Supreme Court, U.S.
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In The
Supreme Court of the United States

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TOBACCO-FREE KIDS ACTION FUND, et al.,

Petitioners,

v.

PHILIP MORRIS USA INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

HOWARD M. CRYSTAL
Counsel of Record
KATHERINE A. MEYER
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

Counsel for Petitioners

Of counsel:
PROFESSOR G. ROBERT BLAKEY
William J. and Dorothy K. O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
Notre Dame, Indiana 46556
(574) 631-5717
*for identification only

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QUESTIONS PRESENTED

1. Whether RICO, which authorizes district courts to "prevent and restrain violations" "by issuing appropriate orders, including, but not limited to: ordering any person to *divest himself of any interest, direct or indirect, in any enterprise . . .* ," 18 U.S.C. § 1964(a) (emphasis added), allows the district court to consider, in a case concerning a massive and decades-long fraud involving a product so addictive that millions of consumers who want to quit are unable to do so on their own, requiring the cigarette company respondents to fund targeted public education and tobacco cessation programs should the court find such remedies necessary to "divest" them of their ill-gotten assets – addicted smokers.

2. Whether RICO, which authorizes district courts to "prevent and restrain violations" "by issuing appropriate orders, *including, but not limited to*" certain enumerated remedies, 18 U.S.C. § 1964(a) (emphasis added), allows the district court to consider ordering equitable remedies that include requiring the cigarette company respondents to fund targeted public education and tobacco cessation programs, or to disgorge their illegally-obtained profits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were granted intervention below, are 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 (hereafter "Public Health Advocates"). They have no parent companies, and do not issue stock.

Respondents are Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Altria Group, Inc., Lorillard Tobacco Co., British American Tobacco (Investments) Ltd., and Brown & Williamson Holdings, Inc. (hereafter "tobacco companies"), as well as The Council for Tobacco Research-USA, Inc., The Tobacco Institute, Inc., and Liggett Group, Inc. The United States is also a respondent here.

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OPINIONS BELOW

The opinions of the court of appeals are reported at 566 F.3d 1095 (Pet.App.1) and 396 F.3d 1190 (Pet.App.118). The district court's amended final opinion is not reported.[1] The court of appeals orders denying petitions for rehearing *en banc* are not reported. Pet.App.274, 276.

JURISDICTION

The court of appeals' final judgment was entered on May 22, 2009. The orders denying petitions for rehearing and rehearing *en banc* were entered on September 22, 2009. Pet.App.272-75. On December 15, 2009, The Chief Justice granted Petitioners' request for an extension of time to February 19, 2010 to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] The remedies section of the district court's opinion (Pet.App.208), and the final judgment and remedial order (Pet.App.252) are reproduced here. Citations to the district court's findings will refer to specific Findings of Fact ("FF___"), which are reproduced in the Joint Appendix ("C.A.App.") below. C.A.App.1704-3385. References to the district court's legal conclusions will also cite to the amended opinion reproduced in the Joint Appendix below. *E.g.*, Op.___ (C.A.App.___).

STATUTORY PROVISIONS INVOLVED

Section 1964 of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964, is set out in the Appendix. Pet.App.278.

STATEMENT OF THE CASE

In a case brought by the United States pursuant to its authority under 18 U.S.C. § 1964(b), the district court, in an exhaustive decision, concluded that the major manufacturers of cigarettes for decades engaged in, and continue to engage in, a massive coordinated campaign to deceive millions of American consumers, and particularly teenagers, about the toxicity and addictiveness of cigarettes. FF1-4088. The court further concluded that this misconduct violates RICO, and is likely to continue. Op.1498-1612 (C.A.App.3231-345). The court of appeals found no material error in these conclusions.

In an interlocutory ruling prior to the trial, Pet.App.118, and on review of the final judgment, Pet.App.1, the court of appeals ruled that regardless of the evidence before the court RICO § 1964(a) *precludes* the court from even considering whether to impose remedies requiring the tobacco companies to (a) fund targeted public education and tobacco cessation programs, or (b) relinquish to the government the profits they made from their illegal conduct. Because these rulings conflict with decisions of other courts of appeals, raise matters of exceptional

importance, and are inconsistent with this Court's precedents, the Public Health Advocates petition this Court for review.

A. The Interests Of The Public Health Advocates

The tobacco companies sell a product – cigarettes – that is extremely addictive and causes death and disease when used exactly as intended. FF510-33, FF828-40. To obtain new customers and keep them smoking in light of these realities, the record shows that the tobacco companies undertook a coordinated fraud to induce young consumers to begin smoking, to constantly attract new, young smokers to replace those who either manage to quit smoking or who, over time, die from smoking-related diseases, and to discourage and make it more difficult for smokers to quit. FF509-1763; FF2023-4034. As this Court has recognized, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). The district court found that "[c]igarette smoking and exposure to secondhand smoke . . . *kills nearly 440,000 Americans every year,*" or more than 1200 every single day – a number "substantially greater than the combined annual number of deaths due to illegal drug use, alcohol consumption, automobile accidents, fires, homicides, suicides, and AIDS." FF510 (emphasis added).

The Public Health Advocates are, as the district court observed, "major public health organizations" that have "long experience with smoking and health issues." July 25, 2005 Op.10-11 (C.A.App.1376-77). They intervened in this case to advocate for broader remedies than the government was requesting, *see* Pet.App.13-14, in light of their "clear interest in advancing the public health and in the remedies proposed in this case." Op.14 (C.A.App.1747); *see also* Pet.App.106 (describing intervenors' interests). Effective public education and tobacco cessation programs, would, as the district court observed, "unquestionably serve the public interest," Pet.App.249-50, and are vital to advancing the Public Health Advocates' interests.

B. RICO Section 1964

Congress enacted RICO to provide "'*new remedies* to deal with the unlawful activities of those engaged in organized crime.'" *United States v. Turkette*, 452 U.S. 576, 588 (1981) (quoting Pub. L. No. 91-452, § 1 (codified at 18 U.S.C. § 1961 note)) (emphasis added). To achieve RICO's remedial purposes, § 1964(a) confers broad authorization for district courts to:

> *prevent and restrain* violations of section 1962 . . . by issuing *appropriate orders*, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future

> activities or investments of any person . . . or ordering dissolution or reorganization of any enterprise.

18 U.S.C. § 1964(a) (emphasis added).

As the Senate Report explained, "[a]lthough certain remedies are set out [in § 1964], the list is not exclusive, and the *only limit* on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." S. Rep. No. 617, 91st Cong., 1st Sess. 160 (1969) (emphasis added). Accordingly, Congress has directed that RICO should "'be liberally construed to effectuate its remedial purposes.'" *Boyle v. United States*, 129 S. Ct. 2237, 2243 (2009) (quoting Pub. L. No. 91-452, § 904 (codified at 18 U.S.C. § 1961 note)). This Court has explained that "if Congress' liberal-construction mandate is to be applied anywhere, it is in section 1964, *where RICO's remedial purposes are most evident.*" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985) (emphasis added); *see also* 115 Cong. Rec. 9567 (1969) (RICO Senate sponsor John L. McClellan explaining that "the ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice [which] is not hindered by [this] bill").

C. Proceedings Below

1. The Lawsuit And The Interlocutory Appeal

The United States filed this civil RICO action in 1999, alleging, *inter alia*, that the tobacco companies have engaged in a massive fraudulent scheme designed to deceive, attract and addict consumers, almost all of whom start smoking cigarettes as children. C.A.App.794 (first amended complaint). Asserting violations of RICO § 1962(c) and § 1962(d), 18 U.S.C. §§ 1962(c)-(d), the government alleged that an order requiring the companies to fund public education and tobacco cessation programs, and to disgorge their unlawfully obtained profits, was necessary to redress the companies' misconduct. C.A.App.884-87.

Before the trial, the district court ruled that the equitable authority provided by RICO § 1964(a) includes the authority to require disgorgement. *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72, 77 (D.D.C. 2004); *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 149-52 (D.D.C. 2000). On interlocutory appeal of that decision a divided panel reversed. Pet.App.118. The majority concluded that § 1964(a) is "limited to forward-looking remedies that are aimed at *future* violations," and that disgorgement is thus impermissible because, in the majority's view, it is always a "backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." Pet.App.135 (emphasis added). The majority also rejected the argument that even if only

forward-looking remedies are permitted, disgorgement can be forward-looking by deterring further RICO violations. Pet.App.138.

Judge Tatel dissented on the grounds that the majority ruling could not be reconciled with this Court's precedents. Pet.App.176-85. He noted that in *Mitchell v. Robert DeMarco Jewelry, Inc.*, 361 U.S. 288, 291-95 (1960), for example, this Court ruled that a provision empowering the district court to "restrain violations" conferred "full equitable powers," which included requiring the defendant to disgorge *back* wages. Pet.App.183; *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) (authorizing remedy to "disgorge profits"). As Judge Tatel also observed, the majority decision also conflicted with many decisions of other courts of appeals, several of which have found that disgorgement *can* be granted under RICO § 1964(a), Pet.App.198-99, and others of which have often relied on *Porter* and *Mitchell* to "read general equitable jurisdiction into a variety of statutes that fail to provide explicitly for it." Pet.App.185-86. Judge Tatel further explained that even if the court were limited to remedies aimed at future violations, disgorgement can accomplish that purpose by deterring further misconduct. Pet.App.193-203. By a three-three vote, with three Judges not participating, the court of appeals denied *en banc* review, Pet.App.276, and this Court denied certiorari. *United States v. Philip Morris USA Inc.*, 546 U.S. 960 (2005).

2. The Trial And The District Court Ruling

During a nine-month trial during 2004-05, the government demonstrated that the tobacco company respondents have engaged in a massive fraud that has gone on for decades with devastating consequences for millions of Americans. The government demonstrated that cigarettes are harmful and addictive, and that the companies have long known but publicly denied both of these critical features of their product. FF509-1265. The government further demonstrated that, because of its addictive nature, millions of people who want to quit smoking cigarettes are unable to do so. FF871 ("Every year, an estimated seventeen million people in the United States attempt to quit smoking. Fewer than one and a half million, or 8%, succeed in quitting permanently").

The government also submitted undisputed evidence that the tobacco companies consider young addicted smokers to be financial assets that they seek to acquire and maintain through their marketing efforts. Thus, as one industry memorandum explained, the companies' marketing was designed to "[a]ttract a smoker at the earliest opportunity and let brand loyalty turn that smoker into a *valuable asset*." C.A.App.5490 (emphasis added). As another industry official candidly explained, "if we hold these YAS [Younger Adult Smokers] for the market average of 7 years, they would be worth *over $2.1 billion in aggregate incremental profit*." C.A.App.5948 (emphasis in original); *see also* C.A.App.5953 (the "value of

[younger adult smokers] compounds over time"). The government further demonstrated that in order for the tobacco companies to continue to obtain new smokers and keep existing smokers – *i.e.*, to acquire, and maintain, these long-term "[a]ssets," FF2735 – the companies falsely denied, and continue to deny, the adverse health effects of smoking and secondhand smoke, the addictiveness of their products and their manipulation of nicotine to further addiction, their youth marketing efforts, and their use of deceptive health descriptors such as "low tar" and "light" to induce consumers who wish to quit to continue smoking. *See* FF509-1763; FF2023-3862.

During the trial's remedy phase the government did not present evidence supporting disgorgement in light of the interlocutory ruling, but did present evidence to support the need for a targeted public education campaign as well as a tobacco cessation program. *See, e.g.,* C.A.App.1282-92; C.A.App.1275-80; *see also* C.A.App.1182-90.

In post-trial briefing, the Public Health Advocates argued that these remedies are consistent with the plain language of RICO, which expressly authorizes "appropriate orders" that will "divest" the violator of "any interest, direct or indirect," 18 U.S.C. § 1964(a), that it has obtained as a result of the unlawful acts. Post-Trial Brief of Plaintiff-Intervenors ("Post-Trial B.") (Sept. 1, 2005). The Public Health Advocates explained that the power of addiction makes smokers different from other victims of fraud because it is the addictive power of cigarettes that

forces them to continue to financially reward tobacco companies long after the fraud is exposed. *Id.* at 8-36. They further explained that the tobacco companies cannot reasonably challenge the unusual contention that addicted smokers are, in essence, an *asset* from which they continue to benefit, because the companies *own* documents demonstrate that they consider addicted smokers, and particularly young addicted smokers, to be vital long-term assets from which they receive dividends throughout the years these customers continue to purchase cigarettes to satisfy their addiction. *Id.*; *see, e.g.,* C.A.App.5490 (discussing turning customers "into a valuable asset").

The Public Health Advocates thus argued that the court should consider requiring the companies to fund public education to more effectively warn smokers and potential smokers, and to fund tobacco cessation programs targeting addicted smokers as a means of *divesting* the companies of their unlawfully obtained financial interest in the millions of Americans who, because they became addicted to cigarettes while the companies were engaging in fraud, continue to buy them on a regular basis, further enriching the coffers of the very same companies that defrauded them. Post-Trial B. at 26-31. The Public Health Advocates argued that such remedies would also have the effect of deterring further misconduct. *Id.*

In its final ruling, the district court made more than 4000 findings of fact to support its conclusion that the tobacco companies (a) "falsely denied, distorted and minimized the significant adverse health

consequences of smoking for decades"; (b) "concealed and suppressed research data and other evidence that nicotine is addictive"; (c) "falsely denied that they can and do control the level of nicotine delivered in order to create and sustain addiction"; (d) "falsely marketed and promoted low tar/light cigarettes as less harmful than full-flavored cigarettes in order to keep people smoking and sustain corporate revenues"; (e) "publicly denied what they internally acknowledged: that [second-hand smoke] is hazardous to nonsmokers"; and (f) "spent billions of dollars every year on their marketing activities in order to encourage young people to try and then continue purchasing their cigarette products in order to provide the replacement smokers they need to survive." FF509-1763; FF2023-3862. As the court summarized:

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

> suffering, soaring health costs, or the integrity of the legal system.

Op. 1500 (C.A.App.3233-34).

The court also found that cigarettes are the number one cause of premature, preventable death in this country, FF2703, but that because of the addictiveness of the tobacco companies' products it is extremely difficult to stop smoking, *e.g.,* FF868-81 – and that because their addicted customers die prematurely, the tobacco companies market cigarettes to young people *to serve as replacement smokers. See, e.g.,* FF2735 (noting a 1978 Philip Morris document titled "The Assets," reporting that the "percentage of smokers in the 17-24 year old age group is up, and the amount smoked per day per young smoker is also up"); FF2636 ("Less than one-third of smokers start after age 18"); FF2963-90 (Joe Camel campaign intended to, and succeeded in, getting young people to begin smoking).

Finally, the court concluded that despite a 1998 settlement with the states and other restrictions on their conduct the companies have continued, and are likely in the future to continue, their RICO violations. Op.1601-12 (C.A.App.3334-45); Op.1603 (C.A.App.3336) ("[t]he evidence in this case clearly establishes that Defendants have not ceased engaging in unlawful activity").

To remedy these violations, the court, *inter alia*, ordered the companies to both issue corrective communications regarding the true health effects of

cigarettes and make documents and other information concerning the companies' misconduct publicly accessible. Final Judgment and Remedial Order ("Final Order") §§ II.B-C (Pet.App.255-69). Although recognizing that the companies' misconduct was likely to continue, Op.1603 (C.A.App.3336), the court also issued a general injunction against further violations. Final Order § II.A.1 (Pet.App.253).[2]

The court recognized that additional equitable remedies, including targeted public education and tobacco cessation programs, "would unquestionably serve the public interest." Pet.App.240-50. However, the court nevertheless concluded that as a matter of law it could not consider the evidence regarding these remedies, or disgorgement, on the grounds that all of these remedies were barred by the court of appeals' interlocutory ruling. *Id.*

3. The Court Of Appeals' Final Ruling

On appeal, a *per curiam* panel affirmed the district court in all material respects, rejecting – with minor exceptions not relevant here – the companies' arguments as to the district court's liability findings and remedies. Pet.App.19-103. With regard to disgorgement and the additional remedies urged by the government and the Public Health Advocates, the

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[2] The court also prohibited descriptors that convey a misleading health message, such as "light" or "low tar." *Id.* § II.A.4 (Pet.App.255).

panel affirmed the district court on the grounds that such remedies were barred by the court's previous interlocutory ruling. Pet.App.107-16. The tobacco companies' petitions for panel rehearing and rehearing *en banc* were denied. Pet.App.272-75.

REASONS FOR GRANTING THE PETITION

In two opinions the court of appeals has ruled that RICO § 1964(a) severely restricts the scope of the district court's equitable authority to consider appropriate remedies in this case. There are compelling reasons for this Court to review these rulings.

First, the rulings below conflict with decisions of other courts of appeals in three respects. Two courts of appeals have ruled that disgorgement *may be* permissible under § 1964(a), which is squarely at odds with the interlocutory ruling in this case barring disgorgement under any circumstances. *See Richard v. Hoechst Celanese Chem. Group*, 355 F.3d 345, 354-55 (5th Cir. 2003); *United States v. Carson*, 52 F.3d 1173, 1181 (2d Cir. 1995). Seven other courts of appeals have concluded that statutes enumerating remedial powers similar to those contained in § 1964(a) grant the *full scope* of the court's equitable authority, which also presents a conflict with the D.C. Circuit's restrictive interpretation of § 1964(a) here. *See, e.g., United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058-61 (10th Cir. 2006) (finding that a statute empowering the district court to restrain violations

authorizes a disgorgement remedy). Seven courts of appeals have also concluded that equitable remedies such as disgorgement are *forward-looking* because they deter further misconduct, in conflict with the panel majority's ruling here that disgorgement is entirely backward-looking. *See, e.g., SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) (disgorgement "has the effect of deterring subsequent fraud").

Second, the magnitude of the fraud at issue here and its devastating consequences – illness and death for hundreds of thousands of Americans each year – provides an additional, independent basis for review. While important, the remedies the district court has imposed will by no means provide "complete relief," *Mitchell*, 361 U.S. at 291-92, and review is thus warranted to permit the district court to consider the *full scope* of its equitable power in fashioning those remedies that will best serve RICO's remedial purposes in this unique case.

Third, the court of appeals' holding that the district court has no authority even to consider evidence that requiring the tobacco companies to fund targeted public education and tobacco cessation programs is necessary as a means of divesting them of their ill-gotten gains – *i.e.*, addicted smokers unable to quit – conflicts with this Court's RICO and antitrust precedents, which provide that § 1964(a) authorizes a district court to "divest the association of the fruits of its ill-gotten gains," *Turkette*, 452 U.S. at 585, and thereby "eliminate the effects" of the legal violations. *Ford Motor Co. v. United States*, 405 U.S. 562, 578

(1972). The court's holding, and the interlocutory ruling barring disgorgement, also conflict with this Court's precedents explaining that a statutory grant of equitable authority like the one contained in § 1964(a) encompasses the full scope of a district court's equitable power. *See, e.g., Porter*, 328 U.S. at 398; *Mitchell*, 361 U.S. at 289-93.

I. THE COURT OF APPEALS' RULINGS CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

1. The interlocutory ruling barring disgorgement as a remedy under RICO § 1964(a) under any circumstances conflicts with the holdings of two other courts of appeals that have held that disgorgement *may* be awarded under § 1964(a) if tied to future unlawful conduct. *United States v. Carson*, 52 F.3d at 1181-82; *Richard v. Hoechst Celanese Chem. Group*, 355 F.3d at 355. In *Carson*, the Second Circuit explained that "[a]s a general rule, disgorgement is among the equitable powers available to the district court" in § 1964(a), and that the appropriate measure of disgorgement would be the "gains [that] are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d at 1181-82. The Fifth Circuit concurred with that interpretation in *Richard v. Hoechst Celanese Chem. Group*, 355 F.3d at 354-55; *see also, e.g., United States v. Private Sanitation Ind. Ass'n*, 914 F. Supp. 895, 900-01 (E.D.N.Y. 1996).

The panel majority in the interlocutory appeal here, in square conflict with these rulings, concluded that the remedial powers conferred by § 1964(a) "*do not extend to disgorgement in civil cases*." Pet.App.141 (emphasis added). As the majority explained, "[w]hile we avoid creating circuit splits when possible, in this case we can find no justification for considering *any* order of disgorgement to be forward-looking as required by § 1964(a)." Pet.App.142 (emphasis added).

2. Further, the rulings of the D.C. Circuit, Second Circuit and Fifth Circuit, which have all concluded that *any* § 1964(a) remedy must address *future* illegal acts, also conflict with rulings of seven other courts of appeals that, interpreting similar provisions in other federal statutes, have followed this Court's precedents in *Porter* and *Mitchell* by authorizing equitable remedies such as disgorgement or restitution *irrespective* of future violations. Most recently, in *United States v. Rx Depot, Inc.*, the Tenth Circuit ruled that § 332(a) of the Federal Food Drug and Cosmetics Act ("FDCA"), 21 U.S.C. § 332(a), which authorizes district courts "to restrain violations," empowered the court to award disgorgement irrespective of the defendant's future conduct. 438 F.3d at 1058; *see also id.* ("we do not think the presence of the term 'restrain' in a statutory grant of general equity jurisdiction is dispositive evidence of Congress' intent to limit remedies to those that are forward-looking"); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 223 (3d Cir. 2005) (authorizing restitution under FDCA); *United States v. Universal Mgmt. Servs., Inc.*,

191 F.3d 750, 762 (6th Cir. 1999) (restitution authorized under the FDCA). Numerous other courts of appeals have reached the same conclusion in interpreting other similar statutes. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (interpreting the Federal Trade Commission Act); *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76 n.9 (3d Cir. 1993) (Commodity Exchange Act); *ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1184-85 (1st Cir. 1980) (Motor Carrier Act); *CFTC v. Hunt*, 591 F.2d 1211, 1222-23 (7th Cir. 1979) (Commodity Exchange Act); *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 227-30 (9th Cir. 1978) ("prevent and restrain" under antitrust statute construed to authorize contract rescission).

Indeed, the D.C. Circuit *itself* has interpreted the Securities Exchange Act to permit disgorgement simply on the grounds that the security laws "vest jurisdiction in the federal courts." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). The D.C. Circuit's ruling in that context is incompatible with the court's conclusion in this case that disgorgement and the other equitable remedies sought by petitioners are unavailable under civil RICO.

3. Even if § 1964(a) constrained a district court to forward-looking remedies only, the panel's ruling that disgorgement is "a quintessentially backward-looking remedy focused on remedying the effects of past conduct," Pet.App.135, also conflicts with the decisions of seven circuit courts of appeals that have concluded that disgorgement is in fact

forward-looking because it may deter further misconduct. *Cavanagh*, 445 F.3d at 117 (disgorgement "has the effect of deterring subsequent fraud"); *Rx Depot*, 438 F.3d at 1061 ("Disgorgement, which deprives wrongdoers of their ill-gotten gains, deters violations of the law by making illegal activity unprofitable"); *Lane Labs*, 427 F.3d at 229 ("the restitution ordered by the District Court will deter future violations of the [Act] by the Appellants"); *Gem Merch. Corp.*, 87 F.3d at 470; *Universal Mgmt. Servs., Inc.*, 191 F.3d at 762; *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982); *ICC v. B&T Transp. Co.*, 613 F.2d at 1186. As this Court explained in *Porter*, "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter*, 328 U.S. at 400; *cf. Friends of the Earth v. Laidlaw*, 528 U.S. 167, 186 (2000) ("it is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties").

Thus, the court of appeals' decisions to preclude the district court from even considering the evidence supporting disgorgement or other equitable remedies – such as targeted public education and tobacco cessation programs – on the basis of the impact of such remedies on the companies' *future* behavior also conflicts with the decisions of other courts of appeals. *See* Pet.App.202 (Tatel, J., dissenting) (noting that "record evidence in this case suggests that disgorgement will in fact 'prevent and restrain'

defendants from committing future RICO violations"); C.A.App.1229 (plaintiffs' expert testimony that public education and tobacco cessation programs will reduce the tobacco companies' incentives for further fraud); *see also* Pet.App.90-92 (upholding corrective statements remedy in light of the impact of those statements on the companies' future conduct).

These conflicts with decisions of other courts of appeals warrant review by this Court.

II. REVIEW IS ALSO WARRANTED BECAUSE THIS APPEAL CONCERNS A MATTER OF EXCEPTIONAL IMPORTANCE.

Review is also warranted in this case in light of the exceptionally important matters at issue. The government brought this civil RICO action to expose and remedy one of the most sophisticated and far-reaching frauds ever undertaken in this country – one that has been inflicted on millions of children and other ordinary law-abiding citizens. As the district court concluded, for decades the tobacco companies succeeded in fraudulently inducing millions of Americans, especially children, to become addicted to their debilitating products. This case was necessary to reign in that misconduct, and, as much as possible, prevent it from continuing to harm the public.

The remedies the district court has thus far imposed are valuable, but they do not deprive the tobacco companies of the "fruits of [their] ill-gotten gains," *Turkette*, 452 U.S. at 585, because they allow

the companies both to *continue to profit* from the sale of cigarettes to the consumers they successfully addicted to their products, and to *retain the profits* they have already reaped as a result of their decades of massive fraud. The fact that the district court was not permitted to evaluate the evidence related to the efficacy of the proposed public education and tobacco cessation programs, or disgorgement, to prevent *future* misconduct by the tobacco companies also warrants review – particularly since the district court found that an existing broad base injunction, the 1998 settlement with the states, was insufficient to do so. Op.1601-12 (C.A.App.3334-45).

III. THE RULINGS BELOW ALSO CONFLICT WITH THIS COURT'S PRECEDENTS.

A. The Court Of Appeals' Ruling That Public Education and Tobacco Cessation Remedies May Not Be Considered Pursuant To RICO Section 1964(a) Conflicts With This Court's RICO And Antitrust Precedents.

1. The court of appeals' ruling that § 1964(a) does not permit the district court to consider requiring the tobacco companies to fund targeted public education and tobacco cessation programs, even if the court were to find that these remedies are necessary as a means of divesting them of their ill-gotten gains – in this unusual case, addicted smokers who, because they are unable to quit, keep providing additional profits to the companies, Pet.App.111 – is

fundamentally inconsistent with this Court's ruling in *Turkette*. 452 U.S. 576. In that case this Court specifically found that § 1964(a) encompasses remedies that will "divest the association of the *fruits of its ill-gotten gains*." *Id.* at 585 (emphasis added). The Court reached this conclusion after an extensive review of RICO's legislative history, emphasizing that the statute was designed to provide:

> *new approaches* that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place *on all available fronts*.

Id. at 591-92 (quoting S. Rep. No. 617 at 79) (emphasis added); *see also id.* at 592 n.14 (discussing legislative history in which Congress recognized the need to address violators' "ill-gotten gains"). Thus, in *Turkette* this Court concluded that § 1964(a) permits the court to address the *consequences* of the enterprise's unlawful activities, for, as the Court observed, in § 1964 "Congress has provided civil remedies *for use when the circumstances so warrant*." *Id.* at 585 (emphasis added).

Here, based on an overwhelming factual record, the district court found that through multiple schemes and organizations, and over many decades, the tobacco companies disseminated false and misleading information about smoking, and that these efforts

were aimed at young people and are a "substantial contributing factor" in their decisions to begin and continue to smoke. FF509-827; FF2630-3023. The record further demonstrates that the companies consider young addicted smokers to be vital long-term assets. *See, e.g.,* C.A.App.5943 ("value of [younger adult smokers] compounds over time"). Therefore the court of appeals erred in ruling that the district court lacks the equitable authority under RICO § 1964(a) to consider whether to require the tobacco companies to pay for public education and tobacco cessation programs as a means of divesting them of addicted smokers who are the "fruits of [their] ill-gotten gains." *Turkette*, 452 U.S. at 585; *see also Boyle*, 129 S. Ct. at 2247 (explaining that the Court has "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe") (citations omitted); *National Org. for Women v. Scheidler*, 510 U.S. 249, 260 (1994) (rejecting the argument RICO is limited to traditional forms of organized crime such as the mafia, explaining that "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime") (citations omitted).[3]

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[3] These remedies are also consistent with RICO's overall objectives because, as the district court found, a major goal of the companies' fraud was to addict *teenagers* who could serve as replacement smokers as the companies' older customers died.

(Continued on following page)

2. The ruling below is also in conflict with this Court's precedents under the antitrust laws, on which § 1964 was modeled. *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151-52 (1987) ("The use of an antitrust model for the development of remedies against organized crime was unquestionably at work when Congress later considered the bill that eventually became RICO."); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) ("Congress consciously patterned civil RICO after [the Clayton] Act."). In that context the Court has repeatedly noted that the district court's authority to remedy violations encompasses remedies designed to deprive violators of "future benefits from their forbidden conduct." *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 89 (1950); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1945) ("[t]hose who violate the Act may not reap the benefits of their violations").

For example, in *Ford Motor Co. v. United States*, the Court affirmed remedies requiring Ford to restore the victim of the unlawful conduct to its prior condition – including insuring that the divested company's future owner would protect worker wages and

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FF2634-46. As RICO sponsor Senator Roman L. Hruska emphasized during debate on RICO, the statute was intended to address the impact of criminal activity – and especially addictive drugs – on young people in particular. 116 Cong. Rec. 602 (1970) ("[o]ne of the most pernicious threats posed by organized crime is to our youth, by making a business out of corrupting the hope of our Nation with deadly narcotics and dangerous drugs").

pensions. 405 U.S. at 572. Emphasizing the district court's "*large discretion to fit the decree to the special needs of the individual case*," the Court recognized that such a decree would serve to "*eliminate the effects*" of the prior legal violation. *Id.* at 573 n.8 (citations omitted) (emphasis added); *see also, e.g., Int'l Boxing Club v. United States*, 358 U.S. 242, 262 (1959) (recognizing that "sometimes relief, to be effective, must go beyond the narrow limits of the proven violation") (citations omitted); *Int'l Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947) (noting courts' "large discretion to model their judgments to fit the exigencies of the particular case").

Similarly, here, the district court had the authority to consider remedies that would "eliminate the effects," *Ford*, 405 U.S. at 573 n.8, of the tobacco companies' misconduct by educating the public about the true health risks of smoking and the nature of addiction, and providing unlawfully addicted smokers who would like to quit with the tools to do so. *See also, e.g., Schine Chain Theaters v. United States*, 334 U.S. 110, 128 (1948) (divestment authorized to "undo what could have been prevented had the [defendants] not outdistanced the government in their unlawful project"); *United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966) (an adequate antitrust remedy should "deprive the defendants of any of the benefits of the illegal conduct"); *United States v. E.I. du Pont de*

Nemours & Co., 366 U.S. 316, 326 (1961) (relief must be "effective to redress the violations").[4]

The court of appeals sought to distinguish these antitrust precedents by noting that the antitrust laws prohibit the "condition of monopolization" itself, whereas under RICO future violations require "ongoing *acts*, not ongoing conditions." Pet.App.110-11 (emphasis added). This reasoning fails to recognize that under the unique facts of this case the "ongoing condition[]," *id.*, at issue is the cigarette *addiction* suffered by millions of Americans *because* of the false information they were provided. Thus, like the monopolist who continues to reap improper profits until the monopoly is broken and competition is restored, here the tobacco companies will *continue* to enrich themselves from their long-term investments in young addicted smokers unless the district court crafts remedies to help these individuals not only learn the truth, but quit smoking should they so choose.

These conflicts with this Court's precedents warrant review.

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[4] Indeed, remedies that would free smokers of their addiction to cigarettes would also be closely analogous to "rescind[ing] a contract induced by fraud" – another remedy this court has explained "may be maintained in equity. . . ." *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 289 (1940); *see also J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (noting that in "suits in equity" under the Securities Exchange Act a court may "fashion a remedy to rescind a fraudulent sale").

B. The Court Of Appeals' Rulings Also Conflict With This Court's Precedents Concerning The Scope Of A District Court's Equitable Powers.

1. The court of appeals' rulings that the district court may not consider evidence about the impact of or need for public education or tobacco cessation remedies, or disgorgement, also conflict with this Court's precedents explaining that, "where district courts are properly acting as courts of equity, they have discretion" to consider all appropriate remedies "unless a statute clearly provides otherwise." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). As this Court has explained, "only by a '*clear and valid legislative command*,'" *id.* (quoting *Porter*, 328 U.S. at 398) (emphasis added), should a court conclude that a Congressional grant of equitable authority is limited to only certain remedies. Moreover, as the Court has also stressed, where, as here, "the public interest is involved," the court's "equitable powers assume an *even broader and more flexible character* than when only a private controversy is at stake." *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 398) (emphasis added); *see also, e.g., E.I. du Pont*, 366 U.S. at 358 n.8 ("'There is in fact *no limit to the[] variety and application*'" of equitable remedies, for "'the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties'") (quoting 1 John

N. Pomeroy, *Equity Jurisprudence* § 109 (5th ed. 1941)) (emphasis added).

In dissenting from the interlocutory ruling, Judge Tatel observed that § 1964 contains no limit on the scope of available equitable remedies. Pet.App.174-86. To the contrary, the broad grant of equitable authority contained in § 1964(a) – which Congress intended to authorize "enhanced sanctions and new remedies," Pub. L. No. 91-452, § 1 (codified at 18 U.S.C. § 1961 note) – is indistinguishable from the statutory authorities upon which this Court in *Porter* and *Mitchell* concluded that a district court may compel a defendant to return the benefits obtained from unlawful conduct.

In *Mitchell*, the Court considered whether a statute authorizing remedies "to restrain violations" authorized an order requiring the defendant to disgorge the wages it had failed to pay as a result of a wrongful discharge. 361 U.S. at 289-90. Rejecting the argument that the authority to "restrain" violations precludes such a remedy, the Court explained that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide *complete relief* in light of statutory purposes." *Id.* at 291-92 (emphasis added). The Court in *Porter* similarly concluded that a broad grant of equitable authority empowered the district court to "decide whatever other issues and give whatever other relief may be necessary under the circumstances," 328 U.S. at 398,

and that "once its equity jurisdiction has been invoked," the district court had the authority to issue "a decree *compelling one to disgorge profits*, rents or property acquired" in violation of the statute. *Id.* (emphasis added).

As Judge Tatel explained in his dissent, Pet.App.176-85, just like the statutes in *Mitchell* and *Porter*, RICO § 1964(a) grants the district court the full scope of its equitable authority to address violations, authorizing the court to issue "appropriate orders, including but not limited to" several general examples of equitable powers. 18 U.S.C. § 1964. This includes the equitable power of disgorgement, *Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) ("we have characterized damages as equitable where they are restitutionary, such as in actions for disgorgement of improper profits") (citation omitted), as well as the other equitable remedies that plaintiffs advanced, but the district court has not yet considered here. *See United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 10-11 (D.D.C. 2002) (ruling that public education and smoker cessation remedies are equitable in nature); *see also Freeman v. Pitts*, 503 U.S. 467, 487 (1992) ("The essence of a court's equity power lies in its inherent capacity *to adjust remedies in a feasible and practical way* to eliminate the conditions or redress the injuries caused by unlawful action") (emphasis added); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (noting court's authority to "mould each decree to the necessities of the particular case") (quoting

Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)) (emphasis added).[5]

2. The panel majority's specific rationale for interpreting § 1964(a) to preclude disgorgement is also at odds with this Court's rulings. The majority invoked the canons *noscitur a sociis* and *ejusdem generis* to conclude that, based on the nature of the remedies listed in § 1964(a), any other appropriate remedies must be "forward-looking" to prevent future RICO violations – which in the panel's view does not include disgorgement. Pet.App.139-40. However, this Court has endorsed the contrary conclusion – that where Congress authorizes appropriate remedies in a statute, "including" several specifically enumerated examples, "the preceding word 'including' makes clear that the authorization *is not limited to the specified remedies there mentioned. . . .*" *West v. Gibson*, 527 U.S. 212, 217 (1999) (citing 42 U.S.C. § 2000e-16(b)) (emphasis added); *see also id.* at 218 ("The word 'including' makes clear that 'appropriate remedies' are not limited to the examples that follow the word").

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[5] Disgorgement is within a court's equitable power because it was an accepted remedy in " 'the English Court of Chancery at the time of the separation of the two countries.' " *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I. Southern Inc.*, 306 U.S. 563, 568 (1939)); *see also SEC v. Cavanagh*, 445 F.3d at 120 ("English equity courts compelled the repayment (in effect, 'disgorgement') of ill-gotten gains in cases decided before our independence").

In *West* even the dissent, which would have read the provision at issue more *narrowly*, invoked *noscitur a sociis* and *ejusdem generis* to conclude that appropriate remedies should be "of the same nature as" the equitable remedies listed – "*i.e. equitable remedies.*" *Id.* at 225 (Kennedy, J., dissenting) (emphasis added); *see also id.* at 226 ("[t]he phrase 'appropriate remedies,' furthermore, connotes the remedial discretion which is the hallmark of equity"). The court of appeals majority's invocation of these canons to reach the *opposite* conclusion in this case is inconsistent with these precedents. *See also De Beers Consol. Mines v. United States*, 325 U.S. 212, 218-19 (1945) (explaining that the authority conferred in the term "prevent and restrain" in the Sherman Act "is to be exercised according to the general principles which govern the granting of equitable relief"); *cf.* G. Robert Blakey and Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning And Impact On Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 Am. Crim. L. Rev. 1345, 1627 App. E (1996) (explaining that the term "prevent and restrain" is "a typical, common law couplet" with a unitary meaning).

3. The court of appeals' further conclusion that RICO's *other* remedy provisions support restricting the scope of § 1964(a) also conflicts with this Court's decisions. Pet.App.139-40. This Court rejected the same argument in *Porter*. 328 U.S. at 401-02. As with the statute at issue there, in enacting RICO Congress sought to give the government *multiple* tools to

achieve the statute's goals. *See* S. Rep. No. 617, at 79 (recognizing broad availability of criminal and civil remedies); *see also id.* at 80 (explaining that the criminal law is "a relatively ineffectual tool" to implement RICO's goals); *accord Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) ("Congress may impose both a criminal and a civil sanction in respect to the same act or omission").[6]

The many conflicts with these precedents also warrant review.

CONCLUSION

This Court should grant review and restore to the district court the authority Congress granted in RICO § 1964(a). With its authority properly restored,

[6] The court of appeals' reliance on *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) – which concerned whether a *private* party could utilize the injunction provision of a statute for the treatment and storage of hazardous waste to recover the costs of a *prior* waste cleanup – was also misplaced. Pet.App.136-38. Because the provision at issue only addressed "*imminent*" dangers, and Congress had passed another statute specifically aimed at *past* clean-up issues, the Court unsurprisingly concluded that the injunctive provision in the former statute did not authorize a *private* cost-recovery claim. 516 U.S. at 484-86. The Court also noted that since participation by the United States precluded *any* private use of the injunctive provision, *see* 42 U.S.C. § 6972(b)(2)(B), the petitioner's interpretation would lead to an absurd result whereby cost recovery would be available only in cases so insubstantial that the government declined to get involved. 516 U.S. at 486-87.

the district court can bring full force to its formidable findings, and consider in the first instance which of the remedies advanced by the United States and the Public Health Advocates will most appropriately redress the tobacco companies' far-reaching misconduct in this extremely unique case.

For the foregoing reasons, petitioners respectfully request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

HOWARD M. CRYSTAL
Counsel of Record
KATHERINE A. MEYER
MEYER GLITZENSTEIN
& CRYSTAL
1601 Connecticut Ave., N.W.,
Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

Counsel for Petitioners

Of counsel:
PROFESSOR G. ROBERT BLAKEY
William J. and Dorothy K. O'Neill
Professor of Law
NOTRE DAME LAW SCHOOL*
Notre Dame, Indiana 46556
(574) 631-5717
*for identification only

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