Nos. 09-978 & 09-994

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

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

Respondents.

TOBACCO-FREE KIDS ACTION FUND, ET AL.,

Petitioners,

v.

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

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that disgorgement and other backward-looking remedies are unavailable under 18 U.S.C. § 1964(a), which authorizes district courts to issue only "appropriate orders" that "prevent and restrain" violations of the Racketeer Influenced and Corrupt Organizations Act.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

Altria Group, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

R.J. Reynolds Tobacco Company is directly and wholly owned by R.J. Reynolds Tobacco Holdings, Inc. (a Delaware corporation). R.J. Reynolds Tobacco Holdings, Inc. is a direct, wholly owned subsidiary of Reynolds American, Inc., a publicly traded corporation. Brown & Williamson Holdings, Inc. owns more than 10% of the common stock of Reynolds American, Inc.

Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., and no other publicly held company owns 10% or more of its stock.

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc. Lorillard, Inc. is the only publicly held company that owns 10% or more of Lorillard Tobacco Company's stock.

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BRIEF IN OPPOSITION

Respondents Philip Morris USA Inc. ("PM USA"), R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Brown & Williamson Holdings, Inc., and Altria Group, Inc. respectfully submit this brief in opposition to the petitions for writs of certiorari filed by the United States and by the Tobacco-Free Kids Action Fund et al. ("intervenors").

OPINIONS BELOW

The court of appeals' opinions are reported at 566 F.3d 1095 (U.S. Pet. App. 1a) and 396 F.3d 1190 (U.S. Pet. App. 99a). The opinions of the United States District Court for the District of Columbia are reported at 449 F. Supp. 2d 1 (U.S. Pet. App. 258a; Defs.' Pet. App. 101a), 321 F. Supp. 2d 72 (U.S. Pet. App. 177a), and 116 F. Supp. 2d 131 (U.S. Pet. App. 196a).

JURISDICTION

The court of appeals filed its final opinion on May 22, 2009. It denied respondents' timely petitions for rehearing or rehearing en banc, and a related suggestion of mootness, on September 22, 2009. On December 11 and 15, 2009, the Chief Justice extended the time for the government and intervenors to file petitions for writs of certiorari to and including February 19, 2010. Nos. 09A572, 09A573. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, is set forth in full in the appendix to PM USA's petition for a writ of certiorari (No. 09-976). Sections 1963 and

1964 of RICO are reproduced in the appendix to this brief in opposition.

STATEMENT

This is not the first time that petitioners' questions presented have come before the Court in this case. In 2005, the Court declined to review the D.C. Circuit's interlocutory decision that the government cannot obtain disgorgement and other backward-looking remedies under Section 1964(a) of RICO—a provision limited to relief that "prevent[s] and restrain[s]" RICO violations. *United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir.), *cert. denied*, 546 U.S. 960 (2005) (U.S. Pet. App. 99a).

The D.C. Circuit reaffirmed that decision last year (U.S. Pet. App. 1a), and the government, joined by intervenors, now seeks for a second time this Court's review of that holding. But petitioners identify no developments in the law of RICO that call into question the court of appeals' holding or this Court's decision to deny review. As in 2005, it remains the case that the government pursues disgorgement under Section 1964(a) only exceptionally rarely, that *no* appellate court has ever adopted petitioners' sweeping argument that the provision authorizes purely backward-looking remedies, and that *every* court of appeals that has addressed the argument has rejected it.

Indeed, in the forty years since RICO was enacted, only three courts of appeals have addressed the potential availability of disgorgement under the narrow language of Section 1964(a). Not a single one of those circuits has agreed with the government's argument here: that *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), require that dis-

gorgement be broadly available under RICO. Instead, as intervenors concede, all three circuits to consider the question have concluded that "*any* § 1964(a) remedy must address *future* illegal acts." Int. Pet. 17 (emphases in original).

No circuit has adopted the government's arguments under *Porter* and *Mitchell* for good reason: the text and structure of RICO plainly provide that disgorgement and other backward-looking relief cannot be awarded under Section 1964(a). The availability of such relief would not only nullify Section 1964(a)'s "prevent and restrain" language but also circumvent RICO's comprehensive remedial framework. As the court of appeals explained, *other* provisions of RICO provide mechanisms for separating an alleged racketeer from its ill-gotten gains, but those provisions impose procedural protections—including trial by jury—that are inapplicable under Section 1964(a). The government seeks to circumvent those procedural requirements here by obtaining in a Section 1964(a) action tried before a single district court judge a punitive order forfeiting $280 *billion* of defendants' past profits.

Accordingly, as it has done once before, the Court should deny review because the questions presented do not implicate a conflict with the precedent of this Court or other courts and have limited significance outside the "unique" context of this case. Int. Pet. 15.

1. On the same day in 1999 that it announced the termination of a grand jury investigation of defendants without seeking an indictment, the government filed this suit against the major domestic tobacco companies and two industry organizations. The government brought claims under the Medical

Care Recovery Act, 42 U.S.C. § 2651(a), and Medicare Secondary Payer statute, *id.* § 1395y(b)(2), seeking billions of dollars in damages for smoking-related health-care costs.

The government also alleged that defendants had violated RICO by forming an "associated in fact" enterprise that undertook a decades-long campaign to mislead the American public about the health effects and addictiveness of smoking. In framing its RICO claim, the government did not invoke any of the provisions that explicitly authorize monetary relief for past RICO violations, including RICO's criminal forfeiture provision (18 U.S.C. § 1963(a))—which requires a jury trial and proof beyond a reasonable doubt—or its civil treble-damages provision (*id.* § 1964(c))—which requires a jury trial and proof of a nonremote injury proximately caused by the defendant's conduct.

The government instead brought suit under Section 1964(a) of RICO. That provision—which provides for trial before a single district court judge and does not require proof beyond a reasonable doubt or a showing of proximate cause—grants district courts jurisdiction to issue only "appropriate orders" that "*prevent and restrain*" RICO violations. 18 U.S.C. § 1964(a) (emphasis added). The government did not limit itself, however, to seeking equitable remedies aimed at preventing and restraining future RICO violations. The government sought both sweeping injunctive relief and the purported "disgorgement" of $280 *billion* in *past* profits that defendants had earned from cigarette sales since 1971, the year after RICO was enacted.

The district court eventually dismissed the government's statutory claims for the recovery of health-

care costs (*United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 135 (D.D.C. 2000)), but denied defendants' motion to dismiss the RICO disgorgement claim, and their subsequent motion for summary judgment, on the ground that "disgorgement is a permissible remedy under Section 1964(a)." U.S. Pet. App. 183a n.7.

2. The district court certified its summary judgment ruling on the disgorgement claim for interlocutory appeal to the D.C. Circuit.

The D.C. Circuit reversed. The court of appeals held that "the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement as a possible remedy in this case." U.S. Pet. App. 110a. The court explained that jurisdiction under Section 1964(a) to "prevent and restrain" RICO violations "is limited to forward-looking remedies that are aimed at future violations." *Id.* at 113a. The meaning of the "prevent and restrain" limitation, the court continued, is confirmed by the fact that the three remedies explicitly mentioned in Section 1964(a)—divestiture, injunctions "restrict[ing] . . . future activities," and dissolution—"are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*." *Id.* (emphasis in original). In contrast with these examples, "[d]isgorgement . . . is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo," and is therefore unavailable under Section 1964(a). *Id.* at 113a-14a.

In reaching this conclusion, the D.C. Circuit rejected the government's argument that Section 1964(a) is "a plenary grant of equitable jurisdiction." U.S. Pet. App. 114a. The court of appeals ex-

plained that the government's open-ended reading of the statute "not only nullifies the plain meaning of the terms ['prevent' and 'restrain'] and violates our canon of statutory construction that we should strive to give meaning to every word, but also neglects Supreme Court precedent." *Id.* (citations omitted). The court specifically relied on *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), where this "Court held that compensation for past environmental cleanup was ruled out by the plain language of the Resource Conservation and Recovery Act which authorized actions 'to restrain' persons who were improperly disposing of hazardous waste." U.S. Pet. App. 114a. "If 'restrain' is only aimed at future actions," the court reasoned, "'prevent' is even more so." *Id.*

Finally, the court of appeals reasoned that "[p]ermitting disgorgement under § 1964(a) would . . . thwart Congress' intent in creating RICO's elaborate remedial scheme." U.S. Pet. App. 119a. "The disgorgement requested here is similar in effect to the relief mandated under the criminal forfeiture provision, § 1963(a), without requiring the inconvenience of meeting the additional procedural safeguards that attend criminal charges," and would permit the government to "collect sums paralleling—perhaps exactly—the damages available to individual victims under § 1964(c)." *Id.* at 118a. The government's disgorgement request therefore "raise[d] issues of duplicative recovery of exactly the sort that . . . constitute[ ] a basis for refusing to infer a cause of action not specified by the statute." *Id.* at 118a-19a.

Judge Williams joined the opinion of the court of appeals in full. He wrote separately to highlight the shortcomings in the remedial approach—suggested by some appellate courts but never applied by *any* of

those courts—that would permit a limited form of disgorgement restricted to ill-gotten gains that remain available to fund future RICO violations. U.S. Pet. App. 122a-23a. Judge Tatel dissented, adopting the government's expansive reading of Section 1964(a). *Id.* at 135a. The D.C. Circuit denied the government's petition for rehearing en banc without opinion.

The government then filed a petition for a writ of certiorari, asking this Court to decide "[w]hether the district court's equitable jurisdiction to issue 'appropriate orders' to 'prevent and restrain' violations of [RICO] encompasses the remedial authority to order disgorgement of illegally-obtained proceeds." Pet. i (No. 05-92). This Court denied review. *United States v. Philip Morris USA Inc.*, 546 U.S. 960 (2005).

3. After a nine-month bench trial, the district court ruled that defendants had violated RICO by associating together to form a racketeering enterprise and committing predicate acts of mail and wire fraud in the form of false statements about the health risks and addictiveness of smoking. The district court also ruled that defendants were likely to commit further RICO violations in the future—even though the "landmark" Master Settlement Agreement ("MSA") between the States and the tobacco industry had already prohibited defendants from jointly engaging in the decades-old conduct that formed the basis for the government's suit. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001).

With input from intervenors—who were permitted to participate in the case solely on remedial issues—the district court crafted a series of sweeping injunctions to "prevent and restrain" future RICO

violations by defendants. Among other things, those injunctions require defendants to remove "light" and "low tar" descriptors from the packages and brand names of their cigarettes, to comply with new and burdensome document disclosure obligations well beyond those already imposed by the MSA, and generally to obey the law by refraining "from engaging in any act of racketeering . . . relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes." U.S. Pet. App. 391a.

Based on the D.C. Circuit's decision identifying the limits of Section 1964(a), however, the district court rejected petitioners' request that it order defendants to fund a smoking-cessation program and nationwide public education campaign because those remedies were not "aimed at preventing and restraining future RICO violations." U.S. Pet. App. 392a, 399a.

4. On appeal from the final judgment, the D.C. Circuit affirmed in all significant respects.

The court of appeals reiterated its "denial of [petitioners'] request for disgorgement," which the court "affirm[ed] as the law of the case." U.S. Pet. App. 90a. It also upheld the district court's refusal to order defendants to fund a smoking-cessation program and public education campaign. *Id.* at 92a. The court explained that programs to reduce cigarette sales do not "prevent and restrain" violations of RICO because "[f]uture cigarette sales, even to addicted smokers, are not by themselves RICO violations." *Id.* "The proposed remedies," the court continued, "attempt to prevent and restrain future effects of past RICO violations, not *future* RICO violations[;] therefore they are outside the district court's

authority under section 1964(a)." *Id.* (emphasis added).

The court added that, even if the proposed smoking-cessation program and public education campaign "would eliminate Defendants' incentive to market their products fraudulently by shrinking Defendants' customer base," such "general deterrence remedies [are] aimed . . . wide of the statutorily-ordained mark." U.S. Pet. App. 93a, 94a. Section 1964(a) authorizes "injunctions to prevent and restrain fraudulent statements about smoking and health and addiction," the court concluded, "not to prevent Defendants from marketing and selling their products at all." *Id.* at 94a.

REASONS FOR DENYING THE PETITIONS

As was the case when this Court denied review in 2005, none of the traditional criteria for certiorari is met here. The D.C. Circuit's remedial decision is fully consistent with this Court's decisions, which require courts to analyze the text and structure of each statute, because the plain text and structure of RICO plainly preclude disgorgement and other backward-looking remedies. The courts of appeals that have examined the text and structure of RICO have unanimously rejected the government's broad submission here and agreed with the decision below that Section 1964(a) addresses only future RICO violations. And, any disagreement between the decision below and decisions suggesting that a limited form of RICO disgorgement *might be* available under some circumstances, if tailored to address future RICO violations, is purely academic because petitioners explicitly *reject* the limitations on disgorgement imposed by the Second and Fifth Circuits. Finally, as shown by the fact that this issue has produced a

mere three appellate decisions in four decades, the questions presented by petitioners have limited jurisprudential implications outside the "unique facts" of this case (Int. Pet. 26), and any remaining significance those issues might have even in this case has been overtaken by the recent enactment of comprehensive federal tobacco legislation.

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 1964(a) IS CONSISTENT WITH THIS COURT'S PRECEDENT.

The United States elected to bring this action under 18 U.S.C. § 1964(a), which authorizes only "appropriate orders" that "prevent and restrain" RICO violations. Applying the interpretive principles established by this Court in *Porter*, *Mitchell*, and *Meghrig*, the court of appeals correctly held that the plain language of Section 1964(a)—as well as RICO's comprehensive remedial framework—limit the "appropriate" relief under that provision to forward-looking remedies that "prevent and restrain" *future* RICO violations.

A. The Text Of Section 1964(a) And RICO's Comprehensive Remedial Framework Exclude Disgorgement And Other Backward-Looking Remedies.

This Court explained in *Porter* that, *"[u]nless otherwise provided by statute*, all the inherent equitable powers of the District Court are available." 328 U.S. at 398 (emphasis added). Disgorgement and other backward-looking remedies are unavailable under Section 1964(a) because the text and structure of RICO unambiguously provide otherwise.

1. The government contends that Section 1964(a) is a "plenary grant of equitable jurisdiction."

U.S. Pet. 13. In fact, Section 1964(a) grants district courts jurisdiction only "to prevent and restrain violations of [RICO] by issuing appropriate orders." 18 U.S.C. § 1964(a). Because a court cannot "*prevent* and *restrain*" what has already occurred, jurisdiction under Section 1964(a) is necessarily "limited to forward-looking remedies that are aimed at *future* violations" of RICO. U.S. Pet. App. 113a (emphasis added); *see also Webster's New International Dictionary* 1960, 2125 (2d ed. 1955) (defining "prevent" and "restrain," respectively, as "forestall" and "hold back"). Construing Section 1964(a) to authorize remedies intended to redress *past* violations of RICO would nullify the words "prevent and restrain," and violate the canon of construction requiring courts to "give effect to every word of a statute wherever possible." *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 & n.8 (1993) (statutory language limiting remedies "must mean *something*" and cannot be rendered "superfluous") (emphasis in original). Thus, there is no basis for the government's extraordinary notion that granting district courts the power to "prevent and restrain" violations somehow vests them with precisely the same remedial power they would possess if the statute stated that courts may impose the "full range of equitable remedies."

The court of appeals' reading of the "prevent and restrain" limitation is confirmed by the fact that each of the remedies specifically enumerated in Section 1964(a) is directed at future RICO violations. The section lists three examples of remedies that are "appropriate" to "prevent and restrain" RICO violations: divestiture, reasonable restrictions on future activities, and dissolution. 18 U.S.C. § 1964(a). Each of these remedies is designed to "prevent future

violations" by directly regulating "future conduct" or "separating the criminal from the RICO enterprise" itself. U.S. Pet. App. 117a. For example, divestiture—a forced sale of assets where, unlike disgorgement, the defendant is permitted to keep the proceeds—effectuates going-forward structural changes that preclude the defendant from using the divested enterprise to commit future violations.

Disgorgement is a very different remedy. Unlike divestiture, restrictions on future activities, and dissolution, disgorgement of ill-gotten gains "is a quintessentially *backward-looking* remedy focused on remedying the effects of past conduct." U.S. Pet. App. 113a (emphasis added). This Court's own discussions of "disgorgement" confirm its backward-looking nature: The Court has repeatedly recognized that "disgorgement of improper profits . . . is a remedy only for restitution," and is therefore "limited to restoring the status quo and ordering the return of that which rightfully belongs to the [victim]." *Tull v. United States*, 481 U.S. 412, 424 (1987) (internal quotation marks omitted); *see also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (disgorgement is "restitutionary"). Because it is designed to "restor[e] the status quo," disgorgement "is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct." U.S. Pet. App. 114a (emphasis in original).

The smoking-cessation program and public education campaign proposed by petitioners also fall outside the narrow jurisdictional scope of Section 1964(a). Those proposed remedies are avowedly designed to "redress the ongoing effects of . . . violations

of RICO" that occurred in the "*past*" (U.S. Pet. 14, 19 (emphasis added)), not to "prevent and restrain" RICO violations that might occur in the *future*. Indeed, the smoking-cessation program and public education campaign are not directed at *defendants'* future behavior (much less their RICO violations), but solely at future *consumer* behavior and, just like disgorgement, are "awarded without respect to whether the defendant[s] will act unlawfully in the future." U.S. Pet. App. 114a.

The government has no serious argument to rebut these points, and intervenors fare no better with their concededly "unusual contention" that addicted smokers are "ill-gotten assets" that the proposed remedies will "divest" from defendants. Int. Pet. i, 10. Even if human beings could be deemed "assets" that can be disposed of by judicial decree—a proposition unknown in American law since the ratification of the Thirteenth Amendment—the only thing that this proposed remedy could "prevent and restrain" is future cigarette *sales*, which "are not by themselves RICO violations." U.S. Pet. App. 92a. To the contrary, the continued, legal sale of cigarettes is expressly contemplated by federal law—as Congress recently reaffirmed. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000); *see also* Family Smoking Prevention and Tobacco Control Act ("FDA Act"), Pub. L. No. 111-31, § 907(d)(3), 123 Stat. 1776, 1803 (June 22, 2009) (prohibiting the FDA from "banning all cigarettes"). Approving petitioners' proposed remedies would thus transform Section 1964(a) from a statute targeting future *RICO*

violations into an open-ended authorization to proscribe future *lawful* conduct.[1]

2. This Court's interpretations of the Sherman and Clayton Acts remove any conceivable ambiguity as to whether disgorgement and other forward-looking remedies "prevent and restrain" RICO violations within the meaning of Section 1964(a). The Sherman and Clayton Acts authorize courts to order remedies that "prevent and restrain" antitrust violations (15 U.S.C. §§ 4, 25), and served as the model for RICO's similarly worded remedial provision. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151-52 (1987).

In the nearly 100 years since the antitrust laws were enacted, *no* court has ever interpreted the Sherman Act or Clayton Act to permit civil disgorgement. This reflects the longstanding principle that the antitrust laws' express remedies cannot be supplemented by implied equitable remedies. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981). In light of that clear limitation on courts' remedial authority under the antitrust laws, it is inconceivable that Congress would have used the same "prevent and restrain" formulation in Section 1964(a) if it had intended to authorize disgorgement. *See Holmes v. Sec. Investor Prot. Corp.*,

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[1] Petitioners' reliance on RICO's "liberal-construction mandate" is misplaced. U.S. Pet. 18. This Court has made clear that "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). Notwithstanding that clause, the "purposes Congress had in mind" when it enacted RICO "must be gleaned from the statute through the normal means of interpretation." *Id.* at 184.

503 U.S. 258, 268 (1992) (courts "may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used" in the antitrust laws).

Petitioners nevertheless invoke this Court's antitrust decision in *Ford Motor Co. v. United States*, 405 U.S. 562 (1972), to support their expansive reading of Section 1964(a). Int. Pet. 24-25; *see also* U.S. Pet. 20. That case, however, considered the availability of *divestiture*, a forward-looking remedy explicitly authorized under Section 1964(a). *Ford Motor Co.*, 405 U.S. at 565. The case did not consider disgorgement or any other backward-looking remedy.

Far more pertinent is the government's decision, while litigating this case, not to pursue "disgorgement of illegal profits" in its antitrust litigation against Microsoft Corporation because it considered the remedy "not available" under the antitrust laws. 67 Fed. Reg. 12,090, 12,135 (Mar. 18, 2002). The government explained that, in a suit seeking equitable relief under a statutory provision designed to "prevent and restrain" violations, "the goals of the remedy . . . are to enjoin the unlawful conduct *[and] prevent its recurrence*." *Id.* (emphasis added). Disgorgement and other backward-looking remedies, the government reasoned, are therefore "not available." *Id.*; *see also* Br. for the United States as Amicus Curiae at 25, *Scheidler v. NOW*, 547 U.S. 9 (2006) (Nos. 04-1244 & 04-1352) (the Sherman Act and Section 1964(a) are "parallel in . . . critical respects," including that "both confer on courts 'jurisdiction' to prevent and restrain violations").

3. Moreover, the "presumption that a remedy was deliberately omitted from a statute is strongest

when," as in RICO, "Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Nw. Airlines v. Transp. Workers Union of Am.*, 451 U.S. 77, 97 (1981).[2] Congress manifestly did not "entrust[ ] to an equity court the enforcement of" RICO, guided only by "the historic power of equity to provide complete relief" (*Mitchell*, 361 U.S. at 291, 292), but instead set forth a comprehensive framework of appropriate remedies available in specific circumstances.

RICO expressly provides two mechanisms for recovering the ill-gotten gains of alleged racketeers—both of which impose procedural requirements, including trial by jury, that are inapplicable to truly equitable suits under Section 1964(a). First, Section 1963(a) expressly authorizes the government to forfeit ill-gotten proceeds in a criminal proceeding. Second, persons who have been injured by racketeering activities may bring a civil treble-damages action under Section 1964(c).

The government bypassed both of those provisions when it filed suit under Section 1964(a). It

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[2] *See also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (a "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly") (emphasis in original; internal quotation marks omitted); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 732 (1989) ("Whatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute."); *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943) ("the specification of one remedy normally excludes another").

then sought to use that narrow equitable provision to forfeit $280 billion in defendants' past profits—*four* times the domestic defendants' current market capitalization—by proving its case to a single district court judge (and successfully urging the D.C. Circuit to apply only cursory appellate review to the district court's findings of fact (*see* U.S. Pet. App. 49a)).

Thus, petitioners' boundless interpretation of the remedies available under Section 1964(a) would not only add unauthorized remedies, but also affirmatively "subsume" the "other remedies" explicitly created by RICO, thereby undermining the statute's carefully crafted remedial framework. *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). If disgorgement were available under Section 1964(a) without meeting the procedural requirements applicable under Sections 1963(a) and 1964(c), the government would have little reason to seek to recover an alleged racketeer's ill-gotten gains under a provision other than Section 1964(a). As the Court has noted, "[t]here is no reason why Congress would bother to specify conditions under which a person may bring a . . . claim, and at the same time allow [identical] actions absent those conditions." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

Indeed, if the government were correct that Section 1964(a) is a "plenary grant of equitable jurisdiction" (U.S. Pet. 13), there would have been no need for Congress to have enacted that provision at all because Section 1964(a) would not impose *any* restrictions on courts' "inherent equitable powers." *Porter*, 328 U.S. at 398. Under the government's limitless conception of courts' equitable authority, RICO's general authorization in 18 U.S.C. § 1964(b) for the government to "institute proceedings" seeking equitable

relief would itself constitute a "plenary grant of equitable jurisdiction." The government's argument that Section 1964(a) does the same thing as Section 1964(b)—instead of serving as a *limit* on equitable remedies—strips Section 1964(a) of all meaning.

B. This Court's Precedent Confirms That Backward-Looking Remedies Are Unavailable Under Section 1964(a).

Petitioners stake their case for this Court's review on a purported conflict between the decision below and this Court's decisions in *Porter* and *Mitchell*. Far from conflicting with the court of appeals' holding, however, *Porter* and *Mitchell* underscore that disgorgement is *not* available because RICO's text and structure plainly "provide[ ]" otherwise. *Porter*, 328 U.S. at 398. Indeed, RICO constitutes a "clear and valid legislative command" to the contrary. *Id.*

1. In *Porter*, the Court held that the government could seek restitution of rents collected by a landlord in excess of the price ceilings established under the Emergency Price Control Act ("EPCA"), a statute with a fundamentally different text and structure from RICO. 328 U.S. at 402. EPCA broadly authorized the government to "make application to the appropriate court for an order enjoining [prohibited] acts or practices, or for an order enforcing compliance with such provision," and granted courts jurisdiction to issue "a permanent or temporary injunction, restraining order, or *other order*" when a "person *has engaged* or is about to engage in" a violation of the statute. *Id.* at 397 (emphases added).

This Court explained that, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity,

the full scope of that jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398. The Court found no such "restrict[ion]" in EPCA because a statute authorizing an "*other* order" for past violations—in addition to prospective injunctive relief—plainly encompasses retrospective remedies. *Id.* at 399. The Court emphasized that the restitutionary relief available under EPCA was "consistent with and differ[ed] greatly from the damages and penalties" available under other provisions of the statute (*id.* at 402), and that the "legislative background of [EPCA] confirm[ed]" its "conclusion" regarding the availability of restitution. *Id.* at 400.

None of the rationales on which the Court relied in *Porter* to uphold a restitutionary remedy under EPCA is applicable to RICO. RICO *does*, "in so many words," explicitly restrict courts' equitable jurisdiction to those remedies that "prevent and restrain" future RICO violations, and therefore affirmatively excludes disgorgement and other backward-looking remedies. Moreover, RICO's comprehensive remedial framework provides other explicit mechanisms under Sections 1963(a) and 1964(c) for separating a racketeer from its ill-gotten gains. Finally, the legislative history of Section 1964(a) makes clear that this carefully crafted set of remedies is not to be supplemented with implied remedies that are unrelated to the statutory objective of "prevent[ing] and restrain[ing]" future RICO violations. *See* S. Rep. No. 91-617, at 81 n.11 (1969) ("'[T]he remedy in equity is purely *preventative*. The chancellor does not punish the defendant for what he *has done*.'") (quoting *Respass v. Commonwealth*, 115 S.W. 1131, 1132 (Ky. 1909)) (emphasis added).

The language and structure of the Fair Labor Standards Act ("FLSA") construed in *Mitchell* pro-

vide an even starker contrast to RICO. The Court held in *Mitchell* that an equitable order reimbursing employees for lost wages was an available remedy under a statute that granted courts "jurisdiction for cause shown, to restrain violations" of a provision prohibiting discharge in retaliation for the disclosure of minimum-wage and overtime violations. 361 U.S. at 296. Although the FLSA lacked some of the broad remedial language of EPCA—such as its open-ended authorization to issue "other order[s]"—the Court concluded that the FLSA lacked any textual guideposts suggesting a *limitation* of equitable remedies. As the Court saw the issue, the statute was "silent" one way or the other. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (in *Mitchell*, "this Court held, in the face of a silent statute, that district courts enjoyed the 'historic power of equity' to award lost wages").[3]

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[3] Petitioners repeatedly cite *United States v. Turkette*, 452 U.S. 576 (1981), and imply that the Court's decision in that *criminal* RICO action somehow addressed the issue in this case. U.S. Pet. 13, 14, 19, 22, 28, 29, 31; Int. Pet. 4, 15, 20, 22, 23. But the only question presented in *Turkette* was "whether the term 'enterprise' as used in RICO encompasses both legitimate and illegitimate enterprises." *Turkette*, 452 U.S. at 578. In resolving that liability question, the Court noted that the lower court had believed that the remedies collectively provided by Sections 1964(a) and 1964(c)—"divestiture, dissolution, reorganization, restrictions on future activities by violators of RICO, and treble damages"—would have utility only with respect to legitimate enterprises. *Id.* at 585. The Court disagreed, holding that the enumerated remedies could be useful regardless of whether the enterprise was ostensibly legitimate or admittedly criminal. *Id.* Needless to say, the Court's conclusion that the remedies *expressly* identified in Section 1964 do not preclude the application of RICO to legitimate enterprises

2. The court of appeals' interpretation of Section 1964(a)—and its application of *Porter* and *Mitchell*—are confirmed by this Court's decision in *Meghrig*, which construed a statute with a comprehensive and carefully circumscribed set of remedies analogous to RICO's remedial framework.

In *Meghrig*, the Court unanimously held that the Resource Conservation and Recovery Act ("RCRA")—"a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste"—does not confer jurisdiction to order "'equitable restitution'" for past cleanup costs. 516 U.S. at 482, 483. In its citizen-suit provision, RCRA grants district courts authority "'*to restrain* any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . , *to order such person to take such other action as may be necessary*, or both.'" *Id.* at 484 (quoting 42 U.S.C. § 6972(a)) (emphases in *Meghrig*).

The Court explained that "[n]either remedy"—"a mandatory injunction . . . order[ing] a responsible party to 'take action'" or "a prohibitory injunction . . . 'restrain[ing]' a responsible party from further violating RCRA"—"contemplates the award of past cleanup costs." *Meghrig*, 516 U.S. at 484. The Court's reading of the plain language of RCRA was confirmed by "a comparison between the relief available under" RCRA and the relief available under

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[Footnote continued from previous page]

hardly supports the notion that the Court has endorsed disgorgement or other remedies *not* listed in Section 1964.

CERCLA, which "expressly permits" the recovery of past cleanup costs. *Id.* at 484, 485. "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy." *Id.* at 485.

The Court also explicitly rejected the government's reliance on *Porter* to read a remedy of "equitable restitution" into RCRA's comprehensive remedial framework and made clear that *Porter* does not reach nearly as far as the government supposes. *Meghrig*, 516 U.S. at 487. As it does here, the government argued in *Meghrig* that, under *Porter*, "district courts retain inherent authority to award any equitable remedy that is not expressly taken away from them by Congress." *Id.* The Court found the government's reliance on *Porter* to be misplaced because "the limited remedies described in [RCRA], along with the stark differences between the language of that section and the cost recovery provisions of CERCLA, amply demonstrate that Congress did not intend" for courts to find an implied remedy for equitable restitution in RCRA. *Id.* It is an "'elemental canon of statutory construction'" that, "where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, . . . 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies.'" *Id.* at 487-88 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981)).

While the government has now, by dint of necessity, come around to the view that RCRA possesses several "distinctive forward-looking features" absent from RICO (U.S. Pet. 26), the reasons for confining Section 1964(a) to forward-looking relief are *at least*

as strong as the reasons for imposing similar remedial limitations on RCRA. Like the language of RCRA, the language of Section 1964(a) limits the available remedies to forward-looking relief; those temporal restrictions are doubly apparent in RICO, which requires that relief both "*prevent*" and "*restrain*" future violations. Moreover, like RCRA, RICO provides a comprehensive remedial framework that would be dramatically undermined by the availability of disgorgement. And, just as CERCLA demonstrates that Congress knows how to order backward-looking environmental remedies when it wants to, the availability of backward-looking monetary awards in the *same* statute—Sections 1963(a) and 1964(c) of RICO—even more compellingly highlights the absence of any comparable authorizing language in Section 1964(a).[4]

II. THE QUESTIONS PRESENTED DO NOT IMPLICATE A CIRCUIT SPLIT.

The government contends—in a cursory, two-paragraph argument—that the decision below conflicts with decisions of the Second and Fifth Circuits. U.S. Pet. 26-27. As was the case when this Court denied the government's petition for certiorari in 2005, however, no published appellate decision has ever upheld a disgorgement remedy under Section 1964(a). Nor has any circuit ever endorsed the

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[4] In fact, RCRA possesses several indicia of the availability of backward-looking relief that are absent from RICO, including its broad authorization to require polluters "to take such other action as may be necessary" (42 U.S.C. § 6972(a)) and its savings clause explicitly "preserving remedies under statutory and common law." *Meghrig*, 516 U.S. at 487 (citing 42 U.S.C. § 6972(f)).

sweeping proposition advanced by petitioners that purely backward-looking remedies are available under Section 1964(a). To the contrary, the Second, Fifth, and D.C. Circuits—the only circuits to have addressed the issue—all agree that Section 1964(a) is limited to forward-looking remedies. Any disagreement among those courts as to the precise contours of these remedies is purely academic and does not warrant this Court's review because petitioners acknowledge that the relief they seek is not available in *any* of these circuits.

A. In *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996), the Second Circuit vacated a disgorgement award issued against a former union leader under Section 1964(a). *Id.* at 1182. The court explained that "the jurisdictional powers in § 1964(a) serve the goal of foreclosing *future* violations, and do not afford broader redress," and that the court therefore could "not see how it serves any civil RICO purpose to order disgorgement of gains ill-gotten long ago by a retiree." *Id.* (emphasis added). The Second Circuit further emphasized that "disgorgement of all ill-gotten gains may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future RICO violations." *Id.* "If this were adequate justification," the court explained, "the phrase 'prevent and restrain' would read 'prevent, restrain and discourage,' and would allow any remedy that inflicts pain." *Id.*

Although the Second Circuit held out the possibility that a disgorgement award might be reinstated on remand if "there [was] a finding that the gains [were] being used to fund or promote the illegal conduct, or constitute capital available for that purpose" (*Carson*, 52 F.3d at 1182), neither the Second Circuit

nor any other circuit has ever upheld a disgorgement award on that ground. In fact, in the fifteen years since *Carson*, no Second Circuit decision has so much as addressed the issue.

In *Richard v. Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345 (5th Cir. 2003), *cert. denied*, 543 U.S. 917 (2004), the Fifth Circuit rejected a disgorgement claim under Section 1964(a) because the defendants had ceased production of the defective products that were the basis for the plaintiff's suit. *Id.* at 355. The court explained that the proposed disgorgement was "impermissible under § 1964(a)" because the section's "equitable remedies are available only to prevent ongoing and future conduct." *Id.* The court acknowledged that the Second Circuit in *Carson* had envisioned circumstances in which disgorgement might be available under Section 1964(a), but, like the Second Circuit, had no occasion to apply that reasoning because no facts warranted it. *Id.* at 354.

There is accordingly no circuit split on the questions presented by petitioners. As the D.C. Circuit emphasized, *no* circuit has adopted petitioners' position that Section 1964(a) authorizes purely backward-looking remedies targeting a defendant's ill-gotten gains or the ongoing effects of past RICO violations. *See* U.S. Pet. App. 92a ("Even those courts that would allow some version of disgorgement under section 1964(a) recognize that the statute is limited to preventing future violations and does not extend to future effects flowing from past violations."). Indeed, far from embracing *Carson* and *Richard*, petitioners explicitly *reject* "the limitations on disgorgement identified in" those decisions. U.S. Pet. 26-27; *see also* Int. Pet. 17.

Thus, any disagreement between the D.C. Circuit and the Second and Fifth Circuits regarding the potential availability of disgorgement under Section 1964(a) is not implicated in this case because the government never attempted to construct a disgorgement model that was limited to defendants' supposedly "available" ill-gotten gains. It has instead persisted in its view throughout this litigation that "disgorgement" is available to fund the federal fisc—as with any other penalty or fine—without regard to whether the disgorged funds represent ill-gotten gains that remain available to finance future RICO violations.

B. In an unsuccessful effort to identify a circuit split, petitioners also cite a hodgepodge of decisions that interpret *other* statutes to permit disgorgement. *See* U.S. Pet. 27-28; Int. Pet. 17-18. But this Court's cases make clear that the availability of equitable remedies turns on a particular statute's text and structure, and is not amenable to petitioners' one-size-fits-all rule. *Compare Porter*, 328 U.S. at 398, *with Meghrig*, 516 U.S. at 483. None of the other statutes invoked by petitioners includes the restrictive "prevent and restrain" language of Section 1964(a) or the structural guideposts found in RICO.

The Securities Exchange Act, for example, authorizes federal courts to grant "*any* equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5) (emphasis added). Similarly, the Commodities Exchange Act includes an "enforcement provision [that] is nearly identical to the EPCA's enforcement provision" at issue in *Porter*. *CFTC v. Wilshire Inv. Mgmt. Co.*, 531 F.3d 1339, 1344 (11th Cir. 2008).

Cases interpreting the Food, Drug, and Cosmetic Act ("FDCA") to authorize disgorgement are equally unhelpful to petitioners. Even if those decisions were correct, several of the courts that have held that disgorgement is available under the FDCA have explicitly emphasized that RICO is a distinct statute with features that clearly indicate a limited grant of equitable jurisdiction. The Tenth Circuit, for example, explained that courts' remedial authority under Section 1964(a) is restricted by "statutory language in RICO not present in the FDCA." *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1059 (10th Cir. 2006); *see also United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 233 (3d Cir. 2005) (Section 1964(a) is "far less broad than" the FDCA). Indeed, the government itself has argued that the remedial provisions of RICO and the FDCA are "fundamentally different." Mem. of Points and Authorities of the United States in Support of Mot. to Dismiss at 44, *Allergan, Inc. v. United States*, No. 09-1879 (D.D.C. Jan. 11, 2010).

III. THE D.C. CIRCUIT'S REMEDIAL HOLDING HAS LIMITED IMPORTANCE OUTSIDE THIS UNPRECEDENTED LITIGATION.

Petitioners' inability to meet this Court's certiorari criteria is underscored by their failure to present a question with meaningful legal implications outside the setting of this extremely unusual case. As even intervenors acknowledge, the remedial issues presented in this case are "unique" and unlikely to have widespread jurisprudential significance. Int. Pet. 15.

This case is unprecedented in numerous respects. In fact, the government's decision to seek "disgorgement" at all was itself highly unusual. In the forty years since RICO's enactment, the government had

never, until this case, sought disgorgement from a legitimate business selling a legal product. And, in those rare cases where the government had sought disgorgement, it had done so only in the context of organized crime and only for relatively minor amounts (*see, e.g.*, *Carson*, 52 F.3d at 1181)—not, as here, for an amount larger than the gross domestic product of 155 countries and forty times the size of the federal judiciary's annual budget.[5]

It is therefore unsurprising that, until this case, the government never contended that the availability of disgorgement has "potentially far-reaching implications" for its ability to obtain relief under RICO. U.S. Pet. 29. The government's longstanding lack of interest in this issue is understandable in light of the availability of RICO's criminal forfeiture remedy, which authorizes the recovery of the same monetary relief the government is attempting to obtain here through disgorgement. Indeed, the government brings criminal forfeiture actions under RICO with comparative regularity, and nothing in the decision below impairs its ability to continue to do so in the future. The government simply made the tactical decision not to invoke that remedy in this case and instead to seek a comparable recovery under Section 1964(a) without the inconvenience of having to prove its case convincingly to a jury.

Moreover, the government's case for review is even weaker now than it was in 2005 because Congress's recent enactment of the FDA Act affords the

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[5] *See* World Bank, World Development Indicators Database, *at* http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf; Administrative Office of the United States Courts, *2008 Annual Report of the Director* 7 (2009).

federal government new and extensive regulatory authority over the tobacco industry. The regulatory oversight imposed by the FDA Act subjects virtually every aspect of defendants' business to stringent government scrutiny. Thus, even if disgorgement and other backward-looking remedies were available under Section 1964(a), their availability would do little to further RICO's statutory objectives in this case because the FDA Act—together with the regulatory requirements imposed by the MSA between the tobacco industry and the States—eliminates any reasonable possibility that, with or without the disgorgement of their prior profits, defendants will engage in future racketeering conduct.

Finally, this case is an especially poor vehicle for considering the availability of disgorgement under RICO. The issue framed by the government—the availability of equitable disgorgement under RICO—is not even presented on these facts because the government's punitive attempt to extract $280 billion in prior revenue from defendants is plainly *legal*, not equitable, in nature. A purported restitutionary remedy is legal where, as here, the plaintiff seeks to impose "personal liability upon the defendant to pay a sum of money," as opposed to "restor[ing] to the plaintiff particular funds" where the plaintiff can "assert title or right to possession of particular property." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213, 214 (2002) (internal quotation marks omitted); *see also* Restatement (First) of Restitution § 215, at 866 (1937) (pointing to "necessity of tracing property" to assert equitable restitution).

Indeed, the fact that the government insists on labeling its proposed forfeiture "disgorgement" cannot obscure its obvious *legal* character. The proposed

monetary remedy is not restitution at all because the government has never indicated an intention to "restor[e] the status quo" by "ordering the return" of defendants' profits to consumers who purchased cigarettes. *Tull*, 481 U.S. at 424 (internal quotation marks omitted); *cf. Porter*, 328 U.S. at 396-97 (equitable remedy returned illegal rents to aggrieved tenants); *Mitchell*, 361 U.S. at 289 (equitable remedy reimbursed employees for lost wages). The government instead presumably intends to deposit those funds directly in the federal treasury, as it would do with any other *in personam* money judgment or any civil or criminal penalty it recovered under RICO. Accordingly, even if equitable disgorgement to *victims* were implicitly available under RICO in some narrow circumstances, that would not resolve this case because the Court is especially reluctant to infer a monetary remedy for the *government*. *See United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 314-15 (1947).

Furthermore, even if the government were correct (at 23 n.7) that disgorgement can be a forward-looking remedy because it generally deters future violations, this would be another reason that the novel type of disgorgement sought by the government would not be an equitable remedy. As this Court has held in similar settings, monetary penalties are legal in nature where they are designed "to further retribution and deterrence" and therefore "reflect[ ] more than a concern to provide equitable relief." *Tull*, 481 U.S. at 423.

To hold that the government is entitled to its requested monetary relief, the Court would also need to grapple with serious separation-of-powers and Eighth Amendment issues. The $280 billion award sought by the government—which is four times the

domestic defendants' current market capitalization—was transparently designed to put tobacco companies out of business. The government's pursuit of this potentially bankrupting remedy conflicts with Congress's recently reiterated intention that cigarettes remain legally available subject to federal regulatory oversight. FDA Act § 907(d)(3), 123 Stat. at 1803. And, any disgorgement award that is even remotely close to the astounding figure sought by the government would be "grossly disproportionat[e]" to defendants' alleged RICO violations and thus manifestly unconstitutional. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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May 25, 2010