No. 09-_____

IN THE
Supreme Court of the United States

LORILLARD TOBACCO COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a group of corporations can constitute an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68.

(2) Whether the court of appeals contravened the First Amendment and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), by failing to undertake independent appellate review of the factual findings of a district court that has found that speech is not constitutionally protected because it is fraudulent.

(3) Whether a court may deem speech to be fraudulent where: (a) the speech addressed important public controversies and potential regulation; (b) the speech expressed opinions regarding ongoing scientific disputes or statements that were undisputedly true under at least one reasonable interpretation; (c) there was no allegation or finding that any individual associated with Petitioner possessed specific intent to defraud; or (d) there was no evidence or finding that the speech was material to a reasonable consumer.

(4) Whether the court of appeals erred by denying First Amendment protection to use of the terms "light" and "low-tar," where statements using those terms accurately summarize tar and nicotine levels as measured by the method approved by the Federal Trade Commission.

(5) Whether the court of appeals erred in affirming an injunction that merely tracks broad statutory commands, compels speech in the form of

"corrective statements," and is not predicated on a reasonable likelihood of future RICO violations.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner in this case is Lorillard Tobacco Company. Lorillard Tobacco Company is a wholly-owned subsidiary of Lorillard, Inc. Lorillard, Inc. is the only publicly held company that owns 10% or more of Lorillard Tobacco Company's stock.

The Respondents are the United States of America, and Intervenors below: Tobacco-Free Kids Action Fund; American Cancer Society; American Heart Association; American Lung Association; Americans for Nonsmokers' Rights; and National African American Tobacco Prevention Network.

In addition to Petitioner, Defendants-Appellants-Cross-Appellees below were Philip Morris USA Inc.; Altria Group, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Holdings, Inc.; British American Tobacco (Investments) Ltd.; The Council for Tobacco-Research-U.S.A., Inc.; The Tobacco Institute, Inc.; and Liggett Group, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES AND RULES

MISCELLANEOUS

Blank Page

PETITION FOR A WRIT OF CERTIORARI

This Petition presents the Court with an opportunity to rein in a federal statute, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), that has become virtually limitless in its application. This case starkly illustrates the absence of manageable boundaries on RICO's scope. The United States, relying on lower court decisions that have refused to recognize limitations on an association-in-fact "enterprise" as defined in 18 U.S.C. § 1961(4), has challenged the conduct of an entire industry over many decades, and has sought remedies that threaten its continued existence.

Under the government's theory, an association-in-fact enterprise, notwithstanding its statutory definition as "any union or group of *individuals* associated in fact although not a legal entity," may consist of a group of *corporations*. A review of the statutory language, structure, and purpose makes clear that a group of corporations cannot form an association-in-fact enterprise. Several members of this Court have expressed skepticism about the contrary position adopted by the lower courts. *See* Transcript of Oral Argument, *Mohawk Indus., Inc. v. Williams*, No. 05-465 (Apr. 26, 2006) ("*Mohawk* Tr."), at 28-54. This case–which the United States has described as the most important civil RICO case in history, *see* Petition for Writ of Certiorari, *United States v. Philip Morris USA Inc.*, No. 05-92 ("05-92 U.S. Pet."), at 8 (2005)–provides an excellent vehicle for the Court to address squarely the scope of Section 1961(4)'s definition of

enterprise, which the lower courts have misconstrued to give RICO an effectively unlimited reach.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 566 F.3d 1095. The decision of the district court (Pet. App. 101a) is reported at 449 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2009. Pet. App. 1a. Petitions for rehearing were denied on September 22, 2009. *Id.* at 2182a-2185a. On November 10, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari until February 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Section 1961(4) of Title 18, United States Code, provides:

> **§ 1961. Definitions**
>
> As used in this chapter—
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.

Other relevant provisions of the RICO statute, 18 U.S.C. §§ 1961-18, are reproduced in the Statutory Appendix.

STATEMENT

1. In September 1999, the government brought suit against Lorillard and the rest of the U.S. tobacco industry. The complaint sought disgorgement of profits and injunctive and declaratory relief under RICO and other statutes.[1] In February 2001, the government filed an amended complaint against the same group of defendants.

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[1] The government also asserted claims under the Medical Care Recovery Act, 42 U.S.C. §§ 2651, *et seq.*, and the Medicare Secondary Payer provisions of Subchapter 18 of the Social Security Act, 42 U.S.C. § 1395y(b)(2)(B)(ii) & (iii). The district court dismissed those claims. *See United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131 (D.D.C. 2000). The government did not appeal that ruling.

RICO makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity" or to conspire to do so. 18 U.S.C. §§ 1962(c), (d). A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or *group of individuals associated in fact* although not a legal entity." *Id.* § 1961(4) (emphasis added). RICO authorizes district courts "to prevent and restrain violations of [RICO] by issuing appropriate orders" for equitable relief. *Id.* § 1964(a).

The government's complaint alleged that defendants and "others known and unknown" constituted an association-in-fact enterprise under Section 1961(4). First Am. Compl. ¶ 204. It further alleged that, beginning no later than 1953 and continuing for more than 45 years, defendants violated RICO by conducting the affairs of that enterprise through a pattern of racketeering activity. *Id.* According to the government, this pattern of racketeering involved over 100 mailings and wirings that violated the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343. *Id.*[2]

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[2] Many of the alleged predicate acts were acts or statements that were not directed to consumers, Pet. App. 2124a-2180a, and nearly all of the public statements identified by the government were made by defendants to oppose government (continued...)

The government sought sweeping injunctive relief involving virtually every aspect of defendants' lawful businesses. Even though Section 1964(a) limits district court jurisdiction to remedies calculated to "prevent and restrain" *future* RICO violations, the government's allegations focused overwhelmingly on conduct that occurred decades ago–much of which concerned people who are no longer employed by the companies (or even alive), trade organizations that no longer exist, and scientific issues that defendants have not disputed for years. *Id.* ¶¶ 1–6.[3]

The government requested a generic injunction barring defendants from committing any "acts of racketeering" and "making false, misleading or deceptive statements or representations concerning cigarettes." *Id.* at pp. 92–93. The government also sought an injunction compelling defendants to make "corrective statements regarding the health risks of cigarette smoking and the

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regulation or as part of the unfolding scientific and public health debate regarding smoking and disease, *id.* at 373a-1801a, 1893a-1921a.

[3] The government also sought a monetary recovery of $280 *billion* as an equitable "disgorgement" of defendants' "profits." On interlocutory appeal, the D.C. Circuit held that § 1964(a) does not authorize this remedy because disgorgement is aimed at *past* misconduct, not at preventing and restraining *future* RICO violations. *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005). This Court denied the government's petition for a writ of certiorari from that decision. *United States v. Philip Morris USA Inc.*, 546 U.S. 960 (2005).

addictive properties of nicotine." *Id.* The government further sought appointment of a court-approved monitor to oversee defendants' business activities and their compliance with these injunctions. *Id.*

2. After five years of discovery and pre-trial proceedings, the case went to trial in September 2004. The bench trial lasted nine months and included live testimony from more than 80 witnesses, written testimony from more than 150 witnesses, and more than 14,000 exhibits.

The government alleged that defendants made false statements or denials relating to (1) the health risks of smoking and exposure to environmental tobacco smoke, (2) sponsoring independent research into the health effects of smoking, (3) addiction, (4) nicotine manipulation, (5) youth marketing, and (6) marketing of "light" and "low tar" cigarettes. *Id.* ¶¶ 3, 35-125. The government also alleged that defendants suppressed evidence and destroyed documents relating to these alleged schemes. *Id.*

In attempting to prove the alleged frauds, the government expressly asserted that it would not seek to prove that any individual corporate agent acted with specific intent. Instead, the government contended that the speaker's intent was "immaterial" because specific intent could be proved through defendants' "collective knowledge." Transcript of Proceedings at 39:4-12 (Sept. 21, 2004).

In August 2006, fifteen months after the trial ended, the district court issued a 1,653-page opinion

ruling that defendants had conspired to violate RICO and had in fact violated RICO. Pet. App. 94a. In the opinion's "Findings of Fact" section, the court stated that its use of the word "enterprise" "d[id] not imply that Defendants' activities meet the statutory definition [of 'enterprise'] contained in 18 U.S.C. § 1964(a)." *Id.* at 119a n.8. Yet in the "Conclusions of Law" section of the opinion, the court supported its holding on the "enterprise" requirement with generic "see generally" citations to its Findings of Fact. *Id.* at 1921a-1944a.

The district court variously described the enterprise either as being "comprised of a group of business entities and individuals associated-in-fact, including Defendants to this action," or "individual defendants working together" even though RICO's statutory language restricts association-in-fact enterprises to groups of "individuals," not corporations. *Id.* at 1921a, 1930a. The court further found that the enterprise "created and used formal and informal entities, many with overlapping participants and purposes to serve [its] central mission." *Id.* at 1926a. The court referred to the "organization of the Enterprise" as an "amoeba" that "changed its shape to fit current needs." *Id.* at 1925a-1926a.

Consistent with the amorphous nature of the enterprise that the district court found, and the government's theory before and at trial that it need not show that any agent or employee of any defendant acted with specific intent, the district court adopted the government's collective corporate intent standard and found that defendants acted

with the requisite intent based on the "collective knowledge" of the entire "Enterprise." *Id.* at 1972a, 1976a-1985a.

After finding defendants liable under RICO, the district court proceeded to impose remedies. The court ordered defendants to make "corrective communications" regarding "(1) the adverse health effects of smoking; (2) the addictiveness of smoking and nicotine; (3) the lack of any significant health benefit from smoking [low tar cigarettes]; (4) Defendants' manipulation of cigarette design . . .; and (5) the adverse health effects of exposure to secondhand smoke." *Id.* at 104a. The court ordered that these statements be published in newspapers and on television, and placed on cigarette packages and point-of-sale advertising in hundreds of thousands of retail outlets. *Id.*

The district court found that, "in terms of formal organization," the purported "enterprise" operated through industry organizations, *id.* at 1926a, and that those organizations had been permanently disbanded, *id.* at 1926a-1928a. Consistent with these findings, the district court failed to identify *any* alleged joint activity after 1998, let alone joint activity amounting to an "enterprise." Nonetheless, with no evidentiary citation or explanation, the district court found that those organizations "can readily be re-activated" such that the "enterprise" is reasonably likely to recur. *Id.* at 1928a. The court further concluded that the possibility that defendants might have unspecified "temptations" or "opportunities" to resurrect the enterprise or "take similar unlawful actions in order

to maximize their revenues" sufficed to impose injunctive relief. *Id.* at 2009a.

3. Defendants appealed, and the government cross-appealed the denial of certain remedies. The court of appeals issued a decision affirming in part and reversing in part. *Id.* at 1a-101a.

The panel affirmed the district court's liability decision in its entirety. Departing from RICO's plain language and invoking circuit precedent, the court of appeals held that defendants, as corporations, may be part of an association-in-fact enterprise. *Id.* at 18a-22a. The court acknowledged that "§ 1961(4) *nowhere expressly mentions*" association-in-fact enterprises comprised of corporations, but nonetheless concluded that such an association is an enterprise under RICO. *Id.* at 19a (emphasis added). The court relied on Congress's "switching between 'means' and 'includes' in the same definitional provision, . . . signal[ing] its intent to distinguish between exhaustive and non-exhaustive lists." *Id.* at 26a. The court concluded that Congress, by using the word "includes" to introduce the list of enterprises, "retain[ed] the *possibility* that some additional non-legal entities beyond" the specified "group of individuals associated in fact" could constitute an enterprise. *Id.* at 27a. The court did not explain why a group of *corporations* could form an unenumerated, non-legal entity enterprise consistent with the statutory text, much less how that type of enterprise promotes RICO's goal of combating organized crime.

Although the alleged fraud in this case implicated defendants' First Amendment rights, the panel refused without discussion to follow this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and to engage in independent review of the district court's factual findings. Pet. App. 16a. Instead, the panel deferred to the district court under the clearly erroneous standard of Federal Rule of Civil Procedure 52. *Id.* Thus, even though the panel observed that "we may not have reached all the same conclusions as the district court," it affirmed the district court's factual findings "under the highly deferential clearly erroneous standard." *Id.* at 67a. The panel then used those findings to reject defendants' First Amendment defense to statements made to defeat governmental regulation or in the unfolding scientific and public health debate regarding smoking and disease. *See id.* at 43a-46a. The panel labeled as "fraudulent" speech which the district court found was directed at public regulation, not consumers' purchases; speech that never reached consumers (*e.g.*, congressional and agency statements on proposed regulations); and even speech that never went outside the defendant companies. *Id.* at 41a-43a.

Moreover, while recognizing that "at times the [district] court articulated a 'collective intent' standard" of "dubious" validity, the panel upheld the district court's specific intent finding with respect to the frauds. *Id.* at 40a-41a. In fact, the panel relieved the government of its litigation position and the district court's adoption of a collective intent standard, concluding that an *individual's* specific

intent can be inferred from the *corporation's* collective knowledge. *Id.* at 32a-41a. The panel failed to explain how, consistent with defendants' Due Process rights and the notice requirements of federal litigation, it could adopt this theory when the government never pursued, and actually disclaimed, an individual intent theory in favor of a collective intent theory at trial.

4. On July 31, 2009, Lorillard and other defendants filed separate petitions for rehearing and rehearing en banc. The petitions addressed, among other issues, the court of appeals' holding that a group of corporations could form an association-in-fact enterprise. The court of appeals denied the petitions on September 22, 2009. *Id.* at 2182a-2185a. The court of appeals has stayed the mandate pending disposition of defendants' petitions for writs of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Holding That A Group Of Corporations Can Form An Association-In-Fact Enterprise Under RICO Warrants This Court's Review.

The court of appeals' holding that a group of corporations associated in fact can constitute a RICO "enterprise" merits this Court's review. The statutory language, structure, and purpose make clear that a group of corporations is not "a group of individuals associated in fact." Moreover, several members of this Court have expressed skepticism that the definition of a RICO enterprise extends to a group of corporations associated in fact. *See Mohawk*

Tr. at 28-54. The Court has recently suggested, in passing and in *dicta*, that the definition of "enterprise" does not "foreclose the possibility" that there "might" be enterprises beyond those "specifically enumerated." *Boyle v. United States*, 129 S. Ct. 2237, 2243 n.2 (2009). But *Boyle* did not decide that question, let alone the more specific question presented by this Petition: whether a group of corporations associated in fact constitutes a RICO enterprise.

The question presented is exceptionally important. The "enterprise" element of a RICO offense is the primary feature that distinguishes RICO liability from other civil and criminal prohibitions. If there are no meaningful limitations on what entities can constitute an association-in-fact enterprise, then the differences between RICO and other liability regimes will dissolve and conduct that Congress had no intention of regulating under RICO will be swept within its domain. Without intervention by this Court, the Government and private parties will continue to misuse RICO in cases where it was never meant to apply.

The Court should intervene in this case, particularly in view of the draconian remedies sought by the Government, which illustrate the enormous consequences of expanded RICO liability. Lower courts, which have adopted a uniform but incorrect position on the definition of "enterprise," are unlikely to change course on their own, especially after this Court's *dicta* in *Boyle*. This Court should not allow its passing treatment of this critical issue to constitute the last word on the matter. Having expressed doubts in *Mohawk* about the propriety of

the very enterprise theory on which hinges the "most important civil RICO action that the Government has ever brought," 05-92 U.S. Pet. at 8, this Court should now squarely address whether a group of corporations can form an association-in-fact enterprise.

A. Congress Excluded Corporations From An Association-in-Fact Enterprise.

1. Section 1961(4) provides that a RICO "'enterprise'" "includes [1] any *individual*, partnership, *corporation*, association, or other legal entity, and [2] any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphases added). Congress expressly identified *both* individuals and corporations in the "legal entity" category of enterprises, but it identified *only* "individuals" in the association-in-fact category of enterprises. *See United States v. Turkette,* 452 U.S. 576, 581-82 (1981) (discussing the two categories of RICO enterprises). Given this disparate statutory language, a group of corporations cannot be an association-in-fact enterprise unless (1) the term "individuals" includes "corporations" or (2) the list of association-in-fact enterprises is not exhaustive *and* includes a group of corporations. As the government has conceded, the first possibility is untenable, given the distinct treatment of an "individual" and a "corporation" in the first part of the enterprise definition. *See* Brief for the United States as *Amicus Curiae* Supporting Respondents, *Mohawk Indus., Inc. v. Shirley Williams,* No. 05-465, at 6 (2006); *see also Mohawk* Tr., at 31 (statement of Roberts, C.J.) ("[W]hatever an individual is it's different than a

corporation."); 1 U.S.C. § 1 (distinguishing between "individuals" and "corporations"). The court of appeals focused on the second possibility, and held that the list of association-in-fact enterprises is not exhaustive and includes a group of corporations. That holding is contrary to the statutory language.

Congress expressly listed individuals, corporations, and all other legal entities as falling within the "legal entity" category of enterprise, but listed *only* individuals as falling within the association-in-fact category. As this Court has repeatedly explained, "where 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." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and alteration omitted)). The *Russello* canon applies with special force here because Congress chose to specify corporations (and other legal entities) as included in the first category of enterprises and to omit them from the other category *within the very same provision.*

The court of appeals nevertheless held that Congress's use of the term "includes" in the definition of enterprise, and its use of the term "means" in other definitional provisions of RICO, indicates that Congress intended to set out a non-exhaustive list of RICO enterprises, and to include a group of corporations as an association-in-fact enterprise. Pet. App. 26a. As this Court has explained, whether the word "includes" introduces an

exhaustive list depends on context. *See Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934). "The term 'includes' may sometimes be taken as synonymous with 'means'"; the term may also "import[] a general class, some of whose particular instances are those specified in the definition." *Id.* at 125 & n.1.

This Court recently suggested in passing that the use of that term in Section 1961(4) leaves open "*the possibility* that the term ['enterprise'] *might* include, in addition to the specifically enumerated entities, others that fall within the ordinary meaning of the term." *Boyle*, 129 S. Ct. at 2243 n.2 (emphasis added). This was *dicta*, because the alleged association-in-fact enterprise in *Boyle* was a group of *individuals*, and the sole issue before the Court was whether "an association-in-fact enterprise under [RICO] must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." *Id.* at 2241 (internal quotation marks omitted). For several reasons, moreover, the use of the term "includes" in Section 1961(4) does not expand the scope of an association-in-fact enterprise to encompass a group of corporations.[4]

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[4] Although Petitioner believes that the *dicta* in *Boyle* warrant full examination by the Court, Petitioner's position does not depend on a conclusion that RICO's definition of an association-in-fact enterprise is exhaustive. This Court could assume that the definition is non-exhaustive and hold that, whatever other types of association-in-fact enterprises might be possible, a group of corporations cannot form an association-in-fact enterprise because corporations are specifically included in the (continued...)

First, Congress used the term "includes" in three other definitional provisions in Section 1961, and each of those provisions is exhaustive. For example, Section 1961(10) states that "Attorney General" "includes" the Attorney General of the United States and his or her designees. 18 U.S.C. § 1961(10). Plainly, the term does not encompass other persons not described in the statute–such as the legal officers of state governments or other nations, or even private citizens–simply because the definition uses the word "includes." *See also id.* § 1961(3) ("'[P]erson' includes any individual or entity capable of holding a legal or beneficial interest in property."); *id.* § 1961(9) ("'[D]ocumentary material' includes any book, paper, document, record, recording, or other material."). Because Congress used both "means" and "includes" to introduce exhaustive definitions in other provisions of Section 1961, the use of "includes" in Section 1961(4) does not demonstrate that Congress intended its definition of "enterprise" to be non-exhaustive.

Second, Congress used the phrase "including but not limited to" for the purpose of introducing non-exhaustive lists in Section 1964(a). Because Congress used this specific terminology to introduce a non-exhaustive list, a binary comparison of the words "includes" and "means" cannot determine whether the definition of enterprise is exhaustive. *See Mohawk* Tr., at 42-43 (statement of Scalia, J.) (observing that there is a "big difference" between

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legal-entity category of enterprises but omitted from the association-in-fact category.

statutes that use the term "means" to introduce some definitions and "includes" for others and statutes such as RICO that contain a third formulation such as "includes . . . without limitation"). Instead, because the word "includes" is used to denote an exhaustive list in other definitional provisions of Section 1961, the word should be given the same meaning in Section 1961(4). *See, e.g., U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 460 (1993) ("Presumptively, identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks and citation omitted)).

This Court recently held that a definition introduced by the term "includes" is exhaustive. *See Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). The statute at issue in *Carcieri* provided that the term "Indian" "shall include" various categories of persons. *See* 25 U.S.C. § 479. The United States argued that introducing the definition of "Indian" with the phrase "shall include" meant that there was a gap that the agency could fill with regulations. *Carcieri*, 129 S. Ct. at 1066. Despite the fact that other defined terms were introduced with the more restrictive phrase "shall be construed to refer to," 25 U.S.C. § 479, the Court held that Congress had "explicitly and comprehensively defined the term ['Indian'] by including only three discrete definitions." *Carcieri*, 129 S. Ct. at 1066. Similar reasoning supports the conclusion that the term "includes" in Section 1961(4) is exhaustive.

Third, even if Congress's use of the term "includes" could be interpreted to render the definition of an association-in-fact enterprise non-

exhaustive, Congress expressly included corporations in the legal entity category of enterprise while omitting them from the association-in-fact category of enterprise in the very same provision. If Congress had intended to include corporations and other legal entities in the "association-in-fact" category, it easily could have done so, either by repeating the list from the first category, or by using the word "persons" instead of "individuals." *See* 18 U.S.C. § 1961(3) (defining "person" to include "any individual or entity"). Given the stark contrast in the statutory language used to define the two categories of enterprise, the word "includes" has to do more work than it can bear to expand a "group of individuals associated in fact" to mean "a group of corporations associated in fact."

Nothing about Congress's description of the two categories of enterprises suggests that Congress intended to "import[] a general class" of association-in-fact enterprises, *see Helvering*, 293 U.S. at 126 n.1, that would include the very entities that it listed only in the first "legal-entity" category. *See Mohawk* Tr. at 51 (noting "the peculiarity of this definition[,] in which, although it starts out with the word includes, the[re] follows [a] listing, A, B, C, and D, and then it repeats one, *and only one*, of the items on the list and says groups of those items, i.e., individuals, are included" (emphasis added)); *see also id.* at 42 (Alito, J.) ("[T]he only thing that seems possibly to be omitted from the list is what's involved here, which is a group consisting of a corporation or . . . other legal entity . . . and natural persons.").

2. This reading of the statutory text is reinforced by consideration of the purpose of RICO.

Far from viewing corporations as a threat that needed to be addressed, Congress enacted RICO largely out of concern that corporations would be *victimized* by organized crime. *See Turkette*, 452 U.S. at 588-93 (discussing RICO's legislative history). This Court has observed that "the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime." *Id.* at 591. The first category of "legal entity" enterprises, *see id.* at 581-82, corresponds to that purpose, as it contemplates the use of a legitimate entity as a vehicle for the commission of criminal activity.

While "the infiltration of legitimate businesses was of great concern," *id.* at 593, Congress also "recognized that organized crime uses its primary sources of revenue and power—illegal gambling, loan sharking and illicit drug distribution—as a springboard into the sphere of legitimate enterprise," *id.* at 591. Congress sought to "strik[e] at the source of th[is] problem," *id.* at 593, by defining an enterprise to include a group of individuals "associated in fact" for the purpose of engaging in criminal activity, *see* Samuel A. Alito, Jr., *Racketeering Made Simple[r], in The RICO Racket* 1, 3-4 (G. McDowell ed. 1989) (explaining that RICO had "two aims: . . . to make it unlawful for *individuals* to function as members of organized criminal groups [and] . . . to stop organized crime's infiltration of legitimate business" (emphasis added)).

There is no indication that Congress intended RICO to be used to combat *corporations* engaged in joint criminal activity. "Congress did not enact RICO because it was concerned that criminal conspiracy

law, applied to corporations, didn't adequately touch interstate commerce." *Mohawk* Tr., at 36 (statement of Roberts, C.J.). Thus, Congress's purposes in enacting RICO confirm that the omission of corporations from the category of association-in-fact enterprises was intentional.

B. Other Principles Of Statutory Interpretation Support The Conclusion That A Group Of Corporations Is Not An Association-In-Fact Enterprise.

Even if the Court were to conclude that Congress's use of the term "includes" creates ambiguity as to whether a group of corporations can be an association-in-fact enterprise, the doctrine of constitutional avoidance, the unworkable nature of the corporations-associated-in-fact-enterprise theory, and the rule of lenity all support resolving that ambiguity by restricting the category of association-in-fact enterprises to those expressly identified in the definition.

1. Members of this Court repeatedly have expressed concerns about the breadth and vagueness of the RICO statute. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., concurring in part and dissenting in part) ("Numerous justices have expressed dissatisfaction with either the breadth of RICO's application, or its general vagueness at outlining the conduct it is intended to prohibit.") (internal citations omitted); *H.J., Inc.*, 492 U.S. at 255-56 (Scalia, J., concurring) (stating that the majority's failure to "remove[] the vagueness" concerning the "pattern of racketeering activity" "bodes ill for the day when [a constitutional

challenge to RICO] is presented" (internal quotation marks omitted)). As the cardinal feature of RICO, the "enterprise" concept must have a definite meaning. In the absence of discernible restrictions on what combinations or groupings can form an association-in-fact enterprise, RICO's reach becomes virtually unbounded and its application unduly vague. The "enterprise" definition should be read to avoid these constitutional difficulties. *See Gomez v. United States*, 490 U.S. 858, 864 (1989) (The Court "avoid[s] an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

2. Moreover, interpreting the term "includes" to expand the category of association-in-fact enterprises to a group of corporations undermines the basic structural requirements of RICO. In particular, allowing plaintiffs to allege that a group of corporations is an enterprise creates a serious risk of judicial misapplication of several of the critical elements in a RICO case. This case pointedly illustrates these risks.

RICO requires that an enterprise be distinct from the RICO defendant. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), this Court held that the statute requires "such distinctness" because RICO liability "depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their *own* affairs." *Id.* at 163 (internal quotation marks omitted). Unlike joint individual activity, such as the classic example of members of an organized crime family working together for the good of the

family, determining whether a group of corporate defendants are working for the benefit of the "enterprise" of corporations and not for the corporations individually is exceptionally difficult, if not impossible.

Here, for example, the government alleged and the court of appeals determined that defendants "join[ed] together in a decades-long conspiracy to deceive the American public about the health effects and addictiveness of smoking cigarettes." Pet. App. 6a. But the alleged scheme did not result in pooled proceeds that were allocated among the defendants; rather, each defendant sold its own brands of cigarettes in competition with the other defendants.

The most vivid illustration of this defect in the government's case is the alleged fraudulent scheme involving "light" cigarettes. The district court never once suggested that the affairs of the enterprise related in any way to "lights," because defendants never *coordinated* with respect to "lights." Instead, *all* of the alleged fraudulent speech to consumers about "lights" involved *parallel* conduct, where Defendants were vigorously competing against each other in the development, advertising, and marketing of such cigarettes. Pet. App. 971a-1256a, 1904a-1908a; *cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007) ("[C]onscious parallelism, a common reaction of firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence . . . is not in itself unlawful." (internal quotation marks and citation omitted)). Thus, there is simply no basis for concluding that the defendants were conducting or participating in the

conduct of the affairs of the so-called "enterprise," as opposed to their own affairs.[5]

Moreover, RICO "directly aims" at the "high ranking individuals" within an enterprise, *Cedric Kushner*, 533 U.S. at 165, who operate or manage the enterprise's affairs through racketeering. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). Because a corporation is inanimate, the legal fiction that a corporation has engaged in conduct that violates a statute must be based on the conduct of the individuals who acted on its behalf. *See Jordan v. Medley*, 711 F.2d 211, 217 (D.C. Cir. 1983) (Scalia, J.).

The government could have named individual corporate employees under the plain language of Section 1961(4) and sought to impose liability on defendants based on the actions of those individuals. *But see Cedric Kushner*, 533 U.S. at 166. Yet by pursuing the "corporations associated in fact" interpretation of Section 1961(4) without naming any

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[5] Including corporations in the category of association-in-fact enterprises has led to an even more direct evisceration of RICO's distinctness requirement. Recognizing that a deep-pocketed corporate defendant cannot also constitute the RICO enterprise, some plaintiffs have simply alleged that the corporation "associated" with its own agents: this tactic has created a circuit split that this Court previously recognized warranted its review. *See* Petition for a Writ of Certiorari, *Mohawk Industries, Inc. v. Williams*, No. 05-465, 2005 WL 2566486 (first question presented), *cert. granted*, 546 U.S. 1075, *dismissed and remanded*, 547 U.S. 516 (2006) (ordering further consideration in light of intervening decision).

individuals as members of the enterprise, the government portrays an "enterprise" that: (1) cannot be distinguished from any combination of employees of the corporate defendants, whether culpable or not; (2) cannot be assessed for continuity of its membership or its connection to any predicate acts; (3) provides no means of distinguishing "corporate" affairs from "enterprise" affairs; and (4) provides defendants with no notice of which specific employees were purportedly members of the "enterprise" and whose conduct they must defend. Moreover, for groups of corporations, there is an increased risk that an "enterprise" will impermissibly be found based merely on the existence of a "pattern of racketeering activity," even though the two are "separate element[s] that must be proved." *Boyle*, 129 S. Ct. at 2245.

Here, for example, because the Master Settlement Agreement with the States terminated the actual legal entities that allegedly were used to coordinate the frauds, *see* Pet. App. 1926a-1928a, the government was forced to allege an enterprise that the district court described as "[l]ike an amoeba" that "changed its shape to fit current needs," *id* at 1925a. The impossibility of identifying the "structure" of this so-called "enterprise" explains the district court's characterization. *See Boyle*, 129 S. Ct. at 2244 ("an association-in-fact enterprise must have a structure"—*i.e.*, "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose"). It likewise explains why the district court ultimately defined the enterprise in terms of the alleged "overarching scheme to defraud

smokers and potential smokers," Pet. App. 1949a, thereby committing the legal error of equating the enterprise with "the pattern of racketeering activity," *Boyle*, 129 S. Ct. at 2245 (citation omitted).

3. Finally, to the extent that the word "includes" creates ambiguity as to the scope of the "enterprise" definition, the rule of lenity requires that the definition be narrowly construed to exclude a group of corporations associated in fact from the definition of an enterprise. *See Mohawk* Tr., at 47 (statement of Scalia, J.) (asserting that the "enterprise" definition is "at least . . . ambiguous" and asking why the rule of lenity should not apply). The rule of lenity applies to RICO because the statute contains both civil and criminal penalties, and the law is clear that a statute must be interpreted "consistently" whether its application arises "in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also H.J. Inc.*, 492 U.S. at 255 (RICO "must, even in its civil applications, possess the degree of certainty required for criminal laws.") (Scalia, J., concurring).

Because the definition of enterprise clearly excludes a group of corporations or is at least ambiguous, this Court should grant certiorari and reverse the court of appeals' decision. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) (applying the "venerable rule [of lenity]" and concluding that the term "proceeds" in the federal money-laundering statue must be given the narrower of two equally possible meanings).

C. This Question Presented Is Exceptionally Important.

While RICO has been applied to a very broad array of conduct, that is no reason to avoid imposing limitations on RICO's reach that are well-supported by the language, structure, and purpose of the statute. Absent this Court's intervention, the RICO statute will be used, as it has been used in this case, to target corporations engaged in joint corporate activity and to seek remedies that threaten their existence. As Justice Breyer observed, construing the "enterprise" definition to include a group of corporations associated in fact "would RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity," something Congress "has no reason whatsoever for doing." *Mohawk* Tr., at 44. That threat is of nationwide concern because it will chill the types of "joint ventures" that this Court has emphasized "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

The absence of a circuit split should not prevent the Court from granting review. According to the government, this is the most important civil RICO action it has ever brought, *see* U.S. Pet. 05-92, at 8, and the case hinges on its flawed theory that a group of corporations associated in fact constitutes a RICO enterprise. This would not be the first case in which this Court granted review of an exceptionally important issue of federal statutory interpretation in the absence of a circuit conflict. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 294-95 & n.1 (2001) (Stevens,

J., dissenting) ("Just about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI. . . . No Court of Appeals has ever reached a contrary conclusion."); *see also* E. Gressman et al., *Supreme Court Practice* § 4.13, at 267 (9th ed. 2008) ("Many of the cases coming to the Supreme Court on certiorari involve the construction and application of acts of Congress . . . . In some of them it can be shown that there is a conflict among lower courts . . . . In others, however, the importance of the issue is the major basis for securing review."). This Court's review is especially necessary in this case, because the position of the lower courts is highly unlikely to change in light of this Court's *dicta* in *Boyle*. This Court's initial, passing suggestions on this vitally important issue, contained in a footnote, should not be the Court's last word.

Moreover, a circuit split exists on the related question of whether a corporation and its agents can constitute an association-in-fact enterprise. This Court granted review on that question, but did not decide it, in *Mohawk Industries, Inc. v. Williams*, No. 05-465, 2005 WL 2566486, *cert. granted*, 546 U.S. 1075, *dismissed and remanded*, 547 U.S. 516 (2006). A resolution in petitioner's favor here on the antecedent question of whether a corporation may form an association-in-fact enterprise would resolve that split.

Finally, this case presents an ideal vehicle to decide whether a group of corporations can constitute an association-in-fact enterprise. Unlike in recently denied certiorari petitions, in which it appeared that

the issue might not have been squarely pressed or passed upon below, *see Mohawk Indus., Inc. v. Williams*, 127 S. Ct. 1381 (2007); *Microsoft Corp. v. Odom*, 552 U.S. 985 (2007), in this case the issue was both "squarely pressed" *and* "passed upon below," *see* Pet. App. 17a-29a. Moreover, the correct definition of enterprise is a threshold issue that would dispose of the entire case, obviating the need for this Court to address the other errors in the judgment below.

II. The Court of Appeals' Decision Raises Additional Issues That Warrant This Court's Review.

A. The D.C. Circuit Applied The Wrong Standard Of Review To Factual Findings That Implicate the First Amendment.

This Court has held that an appellate court must conduct an independent review of the record when the availability of First Amendment protection depends on a trial court's factual findings. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). The D.C. Circuit nonetheless refused to conduct an independent review, and instead upheld the district court's factual findings under a deferential clearly erroneous standard of review. Pet. App. 16a. The court expressly acknowledged that it "may not have reached all the same conclusions as the district court" had it conducted an independent examination of the record. *Id.* at 67a.

This Court should review the D.C. Circuit's use of the clearly erroneous standard of review to

resolve a circuit split regarding when the First Amendment requires independent appellate review of factual findings. Three circuits hold, consistent with *Bose*, that independent appellate review is required whenever First Amendment protection depends on whether speech is false or misleading. *See Byrum v. Landreth*, 566 F.3d 442 (5th Cir. 2009); *Revo v. Disciplinary Bd. of the Sup. Ct. of N.M.*, 106 F.3d 929 (10th Cir. 1997); *Falanga v. State Bar of Ga.*, 150 F.3d 1333 (11th Cir. 1998). In contrast, the Fourth Circuit agrees with the D.C. Circuit that de novo appellate review is not required. *See SEC v. Pirate Investor LLC*, 580 F.3d 233 (4th Cir. 2009).

B. The Court of Appeals Erred By Denying First Amendment Protection to a Wide Range of Non-Commercial Speech.

The vast majority of the speech at issue in this case is non-commercial speech involving important public issues. *See, e.g.*, Pet. App. 654a-656a, 1540a-1541a, 1604a-1605a. Much of this speech opposed government action aimed at regulating the tobacco industry. *Id.* at 857a-861a, 1962a-1963a. Other statements involved opinions regarding issues of scientific debate or assertions of facts that are true under at least one reasonable interpretation. *Id.* at 654a-656a.

The D.C. Circuit's decision that none of this speech is entitled to First Amendment protection conflicts with decisions of this Court and other courts of appeals. For example, defendants' efforts to affect governmental regulation of the tobacco industry are protected under the *Noerr-Pennington* doctrine. *See*

E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961). Likewise, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Courts of appeals have held, contrary to the D.C. Circuit's decision, that fraud statutes prohibit only false factual statements, not opinions on "one side of a . . . scientific dispute," *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999), or ambiguous statements that are true under a "reasonable interpretation[]," *United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994).

C. The First Amendment Protects The Use Of Terms That Accurately Summarize Tar And Nicotine Levels.

The district court found that, as a result of a behavior known as "compensation," cigarettes with less tar—as measured by the Cambridge Filter Method—were not healthier than full flavor cigarettes. Pet. App. 972a. Based on this finding, the district court concluded that the use of the terms "light" and "low-tar" to describe low-tar cigarettes was fraudulent because those terms "*implied* a health benefit as a result of lowered tar levels." *Id.* at 1140a (emphasis added). The court of appeals affirmed this conclusion. *Id.* at 11a, 38a-39a.

Contrary to the court of appeals' decision, the use of these terms is not fraudulent because it accurately summarizes the results of the Cambridge Filter Method. Even if the use of these terms could

be interpreted to imply a health benefit, that is not the only reasonable interpretation that could be drawn from the terms. It is also reasonable to conclude that the terms "light" and "low-tar" simply described the cigarettes' relative tar levels as measured by the Cambridge Filter Method, and therefore fraud cannot be inferred from their use. *See, e.g.*, *Migliaccio*, 34 F.3d at 1525. Petitioner cannot be faulted for relying on the Cambridge Filter Method to measure tar and nicotine levels because the Federal Trade Commission *approved* "'factual statement[s] of the tar and nicotine content' . . . as measured by the Cambridge Filter Method." Pet. App. 47a (quoting *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 549 (2008)).

D. The Injunction, Which Is Not Predicated On The Likelihood Of Future RICO Violations, Improperly Tracks Broad Statutory Commands And Compels Speech.

A district court may issue an injunction under Section 1964(a) of RICO only to "prevent and restrain" future RICO violations. 18 U.S.C. § 1964(a). The D.C. Circuit's conclusion that the injunction meets this requirement cannot be squared with the 1998 Master Settlement Agreement between the tobacco companies and the States, or with the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009). The Master Settlement Agreement dismantled the industry organizations that allegedly operated the enterprise and prohibited defendants from engaging in future joint racketeering activity of

the type challenged by the government here. Pet. App. 1926a-1928a. Moreover, the newly enacted legislation prohibits or subjects to extensive federal oversight the activities on which the district court premised its future violations determination. *See* Pub. L. No. 111-31, 123 Stat. 1776. The injunction therefore exceeds the district court's authority under RICO and should be vacated.

The injunction is also impermissibly vague. It prohibits defendants from, among other things, making false statements and committing racketeering acts. Pet. App. 71a-72a. This vaguely worded injunction, which purports to prohibit defendants from violating the law, contravenes Federal Rule of Civil Procedure 65(d) and this Court's decisions interpreting that rule. Rule 65(d) requires "[e]very order granting an injunction . . . [to] describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d); *see Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945) (relying on Fed. R. Civ. P. 65(d) to vacate an injunction that prohibited violations "'as charged in the complaint'"). Despite this prohibition on referencing other documents, the D.C. Circuit nevertheless upheld the injunction by "read[ing]" it "in the context of the district court's legal conclusions and 4,088 findings of fact." Pet. App. 71a-74a.

Finally, the court of appeals erred in affirming the injunction's requirement that defendants express "corrective" public policy views through a media campaign in "major newspapers" and a "major television network." Pet. App. 83a. This aspect of

the injunction violates the First Amendment's prohibition on compelled speech. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977). It also conflicts with the Seventh Circuit's rejection of an order mandating corrective statements. *See Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be granted.

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