NOTE

Drugs and Racketeering Don't Mix: The Potential Achilles' Heel of the National Prescription Opiate Litigation

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ABSTRACT

In 1970, Congress created a powerful litigation weapon to combat organized crime: the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The government originally used this statute successfully to prosecute notorious organized crime groups like La Cosa Nostra. In addition to its criminal sanctions, RICO also contains a civil enforcement mechanism ("Civil RICO"), which allows private parties to institute suits against persons who participate in the affairs of an enterprise through a pattern of racketeering activity. In Civil RICO litigation, the type of enterprise most commonly pled is one that consists of a group of individuals associated in fact. This Note contends that RICO's plain language, structure, and legislative history indicate that only groups of individuals—not groups of corporations or other legal entities—can form an association-in-fact enterprise. Despite these strong indications, plaintiffs in the National Prescription Opiate Litigation have filed Civil RICO actions on the theory that several large pharmaceutical corporations formed an association-in-fact enterprise to fuel the opioid epidemic. The success of this litigation very well could rest on the meaning of "enterprise" in the Civil RICO statute. Based on the text, structure, and history of Civil RICO, this Note contends that groups of corporations can never form association-in-fact enterprises.

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* J.D., expected May 2021, The George Washington University Law School; B.A., Government, May 2018, Patrick Henry College. I thank the editors of *The George Washington Law Review* for their careful edits and thoughtful insights. Any remaining errors are my own. I also want to thank my wife, Ashlyn, for her loving support and encouragement.

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INTRODUCTION

The opioid crisis has rocked America. Every day, opioid overdoses take the lives of roughly 130 Americans.[1] Between 1999 and 2018, opioid overdoses killed nearly 450,000 people.[2] And the majority—almost 70%—of all overdoses in 2018 involved an opioid of some sort.[3] The toll on the economy is also startling. Experts estimate that the opioid crisis annually bilks the economy of $78.5 billion in the form of healthcare treatment, lost productivity, and criminal justice costs.[4] Recently, local governments and grieving families have blamed large pharmaceutical companies for the fallout—with some justification.[5] In the late 1990s, large pharmaceutical companies reassured doctors and their patients that opiate pain relievers had little to no addictive qualities.[6] These assurances, coupled with an opiate's ability to quickly quell pain, led doctors to prescribe opiates indiscriminately before the opiates' addictive effects became mainstream knowledge.[7] To combat the drug-induced devastation, concerned citizens and government entities took to the courts. Their complaints echoed a common refrain: big pharmaceutical companies and "drug dealers in white coats" teamed up to distribute medically unnecessary opioids in massive quantities.[8]

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1 *Opioid Overdose: Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2020), https://www.cdc.gov/drugoverdose/epidemic/index.html [https://perma.cc/WF9A-A2QZ]; *see also Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (May 27, 2020), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis [https://perma.cc/H44C-5F83].

2 *Opioid Overdose: Understanding the Epidemic*, *supra* note 1.

3 *Id.*

4 *See Opioid Overdose Crisis*, *supra* note 1.

5 *See, e.g.*, Laura Strickler, *Purdue Pharma Offers $10-12 Billion to Settle Opioid Claims*, NBC NEWS (Aug. 27, 2019, 2:32 PM), https://www.nbcnews.com/news/us-news/purdue-pharma-offers-10-12-billion-settle-opioid-claims-n1046526 [https://perma.cc/28XU-3VPW].

6 *See Opioid Overdose Crisis*, *supra* note 1.

7 *Id.*

8 *See* Zolan Kanno-Youngs, *'Drug Dealers in White Coats,'* WALL ST. J. (Oct. 11, 2018,

Although the plaintiffs' bar has leveled a volley of claims against opioid manufacturers,[9] one statute promises particularly vindicating results: the Racketeer Influenced and Corrupt Organizations Act ("RICO").[10] Originally enacted in 1970 to combat organized crime,[11] RICO contains a civil enforcement mechanism ("Civil RICO") that allows a private party to sue a person who "'conduct[s] or participate[s], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity[,]' or conspires to do so."[12] In other words, Civil RICO only targets specific kinds of unlawful conduct that take place within an enterprise—typically one-off grievances that escaped criminal prosecution under RICO.

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."[13] This language poses one major problem for plaintiffs in the current National Prescription Opiate Litigation: most—if not all—of the plaintiffs have alleged that multiple pharmaceutical companies have formed an association-in-fact enterprise,[14] but the statutory language only covers "group[s] of *individuals* associated in fact."[15] In other words, if a RICO Enterprise cannot consist of corporations associated in fact, then large pharmaceutical companies should be categorically immune from liability under RICO.

This Note argues that the text, structure, and history of RICO categorically exclude corporate defendants from classification as association-in-fact enterprises because § 1961(4) limits informal enterprises to "groups of individuals." Part I discusses the origins of the RICO statute, the Supreme Court's previous attempts to clarify the

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5:07 PM), https://www.wsj.com/articles/drug-dealers-in-white-coats-1539292026 [https://perma.cc/WBL8-Q2CK] (deeming doctors who prescribed unnecessary opiates "drug dealers in white coats").

9 For example, a county in Tennessee has sued several large pharmaceutical companies alleging negligence, unjust enrichment, civil conspiracy, and unlawful conduct under the Civil RICO statute. *See* Complaint at vi, Cannon Cnty. v. Purdue Pharma L.P., No. 3:18-cv-00614 (M.D. Tenn. July 6, 2018), ECF No. 1.

10 18 U.S.C. §§ 1961–68.

11 The statute was originally enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91–452, 84 Stat. 941.

12 United States v. Gills, 702 F. App'x 367, 373 (6th Cir. 2017) (alterations in original) (quoting 18 U.S.C. § 1962(c), (d)).

13 18 U.S.C. § 1961(4).

14 *See generally* Mike Curley, *Purdue, Opioid Distributors Can't Dodge RICO Claims in MDL*, Law360 (Sept. 10, 2019, 1:24 PM), https://www.law360.com/articles/1197206/purdue-opioid-distributors-can-t-dodge-rico-claims-in-mdl [https://perma.cc/MY7X-XU64].

15 18 U.S.C § 1961(4).

meaning of RICO enterprise, and the approach adopted by the circuit courts of appeals on this issue. Part II discusses how the Court might resolve the issue by examining the text, structure, and history of the relevant provisions. And Part III discusses the potential ramifications of a Supreme Court decision on the opioid crisis litigation.

I. Opiate Multidistrict Litigation and Civil RICO

The opioid litigation—consisting of over 2,000 individual cases—has largely been consolidated into a massive multidistrict litigation ("Opiate MDL") action pending in the Northern District of Ohio.[16] Most of the plaintiffs have brought Civil RICO claims, alleging that pharmaceutical corporations engaged in a pattern of racketeering activity when they formed an association-in-fact enterprise to peddle opioids while deliberately downplaying their addictive qualities.[17] The Opiate MDL puts front-and-center the issue of whether corporate defendants can form an association-in-fact enterprise under RICO. Civil RICO has been a repeat player at the Supreme Court. Past decisions on the statute have discerned the meaning of key terms like "enterprise" and "individuals."[18] In doing so, the Court has shown that the statute's text, structure, and history play dispositive roles in the analysis.[19] Although many circuit courts of appeals have decided that corporations can form association-in-fact enterprises, these decisions omit meaningful discussion of the factors that the Supreme Court traditionally considers—namely, text, structure, and history.[20] These guiding lights foreshadow appellate-level difficulties for the Opiate

16 *See* Transfer Order at 3, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (J.P.M.L. Dec. 12, 2017), ECF No. 1; *see also MDL 2804: National Prescription Opiate Litigation*, U.S. Dist. Ct. for the N. Dist. of Ohio, https://www.ohnd.uscourts.gov/mdl-2804 [https://perma.cc/38NV-CNXB]; Colin Dwyer, *Your Guide to the Massive (and Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM), https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation [https://perma.cc/ZW79-K4GZ]. The consolidation effort began in 2017 when plaintiffs in 46 different actions petitioned the United States Judicial Panel on Multidistrict Litigation to centralize the proceedings under 28 U.S.C. § 1407. The result of all the petitions and objections was that a large majority of then-pending opiate litigation was consolidated in the Northern District of Ohio. *See* Transfer Order at 3, *In Re* Nat'l Prescription Opiate Litig., Case No. 1:17-md-02804-DAP (J.P.M.L. Dec. 12, 2017), ECF No. 1. Although these cases are consolidated, they will "ordinarily retain their separate identities." Gelboim v. Bank of Am. Corp., 574 U.S. 405, 413 (2015).

17 *See* Curley, *supra* note 14.

18 *See infra* Section I.D.

19 *See infra* Section I.D.

20 *See infra* Section I.D.–E.

MDL plaintiffs because Civil RICO may not support a cause of action against corporations associated in fact.[21]

A. RICO's Connection to the Opiate MDL

The outcome of the Opiate MDL could turn on the meaning of a RICO "enterprise." Several plaintiffs are currently pleading Civil RICO violations against a slate of large pharmaceutical corporations, including businesses in their supply chain and marketing firms ("MDL Defendants").[22] For example, several of the plaintiffs allege that the MDL Defendants formed an association-in-fact enterprise.[23] Although the Northern District of Ohio placed some of the case documents under seal, the court has published some interim opinions that illuminate the content of the disputes—and Civil RICO is playing a prominent role.[24] As noted in a magistrate's report and recommendation, one of the central issues in the cases is whether the plaintiffs properly pleaded the existence of an association-in-fact enterprise under § 1961(4).[25]

RICO's presence in the Opiate MDL reflects a broader trend of plaintiffs using Civil RICO as the ultimate civil litigation weapon. Civil RICO suits have flooded the federal courts and posed serious threats to legitimate corporations.[26] In 2018, Civil RICO suits reached an all-time high of 1,405 suits in a single year.[27] The number of criminal defendants prosecuted under the statute—213—was over six times

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21 *See infra* Part II.

22 *See In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804, 2018 WL 6628898, at *5 (N.D. Ohio Dec. 19, 2018).

23 Although the court has sealed most of the complaints, some law firms, like Lieff Cabraser Heimann & Bernstein, have posted the Opiate MDL complaints that their firm authored. The complaints allege Civil RICO violations, and they specifically allege that multiple corporations formed association-in-fact enterprises under § 1961(4). *E.g.*, Complaint ¶ 131, Am. Fed'n of State, Cnty., & Mun. Emps. Dist. Council 37 Health & Sec. Plan v. Purdue Pharma L.P., No. 1:17-cv-2585 (N.D. Ohio Dec. 12, 2017), ECF No. 1, https://www.lieffcabraser.com/pdf/Opioids_Class_Action_Complaint_20171212.pdf [https://perma.cc/N9TZ-GD5S] ("The Opioids Promotion Enterprise is an association-in-fact within the meaning of 18 U.S.C. § 1961(4) . . . .").

24 *See In re* Nat'l Prescription Opiate Litig., No. 1:17-cv-02804, 2018 WL 4895856, at *16–18 (N.D. Ohio Oct. 5, 2018).

25 *See id.*

26 *See* Caroline N. Mitchell, Jordan Cunningham & Mark R. Lentz, *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, 3, 33 (2008); Nicholas L. Nybo, Comment, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U. L. REV. 19, 24–26 (2013).

27 *Anti-Racketeering Civil Suits Jump in 2018*, TRAC (Oct. 30, 2018), https://trac.syr.edu/tracreports/civil/535/ [https://perma.cc/HS6K-ZR33]. The prevalence of Civil RICO suits is nothing new. *See* Chief Justice William H. Rehnquist, *Reforming RICO*, *in* THE RICO RACKET 63, 64

lower.[28] The numbers make sense given the bounty of a successful Civil RICO claim: treble damages, attorney's fees, and the stigmatizing label that the defendant engaged in "racketeering."[29]

To state a cognizable claim for Civil RICO,[30] the plaintiff must allege that the defendant "'conduct[s] or participate[s], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity[,]' or conspires to do so."[31] This section prohibits criminal actors from using a formal enterprise (e.g., a corporation) to perpetrate racketeering activity (e.g., fraud).[32] It also prohibits multiple criminal actors from banding together into an informal enterprise (e.g., a street gang) to perpetrate racketeering activity (e.g., dealing in a controlled substance).[33] Because the RICO statute is long and complex,[34] this Note focuses entirely on the scope and meaning of association-in-fact enterprises under § 1962(c).

A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of

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(Gary L. McDowell ed., 1989) ("Civil filings under [RICO] have increased more than eight-fold over the last five years to nearly a thousand cases during calendar year 1988.").

28 *Anti-Racketeering Civil Suits Jump in 2018*, *supra* note 27. Setting 2018 aside, the discrepancy between civil and criminal RICO suits has remained steady over the past decade, with civil suits outnumbering criminal prosecutions three-to-one. *Id.*

29 *See* 18 U.S.C. § 1964(c); *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 506 (1985) ("Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat."); Ruiz v. Alegria, 896 F.2d 645, 650 (1st Cir. 1990) ("The mere assertion of a RICO claim consequently has an almost inevitable stigmatizing effect on those named as defendants. In fairness to innocent parties, courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.").

30 The statute contains two other types of RICO offenses: § 1962(a) prohibits acquiring an interest in an enterprise formed with racketeering income, and § 1962(b) prohibits acquiring an interest in an enterprise through racketeering activity. However, conducting or participating in the affairs of an enterprise engaged in racketeering activity in violation of § 1962(c) is the most commonly alleged RICO offense. *See* 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, 173 (2007).

31 United States v. Gills, 702 F. App'x 367, 373 (6th Cir. 2017) (alterations in original) (quoting 18 U.S.C. § 1962(c), (d)).

32 *See, e.g.*, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 160 (2001) (discussing a § 1962(c) violation where the president and sole shareholder of a corporation that promoted boxing matches used that corporation to engage in allegedly fraudulent activity).

33 *See, e.g.*, *Gills*, 702 F. App'x at 373 (discussing a § 1962(c) violation where a group of twelve individuals used their street gang, "Murda Ville," to deal drugs).

34 For a thorough compilation of Civil RICO and its corollary issues, see generally Frank J. Marine & Patrice M. Mulkern, U.S. DEP'T OF JUST., CIVIL RICO: 18 U.S.C. §§ 1961–1968: A MANUAL FOR FEDERAL ATTORNEYS (2007), https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/civrico.pdf [https://perma.cc/5MVG-TH67].

individuals associated in fact although not a legal entity."[35] Broadly conceived, this statute contains two types of RICO enterprises: formal enterprises (individuals, partnerships, corporations, associations, or other legal entities) and association-in-fact enterprises (informal groups of individuals). Cognizable Civil RICO claims "*must allege*" a valid RICO enterprise.[36] The Supreme Court has announced some principles that limit and clarify the meaning of enterprise. For example, it has held that a RICO defendant must participate in affairs of a separate enterprise, not just its own affairs.[37] The Court has also held that a RICO defendant must be distinct from the alleged RICO enterprise.[38] Despite these guiding principles, the Supreme Court has never decided whether an association-in-fact enterprise can consist solely of corporations.[39] This lack of guidance has made Civil RICO a viable weapon for plaintiffs in the Opiate MDL.

The Opiate MDL plaintiffs have built their Civil RICO claims on the idea that association-in-fact enterprises can consist solely of corporations. The plaintiffs have generally alleged that the MDL Defendants formed two different enterprises: a marketing enterprise and a supply chain enterprise.[40] The marketing enterprise consists solely of marketing corporations.[41] Allegedly, the MDL Defendants used the marketing enterprise to stir up continued demand for opioids by advertising their ability to quell long-term chronic pain conditions.[42] The supply chain enterprise also consists solely of corporations—ones that manufacture and distribute opioids.[43] The MDL Defendants allegedly used the supply chain enterprise to increase the overall supply of opioids.[44] Through these enterprises, the MDL Defendants were allegedly able to drum up both the supply of and the demand for medically unnecessary opioids.[45] In other words, the Opiate MDL plaintiffs have made Civil RICO a cornerstone of their litigation strategy. But the cornerstone only holds to the extent that association-in-fact enterprises can be exclusively formed with groups of corporations.

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35 18 U.S.C. § 1961(4).

36 *See Cedric Kushner*, 533 U.S. at 161 (emphasis added).

37 *See* Reves v. Ernst & Young, 507 U.S. 170, 185 (1993).

38 *See Cedric Kushner*, 533 U.S. at 162.

39 *See* Mitchell et al., *supra* note 26, at 23–32.

40 *See In re* Nat'l Prescription Opiate Litig., No. 1:17-md-2804, 2018 WL 6628898, at *5 (N.D. Ohio Dec. 19, 2018).

41 *Id.* at *5 n.4.

42 *Id.* at *5.

43 *Id.* at *5 n.5.

44 *Id.* at *5.

45 *See id.*

B. RICO's History and Purpose

RICO was enacted in 1970 to combat organized crime rings that had infiltrated otherwise legitimate business entities.[46] Congress stated that "the purpose of this Act [is] to seek the eradication of organized crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[47] When President Nixon signed the Organized Crime Control Act into law, he said "that the new law would allow federal law enforcement 'to launch a total war against organized crime.'"[48] The new statute was a huge success in the war on organized crime, and scholars specifically credit the demise of the notorious La Cosa Nostra ("LCN") to the statute's effectiveness.[49] Since the first successful prosecution of LCN boss Frank "Funzi" Tieri,[50] commentators have generally pronounced the end of organized crime families.[51] Despite the success of RICO prosecutions, Congress wanted to do more than merely jail the leaders and participants of organized crime groups—it wanted to entirely stamp out the criminal syndicate and restore balance to the communities and businesses harmed by organized crime.[52] This all-out approach to combating or-

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46 *See* S. REP. NO. 91-617, at 76–78 (1969) (discussing how La Cosa Nostra and other organized crime groups posed "a new threat to the American economic system").

47 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose).

48 A. Darby Dickerson, *Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction Under 18 U.S.C. § 1965*, 75 NEB. L. REV. 476, 483 (1996) (quoting Remarks on Signing the Organized Crime Control Act of 1970, 1970 PUB. PAPERS 846 (Oct. 15, 1970)).

49 *See, e.g.*, Brian Goodwin, Note, *Civil Versus Criminal RICO and the "Eradication" of La Cosa Nostra*, 28 NEW ENG. J. CRIM. & CIV. CONFINEMENT 279, 279 n.1 (2002) ("'La Cosa Nostra' refers to a nationwide crime organization which is divided into units called 'families.' It is an Italian phrase that translates into English as 'our thing' or 'this thing of ours.'" (quoting United States v. Dist. Council of N.Y.C. & Vicinity of the United Brotherhood of Carpenters & Joiners of Am., 880 F. Supp. 1051, 1056 n.1 (S.D.N.Y. 1995))).

50 *See* Manna v. U.S. Dep't of Justice, 815 F. Supp. 798, 802 n.3 (D.N.J. 1993) ("On November 21, 1980, Frank 'Funzi' Tieri was convicted of being the 'boss' of [La Cosa Nostra] . . . and of operating its affairs through a pattern of racketeering activity which involved predicate acts of murder, extortion, loansharking, receipt of stolen property and bankruptcy fraud."); United States v. Tieri, 636 F.2d 1206, 1206 (2d Cir. 1980) (denying appeal).

51 *See* Goodwin, *supra* note 49, at 280–81 (describing various proclamations that RICO's success effected the end of organized crime families). *But see id.* at 284 (arguing that "any ringing of the 'death knell' of organized crime is . . . premature").

52 The Senate Report for the Organized Crime Control Act attributes the creation of Civil RICO to the idea that the property and economic base of organized crime syndicates must be wiped out to prevent new leaders from continuing the criminal activity. *See* S. REP. NO. 91-617, at 78–79 (1969). The Senate decided that the best way to accomplish this "attack . . . on all available fronts" was through the creation of a civil enforcement mechanism. *Id.* at 79. Civil

ganized crime led Congress to pass a civil enforcement mechanism to accompany RICO's criminal prohibitions and penalties.[53]

Civil RICO was originally designed to sweep up the harms caused by organized crime in a manner that criminal enforcement was ill-equipped to do.[54] Accordingly, § 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."[55] In other words, this provision allows any person injured by a § 1962 RICO offense to initiate a civil lawsuit on his own behalf and potentially recover treble damages and attorney's fees.[56] Nothing in the legislative record indicates that Congress intended private litigants to use Civil RICO as a mechanism to transform run-of-the-mill business disputes into treble damage RICO suits.[57] Nevertheless, the overwhelming majority of Civil RICO suits are just artfully-pleaded "garden-variety civil fraud cases" that belong in state court.[58] The cases have nothing to do with criminals infiltrating legitimate businesses.[59] So although RICO's criminal provisions seem to have done a fine job carrying out Congress's original aim of eradicating organized crime, Civil RICO has increasingly been used as "the blunt instrument of civil litigation" in cases that do little to further Congress's crime-fighting goals.[60]

C. RICO's Text and Structure

Congress brought RICO to life when it passed the Organized Crime Control Act of 1970.[61] The statute broadly forbids persons from engaging in a pattern of racketeering activity through an enterprise

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RICO essentially allows private people wronged by racketeering to work alongside the government by tearing up the economic roots of organized crime in civil court. *See id.*

53 *See id.*

54 *See id.* at 80–81.

55 18 U.S.C. § 1964(c).

56 *See id.*

57 Mitchell et al., *supra* note 26, at 3.

58 Rehnquist, *supra* note 27, at 63–64. For an example of a private litigant RICO-izing "garden-variety" state law disputes, see DeMauro v. DeMauro, 115 F.3d 94 (1st Cir. 1997) (discussing an especially bitter divorce proceeding in which one spouse invoked Civil RICO to challenge the other spouse's transfer of certain marital assets).

59 *See* Rehnquist, *supra* note 27, at 66–67.

60 JOHN J. HAMILL, BRIAN H. ROWE, KAIJA K. HUPILA & EMILY BURKE BUCKLEY, PRACTICE SERIES: RICO: A GUIDE TO CIVIL RICO LITIGATION IN FEDERAL COURTS 1 (2014), https://jenner.com/system/assets/assets/9961/original/Civil%20RICO%202014.pdf [https://perma.cc/QU9Y-XYG3].

61 Pub. L. No. 91-452, 84 Stat. 922.

that affects interstate or foreign commerce.[62] The most commonly alleged RICO offense stems from 18 U.S.C. § 1962(c),[63] which forbids "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[64]

RICO's statutory offenses contain several terms of art that are either defined elsewhere in the statute or interpreted by the federal judiciary. For example, racketeering activity has a very specific definition in § 1961(1). Racketeering activity includes state law offenses like "murder, kidnapping, gambling, arson, robbery, bribery, [and] extortion," and over a hundred federal offenses like wire fraud, obstruction of justice, and witness tampering.[65] Because these predicate offenses are all separately punishable under state and federal law, RICO only becomes implicated when a person[66] participates in an enterprise that engages in a pattern of racketeering activity.[67]

A pattern of racketeering activity means that the offender commits "at least two acts of racketeering activity"—as defined in § 1961(1)—within a ten-year period.[68] For example, committing two acts of wire fraud within ten years would constitute a pattern of racketeering activity. RICO, however, does not reach persons who merely commit multiple acts of racketeering activity on their own. RICO only punishes persons who commit multiple acts of racketeering activity through the affairs of a *separate enterprise*.[69] For purposes of RICO, the word 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."[70] This definition is critical to understanding whether corporations can form an association-in-fact enterprise.

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62 *See* 18 U.S.C. § 1962.

63 *See* Gordon, *supra* note 30, at 173.

64 18 U.S.C. § 1962(c).

65 *Id.* § 1961(1).

66 Defined as "includ[ing] any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3).

67 *See id.* § 1962.

68 *Id.* § 1961(5).

69 *See id.* § 1962(c). Put another way, an individual cannot be subject to RICO if they engage in kidnapping five times over a 10-year period if the kidnappings were not part of some larger enterprise.

70 *Id.* § 1961(4).

D. Teachings from the Supreme Court's Interpretation of Civil RICO Provisions

Since 1981, the Supreme Court has announced five decisions that address the meaning of RICO enterprise.[71] Although none specifically address whether a corporation can ever form an association-in-fact enterprise under § 1962(c), each decision shows the Court's commitment to a textualist mode of reasoning that emphasizes the text, structure, and history of the statute. In each of the cases, the Court's textualist approach narrowed the meaning of RICO enterprise.

1. Association-in-Fact Enterprises Encompass Illegitimate Activity: United States v. Turkette

In 1981, the Supreme Court held that the term "enterprise" in § 1962(c) encompasses both legitimate and illegitimate enterprises.[72] At trial, the respondent in *United States v. Turkette*[73] was convicted on nine counts of "conspiracy to conduct and participate in the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering activities, in violation of 18 U.S.C. § 1962(d)."[74] Because the indictment alleged that the RICO enterprise consisted of "a group of individuals associated in fact for the purpose of *illegally* trafficking in narcotics"[75] and other *illegal* offenses, the respondent argued that "RICO was intended solely to protect *legitimate* business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise."[76] The Court rejected this argument.[77]

In rejecting the respondent's argument, the Court relied exclusively on the statutory text by implementing the plain-meaning rule.[78] The Court described the plain-meaning rule this way: "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be re-

71 *See* Boyle v. United States, 556 U.S. 938 (2009); Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (per curiam); Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001); Reves v. Ernst & Young, 507 U.S. 170 (1993); United States v. Turkette, 452 U.S. 576 (1981).

72 *Turkette*, 452 U.S. at 580.

73 452 U.S. 576, 580 (1981).

74 *Id.* at 578–79 (footnote omitted).

75 *Id.* at 579 (emphasis added).

76 *Id.* at 579–80 (emphasis added).

77 *Id.* at 580.

78 *Id.*

garded as conclusive.'"[79] After quoting the language of § 1962(c), the Court noted that the text did not exclusively restrict the term "enterprise" to illegal endeavors.[80] The Court reasoned that Congress easily could have restricted the meaning of enterprise by adding the word "legitimate" to its definition.[81] But Congress declined to do so.[82] For the Court, this textual analysis was dispositive. It served as the sole basis on which the Court reversed the Court of Appeals, which "clearly departed from and limited the statutory language."[83]

2. *RICO Defendant Must Participate in the Affairs of a Separate Enterprise:* Reves v. Ernst & Young

In the 1993 case of *Reves v. Ernst & Young*,[84] the Supreme Court held that a RICO defendant "must participate in the operation or management of the enterprise" to fall within the scope of § 1962(c).[85] Although this case focused mainly on the level of participation in the enterprise required to trigger civil liability,[86] the Court's approach to statutory interpretation informs whether multiple corporations can constitute an association-in-fact enterprise.

Like in *Turkette*, the Court here began its analysis with the text of the statute. The particular language at issue was the clause in

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79 *Id.* (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

80 *Id.* at 580–81 ("There 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.").

81 *Id.* at 581.

82 *Id.*

83 *Id.* The Court then dismissed three justifications that the First Circuit used to restrict the word "enterprise" to *legitimate* enterprises. First, the rule of *ejusdem generis* played no part in the analysis because it only aids in the interpretation of ambiguous language. *See id.* at 581–82. Second, imputing the ordinary meaning of "enterprise" to the statutory definition did not create internal inconsistencies within the statute. *See id.* at 582–85. And third, interpreting RICO to include both legitimate and illegitimate enterprises did not corrupt the balance between federal and state criminal law enforcement. *See id.* at 586–87.

84 507 U.S. 170 (1993).

85 *Id.* at 185 ("[W]e hold that 'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must participate in the operation or management of the enterprise itself." (citation omitted) (quoting 18 U.S.C. § 1962(c))).

86 The facts of the case help illustrate the decision's scope. The defendant in *Reves* was an accounting firm that provided services to a farmers' cooperative—the alleged RICO enterprise. *Id.* at 172–77. The plaintiffs alleged that the firm misled the co-op's investors through a pattern of racketeering activity. *Id.* at 170. The Court determined, however, that § 1962(c) requires a RICO defendant to have "*some* part in directing the enterprise's affairs." *Id.* at 179. And because the firm merely performed accounting services for the enterprise, it did not direct any of the enterprise's affairs as required to constitute operation or management. *Id.* at 179, 186.

§ 1962(c) making it unlawful "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs . . . ."[87] The parties heavily disputed the meaning of "conduct" and "participate"—with the petitioner urging a broad interpretation and the respondent urging a narrow interpretation.[88] To resolve the competing language interpretations, the Court consulted dictionaries that were in circulation at or near the time that Congress passed the Organized Crime Control Act.[89] The dictionary definitions led the Court to "understand the word 'conduct' to require some degree of direction and the word 'participate' to require some part in that direction."[90] The Court, therefore, concluded that RICO requires "participat[ion] in the operation or management of the enterprise itself."[91]

Once the Court established the plain meaning of the statute's key words, it then validated that meaning with the statute's legislative history.[92] The Court consulted the text of the original Senate bill,[93] hearing statements made by then-Assistant Attorney General Will Wilson when he testified on bills relating to organized crime,[94] House and Senate reports on the proposed legislation,[95] and comments made by members of Congress on the floor.[96]

One of the petitioner's main arguments was that RICO's liberal construction clause[97] requires the Court to read the statute in a way that encompassed the respondent's activity in the RICO enterprise.[98] The Court rejected this argument.[99] When Congress included the liberal construction clause, the Court said that Congress's aim was "to ensure that Congress'[s] intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new

87 18 U.S.C. § 1962(c).

88 *See* Brief for Petitioners, Reves v. Ernst & Young, 507 U.S. 170 (No. 91-886), 1992 WL 511960, at *36–41; Brief for Respondent, Reves v. Ernst & Young, 507 U.S. 170 (No. 91-886), 1992 WL 511962, at *25–29.

89 *See Reves*, 507 U.S. at 177–78.

90 *Id.* at 179.

91 *Id.* at 185.

92 *Id.* at 179–83.

93 *Id.* at 180.

94 *See id.* at 181.

95 *See id.*

96 *See id.* at 182.

97 In Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947, Congress stated that the "provisions of this title shall be liberally construed to effectuate its remedial purposes."

98 *See Reves*, 507 U.S. at 183.

99 *See id.*

purposes that Congress never intended."[100] For this reason, the Court viewed the clause as "an aid for resolving an ambiguity; it is not to be used to beget one."[101] And in the event that § 1962(c) contained an ambiguity, the Court hinted that the rule of lenity would control and favor the same narrow interpretation that the Court ultimately adopted.[102] In sum, the Court's emphasis on plain meaning reaffirms its approach to interpreting RICO and sheds light on its likely approach to interpreting whether corporations can form association-in-fact enterprises under § 1962(c).

3. *RICO Defendant Must Be Distinct from the Alleged RICO Enterprise:* Cedric Kushner Promotions v. King

In 2001, the Supreme Court decided *Cedric Kushner Promotions, Ltd. v. King*.[103] The case centered on a dispute between two boxing promoters.[104] The plaintiff, Cedric Kushner Promotions, sued Don King for violating the Civil RICO statute.[105] Cedrick Kushner Promotions claimed that King used his corporation, Don King Productions, to engage in a pattern of racketeering activity—fraud.[106] King defended on the grounds that he and his corporation were insufficiently distinct from each other, which precluded him from liability under RICO.[107] The Court rejected King's defense and held that RICO liability attaches whenever a person, legally distinct from the corporate enterprise, uses the corporation to engage in a pattern of racketeering activity.[108]

Consistent with the previously discussed RICO cases, the Court reached its conclusion by reading the statute in "ordinary English."[109] For this case, "ordinary English" meant reading the statute in light of

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100 *Id.*

101 *Id.* at 184 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 n.10 (1985)).

102 *See id.* at 184 n.8; *see also* Mitchell, et al., *supra* note 26, at 4 n.15. "The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants." Whitman v. United States, 135 S. Ct. 352, 353 (2014). But the rule only comes into play after the traditional tools of statutory interpretation fail to clear up the ambiguity. *See* Shular v. United States, 140 S. Ct. 779, 787 (2020).

103 533 U.S. 158 (2001).

104 *Id.* at 160–61.

105 *Id.*

106 *Id.*

107 *See id.*

108 *See id.* at 161; *id.* at 163 ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that.").

109 *Id.* at 161.

common grammar principles and deriving the meaning of individual words from ordinary dictionaries.[110] In other words, the Court broke no new ground when it took a textualist approach to interpreting the statutory language.

In addition to the textual analysis, the Court also looked to the statute's purpose to determine whether its interpretation could be harmonized with Congress's original goals. The Court considered the basic purposes of RICO as "protect[ing] a legitimate 'enterprise' from those who would use unlawful acts to victimize it and also protect[ing] the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.'"[111] Each of these purposes center around a common theme: preventing a person from taking over a separate enterprise to perpetrate illegal activity. For this reason, the Court found that reading § 1962(c) to require proof of a person and separate enterprise resonates with the statute's purposes.[112]

4. *The Court Declines to Consider Whether Corporations Can Form an Association-in-Fact Enterprise:* Mohawk Industries, Inc. v. Williams

In 2006, the Court came close to deciding whether corporations can form an association-in-fact enterprise under the statute.[113] *Mohawk Industries, Inc. v. Williams*[114] involved allegations that the RICO defendant (a large carpet manufacturer) formed a RICO enterprise with its outside recruiters and staffing agencies to commit a pattern of racketeering activity (immigration law violations).[115] The question presented was "[w]hether a defendant corporation and its agents engaged in ordinary, arms-length dealings can constitute an 'enterprise' under [§ 1962(c)]."[116]

The Court never issued an opinion in the case.[117] Instead, the Court dismissed the writ of certiorari as improvidently granted, vacated the judgment, and remanded the case for further consideration

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110 *Id.* at 161–62.

111 *Id.* at 164 (citations omitted) (quoting Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994)).

112 *Id.*

113 *See* Mohawk Indus., Inc. v. Williams, 547 U.S. 516, 516 (2006) (per curiam).

114 547 U.S. 516 (2006) (per curiam).

115 *See* Brief of Petitioner, *Mohawk*, 547 U.S. 516 (No. 05-465), 2006 WL 282167, at *5–9.

116 *Id.* at i.

117 *See Mohawk*, 547 U.S. at 516.

in light of *Anza v. Ideal Steel Supply Corp*.[118] Despite *Mohawk*'s ultimate disposition, the case was fully briefed and went to oral argument. At oral argument, at least six Justices strongly indicated that multiple corporations could not form an association-in-fact enterprise under the language in § 1962(c).[119] These indications should come as no surprise given the Court's repeated use of textualism to resolve disputes over the meaning of Civil RICO provisions. Nevertheless, the Court left for another day the question of corporations and association-in-fact enterprises.

5. *RICO Enterprise Characteristics: Purpose, Relationship, and Longevity:* Boyle v. United States

The Supreme Court addressed the structure of association-in-fact enterprises for the last time in 2009 when it decided *Boyle v. United States*.[120] *Boyle* involved allegations of a *criminal* association-in-fact enterprise.[121] The enterprise consisted of a fluctuating group of individuals that participated in several bank thefts in different states during the 1990s.[122] Before the case was submitted to the jury, the trial judge gave an instruction about the meaning of a RICO enterprise that largely tracked the language from *Turkette*.[123] The defendant requested that the trial judge supplement the *Turkette* instruction with one that required the government to prove "that the enterprise 'had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.'"[124] The trial judge refused the instruction.[125] This decision by the trial judge led the Supreme Court to iden-

118 *See id.*; *see also* Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) (discussing the scope of RICO's proximate cause requirement). Note that *Anza* only addressed RICO's proximate cause requirement. *See id.* at 453.

119 For an excellent discussion of the Justices' questions and their likely dispositions toward the question presented in *Mohawk*, see Mitchell et al., *supra* note 26, at 22–31.

120 556 U.S. 938 (2009).

121 *See id.* at 941.

122 *See id.*

123 The jury instruction spoke specifically to the structure of the RICO enterprise. To find the presence of an enterprise, it required the jury to find that: "(1) There [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose." *Id.* at 942 (alteration in original) (quoting appellate record); *see* United States v. Turkette, 452 U.S. 576, 583 (1981).

124 *Boyle*, 556 U.S. at 943 (quoting appellate record).

125 *Id.*

tify the required characteristics of an association-in-fact enterprise under § 1962(c).[126]

To understand the structural characteristics of a RICO enterprise, the Court—unsurprisingly—began with the text. The Court noted that the statutory definition of "enterprise"[127] does not set the "outer boundaries of the 'enterprise' concept."[128] In a footnote, the Court stated that § 1961(4) "does not purport to set out an exhaustive definition of the term."[129] The Court hinted that the difference between an illustrative and exclusive definition of enterprise turns on the use of the word "includes" instead of "means."[130] The Court complemented the definition's structure with the precise language chosen by Congress. The language says that "*any* . . . group of individuals associated in fact" can form an enterprise.[131] The structure and word choice counseled the Court to conclude that the RICO definition of enterprise is expansive.[132] And, contrary to the petitioner's suggestions, the definition does not require the government to prove any structural characteristics beyond those mentioned in the statute.[133] In deciding this case, the Court found that the structure and language of RICO's enterprise definition complement the statute's broad reach.[134]

E. Views from the United States Courts of Appeals

Although no Supreme Court opinion has directly addressed whether corporations (or any legal entity) can form an association-in-fact enterprise under § 1961(4), many circuit courts have addressed the issue. All have found that corporations can form an association-in-fact enterprise.[135] The decisions on this issue were mostly generated in

126 *Id.* at 940–41.

127 18 U.S.C. § 1961(4).

128 *Boyle*, 556 U.S. at 944.

129 *Id.* at 944 n.2.

130 *See id.* The Court cited to a comparison between the definitions for "racketeering activity" and "State" which use the verb "*means*," *see* §§ 1961(1)–(2), and the definitions for "person" and "enterprise" which use the verb "*includes*," *see* §§ 1961(3)–(4). This difference led the Court to believe that § 1961(4) "does not foreclose the possibility that the term might include, in addition to the specifically enumerated entities, others that fall within the ordinary meaning of the term 'enterprise.'" *Boyle*, 556 U.S. at 944 n.2.

131 18 U.S.C. § 1961(4) (emphasis added).

132 *Boyle*, 556 U.S. at 944.

133 *See id.* at 948.

134 *Id.* at 944.

135 *See, e.g.*, Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 995 (8th Cir. 1989); Fleischhauer v. Feltner, 879 F.2d 1290, 1296–97 (6th Cir. 1989); United States v. Feldman, 853 F.2d 648, 655 (9th Cir. 1988); United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir. 1988); United States v. Navarro-Ordas, 770 F.2d 959, 969 n.19 (11th Cir. 1985); Bunker Ramo Corp. v.

the 1980s and dealt with RICO's criminal provisions, not Civil RICO. Nevertheless, the decisions relied on one of three common patterns of reasoning to support the idea that corporations can form association-in-fact enterprises: (1) that the word "includes" in § 1961(4) introduces an illustrative, not exclusive, definition of enterprise; (2) that RICO's liberal construction clause requires the association-in-fact clause to encompass legal entities; and (3) that dicta in *Turkette* requires an expansive interpretation of enterprise.[136]

1. The Verb "Includes" Introduces an Illustrative Definition

The most common argument for corporate associations-in-fact stems from the word "includes" in RICO's definition for enterprise. It states that "'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."[137] This argument reasons that because the definition uses the word "includes" and not "means," the following text merely illustrates—not lists—the kinds of entities that can be an enterprise.[138] This reasoning has received passing recognition by the Supreme Court in *Boyle*.[139]

2. The Liberal Construction Clause Requires Association-in-Fact Enterprises to Include Legal Entities

Section 904(a) of the Organized Crime Control Act of 1970 has a liberal construction clause that requires courts to "liberally construe[ ] [RICO] to effectuate its remedial purposes."[140] Some circuits have used this clause to justify interpreting § 1961(4) to include multiple legal entities allegedly engaged in racketeering activity.[141]

United Bus. Forms, Inc., 713 F.2d 1272, 1285 (7th Cir. 1983); United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979).

136 *See* Brief of Petitioner, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (per curiam) (No. 05-465), 2006 WL 282167, at *20 n.8 (arguing that these patterns of reasoning fail to support the notion that corporations can form association-in-fact enterprises).

137 18 U.S.C. § 1961(4) (emphasis added).

138 *E.g.*, *Huber*, 603 F.2d at 394 (finding that corporations can be associated in fact because the use of "includes" in the enterprise definition "indicates that the list is not exhaustive but merely illustrative" (citing Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 99–100 (1941))).

139 *See supra* note 130 and accompanying text.

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

141 *E.g.*, United States v. London, 66 F.3d 1227, 1243–44 (1st Cir. 1995) (relying on the liberal construction clause to reject the defendant's contention that a RICO enterprise only extends to groups of natural persons associated in fact).

3. *Dicta in* Turkette *Suggests an Unlimited Definition of Enterprise*

In *Turkette*, the Supreme Court said that "[t]here is no restriction upon the associations embraced by the definition" of enterprise in § 1961(4).[142] Some circuits have relied on this to justify an expansive reading of § 1961(4) that encompasses multiple corporations.[143]

II. A Textualist Interpretation of RICO Enterprise

Reading RICO's definition of enterprise in a manner consistent with the Supreme Court's past RICO-related decisions—by focusing on the primacy of the statute's plain language and structure, and by verifying the resulting interpretation with RICO's history and purpose—necessitates the conclusion that corporations (or other legal entities) can never form an association-in-fact enterprise. Any appellate court faced with determining the meaning of association-in-fact enterprise should follow the Supreme Court's clear guidance and give great weight to the plain meaning of RICO's enterprise definition.[144]

A. *An Association-in-Fact Enterprise May Only Consist of "Groups of Individuals"*

When interpreting the language of Civil RICO, the Supreme Court has been fairly clear on where to begin: "[L]ook first to its language."[145] Section 1961(4) defines "enterprise" to "include[ ] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[146] The definition contemplates two distinct categories of enterprises: legal enterprises and association-in-fact enterprises.[147] At first blush, the casual reader might think that the definition encompasses corporations—after all, the statute plainly says that "enterprise" includes "corporation."[148] But the meaning of enterprise must

142 United States v. Turkette, 452 U.S. 576, 580 (1981).

143 *E.g.*, United States v. Feldman, 853 F.2d 648, 655 (9th Cir. 1988) (citing *Turkette*, 452 U.S. at 580) (supporting the proposition that § 1961(4) does not restrict the type or structure of associations embraced by Civil RICO).

144 The petitioner in *Mohawk* strongly urged the Court to adhere to the plain meaning of the statute and asserted many of the arguments presented in this Part. *See* Brief of Petitioner, Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (per curiam), 2006 WL 282167, at *12–26. The Court, however, never engaged with these arguments because it dismissed the writ as improvidently granted. *See supra* Section I.D.4.

145 *Turkette*, 452 U.S. at 580.

146 18 U.S.C. § 1961(4).

147 *Id.*

148 *See id.*

be read in conjunction with the statutory offense listed in § 1962(c). The offense exclusively prohibits a *person* from conducting or participating in the conduct of an *enterprise*'s affairs through a pattern of racketeering activity.[149] *Cedric Kushner* demonstrates this genre of RICO enterprise. The plaintiff in *Cedric Kushner* alleged that the defendant, Don King, used his corporation, Don King Productions, to engage in a pattern of racketeering activity.[150] The plaintiff never alleged that multiple corporations informally banded together to form a RICO enterprise.[151] Instead, Don King Productions served as a formal RICO enterprise through which a separate individual, Don King, perpetrated a pattern of racketeering activity.[152] Put another way, King's actions fell within RICO's reach because he used his corporation to commit his allegedly criminal acts.[153] Only in this limited sense, where a person uses a single, formal corporation to carry out a pattern of racketeering activity, can corporations become a RICO enterprise. But if plaintiffs fail to allege that the single corporation was, in and of itself, the racketeering enterprise, the text leaves them with only one option—to allege that the corporation was part of a larger, informal enterprise associated in fact. This artful pleading practice comes with several inherent limitations.

1. An Individual Is a Natural Person, Not a Corporation

When Congress used the phrase "group of individuals" in § 1961(4), it likely meant what it said—a group of *individuals*, not corporations.[154] When faced with the task of discerning a specific word's meaning, the Court has often looked to the word's ordinary English meaning.[155] Like in *Reves*, the easiest and most accurate way to discern the meaning of specific terms is by looking at dictionaries—spe-

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149 *Id.* § 1962(c).

150 Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 160 (2001).

151 *See id.*

152 *See id.* at 160, 163.

153 For more specific information on King's boxing racket, see Brief for Petitioner, *Cedric Kushner*, 533 U.S. 158 (No. 00-549), 2001 WL 81604, at *5.

154 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) ("Supremacy-of-Text Principle[:] The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."); *see also id.* at 69 ("Ordinary-Meaning Canon[:] Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.").

155 *E.g.*, *Cedric Kushner*, 533 U.S. at 161–62; Reves v. Ernst & Young, 507 U.S. 170, 177–79 (1993).

cifically, dictionaries that were in circulation at the time of the statute's passage.[156]

Reves explicitly endorses the use of *Webster's Third New International Dictionary of the English Language* as a resource for interpreting the meaning of Civil RICO provisions.[157] The dictionary defines "individual" as "a single human being as contrasted with a social group or institution."[158] Although not used in *Reves*, the *American Heritage Dictionary of the English Language* was also used around the time that Congress enacted RICO, and endorses a similar view of the word. It describes an "individual" as "[a] single human being considered separately from his group or from society."[159] In short, several dictionaries in circulation around the time Congress passed the Organized Crime Control Act limit the word "individual" to natural persons. They do not include any reference to corporations.

The context of the RICO statute reinforces what dictionaries and common sense make clear.[160] If Congress wanted the word "individual" to refer to natural persons *and* corporations, it knew how to do so. In § 1961(3), Congress defined the word "person" as "any individual or entity."[161] Under this definition, Congress showed that it understood a "person" and an "individual" to be two separate things. The word "person" encompasses the word "individual," making the former broader than the latter. The only distinguishing feature between a "person" and an "individual" is that a "person" can be used to refer to legal entities capable of holding an interest in property.[162] If the word "individual" also encompassed legal entities, then Congress's definition of "person" in § 1961(3) would be superfluous. It is therefore unlikely that "individual" encompasses legal entities because courts routinely avoid interpreting a word "that causes it to duplicate another provision or to have no consequence."[163]

The definition of "enterprise" supports the linguistic distinction between "person" and "individual." When Congress defined "enter-

156 *See Reves*, 507 U.S. at 177–79.

157 *See id.* at 177.

158 *Individual*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1152 (1969).

159 *Individual*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 670 (William Morris ed., 1970).

160 *See* SCALIA & GARNER, *supra* note 154, at 167 ("Whole-Text Canon[:] The text must be construed as a whole.").

161 18 U.S.C. § 1961(3).

162 *Id.*

163 SCALIA & GARNER, *supra* note 154, at 174 (defining the surplusage canon).

prise," it listed both the word "individual" and the word "corporation"—with only a single word separating the two—in § 1961(4).[164] This adds evidence to the claim that Congress did not understand the word "individual" to include corporations. And to top it off, the second and final clause of § 1961(4) refers to a "group of individuals associated in fact *although not a legal entity*."[165] If by "individual," Congress meant "corporation," it could have said so. But as it stands, the plain language of § 1961(4) says that only "groups of *individuals*" can form an association-in-fact enterprise.[166]

The negative-implication canon also cements the meaning of "individual" as a reference to natural-born persons, not corporations. This canon—also called *expressio unius est exlusio alterius*—means that a term left out of a list gives rise to the reasonable inference that Congress meant to exclude that term.[167] Congress chose to use the phrase "group of individuals" among a list of seven different items—each of which constitute an "enterprise" under § 1961(4).[168] It did not state that a "group of persons," "group of entities," or "group of corporations" could constitute an enterprise.[169] Congress's omission of these phrases in a detailed list likely means that Congress intended to exclude corporations from becoming a constituent part of an association-in-fact enterprise. The negative implication canon has particular force in this context because Congress explicitly listed corporations in the first clause of § 1961(4), but not the second.[170] The comparison between these two clauses indicates that Congress made a "deliberate choice" to exclude corporations from serving as association-in-fact enterprises.[171]

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164 18 U.S.C. § 1961(4) ("'[E]nterprise' includes any *individual*, partnership, *corporation*, association, or other legal entity . . . ." (emphasis added)).

165 *Id.* (emphasis added).

166 *Id.* (emphasis added).

167 *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017); *see also* Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (explaining that the negative implication canon "has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." (quoting United States v. Vonn, 535 U.S. 55, 65 (2002))).

168 18 U.S.C. § 1961(4).

169 *Id.*

170 *See id.*; Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

171 *See Barnhart*, 537 U.S. at 168.

2. *Use of the Verb "Includes" in § 1961(4) Is Exclusive, Not Illustrative*

When Congress used the word "includes" in its definition of "enterprise," it used the term in an exclusive—not illustrative—sense.[172] Judge Friendly of the United States Court of Appeals for the Second Circuit once explained that although "[d]efinitions in . . . legislation often use the word 'include' out of abundant caution, . . . that does not afford carte blanche to 'include' [additional terms], neither expressly mentioned nor within the normal meaning of the language, simply because a court may think this is a good idea."[173] The meaning of "include" in a statute depends on its context.[174]

First, the structure of § 1961(4) shows that the word "includes" does not modify association-in-fact enterprises. The definition of enterprise contains two separate clauses. The first clause states that an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity."[175] This appears to be a non-exhaustive, illustrative list of the types of *formal* enterprises that RICO encompasses. The last item—"or other legal entity"—is plainly a catch-all phrase to conclude this portion of the clause.[176] But then the definition takes a full break before describing the set of *informal* enterprises encompassed by the statute.[177] After the catch-all phrase that concludes the first clause, the definition states that an enterprise also encompasses "any union or group of individuals."[178] This second clause is specific and exhaustive. Congress did not include a second catch-all phrase to encompass other types of groups, making a "union or group of individuals" the only two types of non-legal-entity combinations that can qualify as a RICO enterprise.

Second, where the word is followed by a single object, the word "includes" is likely meant in an illustrative fashion.[179] But where the word "includes" is followed by a specific list of descriptors (each of which have different characteristics), the word "includes" is likely

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172 *See* 18 U.S.C. § 1961(4) ("'[E]nterprise' 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.").

173 Willheim v. Murchison, 342 F.2d 33, 42 (2d Cir. 1965).

174 *See, e.g.*, Helvering v. Morgan's, Inc., 293 U.S. 121, 125–26 (1934).

175 18 U.S.C. § 1961(4).

176 *See id.*

177 *See id.*

178 *Id.*

179 *E.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188–89 (1941) (noting the NRLB's power "to take such affirmative action, including reinstatement of employees with or without back pay" was not limited to the one illustrative example (quoting 29 U.S.C. § 160)).

meant in the exclusive sense.[180] The definition at issue here follows the word "includes" with six specific descriptors (individual, partnership, corporation, association, union, and group of individuals) of two fundamentally different types (legal and non-legal entities). If "includes" can ever be used in an exclusive rather than illustrative sense, § 1961(4) is a prime candidate for that type of meaning.

3. *Any Remaining Ambiguity Triggers the Rule of Lenity Which Requires Resolution Favoring Corporate RICO Defendants*

If there are any doubts as to the scope of association-in-fact enterprises, those doubts should be resolved in favor of the RICO defendant under the rule of lenity.[181] The rule of lenity, which requires any ambiguity to be strictly construed in favor of the defendant, applies to all criminal statutes.[182] Because RICO has both civil *and criminal* applications, it must "possess the degree of certainty required for criminal laws."[183] Therefore, should any ambiguity remain over the scope of "enterprise" in § 1961(4), the Court should interpret that ambiguity with the narrowest, most reasonable reading so that the statute only applies to "conduct clearly covered."[184]

Although RICO contains a liberal construction clause, the Supreme Court has specifically counseled that this clause may not necessarily override the rule of lenity where ambiguity exists.[185] Should a court harbor any doubts as to whether Congress meant what it said in § 1961(4)—that only "groups of individuals" can form an association-in-fact enterprise—those doubts should be resolved in favor of the RICO defendant.

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180 *See* Dong v. Smithsonian Inst., 125 F.3d 877, 879–80 (D.C. Cir. 1997) (discussing "an application of 'reverse ejusdem generis (where the general term reflects back on the more specific rather than the other way around), [so] that the phrase "A, B, or any other C" indicates that A is a subset of C'" (alteration in original) (quoting United States v. Williams-Davis, 90 F.3d 490, 508–09 (D.C. Cir. 1996))).

181 *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 n.10 (1985) (explaining that § 1961(4) should be subject to strict construction under the rule of lenity).

182 *See* United States v. Resnick, 299 U.S. 207, 209 (1936); *see also supra* note 102.

183 H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment); *see also* Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (stating that the rule of lenity applies to statutes that contain civil and criminal applications).

184 United States v. Lanier, 520 U.S. 259, 266 (1997).

185 *See Sedima*, 473 U.S. at 491 n.10.

B. Limiting Association-in-Fact Enterprises to "Groups of Individuals" Vindicates RICO's History and Purpose

The history and purpose of RICO support an interpretation of § 1961(4) that categorically excludes corporations from association-in-fact enterprises. From their enactment, the criminal *and civil* components of RICO were designed to combat *organized crime*.[186] As the legislative history makes clear, RICO's specific targets were individual wrongdoers who used a criminal enterprise (either a legal enterprise or an enterprise associated in fact) to commit wrongdoing.[187] Indeed, much of the legislative history focuses on separating individual wrongdoers from otherwise legitimate business organizations.[188] Congress originally viewed corporations as the victims of organized crime—not the perpetrators.[189] As evidence of this view, Congress rejected an earlier draft of RICO that contained an expansive definition of "enterprise" that would have encompassed "any group" or "any other organization having for one of its purposes" the commission of racketeering acts.[190] In rejecting this expansive concept of enterprise, Congress instead adopted a nuanced version of the idea that carefully distinguishes concepts like "person," "individual," and "corporation."[191] Therefore, like the Court concluded in *Reves*[192] (albeit in the context of § 1962(c)), the legislative history and purpose of the statute vindicate the plain language of § 1961(4)—that it only applies to "groups of *individuals*" associated in fact.

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186 *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose) ("[T]he purpose of this Act [is] to seek the eradication of organized crime . . . .").

187 *See, e.g.*, 116 CONG. REC. 586 (1970) (statement of Sen. McClellan) ("[T]he most serious aspect of the challenge that organized crime poses to our society is the degree to which its members have succeeded in placing themselves above the law.").

188 *See, e.g.*, 116 CONG. REC. 602 (1970) (statement of Sen. Hruska) (RICO was "designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses . . . ."); *see also* S. REP. NO. 91-617, at 79 (1969) (stating that RICO was targeted at "individuals . . . [and] the economic base through which those individuals constitute such a serious threat"); *id.* at 82 ("[P]arties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the public, these individuals must be prohibited from continuing to engage in this type of activity in any capacity.").

189 *See, e.g.*, 116 CONG. REC. 602 (statement of Sen. Hruska) (RICO "contains a rather novel . . . [and] a most promising and ingenious proposal for crippling organized crime's relatively recent, but spectacularly successful, emergence into the field of legitimate business and unions."); *see also* S. REP. NO. 91-617, at 1 (stating that the "money and power" of organized crime "are increasingly used to infiltrate and corrupt legitimate business and labor unions").

190 *See* S. 2187, 89th Cong. §§ 2(a), 3(2) (1966).

191 *See supra* Section II.A.1.

192 Reves v. Ernst & Young, 507 U.S. 170, 179–83 (1993).

III. Consequences for the Opiate MDL

The meaning of § 1961(4)—the informal enterprise requirement—may soon become ripe for review given the unique nature of the Opiate MDL litigation. There are strong, good-faith arguments that only natural-born individuals can constitute association-in-fact enterprises under the statue. And although the federal courts of appeals have uniformly held that groups of corporations can fit the bill,[193] these interpretations have not scrutinized the text, structure, or history of § 1961(4) like the Supreme Court has repeatedly done with other Civil RICO provisions. The question of corporations banding together to form association-in-fact enterprises is unique because it has already proven itself worthy of Supreme Court review.[194] Since the dismissal in *Mohawk*, however, no party has been able to tee up the issue cleanly again. The Opiate MDL might provide appellate courts—and perhaps even the Supreme Court—an ideal vehicle to settle this issue once and for all.

For several reasons, the Opiate MDL has the necessary momentum to take the question of corporate association-in-fact enterprises back to the Supreme Court. First, the pharmaceutical companies have a legitimate basis on which to argue that they are not susceptible to Civil RICO liability under the definition of enterprise.[195] Second, the parties in the case have the resources to take the case to the high Court.[196] Third, the opiate crisis already has headline grabbing attention.[197] And lastly, the unique nature of MDL litigation could cause the same issue to simultaneously spring up in multiple different circuits, which would create a powerful case for granting a writ of certiorari.[198] In short, the Opiate MDL possesses the right kind of clout, resources, and legal issues to get the Court's attention.

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193 *See supra* Section I.E.

194 *See* Mohawk Indus., Inc. v. Williams, 547 U.S. 516 (2006) (per curiam).

195 *See* Fed. R. Civ. P. 11(b)(2) (permitting attorneys to make "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").

196 *See, e.g.*, Rosie McCall, *Big Pharma Companies Earn More Profits than Most Other Industries, Study Suggests*, Newsweek (Mar. 4, 2020, 6:01 AM), https://www.newsweek.com/big-pharma-companies-profits-industries-study-1490407 [https://perma.cc/8UJQ-8QLX].

197 *See* Sup. Ct. R. 10(c) (stating that one indicator of cert-worthiness is whether "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, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."); *see also supra* Introduction.

198 *See* Sup. Ct. R. 10(a) (stating that another indicator of cert-worthiness is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also* Gelboim v. Bank of Am. Corp., 574 U.S. 405, 413 (2015) ("Cases consolidated for MDL pretrial proceedings ordinarily

If the Opiate MDL gives way to any appeals, the reviewing courts should hold that the MDL Defendants are categorically immune from Civil RICO claims—at least those claims premised on allegations that corporations formed association-in-fact enterprises. This is the only holding that would properly reconcile the text, structure, and history of Civil RICO with Supreme Court precedent. Although it may seem far-fetched given the uniformity of the circuit courts, multiple federal district courts have already reached this conclusion based on the plain meaning of the statute.[199]

Following the law on this issue may give a big win to big pharmaceutical companies—the same companies many people blame for the opioid crisis.[200] But setting the evidence for that blame aside, the proper response from the judiciary hardly looks like holding groups of corporations liable under a statute designed for groups of individuals. In his opinion in *United States v. Dickson*,[201] Justice Story wrote, "[I]t is not to be forgotten, that ours is a government of laws, and not of men; and that the Judicial Department has imposed upon it, by the Constitution, the solemn duty to interpret the laws . . . ; and however disagreeable that duty may be, . . . it is not at liberty to surrender, or to waive it."[202] If following the law in this instance means that hard-hit plaintiffs can no longer bring down groups of corporations associated in fact using a statute that says, "groups of individuals associated in fact," then that is still a win for the rule of law and our ordered scheme of liberty.

Conclusion

The Civil RICO statute seems to have a gaping hole that the Supreme Court has declined to plug. On the statute's plain terms, association-in-fact enterprises only apply to groups of individuals, not corporations. Nevertheless, plaintiffs litigating against large pharmaceutical companies have pled that corporations committed Civil RICO violations by engaging in a pattern of racketeering activity

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retain their separate identities, so an order disposing of one of the discrete cases in its entirety should qualify under [28 U.S.C.] § 1291 as an appealable final decision." (footnote omitted)).

199 *E.g.*, Benard v. Hoff, 727 F. Supp. 211, 215 (D. Md. 1989) (finding that "[c]orporations cannot under RICO associate in fact to constitute an enterprise"); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146, 1151 (D.N.J. 1983) (finding that an association-in-fact enterprise cannot consist of two corporations and two individuals), *rev'd on other grounds*, 742 F.2d 786 (3d Cir. 1984).

200 *See supra* Introduction.

201 40 U.S. (15 Pet.) 141 (1841).

202 *Id.* at 162.

through an associated-in-fact enterprise comprised solely of corporations. This issue of federal law was important enough to flag the attention of the Supreme Court once. And if a circuit split forms on the issue and prompts the Court to grant certiorari, it will likely consult the text, structure, and history of the statute on its way to categorically excluding corporations from association-in-fact enterprises.