No. 09-994

In The Supreme Court of the United States

TOBACCO-FREE KIDS ACTION FUND, et al.,

Petitioners,

v.

PHILIP MORRIS USA INC., 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 PETITIONERS

HOWARD M. CRYSTAL
Counsel of Record
KATHERINE A. MEYER
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

Counsel for Petitioners

Of counsel:
PROFESSOR G. ROBERT BLAKEY
William J. and Dorothy K. O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
Notre Dame, Indiana 46556
(574) 631-5717
*for identification only

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

REPLY BRIEF FOR THE PETITIONERS

While respondents largely argue the merits of the appeal, their arguments cannot obscure the underlying fact that petitioners meet this Court's criteria for certiorari. Indeed, in ruling that disgorgement is categorically precluded under 18 U.S.C. § 1964(a), the court of appeals itself observed that two other circuits have a different view, and the dissent explained that the majority decision created an even *broader* split in the courts of appeals regarding the proper approach to interpreting multiple federal statutes conferring broad equitable powers. 09-994 App. (Int. App.) at 142, 153-54, 185-86. Certiorari is appropriate here on that basis alone, and respondents' effort to deny these circuit conflicts, as well as their attempt to reconcile the court of appeals' ruling with this Court's own clearly applicable precedents, is unavailing.

A. Review Is Necessary To Resolve Several Conflicts Among The Courts Of Appeals.

Respondents do not acknowledge the split among the circuit courts concerning the proper interpretation of this Court's rulings in *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946), and *Mitchell v. Robert DeMarco Jewelry*, 361 U.S. 288, 291-95 (1960). Resp. Opp. at 23-27.

1. Seven courts of appeals have interpreted grants of equitable authority indistinguishable from § 1964(a) to authorize equitable remedies like disgorgement. *See* 09-994 Pet. at 17-19. For example,

three circuit courts have *rejected* the argument that because the Federal Food, Drug, and Cosmetic Act authorizes the court to "restrain violations," 21 U.S.C. § 332(a), a district court may not award disgorgement or restitution, concluding instead that such language "invokes courts' general equity jurisdiction. . . ." *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1061 (10th Cir. 2006); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 223 (3d Cir. 2005); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 762 (6th Cir. 1999). Similarly, although the Commodity Exchange Act authorizes district courts to "enjoin" violations and "enforce compliance," 7 U.S.C. § 13a-1 – terms that respondents argue preclude disgorgement – numerous courts have concluded that disgorgement may be awarded under this grant of authority. *See CFTC v. Wilshire Inv. Mgmt.*, 531 F.3d 1339, 1344 (11th Cir. 2008) (noting agreement with five other circuits). Each of these circuit courts reached this conclusion by applying the interpretive principles set forth in *Porter* and *Mitchell* to the statutory language at issue.[1]

---

[1] *See also FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (statute authorizing courts to "enjoin" violations interpreted to authorize disgorgement); *ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1184-85 (1st Cir. 1980) (statute which "[b]y its terms . . . empower the I.C.C. to seek only prospective injunctions to restrain future conduct" interpreted to permit restitution). Moreover, when the D.C. Circuit interpreted the Securities Exchange Act to allow disgorgement "simply because" the statute "vest[s] jurisdiction in the federal courts," *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989), the court relied on similar language; the general "equity" section on which

(Continued on following page)

Moreover, respondents do not address the additional circuit split created by the D.C. Circuit's ruling that disgorgement has no impact on a defendant's *future* conduct, Int. App. at 138, 147-150, in light of the numerous other circuits that – applying *Porter*, 328 U.S. at 400 – have ruled that disgorgement *does* impact a defendant's future behavior. *E.g., Rx Depot*, 438 F.3d at 1061 ("by making illegal activity unprofitable," disgorgement "deters violations of the law").

2. Respondents argue that resolution of the split among the circuit courts of appeals as to the proper interpretation of § 1964(a) would be "purely academic" in this case. Resp. Opp. at 9. To the contrary, whether the Court adopts the more limited disgorgement approved in *United States v. Carson*, 52 F.3d 1173, 1181-82 (2d Cir. 1995), or applies *Porter* and *Mitchell* to find that § 1964(a) bestows the full scope of the district court's equitable authority, the Court's resolution of this split will both resolve the availability of disgorgement in future cases and allow the district court in this case to determine, based on the *full scope* of its equitable powers, which specific remedies will most appropriately redress the tobacco companies' far-reaching misconduct.

---

respondents rely – 15 U.S.C. § 78u(d)(5) (*see* Resp. Opp. at 26) – *did not yet exist*. *See* Sarbanes-Oxley Act of 2002, § 21(d), Pub. L. No. 107-204, 116 Stat. 745, 779 (2002) (adding this provision).

B. Review Is Also Necessary In Light Of Conflicts With This Court's Precedents.

1. Respondents have relegated to a footnote, Resp. Opp. at 20 n.3, their attempt to distinguish *United States v. Turkette*, in which this Court held that, pursuant to § 1964(a), a group "associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs" may be forced to "divest the . . . *fruits of its ill-gotten gains*." 452 U.S. 576, 579, 585 (1981) (other citations omitted) (emphasis added). If a court may divest that kind of association of the "fruits of *its* ill-gotten gains," *id.* (emphasis added), the district court here may consider whether to impose remedies that would divest the tobacco company defendants of the fruits of *their* ill-gotten gains, including the millions of addicted smokers who they successfully persuaded to use their highly addictive products. *See, e.g.,* FF 2375 (tobacco company executives referring to young smokers as "Assets").[2]

---

[2] While respondents are correct that, consistent with the Thirteenth Amendment, people cannot be considered "assets" as a matter of law, Resp. Opp. at 13, this does not preclude the district court from considering whether, as a *factual* matter, addicted smokers are the tobacco company respondents' financial assets. *See*, *e.g.*, C.A. App. at 5948 (tobacco official explaining that "if we hold these YAS [Younger Adult Smokers] for the market average of 7 years, they would be worth *over $2.1 billion in aggregate incremental profit*") (emphasis in original); *see also* C.A. App. at 5953 (the "value of [younger adult smokers] compounds over time").

2. Respondents' argument that the disgorgement and divestment remedies advocated by the Public Health Advocates are "implied equitable remedies" that would not be permissible under the antitrust laws, Resp. Opp. at 14, conflates remedies available to the *government* with those available to private parties. Whatever limitations might pertain to *private* actions – under antitrust or other laws – this Court has long recognized that a district court's "equitable powers assume an *even broader and more flexible character*" when the United States is enforceing the law. *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 398) (emphasis added). This is particularly true where, as in RICO, the provision is one Congress wrote solely for use by the federal government. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961) ("once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor").[3]

Respondents' reliance on this Court's antitrust precedents, Resp. Opp. at 14, is also misplaced. These precedents confirm that the district court's authority extends to remedies designed to address "the effects"

[3] Many of the precedents on which respondents rely are similarly inapposite, as they involve efforts by *private* parties to invoke a court's equitable powers to recover funds for private use. *See* Resp. Opp. at 16 n.2 (citing private recovery cases); *see also Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) (concerning *private* cost recovery).

of the tobacco companies' massive misconduct. *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972); *see also, e.g.*, *Schine Chain Theaters v. United States*, 334 U.S. 110, 128 (1948) (authorizing remedies "to *undo* what could have been prevented") (emphasis added). In this case the district court should be authorized to consider how best to address those effects, including, *inter alia*, whether to require the tobacco company defendants to fund targeted public education and tobacco cessation programs.[4]

C. Respondents' Other Arguments Are Irrelevant.

The remainder of respondents' arguments concern the merits or are otherwise premature at this juncture.

1. The arguments respondents advance in support of their interpretation of § 1964(a) do not withstand scrutiny.

---

[4] Respondents admit that the remedies in *Ford Motor Co.* – including the requirements to guarantee existing wages and pensions and even provide jobs to any displaced workers, 405 U.S. at 572 – were "forward-looking." Resp. Opp. at 15. If these far-reaching and costly measures to restore those individuals to their condition prior to Ford's misconduct are forward-looking, then measures designed to restore addicted smokers to *their* condition prior to the tobacco companies' large-scale violations of law are also sufficiently forward-looking to be considered under § 1964(a).

First, respondents' contention that because RICO contains both civil and criminal penalties, the criminal provisions *preclude* certain civil remedies, Resp. Opp. at 4, 6, 16, 17, has already been considered and rejected by this Court. *See* Int. App. at 178-85 (citing cases); *see also Shearson/Am. Express v. McMahon*, 482 U.S. 220, 239 (1987) (rejecting argument based on the "'overlap' between RICO's civil and criminal provision"); *cf. FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 551 (1960) ("The fact that activity which falls within the civil proscription of [the antitrust laws] may also be criminal under [another section] is entirely irrelevant").[5]

Second, respondents' argument that petitioners' interpretation of § 1964(a) would render the limitations written into the provision superfluous, Resp. Opp. at 10-12, ignores the broader statutory construction question at issue here: whether § 1964(a) is a grant of limited or broad authority. Section 1964(a) authorizes district courts to issue "appropriate orders,

---

[5] *Meghrig*, 516 U.S. 479, on which respondents heavily rely, *see* Resp. Opp. at 6, 21-22, is not to the contrary. The statutory scheme at issue there contains unique features, such as a provision that explicitly *prohibits* private parties from bringing suit pursuant to the statute's injunctive provision if the government takes action. 42 U.S.C. § 6972(b)(2)(B). This makes sense to avoid duplicative *injunctive* relief. However, interpreting the injunctive provision to also encompass private *cost recovery* would have led to an "absurd result" whereby a plaintiff's ability to obtain that recovery would turn on the vagaries of whether the United States participates. *See Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982).

including, but not limited to," certain listed remedies. 18 U.S.C. § 1964(a) (emphasis added). If, as respondents contend, Congress crafted § 1964(a) to narrowly *constrain* a district court's remedial powers, then the court's authority should be limited to the specific enumerated remedies, as the court of appeals concluded. *See* Int. App. at 139. If, on the other hand, Congress crafted § 1964(a) to insure that a district court would have at its disposal the *full spectrum* of the court's traditional equitable authority in remedying violations of RICO, then respondents' statutory construction arguments fail. *See West v. Gibson*, 527 U.S. 212, 217 (1999) (finding that the use of the term "including" before listing several examples "makes clear that the authorization is *not limited to the specified remedies there mentioned*") (emphasis added); *see also* Pub. L. No. 91-452, § 904 (codified at 18 U.S.C. § 1961 note) (directing that "[t]he provisions of this title shall be liberally construed to effectuate [RICOS's] remedial purposes").[6]

Third, respondents assert that even if the district court possesses the full scope of its equitable powers, disgorgement is a *legal* remedy that is unavailable in

[6] Respondents' contention that the district court may not consider targeted public education and tobacco cessation programs because they would not prevent future RICO violations, Resp. Opp. at 12-13, similarly begs the question here – *i.e.*, the required nexus between § 1964(a) remedies and a defendant's RICO violations, which in this case the district court found, and the court of appeals unanimously affirmed, are reasonably likely to continue. *See* Int. App. at 69-77.

this case. Resp. Opp. at 29-30; BATCo Opp. at 6, 13. This is also mistaken. Irrespective of whether a *private* party's request to recover money is a "legal" rather than equitable claim, *id.*, it is well-established that courts possess the equitable authority to "compel disgorgement of wrongly gained assets" in a case brought by the *government*. *SEC v. Cavanagh*, 445 F.3d 105, 120 (2d Cir. 2006) (discussing history of disgorgement as an equitable remedy); *see also Tull v. United States*, 481 U.S. 412, 424 (1987) ("an action for disgorgement of improper profits [is] traditionally considered an equitable remedy").[7]

2. Respondents also ask the Court to deny certiorari on the grounds that the United States is not entitled to the disgorgement sum advocated by the government before the court of appeals issued its disgorgement ruling. Resp. Opp. at 3, 4, 17, 28; BATCo Opp. at 2, 6. At this juncture, however, this case does not concern the appropriate *amount* of

[7] Respondents' reliance on *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) – another *private* recovery action – is also misplaced. Resp. Opp. at 29; BATCo Opp. at 13. The Court in that case explained that "recover[y] of profits produced by [a] defendant's use of" improperly obtained property is "a form of equitable restitution" even for a private party. 534 U.S. at 214 n.2. As BATCo emphasizes, in this case most of the disgorgement sought by the government represents just this kind of "additional gains." BATCo Opp. at 3, 11. In any event, respondents also do not assert that the targeted public education and tobacco cessation remedies that petitioners contend the district court should be permitted to consider are legal rather than equitable remedies.

disgorgement – or the precise contours of any other equitable remedy. Indeed, in ruling on summary judgment that disgorgement *may* be permissible here, the district court emphasized that "there are genuine disputes over material facts which must be considered in the calculation of any disgorgement that may be ordered by this Court upon a finding of liability" – disputes "that can only be resolved at trial." *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72, 81-82 (D.D.C. 2004); *see also* BATCo Opp. at 5 (acknowledging that the district court "deferred until trial" the scope of the disgorgement remedy). Those disputes were never resolved because of the interlocutory ruling barring disgorgement, which led the district court to decline consideration of *any* of these remedies. Int. App. at 212, 240-241, 248-250.[8]

Therefore, this appeal concerns only the threshold question of whether the *kind* of equitable remedies plaintiffs seek are available under § 1964(a), not whether they will be awarded in this case. Once that threshold question is resolved, the matter should be remanded to the district court to address the contours of specific remedies. *See Samantar v. Yousuf*, No. 08-1555, 2010 WL 2160785, at *2 (S. Ct. June 1, 2010) ("whether [the defendant] may have other valid

[8] BATCos references to witnesses who "testified," BATCo Opp. at 3, refers to pre-trial testimony.

defenses to the grave charges against him, are matters to be addressed in the first instance by the District Court on remand"); *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("[I]f it is not necessary to decide more, it is necessary not to decide more") (Roberts, J., concurring).[9]

Respondents similarly assert that the remedies plaintiffs seek are inappropriate in light of the enactment in June 2009 of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009). *See* Resp. Opp. at 29; BATCo Opp. at 9. This argument also belongs before the district court in the first instance to decide whether – in light of its restored equitable powers; the new legislation; and any other developments – equitable remedies such as those sought by plaintiffs are appropriate in this case. *E.g., Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 381 (2008) ("we vacate the judgment of the Court of Appeals and remand for the District Court to conduct the relevant inquiry under

[9] Respondents' acknowledgment that by the time this issue reached summary judgment the government had already reduced its disgorgement request by more than *60%*, *see* BATCo Opp. at 10, highlights respondents' understanding that it is premature to contest the scope of any disgorgement award until the government demonstrates the appropriate amount, and the district court first has an opportunity to consider precisely what remedies to impose. The same approach should govern BATCo's concerns regarding joint and several liability. *See* BATCo Opp. at 3.

the appropriate standard"). Accordingly, these matters are not before this Court at this time, and are not bases on which the Court should resolve petitioners' request for certiorari.[10]

* * *

For the foregoing reasons and those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD M. CRYSTAL
Counsel of Record
KATHERINE A. MEYER
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W.,
Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com
Counsel for Petitioners

[10] Contrary to respondents' contention, the government's *prior* petition for certiorari in this case is also completely irrelevant. Resp. Opp. at 2, 9; BATCo Opp. at 8. In urging the Court to deny that petition, the tobacco company defendants argued that review was "premature," and that "[i]f the government is dissatisfied with the outcome of any appeal from the final judgment, it can pursue review in this Court then," Brief in Opposition at 2, United States v. Philip Morris USA, Inc., No. 05-92 (S.Ct. Sept. 16, 2005) – precisely what has occurred.

Of counsel:
PROFESSOR G. ROBERT BLAKEY
William J. and Dorothy K. O'Neill
Professor of Law
NOTRE DAME LAW SCHOOL*
Notre Dame, Indiana 46556
(574) 631-5717
*for identification only