No. 15-138

IN THE

# Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

*Petitioners,*

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit**

## MOTION AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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**MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

Pursuant to Rule 37(2)(b) of the Rules of this Court, Washington Legal Foundation (WLF) respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Petitioners. On August 18, 2015, more than 10 days prior to the due date for WLF's brief, undersigned counsel notified counsel of record for all parties of WLF's intention to file. Although counsel for Petitioners consents to the filing of WLF's brief, counsel for Respondents opposes WLF's filing its brief within the time frame permitted by Rule 37(2)(a). Accordingly, this motion for leave to file is necessary.

WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears in this Court as *amicus curiae* to defend the presumption that, absent clear congressional intent to the contrary, Acts of Congress do not provide a remedy for alleged misconduct occurring outside the United States. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Morrison v. Nat'l Australian Bank Ltd.*, 561 U.S. 247 (2010). WLF also regularly participates in litigation concerning the proper scope of civil actions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*. (RICO). *See, e.g., Pfizer Inc. v. Kaiser Found. Health Plan Inc.*, 134 S. Ct. 786 (2013); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

WLF has long been concerned that the reflexive invocation of RICO by civil litigants engaged in garden-variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens the federal judiciary. While Congress adopted RICO as a tool to fight organized crime, civil RICO is now frequently invoked in "everyday fraud cases brought against respected and legitimate enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). Among the many creative attempts to drastically expand RICO's reach, none are more problematic than recent civil suits brought by foreign governments against American businesses for overseas conduct.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It submits this brief solely due to its interest in ensuring the Court's further judicial review of the important question presented by the Petition. Because of its lack of a direct interest, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, WLF respectfully requests that it be allowed to participate as an *amicus curie* in this case.

Respectfully submitted,

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August 31, 2015

## QUESTION PRESENTED

Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq*., applies extraterritorially.

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## INTEREST OF *AMICUS CURIAE*[1]

The interests of Washington Legal Foundation (WLF) are more fully set forth in its accompanying motion for leave to file this brief. In short, WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF agrees with Petitioners that the Second Circuit's opinion deepens even further an existing circuit split on whether, and to what extent, RICO applies extraterritorially. By extending RICO to cover allegations of foreign racketeering, foreign enterprises, and foreign injuries, the decision below implicates several areas of confusion among the lower courts as to the statute's proper reach. The petition is therefore an excellent vehicle for providing sorely needed guidance on an important and recurring question of law. WLF writes separately to address the significant harm that will result for both our civil justice system and U.S. interests abroad if the decision below is allowed to stand. For the reasons that follow, WLF joins with Petitioners in urging this Court to grant certiorari.

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[1] Pursuant to Supreme Court Rule 37(6), *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for all parties with notice of WLF's intent to file this brief.

## STATEMENT OF THE CASE

RICO, 18 U.S.C. § 1961 *et seq*., creates criminal penalties for a broad range of conduct involving covered enterprises and patterns of racketeering activity. It also authorizes "any person injured in his business or property by reason of" a violation of RICO's criminal provisions to bring a civil suit to recover treble damages, plus the cost of bringing the suit. 18 U.S.C. § 1964(c). The petition invites the Court to decide, once and for all, whether RICO provides such a civil remedy for extraterritorial conduct, and if so, to what extent.

Petitioners are RJR Nabisco, Inc. (RJR) and several related entities. Respondents are the European Community (EC) and 26 member states.[2] Respondents sued Petitioners under RICO, alleging that Petitioners conspired with cigarette wholesalers in such far-flung countries as Colombia and Croatia, among other places, to launder monies derived from the sale of illegal narcotics in Europe. Pet. App. 2a-3a. The complaint alleges that, in furtherance of this global conspiracy, Petitioners engaged in various predicate racketeering acts in violation of RICO, including mail fraud, wire fraud, and money laundering. *Id.* at 3a-5a. As a result of these alleged RICO violations, Respondents claim myriad injuries to European governments and their economies in the form of lost tax revenues, higher law enforcements

[2] Since this lawsuit was originally filed, the European Community has been incorporated into the European Union. *See European Cmty. v. RJR Nabisco, Inc.,* 764 F.3d 129, 148 (2d Cir. 2014).

costs, and reduced profits to their state-owned tobacco businesses. *Id.* at 211a-228a.

The United States District Court for the Eastern District of New York dismissed Respondents' RICO claims. Applying this Court's holding in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), the district court found that because the RICO statute is "silent as to any extraterritorial application," it "has none." Pet. App. 44a. And because the enterprise alleged in the complaint consisted of "a loose association of Colombian and Russian drug-dealing organizations and European money brokers whose activity was directed outside the United States," the complaint failed to state an actionable claim under RICO. *Id.* at 5a.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed, expressly holding that RICO applies extraterritorially. The appeals court rejected the district court's conclusion that RICO cannot apply to extraterritorial conduct because "with respect to a number of offenses that constitute predicates for RICO liability … Congress has clearly manifested an intent that they apply extraterritorially." Pet. App 3a. The panel also fully extended RICO to foreign enterprises, reasoning without any statutory basis that this Court's presumption against extraterritorial application of U.S. laws "does not command giving foreigners carte blanche to violate the laws of the United States." *Id.* at 14a. As to several of the alleged RICO predicates (including mail and wire fraud), the appeals court acknowledged that those statutes do not apply extraterritorially but nevertheless held that the

complaint alleged sufficient domestic activity to come within RICO's ambit. *Id.* at 18a-24a.

Petitioners sought rehearing on the basis that, regardless of the geographic scope of the alleged RICO enterprise or any underlying predicate acts, 18 U.S.C. § 1964(c) requires a domestic *injury* before a plaintiff is entitled to treble damages. Pet. App. 55a-58a. In response, the panel issued a second opinion extending § 1964(c) to extraterritorial injuries as well. Reasoning that this Court's presumption against extraterritoriality is "primarily concerned with the question of what *conduct* falls within a statute's purview," the panel held that such a presumption does not apply to the question of extraterritorial injury caused by violations of RICO. *Id*. at 58a.

Petitioners sought rehearing en banc, which was denied by an 8-5 vote. Judge Jacobs, writing for all five dissenters, insisted that further review was needed in light of the "frequency of RICO litigation" in the Second Circuit and the "tension" between the panel opinion and prior precedent, including *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (holding that because "RICO is silent as to any extraterritorial application … it has none"). Pet. App. 68a-69a.

Judge Cabranes, joined by Judges Jacobs, Raggi, and Livingston, lamented that "a panel of our court has discovered and announced a new, and potentially far-reaching, judicial interpretation of the statute—one that finds little support in [the] history of the statute, its implementation, or the precedents of the Supreme Court." Pet. App. 73a.

Writing for the same four judges, Judge Raggi criticized the panel opinion for creating a circuit split and failing to follow this Court's approach to extraterritorial analysis in *Morrision*. She urged further review not only to decide whether "RICO applies extraterritorially" but in order to establish "criteria for determining whether a RICO claim is domestic or extraterritorial." Pet. App. 77a.

## SUMMARY OF ARGUMENT

The petition raises a question of exceptional importance. Although a straightforward application of this Court's precedents clearly dictates that RICO does not apply extraterritorially, substantial confusion persists among the lower federal courts as to the extent of the statute's extraterritorial reach, if any. Rather than provide clarity, the Second Circuit's decision below muddles the law further by extending RICO to cover foreign racketeering, foreign enterprises, *and* foreign injuries. In an era of ever-increasing globalization, this Court's review is desperately needed to safeguard the longstanding presumption against the extraterritorial application of U.S. law.

Even when cabined to wholly domestic matters, civil RICO is uniquely prone to abuse. RICO is notorious for its elasticity and for enabling plaintiffs to convert ordinary civil disputes into federal racketeering claims. And RICO provides treble damages and recovery of all costs, including attorney fees, to prevailing plaintiffs. Armed with the loss of goodwill and reputation that often follow the news that a defendant company has been accused of "racketeering" activity, civil RICO

plaintiffs encounter little trouble extracting settlements for even the most frivolous claims.

Giving extraterritorial effect to a statute with the unparalleled breadth and civil remedies of RICO will only make matters worse. The decision below unquestionably will invite wholly foreign litigation into the United States, where it does not belong. Allowing foreign litigants to bring what are otherwise ordinary foreign civil disputes into U.S. federal courts will dramatically increase the burden on the federal courts, impose higher litigation costs on multi-national businesses, and force defendants into coercive settlements. This is of particular concern in light of this Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, as activist plaintiffs are strategically pivoting to civil RICO as a surrogate for claims that are now foreclosed under the Alien Tort Statute.

Finally, review is warranted to help ensure that federal courts do not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences unintended by the political branches. Although the plaintiffs in this case happen to be foreign sovereigns, the vast majority of civil RICO litigation is initiated by private plaintiffs. The doctrine of international comity reduces conflicts among nations regarding whose courts should hear disputes over which both countries might exercise jurisdiction. If ill-considered decisions by U.S. courts are allowed to blur the accepted territorial limits of U.S. law, other nations may retaliate in kind. As a result, U.S. companies could likely find themselves subject to similar actions brought by overseas plaintiffs.

## REASONS FOR GRANTING THE PETITION

### I. THE GLOBAL EXPANISION OF RICO INVITES AN EXPLOSION IN CIVIL LITIGATION ABUSE

#### A. Civil RICO Is Uniquely Vulnerable to Abuse by the Plaintiffs' Bar

Although RICO was adopted as a new law enforcement tool for combatting organized crime, the civil RICO provision, 18 U.S.C. § 1964(c), has rarely been used for that purpose. Instead, the ever-increasing number of civil RICO suits filed each year primarily target legitimate, everyday business activity that would not fit most people's definition of racketeering. And because RICO is drafted so broadly, plaintiff's attorneys can file as RICO claims a growing number of disputes that Congress never could have foreseen. "Through innovative lawyering, civil RICO claims have centered on a myriad of subjects, including sexual harassment, the 1986 air strike on Libya, mismanagement of hazardous waste sites, anti-abortion protest activities, a parishioner's grievances against her former church, a strict products liability suit involving defective infant formula, and a wrongful discharge action." Petra J. Rodrigues, *The Civil RICO Racket: Fighting Back with Federal Rule of Procedure 11*, 64 ST. JOHN'S L. REV. 931, 936-37 (1990).

Because the "danger of vexatiousness" is especially strong in RICO cases, *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987), the statute has become a highly profitable vehicle for the plaintiffs' bar. As a result, judges and legal scholars

have routinely criticized the overly expansive reach of civil RICO, which provides "many ordinary civil cases with an entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 VILL. L. REV. 853, 857 (1990); *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread."); William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 13 (1989) (inviting "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court").

The attractiveness of civil RICO for plaintiffs and the plaintiffs' bar is not difficult to understand. RICO applies not only to individual actors, but also to corporations, and promises treble damages and recovery of costs, including attorney fees, to prevailing plaintiffs. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) ("RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers."). And RICO's liberal venue provisions, which allow suit to be brought in any district where the defendant "resides, is found, has an agent, or transacts his affairs," 18 U.S.C. § 1965(a), invite forum shopping by RICO plaintiffs.

Moreover, plaintiffs can always threaten to use the provocative public-relations implications of RICO's title to coerce settlements from companies who understandably fear the loss of goodwill and reputation that would accompany the news that the

company has been accused of "racketeering" activity. "Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those action's RICO violations." Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 626 (1990).

Statistical studies suggest that plaintiffs are filing RICO lawsuits based on alleged "racketeering" conduct that federal prosecutors see no reason to pursue. "Between 2001 and 2006, there was an average of 759 civil RICO claims filed per year, while in those same years, a paltry average of 212 criminal RICO cases were referred to the United States Attorney's Office." Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U. L. REV. 19, 24 (2013). Similarly, a 2002 study found that, of all RICO cases decided by federal appellate courts between 1999 and 2001, 78% were civil and only 22% were criminal. Pamela H. Busy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 & n.111 (2002). Even when confined to its proper domestic sphere, civil RICO is uniquely vulnerable to abuse.

### B. Extraterritorial Application of RICO Will Only Invite Further Abuse

Unless this Court intervenes, frivolous RICO claims will proliferate even more under the appeals court's aberrant holding below. While civil actions under RICO have always been a lightning rod for

criticism, extending RICO to cover allegations of foreign racketeering, foreign enterprises, and foreign injuries, as the Second Circuit has now done, further exacerbates the problem. The unusual breadth of RICO, and the mischief that will accompany its extension into wholly foreign disputes, make this Court's review all the more necessary.

Among the many creative attempts to expand the law's reach, none are more unfounded than recent civil RICO suits brought by foreign governments against American businesses for alleged "racketeering" activities overseas. *See* Ignacio Sanchez & Kevin O'Scannlain, *Foreign Governments' Misuse of Federal RICO: The Case for Reform*, WASHINGTON LEGAL FOUNDATION WORKING PAPER (May 2006) ("[T]he clearest and most egregious misuse and abuse of civil RICO to date is a growing species of litigation brought not by the United States, but by *foreign* governments.").[3] Such use of RICO exceeds even the reach of the statute's overly expansive language.

Although such disputes are best adjudicated in the courts of the countries that bring them, opportunistic plaintiffs are seeking to extract the settlement of frivolous claims from American companies unable to cope with the threat of treble damages and the unfavorable publicity that arises whenever one is labeled a "racketeer." These plaintiffs carefully tailor their complaints to meet the statutory requirements of a RICO lawsuit:

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[3] Available at http://www.wlf.org/publishing/publication_detail.asp?id=1767.

> These claims are often constructed by piggy-backing on legitimate U.S. criminal investigations of the criminal racketeers. The lawyer's convert the government's evidence (usually after extensive investigation and discovery), discard the foreign criminal racketeers and *replace* them with the deep pockets whose products were used illegally by the criminals. The legitimate business entity is thereby bootstrapped into alleged "schemes." The criminal actors go unnamed in these suits, revealing their true purpose as nothing more than an attempt to wrest vast sums from corporations with extensive financial resources.

Sanchez & O'Scannlain, *supra*, at 3.

If this Court were to deny review in this case, foreign governments and their political subdivisions would undoubtedly view the decision below as a free-standing invitation to bring RICO suits against U.S. multi-national companies in federal district courts inside the Second Circuit. And one can easily imagine the onslaught of similar RICO cases that would be brought by foreign agencies, municipalities, and business competitors against U.S. companies absent this Court's intervention. Individual foreign plaintiffs, too, will surely take advantage of RICO's unusual breadth to refashion foreign-law claims as civil RICO claims. The availability of treble damages and attorney fees under RICO would dramatically increase the settlement value of such claims. Such easy access to federal courts would provide foreign plaintiffs with American procedural advantages (*e.g.*,

discovery, class actions, jury trials, and contingent-fee arrangements with counsel) that are simply unavailable in most foreign jurisdictions.

Because RICO has been so broadly interpreted, the existing split of authority regarding the threshold legal issue of extraterritoriality provides no clear answer for companies—be they domestic or international—about the extent to which their entirely overseas conduct may be deemed subject to treble-damages liability in the United States. As this Court has emphasized, "[s]imple jurisdictional rules … promote greater predictability. Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). In the absence of a consistent and uniform interpretation of RICO, the risk of protracted litigation and ruinous damage awards will also likely discourage legitimate businesses from engaging in perfectly legitimate market activity that *might* subject them to suit here.

WLF does not mean to suggest that the Court ought to read RICO in a crabbed manner for the purpose of restricting the reach of the admittedly overbroad statute. To the contrary, WLF recognizes that it is not this Court's role to rewrite RICO, and that any *statutory* deficiencies are best addressed by Congress. *Sedima*, 473 U.S. at 500 ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because the plaintiffs are not taking advantage of it in its more difficult applications."). Nonetheless, jettisoning the presumption against extraterritoriality would be such a dramatic expansion of RICO that the Court should, as Petitioners urge, grant review to carefully

consider whether Congress could really have intended that result.

## II. IN THE WAKE OF *KIOBEL*, ACTIVIST PLAINTIFFS VIEW CIVIL RICO AS A SURROGATE FOR CLAIMS THAT ARE NOW FORECLOSED UNDER THE ALIEN TORT STATUTE

Giving extraterritorial application to a statute of RICO's breadth would also enable plaintiffs to circumvent the important territorial limits that this Court has recently recognized in the Alien Tort Statute (ATS), 28 U.S.C. § 1350, which authorizes federal courts to hear claims brought by aliens for only a "modest number of international law violations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

The ATS existed for over 200 years but was rarely used until 1976, when a cohort of enterprising plaintiffs' attorneys seized on the law to sue a former Paraguayan police chief on behalf of two Paraguayan nationals for the kidnap, torture, and murder of their son—in Paraguay. That lawsuit resulted in the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which expressly enabled alleged victims of human rights violations to bring suit in federal court.

For decades following *Filartiga*, human rights activists routinely relied on the ATS as their vehicle of choice to sue multi-national corporations for alleged overseas violations of the "law of nations," and many lower federal courts interpreted the ATS to permit a global remedy for international

law violations. *See* HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 35 (2008) (stating that the Second Circuit's *Filartiga* decision "spawn[ed an] entirely new way[] of looking at the law" and "triggered a wave of academic scholarship and more than a quarter-century of human rights litigation in U.S. courts").

This Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), not only rejected the notion that the ATS creates a global cause of action, but it did so unanimously. Requiring dismissal of plaintiffs' claims against foreign defendants based on the actions of a foreign government in its own territory, the Court held that nothing in the text, history, or purpose of the ATS suggested that Congress intended to override the venerable presumption against extraterritorial application of U.S. law. 133 S. Ct. at 1665-69. The Court held further that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

After the Court granted certiorari in *Kiobel*, "litigators in the broader [human rights] community appear[ed] to be undergoing a recalibration—a search for alternative vehicles by which to sustain the momentum in litigating involvement in extraterritorial abuses." Julian Simcock, *Recalibrating After* Kiobel*: Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act (RICO) in Litigating International Corporate Abuse*, 15 CUNY L. REV. 301, 304 (2012); *see also* Eric Allen Engle, *Extraterritorial Jurisdiction: Can RICO*

*Protect Human Rights?,* 3 J. HIGH TECH. L. 1, 10 (2004) (proposing "the use of RICO to supplement and fortify claims under [the ATS]").

Indeed, "the well-documented flexibility of RICO as a tool for ascribing liability to individuals who are removed from the direct perpetration of crimes has led some commentators to suggest that the Act may be an appropriate vehicle by which to pursue corporate involvement in international abuses." Simcock, *supra*, at 306. Moreover, "[a] certain similarity exists between RICO and the [ATS]: both import foreign substantive law as the basis of a new independent federal claim." Engle, *supra*, at 9. Most traditional human rights abuses, such as murder, robbery, bribery, extortion, etc., all easily qualify as predicate offenses under RICO. *Ibid.*

"Many of the claims that have been brought under ATS cases (and other human rights litigation) are featured as predicate offenses under RICO as well." Simcock, *supra*, at 310. Indeed, it is rather telling that some of the most far-fetched ATS lawsuits also included RICO claims. *See, e.g., Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of a quorum*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (asserting ATS and RICO claims against fifty corporate defendants for their "complicity" in South African apartheid); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011) (asserting ATS and RICO claims against U.S. military contractors in connection with alleged abuses at the Abu Ghraib military prison in Iraq).

Such ATS and RICO claims are sometimes dismissed by the district court on foreign non conveniens grounds, only to be reinstated later on appeal. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (suit by Nigerian citizens against Dutch and British holding companies alleging human rights abuses stemming from oil exploration in Nigeria). Others survive the pleadings stage but are later disposed of on summary judgment—*precisely* on the ground that RICO does not apply extraterritorially. *See Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (suit by Myanmar citizens against Myanmar government and government-owned oil company for human rights abuses in furtherance of an oil-pipeline project).

Much like its earlier *Filartiga* decision ushered in a flood of ATS litigation, the Second Circuit's deeply flawed decision below, if left undisturbed, will effectively authorize activist plaintiffs to litigate under RICO the very same factual allegations that *Kiobel* now bars them from pursuing under the ATS. As a result, claims that would otherwise have little or no settlement value as ATS claims will, when recast as civil RICO claims seeking treble damages, provide even greater leverage against defendants than that available under the ATS.

In sum, permitting the use of civil RICO as a substitute for ATS litigation would saddle U.S. multi-national companies with potentially paralyzing risks of liability. If human-rights activists are able to bring suit in district courts inside even a single federal circuit that allows RICO to encompass

overseas activities, American companies will find themselves litigating claims of this sort for many years to come.

## III. THE DECISION BELOW THREATENS TO UNDERMINE AMERICA'S VITAL FOREIGN POLICY INTERESTS

The Second Circuit's overly expansive interpretation of RICO's territorial reach not only ignores this Court's longstanding presumption against the extraterritoriality of federal law, but it threatens to undermine American foreign policy interests. Rather than ignoring federal law, courts should examine possible conflicts of law, consider the weight of the U.S. government's interests, and consider whether those interests are sufficiently compelling to outweigh principles of international law, comity, sovereignty, and reciprocity. By exercising RICO jurisdiction over events taking place in foreign countries whose governments have a much greater stake in those events than do American courts, the panel's opinion risks considerable conflict between the laws of the United States and the laws of those foreign countries—in the absence of any clear indication from Congress that it approves of such litigation.

The disastrous ramifications of the holding below are by no means limited to the parties in this case. Although the plaintiffs here happen to be foreign governments, that is the narrow exception to the rule. The overwhelming majority of civil RICO litigation is initiated not by governments, but by private plaintiffs. This is of critical concern because private plaintiffs often do not "exercise the degree of

self-restraint and consideration of foreign governmental sensibilities" as sovereign governments might. *See, e.g.,* Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999).

Foreign sovereigns zealously guard their own territorial prerogatives, but extending unusually broad statutes like RICO—which contains onerous criminal forfeiture provisions and provides for generous civil remedies including treble damages—to conduct occurring exclusively overseas, would encroach upon traditional sovereign interests and foster international resentment. Indeed, the Second Circuit's expansive construction of RICO dramatically increases the likelihood that foreign companies and individuals will find themselves named as *defendants* in future civil RICO actions. As Judge Cabranes explained in his dissent from the denial of rehearing en banc:

> If this decision remains undisturbed, the prevailing plaintiffs here, the European Community and its member states, will have achieved a pyrrhic victory, and one that the Community's constituents will have cause to regret in the years ahead. Why? Because its citizens, natural and corporate, are among the likely targets of future RICO actions under the panel's interpretation of the statute.

Pet. App. 70a. If the Second Circuit's decision is allowed to stand, foreign defendants will increasingly be subjected to the burdens of intrusive discovery, pretrial litigation, and even trial in U.S. courts based on overseas conduct.

This Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This rule of statutory construction "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.* at 164. Such an approach "reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow" and "thereby helps the potentially conflicting laws of different nations work in harmony—a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil. Co.*, 499 U.S. 244, 248 (1991). This canon "preserv[es] a stable background against which Congress can legislate with predictable effects." *Morrison*, 561 U.S. 247, 261 (2010). In contrast, applying American laws to foreign conduct or events often constitutes "an interference with the authority of another sovereign, contrary to the comity of nations." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). Such extraterritorial application of American laws is controversial and can often lead to the impression that the United States is imposing its values on the rest of the international community. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2005) (applying the "presumption that United States law governs domestically but does not rule the world").

Foreign countries frequently object to extraterritorial application of United States law. Subjecting a foreign company to intrusive discovery and extensive pretrial litigation may well impose burdens inconsistent with the policies of its home nation. This Court has cautioned that lower federal courts "should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Distr. of Iowa*, 482 U.S. 522, 546 (1987) ("American courts should take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations.").

The presumption against extraterritoriality is especially strong where, as here, the statute affords civil remedies substantially different in kind from those available under foreign law. As this Court has emphasized in limiting the extraterritorial reach of federal antitrust laws, "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 164. For that reason, "several foreign nations" have complained that "apply[ing] our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations." *Ibid.*

In recent years, the European Union and other foreign regulators have become much more aggressive in enforcing their antitrust laws and other laws regulating business. This Court has long

recognized that "interference with the authority of another sovereign, contrary to the comity of nations" may breed resentment. *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 29 (1925). But if ill-considered decisions by U.S. appeals courts are allowed to blur the accepted territorial limits of U.S. law, U.S. companies will likely find themselves subject to similar actions by foreign plaintiffs based on their domestic actions that have alleged effects overseas.

Respecting the laws of foreign nations not only prevents such retaliation toward the United States, but it also best furthers the interests of the United States and the international business community. Congress, in conjunction with the Executive Branch, has consistently sought to increase America's standing in world markets. Those important efforts will be undercut significantly if the decision below is allowed to stand. "The expansion of American business and industry will hardly be encouraged if … we insist on a parochial concept that all disputes must be resolved under our laws and our courts." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

## CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition for certiorari.

Respectfully submitted,

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