No. 06-873

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS*
JUAN P. MORILLO
STEVEN T. COTTREAU
MATTHEW J. WARREN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 6, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

BLANK PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

SCHOLARLY AUTHORITY Page

BLANK PAGE

REPLY BRIEF OF PETITIONER

As set forth in the petition, this case presents three significant questions about the proper scope of civil suits under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). Plaintiffs attempt to avoid this Court's review by systematically misstating the record and the law. *First*, as to direct injury, plaintiffs claim the court of appeals complied with *Anza* in large part because that court "cited *Anza*." Opp. 3. Under any fair reading of the opinion below, it is clear that the panel was not faithful to *Anza*'s teachings. *Second*, as to the enterprise issue, plaintiffs mistakenly claim that a 4-3 circuit split has already been resolved by this Court. With that argument failing, plaintiffs also mischaracterize the record below and claim that Mohawk waived the antecedent argument regarding the statutory definition of enterprise. That view, however, is simply mistaken. Mohawk has consistently claimed that the enterprise allegations are legally insufficient and sought rehearing en banc from the court of appeals on the precise argument that prior binding circuit precedent had wrongly rejected. *Third*, plaintiffs unavailingly claim that the circuit split over whether an injury to wages provides civil RICO standing is not implicated by this case.

1. This Court's decision last Term in *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), held within it the promise to clarify substantially the proper scope of civil RICO litigation. Allegations of an injury that flowed *logically* from the alleged RICO violation were not enough. Instead, *Anza* requires that the action that directly caused plaintiff's injury had to be the RICO violation, and not some other action that resulted from the violation. See *id.* at 1997 ("The cause of [plaintiff's] asserted harm[] ... is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."). This Court explained that RICO's direct injury requirement "is meant to

prevent ... intricate, uncertain [damage] inquires from overrunning RICO litigation." *Id.* at 1998.

The court of appeals failed to apply *Anza* despite this Court's direction to reconsider this case. Indeed, plaintiffs' defense of the decision below is telling: According to plaintiffs, the court of appeals complied with this Court's order because it "cites *Anza*" and included "extensive and accurate quotation of *Anza*." Opp. 3, 4. But citing *Anza* while ignoring its holding is not complying with it. Even a cursory review of plaintiffs' claim reveals that it fails to state a claim for the same reasons the claim in *Anza* failed. Like the *Anza* plaintiff, plaintiffs allege an injury (depressed wages) resulting from their employer's decision to pay them a particular wage rate. That wage rate is not itself unlawful. Instead, plaintiffs allege that Mohawk selected it because its alleged RICO violations enabled it to do so (in the same way that the *Anza* defendant was alleged to have selected a price as a result of tax fraud).[1] That this alone is fatal to plaintiffs' claim is confirmed by the fact that Mohawk's wage rate is influenced by a complex multitude of factors. See Pet. 13-14. While Ph.D. labor economists regularly debate these myriad influences, this is precisely the type of debate that this Court held that jurors should not decide in an already complicated RICO case. See *Anza*, 126 S. Ct. at 1997.

---

[1] Plaintiffs contend that their injury is direct because the purported motivation of federal immigration law is to protect jobs for legal workers. *See* Opp. 5. Even if that were the case, all intended beneficiaries of a law are not *directly* injured, as RICO requires. Legislative history often identifies victims who nonetheless are not *directly* injured victims for civil RICO purposes. For example, Congress has explained that criminal schemes to avoid sales tax on cigarettes harm "[t]he truly innocent victims": legitimate retailers driven out of business because of competition from untaxed cigarettes. S. Rep. No. 95-962, at 7-8 (1978), *available at* 1978 U.S.C.C.A.N. 5518, 5522. But *Anza* rejected suits by such "victims" because their injuries are indirect.

In failing to apply *Anza*'s holding, the court of appeals fashioned its own incompatible test: the injury is direct when there is a "correlation" with the RICO violation. Pet. App. 17a. A correlation requirement, however, is exactly the type of tenuous connection *Anza* rejects as insufficient: indeed, the failure to charge customers sales tax in *Anza* certainly correlated with the ability to win those customers from a competitor. As a result, the court of appeals has robbed *Anza* of its promise to rein in attenuated claims.

By contrast, the Seventh Circuit properly understood *Anza* and rejected a "correlated" injury. Plaintiffs deny that the Eleventh Circuit's decision creates a circuit split with the Seventh Circuit in *James Cape & Sons Co.* v. *PCC Constr. Co.*, 453 F.3d 396 (7th Cir. 2006). See Opp. 8. Plaintiffs are wrong. Each of the primary factors that the Eleventh Circuit relied upon to find a direct injury in this case was equally present in *James Cape*. Like respondents here, the *Cape* plaintiff pled an injury (losing competitive bids) that correlates with the alleged predicate act (a competitor's bid rigging). And like respondents, the *Cape* plaintiff pled that the purpose of the racketeering acts was to steal contracts from it.[2] Under the Eleventh Circuit's analysis, the correlation between lost contracts and bid-rigging, and the defendants' alleged purpose to take contracts from the plaintiff would be sufficient to plead a direct injury. See Pet. App. 16a-17a. But the Seventh Circuit rejected that holding, focusing instead on the central *Anza* inquiry: whether the plaintiff's claimed injury was the direct result of the claimed predicate acts. *James Cape*, 453 F.3d at 403. The stark division between the Seventh Circuit's straightforward

[2] *See* Compl. ¶ 1, *James Cape*, No. 05-C-269 (E.D. Wisc. filed Mar. 10, 2005) ("The defendants conspired to take work from James Cape for the defendants' benefit and to James Cape's detriment.").

application of *Anza* and the Eleventh Circuit's "correlation" test provides another reason to grant review.[3]

2. Last Term this Court recognized that the question of whether a RICO claim can be predicated upon an association-in-fact enterprise consisting of a corporation and its agents warranted review.[4] In an attempt to avoid review, plaintiffs no longer maintain that the split is not implicated—that effort failed in their prior brief in opposition. See Br. in Opp. at 2, No. 05-465 (U.S. filed Nov. 9, 2005). Instead, plaintiffs now take an equally unavailing tack, asserting that this Court "effectively answered" the question and resolved the split in *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158 (2001). Opp. 13-14.

Plaintiffs badly mischaracterize this Court's decision in *Cedric Kushner*. There, the Court only noted the enterprise question presented here—it did not purport to resolve it. *Cedric Kushner* involved a classic RICO situation where an individual controls and misuses a corporation. The issue in that case was whether the shareholder and employee of a corporation could be sued as a RICO defendant for conducting the affairs of the corporation as a RICO enterprise. This Court held that it could, finding that the individual defendant was distinct from the corporation he

---

[3] Plaintiffs also suggest *James Cape* is distinguishable because the state agency awarding contracts "had to make inflated payments." Opp. 8. *James Cape*, however, involved undercutting by *lower* bids. As a result, the state agency was not a more immediate victim—it saved money.

[4] Plaintiffs assert that this Court's June 5, 2006 order vacating *Williams I* and ordering the Eleventh Circuit to reconsider this case in light of *Anza* was an admission that the Court "had made a mistake by granting certiorari" on the enterprise issue. Opp. 1. This Court, of course, best understands the basis for that action, but it is at least equally plausible that *Anza* so obviously should have ended this litigation that this Court decided that resolving the enterprise issue was unnecessary at that time. In fact, it was Mohawk who suggested that "this Court vacate and remand ... in light of [the] decision in *Anza*." Pet'r Reply Br. 13 n.10, No. 05-465 (U.S. filed Apr. 11, 2006).

controlled. See *Cedric Kushner*, 533 U.S. at 163. *Cedric Kushner*, however, distinguished circuit court precedent rejecting an enterprise analogous to the one alleged in the instant case—one where a corporation is named as the defendant "and the corporation, together with all its employees and agents, were the 'enterprise.'" *Id.* at 164. The Court noted that such "precedent involved quite different circumstances which are not presented here." *Id.* Indeed, the Court expressed skepticism about such an enterprise, noting that it was an "oddly constructed entity." *Id.*

The Court should grant certiorari to decide the issue reserved in *Cedric Kushner*, and it should do so by resolving the critical antecedent question of whether a corporation may ever be a constituent part of an enterprise consisting of a "group of individuals associated in fact." 18 U.S.C. § 1961(4). See Pet. 20-22. Plaintiffs' claim that this issue has been "waived" (Opp. 9) is yet another mischaracterization in their attempt to avoid review.

Contrary to plaintiffs' suggestions, Mohawk has consistently maintained that the enterprise in this case is invalid. In fact, Mohawk's first argument in its motion to dismiss before the district court was that "THE COMPLAINT FAILS TO IDENTIFY A LEGALLY SUFFICIENT ENTERPRISE." Mot. to Dismiss 7, No. 4:04-CV-03 (N.D. Ga. filed Feb. 9, 2004). After a contrary ruling from the district court, that court granted Mohawk permission to file an interlocutory appeal as to whether "Plaintiffs had adequately pleaded the existence of a RICO enterprise." Pet. App. 71a-72a. Then, before the Eleventh Circuit panel, Mohawk continued to argue that the "Complaint fails to allege a RICO enterprise." Br. of Appellant 11, No. 04-13740 (11th Cir. filed Sept. 7, 2004).

Mohawk preserved the enterprise issue even in the face of Eleventh Circuit precedent that had long held that "a group of corporations can be a 'group of individuals associated in fact.'" *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969

n.19 (11th Cir. 1985); see also *United States* v. *Goldin Indus.*, 219 F.3d 1271, 1277-78 (11th Cir. 2000). While that binding precedent precluded Mohawk from arguing that the district court or panel overrule *Navarro-Ordas* and *Goldin*, Mohawk preserved the overarching issue of whether plaintiffs had pled a legally cognizable RICO enterprise.[5]

In any event, plaintiffs' point misses the mark entirely because Mohawk *did* explicitly raise the foreclosed § 1961(4) argument both before the panel and the entire Eleventh Circuit. Mohawk specifically asserted that "the supposed 'association-in-fact' enterprise of Mohawk and its recruiters does not satisfy 18 U.S.C. § 1961(4), which defines 'association-in-fact enterprise' as 'a group of individuals associated in fact'—not a group of corporations."[6] Following a ruling by the panel on remand, Mohawk again specifically sought rehearing en banc on this issue and urged the Eleventh Circuit to grant rehearing in order to reconsider *Navarro-Ordas* and *Goldin* en banc. See Pet. App. 81a-84a.

Even if Mohawk had not raised the *argument* before the Eleventh Circuit (which it had), Mohawk's consistent pressing of the *issue* of whether plaintiffs pled a legally cognizable enterprise fully preserved all arguments supporting that issue. *See* Stern & Gressman, *Supreme Court Practice* § 6.26, at 421 (8th ed. 2002) ("Although the Court

---

[5] *See MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 770 (2007) (recognizing that failure to raise "precluded" arguments about a claim did "not suggest a waiver," but rather "counsel's sound assessment that the argument would be futile"). Even if Mohawk had not pressed this issue below (which it did), the Eleventh Circuit certainly passed upon the issue, relying upon *Goldin* to hold that RICO required only "'an association of individual entities.'" Pet. App. 7a-8a (quoting *Goldin*, 219 F.3d at 1275). *See Lebron* v. *National R.R.*, 513 U.S. 374, 379 (1995) ("Our practice permit[s] review of an issue not pressed so long as it has been passed upon." (internal quotation marks omitted)).

[6] Mohawk Supp. Br. 20 n.15 (11th Cir. filed Aug. 18, 2006) (recognizing that though "this panel may be bound by *Navarro-Ordas* ... Mohawk believes that *Navarro-Ordas* should be reconsidered en banc").

generally declines to review *issues* not pressed or passed upon by the lower courts, it has allowed petitioners to make new *arguments* in support of claims properly presented below.").[7] Parties need not "demand overruling of a squarely applicable, recent circuit precedent" to preserve issues for appeal to this Court. *United States* v. *Williams*, 504 U.S. 36, 44 (1992).[8]

Plaintiffs' contrary assertion that "Mohawk is still bound by the affirmative concessions it made in the lower courts" misstates both the law and the facts. Opp. 11. As to the law, respondent's argument misunderstands the doctrine of judicial estoppel. That doctrine only applies where the a party has "*prevail[ed]* in one phase of a case on an argument and then rel[ied] on a contradictory argument to prevail in another phase." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (emphasis added) (internal quotation marks omitted). Mohawk certainly did not "prevail" before either the district court or the court of appeals. Nor were Mohawk's statements "clearly inconsistent" with the position that binding precedent

---

[7] *See also Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *Lebron*, 513 U.S. at 378-79 (explaining "traditional rule" is to permit parties who have preserved claims before the lower courts to raise "new argument[s] to support ... [those] consistent claim[s]" and holding that argument that Amtrak was a government entity, which petitioner had "expressly disavowed" before district court and court of appeals, was nonetheless preserved because it was not "a new claim" but "a new argument" in support of claim that Amtrak was obliged to afford petitioner First Amendment rights).

[8] In fact, the correct interpretation of a statute is a question that will always be passed upon by a court applying that statute. *See United States Nat'l Bank of Ore.* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 446-47 (1993) ("[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law" (internal quotation marks omitted)).

permitting a corporation to be a member of an association-in-fact enterprise should be overruled. *Id.* at 750.[9]

This Court has not even found estoppel in circumstances where a party failed to raise the argument below (which Mohawk did not fail to do here by specifically raising the issue of overruling binding precedent in the court below). Thus, in *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661 (2001), the petitioner argued before the district court and court of appeals that it was not providing public accommodations subject to the Americans With Disabilities Act ("ADA"). See *id.* at 678. Before this Court, however, petitioner "reframe[d]" its argument to contend that the plaintiffs were not members of a

---

[9] Instead, each of the three statements cited by plaintiffs (Opp. 9-10 & n.29) merely responded to plaintiffs' arguments that accepting the Seventh Circuit's reasoning in *Baker* would necessarily conflict with the Eleventh Circuit's holding in *Goldin* that a group of corporations could be an association-in-fact enterprise. Mohawk's response was to press the invalidity of the alleged enterprise by making *arguments* distinguishing *Goldin* (which was binding). As Mohawk acknowledged, "*current law* ... requires that to sufficiently allege a RICO enterprise, a plaintiff must allege that the enterprise is comprised of a corporation and a separate, independent third party." Br. of Appellant 12-13 (emphasis added) (cited in Opp. 10 n.29). Thus, when plaintiffs argued to the district court that the "allegations are sufficient because a corporation may be both the RICO 'person,' *i.e.*, the defendant, and part of an association in fact enterprise," Opp. to Mot. to Dismiss 7 (N.D. Ga. filed Mar. 9, 2004) (citing *Goldin*, 219 F.3d at 1275-76.), Mohawk explained that it agreed with plaintiffs' contention that under Eleventh Circuit law "a corporation can be both a RICO person and part of an association-in-fact enterprise," but that this was beside the point because "it is the RICO enterprise, not the employer, that must be operated through a pattern of racketeering activities," Reply in Supp. of Mot. to Dismiss 4-5 (N.D. Ga. filed Mar. 30, 2004). Likewise, before the panel, Mohawk responded to the argument that "*Baker* is ... inconsistent with this Court's precedents," by stating that "nothing in Mohawk's rule" that it urged upon the panel would be inconsistent with *Goldin*. Mohawk Reply 10-11 & n.8 (11th Cir. filed Nov. 5, 2004). Far from "advocat[ing]" the status quo, Opp. 11 n.32, these excerpts demonstrate nothing more than Mohawk's recognition of the settled circuit law that bound the district court and the panel.

protected class under the ADA. *Id.* Despite petitioner's "failure to make this exact argument below," this Court held that it had preserved the underlying issue of whether the ADA applied, and considered the argument. See *id.* at 678 n.27.[10]

In short, no obstacles prevent this Court's review of the significant enterprise question presented. As the U.S. Chamber of Commerce as *amicus curiae* notes (Br. 3-4), this case presents a rare opportunity to correct a fundamental misinterpretation of RICO's enterprise requirement because the issue is seldom raised in light of the uniformity of contrary authority. Without correction, plaintiffs will continue to file suits based upon legally flawed enterprises and extract unwarranted, unreviewable settlements.[11]

3. Finally, plaintiffs do not (and could not) deny that the circuit courts are divided in two significant ways over the construction of RICO's limitation of civil standing to plaintiffs "injured in [their] business or property." 18 U.S.C. § 1964(c). See Pet. 24-28. Plaintiffs concede that the Seventh Circuit's decision in *Evans* v. *City of Chicago*, 434 F.3d 916 (7th Cir. 2006) creates a circuit split with other courts readily finding lost wages to be a RICO injury. See Opp. 18 n.55. Plaintiffs, however, assert that the split is not

---

[10] Plaintiffs rely (Opp. 11 nn. 33 & 34) upon entirely inapposite cases where this Court declined to consider an argument because it was not fairly comprised in the question presented. Here, however, the § 1961(4) argument is squarely within the question presented of "[w]hether a corporation and its agents can constitute an association-in-fact RICO enterprise." *See* Pet. i, 20-23. Plaintiffs also wrongly assert that Mohawk's counsel "conceded Mohawk's failure to preserve the issue" at oral argument. Opp. 10. To the contrary, Mohawk's counsel stated that the § 1961(4) question was a "logically prior question" that was "fairly subsumed within the question presented" as it was then phrased in the prior petition. Tr. Oral Arg. at 7, 10, No. 05-465 (U.S. Apr. 26, 2006).

[11] Indeed, plaintiffs' response is telling. Even though their RICO claim is fundamentally and incurably flawed, plaintiffs assert their "entitle[ment] to seek leave to amend their allegations" (Opp. 21), undoubtedly in the hope that in discovery a settlement could be extracted.

implicated here because *Evans* "agree[d] with the Eleventh Circuit's analysis," (*id.* at 19) in that *Evans* recognized an interest in business or property where a plaintiff could establish "a property right in promised or contracted for wages." *Evans*, 434 F.3d at 928. But plaintiffs here do not allege that they were deprived of "promised or contracted for wages." Plaintiffs received exactly the wages for which they bargained. Thus, the Seventh Circuit's recognition of "promised or contracted for" wages is fundamentally at odds with the Eleventh Circuit's unbridled holding that plaintiffs had "a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." Pet. App. 13a (internal quotation marks omitted).

Resolving the specific split over lost wages also affords the opportunity to resolve the underlying split over the meaning of "property" in RICO's civil standing provision. Pet. 25-27. Plaintiffs do not contest this split (Opp. 19-20), but note that the court below rested its decision on a "business" interest (Opp. 20). But the finding of a "business" interest quoted verbatim from the Ninth Circuit's finding of a "property" interest on similar facts. Pet. App. 13a (citing *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163, 1168 n.4 (9th Cir. 2002)). More importantly, determining whether a claim for depressed wages supports civil RICO standing gives this Court the opportunity to give meaning to both the term "property" and the term "business," as those terms are used in § 1964(c).[12]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

---

[12] There is no merit to plaintiffs' argument that this Court should deny review because this case involves an interlocutory order. Opp. 20-22. This Court regularly reviews § 1292(b) appeals because they reflect the judgment of the district and circuit courts that a case presents important questions that may spare the courts and the parties undue expense. None of the "interlocutory" cases plaintiffs cite involves a § 1292(b) appeal.

Respectfully submitted,

CARTER G. PHILLIPS*
JUAN P. MORILLO
STEVEN T. COTTREAU
MATTHEW J. WARREN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

February 6, 2007

* Counsel of Record

BLANK PAGE