No. 15-___

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act ("RICO") applies extraterritorially.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Defendants and Appellees in the courts below, are R. J. Reynolds Tobacco Company (a North Carolina corporation); RJR Nabisco, Inc.; RJR Acquisition Corp.; RJR Nabisco Holdings Corp.; R.J. Reynolds Tobacco Holdings, Inc.; R. J. Reynolds Global Products, Inc.; Reynolds American Inc.; and R. J. Reynolds Tobacco Company (a New Jersey corporation).

Respondents, who were Plaintiffs and Appellants in the courts below, are the European Community, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cypress, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden.

Pursuant to this Court's Rule 29.6, petitioners declare as follows:

R. J. Reynolds Tobacco Company (a North Carolina corporation) is successor by merger to R. J. Reynolds Tobacco Company (a New Jersey corporation) and is a wholly-owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., f/k/a RJR Nabisco, Inc. R.J. Reynolds Tobacco Holdings, Inc. is a wholly-owned subsidiary of Reynolds American Inc. ("RAI"), a publicly held corporation.

R. J. Reynolds Global Products, Inc., is an indirect, wholly-owned subsidiary of RAI, a publicly held corporation.

RJR Acquisition Corp., f/k/a Nabisco Group Holdings Corp., f/k/a RJR Nabisco Holdings Corp., merged into R.J. Reynolds Tobacco Holdings, Inc., f/k/a RJR Nabisco, Inc.

British American Tobacco p.l.c. and its subsidiaries collectively own more than 10% of the common stock of RAI.

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OPINIONS BELOW

The district court's opinion dismissing the RICO claims in this case (Pet.App. 37a) appears at 2011 U.S. Dist. LEXIS 23538. The Second Circuit's merits opinion (Pet.App. 1a) is reported at 764 F.3d 129, and its opinion denying panel rehearing (Pet.App. 55a) is reported at 764 F.3d 149. The five opinions respecting the denial of rehearing en banc (Pet.App. 59a) are reported at 783 F.3d 123.

JURISDICTION

The Second Circuit entered judgment on April 23, 2014. Pet.App. 1a. The panel denied rehearing and amended its opinion on August 20, 2014. Pet.App. 55a. The Second Circuit denied rehearing en banc on April 13, 2015. Pet.App. 59a. On July 6, 2015, Justice Ginsburg extended the time for filing this petition to and including July 27, 2015. Application No. 15A24. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of RICO is set forth in the appendix. Pet.App. 105a.

STATEMENT OF THE CASE

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court emphatically reaffirmed the presumption that federal statutes do not apply extraterritorially, chided the Second Circuit for its repeated disregard of that presumption, and squarely held that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 255. Applying the presumption, this Court further held that § 10(b) of the Securities

Exchange Act of 1934 has as its "focus" the purchase and sale of securities, and thus applies only to domestic purchases and sales. *See id.* at 265-70. Accordingly, the Court ordered dismissal of a "foreign cubed" complaint alleging that a foreign defendant had defrauded a foreign plaintiff in connection with a foreign securities transaction. *Id.*

This case presents the question whether RICO applies extraterritorially, and if so to what extent. Between *Morrison* and the decision below, dozens of lower-court decisions—including one from the Ninth Circuit—uniformly held that "RICO does not apply extraterritorially." *United States v. Xu*, 706 F.3d 965, 974-75 (9th Cir. 2013). Yet the panel in this case, in one fell swoop, extended RICO to foreign racketeering activity, foreign enterprises, *and* foreign injuries. In four separate opinions, five judges dissented from the denial of en banc to reconsider that breathtaking, foreign-cubed expansion of a major federal statute that itself sweepingly extends to scores of criminal offenses.

1. RICO, 18 U.S.C. § 1961 *et seq.*, prohibits four categories of conduct involving covered enterprises and patterns of racketeering activity. Section 1962(a) makes it unlawful for any person to invest income derived from a "pattern of racketeering activity" in an "enterprise." Section 1962(b) makes it unlawful for any person to acquire an "enterprise" through a "pattern of racketeering activity." Section 1962(c) makes it unlawful for any person to conduct the affairs of an "enterprise" through a "pattern of racketeering activity." Finally, § 1962(d) makes it unlawful for any person to conspire to violate any of the three preceding provisions.

RICO specifically defines the critical statutory terms of "enterprise" and "pattern of racketeering activity." A covered "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). A covered "pattern of racketeering" consists of "at least two acts of racketeering activity" committed within ten years of one another. *Id.* § 1961(5). In turn, "racketeering activity" is defined to include "any act which is indictable under any of the following provisions of title 18," followed by a string-cite to well over 100 provisions. *Id.* § 1961(1)(B). That list includes many predicate offenses that apply only domestically, such as mail fraud, wire fraud, and the Travel Act, *id.* §§ 1341, 1343, 1952; some predicate offenses that apply both domestically and extraterritorially, such as money laundering and providing material support to foreign terrorist organizations, *id.* §§ 1956-57, 2332b(g)(5)(B), 2339B; and a few predicate offenses that apply only extraterritorially, such as the prohibition on engaging in illicit sexual activity "in foreign places," *id.* § 2423(c). RICO itself, however, is silent as to its own geographic scope.

RICO provides for a range of criminal and civil enforcement. Section 1963 imposes criminal penalties for violations of § 1962. Sections 1964(a) and (b) authorize the Attorney General to bring civil actions to prevent and restrain such violations. Finally, and most relevant here, § 1964(c) affords a private right of action—plus treble damages and attorneys' fees—to "[a]ny person injured in his business or property by reason of a violation of section 1962."

2. Petitioners in this case are the R.J. Reynolds Tobacco Company and various of its affiliated corporations. Respondents are the European Community ("EC") (now the European Union) and 26 of its Member States. Respondents sued petitioners under RICO; they allege that petitioners were involved in a worldwide scheme to launder the proceeds of illegal drug sales in Europe, and that this money-laundering scheme caused various harms to European governments in Europe.[1]

The alleged money-laundering scheme consisted of at least five discrete sets of transactions. First, foreign drug traffickers, located in Afghanistan, Colombia, the Middle East, and Russia, smuggled illegal narcotics into Europe and sold them there for Euros. Pet.App. 153a-154a. Second, the drug traffickers traded those Euros for other foreign currencies, in transactions with black-market money brokers also located in Europe. Pet.App. 156a-157a. Third, the money brokers sold the Euros to European cigarette importers. Pet.App. 157a.

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[1] The operative complaint in this case is the sixth filed by the EC in a series of successive cases. The first case, filed by the EC alone, was dismissed on the ground that the EC is not a proper party to complain about alleged injuries to its Member States. *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 501-02 (E.D.N.Y. 2001). The second case, filed by the EC and 10 Member States, was dismissed on the ground that it sought recovery for the sovereign injuries of foreign governments, in violation of the revenue rule. *European Cmty. v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231, 236-45 (E.D.N.Y. 2002), *aff'd sub nom. European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Sotomayor, J.), *vacated*, 544 U.S. 1012 (2005), *adhered to on remand*, 424 F.3d 175 (2d Cir. 2005) (Sotomayor, J.). These prior dismissals are not at issue here.

Fourth, the European importers used the funds to purchase cigarettes from cigarette wholesalers. *Id.* Fifth, the wholesalers in turn purchased cigarettes from petitioners, and shipped those cigarettes to the importers for retail sale in Europe. Pet.App. 159a-160a. According to the complaint, the cigarette wholesalers with whom petitioners conducted business were located in such foreign countries as Colombia, Croatia, Panama, and Venezuela. Pet.App. 167a, 172a, 175a, 177a, 191a-192a. The complaint also alleges that petitioners unlawfully sold cigarettes in Iraq, in territory controlled by a foreign terrorist organization. Pet.App. 178a-182a.

The complaint alleges a RICO "enterprise" made up of petitioners, drug traffickers, and "distributors, shippers, currency dealers, wholesalers, money brokers, and other participants" in the scheme described above. Pet.App. 238a-239a. It alleges a "pattern of racketeering activity" consisting of predicate acts of money laundering, mail fraud, wire fraud, Travel Act violations, and providing material support to foreign terrorist organizations. Pet.App. 239a-251a. The RICO violations allegedly caused 36 different injuries to European governments in Europe—including lost tax revenue, increased law-enforcement costs, various harms to their respective economies, and reduced profits to their state-owned tobacco businesses. Pet.App. 211a-228a.

3. The district court dismissed the RICO claims as impermissibly extraterritorial. Applying *Morrison*, the court reasoned that because "RICO is silent as to any extraterritorial application," it therefore "has none." Pet.App. 44a. Further applying *Morrison*, the court looked to the "focus" of RICO to determine

what constitutes a permissible domestic application of the statute. Pet.App. 45a-48a. The court held that, because RICO is focused on the "enterprise" that conducts or is affected by racketeering, the statute extends only to domestic enterprises. *Id.*

The court then concluded that the complaint in this case does not allege a domestic enterprise. To determine where an enterprise is located, the court applied the "nerve center" test from *Hertz Corp. v. Friend*, 559 U.S. 79 (2010), which focuses on where the corporation or enterprise is controlled. Pet.App. 48a. Here, the alleged money-laundering enterprise was controlled by foreign narcotics traffickers, with petitioners alleged to be "nothing more than sellers of fungible goods in a complex series of transactions directed by South American and Russian gangs." Pet.App. 52a.

4. On appeal, a panel of the Second Circuit reversed. Neither side—nor the United States as amicus—asked the court to hold that RICO applies extraterritorially. Rather, the only disputed issue was what constitutes a permissible domestic application of RICO. Yet the court of appeals, taking a different view from those expressed by the litigants and by all prior decisions, held that RICO *does* apply extraterritorially. Its original opinion extended the substantive provisions of RICO to extraterritorial patterns of racketeering activity and extraterritorial enterprises, and its opinion on rehearing further extended civil RICO to extraterritorial injuries. Thus, that court's ultimate rule was that civil RICO extends to *foreign* racketeering activity carried out by *foreign* enterprises and causing *foreign* injuries.

First, the panel extended RICO to extraterritorial patterns of racketeering activity. It held that "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate." Pet.App. 9a. The panel reasoned that, by "incorporating" extraterritorial statutes "into RICO" as predicate acts of racketeering, Congress "clearly communicated its intention" that RICO itself apply extraterritorially. Pet.App. 11a. Moreover, the panel further reasoned that if RICO covered only domestic patterns of racketeering, then Congress's decision to incorporate exclusively extraterritorial predicate statutes would be inexplicable. Pet.App. 10a. In so extending RICO, the court severely limited its own prior precedent in *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam), which had held that "RICO is silent as to any extraterritorial application," *id.* at 33 (citation omitted), and that, "'[w]hen a statute gives no clear indication of an extraterritorial application, it has none,'" *id.* (quoting *Morrison*, 561 U.S. at 255).

Next, the panel extended RICO to foreign enterprises. Without citing any textual basis, it reasoned that limiting RICO to domestic enterprises would be an "illogical" policy, because "[s]urely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States." Pet.App. 14a.

Applying these rules, the panel held that the RICO counts in this case state viable claims. The panel reasoned that, because the money-laundering and material-support statutes by their terms apply

extraterritorially, RICO likewise applies to extraterritorial patterns of racketeering activity predicated on violations of those statutes. Pet.App. 17a-18a. The court acknowledged that the mail fraud, wire fraud, and Travel Act statutes do not apply extraterritorially, but it held that the complaint adequately alleged domestic violations of those statutes. Pet.App. 18a-24a.[2]

5. Petitioners sought rehearing on the ground that the panel had ignored one of their principal contentions—that regardless of the geographic scope of § 1962, plaintiffs seeking treble damages under § 1964(c) must allege a domestic injury.

In response, the panel issued a second opinion extending § 1964(c) to extraterritorial injuries. It reasoned that § 1964(c) extends to any injury "caused by predicate acts sufficiently related to constitute a pattern." Pet.App. 56a (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985)). The panel further reasoned that the presumption against extraterritoriality is "primarily concerned with the question of what *conduct* falls within a statute's purview," and thus does not apply to the question whether a statutory private right of action extends to extraterritorial injuries. Pet.App. 58a.

6. Petitioners sought rehearing en banc. More than seven months later, the court denied it by an 8-5 vote, which prompted one published concurrence and four published dissents.

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[2] The court further held that the district court had erred in dismissing respondents' state-law claims for lack of subject-matter jurisdiction. Pet.App. 24a-36a; *see also* 814 F. Supp. 2d 189 (E.D.N.Y. 2011). That holding is not at issue here.

Judge Jacobs, writing for all five dissenters, argued that further review was appropriate given the "frequency of RICO litigation" in the Second Circuit and the "taut tension" between the panel opinion and prior decisions. Pet.App. 68a-69a.

Judge Cabranes, joined by Judges Jacobs, Raggi, and Livingston, explained that the panel decision was "flatly inconsistent with years of precedent" from this Court, which "treats RICO as an offense distinct from its predicate acts." Pet.App. 71a. "Although it is indisputable that Congress intended for certain RICO predicate statutes to apply to actions or events abroad, there is no clear basis for concluding that Congress intended for RICO itself to go along with them." *Id.* He summarized things as follows: "After more than four decades of experience with [RICO], a panel of our court has discovered and announced a new, and potentially far-reaching, judicial interpretation of the statute—one that finds little support in this history of the statute, its implementation, or the precedents of the Supreme Court; that will encourage a new litigation industry exposing business activities abroad to civil claims of 'racketeering'; and that will invite our courts to adjudicate civil RICO claims grounded on extraterritorial activities anywhere in the world." Pet.App. 73a-74a (footnotes omitted).

Judge Raggi, writing for the same four judges, further explained that the panel had misapplied *Morrison* and created a circuit split in doing so: "Since [*Morrison*], courts in this circuit and around the nation uniformly have held that [RICO] does not apply extraterritorially. These courts have sometimes differed in how they determined whether

a particular RICO application was domestic or extraterritorial, but their underlying assumption has been consistent: 'RICO is silent as to any extraterritorial application' and, therefore, 'it has none.'" Pet.App. 74a (quoting *Norex*, 631 F.3d at 33, and *Morrison*, 561 U.S. at 255). Accordingly, she urged further review both on the threshold question whether "RICO applies extraterritorially" at all and on the "criteria for determining whether a RICO claim is domestic or extraterritorial." Pet.App. 77a.[3]

REASONS FOR GRANTING THE PETITION

Five years ago, this Court decisively rejected the "conduct" and "effects" tests previously used by the Second Circuit to determine the extraterritorial reach of various federal statutes, including the securities laws and RICO. *See Morrison*, 561 U.S. at 255-61. In their place, this Court required a two-step analysis more consistent with the presumption against extraterritoriality. First, to determine whether the presumption is overcome, a court must decide whether the statute at issue contains any "clear indication" that it applies extraterritorially. *Id.* at 255, 265. If not, the court then must determine what qualifies as a domestic application of the statute at issue. *See id.* at 266. To do so, it must identify what elements are the "focus" of the statute, and those elements apply only domestically. *See id.* at 268. Thus, because § 10(b) of the Exchange Act

[3] Separately dissenting, Judge Lynch agreed that the panel decision was "deeply in tension" with *Norex*, but reserved judgment on which of the two is correct. Pet.App. 103a. Only Judge Hall—a member of the original panel—defended the panel opinion. Pet.App. 60a.

focuses on the purchase and sale of securities, it applies only to domestic purchases and sales of securities (or to purchases and sales of securities listed on a U.S. exchange), regardless of where any fraudulent conduct occurred or where the plaintiff or defendant resides. *See id.* at 269-70.

In seeking to apply the *Morrison* framework to RICO, the lower courts have reached broad agreement in one respect, but are deeply divided in another. Prior to the panel decision below, the courts had unanimously concluded at step one of *Morrison* that RICO "does not apply extraterritorially." *Xu*, 706 F.3d at 974-75. At step two, however, the courts sharply divided over how to distinguish between domestic and extraterritorial applications. The Ninth Circuit and numerous district courts concluded that the sole "focus" of RICO is the pattern of racketeering activity. These courts thus held that RICO applies only to domestic racketeering, but extends to foreign enterprises. Other courts, including the district court below, concluded that the "focus" of RICO is the enterprise, and thus held that RICO applies only to domestic enterprises, but extends to foreign racketeering. The United States, for its part, argued below that the "focus" of RICO is *both* the pattern of racketeering and the enterprise, and that § 1962 thus applies if *either* of them is domestic. Br. for United States as *Amicus Curiae* in Support of Neither Party 9-15, *RJR Nabisco, Inc.*, 764 F.3d 129 (No. 11-2475) ("U.S. Br."). And no court, to our knowledge, had extended RICO's civil cause of action to extraterritorial injuries.

In this case, the Second Circuit held, contrary to the Ninth Circuit and every other court to have

considered the issue, that there *is* a "clear indication" that RICO applies to extraterritorial patterns of racketeering activity, at least to the same extent as do the underlying predicate offenses. Moreover, the court further extended RICO to extraterritorial enterprises and injuries, thus authorizing civil RICO actions based on *foreign* patterns of racketeering conducted through *foreign* enterprises and causing *foreign* injuries. This is just such a case: The complaint alleges a far-flung scheme in which narcotics traffickers located in South America, Europe, and Asia laundered proceeds from illegal drug sales in Europe and thereby caused harm to European governments in Europe. Only under the Second Circuit's novel and expansive approach would such allegations state a claim under civil RICO.

This Court's intervention is warranted for four reasons. *First*, the lower courts are now divided on both the threshold question whether RICO applies extraterritorially at all and on the related question of which elements of a civil RICO claim must be domestic. *Second*, the question of RICO's geographic scope is recurring and important—which is why the United States filed an unsolicited amicus brief below, and why five circuit judges urged rehearing en banc. *Third*, this case presents an ideal vehicle for resolving that question: The lengthy opinions below fully address all the pertinent issues, and the case squarely implicates all the statutory elements (enterprise, pattern, *and* injury) that might constitute the relevant "focus" of civil RICO. *Fourth*, the Second Circuit's approach is profoundly wrong: Its foreign-cubed expansion of RICO misreads the statute, contravenes *Morrison*, and once again degrades the presumption against extraterritoriality.

I. THE LOWER COURTS ARE DEEPLY DIVIDED OVER WHETHER AND HOW RICO APPLIES EXTRATERRITORIALLY

Even before the panel decision below, courts and commentators had noted the confusion in the lower courts over how to apply *Morrison* to RICO. *See, e.g.*, *Borich v. BP, P.L.C.*, 904 F. Supp. 2d 855, 861 (N.D. Ill. 2012) ("courts have divided" on issue); Gideon Mark, *RICO's Extraterritoriality*, 50 AM. BUS. L.J. 543, 544 (2013) (courts "have split sharply"). And the opinion below significantly deepened the split, by introducing yet another approach that expands RICO's geographic reach even farther. This Court's review is needed to resolve this three-way conflict and to clarify the outer bounds of RICO's potent civil cause of action.

A. *Morrison* Rejected The "Conduct" And "Effects" Tests That Lower Courts Had Used To Determine RICO's Extraterritorial Scope

1. *Morrison* considered whether and how § 10(b) of the Exchange Act applies to foreign conduct. For decades, the lower courts, following the lead of the Second Circuit, had used a combination of two "complex" and "unpredictable" tests to determine which extraterritorial securities frauds were covered. *Morrison*, 561 U.S. at 256. An "effects test" asked whether the conduct had a "substantial effect" in the United States, and a "conduct test" asked whether material or significant contributing conduct occurred in this country. *See id.* at 257-58. The courts used that same analysis to determine the extraterritorial scope of various other federal statutes, including RICO. *See*, *e.g.*, *id.*; *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

This Court squarely rejected those tests as "unpredictable," "inconsistent," without basis in statutory text, and contrary to the longstanding presumption that Congress does *not* generally mean to apply federal statutes extraterritorially. *See* 561 U.S. at 260-61. In their place, the Court set forth a different approach that would "preserv[e] a stable background against which Congress can legislate." *Id.* at 261.

In particular, the Court first asked whether the presumption against extraterritoriality had been overcome by some "affirmative indication" in the statute, such as "a clear statement of extraterritorial effect" or "clear indication" from other "sources of statutory meaning." *Id.* at 265. For § 10(b) of the Exchange Act, the answer was no—despite its "reference to foreign commerce," another reference to foreign countries in the Act's statement of purposes, and a statutory exception that appeared to presume some extraterritorial application. *Id.* at 263. None of those features sufficed as a "clear" and "affirmative" indication of extraterritorial coverage to rebut the presumption. *See id.* at 265.

After concluding that § 10(b) does not "apply extraterritorially," the Court next inquired whether the disputed application was extraterritorial or domestic. *Id.* at 266. After all, applying the presumption against extraterritoriality is often "not self-evidently dispositive," for "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.* The critical second question is thus: What connection to the United States is necessary to make the contested application *domestic*?

The Court made clear that one cannot evade the presumption against extraterritorially simply by alleging "*some* domestic activity." *Id.* Rather, "the focus" of the statutory provision—the element or elements that are "the objects of the statute's solicitude"—must be domestic in the disputed application at issue. *Id.* at 267. Thus, because the "focus" of § 10(b) is on "transactions in securities," a domestic application of that provision is one that involves transactions in the United States or securities sold on United States exchanges. *Id.* Accordingly, § 10(b) applies only to such domestic transactions, and the presence of upstream or downstream conduct or effects in the United States does not extend that provision to otherwise extraterritorial transactions. *See id.* at 266-70.

2. *Morrison* significantly changed the law used by lower courts to determine the geographic scope of RICO. As noted above, the courts of appeals had previously applied the same "conduct" and "effects" tests that *Morrison* condemned. *See* Mark, *supra*, at 543 ("courts commonly analyzed RICO's extraterritoriality by borrowing two tests from securities and antitrust law—'conduct' and 'effects'"); *Al-Turki*, 100 F.3d at 1051 (using conduct and effects tests to determine extraterritorial scope of RICO); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) (in RICO case, looking to "tests used to assess the extraterritorial application of the securities laws"). By emphatically rejecting the "conduct" and "effects" tests, *Morrison* "threw the tests for extraterritorial application of RICO into flux." Anneka Huntley, *RICO's Extraterritoriality After Morrison: Where Should We Go from Here?*, 65 HASTINGS L.J. 1691, 1700-01 (2014).

B. Most Courts Now Refuse To Apply RICO Extraterritorially, But Disagree On What Constitutes A Domestic Application

In attempting to apply *Morrison* to RICO, "the lower courts have been 'all over the board' producing 'the very confusion and variation in standards' the Supreme Court hoped to remedy by rendering the decision." Melvin L. Otey, *Why RICO's Extraterritorial Reach Is Properly Coextensive with the Reach of Its Predicates*, 14 J. INT'L BUS. & L. 33, 34 (2015). Until the panel decision in this case, courts "around the nation uniformly ha[d] held that [RICO] does not apply extraterritorially," since the statute contains no clear indication of any extraterritorial sweep. Pet.App. 74a (Raggi, J., dissenting from denial of en banc). But the courts disagreed about what is RICO's "focus," and thus divided on the equally important question of what constitutes a "domestic" application of the statute.

1. Prior to the decision below, every court to consider the question had held, under the first step of *Morrison*, that RICO contains no "clear indication of an extraterritorial application" and therefore "has none." 561 U.S. at 255.

In *Xu*, the Ninth Circuit squarely held that RICO does not apply extraterritorially. As that court explained, "courts that have addressed the issue" since *Morrison* "have uniformly held that RICO does not apply extraterritorially." 706 F.3d at 974. The Ninth Circuit embraced these decisions as "faithful to *Morrison*'s rationale"—because "RICO is silent as to its extraterritorial application," it follows that "RICO does not apply extraterritorially in a civil or criminal context." *Id.* at 974-75. Likewise, in *CGC*

Holding Co. v. Broad & Cassel, the Tenth Circuit noted uniform precedent, the district court's holding, and the parties' agreement "that RICO does not apply extraterritorially." 773 F.3d 1076, 1097 (10th Cir. 2014). The court then discussed at length the division of authority on the step-two question of "identifying the 'focus' of RICO," which determines what constitutes a domestic application, but ultimately reserved judgment on that latter question. *See id.* at 1097-98.

District courts across the country likewise have held that RICO does not apply extraterritorially. *E.g.*, *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 164 (D.D.C. 2013) ("courts have uniformly concluded" that "RICO does not apply extraterritorially"); *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 937 (N.D. Cal. 2012) ("courts have uniformly held that RICO is silent as to its extraterritorial application and that, under *Morrison*, it therefore has none"); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1348 (S.D. Fla. 2012) ("Sosa argues that, because RICO … is silent with respect to extraterritorial application, it has no such application. Every court to consider this argument after *Morrison* has embraced it."); *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 U.S. Dist. LEXIS 189601, at *23 (S.D. Tex. Aug. 23, 2013) ("post-*Morrison* courts have uniformly held that RICO does not apply extraterritorially"); *In re Le-Nature's, Inc. v. Krones, Inc.*, No. 09-cv-1445, 2011 U.S. Dist. LEXIS 56682, at *13-14 (W.D. Pa. May 26, 2011) ("Because the RICO statute does not contain evidence that Congress intended extraterritorial

application, *Morrison* has been held to preclude such application.").[4]

2. While the lower courts had agreed that RICO does not apply extraterritorially, they disagreed at *Morrison*'s important second step—*i.e.*, how to distinguish a permissible domestic application of RICO from an impermissible extraterritorial one. As *Morrison* explained, applying the presumption often "requires further analysis," because merely alleging "*some* domestic activity" is not sufficient to establish the domestic application of a statute. 561 U.S. at 266. Rather, the domestic activity must encompass the statutory "focus." *Id.* But the lower courts have found it "unclear how *Morrison*'s logic … precisely translates to RICO." *Toyota Motor*, 785 F. Supp. 2d at 914-15.

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[4] *See also In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 731 (S.D.N.Y. 2013) ("RICO does not apply extraterritorially."); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 543 (S.D.N.Y. 2013) ("The RICO statutes do not apply extraterritorially."); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 239 (S.D.N.Y. 2012) ("presumption against extraterritorial application governs in RICO cases"); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011) ("there can be no dispute that RICO is silent as to its extraterritorial application" and thus "RICO *does not* apply extraterritorially"); *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 28-29 (D.D.C. 2011) ("there is no evidence that Congress intended to criminalize foreign racketeering activities under RICO"); *Cedeno v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (RICO not "sufficiently clear to overcome the presumption against extraterritoriality"); *Goodwin v. Bruggeman-Hatch*, No. 13-cv-02973, 2014 U.S. Dist. LEXIS 108911, at *23 (D. Colo. June 2, 2014) ("RICO does not apply to extraterritorial conduct").

In particular, a conflict developed between two alternative approaches. *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 571 (S.D.N.Y. 2014) ("The decisions to have considered the matter have taken essentially one of two approaches to determining whether application of RICO to situations involving conduct both in the United States and abroad would be extraterritorial."). Some courts, including the Ninth Circuit, held that the sole statutory focus of RICO is the "pattern of racketeering activity," so that RICO requires a domestic pattern but not a domestic enterprise. Other courts, like the district court below, concluded that RICO is focused on the "enterprise" affected or implicated by racketeering, so that RICO covers only domestic enterprises. Finally, some commentators and parties (including petitioners) have argued that the "focus" of a *civil* cause of action under RICO is the plaintiff's injury, so that § 1964(c) applies only to domestic injuries. Prior to the decision below, no court (to our knowledge) had addressed that contention one way or the other.

a. The Ninth Circuit and various district courts in other circuits have held that RICO applies only to domestic patterns of racketeering activity.

In *Xu*, the Ninth Circuit explained that courts to have addressed the issue have "fall[en] essentially into two camps"—one looking solely to the location of the enterprise, the other solely to the location of the pattern of racketeering activity. 706 F.3d at 975. After thorough analysis, it rejected the former and adopted the latter. *Id.* at 977. The Ninth Circuit described RICO as designed to "punish patterns of organized criminal activity in the United States." *Id.*

at 978. By contrast, that court criticized the "enterprise" test, despite its "administrative ease, familiarity, and consistency," as promoting what the court regarded as "absurd results"—*i.e.*, immunizing foreign groups carrying out illegal acts in the United States. *Id.* at 977.

Applying these principles, the Ninth Circuit held that the pattern of racketeering activity alleged in the *Xu* case, "to the extent it was predicated on extraterritorial activity" in China, was "beyond the reach of RICO." *Id.* at 978. Moreover, the court reached that conclusion even though the predicate acts included a money-laundering conspiracy. *See id.* at 973, 993. On the other hand, § 1962 did apply to the extent that the "pattern of racketeering activity" was "executed and perpetrated in the United States." *Id.* at 979. The court thus held that it was "constitutional error" to allow the jury to convict the defendants based on "extraterritorial activity," but it ultimately concluded that this error was harmless. *Id.* at 979 n.2. Finally, the court concluded that the location of what it described as the "international enterprise" at issue (*id.* at 974) was irrelevant to the geographic scope of RICO. *See id.* at 978-79. *See also Howard v. Maximus, Inc.*, No. 3:13-cv-01111, 2014 U.S. Dist. LEXIS 109199, at *13-14 (D. Ore. May 6, 2014) ("the Ninth Circuit chose to join those courts focusing on the location of the racketeering").

Various district courts have followed this same approach. In *CGC Holding Co. v. Hutchens*, for example, the court adopted the pattern test and refused to dismiss a RICO suit against an enterprise allegedly based in Canada, because the plaintiff had alleged a pattern of racketeering that "largely

occurred within the United States." 824 F. Supp. 2d 1193, 1209 (D. Colo. 2011). Conversely, in *Hourani*, the court adopted the pattern test and dismissed a RICO claim against a domestic enterprise because the alleged pattern of racketeering activity had occurred in Kazakhstan. 943 F. Supp. 2d at 165-66. And in *Borich*, which likewise concluded that the "proper focus" of RICO "is the pattern of racketeering activity," the court simply ignored the alleged "[f]oreign racketeering activity" in order to determine whether the plaintiff had stated a valid RICO claim. 904 F. Supp. 2d at 861-62.

b. Various other courts have held that the correct approach for determining RICO's territorial coverage is to assess the location of the enterprise. Under this approach, domestic enterprises may be liable for foreign acts of racketeering, but foreign enterprises are not liable for domestic acts of racketeering.

The enterprise approach was developed by Judge Rakoff, who literally wrote the book on RICO. *See* J. Rakoff & H. Goldstein, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (2015). In *Cedeno*, Judge Rakoff reasoned that the "focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity." 733 F. Supp. 2d at 474. He based that conclusion on the text and structure of RICO, which prohibits patterns of racketeering only insofar as they "impact an enterprise" in particular ways. *Id.* at 473-74. Accordingly, he concluded, RICO applies only to domestic enterprises. *Id.* at 474 ("RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign."). He therefore dismissed civil

RICO claims alleging that an enterprise based in Venezuela had committed a pattern of racketeering activity in part in the United States. *See id.*

Although *Cedeno* was superseded in the Second Circuit by the decision below, courts elsewhere have adopted its holding—again, with real practical consequences. For example, in *Le-Nature's*, a district court in Pennsylvania refused to dismiss a claim based on an alleged pattern of racketeering in Germany, because "the alleged enterprise was domestic, and within the ambit of RICO." 2011 U.S. Dist. LEXIS 56682, at *18. Conversely, a district court in Florida dismissed a RICO claim alleging that a Peruvian enterprise had carried out a pattern of racketeering activity in Florida. *See Sorota*, 842 F. Supp. 2d at 1350 (reasoning that plaintiff "alleges a foreign—not a domestic—RICO enterprise," leading to dismissal "regardless of where the predicate acts of racketeering occur"). *Accord Bhari Info. Tech. Sys. Private Ltd. v. Sriram*, 984 F. Supp. 2d 498, 504 (D. Md. 2013) (dismissing RICO claim where "the *enterprise* through which the RICO violations occurred" was not sufficiently domestic).

c. Finally, for private damages actions under RICO, a separate extraterritoriality question arises: whatever the geographic scope of the substantive provisions in § 1962, whether the cause of action in § 1964(c) extends to extraterritorial injuries.

Soon after *Morrison* was decided, one prominent commentator argued that its logic "should limit RICO's future application to cases in which the conduct of the foreign enterprise causes *injuries* in the U.S." John C. Coffee, Jr., *What Hath 'Morrison' Wrought?*, N.Y.L.J., Sept. 16, 2010 (emphasis added);

see also id. ("For the future, … the appropriate focus should be whether victims were injured in the United States."). Prior to the decision below, no court (to our knowledge) had extended § 1964(c) to extraterritorial injuries, and not even the United States, as amicus below, sought such an extension. *See* U.S. Br. at 3 n.2.

C. The Second Circuit Held That RICO *Does* Apply Extraterritorially, And That *No* Domestic Link Need Be Alleged or Proved

The Second Circuit adopted none of these three possible positions. Instead, it entirely "untether[ed] RICO from its mooring on United States shores." Pet.App. 75a (Raggi, J., dissenting from denial of en banc). Accordingly, civil RICO claims based on *foreign* patterns of racketeering activity conducted through *foreign* enterprises and causing *foreign* injuries—the RICO equivalent to what Justice Stevens in *Morrison* called "foreign-cubed" securities suits, 561 U.S. at 283 n.11 (Stevens, J., concurring in judgment)—are now viable in the Second Circuit.

1. Although all other courts had readily concluded that RICO contains no clear indication of extraterritorial coverage, the panel held that "RICO applies extraterritorially" to the extent that "liability or guilt could attach to extraterritorial conduct under the relevant RICO predicates." Pet.App. 9a. The panel reasoned that Congress, by "explicitly incorporating" extraterritorial statutes into RICO's definition of "racketeering activity," thereby manifested a clear intent to give the "pattern of racketeering activity" comparable extraterritorial coverage. Pet.App. 9a-10a ("when a RICO claim depends on violations of a predicate statute that

manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too"). Thus, because the money-laundering and material-support statutes are expressly extraterritorial, *see* 18 U.S.C. §§ 1956(f), 2339B(d)(2), RICO covers patterns of racketeering activity predicated on the violation of those statutes.

Moreover, the panel further extended RICO to extraterritorial enterprises and injuries. Its original opinion did not dispute that the complaint had alleged a foreign enterprise, but rejected the requirement of a domestic enterprise as "illogical." Pet.App. 14a. Similarly, in denying panel rehearing, the panel squarely held that "RICO imposes no such requirement" of a "domestic injury." Pet.App. 55a.

As a result of those holdings, all of the RICO allegations in the complaint were held to state viable claims: Although the complaint was based on allegations that a foreign enterprise committed acts of racketeering abroad and injured European governments within their own territory, the complaint was viable simply because it alleged violations of extraterritorial criminal predicates.

2. The Second Circuit's triply-extraterritorial expansion of RICO conflicts with the rule *everywhere else*, and the conflict is not merely theoretical. For example, the indictment in *Xu* would now survive in the Second Circuit, because the racketeering predicates in China included money-laundering offenses, *see* 706 F.3d at 978—the same expressly extraterritorial offenses principally alleged here. So too would the claims that were dismissed in *Hourani*, where the plaintiffs alleged money laundering in Kazakhstan, 943 F. Supp. 2d at 160, 167; in *Iraq*,

where the plaintiffs alleged money laundering in Iraq, 920 F. Supp. 2d at 545-46; or in *Cedeno*, where the plaintiffs alleged money laundering in Venezuela, 733 F. Supp. 2d at 473.[5]

* * *

In sum, "[l]ower courts have been struggling to apply RICO extraterritorially in the absence of further guidance from the Supreme Court, and their efforts have produced a sharp split regarding how its reach should be discerned." Otey, *supra*, at 52. This three-way split on the extraterritorial scope of a major federal statute—with the Second Circuit taking the most radically expansive view—cannot be resolved without this Court's intervention.

II. THE QUESTION PRESENTED HAS GREAT SIGNIFICANCE

The geographic scope of RICO also warrants this Court's attention because it is recurring and important. RICO litigation is common, and the opinion below broadly opens the door for civil plaintiffs to target, in U.S. courts, business practices across the globe—thereby threatening the very international discord and litigation bonanza that *Morrison* sought to prevent.

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[5] The panel commented that its extension of RICO to extraterritorial *enterprises* "accords with" *Xu*, "although on different reasoning." Pet.App. 16a n.6. However, the panel neglected to mention that *Xu* expressly requires a domestic *pattern of racketeering activity*, 706 F. 3d at 975-79, whereas the panel here expressly rejected that requirement, Pet.App. 9a-14a.

A. The Extraterritorial Scope Of RICO Arises Frequently In Federal And State Courts

Judge Jacobs cited the "frequency of RICO litigation in this Circuit" as justifying further review by his court. Pet.App. 69a (dissenting from denial of en banc). By the same token, the frequency of RICO litigation nationwide is among the reasons why this Court should review the basic question about its geographic scope.

In just the five years since *Morrison*, three courts of appeals have discussed how to apply it to RICO (the Ninth Circuit in *Xu*, the Tenth in *CGC Holding*, and the Second in this and several other cases). More than a dozen district courts throughout the country have also done so. And even since the Second Circuit issued its decision below, a half-dozen cases in that circuit have relied on it—not just in the civil RICO context, but also by extending its analytical approach to other statutes. *E.g.*, *United States v. Ahmed*, No. 12-CR-661, 2015 U.S. Dist. LEXIS 36973, at *25 (E.D.N.Y. Mar. 24, 2015) (18 U.S.C. § 924(c) applies extraterritorially to same extent as its predicates).

Moreover, this question affects considerable *state*-court litigation, too. Many states have enacted their own versions of RICO, and federal authority is highly persuasive for courts applying those statutes. *See, e.g.*, *Arthur v. JP Morgan Chase Bank, N.A.*, 569 F. App'x 669, 681 & n.12 (11th Cir. 2014) (finding it "unlikely" that Florida Supreme Court would apply Florida's RICO statute extraterritorially in light of *Morrison*, since federal law is "persuasive when interpreting the Florida RICO Act").

B. The Decision Below Threatens The Adverse Impacts That The Presumption Against Extraterritoriality Is Designed To Prevent

The decision below also opens the door to a *type* of civil litigation that will adversely affect important American interests—which is exactly why *Morrison* presumed Congress did not authorize it.

Specifically, the panel decision "invite[s] our courts to adjudicate civil RICO claims grounded on extraterritorial activities anywhere in the world." Pet.App. 73a-74a (Cabranes, J., dissenting from denial of en banc). Its rule authorizes plaintiffs to sue for "overseas" conduct by a "foreign enterprise," Pet.App. 75a (Raggi, J., dissenting from denial of en banc)—even when nobody in the United States has suffered an injury. Reported cases confirm that this is not mere speculation. Citing the panel opinion, courts over the last year have permitted RICO claims based on everything from political oppression in Ukraine, *see Tymoshenko v. Firtash*, 57 F. Supp. 2d 311, 324-25 (S.D.N.Y. 2014) (allowing plaintiffs to amend complaint in light of panel opinion, despite prior dismissal on extraterritoriality grounds), to bribery of Venezuelan officials, *see Reich v. Lopez*, 38 F. Supp. 3d 436, 447-48 (S.D.N.Y. 2014). By contrast, before the panel decision, courts had dismissed RICO claims arising from, *e.g.*, a Jordanian entity's racketeering in the Middle East that harmed citizens of Nepal, *Adhikari*, 2013 U.S. Dist. LEXIS 189601, at *22-26; a money-laundering scheme in connection with the Oil-for-Food program that harmed the Republic of Iraq, *Iraq*, 920 F. Supp. 2d at 545-46; and an extortion and money-laundering operation in Kazakhstan that caused harm there,

Hourani, 943 F. Supp. 2d at 167-68. If filed in the Second Circuit today, those claims would survive. Pet.App. 72a n.8 (Cabranes, J., dissenting from denial of en banc) (describing panel as "welcom[ing] such claims into federal court"). The whole world is now the oyster of RICO plaintiffs' lawyers.

For two reasons, this global expansion of RICO will "have a significant and long-term adverse impact." Pet.App. 69a (Cabranes, J., dissenting from denial of en banc). *First*, as this Court warned in *Morrison*, it threatens to turn the United States into "the Shangri-La … for lawyers" around the world. 561 U.S. at 270. Indeed, given RICO's authorization of treble damages and shifting of attorneys' fees, 18 U.S.C. § 1964(c)—as well as its status as "one of America's most powerful statutes," Otey, *supra*, at 34—the concern should be even greater for RICO than for securities claims. *Cf. Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991) ("Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device."). And RICO's broad venue rules, which permit suit in any district where the defendant "resides, is found, has an agent, or transacts his affairs" (18 U.S.C. § 1965(a)), will make it particularly easy for plaintiffs anywhere around the globe to file future RICO actions against large American corporations in New York. Hence Judge Cabranes' apt warning that the decision will "encourage a new litigation industry." Pet.App. 73a (dissenting from denial of en banc).

Second, extraterritorial application of U.S. law causes "clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248

(1991). That is certainly true of RICO: While the EC here seeks to invoke that statute overseas, any victory would be "pyrrhic," because "its citizens … are among the likely targets of future RICO actions under the panel's interpretation of the statute." Pet.App. 70a (Cabranes, J., dissenting from denial of en banc). RICO's expansion thus poses a "danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Shell Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

In short, "[r]esolution to the question of RICO's extraterritorial reach is absolutely vital to American interests." Otey, *supra*, at 34.

III. THIS IS A GOOD VEHICLE TO ADDRESS RICO'S EXTRATERRITORIAL REACH

For three reasons, this is an ideal case to address the question presented: The issue manifestly matters; the facts vividly illustrate the effects of the panel's radical rule; and the various arguments were exhaustively developed below.

First, resolution of the question presented would materially affect disposition of this case. Limiting RICO to domestic *patterns* of racketeering activity would substantially narrow the case. As the panel itself acknowledged, much of this case rests on allegations of money laundering outside the United States. Pet.App. 4a, 16a. Limiting RICO to domestic *enterprises* also would substantially narrow the case. In fact, the only "enterprise" actually alleged in the complaint consists of an "association-in-fact" made up of petitioners, drug traffickers, and "associated distributors, shippers, currency dealers, wholesalers, money brokers, and other participants" working together to launder the proceeds of illegal drug sales

in Europe. Pet.App. 239a. The district court squarely held that this alleged enterprise was foreign, Pet.App. 51a-52a, and the Second Circuit did not question that holding, Pet.App. 14a.[6] Finally, limiting civil RICO to domestic *injuries* would result in outright dismissal, as the complaint rests entirely on injuries allegedly suffered by respondents in Europe. Pet.App. 211a-228a. Thus, only under the Second Circuit's radically expansive approach could the complaint survive in anything remotely resembling its current form. (Of course, if this Court were to hold that RICO does not apply extraterritorially, and announce the appropriate rule for determining what constitutes a permissible domestic application of RICO, it could leave for the lower courts on remand the task of parsing the complaint to determine which small parts of it, if any, would survive.)

Second, the extreme facts of this case make it an ideal vehicle for appreciating the consequences of the Second Circuit's rule. As explained, respondents' claim rests principally on allegations of drug trafficking and money laundering in *Europe*, *South*

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[6] In denying rehearing, the panel briefly suggested that the complaint also states a violation of § 1962(a) based on the alleged investment of racketeering proceeds in a domestic "enterprise" defined as the Brown & Williamson Tobacco Company ("B&W"). Pet.App. 13a n.5. However, the § 1962(a) allegations in the complaint rest entirely on the foreign "association-in-fact" enterprise discussed above. Pet.App. 238a-239a, 252a-254a. More importantly, a claim under § 1962(a), if based on the investment in B&W, would not suggest any domestic enterprise that could support RICO claims under § 1962(b) or (c).

America, and *the Middle East*. At its heart is an alleged enterprise based in *Russia* and *Colombia*. And it alleges injuries to sovereign European nations in *Europe*. It is hard to imagine a case that Congress is less likely to have invited into U.S. courts. Yet, according to the panel below, Congress *clearly indicated* its intent to do so.

Third, the issue was exhaustively developed below. Petitioners moved to dismiss the complaint on extraterritoriality grounds; respondents opposed; petitioners replied; and the parties filed supplemental briefs after *Morrison* was decided. *See* Dkts. 84, 87, 95, 97, 99. The issue was exhaustively addressed in the opinion by the district court (Pet.App. 44a-52a); in an amicus filing by the United States; in two separate opinions by the Second Circuit panel (Pet.App. 7a-24a, 55a-58a); and in five separate opinions respecting the denial of en banc (Pet.App. 59a-104a). In sum, no further percolation is necessary to sharpen the question presented.

IV. THE DECISION BELOW IS WRONG

The panel decision misunderstands RICO, contravenes *Morrison*, and once again degrades the presumption against extraterritoriality. "RICO is silent as to its extraterritorial application." *Xu*, 706 F.3d at 974. That alone should end the inquiry, for "[w]hen a statute gives no clear indication of an extraterritorial application, *it has none*." *Morrison*, 561 U.S. at 255 (emphasis added). Yet here, rather than conclude that RICO has *no* extraterritorial reach, the panel below made it triply extraterritorial. Each of those extensions was wrong.

A. The "pattern of racketeering" provisions of RICO give no hint of an extraterritorial application,

as those provisions nowhere address their own geographic scope. To the contrary, RICO simply defines the predicate "racketeering activity" comprising the "pattern" as including "any" act that is indictable under vast swaths of Title 18. *See* 18 U.S.C. § 1961(1)(B). And, of course, "it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665.

The panel below nonetheless chose "to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes." Pet.App. 15a. It reasoned that any congressional intent to make a predicate statute extraterritorial necessarily carries over to RICO itself, with the courts effectively "looking through" to the underlying predicate statutes. *See id.*

The fundamental flaw in that approach is that RICO is not "an aggravating statute that simply adds new consequences to the predicate offenses." Pet.App. 77a (Raggi, J., dissenting from denial of en banc). To the contrary, "that premise, from which the rest of the panel's analysis flows," is "at odds" with various lines of precedent, including cases holding that prosecution for predicate offenses creates no double-jeopardy bar to a RICO prosecution. *Id.*; *see also* Pet.App. 71a (Cabranes, J., dissenting from denial of en banc) (RICO "prohibits distinct behavior"); *Cedeno*, 733 F. Supp. 2d at 474 ("RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts."). Accordingly, the clear congressional intent to make some predicate statutes extraterritorial cannot substitute for what *Morrison*

requires: clear congressional intent to make *RICO itself* extraterritorial. And the panel's contrary conclusion "may allow an end-run around the revivified presumption against extraterritoriality in *Morrison* and *Kiobel*." Pet.App. 71a (Cabranes, J., dissenting from denial of en banc).

Alternatively, the panel reasoned that the incorporation of predicate statutes that are *exclusively* extraterritorial would be nonsensical if RICO was limited to domestic patterns of racketeering activity. Pet.App. 10a. But, as Judge Raggi explained, foreign acts of racketeering, even if not independently actionable, can help show that domestic acts exhibit the necessary relatedness and continuity to constitute a pattern. Pet.App. 90a-91a (dissenting from denial of en banc); *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239-41 (1989) (addressing relatedness and continuity). In any event, even if RICO extended to patterns of racketeering activity based on the violation of *exclusively* extraterritorial predicate statutes, that would provide no support for *further* extending RICO to patterns of racketeering activity based on violation of predicate statutes that apply domestically and extraterritorially, which do not even arguably raise the same concern about meaningless incorporation. That is so because, even where a statute has *some* extraterritorial effect, the presumption still "remains instructive" in determining its "*extent*." *Microsoft v. AT&T Corp.*, 550 U.S. 437, 456 (2007). And here, the alleged pattern of racketeering activity involves no predicate statutes that are exclusively extraterritorial.

B. The panel erred further in extending RICO to extraterritorial enterprises. In pertinent part, RICO defines covered enterprises as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). Not a word of that definition suggests extraterritorial application, much less does so clearly and affirmatively. *See Kiobel*, 133 S. Ct. at 1665. Nor, of course, do the panel's policy arguments about what might or might not be "illogical" (Pet.App. 14a). Moreover, the enterprise element of RICO cannot be dismissed as an ancillary detail far removed from the "'focus' of congressional concern." *Cf. Morrison*, 561 U.S. at 266. To the contrary, the "enterprise" is a central focus of RICO, as the United States correctly explained in its amicus brief. *See* U.S. Br. at 10 ("One focus of RICO is on enterprises.").

The United States further argued that, because § 1962 is focused on *both* its pattern and the enterprise elements, only *one* of them must be domestic. *See id.* at 12. That proposed rule is narrower than the one adopted by the panel, because the panel would apply RICO even if *neither* of those elements (nor the further element of injury) is domestic. But even the United States' narrower view makes little sense. *Morrison* holds that, absent some clear indication to the contrary, the "focus" of a statute is presumed to be domestic. *See* 561 U.S. at 266-69. Accordingly, if *both* the pattern and enterprise elements of § 1962 were deemed to be foci of RICO, then *both* of those elements must be domestic for RICO to apply.

C. The panel erred a third time in extending § 1964(c) to extraterritorial injuries. That provision affords a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." It is entirely silent as to its own geographic scope, and its "focus" is plainly the injury caused by a RICO violation, as opposed to the underlying violation separately addressed by § 1962. Moreover, even if the panel were correct that § 1962 applies extraterritorially, that would not suggest that § 1964(c) does so as well, just as the fact that § 30(a) of the Exchange Act applies extraterritorially in no way suggests that § 10(b) of that Act also does. *See Morrison*, 561 U.S. at 264-65. To the contrary, it would suggest just the opposite, by confirming that Congress, when it wanted, could speak with the requisite degree of clarity. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Finally, the panel's invocation of *Sedima* (Pet.App. 56a) provides no support for its extension of § 1964(c) to extraterritorial injuries. That case held only that § 1964(c) does not implicitly require a "racketeering injury" akin to the "antitrust injury" required for private civil antitrust claims. *See* 473 U.S. at 493-500. It has nothing whatsoever to do with any question of extraterritoriality.

* * *

In short, *Morrison* requires a clear indication that RICO—and not just the distinct crimes defined as the predicates comprising racketeering activity—applies abroad. Because there is no such indication for *any* element of a civil RICO claim, and certainly not for *all three*, the panel's ruling erroneously stretches the statute far beyond its proper scope.

CONCLUSION

The petition for certiorari should be granted.

JULY 2015

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