

507 US 176 (1993)
No. 91-886

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BOB REVES, ROBERT H. GIBBS and
FRANCES GRAHAM, As Representatives
of a Class of Noteholders,
Petitioners,
vs.
ERNST & YOUNG,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE
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AND COMMERCIAL LAW ATTORNEYS
(NASCAT) IN SUPPORT OF PETITIONERS

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NO. 91-886
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

BOB REVES, et al., Petitioners,
vs.
ERNST & YOUNG, Respondent.

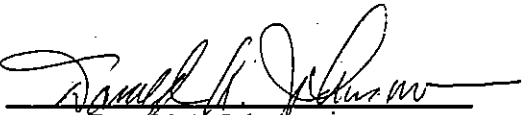
STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 311 South Spring Street, Suite 200, Los Angeles, California 90013. On this date, I served the within BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California in sealed envelopes addressed as follows:

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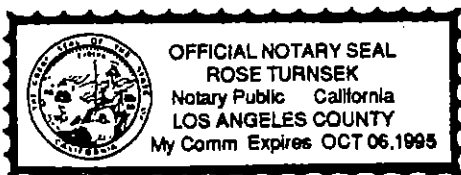
That affiant makes this service for KEVIN P. RODDY, Counsel of Record, MILBERG WEISS BERSHAD SPECTHRIE & LERACH, Attorneys for *Amicus Curiae* herein, and that to the best of my knowledge all persons required to be served in said action have been served.




Donald A. Johnson

On April 8, 1992, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.





Notary Public in and for
said county and state

QUESTION PRESENTED

Did the Eighth Circuit err when it held, in conflict with other courts of appeals, that §1962(c) of the RICO statute, which makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity," requires proof that the defendant managed or operated the enterprise?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE <i>AMICUS CURIAE</i>	1
ARGUMENT	3
A. RICO'S EXPRESS STATUTORY LANGUAGE, MANDATED LIBERAL CONSTRUCTION AND LEGISLATIVE HISTORY REQUIRES THIS COURT TO INTERPRET SECTION 1962(c) BROADLY TO EFFECTUATE THE STATUTE'S REMEDIAL PURPOSES.	3
B. THE STANDARD ADOPTED BY THE COURT BELOW IS CONTRARY TO THAT FOLLOWED IN OTHER CIRCUITS AND CONFLICTS WITH RICO'S STATED PURPOSE TO PROTECT LEGITIMATE BUSINESS AGAINST INFILTRATION AT ALL LEVELS.	8

C. REFERENCE TO OTHER PROVISIONS OF OCCA DEMONSTRATES THAT THE APPLICABLE STANDARD IS WHETHER DEFENDANTS, PROFESSIONAL OR OTHERWISE, PERFORMED ACTS THAT ARE "HELPFUL" OR "NECESSARY" TO THE RICO ENTERPRISE	19
D. REFERENCE TO THE SAVINGS AND LOAN CRISIS DEMONSTRATES HOW RESPONDENT'S PROFESSIONAL SERVICES HAVE BEEN "NECESSARY" OR "HELPFUL" TO THE OPERATION OF RICO ENTERPRISES WHICH HAVE DEFRAUDED THE GOVERNMENT AND THOUSANDS OF INNOCENT VICTIMS	25
CONCLUSION	30

TABLE OF AUTHORITIES

Page

Cases

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987)	7
Arthur Young & Co. v. Reves, 937 F.2d 1310 (8th Cir. 1991), <i>cert. granted and denied</i> , ___ U.S. ___, 1, 5, 6, 15 60 U.S.L.W. 7578 (1992)	20, 24, 30
Baggio v. EC Solar, Inc., No. 88 C 1893, 1990 U.S. Dist. LEXIS 5569 (N.D. Ill. May 8, 1990)	21
Bank of America Nat'l Trust & Savings Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986)	20, 21, 30
Bennett v. Berg, 685 F.2d 1053 (8th Cir.), <i>aff'd en banc</i> , 710 F.2d 1361 (8th Cir.), <i>cert. denied</i> , 464 U.S. 1008 (1983).	14, 15
Bennet v. Berg, Civil Action No. 80-0381-CV-W, 1984 Westlaw 2756 (W.D. Mo. June 21, 1984)	15
Blake v. Dierdorff, 856 F.2d 1365 (9th Cir. 1988)	13
Braswell v. United States, 487 U.S. 99 (1988).	9

	Page
Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49 (S.D. Ohio 1986)	21
Director of Office of Thrift Supervision v. Ernst & Young, Misc. No. 91-401 (RCL), 1992 U.S. Dist. LEXIS 2315 (D.D.C. Mar. 3, 1992)	25
Farberware, Inc. v. Groben, 764 F. Supp. 296 (S.D.N.Y. 1991)	12
First Finan. Savs. Bank, Inc. v. American Bankers Ins. Co., 699 F. Supp. 1167 (E.D.N.C. 1988)	21
Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984), <i>vacated in part on other grounds sub nom.</i> , Joel v. Cirrito, 473 U.S. 922 (1985)	9
Garrett v. United States, 471 U.S. 773 (1985)	10
H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)	3, 4, 6, 7, 9, 22
Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), <i>aff'd on other grounds per curiam</i> , 473 U.S. 606 (1985)	4
Holmes v. SIPC, ____ U.S. ____, 1992 U.S. LEXIS 1947 (Mar. 24, 1992)	7

	Page
Iannelli v. United States, 420 U.S. 770 (1975), <i>ovrl'd on other grounds by</i> Brown v. Ohio, 432 U.S. 161 (1977).	22
In re American Continental Corp./Lincoln Savings & Loan Securities Litigation, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,704 (D. Ariz. 1990).	2, 30
In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Securities Litig., 636 F. Supp. 1138 (C.D. Cal. 1986)	21
Lincoln Savs. & Loan Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990)	28
Morin v. Trupin, 747 F. Supp. 1051 (S.D.N.Y. 1990)	12
National Union Fire Ins. Co. v. Califinvest, No. 90 Civ. 2476 (LLS), 1992 U.S. Dist. LEXIS 1956 (S.D.N.Y. Feb. 14, 1992)	12
Northern Sec. Co. v. United States, 193 U.S. 197 (1904)	8
Odesser v. Continental Bank, 676 F. Supp. 1305 (E.D. Pa. 1987).	21
Overnite Transp. Co. v. Truck Drivers, Etc. Local No. 705, 904 F.2d 391 (7th Cir. 1990).	13

	Page
Papai v. Cremosnik, 635 F. Supp. 1402 (N.D. Ill. 1986)	9
Richards v. United States, 369 U.S. 1 (1962)	6
Russello v. United States, 464 U.S. 16 (1983).	4, 6, 7, 9
Sanabria v. United States, 437 U.S. 54 (1978). . . . .	.23
Schacht v. Brown, 711 F.2d 1343 (7th Cir.), <i>cert. denied</i> , 464 U.S. 1002 (1983). . . . .	.17, 18
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) . . . . .	.3, 4, 7-9, 22
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)	6, 8
Sun Savs. & Loan Ass'n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987). . . . .	.13
Tafflin v. Levitt, 493 U.S. 455 (1990)	4, 7
Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263 (3d Cir. 1987) . . . . .	.17
United States v. Arthur Young & Co., 465 U.S. 805 (1984) . . . . .	.29

	Page
United States v. Avarello, 592 F.2d 1339 (5th Cir.), <i>cert. denied</i> , 444 U.S. 844 (1979) . . . . .	.24
United States v. Bennett, 563 F.2d 879 (8th Cir.), <i>cert. denied</i> , 434 U.S. 924 (1977) . . . . .	.24
United States v. Bright, 630 F.2d 804 (5th Cir. 1980). . . . .	.17
United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), <i>cert. denied</i> , 465 U.S. 1005 (1984). . . . .	.13, 15
United States v. De Peri, 778 F.2d 963 (3d Cir. 1985), <i>cert. denied</i> , 475 U.S. 1110 (1986). . . . .	.17
United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), <i>cert. denied</i> , 439 U.S. 953 (1978)	5, 10, 18
United States v. Ellison, 793 F.2d 942 (8th Cir.), <i>cert. denied</i> , 479 U.S. 937 (1986) . . . . .	.15
United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977) <i>aff'd</i> , 578 F.2d 1371 (2d Cir.), <i>cert. dismissed</i> , 439 U.S. 801 (1978). . . . .	.11
United States v. Garver, 809 F.2d 1291 (7th Cir. 1987)	5

	Page
United States v. Grezo, 566 F.2d 854 (2d Cir. 1977) . . . . .	.23
United States v. Hammond, 821 F.2d 473 (8th Cir.), <i>cert. denied</i> , 484 U.S. 986 (1987) . . . . .	.23, 24
United States v. Horak, 833 F.2d 1235 (7th Cir. 1987) . . . . .	.14, 16
United States v. Janotti, 729 F.2d 213 (3d Cir.), <i>cert. denied</i> , 469 U.S. 880 (1984) . . . . .	.17
United States v. Jenkins, 649 F.2d 273 (4th Cir. 1981). . . . .	.24
United States v. Kaplan, 886 F.2d 536 (2d Cir. 1989), <i>cert. denied</i> , 493 U.S. 1076 (1990). . . . .	.16
United States v. LeRoy, 687 F.2d 610 (2d Cir. 1982), <i>cert. denied</i> , 459 U.S. 1174 (1983). . . . .	.12
United States v. Manzella, 782 F.2d 533 (5th Cir.), <i>cert. denied</i> , 476 U.S. 1123 (1986). . . . .	.22
United States v. Martino, 648 F.2d 367 (5th Cir. 1981), <i>cert. denied</i> , 456 U.S. 949 (1982), <i>on remand</i> , 681 F.2d 952 (5th Cir. 1982), <i>aff'd on other grounds sub nom.</i> , Russello v. United States, 464 U.S. 16 (1983). . . . .	.21, 22

	Page
United States v. Meese, 479 F.2d 41 (8th Cir. 1973) . . . . .	.24
United States v. Mokol, No. 90-2681, 1992 U.S. App. LEXIS 4728 (7th Cir. Mar. 18, 1992) . . . . .	.16
United States v. Monsanto, 491 U.S. 600 (1989) . . . . .	.4, 6, 7
United States v. Palmeri, 630 F.2d 192 (3d Cir. 1980), <i>cert. denied</i> , 450 U.S. 967 (1981) . . . . .	.12
United States v. Pieper, 854 F.2d 1020 (7th Cir. 1988) . . . . .	.13, 14
United States v. Pinelli, 890 F.2d 1461 (10th Cir. 1989) <i>cert. denied</i> , 494 U.S. 1038 (1990). . . . .	.22
United States v. Provenzano, 688 F.2d 194 (3d Cir.), <i>cert. denied</i> , 459 U.S. 1071 (1982). . . . .	.12
United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985), <i>cert. denied</i> , 475 U.S. 1098 (1986). . . . .	.13
United States v. Reeder, 614 F.2d 1179 (8th Cir. 1980) . . . . .	.24
United States v. Riccobene, 709 F.2d 214 (3d Cir.), <i>cert. denied</i> , 464 U.S. 849 (1983) . . . . .	.24

	Page
United States v. Rieger, 942 F.2d 230 (3d Cir. 1991) . . . . .	.23
United States v. Robilotto, 828 F.2d 940 (2d Cir. 1987), <i>cert. denied</i> , 484 U.S. 1011 (1988). . . . .	.12
United States v. Roth, 860 F.2d 1382 (7th Cir. 1988), <i>cert. denied</i> , 490 U.S. 1080 (1989). . . . .	.16
United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), <i>cert. denied</i> , 452 U.S. 961 (1981)	11-13
United States v. Simmons, 923 F.2d 934 (2d Cir.), <i>cert. denied</i> , ___ U.S. ___, 111 S. Ct. 2018 (1991). . . . .	.11
United States v. Starnes, 644 F.2d 673 (7th Cir. 1981). . . . .	.18
United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973) . . . . .	.15
United States v. Tille, 729 F.2d 615 (9th Cir.), <i>cert. denied</i> , 469 U.S. 845 (1984) . . . . .	.18
United States v. Tucker, 638 F.2d 1292 (5th Cir. 1981) . . . . .	.24
United States v. Turkette, 452 U.S. 576 (1981)	4, 6-10

	Page
United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985), <i>cert. denied</i> , 474 U.S. 1100 (1986).	17
United States v. Welch, 656 F.2d 1039 (5th Cir. 1981), <i>cert. denied</i> , 456 U.S. 915 (1982)	13
United States v. Yarbrough, 852 F.2d 1522 (9th Cir.), <i>cert. denied</i> , 488 U.S. 866 (1988)	12
United States v. Yonan, 800 F.2d 164 (7th Cir. 1986), <i>cert. denied</i> , 479 U.S. 1055 (1987).	15
United States v. Zannino, 895 F.2d 1 (1st Cir.), <i>cert. denied</i> , 494 U.S. 1082 (1990).	24
United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), <i>cert. denied</i> , 489 U.S. 1066 (1989).	12
Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948 (D.C. Cir. 1990), <i>cert. denied</i> , ___ U.S. ___, 111 S. Ct. 2839 (1991).	5, 6

Statutes, Rules and Regulations

18 U.S.C. §802 . . . . .	.22
18 U.S.C. §803 . . . . .	.22
18 U.S.C. §1511 . . . . .	.22
18 U.S.C. §1955 . . . . .	.6, 19, 22-24, 30
18 U.S.C. §1961	1, 4
18 U.S.C. §1961(1)	9
18 U.S.C. §1962	2, 7
18 U.S.C. §1962(c)	<i>passim</i>
18 U.S.C. §1964	2, 4
18 U.S.C. §1964(c)	7, 17
18 U.S.C. §1965	2
18 U.S.C. §1968	1, 4
18 U.S.C. §3575 <i>et seq.</i> . . . . .	.22
18 U.S.C. §3575(e) . . . . .	.22
21 U.S.C. §848(b) . . . . .	.10
84 Stats 922-23	8
84 Stats 941	4
84 Stats 947	4, 7, 15

Legislative Material

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 4033 (1970)	4
Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 159 (1969)	4
S. Rep. No. 617, 91st Cong., 1st Sess. at 76. . . . .	.10

	Page
Secondary Authorities	
A. Arens & J. Loebbecke, <i>Auditing: An Integrated Approach</i> (1976)	29
Blakey, <i>An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform</i> , 43 Vand. L. Rev. 851 (1990)	28
Conyers, <i>Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime</i> , 17 Am. Crim. L. Rev. 287 (1980)	9
E. Devitt & C. Blackmar, <i>Federal Jury Practice and Instructions</i> , §61.05 (1977)	23
France, <i>Savings & Loan Lawyers</i> , (May 1991) 77 A.B.A.J. 52	26
General Accounting Office, <i>CPA Audit Quality: Failures of CPA Audits to Identify and Report Significant Savings and Loan Problems</i> (1989)	29
1970 U.S. Code Cong. & Adm. News (1970)	23
Note, <i>Securities Attorneys Face Liability For Wrongs of Their Corporate Clients</i> , (1990) 5 J. of Legal Comment. 403	27
3 <i>Oxford English Dictionary</i> (2d ed. 1989)	6
11 <i>Oxford English Dictionary</i> 357 (2d ed. 1989)	6

	Page
<i>Report of the National Commission on Fraudulent Financial Reporting (1987)</i>	29
<i>Webster's Dictionary of Synonyms (1942)</i>	7

INTEREST OF THE *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys (NASCAT) hereby files its *amicus curiae* brief in support of Petitioners. For the reasons set forth herein, NASCAT supports reversing the decision of the Eighth Circuit Court of Appeals in this case.¹

NASCAT is an association of nearly 500 attorneys who litigate antitrust, commercial, consumer and securities fraud class action and derivative cases in federal and state courts throughout the country. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior and improving the access of victims to justice and adequate compensation for the wrongs that have been inflicted upon them.

NASCAT's members have litigated (and are presently litigating) numerous treble damage civil actions arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968.² NASCAT has found

¹ The Eighth Circuit's decision is reported as *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991) ("*Arthur Young*"), cert. granted and denied, ___ U.S. ___, 60 U.S.L.W. 7578 (1992). NASCAT has obtained consent to file this brief from both Petitioners and Respondent.

² For example, members of NASCAT serve as counsel for nearly 20,000 investors in now-bankrupt American Continental Corporation ("*ACC*"), controlled by convicted felon Charles H. Keating, Jr. ("*Keating*"), who used the premises of ACC's wholly-owned, federally-insured thrift, Lincoln Savings & Loan ("*Lincoln Savings*"), to peddle hundreds of millions of dollars of junk bonds to elderly victims which became worthless when ACC declared bankruptcy and federal regulators seized Lincoln Savings in April, 1989. Keating's fraudulent scheme caused the most catastrophic savings and loan failure in American history, estimated to cost the taxpayers over \$2 billion. NASCAT's and Respondent's interests in this case and the *ACC/Lincoln Savings* case are intertwined because the victims' class action lawsuit, which is presently in trial in the District of Arizona, asserts civil RICO, federal securities fraud and state law (including Arizona RICO)

(continued)

civil RICO actions to be one of the few effective remedies that a wide range of the American people, from small businesses to the elderly, have to obtain adequate redress when they are cheated by fraudulent or criminal behavior which, unfortunately, runs rampant in today's society. To insure that the access to justice and adequate compensation which Congress expressly provided in RICO's civil remedy provisions, 18 U.S.C. §§1964-1965, based upon violations of RICO's proscriptions, 18 U.S.C. §1962, is neither narrowed nor foreclosed but, rather, is nurtured and interpreted in accordance with the statute's express remedial purpose, NASCAT believes that the decision of the court below should be reversed.

NASCAT submits that the Eighth Circuit's restrictive interpretation of the "conduct" element of §1962(c) not only misinterprets the statutory language and ignores RICO's Liberal Construction Clause and legislative history but will result in an unwarranted emasculation of the statute, which Congress expressly designed to combat organized criminal behavior and provide an additional yet essential remedy for victims of fraudulent schemes. Upholding the lower court's misguided interpretation and application of the statute in this case could result in certain professional wrongdoers'

(fn. continued)
claims against professional co-conspirators — lawyers, accountants (including Respondent's predecessor firm, Arthur Young & Company), economists and investment bankers — who assisted Keating in operating his engine of greed and avarice. *See In re American Continental Corp./ Lincoln Savings & Loan Securities Litigation*, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,704 (D. Ariz. 1990). Following three days of testimony, Respondent settled investors' claims for a record payment of \$63 million while ACC/Lincoln Savings outside counsel, Jones, Day, Reavis & Pogue, paid \$24 million. *See A. Cowan, Big Law and Auditing Firms To Pay Millions in S. & L. Suit*, N.Y. Times, Mar. 31, 1992, at A1; A. Stevens, *Ernst & Young and Jones Day Law Firm To Pay \$87 Million in Lincoln S & L Case*, Wall St. J., Mar. 31, 1992, at A3. As a result, the court's decision in the case at bar, in which Respondent seeks immunity for professionals from civil and criminal RICO liability, could have immediate and lasting impact.

(including Respondent's) undeserved immunity from RICO prosecutions and treble damage civil actions. No person or entity (including accountants, attorneys, or bankers) is immune from RICO's proscriptions, yet group immunity is undeniably sought by Respondent and its fellow professional *amici* in this case. Moreover, failure to reverse the decision of the court below would unduly hamper the Government's ability to rely on §1962(c) in criminal RICO prosecutions, where it has been effectively utilized in organized crime cases over the past 20 years.

ARGUMENT

A. RICO'S EXPRESS STATUTORY LANGUAGE, MANDATED LIBERAL CONSTRUCTION AND LEGISLATIVE HISTORY REQUIRES THIS COURT TO INTERPRET SECTION 1962(c) BROADLY TO EFFECTUATE THE STATUTE'S REMEDIAL PURPOSES

This civil RICO case focuses on the proper interpretation of the "conduct" element of §1962(c) of the statute.³ Contrary to Respondent's assertion, §1962(c)'s purposeful disjunctive construction makes unlawful the direct *or* indirect conduct of *or* participation in the conduct of an enterprise's affairs by *any* person employed by *or* associated with the enterprise.⁴ The broad statutory language deliberately employed by Congress in crafting RICO⁵ and especially

³ RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." 18 U.S.C. §1962(c).

⁴ See *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 231-32 (1989) ("RICO renders criminally and civilly liable 'any person' . . . who, being employed by or associated with . . . an enterprise, conducts or participates in the conduct of its affairs 'through a pattern of racketeering activity'"); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) ("A violation of §1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.") (footnote omitted).

§1962(c)⁶ does not distinguish between so-called "insider" and "outsider" defendants⁷ in criminal or civil cases; rather,

⁵ RICO, Chapter 96 of Title 18 of the U.S. Code, 18 U.S.C. §§1961-1968, was added by Title IX of the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. 91-452, 84 Stat. 941. Section 904(a) of OCCA, 84 Stat. 947, directs that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes." As stated in *Russello v. United States*, 464 U.S. 16, 27 (1983), RICO is the "only substantive federal criminal statute that contains such a directive," and as elaborated in *Sedima*, a civil RICO case:

This less restrictive reading [of RICO] is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language, see *United States v. Turkette*, 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, §904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

473 U.S. at 497-98. In *Sedima*, this Court also stated that "if Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Id.* at 491 n.10. RICO's Liberal Construction Clause is used to interpret the statute in both civil and criminal cases, see *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990); *Northwestern Bell*, 492 U.S. at 248-49; *United States v. Monsanto*, 491 U.S. 600, 609 (1989); *Russello*, 464 U.S. at 21; *United States v. Turkette*, 452 U.S. 576, 587, 593 (1981). Notwithstanding Respondent's urgings, it cannot be avoided here.

⁶ The House and Senate Reports accompanying RICO expressly stated that §1962(c)'s prohibitions are without limitation or exception. See Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 159 (1969) (§1962(c) applies to any "conduct of the enterprise through the prohibited pattern"; "there is no limitation on the prohibition"); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 4033 (1970) (same). See also *Russello*, 464 U.S. at 21-22 (calling "participate" and other RICO definitions "concepts of breadth"); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984) ("conduct" and "participate" are "broad terms which would defy judicial confinement"), *aff'd on other grounds per curiam*, 473 U.S. 606 (1985).

⁷ Persons or entities "employed by" the enterprise are often referred to as "insiders" while "outsiders" are most often held liable under §1962(c)'s
(continued)

any person "associated with" the enterprise who directly or indirectly participates in the "conduct" of its affairs through a pattern of racketeering activity has violated the statute.⁸ The court below inexplicably ignored §1962(c)'s deliberately broad and disjunctive construction, as well as RICO's express legislative history, when it held that Respondent did not directly or indirectly conduct or participate in the conduct of the enterprise's affairs.⁹

(fn. continued)
"associated with" language, see *United States v. Garver*, 809 F.2d 1291, 1301 (7th Cir. 1987); however, professional assistants such as Respondent who are employed or retained to assist in a fraudulent scheme may face liability under either clause because of their necessarily intimate involvement with kingpins like Milken and Keating.

⁸ See *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc) ("[§]1962(c) provides that participation may be indirect as well as direct, and nothing . . . precludes liability on the part of outsiders. The crucial question is not whether a person is an insider or an outsider . . ."), cert. denied, ___ U.S. ___, 111 S. Ct. 2839 (1991); *Garver*, 809 F.2d at 1301 (quoting *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978)) (RICO applies to both insiders and outsiders — "those merely "associated with" an enterprise — who participate . . . in the enterprise's affairs . . .").

⁹ This case is a class action arising out of the sale of securities (notes) issued by a cooperative. Summary judgment was granted by the district court as to the RICO claim against the outside auditor (Arthur Young) and was affirmed by the Eighth Circuit, which held that the auditor's involvement in the enterprise (the cooperative) "did not rise to the level required for a RICO violation." *Arthur Young*, 937 F.2d at 1324. The Eighth Circuit stated that participating in the conduct of the affairs of an enterprise in violation of §1962(c) "ordinarily will require some form of participation in [its] operation or management," and held that Respondent's performance of audits, meeting with the board of directors to explain the audits, and making presentations at annual meetings "in no way rise[s] to the level of participation in the management or operation of" the cooperative, even though "[i]n the course of this involvement it is clear that Arthur Young committed a number of reprehensible acts." *Id.* In so holding, the court ignored RICO's statutory language, mandated liberal construction and legislative history, as well as its previous interpretation of the "conduct" element in criminal RICO cases and its construction of the identical term found in another provision of OCCA, the federal gambling syndicate
(continued)

To find the meaning of "conduct," this Court must "begin, of course, with RICO's text, in which Congress followed a 'pattern [of] utilizing terms and concepts of breadth' "10 and must " 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.' "11 If RICO's language is plain, it controls;¹² if its language, syntax, or context is ambiguous,¹³ the construction that

(fn. continued)

statute, 18 U.S.C. §1955. Thus, the Eighth Circuit not only reached the wrong result, but its method of analysis was seriously flawed.

¹⁰ *Northwestern Bell*, 492 U.S. at 237 (quoting *Russello*, 464 U.S. at 21).

¹¹ *Id.* at 238 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

¹² *Id.* at 249; see also *Monsanto*, 491 U.S. at 606; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987); *Russello*, 464 U.S. at 21, 29; *Turkette*, 452 U.S. at 587 n.10.

¹³ In *Northwestern Bell*, where this Court reversed the Eighth Circuit's restrictive interpretation of "pattern of racketeering activity," Justice Brennan began the Court's analysis by construing RICO's statutory text, 492 U.S. at 237-39, relying on a dictionary definition of "pattern" to find its "normal usage," *id.* at 238 ("A 'pattern' is an 'arrangement or order of things or activities.' ") (quoting 11 *Oxford English Dictionary* 357 (2d ed. 1989)). In this case, the court below cited with favor the District of Columbia Circuit's earlier decision in *Yellow Bus*, which had also adopted a restrictive interpretation of "conduct" and offered the following linguistic analysis:

"Conduct" is synonymous with "management" or "direction." Webster's Third New International Dictionary 473 (1961). The "conduct of the [enterprise's] affairs" thus connotes more than just some relationship to the enterprise's activity; the phrase refers to the guidance, management, direction or other exercise of control over the course of the enterprise's activities. In order to participate in the conduct of an enterprise's affairs, then, a person must participate, to some extent, in "running the show."

Yellow Bus, 913 F.2d at 954; see *Arthur Young*, 937 F.2d at 1324. But these courts' purported "plain language" analysis is far too restrictive because it is generally recognized that persons who take part in carrying out the activities of an enterprise *without* managing or directing its goals still "conduct" its activities. Thus, the definition of "conduct" found in 3 *Oxford English Dictionary* 691 (2d ed. 1989), the same dictionary utilized by this Court in *Northwestern Bell*, 492 U.S. at 238, includes the meaning

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would "effectuate its remedial purposes" by "providing enhanced sanctions and new remedies" must be adopted,¹⁴ and for more specific guidance, this Court "must look past the [statutory] text to RICO's legislative history, as we have done in prior cases construing the Act."¹⁵ Finally, as the court below pointedly ignored in this case, "conduct" must be read in the same fashion, whether civil¹⁶ or criminal RICO is involved.¹⁷ When these rules of construction are

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"[t]o direct, manage, carry on (a transaction, process, business, institution, legal case, etc.)," but pointedly adds: "The notion of direction or leadership is often obscured or lost; e.g., an investigation is *conducted* by all those who take part in it." To the same effect is *Webster's Dictionary of Synonyms* 184 (1942) (emphasis added), which states that "[c]onduct may imply the act of an agent who is both the leader and the person responsible for the acts and achievements of a group having a common end or goal . . . , but often the idea of leadership is lost or obscured, and the stress is placed on a carrying on by all or by many of the participants." Giving RICO's terms their "ordinary meaning," *Russello*, 464 U.S. at 21, the term "conduct" does not include these misguided courts' limitation that a person must participate in "running the show." Indeed, imposing a "management" or "significant control" limitation on the term "conduct" violates this Court's rule of RICO construction because it reads words into the statute that "appear[] nowhere in the language or legislative history." *Id.* at 240-41 (rejecting Eighth Circuit's "multiple scheme" limitation on "pattern" requirement because of lack of support in the statute or legislative history).

¹⁴ 84 Stat. at 947; see also *Tafflin*, 493 U.S. at 466-67; *Monsanto*, 491 U.S. at 609; *Sedima*, 473 U.S. at 497-98; *Russello*, 464 U.S. at 27; *Turkette*, 452 U.S. at 587-88, 593.

¹⁵ *Northwestern Bell*, 492 U.S. at 229 (citing *Sedima*, 473 U.S. at 486-90; *Russello*, 464 U.S. at 26-29; and *Turkette*, 452 U.S. at 586-87).

¹⁶ Violations of RICO may be enforced by private treble damage suits brought under §1964(c), which provides that "[a]ny person injured in his business or property by reason of" a violation of §1962 may sue. 18 U.S.C. §1964(c). Thus, the statute brings to bear "the pressure of 'private attorneys general' on a serious national problem for which private prosecutorial resources are deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987); see also *Holmes v. SIPC*, ___ U.S. ___, 1992 U.S. LEXIS 1947, at *44 (Mar. 24, 1992) (O'Connor, J., and White and Scalia, JJ., concurring in part).

followed, the untenability of the Eighth Circuit's decision becomes clear.

B. THE STANDARD ADOPTED BY THE COURT BELOW IS CONTRARY TO THAT FOLLOWED IN OTHER CIRCUITS AND CONFLICTS WITH RICO'S STATED PURPOSE TO PROTECT LEGITIMATE BUSINESS AGAINST INFILTRATION AT ALL LEVELS

In considering the meaning of "conduct," most circuit courts have properly adopted varying formulations of the same general approach: they require *some* relationship between the affairs of the enterprise and a defendant's predicate acts of racketeering, but recognize that a mere coincidental or tangential connection between a person, a legitimate enterprise, and the racketeering activity is not sufficient. Yet, most courts recognize that "conduct" must be interpreted and applied in the broadest possible manner to insure that the statute's express purpose to combat¹⁸ organ-

¹⁷ *Shearson*, 482 U.S. at 239; *Sedima*, 473 U.S. at 489; cf. *Northern Sec. Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting) ("The words [used in a statute] cannot be read one way in a suit which is to end in a fine and imprisonment and another way in one which seeks an injunction.").

¹⁸ Congress enacted RICO as Title IX of OCCA because it found that 18th and 19th Century jurisprudence was ineffective to combat white-collar crime and fraudulent behavior. OCCA's Statement of Findings recognized that organized crime "is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, *fraud*, and corruption," that such activities "weaken the stability of the Nation's economic system, *harm innocent investors and competing organizations*, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens" and that organized crime "continues to grow" because "the sanctions and remedies available to the Government are necessarily limited in scope and impact." In light of these findings, it was Congress' declared purpose "to seek the eradication of organized crime" by "providing *enhanced sanctions and new remedies* to deal with" its unlawful activities. 84 Stat. 922-23 (emphasis added); see also *Turkette*, 452 U.S. at 588-89

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