No. 09-976

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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The sole basis for jurisdiction in this case required the government to establish (i) a statutory "enterprise" (ii) that is likely to violate RICO in the future. The government did neither, but a single judge nonetheless adopted the government-drafted findings and issued obey-the-law injunctions that defy Fed. R. Civ. P. 65(d). The D.C. Circuit, in turn, refused to perform the independent review that *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), requires. For good measure, the D.C. Circuit also declined even to address the recent enactment of comprehensive federal tobacco legislation that destroys any basis for jurisdiction. Not surprisingly, very little about this can be squared with the relevant statutes, this Court's cases, or the law of other circuits.

The government's arguments against review are factually baseless and legally wrong. Thus, its claim that defendants challenged no fact-finding is false; defendants attacked the key findings that underlay the judgment, including specific intent, the likelihood of future violations, and the "fraud" regarding "light" cigarettes, environmental tobacco smoke ("ETS"), and addiction. And the D.C. Circuit addressed those challenges—but refused to apply *Bose*.

Similarly, appellate courts may not ignore intervening Acts of Congress that deprive them of jurisdiction by punting a correct resolution of the case to later proceedings under Rule 60(b); nor may they ignore the text of RICO merely because other circuits have. Finally, an appellate court may not uphold open-ended injunctions by incorporating 4,000-plus

"fact-findings"—a ground expressly precluded by Rule 65(d).

Conceived as a political prop for a State of the Union address, this litigation transparently was designed to restrict defendants' protected speech, yet culminated in deeply flawed government-drafted rulings that received no meaningful appellate review. The blizzard of paper filed by respondents cannot paper over those facts.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *BOSE* AND ITS PROGENY.

The D.C. Circuit's application of the "highly deferential" clearly erroneous standard of review squarely conflicts with *Bose*—which mandates "an *independent* examination of the whole record" in "cases raising First Amendment issues" (466 U.S. at 499 (emphasis added; internal quotation marks omitted))—and lower-court decisions holding that independent review is required *whenever* First Amendment protection turns on whether speech is misleading. *See, e.g.*, *Byrum v. Landreth*, 566 F.3d 442, 448 n.5 (5th Cir. 2009); *see also* Pet. App. 67a.

The government does not seriously dispute that the D.C. Circuit's refusal to conduct independent review here adds to an existing circuit split on this important First Amendment issue. Instead, the government relies on baseless diversions, arguing (i) that defendants waived the issue, (ii) that independent review would not have affected the decision below, and (iii) that this Court's ruling in *Bose* supposedly does not apply to mail and wire fraud cases. The government is wrong on all counts.

1. The government's claim that defendants waived the issue by stating at oral argument that

their challenges were legal in nature is frivolous. U.S. Opp. 28-29. Large portions of the argument, which the government tellingly does not present in its appendix, were devoted to attacking the factual underpinnings of the alleged fraud, including those that relied on the marketing of "light" cigarettes, their addictive nature, and ETS. *See, e.g.*, Reply App. 25a (Descriptors are "literally true. They're actually true.").[1] The briefing likewise was replete with similar challenges (under *Bose*) to the district court's findings of fraud, specific intent, and likelihood of future violations. *See, e.g., id.* at 116a ("court erred in finding fraud relating to addiction") (capitalization altered).[2] As defendants explained in their merits briefing and again in their petition for rehearing, "many of the findings here involve constitutionally protected statements on important public controversies or proposed regulation that must be reviewed *de novo*." *Id.* at 70a (citing *Bose*); *see also id.* at 120a-25a.

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[1] *See also* Reply App. 19a ("You don't have a scintilla of evidence along those lines with respect to addi[c]tion or ETS"); *id.* at 30a ("It is impossible, as a result of the MSA, for the government to demonstrate that there is a likely future enterprise or likely future fraud."); U.S. App. 7a ("I don't want to be misquoted as having said that I agree with the fact findings of the district court."); Reply App. 54a (same).

[2] *See also* Reply App. 74a ("the government's failure of proof under the correct [specific intent] standard requires the entry of judgment for defendants"); *id.* at 86a ("The government failed to satisfy its burden of showing how a reasonable likelihood of future RICO violations persists in the face of the MSA."); *id.* at 102a ("with respect to the alleged ETS scheme, the court erred in finding that good faith and scientifically supported statements about the health effects of ETS amounted to criminal fraud"); *id.* at 112a ("court erred in finding fraud relating to environmental tobacco smoke") (capitalization altered).

The best that might be said about the government's waiver argument is that defendants did not waste time attacking findings of ancient historical fact relating to decades-old conduct, such as whether meetings occurred at the Plaza Hotel in 1953. That hardly supports the government's claim that the findings that defendants *did* challenge are now unreviewable. "Preservation" scarcely required defendants to frame those challenges under the clearly-erroneous test of Rule 52, which they contend does *not* apply.

Indeed, if the D.C. Circuit had remotely believed that no defendant challenged the facts it easily could have disposed of the appeal on that basis. Instead, the court recognized that "[d]efendants raise[d] numerous challenges to the *correctness* of the district court's findings that they committed racketeering acts." Pet. App. 29a (emphasis in original). The court passed upon each of those factual arguments—but explicitly refused to perform independent review under the perceived compulsion of circuit precedent that narrowly construed *Bose*. *E.g.*, Pet. App. 52a (citing *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41-42 & n.3 (D.C. Cir. 1985)); *see also id.* at 16a, 28a, 49a, 50a, 52a, 53a, 61a, 64a, 65a, 66a, 67a. The *Bose* question was therefore both pressed *and* passed upon below.

2. The government is also wrong to deny that independent appellate review would have altered the outcome of this case. Not only did the court of appeals expressly say so (Pet. App. 67a), but it also upheld numerous factual findings that could not have withstood anything but the most "highly deferential" review. For example, it affirmed the district court's finding that the use of "light" descriptors was fraudulent because there are purportedly "'lights and regu-

lars of the same brands that have the same FTC tar rating.'" *Id.* at 49a (quoting *id.* at 1907a). If the court of appeals had reexamined that finding, however, the record would have compelled it to reject the district court's conclusion because the finding was premised on a flawed comparison between cigarettes *of different lengths* (Virginia Slims 100's and Virginia Slims Lights 120's). *See* Reply App. 125a. No speaker should lose its First Amendment freedoms on the basis of such manifestly flawed—and virtually unreviewed—fact-finding.

3. The government's suggestion that *Bose* is inapplicable where mail and wire *fraud* are alleged is meritless. U.S. Opp. 30. *Bose*'s holding that "actual malice" must be reviewed independently was based on the "kinship" that this element of defamation has "to English cases considering the kind of motivation that must be proved to support a common-law action for deceit." 466 U.S. at 502. It thus would be odd if the rule requiring independent review did not apply to deceit itself. *See Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 100 (1990) (plurality op. of Stevens, J.); *id.* at 111 (Marshall, J., concurring in the judgment).

More broadly, *Bose* makes clear that independent appellate review is required *whenever* the availability of First Amendment protection rests on a factual finding that separates protected from unprotected speech. The Court has emphasized that, when the "question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated[,] . . . [it] examine[s] for [itself] the statements in issue." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (internal quotation marks omitted). "[T]he exercise of this power is the process through which [First

Amendment] rule[s] . . . evolve[ ] and [their] integrity is maintained." *Bose*, 466 U.S. at 503. "In such cases"—including those involving alleged libel, fighting words, obscenity, and child pornography—"independent review of the record" is required "to be sure that the speech in question actually falls within the unprotected category." *Id.* at 505. Fraud also generally falls outside the First Amendment's protections (*see* U.S. Opp. 35)—but before speech can be definitively relegated to this unprotected status, appellate courts must independently examine the factual findings to ensure that the speech is indeed fraudulent.

In fact, in the context of political speech, which is also at issue here, even deliberately false speech is protected. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961). That factor also supports review, because the government does not deny that the D.C. Circuit's contrary holding conflicts with other circuits' decisions applying *Noerr-Pennington* to deliberately false statements. *Compare* Pet. App. 44a, *with Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000). The fact that the decisions applying *Noerr-Pennington* to deliberately false speech have arisen in the antitrust—rather than the RICO—context is irrelevant because the antitrust laws served as the model for RICO. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151-52 (1987). Moreover, as the government itself concedes, the *Noerr-Pennington* doctrine stems from First Amendment concerns that apply equally in both the antitrust and RICO settings. U.S. Opp. 48.

II. REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS OVERSTEPPED ITS JURISDICTIONAL BOUNDS.

The government's effort to reconcile the decision below with the statutory and constitutional limitations on courts' RICO jurisdiction is equally unconvincing.

1. The government rests its defense of the court of appeals' atextual definition of an "associated in fact" enterprise on *Boyle v. United States*, 129 S. Ct. 2237 (2009). But *Boyle* confirms that, *even if* RICO's definition of "enterprise" can be supplemented to include entities not "specifically enumerated" in the text, those entities must fall "within the *ordinary meaning* of the term." *Id.* at 2243 n.2 (emphasis added). Groups of for-profit corporations that fiercely compete with each other for business—while informally associating through trade organizations to influence government policy—do not remotely fall within the "ordinary meaning" of an "enterprise."

The government offers virtually no response to this argument, but instead directs most of its attention to the threshold statutory argument (advanced in greater detail by Lorillard) that RICO's text precludes *all* corporations (whether competitors or affiliates) from forming associated-in-fact enterprises. U.S. Opp. 15-27. But the government is wrong on that too, because it has no good answer to the single most powerful indication of Congress's contrary intent: While RICO expressly *includes* corporations within the definition of legal entities that by themselves can constitute an enterprise, it *omits* groups of corporations from its enumeration of non-legal entities that can constitute an "associated in fact" enterprise. 18 U.S.C. § 1961(4). That purposeful omission

is fatal to the government's case. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *Samantar v. Yousuf*, No. 08-1555, slip op. at 10-12 (June 1, 2010).[3]

2. The government also fails to reconcile the decision below with the limitations that RICO and Article III impose on district courts' jurisdiction to issue injunctive relief.

Section 1964(a) authorizes injunctive relief only when it "prevent[s] and restrain[s]" likely future *RICO* violations. 18 U.S.C. § 1964(a). Article III limits injunctive relief to cases in which there is "a realistic threat" that the challenged conduct will recur in "the reasonably near future." *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7, 108 (1983). In light of the MSA and FDA Act, however, there is no reasonable likelihood that PM USA will commit any fraud in the future. Moreover, apart from the unlikelihood of any fraud, there can be no RICO violation of any kind without a statutory enterprise, and the MSA and FDA Act together prohibit future joint racketeering activity of the type that the government alleged as the "enterprise" here. *See* PM USA Pet. 28-29. At a minimum, a GVR is appropriate so the question raised by the intervening FDA Act can be explicitly passed upon by the D.C. Circuit, which has improperly refused even to consider the effect of that new law.

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[3] The trade associations, TI and CTR, obviously were corporate "enterprises" under RICO, but they were defunct by the time this case was tried and thus could not support a RICO claim solely for *prospective* relief under Section 1964(a). That is why the government manufactured the atextual "enterprise" it used here.

Citing *Horne v. Flores*, 129 S. Ct. 2579 (2009), both the government and intervenors assert that, in the first instance, PM USA should seek modification of the injunctions from the district court. U.S. Opp. 55; Int. Opp. 5. But *Horne* involved a *collateral* attack on an existing injunction (129 S. Ct. at 2588), not the obligation of appellate courts to apply the law as it exists on direct review. *Horne* may establish that district courts retain the power to modify injunctions *even after* appeals are exhausted, but it cannot justify the refusal to properly adjudicate an appeal in the first place.

On the contrary, absent unusual retroactivity concerns, an appellate court must "apply the law in effect at the time it renders its decision." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (internal quotation marks omitted); *see also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801). No such concerns about retroactivity arise "[w]hen [an] intervening statute authorizes or affects the propriety of prospective relief." *Landgraf*, 511 U.S. at 273. Not surprisingly, this Court has long evaluated the validity of injunctions in light of legislation enacted while the injunction was being appealed. *See, e.g., Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 201 (1921). Were the government's view correct, circuit courts could simply decline to adjudicate appeals on the theory that trial courts might conform their rulings to the law in subsequent collateral proceedings. There is no basis for such an absurd view.

The government's other objections to further review of the district court's injunctions in this Court—or in the D.C. Circuit—are equally makeweight. The government points to a provision of the FDA Act stating that the legislation should not be construed

to "'affect any action pending in Federal'" court. U.S. Opp. 55 (quoting FDA Act § 4(a)). That provision, however, does not amend RICO, which already limited the district court's jurisdiction to the issuance of injunctions that "prevent and restrain" likely future RICO violations; nor could it alter the restrictions that Article III imposes on the court's jurisdiction. The fact that some petitioners—but not PM USA—have challenged a *few* provisions of the FDA Act is irrelevant because the statute is presumed to be constitutional. *Illinois v. Krull*, 480 U.S. 340, 351 (1987). Finally, the fact that the FDA Act does not impose the same "tailored remedies" as the district court's injunctions (U.S. Opp. 56) is irrelevant because the jurisdictional question is not whether the MSA and FDA Act impose the *same* remedies as those injunctions but whether their regulatory requirements extinguish any reasonable likelihood that defendants will engage in future *joint* racketeering activity. The answer to that question is plainly "yes."[4]

III. REVIEW IS WARRANTED BECAUSE THE INJUNCTIONS ARE INCONSISTENT WITH FED. R. CIV. P. 65(d) AND THIS COURT'S PRECEDENT.

The D.C. Circuit upheld the district court's vague and overbroad "obey the law" injunctions on a ground expressly foreclosed by the text of Fed. R. Civ. P. 65(d): by "read[ing]" them "in the context of the district court's . . . 4,088 findings of fact." Pet. App. 74a.

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[4] The alleged violations of the MSA, which have never been examined under *Bose*, do not include a single example of joint racketeering activity by defendants after the MSA went into effect.

The government does not even argue that this "context[ual]" approach was consistent with Rule 65(d). It instead emphasizes that it was the *court of appeals*—rather than the district court—that belatedly attempted to salvage the injunctions by construing them in light of those voluminous findings, and that the requirements of Rule 65(d) are therefore irrelevant. U.S. Opp. 59. But a court of appeals cannot uphold a procedural order on a ground forbidden to the district court itself because the policies that animate the Federal Rules of Civil Procedure apply "equally to the courts of appeals." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989).

The district court's injunctions cannot possibly be squared with those policies. The injunctions—which, among other things, broadly prohibit defendants from engaging in racketeering acts (Pet. App. 2069a)—could encompass a virtually infinite array of conduct. *See* 18 U.S.C. § 1961(1) (listing more than 100 activities that could constitute "racketeering"). Nothing in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)—or any other decision of this Court—authorizes such boundless injunctive relief. U.S. Opp. 59. While *McComb* held that an FLSA injunction need not specify the name of each covered employee or the exact wages owed to each employee (336 U.S. at 194), defendants are not seeking anything close to that level of precision. What they are seeking—and what Fed. R. Civ. P. 65(d) and this Court's precedent mandate—is "reasonable detail" about the conduct that could potentially expose them to contempt sanctions. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Such detail is nowhere to be found in the district court's open-ended order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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