No. 07-

In The

Supreme Court of the United States

OCTOBER TERM 2007

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EDMUND BOYLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for 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

Does proof of an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), require at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages – an exceptionally important question in the administration of federal justice, civil and criminal, that has spawned a three-way circuit split?

List of Parties

Petitioner was indicted with Joseph Cerbone, Thomas Dono, Battista Geritano, Anthony Labarbera, John Labarbera, John Micali, Ronald Petrino and Joseph Spennato. He was tried alone on a redacted superseding indictment.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Edmund Boyle respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming his conviction on racketeering- and bank burglary-related charges; vacating his 151 month sentence (12.5 years) for an *ex post facto* violation; and remanding the case for resentencing before the United States District Court for the Eastern District of New York (Hon. Sterling Johnson Jr., J.). Resentencing is currently scheduled for April 18, 2008.

Opinion Below

The Court of Appeals' unpublished opinion, *United States v. Boyle*, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007), is reproduced in full at 1a *et seq.*[1]

Supreme Court Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). By Feb. 6 order, Justice Ginsburg extended the deadline for Boyle's *certiorari* petition to April 17. This petition timely follows.

Statutory Provisions

This petition concerns the interpretation of two provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), codified at 18 U.S.C. §§ 1961-68. The first, § 1962(c), states in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

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[1] Numbers followed by "a" refer to pages of the Appendix to this petition. Numbers preceded by "A:" and "SPA:" refer, respectively, to pages of Boyle's Appendix and Special Appendix in the Court of Appeals. Numbers preceded by "T:" refer to pages of the trial transcript.

The second provision at issue, 18 U.S.C. § 1961(4), defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity" and, as relevant here, "any union or group of individuals associated in fact although not a legal entity." (Emphasis supplied.)

District Court Jurisdiction

Jurisdiction in the Eastern District of New York rested on various provisions of Title 18, U.S. Code, including, among others, §§ 371, 1962-63, 2113 and 3231.

Statement of the Case

A jury convicted Boyle of racketeering (18 U.S.C. § 1962(c)), racketeering conspiracy (18 U.S.C. § 1962(d)), bank burglary conspiracy (18 U.S.C. § 371) and several bank burglaries and attempted burglaries (18 U.S.C. § 2113(a)). (SPA: 1) The charges arose from the defendant's participation in a bank burglary ring, a putative association-in-fact enterprise under the RICO statute, that the government dubbed the "Boyle Crew." (A: 48)

The evidence at trial, viewed most favorably to the government, established that the "Boyle Crew" was a loosely affiliated "clique" of "friends" – wholly lacking role definition or organizational structure – who sporadically burgled night deposit boxes in shifting combinations. A: 400, 402 (prosecution witness characterizing "Crew" as an iteration of "all of the people named in the indictment basically"), 475-76, 648.

The government's own accomplice witnesses, testifying under cooperation agreements in exchange for leniency, described the purported "Crew" as an amorphous band of "free floaters" without unifying "plan" or "understanding" – ongoing, "formal," "informal" or otherwise. *See, e.g.,* T: 188, 193-94 (Christopher Ludwigsen a.k.a. Paciello ("Paciello")), 766 (Blas Salvatore "Fat Sal" Mangiavillano); A: 301, 503 (Gerard Bellafiore). Rather, "different people" would commit crimes at "different times" and "places" – on an "individual," *ad hoc* and impromptu basis – with no set "crew" or "group" backing. *See, e.g.,* T: 188, 193-94 (Paciello); A: 474-75 (Bellafiore), 648 (Bellafiore: no group "requirements").

More specifically, the cooperators variously admitted that:

- "Nobody had any type of standing where he was the boss...." T: 188 (Paciello).

- "[T]here was no organization *at all*." T: 188 (Paciello) (emphasis supplied); *accord* A: 503 (Bellafiore) (similar).

- "Each individual crime withstood by itself." T: 188 (Paciello) (emphasis supplied).

- There was no "ongoing informal plan" among a "group of people to commit crimes so ... the group could profit." *Id.*

- Individual conspirators "did crimes together" but not "as a group." *Id.* (emphasis supplied).

- "[T]here was no leadership" or "informal understanding among the group." T: 193-94 (Paciello) (emphasis supplied); *accord* A: 503 (Bellafiore) (no "leader[s]" or "formal understanding").

- "[I]t was just who was available to do the job when it came up." T: 194 (Paciello); *accord* A: 474-77 (Bellafiore) (similar); T: 1329 (govt. rebuttal summation) ("These people ... commit ... bank crimes ... with a lot of different people, ... who[ever is] available").

Even the government conceded that the so-called "Boyle Crew" was functionally identical to the string of predicate crimes – the charged pattern of racketeering activity – in which its members engaged. At most, as the government's appeal brief acknowledged, the "Crew" amounted to a "group of individuals who associated together for the common purpose" of committing bank "burglaries." Govt. Br. at 49. "Driven by a collective motive to share in illicit proceeds," the government added, the Crew "target[ed] banks for financial gain," with some members "acting as lookouts" and others attempting to "remove" deposit boxes "using tools." *Id.*

At the close of the evidence, Boyle requested the following jury instruction:

> To establish an association-in-fact enterprise, the government must convince you, beyond a reasonable doubt, that the alleged Boyle Crew had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts. If the government fails to meet this burden, you must acquit Mr. Boyle on the RICO counts.

A: 683 (citations and footnote omitted) (emphasis supplied).

The District Court denied the request, telling the jury, over objection (A: 693), just the opposite: "you may find an enterprise where an association of individuals, ***without*** structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts." A: 771-72 (emphasis supplied).

Boyle challenged the Court's instruction on appeal, arguing that the government's enterprise evidence was legally insufficient – failing to prove a valid association-in-fact distinct from the alleged RICO pattern – under the correct standard embodied in his proposed charge. The Court of Appeals rejected the claim without discussion,[2] presumably relying on circuit precedent. *See, e.g., United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985) ("RICO charges may be

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[2] *See* 3a ("We have considered the appellant's other challenges to the judgment of conviction and find them without merit.").

proven even when the enterprise and predicate acts are functionally equivalent") (citations and internal quotes omitted) (emphasis supplied); *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983) ("We have upheld application of RICO ... where the enterprise was, in effect, no more than the sum of the predicate acts") (emphasis supplied), *abrogated on other grounds, NOW, Inc. v. Scheidler*, 510 U.S. 249 (1994).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD HEAR THIS CASE TO RESOLVE AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION THAT HAS SPLIT THE FEDERAL CIRCUITS THREE WAYS: MUST AN ASSOCIATION-IN-FACT ENTERPRISE POSSESS SOME ASCERTAINABLE STRUCTURE BEYOND THAT INHERENT IN THE RICO PREDICATE CRIMES IT COMMITS?

A. INTRODUCTION

At least two current members of this Court – Justices Scalia and Kennedy – have warned that RICO's breadth and "vagueness" raise "intolerable" constitutional concerns:

> No constitutional challenge to this law has been raised in the present case, ... so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more

> than ... meager guidance bodes ill for the day when that challenge is presented.

H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255-56 (1989) (Scalia, J., concurring in the judgment).[3]

The blanket rule embraced by the Second Circuit in *Ferguson* and *Bagaric* and implicitly ratified in this case – that an association-in-fact enterprise is functionally equivalent to the sum of its predicate acts – compounds and magnifies the concerns expressed by Justices Scalia and Kennedy. It stretches the statutory net even further, conflating RICO's separate pattern and enterprise components, eliminating an essential element of the offense or claim – that of a perceptible and identifiable enterprise – and drastically reducing the burden of proof. If the Second Circuit rule prevails, then Boyle's RICO convictions stand. If it falls they crumble. We ask the Court to accept this case, strike down the rule and clarify what the statute makes "plain" – the enterprise is the "organizational vehicle by or through which the racketeering activity is undertaken," and it is "improper" to merge the two – toppling Boyle's RICO convictions in the process. *Furman v. Cirrito*, 828 F.2d 898, 908 (2d Cir. 1987) (Pratt, J., dissenting).

B. *UNITED STATES v. TURKETTE* AND THE DISTINCTNESS REQUIREMENT

To establish a § 1962(c) violation, a prosecutor or plaintiff must prove "(1) conduct (2) of an enterprise (3)

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[3] Justices Kennedy and O'Connor, along with then-Chief Justice Rehnquist, joined in Justice Scalia's opinion.

through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted). In the "seminal"[4] case of *United States v. Turkette*, this Court addressed the relationship between elements two, three and four, stressing that "[i]n order to secure a conviction under RICO, the [g]overnment must prove **both** the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'" 452 U.S. 576, 583 (1981) (emphasis supplied). An association-in-fact "enterprise," the Court took pains to explain, is a

> group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does ***not*** necessarily establish the other. The "enterprise" is ***not*** the pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times

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[4] *Panix Promotions, Ltd. v. Lewis*, No. 01-Civ. 2709 (HB), 2002 WL 72932, at *5 (S.D.N.Y. Jan. 17, 2002).

> remains a separate element which *must* be proved by the government.

Id. (citation and footnote omitted) (emphasis supplied). *See also, e.g., Odom v. Microsoft Corp.*, 486 F.3d 541, 549 (9th Cir.) (*en banc*) ("the terms refer to two concepts that are 'separate and apart' from one another: The 'enterprise' is the actor, and the 'pattern of racketeering activity' is an activity in which that actor engages") (quoting *Turkette*, 452 U.S. at 583), *cert. denied*, 128 S. Ct. 464 (2007).

C. TURMOIL IN THE CIRCUITS

As the *en banc* Ninth Circuit recently observed, *Turkette*'s "explanation of the meaning of an associated-in-fact enterprise" has not been "clearly understood," bedeviling the "lower courts" and sowing rampant judicial "[c]onfusion." *Id.* at 549. Surveying the muddled legal landscape, *Odom* discerned a three-way circuit split on the issue.

1. The Separate Structural View

According to *Odom*, four circuits have read *Turkette* to require some kind of "ascertainable organizational structure" separate and "beyond" that necessary to "engage in the pattern of illegal racketeering activity," *id.* – exactly what Boyle's request to charge demanded. Falling into this camp, again according to *Odom*, are the following:

- EIGHTH CIRCUIT: *See, e.g., Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003)

("enterprise must have ... an ascertainable structure distinct from the pattern of racketeering"); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (organizational "system of authority beyond" that "necessary to perpetrate the predicate crimes").

- TENTH CIRCUIT: *See, e.g., United States v. Sanders*, 928 F.2d 940, 944 (10th Cir. 1991) (evidence of an "ascertainable structure" existing "apart from the commission of racketeering acts").

- FOURTH CIRCUIT: *See, e.g., United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985) (proof of an organization and "existence beyond that ... necessary to commit the predicate crimes") (citations omitted).

- THIRD CIRCUIT: *See, e.g., United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983) (existence "beyond that ... necessary merely to commit each of the acts charged as predicate racketeering offenses"), *abrogated on other grounds, Griffin v. United States*, 502 U.S. 46 (1991).

2. The Seventh Circuit's Middle Course

The Seventh Circuit – alone among its peers – takes a similar but slightly different approach. According to *Odom*, that court requires "'some' kind of ascertainabl[y] structure[d]" enterprise, though not necessarily one "separate" from the pattern of predicate crimes. 486 F.3d at 550. Examples include *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995), calling for proof of "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making" (citation and internal quotes omitted); *United States v. Rogers*, 89 F.3d 1326, 1337-38 (7th Cir. 1996), mandating "some" structure but not "purposes or goals separate and apart from the pattern of racketeering activity"; and *Limestone Dev. Corp. v. Village of Lemont, Il.*, No. 07-1438, _ F.3d _, 2008 WL 852586, at *6-*7 (7th Cir. April 1, 2008), a recent opinion by Judge Posner reaffirming *Richmond* and collecting similar authorities.

3. The Single Element Approach

In contrast to the Third, Fourth, Seventh, Eighth and Tenth Circuits, the Second Circuit and several others have "rejected" any ascertainable structure requirement – divorced from the pattern or not – for an association-in-fact enterprise. *Odom*, 486 F.3d at 550. Belonging to this school, the *Odom* Court reports, are the following:

- FIRST CIRCUIT: *See, e.g., United States v. Patrick*, 248 F.3d 11, 19 (1ST Cir. 2001) (refusing to "import" an

ascertainable structure requirement "[s]ince Congress intended the term 'enterprise' to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures") (citation omitted).

- D.C. CIRCUIT: *See, e.g., United States v. Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988) (enterprise established by "common purpose among the participants, organization, and continuity").

- ELEVENTH CIRCUIT: *See, e.g., United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983) (declining to require a "distinct, formalized structure").

- SECOND CIRCUIT: *See, e.g., Bagaric*, 706 F.2d at 56 ("it is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure").

A divided Ninth Circuit, sitting *en banc*, went on to join this faction in *Odom*, holding that "an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." 486 F.3d at 551 (emphasis supplied). In reaching this conclusion, the majority adopted the First Circuit's rationale in *Patrick*: that "criminal enterprises 'may not observe the niceties of legitimate organizational structures.'" *Id.* (quoting *Patrick*, 248

F.3d at 19). A different result, it opined, would "necessitate" an enterprise structure serving both legal and "illegal" ends -- "precisely" what *Turkette* held RICO "*not* [to] require." *Id.*

D. THE SINGLE ELEMENT APPROACH OBLITERATES THE DISTINCTNESS RULE, BEGGING THIS COURT'S INTERVENTION AND CORRECTION

The position of this contingent – the First, Second, Ninth, Eleventh and D.C. Circuits – fundamentally misconstrues *Turkette*, dangerously expanding RICO's already immense and much-maligned scope. It is one thing to recognize, as this Court did in *Turkette*, that the "proof used to establish" the independent pattern and enterprise "elements may in particular cases coalesce." 452 U.S. at 583. It is quite another to hold, as does this cluster of circuits, that if two or more "parties perform a series of 'predicate acts'" for their mutual "benefit," they "*ipso facto* constitute an 'enterprise.'" *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result).

This theory would transform every "run-of-the-mill conspiracy" (*id.*) into an automatic RICO violation, with its enhanced criminal penalties and the *in terrorem* threat of treble damages. *Cf., e.g., Riccobene*, 709 F.2d at 221 (without structured enterprise, "federal prosecutors could use the [statute] to invoke an additional penalty" in any case involving commission of two offenses "listed as 'racketeering activities'"). As Judge Posner recently remarked, "[t]hat does not make good sense, and [can]not [be] the law":

> [A] conspiracy is *not* a RICO enterprise unless it has some enterprise-like structure.
>
> ***
>
> The juxtaposition of the two [statutory] phrases ["associated in fact" and "although not a legal entity," 18 U.S.C. § 1961(4)] suggests that "associated in fact" just means structured without the aid of legally defined structural forms such as the business corporation. The inference is reinforced by the fact that before "any union or group of individuals associated in fact" in the statute appears a list of legal entities. Without a requirement of structure, "enterprise" collapses to "conspiracy."

Limestone Dev. Corp., 2008 WL 852586, at *2, *6 (emphasis supplied).[5]

Many other courts agree with Judge Posner's analysis. *See, e.g., Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996) (conspiracy "not an enterprise" within RICO's purview) (emphasis supplied), *abrogated by Odom*; *United States v. Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994) (quality of "structure" distinguishes enterprise from "mere conspiracy"); *Perholtz*, 842 F.2d at 363 ("The same group of individuals who repeatedly

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[5] Judge Posner's original quote, "That does not make good sense, and is not the law," referred to an argument about RICO's statute of limitations. But it applies equally to his discussion of the pattern/enterprise distinction.

commit predicate offenses do not necessarily constitute an enterprise. An extra ingredient is required: organization.") (emphasis supplied); *Bledsoe*, 674 F.2d at 665 (enterprise connotes more than common purpose shared by "wrongdoers" committing crimes through "concerted action").

In contending otherwise, the Second Circuit and its concurring sisters effectively hold that the pattern is the enterprise for RICO purposes – that they are one and the same, essentially synonymous. *See, e.g., Ferguson*, 758 F.2d at 853 ("functionally equivalent") (citations and internal quotes omitted) (emphasis supplied); *Bagaric*, 706 F.2d at 55 ("We have upheld application of RICO ... where the enterprise was, in effect, no more than the sum of the predicate acts") (emphasis supplied). This tack mistakenly blends two discrete but related inquiries, writing the key enterprise element out of the statute, diluting the burden of persuasion and confounding *Turkette*'s clear thrust. *See, e.g. United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir. 1983) ("*Turkette* requires the government to prove both the existence of an 'enterprise' and a 'pattern of racketeering activity.'") (emphasis supplied); *Turkette*, 452 U.S. at 583 (enterprise, an entity "apart" from the pattern, "at all times remains a separate element [that] must be proved"; evidence of one "does not necessarily establish the other") (emphasis supplied); *Furman*, 828 F.2d at 908 ("improper to conflate" pattern and enterprise) (Pratt, J., dissenting).

Whatever its exact contours, the distinctness rule enunciated in *Turkette* plainly contemplates some degree of organizational hierarchy, structure and role definition. *See, e.g., Turkette*, 452 U.S. at 583

(enterprise entails "evidence of an ongoing organization"); *Patrick*, 248 F.3d at 19 (gang had "older members who instructed younger ones, its members referred to the gang as family, and it had 'sessions' where important decision were made"); *United States v. Pimentel*, 346 F.3d 285, 288-89 (2d Cir. 2003) (prison gang with "complex, hierarchical structure," "strict rules of behavior that are brutally enforced," central governing "committee," and local network of "chapters" and officers). The Court should take this opportunity to clarify the requisite showing – to say what the appropriate degree is.

As for the claim that our position impermissibly narrows RICO's intended sweep "because criminal enterprises 'may not observe the niceties of legitimate organizational structures,'"[6] the answer is simple: the statute "targets a more sophisticated crowd." *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result). Contrary to the *Odom* majority's apparent assumption, RICO was not meant to reach any and all "criminal enterprises." *Id.* at 551 (majority opinion). Rather, as *Turkette* instructs, its declared purpose was to eradicate "*organized* crime," 452 U.S. at 589 (citation omitted) (emphasis supplied) – enduring and entrenched criminal groups with at least some "minimal structure, coordination, or ordering principle." *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result). Conversely, the statutory focus was never on "individuals merely associated" together for the

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[6] *Odom*, 486 F.3d 551 (quoting *Patrick*, 248 F.2d at 19).

commission of *ad hoc* or "sporadic crime." *Bledsoe*, 674 F.2d at 665; *accord, e.g., United States v. Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992) (contrasting RICO enterprises with "individuals who associate for the commission of sporadic harm").

Against this legislative backdrop, it is the First, Second, Ninth, Eleventh and D.C. Circuit view that extends RICO liability to "situations far removed from those actually contemplated by Congress," *Riccobene*, 709 F.2d at 221 – not Boyle who would artificially compress the statute's rightful ambit. At any rate, contrary to *Odom*'s and *Patrick*'s tacit premise, no one suggests that criminal confederacies must "observe" the formal "niceties" of "legitimate organization[s]" to qualify as RICO enterprises. *Odom*, 486 F.3d at 551 (citation and internal quotes omitted). All we urge – and all the Third, Fourth, Seventh, Eighth and Tenth Circuits prescribe – is some "ascertainable structural hierarchy" beyond the charged "predicate acts." A: 683 (Boyle's proposed charge) (citations and footnote omitted).

Finally, it bears mention that many of the early cases shunning any structural requirement – for example, *Mazzei* and *United States v. Errico*, 635 F.2d 152 (2d Cir. 1980) – were decided when RICO's basic parameters were unsettled and still in flux, the concepts of relatedness and continuity generally considered attributes of the enterprise rather than the pattern. *See, e.g., Furman*, 828 F.2d at 907-10 (Pratt, J., dissenting); *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986). During this transitional phase, some courts also adorned the enterprise element with "multiple scheme" and "economic motive" requirements.

See, e.g., Furman, 828 F.2d at 808 (Pratt, J., dissenting); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

Collectively, these interpretive glosses – relatedness and continuity, multiple schemes and economic motive – served as alternate means of ensuring an enterprise's "ongoing organization," arguably mitigating any need for further distinctness between pattern and enterprise. *Turkette*, 452 U.S. at 583; *see Ianniello*, 808 F.2d at 190-91 (expressing similar view). But with their subsequent repudiation by this Court – at least in the enterprise context – the single element approach endorsed by the First, Second, Ninth, Eleventh and D.C. Circuits should be reexamined and rebuked. *See, e.g., H.J., Inc.*, 492 U.S. 229; *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (*en banc*); *Scheidler*, 510 U.S. 249. Concomitantly, compelling plaintiffs and prosecutors to plead and prove more "plausible" enterprises comports with this Court's evolving – and increasingly restrictive – conception of antitrust law, RICO's original template. *See, e.g., Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-67, 1973-74 (2007); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 477 (2006).

CONCLUSION

Boyle's petition should be granted.

Respectfully submitted,

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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the accompanying *certiorari* petition contains approximately 3822 words, excluding the parts of the document exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed April 14, 2008

Marc Fernich

MARC FERNICH

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