No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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According to Respondents, civil RICO extends to claims that foreign *injuries* were caused by the corruption of foreign *enterprises* through foreign *patterns* of racketeering. Respondents cannot reconcile that foreign-cubed application with the presumption against extraterritoriality.

Under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), a statute's "focus"—the "object[ ]" of its concern—applies only domestically, absent a "clear indication" to the contrary. *Id.* at 255, 266-67. As we have shown, the focus of RICO's substantive prohibitions is the enterprise being corrupted through a racketeering pattern, and there is no clear indication that the prohibitions extend to foreign enterprises. Moreover, the focus of RICO's private cause of action is the resulting injury, and there is no clear indication that the cause of action extends to foreign injuries. Respondents fail to refute either showing.

As for RICO's cause of action, Respondents argue that the presumption against extraterritoriality is simply inapplicable, but there is no legal or logical basis for such an *ad hoc* exception to the general rule that each provision of a statute is presumptively focused on domestic concerns. Respondents also argue that there is a clear indication that § 1964(c) reaches foreign injuries, but the antitrust analogy upon which they rely actually refutes their position. Indeed, even the Government agrees that § 1964(c) redresses only domestic injuries.

As for RICO's prohibitions, Respondents argue that Congress clearly extended § 1962 to

extraterritorial patterns of racketeering by incorporating certain racketeering predicates with extraterritorial scope. Not only is that argument wrong on its own terms, but it does not even purport to show that Congress further extended § 1962 to the corruption of foreign enterprises, much less that it did so clearly. Nor are Respondents correct in arguing that such a clear indication is unnecessary because the focus of § 1962 is the pattern rather than the enterprise. While Respondents briefly suggest that the focus is the pattern, they quickly retreat to the position that the focus is the corruption of the enterprise. And though they nevertheless contend that what should matter is the location of the racketeering pattern used to corrupt the enterprise, what actually matters is the location of the enterprise being corrupted: the enterprise itself is the object of RICO's concern, not the racketeering pattern used to corrupt it. In sum, there is no basis for the implausible conclusion that Congress intended RICO to prevent foreign enterprises from being corrupted.

Finally, the RICO claims here must be dismissed, because the complaint does not allege either a domestic injury or a domestic enterprise. In fact, Respondents have abandoned any allegation of domestic injury, which alone justifies dismissal. Moreover, Respondents' belated attempts to allege domestic enterprises cannot be reconciled with their own complaint and prior briefs.

I. SECTION 1964(c) REQUIRES A DOMESTIC INJURY, WHICH RESPONDENTS DO NOT ALLEGE

Respondents do not allege any domestic injuries. Resp.Br. 22-23. To the contrary, just last week, they dismissed with prejudice any "damages claims for domestic injuries under 18 U.S.C. § 1964(c)." Order at 2, *European Cmty. v. RJR Nabisco, Inc.*, No. 1:02-cv-05571 (E.D.N.Y. March 4, 2016). That alone justifies the dismissal of their RICO claims, if § 1964(c) does not redress foreign injuries.

And it does not, as the Government now agrees. Earlier this Term, one of the Respondents here itself recognized the presumption against federal civil claims for foreign injuries: "In *Kiobel*, *Empagran* and *Morrison*, this Court recently reemphasized a clear presumption against a cause of action created by a federal statute being construed to allow suit in U.S. courts by foreign plaintiffs for injuries suffered abroad." Br. of the Netherlands at 15, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015) (No. 13-1067). Section 1964(c) does not rebut this presumption.

A. Private Causes of Action Presumptively Do Not Redress Foreign Injuries

Respondents do not defend the Second Circuit's holding that the presumption against extra-territoriality applies only to substantive, conduct-regulating provisions. Nor could they, as this Court repeatedly has applied the presumption on a provision-by-provision basis, including to non-substantive provisions of a jurisdictional or procedural nature. Pet.Br. 45, 53-55; U.S.Br. 31.

Respondents instead argue that the presumption is subject to an *ad hoc* inversion solely for private causes of action, which they contend presumptively apply to foreign injuries. That is incorrect.

1. Respondents cite the "traditional rule" that "'a plaintiff injured in a foreign country' could bring suit 'in American courts.'" Resp.Br. 41-42 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 706-07 (2004)). However, the question here is not whether a plaintiff injured abroad *may sue* in American courts, but rather *what law will provide redress*. On that question, Respondents' own cases demonstrate that American law generally does not provide civil redress for foreign injuries. As *Sosa* explained, "[f]or a plaintiff injured in a foreign country, … the presumptive choice in American courts under the traditional rule [has] been to apply foreign law." *See* 542 U.S. at 705-06. And that is so even when the challenged conduct occurred domestically. *See*, *e.g.*, *id.* at 706-07, 709-10; *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam). In sum, the *relevant* "traditional rule" is precisely the opposite of what Respondents suggest.

Accordingly, Respondents prove our point by arguing that Congress must speak clearly to depart from background law. Resp.Br. 41-42. When Congress enacted RICO's private cause of action, foreign law governed civil suits to redress foreign injuries. Absent a clear indication that § 1964(c) departed from that background rule, it thus redresses only *domestic* injuries. Pet.Br. 48-50.

Respondents object that *Sosa* invoked choice-of-law principles only because the FTCA was not itself a source of substantive law, and that those principles

have nothing to do with the presumption against extraterritoriality. Resp.Br. 56-58. But this Court repeatedly has invoked choice-of-law principles to restrict the extraterritorial scope of federal statutory causes of action. *See*, *e.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953) (interpreting Jones Act by reviewing factors "generally conceded to influence choice of law to govern a tort claim"); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31-32 (1925) (similar for FELA). That is unsurprising, as one goal of the presumption against extraterritoriality is to "protect against unintended clashes between our laws and those of other nations," *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013)—which could arise whenever a federal statute seeks to provide a cause of action for claims normally governed by foreign law.[1]

2. Respondents next contend that none of this Court's extraterritoriality cases has treated the location of injury as dispositive. Resp.Br. 42. But that contention is mistaken.

Among other cases, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), rejected a civil claim because it was based on "foreign injury." *Id.* at 158-59. Contrary to Respondents' suggestion

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[1] Contrary to Respondents' suggestion (Br. 56), the domestic-injury presumption does not render superfluous the FTCA's foreign-country exception at issue in *Sosa*. Rather, the presumption is what made the exception necessary. Without the exception, the FTCA's waiver of sovereign immunity would have exposed the United States to claims that were for foreign injuries, and thus governed by foreign law, which is what Congress wished to avoid. *See Sosa*, 542 U.S. at 707-08.

that the claim failed simply because it involved "foreign conduct," Resp.Br. 48, this Court made clear that the claim would have survived if the plaintiffs had suffered "domestic injury." *Empagran*, 542 U.S. at 158-59. Nor are Respondents correct that *Empagran* is inapposite because it was applying a 1982 amendment to the Sherman Act's substantive prohibitions, rather than applying the Clayton Act's remedial provisions. Resp.Br. 58-59. As this Court made clear, even before that amendment, the *Government* could seek *to enjoin* foreign conduct, but a *private plaintiff* still could not seek *damages* for foreign injury caused by that conduct. *See* 542 U.S. at 169-73. *Empagran* thus confirms that private damages actions are presumptively limited to domestic injuries, even if the underlying substantive law applies and is enforceable by the Government.

By contrast, Respondents prove nothing by observing (Br. 42) that other cases involving private claims for foreign injuries simply did not address the issue. "Questions which merely lurk in the record"—without being "ruled upon"—are "not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). And that is especially true here because the cited cases *rejected* extraterritorial claims on other grounds, such as the lack of jurisdiction, *Kiobel*, 133 S. Ct. at 1663-64, or the inapplicability of substantive law, *Morrison*, 561 U.S. at 273; *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949)—indeed, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246-47 (1991), was not a private suit at all. This Court therefore had no need to decide

whether the claims were *additionally* barred because they sought redress for foreign injuries.

3. Respondents also assert that comity concerns are not implicated by providing federal civil remedies for foreign injuries caused by conduct that federal law substantively prohibits. Resp.Br. 48-55. But that is both irrelevant and wrong.

The presumption against extraterritoriality is based not only on comity, but also on "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 505 U.S. 197, 204 n.5 (1993). That is why this Court has applied the presumption even to procedural provisions that posed "no risk" of "conflict with the laws of other nations." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993). The mere fact that the United States "would not violate … international law" if Congress extended a statute abroad "in no way tends to prove that that is what Congress has done." *Morrison*, 561 U.S. at 272.

In any event, comity concerns are implicated whenever Congress imposes civil remedies for foreign injuries. As *Empagran* explained, "even where nations agree about primary conduct," they may "disagree dramatically about appropriate remedies"; courts thus "must assume" that Congress "would not have tried to impose" American civil remedies, for that would be, as this Court pointedly stated, "an act of legal imperialism." 542 U.S. at 167, 169. The Government reaffirms that point here: "private suits involving injuries suffered outside the [country] have a propensity to produce significant international friction," because "[o]ther nations may perceive our affording a private remedy to foreign

plaintiffs as circumventing the (often more limited) causes of action and remedies that those nations provide." U.S. Br. 33. This concern is amplified for civil RICO, a remedial scheme that has been aptly described as "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

Indeed, some of the Respondents here made the same point as *amici* for *the defendants* in *Empagran*. They argued that "to apply [American] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." 542 U.S. at 167. Now that the shoe is on the other foot, they ask this Court to eschew the presumption against extraterritoriality in favor of other doctrines that assertedly might mitigate comity concerns in particular cases. Resp.Br. 53-55. But *Empagran* rejected this type of "case by case" approach, because it would be "too complex" and lead to "lengthier proceedings," which in turn could "threaten interference with a foreign nation's ability" to enforce its own laws. 542 U.S. at 168-69. Moreover, the particular doctrines suggested by Respondents—*forum non conveniens*, due process, and international law—are principally designed to protect foreign defendants, not to prevent plaintiffs from bypassing the foreign remedial restrictions that properly govern their civil claims for foreign injuries.[2]

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[2] Likewise, Respondents clearly err in suggesting (Br. 51) that it would violate international law to deny them a domestic cause of action for any foreign injuries caused by domestic

B. There Is No Clear Indication That Civil RICO Redresses Foreign Injuries

Respondents do not dispute that the focus of § 1964(c) is the injuries Congress chose to redress. Pet.Br. 45-47; U.S. Br. 30-31. Nor do they dispute that the text of § 1964(c) provides no indication, much less a clear one, of extending to foreign injuries. Pet.Br. 47-48; U.S.Br. 33-34. Instead, Respondents argue that this Court has already treated foreign injuries as covered by RICO's civil cause of action and its antitrust analogue. That is incorrect.

1. Respondents principally assert that this Court's antitrust case-law "has made clear" that § 4 of the Clayton Act—upon which § 1964(c) was modeled—"encompasses injuries abroad." Resp.Br. 43-45. This antitrust analogy not only fails, but affirmatively supports our position.

The few antitrust cases cited by Respondents all presented different questions than whether § 4 of the Clayton Act extends to foreign injuries. *Pfizer, Inc. v. India*, 434 U.S. 308, 313 (1978) (whether a foreign sovereign is a "person" who may file civil antitrust claims); *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213, 215 (1966) (whether the Shipping Act of 1916 impliedly precludes antitrust laws); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-08 (1962) (whether the foreign state-action-

(continued…)

conduct. As explained above, even where the challenged conduct is domestic, the "traditional rule" is that "a plaintiff injured in a foreign country" must rely upon "foreign law" for redress. *See Sosa*, 542 U.S. at 706-07, 709-10.

immunity defense was applicable). Such drive-by decisions are not binding holdings on the foreign-injury issue. *Cooper Indus.*, 543 U.S. at 170; *Empagran*, 542 U.S. at 171. Nor are they evidence, let alone clear evidence, of the background extra-territoriality law against which Congress enacted RICO in 1970—especially since Respondents' lead case, *Pfizer*, post-dated RICO by almost a decade.

Moreover, when this Court in *Empagran* later directly addressed a foreign-injury issue in the antitrust context, it refused to allow private plaintiffs to seek redress for foreign injuries caused by foreign conduct, and it found *no* contrary case from *any* court pre-1982. *See* 542 U.S. at 169-73. Thus, far from establishing that Congress clearly intended civil RICO to redress foreign injuries, antitrust case-law suggests precisely the opposite.

2. Like the Second Circuit, Respondents also invoke this Court's holding in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985), that § 1964(c) does not require any distinctive "racketeering injury." Resp.Br. 45-46. But the compensable *types* of RICO injuries have nothing to do with the *geographic scope* of such injuries. Pet.Br. 55-56; U.S.Br. 34. Nor does it matter whether the particular injuries alleged in *Sedima* were foreign, as the place of those injuries was irrelevant to the question presented, and to this Court's analysis of that question. *See* 473 U.S. at 493-500.

* * *

In sum, since RICO's private cause of action "gives no clear indication of an extraterritorial application" to foreign injuries, "it has none."

Morrison, 561 U.S. at 255. And since Respondents have abandoned any claim of domestic injury, this case can be resolved on that ground alone.

II. SECTION 1962 REQUIRES A DOMESTIC ENTERPRISE, WHICH RESPONDENTS DO NOT VALIDLY ALLEGE

Respondents contend there is a clear indication that RICO's substantive prohibitions apply extra-territorially, because Congress incorporated certain *predicate crimes* that apply extraterritorially. From this, Respondents conclude that § 1962 itself clearly extends to foreign *racketeering patterns* based on those predicates. Not only is that argument wrong on its own terms, but it provides no indication, much less a clear one, that § 1962 further extends to foreign *enterprises*. Because Respondents' clear-indication argument addresses only the racketeering predicates and patterns, it completely misses the mark if the focus of § 1962 is instead the enterprise.

As for the focus, every court to address the issue since *Morrison* has asked whether it is the *pattern* of racketeering activity or the *enterprise* corrupted by that activity. Pet. 19-22. And as we have shown, the text, context, and structure of RICO all make clear that § 1962 is focused on the enterprise. Pet.Br. 25-34. Indeed, neither Respondents nor the Government seriously argue otherwise. Although Respondents briefly suggest that § 1962 focuses on the racketeering pattern itself, they quickly retreat to the position that § 1962 focuses on the corruption of enterprises, but then argue that what matters is the location of the racketeering pattern used to corrupt the enterprise. By contrast, the Government

concedes that the enterprise is a focus of § 1962, but then argues that the racketeering pattern is another focus. Neither line of argument justifies the implausible conclusion that Congress intended RICO to prevent the corruption of foreign enterprises.

A. RICO's Focus Is The Enterprise, And It Thus Presumptively Applies Only To Domestic Enterprises

Respondents make two different arguments for why the enterprise is not a focus of RICO. Each is incorrect, and both would lead to untenable results. Nor does the Government fare any better with its alternative argument that the enterprise and the pattern are both foci of RICO.

1. To begin, Respondents directly argue that "the statute's focus" is "[t]he pattern of racketeering conduct." Resp.Br. 30. But their limited defense of that position is unpersuasive.

First, Respondents note that this Court has described the racketeering pattern as the "heart" of, and the "key" to, a RICO violation. *Id.* (quoting *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989)); *see also* U.S.Br. 21. But those cases merely underscored the distinction between the pattern and the underlying predicate acts: *Malley-Duff* refused to key the statute of limitations to the predicates, 483 U.S. at 154, and *H.J.* required continuity plus relationship among the predicates to establish a pattern, 492 U.S. at 236-37. These decisions in no way suggest that RICO focuses on racketeering patterns for their own sake, rather than for their corrupting influence on enterprises.

Second, Respondents suggest that RICO's harsh penalties were designed to "eradicat[e] … patterns of racketeering activity" because the commission of predicate crimes is more harmful "when they form a 'pattern.'" Resp.Br. 31, 38; *see also* U.S. Br. 21-22. But that suggestion is irreconcilable with Congress's decision not to prohibit racketeering patterns *simpliciter*. Congress instead created a novel offense focused on the corruption of an enterprise, with the racketeering pattern playing only a subordinate, "predicate" role. Pet.Br. 25-26; *cf. Morrison*, 561 U.S. at 266-67 (a statute's focus was on certain securities transactions because it proscribed deception only "in connection with" them).

Third, Respondents deem it immaterial that Congress tied its legislative authority for RICO to the effect on commerce from the enterprise, rather than from the racketeering pattern. Resp.Br. 36. Respondents reason that, because this Court has "rejected an inference of extraterritorial effect from a jurisdictional reference to foreign commerce," it also should disregard "jurisdictional boilerplate" in determining a statute's focus. *Id.* But while generic commerce-clause language does not provide a *clear indication* that a statute extends *extraterritorially*, Pet.Br. 19, it does provide powerful evidence of the statute's *domestic focus*: the language identifies not only the "objects" that "the statute seeks to 'regulate,'" *Morrison*, 561 U.S. at 267, but also the objects that give Congress the constitutional power to regulate. RICO's jurisdictional hook thus underscores that Congress's focus was on the enterprise being corrupted, not the racketeering pattern used to corrupt it. Pet.Br. 27-28.

Finally, Respondents do not dispute—and indeed largely concede—that the remaining textual, contextual, and structural features of RICO that we have identified all point towards a focus on enterprise corruption, not on the racketeering pattern itself. *Compare* Resp.Br. 35-40, *with* Pet.Br. 26-34. One perfect example is the small-investment exception to § 1962(a). Respondents acknowledge that an individual who engages in an egregious "pattern" of racketeering activity, but then invests only a minimal amount of the proceeds in an "enterprise," does not violate § 1962(a). Respondents explain that "Congress could sensibly exempt such conduct *as a trifling instance of the evil it sought to prevent*." Resp.Br. 38 (emphasis added). They thus admit that the "evil" on which RICO focuses is the corruption of the *enterprise*, not the racketeering *pattern* used to corrupt it.

2. Despite ultimately conceding that RICO's focus is on enterprise corruption rather than racketeering patterns, Respondents advance a more circuitous argument for a place-of-the-pattern rule. Specifically, Respondents distinguish between the *enterprise* being corrupted and the *corrupting conduct* of investing in, acquiring, or directing the enterprise: they contend that the focus of RICO is the corrupting conduct, and that this conduct often "occurs in the same place as the pattern of racketeering activity." Resp.Br. 31-32 & n.9. This alternative argument is flawed at every level.

To begin, Respondents err by conflating the underlying racketeering pattern with the corrupting investment in, acquisition of, or direction of the enterprise. These are legally and factually distinct

elements that may occur in geographically distinct locations. Respondents admit as much for the corrupting investments prohibited by § 1962(a); for example, a racketeer may engage in a domestic pattern of gambling, but invest the proceeds abroad in a foreign enterprise. *Id.* 31 n.9. The same is true for the corrupting acquisitions prohibited by § 1962(b); for example, a racketeer may engage in a domestic pattern of extortion that coerces the victim to enter into a transaction abroad surrendering ownership of a foreign enterprise. As for § 1962(c), the corrupting conduct involves "directing the enterprise's affairs" through its "operation or management." *Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993); so, for example, a foreign enterprise may engage in a domestic pattern of mail fraud, but its chief executive may direct those affairs from its headquarters abroad. Respondents' reference to the corrupting investment, acquisition, or direction thus provides no support for tying § 1962's focus to the pattern.

Moreover, once the red herring of the pattern is eliminated, Respondents' proposed distinction between the *corrupting conduct* and the *enterprise corrupted* falls apart. Their attempt to separate the two contradicts the fundamental purposes of RICO and the presumption against extraterritoriality, both of which leave no doubt that what matters is the location of the enterprise itself.

Respondents contend that RICO "focuses on the verbs, not the nouns, of its statutory prohibitions." Resp.Br. 32. But the "enterprise" here is not just any noun. Rather, it is the *common object* of the verbs "invest" (§ 1962(a)), "acquire" (§ 1962(b)), and

"conduct" (§ 1962(c))—*i.e.*, the central "object[ ]" of RICO's "solicitude." *Morrison*, 561 U.S. at 267. RICO is obviously not a securities statute concerned with protecting the integrity of domestic investments and acquisitions for their own sake, even if they involve foreign enterprises. *Compare id.* at 261-70. Nor is it a statute concerned with domestic direction of foreign enterprises. Instead, Congress designed RICO to protect "the Nation's economic system," Pub. L. No. 91-452, 84 Stat. 922, 923 (1970), from the "corrupting influence" of organized crime in "channels of commerce," *Russello v. United States*, 464 U.S. 16, 28 (1983). When Congress prohibited racketeers from corruptly investing in, acquiring, or directing enterprises, it thus was focused on *domestic* enterprises, in accord with "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith*, 507 U.S. at 204 n.5.

Respondents cite a few cases for the proposition that a statute's focus is "typically" on regulated "conduct" rather than regulated entities. Resp.Br. 33-34. That is no doubt often true, but not invariably so. For example, if a corporate-governance statute required "any corporation" to "conduct" any shareholder meetings using certain procedures, it would more naturally be construed as focused on the corporation rather than the conduct of the meeting, and thus presumptively limited to domestic corporations rather than meetings domestically conducted. So too with RICO. Far from a typical federal statute, RICO was a unique innovation. It created a new crime based on predicate acts that are already illegal, but only to the extent those acts are used to corrupt an enterprise. *See generally* Gerard

E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661 (1987). As Judge Rakoff has explained, this construct reveals a "focus" squarely "on the enterprise as the recipient of, or cover for, a pattern of criminal activity." *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473-74 (S.D.N.Y. 2010); *cf. Morrison*, 561 U.S. at 266-67 (similarly holding that the focus of the securities statute at issue was not on deceptive conduct, but rather on the transaction whose integrity was threatened by the deception). Accordingly, since RICO's substantive prohibitions are focused on the enterprise, the relevant geographic fact is where *it* is located.

3. Extending RICO to foreign enterprises absent any clear indication that Congress so intended would produce implausible results. On Respondents' view, a domestic pattern of gambling or extortion would not violate RICO, but § 1962(a) and (b) would prohibit the racketeer from using such patterns to invest in or acquire a foreign enterprise. Likewise, a domestic pattern of mail fraud would not violate RICO, but § 1962(c) would prohibit the pattern if it was directed through the affairs of a foreign enterprise. All this would turn the presumption against extraterritoriality on its head, by imposing criminal liability for domestic conduct *solely* due to *additional foreign conduct*.

With respect to § 1962(a) and (b), Respondents do not even attempt to defend this backward result, and the Government's brief effort is unavailing. The Government contends that "a person who profited from domestic racketeering activity" should not be allowed "to avoid criminal RICO liability by pouring those profits into a foreign enterprise." U.S.Br. 23.

But if the purpose of § 1962(a) and (b) had been to deprive racketeers of their profits, then those provisions would have directly punished the racketeering patterns—and would not have allowed the racketeers to retain or spend their profits at all. Instead, though, § 1962(a) and (b) merely prohibit racketeers from investing in or acquiring an enterprise. The purpose of these provisions is thus not to punish the predicate crimes, but to "protect[ ]" the enterprise from becoming a "victim[ ]." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001). And the victimization of *foreign* enterprises was obviously not Congress's concern.

With respect to § 1962(c), Respondents assert that it would be "perverse" to allow foreign enterprises to conduct domestic racketeering patterns. Resp.Br. 34; *see also* U.S.Br. 20-21. But as we have shown, that naked policy argument, which bears on neither the focus nor the clear indications of RICO, is irrelevant as a legal matter and overblown as a practical matter. Pet.Br. 39-40. Respondents ignore that showing, and the Government's response is unpersuasive. The Government does not dispute that a terrorist cell like the 9/11 hijackers could constitute a domestic association-in-fact enterprise. U.S. Br. 28-29. And while it observes that a lone foreign agent might not violate RICO, *id.* 23 n.8, it does not dispute that such an individual still could be prosecuted under the predicate statutes for domestic criminal conduct, often with harsher penalties than RICO itself, *id.* 18. To be sure, the predicate statutes lack some of RICO's advantages for prosecutors, but that alone cannot possibly justify extending RICO to foreign enterprises.

Moreover, the obvious enterprise focus of § 1962(a) and (b) further confirms that § 1962(c) is similarly focused. After all, those three provisions appear in a clear "three-part structure," *Reves*, 507 U.S. at 182-83, as Respondents themselves acknowledge, Resp.Br. 30-32. In addition, *Morrison*'s "focus" inquiry is simply an interpretive device for determining the geographic scope of federal statutes. *See* 561 U.S. at 255, 266. And it would contravene other basic interpretative canons to construe the defined term "enterprise" to mean "domestic enterprise" in some of its applications, but "domestic or foreign enterprise" in others. Pet.Br. 36-37.

4. Unlike Respondents, the Government concedes that the enterprise is a focus of § 1962. U.S. Br. 9. Yet the Government contends that the racketeering pattern is *another* such focus, and that if *it* is domestic then § 1962 applies. *Id.* 9, 21-22. In short, the Government argues that, if a statutory provision has multiple foci, then only one of them must be domestic.

The Government is mistaken. For one thing, as shown above, § 1962 is *not* focused on racketeering patterns. In any event, the rule established by *Morrison* is that statutory foci apply only domestically, absent a clear contrary indication; the rule is *not* that statutory foci apply extraterritorially, so long as some other significant domestic contact is also present. *See* 561 U.S. at 266. Thus, if the enterprise and the pattern were *both* foci of § 1962, then *each* of them would presumptively apply only domestically.

B. There Is No Clear Indication That RICO Extends To Foreign Enterprises, Or Even To Foreign Racketeering Patterns

Respondents do not dispute that neither RICO's substantive prohibitions nor its "enterprise" definition provides any indication, much less a clear one, that § 1962 reaches foreign enterprises. Pet.Br. 35-36. Instead, Respondents contend that RICO's incorporation of certain predicate offenses with extraterritorial scope clearly indicates that § 1962 extends to foreign enterprises, because otherwise those predicates would be meaningless surplusage. Resp.Br. 24-27. Respondents are wrong.

1. Whether or not RICO's incorporation of extraterritorial *predicates* is a clear indication that § 1962 covers foreign racketeering *patterns*, it in no way suggests that § 1962 prohibits the use of such patterns to corrupt foreign *enterprises*. Rather, it would be entirely consistent with RICO's text, and perfectly "meaningful" in light of its purposes, to prohibit the use of such patterns only insofar as they corrupt *domestic* enterprises. Pet.Br. 36-42.

Respondents do not seriously argue otherwise. Instead of arguing that there is a clear indication that RICO extends to foreign enterprises, they argue that the presumption against extraterritoriality does not apply to the enterprise at all, because RICO's "focus is the racketeering conduct" instead. Resp.Br. 30; *see also id.* 29 ("When the presumption against extraterritoriality has been 'answered' with respect to the statute's focus, … no further limitations on the statute's territorial scope are warranted."). As we have shown, though, RICO's focus is not the racketeering pattern, but the corrupted enterprise.

The Government also makes a handful of policy arguments for why limiting RICO to domestic enterprises would be undesirable. U.S.Br. 22-26. But, as we have shown, these arguments are flawed on their own terms, *supra* Part II.A.3, and thus hardly sufficient to provide a *clear* indication that RICO extends to foreign enterprises.

2. Nor does RICO's incorporation of certain *predicates* with an extraterritorial scope even clearly indicate that § 1962 reaches foreign *patterns*. The fact that RICO incorporates the *substantive* scope of the predicates in no way indicates that it also incorporates their *geographic* scope. Rather, RICO could "meaningfully" cover these individual predicates only insofar as they are part of a pattern that, viewed as a whole, is properly deemed *domestic*. Pet.Br. 42-43. Indeed, that is particularly obvious for the money-laundering and material-support statutes at issue here: because they have *both* domestic and extraterritorial applications, they easily could have been incorporated into RICO solely for their domestic applications. *Id.* 4, 6, 43.

Respondents object that there is no textual basis for limiting § 1962 to domestic applications of these predicates. Resp.Br. 27-28; *see also* U.S.Br. 17. But the presumption against extraterritoriality *always* operates as an *implicit* territorial limitation. The whole point of the presumption is that "some things 'go without saying.'" *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). That is why, for instance, this Court has interpreted the phrase "any civil action" as limited to *domestic* civil actions. *Kiobel*, 133 S. Ct. at 1665. And it is why the phrase "a pattern of racketeering activity" in § 1962 would be limited to

domestic patterns if the pattern element were a focus of RICO. Because such a limiting construction of the "generic" term is at least "possible," the presumption would require adopting it, particularly because the presumption also limits "the extent" of any extra-territoriality. Pet.Br. 19-20.

C. Respondents Do Not Validly Allege A Domestic Enterprise

To salvage a remand, Respondents try to recast their RICO claims as involving three domestic enterprises. But these arguments are irreconcilable with their own complaint and prior briefs.

First, Respondents conjure up claims under § 1962(a) and (b) based on certain Petitioners' acquisition of the Brown & Williamson Tobacco Company ("B&W"). Resp.Br. 20. But the acquisition of that domestic enterprise cannot support those putative claims. To begin, Respondents concede that Count 1 of their complaint, the sole claim under § 1962(a), does not even mention B&W. Resp.Br. 20. The same is true for Count 2 of their complaint, the sole claim under § 1962(b). Pet.App. 253a-255a. And contrary to Respondents' suggestion, the allegations about B&W elsewhere in the complaint cannot be plausibly construed as raising claims challenging the acquisition under § 1962(a) or (b). Instead, the allegations focus entirely on the purported role of B&W in the § 1962(c) claim challenging the conduct of the "RJR Money-Laundering Enterprise." Pet.App. 188a-200a. Indeed, the allegations do not even state that Petitioners *used* racketeering proceeds or a racketeering pattern *to invest in or acquire* B&W, as required under § 1962(a) and § 1962(b), respectively. *Id.* Moreover, Respondents

do not and cannot justify their failure to allege *any injuries* that were proximately caused *by the investment or acquisition itself*, rather than by any ensuing racketeering activity. Pet.Br. 58-59; *see also Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063-64 (2d Cir. 1996).

Second, Respondents attack the district court's conclusion that the alleged "RJR Money-Laundering Enterprise" is a foreign enterprise under the so-called "nerve center" test. Resp.Br. 21; *see also* U.S.Br. 28-29. But this argument also fails. For starters, it is waived. Contrary to Respondents' suggestion (Br. 21 n.8), the petition for certiorari expressly asserted that a domestic-enterprise rule would exclude the "RJR Money-Laundering Enterprise," given the district court's unquestioned holding that this alleged enterprise is foreign. Pet. 29-30. Yet the opposition brief did not dispute that assertion, BIO 12, and thus waived the issue, Pet.Br. 57. In any event, the alleged "RJR Money-Laundering Enterprise" is indisputably foreign. Regardless of the precise legal test applied to determine the location of a RICO enterprise, an enterprise must be characterized as foreign where, as here, it allegedly consists of foreign criminals laundering their foreign criminal proceeds by purchasing fungible goods sold by a domestic cigarette manufacturer. Pet.Br. 57. And that is especially so where, as here, the plaintiffs have made similar allegations against all other large international cigarette manufacturers, Resp.Br. 6-8; Pet.Br. 7 n.2—thus leaving no doubt that the foreign criminals are the common masterminds directing the alleged schemes.

Third, Respondents briefly suggest that their § 1962(c) claim can be limited to a domestic "association-in-fact" enterprise consisting of "the group of American RJR entities." Resp.Br. 22. But this novel suggestion is baseless. It too was waived at the cert-stage, BIO 12, and is entirely unsupported in the complaint, the belatedly-invoked provisions of which merely contain boilerplate allegations that a corporation is liable for the acts of its agents, Pet. App. 184a-185a. Nor could the conduct of such a gerrymandered domestic enterprise be a proximate cause of Respondents' alleged injuries, *see* Pet.Br. 5-6, which would flow from the "distinct" and "remote" acts of the foreign criminals excluded from the enterprise, *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 456-58 (2006).

CONCLUSION

The judgment below should be reversed and the RICO claims dismissed. At a minimum, the judgment should be vacated and the RICO claims remanded for further consideration.

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