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

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization. Its members (law firms and solo practitioners) represent parties in antitrust, commercial, consumer, employee benefit and pension, civil racketeering and securities fraud cases. NASCAT members, who represent victims of corporate abuse, schemes to defraud and white-collar criminal activity, seek to secure compensation, deter wrongdoers, modify corporate behavior and improve access to justice. We advocate the enforcement of state and federal laws to prevent wrongful, fraudulent and manipulative business practices. NASCAT is interested in this case, which involves civil liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, because our members represent the victims of white-collar crime in civil RICO actions.

INTRODUCTION

Ten years ago, Congress authorized the use of RICO's private enforcement mechanism to remedy violations of federal immigration laws. Section 1961(1) of RICO, which defines "racketeering activity," makes violations of § 274 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324, predicate offenses. In 1996, Congress enacted § 203 of the Illegal Immigration Reform and Immigrant

[1] Counsel for NASCAT hereby certify that the consent of the parties has been obtained to the filing of this brief, that they authored it, that no counsel for either party did it, in whole or in part, and that no other party made a monetary contribution to its preparation or submission.

Responsibility Act ("IIRIRA"), 8 U.S.C. § 1324(a)(3)(A). In turn, that statute amended § 274 of the INA to prohibit employment of illegal aliens. Later, Congress enacted the Antiterrorism and Effective Death Penalty Act, which added the amended § 274 to RICO. Pub. L. No. 104-132, 110 Stat. 1274 (1996). These predicate acts were added to RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1)(F), to "help Federal law enforcement officials" because groups "in this country, with ties to others abroad . . . [had] developed to prey upon illegal immigrants who want to come to the United States." 141 Cong. Rec. H1588 (daily ed. Feb. 10, 1995) (statement of Rep. McCollum).

Petitioner, Mohawk Industries, Inc. ("Mohawk"), seeks to limit RICO's effectiveness in combating illegal immigration by restricting "enterprise" to associations-in-fact of individuals, or by excluding those cases in which corporations use independent agents or contractors to carry out or facilitate illegal hiring of undocumented workers. If Mohawk is successful, the purpose of the 1996 statutory enactments will be thwarted. Mohawk has nothing to fear from the configuration of an "enterprise"; rather, it need only fear legal redress by victims when it violates RICO's predicate offenses, including the immigration law predicate acts.

Contrary to Mohawk's assertions, this case is not about confining RICO to its "original purpose" of fighting "organized crime." Congress debated that question in 1969-1970 and rejected it, just as this Court has repeatedly rejected Mohawk's contentions. *H.J., Inc. v. Northwestern Bell Telephone Co*., 492 U.S. 229, 246 (1989) ("[T]he legislative history shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime."); *Sedima, S.P.R.L. v. Imrex*

Co., 473 U.S. 479, 495 (1985) ("'any person' . . . not just mobsters" may violate RICO). Further, this case is not about "clogging" federal court dockets.[2] RICO actions – particularly in private enforcement of federal immigration laws – represent a significant, but minute, portion of the business of the federal courts.[3]

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[2] The RICO litigation "floodgate" myth is refuted in G. Robert Blakey & Thomas Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God is This the End of RICO?,"* 43 VAND. L. REV. 851, 869-73 (1990) ("Blakey & Perry, *Myths*"). Recent data confirms that study. In 2005, 69,818 federal criminal cases were filed; just 29 were criminal RICO cases. U.S. Admin. Office of Courts, FEDERAL JUDICIAL CASELOAD STATISTICS, Table D-2 (Mar. 31, 2005). Federal civil cases filed totaled 278,712; just 840 were civil RICO cases. *Id.,* Table C-2. Since 1989, when this Court clarified the "pattern of racketeering activity" element, civil RICO case filings have steadily declined. From 1980 to 1996, federal civil cases increased from 168,800 to 272,700 cases per year, *see* U.S. Census Bureau, *Statistical Abstract of the United States*, Table No. 346 at 216 (1997), but civil RICO cases filed decreased from 903 cases to 840 cases each year from 1993 to 1997. *Id.* RICO claims no longer routinely appear in commercial litigation; rather, litigants now use them only in cases involving systemic patterns of unlawful conduct. In cases where others use them improperly (a substantial minority of case filings), they are quickly dismissed. The business community formerly shunned civil RICO because its use would legitimate a litigation mechanism that in the early days of its implementation was widely claimed to be illegitimate. That day is no more. *See, e.g., Anza v. Ideal Steel Supply Corp.,* No. 04-433, *cert. granted*, ___ U.S. ___, 126 S. Ct. 713 (2005) (RICO action between head-to-head competitors); Edmund L. Andres, *None Prove So Stubborn as a Giant Spurned,* N.Y. TIMES, June 11, 1997, at C37 (Volkswagen's settlement of RICO case brought by General Motors); Saul Hansell, *Bankers Trust Settles Suit With P. & G.,* N.Y. TIMES, May 10, 1996, at C1 (reporting settlement of RICO suit between corporations).

[3] Empirical studies show that it is the threat of a treble damages suit, not criminal prosecution, that is the backbone of antitrust law prohibitions. Michael Kent Block *et al.*, *The Deterrent Effect of Antitrust Enforcement,* 89 J. POL. ECON. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose . . . a creditable threat to colluding firms

(Continued on following page)

The principal focus of this *amicus* brief is on the factual context of this case. We urge this Court not to separate its legal analysis from the demonstrable effect that illegal immigration has on our society and economy and the consonant need to energize private enforcement under RICO, as Congress specifically intended. "Consequences cannot alter statutes, but may help to fix their meaning." *In Re Rouss*, 116 N.E. 782, 785 (N.Y. 1917) (Cardozo, J.). In 1996, Congress deliberately provided for private enforcement of federal immigration statutes through RICO. While Mohawk seeks this Court's assistance in hobbling that effort, such change can (and should) only come from Congress. *See H.J., Inc.*, 492 U.S. at 249 ("[R]ewriting [RICO] . . . it is a job for Congress, if it is so inclined, and not for this Court.")

SUMMARY OF ARGUMENT

The factual context of this case is crucial. *See Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252, 1255-56 (11th Cir.) (summarizing Respondents' allegations), *cert. granted*, ___ U.S. ___, 126 S. Ct. 830 (2005). Illegal immigration affects our political system because states lose seats in the House of Representatives, and the loss of seats may affect presidential elections. Illegal immigration also affects the U.S.

. . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . "); *see also* Robert H. Lande, *The Future of Private Right of Action in Antitrust*, 16 LOY. CONSUMER L. REV. 329 (2004) (for optimal deterrence, increased level of damages is necessary); G. Robert Blakey, *Of Characterization and Other Matters: Thoughts about Multiple Damages*, 60 LAW & CONTEMP. PROBLS. 99 (1997) (analysis of history, economics, scope and rationale of treble damages).

economy. Illegal immigration is principally a matter of jobs. If employers did not hire illegal workers, illegal immigrants could not find work; if they could not find work, they would not come to this country. Illegal immigration lowers wages for our workers. Tax dollars are lost, and health, welfare and education costs are higher. Our justice system faces higher costs and law enforcement is overwhelmed. In 1996, Congress decided that private enforcement of immigration laws is needed and RICO's civil and criminal remedies were the mechanism chosen to get the job done.

Seeking to avoid liability, Mohawk asks this Court to limit "association-in-fact" RICO "enterprises" by rewriting the statutory definition to confine it to associations of "individuals." This argument, if accepted, would exclude from RICO's broad scope corporate wrongdoers that play a major role in white-collar crime. Mohawk seeks to redefine "includes," the word chosen by Congress in § 1961(4) of RICO to expand the definition of "enterprise," to mean "means." But the plain meaning of the statute clearly controls, as demonstrated by this Court's precedents and numerous circuit court cases examining the definition of "enterprise."

Alternatively, Mohawk seeks to limit "association-in-fact" RICO enterprises by excluding corporate wrongdoers that act with and through independent agents or contractors to violate U.S. immigration laws. But Mohawk's proposed construction gives an undeserved free pass to white-collar criminals by excluding from RICO's broad scope the same corporations and independent agents that recruit illegal immigrants for them, and at which Congress specifically aimed the 1996 legislation. Mohawk's requested rewriting of RICO would frustrate Congress'

specific purpose in passing the 1996 legislation and it should not be endorsed by this court.

ARGUMENT

A. The Effects of Illegal Immigration

This case is about illegal immigration, which negatively influences political, economic, tax, health, welfare, education, corrections and law enforcement in this country.

1. The Political Effect

Illegal immigration affects our nation's political processes. The U.S. population is approaching 300 million people.[4] As of March 2005, 35 million legal and illegal immigrants live in this country, giving the first half of this decade the highest five-year period of immigration in U.S. history. Nearly one-half of the post-2000 arrivals (3.7 million people) are estimated to be illegal aliens.[5] The fastest growing minority is Hispanic and our Hispanic population is now 39.9 million people.[6] This year, illegal

[4] U.S. Census Bureau, *Hispanic and Asian Americans Increasing Faster Than Overall Population* (June 14, 2004); U.S. Census Bureau, *Population Estimates, Annual Estimates of the Population By Sex, Race and Hispanic Origin for the United States: April 1, 2000 to July 1, 2003* (2004); U.S. Census Bureau, *Annual Estimates of the Components of Population Change By Race and Hispanic or Latino Origin for the United States: July 1, 2002 to July 1, 2003* (2004).

[5] Steven A. Camarota, Center for Immigration Studies, *Immigrants at Mid-Decade* 1 (Dec. 2005).

[6] U.S. Census Bureau, *Hispanic and Asian Americans Increasing Faster Than Overall Population* (June 14, 2004).

immigration will rise to 8.5 million people, a net annual increase of 500,000 people.[7] Mexico, the largest source for unauthorized immigration, contributed over five million people to the annual illegal immigration figure, and it is the source of over 70% of our unauthorized population. California, Arizona and Texas have the highest illegal immigrant populations. More than 8% of California's population is composed of illegal immigrants while Arizona and Texas follow with 7% and 6%, respectively.[8]

Politically, illegal aliens cause states to lose seats in the U.S. House of Representatives, thereby threatening to alter the Electoral College. Indiana, Michigan and Mississippi each lost one seat in 2000, while Montana failed to gain a seat in the House that it would have had. In all, nine seats were relocated; Oklahoma, Pennsylvania, Wisconsin, Kentucky and Utah had one fewer House seat than they would have had but for illegal immigration, while California picked up six seats and New York, Texas and Florida gained the other three seats.[9]

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[7] U.S. Census Bureau, *ESCAP II: Demographic Analysis Results* (2001); Center for Immigration Studies, *Current Numbers*, available at www.cis.org/topics/currentnumbers.html (last visited Mar. 8, 2006) ("net annual increase" represents all new illegal immigration minus deaths, legalizations and out-migration of illegal immigrants).

[8] Immigration & Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* 1 (Jan. 2003); Nathan Thornburgh, *The Migrants Next Door,* TIME, Feb. 2006 32 (reporting on growth of illegal immigration from various countries; 6.3 million illegal immigrants from Mexico live in U.S., and 485,000 arrive each year, seeking to raise their average $1.86 per hour rate in Mexico to average $9 per hour in U.S.).

[9] Dudley L. Poston, Center for Immigration Studies, *Remaking the Political Landscape: The Effects of Legal and Illegal Immigration on Congressional Reapportionment* 3 (Oct. 2003).

2. The Economic and Tax Effects

Illegal immigration threatens economic effects.[10] Two issues bring immigrants to the United States: Family and jobs. Two-thirds of the legal immigrants to the U.S. are admitted because of familial relations.[11] Most illegal aliens are here seeking work. **If they could not find work, they would not come to the U.S.; if employers did not provide unlawful employment, they could not find work**. Immigrants (both legal and illegal) increase the labor supply in low-level jobs.[12] Illegal immigrants concentrate in New York, Los Angeles and Chicago, which account for 34.5% of our immigrant population. The volume of goods and services exchanged across the country creates pressure toward the equalization of the price of labor.[13] Significantly, 75% of illegal aliens lack a high school degree.[14]

In 1997, the National Research Council concluded that immigration (both legal and illegal) had significant negative effects on the wages of high school dropouts. The

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[10] This Court has previously recognized the economic effects of illegal immigration. *See DeCanas v. Bica,* 424 U.S. 351, 356-57 (1976) ("illegal aliens . . . [taking] substandard . . . wages . . . can seriously depress wage scales . . . [for] citizens and legally admitted aliens").

[11] Immigration & Naturalization Service, *The Triennial Comprehensive Report on Immigration* 12 (2002).

[12] Steven A. Camarota, Center for Immigration Studies, *The Effects of Immigration on American Workers: Testimony Prepared for the House Judiciary Committee Subcommittee on Immigration and Claims* 1 (Oct. 28, 2003).

[13] George J. Borjas, *Increasing the Supply of Labor Through Immigration: Measuring the Influences on Native-born Workers* 2 (May 2004).

[14] Camarota, *supra* note 12*,* at 11.

income of those who lack a high school degree (11 million of which are native-born) was reduced by up to $13 billion a year. That figure is equal to the government's combined annual expenditures on subsidized school lunches, low-income energy assistance, and the Women, Infants, and Children Program.[15] The influx of immigration also affects wages on the top of the wage scale. In 2000, the typical native-born man without a high school diploma earned $25,000 per year and his reduction was $1,800; the typical male college graduate earned $73,000 per year and his reduction was $2,600.[16] Taxes are also higher. In 2003, the National Research Council estimated that for immigrant households the fiscal cost (tax payments minus service use) could be as high as $22 billion.[17] If 27% of immigration into the U.S. is illegal, this places the economic burden at $5.9 billion. Surveys indicate that up to one-half of employers do not deduct taxes from illegal workers' wages. Typically, undocumented workers receive a tax-free wage that is 20-30% lower than the prevailing wage rate; thus, employers illegally gain profits of at least 17% of the illegal alien's wage.[18]

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[15] National Research Council, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* 7 (James P. Smith & Barry Edmonston, eds., 1997).

[16] Borjas, *supra* note 13, at 8.

[17] Camarota, *supra* note 12, at 1.

[18] Donald L. Huddle, *Immigration and Jobs: The Process of Displacement* 6 (May 1995). Huddle also documents networks of recruiters that link U.S. jobs and Mexican villages – the very organizations this case concerns. *Id.* at 9.

3. The Health, Welfare and Education Effects

The health, welfare and educational costs of illegal immigrant populations are a growing part of public expenditures. The proportion of immigrant-headed households using at least one major welfare program is 29%, compared to 18% for native-born households.[19] Less than one-half of all employed illegal aliens are covered by medical insurance or worker's compensation insurance.[20] If they are injured, they are replaced, and they usually do not receive their last paycheck.[21] Medicaid provides health care coverage for everyone, including illegal aliens, in emergency care facilities. A study of ten states reveals that more than $2 billion was spent in 2002 for emergency Medicaid expenditures; five of the ten states studied reported data indicating at least one-half of the emergency expenditures were for illegal aliens. The Balanced Budget Act of 1997 made money available for distribution to states with the highest number of illegal aliens; in six states, the money was entirely used to replace moneys already spent on undocumented aliens for emergency care services.[22] During the 1995 debates on the Immigration Reform Act, Congressman Solomon told the House of Representatives that Governor Wilson of California had reported to him that two-thirds of the babies born in Los Angeles County hospitals are born to parents who illegally

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[19] Camarota, *supra* note 12, at 1.

[20] Huddle, *supra* note 18, at 6.

[21] *Id.; see also Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2005) (analysis of illegal immigrants and their right to collect tort damages).

[22] General Accounting Office, *Undocumented Aliens: Questions Persist About Their Effects On Hospitals' Uncompensated Care Costs* 9-10, 14 (May 2004).

entered the United States. 141 Cong. Rec. H1586 (1995) (statement of Rep. Solomon).

In fiscal year 1995, $1.1 billion in Aid to Families with Dependent Children (AFDC) and food stamps were provided to households with an illegal alien parent as head of household. Eighty-five percent of these AFDC households were located in California, New York, Texas and Arizona.[23] Any child, regardless of immigration status, is eligible for free primary and secondary education. *Plyler v. Doe*, 457 U.S. 202 (1982). As of 2000, immigrants (both legal and illegal) made up 20% of the 55 million students in the public schools, from kindergarten to twelfth grade, and 1.1 million school-age illegal immigrants reside in the U.S.[24] The annual cost of admitting these illegal immigrants to primary and secondary schools is $7.6 billion.[25]

4. The Corrections Effects

Immigration (both legal and illegal) imposes substantial costs on U.S. corrections systems. The federal inmate population is now at 188,591.[26] The annual cost of incarcerating a

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[23] General Accounting Office, *Illegal Aliens: Extent of Welfare Benefits Received on Behalf of the U.S. Citizen Children* 6, 8 (Nov. 1998).

[24] U.S. Census Bureau, *Current Population Survey 2000*; *see also* Michael E. Fix & Jeffrey S. Passel, *U.S. Immigration: Trends and Implications for Schools* 16 (Urban Inst. 2003).

[25] In 1999-2000, the annual average cost per student was $6,911. Dep't of Education, National Center for Educational Statistics, *Current Expenditures Per Pupil In Fall Enrollment In Public Elementary And Secondary Schools By State: 1969-70 to 1999-2000*.

[26] Dep't of Justice, Federal Bureau of Prisons, *Weekly Population Report,* available at www.bop.gov/locations/weekly_report.jsp (last visited Mar. 8, 2006).

federal inmate in 2005 was $23,267.[27] Twenty-seven percent of the federal prison population is aliens.[28] Thus, last year incarcerated aliens cost the federal corrections system $11-12 million each year; however, less than 9% of our sizeable prison population is in federal prisons.[29] The Urban Institute's 1994 study estimated that 21,395 illegal aliens were incarcerated in California, New York, Florida, Texas, Illinois, New Jersey and Arizona.[30] California was saddled with an annual cost of $368 million to incarcerate 15,000 illegal aliens.[31] According to Congressman Foley, on any given day Florida has 5,504 criminal aliens in state corrections facilities, costing taxpayers more than $14,000 per inmate per year. 114 Cong. Rec. H1595 (1995) (statement of Rep. Foley). During the 1995 House debates, Congressman Packard reported that criminal aliens cost state and county criminal justice systems more than $500 million per year, annual costs, he thought, "We cannot sustain." 114 Cong. Rec. 1590 (1995) (statement of Rep. Packard).

5. Law Enforcement Effects

Lawful and unlawful immigration is beyond the control of the Immigration & Nationalization Service

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[27] 70 Fed. Reg. No. 212 (Nov. 3, 2005).

[28] General Accounting Office, *State and Federal Prisoners, Profiles of Inmate Characteristics in 1991 and 1997* 27 (May 20, 2000).

[29] *Id.* at 8. The states operate more than 1,000 facilities, as compared to the federal government's 100 facilities. *Id.*

[30] Rebecca L. Clark *et al., Fiscal Effects of Undocumented Aliens: Selected Estimates for Seven States* 8-13 (Urban Inst. 1994).

[31] *Id.*; *see also* General Accounting Office, *Illegal Aliens: Assessing Estimates of Financial Burden on California* 6 (Nov. 1994).

(INS).[32] A measure of the immigration phenomenon is the experience of the Department of Justice (DOJ) following the terrorist attacks on September 11, 2001. The DOJ sought to interview 4,112 aliens who might have the ability to help the investigation. By February 2002, 45% of these aliens could not be located because the INS lacked reliable addresses. Similarly, in January 2002, the DOJ established the Absconder Apprehension Initiative and it examined 314,000 aliens with orders of removal. The INS identified 5,046 aliens who were from countries with an al Qaeda presence. As of June 24, 2002, neither the INS nor the Federal Bureau of Investigation (FBI) was able to locate 86% of the absconders.[33]

The Immigration Reform and Control Act of 1986, 100 Stat. 3359 (1986), made it illegal for an employer to hire an illegal alien, but circumvention of the statute is easy. INS data reveals that from October 1996 to May 1998, the INS identified 50,000 unauthorized aliens who had used 78,000 fraudulent documents to obtain employment. The INS has too many responsibilities and, since 1994, it has devoted just 2% of its resources to worksite enforcement; even this was before September 11, 2001. In fiscal year 1998, the INS completed 6,500 employer investigations, or just 3% of the country's employers of illegal aliens. Eighty-three percent of the INS investigations resulted in no employer sanctions, and the agency instituted criminal

[32] As of March 1, 2003, the INS was transferred to the Department of Homeland Security. For convenience, this Brief uses the older usage.

[33] General Accounting Office, *Homeland Security: INS Cannot Locate Many Aliens Because It Lacks Reliable Address Information* 3, 13 (Nov. 2003).

proceedings in just 2% of those investigations.[34] Illegal workers' use of fraudulent documentation makes it difficult to prove the employer's knowledge.[35] The INS was able to collect about one-half of the criminal penalties it assessed, principally due to employer bankruptcy.[36] In short, the U.S. Government, acting through the INS, with its efforts supplemented by the FBI, cannot do the job of curtailing illegal immigration, much less meet its other responsibilities resulting from the events of September 11, 2001.

Given these statistics and trends, it is understandable that in 1996 Congress turned to RICO's private enforcement mechanism to combat illegal immigration. Such "private . . . litigation is one of the surest weapons for effective enforcement" of the law, *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965) (antitrust), and it "provide[s] a significant supplement to the limited resources available to the government." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (antitrust); *accord Sedima*, 473 U.S. at 493 ("Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps") (citing *Reiter*).

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[34] General Accounting Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist* 5, 10, 13 (April 1999).

[35] General Accounting Office, *Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System* (July 1999).

[36] GAO, *supra* note 34, at 15; *see also* Eduardo Porter, *The Search for Illegal Immigrants Stops at the Workplace*, N.Y. TIMES, Mar. 5, 2006, at BU-3 (Bureau of Immigration & Customs Enforcement, devotes about 4% of its personnel to workplace enforcement, down from 9% in 1999; in 1992, nearly 1,500 warnings of impending fines were issued to employers of illegal immigrants but that number had dwindled to just **three** warnings in 2004).

B. Legal Analysis

1. Membership in "Association-in-Fact" RICO Enterprises and Corporations

Section 1961(4) of RICO defines "enterprise" to "**include**[ ] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that "association-in-fact" enterprises include individuals associated together solely for illicit purposes, and emphasized that "[t]here is no restriction upon the associations embraced by" the statutory definition. *Id.* at 580. In this case, consistent with § 1961(4)'s broad definition of "enterprise," Respondents alleged that the RICO enterprise was an association-in-fact "between Mohawk and third-party recruiters," and that the members of this enterprise "share the common purpose of obtaining illegal workers for employment by Mohawk." 411 F.3d at 1258. After carefully analyzing the allegations, the Eleventh Circuit held that Respondents properly alleged an "association-in-fact" enterprise and that Mohawk participated in its operation or management, in violation of § 1962(c). *Id.* at 1257-60. Before this Court, Mohawk seeks to limit "association-in-fact" enterprises to the facts of *Turkette*, and it asks for immunity for wide swaths of white-collar criminal activity by limiting RICO's scope to "organized crime." Mohawk advances revolutionary arguments that do violence to

RICO's plain meaning and are inconsistent with the statutory language and this Court's precedents.[37]

Reading RICO is basically a question of the "language of the statute" – what this Court termed "the most reliable evidence of its intent." *Turkette*, 452 U.S. at 593.[38] This Court's principles are summarized in G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernest & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AMER. CRIM. L. REV. 1345, 1460-61 n.441 (1996), and they are consistent. So, too, are this Court's RICO decisions since 1996: *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999); *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S.

[37] A principal use of RICO by the Government is to prosecute political corruption cases where the enterprise is usually defined as the governmental agency, political office, and the like. *See* Blakey & Perry, *Myths*, 43 VAND. L. REV. at 1020 (reporting that the largest category of RICO prosecutions involved political corruption). Another commentary, G. Robert Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 298-99 (1982) ("Blakey, *Civil RICO Action*"), collects illustrative decisions. That important role for RICO would end if this Court were to accept Mohawk's attempts to narrow the broad definition of "enterprise" it embraced in *Turkette*.

[38] *See* Henry Friendly, BENCHMARKS 202 (1976) ("(1) read the statute, (2) read the statute, (3) read the statute") (quoting Justice Frankfurter's three rules for interpreting statutes); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration."); III Roscoe Pound, JURISPRUDENCE 488-90 (1959) ("specious construction [of statutes] tends to bring law into disrespect; . . . subjects courts to political pressures; [and] invites an arbitrary personal element in judicial administration; [it threatens to make] laws . . . worth little [and to] break down [the] legal order").

158 (2001); and *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

Mohawk offers no reason to abandon these principles, and their meaning is unequivocal. As the court below observed, 411 F.3d at 1257, the definition of "enterprise" is ostensive or partially denotative; it is not connotative; its list of examples is illustrative, not exhaustive. *See Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934).[39] Of the ten definitions listed in § 1961 of RICO, four utilize "includes" while six use "means."[40] "**That the draftsman**

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

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

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used these words in a different sense seems clear." *Helvering*, 293 U.S. at 125 n.1 (emphasis added). RICO's plain meaning controls. *Turkette*, 452 U.S. at 580, 593; *United States v. Russello*, 464 U.S. 16, 20 (1983). If similar language reflects similar meaning, *Reves v. Ernest & Young*, 507 U.S. 170, 177 (1993), then, *a fortiori*, different language reflects different meaning, and this is precisely how the circuit courts read § 1961(4). *See*, *e.g.*, *United States v. Huber*, 603 F.2d 387, 393-95 (2nd Cir. 1979) (rejecting argument that "group of corporations cannot be an enterprise" as stemming from "overly rigid reading of the definitions contained in" § 1961), *cert. denied*, 445 U.S. 927 (1980). *Accord United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (analyzing language used in § 1961(4) and holding that "two or more legal entities **can** form or be part of an association-in-fact RICO enterprise"; collecting cases reaching same result) (emphasis in original), *cert. denied*, 517 U.S. 1155 (1996); *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (affirming criminal RICO conviction; enterprise was "informal consortium" of a law firm and two police departments with three individuals who were named as defendants).

Given RICO's language and these precedents, the court below properly refused to dismiss Respondents' allegation that Mohawk and the third-party recruiters, as "distinct [corporate] entities," formed an association-in-fact RICO enterprise. 411 F.3d at 1258. The contrary result sought by Mohawk would cripple the Government's

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than her owners.]") (*citing United States v. The Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844) (Story, J.) ("The vessel which commits the aggression [of piracy] is treated as the offender" and it is subject to forfeiture *in rem* without regard to the innocence of the owners).

(and fraud victims') ability to prosecute complex, multi-party RICO cases. But Mohawk asserts that in some contexts "includes" means "means" and that § 1964 of RICO uses "includes, but not limited to" twice, arguing that Congress used "includes" to mean "means" in § 1961, and that when it meant "including, but not limited to," it knew how to say it. Mohawk ignores the careful alternative uses of "includes" and "means" in § 1961 and, had one meaning been intended, one usage would have been adopted. The "short answer [to Mohawk's arguments] is that Congress did not write the statute that way." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (citation omitted); *see also Sedima*, 473 U.S. at 489 n.8 ("minor departure in wording . . . [does not] indicate a fundamental departure in meaning."); *Scheidler v. National Organization for Women, Inc.*, ___ U.S. ___, 2006 WL 461512, *8-9 (Feb. 28, 2006).

Mohawk also takes the use of "including, but not limited to" in § 1964 out of its precise context that fixes its meaning. *See M'Culloch v. State*, 17 U.S. (4 Wheat.) 316, 415 (1819) ("The word, then, like others, is used in various senses; and, in its construction, the subject, the **context**, the intention of the person using them, are all to be taken into view.") (emphasis added); *Perine v. Chesapeake & Del. Canal Co.*, 50 U.S. (9 How.) 172, 189 (1850) (same); *see also Dolan v. U.S. Postal Svc.*, ___ U.S. ___, 2006 WL 397935, at *3 (Feb. 22, 2006). Congress's use of "includes" and "means" in § 1961 occurs in the context of a section of definitions that are separate and apart from § 1964. Section 1964 is an independent provision authorizing civil relief and it contains no definition section. The parts that use "including, but not limited to" are not parts of a definition but, rather, a series of illustrations as to the

scope of the equity power granted to the courts. Out of an abundance of caution, Congress used the phrase so that courts would know that the list was "not exhaustive." S. Rep. No. 91-617, 91st Cong., 1st Sess. 160 (1969); 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan). Mohawk's arguments as to the meaning and scope of § 1961(4)'s definition of "enterprise" are contrary to this Court's analysis and holding in *Turkette*, 452 U.S. at 580, and numerous circuit court decisions. *See London*, 66 F.3d at 1243 (collecting cases).

2. Membership in "Association-in-Fact" RICO Enterprises and Corporations and Agents

In *Cedric Kushner Promotions*, 533 U.S. at 161-62, this Court held that for purposes of § 1962(c), the "person" named as the liable "defendant" cannot simultaneously play the role of "enterprise." But in seeking to extend this rule to cover the facts of this case, Mohawk seeks immunity for wide swathes of white-collar crime, not by limiting RICO to organized crime (thereby indirectly excluding white-collar crime), but by directly excluding from RICO a substantial portion of white-collar crime.

Application of RICO's "enterprise" concept to so-called "legitimate" entities presents few problems. *See United States v. Beasley*, 72 F.3d 1518, 1525 (11th Cir.) ("A variety of entities can be enterprises, including benevolent and nonprofit organizations such as unions and benefit funds, governmental units, courts and judicial offices, police departments, and motorcycle clubs to name a few."), *cert. denied*, 519 U.S. 866 (1996). But the definition of "enterprise" also includes an "association-in-fact," which this Court defined to mean "a group of persons associated

together for a **common purpose** of engaging in a course of conduct." *Turkette*, 452 U.S. at 583 (emphasis added). The court below held that "common purpose" had been satisfied because "each member of the enterprise is allegedly reaping a large economic benefit from Mohawk's employment of illegal workers." 411 F.3d at 1258. The Eleventh Circuit squared its holding with criminal RICO precedents, *id*. at 1258-60, and civil RICO decisions from the Second, Sixth and Ninth Circuits. *Id*. at 1259. The court below disagreed with *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 543 U.S. 956 (2004), upon which Mohawk relies. *Compare* 411 F.3d at 1259-60 (discussing *Baker*) *with* Pet. Br. at 34, 37.

To analyze associations-in-fact, a discussion of how the circuit courts treat the "common purpose" element is helpful. The issue is sometimes confused when the focus shifts between wholly illicit enterprises (as in *Turkette*) and other types of enterprises that may be basically lawful but are perverted by a subset of their members for illicit purposes, as in *Beasley*, 72 F.3d at 1525-26 (corruption of a religion), or where the enterprise is composed of witting and unwitting members, as in *Aetna Cas. & Sur. Co. v. P&B Autobody*, 43 F.3d 1546 (1st Cir. 1996), involving a false insurance claims scheme. Some courts have little difficulty in analyzing an enterprise that is (or includes) among its members an innocent "instrument" or "victim" of the racketeering activity. *See*, *e.g.*, *DeFalco v. Bernas*, 244 F.3d 286, 309 (2nd Cir.) (town government was RICO enterprise run by corrupt officials; enterprise is often "passive instrument or victim") (citations omitted), *cert. denied*, 534 U.S. 891 (2001). Other circuits struggle with the "common purpose" element in this situation. *See*, *e.g.*, *United States v. Cianci*, 378 F.3d 71, 83 (1st Cir. 2004). In

such cases, the difficulty arises from the unexamined assumption that the enterprise and its various members can only play the role of "perpetrator"; that is, they must be "guilty." However, while the enterprise is the center or organizing principal of RICO litigation, it is not the defendant; thus, it need not be "guilty." In fact, an association-in-fact enterprise may contain opposing factions, as in *United States v. Orena*, 32 F.3d 704, 710 (2nd Cir. 1994), which held that an internal war in the Columbo organized crime "family" (the RICO enterprise) did not negate a finding of a "common purpose."

Proper application of the "common purpose" element varies with different fact patterns. Nevertheless, better-reasoned cases hold that an association-in-fact RICO enterprise need not reflect a "common purpose" apart from engaging in racketeering. *See*, *e.g.*, *United States v. Rogers*, 89 F.3d 1326, 1336 (7th Cir.), *cert. denied*, 519 U.S. 999 (1996):

> [T]he enterprise [need not] . . . have a purpose separate and apart from the pattern of racketeering activity. The [contrary] position is simply insupportable. . . . [I]t would be nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity. We know from *Turkette* that 'enterprise' includes illegal organizations, or illegal associations-in-fact, that have an exclusively criminal purpose.

Accord Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 786-87 (9th Cir. 1996); *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 770 (8th Cir. 1992).

Most courts recognize that the personal goals of individual members of an association-in-fact enterprise

need not be congruent with the enterprise's "common purpose." Thus, in *Beasley*, 72 F.3d at 1525-26 & n.7, not all members of the religion shared the goals of a murderous subset of its members. *See also United States v. Griffin*, 660 F.2d 966, 1000 (4th Cir. 1981) ("[W]hatver **private** purposes there may have been there was also the requisite commonality of purpose between the defendants to give form to the associational enterprise charged.") (emphasis added). Something as general as "monetary profit" suffices to satisfy "common purpose." *See London*, 66 F.3d at 1244. Thus, if this Court accepts Mohawk's argument as to "common purpose" and follows the Seventh Circuit's analysis in *Baker*, 357 F.3d at 691, there is a severe risk that RICO's salutary use in prosecuting organized crime "families" will be endangered. *See* Note, *Qua Vadis, Association In Fact? The Growing Disparity Between How Federal Courts Interpret RICO's Enterprise Provision in Criminal and Civil Cases*, 80 NOTRE DAME L. REV. 781, 822-23 (2005).[41]

Members of an association-in-fact are distinct from the enterprise itself; thus, they are subject to being sued for RICO violations without violating the person/enterprise

[41] Under the *Baker* court's analysis, because all members of all organizations may have divergent individual goals, no association-in-fact RICO enterprises could ever exist. The Seventh Circuit's analysis is not only out of step with the other circuits, but it also represents bad organization theory. *See* Edward Gross & Amitai Etzonini, ORGANIZATIONS IN SOCIETY 8-13 (1985) ("But whose image of the . . . [of the goals counts?] That of top executives? The board of directors or trustees? The majority of its members? [N]one of these. The organizational goal is . . . [the goal] the organization as a **collectivity** is trying to bring about. . . . Sometimes it is determined through peaceful consultation, at other times . . . [by] a power play . . . among . . . cabals . . . and 'personalities.' ") (emphasis added).

distinction. *See*, *e.g.*, *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989):

> collective entity is something more than the members of which it is comprised. If five persons form an association in fact and engage in a pattern of racketeering activity such as drug smuggling and murder, an individual member could never be prosecuted for violating RICO under the appellants' reasoning because he or she would not be considered distinct from the enterprise. We do not believe that Congress envisioned that this type of conduct would be insulated from RICO prosecutions.

Accord London, 66 F.3d at 1243-44; *United States v. Feldman*, 853 F.2d 648, 655-60 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989).

Shortly after the lower courts' recognition of the person/enterprise distinction rule, some litigants sought to circumvent it by alleging "association-in-fact" enterprises composed of a corporation, its officers and employees. Reasoning that this "entity" was only the corporation by another name, courts refused to recognize it as being distinct from the corporation itself. *See*, *e.g.*, *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 583 (5th Cir. 1992). But Mohawk seeks to extend this "corporation-as-officers-and-employees" rule to immunize from RICO liability those cases in which wrongdoer corporations use independent "contractors" or "agents" to violate the law. This is a bridge too far.

We urge this Court to follow the common sense analysis employed in *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1277 (11th Cir.), *cert. denied*, 531 U.S. 1015 (2000), a decision rendered not on the face of a complaint, but after a jury verdict in a criminal RICO case. In *Goldin*,

which Mohawk ignores even though it was cited by the court below, 411 F.3d at 1257-58, the Eleventh Circuit carefully analyzed the Second Circuit's decisions in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2nd Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998), and *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (2nd Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996).[42] *Discon* properly refused to recognize as distinct an association-in-fact enterprise composed of three corporations because even though they were separate legal entities, they operated "within the scope of a single corporate structure, guided by a single corporate consciousness." 93 F.3d at 1064. On the other hand, *Securitron Magnalock* sustained as distinct an association-in-fact enterprise "where it was an active, operating, ongoing business, each with a presence in the marketplace 'rather than two stacks of papers.'" *Goldin*, 219 F.3d at 1277 (quoting *Securitron*, 65 F.3d at 263). Thus, a group of related corporations could form a distinct association-in-fact enterprise where each "is a separate ongoing business with a separate customer base . . . [if] [e]ach is free to act independently and advance its own interests contrary to the those of the other . . . corporations." *Id.* In short, dependent agents, no; independent agents, yes.

Mohawk and its *amici* attack this distinction, arguing that it places in jeopardy the way U.S. corporations outsource their business now that we have crossed the bridge to the 21st Century. But corporations that do

[42] *Accord Living Designs, Inc. v. E.I. DuPont de Nemours & Co.,* 431 F.3d 353, 361-62 (9th Cir. 2005) (corporation, its independent lawyers and expert witnesses may make up distinct RICO enterprise; "Just as corporate officer can be a person distinct from the corporate enterprise, DuPont is separate from its legal defense team. . . . Indeed, the rule of professional conduct requires law firms to be distinct entities and to maintain their professional independence.") (citations omitted).

business in-house and out-of-house are not in danger of criminal or civil RICO liability because of the way in which they configure their business, or how the Government, or a private plaintiff, might allege that the configuration equals an association-in-fact enterprise. The "enterprise" itself is neither legal nor illegal; it is neutral, as it should be, unless and until the group engages in a pattern of racketeering activity, which is criminal in any case. Reconfiguring association-in-fact enterprises will not exculpate corporations of their criminal violations of the predicate acts.

The Eleventh Circuit's common sense analysis in this case, 411 F.3d at 1257-60, and in *Goldin*, 219 F.3d at 1277 is, however, inconsistent with Seventh Circuit decisions. In *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923 (7th Cir. 2003), Chief Judge Posner, relying on his own prior opinions, chiefly *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-28 (7th Cir. 1997) (holding that "family" of corporations, even though independent, may not constitute enterprise distinct from members), held that an enterprise was not properly alleged where it consisted of a parent corporation and a subsidiary: "A parent and its wholly owned subsidiaries no more have sufficient distinctness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act, unless the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity, which has not been shown here." 329 F.3d at 928 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984)).

This analysis is problematic. First, although of secondary importance (except to illustrate Chief Judge Posner's fidelity to precedent), the Seventh Circuit had already held that *Copperweld*, an antitrust case, was not applicable to RICO. *See Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271,

1281 (7th Cir. 1989). Second, and of signal importance, Chief Judge Posner's reasoning is inconsistent with *Cedric Kushner*, 533 U.S. at 166. Chief Judge Posner was not entitled to ignore this Court's precedent, "unless we wish anarchy to prevail." *Hutto v. Davis*, 454 U.S. 370, 375 (1985). Third, in *Fitzgerald*, 116 F.3d at 226-28, the decision on which Chief Judge Posner principally relied, he offered a test ("family resemblance") that is indeterminate, even though, in other contexts, he is critical of reasoning by analogy. Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 90 (1990) (arguing that it suffers by comparison with logical deduction, scientific deduction and *stare decisis*).

Fourth, as the Court below recognized, 411 F.3d at 1259-60, the Seventh Circuit's approach to association-in-fact enterprises excludes from RICO, as Mohawk would, wide swathes of white-collar crime. This is contrary to RICO's express language and congressional intent. RICO applies to "any person," 18 U.S.C. § 1961(3), and it is not limited to the infiltration of legitimate business by organized crime, or to attacking only criminal gangs. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994) ("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.") (citations omitted). Although in *Fitzgerald*, 116 F.3d at 226-28, the Seventh Circuit asserted a contrary position, namely, that courts should read RICO narrowly in light of its so-called "prototypical application," Chief Judge Posner's reasoning contradicts *H.J., Inc.*, 492 U.S. at 248, which made clear that "Congress drafted RICO broadly enough

to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators."

The Seventh Circuit's position on association-in-fact enterprises is inconsistent with other well-reasoned circuit court precedents. The Third Circuit abandoned a similar narrow focus in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 262-69 (3rd Cir. 1995), holding that officers and directors were distinct from a corporation that constituted the RICO enterprise.

Finally, we do not offer RICO as a panacea for the issues presented by the epidemic of illegal immigration. Of far greater significance would be the adoption of a fair "guest worker" program, as proposed by the Bush Administration, the U.S. Chamber of Congress and the Service Employees International Union.

CONCLUSION

For these reasons, NASCAT respectfully urges this Court to reject the arguments of Petitioner and its amici and to affirm the decision of the Eleventh Circuit in this case.

Respectfully submitted,

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