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IN THE SUPREME COURT OF THE UNITED STATES

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CEDRIC KUSHNER PROMOTIONS, :  
LTD., :  
Petitioner :  
v. : No. 00-549  
DON KING, ET AL. :  
- - - - -X

Washington, D.C.  
Wednesday, April 18, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:12 a.m.

APPEARANCES:

RICHARD A. EDLIN, ESQ., New York, New York; on behalf of  
the Petitioner.  
AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; for  
United States, as amicus curiae, supporting  
Petitioner.  
PETER FLEMING, JR., ESQ., New York, New York; on behalf of  
Respondents.

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C O N T E N T S

PAGE

ORAL ARGUMENT OF

RICHARD A. EDLIN, ESQ.

On behalf of the Petitioner

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AUSTIN C. SCHLICK, ESQ.

For United States, as amicus

curiae, supporting Petitioner 14

PETER FLEMING, JR.

On behalf of Respondents

18

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No.00-549, Cedric Kushner v. Don King, et al.

Mr. Edlin.

ORAL ARGUMENT OF RICHARD A. EDLIN

ON BEHALF OF THE PETITIONER

MR. EDLIN: Mr. Chief Justice, and may it please the Court:

The decision of the Second Circuit adopting a scope of employment test should be rejected and reversed for three principal reasons. First, the scope of employment test cannot be reconciled with the plain language of the statute. Second, the decision below runs contrary to this Court's decision in *Reves*, as well as in *Turkette* and as well as in *Scheidler*. Finally, the decision below would unnecessarily eviscerate the ability of private litigants in the Government to bring 1962(c) actions.

Turning to the first point, on page one of --

QUESTION: Can you tell me something, before you get into this, I would appreciate your correcting the following misapprehension, if it is, or affirming it. This is my question --

MR. EDLIN: Yes, sir.

1           QUESTION: Are we talking about only a really  
2 odd situation? A situation where we're talking about one  
3 individual? Because if there are several individuals in a  
4 corporation, there really is no problem that this Act  
5 clearly applies, but we're only talking about a  
6 circumstance where there's just like one person. Is there  
7 a general aspect --

8           MR. EDLIN: Your Honor, the problem --

9           QUESTION: -- of what we're talking about?

10          MR. EDLIN: I think the problem with the Second  
11 Circuit's decisions is that it does reach the general  
12 problem. Clearly if you have a corporation that has many  
13 employees, and one of the corporate employees is the  
14 person, and the rest of the corporation is the enterprise,  
15 I see no problem with that case. I see no problem with  
16 this case. This case is exactly the same, because the  
17 introduction of the corporate form changes things, and  
18 whether it's a one-person corporation or a multiple-person  
19 corporation, the issue is precisely the same.

20          QUESTION: But -- I just want follow up Justice  
21 Breyer's question, in the case of a large corporation,  
22 what would the Second Circuit say? The same thing?

23          MR. EDLIN: I think the problem with the Second  
24 Circuit's decision is that it may well say the same thing.

25          QUESTION: Now, that's what I didn't see because

1 it seemed to me in any real corporation it's not going to  
2 be following what the corporation wants to commit a crime,  
3 so it's not in the scope of your employment to commit a  
4 crime. And so under the Second Circuit's rule, unless  
5 you're suddenly -- unless we're talking about a  
6 corporation that wants to go off and commit crimes, the  
7 person's never going to be acting in the scope of his  
8 employment, so always he's caught within the statute. If  
9 there's, you know, several people, certainly. Am I right?  
10 Can you explain that very clearly?

11 MR. EDLIN: The problem that we have with the  
12 Second Circuit's decision is that it is hard to  
13 rationalize with the meaning of the statute and with the  
14 Court's decision in Reves. Reves clearly, for example,  
15 confers liability on all inside managers. Whatever else  
16 it does, it certainly confers liability on all inside  
17 managers. There's no question under Reves that Mr. King  
18 would be included within the operation and management test  
19 that this Court adopted there.

20 The Second Circuit's decision immunizes  
21 precisely the same group of people, or a single person,  
22 that Reves would impose liability upon. And the Second  
23 Circuit's decision is not limited and does not distinguish  
24 between corporations in which there is one principal party  
25 or corporations in which there are many parties.

1 I agree with you the scope of management test  
2 doesn't really work, but it's because it doesn't work.  
3 It's not because the Second Circuit has limited it to just  
4 this fact item.

5 QUESTION: In any case, I was going to ask  
6 basically the same question. It seems to me that if the  
7 scope of management test includes at least, as I assume it  
8 must, some reference to the purposes of the corporation,  
9 then no corporation, whether it's a regular corporation or  
10 a pure formality, can be organized as a matter of law to  
11 commit acts of racketeering. So the odd thing to me about  
12 the Second Circuit's opinion is the notion that one would  
13 be within the scope of employment while engaging in the  
14 prohibited activities. And I would have thought that that  
15 was a legal impossibility. Am I missing something?

16 MR. EDLIN: Your Honor, I --

17 QUESTION: I should ask your opponent that  
18 question, but just to stir him up --

19 MR. EDLIN: If you're missing something, I am  
20 too, and I am eager to hear an answer from Mr. Fleming on  
21 that question. But even beyond the corporation, certainly  
22 RICO reaches both legitimate and illegitimate enterprises  
23 and, in the context of the illegitimate enterprise, scope  
24 of employment analysis makes no sense at all. So I just  
25 think that when you look at what the Second Circuit is

1 doing, it can't be reconciled with what the words of the  
2 statute said.

3 The words of the statute are extraordinarily broad.  
4 This Court has had many opportunities to look at this  
5 section of the statute, and when we look, for example, on  
6 page one of the blue brief, at the definitions, person  
7 includes any individual or entity, and an enterprise for  
8 this purpose includes any corporation. And 1962(c) refers  
9 to any person employed by an enterprise.

10 QUESTION: On these facts, could you have  
11 alleged that King was the enterprise and the corporation  
12 was the person?

13 MR. EDLIN: On these facts, I think that that  
14 -- you could allege that, Your Honor. I think that that  
15 would be --

16 QUESTION: So you could have count one, where  
17 one is the person, and count two, and it's the same? That  
18 seems rather odd.

19 MR. EDLIN: No, I don't think that you can do  
20 both. I don't think you can set it up and try to have it  
21 both ways, but I think --

22 QUESTION: But I thought you just indicated you  
23 could do that.

24 MR. EDLIN: If you chose just one. If you had  
25 -- if you chose Don King Productions as the --

1           QUESTION: Well, do you flip a coin to decide  
2 which way you're going to do the count? Do the pleading?

3           MR. EDLIN: Unfortunately, you know, you might  
4 have to do that in the Second Circuit. I don't think  
5 that's the way that the statute is --

6           QUESTION: No, but under your theory. Under  
7 your theory you say that you can participate with your own  
8 corporation. I said what's the difference between an  
9 enterprise and a person on the facts of this case? It  
10 seems to me that they could have just been flipped around.

11          MR. EDLIN: On the facts of this case, Your  
12 Honor, certainly the pleading that we have in this case  
13 satisfies the standards of the case. There's an  
14 individual, he is conducting his affairs through a  
15 corporate enterprise and engaging in racketeering  
16 activities. No question that that pleading is  
17 appropriate. Now if you flip it and you had Don King  
18 Productions conducting the affairs of Don King, depending  
19 upon what the facts were, that would not violate the plain  
20 language of the statute. There are contexts that one  
21 could probably come up with in which the facts would  
22 justify that sort of pleading. In this case, I think  
23 we've pled it the right way.

24          QUESTION: But as far as pleading is concerned,  
25 the rules allow you to plead in the alternative, and you



1 don't have to pick your theory at the pleading stage, so I  
2 guess your answer to Justice Kennedy means that in your  
3 complaint you could have alleged it both ways and then  
4 waited to pick until later on.

5 MR. EDLIN: I think that that's no doubt  
6 technically correct, but I don't think that's what we're  
7 trying to do just because you can plead in the  
8 alternative. I don't think that pleading in the  
9 alternative means that you can plead wholly inconsistent  
10 theories of facts. You can plead alternative results, but  
11 I don't think that a pleading in the alternative like this  
12 would pass a motion simply because I do think that in  
13 terms of the structure of the person and the enterprise,  
14 you do have to pick it.

15 QUESTION: Do you need a corporation on your  
16 theory? I mean, I was reading your presentation and I had  
17 the notion that it wouldn't matter if it were a sole  
18 proprietorship. At least if it had employees, the sole  
19 proprietorship could be the enterprise and King could be  
20 the person. Is that correct?

21 MR. EDLIN: That's correct, Your Honor. In that  
22 case, a sole proprietorship with employees would be an  
23 association-in-fact enterprise and, again, distinct from  
24 the person. So as long as there is no complete overlap  
25 between the person and the association-in-fact, those

1 pleadings which are again not at issue in this case have  
2 routinely been upheld as appropriate pleadings. I think,  
3 Justice Ginsburg, that our circuit just got this one  
4 wrong, and I think that it's very simple to address it.

5           Moving past the language of the statute and on  
6 toward the *Reves* case, again as I mentioned just a moment  
7 ago, *Reves* carefully considered the appropriateness of  
8 imposing liability upon employees or others who were in  
9 operational and management control of the corporation.  
10 There is no question that under that test Don King would  
11 qualify as someone in operational or management control of  
12 this enterprise, and that is the appropriate standard to  
13 use here. It is not a scope of employment standard.  
14 *Reves* is the appropriate standard, and under *Reves* Mr.  
15 King would have liability. The Second Circuit's decision  
16 simply immunizes that.

17           The final vice with the Second Circuit's decision  
18 goes toward the evisceration of 1962(c) actions. 1962(c)  
19 actions, I believe -- I haven't done the math, but I  
20 believe they are the wide majority of RICO claims that are  
21 brought. There are many more cases there.

22           Now, whether you take the Government's example  
23 of a --

24           QUESTION: Any idea what percentage of them  
25 really pick up organized crime, which is supposedly the

1 object of RICO?

2 MR. EDLIN: I don't, Your Honor. I don't know.

3 QUESTION: Yes. That would be a more  
4 interesting statistic as far as whether your  
5 interpretation really fulfills the purpose of RICO.

6 MR. EDLIN: Your Honor, there is no doubt that  
7 the statute was targeted at organized crime, but there is  
8 also little doubt --

9 QUESTION: That's right. And all your statistic  
10 may prove is that the statute is being used excessively  
11 for a purpose that it did not have in mind at all.

12 MR. EDLIN: Your Honor, there is little question  
13 that what you're saying is true, except for the fact that  
14 this Court has read in Sedima into the statute the fact  
15 that it has an extremely broad sweep and it catches  
16 precisely this kind of activity. Congress made a choice  
17 in unveiling the broadest possible statute, that it would  
18 err on the side of including these kinds of cases,  
19 possibly even shifting the burden to Federal courts to  
20 deal with these kinds of claims so that loopholes were not  
21 created for clever racketeers to slip through and avoid  
22 liability.

23 I believe that that demonstrates the breadth of  
24 the statute, and if that is a problem to be remedied as  
25 this Court has observed on many occasions, it lies with

1 Congress. The plain language of this statute has been  
2 amply satisfied by this pleading, and I believe that the  
3 -- again, to my last point, the problem with the Second  
4 Circuit decision is that whether you take the Government's  
5 example of the corporate president who directs the company  
6 to bribe public municipalities, or whether you take our  
7 example of an organized crime family incorporating and  
8 appointing everybody an executive vice president, those  
9 two situations, under the Second Circuit standard, would  
10 not be caught within the scope of the statute, and --

11 QUESTION: Mr. Edlin, you rely rather heavily on  
12 our decision in Reves, and I notice the court of appeals  
13 opinion didn't mention it at all. Did you urge that case  
14 in the Second Circuit?

15 MR. EDLIN: We urged it in the Second Circuit.  
16 We argued it extensively in the Second Circuit, and what  
17 is interesting to me at least in the Second Circuit's  
18 decision -- there are a couple of points of interest.  
19 One, it did not discuss Reves. Second, it was a panel of  
20 two judges in the Second Circuit, but also Judge Lloyd  
21 George of Nevada who, in addition to presumably knowing  
22 something about boxing, knows something about the laws  
23 outside the Second Circuit and how his circuit interprets  
24 this. A per curiam decision which drops a very strong  
25 footnote in footnote 4 which -- in which the Second

1 Circuit owns up to the fact that its decision, it's  
2 intention, if not direct conflict, with the laws of every  
3 other circuit on this point, I think demonstrates in some  
4 way that the Second Circuit was inviting this certiori.

5 QUESTION: Well, a visiting judge is expected to  
6 follow the precedent in the circuit which he visits.

7 MR. EDLIN: I'm simply observing that I found  
8 how the court issued its decision interesting, given the  
9 fact that it does not mention Reves. It is very difficult  
10 to understand how this case, which is so close to Reves,  
11 is not even mentioned in this very short Second Circuit  
12 decision. And I think the reason is obvious. It can't be  
13 reconciled. There is no way to take the facts of this case  
14 and support them under any reading of Reves.

15 QUESTION: I suppose that what they're worried  
16 about, if I'm trying to imaginatively put myself in their  
17 shoes, is that a person could claim the following. Take  
18 any company whatsoever that does business in interstate  
19 commerce, and the plaintiff says there's -- there's a  
20 manager in that company who, on a couple of occasions, at  
21 least two, told the salesmen to overstate or to lie about  
22 a characteristic of the product. That's it. And now all  
23 of those become RICO violations because it is claimed that  
24 this person, you see, is engaging or participating in the  
25 affairs of American Express Company or any other large

1 company, through a pattern of racketeering activity, i.e.  
2 two instances of mail fraud. And that's so distant from  
3 the purposes of this statute that they're searching for  
4 ways to limit the scope.

5 MR. EDLIN: Justice Breyer, I agree with that.  
6 However, this Court has rejected every instance in which a  
7 circuit court has sought to artificially restrict the  
8 language of the statute and has observed that the remedy  
9 is with Congress.

10 This statute was not passed without Congress  
11 observing that these exact criticisms were possible. It  
12 was passed over opposition. The answer to the opposition  
13 was simply that the protections of the statute did not  
14 take place in the definitional sections, it took place in  
15 the pattern and enterprise sections so that garden-variety  
16 frauds are typically not committed with a pattern and  
17 continuity.

18 QUESTION: That's no -- that's no protection in  
19 the hypothetical that Justice Breyer gave you. I mean,  
20 you have one salesman who steps over the line a couple of  
21 times, and suddenly you're -- you're -- the corporation is  
22 into RICO. I mean, that's totally absurd.

23 MR. EDLIN: Justice Scalia, whether it is or it  
24 isn't, it was considered by Congress at the time it was  
25 passed, and Congress made a decision that it would --

1 QUESTION: But don't tell me it's not absurd.  
2 Say you know it's absurd, but that's what Congress  
3 provided. I thought you were trying to say it's not  
4 absurd.

5 MR. EDLIN: I'm trying carefully to say it's not  
6 absurd in that example, but apparently it's hard, and I  
7 won't continue to try to do it. The fact is, though, that  
8 we do have a statute. It's been read by this Court a  
9 number of times, it supports our interpretation of the  
10 statute. The Second Circuit's decision should be  
11 reversed, and I would like to reserve whatever time I have  
12 remaining for rebuttal. Thank you.

13 QUESTION: Very well, Mr. Edlin.

14 Mr. Schlick, we'll hear from you.

15 ORAL ARGUMENT OF AUSTIN C. SCHLICK  
16 FOR UNITED STATES, AS AMICUS CURIAE,  
17 SUPPORTING PETITIONER

18 MR. SCHLICK: Mr. Chief Justice, and may it  
19 please the Court:

20 Section 1962(C) reaches racketeering activity by  
21 a defendant who is employed by the RICO enterprise,  
22 without regard to the scope of the defendant's employment.  
23 That is clear from the text of Section 1962(c) which  
24 reaches racketeering activity by any person employed by or  
25 associated with any enterprise. A scope of employment

1 rule defies that plain language. In addition, a scope of  
2 employment rule is inconsistent with the statutory scheme  
3 in three additional respects.

4 First, a scope of employment rule defies  
5 Congress's intent to reach criminals who infiltrate and  
6 corruptly run legitimate businesses. It's important in  
7 that respect to address the question of whether a criminal  
8 or otherwise wrongful act can be within the scope of  
9 employment. And the answer to that is yes, it can be.  
10 Section 231 of the Restatement of Agency addresses that  
11 point, but consider the example of a corporation which  
12 instructs its employee to make a sale, knowing that the  
13 way that that sale was made traditionally is through  
14 bribery. In that case, the bribery would be within the  
15 scope of employment, notwithstanding that it would be  
16 unlawful and, notwithstanding, there might not have been  
17 specifically urged by the corporation.

18 Because of that, when criminals take control of  
19 a business, they are able to bring illegal activity within  
20 the scope of that business. And under the Second  
21 Circuit's scope of employment rule, that would immunize  
22 the racketeering activity.

23 Second, the scope of employment rule would  
24 create additional difficulties in applying Section  
25 1962(c), because the test itself is contextual and subject



1 to the case-specific application. This Court discussed  
2 that in Faragher v. City of Boca Raton. The difficulties  
3 and the permutations of the rule.

4 Third, a scope of employment limitation is  
5 inconsistent with the Court's holding in Reves that a  
6 defendant, under Section 1962(c), must participate in the  
7 operation or management of the affairs of the business.  
8 If participation and operation and management is necessary  
9 for there to be liability, then carrying out the affairs  
10 of the business cannot prevent liability.

11 An employee who controls a corporation would,  
12 under that rule, be immune from liability when he misuses  
13 his control of the corporation to involve the corporation  
14 in racketeering. If the Court has no questions?

15 QUESTION: Do you see any way to limit the  
16 application of RICO to the situations described by Justice  
17 Breyer? It is a little far afield from its ostensible  
18 purpose.

19 MR. SCHLICK: Yes, Justice O'Connor, the concern  
20 intuitively about Justice Breyer's hypothetical is the  
21 predicate act, which is mail fraud or wire fraud. If you  
22 took the same hypothetical and substitute arson or murder  
23 or narcotics trafficking as the offense, I don't think  
24 that anyone would be shocked or surprised.

25 QUESTION: But that isn't the problem. The

1 question I think is -- is there anything, any judicial  
2 interpretation, because mail fraud is one of the predicate  
3 acts, isn't it? We're not a legislature. I mean, so the  
4 question is, is there some area in this which would be an  
5 interpretation that brings it closer to the basic  
6 congressional intent which is just as you describe, to get  
7 organized crime people the bad things, but not sweep in so  
8 many things. Or this simply a question of that's how the  
9 legislation was drafted, put up with it.

10 MR. SCHLICK: This case goes to the  
11 interpretation of Section 1962, which applies to criminal  
12 as well as civil cases. Courts have looked under Section  
13 1964(c) to addressing particular abuses in the civil  
14 context, but what ever one thinks of the allegations in  
15 this particular complaint, the core fact pattern which is  
16 the running of a business in a pervasively corrupt manner  
17 is exactly what Congress intended to reach through RICO.

18 QUESTION: Do you agree that this complaint  
19 could have been just as easily drafted, switching the  
20 enterprise and the participant?

21 MR. SCHLICK: Justice Kennedy, it would be  
22 possible to frame a complaint either way, but the fact  
23 that --

24 QUESTION: And I mean prove the case as well.

25 MR. SCHLICK: But to do that, you would be

1 alleging two different fact patterns. Suppose the  
2 corporation needed the personal assets of Mr. King to  
3 carry out its racketeering activity. In that case, it  
4 might be possible to have the corporation named as the  
5 defendant or person, and Mr. King as the enterprise. But  
6 that would be a different fact pattern than the one  
7 alleged here. It would not be possible simply to flip the  
8 defendant and the enterprise at will.

9 QUESTION: I'm not sure why not, under this fact  
10 pattern.

11 MR. SCHLICK: Under this fact pattern, the  
12 allegation is that Mr. King has used not only his personal  
13 resources but also other agents, other employees, of DKP  
14 Corporation to carry out the racketeering activity, so it  
15 would be necessary to allege an enterprise that  
16 incorporates those persons or things that are used in the  
17 racketeering.

18 QUESTION: Thank you, Mr. Schlick.

19 Mr. Fleming, we'll hear from you.

20 ORAL ARGUMENT OF PETER FLEMING, JR.

21 ON BEHALF OF RESPONDENTS

22 MR. FLEMING: Mr. Chief Justice Rehnquist, and  
23 may it please this Court:

24 As usual, you depart from what you're prepared  
25 to say. First, the application of 1962(c) to ordinary

1 business, is absurd. We do not rely upon that, although  
2 we do believe that if thinking along with us the Court  
3 concludes that the Second Circuit's reading of 1962(c) and  
4 its application is correct, the absurdity of the other  
5 reading would lead acceptance of its result.

6 Mr. Justice Breyer, our case is not limited to a  
7 single employee situation. It would be -- the Second  
8 Circuit's approach would be applicable if there were five  
9 or six employees or more.

10 QUESTION: Then that's their concern, because if  
11 that's right, then the one time when the interest of the  
12 employee committing the crime and the interest of the  
13 corporation are likely to be congruent is where you have  
14 an evil corporation, and that seems to be the one time  
15 that clearly the Second Circuit rule would exempt from the  
16 statute, and so oddly enough, insofar as it has an impact,  
17 its impact is bad in terms of the statutory purpose.  
18 That's the argument of it.

19 MR. FLEMING: And exempt under (c), but would  
20 not exempt under --

21 QUESTION: I know, but insofar as the Second  
22 Circuit rule has real has real bite beyond a single  
23 person, its bite is biting the person -- in other words,  
24 bite goes just in the wrong direction.

25 MR. FLEMING: Our position would be, Justice

1 Breyer, that (a) covers that situation, and it was  
2 Congress's intent that (a) cover that situation, where the  
3 same response to Justice Souter's question, and that has  
4 to do with whether any criminal act or predicate act or  
5 civil fraudulent act can be considered within the scope of  
6 employment. Unfortunately, I think experience shows that  
7 those -- that torts of that sort are conducted within the  
8 scope of employment.

9 QUESTION: Well, that -- that's an easy  
10 conclusion to draw if your sole test of scope of  
11 employment is intent to benefit the corporation, but the  
12 scope of employment inquiry is broader than that and, even  
13 apart from the fact that there's always a policy component  
14 to it, you've got to take into consideration in some way  
15 corporate purpose, and I take it we at least have common  
16 ground that there is no -- there is not State corporation  
17 law that would charter a corporation to commit within the  
18 scope of its corporate authority an act of racketeering.  
19 We agree on that, don't we?

20 MR. FLEMING: We do agree on that.

21 QUESTION: Okay. And if that has got to be  
22 considered then in determining what can fall within the  
23 scope of the employment of an employee or an officer, then  
24 it's hard for me to see how any act of the officer could,  
25 under State corporation law, be within the scope of his

1 employment because it can't be within the scope of the  
2 corporate purpose.

3 MR. FLEMING: It could be -- it could be to  
4 further the interests of the corporation.

5 QUESTION: Right, but that's true only if that's  
6 your sole test of scope of employment, and if that's going  
7 to be the case, it would just, it seems to me, make for  
8 clearer thinking if we didn't talk about scope of  
9 employment and instead said, look, the test is whether  
10 it's to further the financial interest of the corporation.

11 MR. FLEMING: And what the court of appeals said  
12 -- Second Circuit said in Riverwoods was in the course of  
13 their employment and on behalf of the corporation -- and  
14 on behalf of the corporation.

15 QUESTION: And I'm suggesting that you can't  
16 have both. You might have a subjective purpose to bring  
17 lucre to the corporation, but I don't see how as a matter  
18 of law to be within the scope of employment, too.

19 MR. FLEMING: The Court would -- what you're  
20 saying, Your Honor, is that if an employee commits a tort  
21 -- commits a fraudulent act, it simply cannot be  
22 considered from the scope of employment. I would disagree  
23 with that if, in fact, he was acting for the benefit of  
24 the corporation.

25 QUESTION: Yes, I think you have to disagree

1 with that. And I think you would say that a corporate  
2 charter cannot, certainly under any State law that I'm  
3 aware of, authorize the corporation to act negligently  
4 either.

5 MR. FLEMING: That's correct.

6 QUESTION: Nonetheless, when a -- or willfully  
7 negligent, either. And nonetheless, when a corporate  
8 officer does that, he's deemed to be acting within the  
9 scope of his employment.

10 MR. FLEMING: And we all know what happens.

11 QUESTION: But then scope of employment then  
12 turns --

13 MR. FLEMING: So long as he's acting for the  
14 benefit of the company.

15 QUESTION: Then scope of employment, in effect,  
16 is going to be limited in this context to serving a  
17 corporate purpose in the sense of trying to bring monetary  
18 gain to the corporation. That is the sole test.

19 MR. FLEMING: That is correct, Your Honor.

20 QUESTION: No, you wouldn't say that's the sole  
21 test, Mr. Fleming. Surely if somebody is a lineman for a  
22 telephone company and he does some act that, you know,  
23 that is an act only appropriate for the vice president,  
24 you wouldn't say he's acting within the scope of his  
25 employment. It has to be somehow within the assigned job

1 that the individual has been given, doesn't it?

2 MR. FLEMING: Yes, I think it does.

3 QUESTION: Of course it does.

4 MR. FLEMING: I'm sorry -- I misunderstood. I  
5 thought what Justice Souter was saying was that the  
6 person's acting in his job -- he may be acting tortiously  
7 in his job, but he's acting for the benefit of the  
8 company, and I believe that occurs all of the time,  
9 unfortunately, and when it does occur, it is within the  
10 scope of his employment.

11 QUESTION: But I think the -- I don't want to  
12 take more of your time on this than this last question,  
13 but it seems to me that the way the circuit was referring  
14 to the test, it was confining the test to this one  
15 element. Was it trying to further the financial interest  
16 of the corporation. Whether we as lawyers or judges would  
17 come up with a different test for that phrase, I don't  
18 know. But that seems to be the one criterion that the  
19 circuit was applying, and I thought that's what you were  
20 agreeing to.

21 MR. FLEMING: I am in agreement with that. The  
22 Second Circuit's view is very clear. They say, as all the  
23 circuits say, that under 1962(c) the RICO person must be  
24 distinct from the enterprise, whatever that enterprise may  
25 be. They then say that so far as they are concerned,



1 corporate employees working for the -- on behalf of and  
2 for the benefit of the corporation, are not distinct from  
3 the corporation itself. We think that's consistent with  
4 the traditional view of a corporation. There's the  
5 argument --

6 QUESTION: The thing that strikes me as a little  
7 bit odd about the scope of employment test is that the  
8 scope of employment in *Reves* is one we usually make as  
9 relevant to whether the employer is liable, and it's not  
10 the inquiry we make when we're looking to see if the  
11 employee is liable, and I just don't see how the test  
12 quite fits.

13 MR. FLEMING: If understand what you said,  
14 Justice O'Connor. You make exactly our point about RICO  
15 and why the Second Circuit is correct.

16 QUESTION: I wouldn't think so. I didn't make  
17 the point for that purpose.

18 MR. FLEMING: The common law provides, as the  
19 Court knows, that a corporation is liable certainly  
20 civilly and sometimes criminally for the conduct -- for  
21 the wrongful conduct of its employees. RICO exempts the  
22 enterprise from liability and points to the person only.  
23 We think if you have to look at that issue, when you're  
24 asking yourself what Congress was looking for in 1962(c),  
25 we say that because the enterprise is exempt from

1 liability for the wrongful conduct of the person, that can  
2 be consistent with common law principles only in that  
3 situation where the corporation is exempt by common law.

4 QUESTION: Mr. Fleming, a moment ago you  
5 referred to the distinctness requirement, and you said all  
6 the circuits are in agreement on that. Is that your  
7 considered opinion as opposed to the scope of employment  
8 requirement?

9 MR. FLEMING: All the circuits agree that under  
10 1962(c), there must be the RICO person -- it could be any  
11 person -- the RICO person must be distinct from the  
12 enterprise. All the circuits agree on that, and all the  
13 circuit -- excuse me, Justice Ginsburg?

14 QUESTION: You could have a sole proprietorship  
15 that has some employees, and that would satisfy the  
16 distinctiveness requirement, would it not? Because as long  
17 as it wasn't just the one-person operation with no  
18 employees, so you don't have to have another form. You  
19 could be operating a sole proprietorship and still meet  
20 the distinctiveness requirement, as I understand it.

21 MR. FLEMING: Not in -- not in the -- in the  
22 seventh circuit, yes. And in another circuits, perhaps  
23 yes. In the Second Circuit, no, if the predicate acts  
24 were performed for the benefit of the sole proprietorship.  
25 But I agree, Justice Ginsburg, that a sole proprietorship

1 with a few employees is subject to 1962(c) application.  
2 The question is whether the Second Circuit's view of the  
3 application of 1962(c) should prevail, or whether the view  
4 of other circuits should prevail.

5 The Second Circuit is saying that corporate  
6 employees acting with the corporation and for the benefit  
7 of the corporation are really a part of the corporation  
8 and are not distinct from the corporation for the purposes  
9 of the distinctness required by RICO.

10 QUESTION: The United States is one example  
11 where the Second Circuit position would meet, and it says  
12 here's a corporation, tells its employees go out and bribe  
13 the local police, it will be able to do this, that, or the  
14 other thing, and they won't touch us. Those employees who  
15 are giving the bribe then are acting in the scope of their  
16 employment for the benefit of the corporation, and under  
17 your theory, there would be no RICO claim. Is that  
18 correct?

19 MR. FLEMING: Against the employees. But I think  
20 there could be punishment of the corporation, and perhaps  
21 of the employees also, under Section A of 1962, in which  
22 the corporation is the beneficiary and can be punished.  
23 When you look at the --

24 QUESTION: It would be, I suppose, could make a  
25 criminal bribery case, but as far as 1962(c), on your

1 theory, such a pattern would not fit because it was within  
2 the scope of their employment to give out these  
3 sweeteners.

4 MR. FLEMING: And for the purported benefit of  
5 the corporation.

6 QUESTION: Yes.

7 MR. FLEMING: But the conduct could be reached  
8 under RICO under Section (a), both as to the corpora --  
9 certainly as to the corporation, and we believe also as to  
10 the persons. And when you look at the entire statutory  
11 scheme, you have a situation where under (a) the  
12 beneficiary corporation -- what Mr. Blakey calls the  
13 perpetrator corporation -- is subject to RICO liability.  
14 It doesn't make any sense. When you get to 1962(c), there  
15 should be a quasi-redundancy, and that's why the --

16 QUESTION: I thought that (a) is about -- is  
17 investing racketeering proceeds in an enterprise, and (b)  
18 is about obtaining control, and (c) is about managing the  
19 enterprise or participating in its affairs through a  
20 pattern of racketeering activity. They seem different.  
21 So I thought that -- imagine the case where you have a  
22 group of racketeers -- I mean, let's call them really bad  
23 people, all right? The really bad people in fact created  
24 or are found in positions of responsibility in an  
25 enterprise, and what they do is they have a series of

1 really bad acts. So we get that out of it. Now, where the  
2 really bad people are in an enterprise and they're running  
3 it through really bad acts, your interpretation, according  
4 to the other side, will basically in the worse case bring  
5 them out of section (c). Because these are really bad  
6 people, they have a lot of really bad acts, so they're  
7 just the people that (c) wants, and you write them out,  
8 because after all they are not going against, they are  
9 even furthering what the enterprise is there for. Now,  
10 that's what they say.

11 Now, you say, which may be true, if their  
12 interpretation is right and the legal distinctness  
13 consists of either (a) legal distinctness, or (b) factual  
14 distinctness, the distinctness requirement is always  
15 satisfied but for the fact that where there is a single  
16 person, and he doesn't even work through a corporation.  
17 So you say that meets it meaningless. Now, they say  
18 between the two, theirs is better. All right? So what's  
19 your reply to that, because they say that there should be  
20 limitations? There are other words in the statute to do  
21 it, not this one.

22 MR. FLEMING: Our reply, Your Honor, is that  
23 between one or the other, ours is better. The Second  
24 Circuit --

25 QUESTION: I know that's what you think, but at

1 the moment I would say given the fact that your  
2 interpretation takes it out of the heartland where it  
3 should apply, why isn't theirs better?

4 MR. FLEMING: Because I believe the conduct that  
5 the Court describes can be reached, even under RICO, under  
6 other the sections of RICO.

7 QUESTION: Well, do you get it under (a),  
8 because I thought (a) was about investing in an  
9 enterprise, and I'm assuming --

10 MR. FLEMING: The -- the -- (a) is reprinted in  
11 gray brief, the amicus brief, at page 4(a).

12 QUESTION: Well, it talks about investing the  
13 income or part of the proceeds.

14 MR. FLEMING: If I could, Your Honor, it shall  
15 be unlawful for any person, so it should be unlawful for  
16 any corporation which has received any income derived from  
17 a pattern of racketeering to employ that in the operation  
18 of the enterprise. In the Herako case, the Herako case,  
19 it's exactly how Judge Cutahy harmonized Professor  
20 Blakey's argument about perpetrator corporations.

21 QUESTION: What you're saying it's -- it's using  
22 the income in the operation of its own enterprise?

23 MR. FLEMING: Yes.

24 QUESTION: But I thought you say that person and  
25 enterprise have to be distinct.

1 MR. FLEMING: Person and enterprise have to be  
2 distinct under 1962(c).

3 QUESTION: Oh. You say for (a) they can be the  
4 same.

5 MR. FLEMING: The courts say that they can be  
6 the same, but courts say that (a) is a corporate  
7 beneficiary RICO statute; the perpetrator corporations --

8 QUESTION: So you can get the corporation  
9 because it makes the income and invests it in its own  
10 operations.

11 MR. FLEMING: Exactly.

12 QUESTION: What about the individuals?

13 MR. FLEMING: I believe you can get the  
14 individuals under (a) also, Your Honor.

15 QUESTION: Well, how? They're not getting the  
16 income.

17 MR. FLEMING: Well, it's a question of booking,  
18 I suppose. The difficult word there is received which  
19 after concede, but if the venal people that Justice Breyer  
20 is describing are engaging in all sorts of activity which  
21 is bringing income into the organization or the  
22 enterprise, I believe they can be captured under (a) also.

23 The real risk here --

24 QUESTION: May I just ask quickly for you to  
25 comment on the plain language argument of the opponent --

1 MR. FLEMING: Yes.

2 QUESTION: -- because the language does seem to  
3 read rather plainly in his favor.

4 MR. FLEMING: I have two points if I could,  
5 Justice Stevens. One is any person, which is what I  
6 believe it says, is plain language, but plain language  
7 which has not made sense in the application of a statute  
8 has been disregarded by this Court where appropriate.  
9 It was just --

10 QUESTION: Well, why doesn't it make sense? Any  
11 person -- so you get an enterprise that's violate -- you  
12 know, meets all the definitions, and this statute says any  
13 person who participated as an associate or employee, and  
14 that work is covered. Why doesn't it make sense? It says  
15 that not only the corporation's liable, but the  
16 individuals who perform these foul deeds are equally  
17 liable.

18 MR. FLEMING: It can -- it can be read as  
19 literally meaning that, but there is an inherent ambiguity  
20 when you look at the interpretation of 1962(c). The courts  
21 have not only required distinctness --

22 QUESTION: Well, it had to be distinct. I mean,  
23 obviously it's, one of them is General Motors, the other  
24 is the President of General Motors. They're distinct  
25 people. Why -- why doesn't the plain language just apply?



1 I don't get it.

2 MR. FLEMING: Because the courts have also held  
3 that the enterprise shall not be liable, so --

4 QUESTION: But this statute of this section  
5 doesn't purport to impose liability on the enterprise --

6 MR. FLEMING: Exactly.

7 QUESTION: -- but to impose liability on people  
8 who work for it.

9 MR. FLEMING: That's my point, if Your Honor  
10 please, and if you think about the common law principles  
11 in this Court in Proup has said common law does implicate  
12 the interpreta -- or is implicating the interpretation of  
13 RICO, the only time a corporation is not financially  
14 liable for the wrongdoing of its employees is when the  
15 employee is acting for the employee's benefit and not for  
16 the benefit of the corporation, and that is exactly --  
17 that is the ambiguity in this statute which we think takes  
18 away from applying meaning.

19 This statute says, as interpreted, says any  
20 person -- but it also says the enterprise shall not be  
21 liable for that person's conduct, and we believe the only  
22 fair inference from that, which is also consistent with  
23 what Congress was talking about overall and its dominant  
24 purpose of RICO, the only inference which can be taken  
25 from that is that Congress intended the persons to be

1     liable when they acted within a corporation for their own  
2     personal benefit.

3             QUESTION:  Where does it say that the  
4     corporation shall not be liable for that person's conduct?

5             MR. FLEMING:  Said judicially.  I can only say  
6     that, Judge Scalia.  All of the circuits in connection  
7     with the distinctness rule have felt that the corporation  
8     shall not be -- there is no respondeat superior in RICO.  
9     And that's how we look at it --

10            QUESTION:  Going through Section (c), it doesn't  
11    impose any liability on the corporation.

12            MR. FLEMING:  Excuse me?

13            QUESTION:  And certainly you're dead right that  
14    Section (c ) does not impose liability on the enterprise.  
15    It's focused on the persons.

16            MR. FLEMING:  And we think that you have to look  
17    -- we think you have to look at that when you're trying to  
18    say what did Congress mean here?  You have an (a) section  
19    which we believe implicates the renegade corporation and  
20    its renegade people.  You have association in fact which  
21    was created for the purpose of getting the renegade  
22    organization.  You now have (c).

23            I think everyone agrees that (c) is absurd when  
24    it exposes all commercial America to the threat of RICO.  
25    We don't rely on that.  We don't think the Second Circuit

1     relied on that. I think the Secretary was saying a very  
2     simple thing. They were saying when employees and  
3     officers are working together for the benefit of the  
4     company, they happen to commit acts of alleged fraud, they  
5     are not distinct from the company. They are the  
6     enterprise, and there is no RICO person.

7             Now, I answer the plain language argument in two  
8     ways: The Sherman Act said every person who contracts and  
9     combines, and the single actor model is imposed upon that  
10    quite correctly.

11            I look not only at that, but I also look at what  
12    I've just described, and that is the absence of derivative  
13    liability. You cannot properly interpret this statute and  
14    its application without considering why Congress targets a  
15    person employed but eliminates respondeat superior. The  
16    only time at common law where that occurs, we think you  
17    have to presume that Congress acts with a view toward the  
18    common law is when the person acting --

19            QUESTION: I don't think you can really say it  
20    eliminates respondeat superior. It simply didn't apply  
21    respondeat superior to the activities of these individuals  
22    who are themselves violating the statute because they're  
23    assisting in enterprise doing, engaged in a pattern of  
24    racketeering activity.

25            MR. FLEMING: Our position -- we believe the

1 Second Circuit's position is that the individual who's  
2 targeted under 1962(c) is like the infiltrator. He  
3 happens to be in the corporation, and he acts for his own  
4 benefit. And we think that's totally consistent -- I  
5 really, you now, I read the book and said never ask the  
6 Court a question so I will not, but I think we have to  
7 consider this -- is it conceivable -- is it conceivable  
8 that Congress intended the absurdity that I think this  
9 Court has recognized with regard to the application of --

10 QUESTION: Well, you have the same doctrine in  
11 (a). I mean, on your reading of (a), whatever we do about  
12 (c), exactly the same thing would happen. My example --  
13 why wouldn't it?

14 MR. FLEMING: Because there the corporation is  
15 corrupt.

16 QUESTION: No, no, no. No, going back to the  
17 first example of the bank that has the supervisor with the  
18 two -- I mean, by innocent example. The innocent example,  
19 you get -- there -- you see, there were two instances of  
20 exaggerating or lying about the qualities of our vacuum  
21 cleaner. We said it picked up mice and it doesn't. They  
22 don't fit through the hole.

23 MR. FLEMING: All right.

24 QUESTION: So -- so now twice they've said that,  
25 and it was planned, and of course they sold two vacuum

1 cleaners as a result, and they obtained a thousand dollars  
2 for that, and the money was thereby obtained through a  
3 pattern of racketeering activity, and they used that  
4 thousand dollars to pay expenses of the corporation,  
5 etcetera, and therefore it was used in the operation of  
6 the enterprise. So all the absurdities are just as great  
7 in (a) as they are in (c). Now, am I right or not?

8 MR. FLEMING: No, I think probably not.

9 QUESTION: I'm not?

10 MR. FLEMING: I think not.

11 QUESTION: Because?

12 MR. FLEMING: I think (a) looks more at the  
13 corrupt enterprise, and I think we will all accept the  
14 idea that corrupt enterprise is a potential RICO target.

15 You know, we're not talking about a no-liability  
16 situation when we eliminate some -- when you protect --  
17 when there is some protection afforded under 1962(c). If  
18 there is anything to Mr. Kushner's claims, he has single  
19 damage remedy against not only Mr. King individually, but  
20 Don King Productions. It also, you know, when I, you  
21 know, I think we have to ask this question: Unless the  
22 individual -- the person who is the target of 1962(c) is a  
23 person who has been acting for his own personal benefit  
24 and not for the benefit of the corporation, unless he's  
25 that person, why should that person be subjected to treble

1 damages for his conduct?

2 Put it another way, if that person engaging in  
3 tortious conduct on behalf of his company -- on behalf of  
4 his company -- why should that person be target for treble  
5 damage liability when the company's liability -- the  
6 beneficiary -- is limited to single?

7 QUESTION: Well, the answer to that is very  
8 simple. The statute says so. That's exactly what the  
9 statute says. It's true of collection of an unlawful  
10 debt. If he collects the debt -- we're interested in the  
11 individuals who do these wrongful things. That's what the  
12 statute says.

13 MR. FLEMING: Mr. Justice Stevens, I don't  
14 believe that --

15 QUESTION: I don't think it's absurd at all.

16 MR. FLEMING: We've been sitting around here for  
17 a month, and we've asked ourselves what happens if we are  
18 asked doesn't the statute say exactly that? And we say in  
19 a sense -- in a sense --

20 QUESTION: -- rule of reason in is -- could be a  
21 rule of reason under this statute.

22 MR. FLEMING: In a sense it does, but we believe  
23 that the exemption from corporate liability introduced an  
24 ambiguity which does not allow a plain language reading.

25 Second, you know, this Court -- this Court in

1 Copperweld said every person does not mean every person.  
2 In Pierson it said any person except a judge because it  
3 implicated the common law. In the Bach Laundry case,  
4 defendant was defined as any party. I think Justice  
5 Scalia defined it as a criminal defendant in a concurring  
6 opinion.

7 In 42 U.S.C. 1985, which is conspiracy to  
8 violate civil rights, a number of dist -- a number of  
9 circuit courts and district courts have held that two or  
10 more persons does not mean two or more persons if they're  
11 employed by the corporation. So this single actor -- this  
12 unity of conduct which the Second Circuit focused upon --  
13 is not foreign to the jurisprudence of this Court, and we  
14 believe it is the only appropriate way to harmonize the  
15 absurdity of this statute applied on a plain language  
16 basis, and RICO's purpose of punishing the -- call them  
17 racketeer -- person engaging in racketeering and, in this  
18 case, the quasi-infiltrator, the employee who goes bad and  
19 uses his job as a means of feathering his nest.

20 The department talks about -- Solicitor General,  
21 I'm sorry. I'm always used to saying the department. The  
22 Solicitor General says they need RICO to get unions -- to  
23 bring injunctive action against unions. Think of that.  
24 What they are trying to do is to get rid of the union  
25 officers who, at the expense of the corporation, are

1 feathering -- stuffing their own pockets, feathering their  
2 own nests. We think that's what Congress was looking at  
3 when it's talking about 1962(c), and the one thing we  
4 surely think Congress was not looking at was IBM against  
5 IBM, which is the effect of the any-person analysis.

6 A question was asked about the use of it; I  
7 think in the Sedima case, we do not have the appropriate,  
8 we did not get the up-to-day statistics. In the Sedima  
9 case, the ABA reportedly cited that said that nine percent  
10 -- nine percent of the civil 1962(c) lawsuits were -- had  
11 to do -- had anything to do with organized crime, and the  
12 other ninety-one percent were commercial disputes.

13 I go back to Justice Marshall's dissent in  
14 Sedima, as I go back to Justice Marshall in the Second  
15 Circuit. I think there is another consideration which he  
16 posed. The broad application of 1962(c) for which they  
17 contend is based principally, if not entirely, upon a  
18 quote, unquote, plain language, with all respect, Justice  
19 Stevens, with no real analysis and no answer to all to our  
20 point with regard to the absence of true liability. No  
21 answer at all.

22 The application of their quote, unquote, plain  
23 language approach in essence does turn federal  
24 jurisdiction on its head because not only do you have  
25 people being threatened with treble damage liability where



1 that should not exist, but you have federal jurisdiction  
2 being obtained where everything else lacking, you're in  
3 State court in a common law fraud case, or in this case in  
4 a supposed tortious interference with --

5 QUESTION: The problem with that argument is  
6 that I was involved in some of these decisions, we  
7 thought, well, if we really read it finely, Congress will  
8 straighten it out because they couldn't have meant this  
9 vast extent. But Congress has let it sit there.

10 MR. FLEMING: Am I allowed to -- am I allowed to  
11 comment on what Congress will straighten out?

12 QUESTION: Sure, yeah.

13 MR. FLEMING: They took out securities fraud,  
14 and I assume that's because there is a strong securities  
15 fraud lobby. Mail and wire fraud will never disappear  
16 from this statute, never. First of all, it's needed for  
17 criminal purposes, so it will never disappear as a  
18 predicate act.

19 QUESTION: Thank you, Mr. Fleming.

20 MR. FLEMING: I saw it. Thank you.

21 QUESTION: Mr. Edlin, you have four minutes  
22 remaining.

23 REBUTTAL ARGUMENT OF RICHARD A. EDLIN

24 ON BEHALF OF PETITIONER

25 MR. EDLIN: Mr. Chief Justice, unless there are

1 any questions, we are prepared to waive rebuttal.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Edlin. The  
3 case is submitted.

4 (Whereupon at 11:04 p.m., the case in the above-  
5 entitled matter was submitted.)

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