No. 05-465

In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

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

Respondents.

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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[10] *Id.* at 12-13 (Compl. ¶ 27).

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

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

[13] *Id.* at 23 (Compl. ¶ 76).

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

[18] *Id.* at 73a.

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued on following page)

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

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

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

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

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

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

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

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

A. Mohawk Failed to Preserve its Initial Argument.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[59] *Id.*

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

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

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

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

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[62] *See infra* Part I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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