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IN THE SUPREME COURT OF THE UNITED STATES

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EDMUND BOYLE, :

Petitioner :

v. : No. 07-1309

UNITED STATES. :

- - - - - x

Washington, D.C.

Wednesday, January 14, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 a.m.

APPEARANCES:

MARC FERNICH, ESQ., New York, N.Y.; on behalf of the Petitioner.

ANTHONY YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument in Case 07-1309, Boyle v. United States.

Mr. Fernich.

ORAL ARGUMENT OF MARC FERNICH

ON BEHALF OF THE PETITIONER

MR. FERNICH: Thank you, Mr. Chief Justice, and may it please the Court:

This is a case about a defendant's right to an independent jury determination of each essential element of a RICO offense, specifically a pattern of racketeering and a separate enterprise that is more than just a duplication of the pattern.

To keep the elements apart, ensure their distinct consideration, and give the enterprise independent meaning, juries must be instructed, as in the Seventh Circuit and elsewhere, that an enterprise requires a structure separate from the commission of the predicate acts forming the pattern.

JUSTICE GINSBURG: Mr. Fernich --

MR. FERNICH: Yes, Your Honor.

JUSTICE GINSBURG: -- are we talking just about the instruction to the jury? I know you think that the instruction given here was incorrect. But is -- is it just

1 a question of charge error, or are you saying that there
2 was insufficient evidence of enterprise for this case to go
3 to the jury?

4 MR. FERNICH: I am not suggesting, Your Honor,
5 that there was insufficient evidence of -- of enterprise to
6 go to the jury. My primary point is with respect to the
7 charge. We do contend --

8 JUSTICE GINSBURG: So you're saying if a proper
9 charge had been given, this jury on this evidence still
10 could have convicted the defendant.

11 MR. FERNICH: We contend, to be sure, that the
12 evidence was legally insufficient under rule 29. But we
13 are pressing principally the first -- the jury argument
14 claim here in this Court. We do contend that the evidence
15 was legally insufficient.

16 JUSTICE GINSBURG: Did you make that -- did you
17 make that objection in the trial court?

18 MR. FERNICH: Yes, we did, and we preserved it
19 in the court of appeals as well. And there was, as Your
20 Honor knows, no published opinion with respect to either
21 issue. So both issues are preserved.

22 Now, Your Honor, under a Second Circuit rule
23 that functionally conflates the two elements -- that is,
24 enterprise and pattern -- the jury in this case was not so
25 instructed as to the need for an enterprise with an

1 existence separate and apart from the racketeering acts
2 forming the pattern. For that reason, we contend that the
3 judgment below must be vacated.

4 JUSTICE ALITO: The error was the failure to
5 give the instruction that appears on page 95 of the joint
6 appendix? Is that the error that you're complaining about?

7 MR. FERNICH: Not merely so, Justice Alito.
8 That's why the entire relevant excerpts from the jury
9 charge are included in the joint appendix. We objected to
10 the entirety of the charge, in addition to requesting
11 specific language of our own.

12 To be sure, the principal error of which we
13 complain in this Court is the failure of that instruction
14 anywhere to require, as this Court required in the United
15 States v Turkette, and as 18 U.S.C. 1962(c) itself
16 requires, an entity with a structure separate and apart
17 from the pattern of racketeering.

18 JUSTICE SCALIA: What -- what do you mean by
19 that precisely? Suppose you have a group of -- of people.
20 The ringleader goes and gets a safecracker, he gets a
21 wheelman, and so forth, all the people he needs for the
22 crime. And he says, we're going to call this the -- the
23 Brinks Job Group. Okay? We are the Brinks Job Group. But
24 that's the only thing that he has put the group together in
25 order to do. But it's still a group. He calls it a group,

1 and he gets all these guys together and they -- they meet
2 and have lunch together, and do a lot of stuff together.

3 Would that meet your -- your condition of a
4 separate association from the predicate acts?

5 MR. FERNICH: To be sure, we would contend that
6 it would be a question in the first instance for a properly
7 instructed jury, but without more on the hypothetical that
8 Your Honor has posited, the answer to that question is no.
9 There is no ongoing decisional apparatus, no continuing
10 directional mechanism.

11 JUSTICE SCALIA: Except insofar as it's
12 directed to the Brinks job.

13 MR. FERNICH: Except the degree of
14 organization, I should say, inherent in each individual
15 predicate act.

16 JUSTICE KENNEDY: But -- but you -- you
17 imported -- I'm looking at your quotation from -- from
18 Turkette, on page 5 of your brief. It doesn't seem to me
19 conclusive of your point. In order to answer Justice
20 Scalia, you had to interpolate to add various words. You
21 had to say -- you said an ongoing organization with
22 directions or something to that effect. That's not what
23 Turkette says. Turkette says, as proven by evidence of an
24 ongoing organization, formal or informal, that's
25 continuing. That's all it says.

1 MR. FERNICH: To be sure, Your Honor, we don't
2 contend that Turkette is directly controlling of the issue,
3 and we go through a lengthy textual exegesis in our brief
4 of why we think that implicit in the factors of ongoing
5 organization and continuing unit is a structure
6 requirement. But what Turkette did unequivocally say is
7 that there must be an entity existing separate and apart
8 from the pattern of racketeering activity. There was no
9 such instruction given in this case -- and the word
10 "entity," which appears in section 1961(4) itself and
11 appears twice in this Turkette's decision, surely connotes
12 an ascertainable structure with an existence separate and
13 apart from the pattern of racketeering.

14 JUSTICE GINSBURG: What -- what does
15 "structure" mean? I think you said it doesn't mean that
16 this has to be an organization with a president, a
17 treasurer; it doesn't mean that.

18 MR. FERNICH: It could mean that in an
19 appropriate case, Your Honor. It surely would be
20 probative --

21 JUSTICE GINSBURG: What is -- what is the
22 minimum to qualify as having a structure?

23 MR. FERNICH: The minimum is a separate,
24 ongoing, continuing existence apart from the commission of
25 the predicate acts themselves, and the members necessary to

1 commit those predicate acts, because that by -- by
2 definition, I should say, is the pattern of racketeering
3 activity, and moreover, it is also inherent in any criminal
4 conspiracy that extends over time.

5 To be more specific, the bare minimum
6 requisites for a structure would be: an ongoing
7 directional mechanism; a continuing decisional-making unit
8 -- decision-making unit, I should say -- and some sort of
9 coherent existence between the commission of the
10 racketeering acts themselves. Those are the main
11 ingredients.

12 CHIEF JUSTICE ROBERTS: So all you have to do,
13 to pick up on Justice Scalia's hypothetical, just not the
14 Brinks job, but you have to have one more crime, and that's
15 it. Then everything you've talked about is satisfied.

16 MR. FERNICH: No, that -- that's, respectfully,
17 not what we contend, although in an appropriate case it's
18 conceivable that a properly instructed jury may find
19 structure on those facts. The point that we're conveying
20 here is that this is principally a jury question, and a
21 jury that's properly instructed will make findings,
22 presumably, as to what the -- whether the structure was
23 extant, and those findings would command substantial
24 deference on appeal, as they do in the circuits that have
25 applied a structure requirement. And it would be a

1 relatively easy task for an appellate court to defer to the
2 jury's findings in such a case. There is --

3 JUSTICE GINSBURG: But does the jury -- the
4 words that you asked for -- what was it? "Ascertainable
5 structural hierarchy." And suppose the judge gets
6 questions from the jury, Your Honor, what do you mean by
7 ascertainable structural hierarchy?

8 MR. FERNICH: I'm -- I'm sorry, Justice
9 Ginsburg.

10 JUSTICE GINSBURG: Those were the words that
11 you wanted the judge to include in the charge --

12 MR. FERNICH: To be sure.

13 JUSTICE GINSBURG: -- and your request for the
14 charge, as to say to have an enterprise you need to have --
15 the group has to have an ascertainable structural
16 hierarchy. Those are the three words in -- in your request
17 for the charge.

18 MR. FERNICH: Well, respectfully, Your Honor,
19 it goes beyond that, because the end of --

20 JUSTICE GINSBURG: But those -- but you did ask
21 for those.

22 MR. FERNICH: I did, and --

23 JUSTICE GINSBURG: And now I'm asking you, what
24 does that mean? The judge gives you a charge, the jury is
25 puzzled. Your Honor, we don't understand what you mean by

1 ascertainable structural hierarchy. Would you please tell
2 us specifically?

3 MR. FERNICH: Yes, Your Honor. First of all,
4 the charge that we're asking for specifically is a charge
5 that is given in the Seventh and Eighth Circuit which says
6 a structure separate from the commission of the predicate
7 acts themselves. If a jury were puzzled, in that instance
8 the judge could, as spelled out at pages 31 through 35 of
9 our reply brief, give examples, any number of examples that
10 have been spelled out by the lower courts in -- that have
11 adopted a structure requirement. My --

12 JUSTICE GINSBURG: And some of those examples,
13 it seems, are present here. One you gave was longevity.
14 Well, this has been going on for 10 years, is it? Another
15 was a unique way of operating. And they are specialists in
16 deposit boxes and they have look-out people and they have
17 people who actually break into the bank, and they have a
18 certain amount of skill. So we have longevity, modus
19 operandi, and a division of labor. They have some people
20 being their lookouts and other people doing other things.

21 So I was looking at your list in the reply
22 brief, and it seems to me that this organization, this
23 association of individuals, has some of those
24 characteristics.

25 MR. FERNICH: Your Honor, first of all, to --

1 to get right down to the nitty-gritty of the verdict in the
2 case, it's important to focus on what the jury actually
3 found. The enterprise as charged was a 10-year enterprise.
4 There were three predicate acts found by the jury ranging
5 in date from late December of 1998 through early January of
6 1999. So the longevity aspect is certainly something that
7 we dispute here.

8 Again, to answer Your Honor, to go back to the
9 -- the beginning of our argument, to be sure, the thrust of
10 our argument in this Court is directed to the jury
11 instruction in this case. It may be conceivable -- we
12 don't for a minute concede that the evidence was legally
13 sufficient under rule 29. That said, had a jury been
14 properly instructed and made such a finding, i.e., to find
15 a separately structured enterprise, that would be a finding
16 that would command significant deference, and I'd be hard-
17 pressed --

18 JUSTICE SCALIA: Why -- why do you need a
19 hierarchy? Why do you need a -- why can't it be a
20 democratic mob? I mean, there's no boss and they agree
21 that all of their decisions will be taken unanimously.

22 MR. FERNICH: We don't contend before this
23 Court that it must be hierarchical per se. Certainly to --

24 JUSTICE SCALIA: Well, that's what you
25 requested. Isn't -- isn't that the --

1 MR. FERNICH: I -- I --

2 JUSTICE SCALIA: -- instruction you requested?

3 MR. FERNICH: On the facts of this case,
4 consistent with the examples that are spelled out
5 comprehensively in both the opening brief and the reply
6 brief, that is the one that we focused on. But to be sure
7 -- to be sure, I also objected to the charge as given in
8 its entirety.

9 In this Court we don't press the contention
10 that a hierarchical structure -- hierarchical structure is
11 an irreducible minimum. We do --

12 JUSTICE SOUTER: Well, you -- you couldn't,
13 could you, because the -- an organization can consist of an
14 individual. And it seems to me that all of the
15 requirements that you've been specifying would in an
16 individual case be met simply by showing that there was --
17 there was an individual in business who had a brain.

18 MR. FERNICH: An individual, Your Honor, is --
19 is a legal entity under the first clause of 1961(4). It
20 means a sole proprietorship in this context. And an
21 individual, a legal entity, as set forth in the first
22 clause of section 1961(4), by definition --

23 JUSTICE SOUTER: Well, if I set up a newsstand,
24 it's a sole proprietorship and that's all I have to do.
25 And if -- if I have a -- a functioning brain, I have a

1 decision-making mechanism. I remember from day-to-day what
2 I did, so I have continuity. And -- and it seems to me
3 that all of these requirements are -- are virtually
4 satisfied as a matter of course by an individual who
5 engages in any kind of business that might have interstate-
6 commerce implications.

7 MR. FERNICH: And that is not an absurd result.
8 It is a -- and it is a result that squares with the primary
9 purpose of the statute as enacted, which was to prevent the
10 subversion and infiltration of legitimate business by
11 criminal elements.

12 JUSTICE SOUTER: Oh, absolutely. But it seems
13 to me that it -- it puts you in sort of a -- a difficult
14 position to -- to be calling for or -- or requiring jury
15 instructions that call for, as necessary conditions,
16 findings of structure, continuity, decision-making
17 capacity, and so on, when in fact on -- on at least one
18 variety of enterprise, these conditions are -- are met
19 virtually automatically simply by having somebody doing
20 business in any way.

21 MR. FERNICH: To be sure, Your Honor, we're
22 only calling -- and the problem only arises in the context
23 of an association-in-fact enterprise. The great weight of
24 authority and -- and the plain language of 1961(4) does not
25 define an individual as an association-in-fact enterprise.

1 And it does not square with the plain language of the
2 statute to call an individual an association-in-fact
3 enterprise. And, moreover, doing so would create a whole
4 set of other problems, distinctness problems.

5 JUSTICE SOUTER: Oh, I agree, but an individual
6 can be an -- an enterprise.

7 MR. FERNICH: A legal enterprise.

8 JUSTICE SOUTER: And -- and an association-in-
9 fact can be an enterprise. And if we accept those two
10 propositions, then I think you've got a tough row to hoe in
11 saying that any enterprise which is not an individual has
12 got to have all the formal characteristics that you talk
13 about, given the fact that those characteristics are
14 automatically satisfied by an individual.

15 MR. FERNICH: We don't -- we don't press that
16 contention, Your Honor. We specifically press it for the
17 phrase "any union or group of individuals associated in
18 fact, although not a legal entity." The "individual"
19 portion appears in the first clause of the statute. The
20 distinctness problem simply does not arise in the context
21 of a legal-entity enterprise.

22 And it's important to note, as this Court said
23 in Salinas -- recognized in Salinas --- virtually every
24 criminal prosecution that's brought under 1962(c) is
25 brought against an illicit association-in-fact enterprise.

1 The -- the scenario of an individual being an association-
2 in-fact enterprise -- I don't think it's a valid
3 association-in-fact enterprise as a matter of law. There's
4 a line of cases from the Seventh Circuit that says it's
5 not.

6 And this structural problem, having a structure
7 that's distinct from the pattern of racketeering activities
8 so that the two enter -- elements, I should say, are kept
9 separate and apart, only arises in the context of an
10 association-in-fact enterprise, which is, of course -- is a
11 very, very wide swath --

12 JUSTICE GINSBURG: So would -- would it
13 include, let's say, a street gang? How about -- this may
14 be before your time, but The Lavender Hill Mob?

15 MR. FERNICH: I'm sorry, Your Honor?

16 JUSTICE GINSBURG: It was an Alec Guinness
17 movie, The Lavender Hill Mob.

18 MR. FERNICH: Oh, well, certainly we don't have
19 any quarrel with the proposition of street gangs, and many
20 of them are cited in our briefs. The -- a great
21 preponderance of -- of typical RICO prosecutions are
22 hierarchical, drug-type street gangs which have regimented
23 structures. And again, to answer Justice Scalia's
24 question, we don't contend that that's a strict necessity,
25 but certainly they are not going to have a problem

1 establishing a structured enterprise with a regimented drug
2 gang.

3 JUSTICE ALITO: If hierarchy isn't required,
4 then I'm not clear what more -- what you think needs to be
5 shown beyond the fact that there was an association in fact
6 and whatever continuity needs to be shown in order to
7 establish the pattern. What -- what needs to be shown
8 beyond that?

9 MR. FERNICH: Well, Your Honor --

10 JUSTICE ALITO: What needs to be charged to the
11 jury that they must find beyond that?

12 MR. FERNICH: We contend that they must be
13 charged that there has to be a structure separate from the
14 commission of the predicate acts themselves. The Seventh
15 and Eighth Circuits use pattern jury instructions that give
16 that precise charge. And there has been, to my knowledge,
17 no reported difficulties --

18 JUSTICE ALITO: But what does that mean?

19 MR. FERNICH: It means -- and -- and I would
20 take the test most prominently from Your Honor's own home
21 circuit, as -- as spelled out in the Riccobene case: a --
22 an ongoing decisional-making apparatus to guide the affairs
23 of the enterprise, a directional mechanism. The Third
24 Circuit in Riccobene said an overseeing, clearinghouse and
25 coordination function, and -- and a cohesive existence

1 between predicate acts.

2 JUSTICE ALITO: These are such abstract terms --

3 JUSTICE KENNEDY: It seems to me you've
4 described this -- this gang. One -- one person is a guard.
5 The other person brings the hook to pull the -- the box
6 off. Another person scouts it out. Another person has got
7 the scanner. It seems to me to fit precisely what you've
8 just described.

9 MR. FERNICH: The gang has no structure aside
10 from that which is a necessary incident to the commission
11 of each racketeering act. We don't contend there has to be
12 a formal organization, but there is no evidence of any
13 continuing, ongoing organization other than that when they
14 get together to commit the predicate crimes.

15 JUSTICE KENNEDY: Isn't it pretty clear that if
16 the -- the person who's supposed to be the lookout doesn't
17 perform his job, he's not going to be included in that next
18 heist?

19 MR. FERNICH: There's no evidence of that in
20 the record to my knowledge, Your Honor.

21 JUSTICE GINSBURG: Isn't there a record that
22 this is a more or less steady group that hangs out
23 together, except when one of them gets caught and put in
24 jail, and then they replace someone? But this is -- I
25 thought this was explained as a group that meets regularly

1 in the Brooklyn Social Club?

2 MR. FERNICH: Your Honor, the testimony about
3 the Brooklyn Social Club is -- is a little bit overdrawn, I
4 would say. And I would direct the Court to pages 58 and 74
5 through 75 of the joint appendix, and this is the testimony
6 of Witness Gerard Bellafiore, whose testimony, by the way,
7 is the only testimony we know for a fact that the jury
8 credited. Quote: Just a club to hang out in, not for any
9 type of anything. So --

10 JUSTICE GINSBURG: But one of the members owned
11 the club. Right?

12 MR. FERNICH: Yes. That -- that's true. But
13 there's no evidence in the record that they would do
14 anything other than, for example -- and this is not in the
15 record -- for example, shoot pool at the club. And -- and
16 Bellafiore himself was careful to qualify it in that way so
17 that he wasn't gilding the lily.

18 JUSTICE ALITO: Suppose you have a gang that
19 gets together every Friday afternoon, and by democratic
20 means, they decide what crime they're going to commit that
21 weekend. And they're multi-talented so they -- they look
22 at the whole list of RICO predicates, and they choose a
23 different one each -- you know, each weekend to commit.
24 And they do that over some period of time. And in doing
25 that, they perform different roles at different times. Is

1 that an enterprise?

2 MR. FERNICH: It sounds to me like a jury could
3 -- if they're having regular Friday meetings and they're
4 using sophisticated means to canvas the RICO statute with a
5 degree of -- of complexity and sophistication to figure out
6 what they're going to do or maybe even try to evade the
7 statute, it probably --

8 JUSTICE ALITO: All right. We'll take that
9 part out of it. They don't look at the statute. They just
10 -- whatever crime comes to somebody's mind. They -- they
11 want to commit a crime every weekend to -- to make some
12 money. But it's a different thing, done by different
13 means, different roles.

14 MR. FERNICH: If a jury --

15 JUSTICE ALITO: Does that -- does that have an
16 ascertainable structure?

17 MR. FERNICH: If a jury were properly
18 instructed that there had to be a structure separate and
19 apart from just that which is inherent in the commission of
20 each act, a properly instructed jury probably could well
21 find the requirements satisfied on -- on the hypothetical
22 that Your Honor has posited.

23 The cases say, the cases out of the Seventh
24 Circuit, say it is not a high hurdle. They say it's a low
25 hurdle, and there has to be some structure, but not much --

1 not much -- to distinguish --

2 JUSTICE ALITO: Well, what structure would
3 there be there? What characteristics of that group would
4 satisfy the structural requirement?

5 MR. FERNICH: The ongoing existence, the
6 regular meetings, and the degree of sophistication
7 employed. And it -- it implies that they're not just sort
8 of getting together on an impromptu basis as opportunities
9 arise, but they're sitting around on a regular basis for a
10 -- a continuing period of time and planning things out.
11 What are we going to do this weekend? What are we going to
12 do next weekend?

13 Let's twist the hypothetical a little bit.
14 Maybe they project out 3 or 4 weeks ahead of time. That's
15 what RICO is -- is getting after, some kind of
16 sophistication, some kind of coordination. This is the
17 crux of the statute.

18 JUSTICE GINSBURG: How about during the period
19 that this man -- what was his name? Mangia --

20 MR. FERNICH: Mangiavillano, Your Honor.

21 JUSTICE GINSBURG: Yes. Well, he was running
22 the show. It seems that he was a leader, and that -- and
23 that the group wasn't quite as democratic before he got
24 sent to prison.

25 MR. FERNICH: Your Honor, the testimony in the

1 record is that -- again, what was found by the jury here.
2 The testimony is that Mangiavillano and Boyle and
3 Bellafiore never committed any crimes together. It's --
4 it's very extensively briefed in -- in the lower court.
5 The Second Circuit never addressed it. There's a long
6 multiple-conspiracies argument. I'm not going to get into
7 that in this Court.

8 The fact is that Mangiavillano had nothing to
9 do, nothing to do with the bank burglaries found in this
10 case. There were three burglaries found as RICO -- I
11 shouldn't say burglaries --

12 JUSTICE GINSBURG: That wasn't what I meant.

13 MR. FERNICH: Okay.

14 JUSTICE GINSBURG: I meant, would the
15 organization, as it was described to exist at the time
16 Mangiavillano was there -- would that have satisfied the
17 definition of "structure" because it had a leader?

18 MR. FERNICH: It may have at that point, but
19 there was no evidence -- and -- and because it's outside of
20 the time frame of what the jury was found, there's a lot
21 more diversity in the criminality that was alleged during
22 that period.

23 A properly instructed jury may have found that
24 there was an enterprise existing at that time, although I'm
25 not even sure a jury could so find under Turkette because

1 the -- the core of the membership changed very dramatically
2 over a period of time. But the leadership would be one --
3 to be sure, leadership is something that a jury could take
4 into account and could permissibly find if they were
5 properly instructed. On the facts of this case, I can't
6 answer that question definitively.

7 JUSTICE BREYER: Can you try something out in
8 your mind? Maybe you can't react to it. I'm trying to
9 figure out how -- the structure requirement, what to say.
10 And a thought that is occurring to me, which I am not
11 wedded to -- but I'd like some reactions to it -- is to say
12 that there is a structure means that among this association
13 of people there must be rules, understandings, or behavior
14 that tend to keep the association together over time, other
15 than those which would be essential to allow them to commit
16 the particular crimes at issue.

17 MR. FERNICH: Certainly the defense would take
18 a ruling like that, but --

19 JUSTICE BREYER: Well, I know, but I'm -- I'm
20 trying to work out in my mind is that a sensible thing to
21 say, is the trouble with the word "structure" is everything in
22 the universe has a structure. And so it's awfully vague, and
23 I'm trying to make it a little bit more specific.

24 MR. FERNICH: A structure -- the structure, I
25 don't think, entails necessarily rules, regulations, et

1 cetera. I don't think the word "structure" --

2 JUSTICE BREYER: That isn't what I said. I
3 said rules, understandings, forms of behavior that tend to
4 keep the association together over time, other than those
5 rules, understandings and -- and behaviors that would be
6 necessary -- necessary meant strongly -- to commit the
7 particular crimes at issue.

8 MR. FERNICH: Is Your Honor's question is that
9 a sensible definition of "structure"?

10 JUSTICE BREYER: Yes.

11 MR. FERNICH: Yes, it is a sensible definition
12 of "structure."

13 And if there are no further questions, I'd like
14 to reserve the rest of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr. Fernich.
16 Mr. Yang.

17 ORAL ARGUMENT OF ANTHONY YANG

18 ON BEHALF OF THE RESPONDENT

19 MR. YANG: Mr. Chief Justice, and may it please
20 the Court:

21 An association-in-fact enterprise need not have
22 an ascertainable structure distinct from the predicate acts
23 of racketeering committed by one of its associates,
24 whatever that means. RICO's statutory text, its
25 surrounding context, and this Court's construction of the

1 statute show that RICO's definition of "enterprise" is
2 broad and contains no such limitation.

3 Petitioner's primary argument, that the term
4 "enterprise" is rendered superfluous and merges with the
5 charged pattern of racketeering acts, is wrong for at least
6 three reasons.

7 First, it's wrong as a formal matter. The
8 enterprise is a group of individuals. The pattern is a
9 series of acts.

10 Second, it fails to account for the fact that
11 the relevant pattern of --

12 JUSTICE SCALIA: Wait, wait, wait, wait, wait,
13 wait, wait.

14 I assume that -- that he was responding to the
15 argument that you can establish the enterprise from the
16 mere existence of the pattern of the acts, of the separate
17 acts. And if, indeed, it takes nothing more than the acts
18 to constitute the enterprise, it seems to me he has a
19 point.

20 MR. YANG: That goes to my second reason.

21 JUSTICE SCALIA: Oh, so we'll forget about your
22 first one.

23 MR. YANG: Well, let me -- let me go to --
24 which I think it addresses the second reason. It's
25 distinct as a formal matter, which is that you to have find

1 a group of individuals versus a series of acts. You can
2 infer the group from their actions, just as can you infer,
3 you know, a relationship between individuals by the way
4 they act together. But -- so my first point is a formal
5 one.

6 The second point goes straight to the statute,
7 that the relevant pattern of racketeering acts that is at
8 issue in RICO -- this is 1962(c) -- is a pattern of acts
9 committed by an individual defendant, not a group. In
10 fact, in H.J. this Court explained that the premise that
11 the pattern has to be performed by a group or an
12 association -- this is at page 4 -- 244 of the Court's opinion
13 there -- was wrong and that the pattern can be fully the
14 work of an individual acting alone.

15 It's also wrong because an enterprise remains
16 wholly distinct and pertinent in numerous RICO contexts
17 under the government's interpretation.

18 JUSTICE BREYER: It's -- when you say individual,
19 the first part of the definition of enterprise speaks about any
20 individual partnership, corporation, association, or other
21 legal entity.

22 MR. YANG: That's correct.

23 JUSTICE BREYER: So then, I've read somewhere
24 that people feel that where that individual is involved,
25 the individual is acting as an -- a legal entity such as a

1 sole proprietorship. Is that right?

2 MR. YANG: An individual can be an enterprise
3 as a sole proprietorship, if that's the question.

4 JUSTICE BREYER: I'm talking about a legal
5 entity. And in the second clause, what we're talking about
6 here, specifically, it is a corporation, a union, or a
7 group of individuals associated in fact, although not a
8 legal entity.

9 MR. YANG: That's correct. I -- I think there
10 may be some miscommunication on my part. I would direct
11 the Court to page 5a of the appendix which reproduces
12 section 1962(c). It states, it shall be unlawful for any
13 person -- it doesn't say group, enterprise or -- or an
14 association -- that is employed or associated with any
15 enterprise --

16 JUSTICE SCALIA: What appendix? Not -- not the
17 joint appendix.

18 MR. YANG: Excuse me. The -- the appendix to
19 our brief. I'm sorry.

20 JUSTICE SCALIA: All right.

21 MR. YANG: The government gray brief.

22 So what's relevant for purposes of showing an
23 element of a 1962(c) violation is that the defendant alone,
24 perhaps with others -- but the element is the defendant has
25 to commit a pattern of racketeering. There are other

1 elements. For instance, the defendant has to do so in a
2 manner that participates in the conduct of the affairs of
3 the enterprise. But, of course, that embraces a wholly
4 distinct concept, that is, the enterprise.

5 Now, in many cases, as you have here, the
6 pattern of racketeering activity of this defendant is
7 proved by evidence that that defendant was also working in
8 concert with others. And so in that case, the pattern
9 element, which, again, is the individual's pattern of acts,
10 is proved by the same type of evidence that would prove the
11 enterprise.

12 CHIEF JUSTICE ROBERTS: So then you'd have an
13 easy time before the jury. And the same thing with respect
14 to the individual. All that's saying is that when you're
15 dealing with one person, it's pretty easy to prove that he,
16 you know, directs himself or, you know, has an ongoing
17 plan, but that doesn't mean that it's not a separate
18 element that the jury should have to find.

19 MR. YANG: We don't say that it's not a
20 separate element, and we also don't say that a pattern
21 necessarily --

22 CHIEF JUSTICE ROBERTS: Well, you say that it's
23 not distinct from the underlying offenses.

24 MR. YANG: No, I -- I don't believe so. I
25 think what we -- we said is that the evidence regarding the

1 pattern of activity allows the jury to infer the existence
2 of an enterprise because an enterprise --

3 CHIEF JUSTICE ROBERTS: But they don't have to
4 be separately instructed that they have to find that, do
5 they?

6 MR. YANG: No, they do. In fact the jury
7 can --

8 CHIEF JUSTICE ROBERTS: What is the instruction
9 that the Seventh Circuit and the Eighth Circuit give that
10 you don't think is necessary?

11 MR. YANG: The instruction is the pertaining to
12 an ascertainable structure distinct from the pattern of
13 racketeering. Here, you still have to show an enterprise,
14 and the -- the jury may not infer an enterprise from a
15 pattern, but certainly it's open to the jury. When that
16 pattern -- again, the pattern is an individual's conduct.
17 But when that pattern is shown through evidence that that
18 individual is acting with others over a long period of time
19 to either -- to establish that it's a pattern of
20 racketeering activity, if that same evidence not only shows
21 that the individual committed a pattern of racketeering
22 activity, but it was done in concert with others and that
23 the -- that evidence shows that a group of individuals had
24 associated in fact for the common purpose of engaging in a
25 course of conduct.

1 JUSTICE ALITO: Would you agree there -- there
2 can be a situation in which an individual engages in a
3 pattern of racketeering activity together with other people
4 and yet is not participating in the affairs of an
5 enterprise through the pattern of racketeering activity?

6 MR. YANG: Well, I think that's the case that
7 we gave -- an example that we gave in our brief, which is,
8 say, an individual commits a very long string of bank
9 burglaries and -- actually, make it robberies. Robbery is
10 a predicate act; burglary is not. Bank burglaries with
11 individuals, but each time he does it, it's with a
12 different group of individuals. There you -- the
13 individual would be established -- you could establish a
14 pattern from, say, the -- the relatedness of the crimes
15 through an M.O. or a -- and the long continuous string of
16 crimes, more than a few months, perhaps years. But it
17 would not establish an enterprise.

18 JUSTICE ALITO: And what is -- why would it
19 not? What --

20 MR. YANG: Because there would be -- you
21 would --

22 JUSTICE ALITO: What's lacking there?

23 MR. YANG: What would show is that the
24 individual is not working in concert with others to achieve
25 an end because there's no -- no parallel identity between

1 any two of the crimes except for the individual acting
2 alone.

3 CHIEF JUSTICE ROBERTS: I thought an individual
4 could -- I thought an individual could be the enterprise?

5 MR. YANG: One -- he could be --

6 CHIEF JUSTICE ROBERTS: He's an independent
7 contractor rather than an employee.

8 MR. YANG: He could be an enterprise but not
9 one -- when an individual acts alone as an enterprise, the
10 individual is not liable for racketeering acts under
11 1962(c) under this Court's decision in Cedric Kushner,
12 because there's a requirement in 1962(c) that the
13 individual has to be employed by or associated with the
14 enterprise. And this Court has rec -- explained that you have
15 to have some distinctiveness between the enterprise itself and
16 the individual.

17 So with respect to the individual, there would
18 be no -- there might be an enterprise. It's conceivable that
19 he could be deemed an enterprise, but not one that has any
20 relevance for RICO purposes under 1962(c).

21 JUSTICE ALITO: What if he has a list of -- of
22 25 people who may, on various occasions, want to
23 participate with him in bank robberies? So whenever he
24 gets the urge to commit a bank robbery, he gets out his
25 Rolodex and he picks one or more of them and calls them up

1 and they commit the bank robbery.

2 MR. YANG: I guess it's -- it's unlikely that
3 the government, if that were the only facts, could show an
4 enterprise. If there was some additional evidence that the
5 individuals had gotten together and said, yes, you know
6 what, call me, let's work together, when I'm available call
7 me, but it just happens to be that he's never called me
8 twice.

9 JUSTICE ALITO: Yes, but what's the element
10 then that's missing?

11 MR. YANG: Well, what's -- what's required
12 under this Court's decision in Turkette, which we think
13 flows directly from the language, any group of individuals
14 associated in fact, is that the group of persons must be
15 associated together for a common purpose of engaging in a
16 course of conduct. And that can be shown, as Turkette
17 explained, by evidence of some kind of ongoing
18 organization, formal or informal, that -- whose associates
19 function as an ongoing unit.

20 And in order to prove through one's actions
21 with others that there is a entity -- some agreement and
22 continuing unit behind that, you're going to have to show
23 some identity in the group. If there's no identity except
24 for one person, it would be very difficult to show an
25 enterprise.

1 JUSTICE SOUTER: Why? I guess that's where I'm
2 -- I'm losing the argument. Why is it difficult?

3 MR. YANG: It would be difficult to show an
4 associated -- association-in-fact. I'm sorry. It would be
5 difficult to prove an association-in-fact of more than one
6 person as the enterprise in that context, because it would
7 be difficult to show that that person had joined with
8 others for the common purpose of engaging in a course of
9 common conduct. It would just be a series of distinct
10 crimes.

11 JUSTICE SOUTER: Then why don't you dispense
12 with the association-in-fact category and simply go with
13 the individual?

14 MR. YANG: That was my answer to the Chief
15 Justice's question, because under 1962(c), there has to be
16 distinctiveness in that context.

17 JUSTICE BREYER: Two people -- two people walk
18 along the street and know each other. That's Posner's
19 example. And one of them says I have a great idea. Let's
20 go in and take some money out of the post office. The
21 other says, what happens if a policeman comes? The first
22 one says, we'll bribe him. Okay? Then they do it. That's
23 it. Period.

24 Now, of course that's illegal. But is RICO
25 supposed to catch that?

1 MR. YANG: No. It's --

2 JUSTICE BREYER: Well, what is it that keeps
3 them out of it?

4 MR. YANG: Well, RICO requires, among other
5 things, a pattern of racketeering.

6 JUSTICE BREYER: Well, here we have two -- two
7 -- two related crimes.

8 MR. YANG: Well, they can be related, but under
9 this Court's decision in H.J., you also have to show
10 continuing criminal conduct.

11 JUSTICE BREYER: There was between the continuing
12 --

13 MR. YANG: Well, no, no. But that has a
14 particular meaning under H.J., which is that it has to
15 extend over an extended period of time.

16 JUSTICE BREYER: Well, that is the bribery. I
17 mean, what happens if 3 months from now the postal
18 inspector comes to catch us? We'll bribe him.

19 MR. YANG: Well, again, I'm not sure that that
20 would meet either the continuing aspect, either because
21 it's a threat of criminal activity or because it would
22 satisfy the close in continuity. If it --

23 JUSTICE BREYER: Well, I mean, you're quite
24 right. I agree with you that these are different efforts
25 to try to catch the same problem. And the problem is that

1 I don't think anyone sees that the simple conspiracy and
2 carrying out of two criminal offenses by several people
3 together without more -- without something more -- should
4 violate RICO. I think your answer to that will be you
5 agree with that, but tell me if you don't.

6 And then if you do agree with it, the very
7 difficult problem is to figure out how to get the people to
8 clearly show --

9 MR. YANG: I think I agree with that
10 proposition.

11 JUSTICE BREYER: You agree with the first part?

12 MR. YANG: But -- but the -- what needs to be
13 shown is that there needs to be an enterprise. Sometimes
14 the enterprise in cases are -- are lawful enterprises;
15 sometimes in cases it involves a unlawful organization, and
16 unlawful association-in-fact, like we have here. And that
17 is shown -- the statutory requirement, as explained in
18 Turkette, is simply that this group of people associate
19 together for a common purpose of engaging in a course of
20 conduct.

21 Now, when you have a long -- a series, like we
22 have here replacing -- of crimes -- these sets of crimes went
23 on for almost a decade, involved dozens and dozens of bank
24 thefts and --

25 CHIEF JUSTICE ROBERTS: I thought your friend

1 said the period that the jury found was just a couple of
2 months.

3 MR. YANG: Yes. That concerns the predicate
4 acts of racketeering. This is -- this raises another
5 important issue, which is, the -- the group largely was
6 committing bank burglaries. Those are not predicate acts.
7 The predicate acts here under RICO involve the interstate
8 transportation of stolen funds. There were three of those
9 that were charged as predicate acts, and the jury found
10 those to constitute a pattern.

11 But what this group of individuals were doing,
12 is they were associating in fact for a very long period of
13 time, committing dozens of bank -- bank burglaries, and did
14 so sometimes with the interstate transportation of stolen
15 funds. That's what brought --

16 JUSTICE SCALIA: And -- and were -- were they
17 shown to the jury, all of those bank burglaries?

18 MR. YANG: Oh, there were many things shown to
19 the jury.

20 JUSTICE SCALIA: So it is not at issue in this
21 case whether -- whether the entity can be --

22 MR. YANG: I have to say --

23 JUSTICE SCALIA: -- derived simply from the
24 predicate acts.

25 MR. YANG: I have to say that the -- I'm a

1 little perplexed at this stage in the litigation based --
2 how -- how we got here based on the objection that was made
3 to the district court. The objection that was made, which
4 was a JA 95, was that there's an ascertainable structural
5 hierarchy, which seems to be abandoned at this point,
6 distinct from the charged predicate acts of racketeering.
7 That was repeated at 103, 108, and 109. And then there was
8 also an objection that the -- the entity has to have a
9 particular or formed structure, and that -- that's been
10 abandoned and also inconsistent with Turkette, which
11 recognized that this can be an informal association.

12 And, in fact, there was not an objection to the
13 entire charge. There -- counsel at page JA 97, after --
14 when the court explained that it was going to address his
15 proposed charge at JA 95, said, you know, I have some
16 specific objections to the charge as written and then went
17 through them, and raising those two objections as we've
18 just discussed here.

19 So, we've kind of evolved in terms of what this
20 case is all about. And even if the Petitioner were right,
21 I don't think he could prevail, even under the charge he
22 wants in this case.

23 But let me turn to a few anomalies with respect
24 to Petitioner's interpretation of a structure.

25 JUSTICE GINSBURG: Before you do that, Mr.

1 Yang, could you give us a sense, if you know it, about the
2 practical results of the different formulas that -- there
3 are at least three formulas, I take it, that the different
4 circuits have approved. In -- in the result of the RICO
5 prosecutions, does it really make a difference which one of
6 these is charged, or do they could out the same way anyway?

7 MR. YANG: It will make a difference in some
8 cases. There's a case called Bagaric that this Court cited
9 in its National Organization against -- for Women against
10 Scheidler. In there, there was a -- Bagaric involved a
11 group of Croatian nationalists, loosely knit, who agreed to
12 kind of promote their anti-Yugoslavian agenda through a
13 series of acts that they committed over a number of years,
14 extortion, murder, bombings. There was no structure. It
15 would be very difficult, I think, to fit into the
16 ascertainable structure distinct from the predicate acts of
17 racketeering that Petitioner espouses.

18 There are other cases involving loosely knit
19 groups of gangs such as neighborhood thugs. The Nascimento
20 case involved a neighborhood group of thugs who protected
21 each other, and that was their common -- common bonding
22 element through ultimately killing rivals or intimidating
23 witnesses. There's no hierarchy there. There were no
24 colors, no initiation rights. But this went on over a long
25 period of time.

1 But beyond those -- the classic cases that
2 might fall outside RICO, if the Court were to adopt an
3 ascertainable structure requirement, I think as
4 Petitioner's laundry list of -- of examples at -- and the
5 last five pages of his reply brief illustrate -- that is
6 going to involve a long course of case-by-case
7 adjudication.

8 JUSTICE BREYER: What did you think -- what did
9 you think of the -- probably not much of it, but what did
10 you think of my effort there? And I'm -- I'm trying to
11 point out, as you see, I'm open to anything that will deal
12 with what I think of as a functional problem and the
13 functional problem is exhibited by that Posner example I
14 gave you or by two investment companies that decide what
15 we'll do is we'll issue a letter that's going to be shown
16 to two different people -- that's their only association --
17 or maybe even 100 people, but they know who they are, and
18 they're going to be shown this letter over a period of 5 or
19 10 years, and someone later comes back and says there's a
20 false statement in the letter. Well, they shouldn't issue
21 a false statement, but is that RICO?

22 I mean, so -- so the object -- the object is to
23 find a way of not overextending RICO where there is nothing
24 there but a conspiracy to commit two crimes. Pattern is
25 one help. The pattern is pretty vague, so all the courts

1 but one have come along, I take it, with this other help,
2 which is playing on the word "structure."

3 Now, you heard what I said is -- is a weak
4 effort to try to do something. What is your best effort to
5 do something to deal with the problem? Or what's wrong
6 with my effort? Whatever you want to say.

7 MR. YANG: Let me first address what I think is
8 your underlying concern, that there's a problem. Turkette
9 addressed that. Turkette addressed that it doesn't matter
10 that the evidence used to -- to establish these separate
11 elements may in cases --

12 JUSTICE BREYER: That's different. That's --
13 of course, the same evidence can establish two separate
14 elements. The problem will be conflating the elements so
15 that every single case that you have the first set, you
16 also have the second set.

17 MR. YANG: That problem does not exist as well,
18 because the relevant -- the relevant pattern of
19 racketeering activity that is the element of the crime is
20 something committed by an individual.

21 For instance, let's take a group of individuals
22 who commit a long string of, for instance, bank burglaries.
23 They do so over a series of years. Bank burglary is not a
24 predicate act of racketeering. It's a wholly criminal
25 organization. All they do is commit bank burglaries. One

1 individual is given the money at the end of the -- of each
2 burglary. That individual transports the money interstate.
3 What we would have there is a RICO violation as to the
4 individual, because the individual -- the element is that
5 the individual has transported the money in interstate
6 transportation -- or across State lines, and that is a RICO
7 predicate. But the other things that the -- the group was
8 doing, those are not RICO predicates.

9 JUSTICE BREYER: No, no.

10 MR. YANG: So -- so the element -- it doesn't
11 change. If the individual then does it with some other
12 people -- let's say he brings his buddy along. Two of them
13 do it. That just shows the evidence necessary to show that
14 the individual -- the evidence showed that the individual
15 committed a pattern of racketeering, also happens to show
16 that he did it with a group. But it's the evidence, not
17 the element. The element of the crime in section 1962(c)
18 always turns on the defendants --

19 JUSTICE BREYER: Well, I mean, that -- always,
20 in a case where you sue the investment company because of
21 their one letter used four times, it's the act of the
22 individual. In the case that Posner used, it's always the
23 act of the individual. There's always a criminal act of an
24 individual.

25 MR. YANG: But if you have --

1 JUSTICE BREYER: And he has to be associated,
2 however, with an enterprise for it to fall within RICO, and
3 there also has to be a pattern.

4 MR. YANG: If you take the --

5 JUSTICE BREYER: Let's go back --

6 MR. YANG: -- my -- my hypothetical with the
7 individual transporting the -- the money alone across State
8 lines, you have a pattern. If you just looked at that,
9 individual taking money across State lines by himself, that
10 doesn't establish an enterprise. What would -- so the
11 pattern exists independently.

12 What would show the enterprise is the fact that
13 the evidence might also show that he's doing it with other
14 people. That would show that he -- the element, that is --
15 he is committing a pattern of racketeering activity and
16 he's doing it in concert with others, but that goes to the
17 separate element of enterprise. That is --

18 JUSTICE BREYER: That's right, and our problem
19 is he's doing it with one other person whom he met once,
20 and they agreed to do it, and that's a common law
21 conspiracy. And now suddenly he's done it twice with
22 another person who helped him and they said they'd do it,
23 and now we have RICO. And my belief is -- which you may
24 not agree with -- that that common garden-variety
25 conspiracy to, say, rob a bank and then transport the money

1 a few months later, that that's all that's at issue. That
2 shouldn't be within RICO.

3 MR. YANG: Let me --

4 JUSTICE BREYER: You might come back and tell
5 me it should be.

6 MR. YANG: Let me try to approach that in two
7 separate ways.

8 One, Turkette in footnote 5 was very clear.
9 The Court explained even if the pattern of racketeering
10 activity and the enterprise are established the same way,
11 it doesn't matter. If enterprise has function -- some
12 function -- there's no such thing as, in other words,
13 partial superfluidity of an element, or partial
14 superfluidity of -- of a word.

15 Secondly, the concern about conspiracy exists
16 in any conspiracy. Conspiracy is a inchoate act. You are
17 liable for a conspiracy as soon as you've made the
18 agreement and, under 371, commit an overt act or, under
19 RICO conspiracy, agree to all the necessary elements of a
20 substantive RICO offense.

21 Congress has -- and not only that, you can be
22 charged for a conspiracy and charged for completing the
23 conspiracy as separate crimes. That's the normal rule.
24 That's the normal rule here. You can be charged for a
25 conspiracy to commit RICO offenses.

1 In RICO offenses, the pattern element I don't
2 think can be underestimated here. The pattern element is
3 where RICO has -- plus the -- the list of predicate acts of
4 racketeering -- is really where RICO gets most of its
5 limiting structure. And I think the Court recognized that
6 in H.J. It's the pattern which requires related criminal
7 acts that can be related in a number of ways, M.O. -- the
8 Court gave kind of a list of -- of that in H.J., which I
9 think I won't go through now, but -- as well as continuity,
10 and that can be long-term criminal activity, not just a
11 single or two, but long-term criminal activity, or the
12 threat of criminal activity.

13 Interestingly enough --

14 JUSTICE SCALIA: Mr. Yang, I am -- I am really
15 confused now. I don't -- I am not sure I know what your
16 answer to the question presented is, which is quite simply,
17 must an association-in-fact enterprise under RICO have some
18 ascertainable structure beyond that inherent in the
19 commission of predicate crimes by its members and
20 associates? And you -- your answer is no.

21 MR. YANG: No. I mean, I guess it depends on
22 what you mean -- ascertainable structure distinct --

23 JUSTICE SCALIA: Yes.

24 MR. YANG: It's very -- I have to say it's
25 difficult for me to understand what is being proposed by

1 the other side, particularly once you've lost hierarchy.
2 Hierarchy is something which is an understandable term.

3 JUSTICE SCALIA: Right.

4 MR. YANG: But if you're talking about
5 structure, structure could mean relationship between
6 individuals that enable them to --

7 JUSTICE SCALIA: Right, right.

8 MR. YANG: -- commit their crimes. If that's
9 the case --

10 JUSTICE SCALIA: Yes.

11 MR. YANG: -- I don't see why a jury cannot
12 infer from the fact, over a long period of time, that the
13 -- the alleged members of this group have operated as a
14 unit and have committed acts of racketeering, from that
15 coordinated conduct that you're not able to infer that they
16 had a means of acting as a group.

17 JUSTICE SCALIA: No, but you can tell the jury
18 -- you would have to tell the jury you have to find it. Of
19 course, the jury can find it, but the issue is, must the
20 jury be told that it has to find it? I think he's
21 conceding --

22 MR. YANG: Must -- must the jury --

23 JUSTICE SCALIA: Be told it's not enough,
24 ladies and gentlemen of the jury, for you to find that
25 these predicate acts occurred. You must find -- and -- and

1 you can find it just from the predicate acts, if you think
2 the evidence will -- will justify that. You must find an
3 organization separate from the mere commission of the
4 predicate acts.

5 MR. YANG: What does that mean?

6 JUSTICE SCALIA: I don't know.

7 (Laughter.)

8 MR. YANG: Because Turkette makes very clear
9 that an association-in-fact enterprise can exist for wholly
10 criminal acts. So if -- if, for instance -- take a few
11 hypotheticals. Let's say a group forms for the basis of
12 committing just only predicate acts of racketeering. They
13 do that. Nothing else, just predicate acts, over a 10-year
14 period.

15 JUSTICE SCALIA: Right.

16 MR. YANG: All right? One formulation of
17 Petitioner's is that you have to look at the charged
18 pattern of racketeering acts, presumably because then the
19 jury has to find the charged pattern and then that has to
20 be distinct from the enterprise. If that's the case --
21 let's say there's 100 predicate acts of racketeering. All
22 that does is say that the government has to show 99 and
23 just leave the last one uncharged. That makes no sense.

24 To the extent that Petitioner is saying, okay,
25 there's got to be some -- something other than racketeering

1 activity. Take, for instance, the group that does --
2 wholly legal, but does criminal non-racketeering acts as
3 well as racketeering acts. That's in fact this case. Bank
4 robberies and -- excuse me, bank burglaries, which is not a
5 predicate act, and interstate transportation of funds. It
6 would be wholly anomalous to exclude a group that only did
7 bank robberies, which are predicate acts, but include a
8 group that was only partially racketeering but wholly
9 criminal because --

10 CHIEF JUSTICE ROBERTS: Not at all. Not at
11 all. That would make a lot of sense, because RICO is not
12 intended just to bring in the crimes. They're looking for
13 something else. They're looking for an organization that
14 is involved in these types of things.

15 MR. YANG: But there's nothing -- there's -- in
16 order to find an organization, you're not going to see any
17 more from criminal acts that are not racketeering versus
18 criminal acts that are. Both of them show --

19 JUSTICE KENNEDY: But you -- you would instruct
20 the jury that if these three thefts that are covered by
21 RICO occurred over a period of a year, and they involved
22 lookouts and scanners and so forth, you may infer from
23 these acts an enterprise as defined by the statute.

24 MR. YANG: They might.

25 JUSTICE KENNEDY: You would allow that

1 instruction.

2 MR. YANG: You -- yes, but there has to be
3 more. You have to explain what would be necessary to show
4 an enterprise. And in fact, the -- the appendix to the
5 court of --

6 JUSTICE KENNEDY: Where -- where in your briefs
7 or in the materials do we find the definition of what the
8 enterprise is, other than in the statute, other than the
9 terms of the statute itself?

10 MR. YANG: I believe page 17.

11 JUSTICE KENNEDY: I mean, what -- what do I
12 refer to in order to supplement the instruction that I just
13 noted -- that I just suggested?

14 MR. YANG: Page 17 of our brief reiterates the
15 standard. I believe it's Turkette. It comes from
16 Turkette. And in the appendix to the petition -- or excuse
17 me, the joint appendix -- the charge is at pages 111
18 through 113. That's the charge.

19 JUSTICE KENNEDY: It's at the bottom of 111
20 where he said that you can look to see what it does and
21 make the inference rather than have -- I forget -- an
22 abstract analysis?

23 MR. YANG: But it goes on to say that you must
24 -- the government must prove that there is an ongoing
25 organization with some sort of framework, formal and

1 informal, for carrying out its objectives, and various
2 members and associations of the association function as a
3 continuing unit to achieve a common objective. The
4 government must prove that in every case.

5 In this case, this is not in the JA, but it
6 is in the court of appeals appendix at page A-770. The
7 district court specifically charged the jury that they must
8 find five separate elements of a RICO offense, including
9 the existence of an enterprise as one; two, that the
10 enterprise engaged in or its activities affected interstate
11 or foreign commerce; three, that the defendant was
12 associated in it. Eventually you get down to five, that
13 the defendant knowingly participated in the conduct of the
14 affairs of the enterprise through a pattern of racketeering
15 activity.

16 So the -- the district court explained you have
17 to define an enterprise. And to find an enterprise, what's
18 a necessary element, it said you may infer an enterprise
19 from what it --

20 CHIEF JUSTICE ROBERTS: That's an enterprise.
21 I mean, the objection is that the enterprise is no
22 different than the various predicate acts.

23 MR. YANG: It is different in the sense that
24 you can have a series of predicate acts without an
25 enterprise; you can have an enterprise without a series of

1 predicate acts. Now, the objection seems to be ultimately
2 that the evidence used to show the predicate acts of
3 racketeering may also prove that the enterprise exists,
4 because when you show predicate acts of a defendant, which
5 is the only element -- it doesn't have to work in concert
6 with others to commit the predicate acts of racketeering,
7 but when you show the predicate acts with evidence that
8 individual is acting with others, you can also show that
9 they have -- there is an association-in-fact of individuals
10 who have joined together to pursue a common course of
11 conduct.

12 Thank you, Your Honors.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang.

14 Mr. Fernich, you have 4 minutes remaining.

15 REBUTTAL ARGUMENT OF MARC FERNICH

16 ON BEHALF OF THE PETITIONER

17 MR. FERNICH: Thank you, Your Honor.

18 Very briefly, nobody disputes the proposition
19 that a properly instructed jury would be able to find that
20 racketeering acts committed by an individual is a distinct
21 element from the association-in-fact enterprise. The
22 government is absolutely right, and we agree on that score.
23 The problem is the lower courts have misread Turkette.
24 They're not focusing on the pattern of racketeering
25 activity committed by the individual. They've -- and the

1 instruction, as Justice Kennedy himself quoted in this
2 case, encapsulate it -- encapsulates the problem.

3 Common -- and this is at the bottom of JA 1111.
4 Common sense suggests that the existence of an association-
5 in-fact is oftentimes more readily proven by what it does -
6 - it does -- not rather than what an individual member
7 does, rather than by abstract analysis of its structure.

8 So it only raises a further vagueness problem.
9 We agree that patterns of racketeering activity are
10 properly committed by individuals. If you are going to
11 define the enterprise solely or principally by virtue of
12 the pattern, whose pattern would you define it by? It
13 doesn't even make any sense. And in Turkette, it -- with
14 respect to what occurred in Turkette -- and this is at page
15 5 of my brief. The latter -- and this is a quote from
16 Turkette, and it's referring to the pattern. The latter is
17 proved by evidence of the requisite number of acts of
18 racketeering committed by the participants in the
19 enterprise.

20 We agree in the abstract that a properly
21 instructed jury -- that the pattern and -- and the -- the
22 enterprise are totally different things. The problem is
23 it's a giant circular argument by the government. Juries
24 aren't being properly instructed in that regard, and that
25 only compounds the vagueness of the statute.

1 A second point I would like to make. The
2 government presses its principal definition of an
3 enterprise in its brief, and what I hear here from the
4 government is its common purpose. Common purpose. And I'd
5 like to direct the Court to the Salinas opinion which
6 discussed RICO conspiracy. It's at 522 U.S. -- well, I
7 will give you the -- let's try 118 S. Court 477, it looks
8 like.

9 Common purpose is the hallmark of a conspiracy.
10 And this is in the discussion of a conspiracy. We rejected
11 argument X because it would erode the common law principle
12 that so long as they share a common purpose, conspirators
13 are liable for the acts of their co-conspirators, which is
14 the Pinkerton doctrine which collapses 1962(c) into a
15 general conspiracy statute, if you are going to define an
16 enterprise principally by virtue of its common purpose.
17 That's my second point.

18 As far as the -- the claim that somehow we
19 didn't object sufficiently to the charge, I'm not going to
20 address that in any depth. I would just direct the Court
21 to pages 97 through 109 of the joint appendix. It -- it
22 spells out exactly what we objected to, and we objected to
23 virtually every sentence of the instruction that defines or
24 purports to define an association-in-fact enterprise.

25 As far as the definition of the enterprise, we

1 would certainly agree with Justice Breyer's formulation
2 that something to differentiate it as a long-term, goal-
3 directed, decision-making apparatus that continues in the
4 intervals between the predicate acts would do it. But we
5 contend that structure is largely -- it's a plain English
6 word. It's not antidisestablishmentarianism or something
7 like that. The jury should be instructed, as in the
8 Seventh and Eighth Circuits, that there's got to be a
9 structure separate from the pattern. If the jury has
10 questions, we have lots of faith in district judges, as
11 Justice Ginsburg pointed out; that if the jury comes back
12 with a question, the judge could list examples tailored to
13 the appropriate case.

14 And I just want to hit at the common -- the
15 purpose underlying RICO here. It's very significant in my
16 view that bank burglaries are not, in fact, RICO predicate
17 acts, and if you were to look -- if this Court were to look
18 at my -- my court of appeals briefs in this case, bank
19 burglary is not a RICO predicate act for a reason.
20 Congress made a judgment that bank burglaries are
21 adequately handled by the States, that the States can
22 prosecute them. And the reason why these three bank
23 burglaries had to be dressed up as interstate
24 transportations of stolen money is because this is not
25 really a case in which RICO is properly invoked. It's

1 fully briefed in my court of appeals submission. These are
2 State crimes that a State is perfectly capable -- capable
3 of handling on its own.

4 And unless there are any further questions, I
5 would waive any further rebuttal.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 12:17 p.m., the case in the
9 above-entitled matter was submitted.)

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