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Cover Page Footnote

B.A., University of Massachusetts; J.D. Candidate, 2010, Fordham University School of Law. I thank Professor Ian Weinstein for his invaluable advice and guidance during the writing process. Professor Julian Davis Mortenson also deserves thanks for his assistance. Thank you to my parents, my sister and her family, and my wife, Alena, for their love and encouragement.

STRUCTURAL STRENGTH: RESOLVING A CIRCUIT SPLIT IN *BOYLE v. UNITED STATES* WITH A PRAGMATIC PROOF REQUIREMENT FOR RICO ASSOCIATED-IN-FACT ENTERPRISES

*Michael Morrissey**

This Note addresses the circuit split among the U.S. Courts of Appeals over whether proving an associated-in-fact RICO enterprise requires proof of some ascertainable structure distinct from the underlying pattern of racketeering. After discussing the history of RICO and RICO enterprises, this Note dissects the three-way circuit split and details the facts and positions of Boyle v. United States. *Finally, this Note argues that the U.S. Supreme Court needs to resolve the split with the common-sense position that some ascertainable-structure proof requirement is needed—although the enterprise need not have a purpose distinct from the pattern of racketeering—to balance the potential dangers of RICO's overbreadth with the need to combat the dangers for which RICO was enacted.*

INTRODUCTION

Edmund Boyle does not deny that he was a serial bank burglar.[1] He is, however, contesting his RICO convictions all the way to the U.S. Supreme Court.[2]

In 2003, a federal grand jury returned an indictment charging Boyle with racketeering under 18 U.S.C. § 1962(c),[3] a statute that was enacted in 1970 as part of the Racketeer Influenced and Corrupt Organizations Act (RICO).[4] The charges arose from Boyle's involvement in a bank burglary ring that

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1. *See* Petition for a Writ of Certiorari at 3, Boyle v. United States, No. 07-1309 (U.S. Apr. 15, 2008), 2008 WL 1765769 ("The charges arose from the defendant's participation in a bank burglary ring . . . .").

2. *See generally id.*

3. Brief for the United States in Opposition at 2, *Boyle*, No. 07-1309 (U.S. July 2, 2008), 2008 WL 2676555.

4. *See* Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961–1968 (2006)).

the government called the "Boyle Crew."[5] Boyle "was one of a crew of approximately eight men based in the New York City area who engaged in a string of bank burglaries in at least five [s]tates between 1991 and 1999."[6]

Boyle was convicted by a jury in the U.S. District Court for the Eastern District of New York and sentenced to 151 months of imprisonment.[7] The U.S. Court of Appeals for the Second Circuit affirmed his conviction, but vacated his sentence and remanded for resentencing.[8] Whether the "Boyle Crew" meets the test of a critical element of RICO—an associated-in-fact enterprise—is now a matter for the Supreme Court.[9]

Finding the existence of an enterprise is crucial in any RICO prosecution.[10] Pursuant to 18 U.S.C. § 1962, the investment in,[11] maintenance of an interest in,[12] or participation in the affairs of an enterprise[13] are discrete kinds of prohibited conduct under RICO, as is the conspiracy to do any of the aforementioned acts.[14] To state a claim under § 1962(c) of RICO, for example, the plaintiff or government must sufficiently allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity,"[15] be it a prosecution or civil action.[16]

There are two types of enterprises identified by 18 U.S.C. § 1961(4): enterprises that are legal entities, and enterprises that are "associated in fact."[17] If an enterprise is a legal structure, person, or corporation, the process of meeting the evidentiary requirement is simple—"prosecutors have used an Office of a Governor, Prosecutor's Office, and other entities as the enterprise for a RICO prosecution."[18] When an enterprise is a legal entity, the structure of the § 1962(c) offense is straightforward: "the prohibited conduct is the commission of the predicate acts, with the relation of the crimes to an enterprise serving as an aggravating factual circumstance."[19] The fact that an enterprise exists—and that the given

5. Petition for a Writ of Certiorari, *supra* note 1, at 3.

6. Brief for the United States in Opposition, *supra* note 3, at 2.

7. *Id.* at 1–2.

8. *Id.* at 2.

9. *See* Boyle v. United States, 283 F. App'x 825 (2d Cir. 2007), *cert. granted*, 129 S. Ct. 29 (2008).

10. Ellen S. Podgor, *State and Local Entities as RICO Enterprises: A Matter of Perception*, 98 W. VA. L. REV. 853, 854 (1996).

11. *Id.* (citing 18 U.S.C. § 1962(a) (2006)).

12. *Id.* at 855 (citing 18 U.S.C. § 1962(b)).

13. *Id.* (citing 18 U.S.C. § 1962(c)).

14. *Id.* (citing 18 U.S.C. § 1962(d)).

15. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (referencing what a violation of § 1962(c) requires). Section 1962(c) has been deemed RICO's "most important liability provision." Frank D'Angelo, Note, *Turf Wars: Street Gangs and the Outer Limits of RICO's "Affecting Commerce" Requirement*, 76 FORDHAM L. REV. 2075, 2076 (2008).

16. 18 U.S.C. § 1964.

17. *Id.* § 1961(4).

18. White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/10/the-boyle-case.html (Oct. 14, 2008) [hereinafter The Boyle Case & RICO Enterprises].

19. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 942 (1987).

criminal conduct relates to it—is usually easy to determine and thus not contentious.[20] Satisfying the requirement is "[l]ess clear . . . when the prosecution is premised upon any . . . group of individuals associated in fact although not a legal entity."[21]

Since the group in *Boyle* was obviously not a legal entity, the issue was whether the group was "associated-in-fact." Each crew member had a specific job as a lookout or burglar; the members of the crew would conceal their identities by referring to one another using aliases; and they often utilized walkie-talkies.[22] The illicit gains were divided "based on the amount of risk inherent in each participant's role."[23] On the other hand, trial testimony presumably more favorable to Boyle established that the Boyle Crew "was a loosely affiliated 'clique' of 'friends'—wholly lacking role definition or organizational structure—who sporadically burgled night deposit boxes in shifting combinations."[24]

The evidentiary requirement for the "associated-in-fact" enterprise element remains unsettled law and the subject of a deeply divided circuit split. The question is a significant one, because prosecuting someone like Boyle under RICO affords more serious penalties than would prosecuting Boyle for the individual actions he undertook as part of the Boyle Crew.[25] In April 2008, the U.S. Court of Appeals for the Seventh Circuit reaffirmed that a RICO "enterprise" must have some ascertainable enterprise-like structure in *Limestone Development Corp. v. Village of Lemont*,[26] rejecting the U.S. Court of Appeals for the Ninth Circuit's contrary view in *Odom v. Microsoft Corp.*[27] in May 2007. The Supreme Court has finally decided to resolve this circuit split, recently granting certiorari in *Boyle v. United States*.[28]

The question presented in *Boyle* is whether an associated-in-fact enterprise needs an ascertainable structure apart from the pattern of racketeering it engages in.[29] This highly anticipated decision has broad implications on future prosecutions and civil liability under RICO.[30] A case like Edmund Boyle's provides a clear example of the implications: the narrowest reading of the enterprise element would raise the proof threshold

20. *Id.*

21. The Boyle Case & RICO Enterprises, *supra* note 18 (internal quotation marks omitted).

22. Brief for the United States in Opposition, *supra* note 3, at 2.

23. *Id.*

24. Petition for a Writ of Certiorari, *supra* note 1, at 3.

25. *See* 18 U.S.C. § 1963 (2006) (establishing prison term of "not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment)" for one criminal violation of 18 U.S.C. § 1962); *see also infra* note 184 and accompanying text.

26. 520 F.3d 797, 804 (7th Cir. 2008).

27. 486 F.3d 541, 551 (9th Cir. 2007) (en banc).

28. 283 F. App'x 825 (2d Cir. 2007), *cert. granted*, 129 S. Ct. 29 (2008).

29. *See* Brief for the United States in Opposition, *supra* note 3, at I.

30. *See* The Boyle Case & RICO Enterprises, *supra* note 18 ("[*Boyle*] will hopefully resolve one of the nagging issues that pervades this area of the law.").

to only those associations with a distinct ascertainable structure, while a broad reading opens the door for RICO prosecutions of groups with a less rigid connection.[31]

This Note addresses the aforementioned circuit split regarding the evidentiary requirement of an associated-in-fact enterprise. Part I of this Note examines the history of RICO, its purposes, and its policies. In addition, this part explains what a RICO enterprise can be, particularly examining associated-in-fact enterprises, some of the constitutional misgivings over RICO, and the importance of prosecutorial discretion. Part II of this Note dissects and analyzes the three-way circuit split over the RICO associated-in-fact enterprise structure requirement. The facts and positions of *Boyle* are also detailed in Part II.

In Part III, this Note argues that the Supreme Court needs to resolve the split with the common-sense position that an ascertainable structure is needed—even if the enterprise does not need to have a goal or purpose separate from the pattern of racketeering itself. Such a resolution would balance the potential dangers of RICO's overbreadth with the need to combat the dangers for which RICO was enacted. Imposing structure will help differentiate the common criminal from the racketeer and thus establish proper remedies while not expanding RICO beyond recognition. Not requiring a structure with a separate goal or purpose from the pattern of racketeering itself, on the other hand, will allow RICO remedies against completely illegitimate organizations—even those with less rigid connections than those inherent in legal enterprises.

I. RICO AND THE ENTERPRISE ELEMENT

To put this important issue in perspective, Part I discusses the history of RICO and RICO enterprises. Part I.A examines the policies and purposes behind RICO's enactment. Part I.B analyzes the enterprise requirement, particularly focusing in on the distinction between legal-entity enterprises and associated-in-fact enterprises. Part I.C discusses potential constitutional vagueness problems and prosecutorial discretion.

A. *Policies and Purposes of RICO*

Organized crime in the United States is unquestionably as old as the United States itself,[32] so it is worthwhile to understand its history and the longtime efforts to combat it.[33]

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31. *See, e.g.*, United States v. Masters, 924 F.2d 1362, 1367 (7th Cir. 1991) ("Criminal enterprises have less structure than legal ones. For formal relationships created by contract and rule they substitute informal relationships based on kinship and friendship. It 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." (citing FRANCIS A. J. IANNI & ELIZABETH REUSS-IANNI, A FAMILY BUSINESS: KINSHIP AND SOCIAL CONTROL IN ORGANIZED CRIME 154, 157, 172 (1972))).

RICO's genesis harkens back as far as the 1920s, when the coalescence of negative societal factors led to the rise of organized crime.[34] Before Prohibition, organized crime's widespread impact had not really been felt.[35] But while the problem grew, attempts to eliminate it by prosecuting individual members for individual crimes turned out to be generally ineffective.[36]

The problem eventually became a front-burner issue in Washington, D.C., where a number of senatorial and presidential committees and commissions were formed to analyze organized crime and recommend alternative ways to deal with it.[37] In the 1950s, the Kefauver and McClellan Committees revealed the structure of the Mafia and targeted the organization's infiltration of legitimate businesses as a core problem.[38] In 1965, Attorney General Nicholas Katzenbach was asked by President Lyndon B. Johnson to helm a commission and further tackle the issue.[39] This President's Commission on Law Enforcement and Administration of Justice, dubbed the Katzenbach Commission, delivered its report in 1967.[40] Congress adopted many of the Commission's recommendations for federal legislation, while other recommendations influenced state and local actors.[41]

Despite the sporadic recognition of more general organized criminal groups, the Katzenbach Commission "clearly conceived of organized crime as a single entity and directed its primary attention toward a single target: the Italian syndicate it believed controlled organized crime."[42] The Commission saw the Mafia's "increasing tendency to involve itself in legitimate business and union activities" as a critical part of this threat.[43]

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32. Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 215 (1984).

33. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 662 n.11 (1987) ("As a proper noun, 'Organized Crime' means to most people a formally structured criminal syndicate, or even more specifically, the Sicilian-derived 'La Cosa Nostra' or 'Mafia.' In a broader, common noun use, 'organized crime' may be taken literally to mean any criminal activity that is 'organized,' that is, any crimes committed by a relatively structured continuing group of individuals devoted to crime as a profession.").

34. *See* D'Angelo, *supra* note 15, at 2080 (noting that "factors including increased narcotic use, Prohibition, and the Great Depression contributed to the rise of organized crime" (citing Bradley, *supra* note 32, at 225–29)).

35. Bradley, *supra* note 32, at 226 ("While America had organized crime before [P]rohibition, it was more diverse, loosely structured, and primarily involved with prostitution, gambling and political corruption on a local level. These activities did not require large organizations.").

36. D'Angelo, *supra* note 15, at 2080.

37. *Id.*

38. *Id.*

39. *Id.*

40. Lynch, *supra* note 33, at 666.

41. *Id.* at 666 & n.23.

42. *Id.* at 672.

43. *Id.*

However, the Katzenbach Commission "recommended no innovations in the penal code."[44]

In 1968, numerous anticrime bills were introduced by congressional members, "including many that were specifically responsive to the [Katzenbach] Commission's recommendations."[45] Two bills introduced that year by Senator Roman Hruska are commonly considered to be precursors to RICO.[46] "No action was taken on the bills" in the 1968 session of Congress, though.[47] In the next session of Congress, however, Senator John L. McClellan "introduced a major bill containing most of the organized crime recommendations of the Katzenbach Commission."[48] Senator McClellan spoke at length about the insidious nature of organized crime and the ways to fight it through legislation.[49] Senator Hruska, meanwhile, proposed a new bill that made clear that it was "aimed specifically at racketeer infiltration of legitimate business."[50] The two men teamed up and introduced a bill entitled the "Corrupt Organizations Act of 1969."[51] The bill "was amended in numerous relatively minor respects as it passed through the Senate and House Judiciary Committees," essentially "all but identical to the final version of S. 1861 that was enacted into law as title IX of the Organized Crime Control Act of 1970."[52]

RICO was enacted as part of the larger Organized Crime Control Act (OCCA)[53] and codified into law at 18 U.S.C. §§ 1961–1968.[54] Congress stressed that the purpose of the Act was to "seek the eradication of organized crime in the United States by strengthening the legal tools in the

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44. *Id.* at 671.

45. *Id.* at 673.

46. *Id.* One bill "would have amended the Sherman Antitrust Act to prohibit the investment or use in one line of business of intentionally unreported income from another line of business." *Id.* The other bill "created new civil and criminal penalties for the investment of income derived from various specified criminal activities in a business affecting interstate commerce." *Id.*

47. *Id.*

48. *Id.* at 675.

49. *Id.*

50. *Id.* at 676 (quoting 115 CONG. REC. 6993 (1969)) (internal quotation marks omitted).

51. *Id.*

52. *Id.* at 676–77. When introducing the bill, Senator John McClellan left no doubt as to its purposes. He said,

> The problem, simply stated, is that organized crime is increasingly taking over organizations in our country, presenting an intolerable increase in deterioration of our Nation's standards. Efforts to dislodge them so far have been of little avail. To aid in the pressing need to remove organized crime from legitimate organizations in our country, I have thus formulated this bill. . . . This bill is designed to attack the infiltration of legitimate business repeatedly outlined by investigations of various congressional committees and the President's Crime Commission.

Id. at 677 (quoting 115 CONG. REC. 9567 (1969)).

53. G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim*: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 529 (1987).

54. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961–1968 (2006)).

evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[55] In the Statement and Findings of Purpose for the Act, Congress concluded that organized crime kept spreading because of problems in gathering evidence, which impacted the amount of legally admissible evidence that could be introduced in attempts to punish organized crime members.[56] In addition, Congress found that the "sanctions and remedies available to the Government are unnecessarily limited in scope and impact."[57] Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes,"[58] a directive that has been called a "mandate."[59]

A key provision of RICO, 18 U.S.C. § 1962(c), states,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[60]

As defined by RICO, racketeering encompasses a wide range of state and federal offenses.[61] "RICO is a criminal and civil statute, with a criminal cause of action and criminal penalties as well as a civil cause of action and civil remedies."[62] These civil remedies include treble damages.[63] The Supreme Court in *United States v. Turkette*[64] accepted that the main purpose of RICO was "to cope with the infiltration of legitimate businesses" by organized crime.[65] However, some commentators argue that it was not limited to that purpose or intended solely for "organized crime in the classic mobster sense."[66] While the Supreme Court has noted that

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55. 84 Stat. at 923 (Statement of Findings and Purpose).

56. *Id.*

57. *Id.*

58. § 904(a), 84 Stat. at 947.

59. *See* Blakey & Cessar, *supra* note 53, at 532 (quoting United States v. Long, 651 F.2d 239, 241 (4th Cir. 1981)) (internal quotation marks omitted).

60. 18 U.S.C. § 1962(c) (2006); *see also* D'Angelo, *supra* note 15, at 2076 ("[Section 1962(c)] contains the Act's federal 'jurisdictional hook'—its statutory anchor to Article I congressional power.").

61. *See* 18 U.S.C. § 1961(1). "Racketeering activity" includes many crimes along a continuum between murder and wire and mail fraud. *Id.*

62. Ann B. Whitley, Note, *Collective Institutional Guilt: The Emergence of International Unions' RICO Liability for Local Union Crimes*, 21 AM. J. CRIM. L. 291, 293 (1994); *see also* 18 U.S.C. §§ 1963–1964.

63. *See* 18 U.S.C. § 1964(c). Notwithstanding this harsh civil penalty, the Racketeer Influenced and Corrupt Organizations Act (RICO) has been called fundamentally a criminal statute because "the racketeering activity giving rise to RICO liability must be criminal in nature." Whitley, *supra* note 63, at 293 (quoting Klein v. King, No. C-88-3141 FMS, 1990 WL 61950, at *21 (N.D. Cal. Mar. 26, 1990)) (internal quotation marks omitted).

64. 452 U.S. 576 (1981).

65. *Id.* at 591.

66. Blakey & Cessar, *supra* note 53, at 529 (quoting United States v. Grande, 620 F.2d 1026, 1030 (4th Cir. 1980)) (internal quotation marks omitted). Consider the opinion that Congress enacted RICO "as a general reform designed to sanction 'enterprise criminality'

"RICO is to be read broadly,"[67] RICO's uniquely broad scope has not been met with universal acclaim.[68]

Even after extensive congressional consideration and compromise, though, it has been said that "[t]he final version of RICO . . . does not manifest a limited scope."[69] And yet, Senator McClellan pointed out while introducing section 1961 that "RICO was not intended to accomplish the 'eradication' of organized crime by itself."[70] Additionally, at least one commentator notes that "nowhere in the legislative history is there even a glimmer of an indication that RICO or any of its predecessors was intended to impose additional criminal sanctions on racketeering acts that did not involve infiltration into legitimate business."[71]

Judge Gerard E. Lynch of the U.S. District Court for the Southern District of New York, in an exhaustive four-part series on RICO,[72] opines that while "careful commentators have concluded that Congress intended RICO as a specific response to the problem of criminal infiltration of legitimate enterprises, courts, including the Supreme Court of the United States, and at least one highly influential commentator have found in the legislative history much broader purposes."[73] Moreover, they "have used their findings to justify sweeping interpretations of the statute."[74]

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that is, patterns of racketeering activity committed by, through, or against an enterprise." *Id.* (quoting G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013–14 (1980)).

67. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985).

68. As one commentator notes, "a number of debatable uses of civil RICO exist." Whitley, *supra* note 63, at 294. At least one other commentator has questioned whether "the 'rule of lenity' might play a role in the interpretation of RICO's provisions." Timothy A. Ita, *RICO—Criminal Forfeiture of Proceeds of Racketeering Activity Under RICO:* Russello v. United States, *104 S. Ct. 296 (1983)*, 75 J. CRIM. L. & CRIMINOLOGY 893, 920 (1984).

69. Ita, *supra* note 68, at 918 (citing United States v. Culbert, 435 U.S. 371, 373 (1978)).

70. Lynch, *supra* note 33, at 680 (citing 115 CONG. REC. 9568 (1969)).

71. *Id.*

72. *See generally id.*; Lynch, *supra* note 19. Judge Gerard Lynch has been called a "thoughtful jurist" whose work is "brilliant." The Boyle Case & RICO Enterprises, *supra* note 18. However, his four-part treatment was criticized by at least one prominent scholar. *See* Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988). *But see* Gerard E. Lynch, *A Reply to Michael Goldsmith*, 88 COLUM. L. REV. 802 (1988).

Judge Lynch is not the only current judge from the U.S. District Court for the Southern District of New York to weigh in on RICO; Judge Jed S. Rakoff also opined on the controversial statute before he was appointed to the bench, writing in 1990 that RICO's pattern and enterprise elements were unconstitutionally vague. *See* Jed S. Rakoff, *The Unconstitutionality of RICO*, N.Y.L.J., Jan. 11, 1990, at 3. For other RICO scholarship by Judge Rakoff, *see* JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (1989).

73. Lynch, *supra* note 33, at 664 (footnotes omitted). Judge Lynch was referring to University of Notre Dame Law School Professor G. Robert Blakey, whose work is also cited in this Note, *see supra* note 53; *infra* note 371, and who, elsewhere, has been called "the father of RICO," *see infra* note 175. Professor Blakey's biography page notes that he is "the nation's foremost authority on the Racketeer Influenced and Corrupt Organization Act," and that his "extensive legislative drafting experience resulted in the passage of . . . the Organized Crime Control Act of 1970, Title IX of which is known as 'RICO.'" University of

Judge Lynch concludes that "the latter view, which has had considerable influence on the development of the law, is wrong, and the commentators who criticize it have presented their conclusions in rather summary form."[75] Judge Lynch's fastidious review of the evidence reveals that RICO's primary use has been as a frontal attack on any and all organized crime, not to prevent the mob from gaining access to legitimate organizations.[76] Judge Lynch notes that, in theory, the executive branch can use an overly broad statute to overpower or circumvent traditional, time-honored procedural, jurisdictional, and sentencing safeguards and regulations "essentially whenever it chooses, rais[ing] serious problems of legality and fair notice, and creat[ing] a strong potential for abuse."[77] However, Judge Lynch notes that in actuality no "pattern of abuse" regarding RICO had been found.[78]

There have been different reasons for the broadening of RICO,[79] but definitional problems are among the foremost issues.[80] For example, defining what was meant by an associated-in-fact enterprise was left unclear by the statute.[81]

Notre Dame Law School, G. Robert Blakey: Biography, http://law.nd.edu/people/faculty-and-administration/teaching-and-research-faculty/ g-robert-blakey (last visited Feb. 27, 2009). For more of his scholarship, see G. Robert Blakey & John Robert Blakey, *Civil and Criminal RICO: An Overview of the Statute and Its Operation*, 64 DEF. COUNS. J. 36, 36 (1997) (explaining that "RICO was drafted to deal with 'enterprise criminality,' that is, 'patterns' of violence, the provision of illegal goods and services, corruption in the labor or management relations, corruption in government, and criminal fraud by, through, or against various types of licit or illicit 'enterprises'" (quoting United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983))); *see also* G. Robert Blakey, *Foreword*, 65 NOTRE DAME L. REV. 873 (1990); G. Robert Blakey, *Foreword: Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701 (1990); G. Robert Blakey & Thomas A. 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 (1990).

Blakey was the attorney listed atop the amicus brief supporting the government in *Boyle v. United States*. *See* Brief of Amicus Curiae for National Ass'n of Shareholder & Consumer Attorneys (NASCAT) in Support of Respondent, Boyle v. United States, No. 07-1309 (U.S. Dec. 29, 2008), 2008 WL 5433357 [hereinafter NASCAT Brief for Respondent]. He argued that an association-in-fact enterprise "[d]oes [n]ot [r]equire [p]leading [o]r [p]roof [o]f [a]n [a]scertainable [s]tructure." *Id.* at 2 (internal quotation marks omitted). His argument was based on the reasoning that the statute does not compel a prosecutor or plaintiff to plead or prove as much, *id.* at 9, that RICO's legislative history does not suggest anything to that end, *id.* at 14, and that Edmund Boyle's arguments were in direct conflict with the holding of *United States v. Turkette*, *id.* at 16.

74. Lynch, *supra* note 33, at 664.

75. *Id.* (footnotes omitted).

76. Lynch, *supra* note 19, at 920. Judge Lynch argues that "under the rubric of RICO, federal prosecutors were given enormous discretion to prosecute cases that they felt were inadequately dealt with by existing law, because of jurisdictional or procedural barriers, or inadequate sanctions. In principle, this grant of discretion is highly objectionable." *Id.* at 978.

77. *Id.* at 978–79.

78. *Id.* at 979.

79. *See generally* Lynch, *supra* note 33, at 685–706.

80. *See generally id.* at 685–94.

81. *See infra* Parts I.B, II. Both the discussion in *Turkette* and the fact that *Boyle* is currently in front of the U.S. Supreme Court illustrate this proposition.

B. *The Enterprise Requirement*

Having just discussed the history of RICO itself, Part I.B deals specifically with one of its most critical elements: the enterprise. Existence of an enterprise is one of the key inquiries in any RICO action.[82] Pursuant to 18 U.S.C. § 1962, the investment in,[83] maintenance of an interest in,[84] or participation in the affairs of an enterprise[85] are distinct types of unlawful conduct under RICO, as is the conspiracy to do any of the aforementioned acts.[86] To state a claim under § 1962(c), for example, a plaintiff or the government must sufficiently allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[87] This particular part of the statute provides a good jumping-off point to further explain what an enterprise can be.

By definition, a RICO 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."[88] Our society, in its development of criminal law, has generally viewed group activity as more dangerous than individual wrongdoing, and structured, contemplated activity as more dangerous than ad hoc, haphazard action.[89] Similarly, because of the supposed danger of organization, the policy behind punishing RICO enterprises is basic even when a RICO offense is committed by one person.[90] Our legal system regards the fact that a RICO violator uses an organization over time to commit many crimes as a more serious action, and thus something that merits more punishment.[91] "The fact that there is an enterprise already in place that is separate and distinct from the predicate racketeering acts makes it much simpler to engage in additional and expanded types of criminal activity."[92] When people are conducting a pattern of racketeering activity through an enterprise, they are

82. Podgor, *supra* note 10, at 854.

83. *Id.* (citing 18 U.S.C. § 1962(a) (2006)).

84. *Id.* at 855 (citing 18 U.S.C. § 1962(b)).

85. *Id.* (citing 18 U.S.C. § 1962(c)).

86. *Id.* (citing 18 U.S.C. § 1962(d)).

87. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (citing 18 U.S.C. § 1962(c)).

88. 18 U.S.C. § 1961(4).

89. *See* United States v. Rabinowich, 238 U.S. 78, 88 (1915) ("For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws . . . . [a]nd it is characterized by secrecy, rendering it difficult of detection . . . ."); *see also* Krulewitch v. United States, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring) ("[T]he strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer." (citing 8 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 383 (1926); JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW 110 (1934))).

90. Susan R. Klein & Katherine P. Chiarello, *Successive Prosecutions and Compound Criminal Statutes: A Functional Test*, 77 TEX. L. REV. 333, 343 (1998).

91. *Id.*

92. *Id.* (citing United States v. Masters, 924 F.2d 1362, 1366–67 (7th Cir. 1991)).

committing this behavior through either a legal entity with a built-in structure or in a group that has decided to come together.[93]

The term "enterprise" has been called "a nicely vague and encompassing term that could cover just about anything, and was defined so that it did."[94] Its reach has extended to include police departments, prosecutors' offices, and even the office of the governor, among many other entities.[95] Even an entire state can serve as a RICO enterprise.[96] For legal entity enterprises, the structure of the § 1962(c) offense is straightforward: "the prohibited conduct is the commission of the predicate acts, with the relation of the crimes to an enterprise serving as an aggravating factual circumstance."[97] The fact that an enterprise exists—and that the given criminal conduct relates to it—is usually easy to determine and thus not contentious.[98]

Not only can a RICO enterprise be a legal entity, but it can also be a wholly illegal organization.[99] Establishing the existence of an enterprise is not as easy in cases involving illegal entities. As Judge Lynch articulates, "Where the enterprise is an illegitimate association-in-fact, however, the existence of the enterprise is not merely an easily established formal element of proof. Rather, the existence of the enterprise is both potentially controversial and genuinely significant in legally differentiating RICO offenses from mere aggregations of predicate crimes."[100] In these cases, the enterprise could be said to represent the heart of the crime.[101] If the statute is read literally, "the RICO statute is violated if 'a group of individuals associated in fact'—say, the James gang—runs its enterprise not by criminal means that distort its legitimate ends, but by the very crimes that are the object of the association in the first place."[102]

1. The *Turkette* Decision

In *Turkette*, the Supreme Court noted that the definition of § 1961(4), on its face, appeared "to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones."[103] This use of RICO against illegitimate enterprises "would become the most important, and the most radical, application of the criminal provisions of RICO."[104]

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93. *See* 18 U.S.C. § 1961(4).
94. Lynch, *supra* note 33, at 688 (citing 18 U.S.C. § 1961(4)).
95. Podgor, *supra* note 10, at 857–58.
96. *See* United States v. Warner, Nos. 02 CR 506-1, 02 CR 506-4, 2006 WL 2583722, at *4 (N.D. Ill. Sept. 07, 2006) ("The court reaffirms its previous conclusion that the State of Illinois may, as a matter of law, serve as a RICO enterprise . . . .").
97. Lynch, *supra* note 19, at 942.
98. *Id.*
99. United States v. Turkette, 452 U.S. 576, 580–81 (1981).
100. Lynch, *supra* note 19, at 942–43.
101. *Id.* at 943.
102. Lynch, *supra* note 33, at 694.
103. *Turkette*, 452 U.S. at 580–81.
104. Lynch, *supra* note 33, at 699–700.

In *Turkette*, Novia Turkette Jr. and cohorts were charged with, among other things, conspiracy to conduct and participate in the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering activities in violation of 18 U.S.C. § 1962(d).[105] Of the nine counts charged, the "common thread" was Turkette's alleged governance of the illicit organization through which he conducted and contributed in perpetrating the various crimes described in the RICO count or charged in the eight other counts.[106] Turkette's indictment described the alleged 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.[107]

The evidence at trial concentrated on both the professional nature of the organization and the commission of a number of discrete crimes.[108] Turkette was convicted on all nine counts and was sentenced to a term of twenty years on the substantive counts, a two-year special parole term on the drug count, and a twenty-year concurrent term on the RICO conspiracy count.[109]

On appeal, Turkette argued that RICO was solely intended "to protect legitimate business enterprises from infiltration by racketeers."[110] Turkette argued that "participation in an association which performs only illegal acts and which has not infiltrated [or] attempted to infiltrate a legitimate enterprise" was not made criminal by RICO.[111] The U.S. Court of Appeals for the First Circuit agreed with this argument,[112] but the Supreme Court reversed.[113] The Court explained,

> RICO is equally applicable to a criminal enterprise that has no legitimate dimension or has yet to acquire one. Accepting that the primary purpose of RICO is to cope with the infiltration of legitimate businesses, applying the statute in accordance with its terms, so as to reach criminal enterprises, would seek to deal with the problem at its very source.[114]

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105. *Turkette*, 452 U.S. at 578–79.
106. *Id.* at 579.
107. *Id.* (internal quotation marks omitted).
108. *Id.*
109. *Id.*
110. *Id.* at 579–80.
111. *Id.* at 580.
112. United States v. Turkette, 632 F.2d 896, 899 (1st Cir. 1980), *rev'd*, 452 U.S. 576 ("A careful reading of sections 1961(4) and 1962(c) convinces us that they cannot be used as tandem springboards to reach any individual or groups of individuals who engage in a pattern of exclusively criminal racketeering activity.").
113. *Turkette*, 452 U.S. at 580.
114. *Id.* at 591.

The Court thus "explicitly approved the expansion of RICO to noninfiltrations."[115] The *Turkette* holding could be defended on policy grounds, because operating a wholly illicit organization is not something that society considers "morally neutral," as opposed to running a corporation.[116] In fact, Judge Lynch notes that the operation of a criminal organization constitutes "a distinct species of social harm" and is not "merely an incidental fact about the context" in which a criminal act was committed.[117]

The Court further held that the existence of an "enterprise" may be proven "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[118] The Court explained that a "pattern of racketeering activity" does not constitute an "enterprise."[119] The *Turkette* opinion differentiated an "enterprise," which it defined as "an entity[,] . . . a group of persons associated together for a common purpose of engaging in a course of conduct," from a "pattern of racketeering activity," which it described as "a series of criminal acts as defined by the statute."[120]

Importantly, the *Turkette* Court allowed that "the proof used to establish these separate elements may in particular cases coalesce,"[121] but warned that "proof of one does not necessarily establish the other."[122] In other words, the Court held that it could find both an enterprise and pattern of racketeering from the same evidence in certain cases.

2. Post-*Turkette* Disagreement

Despite an extended treatment on RICO enterprises, however, *Turkette* did not settle the proof requirement for an associated-in-fact RICO enterprise.[123] More than a quarter century after *Turkette*, the law remains

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115. D'Angelo, *supra* note 15, at 2082.

116. Lynch, *supra* note 19, at 943.

117. *Id.* RICO, then, is somewhat divergent from a traditional model. As Judge Lynch writes,

> The distinctive nature of criminal punishment, we are told, is that it represents a societal response to and judgment upon particular moral actions, rather than to a person's character, status, or intentions. The RICO illicit association cases, in contrast, demand a more global judgment about a defendant's character and loyalties. To be found guilty, it is not enough that the defendant has committed specific criminal acts; those acts must be part of an ongoing commitment to the values of a criminal organization.

Id. at 945.

118. *Turkette*, 452 U.S. at 583.

119. *Id.* (internal quotation marks omitted).

120. *Id.* (citing 18 U.S.C. § 1961(1) (2006)).

121. *Id.*

122. *Id.*

123. *Compare* Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804–05 (7th Cir. 2008) (holding that an ascertainable structure is required to prove the enterprise element), *with* Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 464 (2007) (holding that no ascertainable structure is required to prove enterprise). Perhaps the confusion in the circuits is not surprising, as Judge Lynch "contends

unsettled over the Supreme Court's explanation of the meaning of an associated-in-fact enterprise.[124] Yet the Court in *Turkette* claimed there was "no ambiguity in the RICO provisions at issue."[125] The *Turkette* requirements "are easily met where the enterprise has a legal existence, such as a corporation or partnership."[126] But where the enterprise is associated in fact, "proof of the various elements becomes more difficult and proof that demonstrates continuity or organizational structure often overlaps with the proof relied on to show a pattern of racketeering activity."[127]

The circuit courts have conflicting views over whether the same evidence can be used to prove both an associated-in-fact enterprise and the pattern of predicate acts, a disagreement explored in Part II.[128] For now, suffice it to say that it has been noted that ascertainable structure "is hardly a universal characteristic of associations held to be RICO enterprises."[129]

Turkette's language has not been generally beneficial in controlling RICO's reach.[130] The argument that the enterprise element should be limited in different ways has been a difficult one for courts.[131] There are no exceptions to the statutory definition of enterprise.[132] Additionally, while

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that the Court contradicted its own standard established in *Turkette*. While criminal activity was [Novia] Turkette's livelihood, his 'enterprise' was loosely comprised of several individuals with whom he occasionally committed robberies, and a handful of others that he recruited exclusively for arson jobs." Neil Feldman, Feature, *Spiraling Out of Control: Ramifications of Reading RICO Broadly*, 65 DEF. COUNS. J. 116, 122 (1998) (citing Lynch, *supra* note 33, at 705). Since Turkette's group did not constitute an enterprise under RICO, Judge Lynch argues, "they should be accountable as individual criminals who engaged in two or more separate crimes." *Id.*

124. *See Alleged Deal Between Microsoft, Best Buy Is Associated-in-Fact "Enterprise" Under Rico*, 75 U.S.L.W. 1687 (2007) ("The Third, Fourth, Eighth, and Tenth Circuits have all said that an associated-in-fact enterprise must have an ascertainable organizational structure beyond whatever structure is required to engage in the pattern of illegal racketeering activity. The Seventh Circuit requires that there be some kind of ascertainable structure, but it does not require that it be a separate structure. The First, Second, Eleventh, and D.C. Circuits have all said that an ascertainable structure is not required for an associated-in-fact enterprise.").

125. *Turkette*, 452 U.S. at 587 n.10.

126. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 35.2 (2007) (citing United States v. Kirk, 844 F.2d 660, 664 (9th Cir. 1988); Bennett v. Berg, 685 F.2d 1053, 1061 n.9 (8th Cir. 1982), *aff'd in part, rev'd in part on reh'g en banc*, 710 F.2d 1361 (8th Cir. 1983)).

127. *Id.*

128. *See id.* However, it must be noted that the evidence satisfying the requirement of continuity of the organization may also be used to prove the necessary continuous pattern of underlying racketeering. *Id.* at 834–36; *see also infra* Part II.

129. Lynch, *supra* note 19, at 974. Judge Lynch, though, argues that the idea that an enterprise should have both a structure that is ascertainable and "'an existence . . . apart from the commission of the predicate acts' [is] not inconsistent with the existence of enterprises that pursue entirely illicit goals." *Id.* (quoting *Turkette*, 452 U.S. at 583). Rather, he sees *Turkette* as "largely endors[ing] this requirement" by holding "that the enterprise and pattern elements of RICO are indeed distinct (though potentially provable by the same evidence)." *Id.*

130. *Id.*

131. *See* Lynch, *supra* note 33, at 697.

132. *Id.* at 698.

RICO painstakingly spells out the forms that an enterprise might take, as opposed to "the objects that it might have," the reach of that list, the generality of the word "enterprise," and a lack of "any restriction whatever on the substance or purpose of the enterprise, all reinforce the conclusion that the statute covers the broadest possible range of activity."[133]

Moreover, while congressional debate prior to RICO's adoption primarily centered around organized crime's infiltration of "businesses," as Judge Lynch notes, such debate may indicate that infiltration of other sorts of enterprises—such as labor unions or even government agencies—was not beyond the scope of congressional consideration.[134] RICO's pithy definition of an enterprise is virtually no help where wholly illegitimate enterprises are at issue.[135] Finally, there is "no legislative history regarding illegitimate enterprises."[136]

3. Attempts to Limit the Enterprise Element

After explaining the enterprise element, *Turkette*'s holding, and the lack of clarity that flowed from it, it is worth examining attempts to limit the enterprise element. In 1994, one possible limitation of RICO enterprises was emphatically rejected. In *National Organization for Women v. Scheidler*,[137] the Seventh Circuit held that a RICO enterprise must have an economic goal separate and apart from the predicate acts.[138] However, this view was rejected by the Supreme Court, which reversed the Seventh Circuit.[139] Thus, the Court "authorized the expansion of RICO to noneconomic enterprises."[140]

In the original lawsuit,[141] women's rights organizations and health centers brought an action against antiabortion groups, their leaders, and other people to recover for violations of Sherman Anti-Trust Act and RICO.[142] The National Organization for Women (NOW) claimed that the defendants—antiabortion activists, antiabortion groups, and a medical testing laboratory—took part in a conspiracy to shut down all women's health centers providing abortions through a pattern of illegality, which included

> extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false

133. *Id.*
134. *Id.*
135. David Vitter, Comment, *The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View*, 62 TUL. L. REV. 1419, 1448 (1988).
136. *Id.*
137. 968 F.2d 612 (7th Cir. 1992).
138. *Id.* at 629.
139. Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 260–61 (1994).
140. D'Angelo, *supra* note 15, at 2085.
141. Nat'l Org. for Women v. Scheidler, 765 F. Supp. 937 (N.D. Ill. 1991).
142. *Id.* at 938.

> appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel, and medical laboratories.[143]

In reversing, the Supreme Court relied on the plain reading of the text, explaining, "Nowhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required."[144] Even where the Court admitted there was an inference that an economic motive was required for an "enterprise" under § 1962(a) and § 1962(b), the Court said, "[t]he term 'enterprise' in subsections (a) and (b) plays a different role . . . . By contrast, the 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity."[145] One commentator notes that any requirement of an economic goal separate from the commission of the underlying racketeering activity would in all likelihood have excluded most illicit associations from RICO's reach, which *Turkette* expressly forbids.[146]

In contrast to its decision in *Scheidler*, the Supreme Court did limit the scope of the enterprise element in the previous Term. In 1993, the Supreme Court narrowed the scope of § 1962(c) liability in *Reves v. Ernst & Young*.[147] The *Reves* Court found that Congress did not intend RICO to target parties with negligible involvement in racketeering and held that only those who are in "operation or management" of an enterprise "conduct or participate . . . in the conduct of such enterprise's affairs" for the purpose of § 1962(c).[148] When the Supreme Court announced this "operation or management" test, "it represented a significant breakthrough."[149] For the first time since RICO's adoption twenty-three years earlier, the Court instituted a "broad-stroke restriction on the application of" the statute.[150] Opinion about the *Reves* holding was divided, as some pundits thought it meant an end to the liability of nontraditional defendants such as "lawyers, accountants, and various other professionals sometimes pulled into RICO

143. *Scheidler*, 968 F.2d at 615.

144. *Scheidler*, 510 U.S. at 257; *see also* Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protestors and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1368 (1990) ("Congress removed the term 'business' from 'business enterprise' in defining enterprise in Senate Bill 1861 and in the final RICO bill." (citing 18 U.S.C. § 1961(4) (2006))).

145. *Scheidler*, 510 U.S. at 258–59.

146. Lynch, *supra* note 19, at 974.

147. 507 U.S. 170, 195 (1993).

148. Recent Case, United States v. Viola, *35 F.3d 37 (2d Cir. 1994);* United States v. Oreto, *37 F.3d 739 (1st Cir. 1994)*, 108 HARV. L. REV. 1405, 1405 (1995) (citing *Reves*, 507 U.S. 182–86; S. REP. NO. 101-269, at 2 (1990)).

149. Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the* Reves *"Operation or Management" Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1, 2 (2006).

150. *Id.* In 1989, the Supreme Court imposed an interpretive constraint on RICO's pattern element that a § 1962(c) violation requires that the predicate acts are related and continuous. *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989).

suits," while others felt that the repercussions would be minimal and were limited to the facts of that case.[151]

In *Reves*, people who purchased demand notes from a farmers' cooperative filed a class action suit against the cooperative's accountants for securities fraud.[152] The U.S. Court of Appeals for the Eighth Circuit held that the accounting company, Arthur Young, was not involved in the operation or management of the cooperative to the level necessary for any RICO violation.[153] The Supreme Court affirmed.[154]

The Court held that even a person without a formal position in the enterprise could be liable under RICO, but only if that person played "*some* part in directing the enterprise's affairs."[155] The Court examined the statutory language of § 1962(c), concluding that the word "conduct" required "an element of direction," while the word "participate" required "some part in that direction."[156] Thus, the Court found that "to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs."[157] The Court embraced the "operation or management" test because it articulated this requirement in an easy to apply rule.[158] According to the Court, § 1962's legislative history further buttressed the adoption of the "operation or management" test.[159] The Court concluded that RICO's "liberal construction" clause—stating that the "provisions of this title shall be liberally construed to effectuate its remedial purposes"[160]—did not foreclose the adoption of the "operation or management" test.[161] While "[t]he clause obviously [sought] to ensure that Congress'[s] intent [was] not frustrated by an overly narrow reading of the statute," it was not "an invitation to apply RICO to new purposes that Congress never intended."[162] The Court also concluded that Congress did not intend this statute to reach beyond those who acquired or operated an enterprise.[163] Finally, the Court found the "operation or management" test

151. Baumgartel, *supra* note 149, at 2.
152. Arthur Young & Co. v. Reves, 937 F.2d 1310, 1315–21 (8th Cir. 1991).
153. *Id.* at 1324.
154. Reves v. Ernst & Young, 507 U.S. 170, 186 (1993).
155. *Id.* at 179.
156. *Id.* at 178–79.
157. *Id.* at 179 (quoting 18 U.S.C.A. § 1962(c) (2006)).
158. *Id.*
159. *Id.*
160. *Id.* at 183 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970)) (internal quotation marks omitted); *see also supra* note 58 and accompanying text.
161. *Id.* at 183–84.
162. *Id.* at 183. The Court further stated, "Nor does the clause help us to determine what purposes Congress had in mind." *Id.* at 183–84. *But see* Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2145 (2008) ("Whatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO to reflect their—or our—views of good policy.").
163. *Reves*, 507 U.S. at 182; *cf. id.* at 184 n.8 ("Because the meaning of the statute is clear from its language and legislative history, we have no occasion to consider the application of the rule of lenity. We note, however, that the rule of lenity would also favor the narrower 'operation or management' test that we adopt.").

was not limited to upper management under § 1962(c) but could also reach "outsiders" without an official position in an enterprise if these "outsiders" were associated with the enterprise and participated in its operation or management.[164]

Justice David Souter took issue with the *Reves* majority's characterization of RICO as unambiguous.[165] In dissent, Souter stated, "What strikes the Court as clear, however, looks at the very least hazy to me, and I accordingly find the statute's 'liberal construction' provision not irrelevant, but dispositive."[166] Despite Souter's dissent, *Reves*, then,

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164. *Id.* at 184–85.

165. *Id.* at 186 (Souter, J., dissenting). Justice David Souter is not the only current Supreme Court Justice to express concerns over RICO vagueness. Justice Stephen Breyer, while on the U.S. Court of Appeals for the First Circuit, remarked about the need to limit "the potentially boundless scope of the word 'enterprise'" and "distinguish[] culpable, from non-culpable, associations." Ryan v. Clemente, 901 F.2d 177, 180 (1st Cir. 1990). Justice Breyer also recognized "serious consequences for any man or woman, state official or private person, who is publicly accused of 'racketeering,' even in a private complaint." *Id.* at 180–81.

Perhaps the strongest RICO criticism came in Justice Antonin Scalia's concurring opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 251 (1989), which was joined by former Chief Justice William Rehnquist, Justice Sandra Day O'Connor, and Justice Anthony Kennedy. Justice Scalia's frustration centered on the lower courts' varied interpretations of the "pattern of racketeering activity" element of RICO, which Justice Scalia called "enigmatic." *H.J. Inc.*, 492 U.S. at 251 (Scalia, J., concurring in the judgment). According to Justice Scalia, the Supreme Court offered "four clues" on how to interpret the phrase in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), a case the court had heard four years earlier in 1985. *H.J. Inc.*, 492 U.S. at 251. Justice Scalia lamented that instead of "develop[ing] a meaningful concept of 'pattern'" off of the *Sedima* holding, courts "promptly produced the widest and most persistent Circuit split on an issue of federal law in recent memory." *Id.* at 251; *see also Sedima*, 473 U.S. at 500 (Marshall, J., dissenting). Moreover, Justice Scalia was critical of the majority opinion in *H.J. Inc.*, at one point calling it a "murky discussion." *H.J. Inc.*, 492 U.S. at 254. He wrote,

> Today, four years and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach."
>
> . . . I doubt that the lower courts will find the Court's instructions much more helpful than telling them to look for a "pattern"—which is what the statute already says.

Id. at 251–52.

Scalia implied that defining or illuminating the exact requirement for a "pattern of racketeering activity" was not only beyond him, but also beyond the Supreme Court, implying that Congress should step in and amend the statute. *Id.* at 255. He wrote that the majority opinion increased RICO's vagueness instead of removing it, adding nothing to the prior guidance in *Sedima*, which itself "created a kaleidoscope of Circuit positions." *Id.* "That situation is bad enough with respect to any statute, but it is intolerable with respect to RICO." *Id.*

Scalia ended his scathing critique of both the opaque RICO and the Court's efforts to clarify it by noting, "That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when [a Due Process] challenge is presented." *Id.* at 256.

166. *Reves*, 507 U.S. at 187 (Souter, J., dissenting).

represented a powerful opinion in the battle to narrow RICO's scope, if a rare one.[167]

The defendants in *Scheidler* and *Reves* might not be considered the face of "organized crime" by the reasonable person, yet defendants who are organized crime members trying to infiltrate legitimate enterprises are—according to one study—the rarest of RICO defendants.[168] Given this failure of RICO to accomplish virtually anything toward its original goal of directly penalizing organized crime infiltration of legitimate business, reform has been advocated.[169] Judge Lynch argues that it is this

167. Alexander M. Parker, Note, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 838 (1996) ("[A]s with the pattern requirement, the judiciary has interpreted the enterprise language of RICO in its absolute broadest manner. Indeed, the most restrictive element of the enterprise requirement is the separation of enterprise from pattern. This serves to differentiate RICO from ordinary conspiracy, but in this form it does nothing to minimize the statute's recognized overbreadth as the drafters seem to have believed it would."). This broad interpretation extending RICO enterprises ultimately leads to far-flung applications: "RICO has expanded beyond career criminals who insidiously buy up legitimate companies to launder their ill-gotten gains to political activists who proclaim their message in the public square. To suggest that the same statute[] should be used to control activities on both ends of the spectrum is absurd." *Id.* at 848.

168. Lynch, *supra* note 33, at 726–27. In a survey of all reported criminal RICO cases decided in the courts of appeals from 1970–1985, only 17 of 236 RICO indictments (fewer than 8%) included in the study appear to have included counts charging violations of the sections of RICO that directly prohibit infiltration of legitimate enterprises by criminal elements, or conspiracies to violate them. *Id.* at 726. "RICO has been a nearly total failure as a weapon against the kind of activity that led Congress to enact it. The sections of RICO that directly prohibit infiltration of legitimate enterprises by criminal elements have been all but dead letters as prosecuting tools." *Id.* The study, though, did find that "over forty percent—the largest single category—of the 228 indictments containing counts charging violations of section 1962(c) that have generated appellate opinions have involved the operation of wholly criminal enterprises." *Id.* at 733. "Given the emphasis in the legislative history on infiltration of legitimate enterprises, and the early split in the courts of appeals concerning whether an 'enterprise' that had no purpose independent of the commission of the predicate acts of racketeering even could constitute a RICO enterprise," that finding was "impressive." *Id.*; *see also id.* at 735 tbl.1.

169. *Id.* at 763–64. Even when accepting the argument that RICO prosecutions of wholly illegal enterprises are effective and morally acceptable ways of combating organized crime, it does not "necessarily follow that RICO as currently written is the best, or even an acceptable, statutory device for allowing such prosecutions." Lynch, *supra* note 19, at 972. Judge Lynch argues that "it is likely that the same effects can be achieved by a statute that is more carefully drafted to attack the specific evil presented, without the all-encompassing scope of the present RICO statute." *Id.* Another commentator believes that had *Turkette* come out the other way, Congress almost certainly would have stepped in to rewrite RICO. Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 915 (2005). As Stephen Smith argues,

> The Court in *Turkette* could have sent the matter back to Congress by adhering to the originally intended infiltration approach. Had it done so, the Department of Justice would have certainly alerted Congress to the disadvantages of the infiltration approach. To the extent that the Court's opinion clearly articulated the danger that a RICO stripped of infiltration activity could be used simply as a penalty-enhancer for conspiratorial behavior far removed from organized crime, Congress would have been on notice of this serious problem. Not only would Congress's deliberations have been better informed as a result of a reasoned judicial refusal to reconceptualize RICO, but the chances for an effective legislative solution to the overbreadth problem would also have been maximized.

overreaching breadth of the definition of "enterprise" that is the main impediment to narrowing the scope of RICO to a prohibition of wholly illegal organizations.[170] And it has been strongly advocated by more than one commentator that there is a "danger presented by a statute that vests so much additional power (whether or not exercised responsibly) in prosecutors and sentencing judges to escalate the potential or actual sanctions for criminal conduct[, which] puts too much strain on fundamental principles of legality."[171]

C. *Vagueness Problems and Prosecutorial Discretion*

As explained in Part I.B, some courts and commentators believe the traditional RICO enterprise definition allows for too broad of a reach.

> Instead, the Court took the initiative of reconceptualizing RICO on its own and assumed the difficult task of creating limitations on the concepts of "enterprise" and "pattern" to do the work that the requirement of infiltration activity was designed to do. In doing so, the Court eliminated any realistic chance that Congress would limit RICO on its own.
>
> This outcome was particularly unfortunate. Though the Supreme Court has struggled, without much success, to limit RICO to acceptable bounds ever since *Turkette*, it would have been easy for a Congress apprised of the danger of disproportionate punishment to have done so by legislation. Now, by virtue of the approach the Court took in *Turkette*, there is little chance that Congress will ever address this important problem.

Id. at 917–18.

170. Lynch, *supra* note 19, at 973 ("The residual definition of enterprise as 'any . . . group of individuals associated in fact,' is excessively broad and amorphous to serve as the distinguishing feature of a new form of criminality—which is essentially the role played by the enterprise concept in the illicit association cases."). Judge Lynch later concludes, "Some requirement of structure, then, should be an essential part of the definition of enterprise under RICO . . . ." *Id.* at 974–75.

171. Lynch, *supra* note 33, at 763 (arguing for targeted congressional reform of the statute); *see also* Lynch, *supra* note 19, at 981–82 ("[T]he problem of definition remains. While I am not certain that a statute can be drafted that criminalizes membership in a criminal organization without the overbreadth and imprecision characterizing RICO, it seems worthwhile to make the attempt. . . . Realistically, however, it is probably too much to hope for serious discussion in Congress about such a radical overhaul of RICO. . . . The present political and social climate seems particularly ill-suited to the consideration of penal legislation that cannot be portrayed as increasing the 'toughness' of criminal laws. . . . Pending another effort to recodify the federal penal code completely, I fear my suggestions for change in federal RICO are, for want of a better word, academic."); *cf.* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1534 (2008) ("By and large, the Department of Justice has kept a tight rein on use of the statute so as to prevent such prosecutions from spurring Congress to revoke powers that the law gives prosecutors. Still, some prosecutions raise questions about whether RICO's breadth sweeps in cases that do not involve the kinds of threats to sanctioning regimes that justify the statute's existence. There is considerable distance between the sophisticated organized offender for whom the traditional tools of criminal law may be inadequate and the high-profile or otherwise tempting target who happens to commit two or more crimes."); Smith, *supra* note 169, at 915 ("Although faith in prosecutorial discretion has arguably been vindicated by extreme restraint in the use of criminal RICO, the course of action pursued in *Turkette* was, to say the least, dangerous. It created a serious risk of disproportionately severe punishment for ordinary conspiracies bearing little, if any, resemblance to organized crime. Though the risk did not fully materialize, there was no sound reason to take it in the first place.").

Thus, this section deals with two potential repercussions that follow from such an interpretation: (1) such overbreadth may make the statute unconstitutionally vague; and (2) in criminal cases, prosecutorial discretion is critical to prevent the trampling of the spirit, if not the letter, of the law.

The Supreme Court has held that an enactment is void for vagueness under the Due Process Clauses of the Fifth and Fourteenth Amendments "if its prohibitions are not clearly defined."[172] No vagueness challenge concerning RICO has ever reached the Supreme Court, but "a few Justices have hinted at its constitutional vagueness."[173] At least one commentator pointedly argues that RICO's language goes well beyond being too broad and might actually be unconstitutionally vague in some applications.[174] "Reasonable people, including experienced Supreme Court and Federal Justices, cannot ascertain its meaning. In addition, courts have widely differed as to its application. Even Professor [G. Robert] Blakey, the father of RICO, has admitted vagueness concerns. RICO is as vague as vague can be."[175] Another critic attacks the enterprise element as being defined so that it could encompass "everything or nothing,"[176] and wonders, "Is it not obvious that a 'virtually limitless definition' of an essential element of a criminal statute is, by definition, an unconstitutionally vague one?"[177]

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172. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). In *Grayned*, the Court wrote,

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108–09 (alterations in original) (footnotes omitted) (internal quotation marks omitted).

173. Carolyn J. Lockwood, Comment, *Regulating The Abortion Clinic Battleground: Will Free Speech Be the Ultimate Casualty?*, 21 OHIO N.U. L. REV. 995, 1051 (1995); *see also supra* note 165 and accompanying text. Consider the argument that four of the Justices from the *H.J. Inc.* concurrence had more than "hinted" at RICO's unconstitutionality and actually "invited such a challenge [and] strongly suggested that they would support it." Rakoff, *supra* note 72. Judge Rakoff notes that the Court rejected a vagueness challenge to Indiana's "little RICO" statute in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), but points out that the issue of the potential vagueness of any equivalent to the "pattern" and "enterprise" elements of RICO was not before the Court, and that Justices Kennedy, William Brennan, and Thurgood Marshall all dissented on the ground that the Indiana statute was unconstitutionally vague. *Id.*

174. Lockwood, *supra* note 173, at 1051.

175. *Id.*

176. Rakoff, *supra* note 72.

177. *Id.*

However, the argument that RICO is unconstitutionally vague has been summarily dismissed by courts because RICO is far different from the "imprecise loitering statutes that have been found unconstitutionally vague by various courts."[178] Even so, the question remains whether citizens can properly conduct their affairs vis-à-vis a system where prohibitions are painstakingly laid out but where unanticipated harsh penalties can be assessed.[179] Without clearly knowing the penalties that attach to a given offense, a person planning his activities does not have "full notice of what behavior society truly expects" from him—and what conduct it expects him to avoid.[180]

Moreover, the principle of legality "also demands that officials be given reasonably clear instructions concerning how violators should be treated."[181] As one commentator points out, "the more important aspect of the vagueness doctrine, according to the Supreme Court, is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement."[182] This aspect has been considered of primary importance because "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[183]

Whether or not RICO is unconstitutionally vague, the wide berth accorded to RICO's statutory language in both civil actions and criminal penalties leads to comparatively harsh consequences for wrongdoers—a twenty-year prison term, and forfeiture of a business owner's business, for example, for one violation of 18 U.S.C. § 1962.[184] Consider, also, the conclusion that "[c]ivil RICO's treble damages were meant not to reform or regulate racketeers but to ruin them." [185]

On the criminal side of RICO, the potentially thorny issue of federal-state balance arises. Federalism concerns are particularly pronounced under RICO because the nature of federal law enforcement effectively gives individual prosecutors the ability to determine whether ordinarily state crimes will be federalized.[186]

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178. Lynch, *supra* note 33, at 717 ("RICO does not require citizens to guess at their peril what kinds of conduct they must avoid to conduct their affairs in accordance with law.").

179. *Id.*

180. *Id.* at 717–18.

181. *Id.* at 718.

182. Rakoff, *supra* note 72 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)) (internal quotation marks omitted).

183. *Id.* (quoting *Kolender*, 461 U.S. at 358) (internal quotation marks omitted).

184. 18 U.S.C. § 1963 (2006).

185. Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441, 481 (1988).

186. Brief for Center on the Administration of Criminal Law as Amicus Curiae in Support of Petitioner at 24, Boyle v. United States, No. 07-1309 (U.S. Nov. 28, 2008), 2008 WL 5079032 ("Expanding the scope of federal criminal jurisdiction necessarily expands the scope of prosecutorial discretion and therefore pushes decision-making about the 'sensitive' 'federal-state balance' in criminal enforcement farther from politically accountable actors.

Acknowledging this reality, the U.S. Attorney's Office decided long ago to implement guidelines for limiting criminal prosecutions utilizing RICO.[187] Balancing what it calls "society's interest in effective law enforcement against the consequences for the accused," the *United States Attorneys' Manual* states that utilization of RICO, "more so than most other federal criminal sanctions, requires particularly careful and reasoned application."[188] While acknowledging the broad statutory language of RICO and the legislative intent that the statute "shall be liberally construed to effectuate its remedial purpose,"[189] the U.S. Attorney's Office nevertheless decided that "it is the policy of the Criminal Division that RICO be selectively and uniformly used."[190]

Spelling out its mandate for narrow RICO prosecutions, the *United States Attorneys' Manual* stressed that "not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve 'imaginative' prosecutions under RICO which are far afield from the congressional purpose of the RICO statute."[191] And when RICO is sought merely to serve some evidentiary purpose, approval from the Criminal Division will be granted "[o]nly in exceptional circumstances."[192] Thus, the *United States*

Individual federal prosecutors have wide, almost unchecked discretion to make RICO charging decisions.").

187. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.200 (1984) [hereinafter U.S. ATTORNEYS' MANUAL], *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm#9-110.200.

188. *Id.*

189. *Id.*; *see also* Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970).

190. U.S. ATTORNEYS' MANUAL, *supra* note 187, § 9-110.200. In a 5-4 dissenting opinion in *Sedima, S.P.R.L. v. Imrex Co.*, Justice Marshall noted that the only restraining influence on "the inexorable expansion of the mail and wire fraud statutes [in RICO] has been the prudent use of prosecutorial discretion." 473 U.S. 479, 502 (1985) (citation omitted) (internal quotation marks omitted). Justice Marshall noted that there is no such official discretion with respect to civil RICO suits, as, of course, "the restraining influence of prosecutors is completely absent." *Id.* at 504.

191. U.S. ATTORNEYS' MANUAL, *supra* note 187, § 9-110.200.

192. *Id.* For an apparent example of these exceptional circumstances—where the former mayor of Providence, R.I., was convicted under RICO—see Mike Stanton, *Cianci Fails in Final Bid to Overturn His Conviction*, PROVIDENCE J., Oct. 12, 2005, *available at* http://www.projo.com/news/content/projo_20051012_cianci12.131d53aa.html.

The thoughts of U.S. Attorney Robert Clark Corrente about that case are particularly noteworthy:

> It's important for the public psyche to continue to be aggressive in pursuing these kinds of cases . . . . The hidden cost of this type of corruption is the lack of confidence in our elected officials, and the cloud of suspicion that is unfair to 99 percent of them. Then there's the whole cost in terms of businesses that won't locate here because of the perception of corruption, real or imagined.
>
> It's fallen to this office over the years to prosecute public corruption . . . . You'd like to think that after a while you wouldn't need to, that the message would have gotten out there. But to the extent that the message was not out there, the Cianci case shows that we will track down this sort of stuff, even if it takes five years to prosecute and three years for the appeals process.

Id.

Attorneys' Manual presented a view that the congressional purpose was not nearly as broad as some of RICO's foremost champions have believed.

Still, some are concerned that the power in the prosecutors' hands is directly proportional to the vagueness of RICO language—particularly with the enterprise element.[193] Where the enterprise element completely collapses into the pattern of racketeering, the repercussions are that "a prosecutor's decision to charge two loosely related individuals under RICO based solely on predicate acts criminalized by state law is judicially unreviewable. The decision to alter the lines between federal and state criminal enforcement should not be made by federal prosecutors on a case-by-case basis."[194] Perhaps given the unique history of RICO, the disagreement over who it was intended to ensnare, and the particular misgivings of its harshest critics, it is no wonder a circuit split has developed regarding the enterprise element.

II. THE BATTLE OVER THE "ASSOCIATED-IN-FACT" ENTERPRISE REQUIREMENT

Having discussed the history of RICO and RICO enterprises in Part I, Part II of this Note now dissects and analyzes the three-way circuit split over the RICO associated-in-fact enterprise requirement. Part II.A details the arguments supporting a broad reading of the RICO statute, which at least four circuits argue does not require proof of an ascertainable structure. Part II.B details the arguments supporting a narrow reading of the statute, which does require an ascertainable structure separate and distinct from the pattern of racketeering activity. Part II.C details the Seventh Circuit's middle-ground approach, which requires an ascertainable structure as proof for the enterprise element, but does not require the enterprise to have goals or purposes separate and distinct from the pattern of racketeering activity.

The facts and positions of *Boyle* are detailed in Part II.D. The Supreme Court has finally decided to resolve this circuit split, recently granting certiorari in *Boyle*.[195] The question presented is whether an associated-in-fact enterprise needs an ascertainable structure apart from the pattern of racketeering it engages in. This highly anticipated decision has broad implications on future prosecutions and civil liability under RICO.[196] A case like Edmund Boyle's provides a clear example of the implications: the narrowest reading of the enterprise element would raise the proof threshold to only those associations with a distinct ascertainable structure, while the broadest reading opens the door for RICO prosecutions of groups with a less rigid connection.

193. Brief for Center on the Administration of Criminal Law as Amicus Curiae in Support of Petitioner, *supra* note 186, at 23–25.

194. *Id.* at 25.

195. United States v. Boyle, 283 F. App'x 825 (2d Cir. 2007), *cert. granted*, 129 S. Ct. 29 (2008).

196. *See* The Boyle Case & RICO Enterprises, *supra* note 18 ("[*Boyle*] will hopefully resolve one of the nagging issues that pervades this area of the law.").

A. *No Ascertainable Structure (the Minority View)*

Heeding Congress's direction that RICO "shall be liberally construed to effectuate its remedial purposes,"[197] a minority of circuits have adopted a proof requirement that an "associated-in-fact" enterprise needs no ascertainable structure that is separate and distinct from the pattern of racketeering. Recall that in *Turkette*, the Supreme Court held that an enterprise is "an entity separate and apart from the pattern of activity in which it engages."[198] The Court further held that an associated-in-fact enterprise could be a wholly illegitimate organization.[199] The key definition that has flummoxed the circuit courts is *Turkette*'s holding that the enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[200] The enterprise must have a "common purpose."[201] Whether this was the totality of the proof needed—or whether implicit within that statement was evidence of an ascertainable structure—has been the subject of an intractable circuit split for more than a quarter of a century.

As the Ninth Circuit, sitting en banc, noted in *Odom*, "[t]he [Supreme] Court's explanation of the meaning of an associated-in-fact enterprise in *Turkette* has not been clearly understood in the lower courts, including our own."[202] It surveyed the other circuits, as well as its own, before concluding that no ascertainable structure is needed.[203]

The requirement of an ascertainable structure that is separate from the pattern of racketeering activity has been attacked as intellectually dishonest[204] and an "arbitrary tool."[205] Moreover, it has been attacked by lower courts as contrary to the holding of *Turkette*.[206]

1. First Circuit

In *United States v. Patrick*,[207] the First Circuit held that because Congress intended the term "enterprise" to include both legal and criminal

197. Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970).
198. United States v. Turkette, 452 U.S. 576, 583 (1981).
199. *Id.* at 591.
200. *Id.* at 583.
201. *Id.*
202. Odom v. Microsoft Corp., 486 F.3d 541, 549 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 464 (2007).
203. *Id.* at 550–51.
204. Jeffrey E. Grell, Odom v. Microsoft Corp.: *The Ninth Circuit Abandons the Enterprise/Racketeering Activity Distinction*, RICOACT.COM, Aug. 2007, at 5, http://www.ricoact.com/_pdf/ODOM.pdf. Jeffrey Grell is a 1990 magna cum laude graduate of Georgetown University Law Center and a former adjunct professor at the University of Minnesota. *See* RICOAct.com, Biography: Jeffrey Ernest Grell, Biography, http://www.ricoact.com/ about/bio.asp (last visited Feb. 289, 2009).
205. Grell, *supra* note 204, at 2.
206. *Odom*, 486 F.3d at 551.
207. 248 F.3d 11 (1st Cir. 2001).

enterprises, and because "the latter may not observe the niceties of legitimate organizational structures," it could not "import an 'ascertainable structure' requirement into jury instructions."[208]

2. Eleventh Circuit

In *United States v. Cagnina*,[209] the U.S. Court of Appeals for the Eleventh Circuit noted that the Supreme Court decided in *Turkette* that the organization of an associated-in-fact enterprise may be formal or informal, and thus there was no suggestion that it must have "a distinct, formalized structure."[210]

3. Second Circuit

In perhaps the strongest rejection of a separate and distinct ascertainable-structure requirement, the Second Circuit in *United States v. Bagaric*[211] determined that "it is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure."[212] The court recognized that the pattern of a group's misconduct often provides the best evidence toward defining the enterprise.[213] "We have upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts."[214]

4. Ninth Circuit

In *Odom*, the Ninth Circuit abandoned its ascertainable-structure requirement based on the language of *Turkette*, saying that to hold otherwise "would be to require precisely what the Court in *Turkette* held that RICO does *not* require. Such a requirement would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities."[215]

In *Odom*, the plaintiff, James Odom, filed a putative class action suit under 18 U.S.C. §§ 1962(c) and (d) that was dismissed for failure to state a

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208. *Id.* at 19.

209. 697 F.2d 915 (11th Cir. 1983).

210. *Id.* at 921.

211. 706 F.2d 42 (2d Cir. 1983), *abrogated on other grounds by* Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 259–60 (1994).

212. *Id.* at 56.

213. *Id.* at 55.

214. *Id.* (citing United States v. Mazzei, 700 F.2d 85, 88–89 (2d Cir. 1983); United States v. Errico, 635 F.2d 152, 156 (2d Cir. 1980); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (per curiam)); *see also* United States v. Ferguson, 758 F.2d 843, 853 (2d Cir. 1985) ("RICO charges may be proven even when the enterprise and predicate acts are 'functionally equivalent . . . .'" (quoting *Bagaric*, 706 F.2d at 57)). *But see* United States v. Mejia, 545 F.3d 179, 203 (2d Cir. 2008) (pointing out that the charged enterprise, the MS-13 national gang, had "leadership structure" that was "separate from the series of criminal acts").

215. Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 464 (2007).

claim.[216] The U.S. District Court for the Western District of Washington held that Odom failed to allege an "associated-in-fact" enterprise, which at the time in the Ninth Circuit required an ascertainable structure.[217]

Odom alleged that the defendants entered into an agreement in April 2000, when "Microsoft invested $200 million in Best Buy and agreed to promote Best Buy's online store" through its MSN Internet access service.[218] For its part, "Best Buy agreed to promote MSN service and other Microsoft products in its stores and advertising."[219] Odom claimed that pursuant to this agreement, Best Buy employees distributed different Microsoft "Trial CDs," and a customer who purchased a computer would receive a Trial CD providing a free six-month subscription to MSN.[220] He asserted that if the customer was paying by debit or credit card, the Best Buy employee would scan the Trial CD and would claim it was for "inventory control or otherwise misrepresent[] the purpose of the scanning" if asked why.[221] Odom alleged that this scanning sent information to Microsoft, who would then open an MSN account in the customer's name unbeknownst to the customer.[222] If the free trial period ended before the customer cancelled the account, Microsoft would start charging the debit or credit card number.[223] According to Odom, these companies were involved in an associated-in-fact enterprise because of this scheme.[224]

The Ninth Circuit, sitting en banc, reversed and remanded.[225] Noting that the Supreme Court held in *Turkette* that a purely criminal enterprise could be an associated-in-fact enterprise within the meaning of RICO, the Ninth Circuit rejected any further requirement that there be an "ascertainable structure."[226] Instead, *Odom* tracked the language of *Turkette* and held that a plaintiff, or, if a criminal proceeding, the government, need only meet the three-part test of proving that the associated-in-fact enterprise was (1) associated together for a "common purpose" of engaging in a course of conduct;[227] (2) an "ongoing organization, either formal or informal";[228] and (3) comprised of various associates functioning "as a continuing unit."[229] At the beginning of its analysis, the majority noted, "We take from these cases the general instruction that we should not read the statutory terms of RICO

216. *See* Odom v. Microsoft Corp., No. C03-2976P, 2004 WL 5407314, at *2–6 (W.D. Wash. Mar. 16, 2004).
217. *Id.* at *4.
218. *Odom*, 486 F.3d at 543 (internal quotation marks omitted).
219. *Id.* (internal quotation marks omitted).
220. *Id.*
221. *Id.* (internal quotation marks omitted).
222. *Id.*
223. *Id.*
224. *Id.* at 544.
225. *Id.* at 555.
226. *Id.* at 551–52.
227. *Id.* at 552 (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)).
228. *Id.* (quoting *Turkette*, 452 U.S. at 583) (internal quotation marks omitted).
229. *Id.* (quoting *Turkette*, 452 U.S. at 583).

narrowly."[230] The majority cited *Sedima, S.P.R.L. v. Imrex Co.*, which stated that "RICO is to be read broadly."[231] "As Congress admonished and as the Court repeated in *Sedima*, RICO should 'be liberally construed to effectuate its remedial purposes.'"[232]

Two concurrences were written.[233] Judge Barry Silverman, joined by four other judges, concurred only in the result, construing the complaint to allege nothing more than a contract and its performance:[234] "[T]he Complaint assumes that if two parties perform a series of 'predicate acts' for each other's benefit pursuant to a commercial agreement, they *ipso facto* constitute an 'enterprise.' I cannot agree. RICO targets a more sophisticated crowd . . . [as distinguished from] a run-of-the-mill conspiracy."[235] Judge Silverman argued that the majority's interpretation "would make a RICO enterprise out of any commercial agreement between two companies that involved performing two or more RICO predicate acts."[236] Judge Jay Bybee, joined by Judge Stephen Reinhardt, wrote a one-paragraph concurrence that argued that it was "outlandish" that a marketing contract could subject the two businesses to a private RICO

230. *Id.* at 547.

231. *Id.* (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985)).

232. *Id.* (quoting *Sedima*, 473 U.S. at 498). One commentator described *Odom v. Microsoft Corp.* as "well-reasoned," concluding that *Odom* requirements are sufficient to prevent plaintiffs from engaging in "circular reasoning" that an associated-in-fact enterprise exists wherever and whenever people engage in racketeering. *See* Grell, *supra* note 204, at 6. Under the *Turkette* criteria, proving a common purpose will not automatically prove an ongoing organizational structure or the functioning of a continuing unit. *Id.* That commentator notes, "[T]he enterprise/racketeering activity distinction [is] an arbitrary tool used by the courts to dismiss RICO claims that comply with the technicalities of the RICO Act but do not describe 'racketeering' in the traditional, Mafia-based scenario." *Id.* at 2.

Another commentator, applauding the *Odom* decision, agreed with the majority opinion in *Sedima* that RICO should be revised, if at all, by Congress. *See* Recent Case, Odom v. Microsoft Corp., *486 F.3d 541 (9th Cir. 2007) (en banc)*, cert. denied, *128 S. Ct. 464 (2007)*, 121 HARV. L. REV. 1652, 1659 (2008) [hereinafter Recent Case, *Odom*]. *Sedima* dealt with the pattern of racketeering element of RICO. Over a vigorous twenty-four-page dissent by Justice Marshall, the majority allowed the broader interpretation and asserted that the fact that RICO is being applied in situations not contemplated by Congress represents breadth, not ambiguity. *Sedima*, 473 U.S. at 499. This commentator, however, opines that there was no need to drudge up congressional purpose to interpret RICO, since the statute's broad language was enough to do the heavy lifting in this case. Recent Case, *Odom*, *supra*, at 1655–56. The commentator warned that "Supreme Court RICO precedent indicates that this rule of broad construction is unnecessary where the statute is relatively clear. Moreover, where RICO is unclear, the Court has sometimes adopted the *narrower* available construction based on the background common law." *Id.* at 1656. Limitations on RICO outside the actual text of the statute have been applied by the Court, although that course of action was rejected in *Turkette*. *Id.* at 1658; *see, e.g.*, Reves v. Ernst & Young, 507 U.S. 170, 195 (1993); *see also supra* notes 147–67 and accompanying text.

233. *Odom*, 486 F.3d at 555 (Silverman, J., concurring in the judgment); *id.* at 556 (Bybee, J., concurring).

234. *Id.* at 556 (Silverman, J., concurring in the judgment).

235. *Id.* at 555.

236. *See* Recent Case, *Odom*, *supra* note 232, at 1655.

action, but added that the Supreme Court long ago dismissed his concerns.[237]

B. *Separate and Distinct Ascertainable Structure (the Majority View)*

The majority of the circuits have adopted a proof requirement that the ascertainable structure in an "associated-in-fact" enterprise must be separate and distinct from the pattern of racketeering to guard against the dangers of an overly broad interpretation.[238] Where a RICO offense is committed, even by one person, the fact that the person is using an organization over time to commit multiple crimes makes the person worthy of additional punishment:[239] the enterprise, distinct from the actual predicate acts, facilitates expanded types of criminal activity.[240] The difference between a drug kingpin and a garden-variety drug dealer has been cited to illustrate this proposition.[241] What distinguishes the kingpin "is her use of an existing enterprise to enable her to commit many more drug predicates and to allow her to reach additional geographical areas and types of controlled substances."[242] This unique vehicle is considered more injurious to society and more reprehensible than a simple conspiracy plus the commission of predicate crimes, so this operation of an enterprise warrants a harsher punishment.[243]

If "enterprise" is broadly defined, then virtually any dishonest participation in such an "enterprise" would be a RICO violation.[244] One

237. *Odom*, 486 F.3d at 556 (Bybee, J., concurring).

238. *See* Brief for the Petitioner at 6, Boyle v. United States, No. 07-1309 (U.S. Nov. 21, 2008), 2008 WL 5026647 (collecting cases in the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits). Both parties seem to argue that the U.S. Court of Appeals for the District of Columbia Circuit conforms to their view. *Compare* Brief for the United States in Opposition, *supra* note 3, at 7–8 (citing United States v. Perholtz, 842 F.2d 343, 364 (D.C. Cir. 1988) (approving jury instruction and stating "[i]t is not necessary that the enterprise, if it existed, have any particular or formal structure" (citation omitted) (internal quotation marks omitted))), *with* Brief for the Petitioner, *supra*, at 7 (quoting United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (noting that "some structure" is necessary to differentiate enterprise from "mere conspiracy" (citation omitted) (internal quotation marks omitted))). Additionally, an amicus curiae brief for respondent opined that the U.S. Court of Appeals for the Sixth Circuit is in the middle position of this three-way circuit split along with the U.S. Court of Appeals for the Seventh Circuit, which requires an ascertainable structure that need not be separate from the pattern of racketeering activity. *See* NASCAT Brief for Respondent, *supra* note 73, at 21 n.15 (citing United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000)); *see also infra* note 278.

239. Klein & Chiarello, *supra* note 90, at 343.

240. *Id.*

241. *Id.*

242. *Id.* at 343–44.

243. *Id.* at 344.

244. Steven B. Duke, Commentary, *Legality in the Second Circuit*, 49 BROOK. L. REV. 911, 923–24 (1983) (expressing concern about *United States v. Angelilli*, 660 F.2d 23 (2d Cir. 1981) and its progeny). The court held in *Angelilli* that the New York City Civil Court (or similar governmental units) could be enterprises within the meaning of RICO. *Angelilli*, 660 F.2d at 30–31. The court added, "On its face, the definition of 'enterprise' is quite broad." *Id.* at 31; *see also* Smith, *supra* note 169, at 912 ("The effect of *Turkette* is that crooks who get together to commit two or more crimes can potentially be convicted under

commentator fretted that if lawyers for parties in litigation wrote two dishonest briefs—or a court wrote two dishonest opinions—within a ten-year span, RICO was arguably violated.[245]

1. Eighth Circuit

In *Asa-Brandt, Inc. v. ADM Investor Services., Inc.*,[246] the Eighth Circuit reaffirmed its longtime position that proof of an enterprise required a showing that "the enterprise must have a common or shared purpose, some continuity of personnel, and an ascertainable structure distinct" from the predicate crimes.[247] The Eighth Circuit has required this showing for over twenty years, beginning with *United States v. Bledsoe*[248] the year after *Turkette* was decided.

Bledsoe was a criminal case concerning securities fraud wherein twenty-two individuals were originally indicted under RICO.[249] The Eighth Circuit rejected the government's contention that "any association of individuals can be an enterprise"[250] because, under this argument, "any confederation, no matter how loose or temporary, of two or more individuals committing two or more sporadic crimes which are predicate crimes under RICO provides a basis for prosecution under the Act."[251] Disagreeing with other courts that accepted a loose construction of RICO, the *Bledsoe* court looked to RICO's history, the statute's language, and the surrounding context to determine that a broad construction was unwarranted.[252]

The *Bledsoe* court found that although the main reason for enacting 18 U.S.C. § 1962(c) "was to prevent organized crime from infiltrating businesses and other legitimate economic entities," Congress did not draft the statute simply to apply it that way.[253] Citing *Turkette*, the *Bledsoe* court wrote that RICO was not intended to reach any and all criminals who merely associate together and perpetrate two of the specified crimes, but rather was aimed at "organized crime."[254] Establishing that, the *Bledsoe* court recognized that RICO "was not intended to require direct proof that

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RICO. That result, though just applied to highly structured entities like organized crime, creates the danger that garden-variety conspiracies (such as a stick-up man and getaway-car driver who rob a couple of banks) can be prosecuted as RICO violations.").

245. Duke, *supra* note 244, at 924.

246. 344 F.3d 738 (8th Cir. 2003).

247. *Id.* at 752 (citing Handeen v. Lemaire, 112 F.3d 1339, 1351 (8th Cir. 1997)).

248. 674 F.2d 647 (8th Cir. 1982).

249. *See id.* at 651.

250. *Id.* at 661–62.

251. *Id.* at 662. For proof of this proposition in action, the court in *United States v. Bledsoe* cited *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), a case where two defendants were convicted under RICO after the commission of three home burglaries, *id.*

252. *Bledsoe*, 674 F.2d at 662. "[RICO] was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes." *Id.* at 659.

253. *Id.* at 662.

254. *Id.* (citing United States v. Turkette, 452 U.S. 576 (1981)) (internal quotation marks omitted).

individuals are engaged in something as ill defined as 'organized crime.' . . . The statute is an attack on organized crime, but it utilizes a per se approach."[255] Analyzing the word "enterprise," the majority noted that it normally stands for "an undertaking or project or a unit of organization established" for those purposes.[256] In the case of RICO, though, the court found that "an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts."[257] Any two crimes will always be accomplished through some type of coordination, and every time people jointly break the law, there is always some degree of relationship beyond the commission of the crime itself, the *Bledsoe* court noted.[258] For this reason, "unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, the Act simply punishes the commission of two of the specified crimes within a 10-year period."[259] That was not Congress's intent, the court concluded.[260]

To ward off this "danger of guilt by association"[261] and to make sure that enterprise did not require merely a conspiracy, the Eighth Circuit required an "ascertainable structure" distinct from that inherent in a pattern of racketeering activity.[262] This could be demonstrated by proof that a group has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes or that it engaged in a diverse pattern of crimes.[263] A distinct ascertainable structure, according to the *Bledsoe* court, could be found in a Mafia family or a prostitution ring.[264] The majority found that no enterprise was proven.[265] However, Judge Donald Ross' dissent—based mainly on the *Turkette* language and with Congress's direction to construe RICO liberally to effectuate its remedial purposes—concluded that there existed an enterprise.[266]

2. Third Circuit

The U.S. Court of Appeals for the Third Circuit determined two years after *Turkette* that an ascertainable structure separate from the pattern of racketeering was required to prove an "associated-in-fact" enterprise in its

255. *Id.* at 663 (citing United States v. Campanale, 518 F.2d 352, 363–64 (9th Cir. 1975); United States v. Chovanec, 467 F. Supp. 41, 44–45 (S.D.N.Y. 1979)).
256. *Id.* at 664.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 665.
263. *Id.*
264. *Id.*
265. *Id.* at 667.
266. *Id.* at 671–72 (Ross, J., dissenting).

1983 decision, *United States v. Riccobene*.[267] Deeming it unnecessary to show that the enterprise has some function wholly unrelated to the racketeering activity, the *Riccobene* court merely required proof that the enterprise had an existence beyond that required merely to commit each act charged as predicate racketeering offenses.[268] The court further explained that "[t]he function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis" could satisfy RICO's separate existence requirement.[269]

3. Tenth Circuit

In 1991, the U.S. Court of Appeals for the Tenth Circuit adopted the *Riccobene* standard in *United States v. Sanders*.[270] The defendant in *Sanders* was brought to trial on thirty-two counts—including RICO violations, heroin possession, and money laundering, among other crimes.[271] The *Sanders* court, citing *Turkette*, first determined that while the pattern of racketeering activity and the enterprise were separate elements of a RICO violation, "the government need not necessarily adduce different proof for each element."[272] The *Sanders* court, citing *Riccobene*, found that the requirement that the enterprise be separate and distinct from the pattern of racketeering activity could be met "if the evidence shows the organization coordinated the commission of different predicate offenses on an ongoing basis."[273] The Tenth Circuit affirmed the RICO convictions.[274]

4. Fourth Circuit

The U.S. Court of Appeals for the Fourth Circuit also requires an ascertainable structure separate and apart from the pattern of racketeering activity, as articulated in *United States v. Tillett*.[275] There, the court, citing *Riccobene*, found the proof was sufficient to convict marijuana smugglers because their "organization had an existence beyond that which was necessary to commit the predicate crimes."[276]

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267. 709 F.2d 214, 223–24 (3d Cir. 1983), *abrogated on other grounds by* Griffin v. United States, 502 U.S. 46 (1991).
268. *Id.*
269. *Id.* at 224.
270. 928 F.2d 940, 943 (10th Cir. 1991).
271. *Id.* at 942.
272. *Id.* at 943 (citing United States v. Turkette, 452 U.S. 576, 583 (1981)).
273. *Id.* at 944 (citing *Riccobene*, 709 F.2d at 224).
274. *Id.*
275. 763 F.2d 628, 632 (4th Cir. 1985).
276. *Id.* (citing *Riccobene*, 709 F.2d at 223–24; United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982)).

C. *Ascertainable Structure Without Separate or Distinct Goals or Purposes (the Seventh Circuit)*

The Seventh Circuit is in agreement that every RICO enterprise must have some ascertainable structure, but as Judge Richard Posner wrote in *Limestone*, "We grant that the view . . . is not inevitable."[277] The Seventh Circuit has been described as the middle ground in this circuit split, requiring "that there be 'some' kind of ascertainable structure, but . . . not . . . that it be a separate structure."[278]

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277. Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804 (7th Cir. 2008).

278. Odom v. Microsoft Corp., 486 F.3d 541, 550 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 464 (2007); Petition for a Writ of Certiorari, *supra* note 1, at 12. The U.S. Court of Appeals for the Ninth Circuit in *Odom* may have overstated the case, however. One of the Seventh Circuit cases it cited, *Richmond v. Nationwide Cassel L.P.*, explicitly stated that there "must be 'a structure and goals separate from the predicate acts themselves.'" 52 F.3d 640, 645 (7th Cir. 1995) (citing United States v. Korando, 29 F.3d 1114, 1117 (7th Cir. 1994)). The other, *United States v. Rogers*, made it clear that the enterprise and pattern elements must be proven "separate and apart" from each other, but that proof of one may be used to prove the other and that no goal or purpose "separate and apart" from the pattern is needed to prove the enterprise. 89 F.3d 1326, 1336–37 (7th Cir. 1996) (citing United States v. Turkette, 452 U.S. 576, 583 (1981)). *Rogers* never explicitly held that the structure itself must be separate or distinct from the pattern of racketeering. *See generally id.*

Nevertheless, it seems that the Seventh Circuit has staked a position unique from other circuits requiring an ascertainable structure. To further illustrate this point, compare the *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* with that of the U.S. Court of Appeals for the Eighth Circuit. The *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* for an associated-in-fact enterprise under 18 U.S.C. § 1961(4) concludes as follows: "The government must prove the association had some form or structure beyond the minimum necessary to conduct the charged pattern of racketeering." COMM. ON FED. CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT 271 (1998) [hereinafter SEVENTH CIRCUIT INSTRUCTIONS], *available at* http://www.ca7.uscourts.gov/pjury.pdf. In contrast, the Eighth Circuit's model definition of enterprise concludes with, "The government must also prove that the association had a structure distinct from that necessary to conduct the pattern of racketeering activity." JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT Instruction 6.18.1962D, at 367 (2008), *available at* http://www.juryinstructions.ca8.uscourts.gov/crim_manual_2008_expanded.pdf (citing United States v. Leisure, 844 F.2d 1347 (8th Cir. 1988); United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982)); *see also* CRIMINAL PATTERN JURY INSTRUCTIONS COMM. OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS Instruction 2.74.3 cmt. at 250 (2005), *available at* http://www.ca10.uscourts.gov/downloads/pji10-cir-crim.pdf (commenting that *Turkette* "suggest[ed] that the enterprise must have an organization with a structure and goals separate from the predicate acts themselves"). The Seventh Circuit's pattern jury instructions were approved on November 30, 1998, more than two years after *Rogers*. *See* SEVENTH CIRCUIT INSTRUCTIONS, *supra*.

Given that (1) the *Rogers* court held that no distinct goal or purpose is required, (2) the Court in *Turkette* used the language "separate and apart" in its holding in 1981, and (3) other circuits like the Eighth Circuit have emphasized the word "distinct" in determining what kind of structure must be proven to satisfy the enterprise requirement, this Note concludes that the Seventh Circuit occupies a middle ground in this three-way split. The only proper inference, it seems, is that, had the Seventh Circuit wanted to use the words "separate," "distinct," or "apart" in its pattern jury instructions, it would have done so. That it did not leads one to believe that the phrase "beyond the minimum" is not to be equated with the word "distinct." That said, it must also be noted that the U.S. Court of Appeals for

At first glance, this position seems contrary to the maxim that RICO requires the elements of "enterprise" and "pattern of racketeering" to be proven separately.[279] However, *Turkette* held that an "enterprise" could include illegal organizations or illegal associations-in-fact that have an exclusively criminal purpose.[280] Further, as the Seventh Circuit found in *United States v. Rogers*,[281] an enterprise need not have something—such as a legitimate business—separate and apart from the pattern of racketeering activity.[282] Given that explicit rule of *Turkette*, the Seventh Circuit noted in *Rogers* that the question then becomes whether proof of further illegal activity that does not constitute a pattern of racketeering activity is required.[283] The Seventh Circuit answered strongly in the negative: "If so, they would have to be illegal purposes that are not predicate acts, because under defendants' theory the purposes must be 'separate and apart' from the

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the Third Circuit's pattern jury instruction on this issue is similar to the Seventh Circuit's. *See* COMM. ON MODEL CRIMINAL JURY INSTRUCTIONS THIRD CIRCUIT, MODEL CRIMINAL JURY INSTRUCTIONS FOR THE THIRD CIRCUIT Instruction 6.18.1962C-2, at 7 (2008), *available at* http://www.ca3.uscourts.gov/criminaljury/Chap%206%20RICO%20July%202008.pdf ("To find that the enterprise was an entity separate and apart from the alleged pattern of racketeering activity, you must find that the government proved that the enterprise had an existence beyond what was necessary merely to commit the charged racketeering activity.").

After first making the Supreme Court generally aware of this three-way split—and the Seventh Circuit's "[m]iddle [c]ourse"—in the petition for a writ of certiorari, *see* Petition for a Writ of Certiorari, *supra* note 1, at 12, Boyle's attorney, Marc Fernich, subsequently cited Seventh Circuit jury instructions approvingly in his reply brief. *See* Petitioner's Reply Brief at 2–3, Boyle v. United States, No. 07-1309 (U.S. Jan. 6, 2009), 2009 WL 52429 (quoting *Korando*, 29 F.3d at 1118 (finding enterprise must have a structure "separate from the commission of the predicate acts themselves"); United States v. Masters, 924 F.2d 1362, 1367 (7th Cir. 1991) (Posner, J.) (finding jury "properly instructed" that "informal enterprise" must "exist[] as an organization with a structure . . . separate from the predicate acts themselves"); SEVENTH CIRCUIT INSTRUCTIONS, *supra*). Notably, both *United States v. Korando* and *United States v. Masters* were decided before *Rogers*.

At oral argument, Fernich equated the Seventh Circuit jury instructions with those of the Eighth Circuit. *See* Transcript of Oral Argument at 10, *Boyle*, No. 07-1309 (U.S. Jan. 14, 2009), 2009 WL 86554 ("First of all, the charge that we are asking for specifically is a charge that is given in the Seventh and Eighth Circuits which says a structure separate from the commission of the predicate acts themselves."); *id.* at 16.

Given that Fernich was advocating the imposition of an ascertainable structure that would be separate and distinct from the pattern of racketeering activity, this Note concludes that equating the two circuits' pattern jury instructions blurred the extremely fine distinctions that define this admittedly complex issue. At oral argument, Fernich later acknowledged that the Seventh Circuit's cases have said that "it is not a high hurdle. They say it's a low hurdle, and there has to be some structure, but not much—not much to distinguish between." *Id.* at 20. This Note concludes that, from the petitioner's perspective, advocating the Seventh Circuit's position is not equivalent to—or as advantageous as—the Eighth Circuit's position, for the reasons described in this footnote. But circling back to the beginning of this footnote, whether or not the Seventh Circuit indeed "does not require that it be a separate structure" as the Ninth Circuit contended is, at least, a matter in question. *Odom*, 486 F.3d at 550.

279. *Turkette*, 452 U.S. at 583.

280. *Id.* at 581–83.

281. 89 F.3d 1326.

282. *Id.* at 1337 ("No doubt proof of a legitimate business would be highly probative as to the 'enterprise' element, but after *Turkette* we cannot say that it is required.").

283. *Id.*

predicate acts [constituting a pattern of racketeering]. Requiring proof of additional unlawful purposes that are not predicate offenses would be absurd."[284] The court also called such a requirement "nonsensical."[285] Were such a requirement met, "it would also run counter to the obvious rationale behind defendants' argument: that an 'enterprise' is something more structured, more organized than a band of criminals."[286]

The Seventh Circuit gradually developed this view. In the 1995 case *Richmond v. Nationwide Cassel L.P.*,[287] the court wrote that enterprise could be formal or informal and need not have "much structure, but the enterprise must have some continuity and some differentiation of the roles within it."[288] Further, the enterprise must have "a structure and goals separate from the predicate acts themselves."[289] One year later in *Rogers*, the Seventh Circuit rejected appellants' argument that the enterprise is required to have "a *purpose* separate and apart from the pattern of racketeering activity,"[290] calling the position "simply insupportable,"[291] as explained above.[292] In *Rogers*, two men appealed their convictions for "various drug-related activities, including murder in furtherance of a continuing criminal enterprise and possession and distribution of cocaine."[293] The *Rogers* court was careful to lay out its argument, noting that "'enterprise' still requires more than a 'pattern of racketeering activity.' . . . [T]he fact that a single individual may engage in a pattern of racketeering activity without, of course, comprising an enterprise adequately illustrates the inherent and logical distinction between the two elements."[294] The *Rogers* court noted that "[t]he continuity of an informal enterprise and the differentiation among roles can provide the requisite 'structure' to prove the element of 'enterprise.'"[295] In so finding, *Rogers* reiterated the Seventh Circuit's longtime position that "[t]he hallmark of an enterprise is 'structure.'"[296]

In April 2008, the Seventh Circuit maintained the requirement of an ascertainable structure in *Limestone*, rejecting the Ninth Circuit's contrary view in *Odom* in May 2007.[297] In *Limestone*, Judge Posner affirmed a district court's holding that the plaintiff failed to state a claim against the

284. *Id.*
285. *Id.*
286. *Id.*
287. 52 F.3d 640 (7th Cir. 1995).
288. *Id.* at 645 (citing Burdette v. Miller, 957 F.2d 1375, 1379 (7th Cir. 1992)).
289. *Id.* (quoting United States v. Korando, 29 F.3d 1114, 1117 (7th Cir. 1994) (internal quotation marks omitted)).
290. *Rogers*, 89 F.3d at 1336.
291. *Id.*
292. *See supra* notes 281–86 and accompanying text.
293. *Rogers*, 89 F.3d at 1329.
294. *Id.* at 1337.
295. *Id.* (citing United States v. Korando, 29 F.3d 1114, 1117–18 (7th Cir. 1994)).
296. *Id.* (citing United States v. Neapolitan, 791 F.2d 489, 500 (7th Cir. 1986)).
297. Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804–05 (7th Cir. 2008).

defendants, including public officials in Lemont, Illinois, in part because he did not put forth any evidence of an enterprise-like structure.[298]

Judge Posner criticized the complaint while providing a road map to the successful pleading of an enterprise in his circuit, pointing out that "[t]here is no reference to a system of governance, an administrative hierarchy, a joint planning committee, a board, a manager, a staff, headquarters, personnel having differentiated functions, a budget, records, or any other indicator of a legal or illegal enterprise."[299] He could not resist tweaking the plaintiff while recognizing that illegal organizations fall well within the scope of RICO, noting, "The Chicago Vice Lords would be embarrassed to have so little structure."[300]

By acknowledging "the view that every RICO enterprise must have a structure is not inevitable,"[301] Judge Posner seems to grant that the statute may in fact be ambiguous. He did not, however, invoke the rule of lenity.[302] He needed only to carefully read the language of the statute—and did not invoke Congress's rule of construction that RICO should be broadly construed to meet its remedial purposes as the *Odom* majority did[303]—to reach his conclusion.[304]

Judge Posner believed that the critical analysis is in regards to where the emphasis is placed within the § 1961(4) definition of enterprise, which includes "any union or group of individuals associated in fact although not a legal entity."[305] He believed that "[i]f emphasis is placed on 'associated in fact,' no structure is necessary," as he noted that "some courts," such as the *Odom* court, believed.[306] But he believed that such an analysis "truncates the critical statutory language—'associated in fact *although not a legal entity*'—misleadingly."[307] He observed that "[t]he juxtaposition of the two phrases suggests that 'associated in fact' just means structured without the aid of legally defined structural forms" such as a corporation,[308] and that this inference was reinforced by the mention of a list of legal entities directly before the phrase "any union or group of individuals associated in fact" in 18 U.S.C. § 1961(4).[309] Judge Posner concluded this analysis by stating, "Without a requirement of structure, 'enterprise' collapses to 'conspiracy.'"[310]

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298. *Id.*
299. *Id.*
300. *Id.* (citing United States v. Jackson, 207 F.3d 910, 914 (7th Cir. 2000), *vacated and remanded for reconsideration on other grounds*, 531 U.S. 953 (2000)).
301. *Id.*
302. *Id.*
303. *See supra* notes 230–32 and accompanying text.
304. *Limestone*, 520 F.3d at 804–05.
305. *Id.* at 804 (quoting 18 U.S.C. § 1961(4) (2006)) (internal quotation marks omitted).
306. *Id.* (citing Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 464 (2007)).
307. *Id.*
308. *Id.* at 804–05.
309. 18 U.S.C. § 1961(4); *see also Limestone*, 520 F.3d at 805.
310. *Limestone*, 520 F.3d at 805.

Judge Posner then indicated that the Supreme Court's position in *Turkette* backs this view, writing that "one is not surprised that the Supreme Court has said that 'enterprise' is 'proved by evidence of an ongoing organization, formal or informal, *and by evidence that the various associates function as a continuing unit.*'"[311] He wrote that *Richmond* reiterated that language.[312] Judge Posner cited cases in the Third, Fourth, Eighth, and Tenth Circuits "[t]o similar effect."[313] He found that the allegations in the complaint were detailed but bereft of any structure.[314] Interestingly enough, in deciding the enterprise issue, he made no mention of *Rogers*,[315] which articulated that the enterprise need not have goals and purposes separate and distinct from the pattern of racketeering.[316]

D. *The Facts and Positions of* Boyle

The Supreme Court has decided to weigh in on this disagreement among the circuits, recently granting certiorari in *Boyle*.[317] The question presented is whether an associated-in-fact enterprise needs an ascertainable structure apart from the pattern of racketeering in which it engages.[318] This "exceptionally important question" has broad implications on future prosecutions and civil liability under RICO.[319] At issue is whether a bank-burglary ring the government had dubbed the "Boyle Crew" qualifies as an associated-in-fact enterprise.[320] A narrow reading of the enterprise element would raise the proof threshold to only those associations with a distinct ascertainable structure, while a broad reading opens the door for RICO prosecutions of groups with a less rigid connection.

1. Statement of the Case

A jury in the Eastern District of New York convicted Edmund Boyle of racketeering under 18 U.S.C. § 1962(c), racketeering conspiracy under 18 U.S.C. § 1962(d), bank burglary conspiracy under 18 U.S.C. § 371, and

311. *Id.* (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)).

312. *Id.* (citing Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 644 (7th Cir. 1995)). *Richmond* held that an "enterprise is an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *Richmond*, 52 F.3d at 644 (citing Jennings v. Emry, 910 F.2d 1434, 1440 (7th Cir. 1990)) (internal quotation marks omitted).

313. *Limestone*, 520 F.3d at 805 (citing Asa-Brandt, Inc. v. ADM Investor Servs., Inc., 344 F.3d 738, 752 (8th Cir. 2003); United States v. Sanders, 928 F.2d 940, 944 (10th Cir. 1991); United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985); United States v. Riccobene, 709 F.2d 214, 223–24 (3d Cir. 1983)).

314. *Id.*

315. *See generally id.* at 804–05.

316. United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996).

317. United States v. Boyle, 283 F. App'x 825 (2d Cir. 2007), *cert. granted*, 129 S. Ct. 29 (2008).

318. Brief for the United States in Opposition, *supra* note 3, at I.

319. Carol Garfiel Freeman, *Supreme Court Criminal Cases of Interest*, CRIM. JUST., Winter 2009, at 52, 53; *see also* The Boyle Case & RICO Enterprises, *supra* note 18.

320. *See* Petition for a Writ of Certiorari, *supra* note 1, at 3.

several bank burglaries and attempted burglaries under 18 U.S.C. § 2113(a).[321] The charges arose from Boyle's involvement in a bank burglary ring, a putative association-in-fact enterprise under the RICO statute that the government called the "Boyle Crew."[322] Boyle was sentenced to 151 months of imprisonment.[323] The Second Circuit affirmed his conviction but vacated his sentence and remanded for resentencing.[324]

Boyle, along with seven other men based in the New York City area, took part in a number of bank burglaries canvassing a minimum of five states between 1991 and 1999.[325] He and his cohorts would do reconnaissance on banks that had a specific type of night deposit box that they had figured out how to burglarize.[326] The crew targeted banks that were near retail businesses such as shopping malls, because those banks were likely to receive a large, steady stream of cash deposits.[327] They "burglarize[d] those boxes in the early morning hours at the beginning of the week using crowbars, screwdrivers, fishing gaffs, and other burglar's tools."[328] All of the crew members had some particular role such as a lookout or burglar, they protected their identities by referring to each other using aliases, and they often utilized walkie-talkies.[329] Their illegal gains were doled out "based on the amount of risk inherent in each participant's role."[330] The petitioner noted, however, that the Boyle Crew "was a loosely affiliated 'clique' of 'friends'—wholly lacking role definition or organizational structure—who sporadically burgled night deposit boxes in shifting combinations."[331]

Government witnesses who testified under cooperation agreements in exchange for leniency described the group "as an amorphous band of free floaters without unifying plan or understanding—ongoing, formal, informal or otherwise."[332] They testified that "different people"[333] were involved "on an individual, *ad hoc* and impromptu basis—with no set crew or group backing."[334] Additionally, there was accomplice testimony stating that "[n]obody had any type of standing where he was the boss[;] . . . there was no organization at all[;] . . . [e]ach individual crime withstood by itself[;] . . . [t]here was no ongoing informal plan[;] . . . . [and] there was no leadership or informal understanding among the group."[335]

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321. *Id.*
322. *Id.*
323. Brief for the United States in Opposition, *supra* note 3, at 5.
324. *Id.*
325. *Id.* at 2.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. Petition for a Writ of Certiorari, *supra* note 1, at 3.
332. *Id.* at 4 (internal quotation marks omitted).
333. *Id.* (internal quotation marks omitted).
334. *Id.* (internal quotation marks omitted).
335. *Id.* at 4–5 (emphasis omitted) (citations omitted) (internal quotation marks omitted).

At trial, Boyle asked for the following jury instruction:

> To establish an association-in-fact enterprise, the government must convince you, beyond a reasonable doubt, that the alleged Boyle Crew had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts. If the government fails to meet this burden, you must acquit Mr. Boyle on the RICO counts.[336]

The requested instruction was denied,[337] and the court instead mirrored the language of both RICO and *Turkette*[338] and told the jury, over objection, "You may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts."[339] Following his conviction, Boyle challenged the instruction on appeal.[340] He argued that his proposed jury charge was the correct standard, under which the government's enterprise evidence was legally insufficient to prove a valid association-in-fact distinct from the alleged RICO pattern.[341] The Second Circuit "rejected the claim without discussion,"[342] confirmed his conviction, and vacated the sentence because of an issue unrelated to this particular RICO question.[343]

2. Boyle's Position

a. *Petition for Certiorari*

Boyle's attorney, Marc Fernich, made a number of interrelated arguments in the petition for a writ of certiorari.[344] The petitioner argued that the Second Circuit's approach that an associated-in-fact enterprise is "functionally equivalent" to the sum of the underlying racketeering "compounds and magnifies the concerns expressed by Justices Scalia and Kennedy" in *H.J. Inc. v. Northwestern Bell Telephone Co.*[345]

The Second Circuit's approach, Fernich argued, severely lowers the burden of proof.[346] He argued that *Turkette* required distinctness for a good reason, and this approach destroyed the distinctness rule, "dangerously expanding RICO's already immense and much-maligned scope."[347] The

336. *Id.* at 6 (footnote omitted).
337. *Id.* (footnote omitted).
338. Brief for the United States in Opposition, *supra* note 3, at 3.
339. Petition for a Writ of Certiorari, *supra* note 1, at 6 (internal quotation marks omitted).
340. *See id.*
341. *Id.*
342. *Id.*; *see also* United States v. Boyle, 283 F. App'x 825, 826 (2d Cir. 2007) ("We have considered the appellant's other challenges to the judgment of conviction and find them without merit.").
343. Brief for the United States in Opposition, *supra* note 3, at 5.
344. *See* Petition for a Writ of Certiorari, *supra* note 1, at 7–19.
345. *Id.* at 8. For more on Scalia and Kennedy's concerns, see *supra* note 165.
346. Petition for a Writ of Certiorari, *supra* note 1, at 8.
347. *Id.* at 14.

Second Circuit's current position "mistakenly blends two discrete but related inquiries, writing the key enterprise element out of the statute, diluting the burden of persuasion and confounding *Turkette*'s clear thrust."[348] The Second Circuit's position, he continued, would automatically convert every garden-variety conspiracy into a RICO offense, complete with "enhanced criminal penalties and the *in terrorem* threat of treble damages."[349]

Addressing policy, Fernich further noted that many early RICO cases that eschewed a structural component were decided when the basic parameters of RICO were fluctuating and unresolved, when "the concepts of relatedness and continuity generally [were] considered attributes of the enterprise rather than the pattern," and when some courts also adorned the enterprise element with "multiple scheme" and "economic motive" requirements.[350] These latter "interpretative glosses," before they were removed by the Supreme Court, alleviated the need for further differentiation of the two key RICO elements: enterprise and pattern.[351] Fernich also argued that a narrower intended sweep for RICO actually conforms with its policy purposes to "target[] a more sophisticated crowd."[352]

b. *Boyle's Merit Brief*

In the merit brief, the petitioner's research revealed that most circuit courts required an ascertainable structure.[353] The petitioner then made the following arguments:

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348. *Id.* at 16.

349. *Id.* at 14 (citing United States v. Riccobene, 709 F.2d 214, 221 (3d Cir. 1983)).

350. *Id.* at 18.

351. *Id.* at 19.

352. *Id.* at 17 (quoting Odom v. Microsoft Corp., 486 F.3d 541, 555 (9th Cir. 2007) (en banc) (Silverman, J., concurring), *cert. denied*, 128 S. Ct. 464 (2007)).

353. Brief for the Petitioner, *supra* note 238, at 6–7 ("[M]ost circuit courts correctly read *Turkette* to require that an association-in-fact have some perceptible operating structure aside—though permissibly inferable—from that inherent in the predicate acts themselves." (citing United States v. Johnson, 440 F.3d 832, 840 (6th Cir. 2006) ("ongoing structure of persons associated through time, joined in purpose, and organized in . . . manner amenable to hierarchical or consensual decision-making" (citations omitted) (internal quotation marks omitted)); United States v. Smith, 413 F.3d 1253, 1266–67 (10th Cir. 2005) (ongoing organization with decisional framework and control mechanism apart from pattern); United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) ("some structure" necessary to distinguish enterprise from "mere conspiracy" (citations omitted) (internal quotation marks omitted)); United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996) ("The hallmark of an enterprise is structure." (citations omitted) (internal quotation marks omitted)); Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453, 1461–62 (5th Cir. 1991) (hierarchical or consensual decision-making structure; continuity of structure and personnel); United States v. Kragness, 830 F.2d 842, 855–56 (8th Cir. 1987) (ascertainable structure distinct from that inherent in pattern of racketeering; organizational pattern or system of authority providing continuing directional mechanism); United States v. Tillett, 763 F.2d 628, 631 (4th Cir. 1985) ("continuity of structure and personality"); United States v. Riccobene, 709 F.2d 214, 222–24 (3d Cir. 1983) (hierarchical or consensual decision-making structure beyond that necessary to commit each racketeering act)). *But see* United States v. Perholtz, 842 F.2d 343,

(1) Logically and on its face, "*Turkette*'s description of an associative 'enterprise'—a separate '*entity*' with 'ongoing *organization*' and a '*continuing* unit' of associates—implicitly assumes some degree of structure";[354]

(2) A structure requirement is evident in (a) "the titles of RICO and [OCCA]";[355] (b) section 1962(c)'s text viewed under the canon of antinullification;[356] (c) the context and plain meaning of section 1961(4);[357] (d) the element in the ancillary Violent Crimes in Aid of Racketeering Activity (VICAR) statute pertaining to "maintain[ing] or increas[ing]" an enterprise "position";[358] (e) the government's acknowledgment that VICAR mandates an ascertainably structured enterprise distinct from its predicate racketeering;[359] and (f) the painstaking differentiation between enterprise and conspiracy under RICO and OCCA;[360]

(3) A structure requirement squares with RICO's legislative history, which focused on organized crime and its infiltration of the structured entities of business, labor unions, and government;[361]

363–64 (D.C. Cir. 1988) (per curiam) (structure need not be "particular or formal" (citation omitted)).

354. Brief for the Petitioner, *supra* note 238, at 22. Such a reading is consistent with the Court's interpretations of RICO's other main elements: conduct, with respect to which the Court required that an organic entity "operate or manage" an enterprise; and pattern, with respect to which the Court read in an inference of continuity by a true criminal enterprise. *Id.* (citing Reves v. Ernst & Young, 507 U.S. 170 (1993); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989)).

355. *Id.*

356. *Id.* The petitioner asserted that a structured enterprise requirement empowers all of § 1962(c)'s terms and renders none redundant, consistent with the enduring doctrine that avoids meaningless constructions and rejects statutory redundancy. The opposition view, he argued, renders the enterprise element superfluous. *Id.* at 39–40.

357. *Id.* at 22.

358. *Id.* The petitioner cited to VICAR, which was "[p]assed in 1984 to 'complement' RICO," to prove that structure is intrinsic in an enterprise. *Id.* at 44 (citing 18 U.S.C. § 1959 (2006)); *see also* Brief for the Petitioner, *supra* note 238, at 44 (citing 18 U.S.C. § 1959). Since VICAR makes it illegal to gain entrance into, maintain, or increase position in "an enterprise engaged in racketeering activity," an enterprise is thus an entity to which someone can increase his stature or responsibility. *Id.* (quoting 18 U.S.C. § 1959). Thus, the petitioner argued, structure is inherent. *Id.* at 44–46.

359. Brief for the Petitioner, *supra* note 238, at 22.

360. *Id.* "'[T]he objective of a RICO conspiracy is to assist the enterprise's involvement in corrupt endeavors,' whereas the 'objective of the predicate conspiracy is confined to the commission of a particular substantive offense.'" United States v. Irizarry, 341 F.3d 273, 292 n.7 (3d Cir. 2003) (quoting United States v. Pungitore, 910 F.2d 1084, 1135 (3d Cir. 1990)). The petitioner opined that the approach of a minority of courts of appeals blurred the distinction by "merging an enterprise with its pattern of predicate crimes." Brief for the Petitioner, *supra* note 238, at 47.

361. Brief for the Petitioner, *supra* note 238, at 22–23. The petitioner, like Judge Lynch, argued that Congress's primary purpose in enacting RICO was to limit organized crime's infiltration into legitimate businesses. *See id.* at 53–58; *see also supra* note 73 and accompanying text.

(4) A structure requirement syncs with "the realities of daily RICO practice and will not impair the statute's enforcement, as the government customarily proves enterprise structure as a pillar of its RICO litigation strategy";[362]

(5) Lenity compels an ascertainable-structure requirement to avoid serious Fifth and Sixth Amendment problems—"involving vagueness, lack of fair notice and relieving an essential element of the government's burden of proof"—coinciding with the government's view;[363] and

(6) "Boyle's conviction must be reversed for legal insufficiency and instructional error, or the case remanded for application of the ascertainable-structure test in the first instance."[364]

The petitioner addressed the *Turkette* holding by deconstructing its critical language. He pointed out that the *Turkette* Court twice emphasized that the association-in-fact enterprise was "an entity," also noting that the government in that case proposed that an "independent entity" must be "shown" to satisfy the enterprise element.[365] The petitioner further noted that the High Court also stressed twice in *Turkette* that the enterprise must be separate and apart from the pattern of activity and imposed requirements of an "ongoing organization" and a "continuing unit."[366] He then cited common dictionary definitions of "entity" which suggests an entity "exists as a particular and discrete unit" considered "apart from its properties."[367] Hence, an enterprise must be more than the sum of its parts—and the extra something, the petitioner asserted, was structure.[368] For good measure, he

362. Brief for the Petitioner, *supra* note 238, at 23. The petitioner asserted that, "[s]ince the government is already proving enterprise structure in the bulk of cases, a structure requirement will not make RICO charges harder to prosecute—an invalid objection in any event." *Id.* at 62 n.52. The petitioner argued that the government should not "have it both ways, reaping enormous tactical benefits from enterprise structure—powerful expert testimony; damaging 'enterprise proof' exceeding Rule 404(b); prejudicial joinder of defendants, charges and conspiracies; and a functionally extended statute of limitations" while refusing to acknowledge that a structure requirement exists. *Id.* at 62.

363. *Id.* at 23.

364. *Id.*; *see also* Brief of Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Petitioner, Boyle v. United States, No. 07-1309 (U.S. Nov. 28, 2008), 2008 WL 5079033; Brief of Center on the Administration of Criminal Law as Amicus Curiae in Support of Petitioner, *supra* note 186; Brief for the Chamber of Commerce of the United States of America & McKesson Corporation as Amici Curiae in Support of Neither Party at 32, Boyle v. United States, No. 07-1309 (U.S. Nov. 28, 2008), 2008 WL 5079031 (arguing that, if the Court "[r]ejects [t]he [a]scertainable [s]tructure [i]nterpretation [o]f '[e]nterprise,' [t]he Court [s]hould [m]ake [c]lear [t]hat [a]n [a]ssociation-[i]n-[f]act [e]nterprise [m]ust [b]e [c]omprised [o]f [*i*]*ndividuals*, [n]ot [c]orporations [o]r [o]ther [o]rganizations").

365. Brief for the Petitioner, *supra* note 238, at 25 (quoting United States v. Turkette, 452 U.S. 576, 583 & n.5 (1981)) (internal quotation marks omitted).

366. *Id.* (quoting *Turkette*, 452 U.S at 583) (internal quotation marks omitted).

367. *Id.* at 26 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 615 (3d ed. 1996)).

368. *Id.* at 27. "Structure" is defined as "something having a definite or fixed pattern of organization," or "the way in which the parts of something are put together or organized." *Id.*

found a definition of "organization" as "an 'organic structure' or 'purposive systematic arrangement.'"[369]

Next, the petitioner claimed that a structure requirement is evident in all things RICO, from the statute's title, its legislative history, and the complementary VICAR statute.[370] Structure is evident in RICO's considered statutory title: *"Racketeer* Influenced and Corrupt *Organizations* Act,"[371] which was part of the larger Organized Crime Control Act.[372] The petitioner adopted Judge Posner's interpretation of § 1961(4), which hinged on the phrase "although not a legal entity."[373] This interpretation equates the associated-in-fact enterprise with a legal entity enterprise, which the petitioner argued was the implication of the language in 18 U.S.C. § 1961(4): "any union or group of individuals associated in fact although not a legal entity."[374] He then argued that "Judge Posner's interpretation finds additional support in the word 'union,' which immediately precedes 'group of individuals associated in fact' in the second clause."[375] As used in § 1961(4), the petitioner opined that "union" means labor union.[376]

The petitioner warned that the principles of lenity, constitutional avoidance, and constitutional doubt justify his view,[377] noting that in recent

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at 28 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2267 (2002) [hereinafter WEBSTER'S]).

369. Brief for the Petitioner, *supra* note 238, at 27 (quoting WEBSTER'S, *supra* note 368, at 1590).

370. *Id.* at 52 ("In sum, a structured enterprise requirement is manifest in the titles, terms, context and framework of RICO, OCCA and VICAR, interpreted under cardinal construction canons.").

371. *Id.* at 38 (citing United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) (finding title generally relevant in statutory construction)); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 258 n.59 (1982) (noting that title reflects RICO's full and "final scope"); Blakey & Gettings, *supra* note 66, at 1025 n.91 (stressing title's importance in interpreting RICO).

372. *See supra* note 53 and accompanying text.

373. *See* Brief for the Petitioner, *supra* note 238, at 41 (quoting Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804 (7th Cir. 2008)); *see also supra* notes 305–10 and accompanying text.

374. 18 U.S.C. § 1961(4) (2006); *see also* Brief for the Petitioner, *supra* note 238, at 41.

375. Brief for the Petitioner, *supra* note 238, at 42.

376. *Id.* (footnote omitted) (collecting authorities).

377. *Id.* at 63. The canon of constitutional avoidance states that "[w]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932). "The canon of constitutional avoidance is sometimes also referred to as the doctrine of constitutional doubt." Michael T. Crabb, Comment, *"The Executive Branch Shall Construe": The Canon of Constitutional Avoidance and the Presidential Signing Statement*, 56 KAN. L. REV. 711, 720 n.63 (2008); *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (finding canon of constitutional doubt stands for the proposition that when "an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). "The rule of lenity requires ambiguous criminal laws to be interpreted in favor

years the Supreme Court has stressed a defendant's fundamental Fifth and Sixth Amendment rights "to have every essential element of a criminal offense determined by a jury beyond a reasonable doubt."[378] To avert these constitutional issues, the petitioner argued that lenity necessitates an enterprise structure distinct—"though provable in some cases from—that attending its participants' predicate acts."[379] The liberal construction clause of RICO, which mandates that the statute "shall be liberally construed to effectuate its remedial purposes," does not require a different result.[380] He noted that "[t]his would not be the first time the Court rejected an unbridled view of RICO over liberal construction objection."[381]

3. The Government's Argument

a. *Opposition to Certiorari*

Opposing the certiorari petition, the government argued that no "ascertainable structure" requirement was found "in either *Turkette* or RICO's text."[382] The government noted that *Turkette* allowed that "the proof used to establish" the separate enterprise and pattern of racketeering elements "may in particular cases coalesce."[383] Further, the government pointed out that the jury instructions made clear that the government had to prove "*both* the existence of a RICO enterprise and a pattern of racketeering activity."[384]

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of the defendants subjected to them." United States v. Santos, 128 S. Ct. 2020, 2025 (2008) (citing United States v. Bass, 404 U.S. 336, 347–49 (1971); McBoyle v. United States, 283 U.S. 25, 27 (1931); United States v. Gradwell, 243 U.S. 476, 485 (1917)).

378. Brief for the Petitioner, *supra* note 238, at 63 (citing United States v. Booker, 543 U.S. 220, 230 (2005); Blakely v. Washington, 542 U.S. 296, 301 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476–78 (2000)). "A construction that fuses enterprise and pattern, effectively erasing enterprise from the statute, therefore implicates fundamental rights and raises major constitutional concerns." *Id.* at 64. The petitioner further opined that,

> to the extent that (A) 'associated in fact' is a cryptic locution that has riven the circuits; (B) such an enterprise is deemed materially identical to, or wholly inferable from, its pattern of predicate acts; and (C) the pattern concept itself is certifiably vague, the minority approach raises significant notice problems under the Fifth Amendment's due process clause.

Id. at 64–65 (footnote omitted).

379. *Id.* at 66; *see also Santos*, 128 S. Ct. at 2025 (stating that the rule of lenity breaks statutory ties in favor of defendants subjected to "ambiguous criminal laws").

380. Brief for the Petitioner, *supra* note 238, at 66–67 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970)).

381. *Id.* at 67 (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 463 (2006) (Thomas, J., concurring in part and dissenting in part); Reves v. Ernst & Young, 507 U.S. 170, 186–87, 189 (1993) (Souter, J., dissenting)).

382. Brief for the United States in Opposition, *supra* note 3, at 6.

383. *Id.* (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)).

384. *Id.* (citation omitted).

The government further noted that at least four other circuits agreed with the Second Circuit.[385] To the extent that other courts of appeals disagree with the Second Circuit's view, the disagreement is both "superficial and limited."[386] In other words, the new test would rarely result in a different outcome.[387] The government argued that those courts that commonly required an ascertainable structure applied the rule in a fashion consistent with *Turkette*, which held that a RICO enterprise must be an "ongoing organization" composed of associates who "function as a continuing unit."[388] The government also asserted that these courts accept *Turkette*'s holding that "the same evidence can establish both the existence of a RICO enterprise and a pattern of racketeering activity."[389]

Further, the government pointed out that the Supreme Court recently reiterated that it was "not at liberty to rewrite RICO to reflect . . . views of good policy" where "RICO's text provides no basis for imposing a . . . requirement."[390] Finally, the government argued that if "ascertainable structure" proof was required, the evidence introduced at Boyle's trial would satisfy that requirement.[391] Members of Boyle's crew "had particular roles in their spree of burglaries (which could be characterized as an hierarchy), protected their identities with false names, divided their profits, and retained tools of the trade."[392]

b. *Government's Merit Brief*

In its merit brief, the government argued that a RICO enterprise exists—despite no additional ascertainable structure—when a continuing unit of people forms to carry out a pattern of racketeering activity.[393] The government furthered this argument on the foundation that both RICO's wording and its arrangement demonstrate that an "enterprise" need not possess an independent ascertainable structure.[394]

The arguments in support of this contention were:

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385. *See id.* at 7. Both sides seem to claim that the D.C. Circuit is on their side. *See supra* note 238.

386. Brief for the United States in Opposition, *supra* note 3, at 9.

387. *Id.* at 8–9.

388. *Id.* at 8 (quoting *Turkette*, 452 U.S. at 583).

389. *Id.* Also, the government noted that Boyle did not identify any analogous case in which the ascertainable-structure test led to a reversal. *Id.* at 9.

390. *Id.* at 7 (quoting Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2145 (2008)) (internal quotation marks omitted).

391. *Id.* at 10. Interestingly, this argument was not made in the government's merit brief. *See* Brief for the United States at 51, Boyle v. United States, No. 07-1309 (U.S. Dec. 22, 2008), 2008 WL 5369540 ("Regardless of whether it lacked an ascertainable structure, petitioner's enterprise had a common purpose and functioned as a continuing unit. . . . Although the enterprise lacked a distinct management structure, it operated in an organized fashion.").

392. Brief for the United States in Opposition, *supra* note 3, at 10.

393. *See* Brief for the United States, *supra* note 391, at 14.

394. *Id.* at 16.

(1) The definition of "enterprise" in RICO contains no ascertainable-structure requirement;[395]

(2) "'Enterprise'" and a 'pattern of racketeering activity' are distinct concepts that do not merge";[396]

(3) "An independent 'ascertainable structure' requirement is not necessary to distinguish between conspiracy and RICO offenses";[397]

(4) "An independent 'ascertainable structure' requirement finds no support" in the Supreme Court's *Turkette*, *Reves*, and *H.J. Inc.* decisions;[398]

(5) A "textual analysis of section 1961(4), like the title and purpose of RICO, does not support an independent 'ascertainable structure' requirement";[399] and

(6) RICO's purpose "does not support an independent 'ascertainable structure' requirement."[400]

The government also argued that Boyle's other remaining contentions were meritless,[401] and that it established a valid RICO enterprise in this

395. *Id.*

396. *Id.* at 25. The government dismissed the petitioner's argument that the enterprise would collapse into the pattern of racketeering without an ascertainable-structure requirement. *Id.* The government argued that the *Turkette* Court rebuffed a nearly identical argument, stressing that the enterprise was "an entity separate and apart from the pattern of activity" and that one can be proven without the other. *Id.* (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)). It also pointed out that *Turkette* cautioned that merely because a jury could infer the enterprise element from proof of the pattern-of-racketeering element does not render the enterprise element superfluous. *Id.* at 27–28. Language "in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent." *Id.* at 28 (quoting *Turkette*, 452 U.S. at 583 n.5).

The government also contended that even where some circuits required an "ascertainable structure" to meet the enterprise element threshold, these circuits noted that an enterprise's separateness and distinctness from a pattern of racketeering "is established by other factors." *Id.* at 31–32 (citing United States v. Console, 13 F.3d 641, 651–52 (3d Cir. 1993); United States v. Sanders, 928 F.2d 940, 944 (10th Cir. 1991); United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985)).

397. *Id.* at 34. The government differentiated between a conspiracy that violates 18 U.S.C. § 371 and a RICO enterprise. *Id.* at 34–35. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *Id.* at 35 (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975)). "[C]riminal liability attaches 'regardless of whether the crime agreed upon actually is committed.'" *Id.* (quoting United States v. Feola, 420 U.S. 671, 694 (1975)). "By contrast, an association-in-fact enterprise, as *Turkette* makes clear, is an organization or entity—whether formal or informal—that has an 'ongoing' existence and whose members 'function as a continuing unit.'" *Id.* (citing *Turkette*, 452 U.S. at 583).

398. *Id.* at 38–40.

399. *Id.* at 41.

400. *Id.* at 43.

401. *Id.* at 46–47.

case, even if there was no independent ascertainable structure to the "Boyle Crew."[402]

The government claimed that the Supreme Court has concluded since *Turkette* that RICO imposes no restriction on the associations embraced by the definition of "enterprise" because an enterprise includes "any union or group of individuals associated in fact."[403] The government asserted that the word "any" is defined broadly.[404] The government then looked at the RICO phrase "group of individuals associated in fact."[405] It argued that the term "group" is generally understood to be "'a number of individuals bound together by a community of interest, purpose, or function' and, thus, includes a collection of individuals 'associated formally or informally for a common end.'"[406] The government argued that what the *Turkette* Court required for an enterprise—"a group of persons associated together for a common purpose of engaging in a course of conduct," whether lawful or criminal, proven by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit"—was sufficient.[407] Further, the government claimed that *Turkette*'s allowance that the proof used to establish a pattern of racketeering activity and an enterprise "may in particular cases coalesce" shows that the Court did not impose an extratextual limitation of an ascertainable structure "*beyond* that reflected in the coordinated conduct of the enterprise's affairs."[408] The government also found an alternative to the petitioner's definition of "organization."[409]

Since a legal-entity enterprise could include "any individual," the government argued that Congress could not have imposed an ascertainable structure.[410] Likewise, since as few as two people could be an associated-in-fact enterprise, the respondent argued that Congress did not intend that

402. *Id.* at 51 ("The evidence . . . was sufficient to establish that the charged association-in-fact qualified as a RICO enterprise. Regardless of whether it lacked an ascertainable structure, petitioner's enterprise had a common purpose and functioned as a continuing unit.").

403. *Id.* at 16 (quoting United States v. Turkette, 452 U.S. 576, 580 (1981)) (internal quotation marks omitted).

404. *Id.*

405. *Id.* at 16–17; *see also* 18 U.S.C. § 1961(4) (2006).

406. Brief for the United States, *supra* note 391, at 17 (quoting WEBSTER'S, *supra* note 368, at 1004). The government also argued that an "'association' . . . is understood as 'a collection of persons who have joined together for a certain object.'" *Id.* (quoting BLACK'S LAW DICTIONARY 156 (rev. 4th ed. 1968)).

407. *Id.* (quoting *Turkette*, 452 U.S. at 583) (internal quotation marks omitted).

408. *Id.* at 18 (quoting *Turkette*, 452 U.S. at 583) (internal quotation marks omitted).

409. *Id.* at 19 n.4 ("[W]hile the word 'organization' may be defined with reference to the structure of an association of individuals, it may also be defined with reference to the association's common purpose."); *see also supra* note 369 and accompanying text.

410. Brief for the United States, *supra* note 391, at 20–21. *Contra* Petitioner's Reply Brief, *supra* note 278, at 26 (citing Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 165 (2001) (finding that the corporate form distinguishes a business enterprise from a sole shareholder defendant)).

smaller association-in-fact enterprises must always include an ascertainable structure.[411]

The government contended that the petitioner should not have parsed the language of the Supreme Court's string of RICO decisions in *Turkette*, *Reves*, and *H.J. Inc.*,[412] and that in any event the parsing did not support his contention.[413] Even the petitioner's analysis of § 1961(4) did not support an independent ascertainable-structure requirement, the respondent argued, because the word "although" in the phrase "although not a legal entity" merely brought enterprises that had no independent legal existence but were associations in fact within the definition.[414] This argument was an explicit rejection of Judge Posner's contention that the word "although" implied "that the group is just 'structured without the aid of legally defined structural forms such as the business corporation.'"[415] The government also dismissed the petitioner's contention that the word "organizations" in the title of RICO carried a meaning that imposed an ascertainable-structure requirement.[416]

In the same vein, the government argued that the petitioner was wrong to rely on the statutory purposes reflected in RICO's preamble and legislative

411. Brief for the United States, *supra* note 391, at 20 ("Two-person enterprises do not require such attributes in order to operate effectively, and they would not necessarily be expected to display them."). The government also noted that Congress explicitly addressed size and structure in another statute within the Organized Crime Control Act of 1970. *Id.* at 21. "Section 1955 defines an 'illegal gambling business' to mean a gambling business that, among other things, 'involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business.'" *Id.* (quoting 18 U.S.C. 1955(b)(1)(ii) (2006)). RICO, though, left out "ascertainable structure" in its extensive list of definitions. *Id.* at 22. Grafting such a requirement onto RICO, the government continued, would also counteract the admonition that "'RICO is to be read broadly.'" *Id.* at 23 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985)). For that matter, the government argued that the petitioner could not formulate "ascertainable structure" into a definite concept. *Id.* at 22–23. *But cf.* Petitioner's Reply Brief, *supra* note 278, at 27 ("Similarly, the government's claim that the prospect of two-member enterprises undermines any structure requirement mistakenly assumes the structure must be 'formalistic.' In fact, two-person associations may be structured in any number of informal ways, either generally (*e.g.*, copartners; leader/subordinate; first among equals; mentor/apprentice; principal/agent; beneficiary/nominee) or specifically, through fixed roles extending over time (*e.g.*, buyer/seller; importer/exporter; wholesaler/retailer; supplier/distributor; briber/recipient; thief/fence; triggerman/wheelman . . . pimp/prostitute . . . trafficker/launderer; loan shark/collector, [etc.])." (citations omitted)).

412. Brief for the United States, *supra* note 391, at 38. The government noted that "'the language of an opinion is not always to be parsed as though we were dealing with language of a statute' and, instead, must properly be 'read in context.'" *Id.* (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979)).

413. *Id.* at 38–40.

414. *Id.* at 41.

415. *Id.* (quoting Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804–05 (7th Cir. 2008)). The government also argued that, assuming that the word "union" in § 1961(4) does mean labor union, it does not follow that any "group of individuals associated in fact" must also have the same characteristics, be it a formalized structure or elected leaders. *Id.* at 42–43.

416. *Id.* at 43.

history.[417] The statutory text was not ambiguous, the argument continued, so there was no need to use extrinsic materials.[418] The respondent contended that the statute did not limit its reach to organized-crime-type enterprises, the respondent contended.[419]

Finally, the government rejected the petitioner's argument to impose the rule of lenity, contending that it was unnecessary because RICO is broad, not ambiguous.[420] It also rejected the doctrine of constitutional avoidance that the petitioner advocated because there was no merger danger that would cause constitutional problems.[421]

4. Boyle's Reply Brief

In the petitioner's reply brief, he noted that the government urged the Supreme Court to adopt a rule even more expansive than the Second Circuit's, and that the government contended that proof of a RICO pattern will "always" establish an illicit associated-in-fact enterprise under 18 U.S.C. § 1962(c).[422] This argument, he noted, is directly in contradiction to *Turkette*'s mandate that the enterprise and pattern be proven separately, and the petitioner noted that the government's apparent position "is an extraordinary proposition."[423]

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417. *Id.* at 43–44.

418. *Id.* at 44. Further, the "petitioner's contentions are foreclosed by this Court's decision in *H.J. Inc.* The Court there held that a RICO defendant's 'pattern of racketeering activity' need not be characteristic of organized crime or an organized-crime-type perpetrator." *Id.* (citing H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 244–49 (1989)).

419. *Id.* The government opined that the "ability of RICO to reach groups of criminals who operate over time even without formal structure or relationships other than their criminal endeavors is critical to achieving RICO's goals." *Id.* at 28. The government argued that "legislative history shows that Congress deliberately rejected an organized crime limitation on the statute's scope, opting instead for 'language capable of extending beyond organized crime.'" *Id.* at 45 (quoting *H.J. Inc.*, 492 U.S. at 246). "Moreover, the Court in *H.J. Inc.* concluded that a RICO pattern need not be indicative of an organized crime perpetrator 'in either a traditional or functional sense.'" *Id.* at 46 (quoting *H.J. Inc.*, 492 U.S. at 244). "*H.J. Inc.* therefore stands for the proposition that the broad scope of the RICO statute may not be limited by reference to the statute's overriding purpose of eradicating organized crime." *Id.*

420. *See id.* at 49–50.

421. *Id.* at 50 ("While statutes should be construed, where possible, to avoid constitutional questions, that interpretive [canon] has no application here. Petitioner contends that, without an 'ascertainable structure' requirement, the RICO statute would unconstitutionally remove the enterprise element from the jury's consideration and render RICO unconstitutionally vague. Both arguments rest on the premise that a structural requirement is necessary to prevent RICO's enterprise and 'pattern of racketeering activity' elements from merging. But, as shown above, the absence of such a requirement presents no 'merger' problem." (citations omitted)).

422. Petitioner's Reply Brief, *supra* note 278, at 6–7 ("It may well be true that, when a multi-member association-in-fact exists to commit crimes and their crimes form a RICO 'pattern,' a jury could always infer the existence of an enterprise." (quoting Brief for the United States, *supra* note 391, at 27) (internal quotation marks omitted)).

423. *Id.* at 6–7.

5. Oral Argument

On January 14, 2009, the Supreme Court heard oral arguments by the parties.[424] Fernich began by arguing that there should be a distinct ascertainable-structure requirement to differentiate enterprise from pattern, and Justice Ruth Bader Ginsburg quickly asked him if the only issue was the improper jury instructions at trial or whether there was insufficient evidence of enterprise for the case to go to jury.[425] Fernich replied that the evidence was legally insufficient but the jury instruction was his main contention.[426] After clearing up the scope of the jury charge error in response to a question from Justice Samuel Alito, Fernich answered a hypothetical from Justice Antonin Scalia about whether a "group of bank robbers with various roles would constitute an enterprise under petitioner's definition."[427] Boyle's attorney posited that they would not, since they had no ongoing decisional apparatus or continuing directional mechanism.[428]

Justice Anthony Kennedy then noted that the petitioner's use of *Turkette* seemed to "interpolate additional requirements."[429] Fernich answered that he did not contend that *Turkette* is directly controlling, but argued that the Court there held that a structure requirement was implicit.[430] Justice Ginsburg asked what the minimum to qualify as having a structure was, and Fernich answered that the minimum was "a separate, ongoing, continuing existence apart from the commission of the predicate acts themselves, and the members necessary to commit those predicate acts."[431] He specified that "an ongoing directional mechanism, a continuing decision-making unit, and some sort of coherent existence between the commission of the racketeering acts" themselves were three bare minimum ingredients.[432] When Justice Ginsburg later observed that "Boyle's group possessed qualities similar to those examples, such as longevity, modus operandi, and division of labor," Fernich responded "that the longevity aspect was still in dispute."[433]

When Justice Scalia asked what the need is for a hierarchy or boss—as opposed to a democratic mob—Fernich noted that he objected to the jury instruction in its entirety and did not press the contention that hierarchical structure is an irreducible minimum.[434] Justice Souter noted that an

424. Transcript of Oral Argument, *supra* note 278.
425. *Id.* at 3–4.
426. Posting of Eliza Presson to SCOTUSblog, http://www.scotusblog.com/wp/oral-argument-recap-boyle-v-us/ (Jan. 27, 2009, 3:41 PM) (posting Stanford Law School student JP Schnapper-Casteras' recap of the *Boyle* oral argument).
427. *Id.*
428. Transcript of Oral Argument, *supra* note 278, at 6.
429. Presson, *supra* note 426.
430. *Id.*
431. Transcript of Oral Argument, *supra* note 278, at 7–8.
432. Presson, *supra* note 426.
433. *Id.*
434. Transcript of Oral Argument, *supra* note 278, at 11–12; *see also* Presson, *supra* note 426.

individual can be an enterprise and opined that in such a case a one-man enterprise "has got to have all the formal characteristics that you talk about."[435] He argued that might be difficult for issuing meaningful jury instructions.[436] Fernich countered "that RICO does not define an individual as an association-in-fact enterprise and instead . . . [categorizes] individuals as a legal enterprise."[437]

Justice Ginsburg asked whether street gangs would qualify under his proposed definition, and Fernich answered that they would.[438] Justice Alito asked what was needed to be shown, if not hierarchy.[439] Fernich answered that the pattern jury instructions of the Seventh and Eighth Circuit charge the jury "that there has to be a structure separate from the commission of the predicate acts themselves."[440] When Justice Kennedy argued that Boyle and his group fit exactly into Fernich's requested definition, Boyle's attorney argued that there was "no structure aside from that which is a necessary incident to the commission of each racketeering act."[441]

Justice Breyer asked whether Fernich would be amenable to a definition of structure that encompassed rules, understandings, or behaviors that tend to keep the associated-in-fact enterprise together over time beyond those required to commit the underlying crimes.[442] Boyle's attorney answered that it was a satisfactory definition.[443]

Anthony Yang, arguing for the government, argued that the associated-in-fact enterprise needs no ascertainable structure distinct from the underlying pattern, evoking RICO's statutory text and the Court's interpretation of the text in drawing that conclusion.[444] Justice Scalia noted that "it might be problematic if a mere pattern of acts constitutes an enterprise."[445] Yang responded by claiming that Boyle's argument that enterprise merges with pattern was incorrect, since a pattern can be established by acts committed by an individual, while the associated-in-fact enterprise is the group.[446] In response to a question from Justice Alito, Yang responded that an individual can engage in a pattern of racketeering without participating in the affairs of an enterprise, since the pattern of racketeering constitutes the underlying crimes.[447]

Justice Ginsburg asked Yang whether the three different formulas by the various circuits practically produce different results.[448] Yang said it would

435. Transcript of Oral Argument, supra note 278, at 14.
436. *Id.* at 12–14; *see also* Presson, *supra* note 426.
437. Presson, *supra* note 426.
438. Transcript of Oral Argument, *supra* note 278, at 15–16.
439. *Id.* at 16.
440. *Id.*
441. *Id.* at 17.
442. *Id.* at 22.
443. *Id.* at 23.
444. *Id.* at 24.
445. Presson, *supra* note 426.
446. *Id.*
447. Transcript of Oral Argument, *supra* note 278, at 29–30.
448. *Id.* at 37.

make a difference in some cases, such as loosely knit gangs with no hierarchy, and would lead to "a long course of case-by-case adjudication."[449] Justice Breyer noted that "the object is to find a way of not overextending RICO where there is nothing there but a conspiracy to commit two crimes."[450] Justice Breyer, after going back and forth with Yang over various hypotheticals, concluded that a "common garden-variety conspiracy to[,] say, rob a bank and then transport the money a few months later" should not be within the reach of RICO.[451]

When Justice Scalia provided a pattern jury charge that "you must find an organization separate from the mere commission of the predicate acts," Yang responded, "What does that mean?"[452] Justice Scalia answered, "I don't know," and there was laughter.[453] Yang introduced a hypothetical of "a group that formed only to commit predicate acts of racketeering over a 10-year period."[454] He argued that "[i]t would be anomalous to exclude a group that committed only predicate acts, but to include a group that was only partially racketeering but wholly criminal. Chief Justice [John] Roberts disagreed, because RICO was aimed not just at crimes but also certain types of organizations."[455]

On rebuttal, Fernich argued that the lower courts have misread *Turkette*.[456] He further noted that "the government presses its principal definition of an enterprise in its brief"—the inclusion of "common purpose," which is "the hallmark of a conspiracy."[457] He finished in addressing the purpose underlying RICO, arguing that it was "very significant" that bank burglaries are not predicate acts under RICO.[458] Yang had earlier pointed out that, while Boyle and his group were committing bank burglaries, the predicate acts under RICO involved the interstate transportation of stolen funds.[459] Fernich argued that Congress made a judgment that bank burglaries are adequately handled by the states and "that the States can prosecute them. And the reason why the three bank burglaries had to be [dressed] up as interstate transportation of stolen money is [that] this is not really a case in which RICO is properly invoked."[460]

449. *Id.* at 37–38.
450. *Id.* at 39.
451. *Id.* at 42.
452. *Id.* at 45.
453. *Id.*
454. Presson, *supra* note 426.
455. *Id.*
456. Transcript of Oral Argument, *supra* note 278, at 50.
457. *Id.* at 51–52; *see also* Presson, *supra* note 426.
458. Transcript of Oral Argument, *supra* note 278, at 53.
459. *Id.* at 35.
460. *Id.* at 53–54.

III. RECOMMENDING A PRAGMATIC ASCERTAINABLE-STRUCTURE REQUIREMENT

This Note has detailed the history of RICO and the enterprise element, as well as the three-way circuit split regarding the proof needed to prove an associated-in-fact enterprise and the various arguments of the parties in *Boyle*. The most appropriate course of action is for the Supreme Court to adopt the Seventh Circuit's analysis that something beyond conspiracy must be proved if RICO is to have the thrust it was originally intended to have.[461] In other words, proof of an ascertainable structure beyond the minimum necessary to conduct the underlying crimes should be required to prove the enterprise element.[462] However, *Turkette*'s instruction that the proof of both the enterprise and the pattern of racketeering elements will in some cases "coalesce"[463] demands the conclusion that evidence of an enterprise need not include any goals or any purpose separate and distinct from the pattern of racketeering, as the Seventh Circuit held in *Rogers*.[464] This important restriction frees prosecutors and plaintiffs from an overly narrow definition of enterprise.

This middle course is based on the most logical reading of the statute and *Turkette*, although RICO's legislative history could also be considered depending on whether the statute itself is considered ambiguous. This Seventh Circuit standard is both the proper reading of the statute and within the broad and flexible parameters initially set out by Congress when RICO was enacted.

Part III examines the considerations for adopting this view, both in the plain reading of RICO, its legislative history and statutory construction, and the Supreme Court cases interpreting it. This part also discusses how an ascertainable-structure requirement is intertwined with the majority view of the circuits and will not disrupt RICO's enforcement. Finally, this part discusses the policy grounds for articulating this requirement, citing the principles of lenity and constitutional avoidance. The best argument against such a requirement is that there is nothing explicitly in either RICO or *Turkette* that mentions an ascertainable structure. But where a plain meaning can be implied even where not explicit—or where historical (or constitutional) forces compel the implied meaning—this argument is rendered meritless.

Part III.A argues that a practical reading of RICO and *Turkette* is sufficient to install the requirement. Part III.B opines that the statutory construction and legislative history also support this view. Part III.C argues that the minority view is not persuasive, and the Seventh Circuit view will not disrupt RICO's enforcement. Part III.D argues that policy concerns over prosecutorial discretion and potential constitutional problems

461. United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996).
462. *See supra* note 278 and accompanying text.
463. United States v. Turkette, 452 U.S. 576, 583 (1981).
464. *Rogers*, 89 F.3d at 1337.

regarding void for vagueness warrant the consideration of the rule of lenity and the canon of constitutional avoidance.

A. *Practical Reading of RICO and* Turkette *Is Proper*

RICO, it is true, never imposes an "ascertainable structure" requirement on associated-in-fact enterprises.[465] However, it is a short step, and not a giant leap, to infer the requirement on these enterprises. First, start with the title: "Racketeer Influenced and Corrupt Organizations" fairly shouts that the statute is about organized, as opposed to ad hoc, criminality—as does the title of the Organized Crime Control Act.[466] Since, as Edmund Boyle's attorney pointed out in his merit brief, organization and structure can be synonymous,[467] it is no reach to infer that some hierarchical entity is involved.

Next, the text of 18 U.S.C. § 1961(4) implies that "associated-in-fact" enterprises are on equal ground with legal-entity enterprises.[468] That statute reads, "'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."[469] Judge Posner correctly deduced that, if emphasis is placed on "association in fact," no ascertainable structure is necessary—the view of *Odom* and the cases it cited.[470] But, as Judge Posner noted, "that truncates the critical statutory language 'associated in fact *although not a legal entity*'—misleadingly."[471] Judge Posner found that the "juxtaposition of the two phrases" implies that "associated in fact" simply means "structured without the aid of legally defined structural forms" such as a corporation.[472] He believed this inference was reinforced by the mention of a list of legal entities directly before the phrase "any union or group of individuals associated in fact" in 18 U.S.C. § 1961(4).[473] Moreover, the conclusion that a union is a labor union that, like a corporation, has an inherent structure, further bolsters this point.[474] The associated-in-fact enterprise is not *narrowed* by the ascertainable-structure interpretation, as *Odom* purports; it is merely put on equal footing with legal-entity enterprises.[475] Judge Posner concluded that "[w]ithout a requirement of structure, 'enterprise' collapses to 'conspiracy.'"[476]

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465. *See* 18 U.S.C. § 1961(4) (2006).
466. See *supra* notes 370–72 and accompanying text.
467. See *supra* note 369 and accompanying text.
468. *See supra* notes 306–09 and accompanying text.
469. 18 U.S.C. § 1961(4).
470. Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804 (7th Cir. 2008) (citation omitted).
471. *Id.*
472. *Id.* at 804–05.
473. *Id.* at 805 (internal quotation marks omitted).
474. *See supra* note 376 and accompanying text.
475. *See supra* notes 308–09 and accompanying text.
476. *Limestone*, 520 F.3d at 805.

Consider further the logic behind a practical reading of *Turkette*.[477] Legal entities have natural structures and hierarchies.[478] Similar to this, the *Turkette* Court imposed "common purpose," "ongoing organization," and "continuing unit" requirements on associated-in-fact enterprises, which suggests the same or similar structure.[479] An entity without a defined purpose, direction, or organization cannot hold together for very long and will likely fall short of this element.

The best interpretation of *Turkette* was seen by the Seventh Circuit in *Rogers*, which imposed a unique enterprise proof requirement that did not need to have a goal separate and distinct from the pattern of racketeering.[480] Two aspects of the *Turkette* holding compel this conclusion. First, as *Turkette* explicitly allowed wholly illegitimate organizations to be within the purview of RICO—the Act is "equally applicable to a criminal enterprise that has no legitimate dimension or has yet to acquire one"[481]—it did not require any additional legitimate arm of an enterprise. Thus, it would be "absurd" to require an additional illegal structure of an enterprise that is not part of the predicate acts.[482] The government would need to dig up and accuse a defendant of illicit activity not for the sake of charging him with any crime, but for the sake of proving an element of RICO.[483] In other words, it is not appropriate, under *Turkette*, to require evidence of an enterprise with goals or purposes that are separate and distinct from the predicate acts. Doing so would result in the untenable conclusion against an illegitimate organization just described.[484]

A second part of the *Turkette* holding bolsters this view—the idea that proof of the pattern of racketeering and the enterprise will in some cases coalesce.[485] In other words, there will occasionally be instances where a wholly illegitimate organization has no distinct structure, but where the evidence of the crimes the enterprise commits will also prove the hierarchical structure. Since this was explicitly allowed under *Turkette*, it would not be proper to mandate an evidentiary requirement that any structured enterprise must have a separate and distinct goal or purpose. For due process reasons, the government must prove the elements separately; this is different than mandating that the evidence must be one hundred percent completely distinguishable—or even one percent.

477. United States v. Turkette, 452 U.S. 576 (1981).
478. *See supra* note 21 and accompanying text.
479. *Turkette*, 452 U.S. at 583.
480. *See supra* notes 281–86 and accompanying text.
481. *Turkette*, 452 U.S. at 591.
482. United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996).
483. *Id.*
484. *Id.*
485. *Turkette*, 452 U.S. at 583.

B. *Statutory History and Purpose Also Support the Seventh Circuit's View*

The previous view of the Supreme Court that RICO's enterprise element is not ambiguous[486] is simply incorrect. To hold so is to view the naked emperor and remark on his majestic clothes. It is frustrating to watch lower courts argue about the statute, coming to completely contradictory views within a matter of years within the same circuit.[487] But while courts of appeals may not agree on the RICO enterprise element—splitting as many as three ways—all of them think that they have discerned the proper meaning of this unambiguous statute. This posturing and flailing about only compounds a serious problem. The three-way circuit split that has resulted since *Turkette* speaks for itself on the matter of clarity. Moreover, that highly interested attorneys cannot even agree which circuit has held what with respect to the RICO enterprise proof requirement is perhaps the clearest example of confusion.[488]

Based on precedent, it seems unlikely that the Supreme Court will finally declare that the statute meets the threshold of being ambiguous as a matter of law. It is far more likely that the Court will simply find that it requires close statutory interpretation. If, though, the Supreme Court was to finally announce the statute's ambiguity, it would be freed to look at the statutory history and purposes behind RICO. This, too, would allow for adoption of the Seventh Circuit's position.

RICO was initially adopted to prevent the infiltration by organized crime of legitimate businesses.[489] Far afield from those original purposes due to an overly broad construction and civil and prosecutorial zeal, it may now be time to decide how far Congress intended RICO to go. Obviously, there was some general impetus to squelch organized crime, to the extent that one statute could do so.[490] Common sense—or a practical reading of the history and basis for RICO—would lead to the conclusion that RICO did not intend for Best Buy and Microsoft to be considered a racketeering enterprise for performing an admittedly duplicitous fraud on consumers as in *Odom*.[491] In other words, an ascertainable structure is required to separate racketeers from defendants who could have never been conjured up by Senators Hruska and McClellan in 1970.

Further, RICO's liberal construction clause, providing that the statute "shall be liberally construed to effectuate its remedial purposes," does not foreclose this result.[492] The Court has previously "rejected an unbridled

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486. *See id.* at 587–88 n.10 ("no ambiguity in the RICO provisions at issue here"); *see also supra* notes 124–27 and accompanying text.

487. *Compare* Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 464 (2007), *with* Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996) (finding that "it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering").

488. *See supra* note 238 and accompanying text.

489. *See supra* note 73 and accompanying text.

490. *See supra* note 55 and accompanying text.

491. *See supra* notes 73–80 and accompanying text.

492. Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970).

view of RICO over [a] liberal construction objection."[493] Since the Court decided *Reves* and *Scheidler* within a year of one another, it seems logical to assume that the Court will choose whether to restrict the enterprise element on a case-by-case basis. While it is true that the Court has refused to restrict the enterprise element in the past, this does not portend that all future restrictive interpretations will be foreclosed. Consider, too, Fernich's argument that many early RICO cases shunned any structural requirement because (1) RICO's basic parameters were unsettled, (2) the concepts of relatedness and continuity were generally considered attributes of the enterprise rather than the pattern, and (3) "multiple scheme" and "economic motive" requirements were added as interpretative glosses (until overruled) as alternative means of ensuring an enterprise's continuing organization.[494]

The Seventh Circuit's view is proper because it would finally and explicitly define the enterprise element and thus narrow the overwhelming scope of RICO. Whether this "beyond the minimum" requirement for an ascertainable structure is equivalent to holding that the ascertainable structure must be separate and distinct from the pattern of racketeering—and thus whether it answers the question presented in *Boyle* in the affirmative—is a matter open to debate.[495] On the one hand, Fernich equated the Seventh Circuit's pattern jury instruction with that of the Eighth Circuit at oral argument in *Boyle*, even though the instructions use decidedly different language.[496] On the other hand, other circuits and attorneys view the Seventh Circuit as requiring an ascertainable structure that is not separate and distinct from the pattern of racketeering, and Fernich used this characterization in his petition for a writ of certiorari.[497]

This Note contends that it is a slightly lesser standard that need not make the ascertainable structure distinct from the pattern of racketeering. Underlying crimes, even those that form a pattern of racketeering under RICO, can be accomplished with a bare minimum of guile, cohesion, planning, or structure; that the Seventh Circuit requires more is not necessarily equivalent to requiring a separate and distinct standard.[498]

Irrespective of how one views the above distinction, the additional imposition that an enterprise needs no separate and distinct goals or

493. Brief for the Petitioner, *supra* note 238, at 67 (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 463 (2006) (Thomas, J., concurring in part and dissenting in part); Reves v. Ernst & Young, 507 U.S. 170, 186–87, 189 (1993) (Souter, J., dissenting)).

494. *See supra* note 350 and accompanying text.

495. *See supra* note 278 and accompanying text.

496. *See supra* note 278 and accompanying text.

497. *See also* NASCAT Brief for Respondent, *supra* note 73, at 21–22 n.15; *see supra* note 278 and accompanying text.

498. *See, e.g.*, United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996) (finding that "[t]here must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much" (quoting United States v. Korando, 29 F.3d 1114, 1117 (7th Cir. 1994)) (internal quotation marks omitted)); Transcript of Oral Argument, *supra* note 278, at 20 ("[T]he cases out of the Seventh Circuit say it is not a high hurdle. They say it's a low hurdle . . . .").

purposes results in a further defined statute and adherence to *Turkette*,[499] which is a win-win proposition for virtually everyone (except committed racketeers).

C. *None of the Contrary Arguments Are Sufficiently Persuasive*

1. The Ninth Circuit's Analysis Was Incorrect

Odom is the most recent minority view on the issue, and the *Odom* court's logic is based on an overly myopic view of RICO, an overly strict reading of *Turkette*, and incorrect conclusions drawn from legislative history.[500] *Odom*'s focus on the phrase "associated in fact" ignores the qualifier "although not a legal entity" right after it, which in all common sense equates the two types of enterprises.[501] Further, *Odom* reads *Turkette*'s elements too strictly, concluding that an associated-in-fact enterprise can have "ongoing organization" and "continuing unit" without structure. As Fernich explained from a definitional reading of these words, structure is implied throughout.[502] Finally, *Odom* concludes that Congress must change the statute if there is dissatisfaction with the fact that civil plaintiffs are not taking on illegitimate mobsters—but rather legitimate entities.[503] But where statutory phrases are ambiguous, the Supreme Court has sometimes looked to the common law for an interpretation of the term, and has sometimes chosen the narrower construction.[504]

2. Arguments by the Government Were Unpersuasive

The assertions in the government's briefs in *Boyle* are similarly unpersuasive. Any argument that RICO works fine—since any enterprise-proof requirement distinctions are minor[505]—is unsound and can be turned on its head. The fact remains that the majority view requires some ascertainable structure.[506] Thus, it is the leading paradigm in a system where even its critics admit the system works fine.[507] Hence, it seems possible to infer that no problems would be created in a broadening of this majority view, but rather all inconsistency and uncertainty would be avoided.

Next, consider the arguments that no "associated-in-fact" enterprise should be required to have an ascertainable structure, because neither a

499. United States v. Turkette, 452 U.S. 576, 583 (1981); *see also supra* notes 280–86 and accompanying text.

500. *See supra* notes 227–32 and accompanying text.

501. Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804–05 (7th Cir. 2008).

502. *See supra* notes 365–69 and accompanying text.

503. *See* Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 464 (2007).

504. *See supra* note 232 and accompanying text.

505. *See supra* notes 386–87 and accompanying text.

506. *See supra* Part II.B.

507. *See supra* notes 386–87 and accompanying text.

legal entity of one person nor an "associated-in-fact" enterprise of two people could have one. In the first instance, common sense dictates that if one individual is determined to be a "legal entity" enterprise by a court, in all likelihood that individual is a sole proprietor or incorporated.[508] Thus, among other things, the individual likely has a "headquarters," "budget" and/or "records," which Judge Posner explicitly proffered as "indicator[s]of a legal or illegal enterprise."[509] Thus, this argument is particularly specious.

In the second instance, consider the two-person "associated-in-fact" enterprise the government used as an example. The government argued that "Congress could not have intended that such smaller association-in-fact enterprises must always include"[510] an ascertainable structure, because these enterprises "do not require such attributes in order to operate effectively, and they would not necessarily be expected to display them."[511] The government seems to mistakenly assume that only formalistic structures would suffice, which is simply not the case.[512] *Turkette* allowed for formal or informal organization of an enterprise[513] and, as Boyle's attorney points out, there are a whole host of tandems that would qualify: mentor/apprentice, briber/recipient, thief/fence, triggerman/wheelman, pimp/prostitute, trafficker/launderer, and loan shark/collector to name but a few.[514] Once again citing Judge Posner, a headquarters, budget, and records would be proof of an ascertainable structure, as would "a system of governance, an administrative hierarchy, a joint planning committee . . . a manager [or] . . . personnel having differentiated functions."[515]

Another of the government's arguments—that no ascertainable structure is needed to distinguish RICO enterprises from conspiracies[516]—is incorrect. An ascertainable structure would be the easiest way to make sure enterprise did not collapse into conspiracy—as Judge Posner warned it otherwise would.[517] Similarly, the government's argument that enterprise would not collapse into the pattern of racketeering activity is not compelling. The *Turkette* Court twice noted that the enterprise is an entity separate and distinct from the pattern of racketeering,[518] yet different circuits have established different guidelines post-*Turkette* on how to prove an "associated-in-fact" enterprise.[519] Given that the proof in some cases could coalesce—and thus a less-than-diligent fact-finder could conclude, as

508. *See* Petitioner's Reply Brief, *supra* note 278, at 26 (citing Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 165 (2001)).
509. Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804 (7th Cir. 2008).
510. *See* Brief for the United States, *supra* note 391, at 20.
511. *Id.*
512. *See supra* note 411 and accompanying text.
513. United States v. Turkette, 452 U.S. 576, 583 (1981).
514. *See* Petitioner's Reply Brief, *supra* note 278, at 27.
515. *Limestone,* 520 F.3d at 804.
516. *See supra* note 397 and accompanying text.
517. *Limestone*, 520 F.3d at 805.
518. *Turkette*, 452 U.S. at 583.
519. *See supra* Parts II.A–C.

the Second Circuit has, that "RICO charges may be proven even when the enterprise and predicate acts are 'functionally equivalent'"[520]—the proper solution is to incorporate the majority view and impose an ascertainable structure. That some circuits with this requirement find separateness elsewhere[521] is not a compelling reason for the Supreme Court to hold otherwise.

Finally, the notion that the title and purpose of RICO do not support an ascertainable-structure requirement (which would slightly narrow the statute's scope) are best answered by the research and conclusions of Judge Lynch, who opines that, while careful commentators have concluded that Congress intended RICO specifically to address the problem of criminal infiltration of legitimate enterprises, those that have found "much broader purposes" in RICO's historical background—and "have used their findings to justify sweeping interpretations of the statute"—are "wrong."[522] It must also be noted that no less an authority than former Chief Justice John Marshall wrote that a statute's title is generally relevant to statutory construction.[523]

D. *Strong Policy Considerations Merit This Resolution*

Judge Lynch recognized twenty years ago that not only was there a need for a structural requirement for the enterprise element of RICO, but that Congress was unlikely to ratchet down RICO, so to speak.[524] Although the Supreme Court cannot follow its desire on policy grounds,[525] strong policy considerations merit this move. For this reason, the Court must act as it did in *Reves*, when it narrowed the scope of who could be prosecuted under § 1962(c) to people who operated or managed the RICO enterprise.[526]

1. Reliance on Prosecutorial Discretion Is Insufficient and Dangerous

To leave RICO "associated-in-fact" enterprises vague—and essentially rely on prosecutorial discretion in criminal trials—is unsound for a number of reasons. The reliance on a benevolent U.S. Attorney's Office is misguided. It is similar to the government's losing argument in opposition to certiorari in *Boyle* that even if there are distinctions among the circuits, they are minor or trifling distinctions that should not trouble the Supreme

520. United States v. Ferguson, 758 F.2d 843, 853 (2d Cir. 1985) (quoting United States v. Bagaric, 706 F.2d 42, 57 (2d Cir. 1983)); *see also supra* note 214 and accompanying text.

521. *See* Brief for the United States, *supra* note 391, at 31–32; *see also supra* note 396 and accompanying text.

522. Lynch, *supra* note 33, at 664.

523. United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (title generally relevant in statutory construction); *see supra* note 371 and accompanying text.

524. *See supra* notes 170–71 and accompanying text.

525. *See* Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2145 (2008) ("Whatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO to reflect their—or our—views of good policy.").

526. *See supra* notes 155–64 and accompanying text.

Court.[527] Any circuit confusion is something that the Supreme Court should, when it grants certiorari, do everything in its power to resolve.

While the *United States Attorneys' Manual* suggests explicit respect for state law, surely the harms of an overly broad prosecution philosophy are the unwritten anchor of the guidelines.[528] The false assumption is that the U.S. Attorney's office will always treat RICO in a like-minded, even-handed manner across the country and over the coming months and years. Certain prosecution tactics come in and out of vogue; if anything, RICO is the prime example of this. For example, in *Bledsoe*, the government argued "that any association of individuals can be an enterprise."[529] Relying on the discretion and a narrow application of RICO today could evaporate in the future, and the Supreme Court will have lost this golden opportunity to further illuminate.

Moreover, reliance on prosecutorial discretion only solves half the problem: if the past is prologue, there is no evidence that civil RICO plaintiffs will show any restraint in the future,[530] and whether or not those facing civil RICO actions will be considered part of an enterprise will still depend on where the courthouse is located.

2. Constitutional Problems Demand Explicit Enterprise Definition

Further, consider the constitutionality of the matter. The canon of constitutional avoidance and the rule of lenity warrant an ascertainable-structure requirement.[531] In recent years, the Supreme Court has reemphasized a defendant's fundamental Fifth and Sixth Amendment rights to have every essential element of a criminal offense determined by a jury beyond a reasonable doubt.[532] As Fernich noted, "A construction that fuses enterprise and pattern, effectively erasing enterprise from the statute, therefore implicates fundamental rights and raises major constitutional concerns."[533] And while it is true that defendants are aware of what actions will violate the law and constitute the predicate acts under RICO—which would normally end the "void for vagueness" analysis in the case of a garden-variety crime—they are not aware of what associations may constitute a RICO associated-in-fact enterprise. Nor could they be, when the circuits are split three ways. Therefore, they are unaware what the penalty for their actions—the RICO penalty or the garden-variety penalty—will be.[534] So the void for vagueness problem still remains. Moreover, a lack of an ascertainable-structure requirement allows any plaintiff or U.S.

527. *See supra* notes 386–87 and accompanying text.
528. *See supra* notes 187–94 and accompanying text.
529. United States v. Bledsoe, 674 F.2d 647, 661 (8th Cir. 1982); *supra* note 250 and accompanying text.
530. *See supra* note 190 and accompanying text.
531. *See supra* note 377 and accompanying text.
532. *See supra* note 378 and accompanying text.
533. *See* Brief for the Petitioner, *supra* note 238, at 64.
534. *See supra* notes 179–80 and accompanying text.

Attorney to dream up an "enterprise" that catches in its net actors who have only the most attenuated, informal relationship—making this issue a constitutional problem for both defendant (of notice) and plaintiff/prosecutor (of overbroad and amorphous reach).[535] Surely, this incredibly wide latitude must no longer be allowed. Were it not for the discretion the U.S. Department of Justice has shown over the decades (as Justice Marshall pointed out in *Sedima*),[536] the Supreme Court may have been forced to deal with this problem long ago.

Regarding the rule of lenity, Fernich correctly argues that an interpretation of the ambiguous statute that imposes an ascertainable structure will help defendants in this situation.[537] The proof requirement in this situation is one that is spelled out explicitly for the defendant—that he must be part of an enterprise with an ascertainable structure—and one that does not subject him to possible Fifth Amendment concerns on void for vagueness issues.[538] Even if this slightly narrows the scope of RICO associated-in-fact enterprises, it does no violence to the statute or its liberal construction clause.[539] Such a construction would avoid constitutional doubt, and it "would not be the first time the Court rejected an unbridled view of RICO over liberal construction objection."[540]

CONCLUSION

A tool originally designed to prevent organized crime from infiltrating legitimate business has been used in all manners never contemplated by its creators. It is important to continue to use RICO to punish racketeers both criminally and civilly and as a deterrent for those who would engage in racketeering activity. But likewise, there must be a balance of the need for teeth in the statute with the potential dangers of RICO's overbreadth. Moreover, the law must differentiate the racketeer from the common, ad hoc criminal.

Since *Turkette* was decided in 1981, there has been no doubt that the enterprise element must be proved separately from the pattern of racketeering activity. *Turkette*, however, did not do enough to illuminate what was needed to prove enterprise, resulting in a circuit split that has finally wended its way back to the Supreme Court. A majority of circuits have held that an enterprise must have an ascertainable structure separate and distinct from the underlying predicate acts, and there is no evidence that any problems have developed from this interpretation.

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535. For vagueness concerns, see *supra* notes 172–81 and accompanying text.

536. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 502 (1985) (Marshall, J., dissenting).

537. *See* Brief for the Petitioner, *supra* note 238, at 66.

538. *Id.*; *see also* United States v. Santos, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) (noting that when the rule of lenity breaks statutory ties in favor of defendants, it is subjected to "ambiguous criminal laws").

539. *See* Brief for the Petitioner, *supra* note 238, at 66–67.

540. *Id.* at 67 (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 463 (2006) (Thomas, J., concurring in part and dissenting in part); Reves v. Ernst & Young, 507 U.S. 170 186–87, 189 (1993) (Souter, J., dissenting)).

Boyle, then, represents a golden opportunity for the Supreme Court to preserve RICO's important enterprise element by explicitly imposing an ascertainable-structure proof requirement.