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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief in opposition is largely an effort to change the subject. It does not attempt to defend the D.C. Circuit's flawed understanding of the presumption against extraterritoriality or its application of a watered-down "effects" test to RICO. Instead, it mainly urges two alternative but meritless grounds for affirmance, neither of which was properly preserved below. The government also disputes a factual premise accepted by both courts below: that BATCo's "'activities and statements'" for which RICO liability was imposed here "'took place outside of the United States.'" App. 57a-58a (quoting App. 1932a). The government tries to explain away the various circuit conflicts documented in the petition and the five supporting *amicus* briefs, but its efforts fail. This Court's review is warranted.

1. *The Government's Alternative Grounds for Affirmance.* Unable to defend the D.C. Circuit's flawed reasoning, the government instead attempts to justify the result on grounds unmentioned by either of the lower courts. These arguments fail for three reasons. First, they were not properly preserved. Second, they are meritless and thus provide no basis for avoiding the certworthy issues presented in BATCo's petition. Third, even assuming preservation and merit, they make the petition *more* certworthy, not less.

a. *The "conspiracy" theory of extraterritoriality.* The government notes that (i) BATCo was found liable for conspiracy under 18 U.S.C. § 1964(d); (ii) under the substantive liability rules governing conspiracies, a conspirator "is liable for the acts of its co-conspirators undertaken in furtherance of the con-

spiracy"; and (iii) "there is no dispute that the conduct of BATCo's co-conspirators occurred in the United States." Opp. 66-67. The government argues that the domestic conduct of BATCo's co-conspirators is therefore properly attributed to BATCo for purposes of evaluating whether RICO is being applied extraterritorially in this case to BATCo.

The government faults BATCo for failing to "address" this issue (Opp. 67), but neglects to mention why: The government never made this argument in either the D.C. Circuit or the district court. See U.S. C.A. Br. 175-80 (2008 WL 2682546, at *176-81); Reply Memorandum In Support of Post-Trial Brief of the United States ("U.S. D.C. Reply Memo"), at 44-45 (D.D.C. Sept. 19, 2005) (arguing only that "*BATCo's extraterritorial actions* have a direct effect on the United States") (emphasis added); *ibid.* ("[T]he evidence adduced at trial demonstrates that *BATCo's actions* to suppress information and research *around the world* * * * have had * * * an impact * * * in the United States.") (emphasis added).[1] This Court has consistently refused to consider points never pre-

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[1] The government was responding to two BATCo submissions. The Joint Defendants' Proposed Findings of Fact: Chapter Twelve, at 148-56 & n.32 (D.D.C. Aug. 15, 2005), explained that BATCo does not conduct any business or research or make any public statements in the United States, and that its foreign activities were "not intended to, and do not have, any direct or substantial effects on the American public." The Corrected Post-Trial Brief of Joint Defendants, at 125-34 (D.D.C. Sept. 7, 2005 corrected on Sept. 13, 2005), reiterated these arguments and contended that it would be "speculative to find that any of *BATCo's* past or future extraterritorial conduct had a direct and substantial effect on the U.S. public because this record is simply devoid of any evidence of such effect."

sented in the courts below. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *Glover* v. *United States*, 531 U.S. 198, 205 (2001). See generally E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 6.26(c), at 465 (9th ed. 2007). The government thus cannot invoke its conspiracy argument as an alternative ground for affirmance in this Court.

The argument is also meritless. Tellingly, the government cites no authority holding that a conspirator's domestic conduct may be attributed to a foreign co-conspirator for purposes of determining whether RICO is being applied extraterritorially.[2] That theory would allow plaintiffs to circumvent the territorial limits on legislation merely by adding a conspiracy claim, thus rendering the presumption against extraterritoriality a dead letter. There is no evidence that Congress intended to allow such attribution when it enacted RICO. And this Court has rejected as "frivolous" a similar argument regarding the venue provisions of the antitrust laws on which RICO was modeled. See *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 380, 384 (1953) (rejecting argument that Georgia insurance commissioner was "found or has an agent" in Florida because his co-conspirators were located there).

Relying on *Bankers Life*, many courts have similarly rejected the so-called "conspiracy" theory of personal jurisdiction (whereby the forum contacts of one

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[2] *Ford* v. *United States*, 273 U.S. 593 (1927) (Opp. 66-67) is inapposite. That case involved a treaty with Great Britain that expressly reached beyond the United States' territorial jurisdiction. See 273 U.S. at 607-09.

conspirator are attributed to other co-conspirators for purposes of establishing "minimum contacts"). See, *e.g.*, *National Industrial Sand Association* v. *Gibson*, 897 S.W.2d 769, 773 (Tex. 1995); *Hewitt* v. *Hewitt*, 896 P.2d 1312, 1316 (Wash. Ct. App. 1995); *Foley* v. *Marquez*, 2004 WL 603566, at *4 (N.D. Cal. Mar. 22, 2004). To the extent that confusion exists in the lower courts over the validity of that personal-jurisdiction theory, see Pet. for Cert., *Mackey* v. *Compass Marketing, Inc.*, No. 05-1433, at 9-18 (dismissed under Rule 46.1, see 548 U.S. 941 (2006)), the opportunity to address that confusion (even indirectly) would be yet another justification for further review.

b. *The argument based on BATCo's supposedly domestic conduct, including use of the U.S. mails.* Next, the government suggests that the lower courts had no reason to address the extraterritorial reach of RICO because BATCo's own conduct was not exclusively foreign. This argument also fails for multiple reasons.

To begin with, this argument challenges a factual premise plainly accepted by both courts below. As the D.C. Circuit noted, "the district court found that [BATCo's] 'activities and statements took place outside of the United States.'" App. 57a-58a (quoting App. 1932a). The district court also found – again contrary to the government's argument – that "many of BATCo's *Racketeering Acts* took place outside the United States." App. 1931a (emphasis added).[3] Ac-

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[3] This Court typically refrains from "review[ing] concurrent findings of fact by two courts below." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). See generally E. GRESSMAN ET AL., *supra*, § 4.14, at 271.

cordingly, both decisions below rested exclusively on an "effects test" analysis of BATCo's foreign conduct. See App. 59a-60a, 1932a-33a.

There is an excellent explanation. The government *never argued* that the district court could or should avoid the question of extraterritoriality on the ground that BATCo had used the U.S. mails or purportedly engaged in the domestic conduct the government describes here (Opp. 65-66). As demonstrated above, the government effectively *invited* the district court to assume that *only* "extraterritorial actions" and "actions * * * around the world" by BATCo were at issue, and strenuously argued that those foreign activities satisfied the "effects" test. See U.S. D.C. Reply Memo, at 44-45. Although the government advanced its alternative argument *in the D.C. Circuit*, by then it was too late, as BATCo pointed out. See BATCo C.A. Reply Br. 8, 10 (2008 WL 2682540, at *8-9) (objecting to "new-found domestic conduct argument" which government "never argued" below). The D.C. Circuit accordingly never reached this argument, and it is not properly before this Court.

In any event, the argument is wrong. The government relies primarily on the eleven pre-1984 instances of BATCo's use of the U.S. mails or wires, which served as BATCo's predicate acts under RICO. See Pet. 5 n.4. As the district court correctly found, however, those counts involved conduct that "took place outside the United States" (App. 1931a) – the acts of sending or receiving letters or wires *in England*. The government errs further in its reliance (Opp. 63-64) on *Pasquantino* v. *United States*, 544 U.S. 349 (2005), which held that the presumption

against extraterritoriality was inapplicable *not* because U.S. wires *were used*, but because the defendants had "executed" a wrongful scheme "inside the United States." That scheme included, among other things, using *interstate* phone calls placed from New York to order liquor from package stores in Maryland and employing persons to drive the liquor from Maryland into Canada without paying customs taxes. *Id.* at 353. It was this substantial "domestic element" of the defendants' conduct that made it unnecessary, in the majority's view, to address the extraterritoriality issue.[4]

Moreover, RICO punishes a defendant's conduct or participation in the enterprise's racketeering activity. See *United States* v. *Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999). For that reason, several Circuits have held that RICO "predicate acts" of U.S. mail or wire fraud are insufficient to overcome the presumption against extraterritoriality when (as here) they are "merely preparatory" or "peripheral" to fraudulent foreign conduct. *Liquidation Comm'n of Banco Intercontinental, S.A.* v. *Renta*, 530 F.3d 1339, 1351-52 (11th Cir. 2008); *Butte Mining PLC* v. *Smith*, 76 F.3d 287, 291 (9th Cir. 1996); *North South Finance*

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[4] If mere use of U.S. wires converted a foreign scheme into domestic conduct, there would have been no need for the Court to have discussed the defendants' other extensive domestic conduct (544 U.S. at 362, 365, 371-72), or the four dissenters to have analyzed Congress's lack of intent to extend the wire fraud statute to extraterritorial schemes (*id.* at 372-80). To the extent the government's alternative argument for affirmance based on *Pasquantino* would allow this Court to resolve the important extraterritoriality issue left open in that case, that would be a further reason to grant review. See also Int'l Ass'n of Defense Counsel *Amicus* Brief ("IADC Br."), at 8-9.

Corp. v. *Al-Turki*, 100 F.3d 1046, 1052-53 (2d Cir. 1996). BATCo's alleged predicate acts of mail and wire fraud consisted of sending cover letters enclosing materials for publication in the U.K. and an agenda for foreign research conferences, and receiving comments from Brown & Williamson (B&W) about the same. App. 2127a-28a, 2136a, 2143a-49a, 2164a-65a. At most, these communications were "preparatory" or "peripheral" to BATCo's foreign conduct.[5]

2. *The Conflicts and Confusion in the Lower Courts.* The petition and supporting *amicus* briefs document a number of circuit conflicts, including:

(i) disagreement between the Ninth and D.C. Circuits over the meaning of the presumption against extraterritoriality and the definition of "extraterritorial" (Pet. 11-15);

(ii) conflict and confusion in the lower courts over the extraterritorial reach, if any, of RICO, and how that reach is measured (Pet. 17-22);

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[5] The government's new-found domestic conduct argument (Opp. 67-68) also rests on a distorted view of the record. Among other things, BATCo never owned or operated an "experimental tobacco farm in North Carolina." *Id.* at 66. "Y-1" tobacco was developed "[a]t [a *B&W*] experimental farm in North Carolina," not by BATCo. App. 788 (¶1549); see also C.A. JA 9050-52 (testimony that B&W developed Y-1). Neither did the district court find that BATCo ever promoted or marketed cigarettes in the United States. Opp. 66. BATCo sells its cigarettes to R.J. Reynolds in the U.K. for resale by R.J. Reynolds' affiliate, Lane Limited, in the United States. C.A. JA 8231, 8445, 9120. BATCo has never had more than a *de minimis* share of the U.S. market, estimated most recently as 0.02%. C.A. JA 1162. Although space will not permit a complete refutation of this factual sideshow, BATCo answered it in the D.C. Circuit. See Pet. C.A. Reply Br. 8-10 (2008 WL 2682540, at *8-9).

(iii) conflict over the meaning of the "effects" test (Pet. 22-28 & n.10; IADC Br. 10-16; Law Professors' *Amicus* Brief ("Professors' Br."), at 10-11 (identifying "three different analyses" used by the Ninth, Fifth, and Second Circuits));

(iv) conflict over the adequacy of the "effects" test alone to measure extraterritoriality, without also considering such factors as international comity (Pet. 20; Professors' Br. 7-8 (citing cases from First, Third, Fifth, and Seventh Circuits that "have included foreign comity concerns as part of the effects test")); and

(v) conflict over the meaning of *United States* v. *Bowman*, 260 U.S. 94 (1922), which (as the government does not deny) is directly implicated in the split over RICO's extraterritorial reach (IADC Br. 6-8; Professors' Br. 11-12).

These conflicts are widely recognized. See Pet. 12, 14-15; IADC Br. 6-8; Professors' Br. 3-4, 6-9, 10-11. See also C. BRADLEY & J. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS, at 706 (3d ed. 2009) (noting confusion in lower courts over when to "invoke the presumption against extraterritoriality"; citing conflict between the D.C. Circuit and *Subafilms, Ltd.* v. *MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (en banc)).

The government's attempts to downplay these conflicts are wholly unpersuasive. The government first explains that our conflicts argument "rests in part (Pet. 12, 20, 30) on several decisions addressing the extraterritorial effect of various statutes other than RICO." Opp. 68. That is irrelevant. Four of the five conflicts listed above involve *legal doctrines that*

are not RICO-specific. See Pet. 22-24 & n.10, 30. That *Subafilms*, for example, involved the Copyright Act does not render the Ninth Circuit's understanding of the presumption against extraterritoriality any less inconsistent with the D.C. Circuit's understanding. The same is true of the vastly different versions of the "effects" test used by other circuits in cases involving statutes other than RICO. Consistency in the rule of law is imperiled if courts apply contradictory *approaches* to statutory interpretation and different versions of the same legal test.

Equally unavailing is the government's attempt (Opp. 63, 68-70) to distinguish the conflicting cases involving the extraterritorial reach (if any) of RICO, which is the only RICO-specific conflict we identify. Pet. 17-22. According to the government, there is a crucial distinction between cases brought under 18 U.S.C. § 1964(c) and those (such as this case) brought under 18 U.S.C. § 1964(a). The former subsection authorizes actions for treble damages and attorneys' fees by "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." The latter has no such standing requirement and authorizes suits only by the U.S. government for equitable relief to "prevent and restrain violations of section 1962 of this chapter."

That distinction in no way diminishes the conflicts and confusion regarding RICO's extraterritorial reach. Both types of RICO actions require a "violation of section 1962," which sets forth RICO's "prohibited activities." As this Court explained in *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248-56 (1991), the scope of a statute's substantive provisions provides telling evidence of Congress's intent (or lack thereof)

to regulate extraterritorially, and Section 1964(a) and 1964(c) actions are virtually identical in their substantive provisions.[6] The same is true of the other substantial evidence in RICO's text, structure, and legislative history suggesting that Congress *never* intended RICO to extend beyond the nation's borders. See Pet. 16-17, 19, 29-30 & nn.6-7 (discussing service-of-process provision, Congress's declaration of its exclusively domestic purpose, etc.); see also IADC Br. 21-24 & n.9 (reviewing legislative history); Professors' Br. 19-21. That evidence applies with equal force to *both* remedy provisions. With respect to both provisions, "Congress failed to provide any mechanisms for overseas enforcement" of RICO and failed to "address[] the subject of conflicts with foreign laws and procedures." *Aramco*, 499 U.S. at 256.

Nor is there reason to believe that Congress intended to differentiate between the *extraterritorial* reach of the same substantive provisions of RICO when invoked in different types of civil actions under Section 1964. The government's argument assumes that the injury to "business or property" required to show standing must occur in the United States. But the statute does not say that, and that admittedly sensible result follows only if one gives proper weight to the presumption against extraterritoriality, which the D.C. Circuit refused to do here. The requirement of injury to "business or property" is nothing more than a standing requirement borrowed from the antitrust laws as a prudent limitation on private rights of action for treble damages under RICO.

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[6] The only difference is expressly stated in Section 1964(c), which excludes the use of securities-fraud counts as predicate acts. See Pet. App. 4a.

3. *The Important and Recurring Nature of the Issues Presented.* The government does not dispute our showing (Pet. 28-31) that the two issues raised by BATCo's petition are nationally important and recurring. Their significance, moreover, is underscored by the broad *amicus* support from organizations representing business and legal professionals as well as by legal academics. See, *e.g.*, U.S. Chamber Br. 23 (issues of "obvious" and "vital[]" importance to "American business" and to "foreign actors and international comity"); U.K. Int'l Chamber Br. 2, 15-16 ("critically important" issues); KBR Br. 3-4, 5-11 (discussing "critical importance of the presumption against extraterritoriality in an era of globalization"); *id.* at 2, 13-18 (discussing severe burdens RICO's extraterritorial extension imposes on global business and federal courts).

4. *The Merits and the Additional Arguments for Review Raised by* Amici. Strikingly, the government makes no genuine effort to defend the D.C. Circuit's reasoning concerning the presumption against extraterritoriality, to reconcile that reasoning with this Court's decisions, or to explain why BATCo's foreign conduct satisfies the "effects" test. See Pet. 13-14, 24-27, 31-35. The most the government does is quote the D.C. Circuit's holdings and assert they are correct. See Opp. 67, 70. It tellingly makes no attempt to explain how extraterritorial application of RICO could possibly be reconciled with the substantial evidence in RICO's text, structure, and legislative history that Congress intended the statute *not* to apply extraterritorially. See page 10, *supra*. It also says not one word in defense of the questionable application of the "effects" test to RICO. See Pet. 32-34. Finally, the government ignores the many additional persuasive

reasons for review identified by the *amici*. See, *e.g.*, Professors' Br. 14-15, 19-21, 23; IADC Br. 6-9, 16-19, 23-24 & nn.7-9; KBR Br. 8-11, 13-18; U.K. Int'l Chamber Br. 8-14.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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