No. 87-1252

In the Supreme Court of the United States

OCTOBER TERM, 1988

H.J. INC., ET AL., PETITIONERS

v.

NORTHWESTERN BELL TELEPHONE COMPANY, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3058

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
MARK I. LEVY
DENNIS G. FRIEDMAN
Mayer, Brown & Platt
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for the National Association of Manufacturers

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BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States ("NAM") is a voluntary business association of more than 13,000 companies. NAM's member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods.

NAM's members have been named as defendants in a number of private civil suits under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Civil RICO suits against legitimate business entities constitute a principal abuse of the statute, as this Court recognized in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985). The "pattern" element is fundamental to the statutory scheme and, as noted in *Sedima*, is of central importance in correcting abuses of RICO by limiting the civil cause

of action to cases of true racketeering as Congress intended. NAM submits this brief as *amicus curiae* to address the definition of "pattern" and to apprise the Court of the serious abuses of civil RICO that the business community has faced because of the overbroad reading of the pattern element by many lower courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the definition of the term "pattern" in Section 1961(5) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* In *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), this Court recognized that the Act does not define "pattern."

Since RICO does not provide a definition, it is the proper role of the judiciary to give meaning to the term "pattern" by construing it in accordance with the language, history, and purposes of the statute. Indeed, *Sedima* charged "the courts to develop a meaningful concept of 'pattern' " in order to correct "[t]he 'extraordinary' uses to which civil RICO has been put" (473 U.S. at 500). Therefore, unlike the situation in *Sedima*—where the Court believed that the proposed requirements of a prior conviction and racketeering injury had "no support in the statute's history, its language, or considerations of policy" (*id.* at 493)—the question presented in this case requires the Court only to engage in the customary judicial function of construing a statutory term that Congress used but did not define.

As the Court acknowledged in *Sedima*, civil RICO has "evolv[ed] into something quite different from the original conception of its enactors" (473 U.S. at 500). The misuse of civil RICO in suits brought against legitimate business entities exacts a heavy price "by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels" (*id.* at 520 (Marshall, J., dissenting)). Overbroad application of the private treble-damages provision has led to results that Congress could not have in-

tended: distortion of other federal remedies that Congress and the courts have carefully formulated; extension of federal jurisdiction to encompass routine commercial disputes that are properly the domain of state law and state courts; inundation of the federal courts with complex and protracted RICO cases; and coercive pressure on defendants, confronted with the threat of treble damages and the stigma of the label "racketeer," to settle even meritless claims. For these reasons, abuse of civil RICO presents a problem of great concern both to the bench and bar and to the general public.

Under a proper interpretation of RICO, predicate acts of racketeering, to constitute a pattern, must be typical of the way in which the defendant conducts his activities. This definition accords with the plain meaning of the word "pattern" as a regular course of conduct that is characteristic of the defendant's behavior. In addition, it is consistent with the legislative history of RICO and the congressional purpose to level this racketeering statute against professional or career criminals who are engaged in habitual criminality; it was not Congress's intent that RICO broadly encompass every person, including legitimate businesses, alleged to have committed two of the vast array of offenses enumerated in the statute. Finally, this interpretation offers a meaningful and practical solution to the misuse of civil RICO without excluding those situations that were Congress's focus in enacting the statute or interfering with the kinds of criminal prosecutions that the government in fact has brought.

Sedima correctly pointed out that the prevalent misuse of civil RICO is "primarily the result" of the absence of a meaningful definition of "pattern" (473 U.S. at 500). This case affords the Court a critical opportunity to curb widespread abuse of the statute by confining the cause of action to those defendants for whom the draconian provisions of RICO were intended: habitual or career criminals.

ARGUMENT

BECAUSE RICO IS DIRECTED AGAINST CAREER CRIMINALS, THE PATTERN ELEMENT REQUIRES THAT THE PREDICATE ACTS OF RACKETEERING BE TYPICAL AND CHARACTERISTIC OF THE WAY IN WHICH THE DEFENDANT CONDUCTS HIS ACTIVITIES

A. A Pattern Of Racketeering Activity Requires "Relationship" And "Continuity"

The concept of "pattern" is central to RICO. See *Agency Holding Corp.* v. *Malley-Duff & Assoc.*, 107 S. Ct. 2759, 2766 (1987) (emphasis in original) ("the heart of any RICO complaint is the allegation of a *pattern* of racketeering"). In *Sedima*, the Court, quoting from the legislative history of RICO, stated that it is the " 'factor of *continuity plus relationship* which combines to produce a pattern' " (473 U.S. at 496 n.14, quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (emphasis added by the Court)).

Following *Sedima*, the lower courts have reached general agreement on the meaning of "relationship." Predicate acts of racketeering activity meet this requirement if two or more of them are related to each other by means of either their common characteristics or their connection to a common scheme or objective. See, *e.g.*, *Morgan* v. *Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *Torwest DBC, Inc.* v. *Dick*, 810 F.2d 925, 928 (10th Cir. 1987). This test is in accord with the commonly understood meaning of "relatedness." See, *e.g.*, Webster's New World Dictionary 1198 (2d college ed. 1980).

The concept of "continuity" has proven to be more elusive. In our view, the various standards of "continuity" devised by the lower courts represent different attempts to grapple with the same question: when is a defendant's course of criminal conduct sufficiently ongoing and persistent to pose the special threat to society that Congress intended to combat through the severe sanctions of RICO? See, *e.g.*, *Flip Mortg. Corp.* v. *McElhone*, 841

F.2d 531, 538 (4th Cir. 1988) (" 'the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine' * * * [because they involve an] extended, widespread, or particularly dangerous pattern of racketeering").

The Eighth Circuit's "multiple schemes" standard is one salutary effort to return civil RICO to its congressionally intended scope. By requiring that the defendant must have engaged in multiple criminal schemes, the Eighth Circuit eliminates most routine commercial disputes from the reach of the statute, thereby curbing the primary abuse of civil RICO. See 116 Cong. Rec. 35193 (1970) (remarks of Rep. Poff) (emphasis added) (a pattern of racketeering activity requires "at least two *independent* offenses").

There is, however, a more refined standard that is securely grounded in the language and history of RICO and that, we believe, better serves to restrict the statute to its intended sphere. This approach recognizes that the concepts of "pattern" and "continuity" are composed of two elements: recurrence and typicality. Under this test, predicate acts of racketeering have the necessary continuity to form a pattern where (i) at least two of the acts occurred at substantially different times as part of separate criminal episodes or transactions, and (ii) the acts are typical and characteristic of the defendant's conduct.

B. The Pattern Standard Requires That The Racketeering Activity Must Have Occurred At Substantially Different Times As Part Of Separate Criminal Episodes Or Transactions

As indicated by the common meaning of "pattern" and "continuity," RICO is properly read to require that the defendant must have engaged in repeated and ongoing criminality, not merely in one criminal incident that technically constitutes two offenses. Thus, to constitute a pattern, at least two of the acts of racketeering must have occurred at substantially different times as part of separate criminal episodes or transactions.

The courts of appeals have generally recognized that a single criminal episode or objective, even though carried out through a number of illegal acts, fails the pattern requirement as a matter of law. See, *e.g.*, *Roeder* v. *Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987); *Eastern Pub. & Adv.* v. *Chesapeake Pub. & Adv.*, 831 F.2d 488 (4th Cir. 1987); *Medical Emer. Serv. Assoc.* v. *Foulke*, 844 F.2d 391 (7th Cir. 1988); *Garbade* v. *Great Divide Min. & Mill. Corp.*, 831 F.2d 212 (10th Cir. 1987). Accordingly, the racketeering acts, "[i]n order to be sufficiently continuous to constitute a pattern of racketeering activity, * * * must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions." *Morgan* v. *Bank of Waukegan*, 804 F.2d at 975.

This element of the pattern standard serves the important purpose of excluding essentially one-shot offenses, "limited in occurrence, in scope, and in purpose, that have been the traditional subjects of state tort law [and] were not intended to be swept into RICO's reach by Congress" (*Eastern Pub. & Adv.*, 831 F.2d at 492).[1] For example, the distribution of a fraudulent prospectus in separate mailings to different investors does not constitute a pattern of racketeering activity. See *International Data Bank, Ltd.* v. *Zepkin*, 812 F.2d 149 (4th Cir. 1987). Likewise, a series of letters or telephone calls in the course of a single fraudulent endeavor is not a pattern. See *Condict* v. *Condict*, 826 F.2d 923, 927-929 (10th Cir. 1987). And the payment of a bribe, even if made in separate installments that amount to multiple offenses under the criminal code, does not establish a pattern. See *Roeder*, 814 F.2d at 30-31.

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[1] Nearly 30% of the civil RICO cases decided in 1986 involved allegations of racketeering activity limited to a single episode. See Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526, 619 (1987).

In applying this standard, the courts have "realize[d] that skilled attorneys may artfully plead their civil RICO case" to contrive separate criminal episodes or transactions "so as to prevail over a defendant's motion to dismiss." *Jones* v. *Lampe*, 845 F.2d 755, 757 (7th Cir. 1988). This is especially true for racketeering acts involving fraud, since " 'any "scheme" to defraud can be broken down into its component acts' " (*id.* at 758). Thus, " 'the existence of a multiplicity of predicate acts * * * [of fraud] may be no indication of the requisite continuity of the underlying fraudulent activity.' " *Elliott* v. *Chicago Motor Club Ins.*, 809 F.2d 347, 350 (7th Cir. 1987). See also, *e.g.*, *Walk* v. *Baltimore & Ohio R.R.*, No. 87-3585 (4th Cir. May 31, 1988), slip op. 13-14 ("[v]irtually every action taken by * * * a corporation is subject to challenge as either mail or securities fraud"); *Flip Mortg. Corp.*, 841 F.2d at 538 ("a great many ordinary business disputes * * * could be described as multiple individual instances of fraud"); *International Data Bank*, 812 F.2d at 154-155 ("[i]t will be the unusual fraud that does not enlist the mails and wires in its service at least twice"); *Morgan* v. *Bank of Waukegan*, 804 F.2d at 976 ("[t]he existence of multiple predicate acts * * * [of fraud] is only because the acquisition of stock in this context is a complicated transaction that requires many separate statements from a variety of persons").

To avoid this problem of artful pleading and artificially constructed episodes, it is the responsibility "of the district court to carefully scrutinize the allegations contained in the complaint to determine whether they state a claim" (*Jones* v. *Lampe*, 845 F.2d at 757). Although the court ordinarily accepts the plaintiff's factual allegations as true, "it need not close its eyes to the content of these allegations," and "conclusory allegations" and "label[s]" concerning multiple schemes are not controlling (*id.* at 757, 758). Instead, the plaintiff's "characterization of events must be consistent with the facts alleged in the complaint" (*id.* at 758). See also, *e.g.*, *Manax* v. *McNamara*, 842 F.2d 808, 811 (5th Cir. 1988)

("plaintiffs in RICO claims 'must plead specific facts, not mere conclusory allegations' ").

In sum, the requirement of separate criminal episodes or transactions, rigorously applied to screen out inappropriate RICO claims, represents an important element of the pattern definition. But while that requirement is a necessary part of the concept of "pattern," it is not a sufficient and complete standard by itself. Rather, the proper definition of "pattern" must contain an additional element: typicality.

C. The Pattern Standard Requires That The Racketeering Acts Be Typical And Characteristic Of The Defendant's Activities

In addition to separate criminal episodes or transactions, the pattern element requires that the alleged racketeering activity must constitute a typical and characteristic course of the defendant's conduct. This requirement is supported by the plain language of RICO and the commonly understood meaning of "pattern," as well as by the legislative history and purposes of the statute. Under this interpretation, the predicate acts of racketeering constitute a pattern only if they are typical and characteristic of the way in which the defendant conducts his activities.

1. *The Plain Meaning Of "Pattern" Requires Typical And Characteristic Conduct*

Where a term "is not specifically defined in the RICO statute," the Court must assume " 'that the legislative purpose is expressed by the ordinary meaning of the words used.' " *Russello* v. *United States*, 464 U.S. 16, 21 (1983). See also *Organized Crime Control: Hearings on S. 30, and Related Proposals, Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 665 (1970) (*"1970 House Hearings"*) (statement of Ronald L. Gainer, United States Department of Justice) (the bill "says 'pattern,' and pattern has to be construed with its normal meaning"). The ordinary meaning of

"pattern" unmistakably denotes the idea of typical and characteristic conduct.

This central feature of "pattern" has been expressed in a number of ways. For example, "pattern" is defined as "a representative instance" or "a typical example." Webster's Third New International Dictionary 1657 (unabridged 1971). See also, *e.g.*, VII Oxford English Dictionary 565 (1970) ("a typical, model, or representative instance"). Similarly, "pattern" means "a reliable sample of traits, acts, or other observable features characterizing an individual." Webster's Third New International Dictionary 1657 (unabridged 1971); Black's Law Dictionary 1015 (5th ed. 1979). "Pattern" also refers to "a regular, mainly unvarying way of acting or doing." Webster's New World Dictionary 1042 (2d college ed. 1980). And more generally, "pattern" is a "habit," "custom," "practice," or "characteristic." Roget's International Thesaurus ¶ 642.4 at 494 (4th ed. 1977).

These definitions of "pattern" all point to the same conclusion: predicate acts of racketeering, to constitute a pattern, must represent a "typical" and "characteristic" form of the defendant's behavior.

2. *The Legislative History Demonstrates That RICO Is Directed Against Habitual Criminal Conduct By Professional Criminals*

This interpretation of "pattern," requiring a typical and characteristic course of conduct, is reinforced by the legislative history and purposes of RICO. In enacting the special (and especially severe) provisions of RICO, Congress aimed the statute at organized and habitual criminal conduct committed by professional or career criminals for whom crime is a way of life. Properly understood, RICO was not intended to sweep in legitimate businessmen who may be alleged to have committed two predicate offenses in the course of their otherwise legitimate activities.

The lengthy history of RICO is already familiar to this Court. See, *e.g.*, *Sedima*, 473 U.S. at 486-488; *id.* at 510-

519 (Marshall, J., dissenting). As the Court explained in *Russello*, the focus of RICO was organized crime. "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots. * * * The * * * goal was to remove the profit from organized crime by separating the racketeer from his dishonest gains" (464 U.S. at 26, 28). RICO was not intended to supersede the arsenal of criminal and civil remedies provided under state and federal law for ordinary instances of unlawful activity; rather, it was directed against the special problem that had proven insoluble under existing laws and thus gave rise to the need for this new statute: the eradication of organized crime.

In early versions of the bills leading to RICO, Congress sought expressly to define and prohibit "organized crime." For example, in 1967, Senator McClellan, a principal sponsor of RICO, introduced a bill to "outlaw the Mafia and other organized crime syndicates." The bill made it a crime to be a member of "the Mafia" or "any other organization" having as one of its purposes the violation of the criminal laws "relating to gambling, extortion, blackmail, narcotics, prostitution, or labor-racketeering." S. 678, 90th Cong., 1st Sess. (1967).

Although this approach corresponded exactly with Congress's intent to attack organized crime, Congress became concerned that such a statutory offense might be an unconstitutional status crime. See, *e.g.*, 116 Cong. Rec. 35344 (1970) (remarks of Rep. Poff); *id.* at 35343 (remarks of Rep. Celler). Accordingly, Congress abandoned that approach in favor of the formulation, based on the concept of "a pattern of racketeering activity," that ultimately was embodied in RICO.

In redrafting RICO in this manner to allay constitutional concerns, Congress never shifted its focus from organized crime as the target of the statute. The purpose of RICO (and the other provisions of the Organized Crime Control Act of 1970) is clearly indicated in the

congressional statement of findings and purpose: "It is the purpose of this Act to seek the eradication of organized crime in the United States * * * by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." See *Russello*, 464 U.S. at 27. The legislative history of RICO is replete with similar statements, which manifest Congress's understanding that the statute was directed against organized crime. See, *e.g.*, S. Rep. No. 617 at 76; 116 Cong. Rec. at 18939, 18940 (remarks of Sen. McClellan); *id.* at 35196 (remarks of Rep. Celler); *id.* at 35200 (remarks of Rep. St Germain); *id.* at 35344 (remarks of Rep. Poff); *id.* at 35347 (remarks of Rep. Steiger).

At no point in the legislative process did Congress indicate an intention drastically to expand the original scope of RICO to encompass legitimate businessmen and ordinary commercial disputes. In particular, the civil RICO provisions received very little attention in Congress, and the debates nowhere suggest that RICO would routinely be applicable to legitimate corporations and corporate officials having no connection with organized crime; on the contrary, the sponsor of the civil RICO section explained that the provision would afford a remedy to "the victims of organized crime" (116 Cong. Rec. at 35346 (remarks of Rep. Steiger)) and "those who have been wronged by organized crime" (*1970 House Hearings, supra*, at 520 (statement of Rep. Steiger)). See also 116 Cong. Rec. at 35228 (remarks of Rep. Steiger) (civil RICO provides "a powerful weapon against organized crime"); *id.* at 35295 (remarks of Rep. Poff) (civil RICO is a remedy "for use against organized criminality").[2] Moreover, the addition of wire fraud, mail fraud,

[2] In enacting civil RICO, Congress appreciated the problems posed by private parties suing organized crime figures for money damages. Representative Steiger noted "the very difficult position in which a citizen who sues under [civil RICO] will place himself. He may be one individual suing an arm of La Cosa Nostra, and the subject of his lawsuit may be its corrupt involvement in a major industry. He will need * * * courage * * * [to be a plaintiff]" (116

and securities fraud as predicate acts of racketeering—which is largely responsible for the widespread abuse of civil RICO today—was made at the behest of the Securities and Exchange Commission simply to ensure that RICO covered all of the types of offenses that organized crime commonly commits, and in fact that amendment occurred at a time when the statute did not contain a private civil remedy at all. See Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 98-100 & n.130 (1985).

Of course, Congress's revision of the statutory scheme did have the indirect consequence of broadening the reach of RICO beyond the Mafia. But that extension did not signify a radical shift in the thrust of the statute, and it does not suggest that Congress meant to subject legitimate corporations and businessmen to the severe sanctions and stigma of RICO. Thus, as summarized by Senator McClellan, the RICO statute that Congress adopted, like the other titles in the Organized Crime Control Act, "is justified primarily in organized crime prosecutions" and "has been confined to such cases to the maximum degree possible" (116 Cong. Rec. at 18914). Congress well understood that RICO's "provisions [are] primarily intended to affect organized crime" and any "reach beyond organized crime" would be at most "incidental." *Ibid.* (remarks of Sen. McClellan); see also *id.* at 35344 (remarks of Rep. Poff).

The pattern requirement is of critical importance in preventing the expansion of RICO beyond this intended sphere. See S. Rep. No. 617 at 158 ("[t]he concept of 'pattern' is essential to the operation of the statute"). In particular, Senator McClellan recognized the "danger" that the "commission of [predicate] offenses by other individuals" than organized crime figures "would subject

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Cong. Rec. at 35227). Even though Representative Steiger recognized that many potential plaintiffs would not "wish to take advantage of such a remedy" (*1970 House Hearings, supra*, at 520), he intended that civil RICO afford them the "option" (116 Cong. Rec. at 35347).

them to proceedings under" RICO. As he noted, "[i]t is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." Senator McClellan concluded that the danger of such misuse was "small[],"however, because of the pattern element: "[u]nless an individual not only commits such a crime but engages in a pattern of such violations, * * * he is not made subject to proceedings under [RICO]." 116 Cong. Rec. at 18940. Thus, it is the concept of "pattern" that Congress understood would limit RICO to career criminals and guard against the "danger" that the statute would be invoked against others who commit predicate offenses.[3]

Consistent with this legislative history, Justice Powell, in a passage in his dissent in *Sedima* that the majority did not dispute, correctly summarized the RICO scheme:

> "The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime * * *. [Congress intended] to keep the reach of RICO focused directly on traditional organized

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[3] The dissent to the House Report, which was briefly discussed in *Sedima* (473 U.S. at 487, 498), does not indicate that civil RICO was intended to be applied to legitimate businesses. These opponents of the bill recognized that the target of RICO was organized crime, but they expressed concern that, through "poor draftsmanship," the statute might be invoked to "harass" businessmen who commit two predicate offenses. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 185, 187 (1970) (dissenting views). The opponents did *not* state that these private damages suits would be permissible under RICO, but only that "disgruntled and malicious" plaintiffs might attempt to file such actions to destroy "innocent businessmen" through "adverse publicity" and "protracted, expensive" litigation (*id.* at 187). More important, the dissenting Report was based on the clearly incorrect understanding that any two predicate offenses are sufficient to constitute a pattern. Especially because this mistaken interpretation was contradicted by other portions of the legislative history, the views of RICO's opponents do not provide a reliable indicator of the meaning of the statute. See, *e.g.*, *National Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 639-640 (1967); *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964).

> crime and comparable ongoing criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime."

473 U.S. at 526, quoting ABA Report at 71-72. Lower courts and commentators have likewise recognized that the pattern element was intended to limit RICO to members of organized crime and other professional criminals for whom repeated criminality represents a typical and characteristic course of conduct. See, *e.g.*, *Lipin Enterprises Inc.* v. *Lee*, 803 F.2d 322, 324 (7th Cir. 1986) ("[t]he pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes"); *International Data Bank*, 812 F.2d at 155 (quoting *Lipin Enterprises*); *Papai* v. *Cremosnik*, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986) ("RICO's purposes are best served by * * * requiring that * * * the pattern made up of multiple episodes must be a regular part of the way a defendant does business"); Howard, *Moving to Dismiss a Civil RICO Action*, 35 Clev. St. L. Rev. 423, 432, 435 (1987) (Pattern requires that the predicate acts be "representative of the defendant's normal and ongoing course of conduct * * *. In sum, plaintiff must plead that defendant is an habitual criminal").[4]

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[4] To the extent the Court believes the definition of "pattern" is ambiguous notwithstanding the plain language and history of RICO, the rule of lenity provides additional support for our proposed definition. See, *e.g.*, *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954) (a statute that has both criminal and civil provisions must be interpreted in light of "the well-established principle that penal statutes are to be construed strictly"). The various pattern standards advanced by petitioners and their *amici*, and by the courts of appeals other than the Eighth Circuit, represent broad and amorphous tests that unduly expand the reach of

3. *Predicate Acts Of Racketeering Constitute A Pattern Only If They Are Typical And Characteristic Of The Way In Which The Defendant Conducts His Activities*

As we have shown, the term "pattern" should be construed to require that the predicate acts of racketeering constitute a typical and characteristic course of criminal conduct. But that formulation does not answer the question of what must be typified: to what are the predicate acts to be compared in order to determine whether they are typical and characteristic? In our view, the pattern element focuses on the conduct of the defendant and serves to demarcate the category of people who are the intended target of RICO: professional or habitual criminals who engage in racketeering crimes as a regular course of conduct. Under this standard, predicate acts of racketeering constitute a pattern only if they are typical and characteristic of the way in which the defendant conducts his activities.

This interpretation is supported by three overriding considerations. First, it gives the same meaning to the term "pattern" in each of the provisions of Section 1962,

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RICO and fail to give adequate notice of the prohibition and sanctions to which the defendant is subject (*i.e.*, that particular conduct is a RICO violation and not simply a series of predicate offenses).

Application of the rule of lenity is not barred by the "liberal construction" clause in RICO, which provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. § 1961 note. As discussed above, the "purposes" of the statute were to strike at organized crime and professional career criminals; an expansive definition of "pattern" that brings legitimate businessmen and garden-variety commercial disputes within the statute is hardly necessary to effectuate those purposes. The Court in *Sedima* recognized that "[t]he strict- and liberal-construction principles are not mutually exclusive"; the definitional and substantive provisions in Sections 1961 and 1962, which apply to both criminal and civil actions, "can be strictly construed without adopting that approach" in interpreting the private damages remedy in Section 1964(c), "where RICO's remedial purposes are most evident" (473 U.S. at 492 n.10).

which is the statutory structure Congress most likely intended. See *Sedima*, 473 U.S. at 489 ("[w]e should not lightly infer that Congress intended the [same] term to have wholly different meanings in neighboring subsections"). Second, it is most faithful to the legislative history of RICO. And third, it provides a meaningful and workable standard that, consistent with congressional intent, limits the statute to its proper scope and restrains abuses of the private treble-damages provision.

We start with the language of RICO.[5] Section 1962 (a)—which prohibits the investment in an enterprise of income derived from a pattern of racketeering activity—clearly contemplates that the pattern element will be measured by reference to the activities of the defendant; it is plainly the defendant's criminal conduct in obtaining the money, which is then invested in an enterprise, that is the focus of the pattern requirement. Thus, where the defendant typically and characteristically engages in a course of racketeering acts, his conduct constitutes a pattern of racketeering activity, and his investment of the proceeds of those crimes violates Section 1962(a).

The same definition of "pattern" is equally applicable in Sections 1962(b) and 1962(c). In each subsection, the pattern element should be defined to require that the predicate acts be typical and characteristic of the defendant's activities. As in subsection (a), the pattern requirement identifies the type of professional or habitual criminal who is subject to the severe sanctions of RICO.

Of course, pattern is not the only element of a violation under Section 1962(b) or (c). In addition, the de-

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[5] Because "the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime" (*United States* v. *Turkette*, 452 U.S. 576, 591 (1981)), Sections 1962(a) and 1962(b) are especially significant in discerning the congressional intent underlying the statute. Section 1962(c) was added to the bill at the suggestion of the Department of Justice to prohibit criminal conduct by racketeers once they had infiltrated the enterprise. See *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 387 (1969).

fendant must acquire or maintain an interest in the enterprise, or conduct the affairs of the enterprise, "through" his racketeering activity. The term "through" requires that there be a causal connection between the defendant's criminal conduct and the enterprise. Sections 1962(b) and (c) are violated only when the defendant acts "through"—that is, as part of or by means of—a pattern of racketeering activity in order to infiltrate or operate the enterprise. See *Sedima*, 473 U.S. at 496-497 ("[M]ere commission of the predicate offenses * * * [is] not in itself a violation of § 1962 * * *. [T]he essence of the violation is the commission of those [predicate acts forming a pattern] in connection with the conduct of an enterprise"); 116 Cong. Rec. at 18940 (remarks of Sen. McClellan) ("[u]nless an individual * * * engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under [RICO]").

Thus, the unified standard of "pattern" we propose leads to a consistent and coherent interpretation of each of the provisions of Section 1962. Under this reading of the statute, the predicate racketeering acts must be part of a course of criminal conduct that is typical and characteristic of the way the defendant conducts his activities (the "pattern" element) and must have the required nexus to the enterprise (the "through" element) for the particular RICO violation alleged. RICO is violated if the defendant, as part of or by means of a pattern of racketeering activity sufficient to mark him as a professional or habitual criminal, (a) derives income that he invests in an enterprise, (b) acquires or maintains an interest in an enterprise, or (c) conducts the affairs of an enterprise.

By contrast, alternative typicality standards do not permit a uniform interpretation of the pattern element. If the pattern requirement turns on whether racketeering acts are typical of the enterprise itself and its overall operations, as Section 1962(c) plausibly can be read to

say, that standard would be inapplicable to subsections (a) and (b), which do not depend upon the nature or character of the enterprise. Likewise, an interpretation that requires the racketeering acts to be typical of the defendant's relationship to or activities concerning the enterprise—that is, that they be typical of the way in which he acquired or maintained an interest in the enterprise or conducted the enterprise's affairs—while a plausible reading of Sections 1962(b) and (c), cannot be squared with subsection (a). Accordingly, in order to give the term "pattern" a single consistent meaning, as *Sedima* requires, it should be construed to mean that the predicate acts of racketeering must be typical and characteristic of the activities of the defendant.

In addition to being supported by the text of RICO, this definition of "pattern" best comports with the legislative history of the statute. As described above (see pages 9-14, *supra*), RICO is directed at members of organized crime and other professional or career criminals for whom ongoing criminality is a way of life. The construction we propose precisely captures this purpose by using the pattern element to identify such people as the category of defendants who are subject to RICO.

This standard would allow RICO to be invoked in the kinds of cases that were Congress's target in enacting the statute. The organized crime member who takes over or operates a company through acts of violence or fraud, the beer distributor or jukebox supplier who conducts his business by force and threats against reluctant customers or competitors, the "boiler room" operator who sells fraudulent securities, the motorcycle gang that is in the business of selling drugs or committing arson-for-hire—all of these situations, which were the intended focus of RICO, would remain well within the ambit of the statute.[6]

[6] The legislative history offers an example (116 Cong. Rec. at 607, 18940, 36296), which petitioners cite (Br. 17), of the leader of the New Jersey Cosa Nostra using murder and arson to sell substandard laundry detergent to the A&P Tea Company. This example is easily encompassed by our pattern definition.

Our proposed pattern definition likewise would not interfere with proper criminal enforcement of RICO. RICO's sanctions would remain fully available in the great run of cases, involving professional criminals and illegitimate enterprises-in-fact, in which the government has actually brought criminal prosecutions. Indeed, the Department of Justice Guidelines on RICO already direct federal prosecutors that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of *a single criminal episode or transaction.*" United States Attorneys' Manual § 9-110.340 (Mar. 9, 1984) (emphasis added). See pages 5-6, *supra.*

At the same time, this definition will restrict RICO to its proper scope in a way that is both more meaningful and more practical than alternative standards. An inherent difficulty in formulations that tie the pattern to either the enterprise or the defendant's relationship with the enterprise is that the term "enterprise" is exceedingly broad. See 18 U.S.C. § 1961(4); *United States* v. *Turkette*, 452 U.S. 576 (1981). It is up to the plaintiff to allege the relevant enterprise in any particular case (or even different enterprises for different RICO counts in the same case, as this litigation illustrates), and the enterprise allegations are often manipulated through "artful[] plead[ing]" (*Jones* v. *Lampe*, 845 F.2d at 757). Thus, under any legal standard that focuses the pattern requirement on the enterprise, the plaintiff can effectively determine the pattern issue by virtue of his control over the enterprise allegations. For this reason, two RICO cases that are otherwise identical, but involve different enterprise allegations, could arbitrarily lead to different results.

Of equally great importance, this interpretation of the pattern element provides a workable standard that can feasibly be applied in litigation. Consistent with the requirement of Fed. R. Civ. P. 11 that a complaint be "warranted" by law and "not interposed for any improper purpose," a great many inappropriate RICO cases that

are now being brought simply would not be filed under the proposed pattern test. In addition, improper cases that are nevertheless filed could often be dismissed on the pleadings or after preliminary discovery when there is no reasonable basis for concluding that the pattern element could be satisfied.

In cases that do proceed to trial, this pattern standard can readily be "explain[ed] to a jury" (*Sedima*, 473 U.S. at 495 n.12) in the court's instructions. The ultimate issue for the jury on the pattern element is whether the defendant typically and characteristically conducts his activities by means of acts of racketeering. Among the considerations that a jury should take into account in resolving that issue are: (1) the number and frequency of the racketeering acts (or episodes or transactions); (2) the nature of the predicate acts and any inference that the defendant engaged in that type of crime on an ongoing and regular basis; (3) the extent of the defendant's business that was involved in the racketeering acts; (4) the proceeds that the defendant received from the racketeering acts in relation to any legitimate sources of income; and (5) any indications that the defendant was not involved in a legitimate business, such as failure to comply with applicable state or federal requirements, an inadequate capital structure, or other earmarks of a "front" or "dummy" company. While it is, of course, possible to envision cases that present close questions of statutory coverage, instructions along the foregoing lines should provide suitable guidance for the jury's determination of the pattern issue.

The nature of the proof necessary to establish a pattern will depend upon the circumstances of the particular case. For example, two instances of certain racketeering offenses—such as extortion, contract murder, or arson-for-hire—may provide a basis for a jury to find that the defendant is a professional or habitual criminal, especially if proof of those offenses is accompanied by corroborative evidence such as the absence of any legitimate source of income for the defendant or indications that

he planned to commit those crimes in the future. Similarly, a jury could conclude that the pattern element is satisfied by proof of two or more acts of wire or mail fraud by a "shell" corporation whose entire operation involves fraudulent practices—the classic "boiler room" scheme. And it would be sufficient to show that the defendant engaged in numerous episodes of racketeering over a significant period of time from which he received substantial income, even though he had lawful income as well. On the other hand, the fact that employees of one division of a large corporation allegedly mailed misleading documents on two or more occasions would not give rise to an inference that the corporate defendant was an habitual criminal and would not be enough to avoid pretrial dismissal of the complaint.

In the present case, application of this pattern standard is straightforward and leads to affirmance of the judgment below. The complaint does not, and plausibly could not, allege that Northwestern Bell's business was typically and characteristically conducted through the alleged bribery scheme or other racketeering activity. As the district court determined, "[i]t cannot be said * * * that the alleged 'pattern' of predicate acts is a 'regular part of the way' defendants conduct their business" (653 F. Supp. 908, 916). Because Northwestern Bell does not fall within the category of professional criminals against whom RICO was directed, petitioners' complaint was properly dismissed.

D. The Pattern Definitions Advanced By Petitioners And The Solicitor General Are Neither Legally Supported Nor Adequate To Curtail The Widespread Abuse Of Civil RICO

As all of the members of the Court agreed in *Sedima*, civil RICO has been subject to substantial abuse. The pattern definitions proposed by petitioners and the Solicitor General are neither adequate to curtail these abuses nor supported by the language and history of the statute.

1. *Civil RICO Has Been Subject To Serious Abuse*

The Court in *Sedima* recognized that civil RICO has "evolv[ed] into something quite different from the original conception of its enactors" (473 U.S. at 500). Indeed, "private civil actions under the statute are being brought almost solely against [respected and legitimate businesses], rather than against the archetypal, intimidating mobster" (*id.* at 499). "In practice, [civil RICO] frequently has been invoked against legitimate businesses in ordinary commercial settings" (*id.* at 506 (Marshall, J., dissenting)), and "private civil actions [are] being brought frequently against respected businesses to redress ordinary fraud and breach of contract cases" (*id.* at 524 (Powell, J., dissenting)). Former Senator Hruska has also recently noted that civil RICO is being used in ways that Congress did not intend and would not have approved. See *Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c): Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 9 (1985) ("*Senate Hearings*"); Note, *Civil RICO—What Hath Congress Wrought?*, 20 Creighton L. Rev. 1225, 1225 (1987).

In fact, as the Department of Justice has observed, civil RICO has become "a general federal anti-fraud remedy," and its application against "traditional organized criminal activities" is "far outweighed" by its use against "reputable businessmen." *Senate Hearings*, *supra*, at 140 (statement of Assistant Attorney General Trott). In 1985 and 1986, 92% of all reported civil RICO cases did not involve allegations of racketeering acts characteristic of professional criminal activity; on the contrary, of cases subsequent to *Sedima*, 59% alleged mail fraud as the predicate offenses, 51% alleged wire fraud, and 20% alleged securities fraud. Blakey & Cessar, 62 Notre Dame L. Rev. at 619, 620. Nearly all of these suits were ordinary civil disputes masquerading as racketeering cases.

As noted by Judge Mikva, "a RICO count is filed almost as boilerplate" in many federal suits, much "like the ad damnum clause in a complaint." *RICO Reform Legislation: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 527 (1985-1986) ("*House Hearings*"). The reasons for this misuse are self-evident: RICO—by affording treble damages and attorneys' fees, by stigmatizing the defendant as a "racketeer," and by conferring federal jurisdiction—provides an "unusually attractive civil remedy" (*id.* at 366 (letter from Assistant Attorney General Bolton)). See *Sedima*, 473 U.S. at 504 (Marshall, J., dissenting). Moreover, unlike criminal enforcement of RICO, private damages suits can be filed by hyper-aggressive litigants and are not restrained by "[t]he responsible use of prosecutorial discretion" (*id.* at 503 (Marshall, J., dissenting)).

Abuse of civil RICO creates a host of undesirable consequences that Congress—in its brief consideration of the private damages provision—surely could not have intended. First, "there has been an explosion of private civil RICO lawsuits" that has placed an "inappropriate and increasingly heavy burden" on the federal courts. *House Hearings*, *supra*, at 366 (letter from Assistant Attorney General Bolton). In 1986, more than 1000 private civil RICO cases were filed in federal court;[7] since approximately one-third to one-half of all civil RICO filings had no other basis for federal jurisdiction (see Blakey & Cessar, 62 Notre Dame L. Rev. at 619, 622), a proper construction of RICO would remove a great deal of burdensome litigation from federal court.[8]

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[7] By contrast, only 120 criminal RICO indictments were approved for filing by the Department of Justice in 1986. See Goldsmith, *RICO and Enterprise Criminality*, 88 Colum. L. Rev. 774, 790 n.113 (1988).

[8] These figures do not tell the full story, for, as the Judicial Conference has explained, "the number of civil RICO cases is substantially larger than can be statistically documented" and such cases "require a disproportionately large amount of time to re-

In addition, overly broad application of civil RICO "displaces important areas of federal law" (*Sedima*, 473 U.S. at 504 (Marshall, J., dissenting)) by allowing private damages suits without regard to limitations that exist under other federal statutes. See *House Hearings*, *supra*, at 365 (letter from Assistant Attorney General Bolton), 529 (statement of Judge Mikva). For instance, as then-SEC Chairman Shad explained, the use of mail and wire fraud as predicate offenses in civil RICO suits "has preempted much of th[e] field" of federal securities laws, thus "substantially altering the balance of private and public rights" that "Congress, the courts, and the Commission have crafted over the past 50 years." *House Hearings*, *supra*, at 445-446. See also *Sedima*, 473 U.S. at 505 (Marshall, J., dissenting).

In much the same way, an expansive interpretation of RICO would "federalize[] important areas of civil litigation that until now were solely within the domain of the States," thereby "altering fundamentally the federal-state balance" (*Sedima*, 473 U.S. at 504 (Marshall, J., dissenting)). Ordinary commercial disputes that otherwise would be subject to state law, and adjudicated in state courts, are now routinely transformed into federal RICO claims. See, *e.g.*, Report of the Proceedings of the Judicial Conference of the United States, Mar. 12-13, 1986, at 11-12 (RICO has "caus[ed] what would formerly have been considered routine breach of contract or common law fraud actions triable only in state courts * * * to be filed in federal courts," which "causes friction with the state court system").

Finally, the bludgeon of civil RICO is frequently used by plaintiffs to coerce lucrative settlements of unmeritorious claims. As Justice Marshall explained in *Sedima* (473 U.S. at 504, 506 (dissenting opinion)):

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solve." Report of the Proceedings of the Judicial Conference of the United States, Sept. 21, 1987, at 76. Moreover, "the impact on the federal courts of suits brought under * * * [civil RICO] grows daily more acute." Report of the Proceedings of the Judicial Conference of the United States, Mar. 17, 1987, at 19.

> [T]he defendant, facing a tremendous financial exposure in addition to the threat of being labelled a "racketeer," will have a strong interest in settling the dispute.
>
> * * * * *
>
> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.

Indeed, "often [the] sole effect [of including a RICO count] is intended to or at least has the effect of pressing the other side into a settlement." *House Hearings*, *supra*, at 527 (statement of Judge Mikva).

Thus, abusive civil RICO suits "take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels" (*Sedima*, 473 U.S. at 520 (Marshall, J., dissenting)). Without question, civil RICO litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). As the Court recognized in *Blue Chip Stamps* with respect to "nuisance or 'strike' suits" under the securities laws, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment" (*id.* at 740).

A proper pattern definition is critical to the sound application of civil RICO. See pages 4, 12, *supra*. As this Court recognized in *Sedima*, the present abuse of civil RICO has occurred primarily because of the lack of "a meaningful concept of 'pattern'" (473 U.S. at 500). Many inappropriate civil RICO cases have been sustained by the lower courts under lax pattern standards. See, *e.g.*, *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985) (two fraudulent mailings to a single victim

in a five-month period constituted a pattern because the acts were related and not isolated); *Environmental Tectonics* v. *W.S. Kirkpatrick Inc.*, No. 87-5328 (3d Cir. May 2, 1988) (one bribe to a foreign government official to influence one contract, in violation of several statutes and occurring in several installments, constituted a pattern); *Sun Sav. & Loan Ass'n* v. *Dierdorff*, 825 F.2d 187 (9th Cir. 1987) (four mailings over five months to cover up a kickback were not isolated or sporadic and hence constituted a pattern).

Our proposed pattern definition would provide a significant check on such abuses. By contrast, as we now discuss, the standards proposed by petitioners and the Solicitor General would be ineffective in curbing RICO misuse and represent a faulty analysis of the statute.

2. *The Pattern Definitions Urged By Petitioners And The Solicitor General Are Unsound And Should Be Rejected*

Although petitioners are far from clear in the definition they propose (see Pet. Br. 24-31), in the end they seem to urge a standard that "look[s] at the racketeering acts and the activity prohibited under § 1962(a), (b), (c) or (d), and/or the relationship of the acts to the enterprise and/or the acts and the nature of the enterprise itself" (*id.* at 32). It need hardly be said that this is no standard at all; indeed, petitioners acknowledge that their discussion "only illustrate[s] the type of factors" (*id.* at 34) that might be relevant. The only thing that is clear is that petitioners' approach is exceedingly broad, allowing two acts to establish a pattern provided only that they are related (*id.* at 33). Moreover, contrary to *Sedima*, the meaning of the term "pattern" under petitioners' proposal "changes depending upon which subsection of [Section 1962] is alleged" (*ibid.*). And petitioners' formulation would be completely unworkable in practice, since it is incapable of application on pretrial motions and would invariably make the pattern issue a question for the "finder of fact" based on "the total

factual context of each case" (*id.* at 32). Such a nebulous standard, combined with the lure of treble damages and attorneys' fees, would invite a flood of ungovernable RICO suits in federal court.

Many of the same criticisms also apply to the lax pattern standard advocated by the Solicitor General: "a RICO pattern is present whenever the defendant's acts of committing the predicate offenses are not isolated or sporadic" (U.S. Br. 4). The Solicitor General provides no definition or test for deciding whether racketeering acts are "isolated" or "sporadic." Furthermore, he ignores the plain meaning of "pattern" as acts that are "typical" or "characteristic." There is a broad middle ground between "sporadic" and "typical"; the fact that something is not sporadic does not mean, as the government contends, that it is typical.

The Solicitor General's interpretation is sweeping in its coverage. In his view, it is sufficient (although not necessary, see U.S. Br. 6, 10 n.5) that "the acts form a pattern by virtue of a connection to a common scheme, plan, or motive" (*id.* at 5). But that condition will routinely be satisfied unless the acts are entirely random and unorganized; in the real world it will be rare that the predicate acts will not be connected by a "common scheme, plan, or motive." In addition, the government reads the pattern element to "contain[] no requirement that the predicate crimes be separated by any particular interval in time" (*id.* at 14 n.7). Thus, a single criminal episode or transaction that technically involves two offenses—such as a fraudulent statement made in two letters written and mailed at the same time—is automatically a "pattern." Virtually any two acts of racketeering will be included.

In essence, the Solicitor General's test requires relatedness but disregards continuity. Under his standard, pattern subsumes any "groups of predicate crimes that are connected in some way" (U.S. Br. 10). The government's

all-inclusive approach parallels the Fifth Circuit's decision in *R.A.G.S. Couture* (see pages 25-26, *supra*), which has been universally criticized—by the Fifth Circuit itself and even by proponents of broad civil RICO—for upholding a pattern whenever two racketeering acts are related and not isolated. See, *e.g.*, *Condict* v. *Condict*, 826 F.2d at 929; *Montesano* v. *Seafirst Commercial Corp.*, 818 F.2d 423, 424-426 (5th Cir. 1987); Blakey & Cessar, 62 Notre Dame L. Rev. at 538 n.37.

Recognizing the expansiveness of his approach, the Solicitor General points to the "enterprise" element to argue that his pattern definition "does not convert every series of related criminal acts into a RICO violation" (U.S. Br. 12). Given the breadth of the term "enterprise" in Section 1961(4) and this Court's decision in *Turkette*, however, this statement is cold comfort indeed. Seldom will two or more racketeering acts not involve, at the least, a "group of individuals associated in fact although not a legal entity" (18 U.S.C. § 1961(4)). Under the government's construction, precious little criminal conduct involving enumerated predicate offenses would be outside the scope of RICO, a result that Congress surely did not intend.

Beyond these difficulties, the Solicitor General's brief totally ignores the fact that this is a *civil* RICO case. His entire argument is framed by reference to *criminal* prosecutions, and in particular to prosecutions involving illegitimate enterprises (see U.S. Br. 12, 19). Nowhere does the Solicitor General so much as mention, let alone propose a solution for, the substantial abuses of civil RICO that *Sedima* recognized and the legal community has widely condemned. In fact, he disclaims the application of his pattern definition to cases involving legitimate enterprises (*id.* at 19 n.10), which would include almost all civil RICO suits. The government has simply failed to come to grips with the problem before the Court.

Finally, contrary to the Solicitor General's argument (U.S. Br. 8-10), RICO is not subject to the definition of

"pattern" contained in the dangerous special offender statute, 18 U.S.C. § 3575(e), repealed effective November 1, 1987, Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987, and Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728. Since Section 3575 was enacted together with RICO as part of the Organized Crime Control Act of 1970, the Court's analysis in *Russello* is directly applicable here: "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'" (464 U.S. at 23). "If this was Congress's intent [to include the Section 3575(e) definition in RICO], one would expect it to have said so in clear and understandable terms" (*id.* at 25).

Furthermore, the government has offered no reason to believe that Congress *sub silentio* would have intended to transpose a definition contained in the dangerous special offender statute—a sentence-enhancement provision that is applied in the discretion of the court and has no private enforcement mechanism—to RICO, which is a substantive provision whose treble-damages remedy can be invoked entirely at the behest of a private party. Given these differences between the statutes, it is perfectly understandable why Congress adopted a broader definition of "pattern" in the dangerous special offender act than in RICO.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3058

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
MARK I. LEVY
DENNIS G. FRIEDMAN
Mayer, Brown & Platt
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for the National Association of Manufacturers

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