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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
MOHAWK INDUSTRIES, INC., :
Petitioner :
v. : No. 05-465
SHIRLEY WILLIAMS, ET AL. :
- - - - -X

Washington, D.C.
Wednesday, April 26, 2006

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:10 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
of the Petitioner.

HOWARD W. FOSTER, ESQ., Chicago, Illinois; on behalf of
the Respondents.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the United States, as amicus curiae,
supporting the Respondents.

1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Mohawk Industries v. Williams.

5 Mr. Phillips.

6 ORAL ARGUMENT OF CARTER G. PHILLIPS

7 ON BEHALF OF THE PETITIONER

8 MR. PHILLIPS: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This case involves the somewhat murky concept
11 of an association-in-fact enterprise within the meaning
12 of section 1961(4) of title 18, which is the RICO
13 statute, and actually the specific language in this
14 case, which is reproduced in the Petitioner's brief at
15 page 2, is a group of individuals associated in fact.

16 In this case, there are two fairly obvious
17 enterprises that one might have expected a plaintiff to
18 identify in this -- in its -- in their complaint. The
19 first one is Mohawk Industries, which is their
20 employer. That is a corporation, clearly eligible to
21 serve as an enterprise. But, of course, the problem is
22 if you identify Mohawk as the -- as the enterprise, you
23 then cannot sue Mohawk as the person under this Court's
24 decision in Kushner. And so Mohawk was an unattractive
25 enterprise under -- on that -- because of that reason.

1 Second, there are the recruiting and
2 temporary agencies which are likely corporations and
3 certainly are legal entities and, again, are eligible
4 to be enterprises within the meaning of the statute.
5 But, again, here the problem is that there is no
6 indication that Mohawk in any way directs or conducts
7 the affairs of those agencies, and therefore, under
8 this Court's explicit holding in *Reves*, there would no
9 -- there would be no basis for liability.

10 And so the plaintiffs have attempted to sort
11 of move around those two substantial obstacles to
12 stating a claim by laying the claim to what is called
13 an association-in-fact enterprise. Their complaint at
14 paragraph 76, which is on page 23 of the joint
15 appendix, states this fairly broadly. Mohawk has
16 participated in an association-in-fact enterprise with
17 third party employment agencies and other recruiters.

18 The question is what is this enterprise and
19 does it have legs for purposes of bringing a RICO
20 action. In analyzing that question, it seems to me
21 there are two subissues within that.

22 The first one is whether or not the language
23 of section 1961(4) precludes using the corporation as
24 part of an association-in-fact enterprise because
25 1961(4) explicitly -- or specifically refers to

1 individuals, and everyone has recognized, including I
2 think the Respondents and the United States, that if --
3 if it were clear that association-in-fact enterprises
4 or that enterprises limited to individuals under these
5 circumstances, given the structure of the statute, the
6 corporation would not be permissibly brought in on this
7 particular theory. So you have to get past whether or
8 not that is a limiting principle under this definition.

9 JUSTICE KENNEDY: If we were --

10 JUSTICE SCALIA: Before you get to your
11 second point, why is that first point before us? You
12 -- you didn't raise it in the courts below. You didn't
13 raise it in your petition here. Your question
14 presented it -- I'd like to stretch to reach it, but I
15 don't even find it necessarily included within the
16 question presented. The question presented is whether
17 a defendant corporation and its agents engaged in
18 ordinary, arms-length dealings can constitute an
19 enterprise in light of the settled rule that a RICO
20 defendant must conduct or participate in the affairs of
21 some distinct enterprise and not just its own affairs.

22 It seems to me it's only question two you put before
23 us.

24 MR. PHILLIPS: Justice Scalia, the -- the
25 answer -- a couple answers.

1 First of all, obviously, we could not have
2 raised this before the -- either the district court or
3 the court of appeals because the law was absolutely
4 settled in the Eleventh Circuit.

5 JUSTICE SCALIA: As it is in nine other
6 circuits.

7 MR. PHILLIPS: As it is in nine other
8 circuits.

9 JUSTICE SCALIA: And all circuits against
10 you.

11 MR. PHILLIPS: To be sure.

12 JUSTICE SCALIA: And we would have been
13 unlikely to accept cert on -- on point one alone I
14 think.

15 MR. PHILLIPS: Right.

16 But the second -- but the question is not --
17 the question is whether or not that issue is fairly
18 subsumed within the question that was actually
19 presented, and that --

20 JUSTICE GINSBURG: I think it's -- it's a
21 little more difficult in your case because you're
22 pursuing an interlocutory appeal, which you were
23 allowed to do only because you've got double
24 certification and you got certification on the
25 questions that the district court addressed. You can't

1 expand a 1292(b) order to include things that were not
2 decided below.

3 MR. PHILLIPS: The -- the question presented
4 in this case -- and it's the same question that was
5 presented below -- is whether the defendant corporation
6 and its agents under these circumstances can constitute
7 an enterprise.

8 JUSTICE SCALIA: In light of the settled rule
9 that a defendant must conduct or participate in the
10 affairs of some distinct enterprise and not just its
11 own affairs.

12 MR. PHILLIPS: To be sure. But the --

13 JUSTICE SCALIA: If you hadn't included that
14 last part, in light of, but it seems to me you're
15 focusing on the -- on the particular claim that you're
16 making.

17 MR. PHILLIPS: But, Justice Scalia, the in
18 light of certainly raises the secondary issue, but it's
19 still -- I mean, the rule is whether it's fairly
20 subsumed within the question. And it is a logically
21 prior question whether or not the statute extends to
22 this particular situation.

23 JUSTICE SCALIA: It is logically prior, and I
24 hate to go through all the trouble of figuring out this
25 case if, indeed, corporations are ineligible anyway. I

1 mean, you know, we're -- we're answering a totally
2 hypothetical, nonexistent question.

3 MR. PHILLIPS: But the situation that's
4 presented here is identical to the situation that
5 existed in McNally v. United States, Justice Scalia.
6 In that case, the question was whether or not an
7 intangible rights theory of mail fraud could be
8 extended to include nongovernment officials. That was
9 the specific question presented in that case, and
10 that's the -- the question the Court granted. And
11 every court of appeals had interpreted that statute to
12 say that intangible rights theories are valid under
13 that statute. And -- and that issue was not adverted
14 to in the petition, and it was briefed in this Court --

15 JUSTICE GINSBURG: And they weren't --

16 MR. PHILLIPS: -- and it was regarded as
17 fairly subsumed just as --

18 JUSTICE GINSBURG: -- they weren't --

19 MR. PHILLIPS: I'm sorry, Justice Ginsburg.

20 JUSTICE GINSBURG: -- they weren't -- your
21 problem is you don't have a final judgment. The only
22 way that you can get even to the court of appeals is on
23 that 1292(b) order. And I thought that the function of
24 1292(b) was to say specify the questions that are so
25 important that they have to be decided and appealed

1 before there's a final judgment. And whatever there
2 might have -- whatever one might read into a question
3 presented, I don't think that 1292(b) orders have ever
4 been treated that way.

5 MR. PHILLIPS: I -- I don't have any specific
6 authority to the contrary, although the other side
7 didn't argue 1292(b) as in some sense a limitation
8 here. And I don't see anything in this Court's rules
9 which broadly authorize the Court to grant certiorari
10 to any question that's fairly subsumed within the
11 question presented. And it is a totally artificial
12 inquiry to sit here and say, you know, how are we going
13 to analyze what is --

14 JUSTICE BREYER: Suppose we get through that.
15 I see the artificial part. Just what is it? Piling
16 Pelion on something or other. Mountains that you pile
17 one on top of the other.

18 But your opponents have cited in your brief
19 -- in the brief on page 12 that counsel for Mohawk said
20 to the court, specifically, Mohawk agrees that a
21 corporation can be both a RICO person and part of an
22 association-in-fact enterprise. Now, if we can
23 overcome all these other problems --

24 MR. PHILLIPS: Right.

25 JUSTICE BREYER: -- what do we do about that

1 particular concession?

2 MR. PHILLIPS: The -- the clause that
3 introduces that is under current law, and that's
4 absolutely true in the Eleventh Circuit. Under current
5 law, as it existed in the Eleventh Circuit when we
6 wrote that, there was no question that a corporation
7 can be included within an association-in-fact
8 enterprise. Therefore, all we were doing was conceding
9 what the state of the law was in the Eleventh Circuit
10 and not questioning that, as -- as, candidly, we had no
11 ability to do that. It would have been an utterly
12 futile gesture to have raised this issue at any point
13 prior to.

14 We could have raised it in the petition for
15 certiorari, to be sure. We -- we think it is fairly
16 subsumed within the question presented, and we also
17 think it would be an -- an utterly artificial exercise
18 to try to analyze what is an association-in-fact
19 enterprise without first deciding whether or not a
20 corporation could be included in the first instance
21 because, as Justice Scalia says, if they can't, then it
22 seems to me this is a substantially easier question,
23 and also it is an extraordinarily important one.

24 It is true that the courts of appeals have
25 lined up consistently on the other side of this issue,

1 but it is equally true that none of them has analyzed
2 this issue with anything near the kind of care that
3 would at least give me comfort that they've finally and
4 fully resolved the issue. And we're not going to get a
5 more thorough vetting of it at this point because the
6 circuits are -- are at this -- at this stage
7 essentially lined up. So the right time and
8 opportunity for the Court is here.

9 CHIEF JUSTICE ROBERTS: Well, unless somebody
10 raises it. Unless somebody raises it below to preserve
11 it for the rehearing en banc or -- or some other way.

12 MR. PHILLIPS: But all of those courts are
13 going to say the same thing, which is that this issue
14 has been resolved. It's possible, presumably, you
15 might get an en banc review on it, but again, you don't
16 have the question -- you don't have a split anywhere
17 other than some district court decisions that have --
18 that have recognized our interpretation.

19 The issue is squarely posed here at this
20 point. It's been fully briefed for this Court.

21 JUSTICE BREYER: Well, what -- what sense
22 would it make on the merits to get your interpretation
23 on the merits, which would mean, I guess, that five
24 individuals could be an enterprise because that's a
25 group of individuals.

1 MR. PHILLIPS: Yes, that's true.

2 JUSTICE BREYER: Five labor unions couldn't.
3 Five corporations couldn't. One individual and four
4 labor unions couldn't. One individual and four
5 corporations couldn't. One individual and three
6 partnerships couldn't. And -- but what -- what sense
7 would that make?

8 MR. PHILLIPS: Because all of those various
9 combinations can still be attacked under the theory of
10 RICO by just simply structuring your -- your enterprise
11 in the proper way. It is true you can't broaden it.
12 You can't expand the enterprise definition in order to
13 include a variety of different elements, but there's no
14 way -- I mean, in this case, for instance, they could
15 have named Mohawk as the enterprise. They could have
16 named the -- the recruiting agencies as the enterprise.
17 They could have named the corporate officers as the
18 enterprise, and they could have dealt with all of them
19 as a conspiracy. And all of those are ways to get at
20 precisely the issues that you identify, Justice Breyer.

21 JUSTICE GINSBURG: If -- if --

22 MR. PHILLIPS: And the answer --

23 JUSTICE GINSBURG: -- if Mohawk were a
24 partnership instead of a corporation --

25 MR. PHILLIPS: Yes.

1 JUSTICE GINSBURG: -- the partnership is an
2 association of individuals.

3 MR. PHILLIPS: Well, a partnership is
4 identified specifically under the statute as a -- as a
5 -- as an enterprise -- as eligible for an enterprise.

6 JUSTICE GINSBURG: So if the answer is yes,
7 if Mohawk had been a partnership, you would not have
8 this particular objection.

9 MR. PHILLIPS: That's correct. That wouldn't
10 be this particular --

11 JUSTICE GINSBURG: So it's only the corporate
12 form.

13 MR. PHILLIPS: Well, no. If we were a
14 partnership, it couldn't be in an enterprise with --
15 with an association of individuals. The question is --

16 JUSTICE GINSBURG: That's --

17 MR. PHILLIPS: -- does -- can you have an
18 associational enterprise that extends beyond
19 individuals, that gets -- that goes beyond the gangs
20 and their family.

21 JUSTICE GINSBURG: Well, that's why I'm
22 asking you about the partnership because it is an
23 association of individuals. So I'm not clear on what
24 your answer is. No partnership could be treated just
25 like a corporation. They're not an individual? Or

1 partnerships are okay because there's not a separate
2 entity. It's a -- it's a association of individuals.

3 MR. PHILLIPS: Yes, let me be clear on this,
4 that if -- if you just bring an action against the
5 partnership qua partnership you could clearly do that
6 because that's defined as a -- as a legal entity --

7 JUSTICE GINSBURG: No. Would the --

8 MR. PHILLIPS: -- for purposes -- if you're
9 trying to take the partnership and tag it to another
10 group of rag-tag individuals, that would not be an
11 enterprise in fact because that's not an -- an
12 association of individuals. It's a partnership which
13 has an entity apart from the individuals.

14 Now, if you disaggregated all of the
15 individuals within the partnership and called them
16 individuals and said that they group with another group
17 of individuals, then, yes. I think if you could
18 demonstrate that there is the loose organization,
19 common purpose, and all of the requirements for having
20 an association-in-fact available, sure, that wouldn't
21 be any problem.

22 JUSTICE SCALIA: If this provision is
23 exclusive, as you claim it is -- it's intended to be an
24 exclusive definition, why -- why would they include
25 union, just union and individuals? What's magic about

1 a union that --

2 MR. PHILLIPS: Because --

3 JUSTICE SCALIA: -- that is not equally magic
4 about a partnership or a corporation?

5 MR. PHILLIPS: No. Well, because what they
6 have -- you have to go back to the original list. The
7 list starts off with individuals, corporations,
8 partnerships, associations, and other legal entities,
9 unions, which is in addition to that because it's not a
10 legal entity, or at least there was case law at the
11 time --

12 JUSTICE SCALIA: Oh, I see.

13 MR. PHILLIPS: -- that it's not a legal
14 entity. And then other associations.

15 JUSTICE SCALIA: This refers to a union that
16 is not -- is not an association.

17 MR. PHILLIPS: Right. This is just a union.

18 JUSTICE SCALIA: Or any legal entity.

19 MR. PHILLIPS: Right.

20 JUSTICE SCALIA: A union that is not --

21 MR. PHILLIPS: It's just an additional item
22 in the list.

23 JUSTICE SCALIA: -- not a legal entity. I
24 see.

25 JUSTICE ALITO: But why would they use

1 includes in that provision and means in other
2 provisions?

3 MR. PHILLIPS: Because I think they viewed
4 those as absolutely synonymous, Justice Alito, and --
5 and the reason I think that is because we know that in
6 some instances they use including but not limited to,
7 which reflects that Congress recognized that includes
8 in some contexts is an exhaustive listing, and I think
9 they thought in some contexts, meaning 1961(4), that it
10 was an exhaustive listing.

11 And also, it's important to look at the other
12 definitions of 1961(4), and I think this is the most
13 important element of the other side's submission in
14 this case because they do no business with any of the
15 other definitions. The Attorney General, the
16 definition of property for forfeiture purposes, those
17 are unquestionably exhaustive lists. At least, that's
18 the way I -- we argued it. They didn't respond to
19 that. And yet, those are introduced with the term
20 includes.

21 So it strikes me that the best contextual
22 evidence of what Congress intended here was that
23 includes would be used exhaustively and that the use of
24 individuals of associated in fact would be used as a
25 limiting principle, not as part of an exhaustive

1 principle that expands the scope of this beyond --
2 beyond -- into a realm where it becomes nothing but a
3 mere conspiracy statute, which is what it is today
4 under this -- under this particular theory.

5 That's -- unless there are further questions
6 about the straight statutory interpretation question,
7 then I would go to the second issue, which is assuming
8 that corporations can, nevertheless, be involved in
9 association-in-fact enterprises, does this state such a
10 thing.

11 And here, you have to go back to the Court's
12 opinion in *Reves*, and in *Reves*, what the Court held is
13 that liability depends on showing that the defendants
14 conducted or participated in the conduct of the
15 enterprise's affairs, not just their own affairs.
16 Okay? So it is an element of RICO liability that you
17 have to distinguish the -- the corporate defendant's
18 affairs in that case and -- and the affairs of the --
19 of the enterprise in this case.

20 JUSTICE SOUTER: And don't they do that by --
21 don't the allegations do that here by claiming that the
22 corporation was manufacturing or providing false Social
23 Security cards and was giving aid to the immigrants if
24 the -- the law got too close to them? I mean, that is
25 not merely the conduct by a corporation of the normal

1 business of hiring and employing people. Isn't that
2 the sort of extra that is alleged that takes this out
3 simply of the -- of the category of the -- of the
4 corporation conducting its own affairs?

5 MR. PHILLIPS: Justice Souter, that is the
6 only allegation that comes remotely close to suggesting
7 anything along those lines, but I -- my submission to
8 you is that it doesn't get you there because what it
9 says is that the recruiters are sometimes assisted --
10 it does say the recruiters -- by Mohawk employees who
11 carry Social Security cards which they use for
12 prospective or existing employees' needs to assume a
13 new identity. That's when they come to Mohawk as
14 applicants or as employees, Mohawk provides them with
15 this identification. That's the allegation. That's
16 simply Mohawk conducting its own affairs. That's not
17 conducting or directing the affairs.

18 JUSTICE SOUTER: Well, maybe I misunderstood
19 the thrust of the allegation. I thought the thrust of
20 the allegation was that Mohawk was acting illegally in
21 providing phony Social Security cards.

22 MR. PHILLIPS: Well, I don't doubt that
23 there's a claim that -- that there's illegality. All
24 of this is permeated with claims of illegality.

25 JUSTICE SOUTER: Doesn't -- doesn't that get

1 them at least to -- through the motion to dismiss, and
2 doesn't it at least get them to summary judgment?

3 MR. PHILLIPS: I don't think so because even
4 in *Reves*, the -- Ernst & Young had been found to have
5 engaged in illegality, that there was -- that there was
6 securities fraud involved there. So that's -- that
7 doesn't distinguish it. The fact of illegality would
8 make it a conspiracy, but it doesn't demonstrate either
9 what the -- what the association-in-fact enterprise is
10 and what are its affairs that are distinguished from
11 the affairs of the corporation.

12 JUSTICE SOUTER: But in -- in *Reves* -- and if
13 -- and -- and you -- you may well correct me on this
14 because I'm -- I'm -- my memory is not precise. But I
15 thought in *Reves*, in effect, what they did was to lie
16 in the course of doing the sort of the thing that they
17 normally do. Here, the allegation is that they were
18 doing something, providing phony ID's, that employers
19 don't normally do. Isn't -- and, you know, maybe
20 that's a fine line, but is -- is it not a fine enough
21 line to get it out of *Reves* and get it beyond the
22 motion to dismiss?

23 MR. PHILLIPS: I don't think so, Justice
24 Souter, because -- because the -- it's a question I
25 think of abstraction. What we normally do is hire

1 employees and review their applications. Now, in that
2 process, we've been alleged to engage in illegal acts
3 by providing them with false identifications. But I
4 don't see how that's any different from the Reves
5 situation where the claim is that you're providing
6 ordinary auditing advice, but in the process you're
7 lying. You're engaged in illegal activities. It seems
8 to me it is precisely the same problem in both
9 situations.

10 JUSTICE SOUTER: Well, there is -- there is a
11 common element of illegality, but the distinction is
12 that in Reves, you're supposed to be providing these
13 services, making out statements, et cetera, and you put
14 the wrong numbers in them.

15 MR. PHILLIPS: Intentionally.

16 JUSTICE SOUTER: Whereas in -- in this case,
17 an employer does not normally go about providing phony
18 ID's or any ID's for the people it hires. It says, who
19 are you? What's your Social Security number? And --
20 and there's -- there's an affirmative act here.

21 MR. PHILLIPS: Right. Justice Souter, I
22 don't doubt that, but the question is what is the legal
23 standard in Reves. And Reves doesn't say, did you
24 engage in illegality, and Reves doesn't say, can we
25 make out a claim of conspiracy. Reves says what you

1 have to demonstrate is that you are conducting or
2 directing the operations or affairs of some entity,
3 apart from yourself. And here, all we're doing is
4 giving ID cards to our either actual or potential
5 employees.

6 JUSTICE SOUTER: In -- in -- yes, but you're
7 doing it in connection with a -- a joint recruitment
8 activity. In other words, the -- the agencies that you
9 hire to get the workers up to the door are not going to
10 succeed very well if -- if all the workers are going to
11 arrive without any papers and without any -- any
12 indication like a Social Security card and so on that
13 they can be part of -- of the legal work force. So
14 there's -- there's something extra being done both by
15 the -- the recruiters and by you, and the extra, in
16 effect, is a -- a scheme to provide phony ID's that
17 suggest that these people are -- are lawful rather than
18 -- than unlawful immigrants.

19 MR. PHILLIPS: But that still doesn't seem to
20 me, Justice Souter, to satisfy the Reves standard,
21 which is not just that there has to be something more
22 than conducting your own affairs immediately, although
23 that's important, and I don't think that -- I don't
24 think you can show that -- either that we went beyond
25 conducting our affairs or that the recruiters went

1 beyond conducting their affairs. All of these
2 allegations break out that way.

3 But what Reves says you have to do is
4 demonstrate that you conducted or directed the affairs
5 of whatever this association-in-fact entity is.

6 CHIEF JUSTICE ROBERTS: So -- so that if you
7 charged --

8 MR. PHILLIPS: And that's the part that's
9 missing. I'm sorry.

10 CHIEF JUSTICE ROBERTS: So that if you
11 charged the workers, you know, \$10 for their fake ID
12 cards, you think that would be a different case.

13 MR. PHILLIPS: No, I don't think either of
14 those --

15 CHIEF JUSTICE ROBERTS: Because there, that's
16 -- there, you -- you -- there's a separate enterprise
17 basically selling ID cards, and that's not part of
18 Mohawk's business. But if you're just hiring them the
19 way you hire other employees, illegally as it's
20 alleged, that's Mohawk's enterprise if there's some
21 separate illegal activity?

22 MR. PHILLIPS: Well, see, under those
23 circumstances, I wouldn't have any problem calling
24 Mohawk the enterprise. I mean, that's the whole point
25 of this. The -- the logical enterprise here is the

1 corporation. The question is do you go beyond that to
2 create these completely artificial entities. I mean,
3 you know, this -- this associational enterprise doesn't
4 exist except in the minds of the plaintiffs.

5 JUSTICE SCALIA: Mr. Phillips, I -- I tend to
6 agree with that, but I -- I just hate to get the lower
7 courts into this business of determining when a
8 corporation is going beyond its business. Your -- your
9 discussion with Justice Souter I think indicates how --
10 how hard that is, or some of the examples that the
11 Government brings up, such as a drug company that --
12 that sells drugs illegally, violating the drug laws.
13 Is that part of its business or not part of its
14 business? I -- I really don't -- don't want to buy
15 into that.

16 MR. PHILLIPS: Well, I think it's a little
17 late in the day, Justice Scalia, because that is
18 precisely the standard the Court articulated in *Reves*.

19 It said the question is not do you -- are you -- are
20 you conducting the affairs of your own operation,
21 however that's defined. But I'm not sure whether you
22 need to -- you need to define.

23 I mean, you know, in some ways, this also
24 goes to why it -- it's a mistake to get into this in
25 the first place because if you just said it has to be

1 individuals associated in fact, you don't have to get
2 into any of this inquiry. You could obviate the need
3 to evaluate all of these problems in one fell swoop.

4 But even assuming that you still want to live
5 in this world, you still -- it seems to me you've got
6 to identify what it is -- what -- what is the nature,
7 what is the loose organization of this separate
8 enterprise, and then what are its functions. And then
9 you have to evaluate how it is that the defendant is,
10 in fact, operating or conducting or directing the
11 affairs of that enterprise.

12 And that's what's missing, Justice Souter, in
13 -- in footnote -- or excuse me -- in paragraph 76
14 because while it goes to -- you know, it says we paid
15 for illegal aliens to be employed. Okay, well, that --
16 that's clearly hiring. That's the first one.

17 The second one is they have temp agencies and
18 they pool their employees and they loan them to us for
19 a fee. Well, that's the business of temp agencies.
20 That's what they do. They transport employees to -- so
21 they'll have them available in their pool. That's not
22 -- we don't direct any of that. We -- we are their --
23 we are -- it's an arms-length deal.

24 JUSTICE SOUTER: Okay, but I still think
25 sooner or later we have to come back to something that

1 you and I went over a moment ago, and that is the --
2 one function, maybe the function, of -- of the -- of
3 the -- the entity claimed here is -- is providing cover
4 for the illegal status of the aliens. And it seems to
5 me that there is at least a bare claim here that Mohawk
6 is directing the affairs or the business of -- of this
7 third entity --

8 MR. PHILLIPS: Well, the -- the --

9 JUSTICE SOUTER: -- by -- by the way that it
10 is -- allegedly provides phony Social Security cards.

11 MR. PHILLIPS: Well, according to the
12 allegation in paragraph 77, it just says obtaining
13 illegal workers. It doesn't say anything about
14 providing them with cover, that the common purpose of
15 this enterprise --

16 JUSTICE SOUTER: Where -- where do we --
17 you're going to have to help me out then. Where --
18 where in the -- the pleadings or the -- the papers do
19 we get into the Social -- do we get the allegations of
20 the Social Security card?

21 MR. PHILLIPS: That's paragraph 76.

22 JUSTICE SOUTER: Okay.

23 MR. PHILLIPS: And that's a factual
24 allegation. But -- but it -- but all I'm saying is --

25 JUSTICE SOUTER: But isn't that factual

1 allegation, as a bare matter, sufficient to satisfy the
2 objection that you raise, that something more than
3 merely the activity -- the conduct of -- of their
4 separate business is going on?

5 MR. PHILLIPS: No, because what you still
6 need -- there's still a higher -- it's not just the
7 higher threshold that it's got to be something that
8 moves beyond what the corporation does. It has to
9 involve the direction or the conduct of the operation
10 of a separate entity.

11 JUSTICE SOUTER: Well, if -- if, in fact, it
12 is the case that Mohawk is -- is providing the Social
13 Security cards, isn't it directing the means by which
14 the third -- the third entity is, in effect, illegally
15 -- or supplying illegal workers in -- in this -- this
16 joint enterprise?

17 MR. PHILLIPS: Well, obviously, we're going
18 to disagree about this I think, but at the end of the
19 day, I think the bottom line is what we're doing is
20 when the applicant shows up at our doorstep or when
21 they have, in fact, been hired, if for -- and this is
22 the allegation. Obviously, none of this is true. But
23 this is the allegation. That we then -- we then supply
24 those employees -- our employees and our applicants
25 with these false ID's. That's part of the process of

1 our own hiring.

2 JUSTICE SOUTER: Is it reasonable -- is it
3 reasonable to suppose, on the basis reading the
4 allegations as they have to be read at this stage of
5 the proceeding -- is it reasonable to infer that --
6 from the allegation that there is an understanding
7 between Mohawk and the employment agencies that Mohawk
8 will provide this documentation and therefore make the
9 scheme work?

10 MR. PHILLIPS: Well, it -- the allegation
11 certainly doesn't say that.

12 JUSTICE SOUTER: It doesn't say that in any
13 -- any black letter statement.

14 MR. PHILLIPS: There is only one sentence in
15 the allegation that even remotely says anything about
16 this. And again, Justice Souter, the -- the fundamental
17 assumption here is that if there's something that goes
18 anywhere beyond our affairs, that that by itself is
19 sufficient to take you out of Reves. And what I would
20 argue strenuously is that what Reves says is you have
21 to be conducting or directing the operations of the
22 other entity's affairs. And providing this doesn't
23 conduct or direct anything. It may -- it may be a
24 conspiracy. It may satisfy some interrelationship, but
25 I don't see how it gets you to the point of an existing

1 enterprise.

2 If there are no further questions, I'd
3 reserve the balance of my time, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Phillips.

6 Mr. Foster.

7 ORAL ARGUMENT OF HOWARD W. FOSTER

8 ON BEHALF OF THE RESPONDENTS

9 MR. FOSTER: Yes. Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 As Mr. Phillips makes quite clear, Mohawk
12 does not like the way the plaintiffs have written their
13 complaint in this case. He would prefer -- they would
14 prefer that the enterprise be Mohawk Industries and
15 certain individuals within the corporation be named
16 as the RICO persons. But the plaintiffs write their
17 complaint and the plaintiffs are the master of their
18 complaint, and at this stage, as far as the case has
19 proceeded, which is only up to a motion to dismiss,
20 that's what we are to deal with, whether this states a
21 cause of action under RICO.

22 There seems to be no dispute in the lower
23 courts that corporations can form associations of fact
24 with other entities and that a corporation can be a
25 person conducting the affairs of such an entity. We

1 have alleged that here.

2 CHIEF JUSTICE ROBERTS: There may be no
3 dispute about it, but it does seem kind of strange to
4 encompass them under the term individuals when the same
5 statute uses individuals and corporations separately.

6 MR. FOSTER: Yes, Mr. Chief Justice. But
7 actually the term -- the definition of enterprise in
8 RICO starts with the word includes and it also states
9 any union or group of individuals associated in fact,
10 though not a legal entity.

11 The word union is not defined. According to
12 Mohawk, union should be interpreted to mean a labor
13 union, but that makes no sense structurally because the
14 first part of that definition includes legal entities,
15 and if reference were being made by Congress to a labor
16 union, then the union would have been inserted in that
17 part of it because at the time RICO was written in
18 1970, Congress had already enacted the Labor Management
19 Relations Act of 1946, which made labor unions suable
20 entities.

21 JUSTICE ALITO: Well, do you agree that
22 that's an exhaustive list in subsection (4)?

23 MR. FOSTER: I don't think it's an exhaustive
24 list, Justice Alito. It -- the Court has held in
25 previous cases that RICO used concepts and terms of

1 breadth. This would appear to be that, as the Court
2 said in both *H.J. v. Northwestern*, *Russello*, and
3 *Turkette*.

4 JUSTICE ALITO: Well, would you agree that
5 includes is meant to be exhaustive in many of the other
6 -- in a number of the other subsections of this
7 definitional provision?

8 MR. FOSTER: I -- I don't think so. I
9 believe that the way includes is actually used, for
10 example, in the definition of Attorney General, opens a
11 long definition which is itself exhaustive, but leaves
12 room for change. Attorney General was written in a way
13 that allowed any official to be designated by the
14 Attorney General to fall within that description.
15 There's room for designations and there's room for
16 change in the Justice Department as it occurs over
17 time.

18 JUSTICE SCALIA: I don't see how your point
19 regarding union helps you any because if -- if you --
20 if you win the point that union doesn't mean a labor
21 union, you still have, as -- as the end of this
22 definition, any union or group of individuals.

23 MR. FOSTER: Yes.

24 JUSTICE SCALIA: A union of individuals or a
25 group of individuals. You're still stuck with

1 individuals.

2 MR. FOSTER: Well, I think union is -- it
3 says union or group of individuals. I think union is
4 something --

5 JUSTICE SCALIA: Either union means labor
6 union or it means a union or group of individuals.

7 MR. FOSTER: I would -- Justice Scalia, I
8 don't believe that union means labor union because --

9 JUSTICE SCALIA: Okay.

10 MR. FOSTER: -- if it meant a labor union
11 there --

12 JUSTICE SCALIA: I'll give you that. Then --
13 then it means a union or group of individuals.

14 MR. FOSTER: A union or group of individuals.

15 JUSTICE SCALIA: Right. So, you know, you're
16 just as bad off.

17 MR. FOSTER: Well, the word individual is not
18 defined in the statute either, and --

19 CHIEF JUSTICE ROBERTS: Well, it's not
20 defined in the statute, but the prior list in the same
21 sentence says individual, partnership, corporation. So
22 you'd assume whatever an individual is it's different
23 than a corporation or they wouldn't have had to say
24 corporation again.

25 MR. FOSTER: The enterprise alleged here, Mr.

1 Chief Justice, is actually not a single corporation.
2 That first list would not encompass a group of
3 corporations. A group of corporations is actually not
4 a single legal entity. It's a group of legal entities
5 that have combined to commit a pattern of racketeering
6 activity. It doesn't neatly fit into the first
7 definition, which seems to encompass only single
8 entities.

9 And so every single circuit court in the --
10 in the country to examine this question has held that
11 Congress didn't expect, anticipate, or intend to
12 exclude groups of legal entities from being -- being a
13 -- a RICO enterprise. They were captured by the second
14 part of the definition.

15 JUSTICE BREYER: There is --

16 JUSTICE KENNEDY: Still, it -- it -- you
17 know, we usually talk about person can mean a
18 corporation. This says individual. A person is
19 defined in -- in sub (3) just above it. A person
20 includes any individual or entity. Then the next thing
21 says individual. So it's not a -- it doesn't sound
22 like a corporation.

23 MR. FOSTER: Well, the use of the word union
24 or group of individuals seems to broaden it. The word
25 includes at the beginning of the definitional section

1 broadens it even further. As this Court held in
2 footnote 14 of the -- in the Sedima decision, the use
3 of the word requires in that definitional section was
4 key to understanding what it meant, and it said
5 requires, in terms of pattern, meant more than simply
6 two predicate acts. The word requires had to mean
7 more, and it had to be read in context. We think that
8 this should be read in context.

9 JUSTICE GINSBURG: I thought your position
10 was it shouldn't be read at all because --

11 MR. FOSTER: Yes.

12 JUSTICE GINSBURG: -- this -- this Court is a
13 court of review, and to take a question that was never
14 certified, even to the court of appeals, to have this
15 Court address it seems to me very strange. It seems to
16 me to erode rather starkly the final judgment rule,
17 which we don't have here.

18 MR. FOSTER: Well, I agree with that, Justice
19 Ginsburg. I don't think the Court should entertain the
20 question at all. And --

21 JUSTICE KENNEDY: Well, what we're reviewing
22 is a ruling, not a question. You certify a ruling.
23 Now, it's usually set out for the court of appeals so
24 they know what the question is.

25 MR. FOSTER: We are reviewing a ruling --

1 JUSTICE KENNEDY: What you're reviewing here
2 is a ruling.

3 MR. FOSTER: It's a ruling. We're not
4 reviewing a final judgment. All it is is a ruling. It
5 came to this Court and the question that this Court
6 accepted for certiorari has actually been -- all but
7 abandoned.

8 Mr. Phillips hardly used the word agent at
9 all, if at all. He doesn't argue why his rule about
10 distinctness should be applied here. There is no
11 allegation or he doesn't make any legal argument that
12 the members of this association-in-fact enterprise
13 should be deemed to be agents of Mohawk. That's not
14 alleged in the complaint. That's not the way the
15 complaint was written. They're all alleged to be
16 separate legal entities. They're -- for the motion to
17 dismiss stage, that is enough to satisfy this Court's
18 requirement in Cedric Kushner that the members of an
19 enterprise be distinct from --

20 CHIEF JUSTICE ROBERTS: What is there
21 different about your proceeding to treat this as a RICO
22 enterprise that isn't covered by normal corporate
23 criminal conspiracy law? What does RICO add here?

24 MR. FOSTER: RICO does add more. It can't be
25 a mere criminal conspiracy to commit a single crime.

1 There needs to be an association of entities that
2 associate over a considerable period of time to meet
3 either closed-ended continuity or open-ended and commit
4 a pattern of criminal acts that are related to each
5 other, that go on for --

6 CHIEF JUSTICE ROBERTS: So they hire more
7 than one person.

8 MR. FOSTER: They hired -- and the
9 association itself, Mr. Chief Justice, would have to
10 exist over a -- a significant period of time. There
11 would have to be -- there's this durational element --

12 CHIEF JUSTICE ROBERTS: How is that different
13 than a normal contractual relationship that a
14 corporation is going to have with any number of
15 suppliers, vendors, agents?

16 MR. FOSTER: Yes. Normal contractual
17 relationship is not to commit a felony, and if --

18 CHIEF JUSTICE ROBERTS: No, but I'm trying to
19 see what RICO adds to the normal conspiracy law --

20 MR. FOSTER: Yes.

21 CHIEF JUSTICE ROBERTS: -- that would
22 otherwise be applicable. So we're assuming that the
23 arrangement is there and that they're engaging in
24 illegal activity.

25 MR. FOSTER: All right. And then we have the pattern

1 and the durational aspect of it. And it has to affect
2 interstate commerce -- the enterprise does -- and in
3 order to have a civil cause of action --

4 CHIEF JUSTICE ROBERTS: But Congress didn't
5 -- to be fair, Congress did not enact RICO because it
6 was concerned that criminal conspiracy law, applied to
7 corporations, didn't adequately touch interstate
8 commerce. The whole point is that they had something
9 significantly different in mind, and your allegations
10 in the complaint seem to be fully met by application of
11 criminal conspiracy law.

12 MR. FOSTER: Well, Mr. Chief Justice, a RICO
13 enterprise among -- is a conspiracy to commit crime,
14 but it's conspiracy plus. The plus is --

15 JUSTICE SOUTER: But isn't -- isn't the plus
16 simply more than one act?

17 MR. FOSTER: The plus is more than one act.
18 There has to be a pattern.

19 JUSTICE SOUTER: So -- so -- no, but I mean
20 literally. As -- as long as -- as two illegal workers
21 are going to be hired, isn't that sufficient to convert
22 -- to go from conspiracy to -- to RICO on your
23 analysis?

24 MR. FOSTER: There would have to be at least
25 two, and there would -- it would have to go on to meet

1 the Court's pattern requirement. Two generally is held
2 not to be enough if it's a closed period of time that's
3 over. But this complaint alleges an open period, and
4 two would be enough, coupled with the allegation that
5 this is the normal way for the company to conduct its
6 business.

7 CHIEF JUSTICE ROBERTS: I'm trying to give
8 you a chance to explain why this looks like RICO rather
9 than just criminal conspiracy. And you've come up
10 you said interstate commerce. There's got to be more
11 than one. Well, none of that really suggests a
12 distinction. What -- what is it that makes this a RICO
13 case rather than just a criminal conspiracy case?

14 MR. FOSTER: It's because we have a joint
15 venture of entities operating over a long period of
16 time that have victimized a large number of people, and
17 there's a pattern of racketeering activity. And --

18 CHIEF JUSTICE ROBERTS: There's a pattern
19 because they hired more than one.

20 MR. FOSTER: They hired more than one. In
21 fact, the statute requires 10 in a 12-month period.
22 So there would actually have to be 10 for at least 2
23 years. So that would mean at least 20 illegal aliens
24 have to have been hired under the 1324 section that's
25 alleged in this complaint. And probably for more than

1 2 years or an ongoing pattern of racketeering activity,
2 and a person has to have been proximately harmed by a
3 predicate act in order to assert a civil cause of
4 action. Beyond that, there is the -- of course, the
5 requirement of *Reves* that the person -- and here the
6 corporation is participating in the affairs or
7 conducting the affairs of an enterprise. And --

8 JUSTICE SCALIA: Yes, but *Reves* demonstrates
9 that -- that your statement earlier that since it was
10 fraudulent action, it couldn't have been the business
11 of the corporation is simply false. We -- we haven't
12 held that whenever a corporation violates the law, it
13 goes beyond its business, although in a sense it does.
14 In *Reves*, we -- we said it didn't.

15 MR. FOSTER: Here, Justice Scalia, there is,
16 as was pointed out earlier in the dialogue with Justice
17 Souter, a very close cooperation among Mohawk and these
18 third parties to get workers, to bring them from --

19 JUSTICE SCALIA: I understand that, but
20 that's -- we have to get into that is my point. We
21 can't just say since providing them with -- with phony
22 ID's is unlawful, it can't be the business of the
23 corporation.

24 MR. FOSTER: Yes, I agree. And I would
25 contend that there is enough factual detail and a

1 description of the claim asserted in this complaint to
2 satisfy rule 8 to state a claim.

3 And the type of factual inquiry that Mohawk
4 has suggested, that Mr. Phillips has suggested, saying,
5 for example, their test that Mohawk cannot be
6 participating in the affairs of an enterprise that
7 involves hiring because it itself involves hiring would
8 dramatically change the interpretation of RICO. It
9 would mean that, for example, a drug dealer could not
10 participate in a drug enterprise because he does what
11 the enterprise does.

12 Since all corporations are engaged in hiring
13 activities, therefore, then no corporation or other
14 business entity could ever be prosecuted or sued under
15 RICO because that -- there is overlap between what they
16 do and what an enterprise does, the -- if the
17 enterprise is devoted to recruiting illegal workers for
18 a business. That just can't be what Congress had in
19 mind, and it's not consistent with what this Court held
20 in Turkette that a common purpose is required for there
21 to be a RICO enterprise.

22 In conclusion, I do not believe that the
23 Court should address Mohawk's first point. I thought
24 it was startling to return to that issue, that Mr.
25 Phillips stated the reason that it was not raised below

1 was because he knew that they would lose and the Eleventh
2 Circuit would rule against them. But, nevertheless, he
3 wishes it to be addressed by this Court and simply
4 bypass the court of appeal in the Eleventh Circuit. If
5 there's no split below, then the question would not
6 have been accepted for cert presumably, as has been
7 pointed out, and it should not be entertained now.

8 For the reasons stated, I believe that the
9 judgment of the Eleventh Circuit Court of Appeals
10 should be affirmed. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 And Mr. Stewart.

13 ORAL ARGUMENT OF MALCOLM L. STEWART

14 ON BEHALF OF THE UNITED STATES,

15 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

16 MR. STEWART: Thank you, Mr. Chief Justice,

17 and may it please the Court:

18 Respondents' complaint alleges that
19 Petitioner has entered into a long-term, collaborative
20 venture with outside recruiters in order to perpetrate
21 hundreds, if not thousands of violations of Federal
22 immigration law. That sort of concerted, ongoing
23 racketeering activity alleged in the complaint is
24 encompassed by the text of 18 U.S.C. 1962(c) and it
25 directly implicates section 1962(c)'s core purpose.

1 The judgment of the court of appeals should be
2 affirmed.

3 Now, with respect to the textual question,
4 our argument is not that the collaborative venture
5 alleged in this complaint falls within the terms of
6 section 1961(4). Our argument is that it falls within
7 the usual background understanding of the term
8 enterprise and that it's not excluded from the statute
9 by operation of 1961(4).

10 To take the first point first, if Congress
11 had not defined the term enterprise at all, but had
12 used the term enterprise in section 1962(c), this --
13 the courts construing the provision would have had to
14 determine whether the term enterprise was naturally
15 encompassed -- was naturally construed to encompass not
16 simply discrete legal entities but collaborations between
17 discrete actors. And I think it's pretty clear that
18 the term would have been construed to include such
19 ventures.

20 That is, the -- RICO was enacted against the
21 backdrop of the Travel Act which prevented the use of
22 business enterprises to perpetrate particular crimes
23 and it was well established that a business enterprise
24 meant not simply a corporation or similar discrete
25 legal entity --

1 JUSTICE ALITO: Why shouldn't includes here
2 be read to mean means when that seems to be the way
3 it's used in other subsections of this provision and
4 when the only thing that seems to be -- if this is not
5 an exhaustive list, the only thing that seems possibly
6 to be omitted from the list is what's involved here,
7 which is a group consisting of a corporation or other
8 legal -- other legal entity and -- and natural persons.

9 MR. STEWART: I think there are several
10 reasons.

11 First, this Court's decisions make clear that
12 while includes may be construed as exclusive, if it
13 appears alone, when Congress employs the means/includes
14 structures -- structure and introduces some definitions
15 with the word means and others with the word includes,
16 that choice of verb should be taken as advertent, and
17 the Court shouldn't likely conclude that Congress
18 simply used the terms as interchangeable.

19 Second --

20 JUSTICE SCALIA: Do -- do any of those cases
21 that you allude to that have means in some sections,
22 includes in others -- do any of them have in third
23 sections, includes, comma, without limitation, comma?

24 MR. STEWART: No, but the -- the includes --

25 JUSTICE SCALIA: Well, I think that's a big

1 difference.

2 MR. STEWART: I think it would be a big
3 difference if the phrase, including but not limited to,
4 appeared in another provision of 1961, but that's not
5 where the phrase appears. The phrase appears in, I
6 believe it's, 1964(c) which deals with the -- the civil
7 remedies provision, and where --

8 JUSTICE SCALIA: Close enough.

9 MR. STEWART: -- where the word includes
10 stood alone within that section, it was natural for
11 Congress to use what we call a -- a belt and suspenders
12 approach, making it clear that the word includes
13 shouldn't be taken as exclusive.

14 The second point I'd make is that the last of
15 -- I believe it's the last provision of 1961(4) is the
16 definition of pattern of racketeering activity. And
17 that definition is introduced by the word requires.
18 The term pattern of racketeering activity requires at
19 least two racketeering acts committed not more than 10
20 years apart. And this Court in Sedima and then in H.J.,
21 Incorporated has attached significance to that choice
22 of verbs and has explained that Congress' use of the
23 word requires, rather than the verb means, implies that
24 two are necessary but not necessarily sufficient. So
25 when we're construing a provision in which the Court

1 has already recognized that, at least in some
2 instances, Congress' use of varying verbs to introduce
3 the different subsections will be taken as significant
4 --

5 JUSTICE BREYER: Yes, but if we're trying to
6 think of what they were getting at, it's possible that
7 Congress was worried about organized crime taking over
8 the pizza parlor or taking over a trades union or
9 taking over a similar kind of enterprise. So that's
10 what they're thinking about.

11 Now, if we're thinking about that, they put
12 in the word groups of individuals because they
13 understand that organized crime could take over a group
14 of individuals. Now, once you do that, you RICO-ize
15 vast amounts of conspiracy law.

16 MR. STEWART: Well, I don't think --

17 JUSTICE BREYER: But -- but they had no
18 reason whatsoever for doing the same thing for what we
19 have are associations of trade unions with each other
20 or associations of -- of corporations with each other.

21 And to do that, adding that in when it doesn't say
22 that, would RICO-ize, with its treble damages and
23 private plaintiffs and everything, vast amounts of
24 ordinary commercial activity, not ordinary only in
25 that, but importantly, a certain amount of criminal

1 activity like passing bad checks or fraudulent behavior
2 is involved. But Congress wouldn't have wanted to --
3 that has not to do with organized crime. That does not
4 have to do with taking over legitimate enterprises.

5 So read this, I think he's saying, to mean
6 what it says most naturally. They're worried about
7 groups of individuals. They're not worried about
8 groups of corporations or groups of trade unions
9 interacting with each other.

10 And I'm trying to put the argument the other
11 way, and I wanted see what you respond.

12 MR. STEWART: I mean, in terms of speculation
13 about Congress's motive, I think you're very likely
14 right that the reason Congress added a specific
15 reference to groups of individuals was that they were
16 thinking in terms of mob families or syndicates,
17 criminal gangs that had no discrete status as a legal
18 entity. They're not incorporated, but they function as
19 unit. And they had those in mind, and they intended --
20 they wanted to make sure those were covered even though
21 they were not discrete legal entities.

22 And I think you're likely right that the
23 reason they didn't specifically include groups of
24 corporations is that they didn't have them in mind as
25 likely sources of trouble at the time. But that

1 doesn't answer the question whether they intended to
2 exclude the coverage of those alliances if they would
3 otherwise be encompassed by the normal meaning of the
4 term enterprise. And if it came to cause the --

5 JUSTICE BREYER: You're -- you're willing to
6 go this far with them. You say take those words,
7 groups of individuals, and throw them away. And you're
8 saying after we throw them away, they're still covered,
9 and the reason that they're still covered is even
10 though the word enterprise includes any individual,
11 partnership, corporation, the word enterprise also
12 includes groups of legal entities, groups of trades
13 unions, groups of associations, even without that word
14 group of individuals.

15 MR. STEWART: Exactly. If -- if the term
16 enterprise appeared in 1962(c) but were an undefined
17 term --

18 JUSTICE BREYER: All right. Now, is there
19 any indication in the legislative history or anywhere
20 else in the statute that this meaning of the word
21 enterprise is what is intended, that is, that this
22 meaning of the word enterprise went beyond what it says
23 here, excluding group of individuals?

24 MR. STEWART: There -- there is in the
25 legislative history. That is, the legislative history

1 describes the coverage of the term enterprise as
2 encompassing any associative group.

3 Now, we don't contend from that stray
4 reference that Congress specifically had in mind
5 alliances between corporations and specifically
6 intended to include them. What we do contend is that
7 that legislative history is inconsistent with the
8 hypothesis that Congress anticipated the problem of
9 alliances of corporations and carefully --

10 JUSTICE SCALIA: Mr. Stewart, this -- this
11 thing is at least -- at least -- ambiguous. Why
12 shouldn't we apply the rule that we normally apply with
13 regard to criminal statutes that where there is an
14 ambiguity, the rule of lenity applies and we shouldn't
15 give the -- the Government license to -- to ride closer
16 herd than -- than is clear in the statute? Why isn't
17 -- why isn't that an easy way to --

18 MR. STEWART: First, I --

19 JUSTICE SCALIA: -- resolve this question?

20 MR. STEWART: -- I don't think that at the
21 end of the day, after all the tools of statutory
22 construction are applied, there is a genuine and
23 certainly not a grievous ambiguity. That is, there --
24 there are two potential sources of ambiguity. One
25 could simply be there's uncertainty about whether the

1 word enterprise, taken alone, would typically be
2 construed -- nobody is contending --

3 JUSTICE SCALIA: That's irrelevant because
4 it's not taken alone. It is defined. So the only --
5 the only question is what this -- what this definition
6 means. Is it exclusive or not exclusive? That's
7 really the only issue.

8 MR. STEWART: The -- the only question is
9 whether this list should be taken to exclude things
10 that are not on the list even though they would
11 otherwise be encompassed by the normal meaning of the
12 word enterprise. And this Court in many decisions has
13 given Congress a template. It said if you use the
14 means/includes dichotomy, we will take that choice to
15 be advertent and we will assume that when you use means
16 that's intended to be exclusive; when you use includes,
17 that's intended to be not exclusive.

18 JUSTICE SCALIA: Even -- even when it's
19 absolutely clear and -- and as pointed out by -- by
20 your friend, you -- you did not refute the point that
21 in other sections where it says includes, it is
22 unquestionable that it is exclusive.

23 MR. STEWART: That -- that was part of
24 Justice Alito's question, and I think there are two
25 different senses in which a statutory list could be

1 considered exclusive or comprehensive. That is, one
2 would be legal exclusivity. For instance, the
3 definition of racketeering activity says racketeering
4 activity means acts indictable under the following
5 statutes. That definition is legally exclusive in the
6 sense that if -- if Congress enacted a new statute and
7 it prohibited conduct that was classic mob activity,
8 but it wasn't on the list of RICO predicates, we would
9 say that's out, it's not racketeering within the
10 meaning of the statute even though it would be
11 racketeering activity within a common understanding.

12 I think with the definition of Attorney
13 General, what we have is a different sort of
14 comprehensiveness. That is, it may well be that the
15 definition of Attorney General is comprehensive in the
16 sense of actually listing all the people who could
17 otherwise plausibly be regarded as standing in the
18 shoes of the Attorney General. It may be that
19 Congress, when it promulgated the list, got everything
20 that would have been covered anyway. It's not legally
21 comprehensive or legally exclusive in the sense of
22 directing courts that even an official who would
23 otherwise be regarded as an appropriate surrogate for
24 the Attorney General is not to be so regarded if he's
25 off -- off the list.

1 JUSTICE ALITO: Well, a State attorney -- a
2 State attorney general wouldn't fall within subsection
3 10. Would -- would that be the case?

4 MR. STEWART: I -- I agree with that, but I
5 don't think that in the context of a Federal statute
6 referring to the Attorney General, a State attorney
7 general would typically be encompassed within the
8 meaning of that provision even if the provision were
9 undefined, whereas I think because executive power is
10 -- is generally deemed to be delegable, subordinate
11 officials standing in the shoes of a cabinet officer
12 would usually be thought to be encompassed by the
13 reference to the cabinet officer alone.

14 The other thing we would say, of course, on
15 the -- the statutory point is that there have -- there
16 has been a unanimous pattern of court of appeals
17 decisions in this area. Congress has not acted to
18 contract the definition of enterprise, but instead has
19 added new predicate acts.

20 JUSTICE SCALIA: What's the best court of
21 appeals opinion, the most thoroughly considered? I
22 haven't read any of them. Tell me -- tell me the best
23 one. I'd like to read it.

24 MR. STEWART: I've looked at them and -- I
25 would agree with Mr. Phillips that the analysis doesn't

1 tend to be lengthy, but I think Feldman would be one.
2 By and large, the -- the courts adopt the -- the
3 reasoning that we've adopted here, namely that because
4 the word includes signals an intent to be nonexhaustive
5 or to admit of other things being covered even if
6 they're not on the list, then they should be covered.
7 The --

8 JUSTICE BREYER: Are there any dissents in
9 any of those cases?

10 MR. STEWART: I don't recall any dissents at
11 least on the point. I -- I don't want to represent
12 that there have never been any. I don't recall any
13 dissents at least on the -- the pure question of
14 whether an association in fact comprised in part of
15 artificial legal entities can ever be covered.

16 JUSTICE SOUTER: Do any of the court of
17 appeals opinions deal specifically with the peculiarity
18 of this definition in which, although it starts out
19 with the word includes, then follows a -- a listing, A,
20 B, C, and D, and then it repeats one, but only one, of
21 the items on the list and says groups of these items,
22 i.e., individuals, are included? That's the
23 peculiarity of the definition. Do any of the courts of
24 appeals come to grips with that?

25 MR. STEWART: I don't know of any court of

1 appeals opinion that really focus on that -- focuses on
2 that aspect of the question.

3 But -- but, again, we can accept kind of the
4 factual premises about what led Congress to draft the
5 legislation as it did, namely that it anticipated the
6 problem of groups of individuals banding together to
7 commit criminal acts and didn't anticipate the problem
8 of groups of corporations banding together for like
9 purposes.

10 But I think the whole point of having a
11 template, having an established rule that means and
12 includes, when they're used in the same statutory
13 provision will be taken as meaning different things, as
14 to give Congress a clue that if you've tried to list
15 everything but you're not sure that you've got it all,
16 here's the way that you can ensure that some new
17 arrangement that would otherwise fall within the
18 defined term is not going to be knocked out, and if you
19 want it to be knocked out, use the words means.

20 With respect to the second argument, that the
21 -- the core of Petitioner's position is that it can't
22 be held liable under RICO because it's simply
23 conducting its own business, and I think that's wrong
24 for two reasons.

25 First, there's no rule that says a

1 corporation can't simultaneously in a single act be
2 conducting its own business and the business of a
3 separate enterprise, and I think H.J., Incorporated is
4 an example of that. The allegation in that case was
5 that a utility corporation and its officers had engaged
6 in a systematic pattern of bribing the members of a
7 public utility commission to allow the corporation to
8 charge higher rates. And the suit was allowed to go
9 forward on the theory that through the pattern of
10 bribery, the utility was, in practical terms,
11 participating in the conduct of the public utility
12 commission's affairs.

13 Now, clearly in attempting to bribe the
14 utility commission members, the utility was, in a
15 sense, conducting its own business. That is, viewed at
16 a high level of generality, efforts to persuade rate-
17 setting bodies to allow a utility to charge higher
18 rates are an integral part of the utility's own
19 business. That didn't prevent it from simultaneously
20 being a means of participating in the conduct of a
21 different entity's business.

22 And second, there's more alleged in this
23 complaint, and I think some of the questions brought
24 this out. May I finish my sentence?

25 There's more alleged in the complaint than

1 simply the unlawful hiring of illegal aliens. There
2 are hiring inducement and transporting offenses that
3 would constitute separate violations that are
4 antecedent to but not part of Mohawk's business.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Phillips, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

9 MR. PHILLIPS: Thank you, Mr. Chief Justice.

10 Justice Ginsburg, let me -- let me try to
11 justify having this issue before the Court. First of
12 all, 1292(b) has never been as narrowly confined as you
13 suggest, and indeed, in this case, you know, what
14 you're entitled to do is to bring up any issues related
15 to the challenged order. And in this case we not only
16 raised the RICO issue, but we also raise State law
17 issues in the -- in the Eleventh Circuit which were not
18 within the specific grant and were entertained by the
19 Eleventh Circuit because that's the standard.

20 And then once you get past that, Justice
21 Kennedy is absolutely right. The issue is whether
22 there's an order to be reviewed. There is no final
23 judgment rule on claims coming out of the Federal
24 courts of appeals, and therefore, it's -- it's
25 absolutely fair game. And the issue is I -- I submit,

1 fairly subsumed within the question presented.

2 Justice Souter, you know, with respect to the
3 ID cards, I think it's very important to recognize that
4 for us to do our business, we have to have an ID card
5 in order to fill out the forms necessary to satisfy the
6 immigration laws. So that -- you know, those ID cards
7 add nothing to the -- to the conduct of our business.

8 And, you know, Mr. Stewart just suggested
9 that, well, but you know, we do go beyond that and that
10 H.J. allows some a -- a different analysis of this
11 particular point. But H.J. preceded *Reves*. This Court
12 held in *Reves* that you have to distinguish between the
13 activities of the enterprise and the activities of the
14 defendant and -- and they've never made any effort to
15 do that. All they do is suggest we've engaged in
16 wrongdoing, that our third party recruiters engaged in
17 wrongdoing, and that we're a conspiracy. There's
18 nothing in there that remotely suggests that there is
19 an existing enterprise.

20 With respect to the question of how to
21 interpret this particular statute, Justice Scalia is
22 absolutely correct that at the end of the day, this is
23 at most an ambiguous provision, and if it's an
24 ambiguous provision, we ought to be entitled to the
25 rule of lenity. I didn't hear any adequate answer to

1 Justice Kennedy's specific question about why do they
2 use person in the subsection just ahead of it, if they
3 really meant to embrace everything here.

4 And it's no answer to say, well, enterprise
5 is a term that could be -- that has a general
6 background. Enterprise is the linchpin of this
7 statute. The notion that Congress didn't mean to very
8 specifically and explicitly define enterprise here is
9 absurd. Of course, it defined it, and it provided a
10 very specific and detailed definition. And it's not
11 free for the Government or for anyone else then to come
12 here and shunt aside that definition and say, well,
13 we're just going to deal with background principles.

14 The truth is they're trying to write out of
15 it groups of individuals acting in association. That
16 language is there. It was put there for a reason. The
17 Government concedes that it didn't -- that it never --
18 that Congress never had this issue in mind. How it can
19 be then that this is not at least sufficiently
20 ambiguous that you should construe it in our favor
21 strikes me as -- as very difficult to understand.

22 And finally, I don't -- I've never heard the
23 expression RICO-ize before, Justice Breyer, but I -- I
24 embrace it wholeheartedly because that is precisely
25 what we're talking about here. These are enormous

1 penalties that are imposed, and it's a statute that
2 this Court has recognized in the past, even on its own
3 terms, is very broad. Certainly there is no reason to
4 take those terms and RICO-ize the -- the breadth of
5 corporate activity that the plaintiffs' complaint in
6 this case would -- would allow. The Court should
7 reverse the decision below and dismiss this complaint,
8 just as the Seventh Circuit did.

9 If there are no further questions, thank you,
10 Your Honors.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Phillips.

13 The case is submitted.

14 (Whereupon, at 12:10 p.m., the case in the
15 above-entitled matter was submitted.)

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