No. 09-980

IN THE
Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,

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

BRIEF OF *AMICUS CURIAE* KBR, INC. IN SUPPORT OF PETITIONER

STEPHEN B. KINNAIRD
Counsel of record
D. SCOTT CARLTON
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for *Amicus Curiae* KBR, Inc.

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STATEMENT OF INTEREST[1]

Amicus curiae KBR, Inc. ("KBR") is a global engineering, construction, and services company supporting the energy, hydrocarbon, government services, minerals, civil infrastructure, power, and industrial sectors in countries around the world. KBR is incorporated under the laws of Delaware and maintains its corporate headquarters in Houston, Texas. KBR and affiliated entities (collectively the "KBR Defendants") are currently defending a lawsuit in federal district court that involves the extraterritorial application of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). *See Adhikari v. Dauod & Partners*, Case No. 09-cv-1237 (S.D. Tex.).

In *Adhikari*, plaintiffs, all nationals of Nepal, brought RICO claims against the KBR Defendants for alleged conduct occurring entirely outside of the United States, principally by separate foreign companies who subcontracted with the KBR Defendants to provide services related to the Iraq War effort. The district court denied the KBR Defendants' motion to dismiss the RICO claim, relying on allegations that the KBR Defendants "gained substantial economic benefit" from the conduct underlying the RICO allegations. *Adhikari*,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

No. 09-cv-1237, Dkt. #168, at 22 (Nov. 3, 2009). The district court held that general economic benefits and competitive advantage that the KBR Defendants allegedly derived from the RICO "enterprise" satisfied the "effects" test for extraterritorial application of RICO. The KBR Defendants subsequently filed a motion to certify the issue for interlocutory appeal, but that motion was denied by the district court on March 1, 2010.

KBR has a strong interest in resolution of the question presented of the extraterritorial application of RICO. This Court's determination of that question on the merits would not only directly affect the RICO claims in *Adhikari*, but would also provide important predictability to global services providers like KBR that engage in foreign operations and rely on foreign subcontractors. RICO's broad prohibitions against criminal enterprises can be easily manipulated by plaintiffs, as in *Adhikari*, in an effort to impute the alleged conduct of foreign actors to American companies. The availability of treble-damages RICO claims predicated on wholly foreign conduct fosters uncertainty in the management of legal risks for global companies and improperly invites litigation of foreign claims in American courts.

In its petition for certiorari, British American Tobacco (Investments) Limited ("BATCo") has demonstrated in detail the error of the D.C. Circuit's extraterritoriality ruling, and analyzed the conflicts of authority justifying this Court intervention. Pet. 11-36. KBR will not repeat that analysis. KBR instead offers this brief as *amicus curiae* to bring two important considerations to the Court's attention: (1) the jeopardization of international comity by extra-

territorial application of a broad public-order statute like RICO that predicates relief on local crimes and provides for treble damages and structural injunctions, and (2) the improper incentives for private litigants to reconstitute foreign claims as RICO claims so as to invoke the jurisdiction of American courts and avail themselves of both favorable procedures and expansive civil RICO remedies.

SUMMARY OF ARGUMENT

In the decision below, the D.C. Circuit effectively reversed the presumption against the extraterritoriality of federal law established by this Court's precedents. It held that federal statutes are deemed to reach wholly foreign conduct that has direct and substantial effects in the United States; indeed, according to the court, the presumption against extraterritoriality is not even implicated if such effects are alleged. Pet. App. 58a. The D.C. Circuit went astray in so ruling; as petitioners demonstrate, such effects from foreign conduct may provide a proper basis for federal jurisdiction only if plaintiffs can *overcome* the presumption that Congress does not legislate extraterritorially. Pet. 11-17.

This Court's review is necessary because of the critical importance of the presumption against extraterritoriality in an era of globalization. The presumption is rooted in the separation of powers, ensuring that Congress and not the judiciary decides the difficult and delicate questions inherent in the projection of American law abroad. The presumption promotes international comity because it prevents

friction with foreign sovereigns arising from claims that Congress has not authorized under federal law. Foreign sovereigns jealously guard their territorial jurisdiction. Statutes like RICO that impose onerous criminal sanctions (including stiff criminal forfeiture provisions) and broad civil remedies, if extended to conduct occurring exclusively in foreign territory, would trench upon traditional sovereign prerogatives and kindle resentment. The unusual breadth of RICO, and the mischief threatened by its extension to foreign disputes, make this Court's review imperative.

Not only does the extraterritorial application of RICO entail serious intrusion upon foreign sovereign authority, but it prejudices multinational companies and imposes substantial and unwarranted burdens upon the federal courts. Even within its proper domestic sphere, RICO is notorious for its malleability, and for the ill effects of converting ordinary civil disputes into federal racketeering claims. Foreign plaintiffs can and do take advantage of that same malleability to refashion foreign-law claims as RICO claims, and their incentives to do so are manifold. The treble damages, attorney's fees, and structural injunctions available under RICO dramatically increase the settlement value of claims, and the invocation of federal court jurisdiction avails foreign plaintiffs of American procedural advantages (such as discovery, jury trials, class actions, and contingent-fee arrangements with counsel) that are commonly unavailable in foreign courts. Plaintiffs will enjoy those advantages not only as to the RICO claims, but also as to any foreign claims that the district court may hear in the exercise of

supplemental jurisdiction. The challenge of having fact-based RICO claims dismissed on the pleadings or on summary judgment only heightens the difficulties that defendants will face. Foreign RICO claims will proliferate under the aberrant rule below, and this Court should intervene to prevent the litigation distortions and burdens that extraterritorial application of RICO will invite.

ARGUMENT

I. This Court's Precedent Establishes a Strong Presumption Against Extraterritorial Application Of Federal Law.

A. The Presumption Against Extraterritoriality Ensures That International Comity Is Not Jeopardized Without Explicit Congressional Action.

The presumption against extraterritorial application of United States law is an unwavering principle of American jurisprudence. When Congress enacts legislation regulating conduct, courts operate under "the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small v. United States*, 544 U.S. 385, 388-89 (2005); *Sandberg v. McDonald*, 248 U. S. 185, 195 (1918). If Congress fails to use "words which definitely disclose an intention to give it extraterritorial effect," *New York Central R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925), the statute is "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *Am. Banana Co. v. United Fruit*

Co., 213 U.S. 347, 357 (1909); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 265 (1991) ("*Aramco*").

Several policy considerations underlie the presumption against extraterritorial jurisdiction. *See Smith v. United States*, 507 U.S. 197, 204 n.5 (1993). The first consideration supporting the presumption is the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.*; *see also Foley Bros.*, Inc., *v. Filardo*, 336 U.S. 281, 285 (1949) ("It is based on the assumption that Congress is primarily concerned with domestic conditions.").

Second, the presumption reflects the judicial branch's respect for the separation of powers and its deference to Congress in the sensitive arena of foreign affairs. Exercising the legislative power, Congress is "able to calibrate its provisions in a way that [courts] cannot." *Aramco*, 499 U.S. at 259. The judiciary accordingly looks to Congress for a positive sign of a statute's reach. *See Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 444 (2007) (citing *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972)). Courts leave it "in Congress' court" to determine to what extent a statute has "extraterritorial thrust," and refrain from "forecasting Congress' likely disposition" by trying to divine extraterritorial intent from an equivocal text. *Id.* at 458-59; *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (requirement of congressional intent "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes"). Therefore, courts assume "'that Congress legislates against the backdrop of the presumption against

extraterritoriality.'" *Smith*, 507 U.S. at 204 (quoting *Aramco*, 499 U.S. at 248).

A third and equally important consideration is the "desire to avoid conflict with the laws of other nations." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993). Application of United States law to foreign conduct, while constitutionally permissible, *Aramco*, 499 U.S. at 248, risks "'an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.'" *Chisholm*, 268 U.S. at 31-32 (citation omitted); *see also* Ellen S. Podgor, *Extraterritorial Criminal Jurisdiction: Replacing "Objective Territoriality" With "Defensive Territoriality," in 28 Studies in Law, Politics & Society* 117, 124-25 (Austin Sarat & Patricia Ewick eds., 2003) (discussing the repercussions of expansive extraterritorial jurisdiction). Given the primacy of territorial jurisdiction, *cf.* U.N. Charter art. 2, para. 7 (forbidding UN interference in domestic jurisdiction); G.A. Res. 48/124, U.N. Doc. A/RES/48/124 (Dec. 20, 1993) (affirming principle of non-interference in sovereign internal affairs), international law "limit[s] the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citing Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2) (1986)). Because Congress is presumed to act in conformity with customary international law, courts "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.*; *see also Microsoft*

Corp., 550 U.S. at 455 (same); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J. dissenting) (describing "'prescriptive comity'" as "the respect sovereign nations afford each other by limiting the reach of their laws"). The presumption thus "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248.

Extraterritorial application of American law impinges on foreign sovereignty by forcing foreigners to "bear the costs of domestic regulation, even though foreigners (*i.e.*, those beyond the state's territorial borders) are nearly powerless to change those regulations." *See* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 Minn. L. Rev. 815, 859-60 (2009); *see also* See Mark P. Gibney, *The Extraterritorial Application of U.S. Laws: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. Int'l & Comp. L. Rev. 297, 312-13 (1996) (describing the undemocratic nature of extraterritorial laws).

Moreover, the presumption against extraterritoriality is not just a matter of deference to foreign sovereigns; it protects the United States and its nationals against retaliatory actions by foreign states. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); Parrish, *supra*, 93 Minn. L. Rev. at 857. Foreign sovereigns will feel less constrained in giving their own laws extraterritorial effect if United States courts aggressively grant American laws extraterritorial reach. Furthermore, several

countries have reacted to extraterritorial application of United States law by some courts by enacting "blocking statutes" to prevent foreign discovery or other assistance to U.S. litigation, and by rejecting enforcement of United States judgments. *See, e.g.*, Restatement (Third) of Foreign Relations intro, note, at 304; Amicus Brief of the Federal Republic of Germany in *Empagran*, No. 03-724, 2004 WL 226388, at *27-*28 (Feb. 3, 2004). Far better for courts to reject extraterritorial jurisdiction where congressional intent is unclear, leaving it to Congress to put its house in order.

Where, as here, a federal statute contains criminal penalties, the presumption against extraterritorial application is especially acute. Historically, the Court has expressed reluctance to give criminal laws extraterritorial effect, noting that "'[c]rimes are in their nature local, and the jurisdiction of crimes is local.'" *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (quoting Sir William Blackstone); *see also United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-31 (1818) (declining to apply federal statute punishing piracy to conduct of foreign nationals on a foreign ship).[2] Because the protection of private individuals and property abroad is typically a prerogative of the territorial sovereign, this Court

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[2] The presumption against extraterritorial application of United States law was recognized as early as 1795 in an opinion of then Attorney General Bradford. *See* Breach of Neutrality, 1 U.S. Op. Att'y Gen. 57, 58, 1795 WL 329 (U.S.A.G. 1795) ("as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States").

has demanded a clear statement of congressional intent to apply general federal criminal statutes to conduct occurring abroad:

> Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. *If punishment of them is to be extended to include those committed out side of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.*

United States v. Bowman, 260 U.S. 94, 98 (1922) (emphasis added). The Court has thus "staked out a position rejecting broad extraterritorial application of criminal law in the absence of express congressional mandate." Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering United States v. Bowman*, 44 San Diego L. Rev. 585, 588 (2007).

Finally, the presumption against extra-territoriality operates with force when the statute affords substantial civil remedies different in kind from those available under foreign law. As this Court has noted in limiting the extraterritorial reach of the antitrust laws, "even where nations agree about

primary conduct, say price fixing, they disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 164. This Court noted that "[t]he application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy." *Id.* The Court further observed that "several foreign nations" protested that "apply[ing] our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." *Id.* [3]

B. The Substantial Risks To International Comity From Extraterritorial Application of RICO Support Review of the Ruling Below.

All these considerations militate against the extraterritorial application of RICO. First, RICO is devoid of the requisite "'specific language' ... reflecting congressional intent" "to apply the statute

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[3] Foreign countries frequently object to extraterritorial applications of United States law. *See, e.g.*, *McCulloch*, 372 U.S. at 16-17, 21 (acknowledging "vigorous protests from foreign governments," among other considerations, in ultimately holding that National Labor Relations Act should not apply to foreign-flag ships employing foreigners); Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. Rev. 523, 523-24 (1993) ("The United States has offended the sovereignty of other countries" by "impos[ing] its regulations on transactions that may be viewed as essentially foreign"); *In re Westinghouse Elec. Corp., Uranium Contracts Litig.*, 1978 All E.R. 434 (H.L. 1977) (attempts by the United States to apply its laws extraterritorially are "not in accordance with international law").

abroad." *Aramco*, 499 U.S. at 251-52 (citation omitted); *see Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991) ("the language and legislative history of RICO fail to demonstrate clear Congressional intent to apply the statutes beyond U.S. boundaries"). Second, the wide-ranging predicate offenses that constitute unlawful racketeering under RICO include many ordinary crimes against private individuals and property that are local in nature and under *Bowman* are presumptively not subjects of exterritorial regulation. *See* 18 U.S.C. § 1961(1); Pub. L. 91-452, 84 Stat. 922, 923 (describing the principal purpose of RICO as "the eradication of organized crime *in the United States*") (emphasis added). The international comity concerns present whenever criminal laws are given extraterritorial effect are heightened because RICO imposes especially "severe criminal penalties . . . on those engaged in conduct within the Act's compass." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411-12 (2003) (Ginsburg, J., concurring) (citing 18 U.S.C. § 1963(a) (up to 20 years' imprisonment and wide-ranging forfeiture for a single criminal violation). Finally, the "drastic remedies" available to civil RICO plaintiffs, *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 233 (1989) – which include structural injunctions to reconstitute enterprises and divest defendants of their interests therein, treble damages, and attorneys' fees, 18 U.S.C. § 1964(a) & (c) – are precisely the kind that this Court recognized in *Empagran* as likely to affront foreign sovereigns. Intent to apply such draconian criminal and civil penalties to the foreign conduct of foreign actors cannot reasonably be imputed to Congress.

The court of appeals never addressed these concerns because of its misconception of this Court's extraterritoriality precedents. Pet. 11-17. The court improperly assumed that the presumption against extraterritoriality is not implicated if the alleged foreign conduct has substantial domestic effects. Pet. App. 58a. To the contrary, while such effects may be a legitimate basis for extraterritorial jurisdiction, the presumption remains that such jurisdiction is not intended unless Congress expressly authorizes it.

The D.C. Circuit's error is grievous and in conflict with the precedents of this Court and other courts of appeals. Pet. 17-28. At a minimum, however, the substantial international comity concerns raised by the application of RICO to foreign conduct justify this Court's review of the ruling below.

II. Extraterritorial Application of RICO Will Unduly Burden Multinational Companies and Federal Courts with Foreign Civil Litigation.

Infringement of foreign sovereign interests is not the only evil that follows from the decision below. Giving extraterritorial effect to a statute with the unparalleled breadth and civil remedies of RICO will invite wholly foreign litigation into the United States that does not belong here, and will unduly burden both multinational businesses and the federal courts.

Even within its proper domestic sphere, RICO has been interpreted to extend dramatically beyond its original purpose of fighting organized crime. *Sedima, S.P.R.C. v. Imrex Co.*, 473 U.S. 479, 500 (1985). Judges rue the expansive reach of RICO, which

provides "many ordinary civil cases with an entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 Vill. L. Rev. 853, 857 (1990). *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread."); William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 13 (1989) (advocating "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court."); Samuel A. Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket*, 12-13 (Nat'l Legal Ctr. for the Pub. Interest 1989).[4] The expansive construction of civil RICO "quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions." *Sedima*, 473 U.S. at 501-22 (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting).

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[4] *See also* David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 Campbell L. Rev. 145, 148 (1990) ("every single district judge with whom I have discussed the subject (and I'm talking in the dozens of district judges from across the country) echoes the entreaty expressed in the Chief Justice's title in *The Wall Street Journal*," [Get RICO Cases Out of My Courtroom, May 19, 1989, p. A14, col. 4]"). Scholars echo these concerns. *See* Neil Feldman, *Spiraling Out of Control: Ramifications of Reading RICO Broadly*, 65 Def. Couns. J. 116 (1998) (outlining problems with overly broad RICO application); Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. Rev. 33, 56-57 (1996) (criticizing civil RICO's breadth); Blair Silver, *Controlling Patent Trolling With Civil RICO*, 11 Yale J.L. & Tech. 70 (2009).

Indeed, even by the mid-1980s, the American Bar Association recognized an "epidemic" in civil RICO claims which abused the legal system, distorted legitimate claims, stretched the law beyond its intended limits, and "spawned a new somewhat confusing body of jurisprudence." Arthur F. Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 Notre Dame L. Rev. 896, 898 (1990) (citing Arthur F. Mathews, *et al., Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* (1985)). Civil RICO litigation has exploded because lawyers may invoke RICO under a broad range of circumstances, leading to fact-intensive hearings and trials-within-trials. *See* Abrams, *supra*, 50 SMU L. Rev. at 63-75.

The same malleability of RICO will allow foreign plaintiffs to convert many foreign-law disputes into federal claims (for example, by finding some use of U.S. mails or communications networks to support mail or wire fraud allegations). Allowing foreign litigants to bring what are otherwise ordinary foreign civil disputes into U.S. federal courts will only increase the burden on those courts, impose higher litigation costs on defendants, and force defendants into coercive settlements. Even before the D.C. Circuit's ruling, foreign plaintiffs began bringing civil RICO claims based on conduct occurring entirely outside the territorial borders of the United States. Typically, foreign plaintiffs invoke RICO by asserting claims against foreign and domestic companies for conduct (1) consistent with ordinary business disputes and (2) occurring entirely outside the United

States. *See, e.g., Jose*, 801 F. Supp. 349 (foreign plaintiffs bringing RICO claim against foreign corporation for employment-related issues); *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1048 (2d Cir. 1996) (civil RICO claim alleged in a "dispute among groups of foreign companies and foreign nationals, arising out of the 1989 sale and reorganization of a French bank"); *Orion Tire Corp. v. Goodyear Tire & Rubber Co.,* 268 F.3d 1133 (9th Cir. 2001) (foreign corporation brought RICO claim against corporation regarding joint venture entered into with Chinese government); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003) (civil RICO claim arising from murder by Colombian nationals of trade union leader). If the presumption against extraterritoriality is not applied to RICO claims, these foreign controversies are merely a prelude to the numerous disputes that federal courts will find themselves adjudicating in the future.

The incentives for foreign litigants to refashion foreign law claims as civil RICO claims are many. First, civil RICO gives foreign litigants extraordinary settlement leverage; "[t]he mere threat of a private RICO suit produces settlements because of the risk of treble damages, attorney's fees, expensive discovery, and the public label 'racketeer.'" Arthur F. Mathews, *Legislative Reform of Civil RICO: The Business Community's Perspective, in* Philip A. Lacovara, Jay Kelly Wright & Geoffrey F. Aronow, *Law & Business, Inc., Civil RICO Litigation* 240-41 (1985); *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 155 (2d Cir. 2005) ("recogniz[ing] that the possibility of a RICO treble damages award might have made the choice of a United States forum attractive" to the

plaintiff); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) ("extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"). Second, civil RICO may enable foreign litigants to take advantage of favorable American procedures typically unavailable in foreign courts (such as liberal discovery, class actions, contingent fees, and jury trials). *See, e.g.*, Friedrich K. Juenger, *The Internationalization of Law and Legal Practice: Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553, 561 (1989) (explaining how "exorbitant" jurisdictional practices in the United States provide an incentive to forum shop); *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (*en banc*) (noting that when foreign plaintiff chooses a United States forum, "a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries"). Such favorable remedies and procedures would apply not only to the civil RICO claims, but also to foreign law claims over which the district court may exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367.

Finally, giving extraterritorial application to a statute of RICO's breadth will enable litigants to circumvent the carefully crafted limitations in other federal statutes authorizing recovery for harms caused by foreign conduct. For example, Congress has authorized relief for plaintiffs injured by certain types of foreign conduct under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, but most courts have limited recovery to violations of international law by

state actors (or private actors engaged in genocide or war crimes). *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) ("Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (customary international law "does not reach private, non-state conduct"); *see also Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (holding that the ATS applies to certain categories of action associated with civil strife, including genocide). Claims that would have marginal settlement value as ATS claims result in substantially greater leverage against defendants when recast as civil RICO claims.

The presumption that "United States law governs domestically but does not rule the world," *Microsoft*, 550 U.S. at 454, should apply to RICO. The inevitable result of permitting extraterritorial application of RICO is to subject federal courts to disputes that have no material connection with the United States. Therefore, the Court should grant the petition to prevent already overtaxed federal courts from being further burdened by foreign controversies.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHEN B. KINNAIRD (counsel of record)
D. SCOTT CARLTON
Paul, Hastings, Janofsky
& Walker LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Counsel for *Amicus Curiae*
KBR, Inc.

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