No. 05-92

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILIP MORRIS USA INC., *ET AL.*,

Respondents.

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

BRIEF IN OPPOSITION

TODD R. GEREMIA
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

MICHAEL A. CARVIN
(Counsel of Record)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939
Attorneys for Respondent R.J. Reynolds Tobacco Company
(Additional Counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

Murray R. Garnick
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004

Attorneys for Respondents
Philip Morris USA Inc. and
Altria Group Inc.

David M. Bernick
Stephen R. Patton
KIRKLAND & ELLIS LLP
200 East Randolph Drive,
Suite 5900
Chicago, Illinois 60601

Attorneys for Respondent
Brown & Williamson Tobacco
Corporation (individually, and
as successor by merger to, The
American Tobacco Company)

J. William Newbold
Michael B. Minton
Richard P. Cassetta
THOMPSON COBURN LLP
One US Bank Plaza, Suite 3500
St. Louis, Missouri 63101-1693

Attorneys for Respondent
Lorillard Tobacco Company

Steven Klugman
Steven S. Michaels
DEBEVOISE & PLIMPTON
LLP
919 Third Avenue
New York, New York 10022

Attorneys for Respondent
The Council for Tobacco
Research-U.S.A., Inc.

Bruce G. Sheffler
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza, 34th Floor
New York, New York 10112-0219

Attorneys for Respondent
British American Tobacco
(Investments)
Limited (f/k/a British-American
Tobacco Company Limited)

Aaron H. Marks
Leonard A. Feiwus
KASOWITZ BENSON
TORRES & FRIEDMAN LLP
1633 Broadway
New York, New York 10019

Attorneys for Respondent
Liggett Group, Inc.

James A. Goold
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

Attorneys for Respondent
The Tobacco Institute, Inc.

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CORPORATE DISCLOSURE STATEMENTS

Respondents make the following corporate disclosure statements pursuant to Supreme Court Rule 29.6:

Respondent Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

Respondent Altria Group, Inc. has no parent company. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to respondent R.J. Reynolds Tobacco Company, a New Jersey corporation. The existing R.J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American Inc., which is a Delaware corporation. Respondent Brown & Williamson Tobacco Corporation holds more than 10% of the stock of Reynolds American Inc.

Respondent Brown & Williamson Holdings, Inc. is a Delaware corporation. Brown & Williamson is wholly owned by BATUS Tobacco Services, LLC, which is a non-public holding company. Brown & Williamson's ultimate parent is British American Tobacco, p.l.c., which is a publicly held United Kingdom corporation. All other indirect parent companies of Brown & Williamson are non-public companies.

Respondent Lorillard Tobacco Company is wholly owned by Lorillard Inc. Lorillard Inc. is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

Respondent Liggett Group Inc. is a wholly owned, indirect subsidiary of Vector Group Ltd. Vector Group Ltd.'s stock is publicly traded on the New York Stock Exchange.

The following parent companies and publicly held companies have a 10% or greater ownership interest in respondent British American Tobacco (Investments) Limited: British American Tobacco p.l.c., British American Tobacco (1998) Limited, and British-American Tobacco (Holdings) Limited.

Respondent The Council for Tobacco Research-U.S.A., Inc. ("CTR") had no parent companies, subsidiaries, or affiliates which have outstanding securities in the hands of the public. CTR was a not-for-profit New York corporation which has been dissolved, and which is in the process of winding up its affairs, pursuant to a plan of voluntary dissolution approved by the Supreme Court of the State of New York on November 6, 1998.

Respondent The Tobacco Institute, Inc. is a dissolved New York not-for-profit corporation. It had no shareholders, subsidiaries, or parent corporations.

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INTRODUCTION

This interlocutory case does not satisfy the Court's well-established standards for review. The D.C. Circuit held that both the plain text of § 1964(a) and the "comprehensive and reticulated" remedial structure of RICO create "a necessary and inescapable" inference that § 1964(a) is not a general grant of equity jurisdiction, but a carefully limited provision that allows only for forward-looking remedies. Pet. App. 2a. This forward-looking provision expressly permits district courts to issue orders to "prevent and restrain" future RICO violations, but does not authorize the "quintessentially backward-looking remedy" of disgorgement of past ill-gotten gains. *Id.* at 13a. The lower court's straightforward construction of the statute follows directly from *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), and does not conflict with *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), or *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

Any difference in approach among the courts of appeals on this issue is at most academic and has no bearing on the outcome here. Every appellate court to consider the issue has rejected the government's sweeping interpretation of § 1964(a). And no circuit has ever upheld an award of disgorgement under civil RICO. Indeed, even the Second Circuit, which has recognized the theoretical possibility of disgorgement under § 1964(a) in limited circumstances, would not allow the disgorgement remedy the government seeks here. Nor is the issue a sufficiently recurring one to justify review. In the almost 35 years since the statute was enacted, the government has sought to use this so-called "critically important remedial tool" (Pet. 20) in only a handful of RICO cases—and never in one even remotely resembling this dressed-up product liability dispute.

The procedural posture of this case also makes review at this time inappropriate. The D.C. Circuit's ruling is not simply interlocutory, which alone is a sufficient basis to

deny review. The government's petition asks this Court to rule on one possible *remedy* while the district court is still deciding *liability* (and whether to award other potential remedies). If the district court finds no liability, any review by this Court would result in an advisory opinion. Furthermore, even if liability were assumed, granting review at this stage would be premature because the supposed "critical" importance of a disgorgement remedy in this case cannot be assessed until the courts below resolve whether the *other* draconian remedies proposed by the government are available, appropriate, and sufficient. If the government is dissatisfied with the outcome of any appeal from the final judgment, it can pursue review in this Court then.

To be sure, the district court granted respondents permission to seek an interlocutory appeal under 28 U.S.C. § 1292(b). Interlocutory appeal at that time made sense, however, because, as the district court found, a decision by the court of appeals on disgorgement would "dramatically affect the shape and length of the trial." Pet. App. 150a. In fact, the D.C. Circuit issued its decision before the district court heard evidence relating to remedies. Thus, interlocutory appeal achieved its purpose: substantial evidence relating to disgorgement was not presented, and the trial was streamlined. Now, however, the trial is over, and the parties will have completed the post-trial briefing before the government's petition is even circulated to the Court.

Accordingly, adding yet another layer of interlocutory review by this Court would not serve the purpose that prompted review before the D.C. Circuit. Notably, the government has offered no good reason why the Court should expend its scarce resources to decide a case in this posture—or what possible benefit would accrue if the Court abandoned its customary practice of refusing to review interlocutory orders. Nor has the government even attempted to explain how it would be prejudiced in this case if it were required to await an appeal from a final judgment.

In short, the petition should be denied because the D.C. Circuit faithfully implemented this Court's precedent governing the scope of statutory remedial provisions. The Court should also deny review because of the interlocutory posture of this case. The most efficient and orderly manner of proceeding is to permit the district court to issue its final judgment and then allow for appellate review in the ordinary course.

STATEMENT OF THE CASE

A. The Government's Claim

The government brought this case on September 22, 1999, immediately after announcing its decision to conclude a criminal investigation of respondents without bringing any charges. In its complaint, the government sought billions of dollars in damages under the Medical Care Recovery Act, 42 U.S.C. § 2651(a), and the Medicare Secondary Payer statute, 42 U.S.C. § 1395y(b)(2), for expenditures it claimed it made for the treatment of smoking-related diseases. On respondents' motion, the district court dismissed these claims on the ground that the government could not state a claim for damages under those statutes. Pet. App. 79a-128a.

The government's sole remaining claims are its civil RICO claims. These claims are predicated on the notion that respondents—who account for approximately 85% of all cigarette sales in the United States—are a RICO "enterprise." The government alleges that, since 1953, much of respondents' marketing and promotional activities relating to the sale of cigarettes were "predicate acts" of mail and wire fraud—even though many, if not most, of these acts were well known to the government, which has regulated cigarette labeling and advertising for decades. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-38 (2000) (describing legislation addressing "problem of tobacco and health"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542-46 (2001) (same); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 514-15 (1992) (describing

congressionally prescribed warnings designed to inform consumers of health risks of smoking).

The government's prayer for relief included a broad range of injunctive relief under 18 U.S.C. § 1964(a)—a provision that authorizes courts to order remedies that "prevent and restrain" RICO violations. Although no RICO provision expressly permits the government to seek a monetary remedy in a civil case, the government nonetheless asserted a claim to recover $280 *billion* under the label of equitable "disgorgement." The government invoked § 1964(a) as its legal authority for this claim.

B. Pretrial Proceedings

Respondents moved under Rule 12(b)(6) to dismiss the government's disgorgement claim on the ground that this backward-looking monetary remedy does not "prevent and restrain" future RICO violations within the meaning of § 1964(a). The district court disagreed, relying on *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995). Pet. App. 118a-121a. In *Carson*, the Second Circuit *reversed* a disgorgement award because it was not necessary to "prevent and restrain" the defendant. *Carson* also stated, however, that a truncated form of disgorgement might be allowable if ill-gotten "gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d at 1182. The district court reasoned that, at the motion to dismiss stage, it could not make the finding suggested by *Carson*. Pet. App. 120a-121a.

At the close of discovery, respondents moved for summary judgment on the government's disgorgement claim. Respondents reiterated their contention that disgorgement is not, as a general matter, available under § 1964(a). They also argued that disgorgement was not available because the government had not shown that respondents had any ill-gotten gains that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose" under *Carson*. Finally,

respondents argued that the government failed to limit its disgorgement estimate to profits that were illegally obtained or could be used to promote racketeering.[1]

The district court denied respondents' motion. Pet. App. 129a-147a. The court noted that it earlier had rejected respondents' argument that disgorgement was not an available remedy under § 1964(a). *Id.* at 135a. This time, the district court also rejected the *Carson* decision, saying that it "does not find persuasive *Carson*'s rationale for limiting disgorgement under Section 1964(a)." *Id.* at 145a. The court also rejected respondents' arguments concerning the deficiencies in the government's disgorgement model on the ground that they raised triable issues of fact. *Id.* at 135a-147a. The district court certified its interlocutory order for appeal pursuant to 28 U.S.C. § 1292(b), and the D.C. Circuit granted respondents' petition for permission to appeal. Pet. App. 148a-153a, 154a.

C. The D.C. Circuit's Decision

The D.C. Circuit reversed. It first addressed its jurisdiction under *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996), to decide "whether disgorgement is available at all." Pet. App. 5a. Reasoning that its jurisdiction encompassed "any issue fairly included within the certified order," *Yamaha*, 516 U.S. at 205, the court held that the question whether "disgorgement *vel non* is an available remedy" is "logically antecedent" to and "logically interwoven" with the more "narrow question of whether the disgorgement [the government] seeks is consistent with the standards of *Carson*." Pet. App. 5a. Accordingly, the court ruled that it had jurisdiction to decide the issue. *Id.* at 12a.[2]

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1 The amount of disgorgement sought by the government was many times the combined net worths of all respondents.

2 In the D.C. Circuit, the government conceded that the court of appeals had jurisdiction to decide this issue, but argued that the court

On the merits, the court of appeals held that disgorgement is not available under § 1964(a) because the statutory language that confers jurisdiction to "prevent and restrain" RICO violations "indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations." Pet. App. 15a. Disgorgement of past ill-gotten gains does not fit within this express limitation, because it "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." *Id.* at 15a-16a.

The court of appeals also reasoned that reading a disgorgement remedy into § 1964(a) would "thwart Congress's intent in creating RICO's elaborate remedial scheme." Pet. App. 21a. The court stated that "Congress' care in formulating such a 'carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.* at 19a (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002)).

Judge Williams concurred to emphasize problems with the government's "fallback" position that § 1964(a) be interpreted as allowing a truncated form of disgorgement per *Carson*. Judge Williams reasoned that limiting disgorgement to the "actual assets" unjustly received would lead to "absurd results" because money was fungible and such a limitation "would allow a defendant to escape liability

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should exercise its discretion under § 1292(b) and not decide it. *See* Oral Argument Transcript at 42 ("MR. DREEBEN: Well, I would agree, Judge Sentelle, that the Court should not decide the *Carson* issue without considering the antecedent question of whether disgorgement is available at all."); *id.* at 43 ("[T]he court may choose to exercise jurisdiction . . . ."). The government's petition here likewise does not challenge the court of appeals' jurisdiction to determine whether disgorgement is an available remedy under § 1964(a).

by spending ill-gotten gains while husbanding other assets." Pet. App. 24a. On the other hand, limiting disgorgement to reduce the defendant's ability to commit future RICO violations would lead to "a virtually metaphysical quest to draw lines based on the likelihood that particular resources will be devoted to crime." *Id.* at 25a.

Judge Tatel dissented. He adopted the government's view that, notwithstanding the "prevent and restrain" limitation in § 1964(a), "district courts have authority to order any remedy, including disgorgement, within their equitable powers." Pet. App. 51a.

The D.C. Circuit denied the government's petition for rehearing or rehearing *en banc* without opinion.

D. The Trial

The nearly nine-month trial in the district court was not stayed pending the appeal to the D.C. Circuit. The trial began September 21, 2004, and concluded June 9, 2005. During 117 trial days, 85 witnesses testified live, and the prior testimony of 162 witnesses was introduced. Over 13,000 exhibits were offered into evidence. The D.C. Circuit's decision, issued in the middle of trial, made it unnecessary for the district court to hear evidence related to disgorgement.

Much of the mammoth trial focused on as-yet undecided issues concerning the government's liability case. These issues included whether the government proved the elements of a RICO claim—*e.g.*, whether the government has proven an "enterprise" and whether respondents conducted any "enterprise" through a "pattern of racketeering activity." Furthermore, as the district court held and the government concedes, under § 1964(a) the government has to prove that there is a "reasonable likelihood" that respondents would continue to violate RICO in the future. *United States v. Philip Morris Inc.*, 116 F. Supp. 2d 116, 148 (D.D.C. 2000). Thus, to obtain any remedy at all, the government must prove that respondents are likely to violate RICO in the

future, even though they are already subject to a panoply of "permanent injunctive relief" pursuant to the "landmark" 1998 settlement agreement among respondents and the States. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. at 533.[3]

Beyond this, a substantial portion of the trial was devoted to the non-disgorgement remedies that the government seeks. In sharp contrast to the Petition's depiction of the opinion below as rendering civil RICO toothless, the government continues to seek *billions* of dollars in "equitable" relief under § 1964(a), none of which has been expressly ruled on yet by the district court or the D.C. Circuit. For example, the government seeks at least $10 billion for a "national smoking cessation program" and billions of dollars more in other remedial measures and penalties if respondents do not meet specified annual "reductions in Youth smoking rates." Docket No. 5531, Government's Proposed Final Order §§ IVA-D.

The government further seeks a vast array of injunctive and other relief. In addition to a general injunction against committing RICO violations, the government has proposed specific injunctions related to respondents' manufacturing and marketing of cigarettes. *See id.* § V. The government has also made a detailed proposal for court-appointed monitors, and their staff, to be paid for by respondents. *See*

[3] Under the 1998 settlement agreement, respondents are already barred from any continuation of the core violations alleged by the government here. For example, they are already enjoined from "target[ing]" youth in "advertising, promotion or marketing," *see* Joint Defs.' Ex. 045158, at 18-19; from making "any material misrepresentation of fact regarding the health consequences" of smoking, *see id.* at 36; from entering into any agreement with each other that would "limit[] or suppress[] research" on smoking and health or "into the marketing and development of new products," *see id.* at 35-36; and from a wide array of advertising and marketing practices, *see id.* at 18-36. Moreover, the trial record showed that the States and Territories actively monitor and enforce respondents' compliance with these injunctions.

id. § VI. These monitors would have the authority to "seek sanctions" with "no limit" against respondents for violating any provision of the government's proposed final judgment. *Id.* § VI.C(1)(m). They would also have "complete and unfettered access to" respondents' internal documents, subpoena power and the power to compel testimony, and access to "any meeting of senior management or of the board of directors" of the respondents. *Id.* § VI.C(1)(d), (e), (g). Each tobacco manufacturer would also have to appoint a "Compliance Officer" to "supervise that Defendant's activities to ensure that the Defendant complies with" all of the government's proposed injunctions and other requested relief. *Id.* § VI.J. The district court has also allowed private parties to intervene for the purpose of seeking more drastic relief than that sought by the government.

The district court has not ruled on any of the remedies sought by the government or intervenors or determined whether any combination of the proposed remedies would suffice to "prevent and restrain" future RICO violations. Nor has it ruled on the antecedent question of whether respondents are liable for any RICO violations. By the end of September, the parties will have submitted a total of nearly 6,000 pages of proposed findings of fact and post-trial briefing to the district court on all of the liability and remedies issues yet to be decided in this case.

REASONS FOR DENYING THE PETITION

I. The Government's Interlocutory Petition Is Premature

The issue presented in the government's petition is not certworthy at any juncture, but review is particularly inappropriate at this interlocutory stage of the proceedings. The Acting Solicitor General asks this Court to decide the theoretical availability of one potential remedy—disgorgement—before the district court has decided liability or whether any of the other proposed drastic remedies would be appropriate and sufficient. So far as we can discern, this

Court has *never* taken an interlocutory appeal when the lower courts were still actively considering liability (and possible additional remedies).

The fact that the D.C. Circuit's decision is interlocutory weighs heavily against granting certiorari.[4] The government itself has repeatedly, and successfully, argued that the interlocutory nature of a case is "alone" a sufficient ground for denying certiorari.[5] As the government has explained, the rule disfavoring interlocutory review "enables the Court to examine cases on a full and concrete record, prevents unnecessary delays in the trial, protects the Court from deciding issues unnecessarily, and allows the Court to consider all of the issues presented at one time." U.S. Opp. at 17, *Moussaoui v. United States,* 125 S. Ct. 1670 (2005) (denying petition). None of the "extraordinary" circumstances warranting interlocutory review is present here. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*,

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4 *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *see also Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); Robert L. Stern & Eugene Gressman, *et al.,* SUPREME COURT PRACTICE § 4.19, at 260 (8th ed. 2002) ("[I]n the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

5 *See e.g.*, Brief for the United States in Opposition ("U.S. Opp."), 2005 WL 123450, *Evans v. Stephens*, 125 S. Ct. 1640 (2005) (denying petition) ("The interlocutory status of this case is 'of itself alone' a 'sufficient ground for the denial of the [writ].'") (quoting *Hamilton-Brown Shoe*, 240 U.S. at 258); U.S. Opp., 2005 WL 45652, at *11-*12, *City of New York v. United States*, 125 S. Ct. 1295 (2005) (denying petition) (same); U.S. Opp., 2004 WL 530963, at *8, *Christian v. United States*, 541 U.S. 972 (2004) (denying petition) ("This Court's customary practice is to 'await final judgment in the lower court before exercising [its] certiorari jurisdiction.'") (quoting *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J.)).

240 U.S. 251, 258 (1916). Review at this juncture would not, for example, relieve any party of the burden caused by a preliminary injunction or avoid the potential burden of a future trial that conflicts with a defendant's immunity. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964). The government offers no explanation why the usual rule against interlocutory grants of certiorari should not apply here.

The reasons for interlocutory review by the D.C. Circuit no longer apply. The district court granted respondents permission to seek interlocutory appeal because a ruling on disgorgement would "dramatically affect the shape and length of the trial." Pet. App. 150a. The trial is now over, however, and the entire case is pending for decision before the district court. Interlocutory review by this Court would therefore result in none of the practical benefits provided by the D.C. Circuit's earlier review.

On the other hand, interlocutory review would raise all of the problems that this Court has repeatedly recognized. The remedial issue on which the government seeks review may very well be rendered moot because the district court may find that respondents are not liable under RICO. The district court, for example, may well rule that respondents did not form an "enterprise," did not conduct the "enterprise" through a "pattern of racketeering activity," or are not reasonably likely to violate RICO in the future (especially in light of the 1998 settlement with States, *see supra* note 3). Alternatively, the district court may find that respondents are liable, but impose other equitable remedies that, in the district court's view, will suffice to ensure that the companies are unable to violate RICO in the future. Thus, the potential for an unnecessary and purely advisory opinion in this case (or dismissal of certiorari to avoid that result) is

far higher than in other cases where the Court has granted interlocutory review.[6]

Apparently recognizing this fundamental deficiency, the government seeks to reassure the Court that the district court will find liability. Pet. 21, 26. The Acting Solicitor General goes so far as to suggest that the district court's failure to indicate whether the government has met its burden of proof

[6] The cases cited by the government where interlocutory review was allowed are plainly distinguishable. First, in several of these cases, "the interlocutory orders certified to the courts of appeals had been converted into final orders of dismissal or summary judgment by the courts of appeals," thus presenting this Court with a final judgment on one or more claims. Stern & Gressman, SUPREME COURT PRACTICE § 4.19, at 261; *see Cutter v. Wilkinson*, 125 S. Ct. 2113, 2117 (2005); *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372-74 (2004); *Bartnicki v. Vopper*, 532 U.S. 514, 522 (2001); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 243-44 (2000). Second, in other cases, the Court granted interlocutory review to consider whether a federal court had jurisdiction or authority over the action. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 4 (2003); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 693-94 (2003); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). The Court's review in these cases ensured that a party was not forced to litigate in an improper forum—a harm that could not be remedied by later review. Third, the government cites cases where it says the Court granted certiorari to "addres[s] remedial issues in advance of a liability determination." Pet. 26. But in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), the defendant was "subjec[t] . . . to virtual strict liability," with only the "amount of damages" left to be determined. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1477 (D.D.C. 1985). And in *Norfolk Southern Railway Co. v. Kirby*, 125 S. Ct. 385 (2004), and *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), the district courts stayed proceedings pending appeal, so that there was no risk, as there is here, that the remedial question would be mooted by a liability determination. *See Calhoun v. Yamaha Motor Corp., U.S.A.*, No. Civ.A.90-4295, 1993 WL 218833, at *2 (E.D. Pa. June 21, 1993); *Norfolk S. Ry. Co. v. Kirby*, No. 02-1228, 2004 WL 909899, at *13 (Nov. 9, 2004). Likewise, in *United States v. 92 Buena Vista Avenue*, 507 U.S. 111 (1993), there were no proceedings on remand that could have mooted the case while this Court was considering it.

somehow means that the court will likely rule in favor of the government. *Id.* at 26. That is simply nonsense. The district court's failure to give any indication of its leanings suggests only that it recognizes the impropriety of prejudging cases prior to the full presentation of evidence and argument. It is obviously not a reason for this Court to assume liability.

Moreover, even if the government should win at the district court level, granting review now would likely lead to confusion and unnecessary piecemeal judicial review. First, as even the government acknowledges (Pet. 26 n.10), it is most likely that the district court's decision will be before the D.C. Circuit at the same time the disgorgement issue would be before this Court, leading to the inefficient if not unprecedented prospect of this Court and the D.C. Circuit considering the same case at the same time. Second, even aside from this problem, granting review now would not mean that the district court would address disgorgement before the plenary appeal. Instead, if the result of this Court's ruling were a remand to the district court, that would likely occur at the same time the case is before the D.C. Circuit. *See* Pet. 26 n.10. The district court would have little reason to resolve the fact-specific question of whether, and how much, disgorgement is appropriate while the liability and other remedial issues are on appeal—indeed, it may not even have jurisdiction to do so. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Thus, there is no reason to think that the disgorgement question will be resolved more quickly if the petition is granted than if it is addressed by this Court after an appeal from a final judgment. In short, interlocutory review would likely not even produce the feeble "benefit" of expedited resolution that the government proffers as the sole justification for immediate review.[7]

[7] Nor does the *possibility* that the district court might stay proceedings solve the problem. First, the district court has never

But even if some minor delay in resolving the disgorgement question did result from denial of review at this time, this would not cause any prejudice to the government or the public interest. Under the D.C. Circuit's ruling, the district court retains full power to issue any appropriate injunctive relief necessary to prevent and restrain future RICO violations. The disgorgement remedy sought by the government, however, is purely a monetary transfer from the respondents to the federal treasury. So there is no cognizable prejudice to the government or the public caused by whatever minor delay might be entailed in resolving the disgorgement issue after entry of final judgment and a plenary appeal.

Granting review at this stage also would be premature because, even if the district court finds liability, the need for disgorgement as a remedy in this case cannot be assessed until the courts below resolve whether the other drastic, multi-billion-dollar remedies proposed by the government are permissible and sufficient to preclude future RICO violations. The Court should give the lower courts an opportunity to determine what, if any, remedies should be imposed before considering the availability of, and need for, a disgorgement remedy that the government has only rarely

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indicated that it would stay proceedings pending interlocutory review and, indeed, the court refused to stay the trial pending the interlocutory appeal to the D.C. Circuit. *See* Dist. Ct. Order #640. Second, a stay at this juncture would likely only further delay the resolution of this action—and thus produce the exact opposite result that the government ostensibly seeks with this petition. Indeed, a stay until this Court renders a decision in Spring 2006 would delay the district court's decision to approximately the same time that an *appeal* would finally be resolved by the D.C. Circuit in the absence of a stay. *See* Pet. 26 n.10. (And, of course, a stay below would be affirmatively counterproductive if respondents were to prevail on the merits.)

sought—and never in a case so far removed from the heartland of RICO.

In short, if this Court were to conclude that the disgorgement issue is otherwise worthy of review, it will have the issue before it in relatively short order on appeal from any final judgment. The case would then be in a posture in which this Court (1) would be assured that the issue would not be mooted in the middle of its deliberations by a liability finding in respondents' favor, (2) could take up the issue without the uncertainty and awkwardness of having both it and the D.C. Circuit considering the same case at the same time, and (3) would have the benefit of a full record as to liability and other remedies. Nothing is lost by waiting until the case has ripened to a final judgment and nothing is gained by granting interlocutory review now.

II. The D.C. Circuit's Decision Is Entirely Consistent With This Court's Precedents

The decision below creates no conflict with the decisions of this Court. In holding that § 1964(a) does not authorize a disgorgement remedy, the D.C. Circuit based its decision on that section's specific "prevent and restrain" limitation on remedial authority, along with the overall structure of RICO's comprehensive remedial scheme. The court concluded that these together create a "necessary and inescapable inference" that disgorgement is unavailable. Pet. App. 13a-21a.

Relying on *Porter* and *Mitchell*, the government argues that a sweeping power to disgorge should be inferred because federal courts purportedly possess "the full range of equitable powers" unless Congress explicitly says otherwise. Pet. 10. The government misreads *Porter* and *Mitchell*, both of which involved different statutory language and a fundamentally different remedial scheme, and each of which reached self-evidently sensible results that cannot be extrapolated to the vastly different RICO context.

Porter and *Mitchell* simply stand for the proposition that, "*[u]nless otherwise provided by statute*, all the inherent equitable powers of the District Court are available." *Porter*, 328 U.S. at 398 (emphasis added). Where, as here, the statute by its explicit terms provides specific, limited remedies and has also omitted a remedy from its list, the statute has "otherwise provided" and has created the "necessary and inescapable inference, restrict[ing] the court's jurisdiction in equity." *Id.* In such circumstances, Congress has itself specified the remedies available to enforce the statute and therefore plainly has not "entrust[ed] to an equity court the enforcement of prohibitions." *Mitchell*, 361 U.S. at 291-92.

Equally important, the government's strained interpretation both renders § 1964(a) wholly superfluous and conflicts with the well-established presumption *against* inferring a remedy that is not specified in a statute containing a comprehensive remedial scheme.

1. Section 1964(a) expressly limits the scope of a district court's "jurisdiction" to only those "appropriate orders" that "prevent and restrain violations of section 1962 of this chapter." 18 U.S.C. § 1964(a). The statute goes on to provide an illustrative list of three types of forward-looking remedies, including divestiture, that meet this "prevent and restrain" limitation.[8]

[8] As the D.C. Circuit explained, although the statute uses the words "including, but not limited to" in introducing a non-exhaustive list of examples, under the canons of *noscitur a sociis* and *ejusdem generis*, any other non-listed remedy must be similar in nature to those enumerated remedies. Pet. App. 19a. "The remedies explicitly granted in § 1964(a) are all directed toward future conduct and separating the criminal from the RICO enterprise to prevent future violations." *Id.* Accordingly, because disgorgement is aimed at separating the criminal from his prior ill-gotten gains, it "may not be properly inferred from § 1964(a)." *Id.*

Since it is impossible to prevent and restrain that which has already occurred, Section 1964(a)'s "jurisdiction is limited to forward-looking remedies that are aimed at future violations." Pet. App. 15a. As the D.C. Circuit correctly held, disgorgement is an inherently backward-looking remedy. *Id.* at 13a. The focus and purpose of disgorgement is not to prevent or restrain future conduct, but to undo the effects of past misconduct by restoring the *status quo ante*. *Tull v. United States*, 481 U.S. 412, 424 (1987) (disgorgement is "a remedy only for restitution . . . limited to *restoring* the status quo") (emphasis added; internal quotation marks omitted).[9] Disgorgement is awarded wholly without regard to whether a defendant will act unlawfully in the future. Pet. App. 17a; *SEC v. Colello*, 139 F.3d 674, 679 (9th Cir. 1998) ("To order disgorgement, the district court need not have found that [the defendant] was likely to violate securities laws in the future."). It is neither measured by, nor directed toward, future conduct. Pet. App. 17a.

The government does not dispute this. Rather, it argues that, notwithstanding § 1964(a), RICO vests courts with the *same* power as if the statute had expressly authorized the "full range of equitable" remedies, including those, like disgorgement, that do not prevent or restrain. Pet. 10. The government's position therefore renders the words "prevent and restrain" meaningless: district courts would enjoy precisely the same remedial power if those words were eliminated from the statute. As the D.C. Circuit explained, the government's position "nullifies the plain meaning of the terms and violates [the] canon of statutory construction that we should strive to give meaning to every word." Pet. App. 16a. Statutory language limiting available remedies "must

[9] *See also* RESTATEMENT OF RESTITUTION § 1, cmt. a (1937) ("A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.").

mean *something*" and may not be rendered "superfluous." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 n.8 (1993) (emphasis in original); *see also Great-West Life*, 534 U.S. at 209-10.

Indeed, under the government's interpretation, the *entirety* of § 1964(a), not just its "prevent and restrain" language, would be meaningless. The next subsection, § 1964(b), authorizes the Attorney General to bring a civil RICO action. Under the government's interpretation of *Porter*, this provision would impliedly authorize the government to seek the full panoply of equitable remedies. The government's argument that § 1964(a) does the same thing—instead of serving as a *limit* on equitable remedies—thus assigns no meaning at all to that subsection and renders it entirely superfluous. That simply cannot be. The only possible interpretation that makes sense of the entirety of § 1964 is that subsection (a) constrains equitable remedies, limiting them to forward-looking remedies like those expressly mentioned in that provision.

2. The government's position is also contrary to the "'elemental canon of statutory construction'" that, "'where a statute expressly provides a particular remedy or remedies,'" courts should not order additional, unspecified remedies against the wrongdoer—equitable or otherwise. *Meghrig*, 516 U.S. at 488 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)). To the contrary, "Congress' care in formulating such a 'carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." Pet. App. 20a (quoting *Great-West Life*, 534 U.S. at 209; emphasis in original).[10] Indeed, since, as this

[10] *See also Middlesex County*, 453 U.S. at 15 ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."); *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 93-94 (1981) ("The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies."); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers*, 414 U.S. 453, 458 (1974) (remedies limited where Congress "expressly provid[es] a particular remedy or remedies"); *Switchmen's Union of N. Am. v. NMB*, 320 U.S. 297, 301 (1943) ("[T]he specification of one remedy normally excludes another.").

Court has "said many times," federal courts "possess only that power authorized by Constitution and statute," the limited statutory authorization to prevent and restrain may "not . . . be expanded by judicial decree" to encompass disgorgement. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2616-17 (2005) (internal quotation marks omitted); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Thus, "whatever" *Porter* and *Mitchell* may say about "the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 732 (1989). While the government is correct that *Porter* "stated a rule of general applicability," that rule plainly does not permit the judiciary to add drastic new equitable remedies to a comprehensive statutory scheme where Congress has determined the appropriate set of remedies. Pet. 12.

The issue in *Porter* was whether the Emergency Price Control Act of 1942 authorized courts to compel disgorgement of excess rental charges imposed in violation of the statute. Unlike § 1964(a), the statutory language in *Porter* authorized courts to grant "a permanent or temporary injunction, restraining order, or *other order*," against a person who "*has engaged*" in a statutory violation. 328 U.S. at 397 (emphases added). Authorizing an "other order," in

addition to prospective injunctions, for *prior* violations plainly authorizes retrospective equitable remedies such as restitution. In *Mitchell*, the Court addressed the question whether reimbursement of lost wages for wrongful discharge was available under the Fair Labor Standards Act (FLSA). *Mitchell* inferred a remedy for back pay "in the face of a *silent* statute," where Congress had *not* delineated the scope of this remedy. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (emphasis added). Indeed, the FLSA was not only silent on back pay; it contained a strong presumption that a remedy for reimbursement of lost wages for wrongful discharge *was* available.[11] Thus, *Porter* did not infer the availability of a remedy outside the scope of a narrow jurisdictional grant and *Mitchell* did not interpret a comprehensive statutory scheme that dealt with the remedy at issue.

3. Any ambiguity on this point is eliminated by this Court's later ruling in *Meghrig*, in which the Court unanimously rejected precisely the interpretation of *Porter* that the government advances again here. There, the government argued that "equitable restitution" for clean-up costs was authorized because "district courts retain inherent authority to award any equitable remedy." 516 U.S. at 487.

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11 Prior to *Mitchell*, Congress had amended the pertinent FLSA remedial provision in the wake of two appellate decisions holding that courts had the power *both* to award reimbursement of unpaid overtime wages *and* to award back pay for unlawful discharges in actions brought by the Secretary of Labor. *See Mitchell*, 361 U.S. at 294. The amended provision took away the power to award unpaid overtime wages, but did not take away a monetary remedy for lost wages caused by an unlawful discharge. *See id.* at 289. The differential treatment of the Secretary's power with respect to overtime wages and back pay for wrongful discharge created a strong negative pregnant that the latter remedy remained available. The Court therefore concluded that Congress intended the FLSA's remedial provision to "empower[] a District Court to order reimbursement for loss of wages caused by an unlawful discharge or other discrimination." *Id.* at 289, 296.

This Court rejected that argument, ruling that the grant of authority to "restrain" violations of the Resource Conversation and Recovery Act (RCRA) did not encompass "equitable restitution," but only a "prohibitory injunction." *Id.* at 484. The Court also found that the remedy of restitution was inconsistent with the "limited remedies described." *Id.* at 487. Under the "elemental canon of statutory construction," it "cannot be assumed that Congress intended to authorize by implication additional judicial remedies" outside the scope of a statutory grant of authority. *Id.* at 488.[12] Consequently, *Meghrig* explicitly rejects both the government's major premise (that *Porter* requires reading equitable powers into a comprehensive statutory scheme) and its minor premise (that "restrain" connotes "a broad grant of equitable jurisdiction," including "restitution"). Pet. 9.

In response to *Meghrig,* the government asserts that lawsuits implicating the "public interest"—like *Porter* and this case—justify broader "equitable powers" than those permissible in a "mere private controversy," like that supposedly at issue in *Meghrig*. Pet. 17. But nothing in *Meghrig* (or elsewhere) even remotely suggests that the rules governing the interpretation of the statutory term "restrain" somehow differ depending on whether the lawsuit implicates the "public interest" or whether the plaintiff is a "citizen" or the government. These considerations are for Congress to weigh. Moreover, whether a particular remedy "restrains" violations depends on what the remedy does, not who seeks it. Indeed, if anything, the Court is more reluctant to infer a monetary remedy for the federal treasury than it is when the

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12 Indeed, the statute in *Meghrig* was far more susceptible to inferring equitable restitution than RICO is because, unlike § 1964(a), RCRA broadly authorizes courts to order polluters "to take such other action as may be necessary" and contained an *express* provision "*preserving* remedies under statutory and common law." *Id.* at 484, 487 (emphasis added).

actual victims of a defendant's wrongdoing seek compensation for that loss. *See United States v. Standard Oil*, 332 U.S. 301, 314-15 (1947); *United States v. Gilman*, 347 U.S. 510, 512-13 (1954). (In both *Porter* and *Mitchell* the disgorged sums would have been paid to the victims of the defendants' infractions.) In any event, the environmental statute and lawsuit in *Meghrig* directly implicated the "public interest" in eliminating toxic waste, and there is no hint in *Meghrig*, or any other case, that these important environmental statutes or suits somehow implicate only "private" interests. Thus, the D.C. Circuit's decision is entirely consistent with both *Porter* and *Mitchell* and correctly applies this Court's holding in *Meghrig*.

4. The D.C. Circuit properly rejected the government's interpretation of § 1964(a) for additional reasons. *First*, such a construction of the statute not only would supplement a comprehensive and integrated remedial scheme, but would (unlike in *Porter* and *Mitchell*) "*subsume* other remedies" that are set forth explicitly. *Nat'l R.R. Passenger Corp. v. Nat'l Assn. of R.R. Passengers*, 414 U.S. 453, 458 (1974) (emphasis added). Congress authorized the government to obtain a defendant's ill-gotten gains only under the tightly controlled conditions specified in § 1963(a)'s criminal forfeiture provision—*i.e.*, when the government proves a criminal violation and complies with such procedural protections as a heightened burden of proof, notice requirements, and a five-year statute of limitations. The government's reading of § 1964(a) would nullify these important procedural protections. As this Court recently noted in rejecting a similar effort to inject the equitable remedy of contribution into a remedial scheme that provided for that remedy only in a specific circumstance, "[t]here is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim [] and at the same time allow contribution actions absent those conditions." *Cooper Indus. v. Aviall Servs.*, 125 S. Ct. 577, 583 (2004); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). Indeed, under the government's logic, it is in a *better* position to claim respondents' allegedly illegal proceeds because it determined that no criminal charges were justified and, instead, commenced this civil action. *See* p. 3, *supra*.

Second, the decision below accords with the settled principle that the interpretation of RICO should be guided by the interpretation of the antitrust statutes, which also provide the district court with jurisdiction to "prevent and restrain" violations.[13] In the more than 90 years that the Sherman Act and the Clayton Act have been on the books, no court has ever interpreted either statute as permitting civil disgorgement. *See, e.g., In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234 (9th Cir. 1976). Indeed, the government itself has made clear that the "prevent and restrain" limitation in the antitrust laws *precludes* disgorgement. *See* 67 Fed. Reg. 12090, 12135 (Mar. 18, 2002) (explaining the government's decision not to seek disgorgement in *United States v. Microsoft* because "[t]his is a government civil action for injunctive relief, and monetary damages are not available in such actions").

More generally, it has long been established that the antitrust laws' express remedies cannot be supplemented by

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[13] *See* 15 U.S.C. § 4 (providing district courts "with jurisdiction to prevent and restrain" violations); 15 U.S.C. § 25 ("The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act."). As this Court has repeatedly noted, "[t]he use of an antitrust model for the development of remedies against organized crime was unquestionably at work when Congress later considered the bill that eventually became RICO." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151-52 (1987); *see also Rotella v. Wood*, 528 U.S. 549, 557 (2000).

implied equitable remedies. *See Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (courts may not infer equitable remedy of contribution into antitrust laws); *see also D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co.*, 236 U.S. 165, 174 (1915) (no inherent authority to award equitable remedies under antitrust laws). Consequently, as the Acting Solicitor General recently argued, it is wrong to assess the remedies available under § 1964(a) by "relying on courts' 'inherent powers'" to issue equitable relief. Br. of U.S. at 24 n.5, *Scheidler v. Nat'l Org. for Women, Inc.*, Nos. 04-1244, 04-1352 (filed Sept. 9, 2005). In its brief in *Scheidler*, the government explains that, because early antitrust precedent clearly established that "the remedy can be only that which the statute prescribes," it was wrong to infer additional, unspecified remedies, such as injunctive relief in private civil RICO suits. *Id.* at 24. "In light of this Court's precedents construing the Sherman Act, Congress is presumed to be aware when it enacted RICO that, absent inclusion of an *express* private right to obtain injunctive relief, the language it selected would be construed to exclude such a right." *Id.* at 25 (emphasis in original). *See also Holmes v. Sec. Investor Protection Corp.*, 502 U.S. 258, 268 (1992) (Court may "fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words . . . in the [antitrust laws]"). By the same token, the established antitrust principle rejecting inference of additional remedies, especially disgorgement, is powerful proof that the remedy is not available under § 1964(a).

III. Any Circuit Conflict Is Academic And Not Implicated By This Case

There is also no genuine circuit split on the question presented by this case. A conflict is meaningful only if the case at hand would be decided differently depending on the circuit in which it arose. That is not the case here. Although there is a theoretical disagreement between the D.C. and Second and Fifth Circuits as to whether there would *ever* be a civil RICO case in which disgorgement could be ordered,

there is agreement among the circuits that no such relief would be available in a case like this one. This case accordingly presents at most an academic conflict that does not warrant review.

No appellate court has ever allowed disgorgement in a civil RICO action. Nor has any appellate court ever adopted the government's interpretation that § 1964(a) grants a district court unbridled equitable powers pursuant to *Porter* and *Mitchell*. To the contrary, both the Second and Fifth Circuits have agreed with the D.C. Circuit that § 1964(a) and its "prevent and restrain" limitation restrict courts to forward-looking remedies aimed at future unlawful conduct. *See Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345 (5th Cir. 2003), *cert. denied*, 125 S. Ct. 46 (2004); *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995). Any "conflict" among these decisions is hypothetical only, with no bearing on the outcome of this case.

In *Richard*, the Fifth Circuit dismissed a RICO disgorgement claim as a matter of law because, under § 1964(a), "equitable remedies are available only to prevent ongoing and future conduct." 355 F.3d at 355. Although the Fifth Circuit, citing *Carson*, hypothesized in *dictum* that there might be such a thing as forward-looking disgorgement, the court found that the disgorgement claim at issue was "impermissible under § 1964(a)" because it would not "'prevent and restrain' similar RICO violations in the future." *Id.* The court concluded that the disgorgement sought would "do little more than compensate for the alleged loss." *Id.*

Similarly, the Second Circuit in *Carson* emphasized that remedies under § 1964(a) must be "designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." 52 F.3d at 1182 (emphasis in original). Thus, the remedial powers conferred by § 1964(a) do not "afford broader redress" than "foreclosing future violations." *Id.* The statute certainly "does not authorize the government to recapture all

the losses of those wronged by civil RICO violators." *Id.* Indeed, as the D.C. Circuit noted, *Carson* emphatically rejects Judge Tatel's argument that disgorgement can be said to prevent and restrain because it "serves a crucial deterrent function." Pet. 13 n.5. "'If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain, and discourage,' and would allow any remedy that inflicts pain.'" Pet. App. 18a (quoting *Carson*, 52 F.3d at 1182).

To be sure, the D.C. Circuit held that disgorgement is not authorized at all, while the Second Circuit suggested that it might somehow be permissible under limited circumstances if "the gains [to be disgorged] are being used to fund or promote the illegal conduct, or constitute capital available for that purpose.'" Pet. App. 21a (quoting *Carson*, 52 F.3d at 1182). However, the Second Circuit has *never* authorized disgorgement under this standard, and the limitations it adopted leave no doubt that it would reject the government's open-ended disgorgement claim here. The government did not even attempt to construct a disgorgement model that was limited to respondents' "available" ill-gotten gains, as *Carson* requires. As Judge Williams' concurrence noted, the government "reject[s] any limitation to 'ill-gotten gains' in the form of specific money or resources so gained." Pet. App. 23a-24a.

In short, the "conflict" alleged by the government is at most academic, with no practical significance here. Under either the D.C. Circuit's or the Second Circuit's construction of § 1964(a), the government would not be entitled to the disgorgement remedy it seeks. Because adoption of either circuit court's interpretation of the statute would not have resulted in a different outcome, there is no conflict of the kind that provides a basis for this Court's review.

IV. The Government's Policy Arguments Are Better Directed At Congress

The government makes the unsupported policy argument that disgorgement must be allowed because it is a "critically important remedial tool." Pet. 20, 23. The government's hyperbole is belied by the fact that there are only a handful of reported decisions in which the government has sought disgorgement under civil RICO—and never before outside the organized crime context. *See, e.g., Carson*, 52 F.3d at 1181 (citing just three cases where government has sought civil disgorgement, all against organized crime enterprises). It is also telling that, although RICO has been on the books for almost 35 years, the government has *never* stressed the importance of civil disgorgement before this case, and has done so here only following the dismissal of its claims for damages. It is equally telling that Congress, which is "normally quite solicitous where the federal purse [is] involved" (*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)), did not think that disgorging funds to the federal treasury was a sufficiently important remedy to hint at its existence anywhere in the statute or even the legislative history.

RICO's comprehensive scheme demonstrates that, in the civil context, Congress made the government responsible for prospective equitable relief under § 1964(a) and made private parties exclusively responsible for the monetary relief of treble damages under § 1964(c). Thus, § 1964(a) provides solely, and expressly, for forward-looking relief, such as divestiture, the purpose of which is to separate the defendant from the unlawful enterprise and thereby impair the defendant's ability to violate RICO in the future. Pet. App. 15a. Notably, the party subject to divestiture is permitted to retain the full value of the divested interest. In stark contrast, disgorgement strips the defendant of past profits without compensation. *See, e.g., United States v. United States Currency in the Amount of $228,536.00*, 895 F.2d 908 (2d

Cir. 1990) ("'[F]orfeiture' is best described as . . . divestiture without compensation.").[14]

Congress deliberately limited the government's ability to obtain monetary relief to those situations warranting criminal prosecution. *See* 18 U.S.C. § 1963(a). This does not mean that RICO violators will be able to "retain their profits," as the government contends. Pet. 23. It simply means that criminal prosecution or private actions for damages are the methods for depriving violators of their ill-gotten gains, as has been done very effectively under the antitrust laws (even without any criminal forfeiture provision). Indeed, given the right of private parties to obtain treble damages under § 1964(c), limiting the government's ability to obtain monetary relief in the civil context is necessary to avoid the "duplicative recovery" that would result if defendants had to pay both treble damages and disgorgement. Such a result was precisely the potential evil that led this Court, in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 269 (1992), to refuse to infer a cause of action not specified in RICO. As the Court noted, it is "unjustified by the general interest in deterring injurious conduct" to infer an unspecified remedy into RICO because the injured victims "can generally be counted on to vindicate the law as private attorneys general." *Id.*

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[14] Thus, contrary to the government's assertion (Pet. 20-21) divestiture is the opposite of disgorgement. For this reason, the government's reliance on the statement in *United States v. Turkette*, 452 U.S. 576, 585 (1981), that the purpose of RICO is to "divest the association" of "ill-gotten gains" is misplaced. Pet. 21. The *Turkette* Court was simply making the point that divesting a racketeer of his interest in the "enterprise" is among the "aim[s]" of the remedies *expressly* "provided by § 1964." 452 U.S. at 585. The Court's discussion of the "aim" of *express* remedies obviously cannot support the use of disgorgement, which is excluded from both the text of § 1964(a) and the discussion in *Turkette* itself.

If the government truly believes it needs more expansive remedies under RICO, it ought to direct its concerns to Congress, not this Court. As the Court is well aware, the thrust of judicial opinion is not that RICO has been "severely constrain[ed]" (Pet. 22), but that, having "evolved into something quite different from the original conception of the enactors," it threatens to inflict excessive liability on legitimate businesses. *See, e.g., Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985). This "unbridled" expansion of the statute (*id.* at 500) is exemplified by the instant case, where the government, for the first time, has used RICO to bring a federal product liability action for fraud against virtually an entire industry engaged in a lawful business important to the Nation's economic well-being. *See* 15 U.S.C. § 1331; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000).[15]

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[15] If the government's sweeping disgorgement theory were sustained, similar demands for the profits of manufacturers could be made in other product liability contexts where industry critics contend that manufacturers failed to give adequate warnings to consumers or disregarded evolving scientific evidence. It is for Congress to weigh the policy implications of any extension of RICO remedies to the product liability field where carefully fashioned common law and statutory remedies already apply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TODD R. GEREMIA
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

MICHAEL A. CARVIN
(*Counsel of Record*)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

Attorneys for Respondent R.J. Reynolds Tobacco Company

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