No. 06-873

In The
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSON, Individually and on behalf of a class,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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INTRODUCTION

This is Mohawk Industries, Inc.'s second Petition for a writ of certiorari to review a 2004 district court decision denying a motion to dismiss the plaintiffs' federal RICO claims. After an interlocutory appeal to the Eleventh Circuit Court of Appeals, this Court granted certiorari last Term to consider some of the enterprise questions Mohawk reiterates in this second Petition. But after full briefing and oral argument, the Court concluded that it had made a mistake by granting certiorari and dismissed the writ as improvidently granted. *See Mohawk Industries, Inc. v. Williams*, 126 S. Ct. 2016 (2006), reproduced at Pet. App. 31a. The Petition offers the Court no reason to revisit that decision or this case a second time.

REASONS FOR DENYING THE PETITION

The Petition argues that the Eleventh Circuit's decision in *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006) ("*Williams II*") raises three separate questions worthy of this Court's review. In truth, none of the Questions Presented meets the Court's guidelines for granting certiorari. *See* Sup. Ct. Rule 10. Moreover, it is worth recalling that Mohawk's prior Petition, in Case No. 05-465, raised virtually all of the substantive issues that Mohawk now presses in this second Petition. Although Mohawk frames the first Question Presented as the proper application of a decision from last Term, that question merely subsumes and recycles the same proximate cause

arguments Mohawk raised in its initial Petition.[1] Similarly, the enterprise issues collected under the second Question Presented repeat the arguments this Court considered but declined to address when it dismissed certiorari last Term.[2] And although Mohawk has added a third Question Presented concerning the definition of an injury to business or property under 18 U.S.C. § 1964(c), even that issue was presented in Mohawk's initial Petition.[3] Having already devoted substantial resources to this case only to dismiss the initial grant of certiorari as improvident, the Court should decline to review the case a second time.

I. The Court Need Not Grant Certiorari To Review Last Term's Decision in *Anza v. Ideal Steel Supply Corporation.*

First, Mohawk argues that the Court should grant certiorari to address the Eleventh Circuit's application of *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). Rather than admit that it seeks this Court's review to

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[1] *Compare* Petition for a Writ of Certiorari at 18-23 (No. 05-465) (hereinafter "2005 Pet.") (plaintifffs failed to plead a direct and proximate injury to business or property) *with* Petition for a Writ of Certiorari at 10-16 (No. 06-873) (hereinafter "Petition" or "Pet.") (same argument under *Anza*).

[2] *Compare* 2005 Pet. at 10-18 (seeking certiorari to review whether corporations and their agents may form an association in fact enterprise) *and* Br. of Pet. at 12-26, *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016, 2006 WL 282167 (2006) (No. 05-465) (arguing that corporations cannot be members of association-in-fact enterprises) *with* Pet. at 16-24 (reciting the same two arguments).

[3] *Compare* 2005 Petition at 19-21 (arguing that wage depression cannot qualify as an injury to business or property) *with* Pet. at 24-28 (same argument).

correct the alleged misapplication of a properly stated rule of law, Mohawk contends that *Williams II* both (1) ignores *Anza* and (2) creates an immediate circuit split over the very same decision. Of course, these contentions cannot both be true; and in fact, Mohawk is wrong on both counts.

A. The Eleventh Circuit Faithfully and Correctly Applied *Anza*.

The Petition contends the Eleventh Circuit thumbed its nose at this Court's direction to further consider *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005) ("*Williams I*") in light of *Anza*.[4] Even though *Williams II* cites *Anza* more than ten times,[5] Mohawk contends the court of appeals "ignored" *Anza*'s central holding "that RICO civil plaintiffs must plead an injury directly caused by the RICO predicate acts and not by another 'set of actions . . . entirely distinct from the alleged RICO violation.'"[6] Mohawk further claims that the Eleventh Circuit ignored *Anza*'s holding that the "central question" in evaluating a RICO plaintiff's allegations of injury is "whether the alleged RICO violation led directly to the plaintiff's injuries."[7] But *Williams II* acknowledges and applies those very holdings. Indeed, the Eleventh Circuit began its proximate cause discussion by quoting *Anza*'s "central question" for analyzing causation in a civil RICO case and then underscored *Anza*'s emphasis that there "must be 'some direct relation' between the injury alleged and the

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[4] *See, e.g.*, Pet. at 16 (Eleventh Circuit "fail[ed] to heed *Anza* in the wake of this Court's explicit instruction to do so").

[5] *See Williams II*, Pet. App. at 14a-21a.

[6] Pet. at 3.

[7] *Id.* at 12.

injurious conduct in order to show proximate cause."[8] The court of appeals then went on to examine the list of additional "motivating principle[s]" precisely as *Anza* instructs.[9]

As the losing party below, Mohawk obviously takes great issue with the Eleventh Circuit's conclusion in this case. But given the court of appeals' extensive and accurate quotation of *Anza*, there can be no genuine controversy over whether *Williams II* properly states the rule of law announced in *Anza*. Accordingly, even if Mohawk were correct (which it is not) and the Eleventh Circuit had committed some technical error in applying *Anza* (which it did not), certiorari is unwarranted because this Court "is not primarily concerned with the correction of errors in lower court decisions."[10] To the contrary, Supreme Court Rule 10 expressly provides that the writ will not be granted to review the purported misapplication of a properly stated rule of law. And in *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), the Court explained that its discretionary review "depends on numerous factors ***other than*** the perceived correctness of the judgment we are asked to review." (emphasis added)

In any event, Mohawk's criticisms of the Eleventh Circuit's application of *Anza* miss the mark. *Anza* held that the defendant's fraud on the State of New York tax

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[8] *Williams II*, Pet. App. at 14a-15a.

[9] *Id.* at 15a-16a. Mohawk's suggestion that *Williams II* defies *Anza* by referring to the Respondents' allegation that Mohawk intended to injure them refers to the Eleventh Circuit's standing analysis, not its proximate cause analysis under *Anza*. *See* Pet. at 14.

[10] Robert L. Stern & Eugene Grossman, *Supreme Court Practice* § 4.17 at 256 (8th ed. 2002).

authority did not cause a third party any injury cognizable under RICO.[11] As the Court observed, the State – not the defendant's competitor – was the direct victim of this misconduct.[12] As a result, the *Anza* Court held the plaintiff could not recover damages for lost sales due to the defendant's decision to lower the prices it charged its customers.[13]

As *Williams II* explains, the claims here are very different because the plaintiffs do not seek to recover damages for fraud (or any other misconduct) directed at other parties.[14] Rather, the plaintiffs allege they are the direct victims of Mohawk's illegal hiring and other racketeering activity, which directly and unlawfully expands the pool of labor available to Mohawk and depresses the wages Mohawk pays all its employees.[15] Protecting the wages and working conditions of legal workers has been the primary motivating factor behind the nation's immigration laws for at least a century.[16] And this Court's precedents repeatedly

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[11] *See Anza*, 126 S. Ct. at 1997.

[12] *Id.*

[13] *Id.*

[14] *Williams II*, Pet. App. at 16a-21a.

[15] *See, e.g.*, Compl. ¶ 33-38, Pet. App. at 91a-93a.

[16] *See* H.R. Rep. No. 1365, 82d Congress, 2d Sess. at 10, 1952 U.S.C.C.A.N. 1653, 1662 (1952). *See also* S. Rep. No. 44-689, at IV-V (1877) (noting Congressional conclusion that competition from foreign workers depressed wages to "ruinously low rates"); House Comm. on the Judiciary, 100th Cong., *Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis* at 8 (Comm. Print 1988) (same); H.R. Rep. No. 98-115, pt. 1 at 95-96 (1983) ("Illegal immigration ... depresses the wages and working conditions of low-skilled workers in this country, and reduces their employment opportunities"); S. Rep. No. 99-132 at 16 (1985) ("we seek to eliminate the illegal subclass now present in our society.... Their

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recognize the innate, direct connection between hiring undocumented aliens and depressed wages for American workers.[17]

To better fit *Anza*'s mold, the Petition mischaracterizes the Complaint to allege an injury passed on from one category of employees to another.[18] This distortion – which must be rejected on a motion to dismiss – actually underscores that the plaintiffs are the only direct victims of the criminal conduct alleged. In *Anza* and its predecessor, *Holmes v. SIPC*, 503 U.S. 258 (1992), the Court held that the injuries alleged were not direct because there was a "more immediate victim" to vindicate the statute's purposes.[19] Because the plaintiffs are the direct victims of Mohawk's racketeering activity, *Anza* does not require dismissal. The only other court to consider *Anza* in the

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illegal status and resulting weak bargaining position cause [undocumented workers] to depress U.S. wages and working conditions"). Indeed, it is for this reason that the Department of Labor must certify that hiring certain foreign workers will not have "an adverse effect" on the wages, terms and benefits of U.S. workers. 20 C.F.R. § 656.24(b)(3).

[17] *See DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976) ("acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens"); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

[18] *See* Pet. at 12-13 (arguing that the plaintiffs' injuries are derivative of conduct that Mohawk directs at other parties).

[19] *See Anza*, 126 S. Ct. at 1998 ("[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate their laws by pursuing their own claims."); *Holmes*, 503 U.S. at 273. *See also Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 541 (1983) (identifying alternative plaintiffs with more direct claims). *Compare* Pet. at 15 n.10 (arguing that the lack of any direct victim is irrelevant under *Anza*).

context of similar illegal hiring allegations reached the very same conclusion.[20]

Although Mohawk argues that *Williams II* defies this Court's June 5, 2006 GVR order, the Court did not direct the Eleventh Circuit to dismiss the Complaint. The Court has explained that a GVR is appropriate when it is "not certain that the case [is] free from all obstacles to reversal on [the] intervening precedent."[21] Such an order merely indicates that the Court believes the intervening precedent is "sufficiently analogous and, perhaps, decisive to compel reexamination of the case."[22] As a result, the Court's GVR is not the functional equivalent of a summary reversal, as the Petition argues. The Eleventh Circuit complied with this Court's direction and its application of *Anza* provides no basis for a second grant of certiorari.

B. There is No Circuit Split Over *Anza*.

Nor did *Williams II* create an immediate circuit split over the proper application of *Anza*. Only two courts have considered *Anza*'s impact on the proximate cause theory alleged here, and both concluded that allegations of hiring large numbers of undocumented workers are not "entirely

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[20] *See Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2006 WL 2868980 (E.D. Tenn. Sept. 29, 2006) (declining to certify an interlocutory appeal after denying the defendants' motion for judgment on the pleadings based on *Anza*). *Accord Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 619 (6th Cir. 2004) (pre-*Anza* case upholding the same allegations of proximate cause); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1172 (9th Cir. 2002) (same).

[21] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222-23 (1995).

[22] *United States v. Vanorden*, 414 F.3d 1321, 1327 n.4 (11th Cir. 2005) (*citing Henry v. City of Rock Hill*, 376 U.S. 776, 776-77 (1964)).

distinct from" the injury of depressed wages for legal workers.[23] As a result, there is no split of authority for this Court to review.

The only conflict between *Williams II* and the Seventh Circuit's decision in *James Cape & Sons Co. v. PCC Construction Co.*, 453 F.3d 396 (7th Cir. 2006) is the difference between the facts and claims alleged in the respective complaints. In *James Cape*, the plaintiff sought to recover RICO damages for lost profits on bids it allegedly failed to win as a result of a bid-rigging scheme that targeted a third party, the Wisconsin Department of Transportation.[24] That scheme directly injured the Department, which had to make inflated payments to the winning contractors. Following *Anza*, the Seventh Circuit held that this more immediate victim "was fully capable of pursuing appropriate remedies much like the State of New York."[25] Rather than a circuit split, therefore, Mohawk has merely identified two different sets of facts for which *Anza* compels two different results. Even if Mohawk (incorrectly) contends *James Cape* illustrates some problem with the Eleventh Circuit's analysis of this Complaint, that type of fact-specific inquiry into the application of a precedent that is less than a year old is not the type of issue that typically concerns this Court.[26]

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[23] *See Williams II*, Pet. App. at 14a-21a; *Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2006 WL 2868980, at *3-4 (E.D. Tenn. Sept. 29, 2006) (declining to certify an interlocutory appeal after denying the defendants' motion for judgment on the pleadings based on *Anza*).

[24] *James Cape & Sons*, 453 F.3d at 404.

[25] *Id.*

[26] *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific

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II. The Court Has Already Concluded It Would Be a Mistake to Review the Enterprise Questions Presented in Mohawk's Petition.

Last Term, the Court afforded Mohawk full briefing and oral argument on all the enterprise issues collected under the second Question Presented in Mohawk's Petition. But rather than reach the merits of those questions, the Court dismissed the writ as improvidently granted.[27] That ruling came after the Court discovered Mohawk had expressly waived its primary merits argument in the lower courts. Because this second Petition seeks to revive the same arguments the Court discarded last Term, certiorari is even less appropriate now.

Mohawk first introduced the argument that a corporation cannot be a member of an association-in-fact RICO enterprise pursuant to 18 U.S.C. § 1961(4) in its merits brief in this Court last Term. For two years before that filing, Mohawk had argued that corporations *could be* members of such enterprises. In 2004, Mohawk told the district court that: "Specifically, ***Mohawk agrees*** that ***a corporation can be both a RICO person and part of***

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facts."); *McCray v. New York*, 461 U.S. 961, 963 (1983) (denying certiorari because the question required further study in the lower courts); *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (indicating that certiorari was denied because a majority believed Supreme Court review should be deferred until "more state supreme courts and federal circuits have experimented" with the problem) (Marshall, J., dissenting). *See also* John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982) ("The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.").

[27] *Mohawk*, 126 S. Ct. at 2016.

***an association-in-fact enterprise*[.]"**[28] And Mohawk subsequently informed the Eleventh Circuit that its arguments were perfectly consistent with RICO liability for corporations that participated in the affairs of an association-in-fact enterprise:

> Indeed, ***nothing in Mohawk's rule would affect the RICO liability of a corporation that truly participates in some larger association of corporations or (non-agent) individuals*** by engaging in racketeering activities on the enterprise's behalf.[29]

Based on these concessions and Mohawk's failure to preserve the antecedent question of whether a corporation can form an association-in-fact enterprise, the Court questioned whether it properly could reach any of Mohawk's enterprise arguments at last Term's oral argument.[30] In response, Mohawk's counsel conceded Mohawk's failure to preserve the issue and urged the Court to overlook that defect in its appeal.[31] But after devoting substantial time to hearing the case, the Court declined to reach the merits of Mohawk's enterprise arguments in this case.

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[28] *See* Mohawk Dist. Ct. Reply Br. at 5 (emphasis added) [Dist. Ct. Dkt. No. 43].

[29] Mohawk's 11th Cir. Reply Brief at 11 n.8 (filed Nov. 5, 2004) (emphasis added). *See also* Mohawk's 11th Cir. Br. at 12-13 (filed Sept. 7, 2004) ("This [plaintiff's theory] would be a substantial departure from ***current law, which requires that to sufficiently allege a RICO enterprise, a plaintiff must allege that the enterprise is comprised of a corporation*** and a separate, independent third party.") (emphasis added).

[30] *See* Tr. Oral Arg. at 5-10 (No. 05-465) (Apr. 26, 2006).

[31] *Id.* at 10 (suggesting that Mohawk waived the argument because "current law in the Eleventh Circuit law" rendered it "utterly futile").

This history is relevant here only because Mohawk cannot correct the procedural defects that led the Court to dismiss the writ on the very same enterprise questions that Mohawk recycles in the present Petition. Mohawk is still bound by the affirmative concessions it made in the lower courts.[32] And this Court still does not consider arguments that a petitioner failed to preserve for appeal.[33] In two very recent Opinions, the Court has reaffirmed that it will not consider arguments the Petitioner has already conceded and will not rule in the first instance on claims the lower courts did not consider.[34]

As discussed below, the Petition does not identify any enterprise issue worthy of this Court's attention. But given the Court's aversion to deciding questions not properly

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[32] Mohawk's attempt to resurrect its enterprise arguments by seeking an en banc review of the Eleventh Circuit precedents that led Mohawk to concede a corporation can be a member of an association-in-fact enterprise, *see* Pet. App. at 81a-83a, is too little too late. Neither Mohawk's en banc petition to the court of appeals nor its second Petition to this Court makes any attempt to explain why Mohawk should be permitted an about-face to argue the opposite of a position it advocated for two years in the district court and the court of appeals.

[33] *See, e.g., NOW v. Scheidler*, 510 U.S. 249, 262 (1994) (refusing to consider a constitutional challenge to RICO that the defendant failed to raise below); *Am. Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 608 (1985) (refusing to consider unpreserved argument that the complaint failed to allege a violation of 18 U.S.C. § 1962(c)).

[34] *Gonzales v. Duenas-Alvarez*, 127 S. Ct. ___, 2007 WL 98723, at *8 (Jan. 17, 2007) ("Regardless, the lower court did not consider the claims and we decline to reach them in the first instance") (collecting authorities); *Norfolk Southern Ry. Co. v. Sorrells*, 127 S. Ct. ___, 2007 WL 57176 (Jan. 10, 2007) (rejecting a petitioner's attempt to "smuggle" an antecedent question into the merits briefing despite having conceded the question in the lower courts).

developed below, the Court should deny certiorari in this case even if it did.

A. The Circuit Courts Have Unanimously Confirmed That Corporations Can Be Members of Association-in-Fact Enterprises.

On the merits, Mohawk urges the Court to grant certiorari and hold that corporations cannot be members of association-in-fact enterprises as a matter of law.[35] At oral argument last Term and again in the Petition, Mohawk concedes that the circuit courts have unanimously rejected this argument.[36] The courts agree on this point, in spite of Mohawk's arguments about isolated snippets of the statute, because § 1961's broader structure, as well as the drafters' careful use of "includes" rather than "means" in some but not all the definitions, demonstrates that § 1961(4) is drawn to be as broadly inclusive as possible. Reading the statute in context, the circuit courts universally have held that Mohawk's argument contradicts the plain language, leads to absurd results and "makes nonsense of the statute."[37] And although Mohawk claims that all the

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[35] *See* Pet. at 20-24.

[36] *See* Tr. Oral Arg. at 5-6 (No. 05-465) (Apr. 26, 2006) (Justice Scalia observing that 10 federal circuits have concluded corporations can be members of association-in-fact enterprises and that the Court would have been unlikely to grant certiorari to review that question standing alone); *Id.* (Mohawk's counsel acknowledging the lack of any split of authority and the unlikelihood of Supreme Court review). Pet. at 20-22 (acknowledging that the federal courts have universally rejected Mohawk's antecedent enterprise argument).

[37] *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979). *See also United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991); *United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (*citing* extensive authority); *United States v. Console*, 13 F.3d 641, 652 (3d Cir. 1993);

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circuit courts have made a grave error that perniciously extends RICO's reach into "ordinary commercial activity,"[38] Congress has never amended the statute to immunize corporations in the manner Mohawk proposes. Moreover, in its amicus brief to the Court last Term, the United States opposed Mohawk's construction of the statute and argued that it would "significantly impair the government's ability to enforce the statute's substantive provisions and to obtain effective remedies."[39] The Court should not grant certiorari to reconsider a statutory construction that has been well-settled for decades only to make nonsense of the statute and render RICO useless to government prosecutors as well as civil plaintiffs.

B. *Cedric Kushner* Resolved Any Division of Authority Over Whether a Corporation and its Legally Distinct Agents Can Form a RICO Enterprise.

Alternatively, Mohawk urges the Court to resolve a "deep[ening]" and "wid[ening]" circuit split over whether a corporation and its legally distinct, non-employee agents can form an association-in-fact enterprise.[40] But the Court effectively answered that question in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), holding that 18 U.S.C. § 1962(c) requires nothing more than legal

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United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989); *United States v. Perholtz*, 842 F.2d 343, 352-53 (D.C. Cir. 1988); *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1988).

[38] Pet. at 22.

[39] Br. for the United States as *Amicus Curiae* at 16 (05-465).

[40] Pet. at 16-18.

distinctness between the defendant and the RICO enterprise. In *Cedric Kushner*, the complaint named a corporation as the enterprise and the corporation's president as the defendant. Because the defendant was also the corporation's sole owner and employee, he sought to dismiss on the theory that there was no distinction between him and the alleged enterprise. After acknowledging that the statute "suggests" the enterprise cannot be "simply the same 'person' [or defendant] referred to by a different name," the Court went on to hold that even a formal distinction satisfied this requirement:

> The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. ***And we can find nothing in the statute that requires more "separateness" than that.***[41]

Even though the owner/employee was clearly a corporate agent, alleged to be acting in furtherance of the corporation's interests, this Court held that the defendant and his corporation were separate enough to satisfy § 1962(c)'s implied distinctness requirement.[42]

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[41] *Cedric Kushner*, 533 U.S. at 163 (emphasis added).

[42] In *Cedric Kushner*, the corporation was the enterprise, not a member of a larger association in fact. But including the RICO person in a broader association in fact enterprise is entirely consistent with *Kushner*'s distinctness analysis because "[a] collective entity is something more than the members of which it is comprised." *Atlas Pile Driving*, 886 F.2d at 995 (concluding that a corporation can be the RICO defendant as well as a member of a larger association in fact enterprise). *See also United States v. Goldin Indus.*, 219 F.3d 1271, 1276 (11th Cir. 2000) ("To find that a defendant cannot be *part* of the enterprise would undermine the purposes of the RICO statute");

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Mohawk argues that there is a split between the circuits that have (1) adopted a "distinct entities" test in accordance with *Cedric Kushner* and (2) rejected an enterprise comprised of a corporation plus its employees, subsidiaries or agents on the grounds that such an entity "is in reality no more than the defendant itself."[43] With only two exceptions, the cases Mohawk cites to support the second half of this purported split pre-date *Cedric Kushner*. And without exception, those rulings rely on theories the *Cedric Kushner* Court unanimously rejected.[44] For example, *Cedric Kushner* specifically disavowed the argument that the RICO statute requires additional distinctness because a corporation can only act through its employees.[45] The Court similarly held that *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), a Sherman Act case holding that a corporation cannot conspire with a wholly-owned subsidiary, has no application to RICO.[46] Accordingly, while the Court's opinion noted and distinguished many of the cases that Mohawk now

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London, 66 F.3d at 1243; *United States v. Feldman*, 853 F.2d 648, 658 (9th Cir. 1988); *Cullen v. Margiotta*, 811 F.2d 698, 729-30 (2d Cir. 1987).

[43] *See* Pet. at 18.

[44] *See* Resp. Br. at 44-50 (05-465).

[45] *Compare Kushner*, 533 U.S. at 166-67 *with Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("Because a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise.").

[46] *Compare Cedric Kushner*, 533 U.S. at 166 (*Copperweld* "doctrine turns on specific antitrust objectives") *with Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1998) (*citing Copperweld* for proposition that Chrysler and its wholly-owned distributors could not be held liable under RICO).

recites in its petition, *Cedric Kushner*'s analysis dismantles the analytical underpinnings of those cases.[47]

Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004) and *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923 (7th Cir. 2003) are the only post-*Cedric Kushner* cases Mohawk can cite for any lingering doubt about the consequences of *Cedric Kushner*'s unanimous conclusion that legally distinct entities are separate enough to serve as the defendant and enterprise in a RICO case. Because both *Bucklew* and *Baker* fail to acknowledge *Cedric Kushner* and instead apply *Copperweld* despite *Cedric Kushner*'s contrary admonition, those cases are wrongly decided.[48] And although this Court granted certiorari based on Mohawk's *Baker* arguments last Term, Mohawk made no effort to defend *Baker* in its merits briefs. After closely reviewing the merits of this question last Term, the Court dismissed certiorari as improvidently granted.

The Petition urges the Court to revisit the question in this case because Mohawk contends the Ninth Circuit's decision to follow *Cedric Kushner* in *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005), further extends the circuit split.[49] But Mohawk cited

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[47] While the United States took no position on this particular point, the government did oppose Mohawk on the merits and argued that Mohawk's reference to the *Riverwoods* line of cases was a "non sequitur" in this case. *See* U.S. Amicus Br. at 27-30 (No. 05-465).

[48] *See Bucklew*, 329 F.3d at 934 (*citing Copperweld* for the proposition that "A parent and its wholly owned subsidiaries no more have sufficient distinctness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act"); *Baker*, 357 F.3d at 691 (*citing Bucklew*).

[49] *See* Pet. at 18.

Living Designs, to this Court in its merits brief last Term,[50] months before the Court decided to forego the enterprise issues presented in this case. The Court also declined to reach any of the enterprise issues presented in *Living Designs*, by denying the writ in that case one week after dismissing certiorari here.[51] Accordingly, there has been no material change in the circuit courts with respect to the enterprise question the Court dismissed in June 2006. And Mohawk can offer the Court no reason to reinstate certiorari to take up the very same question it declined to reach – in either this case or *Living Designs* – last Term.

III. The Petition's "Business or Property" Questions Are Not Presented in this Case.

In its third Question Presented, Mohawk urges the Court to grant certiorari to address two separate issues concerning the meaning of "business or property" under 18 U.S.C. § 1964(c). The short answer is that neither of these issues has anything to do with this case.

First, Mohawk argues that the Court should grant certiorari to resolve a purported circuit split over whether depressed wages can qualify as an injury to business or property. Mohawk concedes that several circuits have concluded that plaintiffs can bring RICO suits to recover lost wages, but claims the Seventh Circuit created a circuit split on this question with its decision in *Evans v. City of Chicago*, 434 F.3d 916, 925 (7th Cir. 2006).[52] What the

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[50] *See* Br. of Pet. at 31, 35 (Feb. 2, 2005) (No. 05-465).

[51] *See E.I. Dupont de Nemours & Co. v. Living Designs, Inc.*, 126 S. Ct. 2861 (June 12, 2006).

[52] *See* Pet. at 24-25.

Petition does not confess, is that *Evans* expressly distinguishes the depressed wage claims made in this very case.

In *Evans*, the plaintiff sought to recover damages for income lost because he could not work during a period of alleged false imprisonment. Like every circuit to consider the issue, the Seventh Circuit held that the "inability to pursue or obtain meaningful employment" is a "personal injury" that cannot be recovered under RICO.[53] The same limitation applies to private antitrust suits seeking damages for injuries to "business or property" under Section 4 of the Clayton Act, on which 18 U.S.C. § 1964(c) is modeled.[54] *Evans* cites and follows these authorities, including precedents from both the Seventh Circuit and Eleventh Circuits. Accordingly, there is no dispute in these or any other circuit courts about the proposition of law applied in *Evans*.[55]

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[53] *Evans*, 434 F.3d at 926 (collecting cases); *Doe v. Roe*, 958 F.2d 763, 767 (7th Cir. 1992) ("Not surprisingly, all other courts construing this language have likewise concluded that a civil RICO action cannot be premised solely upon personal or emotional injuries") (collecting authorities) *see also,* David B. Smith and Terrance G. Reed, *Civil RICO*, 10.04[1] (Compensable Injuries) (2006) ("One proposition about RICO damages which appears to have widespread support is that the business or property limitation in section 1964(c) does not permit recovery for personal injuries. This limitation applies to private antitrust suits under section 4 of the Clayton Act and courts have similarly construed section 1964(c) in reliance on this interpretation of section 4") (internal quotations omitted).

[54] *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339-40 (1979).

[55] To be sure, *Evans* noted a disagreement with *Diaz v. Gates*, 470 F.3d 897 (9th Cir. 2005) (*en banc*), *cert. denied*, 126 S. Ct. 1069 (2006), but that concerned (1) whether income lost to false imprisonment was a personal injury and (2) conflicting property rights under state law. *See Evans*, 434 F.3d at 931 n.26. Those disagreements are not implicated

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As *Evans* recognized, however, not every claim for lost wages is a claim for personal injury and, in the proper circumstances, a plaintiff may "recover under RICO for loss of an employment opportunity."[56] To illustrate the distinction between personal injuries and damages that qualify as injuries to business or property, the *Evans* court cited the Eleventh Circuit's analysis in this case:

> Where an employee is able to establish that he has been unlawfully deprived of a property right in promised for or contracted for wages, the courts have been amenable to classifying the loss of those wages as injury to "business or property." *See e.g., Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252, 1260 (11th Cir. 2005).[57]

Given the *Evans* court's apparent agreement with the Eleventh Circuit's analysis in *Williams I*, which is repeated verbatim in *Williams II*, there is no circuit split for the Court to resolve here.

Mohawk also urges the Court to grant certiorari to address an opaque dispute over whether "property" may derive from federal or state law – or both. Section 1964(c) is presumably broad enough to protect property interests defined by any source of authority, including federal and state law.[58] But whatever the merits or consequences of

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here because the Respondents do not allege false imprisonment or personal injury.

[56] *Evans*, 434 F.3d at 928.

[57] *Id.*

[58] Even in the takings jurisprudence that Mohawk improperly seeks to import here, this Court has held that "property" under the Fourteenth Amendment can be defined by any source, including state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

this debate, it was neither considered nor resolved in *Williams II*. In fact, the Eleventh Circuit specifically declined to rule on whether depressed wages constitutes an injury to property under § 1964(c):

> We need not reach whether plaintiffs have a property interest because plaintiffs clearly have alleged a business interest affected by Mohawk's alleged RICO violations.[59]

This ruling renders any debate over the potential sources of property interests academic in this case. The Court, therefore, should not grant certiorari on the Petition's third Question Presented.

IV. The Court Should Decline to Review this Interlocutory Order.

Finally, the Court should deny Mohawk's second Petition because the issues at stake here will be greatly shaped and illuminated by the evidence. With respect to both the enterprise and proximate cause issues that Mohawk advances, the Eleventh Circuit held that the Respondents had plainly alleged enough to proceed, but emphasized that they would have to prove their case to prevail.[60] Ultimately, the question of whether Mohawk's

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[59] Pet. App. at 12a. The Petition misrepresents the Complaint by suggesting the Respondents alleged only an injury to property. *See* Pet. at 24. In fact, the Complaint alleges the Respondents and the class have suffered an injury to both business and property. Pet. App. at 103a (Compl. ¶ 86).

[60] *See Williams II*, Pet. App. at 9a ("Whatever difficulties the plaintiffs may have in proving such an allegation, they have sufficiently alleged that Mohawk is engaged in the operation or management of the enterprise."); *id.* at 21a ("Although the plaintiffs' evidence in this case may not ultimately prove the proximate-cause requirement, we

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racketeering activity depresses wages for its legal employees is a question of fact that can only be resolved with data, factual analysis and expert testimony. These issues, therefore, are not well-suited to decision as a matter of law on a motion to dismiss. And even if Mohawk could convince the Court that the Complaint was deficient in some respect, the plaintiffs would be entitled to seek leave to amend their allegations, which "should be freely given when justice so requires."[61]

For these and other similar reasons, this Court traditionally has preferred to grant the writ to review final rather than interlocutory orders.[62] Because the review of a non-final order induces inconvenience, litigation costs and delay in reaching ultimate justice, lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application."[63] More than a century ago, the Court advised that it would not "issue a writ of certiorari to review a decree of the circuit court of appeals on an appeal from an interlocutory order unless it is ***necessary to prevent extraordinary inconvenience and embarrassment*** in the conduct of the cause."[64] Allowing this case to proceed to

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conclude that the plaintiffs' complaint states a sufficiently direct relation between their alleged injury and Mohawk's alleged unlawful predicate acts to withstand Mohawk's motion to dismiss.").

[61] Fed. R. Civ. P. 15(a).

[62] *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (the Court's "normal practice is to deny[ ] interlocutory review") (Stevens, J., dissenting).

[63] *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

[64] *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added). *See also Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

class and merits discovery – more than three years after the case was filed – hardly meets that standard.

CONCLUSION

For the foregoing reasons, the Court should deny Mohawk's second Petition for certiorari in this interlocutory appeal.

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