

IN THE SUPREME COURT OF THE UNITED STATES

3 CEDRIC KUSHNER PROMOTIONS, :
100 BROADWAY NEW YORK, N.Y. 10006

4 LTD., :
:

5 Petitioner :

6 v. : NO. 00-549

7 DON KING, ET AL. :

9 Washington, D.C.

10 Wednesday, April 18, 2001

12 argument before the Supreme Court of the United States at
13 10:12 a.m.

14 APPEARANCES :

15 RICHARD A. EDLIN, ESQ., New York, New York; on behalf of
16 the Petitioner.

17 AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; for
19 United States, as amicus curiae, supporting
20 Petitioner.

21 PETER FLEMING, JR., ESQ., New York, New York; on behalf of
22 Respondents.

23

24

25

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202) 289-2260
(800) FOR DEPO

	C O N T E N T S	PAGE
1		
2		
3	ORAL ARGUMENT OF	
4	RICHARD A. EDLIN, ESQ.	
5	On behalf of the Petitioner	3
6	AUSTIN C. SCHLICK, ESQ.	
7	For United States, as amicus	
8	curiae, supporting Petitioner	14
9	PETER FLEMING, JR.	
10	On behalf of Respondents	18
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1

P R O C E E D I N G S

2

(10:12 a.m.)

3

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

5

Mr. Edlin.

6

ORAL ARGUMENT OF RICHARD A. EDLIN

7

ON BEHALF OF THE PETITIONER

8

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

10

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.

20

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

21

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 --

25

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.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25