HOW DOES ONE OPERATE OR MANAGE AN ENTERPRISE? INSIGHTS FROM *BOYLE V. UNITED STATES*

MICHAEL LEVI THOMAS*

The Racketeer Influenced and Corrupt Organizations Act (RICO) is an innovative criminal and civil statute drafted by Congress to combat whole criminal organizations. Section 1962(c) of RICO, its most used provision, prohibits an individual from conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. In Reves v. Ernst & Young*, the Supreme Court sought to resolve a circuit split over the interpretation of this section and ultimately held that the "operation or management" test would determine liability under § 1962(c). However, the* Reves *Court did not fully define the operation or management test, nor have the lower courts applied it in a consistent manner. Recently, Justice Stevens, dissenting in* Boyle v. United States*, alleged that the Court's interpretation of RICO's associated-in-fact enterprise element conflicted with* Reves *and the operation or management test. Justice Alito, writing for the majority, denied such a conflict. This Note continues that conversation by examining whether a conflict exists between the operation or management test and the Court's interpretation of RICO's associated-in-fact enterprise element. Finding that a strict conception of the operation or management test does conflict with the Court's recent interpretation of associated-in-fact enterprise in* Boyle*, this Note proposes a less restrictive interpretation of § 1962(c), and thus a more flexible application of the* Reves *operation or management test, that more consistently interacts with a broad understanding of enterprise as defined in* Boyle*. Simply put, this Note argues that courts can hardly require that a RICO defendant play a role in the leadership of an enterprise itself, while readily applying RICO to enterprises that have no real leadership structure.*

INTRODUCTION

This Note examines conflicting interpretations of the Racketeer Influenced and Corrupt Organizations Act (RICO).[1] The heart of this Note's analysis is the conflict between the Supreme Court's recent decision in *Boyle v. United States*[2] and the earlier case of *Reves v. Ernst & Young*,[3] which set out the Court's ill-defined operation or management test. In *Boyle*, the Supreme Court denied that there was

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1 18 U.S.C. §§ 1961–1968 (2006).

2 129 S. Ct. 2237 (2009).

3 507 U.S. 170 (1993).

a conflict between its holding and the operation or management test, but in practice, before *Boyle*, various lower courts had applied the operation or management test in a strict manner that conflicts with the Court's new holding. While *Boyle* held that members of a crime group who simply assisted in carrying out crimes—and who had no leadership or decision-making role within the group—could be liable under RICO, previous cases that applied the operation or management test had required a greater level of leadership or decision making. *United States v. Viola* is one of these cases.[4]

Viola arose out of a multidefendant jury trial against a crime ring that operated on the Red Hook, Brooklyn, waterfront.[5] Under the direction of Anthony Viola, the ring primarily engaged in importing cocaine and marijuana, stealing goods from the pier and adjoining warehouses, and selling those stolen goods on the black market. Michael Formisano, one of the defendants in *Viola*, performed odd jobs for Anthony Viola. At trial, the government proved that Formisano knowingly transported and sold stolen goods on behalf of the Viola ring on at least two occasions.[6] Viola, Formisano, and other members of the crime ring were prosecuted under RICO—an innovative criminal and civil conspiracy statute passed by Congress as part of the Organized Crime Control Act of 1970.[7] As the Act's name suggests, it was drafted in response to growing concerns over the Mafia.[8] Nonetheless, RICO was broadly written to encompass the

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[4] 35 F.3d 37 (2d Cir. 1994). For a similar application of the operation or management test in the context of a legitimate enterprise, see *Harpole Architects, P.C. v. Barlow*, 668 F. Supp. 2d 68, 75–76 (D.D.C. 2009), in which the court held that an employee of an enterprise who oversaw its finances did not meet the operation or management test because she was not part of the upper management. For an application of the operation or management test in the context of professionals, such as attorneys and accountants, see *infra* notes 58–59 and accompanying text. For other applications of the operation and management test by lower courts, see generally *infra* Part I.A.2.

[5] The background information regarding *Viola* is derived from the Second Circuit opinion. *See* 35 F.3d at 39–40. The original indictment was against seventeen individuals. The appeal before the Second Circuit involved five of those defendants who were tried and convicted together. *Id.*

[6] *Id.* at 43.

[7] Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941–48 (1970) (codified at 18 U.S.C. §§ 1961–1968 (2006)).

[8] *See* Pub. L. No. 91-452, 84 Stat. 922, 922 ("[O]rganized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy . . . ."); H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 245 (1989) ("Organized crime was without a doubt Congress' major target [in passing the Act] . . . ."). A special Senate committee, established in 1950 and popularly known as the Kefauver Committee, initially highlighted the problems created by organized crime. *See generally* ESTES KEFAUVER, CRIME IN AMERICA (Sidney Shalett ed., 1968) (describing Senator Kefauver's experiences as Chairman of the Senate Crime Committee). Adding to this work, hearings led by Senator John McClellan exposed the structure of the Mafia and

various forms that criminal groups could take on,[9] essentially making it a crime to engage in a pattern of racketeering activity in connection with the investment in, conduct of, establishment of, or acquisition of an enterprise, or to conspire to do any of these.[10]

The defendants in *Viola* were convicted of violating § 1962(c) of RICO, which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[11]

Section 1962(c)—RICO's most encompassing substantive provision—is used by plaintiffs and prosecutors more than any other RICO provision[12] because it essentially prohibits the repeated use of an enterprise in an unlawful manner. To secure a conviction under § 1962(c) against the defendants in *Viola*, the government had to prove 1) the existence of an enterprise; 2) that the defendants were employed by or associated with that enterprise; 3) that the defendants conducted or

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included the first public testimony about the Mafia by a former Mafia member. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON GOV'T OPERATIONS, ORGANIZED CRIME AND ILLICIT TRAFFIC IN NARCOTICS, S. REP. NO. 89-72, at 1 (1965).

[9] *See H. J. Inc.*, 492 U.S. at 248 ("Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."). The Racketeer Influenced and Corrupt Organizations Act (RICO) itself makes no mention of organized crime or the Mafia. Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 773 (1990). Instead it uses the broad term "enterprise," which can include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (2006).

[10] 18 U.S.C. § 1962(a)–(d); Caroline N. Mitchell, Jordan Cunningham & Mark R. Lentz, *Returning RICO to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. § 1961(4)*, 13 FORDHAM J. CORP. & FIN. L. 1, 2 (2008). The primary novelty of RICO is that it imposes heightened criminal sanctions upon those who use an "enterprise" to commit crimes, thus making it possible to "attack[ ] the organization itself." Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 648 (1989). Criminal violations of RICO may result in a fine, imprisonment of up to twenty years (or life if the racketeering activity is based on a crime that carries a maximum penalty of life imprisonment), and forfeiture of proceeds, property, or interest in an enterprise derived from the racketeering activity. § 1963(a). The other novel feature of RICO is that it allows for private civil enforcement, providing treble damages and attorneys' fees to those plaintiffs who are successful. *See* § 1964(c).

[11] § 1962(c).

[12] *See* Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. §§ 1962(c) and 1964(c)*, 32 VT. L. REV. 171, 173 (2007) ("[Section] 1962(c) is the most commonly charged RICO violation . . . ."); Ira H. Raphaelson & Michelle D. Bernard, *RICO and the "Operation or Management" Test: The Potential Chilling Effect on Criminal Prosecutions*, 28 U. RICH. L. REV. 669, 696 (1994) (providing data that ninety-eight percent of RICO indictments include some allegation of a violation of § 1962(c)).

participated in the conduct of that enterprise's affairs; and 4) that they did so through a pattern of racketeering activity.[13] The enterprise in *Viola* was the Viola crime ring. Specifically, this crime ring was an *associated-in-fact enterprise*, which is defined by the statute as "a group of individuals associated in fact although not a legal entity."[14] Formisano, employed by Viola himself, was shown to be employed by or associated with this enterprise. Formisano's multiple acts of transporting and selling stolen goods constituted a "pattern of racketeering activity." The trial court concluded that such activity on behalf of the crime ring constituted conducting or participating in the conduct of the enterprise's affairs.[15]

The Second Circuit subsequently overturned Formisano's RICO conviction, finding that under the "operation or management" test handed down by the Supreme Court in *Reves v. Ernst & Young*,[16] Formisano did not conduct or participate in the conduct of the enterprise's affairs because "he simply did not come within the circle of people who operated or managed the enterprise's affairs."[17] Yet this test that the Second Circuit used to overturn Formisano's conviction was not adequately explained when the Supreme Court handed it down in *Reves*, and lower courts have not applied it in a consistent

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[13] Racketeering activity is defined as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . , which is chargeable under State law and punishable by imprisonment for more than one year," or any of a long list of other federal crimes. 18 U.S.C. § 1961(1); *see also* Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in* Reves, 51 WASH. & LEE L. REV. 61, 63 (1994) ("'[R]acketeering activity[ ]' is simply the violation of any of a laundry list of various crimes—also called predicate acts—catalogued in section 1961(1)."). A *pattern of* racketeering activity is "at least two acts of racketeering activity, . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." § 1961(5).

[14] § 1961(4). Since a crime group (such as that in *Viola*) is usually not a legal entity, it falls under this category. *Id.* If one conceptualizes a typical criminal scenario (in which there is a victim and perpetrator), an enterprise under § 1962(c) can occupy the role of perpetrator, victim, or instrument used to carry out the crime. If the enterprise is an illegal group, which exists for the purpose of committing crimes, it occupies the role of perpetrator because it is collectively committing crimes against others. G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 308–09 & nn.176–78 (1982). If the enterprise is an otherwise legitimate organization, such as a union or business, and an individual conducts the affairs of that enterprise through a pattern of racketeering activity, the enterprise can occupy the role of victim (if the individual is committing crimes against the enterprise itself, such as embezzlement) or instrument (by providing a means for an individual to commit crimes against others). *Id.*

[15] United States v. Viola, 35 F.3d 37, 39–40 (2d Cir. 1994).

[16] 507 U.S. 170 (1993). For a full discussion of *Reves*, see *infra* Part I.A.1.

[17] *Viola*, 35 F.3d at 43. The Second Circuit described Formisano as one who was not on the Viola crime ring's ladder of operation, but instead "was sweeping up the floor underneath it." *Id.*

manner.[18] In *Boyle v. United States*, Justice Stevens suggested that the Court's current interpretation of RICO's associated-in-fact enterprise is in conflict with the operation or management test, while the majority dismissed such a conflict.[19] However, when *Boyle* is viewed alongside cases like *Viola*, a conflict becomes apparent. While the *Viola* court held that Formisano could not be liable under RICO because he did not hold a decision-making position in the Viola crime ring,[20] *Boyle* held that an enterprise sufficient for RICO liability could consist of a group that has no decision-making structure and that is comprised of those who simply carry out crimes together.

This Note continues the conversation between the majority and dissent in *Boyle* by examining whether a conflict exists between the operation or management test and the definition of associated-in-fact enterprise adopted by the Court in *Boyle*. Part I describes the interpretive history of § 1962(c) and RICO's associated-in-fact enterprise. I demonstrate that despite its lack of clarity, the holding of *Reves v. Ernst & Young* suggests that the operation or management test is to be applied strictly and in a structural manner. I go on to show the differing ways that the lower courts have grappled with *Reves*'s operation or management test. Then, I describe *Boyle v. United States*, in which the Court held that an associated-in-fact RICO enterprise need not have any real organizational structure. In Part II, I argue that a strict application of the *Reves* operation or management test, and thus a restrictive reading of § 1962(c), is in conflict with the interpretation of associated-in-fact enterprise in *Boyle*, presenting inconsistency in interpretation and application of the statute. In light of this conflict, in Part III, I propose that the *Reves* operation or management test be understood to require only that an individual knowingly make decisions as to an enterprise's affairs *or* knowingly carry out those affairs.

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[18] *See infra* Part I.A.2 (describing the application of the operation or management test by the lower courts).

[19] 129 S. Ct. 2237, 2243 n.3, 2248–49 (2009) (Stevens, J., dissenting). See *infra* notes 88–90 and accompanying text for a description of the exchange between the majority and dissent.

[20] *See* Carrie J. DiSanto, Case Comment, Reves v. Ernst & Young*: The Supreme Court's Enigmatic Attempt To Limit Outsider Liability Under 18 U.S.C. 1962(c)*, 71 NOTRE DAME L. REV. 1059, 1084 (1996) (suggesting that Formisano should have been liable under § 1962(c)).

I
SECTION 1962(C) AND THE ENTERPRISE ELEMENT

A. Section 1962(c): "Conduct or Participate, Directly or Indirectly, in the Conduct of Such Enterprise's Affairs"

Before the Supreme Court weighed in, the lower courts crafted varying interpretations of what was required to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" under § 1962(c) of RICO. The prevailing tests at the time were the relatedness test,[21] nexus test,[22] and operation or management test.[23] In the 1993 case of *Reves v. Ernst & Young*, the Supreme Court

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[21] Employed by the Second, Third, and Ninth Circuits, the "relatedness" test was satisfied if the defendant was "enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise," or if "the predicate offenses [were] related to the activities of [the] enterprise." United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980); *see also* United States v. Yarbrough, 852 F.2d 1522, 1544 (9th Cir. 1988) (citing *Scotto* and applying the same test, despite referring to it as a "nexus" test); United States v. Provenzano, 688 F.2d 194, 200 (3d Cir. 1982) (citing *Scotto*).

[22] The narrower "nexus" test was employed by the Fifth and Seventh Circuits and was satisfied if (1) "the defendant's position in the enterprise facilitated his commission of the racketeering acts," and (2) "the predicate acts had some effect on the . . . enterprise." United States v. Cauble, 706 F.2d 1322, 1331–33 (5th Cir. 1983); *see also* Overnite Transp. Co. v. Truck Drivers Union Local No. 705, 904 F.2d 391, 393 (7th Cir. 1990) (citing *Cauble*); J. Todd Benson, Note, Reves v. Ernst & Young*: Is RICO Corrupt?*, 54 LA. L. REV. 1685, 1689 (1994) (describing the nexus test as a two- rather than a three-pronged test, since the first prong is simply the "proof required to establish *any* RICO violation"). The Eleventh Circuit—although applying a different, more vague analysis—likewise required a sufficient "nexus between the enterprise and the racketeering activity." United States v. Carter, 721 F.2d 1514, 1525–27 (11th Cir. 1984); *see also* Scott Paccagnini, *How Low Can You Go (Down the Ladder): The Vertical Reach of RICO*, 37 J. MARSHALL L. REV. 1, 11 (2003) (describing the Eleventh Circuit's "facilitation or utilization" test as a nexus test).

[23] The Fourth, Eighth, and D.C. Circuits employed the most restrictive test, which required that an individual participate in the operation or management of the enterprise. *E.g.*, Yellow Bus Lines, Inc. v. Drivers Local Union 639, 913 F.2d 948, 954 (D.C. Cir. 1990); Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir. 1983); United States v. Mandel, 591 F.2d 1347, 1375 (4th Cir. 1979); *see* Paccagnini, *supra* note 22, at 8 (describing the operation or management test as the most restrictive pre-*Reves* test). The Fourth Circuit found that § 1962(c) was often referred to in the legislative history as prohibiting "operation of any enterprise" and concluded that interpreting § 1962(c) in this way would allow it to complement § 1962(a) and (b) in carrying out the congressional purpose of preventing infiltration of legitimate businesses. *Mandel*, 591 F.2d at 1375–76. Without much analysis, the Eighth Circuit also adopted this test. *See Bennett*, 710 F.2d at 1364. Also relying on legislative history and the perceived purpose of RICO, the D.C. Circuit adopted an even more restrictive version of the operation or management test, concluding that "a person must participate, to some extent, in 'running the show.'" *Yellow Bus Lines*, 913 F.2d at 954. The D.C. Circuit placed particular emphasis on the phrase "conduct of [the enterprise's] affairs," which it believed referred to "guidance, management, direction or other exercise of control." *Id.* (alteration in original) (quoting 18 U.S.C. § 1962(c) (1988)).

attempted to resolve this split by adopting the operation or management test.[24]

1. Reves v. Ernst & Young*: The Operation or Management Test*

Reves involved a suit by the noteholders of a farmers' co-op against the co-op's accounting firm, Ernst & Young, for violating § 1962(c) of RICO.[25] The noteholders alleged that Ernst & Young knowingly created fraudulent financial statements and audit reports for the co-op.[26] Based on these allegations, a jury found that Ernst & Young committed state and federal securities fraud. Nonetheless, the trial court dismissed the § 1962(c) claim because Ernst & Young did not "participat[e] in the management or operation of the Co-op."[27] The Eighth Circuit and Supreme Court affirmed.

Setting out to interpret § 1962(c), the seven-justice majority opinion written by Justice Blackmun began with textual analysis. The Court found it reasonable to give similar meanings to both uses of the word "conduct" in the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs."[28] The Court defined conduct as "to lead, run, manage, or direct."[29] In response to the dissent's argument that "conduct" carries two different meanings because it is used first as a verb, and then as a noun, the majority stated that conduct must carry "an element of direction when used as a noun," because otherwise its use in the statute becomes "superfluous."[30] The majority thus concluded that both the noun and verb

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[24] 507 U.S. 170 (1993).

[25] *Id.* at 172–77. The accounting firm that performed the audits for the co-op was originally Russell Brown. Russell Brown was purchased by Arthur Young, which, by the time of the Supreme Court decision, became Ernst & Young. *See id.* at 173 & n.2. For clarity's sake, I refer to the accounting firm as Ernst & Young throughout.

[26] *Id.* at 175–77. The allegations stemmed from Ernst & Young's inaccurate valuation of a gasohol plant that the co-op had purchased. By incorrectly valuing the plant, the co-op looked solvent on its books when it really was not. *Id.* at 172–74. Despite evidence tending to show that Ernst & Young knew this valuation was faulty, the firm used it in the co-op's 1981 and 1982 audits and did not reveal their valuation decision or its consequences to the co-op board, shareholders, or noteholders. *See* Arthur Young & Co. v. Reves, 937 F.2d 1310, 1316–20 (8th Cir. 1991).

[27] *Arthur Young & Co.*, 937 F.2d at 1323–24. It is important to note that the fraud that Ernst & Young committed would satisfy a pattern of racketeering activity. *See supra* note 13 (defining "pattern of racketeering activity"). Nor was there a question of whether Ernst & Young was employed by or associated with an enterprise. The sole reason that the noteholders were precluded from pursuing treble damages is that the Eighth Circuit and the Supreme Court concluded that Ernst & Young could not be found to have conducted or participated, directly or indirectly, in the conduct of the co-op's affairs.

[28] *Reves*, 507 U.S. at 177 (quoting § 1962(c)) (internal quotation marks omitted) (citing Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986)).

[29] *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 474 (1976)).

[30] *Id.* at 178.

forms of "conduct" require an element of direction. It is from this textual analysis that the Court purported to derive its interpretation of § 1962(c): "In order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs."[31]

The Court went on to point out that "the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise." Instead, "*some* part in directing the enterprise's affairs is required."[32] In short, the Court used textual analysis to find that a violation of § 1962(c) requires that a defendant have some part in directing an enterprise's affairs, but it does not require a formal position in the enterprise.

The Court's initial interpretation of § 1962(c) suggests expansive liability. While the Court concluded that the term "conduct" requires an element of direction, liability does not turn on whether an individual has a formal position in the enterprise; only *some part in directing the affairs* is required. One understanding of the Court's new test is that the phrase "operation or management" is simply shorthand for the requirement that some part in directing the affairs is necessary. In fact, the Court concluded its initial analysis by stating, "The 'operation or management' test expresses this requirement in a formulation that is easy to apply."[33] Such a reading is supported by the fact that the Court did not derive the terms "operation or management" from the text of the statute—instead, it derived only the requirement that one must have some part in directing an enterprise's affairs. Thus, *operation or management* appears, at first, not to be a requirement in itself, but simply a shorthand for the more precise requirement that the defendant have some part in directing the enterprise's affairs.

However, the majority continued its analysis by examining the legislative history, responding to the plaintiffs' and United States' arguments, and applying its interpretation of the test to the facts. Because of these efforts, the operation or management test grew teeth. Contrary to precedent, the Court declared that RICO's liberal construction clause—Congress's command to construe RICO liberally—was to play no part in the interpretation of § 1962(c) because the intent of Congress was "clear."[34] The Court gained

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[31] *Id.* at 179 (quoting § 1962(c)).

[32] *Id.* (quoting § 1962(c)).

[33] *Id.*

[34] *Id.* at 183–84 ("The clause 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.'" (quoting Sedima v. Imrex Co., 473 U.S. 479, 491 n.10 (1985))).

support for the phrase "operation or management" by examining the legislative history and finding numerous instances in which § 1962(c) was characterized "as prohibiting the operation of an enterprise through a pattern of racketeering activity."[35] The Court's defense of the operation or management test suggested that it was to be applied in a hierarchical manner: It pointed out that an enterprise may be operated "not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management," and noted that while § 1962(c) specifically states that it applies to those "associated" with an enterprise, it cannot apply to "complete 'outsiders'" because an individual must "participate in the operation or management of the enterprise itself."[36] In summation, the Court described its holding as follows: "'[T]o conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must participate in the operation or management of the enterprise itself . . . ."[37] While the majority did not explain how this holding applied to the facts before it, a possible understanding is that Ernst & Young was not liable because it was outside of the co-op's operational structure, and hence had no control over the enterprise.[38]

RICO's liberal construction clause provides, "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947. Prior to *Reves*, the Supreme Court "rejected narrow interpretations of RICO espoused by the lower courts" and "heeded the liberal construction clause appended to the statute." Alexander D. Tripp, Comment, *Margins of the Mob: A Comparison of* Reves v. Ernst & Young *with Criminal Association Laws in Italy and France*, 20 FORDHAM INT'L L.J. 263, 289 (1996). *See generally* David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41 (1996) (examining the application of RICO's liberal construction clause).

[35] *Reves*, 507 U.S. at 179–83; *see infra* notes 111–15 and accompanying text (describing the analysis of legislative history in *Reves*). At the conclusion of its legislative-history analysis, the Court proclaims, for the first time, that "one is not liable . . . unless one has participated in the operation or management of the enterprise itself." *Reves*, 507 U.S. at 183.

[36] *Reves*, 507 U.S. at 184–85; *see also infra* Part II.B (describing the inherent structural requirement in *Reves*).

[37] *Reves*, 507 U.S. at 185 (quoting § 1962(c)).

[38] *See* cases cited *infra* note 47 (interpreting the holding of *Reves* in this manner). The *Reves* majority simply stated,

> [W]e only could conclude that [Ernst &] Young participated in the operation or management of the Co-Op itself if [Ernst &] Young's failure to tell the Co-Op's board that the plant should have been given its fair market value constituted such participation. We think that [Ernst &] Young's failure in this respect is not sufficient to give rise to liability under § 1962(c).

Reves, 507 U.S. at 186. However, at an earlier point in its analysis, the Court suggested that Ernst & Young was not liable because it was outside of the co-op's operational structure: "We need not decide . . . how far § 1962(c) extends down the ladder of operation because it is clear that [Ernst &] Young was not acting under the direction of the Co-Op's officers or board." *Id.* at 184 n.9. The dissent, on the other hand, gave little attention to Ernst &

Despite the majority's belief that the operation or management test was a "formulation that is easy to apply,"[39] the test left a number of inconsistencies and open questions for lower courts to sort out.[40] Of chief importance, the Court did not make clear whether the requirement for § 1962(c) is that "one must have *some* part in directing" the enterprise's affairs—allowing operation or management to serve simply as a name for this test—or if the requirement was instead that one must "participate in the operation or management of the enterprise itself."[41] The majority's textual analysis suggests that the former applies; its further explanation and application to the facts suggests that the latter governs.[42] The primary distinction between these two possible tests is what they might require the defendant to direct. Employing the directing of affairs formulation, one might say that an individual need only have some part in directing the execution of some of the various activities that the enterprise does. In other words, the individual must knowingly make decisions as to the enterprise's affairs or knowingly carry out those affairs.[43] But under the operation or management formulation, one might think that an individual has to do more by playing some part in directing the enterprise itself.[44]

2. Erratic Application of the Court's "Easy To Apply" Test

The circuit courts have given the imprecise holding of *Reves* varying weight and have interpreted it in differing ways.[45] The lower courts have consistently applied *Reves* in one circumstance though: when the defendants are those at the top of an enterprise—the actual

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Young's posture in relation to the co-op's operational structure. It instead pointed out how Ernst & Young's *actions* demonstrated that it met the operation or management test. *Id.* at 189–96 (Souter, J., dissenting).

[39] *Reves*, 507 U.S. at 179.

[40] Michael Vitiello, *More Noise from the Tower of Babel: Making "Sense" Out of* Reves v. Ernst & Young, 56 OHIO ST. L.J. 1363, 1401 (1995); Benson, *supra* note 22, at 1698; *see infra* Part I.A.2 (describing lower courts' applications of *Reves*).

[41] *Reves*, 507 U.S. at 170.

[42] *Compare supra* notes 28–33 and accompanying text (describing the initial textual analysis in *Reves*), *with supra* notes 34–38 and accompanying text (describing the further analysis in *Reves*, where the Court examined the legislative history, responded to the arguments of the plaintiffs and United States, and applied its interpretation to the facts).

[43] *See infra* Part III.B (arguing for such an application of *Reves*).

[44] *See supra* notes 37–38 and accompanying text (noting the Court's conclusion that participation in the operation or management of the enterprise was required and that Ernst & Young might have avoided liability because it did not have control over the enterprise).

[45] For an extensive survey of early applications of *Reves*, see G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1484–558 (1996).

managers.[46] Additionally, despite their differing understandings of *Reves*, lower courts almost always apply the operation or management test in a structural manner by placing a particular emphasis on what *position* a defendant held within an enterprise's structure—as opposed to focusing on the actions of the defendant in relation to the enterprise.

The First, Sixth, Seventh, and Eleventh Circuits have characterized *Reves* as "a case about the liability of *outsiders*," in which Ernst & Young was not liable because it was "outside the chain of command."[47] For those individuals found to be within an enterprise's chain of command, these courts apply a specific test: "[O]ne may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them."[48] This manner of applying *Reves* to enterprise insiders is based on the Supreme Court's statement that those "under the direction of upper management" can take part in the operation or management of the enterprise as well.[49]

Other courts have sought to hold true to *Reves*'s statement that a defendant "must participate in the operation or management of the enterprise itself"[50] by applying this phrase to those both inside and outside an enterprise.[51] Yet courts taking this approach do not apply

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[46] *See* Christopher W. Madel, *The Modern RICO Enterprise: The Inoperation and Mismanagement of* Reves v. Ernst & Young, 71 TUL. L. REV. 1133, 1171–73 & 1172 n.169 (1997) ("Courts normally assume or quickly hold that kingpins satisfy the operation or management test.").

[47] United States v. Oreto, 37 F.3d 739, 750 (1st Cir. 1994); *see also, e.g.*, United States v. Fowler, 535 F.3d 408, 418–19 (6th Cir. 2008) (endorsing *Oreto*'s interpretation of *Reves*); United States v. Browne, 505 F.3d 1229, 1277 (11th Cir. 2007) (same); MCM Partners v. Andrews-Bartlett & Assocs., 62 F.3d 967, 978–79 (7th Cir. 1995) (same). The basis of this application is the Supreme Court's statement that it "need not decide in this case how far § 1962(c) extends down the ladder of operation because it is clear that Arthur Young was not acting under the direction of the Co-Op's officers or board." Reves v. Ernst & Young, 507 U.S. 170, 184 n.9 (1993); *see Oreto*, 37 F.3d at 750 ("[T]he reason the accountants were not liable in *Reves* is that . . . [they] were outside the chain of command through which the enterprise's affairs were conducted."). For a general description of this manner of applying *Reves*, see Adam B. Weiss, Note, *From the Bonannos to the Bin Ladens: The* Reves *Operation or Management Test and the Viability of Civil RICO Suits Against Financial Supporters of Terrorism*, 110 COLUM. L. REV. 1123, 1137–38 (2010).

[48] *Oreto*, 37 F.3d at 750. Various individuals have satisfied this test. *See, e.g.*, *Fowler*, 535 F.3d at 418–19 (member of a criminal enterprise who murdered, stole, extorted, and distributed drugs at the behest of the enterprise's leaders); *MCM Partners*, 62 F.3d at 978–79 (two companies that committed racketeering acts at the behest of a third company in an associated-in-fact enterprise); *Oreto*, 37 F.3d at 750–51 (debt collectors in a loan sharking operation).

[49] *Fowler*, 535 F.3d at 419 (quoting *Reves*, 507 U.S. at 184); *Browne*, 505 F.3d at 1277 (same); *MCM Partners*, 62 F.3d at 978 (same); *Oreto*, 37 F.3d at 750 (same).

[50] *Reves*, 507 U.S. at 185.

[51] *See, e.g.*, United States v. Diaz, 176 F.3d 52, 92–93 (2d Cir. 1999) (holding that a defendant who is not in a managerial role within the enterprise may participate in the

the operation or management test in a consistent manner. At a minimum, they agree that knowingly implementing decisions is not sufficient, often holding that "simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient."[52] As a corollary, if plaintiffs or prosecutors can show that an individual had discretionary authority in how he carried out his activities, some courts are more likely to find that he is liable.[53] A common thread throughout these cases is a structural analysis that asks where the defendant is on the "ladder of operation"—the further down a defendant is on the organizational ladder, the less likely a court is to find that she meets the operation or management test.[54] A few courts are very reluctant to extend liability down the organizational ladder even slightly.[55] Additionally, when a defendant is not in

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operation or management if he "exercise[s] broad discretion" in carrying out acts on behalf of the enterprise (quoting Napoli v. United States, 45 F.3d 680, 683 (2d Cir. 1995)) (internal quotation marks omitted)); United States v. Viola, 35 F.3d 37, 40–41, 43 (2d Cir. 1994) (finding that a minor member of a criminal enterprise "did not come within the circle of people who operated or managed the enterprise's affairs"); Univ. of Md. v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1538–40 (3d Cir. 1993) (holding that an outside accounting firm was not liable because it did not have "any part in operating or managing the affairs of" the enterprise); Harpole Architects, P.C. v. Barlow, 668 F. Supp. 2d 68, 75–76 (D.D.C. 2009) (finding that a "'lower rung' participant" in an enterprise was not liable because she did not participate in the operation or management of the enterprise itself).

[52] *Viola*, 35 F.3d at 41; *see Univ. of Md.*, 966 F.2d at 1538–39 ("[N]ot even action involving some degree of decisionmaking constitutes participation in the affairs of an enterprise.").

[53] *See, e.g.*, Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1156 (11th Cir. 2006) ("[D]efendant also must 'knowingly implement[ ]' and 'mak[e]' decisions." (third alteration in original) (quoting United States v. Starrett, 55 F.3d 1525, 1548 (11th Cir. 1995))); *Diaz*, 176 F.3d at 93 ("Antuna and Cruz's decision to kill White . . . demonstrates that they had discretionary authority in carrying out the instructions of their principals."); *Viola*, 35 F.3d at 43 (suggesting that the defendant would have been liable if his actions were taken with "the exercise of appreciable discretionary authority"). On the other hand, some courts place a greater emphasis on the position of the individual in the enterprise. *See, e.g.*, *Harpole*, 668 F. Supp. 2d at 75 ("'[L]ower rung participants in the enterprise' will only be liable if they act 'under the direction of upper management.'" (quoting *Reves*, 507 U.S. at 184) (alteration in original)).

[54] *See, e.g.*, *Diaz*, 176 F.3d at 92–93 ("Antuna and Cruz were both on the ladder, rather than under it."); *Viola*, 35 F.3d at 43 ("Formisano was not on the ladder at all, but rather . . . was sweeping up the floor underneath it."); United States v. Thai, 29 F.3d 785, 816 (2d Cir. 1994) ("Quang . . . participated in the conduct of BTK's affairs . . . [, as] he was not at the bottom of the management chain. . . . Without deciding how far down the ladder of operation § 1962(c) extends, we have no doubt that it extends at least to Quang.").

[55] *See, e.g.*, United States v. Cummings, 395 F.3d 392, 398–400 (7th Cir. 2005) (finding that customer service supervisors and an individual in the purchasing department were not operators or managers of the enterprise when they released company information in exchange for bribes); Stone v. Kirk, 8 F.3d 1079, 1092 (6th Cir. 1993) (holding that a sales representative who violated securities laws on behalf of the enterprise was not liable); *Harpole*, 668 F. Supp. 2d at 75–76 ("Defendant was a 'bookkeeper and administrative

a traditional managerial role, some courts have asked whether she was "integral" to the enterprise's activities, focusing more on the "operation" element of the operation or management test.[56] Courts often resort to this "integral" inquiry when a defendant was clearly using an enterprise as a means to conduct racketeering activity, but there is no traditional management-employee relationship. This scenario is common in associated-in-fact enterprises.[57]

Finally, when a defendant is a professional—such as an accountant or attorney—providing services to an enterprise, courts are quick to find that the defendant does not meet the operation or management test.[58] Whether this is an appropriate way to apply RICO or not, it was an anticipated result of *Reves*,[59] which exculpated an accounting firm.

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assistant,' whose duties included 'overseeing the firm's finances . . . .' She was not, however, a member of the 'upper management' of the enterprise." (quoting Complaint at 2, *Harpole*, 668 F. Supp. 2d 68 (No. 1:09-cv-01598))).

[56] *See, e.g.*, United States v. Shamah, 624 F.3d 449, 455 (7th Cir. 2010) ("Given his discretion and authority as a police officer, . . . Shamah operated or managed the integral duties of the police department's daily affairs."); United States v. Parise, 159 F.3d 790, 796–97 (3d Cir. 1998) ("[E]ven before he had a formal role within the [enterprise, the defendant] was deeply involved in—and integral to—the operation of [it]."); United States v. Shifman, 124 F.3d 31, 36 (1st Cir. 1997) ("[A] defendant who is 'plainly integral to carrying out' the enterprise's activities may be held criminally liable under RICO." (quoting United States v. Oreto, 37 F.3d 739, 750 (1st Cir. 1994))); United States v. Wong, 40 F.3d 1347, 1373–74 (2d Cir. 1994) (finding § 1962(c) satisfied since the defendants were "intimately involved" in the criminal activities of the enterprise). This test has also been described as seeking to ensure a sufficient nexus between the individual and the enterprise's activities. *See* United States v. Urban, 404 F.3d 754, 770 (3d Cir. 2005) (quoting *Parise*, 159 F.3d at 796, for the proposition that *Reves* limits liability to those instances where there is a "nexus between the person and the conduct in the affairs of an enterprise" (internal quotation marks omitted)).

[57] *See, e.g.*, cases cited *supra* note 56 (involving primarily associated-in-fact enterprises).

[58] *See* Madel, *supra* note 46, at 1190 (explaining how some courts view *Reves* as exempting professionals from § 1962(c) liability); Vitiello, *supra* note 40, at 1387–91 (same); *see also, e.g.*, Baumer v. Pachl, 8 F.3d 1341, 1344–45 (9th Cir. 1993) (attorney's activities for an enterprise did not satisfy *Reves*); Univ. of Md. v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1538–40 (3d Cir. 1993) (accounting firm not liable since it was performing generic financial services for an insurance company); Nolte v. Pearson, 994 F.2d 1311, 1317 (8th Cir. 1993) (attorney not found to have participated in the operation or management of enterprise); Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L., 832 F. Supp. 585, 591–92 (E.D.N.Y. 1993) (simply "providing legal advice and legal services" not sufficient under *Reves*); Sassoon v. Altgeld, 777, Inc., 822 F. Supp. 1303, 1307 (N.D. Ill. 1993) ("providing legal services" to partnership not sufficient under *Reves*). *But see* Handeen v. Lemaire, 112 F.3d 1339, 1350–51 (8th Cir. 1997) (attorney satisfied *Reves* by "navigat[ing] estate through the bankruptcy system").

[59] *See Handeen*, 112 F.3d at 1348 (describing changes in professional liability after *Reves* as "not especially surprising"). Following *Reves*, an array of articles emerged examining the new landscape of professional liability under RICO. *See, e.g.*, Melissa Harrison, *The Assault on the Liability of Outside Professionals: Are Lawyers and Accountants Off the*

B. Defining the RICO Enterprise: Is Structure Required?

In any § 1962(c) case, determining whether an individual's acts satisfy § 1962(c) and the *Reves* operation or management test requires a definition of the entity at hand. Consequently, the practical impact of the various tests employed by the lower courts seeking to apply § 1962(c) and *Reves* is significantly influenced by how an enterprise is conceptualized in the first instance. This interrelation and interdependence between the substantive requirements of § 1962(c) and RICO's enterprise element are at the heart of the conversation between the majority and dissent in *Boyle*[60]—a conversation this Note takes to its logical conclusion. With that in mind, the following examines how RICO's enterprise element has been defined by the lower courts and ultimately by the Supreme Court in *Boyle*.

An enterprise can be "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[61] This definition is exceedingly broad; it had to be in order to encompass the various forms that legal and illegal groups could take on and the various ways that individuals could commit crimes using these groups.[62] The definition's broadest form is a "group of individuals associated in fact although not a legal entity" (known as an associated-in-fact enterprise). Its breadth has caused courts much grief, as they have struggled to determine what a party must demonstrate to prove the existence of an associated-in-fact enterprise in a particular case. In *United States v. Turkette*, the Supreme Court shed some light on this subject by holding that the term "enterprise" encompassed both legitimate and illegitimate groups.[63] In the course of its opinion, the Court described an enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct," which "is proved by

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Hook?, 65 U. CIN. L. REV. 473 (1997); Catherine M. Clarkin, Note, Reves v. Ernst & Young*: The Elimination of Professional Liability Under RICO*, 43 CATH. U. L. REV. 1025 (1994); Jeffrey N. Shapiro, Comment, *Attorney Liability Under RICO § 1962(c) After* Reves v Ernst & Young, 61 U. CHI. L. REV. 1153 (1994). For the argument that *Reves* should not be applied in this manner, see *infra* note 203 and accompanying text.

[60] *See infra* notes 88–90, 144–49 and accompanying text (describing the conversation between the majority and dissent in *Boyle*).

[61] 18 U.S.C. § 1961(4) (2006).

[62] *See* Lynch, *supra* note 9, at 771 (describing Congress's decision to define "enterprise" broadly).

[63] 452 U.S. 576 (1981). Since the Court found nothing in the statute that would limit it to legitimate organizations, the Court concluded that the term "enterprise" encompassed wholly illegitimate organizations as well. *Id.* at 580–81. *Turkette* was the Supreme Court's first venture into interpreting RICO. Similar to the approach used in *Turkette*, in *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994), the Court clarified that an enterprise need not have an economic motive. *Id.* at 262.

evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[64] The Court then stated that while the proof used to establish the "enterprise" and the "pattern of racketeering activity" "may in particular cases coalesce," "[t]he existence of an enterprise at all times remains a separate element which must be proved by the Government."[65]

1. The Circuits Split Over the Associated-in-Fact Enterprise[66]

Prior to *Boyle*, the majority view—adopted by the Third, Fourth, Fifth, Sixth, Eighth, Tenth, and D.C. Circuits—was that an associated-in-fact enterprise must have "some sort of structure . . . for the making of decisions, whether it be hierarchical or consensual," and that "[t]here must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis."[67] Based on the statements in *Turkette* that the enterprise and pattern of racketeering activity are separate elements that must be proved, these courts also required that the structure be ascertainable and separate

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64 *Turkette*, 452 U.S. at 583.

65 *Id.*

66 For more in-depth background on the associated-in-fact-enterprise circuit split prior to *Boyle*, see Michael Morrissey, Note, *Structural Strength: Resolving a Circuit Split in* Boyle v. United States *with a Pragmatic Proof Requirement for RICO Associated-in-Fact Enterprises*, 77 FORDHAM L. REV. 1939 (2009).

67 United States v. Riccobene, 709 F.2d 214, 222 (3d Cir. 1983); *see, e.g.*, Clark v. Douglas, No. 06-40364, 2008 U.S. App. LEXIS 113, at *12 (5th Cir. Jan. 4, 2008) (requiring that the alleged enterprise's "members function[ ] as a continuing unit with a coherent decision-making structure"); United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000) (requiring that an associated-in-fact enterprise have continuity of structure, which is shown by "an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than [an] ad hoc, basis" (quoting United States v. Kragness, 830 F.2d 842, 856 (8th Cir. 1987) (internal quotation marks omitted))); United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (requiring that an associated-in-fact enterprise have some structure beyond that of a conspiracy); United States v. Sanders, 928 F.2d 940, 943 (10th Cir. 1991) (requiring "evidence of an ongoing organization" to find the existence of an associated-in-fact enterprise); United States v. Tillett, 763 F.2d 628, 631 (4th Cir. 1985) (same); United States v. Bledsoe, 674 F.2d 647, 664 (8th Cir. 1982) (same). The Seventh Circuit took a middle-ground approach. While requiring that an associated-in-fact enterprise have structure, it did not require that the structure be greater than that inherent in the pattern of racketeering activity. *See* United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996) (requiring structure but concluding that "it would be nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity"); *see also* Odom v. Microsoft Corp., 486 F.3d 541, 550 (9th Cir. 2007) ("The Seventh Circuit requires that there be 'some' kind of ascertainable structure, but it does not require that it be a separate structure."). The question of "structure" arises primarily in the associated-in-fact enterprise context because other enterprises, such as partnerships, corporations, or associations, by nature have some sort of business structure.

from that inherent in the pattern of racketeering activity.[68] The majority test was driven by a concern that without a structural requirement, minor criminal schemes would unjustifiably fall under § 1962(c).[69]

The minority view, adopted by the First, Second, Ninth, and Eleventh Circuits, was that proof of an enterprise did not require an ascertainable structure.[70] These courts focused more on the statement in *Turkette* that the evidence used to prove the enterprise and pattern of activity "may in particular cases coalesce."[71] The test they applied came from the language in *Turkette* that an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[72] Also similar to *Turkette*, the minority approach was grounded in the belief that courts should not narrow RICO by imposing requirements that do not exist within its text.[73]

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[68] *E.g.*, *Riccobene*, 709 F.2d at 223–24; *Clark*, 2008 U.S. App. LEXIS 113, at *11; *Tillett*, 763 F.2d at 632 (citing *Riccobene*); *Sanders*, 928 F.2d at 944 (same); *Bledsoe*, 674 F.2d at 665.

[69] *See Riccobene*, 709 F.2d at 221 (describing the dangers of a broad interpretation of enterprise); *Bledsoe*, 674 F.2d at 661–62 ("[U]nder the Government's argument, any confederation, no matter how loose or temporary, of two or more individuals committing two or more sporadic crimes which are predicate crimes under RICO provides a basis for prosecution under the Act."). It was believed that "[RICO] was not intended to reach criminals who merely associate together and perpetrate two of the specified crimes, rather it was aimed at 'organized crime.'" *Bledsoe*, 674 F.2d at 662. And while small criminal groups may not exhibit a complex structure, such a structure is characteristic of the traditional organized crime groups at which RICO was aimed. *See id.* at 665 ("The command system of a Mafia family is an example of this type of structure as is the hierarchy, planning, and division of profits within a prostitution ring.").

[70] *See, e.g.*, *Odom*, 486 F.3d at 551 ("[A]n associated-in-fact enterprise under RICO does not require any particular organizational structure . . . ."); United States v. Patrick, 248 F.3d 11, 18–19 (1st Cir. 2001) ("[W]e refuse to import an 'ascertainable structure' requirement into jury instructions."); United States v. Bagaric, 706 F.2d 42, 56 (2d Cir. 1983) ("[I]t is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure."); United States v. Cagnina, 697 F.2d 915, 921 (11th Cir. 1983) ("*Turkette* did not suggest that the enterprise must have a distinct, formalized structure.").

[71] *See Cagnina*, 697 F.2d at 921 (citing *Turkette*, 452 U.S. at 583); *see also Patrick*, 248 F.3d at 18–19 (same).

[72] *Turkette*, 452 U.S. at 583; *see Odom*, 486 F.3d at 552 (quoting *Turkette*); *Patrick*, 248 F.3d at 18–19 (same).

[73] *See Odom*, 486 F.3d at 553 ("In *Turkette*, the Supreme Court carefully articulated the criteria for an associated-in-fact enterprise under RICO. We do not believe that we are at liberty to add to them."); *Patrick*, 248 F.3d at 19 ("Since Congress intended the term 'enterprise' to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures, we refuse to import an 'ascertainable structure' requirement into jury instructions." (quoting *Turkette*, 452 U.S. at 580–81)).

2. Boyle v. United States *Disavows a Structural Requirement*

In *Boyle v. United States*, the Supreme Court resolved the split between the circuits by adopting the minority approach.[74] The defendant, Boyle, participated in a "series of Bank thefts" with a "loosely and informally organized" group, whose members "met beforehand to plan the crime, gather tools . . . , and assign the roles that each participant would play."[75] Boyle was indicted for violating § 1962(c) and at trial requested a jury instruction that an enterprise must have "an ascertainable structural hierarchy distinct from the charged predicate acts."[76] The trial court—residing in a minority circuit, which did not require an ascertainable structure—refused to give such an instruction.[77] The jury convicted Boyle of the RICO charges and the Second Circuit Court of Appeals and Supreme Court affirmed.

The issue facing the Supreme Court was "whether an association-in-fact enterprise . . . must have an 'ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.'"[78] Writing for a seven-member majority, Justice Alito set the mood for the opinion by immediately pointing out that RICO's definition of an enterprise is "broad," with a "wide reach," "the very concept of an association in fact is expansive," and "the RICO statute provides that its terms are to be 'liberally construed to effectuate its remedial purposes.'"[79] The Court then went on to hold that "an association-in-fact enterprise must have a structure," which it defined as including three structural features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit

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74 129 S. Ct. 2237, 2244–45 (2009).

75 *Id.* at 2241. It consisted of "a core group, along with others who were recruited from time to time." *Id.* They "generally split the proceeds from the thefts." *Id.* The group did not have a leader or hierarchy, nor did they "ever formulate[ ] any long-term master plan or agreement." *Id.*

76 *Id.* at 2242 (quoting Joint Appendix at 95, *Boyle*, 129 S. Ct. 2237 (No. 07-1309), 2008 WL 5056021 [hereinafter Joint Appendix]) (internal quotation marks omitted).

77 The jury instruction, derived largely from *Turkette*, required only "an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives," whose "members and associates . . . function[ed] as a continuing unit to achieve a common purpose." *Id.* (second alteration in original) (quoting Joint Appendix, *supra* note 76, at 112) (internal quotation marks omitted). It further stated: "Regarding 'organization,' *it is not necessary that the enterprise have any particular or formal structure*, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise." *Id.* at 2242 n.1 (alteration in original) (quoting Joint Appendix, *supra* note 76, at 112–13).

78 *Id.* at 2241 (quoting Petition for a Writ of Certiorari at i, *Boyle*, 129 S. Ct. 2237 (No. 07-1309)).

79 *Id.* at 2243 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947).

these associates to pursue the enterprise's purpose."[80] Despite this proclamation that an enterprise must have a structure, the Court adopted the approach taken by the minority of circuits—which did not require a structure at all.[81] While the majority of circuits required a "structure," as the word is commonly understood,[82] the Supreme Court depleted this word of any meaning at all[83]:

> Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. . . . [N]othing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the

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[80] *Id.* at 2244. The Court used a dictionary to define "structure" as "'[t]he way in which parts are arranged or put together to form a whole' and '[t]he interrelation or arrangement of parts in a complex entity.'" *Id.* (quoting AMERICAN HERITAGE DICTIONARY 1718 (4th ed. 2000)).

[81] *Cf.* Eric Hansford, Note, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1162 n.89 (2011) (classifying *Boyle* as a case in which the Supreme Court resolved a circuit split without identifying the relevant circuits). The Court affirmed the jury instruction of the Second Circuit (a minority court) and held that the specific word "structure" need not be included in jury instructions. *Boyle*, 129 S. Ct. at 2244. The structural features that *Boyle* required (purpose, relationship, and longevity) were simply a restatement of the language in *Turkette*, which the minority of circuits primarily used as their test for an enterprise. *See supra* notes 63–65 and accompanying text (describing *Turkette*); *supra* notes 70–73 and accompanying text (describing the minority approach). The Court began its analysis by quoting the language in *Turkette*, and after it listed an enterprise's structural features, it again quoted this same language. *See Boyle*, 129 S. Ct. at 2243, 2244; *see also In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 366 n.63 (3d Cir. 2010) ("Boyle appears to use 'structure' as an overarching term encompassing all of the requisite elements: common purpose, relationships among those associated with the enterprise, and the continuity necessary to allow the associates to pursue the enterprise's purpose.").

[82] *See, e.g.*, Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804 (7th Cir. 2008) ("[A] conspiracy is not a RICO enterprise unless it has some enterprise-like structure, such as that of a cartel exempt from antitrust law . . . ."); United States v. Riccobene, 709 F.2d 214, 222 (3d Cir. 1983) (noting that an associated-in-fact enterprise required "some sort of structure . . . for the making of decisions, whether it be hierarchical or consensual" and that "[t]here must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis"); United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982) ("The command system of a Mafia family is an example of this type of structure as is the hierarchy, planning, and division of profits within a prostitution ring.").

[83] DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO § 3.02[1] (2010) (describing *Boyle* as "holding that an association-in-fact enterprise must have a 'structure,' but depriving the structure requirement of any real content"). Given that the structure requirement has no real content, it makes perfect sense for the Court to provide that the term "structure" need not be revealed to the jury. *See Boyle*, 129 S. Ct. at 2244 (finding the district court did not have to use "structure" in its jury instructions). Otherwise, a jury might breathe some life into the structural requirement, understanding it to mean more than simply "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.*

> statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.[84]

The majority bolstered its holding that a RICO enterprise need not have a formal structure by comparing RICO to other organized crime statutes in which Congress did include specific structural requirements.[85] Continuing to adopt the minority approach, Justice Alito, writing for the majority, implied that the minimal structure the Court required need not be ascertainable.[86] He also made clear that it need not be a structure beyond that inherent in the pattern of racketeering activity.[87]

II

Is There a Conflict Between *Reves* and *Boyle*?

Dissenting in *Boyle*, Justice Stevens pointed out the interdependence between the substantive requirements of § 1962(c) and RICO's enterprise element, and he accused the majority of handing down a definition of enterprise that was inconsistent with the *Reves* operation or management test. He asserted that the fact "[t]hat an enterprise must have business-like characteristics is confirmed by the text of § 1962(c) and our decision in *Reves v. Ernst & Young*."[88] In response,

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[84] *Boyle*, 129 S. Ct. at 2245–46.

[85] The Court reasoned,

> 18 U.S.C. § 1955(b), which was enacted together with RICO as part of the Organized Crime Control Act of 1970, 84 Stat. 922, defines an "illegal gambling business" as one that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." A "continuing criminal enterprise," as defined in 21 U.S.C. § 848(c), must involve more than five persons who act in concert and must have an "organizer," supervisor, or other manager. Congress included no such requirements in RICO.

Id. at 2246 (quoting 18 U.S.C. § 1955(b) (2006) and 21 U.S.C. § 848(c) (2006)).

[86] Justice Alito explained, "Whenever a jury is told that it must find the existence of an element . . . , that element must be 'ascertainable' or else the jury could not find that it was proved. Therefore, telling [a jury] to ascertain the existence of an 'ascertainable structure' would [be] redundant and potentially misleading." *Id.* at 2244–45; *see also supra* notes 70–73 and accompanying text (describing the minority approach). The majority's statement becomes even more confusing when one realizes that the Court also held that a trial court does not have to tell the jury that a structure is required in the first instance. *See Boyle*, 129 S. Ct. at 2244.

[87] The Court held that an enterprise is a separate element, which must be proved, but may be inferred from "evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity." *Boyle*, 129 S. Ct. at 2245. It based this on the statement in *Turkette* that the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise "may in particular cases coalesce." *Id.* (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)).

[88] *Id.* at 2248 (Stevens, J., dissenting).

Justice Alito argued that *Reves* was "inapposite because [it] turned on [the] interpretation of the participation requirement of § 1962(c), not the definition of 'enterprise.'"[89] Justice Alito further stated that "it would be an interpretive stretch to deduce from the requirement that an enterprise must be 'directed' to impose the much broader, amorphous requirement that it be 'business-like.'"[90]

This Part builds upon the exchange between the majority and dissent by examining whether there is a conflict between the *Reves* operation or management test and the definition of a RICO enterprise as set forth in *Boyle*. In so doing, I present three different levels upon which these cases can be seen as clashing. I begin by comparing the interpretive approaches taken in the two opinions. I then demonstrate that the *Reves* operation or management test can be viewed as including an inherent structural element. Finally, I explain how the interpretation of "enterprise" in *Boyle* is in conflict with a strict understanding of the operation or management test.

A. Divergent Interpretive Approaches

The interpretive approach taken by the Court in *Reves* signaled to many lower courts that it was appropriate to interpret RICO in a restrictive manner.[91] This was in contrast with the Court's previous interpretations of RICO's major substantive provisions, all of which employed the maxim "RICO is to be read broadly."[92] On the other

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[89] *Id.* at 2244 n.3. In stark contrast with this statement, Justice Alito used § 1962(c) to define the amount of structure required for an enterprise. *Id.* at 2244 ("Section 1962(c) reinforces this conclusion and also shows that an 'enterprise' must have some longevity, since the offense proscribed by that provision demands proof that the enterprise had 'affairs' of sufficient duration to permit an associate to 'participate' in those affairs through 'a pattern of racketeering activity.'" (quoting 18 U.S.C. § 1961(c))).

[90] *Id.* at 2244 n.3.

[91] *See* Courtland L. Reichman, Comment, *Federal Remedies for Abortion Protest: Discordance of First Principles*, 44 EMORY L.J. 773, 815–16 (1995) (describing *Reves* as a case in which the Supreme Court showed willingness to restrict the reach of RICO and as a case that signaled that the Court might be changing its interpretive approach toward RICO). Thus, it should come as no surprise that prior to *Boyle*, eight of the circuit courts felt that it was appropriate to read a structural requirement into RICO's enterprise element. *See supra* notes 67–69 and accompanying text (describing the requirement in a majority of circuits that an enterprise have an ascertainable structure).

[92] Sedima v. Imrex Co., 473 U.S. 479, 497–98 (1985) ("RICO is to be read broadly. This is the lesson . . . of Congress' self-consciously expansive language and overall approach . . . ." (citing United States v. Turkette, 452 U.S. 576, 586–87 (1981))); Camp, *supra* note 13, at 79 ("[T]he *Turkette* Court decided that, given 'the purposes and goals of the Act, as well as the language of the statute,' it would presume that the terms of the statute should be given their broadest reading . . . . The *Reves* Court reversed this presumption." (quoting *Turkette*, 452 U.S. at 590)); Vitiello, *supra* note 40, at 1365 ("Prior to . . . *Reves v. Ernst & Young*, the Court had reviewed only four cases involving RICO's substantive provisions. In all four cases, the lower federal courts had limited RICO's broad language only to be

hand, the interpretive approach taken in *Boyle* signaled that this maxim still governs when interpreting RICO.[93]

The *Reves* opinion began by focusing on one word, "conduct," and then using that word to narrow a phrase that was arguably broad.[94] Conversely, *Boyle* began by looking at a whole subsection and observing that RICO's definition of an enterprise is "broad," with a "wide reach," and that "the very concept of an association in fact is expansive."[95] The Court could have just as easily made this observation in *Reves*, since the applicable phrases in § 1962(c) read, "employed by *or associated with*," "conduct *or participate*," "directly *or indirectly*."[96] These are clearly words designed to prevent courts from narrowly construing the text; they reach both ends of various spectrums in order to cover a broad array of circumstances.[97] Likewise, in *Boyle*, the Court compared RICO to other statutes that specifically required greater structure in order to demonstrate that, if Congress had so intended, it could have also made such structure a requirement for a RICO enterprise.[98] Yet again, the same approach could have been taken in *Reves* to refute an operation or management requirement: Section 1962(c) does not use words such as "manage" or "direct," but these words were used in "18 U.S.C. § 1955(b), which was enacted together with RICO as part of the Organized Crime

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reversed by the Supreme Court which adopted broad readings of RICO's statutory concepts."); DiSanto, *supra* note 20, at 1062 ("Prior to . . . the Supreme Court's decision in *Reves v. Ernst & Young*, the Court had given RICO's substantive provisions a broad interpretation."); *see also supra* note 34 (describing the application of RICO's liberal construction clause by courts).

[93] *Boyle* cited *Sedima v. Imrex Co.* specifically for the proposition that "RICO is to be read broadly." 129 S. Ct. at 2243 (citing 473 U.S. 479, 497 (1985)). *See also supra* notes 79–87 and accompanying text (describing the interpretive approach to RICO taken in *Boyle*).

[94] *See supra* notes 28–31 and accompanying text (describing the textual analysis in *Reves*); *infra* notes 96–97 and accompanying text (explaining the broad nature of § 1962).

[95] 129 S. Ct. at 2243 (citing Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 216 (2008)); *see supra* notes 79–87 and accompanying text (describing the interpretive approach taken by the *Boyle* majority).

[96] 18 U.S.C. § 1962(c) (2006) (emphases added).

[97] *See* Russello v. United States, 464 U.S. 16, 21–22 (1983) (describing the phrase "'participate' in § 1962(c)" as among RICO's "terms and concepts of breadth"); Lynch, *supra* note 9, at 774 (describing § 1962(c) as the "device by which Congress originally expanded RICO"); *cf. Sedima*, 473 U.S. at 497–98 (1985) ("RICO is to be read broadly. This is the lesson . . . of *Congress' self-consciously expansive language* and overall approach . . . ." (citing *Turkette*, 452 U.S. at 586–87) (emphasis added)); Matthew Spitzer, Comment, *What's All the Racket?: The Use of RICO Disgorgement, the Circuit Split It Caused, and Its Impropriety*, 21 ST. JOHN'S J. LEGAL COMMENT. 837, 846 (2007) ("The drafting of the statute was purposely left vague so that prosecutors could adapt it to their individual cases.").

[98] *See supra* note 85 (quoting *Boyle*, 129 S. Ct. at 2246).

Control Act of 1970."[99] If Congress had intended for § 1962(c) to apply only to those who "operate or manage" an enterprise, it knew how to implement such a restriction.[100]

In *Reves*, the Court used legislative history to bolster its holding that § 1962(c) requires a person to participate in the operation or management of an enterprise.[101] Yet in *Boyle*, the Court refused to look at legislative history because it found the statutory language to be clear.[102] If it had chosen to examine legislative history, it might have found support for a narrower structural requirement, as the dissent and lower courts did.[103] Similarly, while the Court immediately mentioned RICO's liberal construction clause as a reason to interpret the statute broadly in *Boyle*, it refused to allow the clause to play any interpretive role in *Reves*.[104]

In short, the divergent interpretive approach taken in these two cases leaves one asking, as Judge Mikva of the D.C. Circuit did, "Why is one element of the statute properly deemed broad while another read narrowly?"[105] The Supreme Court has provided no answer to this question. It is certainly possible that the underlying intent of the *Reves* majority was to limit RICO's applicability to the broad array of civil actions in which it was being used.[106] But even if this were the Court's intention, the Court has generally refused to allow such policy

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[99] *Boyle*, 129 S. Ct. at 2246.

[100] *See* DiSanto, *supra* note 20, at 1088–89 (concluding, after looking at a statute similar to RICO, that "[i]t is obvious that Congress, in enacting the language in § 1962(c) knew how to confine the scope of the statute to operators or managers if it so wished, but did not do so"); *cf. Turkette*, 452 U.S. at 581 ("Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate.'").

[101] *See supra* note 35 and accompanying text (noting the analysis of legislative history in *Reves*).

[102] 129 S. Ct. at 2246–47.

[103] *See id.* at 2252 (Stevens, J., dissenting) (finding "no evidence . . . that Congress intended to reach such ad hoc associations of thieves"); *supra* note 69 and accompanying text (describing the concerns of a majority of circuits).

[104] *Compare Boyle*, 129 S. Ct. at 2243 ("[T]he RICO statute provides that its terms are to be 'liberally construed to effectuate its remedial purposes.'" (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947)), *with* Reves v. Ernst & Young, 507 U.S. 170, 183–84 (1993) ("RICO's 'liberal construction' clause does not require rejection of the 'operation or management' test. . . . [I]t is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind.").

[105] Yellow Bus Lines, Inc. v. Drivers Local Union 639, 913 F.2d 948, 957 (D.C. Cir. 1990) (Mikva, J., concurring) (questioning his colleagues' narrow construction of § 1962(c)).

[106] The *Reves* majority does not suggest or even mention this concern. But *Reves* was a civil RICO case, and in other instances the Supreme Court has expressed worry over the extensive use of RICO in civil suits. *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 472–73 (2006) (Thomas, J., dissenting) (explaining the expansion of civil RICO cases and judicial misgivings about its increased scope); William H. Rehnquist, *Get RICO Cases Out*

concerns to trump the practice of interpreting RICO broadly.[107] The resulting confusion over what interpretive approach should be taken with regard to RICO is particularly frustrating for lower courts, which must determine how to apply RICO beyond the specific circumstances presented in Supreme Court cases. If the presumption is to read RICO narrowly, then lower courts might feel compelled to apply the operation or management test in a strict manner by extending liability to only the leadership and management of an enterprise. Some of the lower courts did just this.[108] On the other hand, if the presumption is that RICO should be read broadly, the operation or management test should be applied in a less restrictive manner—an approach advocated in Part III.

B. Implied Structural Requirement in Reves*?*

In *Reves*, the Court held that liability under § 1962(c) requires that an individual participate in the operation or management of the enterprise itself, arguably viewing a RICO enterprise as a structured organization through which one could exert control. In his dissent in *Boyle*, Justice Stevens argued that the majority was disregarding this structural conception of an enterprise. When interpreting ambiguous statutes, courts frequently apply the maxim that a term should be construed to carry a consistent meaning through all of the provisions of an act.[109] For this reason, "enterprise" as understood in the context of

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of My Courtroom, WALL ST. J., May 19, 1989, at A14 (suggesting that Congress "enact amendments to civil RICO to limit its scope").

[107] *See* Raphaelson & Bernard, *supra* note 12, at 699 ("[O]ne has to conclude that the Court in *Reves* adopted the 'management or control' test in order to limit RICO. Such a policy determination has generally been left by the Court to Congress."); *supra* note 92 and accompanying text (describing the interpretive approach taken in *Reves* as being in opposition to prior interpretations of RICO by the Supreme Court). Additionally, tinkering with RICO because it is being applied beyond the original evil identified by Congress ignores the fact that Congress knew that RICO would reach beyond organized crime and drafted the statute broadly in light of that knowledge. *See* 116 CONG. REC. 18,940 (1970) (statement of Sen. Scott McClellan) ("It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well."); Camp, *supra* note 13, at 65 (noting that RICO's drafters recognized that RICO was "much broader than necessary to capture either Congressional intent or mafioso"); *see also* H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 248–49 (1989) (describing how the broad scope of RICO comports with the intent of its drafters); Camp, *supra* note 13, at 62 ("[The Supreme Court] has taken a consistently expansionist approach to RICO, constantly giving broad readings to RICO's terms and repeatedly rejecting lower court efforts to narrow the statute's scope . . . .").

[108] *See supra* notes 52–55 and accompanying text (describing some of the stricter applications of the operation or management test by lower courts).

[109] *See* Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995) ("[W]e adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions."); *cf.*

the operation or management test should carry the same meaning as "enterprise" as interpreted in *Boyle*. If application of the operation or management test implicitly requires that an enterprise have a "business-like" structure—as Justice Stevens claimed—then the Court in *Boyle* should have considered this when interpreting the enterprise element. The two interpretations are, in many ways, interdependent.[110] The analysis below suggests that the *Reves* Court's conception of the operation or management test, and its subsequent application of the test, presupposed that a RICO enterprise would have a business-like structure—giving credence to Justice Stevens's argument.

The majority opinion in *Reves* garnered support for its interpretation from the legislative history of § 1962, most of which spoke of enterprises as legitimate businesses. The Court quoted several sources of the law's history, including Senate Bill 1861, which referred to "management of *legitimate organizations*";[111] a statement by Assistant Attorney General Wilson, who referred to "ownership, control and operation of *business concerns*";[112] and a statement by Representative Celler, who referred to "conduct of the affairs of *a business*."[113] The Court also quoted the sponsor of the bill, Senator McClellan, who described the bill as prohibiting "operat[ing] an interest in an

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Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 391 (1983) ("[T]he same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time."). The corollary is that this canon of interpretation is not unyielding. Differences in context may demonstrate that two identical words, in fact, do not carry the same meaning. *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 366–69 (2005) (explaining the appropriate application of the presumption that a word should carry a consistent meaning throughout a statute). However, this is not the case with "enterprise," as there is no question that it is a specific concept, unique to RICO, and is defined therein. Given that "enterprise" is specifically defined in RICO, the term should carry the same definition throughout. *See* Stenberg v. Carhart, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

110 *Cf.* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . .").

111 Reves v. Ernst & Young, 507 U.S. 170, 181 (1993) (emphasis added) (quoting S. 1861, 91st Cong. (1969)).

112 *Id.* (emphasis added) (quoting *Measures Related to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 91st Cong. 387 (1969) (statement of Will Wilson, Assistant Att'y Gen. of the United States)).

113 *Id.* at 182 (emphasis added) (quoting 116 CONG. REC. 35,196 (1970) (statement of Rep. Emanuel Celler, Chairman, H. Comm. on the Judiciary)).

interstate *business*."[114] The list goes on.[115] While the Court did not use the legislative history to read a legitimate-business requirement into RICO (*Turkette* had already disavowed such an interpretation[116]), its conception of what it means to operate or manage an enterprise appears to be colored by this legislative history.[117] Evidence of this can be seen throughout the rest of the analysis and holding of *Reves*.

First, the Court bases the whole interpretation of § 1962 on its definition of the word "conduct," defining it as "to lead, run, manage, or direct."[118] This definition itself implies a "business-like" structure through which an individual can lead, run, manage, or direct. The implication is magnified when the Court ultimately sums up its holding: To violate § 1962(c), "one must participate in the operation or management of the enterprise itself."[119] This test suggests that it is not enough for an individual to conduct a portion of the *affairs* of an enterprise (such as by willingly carrying out crimes for the enterprise or carrying out one's job in the enterprise in an illegal manner). The test implies that an individual must take part in controlling the *enterprise itself* (such as by occupying a leadership role and controlling how the enterprise as a whole operates).[120] Simply put, this is not how one

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[114] *Id.* at 183 (emphasis added) (quoting 116 CONG. REC. 18,940 (1970) (statement of Sen. Scott McClellan)).

[115] In footnote seven, the majority quoted two legislators as using the phrase "operate such *businesses*" and another as using the phrase "operate *commercial organizations*." *Id.* at 182 n.7 (emphases added) (quoting 116 CONG. REC. 607, 36,296, 35,227 (1970) (statements of Sen. Byrd, Sen. Dole, and Rep. Steiger, respectively).

[116] United States v. Turkette, 452 U.S. 576 (1981).

[117] These statements in the legislative history suggest that an enterprise should have a business-like structure and that operation or management is required. This goes against the argument I make in Part III that *Boyle*'s holding that an enterprise need not have a structure is the correct interpretation of RICO and that § 1962(c) should be interpreted in light of it. The first response to this apparent inconsistency—made by Justice Souter—is that these business-related terms were simply used as a shorthand to describe the statute. *Reves*, 507 U.S. at 188 n.1 (Souter, J., dissenting) ("The legislative history demonstrates only that when Members of Congress needed a shorthand method of referring to § 1962(c), they spoke of prohibiting 'the operation' of an enterprise through a pattern of racketeering activity."). The second response is that while some in Congress may have described § 1962(c) this way, these requirements were not written into the text of the statute. *See supra* note 100 and accompanying text (noting that if Congress had intended to require operation or management, it could have easily used these terms). The final response is that the overall legislative history and text of the statute evince an intent that the law be applied expansively. *See infra* note 177.

[118] *Reves*, 507 U.S. at 177; *see supra* notes 28–29 and accompanying text (describing the Court's analysis of the word "conduct" in *Reves*).

[119] *Reves*, 507 U.S. at 185.

[120] *See* Daniel Luccaro et al., *Racketeer Influenced and Corrupt Organizations*, 38 AM. CRIM. L. REV. 1211, 1237 (2001) (noting that an individual's involvement "must rise to the level of decision-making"); *supra* notes 34–38 and accompanying text (describing the strict holding of *Reves*).

describes the actions of members of an enterprise with no leadership, where individuals simply come together and commit crimes.[121] The actions of members of such an ad-hoc enterprise would be better described as carrying out their collective affairs.[122] Instead, the Court adopts a meaning of "conduct" that describes the actions of an individual who holds a leadership role within a business-like structure, and who is directing when, how, and by whom the activities of the organization are being carried out.[123]

An implicit requirement of a business structure is further suggested by the manner in which the Court applies its new test to the facts of *Reves.* The Court asked whether Ernst & Young had a role in the management of the co-op itself, not what the *affairs* of the co-op were and whether Ernst & Young took part in directing those affairs. If the Court had done so—as the dissent did—it would have found Ernst & Young liable:[124] Surely creating fraudulent financial records and statements on behalf of the co-op, representing them as correct, and failing to disclose them to the shareholders and noteholders of the company[125] would be considered affairs of the enterprise that Ernst & Young "ha[d] some part in directing."[126] Instead, the Court found Ernst & Young not liable under RICO because it could not "conclude that [Ernst &] Young participated *in the operation or management of the Co-Op itself*."[127] When the test is looked at through this application to the facts, it appears that an enterprise must have a "business-like" structure. Without such a structure, by what means would one go about operating or managing the enterprise? Simply directing the

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121 Yet this is exactly how the actions of the members of the enterprise in *Boyle* were described. *See supra* note 75 and accompanying text (describing activities of the associated-in-fact enterprise in *Boyle*).

122 But a similar definition was suggested by the plaintiff in *Reves* and rejected by the Court. *See* 507 U.S. at 177–78 (noting petitioner's argument that "conduct" should be read as "carry on" (citing Brief for Petitioners at 23, *Reves*, 507 U.S. 170 (No. 91-886))).

123 *See* Boyle v. United States, 129 S. Ct. 2237, 2248–49 (2009) (Stevens, J., dissenting) (arguing that the operation or management test shows that an enterprise must have "a certain quantum of business-like organization"); *see also* Madel, *supra* note 46, at 1162–69 (describing *Reves*'s "position analysis," in which a court must first find "at least one person with a 'high level' position within the enterprise"); *infra* notes 156–64 and accompanying text (listing the types of enterprise structures required by lower courts pre-*Boyle*).

124 Unlike the majority, the dissent did not place particular importance on whether Ernst & Young was in a management position within the co-op. Instead, the dissent conducted a much more meticulous examination of Ernst & Young's *actions* and demonstrated how those actions constituted affairs of the co-op that Ernst & Young directed. *See Reves*, 507 U.S. at 189–96 (Souter, J., dissenting) (describing the actions conducted by Ernst & Young as typical duties of the management of a corporation).

125 *See id.* at 191–95, 192 nn.4–5 (describing in detail the actions of Ernst & Young).

126 *Id.* at 179 (majority opinion).

127 *Id.* at 186 (emphasis added).

enterprise's affairs, without some control over the enterprise itself, is not enough.

Finally, as the Court sought to explain how its holding might apply to other scenarios, it described an enterprise in a structured manner. It stated that "liability under § 1962(c) is not limited to upper management" and that "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management."[128] The Court also stated, "We need not decide in this case how far § 1962(c) extends down the ladder of operation because it is clear that [Ernst &] Young was not acting under the direction of the Co-Op's officers or board."[129] All of these phrases describe a hierarchical business-like structure where there are clear insiders, outsiders, managers, and individuals acting under the management. In fact, based on the last statement, the Court's opinion could be summed up by the notion that Ernst & Young was not liable because it was outside the co-op's management structure.[130]

Based on the foregoing, it is safe to conclude that the *Reves* majority assumed that operating or managing an enterprise would necessarily take place within a business-like structure. Consequently, the lower courts picked up on this trend, and, like the Supreme Court in *Reves*, they applied the operation or management test in a way that presupposed a structure.[131] In *Oreto*, the First Circuit concluded that Ernst & Young had not been liable in *Reves* because it was "outside the chain of command through which the enterprise's affairs were conducted."[132] The *Oreto* court also viewed RICO liability as extending down the organizational ladder to reach both "generals" and "foot soldiers" within the enterprise, and concluded that liability under § 1962(c) applied to those who direct an enterprise and to those who are under them.[133]

Other courts have followed the First Circuit's understanding that § 1962(c) applies only when a person is within an enterprise's

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128 *Id.* at 186.

129 *Id.* at 184 n.9.

130 *See* United States v. Oreto, 37 F.3d 739, 750 (1st Cir. 1994) ("In our view, the reason the accountants were not liable in *Reves* is that . . . [they] were outside the chain of command through which the enterprise's affairs were conducted.").

131 *Cf.* Blakey & Roddy, *supra* note 45, at 1484 (characterizing the lower courts' applications of the operation or management test as focusing on whether an individual is inside or outside of an enterprise, and, when inside an enterprise, where the individual is in the chain of command).

132 *Oreto*, 37 F.3d at 750.

133 *Id.* at 750–51.

hierarchical structure.[134] One court summed up its understanding of § 1962(c) this way: "[A] RICO enterprise may be operated at least by 'upper management, lower-rung participants in the enterprise who are under the direction of upper management, or others associated with the enterprise who exert control over it . . . .'"[135] Another court went so far as to conclude that "'[l]ower rung participants' in the enterprise will only be liable if they act 'under the direction of upper management.'"[136] Some courts have placed an even greater emphasis on where the individual is on the "ladder of operation." One defendant was described as "on the ladder,"[137] while another was described as "not on the ladder at all" but "sweeping up the floor underneath it."[138] Still another was described as "not at the bottom of the management chain."[139] Moreover, a few courts have allowed individuals to escape liability because they were not in a management position within the enterprise.[140] In the same way, the operation or management test has sometimes been described in the literature as a hierarchical test.[141]

In complete opposition to the way the *Reves* Court and lower courts viewed a RICO enterprise, the *Boyle* majority made it absolutely clear that a RICO enterprise need not have any formal decision-making or hierarchical structure.[142] This conflict between the

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134 *See* United States v. Fowler, 535 F.3d 408, 418–19 (6th Cir. 2008) (adopting the analysis used in *Oreto*); United States v. Browne, 505 F.3d 1229, 1276–77 (11th Cir. 2007) (upholding a district court's refusal to omit "conducting the operation of the affairs of an enterprise as a lower level participant" as a basis of liability in the jury instruction); MCM Partners v. Andrews-Bartlett & Assocs., 62 F.3d 967, 979 (7th Cir. 1995) ("The question posed in the instant case, then, is whether A–B and FDC should be characterized as 'outsiders,' like the accounting firm in *Reves*, or as lower-rung participants who acted under the direction of the enterprise's upper management.").

135 *MCM Partners*, 62 F.3d at 977 (quoting Azrielli v. Cohen Law Offices, 21 F.3d 512, 521 (2d Cir. 1994)).

136 Harpole Architects, P.C. v. Barlow, 668 F. Supp. 2d 68, 75 (D.D.C. 2009) (quoting Reves v. Ernst & Young, 507 U.S. 170, 184 (1993)).

137 United States v. Diaz, 176 F.3d 52, 92–93 (2d Cir. 1999).

138 United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994).

139 United States v. Thai, 29 F.3d 785, 816 (2d Cir. 1994).

140 *See, e.g.*, cases cited *supra* note 55 (listing cases where courts were reluctant to extend liability down the ladder of operation).

141 *See, e.g.*, Madel, *supra* note 46, at 1162–64 ("The operation or management test first requires that the section 1962(c) claimant identify at least one person with a 'high level' position within the enterprise . . . . Under *Reves*, therefore, failure to identify one person who directed or controlled an enterprise's affairs should result in the dismissal of a section 1962(c) claim."); Tripp, *supra* note 34, at 322 ("If RICO is to be applied consistently in the manner in which it was designed, liability under § 1962(c) should not be limited by the imposition of a hierarchical requirement and the *Reves* test.").

142 *See supra* notes 80–84, 89–90 and accompanying text (analyzing the majority opinion in *Boyle*).

two opinions, although noticed by the *Boyle* dissent, was quickly rejected by the majority.[143]

C. Inconsistency Within RICO

Even conceding that the Supreme Court and many of the lower courts presupposed a structured enterprise when they adopted and applied the operation and management test, does interpreting § 1962(c) in this manner suggest that the term "enterprise" should be interpreted as requiring a structure? After all, as Justice Alito pointed out, "enterprise" is defined in a different section of RICO.[144]

Justice Stevens believed that *Reves*'s definition of "enterprise" implied structure. He reminded the majority that "[i]t is not enough for a defendant to 'carry on' or 'participate in' an enterprise's affairs through a pattern of racketeering activity; instead, evidence that he operated, managed, or directed those affairs is required."[145] From this he drew the conclusion that "the enterprise element demands evidence of a certain quantum of business-like organization—i.e., a system of processes, dealings, or other affairs that can be 'directed.'"[146] Justice Stevens's consideration of other parts of the statute in his interpretation is not out of the ordinary but rather a common practice by courts[147]—including the Supreme Court, which used this approach in a prior case to interpret the term "enterprise" within RICO.[148] Even so, the majority in *Boyle* dismissed the use of this method to interpret "enterprise" as requiring a business-like structure, retorting that "*Reves v. Ernst & Young* is inapposite because that case turned on our interpretation of the participation requirement of § 1962, not the definition of 'enterprise.'"[149]

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[143] *See supra* notes 89–90 and accompanying text (describing the *Boyle* majority's response to the dissent's argument in favor of a structural requirement consistent with *Reves*).

[144] Boyle v. United States, 129 S. Ct. 2237, 2243 n.3 (2009).

[145] *Id.* at 2248–49 (Stevens, J., dissenting).

[146] *Id.* at 2249.

[147] For example, the Supreme Court has previously stated,

> Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (citations omitted).

[148] In *National Organization for Women v. Scheidler*, in order to discern whether an enterprise must have an economic motive, the Court examined the various roles that an "enterprise" can play within § 1962(a), (b), and (c). 510 U.S. 249, 258–59 (1994).

[149] 129 S. Ct. at 2243 n.3 (citing Reves v. Ernst & Young, 507 U.S. 170, 184–85 (1993)).

Oddly enough, one page later, the *Boyle* majority itself used this exact technique in order to interpret "enterprise" as requiring "three structural features," the last of which was "longevity."[150] In explaining why longevity is required, the Court reasoned, "Section 1962(c) . . . shows that an 'enterprise' must have some longevity, since the offense proscribed by that provision demands proof that the enterprise had 'affairs' of sufficient duration to permit an associate to 'participate' in those affairs through 'a pattern of racketeering activity.'"[151] However, with this analysis, the Court completely ignored *Reves*, in which it provided that § 1962(c) demands more than just proof that an associate "participate[d] in those affairs." *Reves* held that the offense demands proof that an associate "have some part in directing those affairs" or, as the Court ultimately framed it, "participate[d] in the operation or management of the enterprise itself."[152] This reasoning by the *Boyle* Court—that § 1962(c) requires that an enterprise have longevity but no greater structure—makes sense only if the operation or management test no longer applies to § 1962(c) or if the test is not as restrictive as it first seemed when *Reves* was handed down. The Court did not state that it was overruling *Reves*; it simply ignored it or conceived of the operation or management test in a less restrictive light than one would expect after reading the opinion and viewing the lower courts' applications of it.

Marrying the Court's interpretative technique with the operation or management test, an enterprise would need to have not only longevity, but also a structure that permits an associate to "participate in the operation or management of the enterprise itself." Justice Stevens understood this to mean that "the enterprise element demands evidence of a certain quantum of business-like organization."[153] However, he does not completely explain what he means by "business-like organization." More precisely, § 1962(c) after *Reves* would seem to require a structure through which an associate could be shown to have operated or managed the enterprise itself.[154]

When the RICO enterprise is interpreted in this manner, it becomes clear that the ascertainable structure requirement applied by the majority of circuits[155]—which *Boyle* overruled—read RICO consistently with a strict understanding of the *Reves* operation or

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[150] *Id.* at 2244.

[151] *Id.*

[152] *Reves*, 507 U.S. at 179, 185.

[153] *Boyle*, 129 S. Ct. at 2249 (Stevens, J., dissenting).

[154] *See supra* notes 118–30 and accompanying text (finding an inherent structural requirement in the holding and application of *Reves*).

[155] *See supra* notes 67–69 and accompanying text.

management test. As suggested by *Reves*, these courts did not require or look for just any kind of structure. They looked for structures that allowed for operation or management of the enterprise, including a "mechanism for controlling and directing [group] affairs";[156] a group "organized in a manner amenable to hierarchical or consensual decision-making";[157] a "unified decision-making structure";[158] a "system of governance, an administrative hierarchy, a joint planning committee, a board, a manager";[159] an "organizational pattern or system of authority"; "[t]he command system of a Mafia family"; "hierarchy, planning, and division of profits";[160] "strict rules of behavior that are brutally enforced";[161] "'sessions' where important decisions were made";[162] "weekly meetings";[163] and an "enterprise-like structure, such as that of a cartel."[164]

All of these structures make sense in light of *Reves* and the operation or management test. But since the Supreme Court in *Boyle* ignored *Reves*, it concluded that a court need not require even one of these structures.[165] As the Tenth Circuit saw it, "[A]fter *Boyle*, an association-in-fact enterprise need have no formal hierarchy or means for decision-making."[166] In other words, an enterprise need not have a structure through which an individual operates or manages the enterprise itself. The only structure needed after *Boyle* is "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[167] This is inconsistent with a strict understanding of the *Reves* operation or management test, which requires, as Justice Stevens put it, "a certain quantum of business-like organization—*i.e.*, a system of processes, dealings, or other affairs that can be 'directed.'"[168]

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156 United States v. Riccobene, 709 F.2d 214, 222 (3d Cir. 1983).

157 Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 644 (7th Cir. 1995) (quoting Jennings v. Emry, 910 F.2d 1434, 1440 (7th Cir. 1990)).

158 Clark v. Nat'l Equities Holdings, 561 F. Supp. 2d 632, 639 (E.D. Tex. 2006).

159 Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 804 (7th Cir. 2008).

160 United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982).

161 United States v. Pimentel, 346 F.3d 285, 288 (2d Cir. 2003).

162 United States v. Patrick, 248 F.3d 11, 19 (1st Cir. 2001).

163 United States v. Smith, 413 F.3d 1253, 1268 (10th Cir. 2005).

164 *Limestone Dev. Corp.*, 520 F.3d at 804.

165 *See supra* notes 79–87 and accompanying text (explaining the holding of *Boyle*).

166 United States v. Hutchinson, 573 F.3d 1011, 1021 (10th Cir. 2009).

167 Boyle v. United States, 129 S. Ct. 2237, 2244 (2009).

168 *Id.* at 2249 (Stevens, J., dissenting).

III
The Operation or Management Test After *Boyle*

In this Part, I provide suggestions for interpreting § 1962(c) in light of the *Boyle* Court's recent interpretation of an "enterprise" under RICO. I consider how the areas of conflict described in Part II should influence the manner in which courts interpret § 1962(c) and the *Reves* operation or management test. But first, I briefly explain why the holding of *Reves* should yield to, or be read in light of, *Boyle*.

A. Interpreting § 1962(c) in Light of Boyle

As outlined in Part II, various potential conflicts exist between *Reves* and *Boyle*, but why should this lead us to apply § 1962(c)—and *Reves*'s interpretation of it—in light of *Boyle*? First, it is a well-established interpretive rule that terms within a statute are to be interpreted in a consistent manner throughout the statute.[169] Thus, "enterprise" as understood in the context of the operation or management test should carry the same meaning as "enterprise" as defined in *Boyle*. As described above, the two interpretations are, in many ways, interdependent.[170] Second, on at least two occasions, the Supreme Court has endorsed the practice of interpreting one section of RICO in light of another.[171] The *Boyle* Court purported to offer the final say on the definition of "enterprise" in RICO and was clear in holding that it did not require a formal structure.[172] Given this holding, it would go directly against recent Supreme Court precedent to try to interpret "enterprise" in light of *Reves*: The Court explicitly disallowed such an interpretation.[173] Thus, any inconsistency within RICO as to the meaning of "enterprise" must be resolved by applying the definition handed down in *Boyle*. Third, the holding of *Reves* was unclear and failed to define fully the operation or management test; the Court left up for grabs how it should be applied in other situations.[174]

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169 *See supra* note 109 and accompanying text.

170 *See supra* notes 110–11 and accompanying text.

171 *See supra* notes 148, 150–51 and accompanying text.

172 *See supra* Part I.B.2.

173 *See Boyle*, 129 S. Ct. at 2243 (refusing to interpret "enterprise" in light of the operation or management test).

174 *See* Reves v. Ernst & Young, 507 U.S. 170, 184 n.9 (1993) ("[W]e need not decide . . . how far § 1962(c) extends down the ladder of operation . . . ."); *see also, e.g.*, Vitiello, *supra* note 40, at 1401 (describing the Supreme Court as creating confusion in *Reves* with "inconsistent statements" and leaving "unexplored the meaning of 'operation,' thereby leaving itself latitude in future RICO cases"); Benson, *supra* note 22, at 1698 ("How narrow the 'operation or management' test is remains an open question. By failing to provide guidance on exactly what the 'operation or management' test means, the Court effectively leaves the

Finally, as to interpretive approaches to RICO, a strict application of the operation or management test—by effectively reading new, restrictive requirements into the statute—is contrary to all other approaches to RICO taken by the Supreme Court. All cases prior to *Reves* that interpreted substantive RICO provisions made clear that RICO was to be interpreted broadly, based on the statutory text and the intent of Congress.[175] *Boyle* reaffirmed this practice.[176] Such an approach comports with both the text of RICO itself and the intent of Congress.[177] Interpreting RICO in a restrictive manner simply has no justification in Supreme Court precedent, the text of RICO, or the intent of its drafters, and *Reves* provided only a weak explanation for why a restrictive approach would be appropriate.[178]

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issue to the lower courts for resolution."); *supra* notes 39–44 and accompanying text (pointing out inconsistencies and questions left open in *Reves*).

[175] *E.g.*, Sedima v. Imrex Co., 473 U.S. 479, 497–98 (1985) ("RICO is to be read broadly. This is the lesson . . . of Congress' self-consciously expansive language and overall approach . . . ." (citing United States v. Turkette, 452 U.S. 576, 586–87 (1981))); Russello v. United States, 464 U.S. 16, 21 (1983) (noting "the pattern of the RICO statute in utilizing terms and concepts of breadth"); *see also supra* note 92 and accompanying text (describing the interpretive approach in *Reves* as contrasting with all prior interpretations of RICO's substantive provisions).

[176] *Boyle* cited *Sedima v. Imrex Co.* for the proposition that "RICO is to be read broadly." *Boyle*, 129 S. Ct. at 2243 (citing *Sedima*, 473 U.S. at 497); *see also supra* notes 79–87 and accompanying text (describing the interpretive approach taken in *Boyle*).

[177] The text of RICO demonstrates the statute's breadth. *See* cases cited *supra* note 175 (listing Supreme Court cases that took note of RICO's expansive terms). RICO's liberal construction clause provides, "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947. Senator Scott McClellan, RICO's sponsor, acknowledged RICO's breadth and application beyond organized crime. *See* 116 CONG. REC. 18,940 (1970) (statement of Sen. Scott McClellan) ("It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well."); *see also* H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 248–49 (1989) (describing how the broad scope of RICO comports with the intent of its drafters); Camp, *supra* note 13, at 65–66 (noting that RICO's drafters recognized that RICO was "much broader than necessary to capture either Congressional intent or mafioso").

[178] The *Reves* majority did not address the Court's prior cases that determined that RICO was to be read broadly. *See* cases cited *supra* note 175. As to RICO's liberal construction clause, the majority stated,

> This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind.

Reves, 507 U.S. at 183–84. Additionally, the majority responded to arguments of the petitioners and the United States by stating that "it would be consistent with neither the language nor the legislative history of § 1962(c) to interpret" RICO as broadly as they advocated. *Id.* at 185. Thus, while the majority defended its opinion, it did not acknowledge that it might have been reading RICO in a restrictive manner, let alone explain why such a restrictive approach would be favored over the broader approach taken in prior cases.

B. Redefining the Operation or Management Test

Given the inconsistency between *Boyle* and a strict application of the operation or management test, one might argue that *Reves* should be overruled altogether so that § 1962(c) is interpreted to require no more direction, operation, or management than is inherent in the phrase "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs."[179] However, lower courts and the Supreme Court are unlikely to take such a direct approach.[180] Therefore, the more helpful question to ask is how does *Boyle* shed light on *Reves* and the operation or management test?[181] In answering this question, we can gain much by focusing on what an enterprise *does not* require after *Boyle*, and by examining how the operation or management test would be met by an individual participating in the affairs of an enterprise with these minimum requirements.[182]

Boyle required that an associated-in-fact enterprise have only "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[183] The *Boyle* Court further explained that no greater decision-making structure is required.[184] Since no hierarchical or formal decision-making structure is required for an enterprise in the first instance, *Boyle* makes clear that whether a person holds a formal position in an associated-in-fact enterprise should not determine

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[179] 18 U.S.C. § 1962(c) (2006). Many commentators have expressed disdain for *Reves* and would delight in its demise. *See generally, e.g.*, Camp, *supra* note 13, at 77–80 (criticizing the approach taken in *Reves*); Madel, *supra* note 46, at 1161–75, 1202–09 (critiquing *Reves* and its subsequent application by the lower courts and providing suggestions for how to circumvent *Reves*'s requirements); Vitiello, *supra* note 40, at 1367 (criticizing *Reves* and its subsequent application by the lower courts and "urging a framework of analysis for § 1962(c) that would return RICO more closely to specific situations contemplated by RICO's drafters").

[180] While *Boyle* ignored the operation or management test, it did not purport to overrule it, leaving the lower courts no precedent for making such a bold move. *See supra* text accompanying notes 145–52 (examining the *Boyle* majority's statements that the operation or management test did not affect the interpretation of "enterprise"). Nor would the Supreme Court overrule *Reves* itself, for "[t]he Court has been loath[ ] to overrule precedent in statutory construction cases." Vitiello, *supra* note 40, at 1381.

[181] This is especially true since *Reves* left its test open for clarification in future cases. *See supra* note 174.

[182] Professor Julie Ross briefly described a similar approach when explaining how peer-to-peer file sharers, who violate copyright laws, could fall within § 1962(c) and the operation or management test after *Boyle*. *See* Julie L. Ross, *A Generation of Racketeers? Eliminating Civil RICO Liability for Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 55, 103 & n.210 (2010) (concluding, based on *Boyle*, that an individual need not hold a managerial role in an enterprise to be liable under § 1962(c)); *infra* text accompanying note 189 (quoting Ross, *supra*).

[183] Boyle v. United States, 129 S. Ct. 2237, 2244 (2009).

[184] *Id.* at 2245–46.

whether he or she is liable under § 1962(c). In other words, it should not matter, in and of itself, where—or whether—a person is located in an organization's "chain of command."[185]

This interpretation of § 1962(c) is confirmed by looking at the associated-in-fact enterprise in *Boyle*. The group did not have a leader or hierarchy; it was "loosely and informally organized," consisting of "a core group, along with others who were recruited from time to time."[186] Whether the individuals employing this enterprise violated § 1962(c) could not depend on hierarchy, nor could it depend on position, because the enterprise did not have these structural attributes, and *Boyle* held that it did not need them. Thus, contrary to the approach taken by some courts (for example, the Second Circuit in *Viola*[187]), a member of an associated-in-fact enterprise who has committed crimes for that enterprise (such as Formisano) should not escape liability simply because he did not hold a high enough position in the enterprise.[188] Professor Julie Ross briefly touched on this concept in an article advocating against the potential application of RICO to copyright infringers:

> If an enterprise need not have a hierarchical structure or chain of command, then it follows that an associate in such a non-hierarchical enterprise may "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" without holding some sort of managerial or directorial role in the enterprise . . . .[189]

This same understanding should translate to those individuals within enterprises that do possess hierarchy or management positions, such as a legitimate business or a traditional Mafia family. It would be absurd—and contravene the clear intent of RICO's drafters—for those individuals at the bottom of the "chain of command" of a more structured enterprise, who are committing the same or worse crimes than those in an associated-in-fact enterprise, to escape RICO's wrath

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185 Obviously, this is in opposition to the way in which lower courts have applied, and commentators have described, *Reves*. *See supra* notes 131–41 and accompanying text (explaining that the lower courts have applied *Reves* in a structural manner and that some commentators have described it as imposing a hierarchical test). Yet this analysis of the *Reves* operation or management test by the lower courts and in the literature occurred before *Boyle* and thus without the insight that *Boyle* provides. This Note adds to the literature by analyzing *Reves* with the benefit of this new piece to the RICO interpretive puzzle.

186 *Boyle*, 129 S. Ct. at 2241.

187 United States v. Viola, 35 F.3d 37, 44–45 (2d Cir. 1994); *see supra* Introduction (describing the *Viola* case and the defendant Formisano's exculpation under the operation or management test); *see also* cases cited *supra* notes 54–55 (taking a strict structural approach similar to *Viola*).

188 *See* Madel, *supra* note 46, at 1186–87 (describing the analysis in *Viola* as contrary to RICO and an incorrect application of *Reves*).

189 Ross, *supra* note 182, at 103 n.210 (quoting 18 U.S.C. § 1962(c) (2006)).

simply because their enterprise has more structure. If anything is clear from RICO's legislative history, it is that Congress intended to bring down the Mafia, a group with a long chain of command.[190] Looking at this scenario in relation to *Boyle*, if a Mafia member at the bottom of a "chain of command" participates in bank thefts (like the *Boyle* defendants), it would be antithetical to RICO for him to fall outside of RICO's provisions due to the greater structure of the Mafia. That such intended targets of RICO would not be subject to it was a legitimate concern expressed in the aftermath of *Reves*.[191] Even so, after *Boyle*, courts have precedent that suggests that these issues should be avoided by doing away with § 1962(c) analyses that turn on formal position or location in a "chain of command." Such an approach can be seen as in line with *Reves* if courts focus on the fact that the Supreme Court explicitly left open the question of "how far § 1962(c) extends down the ladder of operation."[192] In other words, *Boyle* helps answer this interpretive question left open in *Reves* by clarifying that formal position should not be a determinative factor when applying § 1962(c).

A related observation that can be drawn from *Boyle* is that an individual's lack of control over the "enterprise itself" should not be determinative. *Boyle* made clear that an enterprise need not have any real means by which it is managed as a whole: "[D]ecisions may be made on an ad hoc basis and by any number of methods . . . ."[193] For example, no member of the associated-in-fact enterprise in *Boyle* managed the enterprise itself, since there was no leader, and these individuals simply came together occasionally and carried out crimes.[194] Nonetheless, *Reves* explicitly held that one must "participate in the operation or management of the enterprise itself."[195] Despite this language, the lower courts could read this test in line with

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[190] *See* Vitiello, *supra* note 40, at 1400–02 (describing the structure of the Mafia, the RICO drafters' familiarity with it, and RICO's design to reach those at the bottom of the Mafia's chain of command, as well as advocating that the operation or management test should not be applied to exclude such low-level Mafia members); *see also* Raphaelson & Bernard, *supra* note 12, at 699 (noting potential problems in applying the operation or management test to low-level "mafia foot soldier[s]"); *supra* note 8 and accompanying text (describing the purpose of RICO); *cf.* United States v. Turkette, 452 U.S. 576, 591 (1981) (noting the purpose of RICO to address the "infiltration of legitimate business by organized crime").

[191] *See, e.g.*, secondary sources cited *supra* note 190.

[192] Reves v. Ernst & Young, 507 U.S. 170, 184 n.9 (1993); *see also* Vitiello, *supra* note 40, at 1403 (arguing that this statement from *Reves* and its particular facts suggest that its holding should be applied narrowly).

[193] Boyle v. United States, 129 S. Ct. 2237, 2245 (2009).

[194] *Id.* at 2241.

[195] *Reves*, 507 U.S. at 185.

Boyle if they placed more emphasis on the initial requirement in *Reves* that one must "have some part in directing those affairs."[196] Reading *Reves* in this way would relegate the phrase "operation or management" to simply serve as shorthand for the "directing of affairs" interpretation of § 1962(c). Additionally, it could be argued that this is what the Court originally had in mind when it stated, "The 'operation or management' test expresses this requirement in a formulation that is easy to apply."[197]

Placing emphasis on the "directing of affairs" aspect of *Reves* would also more accurately describe the role of many individuals in an enterprise like the one in *Boyle.* Their actions can be seen as the "directing of affairs" if the phrase is understood to mean knowingly making decisions as to an enterprise's affairs or knowingly carrying out those affairs. In this way, each individual in the *Boyle* enterprise, in his own right, could be said to direct the affairs—even if his contribution was minimal—given that the affairs of the enterprise in *Boyle* were the different activities required for a successful bank theft.[198] Each member of the enterprise directed some of these activities each time he participated in or prepared for a bank theft. Applying this test would result in an analysis that asks 1) what are the affairs of the enterprise, and 2) was the defendant knowingly making decisions as to those affairs or knowingly carrying out those affairs through a pattern of racketeering activity?[199] This type of analysis is much more satisfactory than those that look at hierarchy or control because it specifically focuses on a person intentionally using an enterprise to commit crimes—the heart of what § 1962(c) prohibits.

Finally, one must ask how this understanding of § 1962(c) applies to those *outside* of an enterprise. Again, once it is clear how little structure an enterprise requires, it becomes apparent that tests that

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196 *Id.* at 179.

197 *Id.*; *see supra* notes 29–33 and accompanying text (describing the initial analysis in *Reves*).

198 *Cf.* Ross, *supra* note 182, at 103 & n.210 (noting that individuals using peer-to-peer "software to locate and copy works . . . could be said to be 'directing' the affairs of the enterprise for unlawful purposes, because each of the users has the ability to exercise such control").

199 Indeed, some courts did apply *Reves* in a manner that resembled this approach by asking whether an individual inside an enterprise "knowingly implemented decisions." *See supra* notes 47–49 and accompanying text (noting that the First, Sixth, Seventh, and Eleventh Circuits have found the operation or management test to be satisfied by an individual inside an enterprise if she "knowingly implemented decisions"). But the fault in the approach of these courts is that they considered *Reves* as a case only about outsider liability and thus placed too much emphasis on whether a person is formally inside or outside an enterprise. *See infra* notes 200–03 and accompanying text (explaining why such an analysis is incorrect).

simply focus on whether a person is inside or outside the "chain of command" cannot be correct. In *Boyle*, the enterprise was "loosely and informally organized" and consisted of "a core group, along with others who were recruited from time to time."[200] Such an enterprise does not have a clear "inside or outside." These individuals look less like employees and more like "associates"—hence the phrase "associated in fact."[201] Additionally, § 1962(c) specifically extends liability to those "associated with" an enterprise.[202] If a person is using the enterprise to commit crimes, liability should not turn on whether he or she is technically inside or outside the enterprise, especially given the specific extension of liability to those "associated with the enterprise." Instead, liability should turn on whether a person "directed the affairs," as understood to mean knowingly made decisions as to an enterprise's affairs or knowingly carried out those affairs. And in the context of outside professionals who commit crimes on behalf of an enterprise, the same test should apply. Despite some courts' tendencies to do so, exonerating professionals simply because they are professionals has no basis in RICO and produces unequal application of the statute.[203]

The benefits of a test that asks whether an individual knowingly made decisions as to an enterprise's affairs or knowingly carried out those affairs are fourfold. First, the test ensures that § 1962(c) is not applied restrictively, but instead, liberally—an approach that comports with the text of § 1962(c), RICO as a whole, and the broader interpretive approach that the Supreme Court has taken toward RICO.[204] While many have convincingly argued that RICO is overly broad, statutory interpretation by the judiciary is not the appropriate avenue for addressing such concerns.[205] Second, it prevents § 1962(c) liability from turning on structural elements such as hierarchy or

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200 Boyle v. United States, 129 S. Ct. 2237, 2241 (2009).

201 18 U.S.C. § 1961(4) (2006).

202 *Id.* § 1962(c).

203 *See* Madel, *supra* note 46, at 1190–91 (arguing that courts that have read *Reves* to immunize professionals based on their status alone have "mischaracterized" the opinion); Vitiello, *supra* note 40, at 1391–95 ("Creating an exemption for professionals sets up a questionable double standard[,] . . . giv[ing] professionals a blanket immunity even when their conduct violates provisions of § 1962(c). By contrast, no immunity exists for a Mafioso or a business person who commits the same acts."); *see also supra* notes 58–59 and accompanying text (describing the tendency of courts to apply *Reves* in a way that exonerates professionals).

204 *See supra* note 103.

205 Chief Justice Rehnquist provided a perfect example of this concept in practice when he wrote an op-ed entitled *Get RICO Cases Out of My Courtroom*, in which he described the judiciary's limited ability to restrict RICO and requested that Congress enact amendments to limit the scope of the statute. *See* Rehnquist, *supra* note 106.

formal positions, which *Boyle* held were not required elements of a RICO enterprise. Third, it allows consistent application of the statute across similarly situated individuals, regardless of what type of enterprise the individual uses or what position he may or may not hold within an enterprise. Finally, it makes the interpretation of RICO as a whole more consistent by relieving the strain between *Reves* and *Boyle*.

Conclusion

Section 1962(c) of RICO is the most used section of RICO, and the lower courts currently interpret it inconsistently. *Reves v. Ernst & Young* was an unclear opinion that suggested that RICO should be interpreted restrictively and that a RICO enterprise should have a formal structure by which one could operate or manage an enterprise. Picking up on this suggestion, the lower courts have applied § 1962(c) in a restrictive manner and have done so by relying on structural factors.

In direct opposition to this application of § 1962(c), *Boyle v. United States* reaffirmed the broad interpretive approach traditionally taken toward RICO. *Boyle* made clear that an enterprise does not need formal structural aspects. In light of this interpretive conflict, the lower courts should restore consistency to their application of § 1962(c) by reexamining their understanding of *Reves* and § 1962(c). In so doing, courts should focus on *Reves*'s requirement that one "have some part in directing those affairs" and understand the phrase to mean knowingly carrying out the enterprise's affairs, thus allowing "operation or management" to serve only a descriptive function. Furthermore, the lower courts should abandon all § 1962(c) analyses that turn on formal position, chain of command, whether a person is inside or outside of an enterprise, or whether he is a professional. The courts will accordingly provide a more consistent interpretation of RICO and a more just application of § 1962(c) to similarly situated individuals.