No. 15-138

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 Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*., applies extraterritorially.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE GLOBAL EXPANSION OF RICO INVITES AN EXPLOSION IN CIVIL LITIGATION ABUSE 8

A. Civil RICO Is Uniquely Prone to Abuse by the Plaintiffs' Bar 8

B. Extraterritorial Application of RICO Will Only Invite Further Abuse 10

II. THE PRESUMPTION AGAINST EXTRATERRITORIALITY GOVERNS § 1962 OF RICO IN BOTH CIVIL AND CRIMINAL CASES 14

A. This Court's Presumption Against Extraterritoriality Applies Fully to Criminal Statutes 15

B. Statutes Providing for Civil and Criminal Liability Can Have Only One Authoritative Meaning 18

III. IN THE WAKE OF *KIOBEL*, ACTIVIST PLAINTIFFS ARE EXPLOITING CIVIL RICO AS A SURROGATE FOR CLAIMS THAT THIS COURT FORECLOSED UNDER THE ALIEN TORT STATUTE..... 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES:

Am. Isuzu Motors, Inc. v. Ntsebeza,
553 U.S. 1028 (2008) 24

Anza v. Ideal Steel Supply Corp.,
547 U.S. 451 (2006) 9

Blackmer v. United States,
284 U.S. 421 (1932) 17

Bond v. United States,
134 S. Ct. 2077 (2014) 16

Carter v. Welles-Bowen Realty, Inc.,
736 F.3d 722 (6th Cir. 2013) 18

Clark v. Martinez,
543 U.S. 371 (2005) 19, 21

Crandon v. United States,
494 U.S. 152 (1990) 19

Doe I v. Unocal Corp.,
395 F.3d 932 (9th Cir. 2002) 24

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 16

European Cmty. v. RJR Nabisco, Inc.,
764 F.3d 129 (2d Cir. 2014) 3

Page(s)

FCC v. Am. Broad. Co.,
347 U.S. 284 (1954) 20

Filartiga v. Peña-Irala,
630 F.2d 876 (2d Cir. 1980) 22

Hertz Corp. v. Friend,
559 U.S. 77 (2010) 13

H.J. Inc. v. Nw. Bell Tel. Co.,
492 U.S. 229 (1989) 18

Int'l Data Bank, Ltd. v. Zepkin,
812 F.2d 149 (4th Cir. 1987) 8

Khulumani v. Barclay Nat'l Bank Ltd.,
504 F.3d 254 (2d Cir. 2007) 24

Kiobel v. Royal Dutch Petroleum Co.,
133 S. Ct. 1659 (2013) 1, 7, 22, 23, 24

Leocal v. Ashcroft,
543 U.S. 1 (2004) 7, 19, 21

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247 (2010) 1, 3, 5, 7, 15, 16

Norex Petroleum Ltd. v. Access Indus., Inc.,
631 F.3d 29 (2d Cir. 2010) 5, 14, 15

Saleh v. Titan Corp.,
580 F.3d 1 (D.C. Cir. 2009),
cert. denied, 131 S. Ct. 3055 (2011) 24

Page(s)

Scheidler v. Nat'l Org. for Women,
537 U.S. 393 (2003) 19

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 2, 9, 13

Small v. United States,
544 U.S. 385 (2005) 17

Sosa v. Alvarez-Machain,
542 U.S. 692, 714 (2004) 21

United States v. Ayesh,
702 F.3d 162 (4th Cir. 2012) 17

United States v. Bowman,
260 U.S. 94 (1922) 17

United States v. Flores,
289 U.S. 137 (1933) 17

United States v. Gatlin,
216 F.3d 207 (2d Cir. 2000) 17

United States v. Palmer,
16 U.S. 610 (1818) 16

United States v. Santos,
553 U.S. 507 (2008) 21

United States v. Thompson/Ctr. Arms Co.,
504 U.S. 505 (1992) 19, 20

Page(s)

United States v. Vilar,
729 F.3d 62 (2013) 17, 18

United States v. Wiltberger,
5 Wheat. 76 (1820) 20

Whitman v. United States,
135 S. Ct. 352 (2014) 20

Wiwa v. Royal Dutch Petroleum Co.,
226 F.3d 88 (2d Cir. 2000) 24

STATUTES:

18 U.S.C. § 1961 *et seq.* 1

18 U.S.C. § 1962 ..... 15, 18

18 U.S.C. § 1964(c) 4, 8, 15

18 U.S.C. § 1965(a) 9

28 U.S.C. § 1350 21

OTHER AUTHORITIES:

Pamela H. Busy, *Private Justice*,
76 S. CAL. L. REV. 1 (2002) 10

Brief of the United States as *Amicus Curiae* in Support of Limited Rehearing En Banc, *Norex Petroleum Ltd. v. Access Indus., Inc.*,
No. 07-4553-cv (2d Cir. Nov. 22, 2010) 14, 15

Page(s)

Brief for the United States of America, *United States v. Vilar*, No. 10-521(L) (2d Cir. Apr. 18, 2012) 15

Eric Allen Engle, *Extraterritorial Jurisdiction: Can RICO Protect Human Rights?,* 3 J. HIGH TECH. L. 1 (2004) 23

David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71 (2013) 19

HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS (2008) 22

Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U. L. REV. 19 (2013) 10

Anne B. Poulin, *RICO: Something for Everyone*, 35 VILL. L. REV. 853 (1990) 9

Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623 (1990) 10

William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5 (1989) 9

Page(s)

Petra J. Rodrigues, *The Civil RICO Racket: Fighting Back with Federal Rule of Procedure 11*, 64 ST. JOHN'S L. REV. 931 (1990) 8

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ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) 20

Julian Simcock, *Recalibrating After* Kiobel: *Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act (RICO) in Litigating International Corporate Abuse*, 15 CUNY L. REV. 301 (2012)..... 23

INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears in this Court as *amicus curiae* to defend the presumption that, absent clear congressional intent to the contrary, acts of Congress do not provide a remedy for alleged misconduct occurring outside the United States. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Morrison v. Nat'l Australian Bank Ltd.*, 561 U.S. 247 (2010). In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently publishes articles on the proper scope of civil actions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*. (RICO). *See, e.g.,* Ignacio Sanchez & Kevin O'Scannlain, *Foreign Governments' Misuse of Federal RICO: The Case for Reform*, WASHINGTON LEGAL FOUNDATION WORKING PAPER (May 2006).

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly,

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[1] Pursuant to Supreme Court Rule 37(6), *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and stipulations of consent have been lodged with the Court.

New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici have long been concerned that the reflexive invocation of RICO by civil litigants engaged in garden-variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens the federal judiciary. While Congress adopted RICO as a tool to fight organized crime, civil RICO is now frequently invoked in "everyday fraud cases brought against respected and legitimate enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). Among the many abusive attempts to drastically expand RICO's reach, none are more problematic than recent civil suits brought by foreign governments against American businesses for overseas conduct.

Amici agree with petitioners that there is no statutory basis for inferring that Congress enacted RICO with the expansive, extraterritorial scope attributed to it by the panel below. We write separately to address the significant harm that will result for our civil justice system if this Court were to affirm the Second Circuit's untethered expansion of RICO's substantive scope in this case. For the reasons that follow, *amici* join with petitioners in urging the Court to vacate the erroneous holding below.

STATEMENT OF THE CASE

Petitioners are RJR Nabisco, Inc. and several related entities. Respondents are the European Community and its 26 member states.[2] Respondents sued petitioners under RICO, alleging that petitioners conspired with cigarette wholesalers in such far-flung countries as Colombia and Croatia, among other places, to launder monies derived from the sale of illegal narcotics in Europe. Pet. App. 2a-3a. The complaint alleges that, in furtherance of this global conspiracy, petitioners engaged in various predicate racketeering acts in violation of RICO, including mail fraud, wire fraud, and money laundering. *Id.* at 3a-5a. As a result of these alleged RICO violations, respondents claim myriad injuries to European governments and their economies in the form of lost tax revenues, higher law-enforcement costs, and reduced profits to their state-owned tobacco businesses. *Id.* at 211a-228a.

The United States District Court for the Eastern District of New York dismissed respondents' RICO claims. Applying this Court's holding in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), the district court found that because the RICO statute is "silent as to any extraterritorial application," it "has none." Pet. App. 44a. And because the enterprise alleged in the complaint consisted of "a loose association of Colombian and Russian drug-dealing organizations and European

[2] Since this lawsuit was originally filed, the European Community has been incorporated into the European Union. *See European Cmty. v. RJR Nabisco, Inc.,* 764 F.3d 129, 148 (2d Cir. 2014).

money brokers whose activity was directed outside the United States," the complaint failed to state an actionable claim under RICO. *Id.* at 5a.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed, expressly holding that RICO applies extraterritorially. The appeals court rejected the district court's conclusion that RICO cannot apply to extraterritorial conduct because "with respect to a number of offenses that constitute predicates for RICO liability … Congress has clearly manifested an intent that they apply extraterritorially." Pet. App 3a. The panel also fully extended RICO to foreign enterprises, reasoning without any statutory basis that this Court's presumption against extraterritorial application of U.S. laws "does not command giving foreigners carte blanche to violate the laws of the United States." *Id.* at 14a. As to several of the alleged RICO predicates (including mail and wire fraud), the appeals court acknowledged that those statutes do not apply extraterritorially but nevertheless held that the complaint alleged sufficient domestic activity to come within RICO's ambit. *Id.* at 18a-24a.

Petitioners sought rehearing on the basis that, regardless of the geographic scope of the alleged RICO enterprise or any underlying predicate acts, 18 U.S.C. § 1964(c) requires a domestic *injury* before a plaintiff is entitled to treble damages. Pet. App. 55a-58a. In response, the panel issued a second opinion extending § 1964(c) to extraterritorial injuries as well. Reasoning that this Court's presumption against extraterritoriality is "primarily concerned with the question of what *conduct* falls within a statute's purview," the panel held that such a

presumption does not apply to the question of extraterritorial injury caused by violations of RICO. *Id*. at 58a.

Petitioners sought rehearing en banc, which was denied by an 8-5 vote. Judge Jacobs, writing for all five dissenters, insisted that further review was needed in light of the "frequency of RICO litigation" in the Second Circuit and the "tension" between the panel opinion and prior precedent, including *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (holding that because "RICO is silent as to any extraterritorial application … it has none"). Pet. App. 68a-69a.

Judge Cabranes, joined by Judges Jacobs, Raggi, and Livingston, lamented that "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 [the] history of the statute, its implementation, or the precedents of the Supreme Court." Pet. App. 73a.

Writing for the same four judges, Judge Raggi criticized the panel opinion for creating a circuit split and failing to follow this Court's approach to extraterritorial analysis in *Morrison*. She urged further review not only to decide whether "RICO applies extraterritorially" but in order to establish "criteria for determining whether a RICO claim is domestic or extraterritorial." Pet. App. 77a.

SUMMARY OF ARGUMENT

Although a straightforward application of this Court's precedents clearly dictates that RICO does not apply extraterritorially, the Second Circuit's decision below exacerbates an existing circuit split by extending RICO to cover foreign racketeering, foreign enterprises, *and* foreign injuries. As the petitioners' brief ably demonstrates, absent clear contrary evidence, statutes apply only domestically, not extraterritorially, and nothing in RICO rebuts this Court's longstanding presumption that Congress regulates with only domestic concerns in mind.

Even when cabined to wholly domestic matters, civil RICO is uniquely prone to abuse. RICO is notorious for its elasticity and for enabling plaintiffs to convert ordinary civil disputes into federal racketeering claims. And RICO provides treble damages and recovery of all costs, including attorney fees, to prevailing plaintiffs. Armed with the loss of goodwill and reputation that often follow the news that a defendant company has been accused of "racketeering" activity, civil RICO plaintiffs can extract settlements for even the most frivolous claims.

Giving extraterritorial effect to a statute with the unparalleled breadth and remedies of RICO will only make matters worse. Affirming the decision below unquestionably will invite wholly foreign litigation into the United States, where it does not belong. Allowing foreign litigants to bring what are otherwise ordinary foreign civil disputes into U.S. federal courts will dramatically increase the burden on the federal courts, impose higher litigation costs

on multi-national businesses, force defendants into coercive settlements, and hence work injustice.

Moreover, any contention by the Government that RICO's substantive prohibitions can have two different meanings—an extraterritorial reading in criminal cases, and a purely domestic one in civil cases—is simply wrong. In arguing that RICO simultaneously enjoys two authoritative constructions, the Government has gone so far as to suggest that criminal statutes enjoy a presumption *in favor of* extraterritoriality. Not so. As this Court has emphasized, the presumption against extraterritoriality "applies … in *all* cases." *Morrison*, 561 U.S. at 261 (emphasis added). And when a single statute has both criminal and civil applications, the Court has repeatedly held that "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004).

Reversing the panel's expansive holding below is especially crucial in light of this Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, as activist plaintiffs are strategically pivoting to civil RICO as a surrogate for claims that are now foreclosed under the Alien Tort Statute. If this Court were to affirm the Second Circuit's deeply flawed decision below, it would effectively authorize activist plaintiffs to litigate under RICO the very same factual allegations that *Kiobel* now bars them from pursuing under the ATS. Permitting the use of civil RICO as a substitute for ATS litigation would saddle U.S. multi-national companies with paralyzing risks of liability absent any Congressional mandate to do so.

ARGUMENT

I. THE GLOBAL EXPANSION OF RICO INVITES AN EXPLOSION IN CIVIL LITIGATION ABUSE

A. Civil RICO Is Uniquely Prone to Abuse by the Plaintiffs' Bar

Although RICO was adopted as a new law enforcement tool for combating organized crime, the civil RICO provision, 18 U.S.C. § 1964(c), has rarely been used for that purpose. Instead, the ever-increasing number of civil RICO suits filed each year primarily target legitimate, everyday business activity that would not fit most people's definition of racketeering. And because RICO is drafted so broadly, plaintiffs' attorneys can file as RICO claims a growing number of disputes that Congress never could have foreseen. "Through innovative lawyering, civil RICO claims have centered on a myriad of subjects, including sexual harassment, the 1986 air strike on Libya, mismanagement of hazardous waste sites, anti-abortion protest activities, a parishioner's grievances against her former church, a strict products liability suit involving defective infant formula, and a wrongful discharge action." Petra J. Rodrigues, *The Civil RICO Racket: Fighting Back with Federal Rule of Procedure 11*, 64 ST. JOHN'S L. REV. 931, 936-37 (1990).

Because the "danger of vexatiousness" is especially strong in RICO cases, *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987), the statute has become a highly profitable vehicle for the plaintiffs' bar. As a result, judges and legal scholars

have routinely criticized the overly expansive reach of civil RICO, which provides "many ordinary civil cases with an entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 VILL. L. REV. 853, 857 (1990); *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread."); William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 13 (1989) (inviting "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court").

The attractiveness of civil RICO for plaintiffs and the plaintiffs' bar is not difficult to understand. RICO applies not only to individual actors, but also to corporations, and it promises treble damages and recovery of costs, including attorney fees, to prevailing plaintiffs. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) ("RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers."). And RICO's liberal venue provisions, which allow suit to be brought in any district where the defendant "resides, is found, has an agent, or transacts his affairs," 18 U.S.C. § 1965(a), invite forum shopping by RICO plaintiffs.

Moreover, plaintiffs can always threaten to use the provocative public-relations implications of RICO's title to coerce settlements from companies that understandably fear the loss of goodwill and reputation that would accompany news of the

company's being accused of "racketeering" activity. "Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations." Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 626 (1990).

Statistical studies suggest that plaintiffs are filing RICO lawsuits based on alleged "racketeering" conduct that federal prosecutors see no reason to pursue. "Between 2001 and 2006, there was an average of 759 civil RICO claims filed per year, while in those same years, a paltry average of 212 criminal RICO cases were referred to the United States Attorney's Office." Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U. L. REV. 19, 24 (2013). Similarly, a 2002 study found that, of all RICO cases decided by federal appellate courts between 1999 and 2001, 78% were civil and only 22% were criminal. Pamela H. Busy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 & n.111 (2002). Even when confined to its proper domestic sphere, civil RICO is uniquely prone to abuse.

B. Extraterritorial Application of RICO Will Only Invite Further Abuse

Unless this Court reverses the aberrant holding below, frivolous RICO claims will proliferate even more. While civil actions under RICO have always been a lightning rod for criticism, extending

RICO to cover allegations of foreign racketeering, foreign enterprises, and foreign injuries, as the Second Circuit has now done, further exacerbates the problem. The unusual breadth of RICO—and the mischief that will surely accompany its extension into wholly foreign disputes—offer the Court an independent basis for overturning the panel decision below.

Among the many creative attempts to expand the law's reach, none are more unfounded than recent civil RICO suits brought by foreign governments against American businesses for alleged "racketeering" activities overseas. *See* Ignacio Sanchez & Kevin O'Scannlain, *Foreign Governments' Misuse of Federal RICO: The Case for Reform*, WASHINGTON LEGAL FOUNDATION WORKING PAPER (May 2006) ("[T]he clearest and most egregious misuse and abuse of civil RICO to date is a growing species of litigation brought not by the United States, but by *foreign* governments.").[3] Such use of RICO exceeds even the reach of the statute's overly expansive language.

These disputes are best adjudicated in the courts of the countries that bring them. Nonetheless, opportunistic plaintiffs have sought to extract the settlement of frivolous claims from American companies unwilling to cope with the threat of treble damages and the unfavorable publicity that arises whenever one is labeled a "racketeer." These plaintiffs carefully tailor their

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[3] Available at http://www.wlf.org/publishing/publication_detail.asp?id=1767.

complaints to meet the statutory requirements of a RICO lawsuit:

> These claims are often constructed by piggy-backing on legitimate U.S. criminal investigations of the criminal racketeers. The lawyers convert the government's evidence (usually after extensive investigation and discovery), discard the foreign criminal racketeers and *replace* them with the deep pockets whose products were used illegally by the criminals. The legitimate business entity is thereby bootstrapped into alleged "schemes." The criminal actors go unnamed in these suits, revealing their true purpose as nothing more than an attempt to wrest vast sums from corporations with extensive financial resources.

Sanchez & O'Scannlain, *supra*, at 3.

If this Court were to make an exception to the presumption against extraterritoriality in this case, foreign governments and their political subdivisions would undoubtedly view that decision as a free-standing invitation to bring RICO suits against U.S. multi-national companies in federal district courts throughout the country. And one can easily imagine the onslaught of similar RICO cases that would be brought by foreign agencies, municipalities, and business competitors against U.S. companies in the wake of such a ruling. Individual foreign plaintiffs, too, will surely take advantage of RICO's unusual breadth to refashion foreign-law claims as civil RICO

claims. The availability of extraordinary treble damages and attorney fees under RICO would dramatically increase the settlement value of otherwise ordinary claims. In addition, easy access to federal courts would provide foreign plaintiffs with American procedural advantages (*e.g.*, discovery, class actions, jury trials, and contingent-fee arrangements with counsel) that are simply unavailable in most foreign jurisdictions.

Because RICO has been so broadly interpreted, companies—both domestic and international—desperately need a clear, bright-line rule as to when their entirely overseas conduct may be deemed subject to treble-damages liability in the United States. As this Court has emphasized, "[s]imple jurisdictional rules … promote greater predictability. Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). When properly applied and enforced, the venerable presumption against extraterritoriality affords the business community with that much-needed clarity and is consistent with this Court's precedents.

WLF does not mean to suggest that the Court ought to read RICO in a crabbed manner for the purpose of restricting the reach of the admittedly overbroad statute. To the contrary, WLF recognizes that it is not this Court's role to rewrite RICO, and that any *statutory* deficiencies are best addressed by Congress. *Sedima*, 473 U.S. at 500 ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because the plaintiffs are not taking advantage of it in its more

difficult applications."). Nonetheless, jettisoning the traditional presumption against extraterritoriality (as the Second Circuit effectively did here) would so dramatically expand RICO that the Court should, as petitioners urge, vacate the decision below and remand with instructions to affirm the district court's dismissal of the RICO claims in their entirety.

II. THE PRESUMPTION AGAINST EXTRATERRITORIALITY GOVERNS § 1962 OF RICO IN BOTH CIVIL AND CRIMINAL CASES

Although *amici* do not yet have the benefit of the Government's *amicus curiae* brief in this case, we anticipate that the United States will articulate a view substantially similar to that advanced in its *amicus curiae* brief in *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010). In that case, after the Second Circuit held that civil RICO had no extraterritorial application, the United States took the somewhat unusual step of requesting a limited hearing en banc so the court could clarify that its decision did *not* apply with equal force to RICO prosecutions by the Government. *See* Brief of the United States as *Amicus Curiae* in Support of Limited Rehearing En Banc, *Norex Petroleum Ltd. v. Access Indus., Inc.*, No. 07-4553-cv (2d Cir. Nov. 22, 2010) (hereinafter, U.S. *Norex* Br.) ("The government has a strong interest in ensuring that RICO remains available to prosecute and otherwise prevent and restrain extraterritorial offenses.").

In response, the Second Circuit panel amended its opinion to include the following

clarification: "Because Norex brought a private lawsuit pursuant to 18 U.S.C. § 1964(c), we have no occasion to address—and express no opinion on—the extraterritorial application of RICO when enforced by the government." *Norex Petroleum*, 631 F.3d at 33. *Amici* agree with that clarification to the extent that it imposes a domestic injury requirement under civil RICO, 18 U.S.C. § 1964(c), but reject any suggestion that RICO's substantive prohibitions, 18 U.S.C. § 1962, can mean one thing in a civil context and another in a criminal one.

Nonetheless, asserting that § 1962 has two different meanings—an extraterritorial reading that applies for actions brought by the Government, and a purely domestic one that applies in private, civil actions—the United States has gone so far as to suggest that criminal statutes "enjoy a presumption *in favor of* extraterritoriality." U.S. *Norex* Br. at 1, 3. Indeed, even after this Court's unanimous decision in *Morrison*, the Government has persisted in claiming that the presumption against extraterritoriality does not apply to criminal charges brought under § 10(b) of the Securities Exchange Act of 1934—the very statute at issue in *Morrison*. *See* Brief for the United States of America, *United States v. Vilar*, No. 10-521(L), at 96-101 (2d Cir. Apr. 18, 2012). As demonstrated below, the Government's position simply has no basis in the law.

A. This Court's Presumption Against Extraterritoriality Applies Fully to Criminal Statutes

Contrary to the Government's contention that RICO's substantive prohibitions apply extra-

territorially for the United States but domestically for everyone else, no basis exists in the law for such a distinction. Rather, as this Court emphasized in *Morrison*, judges must "apply the presumption [against extraterritoriality] in *all cases*, preserving a stable background against which Congress can legislate with predictable effects." 561 U.S. at 261 (emphasis added). And nothing in *Morrison* suggests that the ordinary assumption that Congress "is primarily concerned with domestic conditions," *id.* at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)), should not apply to statutory violations imposing both civil and criminal liability.

Any suggestion to the contrary departs sharply from nearly 200 years of precedent. This Court first applied the presumption against extraterritoriality to the Government in a criminal prosecution in *United States v. Palmer*, 16 U.S. 610 (1818), which held that the anti-piracy provisions of the Crimes Act of 1790 did not reach conduct committed by foreigners aboard foreign vessels on the high seas. Although acknowledging that the statute's words, "any person or persons," were broad enough to include "every human being," Chief Justice Marshall (writing for the Court) nonetheless held that such broad statutory language must "be limited to cases within the jurisdiction of the state." 16 U.S. at 631.

Since *Palmer*, this Court has consistently adopted the venerable presumption against extraterritoriality in criminal cases. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) ("[W]e presume, absent a clear statement from Congress, that federal statutes do not apply outside the United

States."); *Small v. United States*, 544 U.S. 385, 388 (2005) (applying the "commonsense notion that Congress generally legislates with domestic concerns in mind"); *United States v. Flores*, 289 U.S. 137, 155 (1933) (Stone, J.) ("[T]he criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial effect."); *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (Hughes, C.J.) ("[L]egislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States."); *United States v. Bowman*, 260 U.S. 94, 98 (1922) (Taft. C.J.) ("If punishment is to be extended to include those [frauds] committed outside the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.").[4]

As these cases demonstrate, "[a] statute either applies extraterritorially or it does not, and once it is determined that a statute does not apply extraterritorially, the only question we must answer in the individual case is whether the relevant conduct occurred in the territory of a foreign sovereign." *United States v. Vilar*, 729 F.3d 62, 74

[4] The federal courts of appeals have followed suit. *See, e.g., United States v. Ayesh*, 702 F.3d 162, 166 (4th Cir. 2012) ("Whether Congress has exercised that authority is a matter of statutory construction and, generally, statutes enacted by Congress, including criminal statutes, apply only within the territorial jurisdiction of the United States."); *United States v. Gatlin*, 216 F.3d 207, 214-15 (2d Cir. 2000) (reversing defendant's criminal conviction absent "clear congressional intent to apply [the] statute extraterritorially").

(2013). Accordingly, "the distinction the government attempts to draw between civil and criminal laws is no response to the fundamental purposes of the presumption." *Ibid.* Contrary to the Government, there is "no reason that these concerns are less pertinent in the criminal context." *Ibid.*

B. Statutes Providing for Civil and Criminal Liability Can Have Only One Authoritative Meaning

The Government's contention also contradicts the simple and commonsense principle of statutory interpretation that "[a] single statute with civil and criminal applications receives a single interpretation." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013); *see H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws."); *see also Vilar*, 729 F.3d at 74 ("The presumption against extraterritoriality is a method of interpreting a statute, which has the same meaning in every case."). If Congress intended to abrogate this rule for a hybrid statutory provision such as § 1962, it could have simply written that distinction into the statutory text. It did not.

If the words of a statute are to comport with the rule of law, they must have the same meaning whether the statute is used in a civil or criminal context. As relevant here, "there is no compelling justification for a court to give two constructions to a single statute—a domestic one for civil actions, and an extraterritorial one for criminal prosecutions—

based solely on the nature of the underlying proceeding." David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71, 78 (2013).

This interpretative principle controls even where a particular canon of construction governs only some applications of a statute, but not others. As this Court has explained, "it is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The *lowest common denominator*, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (emphasis added).

For example, the principle that a statutory provision can only have one meaning is illustrated in cases applying the rule of lenity, which holds that any ambiguity concerning the ambit of criminal statutes should be resolved in favor of the defendant. Even though the rule of lenity applies to only criminal *statutes*, its application is by no means confined to criminal *cases*. Instead, this Court has consistently applied the rule of lenity in *civil* cases implicating the scope of statutory provisions that enjoy both criminal and civil applications. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004) (Immigration and Naturalization Act); *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 408-09 (2003) (Hobbes Act); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (National Firearms Act); *Crandon v. United States*,

494 U.S. 152, 158 (1990) (federal contractor conflict-of-interest law).

In other words, the rule of lenity "is *not* a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." *Thompson/Ctr. Arms*, 504 U.S. at 518-19 n.10. Rather, it "is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language." *Ibid.* Thus, when a statute like RICO provides for both civil remedies and criminal penalties, it is "inconceivable" for "the language defining [a] violation to be given one meaning (a narrow one) for the penal sanction and a different meaning (a more expansive one) for the private compensatory action." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 297 (2012); *see FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the [FCC] and another for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases.").

This understanding also "vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy." *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (statement of Scalia, J., respecting the denial of certiorari) (citing *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820)). That is one reason why ambiguous criminal statutes must be

narrowly construed, so that the federal courts avoid "making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008).

As the Court has repeatedly explained, "we must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U.S. at 11-12 n.8. To hold otherwise, as the Government urges, "would render every statute a chameleon" and "would establish within our jurisprudence … the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark*, 543 at 382, 386.

III. IN THE WAKE OF *KIOBEL*, ACTIVIST PLAINTIFFS ARE EXPLOITING CIVIL RICO AS A SURROGATE FOR CLAIMS THAT THIS COURT FORECLOSED UNDER THE ALIEN TORT STATUTE

Giving extraterritorial application to a statute of RICO's breadth would also enable plaintiffs to circumvent the important territorial limits that this Court has recently recognized in the Alien Tort Statute (ATS), 28 U.S.C. § 1350, which authorizes federal courts to hear claims brought by aliens for only a "modest number of international law violations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

The ATS existed for over 200 years but was rarely used until 1976, when a cohort of enterprising plaintiffs' attorneys seized on the law to sue a former Paraguayan police chief on behalf of two Paraguayan nationals for the kidnap, torture, and murder of

their son—in Paraguay. That lawsuit resulted in the Second Circuit's 1980 decision in *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which expressly enabled alleged victims of human rights violations to bring suit in federal court.

For decades following *Filartiga*, human rights activists routinely relied on the ATS as their vehicle of choice to sue multi-national corporations for alleged overseas violations of the "law of nations," and many lower federal courts interpreted the ATS to permit a global remedy for international law violations. *See* HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 35 (2008) (stating that the Second Circuit's *Filartiga* decision "spawn[ed an] entirely new way[] of looking at the law" and "triggered a wave of academic scholarship and more than a quarter-century of human rights litigation in U.S. courts").

This Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), not only rejected the notion that the ATS creates a global cause of action, but it did so unanimously. Requiring dismissal of plaintiffs' claims against foreign defendants based on the actions of a foreign government in its own territory, the Court held that nothing in the text, history, or purpose of the ATS suggested that Congress intended to override the venerable presumption against extraterritorial application of U.S. law. 133 S. Ct. at 1665-69. The Court held further that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

Once the Court granted certiorari in *Kiobel*, "litigators in the broader [human rights] community appear[ed] to be undergoing a recalibration—a search for alternative vehicles by which to sustain the momentum in litigating involvement in extraterritorial abuses." Julian Simcock, *Recalibrating After* Kiobel*: Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act (RICO) in Litigating International Corporate Abuse*, 15 CUNY L. REV. 301, 304 (2012); *see also* Eric Allen Engle, *Extraterritorial Jurisdiction: Can RICO Protect Human Rights?,* 3 J. HIGH TECH. L. 1, 10 (2004) (proposing "the use of RICO to supplement and fortify claims under [the ATS]").

Indeed, "the well-documented flexibility of RICO as a tool for ascribing liability to individuals who are removed from the direct perpetration of crimes has led some commentators to suggest that the Act may be an appropriate vehicle by which to pursue corporate involvement in international abuses." Simcock, *supra*, at 306. Moreover, "[a] certain similarity exists between RICO and the [ATS]: both import foreign substantive law as the basis of a new independent federal claim." Engle, *supra*, at 9. Most traditional human rights abuses, such as murder, robbery, bribery, extortion, etc., all easily qualify as predicate offenses under RICO. *Ibid.*

"Many of the claims that have been brought under ATS cases (and other human rights litigation) are featured as predicate offenses under RICO as well." Simcock, *supra*, at 310. Indeed, it is rather telling that some of the most far-fetched ATS lawsuits also included RICO claims. *See, e.g.,*

Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of a quorum*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (asserting ATS and RICO claims against 50 corporate defendants for their "complicity" in South African apartheid); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011) (asserting ATS and RICO claims against U.S. military contractors in connection with alleged abuses at a military prison in Iraq).

Such ATS and RICO claims are sometimes dismissed by the district court on forum non conveniens grounds, only to be reinstated later on appeal. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (suit by Nigerian citizens against Dutch and British holding companies alleging human rights abuses stemming from oil exploration in Nigeria). Others survive the pleadings stage but are later disposed of on summary judgment—*precisely* on the ground that RICO does not apply extraterritorially. *See Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (suit by Myanmar citizens against Myanmar government and government-owned oil company alleging human rights abuses in furtherance of an oil-pipeline project).

If this Court were to affirm the Second Circuit's deeply flawed decision below, it would effectively authorize activist plaintiffs to litigate under RICO the very same factual allegations that *Kiobel* now bars them from pursuing under the ATS. As a result, claims that would have little or no settlement value as ATS claims would provide, when recast as civil RICO claims seeking treble damages,

even greater leverage against defendants than that available under the ATS. Such a substantial risk of protracted litigation and ruinous damage awards will discourage legitimate businesses from engaging in perfectly legitimate market activity that *might* subject them to suit here.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court reverse the decision below.

Respectfully submitted,

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