

In The
Supreme Court of the United States

—◆—
EDMUND BOYLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

—◆—
**BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SHAREHOLDER AND
CONSUMER ATTORNEYS (NASCAT)
IN SUPPORT OF RESPONDENT**

—◆—
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INTEREST OF *AMICUS CURIAE*¹

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization. Its members (including law firms and solo practitioners) represent parties in antitrust, commercial, consumer protection, employee benefit and pension, civil racketeering and securities fraud cases. NASCAT's members, who represent victims of corporate abuse, schemes to defraud and white-collar criminal activity, seek to secure compensation, deter wrongdoers, modify corporate behavior and improve access to justice. We advocate the enforcement of state and federal laws to prevent wrongful, fraudulent and manipulative business practices. NASCAT is interested in this case because even though Petitioner appeals from a criminal conviction, it necessarily implicates civil liability under the Racketeer Influenced and Corrupt Organizations Act

¹ Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, as required by Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

(“RICO”), 18 U.S.C. §§ 1961-1968, and “little RICO” statutes enacted in a majority of the states.²

◆

ARGUMENT

I. AN ASSOCIATION-IN-FACT RICO ENTERPRISE DOES NOT REQUIRE PLEADING OR PROOF OF AN “ASCERTAINABLE STRUCTURE”

A. Introduction

Enacted in 1970 as Title IX of the Organized Crime Control Act, RICO provides for both criminal and civil liability. Pub.L. No. 91-452, § 901, 84 Stat. 922 (1970), *codified at* 18 U.S.C. §§ 1961-1968. Civil RICO provides for treble damages. 18 U.S.C. § 1964(c). In this case, Petitioner was convicted at trial of violating Section 1962(c) of RICO, which provides:

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

² A majority of the states and U.S. territories have enacted “little RICO” statutes that are, to a greater or lesser extent, modeled after the federal statute. *See* John E. Floyd, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (Am. Bar Ass’n 1998) (extensive comparison of state and federal RICO laws).

such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

To state liability for a claim under Section 1962(c), the Government or a civil RICO plaintiff must allege “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985); *accord Odom v. Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir.), *cert. denied*, 128 S. Ct. 464 (2007). The necessary elements for liability for a criminal RICO conviction are the same. *See, e.g., H.J. Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229, 236 (1989) (“pattern” element “appl[ies] to criminal as well as civil applications”); *accord Sedima*, 473 U.S. at 489 (“violation”). The only question presented in this appeal is the second element – “enterprise” – of a Section 1962(c) criminal prosecution or civil claim when based on an “association-in-fact” theory.

The definition of “enterprise” in RICO is straightforward. In its entirety, the definition is: “‘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) (emphasis added). As is evident from the plain text, this definition is hardly demanding. A single “individual” is an enterprise. Similarly, a single “partnership,” a single “corporation,” a single “association,” and a single

“other legal entity” are enterprises. *See Odom*, 486 F.3d at 548.

This Court admonishes courts to construe RICO and, in particular, “enterprise” expansively. *See National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 257 (1994) (“NOW”) (“RICO broadly defines ‘enterprise’”); *United States v. Turkette*, 452 U.S. 576, 586-587 (1981); *Sedima*, 473 U.S. at 497-98. With few exceptions, the circuit courts of appeals adhere to this admonition. *See, e.g., City of New York v. Smokes-Spirits.Com, Inc.*, 541 F.3d 425, 447 (2d Cir. 2008); *Odom*, 486 F.2d at 547; *United States v. Cianci*, 378 F.3d 71, 78-79 (1st Cir. 2004); *United States v. London*, 66 F.3d 1227, 1243-1244 (1st Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996); *United States v. Lee Stoller Enters., Inc.*, 652 F.2d 1313, 1318 (7th Cir.), *cert. denied*, 454 U.S. 1082 (1981). Congress gave the term great flexibility by using the word “includes” rather than “means”; thus, its definition is illustrative, not exhaustive. *See United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir.) (Posner, J.), *cert. denied*, 500 U.S. 919 (1991); *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988). Accordingly, courts properly interpret “enterprise” to include (1) legal entities, that is, legitimate business partnerships or corporations, **and** (2) illegitimate associations-in-fact, marked by an ongoing formal **or** informal organization of individual or legal-entity associates, *see Cianci*, 378 F.3d at 79, who or which function as a continuing unit “for a common purpose of engaging in a course of conduct.”

Turkette, 452 U.S. at 580-583; *see also United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001), *cert. denied*, 535 U.S. 910 (2002). The enterprise charged in this case is of the illegitimate associated-in-fact variety and “[w]hat is disputed is the manner in which a group must be associated.” *Odom*, 481 F.3d at 548.

NASCAT respectfully submits that the answer to this question was decided by this Court more than a quarter-century ago in *Turkette*, 452 U.S. at 580-593. Carefully examining RICO’s language (*id.* at 580-587), legislative history (*id.* at 588-593), and purpose (*id.* at 593), this Court – with a lone dissent – articulated the evidentiary criteria for an associated-in-fact enterprise under RICO. To establish (“prove”) the existence of such an enterprise at trial, the Government (or civil RICO plaintiff) must offer “evidence of an ongoing organization, formal or informal,” and “evidence that the various associates function as a continuing unit.” *Id.* at 583. This Court required no other evidentiary showing. *See id.*; *see also City of New York*, 541 F.3d at 447; *Odom*, 486 F.3d at 552.³ As set

³ In *Turkette*, 452 U.S. at 583, this Court spoke repeatedly of what must be “**proved**” at trial – not what must be **alleged** or **pled**. *See id.* (referring to what “the Government must **prove**”; “**proved** by evidence”; “**proof** used to establish”; “**proof** of one”; and “must be **proved** by the Government.”). *Id.* (emphasis added; footnote omitted); *see also United States v. Nascimento*, 491 F.3d 25, 32 (1st Cir. 2007) (quoting *Turkette*), *cert. denied*, 128 S. Ct. 1738 (2008); *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983). *Turkette* says nothing about what must be **alleged** by the Government or civil RICO plaintiffs. Consistent with Rule 8(a) of the Federal Rules

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forth herein, the majority of the circuits faithfully adhere to the criteria enumerated in *Turkette*, 452 U.S. at 583. In practice, the dual requirements of (1) distinctness,⁴ and (2) the proof needed to demonstrate

of Civil Procedure, the pleading stage should offer a “low hurdle” to clear. *City of New York*, 541 F.3d at 449; see also *In re Summitomo Copper Litig.*, 104 F. Supp. 314, 319 (S.D.N.Y. 2000) (Pollack, S.J.) (“Allegations of the existence of a RICO enterprise must meet only the ‘notice pleading’ requirements of” Rule 8(a) (citations omitted)). Nevertheless, district courts “confuse[. . .] what must be pleaded with what must be proved,” ignoring that “[i]t is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action.” *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 790 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985). As Judge Posner recognized in *Limestone Devel. Corp. v. Village of Lemont*, 520 F.3d 797, 805 (7th Cir. 2008), civil RICO plaintiffs may “conduct discovery” to flesh out their evidentiary showing of an association-in-fact. See also *Dubai Islamic Bank v. Citibank, N.A.*, 126 F. Supp. 2d 659, 671 (S.D.N.Y. 2000) (“not always . . . reasonable to expect . . . when a defrauded plaintiff frames his complaint he will have available sufficient factual information regarding the inner workings of a RICO enterprise”). Expecting the pleader to allege pre-discovery what he, she, or it can only obtain in discovery is a classic “Catch-22.” See Joseph Heller, *CATCH-22*, 47 (Dell 1985) (“He would be crazy to fly more missions and sane if he didn’t, but if he was sane he had to fly them. Yossarian was moved very deeply by the absolute simplicity of [the Catch-22.]”).

⁴ In cases alleging violations of § 1962(c), the Government and civil RICO plaintiffs must “allege and prove the existence 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 Promotions, Ltd. v. King*, 533 U.S. 158, 161-162 (2001). A “person” is “any individual or entity capable of holding a legal or beneficial interest in property.” 18 U.S.C. § 1961(3). Thus, “by virtue of the distinctness requirement, a corporate entity

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an associated-in-fact enterprise “work in tandem to weed out claims dressed up as RICO violations but which are not in fact.” *City of New York*, 541 F.3d at 447. The “distinctness” requirement requires the Government or civil RICO plaintiff to allege and prove at trial that the RICO “person” is legally separate from the RICO “enterprise,” while the “association-in-fact” requirements ensure that “distinctness” is not achieved by simply adding on entities to the enterprise that do not in fact operate as a “continuing unit” or share a “common purpose.” *Id.* (quoting *Turkette*, 452 U.S. at 583). Anything more is superfluous.

Before this Court, however, Petitioner and his *amici* seek to rewrite *Turkette* by unjustifiably adding or substituting the element of an “ascertainable structure” to the factors carefully enumerated by this Court. In effect, they seek judicial immunity for wide

may not be both the RICO person and the RICO enterprise under [§] 1962(c).” *City of New York*, 541 F.3d at 447 (citation omitted). Nevertheless, “a defendant can clearly be a person under the statute and also be *part* of the [association-in-fact] enterprise,” because the “prohibition against the unity of person and enterprise applies only when the singular person or entity is defined as both the person and the only entity comprising the enterprise.” *United States v. Goldin Indus.*, 219 F.3d 1271, 1275 (11th Cir.) (collecting cases), *cert. denied*, 531 U.S. 1015 (2000); *see also Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir. 1995) (notwithstanding common ownership and a common officer and agent, each distinct corporation could be charged individually as a “person” under § 1962(c) while also being considered jointly as constituting the “enterprise”), *cert. denied*, 516 U.S. 1114 (1996).

swaths of “white-collar” criminal activity, most often schemes to defraud, by limiting RICO’s scope to “organized crime.”⁵ Petitioner advances already soundly rejected arguments to limit RICO that do violence to the statute’s plain meaning and are inconsistent with its statutory language, legislative history and public policy. Properly applied, the factors enumerated by this Court in *Turkette* provide carefully crafted tools for a fact-finder to use to determine the existence of an association-in-fact RICO enterprise in a criminal prosecution or civil litigation. *See, e.g., City of New York*, 541 F.3d at 446-451 (association-in-fact of corporations operating as “functioning unit” to deprive city of cigarette tax revenues); *Odom*, 486 F.3d at 552-553 (association-in-fact of corporations “functioned as a continuing unit” to defraud consumers); *Cianci*, 378 F.3d at 84 (association-in-fact of corrupt mayor and confederates and municipal agencies and entities). Another layer of complex criteria, not required by the language of the statute, is unnecessary.

⁵ As this Court observed in *NOW*, 510 U.S. at 260, “[t]he occasion for Congress’ action was the perceived need to combat organized crime. But 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 its application to organized crime.” *Id.* (citation omitted). The notion that RICO is somehow limited to “organized crime” – however defined – finds no support in the statute’s text and is at “odds with the tenor of its legislative history.” *H.J. Inc.*, 492 U.S. at 244. As such, this new incarnation of the “organized crime” limitation ought to gain no traction with this Court.

No showing on this record demonstrates that the law as it is does not work well.

B. The Statutory Definition Of “Enterprise” Does Not Require The Government Or Civil RICO Plaintiff To Plead And Prove The Existence Of An “Ascertainable Structure”

As this Court recognized in *Turkette*, “[i]n determining the scope of a statute, we look first to its language.” 452 U.S. at 580. Reading RICO is basically a question of the “language of the statute” – what this Court termed “the most reliable evidence of its intent.” *Id.* at 593.⁶ This Court’s principles, consistently applied, are summarized in G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM.

⁶ See Henry Friendly, BENCHMARKS 202 (1976) (“(1) read the statute, (2) read the statute, (3) read the statute”) (quoting Justice Frankfurter’s three rules for interpreting statutes); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) (“A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration.”); III Roscoe Pound, JURISPRUDENCE, 488-490 (1959) (“specious construction [of statutes] tends to bring law into disrespect; . . . subjects courts to political pressures; [and] invites an arbitrary personal element in judicial administration; [it threatens to make] laws . . . worth little [and to] break down [the] legal order”).

L. REV. 1345, 1460-1461 n.441 (1996). So, too, are this Court's recent criminal and civil RICO decisions: *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999); *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Scheidler v. Nat'l Org. for Women*, 547 U.S. 9 (2006); *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006); and *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008).

Petitioner offers no reason to abandon these principles, and their meaning is unequivocal. This Court's statutory analysis in *Turkette*, 452 U.S. at 580-587, makes manifest, beyond serious cavil, that nothing in Sections 1961, 1962, or 1964 of RICO requires the Government or civil RICO plaintiff(s) to allege or prove the existence of an "ascertainable structure" for the trier of fact to find the "enterprise" element established.⁷ The definition of "enterprise" in RICO is ostensive or partially denotative; it is not connotative; its list of examples is illustrative, not

⁷ See Paul Edgar Harold, *Quo Vadis, Association in Fact? The Growing Disparity Between How Federal Courts Interpret RICO's Enterprise Provisions in Criminal and Civil Cases (With a Little Statutory Background to Explain Why)*, 80 NOTRE DAME L. REV. 781, 789 (2005) (analyzing statutory definition of "enterprise": "All that is required is an association of individuals with the purpose of doing whatever criminal activities they plan on doing. No hierarchical structure, no decisionmaking unit, no activities distinct from the racketeering acts, and no far reaching plans or purposes are required by the text.").

exhaustive. See *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934).⁸ Of the ten definitions listed in Section 1961 of RICO, four utilize “includes” while six use “means.”⁹ ***That the draftsman used these***

⁸ In *Helvering*, 293 U.S. at 125 n.1, this Court stated that the terms “means” and “includes” are not necessarily synonymous, and the distinction in their use is aptly pointed out in RICO: “[One section] . . . gives general definitions of ten terms; of these, three are stated to ‘include’ designated particular instances, the other seven are stated to ‘mean’ the definitions subsequently given. [Another section] . . . , in addition to the definitions contained in [the other section,] . . . gives four of which two use the verb ‘include’ and two the verb ‘means.’ That the draftsman used these words in a different sense seems clear. The 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.” *Accord Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); see also Reed Dickerson, *THE FUNDAMENTALS OF LEGAL DRAFTING*, § 7.2 at 99-100 (1965) (distinguishing between connotative definitions that are exhaustive – either “is” or “means” – and denotative definitions that may be exhaustive – “means” – or partial, such as “includes”).

⁹ For example, § 1961(3) of RICO defines “person” to “include[. . .] any individual or entity capable of holding a legal or beneficial interest in property.” Beyond human beings and corporations, how far does this meaning extend? For example, under admiralty law a ship does not “own” property; it is property, but it is also a “person” for purposes of liability. II Thomas A. Russell, ed., *BENEDICT ON ADMIRALTY* § 21, at 2-1-2-2 (7th ed. 2005) (“A ship is, of necessity, a wanderer. She visits shores where her owners are neither known nor are accessible. . . . The ship is so much an independent enterprise, a juridical aggregate of right and liabilities [that creditors contract or tort may sue her *in rem* rather than her owners.]”) (citing *United States v. The Malek Adhel*, 43 U.S. (2 How.) 210, 233-234 (1844)

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words in a different sense seems clear.” *Helvering*, 293 U.S. at 125 n.1 (emphasis added). RICO’s plain meaning controls. *Turkette*, 452 U.S. at 580, 593; *United States v. Russello*, 464 U.S. 16, 20 (1983). If similar language reflects similar meaning, see *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (§ 1962(c): “word ‘conduct’ is used twice”), then, *a fortiori*, different language reflects different meaning, and this is precisely how the circuit courts read Section 1961(4). See, e.g., *United States v. Huber*, 603 F.2d 387, 393-35 (2d Cir. 1979) (rejecting argument that “group of corporations cannot be an enterprise” as stemming from “overly rigid reading of the definitions contained in” § 1961), *cert. denied*, 445 U.S. 927 (1980). *Accord London*, 66 F.3d at 1243-1244 (analyzing language used in § 1961(4) and holding that “two or more legal entities **can** form or be part of an association-in-fact RICO enterprise”; collecting cases reaching same result) (emphasis in original); see also *United States v. Warner*, 498 F.3d 666, 694 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2500 (2008).

Petitioner asserts that in some contexts “includes” means “means” and that Section 1964 of RICO uses “includes, but not limited to” twice, arguing that Congress used “includes” to mean “means” in Section 1961, and that when it meant “including, but not limited to,” it knew how to say it. Petitioner

(Story, J.) (“The vessel which commits the aggression [of piracy] is treated as the offender” and it is subject to forfeiture *in rem* without regard to the innocence of the owners.).

ignores the careful alternative uses of “includes” and “means” in Section 1961 and, had one meaning been intended, one usage would have been adopted. The “short answer [to Petitioner’s arguments] is that Congress did not write the statute that way.” *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (citation omitted); *see also Sedima*, 473 U.S. at 489 n.8 (“minor departure in wording . . . [does not] indicate a fundamental departure in meaning.”).¹⁰

Petitioner also takes the use of “including, but not limited to” in Section 1964 out of its precise context that fixes its meaning. *See McClulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (“The word, then, like others, is used in various senses; and, in its construction, the subject, the **context**, the intention of the person using them, are all to be taken into view.”) (emphasis added); *see also Dolan v. U.S. Postal Svc.*, 546 U.S. 481, 486 (2006) (“The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of

¹⁰ NASCAT agrees with and adopts the Government’s careful exegesis (reading the meaning of words) of the relevant terms; nothing further is necessary on our part. On the other hand, we emphatically reject the Petitioner’s eisegesis (reading meaning into a word). The judicial function begins and ends with exegesis; eisegesis invades the legislative function and it violates separation of powers. Moreover, Petitioner’s eisegesis is inconsistent with standard organizational theory; it begins and ends with a result-oriented mindset. On general organizational theory, *see generally* Edward Gross & Amitai Etzioni, *ORGANIZATIONS IN SOCIETY* (1985), the classis text in the area.

its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”)

Congress’s use of “includes” and “means” in Section 1961 occurs in the context of a section of definitions that are separate and apart from Section 1964. Section 1964 is an independent provision authorizing civil relief and it contains no definition section. The parts that use “including, but not limited to” are not parts of a definition but, rather, a series of illustrations as to the scope of the equity power granted to the courts. Out of an abundance of caution, Congress used the phrase so that courts would know that the list was “not exhaustive.” S. Rep. No. 91-617, 91st Cong., 1st Sess. 160 (1969); 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan). Petitioner’s arguments as to the meaning and scope of Section 1961(4)’s definition of “enterprise” are contrary to this Court’s analysis and holding in *Turkette*, 452 U.S. at 580, and numerous circuit court decisions.

C. Nothing In RICO’s Legislative History Requires Pleading Or Proof That The “Enterprise” Has An “Ascertainable Structure”

Just as the text of the “enterprise” definition contemplates an expansive view of what constitutes an association-in-fact enterprise, nothing in RICO’s

legislative history counsels narrowing the expansiveness of the textual definition. *See Turkette*, 452 U.S. at 588-593 (analyzing RICO’s legislative history).

To start, in dealing with the legislative history of RICO, this Court repeatedly states that only “clearly expressed legislative intent to the contrary” of clear statutory language will support the narrowing of RICO’s text. *See, e.g., NOW*, 510 U.S. at 261. In the case of the association-in-fact enterprise, not only is the legislative history unambiguous, but it, in fact, supports broadly interpreting the statutory language. Regarding RICO’s legislative history, the House Report on the Organized Crime Control Act adds much to strengthen the textual analysis given above: It states that because the definition of “enterprise” includes “associations in fact . . . infiltration of any associative group by any individual or group capable of holding a property interest can be reached.” H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4032.¹¹ This language

¹¹ The Fifth Circuit takes this language in the House Report and the language of the statute itself to find that association-in-fact enterprises can be composed of both legal entities and individuals:

Appellants contend that because the indictment described the enterprise as “a group of individuals associated in fact with various corporations,” the enterprise alleged did not fall within the literal bounds of the statutory classifications. We reject this claim. . . .

Use of the verb “includes” in the statutory definition indicates congressional intent not to limit a RICO enterprise to the specific categories listed; rather, the

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contemplates a broad understanding of what constitutes an association-in-fact, and Petitioner is hard pressed to argue that Congress believed limitations to the association-in-fact concept existed beyond what inhered in the word “association.”

As this Court found in *Turkette*, RICO’s legislative history amply shows Congress did not intend to limit the association-in-fact enterprise concept only to “organized crime.” Conceptually, the House Report provided, and RICO’s drafters along with this Court understood, that the association-in-fact enterprise provision allowed for the infiltration of “any associative group” to be punished.

D. Petitioner’s Arguments Are Contrary To The Substance And Meaning Of This Court’s Decision In *Turkette*

In *Turkette*, defendants were alleged to have formed an associated-in-fact enterprise within the meaning of Sections 1961(4) and 1962(c).¹² In the

language “reveals that Congress opted for a far broader definition of the word ‘enterprise.’” Moreover, the House report accompanying RICO stated that “enterprise” included “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.”

United States v. Thevis, 665 F.2d 616, 625 (5th Cir.) (quoting House Report), *cert. denied*, 459 U.S. 825 (1982).

¹² In *Turkette*, 452 U.S. at 578-579, a nine-count indictment charged Turkette and twelve others with conspiracy to conduct

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words of the statute, they were alleged to have been a “group of individuals associated in fact” for the purpose of engaging in acts constituting “a pattern of racketeering activity.” The First Circuit agreed with defendants that RICO was designed “solely to protect legitimate business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise.” 452 U.S. at 579-580. This Court reversed, holding that a “group of individuals associated in fact” was an enterprise under RICO even if the purpose of the enterprise was exclusively criminal. *Id.* at 593.

In the course of its analysis, this Court refuted various analytic mistakes by the court of appeals. The First Circuit’s conclusion that RICO did not apply to

and participate in the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering activity. The indictment described the RICO enterprise as “a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings. . . .” *Id.* After a six-week trial, “in which the evidence focused upon both the professional nature of th[e] organization and the execution of a number of distinct criminal acts,” *id.* at 579, Turkette was convicted on all nine counts. See generally Thomas S. O’Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 660-663 (1989) (discussing *Turkette*).

wholly illegal enterprises depended in part on its reasoning that a contrary holding would render portions of the statute superfluous. The court of appeals had stated:

If “a pattern of racketeering” can itself be an ‘enterprise’ for purposes of [§] 1962(c), then the two phrases ‘employed by or associated with any enterprise’ and ‘the conduct of such enterprise’s affairs through [a pattern of racketeering activity]’ add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises.

Turkette, 452 U.S. at 582 (quoting *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir. 1980) (alteration in original)). This Court was at pains to correct the First Circuit’s reading of the statute. It wrote:

[The court of appeals’ conclusion] is based on a faulty premise. That a wholly criminal enterprise comes within the ambit of the statute does not mean that a “pattern of racketeering activity” is an “enterprise.” In order to secure a conviction under RICO, the Government must prove both the existence of an “enterprise” and the connected “pattern of racketeering activity.” The enterprise is an entity, for present purposes 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.***

Id. at 583 (emphasis added; citation omitted).

In context, this passage from *Turkette* is easy to understand. The court of appeals mistakenly conflated the term “enterprise” with the term “pattern of racketeering activity.” This Court pointed out that 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. These separate concepts can be expressed grammatically: As used in the second italicized passage in *Turkette*, “enterprise” is the subject and “pattern of racketeering activity” is part of the predicate. (Actions that form the “pattern of racketeering activity” are often referred to as “predicate” acts, though likely not in the grammatical sense.) This Court further explained that proof of a “pattern of racketeering activity” is not, by itself, proof of an “enterprise.” *Id.* “Enterprise” and “pattern

of racketeering activity” are separate elements that require separate proof. In the words of this Court, “[t]he existence of an enterprise at all times remains a separate element which must be proved by the Government.” *Id.* (stating that “[w]hile the proof used to establish these separate elements [of ‘enterprise’ and ‘pattern of racketeering activity’] may in particular cases coalesce, proof of one does not necessarily establish the other”).¹³

To read this Court’s statement in *Turkette* as requiring that an associated-in-fact enterprise have a “structure” beyond that necessary to carry out its pattern of illegal racketeering activities is not only to misread the particular passage of *Turkette*, it is also fundamentally to misunderstand *Turkette*’s holding.

¹³ *Turkette* left intact the Fifth Circuit’s holding in *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978):

In defining “enterprise,” Congress made clear that the statute extended beyond conventional business organizations to reach “any . . . group of individuals” whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes. The statute demands only that there be association “in fact” when it cannot be implied in law. ***There is no distinction, for “enterprise” purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that controls a secret criminal network.***

Id. at 898 (emphasis added); *see also Goldin Indus.*, 219 F.3d at 1275.

The First Circuit in *Turkette* had read RICO to impose liability only when a legitimate business was infiltrated by a criminal enterprise, meaning that RICO did not impose liability on purely criminal enterprises. Needless to say, this Court reversed. As a result, the Government has widely and successfully used RICO to bring Mafia families to their knees.¹⁴

To require that an associated-in-fact enterprise have a “structure” beyond that necessary to carry out its racketeering activities would be to require precisely what this Court in *Turkette* held that RICO does *not* require.¹⁵ NASCAT asserts that the “ascertainable

¹⁴ PRESIDENT’S COMMISSION ON ORGANIZED CRIME, THE IMPACT, ORGANIZED CRIME TODAY 133-135 (1986); James B. Jacobs, BUSTING THE MOB: THE UNITED STATES V. COSA NOSTRA 23-24 (1994); Julie Gunnigle, *Birds of A Feather RICO: Trying Partners in Crime Together*, 34 SYRACUSE J. INT’L L. & COM. 41, 104-106 (2006) (summarizing empirical data on selected Mafia families and recommending a RICO-type statute to the United Kingdom to fight terror more effectively).

¹⁵ The Eighth, Tenth, Fourth and Third Circuits read the language in *Turkette* to require that an association-in-fact enterprise have some kind of “ascertainable” separate structure. See, e.g., *Asa-Brandt, Inc. v. ADM Investor Svcs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir.), cert. denied, 502 U.S. 845 (1991); *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *Riccobene*, 709 F.2d at 223-224.

The Seventh Circuit requires “some” kind of structure but does not require that it be a “separate” structure. See, e.g., *Limestone Devel.*, 520 F.3d at 804-805; *Richmond v. Nw. Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995); see also *United States v. Rogers*, 89 F.3d 1326, 1337-1338 (7th Cir.) (imposing “some” structural requirements, but concluding that it would be “non-sensical to require proof that an enterprise had purposes or

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structure” requirement represents yet another attempt to improperly limit RICO’s deliberately broad reach.¹⁶

goals separate and apart from the pattern of racketeering activity”), *cert. denied*, 519 U.S. 999 (1996). The Sixth Circuit also falls into this middle group. *See, e.g., United States v. Tocco*, 200 F.3d 401, 425 (6th Cir. 2000).

By contrast, five circuits rightly reject any requirement of an “ascertainable structure” for an associated-in-fact enterprise. *See, e.g., Odom*, 486 F.3d at 551 (Ninth Circuit: “We take this opportunity to join the circuits that hold that an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise”) (citing cases); *City of New York*, 541 F.3d at 447-448 (Second Circuit has rejected “ascertainable structure” requirement); *Nascimento*, 491 F.3d at 32-34 (same; collecting First Circuit decisions); *Cianci*, 378 F.3d at 82 (First Circuit has “approved [jury] instructions based strictly on *Turkette*’s explanation of how a criminal enterprise might qualify as a RICO enterprise”) (citation omitted); *Perholtz*, 842 F.2d at 354 (concluding that enterprise is “established by common purpose among the participants, organization, and continuity”); *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983) (“*Turkette* did not suggest that the enterprise must have a distinct, formalized structure.”); *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983) (stating that “it is logical to characterize any associative group in terms of what it **does**, rather than by abstract analysis of its structure” (emphasis in original), *abrogated on other grounds by Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

¹⁶ The “ascertainable structure” limitation originated in *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982), which stated that such structure “might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes.” Uncomfortable with RICO’s breadth, as drafted by Congress, beyond organized crime or its

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Such a requirement would necessitate that the enterprise have a structure to serve **both** illegal racketeering activities and legitimate activities. In other words, it would require – as the First Circuit sought to require in *Turkette* – that the enterprise have a structure serving both illegitimate **and** legitimate purposes. But this Court reached the opposite result, holding that a purely criminal enterprise can be an associated-in-fact enterprise within the meaning of RICO. *See also Cedric Kushner Promotions*, 533 U.S. at 164-165 (stating that RICO “protects the public from those who would unlawfully use an ‘enterprise’ (whether legitimate or illegitimate) as a ‘vehicle’

infiltration of legitimate business, *Bledsoe* (like the First Circuit in *Turkette*) initially sought to confine RICO to the infiltration of legitimate business by “organized crime.” The First Circuit’s effort was rejected by this Court in *Turkette*, but *Bledsoe* represented the Eighth Circuit’s effort to confine RICO to its supposed origins in the effort to take the measure of the families of the Mafia, and “structure” was its chosen technique. *Bledsoe*, 674 F.2d at 664 (“the command system of a Mafia family is an example of this type of structure”). In other words, the “ascertainable structure” requirement advanced here by Petitioner and his *amici* is nothing more than the discredited “organized crime” limitation called by another name. Whatever it is called, it is not how Congress consciously drafted RICO, nor is it consistent with this Court’s uniform jurisprudence. *See Bridge*, 128 S. Ct. at 2145: “Whatever the merits of petitioner’s arguments [to limit RICO with a reliance requirement] as a policy matter, we are not at liberty to rewrite RICO to reflect their – or our – views of good policy. We have repeatedly refused to adopt narrowing construction of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.”

through which ‘unlawful . . . activity is committed’”) (ellipsis in original; citations omitted).

Further, to require that an associated-in-fact enterprise have an “ascertainable structure” – whether that structure serves both legitimate and illegitimate activities *or* only illegitimate activities – is to misread the language of RICO and this Court’s analysis in *Turkette*. As the First Circuit now states, such a requirement improperly narrows the definition of an associated-in-fact enterprise because criminal enterprises “may not observe the niceties of legitimate organizational structures.” *Patrick*, 248 F.3d at 19. An associated-in-fact enterprise must, of course, exist, as required by the statute and as explained in *Turkette*. But nothing in the statute or this Court’s jurisprudence requires that the enterprise have an “ascertainable structure.” *See Odom*, 486 F.3d at 548-553.

E. The Lower Courts Have Properly Applied The Three Factors Enumerated By This Court In *Turkette* To Determine Whether RICO Association-In-Fact Enterprises Have Been Alleged And/Or Proven Without Reference To An “Ascertainable Structure” Requirement

As recently recognized and applied by the Second Circuit in *City of New York*, 541 F.3d at 447-451, and by the Ninth Circuit in *Odom*, 486 F.3d at 548-553, both civil RICO cases, and by the First Circuit in *Nascimento*, 491 F.3d at 32-34, the appeal from a

criminal RICO conviction, this Court's careful articulation in *Turkette* of the criteria for an associated-in-fact enterprise provide the principal tools "a fact-finder should use to distinguish a RICO enterprise from an ad hoc criminal confederation." *Cianci*, 378 F.3d at 84. In numerous reported cases decided since 1981, the lower courts have successfully applied those requirements to associations-in-fact enterprises involving individuals, corporate entities and combinations of both, just as the trial court, jury and Second Circuit did in this case.

In this case, the evidence introduced by the Government at trial showed that "members of [P]etitioner's crew had particular roles, protected their identities by using false names, engaged in advance surveillance and planning (including gathering the necessary tools), and divided the robbery proceeds in a systematic fashion in which members engaging in higher risk roles were compensated with greater shares." Brief for the Chamber of Commerce of the United States and McKesson Corporation As *Amici Curiae* in Support of Neither Party, at 25-26 (Nov. 22, 2008). "These facts evince oversight and coordination activities, including coordination among members to avoid apprehension." *Id.* at 26. Thus, even in those circuits that have adopted the "ascertainable structure" requirement for proving an association-in-fact enterprise at trial, the evidence in this case is more than sufficient to establish the "enterprise" element. See, e.g., *United States v. Eppolito*, 543 F.3d 25, 51-57 (2d Cir. 2008); *City of New York*,

541 F.3d at 450-451 (scheme to avoid paying cigarette taxes to city, which sufficiently alleged a “continuing unit” by alleging that corporations “entered profit sharing and employment agreements and that they have ‘interlocking financial and management agreements’”; in addition, city sufficiently alleged the “roles” played by defendants in operating or managing enterprise); *Nascimento*, 491 F.3d at 32-33 (members of “street gang” shared weapons, “self-identified as belonging to” the gang, and members “kept tabs on one another”); *Odom*, 486 F.3d at 552-553 (contracting entities “established mechanisms” for communicating “financial information,” “agreed to promote” each other’s products, and “functioned as a continuing unit”); *United States v. Connolly*, 341 F.3d 16, 27 (1st Cir. 2003) (members of criminal gang “join[ed] forces to protect themselves from prosecution,” “shared resources and revenue” and had “a sense of membership”); *United States v. Kehoe*, 310 F.3d 579, 587 (8th Cir. 2002) (White Supremacist group; leader “possessed and controlled the majority of the proceeds from the enterprise’s illegal activities” and “he distributed the remainder to his cohorts”), *cert. denied*, 538 U.S. 1048 (2003); *Rogers*, 89 F.3d at 1337 (drug ring; “differentiation among roles can provide the requisite ‘structure’ to prove the element of ‘enterprise’”) (citation omitted); *United Healthcare Corp. v. Am. Trade Ins. Co.*, 88 F.3d 563, 570 (8th Cir. 1996) (associated-in-fact corporations “operated as a continuing business unit . . . in its insurance sales and marketing activities”). Thus, Petitioner improperly seeks to improperly

tack onto the statute an element that would not change the result in his own case.

F. Petitioner's Arguments Are Contrary To RICO's Purpose And Public Policy

Finally, as this Court stated in *Turkette*, 452 U.S. at 593, the policy consequences of the “ascertainable structure” limitation that Petitioner urges are relevant. “Consequences cannot alter statutes, but may help to fix their meaning.” *In re Rouss*, 221 N.Y. 81, 91, 116 N.E. 782, 785 (1917) (Cardozo, J.). NASCAT submits that an “ascertainable structure” requirement tends to thwart, rather than further, the well-established purposes of RICO. As this Court held in *Turkette*, 452 U.S. at 578, RICO reaches purely criminal enterprises as well as legitimate ones. To the extent an “ascertainable structure” requirement is construed to require an organization engaging in both legitimate business activity *and* predicate acts of racketeering, *Turkette's* holding is flouted.

Moreover, even with respect to purely criminal enterprises, to require an “ascertainable structure” with an existence beyond that necessary to perform the predicate acts is not mandated by RICO's language and it improperly limits its scope. As the Second Circuit stated in *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983), such a requirement “would lead to the anomalous result that a large scale underworld operation which engaged solely in trafficking of heroin would not be

subject to RICO's enhanced sanctions, whereas small-time criminals jointly engaged in infrequent sales of contraband drugs and illegal handguns arguably could be prosecuted under RICO." As the District of Columbia Circuit concurred in *Perholtz*, 842 F.2d at 353, Petitioner's reading of Section 1961(4) "would lead to the bizarre result that only criminals who fail to form corporate shells to aid their illicit schemes could be reached by RICO. This interpretation hardly accords with Congress' remedial purposes: To design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless." As the Seventh Circuit said in *Masters*, 924 F.2d at 1367, "[i]t would be ironic if the RICO statute, aimed primarily at criminal enterprises such as the Mafia and its many petty imitators, was more effective against legal enterprises because the latter have a more perspicuous, articulated structure." *Accord Rogers*, 89 F.3d at 1337; *Atlas Pile Driving Co. v. DiCon Finan. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989) ("[W]e think it unwise policy to permit individuals to escape the reach of RICO through the simple artifice of incorporating"); *McCullough v. Suter*, 757 F.2d 142, 143-144 (7th Cir. 1985) ("[W]e do not suppose that 'Murder Inc.' was really a corporation; and we cannot believe that Congress would have wanted gangsters [associated in fact] to be able to escape the clutches of section 1962(c) just by avoiding the corporate form").¹⁷

¹⁷ In *Masters*, 924 F.2d at 1366, in which the Seventh Circuit affirmed defendant's RICO conviction, the alleged
(Continued on following page)

Finally, a principal and wholly proper use of RICO by the Government is to prosecute political corruption cases where the enterprise is usually defined as the governmental agency, political office, and the like. See G. Robert Blakey & Thomas Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God is This the End of RICO?,"* 43 VAND. L. REV. 851, 1020 (1990) (reporting that the largest

enterprise was described as an “informal consortium of a law firm and two police departments with the three individuals who are the defendants.” On appeal, the defendants argued that a RICO enterprise, “unless it is a legal entity such as an individual, a partnership, or a corporation, can only be a ‘union or group of *individuals*’ which Masters’ law firm, the Willow Springs Police Department, and the Cook County Sheriff’s Police Department are not.” *Id.* Justice Posner stated that “[t]he argument has repeatedly and we think correctly been rejected,” *id.*, citing the Ninth Circuit’s decision in *United States v. Feldman*, 853 F.2d 648, 655 (9th Cir. 1988), and the D.C. Circuit’s decision in *Perholtz*, 842 F.2d at 352-53. Justice Posner 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.

924 F.2d at 1366.

category of criminal RICO prosecutions involved political corruption). *See, e.g., United States v. McDade*, 28 F.3d 283, 295-297 (3d Cir. 1994) (upholding association-in-fact RICO enterprise consisting of congressman, his two offices and congressional subcommittees that he chaired), *cert. denied*, 455 U.S. 910 (1982); *United States v. Dischner*, 974 F.2d 1502, 1511 (9th Cir. 1992) (upholding association-in-fact enterprise consisting of municipal officials, office of mayor and department of public works), *cert. denied*, 507 U.S. 923 (1993); *United States v. Angelilli*, 660 F.2d 23, 31-33 (2d Cir. 1981) (“We view the language of § 1961(4), . . . as unambiguously encompassing governmental units, . . . and the substance of RICO’s provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public or governmental entities.”), *cert. denied*, 455 U.S. 910 (1982); *see also* G. Robert Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 298-299 (1982) (collecting decisions). In *Cianci*, 378 F.3d at 78-88, where the First Circuit affirmed the RICO convictions of the mayor of Providence, Rhode Island, and associates who operated affairs of an associated-in-fact enterprise consisting of themselves, the city and its agencies and entities to enrich themselves, the court stated that “[a] RICO enterprise animated by an illicit common purpose can be comprised of an association-in-fact of municipal entities and human members when the latter exploits the former to carry out that purpose.” *Id.* at 83. After surveying the above-referenced decisions from the Second, Third

and Ninth Circuits, the First Circuit stated: “In each of these cases, the groupings of individuals and corporate or municipal entities were sufficiently organized and devoted to the alleged illicit purposes that the resulting whole functioned as a continuing unit. The common purpose was dictated by individuals who controlled the corporate or municipal entities’ activities and manipulated them to the desired illicit ends.” *Id.*

RICO’s important role in combating political corruption would effectively end if this Court were to accept Petitioner’s attempts to narrow the broad definition of “enterprise” found in section 1961(4) and explicated in *Turkette*.



CONCLUSION

For the reasons stated herein, NASCAT respectfully submits that the decision of the Court below affirming Petitioner’s RICO conviction should be affirmed.

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