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IN THE

Supreme Court of the United States

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ALTRIA GROUP, INC.,

*Petitioner,*

v.

UNITED STATES OF AMERICA, et al.,

*Respondents.*

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

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PETITION FOR A WRIT OF CERTIORARI

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**QUESTION PRESENTED**

May a corporation be found to have the necessary specific intent to defraud in a RICO case without any evidence that any particular individual in the corporation had such specific intent?

**PARTIES TO THE  
PROCEEDING BELOW**

The parties in the Court of Appeals were petitioner Altria Group, Inc., Philip Morris USA 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., as defendants-appellants/cross-appellees; respondent United States of America, as plaintiff-appellee/cross-appellant; and 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, as intervenors-appellees/cross-appellants.

**RULE 29.6 STATEMENT**

Altria Group, Inc. has no parent corporation and there is no publicly held corporation with a 10% or greater ownership interest in Altria Group, Inc.

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Petitioner Altria Group, Inc. (“Altria”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of liability against Altria.

### **OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 566 F.3d 1095. Pet. App. 1a-100a.<sup>1</sup> The orders of the Court of Appeals denying rehearing and rehearing en banc are not reported. Pet. App. 2182a-2183a, 2184a-2185a. The opinion of the district court is reported at 449 F. Supp. 2d 1. Pet. App. 101a-2181a.

### **JURISDICTION**

The judgment of the Court of Appeals was entered on May 22, 2009. Petitioner’s timely petition for rehearing or rehearing en banc was denied on September 22, 2009. On November 10, 2009, the Chief Justice extended all parties’ time to file petitions for certiorari until February 19, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS INVOLVED**

The statutory provisions involved are 18 U.S.C. §§ 1341, 1343, 1961, and 1962. They are reproduced in the Statutory Appendix.

### **STATEMENT**

The RICO judgment against Altria was affirmed in the absence of any finding that any particular person

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<sup>1</sup> “Pet. App.” citations are to the appendix filed by Philip Morris USA Inc. on behalf of all of the defendant petitioners.

caused the predicate acts of mail fraud charged against Altria with a specific intent to further any fraudulent scheme. Instead, both courts below apparently embraced the notion that Altria could be found liable under RICO pursuant to an inference based on findings that other corporate participants in the alleged RICO enterprise committed other acts with specific intent to defraud. That holding, which effectively dispensed with the need to prove specific intent as to each corporate defendant, conflicts with the holdings of other Courts of Appeals and presents an important issue that warrants this Court's review.

#### **A. Proceeding Below**

In September 1999, the government brought this action against 11 tobacco companies, holding companies, and trade associations, alleging civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. After a nine-month bench trial, seven defendants (including Altria) were found liable. Pet. App. 101a-2181a. The Court of Appeals affirmed the district court's judgment, with exceptions not relevant here. Pet. App. 1a-100a.

#### **B. Altria Is Solely a Holding Company**

Altria is a publicly owned holding company with less than 40 employees. Pet. App. 482a-483a n.12; C.A. App. A9145.<sup>2</sup> Altria does not manufacture, sell,

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<sup>2</sup> "C.A. App." citations are to the Joint Appendix filed in the Court of Appeals.

or distribute cigarettes or any other product. C.A. App. A9145.

Altria owns Philip Morris USA Inc. (“PM USA”), as well as other companies, but Altria does not manage PM USA’s day-to-day affairs. C.A. App. A9146-47. PM USA has a separate board of directors which manages its business. C.A. App. A9146.

### **C. The Basis for Altria’s Liability Is Four Attorney Cease-and-Desist Letters**

The government alleged only nine predicate acts of mail fraud against Altria. Pet. App. 2151a-2156a, 2160a-2161a. The Court of Appeals affirmed on just four of them. Pet. App. 55a.

The four surviving predicate acts are all based upon cease-and-desist letters written by an in-house employment lawyer, Eric Taussig. Pet. App. 2152a-2154a; *see* C.A. App. A5655-56, A5664-65. The letters were sent to two former PM USA scientists, and sought compliance with PM USA confidentiality agreements. C.A. App. A5655-56, A5664-65. There is no dispute that the relevant confidentiality agreements were valid and had been violated.

### **D. There Is No Evidence That *Any* Officer or Employee of Altria Had Any Specific Intent to Defraud in Sending the Letters**

There is no evidence that Mr. Taussig had any intent to defraud in sending the cease-and-desist letters (as opposed to an intent to enforce valid confidentiality agreements). The Court of Appeals did not dispute this. Instead, it held that “the statute looks to the intent of the individual who *caused* the mailing, not the individual who drafted or

physically mailed it.” Pet. App. 56a (emphasis in original).

However, the record is equally devoid of evidence that anyone else at Altria caused the mailing with specific intent to defraud. Indeed, there is no evidence that anyone else at Altria caused the mailing. Thus, there is literally no evidence of specific intent to defraud with respect to any of the four remaining predicate acts.

**E. Before and at Trial, the Government Disclaimed Any Need to Prove That Any Individual Officer or Employee Had Specific Intent**

In its opening statement, the government stated that it would not attempt to show that any individual corporate representative had specific intent, but that it would rely instead on the corporation’s “collective knowledge”:

Every defendant in this case is a corporate entity. As Your Honor knows, a corporate entity is not like a natural living person. A natural person’s intent and knowledge, unlike a corporation, can often be determined from the words and actions of that single natural person alone. A corporation by contrast is a collective entity.

Therefore, the law recognizes that a plaintiff may prove a corporation’s knowledge and intent through the combined words and actions of the corporation officers, employees, agents and representatives.

Therefore, our proof will not focus on whether, if we are looking at a particular statement which we are alleging to be falsely and knowingly made, we are not going to focus on evidence that that particular representative knew or believed the statement to be false because that's immaterial. Rather, the government's proof will rest on the collective knowledge of the defendants' corporations' officers, employees, agents and representatives. In short, our proof will rest on the totality of the evidence. C.A. App. A9043.

The government reiterated this position throughout the trial. C.A. App. A9108, A9348.

**F. The Courts Below Upheld Altria's Liability Without Any Evidence That Anyone at Altria Had Specific Intent to Defraud**

The district court made no specific intent findings for the four remaining predicate acts. Indeed, it made no findings of specific intent on the part of Altria at all. Instead, following the government's lead, the district court made a generalized finding of specific intent on the part of all defendants, holding that "specific intent may be established by the collective knowledge of each defendant and of the enterprise as a whole." Pet. App. 1979a.

The Court of Appeals acknowledged that, to determine corporate intent, "we look to the state of mind of the individual corporate officers and employees who made, ordered, or approved the statement." Pet. App. 33a. It also stated that it was "dubious of the legal soundness of the 'collective

intent' theory." Pet. App. 41a. However, it nonetheless upheld the district court's finding of specific intent, saying:

Specific intent to defraud may be inferred where, as here, there is a pattern of corporate research revealing a particular proposition, for example, that smoking is addictive; an ensuing pattern of memoranda within the corporation acknowledging that smoking is addictive, even though the memoranda may or may not have gone directly to the executive who makes the contrary statement; and the corporate CEO or other official of high corporate status then makes a public statement stating that smoking is not addictive, contrary to the knowledge within the corporation. Pet. App. 40a.

Neither the district court nor the Court of Appeals made any finding that *anyone* at Altria (Mr. Taussig or anyone else) had any specific intent to defraud, or knew that the letters he sent were part of any fraud. Thus, the judgment against Altria cannot be sustained on any theory of intent inferred from "collective knowledge" at Altria – whether that theory is articulated as the government formulated it at trial, or as the Court of Appeals reformulated it on appeal.<sup>3</sup>

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<sup>3</sup> The decision below also cannot be sustained on any theory of piercing the corporate veil between Altria and PM USA, because both the government and the district court expressly disavowed such a theory. Pet. App. 1943a n.58.

Instead, the Court of Appeals appears to have concluded that Altria's liability could be predicated on the inferred specific intent of *other* corporate defendants. Mr. Taussig's lack of fraudulent intent did not preclude liability, the Court of Appeals said, "[g]iven that the district court permissibly inferred the corporate *Defendants'* intent from the intent of numerous high-level executives," and "given that it found that *Defendants'* 'caused' the mailings in order to further the scheme to defraud." Pet. App. 57a (emphasis added).

The Court of Appeals affirmed the district court's finding that Altria conspired to violate RICO based upon "the circumstantial inference that Altria conspired with the other Defendants to violate RICO." Pet. App. 57a. Missing, here again, was any evidence that anyone at Altria had the specific intent to defraud necessary to sustain this claim. *See, e.g., United States v. Dale*, 991 F.2d 819, 851 (D.C. Cir. 1993).

### **REASONS FOR GRANTING THE PETITION**

By finding that Altria had specific intent to defraud, without evidence that any officer or employee of Altria had any such intent, the courts below have raised important issues which should be reviewed by this Court.

In the first place, by holding that specific intent may be inferred from an aggregation of the knowledge and beliefs of other employees of the corporation, the courts below have placed themselves in conflict with other circuits. These circuits have held that the required state of mind must exist in the particular individual directing or carrying out the

wrongful conduct, and cannot be imputed based on the knowledge or beliefs of others. *See, e.g., Southland Sec. Corp. v. INSpire Solutions Inc.*, 365 F.3d 353, 366 (5th Cir. 2004); *Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F.2d 882, 886 n.2 (6th Cir. 1990); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435-36 (9th Cir. 1995); *Woodmont, Inc. v. Daniels*, 274 F.2d 132, 137 (10th Cir. 1959). This conflict among circuits calls for review and correction by this Court.

However, even if this Court were to uphold a “collective knowledge” approach to corporate specific intent, that would not suffice to impose liability upon Altria in this case. As to Altria, the government simply failed to present even “collective knowledge” evidence. Accordingly, as to Altria, there was a failure of proof even under the theory of specific intent espoused by the government at trial.

To affirm Altria’s liability, the Court of Appeals therefore appears to have fallen back upon the inferred specific intent of other defendants, saying that a finding of fraudulent intent in mailing the Taussig letters was appropriate “[g]iven that the district court permissibly inferred the corporate *Defendants*’ intent from the intent of numerous high-level executives,” and “given that it found that *Defendants* ‘caused’ the mailings in order to further the scheme to defraud.” Pet. App. at 57a (emphasis added).

This, however, violated the fundamental principle that “knowledge [and] intent . . . must be proven, not assumed, with respect to each defendant.” *Boim v. Holy Land Found. for Relief and Dev.*, 511 F.3d 707,



756 (7th Cir. 2007). This principle has been consistently applied in the RICO context. Courts have repeatedly held, for example, that criminal guilt under RICO must be proven “on the basis of [the defendant’s] own proven conduct, association is not enough.” *United States v. To*, 144 F.3d 737, 746 (11th Cir. 1998); *accord, e.g., United States v. Elliott*, 571 F.2d 880, 906 (5th Cir. 1978). *Cf. Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (in conspiracy cases, “extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass”). The Court should grant certiorari in order to make clear that guilt by association is not an acceptable standard of specific intent.

Unless reviewed by this Court, the holding below will dramatically expand the scope of the RICO statute where, as here, the government brings a far-reaching RICO case based upon allegations of mail fraud and wire fraud. Such predictability and notice as the mail fraud and wire fraud statutes afford are importantly bound up with the requirement that the government prove that each defendant had the specific intent to defraud. By watering down this requirement to the point of nonexistence in the case of corporations, the court below eliminated an important safeguard against the misuse of these sweeping statutes.

**CONCLUSION**

The petition of Altria Group, Inc. for a writ of certiorari should be granted. In the alternative, the judgment of the Court of Appeals should be vacated as to Altria Group, Inc., on the ground that no tenable approach to corporate specific intent can impose liability upon Altria Group, Inc., when no one at Altria Group, Inc. had such intent.

Dated: February 18, 2010

Respectfully submitted,

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