No. 07-1309

IN THE
Supreme Court of the United States

EDMUND BOYLE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Center on the Administration of Criminal Law is dedicated to defining and promoting best practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is a central feature of criminal enforcement at all levels of government, there is a dearth of scholarly attention to how prosecutors exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decision-making. The Center's litigation program aims to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts, at all levels. The Center focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues.

The Center files this *amicus* brief out of concern that the government has interpreted provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to grant individual prosecutors nearly unfettered discretion to alter the balance between state and federal criminal prosecutions. RICO criminalizes the association with and participation in the conduct of an enterprise that engages in a series of defined federal and state crimes. Because these

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

underlying "predicate acts" may be comprised solely of state crimes, RICO significantly expands the federal government's criminal jurisdiction and the power of federal prosecutors. That expansion is typically justified by the federal interest in eliminating organized crime. The decision under review, however, does away with any meaningful "enterprise" requirement under RICO, allowing the existence of criminal activity – including exclusively state-law crimes – to establish the existence of an "enterprise." That interpretation significantly alters the balance of federal and state law enforcement and improperly expands the prosecutorial jurisdiction of federal prosecutors. The Court should therefore limit that expansion by holding that proof of an ascertainable structure is necessary to a finding that the "enterprise" element of a RICO violation has been met.

SUMMARY OF ARGUMENT

The court of appeals upheld petitioner's conviction under RICO, despite the district court's refusal to instruct the jury that a RICO "enterprise" must have "an ascertainable structural hierarchy distinct from the charged predicate acts." JA 95. In so doing, the court of appeals effectively merged the elements of "enterprise" and "pattern of racketeering activity" under the statute. *See* 18 U.S.C. § 1962(c). The court of appeals' ruling that the jury did not have to find an ascertainable structure to satisfy the "enterprise" element of the statute thus conflicts with this Court's holding in *United States v. Turkette*, 452 U.S. 576 (1981), that a RICO enterprise "is an entity separate and apart from the pattern of [racketeering] activity in which it engages." *Id.* at 583. It criminalizes conduct that does not implicate the significant

federal interest in combating organized crime that underlies RICO. And it threatens to upset the balance between state and federal prosecutions that Congress drew when it included the requirement of "enterprise" as an element of the RICO offense.

I. In *Turkette*, this Court held that, to give effect to each element of the RICO statute, a RICO "enterprise" must be distinct from the "pattern of [racketeering] activity in which it engages." 452 U.S. at 583. The Court reasoned that an "enterprise" is an entity, whereas a "pattern of . . . activity" is a series of acts. The Court held that the existence of an "enterprise" could be proven through evidence of an "ongoing organization" that functioned as a "continuing unit." *Id.*

"[L]egal" entities are distinct from their activities by operation of law. When an enterprise is alleged to be an "associat[ion] in fact although not a legal entity," 18 U.S.C. § 1961(4), the government must still prove that the enterprise has an existence independent of its activities. Otherwise, the "enterprise" requirement would be effectively read out of the statute. That proof must take the form of some *structure* separate from the enterprise's activities.

The requirement that an enterprise have an ascertainable structure comports with the Court's guidance that enterprises must be ongoing organizations and continuing units. Indeed, the majority of circuits to have considered the question have concluded that *Turkette* requires proof of ascertainable structure. The requirement of structure also reflects Congress's core concern in enacting RICO – the elimination of criminal organizations that pose a threat that transcends the specific predicate acts in which they engage. The contrary view – that the government

need prove no more than that a group of individuals engaged in a pattern of racketeering activity to satisfy the element of "enterprise" under RICO – is not persuasive, because it fails to distinguish between the finding that a properly instructed jury must make – that an enterprise has structure – and the evidence that may support such a finding, which may include evidence of the enterprise's activities.

It is not necessary to conclude that associations-in-fact must have the *same* structure as business organizations in order to find that they still have *some* ascertainable structure. The courts of appeals that have implemented a requirement of structure have applied that term flexibly, finding structure in a wide variety of mechanisms for coordinated action and decision-making.

II. Principles of federalism provide a further reason why this Court should not weaken the distinction set forth in *Turkette*. The Second Circuit's interpretation would improperly extend federal authorities' broad discretion to prosecute state crimes. As this Court has repeatedly affirmed, however, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). No such clear statement can be found here.

When Congress enacted RICO, it recognized that it was substantially expanding federal prosecutorial power, but it limited the exercise of that power to circumstances in which the criminal acts were carried out as part of an "enterprise." The intent to combat such criminal *organizations* lies at the core of the federal interest animating the RICO statute. If that element can be proven by the "pattern of

racketeering activity" standing alone, then the necessity of a distinct enterprise collapses. Because state crimes may comprise RICO predicate acts, it would be possible to prosecute under RICO multiple acts of state criminality by loosely grouped individuals without the special circumstance – an "enterprise" – that implicates the federal interest.

Such prosecutions would threaten core principles of federalism and this Court's consistent understanding that the States enjoy a historical sovereignty over the enforcement of the criminal law. First, prosecutions of state crimes under RICO committed by groups lacking structure could impose a penalty far different from that which the State would impose, undermining local policy judgments. Second, such prosecutions would blur the lines of democratic accountability between the state and federal governments, making it harder for citizens to give effect to their preferences about criminal enforcement. Finally, such prosecutions would create the possibility of significant misallocations of judicial and law enforcement resources to prosecute at the federal level crimes better handled by local authorities. These concerns take on special prominence in light of the broad discretion federal prosecutors enjoy. That discretion means that important decisions about the boundary between federal and state law enforcement are pushed even farther from politically accountable actors.

For those reasons, the Court should reject an interpretation of "enterprise" that would result in such sweeping changes absent explicit congressional sanction. This Court should reverse the court of appeals and hold that the government must prove an enterprise with "ascertainable structure" to sustain a conviction under RICO.

ARGUMENT

I. RICO REQUIRES THAT AN "ENTERPRISE" HAVE AN ASCERTAINABLE STRUCTURE DISTINCT FROM THE UNDERLYING CRIMINAL CONDUCT

Section 1962(c) of RICO 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." 18 U.S.C. § 1962(c). In turn, the statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity" or, as relevant here, "any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

Petitioner in this case asked the district court to instruct the jury that a RICO "enterprise" must have "an ascertainable structural hierarchy distinct from the charged predicate acts." JA 95. The district court rejected that instruction. JA 112. Instead, the district court instructed the jury that it "may find an enterprise where an association of individuals, *without structural hierarchy*, forms solely for the purpose of carrying out a pattern of racketeering acts," and that "it is not necessary that the enterprise have *any particular or formal structure*." *Id.* (emphases added). The court of appeals affirmed.

Under the district court's instruction, the meaning of "enterprise" merges with the "pattern of racketeering activity" in section 1962(c). The instruction therefore runs afoul of this Court's holding in *United States v. Turkette*, 452 U.S. 576 (1981), that "[t]he 'enterprise' . . . is an entity *separate and apart from*

the pattern of [racketeering] activity in which it engages." *Id.* at 583 (emphasis added). Petitioner's proposed jury instruction correctly states the law. This Court should reverse.

A. *Turkette* Requires That A RICO Enterprise Be Distinct From The Pattern Of Racketeering Activity In Which It Engages

In *Turkette*, this Court interpreted "enterprise" in the RICO statute in a manner that forecloses the jury instruction approved by the district court and the court of appeals in this case. The defendant in *Turkette* was convicted of conspiracy to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of section 1962(d). *See* 452 U.S. at 578-79. The indictment alleged that Turkette and other individuals were associated with each other for the purpose of carrying out a number of criminal acts. *See id.* The evidence at trial "focused upon . . . the professional nature of this organization." *Id.* at 579.

The court of appeals dismissed the indictment because, in its view, an "enterprise" under RICO could only be a "legitimate" organization, rather than a "group[] of individuals who engage in a pattern of exclusively criminal racketeering activity." *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir. 1980). The court reasoned, in part, that an exclusively criminal organization would in fact be nothing more than a "pattern of racketeering activity." For such organizations, therefore, separate proof of the element of "enterprise" would be superfluous. The court therefore concluded that criminal organizations could not be enterprises within the meaning of the statute. *See id.*

This Court reversed. The Court rejected the First Circuit's "faulty premise" that to give effect to each of the elements of the crime in section 1962(c) required the exclusion of wholly criminal organizations from "the ambit of the statute." *Turkette*, 452 U.S. at 583. Instead, the Court gave meaning to each element of the statute by holding that an "enterprise" must always have an existence separate and distinct from *any* activities – licit or illicit – in which it engaged. *See id.* As the Court stated: "The enterprise is an *entity*, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal *acts* as defined by the statute." *Id.* (emphasis added); *see also* 18 U.S.C. § 1961(4) (defining "enterprise" as any "legal entity" or "associat[ion] in fact although not a legal entity").

Based on the statutory premise that an "enterprise" "is an entity separate and apart from the pattern of activity in which it engages," 452 U.S. at 583, the Court made several additional observations about the evidence that could be used to prove the existence of such an entity. Thus, although the "pattern of racketeering activity" could be proved solely through evidence of those acts, to establish the existence of an "enterprise," the government had to offer "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *Id.* The Court was careful to note that, although the evidence offered to prove the elements "may in particular cases coalesce," proof of the pattern of racketeering activity "does not necessarily" prove the existence of the enterprise. *Id.*

B. The Jury Instruction In This Case Improperly Conflates The Elements Of "Enterprise" And "Pattern Of Racketeering Activity"

1. *Turkette* therefore establishes, consistent with the statutory definition of "enterprise," *see* 18 U.S.C. § 1961(4), that a RICO "enterprise" must be an "entity" separate and distinct from its activities. That characteristic is easily demonstrated by "legal entit[ies]." *Id.* Corporations, partnerships, and other such associations are granted independent status under the law. They are entities distinct from their activities because the law affirmatively confers that status.

A non-legal entity or association-in-fact, broadly speaking, can be defined by what it is or what it does. *Turkette* holds, however, that a pattern of racketeering activity, standing alone, is insufficient to constitute the relevant entity, or "enterprise," for the purpose of the RICO statute. Rather, an "enterprise" must be defined by more than simply the racketeering acts in which it engages. Otherwise, the "enterprise" requirement is effectively read out of the statute: all that is required for liability is a "pattern of racketeering activity." Therefore, in cases where the only concerted activities of a group of individuals are the crimes that constitute the pattern of racketeering activity, the jury must make some additional finding by inference or direct proof to establish the existence of an "enterprise."

That additional finding must be that the enterprise has a *structure*. The enterprise cannot be defined by what it does; it must be defined by what it *is* – an *organization* with an ascertainable *structure*. This Court's own examples of the elements of proof that

may demonstrate an enterprise – "ongoing organization" and a "continuing unit," *Turkette*, 452 U.S. at 583, both suggest the need for some ascertainable structure. An association could not "continu[e]" to exist, nor could it in any way be "organiz[ed]," without an element of structure.

In approving a jury instruction that relieved the government of the burden of proving any structure, the court of appeals ran afoul of the key holding in *Turkette* and allowed the jury to find proof of an enterprise from its racketeering activities alone.

2. The majority of circuit courts have properly understood that *Turkette* imposes a requirement of ascertainable structure upon associated-in-fact RICO enterprises. The Seventh Circuit, relying on *Turkette*, has reasoned that, "[i]f the 'enterprise' is just a name for the crimes the defendants committed, . . . then it would not be an enterprise within the meaning of the statute" and "two statutory elements – enterprise and pattern – would be collapsed into one." *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991) (Posner, J.). Instead, that court required proof "that the informal enterprise . . . existed as an organization with a structure and goals separate from the predicate acts themselves." *Id.*; *see also Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 804-05 (7th Cir. 2008) (Posner, J.) ("'[A]ssociated in fact' just means structured without the aid of legally defined structural forms such as the business corporation."); *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) (holding that "the central element of an enterprise is structure" and that "Congress intended the phrase 'a group of individuals associated in fact although not a legal entity' . . . to encompass only an association having

an ascertainable structure"). Similarly, the Eighth Circuit has held that, "under RICO, an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." *United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir. 1982). Instead, that court "requires proof of some structure separate from the racketeering activity." *Id.* And, in *United States v. Riccobene*, 709 F.2d 214 (3d Cir. 1983), the Third Circuit interpreted this Court's statements that an enterprise requires an "ongoing organization" and "continuing unit" to mean that the enterprise must have structure. *See id.* at 222 ("The 'ongoing organization' requirement relates to the superstructure or framework of the group."); *id.* at 223 (explaining that the "continuing unit" requirement means "that each person perform a role in the group consistent with [its] organizational structure"); *id.* at 224 ("The function of overseeing and coordinating the commission of [racketeering activities] on an on-going basis is adequate to satisfy the separate existence requirement."). Other courts are in substantial accord. *See*, *e.g.*, *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985) ("Evidence of the ongoing nature of the organization relate[s] to the operational structure of the group."); *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir. 2006) (finding an "enterprise" where evidence suggested "a hierarchical decision-making structure and a division of labor among the various players"); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir. 1991).

3. The conclusion that the "enterprise" element of the RICO statute requires proof of an ascertainable structure draws additional support from the other uses of the term "enterprise" in the RICO statute.

Section 1962(a) prohibits the use of unlawful income in the "acquisition of any interest in, or the establishment or operation of, any enterprise" that affects interstate or foreign commerce. 18 U.S.C. § 1962(a). Similarly, section 1962(b) refers to the "acqui[sition] or maint[enance], direct[] or indirect[], [of] any interest in or control of any enterprise." *Id.* § 1962(b). Finally, section 1964(a), which imposes civil liability for RICO violations, refers to the divestment of an interest in an enterprise and the "dissolution or reorganization of any enterprise." *Id.* § 1964(a). Each of these provisions reflects Congress's understanding that a RICO "enterprise" would have an ascertainable structure and existence apart from the predicate acts themselves. These provisions reinforce the conclusion that Congress understood that an "enterprise" must be an entity in which one could have an "interest" or which one could "control." The requirement of ascertainable structure gives effect to that understanding and makes the statute coherent and consistent. *See*, *e.g.*, *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor.").

4. Finally, the requirement of an ascertainable structure effectuates the core congressional interest in "seek[ing] the eradication of *organized* crime in the United States." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (emphasis added). Congress was especially concerned with the "sophisticated, diversified, and widespread" activities of organized criminals and their effect on interstate commerce and economic activity. *Id.* at 922. Criminal organizations that are more than just loosely affiliated individuals who sporadically engage

in criminal activity pose special problems for law enforcement that RICO helps to solve.

As the Court noted in *Turkette*, Congress took aim primarily at the "infiltration of legitimate business by organized crime." 452 U.S. at 591. Organized criminal syndicates use their illegitimate criminal enterprises – their "primary sources of revenue and power" – as a "springboard into the sphere of legitimate enterprise." *Id.* The prosecution of highly organized criminal entities is therefore in part a "preventive" measure to prevent infiltration before it occurs. *Id.* at 593.

Nevertheless, "Congress' concerns were not limited to infiltration." *Russello v. United States*, 464 U.S. 16, 28 (1983). Rather, Congress recognized that structured criminal organizations themselves were uniquely harmful. That conviction under RICO requires proof of an "enterprise" separate and distinct from the predicate acts the participants undertake is evidence of the special opprobrium that Congress assigned to such entities. "Indeed, . . . the enterprise element constitutes the essence of the crime. Operation of a criminal organization . . . is [not] merely an incidental fact about the context in which a criminal act was committed. Rather, it constitutes a distinct species of social harm." Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 943 (1987). That harm arises primarily from the fact that "[o]rganized criminal groups . . . make possible the infliction of greater harm than can be committed by individuals." *Id.* at 958.

Indeed, despite the dangerous nature of the organizations themselves, structured enterprises have historically been able to avoid "mass prosecutions" by spreading their activities across jurisdictions and

engaging in multi-faceted criminal conduct. *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978); *see also* Lynch, 87 Colum. L. Rev. at 929-30. RICO's focus on structure "helps to eliminate this problem by creating a substantive offense" – separate from the jurisdictionally and substantively disparate predicate acts – "which ties together these diverse parties and crimes." *Elliott*, 571 F.2d at 902.

C. Decisions Finding That An "Enterprise" Does Not Require Ascertainable Structure Are Not Persuasive

The minority view that the government need not demonstrate any ascertainable structure separate from the pattern of racketeering activities to prove the existence of a RICO enterprise not only conflicts with the central holding of *Turkette*; it is also unpersuasive on its own terms.

First, courts have misunderstood *Turkette*'s statement that "the proof used to establish the[] separate elements" of enterprise and pattern "may in particular cases coalesce," 452 U.S. at 583, to draw the further conclusion that the jury need not find an ascertainable structure. *See*, *e.g.*, *United States v. Patrick*, 248 F.3d 11, 18-19 (1st Cir. 2001); *United States v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988); *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 22 (2d Cir. 1983). But *Turkette*'s evidentiary observations do not override its central holding that the government must prove the existence of an entity apart from any pattern of racketeering activity; rather, the Court was commenting on the evidence from which a jury could infer the existence of an enterprise. It may be true that evidence of racketeering activities can *support* a finding that the enterprise has a structure, but that evidence must be evaluated by a jury properly

instructed on all the elements of the offense. That is, the jury must still be instructed that a RICO violation requires proof of an enterprise with an ascertainable structure. In *Masters*, for example, the jury was instructed that it needed to find an "organization with a structure and goals separate from the predicate acts themselves." 924 F.2d at 1367. On appeal, the court held that the jury could infer a structure from the fact that the enterprise was "in place ready to respond effectively" to new developments in the course of its activities. *Id.*

In this case, the Second Circuit presumably relied on its prior holding that "it is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure." *United States v. Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983). For the reasons described above, however, that position is inconsistent with *Turkette*. The jury instruction in this case reflects the same error.

Second, other courts focus on the fact that non-legal entities – and criminal organizations in particular – "may not observe the niceties of legitimate organizational structures" to conclude that it is infeasible to instruct juries that they must find an ascertainable structure. *Patrick*, 248 F.3d at 19; *see also Odom v. Microsoft Corp.*, 486 F.3d 541, 551-52 (9th Cir.) (en banc), *cert. denied*, 128 S. Ct. 464 (2007). But the fact that such organizations do not have the *same* structure as legal entities does not mean that they have *no* structure. Circuit courts that require evidence of a structural hierarchy to find an association-in-fact do not, of course, require proof of the formalities found in legal entities. "Criminal enterprises have less structure than legal ones." *Masters*, 924 F.2d at 1367. Instead, those

courts have described the "structure" in this context as a "mechanism for controlling and directing the affairs of the group on an on-going . . . basis," and for "the making of decisions, whether [on a] hierarchical or consensual" basis. *Riccobene*, 709 F.2d at 222; *see also Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (requiring proof of "an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making") (internal quotation marks omitted). A properly instructed jury can find "structure" in many attributes of associations-in-fact.

Third, some courts take the requirement of "structure" to mean that the enterprise must engage in activities other than the pattern of racketeering activity. *See*, *e.g.*, *Odom*, 486 F.3d at 551 ("Such a requirement would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities."); *Perholtz*, 842 F.2d at 363. These courts reject any requirement of "structure" because, under that view, such a requirement is inconsistent with *Turkette*. But this conflates two distinct issues – that is, whether the enterprise engages in legitimate activities (not required) and whether the enterprise exists as an entity apart from its illegitimate activities (required). As described above, both wholly criminal and partially non-criminal enterprises may have an ascertainable structure. As *Turkette* teaches, however, the existence of an enterprise as an entity must be separate and distinct from its activities.

II. AN OVERLY BROAD READING OF RICO'S "ENTERPRISE" REQUIREMENT WOULD UPSET THE BALANCE BETWEEN STATE AND FEDERAL LAW ENFORCEMENT

Principles of statutory construction rooted in significant federal concerns reinforce the conclusion that a RICO "enterprise" must have an ascertainable structure independent of the predicate crimes and confirm the importance of the distinction established in *Turkette*. In *United States v. Bass*, 404 U.S. 336 (1971), this Court held that it would not favor reading ambiguous criminal statutes to "significantly change[] the federal-state balance" of "criminal jurisdiction." *Id.* at 349. The court of appeals' interpretation of "enterprise" would tip the scales too heavily in favor of federal criminal jurisdiction by granting federal prosecutors the authority to prosecute state crimes. This Court should "not be quick to assume that Congress . . . meant to effect" such a "significant change in the sensitive relation between state and federal criminal jurisdiction." *Id.*

A. The Absence Of An Ascertainable Structure Requirement Enables Federal Prosecutors To Prosecute Crimes That Ordinarily Fall Within The Purview Of State Authorities

As this Court acknowledged in *Turkette*, RICO grants significant power to federal prosecutors to prosecute criminal acts that are also crimes under state law. *See* 452 U.S. at 586 ("Congress was well aware that it was entering a new domain of federal involvement."). Congress circumscribed that power, however, by requiring that it be exercised only when the crime involved an "enterprise" that is independent of the "pattern of racketeering activity" or the

acts themselves. The inclusion of that independent requirement indicates Congress's intent not to displace state prosecutorial authority except in those circumstances where an "enterprise" engaged in a "pattern of racketeering activity." That circumstance is distinct from a mere series of crimes committed by an overlapping group of individuals. As described above, prosecution of such enterprises is the key federal interest that Congress sought to vindicate through RICO. If, however, an "enterprise" can be defined solely by the racketeering acts in which it engages, then the distinction between the "enterprise" and the "pattern of racketeering activity" collapses. That in turn threatens the balance between state and federal authority that Congress struck.

The "pattern of racketeering activity" under RICO may be comprised of any two acts of "racketeering activity" committed within 10 years of each other. *See* 18 U.S.C. § 1961(5). A wide range of crimes qualify as "racketeering activity," including "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, [or] extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year." *Id.* § 1961(1)(A). Under the definition of "enterprise" in the jury instruction approved in this case, then, a federal RICO prosecution may be brought against two individuals who come together within a single jurisdiction for the sole purpose of committing two or more state crimes. That would mark a significant expansion of federal authority to prosecute what might otherwise be exclusively state crimes, but without the special circumstance – the presence of an "enterprise" – that implicates the important federal

interest in "eradicating organized crime from the social fabric." *Turkette*, 452 U.S. at 585.[2] As described in Part I.B.4, *supra*, RICO takes aim at structured organizations that can impose potentially greater harms upon society and that have proven historically more difficult to prosecute. To allow prosecutions in cases where that interest is not implicated would stray significantly from that core policy objective.

In this case, the defendants burgled a series of banks, thereby giving rise to federal bank burglary charges. *See* Br. in Opp. 2; *supra* note 2. If, however, the defendants had burgled a series of houses, the prosecution would still be sustainable under the Second Circuit's reading of the RICO statute. Petitioner and his co-defendants associated for the purpose of committing a series of crimes; robbing a house may be a racketeering act under the statute. *See* 18 U.S.C. § 1961(1)(A). In the absence of any additional requirement of structure, the government could secure a RICO conviction by proving that the defendants acted together to carry out a series of local burglaries.

The use of the statute in that manner is improper in light of Congress's federal interest in adopting the RICO statute. RICO criminalizes "the furthering of the enterprise; not the predicate acts," *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981), and "was enacted to supplement rather than replace the

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[2] The "pattern of racketeering activity" charged in this case involved bank robberies punishable under federal law and therefore does not implicate these federalism concerns directly. *See* 18 U.S.C. § 2113(a). But many of the same concerns about expanded prosecutorial discretion – including providing prosecutors with the ability to wield greatly enhanced penalties – apply in the case of federal crimes as well.

existing predicate crimes and penalties," *United States v. Crosby*, 20 F.3d 480, 484 (D.C. Cir. 1994). In other words, "Congress intended that a RICO violation be a discrete offense that can be prosecuted separately from its underlying predicate offenses." *Id.* But if the "enterprise" is synonymous with the underlying predicate crimes, and the underlying predicate crimes are solely state crimes, then the distinct federal interest – that is, a federal interest in prosecuting criminal *organizations* as opposed to the underlying crimes – is essentially read out of the statute. *Cf. United States v. Carillo*, 229 F.3d 177, 182 (2d Cir. 2000) (noting that "RICO's allusion to state crimes was not intended to incorporate elements of state crimes" into the RICO statute) (internal quotation marks omitted). If, on the other hand, the government must prove the existence of an enterprise with independently ascertainable structure, then the prosecution requires something more than proof of state crimes: it requires proof of an "entity." 18 U.S.C. § 1961(4). As described in Part I.B.4, *supra*, the presence of an entity is what implicates the particularly federal interests behind the statute.

B. Prosecuting An "Enterprise" Defined Solely By State Criminal Activities Is Inconsistent With Basic Principles Of Federalism

1. As the Court has recognized, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). States traditionally enjoy a "historical[] . . . sovereign[ty]" in defining and policing basic criminal offenses with which this Court is loathe to interfere. *Id.* at 564. The court of appeals' interpretation puts

at risk several attributes of state sovereignty in the area of law enforcement.

First, the Court "accord[s] . . . deference to the policy judgments that find expression in the legislature's choice of [criminal] sanctions." *Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality). Local policy preferences take on special importance with respect to prohibited acts that carry the sanctions of the criminal law. The Court should therefore be particularly wary of allowing an overbroad reading of the RICO statute to override local preferences in this area.

The Second Circuit's interpretation of "enterprise" has precisely this effect. This concern is especially sharp given that RICO's penalties are often harsher than comparable penalties under state law. Without the requirement of a structured enterprise, federal prosecutors could use RICO not only "to invoke an additional penalty" in any case involving commission of two state offenses "listed as racketeering activities," *Riccobene*, 709 F.2d at 221 (internal quotation marks omitted), but also to impose a *conflicting* penalty. In New York, for example, ordinary burglary – of, say, a convenience store – is punishable by a sentence of imprisonment up to seven years. *See* N.Y. Penal Law §§ 70.00(2)(d), 140.20. A RICO prosecution of several acts of state burglary, however, would result in a sentence of up to 20 years of imprisonment and asset forfeiture for each substantive violation. *See* 18 U.S.C. § 1963(a).[3]

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[3] It is worth noting that a more limited reading of "enterprise" has salutary benefits for the application of RICO in the civil context. *See* 18 U.S.C. § 1964. In that context, the requirement of an ascertainable structure would serve as a "commonsense liability limitation," helping to prevent civil plaintiffs

Requiring that an "enterprise" have ascertainable structure justifies the additional penalty. In that circumstance, a different sovereign has chosen to criminalize a kind of behavior that includes but is distinct from the state offense. But if the federal penalty is imposed for precisely the same behavior that the State chooses to criminalize – because a RICO enterprise does not exist beyond the solely state-law predicate acts in which it engages – then RICO would be a tool to override the local preferences of the State. This would be in contravention of the long history of allowing local mores in the context of criminal sanctions for state offenses to prevail and would fail to give "full effect to the State's choice of [its] legitimate penological goal[s]." *Ewing*, 538 U.S. at 29 (plurality).

Second, democratic accountability requires clarity in the application of the criminal law. Dispensing with a meaningful "enterprise" requirement under the statute would greatly expand concurrent state and federal jurisdiction over certain crimes. When a federal court interprets a federal statute to cover conduct that is characteristically criminalized by state law and prosecuted by state officers, lines of political accountability may be blurred. That would contravene this Court's federalism-based requirement that "citizens . . . have some means of knowing which of the two governments to hold accountable for the failure to perform a given function." *Lopez*, 514 U.S. at 576-77.

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from wielding the threat of treble damages and attorneys' fees in federal court in support of meritless claims. *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000).

Third, an expansive interpretation of "enterprise" could misallocate limited federal resources. *See Rewis v. United States*, 401 U.S. 808, 812 (1971) (noting danger of "overextend[ing] limited federal police resources" when federal criminal statute could be interpreted to reach state crimes); *Bass*, 404 U.S. at 350 (same). Federal resources are best used to investigate and prosecute multi-jurisdictional crimes or crimes in which the federal government has a particular interest. Federal prosecution of state crimes may result in both the unnecessary duplication of law enforcement efforts across jurisdictions and the diversion of federal resources away from the prosecution of crimes for which their specialized expertise is better suited. Those crimes, of course, include the multi-jurisdictional organized crime that RICO was intended to combat, *see supra* Part I.B.4, as well as national security matters, complex financial fraud, and other such activity that implicates distinctly federal interests.

Such prosecutions also put unnecessary strain on the federal courts. Federal judges have been among the most vocal critics of "[t]he trend to federalize crimes that traditionally have been handled in state courts," which "not only . . . tax[es] the Judiciary's resources and affect[s] its budget needs, but . . . also threatens to change entirely the nature of our federal system." Hon. William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* *3 (Jan. 1999), *available at* http://www.uscourts.gov/ttb/jan99ttb/january1999.html. Prosecuting essentially state criminal actions in federal court unnecessarily adds to the already-clogged federal criminal docket with no corresponding justification.

2. Federalism concerns are particularly pronounced in this context because the nature of federal law enforcement effectively gives individual prosecutors the ability to determine whether ordinarily local crimes will be federalized. Expanding the scope of federal criminal jurisdiction necessarily expands the scope of prosecutorial discretion and therefore pushes decision-making about the "sensitive" "federal-state balance" in criminal enforcement farther from politically accountable actors. *Bass*, 404 U.S. at 349.

Individual federal prosecutors have wide, almost unchecked discretion to make RICO charging decisions.[4] The prosecution of federal crimes is the "special province" of the Executive Branch. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). Courts are therefore "hesitant to examine the decision whether to prosecute." *Wayte v. United States*, 470 U.S. 598, 607-08 (1985). Because the many factors that bear upon the exercise of pros-

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[4] The *United States Attorneys' Manual* (1997) acknowledges this concern and imposes some internal limitations on prosecutors' ability to bring RICO charges. All such proposed indictments are subject to review by the Criminal Division of the Department of Justice ("DOJ"). *See* USAM 9-110.101. Of particular relevance here, the *Manual* provides that "RICO should be used to prosecute what are essentially violations of state law only if there is a compelling reason to do so." USAM 9-110.310. DOJ's own decision to channel its discretion in this fashion further suggests that the appropriate interpretation of "enterprise" should keep that element distinct from the underlying predicate crimes. At the very least, DOJ's internal limitations do not detract from the argument that interpreting RICO to allow the prosecution of state crimes vests too much discretion in individual prosecutors. The *Manual* does not create any enforceable substantive or procedural rights. *See United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir. 1993) (citing USAM 1-1.100). And DOJ may easily reverse its position; as described above, such decisions are not reviewable.

ecutors' "broad discretion," *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982), are "not readily susceptible to the kind of analysis the courts are competent to undertake," the decision to prosecute is "particularly ill-suited to judicial review," *Wayte*, 470 U.S. at 607. Courts therefore do not ordinarily review the decision to charge a crime.

The result is that a prosecutor's decision to charge two loosely related individuals under RICO based solely on predicate acts criminalized by state law is judicially unreviewable. The decision to alter the lines between federal and state criminal enforcement should not be made by federal prosecutors on a case-by-case basis.

C. The Court Should Preserve A Meaningful "Enterprise" Requirement To Avoid Expanding The Scope Of Federal Criminal Jurisdiction Without Express Congressional Sanction

1. As described above, this Court has expressed a particular sensitivity to the balance of power between the States and the federal government in the criminal arena. The Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. The Court has repeatedly "resist[ed] the Government's reading of" a criminal statute when it "invites [the Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *see also Jones v. United States*, 529 U.S. 848, 858 (2000) (rejecting an interpretation that would "render the 'traditionally local criminal conduct' in which petitioner . . . engaged

'a matter for federal enforcement'") (quoting *Bass*, 404 U.S. at 350).

In similar cases, where the government sought an expansive construction of a criminal statute that would affect the federal-state balance, this Court has opted for the narrower construction when Congress's intent was not made explicit. For example, in *Rewis*, the Court refused to adopt an "expansive" interpretation of the Travel Act, because, in part, it "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." 401 U.S. at 812. And, in *Bass*, the Court rejected an aggressive reading of a federal firearm law, stating that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." 404 U.S. at 349.

For similar reasons, the Court should reject a construction of "enterprise" that does not require an ascertainable structure; otherwise, the element of "enterprise" would collapse into predicate acts themselves, rendering purely state criminal conduct a matter of federal enforcement. "[I]t would require statutory language much more explicit than that . . . here" to reach the conclusion "that Congress intended to put the Federal Government in the business of policing" wholly state crimes through the application of a broad concept of "enterprise." *United States v. Enmons*, 410 U.S. 396, 411 (1973). Nothing in the definition of "enterprise" or the substantive offense suggests that is so. Given the potential mischief from a definition of "enterprise" that encompasses a series of activities criminalized by state law – in the absence of some ascertainable structure – it is appropriate to require a "clear statement" from Congress of its intent to bring about that result. *Bass*,

404 U.S. at 349. Because such a clear statement is lacking here, the Court should construe the meaning of "enterprise" narrowly. *See id.* at 349-50.

2. Nothing in the Court's prior cases addressing the federalism concerns that arise out of RICO requires a different outcome.

In *Turkette*, for example, the Court declined to use concerns over federalism as a basis for limiting the meaning of "enterprise" to legitimate organizations. *See* 452 U.S. at 586-87. The Court reasoned that, "even assuming" that a definition of "enterprise" that included legitimate *and* illegitimate organizations would "substantially alter the balance between federal and state enforcement of criminal law," "the language of the statute and its legislative history indicate[d] that Congress was well aware . . . that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law." *Id.*

Turkette is distinguishable on two grounds. *First*, there is a significant difference between interpreting RICO to cover several types of enterprises, as the Court did in *Turkette*, and interpreting it to eliminate – for all practical purposes – the requirement of an independently ascertainable enterprise, as the court of appeals did in this case. The former interpretation brought within the statute's ambit a larger number of potential state prosecutions – namely, those that might be associated with wholly illegitimate enterprises. But that interpretation nevertheless retained the federal interest in prosecuting those crimes *when they involved discrete organizations*. That interpretation depended on the existence of a uniquely federal element of the crime – the "enterprise" – that had to be proven in federal court.

Congress could have reasonably chosen to supplement state criminal enforcement in the service of achieving that federal goal. *See Turkette*, 452 U.S. at 586-87.

In this case, by contrast, the court of appeals' interpretation of "enterprise" renders it synonymous with the underlying state offenses in which the enterprise engages. As described above, that effectively removes the federal interest in prosecuting discrete organizations and instead allows prosecutions of two or more individuals whose association is defined solely by the state crimes they commit. That is a far more significant change than the issue addressed in *Turkette*.

Second, the *Turkette* Court concluded that the plain language of the statute could not be read to draw a distinction between legitimate and illegitimate organizations. *See id.* at 580-81. In the absence of any ambiguity, this Court concluded that "Congress was well aware of the fear that RICO would move large substantive areas formerly totally within the police power of the State into the Federal realm." *Id.* at 586-87 (alteration and internal quotation marks omitted). For the reasons described in Part I, the language of the statute and the concerns that animated its enactment make clear that Congress intended *not* to federalize the prosecution of state offenses in the absence of a structured organization, which is the linchpin of the federal interest.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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