14-0826-cv(L),

14-0832-cv(CON)

United States Court of Appeals
for the
Second Circuit

CHEVRON CORPORATION,

Plaintiff-Appellee,

– v. –

STEVEN DONZIGER, THE LAW OFFICES OF STEVEN R. DONZIGER, HUGO GERARDO CAMACHO NARANJO, JAVIER PIAGUAJE PAYAGUAJE, DONZIGER & ASSOCIATES, PLLC,

Defendants-Appellants,

(Caption Continues on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* PROFESSOR G. ROBERT BLAKEY IN SUPPORT OF PLAINTIFF-APPELLEE

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STRATUS CONSULTING, INC., DOUGLAS BELTMAN, ANN MAEST,

Defendants-Counter-Claimants,

PABLO FAJARDO MENDOZA, LUIS YANZA, FRENTE DE DEFENSA DE LA AMAZONIA, AKA AMAZON DEFENSE FRONT, SELVA VIVA SELVIVA CIA, LTDA, MARIA AGUINDA SALAZAR, CARLOS GREFA HUATATOCA, CATALINA ANTONIA AGUINDA SALAZAR, LIDIA ALEXANDRA AGUIN AGUINDA, PATRICIO ALBERTO CHIMBO YUMBO, CLIDE RAMIRO AGUINDA AGUINDA, LUIS ARMANDO CHIMBO YUMBO, BEATRIZ MERCEDES GREFA TANGUILA, LUCIO ENRIQUE GREFA TANGUILA, PATRICIO WILSON AGUINDA AGUINDA, CELIA IRENE VIVEROS CUSANGUA, FRANCISCO MATIAS ALVARADO YUMBO, FRANCISCO ALVARADO YUMBO, OLGA GLORIA GREFA CERDA, LORENZO JOSE ALVARADO YUMBO, NARCISA AIDA TANGUILA NARVAEZ, BERTHA ANTONIA YUMBO TANGUILA, GLORIA LUCRECIA TANGUI GREFA, FRANCISO VICTOR TRANGUIL GREFA, ROSA TERESA CHIMBO TANGUILA, JOSE GABRIEL REVELO LLORE, MARIA CLELIA REASCOS REVELO, MARIA MAGDALENA RODRI BARCENES, JOSE MIGUEL IPIALES CHICAIZA, HELEODORO PATARON GUARACA, LUISA DELIA TANGUILA NARVAEZ, LOURDES BEATRIZ CHIMBO TANGUIL, MARIA HORTENCIA VIVER CUSANGUA, SEGUNDO ANGEL AMANTA MILAN, OCTAVIO ISMAEL CORDOVA HUANCA, ELIA ROBERTO PIYAHUA PAYAHUAJE, DANIEL CARLOS LUSITAND YAIGUAJE, BENANCIO FREDY CHIMBO GREFA, GUILLERMO VICENTE PAYAGUA LUSITANTE, DELFIN LEONIDAS PAYAGU PAYAGUAJE, ALFREDO DONALDO PAYAGUA PAYAGUAJE, MIGUEL MARIO PAYAGUAJE PAYAGUAJE, TEODORO GONZALO PIAGUAJ PAYAGUAJE, FERMIN PIAGUAJE PAYAGUAJE, REINALDO LUSITANDE YAIGUAJE, LUIS AGUSTIN PAYAGUA PIAGUAJE, EMILIO MARTIN LUSITAND YAIGUAJE, SIMON LUSITANDE YAIGUAJE, ARMANDO WILFRIDO PIAGUA PAYAGUAJE, ANGEL JUSTINO PIAGUAG LUCITANT, KEMPERI BAIHUA HUANI, AHUA BAIHUA CAIGA, PENTIBO BAIHUA MIIPO, DABOTA TEGA HUANI, AHUAME HUANI BAIHUA, APARA QUEMPERI YATE, BAI BAIHUA MIIPO, BEBANCA TEGA HUANI, COMITA HUANI YATE, COPE TEGA HUANI, EHUENGUINTO TEGA, GAWARE TEGA HUANI, MARTIN BAIHUA MIIPO, MENCAY BAIHUA TEGA, MENEMO HUANI BAIHUA, MIIPO YATEHUE KEMPERI, MINIHUA HUANI YATE, NAMA BAIHUA HUANI, NAMO HUANI YATE, OMARI APICA HUANI, OMENE BAIHUA HUANI, YEHUA TEGA HUANI, WAGUI COBA HUANI, WEICA APICA HUANI, TEPAA QUIMONTARI WAIWA, NENQUIMO VENANCIO NIHUA, COMPA GUIQUITA, CONTA NENQUIMO QUIMONTARI, DANIEL EHUENGEI, NANTOQUI NENQUIMO, OKATA QUIPA NIHUA, CAI BAIHUA QUEMPERI, OMAYIHUE BAIHUA, TAPARE AHUA YETE, TEWEYENE LUCIANA NAM TEGA, ABAMO OMENE, ONENCA ENOMENGA, PEGO ENOMENGA, WANE IMA, WINA ENOMENGA, CAHUIYA OMACA, MIMA YETI,

Defendants,

ANDREW WOODS, LAURA J. GARR, H5,

Respondents.

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TABLE OF AUTHORITIES (Continued)

Page(s)

H.J., Inc. v. Nw. Bell Tel., Co.,
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TABLE OF AUTHORITIES (Continued)

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Rodoconachi et al. v. Elliot,
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42 U.S.C. § 1981 *et seq*.....5

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Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) 7, 8

Pub. L. No. 91-452, §§ 1963–64, 84 Stat. 943–44 (1970).....3

Pub. L. No. 91-452, Title IX, 84 Stat. 922, 941 (1970).....2, 3, 8

Other Authorities

Antonin Scalia, A MATTER OF INTERPRETATION 135 (Amy Gutmann ed. 1997) 2

Carl Kaysen & Donald F. Turner, ANTI-TRUST POLICY 17 (1959) 9

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TABLE OF AUTHORITIES (Continued)

Page(s)

Ernest Weekley, CRUELTY TO WORDS 43 (1931) 12

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Michael Block et al., *The Deterrent Effect of Anti-trust Enforcement*, 89 J. POL. ECON. 429, 440 (1981) 9

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is G. Robert Blakey. I am the William J. and Dorothy K. O'Neill Emeritus Professor of Law at the Notre Dame Law School, where I taught federal criminal law for over thirty years. In brief, I was also the Chief Counsel of the Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary when the Subcommittee processed the legislation that became RICO in 1969 and 1970. In addition, I have widely written on RICO and filed amicus briefs in the United States Supreme Court on RICO issues. Courts rely on my scholarship in the interpretation and application of RICO. Accordingly, I have an abiding interest in the interpretation and application of RICO. A matter is pending before this Court that raises the important issue of whether the provisions of RICO authorize this Court, under proper circumstances, to grant equitable relief at the suit of a private party. I respectfully submit this amicus brief in support of the Plaintiff-Appellee's contention that RICO, in fact, authorizes a court to issue equitable relief at the suit of a private party.[1]

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[1] No party's counsel or anyone else authored this brief in whole or in part. No party's counsel or anyone else contributed money or is expected to contribute money to fund preparing this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties to this appeal have been requested to consent to my filing this brief, and counsel for Plaintiff-Appellee and all Defendants-Appellants consent.

Because context is an essential part of meaning,[2] this brief reviews the enactment, purpose, scope, and relevant interpretations of RICO. It urges on this Court a properly liberal construction of RICO that inevitably leads to finding that Congress granted private parties the right to obtain full equitable relief.

ARGUMENT

I. ENACTMENT OF THE ORGANIZED CRIME CONTROL ACT

In 1970, Congress enacted the Organized Crime Control Act; Title IX is the Racketeer Influenced and Corrupt Organizations Act ("RICO").[3] Congress drafted Title IX to deal with "enterprise criminality,"[4] that is, "patterns" of:

> (1) violence (e.g., murder, robbery, etc.);
>
> (2) the provision of illegal goods and services (e.g., drugs, gambling, prostitution, etc., including undocumented aliens);
>
> (3) corruption in labor or management relations (e.g., bribery, extortion, embezzlement, etc.);

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[2] *See* Antonin Scalia, A MATTER OF INTERPRETATION 135 (Amy Gutmann ed. 1997) ("The principle determinant of meaning is context . . . .").

[3] Pub. L. No. 91-452, Title IX, 84 Stat. 922, 941 (1970), codified at 18 U.S.C. §§ 1961–1968 (2012) (hereinafter RICO or Section ---).

[4] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) ("[E]nterprise criminality" consists of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors.") (citations omitted).

(4) corruption in government (e.g., bribery, extortion, fraud against the government, etc.); and

(5) commercial and other forms of fraud (e.g., schemes to defraud, bankruptcy fraud, securities fraud, etc.) by, through, or against various types of licit or illicit enterprises.[5]

Because Congress found that the "sanctions and remedies" previously available to control these offenses were "unnecessarily limited in scope and impact," it enacted RICO to "provide enhanced [criminal and civil] sanctions and new remedies," including fines, imprisonment, forfeiture, injunctions, and treble damage relief for persons injured in their business or property because of a violation of the statute.[6]

II. THE ORGANIZED CRIME MYTH

The legislative history of RICO "clearly demonstrates" that Congress "intended [RICO] to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[7] The major purpose of RICO was to address the "infiltration of legitimate business by organized crime," but the

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[5] *See* G. Robert Blakey, *The Civil RICO Fraud Action in Context*, 58 NOTRE DAME L. REV. 237, 300–06 (1982) (categorization of diverse predicate acts).

[6] Pub. L. No. 91-452, Title IX, Statement of Findings and Purpose, 84 Stat. 922–23 (1970); Pub. L. No. 91-452, §§ 1963–64, 84 Stat. 943–44 (1970).

[7] *Russello v. United States*, 464 U.S. 16, 26 (1983).

statute was designed to reach both "legitimate and illegitimate enterprises."[8] Similar to the anti-trust statutes on which Congress modeled it, Congress used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions."[9] "[C]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to common law."[10] Significantly, Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."[11] "'The occasion for Congress's action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.'"[12] As the Court observed, the contention that RICO is limited to

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8 *United States v. Turkette*, 452 U.S. 576, 584, 591 (1981).

9 *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933), *overruled in part on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (corporate subsidiary and parent are "single enterprise").

10 *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 150 (1987).

11 *H.J., Inc. v. Nw. Bell Tel., Co.*, 492 U.S. 229, 248–49 (1989).

12 *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 269 (1994) (quoting *H.J., Inc.*, 492 U.S. at 248); *accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (finding the statute covers not just "mobsters and organized criminals"; "[legitimate enterprises] enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.").

"organized crime . . . finds no support in the Act's text, and is at odds with the tenor of its legislative history."[13] RICO is similar to other legislation Congress has enacted as general reform—aimed at a specific target, but not limited to that specific target.[14]

III. CRIMINAL AND CIVIL PROCEEDINGS

RICO's two-track system of criminal and civil litigation, which Congress designed to achieve its remedial purposes, fits well into the federal system of justice. RICO's criminal and civil provisions are:

(1) Section 1961 of Title 18 sets out RICO's building-block "definitions." They apply in all actions under RICO.

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[13] *H.J. Inc.*, 492 U.S. at 244.

[14] RICO fits well into the traditional pattern of federal legislation aimed at a particular problem, but drafted in all-purpose language. The Ku Klux Klan Act of 1871 is illustrative. *See* 18 U.S.C. §§ 241–42 (criminal sanctions); 42 U.S.C. § 1981 *et seq*. (civil sanctions). The aim of the 1871 Act was the night-riding of the Klan, but courts impose its criminal and civil sanctions on "any person" who deprives another of his civil rights; its sponsors aimed the Act at the Klan, but it applies today to police officers anywhere. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("[The KKK Act is] cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates."), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *Koon v. United States*, 518 U. S. 81, 85–88 (1996) (reviewing the prosecution of the Los Angeles police officers under §242 for the beating of Rodney King). Subsequently, King obtained $3.8 million dollar in a private settlement of his civil rights claim under Section 1983 of the Civil Rights Act of 1871. *See* Charlie LeDuff, *12 Years After the Riots, Rodney King Gets Along*, NEW YORK TIMES, Sept. 19, 2004, p. 18; *see also* Jennifer Medina, *Rodney King Dies at 47*, NEW YORK TIMES, June 17, 2012 (reporting that King had accidentally drowned in his swimming pool).

(2) Section 1962 of Title 18 sets out RICO's standards of "unlawful" (not "criminal") "conduct." They apply in all actions under RICO.

(3) Section 1963 of Title 18 sets out RICO's criminal sanctions for a violation of Section 1962.

(4) RICO's criminal sanctions under Section 1963 require:

- A criminal trial,
- instituted by the government,
- through a grand jury indictment; and
- the testing of the government's proof by the standard of "beyond a reasonable doubt."

(5) Section 1964 of Title 18 sets out RICO's civil sanctions for a violation of Section 1962. The scope of this provision is the issue in these proceedings. RICO's civil remedies under Section 1964 require:

- A civil trial,
- instituted
- either by the government or a private plaintiff; and
- the testing of either the government's or a private party's proof by the standard of "preponderance" of the evidence.[15]

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[15] *See*, *e.g.*, *Sedima*, 473 U.S. at 488–89, 491 (Sections 1963 and 1964 use "violation" in the same sense; "[w]e should not lightly infer that Congress

IV. LIBERAL CONSTRUCTION

Congress directed that courts "liberally" construe RICO to achieve its "remedial" purposes.[16] If RICO's language is plain, it controls.[17] If its language, syntax, or context is ambiguous, Congress mandated the construction that would realize its remedial purposes of providing "enhanced sanctions and new

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intended the term to have wholly different meanings in neighboring subsections."); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974) (applying preponderance of the evidence standard in government suit); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302–03 (7th Cir. 1987) (applying preponderance of the evidence standard in private suit).

[16] Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) ("The provisions of [RICO] shall be liberally construed to effectuate its remedial purposes"). Elsewhere, I have dispelled confusion over the classification of treble damages as necessarily either "actual" or "punitive" damages. *See* G. Robert Blakey, *Of Characterization and Other Matters: Thought About Multiple Damages*, 60 LAW & CONTEMP. PROBS. 97 (1997). They are neither. They are, as a matter or history, "accumulative" damages whose purpose is remedial, not punitive. *See, e.g.*, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406 (2003) ("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature. In [*Agency Holding Corp.*, 483 U.S. at 151], we stated that 'both RICO and the Clayton Act are designed *to remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees,' (emphasis added). And in *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 241 (1987) we took note of the 'remedial function' of RICO's treble-damages provision.").

[17] *See Scheidler*, 510 U.S. at 261–62; *Turkette*, 452 U.S. at 587 n.10; *Russello*, 464 U.S. at 29; *Shearson/Am. Express*, 482 U.S. at 238–39; *United States v. Monsanto*, 491 U.S. 600, 606 (1989); *H.J. Inc.*, 492 U.S. at 249.

remedies."[18] Courts ought read its language in the same fashion, whatever the character of the suit.[19]

V. CIVIL ENFORCEMENT

The civil enforcement mechanism of RICO provides sanctions of injunctions, treble damages, costs, and attorney's fees. The government and private parties may bring civil suits. "[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice" to enforce the law.[20] As in RICO's model in the anti-trust laws,[21] RICO creates "a private enforcement mechanism that [1] deter[s] violators, [2] deprive[s] them of

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[18] *Turkette*, 452 U.S. at 588–89, 593; *see also Russello*, 464 U.S. at 27; *Sedima*, 473 U.S. at 497–98; *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990). Congress stated RICO's remedial purposes in its Statement of Findings and Purpose. Pub. L. No. 91-452, § 904(a), 84 Stat. 922–23 (1970) (Explaining that "the . . . remedies available . . . are unnecessarily limited in scope and impact" and that "the purpose of this Act [is] to . . . provide [] enhanced sanctions and new remedies . . . .").

[19] *Sedima*, 473 U.S. at 498; *H.J. Inc.*, 492 U.S. at 236 (pattern requirement "appl[ies] to criminal as well as civil applications of the Act"). The principle is variable, however, depending on context. *See, e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997) (different considerations apply to civil and criminal statutes of limitations); *Beck v. Prupis*, 529 U.S. 494, 501 n.6 (2000) (criminal conspiracy not identical in common law background to civil conspiracy).

[20] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

[21] *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 267 (1992) ("We have repeatedly observed . . . that Congress modeled § 1964(c) on the civil-action provision of the federal anti-trust laws, § 4 of the Clayton Act . . . .") (citing *Agency Holding Corp.*, 483 U.S. at 150–151; *Shearson/American Express*, 482 U.S. at 241; *Sedima*, 473 U.S. at 489).

the fruits of their illegal actions, and [3] provides ample compensation to the victims . . . ."[22] In fact, Congress in 1970 achieved a remarkable integration between the anti-trust statutes and RICO in protecting the free market place. The anti-trust statutes protect against collusion in the market. RICO protects against violence and fraud in the market. Together, they seek a market characterized by integrity and freedom.[23]

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[22] *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (anti-trust); *see also Agency Holding Corp.*, 483 U.S. at 151 (RICO "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate."); *Shearson/Am. Express*, 482 U.S. at 241 ("RICO's drafters sought to provide vigorous incentives for plaintiffs to pursue RICO claims"); *Sedima*, 473 U.S. at 493 ("private attorney general provision [is] in part designed to fill prosecutorial gaps") (citing *Reiter*, 442 U.S. at 344). The classic, and in my opinion still unsurpassed, article is Michael Block et al., *The Deterrent Effect of Anti-trust Enforcement*, 89 J. POL. ECON. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose[] a credible threat . . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . .").

[23] "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." Carl Kaysen & Donald F. Turner, ANTI-TRUST POLICY 17 (1959). *Accord Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exerted through force or fraud or agreement.").

VI. THE SCOPE OF RELIEF GRANTED BY SECTION 1964 TO PRIVATE PARTIES INCLUDES EQUITABLE RELIEF

The issue squarely before this Court is whether private parties may obtain equitable relief under § 1964.[24] This *amicus* agrees with the Seventh Circuit's opinion in *Scheidler* that private parties have the power to obtain the full range of equable remedies. It also follows the conclusions and reasoning I have set out in a previous article, to which I respectfully refer the Court.[25]

Here, as elsewhere in statutory construction, reading the statute is the beginning of wisdom, because the "language of the statute [is] the most reliable evidence of its intent . . . ."[26]

The relevant text of Section 1964 reads:

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[24] The courts of appeal are in conflict on the availability of private equitable relief under RICO. *Compare Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986) (no private equitable relief), *with Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) (private equitable relief authorized), *rev'd on other grounds by* 537 U.S. 393 (2002).

[25] G. Robert Blakey & Scott Cessar, *Equitable Relief Under Civil RICO*, 62 NOTRE DAME L. REV. 526 (1987) (rejecting the reasoning and holding of *Religious Technology Center* on textual, legislative history, and policy grounds).

[26] *Turkette*, 452 U.S. at 593 (RICO); *see also* Henry Friendly, BENCHMARKS 202 (1967) ("(1) read the statute, (2) read the statute, and (3) read the statute!") (quoting Justice Frankfurter)).

> Civil remedies.
>
> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders . . . .
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

Analysis of any statute must, of course, begin with its language.[27] A court must interpret language according to its ordinary meaning. [28] Under the liberal construction directive, the words, particularly in RICO's civil sections, require liberal construction.[29] But common law words are read in light of their common law meaning.[30]

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[27] *Turkette*, 452 U.S. at 580 ("[L]ook first to [the statute's] language. If the statutory language is unambiguous, . . . that language must ordinarily be regarded as conclusive.").

[28] *Russello*, 464 U.S. at 20 ("Legislative purpose is expressed by the ordinary meaning of the words.") (citation omitted).

[29] *Sedima*, 473 U.S. at 491 n.10 ("Indeed, if Congress' liberal construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident."); *see also id.* at 497–98 ("RICO is to be read broadly. This is the lesson of . . . Congress' self consciously expansive language and over all approach . . . . The statute's 'remedial purposes' are

Section 1964(a) gives federal courts the power "to prevent and restrain violations of" RICO. The phrase "prevent and restrain" is a common law couplet. Anglo-Saxon peasants could not speak French. Thus, after the Norman Conquest, the common law courts often used a couplet, consisting of a French and an Anglo-Saxon word, to express a single legal idea.[31] The couplet in Section 1964(a) carries with it a general grant of the power to issue court orders, including for equitable relief.[32]

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nowhere more evident that in the provision of a private action for those injured by racketeering activity.").

[30] *Beck*, 529 U.S. at 500–01 ("To interpret RICO's civil conspiracy subsection, we turn to the well-established common law.").

[31] *See* Ernest Weekley, CRUELTY TO WORDS 43 (1931).

[32] *See, e.g.*, *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 218 (1945) (interpreting the Sherman Act's conferral of jurisdiction "to prevent and restrain violations of [that] Act" to give court "power ... traditionally exercised by courts of equity"); *see also* Joseph Story, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 865–66 at 575 (1st English ed. 1884) (Under Roman law, which English equity powers reflected, courts possessed prohibitory, restitutionary, and exhibitory powers.). Even today, legal materials in the United Kingdom use the words "prevent" and "restrain" synonymously. *See, e.g.*, *Bici & Another v. Ministry of Defense* [2004] EWHC 786 (QB) ¶ 101 (used to mean "stop" in connection with soldiers protecting themselves from possible harm); *see also* Planning (Hazardous Substances) Act of 1997 (Scotland), Ch. 10 § 25 (2) granting power to a court to "restrain[] or prevent[]" breaches of controls. Earlier uses include *Smurthwaite et al. v. Hannay et al.*, [1894] H.L. at 503 (Kay, L. J.) (plenary power of court "to prevent and restrain" abuse of it processes); *Rodoconachi et al. v. Elliot*, [1874-1880] All E. R. 618 (Bramwell, J.) (embargo to "prevent and restrain" commerce.).

Section 1964(b) authorizes the government to sue under Section 1964; it sets aside the common law rule that equity could not enjoin a crime.[33] Without this provision, the propriety of government civil suits to enjoin violations of RICO would be problematic.

The government focuses its civil suits principally against unions with a history of significant organized crime influence.[34] Nevertheless, industries with a history of similar influence are also the target of government civil suits.[35]

Under § 1964(a), the disgorgement of illicit profits is a significant civil remedy.[36] The disgorgement of illicit profits is a general civil remedy; it is not unique to RICO.[37] In addition, the general availability of the remedy of disgorgement is not limited to government suits.[38]

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[33] *Gee v. Pritchard*, [1818] 36 Eng. Rep. 670, 674.

[34] *See, e.g., United States v. Local 1804-1 Int'l. Longshoremen's Ass'n., AFL-CIO*, 44 F.3d 1091 (2d Cir. 1995).

[35] *See, e.g., United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082 (2d Cir.1995).

[36] *See, e.g., Private Sanitation Ass'n of Nassau/Suffolk*, 44 F.3d at 1084.

[37] *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 398–99 (1946) (Disgorgement is a proper remedy, even though not mentioned in rent control statute, because "[u]nless a statute . . . restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."); *see generally SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474–77 (2d Cir. 1996) (stating that the measure of disgorgement is "reasonable approximation of profits," with a credit given for prior settlements to victims, and its purpose

As noted above, the courts of appeal are in conflict on the availability of private equitable relief under RICO. *Scheidler* is correctly decided; I cannot add to its reasoning.[39] Judge Wood is an artisan of unique skill at her craft. She makes the compelling point that equity relief is available to private parties with more and better skill than I did in my 1987 essay, though both find that private equity relief, under proper circumstances, is available to private parties. *Accord In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1282–83 (S.D. Fla. 2003) (following *Scheidler*). She covers each of the essential points in her opinion, including the 30-year-old,

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is "to deprive violators of their ill-gotten gains . . . [and to] deter[]"); *Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir. 1986) (purpose of disgorgement is to "depriv[e] the wrongdoer of his ill-gotten gains and deter[]").

[38] *See, e.g.*, *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965) (securities statute) (disgorgement measured by loss to victim or gain to wrongdoer because "it is simple equity that a wrongdoer should disgorge his fraudulent enrichment"); *see generally United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 366 (1961) (anti-trust) (Divestment "deprives [violators] of the benefits of their conspiracy."); *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128–29 (1948) (anti-trust) (Divestment, "[l]ike restitution[,] . . . merely deprives a defendant of the gains from his wrongful conduct."), *overruled on other grounds by Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752 (1984); *accord* Einer Elhauge, *Disgorgement as an Anti-trust Remedy*, 76 ANTITRUST L. J. 79, 79–81 & n.6 (2009) (finding disgorgement authorized under anti-trust law, albeit inexplicably underused) (citing, along with controlling Supreme Court decisions, the leading anti-trust treatise, 2 A Areeda & Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTI-TRUST PRINCIPLES AND THEIR APPLICATION (3D ED. 2006)).

[39] *Scheidler*, 267 F.3d at 695–700; *see also* Blakey & Cessar, 62 NOTRE DAME L. REV. 526 (rejecting reasoning and holding of *Religious Technology Center* on textual, legislative history, and policy grounds).

and unfortunately incorrect, dicta of this Court in *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28–29 (2d Cir. 1983).[40] At this point, I can only draw the Court's attention to the relevant pages in her opinion, noted above. I cannot add to what she said for the Seventh Circuit.[41]

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[40] On *United States v, Carson*, 52 F.3d 1173 (2d Cir. 1995) and *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), *see* G. Robert Blakey & Michael Geradi, *Eliminating the Overlap or Creating a Gap?*, 28 NOTRE DAME J. of L., ETHICS & PUB. POLICY 435, 448–49 n.31 (2014).

[41] One additional comment: Courts sometimes seek to limit RICO out of a fear of civil RICO litigation proliferating, and with it the threat of treble damages. That motive is illicit. *Reiter*, 442 U.S. at 344–45 (refusing to narrow the private anti-trust remedy because courts "must take the statute as we find it."). If civil RICO litigation is growing too large, the "correction must lie with Congress." *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 660 (2009) (quotation omitted) (reviewing the Court's repeated rejection of efforts to limit RICO despite the statutory language). Congress knows how to limit civil RICO when it is of a mind to do it. *See, e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, §107 (1995) (amending §1964 (c) to exclude civil securities actions). The threat of unfounded civil RICO filings seeking treble damage relief is adequately deterred by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (limitation on mere notice pleading without plausible factual support).

CONCLUSION

In conclusion, *Amicus* urges this Court to affirm the judgment of the court below that equity relief is authorized at the behest of a private person suing under RICO.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 4,587 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2013.

Dated: October 8, 2014 /s/ G. Robert Blakey