No. 05-465

In the Supreme Court of the United States

MOHAWK INDUSTRIES, INC., PETITIONER

v.

SHIRLEY WILLIAMS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an association between (a) a corporation that is alleged to have engaged in the systematic hiring and employment of illegal workers and (b) outside recruiters who are alleged to have assisted in those practices can constitute an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq*.

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INTEREST OF THE UNITED STATES

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, imposes criminal and civil liability for specified forms of racketeering activity committed by a "person" in connection with an "enterprise." The United States frequently brings criminal and civil enforcement actions under RICO. This case presents the question whether and under what circumstances a corporation, together with outside recruiters who are alleged to have facilitated the corporation's unlawful employment practices, can form a RICO "enterprise." Because the United States frequently initiates suits in which a corporation is alleged to be a constituent member of a RICO "enterprise," the United States has a substantial interest in the Court's resolution of this case.

STATEMENT

1. RICO makes it "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 or collection of unlawful debt." 18 U.S.C. 1962(c). RICO's definitional section states that the term "'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." 18 U.S.C. 1961(4). The term "racketeering activity" is defined to encompass acts that are indictable under, *inter alia*, 18 U.S.C. 1546 or Section 274 of the Immigration and Nationality Act. See 18 U.S.C. 1961(1)(A) and (F) (2000 & Supp. II 2002). A person who violates RICO is subject to criminal penalties, see 18 U.S.C. 1963, and to civil liability, see 18 U.S.C. 1964(c).

2. On January 6, 2004, respondents filed suit against petitioner on behalf of a putative class of petitioner's current or former hourly employees who are legally authorized to work in the United States. See J.A. 7-31 (Complaint). The complaint alleged that petitioner had "engaged in the widespread employment of illegal workers, *i.e.*, workers who are not authorized to be employed in the United States," J.A. 8, and that petitioner's employment practices constituted a "pattern of racketeering activity" within the meaning of 18 U.S.C. 1961(5) because petitioner "ha[d] committed hundreds, and probably thousands, of violations of 8 U.S.C. § 1324(a) and 18 U.S.C. § 1546," J.A. 22; see J.A. 18-23. The complaint further alleged that petitioner had committed those violations through "an association-in-fact enterprise with third party employment agencies and other recruiters * * * that supply [petitioner] with illegal workers." J.A. 23. The complaint explained that

recruiters are paid a fee for workers supplied to petitioner; that recruiters provide a pool of employees for petitioner's work needs; that some recruiters locate workers in Texas and transport them to Georgia; that other recruiters employ illegal workers themselves and then transport them to petitioner for a fee; and that "[t]hese recruiters are sometimes assisted by [petitioner's] employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity." *Ibid.* The complaint further alleged that "[t]he recruiters and [petitioner] share the common purpose of obtaining illegal workers for employment by [petitioner]"; that "[t]he enterprise has worked in this fashion continuously over at least the last five years"; and that petitioner "participates in the operation and management of the affairs of the enterprise." *Ibid.*

3. The district court denied petitioner's motion to dismiss respondents' RICO claims. Pet. App. 24a-61a. Petitioner contended, *inter alia*, that respondents had not adequately alleged the existence of a RICO "enterprise." The district court rejected that contention, see *id.* at 40a-48a, and certified its ruling for interlocutory appeal, see *id.* at 68a-72a.

4. The court of appeals granted petitioner's request for permission to appeal under 28 U.S.C. 1292(b), see Pet. App. 67a, and affirmed in relevant part, *id.* at 1a-23a.

The court of appeals held that the numerous and ongoing violations of federal immigration law alleged in respondents' complaint would constitute a "pattern of racketeering activity" for purposes of RICO. See Pet. App. 5a-6a. The court further held that respondents had "sufficiently alleged an 'enterprise' under RICO; that is an association-in-fact between [petitioner] and third-party recruiters." *Id.* at 7a. The court explained that "[petitioner] and the third-party recruiters are distinct entities that, at least according to the complaint, are engaged in a conspiracy to bring illegal workers into this

country for [petitioner's] benefit. As such, the complaint sufficiently alleges an 'enterprise' under RICO." *Id.* at 7a-8a. The court also held that the complaint had adequately alleged a common purpose among the members of the enterprise, in light of the allegations that "the members of the enterprise stand to gain sufficient financial benefits from [petitioner's] widespread employment and harboring of illegal workers." *Id.* at 8a. Finally, the court of appeals stated that respondents had "sufficiently alleged that [petitioner] is engaged in the operation or management of the enterprise." *Id.* at 8a-9a.

The court of appeals acknowledged (Pet. App. 9a-10a) that in *Baker* v. *IBP, Inc.*, 357 F.3d 685, 690-691, cert. denied, 543 U.S. 956 (2004), the Seventh Circuit had held that substantially similar allegations did not state a claim under RICO because those allegations suggested the existence of divergent goals among the members of the purported "enterprise." The court of appeals declined to adopt the *Baker* court's approach, however, explaining that in the Eleventh Circuit "there has never been any requirement that the 'common purpose' of the enterprise be the sole purpose of each and every member of the enterprise." Pet. App. 10a. The court concluded: "In this case, the complaint alleges that [petitioner] and the recruiters, under [petitioner's] direction, worked together to recruit illegal workers to come to Georgia and that they had the common purpose of providing illegal workers to [petitioner] so that [petitioner] could reduce its labor costs and the recruiters could get paid. This commonality is all that this circuit's case law requires." *Ibid.*

SUMMARY OF ARGUMENT

I. As used in RICO, the term "enterprise" encompasses a de facto alliance among corporations or similar artificial legal entities. Although such associations are not specifically mentioned in 18 U.S.C. 1961(4), Section 1961(4) is introduced

by the word "includes" and is intended to provide an illustrative rather than an exhaustive roster of RICO "enterprise[s]." That construction of the statutory term accords with common usage and established legal principles: the word "enterprise" is often used to refer to collaborative ventures that do not involve the creation of a discrete legal entity, and corporations are generally deemed capable of entering into agreements (including illicit agreements) on the same terms as natural persons. Petitioner's reliance on the rule of lenity is misplaced, both because Congress has directed that RICO is to be liberally construed, and because no serious ambiguity exists as to whether a de facto association of corporations can constitute a RICO "enterprise." The government's criminal and civil enforcement efforts under RICO would be significantly impaired if the only associations in fact that could be treated as RICO enterprises were those composed exclusively of individuals.

II. Respondents' complaint adequately alleged that petitioner and outside recruiters had entered into a de facto alliance having the essential attributes—a common purpose and a continuing organizational presence—of a RICO associated-in-fact enterprise. More is alleged here than a contract between legally distinct entities. Rather, the complaint alleged that distinct business entities entered into a longstanding arrangement designed to facilitate the repeated commission of racketeering crimes. Such an alliance is properly regarded as an associated-in-fact RICO enterprise, even if the terms of the arrangement are determined through arms-length negotiations between the parties. The fact that a corporation's liability under 18 U.S.C. 1962(c) may turn on whether it commits racketeering crimes through its own employees or in combination with others is a natural consequence of the judgment, which has long been reflected in the law of conspiracy and

which informs the application of RICO, that *collaborative* criminal endeavors pose distinct threats to the public welfare.

ARGUMENT

I. THE RICO TERM "ENTERPRISE" ENCOMPASSES AN ASSOCIATION IN FACT THAT INCLUDES A CORPORATION AS A CONSTITUENT MEMBER

RICO's definitional section states that, as used in the statute, the term "'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." 18 U.S.C. 1961(4). Section 1961(4) thus describes two "type[s] of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not." *United States* v. *Turkette*, 452 U.S. 576, 582 (1981). The latter type of enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," and its existence "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 583.

Petitioner contends (Br. 12-26) that, because a corporation is not an "individual" within the meaning of Section 1961(4), an association in fact of which a corporation is a constituent member cannot be a RICO "enterprise." Although petitioner's premise is correct, its suggested conclusion does not follow. Section 1961(4), which is introduced by the word "includes," neither provides an exhaustive roster of the "enterprise[s]" covered by RICO nor excludes a de facto alliance that would constitute an "enterprise" under the usual understanding of that term. Petitioner's proposed categorical rule that a corporation cannot be a constituent part of an associated-in-fact RICO enterprise is thus unsupported by the statutory text, and it would hinder the effective implementation of the law in both the criminal and civil contexts.

A. Section 1961(4) Of Title 18 Contains An Illustrative, Rather Than Exclusive, List Of RICO "Enterprises"

1. Section 1961(4) of Title 18 states that the term "enterprise" "includes" the various entities enumerated in that provision. 18 U.S.C. 1961(4). "In [definitional] provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933); see *Webster's Third New International Dictionary* 1143 (1993) (defining "include" to mean, *inter alia*, "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate"). When 18 U.S.C. 1961 (2000 & Supp. II 2002) is read as a whole, it is clear that the verb "includes" in Section 1961(4) should be interpreted in that manner, and that the list that follows should be treated as illustrative rather than exclusive.

As petitioner explains (Br. 16-17 & n.7), "the term 'includes' may sometimes be taken as synonymous with 'means,'" and thus as introducing a comprehensive list. *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 (1934). Read as a whole, however, the definitional section of RICO (18 U.S.C. 1961 (2000 & Supp. II 2002)) makes clear that Congress did not intend for the word "includes" to have that effect in 18 U.S.C. 1961(4). That definitional section contains four subsections that use the word "includes" (18 U.S.C. 1961(3), (4), (9), and (10)), and five that use the word "means" (18 U.S.C. 1961(1), (2), (6), (7), and (8)). In interpreting similarly structured provisions, in which some definitions are introduced by "means" and others by "includes," this Court has consistently declined to treat the two words as synonymous, and has construed the word "includes" to introduce an illustrative rather than an exclusive list. As the Court explained in *Helvering*, "[t]he natural distinction would be that where 'means' is employed,

the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." 293 U.S. at 125 n.1; accord *Marotta*, 287 U.S. at 517 ("When the section as a whole is regarded, it is evident that these verbs are not used synonymously or loosely but with discrimination and a purpose to give each a meaning not attributable to the other."); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 & n.15 (1977) (holding that the definition of "property" contained in former Federal Rule of Criminal Procedure 41(h) "does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41," and explaining that, "[w]here the definition of a term in Rule 41(h) was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"); cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941) ("To attribute * * * a [limiting] function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application."); U.S. Amicus Br. at 12-13, *S.D. Warren Co.* v. *Maine Bd. of Envtl. Protection*, No. 04-1527 (argued Feb. 21, 2006).[1]

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[1] Noting that 18 U.S.C. 1964(a) uses the phrase "including, but not limited to," petitioner contends (Br. 17) that Congress's failure to employ similar language in Section 1961(4) reflects an intent that the list of covered "enterprise[s]" be treated as exclusive. Congress cannot be faulted for taking a belt-and-suspenders approach in Section 1964(a), especially in light of this Court's willingness to consider equating "includes" with "means" when only the former appears in a statutory section. Unlike Section 1961, Section 1964 does not contain other subsections introduced by the word "means" (and it is not a definitional provision at all). Although Congress might have introduced 18 U.S.C. 1961(3), (4), (9), and (10) with the phrase "includes, but is not limited to," Congress's use of a statutory structure with a settled legal meaning (see pp. 7-8, *supra*) rendered the additional language unnecessary. By using the verb "means" to introduce some of RICO's definitions and "includes" to introduce

The definition of "pattern of racketeering activity" contained in 18 U.S.C. 1961(5), and this Court's construction of that provision, reinforce the conclusion that the verb "includes" in Section 1961(4) should not be treated as synonymous with "means." Section 1961(5) states that the term "'pattern of racketeering activity' *requires* at least two acts of racketeering activity." 18 U.S.C. 1961(5) (emphasis added). This Court has attached significance to Congress's choice of verbs, explaining that "the definition of a 'pattern of racketeering activity' differs from the other provisions in § 1961 in that it states that a pattern '*requires* at least two acts of racketeering activity,' not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (citation omitted). The Court has focused on the verb "requires" to give the phrase "pattern of racketeering activity" a narrower construction than would have been warranted if Section 1961(5) were introduced by the word "means." See *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 237-243 (1989). Congress's use in Section 1961(4) of the introductory verb "includes" should likewise be viewed as denoting *broader* coverage than would the word "means."

2. Petitioner contends that Congress's express reference in Section 1961(4) to "group[s] of individuals associated in fact" suggests an intent not to cover associations in fact composed in part of artificial legal entities such as corporations. See Pet. Br. 14-15 (citing, *inter alia*, *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 81 (2002)).[2] But while the maxim

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others, Congress clearly expressed its intent that the latter definitions should be treated as non-exclusive.

[2] Petitioner also contends (Br. 20-26) that construing Section 1961(4) to exclude associations in fact composed in part of corporations would be consistent with Congress's intent to combat organized crime. Section 1961(4)'s express inclusion of associated-in-fact enterprises may reflect Congress's effort

expressio unius est exclusio alterius is often a useful aid to statutory construction, it is not properly applied where, as here, Congress has used the verb "includes" to introduce a non-exhaustive list of examples. By introducing Section 1961(4) with the word "includes," within a provision in which other definitions are introduced by the word "means," Congress signaled that the omission of particular types of enterprises from the list that follows should *not* be read to imply a deliberate exclusion. Compare *Echazabal*, 536 U.S. at 80 (explaining that "the expansive phrasing of 'may include' points directly away from the sort of exclusive specification" that the *expressio unius* maxim might otherwise suggest).

The legislative history confirms that understanding. Both the Senate and House Reports accompanying RICO stated that the term "enterprise" was defined "to include associations in fact, as well as legally recognized associative entities. Thus, infiltration of *any associative group* by any individual or group capable of holding a property interest can be reached." S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (emphasis added); see H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56 (1970) (using identical language). The Committees'

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to ensure that organized-crime syndicates are treated as covered "enterprises." This Court has recognized, however, that, while "[o]rganized crime was without a doubt Congress' major target" in enacting RICO, *H.J. Inc.*, 492 U.S. at 245, the statute's coverage is not limited to conduct with an organized-crime nexus. Rather, "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime," *id.* at 248. And even insofar as RICO was intended to combat organized crime, Congress drafted the statute with an awareness that "persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises," *ibid.*, and with an intent to prevent sophisticated criminals from exploiting loopholes in the statute's coverage, see, *e.g.*, *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980). Petitioner's construction of the term "enterprise" would disserve that intent.

description of the statutory definition as encompassing "any associative group" substantially undermines petitioner's contention (Br. 14-15) that Congress used the phrase "union or group of individuals associated in fact" (18 U.S.C. 1961(4)) specifically to exclude such associations. Cf. *Turkette*, 452 U.S. at 580 ("There is no restriction upon the associations embraced by the definition [of 'enterprise'].").

In *New York Telephone*, this Court rejected a proposed inference very similar to the one advocated by petitioner here. The Court in *New York Telephone* construed former Federal Rule of Criminal Procedure 41(h), which provided that "[t]he term 'property' is used in this rule to include documents, books, papers and any other tangible objects." 18 U.S.C. App. at 1465 (1976); see *New York Tel.*, 434 U.S. at 169. Relying in particular on the fact that other definitions in Rule 41(h) were "introduced by the phrase 'to mean'" (*id.* at 169 n.15), this Court stated that, "[a]lthough Rule 41(h) defines property 'to include documents, books, papers and any other tangible objects,' it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41." *Id* at 169. Notwithstanding Rule 41(h)'s express reference to "tangible objects," this Court concluded that "Rule 41 is sufficiently broad to include seizures of intangible items such as dial impulses recorded by pen registers as well as tangible items." *Id.* at 170. Similarly here, in the context of 18 U.S.C. 1961 taken as a whole, Section 1961(4)'s reference to "group[s] of individuals associated in fact" does not preclude the possibility that other associative groups could qualify as RICO "enterprises."[3]

[3] Petitioner did not argue in the court of appeals that a corporation can never be a constituent member of an associated-in-fact RICO enterprise, and the Eleventh Circuit accordingly did not discuss the interpretive issues raised by Part I of petitioner's brief in this Court. Every court of appeals to address the question, however, has agreed that a de facto alliance of which a corpora-

B. Petitioner's Construction Of The RICO Term "Enterprise" Is Inconsistent With The Usual Understanding Of That Term And Would Hinder The Effective Implementation Of The Statute

1. Congress's use of the word "includes" to introduce 18 U.S.C. 1961(4) does not give courts unfettered discretion to decide whether a de facto alliance between a corporation and other actors should be treated as a RICO "enterprise." Cf. Pet. Br. 16 (citing *Willheim* v. *Murchison*, 342 F.2d 33, 42 (2d Cir.), cert. denied, 382 U.S. 840 (1965)). Rather, it simply means that, *if* the term "enterprise" would otherwise be understood to encompass such an alliance, it should be treated as covered, notwithstanding its omission from the list of illustrative examples contained in Section 1961(4).

At the time of RICO's enactment in 1970, the term "enterprise" would naturally have been understood to encompass not only discrete legal entities, but also de facto alliances formed for the purpose of achieving a common objective. This Court's opinions in the years preceding RICO's enactment

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tion or similar artificial legal entity is a part may constitute an "enterprise" within the meaning of RICO. See, *e.g.*, *United States* v. *Najjar*, 300 F.3d 466, 484-485 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *London*, 66 F.3d 1227, 1244 (1st Cir. 1995), cert. denied, 517 U.S. 1155 (1996); *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *United States* v. *Masters*, 924 F.2d 1362, 1366 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991); *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *United States* v. *Perholtz*, 842 F.2d 343, 352-353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *United States* v. *Aimone*, 715 F.2d 822, 828 (3d Cir. 1983), cert. denied, 468 U.S. 1217 (1984); *United States* v. *Thevis*, 665 F.2d 616, 625-626 (5th Cir.), cert. denied, 456 U.S. 1008, 458 U.S. 1109, and 459 U.S. 825 (1982); *Huber*, 603 F.2d at 393-394. Although Congress on numerous occasions has amended other definitional provisions contained within 18 U.S.C. 1961, it has not acted to narrow the coverage of Section 1961(4), despite the monolith of precedent dating back over 20 years.

used the term in that manner.[4] In addition, the Travel Act, which was enacted in 1961 and prohibited interstate travel or the use of interstate commercial facilities in connection with "any business enterprise involving" specified crimes (18 U.S.C. 1952(b) (1964)), had repeatedly been applied to collaborative criminal endeavors that did not involve the creation of any distinct legal entity. See, *e.g.*, *United States* v. *Brennan*, 394 F.2d 151, 153 (2d Cir.), cert. denied, 393 U.S. 839 (1968); *United States* v. *Zizzo*, 338 F.2d 577, 580 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965). Indeed, petitioner does not contend that such de facto alliances fall outside the usual understanding of the word "enterprise."

Once that general principle has been established, neither common English usage nor background legal principles suggest that the term "enterprise" should be understood to exclude alliances composed in whole or in part of corporations. "After all, incorporation's basic purpose is to create a distinct legal entity," *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001), that is treated at law as a "person." A corporation is generally capable of entering into contractual agreements on the same terms as natural persons, and the rights and obligations established by such contracts are those of the corporation alone. See, *e.g.*, *Domino's Pizza, Inc.* v. *McDonald*, 126 S. Ct. 1246, 1250 (2006) ("[I]t is fundamental corporation and agency law * * * that the shareholder and

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[4] See, *e.g.*, *Radio & Television Broad. Technicians Local Union 1264* v. *Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (explaining that the National Labor Relations Board "considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise"); see also *Namet* v. *United States*, 373 U.S. 179, 183 (1963) (explaining, with regard to an illegal gambling operation, that the defendant "was acting as banker for the enterprise"); *Callanan* v. *United States*, 364 U.S. 587, 594 (1961) ("[T]he danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.").

contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts."). A corporation is also deemed capable of joining a conspiracy and is subject to potential civil and criminal liability therefor. See 10 *Fletcher Cyclopedia of the Law of Private Corporations* §§ 4884, 4951.50, at 330-331, 668-669 (2001 rev. ed.). There is no sound reason to treat corporations as incapable of entering into the sort of de facto alliance that would constitute a RICO "enterprise" if it were formed solely by natural persons. The Seventh Circuit has explained:

> The statute says "'enterprise' includes"—not "'enterprise' means." The point of the definition is to make clear that it need not be a formal enterprise; "associated in fact" will do. Surely if three individuals can constitute a RICO enterprise, as no one doubts, then the larger association that consists of them plus entities that they control can be a RICO enterprise too. Otherwise while three criminal gangs would each be a RICO enterprise, a loose-knit merger of the three, in which each retained its separate identity, would not be, because it would not be an association of individuals. That would make no sense.

United States v. *Masters*, 924 F.2d 1362, 1366 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991).

2. Petitioner's reliance (Br. 19-20) on the rule of lenity is misplaced. The rule of lenity is not a restriction on congressional power, but a canon of statutory construction. See, *e.g.*, *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) (characterizing the rule of lenity as "a time-honored interpretive guideline when the congressional purpose is unclear"); *Busic* v. *United States*, 446 U.S. 398, 407 (1980). The rule "is not to be applied where to do so would conflict with the implied or expressed intent of Congress." *Liparota*, 471 U.S. at 427.

Here, application of the rule of lenity would contravene Congress's intent. RICO expressly provides that the statute should be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947; see *Sedima*, 473 U.S. at 497-498 (inferring principle that "RICO is to be read broadly" both from "Congress' self-consciously expansive language and overall approach" and from the statute's liberal-construction clause). The presumption that statutes having criminal applications should be construed narrowly cannot be controlling where, as here, Congress has directed courts to employ a different interpretive methodology.[5]

In any event, the rule of lenity "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (citations, brackets, and internal quotation marks omitted). In light of the structure of 18 U.S.C. 1961 as a whole and this Court's decisions construing comparable definitional provisions (see pp. 7-8, *supra*), no "grievous ambiguity" exists as to whether a de facto alliance of corporations can constitute a RICO "enterprise." Far from establishing such ambiguity, petitioner merely seeks to avoid the natural reach of the term "enterprise."[6]

[5] Contrary to petitioner's assertion (Br. 19), the Court in *Sedima* did not hold that "18 U.S.C. §§ 1961 and 1962 should be strictly construed under the rule of lenity." *Sedima* involved the construction of 18 U.S.C. 1964(c) and presented no issue concerning the scope of coverage of either Section 1961 or Section 1962; the Court simply held that Section 1964(c) should be interpreted broadly to effectuate RICO's purposes *even assuming* that strict construction of Sections 1961 and 1962 would be appropriate. See 473 U.S. at 491-492 n.10.

[6] The rule of lenity serves in part to "ensure[] that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. Construing the RICO term "enterprise" to encompass the association in fact alleged here does not subject petitioner to any unfair surprise,

3. The United States frequently brings criminal or civil enforcement actions alleging that the defendants have violated 18 U.S.C. 1962(c) by conducting or participating in the conduct of the affairs of an associated-in-fact RICO "enterprise" that consists in part of a corporation or other artificial legal entity. The categorical rule advocated by petitioner, under which the only associations in fact that could be treated as RICO "enterprises" would be those composed exclusively of individuals, would significantly impair the government's ability to enforce the statute's substantive provisions and to obtain effective remedies.[7]

a. Criminal and civil RICO defendants often conduct both racketeering and other activities through multiple legal entities. See, *e.g.*, *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1273 (11th Cir.), cert. denied, 531 U.S. 1015 (2000); *United States* v. *Feldman*, 853 F.2d 648, 651-656 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989). In some instances, the defendant's control over multiple legal entities that are

particularly in light of the substantial and unbroken body of precedent in the courts of appeals including the Eleventh Circuit (see note 3, *supra*) holding that a corporation or similar entity may be a member of an associated-in-fact RICO "enterprise." Cf. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (noting that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute"). Petitioner can scarcely claim to have relied on its current narrower construction of Section 1961(4), since petitioner did not urge that construction until its brief on the merits in this Court.

[7] Although it is possible for a corporation to violate 18 U.S.C. 1962(c) by participating in the conduct of the affairs of a separate legal entity, see *H.J. Inc.*, 492 U.S. at 233-234 (plaintiffs alleged, *inter alia*, that a telephone company had participated in the conduct of the affairs of a public utility commission by bribing the commission's members), the vast majority of criminal and civil cases filed by the United States in which corporations have been named as defendants have alleged the existence of a larger associated-in-fact enterprise. As a practical matter, acceptance of petitioner's proposed construction of Section 1961(4) would render corporations largely immune from liability under Section 1962(c).

nominally distinct from each other may be essential to the achievement of his criminal goals.[8] In such cases, treatment of the corporations or similar entities as components of a single RICO "enterprise" reflects the essential character of the defendant's unlawful scheme.

b. In order to establish a violation of 18 U.S.C. 1962(c), the government must prove that the defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Although a "'pattern of racketeering activity' requires at least two acts of racketeering," 18 U.S.C. 1961(5), two such acts are not always sufficient to establish the requisite "pattern," see *H.J. Inc.*, 492 U.S. at 237-238; p. 9, *supra*. "To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." 492 U.S. at 240; see *id.* at 242 ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.").

When a defendant perpetrates criminal conduct through the coordinated activities of nominally distinct corporations,

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[8] See, *e.g.*, *Securitron Magnalock Corp.* v. *Schnabolk*, 65 F.3d 256, 263-264 (2d Cir. 1995) (defendant used his control of a security firm and a magnetic-lock manufacturer to defame a competing lock manufacturer; the fraud drew strength from, *inter alia*, the seemingly diverse sources of the defamatory statements), cert. denied, 516 U.S. 1114 (1996); *Feldman*, 853 F.2d at 656 (where defendant controlled seven corporations, "it was [the corporations'] very separate existence that made [defendant's] activities possible and profitable" by allowing him to hide fraudulently obtained insurance proceeds from creditors); *United States* v. *Perkins*, 596 F. Supp. 528, 529 (E.D. Pa.) (to facilitate bid-rigging scheme, defendant "set up six corporations to appear to be separate and independent vendors bidding competitively for defense contracts"), aff'd, 749 F.2d 29 (3d Cir. 1984) (Table), cert. denied, 471 U.S. 1015 (1985).

it may be difficult for the government to prove the requisite "pattern of racketeering activity" with respect to any *single* corporation, even though such a pattern is evident when the activities of all such corporations are viewed together.[9] Under petitioner's theory, however, the government would be precluded from relying upon the cumulative activities of different corporations (or similar artificial entities) to demonstrate that the defendant conducted the affairs of an "enterprise" through a "pattern of racketeering activity." That rule "would perversely insulate the most sophisticated racketeering combinations from RICO's sanctions, the precise opposite of Congress' intentions." *United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980).

c. Even when acceptance of petitioner's legal theory would not altogether preclude a RICO criminal or civil action from going forward, it might hinder the effective implementation of the statute's remedial provisions. Petitioner contends (Br. 41) that its interpretive approach will not "impair RICO's usefulness as a tool to attack corporate wrongdoing" because "the officers and managers who direct a corporation to engage in racketeering activity [] will always be appropriate § 1962(c) defendants when they conduct the affairs of that corporation through a pattern of racketeering activity." A prosecution of

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[9] See, *e.g.*, *United States* v. *Butler*, 954 F.2d 114, 120 (2d Cir. 1992) (defendant claimed that the enterprise consisted of a single legal entity and the proof showed one predicate act committed in relation to that entity, but court found that the RICO enterprise consisted of four legal entities and that defendant had committed multiple predicate acts in the conduct of that larger enterprise); cf. *United States* v. *Stolfi*, 889 F.2d 378, 379-380 n.1 (2d Cir. 1989) (where defendants contested government's allegation that a union and a welfare fund together constituted a single RICO "enterprise," defendants sought jury instruction stating in part that, if the jury found that the union and the fund were distinct enterprises, it must "find that as to *each enterprise* the defendant you are considering committed two acts of racketeering related by some common plan, scheme or motive").

the blameworthy corporate officers, however, would not enable the government to obtain forfeiture of the corporation's own assets, including profits the corporation may have realized as a direct result of its racketeering. See 18 U.S.C. 1963(a); *Russello* v. *United States*, 464 U.S. 16, 20-29 (1983) (profits and proceeds derived from racketeering in violation of 18 U.S.C. 1962(c) are forfeitable under Section 1963(a)). Because "the Government is entitled to seek forfeiture of only *the defendant's* interest in property that was derived from, or was used to commit, the criminal offense," *United States* v. *BCCI Holdings, Luxembourg, S.A.*, 69 F. Supp. 2d 36, 51 (D.D.C. 1999) (emphasis added), the United States can obtain RICO forfeitures of *corporate* assets only by bringing a prosecution against the corporation itself. And because liability under 18 U.S.C. 1962(c) requires proof "of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name," *Cedric Kushner*, 533 U.S. at 161, the government's ability to prosecute the corporation will often depend upon its ability to allege and prove the existence of a larger RICO enterprise.

The prohibitions of 18 U.S.C. 1962(c) apply to "any person," with the term "person" defined to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. 1961(3). That definition clearly encompasses a corporation, and the text of Section 1962(c) provides no basis for exempting corporations from RICO liability in situations where natural persons would be covered. Cf. *H.J. Inc.*, 492 U.S. at 249 ("Legitimate businesses 'enjoy neither an inherent capacity for criminal activity nor immunity from its consequences.'") (quoting *Sedima*, 473 U.S. at 499). As this Court's decision in *Cedric Kushner* makes clear, a corporation (like a natural person) that *unilaterally* commits RICO predicate acts cannot be held liable under Section 1962(c) on the theory that it conducted its *own* affairs through

a pattern of racketeering activity. See 533 U.S. at 162-163. In that circumstance, the individual corporate officers who oversaw the unlawful conduct may be the only available RICO defendants. But when a corporation enters into a de facto alliance that would constitute a Section 1961(4) association in fact if it were formed by individuals, a rule that would insulate the corporation from RICO liability is unsupported by RICO's text, and it would disserve the statute's purposes.

Acceptance of petitioner's position would also substantially impair the government's ability to obtain effective relief in cases involving the corruption of labor unions. The civil RICO remedies available to the United States under 18 U.S.C. 1964 were intended in significant part to address the corrupt control and influence of organized crime over labor unions and related legal entities. See, *e.g.*, S. Rep. No. 617, *supra*, at 77-83; H.R. Rep. No. 1574, 90th Cong., 2d Sess. 5-9 (1968). To address that problem, the United States has brought numerous civil RICO lawsuits, which typically allege the existence of an associated-in-fact RICO enterprise consisting of a labor union, related benefit plans, other related legal entities, and corrupt union officials and organized crime figures. In such cases, the United States has obtained injunctive relief against the union-defendants, including appointment of court officers to monitor union operations and to enforce union election-reform and ethical-practices requirements on an ongoing basis. Under petitioner's construction of 18 U.S.C. 1961(4), however, the government would be precluded from naming as a defendant (and obtaining equitable relief against) the union itself. Although the government could proceed against corrupt individuals under Section 1962(c) (since the union would constitute a RICO "enterprise"), the relief available against individual defendants would not adequately address *systemic* problems of union corruption.

II. RESPONDENTS' COMPLAINT ADEQUATELY ALLEGED A VIOLATION OF 18 U.S.C. 1962(c)

Petitioner contends that, if the allegations of respondents' complaint are deemed sufficient to state a claim under 18 U.S.C. 1962(c), every contract between a corporation and persons outside the corporate structure will result in the formation of a RICO associated-in-fact "enterprise." See, *e.g.*, Pet. Br. 40 (asserting that the Eleventh Circuit's approach "recognizes an 'enterprise' whenever a corporation contracts with another entity"). That argument is misconceived. The government or a private plaintiff obviously cannot establish the existence of a RICO "enterprise" simply by proving a contractual agreement between legally distinct actors. Other well-established legal principles prevent such an overbroad application of RICO by defining the characteristics—chiefly, a shared purpose among the members and a continuing organizational presence—that an associated-in-fact enterprise must be shown to possess. Petitioner's proposed categorical rule, to the effect that business entities engaged in "arms-length dealings" (Br. i) can *never* combine to form a RICO associated-in-fact enterprise, is both unnecessary and unsound.

A. Respondents' Complaint Adequately Alleged That Petitioner Has Participated In The Operation Of A RICO Enterprise

This Court in *Turkette* described the basic attributes of a RICO associated-in-fact enterprise. The Court explained that such an enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," and that its existence "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." 452 U.S. at 583; see, *e.g.*, *United States* v. *Rogers*, 89 F.3d 1326, 1335-1338

(7th Cir.), cert. denied, 519 U.S. 999 (1996); *United States* v. *Blinder*, 10 F.3d 1468, 1473-1475 (9th Cir. 1993); *United States* v. *Church*, 955 F.2d 688, 697-699 (11th Cir.), cert. denied, 506 U.S. 881 (1992). The instant case comes to this Court on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and it is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Respondents' complaint adequately alleged that an enterprise having the characteristics set forth in *Turkette* existed, and that petitioner participated in the conduct of the enterprise's affairs.

1. Respondents alleged that "[t]he recruiters and [petitioner] share the common purpose of obtaining illegal workers for employment by [petitioner]." J.A. 23. Proof of that allegation at trial would satisfy the "common purpose" requirement articulated in *Turkette*. In *Baker* v. *IBP, Inc.*, 357 F.3d 685, 691, cert. denied, 543 U.S. 956 (2004), the Seventh Circuit found similar allegations to be inadequate to establish the requisite "common purpose," based in part on the fact that "the recruiters want to be paid more for services rendered" while the employer "would like to pay them less." That holding is erroneous because, as the court of appeals in this case recognized, there is no "requirement that the 'common purpose' of the enterprise be the sole purpose of each and every member of the enterprise." Pet. App. 10a.

Indeed, in few if any associated-in-fact enterprises is there *complete* unity of purpose among the group's members. In the paradigmatic criminal syndicate, some members may receive specified sums for particular acts, while others may receive an agreed-upon percentage of the proceeds; and it can safely be assumed that each member of the enterprise will be principally concerned with maximizing his own "take." Cf. *Russello*, 464

U.S. at 19-20 (describing associated-in-fact enterprise in which the owner of a commercial building paid a flat fee to an arsonist and collected insurance proceeds after the building was destroyed). When two individuals enter into a continuing arrangement in which the first sells wholesale quantities of narcotics to the second, who then resells to users, the desire of the first individual to maximize the wholesale price and of the second individual to minimize it does not prevent the formation of an associated-in-fact enterprise. Rather, the shared objective of facilitating narcotics trafficking satisfies the "common purpose" requirement. The same principle applies here.[10]

2. Respondents also adequately alleged the existence of an "ongoing organization" whose "various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. Respondents alleged that petitioner had "engaged in an open and ongoing pattern of" immigration-law violations during a five-year period, assisted by recruiters who "work closely with [petitioner] to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular [petitioner]

[10] Conspiracy law draws a similar distinction between mere buyer-seller arrangements, which do not form a conspiracy, and joint ventures in which both parties have an interest in the overall success of the endeavor, which do. Compare, *e.g.*, *United States* v. *Suggs*, 374 F.3d 508, 518-519 (7th Cir. 2004) (itemizing factors bearing on whether a "buyer-seller relationship developed into a cooperative venture" and finding evidence sufficient to support the inference that a "consistent, long term distribution conspiracy" existed), cert. denied, 543 U.S. 1079 (2005), with *United States* v. *Rivera*, 273 F.3d 751, 755 (7th Cir. 2001) (finding insufficient evidence "to infer the evolution from a mere buyer-seller arrangement to conspiracy"). Relevant factors in a drug-distribution case include "whether there was prolonged cooperation between the parties, a level of mutual trust, standardized dealings, sales on credit (or 'fronting'), and the quantity of drugs involved," which may demonstrate the requisite "shared stake in the illegal venture." *Suggs*, 374 F.3d at 518. Analogous factors apply in the present context. Cf. *Salinas* v. *United States*, 522 U.S. 52, 65 (1997) (noting that conspiracy and enterprise may be "coincident in their factual circumstances").

facility on short notice as the need arises." J.A. 23. The complaint further alleged that some recruiters "have relatively formal relationships with [petitioner] in which they employ illegal workers and then loan or otherwise provide them to [petitioner] for a fee," and that such "recruiters are sometimes assisted by [petitioner's] employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity." *Ibid.* Respondents thus alleged that a de facto alliance between petitioner and the recruiters, in which each member of the enterprise performed a defined function, had operated continuously during an extended period of time to provide petitioner a steady stream of unlawful workers.

3. To prevail in this case, respondents must ultimately demonstrate that petitioner "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Respondents' generalized averment that petitioner "participates in the operation and management of the affairs of the enterprise" (J.A. 23) would likely have been sufficient to survive a motion to dismiss. See Fed. R. Civ. P. 8(a)(2) (complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); cf. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974) (so long as a criminal defendant is fairly apprised of the charge against him, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself"). Any doubt on that point is eliminated by respondents' more specific allegations that the recruiters "work closely with [petitioner] to meet its employment needs by offering a pool of illegal workers" and "are sometimes assisted by [petitioner's] employees who carry a supply of social security cards." J.A. 23.

B. No Exception To RICO's Prohibitions Exists For "Arms-Length Dealings" Between Distinct Business Entities

Petitioner frames the question presented (Br. i) as whether business entities "engaged in ordinary, arms-length dealings can constitute an 'enterprise' under [RICO]." Petitioner contends (Br. 27) that the Eleventh Circuit's approach "improperly allows plaintiffs to pursue [RICO] claims against a corporation by alleging that the corporation entered into routine business relationships to perform the activities of the corporation." Contrary to petitioner's contention, nothing in RICO precludes a finding that commercial actors engaged in an "arms-length business arrangement" (Br. 35) have formed an associated-in-fact "enterprise."

1. As explained above (see pp. 21-24, *supra*), the principles announced by this Court in *Turkette*, and subsequently applied in numerous court of appeals decisions, place meaningful limits on the ability of the government and private plaintiffs to allege and prove the existence of an associated-in-fact RICO enterprise. In particular, the requirements that the members of an associated-in-fact enterprise share a "common purpose" (*Turkette*, 452 U.S. at 583), and that "the various associates function as a continuing unit" (*ibid.*), ensure that business entities will not be deemed to have formed a RICO enterprise simply by entering into private contracts. Contrary to petitioner's suggestion (Br. 40), the adequacy of respondents' complaint therefore does not depend on the proposition that a RICO "enterprise" exists "whenever a corporation contracts with another entity."

2. Petitioner describes this case as involving "routine business relationships" (Br. 27) and observes (Br. 38) that "[h]iring employees is a core corporate function." The specific conduct alleged in respondents' complaint, however—*i.e.*, petitioner's alleged knowing and systematic violations of federal

immigration law during an extended period of time through an alliance with outside recruiters—cannot plausibly be characterized as a "routine" business practice. Petitioner is not immunized from RICO liability simply because its alleged racketeering activities fall within a more general category of corporate practices that are essential to the operation of a business.

By way of analogy, suppose that a seemingly legitimate pharmaceutical company diverted a portion of its manufacturing capacity to the illicit production of methamphetamine. If the company entered into an ongoing arrangement with another entity, which agreed to furnish the raw materials for methamphetamine production on a continuing basis in order to facilitate the company's unlawful practices, the government could properly charge the pharmaceutical company under 18 U.S.C. 1962(c), on the theory that the two entities were constituent members of a RICO associated-in-fact enterprise. The defendant in those circumstances could not avoid prosecution by arguing that the manufacture of drugs is a "core corporate function" of a pharmaceutical company, and that the government therefore had alleged nothing more than unlawful conduct of the company's "own business" (Pet. Br. 38).[11]

With respect to the adequacy of respondents' complaint, moreover, it is crucial that the outside recruiters are alleged to have been *knowing* participants in petitioner's scheme to

[11] When the government alleges the existence of an associated-in-fact enterprise engaged in narcotics distribution, and identifies a street-level dealer as one member of the enterprise, the person *most likely* to be a fellow member would be a wholesaler who sold the dealer drugs. That does not mean that every wholesale transaction in illicit narcotics entails the formation of a RICO enterprise: the government must prove the existence of an "ongoing organization" in which "the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583. But there is no basis for a categorical rule that a narcotics retailer and his wholesaler can *never* be fellow members of an associated-in-fact enterprise, simply because the interaction between the two involves "arms-length" business dealings.

locate and employ illegal aliens. See J.A. 23. A quite different situation would be presented if an employment agency regularly located and referred *legal* workers to a business corporation, which then utilized the workers in the performance of racketeering acts. If the employment agency was unaware of the corporation's unlawful conduct, the two entities would lack the requisite "common purpose" and therefore could not be regarded as constituent members of an associated-in-fact enterprise, even if the agency's referrals were essential as a practical matter to the corporation's illicit endeavors. The "common purpose" requirement thus helps to ensure that a corporation is not held liable under 18 U.S.C. 1962(c) for what is in substance unilateral misconduct.

3. Petitioner contends (Br. 30-32) that, because the courts of appeals have consistently refused to treat a corporation together with its officers and employees as an associated-in-fact enterprise, this Court should hold that such an enterprise cannot consist of a business corporation and its contracting partner. That is a non sequitur. Because the recruiters who are alleged to have assisted in petitioner's unlawful practices stand in a fundamentally different relation to the corporation than do petitioner's employees, treatment of petitioner and the outside recruiters as members of an associated-in-fact enterprise is (if respondents' allegations are taken as true) fully consistent with the text and purposes of RICO.

a. Because 18 U.S.C. 1962(c) "require[s] some distinctness between the RICO defendant and the RICO enterprise," a RICO defendant (whether a natural person or an artificial entity) cannot be held liable under Section 1962(c) based solely on proof that it conducted its *own* affairs through a pattern of racketeering activity. *Cedric Kushner*, 533 U.S. at 162. The necessary distinctness exists where, as here, the Section 1962(c) defendant is one member of an alleged associated-in-fact enterprise. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d

343, 353-354 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); *Haroco, Inc.* v. *American Nat'l Bank & Trust Co.*, 747 F.2d 384, 401 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985). Proof that an alleged association in fact is an "ongoing organization" whose members join to "function as a continuing unit," *Turkette*, 452 U.S. at 583, by its nature implies that the group should be regarded for purposes of RICO as an entity distinct from any single member. In virtually every case in which the United States alleges the existence of a RICO association in fact, the defendant is alleged to be a member of that enterprise. See, *e.g.*, *Russello*, 464 U.S. at 19; *Turkette*, 452 U.S. at 578-579. And Congress's determination that an association in fact should be treated as a RICO "enterprise" would be largely negated if the persons who form such an association were immune from liability for the illicit conduct of its affairs.

b. As petitioner observes (Br. 30-31), the courts of appeals have agreed that a corporation cannot be held liable under 18 U.S.C. 1962(c) for conducting the affairs of a purported association in fact consisting of the corporation and its own employees. See, *e.g.*, *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (*Riverwoods*). Contrary to petitioner's suggestion (Br. 39), however, that rule does not rest on the mere fact that a corporation contracts with its employees for the performance of tasks that benefit the corporation. Rather, because an employee is *part of* the corporation, the two are not naturally characterized as forming a combination that can meaningfully be distinguished from the corporation itself. The recruiters who are alleged to have assisted petitioner in its unlawful employment practices, by contrast, have no place within petitioner's corporate structure. Indeed, petitioner repeatedly characterizes the dealings between itself and the recruiters as being conducted at "arms-length" (*e.g.*, Pet. Br. i). The rationale for the rule announced in *Riverwoods* and like cases is therefore inapplicable here.

As the government's brief in *Cedric Kushner* explained, the *Riverwoods* holding also serves to prevent circumvention through artful pleading of 18 U.S.C. 1962(c)'s requirement that the alleged violator must be distinct from the RICO enterprise. See U.S. Amicus Br. at 16, *Cedric Kushner* (No. 00-549). A corporation together with its employees will necessarily satisfy the requirements set forth in *Turkette—i.e.*, that the government or private plaintiff prove the existence of an "ongoing organization" whose members share a "common purpose" and "function as a continuing unit." 452 U.S. at 583. Thus, if a corporation and its personnel could be treated as fellow members of an associated-in-fact enterprise, "the prohibition on naming the same corporation as both the defendant and the RICO enterprise could be routinely evaded by listing corporate officers and employees as part of the enterprise, without affecting the gravamen of the complaint." U.S. Amicus Br. at 16, *Cedric Kushner* (No. 00-549). No comparable danger of circumvention exists here, since a corporation and outside entities may be treated as constituent members of an associated-in-fact enterprise only if the plaintiff alleges and proves that the group members were not merely contractually linked, but also shared a "common purpose" and "function[ed] as a continuing unit." *Turkette*, 452 U.S. at 583.

c. Petitioner suggests (*e.g.*, Br. 35) that it is somehow anomalous to distinguish, for purposes of Section 1962(c)'s coverage, between cases in which a corporation undertakes a pattern of racketeering activity through its own employees, and cases in which it receives the assistance of persons outside the corporate structure. That distinction, however, follows directly from the fact that Section 1962(c) prohibits, not the commission of racketeering crimes per se, but the use of racketeering activity to operate or manage an *enterprise* that is distinct from the violator itself. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 177-185 (1993); *Cedric Kushner*, 533 U.S. at 160-

163.[12] The necessary consequence of that limitation on Section 1962(c)'s coverage is that criminal conduct undertaken in collaboration with others may trigger distinct legal sanctions that do not apply in cases of wholly unilateral wrongdoing. That feature of RICO is scarcely novel: the law of conspiracy has long reflected the judgment that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[12] In Part II of its brief, petitioner purports to "[a]ssum[e] for the sake of argument that an association-in-fact enterprise can sometimes include legal entities such as a corporation." Pet. Br. 27. Petitioner goes on to contend, however, that a corporation cannot enter into an association in fact with its own officers and employees, *or* with affiliated corporate entities, *or* with persons who deal with the corporation at "arms-length." It is not clear who is left. Though framed as a narrower alternative to the categorical position taken in Part I of petitioner's brief, acceptance of petitioner's argument in Part II would as a practical matter establish a per se rule or something very close to it. Similarly, petitioner's contention that a de facto criminal alliance between corporate entities should be treated no differently than unilateral corporate wrongdoing is inconsistent with Congress's evident purpose in applying Section 1962(c) to associated-in-fact enterprises, and with the assumption that such enterprises may include corporations as constituent members.

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