No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. 1964(a), a district court has jurisdiction to issue "appropriate orders" to "prevent and restrain" violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq*. Respondents were found liable for decades-long RICO violations that entailed a multi-faceted scheme to defraud the American public for the purpose of addicting smokers, deceiving actual and prospective smokers about the health effects and addictive properties of respondents' products, and thereby obtaining revenue from the sale of cigarettes. The question presented is:

Whether 18 U.S.C. 1964(a) categorically bars a district court from ordering disgorgement of ill-gotten gains as well as other equitable relief, such as smoking-cessation and public-education remedies, designed to redress the continuing consequences of RICO violations.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-98a, 99a-176a) are reported at 566 F.3d 1095 and 396 F.3d 1190. The opinions of the district court (Pet. App. 258a-400a, 177a-195a, 196a-245a) are reported at 449 F. Supp. 2d 1, 321 F. Supp. 2d 72, and 116 F. Supp. 2d 131.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2009. Petitions for rehearing were denied on September 22, 2009 (Pet. App. 246a-249a). On December 11, 2009, the Chief Justice extended the time within which to

file a petition for a writ of certiorari to and including February 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition (Pet. App. 254a-257a).

STATEMENT

1. The United States brought this action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, against nine cigarette manufacturers and two related trade organizations. For the last half century, those defendants (collectively, respondents) have engaged in a pattern of racketeering activity and a conspiracy to engage in racketeering that has cost the lives and damaged the health of untold millions of Americans. As the district court explained, "the evidentiary picture must be viewed in its totality in order to fully appreciate how massive the case is against [respondents], how irresponsible their actions have been, and how heedless they have been of the public welfare and the suffering caused by the cigarettes they sell." Pet. App. 298a.

Respondents' business "survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system." Pet. App. 291a. Respondents "have known many of these facts for at least 50 years or more," and, "[d]espite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community." *Id.* at 291a-292a. Each year, "over 400,000 people die of smoking related diseases" and an additional, "relatively

small number of people * * * quit smoking." *Id.* at 324a; cf. *id.* at 306a. Accordingly, to maintain and expand its customer base, respondents' "overarching economic goal" has been "to keep smokers smoking; to stop smokers from quitting; to encourage people, especially young people, to start smoking; and to maintain or increase corporate profits." *Id.* at 321a-322a.

Since 1953, respondents have used the mails and wires to execute a "multi-faceted, sophisticated scheme to defraud" for the purpose of obtaining revenue from the sale of cigarettes to smokers and potential smokers. Pet. App. 344a, 356a; *id.* at 307a, 349a-350a, 357a-358a. At its core, the scheme "misleads consumers in order to maximize [respondents'] revenues by recruiting new smokers (the majority of whom are under the age of 18), preventing current smokers from quitting, and thereby sustaining the industry." *Id.* at 357a-358a.

Nicotine addiction forms a core of respondents' scheme. Respondents "have long known that nicotine creates and sustains an addiction to smoking" and that their sales, profits, and financial health "depend on creating and sustaining that addiction." Pet. App. 313a. Respondents have conducted "extensive research into how nicotine operates within the human body" and have used their scientific knowledge to "design[] their cigarettes to precisely control nicotine delivery levels," with "[e]very aspect of a cigarette * * * precisely tailored" to deliver "the optimum amount of nicotine [to] create and sustain smokers' addiction." *Id.* at 313a-314a, 316a.

Respondents are also acutely aware—and have been for decades—that "smoking causes disease, suffering, and death." Pet. App. 306a-308a. From 1953 until at least 2000, however, respondents "repeatedly, consistently, vigorously—and falsely—denied the existence of any adverse

health effects from smoking." *Id.* at 307a. To combat growing research from the scientific and medical communities, respondents "established, staffed, and funded" an "intricate, interlocking, and overlapping web of national and international organizations, committees, affiliations, conferences, research laboratories, funding mechanisms, and repositories for smoking and health information." *Id.* at 305a. Respondents then "mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an 'open question.'" *Id.* at 307a-308a.

Respondents also "have repeatedly made vigorous and impassioned public denials—before Congressional committees, in advertisements in the national print media, and on television—that neither smoking nor nicotine is addictive, and that they do not manipulate, alter, or control the amount of nicotine contained in the cigarettes they manufacture." Pet. App. 315a-316a. "Those denials were false." *Id.* at 318a.

Notwithstanding those denials, respondents "knew that many smokers were concerned and anxious about the health effects of smoking" and that such smokers "would rely on the health claims made for low tar cigarettes as a reason * * * for not quitting smoking." Pet. App. 322a. Respondents accordingly "marketed and promoted their low tar brands as being less harmful than conventional cigarettes" in order to give "smokers an acceptable alternative to quitting smoking, as well as an excuse for not quitting." *Id.* at 320a-321a.

Respondents implemented "massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular

cigarettes," notwithstanding that respondents have "known for decades" that such claims are "blatantly false" and "misleading." Pet. App. 43a-44a (citations omitted). "By engaging in this deception," respondents "successfully * * * marketed and promoted their low tar/light cigarettes," "dramatically increased their sales of [such] cigarettes, assuaged the fears of smokers about the health risks of smoking, and sustained corporate revenues in the face of mounting evidence about the health dangers of smoking." *Id.* at 322a-323a; see 449 F. Supp. 2d at 860 ("[Respondents'] efforts have been successful. Even though low tar smokers have a greater desire to quit, their misconception that low tar cigarettes are less harmful dissuades them from doing so."). As a result, the market share for "low tar brands" increased from 2% to 81.9% of total cigarette sales between 1967 and 1998, see *id.* at 508, and, by 2006, "low tar" brands accounted for 92.7% of the 343 billion cigarettes sold that year in the United States. Federal Trade Commission, *Cigarette Report for 2006* 2, 7 (2009).

In order to replenish their customer base, respondents turned to the Nation's youth. Respondents understood that "smokers are remarkably brand-loyal," that "brand switching rates are low and falling," and that the "only way [respondents] can sustain themselves is by bringing in large numbers of replacement smokers each year." Pet. App. 325a-326a. "The majority of people who become addicted smokers start smoking before the age of eighteen, and many more before the age of twenty one." *Id.* at 325a. Respondents thus "realize[d] that they need[ed] to get people smoking their brands as young as possible in order to secure them as lifelong loyal smokers." *Id.* at 326a.

Respondents "intensively researched and tracked young people's attitudes, preferences, and habits" and used that research "to create highly sophisticated and appealing mar-

keting campaigns targeted to lure [young people] into starting smoking and later becoming nicotine addicts" in order to "replace those who die * * * or quit." Pet. App. 334a. That marketing "historically, as well as currently," targets "young people, including those under twenty-one, as well as those under eighteen." *Id.* at 333a-334a. Respondents have "spent billions of dollars" annually on such marketing—which is a "substantial contributing factor to youth smoking initiation and continuation"—while "consistently, publicly, and falsely, denying they do so." *Id.* at 333a, 335a.

"In short, [respondents] have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that [their] success exacted." Pet. App. 292a.

2. In 1999, the United States filed this civil action against respondents under RICO and two other statutes not relevant here. The government alleged that respondents conducted and conspired to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. 1962(c) and (d), by engaging in a decades-long scheme to defraud that was executed in part through respondents' use of mail and wire communications. Pet. App. 178a-179a, 300a; see 18 U.S.C. 1341, 1343, 1961(1)(B) and (5). The government sought equitable relief under RICO's "[c]ivil remedies" section, which provides:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type

> of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. 1964(a). As part of its original request for relief, the government sought equitable disgorgement of approximately $280 billion for ill-gotten gains that respondents obtained through their scheme to defraud. Pet. App. 178a & n.4.

After more than two years of discovery, respondents moved for partial summary judgment on the scope of the government's disgorgement remedy. Pet. App. 179a-180a, 301a-302a. The district court denied that motion (*id.* at 177a-195a), rejecting respondents' argument that a disgorgement remedy is limited under RICO to those ill-gotten gains that are presently available to fund further unlawful activities. *Id.* at 183a-193a.

3. In 2005, on respondents' interlocutory appeal under 28 U.S.C. 1292(b), a divided panel of the court of appeals reversed. Pet. App. 99a-176a. The majority concluded that RICO's grant of jurisdiction to enter appropriate orders "to prevent and restrain violations of [RICO]," 18 U.S.C. 1964(a), is "limited to forward-looking remedies that are aimed at future [RICO] violations." Pet. App. 113a; see *id.* at 111a-120a. That limitation, the court observed, prohibits any order of disgorgement because, in its view, disgorgement of ill-gotten gains "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." *Id.* at 113a-114a.

The court further noted that RICO's criminal forfeiture provision, 18 U.S.C. 1963(a), and the private right of action for treble damages, 18 U.S.C. 1964(c), provide remedies for past conduct. "This 'comprehensive and reticulated' scheme," the court concluded, "along with the plain mean-

ing of the words [of Section 1964(a)], serves to raise a 'necessary and inescapable inference' * * * that Congress intended to limit relief under § 1964(a) to forward-looking orders, ruling out disgorgement." Pet. App. 118a (citation omitted).

The court recognized that its holding was in conflict with decisions of the Second Circuit in *United States* v. *Carson*, 52 F.3d 1173 (1995), cert. denied, 516 U.S. 1122 (1996), and the Fifth Circuit in *Richard* v. *Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345 (2003), cert. denied, 543 U.S. 917 (2004). Pet. App. 119a-120a. But the court found it impossible to "avoid creating [a] circuit split[]" given its interpretation of Section 1964(a). *Ibid.*[1]

In his dissenting opinion (Pet. App. 133a-176a), Judge Tatel concluded that the majority's narrow reading of Section 1964's grant of authority to the district courts to "prevent and restrain" RICO violations is inconsistent with this Court's decisions in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), which establish that a grant of equitable jurisdiction includes the full range of traditional equitable remedies unless the statute by its terms or by necessary inference restricts the court's jurisdiction in equity. Pet. App. 149a-164a. Judge Tatel also rejected the proposition that disgorgement is, by its nature, "backward-looking," *id.* at 165a-166a, and concluded that the district court should be allowed to decide in the first instance "what remedy or combination of remedies" would "serve to prevent and restrain" RICO defendants from committing future RICO violations, *id.* at 171a.

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[1] Judge Williams joined the majority opinion, but wrote separately to emphasize his disagreement with the Second Circuit's decision in *Carson*. Pet. App. 121a-123a.

The court of appeals denied the government's petition for rehearing en banc by a 3-3 vote, with 3 judges not participating. Pet. App. 252a-253a. The United States petitioned for a writ of certiorari before further district court proceedings resolved the merits and granted remedies. The Court denied that petition. 546 U.S. 960 (2005).

4. The district court held a nine-month bench trial and, in August 2006, entered final judgment against respondents. The court's comprehensive decision, which includes over 4000 specific findings of fact and encompasses nearly one volume of the Federal Supplement, see 449 F. Supp. 2d at 1-987,[2] details the "overwhelming evidence" that respondents maintained, and have continued to maintain, an illegal racketeering enterprise, and that each defendant has violated 18 U.S.C. 1962(c) and (d) by agreeing to and actually "participat[ing] in the conduct, management, and operation of the Enterprise through a pattern of racketeering activity." Pet. App. 289a-290a, 341a, 346a-349a, 353a; see *id.* at 357a (concluding that the evidence "clearly establishes that [respondents] have not ceased engaging in unlawful activity" and "continue[] to engage in conduct that is materially indistinguishable from their previous actions, activity that continues to this day").

The court found that respondents "devised a scheme to defraud" the public in which respondents "coordinated significant aspects of their public relations, scientific, legal, and marketing activity" and repeatedly used the mails and wire communications to further their scheme. Pet. App.

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[2] The district court's decision is reproduced in excerpted form in Volume II of the petition appendix (Pet. App. 258a-400a).

344a, 349a. More specifically, the court found that respondents

> executed the scheme by using several different strategies including: (1) denying that there were adverse health effects from smoking; (2) making false, misleading, and deceptive public statements designed to maintain doubt about whether smoking and exposure to secondhand smoke cause disease; (3) denying the addictiveness of smoking cigarettes and the role of nicotine therein; (4) disseminating advertising for light and low tar cigarettes suggesting they were less harmful than full flavor ones; and (5) undertaking a publicly announced duty to conduct and publicize disinterested and independent research into the health effects of smoking upon which the public could rely.

Id. at 349a-350a. "[M]ore colloquially," the court explained that,

> over the course of more than 50 years, [respondents] lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal—to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.

Id. at 344a.

The district court further found it reasonably likely that the cigarette-manufacturer respondents (other than Liggett) will continue to violate RICO in the future. Pet. App. 354a-363a. The court accordingly granted injunctive relief barring respondents from engaging in further racketeering or fraud, reconstituting certain joint organizations, and using health descriptors such as "light" and "low tar." *Id.* at 371a-375a, 390a-391a. The court also required that respondents make corrective statements in specified media, continue to maintain document depositories containing industry documents disclosed in litigation, and provide disaggregated marketing data to the government. *Id.* at 376a-390a.

The district court denied an equitable decree requiring respondents to fund a national smoking-cessation program and a public-education campaign. Pet. App. 391a-392a, 398a-399a. The court acknowledged that respondents had executed an "extremely successful scheme to increase their revenues at the expense of smokers, potential smokers, and the American public" by "defraud[ing] consumers regarding [the health effects of] light and low tar cigarettes," and that the government's requested smoking-cessation program "would unquestionably serve the public interest." *Id.* at 391a-392a; see *id.* at 398a (respondents' fraud was "exceptionally effective"). The court similarly acknowledged that the government's requested public-education campaign, "aimed at diluting both the impact of [respondents'] fraudulent statements and at undermining the efficacy of [respondents'] marketing efforts towards youth," would "unquestionably serve the public interest." *Id.* at 399a. But the court ultimately concluded that the court of appeals' interlocutory decision precluded both remedies because they are "not specifically aimed at preventing and restraining future RICO violations." *Id.* at 392a, 399a.

5. In May 2009, the court of appeals issued a decision (Pet. App. 1a-98a) affirming in part, reversing in part, and remanding for further proceedings "regarding only four discrete issues." *Id.* at 97a-98a. The court affirmed the district court's holding that respondents violated RICO as to all but the two trade-organization respondents (which were dissolved before judgment). The court explained that respondents participated in the conduct of the affairs of an enterprise with "the common purpose of obtaining cigarette proceeds by defrauding existing and potential smokers" and that respondents' RICO "liability rests on deceits perpetrated with knowledge of their falsity" reflected in "countless examples of [their] deliberately false statements." *Id.* at 25a, 41a-42a; see *id.* at 13a-67a. The court also largely affirmed the remedies granted by the district court but remanded for further consideration of four discrete remedial issues not relevant here. *Id.* at 67a-86a, 98a.

Relying on its disgorgement opinion, the court of appeals affirmed the district court's rejection of equitable smoking-cessation and public-education remedies. Pet. App. 90a-95a. Under the reasoning of its prior opinion, the court explained, "the district court may craft only forward-looking remedies aimed at preventing and restraining future RICO violations." *Id.* at 90a-91a. The court acknowledged the government's position that the smoking-cessation and public-education remedies were justified because respondents' future cigarette sales to "a smoker who became addicted in the past due to [respondents'] fraud" is "a continuing effect of the past fraud, due to the nature of addiction." *Id.* at 91a. But the court nonetheless concluded that the smoking-cessation and public-education remedies are impermissible under Section 1964(a), as previously construed, because they "attempt to prevent and restrain fu-

ture effects of past RICO violations, not future RICO violations." *Id.* at 92a.

REASONS FOR GRANTING THE PETITION

The court of appeals has significantly curtailed Congress's plenary grant of equitable jurisdiction in 18 U.S.C. 1964(a) "to prevent and restrain violations" of RICO by holding that a district court may "craft only forward-looking remedies aimed at preventing and restraining future RICO violations." Pet. App. 90a-91a, 113a. Under that ruling, the court barred, as a matter of law, any equitable disgorgement of ill-gotten gains or other equitable relief to redress the continuing effects of past conduct. *Id.* at 91a (citing *id.* at 113a-114a). That holding contradicts the text and purposes of RICO, erroneously restricts the broad and flexible equitable authority that Congress conferred upon federal courts under RICO, and conflicts with the decisions of this Court and other courts of appeals.

One of the principal functions of equitable relief under RICO "is to divest the association of the fruits of its ill-gotten gains." *United States* v. *Turkette*, 452 U.S. 576, 585 (1981). Indeed, this Court has made clear that congressional grants of equitable authority to "enjoin" or "restrain" statutory violations similar to that in RICO encompass all traditional equitable remedies, including decrees compelling defendants "to disgorge profits * * * acquired in violation of [statutory prohibitions]," *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946), and directing "reimbursement for [injuries] caused by an unlawful [course of action]" so as to "provide complete relief" for statutory violations. *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 289, 292 (1960). Other courts of appeals have properly followed the rule of *Porter* and *Mitchell*, but the D.C. Circuit in this case created an acknowledged division of author-

ity by restricting the broad equitable authority granted by RICO.

The court of appeals' erroneous legal rulings have exceptional importance to this case. By holding that federal courts lack authority to advance the public interest by granting equitable relief either to separate respondents from their ill-gotten gains or to redress the ongoing effects of their violations of RICO, the court of appeals has eviscerated the relief available in the most significant civil RICO action ever filed by the United States. The ruling thwarts the district court's efforts to craft appropriate equitable relief to remedy the ongoing effects of fifty years of unlawful racketeering activity—unlawful acts that have harmed and continue to harm the lives and health of many millions of Americans.

A. The D.C. Circuit's Narrow Interpretation Of Section 1964(a) Conflicts With Decisions Of This Court And Imposes Unwarranted Constraints On Equitable Jurisdiction

1. Congress enacted RICO to provide "new remedies to deal with the unlawful activities of those engaged in organized crime." *Turkette*, 452 U.S. at 589 (quoting Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 923). To that end, Congress vested the district courts with jurisdiction to issue "appropriate orders" to "prevent and restrain" violations of RICO. 18 U.S.C. 1964(a). That broad grant of remedial authority is not, as the court of appeals held, limited "to forward-looking remedies aimed at preventing and restraining future RICO violations." Pet. App. 75a, 92a. The text of Section 1964(a), this Court's decisions in *Porter* and *Mitchell* construing parallel grants of equitable jurisdiction, and the specific context in which Congress enacted RICO demonstrate that Congress vested district courts with full equitable authority to award

complete relief for violations of RICO, including orders to disgorge ill-gotten gains and to redress the continuing health and other effects of respondents' fraudulent scheme to cause countless individuals to commence and maintain an addiction to their products that will continue well into the future.

When Congress enacted RICO in 1970, it legislated against the backdrop of the Court's decisions in *Porter* and *Mitchell*. Those decisions establish that "[w]hen Congress entrusts to an equity court the enforcement of [statutory] prohibitions," it invokes "the historic power of equity to provide complete relief." *Mitchell*, 361 U.S. at 291-292. Under such a statute, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction," in the absence of "a clear and valid legislative command" limiting the "comprehensiveness" of such authority. *Id.* at 291 (quoting *Porter*, 328 U.S. 398). The "full scope" of "the court's jurisdiction in equity" must therefore "be recognized and applied" "[u]nless a statute in so many words, or by a necessary and inescapable inference," restricts that authority. *Ibid.* (quoting *Porter*, 328 U.S. 398).[3] And when "the public interest is involved" in a suit brought by the government, the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.* (quoting *Porter*, 328 U.S. 398).

The Court in *Porter* applied those principles in construing the Emergency Price Control Act of 1942 (EPCA), ch. 26, 56 Stat. 23. EPCA authorized the government to apply to an appropriate court for "an order enjoining [prohibited]

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[3] See also *Miller* v. *French*, 530 U.S. 327, 340 (2000) (requiring "an 'inescapable inference'" to "construe a statute to displace courts' traditional equitable authority") (citation omitted); *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001).

acts or practices" or "enforcing compliance" with the Act, and provided that if a violation was established, "a permanent or temporary injunction, restraining order, or other order shall be granted." 328 U.S. at 397 (quoting EPCA § 205(a), 56 Stat. 33). The Court construed this provision to authorize a court to issue a "decree compelling [the defendant] to disgorge profits * * * acquired in violation of the [EPCA]." *Id.* at 398-399. Such a decree, the Court explained, both assures "[f]uture compliance" by compelling a violator "to restore [his] illegal gains" and falls "within the recognized power and within the highest tradition of a court of equity" to "act in the public interest by restoring the status quo." *Id.* at 400, 402.

Mitchell reaffirmed *Porter*'s recognition of the broad scope of federal equity jurisdiction, and held in the context of government suits to enforce the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, that district courts may redress the effects of past statutory violations through appropriate equitable decrees. In language echoed in 18 U.S.C. 1964(a)'s authorization to "restrain violations" of RICO, the FLSA vests district courts with jurisdiction to "restrain violations" of the FLSA in actions brought by the Secretary of Labor. 29 U.S.C. 217. That authorization to "restrain violations," *Mitchell* held, invokes "the historic power of equity to provide complete relief" and includes the power "to order reimbursement for loss of wages caused by [a retaliatory] discharge" of employees in violation of the Act. 361 U.S. at 289, 291-292.

Porter and *Mitchell* directly govern the interpretation of Section 1964(a)'s authorization to issue "appropriate orders" to "prevent and restrain" violations of RICO. The grant of authority to "prevent" violations of RICO is not materially different from the statutory authority in *Porter* to issue orders "enjoining" prohibited acts and practices

and "enforcing" compliance with the Act, which permitted courts to direct defendants "to disgorge profits" flowing from statutory violations. See *Porter*, 328 U.S. 398-399. And authority to "restrain violations" of RICO is materially identical to the authority in the FLSA that *Mitchell* held confers the power to "provide complete relief" by directing monetary payments to redress harmful effects "caused by [the defendant's] unlawful" actions. *Mitchell*, 361 U.S. at 289, 291-292. The Congress that enacted Section 1964(a) in 1970 is presumed to have legislated with such firmly established and directly relevant decisions in mind. See, *e.g.*, *United States* v. *Alaska*, 521 U.S. 1, 35 (1997); *Cannon* v. *University of Chi.*, 441 U.S. 677, 698-699 (1979).[4]

The background rule of *Porter* and *Mitchell* means that RICO's text authorizes a district court to exercise the full range of equitable remedies—including disgorgement and other relief designed to undo the effects of past wrongdoing—absent a "clear" statutory command that "in so many words, or by a necessary and inescapable inference," re-

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[4] The court of appeals' attempts to distinguish *Porter* and *Mitchell* are unavailing. The majority sought to confine *Porter* to the particular statute in that case, noting that, after *Porter* announced the controlling principles of construction, it went on to "set forth two theories under which" the restitution order fit within the specific language of EPCA. Pet. App. 112a-113a. *Mitchell*, however, expressly rejected just such an attempt to limit *Porter*. The Court stated that "[t]he applicability of [*Porter*'s] principle is not to be denied * * * because, having set forth the governing inquiry, [*Porter*] went on to find in the language of the statute affirmative confirmation of the power to order reimbursement." 361 U.S. at 291. *Mitchell* left no doubt that *Porter* stated a rule of general applicability: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-292.

stricts a district court's traditional, flexible equitable authority. See *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 398). Nothing of the sort appears in RICO. Quite the contrary, the clear statutory command of RICO and the inescapable inference from its origins is that courts have broad authority to provide appropriate relief targeting ill-gotten gains and harmful effects of respondents' unlawful conduct.

Congress specifically directed in RICO's text that the statute "be liberally construed to effectuate its remedial purposes," OCCA § 904(a), 84 Stat. 947, and this Court has emphasized that this "liberal-construction mandate" applies with particular force "in § 1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 492 n.10 (1985).[5] The Court has also repeatedly recognized that Congress enacted RICO to "provide new weapons of unprecedented scope" to attack the "economic roots" of the targeted activity. *Russello* v. *United States*, 464 U.S. 16, 26 (1983). "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime" and, for that reason, the Court has emphasized that "all of the Act's provisions should be read" in the spirit of "attacking crime on all fronts." *Sedima*, 473 U.S. at 498; see S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969) (*Senate Report*) (RICO is intended to attack "their source of economic power" on "all available fronts"). That attack was intended, *inter alia*, to

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[5] Even outside the Section 1964 context, the Court has consistently rejected arguments intended to restrict the statute's "clear but expansive" text, and has "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Boyle* v. *United States*, 129 S. Ct. 2237, 2246-2247 (2009) (quoting *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008)) (collecting cases).

"divest the association of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585.

The error in the court of appeals' narrow and rigid interpretation of Section 1964(a) in the face of that liberal construction mandate is especially vivid in the court's categorical rejection of the government's proposed smoking-cessation and public-education remedies. Those measures were intended to halt the continuing and serious adverse health consequences of the fraudulent scheme perpetrated by respondents to induce untold numbers of individuals to commence and maintain into the future an addiction to respondents' products. The remedies would thereby prevent respondents from continuing to reap the financial benefits of their unlawful conduct that produced the addiction. One established meaning of "restrain" makes clear that Section 1964(a)'s broad grant of equitable authority includes the authority to compel such measures. Whereas "restrain" in some contexts can mean "to hold (as a person) back from some action," *Webster's Third New Int'l Dictionary* 1936 (1961) (definition 1a), the term also carries an additional meaning of particular relevance to those remedies: "to moderate or limit the force, effect, development, or full exercise of." See *ibid.* (definition 2a). Equitable orders that mitigate or limit the continuing "force" and "effect" of past statutory violations fall comfortably within the grant of authority in Section 1964(a) to "restrain" such violations.

That conclusion is reinforced by this Court's recognition of the appropriate scope of remedies in government enforcement actions under the antitrust laws, on which Congress drew to ensure an expansive reach of Section 1964(a). See, *e.g.*, *Senate Report* 81; *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). This Court has stressed that "[t]he purpose of relief in an antitrust case is 'so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the

public freedom from its continuance.'" *United States* v. *Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) (second brackets in original) (citation omitted); see also *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 n.8 (1972) (relief "necessary and appropriate in the public interest *to eliminate the effects* of the acquisition offensive to the statute") (citation omitted). So too here, the remedies the government sought were intended, *inter alia*, to cure and eliminate the effects of the conduct offensive to RICO.[6]

2. The court of appeals did not question the "historic power of equity to provide complete relief," *Mitchell*, 361 U.S. at 292, including the power to compel a wrongdoer to disgorge its ill-gotten gains, *Porter*, 328 U.S. at 401. It concluded, however, that RICO's text and structure restrict the scope of that authority, Pet. App. 111a, and that a "district court may craft only forward-looking remedies aimed at preventing and restraining future RICO violations," *id.* at 90a-91a. The court of appeals was wrong.

Nothing in RICO limits court orders to forward-looking remedies targeting future RICO violations. As *Porter* and *Mitchell* make clear, past statutory violations can produce ill-gotten gains or continue to cause harm that should, in

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[6] The court of appeals distinguished the equitable relief available under RICO from that available in the antitrust context by reasoning that "[t]he condition of monopolization is itself a violation of the Sherman Act" and, for that reason, "district courts may order remedies to cure the monopolizing effects" of statutory violations. Pet. App. 93a. That is incorrect. "Simply possessing monopoly power and charging monopoly prices does not violate" the Sherman Act, which instead "targets 'the willful acquisition or maintenance of [monopoly] power.'" *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1118 (2009) (citation omitted). Accordingly, as with RICO, a court in an antitrust case can grant equitable relief to redress the continuing effects of a defendant's prior violation. See, *e.g.*, *Ford Motor Co.*, 405 U.S. at 575-576, 578.

the public interest, be redressed by an "appropriate order." A rigid distinction between forward- and backward-looking remedies under RICO simply ignores the "historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell*, 361 U.S. at 292. And where RICO violations produce effects that survive the violation itself, the authority "to act in the public interest by restoring the status quo" falls squarely within the federal judiciary's "highest tradition." *Porter*, 328 U.S. at 402. None of the bases for the court of appeals' restrictive interpretation of Section 1964(a) survives analysis.

a. The court inferred that RICO limits a court's equitable authority from Section 1964(a)'s statement that courts have jurisdiction to issue appropriate orders "including, but not limited to:" ordering any person to divest himself of any interest in any enterprise; imposing reasonable restrictions on the future activities or investments of any person; or ordering the dissolution or reorganization of any enterprise. 18 U.S.C. 1964(a). The court reasoned that those remedies "are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*," and that Section 1964(a) should therefore be read as authorizing only "remedies similar in nature" under the interpretive canons of *noscitur a sociis* and *ejusdem generis*. Pet. App. 113a, 116a-117a. There are two basic flaws in that analysis.

First, the court of appeals was wrong in its premise about the purpose of the remedies that Section 1964(a) identifies as "includ[ed]." While orders requiring divestiture, restrictions on future activities, or dissolution or reorganization of an enterprise can serve to separate the RICO violator from the enterprise and thereby protect against future violations, that is not the only purpose of such remedies. They also serve to restrain the ongoing effects of past

conduct—*e.g.*, by undoing the corrupt election of a labor union leader, or reorganizing a company that has been infiltrated by organized crime to restore the company to lawful and fair operations.

Second, and in any event, RICO authorizes appropriate orders to "prevent and restrain" violations of RICO—statutory text that under *Porter* and *Mitchell* confers the full power of equity to afford complete relief in government enforcement actions, including repayment of ill-gotten gains and undoing the continuing effects of past violations. Nothing in the succeeding phrase introduced by the word "including" limits the scope of that broad grant of authority. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941).

The word "include" is "frequently, if not generally, used as a word of extension or enlargement." *American Sur. Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). That is clearly so here. The express "inclu[sion]" of specific remedies in Section 1964(a) guaranteed that it would be read *expansively* to encompass certain remedial measures that Congress deemed essential to address the illicit influence and economic base of RICO violators. See *Turkette*, 452 U.S. at 585, 591-593. Section 1964's remedial provisions afforded "*enhanced* sanctions and *new* remedies." 84 Stat. 923 (emphasis added). By identifying certain remedies, Congress ensured a broad, not restrictive, application of the equitable authority it conferred on federal courts to "prevent and restrain" RICO violations. That conclusion is underscored by Section 1964(a)'s express directive that the appropriate orders it authorizes are "not limited to" those identified, as well as by the legislative history. See *Senate Report* 81 ("The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explic-

itly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that [RICO] seeks essentially an economic, not a punitive goal.").[7]

b. The court of appeals' analysis of RICO's structure likewise furnishes no basis for its decision. The court correctly observed that RICO provides for the district court in a criminal case to include a fine and mandatory forfeiture of unlawfully obtained proceeds as part of the sentence, 18 U.S.C. 1963(a), and that a person injured in his business or property by a RICO violation may sue the offender for treble damages, 18 U.S.C. 1964(c). See Pet. App. 117a-118a. But those alternative sanctions and remedies do not curtail the independent authority of the government to invoke the court's equitable jurisdiction to provide complete relief in the public interest.

Both *Porter* and *Mitchell* found such equitable authority available under statutes that provided a similarly broad range of alternative remedies. EPCA, at issue in *Porter*, provided "[l]egal, equitable and criminal sanctions," including a private cause of action allowing injured parties to recover treble damages caused by violations. See *Porter*, 328 U.S. at 404 & n.4, 406 n.9 (Rutledge, J., dissenting). The statute also permitted the government to seek such damages on behalf of the United States if the individual was not

[7] The court of appeals also erred in characterizing disgorgement of ill-gotten gains as a "quintessentially backward-looking remedy," Pet. App. 113a. See *id.* at 165a-174a (Tatel, J., dissenting). This Court and courts of appeals have repeatedly recognized that disgorgement serves a crucial forward-looking deterrent function. See, e.g., *Porter*, 328 U.S. at 400 ("Future compliance may be more definitely assured if one is compelled to restore one's illegal gains."); see also, *e.g.*, *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("[d]isgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating" federal law); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (same).

entitled to sue. Pet. App. 150a (Tatel, J., dissenting). Yet such alternative remedies did not displace the equitable authority to protect "the public interest by restoring the status quo." *Porter*, 328 U.S. at 402. In *Mitchell*, the Court similarly "thought it insignificant that * * * both the aggrieved employees and the Secretary could seek lost wages in actions at law under FLSA." Pet. App. 156a (Tatel, J., dissenting) (citing *Mitchell*, 361 U.S. at 303 (Whittaker, J. dissenting)).

The majority below was also mistaken in imposing rigid limitations on available remedies under Section 1964(a) on the ground that, in its view, the "overlap" between disgorgement and criminal forfeiture would circumvent "the additional procedural safeguards that attend criminal charges." Pet. App. 118a. Congress did not intend RICO's criminal and civil remedies to be mutually exclusive. Rather, Congress intended that RICO's deliberately "enhanced sanctions and new remedies," 84 Stat. 923, would give the government a full range of criminal and civil tools and the ability to choose whichever would be most effective. See *Senate Report* 80 (observing that criminal prosecution is "a relatively ineffectual tool" for implementing RICO's "economic policy"). Congress was fully aware of the potential overlap between RICO's criminal and civil remedies, and it intended that a criminal influence "can be legally separated from the organization, either by the criminal law approach * * * or through a civil law approach of equitable relief." *Id.* at 79. That very "combination of criminal and civil penalties" was enacted by Congress to establish "an extraordinary potential for striking a mortal blow against the property interests" of RICO violators. *Turkette*, 452 U.S. at 592 (citation omitted).

The majority erred in equating equitable disgorgement with RICO's provisions for criminal forfeiture and private

damages. Unlike both forfeiture and damages, disgorgement and other equitable remedies, such as the government's proposed smoking-cessation program, are committed to the court's sound discretion. And, unlike a private damages award under Section 1964(c), disgorgement is not trebled; and neither disgorgement nor the other remedies authorized by Section 1964(a) are keyed to a victim's loss, but rather are directly tied to the wrongdoer's ill-gotten gains, the ongoing effects of its RICO violation, and the deterrence of any future violations.

c. The court of appeals similarly erred in believing that *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479 (1996), supports its conclusion that Section 1964(a)'s authority to "restrain" RICO violations is "only aimed at future actions." See Pet. App. 114a. *Meghrig* construed a provision of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, that permitted courts to "restrain any person" who contributed to the improper disposal of solid or hazardous waste. That provision, the Court concluded, contemplates prohibitory injunctions to prevent "a responsible party from further violating RCRA" but does not permit the court in a citizen suit to order the defendant to reimburse a private party for costs incurred to clean up a defendant's past RCRA violations. *Meghrig*, 516 U.S. at 484. RCRA's distinctive text and context warranted that limitation for reasons that have no application to Section 1964(a).

Moreover, *Meghrig* emphasized that RCRA authorizes relief only if a plaintiff shows "imminent" danger of harm to health or the environment. That requirement, the Court concluded, was incompatible with a reading of RCRA as permitting suits to compensate private plaintiffs for cleanup efforts that have already redressed the harm. *Meghrig*, 516 U.S. at 485-486. Indeed, RCRA bars citizens suits if the

government is prosecuting a separate enforcement action. That limitation confirmed that RCRA was not "designed to compensate private parties for their past cleanup efforts," because it would make RCRA "a wholly irrational mechanism for doing so." *Id.* at 486. Those distinctive forward-looking features of RCRA created an "inescapable inference," *Porter*, 328 U.S. at 398, that Congress did not intend in RCRA to vest courts with full equitable authority to provide complete relief. RICO contains no analogous restrictions.

B. The D.C. Circuit's Interpretation Of Section 1964(a) Conflicts With Decisions Of Other Courts of Appeals

1. The court of appeals' interpretation of Section 1964(a) not only conflicts with the principles established in *Porter* and *Mitchell*, but also creates a direct conflict with the Second Circuit's decision in *United States* v. *Carson*, 52 F.3d 1173 (1995), cert. denied, 516 U.S. 1122 (1996), and the Fifth Circuit's decision in *Richard* v. *Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345 (2003), cert. denied, 543 U.S. 917 (2004). As the panel itself recognized (Pet. App. 119a-120a; see *id.* at 102a n.1), the D.C. Circuit is the only court of appeals to hold that disgorgement is categorically unavailable under Section 1964(a), regardless of the facts.

In *Carson*, the Second Circuit held that "disgorgement is among the equitable powers available to the district court" under Section 1964(a), and concluded that disgorgement may be ordered if "the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d at 1181-1182. In *Richard*, the Fifth Circuit agreed that "disgorgement is generally available under § 1964," and similarly stated that disgorgement may be ordered to prevent future statutory violations. 355 F.3d at 354-355. This Court's decisions do not sanction the

limitations on disgorgement identified in *Carson* and *Richard*. But regardless of those limitations, the Second and Fifth Circuit decisions cannot be reconciled with the D.C. Circuit's holding that disgorgement is, as a matter of law, unavailable under Section 1964(a).

2. The D.C. Circuit's decision is also inconsistent with decisions of other courts of appeals applying the principles of *Porter* and *Mitchell* in other contexts. As Judge Tatel explained (Pet. App. 157a), those courts have repeatedly held that grants of equitable authority similar to that in Section 1964(a) do not restrict a federal court's power to order equitable disgorgement or restitution. See, *e.g.*, *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760 (6th Cir. 1999) (grant of jurisdiction in the Federal Food, Drug, and Cosmetic Act (FFDCA) "to restrain" violations authorizes disgorgement and restitution), cert. denied, 530 U.S. 1274 (2000); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (authorization "to enjoin" violations of the Federal Trade Commission Act does not restrict power to order disgorgement); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (provisions of Securities Exchange Act enabling court "to enjoin" violations, 15 U.S.C. 78u(d)(1), encompasses power to order disgorgement); *ICC* v. *B&T Transp. Co.*, 613 F.2d 1182, 1183-1184 (1st Cir. 1980) (provision of Motor Carrier Act of 1980 empowering ICC "to seek only prospective injunctions to restrain future conduct" encompasses restitution); *CFTC* v. *Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979) (absent express restriction, Commodity Exchange Act (CEA) authorizes order compelling disgorgement of illegally obtained profits); *CFTC* v. *British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir.) (following *Hunt*), cert. denied, 479 U.S. 853 (1986); *CFTC* v. *American Metals Exch. Corp.*, 991 F.2d 71, 76 & n.9 (3d Cir. 1993) (same); *CFTC* v. *CO Petro*

Mktg. Group, Inc., 680 F.2d 573, 583-584 (9th Cir. 1982) (same).

Decisions of courts of appeals since the D.C. Circuit rendered its controlling decision in this case in 2005 further underscore the anomaly of its approach. For instance, the Eleventh Circuit has since followed *Porter* and *Mitchell* to hold that Congress's grant of jurisdiction "to enjoin" violations of the CEA "carries with it the full range of equitable remedies, among which is the power to grant restitution." *CFTC* v. *Wilshire Inv. Mgmt. Co.*, 531 F.3d 1339, 1344 (2008). The Third Circuit has likewise held that the FFDCA, which confers jurisdiction "to restrain violations," authorizes an order compelling restitution. *United States* v. *Lane Labs-USA Inc.*, 427 F.3d 219, 223-225 (2005). And the Tenth Circuit, specifically rejecting the D.C. Circuit's premise that disgorgement is a wholly backward-looking remedy, has held that the FFDCA authorizes disgorgement of ill-gotten gains. *United States* v. *Rx Depot*, 438 F.3d 1052, 1058 & n.4, 1061, cert. denied, 549 U.S. 817 (2006). Those recent decisions both underscore the error of the court of appeals' interpretive approach and heighten the need for this Court's review.

C. The Court Of Appeals Incorrectly Decided An Issue Of Exceptional Importance

As this Court has explained, Congress sought to curtail the "revenue and power" that RICO violators derive from their illegal conduct, and it therefore provided remedies that would allow "an attack * * * on *their source of economic power itself*." *Turkette*, 452 U.S. at 592 (quoting *Senate Report* 79). Section 1964(a) accordingly grants courts authority to craft "equitable relief broad enough to do all that is necessary" to address "the economic base" of

RICO violators and to "free the channels of commerce from all illicit activity." *Senate Report* 79.

This Court's decision in *Turkette* recognized that Section 1964 empowers courts "to divest the association of the fruits of its ill-gotten gains." 452 U.S. at 585. The court of appeals nonetheless held that disgorgement is categorically unavailable precisely *because* it is "aimed at separating the criminal from his prior ill-gotten gains." Pet. App. 117a. That holding frustrates one of the chief aims of RICO's civil remedies—deterring future RICO violations by depriving the RICO enterprise of the economic benefits of its unlawful conduct. And the court of appeals' further rejection of the proposed smoking-cessation and education remedies frustrates the courts' ability to redress the continued effects of RICO violations. The court of appeals' decision therefore has potentially far-reaching implications for RICO cases generally.

In addition, the court of appeals' imposition of rigid limitations on the broad and flexible remedial authority intended by Congress under Section 1964(a) raises a question of preeminent importance in the context of this case. The findings sustained by the court of appeals establish that, for half a century, respondents participated in the conduct of the affairs of an enterprise with "the common purpose of obtaining cigarette proceeds by defrauding existing and potential smokers" about the health effects and addictiveness of cigarettes. Pet. App. 25a. Their "efforts to deny and distort the scientific evidence of smoking's harms are demonstrated by not only decades of press releases, reports, booklets, newsletters, television and radio appearances, and scientific symposia and publications, but also by evidence of their concerted[] efforts to attack and undermine the studies in mainstream scientific publications." 449 F. Supp. 2d at 855. These public statements were not

merely false or misleading; they were "clearly and deliberately false": "[Respondents] knew of their falsity at the time and made the statements with the intent to deceive." Pet. App. 41a-42a.

At the same time, the manufacturers "marketed and promoted their low tar brands to smokers—who were concerned about the health hazards of smoking or considering quitting—as less harmful than full flavor cigarettes despite either lacking evidence to substantiate their claims or knowing them to be false." Pet. App. 6a. And based on their extensive research regarding the ways in which "the physical and chemical design parameters of cigarettes influence the delivery of nicotine to smokers," respondents "engineered their products around creating and sustaining this addiction." *Ibid.*; see also *id.* at 34a-35a. As a result of their intentional deception, respondents' "efforts have been successful" both in dissuading low tar smokers from quitting (notwithstanding their "greater desire to quit"), 449 F. Supp. 2d at 860, and in "dramatically increas[ing] their sales of low tar/light cigarettes." Pet. App. 322a-323a; see p. 5, *supra*.

The smoking-cessation and public-education remedies precluded by the court of appeals would directly remedy the "extremely successful scheme to increase [respondents'] revenues at the expense of smokers, potential smokers, and the American public" and, as the district court concluded, "would unquestionably serve the public interest." Pet. App. 391a-392a, 399a. Such remedies are essential to complete relief in this case. The human and economic consequences of respondents' actions are difficult to overstate. "More than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease, often suffering long and painful deaths." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529

U.S. 120, 134 (2000) (citation omitted). "Tobacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." *Id.* at 134-135 (citation omitted). Because nicotine is so addictive, the serious health effects of respondents' massive fraud, along with respondents' ability to continue profiting from that conduct, will persist indefinitely absent relief such as the smoking-cessation and public-education remedies.[8]

Under the text of RICO and the Court's decisions in *Porter* and *Mitchell*, the district court has the equitable authority to "divest the association of the fruits of its ill-gotten gains," *Turkette*, 452 U.S. at 585, and to rectify "the continuing effects of past illegal conduct" on smokers addicted through fraud and on respondents' continued ability to profit from their past wrongs, Pet App. 92a. The Court's review is warranted to resolve the conflict between the decision below and this Court's decisions in *Porter* and *Mitchell*; to resolve the conflicts among the court of appeals on the scope of equitable relief, both under RICO and more generally; and to restore to the district court the discretion required to fashion appropriate remedies for respondents' sustained and extensive violations of RICO.

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[8] The exceptional importance of remedies such as those has not been altered by Congress's recent enactment of the Family Smoking Prevention and Tobacco Control Act (FSPTCA), Pub. L. No. 111-31, Div. A, 123 Stat. 1776 (to be codified in part at 21 U.S.C. 387 *et seq.*). Although the FSPTCA provides, *inter alia*, for the prospective regulation of tobacco products in certain respects, it does not address the ongoing effects of respondents' scheme to defraud, and Congress specifically directed that "[n]othing in th[e] [FSPTCA] * * * shall be construed to— * * * affect any action pending in Federal * * * court." *Id.* § 4(a), 123 Stat. 1782.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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