No.

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC. (f/k/a Philip Morris, Inc.),
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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 OF PHILIP MORRIS USA INC.

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QUESTIONS PRESENTED

The United States brought this suit against the major domestic tobacco companies in an unprecedented effort to use litigation to obtain extensive regulatory authority over the tobacco industry that, until recently, it had been unable to secure through the legislative process. The government alleged that defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, by associating together to operate a purported racketeering enterprise for the purpose of defrauding the public about the health risks of smoking. The government sought sweeping injunctive relief under 18 U.S.C. § 1964(a), which authorizes courts to "prevent and restrain" likely future RICO violations.

After a nine-month trial, the district court issued a 1,600-page opinion that adopted the government's proposed findings of fact virtually verbatim. The court found that defendants had committed RICO predicate acts of mail and wire fraud based primarily on decades-old statements that challenged the public-health community's consensus on the health risks of smoking—statements that, if not found by the court to be fraudulent, would have been protected by the First Amendment. Notwithstanding the First Amendment rights at stake in the district court's determination, the D.C. Circuit applied the highly deferential clearly erroneous standard of review to the district court's factual findings, and affirmed in all significant respects. Shortly after that decision was issued, the President signed the Family Smoking Prevention and Tobacco Control Act, which granted the government extensive regulatory authority over the tobacco industry.

The questions presented are:

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

(2) Whether federal courts may exercise injunctive jurisdiction under RICO and Article III of the Constitution where there is no statutory "enterprise" and any reasonable likelihood of future violations has been extinguished by, among other things, extensive federal tobacco legislation.

(3) Whether injunctions that track broad statutory commands may be upheld under Fed. R. Civ. P. 65(d) and this Court's precedent by "read[ing]" them "in the context" of the district court's voluminous factual findings.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Altria Group, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Holdings, Inc., Lorillard Tobacco Company, British American Tobacco (Investments) Ltd., The Council for Tobacco Research – U.S.A., Inc., and The Tobacco Institute, Inc., were defendants-appellants/cross-appellees 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 were intervenors-appellees/cross-appellants below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc., is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip Morris USA Inc. ("PM USA") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 566 F.3d 1095. Pet. App. 1a. The orders denying PM USA's petition for rehearing or rehearing en banc are unreported. *Id.* at 2182a, 2184a. The opinion of the United States District Court for the District of Columbia is reported at 449 F. Supp. 2d 1. *Id.* at 101a.

JURISDICTION

The court of appeals filed its opinion on May 22, 2009. It denied PM USA's timely petition for rehearing or rehearing en banc, and a related suggestion of mootness, on September 22, 2009. On November 10, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 19, 2010. No. 09A443. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, in relevant part:

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

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and Fed. R. Civ. P. 65 are set forth in the appendix to this petition.

STATEMENT

This extraordinary case grew out of the government's repeated efforts to acquire (unsuccessfully, until recently) extensive regulatory authority over the tobacco industry. The failure of those efforts led the President of the United States in 1999 personally to direct the Attorney General to file this litigation against the industry. This case was brought that year under 18 U.S.C. § 1964(a), a narrow provision of RICO that creates federal jurisdiction in government actions for prospective injunctive relief only. As a result, the case was tried before a single district judge and without a jury. That single judge then adopted the government's proposed legal theories and factual findings—spanning nearly two thousand pages—virtually verbatim: She found that PM USA and other tobacco companies had engaged in a pattern of "fraud" by persisting over several decades in questioning the public-health community's "consensus" concerning the health effects of cigarettes. On that basis, the trial court issued sweeping injunctions to govern defendants' future speech and conduct.

The D.C. Circuit affirmed in pertinent respects. Although it emphasized repeatedly that it might not have agreed with the district court's findings if it had reviewed them *de novo*, it affirmed those findings under the "highly deferential" clearly erroneous standard. In so doing, the D.C. Circuit contravened decisions of this Court—and departed from the decisions of other circuits—requiring independent appellate review where First Amendment rights are at stake, exacerbated the First Amendment and separation-of-powers problems inherent in the government's litigation strategy, and vastly expanded RICO beyond its jurisdictional scope and remedial limits. Indeed, the

decisions below give the government a ready-made pathway for using the courts to acquire regulatory power denied by Congress, to proscribe dissent on major questions of public concern, and to enforce vague speech limits through contempt—all without any substantial procedural protections beyond the agreement of a single judge who adopts the government's view verbatim. For each of those reasons, this Court's review is warranted.

1. On January 19, 1999, in his State of the Union address, President Clinton announced that the government would bring this litigation against the tobacco industry. By that time, the government had failed in its attempts to obtain regulatory authority over the industry through legislation and the administrative rulemaking process. First, in 1996, the FDA invoked its alleged authority under the Food, Drug and Cosmetic Act to promulgate extensive tobacco regulations. Then, in 1998, the government asked Congress to enact comprehensive tobacco legislation that would have expressly conferred this regulatory authority on the FDA. S. 1415, 105th Cong. (1997). Only after the courts rejected the FDA regulations as beyond the agency's authority (*see Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (1998), *aff'd*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)), and Congress declined to enact the proposed legislation, did the President personally direct the Attorney General to resort to the novel approach of seeking judicially imposed regulation by filing a RICO action against the entire tobacco industry.

The government fashioned its RICO suit to circumvent the procedural protections that otherwise would have been available to PM USA and its co-defendants. In particular, it determined not to pur-

sue claims under other RICO provisions potentially available to the government that permit remedies for *past* misconduct, such as (i) the criminal RICO provisions of 18 U.S.C. §§ 1962 & 1963, which require a jury trial and proof beyond a reasonable doubt, and (ii) the civil RICO treble-damages provisions of 18 U.S.C. § 1964(c), which require a jury trial and proof that the plaintiff actually suffered a nonremote injury. Instead, the government brought the case under Section 1964(a), a narrow injunctive provision that gives federal courts "jurisdiction to prevent and restrain violations" of RICO. The government thus placed its bid to secure prospective regulatory authority over the tobacco industry before a single district judge.[1]

2. The complaint alleged that, beginning in the early 1950s, PM USA and its co-defendants used two industry organizations—the Tobacco Institute ("TI") and the Council for Tobacco Research ("CTR")—to disseminate false information about the health risks of smoking and the addictive qualities of nicotine. Had the government been willing to test these allegations before a jury, it easily could have pleaded (though not so easily proven) an ordinary RICO case under the criminal provisions of Sections 1962-1963. It could have alleged that TI or CTR were the RICO "enterprise" and that defendants had operated that historical enterprise through a pattern of racketeering activity.

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[1] On the same day it filed this RICO action, the government announced that it had terminated a years-long grand jury investigation of the same allegations without seeking a criminal indictment. *See* Barry Meier & David Johnston, *How Inquiry into Tobacco Lost Its Steam*, N.Y. Times, Sept. 26, 1999.

By choosing to proceed solely under an injunctive provision aimed at "prevent[ing]" *future* violations of criminal RICO, however, the government foreclosed that option. That is because both TI and CTR were disbanded as a result of the 1998 Master Settlement Agreement ("MSA") between the tobacco industry and the States. In fact, that "landmark" agreement (*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001)) also had already prohibited defendants from jointly engaging in the decades-old conduct that formed the basis for the government's suit.

Because it could not plausibly contend that TI and CTR might operate as a future enterprise—a jurisdictional necessity under Section 1964(a)—the government was forced to contrive an entirely different, and novel, "enterprise." It alleged that the entire tobacco industry—companies that are direct competitors in a multi-billion-dollar market—was actually an "associated in fact" RICO enterprise. According to the government, defendants had formed this "enterprise" by informally coordinating their marketing and research efforts through (the by-then defunct) TI and CTR. The government further alleged that each defendant committed predicate acts of mail and wire fraud by making public statements—in legislative and regulatory forums and in their advertising—that were inconsistent with the public-health community's positions regarding the health risks of smoking. On the basis of these alleged RICO violations (the vast majority of which were decades old), the government sought injunctive relief to prevent defendants from engaging in future joint acts of racketeering, as well as the disgorgement of $280 billion in profits that defendants had earned from cigarette sales since 1971, the year after RICO was enacted.

After years of pre-trial proceedings, an interlocutory appeal in which the D.C. Circuit held that disgorgement is not an available remedy under Section 1964(a) (*United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir.), *cert. denied*, 546 U.S. 960 (2005)), and a nine-month bench trial, the district court issued a 1,600-page opinion that found that PM USA and each of its co-defendants had violated RICO. Pet. App. 101a.

The district court acknowledged that it "might be far better" for "Congress . . . [to] step up to the plate and address national issues with such enormous economic, public health, commercial, and social ramifications." Pet. App. 112a n.3. Nonetheless, the court granted the government broad regulatory control over the tobacco industry by adopting the government's enterprise theory and copying its proposed findings of fact virtually verbatim. Thus, according to the district court, each defendant had committed acts of mail and wire fraud over the course of five decades by purportedly making false statements about the health risks of smoking, the addictiveness of nicotine, whether "low tar" and "light" cigarettes present fewer health risks than other cigarettes, the dangers of secondhand smoke, and whether defendants marketed their products to youth. *Id.* at 103a.

The specific racketeering acts the court found included industry press releases expressing opinions on scientific studies evaluating the health effects of smoking (Pet. App. 2124a-28a), correspondence from defendants discussing such studies (*id.* at 2131a), congressional testimony by defendants' officers and employees (*id.* at 632a), and defendants' product advertisements. *Id.* at 2142a. The court repeatedly faulted defendants for making statements in those various formats that questioned the prevailing pub-

lic-health "consensus" regarding the health effects of cigarettes—including by raising questions about whether nicotine-dependence falls within the traditional definition of "addiction" (*id.* at 631a), whether the public-health community was correct to reject epidemiological studies indicating that "light" cigarettes present reduced health risks (*id.* at 1255a), and whether studies suggesting a link between secondhand smoke and lung cancer are scientifically sound. *Id.* at 1777a.

For example, the district court found that the "scientific and medical community's knowledge of the relationship of smoking and disease . . . achieved consensus in 1964," and that defendants were guilty of fraud because, "even after 1964, [they] continued to deny . . . the existence of such consensus." Pet. App. 357a. Similarly, the court accepted the government's position that the "issuance of the 1988 Surgeon General's Report . . . represented a consensus in the scientific and public health community" regarding the addictiveness of nicotine, and faulted defendants for "respond[ing] to the Report with a series of advertisements, press releases, and public statements attacking and denying the Surgeon General's findings." *Id.* at 654a-55a.

In reaching these conclusions, the district court rejected PM USA's First Amendment defense that the alleged racketeering acts were all either constitutionally protected statements PM USA made as part of the public-health debate about smoking or constitutionally protected commercial speech. Pet. App. 1960a. The court did not dispute that defendants' statements about the health effects of smoking would be entitled to First Amendment protection if they were either true or made in good faith, but instead rejected PM USA's First Amendment defense be-

cause, in the court's view, the statements in question were "fraudulent." *Id.*

The district court also found that, despite the existing injunctions implementing the MSA and disbanding TI and CTR, the defendants were likely to commit future RICO violations that warranted additional and sweeping injunctive relief. Pet. App. 2007a. The injunctions required defendants, among other things, to remove "light" and "low tar" descriptors from the packages and brand names of their cigarettes; to make corrective statements about the adverse health effects of smoking; and generally to obey the law by refraining "from committing any act of racketeering . . . relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes" and from making "any material false, misleading, or deceptive statement or representation." *Id.* at 2069a, 2070a, 2071a.

3. The D.C. Circuit affirmed in all significant respects. Like the district court, the court of appeals held that defendants had formed an "associated in fact" RICO enterprise by informally coordinating their marketing and research efforts. Pet. App. 17a. The D.C. Circuit also upheld the district court's factual findings that PM USA and its co-defendants had engaged in predicate acts of fraud, and that defendants were likely to commit additional RICO violations in the future. *Id.* at 46a, 60a.

In reviewing these factual findings, the D.C. Circuit applied the "highly deferential" clearly erroneous standard of review and rejected defendants' argument that this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), required independent appellate review. Pet. App. 67a. The court acknowledged that, had it un-

dertaken an independent examination of the record, it "may not have reached all the same conclusions as the district court." *Id.* Nonetheless, relying on *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), the court ruled that deferential review is appropriate even where, as here, the government's case is premised on speech that would be constitutionally protected if not found to be fraudulent. Pet. App. 52a.

The D.C. Circuit also upheld almost every aspect of the injunctive relief issued by the district court. The D.C. Circuit rejected defendants' argument that the district court had issued improper "obey the law" injunctions when it barred defendants from all future racketeering acts "'relating in any way to . . . cigarettes'" and all future "'false, misleading, or deceptive statement[s].'" Pet. App. 71a. According to the court, these injunctions—though "broad"—"sufficiently specify the activities enjoined . . . when read in the context of the district court's legal conclusions and 4,088 findings of fact." *Id.* at 73a, 74a.

Shortly after the D.C. Circuit issued its opinion, Congress enacted the Family Smoking Prevention and Tobacco Control Act ("FDA Act"), Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009), which subjects nearly every aspect of PM USA's business to extensive oversight by the FDA. PM USA sought rehearing en banc because, *inter alia*, this new statute removes any possible jurisdictional basis for prospective relief under Section 1964(a), and also filed a suggestion of mootness outlining specific provisions of the new law that eliminate any case or controversy under Article III. The court denied both motions. The recusal of four judges foreclosed the possibility of en banc rehearing without the support of a panel member.

REASONS FOR GRANTING THE PETITION

The government's use of injunctive litigation to obtain regulatory authority that it had been unable to secure through the legislative and administrative processes upended the First Amendment, distorted RICO beyond recognition, and vastly exceeded the remedial authority of Article III courts. Absent further review, the government will henceforth be free to pervert RICO into a device for evading the legislative process, penalizing and chilling public debate on scientific matters, and constraining constitutionally protected speech through vague and sweeping injunctions. And, the government will be able to do so without significant procedural protections beyond the findings of a single judge. For at least three reasons, additional review of this case is required.

First, the D.C. Circuit's application of the "highly deferential" clearly erroneous standard of review to the district court's factual findings conflicts with this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Under *Bose*, independent appellate review is required whenever the availability of First Amendment protection turns on a district court's factual findings. *Bose* therefore required the D.C. Circuit to undertake independent appellate review in this case because the district court based its RICO injunctions on statements that PM USA made about the health effects of smoking in legislative and regulatory forums and in its product advertising—statements that would have been constitutionally protected if not found to be fraudulent. The D.C. Circuit's application of clearly erroneous review deepens an existing circuit split as to whether *Bose* requires independent review of a trial court's finding that speech is not constitutionally protected because it is fraudulent. That issue warrants review

because the findings of a single district judge should not be permitted to chill an entire industry's participation in a public-health debate without surviving the rigorous appellate review required when First Amendment rights are implicated.

Second, the D.C. Circuit vastly overstepped the jurisdictional bounds of 18 U.S.C. § 1964(a) and Article III of the U.S. Constitution. Congress did not remotely contemplate that RICO might be used to penalize or chill disagreement with governmental orthodoxy on debatable scientific claims—be they whether exposure to second-hand smoke is harmful or whether "global warming" requires restructuring the American economy. Indeed, this Court long ago refused to countenance a similar use of the antitrust laws, on which RICO was largely modeled. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140, 141 (1961). Not surprisingly, the specific provisions of RICO on which the government relied do not support the government's theory.

Section 1964(a) confers limited federal court "jurisdiction to prevent and restrain" *future* violations of "Section 1962"—that is, future violations of criminal RICO. Section 1964(a) therefore precludes jurisdiction unless the government demonstrates not only a violation of the underlying criminal provisions of RICO but also that such a violation is sufficiently likely to recur that it warrants injunctive relief. The government could satisfy neither condition in this case, because the statutory definition of "enterprise" (18 U.S.C. § 1961(4)) unambiguously excludes the "associated in fact" enterprise that the government posited here—a group of unaffiliated, competitor *corporations*. The only entities that might have satisfied that definition (TI and CTR) are defunct, and thus scarcely can serve as vehicles for *future* RICO

violations. In any event, even if defendants properly could be treated as an "associated in fact" RICO enterprise, any reasonable probability that defendants would use that "enterprise" to commit future RICO violations was extinguished by the MSA and FDA Act.

Beyond that, to satisfy the case-or-controversy requirement in this suit seeking injunctive relief, the government was required to establish that there is "a realistic threat" that the challenged activity would recur in "the reasonably near future." *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8, 108 (1983). At a minimum, the enactment of the FDA Act shortly after the D.C. Circuit issued its decision clearly removed any doubt that might have subsisted on the "future violations" question. This new statute not only grants the FDA "primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products" (§ 3(1)) and imposes a stringent new regulatory framework on the tobacco industry, but also expressly addresses practices at issue in this suit. This is particularly obvious with respect to use of certain descriptors, such as "light" or "low tar," which are the subject of one of the injunctions in this case. Effective June 2010, the FDA Act flatly prohibits the use of such descriptors and thus manifestly forecloses any possibility that the government will "suffer future injury" as a result of this proscribed (and never-to-be-repeated) marketing practice.

Finally, the vaguely worded "obey the law" injunctions entered by the district court and upheld by the D.C. Circuit are profoundly flawed. Fed. R. Civ. P. 65(d) and this Court's precedent require that the language of an injunction provide meaningful guidance regarding its scope; that guidance must come

from the face of the injunction itself and not from some "other document." The D.C. Circuit nevertheless explicitly relied on the district court's "legal conclusions and 4,088 findings of fact" (Pet. App. 74a)—which take up nearly an entire volume of the *Federal Supplement*—to define the scope of the district court's overbroad injunctions. Because that ruling so clearly contravenes the language of Rule 65(d) and this Court's cases, the Court may wish to consider summary reversal.

I. THE COURT OF APPEALS' APPLICATION OF THE HIGHLY DEFERENTIAL CLEARLY ERRONEOUS STANDARD OF REVIEW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

This Court has held that, "in cases raising First Amendment issues," an "appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted). In such cases, appellate courts are "not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Id.* at 509-10 (internal quotation marks omitted).

Notwithstanding *Bose*'s seemingly unambiguous holding that independent appellate review is required *whenever* First Amendment rights are at stake, the circuits are divided about the scope of this independent-review requirement. This Court's review is warranted to resolve this longstanding division among the circuits on an issue that has pro-

found implications for both fundamental First Amendment rights and the outcome of this litigation.

A. The Decision Below Deepens An Existing Circuit Split Regarding The Scope Of *Bose*'s Independent Appellate Review Requirement.

1. In *Bose*, a product-disparagement action brought against a magazine publisher, this Court held that the First Amendment required the court of appeals to undertake an "independent examination" of the district court's factual finding that the publisher's allegedly false statements about the plaintiff's product were made with actual malice. 466 U.S. at 499. Because the publisher's statements would be constitutionally protected unless made with actual malice, the Court explained that "[a]ppellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Id.* at 514. This "rule of independent review," the Court emphasized, "assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact." *Id.* at 501.

In subsequent cases, this Court made clear that *Bose*'s independent appellate review requirement also applies in other settings where the availability of First Amendment protection turns on a factual finding made by a lower court or administrative agency. One such setting is where the availability of First Amendment protection depends on whether the defendant's speech was false or misleading. In *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), for example, the Court reviewed without deference, and reversed, the finding of a state agency that it was misleading

for an attorney to advertise herself as a certified accountant and a certified financial planner. *Id.* at 143-49. The Court found that those designations were not misleading and therefore could not constitutionally be proscribed because, under the First Amendment, "only false, deceptive, or misleading commercial speech may be banned." *Id.* at 142.

Similarly, in *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), the Court undertook de novo review in reversing the Illinois Supreme Court's finding that it was misleading for an attorney to state on his letterhead that he was a certified civil trial specialist. *Id.* at 108 (plurality op. of Stevens, J.); *id.* at 111 (Marshall, J., concurring in the judgment). The Court found that the statement was not misleading and that it therefore was constitutionally protected commercial speech that could not be prohibited. *Id.* at 110 (plurality op. of Stevens, J.); *id.* at 111 (Marshall, J., concurring in the judgment); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) ("our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court").

2. Despite this Court's seemingly clear holdings in *Bose* and its progeny, lower courts are divided about the circumstances in which the First Amendment requires independent appellate review of a factual finding that speech is false or misleading. While some circuits have faithfully implemented *Bose* by undertaking independent appellate review whenever a district judge or jury has found that speech is not constitutionally protected because it is false or misleading, other circuits, including the D.C. Circuit in

the decision below and earlier cases, have refused to apply independent review in many such circumstances.

The Fifth, Tenth, and Eleventh Circuits all apply independent appellate review whenever the availability of First Amendment protection depends on whether speech is false or misleading. In *Byrum v. Landreth*, 566 F.3d 442 (5th Cir. 2009), for example, the Fifth Circuit preliminarily enjoined on First Amendment grounds a Texas statute that prohibited unlicensed persons from holding themselves out as interior designers. *Id.* at 449. Citing this Court's decisions in *Bose* and *Peel*, the Fifth Circuit explained that it had a "duty to determine as a matter of law whether the inherent character of a statement places it beyond the protection of the First Amendment" (*id.* at 448 n.5 (internal quotation marks omitted)), and found that the commercial speech in question was constitutionally protected because it was, at most, only potentially misleading. *Id.* at 448.

Similarly, in *Revo v. Disciplinary Board*, 106 F.3d 929 (10th Cir. 1997), the Tenth Circuit held that a New Mexico bar rule that restricted attorneys' direct-mail advertising violated the First Amendment. *Id.* at 936. In accordance with its "obligation to make an independent examination of the whole record," the court found that the advertisements in question were not false or misleading and were therefore constitutionally protected commercial speech. *Id.* at 932, 933; *see also Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1347 (11th Cir. 1998) (applying de novo fact review in a case challenging the constitutionality of restrictions on attorney solicitations that the State defended on the ground that the solicitations were misleading).

The D.C. Circuit and Fourth Circuit, in contrast, have refused to undertake de novo appellate review in cases where a district court found that speech was not constitutionally protected because it was false or misleading. In *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), the D.C. Circuit declined to conduct an independent examination of a district court's finding that a cigarette advertisement was deceptive, and instead applied the clearly erroneous standard of review. *Id.* at 42. While conceding that "findings of tendency to deceive and inherent deceptiveness, which bear on whether commercial speech falls outside the scope of the first amendment, might arguably fall within th[e] category requiring heightened review," the D.C. Circuit deemed "the implications of *Bose* . . . far from clear." *Id.* at 42 n.3. The court ultimately concluded that "*Bose* does not change the standard of review in deceptive advertising cases." *Id.* The D.C. Circuit has reaffirmed its position in subsequent decisions. *See Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000); *see also SEC v. Pirate Investor LLC*, 580 F.3d 233, 242 (4th Cir. 2009) (refusing to apply independent review to factual findings in a securities fraud class action).

3. In this case, the D.C. Circuit exacerbated this existing circuit split—and disregarded this Court's decisions in *Bose* and its progeny—when it relied on its earlier *Brown & Williamson* decision to apply the "highly deferential" clearly erroneous standard of review to the district court's factual findings. Pet. App. 67a. The court of appeals applied that deferential standard of review over PM USA's objections even though the district court's findings imposed RICO liability on PM USA based on speech that would have been constitutionally protected had it not been found by the district court to be fraudulent. Indeed,

the vast majority of the district court's findings pertained to statements that PM USA made as part of the public-health debate about smoking and that questioned the emerging public-health consensus about the health risks of smoking. *See, e.g., id.* at 1750a (faulting defendants for making "public statements denying the linkage" between secondhand smoke and disease).[2] As long as these statements were true or made in good faith, they fall squarely within the First Amendment's Speech and Petition Clauses, which provide constitutional protection for "debate on public issues" (*N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) and efforts to influence governmental policy. *Roth v. United States*, 354 U.S. 476, 484 (1957). The district court's remaining findings were premised on PM USA's commercial speech (*see, e.g.*, Pet. App. 2142a), which is likewise constitutionally protected when "truthful." *In re R.M.J.*, 455 U.S. 191, 203 (1982).

The D.C. Circuit's application of the clearly erroneous standard of review is flatly at odds with the independent appellate review requirement established by this Court's cases. Indeed, as this Court explained in express reliance on *Bose*, "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," and an appellate court must therefore "decide for [itself] whether a given

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[2] *See also, e.g.*, Pet. App. 1778a (finding that PM USA had not "fully acknowledge[d]" the health risks of secondhand smoke because it stated on its website that it did not "take a position" on the issue and that "the public should follow the recommendations of the public health authorities"); *id.* at 633a (faulting PM USA for submitting a letter to Congress stating that "nicotine could be described as addictive only if it caused smokers to experience 'intoxication, pharmacological tolerance, and physical dependence'").

course of conduct falls on the near or far side of the line of constitutional protection." *Hurley*, 515 U.S. at 567 (citing *Bose*, 466 U.S. at 503). The D.C. Circuit's deferential review of the district court's factual findings is also inconsistent with the decisions of the Fifth, Tenth, and Eleventh Circuits. *See Byrum*, 566 F.3d at 448 n.5; *Falanga*, 150 F.3d at 1347; *Revo*, 106 F.3d at 932. The approach of those circuits faithfully applies the teachings of *Bose*, which requires independent appellate review *whenever* potentially erroneous factual findings may serve as the basis for "a forbidden intrusion on the field of free expression." 466 U.S. at 499.

B. The Question Presented Has Profound Implications For Both First Amendment Rights And The Outcome Of This Exceptionally Important Case.

There are compelling First Amendment reasons for this Court to grant review to resolve this deep and irreconcilable conflict among the circuits and to ensure that every court of appeals is properly applying the important constitutional principles set forth in *Bose* and its progeny. As this Court recognized in *Bose* and reiterated in later decisions, a trial court judge or jury should not have the virtually unreviewable authority to make factual findings that deny a defendant its fundamental First Amendment freedoms. The "stakes—in terms of impact on future cases and future conduct—are too great" in cases implicating the freedom of speech to "entrust" such determinations "finally to the judgment of the trier of fact." *Bose*, 466 U.S. at 501 n.17; *see also Hurley*, 515 U.S. at 567. Yet, that is precisely what takes place in the D.C. Circuit, where a defendant can be denied its First Amendment rights based on the effectively

unreviewable findings of a single district judge (or even an administrative agency).

Resolution of this question would be particularly appropriate in this case for a number of reasons. First, the government took the unprecedented step of invoking civil RICO to secure sweeping regulatory authority over the tobacco industry that, until recently, Congress itself had repeatedly rejected—and did so at the direction of the President rather than the professional (and politically insulated) prosecutors traditionally responsible for making such decisions. The First Amendment concerns generated by this litigation strategy are particularly acute because the district court used its largely unreviewed factual findings as a basis for issuing injunctive relief that imposes a prior restraint upon defendants' future public statements about the health effects of smoking. Given the vagueness of those injunctions, PM USA is left to guess about the health-related statements it is permitted to make, and—due to the ever-present threat of a contempt finding—will be pressured to remain silent even when it has a good-faith basis for speaking. Additional First Amendment problems are inherent in the government's authority under the district court's injunctions to compel PM USA to make so-called "corrective" statements about its products in newspapers and other forums. The factual findings supporting such constitutionally doubtful relief should receive especially careful scrutiny. *See Hurley*, 515 U.S. at 573 ("one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'").

Second, it is particularly important for this Court to resolve this circuit split because the circuits' differing approaches encourage plaintiffs (and espe-

cially the government) to pick and choose where to bring deceptive advertising actions and similar claims implicating First Amendment rights. The government could have brought this suit in any one of a number of different districts. Had it done so in a district within the Fifth, Tenth, or Eleventh Circuits, the appellate review of the district court's factual findings would have been far more rigorous than the deferential review undertaken by the D.C. Circuit. The availability of fundamental First Amendment freedoms should not depend on a plaintiff's tactical forum-selection decisions.

Third, the circuit conflict is squarely implicated here, where independent appellate review would likely have altered the outcome of the case. As the D.C. Circuit itself acknowledged, if it had applied independent appellate review, it may have been required to reject a number of the factual findings on which the district court premised its issuance of injunctive relief. *See* Pet. App. 67a ("While we may not have reached all the same conclusions as the district court, under the highly deferential clearly erroneous standard the district court's factual findings have sufficient evidentiary support.").

Several of the district court's most important factual findings are threadbare and contradict findings reached in other cases, including its findings on specific intent and the alleged falsity of defendants' statements about "light" cigarettes and secondhand smoke. As to specific intent, for example, the district court failed to identify a single corporate employee who made a statement that he or she did not personally believe to be true and instead mixed and matched conflicting statements by different corporate employees to find that unnamed senior corpo-

rate officers (and hence defendant corporations) possessed the requisite intent. Pet. App. 1976a.

Equally flimsy is the district court's finding that it was fraudulent for PM USA to use descriptors such as "low tar" and "light" in marketing cigarette brands that have lower tar and nicotine yields than other brands under a standardized government testing methodology. Pet. App. 1255a. The district court found these descriptors to be misleading because smokers purportedly "compensate" for the lower nicotine yields of those cigarettes by inhaling more deeply, taking more puffs, or smoking more cigarettes. *Id.* But the Federal Trade Commission approved the testing methodology as an accurate means of conveying comparative tar and nicotine information to the public. C.A. App. 2480. Moreover, the possibility of smoker "compensation" has been widely known to the government and courts for decades (*FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981, 985 (D.D.C. 1983), *aff'd in part*, 778 F.2d 35 (D.C. Cir. 1985)), and several courts have concluded that "compensation" does not undermine the accuracy of the standardized government testing methodology. *See Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 627 (D.N.M. 2007) ("a significant number of persons . . . received the promised lower tar and nicotine from Marlboro Lights cigarettes"); *Pearson v. Philip Morris, Inc.*, 2006 WL 663004, at *7 (Or. Cir. Ct. Feb. 23, 2006) (same).

Similarly, the district court found that it was fraudulent for PM USA to dispute the existence of a link between secondhand smoke and lung cancer after a scientific consensus purportedly emerged on the issue in 1986. Pet. App. 1777a. But, in *1998*, another district court found that the EPA did not have "sufficient evidence to conclude [secondhand smoke]

causes cancer in humans" because there were a "significant number of studies and data which demonstrated no association between [secondhand smoke] and cancer." *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 438, 463 (M.D.N.C. 1998), *vacated on other grounds*, 313 F.3d 852 (4th Cir. 2002).[3]

There is accordingly a strong likelihood that the district court's factual findings were erroneous and would be set aside if reviewed under the standards prescribed by *Bose*. Of course, because the D.C Circuit has not undertaken that essential task, this Court need not itself determine at this time whether the district court's fraud findings in fact survive the required independent review. This Court need only address the applicable standard of appellate review, a purely legal question on which the D.C. Circuit and a minority of other courts have departed from this Court's clear teachings. That exceptionally important question is clearly presented in this extraordinarily important case. The Court should address it now.

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[3] Furthermore, several juries have returned verdicts finding that defendants did not violate RICO based on allegations similar to those asserted by the government in this case. *See Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, No. 98 CV 3287 (E.D.N.Y. verdict returned 2001) (federal RICO); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, No. 97-CV-1422 (N.D. Ohio verdict returned 1999) (federal and state RICO).

II. THE COURT OF APPEALS' HOLDING DISREGARDS THE JURISDICTIONAL BOUNDS OF RICO AND ARTICLE III.

Neither the text nor the history of RICO supports the government's use of that statute to impose regulation on an entire industry. On the contrary, the statute under which the government brought this case, 18 U.S.C. § 1964(a), merely confers a narrow grant of jurisdiction on district courts to enjoin likely future violations of the provisions of RICO. Thus, to establish jurisdiction under Section 1964(a), the government was required to demonstrate an underlying RICO violation that was sufficiently likely to recur in the future so as to justify an injunction. The government did not remotely do that: The text of RICO forecloses the government's view that a group of corporations can be an "associated in fact" enterprise, and the MSA and the FDA Act preclude any conclusion that future racketeering is likely. Further review of these important issues is warranted.

A. The Court Of Appeals' Conclusion That A Group Of Corporations Can Form An "Associated In Fact" RICO Enterprise Conflicts With The Plain Language Of RICO.

RICO creates two distinct categories of "enterprises." The statute provides that the term "'[e]nterprise' includes [1] any *individual*, partnership, *corporation*, 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); *see also United States v. Turkette*, 452 U.S. 576, 581-82 (1981). While the first category of "enterprises"—legal entities—expressly includes both corporations and individuals, the second cate-

gory—unions and groups of individuals associated in fact—plainly does not. *See also* 1 U.S.C. § 1 (distinguishing between "individuals" and "corporations"). Relying on its earlier decision in *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), the D.C. Circuit nevertheless held that groups of corporations can constitute an "associated in fact" RICO enterprise and that the government can therefore use RICO to obtain injunctive relief that grants it regulatory authority over an entire industry. According to the court of appeals, PM USA and its co-defendants had formed such an enterprise by informally associating with each other and coordinating research and marketing activities. Pet. App. 28a.

That conclusion is inconsistent with basic canons of statutory interpretation repeatedly reaffirmed by this Court. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) (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") (internal quotation marks omitted). Moreover, there is simply no indication in the statutory text or legislative history that Congress intended RICO to reach speech made by an informal group of corporations, especially with respect to an attempt to influence government policy relating to an industry as a whole. Many aspects of RICO were modeled on the federal antitrust laws (*see Sedima v. Imrex Co.*, 473 U.S. 479, 489 (1985)), and this Court has made clear that those laws "are not at all appropriate for application in the political arena"—even where the conduct in question involves "deception of the public, manufacture of bogus sources of reference, and distortion of public sources of information" as part of "a publicity campaign designed to influence governmental ac-

tion." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140, 141 (1961) (internal quotation marks and alterations omitted); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).[4]

The D.C. Circuit nonetheless held that a group of corporations can form an "associated in fact" enterprise based on Congress's use of the word "includes" to introduce the definition of "enterprise" in Section 1961(4), which, according to the D.C. Circuit, makes the list nonexhaustive. Pet. App. 27a. *But see* 18 U.S.C. § 1964(a) (using the phrase "including, *but not limited to*," when introducing nonexhaustive lists) (emphasis added). This Court has made clear, however, that, to the extent Section 1961(4) is nonexhaustive, it can encompass only "entities . . . that fall within the ordinary meaning of the term 'enterprise.'" *Boyle v. United States*, 129 S. Ct. 2237, 2243 n.2 (2009). A corporation by itself may be within the ordinary and defined meaning of a RICO "enterprise," but one would not think of a group of unaffiliated corporations informally cooperating in an effort to influence government policy (much less a group of *competing* corporations) as a single "enterprise." *See Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990) (an enterprise is an "ongoing 'structure' of persons associated through time, joined in purpose, and

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[4] The D.C. Circuit misconstrued the scope of this Court's decisions in *Noerr* and *Pennington*, holding—in direct conflict with the decisions of other circuits—that the *Noerr-Pennington* doctrine "does not protect deliberately false or misleading statements." Pet. App. 44a. *But see Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000); *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 160 (3d Cir. 1999).

organized in a manner amenable to hierarchical or consensual decision-making") (citing *Turkette*, 452 U.S. at 581-83). Indeed, while an "individual" or a "group of individuals associated in fact" would not come within the ordinary meaning of an "enterprise," RICO specifically added those terms to its definition of "enterprise." Congress, however, chose not to add to the definition of "enterprise" the peculiar concept of a "group of corporations associated in fact."

To be sure, no court of appeals disagrees with the D.C. Circuit's conclusion that a group of corporations can constitute an "associated in fact" RICO enterprise. But many of the relevant decisions cited by the D.C. Circuit simply rely on earlier decisions from other circuits and present little analysis of the issue—and none involved the efforts of an informal group of corporations to influence public policy. *See, e.g.*, *United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995) (relying principally on the D.C. Circuit's earlier decision in *Perholtz*); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989) (same). In any event, this Court has not hesitated to grant certiorari and reject an erroneous interpretation of a federal statute unanimously adopted by the circuits. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Jones v. United States*, 526 U.S. 227 (1999); *McNally v. United States*, 483 U.S. 350 (1987).

This case starkly illustrates the malleability of the "association in fact" concept if improperly extended to corporations. The government alleged that a group of corporations that are direct competitors nonetheless associated together to form a single RICO enterprise for the purpose of influencing the government's tobacco policy, and the government did so only because a more straightforward RICO the-

ory—that TI and CTR were the enterprise—was foreclosed by the prior dissolution of those entities pursuant to the MSA. RICO's plain statutory language makes clear that Congress did not intend to afford plaintiffs such unfettered discretion to select defendants to target for potential RICO liability.

B. Because The MSA And The Newly Enacted FDA Act Foreclose Future Racketeering, The District Court Lacked Jurisdiction To Issue Injunctive Relief.

The D.C. Circuit also overstepped the jurisdictional limitations of RICO and Article III when it upheld the district court's injunctive relief despite the profound regulatory changes that the MSA and newly enacted FDA Act imposed on the tobacco industry. Further review by this Court—or by the court of appeals, in the first instance—is warranted because the MSA and FDA Act extinguished the district court's jurisdiction. *See Am. Bible Soc'y v. Richie*, 522 U.S. 1011 (1997) (GVR'ing in light of newly enacted statute); *Bd. of Educ. v. Russman*, 521 U.S. 1114 (1997) (same).

The district court possessed jurisdiction under Section 1964(a) of RICO only to issue injunctive relief that "prevent[s] and restrain[s]" future RICO violations. 18 U.S.C. § 1964(a). To obtain injunctive relief, the United States was therefore required to establish a reasonable likelihood that defendants would commit future RICO violations. Pet. App. 61a. The district court concluded that the United States had satisfied that standard. *Id.* at 2007a. In upholding that determination, the court of appeals did not even attempt to reconcile its holding that defendants were likely to commit future RICO violations with

the MSA, which dismantled the industry organizations that defendants allegedly used to operate their enterprise in the past and also prohibited defendants from engaging in future joint racketeering activity of the type challenged by the government here. *Cf. Boyle*, 129 S. Ct. at 2245 n.4 (RICO applies only to jointly conducted racketeering activity).

Moreover, after the court of appeals issued its opinion, Congress dramatically altered the relevant regulatory landscape by enacting the FDA Act, which establishes new and extensive federal regulatory authority over nearly every aspect of PM USA's business, including its manufacturing and marketing of cigarettes. The Act provides that the FDA is to be the "primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products" (§ 3(1)); creates two new administrative bodies to implement the Act's detailed regulatory mandates (§§ 901(e), 917); and establishes "comprehensive restrictions on the sale, promotion, and distribution of [tobacco] products" in advance of further regulations to be promulgated by the FDA. §§ 2(6), 3(1).

Indeed, the FDA Act bans or subjects to extensive federal oversight the very activities on which the district court premised its future violations determination. For example, the "district court noted that . . . Defendants still . . . marketed 'low tar' cigarettes." Pet. App. 66a. But the Act now bans the use of "light" and "low tar" descriptors, effective June 2010, absent a finding by the FDA that a product "significantly reduce[s] harm." § 911(g)(1). The district court also found that "Defendants still . . . falsely denied manipulating nicotine delivery." Pet. App. 66a. The Act, however, forecloses any possibility of future nicotine manipulation by giving the

FDA broad authority to regulate nicotine in cigarettes and to require the submission of nicotine-related information to the government. §§ 904(a)(2), 907(a)(4).

In light of the extensive state and federal regulatory framework established by the MSA and the FDA Act, there is no reasonable likelihood that PM USA will engage in future joint racketeering activity of the type the district court found and on which it premised its forward-looking injunctive relief. The district court's injunctive relief is therefore unnecessary to "prevent and restrain" future RICO violations under Section 1964(a), and the government's strategic decision to use the litigation process to obtain regulatory authority over the tobacco industry was thus both unlawful and unwarranted. The injunctive relief that the government was nevertheless able to secure affords the district court a mechanism for inappropriately second-guessing the expert regulatory judgments of federal and state tobacco regulators.

Furthermore, the advent of the FDA Act so clearly changes the analysis of likely future events, and so thoroughly dispels any doubt that might have remained about the likelihood of future racketeering, that it calls into question not only the lower courts' statutory jurisdiction but also their constitutional authority under Article III. To satisfy the case-or-controversy requirement in this injunctive suit, the government was required to establish "a realistic threat" that the challenged conduct will recur in "the reasonably near future." *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8, 108 (1983). The government must meet this requirement throughout the duration of the litigation. *See Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). But the FDA Act, which gives the government the regulatory authority

it has long sought, precludes the government from making that showing. That is especially obvious with respect to the district court's injunction prohibiting the use of "light" and "low tar" descriptors. Effective June 2010, the FDA Act imposes outright prohibitions on "light" and "low tar" descriptors, and thus forecloses any possibility that the government will "suffer future injury" as a result of defendants' use of this proscribed and never-to-be-repeated marketing practice. *Lyons*, 461 U.S. at 105, 107 n.8, 108. Because the D.C. Circuit failed even to acknowledge the impact of this new landmark legislation on the required analysis, this Court's plenary review (or at the very least a GVR) is warranted.[5]

III. THE COURT OF APPEALS CONTRAVENED FED. R. CIV. P. 65(d) AND THIS COURT'S PRECEDENT WHEN IT RELIED ON THE DISTRICT COURT'S FACTUAL FINDINGS TO UPHOLD ITS VAGUE INJUNCTIONS.

The First Amendment concerns generated by the government's litigation strategy are underscored by the D.C. Circuit's use of an omnibus cross-reference to the district court's "4,088 findings of fact" to provide "context" for—and uphold—the district court's vaguely worded and overbroad injunctions. Pet. App.

[5] The provision in the FDA Act requiring that it not be construed to "affect any action pending in Federal, State, or tribal court" (§ 4(a)(2)) does not preserve the district court's jurisdiction. This declaration that the Act does not alter the substantive law applicable in pending cases leaves undisturbed the statutory requirement under § 1964(a) that jurisdiction is limited to forward-looking injunctive relief that "prevent[s] and restrain[s]" likely future RICO violations and the constitutional requirement that jurisdiction "to seek [an] injunction . . . depend[s] on whether [the plaintiff] [is] likely to suffer future injury" from the challenged conduct. *Lyons*, 461 U.S. at 105.

74a. The court of appeals' affirmance of those glaringly deficient and open-ended injunctions not only chills PM USA's protected First Amendment expression, but also directly contravenes Fed. R. Civ. P. 65(d) and this Court's well-settled precedent. Summary reversal is therefore appropriate. *See Schmidt v. Lessard*, 414 U.S. 473 (1974) (per curiam) (summarily reversing an impermissibly vague injunction).

Fed. R. Civ. P. 65(d) provides that, "[e]very order granting an injunction . . . must describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained." The plain language of that rule—as well as this Court's decisions—make clear that an imprecise injunction cannot be upheld by reference to other documents. *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'").

As this Court has explained, "the specificity provisions of Rule 65(d) are no mere technical requirements." *Schmidt*, 414 U.S. at 476. In fact, they serve two important functions: "prevent[ing] uncertainty and confusion on the part of those faced with injunctive orders, and . . . avoid[ing] the possible founding of a contempt citation on a decree too vague to be understood." *Id.* Where the language of an injunction is not sufficiently specific to ensure "that those who must obey [the injunction] will know what the court intends to require and what it means to forbid," the injunction cannot stand. *Int'l Longshoreman's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967); *see also id.* (vacating an injunction that ordered a union to "comply with and abide by [an arbitrator's] award" due to lack of specificity).

Here, the district court issued a series of sweeping "obey the law" injunctions that it found were necessary to "prevent and restrain" PM USA's likely future violations of RICO under 18 U.S.C. § 1964(a).[6] On appeal, PM USA argued that the injunctions were invalid because their language is simply too imprecise and overbroad to provide meaningful guidance regarding the acts restrained. The D.C. Circuit nevertheless upheld the district court's vaguely worded injunctions by "read[ing]" them "in the context of the district court's legal conclusions and 4,088 findings of fact." Pet. App. 74a.

The D.C. Circuit's reliance on the district court's factual findings to uphold its vague injunctions squarely contravenes Rule 65(d)—which prohibits courts from "referring to the complaint or other document" to define the scope of an injunction—and conflicts with this Court's controlling precedent. *See Hartford-Empire Co.*, 323 U.S. at 411; *Int'l Longshoreman's Ass'n*, 389 U.S. at 76. Indeed, by invoking the district court's 1,600 pages of factual findings to define the injunctions' scope, the court of appeals merely complicated PM USA's task of identifying the particular conduct enjoined by the district court. If left undisturbed, those hopelessly opaque injunctions will foster intolerable uncertainty for PM USA and, due to the ever-present specter of a contempt pro-

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[6] Those injunctions provide that defendants are "enjoined from committing any act of racketeering . . . relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes," and "from making . . . any material false, misleading, or deceptive statement or representation . . . that misrepresents or suppresses information concerning cigarettes." Pet. App. 2069a, 2070a.

ceeding, necessarily chill PM USA's constitutionally protected speech.

CONCLUSION

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

Respectfully submitted.

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