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Of Gangs and Gaggles: Can a Corporation Be Part of an Association-in-Fact RICO Enterprise? Linguistic, Historical, and Rhetorical Perspectives

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ABSTRACT

Over 30 years ago, courts of appeals began to hold that the RICO statute's definition of "association-in-fact enterprise" is broad enough to include corporations as constituent members, even though the definition states that such an association is limited to a "group of individuals."[1] This article demonstrates why these cases were wrongly decided from a variety of perspectives: linguistic, systemic, and consequentialist. It also suggests a strategy for correcting this widespread interpretive error and provides evidence that the Supreme Court may be disposed to agree that the lower courts have uniformly erred.

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INTRODUCTION

Americans find gangsters at once fascinating and frightening. One can confirm the former with reference to the billions of dollars patrons have spent on Mafia-inspired movies like the Godfather series, Wiseguys, and Goodfellas, and the latter with reference to the myriad statutes that Congress and many state legislatures have passed aimed at eradicating "organized" crime. This article examines one aspect of a key pillar in this effort to destroy organized crime—namely, the "enterprise" element of the Racketeer Influenced and Corrupt Organizations Act (RICO).[2]

2. 18 U.S.C. §§ 1961–1968 (2006) ("'[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of

Part I generally introduces the history of organized crime legislation in the United States, explains how RICO relates to, and grows out of, that history, and demonstrates how the concept of "enterprise" is central to RICO jurisprudence. Part II picks up with one aspect of the statutory definition of enterprise—the association-in-fact enterprise (also referred to as the "association in fact" enterprise)—and looks back at the history of that provision's interpretation in the United States Supreme Court. Part III considers very recent interpretations of "association in fact" in the circuit courts and suggests how those interpretations create special problems in the type of RICO case most commonly seen in civil litigation. Part IV examines the association-in-fact definition from a variety of linguistic, systemic, and teleological-evaluative vantage points to determine whether a corporation can be part of an association in fact. I conclude that it cannot, and the circuit courts that have held otherwise are wrong. Part V concludes by recommending a course of action that will bring the question of whether a corporation can be part of an association in fact to the attention of the Supreme Court.

I. A RANDOM WALK THROUGH GANGLAND

A. RICO and Its Aims

If one were charged with drafting legislation designed to root out organized crime, the first step would be to consider what makes "organized" crime organized and what types of things organized criminals do. One way to conceptualize the issue would be to plot the degree of organization along one axis and the types of criminal activity along another. For example, two individuals could come together two or three times to rob a bank, or occasionally to purchase a large quantity of drugs at wholesale value for resale to each individual's own set of customers. Is this crime "organized?" It is hard to say. Alternatively, compare those two individuals to the Mafia, which has hundreds of members, strict membership criteria, a long history, is highly organized along the lines of a Roman Legion, and (sometimes) has well defined areas of criminal expertise. Is this crime "organized?" Almost everyone would agree that this is the paradigmatic case, although—as we will now see—the array of criminal acts undertaken by even a highly structured organization like the Mafia presents difficulties for our hypothetical draftsman.[3]

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individuals associated in fact although not a legal entity[.]" § 1961(4)).

3. For an overview of what organized criminals do, see Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 669–70 (1987).

With respect to what organized criminals do, first is the illicit commercial angle. Organized criminals make goods and services available that would otherwise be unavailable because they are illegal, like narcotics, gambling, and prostitution.[4] Second, they police their markets and rid them of rivals through murder and other violent acts.[5] Third, they corrupt law enforcement and other public officials through bribery and intimidation.[6] Fourth, they invest the proceeds of illegal activities in legitimate businesses, through which they may commit further illegal acts like money laundering and tax evasion by skimming profits.[7] Fifth, they muscle in on legitimate organizations like unions to gain access to pension funds and to take over lucrative lines of business like longshoring or trucking.[8] Sixth, they extract money from legitimate business through protection rackets or loansharking.[9] Seventh, they commit crimes like bank robberies and hijacking.[10]

To state these ranges of form and activity is to describe a difficult exercise in classification. Specifically, it is hard to design a statutory scheme that is broad enough to cover the target group without being so vague as to risk unconstitutionality. Some have argued that the latter is indeed the case with RICO.[11] But others have made a persuasive case that the statute, when drafted, was reasonably narrow and that any (or at least most) vagueness now inherent in it is a result of poor statutory construction in the courts.[12] It is thus worthwhile to consider the context in which RICO

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4. *Id.*

5. Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 254 (1984).

6. Lynch, *supra* note 3, at 734–36.

7. *Id.* at 669–70.

8. G. Robert Blakey & Ronald Goldstock, *"On the Waterfront": RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 343–46 (1980).

9. Leslie G. Kanter, *RICO's Unlawful Debt Collection Provision*, 52 BROOK. L. REV. 957, 968–69 (1987).

10. *See generally* JAY S. ALBANESE, ORGANIZED CRIME IN OUR TIMES (Janice Eccleston ed., 5th ed. 2007).

11. For a discussion on the potential constitutional weaknesses and vagueness of RICO's definition and application, see George C. Freeman, Jr. & Kyle E. McSlarrow, *RICO and the Due Process "Void for Vagueness" Test*, 45 BUS. LAW. 1003, 1008–10 (1990); Michael S. Kelley, *"Something Beyond": The Unconstitutional Vagueness of RICO's Pattern Requirement*, 40 CATH. U. L. REV. 331, 380–94 (1991); Jed S. Rakoff, *The Unconstitutionality of RICO*, N.Y. L.J., Jan. 11, 1990, at 3; Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 721–27 (1990).

12. *See* Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 815–17 (1990) [hereinafter Califa] (noting that legislative history reflects congressional intent to limit RICO's application, but these limits have been minimized through expansive judicial interpretation); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 294 (1983) (observing that "some judges . . . have strained to adopt broad constructions of RICO" with the result

was adopted, as well as fledgling judicial efforts to apply it. Against this backdrop, we will see that the United States Supreme Court's most recent interpretation of RICO's "enterprise" element was in some sense misguided, yet further unwarranted expansion is easily and mostly correctible by the very same "plain meaning" logic that led to error in the first place.

B. A Brief History of Organized Crime Legislation

In late 1949, a series of newspaper and magazine articles warned that a national crime syndicate was seizing control of America's major cities; these reports squared with the findings of local crime commissions in Chicago and California, which also found official corruption under the influence of syndicated crime.[13] At the time, there were few weapons in the federal arsenal to deploy against organized crime, and cries for federal assistance came from many quarters, including the mayors of Los Angeles, New Orleans, Portland, and other cities.[14] In response, on January 5, 1950, Senator Estes Kefauver of Tennessee introduced a resolution authorizing the Committee on the Judiciary to investigate interstate racketeering activities and the use of the facilities of interstate commerce for purposes of organized crime.[15] After much procedural and jurisdictional wrangling between Senate committees, the Special Committee to Investigate Organized Crime in Interstate Commerce was directed to study and investigate

> whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law . . . and, if so, the manner and extent to which, and the identity of the persons, firms, or corporations by which such utilization is being made . . . .[16]

The resolution specifically prohibited the committee from interfering in any way with the rights of the States to regulate gambling within their borders.[17]

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that "the scope of the RICO statute has been expanded far beyond what was intended by Congress.").

13. *Guide to the Records of the U.S. Senate at the National Archives: Chapter 18. Records of Select Committees, 1946–68*, THE CENTER FOR LEGISLATIVE ARCHIVES, http://www.archives.gov/legislative/guide/senate/chapter-18-1946-1968.html (last visited June 26, 2013).

14. *Id.*

15. *Id.*

16. S. Res. 202, 81st Cong. (1950).

17. *Guide to the Records of the U.S. Senate at the National Archives*, *supra* note 13.

For at least three (somewhat overlapping) reasons, the committee's work attracted considerable public interest. First, the subject matter was already high in the public's conscience; second, the committee held hearings throughout the country and summoned a number of high-profile political and underworld figures to testify; and third, the committee was the first to hold televised hearings.[18] Ultimately, the committee's work led to citations for contempt of the Senate against, among many others, the famous mobster Frank Costello and a host of local indictments against criminals and corrupt officials.[19] Along the way, the committee issued four reports, which in sum concluded nationwide organized crime syndicates did exist and that they had a corrupting influence on state and local government.[20] The committee also posited a number of possible legislative solutions, only one of which passed the Senate.[21]

Against this deep background, the direct legislative history of RICO begins in 1967 with the report of the President's Commission on Law Enforcement and Administration of Justice (popularly known as the Katzenbach Commission).[22] Analyses of the Commission's report are readily available elsewhere, so a short summary will do for our purposes. According to Judge Lynch,

> the report of the Katzenbach Commission is significant in the legislative history of the Organized Crime Control Act of 1970, because so many of the provisions of the act find their origins in recommendations of that body and, in particular, in the analysis performed by its task force on organized crime. Three aspects of the Commission's response to organized crime are particularly notable. First, despite occasional recognition of the diffuse nature of "organized criminal groups," the Commission clearly conceived of organized crime as a single entity and directed its primary attention toward a single target: the Italian syndicate it believed controlled organized crime throughout the United States. Second, the Commission saw as a prime aspect of the threat posed by this syndicate its increasing tendency to involve itself in legitimate business and union activities. Finally, while the Commission's conception of the menace of organized crime is

18. *Id.*

19. *Special Committee on Organized Crime in Interstate Commerce (The Kefauver Committee)*, U.S. SENATE HISTORICAL OFFICE, http://www.senate.gov/artandhistory/history/common/investigations/Kefauver.htm (last visited June 26, 2013).

20. *Guide to the Records of the U.S. Senate at the National Archives*, *supra* note 13.

21. *Id.*

22. Lynch, *supra* note 3, at 666.

> significant in understanding the thinking of those who drafted the RICO statute, the Commission itself did not recommend enactment of anything resembling RICO.[23]

Despite the immediate introduction of a flurry of anti-crime legislation in the wake of the Commission report, Congress took no action on the two bills generally acknowledged as RICO precursors, S. 2048 (preventing investment of unreported income in another business) and S. 2049 (preventing investment of income derived from specified crimes in a business).[24] The bills' sponsor, Senator Roman Hruska, emphasized the proposed legislation's usefulness in blocking the criminal penetration of legitimate business rather than the primary criminal acts associated with organized crime.[25] Indeed, as Lynch points out, the language chosen was broad enough to snare *anyone* investing ill-gotten proceeds in a business, not just Mafiosi.[26] But the legislation went nowhere, and it was left to the next Congress to take decisive action.

C. The Structure of RICO and the Importance of "Enterprise"

As I have argued elsewhere and will not belabor here, the structural complexity and expansive language of the RICO statute, when coupled with the different (and often competing) policy aims behind criminal law enforcement and civil litigation, have forced courts to interpret the statute in ways that would make it effective, yet bounded.[27] RICO thus presents two very different faces. Government prosecutions, on the one hand, look very much like what one would expect from an anti-racketeering, anti-Mafia statute: typical indictments target drug distribution rings, interstate bank-robbery gangs, or the organized infiltration of a union or pension fund.[28] Private RICO litigation, on the other hand, rarely turns on

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23. *Id.* at 672–73.
24. *Id.* at 673.
25. *Id.* at 674.
26. *Id.*
27. Randy D. Gordon, *Clarity and Confusion: RICO's Recent Trips to the United States Supreme Court*, 85 TUL. L. REV. 677 (2011) [hereinafter Gordon, *Clarity and Confusion*]; Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. §§ 1962(c) and 1964(c)*, 32 VT. L. REV. 171 (2007) [hereinafter Gordon, *Crimes That Count Twice*]; Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation Under 18 U.S.C. § 1962(c)*, 39 U.S.F. L. REV. 319 (2005) [hereinafter Gordon, *Rethinking Civil RICO*].
28. *E.g.*, Boyle v. United States, 556 U.S. 938, 941–42 (2009) (exhibiting the prosecution of a bank robbery gang); United States v. Daidone, 471 F.3d 371, 373 (2d Cir. 2006) (depicting a loansharking, extortion, witness tampering, and murder prosecution); United States v. Polanco, 145 F.3d 536, 538–39 (2d Cir. 1998) (providing an example of a gun and drug distribution, murder prosecution).

Hollywood-style mobster activity: typical complaints turn on allegations of fraud in insurance, franchise, or other commercial transactions.[29] But there is at least one thing that courts, commentators, and RICO practitioners (both civil and criminal) can agree on: the concept of "enterprise" is the *sine qua non* of any RICO claim and the characteristic that distinguishes a RICO claim from an ordinary tort or criminal claim.[30] Consequently, a failure sufficiently to allege an enterprise disables a claim under *any* substantive RICO theory.[31]

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29. *E.g.*, Hemi Group, LLC v. City of New York, 559 U.S. 1, 4-5 (2010) (showing fraud in connection with collection of sales taxes); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 643–45 (2008) (exhibiting fraud and bid rigging); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 454–55 (2006) (depicting fraud in connection with collection of sales taxes); *see also* Wal-Mart Stores, Inc. v. Watson, 94 F. Supp. 2d 1027, 1031 (W.D. Ark. 2000) ("'[A] high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims.'" (quoting Klehr v. A.O. Smith Corp., 521 U.S. 179, 191 (1997))). As of 1985, "of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% 'allegations of criminal activity of a type generally associated with professional criminals.'" Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 n.16 (quoting Arthur F. Mathews et al, *Report of the Ad Hoc Civil RICO Task Force*, ABA SECTION OF CORP., BANKING, & BUS. LAW 55–56 (1985)). Additionally, "[r]oughly two fifths of all civil actions under RICO are based on charges that the defendant committed mail or wire fraud." Horace D. Nalle, Jr., *Civil RICO Claims Predicated on Mail or Wire Fraud: The Indispensability of Reliance*, 109 BANKING L.J. 272, 272 (1992) (footnote omitted). However, in 2011 the Second Circuit held on a matter of first impression that the Private Securities Litigation Reform Act's RICO amendment bars a plaintiff from asserting a civil RICO claim based on predicate acts of securities fraud, including mail or wire fraud. *See* MLSMK Inv. Co. v. JP Morgan Chase & Co., 651 F.3d 268, 277 (2d Cir. 2011). This is true even if the plaintiff cannot pursue a separate, freestanding securities fraud claim against the defendant. *Id.*

30. *See* Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 794 (6th Cir. 2012) *cert. denied*, 133 S. Ct. 2735 (May 28, 2013) ("An association-in-fact enterprise 'require[s] a certain amount of organizational structure which eliminates simple conspiracies from the Act's reach.'"); Bonner v. Henderson, 147 F.3d 457, 459 (5th Cir. 1998) ("By the very language of the statute, the existence of an enterprise is an essential element of a RICO claim."); United States v. DeFries, 129 F.3d 1293, 1310 (D.C. Cir. 1997) (same); Chang v Chen, 80 F.3d 1293, 1298–99 (9th Cir. 1996), *overruled by* Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (noting that because the focus of RICO is on "organized" crime, an "organizational nexus" must be found at the heart of a scheme actionable under RICO); *see also* Gordon, *Crimes That Count Twice*, *supra* note 27, at 171–72; discussion *supra* Part IV.A. Whether an enterprise is required for liability under the conspiracy prong of § 1962(d) is not as certain. *See* United States v. Harris, 695 F.3d 1125, 1131 (10th Cir. 2012) (holding that on issue of first impression, "the existence of an enterprise is not an element of § 1962(d) conspiracy to commit a substantive RICO violation"); United States v. Applins, 637 F.3d 59, 75 (2d Cir. 2011) *cert. denied*, 132 S. Ct. 813 (2011).

31. *E.g.*, Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 120 (2d Cir. June 19, 2013) (dismissing § 1962(c) claim for failure to allege an "enterprise" separate from the RICO "person"); ISystems v. Spark Networks, Ltd., 10-10905, 2012 WL 3101672, at *5 (5th Cir. Mar. 21, 2012) (failure to plead functional separation between two entities is a "fail[ure] to allege a sufficiently distinct RICO 'enterprise' and therefore an actionable RICO claim");

But not only is the "enterprise" concept important to RICO jurisprudence, it has become paramount as other theories about RICO's interpretation and application have advanced and then fallen away. For example, early on, courts placed a gloss on RICO § 1964(c) that demanded pleading and proof of "racketeering injury."[32] But the Supreme Court, in *Sedima, S.P.R.L. v. Imrex Co.*, soon removed this and similar collars that the lower courts had placed on civil RICO.[33] Thereafter, the path was clear for plaintiffs to bring civil claims that had nothing to do with the prototypical crimes of gangsters (murder, arson, extortion, etc.); allegations of fraud facilitated by two uses of the mail or wires would be enough to get a party started.[34] With the dampers on RICO's civil scope removed, lower courts attempted to stanch the litigation flow in two ways. First, they began to give new bite to the civil-standing "by reason of" requirement of § 1964(c).[35] Second, they began to focus on the "enterprise" element of § 1962, especially when the plaintiff alleged that the enterprise was an "association in fact" (as opposed to a formal business organization like a corporation or partnership).[36]

Brunig v. Clark, 560 F.3d 292, 297 (5th Cir. 2009) ("In order to state a claim under RICO, a plaintiff must allege, among other elements, the existence of an enterprise."); *In re* Burzynski, 989 F.2d 733, 741 (5th Cir. 1993) ("Thus, RICO claims under all four subsections necessitate . . . an enterprise."). *But see* United States v. Harris, 695 F.3d 1125, 1131 (10th Cir. 2012) (holding no enterprise required for a § 1962(d) conspiracy claim); United States v. Applins, 637 F.3d 59, 75 (2d Cir. 2011) *cert. denied*, 132 S. Ct. 813 (2011)(same).

32. *E.g.*, Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 494–96 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985)(discussing an injury by reason of racketeering activity).

33. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

34. *See generally* Douglas E. Abrams, *Civil RICO's Cause of Action: The Landscape After* Sedima, 12 TUL. MAR. L.J. 19, 20–24 (1987) (describing the "explosion of civil RICO litigation" after the Sedima decision); David A. Furlow, *Civil RICO Comes to Texas: A Review of Civil RICO Jurisprudence in the Fifth Circuit and in the Federal District Courts of Texas*, 37 BAYLOR L. REV. 841, 852, 860 (1985)(same); John E. Grenier & Sally S. Reilly, *Civil RICO—The Scope of Coverage After* Sedima, 47 ALA. LAW. 260, 260–61 (1986) (same); William H. Rivoir, III, *Civil RICO—The Supreme Court Opens the Door to Commercial Litigation*, 90 COM. L.J. 621, 621–22 (1985)(same).

35. *E.g.*, Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 477 (2006) ("[I]t [is] fair to interpret the broad language 'by reason of' as meaning, in all civil RICO cases, that the violation must be both the cause-in-fact and the proximate cause of the plaintiff's injury."); Regions Bank v. J.R. Oil Co., 387 F.3d 721, 728–29 (8th Cir. 2004) (interpreting the "by reason of" requirement to mean "causation under the traditional 'tort requirements of proximate or legal causation, as opposed to mere factual or 'but for' causation'" (quoting Bieter Co. v. Blomquist, 987 F.2d 1319, 1325 (8th Cir. 1993))); *see also* Laura Gingera, *Causation and Civil RICO Standing: When is a Plaintiff Injured "by Reason of" a RICO Violation?*, 64 ST. JOHN'S L. REV. 849, 850–51, 864–66 (1990) (discussing the various interpretations by lower courts of the "by reason of" requirement after *Sedima*).

36. *See, e.g.*, Bachman v. Bear, Stearns & Co., 178 F.3d 930, 932 (7th Cir. 1999)

II. *TURKETTE*, *BOYLE*, AND THE PROBLEM OF ASSOCIATION-IN-FACT ENTERPRISES

A. Foundational Principles: Turkette

Novia Turkette, Jr. and twelve others were charged with, among other things, violating RICO § 1962(c) by operating an association-in-fact enterprise through a pattern of racketeering that included drug trafficking, arson, fraud, influencing state trials, and bribing police.[37] Turkette was convicted and appealed to the First Circuit, arguing that RICO "was intended to protect legitimate business enterprises from being preyed upon and taken over by racketeers."[38] And, since the association in fact was "completely criminal," "RICO does not apply."[39] After an exhaustive reading of the statute and its legislative history (which we will consider below), the First Circuit agreed and held that a wholly criminal enterprise did not fit within the definition set forth in § 1961(4).[40]

The Supreme Court disagreed, finding that:

> [t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.[41]

(finding that although defendants were involved in a conspiracy, "it is not an enterprise unless every conspiracy is also an enterprise for RICO purposes, which the case law denies"); Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995) ("[A]ssociation-in-fact enterprise 1) must have an existence separate and apart from the pattern of racketeering, 2) must be an ongoing organization and 3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure."); Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir. 1989) (requiring plaintiffs to "plead specific facts which establish that the association exists for purposes other than simply to commit the predicate acts").

37. United States v. Turkette, 632 F.2d 896, 897 (1st Cir. 1980).

38. *Id.* at 898.

39. *Id.*

40. *Id.* at 899.

41. United States v. Turkette, 452 U.S. 576, 580–81 (1981). One of the leading commentators labels the Court's positions as "absurd," failing to "concede the obvious," and otherwise inadequate. DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO ¶ 3.02[4] (Matthew Bender 2013) [hereinafter SMITH & REED].

Although it framed its reasoning for this conclusion in terms of language, statutory structure, and legislative history, one leaves the opinion with an abiding sense that the Court made a *policy* decision to read § 1961(4) broadly. We see traces of this in the passages considering the consequences of the First Circuits holding: e.g., "[w]hole areas of organized criminal activity would be placed beyond the substantive reach of the enactment."[42] But, as Lawrence Solan astutely observed, "it is wrong to say that 'enterprise' could not be understood to include only legitimate businesses. Generally speaking, that is how the word is used, and the statute's definition is not really very helpful."[43]

B. The Latest Word: Boyle

In 2009, the Supreme Court revisited its holding in *Turkette* and "clarified" it in a way that broadened the scope of associations-in-fact beyond the scope that had persisted in many lower courts for decades.[44] *Boyle* arrived at the Supreme Court framed as a disagreement over the adequacy of a jury instruction given in a criminal RICO trial.[45] The instruction at issue purported to set forth the standards for establishing the "enterprise" element of a RICO claim through an "association in fact."[46] For purposes of deciding the case, the Court stated the question presented as "whether an association-in-fact enterprise must have 'an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.'"[47] For an answer, the Court offered the oracular statement that "such an enterprise must have a 'structure' but that an instruction framed in this precise language is not necessary."[48] What is necessary is something still being sorted out in the lower courts, but there is no doubt that the Court's reasoning leading up to the holding will prove challenging to the tried-and-true defense that an association-in-fact enterprise must look much different from a conspiracy.

After *Turkette*, lower courts were left to wonder whether the range of "illegitimate" associations in fact could cover something like an ordinary "conspiracy" or whether something more complicated like the Mafia was

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42. *Turkette*, 452 U.S. at 589.

43. LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 79 (1993) [hereinafter SOLAN].

44. *See* Gordon, *Clarity and Confusion*, *supra* note 27, at 701–08 (describing the impact that the *Boyle* decision had on the RICO issue). The discussion of *Boyle* that follows here is an abbreviated, updated, and lightly edited version of this article.

45. Boyle v. United States, 556 U.S. 938, 942–43 (2009).

46. *Id.*

47. *Id.* at 945.

48. *Id.* at 941.

required.[49] Most lower courts thought that it meant the latter and developed standards for identifying true "associations"—i.e., gangs that shared at least something of the Mafia's structure of dons, capos, wiseguys, etc.[50] Accordingly, many courts held that an association-in-fact enterprise must have an existence separate and apart from the pattern of racketeering, be an ongoing organization, and function as a continuing unit as shown by a hierarchical or consensual decision making structure.[51]

In *Boyle*, the Court opined that the question before it ("whether an association-in-fact enterprise must have 'an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages[]'")[52] required three separate inquiries: "First, must an association-in-fact enterprise have a 'structure'? Second, must the structure be 'ascertainable'? Third, must the 'structure' go 'beyond that inherent in the pattern of racketeering activity' in which its members engage?"[53] The Court agreed that an association in fact must have a structure.[54] But to define that structure, the Court simply turned to an ordinary dictionary and picked a generic definition: "[i]n the sense relevant here, the term 'structure' means '[t]he way in which parts are arranged or put together to form a whole' and '[t]he interrelation or arrangement of parts in a complex entity.'"[55] Against this standard, then, an association-in-fact enterprise must have at least three features: "[1] a purpose, [2] relationships among those associated with the enterprise, and [3] longevity sufficient to permit these associates to pursue the enterprise's purpose."[56] Once again, though, and despite *Turkette*, not everyone agreed that the text of § 1961(4) demands such a loose reading. Thus, Justice Stevens, in dissent, argued

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49. *See* 18 U.S.C. § 1961(4) (2006) ("[E]nterprise includes . . . any union or group of individuals *associated in fact* although not a legal entity.") (emphasis added).

50. *See e.g.*, United States v. Urban, 404 F.3d 754, 770 (3d Cir. 2005) (An enterprise requires proof "(1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise be separate and apart from the pattern of activity in which it engages.") (quoting United States v. Irizarry, 341 F.3d 273, 286 (3d Cir. 2003)); United States v. Kragness, 830 F.2d 842, 855 (8th Cir. 1987) (finding that an enterprise requires "some continuity of structure and of personnel" and "an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity"). *But see, e.g.*, United States v. Goldin Indus. Inc., 219 F.3d 1271, 1275 (11th Cir. 2000) (finding that an enterprise is "an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes").

51. Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995); Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 433 (5th Cir. 1990).

52. Boyle v. United States, 556 U.S. 938, 945 (2009).

53. *Id.*

54. *Id.* at 945–46.

55. *Id.* (quoting AMERICAN HERITAGE DICTIONARY 1718 (4th ed. 2000)).

56. *Id.*

that associations in fact can only be "business-like entities that have an existence apart from the predicate acts committed by their employees or associates."[57]

It is clear from the statute and our earlier decisions construing the term that Congress used "enterprise" in these provisions in the sense of "a business organization," rather than "a 'venture,' 'undertaking,' or 'project.'" First, the terms "individual, partnership, corporation, association, or other legal entity" describe entities with formal legal structures most commonly established for business purposes. In context, the subsequent reference to any "union or group of individuals associated in fact *although not a legal entity*" reflects an intended commonality between the legal and nonlegal entities included in the provision. "The juxtaposition of the two phrases suggests that 'associated in fact' just means structured without the aid of legally defined structural forms such as the business corporation."[58]

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57. *Id.* at 952 (Stevens, J., dissenting).

58. *Id.* at 952–53 (citations omitted). To show the existence of an enterprise as a separate RICO element, courts pre-*Boyle* would often hold that "[p]laintiffs . . . need to 'plead specific facts which establish that the association exists for *purposes other than simply to commit the predicate acts*.'" Rivera v. AT&T Corp., 141 F. Supp. 2d 719, 726 (S.D. Tex. 2001) (emphasis added). Some version of this rule may yet obtain, even though *Boyle* has relaxed the standards for proving the structure of a RICO enterprise in the criminal context. At least one court has gone so far as to limit *Boyle* to jury instructions only. CIT Grp/ Equip. Fin., Inc. v. Krones, Inc., No. 9-432, 2009 WL 3579037, at *8 n.10 (W.D. Pa. Sept. 16, 2009) ("Defendants' reliance on the *Boyle* decision for the proposition that a plaintiff must plead structural features related to an association in fact enterprise [is] misplaced. The *Boyle* court addressed the inadequacy of a jury instruction, not a pleading."). This is to say that a failure to show that the *enterprise* (as opposed to its individual members) has a function other than to effectuate the alleged scheme may still be fatal to a civil RICO claim. *See, e.g.*, Tipton v. Northrop Grumman Corp., No. 08-1267, 2009 WL 2914365, at *12 (E.D. La. Sept. 2, 2009) (after noting *Boyle*, holding that the plaintiffs' failure "to allege the existence of an enterprise separate and apart from the pattern of racketeering" "is fatal to [their] RICO claims"); *Rivera*, 141 F. Supp. 2d at 726 ("Plaintiffs' allegations establish exactly the opposite: that any association between Tele-Communications, Inc., AT&T Corporation, and Time Warner, Inc. exists merely for the purposes of providing cable services in exchange for a monthly fee."). After *Boyle*, however, some courts appear more willing to infer the existence of an enterprise "separate and apart" from the racketeering activities, as suggested by the Court. *See* County of El Paso v. Jones, No. EP-09-CV-00119-KC, 2009 WL 4730305, at *18 (W.D. Tex. Dec. 4, 2009) (giving an example of an enterprise that was found to be separate from racketeering activities.). In *County of El Paso*, the court held that the plaintiff sufficiently alleged the existence of an enterprise "separate and apart" from the alleged racketeering activities, but noted that even if the County failed to allege an existence separate and apart from Defendants' alleged racketeering activities, it is not clear that this would prove fatal to its claim. Because Defendants' "consulting services" organization functioned through its commission of the predicate racketeering acts, the evidence establishing the association-in-fact and the pattern of racketeering activity in the instant case may 'coalesce.'

The majority disagreed and—over time—the greatest repercussions of the case will no doubt be felt in the "beyond that inherent in the pattern of racketeering activity" issue.[59] The Court suggested:

> This phrase may be interpreted in least two different ways, and its correctness depends on the particular sense in which the phrase is used. If the phrase is interpreted to mean that the existence of an enterprise is a separate element that must be proved, it is of course correct. . . . On the other hand, if the phrase is used to mean that the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity, it is incorrect.[60]

With one stroke, then, the Court eviscerated the holdings of scores of cases in which lower courts had held that there must be a sharp distinction between the alleged associational enterprise and the predicate acts.[61] And, among other things, the Court may well have undermined a good many cases holding that a mere "conspiracy" is not the same as an association-in-fact enterprise.[62] Nonetheless, there are still good reasons (even within

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Id. (citing Boyle v. United States, 556 U.S. 938, 947 (2009)). But even if not, *Boyle* leaves no doubt that an actionable association-in-fact enterprise must exhibit at least two district characteristics: namely, that it is an "ongoing organization" that functions as a "continuing unit." *See* Boyle v. United States, 556 U.S. 938, 951 (2009) (defining the nature of an association in fact enterprise).

59. *Boyle*, 556 U.S. at 947.

60. *Id.*

61. *E.g.*, Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797, 804–05 (7th Cir. 2008) (holding that the plaintiff's complaint failed to identify the structure of an alleged enterprise, and "[w]ithout a requirement of structure, 'enterprise' collapses to 'conspiracy'"); Walker v. Jackson Pub. Sch., 42 Fed. App'x 735, 737–38 (6th Cir. 2002) (affirming district court's dismissal due to a lack of evidence of chain of command or hierarchy); VanDenBroeck v. CommonPoint Mortg. Co., 210 F.3d 696, 699 (6th Cir. 2000), *abrogated on other grounds by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008)) (plaintiff must show formal or informal association as part of a continuing unit separate and apart from the commission of racketeering activity); Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808, 815–16 (8th Cir. 1992) (agreeing with the district court that the plaintiff "failed to allege an enterprise distinct from the alleged pattern of racketeering activity" because "[t]he only common factor that linked all these parties together and defined them as a distinct group was their direct or indirect participation in [the defendant's] scheme to defraud [the plaintiff]"); Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 748 (5th Cir. 1989) (an enterprise must be an entity separate and apart from the pattern in which it engages). *But see* Odom v. Microsoft Corp., 486 F.3d 541, 549–51 (9th Cir. 2007) (noting the circuit split and finding that an associated-in-fact enterprise "does not require any particular organization structure, separate or otherwise").

62. *See Boyle*, 556 U.S. at 950 ("Finally, while in practice the elements of a violation of §§1962(c) and (d) are similar, this overlap would persist even if petitioner's conception of an association-in-fact enterprise were accepted."); *id.* at 957 (Stevens, J., dissenting) ("By

Boyle) to believe that an ordinary civil conspiracy should not qualify for treatment as an enterprise.[63] After all, Boyle ran a gang of bank robbers. This fits comfortably within even a lay view of a criminal enterprise. But that is not what one typically sees in a civil RICO case.[64] There, more often than not, the alleged association in fact is a group of corporations (or corporations and individuals), not a "gang."[65]

III. POST-*BOYLE* DECISIONS

Although post-*Boyle* cases will need to percolate for several years in the lower courts before anything like a consensus on its ultimate meaning emerges, the two following cases, which are representative in many respects, reveal the types of problems that *Boyle* is likely to cause in civil litigation. Once those cases are closely read, we will examine the deep interpretative issues behind these problems. At that point, we will be poised to take up the task of actually interpreting § 1961(4) to see if it supports a reading that would include a corporation as part of an association in fact.

A. The "Contingent Commission" Cases

In what is probably the most significant post-*Boyle* civil case, the Third Circuit released a long-awaited opinion in the matter popularly

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permitting the Government to prove [pattern and enterprise] with the same evidence, the Court renders the enterprise requirement essentially meaningless in association-in-fact cases. It also threatens to make that category of § 1962(c) offenses indistinguishable from conspiracies to commit predicate acts, as the only remaining difference is § 1962(c)'s pattern requirement."); *see e.g.*, Bachman v. Bear, Stearns & Co., Inc., 178 F.3d 930, 932 (7th Cir. 1999) (mere conspiracy to commit racketeering not sufficient to establish association-in-fact enterprise, rather some formal or informal organizational structure apart from the alleged conspiracy to defraud is required).

63. *See, e.g.*, *Bachman*, 178 F.3d at 932 ("That is a conspiracy, but it is not an enterprise unless every conspiracy is also an enterprise for RICO purposes, which the case law denies."); *see also Boyle*, 556 U.S. at 950 ("Section 1962(c) demands much more [than proof of an ordinary conspiracy]: the creation of an 'enterprise'—a group with a common purpose and course of conduct—and the actual commission of a pattern of predicate offenses.").

64. *See supra* note 29 and accompanying text (discussing Private RICO litigation).

65. *E.g.*, Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 787 (6th Cir. 2012) (insurance companies, law firms, lawyers, and insurance agents found to be a RICO enterprise), *cert. denied*, 133 S. Ct. 2735 (May 28, 2013); United States v. Console, 13 F.3d 641, 652 (3d Cir.1993) (holding an association-in-fact RICO enterprise existed between a law firm and a medical practice), *cert. denied*, 511 U.S. 1076 (1994); United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir.1993) (holding a group or union consisting solely of corporations or other legal entities can constitute an "associated in fact" enterprise).

known as the "Contingent Commission" cases.[66] The facts of the Contingent Commission cases are difficult to capsule, but the overarching allegation is that a group of insurance brokers conspired to funnel their clients to co-conspiring insurers, which benefited each of the parties in particular ways.[67] The insurers "bid" for insurance business but were insulated from competition through devices like the submission of dummy offers.[68] The brokers benefited because the insurers paid them "contingent commissions" based on the volume of business steered their way.[69] The insured customers suffered offsetting detriments–they paid premiums that were both rigged and surreptitiously larded with the contingent commissions.[70] Against this backdrop, the plaintiffs claimed Sherman and RICO Act violations, as well as state-law claims.[71]

The plaintiffs brought their RICO claims under two subsections of the Act, §§ 1962(c) and (d).[72] Section 1962(c), as we have already noted, 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 . . . ."[73] Section 1962(d) makes it unlawful "for any person to conspire to violate" § 1962(c).[74] The defendants' arguments were that the plaintiffs (1) had not pled a cognizable enterprise, (2) had not adequately alleged that the defendants had "conducted" the affairs of an enterprise, and (3) did not identify a "pattern of racketeering acts."[75] And because the § 1962(c) claim failed, the § 1962(d) claim—because it is derivative—failed automatically.[76] The Third Circuit took most of these issues up in turn, but left the "pattern" arguments for later decision by the district court.

1. The Alleged Enterprises

The Contingent Commission plaintiffs alleged both types of enterprise defined in § 1961(4) (i.e., legal entities like corporations and partnerships and less formal "associations in fact").[77] The first category consisted of

66. *In re* Ins. Brokerage Antitrust Lit., 618 F.3d 300 (3d Cir. 2010).
67. *Id.* at 308.
68. *Id.* at 312.
69. *Id.* at 308.
70. *Id.*
71. *Id.* at 309.
72. *Id.*
73. 18 U.S.C. § 1962(c) (2006).
74. *Id.* § 1962(d).
75. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 364 (3d Cir. 2010).
76. *Id.*
77. *Id.* at 363.

"broker-centered" enterprises—i.e., each defendant broker and its insurer-partners made up a separate enterprise.[78] The plaintiffs also alleged that a formal legal entity, a trade association called the Council of Insurance Agents and Brokers (CIAB), was an enterprise.[79] The Third Circuit looked at each category separately, and did so in the context of important recent developments at the United States Supreme Court, both procedural and substantive. First, the court confirmed that *Twombly*'s heightened pleading standard applies not just in antitrust cases but to RICO cases as well and—more important—to pleading the "enterprise" element.[80] Second, the court acknowledged that the *Boyle* case significantly relaxed the standard for establishing an association-in-fact enterprise.[81] Reading these cases together, the court stated that "it is clear after *Twombly* that a RICO claim must plead facts plausibly implying the existence of an enterprise with the structural attributes identified in *Boyle*: a shared 'purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.'"[82]

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78. *Id.*

79. *Id.*

80. *Id.* at 369–70; *see also* Rao v. BP Products N. Am., Inc., 589 F.3d 389, 400 (7th Cir. 2009) (finding boilerplate allegations of an association-in-fact enterprise failed to satisfy *Twombly*'s heightened pleading standard); Smartix Int'l Corp. v. MasterCard Int'l LLC, 355 Fed. Appx. 464, 466 (2d Cir. 2009) ("To survive a motion to dismiss, a plaintiff must sufficiently plead [the required elements for a § 1962(c) violation] to meet the standards set forth in *Twombly* and *Iqbal*."); Ozbakir v. Scotti, 764 F. Supp. 2d 556, 570 (W.D.N.Y. 2011) ("Plaintiffs' attempt to transform this single scheme of limited duration into a RICO enterprise, by broadly alleging that multiple acts of racketeering took place during the scheme, fails to meet the RICO pleading standards, particularly under *Twombly* and *Iqbal*."); Jackson v. Sedgwick Claims Mgmt. Servs., Inc., No. 09-11529, 2010 WL 931864, at *22–25 (E.D. Mich. Mar. 11, 2010) ("Although Plaintiffs allege a number of different possible enterprises, they have not arguably alleged one plausible enterprise."); *see generally* Gross v. Waywell, 628 F. Supp. 2d 475, 494–95 (S.D.N.Y. 2009) ("Plaintiffs' reliance on 'mail and/or wire fraud' as the predicate offenses, by operation of *Twombly*'s plausibility test and the particularity requirement of Federal Rule of Civil Procedure 9(b)('Rule 9(b)'), demands greater specificity in the pleadings. Such particularity would require more details regarding the alleged predicate acts in which each particular defendant was directly or indirectly involved or had responsibility, as well as information concerning where, when and by which defendant any representations involved in the alleged fraudulent scheme constituting deception of Plaintiffs were communicated by use of the mail and/or wires, and how such statements actually deceived Plaintiffs."). The court in *Gross* also analyzed 145 reported decisions of civil RICO claims from 2004 to 2007 and found that of the thirty-six cases resolved on the merits, thirty were dismissed under Rule 12(b)(6), three by the court *sua sponte*, and three under Rule 56; all decisions appealed to the Second Circuit were affirmed. *Id.* at 480.

81. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 368.

82. *Id.* at 369–70.

i. Associations in Fact—The broker-centered enterprises

As noted above, the plaintiffs alleged six associations in fact, each consisting of a broker and the network of insurers with whom it had formed a "strategic partnership." The plaintiffs' position was that—at the pleading stage—they were required to do no more than identify the members of each alleged enterprise.[83] The Third Circuit disagreed, and used a somewhat novel analysis. First, it suggested that "[t]he enterprise element of RICO claims is a close analogue of [Sherman Act] § 1's agreement element."[84] Second, it applied this logic to the plaintiffs' enterprise allegations and found them—with one exception discussed below—wanting because a mere hub-and-spoke association or conspiracy allegation is insufficient, absent an enclosing rim of horizontal associations or agreements:

> In our analysis of the antitrust claims, we determined that, with the exception of the alleged Marsh-centered commercial conspiracy, the facts alleged in the complaints do not plausibly imply a horizontal agreement among the insurer-partners. In seeking to establish a "rim" enclosing the insurer-partners in the alleged RICO enterprises, plaintiffs rely on the same allegations we found deficient in the antitrust context: that each insurer entered into a similar contingent-commission agreement in order to become a "strategic partner" [and undertook other agreements with the broker]. . . . As noted, these allegations do not plausibly imply concerted action—as opposed to merely parallel conduct—by the insurers, and therefore cannot provide a "rim" enclosing the "spokes" of these alleged "hub-and-spoke" enterprises.[85]

Thus, the Third Circuit concluded, "[e]ven under the relatively undemanding standard of *Boyle*, these allegations do not adequately plead an association-in-fact enterprise. They fail the basic requirement that the components function as a unit, that they 'be put together to form a whole.'"[86]

The Third Circuit did, however, reach a different conclusion with respect to the "Marsh-centered enterprise."[87] The principal difference was factual—namely, the plaintiffs had pled (and provided evidence) that the insurer-defendants associated with Marsh had rigged bids, which added a horizontal dimension to the enterprise.[88] This was buttressed by

83. *Id.* at 369.
84. *Id.* at 370.
85. *Id.* at 374.
86. *Id.*
87. *Id.* at 375.
88. *Id.*

allegations, for example, of a hierarchical structure under which Marsh created a "brokering plan" with which it would decide which insurers would submit sham bids on which transactions.[89] All this, in the court's view, was sufficient to push the Marsh-centered enterprise well over the *Boyle* line.[90]

ii. Legal entity—The CIAB Enterprise

The Third Circuit quickly agreed with the district court that "CIAB, a legal entity, was an enterprise."[91] The plaintiffs' argument with respect to CIAB was that CIAB afforded an "opportunity" or "forum" for defendants to plan and advance their schemes.[92] But the court held that "[a]vailing oneself of a forum provided by an enterprise does not, without more, plausibly imply that one has participated in the conduct of that enterprise's affairs."[93] The court did note, nonetheless, that the complaint could reasonably be read to allege facts that presented a "closer question."[94] Specifically, the plaintiffs asserted that the defendants had used the CIAB's "institutional machinery" to formulate strategy and issue statements that furthered the alleged fraudulent acts.[95] These allegations raised other legal issues under RICO that had not been squarely addressed on appeal, so the court vacated the dismissal and commended them to the district court for evaluation.[96]

iii. The Marsh-centered enterprise

In one of the (relatively few) troubling holdings in the case, the Third Circuit found a sufficient nexus between the defendants' acts and the conduct of the enterprise.[97] In reasoning that appears circular, the court

89. *Id.* at 375–76.

90. *Id.* at 376. The court noted that "[i]n at least one sense, plaintiffs' allegations regarding the 'Marsh-centered enterprise' exceed[ed] Boyle's requirements," since the plaintiffs had alleged an organized, hierarchical structure while *Boyle* had allowed a "loosely and informally organized" enterprise. *Id.* (quoting Boyle v. United States, 556 U.S. 938, 941 (2009)).

91. *Id.* at 379.

92. *Id.*

93. *Id.* at 381.

94. *Id.*

95. *Id.*

96. *Id.* at 381–83. The Court also vacated the dismissal of the § 1962(d) claims to the extent that they were based on the two enterprises that survived appeal. *Id.* at 383.

97. *Id.* at 378–79. The court stated that "[m]ere association with an enterprise does not violate § 1962(c). To be liable under this provision, a defendant must 'conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern

stated that

> [i]t will often be the case that the interests of the enterprise are congruent with those of its members; such congruence presumably provides the incentive for members to participate in the enterprise. We think, therefore, that "if defendants band together to commit [violations] they cannot accomplish alone . . . then they cumulatively are conducting the association-in-fact *enterprise's* affairs, and not [simply] their *own* affairs."[98]

Against this low standard, the court had no trouble finding that the plaintiffs cleared it: "defendants' alleged collaboration in the Marsh-centered enterprise, most notably the bid rigging, allowed them to deceive insurance purchasers in a way not likely without such collusion"; these activities constitute "participation in the conduct of the enterprise."[99]

B. Gonzalez v. Bank of America Insurance Services

In *Gonzalez v. Bank of America Insurance Services*, the plaintiff sued nine legal entities for fraud based RICO violations on behalf of a nationwide class.[100] He also named the nine defendants as an association-in-fact enterprise.[101] In his pleading, Gonzalez alleged that he was a Mexican immigrant who opened an account at Bank of America.[102] The gravamen of his complaint was that the defendants engaged in a wide-reaching scheme to illegally sell inferior insurance products to Bank of America customers.[103]

In his amended complaint, Gonzalez first alleged that Bank of America identified lower-income Spanish-speaking customers as potential

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of racketeering activity.'" *Id.* at 370–71 (quoting 18 U.S.C. § 1962(c) (2006)). This "conduct" element "requires a defendant to 'have some part in directing those affairs.'" *Id.* at 371 (quoting Reves v. Ernst & Young, 507 U.S. 170, 179 (1993)). In other words, a defendant must have "participated in the operation or management of the enterprise itself." *Id.* (quoting *Reves*, 507 U.S. at 183). Defendants argued that Plaintiffs had not made this showing with respect to either the Marsh-centered enterprise or CIAB.

98. *Id.* at 378 (emphasis in original)(quoting Gregory P. Joseph, CIVIL RICO: A DEFINITIVE GUIDE 332 (3d ed. 2010)).

99. *Id.* In a footnote, the Court undercut its holding by stating, "[w]hether plaintiffs have adequately alleged that defendants participated in the conduct of the Marsh-centered enterprise's affairs 'through a pattern of racketeering activity' is, of course, another matter." *Id.* at n.79. One could argue that it is not "another matter" but is the heart of the matter.

100. Gonzalez v. Bank of Am. Ins. Servs., Inc., 454 Fed. App'x 295, 297 (5th Cir. 2011). By way of disclosure, I was one of counsel in the District Court proceedings.

101. Gonzalez v. Bank of Am., Civil Action H-09-2946, 2011 U.S. Dist. LEXIS 16963, at *19–20 (S.D. Tex. Feb. 20, 2011).

102. *Gonzalez*, 454 Fed. App'x at 296–97.

103. *Id.* at 297.

targets and then conveyed information about these customers to one or more of the other defendants.[104] Gonzalez claimed this information transfer violated the deposit agreement (via a privacy policy incorporated by reference) that customers sign with the bank when they open their accounts.[105] Once the customer information was in hand, a telemarketing company, often one of the defendants, contacted the targeted individuals and offered them death and disability insurance.[106] These telemarketers purportedly used "misleading sales techniques, such as misrepresenting the premium and coverage amounts, the availability of coverage, acting as though they were affiliated with Bank of America, and enrolling individuals despite only receiving a request for more information."[107] In any event, according to plaintiff, the issued insurance policies were underwritten by one of the affiliated insurer defendants and were inferior and overpriced.[108] As a result of these business practices, Gonzalez alleged that he and other potential class members were damaged by the amount of money that was electronically withdrawn from their bank accounts, or by the amount the premiums exceeded the actual value of the insurance.[109]

As the Fifth Circuit noted, although the plaintiff alleged "a litany of allegations about the general business practices of the various Defendants," he said almost nothing about his own interactions with the defendant companies, or about anything that any of the defendants did *to him*.[110] Indeed, all he alleged about his situation was that he opened a bank account at the bank on an undisclosed date, that a telemarketer contacted him and persuaded him to purchase insurance, and that premium withdrawals were taken from his account.[111]

The district court dismissed the RICO claim on multiple grounds.[112] With respect to the enterprise element, the court applied pre-*Boyle* Fifth Circuit law that required a plaintiff to plead "facts showing that . . . [the enterprise] (a) has an existence separate and apart from the pattern of racketeering, (b) is an ongoing organization, and (c) functions as a continuing unit as shown by a hierarchical or consensual decision making structure."[113] On appeal, the Fifth Circuit took a broader tack and—after

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. Gonzalez v. Bank of Am., No. H-09-2946, 2011 U.S. Dist. LEXIS 16963, at *15–21 (S.D. Tex. Feb. 20, 2011).
113. *Id.* at *20 (citing Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995)).

agreeing that there was no personal jurisdiction over one of the nine defendants—held that, among other things, Gonzalez failed to make out a cognizable case for the fraud upon which he predicated his case:

> In its opinion dismissing the amended complaint, the district court found that Plaintiff-Appellant Gonzalez failed to state a claim because he did not make any individual allegations and because the conduct alleged to have been taken against him is not actionable. Having reviewed the record below and the briefing on appeal, we find no error in the district court's decision to dismiss Gonzalez's claims on the merits under Rules 9(b) and 12(b)(6). As noted by the district court, Gonzalez's amended complaint contains almost no allegations about events or actions affecting him. Although the amended complaint is replete with generalized allegations of wrongful conduct, Gonzalez fails to allege facts indicating that Defendants-Appellees acted in an actionable manner towards him personally. Because Gonzalez does not allege that he personally is entitled to any relief, we also agree with the district court's ruling that Gonzalez fails to adequately state a claim against the remaining Defendants-Appellees.[114]

The district court saw the case as a "waste of the public's and defendant's resources,"[115] an attempt to "RICO-ize"[116] an ordinary commercial relationship: "Gonzalez's complaint is a 32-page mask of conclusion to cover its emptiness. It is unorganized, imprecise, and contradictory—amounting to nothing more than a populist press release to reap rewards from an ordinary, proper consumer relationship that he and others may have made."[117] But what if, hypothetically, Gonzalez had been able to show facts as to who, what, when, where, and why that were sufficient to state a fraud claim? Under *Boyle*, the district court's analysis of the enterprise would be found wanting, although—as I have argued elsewhere with respect to a case presenting similar facts[118]—the *Gonzalez*

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114. *Gonzalez*, 454 Fed. App'x at 301.

115. *Gonzalez*, 2011 U.S. Dist. LEXIS 16963, at *25.

116. Justice Breyer used this verbalization at oral argument in *Mohawk Industries, Inc. v. Williams* to describe the consequences of reading "group of corporation" into § 1961(4). *See* Transcript of Oral Argument at 44, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (No. 05-465), 2006 WL 1194498, at *44 [hereinafter Mohawk Transcript] (providing transcript of the oral argument before the Supreme Court).

117. *Gonzalez*, 2011 U.S. Dist. LEXIS 16963, at *25.

118. Gordon, *Clarity and Confusion*, *supra* note 27, at 711–15. The Seventh Circuit's decision in *Crichton v. Golden Rule Ins. Co.* is also illustrative of the problems inherent in open-ended or otherwise casually stated associational enterprise allegations. 576 F.3d 392 (7th Cir. 2009). In *Golden Rule*, the plaintiff purchased insurance under a "master policy"

enterprise should still fail.[119] But should courts and defendants even have to face and fend off a RICO case built on the sands of an enterprise consisting solely of corporate entities?

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offered to members of a consumer and traveler organization (the "Federation"). *Id.* at 394. He later sued the insurer, Golden Rule, on behalf of a nationwide class; the gist of his claims—which included a RICO claim—was that Golden Rule did not adequately disclose the cost of his premiums. *Id.* at 394–95. In connection with his RICO claim the plaintiff alleged, alternatively, that Golden Rule and the Federation constituted an association-in-fact. *Id.* at 398–99. The Court was unpersuaded, holding that "an association-in-fact enterprise must be meaningfully distinct from the entities that comprise it such that the entity sought to be held liable can be said to have controlled and conducted the enterprise rather than its own affairs." *Id.* at 399. Indeed, the plaintiff had "done no more than describe the ordinary operation of a garden-variety marketing arrangement between Golden Rule and the Federation" which "is not what RICO penalizes." *Id.* at 400. Accordingly, the Seventh Circuit rejected the plaintiff's theory, holding that "[t]his is insufficient to state a RICO claim based on an association-in-fact enterprise." *Id.*; *see also In re* McCann, 268 F. App'x 359, 366 (5th Cir. 2008) (stating that members of alleged association-in-fact were "merely partners in a scheme"); Warnock v. State Farm Mut. Auto. Ins. Co., 833 F. Supp. 2d 604, 612 (S.D. Miss. 2011) (finding that law firm improperly filing subrogation claims on behalf of insurance company was company's agent and relationship existed solely to commit predicate acts); Gray v. Upchurch, No. 5:05-cv-210-KS-MTP, 2007 WL 2258906, at *4 (S.D. Miss. Aug. 30, 2007) (holding that allegation that mortgage lenders "knew or should have known" that loans they made were part of fraudulent scheme was insufficient to establish existence of or control over enterprise); Do v. Pilgrim's Pride Corp., 512 F. Supp. 2d 764, 769 (E.D. Tex. 2007) (concluding that "standard business arrangements" between agribusiness and bank did not constitute "continuous RICO enterprise"). *Cf.* Negrete v. Allianz Life Ins. Co. of N. Am., No. CV 05-6838 CAS MANX, 2011 WL 4852314, at *8 (C.D. Cal. Oct. 13, 2011) (finding *Golden Rule Ins. Co.* inapposite because insurance company Allianz's coordination with and control over insurance marketing organizations far exceeded the mere 'conduit' scenario alleged in *Golden Rule*).

119. Even if a plaintiff sufficiently pleads the existence of an enterprise, his § 1962(c) RICO claims will still fail if he does not allege that the "defendants conducted or participated in the conduct of the '*enterprises*' affairs,' not just their *own* affairs." Reves v. Ernst & Young, 507 U.S. 170, 185 (1993). This requires the plaintiff to plead and prove that each of the defendants participated in the "operation" or "management" of the enterprise to the degree that it has "*some* part in directing the enterprise's affairs." *Id.* at 179; *see* Able Sec. and Patrol, LLC. v. Louisiana, 569 F. Supp. 2d 617, 629 (E.D. La. 2008) (holding that plaintiff must plead "how each of these defendants performed acts in furtherance of the enterprise."). This requires "more than 'a formulaic recitation of the elements of a cause of action,'" which—as noted above—is insufficient under *Twombly*. Watts v. Allstate Indem. Co., No. S-08-1877 LKK/GHH, 2009 WL 1905047, at *6 (E.D. Cal. Jul. 1, 2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). It stretches the RICO fabric too far to suggest—as did the *Gonzalez* plaintiff—that merely providing a service through a marketing arrangement with otherwise unrelated corporate groups constitutes the "conduct" of an enterprise. One reason that this element would fail with respect to the insurer in cases like *Gonzalez* or *Golden Rule* is that the acts alleged against it—namely selling insurance and collecting a premium—have no "nexus" with the management or operation of the alleged enterprise.

C. Special Problems under § 1962(c) in the Civil Context

By interpreting the definition of "association in fact" broadly, *Boyle* effectively eliminated one of the most potent tools available to the lower courts for sorting actionable RICO sheep from non-actionable goats. The problem becomes acute in civil litigation because, to fix liability under § 1962(c), a plaintiff "must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name."[120] This means that a corporation—even a corporation that is guilty of conducting its affairs through a pattern of racketeering—cannot be sued or prosecuted under RICO because of the statutorily required person-enterprise distinction.[121] This poses a problem for plaintiffs in civil litigation that is not so pronounced in criminal proceedings. This is so because the Government is usually interested in convicting and imprisoning individuals in RICO cases, whereas a civil plaintiff is interested in recovering money damages.[122] Thus so, the Government is often satisfied with indicting individuals who operate or manage a corporate enterprise through a pattern of racketeering. But a civil plaintiff usually needs the corporate entity to be a defendant because it has the deepest pockets, so there is a temptation to name the corporation as a defendant and part of an association in fact.

In the most common manifestation of the problem, a plaintiff tries to name a corporation as the defendant and part of an association-in-fact

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120. Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001).

121. *See* 18 U.S.C. § 1962(c) (2006) (stating that the accused "person" (i.e., defendant) must be "employed by or associated with" the named enterprise).

122. For example, Government prosecutors are tethered by specific "RICO guidelines." *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.010 to .900 (1999), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm. These guidelines state that "[t]he purpose of the RICO statute is 'the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.'" *Id.* § 9-110.100. They also reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned. Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate its remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve "imaginative" prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. A RICO count which merely duplicates the elements of proof of traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be approved unless it serves some special RICO purpose.
Id. at 9-110.200. Accordingly, the guidelines go on to state that a RICO charge is appropriate only if it meets one or more of seven narrowly cast criteria. *Id.* § 9-110.310.

enterprise consisting of the corporation and various employees, agents, and affiliates.[123] These amalgamations have been met with varying success in the lower courts.[124] Courts have been particularly harsh with putative enterprises consisting of a corporation and its employees, and—following *Kushner*—all the circuits have erected some sort of person-enterprise pleading barrier.[125] These holdings, coupled with pre-*Boyle* structural requirements, made it difficult for plaintiffs to bring ordinary commercial-fraud cases under RICO. But now, with *Boyle* so definitively removing a key weapon for combating the "RICO-izing" of such claims, it makes good sense to reconsider whether a corporation—defendant or not—can be part of an association-in-fact enterprise. For if the Supreme Court is going to read the association-in-fact text of RICO in a literal way when looking at the issue of whether an association of individuals needs to have a structure or purpose beyond committing predicate acts, then it should at least consider whether consistency demands that it read that same text in a literal way when determining if a corporation can be part of an associational enterprise. To that very question we now turn.

IV. INTERPRETING § 1961(4)

It often seems as if there are as many approaches to interpretation as there are texts to interpret. But the various approaches that have been offered to interpret § 1961(4) sort neatly into the categories suggested by a topology outlined by Neil MacCormick: linguistic, systemic, and teleological-evaluative arguments (all of which can be suffused with intentional arguments).[126] Linguistic arguments often come packaged, as one would suspect, as appeals to "plain meaning" or "ordinary language."[127] Systemic arguments seek meaning by evaluating particular text-bites in a larger context, perhaps in other sections of a statute, an entire

123. *See, e.g.*, Cedric Kushner Promotions, Ltd., 533 U.S. at 164 (holding that the president and sole shareholder of the corporation was a "person" separate from the enterprise).

124. *Compare* Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1284–85 (11th Cir. 2006) (involving a corporation and its recruiters formed actionable enterprise) *with* Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 441 (5th Cir. 1987) (finding that defendant bank plus its holding company and three employees not sufficiently distinct).

125. *See* Caroline N. Mitchell et. al., *Returning Rico to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. § 1961(4)*, 13 FORDHAM J. CORP. & FIN. L. 1, 28 (2008) [hereinafter Mitchell et al.] (explaining how pleading barriers have been placed).

126. NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 124–25 (2005) [hereinafter MACCORMICK].

127. *Id.* at 125.

statutory title, or other aspects of a whole legal system.[128] Teleological-evaluative arguments focus on the consequences of rival interpretations and try to match the preferred interpretation with particular salutary social ends or values.[129] And, as already noted, each of these techniques will necessarily invoke (or claim to demonstrate) the "intent" of the legislature in choosing particular words, leaving out particular words, and so forth.[130]

A. Linguistic Arguments

Because we can never be certain what a legislature meant, we are left to ponder what it said. Here, Congress said that a RICO "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[131] Before diving into the competing lines of argument, it is probably worthwhile to pause and consider what is *not* in dispute. That is, there seems to be general agreement that any of the following can be an "enterprise": (1) an "individual," (2) a "partnership," (3) a "corporation," (4) an "association," (5) any "other legal entity," and a "group of individuals associated in fact although not a legal entity." The principal grammatical-linguistic arguments, then, turn on, first, whether "union" is modified and limited by the prepositional phrase "of individuals associated in fact although not a legal entity" (and, if not, whether "union" means labor/trade union or something else) and, second, whether the entire list is to be read as an illustrative or an exhaustive definition. We will look at these issues in turn, but we first need to trace an earlier map of (mis?)reading that may have brought us to this place to begin with.

1. Turkette and its interpretation of "enterprise"

As discussed above, in *Turkette* the Supreme Court took a position on the scope of RICO in general and the "enterprise" definition in particular that—though defensible—was not inevitable.[132] Congress's declared purpose in passing the Organized Crime Control Act of 1970 was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal

128. *Id.* at 127–32. MacCormick sub-categorizes systemic arguments in terms of (1) contextual harmonization, (2) precedent, (3) analogy, (4) conceptual, (5) general principles, and (6) history. *Id.*

129. *Id.* at 132–37.

130. *Id.* at 125.

131. 18 U.S.C. § 1961(4) (2006).

132. *See* discussion *supra* Part II.A.

prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[133] Together, the eleven titles of the Act form these "legal tools;" three of them, Titles VIII (interstate gambling), IX (RICO), and XI (distribution of explosives), created new substantive offenses.[134] The point to be taken here is that Congress did not just outlaw "organized crime" (the phrase remains undefined in the Act); rather, it sought to craft procedures and remedies to correct "defects" in existing law that allowed organized criminals to evade prosecution. RICO was intended to remedy (at least) one of these defects.

There is no dispute that "the major purpose of Title IX is to address the infiltration of legitimate businesses by organized crime."[135] The big question, then, is whether that is its *only* purpose.[136] Most of the courts of appeals that have taken up this question have found in the negative, holding that—although RICO's target may have been the corruption of legitimate businesses—its ambit (as drawn by the statute's language) stretched to include illegitimate organizations.[137] But at least two courts—the Sixth

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133. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

134. *Id.* §§ 803(a), 901(a), 1102(a).

135. United States v. Turkette, 452 U.S. 576, 591 (1981).

136. Justice Thomas' dissent in *Anza v. Ideal Steel Supply Corp.* fairly represents a major strain of concern, especially along RICO's civil dimension:

> Judicial sentiment that civil RICO's evolution is undesirable is widespread. Numerous justices have expressed dissatisfaction with either the breadth of RICO's application, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 501 (1985) (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting) ("The Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions . . . . [T]here is no indication that Congress even considered, much less approved, the scheme that the Court today defines"), or its general vagueness at outlining the conduct it is intended to prohibit, *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255–56 (1989) (Scalia, J., joined by Rehnquist, C. J., and O'Connor and Kennedy, JJ., concurring in judgment) ("No constitutional challenge to this law has been raised in the present case . . . . That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented").

Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 471–72 (2006) (Thomas, J., dissenting).

137. *See, e.g.*, United States v. Sutton, 642 F.2d 1001, 1006–09 (6th Cir. 1980) (en banc) (holding that RICO's reach is not limited to legitimate enterprises only); United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980)(rejecting petitioner's request to overturn precedent applying RICO to both legitimate and illegitimate enterprises); United States v. Provenzano, 620 F.2d 985, 992–93 (3d Cir. 1980) (holding that "enterprise" under prior precedent should be liberally construed, such that claims that an illegitimate enterprise can fall under RICO's reach, while noting five other circuits expressed similar opinions); United States v. Elliott, 571 F.2d 880, 896–98 (5th Cir. 1978) (concluding that Congress intended

Circuit in the *Sutton* panel opinion[138] and the First Circuit in *Turkette*[139]—found otherwise; the Eighth Circuit, though declining to rest its decision on the legitimate/illegitimate distinction, reached a similar result by declaring that an enterprise must be "a discrete economic association existing separately from the racketeering activity."[140] In *Turkette*, the Supreme Court held with the majority of the courts of appeals and found that "neither the language nor structure of RICO limits its application to legitimate 'enterprises.'"[141] None of this controls the interpretive question of whether a corporation can be a member of an association in fact, but—particularly when coupled with *Boyle*—it underscores how loath the Supreme Court has been to interpret the enterprise definition in a way that would limit RICO's reach. One can speculate as to why this might be, but the Court's unwillingness to reject an interpretation of the statute that provides so many advantages to the Government in its battle with organized crime seems as good an explanation as any.[142] But it also underscores how important the question of whether a corporation can be part of an association in fact is for civil litigation: but-for the inclusion of illegitimate organizations in the definition of enterprise, it would be difficult for a plaintiff to name a corporation as a defendant and as part of an association in fact because that association is typically alleged to do

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"enterprise" to be construed liberally to include legitimate and illegitimate enterprises alike).

138. United States v. Sutton, 605 F.2d 260, 263-64 (6th Cir. 1979).

139. United States v. Turkette, 632 F.2d 896, 898–99 (1st Cir. 1980).

140. United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980). This holding survived in one form or another until *Boyle*.

141. United States v. Turkette, 452 U.S. 576, 587 (1981).

142. SMITH & REED, *supra* note 41, ¶ 3.02[1]. Justice Thomas highlights the other, civil, side of the conundrum in his *Anza* dissent when he notes that, among other things, civil RICO suits almost never turn on conduct that one would associate with Mafia-like behavior:

> Congress plainly enacted RICO to address the problem of organized crime, and not to remedy general state-law criminal violations. *See* H. J. Inc. v. Northwestern Bell Telephone Co., 492 U. S. 229, 245 (1989). There is some evidence, to be sure, that the drafters knew that RICO would have the potential to sweep more broadly than organized crime and did not find that problematic. *Id.* at 246–248. Nevertheless, the Court has recognized that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985). . . .This case, like the majority of civil RICO cases, has no apparent connection to organized crime. *See* Sedima, 473 U. S. at 499, n.16 (quoting an ABA Task Force determination that, over the period reviewed, only 9% of civil RICO cases at the trial court level involved "'allegations of criminal activity of a type generally associated with professional criminals'"). Given the distance the facts of this case lie from the prototypical organized criminal activity that led to RICO's enactment, it is tempting to find in the Act a limitation that will keep at least this and similar cases out of court.

Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 471–73 (2006) (Thomas, J., dissenting).

nothing other than illegal acts, even if the corporation itself is legitimate.[143] With these issues in mind, we can now turn to the matter at hand.

2. The Pro and Con of Plain Meaning Arguments

i. Grammar and Syntax

At the outset, we must note that "plain meaning" analysis can take us only so far. For as members of Congress complained at the time of its consideration, RICO "embodies poor draftsmanship," a complaint echoed in many court decisions.[144] Nonetheless, the text is a convenient and necessary starting point. In a nutshell, the argument against including corporations in associations in fact is "that the use of 'individual' in RICO's definition of 'enterprise' refers only to a living person."[145] But this argument, though compelling at first light, must be unpacked and subjected to full examination before it can be accepted. As an exemplar for the various positions, I will refer to briefs and the oral argument in *Mohawk Industries v. Williams*, a recent case presented to but not decided by the United States Supreme Court.[146]

First, so the argument goes, the term "individuals" means natural persons, not corporations, partnerships, limited liability companies and the like. Dictionary definitions of "individual," which generally—though not universally—articulate a distinction between single humans and social groups, support this reading.[147] Second, this distinction seems to be

143. Plaintiffs do this because a corporation cannot be employed by or associated with an enterprise if it *is* the enterprise, which is a required element of a § 1962(c) claim. *See* Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 29–30 (1st Cir. 1986) (noting that the same enterprise cannot simultaneously serve as a person engaging in racketeering and the enterprise facilitating it cannot be one and the same). Thus, plaintiffs allege that the corporation is the defendant and part of an association-in-fact to get around the person-enterprise barrier and still keep the corporation in as the deep-pocket defendant.

144. H.R. REP. 91-1549, at 185 (1970) (dissenting views of Representative John Conyers, Jr., Abner Mikva, and William Ryan); *see, e.g.*, H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989) ("RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court.").

145. Lockheed Martin Corp. v. Boeing Co., 357 F. Supp. 2d 1350, 1364 (M.D. Fla. 2005).

146. *See* Mohawk Indus., Inc. v. Williams, 546 U.S. 1075 (2005) (granting certiorari). The case was fully briefed and then argued, but the Court subsequently remanded the case without decision for reconsideration in light of its opinion in *Anza v. Ideal Supply Corp.*, 547 U.S. 451 (2006). *See* Mohawk Indus., Inc. v. Williams, 547 U.S. 516, 516 (2006) (dismissing the case as improvidently granted, and remanding the case in light of the *Anza* decision to the eleventh circuit for further consideration).

147. *Compare* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 615 (1986) ("a single human being as contrasted with a social group or institution") *with* BLACK'S LAW

embodied in the structure of § 1961(4) itself, in that the first clause sets forth a series that separately lists any "individual" and "corporation" as legal types that serve as a RICO enterprise.[148] In other words, if "individual" were intended to be a general type that includes "corporations" as a subset, then there would be no need for both terms to be included in the series—i.e., "corporation" would be superfluous, an eventuality to be avoided under general principles of statutory construction.[149] Thus, again under general principles of statutory construction, if "individual" means "natural person" in the first clause, it *must* mean the same thing in the second clause.[150] This is the position articulated by at least two Justices at oral argument in *Mohawk*, and one that the United States, as amicus, conceded[151]:

> CHIEF JUSTICE ROBERTS: There may be no dispute about it, but it does seem strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately. . . .
>
> JUSTICE KENNEDY: Still, it—it—you know, we usually talk about person can mean corporation. This says individual. A person is defined in—in sub (3) just above it. A person includes any individual or entity. Then the next thing says individual. So

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DICTIONARY 788 (9th ed. 2009) (Individual means either "[e]xisting as an indivisible entity" or "[o]f or relating to a single person or thing, as opposed to a group."). Dictionaries from the time of RICO's adoption are to similar effect. *See* Brief for Petitioner at 12–13, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (No. 05-465), 2006 WL 282167, at *12–13 [hereinafter Mohawk Petitioner's Brief] (providing dictionary definitions of "individuals" as part of an argument that corporations are not considered individuals).

148. *See* 18 U.S.C. § 1961(4) (2006) (providing a definition of "enterprise" for the purposes of the statute).

149. *See* NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:6, at 230-52 (7th ed. 2010) [hereinafter SINGER] ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . . No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute."); *see also* Corley v. U.S., 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004))).

150. *See* SINGER, *supra* note 149, § 46.6 at 249 ("The same words used twice in the same act are presumed to have the same meaning."); Gustafason v. Alloyd Co., 513 U.S. 561, 569–70 (1995). There is a similar and larger structural argument made to the same effect that is treated below. *See infra* Part IV.A.2.c.

151. Brief for the United States as Amicus Curiae Supporting Respondents at 6, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (No. 05-465), 2006 WL 680358, at *6 [hereinafter Mohawk United States Amicus Brief] (noting that "petitioners premise is correct" with regards to the argument that a "corporation" is not an "individual" under 1964(c)).

it's not a—it doesn't sound like a corporation.[152]

The grammatical and syntactical counterarguments to this position are not especially compelling. Initially, one could take the flat-footed position that "individual" is used in a sense more akin to the common legal concept of "person," which includes both human beings and fictitious entities. One can indeed find authority for this proposition,[153] but that authority seems too slender in this context to overwhelm the specific, contextual argument set forth above. Or one could parse the second clause so that the prepositional phrase "of individuals" modifies "group" but not "union": i.e., the second clause would mean "any union although not a legal entity" or "any group of individuals associated in fact although not a legal entity." There are problems with this position, though. First, maintaining it requires—either explicitly or tacitly—one to rely on the "last antecedent rule" (also known as *reddendo singula singulis*).[154] Under this rule, a qualifying phrase should be read to modify only the noun that it immediately follows.[155] Justice Scalia, in *Barnhart v. Thomas*, offers a colorful illustration:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house—for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by

152. Mohawk Transcript, *supra* note 116, at 29, 32.

153. *See* BLACK'S LAW DICTIONARY 1257 (9th ed. 2009) ("Person" includes both "[a] human being" and "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being.").

154. *See* SINGER, *supra* note 149, § 47:26 (providing a definition of the term and rules of interpretation).

155. *See* Enron Creditors Recovery Corp. v. Alfa, 651 F.3d 329, 335 (2d Cir. 2011) (noting that under last antecedent rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows" (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

> their son, might have wished to preclude all argument by specifying and categorically prohibiting the one activity—hosting a party—that was most likely to cause damage and most likely to occur.[156]

But, as this example reveals, application of the rule is context sensitive and easily gives place to evaluative arguments about intent and purpose. In any event, the "rule" is much maligned,[157] is as often as not observed in the breach,[158] and is opposed by the across-the-board rule, which holds that if a modifying clause or phrase following a list is as applicable to the first word as the others, then the modifier should apply to each item on the list.[159] Accordingly, most observers—including Justice Scalia—concede that the rule is not really a "rule" in the absolute sense and that it "can assuredly be overcome by other indicia of meaning . . . ."[160] Here, in contrast to Justice Scalia's example, we are dealing with two nouns, "union" and "group" that—although not exactly synonymous—are semantically linked. Specifically, a "union" is a combination of individuals whose confederation is effected for "some common purpose";[161] a "group," in slight contrast, is a number of individuals having "some unifying relationship."[162] When we reflect back on one of RICO's undisputed purposes—viz., punishing the infiltration of labor unions—the selection of "union" makes good sense. But it is also logical that the drafters were trying to throw their net a bit wider and punish the infiltration or corruption of other unincorporated "groups" that might not have a specific "common purpose" yet might be targets for infiltration because, like unions, they possess sufficient assets or power to attract the attention of mobsters (e.g., Native American tribes, fraternal organizations, political groups, governmental boards and agencies, and sports clubs and leagues).[163]

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156. Barnhart v. Thomas, 540 U.S. 20, 27–28 (2003). For a discussion of the rule in Supreme Court practice, see Jeremy L. Ross, *A Rule of Last Resort: A History of the Doctrine of the Last Antecedent in the United States Supreme Court*, 39 SW. L. REV. 325 (2009).

157. *See* Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 J. LEGAL WRITING INST. 81, 89 (1996) (noting that the rule "has, in its hundred-plus year history, created as much confusion and disagreement as the ambiguous modifier its drafter [Sutherland] set out to clarify").

158. *See, e.g.*, Nobelman v. Am. Sav. Bank, 508 U.S. 324, 330–31 (1993) (discussing the curing of a default on a secured claim).

159. SOLAN, *supra* note 43, at 34–36.

160. *Barnhart*, 540 U.S. at 26.

161. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 539 (1986).

162. *Id.* at 1290.

163. Lynch suggests that

> [l]egal concepts like corporations or partnerships were inadequate to the definitional task. Criminals could, and the studies available to Congress showed

The point that should draw our closest attention, though, is that both "union" and "group" signal categorization—i.e., they must be linguistically coupled (either explicitly or implicitly) with the phrase "of *something*" and, moreover, in plain meaning terms, that "of something" is usually denoted as "of *individuals*." As a further buttress, they appear in the statute as a coordinate pair, which—as a matter of human language processing—leads one naturally to interpret the phrase as modifying both disjuncts.[164] A review of the opposing positions in *Mohawk* sharpens these general propositions into an instrumental interpretive tool. The plaintiff acknowledged the ordinary dictionary meaning of "union" as we have just discussed it, and then argued: "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.'"[165] Plainly, this simply asserts that which is to be proven and also posits phrasing that is at once awkward and redundant. At oral argument in *Mohawk*, several of the Justices exposed the bareness of this position, as this representative exchange reveals:

> JUSTICE SCALIA: Either union means labor union or it means a union or group of individuals.
>
> MR. FOSTER: I would—Justice Scalia, I don't believe that union means labor union because—
>
> JUSTICE SCALIA: Okay.
>
> MR FOSTER: —if it meant a labor union there—

> that they sometimes did, penetrate not only legal entities officially capable of divided ownership, but also unincorporated businesses nominally owned by a sole proprietor, acquiring covert interests in the profits of such businesses through their muscle or capital. Indeed, "business" itself was too narrow a term. What about labor unions, to take only the most obvious example? Or charitable or social organizations? Or trade associations (the prototypical vehicle for the operation of a "racket")?

Lynch, *supra* note 3, at 688. If this is correct, then the appellate courts in *Sutton* and *Turkette* were on to something in arguing that the rule of ejusdem generis limited the "union or group of individuals" phrase to a legitimate—albeit not necessarily legally formed—association. *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129 (1961). In *Eastern Railroad Presidents Conference*, an antitrust case, one of the defendants was a group, apparently unincorporated, called the Eastern Railroad Presidents Conference, which—as the name suggests—was made up of railroad executives. *Id.* This is more-or-less the point that Justice Stevens made in his *Boyle* dissent when he observed that "[t]he juxtaposition of the two phrases suggests that 'associated in fact' just means structured without the aid of legally defined structural forms such as the business corporation." Boyle v. United States, 556 U.S. 938, 953 (2009) (Stevens, J., dissenting).

164. *Cf.* SOLAN, *supra* note 43, at 32–34 (discussing the same proposition in the context of conjuncts, i.e., coordinating pairs joined by "and").

165. Brief for Respondents at 19, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (No. 05-465), 2006 WL 282167, at *19 [hereinafter Mohawk Respondents' Brief].

JUSTICE SCALIA: I'll give you that. Then—then it means a union or group of individuals.

MR. FOSTER: A union or group of individuals.

JUSTICE SCALIA: Right. So, you know, you're just as bad off.[166]

Finally, we must remember that it would have been an easy drafting exercise to create the syntax that the *Mohawk* plaintiffs sought, either by using the word "persons" in place of "individuals" or, at a minimum, reordering the syntax to read, "group of individuals associated in fact or union." That Congress opted for neither option weighs in favor of excluding corporations from the ambit of "associations in fact."

ii. Illustrative or Exhaustive

Although "enterprise" is included in RICO's "definitions" section, the "definition" does not does not lay out what conditions are necessary or sufficient for something to qualify as an "enterprise."[167] "Enterprise" thus remains, as Solan calls it, a "fuzzy concept at the margins."[168] This sets the stage for an argument over the intended effect of § 1961(4): viz., is it illustrative or exhaustive of the types of things that can qualify as an enterprise? Those in the "illustrative" camp focus on the verb "includes" that starts the section; in rebuttal, those in the "exhaustive" camp deny that "includes" signals the presence of mere examples.

The conclusion that § 1961(4) is merely illustrative proceeds from three related premises, one semantic, one structural, and one historical-contextual. The semantic argument hinges on a putative distinction between "includes" and "means" in any definitional statement.[169] Under

166. Mohawk Transcript, *supra* note 116, at 31.

167. Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L. J. 1561, 1589–90 (1994) [hereinafter Cunningham et al.].

168. SOLAN, *supra* note 43, at 107.

169. I say "putative" because, as we will see, the distinction is not a sharp one and disagreements abound. And RICO cases maintaining that the situation is otherwise carry more than a whiff of question-begging ipse dixit about them. *See, e.g.*, Puerto Rico Am. Ins. Co. v. Burgos, 867 F. Supp. 2d 216, 229 (D. P.R. 2011) (asserting that the definition of enterprise "is merely illustrative as opposed to exhaustive . . . ."). Consider this oft-cited gem from the Seventh Circuit:

> The statute says "'enterprise' includes"—not "'enterprise' means." The point of the definition is to make clear that it need not be a formal enterprise; "associated in fact" will do. Surely if three individuals can constitute a RICO enterprise, as no one doubts, then the larger association that consists of them plus entities that they control can be a RICO enterprise too. Otherwise while three criminal gangs would each be a RICO enterprise, a loose-knit merger of the three, in which each retained its separate identity, would not be, because it would not be

this rubric, definitions that begin with "includes" sort into the "illustrative" category; those that begin with "means" into the "exhaustive."[170] This is essentially a "plain meaning" argument that looks to dictionaries and precedents for support.[171] But this leads nowhere other than to a battle of dictionaries and precedents.[172] So at the end of this battle, we are left in a state of suspense, certain only that "includes" "may sometimes be taken as synonymous with 'means,'"[173] and sometimes "connotes simply an illustrative application of [a] general principle."[174]

With good arguments on both sides of the semantic coin, litigants next turn to a variety of structural arguments that start with and then expand out from § 1961(4). To combat the illustrativists, the exclusivists initially rely on the interpretive maxim *expressio unius est exclusio alterius*.[175] The

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an association of individuals. That would make no sense.

United States v. Masters, 924 F.2d 1362, 1366 (7th Cir. 1991), *cert. denied*, 500 U.S. 919 *and* 502 U.S. 823 (1991); *see also* Rowe v. Bankers Life and Cas. Co., No. 09-CV-00491, 2010 WL 3699928, at *4 n.3 (N.D. Ill. Sept. 13, 2010) (discussing the statutory definition of "long term care"). Sense or not, that is what the statute *says*, so something more than assertion to the contrary should be required.

170. *See* Mohawk Respondents' Brief, *supra* note 165, at 20–22 (citing 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.'"), and Helvering v. Morgan's, Inc., 293 U.S. 121, 126 n.1 (1934) ("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.")).

171. *See* Mohawk United States Amicus Brief, *supra* note 151, at 7 (quoting American Surety Co. v. Marotta, 287 U.S. 513, 517 (1933) ("In [definitional] provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration."), and citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1143 (1993) (defining "include" to mean, *inter alia*, "to place, list or rate as a part or component of a whole or of a larger group, class, or aggregate")).

172. *See* Mohawk Petitioner's Brief, *supra* note 147, at 16–17 (quoting Willheim v. Murchison, 342 F.2d 33, 42 (2d Cir. 1965) (Friendly, J.) ("Definitions in . . . legislation often use the word 'include' out of abundant caution," "that does not afford carte blanche to 'include' [additional items], neither expressly mentioned nor within the normal meaning of the language, simply because a court may think this is a good idea."), and citing AMERICAN HERITAGE COLLEGE DICTIONARY 701 (4th ed. 2002) ("*include* does not rule out the possibility of a complete listing")).

173. Helvering v. Morgan's, Inc., 293 U.S. 121, 125 (1934).

174. Fed. Land Bank v. Bismark Lumber Co., 314 U.S. 95, 99–100 (1941).

175. In another variation that takes one to roughly the same interpretive place, some have offered the maxim *ejusdem generis* (often thought of as "words of a feather flock together"), which—when applied—suggests that "group of individuals" would be limited to a group of individuals making up an enterprise that functions like the enumerated formal ones. *See* United States v. Turkette, 632 F.2d 896, 899 (1st Cir. 1980) (discussing the principle of *ejusdem generis*).

argument runs like this: "Had Congress intended to define 'enterprise' to capture an association in fact with a corporation as a constituent member, it could have easily done so."[176] That is, it would have been a simple matter to list "group" with no qualifying prepositional phrase or add "or entities" to the existing prepositional phrase. But Congress did not, so the "sensible inference [is] that the term left out must have been meant to be excluded"[177]—*expressio unius est exclusio alterius*. Additional weight to this argument comes from the fact that "corporation" appears in the first clause of the definition but not the second.[178] Ultimately, *expressio unius* has persuasive force here, but it is not dispositive because it is a counterweight to—not a negation of—the notion (discussed above) that a sentence beginning with "includes" is exemplary, not comprehensive.[179]

iii. Structural Issues

Another variation on the "means"/"includes" theme arises from the overall structure of § 1961, which sets out ten separate definitions, five beginning with "means,"[180] four with "includes"[181] and one with "requires."[182] Once again, there is something for everyone. An illustrativist can be expected to note that, because Congress used both "means" and "includes" in setting forth § 1961's definitions, "means" must signal a comprehensive definition and "includes" an exemplary one.[183] But an exclusivist will quickly note that the three other instances in § 1961 in which a definition begins with "includes"[184] are at least facially (and

176. Mohawk Petitioner's Brief, *supra* note 147, at 14.

177. Chevron, U.S.A. v. Echazabal, 536 U.S. 73, 81 (2002).

178. City of Chi. v. Envtl. Def. Fund, 511 U.S. 328, 338 (1994) ("'[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another.'" (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993))).

179. *See* Mohawk United States Amicus Brief, *supra* note 151, at 9–10 ("But while the maxim *expressio unius est exclusio alterius* is often a useful aid to statutory construction, it is not properly applied where, as here, Congress has used the verb 'includes' to introduce a non-exhaustive list of examples.").

180. 18 U.S.C. § 1961(1), (2), (6), (7), (8) (2006).

181. *Id.* at § 1961(3), (4), (9), (10).

182. *Id.* at § 1961(5).

183. Helvering v. Morgan's, Inc., 293 U.S. 121, 126 n.1 (1934) ("That the draftsman used these words [viz.: means and includes] in a different sense seems clear."); *see also* Mohawk Respondents' Brief, *supra* note 165, at 20–21 (discussing the distinction between "includes" and "means"); Mohawk United States Amicus Brief, *supra* note 151, at 10 (discussing Congress's selection of either "includes" or "means" to introduce provisions as a signal).

184. 18 U.S.C. § 1961(3), (9), (10) (defining "person," "documentary material," and "Attorney General," respectively).

perhaps indisputably) comprehensive.[185] For example, § 1961(9) defines "documentary material" to include "any book, paper, document, record, recording, or other material." That catch-all term, "other material", strongly suggests that the list is comprehensive; were it otherwise, the catch-all would be superfluous. And indeed, at oral argument in *Mohawk*, this argument found some traction as Justice Scalia noted that the United States "did not refute the point that in other sections where it says includes, it is unquestionable that it is exclusive."[186]

Expanding beyond § 1961 brings yet further elaborations on the "means"/"includes" motif. First, § 1963(b), RICO's criminal-forfeiture provision, begins with "includes" and then goes on to identify real and personal property, including illustrations of each.[187] In the first instance, this definition would appear subject to the same sort of "means"/"includes" analysis as § 1961(4), but the Supreme Court long ago held that identical language in another federal statute[188] is an "all-inclusive listing."[189] Once again, although not putting the ultimate matter to rest, this undermines any notion that there is a categorical distinction between definitions headlined by "means" and those by "includes." Second, § 1964(a) twice uses the phrase "including, but not limited to" to underscore that a list is illustrative,

185. Mohawk Petitioner's Brief, *supra* note 147, at 17–18; Mitchell et al., *supra* note 125, at 18 ("Three other provisions within section 1961 use 'includes' to begin their definition, and each is unquestionably exhaustive.").

186. Mohawk Transcript, *supra* note 116, at 48; *see also* Mohawk Transcript, *supra* note 116, at 42–43 ("JUSTICE ALITO: Why shouldn't includes here be read to mean means when that seems to be the way it's used in other subsections of this provision and when the only thing that seems to be—if this is not an exhaustive list, the only thing that seems possibly to be omitted from the list is what's involved here, which is a group consisting of a corporation or other legal—other legal entity and—and natural persons.") and 51 ("JUSTICE SOUTER: Do any of the court of appeals opinions deal specifically with the peculiarity of this definition in which, although it starts out with the word includes, then follows a—a listing, A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, i.e., individuals, are included? That's the peculiarity of the definition. Do any of the courts of appeals come to grips with that?").

187. *See* 18 U.S.C. § 1963(b) (2006) ("Property subject to criminal forfeiture under this section includes—(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.").

188. *See* 21 U.S.C. § 853(b) (2006) (presenting language identical to that in 18 U.S.C. § 1963(b)).

189. United States v. Monsanto, 491 U.S. 600, 607 (1989) (interpreting 21 U.S.C. § 853(b) (1982 ed., Supp. V)); *see also* Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 3–4, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (No. 05-465), 2007 WL 173804, at *3–4 [hereinafter Mohawk Chamber of Commerce Amicus Brief] (discussing the statutory construction of § 1961(4)).

not exhaustive.[190] The suggestion here is that if Congress had intended § 1961(4) to be similarly illustrative, it would have added the "but not limited to" tag.[191] This argument is appealing, but its weight is only incremental, given that at least some authorities hold that "including" and "including, but not limited to" amount to the same thing.[192]

iv. A Dash of History

Most of the historical-contextual arguments will be reserved for a subsequent section, but brief mention of a couple of drafting issues from RICO's history nicely fit as a cap to the linguistic arguments we have been considering. The first of these arguments pins its hopes on the evolution of multiple crime bills introduced by Senator John L. McClellan and Roman L. Hruska beginning in 1965.[193] In short, this argument pivots on the fact that the definitions sections of two predecessor bills, S. 1623 and S. 2187, introduced their respective definitions with "means," whereas S. 1861, which for the first time defined "enterprise," starts to use "means" and "includes."[194] The inference supposedly to be drawn is that Congress progressed from a "limited" conception of "enterprise" to an "expansive" one and expressed that movement by migrating from the one word to the other.[195] This remains something more of an observation than a proof, and—even for the litigant that sponsored it—it was mostly relegated to a footnote.[196] And, even more important, it does not avoid the central problem: viz., that Congress does not use—and courts do not interpret—the two words in a way consistently signaling a bright-line contradistinction.

The second argument arises from the Senate and House Reports accompanying RICO, which both state that "enterprise" is defined "to include associations in fact, as well as legally recognized associative entities.[197] Thus, infiltration of any associative group by any individual or

190. 18 U.S.C. § 1964(a) (2006).

191. Mohawk Petitioner's Brief, *supra* note 147, at 17.

192. BLACK'S LAW DICTIONARY 831 (9th ed. 2009) ("The participle *including* typically indicates a partial list . . . . But some drafters use phrases such as *including without limitation* and *including but not limited to*—which mean the same thing.").

193. Mohawk Respondents' Brief, *supra* note 165, at 21–22 n.73.

194. *Id.* at 22 n.73 (citing G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young: *Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1666–68 (1996)). It is perhaps worth noting that the bill history that Blakey and Roddy sketch is more convoluted than the Mohawk Respondent suggests.

195. *Id.* at 22 n.74 (citing United States v. Russello, 464 U.S. 16, 22–23 (1983)).

196. *Id.*

197. H.R. REP. NO. 91-1549, at 4032 (1970); S. REP. NO. 91-617, at 159 (1969).

group capable of holding a property interest can be reached."[198] Here, the focus is on the "*any* associative group" phrase, which is read to support an expansive interpretation of "union or group of individuals associated in fact" that would include corporations.[199] But this would appear to prove at once too much and too little: too much because no one disputes that any "associative group" of the statutorily enumerated sort can be an enterprise;[200] too little because the phrase "associative group" phrase—in context—refers to legitimate associations (like a trade or labor union) that can be "infiltrate[ed]," and what is really at issue in cases like *Mohawk* is an allegedly illegitimate enterprise in which a corporation is a constituent part.[201]

B. Systemic Arguments

RICO's many vagaries provide almost endless possibilities for devising systemic interpretive arguments based on policy, principles, history and the like. A few representative examples will aid our discussion.

1. Contextual Harmonization

"The argument from contextual harmonization looks to the way in which any statutory provision is to be found nested in a larger legal scheme, at least that of the single whole statute, often that of a set of related statutes."[202] The aim of this technique is to find the proper interpretation of a troublesome statutory provision by searching other statutory provisions that cast light back on the target. We have already seen a narrow application of the technique when we looked at RICO provisions other than the second clause of § 1961(4) to aid in interpreting that second clause.[203] But the net can be thrown still wider. For example, if we revert to the question of whether "individual" means only a single, natural person, one can look to the general definition provisions of Title 18 (of which RICO is a part). There, one finds that "[a]s used in this title, the term 'organization'

198. H.R. REP. NO. 91-1549, at 4032; S. REP. NO. 91-617, at 159.

199. Mohawk United States Amicus Brief, *supra* note 151, at 12.

200. A fair reading is that the phrase "associative group" was coined and employed as a shorthand for the longer formulation in the immediately preceding sentence: viz., "associations in fact, as well as legally recognized associative entities."

201. The overreading of "any" is unmasked on the very next page of the Senate Report, which states that "Section 1962 establishes a threefold prohibition aimed at the infiltration of legitimate organizations." S. REP. NO. 91-617, at 159.

202. MACCORMICK, *supra* note 126, at 128.

203. *See supra* Part IV.A.2.c. (explaining the structural issues in interpreting the act using other RICO provisions).

means a person other than an individual."[204] By defining the term "organization" by what it is not, the implication is that Congress established a property non-identity under which the reverse must also be true: i.e., an "individual" cannot be an "organization."

2. Precedential Argument

"The argument from precedent says that if a statutory provision has previously been subjected to judicial interpretation, it ought to be interpreted in conformity with the interpretation given to it by other courts."[205] Although a few district court decisions have held that a corporation may not be part of an association in fact,[206] the circuit courts that have opined on the issue all agree that it can.[207] As the Third Circuit recently and emphatically put it, "every circuit to consider the question has . . . held that corporations may be part of an association-in-fact enterprise[,]" and "[t]he judges of these circuits are equally unanimous, for not one has dissented from the proposition that an association-in-fact enterprise may include corporations."[208] This may be the most powerful argument in favor of leaving the interpretation of § 1961(4) as it stands. This is to say that however vague or ambiguous the text of the definition may have been ab initio, thirty years of precedent have put the world on notice that corporations can form parts of associations in fact, which takes the starch out of arguments based on fairness or lack of notice. This is *not*

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204. 18 U.S.C. § 18 (2006); *see also* Mohawk Chamber of Commerce Amicus Brief, *supra* note 189, at 8 (arguing that RICO's provisions distinguish between individuals and corporations).

205. MACCORMICK, *supra* note 126, at 128.

206. *See* Lockheed Martin Corp. v. Boeing Co., 357 F. Supp. 2d 1350, 1364–65 (M.D. Fla. 2005) (holding that a corporation may not be considered part of an association in fact for RICO purposes); Benard v. Hoff, 727 F. Supp. 211, 215 (D. Md. 1989)(holding the same); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146, 1151 (D.N.J. 1983), *rev'd on other grounds*, 742 F.2d 786 (3d Cir. 1984) (holding the same).

207. *See, e.g.*, Odom v. Microsoft Corp., 486 F.3d 541, 548 (9th Cir. 2007) (en banc), *cert. denied*, 128 S. Ct. 464 (2007)(including corporations within the definition of association in fact for RICO purposes); United States v. Najjar, 300 F.3d 466, 484–85 (4th Cir. 2002)(holding the same); United States v. London, 66 F.3d 1227, 1243–44 (1st Cir. 1995) (holding the same); Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 995 n.7 (8th Cir. 1989)(holding the same); United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir. 1988)(holding the same); United States v. Navarro-Ordas, 770 F.2d 959, 969 n.19 (11th Cir. 1985)(holding the same); United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983)(holding the same); Bunker Ramo Corp. v. United Bus. Forms, Inc., 713 F.2d 1272, 1285 (7th Cir. 1983)(holding the same); Atlas United States v. Thevis, 665 F.2d 616, 625–26 (5th Cir. 1980)(holding the same); United States v. Huber, 603 F.2d 387, 393–94 (2d Cir. 1979)(holding the same).

208. United States v. Phillip Morris USA Inc., 566 F.3d 1095, 1111–12 (2009).

to say that the Supreme Court cannot or should not step in to correct a wholesale misinterpretation of the statute, but it does make the task more difficult for litigants.[209] On the other hand, though, most of the circuit decisions have simply assumed, "largely without discussion," that a corporation can be part of an association in fact.[210] This surely means that attorneys — consistent with their Rule 11 obligations — have a good faith basis for raising and preserving this issue for appellate review and an ultimate petition for writ of certiorari.[211]

3. Analogical Argument

Statutes do not exist in a vacuum, and so where one is faced with interpreting a statute that is significantly analogous to another, it makes good sense to interpret the one in harmony with the other.[212] On the "means"/"includes" point, for example, the United States argued in *Mohawk* that the rule at issue in *United States v. New York Telephone*[213] offered a "very similar" analogy.[214] In that case, the Supreme Court examined a rule of criminal procedure providing that "[t]he term 'property' is used in this rule to include documents, books, papers and any other tangible objects."[215] In assessing the scope of the rule, the Court noted that other definitions in it were "introduced by the phrase 'to mean,'" and concluded that the rule "does not restrict or purport to exhaustively enumerate all the items" within its ambit.[216] Thus, despite the list of physical objects, the Court held that the rule was broad enough to comprehend "intangible items such as dial impulses recorded by pen registers as well as tangible items."[217] By analogy, then, the United States in *Mohawk* argued that the Court could read "individuals" to include "corporations" just as it had previously read "tangible" to include "intangible."[218]

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209. *See* SUP. CT. R. 10 (showing that absent a circuit split, the only avenue for review would be Rule 10(c), which states that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.").

210. SMITH & REED, *supra* note 41, ¶ 3.05; *see also* Mitchell et al., *supra* note 125, at 9, 31 n.138 (noting, among other things, that "[f]ive circuits rely exclusively on the analysis from other circuits' opinions").

211. *See* FED. R. CIV. P. 11 (requiring that all pleadings before the Court be proper, with reasonable basis in fact and law, and not be presented for an improper purpose).

212. MACCORMICK, *supra* note 126, at 129.

213. United States v. New York Tel. Co., 434 U.S. 159, 169 (1977).

214. Mohawk United States Amicus Brief, *supra* note 151, at 11.

215. *New York Tel. Co.*, 434 U.S. at 184 n.12.

216. *Id.* at 169 & n.15.

217. *Id.* at 170.

218. Mohawk United States Amicus Brief, *supra* note 151, at 11.

The problem here is that the analogy is not especially close. It is one thing to argue that § 1964(c) of the RICO Act should be interpreted by analogy to § 4 of the Clayton Act because the former was derived from the latter and their wording is almost the same.[219] It is quite another thing, though, to argue that a defunct rule of criminal procedure can shed much interpretive light on a RICO provision dealing with a wholly different concept. But there is another problem afoot: viz., that an argument by analogy works best where the number of candidates to consider is reasonably small and the context is reasonably specific. For example, *New York Telephone*'s interpretation of what the word "property" "includes" in a rule of criminal procedure might have some bearing on the interpretation of what RICO's definition of "property" "includes" in § 1963(b), given that both the rule and the statute set out to define property that the Government can "seize."[220] Here, of course, we are dealing with the interpretation of what the word "enterprise" "includes," so there is a glaring mismatch in terminology that devalues the usefulness of analogical reasoning on the point. Moreover, as we have already seen, "includes" appears hundreds of times in statutory definitions and has been interpreted again and again to differing—sometimes flatly contradictory—effect. In sum, *rough* analogies abound with respect to what the presence of "includes" at the head of a definition is intended to signal, but they are so rough and multifarious as to be mostly pointless and certainly not conclusive.

4. Conceptual Argument

A conceptual argument, which gains its validity by appealing to the desire for coherence across a whole system, "says that if any recognized and doctrinally elaborated general legal concept is used in the formulation of a statutory provision, it ought to be interpreted so as to maintain a consistent use of the concept throughout the system as a whole."[221] Once again, "individual" provides a telling example. There is good evidence that Congress typically (though not exclusively) uses "individual" to refer to a "natural person" as opposed to a "corporation" or other fictional legal

219. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (applying Clayton Act § 4 proximate cause requirement to § 1964(c)); Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 152 (1987) (applying Clayton Act § 4 statute of limitations to § 1964(c)).

220. *Compare* FED. R. CRIM. P. 41(a)(2)(A) (former FED. R. CRIM. P. 41(h)) (defining property to include specific items as well as any tangible items or information) with 18 U.S.C. § 1963(b) (2006) (defining property to include various sorts of real and personal property).

221. MACCORMICK, *supra* note 126, at 130.

entity.[222] Quite often, the distinction becomes apparent in statutory definitions of "person," which separately list "individuals," "corporations," and a host of other entities.[223] One commentator has identified 180 different federal statutes that are designed this way, which strongly suggests that individual-means-single-human-being is a concept recognized across the system.[224]

In some cases, a conceptual argument is a broader application of theory behind arguments from contextual harmonization. In other words, one can range further afield from a word or phase as it is nestled in a statute or set of related statutes. For example, part of the United States Internal Revenue Code contains several pages of definitions.[225] The definitions are introduced by, among other things, "means," "includes," "means and includes," and "includes only."[226] This suggests above all that Congress does not have a simple, binary method for introducing definitions in a way that tacitly labels the lists that follow as bounded or unbounded. And the problem with "includes" is so acute that it has its own definition within the tax code: "[t]he terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined."[227] Plainly, if "includes" were to *always* indicate the presence of an unbounded list, no such statement would be necessary. This is, in essence, a negative conceptual argument—i.e.,

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222. *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012)(confining the definition of individual to include only natural persons). In *Mohamad*, the Supreme Court held that the term "individual" as used in the Torture Victim Protection Act of 1991 (TVPA) encompassed only natural persons. *Id.* at 1705. The Court first noted that "'individual' ordinarily means '[a] human being, a person,'" *id.* at 1707 (quoting 7 OXFORD ENGLISH DICTIONARY 880 (2d ed. 1989)), and looked to the Dictionary Act for support. *Id.* (citing 1 U.S.C. § 1 (2006)). The Court also noted that "federal statutes routinely distinguish between an 'individual' and an organizational entity of some kind," and that before the Court would assume Congress intended "individual" to include more than natural persons, "there must be *some* indication Congress intended such a result." *Id.* (emphasis added). To the Court, this indication could come from "the rare statute . . . in which Congress expressly defines 'individual' to include corporate entities," or when "the statutory context makes that intention clear, because any other reading of 'individual' would lead to an 'absurd' result." *Id.* The TVPA, however, gave no such indications. *See also* Bowoto v. Chevron Corp., 621 F.3d 1116, 1126–27 (9th Cir. 2010) (noting that through the Dictionary Act, "Congress has directed courts to presume the word 'individual' in a statute refers to natural persons and not corporations").

223. The Dictionary Act, which sets the default definitions for the United States Code, takes this tack. 1 U.S.C. § 1 (2006) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . 'person' include[s] corporations . . . as well as individuals.").

224. Mitchell et al., *supra* note 125, at 13 n.60.

225. 26 U.S.C. § 7701 (2006).

226. *Id.*

227. *Id.* § 7701(c).

there is no single concept associated with the word "includes" across the legal system as it is embodied in the United States Code.

5. General Principles Argument

General principles argue that, if there are general principles of law relevant to the target statute, the statute should be interpreted in the way that is most congruent with those principles.[228] An uncodified portion of RICO directs that it "shall be liberally construed to effectuate its remedial purposes."[229] This liberal-construction clause has led some courts to conclude that "the term 'enterprise' should be construed broadly to include an association of legal entities."[230] But there is a countervailing constitutional principle in play: the rule of lenity, which "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[231] As a canon of construction, the rule finds voice in the notion that criminal statutes must be strictly construed.[232] Thus, if § 1961(4) were determined to be ambiguous, the rule of lenity would demand a narrow reading of the term "enterprise": "RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws."[233] So there is a good argument that a departure from a literal reading of §1961(4) by expansively reading "includes" is, as Justice Scalia suggested in *Mohawk*, "at least ambiguous," which would trigger application of the rule of lenity.[234] As a counter, one could expect arguments that the statute is not ambiguous,[235] any ambiguity is not sufficiently "grievous,"[236] and that any

228. MACCORMICK, *supra* note 126, at 130.

229. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

230. United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993); *see also* Mitchell et al., *supra* note 125, at 7 (noting how the term "enterprise" should be construed in the context of RICO).

231. United States v. Lanier, 520 U.S. 259, 266 (1997). *See also* Mohawk Petitioner's Brief, *supra* note 147, at 19–20 (discussing what would trigger the application of the rule of lenity); SOLAN, *supra* note 43, at 77–81 (discussing how the Supreme Court interpreted the term "enterprise" in the context of RICO); Mitchell et al., *supra* note 125, at 19–20 (discussing and defining the rule of lenity).

232. *Lanier*, 520 U.S. at 266.

233. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 257 (1989) (Scalia, J., concurring).

234. Mohawk Transcript, *supra* note 116, at 47.

235. *See* United States v. Turkette, 452 U.S. 576, 587-588 n.10 (1981) ("There being no ambiguity in the RICO provisions at issue here [viz., §1961(4)], the rule of lenity does not come into play."); Boyle v. United States, 556 U.S. 938, 950 (2009) ("Because the statutory language is clear, there is no need to reach . . . arguments based on statutory purpose, legislative history, or the rule of lenity.").

236. Chapman v. United States, 500 U.S. 453, 463 (1991).

unfair surprise attendant upon ambiguity has been cured by the unbroken line of circuit opinions holding that corporations can indeed be members of associations in fact.[237] The first objection is, of course, a significant hurdle, given the Supreme Court's repeated insistence that particular sections of RICO are "clear" or "plain," even though the Justices vehemently disagree as to what that clear or plain meaning is.[238] We will defer for now the question of why that might be and simply register that courts often take a "plain meaning" approach to RICO provisions that are anything but plain.

6. Historical Argument

"The argument from history takes note that a statute or group of statutes can over time come to be interpreted in accordance with a historically evolved understanding of the point and purpose of the statute, or of the group of statutes taken together as a whole."[239] One way to think about this type of argument vis-à-vis § 1961(4) is to consider the substantial precedent holding that an association-in-fact enterprise can include corporations. We have already examined that point and there is no need to labor it further. Another way is to think about the purpose of RICO and how well particular interpretations of the "enterprise" definition fit with that purpose. We will take up these ideas more fully in the next section, but it is worth pausing for a moment to reflect back on our discussion of *Turkette* and its holding that statutorily covered enterprises can be illegitimate as well as legitimate, and how that decision impacts the interpretive issue before us.

The ultimate point we must keep in mind is that the Supreme Court made a *policy* decision in *Turkette*, confirmed in *Boyle*, to read § 1961(4) broadly so as to make more criminals subject to RICO's proscriptions and penalties. But this decision came at an associated cost: subsequent courts

237. *See* Mohawk United States Amicus Brief, *supra* note 151, at 15–16 & n.6 (noting that even if a term is singular, there is precedent for the term being interpreted to extend to group entities).

238. *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (finding section 1964 (c) clear, but divided on the plain meaning of the text). In *Sedima*, all nine Justices agreed that § 1964(c) was unambiguous, but split 5-4 as to the provision's plain meaning. *See id.* at 495–97 (holding that the plain language of § 1964(c) forecloses an "amorphous 'racketeering injury' requirement"); *id.* at 509–10 (Marshall, J., dissenting) (asserting that the majority's rejection of a "racketeering injury" requirement "distorts the statutory language under the guise of adopting a plain-meaning definition, and it does so without offering any indication of congressional intent that justifies a deviation from . . . the plain meaning of the statute"); *see also* SOLAN, *supra* note 43, at 101 (noting that "in an interesting voting paradox, the justices agreed 9-0 that the language is plain, but disagreed 5-4 about what it means").

239. MACCORMICK, *supra* note 126, at 130.

and litigants must interpret the section in light of *Turkette*, which is to say in light of history.[240] That history includes the oft-repeated statement that the "enterprise" concept is unbounded (i.e., "[t]here is no restriction upon the associations embraced by the definition").[241] This statement can be wrenched out of context and, without its trailing qualifiers, appear as a license to reach anything, including associations in fact of corporations.[242] These consequences demand closer examination, a subject to which we now turn.

C. *Teleological-Evaluative Arguments: Consequentialism by Another Name*

Examining the language and context of a statute are important tools in interpretation, but, as MacCormick reminds us, "other values can be significant."[243] Some of these values begin to emerge from the background when we consider that statutes are not found in a cabbage patch or delivered by a stork: they are the product of the purposive acts of legislators. These acts are taken "with a view to reforming the law"—to correcting what MacCormick calls a "mischief" in the existing body of law.[244] Thus, an interpretation that would achieve the ends at which a statute is aimed (be it curing a defect, closing a loophole, or reforming an inequity) has much to commend it. One way of thinking about this is, as Lon Fuller once suggested, by analogy to an invention that was left as a

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240. Solan suggests that courts have interpreted RICO under a "law enforcement model," by which he means that courts "have been generous with prosecutors and stingy with civil plaintiffs in interpreting various provisions of the statute." Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2255 (2003). This phenomenon was no doubt exacerbated by the fact that the interpretations of RICO's substantive provisions first occurred in criminal cases, where the courts were inclined to give the Government a fair amount of leeway in its fight against crime. And, as Reed notes,

> [t]he happenstance that civil RICO was not "discovered" by the plaintiff's bar until the 1980's has had an important influence on the development of RICO jurisprudence. Had the much deplored explosion of civil RICO litigation occurred ten years earlier, the courts would have interpreted the statute much more restrictively than they did with only criminal RICO prosecutions on their docket.

SMITH & REED, *supra* note 41, ¶ 3.02[1] & n.19 (noting also that "[o]nly a handful of civil RICO cases were brought between 1970 and 1980").

241. United States v. Turkette, 452 U.S. 576, 580–81 (1981); *see* discussion *supra* Part II.A (giving the facts of the Turkette case and noting that the Supreme Court read RICO broadly to include criminal activity).

242. *See, e.g.*, United States v. Phillip Morris USA Inc., 566 F.3d 1095, 1112 (2009) (demonstrating author's point that RICO can be taken out of context if read too liberally).

243. MACCORMICK, *supra* note 126, at 132.

244. *Id.*

pencil sketch at the time that its author died.[245] Someone continuing that work would have to ask what the projected device was supposed to do and discern the motivating principle behind it. According to Fuller,

> [s]o it is usually with difficult problems of interpretation. If the draftsman of a statute were called into direct consultation, he would normally have to proceed in the same manner as the judge by asking such questions as the following: Does this case fall within the mischief which the statute sought to remedy? Does it fall within the "true reason of the remedy" appointed by the statute, that is, is the prescribed remedy apt for dealing with this particular manifestation of the general mischief at which the statute was aimed?[246]

Such is the case with RICO and the OCCA of which it is part: "Congress decided that organized crime posed such a grave threat to society that only new, more stringent legislation could ameliorate the situation," especially given that under then-existing laws "most organized crime participants went unpunished."[247] "The problem was multifaceted,"[248] as was the solution, and it behooves latter-day interpreters to (re)consider what defects Congress sought to cure through the OCCA and how it went about doing so.

As I noted at the outset, one of the keys to understanding RICO is to understand the evils it sought to redress. One popular, simple, and oft-quoted formulation comes from a piece written over twenty years ago by (now) Justice Alito, who opined that "RICO's criminal prohibitions have two aims[:] to stop organized crime's infiltration of legitimate business[;] . . . [and] to make it unlawful for individuals to function as members of organized criminal groups."[249] But is this really so? Was this *RICO's* purpose? Or was that the purpose of the entire *OCCA*? We will not find an absolutely clear answer in the structure of RICO or the OCCA, and none of the case law or scholarship puts the matter to rest in anything close to a definitive way. But asking the question and looking at the available evidence can help us answer the important subsidiary question: can a corporation be part of an association-in-fact enterprise?

Many previous commentators and courts have recounted the legislative history of RICO in copious detail, so I will resist the temptation here and stick to a limited number of legislative facts that are largely

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245. LON. L. FULLER, THE MORALITY OF LAW 84–88 (Yale Univ. Press rev. ed. 1969).

246. *Id.* at 85.

247. United States v. Turkette, 632 F.2d 896, 899–900 (1st Cir. 1980).

248. *Id.* at 900.

249. Samuel A. Alito, Jr., *Racketeering Made Simple(r)*, *in* THE RICO RACKET 1, 3–4 (Gary L. McDowell ed., 1989).

undisputed but that are nonetheless sufficiently illuminating for our purposes.[250] To do this, we must set our initial vantage point at a distance and look at the OCCA and—to put the analysis in MacCormick's framework—ask a series of questions that will help us identify the social problem that the OCCA was intended to remedy and, even more specifically, what "defect" in existing law required redress in the form of a new law.

First, what was the social problem? As President Nixon put it to Congress, "[O]rganized crime has deeply penetrated broad segments of American life. In our great cities, it is operating prosperous criminal cartels. In our suburban areas and smaller cities, it is expanding its corrosive influence."[251] How does it do this? It has a "virtual monopoly of illegal gambling, the numbers racket, and the importation of narcotics," the proceeds of which give it the power and resources to underwrite criminal businesses like loansharking, to "infiltrate and corrupt organized labor," and to increase "its enormous holdings and influence in the world of legitimate business."[252] Is this a new problem? Yes, because although organized crime is as old as the Republic, "it has only been in this last half century that these criminal groups have begun seriously to threaten the very integrity of our Nation and the well-being of such large segments of our people."[253] How did this happen? Although "organized criminal groups," the most influential of which were "the 26 families of La Cosa Nostra," had been subject to prosecution efforts, "none had been destroyed" and the leaders of these groups had "been notoriously successful in 'getting off' even in those relatively few cases in which the evidence has warranted the prosecution."[254] Why was this so and how could it be fixed? Mafia chieftains "have developed the process of 'insulation' to a remarkable degree," so much so that even when law enforcement is generally aware of

250. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 510–19 (1985) (Marshall, J., dissenting); United States v. Turkette, 452 U.S. 576, 587–93 (1981) (exploring the legislative history of RICO, reaching a broad interpretation); SMITH & REED, *supra* note 41, ¶ 1.01 (providing background on how courts have interpreted RICO and reached their conclusions); Califa, *supra* note 12, at 807–14 (exploring RICO's application to criminal defendants); G. Robert Blakey, *The Rico Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249–79 (1982) (providing a background of the legislative history of RICO, including the ideas behind the origins of RICO, and how RICO interacts with the OCCA.); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014–21 (1980) (detailing the legislative history of RICO); Lynch, *supra* note 3, at 666–80 (noting the intent of the legislature in passing RICO and RICO's history).

251. S. DOC. NO. 91-617 (1969) (quoting H.R. DOC. NO. 91-105, at 1–3 (1969)).

252. *Id.*

253. 116 CONG. REC. 585 (1970).

254. *Id.* at 585–86.

a leader's involvement in criminal activity, convicting him of his crimes "is usually extremely difficult and sometimes is impossible" simply because there is no evidence linking him "with the crime or his hireling who commits it."[255] The antidote to this was

> a bill which has been carefully drafted to cure a number of debilitating defects in the evidence-gathering process in organized crime investigations, to circumscribe defense abuse of pretrial proceedings, to broaden Federal jurisdiction over syndicated gambling and its corruption where interstate commerce is affected, to attack and to mitigate the effects of racketeer infiltration of legitimate organizations affecting interstate commerce, and to make possible extended terms of incarceration for the dangerous offenders who prey on our society.[256]

It is against this backdrop that we must consider the question of RICO's concerns and purposes and whether those concerns and purposes extend to congeries of legitimate corporations accused (most often, as we have seen) of uniting for the purpose of executing some sort of fraudulent marketing scheme.

To recap, the OCCA was intended to cure "defects" in existing law that had allowed Mafia leaders to escape prosecution because of, for example, witness tampering and intimidation and to plug holes that had made it difficult to prosecute interstate gambling operations or to prohibit the infiltration or corruption of legitimate organizations.[257] So where does RICO figure into this picture? A good place to start is with the other titles of the OCCA to see what they do. Eight of the titles deal with special problems associated with prosecuting members of organized crime: Title I allows the creation of special grand juries and preserving confidentiality;[258] Title II provides for enhanced witness immunity;[259] Title III deals with recalcitrant and fleeing witnesses;[260] Title IV treats false declarations;[261] Title V provides for the security of witnesses and their families;[262] Title VI expands the use of pretrial depositions;[263] Title VII creates new procedures

255. *Id.* at 586.

256. *Id.* at 585.

257. *See id.* (discussing various issues related to organized crime and the inability to effectively prosecute such individuals responsible but insulated from liability).

258. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (codified at 18 U.S.C. § 3321) (2006)).

259. *Id.* at 926–32 (codified at 18 U.S.C. §§ 5001 (2006)).

260. *Id.* at 932 (codified at 28 U.S.C. §§ 1821–1825 (2006)).

261. *Id.* at 932–33 (codified at 18 U.S.C. §§ 1621–1622 (2006)).

262. *Id.* § 501, 84 Stat. at 933.

263. *Id.* at 934 (codified at 18 U.S.C. § 3503 (2006)).

for dealing with evidence obtained from electronic surveillance;[264] and Title X provides for extended prison terms for dangerous special offenders.[265] One title, Title VIII, essentially federalizes criminal law pertaining to illegal gambling.[266] Another, Title XII, creates a commission charged with evaluating the effectiveness and constitutionality of federal criminal laws and practices.[267] That leaves Title XI, which deals with explosives and appears to be a late—and not especially germane—add-on,[268] and Title IX, RICO.[269]

From this structure, it is easy to see that two of the three substantive groups deal with two of the major objects of concern repeatedly articulated in crime-commission and legislative-committee crime reports from the mid-to-late 1960s: prosecution difficulties and illegal gambling. So what was RICO supposed to do? We know that Title IX was—as of January 21, 1970—entitled "Corrupt Organizations" and described thusly: "Prohibits infiltration of legitimate organizations by racketeers or proceeds of racketeering activities where interstate commerce is affected. Authorizes civil remedies comparable to anti-trust to prevent violation of law by divestiture dissolution or reorganization."[270] The House and Senate Reports, as well as the Report of Senate Judiciary Committee, are all to similar effect—i.e., RICO was aimed at infiltration of *legitimate* organizations: "Section 1962 establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations."[271] Title IX "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." Three specific evils are identified: "subversion of legitimate organizations," "infiltration of legitimate businesses," and "takeover of legitimate unions."[272] And when asked for their views on S. 1961, RICO's direct predecessor bill, individuals responding on behalf of executive-branch agencies—including the Attorney General, the Treasury Department, and the Small Business Administration—appeared to think that they were commenting on "a bill designed to prohibit the infiltration of legitimate organizations by racketeers."[273]

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264. *Id.* at 935-36 (codified at 18 U.S.C. § 3504 (2006)).
265. *Id.* at 948 (codified at 18 U.S.C. §§ 3575–3578 (2006)).
266. *Id.* at 936–40 (codified at 18 U.S.C. § 1955 (2006)).
267. *Id.* § 1201, 84 Stat. at 960.
268. *Id.* at 952 (codified at 18 U.S.C. §§ 841–848 (2006)).
269. *Id.* at 941 (codified at 18 U.S.C. §§1961–1968 (2006)).
270. S. REP. NO. 91-617, at 591 (1969).
271. H.R. REP. NO. 91-1549, at 57 (1970).
272. S. REP. NO. 91-617, at 76 (1969).
273. S. REP. NO. 91-617 at 121-26 (Office of Deputy Attorney General); *Id.* at 126 (General Counsel of the Treasury) ("to prohibit the infiltration or management of legitimate

Read in this light, RICO's purpose is narrower than one might assume. To be sure, it was not crafted solely to cripple the group that "is directly descended from and is patterned upon the centuries-old Sicilian terrorist society, the Mafia" (although that was certainly the impetus and primary target).[274] In other words, the statute would reach any organized criminals (be they other ethnic groups, bikers, or otherwise) that infiltrated and corrupted legitimate businesses.[275] But the relatively narrow scope of RICO within the larger OCCA was believed to carry a powerful wallop: viz., the new remedies. If we recall our earlier discussion, prosecution efforts had been spotty, and—even though some notorious racketeers had been imprisoned—"[n]ot a single one of the 'families' of La Cosa Nostra

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organizations by racketeering activity or the proceeds of racketeering activity, where interstate or foreign commerce is affected, and for other purposes"); *Id.* at 128 (Small Business Administration, Office of the Administrator) ("to combat the infiltration of legitimate business by organized crime").

274. 116 CONG. REC. 503, 586 (1970).

275. Although the idea was abandoned on Constitutional grounds, there was discussion in the House about creating a status offense based on membership in the Mafia. *See Bennett v. Berg*, 685 F.2d 1053, 1063 (1982) (discussing legislative history and congressional intent). Justice Thomas, in his *Anza* dissent emphasizes the importance that Congress put on the illegitimate competitive advantage that racketeers had over their legitimate rivals:

> The sponsor of a Senate precursor to RICO noted that "'the evil to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime.'" Upon adding a provision for a civil remedy in a subsequently proposed bill, Senator Hruska noted: "'[This] bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that gap.'" A portion of these bills was ultimately included in RICO, which was attached as Title IX to the Organized Crime Control Act. The Committee Report noted that the Title "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." The observations of the President's Commission on Law Enforcement and Administration of Justice, the source of much of the congressional concern over organized crime, are consistent with these statements. Its chapter on Organized Crime noted that "organized crime is also extensively and deeply involved in legitimate business . . . . [I]t employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out or control lawful ownership and leadership and to exact illegal profits from the public." The report noted that "[t]he millions of dollars [organized crime] can throw into the legitimate economic system gives it power to manipulate the price of shares on the stock market, to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier or harder for businessmen to continue in business."

Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 471–74 (2006) (Thomas, J., dissenting) (internal citations omitted).

has been destroyed."[276] RICO was designed not just to eject organized crime from legitimate organizations but through, among other things, onerous forfeiture provisions, "remove the leaders of organized crime from their sources of economic power."[277] "Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence."[278]

All this suggests that *Turkette* and *Boyle* were wrongly decided, but the holdings of those cases are not our object of study. But it brings us to the doors of three related inquiries that will help us round out the teleological argument: (1) the relationship between the words of the statute and their purpose and intent, (2) RICO's importance as a potent weapon the in the Government's prosecutorial arsenal, and (3) whether a common, lay understanding of what an "enterprise" is can aid the understanding of the ends of RICO and the consequences of interpreting it one way or the other.

When thinking about legislative intent and statutory purpose, it is worth noting that this nomenclature is sometimes disputed and often conflated.[279] If one were to draw a line between the two terms, "intent" might be a rather narrow concept (the "idea she sought to transfer using the words she chose to speak"), whereas "purpose" would be broader ("what a legislator imagines or hopes will change about the world by means of enacting the legislation").[280] On this view, the intent of RICO might be framed as "sending individuals to jail who invest in, muscle in on, or operate enterprises through specified racketeering acts." The purpose of RICO, by contrast, might be framed more broadly, perhaps something like "helping destroy organized crime in the United States."[281] Now there is a good argument to be made that Congress is too complex as a social group to have "purposes" in the strong sense, even though it can have identifiable "intents."[282] But this issue need not long detain us because for *our*

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276. S. REP. NO. 91-617 at 45 (1969).

277. *Id.* at 80.

278. *Id.*

279. For a helpful survey of the various positions, see Abby Wright, *For All Intents and Purposes: What Collective Intention Tells Us about Congress and Statutory Interpretation*, 154 U. PA. L. REV 984 (2006) [hereinafter Wright].

280. *See id.* at 991–92 (discussing a distinction between intent and purpose).

281. Plainly, undertaking this exercise will not generate single definitive formulations of intents and purposes.

282. *See* Wright, *supra* note 279, at 1007–24. The gist of Wright's argument is that Congressional intent can be divined with respect to particular legislation because of how Congress is structured and the procedures it follows. This is so even though we know that individual legislators may not have carefully considered a bill, might be hostile to it, and may have voted for it for horsetrading reasons. But inferring purpose in the broadest sense requires resort to extrinsic reasons, which renders any conclusions suspect. Even though Wright believes that Congress is not an entity capable of forming purposes, she ultimately

purposes we need not defend the farthest outpost: we will look at intent and purpose—however defined—as what Congress hoped to accomplish.[283]

For MacCormick, the "value-based and teleological character" of statutes forces an interpreter to consider what values and aims "should be postulated as the *telos* or end imputed to legislation."[284] And in effecting this inquiry, "the legislature's intention is the proper guide to the imputation of values as ends of legislation[,]" which we would be wise to remember "is a rational and teleological activity guided by political programmes structured by some sense of justice and the common good."[285] One way to go about this task is to look at a statute in its systemic context to see, for example, if a particular interpretation does not make sense. This approach leads to the ascription of what MacCormick calls an "objective" intention to a legislature.[286] What we are concerned with, though, is the more robust approach under which legislative history may reveal the "subjective" intent of legislators that can then be "called in aid in the process of ascribing an 'objective' intention to the legislature as a whole."[287] So where legislative intent is at issue, information about the circumstances of particular legislative acts can be helpful:

> [T]hese include commission reports, committee papers, and the like which identify a mischief and propose possible remedies for it. The "intention of parliament" plays a proper role in legislative interpretation, but not because there is a discoverable state of somebody's mind that can with special authenticity explain the words used as bearing the meaning attested by that mental state. On the contrary, it is because the legislature makes a practice of legislating in English of a particular register; because rational acts of legislation hang together in a coherent way internally and in relation to the rest of the legal system; and because reforms aim to remedy sensibly some identified deficiency; that one can finally impute to the legislature an intention that certain words be understood with a certain meaning rather than another one that they might bear. "Intention" is a rhetorically effective and legitimate way to frame a conclusion about what is the most

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states that many arguments based on "purpose" are really mislabeled "intent" arguments. *Id.* at 1024. Thus said, my proffered statement of RICO's purpose may really be an "intent."

283. *See* Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 453 (2005) [hereinafter Solan, *Private Language*].

284. MACCORMICK, *supra* note 126, at 134.

285. *Id.*

286. *Id.* at 135.

287. *Id.* at 136.

> reasonable interpretation in context, not a further argument to that effect.[288]

Here, as we have seen, there is copious evidence in the historical record, the structure of the OCCA, and even the title of RICO that Congress intended the statute to inhibit the corruption and infiltration of legitimate organizations. But there is negative evidence on our narrow issue as well: no one has ever pointed to any specific statement suggesting that Congress, in passing RICO, was concerned about corporations associating in fact as an "enterprise." Thus, interpreting § 1961(4) in light of legislative history to exclude groups of corporations from the definition of "enterprise" is "not likely to fly in the face of what the statute was intended to accomplish."[289]

Cognitive linguistics helps explain why knowing legislative intent is required in performing statutory construction of a provision like § 1961(4). Wright identifies two paradigmatic situations. The first involves staking the boundaries of a statutory category—e.g., where a court must decide whether an unenumerated item should nonetheless be included in a list.[290] For Wright, "Categories take on the structure they do precisely because they relate to some goal or purpose of the language community[,]" so knowing the legislature's reasons for enacting a statute could alert a court to the inner structure of a category and "in this way tell a court why the members of the category have been placed in the category—that is, what internal structure holds them together[.]"[291] As we have seen, one way of thinking about § 1961(4) is that its first clause lays out formal legal entities like partnerships and corporations and the second lays out less formal—yet nonetheless legitimate—entities like unions. And this reading squares with the legislative history in a way that a reading that would include "group of corporations" in the category does not.

Wright's second situation actually invokes § 1961(4) as an example

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288. *Id.* at 137. Solan writes to similar effect:

> [L]aws are written in language and language can only be understood in context. The thinking of those who supported and proposed the law in the first place may not reflect the will of every legislator, but it can certainly make *some* contribution to statutory interpretation if used wisely. At the very least, it can help us to determine whether the difficulty in applying the statute results from an unfortunate choice of statutory language to effect a legislative goal that becomes clear once one investigates the matter. And it can be used to confirm that decisions made on other grounds are not likely to fly in the face of what the statute was intended to accomplish.

Solan, *Private Language*, *supra* note 283, at 435.

289. Solan, *Private Language*, *supra* note 283, at 435.

290. Wright, *supra* note 279, at 994–95.

291. *Id.* at 995.

and uses Cunningham's work (discussed above) as a springboard. This situation "is one in which two possible categorizations of a concept conflict."[292] This was the root problem in *National Organization for Women v. Scheidler* ("*NOW*"), in which the Supreme Court was called upon to decide whether an antiabortion group could qualify as a RICO enterprise.[293] The defendants argued that an enterprise had to have an economic purpose, a position that the Court rejected.[294] To recall our earlier discussion, prior to *NOW*, Solan had argued that "enterprise" is a "fuzzy" concept. While *NOW* was pending before the Supreme Court, Cunningham and his group of linguists set out to test Solan's thesis by, for example, reviewing media uses of the term "enterprise" and questioning native speakers as to whether they thought certain organizations were "enterprises."[295] Interestingly, the English speakers divided into two groups, one focused "on whether the activity of the enterprise is organized for the achievement of a goal to which the constituent members are jointly committed; the other focuse[d] on whether the entity is like a business."[296] As both Cunningham and Wright observe, this divide largely describes the debate that was then going on in the courts.[297] For Wright, then, "understanding more about the purposes of those who enacted RICO would shed light on which categorization should be selected and, more specifically, given Congress's purpose in enacting RICO, whether [any chosen candidate] should fit within the category of *enterprise*."[298] Here again, legislative history weighs heavily in the "like a business" camp, as opposed to the "joint commitment" camp (i.e., a group of corporations joining to commit illegal acts—which, as a matter of semantics—seems more like a conspiracy than an enterprise).

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292. *Id.*

293. Nat'l Org. for Women v. Scheidler (*NOW*), 510 U.S. 249, 252–54 (1994).

294. *Id.* at 258–59.

295. *See* Cunningham et al., *supra* note 167, at 1595–96 (discussing the difficulty in attaining the true definition from statutes).

296. *Id.* at 1595.

297. *Compare* United States v. Turkette, 452 U.S. 576, 583 (1981) ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. . . . The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages.") *with* Nat'l Org. for Women v. Scheidler, 968 F.2d 612, 627 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 2958 (1993), *rev'd*, 510 U.S. 249 (1994) ("[T]he term enterprise 'encompass[es] only an association having an ascertainable structure which exists for the purpose of maintaining operations *directed toward an economic goal* that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity.'" (quoting United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)) (emphasis original)).

298. Wright, *supra* note 279, at 996 (emphasis original).

CONCLUSIONS AND RECOMMENDATIONS

The RICO statute is fraught with potential and actual ambiguity. Its structure is convoluted, its legislative history is, in many respects, murky, and its interpretation in the courts is often inconsistent and policy-driven rather than text-driven. And it is on this last point that—as we have seen—the circuit courts have made and replicated the decision to permit civil plaintiffs (and, in a fewer number of cases, the Government) to allege association-in-fact enterprises that include (and in many cases consist only of) corporations or other legal entities. The root problem is that the Supreme Court—in *Turkette* and again in *Boyle*—read § 1961(4) too broadly, which has led to serious, though perhaps unintended, consequences in civil litigation. That is now spilled milk, especially given that the Supreme Court is unlikely to overrule itself on a point of statutory construction, as evidenced by the *Boyle* decision itself, which could have overturned *Turkette* or considerably narrowed its holding. So the question remains, "What to do?"

First, litigants must continue to press and preserve the argument that a corporation can never be part of an association in fact. This can be raised both directly and as a predicate question in those § 1962(c) cases in which the person-enterprise distinction is in dispute because a corporation is alleged to be the defendant and part of an association in fact. Ethical obligations to plead in good faith should be no bar here because—for the most part—the circuits that have found it proper to include corporations in associations in fact have done so without much reasoning or discussion and the various Justices' comments in *Mohawk* provide good cover for asking a lower court to take a fresh look at the issue. Second, the Supreme Court should grant certiorari in a case that squarely presents the question. The circuits have uniformly misfired when holding on the point, and now—because of *Boyle's* expansive reading of § 1961(4)—is an opportune time to read the statute fairly and literally to prevent the further "RICO-ization" of commercial and consumer-fraud disputes that are better suited to determination under state law.