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WHY RICO'S EXTRATERRITORIAL REACH IS PROPERLY COEXTENSIVE WITH THE REACH OF ITS PREDICATES

Melvin L. Otey*

INTRODUCTION

In certain respects, the world is smaller now than ever before. The growing ease of communication and travel has begotten routine, instantaneous interaction between individuals, groups, and entities that were formerly isolated by distance or restricted to contact via mail and telephones. Advances in computer technology and the Internet, among other things, have effectively erased the divides and largely obliterated these restrictions. Individuals are using their cellular telephones to communicate and conduct business of various kinds with people all over the globe on a daily basis. While these developments have produced many desirable and beneficial effects, they have also created weighty new risks and dangers for nation-states and their citizenries.

As globalization flourishes, the challenges for each sovereign in protecting its nationals correspondingly multiplies,¹ and this inevitably raises questions about the extraterritorial application of domestic laws, that is, their enforcement beyond domestic boundaries.² More pointedly, America must increasingly wrestle with the extent to which its laws apply to conduct directed from the United States into other nations and activities directed into the United States from other nations.³ Given this reality, it is significant that the

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¹ NAT'L SECURITY STAFF, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: ADDRESSING CONVERGING THREATS TO NATIONAL SECURITY, 3 (2011) ("In January 2010, the United States Government completed a comprehensive review of international organized crime—the first on this topic since 1995. Based on the review and subsequent reporting, the Administration has concluded that, in the intervening years, international—or transnational—organized crime has expanded dramatically in size, scope, and influence and that it poses a significant threat to national and international security.").

² Ryan Walsh, *Extraterritorial Confusion: The Complex Relationship Between Bowman and Morrison and a Revised Approach to Extraterritoriality*, 47 VAL. U. L. REV. 627, 632-33 (2013) ("However, expanding globalism, communications, and technology will inevitably result in multi-jurisdictional conduct, leaving some nations without redress unless they apply their laws extraterritorially.").

³ *Gau Shan Co. v. Bankers Trust*, 956 F.2d 1349, 1354 (6th Cir. 1992) ("In an increasingly international market, commercial transactions involving players from multiple nations have become commonplace. Every one of these transactions presents the possibility of concurrent jurisdiction in the courts of the nations of the parties involved concerning any dispute arising in the transaction."); Juan M. Alcala, *Transnational Disputes in a Global Economy*, 75 TEX. B. J. 512, 512 (2012) ("The growth in cross-border disputes is challenging the way lawyers, judges, and legal scholars across the globe think about and deal with procedural and substantive legal issues, diverse legal regimes, and cultural differences."); Walsh, *supra* note 2 at 629 ("The emergence of new global issues has brought the presumption against extraterritoriality under fire. Crimes are becoming more intricate and complex, and continual developments call for the United States to alter the way it applies federal laws extraterritorially."); NAT'L SECURITY STAFF, *supra* note 1 at 22 ("To address recent TOC trends, the

extraterritorial reach of the Racketeer Influenced and Corrupt Organizations Act, or “RICO,” one of America’s most powerful statutes, the one perhaps most capable of redressing threats necessarily concomitant with increased globalization, is being haphazardly and inconsistently discerned.

Morrison and *Kiobel*, two recent Supreme Court cases, have radically changed the way courts approach extraterritorial inquiries in many instances, but their ultimate import on the question of RICO’s extraterritorial reach is far from settled.⁴ To put it kindly, “the post-*Morrison* RICO cases have yet to settle on a single approach.”⁵ If one were to put a sharper point on it, he or she might fairly conclude that since *Morrison*, the lower courts have been “all over the board” producing “the very confusion and variation in standards” the Supreme Court hoped to remedy by rendering the decision.⁶ Resolution to the question of RICO’s extraterritorial reach is absolutely vital to American interests in the current transnational and geopolitical climate.

RICO is an expansive tool, a veritable broad sword promulgated by Congress to redress dire threats to America’s national economy and security.⁷ Over the course of more than four decades, the statute has proven its mettle in protecting these interests, but continued judicial failures to recognize the full breadth of its extraterritorial reach leaves the nation more vulnerable to new and emerging threats.⁸ This article discusses the significance of the dilemma and proposes that, until contrary guidance is provided by statutory amendment or a

Administration will work with Congress on a range of legislative solutions to allow or enhance the prosecution of TOC enterprises and significant TOC activity that affects the United States. We will also enhance our anti-money laundering and forfeiture authorities to target TOC networks that pose threats to national and international security.”).

⁴ Gideon Mark, *RICO’s Extraterritoriality*, 50 AM. BUS. L.J. 543, 594 (2013) (“It is not at all clear how *Morrison’s* logic translates to RICO.”).

⁵ Mitsui O.S.K. Lines v. Seamount Logistics, 871 F. Supp. 2d 933, 937 (N.D. Cal. 2012); see also Anneka Huntley, *RICO’s Extraterritoriality After Morrison: Where Should We Go From Here?*, 65 HASTINGS L.J. 1691, 1693 (2014) (“Because RICO jurisprudence borrows heavily from securities jurisprudence, and it borrowed the conduct and effects test in particular, the ruling in *Morrison* threw courts into turmoil over how to apply RICO to enterprises and transactions that occur abroad.”).

⁶ Lorrie L. Hargrove et al., *The Extraterritorial Defense: A Border to RICO Claims Arising From International Transactions*, 81 DEF. COUNS. J. 47, 49, 52 (2014).

⁷ H.R. REP. NO. 91-1549, pt. 1, at 164 (1970) (“The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption; . . . (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.”); see also, 18 U.S.C. § 1961 (2012); Doe v. State of Israel, 400 F. Supp. 2d 86, 115 (D.D.C. 2005) (“Congress sought to eradicate the substantial and detrimental economic consequences that plague the United States as a result of organized crime activity. Inferentially, Congress also sought to eradicate the effects of such activity on our domestic security.”) (internal citations omitted); United States v. Noriega, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) (“Though its emphasis is on economic effects, RICO itself is not so limited; it’s history demonstrates concern with our domestic security and welfare as well as our gross national product.”).

⁸ Mark, *supra* note 4, at 545.

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Supreme Court decision squarely addressing the matter, courts should apply RICO extraterritorially insofar as its underlying predicates in a given case apply extraterritorially.

The discussion will proceed in five parts. The first presents a brief overview of the RICO statute, highlighting its breadth. Second, is a description of the rise of transnationalism, which makes the need for proper extraterritorial application of RICO more acute. The third section discusses *Morrison* and *Kiobel*, which ostensibly clarified and refined the judicial canon of extraterritoriality. The fourth addresses the judiciary's struggles in attempting to apply *Morrison* in RICO cases and the merits of identifying the "pattern of racketeering" rather than the "enterprise" as RICO's focus. The final section presents the *bona fides* of the "coextensive with predicate acts" approach to extraterritorial application of RICO as the one that should be adopted by all courts facing this important issue.

I. AN OVERVIEW OF RICO

RICO's breadth, which is its greatest strength,⁹ potentially permits prosecutors and plaintiffs to include persons filling distinct roles in various components of a complex transnational enterprise in one case. For example, the planners, financiers, smugglers, and bombers in a terrorism-related case can be made to stand trial together. Similarly, in a sex trafficking case, the recruiters, drivers, brothel operators, and enforcers can all be called to account in a single indictment or complaint. This sort of comprehensive litigation makes it easier to cast discrete acts in the light of their full criminal and unsavory context. Few, if any, other federal statutes are so thorough and capacious.

Recognizing that organized crime constituted a dire threat to America's economy and national security,¹⁰ Congress enacted RICO as "an aggressive initiative to supplement old remedies and develop new methods for fighting crime."¹¹ Its primary purpose was to protect organizations from the untoward influence and taint of infiltration by nefarious outsiders and racketeers.¹² The track record of RICO's utility in this regard is beyond credible dispute. Federal prosecutors have lauded its efficacy. One called it "an effective weapon against corrupt public officials" and "far and away the most effective attack" against systemic corruption.¹³ Additionally, a former Chief of the Organized Crime and Racketeering Section of the United States Justice Department offered this ringing endorsement: "RICO has proven to be an extremely important tool assisting in the prevention of organized crime in the United States. . . . Currently, it is evident that control of organized crime in the United States would be inconceivable without RICO."¹⁴

⁹ *DelRio-Mocci v. Connolly Props.*, 672 F.3d 241, 254 (3d Cir. 2012) (calling RICO's breadth its "very strength").

¹⁰ S. Res. 30, 91st Cong., 116 CONG. REC. 602 (1970) (statements of Sen. Yarborough and Sen. Hruska); Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970).

¹¹ *Sedima v. Imrex*, 473 U.S. 479, 498 (1985).

¹² *Reeves v. Ernst & Young*, 507 U.S. 170, 185 (1993); *Aetna Casualty Sur. v. P & B Autobody*, 43 F.3d 1546, 1558 (1st Cir. 1994).

¹³ Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1040 (1990).

¹⁴ Bruce G. Ohr, *Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes*, in 58 RESOURCE MATERIAL SERIES, 116TH INT'L TRAINING COURSE VISITING EXPERTS PAPERS 40, 51 (2001).

RICO's impact is not solely limited to criminal prosecutions. While it is a criminal statute, it provides civil remedies¹⁵ and the courts have noted its impact in civil litigation. For example, in *Miranda v. Ponce Federal Bank*, the First Circuit Court of Appeals described how formidable the statute's civil provisions can be: "Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device. The very pendency of a RICO suit can be stigmatizing and its consummation can be costly."¹⁶ More recently, the Southern District of New York observed, "Both the potential financial rewards for plaintiffs, and the stigma that may attach to RICO defendants, make the statute a powerful weapon for aggrieved parties."¹⁷

A. Proscriptions Under 18 U.S.C. § 1962

Congress created four offenses under 18 U.S.C. § 1962 to achieve RICO's design as a supplement to fighting crime. Each involves the use of either a "pattern of racketeering" or a single collection of unlawful debt¹⁸ (that is, a debt incurred through illegal gambling or loansharking activity¹⁹) to influence "enterprises" engaged in or affecting interstate commerce or foreign commerce.²⁰ The first three offenses are substantive.²¹ First, § 1962(a) makes it unlawful to acquire, establish, or operate an enterprise with income derived from such a pattern or collection.²² This is tantamount to a ban on purchasing an enterprise with filthy lucre. Second, § 1962(b) renders culpable those who acquire or maintain an interest in an enterprise through either a pattern of racketeering or collection of unlawful debt.²³ The third substantive proscription, § 1962(c), prohibits persons employed by or associated with an enterprise from conducting or participating in its affairs via the aforementioned pattern or collection.²⁴

The fourth and final provision, § 1962(d), criminalizes any conspiracy to violate one of the three substantive provisions.²⁵ Because RICO conspiracy does not require proof of an overt act, it is broader than traditional conspiracy provisions, including the general federal conspiracy statute.²⁶ Any individual who merely agrees to commit a substantive violation is

¹⁵ See 18 U.S.C. § 1964 (2012).

¹⁶ *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

¹⁷ *DLJ Mortg. Capital v. Kontogiannis*, 726 F. Supp. 2d 225, 236 (E.D.N.Y. 2010).

¹⁸ *United States v. Weiner*, 3 F.3d 17, 24 (3d Cir. 1993); see also *United States v. Pepe*, 747 F.2d 632, 645 (11th Cir. 1984).

¹⁹ See 18 U.S.C. § 1961(1)(A)-(B) (2012); see, e.g., *Rose v. Bartle*, 871 F.2d 331, 356-58 (3d Cir. 1989) (affirming dismissal of a claim alleging violation of §1962(a)).

²⁰ See 18 U.S.C. § 1962 (2012).

²¹ See *id.* at § 1962(a)-(c).

²² See *id.* at § 1962(a).

²³ See *id.* at § 1962(b).

²⁴ See *id.* at § 1962(c); *United States v. Angiulo*, 847 F.2d 956, 966 (1st Cir. 1988), *cert. denied*, 488 U.S. 852 (1988); *United States v. Vastola*, 899 F.2d 211, 228-29 (3d Cir. 1990).

²⁵ See § 1962(d).

²⁶ See *id.* at § 371; *Salinas v. United States*, 522 U.S. 52, 63 (1997) ("There is no requirement of some overt act or specific act in the statute before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy,' § 371. The RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense in § 371."); *United States v. Harris*, 695 F.3d 1125, 1133 (10th Cir. 2012) ("Further,

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culpable under this section.²⁷ This sweeping provision was designed, in part, “to relieve some of the deficiencies of the traditional conspiracy prosecution as a means for coping with contemporary organized crime.”²⁸

B. RICO's Penalties and Remedies

RICO is a powerful, broad criminal statute that provides both severe criminal penalties and potentially onerous civil remedies in order to accomplish its goals.²⁹ Criminally, offenders can be imprisoned for up to twenty years or up to life if the underlying racketeering activity is punishable by life imprisonment. Further, criminal offenders can be compelled to forfeit any interests acquired or used in violation of § 1962.³⁰

Civilly, violators may be subject to treble damages and attorney's fees to prevailing private parties.³¹ Additionally, these offenders may be susceptible to equitable relief including divestiture, dissolution, or reorganization in suits initiated by the government.³² These remedies are essential tools in combating the threats Congress perceived when passing the RICO legislation.³³ In fact, the Supreme Court has specially noted that the civil penalties could be “useful in eradicating organized crime from the social fabric” by purging corrupt associations of their ill-gotten gains.³⁴ Overall, RICO is a heavy, two-headed hammer designed for combat on both criminal and civil fronts, and its punitive features potentially increase its utility in combating extraterritorial threats.

§ 1962(d) requires no overt act, unlike the general criminal conspiracy statute, 18 U.S.C. § 371, which does”); *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004) (noting that the government is not required to prove the defendant committed an overt act in order to prove a RICO conspiracy violation); *Hecht v. Commerce Clearing House*, 897 F.2d 21, 25 (2d Cir. 1990) (“Therefore, although an overt act by itself (whether or not injury ensues) is not a requisite element of a section 1962(d) criminal conspiracy violation, *see United States v. Teitler*, 802 F.2d 606, 613 (2d Cir. 1986), we hold that injury from an overt act is necessary and sufficient to establish civil standing for a RICO conspiracy violation.”).

²⁷ *Salinas*, 522 U.S. at 64 (noting that the RICO conspiracy statute does not require the Government to prove each conspirator agreed to personally commit two predicate acts).

²⁸ *United States v. Griffin*, 660 F.2d 996, 999 (4th Cir. 1981).

²⁹ *Beck v. Prupis*, 529 U.S. 494, 496 (2000); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 479 (2006) (Breyer, J., concurring in part and dissenting in part).

³⁰ *See* 18 U.S.C. § 1963 (2012); *United States v. Corrado*, 227 F.3d 543, 552 (6th Cir. 2000) (“We find that the ‘shall forfeit’ language of the statute mandates that a district court assess forfeiture against the defendant when the facts support a finding of a sufficient nexus between the property to be forfeited and the RICO violation”).

³¹ *See* 18 U.S.C. § 1964(c) (2012).

³² *See id.*; *United States v. Philip Morris USA*, 566 F.3d 1095, 1150 (D.C. Cir. 2009) (“Private parties, on the other hand, may seek relief under section 1964(c), which allows suits for damages. The statutory scheme does not directly provide private parties with a cause of action for equitable remedies”); *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088 (9th Cir. 1986) (“Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO”).

³³ 116 CONG. REC. 602 (1970) (statement of Sen. Hruska) (“But the principal value of this legislation may well be found to exist in its civil provisions which employ the time-tested antitrust remedies of injunction, divestiture, dissolution and reorganization which have been highly effective in removing and preventing harmful behavior in the field of trade and commerce”); *Sedima v. Imrex*, 473 U.S. 479, 498 (1985) (observing that the statute’s remedial purposes are most evident in the provision of a private action for injured persons).

³⁴ *United States v. Turkette*, 452 U.S. 576, 585 (1981).

C. Elements of 18 U.S.C. § 1962(c)

RICO's most frequently charged and litigated substantive provision (and the basis for most alleged RICO conspiracies) is § 1962(c), which makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."³⁵ An introduction to the core components of this sub-section, then, is warranted because its unique features are key both to understanding the difficulties courts have experienced post-*Morrison* in determining its extraterritorial application and in settling on the proper approach.

1. RICO's "Enterprise"

The RICO "enterprise," a required element of any RICO charge or claim,³⁶ is sufficiently expansive to encompass transnational businesses and criminal groups that potentially threaten America's security and economic interests. While some have sought to restrict the concept to stereotypical mobsters portrayed in movies like *The Godfather* and television series like *The Sopranos*, it is not so narrow.³⁷ Because the statute contains no limiting language and Congress called for liberal construction to achieve its remedial purposes, courts generally agree the RICO "enterprise" is far broader than that.³⁸

The statutory definition of enterprise includes legal entities, groups of individuals, and groups composed of individuals and entities that are factually, if not legally, associated.³⁹ This encompasses, *inter alia*, corporations,⁴⁰ branches and offices of government,⁴¹ fire

³⁵ 18 U.S.C. § 1962(c) (2012).

³⁶ *United States v. Hosseini*, 679 F.3d 544, 557 (7th Cir. 2012).

³⁷ *Chevron v. Donziger*, 974 F. Supp. 2d 362, 567 (S.D.N.Y. 2014); *see also* *Moss v. Morgan Stanley*, 553 F. Supp. 1347, 1359 (S.D.N.Y. 1983) ("Indeed, Congress rejected an amendment to RICO designed to explicitly define organized crime because a 'bright line' legislative definition might unconstitutionally create a status offense and because it would be easy for organized criminals to alter their conduct so that they would fall outside of the reach of the statute.").

³⁸ *Boyle v. United States*, 556 U.S. 938, 944 (2009) ("The statute does not specifically define the outer boundaries of the 'enterprise' . . ."); *see Sedima*, 473 U.S. 497 ("RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'"); *see also Hosseini*, 679 F.3d 557 ("[t]he Supreme Court reads this definition ['enterprise'] quite broadly"); *see generally* *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (noting that the RICO statute states "'enterprise' includes" as opposed to "'enterprise' means").

³⁹ *See* 18 U.S.C. § 1961(4) (2012); *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993) (holding that "a group or union consisting solely of corporations or other legal entities can constitute an 'associated in fact' enterprise.").

⁴⁰ *See* 18 U.S.C. § 1961(4) (2012); *see, e.g., United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987); *United States v. Parness*, 503 F.2d 430, 440 (2d Cir. 1974) (foreign corporation can constitute a RICO enterprise), *cert. denied*, 419 U.S. 1105 (1975).

⁴¹ *See, e.g., United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) ("A state or local government office or organization may properly be charged as a RICO enterprise."); *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982) ("In drafting this statute, Congress chose language which was both clear and broad. Nothing in the statutory language employed by Congress prohibited the United States Attorney from drafting this

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departments,⁴² and labor unions,⁴³ all of which may have been created by charter or statute for legitimate purposes, as well as diabolical associations like La Cosa Nostra,⁴⁴ terrorist groups,⁴⁵ drug trafficking organizations,⁴⁶ and violent gangs.⁴⁷ As the Supreme Court explained, “Congress wanted to reach both ‘legitimate’ and ‘illegitimate’ enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.”⁴⁸

Even less formal groups, including those with comparatively loose organizations lacking established hierarchies and shared long-term goals, can potentially qualify if they have a shared purpose, relationships among the associates, and longevity sufficient for the associates to pursue their shared purpose.⁴⁹ No economic motive is required.⁵⁰ Nor are fixed

indictment so as to describe ‘The Office of Governor of Tennessee’ as the ‘enterprise’ here involved.”); *United States v. Grubb*, 11 F.3d 426, 438 (4th Cir. 1993) (“the Office of Judge of the 7th Judicial Circuit”); *United States v. Blackwood*, 768 F.2d 131, 137-38 (7th Cir. 1985), *cert. denied*, 474 U.S. 1020 (1985) (Cook County Circuit Court); *United States v. Shamah*, 624 F.3d 449 (7th Cir. 2010) (Chicago Police Department enterprise); *United States v. Boylan*, 898 F.2d 230 (1st Cir. 1990), *cert. denied*, 498 U.S. 849 (Boston Police Department enterprise).

⁴² See, e.g., *United States v. Balzano*, 916 F.2d 1273, 1290 (7th Cir. 1990) (“The Chicago Fire Department is a legitimate governmental entity possessing a clear organizational structure, thus qualifying as an ‘enterprise’ under RICO.”).

⁴³ See, e.g., *United States v. Local 560*, 974 F.2d 315 (3d Cir. 1992); see generally *United States v. Robilotto*, 828 F.2d 940 (2d Cir. 1987).

⁴⁴ See, e.g., *United States v. Pizzonia*, 577 F.3d 455 (2d Cir. 2009) (Gambino organized crime family of La Cosa Nostra).

⁴⁵ See, e.g., *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1328 (M.D. Fla. 2004) (denying motion to dismiss RICO conspiracy charge against alleged members of the Palestinian Islamic Jihad-Shiqaqi Faction); *United States v. Marzook*, 426 F. Supp. 2d 820, 821 (N.D. Ill. 2006) (denying motion to dismiss RICO conspiracy count against alleged member of Hamas).

⁴⁶ See, e.g., *United States v. Praddy*, 725 F.3d 147 (2d Cir. 2013) (Raleigh Place Crew marijuana trafficking group).

⁴⁷ See 18 U.S.C. § 1962 (2012); see, e.g., *United States v. Nieto*, 721 F.3d 357, 362 (5th Cir. 2013) (Barrio Aztecas); *United States v. Olson*, 450 F.3d 655, 668 (7th Cir. 2006) (Almighty Latin Kings Nation); *United States v. Martinez*, 657 F.3d 811, 815 (9th Cir. 2011) (Mexican Mafia).

⁴⁸ *Sedima v. Imrex*, 473 U.S. 479, 499 (1985) (internal citations omitted); see also *United States v. Turkette*, 452 U.S. 576, 590 (1981) (“In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, *only* the infiltration of legitimate business.”); *Anza v. Ideal Steel Supply*, 547 U.S. 451, 479 (2006) (Breyer, J., concurring in part and dissenting in part) (“RICO essentially seeks to prevent organized criminals from taking over or operating legitimate businesses. Its language, however, extends its scope well beyond those central purposes.”); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied* 429 U.S. 1039 (1977) (“These new penal prohibitions, enhanced sanctions, and new remedies clearly extend to an illegitimate business as well as a legitimate one; to read the Act otherwise does not make sense since it leaves a loophole for illegitimate business to escape its coverage”).

⁴⁹ *Boyle v. United States*, 556 U.S. 938, 941, 946 (2009); see, e.g., *United States v. Bergrin*, 650 F.3d 257, 270-71 (3rd Cir. 2011) (citing *Boyle* and reversing district court’s dismissal of a RICO defendant charging members and associates of an enterprise comprised of five individuals and four corporations); *Jay E. Hayden Found. v. First Neighbor Bank*, 610 F.3d 382, 388-89 (7th Cir. 2010) (acknowledging post-*Boyle* viability of an association-in-fact consisting of a bank, two law firms, and seven persons connected with either the bank or the law firms); *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (affirming convictions where defendant were part of “an informal consortium of a law firm and two police departments with the three individuals”).

⁵⁰ *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 257-59 (1994).

roles, regular meetings, or established rules.⁵¹ At its core, an enterprise is merely “a group of persons associated together for a common purpose of engaging in a course of conduct.”⁵² Most groups presenting a transnational threat to America’s economic or national security would obviously qualify.

2. *Engaged in or Affecting Interstate or Foreign Commerce*

The conduct proscribed under RICO is only actionable if the alleged enterprise engaged in or affected interstate or foreign commerce.⁵³ Only a *de minimis* effect is required to satisfy this jurisdictional element⁵⁴ and the conduct of the enterprise, rather than the individual defendant(s) or specific racketeering activity, must be considered.⁵⁵ For example, a drug trafficking organization in one state, that obtains narcotics from another state, would be sufficient to satisfy the *de minimis* effect requirement.⁵⁶ A group of individuals making intrastate sales of contraband alcohol manufactured out of state would suffice as well.⁵⁷ So, too, would either a bookmaking operation that utilizes supplies originating out of state or a prosecutor’s office that regularly places interstate calls; purchases and uses out of state supplies; and utilizes workers or contractors from other states.⁵⁸ Any group or entity capable of having a transnational impact will almost necessarily have the requisite effect on commerce.

3. *Conduct or Participate in the Affairs of an Enterprise*

Section 1962(c) is different than RICO’s other substantive provisions in that it emphasizes the operation rather than the acquisition of the enterprise. It criminalizes employees and associates conducting or participating, directly or indirectly, in the conduct of an enterprise’s affairs through a pattern of racketeering or collection of an unlawful debt.⁵⁹ This basically makes it unlawful to operate an enterprise in an unscrupulous, illegal manner.

⁵¹ *Boyle*, 556 U.S. at 941, 948.

⁵² *Turkette*, 452 U.S. at 583.

⁵³ *See* 18 U.S.C. § 1962 (2012).

⁵⁴ *See id.*; *United States v. Chance*, 306 F.3d 356, 373 (6th Cir. 2002) (“For purposes of a conviction under 18 U.S.C. §§ 1962(c) & (d), the government need only prove that the enterprise’s racketeering activities had a *de minimis* connection with interstate commerce”) (emphasis added); *United States v. Shryock*, 342 F.3d 948, 984 (9th Cir. 2003) (“The district court, therefore, correctly instructed the jury that a *de minimis* affect on interstate commerce was sufficient to establish jurisdiction under RICO.”) (emphasis added).

⁵⁵ *Allen v. United States*, 45 F. App’x 402, 405 (6th Cir. 2002) (“Moreover, only the criminal enterprise itself or the racketeering activities of those associated with the enterprise, not the conduct of each individual defendant, must affect interstate commerce.”); *United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985) (“It is not the conduct of each individual defendant that must affect interstate commerce, rather the criminal enterprise itself.”); *Rose v. Bartle*, 871 F.2d 331, 357 n.38 (3d Cir. 1989) (“It should be noted that ‘only the criminal enterprise must affect interstate commerce -- not the conduct of each individual defendant.’”) (quoting *United States v. Robinson*, 763 F.2d 778, 781 n.4 (6th Cir. 1985)).

⁵⁶ *United States v. White*, 582 F.3d 787, 803 (7th Cir. 2009).

⁵⁷ *United States v. Robinson*, 763 F.2d 778, 781 (6th Cir. 1985).

⁵⁸ *United States v. Altomare*, 625 F.2d 5, 7-8 (4th Cir. 1980).

⁵⁹ *See* 18 U.S.C. § 1962(c) (2012).

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Significantly, culpability is not limited only to upper level management; supervisory authority and power to make command decisions are not necessary.⁶⁰ All who participate in an enterprise's operation or management potentially come within the statute's purview,⁶¹ and lower level participants under the direction of upper management as well as associates who exert control over the enterprise are part of the class of persons that "conduct" and "participate" in its affairs.⁶² Indeed, "the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise."⁶³ Because there is no geographical limitation for those who conduct and participate in an enterprise's affairs, this net is certainly broad enough to encompass culpable actors situated outside of America's shores.

4. RICO's "Pattern of Racketeering"

As the Supreme Court observed, RICO's "key requirement" is the "pattern of racketeering."⁶⁴ This pattern, which the Court has called "the heart" of an alleged violation,⁶⁵ is a combination of two or more acts or threats (the last of which occurred within ten years after the commission of a prior act of racketeering), enumerated or incorporated by reference in 18 U.S.C. § 1961(1).⁶⁶ The categories of conduct, generally characteristic of organized crime activity,⁶⁷ include felonious acts or threats "involving" (interpreted by the courts to include attempts, conspiracies and solicitations as well as completed offenses)⁶⁸ murder, kidnapping, gambling, arson, robbery, extortion, dealing in obscene matter, and drug trafficking chargeable under state law.⁶⁹ They also include a myriad of offenses indictable under federal statutes roughly analogous to state offenses of the aforementioned ilk, in addition to financial, immigration, narcotics trafficking, and terrorism-related crimes,⁷⁰ all of which are prototypical threats attending increased transnationalism.

The definition of a pattern of racketeering provided in the RICO statute itself only provides minimal parameters for its existence; it is a broad "outer limit" for a concept encompassing more than a collection of enumerated acts.⁷¹ Indeed, the language of 18 U.S.C. § 1961(5) assumes the concept involves more,⁷² and the legislative history demonstrates that

⁶⁰ United States v. Shamah, 624 F.3d 449, 454-55 (7th Cir. 2010).

⁶¹ Reves v. Ernst & Young, 507 U.S. 170, 185 (1993).

⁶² *Id.*

⁶³ United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978).

⁶⁴ H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 236 (1989).

⁶⁵ Agency Holding Corp. v. Malley-Duff & Assoc.'s., 483 U.S. 143, 154 (1987).

⁶⁶ See 18 U.S.C. § 1961(5) (2012).

⁶⁷ 116 CONG. REC. 601, 18940 (1970) (statement of Sen. Hruska).

⁶⁸ See United States v. Manzella, 782 F.2d 533, 537-38 (5th Cir. 1986), *cert. denied*, 476 U.S. 1123 (1986) (reaffirming that "a conspiracy to commit an offense listed in § 1961(1)(A) may serve as a predicate act required to establish a violation of § 1962(c)"); United States v. Licavoli, 725 F.2d 1040, 1044-46 (6th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1984) ("Conspiracy is an 'an act . . . involving murder' under state law"); United States v. Pungitore, 910 F.2d 1084, 1134-35 (3d Cir. 1990) (observing that § 1961(1)(A) encompasses predicate attempts and conspiracies).

⁶⁹ 18 U.S.C. § 1961(1)(A) (2012).

⁷⁰ See *id.* at § 1961(1)(B)-(G).

⁷¹ H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 237 (1989).

⁷² *Id.*

Congress did not intend for isolated acts of racketeering to constitute a “pattern.”⁷³ The amalgamation of predicate acts must have “continuity plus relationship.”⁷⁴ Continuity refers either to a closed period of repeated conduct or to past conduct that projects into the future with a threat of repetition;⁷⁵ while relationship refers either to the connection the predicate acts bear to one another or to some “external organizing principle that renders the acts ‘ordered’ or ‘arranged.’”⁷⁶

The expansive scope of RICO’s “pattern of racketeering” makes the statute a robust weapon for both prosecutors and plaintiffs. It allows for the presentation of what might otherwise seem (outside of the RICO context) to be isolated incidents of criminality and permits a thorough confrontation of societal threats rather than a series of disjointed, duplicative, and costly investigations and prosecutions of discrete events. This is precisely the kind of sweeping tool that is needed to combat complex transnational dangers.

D. Venue for 18 U.S.C. § 1962

Because the expansive list of potential predicate offenses incorporates some state law violations, both state and federal law enforcement agencies can jointly investigate individuals and groups who might be attempting to improperly acquire, influence, or operate enterprises affecting interstate and foreign commerce and charge them in a single federal prosecution in which the true scope of their conduct can be properly presented. For example, in police corruption cases, it is “possible to join in one case seemingly independent shake-downs by various defendants if the proof establishes that the defendants acted in concert by first creating and then capitalizing on a city-wide atmosphere of fear.”⁷⁷ This centralization of enforcement efforts potentially allows prosecutors, and plaintiffs in civil proceedings, to paint the most comprehensive picture of defendants’ culpability and the nature of the corresponding threat while also conserving valuable public resources.

⁷³ See *Sedima v. Imrex*, 473 U.S. 479, 496 n. 14 (1985); *H.J. Inc.*, 492 U.S. at 238 (noting that the principal sponsor of the Senate bill “expressly indicated that ‘proof of two acts of racketeering activity, without more, does not establish a pattern’”).

⁷⁴ See generally 116 CONG. REC. 602 (1970) (statements of Sen. Hruska and Sen. Yarborough); *Marshall & Ilsley Trust v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) (“This circuit has established that the existence of a ‘pattern’ as required by RICO is a fact-specific question encompassing many relevant factors. The racketeering activities involved must reveal some ‘continuity’ -- i.e., activities continuing over time or in different places -- as well as some ‘relationship’ among activities -- i.e., activities adding up to coordinated action”) (internal citations omitted); *H.J. Inc.*, 492 U.S. at 230 (“RICO’s legislative history [reveals Congress’ intent] that to prove a ‘pattern of racketeering’ activity a plaintiff or prosecutor must show [] that the racketeering predicates are related, and that they [amount to] or [pose a threat of continued] criminal activity.”); *Vild v. Visconsi*, 956 F.2d 560, 566 (6th Cir. 1992), *cert. denied*, 506 U.S. 832 (1992) (“Continuity and relationship constitute two analytically distinct prongs of the pattern requirement.”); see also *United States v. Bingham*, 653 F.3d 983, 992 (9th Cir. 2011).

⁷⁵ *H.J. Inc.*, 492 U.S. at 241; see, e.g., *United States v. Hively*, 437 F.3d 752, 762 (8th Cir. 2006) (“Even if the predicate acts had not extended over a period of at least one year, there was also a sufficient threat of repetition in connection to the DTF scheme to show open ended continuity.”); *Schreiber Distributing v. Serv-Well Furniture*, 806 F.2d 1393, 1399 (9th Cir. 1986) (holding that in order to establish a pattern, there must be a threat of continuing activity, and that alleged acts of mail and wire fraud that led to only one shipment of goods did not meet the requirement of a pattern of racketeering activity).

⁷⁶ *H.J. Inc.*, 492 U.S. at 238.

⁷⁷ Coffey, *supra* note 13, at 1041.

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Furthermore, the “pattern” requirement, which necessitates multiple acts over a period of time, makes RICO a continuing offense.⁷⁸ This allows the predicates to be litigated and tried in any district in which they began, continued, or were concluded.⁷⁹ Further, it is not necessary for defendants to complete a racketeering act within the district of indictment.⁸⁰ Consequently, in addition to allowing prosecutors and plaintiffs to more comprehensively and efficiently redress disparate types of related conduct, the statute potentially enables them to allege counts, claims and acts that occurred in multiple venues, potentially even international venues, so long as they pertain to a single enterprise.⁸¹

II. RISING TRANSNATIONALISM

RICO's unique breadth and power, and the proper extraterritorial application of its breadth and power, are particularly germane to American interests in light of the world's increasing transnationalism. While general knowledge of advances in globalization and multinational economic interdependence might properly be presumed, the significance of this rising tide to the present inquiry cannot be. A brief consideration of this shift and its manifestations in America's courts, then, is warranted because they undergird both the urgency for a clear, well-reasoned settlement of the question of RICO's extraterritorial application and the proper evaluation of any proposed solution. At the outset, it is important to note that both transnational business and transnational crime potentially fall within the statute's impressive span.

A. The Proliferation of Transnational Business

The evidence of America's growing economic interdependence is readily apparent. Global banks are developing networks of physical branches and subsidiaries in foreign countries,⁸² and their operations in the United States provide important benefits to the national economy.⁸³ Similarly, transnational auto companies have become as much a part of the American economy as domestic manufacturers.⁸⁴ Honda, for instance, has major facilities in

⁷⁸ *United States v. Yashar*, 166 F.3d 873, 879 (7th Cir. 1999); *United States v. Wong*, 40 F.3d 1347, 1366 (2d Cir. 1994); *United States v. Moscony*, 927 F.2d 742, 754 (3d Cir. 1991), *cert denied*, 501 U.S. 1211 (1991); *United States v. Machado-Erazo*, 986 F. Supp. 2d 39, 55 (D.D.C. 2013).

⁷⁹ *See* 18 U.S.C. § 3237(a) (2012); *United States v. Giovanelli*, 747 F. Supp. 875, 884 (S.D.N.Y. 1989); *see also* *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 61 (1989) (stating that under state RICO statute patterned after federal RICO statute, a requirement that all predicate acts be committed in the jurisdiction where prosecution is brought “would essentially turn the RICO statute on its head: barring RICO prosecutions of large national enterprises that commit single predicate offenses in numerous jurisdictions.”).

⁸⁰ *See* 18 U.S.C. § 1965(a) (2012); *United States v. Royer*, 549 F.3d 886, 896 (2d Cir. 2008) (“In a conspiracy prosecution, venue is proper in any district in which an overt act in furtherance of the conspiracy was committed.”) (internal citations omitted).

⁸¹ *See, e.g., United States v. Marzook*, 426 F. Supp. 2d 820, 826 (N.D. Ill. 2006); *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1328 (M.D. Fla. 2004).

⁸² Nicola Cetorelli & Linda S. Goldberg, *Banking Globalization and Monetary Transmission*, 67 J. FIN. 1811, 1811 (2012).

⁸³ Kathleen A. Scott, *Non-U.S. Banks Operating in the United States—The Federal Reserve as Gatekeeper*, 27 J. TAX'N & REG. FIN. INST'N 37, 37 (2014).

⁸⁴ Jerry Harris, *The World Economic Crisis and Transnational Corporations*, 74 SCI. SOC'Y 394, 396 (2010).

thirty-one cities within sixteen states, while Toyota spends 30 billion dollars annually with American suppliers.⁸⁵ Of course, American auto companies have also assumed an increasingly transnational character; General Motors makes more than three-quarters of its sales abroad, with China and Brazil being its two largest foreign markets.⁸⁶ “Business relationships are crossing national borders in a complex web,”⁸⁷ and courts are taking note.⁸⁸

This expansion of transnational dealings undeniably impacts American society culturally, politically, and economically, but it also affects the nation in a plethora of ways legally.⁸⁹ American jurisprudence is invariably implicated because one natural byproduct of transnational commerce is transnational conflict. International business begets international disagreements and disputes, some of which can be resolved through various alternative dispute resolution procedures, including arbitration.⁹⁰ Other conflicts, however, spawn civil litigation where parties allege causes of action predicated on the conduct of foreign actors in foreign places,⁹¹ and these international business transactions are particularly vulnerable to RICO litigation,⁹² at least partly because many civil RICO claims rest upon alleged mail or wire fraud activity.⁹³

⁸⁵ *Id.*

⁸⁶ *Id.* at 399.

⁸⁷ Alcalá, *supra* note 3.

⁸⁸ See generally *M/S Bremen v. Zapata Off-Shore*, 407 U.S. 1, 8, 15 (1972); *F. Hoffmann-La Roche v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992); *Kaepa Inc. v. Achilles Corp.*, 76 F.3d 624, 629 (5th Cir. 1996) (Garza, J., dissenting) (noting that the world is increasingly economically interdependent); *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 88 (2d Cir. 1997) (Alitmar, J., dissenting) (“The burgeoning global business community fosters economic interdependence and the United States cannot act without regarding to the concerns of the rest of the world.”).

⁸⁹ THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE*, 729-30 (Thomson Reuters 6th ed. 2012).

⁹⁰ Alcalá, *supra* note 3 (“The number and breadth of cross-border disputes has grown as the economy has increasingly become more global. For instance, the number of international arbitrations has increased dramatically in the past 20 years.”); Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1541 (2006).

⁹¹ FRANK B. CROSS & ROGER LEROY MILLER, *THE LEGAL ENVIRONMENT OF BUSINESS: ETHICAL, REGULATORY, GLOBAL, AND CORPORATE ISSUES* 173 (8th ed. 2012) (“The international application of tort liability is growing in significance and controversy. An increasing number of U.S. plaintiffs are suing foreign (or U.S.) entities for torts that these entities have allegedly committed overseas.”); see, e.g., *Liquidation Comm’n of Banco Intercontinental, S.A. v. Alvarez Renta*, 530 F.3d 1339, 1343 (11th Cir. 2008) (civil RICO case involving claims that a Florida businessman helped insiders of a large bank in the Dominican Republic wrongfully divert millions of dollars); *Reyes-Gaona v. N.C. Growers Ass’n*, 250 F.3d 861, 863 (4th Cir. 2001) (involving a Mexican national applying in Mexico for work in the United States with an American corporation); see also *Ohr*, *supra* note 14, at 40 (“[T]he growth of international commerce and the staggering number of international banking transactions performed every day by major banks provide vital benefits to the world’s economies, but they also present ample opportunity for fraud and theft and allow international money launderers to easily hide their ill-gotten gains.”).

⁹² Hargrove et al., *supra* note 6 at 47-48.

⁹³ *Cf. Sedima v. Imrex*, 473 U.S. 479, 500 (1985) (“The ‘extraordinary’ uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of ‘pattern.’”); *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992) (“The widespread abuse of civil RICO stems from the fact that all modern business transactions entail use of the mails or wires—giving plaintiffs a jurisdictional hook—and the fact that RICO offers a far more generous compensation scheme than typically available in state court.”); *Meier v. Musburger*, 588 F. Supp. 2d 883, 904 (N.D. Ill. 2008) (“Given the

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B. Proliferation of Transnational Crime

Otherwise legitimate international commerce can also result in criminal charges because, among other things, transnational competition leads to many of the same corruption problems that attend domestic business dealings.⁹⁴ It is more disconcerting though, that advances in technology, travel, and communication, along with the accompanying shifts in geopolitical relations, have allowed wholly illegitimate businesses to metastasize along with their typically more honorable counterparts.⁹⁵ Beginning in the 1970s, when the RICO statute went into effect, and accelerating in the 1990s, crime groups have taken on an increasingly transnational character.⁹⁶ As the District Court for the District of Columbia explained,

Many modern criminal organizations have an international infrastructure, and the crimes (as well as their effects) transcend national borders. Activities traditionally associated with organized crime, such as wire fraud and money laundering, may originate from a

breadth of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, mailings and wirings have always been favored predicate acts in cases like this where ordinary disputes are sought to be transformed into RICO claims.”).

⁹⁴ See, e.g., *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) (involving an indictment alleging that defendants orchestrated the bribing of Haitian customs officials to significantly reduce customs duties and sales taxes for a Houston-based company in violation of the Foreign Corrupt Practices Act); *Chevron v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (involving a five-year effort to extort and defraud Chevron through the series of RICO predicate acts that included emails and money transfers between the United States and Ecuador as well as bribery of an Ecuadorian judge and court-appointed expert); *United States v. Norris*, 719 F. Supp. 2d 557, 560 (E.D. Pa. 2010) (“This case arises from a grand jury investigation of an international conspiracy to fix the price of certain electrical and mechanical carbon products that were sold in the United States and elsewhere . . .”).

⁹⁵ John T. Picarelli, *Responding to Transnational Organized Crime—Supporting Research, Improving Practice*, 268 NAT. INST. JUST. J. 4, 6 (2011); Jay S. Albanese, *Deciphering the Linkages Between Organized Crime and Transnational Crime*, 66 INT’L AFF. J. 1, 3 (2012) (“These “new” forms of transnational crimes have been made possible by changes in technology and communication, ease of travel, and political unrest—all consequences of globalization and government prohibitions.”); James Cole, Deputy Attorney Gen., Dep’t of Justice, *Speaks at High Level Hemispheric Meeting Against Transnational Organized Crime* (March 1, 2012) in 2012 WL 9246465 (D.O.J.) (“some countries undergoing the transition from authoritarian rule often serve as fertile breeding grounds for organized crime. These countries face serious organized crime challenges that will stifle not only their own economic development, but will also have global implications in our increasingly interconnected world.”); Ohr, *supra* note 14 at 40 (“One of the most serious unintended consequences of the globalization that we have been experiencing for the last few years has been the rapid rise of transnational organized crime groups.”); see, e.g., *Davis Int’l v. New Start Grp.*, 488 F.3d 597, 600-01 (3d Cir. 2007) (affirming in part and reversing in part a District Court’s dismissal of a complaint alleging a decades long fraud perpetrated by members of an international organized group of Russian and American racketeers that was carried out in the United States and Russia and involving, *inter alia*, check-kiting fraud on the Russian central bank that procured the funds in the United States that became the seed money for criminal ventures, including the seizure of a Russian company).

⁹⁶ Picarelli, *supra* note 95; Albanese, *supra* note 95 at 1 (“Transnational organized crime has characterized the last twenty years, beginning with the collapse of the Soviet Union and the rise of vulnerable emerging democracies around the world”); see, e.g., *United States v. Ayala*, 601 F.3d 256, 261 (4th Cir. 2010) (“La Mara Salvatrucha, otherwise known as MS-13, is one of the largest and most violent street gangs in the United States. The gang originated in Los Angeles, California in the 1980s. Since then, it has spread across the country and into foreign countries such as El Salvador, Honduras, and Mexico”); *United States v. Mejia*, 545 F.3d 179, 203-04 (2d Cir. 2008) (noting that the government introduced evidence at trial that Mexican MS-13 cliques act as smugglers; MS-13 is engaged in international narcotics smuggling; and MS-13 members in New York sent money to El Salvador to help members who had been deported from the United States).

different continent than the ultimate place of impact of the crime, and intermediate actors may be located in yet a third place.⁹⁷

The current world climate offers criminal organizations new avenues and a wider berth to ply their odious trades, which enables them to simultaneously operate in disparate and diverse countries in ways they never could before.⁹⁸ For example, “as financial transactions have migrated from cash to checks and other negotiable instruments, and today to electronic transfers, so too have criminals.”⁹⁹ Similarly, crooks are taking advantage of the prominence and anonymity of the Internet through global fraud via sites like eBay,¹⁰⁰ and through cheap, instantaneous global distribution of child pornography.¹⁰¹ In certain respects, then, technological advances, which have been a great blessing in some ways, have been a lamentable curse in others.¹⁰² These and other negative, dangerous appendages to the world’s

⁹⁷ Doe v. State of Israel, 400 F. Supp. 2d 86, 115 (D.D.C. 2005); see also Ohr, *supra* note 14 at 40 (“We, and our colleagues in other countries, have therefore been caught unprepared by the sudden rise in transnational organized crime activities. We are not used to criminals who might reside in country A and travel to country B in order to commit a crime that takes place in countries C, D and E.”).

⁹⁸ NAT’L SECURITY STAFF, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: ADDRESSING CONVERGING THREATS TO NATIONAL SECURITY at THE WHITE HOUSE (2011) (“During the past 15 years, technological innovation and globalization have proven to be an overwhelming force for good. However, transnational criminal organizations have taken advantage of our increasingly interconnected world to expand their illicit enterprises.”); Cole, *supra* note 95 in 2012 WL 9246465(D.O.J.) (“Our review found that alliances between organized criminals and oligarchs from the former Soviet Union threaten U.S. businesses and domestic markets.”); see, e.g., United States v. Coffman, Crim. Action No. 09-181-KKC, 2011 U.S. Dist. LEXIS 22766, at *9 (E.D. Ky. Mar. 7, 2011) (discussing an investigation the Kentucky Department of Financial Institutions where defendant and others were suspected of operating an oil and gas investment scheme using a boiler room call center in Canada with ties to the Russian mafia); United States v. Yousef, 327 F.3d 56, 79 (2d Cir. 2003) (involving a conspiracy hatched in the Philippines to attack twelve American aircraft that served routes in Southeast Asia that resulted in the death of a Japanese national); Press Release, FBI, Manhattan U.S. Attorney and FBI Assistant Dir. in Charge Announce 24 Arrests in Eight Countries as Part of Int’l Cyber Crime Takedown (Jun. 26, 2012) (involving more than 400,000 potential cyber crime victims and \$205 million in losses).

⁹⁹ Salvatore Scanio & Robert W. Ludwig, *Surgings, Swift And Liable? Cybercrime and Electronic Payments Fraud Involving Commercial Bank Accounts: Who Bears The Loss?* 16 J. INTERNET L. 3, 3 (2013).

¹⁰⁰ Michael Levi, *States, Frauds, and the Threat of Transnational Organized Crime*, 66 J. INT’L AFF. 39, 43 (2012); CROSS, *supra* note 91, at 157 (“The nature of the Internet, however, makes it nearly impossible to completely block fraudulent auction activity. Because users can assume multiple identities, it is very difficult to pinpoint fraudulent sellers—they will simply change their screen names with each auction.”); cf. United States v. Horne, 474 F.3d 1004, 1006 (7th Cir. 2007) (“The people who buy and sell through eBay are scattered around the world -- indeed most of the vehicle sales made through eBay are interstate or international.”); see, e.g., United States v. Funiestas, 2006 CCA LEXIS 296 (N.M.C.C.A. Nov. 30, 2006) (“The appellant then sold the military property on eBay, an internet-based sales company, to domestic and international purchasers.”); *Current Developments: Online Auctions*, 28 COMPUTER & INTERNET LAWYER, no. 5, May 2011, at 22-23 (discussing guilty plea of Romanian citizen who “acted as a ‘money mule’ in a complex Internet fraud conspiracy” with co-conspirators in Romania who created fraudulent online auctions for expensive items on sites like eBay, Craigslist, and AutoTrader.com); Wilfredo A. Ferrer, *Twenty-One Individuals Charged in the United States for Alleged Roles in International Internet Fraud Scheme*, CASES & TAKEDOWNS (Jun. 27, 2011), http://www.justice.gov/usao/briefing_room/cc/mca_fl.html.

¹⁰¹ U.N. OFFICE ON DRUGS & CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, at 31, U.N. Sales No. E.10.IV.6 (2010).

¹⁰² *Id.* at vi (“With regard to cybercrime, the Internet has allowed traditional acquisitive crime, such as identity theft, and transnational trafficking, such as the trade in child pornography, to vastly increase in scope”); Cole, *supra* note 95, in 2012 WL 9246465 (“The advance of globalization and the internet, while hugely beneficial to

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technological evolution can potentially compromise America's financial and economic stability as well as its national security.¹⁰³

Transnational rogues markedly complicate the work of domestic law enforcement agencies because they expand their profit margins, increase the complexity of their crimes, and decrease their risks by operating in multiple nation-states.¹⁰⁴ The international movement of their illicit proceeds is illustrative. Funds derived from the commission of crimes in foreign countries are sometimes clandestinely funneled to the United States, mixed with legitimate income or invested in domestic enterprises, and subsequently used in the United States and abroad.¹⁰⁵ By obfuscating "dirty" money with "clean" money, criminals make their ill-gotten

people everywhere, has also created unparalleled opportunities for criminals to expand their operations and use the facilities of global communication and commerce to carry out their criminal activities across national borders."); CROSS, *supra* note 91, at 157 ("In cyberspace, thieves are not subject to the physical limitations of the 'real' world. A thief can steal data stored in a networked computer with Internet access from anywhere on the globe. Only the speed of the connection and the thief's computer equipment limit the quantity of data that can be stolen."); NAT'L SECURITY STAFF, *supra* note 1, at 8 ("Computers and the Internet play a role in most transnational crimes today, either as the target or the weapon used in the crime."); Ohr, *supra* note 14, at 40 ("The internet allows the individual to access information, do business with and communicate instantly with persons in every nation, but at the same time it allows criminals to perpetrate confidence schemes and stock market manipulations, run illegal gambling operations and peddle child pornography across the globe.").

¹⁰³ Cole, *supra* note 95, in 2012 WL 9246465 ("The U.S. Secret Service estimates that criminals using anonymous web sites to buy and sell stolen identities have caused billions of dollars in losses to the United States' financial infrastructure. Some estimates indicate that online frauds perpetrated by Central European cybercrime networks alone have defrauded U.S. citizens or entities of approximately \$1 billion in a single year."); NAT'L SECURITY STAFF, *supra* note 1, at 7-8 ("some estimates indicate that online frauds perpetrated by Central European cybercrime networks have defrauded U.S. citizens or entities of approximately \$1 billion in a single year" and "[p]ervasive criminal activity in cyberspace not only directly affects its victims, but can imperil citizens' and businesses' faith in these digital systems, which are critical to our society and economy."); see also OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS: CYBERCRIME (2005), available at <http://www.bjs.gov/index.cfm?ty=tp&tid=41> ("Cybercrime is one of the greatest threats facing our country, and has enormous implications for our national security, economic prosperity, and public safety. Attorney General Eric Holder has made it one of the Department of Justice's top priorities. The range of threats and the challenges they present for law enforcement expand just as rapidly as technology evolves."); see, e.g., Press Release, United States Attorneys Office, EDNY, Malaysian National Sentenced To 10 Years For Hacking Into Federal Reserve Bank (Nov. 4, 2011), available at <http://www.justice.gov/usao/nye/pr/2011/2011nov04.html>; Press Release, FBI, FS-ISAC & IC3, Fraud Alert—Cyber Criminal Targeting Financial Employee Credentials to Conduct Wire Transfer Fraud (Sept. 17, 2012), available at <http://www.ic3.gov/media/2012/FraudAlertFinancialInstitutionEmployeeCredentialsTargeted.pdf> ("Recent FBI reporting indicates a new trend in which cyber criminal actors are using spam and phishing e-mails, keystroke loggers, and Remote Access Trojans (RAT) to compromise financial institution networks and obtain employee login credentials. The stolen credentials were used to initiate unauthorized wire transfers overseas.").

¹⁰⁴ Phil Williams, *Transnational Criminal Networks*, in NETWORKS AND NETWORKS: THE FUTURE OF TERROR, CRIME, AND MILITANCY 61, 78 (John Arquilla et al. eds., 2001); U.N. OFFICE ON DRUGS & CRIME, *supra* note 101, at 29 ("But the process of globalization has outpaced the growth of mechanisms for global governance, and this deficiency has produced just the sort of regulation vacuum in which transnational organized crime can thrive."); see, e.g., FBI, *supra* note 98.

¹⁰⁵ See, e.g., United States v. Hurley, 63 F.3d 1, 6 (1st Cir. 1995) (involving a money laundering operation in which defendants received narcotics trafficking proceeds in New York in cash and wired over \$136 million to foreign bank accounts, primarily in Colombia, over a period of less than two years); UPDATE 2—Western Union to Pay \$94 Mln in Laundering Probe, REUTERS (Feb. 11, 2010, 5:14 PM), <http://www.reuters.com/article/2010/02/11/westernunion-moneylaundering-idUSN119905220100211> ("Western Union Co (WU.N) has agreed to pay \$94 million to resolve a decade-long probe into alleged illegal money laundering into Mexico involving the company's money transfers.").

gains more difficult to detect, seize, and forfeit.¹⁰⁶ According to the State Department's "International Narcotics Control Strategy Report,"

Money laundering continues to be a serious global threat. Jurisdictions flooded with illicit funds are vulnerable to the breakdown of the rule of law, the corruption of public officials, and destabilization of their economies. The development of new technologies and the possibility of linkages among illegal activities that generate considerable proceeds, transnational criminal organizations, and the funding of terrorist groups only exacerbate the challenges faced by the financial, law enforcement, supervisory, legal, and intelligence communities.¹⁰⁷

The deleterious effects of such activity must not be underestimated. It fosters a world climate of crime in which national borders make people, including Americans, more rather than less vulnerable.¹⁰⁸ James Cole, former Deputy Attorney General of the United States, poignantly crystallized the gravity of the threat attending the rapid increase of transnational organized crime activity:

What are the results of these disturbing trends and new patterns of crime? In short, our review concluded that transnational organized crime has risen to the level of a national security threat. Countries in key regions around the world are finding their governments penetrated, weakened and even taken over by organized crime, undermining their democratic institutions and prospects for economic growth. Economies, including critical markets and the world financial system are being subverted, exploited and distorted by organized criminals through corruption and violence, making it harder for legitimate businesses to compete in those markets and harder for those economies to develop and provide jobs for the law abiding citizens. Terrorists and insurgents are increasingly turning to organized crime to generate funding and acquire logistical support to carry out their violent acts. Cybercrime threatens sensitive government and corporate computer networks, undermines confidence in the international financial system, and costs consumers billions of dollars annually. And despite our many successes, illicit drugs remain a serious threat to the health, safety, security and financial well-being of our citizens.¹⁰⁹

Criminal enterprises are growing more dangerous as they become more versatile, flexible, and diverse,¹¹⁰ so prudence demands thorough deployment of America's laws, including the RICO statute, to protect its citizens from these transnational dangers.

¹⁰⁶ AVI JORISCH, *TAINTED MONEY: ARE WE LOSING THE WAR ON MONEY LAUNDERING AND TERRORISM FINANCING?* 9-10 (2009).

¹⁰⁷ U.S. DEP'T OF STATE, *INT'L CONTROL STRATEGY REPORT VOLUME II: MONEY LAUNDERING AND FINANCIAL CRIMES* 3 (Mar. 2014), *available at* <http://www.state.gov/documents/organization/222880.pdf>.

¹⁰⁸ Ohr, *supra* note 14, at 46 ("The transnational aspects of Eurasian Organized Crime, as practiced by the larger criminal groups, pose a particularly acute threat to the societies of the West. Our law enforcement bodies face great difficulties in attempting to investigate large scale financial fraud and money laundering schemes emanating from the former Soviet Union. Often the only part of the crime taking place within western jurisdictions is the movement of millions, or even billions, of dollars through western bank accounts. Obtaining a clear picture of the possibly criminal activities linked to this money requires the close cooperation of authorities from Russia, other members of the Commonwealth of Independent States and many other countries. Such cooperation is extremely difficult to obtain in a timely manner, particularly when many different countries are involved. As a result, it is often impossible to investigate these cases as thoroughly as they deserve, and the criminals gain the ability to hide and make use of their ill-gotten assets in the west.").

¹⁰⁹ Cole, *supra* note 95, in 2012 WL 9246465.

¹¹⁰ *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991).

III. EXTRATERRITORIAL APPLICATION OF AMERICAN LAWS GENERALLY

Extraterritorial application of RICO fits into the larger framework of the Supreme Court's extraterritorial jurisprudence; thus, a brief discussion of the state of this area of law is in order. Courts recognize "that United States law governs domestically but does not rule the world,"¹¹¹ and generally assume Congress is primarily concerned with domestic conditions.¹¹² Consequently, while Congress has authority to legislate beyond America's territorial boundaries, whether or not it has exercised this authority is a matter of statutory construction.¹¹³ Absent an apparent contrary intent, courts presume legislation is meant only to apply within the territorial jurisdiction of the United States.¹¹⁴ These premises are undergirded by the assumption that Congress has the unique facilities necessary to make important policy decisions in light of the possibilities for international discord and retribution.¹¹⁵ By restraining courts from improperly interfering in potentially delicate aspects of international relations, this cautious approach "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."¹¹⁶

Various tests developed by the lower courts to implement these simple principles have not always been faithful to them. Prior to the Supreme Court's seminal decision in *Morrison* (which was followed by *Kiobel*), courts applied variations or hybrids of the Second Circuit's "conduct test" or "effects test," both of which were fashioned to help them wrangle with extraterritorial Securities Exchange Act claims, to evaluate the extraterritoriality of statutes deemed silent on the issue.¹¹⁷ Under the conduct test, RICO would apply extraterritorially "if conduct material to the completion of the racketeering occurs in the United States."¹¹⁸ Under the effects test, it would apply extraterritorially "if significant effects of the racketeering are felt" in the United States.¹¹⁹

Because several courts have concluded RICO is silent as to its extraterritoriality,¹²⁰ and, presumptively, does not apply extraterritorially,¹²¹ new criteria became necessary for

¹¹¹ *Microsoft v. AT&T*, 550 U.S. 437, 454 (2007).

¹¹² *EEOC v. Arabian American Oil*, 499 U.S. 244, 248 (1991).

¹¹³ *Id.*

¹¹⁴ *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

¹¹⁵ *Benz v. Compania*, 353 U.S. 138, 147 (1957).

¹¹⁶ *Arabian American Oil*, 499 U.S. at 248.

¹¹⁷ See, e.g., *United States v. Philip Morris USA*, 566 F.3d 1095, 1130-31 (D.C. Cir. 2009); *Liquidation Comm'n of Banco Intercontinental, S.A. v. Alvarez Renta*, 530 F.3d 1339, 1351-52 (11th Cir. 2008) ("The more widely accepted view, and the one we adopt today, is that RICO may apply extraterritorially if conduct material to the completion of the racketeering occurs in the United States, or if significant effects of the racketeering are felt here."); *John Doe I v. Unocal*, 395 F.3d 932, 961 (9th Cir. 2002) ("We agree with the Second Circuit that for RICO to apply extraterritorially, the claim must meet either the 'conduct' or the 'effect' test that courts have developed to determine jurisdiction in securities fraud cases.").

¹¹⁸ *Liquidation Comm'n of Banco Intercontinental*, 530 F.3d at 1351-52 (citing *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051-53 (2d Cir. 1996) and *Poulos v. Caesars World*, 379 F.3d 654, 663-664 (9th Cir. 2004)).

¹¹⁹ *Id.*

¹²⁰ See, e.g., *United States v. Chao Fan Xu*, 706 F.3d 965, 974 (9th Cir. 2013); *Norex Petroleum v. Access Indus.*, 631 F.3d 29, 32-33 (2d Cir. 2010).

¹²¹ *Chao Fan Xu*, 706 F.3d at 974-75 ("Therefore, we begin the present analysis with a presumption that RICO does not apply extraterritorially in a civil or criminal context"); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 731 (S.D.N.Y. 2013) ("RICO does not apply extraterritorially.").

RICO cases when the Supreme Court abolished the “conduct” and “effects” tests.¹²² *Morrison* and its progeny, including *Kiobel*, have created uncertainty for courts seeking to apply RICO extraterritorially.¹²³ In charting a way forward for the extraterritorial application of RICO, then, one must consider *Morrison* and *Kiobel* and their general impact on the landscape of extraterritorial jurisprudence.

A. Morrison

The Supreme Court substantially clarified the opaque extraterritorial landscape in *Morrison v. National Australia Bank, Ltd.*¹²⁴ The Court was challenged with determining “whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.”¹²⁵ Ultimately, it reaffirmed the presumption against extraterritorial application of American laws.¹²⁶

In *Morrison*, National Australia Bank Limited, the largest bank in Australia, had purchased HomeSide Lending, Inc., a mortgage servicer headquartered in Florida. While the bank’s shares were not listed on the New York Stock Exchange, its American Depositary Receipts (ADRs), which are derivatives of the underlying shares representing the right to receive a number of its shares traded on certain foreign exchanges, were listed.¹²⁷

According to the complaint, certain executives at HomeSide manipulated the company’s financial models, which inflated the trade value of National’s ADRs, with the knowledge of both companies’ chief executive officers.¹²⁸ Certain Australians who purchased National’s ADRs suffered financial losses when the fraud was exposed and subsequently sued the companies and several executives for claims including alleged violations of § 10(b) and 20(a) of the Securities Exchange Act.¹²⁹ The Second Circuit affirmed the District Court’s dismissal for lack of jurisdiction.¹³⁰

In rejecting the various tests adopted by the several Circuit Courts of Appeals for ascertaining the extraterritorial application of federal statutes, Justice Scalia tersely distilled the Court’s canon of construction regarding extraterritorial application thusly: “When a statute gives no clear indication of an extraterritorial application, it has none.”¹³¹ Further, he

¹²² *Chao Fan Xu*, 706 F.3d at 974-75 (“Therefore, we begin the present analysis with a presumption that RICO does not apply extraterritorially in a civil or criminal context.”); *United States v. Vilar*, 729 F.3d 62, 74 (2d Cir. 2013) (“In sum, the general rule is that the presumption against extraterritoriality applies to criminal statutes, and Section 10(b) is no exception”); *In re Toyota Motor*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011) (“The analysis of RICO’s extraterritorial application begins with the Supreme Court’s decision in *Morrison*, . . .”); *United States v. Philip Morris USA*, 783 F. Supp. 2d 23, 27-28 (D.D.C. 2011) (“[T]he Supreme Court intended the presumption against extraterritoriality to apply to *all* statutes, not simply the Exchange Act. . . . Therefore, the Court concludes that the ruling in *Morrison* must be applied to RICO”) (emphasis in original).

¹²³ Huntley, *supra* note 5.

¹²⁴ See generally *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247 (2010).

¹²⁵ *Id.* at 250-51.

¹²⁶ *Id.*

¹²⁷ *Id.* at 251.

¹²⁸ *Id.* at 252.

¹²⁹ *Id.*

¹³⁰ *Id.* at 253.

¹³¹ *Id.* at 255.

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explained that applying the presumption against extraterritoriality in all cases preserves “a stable background against which Congress can legislate with predictable effects.”¹³²

The Court ultimately decided that none of the securities at issue were of the ilk § 10(b) was designed to regulate and punish because they were not on any American stock exchange and all aspects of the ADR purchases occurred outside the United States.¹³³ Hence, the purchases were not within the “focus” of congressional concern.¹³⁴ While noting that context can be consulted and a statute need not explicitly state that it applies abroad, the Court concluded that § 10(b) of the Exchange Act does not apply extraterritorially because there is no affirmative indication to the contrary.¹³⁵

In *Morrison*, the Court effectively promulgated a two-part test for divining the extraterritorial reach, if any, of federal statutes. First, absent a clear indication to the contrary, a statute has no extraterritorial application. The validity of this presumption is seemingly bolstered by the activity of Congress, which explicitly creates certain laws to apply extraterritorially and amends others to add extraterritorial reach. This suggests that the absence of extraterritorial language in particular statutes is intentional and significant.¹³⁶ Second, regarding domestic conduct, the decision limits a statute’s application to those domestic activities within the “focus” of congressional concern.¹³⁷ In 2013, three years later, the Court demonstrated in *Kiobel* that the *Morrison* test will control its extraterritorial inquiries for the foreseeable future.

B. *Kiobel*

The Court affirmed the *Morrison* holding in *Kiobel v. Royal Dutch Petro. Co.*¹³⁸ There, a group of Nigerian nationals residing in the United States sued Royal Dutch Petroleum Company, and Shell Transport and Trading Company, two holding companies incorporated in the Netherlands and England, respectively, as well as their joint subsidiary incorporated in Nigeria. Following protests by residents in the Ogoniland area where the subsidiary company engaged in oil exploration and production, Nigerian military and police forces beat, raped, killed, and arrested villagers.¹³⁹ The plaintiffs, former residents of Ogoniland, brought a federal suit alleging the companies had aided and abetted violations of the Alien Tort Statute [“ATS”] by the Nigerian government.¹⁴⁰ The Second Circuit dismissed the complaint.¹⁴¹ However, after granting *certiorari*, the Supreme Court considered whether, and under what circumstances, a court can recognize a claim under the ATS for violations of the law of nations occurring within the territory of a foreign sovereign.¹⁴²

¹³² *Id.* at 261.

¹³³ *Id.* at 266-67.

¹³⁴ *Id.* at 266-67, 273.

¹³⁵ *Id.* at 265.

¹³⁶ Walsh, *supra* note 2, at 662.

¹³⁷ *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 695-696 (S.D.N.Y. 2013).

¹³⁸ *Kiobel v. Royal Dutch Petro.*, 133 S.Ct. 1659 (2013).

¹³⁹ *Id.* at 1662-63.

¹⁴⁰ *Id.* at 1662.

¹⁴¹ *Id.* at 1663.

¹⁴² *Id.* at 1662-64.

The Court addressed each of the two prongs of the *Morrison* test. First, it discussed the text of the statute and the historical background against which it was enacted.¹⁴³ Following this survey, the Court concluded, “the presumption against extraterritoriality applies to claims under the ATS” and “nothing in the statute rebuts that presumption.”¹⁴⁴ In the opinion, Chief Justice Roberts noted that “nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach,”¹⁴⁵ and “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”¹⁴⁶ All of the relevant conduct occurred in Nigeria, so no extensive analysis regarding *Morrison*’s second prong, i.e., whether domestic activities fell within the “focus” of congressional concern, was necessary.¹⁴⁷

In *Morrison* and *Kiobel*, the Supreme Court intended to give lower courts the clarity needed to properly and consistently apply federal statutes extraterritorially. Unfortunately, confusion still abounds. The Second Circuit Court of Appeals politely observed, “[d]espite the supposed bright-line nature of *Morrison*’s holding, there has been no shortage of questions raised in its wake.”¹⁴⁸ Others have been less diplomatic: “The Supreme Court’s recent extraterritoriality jurisprudence has been a mess.”¹⁴⁹ This state of uncertainty is particularly distressing because it hampers the full and effective employment of the RICO statute in protecting American interests against transnational threats by potentially truncating its great breadth.

IV. EXTRATERRITORIALITY AND RICO

Lower courts have been struggling to apply RICO extraterritorially in the absence of further guidance from the Supreme Court, and their efforts have produced a sharp split regarding how its reach should be discerned. The difficulty stems largely from disparate conceptions regarding the “focus” of congressional concern in enacting the statute. Some writers have concluded that RICO has two¹⁵⁰ or even three foci.¹⁵¹ Courts have divided into two camps, though; one emphasizing the enterprise and the other emphasizing the pattern.¹⁵²

¹⁴³ *Id.* at 1665-69.

¹⁴⁴ *Id.* at 1669.

¹⁴⁵ *Id.* at 1665.

¹⁴⁶ *Id.* at 1668.

¹⁴⁷ *Id.* at 1669.

¹⁴⁸ *United States v. Vilar*, 729 F.3d 62, 72 (2d Cir. 2013).

¹⁴⁹ William S. Dodge, *The Presumption Against Extraterritoriality After Morrison*, 105 AM. SOC’Y INT’L L. 396, 396 (2001).

¹⁵⁰ *See, e.g.,* Huntley, *supra* note 5, at 1704.

¹⁵¹ *See, e.g.,* Mark, *supra* note 4, at 594-99.

¹⁵² *United States v. Chao Fan Xu*, 706 F.3d 965, 975 (9th Cir. 2013) (“The inquiry into RICO’s focus is far from clear-cut. . . . Courts that have addressed the issue fall essentially into two camps.”); *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 165 (D.D.C. 2013) (“Courts have disagreed somewhat on how to assess the extraterritoriality of a RICO claim, falling generally into two camps.”); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 544 (S.D.N.Y. 2013) (noting that district judges in the Second circuit have not reached agreement on the issue of whether RICO’s focus is the enterprise or the pattern of racketeering while analyzing the case under both approaches); *Borich v. BP, P.L.C.*, 904 F. Supp. 2d 855, 864 (N.D. Ill. 2012) (When applying *Morrison* to RICO, courts have divided on the question of what part of RICO is the appropriate

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A. The "Enterprise Focus" Approach

Several district courts have muddled RICO's extraterritorial waters by mistakenly concluding that congressional focus in enacting the statute was on the enterprise.¹⁵³ As an initial matter, this blatantly contradicts the Supreme Court's guidance regarding the statute's focus.¹⁵⁴ Moreover, it has already proven unsatisfactory in practice. First, multiple courts have acknowledged the inherent difficulties in applying this erroneous determination in the context of an extraterritorial inquiry for RICO.¹⁵⁵ Because RICO enterprises may exist simultaneously in several nations, it is not surprising that courts have already begun developing and employing different tests to determine where enterprises are located for purposes of the extraterritorial inquiry.¹⁵⁶ The resulting variances undermine predictability which, is "an important value of the presumption against extraterritoriality."¹⁵⁷

Second, the approach that follows from the conclusion that RICO's focus is on the enterprise can produce "absurd results."¹⁵⁸ Hypothetically, if officials of two companies

focus); *In re Toyota Motor*, 785 F. Supp. 2d 883, 914-15 (C.D. Cal. 2011) ("It is unclear how *Morrison*'s logic, which evaluates the 'focus' of the relevant statute, precisely translates to RICO.").

¹⁵³ See, e.g., *Mitsui O.S.K. Lines. v. Seamount Logistics*, 871 F. Supp. 2d 933, 938 (N.D. Cal. 2012) ("[B]ecause RICO applies only to domestic enterprises, courts will be called upon to determine whether a particular RICO enterprise, whatever its structure, is extraterritorial or domestic, which implies a rough determination of the location of the enterprise. The enterprise's location need not be targeted with pinpoint accuracy: The relevant question is simply whether the enterprise is extraterritorial or not."); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 732 (S.D.N.Y. 2013) ("[W]e conclude that Congress's focus in enacting RICO was the enterprise."); *In re Le-Nature's, Inc. v. Krones, Inc.*, No. 9-1445, 2011 U.S. Dist. LEXIS 56682 (W.D. Pa. May 26, 2011) ([I]n the case of RICO, the enterprise is clearly an object of Congressional solicitude."); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471 (S.D.N.Y. 2010) ("[T]he focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity. . . . RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.").

¹⁵⁴ *H.J. Inc. v. Nw. Bell Tel.*, 492 U.S. 229, 236 (1989); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 154 (1987).

¹⁵⁵ *United States v. Chao Fan Xu*, 706 F.3d 965, 976 (9th Cir. 2013) ("Determining the geographic location of an enterprise—whether foreign or domestic—is a difficult inquiry, however."); *Mitsui O.S.K. Lines*, 871 F. Supp. 2d at 938 ("The challenge of applying *Morrison* in RICO cases stems from the difficulty of ascertaining where a RICO enterprise is located.").

¹⁵⁶ Compare *Mitsui O.S.K. Lines*, 871 F. Supp. 2d at 940 ("The nerve center test provides a familiar, consistent, and administrable method for determining the territoriality of RICO enterprises in cases such as the one at bar, which blend domestic and foreign elements."), and *European Cmty. v. RJR Nabisco*, No. 02-CV-5771, 2011 U.S. Dist. LEXIS 23538 (E.D.N.Y. Mar. 7, 2011) ("Applying the nerve center test here, to determine an 'enterprise's' location, similarly avoids the 'weigh[ing of] corporate functions, assets, or revenues different in kind, one from the other." *Hertz*, 130 S. Ct. at 1194. An analysis of the territoriality of an "enterprise" in a RICO complaint, therefore, should focus on the decisions effectuating the relationships and common interest of its members, and how those decisions are made."); with *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 733 (S.D.N.Y. 2013) ("In locating the enterprise, the nerve center test, despite its usefulness in other cases, has little value here. The decision making of the alleged enterprise likely occurred in several different countries, and might even have been located in each of the countries in which a defendant was headquartered. . . . Therefore, because the decision making in furtherance of the alleged scheme would likely have occurred in many countries, the 'nerve center' test does not point us to a single location. Given that the location of the enterprise's 'brain' is indeterminate, we will consider the location of the enterprise's 'brawn,' or where the enterprise acted.").

¹⁵⁷ *European Cmty. v. RJR Nabisco*, No. 11 C 5812, 2014 U.S. App. LEXIS 7593 (2d Cir. Apr. 23, 2014).

¹⁵⁸ *Chevron v. Donziger*, 871 F. Supp. 2d 229, 242 (S.D.N.Y. 2012).

engaging in substantial business in the United States, one domestic and one foreign, both conducted the affairs of their respective entities through a pattern of racketeering, officials of the former would be subject to RICO's criminal and civil sanctions while employees and associates of the latter would be immune.¹⁵⁹ In seizing upon this logical and necessary result of the "enterprise focus" approach, members of the defense bar have already begun advocating this ludicrous result in order to protect foreign clients without regard to the extent of their domestic dealings.¹⁶⁰ Such a construction would clearly frustrate the statute's purpose.¹⁶¹

Third, even proponents of the approach have admitted that it largely neuters the RICO statute's prowess in redressing significant threats from international and transnational actors to America's vital security and economic interests.¹⁶² This is wholly untenable because, for example, the Mexican drug cartel leader that exports drugs into the United States and orders kidnappings and murders on American soil to expedite payment from American buyers would be exempt from prosecution under RICO because his enterprise is foreign, even though he is clearly breaking domestic laws and endangering American citizens.¹⁶³ Such a conclusion only exacerbates America's vulnerability to extraterritorial attacks of various kinds.¹⁶⁴ The

¹⁵⁹ *Id.* at 243.

¹⁶⁰ Hargrove, et al., *supra* note 6, at 55 ("If the alleged enterprise is primarily foreign, then a defendant should make a motion to dismiss the RICO claim.").

¹⁶¹ *See* United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) ("[W]e find no indication that Congress intended to limit Title IX to infiltration of domestic enterprises. On the contrary, the salutary purposes of the Act would be frustrated by such construction. It would permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise. We reject any such construction."); United States v. Noriega, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) ("The Act thus permits no inference that it was intended to apply only to conduct within the United States. Such a narrow construction would frustrate RICO's purpose by allowing persons engaged in racketeering activities directed at the United States to escape RICO's bite simply by moving their operations abroad. Yet in the context of narcotics activities, perhaps the greatest threat to this country's welfare comes from enterprises outside the United States such as the Columbian cocaine cartels."); *see also* Chevron 871 F. Supp. 2d 229 ("From a practical perspective, it is well to bear in mind that foreign enterprises have been at the heart of precisely the sort of activities — committed in the United States — that were exactly what Congress enacted RICO to eradicate.").

¹⁶² Huntley, *supra* note 5, at 1715 ("Additionally, the enterprise approach leaves the statute with no, or almost no, extraterritorial application, which is in keeping with the presumption against extraterritoriality and Congress's presumed focus on domestic affairs.").

¹⁶³ *Cf.* European Cmty. v. RJR Nabisco, No. 11 C 5812, 2014 U.S. App. LEXIS 7593 (2d Cir. Apr. 23, 2014) ("Second, the district court's requirement that the defendant be, loosely speaking, associated with a domestic enterprise in order to sustain RICO liability seems to us illogical. Under that standard, if an enterprise formed in another nation sent emissaries to the United States to engage in domestic murders, kidnappings, and violations of the various RICO predicate statutes, its participants would be immune from RICO liability merely because the crimes committed in the United States were done in conjunction with a foreign enterprise. Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States.").

¹⁶⁴ Noriega, 746 F. Supp. at 1517 (stating that RICO "permits no inference that it was intended to apply only to conduct within the United States. Such a narrow construction would frustrate RICO's purpose by allowing persons engaged in racketeering activities directed at the United States to escape RICO's bite simply by moving their operations abroad. Yet in the context of narcotics activities, perhaps the greatest threat to this country's welfare comes from enterprises outside the United States such as the Columbian cocaine cartels."); Mark, *supra* note 4, at 545.

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current geopolitical climate demands a fierce resistance to such excessive restraint, which will be the natural result of carrying the presumption against extraterritoriality too far.¹⁶⁵

B. The “Pattern Focus” Approach

The alternative and better approach, adopted by most courts that have confronted the issue of RICO's focus post-*Morrison*, recognizes that the pattern of racketeering is its focus.¹⁶⁶ The Ninth Circuit, for example, concluded, “RICO's statutory language and legislative history support the notion that RICO's focus is on the pattern of racketeering activity.”¹⁶⁷ This determination is consistent with the Supreme Court's pre-*Morrison* dicta on the matter.¹⁶⁸ While the courts adopting this approach have properly identified the statute's focus, their applications have drawn legitimate criticisms. Some have noted that these courts seem to improperly apply the “conduct” and “effects” tests expressly rejected in *Morrison*.¹⁶⁹ This is a valid criticism where these courts continue focusing on the locus of the predicate acts. The “pattern focus,” then, is a step in the right direction, but careful, precise application is needed.

To date, only two Circuit Courts have squarely confronted the matter of RICO's extraterritorial reach since *Morrison*, and both concluded that RICO's focus is upon the pattern of racketeering. Perhaps this suggests some minimal degree of clarity is developing. Notably, the underlying facts in each case are emblematic of the new and emerging dangers in increasingly globalized societies and illustrate the grave necessity of resolving this issue. Both

¹⁶⁵ Walsh, *supra* note 2, at 651 (“While extraterritorial interpretation may abuse the intended confines of a statute, strictly applying the presumption can have a severely limiting effect and may result in excessive restraint.”).

¹⁶⁶ Hourani v. Mirtchev, 943 F. Supp. 2d 159, 165 (D.D.C. 2013) (finding, “in accordance with the majority of other post-*Morrison* cases deciding this issue,” that “RICO's focus is on the pattern of racketeering activity”); Borich v. BP, P.L.C., 904 F. Supp. 2d 855, 861 (N.D. Ill. 2012) (“That conclusion [that, in determining whether a plaintiff seeks extraterritorial application of RICO, the focus is on whether the enterprise is extraterritorial] has some appeal, but this Court is persuaded by the courts that have concluded that the proper focus is the pattern of racketeering activity and its consequences.”).

¹⁶⁷ United States v. Chao Fan Xu, 706 F.3d 965, 977 (9th Cir. 2013).

¹⁶⁸ Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 236 (1989).

¹⁶⁹ See, e.g., Norex Petroleum v. Access Indus., 631 F.3d 29, 33 (2d Cir. 2010) (dismissing a RICO claim under Fed. R. Civ. P. 12(b)(6), in part, because, “[t]he slim contacts with the United States alleged by *Norex* are insufficient to support extraterritorial application of the RICO statute,” even though the plaintiff alleged that defendants committed numerous racketeering acts in the United States); Cedeño v. Intech Grp., 733 F. Supp. 2d 471, 473-74 (S.D.N.Y. 2010) (dismissing an Amended Complaint with prejudice despite plaintiffs’ “superficial argument” that a RICO should apply extraterritorially to the extent that the alleged predicate acts applied extraterritorially because “RICO does not apply where . . . the alleged enterprise and the impact of the predicate activity upon it are entirely foreign”); United States v. Philip Morris USA, 783 F. Supp. 2d 23, 29 (D.D.C. 2011) (“[I]solated domestic conduct does not permit RICO to apply to what is essentially foreign activity.”); Aluminum Bahr. B.S.C. v. Alcoa Inc., Civ. Action No. 8-299, 2012 U.S. Dist. LEXIS 80478 (W.D. Pa. Jun. 11, 2012) (“To the extent that one considers the district court’s opinion, *Norex v. Access Industries*, 540 F. Supp.2d 438 (S.D. N.Y. 2007), the court engaged in a ‘conducts’ test — the test rejected by the Supreme Court in *Morrison* and by me in *In re Le-Nature’s Inc.*, Civ. No. 9-1445, 2011 U.S. Dist. LEXIS 56682, 2011 WL 211533 at * 2 n. 5 (W.D. Pa. May 26, 2011)”); Hargrove, et al., *supra* note 6, at 53; Huntley, *supra* note 5, at 1711.

of the cases, *United States v. Chao Fan Xu*¹⁷⁰ and *European Cmty. v. RJR Nabisco, Inc.*,¹⁷¹ will be briefly evaluated here for their value to other courts that will grapple with this issue in the future.

1. *Chao Fan Xu*

The Ninth Circuit Court of Appeals confronted the question of RICO's reach in a multinational context in *United States v. Chao Fan Xu*.¹⁷² The court took a step in the right direction by assessing RICO's applicability to the defendants' conduct in a graduated rather than wholesale fashion. Still, the Ninth Circuit did not go far enough; by focusing on the locus of the conduct rather than the language of the underlying predicates, its rationale is properly subject to the same criticisms levied against courts that rejected the "pattern focus" approach in favor of the "enterprise focus" approach.¹⁷³

In *Chao Fan Xu*, four defendants, all Chinese nationals, utilized the tools of the global economy to defraud the Bank of China out of hundreds of millions of dollars; transfer the stolen funds out of China; flee to the United States via immigration fraud; and spend the funds in, among other places, Las Vegas casinos.¹⁷⁴ Consistent with its emphasis on geography, the Court of Appeals determined that the international enterprise had two parts, with one consisting of "racketeering activities conducted predominantly in China" and the other consisting of "racketeering activities in the United States."¹⁷⁵ This is unfortunate language in that it improperly conflates the "enterprise" and "pattern of racketeering" elements. However, it is significant that the court bifurcated the conduct in anticipation of treating the domestic and foreign conduct distinctly, which other courts had failed to do.

Regarding the fraud perpetrated in China against the Bank of China, the court concluded, "to the extent it was predicated on extraterritorial activity, it is beyond the reach of RICO even if the bank fraud resulted in some of the money reaching the United States."¹⁷⁶ The conduct within the territorial United States, however, including violation of America's immigration laws, was deemed properly subject to the government's RICO charges.¹⁷⁷ In rejecting the argument that RICO did not apply under the circumstances because of the extraterritorial nature of the enterprise and some of its activities, the Ninth Circuit reasoned, "Given this express legislative intent to punish patterns of organized criminal activity in the United States, it is highly unlikely that Congress was unconcerned with the actions of foreign enterprises where those actions violated the laws of this country while the defendants were in this country."¹⁷⁸ The court went on to affirm the defendants' RICO convictions "because the convictions are not based on an improper extraterritorial application of RICO, but rather are

¹⁷⁰ See generally *Chao Fan Xu*, 706 F.3d 965.

¹⁷¹ See generally *European Cmty. v. RJR Nabisco*, No. 11 C 5812, 2014 U.S. App. LEXIS 7593 (2d Cir. Apr. 23, 2014).

¹⁷² *Chao Fan Xu*, 706 F.3d at 965.

¹⁷³ Cf. *Doe v. State of Israel*, 400 F. Supp. 2d 86, 115 (D.D.C. 2005) ("The nationality of the criminal enterprise or the locus of the racketeering activity alone, then, should not limit RICO's grasp.").

¹⁷⁴ *Chao Fan Xu*, 706 F.3d at 974.

¹⁷⁵ *Id.* at 978.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

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based on a pattern of racketeering activities that were conducted by the Defendants in the territorial United States.”¹⁷⁹ Apparently, no analysis of the predicate statutes was deemed necessary.

The court’s decision in *Chao Fan Xu* broke with the approach of the various district courts that had considered RICO’s extraterritorial reach post-*Morrison* because it did not treat the matter as an “all or nothing” proposition.¹⁸⁰ This at least allowed redress of conduct that occurred in the United States and potentially avoided the gross inequity of allowing foreign nationals in the United States to violate American law with impunity. The incongruity of its approach is obvious, however; the Court rejected the alleged money laundering predicates because they were “predicated on extraterritorial conduct,” yet upheld stand-alone convictions for the very same conduct.¹⁸¹

While the Ninth Circuit’s recognition of the need to treat RICO predicates distinctly in assessing the statute’s extraterritorial reach is good, the court did not actually apply RICO extraterritorially at all because the pattern it recognized was winnowed to wholly domestic conduct.¹⁸² This failed to answer the “hard” question of the extent to which the statute actually applies extraterritorially. The risk inherent in this approach is evinced by the court’s incongruous treatment of the defendants’ money laundering conduct; in certain instances, the approach will not give full effect to the reach of the underlying predicates. While *Chao Fan Xu* constitutes a step in the right direction, the Second Circuit’s approach in *European Cmty. v. RJR Nabisco, Inc.*, decided approximately one year later, goes further and avoids the risk of incongruity by recognizing that RICO’s extraterritorial reach must be coextensive with that of the predicates comprising the pattern of racketeering in a particular case.¹⁸³

2. *European Community*

After several years of turmoil, the Second Circuit finally arrived at a logical, workable approach to RICO’s extraterritorial application that neither unduly neuters nor expands the statute. Having previously declined to squarely address the issue,¹⁸⁴ the Second

¹⁷⁹ *Id.* at 979.

¹⁸⁰ *Id.* at 975 (“Indeed, Defendants were charged here with membership in a criminal enterprise that involved not only embezzlement against the Bank of China that occurred in China and Hong Kong (part one) but also immigration fraud to escape to the United States with their ill-gotten gains (part two). Accordingly, we must determine whether under the circumstances of this case RICO can be lawfully applied to any, or all, of Defendants’ conduct—foreign or domestic.”).

¹⁸¹ *Id.* at 978-82.

¹⁸² *Id.* at 979 (“We affirm Defendants’ count one convictions because the convictions are not based on an improper extraterritorial application of RICO, but rather are based on a pattern of racketeering activities that were conducted by the Defendants in the territorial United States.”); *Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (“Finally, our interpretation of the wire fraud statute does not give it ‘extraterritorial effect.’ Petitioners used U. S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States.”) (internal citations omitted); *United States v. Coffman*, No. 12-5574, 2014 WL 3673028 (6th Cir. July 22, 2014) (“We do not need to decide the reach of the *Morrison* presumption because defendants’ domestic conduct falls within the ambit of each of the statutes”); *Env’tl. Def. Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) (“[T]he presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States.”).

¹⁸³ *European Cmty. v. RJR Nabisco*, No. 11 C 5812, 2014 U.S. App. LEXIS 7593(2d Cir. Apr. 23, 2014).

¹⁸⁴ See *Norex Petroleum v. Access Indus.*, 631 F.3d 29, 32-33 (2d Cir. 2010).

Circuit finally confronted the question of RICO's extraterritorial reach for the first time after *Morrison in European Cmty. v. RJR Nabisco, Inc.*¹⁸⁵ It concluded, "We think it far more reasonable to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes."¹⁸⁶

The underlying complaint alleged conduct that is becoming more and more typical in our increasingly globalized society and is representative of the complex transnational dangers we now face. The Court described it thusly:

According to the Complaint, the scheme alleged to violate RICO involves a multi-step process beginning with the smuggling of illegal narcotics into Europe by Colombian and Russian criminal organizations. The drugs are sold, producing revenue in euros, which the criminal organizations "launder" by using money brokers in Europe to exchange the euros for the domestic currency of the criminal organizations' home countries. The money brokers then sell the euros to cigarette importers at a discounted rate. The cigarette importers use these euros to purchase RJR's cigarettes from wholesalers or "cut-outs." The wholesalers then purchase the cigarettes from RJR and ship the cigarettes to the importers who purchased them. And the money brokers use the funds derived from the cigarette importers to continue the laundering cycle.¹⁸⁷

RJR was alleged to have "laundered money through New York-based financial institutions and repatriated the profits of the scheme to the United States."¹⁸⁸ In order to facilitate the scheme, the company's executives and employees traveled from the United States to Europe, the Caribbean, and Central America; shipped cigarettes through Panama in order to use Panama's secrecy laws to shield the transactions from government scrutiny; took monthly trips from the United States to Colombia through Venezuela while bribing border guards in order to enter Colombia illegally; and communicated internally and with coconspirators by means of U.S. interstate and international mail and wires.¹⁸⁹

The district court dismissed the RICO claims, but the Second Circuit, noting that "RICO does not qualify the geographic scope of the enterprise,"¹⁹⁰ rejected the lower court's analysis and vacated the dismissal.¹⁹¹ In so doing, the Court of Appeals bifurcated its inquiry into the defendants' activities, but it did so based on the actual language of the predicates rather than their location as the Ninth Circuit did in *Chao Fan Xu*. RICO liability consisting of a pattern of domestic offenses, as well as extraterritorial money laundering and terrorism violations, then, was potentially viable.¹⁹²

Significantly, the Court of Appeals conducted a more careful analysis regarding the indicia of Congressional intentions regarding RICO's extraterritorial application than other courts that have considered the question. Consequently, its investigation more fully respected the statute's unique construction, and it avoided the extremes that have plagued most discussions on the matter. On the one hand, the Second Circuit flatly rejected the district court's conclusion that RICO cannot apply to a foreign enterprise or to extraterritorial

¹⁸⁵ *European Cmty.*, No. 11 C 5812, 2014 U.S. App. LEXIS 7593.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

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conduct.¹⁹³ On the other, it discounted the overzealous contention of some that RICO should be applied extraterritorially in a wholesale fashion simply because some of its predicates apply extraterritorially.¹⁹⁴ According to the court, “Congress manifested an unmistakable intent that certain of the federal statutes adopted as predicates for RICO liability apply to extraterritorial conduct.”¹⁹⁵ It concluded:

RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate. Thus, when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too, but only to the extent that the predicate would. Conversely, when a RICO claim depends on violations of a predicate statute that does not overcome *Morrison*’s presumption against extraterritoriality, RICO will not apply extraterritorially either.¹⁹⁶

The Second Circuit’s conclusion was compelled, first and foremost, by the text of the RICO statute, the examination of which is the first step required by *Morrison*. It noted that § 1961(1), which defines “racketeering activity” for purposes of RICO, incorporates by reference various federal criminal statutes that “unambiguously and necessarily involve extraterritorial conduct.”¹⁹⁷ None of the courts that have concluded that RICO is silent as to its extraterritoriality, including the Second Circuit a few years earlier,¹⁹⁸ squarely confronted this plain reality. Yet, “it is hard to imagine why Congress would incorporate these statutes as RICO predicates if RICO could never have extraterritorial application.”¹⁹⁹ Further, other statutes incorporated as RICO predicates clearly apply to both domestic and extraterritorial conduct.²⁰⁰

The Second Circuit’s “coextensive with the predicate acts” framework in *European Cmty.* provides a straightforward, predictable approach to assessing RICO’s extraterritorial reach that is faithful to the text and intent of the statute. Notably, the court declined to decide precisely how to distinguish between domestic and extraterritorial application of several individual statutes. This will obviously be an area of contention in future cases where this approach is utilized since the reach of the predicates will necessarily determine RICO’s reach.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., *id.* (acknowledging that litigants have argued that RICO’s reference to foreign commerce sufficiently indicates congressional intent that RICO should apply extraterritorially); *United States v. Philip Morris USA*, 783 F. Supp. 2d 23, 28 (D.D.C. 2011) (“The Government argues that because some of the predicate acts which may give rise to a ‘racketeering activity’ prohibited by RICO are extraterritorial in nature Congress must have assumed that RICO would have extraterritorial scope in general”); *Norex Petroleum v. Access Indus.*, 631 F.3d 29, 33 (2d Cir. 2010) (“*Morrison* similarly forecloses Norex’s argument that because a number of RICO’s predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.”).

¹⁹⁵ *European Cmty.*, No. 11 C 5812, 2014 U.S. App. LEXIS 7593.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Norex Petroleum*, 631 F.3d at 32-33.

¹⁹⁹ *European Cmty.*, No. 11 C 5812, 2014 U.S. App. LEXIS 7593.

²⁰⁰ *Id.*

V. BONA FIDES OF THE “COEXTENSIVE WITH PREDICATE ACTS” APPROACH

Given the state of utter confusion regarding RICO’s extraterritorial reach and the significant interests at stake, the Supreme Court will inevitably need to squarely confront and decisively settle the question. When it does, it should adopt the framework from *European Cmty. v. RJR Nabisco, Inc.* The “coextensive with predicate acts” approach was suggested previously,²⁰¹ but it has never gained significant traction in the courts. It is necessary, then, to explain why it is the best way forward in the current climate and articulate the merits for its widespread adoption.

A. This Approach Fully Respects the Statute’s Text

First and foremost, this approach respects the text of the statute as Congress wrote it and keeps the courts in their proper lane. In short, “Congress made RICO extraterritorial when it adopted predicate acts with extraterritorial application.”²⁰² As the Supreme Court noted in *Bridge v. Phoenix Bond & Indem. Co.*, it has “repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.”²⁰³ The same caution is appropriate in determining how to apply the statute extraterritorially. After all, “the fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”²⁰⁴

Second, whatever the precise scope of congressional concern in enacting the statute, it did not limit the geographic scope of the term “enterprise”; rather, it chose language broad enough to encompass foreign enterprises and foreign conduct, at least insofar as the incorporated statutes encompass them.²⁰⁵ Neither did it limit the geographic scope of the term “pattern of racketeering.” Congress certainly could have expressly limited RICO to domestic application, but it did not do so. To the contrary, it chose language that rather clearly encompasses transnational affairs. The reference to “foreign commerce,” for example, is not

²⁰¹ U.S. DEP’T OF JUSTICE, CRIMINAL DIVISION, ORGANIZED CRIME AND RACKETEERING SECTION, CRIMINAL RICO: 18 U.S.C. 1961-1968 (A MANUAL FOR FEDERAL PROSECUTORS) 291-92 (5th ed. 2009) (“[I]t is clear that criminal RICO applies extraterritorially where the alleged racketeering offenses apply extraterritorially”); Stephen C. Warneck, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. REV. 177, 200 (1998) (“Because RICO prescribes criminal penalties for a defendant who has committed two or more acts constituting a ‘pattern of racketeering activity,’ a successful RICO conviction depends upon establishment of the behavior that constitutes the underlying predicate criminal offenses. Because of this special characteristic of a RICO conviction, it appears that RICO can apply extraterritorially only if the statutes defining the relevant predicate offenses also have an extraterritorial reach.”).

²⁰² Daniel Hoppe, *Racketeering After Morrison: Extraterritorial Application of Civil RICO*, 107 NW. U.L. REV. 1375, 1395 (2013).

²⁰³ *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008).

²⁰⁴ *Sedima v. Imrex*, 473 U.S. 479, 499 (1985).

²⁰⁵ See *United States v. Lee Stoller Enter.*, 652 F.2d 1313, 1317 (7th Cir. 1981) (“The word ‘any,’ here [in 18 U.S.C. § 1961(4)] used three times, has a comprehensive meaning of ‘all or every.’ This language is strong and plain. . . . The statute is so broad that it applies to foreign enterprises as well as to domestic ones and to small enterprises as well as to large ones.”) (internal citations omitted).

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dispositive but it is not insignificant either. There is no reason to assume this broad language was employed haphazardly. In fact, there is good reason to believe the converse is true,²⁰⁶ and that deserves judicial deference.²⁰⁷

Failure to give extraterritorial force to statutes incorporated into RICO that expressly state they only apply extraterritorially would constitute a direct rejection of Congress' power to legislate extraterritorially.²⁰⁸ Their inclusion would be inexplicable surplusage if they cannot reach extraterritorial conduct as predicates in a RICO charge or claim. Similarly, failure to fully recognize the extraterritorial reach of predicates that clearly state they can be applied both domestically and extraterritorially amounts to a partial rejection of Congressional authority to legislate beyond America's territorial boundaries. It is not appropriate for the judiciary to limit legitimate causes of action or bases for prosecution written into federal statutes, even if they are applied in seemingly unanticipated circumstances.

Title 18 U.S.C. § 1512(h), for instance, plainly prescribes extraterritorial application for offenses involving tampering with witnesses, victims, and informants.²⁰⁹ Consequently, a drug dealer in the United States would be culpable under the statute for murdering a potential witness against him even if the witness were domiciled in a foreign country.²¹⁰ Also, a business executive in the United Kingdom who induced others to destroy documents in Europe with the intention of impairing their use and availability in an official proceeding in the United States would also be culpable.²¹¹

There is no reasonable basis for contending that Congress intended to curb § 1512's reach one whit when it was imported as a RICO predicate.²¹² The converse, i.e., that Congress incorporated § 1512 precisely because of its reach, and fully intended it to have the same scope it enjoyed as a stand-alone offense when employed as a RICO predicate, is far more plausible and almost certainly true. The same can be said for many other predicates that clearly apply extraterritorially and are essential to protecting American interests against new

²⁰⁶ See *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974) *cert. denied*, 419 U.S. 1105 (1975) (finding no indication that Congress intended § 1962(b) to focus exclusively on the enterprise acquired and sought to protect only American institutions and stating, "On the contrary, its legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises.").

²⁰⁷ Cf. *Pasquantino v. United States*, 544 U.S. 349, 372 (2005) ("It may seem an odd use of the Federal Government's resources to prosecute a U. S. citizen for smuggling cheap liquor into Canada. But the broad language of the wire fraud statute authorizes it to do so, and no canon of statutory construction permits us to read the statute more narrowly.").

²⁰⁸ *European Cmty. v. RJR Nabisco*, No. 11-2475-cv, 2014 U.S. App. LEXIS 7593 (2d Cir. Apr. 23, 2014) ("By incorporating these statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability."); Hoppe, *supra* note 202, at 1394 ("To construe RICO not to apply to extraterritorial conduct would be to ignore the extraterritorial reach of some of the predicate acts in the statute.").

²⁰⁹ See 18 U.S.C. § 1512(h) (2012).

²¹⁰ See *United States v. Fisher*, 494 F.3d 5, 8-9 (1st Cir. 2007).

²¹¹ See *United States v. Norris*, 753 F. Supp. 2d 492, 511 (E.D. Pa. 2010).

²¹² See 18 U.S.C. § 1961(1)(B).

and emerging transnational threats.²¹³ If a curb on the span of the RICO's application is needed, the remedy properly lies with Congress and not the federal courts.²¹⁴

B. This Approach Is Consistent with Approaches to Similar Statutes

In the discussion of RICO's extraterritorial application in judicial and scholastic circles to date, it seems that very few, if any, have carefully considered how courts have determined the extraterritorial reach of other offenses predicated upon underlying substantive violations. For example, it is generally presumed that ancillary statutes apply extraterritorially where the underlying substantive statute has extraterritorial effect.²¹⁵ Title 18, U.S.C. § 3, which criminalizes being an "accessory after the fact," applies extraterritorially if the underlying offense applies extraterritorially.²¹⁶ The same is true of federal conspiracy and aiding and abetting offenses.²¹⁷ Similarly, since *Morrison*, several courts, including three Circuit Courts of Appeal, have concluded that 18 U.S.C. § 924(c) applies extraterritorially insofar as the statute it incorporates applies extraterritorially.²¹⁸ Section 924(c) is a compound

²¹³ See, e.g., 21 U.S.C. § 959 (2012) (possession, manufacture, or distribution of controlled substance); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984); 18 U.S.C. § 1591 (2012) (sex trafficking of children or by force, fraud, or coercion); *United States v. Strevell*, 185 F. App'x 841, 844-45 (11th Cir. 2006); 18 U.S.C. § 2423 (2012) (transportation of minors); *United States v. Weingarten*, 632 F.3d 60, 65 (2d Cir. 2011); 18 U.S.C. § 175 (2012) (prohibitions with respect to biological weapons); 18 U.S.C. § 2332a (2012) (use of weapons of mass destruction); §18 U.S.C. § 2332f (2012) (bombings of places of public use, government facilities, public transportation systems and infrastructure facilities); *United States v. Bodmer*, 342 F. Supp. 2d 176, 191 (S.D.N.Y. 2004) ("If immunity from the FCPA's criminal penalties automatically conferred non-resident foreign nationals with immunity from the money laundering statute, these non-resident foreign nationals could openly serve as professional money launderers of proceeds derived from violations of the FCPA, without repercussion. United States citizens and entities could hire non-resident foreign nationals to launder money derived from FCPA violations, and the launderers would be beyond the reach of the Department of Justice even if part of the conduct occurred in the United States. This would contravene Congress's clearly articulated intention to include foreigners within the scope of the money laundering statute."); 18 U.S.C. § 1462 (2012) (importation of transportation of obscene matter).

²¹⁴ Cf. *Sedima v. Imrex*, 473 U.S. 479, 499-500 (1985) ("It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. 16 Yet this defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.").

²¹⁵ *United States v. Belfast*, 611 F.3d 783, 814 (11th Cir. 2010); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 197 (S.D.N.Y. 2000); *United States v. Reumayr*, 530 F. Supp. 2d 1210, 1219 (D.N.M. 2008) ("Generally, a statute ancillary to a substantive offense statute is presumed to have extraterritorial intent if the underlying substantive offense statute is determined to have extraterritorial intent.").

²¹⁶ *U.S. v. Felix-Gutierrez*, 940 F.2d 1200, 1204-05 (9th Cir. 1991).

²¹⁷ *Chua Han Mow v. U.S.*, 730 F.2d 1308, 1311 (9th Cir.1984) *cert. denied*, 470 U.S. 1031 (1985) (noting that "[t]his court ... has regularly inferred extraterritorial reach of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses."); *United States v. Yousef*, 927 F. Supp. 673, 682 (S.D.N.Y. 1996) ("Extraterritorial jurisdiction over a conspiracy charge depends on whether extraterritorial jurisdiction exists as to the underlying substantive crime."); *United States v. Ali*, 885 F. Supp. 2d 17, 23 (D.D.C. 2012) ("In addition, courts have concluded that the presumption against extraterritoriality does not apply to the federal statutes establishing aiding and abetting and conspiratorial liability where the statute setting forth the underlying substantive offense applies outside U.S. borders.").

²¹⁸ *United States v. Shibin*, 722 F.3d 233, 246-47 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 1935 (2014) ("Finally, § 924(c), on which Count 6 is based, criminalizes the use or possession of a firearm in connection with a crime

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offense, like RICO, and proscribes the use of a firearm during a crime of violence or a drug trafficking crime. These offenses are similar to RICO in that they incorporate other substantive offenses, and this parallel warrants analogous treatment, which the Second Circuit's "coextensive" framework affords.

C. This Approach Maximizes Simplicity and Predictability

Courts should favor the coextensive approach because they generally prefer legal tests and standards that maximize simplicity and predictability while minimizing confusion.²¹⁹ It has been argued that the enterprise approach creates clear lines and can produce predictable results,²²⁰ but approaches based on the geographical locus of the enterprise or the alleged predicate acts require far more intensive and tedious factual determinations, particularly for multinational groups and continuing offenses, that will tend to make outcomes less predictable for the government and private actors.

As noted and discussed previously, these approaches also lead to troubling incongruities. As such, it would be prudent for courts to adopt the "coextensive with predicate acts" framework, which "has the benefit of simplifying the question of what conduct is actionable in the United States and permitting courts to consistently analyze that question regardless of whether they are presented with a RICO claim or a claim under the relevant predicate."²²¹ This approach will help eliminate the discrepancies and disparities that presently characterize judicial decisions in this area.

D. This Approach Protects America's Citizenry and Economy

Frameworks that emphasize physical location actually encourage criminals to strike America's citizens and economy with impunity from beyond its physical borders. This would inevitably incentivize narcotics traffickers, cyber criminals and terrorists, among others, to locate or remain outside of America's physical borders while inflicting tremendous damage

of violence. It is an ancillary crime that depends on the nature and reach of the underlying crime. Thus, its jurisdictional reach is coextensive with the jurisdiction of the underlying crime."); *United States v. Siddiqui*, 699 F.3d 690, 701 (2d. Cir. 2012) ("As for § 924, which criminalizes the use of a firearm during commission of a crime of violence, every federal court that has considered the issue has given the statute extraterritorial application where, as here, the underlying substantive criminal statutes apply extraterritorially. We see no reason to quarrel with their conclusions.") (internal citations omitted); *United States v. Belfast*, 611 F.3d 783, 814 (11th Cir. 2010) (concluding that § 924(c) applies extraterritorially because "a statute ancillary to a substantive offense statute is presumed to have extraterritorial effect if the underlying substantive offense statute is determined to have extraterritorial effect") (internal alterations and quotation marks omitted); *United States v. Ahmed*, No. 10 Cr. 131, 2012 U.S. Dist. LEXIS 39451 (S.D.N.Y. Mar. 21, 2012) ("To the extent that *Morrison* applies to ancillary criminal statutes like section 924(c), it supports extraterritorial application. As has been discussed, section 924(c) explicitly applies "to any crime of violence ... for which the person may be prosecuted in a Court of the United States." 18 U.S.C. § 924(c)(1)(A). And, it is settled that certain crimes of violence committed abroad are punishable in United States courts. With this context, and with *Morrison*'s guidance that a statute need not speak in geographic terms to speak clearly, 130 S.Ct. at 2883, section 924(c) manifests an intention of extraterritorial application.").

²¹⁹ See, e.g., *Hydro Res., v. EPA*, 608 F.3d 1131, 1164 (10th Cir. 2010).

²²⁰ *Huntley*, *supra* note 5, at 1716.

²²¹ *Hoppe*, *supra* note 202, at 1398.

from afar,²²² with full knowledge that sovereign borders protect them from America's courts. The location of the enterprise, and even the racketeering acts themselves, should be material only to the extent that it is relevant in determining the extraterritorial reach of the alleged predicate offenses. To the extent that geography is legally material, then, it will be considered, as it should be, in the analysis of the reach of the individual predicates under the "coextensive with predicate acts" approach.

E. This Approach Minimizes the Potential for Abuse

Several courts have expressed concern that RICO is sometimes applied abusively.²²³ The availability of this tool can encourage overzealous charging decisions and civil suits. Of course, this concern is not nearly so great in criminal cases because the Justice Department offers a filter through which all RICO prosecutions must be screened.²²⁴ Yet, there is no civil screening equivalent, and this is sometimes a source of judicial consternation.²²⁵ Coextensive extraterritorial application of RICO should be inviting for courts because, in stark contrast to arguments for indiscriminate extraterritorial application of RICO where some of the alleged

²²² *Id.*

²²³ AG of Can. v. R.J. Reynolds Tobacco Holdings, 268 F.3d 103, 140 (2d Cir. 2001) (J. Calabresi, dissenting) ("In this respect, I note my own discomfort with various aspects of RICO, and especially of civil RICO. I would not be displeased if the Supreme Court, faced with the possible effects of civil RICO in a case like this one, were to retreat from its insistence on an identical scope for civil and criminal RICO. Similarly, I would welcome a reconsideration by Congress of how far civil RICO ought to go."); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991) ("For another thing, in cases alleging civil RICO violations, particular care is required to balance the liberality of the Civil Rules with the necessity of preventing abusive or vexatious treatment of defendants."); *Meier v. Musburger*, 588 F.Supp.2d 883, 900 (N.D. Ill. 2008) (internal citations omitted) ("Even though Congress never intended that the statute be employed to allow plaintiffs to turn garden-variety state law fraud and breach of fiduciary duty cases into RICO claims, from the beginning, the breadth of RICO's text and the lure of treble damages and attorneys' fees proved irresistible to those bent on federalizing such claims.").

²²⁴ *Sedima v. Imrex*, 473 U.S. 479, 503 (1985) (J. Marshall, dissenting); *DeRio-Mocci v. Connolly Props.*, 672 F.3d 241, 254 (3d Cir. 2012) ("In the criminal arena, this proclivity for abuse is at least limited by prosecutorial discretion, the risk of losing credibility with jurors if the prosecution engages in "overkill" or overreaching, and the related risk of jury nullification. However, RICO's civil remedy is not restricted by any such considerations. Thus, it is not surprising that we are today faced with a claim that this landlord-tenant dispute is really a racketeering conspiracy that should entitle this tenant to treble damages under RICO."); *Helios Int'l S.A.R.L. v. Cantamessa USA*, 12 Civ. 8205, 2014 U.S. Dist. LEXIS 69999 (S.D.N.Y. 2014) ("[F]ederal courts are wary of allowing traditional copyright claims to form the basis of a civil RICO claim unconstrained by the limits of prosecutorial discretion and higher standard of proof that accompany actual government prosecutions under § 2319."); *Fleet Credit Corp. v. Sion*, 699 F. Supp. 368, 377 (D.R.I. 1988) ("[O]verbreadth is limited through prosecutorial discretion in cases brought by the government, but in private actions a proper construction of the pattern requirement is all that constrains plaintiffs to obey Congressional intent."); *Lopez v. Dean Witter Reynolds*, 591 F. Supp. 581, 588 (N.D. Cal. 1984) ("It is incumbent upon courts, especially in civil RICO actions where the restraint of prosecutorial discretion is not present, to scrutinize claims to insure that the statute is not applied to contexts outside those intended by Congress."); *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225, 236 (E.D.N.Y. 2010) ("[P]laintiffs have often been overzealous in pursuing RICO claims, flooding federal courts by dressing up run-of-the-mill fraud claims as RICO violations. In consequence, courts must 'strive to flush out frivolous RICO allegations at an early stage of the litigation.'").

²²⁵ *Id.*

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rackeering acts apply extraterritorially, this approach creates no greater reach than that already inherent in the crimes specifically incorporated by Congress.

Conclusion

Advocates and courts have historically adopted an unnecessarily dualistic approach to the extraterritorial application of RICO. At one poll are those suggesting the statute absolutely cannot be applied extraterritorially because it does not announce congressional intention for such application. At the other, there are those suggesting that Congress has manifested clear intention that the statute be applied extraterritorially in a wholesale fashion. As is so often the case, neither extreme is merited, and the truth is in the middle.

The Second Circuit struck the proper balance and recognized both the length and the limits for redressing extraterritorial conduct inherent in the RICO statute itself. Unless Congress amends the language of the statute, the “coextensive with predicate acts” approach is best for faithfully determining its extraterritorial reach on a case-by-case basis. It allows potential plaintiffs and prosecutors the latitude Congress intended, based on the plain language of the statute, while restraining them from going any further. As a practical matter, it also permits prosecutors and plaintiffs to adequately confront the injurious behavior of United States citizens, on the one hand, while protecting their interests, on the other.

If more is needed in light of present and developing transnational threats, Congress should act decisively to broaden RICO’s extraterritorial scope. Perhaps a legislative remedy is needed. Perhaps one is coming. Unless and until it comes, though, the “coextensive with predicate acts” approach propounded by the Second Circuit provides the clear, logical, and just way forward in light of RICO’s language and purpose. Moreover, it affords the statute the amplitude Congress intended to meet the significant international threats it is uniquely capable of redressing. It permits full, but not reckless, deployment of this “unusually potent weapon”²²⁶ at a time when improper and impractical restraint would be greatly detrimental to America’s vital interests.

²²⁶ *Miranda*, 948 F.2d at 44 (1st Cir. 1991).

