

QUESTION PRESENTED

Whether under 18 U.S.C. § 1962(c) a corporate president may be designated as the RICO "person" who engages in predicate acts by and through a corporation designated as the RICO "enterprise"?

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Statement of Facts

The National Association of Securities and Commercial Law Attorneys (NASCAT), by counsel and pursuant to Rule 37.3(b), hereby files its Motion for Leave to File *Amicus Curiae* Brief in this case. In support of its Motion, NASCAT makes the following showing:

Pursuant to Rule 37.3(a), by letters dated January 8, 2001, NASCAT's Counsel of Record sought written consent from Counsel of Record for Petitioner and Respondents. Petitioner's counsel granted written consent; however, Respondents' counsel has failed or refused to do so.¹

Nature of NASCAT's Interest

NASCAT is composed of attorneys who primarily represent plaintiffs in civil actions seeking to recover damages for violations of antitrust, civil rights, commercial, consumer protection, employee and retiree benefits, environmental, insurance and securities laws, as well as violations of federal and state constitutions. NASCAT's members represent victims of corporate and government abuse, schemes to defraud, defective products, and anti-competitive conduct. Civil actions brought by NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers and deprive them of the

¹ A copy of the consent letter received from Petitioner's Counsel of Record is submitted with this Motion and *Amicus Curiae* Brief.

fruits of their illegal behavior, thereby modifying corporate behavior and improving victims' access to justice.

NASCAT's members represent plaintiffs in civil actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and its state law counterparts. On four previous occasions, NASCAT filed *amicus curiae* briefs in this Court in civil RICO cases. See *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (statute of limitations); *Grimmett v. Brown*, 519 U.S. 233 (1997) (same); *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (§ 1962(c) liability); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (proximate causation).²

The authors of this *amicus curiae* brief collectively have five decades of experience representing plaintiffs *and* defendants in RICO cases, and they are the authors of law review articles and a two-volume treatise addressing various issues arising in civil and criminal RICO litigation. See G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on*

² NASCAT has also filed *amicus curiae* briefs in this Court in cases involving government agent liability, see *Hanlon v. Berger*, 526 U.S. 808 (1999); class action settlements, see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); state law claims for punitive damages, see *BMW of No. America v. Gore*, 517 U.S. 559 (1996); *TXO Production Corp. v. Alliance Resources*, 509 U.S. 443 (1993); ERISA claims, see *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); and securities fraud liability, see *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994); *Musick, Peeler & Garrett v. Wausau, Inc.*, 508 U.S. 286 (1993).

Substantive, Accessory, Aiding and Abetting, and Conspiracy Liability Under RICO, 33 Amer. Crim. L. Rev. 1345 (1996) ("Blakey & Roddy, Reflections"); Kevin P. Roddy, *RICO in Business and Commercial Litigation* (Shepard's-McGraw Hill 1991); G. Robert Blakey & Thomas A. 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 (1990) ("Blakey & Perry, Analysis of the Myths"); G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526 (1987) ("Blakey & Cessar, Equitable Relief"); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) ("Blakey, RICO Civil Fraud Action"); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980) ("Blakey & Gettings, RICO"). These writings address a variety of issues arising in civil and criminal RICO cases, including the distinction between the RICO "person" and "enterprise" that forms the ultimate basis for the Second Circuit's misguided decision in *Cedric Kushner Promotions, Ltd. v. King*, 219 F.3d 115 (2nd Cir.), cert. granted, 69 U.S.L.W. 3397 (2000).

NASCAT respectfully submits that its Motion for Leave to File *Amicus Curiae* Brief should be granted.

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**BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS (NASCAT)
IN SUPPORT OF PETITIONER***

NASCAT argues herein that the Second Circuit's decision in this case should be reversed. In accordance with Rule 37.1, this *amicus curiae* brief will bring to this Court's attention relevant arguments concerning RICO's language, legislative history, and purposes. Indeed, NASCAT advances *different* grounds for reversal than those asserted by Petitioner: NASCAT argues that the "person/enterprise distinction" itself, apart from its application in this appeal, is neither compelled nor supported by RICO's language, legislative history, or express remedial purposes. Based upon our collective experience, the authors of this brief submit that continued adherence to this rule threatens to rob RICO of much of its utility as an essential weapon to combat organized crime and "white-collar" crime. If that rule is rejected, as NASCAT argues herein, the decision of the court below, *a fortiori*, cannot stand and it must be reversed.



* Counsel for a party did not author this brief in whole or in part. No person or entity, other than NASCAT, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

THE PERSON/ENTERPRISE DISTINCTION IS NOT SUPPORTED BY RICO'S STATUTORY LANGUAGE, LEGISLATIVE HISTORY, OR REMEDIAL PURPOSES.**A. RICO Was Intended To Provide Weapons To Combat Enterprise Criminality**

Enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922 (1970), RICO provides criminal and civil sanctions that were designed to attack the foundations of organized crime. *See Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 1611 (2000); *United States v. Turkette*, 452 U.S. 576, 589 (1981); *see also Russello v. United States*, 464 U.S. 16, 26 (1983) ("The legislative history [of RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."³ RICO's terms, however, *expressly* reach

³ RICO's Statement of Findings and Purpose declared that the statute sought "the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, *and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.*" 84 Stat. at 923 (emphasis added). Congress found that "organized crime in the United States [had become] a highly sophisticated, diversified, and widespread activity that annually drained billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption." *Id.* at 922. The result was to "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." *Id.* at 923. *See Beck*, 120 S. Ct. at 1611.

beyond traditional organized crime to include aggravated "white-collar" crime. Its focus is on "enterprise criminality", that is, "patterns" of violence, the provision of illegal goods and services, corruption in labor or management relations, corruption in government, and systemic fraud committed by, through, or against various illicit or licit "enterprises." See *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) ("As finally enacted, RICO authorized the imposition of enhanced penalties and new civil sanctions . . . for all types of organized criminal behavior, that is, *enterprise criminality*, from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors.") (emphasis added) (quoting Blakey & Gettings, *RICO*, 53 Temp. L.Q. at 1013-14). This Court agrees with these precepts: "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. . . ." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989); see also *Sedima, S.P.R.L. v. Imrex Co.*, 472 U.S. 479, 495 (1985) (RICO reaches "'any person' - not just mobsters"). Congress consciously "drafted RICO broad enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *H.J., Inc.*, 492 U.S. at 248-49.

RICO accomplishes its goals by providing, in criminal prosecutions brought by the United States, the sanctions of fine, imprisonment, and forfeiture for violations of § 1962, see 18 U.S.C. § 1963, and, in civil actions brought by the United States *and* private parties, the sanctions of injunctions, treble damages, and attorney's

fees for any person "injured in his business or property by reason of a violation of [§] 1962." 18 U.S.C. § 1964(c). See *Humana, Inc. v. Forsyth*, 525 U.S. 299, 313 (1999).⁴

Like the antitrust statutes on which it is modeled, see *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992), RICO's "private enforcement mechanism . . . [1] deter[s] violators[,] [2] deprive[s] them of the fruits of their illegal actions, and [3] . . . provide[s] ample compensation to victims of [RICO] violations." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (citation omitted).⁵ RICO and the federal antitrust statutes exist in

⁴ See also Richard L. Bourgeois, Jr., *et al.*, *Racketeer Influenced and Corrupt Organizations*, 37 *Amer. Crim. L. Rev.* 879, 882-83 (2000) ("*Bourgeois, Racketeer Influenced*") (providing overview of statutory provisions and emphasizing "close relationship between criminal and civil RICO actions"); G. Robert Blakey & John Robert Blakey, *Civil and Criminal RICO: An Overview of the Statute and Its Operations*, 64 *Def. Couns. J.* 36 (1997) (same).

⁵ RICO and antitrust are well integrated because free choice in the marketplace may be restricted by agreement, force, or fraud. See *American C & L Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting). Antitrust focuses on the first, RICO the second and third; together, they promise a market characterized by freedom and integrity, both physical and fiscal. The classic study of the effectiveness of the private enforcement mechanism shows that "[n]either imprisonment nor monetary penalties pose . . . a credible threat. . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages. . . ." Michael Block, *et al.*, *The Deterrent Effect of Antitrust Enforcement*, 89 *J. of Pol. Economy*, 429, 440 (1981). Chief Judge Posner of the Seventh Circuit also forcefully on similar economic grounds for private enforcement of more than actual damages awards against all forms of antisocial conduct, particularly where concealment is present, as in fraud. Richard A. Posner, *Economic Analysis of Law*, 143, 235, 272, 462 (2nd ed. 1977).

tandem.⁶ Like the Clayton Act, RICO evidences an unequivocal "congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices." *Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. 1075, 1083 (2000). The object of civil RICO is, therefore, not merely to compensate victims "but to make them prosecutors, private attorneys general, dedicated to eliminating racketeering activity." *Id.* (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997)); see also *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483

⁶ Parallels between antitrust and RICO previously recognized by this Court are reflected in the data on the relationship between criminal and civil litigation. Between 1960 and 1980, of the 22,585 civil and criminal cases brought by the government or private parties under the antitrust laws, 84% were instituted by private plaintiffs. U.S. Dep't of Justice, *Source Book of Criminal Justice Statistics*, 431 (1982). Available data indicates that the ratio of criminal RICO prosecutions to civil RICO actions is about the same (15:100). See Blakey & Perry, *Analysis of Myths*, 43 Vand. L. Rev. at 851. Like antitrust, RICO is one of the necessary tools that businesses use to vindicate fraud committed *against* them. See Edmund L. Andrews, *None Prove So Stubborn as a Giant Spurned*, N.Y. Times, Jan. 11, 1997, at 37 (reporting settlement of RICO action brought by General Motors against Volkswagen); Saul Hansell, *Bankers Trust Settles Suit With P&G*, N.Y. Times, May 10, 1996, at 1 (Bankers Trust Co. of New York settled RICO action brought by Procter & Gamble). Since 1989, however, when this Court's decision in *H.J., Inc.* properly precluded asserting civil RICO claims in routine commercial disputes, the number of civil RICO case filings has steadily declined. For 1994-1997, the number of civil cases filed in federal courts *increased* from 235,996 to 265,151 per year. *Statistical Abstract of the United States*, 228 (Table No. 373) (1999). In contrast, the number of civil RICO case filings *decreased* from 900 in 1995 to 763 in 1999. *Judicial Business of the United States*, Table C-2A (1999).

U.S. 143, 151 (1987). Accordingly, RICO is to be read broadly and liberally construed to effectuate these remedial purposes, which are "nowhere more evident than in the provision of a private 'claim for relief.'" *Sedima*, 473 U.S. at 497-98 (citing 84 Stat. 947 and stating that RICO must be "liberally construed to effectuate its remedial purposes").⁷

B. Section 1962 And "Enterprise"

RICO introduced two new concepts: "Enterprise" and "pattern of racketeering activity." See *Agency Holding Corp.*, 483 U.S. at 150 (" 'enterprise' and 'pattern' were simply unknown to common law"). Here, the core concept is "enterprise." See *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir.), cert. denied, 479 U.S. 1086 (1986) ("The central role of the concept of enterprise under RICO cannot be overstated"); Thomas S. O'Neill, Note, *Functions of the Enterprise Concept*, 64 Notre Dame L. Rev. 646, 649-50 (1989) ("O'Neill, *Enterprise Concept*") ("[T]he enterprise concept is at the heart of the statute. It allows RICO to be used against the various types of concerted activity that Congress intended to reach."). Section 1962

⁷ See generally David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 Colum. J.L. & Soc. Probs. 41, 42-43 & n.8 (1996) (stating that RICO's liberal construction clause has been properly applied in criminal cases, but that "judicial hostility to the onslaught of private actions brought under RICO has led [the lower federal courts] to construe RICO's civil provisions strictly - contravening the liberal construction clause" and largely ignoring this Court's construction of the statute) (footnote omitted).

of RICO outlaws each manner in which an "enterprise" engages in, is used to promote, or may be victimized by, long-term criminal activity. Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 Harv. J. Legis. 1, 5 (1993) ("Goldsmith, *Judicial Immunity*"). Thus, § 1962(a) outlaws the investment or use of racketeering proceeds in an "enterprise," and § 1962(b) expands this concept by prohibiting the acquisition or maintenance of an interest in an "enterprise" through any "pattern of racketeering activity." 18 U.S.C. § 1962(a)-(b). See *Beck*, 120 S. Ct. at 1611-12.⁸ Section 1962(c) – the statutory provision most relevant here – provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

⁸ Section 1962(a) states that it "shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity" to "use or invest, directly or indirectly, any part of such income, or the proceeds of such income" in the "acquisition of any interest in, or the establishment or operation of any enterprise" which is engaged in, or the activities of which affect, interstate or foreign commerce. 18 U.S.C. § 1962(a).

Section 1962(b) states that it "shall be unlawful for any person through a pattern of racketeering activity" to "acquire or maintain, directly or indirectly, any interest in or control of any enterprise" which is engaged in, or the activities of which affect, interstate or foreign commerce. 18 U.S.C. § 1962(b). See generally Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 Colum. L. Rev. 661, 666-82, 689-702 (1987) (reviewing origins of § 1962(a) and (b)).

enterprise's affairs through a pattern of racketeering activity.

18 U.S.C. § 1962(c).⁹

Congress defined RICO's key concepts *broadly*. See *Russello*, 464 U.S. at 21-22 (RICO incorporates "terms and concepts of breadth"). The term "person" – which defines the class that can violate RICO and may sue, if victimized by a RICO violation – includes both natural persons and entities, including "white-collar" institutions. See 18 U.S.C. § 1961(3) (" 'person' includes any individual or entity capable of holding a legal or beneficial interest in

⁹ Subsection (d) of § 1962 provides that "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [§ 1962]." 18 U.S.C. § 1962(d). See *Beck*, 120 S. Ct. at 1612; *Salinas v. United States*, 522 U.S. 52, 63-65 (1997). One significant difference between RICO and antitrust concerns *intracorporate* conspiracies. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), this Court held that a corporation and its wholly-owned subsidiary were incapable of conspiring with each other to violate the Sherman Act. The Seventh and Ninth Circuits, however, hold that § 1962(d) of RICO applies to intracorporate conspiracies. See *Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1129 (9th Cir. 1997); *Webster v. Omnitron Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir. 1996); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989). The Eighth Circuit reached the opposite conclusion in *Fogie v. THORN Americas, Inc.*, 190 F.3d 889, 899 (8th Cir. 1999). This subject is comprehensively addressed in Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 *Hastings L.J.* 1155 (1982); see also Blakey & Roddy, *Reflections*, 33 *Amer. Crim. L. Rev.* at 1439-42.

