No. 05-465

In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, Individually and on behalf of a class,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTRODUCTION

Mohawk Industries, Inc.'s opening brief asks this Court to legislate amendments to the federal RICO statute[1] to (1) exclude corporations from association-in-fact enterprises and (2) immunize corporations from liability for conducting the affairs of such enterprises. In support, Mohawk repeatedly argues that Congress cannot possibly have intended to subject corporations engaged in "routine business activity" to RICO liability and that the Eleventh Circuit's opinion will cast open the floodgates of litigation against "legitimate businesses" like Mohawk.

These arguments should have a familiar ring because this Court has had repeated occasion to consider proposals to artificially restrict RICO to avoid the purportedly dire consequences of the statute's broad reach. The Court, however, has properly declined previous invitations to rewrite the RICO statute in the guise of interpretation. Although the Court has twice observed that Congress could narrow the statute's exceptionally broad reach, the legislature instead has expanded RICO by adding predicate acts, including the illegal hiring and harboring crimes at issue here. Nevertheless, the number of civil RICO actions filed in the federal district courts has declined substantially.[2] Indeed, the recent statistics indicate that only one civil RICO case is filed per district judge per

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[1] The Racketeer Influenced and Corrupt Organizations Act, Pub. L. 91-452, Title IX, 84 Stat. 941, at 18 U.S.C. §§ 1961-1968 ("RICO").

[2] *See* Federal Judicial Caseload Statistics, Table 2.2 (Civil Cases Filed By Nature of Suit, Fiscal Years 1988-2004) (972 RICO cases filed in FY 1990 compared to 743 filed in FY 2003 and 777 filed in FY 2004), *available at* http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf.

year.[3] Mohawk's brief, therefore, asks this Court to exceed its constitutional role, ignore Congress's decision to add an illegal hiring predicate to RICO and contradict its own precedents – all to fix a problem that does not exist.

Nor does the Eleventh Circuit's decision criminalize "ordinary business activity," as Mohawk and its *amici* repeatedly claim. Whether criminal or civil, a RICO claim requires an allegation that the defendant engaged in a pattern of serious criminal misconduct. Respondents here allege that Mohawk – in connection with other, distinct third parties – has engaged in widespread violations of the immigration laws for profit. In 1996, Congress enacted statutes that (1) criminalized the employment of undocumented aliens and (2) added illegal hiring to the list of predicate crimes subject to RICO prosecution and treble damage actions. These legislative decisions conclusively demonstrate that Congress intended to permit prosecutors and plaintiffs to use RICO to combat the illegal conduct alleged in the complaint. By arguing that "legitimate" corporations should not face RICO prosecution for hiring undocumented aliens, even when they associate with others in the manner that RICO proscribes, Mohawk asks this Court for nothing less than a judicial veto of these statutes.

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[3] *Compare id. with* Federal Court Management Statistics, District Courts (2005) (U.S. District Court Judicial Caseload Profile) (listing between 650 and 680 district judges from 2000 to 2005), *available at* http://www.uscourts.gov/cgi-bin/cmsd2005.pl.

When law enforcement personnel have raided Mohawk's facilities, illegal workers have fled or attempted to hide to evade arrest.[10] Furthermore, Mohawk has taken steps to conceal this criminal conduct by destroying eligibility documents and helping illegal workers evade law enforcement personnel.[11] Accordingly, respondents allege that Mohawk has committed hundreds, if not thousands, of felonies over several years.[12]

Respondents do not allege that Mohawk committed this conduct alone. Rather, they allege that Mohawk participated in the affairs of an association-in-fact RICO enterprise that includes independent temporary employment agencies, such as Temporary Placement Services, Inc. ("TPS"), and other individual recruiters who are not Mohawk employees.[13] Respondents allege that Mohawk conducts the affairs of this separate enterprise by (1) using the services of the enterprise to procure illegal workers, whom Mohawk unlawfully hires and harbors; (2) using the enterprise to "borrow" additional illegal workers, employed by other members of the enterprise; (3) relying on the other members of the enterprise to provide its illegal workers with housing and false documents;

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[10] *Id.* at 12-13 (Compl. ¶ 27).

[11] *Id.* at 11, 13 (Compl. ¶¶ 20, 28).

[12] Specifically, respondents allege that Mohawk has violated § 274 of the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* ("INA"), by (1) knowingly employing undocumented workers in violation of 8 U.S.C. § 1324(a)(3); (2) harboring illegal aliens in violation of § 1324(a)(1)(A)(iii); and (3) encouraging illegal aliens to enter the United States in violation of § 1324(a)(1)(A)(iv). *See* JA 19-20 (Compl. ¶¶ 58-61).

[13] *Id.* at 23 (Compl. ¶ 76).

and (4) knowingly accepting false documentation provided by other members of the enterprise.[14]

On February 9, 2004, Mohawk moved to dismiss the complaint. In a thorough 53-page opinion, the district court denied Mohawk's motion to dismiss the respondents' federal RICO claim on April 12, 2004.[15] The district court subsequently granted Mohawk's petition for leave to seek an interlocutory appeal and stayed all further proceedings pending that appeal.[16]

The Eleventh Circuit accepted Mohawk's interlocutory appeal and affirmed the district court's decision to uphold respondents' RICO claim.[17] The Eleventh Circuit subsequently denied Mohawk's petition for rehearing *en banc*,[18] but the district court continued its stay pending this Court's review.[19] As a result, the parties have taken no discovery and made no progress towards class certification.

SUMMARY OF THE ARGUMENT

The thrust of Mohawk's argument is that Congress cannot have intended RICO to apply to corporations hiring their own employees, regardless of whether the defendant corporation violates the immigration laws or whether the defendant corporation associates with distinct third parties and entities to commit those crimes. These arguments

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[14] *Id.* at 22-23 (Compl. ¶¶ 75-76).

[15] *See* Pet. App. 61a.

[16] *Id.* at 68a-72a.

[17] *Id.* at 67a; *id.* at 1a-23a.

[18] *Id.* at 73a.

[19] *Id.* at 62a-66a.

simply ignore Congress's 1996 decision to add the illegal hiring of undocumented aliens to the list of predicate crimes that may be prosecuted under RICO. That decision confirms that Congress believed that employers could commit illegal hiring through a distinct RICO enterprise and intended prosecutors and civil plaintiffs to use RICO against corporations that did so.

After obtaining *certiorari* for this Court to review whether a defendant corporation can form an association-in-fact enterprise with its agents, Mohawk's opening brief all but abandons that question. Instead, Mohawk asks the Court to hold that corporations can never be part of an association-in-fact enterprise. That argument has been rejected by every circuit to consider it, and Mohawk affirmatively conceded it in the lower courts.

Mohawk's second argument similarly ignores the agency issue posed in the Question Presented and petitions the Court to limit association-in-fact enterprises to "combination[s] . . . with an existence and activities that are clearly distinct" from its member entities.[20] This new rule has no grounding in the text of the RICO statute or the case law that interprets it. In fact, Mohawk's rule contradicts this Court's seminal precedents in *United States v. Turkette*, *Reves v. Ernst & Young*, and *Cedric Kushner Promotions, Inc. v. King*, and it would require the lower courts to re-examine RICO principles that have been settled for decades. More important, Mohawk's immodest proposal would effectively eliminate association-in-fact enterprises and all 18 U.S.C. § 1962(c) actions by allowing any RICO defendant to escape criminal or civil liability by

[20] Mhk Br. at 27 & n.15.

arguing that it had merely conducted its own affairs rather than the affairs of a larger enterprise. That is not the law, nor should it be.

ARGUMENT

I. Congress Intended Lawsuits Like This One to Enforce the Immigration Laws.

Mohawk argues that Congress cannot possibly have intended to subject "legitimate" corporations conducting their own affairs, "legal ***or otherwise***," to suits like this one.[21] To that end, Mohawk cites selectively from RICO's legislative history and emphasizes that Congress was primarily concerned with individual criminals infiltrating legitimate businesses. But nothing in the legislative history of RICO or the broader Organized Crime Control Act of 1970 ("OCCA"),[22] supports Mohawk's claim that Congress intended corporations engaged in racketeering to be immune from RICO prosecution. And this Court has long recognized that Congress enacted a statute that extends beyond the infiltration concerns that Mohawk emphasizes.[23] Moreover, Mohawk simply ignores subsequent legislative developments that confirm Congress affirmatively intended to impose RICO liability on corporations that associate with others to employ undocumented aliens.

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[21] *Id.* at 37-38 (emphasis added).

[22] Pub. L. No. 91-452, 84 Stat. 941.

[23] *See, e.g., United States v. Turkette*, 452 U.S. 576, 590 (1981) ("we are unpersuaded that Congress . . . confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, only the infiltration of legitimate business").

A. By Making Illegal Hiring of Undocumented Aliens a RICO Predicate Offense, Congress Intended Corporations To Face Suits Like This One.

Since at least 1885, Congress has passed immigration laws "aimed at the practice of certain employers importing cheap labor from abroad."[24] In 1986, Congress passed the Immigration Reform and Control Act ("IRCA"), which for the first time imposed civil and criminal penalties on the corporations that employ undocumented aliens.[25] Congress realized that most illegal immigration has been motivated by the pursuit of higher paying jobs and sought to "end[ ] the magnet that lures [illegal aliens] into this country"[26] and "remov[e] the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of labor."[27] To this end, IRCA specifically amended the INA to eliminate the "Texas

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[24] H.R. Rep. No. 82-1365, at 10 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1662 (discussing the Alien Contract Labor Laws). *See DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976) (illegal aliens can seriously depress wage scales for legal workers); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984) (same discussing the INA); *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) ("IRCA forcefully made combatting the employment of illegal aliens central to the policy of immigration law") (internal quotations omitted).

[25] *See* IRCA, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3360, *codified at* 8 U.S.C. § 1324a.

[26] H.R. Rep. No. 99-682(I), at 45-46 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5649-50. *See also NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2d Cir. 1997) (IRCA combats illegal employment by targeting employers).

[27] H.R. Rep. No. 99-682(I), at 52 (1986), *as reprinted in* 1986 U.S.C.C.A.N. at 5656. *See generally* Memorandum of the President, 60 Fed. Reg. 7885, 7886 (Feb. 7, 1995) ("Employers who hire illegal immigrants . . . suppress[ ] wages and working conditions for our country's legal workers").

proviso," which protected employers from prosecution for harboring undocumented aliens.[28]

Ten years later, the 104th Congress amended the INA again to impose more stringent criminal penalties for knowingly employing undocumented aliens.[29] With this law, Congress intended to further deter employers from hiring undocumented aliens: "It has been recognized for many years that the primary magnet for most illegal immigrants is the availability of jobs – jobs that pay much better than what is available in their home countries."[30] Later that year, the very same 104th Congress added violations of § 274 of the INA, including the illegal hiring, harboring and encouraging crimes alleged here, to the definition of "racketeering activity" at 18 U.S.C. § 1961(1)(F).[31]

Congress is presumed to know the law, and by the time it added these RICO predicates in September 1996, two things were plain. First, Congress was aware that the federal courts had interpreted the broad language of RICO to apply beyond the bounds of "traditional" organized crime and the Mafia's infiltration of legitimate business.[32] Rather than amend the statute to reverse course, Congress has confirmed its expansive intentions for RICO by adding to

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[28] *See* IRCA, Pub. L. No. 99-603, § 112(a), 100 Stat. 3360. For the exclusion of employment activity before this amendment, *see* 8 U.S.C.A. § 1324, 1986 amendments, subsection a.

[29] *See* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 203, Pub. L. No. 104-208, Division C, 110 Stat. 3009-546 (Sept. 30, 1996).

[30] S. Rep. No. 104-249, at 4 (1996).

[31] *See* The Antiterrorism and Effective Death Penalty Act, § 433, Pub. L. No. 104-132, 110 Stat. 1274 (1996).

[32] *See, e.g., Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985).

the statute's predicate acts.[33] Second, Congress knew that corporations and other employers were subject to criminal prosecution for hiring undocumented workers and harboring illegal aliens in violation of the INA because it had added new criminal penalties against employers that employed large numbers of undocumented workers earlier in that year. Accordingly, the 104th Congress well knew that its addition of the INA predicates to the RICO statute would open employers – and corporations like Mohawk – to prosecution and civil suits under RICO. Indeed, by singling out ***only*** those INA violations committed for financial gain for inclusion in § 1961(1)(F), Congress specifically targeted employers for civil and criminal RICO liability. Recognizing this clear purpose, four circuits have held that similar RICO cases against corporations that associate with others to employ and harbor undocumented workers state valid claims that must be decided on the merits: "[T]he fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one."[34]

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[33] *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677, 702 (1979) (Congressional inaction after judicial interpretation of a statute indicates the legislature's agreement or acquiescence in that interpretation); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (noting Congress's failure to further define RICO's pattern requirement after *Sedima*). By contrast, when Congress believes a correction to the statute is necessary, it has demonstrated its ability to narrow RICO. *See* Private Securities Litigation Reform Act, Pub. L. 104-67, § 107, 109 Stat. 737, 758 (Dec. 22, 1995) (amending 18 U.S.C. § 1964(c) to provide "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of RICO").

[34] *Mendoza v. Zirkle*, 301 F.3d 1163 (9th Cir. 2002). *See also Trollinger v. Tyson Foods*, 370 F.3d 602 (6th Cir. 2004); *Williams v.*

(Continued on following page)

B. Mohawk's Arguments Would Nullify Congress's Addition of INA Violations to RICO's Predicate Crimes.

Mohawk attempts to side-step Congress's decision to impose RICO liability on the employers of undocumented aliens by arguing that corporations cannot commit this conduct through the affairs of a distinct RICO enterprise because hiring is a "quintessential corporate function."[35] Even if the defendant corporation commits this crime in association with third parties, Mohawk argues that the employer is immune from RICO because these activities are merely the employer's activities. If Mohawk were correct on this point, however, no employer of illegal workers could ever face RICO prosecution and the addition of an illegal hiring predicate to the RICO statute would serve no purpose. Moreover, because the enterprise questions at issue here are the same for criminal and civil RICO cases,[36] Mohawk's approach would hamstring federal prosecutors as well as civil plaintiffs. Respectfully, these pleas for an amendment or a veto to the statute Congress has passed are directed to the wrong branch of government.[37]

Mohawk Industries, Inc., 411 F.3d 1252 (11th Cir. 2005); *Commercial Cleaning Services, LLC v. Colin Service Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001).

[35] *See* Mhk Br. at 34.

[36] *See, e.g.*, Pet. App. 4a ("These requirements apply whether the RICO claim is civil or criminal in nature.").

[37] *See Sedima*, 473 U.S. at 499-500 (rejecting attempt to impose artificial restrictions on RICO in response to the statute's use against corporations as well as mobsters).

II. An Association-in-Fact Enterprise May Be Comprised of Corporations and Other Entities.

Part I of Mohawk's brief concerns the new and incorrect assertion that a corporation (and any other entity) cannot be a member of an association-in-fact enterprise.

A. Mohawk Failed to Preserve its Initial Argument.

Normally, this Court will not consider arguments that the petitioner failed to preserve in the lower courts and omitted from the petition for *certiorari*.[38] Indeed, the Court has refused to consider unpreserved arguments in at least two prior RICO cases.[39] In this case, Mohawk failed to preserve what has become its primary argument before either the district court or the Eleventh Circuit. Indeed, Mohawk previously conceded that a corporation *could be* a member of an association-in-fact enterprise under § 1961(4). Mohawk informed the district court that: "Specifically, ***Mohawk***

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[38] *See* Sup. Ct. R. 14(1)(a) ("[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"); *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002) (the Court will not decide cases on grounds that are not raised in the petition for certiorari); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 392 n.7 (1996). *See also* Sup. Ct. R. 24(1)(a) (a party's brief "may not raise additional questions or change the substance of the questions already presented" in the petition for certiorari); *Taylor v. Feeland & Kronz*, 503 U.S. 638, 645-646 (1992) (same).

[39] *See NOW v. Scheidler*, 510 U.S. 249, 262 (1994) (refusing to consider a constitutional challenge to RICO that the defendant had failed to raise below); *Am. Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 608 (1985) (refusing to consider unpreserved argument that the plaintiff's complaint failed to allege a violation of 18 U.S.C. § 1962(c)).

agrees that a corporation can be both a RICO person and ***part of an association-in-fact enterprise***[.]"[40] And Mohawk subsequently informed the Eleventh Circuit that current law permits an allegation of an association-in-fact enterprise that includes the defendant corporation:

> This [plaintiffs' theory] would be a substantial departure from ***current law, which requires that to sufficiently allege a RICO enterprise, a plaintiff must allege that the enterprise is comprised of a corporation*** and a separate, independent third party.[41]

In addition, Mohawk's argument does not fairly fall within the question presented in Mohawk's petition for *certiorari*. There, Mohawk argued that the circuit courts are split on the question of whether a corporation and its third party agents can form such an association-in-fact enterprise.[42] Mohawk's petition contains no hint of the additional argument that corporations can never be members of such an enterprise. And because virtually every court to consider Mohawk's proposed construction of 18 U.S.C. § 1961(4) has rejected it as "nonsense,"[43] it is unlikely that the question would have merited this Court's attention

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[40] Mhk Dist. Ct. Reply Br. at 5 (emphasis added) [Dist. Ct. Dkt. 43].

[41] Mhk's 11th Cir. Br. at 12-13 (emphasis added) (filed Sept. 7, 2004). *See also* Mhk's 11th Cir. Reply Brief at 11 n.8 (filed Nov. 5, 2004) ("Indeed, nothing in Mohawk's rule would affect the RICO liability of a corporation that truly participates in some larger association of corporations or (non-agent) individuals by engaging in racketeering activities on the enterprise's behalf.").

[42] *See* Pet. 10-18.

[43] *See, e.g., United States v. Huber*, 603 F.2d 387, 388-89 (2d Cir. 1979); *United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (noting that every circuit to address the argument that an association-in-fact enterprise is limited to individuals has rejected it).

standing alone. The Court, therefore, should enforce its rules that prohibit the parties from adding to the Question Presented by declining to reach Mohawk's first argument.

B. The RICO Statute Contemplates Association-in-Fact Enterprises that Include Corporations and Other Entities.

Mohawk's contention that a corporation cannot form part of an association in fact enterprise fares no better on the merits because it requires the conclusion that Congress intended § 1961(4) to constitute an exclusive listing of every enterprise actionable under RICO. That interpretation contradicts the statute's plain language, which disclaims any such limited reading by providing that an enterprise "includes" the referenced persons and entities *and* "***any*** union or group of individuals associated in fact." Mohawk's restrictive reading of § 1961(4) also contradicts the Court's observation that Congress employed "enterprise" as a term of breadth,[44] and *Turkette*'s holding that "[t]here is no restriction upon the associations embraced by the definition" of an enterprise.[45] Finally, Mohawk's view conflicts with this Court's general recognition that "RICO is to be read broadly" in light of "Congress' self-consciously expansive language and overall approach."[46]

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[44] *See United States v. Russello*, 464 U.S. 16, 21-22 (1983) (among the "terms and concepts of breadth" Congress employed in the RICO statute "are 'enterprise' in § 1961(4) . . . and 'participate' in § 1962(c)").

[45] *See Turkette*, 452 U.S. at 580.

[46] *Sedima*, 473 U.S. 497-98.

1. The Circuit Courts Have Unanimously Rejected Mohawk's Argument that a Corporation Cannot Be a Member of An Association-in-Fact Enterprise Because § 1961(4) Is Illustrative, Not Exhaustive

Although Mohawk's argument that a corporation cannot form any part of an association-in-fact enterprise is new to this case, it is hardly novel to the federal courts. RICO defendants have repeatedly made the same argument to the district and circuit courts, which have almost universally rejected it because it contradicts the plain language of the statute and would lead to absurd results. The Second Circuit dispatched Mohawk's argument more than twenty-five years ago because it "makes nonsense of the statute."[47] More than a decade later, the Seventh Circuit similarly rejected the argument because it "would make no sense."[48] By 1995, the First Circuit could observe that the contention that "an association-in-fact RICO enterprise . . . must be an association of individuals, and cannot include legal entities" had been "addressed to a number of circuit courts, and each has rejected it."[49] Indeed, despite the more than 35 years RICO and § 1961(4) have been on the books, Mohawk is unable to cite a single case that adopts its conclusion that corporations cannot join an association-in-fact enterprise.

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[47] *Huber*, 603 F.2d at 388-89.

[48] *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991).

[49] *London*, 66 F.3d at 1243-44 (citing extensive authority). *See also United States v. Console*, 13 F.3d 641, 652 (3d Cir. 1993); *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *United States v. Perholtz*, 842 F.2d 343, 352-53 (D.C. Cir. 1998); *Masters*, 924 F.2d at 1366; *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1982).

2. The Statute Precludes Mohawk's Inference that Congress Excluded Corporations and Other Entities From Association-In-Fact Enterprises.

The reason the circuit courts have universally rejected Mohawk's argument springs from the plain language of the statute. Congress defined the concept of a RICO enterprise at 18 U.S.C. § 1961(4), with broad language: "an 'enterprise' includes . . . any union or group of individuals associated in fact although not a legal entity." The task of interpreting this definition begins and ends with this language itself, for where, as here, the statute is plain, "the sole function of the courts is to enforce it according to its terms."[50] In fact, this Court has already held that there can be "no uncertainty" attributed to the very language that Mohawk has put at issue.[51] Because § 1961(4) contains no ambiguity, the Court should enforce Congress's plain directive and avoid the absurd implications of Mohawk's construction.

a. *Expressio Unius* Cannot Be Applied to § 1961(4).

Mohawk argues that Congress's inclusion of certain types of persons and entities in the definition of enterprise at § 1961(4) necessarily excludes any other form of enterprise, invoking the doctrine of *expressio unius est exclusio alterius*.[52] *Turkette* rejected the application of a similar doctrine to

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[50] *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

[51] *Turkette*, 452 U.S. at 581 & 587 n.10 (refusing to apply the rule of lenity and other aids to construction in interpreting § 1961(4)); *Scheidler*, 510 U.S. at 262 (same). *See also Reves v. Ernst & Young*, 507 U.S. 170, 184 n.8 (1993) (same for § 1962(c)).

[52] *See* Mhk Br. at 12-15.

§ 1961(4) because it could discern no "uncertainty in the meaning to be attributed to the phrase 'any union or group of individuals associated in fact[.]'"[53] Moreover, as this Court has observed, "the rule [of *expressio unius*] is fine when it applies," but in other cases, "it just fails to work." *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80, 84 (2002).

In *Echazabal*, the unanimous Court refused to apply *expressio unius* to a federal statute that provided certain types of qualification standards "may include" an identified requirement.[54] The Court refused to exclude other requirements because "the expansive phrasing of 'may include' points directly away from the sort of exclusive specification" that would support the inference. Like the provision at issue in *Echazabal*, § 1961(4)'s definition of enterprise employs the same expansive language to negate the exclusion Mohawk would imply here.

Furthermore, § 1961(4) does not constitute the type of comprehensive listing that would support the inference, of intentional exclusion by omission.[55] Before making that inference, this Court has required that the statute at issue include the essential ingredient of a "series of two or more terms or things that should be understood to go hand in

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[53] *Turkette*, 452 U.S. at 581 (rejecting the application of *ejusdem generis* because that "comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute").

[54] *See Echazabal*, 536 U.S. at 80.

[55] *See, e.g, Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; ***it has force only*** when the items expressed are members of an 'associated group or series,' ***justifying the inference that items not mentioned were excluded by deliberate choice***, not inadvertence.") (emphasis added).

hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded."[56] Section 1961(4) does not fit this bill.

Mohawk concedes that § 1961(4) does not provide a single list of entities that would imply the exclusion of corporations.[57] Rather, as this Court held in *Turkette*, the statute identifies "two categories of associations that come within the purview of the 'enterprise' definition."[58] The first category encompasses "legal entities," and the second encompasses any additional associations that do not form a legal entity. This second "catch all" category contains no "specific enumeration" of all the associations included in the statute.[59] Rather than attempting to list the numerous combinations of persons and entities that conceivably could associate, § 1961(4)'s second clause simply says that ***any*** union or group associated in fact will do.[60] Compared even against the far more detailed enumeration of persons and entities in § 1961(4)'s first clause, there can be no serious argument that the second clause constitutes a series of terms from which the omission of corporations (or any other legal entity) is so striking that it necessarily bespeaks a considered and advertent omission.[61] And because Mohawk's

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[56] *Echazabal*, 536 U.S. at 81, *quoted in Barnhart*, 537 U.S. at 168.

[57] *See* Mhk. Br. at 16.

[58] 452 U.S. 576, 581-82.

[59] *Id.*

[60] *See Masters*, 924 F.2d at 1366 ("The point of the definition is to make clear that it need not be a formal enterprise; 'associated in fact' will do.").

[61] *See Echazabal*, 536 U.S. at 81; *Barnhart*, 537 U.S. at 168. The general language in § 1961(4)'s second clause distinguishes the far narrower language considered in *Willheim v. Murchison*, 342 F.2d 33, 36 (2d Cir. 1965), and explains the absence of an additional phrase analogous to the "any . . . other legal entity" that appears in § 1961(4)'s first clause.

interpretation of the statute would lead to absurd and obviously unintended results,[62] all three of the *Echazabal* strikes against an inference of exclusion are present here.

Mohawk's argument further ignores the presence of the "any union" language in § 1964(1). By its plain and ordinary meaning, a "union" refers to "something formed by a combining or coalition of parts or members . . . a confederation of independent individuals (as nations or persons) for some common purpose."[63] That concept is certainly broad enough to encompass an association comprised of corporations and others, particularly when read in context: "[A]ny union . . . associated in fact."[64] Accordingly, even if the Court were to rewrite § 1961(4)'s phrase "any . . . group of individuals associated in fact" to read "any . . . group of natural persons," as Mohawk advocates,[65] that would not imply that corporations cannot form association-in-fact enterprises.

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[62] *See infra* Part I.

[63] *See* Merriam-Webster's Collegiate Dictionary 1292 (10th ed. 1999).

[64] That Congress did not intend to limit this reference to labor unions is clear from the term's exclusion from the list of legal entities that can constitute enterprises in § 1961(4)'s first clause. *See Turkette*, 452 U.S. at 582. Furthermore, Congress cannot have intended "any union . . . of individuals" because that would render (1) the term "union" redundant and (b) the term "group" superfluous.

[65] Mohawk concedes there is ample authority for reading individuals to encompass corporations. *See* Mhk. Br. at 13 n.5. To argue that the term captures only natural persons in this context, however, Mohawk emphasizes that (1) statutory language should be afforded its plain meaning; (2) statutes should be construed to avoid rendering language superfluous; (3) terms should have the same, consistent meaning throughout a statute; and (4) Congress's juxtaposition of different language in successive statutory sections indicates a deliberate choice. *Id.* at 12-15. But Mohawk would have the Court abandon all these canons of construction when it considers the natural implication of

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b. Mohawk's Interpretation Improperly Negates The Distinction Between "Includes" and "Means" in RICO's Definition Section.

The statute's structure reinforces the conclusion that § 1961(4) does not imply the exclusion of corporations from association-in-fact enterprises. Section 1961 contains ten separate definitions. Five of those definitions begin with the term "means,"[66] while another four, including the definition of enterprise, use the more open-ended term "includes."[67] This different terminology is critical because this Court has recognized that when Congress begins a definition with "means" it intends a comprehensive definition that excludes any meaning left unstated.[68] By contrast, where Congress begins a definition with "includes" the Court has read that language to indicate an exemplary definition that "comprehends or embraces" additional meanings that may not be stated explicitly.[69] Moreover, where Congress employs both

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Congress's decision to use "includes" rather than "means" in § 1961(4). This inconsistency reveals that the desired result, rather than any principled interpretation of the statute, directs Mohawk's analysis.

[66] *See, e.g.*, 18 U.S.C. § 1961 (1, 2, 6, 7 & 8).

[67] *See, e.g.*, 18 U.S.C. § 1961 (3, 4, 9 & 10). The final subsection, § 1961(5), which provides that a pattern of racketeering activity "requires at least two acts of racketeering activity," is a limitation, not a definition. *See H.J., Inc.*, 492 U.S. at 237.

[68] *See Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1979) (distinguishing between use of "means" and "includes" in a definition); *Groman v. Commissioner*, 302 U.S. 82, 86 (1937) ("This conclusion is fortified by the fact that when an exclusive definition is intended the word 'means' is employed . . . whereas here the word used is 'includes.' ").

[69] *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 (1934). *See also* 2A Norman J. Singer, *Sutherland's Statutes and Statutory Construction* § 47.7 (6th ed. 2005) ("A term whose statutory definition declares what

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"means" and "includes" in the same statute, this Court has concluded that the drafters made an advertent choice to distinguish between comprehensive and illustrative definitions.[70]

As a result, when Congress uses both "means" and "includes" in the same statute, as it did in § 1961 and throughout the OCCA,[71] that language cannot be read as synonymous and any definitions that begin with "includes" must be read as exemplary rather than comprehensive.[72] That implication is particularly strong here, because previous versions of the bills that eventually became RICO employed only "means" in their definitional sections. When Congress added the provision that eventually became § 1961, and first defined "enterprise," however, it began to use "includes" as well as "means" to indicate where it intended a

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it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means' ").

[70] *Helvering*, 293 U.S at 126 n.1 ("That the draftsman used these words in a different sense seems clear. The natural distinction would be that where 'means' is employed the term and its definition are to be interchangeable equivalents, and that ***the verb 'includes' imports a general class***, some of whose particular instances are those specified in the definition.") (emphasis added). *Accord Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.") (citations omitted).

[71] The OCCA's other provisions further indicate that Congress's use of "means" and "includes" was advertent. Thus, in Title II, Congress used both "means" and "includes," *see* 18 U.S.C. § 6001 (using "means" in subsections (1), (3), and (4), and "includes" in subsection (2)). By contrast, Title I uses "includes," *see* 18 U.S.C. § 3333(f), and Title XI used "means" exclusively. *See* 18 U.S.C. § 841.

[72] *Cf. Sedima*, 473 U.S. at 497 n.14 (fact that Congress used the different formulation of "requires" in § 1961(1)(5) precluded argument that a pattern "means" two acts of racketeering activity).

broader definition.[73] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."[74]

Section 1961(4), therefore, is an exemplary definition, and every circuit court to consider Mohawk's contrary argument has rejected it.[75] Mohawk's suggestion that the Court construed this provision to provide a comprehensive list of enterprises in *NOW v. Scheidler*, 510 U.S. 249 (1994) is not correct. Regardless of what the parties may have argued, *Scheidler* reaffirmed *Turkette*'s observation that § 1964(1) is a broad provision without any "restriction on the associations embraced by the definition."[76]

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[73] Senate Bill 1861, which defined the term "enterprise" for the first time, represented the combination of Senator McClellan's S. 2187 and Senator Hruska's S. 1623. *See* G. Robert Blakey and Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young, 33 Am. Crim. L. Rev. 1369, 1666-68 (1996) (describing this progression). Both S. 1623 and S. 2187 employed "means" as the exclusive introduction to their defined terms. *See* S. 1623 § 2, 91st Cong. (1969); S. 2187 § 3, 89th Cong. (1965). When those bills were combined into S. 1861, however, Congress began to use both "means" and "includes" in its definitions, including the definition of enterprise that was enacted at § 1961(4). *See also* H.R. 10312, 91st Cong. (1969) (same language in Rep. Poff's House bill).

[74] *Russello*, 464 U.S. at 23-24.

[75] *See, e.g., United States v. Cianci*, 378 F.3d 71, 79 (1st Cir. 2004), *cert. denied*, 126 S. Ct. 421 (2005) ("The term's flexibility is denoted by the use of the word 'includes' rather than 'means' or 'is limited to'; it does not purport to be exhaustive."). *See supra* note 50.

[76] *Scheidler*, 510 U.S. at 260.

3. RICO's Legislative History Does Not Contradict § 1961(4)'s Plain Language.

Mohawk invites the Court to supplant this clear statutory language by citing selected portions of the legislative history. This Court, however, "start[s] with the assumption that legislative purpose is expressed by the ordinary meaning of the words used."[77] After all, "it is the statute, and not the Committee Report, which is the authoritative expression of the law."[78] Extrinsic materials, including legislative history, "have a role in statutory interpretation ***only*** to the extent they shed a reliable light on the enacting Legislature's understanding of ***otherwise ambiguous terms***."[79] Indeed, it would work a "radical abandonment" of precedent to resort to legislative history absent a compelling need to interpret ambiguous statutory text.[80]

In *Turkette*, this Court concluded that there was no such ambiguity in § 1961(4).[81] Indeed, *Turkette* declined to impose an artificially narrow construction on that provision based on the same arguments about RICO's legislative

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[77] *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

[78] *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994).

[79] *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611, 2626 (2005) (emphasis added).

[80] *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187 n.8 (2004) (plurality opinion) (quoting Chief Justice Marshall's opinion in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 399 (1805)). *Accord Exxon*, 125 S. Ct. at 2626.

[81] *See Turkette*, 452 U.S. at 587 n.10 ("There being no ambiguity in the RICO provisions [§§ 1961(4) and 1962(c)], the rule of lenity does not come into play.").

history that Mohawk recycles here.[82] The Court should similarly decline Mohawk's invitation to use selected legislative history to re-write RICO's broad language.

Furthermore, this Court has repeatedly recognized that Congress enacted a statute that far surpasses the activities of traditional organized crime or the infiltration of legitimate business.[83] By the same token, the fact that Congress was greatly concerned with the exploits of individual criminals does not compel the conclusion that only individuals may be constituent members of an enterprise. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provision of our laws rather than the principal concerns of our legislators by which we are governed."[84]

Nor is Mohawk correct to suggest that Congress only considered corporations as potential victims of racketeering activity. If that were true, Congress would not have included "entities," including corporations, within the definition of "persons" subject to RICO prosecution.[85] In any event, the OCCA's legislative history confirms that Congress was concerned about corporations that perpetrated crimes. In fact, Congress heard testimony from the U.S. Chamber of

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[82] *Id.* at 584-93.

[83] *See H.J., Inc.*, 492 U.S. at 248 ("The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."); *Scheidler*, 510 U.S. at 260 (same).

[84] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). *See also City of Chicago*, 511 U.S. at 339 ("It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text.").

[85] *See* 18 U.S.C. § 1961(3).

Commerce that honest business men faced unfair competition from "***so-called legitimate businesses*** [that] have been able to secure tax advantages, avoidance of zoning and building regulations, of health standards, etc."[86]

Finally, Mohawk claims that a judicial amendment to § 1961(4) is necessary to avoid difficult (albeit different) problems purportedly caused by Congress's imprecise language and this Court's decision in *Turkette*. The circuit courts, however, have had no difficulty rejecting the suggestion that § 1961(4) limits association-in-fact enterprises to groups of natural persons; on that point, they are unanimous.[87] In fact, the circuits consistently have held that corporations and other entities can join with (1) natural persons[88] and (2) other corporations and entities to form association-in-fact enterprises.[89] Mohawk's unsupported assertion that the courts have had more difficulty with the proof required to establish the structure and common

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[86] *See, e.g.*, Supplemental Statement of Aaron M. Kohn, Managing Director, Metropolitan Crime Commission of New Orleans, Inc., Member, Advisory Panel on Crime Prevention and Control of the U.S. Chamber of Commerce, Organized Crime Control: Hearings on S.30 before Subcommittee No. 5 of the Committee of the Judiciary, 91st Cong. 112, at 433 (1970).

[87] *See supra* Part II (A) & note 50.

[88] *See, e.g., United States v. Goldin Indus., Inc.*, 219 F.3d 1271 (11th Cir. 2001); *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263-64 (2d Cir. 1995); *Libertad v. Welch*, 53 F.3d 428, 443-44 (1st Cir. 1995); *United States v. Hughes*, 895 F.2d 1135, 1142 (6th Cir. 1990); *United States v. Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988); *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983); *Thevis*, 665 F.2d at 625 (5th Cir. 1982).

[89] *See, e.g., London*, 66 F.3d at 1243-44; *Console*, 13 F.3d at 650-51; *Dana Corp. v. Blue Cross & Blue Shield*, 900 F.2d 882, 887 (6th Cir. 1990); *Atlas Pile Driving*, 886 F.2d at 995; *United States v. Porcelli*, 865 F.2d 1352, 1363-64 (2d Cir. 1989); *Huber*, 603 F.2d at 393-94.

purpose required to establish an enterprise is no reason to categorically exclude corporations and other entities from the statute.[90]

III. Mohawk's Vague Test For Measuring Distinctness Contradicts the Statute and Would Eliminate Association-in-Fact Enterprises.

Like Part I, Part II of Mohawk's brief abandons the specific question on which this Court granted *certiorari*. Having recognized that (1) the complaint does not allege a principal-agent relationship between Mohawk and any of the third party recruiters that constitute the enterprise, and (2) *Kushner* requires nothing more than legal distinctness between the defendant and the RICO enterprise, Mohawk has changed its argument. Rather than continue to argue that agency negates the formation of an enterprise, Mohawk now argues that as long as a defendant corporation is performing its business activities, it cannot – ***as a matter of law*** – participate in the affairs of a broader RICO enterprise, ***even if the defendant corporation conducts those activities by associating with third parties to engage in a pattern of racketeering activity***. That is not the law, and if it were, no corporation (or arguably any other defendant) could be prosecuted as a member of an association-in-fact enterprise because the defendant would simply recharacterize the alleged conduct as its own business affairs.

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[90] *See, e.g., Sedima*, 473 U.S. at 491 (even the imposition of significant logistical difficulties will not justify the "invention of a requirement that cannot be found in the [RICO] statute and that Congress . . . did not envision").

The only apparent utility of the new test Mohawk proposes is to excuse corporations from RICO liability. Mohawk's proposal is not derived from the statutory text, the legislative history or the precedent of this or any other court. Moreover, the inherent vagueness of a test that turns on the defendant's definition of its own affairs precludes Mohawk from articulating a specific rule that the lower courts could apply in a principled way. What reason could a corporation (or any other defendant) have for joining an association-in-fact enterprise other than to further its own affairs and interests? This Court has rejected previous attempts to invent and impose vague restrictions on the RICO statute,[91] and it should do so again here.

Whether under the guise of its previous agency argument or the new test proposed in its opening brief, Mohawk urges this Court to transform RICO from a statute of exceptional breadth to one with a "razor thin zone of application" that is entirely inconsistent with the broad language Congress employed and the liberal construction it demanded for this statute.[92] Respondents will first address the agency question presented on *certiorari*, before turning to the untenable new approach Mohawk urges on this Court.

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[91] *See H.J., Inc.*, 492 U.S. at 243-49 (rejecting arguments for an amorphous organized crime limitation on RICO); *Sedima*, 473 U.S. at 493-94 (rejecting a "racketeering injury" requirement for RICO civil actions because it was impossible to define and apply).

[92] *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267-68 (3d Cir. 1995) (*citing Sedima*, 473 U.S. at 497-98).

A. Mohawk Cannot Escape RICO Liability By Inventing Agency Relationships Among the Members of the Enterprise.

The question that this Court agreed to review is whether a "defendant corporation and its agents" can form a RICO enterprise that is separate from the defendant corporation. The answer to that question is "yes" because this Court has unanimously held that the statute requires nothing more than legal separateness between the RICO person and the enterprise. That holding applies to both "legitimate enterprises" made up of corporations and their business allies and "illegitimate enterprises" made up of individual criminals because RICO's enterprise and participation requirements are the same for criminal and civil cases.[93]

Mohawk has argued that agency relationships among the members of an enterprise should defeat distinctness. That argument fails because neither the statute, nor this Court's interpretation of it in *Kushner*, makes any reference to the concept of agency. The statute requires only that the defendant associate with the other members of the enterprise and participate in the conduct of its affairs,[94] and that is what the complaint alleges. By contrast, the complaint makes no allegation of agency among the members of the enterprise.

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[93] *See* Pet. App. 4a; *Cf. H.J., Inc.*, 492 U.S. at 232-33 (pattern requirement applies in both civil and criminal cases).

[94] *See* § 1961(4) (demanding an association-in-fact); § 1962(c) (requiring that the RICO defendant be "associated with" the enterprise and "conduct or participate in the conduct of" its affairs).

1. *Kushner* Requires Nothing More Than Legal Distinctness Between the RICO Person and the Enterprise.

In *Kushner*, the unanimous Court read § 1962(c) to "suggest" a need to plead and prove two distinct entities: (1) a RICO person (or defendant) and (2) a RICO enterprise "that is not simply the same 'person' referred to by a different name."[95] But the same unanimous Court also concluded that a formal legal distinction between the person and the enterprise satisfied that requirement:

> The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. ***And we can find nothing in the statute that requires any more "separateness" than that.***[96]

Accordingly, in *Kushner*, it was enough that the defendant person was legally distinct from a corporation of which he was the sole owner, employee and president. Even though the owner/employee was clearly a corporate agent, alleged to be acting in furtherance of the corporation's interests, this Court held that the defendant and his corporation were separate enough to satisfy § 1962(c)'s implied distinctness requirement.

In *Kushner*, the corporation was the enterprise, not a member of a larger association-in-fact. But including the RICO person in a broader association-in-fact enterprise is entirely consistent with *Kushner*'s distinctness analysis because "[a] collective entity is something more than the

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[95] *See Kushner*, 533 U.S. at 161.

[96] *Id.* at 163 (emphasis added).

members of which it is comprised."[97] Accordingly, the circuit courts have had no difficulty concluding that defendant corporation can be included in a broader RICO enterprise.[98] As a result, respondents' enterprise allegations satisfy § 1962(c).

In the courts below and in its petition for *certiorari*, Mohawk argued that agency relationships among the members of an enterprise were inconsistent with § 1962(c)'s distinctness requirement. This objection will not work because even agents and principals are legally distinct.[99] Moreover, *Kushner* held that the president of a corporation "acting within the scope of his authority,"[100] was distinct from the corporation named as the enterprise, even though he was undoubtedly a corporate agent.[101] Although the Court acknowledged the "principle that a corporation acts only through its directors, officers and

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[97] *Atlas Pile Driving*, 886 F.2d at 995 (concluding that a corporation can be the RICO defendant as well as a member of a larger association-in-fact enterprise).

[98] *Goldin Indus.*, 219 F.3d at 1275 ("To find that a defendant cannot be *part* of the enterprise would undermine the purposes of the RICO statute"). *See also London*, 66 F.3d at 1243; *Atlas Pile Driving*, 886 F.2d at 995; *Feldman*, 853 F.2d at 658; *Cullen v. Margiotta*, 811 F.2d 698, 729-30 (2d Cir. 1987).

[99] Restatement (Third) of the Law of Agency § 1.01 cmt. c (Tentative Draft No. 2, Mar. 14, 2001) ("Despite their agency relationship, a principal and agent retain separate personalities"). *See also Graham v. LaCrosse M.R. Co.*, 102 U.S. 148, 161 (1880) ("A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law, it is as distinct a being as an individual"); Brief for the United States as *Amicus Curiae* in *Kushner*, 2001 WL 85159, at *19-21 (Jan. 25, 2001) ("Agency doctrines do not negate the actual distinctness of principal and agent for purposes of defining a RICO enterprise.").

[100] 533 U.S. at 160-65.

[101] *See* Restatement (Third) of the Law of Agency § 1.01 cmt. c.

agents," the Court sustained the plaintiff's enterprise allegations because a corporation and its employees and agents "are not legally identical."[102] As a result, Mohawk's now-abandoned agency argument cannot be reconciled with *Kushner*.[103]

2. Respondents Have Not Alleged That the Other Members of the Enterprise Are Mohawk's Employees, Subsidiaries or Agents.

Although *Kushner* reserved judgment on the question of whether the defendant corporation and its ***employees*** can form a distinct enterprise, the complaint here alleges an enterprise that consists of the defendant corporation and (1) separately incorporated recruiting firms and (2) persons who are not on the defendant corporation's payroll. Because this case comes to the Court on the pleadings, the record begins and ends with these allegations: "At this stage of the litigation [the Court] must accept plaintiffs' allegations as true"[104] Mohawk cannot win a motion to dismiss by demanding the Court select the least favorable of all the possible inferences.[105] Rather, respondents' RICO claim "must be

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[102] *Kushner*, 533 U.S. at 165.

[103] When Mohawk advanced its agency argument in the lower courts, it cited cases holding that corporations are not distinct from their employees or subsidiaries. *Kushner* noted these cases but declined to consider their merits. 533 U.S. at 164. Obviously, however, a corporation is not the same legal person as its employees or even its wholly-owned subsidiaries for the same reasons discussed in *Kushner*. *Id.* at 163. For more on these cases, which Mohawk now cites in support of its new test, *see infra* Part III(C)(2).

[104] *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

[105] *See Papasan v. Allain*, 478 U.S. 265, 282 (1986).

sustained if relief could be granted 'under any set of facts that could be proved consistent with the allegations.'"[106]

Mohawk's attempts to re-characterize respondents' allegations violate these standards. Respondents allege that Mohawk – in association with distinct third parties – has committed hundreds and perhaps thousands of felonies to unlawfully expand its labor pool:

> Mohawk has engaged in an open and ongoing pattern of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 during the last five years through its participation in an association-in-fact enterprise with ***third party*** employment agencies and other recruiters, including Temporary Placement Services ("TPS"), that supply Mohawk with illegal workers. Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity.[107]

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[106] *Scheidler*, 510 U.S. at 256 (*quoting Hishon*, 467 U.S. at 73).

[107] JA 23 (Compl. ¶ 76) (emphasis added).

The complaint, therefore, does not allege an enterprise that consists only of Mohawk and its employees. Nor have the respondents alleged that the enterprise consists of any Mohawk subsidiary. As a result, neither the district court nor the court of appeals had any difficulty reading respondents' pleading to allege that the recruiters and employment agencies are legally and practicably distinct from Mohawk itself.[108]

B. Mohawk's Proposed Test For Determining Whether a Defendant Has Participated in the Affairs of a Distinct Enterprise Would Eviscerate Association-in-Fact Liability.

Rather than take up these agency issues, Part II of Mohawk's brief urges the Court to restrict the definition of an association-in-fact enterprise to combinations "with an existence and activities that are clearly distinct from a member corporation."[109] Mohawk's amorphous proposal finds no footing in the RICO statute and would contradict this Court's precedents in *Reves*, *Turkette*, and *Kushner*. Moreover, the sweep of Mohawk's proposed test is breathtaking: it would immunize corporations from association-in-fact liability because the defendant corporation could always claim it was merely performing its own functions and activities. Mohawk has not identified any specific rule

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[108] *See* Pet. App. 7a-8a; *id.* at 44a-48a. Moreover, while the question of agency is heavily dependent upon the facts, *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 323, 323-24 (1992), the reported cases indicate that distinct recruiting firms typically constitute independent contractors and not agents. *See Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 933 (D.S.C. 1997); *Freedom Labor Contractors v. State Div. of Unemployment Compensation*, 779 So.2d 663, 665 (Fl. App. 2001).

[109] Mhk Br. at 27.

or principle that would allow this Court – and those that must apply its precedents – to determine the potential limits of a defendant's affairs. Accordingly, there is nothing to prevent any defendant from simply re-characterizing its racketeering activity as its own affairs.

Moreover, the position Mohawk advocates is tremendously unwise. Although Mohawk pitches its argument to benefit only legitimate corporations, Mohawk's test would benefit all RICO defendants because the statute does not distinguish between corporate and individual offenders and its distinctness and enterprise requirements apply in both criminal and civil cases. As this Court observed in *Sedima*, corporations "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences."[110] Mohawk's artificial restrictions on the statute would establish a RICO safe harbor, where criminal enterprises of all stripes could hide from federal prosecutors and civil plaintiffs merely by incorporating, leading to "the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO."[111]

Mohawk's murky test cannot be reconciled with the statute and it is devoid of any working principle that litigants, lawyers or the lower courts can apply in a predictable way. This Court should reject it.[112]

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[110] 473 U.S. at 499.

[111] *London*, 66 F.3d at 1244.

[112] *See Sedima*, 473 U.S. at 493-94.

1. Mohawk's Proposal Contradicts the Purpose of the RICO Statute.

Mohawk's arguments make no sense in the context of the RICO statute's objectives. While Mohawk states its proposal in various terms, it asks the Court to limit association-in-fact enterprises "to circumstances where the 'group' has functions and activities that are distinct from those of its member entities."[113] But Congress enacted RICO to combat enterprise criminality precisely because it found the prospect of different actors teaming up to pursue criminal conduct more dangerous than individual criminals acting alone.[114] By definition, therefore, an association-in-fact enterprise consists of different actors that join their separate functions and activities "for a common purpose of engaging in a course of conduct."[115] To immunize defendants that claim they are pursuing their own affairs in addition to the conduct that violates § 1962(c), would make nonsense of the statute.[116]

For example, the association of an individual Mafia loan shark and the persons who enforce the terms of loans

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[113] Mhk Br. at 27 & n.15.

[114] *See, e.g., United States v. Elliott*, 571 F.2d 880, 905 (5th Cir. 1978) ("we recognize that collective action toward an illegal end involves a greater risk to society than individual action toward the same end"); *Ianelli v. United States*, 420 U.S. 775, 778 (1975) (same, in the OCCA context).

[115] *Turkette*, 452 U.S. at 583.

[116] Mohawk's repeated contention that this plain reading of the statute converts RICO into a general conspiracy statute is not correct. RICO liability requires more than the formation of an enterprise, it further requires allegations and proof that the defendant engaged in a pattern of specific criminal conduct and perpetrated that conduct through an enterprise. *See* 18 U.S.C. §§ 1961(1) & 1962.

by physically threatening and abusing debtors is a classic RICO association-in-fact enterprise.[117] Under Mohawk's proposed limitation, however, neither the loan shark nor the enforcers would risk RICO liability as long as they each merely perform their own respective affairs of extending credit and enforcing loan agreements. To incur RICO liability under Mohawk's test, these mobsters would have to further combine to do something so entirely different from their own "routine business affairs" that the group could be said to be engaged in "functions and activities that are distinct from the member entities." This approach would transform RICO from a statute concerned about the conduct of criminal enterprises to one principally concerned with diversification, where liability is limited to enterprises in which the members self-consciously play out of their familiar positions. Mohawk's assumption that separate actors should be permitted to profit from criminal conduct, but nevertheless avoid RICO liability as long as they do not perform additional, different functions, therefore, is at odds with the statute's primary objective.

2. Mohawk's Test For Participation in the Affairs of an Enterprise Is Fatally Inconsistent With *Reves*.

Although Mohawk supports its amorphous new test by citing *Reves v. Ernst & Young*, Mohawk does ***not*** challenge respondents' allegation that Mohawk conducted the affairs of the enterprise by simultaneously operating

[117] *See United States v. Salerno*, 108 F.3d 730, 739 (7th Cir. 1997) (affirming RICO of defendant who participated in a loan sharking enterprise); *United States v. Shifman*, 124 F.3d 31, 35-36 (1st Cir. 1997) (same).

or managing both its own and the enterprise's affairs. Indeed, Mohawk appears to agree that it is alleged to be a ringleader in the enterprise, which answers the question actually posed in *Reves*. Instead, Mohawk argues that its extensive participation in the enterprise is not distinct from Mohawk's own affairs.

a. Because *Reves* Concerns "Outsiders," Not Members of Association-in-Fact Enterprises, It Does Not Support Mohawk's Proposed Test.

Mohawk constructs its participation argument from a single line in *Reves*, where the Court observed that § 1962(c) requires that the defendant conduct or participate in the enterprise's affairs, not ***just*** its own affairs.[118] But nothing in this sentence or the rest of the Court's opinion supports the untenable inference that a defendant's conduct of its own business precludes participation in a larger association-in-fact enterprise. The passage Mohawk cites confirms that the management test adopted in *Reves* would exclude "complete outsiders" to the enterprise. As a result, the circuit courts have read *Reves* as a case about the liability of outsiders who assist the enterprise.[119] But unlike *Reves*, where the enterprise was a single farm cooperative, to which the defendant was a complete outsider,[120] the enterprise alleged here is an

[118] *See Reves*, 507 U.S. at 185.

[119] *See MCM Partners Inc. v. Andrews-Barlett & Assocs.*, 62 F.3d 967 (7th Cir. 1995); *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910 (8th Cir. 2001); *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001).

[120] *Reves*, 507 U.S. at 186.

association-in-fact, of which Mohawk is a member or "insider." The *Reves* Court's observation that a RICO defendant must do more than merely participate in "just its own affairs," therefore, cannot be read to immunize ***insiders*** from liability when they conduct the enterprise's affairs ***in addition to*** their own affairs.

For example, consider an enterprise made up of corporations and other persons engaged in processing scrap metal, where the defendant corporations illegally short-weigh the metal and distribute fraudulent invoices to their customers. The tasks of weighing metal, preparing invoices and mailing them to customers certainly fall within the "classic" internal corporate functions of the businesses at issue. According to Mohawk, therefore, any enterprise that includes these defendants must fail for lack of "functions and activities that are distinct from those of its member entities." But because the defendants associate with additional third parties to conduct this business through a pattern of racketeering activity – *in addition to conducting their own affairs* – the United States has secured § 1962(c) convictions on these facts.[121]

The same holds true for drug dealing enterprises. Although the various participants in such an enterprise, from the kingpin to the manufacturers to the mid-level distributors, are all engaged in their own drug dealing, there is no question that they are ***also*** conducting (or participating in the conduct of) the affairs of a larger enterprise, distinct from their own individual affairs, by engaging in those

[121] *See Goldin Indus.*, 219 F.3d at 1271. *See also United States v. Allen*, 155 F.3d 35 (2d Cir. 1998) (government brought civil RICO complaint seeking to enjoin a short-weighing scheme).

activities.[122] Before RICO liability would attach under Mohawk's view, however, these drug dealers presumably would have to diversify their efforts into a new and different type of crime. To date, the federal courts have had no difficulty applying RICO to drug enterprises,[123] but if the Court adopted Mohawk's test and allowed RICO defendants to invoke the tautology of "their own affairs" as a defense, these and many more RICO convictions would have to be overturned.

b. Mohawk's Proposed Participation Test Would Contradict *Reves* By Allowing Upper Rung Defendants to Escape RICO Liability.

The error of Mohawk's approach is further exposed when considered against *Reves*' holding that RICO liability firmly attaches to those who conduct or direct the enterprise. To capture these defendants, *Reves* requires proof that the defendant operated or managed the enterprise's affairs. But evidence that shows the defendant played "*some* part in ***directing*** the enterprise's affairs"[124] will tend to establish that the other members of the enterprise were merely helping the defendant carry out its own affairs. Indeed, the more the other enterprise members defer to the defendant, the stronger the defendant corporation's argument that it "is simply using another organization to

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[122] *See, e.g., United States v. Posada-Rios*, 158 F.3d 832, 856 (5th Cir. 1998) (affirming RICO conviction of a drug dealer for participating in an association-in-fact drug enterprise).

[123] *Id. See also United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) (affirming RICO conviction because the government did not have to show "that [defendants] had a legitimate business with the other witnesses who also distributed cocaine on the side").

[124] *Reves*, 507 U.S. at 179 (second emphasis added).

assist the corporation in its own affairs (legal or otherwise)."[125] In the context of the drug dealing enterprise considered above, this logic would allow the kingpin to escape RICO liability by arguing that the manufacturers and distributors were merely assisting him with his own affairs. By arguing that there can be no liability when the enterprise supports the defendant's activities, Mohawk turns *Reves* on its head and its proposed approach would allow the most culpable defendants, those that *Reves* described as "upper management,"[126] to escape prosecution under § 1962(c).

Following *Reves*, all the circuits have held that a defendant that directs and delegates the conduct of its business affairs to the other members of an association-in-fact enterprise satisfies *Reves* by conducting the affairs of a distinct enterprise. For example, in *MCM Partners, Inc. v. Andrews Bartlett & Assocs., Inc.*, 62 F.3d 967, 977-78 (7th Cir. 1995), a defendant corporation that directed the other members of an association-in-fact enterprise to implement the defendant's decisions and further the defendant's objective of eliminating competition and increasing its profits satisfied the *Reves* operation and management test.[127] Respondents, therefore, satisfied

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[125] Mhk Br. at 37-38.

[126] *Reves*, 507 U.S. at 173.

[127] *Accord Abels*, 259 F.3d at 917-18 ("To direct a business's normal activities is to participate in the conduct of an enterprise within the meaning of RICO"); *Napoli v. United States*, 32 F.3d 31, 36 (2d Cir. 1994); *Smith*, 247 F.3d at 534; *United States v. Parise*, 159 F.3d 790, 797 (3d Cir. 1998); *Davis v. Mutual Life Insurance Co.*, 6 F.3d 367, 380 (6th Cir. 1993). *See also* Christopher W. Madel, *The Modern RICO Enterprise: The Inoperation and Mismanagement of* Reves v. Ernst & Young, 71 Tul. L. Rev. 1133, 1171-72 (1997) ("Because they naturally exert control and direction over an enterprise's affairs, kingpins or leaders of

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Reves by alleging Mohawk conducts the enterprise's affairs when it delegates the task of procuring, transporting, encouraging, harboring and even hiring its undocumented workers to TPS, individual recruiters and others members of the enterprise. Indeed, the complaint alleges that Mohawk borrows illegal workers actually employed by TPS and other temporary employment agencies, without ever "hiring" them.[128] When those allegations prove true, Mohawk will have violated § 1962(c) by participating in the enterprise's affairs according to the law in every circuit in the country.[129]

3. Mohawk's Suggestion that Illegal Hiring Cannot Be Conducted Through the Affairs of a Distinct Enterprise Contradicts Congress' Decision to Add Violations of the INA to the RICO Statute.

To its misreading of *Reves*, Mohawk adds the ill-conceived notion that respondents have alleged nothing more than Mohawk's conduct of it own affairs through a pattern of illegal immigration violations because "[h]iring its own employees is a classic internal function of a company."[130] The most obvious rejoinder is that Congress

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an enterprise, always satisfy the operation-or-management test's position and participation elements").

[128] *See* JA 10-12, 23 (Compl. ¶¶ 16-26, 76).

[129] *See also Scheidler*, 510 U.S. at 259 (§ 1962(c) is violated when the defendant uses the enterprise as a vehicle to commit the pattern of racketeering activity); *United States v. Starrett*, 55 F.3d 1525, 1542-43 & n.10 (11th Cir. 1995) (proof that the "facilities and services of the enterprise were regularly and repeatedly used to make possible the racketeering activity" establishes the conduct of the enterprise's affairs).

[130] Mhk Br. at 28.

clearly contemplated RICO prosecutions for illegal hiring when it added violations of the INA to the RICO statute in 1996. Accordingly, Congress – if not Mohawk and its *amici* – plainly believed that an employer could commit that conduct through the affairs of a distinct enterprise. Otherwise, there would have been little point in making illegal hiring a predicate RICO offense.[131]

Moreover, Mohawk's arguments ignore the additional racketeering conduct alleged in this case. For example, in addition to direct hiring, respondents allege that Mohawk "borrows" and harbors the employees of other members of the enterprise.[132] The complaint further alleges that Mohawk conceals the enterprise's illegal activity by destroying employment documents and helping undocumented workers evade detection during government raids. Despite the broad sweep of Mohawk's tautological defense, it is far more difficult to characterize this conduct as merely Mohawk's affairs.[133]

C. Mohawk's Additional Distinctness Requirements Cannot Be Reconciled With the Statute or *Turkette*.

Mohawk's proposed restriction on association-in-fact enterprises is flatly inconsistent with § 1961(4), which, as explained above, defines that concept to encompass ***any***

[131] Section 1962(c) is by far the most popular RICO provision for prosecutors and civil plaintiffs alike. *See, e.g.*, J. Rakoff & H. Goldstein, *RICO: Civil and Criminal Law and Strategy* § 1.06[3] (2005).

[132] JA 23 (Compl. ¶ 76).

[133] *See, e.g., Chen v. Mayflower Transit, Inc.*, 315 F. Supp.2d 886, 906 (N.D. Ill. 2004) (denying summary judgment on a similar argument because the evidence demonstrated that the defendant conducted and delegated activities that surpassed its own affairs).

association of persons and entities as long as they are associated in fact.[134] By limiting association-in-fact enterprises to some subset that satisfies Mohawk's murky additional qualifications, Mohawk's proposal would impose artificial restrictions on the full range of "associations embraced by the definition."[135] Nor can Mohawk's proposal be reconciled with *Kushner*'s interpretation of § 1962(c) to require nothing more than legal separateness between the defendant and the enterprise.[136]

1. Mohawk's Test For Distinctness Contradicts *Turkette*.

Moreover, Mohawk's proposal contradicts *Turkette*, which sets forth the requirements for pleading and proving association-in-fact enterprises, and holds that members of an association-in-fact enterprise must "associate [ ] together ***for a common purpose*** of engaging in a course of conduct."[137] The lower courts have applied that requirement faithfully and without apparent difficulty. According to Mohawk, however, an association for a common purpose will not suffice if it coincides with the individual purpose of any member of the enterprise. Indeed, by suggesting that an identity of purpose negates the distinctness necessary to form an enterprise as a matter of law, Mohawk's test actually converts *Turkette's* required proof of a

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[134] *See* 18 U.S.C. § 1961(4); *see also supra* Part II.

[135] *Turkette*, 452 U.S. at 580. Indeed, Mohawk's argument that Congress cannot have intended to subject "legitimate corporations" and their "natural business allies" to RICO liability merely recycles the argument rejected in *Turkette* and *Sedima*.

[136] *See supra* Part III (A).

[137] *Turkette*, 452 U.S. at 583.

common purpose to an absolute defense to RICO liability by rendering the members of the enterprise indistinct. Mohawk's approach, therefore, would upend twenty-five years of settled law and force the lower courts to discern whether the interests and affairs of the individual members of the enterprise are (1) common enough to satisfy *Turkette*, but (2) not so common that they destroy Mohawk's heightened distinctness requirement between the defendant and the enterprise. It is difficult to see how prosecutors or plaintiffs would be able to navigate any racketeer through these shoals. But the "razor thin zone" of RICO liability that would survive Mohawk's articulated test cannot be reconciled with Congress's expansive language and the express "admonition that RICO is to 'be liberally construed to effect its remedial purposes.' "[138]

2. Mohawk's Proposals Find No Support in the Cases That Reject Enterprises Consisting of a Corporation and its Employees or Subsidiaries: *Copperweld* Does Not Apply to RICO.

The only support Mohawk offers for its invitation for the Court to ignore the relevant statutory text, contradict Congress's intent and overturn its own RICO precedents, is a line of cases rejecting attempts to plead an association-in-fact enterprise comprised of (1) the corporation and all its employees; or (2) a corporation and its wholly-owned subsidiaries.[139] The short answer to these cases is that the association alleged here is not so limited.[140] Respondents'

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[138] *Jaguar Cars*, 46 F.3d at 267.

[139] *See* Mhk Br. at 30-32.

[140] *See supra* Part III (A)(2).

complaint makes no claim that the individual recruiters are Mohawk employees or that TPS and the other third party recruiting firms with whom Mohawk associates are within Mohawk's corporate family. Accordingly, as in *Kushner*, these cases are distinguishable on their facts.[141]

Furthermore, it is entirely unclear whether Mohawk's collection of pre-*Kushner* decisions can be reconciled with this Court's holding that nothing more than legal distinctness between a corporation and its only employee is required to satisfy § 1962(c). Although *Kushner* declined to consider the merits of these cases, the Court's holding has significant implications for their continued vitality.[142] If, as in *Kushner*, the sole employee and president of a corporation is distinct from the corporation/enterprise, the corporation is similarly distinct from its employees and its separately incorporated subsidiaries.

Moreover, *Kushner* takes direct aim at the basic reasoning of Mohawk's cases. The cases rejecting enterprises that consist of a corporation and its subsidiaries trace their reasoning to *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), where the Court rejected an "intracorporate conspiracy" offered to state a Sherman Act § 1 claim.[143] The circuit courts had been divided over

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[141] *See Kushner*, 533 U.S. at 164.

[142] *Id.*

[143] *See, e.g., Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003) ("A parent and its wholly owned subsidiaries no more have sufficient distinctiveness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act" citing *Copperweld,* despite its prior disapproval in the RICO context by *Kushner* and *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989)); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (citing *Copperweld*); *Bachman v. Bear Stearns & Co.*, 178 F.3d 930 (7th

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Copperweld's implications for RICO enterprises,[144] but in *Kushner*, this Court held that the economic considerations that justified the *Copperweld* rule in the antitrust context had no bearing on the entirely different enterprise considerations at issue in § 1962(c).[145]

By the same token, the cases that refuse to distinguish between a corporation and its employees typically turn on the observation that corporations can act only through employees and officers.[146] Alternatively, these decisions attempt to distinguish between employees acting within the scope of their corporate authority and those who exceed that authority.[147] *Kushner* rejected both of

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Cir. 1999) (citing *Fitzgerald*). *Cf. Brannon v. Boatmen's First Nat'l Bank*, 153 F.3d 1144, 1147 (10th Cir. 1998) ("[a] parent corporation, as a matter of corporate reality, is nothing more than the controlling shareholder of a subsidiary"); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 898 (8th Cir. 1999) (relying upon *Copperweld* in RICO analysis).

[144] *Compare Ashland Oil*, 875 F.2d at 1281 (rejecting the intracorporate conspiracy doctrine in the RICO context) *and Webster v. Omnitron Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996) (same) *with Bucklew*, 329 F.3d at 924 *and Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 898-99 (8th Cir. 1999).

[145] *Kushner*, 533 U.S. at 166 (*Copperweld* "doctrine turns on specific antitrust objectives"). *Accord Kirwin v. Price Communications Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004) (following *Kushner's* rejection of *Copperweld*).

[146] *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("Because a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise"); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 300-01 (3rd Cir. 1991) ("[a] corporation must always act through its employees and agents"); *Gasoline Sales, Inc. v. Aero Oil*, 39 F.3d 70 (3rd Cir. 1990) (following the "*Brittingham* rationale"). In *Jaguar Cars*, 46 F.3d at 262-64 & n.3, the Third Circuit partially overruled *Brittingham*, *Gasoline Sales* and a number of additional similar circuit precedents in light of *Reves* and *Sedima*.

[147] *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 219 F.3d 115, 117 (2d Cir. 2000) (citing *Riverwoods* and *Discon, Inc. v. NYNEX Corp.*,

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these theories as inconsistent with the RICO statute's text and its purposes.[148] To the extent, therefore, that Mohawk's arguments and the case law offered to support them are animated by any suggestion that the members of an enterprise must be separate economic actors or that they must be capable of deviating from an authorized corporate mission, *Kushner* has disposed of those concerns.

Recognizing the inconsistency between the reasoning of these cases and this Court's subsequent decision in *Kushner*, Mohawk now reads these cases to cohere around the alternative principle that a corporation and third parties who combine for the purpose of performing the corporation's own "functions or activities" cannot form a distinct enterprise as a matter of law. The opinions actually delivered in these cases set forth no such rule.[149] But even if *Riverwoods* and its progeny could be retro-fitted to avoid *Kushner*, the results in those cases are difficult to reconcile with a statute that requires nothing more than formal distinctness to separate the RICO defendant and the enterprise.[150] As Judge Posner frankly acknowledged in *Fitzgerald v. Chrysler Corp.*, a case cited by Mohawk and its *amici*, the exclusion of

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93 F.3d 1055 (2d Cir. 1996), *rev'd*, 525 U.S. 128 (1998), in support of a "scope of authority" test, *rev'd*, 533 U.S. 158 (2001)); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 449 (1st Cir. 2000) (employees and subsidiary were not distinct from the corporation absent an allegation that they exercised independent action or deviated from the scope of their corporate authority); *Parker & Parsley Petr. Co. v. Dresser*, 972 F.2d 580, 583 nn.2-3 (5th Cir. 1992); *Board of County Comm'rs v. Liberty Group*, 965 F.2d 879, 886 (10th Cir. 1992).

[148] *Kushner*, 533 U.S. at 166-67.

[149] *See, e.g.*, Mhk Br. at 31 ("***Stated differently***, [*Riverwoods* holds that] a corporation does not conduct the affairs of some other enterprise when it acts through its employees") (emphasis added).

[150] *See Kushner*, 533 U.S. at 163.

enterprises made up of different members of the same corporate family "doesn't emerge from the statutory language" but instead extends from a desire to impose limitations on the statute.[151] The Court rejected that approach to interpreting RICO more than twenty years ago.[152] In any event, the Court need not resolve the continued viability of *Riverwoods*, *Discon* and *Fitzgerald* to decide this case because the respondents here allege that Mohawk conducted the affairs of a larger, unlawful enterprise.

3. *Baker v. IBP, Inc.* Was Wrongly Decided.

The sole authority that can be read to support Mohawk's approach is the Seventh Circuit's unprecedented decision in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 543 U.S. 959 (2004), which dismissed a complaint that alleged a similar enterprise comprised of the defendant corporation and independent recruiters. *Baker* well illustrates the conflict between Mohawk's amorphous test and this Court's precedents. For example, *Baker's* enterprise discussion begins by citing a Seventh Circuit case that continued to apply *Copperweld* to RICO despite this Court's contrary admonition in *Kushner*, a decision the *Baker* court never addressed.[153] Applying *Copperweld*-Sherman Act analysis, the Court concluded IBP and the recruiters could

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[151] 116 F.3d at 226.

[152] *Sedima*, 473 U.S. at 499 ("The fact that [RICO] is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.")

[153] *See Baker*, 357 F.3d at 691 (citing *Bucklew*, 329 F.3d at 934). *Compare Kushner*, 533 U.S. at 166; *Ashland*, 875 F.2d at 1281 (a prior Seventh Circuit precedent that similarly abdjured the *Copperweld* doctrine in RICO cases).

not associate because they had "divergent goals."[154] Thus, the *Turkette* common purpose analysis focused not on the purpose of committing the racketeering activity, which the Court acknowledged, but on the members' other activities, which are irrelevant to RICO. However, the Court went on to reach the opposite conclusion, that the affairs of the enterprise were ***too intertwined*** with the defendant's affairs: "The nub of the complaint is that [the defendant corporation] operates ***itself*** unlawfully."[155] *Baker* never explained precisely how much commonality the plaintiffs would have to plead to (1) satisfy *Turkette*'s common purpose requirement but (2) avoid the conclusion that the enterprise's affairs were no different from the defendant corporation's affairs. Nor did the panel address the extensive authority that holds a member of an association-in-fact enterprise participates in the affairs of that enterprise by delegating racketeering activity to other members of the enterprise[156] Those precedents answer *Baker*'s question "how is it that [the defendant] operates or manages that enterprise through a pattern of racketeering activity?"[157]

Baker cites no authority for its contrary holdings and makes no attempt to reconcile its decision with this Court's precedents in *Reves*, *Turkette* and *Kushner*. Like Mohawk's brief, *Baker* fails to articulate a specific rule or principle that this or any other court could apply in any certain or predictable way. And although Mohawk cited the split of authority *Baker* created as the reason this Court should grant *certiorari*, Mohawk's opening brief

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[154] *Id.* at 691.

[155] *Id.* at 691-92.

[156] *See infra* Part III (B)(2)(b).

[157] *Baker*, 357 F.3d at 691.

makes no attempt to defend the Seventh Circuit's decision. The case is wrongly decided, and it cannot support a wholesale revision of RICO's broad statutory language.

CONCLUSION

Mohawk's opening brief asks this Court to re-draft the RICO statute. In support of this wholly illegitimate endeavor, Mohawk leads with an argument that cannot be found in its petition for *certiorari* and that Mohawk expressly conceded below. Mohawk then turns to arguments that have no textual support and would contradict decades of this Court's precedents. Congress intended to authorize RICO prosecutions and treble damage suits like this one to enforce the Nation's laws against alien smuggling and hiring undocumented aliens. This Court should defer to that legislative judgment, affirm the Eleventh Circuit's decision and allow respondents to pursue their claims on the merits.

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