

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EDMUND BOYLE, :

4 Petitioner :

5 v. : No. 07-1309

6 UNITED STATES. :

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8 Washington, D.C.

9 Wednesday, January 14, 2009

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11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:16 a.m.

14 APPEARANCES:

15 MARC FERNICH, ESQ., New York, N.Y.; on behalf of  
16 the Petitioner.

17 ANTHONY YANG, ESQ., Assistant to the Solicitor  
18 General, Department of Justice, Washington, D.C.; on  
19 behalf of the Respondent.

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P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument in Case 07-1309, Boyle v. United States. Mr. Fernich.

ORAL ARGUMENT OF MARC FERNICH  
ON BEHALF OF THE PETITIONER

MR. FERNICH: Thank you, Mr. Chief Justice, and may it please the Court:

This is a case about a defendant's right to an independent jury determination of each essential element of a RICO offense, specifically a pattern of racketeering and a separate enterprise that is more than just a duplication of the pattern.

To keep the elements apart, ensure their distinct consideration, and give the enterprise independent meaning, juries must be instructed, as in the Seventh Circuit and elsewhere, that an "enterprise" requires a structure separate from the commission of the predicate acts forming the pattern.

JUSTICE GINSBURG: Mr. Fernich --

MR. FERNICH: Yes, Your Honor.

JUSTICE GINSBURG: -- are we talking just about the instruction to the jury? I know you think that the instruction given here was incorrect. But is

1 it just a question of charge error or are you saying  
2 that there was insufficient evidence of enterprise for  
3 this case to go to the jury?

4 MR. FERNICH: I am not suggesting, Your  
5 Honor, that there was insufficient evidence of -- of  
6 enterprise to go to the jury. My primary point is with  
7 respect to the charge. We do contend --

8 JUSTICE GINSBURG: You're saying if a proper  
9 charge had been given, this jury on this evidence still  
10 could have convicted the defendant?

11 MR. FERNICH: We contend, to be sure, that  
12 the evidence was legally insufficient under Rule 29.  
13 But we are pressing principally the first -- the jury-  
14 argument claim here in this Court. We do contend that  
15 the evidence was legally insufficient.

16 JUSTICE GINSBURG: Did you make that -- did  
17 you make that objection in the trial court?

18 MR. FERNICH: Yes, we did, and we preserved  
19 it in the court of appeals as well. And there was, as  
20 Your Honor knows, no published opinion with respect to  
21 either issue, so both issues are preserved.

22 Now, Your Honor, under the Second Circuit  
23 rule that functionally conflates the two elements, that  
24 is enterprise and pattern, the jury in this case was not  
25 so instructed as to the need for an enterprise with an

1 existence separate and apart from the racketeering acts  
2 forming the pattern. For that reason we contend that  
3 the judgment below must be vacated.

4 JUSTICE ALITO: The -- the error was the  
5 failure to give the instruction that appears on page 95  
6 of the joint appendix? Is that the error that you are  
7 complaining about?

8 MR. FERNICH: Not merely so, Justice Alito.  
9 That is why the entire relevant excerpts from the jury  
10 charge are included in the joint appendix. We objected  
11 to the entirety of the charge, in addition to requesting  
12 specific language of our own. To be sure, the principal  
13 error of which we complain in this Court is the failure  
14 of that instruction anywhere to require, as this Court  
15 required in the United States v Turkette, and as 18  
16 U.S.C. 1962(c) itself requires, an entity with a  
17 structure separate and apart from the pattern of  
18 racketeering.

19 JUSTICE SCALIA: What -- what do you mean by  
20 that precisely? Suppose you have a group of people, the  
21 ringleader goes and gets a safecracker, he gets a  
22 wheelman, and so forth, all the people he needs for the  
23 crime; and he says we are going to call this the -- the  
24 Brinks Job Group, okay? We are the Brinks Job Group.  
25 But that's the only thing that he has put the group

1 together in order to do. But it's still a group. He  
2 calls it a group and he gets all these guys together and  
3 they -- they meet and have lunch together, and do a lot  
4 of stuff together.

5           Would that meet your -- your condition of a  
6 separate association from the predicate acts?

7           MR. FERNICH: To be sure, we would contend  
8 that it would be a question in the first instance for a  
9 properly instructed jury, but without more on the  
10 hypothetical that Your Honor has posited, the answer to  
11 that question is no. There is no ongoing decisional  
12 apparatus, no continuing directional mechanism.

13           JUSTICE SCALIA: Except insofar as it is  
14 directed to the Brinks job.

15           MR. FERNICH: Except the degree of  
16 organization, I should say, inherent in each individual  
17 predicate act.

18           JUSTICE KENNEDY: But you -- you imported --  
19 I'm looking at your quotation from Turkette, at page 5  
20 of your brief. It doesn't seem to me conclusive of your  
21 point. In order to answer Justice Scalia, you had to  
22 interpolate, to add various words. You had to say --  
23 you said an ongoing organization with directions or  
24 something to that effect. That is not what Turkette  
25 says. Turkette says "as proven by evidence of an

1 ongoing organization, formal or informal, that is  
2 continuing." That's all it says.

3 MR. FERNICH: To be sure, Your Honor, we  
4 don't contend that Turkette is directly controlling of  
5 the issue and we go through a lengthy textual exegesis  
6 in our brief of why we think that implicit in the  
7 factors of ongoing organization and continuing unit is a  
8 structure requirement. But what Turkette did  
9 unequivocally say is that there must be an entity  
10 existing separate and apart from the pattern of  
11 racketeering activity. There was no such instruction  
12 given in this case -- and the word "entity," which  
13 appears in section 1961(4) itself and appears twice in  
14 the Turkette decision, surely connotes an ascertainable  
15 structure with an existence separate and apart from the  
16 pattern of racketeering.

17 JUSTICE GINSBURG: What does "structure"  
18 mean? I think you said it doesn't mean that this has to  
19 be an organization with a president, a treasurer; it  
20 doesn't mean that.

21 MR. FERNICH: It could mean that in an  
22 appropriate case, Your Honor. It surely would be  
23 probative --

24 JUSTICE GINSBURG: What is -- what is the  
25 minimum to qualify as having a structure?

1           MR. FERNICH: The minimum is a separate,  
2 ongoing, continuing existence apart from the commission  
3 of the predicate acts themselves, and the members  
4 necessary to commit those predicate acts, because that  
5 by definition, I should say, is the pattern of  
6 racketeering activity; and moreover, it is also inherent  
7 in any criminal conspiracy that extends over time.

8           To be more specific, the bare minimum  
9 requisites for a structure would be: an ongoing  
10 directional mechanism; a continuing decisional-making  
11 unit -- decisionmaking unit, I should say -- and some  
12 sort of coherent existence between the commission of the  
13 racketeering acts themselves. Those are the main  
14 ingredients.

15           CHIEF JUSTICE ROBERTS: So all you have to  
16 do, to pick up on Justice Scalia's hypothetical, is just  
17 not the Brinks job, but you have to have one more crime,  
18 and that's it; then everything you've talked about is  
19 satisfied?

20           MR. FERNICH: No, that is, respectfully, not  
21 what we contend, although in an appropriate case it is  
22 conceivable that a properly instructed jury may find  
23 structure on those facts. The point that we are  
24 conveying here is that this is principally a jury  
25 question, and a jury that is properly instructed will



1 make findings, presumably, as to what the -- whether the  
2 structure was extant, and those findings would command  
3 substantial deference on appeal, as they do in the  
4 circuits that have applied a structure requirement; and  
5 it would be a relatively easy task for an appellate  
6 court to defer to the jury's findings in such a case.  
7 There is a --

8 JUSTICE GINSBURG: The jury -- the words  
9 that you asked for, what was it? "Ascertainable  
10 structural hierarchy." And suppose the judge gets  
11 questions from the jury: "Your Honor, what do you mean  
12 by ascertainable structural hierarchy?"

13 MR. FERNICH: I'm -- I'm sorry,  
14 Justice Ginsburg.

15 JUSTICE GINSBURG: Those are the words that  
16 you wanted the judge to include in the charge --

17 MR. FERNICH: To be sure.

18 JUSTICE GINSBURG: -- and it's your  
19 requested charge, as to say to have an enterprise you  
20 need to have -- the group has to have an ascertainable  
21 structural hierarchy. Those are the three words in your  
22 requested charge.

23 MR. FERNICH: Well, respectfully, Your  
24 Honor, it goes beyond that, because the end of --

25 JUSTICE GINSBURG: But those -- but you did

1 ask for those.

2 MR. FERNICH: I did, and --

3 JUSTICE GINSBURG: And now I'm asking you,  
4 what does that mean? The judge gives your charge, the  
5 jury is puzzled: Your Honor, we don't understand what  
6 you mean by "ascertainable structural hierarchy"; would  
7 you please tell us specifically?

8 MR. FERNICH: Yes, Your Honor. First of  
9 all, the charge that we are asking for specifically is a  
10 charge that is given in the Seventh and Eighth Circuits  
11 which says a structure separate from the commission of  
12 the predicate acts themselves. If a jury were puzzled,  
13 in that instance the judge could, as spelled out in  
14 pages 31 through 35 of our reply brief, give examples,  
15 any number of examples that have been spelled out by the  
16 lower courts in -- that have adopted a structure  
17 requirement.

18 JUSTICE GINSBURG: And some of those  
19 examples it seems are present here. One you gave was  
20 longevity, well, this has been going on for 10 years;  
21 another was a unique way of operating, and they are  
22 specialists in deposit boxes and they have look-out  
23 people and they have people who actually break into the  
24 bank, and they have a certain amount of skill.

25 So we have longevity, modus operandi, and a

1 division of labor. They have some people being their  
2 lookouts and other people doing other things. So I was  
3 looking at your list in the reply brief, and it seems to  
4 me that this organization, this association of  
5 individuals, has some of those characteristics.

6 MR. FERNICH: Your Honor, first of all, to  
7 get right down to the nitty-gritty of the verdict in the  
8 case, it's important to focus on what the jury actually  
9 found. The enterprise as charged was a 10-year  
10 enterprise. There were three predicate acts found by  
11 the jury ranging in date from late December of 1998  
12 through early January of 1999. So the longevity aspect  
13 is certainly something that we dispute here.

14 Again, to answer Your Honor, to go back to  
15 the beginning of our argument, to be sure the thrust of  
16 our argument in this Court is directed to the jury  
17 instruction in this case. It may be conceivable, we  
18 don't for a minute concede that the evidence was legally  
19 sufficient under rule 29. That said, had a jury been  
20 properly instructed and made such a finding, i.e., to  
21 find a separately structured enterprise, that would be a  
22 finding that would command significant deference, and  
23 I'd be hard-pressed --

24 JUSTICE SCALIA: Why -- why do you need a  
25 hierarchy? Why do you need a boss? Why can't it be a

1 democratic mob? I mean, there is no boss and they agree  
2 that all of their decisions will be taken unanimously?

3 MR. FERNICH: We don't contend before this  
4 Court that it must be hierarchical per se. Certainly --

5 JUSTICE SCALIA: Well, that's what you  
6 requested. Isn't -- isn't that the instruction you  
7 requested?

8 MR. FERNICH: On the facts of this case,  
9 consistent with the examples that are spelled out  
10 comprehensively in both the opening brief and the reply  
11 brief, that is the one that we focused on. But to be  
12 sure -- to be sure, I also objected to the charge as  
13 given in its entirety. In this Court we don't press the  
14 contention that a hierarchical structure -- hierarchical  
15 structure is an irreducible minimum. We do --

16 JUSTICE SOUTER: Well, you couldn't, could  
17 you, because the -- an organization can consist of an  
18 individual. And it seems to me that all of the  
19 requirements that you have been specifying would in an  
20 individual case be met simply by showing that there was  
21 -- there was an individual in business who had a brain.

22 MR. FERNICH: An individual, Your Honor, is  
23 -- is a legal entity under the first clause of 1961(4).  
24 It means a sole proprietorship in this context. And an  
25 individual, a legal entity, as set forth in the first

1 clause of 1961(4), by definition --

2 JUSTICE SOUTER: Well, but, if I set up a  
3 newsstand, it's a sole proprietorship and that's all I  
4 have to do. And if I have a functioning brain, I have a  
5 decisionmaking mechanism. I remember from day-to-day  
6 what I did, so I have continuity. And -- and it seems  
7 to me that all of these requirements are -- are  
8 virtually satisfied as a matter of course by an  
9 individual who engages in any kind of business that  
10 might have interstate-commerce implications.

11 MR. FERNICH: And that is not an absurd  
12 result. It is a -- and it is a result that squares with  
13 the primary purpose of the statute as enacted, which was  
14 to prevent the subversion and infiltration of legitimate  
15 business by criminal elements.

16 JUSTICE SOUTER: Oh, absolutely. But it  
17 seems to me that it -- it puts you in sort of a -- a  
18 difficult position to -- to be calling for or -- or  
19 requiring jury instructions that call for, as necessary  
20 conditions, findings of structure, continuity, decision-  
21 making, capacity and so on, when in fact on -- on at  
22 least one variety of enterprise, these conditions are --  
23 are met virtually automatically simply by having  
24 somebody doing business in any way.

25 MR. FERNICH: To be sure, Your Honor, we are

1 only calling -- and the problem only arises in the  
2 context of an association-in-fact enterprise. The great  
3 weight of authority and the plain language of 1961(4)  
4 does not define an individual as an association-in-fact  
5 enterprise. And it does not square with the plain  
6 language of the statute to call an individual an  
7 association-in-fact enterprise. And, moreover, doing so  
8 would create a whole set of other problems,  
9 distinctly --

10 JUSTICE SOUTER: Oh, I agree, but an  
11 individual can be an -- an enterprise.

12 MR. FERNICH: A legal enterprise.

13 JUSTICE SOUTER: And -- and an association,  
14 in fact, can be an enterprise. And if we accept those  
15 two propositions, then I think you've got a tough row to  
16 hoe in saying that any enterprise which is not an  
17 individual has got to have all the formal  
18 characteristics that you talk about, given the fact that  
19 those characteristics are automatically satisfied by an  
20 individual.

21 MR. FERNICH: We don't -- we don't press  
22 that contention, Your Honor. We specifically press it  
23 for the phrase "any union or group of individuals  
24 associated in fact, although not a legal entity." The  
25 "individual" portion appears in the first clause of the

1 statute. The distinctness problem simply does not arise  
2 in the context of a legal-entity enterprise.

3           And it's important to note, as this Court  
4 said in *Salinas* -- recognized in *Salinas* ---virtually  
5 every criminal prosecution that is brought under 1962(c)  
6 is brought against an illicit association-in-fact  
7 enterprise. The -- the scenario of an individual being  
8 an association-in-fact enterprise, I don't think it's a  
9 valid association-in-fact enterprise as a matter of law.  
10 There is a line of cases from the Seventh Circuit that  
11 says it's not.

12           And this structural problem, having a  
13 structure that is distinct from the pattern of  
14 racketeering activities so that the two elements, I  
15 should say, are kept separate and apart, only arises in  
16 the context of an association-in-fact enterprise, which  
17 is, of course, a very, very wide swath.

18           JUSTICE GINSBURG: Would it include, let's  
19 say, a street gang? How about -- this may be before  
20 your time, but "*The Lavender Hill Mob*"?

21           MR. FERNICH: I'm sorry, Your Honor?

22           JUSTICE GINSBURG: The Alec Guinness movie,  
23 "*The Lavender Hill Mob*."

24           MR. FERNICH: Oh, well, certainly we don't  
25 have any quarrel with the proposition of street gangs,

1 and many of them are cited in our briefs. The great  
2 preponderance of typical RICO prosecutions are  
3 hierarchical, drug-type street gangs which have  
4 regimented structures. And again, to answer  
5 Justice Scalia's question, we don't contend that that is  
6 a strict necessity, but certainly they are not going to  
7 have a problem establishing a structured enterprise with  
8 a regimented drug gang.

9 JUSTICE ALITO: If hierarchy is not  
10 required, then I'm not clear what more -- what you think  
11 needs to be shown beyond the fact that there was an  
12 association in fact and whatever continuity needs to be  
13 shown in order to establish the pattern. What -- what  
14 needs to be shown beyond that?

15 MR. FERNICH: Well, Your Honor --

16 JUSTICE ALITO: What needs to be charged to  
17 the jury that they must find beyond that?

18 MR. FERNICH: We contend that they must be  
19 charged that there has to be a structure separate from  
20 the commission of the predicate acts themselves. The  
21 Seventh and Eighth Circuits use pattern jury  
22 instructions that give that precise charge. And there  
23 has been, to my knowledge, no reported difficulties --

24 JUSTICE ALITO: But What does that mean?

25 MR. FERNICH: It means -- and -- and I would



1 take the test most prominently from Your Honor's own  
2 home circuit as spelled out in the Riccobene case: A --  
3 an ongoing decisional-making apparatus to guide the  
4 affairs of the enterprise, a directional mechanism.

5 The Third Circuit in Riccobene said an  
6 overseeing, clearinghouse and coordination function, and  
7 -- and a cohesive existence between predicate acts.

8 JUSTICE ALITO: I -- I just --

9 JUSTICE KENNEDY: Basically, you described  
10 this -- this gang. One -- one person is a guard. The  
11 other person brings the hook to pull the -- the box off.  
12 Another person scouts it out. Another person's got the  
13 scanner. It seems to me to fit precisely what you have  
14 just described.

15 MR. FERNICH: The gang has no structure  
16 aside from that which is a necessary incident to the  
17 commission of each racketeering act. We don't contend  
18 there has to be a formal organization, but there is no  
19 evidence of any continuing, ongoing organization other  
20 than that when they get together to commit the predicate  
21 crimes.

22 JUSTICE KENNEDY: Isn't it pretty clear that  
23 if the -- the person who is supposed to be the lookout  
24 doesn't perform his job, he is not going to be included  
25 in that next heist?

1 MR. FERNICH: There is no evidence of that  
2 in the record to my knowledge, Your Honor.

3 JUSTICE GINSBURG: Isn't there a record that  
4 this is a more or less steady group that hangs out  
5 together, except when one of them gets caught and put in  
6 jail, and then they replace him with someone? But this  
7 is -- this was explained as a group that meets regularly  
8 in the Brooklyn Social Club?

9 MR. FERNICH: Your Honor, the testimony  
10 about the Brooklyn Social Club is -- is a little bit  
11 overdrawn, I would say. And I would direct the Court to  
12 pages 58 and 74 through 75 of the joint appendix, and  
13 this is the testimony of the witness Gerard Bellafiore,  
14 whose testimony, by the way, is the only testimony we  
15 know for a fact that the jury credited. Quote: "Just a  
16 club to hang out in, not for any type of anything."

17 JUSTICE GINSBURG: But one of the members  
18 owned the club, right?

19 MR. FERNICH: Yes. That -- that's true.  
20 But that -- there is no evidence in the record that they  
21 would do anything other than, for example -- and this is  
22 not in the record -- for example, shoot pool at the  
23 club. And -- and Bellafiore himself was careful to  
24 qualify it in that way so that he wasn't gilding the  
25 lily.

1 JUSTICE ALITO: Suppose you have a gang that  
2 gets together every Friday afternoon and by democratic  
3 means they decide what crime they are going to commit  
4 that weekend. And they are multi-talented so they --  
5 they look at the whole list of RICO predicates, and they  
6 choose a different one each -- you know, each weekend to  
7 commit. And they do that over some period of time, and  
8 in doing that they perform different roles at different  
9 times. Is -- is that an enterprise?

10 MR. FERNICH: It sounds to me like a jury  
11 could -- if they are having regular Friday meetings and  
12 they are using sophisticated means to canvas the RICO  
13 statute with a degree of complexity and sophistication  
14 to figure out what they are going to do or maybe even  
15 try to evade the statute, it probably --

16 JUSTICE ALITO: We will take that part out  
17 of it. They don't look at the statute. They just --  
18 whatever crime comes to somebody's mind. They -- they  
19 want to commit a crime every weekend to -- to make some  
20 money. But it is a different thing, done by different  
21 means, different roles.

22 MR. FERNICH: If the jury --

23 JUSTICE ALITO: Does that have an  
24 ascertainable structure?

25 MR. FERNICH: If the jury were properly

1 instructed that there had to be a structure separate and  
2 apart from just that which is inherent in the commission  
3 of each act, a properly instructed jury probably could  
4 well find the requirements satisfied on -- on the  
5 hypothetical that Your Honor has posited.

6           The cases say -- the cases out of the  
7 Seventh Circuit say it is not a high hurdle. They say  
8 it's a low hurdle, and there has to be some structure,  
9 but not much -- not much to distinguish between --

10           JUSTICE ALITO: Well, what structure would  
11 there be there? What characteristics of that group  
12 would satisfy the structural requirement?

13           MR. FERNICH: The ongoing existence, the  
14 regular meetings, and the degree of sophistication  
15 employed. And it implies that they are not just sort of  
16 getting together on an impromptu basis as opportunities  
17 arise, but they are sitting around on a regular basis  
18 for a -- a continuing period of time and planning things  
19 out. What are we going to do this weekend? What are we  
20 going to do next weekend?

21           Let's twist the hypothetical a little bit.  
22 Maybe they project our three or four weeks ahead of  
23 time. That's what RICO is -- is getting after, some  
24 kind of sophistication, some kind of coordination. This  
25 is the crux of the statute.

1 JUSTICE GINSBURG: How about during the  
2 period that this man -- what was his name, Mangia --

3 MR. FERNICH: Mangiavillano, Your Honor.

4 JUSTICE GINSBURG: Yes. When he was running  
5 the show, it seems that he was a leader, and that the --  
6 and that the group wasn't quite as democratic before he  
7 got sent to prison.

8 MR. FERNICH: Your Honor, the testimony in  
9 the record is that -- again, what was found by the jury  
10 here. The testimony is that Mangiavillano and Boyle and  
11 Bellafiore never committed any crimes together. It is  
12 -- it is very extensively briefed in -- in the lower  
13 court. The Second Circuit never addressed it. There is  
14 a long multiple-conspiracies argument. We are not going  
15 to get into that in this Court.

16 The fact is that Mangiavillano had nothing  
17 to do, nothing to do with the bank burglaries found in  
18 this case. There were three burglaries found as RICO --  
19 I shouldn't say "burglaries" --

20 JUSTICE GINSBURG: That wasn't what I meant.

21 MR. FERNICH: Okay.

22 JUSTICE GINSBURG: I meant, would the  
23 organization, as it was described to exist at the time  
24 Mangiavillano was there, would that have satisfied the  
25 definition of "structure" because it had a leader?

1 MR. FERNICH: It may have at that point, but  
2 there was no evidence -- and -- and because it's outside  
3 of the time frame of what the jury has found, there is a  
4 lot more diversity in the criminality that was alleged  
5 during that period.

6 A properly instructed jury may have found  
7 that there was an enterprise existing at that time,  
8 Although I'm not even sure a jury could so find under  
9 Turkette because the core of the membership changed very  
10 dramatically over a period of time. But the leadership  
11 would be one -- to be sure, leadership is something that  
12 a jury could take into account and could permissibly  
13 find if they were properly instructed. On the facts of  
14 this case, I cannot answer that question definitively.

15 JUSTICE BREYER: Could you try something out  
16 in your mind, and maybe you can't react to it. I'm  
17 trying to figure out how the structure requirement, what  
18 to say, and a thought was occurring to me which I am not  
19 wedded to, I would like some reactions to it: Is to say  
20 that there is a structure means that among this  
21 association of people there must be rules,  
22 understandings, or behavior that tend to keep the  
23 association together over time, other than those which  
24 would be essential to allow them to commit the  
25 particular crimes at issue.

1 MR. FERNICH: Certainly the defense would  
2 take a ruling like that, but what --

3 JUSTICE BREYER: Well, I know, but I'm  
4 trying to work out in my mind, is that a sensible thing  
5 to say? The trouble with the word "structure" is  
6 everything in the universe has a structure, and so it's  
7 awfully vague? I'm trying to make it a little bit more  
8 specific.

9 MR. FERNICH: A structure -- the structure I  
10 don't think entails necessarily rules, regulations, et  
11 cetera. I don't think the word "structure" --

12 JUSTICE BREYER: That isn't what I said. I  
13 said: Rules, understandings, forms of behavior that  
14 tend to keep the association together over time, other  
15 than those rules, understandings and associations and  
16 behaviors that would be necessary -- "necessary" meant  
17 strongly -- to commit the particular crimes at issue.

18 MR. FERNICH: Is Your Honor's question is  
19 that a sensible definition of "structure"?

20 JUSTICE BREYER: Yes.

21 MR. FERNICH: Yes, it is a sensible  
22 definition of "structure."

23 And if there are no further questions, I  
24 would like to reserve the rest of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Fernich.

2 Mr. Yang.

3 ORAL ARGUMENT OF ANTHONY YANG

4 ON BEHALF OF THE RESPONDENT

5 MR. YANG: Mr. Chief Justice, and may it  
6 please the Court:

7 An association-in-fact enterprise need not  
8 have an ascertainable structure distinct from the  
9 predicate act of racketeering committed by one of its  
10 associates, whatever that means. RICO's statutory text,  
11 its surrounding context, and this Court's construction  
12 of the statute show that RICO's definition of  
13 "enterprise" is broad and contains no such limitation.

14 Petitioner's primary argument, that the term  
15 "enterprise" is rendered superfluous and merges with the  
16 charged pattern of racketeering acts, is wrong for at  
17 least three reasons: First, it's wrong as a formal  
18 matter. The enterprise is a group of individuals. The  
19 pattern is a series of acts. Second, it fails to  
20 account for the fact that the relevant pattern of --

21 JUSTICE SCALIA: Wait, wait, wait, wait,  
22 wait. I assume that he was responding to the argument  
23 that you can establish the enterprise from the mere  
24 existence of the pattern of the acts, from the separate  
25 acts. And if indeed it takes nothing more than the acts



1 to constitute the enterprise, it seems to me he has a  
2 point.

3 MR. YANG: That goes to my second reason.

4 JUSTICE SCALIA: Oh, so we'll forget about  
5 your first one.

6 MR. YANG: Well, let me go to -- which I  
7 think it addresses the second reason. It's distinct as  
8 a formal matter, which is that have you to have find a  
9 group of individuals versus a series of facts. You can  
10 infer the group from their actions, just as can you  
11 infer, you know, a relationship between individuals by  
12 the way they act together. But --

13 JUSTICE SCALIA: So --

14 MR. YANG: My first point is a formal one.  
15 The second point goes straight to the statute: That the  
16 relevant pattern of racketeering acts that is at issue  
17 in RICO -- this is 1962(c) -- is a pattern of acts  
18 committed by an individual defendant, not a group. In  
19 fact, in H.J. this Court explained that the premise that  
20 the pattern has to be performed by a group or an  
21 association -- this is at page 244 of the Court's  
22 opinion there -- was wrong and that the pattern can be  
23 fully the work of an individual acting alone.

24 It's also wrong because an enterprise  
25 remains wholly distinct and pertinent in numerous RICO

1 contexts under the government's interpretation.

2 JUSTICE BREYER: When you say "individual,"  
3 the first part of the definition of "enterprise" speaks  
4 about any individual partnership, corporation,  
5 association, or other legal entity.

6 MR. YANG: That's correct.

7 JUSTICE BREYER: So then, I've read  
8 somewhere that people feel that where that individual is  
9 involved, the individual is acting as an -- a legal  
10 entity such as a sole proprietorship. Is that right?

11 MR. YANG: An individual can be an  
12 enterprise as a sole proprietorship, if that's the  
13 question.

14 JUSTICE BREYER: I'm talking about a legal  
15 entity. And in the second clause, what we are talking  
16 about here, specifically, it is "a corporation, a union,  
17 or a group of individuals associated in fact although  
18 not a legal entity."

19 MR. YANG: That's correct. I think there  
20 may be some miscommunication on my part. I would direct  
21 the Court to page 5a of the appendix which reproduces  
22 section 1962(c). It states: "It shall be unlawful for  
23 any person" -- it doesn't say "group," "enterprise" or  
24 an "association" -- "that is employed or associated with  
25 an enterprise" --

1 JUSTICE SCALIA: What appendix? Not the  
2 joint appendix?

3 MR. YANG: Excuse me. The appendix to our  
4 brief. I'm sorry.

5 JUSTICE SCALIA: All right.

6 MR. YANG: The gray brief. So what's  
7 relevant for purposes of showing an element of a 1962(c)  
8 violation is that the defendant alone, perhaps with  
9 others, but the element is the defendant has to commit a  
10 pattern of racketeering. There are other elements. For  
11 instance, the defendant has to do so in a manner that  
12 participates in the conduct of the affairs of the  
13 enterprise. But, of course, that embraces a wholly  
14 distinct concept, that is the enterprise.

15 Now, in many cases, as you have here, the  
16 pattern of racketeering activity of this defendant is  
17 proved by evidence that that defendant was also working  
18 in concert with others. And so in that case, the  
19 pattern element, which, again, is the individual's  
20 pattern of acts, is proved by the same type of evidence  
21 that would prove the --

22 CHIEF JUSTICE ROBERTS: So then you'd have  
23 an easy time before the jury. And same thing with  
24 respect to the individual. All that's saying is that  
25 when you are dealing with one person, it's pretty easy

1 to prove that he, you know, directs himself or, you  
2 know, has an ongoing plan, but that doesn't mean that  
3 it's not a separate element that the jury should have to  
4 find.

5 MR. YANG: We don't say that it's not a  
6 separate element, and we also don't say that a pattern  
7 necessarily would --

8 CHIEF JUSTICE ROBERTS: Well, you say that  
9 it's not distinct from the underlying offenses.

10 MR. YANG: No, I don't believe so. I think  
11 what we have said is that the evidence regarding the  
12 pattern of activity allows the jury to infer the  
13 existence of an enterprise because an enterprise --

14 CHIEF JUSTICE ROBERTS: But they don't have  
15 to be separately instructed that they have to find that,  
16 do they?

17 MR. YANG: No, they do. And in fact the  
18 jury can --

19 CHIEF JUSTICE ROBERTS: What is the  
20 instruction that the Seventh Circuit and the Eighth  
21 Circuit give that you don't think is necessary?

22 MR. YANG: The instruction is pertaining to  
23 an ascertainable structure distinct from the pattern of  
24 racketeering. Here you still have to show an  
25 enterprise, and the jury may not infer an enterprise

1 from the pattern, but certainly it's open to the jury.  
2 When that pattern -- again, a pattern is an individual's  
3 conduct -- but when that pattern is shown through  
4 evidence that the individual is acting with others over  
5 a long period of time -- to either establish that it's a  
6 pattern of racketeering activity, if that same evidence  
7 not only shows that the individual committed a pattern  
8 of racketeering activity, but it was done in concert  
9 with others and that the -- that evidence shows that a  
10 group of individuals had associated in fact for the  
11 common purpose of engaging in criminal conduct.

12 JUSTICE ALITO: Would you agree there could  
13 be a situation in which an individual engages in a  
14 pattern of racketeering activity together with other  
15 people and yet is not participating in the affairs of an  
16 enterprise through the pattern of racketeering activity?

17 MR. YANG: Well, I think that's the case  
18 that we gave -- an example that we gave in our brief,  
19 which is saying an individual commits a very long string  
20 of bank burglaries and -- actually, make it robberies.  
21 Robbery is a predicate act; burglary is not. Bank  
22 burglaries with individuals, but each time he does it,  
23 it's with a different group of individuals. There you  
24 -- the individual would be established -- you could  
25 establish a pattern from, say, the relatedness of the

1 crimes to an M.O. or a -- and in the long continuous  
2 string of crimes, more than a few months, perhaps years.  
3 But it would not establish an enterprise.

4 JUSTICE ALITO: And what is -- why would it  
5 not? What --

6 MR. YANG: Because there would be -- you  
7 would --

8 JUSTICE ALITO: What's lacking there?

9 MR. YANG: What would show is that the  
10 individual is not working in concert with others to  
11 achieve an end. There's no parallel identity between  
12 any two of the crimes except for the individual acting  
13 alone.

14 CHIEF JUSTICE ROBERTS: I thought an  
15 individual -- I thought an individual could be the  
16 enterprise?

17 MR. YANG: One -- he could be --

18 CHIEF JUSTICE ROBERTS: An independent  
19 contractor rather than an employee.

20 MR. YANG: He could be an enterprise but not  
21 one -- when an individual acts an alone as an  
22 enterprise, the individual is not liability for  
23 racketeering acts under 1962(c) under this Court's  
24 decision in Cedric Kushner, because there's a  
25 requirement in 1962(c) that the individual has to be

1 employed by or associated with the enterprise. And this  
2 Court has explained that you have to have some  
3 distinctiveness between the enterprise itself and the  
4 individual.

5 So with respect to the individual, there  
6 would be no -- there might be an enterprise. It is  
7 conceivable that he could be deemed an enterprise, but  
8 not one that has any relevance for RICO purposes under  
9 1962(c).

10 JUSTICE ALITO: What if he has a list of 25  
11 people who may, on various occasions, want to  
12 participate with him in bank robberies? So whenever he  
13 gets the urge to commit a bank robbery, he gets out his  
14 rolodex and he picks one or more of them and calls them  
15 up and they commit the bank robbery?

16 MR. YANG: I guess it's unlikely that the  
17 government, if that were the only fact, could show an  
18 enterprise. If there was some additional evidence that  
19 the individuals had gotten together and said, yeah, you  
20 know what, call me, let's work together, when I'm  
21 available call me, but it just happens he never called  
22 me twice.

23 JUSTICE ALITO: What is the element, then,  
24 that is missing?

25 MR. YANG: Well, what's required under this

1 Court's decision in *Turkette*, which we think flows  
2 directly from the language, any group of individuals  
3 associated in fact, is that the group of persons must be  
4 associated together for a common purpose of engaging in  
5 a course of conduct. And that could be shown, as  
6 *Turkette* explained, by evidence of some kind of ongoing  
7 organization, formal or informal, that -- whose  
8 associates function as an ongoing unit.

9           And in order to prove through one's actions  
10 with others that there is an entity -- some agreement  
11 and continuing unit behind it, you are going to have to  
12 show some identity in the group. If there is no  
13 identity except for one person, it would be very  
14 difficult to show an enterprise.

15           JUSTICE SOUTER: Why -- I guess that's where  
16 I'm losing the argument. Why is it difficult?

17           MR. YANG: It would be difficult to prove an  
18 association in fact. I'm sorry. It would be difficult  
19 to prove an association in fact of more than one person  
20 as the enterprise in that context, because it would be  
21 difficult to show that that person had joined with  
22 others for the common purpose of engaging in a course of  
23 common conduct. It would just be a series of distinct  
24 crimes.

25           JUSTICE SOUTER: Then why don't you dispense



1 with the association-in-fact category and simply go with  
2 the individual?

3 MR. YANG: That was my answer to the Chief  
4 Justice's question, because under 1962(c), there has to  
5 be distinctiveness in that context.

6 JUSTICE BREYER: Two people -- two people  
7 walk along the street and know each other, suppose  
8 that's the example, and one of them says I have a great  
9 idea. Let's go in and take some money out of the post  
10 office. The other says, what happens if a policeman  
11 comes? The first one says, we'll bribe him. Okay.  
12 Then they do it. That's it. Period.

13 Now, of course that's illegal. But is RICO  
14 supposed to catch that?

15 MR. YANG: No.

16 JUSTICE BREYER: What is it that keeps them  
17 out of it?

18 MR. YANG: Well, RICO requires, among other  
19 things, a pattern of racketeering.

20 JUSTICE BREYER: Well, here we have two --  
21 two -- two related crimes.

22 MR. YANG: Well, they can be related, but  
23 under this Court's decision in H.J. you also have to  
24 show continuing criminal conduct.

25 JUSTICE BREYER: There was between the two.

1 MR. YANG: Well, no. That has a particular  
2 meaning under H.J., which is that it has to extend over  
3 an extended period of time.

4 JUSTICE BREYER: That is the bribery. What  
5 happens if three months from now the postal inspector  
6 comes to catch us, we will bribe him.

7 MR. YANG: Well, again, I'm not sure that  
8 that would meet the continuing aspect, either because  
9 it's a threat of continuing activity or because it would  
10 satisfy the closing continuity.

11 JUSTICE BREYER: You are quite right, I  
12 agree with you that these are different efforts to try  
13 to catch the same problem. And the problem is that I  
14 don't think anyone sees that the simple conspiracy in  
15 carrying out of two criminal offenses by several people  
16 together without more -- without something more should  
17 violate RICO. I think your answer to that would be you  
18 agree with that, but tell me if you don't.

19 And then if you do agree with it, the very  
20 difficult problem is to figure out how to get the people  
21 to clearly show a pattern or not.

22 MR. YANG: I think I agree with that  
23 proposition. But what needs to be shown is that there  
24 needs to be an enterprise. Sometimes the enterprise in  
25 cases are lawful enterprises; sometimes in cases it

1 involves an unlawful organization or unlawful  
2 association in fact, like we have here. And that is  
3 shown -- the statutory requirement, as explained in  
4 Turkette, is simply that this group of people associate  
5 together for a common purpose of engaging in a course of  
6 conduct.

7 Now, when you have a long -- a series, like  
8 we have here of racketeer -- of crimes. These sets of  
9 crimes went on for almost a decade, involved dozens and  
10 dozens of bank heists.

11 CHIEF JUSTICE ROBERTS: In fact, your friend  
12 said that the period the jury found was just a couple of  
13 months.

14 MR. YANG: Yes, that concerns the predicate  
15 acts of racketeering. This is -- this raises another  
16 important issue, which is, the group largely was  
17 committing bank burglaries. Those are not predicate  
18 acts. The predicate acts here under RICO involve the  
19 interstate transportation of stolen funds. There were  
20 three of those that were charged as the predicate act,  
21 and the jury found those to constitute a pattern.

22 But what this group of individuals were  
23 doing, is they were associating in fact for a very long  
24 period of time, committing dozens of bank -- bank  
25 burglaries, and did so sometimes with the interstate

1 transportation -- that's what brought --

2 JUSTICE SCALIA: And -- and were they shown  
3 to the jury, all of those bank burglaries?

4 MR. YANG: Oh, there were many things shown  
5 to the jury.

6 JUSTICE SCALIA: So it is not at issue in  
7 this case whether -- whether the entity can be --

8 MR. YANG: I have to say --

9 JUSTICE SCALIA: -- derived simply from the  
10 predicate acts?

11 MR. YANG: I have to say I'm a little  
12 perplexed at this stage in the litigation based -- how  
13 we got here based on the objection that was made to the  
14 district court. The objection that was made, which was  
15 a J.A. 95, was that there was an ascertainable  
16 structural hierarchy which seems to be abandoned at this  
17 point, distinct from the charged predicated acts of  
18 racketeering, that was repeated at 103, 108, and 109.  
19 And then there was also an objection that the entity has  
20 to have a particular or formed structure, and that has  
21 been abandoned and also inconsistent with Turkette,  
22 which recognized that this could be an informal  
23 association.

24 And, in fact, there was not an objection to  
25 the entire charge. Counsel at page J.A. 97, after --

1 when the court explained that it was going to address  
2 his proposed charge at J.A. 95 said, you know, I have  
3 some specific objections to the charges written, and  
4 then went through them, and raising those two objections  
5 as we've just discussed here.

6 So, we've kind of evolved in terms of what  
7 this case is all about. And even if the Petitioner were  
8 right, I don't think he could prevail, even under the  
9 charge he wants in this case.

10 But let me turn to a few anomalies with  
11 respect to Petitioner's interpretation of a structure.

12 JUSTICE GINSBURG: Before you do that, Mr.  
13 Yang, could you give us a sense, if you know it, about  
14 the practical results of the different formulas that --  
15 there are at least three formulas, I take it that the  
16 different circuits have approved. In the result of the  
17 RICO prosecution, does it really make a difference which  
18 one of these is charged or do they could out the same  
19 way, anyway?

20 MR. YANG: It will make a difference in some  
21 cases. There is a case called Bagaric that this Court  
22 cited in its National Organization for Women Against  
23 Scheidler. In there, there was a -- the -- involved a  
24 group of Croation nationalists, loosely knit, who agreed  
25 to promote their anti-Yugoslavian through a series of

1 acts they committed over a series of years, extortion,  
2 murder, bombings. There was no structure, it would be  
3 very difficult to fit into the ascertainable structure  
4 distinct from the predicate act of racketeering that  
5 Petitioner espouses.

6           There are other cases involving loosely knit  
7 gangs such as neighborhood thugs. The Nascimento case  
8 involved a neighborhood group of thugs that protected  
9 each other, and that was their common -- common bonding  
10 element through killing rivals or intimidating  
11 witnesses. There's no hierarchy there. There were no  
12 colors, no initiation rights. But this went on for over  
13 a long period of time.

14           But beyond the classic cases that might fall  
15 outside RICO, if the Court were to adopt an  
16 ascertainable structure requirement, I think as  
17 Petitioner's laundry list of -- of examples -- unless  
18 my -- his reply brief illustrates, that is going to  
19 involve a long course of case-by-case adjudication.

20           JUSTICE BREYER: What did you think -- what  
21 did you think of the -- probably not much of it, but  
22 what did you think of my effort there? And I am trying  
23 to point out, as you see, I am open to anything that  
24 will deal with what I think of as a functional problem  
25 and the functional problem is exhibited by that Posner

1 example I gave you or by two investment companies that  
2 decide, what we will do is we will issue a letter that  
3 is going to be shown to two different people; that is  
4 their only association; or maybe 100 people, but they  
5 know who they are, and they are going to be shown this  
6 letter over a period of five or 10 years, and someone  
7 later comes back and says there is a false statement in  
8 the letter. Well, they shouldn't issue a false  
9 statement, but is that RICO?

10 I mean, so -- so the object -- the object is  
11 to find a way of not overextending RICO where there is  
12 nothing there but a conspiracy to commit two crimes.  
13 Pattern is one help. The pattern is pretty vague, so  
14 all the courts but one have come along, I take it, with  
15 this other help, which is playing on the word structure.

16 Now you have heard what I said as a weak  
17 effort to try to do something. What is your best effort  
18 to do something to deal with the problem? Or what's  
19 wrong with my effort? Whatever you want to say.

20 MR. YANG: Let me first address what is your  
21 underlying concern, that there is a problem. Turkette  
22 addressed that; Turkette addressed that it doesn't  
23 matter that the evidence used to establish these  
24 separate elements may in case of --

25 JUSTICE BREYER: That's different.

1 That's -- of course the same evidence can establish two  
2 separate elements.

3 MR. YANG: The --

4 JUSTICE BREYER: The problem will be  
5 conflating the elements so that every single case that  
6 you have the first set, you also have the second set.

7 MR. YANG: That problem does not exist as  
8 well, because the relevant pattern of racketeering  
9 activity that is the element of the crime is something  
10 committed by individuals.

11 For instance, let's take a group of  
12 individuals who commit a long string, of, for instance,  
13 burglaries, they do so over a series of years. Bank  
14 burglary is not a predicate act of racketeering; it's a  
15 wholly criminal organization; all they do is commit bank  
16 burglaries. One individual is given the money at the  
17 end of the -- of each burglary. What we would have  
18 there is a RICO violation after the individual, because  
19 the individual, the element is that the individual has  
20 transported the money in interstate transportation -- or  
21 across State lines, and that is a RICO predicate; but  
22 the other things that the group was doing, those are not  
23 RICO predicates.

24 JUSTICE BREYER: No, no.

25 MR. YANG: So the -- so the element, it



1 doesn't change, if the individual then does it with some  
2 other people -- let's say he brings his buddy along, two  
3 of them do it, that just shows the evidence necessary to  
4 show that the individual -- the evidence showed that the  
5 individual committed a pattern of racketeering, also  
6 happens to show he did it with a group, but it's the  
7 evidence, not the element. The element of the crime in  
8 section 1962(c) always turns on the defendant.

9 JUSTICE BREYER: Always, in a case where you  
10 sue the investment company because of their one letter  
11 used four times, it's the act of the individual. In the  
12 case that Posner used, it's always the act of the  
13 individual. There's always a criminal act of an  
14 individual.

15 MR. YANG: But if you have --

16 JUSTICE BREYER: And he has to be  
17 associated, however, with an enterprise for it to fall  
18 within RICO, and there also has to be a pattern.

19 MR. YANG: If we take --

20 JUSTICE BREYER: That's going back --

21 MR. YANG: -- my hypothetical with the  
22 individual transporting the money alone across State  
23 lines, you have a pattern. If you just looked at that,  
24 individual taking money across State lines, by himself,  
25 that doesn't establish enterprise. What would -- so the

1 pattern exists independently.

2           What would show the enterprise is the fact  
3 that the evidence might also show that he is doing it  
4 with other people. That would show that he -- the  
5 element that is, that he is committing a pattern of  
6 racketeering activity and he is doing it in concert with  
7 others, but that goes to the separate element of  
8 enterprise. That is --

9           JUSTICE BREYER: That's right, and our  
10 problem is he is doing it with one other person whom he  
11 met once, and they agreed to do it, and it's a common  
12 law conspiracy; and now suddenly he has done it twice  
13 with another person who helped him and they said they  
14 would do it, and now we have RICO; and my belief is --  
15 which you may not agree with -- that that common  
16 garden-variety conspiracy to say, rob a bank and then  
17 transport the money a few months later, that that's all  
18 that's at issue. That shouldn't be within RICO.

19           MR. YANG: Let me --

20           JUSTICE BREYER: You might come back and  
21 tell me it should be.

22           MR. YANG: Let me try to approach that in  
23 two separate ways. One, Turkette in footnote 5 was very  
24 clear. The Court explained even if the pattern of  
25 racketeering activity and the enterprise are established

1 the same way, it doesn't matter, if enterprise has  
2 function -- some function, there is no such thing as, in  
3 other words, partial superfluidities of an element, or  
4 partial superfluidity of a word.

5           Secondly, the concern about conspiracy  
6 exists in any conspiracy. Conspiracy is an inchoate  
7 act. You are liable for conspiracy as soon as you made  
8 the agreement, and under 371 commit an overt act or  
9 under RICO conspiracy agree to all the necessary  
10 elements of a substantive RICO offense.

11           Congress has -- and not only that, you can  
12 be charged for conspiracy and charged for completing the  
13 conspiracy as separate crimes. That's the normal rule.  
14 That's the normal rule here. You can be charged for a  
15 conspiracy to commit RICO offenses, and RICO offenses,  
16 the pattern element I don't think can be overestimated  
17 here.

18           The pattern element is where RICO has --  
19 plus the list of predicate acts of racketeering -- is  
20 really where RICO gets most of its limiting structure,  
21 and I think the Court recognized that in H.J.

22           It's the pattern which requires related  
23 criminal acts that can be related in a number of ways,  
24 and the -- the Court gave kind of a list of that in  
25 H.J., which I think I won't go through now, but as well

1 as continuity, and that could be long-term criminal  
2 activity, not just a single or two, but long-term  
3 criminal activity, or the threat of criminal activity.

4 Interestingly enough --

5 JUSTICE SCALIA: I am -- I am really  
6 confused now. I don't -- I am not sure I know what your  
7 answer to the question presented is, which is quite  
8 simply must an association-in-fact enterprise under RICO  
9 have some ascertainable structure beyond that inherent  
10 in the commission of predicate crimes by its members and  
11 associates?

12 And you -- your answer is no?

13 MR. YANG: No. I mean, I guess it depends  
14 on what you mean -- ascertainable structure --

15 JUSTICE SCALIA: Yes.

16 MR. YANG: It's very -- I have to say it's  
17 difficult for me to understand what is being proposed by  
18 the other side, particularly once you have lost  
19 hierarchy. Hierarchy is something which is an  
20 understandable term.

21 JUSTICE SCALIA: Right.

22 MR. YANG: But if you are talking about  
23 structure, structure could mean relationship between  
24 individuals that enable them to --

25 JUSTICE SCALIA: Right, right.

1 MR. YANG: -- commit their crimes. If that's  
2 the case --

3 JUSTICE SCALIA: Yes.

4 MR. YANG: -- I don't see why a jury cannot  
5 infer from the fact that over a long period of time the  
6 alleged members of this group have operated as a unit  
7 and have committed acts of racketeering, from that  
8 coordinating conduct that you were not able to infer  
9 that they had a means of acting as a group.

10 JUSTICE SCALIA: Yes, but you would have to  
11 tell the jury -- you would have to tell the jury you  
12 would have to find it. Of course the jury can find it,  
13 but the issue is must the jury be told that it has to  
14 find it? I think he's conceding --

15 MR. YANG: Must the jury --

16 JUSTICE SCALIA: Be told it's not enough,  
17 ladies and gentlemen of the jury, for you to find that  
18 these predicate acts occurred; you must find -- and you  
19 can find it just from the predicate acts, if you think  
20 the evidence will justify that -- you must find an  
21 organization separate from the mere commission of the  
22 predicate acts.

23 MR. YANG: What does that mean?

24 JUSTICE SCALIA: I don't know.

25 (Laughter.)

1           MR. YANG: Because Turkette makes very clear  
2 that an association-in-fact enterprise can exist for  
3 wholly criminal acts. So if for instance, take a few  
4 hypotheticals. Let's say a group forms for the basis of  
5 committing just only predicate acts of racketeering,  
6 they do that. Nothing else, just predicate acts, over a  
7 10-year period.

8           JUSTICE SCALIA: Right.

9           MR. YANG: All right? One formulation of  
10 petitioners is you have to look at the charged pattern  
11 of racketeering acts, presumably because then the jury  
12 has to find the charged pattern and then that has to be  
13 distinct from the enterprise. If that is the case --  
14 let's say there is 100 predicate acts of racketeering.  
15 All that does is say that the government has to show 99  
16 and leave the last one uncharged. That makes no sense.

17           To the extent that Petitioners say that  
18 okay, there has got to be some -- something other than  
19 racketeering activity, take for instance, the group that  
20 does wholly legal, but does criminal non-racketeering  
21 acts as well as racketeering acts; that's in fact this  
22 case. Bank robberies and -- excuse me, bank burglaries,  
23 which is not a predicate act, and interstate  
24 transportation of funds. It would be wholly anomalous  
25 to exclude a group that only did bank robberies, which

1 are predicate acts, but include a group that was only  
2 partially racketeering but wholly criminal.

3 CHIEF JUSTICE ROBERTS: Not at all; not at  
4 all. That would make a lot of sense, because RICO is  
5 not intended just to bring in the crimes. They are look  
6 for something else. They are looking for an  
7 organization that is involved in these types of things.

8 MR. YANG: But there is nothing -- there's  
9 -- in order to find an organization, you are not going  
10 to see any more from criminal acts that are not  
11 racketeering versus criminal acts that are. Both of  
12 them show --

13 JUSTICE KENNEDY: But -- but you -- you  
14 would instruct the jury that if these three thefts that  
15 are covered by RICO occurred over a period of a year,  
16 and they involved lookouts and scanners and so forth,  
17 you may infer from these acts an enterprise as defined  
18 by the statute?

19 MR. YANG: They might.

20 JUSTICE KENNEDY: You would allow that  
21 instruction?

22 MR. YANG: You -- yes, but there would have  
23 to be more. You have to explain what would be necessary  
24 to show an enterprise. And in fact the -- the  
25 appendix to the --

1 JUSTICE KENNEDY: Where -- where in your  
2 briefs or in the materials do we find the definition of  
3 what the enterprise is, other than in the statute, other  
4 than the terms of the statute itself?

5 MR. YANG: I believe page 17.

6 JUSTICE KENNEDY: I mean, in other -- what  
7 do I refer to in order to supplement the instruction  
8 that I just noted -- that I just suggested?

9 MR. YANG: Page 17 of our brief reiterates  
10 the standard, I believe it's Turkette, it comes from  
11 Turkette and in the appendix to petition -- or excuse  
12 me, to the joint appendix, the charge is at pages 111  
13 through 113. That's the charge.

14 JUSTICE KENNEDY: That's at the bottom of  
15 111 where it said you can look to see what it does and  
16 make the inference rather than have -- I forget -- an  
17 abstract analysis?

18 MR. YANG: But it goes on to say that you  
19 must -- the government must prove that there is an  
20 ongoing organization with some similar framework, formal  
21 and informal, for carrying out its objectives and  
22 various members and associations of the association  
23 function as a continuing unit to achieve a common  
24 objective.

25 The government must prove that in every



1 case. In this case, this is not in the J.A., but it is  
2 in the court of appeals appendix at page 8770, the  
3 district court specifically charged the jury that they  
4 must find five separate elements of a RICO offense,  
5 including the existence of an enterprise as one; two,  
6 that the enterprise engaged in or its activity affected  
7 interstate or foreign commerce; three, that the  
8 defendant was associated in it.

9           Eventually you get down to five, that the  
10 defendant knowingly participated in the conduct of the  
11 affairs of the enterprise through a pattern of  
12 racketeering.

13           So the district court explained you have to  
14 define an enterprise. And to find an enterprise, what's  
15 a necessary element, it said you may infer an enterprise  
16 from what the --

17           CHIEF JUSTICE ROBERTS: You say enterprise.  
18 I mean, the objection is that the enterprise is no  
19 different than the various predicate acts.

20           MR. YANG: It is different in the sense that  
21 you can have a series of predicate acts without an  
22 enterprise, you can have an enterprise without a series  
23 of predicate acts. Now what, the objection seems to be  
24 ultimately that the evidence needs to show the predicate  
25 acts of racketeering may also prove that the enterprise

1 exists, because when you show predicate acts of a  
2 defendant, which is the only element, he doesn't have to  
3 work in concert with others to commit the predicate acts  
4 of racketeering, but when you show the predicate acts  
5 with evidence that individual is acting with others, you  
6 can also show that they have -- there is an association  
7 in fact of individuals who joined together to pursue a  
8 common course of conduct. Thank you, Your Honors.

9 CHIEF JUSTICE ROBERTS: Thank you Mr. Yang.

10 Mr. Fernich, you have four minutes  
11 remaining.

12 REBUTTAL ARGUMENT OF MARC FERNICH

13 ON BEHALF OF THE PETITIONER

14 MR. FERNICH: Thank you, Your Honor.

15 Very briefly, nobody disputes the  
16 proposition that a properly instructed jury would be  
17 able to find that racketeering acts committed by an  
18 individual is a distinct element from the  
19 association-in-fact enterprise. The government is  
20 absolutely right and we agree on that score. The  
21 problem is the lower courts have misread Turkette. They  
22 are not focusing on the pattern of activity committed by  
23 the individual; they have -- and the instruction as  
24 Justice Kennedy himself quoted in this case encapsulate  
25 it -- encapsulates the problem.

1                   Comments -- and this is at the bottom of  
2 J.A. 1111. Common sense suggests that the existence of  
3 an association in fact is oftentimes more readily proven  
4 by what it does -- it does, not rather than what an  
5 individual member does -- rather than by abstract  
6 analysis of its structure.

7                   So it only raises a further vagueness  
8 problem. We agree that patterns of racketeering  
9 activity are properly committed by individuals. If you  
10 are going to define the enterprise solely or principally  
11 by virtue of the pattern, whose pattern would you define  
12 it by? It doesn't even make any sense. And in  
13 Turkette, it -- with respect to what occurred in  
14 Turkette -- and this is at page 5 of my brief, the  
15 latter -- and this is a quote from Turkette, and it is  
16 referring to a pattern: "The latter is proved by  
17 evidence of the requisite number of acts of racketeering  
18 committed by the participants in the enterprise."

19                   We agree in the abstract that a properly  
20 instructed jury, that the pattern and the enterprise are  
21 totally different things. The problem is it's a giant  
22 circular argued by the government. Juries are not being  
23 properly instructed in that regard, and that only  
24 compounds the vagueness of the statute.

25                   The second point I would like to make: the

1 government presses its principal definition of an  
2 enterprise in its brief, and what I hear here from the  
3 government is its common purpose. Common purpose. And  
4 I would like to direct the Court to the Salinas opinion  
5 which discussed RICO conspiracy. It's at 522 U.S. --  
6 well, I will give you the -- let's try 118 S. Court 477.

7           It looks like common purpose is the hallmark  
8 of a conspiracy. This is in the discussion of a  
9 conspiracy: "We rejected argument X because it would  
10 erode the common law principle that so long as they  
11 share a common purpose, conspirators are liable for the  
12 acts of their co-conspirators, which is the Pinkerton  
13 doctrine which collapses 1962(c) into a general  
14 conspiracy statute, if you are going to define an  
15 enterprise principally by virtue of its common purpose.  
16 My second point.

17           As far as the claim that somehow we didn't  
18 object sufficiently to a charge, I am not going to  
19 address that in any depth. I would just direct the  
20 Court to pages 97 through 109 of the joint appendix. It  
21 -- it spells out exactly what we objected to, and we  
22 objected to virtually every sentence of the instruction  
23 that defines or purports to define an  
24 association-in-fact enterprise.

25           As far as the definition of the enterprise,

1 we would certainly agree with Justice Breyer's  
2 formulation that something to differentiate it as a  
3 long-term, goal-directed, decisionmaking apparatus that  
4 continues in the intervals between the predicate acts  
5 would do it, but we contend that structure is largely,  
6 it's a plain English word, it's not  
7 antidisestablishmentarianism or something like that; the  
8 jury should be instructed as in the Seventh and Eighth  
9 Circuits that there has got to be a structure separate  
10 from the pattern. If the jury has questions, we have  
11 lots of faith in district judges, as Justice Ginsburg  
12 pointed out; that if the jury comes back with a question  
13 the judge could list examples tailored to the  
14 appropriate case.

15           And I just want to hit the common -- the  
16 purpose underlying RICO here. It's very significant in  
17 my view that bank burglaries are not in fact RICO  
18 predicate acts, and if you were to look -- if this Court  
19 were to look at my court of appeals brief in this case,  
20 bank burglary is not a RICO predicate act for a reason.  
21 Congress made the judgment that bank burglaries are  
22 adequately handled by the States, that the States can  
23 prosecute them. And the reason why the three bank  
24 burglaries had to be addressed up as interstate  
25 transportation of stolen money is this is not really a

1 case in which RICO is properly invoked.

2 It's fully briefed in my court of appeals  
3 submission. These are State crimes that a State is  
4 perfectly capable -- capable of handling on its own.  
5 And unless there are any further questions, I would  
6 waive any further rebuttal.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel,  
8 the case is submitted.

9 (Whereupon, at 12:17 p.m., the case in the  
10 above-entitled matter was submitted.)

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