07-4553-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-4553-cv

NOREX PETROLEUM LIMITED,

Appellant,

—v.—

ACCESS INDUSTRIES, INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF LIMITED REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

CONCLUSION 8

TABLE OF AUTHORITIES

CASES:

Bowen v. *Massachusetts*, 487 U.S. 879 (1988) 4

Boyle v. *United States*, 129 S. Ct. 2237 (2009) 3

Matthews v. *United States*, 622 F.3d 99 (2d Cir. 2010) 2

Morrison v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) 1, 7, 8

Norex Petroleum Ltd. v. *Access Indus., Inc.*, 622 F.3d 148 (2d Cir. 2010) 1, 2

North South Fin. Corp. v. *Al-Turki*, 100 F.3d 1046 (2d Cir. 1996) 4

Pyzynski v. *N.Y. Cent. R.R. Co.*, 421 F.2d 854 (2d Cir. 1970) 5

Schulz v. *IRS*, 413 F.3d 297 (2d Cir. 2005) 2

United States v. *Belfast*, 611 F.3d 783 (11th Cir. 2010) 5, 8

United States v. *Bowman*, 260 U.S. 94 (1922) 2, 3, 4, 7, 8

United States v. *Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991) 5

United States v. *Leija-Sanchez*, 602 F.3d 797 (7th Cir. 2010) 6, 7, 8

United States v. *Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) 5, 7

United States v. *Parness*, 503 F.2d 430 (2d Cir. 1974) 7

United States v. *Plummer*, 221 F.3d 1298 (11th Cir. 2000) 5

United States v. *Yousef*, 327 F.3d 56 (2d Cir. 2003) 3, 4, 5, 6

STATUTES AND OTHER LEGISLATIVE MATERIALS:

18 U.S.C. § 32(a) 3, 4

18 U.S.C. § 32(a)(1) 4, 5

18 U.S.C. § 37(b)(2) 4

18 U.S.C. § 175(a) 4

18 U.S.C. § 229(c) 4

18 U.S.C. § 351(i) 4

18 U.S.C. § 371 4

18 U.S.C. § 831(c) 4

18 U.S.C. § 832(b) 4

18 U.S.C. § 924(c) 8

18 U.S.C. § 1116(c) 4

18 U.S.C. § 1203(b)(1) 4

18 U.S.C. § 1512(h) 4

18 U.S.C. § 1513(d) 4

18 U.S.C. § 1751(k) 4

18 U.S.C. § 1959 6

18 U.S.C. § 1961(1) 3, 5

18 U.S.C. § 1961(1)(G) 4

18 U.S.C. § 1962 . . . . 1, 4, 6, 7, 8

18 U.S.C. § 1962(a) 5

18 U.S.C. § 1962(b) 5, 7

18 U.S.C. § 1962(c) 5

18 U.S.C. § 1963 . . . . 1, 4, 6, 7, 8

18 U.S.C. § 1964(a) 1, 4, 6, 7, 8

18 U.S.C. § 1964(b) 1, 4, 6, 7, 8

18 U.S.C. § 1964(c) 1, 2

18 U.S.C. § 2281(b) 4

18 U.S.C. § 2332(a) 5

18 U.S.C. § 2332a(b) 5

18 U.S.C. § 2332b(g)(5)(B) 4

18 U.S.C. § 2332f(b)(2) 4

18 U.S.C. § 2332g(b) 4

18 U.S.C. § 2332h(b) 4

18 U.S.C. § 2339B(d) 4

18 U.S.C. § 2339C(b)(2) 4

18 U.S.C. § 2339D(b) 4

18 U.S.C. § 2340A 4

Pub. L. No. 91-542, 84 Stat. 947 (1970) 5

Pub. L. No. 107-56, 115 Stat. 272 (2001) 4

S. Rep. No. 91-617 (1969) 5

MISCELLANEOUS AUTHORITIES:

Deputy Attorney General David W. Ogden, Remarks at the 78th
Interpol General Assembly, Singapore (Oct. 12, 2009) 6

PRELIMINARY STATEMENT

The panel affirmed the dismissal of Norex's Racketeer Influenced and Corrupt Organizations Act (RICO) claims, reasoning that (1) the scheme Norex alleged was extraterritorial; and (2) "RICO is silent" about extraterritoriality and thus did not reach the scheme. 622 F.3d 148, 151-152. Because Norex brought a private action under 18 U.S.C. § 1964(c), the panel had no occasion to address whether RICO applies extraterritorially when enforced in a criminal prosecution under Sections 1962 and 1963 or when the government otherwise seeks, under Section 1964(a) and (b), "to prevent and restrain violations of [S]ection 1962." Accordingly, the panel's opinion would not properly be read to govern in those contexts. But broad language in the opinion could be misread by other parties or courts to suggest that RICO may never apply extraterritorially, even when enforced by the government. Such a reading would conflict with settled Supreme Court and circuit precedent—undisturbed by *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010)—concerning the extraterritorial application of criminal statutes. It would also misread RICO's text, structure, purpose, and legislative history. The government has a strong interest in ensuring that RICO remains available to prosecute and otherwise prevent and restrain extraterritorial offenses in appropriate cases. The Court should protect that interest by granting rehearing en banc for the limited purpose of clarifying that the panel did

not decide any question beyond the availability of extraterritorial private civil RICO actions.[1] *Cf. Schulz* v. *IRS*, 413 F.3d 297, 298 (2d Cir. 2005). Also, although Norex has not sought panel rehearing, that would not preclude the panel from simply amending its opinion *sua sponte* to account for the concerns set forth in this brief. *Cf. Matthews* v. *United States*, 622 F.3d 99, 100 n.** (2d Cir. 2010).

ARGUMENT

In holding that RICO's "silen[ce]" about extraterritoriality was dispositive, the panel rejected the notion that "because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach." 622 F.3d at 151. The Court should grant further review to clarify that its decision is not intended to govern future RICO cases not arising under Section 1964(c).

I. The Supreme Court has long held that the presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction" but instead derive from "the right of the government to defend itself against * * * fraud wherever perpetrated." *United States* v. *Bowman*, 260 U.S. 94, 98 (1922). In *Bowman*, the Court observed that limiting the "locus" of such statutes to the domestic sphere would

[1] The government takes no position here on whether and to what extent private civil RICO actions under Section 1964(c) may be based on extraterritorial conduct. Nor does it express a view on whether the scheme Norex alleged was in fact extraterritorial rather than domestic. 622 F.3d at 152 (panel concluded Norex's allegations could not "support a claim of domestic application").

"curtail the[ir] scope and usefulness" and "leave open a large immunity" for international offenses. *Ibid*. Applying *Bowman* in *United States* v. *Yousef*, 327 F.3d 56 (2003), this Court held that 18 U.S.C. § 32(a), prohibiting aircraft destruction, applies extraterritorially. *Id*. at 86-88. *Yousef* made clear that "Congress is presumed to intend extraterritorial application" of statutes that meet the *Bowman* test. *Id*. at 87. In other words, such statutes enjoy a presumption *in favor of* extraterritoriality.

II. In cases of government enforcement, RICO meets the *Bowman* test.

A. First, RICO "does not depend on the locality of * * * defendants' acts" (*Yousef*, 327 F.3d at 87), because its predicates do not. The substantive RICO provisions prohibit certain types of conduct, all of which have as a component the commission of "a pattern of racketeering activity." In turn, the statute defines "racketeering activity" to include "any act which is indictable" under a long list of federal criminal statutes; "any act or threat involving" certain enumerated state felonies; and "any offense involving" other federal crimes. 18 U.S.C. § 1961(1). Congress's use of an unqualified "any" strongly suggests coverage of both domestic and extraterritorial predicate acts as long as they are "indictable." *Cf. Boyle* v. *United States*, 129 S. Ct. 2237, 2243 (2009) (emphasizing breadth intended by term "any" in RICO's definition of "enterprise"). And RICO's predicates include an array of statutes that apply extraterritorially, in some instances because of an explicit

extraterritoriality provision (*e.g.*, 18 U.S.C. §§ 37(b)(2), 175(a), 229(c), 351(i), 831(c), 832(b), 1116(c), 1203(b)(1), 1512(h), 1513(d), 1751(k), 1956(f), 1957(d)(2), 2281(b), 2332f(b)(2), 2332g(b), 2332h(b), 2339B(d), 2339C(b)(2), 2339D(b), and 2340A),[2] and in others by virtue of case law (*e.g.*, 18 U.S.C. § 32(a), under *Yousef*).[3]

Given this design, it does not matter that Sections 1962, 1963, and 1964(a) and (b) do not themselves say "RICO applies abroad when enforced by the government." When Congress included as racketeering "any" acts indictable under the predicate statutes, it knew that a host of them already applied extraterritorially (*see Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988)), and it presumably wanted RICO applied extraterritorially to at least that extent. Courts have consistently held that where one statute piggybacks on a different, extraterritorial one in this fashion, the former also applies extraterritorially even if it is itself silent on the matter. *Yousef*, 327 F.3d at 87-88 (general conspiracy statute, Section 371, applied extraterritorially where conspiracy

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[2] Like the panel decision, *North South Finance Corp.* v. *Al-Turki*, 100 F.3d 1046 (2d Cir. 1996), did not address whether RICO applies extraterritorially when enforced by the government. It thus did not apply *Bowman*. Indeed, it suggested that private civil RICO, providing for treble damages, raises "concerns about international comity" that government enforcement of RICO does not. *Id*. at 1052. In any event, *Al-Turki* was decided before Congress added a significant number of new extraterritorial statutes as RICO predicates, including many of the statutes listed in the text *supra*. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 382 (2001); *see* 18 U.S.C. §§ 1961(1)(G), 2332b(g)(5)(B).

[3] Section 32(a)(1), which *Yousef* applied extraterritorially, prohibits destruction of aircraft operated "in interstate, overseas, or foreign air commerce." It would be odd indeed if a terrorist group committing a series of aircraft bombings could be prosecuted for the destruction of discrete aircraft in "foreign air commerce" but not for the pattern of extraterritorial bombings as a whole.

was to violate Section 32(a)(1)).[4]

Indeed, it would be anomalous to hold that RICO can never apply extraterritorially where some of its predicate statutes can *only* be violated by extraterritorial conduct. *See, e.g.*, 18 U.S.C. §§ 2332(a) (killing a United States national "while such national is outside the United States") and 2332a(b) (using certain weapons "outside of the United States"). That interpretation would render meaningless Congress's decision to include such predicates. And this Court will not "attribute to Congress the intention to engage in such a futile legislative exercise." *Pyzynski* v. *New York Central Railroad Co.*, 421 F.2d 854, 858 (2d Cir. 1970). Doing so would be especially misguided in the context of RICO, which Congress intended (1) to reach "*any* enterprise" in "interstate or *foreign* commerce" (18 U.S.C. § 1962(a), (b), (c)) (emphases added); and (2) to "be liberally construed to effectuate its remedial purposes" (Pub. L. No. 91-542, § 904(a), 84 Stat. 947 (1970)).[5]

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[4] *See also, e.g.*, *United States* v. *Felix-Gutierrez*, 940 F.2d 1200, 1203-1205 (9th Cir. 1991); *United States* v. *Plummer*, 221 F.3d 1298, 1304-1306 (11th Cir. 2000); *United States* v. *Belfast*, 611 F.3d 783, 813-815 (11th Cir. 2010).

[5] The Senate Report supports this analysis, making clear that Congress wanted to "free the channels of commerce from all illicit activity," and that RICO would serve the purpose by "attack[ing] * * * on all available fronts." S. Rep. No. 91-617, at 79 (1969). Because Section 1961(1) defines illicit racketeering to include extraterritorial predicates, RICO's "attack * * * on all available fronts" is necessarily extraterritorial in some cases. *See United States* v. *Noriega*, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) (citing Senate Report as evidence that Congress intended RICO to apply extraterritorially in that criminal case).

B. Second, "restricting" Sections 1962, 1963, and 1964(a) and (b) "to United States territory would severely diminish [their] effectiveness." *Yousef*, 327 F.3d at 87. It would provide a dangerous loophole for transnational racketeering enterprises. *United States* v. *Leija-Sanchez*, 602 F.3d 797, 799-800 (7th Cir. 2010) (Easterbrook, J.) (18 U.S.C. § 1959, a criminal statute, applies to racketeering "enterprises that engage in or affect 'foreign commerce'"; because "[c]riminal businesses may be international in scope," the statute "cannot be implemented" effectively if it is limited to the domestic sphere).

"By one estimate, organized crime today comprises up to 15 percent of the global gross domestic product." Deputy Attorney General David W. Ogden, Remarks at 78th Interpol General Assembly, Singapore (Oct. 12, 2009).[6] Much of that crime implicates the United States' economic, law enforcement, and national security interests — interests Congress sought to vindicate by including, as RICO predicates, international fraud, money laundering, terrorism, and other extraterritorial offenses. Accordingly, the Department of Justice recently implemented a comprehensive Law Enforcement Strategy to Combat International Organized Crime.[7] The success of that effort will turn in significant measure on the continued availability of Sections 1962,

[6] http://www.interpol.int/Public/ICPO/IntLiaison/UN/MinisterialMeeting200910/Other Speeches/USA.pdf.

[7] http://www.justice.gov/criminal/icitap/pr/2008/04-23-08combat-intl-crime-overview.pdf.

1963, and 1964(a) and (b) to combat criminal schemes transcending our borders.

In short, when enforced by the government, RICO enjoys a presumption of extraterritoriality that its text, structure, purpose, and history only reinforce. *United States* v. *Parness*, 503 F.2d 430, 439 (2d Cir. 1974) (holding Section 1962(b) applies to investment of racketeering income in foreign enterprise, and finding "no indication" that "Congress intended to limit [RICO] to infiltration of domestic enterprises," a reading that would flout RICO's "inclusive" design and "frustrate[ ]" its "salutary purposes"); *United States* v. *Noriega*, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) (RICO "permits no inference" that "it was intended to apply only" domestically).

III. *Morrison* does not reverse that presumption or otherwise limit Sections 1962, 1963, and 1964(a) and (b) to the domestic sphere. Like this case, it addressed private enforcement of a civil statute. It did not mention *Bowman*, let alone overrule it. This Court is thus bound to follow *Bowman* and should clarify that district courts in this circuit must do the same when construing Sections 1962, 1963, and 1964(a) and (b).[8] *Leija-Sanchez*, 602 F.3d at 798-799 (decisions establishing presumption that

[8] An overbroad reading of *Morrison* would potentially undercut government enforcement not only of RICO, but also of other provisions. For example, applying a rigid "presumption against extraterritoriality," without consideration of the specific statute and context at issue, could impair non-RICO criminal conspiracy prosecutions in cases related to international terrorism, narco-trafficking, arms-trafficking, and organized crime, where much of the underlying conduct may have occurred abroad. It could also impair government enforcement under statutes arising in other areas, including taxation and protection of the environment.

privately enforced civil statutes do not apply extraterritorially "cannot implicitly overrule" *Bowman*, which controls "until the Justices themselves overrule it");[9] *United States* v. *Belfast*, 611 F.3d 783, 813-815 (11th Cir. 2010) (applying *Bowman*, post-*Morrison*, to hold 18 U.S.C. § 924(c) extraterritorial).

CONCLUSION

RICO applies extraterritorially when enforced under Sections 1962, 1963, and 1964(a) and (b), at least to the same extent RICO's predicates apply extraterritorially. The Court should grant rehearing en banc for the limited purpose of clarifying that the panel did not hold otherwise.

[9] The Supreme Court denied Leija-Sanchez's petition for a writ of certiorari on October 4, 2010, after *Morrison* was decided. 2010 WL 3207722.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of the United States as Amicus Curiae was prepared in a 14-point, proportionally spaced, serif font (Times New Roman), using WordPerfect X4; the Brief does not exceed seven and a half pages; and, accordingly, the Brief complies with the requirements of Fed. R. App. P. 29(d), 32(a)(5)(A), and 35(b)(2).

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ANTI-VIRUS CERTIFICATION

Case Name: Norex Petroleum v. Access Industries

Docket Number: 07-4553-cv

I, Louis Bracco, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 11/22/2010) and found to be VIRUS FREE.

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