is also no publicly held corporation that owns 10% or more of Best Buy Co., Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Microsoft Corporation ("Microsoft") 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The district court's opinion granting in part Petitioner's motion to dismiss was unpublished and is reproduced in the appendix ("Pet. App.") at 28a-37a. The Ninth Circuit's order granting rehearing en banc was published at 466 F.3d 747 (9th Cir. 2006) and is reproduced at Pet. App. 40a. The Ninth Circuit's opinion reversing the district court's order was published at 486 F.3d 541 (9th Cir. 2007) and is reproduced at Pet. App. 1a-27a. The Ninth Circuit's order staying the mandate pending the filing of this petition for a writ of certiorari was unpublished and is reproduced in the appendix at Pet. App. 38a.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1961(4) of Title 18 to the United States Code provides that:

> [As used in this chapter,] "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .

Section 1962(c) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1964(c) of Title 18 to the United States Code provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore 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, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

In *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), this Court observed that one of the reasons civil RICO evolved into "something quite different from the original conception of its enactors" was the failure of "the courts to develop a meaningful concept of 'pattern.'" *Id.* at 500. The present

petition arises because it is now clear—some twenty-six years after this Court's decision in *United States* v. *Turkette*, 452 U.S. 576 (1981)—that the lower courts have not developed a consistent and meaningful concept of another critical limitation in the RICO statute: the "enterprise" requirement.

This petition arises from a suit by a putative class of customers of Best Buy Stores, L.P. ("Best Buy") who allege that Microsoft and Best Buy entered into a joint marketing agreement under which trial memberships to Microsoft's MSN Internet Access service ("MSN service") were activated in their names without their knowledge when they purchased certain products from Best Buy. Plaintiffs alleged that this agreement and the actions of Microsoft and Best Buy in furtherance of this agreement constituted an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). The Ninth Circuit's decision, which permits this theory of liability to proceed, concededly conflicts with those of other circuits and presents two significant questions concerning the proper interpretation of a statute that is of particular importance to the business community.

The first question is whether an association-in-fact RICO enterprise must have an ascertainable structure separate and apart from what would be inherent in the alleged pattern of racketeering activity. The Ninth Circuit answered this question in the negative, concluding that an association-in-fact "enterprise" need be no more than the sum of the alleged predicate racketeering acts, thereby exacerbating a sharp split in the courts of appeals (now four to seven) on this issue. The Ninth Circuit candidly acknowledged that its holding conflicted with the decisions of the Third, Fourth, Eighth, and Tenth Circuits. Pet. App. 14a-15a. Indeed, the Ninth Circuit's decision also conflicts with the holdings of the Fifth, Sixth, and Seventh Circuits, while it is in accord with decisions of the First, Second, and Eleventh Circuits.

The Ninth Circuit's ruling effectively reads the "enterprise" element out of the statute and thereby impermissibly relaxes the limitations Congress placed on the imposition of RICO's harsh penalties. Section 1962(c)'s requirement that a defendant participate in the operation or management of an "enterprise" is a "critical limitation" on RICO that prevents it from becoming a routine vehicle for imposing civil liability; otherwise, it would be nothing more than a conspiracy or aiding and abetting statute. *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993). The concept of "enterprise" is central to RICO, which was enacted to eradicate *organized* crime. *Turkette*, 452 U.S. at 589. Yet the Ninth Circuit held that where an association-in-fact enterprise is alleged, no organization is required beyond that inherent in the commission of the predicate acts. Under this reading of the statute, the "enterprise" requirement is no limitation at all, at least where two corporate entities are engaged in any joint activities.

The second question meriting this Court's review is whether a group of corporations can constitute an association-in-fact RICO enterprise. Although Petitioner did not expressly raise this precise issue below (as it was previously decided by the Ninth Circuit, see *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993)), Petitioner has contended throughout this litigation that the enterprise alleged is legally deficient.

The flawed view that an associated-in-fact enterprise can be made up of a group of corporations is contrary to the plain language of the statute, which defines an association-in-fact enterprise as a "group *of individuals* associated in fact." 18 U.S.C. § 1961(4) (emphasis added). Yet this erroneous interpretation is widely adopted by the lower courts and results in numerous civil suits—most of which result in settlements—predicated on a theory unsupported by the statute. There is no conflict among the lower courts on this issue, but the question is one of fundamental importance

because it frames the first question presented in this petition and it exposes virtually every business entity to potential exposure to RICO's treble damages for every joint activity with another business.

The Ninth Circuit's decision permits plaintiffs to proceed with RICO suits against corporations based on their ordinary contractual or other business relationships. If left intact, the appellate court's construction of the RICO enterprise requirement will transform vast amounts of legitimate commercial activity into conduct actionable under RICO. Expanding RICO's scope in this manner will impose significant and unintended costs on American businesses and will convert a statute designed to eradicate organized crime into a tool to induce settlements from legitimate businesses that cannot risk the possibility of an award of treble damages or the reputational injury of being subjected to suit in federal court under a statute associated with racketeers and mobsters. The Court should grant certiorari to help restore civil RICO to its proper role: that of a narrowly drawn remedy aimed at providing redress to the direct victims of organized criminal activity—not a mechanism for the extraction of windfall recoveries arising from perfectly ordinary business transactions.

1. On May 15, 2003, respondent James Odom filed a complaint in the United States District Court for the Northern District of California against Microsoft and Best Buy on behalf of a purported class of all persons "in whose names [a trial subscription to Microsoft's MSN service was] established and activated by the scanning of a Trial CD at a Best Buy store, during the period from May 15, 1999 to the present." Compl. ¶ 19. Plaintiff asserted two federal RICO claims under 18 U.S.C. § 1962(c) and (d) stemming from a joint marketing agreement between Microsoft and Best Buy under which each agreed to promote the other's products and

services.[1] Plaintiff alleged that the agreement and the actions of Microsoft and Best Buy in furtherance of the agreement constituted an "enterprise" and that the defendants conducted the affairs of this claimed "enterprise" though a pattern of racketeering activity.

2. Microsoft moved to dismiss the original complaint in the Northern District of California, arguing *inter alia* that Plaintiff failed adequately to plead a RICO enterprise. Best Buy joined in that motion. At the same time, Microsoft filed (and Best Buy joined) a separate motion to transfer the case to the Western District of Washington. The transfer motion was granted on October 1, 2003.

3. On November 19, 2003, Plaintiffs filed a First Amended Complaint ("Amended Complaint") in the Western District of Washington. Am. Compl. Plaintiffs asserted federal RICO claims under 18 U.S.C. § 1962(c) and (d), a claim under the Electronic Fund Transfer Act (15 U.S.C. § 1693), a claim under the Washington Consumer Protection Act (Wash. Rev. Code § 19.86.010), and a claim for unjust enrichment.

Plaintiffs' allegations almost exclusively focused on the actions alleged to constitute the claimed pattern of racketeering activity. Plaintiffs asserted that "[u]nder an agreement signed in April 2000, Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store through its MSN service" and that, in exchange, "Best Buy agreed to promote MSN service and other Microsoft products in its stores and advertising." Am. Compl. ¶ 10. Specifically, Plaintiffs alleged that Best Buy would distribute to its retail customers a Trial CD that provided the customer a trial subscription to MSN service for 30 days or six months, depending on the merchandise purchased. *Id.* ¶ 11. Plaintiffs further alleged that a trial MSN service account was established in the customer's name without his or her

[1] The complaint set forth one alleged RICO predicate act—wire fraud (18 U.S.C. § 1343).

knowledge when a Best Buy employee scanned a Trial CD at the checkout counter. *Id.* ¶¶ 12-13. At the end of the trial subscription period, Plaintiffs claimed, Microsoft would begin to charge the customer for the MSN service that the customer allegedly did not know was established. *Id.* ¶ 17.[2]

In an attempt to satisfy § 1962(c)'s requirement that the defendants conduct the affairs of an "enterprise," Plaintiffs asserted that the joint marketing agreement between Microsoft and Best Buy, "together with Defendants' activities in furtherance of the agreement, constitute an 'enterprise.'" Am. Compl. ¶ 34. In addition, Plaintiffs alleged that:

> [t]he material decisions guiding the operation of this enterprise—including but not limited to decisions concerning the form and content of campaigns, advertising, and other vehicles used by either Defendant to promote the other's products and services pursuant to their agreement (and including the design and implementation of the mechanisms through which MSN accounts are established by the swiping of a Best Buy customer's credit or debit card and the scanning of a Trial CD)—are made by Defendants jointly.

Id. ¶ 35. Plaintiffs further claimed that "Best Buy receives a flat payment" as well as "a portion of each monthly MSN charge paid by the customer" from Microsoft. *Id.* ¶ 38.

4. Microsoft and Best Buy filed separate motions to dismiss the Amended Complaint in the Western District of Washington arguing *inter alia* that Plaintiffs' RICO claims should be dismissed because their allegations failed to plead the existence of a cognizable enterprise. On March 16, 2004, the district court dismissed with prejudice Plaintiffs' RICO claims, holding that they did not allege the existence of an

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[2] While the allegations in the Amended Complaint must be taken as true at this stage, Fed. R. Civ. P. 12(b)(6), Microsoft denies any illegal conduct.

enterprise separate and distinct from the alleged racketeering activity. Pet. App. 34a Thereafter, Plaintiffs voluntarily dismissed their remaining non-RICO claims. On May 18, 2004, the district court entered final judgment for the defendants on the RICO claims.

5. A divided Ninth Circuit, sitting *en banc*, reversed the district court's judgment. Pet. App. 21a. Although a panel of the Ninth Circuit previously held that an association-in-fact enterprise must have an ascertainable organizational existence separate and distinct from that inherent in the alleged pattern of racketeering activity, see *Chang* v. *Chen*, 80 F.3d 1293 (9th Cir. 1996), the majority opinion rejected any such requirement, holding that RICO plaintiffs need not allege that the claimed enterprise had any organizational structure beyond that necessary to commit the alleged acts of racketeering. Pet. App. 17a. Because in this case Plaintiffs alleged that Microsoft and Best Buy "had a common purpose of increasing the number of people using Microsoft's Internet Service," "formed a vehicle for the commission of at least two predicate acts of fraud," and operated under the joint marketing agreement for two years, the Ninth Circuit concluded that Plaintiffs adequately pled an association-in-fact RICO enterprise. *Id.* at 19a-20a.

The majority expressly acknowledged the deeply divided and mature split among the circuits and that its holding conflicted with the decisions of at least four other circuits. Pet. App. 14a-15a (citing decisions from the Third, Fourth, Eighth, and Tenth Circuits). Although the precise formulations vary, each of these circuits interpreted Section 1962(c) and this Court's decision in *United States* v. *Turkette* to require an association-in-fact enterprise to have an ascertainable organizational existence separate and distinct from the alleged pattern of racketeering activity. See *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) ("enterprise must have ... an ascertainable structure distinct from the pattern of racketeering"); *United*

States v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991) ("enterprise" must have "an ascertainable structure that exist[s] apart from the commission of racketeering acts"); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985) (to allege an "enterprise," a plaintiff must "show that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citations omitted)); *United States* v. *Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983) ("enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses").

The majority disagreed with these circuits' reading of *Turkette*, holding that this Court's statement that an "enterprise" is "an entity separate and apart from the pattern of activity in which it engages," *Turkette*, 452 U.S. at 583, "is merely a statement of the obvious: The enterprise and its activity are two separate things. One is the enterprise. The other is its activity." Pet. App. 17a. The majority also concluded that a requirement that an enterprise have an ascertainable structure distinct from that necessary to commit the alleged racketeering acts "would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities." *Id.* at 18a. Accordingly, the Ninth Circuit joined what it considered to be the four circuits that have rejected such a requirement. *Id.* at 17a (citing decisions from the First, Second, Eleventh, and District of Columbia Circuits).[3]

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[3] The majority opinion concluded that there was an even split among the circuits. But the majority did not properly recognize that the Fifth, Sixth, and Seventh Circuits have each held that an enterprise must have an ascertainable separate structure. *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987) ("Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank."); *Richmond* v. *Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) ("There must be 'a structure and goals separate from the predicate acts themselves.'") (quoting *United States* v. *Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994)); *United States* v. *Johnson*, 440 F.3d 832, 840 (6th Cir.) ("'The hallmark of

Seven of the fifteen judges, although concurring in the ultimate result because they believed Respondents should be permitted to attempt to replead the existence of a separate enterprise, disagreed that Plaintiffs' allegations in the existing Amended Complaint gave rise to liability under RICO. Noting that "Odom's complaint narrowly defines the 'enterprise' as only the marketing agreement between Best Buy and Microsoft together and their activities in furtherance of that agreement," five judges rejected the proposition that "if two parties perform a series of 'predicate acts' for each other's benefit pursuant to a commercial agreement, they *ipso facto* constitute an 'enterprise.'" Pet. App. 25a (Silverman, J., concurring in the result). Rather, citing the purpose of RICO—the eradication of *organized* crime—these judges argued that, to constitute a RICO enterprise, a group of persons associated in fact must have at least "some minimal structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy." *Id.* Two other judges stated that "[i]t strikes [us] as outlandish that what Judge Silverman correctly describes as a 'marketing contract' between Microsoft and Best Buy could subject them to a private RICO action." *Id.* at 27a (Bybee, J., concurring in the result).

The Ninth Circuit stayed its mandate pending the filing of this petition for a writ of certiorari. Pet. App. 38a.[4]

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an enterprise is structure .... [T]here must be some structure, to distinguish an enterprise from a mere conspiracy ....'") (quoting *United States* v. *Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996)), *cert. denied*, 127 S. Ct. 48 (2006). Also erroneous is the majority's inclusion of the D.C. Circuit among the list of circuits that reject the requirement of a separate and ascertainable structure. The case cited, *United States* v. *Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988), did not address this issue, instead concerning itself with the different question of whether an enterprise must be proven with *separate evidence* from the evidence of the predicate acts.

[4] The Ninth Circuit denied Plaintiffs' motion for reconsideration of the order staying the mandate on June 28, 2007. Pet. App. 39a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER A RICO ENTERPRISE MUST HAVE AN ASCERTAINABLE ORGANIZATIONAL EXISTENCE SEPARATE AND DISTINCT FROM THE ALLEGED PATTERN OF RACKETEERING ACTIVITY.

This case presents the question whether an association-in-fact RICO "enterprise" must have an ascertainable, and ongoing, organizational structure separate and apart from what would be inherent in the alleged pattern of racketeering. See 18 U.S.C. § 1962(c). The Ninth Circuit's conclusion that it need not is consistent with rulings of the First, Second, and Eleventh Circuits. These decisions, however, directly conflict with the conclusions of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits. Indeed, the Ninth Circuit itself acknowledged a deep and irreconcilable split among the circuits and that its holding conflicted with the decisions of at least four other circuits. Pet. App. 14a-15a. That is reason enough for this Court to grant certiorari.

Section 1962(c) makes it "unlawful for any person employed by or associated with any *enterprise* . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (emphasis added). RICO also makes it unlawful for any person to conspire to violate any provision of this subsection. *Id.* § 1962(d). The statute defines the term "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

This Court previously considered the definition of an association-in-fact enterprise. In *United States* v. *Turkette*, the defendants were accused of conducting the affairs of a RICO enterprise described as a group of individuals

associated in fact for the purpose of engaging in a pattern of racketeering activity involving illegal drug trafficking, arson, and other crimes. See 452 U.S. 576, 579 (1981). The First Circuit held that the definition of "enterprise" was limited to legitimate enterprises and did not encompass an association that performed only illegal acts and that had not infiltrated a legitimate enterprise. See *id.* at 579-80. Reading the statute to apply only to legitimate enterprises was necessary, the First Circuit reasoned, to avoid an interpretation of the statute under which a "pattern of racketeering" can, without more, be an "enterprise." See *id.* at 582.

This Court reversed, holding that the term "enterprise" includes both legitimate and illegitimate enterprises. See *id.* at 587. Rejecting the First Circuit's premise that reading the statute to encompass wholly criminal enterprises would necessarily "mean that a 'pattern of racketeering activity' is an 'enterprise,'" this Court stressed that whether legitimate or criminal, "[t]he existence of an enterprise at all times remains a separate element" from the existence of a pattern of racketeering activity. *Id.* at 583.

The Court described the attributes of an associated-in-fact enterprise, and distinguished it from a "pattern of racketeering activity," as follows:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

Id.

Although recognizing that the evidence "used to establish these separate elements may in particular cases coalesce," this Court held that "proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Id.*

After *Turkette*, the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits held that a RICO enterprise must have an ascertainable structure and organization separate and distinct from the alleged acts of racketeering because, absent such a requirement, the "enterprise" element of the offense would be interchangeable with the "pattern of racketeering" element and could be satisfied merely by alleging the existence of a conspiracy among the defendants. The Ninth Circuit in the decision below and the First, Second, and Eleventh Circuits disagreed. In those circuits, any loose affiliation of defendants (including a simple conspiracy) is enough to constitute a RICO enterprise.

The Ninth's Circuit's view that a separate ascertainable structure requirement "would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities," Pet. App. 18a, echoes that of the First Circuit, which rejected such a requirement because "Congress intended the term 'enterprise' to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures." *United States* v. *Patrick*, 248 F.3d 11, 19 (1st Cir. 2001) (citations omitted). The Eleventh Circuit also rejected any such requirement, holding that a RICO enterprise may be made up of "any group of individuals 'whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes.'" *United States* v. *Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983). Similarly, the Second Circuit "upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of

the predicate racketeering acts." *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983).

The Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits disagree with this view, holding that an enterprise must be an organization with an ascertainable structure that is separate and apart from that inherent in the pattern of racketeering activity. See *United States* v. *Johnson*, 440 F.3d 832, 840 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006); *United States* v. *Sanders*, 928 F.2d 940, 944 (10th Cir. 1991); *United States* v. *Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *United States* v. *Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983); *United States* v. *Bledsoe*, 674 F.2d 647, 663 (8th Cir. 1982).

These Circuits base their conclusions on two related rationales. First, the broad interpretation espoused by the First, Second, Eleventh, and now Ninth Circuits would effectively render the "enterprise" element of the statute superfluous. "If the 'enterprise' is just a name for the crimes the defendants committed, or for their agreement to commit these crimes ..., two statutory elements—enterprise and pattern—would be collapsed into one." *Masters*, 924 F.2d at 1367 (citations omitted); see *Bledsoe*, 674 F.2d at 664. Such a result, these courts held, would be incongruous given the "central role of the concept of enterprise under RICO." *United States* v. *Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986); see *Riccobene*, 709 F.2d at 221; *United States* v. *Anderson*, 626 F.2d 1358, 1368 (8th Cir. 1980).

Second, this broad definition would equate the term "enterprise" with conspiracy, a result not intended by Congress. "A comparison of the severe penalties authorized by RICO with those for conspiracy indicates that the Act must have been directed at participation in enterprises consisting of more than simple conspiracies to perpetrate the predicate acts of racketeering." *Bledsoe*, 674 F.2d at 664 (comparing 18

U.S.C. § 1963(a) with 18 U.S.C. § 371). This interpretation is also untenable because it would render § 1962(d), which makes it unlawful to conspire to violate § 1962(c), a prohibition on conspiracies to conspire. *Anderson*, 626 F.2d at 1368; see *Riccobene*, 709 F.2d at 221.

Indeed, the language and structure of the RICO statute suggest that, despite the apparent breadth of the definition in 18 U.S.C. § 1961(4), an "enterprise" must be more than a joint or coordinated undertaking by two or more persons. As the Eighth Circuit reasoned in *United States* v. *Bledsoe*:

> The crime defined in 18 U.S.C. § 1962(c) involves two modes of association with an enterprise. In order to violate the provision, an individual must be "employed by or associated with" an enterprise and must "participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Construing the statute to give effect to all its words, it requires an association with an enterprise which is distinct from participating in the conduct of the enterprise through a pattern of racketeering activity. In order for such association, for example, formal membership in or employment by a legitimate organization or their equivalent in a criminal group, to exist, the enterprise must be more than an informal group created to perpetrate the acts of racketeering.

674 F.2d at 663 (footnote omitted). It is significant that the statute says "associated with" an enterprise. It does not say "associated in an enterprise." The enterprise must therefore be something more than, and distinct from, the persons who comprise it and the acts they allegedly commit.

Thus, the Eighth Circuit held that an alleged association-in-fact enterprise consisting of two county administrators and a salesman who allegedly conspired to submit and approve payment of bogus invoices for merchandise never received by the county does not satisfy the "enterprise" requirement.

Anderson, 626 F.2d at 1362. Noting that "[a] contrary interpretation would alter the essential elements of the offense as determined by Congress" by conflating the "enterprise" and "pattern of racketeering" elements, *id.* at 1365, the Eighth Circuit held that the term "enterprise" encompasses "'only an association having an ascertainable structure ... that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity.'" *Id.* at 1372.

The Fifth Circuit similarly rejected an alleged association-in-fact enterprise made up of a bank, its holding company, and three employees who purportedly conspired to charge excessive interest rates. See *Atkinson*, 808 F.2d at 440-41. Holding that an enterprise must be an entity separate and apart from the pattern of activity in which it engages, the Fifth Circuit rejected the plaintiffs' claim that this purported enterprise had an ascertainable separate structure because "there was no evidence that the bank, its holding company, and the three employees were associated in any manner apart from the activities of the bank." *Id.*

The Seventh Circuit likewise rejected allegations of an associated-in-fact enterprise that, although sufficient to demonstrate a conspiracy, contained nothing to show that those associating together comprised or created an ascertainable organization. See *Bachman* v. *Bear, Stearns & Co.*, 178 F.3d 930, 931-32 (7th Cir. 1999) (holding that an alleged association-in-fact of the plaintiff's former employer, its parent company, a corporate majority shareholder, two officers and an investment company, all of whom supposedly acted in concert to defraud the plaintiff over a period of several years, might be enough to state a conspiracy, but was insufficient for a RICO enterprise because there was nothing to show that these associates were an organization). See also *Johnson*, 440 F.3d at 840 ("'The hallmark of an enterprise is structure .... [T]here must be some structure, to distinguish an enterprise from a mere conspiracy ....'") (quoting *United*

States v. *Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996)); *Neapolitan*, 791 F.2d at 550 ("While the hallmark of conspiracy is agreement, the central element of an enterprise is structure. An enterprise must be more than a group of people who get together to commit a 'pattern of racketeering activity.'").

The Third, Fourth, Sixth, and Tenth Circuits also endorsed the distinct organizational existence requirement. See *Riccobene*, 709 F.2d at 221-24 (to avoid the danger that "federal prosecutors could use the law to invoke an additional penalty whenever they had a case involving the commission of two offenses that, coincidentally, were among those listed as 'racketeering activities,'" the term "enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses"); *Tillett*, 763 F.2d at 632 (to allege an "enterprise," a plaintiff must "show that the organization had an existence beyond that which was necessary to commit the predicate crimes" (citations omitted)); *Sanders*, 928 F.2d at 944 ("enterprise" must have "an ascertainable structure that exist[s] apart from the commission of racketeering acts").

The stark conflict between the decisions of the First, Second, Ninth, and Eleventh Circuits and those of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits on whether an association-in-fact RICO enterprise must have an ascertainable structure and organization separate and apart from that inherent in the pattern of racketeering activity is an issue of national importance that warrants this Court's review. The broad definition of "enterprise" adopted by the First, Second, Ninth, and Eleventh Circuits would create a drastic and unwarranted expansion of RICO civil liability into an area far afield from the initial purpose of the statute. While it is true that RICO is applied in circumstances different from its initial purpose "to attack the 'infiltration of organized crime and racketeering into legitimate organizations,'" *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993) (quoting S. Rep.

No. 91-617, at 76 (1969)), RICO is clearly not designed as a general civil liability remedy to be used to obtain treble damages against corporations engaged in ordinary contractual business activities. To the contrary, the requirements of § 1962(c), including the enterprise requirement, are "critical limitation[s]" on the applicability of RICO. *Id.* at 183.

Because it allows plaintiffs to plead an association-in-fact enterprise in any case in which there is coordinated activity among businesses, this expansive definition of "enterprise" all but eliminates the enterprise requirement from the statute. Under this standard, any company that engages in a co-marketing arrangement, enters into a distribution agreement, or has any contractual relationship with another company could be alleged to have participated in an "enterprise" designed to engage in the marketing, distribution, or other contractual activity. The rule, in effect, would make a broad range of routine corporate conduct actionable under RICO.[5] This dramatic increase in potential corporate RICO liability with its draconian remedies warrants review.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE THRESHOLD QUESTION OF WHETHER A GROUP OF CORPORATIONS CAN CONSTITUTE AN ASSOCIATION-IN-FACT ENTERPRISE.

The Court should also grant review to consider an antecedent misinterpretation of RICO's enterprise definition that has gained wide acceptance among lower courts: the flawed view that a group of corporations can constitute an association-in-fact enterprise. Although previously adopted by the Ninth Circuit, see *United States* v. *Blinder*, 10 F.3d

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[5] Moreover, the disagreement among federal appellate courts on this question presents a significant risk of forum shopping. Corporations targeted by civil RICO actions often do business in several states, and this circuit split means that the same corporation would be subject to different liability in different states.

1468, 1473 (9th Cir. 1993), and thus not explicitly contested below, this view is clearly wrong. RICO's definition provides that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). It is plain—both from ordinary meaning and the structure of the statute itself—that the "group of *individuals* associated in fact" refers only to groups of natural persons, not groups of corporations. See *Webster's Third International Dictionary of the English Language* 1152 (1969) (defining "individual" as "a single human being as contrasted with a social group or institution"); 18 U.S.C. § 1961(4) (listing at outset of definition "individual" separately from other entities, including "corporation").

The Court considered this question two terms ago but chose not to resolve it, apparently because it was not raised explicitly in the petition for certiorari. See *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006).[6] In that case, the focus was on whether the definition of "enterprise"—in light of its introduction by the term "includes"—was comprehensive or instead merely provided a list of examples that could be judicially expanded upon. As this Court recognizes, "the term 'includes' may sometimes be taken as synonymous with 'means,'" and thus as introducing a comprehensive list. *Helvering* v. *Morgan's, Inc.*, 293 U.S.

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[6] At oral argument in *Mohawk*, Chief Justice Roberts commented that "it does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." Tr. Oral Arg. at 29, *Mohawk Indus., Inc.* v. *Williams*, 126 S. Ct. 2016 (2006) (No. 05-465). *See also id.* at 32 (Kennedy, J.) ("A person is defined—in sub (3) just above it. A person includes any individual or entity. Then the next thing [§ 1961(4)] says [is] individual. So it's not a—it doesn't sound like a corporation."); *id.* at 51 (Souter, J.) (noting the "peculiarity of the definition" of enterprise, which lists "A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, i.e., individuals, are included").

121, 125 (1934). The structure of RICO provides powerful evidence that Congress used "includes" to introduce comprehensive definitions.[7]

A reading of § 1961(4) to mean what it says accords with the "two aims" of RICO: "to make it unlawful for *individuals* to function as members of organized criminal groups" and "to stop organized crime's infiltration of legitimate businesses." S. Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added). Expanding the meaning of "group of individuals" to encompass corporations takes RICO well beyond these purposes. Such an expansion threatens to "RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity." Tr. Oral Arg. at 44-45, *Mohawk*, 126 S. Ct. 2016 (2006) (No. 05-465) (Breyer, J.).

The circuit courts' rationales for "RICO-izing" groups of corporations are unpersuasive. For instance, the Eleventh Circuit baldly held that "a group of corporations can be a 'group of individuals associated in fact.'" *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985). See also *United States* v. *Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988). Others grafted language onto § 1961(4) that is plainly not there. See *Bunker Ramo Corp.* v. *United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) (adding to end of enterprise definition "and any combination of them"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1980) (approving of "enterprise" consisting of "'a group of individuals

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[7] Justice Alito commented on this point at oral argument in *Mohawk*, asking:

> Why shouldn't includes here be read to mean means when that seems to be the way it's used in other subsections of this provision and when the only thing that seems to be ... omitted from the list is what's involved here, which is a group consisting of a corporation or ... other legal entity ... and natural persons.

Tr. Oral Arg. at 42, *Mohawk*, 126 S. Ct. 2016 (No. 05-465).

associated in fact with various corporations'"). Other courts simply relied on the term "includes"—without any analysis of whether "includes" was used elsewhere in RICO to introduce comprehensive definitions. See, *e.g.*, *Masters*, 924 F.2d at 1366; *Thevis*, 665 F.2d at 625; *United States* v. *Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988); *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979).

The courts of appeals may be unanimous on this point, but they are unanimously wrong and their reasoning, which has been quite sparse, does not withstand scrutiny.[8] As a result, numerous civil suits are predicated upon a theory that lacks support in the statute.

Nothing in its text, legislative history, or purpose indicates that RICO was intended to apply to groups of corporations. Indeed, RICO was intended to *protect* businesses from organized crime, not to impose onerous burdens on them. See 116 Cong. Rec. 600, 602 (1970) (remarks of Sen. Hruska) (RICO was "designed to remove the influence of organized crime from legitimate businesses by attacking its property interests and by removing its members from control of legitimate business[]"). Yet because of the potential for plaintiffs to extract windfall recoveries, the statute increasingly is used against legitimate businesses.

A civil action under RICO is "an unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda* v. *Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). The Ninth Circuit's holding in this case serves only to further arm those who would attempt to extract settlements from legitimate businesses that cannot risk the possibility of being labeled as racketeers or subjected to an award of treble damages. RICO was never intended to be—and is not—a general criminal conspiracy statute or basis for

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[8] At oral argument in *Mohawk*, the United States acknowledged that "the analysis doesn't tend to be lengthy." *See* Tr. Oral Arg. at 50-51, *Mohawk*, 126 S. Ct. 2016 (2006) (No. 05-465).

invoking federal jurisdiction over alleged consumer protection claims. This Court should grant certiorari to correct this misinterpretation of RICO and restore association-in-fact enterprises to the scope Congress intended.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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