Case Nos. 06-5267, 06-5268, 06-5269, 06-5270,
06-5271, 06-5272, 06-5332, 06-5367
(Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

TOBACCO-FREE KIDS ACTION FUND, et al.,

Intervenors,

v.

PHILIP MORRIS USA INC. (f/k/a Philip Morris, Inc.), et al.,

Defendants-Appellants.

Appeal From The Judgment Of The United States District Court
For The District Of Columbia

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS URGING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Defendants-Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Defendants-Appellants.

C. Related Cases

References to related cases appear in the Brief for Defendants-Appellants.

D. Statutes and Regulations

All applicable statutes, etc., are contained in the Brief for Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

1. The full name of the party that undersigned counsel represents in this case is: The Chamber of Commerce of the United States of America ("Chamber").

2. The Chamber has no parent corporation, and no publicly held company owns 10% or more of any of the Chamber's stock.

Theodore B. Olson /ACT

CERTIFICATE OF COUNSEL

In accordance with Circuit Rule 29(d), undersigned counsel certifies that it would not have been practicable for the Chamber to join any of the other *amicus curiae* briefs filed in support of defendants-appellants because the Chamber has interests that are significantly different from those of the other organizations that filed *amicus curiae* briefs. The Chamber does not represent the particular interests of any single industry or industry sector. The Chamber instead represents the broad interests of all American businesses because its members include businesses and business organizations of every size and in every industry. The Chamber therefore has a unique perspective on the government's use of the Racketeer Influenced and Corrupt Organizations Act to regulate a legitimate industry, which made it impracticable for the Chamber to join any of the other *amicus curiae* briefs.

Theodore B. Olson /ACT

Theodore B. Olson

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GLOSSARY

FTC	Federal Trade Commission
RICO	Racketeer Influenced and Corrupt Organizations Act

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the Nation's largest business federation. With a substantial number of members in each of the fifty States, the Chamber's membership includes more than three million businesses and business organizations, which are of every size and in every industry sector. One of the Chamber's associational purposes is to protect its members from overbroad interpretations of federal criminal and civil statutes. To that end, the Chamber has frequently participated as an *amicus curiae* in litigation concerning the Racketeer Influenced and Corrupt Organizations Act ("RICO"), including by filing an *amicus curiae* brief in an earlier appeal in this case. *See United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir. 2005).

Much like the circumstances that compelled it to participate in that earlier appeal, the Chamber once again is concerned that the district court's decision will effect a massive and unwarranted expansion of RICO and the federal fraud statutes that will significantly increase U.S. companies' costs of doing business both domestically and overseas, to the detriment of the Chamber's members, their employees, and consumers.

The government's arguments in this case and the district court's decision transform RICO—a statute that Congress enacted to address the problem of organized crime—into a tool for regulating a legal industry that is already subject

to extensive oversight by Congress and federal administrative agencies. The regulation of tobacco companies and other industries should be accomplished through industry-specific legislation and administrative regulations, not through the distortion of RICO and other federal statutes enacted to address a wholly unrelated set of concerns. The efforts of the Department of Justice to accomplish regulation through litigation—and the district court's opinion condoning those efforts—circumvent the carefully considered regulatory decision-making of Congress and the relevant federal administrative agencies.

The district court's decision also significantly diminishes the burden of proof for establishing that a corporation possessed the specific intent to engage in fraudulent conduct. The specter of potentially devastating fraud liability based on statements that no employee ever intended to be misleading will compel corporations to adopt inefficient measures to monitor every public statement made by their employees, and will inevitably chill the constitutionally protected speech of corporations.

Because the district court's decision threatens to profoundly alter the regulatory landscape in which American businesses operate, the Chamber has a substantial interest in seeing that decision reversed.

SUMMARY OF ARGUMENT

The district court's decision is premised on at least two fundamental legal errors that warrant reversal of the judgment in its entirety. Moreover, even if the defendants did violate RICO, the extraterritorial aspects of the district court's injunction should be vacated.

I. The judgment below should be reversed because the district court disregarded the well-established principle that a corporation can be convicted of mail or wire fraud—or any other specific-intent crime—only if the government proves that a specific corporate employee possessed the requisite specific intent to defraud. *See N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909). That standard ensures that corporations are not exposed to onerous fraud liability for public statements that were inadvertently false and that no corporate employee intended to be misleading. The district court expressly and repeatedly denied the existence of this fundamental principle of corporate criminal liability, and instead held that a "company's fraudulent intent may be inferred from . . . the company's collective knowledge." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 896 (D.D.C. 2006). It therefore did not require the government to prove—and the district court did not find—that any identifiable employee of the defendant corporations possessed the specific intent to defraud the public about their products. Because the government was unable to establish the

elements of mail or wire fraud, which constitute the only alleged acts of racketeering, its RICO claims fail.

II. Reversal is also warranted because the government did not plead or prove a valid RICO enterprise. A defendant violates RICO if it conducts the affairs of a statutorily defined "enterprise" through a pattern of racketeering activity. 18 U.S.C. § 1962(c). RICO defines "enterprise" as any legal entity, as well as any union or any "group of individuals" associated in fact. *Id.* § 1961(4). The government alleged that the defendants were part of an association-in-fact enterprise consisting exclusively of corporations. The district court's conclusion that a group of corporations can constitute an association-in-fact enterprise is flatly inconsistent with the plain language of RICO and with the legislative objectives that underlie the statute, which Congress enacted to address illegal activity by criminal gangs and other groups of individuals, not to regulate legitimate industries already subject to extensive federal oversight. This Court should therefore reject its earlier dicta in *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988) (per curiam), and hold that an association-in-fact enterprise cannot be comprised of a group of corporations.

III. Finally, even if the defendants did violate RICO, the district court's injunction should nevertheless be vacated to the extent that it restricts their overseas marketing. Such foreign activities do not violate RICO because the

statute does not include a clear indication of Congress's intent to apply U.S. law extraterritorially and because the district court did not find that the defendants' overseas marketing has any effects in the United States. The regulation of the defendants' overseas marketing is more appropriately undertaken by the foreign countries in which that activity occurs.

ARGUMENT

I. CORPORATIONS CANNOT BE HELD LIABLE FOR SPECIFIC-INTENT CRIMES UNLESS AT LEAST ONE IDENTIFIED CORPORATE EMPLOYEE HAS THE REQUISITE INTENT.

The government's RICO allegations rest on the premise that the defendants engaged in a pattern of racketeering activity comprised of acts of mail and wire fraud, both of which are specific-intent crimes.[1] To establish that the defendants committed acts indictable under the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343), the government was therefore required to prove that the defendant corporations had the "specific intent to defraud" when they engaged in the predicate acts alleged in the complaint. *Post v. United States*, 407 F.2d 319, 329 (D.C. Cir. 1968).

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1 *See United States v. Rhone*, 864 F.2d 832, 836 (D.C. Cir. 1989) (mail fraud); *United States v. Milwitt*, 475 F.3d 1150, 1156 (9th Cir. 2007) (wire fraud).

Corporations, of course, are merely legal fictions that can have no intent of their own; the requisite *mens rea* for specific-intent crimes must be imputed to them. *See, e.g.*, *United States v. Cotter*, 60 F.2d 689, 694 (2d Cir. 1932) (L. Hand, J.). Although it has been well-established for nearly a century that only intent possessed by specific corporate employees can be imputed to a corporation, the district court relied upon the novel notion of "collective" corporate intent to hold the defendants liable under RICO. In so doing, it cast aside settled precedent, vastly expanded corporations' exposure to fraud liability, and inevitably chilled constitutionally protected corporate speech.

A. Only The Actual Intent Possessed By A Corporation's Employees Can Be Imputed To A Corporation.

The principle that only the intent of specific corporate employees can be imputed to a corporation is deeply rooted. At common law, corporations could not be prosecuted for any crimes that contained an *actus reus* requirement. *See, e.g.*, *Anonymous*, 12 Mod. 559 (K.B. 1701). Although this prohibition eroded over time, corporate immunity from specific-intent crimes lingered well into the nineteenth century, with courts explaining this immunity on the ground that corporations could not possess the requisite "evil" or "malicious" intent. *See, e.g.*, *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray 339, 345-46 (Mass. 1854) (a corporation can be prosecuted for "misfeasance," but not for crimes of "evil intention"). In *New York Central & Hudson River Railroad Co. v. United*

States, 212 U.S. 481 (1909), however, the Supreme Court rejected this limitation, and held that corporations can be held liable under federal criminal statutes for "the knowledge ***and intent***" of their employees. *Id.* at 495 (emphasis added); *see also United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958) (corporations "can be guilty of 'knowing' or 'willful' violations of regulatory statutes through the doctrine of respondeat superior").

Relying on *Central & Hudson*, lower federal courts have repeatedly and consistently held that only intent possessed by a specified corporate employee can be imputed to a corporation.[2] In *Saba v. Compagnie Nationale Air France*, 78 F.3d 664 (D.C. Cir. 1996), for example, this Court held that a plaintiff could not demonstrate that a corporation engaged in "willful misconduct" by simply aggregating the negligent acts of the corporation and its employees. To establish willfulness, the plaintiff was instead required to prove that specific corporate employees knew that their conduct would likely cause harm. *See id.* at 669; *see also First Equity Corp. of Fla. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 260

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[2] *See, e.g.*, *Southland Sec. Corp. v. Inspire Ins. Solutions Inc.*, 365 F.3d 353, 366-67 (5th Cir. 2004) (collecting cases); *United States v. Sain*, 141 F.3d 463, 475 (3d Cir. 1998); *see also* Han Hyewon & Nelson Wagner, *Corporate Criminal Liability*, 44 Am. Crim. L. Rev. 337, 347 (2007) ("Only when an employee possesses a particular state of mind can a corporation be held to have that particular state of mind.").

(S.D.N.Y. 1988) ("A corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual.").

B. The District Court Erred By Relying Upon A Collective Corporate Intent Theory.

The district court rejected the well-established proposition that corporations can only be held liable for specific-intent crimes where an identified corporate employee possessed the requisite specific intent. Indeed, the district court unequivocally proclaimed that the principle ***does not exist***, asserting that "courts, including our Circuit, have . . . rejected the theory . . . that a corporate state of mind can only be established by looking at each individual corporate agent at the time s/he acted." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 896 (D.D.C. 2006) ("*Philip Morris II*"). Starting from this flawed premise—for which it provided no authority—the district court did not identify any employee within any of the defendant corporations that specifically intended to engage in acts of mail or wire fraud, but instead manufactured a fictional corporate intent based on the collective knowledge of each corporation's employees (and, even more broadly, based on the collective knowledge of the enterprise as a whole). *See id.* (a "company's fraudulent intent may be inferred from all of the circumstantial evidence including the company's collective knowledge").

The district court's conclusion that corporate intent can be inferred from the collective knowledge of a corporation's employees cannot be reconciled with

Central & Hudson and its progeny. Indeed, in *Saba*, this Court rejected the very theory on which the district court relied, and explained that, although corporate knowledge could be determined by aggregating the knowledge of individual employees, corporate intent "depended on the wrongful intent of specific employees." 78 F.3d at 670 n.6.

Moreover, even putting aside this irreconcilable conflict with binding circuit precedent, the district court's two policy justifications for its expansive new theory of corporate intent are unpersuasive. First, the district court asserted that requiring plaintiffs to demonstrate that a specific corporate employee possessed the requisite specific intent would create an "insurmountable burden" for plaintiffs pursuing RICO claims based on mail and wire fraud. *Philip Morris II*, 449 F. Supp. 2d at 896. This contention is belied by the fact that courts regularly find corporations liable for violations of the mail and wire fraud statutes. *See, e.g.*, *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1277 (11th Cir. 2000) (affirming three corporations' RICO convictions predicated on mail and wire fraud); *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998). It is likely for this reason that Congress has shown no desire to alter *Central & Hudson*'s well-established standard for proving corporate intent.

Second, the district court contended that the *Central & Hudson* standard would allow corporations to escape liability by deliberately "dividing up duties" so

that no individual employee would obtain the knowledge necessary to form the requisite fraudulent intent. *See Philip Morris II*, 449 F. Supp. 2d at 897. This concern, however, is fully addressed by the "willful blindness" doctrine, which prevents a defendant from avoiding responsibility for false statements by intentionally structuring its corporate operations to evade liability. *See, e.g.*, *Saba*, 78 F.3d at 668; *United States v. Inv. Enters., Inc.*, 10 F.3d 263, 268-69 (5th Cir. 1993). Significantly, the willful blindness doctrine retains the requirement of an intentionally wrongful act because it applies only when corporate managers ***intentionally*** restrict the flow of information in an attempt to avoid criminal liability. The district court's specific-intent theory, on the other hand, essentially adopts a strict liability standard because it exposes a corporation to fraud liability whenever one of its employees possesses enough information to know that another employee has made an unintentionally false statement—even though the employee with the necessary information was unaware of the false statement and no one within the corporation had deliberately impeded the flow of information throughout the company.

Applying the district court's relaxed specific-intent standard to this case would raise serious questions under the Due Process Clause. The mail and wire fraud statutes forbid devising a "scheme or artifice" to defraud. 18 U.S.C. §§ 1341, 1343. Neither statute, however, defines a "scheme or artifice," and the

Supreme Court has interpreted that phrase broadly to include "everything designed to defraud." *Durland v. United States*, 161 U.S. 306, 313 (1896). It is therefore the defendant's "intent and purpose"—rather than his conduct—that puts him on notice that he may be committing mail or wire fraud. *Id.* Indeed, were it not for the mail and wire fraud statutes' rigid specific-intent requirements, their essentially limitless scope would render them void for vagueness. *See, e.g., United States v. Stewart*, 872 F.2d 957, 959 (10th Cir. 1989). The district court's strict liability theory of corporate intent removes this safeguard and may well render the mail and wire fraud statutes unconstitutionally vague as applied to corporate defendants, who would be left to guess as to whether they were engaging in conduct that rose to the level of a "scheme or artifice" to defraud.

The district court's radical reworking of the corporate specific-intent standard will dramatically expand corporations' exposure to fraud liability and have profound practical implications for the way in which U.S. businesses communicate with the public. The district court's decision effectively imputes the knowledge of every corporate employee to every other employee of that corporation (and, even more broadly, to every employee of every other company involved in a purported RICO enterprise). Under the district court's reasoning, a corporation with dozens of offices and thousands of employees could be held criminally liable for fraud where one of its customer service agents—believing the

representation to be true—stated that the company had never received a safety-related customer complaint, while a mailroom clerk in a different location—who was unaware of the customer service agent's statement—knew that the company had received its first such complaint just a few days before. This inadvertent misstatement would be sufficient to give rise to criminal fraud liability under the district court's strict-liability standard because it "directly contradicted the internal knowledge of the company," even though none of the corporation's employees intended to mislead the public. *Philip Morris II*, 449 F. Supp. 2d at 896.

If a corporation could be held liable for fraud whenever an employee made a public statement that at least one other employee knew to be inaccurate (regardless of whether the second employee was aware of the statement), corporations would be compelled to undertake an extensive and inefficient review of every public statement to ensure that there was not an employee, somewhere in the organization, who knew the statement to be incorrect. Although corporations should be expected to undertake all reasonable efforts to ensure that their public statements are accurate, it would be virtually impossible for a corporation ever to be completely certain that its public statements were consistent with the knowledge of every single employee. As a result, corporations would frequently decide to remain silent, rather than risk potentially crippling fraud liability. Indeed, by effectively nullifying the mail and wire fraud statutes' intent requirements, the

district court's theory of corporate intent will chill a substantial amount of constitutionally protected corporate speech and deter procompetitive and proconsumer corporate conduct. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, . . . without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence").

This Court should therefore reject the district court's flawed collective intent standard, and hold that corporations can only be found liable for specific-intent crimes where a specific, identified corporate employee possesses the requisite intent.[3]

II. A GROUP OF CORPORATIONS CANNOT CONSTITUTE AN ASSOCIATION-IN-FACT RICO ENTERPRISE.

Even if the district court's specific-intent analysis were not flawed, reversal would still be required because the district court erred in holding that a group of corporations can constitute an association-in-fact RICO enterprise.

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[3] Moreover, even if the government disavows the district court's novel corporate intent standard in favor of the well-settled *Central & Hudson* framework, the fact remains that the district court did not identify even one of the defendants' employees who had the specific intent to defraud.

The district court's resolution of the association-in-fact issue rests upon this Court's per curiam decision in *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988). *See Philip Morris II*, 449 F. Supp. 2d at 869. "Binding circuit law," however, "comes only from the holdings of a prior panel, not from its dicta." *Gersman v. Group Health Ass'n*, 975 F.2d 886, 897 (D.C. Cir. 1992). *Perholtz*'s discussion of association-in-fact RICO enterprises is dicta that is not binding on this panel and that should be rejected in light of RICO's plain language and the policies underlying the statute.

A. *Perholtz* Does Not Control This Case.

In *Perholtz*, two individuals were convicted of participating in the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). 842 F.2d at 351-52. The indictment identified the enterprise as "a group of individuals, partnerships, and corporations associated in fact." *Id.* at 351 n.12. Because the defendants failed to object to the indictment in the district court, this Court used plain-error review to examine the defendants' claim that a group of individuals and corporations could not constitute an association-in-fact enterprise. *See id.* at 352-53.

It is well settled that only "obvious" errors warrant reversal on plain-error review. *See United States v. Washington*, 115 F.3d 1008, 1010 (D.C. Cir. 1997). If this Court has not yet decided an issue examined under the plain-error standard

and a colorable argument exists in support of the district court's decision, then any error the district court may have committed cannot be "obvious." *See, e.g.*, *United States v. Thomas*, 896 F.2d 589, 591 (D.C. Cir. 1990). Because plain-error analysis need proceed no further than determining whether the district court made an obvious error, it is not necessary for a court to resolve novel issues of law authoritatively in rejecting a claim on plain-error review, and any portions of such an opinion that could be construed as providing an authoritative answer to a novel question therefore constitute dicta that does not bind later panels. *See United States v. Flores*, 477 F.3d 431, 436 n.2 (6th Cir. 2007) (concluding that a previous panel's extension of precedent on plain-error review was nonbinding dicta); *see also United States v. Voelker*, 489 F.3d 139, 148 n.9 (3d Cir. 2007) (discounting the persuasive force of an earlier decision rendered on plain-error review).

The district court could not have committed plain error in *Perholtz* by failing to dismiss the indictment sua sponte because this Court had not yet addressed whether a corporation could be part of an association-in-fact enterprise and because several other courts had held that such an enterprise could include corporations. *See, e.g.*, *United States v. Huber*, 603 F.2d 387, 393-94 (2d Cir. 1979). Because any defect in the indictment could not have been "obvious"—and therefore could not have amounted to plain error—it would have been appropriate for the *Perholtz* court to end its analysis at that point. *See, e.g.*, *Thomas*, 896 F.2d

at 591. The panel nevertheless reached out to conclude that individuals, corporations, and other entities may constitute an association-in-fact enterprise under RICO. *Perholtz*, 842 F.2d at 353. This pronouncement is nonbinding dicta because the Court could have decided the case on the narrower ground that the district court's decision was not obvious error. *See Flores*, 477 F.3d at 436 n.2.

B. Neither The Text Nor The Purpose Of RICO Justifies Expanding Associations In Fact To Include Groups Of Corporations.

Although this Court's dicta may warrant at least some weight in future cases, *Perholtz*'s dicta has no persuasive force because its textual analysis is incomplete and its nontextual reasoning has been undermined by later binding decisions and by statutory amendments. A thorough examination of RICO's statutory text and its underlying policies unambiguously demonstrates that a group of corporations cannot constitute an association-in-fact enterprise.

1. The Text Of Section 1961(4) Limits Associations In Fact To Groups Of Individuals.

RICO creates two distinct categories of "enterprises." The statutory definition provides that "'enterprise' includes [1] any individual, partnership, corporation, association, or other legal entity, and [2] any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4); *see also United States v. Turkette*, 452 U.S. 576, 581-82 (1981) (recognizing these two categories of RICO enterprises). Although the first category—legal entities—

includes corporations, the plain language of Section 1961(4) makes clear that the second category—unions and associations in fact that are not legal entities—does not encompass groups of corporations, but is instead limited to "group[s] of ***individuals***." 18 U.S.C. § 1961(4) (emphasis added).

The government itself has acknowledged that a "corporation" is not an individual under RICO and therefore cannot form part of a "group of individuals." *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 6, *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016 (2006) (No. 05-465) ("U.S. *Mohawk* Br."). Indeed, RICO defines the term "person" to include "[1] any individual or [2] entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Because corporations fall within the second clause of this definition, they cannot also be "individuals" under RICO.

Despite the unambiguous language of Section 1961(4) limiting association-in-fact enterprises to groups of individuals, the government has elsewhere argued that an association-in-fact enterprise can be comprised of a group of corporations because the word "includes" introduces the definition of "enterprise" and purportedly indicates that the definition is nonexhaustive. *See* U.S. *Mohawk* Br. at 6. The courts of appeals that have addressed this issue—including the *Perholtz* court—also rested their textual analysis almost exclusively on an expansive

definition of the word "includes." *See, e.g.*, *Perholtz*, 842 F.2d at 353; *Huber*, 603 F.2d at 394.

That word cannot bear the weight that the government and prior decisions place upon it. Both the Supreme Court and this Court have repeatedly recognized that the word "includes" can introduce an exhaustive list. *See, e.g.*, *United States v. Monsanto*, 491 U.S. 600, 607 (1989); *Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir. 1997). To be sure, Congress can also use "includes" to introduce a nonexhaustive list. *See, e.g.*, *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). To determine which usage Congress intended, courts look to the surrounding context and to whether the list Congress did supply provides a "general principle" against which unenumerated candidates can be tested. *Dong*, 125 F.3d at 880. Neither of these factors supports expanding the definition of "enterprise" to encompass groups of corporations.

When Congress intended to create a nonexhaustive list in RICO, it made its intention clear by using the phrase "including, ***but not limited to***." *See* 18 U.S.C. § 1964(a) (using that phrase twice to introduce nonexhaustive lists of civil remedies available under RICO). In contrast, Congress used "includes," standing alone, to introduce exhaustive lists. For example, it is difficult to conceive of Congress intending for RICO's definition of "Attorney General," which begins with the word "includes," to be nonexhaustive. 18 U.S.C. § 1961(10).

These other uses of the word "includes" in RICO—together with the well-established principle that a word should be given the same meaning throughout a single statutory section (*see, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503, 1513 (2006))—indicate that Congress intended the definition of "enterprise" to be exhaustive. If it had not, it would have stated that the term "enterprise" "includes, but is not limited to," the examples set forth in Section 1961(4).

Moreover, the first clause of Section 1961(4) lists legal entities—such as corporations and partnerships—that may constitute a RICO enterprise and ends with the phrase "or other legal entity." 18 U.S.C. § 1961(4); *see also id.* § 1961(9) (defining "documentary material" to "include[] any book, paper, document, record, recording, or other material"). This phrase performs the precise interpretative function that the government and *Perholtz* assign to the word "includes": It authorizes courts to expand the list of possible legal entities that may constitute a RICO enterprise. Notably, Congress did ***not*** include a similar phrase in the second clause of Section 1961(4) defining associations in fact, which lacks any "general principle" by which courts can identify categories of association-in-fact enterprises that Congress intended to cover, but ostensibly did not enumerate. *See Turkette*, 452 U.S. at 582 (the association-in-fact clause in Section 1961(4) does "not contain[] any specific enumeration that is followed by a general description").

Construing the word "includes" as nonexhaustive would obviate the distinction between the language that Congress used in the two clauses of Section 1961(4).

2. The Legislative Objectives Underlying RICO Confirm That Groups Of Corporations Cannot Be Association-In-Fact Enterprises.

The conclusion that the plain language of Section 1961(4) does not extend the definition of "enterprise" to groups of corporations is confirmed by the legislative rationale underlying RICO. Congress designed RICO specifically "to address the infiltration of legitimate business by organized crime." *Turkette*, 452 U.S. at 591. One of Congress's principal concerns was criminal activity by gangs and other organized crime syndicates. *See* U.S. *Mohawk* Br. at 10 n.2. Indeed, concern about organized crime families permeates RICO's legislative history. *See Turkette*, 452 U.S. at 591. To bring the activities of gangs and other informal networks of criminal individuals within RICO's scope, Congress defined the term "enterprise" to include "group[s] of individuals associated in fact."

RICO's legislative history does not give any indication, however, that Congress intended for the statute to address criminal activity by groups of corporations. There is accordingly no legitimate basis for a court to transform RICO—a statute designed to remedy the problem of organized crime—into a tool for regulating lawful industries. The tobacco industry, for example, is already subject to numerous tobacco-specific federal laws and extensive oversight by the

Federal Trade Commission ("FTC"). Congress did not intend for RICO to provide the Department of Justice and federal courts with a means of second-guessing the federal tobacco policy crafted by Congress and the FTC.

Indeed, the district court's decision that a group of corporations can constitute an association-in-fact enterprise enables the Department of Justice and federal courts to engage in industry-wide regulation that is at odds with congressional and agency policy. The use of RICO to blind-side corporations with industry-wide requirements that conflict with the regulatory framework established by Congress and the relevant federal administrative agencies injects instability and uncertainty into the marketplace, and weakens the foundations of the national economy.

Moreover, the expansive reading of Section 1961(4) adopted by the government and the district court is unnecessary because RICO already provides ample tools for addressing criminal operations that involve multiple corporations. Section 1962(c) prevents individuals from conducting the affairs of a corporation or other legal entity through a pattern of racketeering activity. If those same individuals conduct the affairs of multiple corporations through a pattern of

racketeering activity, then the government can legitimately convict them of multiple violations of Section 1962(c).[4]

The district court's distortion of the plain language of Section 1961(4) to include groups of corporations is therefore not only flawed from a legal standpoint but also unnecessary from a practical perspective.

3. None Of The Arguments For Expanding The Plain Language Of Section 1961(4) To Reach A Group Of Corporations Is Persuasive.

Perholtz and the cases on which it relies generally offer three nontextual arguments to support expanding the definition of "enterprise" to include groups of corporations. Each of those arguments has been undermined by later developments.

a. *The liberal construction clause.* Section 904(a) of the Organized Crime Control Act of 1970—Title IX of which is RICO—states that RICO should be construed "liberally . . . to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). The *Perholtz* court asserted that restricting association-in-fact enterprises to "group[s] of individuals"—as does the plain

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[4] Concerted wrongdoing by corporations can also be addressed by conspiracy actions against either the individuals managing the corporations or the corporations themselves. *See* 18 U.S.C. § 371; *see also United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir. 1994) ("a corporation may be liable under § 371 for conspiracies entered into by its agents and employees").

language of Section 1961(4)—would "contravene this principle of statutory construction." 842 F.2d at 353.

This Court has already determined, however, that the liberal construction clause is irrelevant to the interpretation of Section 1961(4). In *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990) (en banc), *overruled in part on other grounds by Reves v. Ernst & Young*, 507 U.S. 170 (1993), this Court explained that the rule of lenity—which requires that "ambiguous criminal statutes . . . be construed in favor of the accused" (*Staples v. United States*, 511 U.S. 600, 619 n.17 (1994))—trumps RICO's liberal construction clause with respect to those parts of the statute that have criminal as well as civil applications. *See Yellow Bus Lines*, 913 F.2d at 956-57. Because the definition of "enterprise" in Section 1961(4) applies in criminal cases, the rule of lenity, rather than the liberal construction clause, controls. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985) ("The strict- and liberal-construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c)."). Thus, to the extent that there is any ambiguity as to whether Congress intended the enumerated list of enterprises in the second clause of Section 1961(4) to be exhaustive, this Court should adopt the narrower construction excluding groups of corporations and other unenumerated groups from the scope of Section 1961(4).

b. *Ensuring that RICO is available to prosecute sophisticated criminals.* The *Perholtz* court also asserted that limiting association-in-fact enterprises to groups of individuals "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." 842 F.2d at 353. This reasoning is undermined, however, by the Supreme Court's decision in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), which makes clear that forming a corporation actually ***increases*** an individual defendant's exposure to RICO liability.

In *Cedric Kushner*, the Supreme Court held that liability can attach for conducting or participating in an enterprise's affairs under Section 1962(c) only where the defendants are distinct from the enterprises they allegedly conducted. 533 U.S. at 161-63; *see also Confederate Mem'l Ass'n v. Hines*, 995 F.2d 295, 299-300 (D.C. Cir. 1993) (recognizing the same principle). Thus, a lone criminal, without more, cannot be held liable under Section 1962(c) for engaging in a pattern of racketeering activity because treating the criminal himself as the RICO enterprise would violate the distinctness requirement. *See, e.g.*, *United States v. DiCaro*, 772 F.2d 1314, 1320 (7th Cir. 1985).

If that same criminal formed a corporation and conducted that corporation's affairs through the same pattern of racketeering activity, however, he could be held liable under Section 1962(c). Under those facts, the corporation would be an

enterprise that is entirely distinct from the individual who owns and controls it, and liability under Section 1962(c) therefore could attach. *See Cedric Kushner*, 533 U.S. at 163-66. Thus, contrary to the *Perholtz* court's assertion that excluding groups of corporations from the definition of association-in-fact enterprises would enable individuals who establish corporations to evade RICO liability, the act of incorporation actually augments an individual's RICO exposure.

c. *Protecting RICO's forfeiture remedy.* Although *Perholtz* offered no further analysis to support its dicta, the opinion approvingly cites *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), where the Second Circuit contended that including groups of corporations within the definition of association-in-fact enterprises is necessary to prevent individual RICO defendants from evading Section 1963's forfeiture remedy by transferring profits obtained from an illegally operated corporation to a legitimate business. *Id.* at 394. This reasoning is flawed because Section 1962(a) forbids investing "any income derived . . . from a pattern of racketeering activity" in an enterprise (including another corporation), and would therefore foreclose efforts to shield illegally obtained funds from forfeiture through investments in legitimate corporations.

Moreover, the relation-back doctrine adopted in the 1984 amendments to RICO transfers title to racketeering proceeds to the United States government "upon the commission of the act giving rise to forfeiture," rather than upon entry of

a forfeiture order. 18 U.S.C. § 1963(c). Because illegally obtained funds are forfeited at the time the illegal activity takes place, transferring those funds to a legitimate corporation does not prevent forfeiture. *See United States v. Saccoccia*, 354 F.3d 9, 13 (1st Cir. 2003).

* * *

For all of the foregoing reasons, this Court should hold that a group of corporations cannot constitute an association-in-fact enterprise. Not only do RICO's plain language and legislative history compel that result, but a contrary conclusion would effectively transform RICO from a statutory tool for combating organized crime into a means of regulating the activities of legitimate industries already subject to extensive congressional and agency oversight. RICO simply was not designed to provide the Department of Justice and federal courts with a means of second-guessing congressional and administrative regulation of private industry.

III. RICO DOES NOT AUTHORIZE INJUNCTIONS REGARDING OVERSEAS ACTIVITY THAT HAS NO DOMESTIC EFFECTS.

The district court enjoined the defendants from using any "express or implied health messages or descriptors," such as "low tar" or "light," on domestic or foreign packaging or promotional materials. *United States v. Philip Morris USA, Inc.*, 477 F. Supp. 2d 191, 196-98 (D.D.C. 2007) ("*Philip Morris III*"). Even if the defendants could be held liable under RICO, this aspect of the district court's

injunction should not stand because RICO does not grant U.S. courts the authority to enjoin foreign conduct that has no effects in the United States.

A. RICO Does Not Apply Extraterritorially.

The Supreme Court has repeatedly held that courts must not construe a U.S. law as encompassing foreign conduct "unless . . . the affirmative intention of the Congress" to apply the law extraterritorially is "clearly expressed" in the statutory language. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotation marks omitted). This presumption against extraterritoriality is grounded in comity considerations and "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 248. Indeed, decisions affecting international relations are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

RICO is completely "silent as to any extraterritorial application," *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996), and Congress thus has not "clearly expressed" its "affirmative intention" to apply the statute to overseas activity. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Moreover, RICO provides for treble-damages awards, which "heighten[] concerns about international comity and foreign enforcement" (*Al-Turki*, 100 F.3d at 1052),

and reinforce the conclusion that Congress did not intend for the statute to apply extraterritorially.

Because RICO only empowers a court to grant "forward-looking remedies that are aimed at future [RICO] violations" (*United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005)) and the defendants' foreign activities cannot violate RICO, the district court erred in relying on RICO to restrict the defendants' overseas marketing.

B. The United States Has No Legitimate Interest In Regulating The Defendants' Foreign Marketing Activities.

The flaws in the district court's injunction are compounded by the fact that the defendants' overseas marketing activities have no domestic effects. The United States therefore has no legitimate interest in regulating that foreign conduct.

Federal courts have long acknowledged that the United States has no interest in protecting foreign consumers from conduct occurring in foreign countries. In *McBee v. Delica Co.*, 417 F.3d 107 (1st Cir. 2005), for example, the First Circuit refused to issue a Lanham Act injunction directed at a Japanese retailer's sales in Japan, even though it did enjoin sales of the same products in the United States. The court explained that "there is no United States interest in protecting ***Japanese consumers***." *Id.* at 126 (emphasis in original). In contrast, in *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944) (Minton, J.), the Seventh Circuit upheld an injunction barring misleading statements made overseas to foreign consumers because the

court determined that the foreign statements had significant domestic effects. *See id.* at 34-35.

This distinction between foreign conduct with domestic effects (which may potentially be subject to domestic regulation) and foreign conduct with no domestic effects (which is not subject to U.S. law in the absence of a clear statement of congressional intent) is borne out by the Supreme Court's decision in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), where the Court held that the Sherman Act could not be applied to foreign conduct that had both domestic effects and independent foreign effects because the plaintiffs were harmed exclusively by the foreign effects. *See id.* at 165. As Justice Breyer asked rhetorically, "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers . . . ?" *Id.*

The extraterritorial aspects of the district court's injunction pertain to overseas marketing that has no domestic effects. The marketing prohibited by the extraterritorial portion of the injunction occurs entirely overseas and is directed exclusively at foreign consumers. Indeed, the district court itself failed to identify any domestic effects attributable to that foreign marketing activity. The court instead found that the defendants' overseas actions ***as a whole*** and throughout the life of the purported enterprise had significant domestic effects. *See Philip Morris*

III, 477 F. Supp. 2d at 197. According to the district court, these cumulative domestic effects bring all of the defendants' overseas conduct within RICO's scope. *See id.* at 197-98. This analysis is fundamentally flawed, however, because it failed to determine precisely which aspects of the defendants' foreign conduct had domestic effects, and which did not. *Cf. McBee*, 417 F.3d at 122-26 (examining the defendant's conduct by category and enjoining only those activities with substantial domestic effects); *Empagran*, 542 U.S. at 160 (distinguishing between the injuries suffered by foreign and domestic purchasers).[5]

In light of RICO's silence on extraterritorial issues, this Court should vacate the portions of the district court's injunction applicable to foreign marketing activities, which are more appropriately regulated by the foreign countries where those activities take place.

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5 The district court also suggested that the extraterritorial aspects of its injunction are appropriate because there is no "ethical" justification for exposing foreign consumers to advertising that is banned in the United States. *Philip Morris III*, 477 F. Supp. 2d at 198. Needless to say, federal judges' moral judgments are not a recognized basis for extending the application of U.S. law to foreign nations.

CONCLUSION

This Court should reverse the district court's judgment. In the event that the judgment is not reversed in its entirety, this Court should vacate the aspects of the district court's injunction applicable to the defendants' overseas marketing activities.

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CERTIFICATION OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

The undersigned, one of the attorneys for *Amicus Curiae*, hereby certifies pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure that the foregoing brief complies with the type-volume limitation set forth in this Court's Order of August 3, 2007. The brief is set in 14-point Times New Roman type and, according to the word processing system used to prepare the brief, contains 6,783 words, not including the matter expressly excluded by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

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