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ARTICLES

RETURNING RICO TO RACKETEERS: CORPORATIONS CANNOT CONSTITUTE AN ASSOCIATED-IN-FACT ENTERPRISE UNDER 18 U.S.C. § 1961(4)

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INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-68 (2006), prohibits a “person” from engaging in a “pattern of racketeering activity” in connection with the acquisition, establishment, or conduct of an “enterprise.”⁴ Violations of the statute can trigger both civil and criminal penalties,⁵ including treble damages and attorneys’ fees on the civil side. RICO’s broad language created a potential for abuse of civil actions, which has long been recognized.⁶ For more than a decade, however, courts were not confronted by this potential. “Throughout the 1970s and early 1980s, RICO’s civil remedies went virtually unnoticed and unused.”⁷ Even criminal suits under RICO were rarely filed before 1982, averaging twenty per year in that period.⁸ Many of the precedents during these formative years read RICO in a broad, remedial fashion without fear of misapplication.⁹ The potential for abuse of RICO, especially on the civil side, remained latent.

4. See 18 U.S.C. §§ 1961(3), (5), (4) (2006) (defining, respectively, “person,” “pattern of racketeering activity,” and “enterprise”); see also *id.* § 1961(1) (defining the key term “racketeering activity”).

5. See 18 U.S.C. §§ 1963, 1964 (2006).

6. See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985) (“We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors.” (citing Arthur F. Mathews, et al., *Report of the Ad Hoc Civil RICO Task Force of the A.B.A. Section of Corporation, Banking and Business Law* (1985) [hereinafter *ABA Report*])). This concern was made more explicit in Justice Marshall’s dissent in *Sedima. Id.* at 506 (Marshall, J., dissenting) (“Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.” (citing *ABA Report, supra*)).

7. A. Darby Dickerson, *Curtailing Civil RICO’s Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction Under 18 U.S.C. § 1965*, 75 NEB. L. REV. 476, 485 (1996).

8. “During RICO’s first decade, there were fewer than 220 prosecutions—or a little over 20 per year on average. Since 1982, the yearly average has exceeded 100.” Samuel A. Alito, Jr., *Racketeering Made Simple(r)*, in *THE RICO RACKET* 1, 11 (Gary L. McDowell ed., 1989).

9. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 84 Stat. 922, 947 (1970) (“The provisions of this title [RICO] shall be liberally construed to effectuate its remedial purposes.”); see, e.g., *United States v. Turkette*, 452 U.S. 576, 580 (1981) (citing the liberal construction provision in finding “no restriction upon the

This potential soon became a reality. From 2001 to 2006 alone, civil RICO plaintiffs filed, on average, 759 private civil claims each year. Although astonishing, these numbers are not anomalous given the last two decades of RICO jurisprudence,¹⁰ in whom a rising proportion of claims are inapposite to the intentions of RICO's drafters.¹¹ Ironically, actions often target legitimate corporate organizations, among the parties whom RICO was designed to protect from mob infiltration.¹² Such claims seek to RICO-ize ordinary commercial activity and turn garden-variety business disputes into federal claims for treble damages and attorney's fees. In one recent example, a professional wrestling promoter sued the makers of action figures and video games and licensing agents, alleging commercial bribery and related claims in connection with licensing agreements.¹³

Several courts have tried to limit RICO's reach in response to the exponential growth of civil RICO, seeking to prevent the "RICO-iz[ation]"¹⁴ of the law of corporations, business, or torts. Notably, the Supreme Court limited section 1962(c) to claims based on a strict textual

associations embraced by the definition [of enterprise in 18 U.S.C. § 1961(4)]"). Notably, *Turkette* overruled a First Circuit decision which limited RICO's application to "legitimate" enterprises, a restriction which had no textual basis. *See infra* notes 38-39 and accompanying text.

10. *See Federal Judicial Caseload Statistics*, Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, for 2001-2006, respectively, <http://www.uscourts.gov/caseloadstatistics.html> (last visited Sept. 30, 2007) (detailing the number of cases commenced by type per year); *see also* William H. Rehnquist, *Reforming Rico*, in *THE RICO RACKET* 63, 64 (Gary L. McDowell ed., 1989) ("Civil filings under [RICO] have increased more than eight-fold over the last five years to nearly a thousand cases during calendar year 1988.").

11. Rehnquist, *supra* note 10, at 64 ("Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts.").

12. *See, e.g.*, S. Rep. 91-617, at 76 (indicating Title IX [RICO] "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce").

13. *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484 (S.D.N.Y. 2006).

14. *See* Transcript of Oral Argument, No. 05-465, 2006 WL 1194498, at *44, *56 (2006), *Mohawk Indus.*, 126 S. Ct. 2016 (No. 05-465), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-465.pdf [hereinafter *Mohawk Indus. Transcript*]. The term "RICO-ize" was apparently coined by Justice Breyer during oral argument in *Mohawk Industries, Inc. v. Williams*, 126 S. Ct. 2016 (2006) (*per curiam*) (dismissing certification as improvidently granted).

analysis. The Court held that a RICO defendant must participate in the RICO enterprise, not merely conduct its own affairs, to be liable under section 1962(c).¹⁵ More recently, the Court now requires that a RICO defendant be distinct from the RICO enterprise.¹⁶ In response, private plaintiffs attempt to plead around the rule. Rather than allege that a corporate defendant constitutes an entire enterprise, civil claimants assert that such a defendant belongs to part of a larger group “associated in fact.”¹⁷ The Supreme Court considered this possibility in *Kushner* and warned lower courts not to accept this species of evasive pleading.¹⁸ Most circuits, however, have found that legal entities can be a part of larger associations in fact.¹⁹

15. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (“[L]iability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their *own* affairs. Of course, ‘outsiders’ may be liable under § 1962(c) if they are ‘associated with’ an enterprise and participate in the conduct of *its* affairs . . .”). The Court began to replace its liberal construction of RICO with the rule of lenity—a tool of construction appropriate for a quasi-criminal statute. *See id.* at 183, 184 n.8.

16. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001) (“We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.”). The Court accepted a slight distinction—between the corporate owner as natural person and the corporation as legal person. *See id.* The case presented the archetypal RICO fact pattern, an individual defendant using an enterprise for racketeering activity. *Id.* at 161-62. This case laid the foundation for the current circuit split. *See infra* Part III.

17. *Radionic Indus., Inc. v. GTE Prods. Corp.*, 665 F. Supp. 622, 628 (N.D. Ill. 1987) (arguing that such pleading is “essentially a linguistic maneuver designed to slip around the [*Haroco, Inc. v. Am. Nat’l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984)] decision [requiring defendant-enterprise distinction] and pin vicarious liability on a deep pocket . . .”). In short, plaintiffs want to be able to name the corporation as the RICO defendant because of their finances. *See* Mark Stephen Poker, *Reaching a Deep Pocket Under the Racketeer Influenced and Corrupt Organizations Act*, 72 MARQ. L. REV. 511 (1989) (“[I]n a given case, the corporate defendant may be the only potential defendant with the proverbial deep pocket.”). In order to do that, the distinctness requirement forces plaintiffs to find some larger enterprise of which the defendant corporation is a part. Alleging an ‘associated-in-fact’ enterprise allows a corporation to be named as the defendant in addition to being part of the larger association-in-fact—it is an escape hatch from the distinctness requirement.

18. *Kushner*, 533 U.S. at 164 (“It is less natural to speak of a corporation as ‘employed by’ or ‘associated with’ this latter oddly constructed entity.”).

19. *See, e.g., United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1296-97 (6th Cir. 1989); *United States v. Feldman*, 853 F.3d

This Article contends that a proper reading of the definition of “associated-in-fact” enterprise returns RICO to its racketeering roots. In light of the importance of the statutory definition of “enterprise,” its language merits quotation in full: “‘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.”²⁰ A close reading of the statute recognizes the difference between a corporation and an individual, resulting in the conclusion that corporations cannot be part of a “group of *individuals* associated in fact.” The inclusion of “group of individuals” was designed to reach associations of figures in an unrecognized criminal organization—not legitimate corporations.²¹ In other words, the correct reading of RICO would return the statute to its original purpose of combating both the civil and criminal dimensions of organized criminal activity.

Part I examines the interpretation of RICO as articulated in seminal circuit precedents. These early cases relied on three principal bases for their decisions. Part II returns to the language of the statute, applying familiar tools of statutory interpretation that reveal the errors in the reasoning of the circuits. The law that matters, however, is the law as interpreted. So why, given the circuit consensus, does it matter if a proper reading of the statute would protect corporations from the RICO-ization of general law? Part III responds to this question by pointing to the opportunity for a rediscovery of this reasonable limitation on RICO.²²

648, 655 (9th Cir. 1988); *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir. 1988); *United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985); *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.3d 1272, 1285 (7th Cir. 1983); *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983); *United States v. Thevis*, 665 F.2d 616, 625 (Former 5th Cir. 1982); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979).

20. 18 U.S.C. § 1961(4) (2006); *see generally* George K. Chamberlin, Annotation, *What Is an “Enterprise,” as Defined at 18 U.S.C.A. § 1961(4), For Purposes of the Racketeer Influenced and Corrupt Organizations (RICO) Statute (18 U.S.C.A. § 1961 et seq.)*, 52 A.L.R. FED. 818 (1981 & Supp. 2007) (collecting and summarizing cases on the definition of enterprise).

21. *See infra* notes 50-53 and accompanying text.

22. *See Mohawk Indus. Transcript, supra* note 14.

I. UNIFORM ERROR: LEGAL ENTITIES, ASSOCIATED-IN-FACT
AND THE CIRCUITS

The expansive interpretation of RICO occurred primarily in federal appeals courts during the 1980s.²³ The Supreme Court's 2001 decision in *Kushner* called into question the precedent set in that period.²⁴ Notably, six of the seven earliest appeals court cases stem from criminal prosecutions,²⁵ where RICO's application is ordinarily tempered by regulatory oversight of the moving party (the government) and the reluctance of courts to overturn convictions on technicalities.²⁶ The sole civil case amounted to a recitation of two of the earlier criminal cases and added no further analysis aside from supplementing the definition of "enterprise" with language not found in the statute.²⁷

23. Cf. *Feldman*, 853 F.2d at 655-56; *Perholtz*, 842 F.2d at 353; *Navarro-Ordas*, 770 F.2d at 969 n.19; *Aimone*, 715 F.2d at 828; *Bunker Ramo*, 713 F.2d at 1285; *Thevis*, 665 F.2d at 625; *Huber*, 603 F.2d at 393-94.

24. *Kushner*, 533 U.S. at 164 (stating that an association of legal and natural persons would be an "oddly constructed entity").

25. *Feldman*, 853 F.2d 648 (Ninth Circuit); *Perholtz*, 842 F.2d 343 (District of Columbia Circuit); *Navarro-Ordas*, 770 F.2d 959 (Eleventh Circuit); *Aimone*, 715 F.2d 822 (Third Circuit); *Thevis*, 665 F.2d 616 (Former Fifth Circuit); *Huber*, 603 F.2d 387 (Second Circuit). *Bunker Ramo*, 713 F.2d 1272 (Seventh Circuit) is the lone civil case of the group.

26. Paul Edgar Harold, *Quo Vadis, Association in Fact? The Growing Disparity Between How Federal Courts Interpret Rico's Enterprise Provision in Criminal and Civil Cases (With a Little Statutory Background to Explain Why)*, 80 NOTRE DAME L. REV. 781, 782 (2005) ("Currently, federal courts evidence the judicial hostility to civil RICO in particular through tightening their interpretation of what constitutes an association-in-fact enterprise in the civil context, while concurrently unduly loosening the previous restrictions on criminal association-in-fact enterprises."); cf. Rehnquist, *supra* note 10, at 65 ("[T]here is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court . . .").

27. *Bunker Ramo*, 713 F.2d at 1285 ("Enterprise," the first crucial concept, is defined as including 'any individual, partnership, corporation, association, or other legal entity, . . . any union or group of individuals associated in fact although not a legal entity,' 18 U.S.C. § 1961(4), and any combination of them." (emphasis added) (citing *Thevis*, 665 F.2d at 625; *Huber*, 603 F.2d at 393-94)). An Eleventh Circuit case similarly changed the statutory language in a way that would reach corporations associated in fact. See *United States v. Hewes*, 729 F.2d 1302, 1311 (11th Cir. 1984) ("Our precedent indicates that a RICO enterprise exists where a group of persons associates, formally or informally, with the purpose of conducting illegal activity . . .")

Generally, three arguments typify circuit court RICO jurisprudence in this time period: (1) since the word “includes” introduces the definition of “enterprise,”²⁸ the list following “includes” is illustrative, not exhaustive;²⁹ (2) an expansive reading of the statute comports with Congress’s command of liberal interpretation;³⁰ and (3) “[t]here is no restriction upon the associations embraced by the definition . . .” of enterprise.³¹

Congress stated that RICO “shall be liberally construed to effectuate its remedial purposes.”³² Several circuits took this to mean that “the term ‘enterprise’ should be construed broadly to include an association of legal entities.”³³ Any more “restrictive interpretation of the definition of enterprise would contravene this principle of statutory

(emphasis added) (affirming conviction of a group of natural persons, or individuals).

28. 18 U.S.C. § 1961(4) (1970) (current version at 18 U.S.C. § 1961(4) (2006)).

29. See *Huber*, 603 F.2d 387 (holding for the first time among the circuits that legal entities can be part of ‘associations in fact’); see also *United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995) (quoting *Perholtz*, 842 F.2d at 353); *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (“The statute says “‘enterprise’ includes”-not “‘enterprise’ means.” The point of the definition is to make clear that it need not be a formal enterprise . . .”); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989) (relying on the other circuits while noting “the statute’s language is illustrative, not exhaustive”); *Perholtz*, 842 F.2d at 353 (“The statute defines ‘enterprise’ as including the various entities specified; the list of entities is not meant to be exhaustive.”); *Aimone*, 715 F.2d at 828 (“The court reasoned that Congress used the word ‘includes’ in the enterprise definition to indicate a non-exhaustive listing of associations and that a broad interpretation was intended.” (citing *Thevis*, 665 F.2d at 625)); *Thevis* 665 F.2d 616, 625 (“Use of the verb ‘includes’ in the statutory definition indicates congressional intent not to limit a RICO enterprise to the specific categories listed . . .”). In other words, just because the statutory language does not mention legal entities being associated in fact does not mean that they are not encompassed within the definition’s ambit.

30. Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

31. *United States v. Turkette*, 452 U.S. 576, 580-81 (1981). These courts ignore the second clause of the sentence, which clearly shows that the *Turkette* court was focused on the limited issue of whether legitimate organizations could be RICO enterprises. Cf. *id.*

32. Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

33. *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993).

construction.”³⁴ The Supreme Court twice cited this provision while striking down extra-textual restrictions of RICO.³⁵

In one of those cases, *United States v. Turkette*,³⁶ the Court reversed a First Circuit decision that limited RICO to legitimate (i.e. non-criminal) organizations only.³⁷ In the process, the Court stated, “There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones.”³⁸ Several circuits quote this language selectively to conclude that there are no restrictions on the associations that can constitute an enterprise.³⁹ Indeed, these courts omit the latter part of this passage from *Turkette*, making it stand for the much broader proposition that: “There is no restriction upon the associations embraced by the definition” Read in context, the full quote shows that the Court was focused on whether the language in the definition of “enterprise” was restricted to criminal enterprises, and in the course of that analysis the Court rejected a reading at odds with the plain language.

The Fifth Circuit also relies on *Turkette*, though not the same passage, to give breadth to RICO’s definition of enterprise.⁴⁰ The panel

34. *Perholtz*, 842 F.2d at 353; see also *London*, 66 F.3d at 1243 (quoting *Perholtz*, 842 F.2d at 353); *Huber*, 603 F.2d at 394 (“There is no reason to believe that Congress cared what form such infiltration took . . .”).

35. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (“The statute’s ‘remedial purposes’ are nowhere more evident than in the provision of a private action for those injured by racketeering activity. Far from effectuating these purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate § 1964(c)”) (internal citation omitted) (reversing the decision of the Second Circuit, which had found a requirement that the RICO civil defendant already have been convicted of a predicate act); *Turkette*, 452 U.S. at 587 (“With or without this admonition, we could not agree with the Court of Appeals that illegitimate enterprises should be excluded from coverage.”).

36. 452 U.S. 576 (1981).

37. See *id.* at 581.

38. *Id.* at 580-81.

39. *London*, 66 F.3d at 1243 (quoting *Perholtz*, 842 F.2d at 353); *United States v. Feldman*, 853 F.2d 648, 655 (9th Cir. 1988); *Perholtz*, 842 F.2d at 353; *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983).

40. See *United States v. Thevis*, 665 F.2d 616, 625 (Former 5th Cir. 1982) (“[T]he language ‘reveals that Congress opted for a far broader definition of the word ‘enterprise.’” (quoting *Turkette*, 452 U.S. at 593)). The Fifth Circuit has nonetheless

argued that the legislative history supports a broad reading of enterprise, noting a passage in the House Report stating that the “infiltration of any associative group by *any individual or group* . . . can be reached.”⁴¹ It is the only circuit to rely on legislative history. Five circuits rely exclusively on the analysis from other circuits’ opinions.⁴² Several circuits performing their own analysis have examined some of the policy consequences of excluding corporations from associations in fact. In the words of the Eighth Circuit, “we think it unwise policy to permit individuals to escape the reach of RICO through the simple artifice of incorporation.”⁴³

Several district courts disagreed with the circuit consensus. In *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, the New Jersey District Court reasoned that the alleged enterprise of two corporations and two individuals could not constitute a RICO enterprise “[s]ince the combined entity is not a union and is not ‘associated

recognized limits on its broad reading; it has recognized that trusts cannot form all or part of a RICO enterprise. *See Bonner v. Henderson*, 147 F.3d 457, 459-60 (5th Cir. 1998) (“A trust is neither a legal entity nor an association in fact. . . . An association-in-fact consists of *personnel* who share a common purpose and collectively form a decision-making structure.” (emphasis added)).

41. *Thevis*, 665 F.2d at 625 (quoting H. Rep. 91-1549) (emphasis added). Identical language appears in the Senate Report. *See* S. Rep. 91-617, at 58.

42. *London*, 66 F.3d at 1243-44 (citing, *inter alia*, *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993) and *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n. 7 (8th Cir. 1989) and quoting at length from *Perholtz*, 842 F.2d 343; *Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F.2d 882, 887 (6th Cir. 1990) (citing *Huber*, 603 F.2d at 393-94); *Fleischhauer v. Feltner*, 879 F.2d 1290 (6th Cir. 1989) (citing *Feldman*, 853 F.2d at 655-56); *Feldman*, 853 F.2d at 655-56 (citing *Turkette*, *Thevis*, *Aimone*, and *Huber*); *United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (citing *Huber*); *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) (citing *Thevis* and *Huber*).

43. *Atlas Pile Driving Co.*, 886 F.2d at 995 n.7 (8th Cir. 1989); *see also London*, 66 F.3d at 1244 (quoting *Perholtz*, 842 F.2d at 353); *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (“Otherwise while three criminal gangs would each be a RICO enterprise, a loose-knit merger of the three, in which each retained its separate identity, would not be, because it would not be an association of individuals. That would make no sense.”); *Perholtz*, 842 F.2d at 353 (“Appellants’ reading of section 1961(4) would lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO.”); *Huber*, 603 F.2d at 394 (“We agree with the government that appellant’s reading of the statute would perversely insulate the most sophisticated racketeering combinations from RICO’s sanctions, the precise opposite of Congress’s intentions.”).

individuals'"⁴⁴ To hold otherwise, the *Seville* court concluded, would "effectively eliminate the enterprise element of RICO and drastically expand federal jurisdiction over all business torts which involve the use of the mails or telephones."⁴⁵ Judge Niemeyer, while on the District Court of Maryland,⁴⁶ agreed, holding that "[c]orporations cannot under RICO associate in fact to constitute an enterprise."⁴⁷ The Eastern District of Arkansas analyzed *Huber* at length, disagreeing with it and other cases: "*What the Court failed to note is that the Act, with its civil and criminal provisions, has both punitive and remedial purposes. While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon*" the rule of lenity.⁴⁸

44. 567 F. Supp. 1146, 1151 (D.C.N.J. 1983), *rev'd on other grounds*, 742 F.2d 786 (3d Cir. 1984). The Third Circuit held that the pleadings sufficiently alleged four different enterprises, thus not reaching the question of whether the two corporations and two individuals could constitute an association-in-fact. *Seville Indus. Mach.*, 742 F.2d at 790.

45. *Seville Indus. Mach.*, 567 F. Supp. at 1152.

46. Judge Niemeyer currently sits on the Fourth Circuit. U.S. Court of Appeals for the Fourth Circuit, <http://www.ca4.uscourts.gov/judges.htm>.

47. *Benard v. Hoff*, 727 F. Supp. 211, 215 (D. Md. 1989). The Eastern District of Virginia disagreed with this opinion and declined to follow it. *See Chisolm v. Charlie Falk's Auto Wholesale, Inc.*, 851 F. Supp. 739, 747 (E.D. Va. 1994), *vacated on other grounds sub nom. Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331 (4th Cir. 1996). The court in *Rodriguez v. Banco Central*, 777 F. Supp. 1043, 1054 n.15 (D.P.R. 1991), indicated its agreement in principle with Judge Niemeyer's opinion in *Benard. Rodriguez*, 777 F. Supp. at 1054 n.15 ("[W]e actually believe that Banco Central's position [that a corporation cannot be part of an association in fact] is a much sounder reading of the statutory language, and seems not to be directly contradicted by any of the legislative history surrounding passage of this section."). However, the court elected not to follow this theory because of the law of the case doctrine. *Rodriguez*, 777 F. Supp. at 1054 n.15.

48. *United States v. McClendon*, 712 F. Supp. 723, 729 (quoting *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976) (holding that the State of Maryland cannot be an enterprise)).

II. A RETURN TO PLAIN MEANING: “INDIVIDUALS,” “INCLUDING,” LENITY AND LEGISLATIVE HISTORY⁴⁹

Despite their consensus, the precedent in the circuits is flawed. As even its name suggests, the Racketeer Influenced and Corrupt Organizations Act criminalizes the influencing or corruption of an organization.⁵⁰ A more considered textual reading of the statutory definition of enterprise would return RICO to what the legislature intended—a weapon to be used against organized crime. It also would reverse the growing trend of using the statute to federalize vast areas of “garden variety” fraud, which exposes corporate defendants to punitive treble damages for alleged torts committed during the course of ordinary commercial activity.

RICO “has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures.”⁵¹ The inclusion of associations-in-fact was intended to draw criminal syndicates and their leaders within the statutory reach, not associations of legitimate

49. The two petitions for certiorari in *Mohawk Indus., Inc. v. Williams*, briefs in support and opposition thereto, and briefs of the parties and *amici curiae* for the granted petition, No. 05-465, all offer different portions of the argument in this Part at length. This Part reviews and expands upon the arguments contained in those documents. Nonetheless, those materials provide an excellent extended discussion of the errors in the circuits’ reasoning.

50. The name of a legislative act may be used to shed light on ambiguous words or phrases. See *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528-29 (1947) (noting “the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase.” (citations omitted)).

51. S. Rep. 91-617, at 76 (stating the purpose of RICO); see also Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (stating RICO’s purpose “to seek the eradication of organized crime in the United States”); Sen. R. 91-617, at 2 (“It is the purpose of this act to seek the eradication of organized crime in the United States . . . 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.”) (stating the overall purpose of the Organized Crime Control Act of 1970). Samuel Alito noted that the two aims of RICO are “to make it unlawful for *individuals* to function as members of organized criminal groups” and “to stop organized crime’s infiltration of legitimate businesses.” Alito, *supra* note 8, at 3-4 (emphasis added).

businesses.⁵² Congress, in fact, debated using a definition that encompassed any form of combination, including corporations.⁵³ The fact that Congress considered language that swept far more broadly and rejected it reflects a considered legislative judgment that groups of corporations associated-in-fact were beyond the statutory objectives and reach of RICO.⁵⁴ Thus, the Fifth Circuit in *Thevis* misread the legislative history of RICO. The text, structure, and history of RICO, as well as application of familiar rules of statutory interpretation, all reinforce the conclusion that corporations cannot be part of associations-in-fact.

The plain text of RICO's definition of enterprise makes it clear by use of the word "individual" that a corporation cannot be part of an association-in-fact.⁵⁵ The circuits' reliance on the word "includes" is

52. See Sen. R. 91-617, at 42. RICO was intended to reach the heads of mafia-type organizations, as *individuals*, who often could not be convicted based on the criminal actions of their subordinates. Clearly, such mafia "families" would be a group of individuals associated-in-fact. This is clearly reflected in the RICO statute's legislative history. The Senate Report indicates "[o]rganized crime leaders moreover, have been notoriously successful in escaping punishment . . ." *Id.* It was further added "[w]here an organization is acquired or run by defined racketeering methods, then the persons involved can be legally *separated from the organization* Through this new approach, it should be possible to remove *the leaders* of organized crime from their sources of economic power." *Id.* at 79-80 (emphases added). Additionally, the Report indicates "[n]evertheless, it must be emphasized that . . . Title IX seeks essentially an economic, not a punitive goal These provisions [the civil remedies] should effectively remove *the criminal figure* from *the particular corrupt organization*." *Id.* at 81-82 (emphases added). Note the use of the singular "organization" in the foregoing statement. In passing RICO it was also noted "it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations." 116 CONG. REC. 591, 591 (1970) (statement of Sen. McClellan introducing RICO). It was also explained that Title IX (RICO) was "designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its *members* from control of legitimate busines[s]." *Id.* at 602 (remarks of Sen. Hruska) (emphasis added).

53. See S. 2187 § 3(2), 89th Cong. (1965) (defining organization as "any group, society, confederation, or syndicate whose aims, objectives, and purposes" included racketeering acts). This broader definition would have reached "any group," including a group that included corporations.

54. Cf. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 378 n.13 (2000) ("The fact that Congress repeatedly considered and rejected targeting a broader range of conduct lends additional support to our view.").

55. 18 U.S.C. § 1961(4) (2006) ("'[E]nterprise' includes any individual,

misplaced; Congress used that word in RICO, as it has in numerous other statutes, to give an exhaustive definition.⁵⁶ Congress uses “individual” to refer to a natural person, distinct from legal entities. In the Dictionary Act, setting forth default statutory definitions, Congress defined “person” to “include corporations . . . *as well as* individuals.”⁵⁷ If individuals included corporations, the listing of corporations separately from individuals would have been superfluous. “It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”⁵⁸

The conclusion that a group of individuals cannot include corporations is reinforced by other statutory definitions. The definition of the term “organization” as used throughout title 18 of the United States Code (in which RICO is codified), also distinguishes between legal persons and individuals.⁵⁹ Congress uses “individual” as a fundamental definitional term to refer to human beings.⁶⁰ Moreover, ten separate public laws passed by the 89th, 90th and 91st Congresses (the three immediately prior to the passage of RICO) used the word “individual,” to denote a single human being as opposed to a legal

partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”).

56. See *infra* note 60.

57. 1 U.S.C. § 1 (2006) (emphasis added).

58. TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted).

59. 18 U.S.C. § 18 (2006) (“As used in this title, the term ‘organization’ means a person other than an individual.”); see also *id.* § 225 (2006) (setting different maximum fines depending on whether the defendant is an individual or organization). Compare U.S. Sentencing Guidelines § 5E1.3 Application Notes (applying “only if the defendant is an individual”), with *id.* § 8E1.1 (“This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual”), and *id.* § 8A1.2 (governing the sentencing of organizations).

60. At least 180 different federal statutes evidence the use of “individual,” as distinct from “corporation,” to define terms such as “person.” See, e.g., 5 U.S.C. § 8471(4) (“[T]he term ‘person’ means an *individual*, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or labor organization.”); 11 U.S.C. § 101(41) (“The term ‘person’ includes *individual*, partnership, and corporation”); 26 U.S.C. § 7701(a)(1) (“The term ‘person’ shall be construed to mean and include an *individual*, a trust, estate, partnership, association, company or corporation.”); 42 U.S.C. § 4601(5) (“The term ‘person’ means any *individual*, partnership, corporation, or association.”) (emphases added).

entity.⁶¹ These definitions comport with the ordinary, dictionary meaning of individual—“a single human being *as contrasted with a social group or institution.*”⁶²

RICO itself notes the distinction between individuals and legal persons.⁶³ The definition of person, in section 1961(3) immediately

61. See, e.g., 7 U.S.C. § 2116(b), Pub. L. 89-502, § 17, 80 Stat. 286 (1966) (“The term ‘person’ means any individual, partnership, corporation, association, or any other entity.”); 7 U.S.C. § 2250a, Pub. L. 89-106, § 1, 79 Stat. 431 (1965) (noting that “appropriations of the Department of Agriculture may be expended for the erection of buildings and other structures on land owned by States, counties, municipalities, or other political subdivisions, corporations, or individuals”); 12 U.S.C. § 1701y(a)(6), Pub. L. 90-448, Title I, § 107, 82 Stat. 491 (1968) (“The Foundation is authorized to receive donations and grants from individuals and from public and private organizations, foundations, and agencies.”); 12 U.S.C. § 1701z-2(g), Pub. L. 91-609, Title V, § 502, 84 Stat. 1784 (1970) (“The Secretary is authorized to request and receive such information or data as he deems appropriate from private individuals and organizations, and from public agencies.”); 12 U.S.C. § 1735g(a)(3), Pub. L. 89-117, Title I, § 107(a)-(e), 79 Stat. 458 (1965) (using the term individual to define “distressed mortgagor” as a natural person—a “serviceman”); 20 U.S.C. § 80g(a)(3), Pub. L. 90-637, § 4, 82 Stat. 1358 (1968) (“obtain grants from, and make contracts with, State, Federal, local, and private agencies, organizations, institutions, and *individuals*” (emphasis added)); 20 U.S.C. § 85(b), Pub. L. 89-772, 80 Stat. 1322 (1966) (“The Smithsonian Institution is authorized to accept the voluntary services of such organizations, and the voluntary services of *individuals*, for the benefit of the National Zoological Park.” (emphasis added)); 22 U.S.C. §§ 2764(a), (b), Pub. L. 90-629, § 24, 82 Stat. 1324 (1968) (“The President may guarantee any *individual*, corporation, partnership, or other juridical entity doing business in the United States” (emphasis added)); 23 U.S.C. § 404, Pub. L. 89-564, § 101, 80 Stat. 733 (1966) (“The appointed members . . . shall be selected from among . . . other public and *private agencies, organizations, or groups* demonstrating an active interest in highway safety, as well as research scientists and other *individuals* who are expert in this field.” (emphases added)). The tenth is the Higher Education Act of 1965, which has been largely amended and superseded by the Higher Education Amendments of 1986, Pub. L. 99-498, 100 Stat. 1268 (1986), and other reauthorizations in 1972, 1976, 1980, 1992, 1998, and 2006. The 1965 Act provided, in part, that “[p]ayments under this Act to any *individual* or to any State or Federal agency, institution of higher education, or *any other organization*” Pub. L. 89-329, § 802, 79 Stat. 1219 (1965) (emphases added).

62. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1152 (1969) (emphasis added); see also AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 670 (1969) (“A single human being considered separately from his group or from society.”); BLACK’S LAW DICTIONARY 913 (4th ed. 1968) (“As a noun, this term denotes a single person . . . and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association”).

63. See *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484

preceding the definition of enterprise in section 1961(4), defines “person” as including “any individual *or* entity capable of holding a legal or beneficial interest in property.”⁶⁴ Further, the definition of enterprise itself reveals that Congress knew the two terms were different. The first part of the definition states that it includes “individual, partnership, corporation, association, or other legal entity.”⁶⁵ If “individual” included all the legal persons that followed, their inclusion in the statute would be redundant. The statutory canon that no words are insignificant points to the conclusion that RICO uses the term “individuals” as distinct from corporations.⁶⁶ The rule that identical words should be given consistent meaning throughout a statute dictates that the term “individuals” as used in the second part of the definition of enterprise—a “group of individuals associated in fact *although not a legal entity*”—should have the same meaning as used in the first part and section 1961(3).⁶⁷ The emphasized text in the statute further urges this conclusion.

The fact that the first part of the definition of “enterprise” includes both individuals and corporations while the second only lists individuals, gives rise to the “sensible inference that the term left out must have been meant to be excluded.”⁶⁸ This sensible inference is embodied in the canon of statutory interpretation *expressio unius est exclusio alterius*, which has been applied by the Court in analyzing

U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . .”).

64. 18 U.S.C. § 1961(3) (2006) (emphasis added).

65. *Id.* § 1961(4).

66. *See Clinton v. City of New York*, 524 U.S. 417, 428-29 (1998). This is the only Supreme Court case to define ‘individuals’ more broadly. The Court reached that conclusion because to read individual otherwise “would produce an absurd and unjust result which Congress could not have intended.” *Id.* at 429 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)). No such “absurd” result obtains here: reading individual in its ordinary sense would actually return RICO to Congress’s intended purview.

67. 18 U.S.C. § 1961(4) (2006) (emphasis added). “It is a normal rule of statutory construction . . . that identical words used in different parts of the same act are intended to have the same meaning . . .” *Comm’r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (citations and internal quotations omitted).

68. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (refusing to apply this inference because of the broad, expansive language used *within* the definition, as opposed to introducing it).

RICO provisions.⁶⁹ The application of this maxim is buttressed by the fact that when Congress wants to define “enterprise” to include a group of legal entities, it has done so explicitly.⁷⁰ This comparison shows that Congress meant what it said when it restricted associations in fact to those groups that were “not a legal entity.”⁷¹ Tellingly, in its *amicus* brief in *Mohawk Industries*, the United States conceded that a corporation was not an individual under section 1961(4).⁷² If a corporation or other legal entity cannot be an individual, they also cannot form part of an association-in-fact because they cannot be part of a “union or group of individuals.”

69. *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (internal quotations omitted) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (applying this maxim to 18 U.S.C. § 1963(a)(1), finding no restriction as opposed to § 1963(a)(2)); *see generally* 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:23 (6th ed. 2005).

70. *See, e.g.*, 29 U.S.C. § 203(r)(1) (2006) (“‘Enterprise’ means the related activities performed (either through unified operation or common control) by any *person* or *persons* for a common business purpose, and includes all such activities whether performed in one or more establishments or by *one or more corporate or other organizational units . . .*” (emphases added)). “[T]his provision shows that Congress knew how to draft a [definition] when it wanted to.” *City of Chicago v. Env’tl. Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotations and citations omitted). Indeed, as the legislative history discussed *supra* at note 51 shows, Congress did consider several broader definitions of enterprise in RICO but finally settled on the current text, a process demonstrating their considered judgment.

71. 18 U.S.C. § 1961(4). This last provision prevents the application of the statutory canon *ejusdem generis*. The first part of § 1961(4)’s definition of enterprise contains a catch-all provision, “other legal entity,” whereas the second clearly does not, and in fact excludes legal entities with this provision. *Compare* “any individual, partnership, corporation, association, or other legal entity,” with “any union or group of individuals associated in fact although not a legal entity.” The second section of the definition therefore was intentionally drafted more narrowly to catch only mafia-type organizations. *See supra* note 51.

72. Brief for the United States as Amicus Curiae Supporting Respondents at 6, *Mohawk Indus., Inc. v. Williams*, 546 U.S. 1075 (2005) (No. 05-465), available at <http://www.usdoj.gov/osg/briefs/2005/3mer/1ami/2005-0465.mer.ami.pdf> (“Petitioner contends (Br. 12-26) that, because a corporation is not an ‘individual’ within the meaning of Section 1961(4), an association in fact of which a corporation is a constituent member cannot be a RICO ‘enterprise.’ Although petitioner’s premise is correct . . .”).

The United States sought to avoid this conclusion, despite its concession that corporations are not individuals, by relying on the use of the word “includes” at the start of the definition.⁷³ This reliance is misplaced; the dictionary definition of “include” specifies that it “does not rule out the possibility of a complete listing.”⁷⁴ The Supreme Court itself recognized that “includes” or “including” can be used to introduce exhaustive definitions as well as exemplary lists.⁷⁵ Indeed, the Court treats other such definitions within the RICO statute as comprehensive, despite being introduced by “includes.”⁷⁶ It has also twice struck down judicial limitations on the definition of a RICO enterprise, both of which could follow logically from the text, on the grounds that the plain text is exhaustive.⁷⁷

73. *Id.* (“Section 1961(4), which is introduced by the word ‘includes,’ neither provides an exhaustive roster of the ‘enterprise[s]’ covered by RICO nor excludes a de facto alliance that would constitute an ‘enterprise’ under the usual understanding of that term.”).

74. AMERICAN HERITAGE COLLEGE DICTIONARY 701 (4th ed. 2001); *see also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 665 (1970) (noting that include can “impl[y] that all of the components are stated”); BLACK’S LAW DICTIONARY 905 (4th ed. 1968) (defining include as “to confine within, . . . comprise, comprehend . . .”). The contemporary edition of Black’s Law Dictionary notes that “[i]ncluding may, according to context, express an enlargement and have the meaning of *and* or *in addition to*, or merely specify a particular thing already included within the general words theretofore used.” *Id.* (underlining added, italics in original).

75. *See, e.g.*, *Helvering v. Morgan’s, Inc.*, 293 U.S. 121, 125 (1934) (“It may be admitted that the term “includes” may sometimes be taken as synonymous with ‘means,’”); *Montello Salt Co. v. Utah*, 221 U.S. 452, 466 (1911) (“The court also considered that the word “including” was used as a word of enlargement, the learned court being of opinion that such was its ordinary sense. With this we cannot concur. It is its exceptional sense, as the dictionaries and cases indicate.”); *see also* *Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir. 1997) (finding that “includes” introduced a comprehensive definition); *Willheim v. Murchison*, 342 F.2d 33, 42 (2d Cir. 1965) (Friendly, J.) (“Definitions in securities and other legislation often use the word ‘include’ out of abundant caution But that does not afford carte blanche to ‘include’ transactions, neither expressly mentioned nor within the normal meaning of the language, simply because a court may think this a good idea.”). *But see, e.g.*, *Am. Surety Co. v. Marotta*, 287 U.S. 513, 517 (1933) (noting that, in statutory definitions, “‘include’ is frequently, *if not generally*, used as a word of extension or enlargement rather than as one of limitation or enumeration.” (emphasis added)).

76. *See* *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (holding that 21 U.S.C. § 853(b), which had the exact same wording as 18 U.S.C. § 1963(b), including “includes,” to be an “all-inclusive listing”).

77. *See* *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 254 (1994) (striking

Understanding the use of “includes” as exhaustive also follows from the text and structure of RICO’s statutory scheme.⁷⁸ Three other provisions within section 1961 use “includes” to begin their definition, and each is unquestionably exhaustive. Section 1961(3) defines person to include “any individual or entity capable of holding a legal or beneficial interest in property.”⁷⁹ No court has suggested that this definition is not exhaustive. Sections 1961(9) and (10) conclude their definitions with catch-all provisions, such that these sections must, of necessity, be exhaustive.⁸⁰ When Congress wanted a definition in RICO to be exemplary and not exhaustive, it clearly stated that the definition was “including, but not limited to” the statutory text.⁸¹ “Includes” in section 1961(4) should be given the same exhaustive meaning as it has in other parts of the same statute, much like the meaning of “individuals” should remain constant. Therefore, the circuits’ attempts

down a limitation to economic enterprises); *United States v. Turkette*, 452 U.S. 576, 580-81 (1981) (striking down a limitation to legitimate enterprises). The second part of the sentence in *Turkette*, always truncated when cited by the circuits as noted *supra* in Part I, requires a return to the strict textual definition of enterprise.

There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones.

452 U.S. at 580-81. When thus put in context, the *Turkette* quote actually supports treating the definition of enterprise as comprehensive and eliminating corporations or other legal entities from associations in fact. *Cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.”).

78. *See United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear . . .”).

79. 18 U.S.C. § 1961(3).

80. *See* 18 U.S.C. § 1961(9) (“or other material”); *id.* § 1961(10) (“or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General”).

81. 18 U.S.C. § 1963(b) (*repealed by* Pub. L. No. 98-473, § 302, 98 Stat. 1837, 2040 (1984)); *id.* at § 1964(a) (twice); *see also* S. Rep. 91-617, at 160 (“Although certain remedies are set out, the list is not exhaustive . . .”). This is the only reference to illustrative and not exhaustive definitions in the Senate Report. The legislative history of § 1964(a) thus confirms that Congress used “including, but not limited to” in RICO when it wanted an illustrative definition.

to broaden the definition of “enterprise” beyond what is contained in the statute are unsupported by the use of the word “includes.”

Nor does the statutory mandate for broad construction support the circuits’ reading of section 1961. “Congress’s call for a liberal interpretation in order to effectuate the Act’s ‘remedial purposes’ does not outweigh the Court’s duty under the ‘rule of lenity’ to construe criminal statutes strictly.”⁸² The rule of lenity “ensures fair warning by so resolving any ambiguity in a criminal statute as to apply it only to conduct clearly covered.”⁸³ Although the rule has its roots in the criminal law notion of fair warning, it applies to statutes which have both civil and criminal applications.⁸⁴ Indeed, the Court has specifically held that the rule of lenity applies to sections 1961 and 1962 of RICO. “But even if [the rule of lenity] has some application, it does not support the court’s holding. The strict-and liberal-construction principles are not mutually exclusive; [section] 1961 and [section] 1962 can be strictly construed without adopting that approach to [section] 1964(c).”⁸⁵ Indeed, the legislative history of the liberal construction clause supports

82. *United States v. McClendon*, 712 F. Supp. 723, 729 (E.D. Ark. 1988); *see also* *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (The liberal construction clause “is not an invitation to apply RICO to new purposes that Congress never intended.”).

83. *United States v. Lanier*, 520 U.S. 259, 266 (1997); *see also* *United States v. Granderson*, 511 U.S. 39, 54 (1994) (“In these circumstances—where text, structure, and history fail to establish that the Government’s position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”) (defining the rule and its applicability).

84. *See, e.g.,* *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (“Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.”); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion)

The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. . . . It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center’s favor. (internal citations and quotations omitted); *Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying the rule of lenity to a criminal statute in a civil action).

85. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985) (rejecting a prior criminal conviction requirement); *see also* *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) (“RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws . . .”).

the conclusion that it was meant to apply only to section 1964.⁸⁶ Following the Court's command to apply the rule of lenity, section 1961(4) must be given a narrow reading so that defendants have fair warning that their actions may conflict with the law. The very difficulty of identifying associations-in-fact urges that the statute be construed narrowly.⁸⁷ If the text and structure of the statute are ambiguous, the rule of lenity requires that courts not include legal entities within associations-in-fact.

Finally, the policy reasoning of the circuits is both inappropriate and incorrect. Policy choices are appropriately left to Congress, and not the courts, which must confine themselves to interpreting the statutory language. "Our individual appraisal of the wisdom or unwisdom [sic] of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."⁸⁸ Notwithstanding the inapplicability of the statute, concern that individuals would be able to avoid RICO by incorporating is simply misplaced. The definition of "enterprise" expressly provides that corporations, standing alone, can be RICO enterprises; RICO therefore does reach the sophisticated racketeer who forms a corporate shell in his or her *individual* capacity.⁸⁹ Indeed, that was precisely the result in *Kushner*, in which the defendant individual

86. See S. Rep. No. 91-617, at 160 (1969) ("Subsection (a) contains broad remedial provisions for reform of corrupted organizations. . . . Because the action is remedial, not punitive . . ."). Section 1964 is the only part of the Act which the Senate describes as having remedial purposes. As the justification for liberal construction relied on the Act's 'remedial purposes,' this is the only section where it would apply. Note as well that here, where Congress intended for the definition to be illustrative, it used the term "including, but not limited to," rather than merely "includes."

87. See *Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982) ("An enterprise is particularly likely to be found where . . . the enterprise alleged is a legal entity rather than an 'associational enterprise.'). As the latter part of this quotation suggests, associations-in-fact are understandably more difficult to delineate. See the discussion of how circuits have split over the requisite attributes of associations-in-fact, *infra* notes 116-26 and accompanying text.

88. *TVA v. Hill*, 437 U.S. 153, 194 (1978); *cf. supra* note 43, (noting the circuit's use of the words 'unwise,' 'bizarre,' 'policy,' 'perversely,' and 'no sense' to justify their holdings).

89. In other words, the individual could be liable for controlling an enterprise corporation through a pattern of racketeering. This answers the concerns raised by those circuits that engaged in outcome oriented reasoning. See *supra* note 43 and accompanying text.

was held to be distinct from the RICO enterprise—his wholly owned corporation.⁹⁰

From a policy perspective, the goal of reasonably limiting the statute's use against legitimate corporations is best served by a narrow reading. Construing “group of individuals” to include both legal and natural persons creates unbounded liability potential under RICO.⁹¹ Under such a construction, a RICO “enterprise” could be nothing more than two businesses that enter into a joint marketing agreement, as demonstrated by the recent Ninth Circuit opinion *Odom v. Microsoft Corporation*.⁹² Plaintiff Odom had alleged that Microsoft and Best Buy formed an association-in-fact enterprise by virtue of an agreement that Microsoft would promote Best Buy's online store through its MSN service.⁹³ Odom alleged wire fraud, claiming that Microsoft and Best Buy misrepresented that his credit card eventually would be billed for internet service included with the laptop he purchased.⁹⁴

Odom illustrates how plaintiffs can elevate ordinary commercial torts like fraud to the level of racketeering activity simply by pleading a RICO claim based upon an association-in-fact enterprise.⁹⁵ Under *Odom*'s reasoning, virtually any two businesses in a joint venture would be associated-in-fact and potentially exposed to fraud-based RICO litigation.⁹⁶ Given the threat of treble damages and attorneys' fees

90. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

91. *See, e.g.*, *Bruns v. Ledbetter*, 583 F. Supp. 1050, 1055 (S.D. Cal. 1984) (noting that, were RICO to be read broadly, it “would literally make a federal case out of nearly every instance of business fraud”).

92. 486 F.3d 541 (9th Cir. 2007) (en banc), *cert. denied*, 76 U.S.L.W. 3199 (2007).

93. *Id.* at 543.

94. *See id.* at 543-45. The district court had dismissed for, *inter alia*, failure to allege a proper association-in-fact enterprise. *Id.* In a 6-5 decision, the en banc panel reversed. *Id.* at 543. The majority opinion assumed, without discussion, that “a corporation can be an ‘individual’ for purposes of an associated-in-fact enterprise.” *Id.* at 548. It joined the First, Eleventh, Second and D.C. Circuits by holding that “an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise.” *Id.* at 551.

95. *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226 (7th Cir. 1997) (“Read literally, RICO would encompass every fraud case against a corporation, provided only that a pattern of fraud and some use of the mails or of telecommunications to further the fraud were shown . . .”).

96. *Odom*, 486 F.3d at 552-53. The *Odom* majority found the threefold criteria for an associated-in-fact enterprise set forth in *Turkette*—a common purpose, an ongoing organization, and evidence of function as a continuing unit—satisfied by allegations of

carried by a RICO judgment, the exposure to RICO litigation created by *Odom*'s expansive understanding of associations-in-fact discourages legitimate, consumer-friendly business ventures. Without any reasonable limitation on what may constitute an associated-in-fact enterprise, RICO essentially becomes a vehicle for seeking punitive damages in federal courts for garden-variety civil fraud, which unnecessarily expends judicial and economic resources.⁹⁷ Construing "group of individuals" as this Article contends would drastically reduce the quantity of fraud-based civil RICO suits against legitimate businesses.

III. THE CURRENT OPPORTUNITY FOR RICO REFORM IN THE SUPREME COURT

Despite the textual and legislative arguments discussed above, it seems settled among the circuits that associations-in-fact may be formed by any combination of entities. Ordinarily, that the circuits' interpretation of "association-in-fact" is erroneous is, at best, cold comfort to corporations; the relevant law is the law as it is interpreted. A majority of the current Supreme Court, however, recently offered a different take on the question of whether legal entities could be part of an association-in-fact.⁹⁸ During oral arguments in *Mohawk Industries, Inc. v. Williams*,⁹⁹ the questioning by several justices indicated a

Microsoft and Best Buy's concerted action in implementing their joint-marketing agreement.

97. See Rehnquist, *supra* note 10, at 64 (observing that "[m]ost of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts").

98. A Justice's questioning, of course, should not be taken as signifying a settled opinion. Nonetheless, "by keeping track of the number of questions each Justice asks, and by evaluating the relative content of those questions, one can actually predict before the argument is over which way each Justice will vote." Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 272 (2004). *But see* Rex. E. Lee, *Oral Argument in the Supreme Court*, 72 A.B.A. J. 60, 60 (1986) ("It should not be inferred, however, that comments in oral argument always reflect the justices' views. In the case of some members of the present Court [1986], what you see and hear at oral argument is what you get at the conference vote. In other cases, it is not"). While this Article does not take the position that a return to RICO's text is a forgone conclusion, the Justices' questioning does suggest that it is more than a mere fleeting possibility if the right case comes before the Court.

99. See *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016, 2016 (2006).

willingness to revisit the settled circuit consensus.¹⁰⁰ Only seven justices asked questions; Justices Stevens and Thomas did not speak at all. Of these seven, only Justice Ginsburg appeared to support the conclusion reached by the circuit courts.¹⁰¹

Three of the justices highlighted the difference between RICO's use of individual and corporation. Chief Justice Roberts stated, "it does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately."¹⁰² Later, he repeated that, "whatever an individual is it's different than a corporation or they wouldn't have had to say corporation again."¹⁰³ Justice Kennedy followed this question, noting that "[t]his says 'individual'. A 'person' is defined in – in sub (3) just above it. A 'person' includes any individual or entity. Then the next thing says 'individual'. So it's not a – it doesn't sound like a corporation."¹⁰⁴

100. See Mohawk Indus. Transcript, *supra* note 14.

101. See *id.* at *6-9, *33 (focusing on the procedural posture of the case, Justice Ginsburg stated, "[the Supreme] Court is a court of review, and to take a question that was never certified, even to the court of appeals, to have the Court address it seems to me very strange. It seems to me to erode rather starkly the final judgment rule, which we don't have here."). When she did address the question of whether legal entities could be part of an association-in-fact, however, Justice Ginsburg suggested that, because partnerships were entities comprised of an association of individuals, corporations could be covered within groups of individuals associated in fact. *Id.* at *12-14. She stated, "[T]hat's why I'm asking you about the partnership because it's an association of individuals. . . . No partnership could be treated just like a corporation. They're not an individual? Or partnerships are okay because there's not a separate entity. It's a – it's a association of individuals." *Id.* at *13-14. Carter Phillips of Sidley Austin, counsel for the corporation, ably responded to this concern, noting that an action against the partnership itself would be an action against an entity, but "if you're trying to take the partnership and tag it to another group of rag-tag individuals, that would not be an enterprise in fact because that's not an – an association of individuals. It's a partnership which has an entity apart from the individuals." *Id.* at *14.

102. *Id.* at *29.

103. *Id.* at *31.

104. *Id.* at *32 (internal quotes added). Before joining the Court, Justice Kennedy also expressed some hesitance about civil RICO's broad reach. See *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring) (noting that the broad reach of the federal mail and wire fraud statutes "exists against a backdrop of prosecutorial discretion No such check operates in the civil realm. . . . It is most unlikely that Congress envisaged use of the RICO statute in a case such as the one before us, but we are required to follow where the words of the statute lead"). Taken together with this question, Justice Kennedy appears committed to limiting civil RICO to what the words of the statute allow.

Immediately preceding Chief Justice Roberts' questioning, Justice Scalia weighed in, noting that the statute required "[a] union of individuals or a group of individuals. You're stuck with individuals. . . . Then – then it means a union or group of individuals. . . . Right. So, you know, you're just as bad off."¹⁰⁵ Three of the Justices, therefore, seemed to base their position in part on the differentiation between individuals and corporations throughout RICO's definitional sections. If a corporation or other legal entity cannot be an individual, they also cannot form part of an association-in-fact because they cannot be part of a "union or group of individuals."

Another three Justices, including Justice Scalia, also based their opinion on the fact that "includes," as used by section 1961(4), presents an exhaustive definition of enterprise. Justice Alito began this line of thought, asking "[w]hy shouldn't 'includes' here be read to mean 'means' when that seems to be the way it's used in other subsections of this provision"¹⁰⁶ Following up, Justice Scalia asked if any of the cases which read "includes" as merely illustrative "have in third sections, includes, comma, without limitation, comma."¹⁰⁷ Upon hearing that they did not, Justice Scalia said "I think that's a big difference."¹⁰⁸ Finally, although Justice Souter appeared prepared to permit the case to advance beyond a motion to dismiss,¹⁰⁹ he also expressed skepticism about the circuits' interpretation. He asked if the circuits' opinions dealt with the oddity of the definition "in which, although it starts out with the word includes, then follows a – a listing, A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, i.e., individuals, are included?"¹¹⁰ This questioning suggests that the Court would take a hard look at the circuits' reading of "includes" as non-exhaustive and might reject it as a basis for finding corporations can form associations-in-fact.

105. Mohawk Indus. Transcript, *supra* note 14, at *30-31.

106. *Id.* at *42; *see also id.* at *29-30 ("Well, do you agree that that's an exhaustive list in subsection (4)? . . . Well, would you agree that includes is meant to be exhaustive in many of the other – in a number of the other subsections of this definitional provision?").

107. *Id.* at *42.

108. *Id.* at *42-43.

109. *See id.* at *18-19 ("Doesn't – doesn't that get them at least to – through the motion to dismiss, and doesn't it at least get them to summary judgment?").

110. *Id.* at *51.

The oral argument barely addressed the rule of lenity and RICO's legislative history. Justice Scalia was the only member of the Court to mention the rule of lenity. He asked Assistant Solicitor General Stewart why the Court shouldn't "apply the rule that we normally apply with regard to criminal statutes that where there is an ambiguity, the rule of lenity applies and we shouldn't give the – the Government license to – to ride closer herd than – than is clear in the statute?"¹¹¹ As for legislative history, only the Chief Justice and Justice Breyer mentioned it at oral argument.¹¹² The Chief Justice stated that "Congress did not enact RICO because it was concerned that criminal conspiracy law, applied to corporations, didn't adequately touch interstate commerce. The whole point is that they had something significantly different in mind"¹¹³

Justice Breyer explained his own reasoning on the definitional issue at length, noting *inter alia*, that, "it's possible that Congress was worried about organized crime taking over the pizza parlor [T]hey had no reason whatsoever for doing the same thing [with associations of corporations]"¹¹⁴ He continued to note that "to do that, adding [groups of corporations] in when it doesn't say that, would RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity But Congress wouldn't have wanted to – that has not [sic] to do with organized crime."¹¹⁵ He concluded, stating "[t]hey're worried about groups of individuals. They're not worried about groups of corporations or groups of trade unions interacting with each other."¹¹⁶

Thus, six Justices seemed receptive to the argument that corporations could not be part of a group of individuals associated-in-fact, and a seventh, Justice Thomas, might well be sympathetic to the views they expressed.¹¹⁷ Justice Stevens, although less predictable than

111. *Id.* at *47.

112. *See* Alito, *supra* note 8, at 3-4 (noting the two aims of RICO—"to make it unlawful for individuals to function as members of organized criminal groups" and "to stop organized crime's infiltration of legitimate business")

113. Mohawk Indus. Transcript, *supra* note 14, at *36.

114. *Id.* at *44.

115. *Id.* at *44-45.

116. *Id.* at *45.

117. *See generally* H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 REGENT U. L. REV. 365, 366, 368, 371 (1999-2000). "The text is his lodestar." *Id.* at 366. "Rejecting legislative history and sources outside the statutory text, Justice Thomas relies on canons of construction to resolve statutory ambiguity."

Justice Thomas, also may be inclined to agree.¹¹⁸ Instead, however, the Court chose to dismiss *certiorari* as improvidently granted and remand the case.¹¹⁹ Getting a similar case before the Justices may be difficult in

Id. at 368. “Justice Thomas avoids interpreting ambiguities to render statutory language superfluous.” *Id.* at 371. Justice Thomas himself has said as much. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) (“[A]s judges we cannot use ambiguity as a license to project our modern theories and preconceptions upon the Constitution. Rather, we must strive to operate, even in those areas of ambiguity or unclarity, with principles and with rules; otherwise the results in federal cases would still reduce to personal preferences.”). Applying this jurisprudence to § 1961(4), Justice Thomas seems likely to stick to the statutory language and follow the canons in their application, detailed *supra* Part II, to conclude that corporations cannot be a part of a group of individuals associated-in-fact. Furthermore, Justice Thomas has written about the abuse of civil RICO and the need to limit the statute to Congress’s concern with organized crime. See *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 2004-05 (2006) (Thomas, J., concurring in part and dissenting in part). “Given the distance the facts of this case lie from the prototypical organized criminal activity that lead to RICO’s enactment, it is tempting to find in the Act a limitation that will keep at least this and similar cases out of court.” *Id.* at 2005 (declining to join the majority because it would also eliminate those cases “that were at the core of Congress’ concern . . .”).

118. See Diane L. Hughes, Note, *Justice Stevens’ Method of Statutory Interpretation: A Well-Tailored Means for Facilitating Environmental Regulation*, 19 HARV. ENVTL. L. REV. 493, 493 (1995) (“Justice John Paul Stevens is sometimes described as a maverick, a wild card, or a loner for his refusal to align himself with either the conservative or the liberal factions on the Supreme Court. . . . [His jurisprudence reflects a] unique, fact-specific approach . . .” (footnotes omitted)). His method of statutory interpretation focuses primarily on a statute’s purpose. See, e.g., John F. Manning, *Competing Presumptions about Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2049 (2006) (“At present, Justice Stevens is the only member of the Supreme Court who openly subscribes to the strong form of purposivism associated with the Court’s landmark decision in *Holy Trinity*.”); Hughes, *supra*, at 494 (“Although Justice Stevens exercises a less deferential and more active judicial role when individual dignity rights are in question, in cases involving statutory interpretation, where such concerns are not raised, he crafts decisions with narrow applicability that accurately reflect the policy objectives advanced by legislative and executive institutions.” (footnotes omitted)); see generally Robin Kundis Craig, *The Stevens/Scalia Principle and Why it Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955 (2005) (comparing Justice Scalia’s strict plain meaning approach with Justice Stevens’ use of the legislative purpose). As the detailed examination of the legislative history of RICO shows, *supra* notes 50-53 and accompanying text, the main purpose of the statute was to eliminate organized crime’s influence on legitimate business. Therefore, Justice Stevens might be convinced to interpret the statute consistent with that purpose.

119. *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016 (2006). After deciding *Anza v. Idea Steel Supply Corp.*, 126 S. Ct. 1991 (2006), the Court dismissed its partial grant

the absence of a current circuit split and a general reluctance to overturn what has become settled law.¹²⁰ Indeed, the Court rejected a second petition for *certiorari* after remand in *Mohawk Industries*.¹²¹

The Court is far more likely to grant *certiorari* if a circuit split arises.¹²² Two circuits have yet to expressly decide whether corporations can be part of associated-in-fact enterprises and thus could create a split on the direct issue. The Tenth Circuit has never confronted this issue with regard to the federal RICO statute, but concluded that the Colorado state RICO statute, with similar language,¹²³ allowed for corporations to be part of an association-in-fact.¹²⁴ Some early Fourth Circuit precedents suggested that its view was that corporations cannot be part of associated-in-fact enterprises.¹²⁵ Yet, that court upheld

of certiorari as improvidently granted, granting certiorari without limitation, vacating the lower court ruling and remanding the case to the Eleventh Circuit for reconsideration in light of the *Anza* decision. *Id.*

120. See Sup. Ct. R. 10 (2005), available at <http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf> (“A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.”). The circuits have all properly stated the rule, or statutory definition of enterprise, but misapplied it to include legal entities in associations-in-fact. See also *Mohawk Indus. Transcript*, *supra* note 14, at *6 (Scalia, J.) (“And we would have been unlikely to accept cert on -- on point one alone I think.”).

121. *Mohawk Indus., Inc. v. Williams*, 127 S. Ct. 1381 (2007).

122. See Sup. Ct. R. 10(a) (2005), available at <http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf> (noting that one of the primary reasons the court grants a petition is that “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”).

123. COLO. REV. STAT. § 18-17-103(2) (2006). (“‘Enterprise’ means any individual, sole proprietorship, partnership, corporation, trust, or other legal entity or any chartered union, association, or group of individuals, associated in fact although not a legal entity, and shall include illicit as well as licit enterprises and governmental as well as other entities.”). This language, by expressly including ‘association’ without a qualifier as one of the enterprises that may be associated-in-fact, is more permissive to the inclusion of corporations within associated in fact enterprises than the federal statute, which is limited to groups of *individuals*.

124. *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Kozeny*, 19 Fed. Appx. 815, 821 (10th Cir. 2001) (“We are not inclined to disturb the district court’s understanding of C.R.S. §§ 18-17-103(2) and (4) [that corporations can be part of an associated in fact enterprise].”).

125. See, e.g., *Entre Computer Ctrs., Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279, 1287 (4th Cir. 1987) (declining to reach the direct question, as the distinctness requirement between the corporation and alleged association in fact was not met, even where the franchisees at issue were independent legal persons), *overruled by* *Busby v.*

convictions explicitly based on that theory of the RICO enterprise.¹²⁶ *United States v. Najjar* explicitly affirmed a conviction where the indictment charged that individuals and a corporation “were an association in fact and constituted an enterprise.”¹²⁷ On appeal, the defendant attacked the conviction only on the distinctness requirements of section 1962(c), and thus the Fourth Circuit has never directly resolved the section 1961(4) question.¹²⁸

The Court originally granted *certiorari* in *Mohawk Industries* to clarify the degree of distinction needed between the RICO “person” and the “enterprise.”¹²⁹ Every circuit has now recognized what the Supreme Court held in *Kushner*—that there needs to be some degree of distinction between the two.¹³⁰ Most also have recognized that a corporation’s association with its own employees cannot constitute an associated-in-fact enterprise distinct from the corporation.¹³¹ However,

Crown Supply, Inc., 896 F.2d 833, 840-41 (4th Cir. 1990) (regarding the lack of a distinctiveness requirement in § 1962(a) as opposed to §1962(c)); *United States v. Computer Scis. Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (dismissing RICO indictment against corporation, implicitly rejecting argument that it could be associated in fact with its own division, stating that “[a] corporation, in common parlance, is not regarded as distinct from its unincorporated divisions either[,] [b]earing in mind that lenity applies even in RICO cases . . .”), *overruled by Busby*, 896 F.2d at 840-41 (regarding § 1962(a)’s lack of a distinctiveness requirement); *United States v. Griffin*, 660 F.2d 996, 999-1000 (4th Cir. 1981) (upholding the conviction of a group of natural persons associated in fact while noting the importance of individuals more than ten times, in contradistinction to corporations).

126. *United States v. Vogt*, 910 F.2d 1184, 1193 (4th Cir. 1990) (affirming a conviction where the RICO enterprise included five corporations associated with certain individuals).

127. *United States v. Najjar*, 300 F.3d 466, 484 (4th Cir. 2002).

128. Judge Niemayer, the District Judge who decided *Benard v. Hoff*, 727 F. Supp. 211, 215 (D. Md. 1989), discussed *supra* note 47, did not sit on either the *Vogt* or *Najjar* panels. That he is now on the Fourth Circuit creates at least the possibility that a circuit panel with him on it would resolve the question in the proper manner, unbound by precedent on the precise point.

129. *Mohawk Indus., Inc. v. Williams*, 546 U.S. 1075 (2006) (mem.).

130. The Eleventh Circuit was the last to come around on this issue. *See United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1270 (11th Cir. 2000) (en banc) (abrogating previous circuit precedent and citing the cases from other circuits).

131. *See, e.g., Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 449 (1st Cir. 2000); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Bd. of County Comm’rs of San Juan County v. Liberty Group*, 965 F.2d 879, 885-86 (10th Cir. 1992); *Old Time Enters., Inc. v. Int’l Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989); *see generally* Otto Immel, *Corporation-Employee Association in*

the circuits are divided on whether a corporation's association with non-employee agents suffices to meet the distinctness requirement and form a RICO enterprise associated-in-fact. The Sixth, Ninth and Eleventh Circuits all hold that as long as the agent is a legally distinct entity, the distinctness requirement is met.¹³² On the other hand, the Second, Third, Fourth and Seventh Circuits all impose much stricter requirements for differentiation between agents and corporations than mere legal distinctness.¹³³

Fact Enterprises in Civil Rico, 60 DEF. COUNS. J. 88, 96 (1993) (noting that "the clear weight of authority indicates that such corporation-employee associations-in-fact are not viable RICO enterprises").

132. See *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1284 (11th Cir. 2006) ("This Court has never required anything other than a 'loose or informal' association of distinct entities."); *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361-62 (9th Cir. 2005) ("The more difficult question is whether the enterprise formed by the group of DuPont, the law firms it employed, and the expert witnesses that the law firms retained is separate and distinct from DuPont, the RICO 'person' alleged in Plaintiffs' complaint. We conclude that they are."); *Davis v. Mut. Life Ins. Co. of N.Y.*, 6 F.3d 367, 377 (6th Cir. 1993) (holding that because the defendant was a legally distinct entity, a RICO enterprise could be found between it and another company which was contracted only to sell defendant's product, even though it did note that agents putatively would not satisfy the distinctness requirement); see generally Amy L. Higgins, Comment, *Pimpin' Ain't Easy Under the Eleventh Circuit's Broad RICO Enterprise Standard*: *United States v. Pipkins*, 73 U. CIN. L. REV. 1643, 1651-57 (2005) (detailing the case-law of several circuits construing the breadth of RICO's requirement, concluding that the broad view is inferior and should be overturned); Michael A. Gardiner, Comment, *The Enterprise Requirement: Getting to the Heart of Civil RICO*, 1988 WIS. L. REV. 663, 679-91 (discussing these two schools of thought and stating the broad view is inferior). This Article alters Gardiner's positioning of the circuits, however, in order to accord with precedent since 1988.

133. See *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (Posner, C.J.) ("But it is enough to decide this case that where a large, reputable manufacturer deals with its dealers and other agents in the ordinary way, . . . the manufacturer plus its dealers and other agents . . . do not constitute an enterprise within the meaning of the statute."); *Riverwoods*, 30 F.3d at 344 ("Nevertheless, by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented."); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 301 (3d Cir. 1991) (quoting and agreeing with the District Court: "It noted that a corporation always acts through its employees and agents, and found that '[a]ccepting plaintiffs' contention would also be akin to read[ing] the enterprise requirement out of the statute entirely, whenever a corporate defendant is involved.'" (internal quotation and citation omitted)), *overruled by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995) (on other grounds); *Entre Computer Ctrs., Inc. v. FMG of Kansas City, Inc.*, 819 F.2d

The circuits also disagree over whether, and to what degree, an associated-in-fact enterprise must possess some ascertainable structure separate from the racketeering activity. The narrow camp, represented on this issue by the Third, Fourth, Eighth and Tenth Circuits, requires that the association possess some cognizable structure separate from the racketeering activity.¹³⁴ The Seventh Circuit requires a structure but does not require that it be separate from the racketeering.¹³⁵ No

1279, 1287 (4th Cir. 1987) (finding that the distinctness requirement was not met, even where the franchisees at issue were independent legal persons), *overruled by* *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) (regarding the lack of a distinctiveness requirement in § 1962(a) as opposed to §1962(c)); *United States v. Computer Scis. Corp.* 689 F.2d 1181, 1190 (4th Cir. 1982) (dismissing RICO indictment against corporation, implicitly rejecting argument that it could be associated in fact with its own division, stating that “[a] corporation, in common parlance, is not regarded as distinct from its unincorporated divisions either[,]bearing in mind that lenity applies even in RICO cases”), *overruled by* *Busby v. Crown Supply, Inc.* 896 F.2d 833, 840-41 (4th Cir. 1990) (regarding § 1962(a)’s lack of a distinctiveness requirement); *see also* *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23-24 (1st Cir. 1988) (concerning subsidiaries, but using similar language); *see generally* Laurence A. Steckman, *RICO Section 1962(c) Enterprises and the Present Status of the “Distinctiveness Requirement” in the Second, Third, and Seventh Circuits*, 21 *TOURO L. REV.* 1083 (2006) (providing two hundred pages of detailed analysis of the evolution of the doctrines in these circuits, Part IV is especially helpful for this issue).

134. *See* *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) (noting that “enterprise must have . . . an ascertainable structure distinct from the pattern of racketeering”) (citing *Handeen v. Lemaire*, 112 F.3d 1339, 1351 (8th Cir. 1997)); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir. 1991) (noting that “enterprise” requires evidence of “an ascertainable structure that exist[s] apart from the commission of racketeering acts”); *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985) (noting that “enterprise” requires evidence “to show that the organization had an existence beyond that which was necessary to commit the predicate crimes”) (citations omitted); *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983) (noting that “enterprise” must have “an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses”); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (noting that proof of ascertainable structure “might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes”).

135. *See* *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) (imposing “some” structural requirements, but concluding that it would be “nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity”); *see also* *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (requiring proof of “an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or

structure at all is required by the First, Second, Ninth, Eleventh and District of Columbia Circuits.¹³⁶ As yet, the Supreme Court has not granted *certiorari* to address the confusion in the lower courts on this important question of federal law. If the Court does consider the issue in a case involving corporate defendants allegedly associated-in-fact, the case would present the logically antecedent question of whether such corporation can *ever* be a part of an association-in-fact.¹³⁷

Attorneys representing corporations alleged to be part of “associated-in-fact” RICO enterprises need to preserve this issue and raise it with the courts of appeal and, potentially, the Supreme Court.¹³⁸

consensual decision-making” (internal quotation marks and citation omitted)).

136. See *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (“To require that an associated-in-fact enterprise have a structure beyond that necessary to carry out its racketeering activities would be to require precisely what the Court in *Turkette* held that RICO does *not* require.”), *cert. denied*, 76 U.S.L.W. 3199 (2007); *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001) (“Since Congress intended the term ‘enterprise’ to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures, we refuse to import an ‘ascertainable structure’ requirement into jury instructions.”) (citation omitted); *United States v. Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988) (concluding that enterprise is “established by common purpose among the participants, organization, and continuity”); *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983) (“*Turkette* did not suggest that the enterprise must have a distinct, formalized structure.”); *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983) (stating that “it is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure”), *abrogated by Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (on other grounds).

137. This Article only provides a brief sketch of these two major splits and much more can be said on these two. The circuits disagree on several other RICO interpretation issues as well. Consultation with attorneys with exposure to several circuits is recommended in order to preserve these issues for appeal. Litigants should take care to perform the proper maintenance on the appellate vehicle.

138. See *Mohawk Indus. Transcript*, *supra* note 14 at *10-11. At the oral argument before the Supreme Court in *Mohawk Industries*, Carter Phillips, facing questioning about a concession in the lower court that corporations could be part of an associated-in-fact enterprise, argued that it would have been “futile” to raise the claim that a corporation does not fit within the definition of an “association in fact” in the Eleventh Circuit because the law was so established. *Id.* At the same time, however, he argued that it was “equally true that none of them [the circuit courts] has analyzed this issue with anything near the kind of care that would at least give me comfort that they’ve finally and fully resolved the issue.” *Id.* at *11. Phillips, who appears to have been an advocate with a strong argument that had not been properly raised below, tried to justify his effort to have the Supreme Court consider it nonetheless by claiming it was subsumed in the question presented and “we’re not going to get a more thorough vetting

Because of the current status of the circuit court law on this issue, many defendants either concede the argument or fail to raise it in the trial courts.¹³⁹ Litigants, however, may challenge “settled” law when they do so in a good faith, non-frivolous way.¹⁴⁰ The arguments set forth in this Article could form the basis for a good faith request for a change in the law in those circuits that have previously addressed this issue.

CONCLUSION

The current circuit conclusion—that corporations can be part of groups of *individuals* associated-in-fact—permits most routine business disputes and tort claims, or “garden variety” fraud with multiple defendants, to be litigated as RICO claims at a tremendous cost to our national economy.¹⁴¹ The pestilence of these suits led one commentator to describe their proliferation as its own racket.¹⁴² In those circuits which take the broadest view of the statutory definition of enterprise,

of it at this point because the circuits are – are at this – at this stage essentially lined up. So the right time and opportunity for the Court is here.” *Id.* The Chief Justice did not seem persuaded, beginning the thought, “Well, unless somebody raises it. Unless somebody raised it below to preserve it for the rehearing en banc or – or some other way.” *Id.*

139. See, e.g., *Odom*, 486 F.3d at 548 (“It is undisputed that a corporation can be an ‘individual’ for purposes of an associated-in-fact enterprise.”).

140. See FED. R. CIV. P. 11(b)(2) (setting forth the good faith requirements with which lawyers filing pleadings briefs must comply). It treats the filing of a document signed by an attorney as a representation that the “claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” *Id.*

141. See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (“Instead of being used against mobsters and organized criminals, [RICO] has become a tool for *everyday* fraud cases”) (emphasis added); *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161 (C.D. Cal. 2003) (travel agency alleging that airline violated RICO and breached its contract with agency by forcing it to pay fee for processing refunds). But see 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, 569 (1987) (criticizing the use of the term garden variety fraud).

142. See Paul I. Rachlin, Note, *RICO's New Community of Racketeers: The Need for a Prior Criminal Conviction Requirement*, 64 WASH. U. L.Q. 229, 231 (1986); see also *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting) (“It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.”).

plaintiffs are able to assert a RICO claim against a corporation any time the corporation hires a contractor to perform a related task, thereby forming an association-in-fact.¹⁴³ Exposed to the tremendous liability of ruinous treble damages and the stigma of the “racketeer” label,¹⁴⁴ defendant corporations face a Hobson’s, or even Hobbesian, choice—either accept that risk or settle the suit.¹⁴⁵

Such a prisoner’s dilemma was not the aim of RICO’s drafters, who intended the statute to be a new weapon against organized crime, deployed in protection of legitimate businesses.¹⁴⁶ The judicial error came about largely because appellate courts were not confronted with the modern abuse of RICO when drafting early opinions,¹⁴⁷ and therefore read the statute broadly without fear of misapplication. Pandora’s Box was opened, therefore, without a full appreciation of its contents. As the abuse of civil RICO multiplied, the Supreme Court has pruned its applicability to garden variety fraud.¹⁴⁸ In its most recent

143. *See supra*, note 132.

144. *See, e.g.*, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 285 (1992) (O’Connor, J., concurring) (“In addition to the threat of treble damages, a defendant faces the stigma of being labeled a ‘racketeer.’”); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (“Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device. The very pendency of a RICO suit can be stigmatizing and its consummation can be costly; a prevailing plaintiff, for example, stands to receive treble damages and attorneys’ fees.”); *Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990) (“The mere assertion of a RICO claim consequently has an almost inevitable stigmatizing effect on those named as defendants. In fairness to innocent parties, courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.”); *United States v. Anderson*, 626 F.2d 1358, 1361 n.2 (8th Cir. 1980) (“This creates a situation where the reversal of the RICO counts does not affect the sentences of the defendants. Nevertheless, we consider it necessary to review the convictions on the RICO counts . . . because of the possible stigma stemming from the connotations surrounding the offense of ‘racketeering.’”).

145. *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting) (“Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit.”); *Crawford v. Washington*, 541 U.S. 36, 42 n.1 (2004) (quoting, with approval, the lower court’s description of an evidentiary ruling as presenting “an untenable Hobson’s choice”). *Cf. THOMAS HOBBS, THE LEVIATHAN* 120 (1967) (“[A] man is naturally obliged to hand over his money to a thug who points a revolver at him and says ‘Your money or your life.’”).

146. *See* the discussion of RICO’s legislative history *supra* notes 50-56 and accompanying text.

147. *See supra* notes 7-9 and accompanying text.

148. *See* Sabrina Tavernise, *Russian Suit is Dismissed in U.S. Court*, N.Y. TIMES, Apr. 1, 2003, at W1 (“A series of recent rulings by the United States Supreme Court has

case, the majority, notably joined by Justices Stevens, heightened the causation requirement under section 1964(c), limiting RICO suits to private plaintiffs who could prove direct causation.¹⁴⁹

This Article contends that the Court is primed to give the statutory definition of “enterprise” a more considered, textual reading that would exclude corporations from the definition of associated-in-fact enterprises. This would close Pandora’s Box, ridding legitimate corporations of the financial drain of RICO strike suits. A close reading of the statutory language and the application of familiar rules of statutory construction, such as the rule of lenity and the principle that no language should be rendered superfluous, urge the conclusion that legal entities cannot be part of a group of individuals, associated-in-fact. Notably, this textual reading does not insulate corporations from liability when they violate the law. Business fraud, when proven, can be reached through the ordinary criminal and civil statutes enacted to forbid such activity. Indeed, the illegal actions of a corporation, *qua* corporation, are themselves reachable through RICO. The statute permits any form of legal entities to be, itself, the enterprise¹⁵⁰ or person.¹⁵¹ A proper reading of RICO, therefore, would return that statute to its racketeering roots while still providing adequate remedies for violations of the law.

reined in use of the [RICO] statute somewhat, but it remains one of the most powerful legal weapons available in the United States.”).

149. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1998 (2006) (“When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.”). This direct causation requirement has created its own split in the circuits. *Compare James Cape & Sons Co. v. PCC Constr. Co.*, 453 F.3d 396, 403 (7th Cir. 2006) (requiring proof of direct causation), *with Williams v. Mohawk Indus. Inc.*, 465 F.3d 1277, 1289 (11th Cir. 2006) (permitting proof of “direct correlation”).

150. *See* 18 U.S.C. § 1961(4) (2006); *see also* *United States v. Feldman*, 853 F.2d 648, 655 (9th Cir. 1988) (“Each individual corporation is in itself a legal entity and, alone, may be charged as the RICO enterprise.”). *Feldman* is the seminal precedent in the Ninth Circuit that corporations can be part of a group of individuals.

151. 18 U.S.C. § 1961(3) (2006) (“‘person’ includes any individual *or entity*” (emphasis added)); *see, e.g.*, *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir. 1987) (“A corporation may be a ‘person’ under RICO.”).