No. 09-1012

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*

Respondents.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

The Petitioner, Lorillard Tobacco Company, is a wholly-owned subsidiary of Lorillard, Inc. No publicly held corporation other than Lorillard, Inc. owns 10% or more of Lorillard Tobacco Company's stock.

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REPLY BRIEF FOR PETITIONER

The Government's brief in opposition confirms that the "most important civil RICO action that the Government has ever brought" (05-92 U.S. Pet. 8) rests on an "enterprise" theory that cannot be squared with RICO's language, structure, or purpose. The Government leans heavily on this Court's decision in *Boyle v. United States*, 129 S. Ct. 2237 (2009), but that case involved a *statutorily enumerated* enterprise of *individuals* associated in fact; it did not decide whether *corporations* associated in fact fall within RICO's definition of "enterprise." That question is answered by the statutory text, which expressly includes corporations in the "legal entity" category of enterprise but excludes them from the "associated-in-fact" category. 18 U.S.C. § 1961(4). *See Russello v. United States*, 464 U.S. 16, 23 (1983) (Court presumes that "Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Without acknowledging that it must overcome the *Russello* presumption, the Government invokes *Boyle*'s discussion of the ordinary meaning of "enterprise." Opp. 20. But it is well settled that the Court looks first to the statutory definition of a term; it looks to ordinary meaning only if the statutory text provides no answer to the question. *See, e.g., Dean v. United States*, 129 S. Ct. 1849, 1853 (2009).

The Government emphasizes the uniform body of circuit precedent (Opp. 24-26), but the vast majority of circuit court decisions resolve the issue in a paragraph or footnote, or by merely citing other cases. Not one addresses the presumption that

arises from Congress's disparate inclusion and exclusion of the term "corporations." *See infra* pp. 11-12.

The Government does not dispute that the question is important, and that the most important civil RICO case it has ever brought hinges on the answer. The Court should grant review and correct a flawed body of circuit precedent.

1. This Court has stated repeatedly that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (internal quotation marks omitted); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 63 (2006); *Duncan v. Walker*, 533 U.S. 167, 173 (2001). Here, Congress included *both* "individuals" and "corporations" in the "legal entity" category of "enterprise, but included *only* "individuals" in the "associated-in-fact" category. *See* 18 U.S.C. § 1961(4). If Congress had intended to include corporations and other legal entities in the "associated-in-fact" category, it easily could have done so, either by repeating the list from the first category, or by using the word "persons" instead of "individuals." *See* 18 U.S.C. § 1961(3) ("person includes any individual or entity . . . ").

The Government does not squarely confront the *Russello* canon. Instead, it argues (Opp. 13-20) that the definition of "enterprise" is non-exhaustive because it uses the word "includes" rather than "means," a more restrictive term which Congress used to introduce other RICO definitions. Of course,

the definition of "enterprise" could be non-exhaustive, and yet exclude corporations from the "associated-in-fact" category. The Government resists this conclusion, arguing that *Boyle* established that "the ordinary meaning of enterprise is not restricted by Section 1961(4)'s non-exhaustive enumeration." Opp. 20 (internal quotation marks omitted).

The Government needs to be right on both points; it is wrong on both.

a. *Boyle* did not "expressly h[o]ld" (Opp. 17) that Section 1961(4) is non-exhaustive. *Boyle* addressed the structural features of a type of enterprise that is expressly enumerated in the statute: "a group of individuals associated in fact." The Court thus had no occasion to decide whether the statutory definition of "enterprise" is exhaustive. The Court's suggestion, in a footnote, that Section 1961(4) left open "*the possibility* that the term ['enterprise'] *might* include" non-enumerated entities was *dicta*. 129 S. Ct. at 2243 n.2 (emphases added). The Court's qualified language confirms that it did not definitively resolve whether Section 1961(4) contains an exhaustive enumeration of the entities that may comprise an "enterprise" – much less whether the statutory definition includes a group of corporations associated in fact.

As Lorillard's Petition explains (at 14-17), whether the word "includes" introduces an exhaustive list depends on context, and there are several reasons to conclude that the definition of "enterprise" is exhaustive. The Government responds that the word "includes" typically "'connotes simply an illustrative application of the

general principle.'" Opp. 15-16 (quoting *Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941)). But nothing about Congress's description of the two categories of enterprises suggests that Congress intended to "import[] a general class" of "associated-in-fact" enterprises, *see Helvering v. Morgan's Inc.*, 293 U.S. 121, 126 n.1 (1934), that includes the very entities that Congress listed only in the "legal-entity" category.

Several other definitional provisions in RICO that are introduced by the word "includes" are exhaustive rather than illustrative. *See* Pet. 16. The Government's contention that RICO's definition of "Attorney General" is not exhaustive departs from the position it took in *Mohawk*. *See* Transcript of Oral Argument, *Mohawk Indus., Inc. v. Williams*, No. 05-465 (Apr. 26, 2006), at 49 ("[I]t may well be that the definition of Attorney General is comprehensive in the sense of actually listing all the people who could otherwise plausibly be regarded as standing in the shoes of the Attorney General."). And while the Government faults Petitioner for simply quoting RICO's definitions of "person" and "documentary material," the exhaustiveness of these definitions is apparent. The term "person" "includes *any individual or entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). This list is exhaustive because any entity that is *not* capable of holding a legal or beneficial interest in property would *not* fall within the "general class" or "general principle." So too with the definition of "documentary material," which "includes any book, paper, document, record, recording, *or other material*." 18 U.S.C. § 1961(9) (emphasis added). Rather than listing a few items to

illustrate a general principle, Congress covered the field by using the catch-all "other material." Congress's use of the word "includes" thus does not demonstrate that a RICO definition is non-exhaustive.

This Court recently reaffirmed that a definition introduced by the term "includes" can be exhaustive. *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). The Government correctly notes (Opp. 19) that *Carcieri* interpreted the term "Indian" narrowly based on other provisions of the statute, but the Court's reasoning supports Petitioner's argument. Because Congress expressly extended other provisions in the statute to Indian tribes that were not enumerated in the definition of "Indian," the Court concluded that Congress intended to exclude those tribes from the definition of "Indian," notwithstanding its use of "includes" in the definition. Likewise, in defining "enterprise," Congress indicated its intention to exclude groups of corporations and other legal entities from the "associated-in-fact" category by expressly listing them only in the "legal entity" category.[1]

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[1] The Government's attempt (Opp. 19-20) to distinguish *Carcieri* because the statute at issue, unlike Section 1961, did not use both "includes" and "means" is equally unpersuasive. The statute in *Carcieri* defined some terms by using the word "includes," and others by using the words "shall be construed to refer to" – a phrase no less restrictive than "means." 129 S. Ct. at 1066.

b. Even if the definition of "enterprise" is non-exhaustive, the Government must overcome the *Russello* canon to establish that a group of corporations falls within the "associated-in-fact" category. This Court's recent decision in *Samantar v. Yousuf* is instructive. There, the Court refused to read the definition of "foreign state" to include foreign officials, even though the definition was introduced by the word "includes." 2010 WL 2160785, *6-7 (Jun. 1, 2010). The Court explained that, "even if the list in [28 U.S.C.] § 1603(a) is merely illustrative, it still suggests that 'foreign state' does not encompass officials, because the types of defendants listed are all entities" and because "elsewhere in the [statute] Congress expressly mentioned officials when it wished to count their acts as equivalent to those of the foreign state." *Id.* By the same token, even assuming that the list of enterprises in Section 1961(4) is merely illustrative, it still suggests that an "associated-in-fact" enterprise does not encompass a group of corporations, because an enumerated "associated-in-fact" enterprise is composed of individuals, and Congress expressly mentioned corporations when it wanted to treat them as an enterprise. *See also* Brief for the United States as Amicus Curiae, *Samantar v. Yousuf*, 2010 WL 342031, *18 (No. 08-1555) (arguing that "foreign state" definition introduced by the word "includes" is not "devoid of any limiting principle" and deriving limitation from the statutory enumeration).

In arguing for a different result here, the Government tries to stretch *Boyle* beyond the limits of its reasoning. The Government contends that: (i) a group of corporations acting with a common purpose

qualifies as an "associated-in-fact" enterprise because such an enterprise falls within the ordinary meaning of "enterprise," and (ii) *Boyle* concluded that "the ordinary meaning of enterprise is not restricted by Section 1961(4)'s non-exhaustive enumeration of included enterprises." Opp. 20 (internal quotation marks omitted). Again, the Government is incorrect on both points.

As Petitioner Philip Morris USA demonstrates, a group of competing corporations that affiliate informally to affect government policy does not fall within the ordinary meaning of enterprise. *See* Pet. for Writ of Certiorari, *Philip Morris USA Inc. v. United States of America*, No. 09-976, at 26 (Feb. 19, 2010). Moreover, *Boyle*'s discussion of the ordinary meaning of "enterprise" had nothing to do with whether Section 1961(4)'s enumeration is exhaustive. The defendants there were an *enumerated* "group of individuals associated in fact"; the question was whether that enumerated enterprise also had to exhibit particular structural features. The Court considered the ordinary meaning of "enterprise" solely for the purpose of resolving that question.

Boyle did not suggest, much less hold, that *all* groupings to which the ordinary meaning of "enterprise" might apply are covered, even if they were purposely omitted from the "associated-in-fact" enumeration. Such a result would violate the settled rule that courts will consider the language, structure, and context of a definition before resorting to ordinary meaning. *See, e.g., Dean*, 129 S. Ct. at 1853 ("We start, as always, with the language of the statute.") (internal quotation marks omitted); *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When

a statute includes an explicit definition, we must follow that definition[.]"); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

The Government cannot alter the analysis by invoking (Opp. 21) RICO's liberal construction principle. This Court has observed that this principle cannot be used to "apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). The two categories of "enterprise" correspond to RICO's "two aims: . . . to stop organized crime's infiltration of legitimate business [and] . . . to make it unlawful for individuals to function as members of organized criminal groups." Samuel Alito, Jr., *Racketeering Made Simple(r)*, in *The RICO Racket* 1, 3-4 (G. McDowell ed. 1989); *see* Pet. 19.

The Government does not directly address this point, but contends that "Congress had no reason to doubt that corporations . . . would be capable of entering into the sort of dangerous *de facto* alliances that characterize RICO enterprises." Opp. 22. The relevant inquiry, however, is not whether corporations are capable of entering into *de facto* alliances, but whether Congress perceived that pre-RICO conspiracy law was unable to handle such corporate conspiracies, as it had proven unable to handle organized crime conspiracies. And the answer is plainly no.

In contrast to Congress's well-documented concern about the inadequacy of the criminal law as applied to the secret and disparate activity of multiple and shifting individuals associated with

organized crime syndicates, *see, e.g.*, Alito, *supra*, at 4; *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978), RICO's extensive legislative history contains no indication that Congress viewed the criminal law as inadequate to address joint corporate activity. To the contrary, it largely treated corporations as victims of racketeering enterprises. *See, e.g.*, 116 Cong. Rec. at 602 (1970) (remarks of Sen. Hruska); S. Rep. No. 91-617 (1969) at 76-77 (summarizing legislative findings addressing "infiltration of legitimate businesses"). Congress thus had no reason to extend the concept of "associated-in-fact" enterprises to a group of corporations.

The Government, like the court below, raises the specter that "'racketeers who would otherwise constitute an association-in-fact might evade RICO's grasp by virtue of their ability to operate through corporations and establish complex networks of companies, kickbacks, and contracts to achieve their illicit ends.'" Opp. 22 (quoting Pet. App. 24a). That concern provides no basis for sweeping into the statutory definition of "enterprise" entities that Congress excluded. Moreover, prosecutors and courts can choose from a range of options in such cases, including treating the racketeers operating the shell companies as a group of individuals associated in fact, or using statutes other than RICO to address joint corporate criminal activity.

2. The text and structure of the "enterprise" definition give rise to a strong inference that Congress excluded groups of corporations from the "associated-in-fact" enterprise category. Congress's purpose in enacting RICO reinforces that inference. But even if the Court were not persuaded that the statutory language clearly excludes corporations

from the associated-in-fact category, surely that language does not clearly *include* them. Yet the Government limits to a single paragraph (Opp. 23-24) its response to the argument that established principles of statutory construction, including the doctrine of constitutional avoidance and the rule of lenity, support resolving any ambiguity in Petitioner's favor.

The Government contends (Opp. 23) that Congress used "inclusive" and "capacious" language, but we have explained that the word "includes" does not imply that entities enumerated in category A but not in category B are included – much less clearly included – in category B. The Government also invokes the liberal construction principle, but we have already explained that RICO's "remedial goals" (Opp. 23) did not include combating joint conduct by bona fide corporations.

The Government's final contention is that this Court has "repeatedly rejected similar appeals to narrow RICO's provisions based on the rule of lenity." Opp. 24 (citing cases). But the cases the Government cites all involved arguments for adopting extra-textual *limitations* on RICO's scope. Here, in contrast, Petitioner is not arguing for an extra-textual limitation on RICO's scope. Instead, the Government is advocating an extra-textual *expansion* of RICO's scope by reading Section 1961(4)'s reference to a "group of individuals associated in fact" to encompass a group of corporations associated in fact.

3. The Government argues that this Court should not address the "enterprise" definition "so soon after *Boyle* addressed the term's meaning" and

in the absence of a circuit split. Opp. 24-26. Neither reason is persuasive.

If anything, *Boyle*'s *dicta* make it even less likely that the courts of appeals will revisit the question presented in this case on their own. This Court should not allow *Boyle*'s footnote to stand as the last word on a critical definitional issue under RICO.

Moreover, the absence of a circuit split should not preclude review by this Court where, as here, so many of the court of appeals' decisions contain little or no analysis. *See Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio*, 900 F.2d 882, 887 (6th Cir. 1990) (no analysis; citation to *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979)); *United States v. Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985) (same); *United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (no analysis; quotation from *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988)); *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989) (footnote); *United States v. Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988) (one paragraph); *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1982) (same); *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (same); *United States v. Aimone*, 715 F.2d 822, 827-28 (3d Cir. 1983) (analysis limited; quotation from *United States v. Turkette*, 452 U.S. 576, 580 (1981), that "[t]here is no restriction upon the associations

embraced by the definition").[2] Indeed, *none* of the decisions addresses Petitioner's primary contention based on the disparate inclusion of corporations in one "enterprise" category but not the other.[3]

If there were any doubt about whether review is warranted, it should be resolved in favor of certiorari given that the Government's most important civil RICO case hangs in the balance. This is especially true if the Court chooses to review the remedial question the Government has presented about the availability of disgorgement. This Court should not consider whether a draconian remedy is available to the Government without determining whether the

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[2] *Aimone*'s reliance on *Turkette* is misplaced. The full sentence in *Turkette* reads: "There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." 452 U.S. at 580. Moreover, *Turkette* involved an enumerated enterprise (a group of individuals associated in fact); the "restriction" to which *Turkette* refers – whether an association of individuals must have a legitimate purpose – has no basis in the statutory text.

[3] *Huber* and *Perholz* contain the most analysis. The *Huber* court, like the Government here, cited Congress's use of the word "includes," RICO's liberal construction principle, and a concern that excluding groups of corporations would allow racketeers to evade RICO's sanction. 603 F.2d at 393-94. *Perholtz* (mistakenly) relied on *Turkette* and otherwise tracked *Huber*'s analysis. 842 F.2d at 353.

Government's case rests on a mistaken conception of a RICO "enterprise."[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Petitioner relies on the reply briefs filed by its co-petitioners to address the remaining issues raised in its petition for certiorari.

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