No. 17-1607

In The
Supreme Court of the United States

KENNETH E. FAIRLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF AMICI CURIAE PROFESSORS OF EVIDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Over the past twelve years, multiple courts of appeals have held that the coconspirator exception to the hearsay rule, codified at Fed. R. Evid. 801(d)(2)(E), extends to out-of-court statements made in furtherance of lawful joint ventures.

The question presented is whether the coconspirator exception indeed applies to completely lawful activity or whether instead – in keeping with the plain English meaning of the word "conspiracy" – Rule 801(d)(2)(E) applies only to statements made in furtherance of illegal activities.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors of evidence who have studied, taught, and written about the Federal Rules of Evidence. Amici believe this case presents important questions concerning the admissibility of evidence at federal trials. Amici law professors, as a group, have special insight into the purposes of the hearsay rule and its exceptions, and a professional interest in ensuring the rational and coherent development of American evidence law.

Amici include authors of leading evidence texts such as the *Federal Rules of Evidence Manual*, *Modern Scientific Evidence*, and evidence volumes of Wright & Miller's *Federal Practice and Procedure*. Ben Trachtenberg, lead author of brief for amici, is an Associate Professor of Law at the University of Missouri School of Law and is the author of *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581 (2010).

A complete list of amici who reviewed and join in this brief is included in the attached Appendix. The views expressed herein are those of the individual

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made such a monetary contribution.

amici, not of any institutions or groups with which they may be affiliated.

SUMMARY OF ARGUMENT

The coconspirator statement exception to the hearsay rule, codified at Federal Rule of Evidence 801(d)(2)(E), does not cover statements made in furtherance of lawful ventures. For centuries, courts in England and America have recognized an exception to the hearsay rule allowing use of a statement against a party if the statement was uttered by the party's coconspirator during the pendency of and in furtherance of their conspiracy. Unlike hearsay deemed admissible because of reliability—such as business records and statements made for medical diagnosis—coconspirator statements are deemed "not hearsay" because of practical necessity. Absent such evidence, the prosecution of many serious crimes, committed secretly, would be impossible. Indeed, the Advisory Committee Note to Rule 801 provides that "no guarantee of [the declarant's] trustworthiness is required" to admit coconspirator hearsay.

In addition, like other opposing party statements (*i.e.*, "admissions by party-opponent") codified at Federal Rule of Evidence 801(d)(2), coconspirator hearsay is admissible in part because the party against whom it is used has brought it upon himself. A party's own statements may be used against him, *see* Rule 801(d)(2)(A), because a litigant is estopped from

questioning his own reliability. Statements by agents or employees may be used against principals or employers, *see* Rule 801(d)(2)(D), because bosses may properly be held responsible for the actions of their underlings, under a theory like that of *respondeat superior* in tort. Similarly, statements of a party's coconspirator may be used against him, *see* Rule 801(d)(2)(E), because the party made his bed upon joining the conspiracy, and at trial he must sleep in it.

Centuries of treatises and court opinions demonstrate that the coconspirator hearsay exception has been limited to statements made in furtherance of illegal enterprises,[2] and for good reason. The credible justifications for a coconspirator exception—(1) the need to uncover and punish crimes or civil wrongs committed in hiding and (2) the sense that a conspirator has only himself to blame when fellow lawbreakers' words are used to hang him—make no sense when applied to "lawful joint ventures," that is, to perfectly legitimate activities involving multiple persons. After all, lawful ventures present no special danger justifying a relaxation of normal evidence law, and joining a legitimate venture should not subject someone to unreliable evidence. Recent court decisions construing Rule 801(d)(2)(E) to include "coventurer hearsay" are outliers that have created a split among the circuits, and this Court should reject the "lawful joint venture" interpretation of the coconspirator exception.

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[2] The unlawful enterprise may violate civil or (more commonly) criminal law.

ARGUMENT

I. The Original Conspirator Statement Exception Applied to Unlawful Conspiracies, not to Lawful Ventures.

From the earliest reported cases in which hearsay was admitted pursuant to a coconspirator statement exception, the exception has applied to illegal schemes, as the word "coconspirator" implies. The exception became part of colonial American law, and our earliest treatises and judicial opinions contain consistent references to illegal conduct. In the centuries since our independence, American reporters brim with cases in which courts use the words "criminal," "unlawful," "illegal," or "illicit" when describing the sort of joint venture relevant to the exception. In short, any argument that the coconspirator exception has traditionally included "lawful joint venture hearsay" misstates historical facts.

A. The Birth of the Exception at English Common Law

A hearsay rule similar to its modern incarnation did not exist until between 1675 and 1690. Before then, hearsay "objections" went to the weight of evidence instead of admissibility. *See* John H. Wigmore, *The History of the Hearsay Rule*, 17 Harv. L. Rev. 437, 444–45 (1904). The coconspirator exception is similarly old, arising around the same time as the crystallization of the hearsay rule. In the earliest cases, like the 1683 treason trial of Lord Russell, coconspirator hearsay

often consisted of statements that themselves were criminal—such as treasonous statements. Although statements illegal in and of themselves often require no hearsay exception at all—such as when offered not "to prove the truth of the matter asserted" but instead to convict the declarant for the crime of uttering them—English commentators and judges drew from early cases a general rule authorizing the admission against a conspirator of statements made by his coconspirators in furtherance of their criminal scheme. *See* Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 Hofstra L. Rev. 323, 325–26 (1984). By the eighteenth century, English law included a coconspirator statement exception materially identical to that codified in the Federal Rules of Evidence.

B. Receipt of the Exception in America

The exception is noted in early American evidence treatises and appears in cases older than the Republic. Considering the origin of the exception, it is no surprise that the earliest American references to it explicitly mention illegal conduct performed by coconspirators. Thomas Starkie, whose English treatise on evidence was republished in multiple American editions and received great respect from American jurists, described the exception as follows:

> Where several combine together for the same *illegal purpose*, . . . a declaration made by one conspirator at the time of doing an act in

> furtherance of the general design, is evidence against the other conspirators.

2 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 402 (Phila., P.H. Nicklin & T. Johnson 3d American ed. 1830) (emphasis added). S.M. Phillipps, another scholar well respected when the United States was young, used similar language to discuss when conspirator statements could be admitted despite the hearsay rule:

> It is an established rule, that where several persons are proved to have combined together for the same *illegal purpose*, . . . any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and therefore part of the res gestae, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in furtherance of a common design.

1 S. March Phillipps, *A Treatise on the Law of Evidence* 199–200 (N.Y., Banks, Gould & Co. 3d ed. 1849) (emphasis added). By 1829, this Court had described the modern coconspirator exception. *See Am. Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 363–65 (1829). This Court held:

> [W]here two or more persons are associated together for the same *illegal purpose*, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gesta, may be given in evidence against the others.

Id. at 365 (emphasis added). Similar language would appear throughout the nineteenth and twentieth centuries.

II. The Drafters of the Federal Rules of Evidence Intended to Codify the Traditional Meaning of the Coconspirator Statement Exception, not to Expand its Scope.

During the codification of federal evidence rules, the authors chose to keep the traditional coconspirator hearsay exception, neither expanding nor contracting its scope. The language of Rule 801(d)(2)(E), the Advisory Committee Note, and the legislative history all demonstrate a plan to maintain the existing exception, which covered statements made in furtherance of illegal combinations.

A. Plain Meaning

As enacted in 1975, Federal Rule of Evidence 801(d)(2)(E) provided that a statement is not hearsay if it "is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." This sentence should be enough to bury the "lawful joint venture" interpretation of the coconspirator hearsay exception. To conclude that Rule 801(d)(2)(E) includes lawful ventures, one must believe that Congress, seeking to convey a concept such as "any joint enterprise, whether legal or illegal" could find no word more apt than "conspiracy." Proponents of the "coventurer hearsay" theory ask this

Court to hold that the word "conspiracy" does not connote illegality. *But see Black's Law Dictionary* 375 (10th ed. 2014) (defining "conspiracy" as "agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose"). Respect for plain English demands rejecting the lawful joint venture hearsay exception.

B. Advisory Committee Note and Legislative History

Neither the Advisory Committee Note to Rule 801 nor related congressional committee reports provide any indication that those voting for the Federal Rules intended Rule 801(d)(2)(E) to cover statements made in furtherance of lawful ends. Rather, the Advisory Committee rejected a proposal that the coconspirator exception should cover all statements made concerning a conspiracy during its pendency, instead of only those made "in furtherance" of the conspiracy. Although Rule 801(d)(2)(D), which codifies the principal-agent hearsay exception, was written to include "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" and was not limited to statements "in furtherance" of the agency or employment relationship, the Advisory Committee concluded that coconspirator hearsay is not properly analogized to statements of agents. The Advisory Committee Note states that "the agency theory of

conspiracy is at best a fiction and ought not to serve as a basis for admissibility [of coconspirator hearsay] beyond that already established." The Note then cites cases and legal commentary, all concerning statements in furtherance of illegal activity. *See* Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581, 604–07 (2010) (reviewing cited cases and articles in detail). Appeals to the Advisory Committee Note in support of the lawful joint venture hearsay exception are in vain.

Legislative history is no better for the lawful joint venture exception. Proponents quote the Senate Report on the Federal Rules of Evidence, which states:

> While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged.

S. Rep. No. 93–1277, at 26–27 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7073. The words "joint venturer" allow the initial misconception that no illegality is required to create a "conspiracy" under the exception. Not so. The Senate Report shows that despite using the word "conspiracy" in the codified exception, drafters did not limit the scope of the exception to *charged* conspiracies. Under Rule 801(d)(2)(E), a "conspiracy" may be uncharged, but it must still be a conspiracy. The two cases cited in the Senate Report show that lawful conduct was not under consideration. The cases are

United States v. Rinaldi, 393 F.2d 97, 99 (2d Cir. 1968), which concerned a conspiracy to lie to immigration officers, and *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969), which concerned a conviction for possession and sale of heroin.

III. Since 1975, Courts Applying Rule 801(d)(2)(E) Have Overwhelmingly Limited Its Scope to Unlawful Combinations.

In addition to the plain language of Rule 801 and its legislative history, decades of judicial practice since the codification of the Federal Rules demonstrate that the coconspirator exception is properly limited to illegal ventures. Before the adoption of the lawful joint venture exception in 2006 by the U.S. Court of Appeals for the D.C. Circuit, federal cases admitting statements made in furtherance of lawful ventures pursuant to Rule 801(d)(2)(E) were nearly nonexistent.

A. Results of a Study of 2,500 Federal Cases

Following the enactment of the Federal Rules of Evidence, federal courts applied the coconspirator exception in thousands of cases, issuing opinions to settle disputes over whether a statement was "in furtherance" of a conspiracy, whether it was made during the conspiracy, and whether a conspiracy even existed between the declarant and the party against whom the evidence was offered. A 2010 article reports the results of a study reviewing about 2,500 cases in which federal courts issued opinions concerning the admission of

evidence under Rule 801(d)(2)(E). The study covered trial court and appellate opinions from eight circuits, published and unpublished. The results are stark: Of the 2,516 opinions for which the object of a conspiracy was recorded, all but four concerned an illegal object. *See* Trachtenberg, *supra*, at 623–26. Three of the four outliers concerned the same criminal case from the District of Kansas. The other outlier is a civil case in which the trial judge followed the D.C. Circuit's holding in *United States v. Gewin*, 471 F.3d 197 (D.C. Cir. 2006). In other words, if the Federal Rules of Evidence as codified in 1975 allowed the admission under Rule 801(d)(2)(E) of statements made in furtherance of lawful joint ventures, litigants ignored this hearsay exception—forgoing the opportunity to use the sort of evidence so important by Respondent in this case—for three decades. If the lawful joint venture theory were credible, one would find court opinions discussing the questions addressed in traditional coconspirator hearsay cases: whether a "joint venture" existed, and whether the proffered statement was "in furtherance" of it. Yet no evidence of such cases has been presented.

B. Nearly All Pre-2006 Cases Reciting the Lawful Joint Venture Exception Are Dicta

To compensate for their lack of cases applying the "lawful joint venture" theory, proponents pepper their briefs with string cites purporting to prove that several courts have long admitted "coventurer hearsay." Nearly all of those cases are dicta. In addition, "lawful

joint venture" proponents misread an opinion of this Court commonly cited for the proposition that the "combination" of the declarant and the party against whom hearsay is offered need not be "criminal or otherwise unlawful."

Prosecution briefs on this issue tend to cite the same batch of cases. *See* Trachtenberg, *supra*, at 612–13 (collecting citations to briefs). These court opinions, despite containing language that if quoted out of context seems to imply that courts have adopted the "lawful joint venture" exception, do not actually involve the admission of statements made in furtherance of lawful ventures. *See id.* at 613–20 (analyzing commonly cited cases). For example, briefs commonly cite *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979) to show that a recreational boat trip is a "joint venture" allowing admission of hearsay under Rule 801(d)(2)(E), quoting the opinion as follows:

> It is clear to us that the voyage was a "joint venture" in and of itself apart from the illegality of its purpose and that the logbook was therefore admissible as nonhearsay under the rule.

Id. at 886 n.41. *Postal*, however, concerned the logbook of a ship used to smuggle about "eight thousand pounds" of marijuana, *id.* at 867, meaning that the opinion's conclusions concerning "lawful joint ventures" are dicta.[3] Other commonly cited cases containing dicta

[3] The court below relies on an opinion citing *Postal* as binding precedent. *See United States v. Fairley*, 880 F.3d 198, 213 (5th Cir.

useful to revisionists concern bribery of a Congressman, *see United States v. Weisz*, 718 F.2d 413, 416, 433 (D.C. Cir. 1983), and the murder of a Congressman at the "People's Temple" in Guyana, *see United States v. Layton*, 855 F.2d 1388, 1393–94, 1398 (9th Cir. 1988). Until the D.C. Circuit issued *Gewin*, no court of appeals had applied Rule 801(d)(2)(E) in a case involving lawful conduct.

Further, a decision of this Court commonly cited by "lawful joint venture" proponents, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), does not support the application of the coconspirator exception to lawful ventures. True, the *Hitchman Coal* opinion recites the fiction that the coconspirator exception is justified by the law of agency, *see id.* at 249, but the opinion states on the very same page that a proponent of conspirator hearsay must establish the "element of illegality" to win admission of the evidence. *Id.* The dispute in *Hitchman Coal* was over whether the hearsay statements themselves could support a finding of illegality, not whether illegality was a necessary part of coconspirator hearsay.[4]

2018) (quoting *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) to support the conclusion that "Fairley's argument misunderstands the nature of the coconspirator exception."); *El-Mezain*, 664 F.3d at 503 ("The defendants argue that *Postal* misread the legislative history of Rule 801(d)(2)(E), and they urge us to reject the so-called 'lawful joint venture theory.' However, our circuit has embraced the theory in precedent that we may not ignore.").

[4] For an example of prosecutors misconstruing *Hitchman Coal*, *see* Brief for the United States at 76–77, *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. Jan. 28, 2011) (No. 09-10560). The

The D.C. Circuit and Fifth Circuit have misinterpreted the coconspirator exception—in part because of a misreading of this Court's precedent—and have departed from the longstanding practice of sister circuits.

C. Courts Adopting the Lawful Joint Venture Rule Since 2006 Have Created a Circuit Split

Since the D.C. Circuit announced its adoption of the joint venture hearsay exception in *United States v. Gewin*, 471 F.3d 197 (D.C. Cir. 2006), various federal courts have stated that a "conspiracy" need not be unlawful to satisfy Rule 801(d)(2)(E). *See, e.g.*, *Datatreasury Corp. v. Wells Fargo & Co.*, No. 2:06-CV-72 DF, 2010 WL 903257, at *2 (E.D. Tex. Mar. 4, 2010) ("A joint venture or 'conspiracy' need not be for an unlawful purpose to satisfy the hearsay exception."); *United States v. El-Mezain*, 664 F.3d 467, 503 (5th Cir. 2011) ("[W]e are not alone in our construction of Rule 801(d)(2)(E), as our sister circuits have also held that statements made in furtherance of a lawful common enterprise are admissible.").[5] Combined with the dicta discussed above, these recent decisions provide ammunition for

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brief quoted *Hitchman Coal* to illustrate "the coconspirator exception's grounding in the law of agency" and to "explain[] why a 'conspiracy' under the Rule need not be criminal," but it did not mention the "element of illegality" required by the *Hitchman Coal* Court.

[5] One state court has explicitly rejected this interpretation of its own coconspirator hearsay exception, which is modeled on the federal rule. *See State v. Tonelli*, 749 N.W.2d 689, 693–94 (Iowa 2008).

those who would avoid the plain meaning of "conspiracy" in Rule 801(d)(2)(E).

A decision of the U.S. Court of Appeals for the Seventh Circuit exemplifies the confusion sown by the lawful joint venture theory. Considering the appeal of a grant of summary judgment in an employment discrimination case, the court addressed what evidence would have been admissible at trial. *See Smith v. Bray*, 681 F.3d 888, 901–02 (7th Cir. 2012), *overruled on other grounds by Ortiz v. Werner Enters, Inc.*, 834 F.3d 760 (2016). Certain challenged evidence consisted of hearsay the plaintiff claimed was admissible under Rule 801(d)(2)(E), and the court approvingly quoted *Gewin* and other opinions stating that "Rule 801(d)(2)(E) applies not only to conspiracies but also to joint ventures." *Id.* at 904 (quoting *United States v. Kelley*, 864 F.2d 569, 573 (7th Cir. 1989)). The court then, however, held that the challenged hearsay was not admissible under Rule 801(d)(2)(E) because the plaintiff could not show that the declarant and the defendant shared an unlawful motive.

> We do not think this testimony shows that [defendant] Bray conspired with [hearsay declarant] Bianchetta to retaliate against [plaintiff] Smith for his complaints of discrimination. In a corporation or other business or institution, one should expect to find some concerted action among people with different responsibilities who are expected to work together, like supervisors and human resources staff. In a case of individual liability, evidence of that legitimate concerted action should not

> be interpreted too easily as evidence of a conspiracy so that one person's admission of an unlawful motive is attributed to another.

Id. at 905. In other words, despite reciting the lawful joint venture rule, the Seventh Circuit refused to apply the coconspirator hearsay exception to lawful joint activity. *See id.* ("[Plaintiff's evidence] may show some concert of action between Bianchetta and Bray, but it does not indicate that they shared a common *unlawful* motive.") (emphasis added); *see also id.* at 906 n.7 ("The fact that Bray told Bianchetta that Concentra was managing Smith's disability claim does nothing to suggest the existence of an unlawful conspiracy between them. Rather, providing that sort of information is precisely the kind of conversation one would expect to occur routinely between human resource managers and supervisors.").

In addition, several circuits have not addressed the "lawful joint venture" theory explicitly but have precedent strongly indicating a requirement of illegality under Rule 801(d)(2)(E). *See, e.g.*, *United States v. Dworken*, 855 F.2d 12, 24–25 (1988) (considering whether prosecutors demonstrated "*illegal* conspiracies" as opposed to mere "agreements to travel to Maine to inquire about and negotiate a transaction"); *United States v. Broome*, 732 F.2d 363, 364 n.1 (4th Cir. 1984) (evidence of "illicit association"); *United States v. Blankenship*, 954 F.2d 1224, 1231 (6th Cir. 1992) ("criminal joint venture"); *United States v. Meggers*, 912 F.2d 246, 248 (8th Cir. 1990) ("illegal association").

In *Gewin*, by contrast, the D.C. Circuit found that a "group had engaged in a common enterprise of stock promotion" and "rejected Gewin's claim . . . that Rule 801(d)(2)(E) . . . requires, before admission of coconspirators' out-of-court statements, a showing of an *unlawful* conspiracy, not merely action in concert toward a common goal." 471 F.3d at 200 (emphasis in original).

Accordingly, a split exists among the circuits. The D.C. Circuit and the Fifth Circuit have held that Rule 801(d)(2)(E) applies to statements made in furtherance of all joint ventures, whether lawful or unlawful. The Seventh Circuit has rejected this interpretation, refusing to admit hearsay made in furtherance of lawful business. The study recounted above demonstrates that courts adopting the lawful joint venture hearsay exception have departed from decades of practice. Before 2006, federal courts did not admit evidence under the coconspirator hearsay exception unless the underlying "conspiracy" violated the law. Now, multiple circuits have squarely held that a "conspiracy" need not be illegal under the rule.

Further, prosecutors are citing *Gewin* and its progeny nationwide, seeking to claim new territory for the lawful joint venture exception. *See, e.g.*, Government's Memorandum of Law in Support of Its Motion in Limine at 10–11, *United States v. Stein*, 488 F. Supp. 2d 370 (S.D.N.Y. June 13, 2007) (S1 05 Crim. 888) (arguing that Rule 801(2)(d)(E) applied because "defendants and their colleagues were plainly engaged in a joint venture to devise, market, and implement tax

shelters," the alleged illegality of which was "wholly distinct from the instant evidentiary question"); SEC's Trial Brief & Motion Pursuant to FRE 801(d)(2)(A) & (E) to Admit Defendant Jordan's Prior Testimony into Evidence Against All Defendants at 5–6, *SEC v. Pietrzak*, No. 1:03-CV-1507 (N.D. Ill. July 16, 2007) ("[I]t is axiomatic that the SEC need not plead or prove an unlawful conspiracy, but may satisfy this requirement by showing that the Defendants 'act[ed] in concert toward a common goal' by a preponderance of the evidence.") (quoting *Gewin*); Letter Reply Brief of United States at 1, *United States v. Schiff*, 538 F. Supp. 2d 818 (D.N.J. Feb. 25, 2008) (Crim. No. 06-406) ("The defendant's main contention is that the conspiracy or joint venture shown for purposes of Federal Rule of Evidence 801(d)(2)(E) 'must have as its object an unlawful purpose.' The law, however, is to the contrary."); Trial Brief of the United States, *United States v. Zinnel*, No. 2:11-cr-00234-TLN, 2013 WL 9868379 (E.D. Cal. June 7, 2013) (arguing statements are admissible because "Zinnel and Eidson were in business together throughout the charge period," making it irrelevant "whether or not what they were doing in their joint enterprise was illegal"); United States' Trial Brief, *United States v. Fidler*, No. 15-10300-DPW, 2017 WL 3599789 (D. Mass. July 10, 2017) ("Further, even if the non-defendant co-conspirator was not deemed to be a member of the charged conspiracy, . . . he knowingly participated in a joint venture with defendants to advance Local 25's objective (i.e., getting jobs)."). By addressing this issue now, this Court can prevent error from tainting trials across America.

IV. Rules 801(d)(2)(D), 803(6), and 803(8) as Written Further Sound Policy.

The circuit split is particularly damaging because it renders ineffective multiple provisions of the Federal Rules of Evidence, undermining the sound policies of Rule 801(d)(2)(D), Rule 803(6), and Rule 803(8).

A. The Lawful Joint Venture Exception Undermines the Limitations of Rule 801(d)(2)(D)

The lawful joint venture interpretation of the coconspirator hearsay exception undermines the careful construction of Rule 801(d)(2)(D), which codifies the principal-agent (or employer-employee) exception. Rule 801(d)(2)(D) allows the words of underlings to be used against supervisors who control them (or, at least, could control them), but the words of bosses cannot be used against subordinates. *See id.* (defining as not hearsay a statement "made by the party's agent or employee on a matter within the scope of that relationship and while it existed"). The coconspirator exception, however, lacks this limitation. It allows the use of statements by any member of a conspiracy against all others, meaning that underlings can be faced with the unconfronted hearsay of their superiors. *See* 4 Steven A. Saltzburg et al., *Federal Rules of Evidence Manual* § 801.02[6][f]-[g] (8th ed. 2002); *United States v. Hunt*, 272 F.3d 488, 495 (7th Cir. 2001). In other words, Rule 801(d)(2)(E) allows use of a drug kingpin's words—if uttered in furtherance of a conspiracy—against a low-level street corner dealer. (Moreover,

statements in furtherance of a conspiracy may be used against participants who joined after the statements were made. *See United States v. Badalamenti*, 794 F.2d 821, 826–28 (2d Cir. 1986).)

Conversely, the principal-agent exception works only in one direction: The agent's statements may be admitted against the principal, but not vice versa. The existing broad scope of Rule 801(d)(2)(E) may be justifiable, at least in part, on the basis that only people who are part of illegal ventures suffer its harms.[6] That is, hearsay evidence is admissible against a party under the coconspirator exception only if a federal judge finds by a preponderance of the evidence that the party and the declarant shared the same unlawful ends.

These justifications hold no water when applied to members of "lawful joint ventures," such as two employees of the same corporation (whose "common scheme" is to earn profits for the company), or two persons collaborating on a federal grant proposal (whose common goal is lawfully obtaining the grant).[7] Yet federal prosecutors have used "conspiracies" such as these when proffering evidence under the revisionist

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[6] In addition, the "both-directions" nature of Rule 801(d)(2)(E) tracks the *Pinkerton* rule, which renders all conspirators liable for substantive crimes of coconspirators (if committed in furtherance of the conspiracy, and reasonably foreseeable).

[7] This is not to say that partners in lawful joint ventures should never be responsible for one another's statements. If the partners are agents of one another, their statements might be deemed not hearsay by Rule 801(d)(2)(D), the principal-agent exception. Unless their partnership is unlawful, however, the coconspirator hearsay exception is not applicable.

interpretation of the exception. *See* Trachtenberg, *supra*, at 624 n.259; *see also* Government's Opposition to Defendant's Motion for a New Trial at 2, *United States v. Stevens*, No. 1:08-CR-231, 2009 WL 192240 (D.D.C. Jan. 16, 2009) (arguing statements should be admitted because the declarant and defendant "collaborated closely and over a long period of time on renovating defendant's chalet"); Government's Trial Memorandum at 14–15, *United States v. Bruno*, No. 09-CR-029 (N.D.N.Y. Oct. 5, 2009) ("In view of Bruno's contractual associations with [various businesses], documents of those entities, as well as oral statements made by their representatives, are admissible pursuant to Fed. R. Evid. 801(d)(2)(E) as co-conspirator statements."). The lawful joint venture rule has also already begun infecting civil litigation, and it will increase discovery burdens once attorneys learn of an immense new category of admissible hearsay. *See* Trachtenberg, *supra*, at 645–48.

When the "venture" is a law-abiding business instead of a traditional "conspiracy," hearsay declarants are not alleged to have done anything illegal, much less to have participated in an illegal scheme with the defendant. The "conspiracy" alleged is the daily workings of a corporation. And the action that subjects a defendant to hearsay without the benefit of cross-examination—statements no more reliable than the vast universe of utterances barred by the hearsay rule[8]—is working

[8] As noted above and in the Advisory Committee Note, statements deemed "party admissions" are not considered especially reliable. Limiting the flow of unreliable hearsay to federal juries,

an honest job. Use of this evidence impairs the truth-seeking function of federal trials and punishes parties who have committed no misconduct whatsoever.

B. The Lawful Joint Venture Exception Undermines the Limitations of Rule 803(6) and Rule 803(8)

As the prosecution briefs cited above demonstrate, the lawful joint venture exception also undermines the limitations of the business records exception, codified at Rule 803(6), and the public records exception, codified at Rule 803(8). If all statements in furtherance of lawful ventures are "not hearsay," the proponent of a business record often need not show that it was "made . . . by—or from information transmitted by—someone with knowledge," Fed. R. Evid. 803(6)(A), much less prove this traditional requirement with the testimony or certification of a qualified witness, *see* Fed. R. Evid. 803(6)(D).[9]

Rule 803(6) covers business records only when "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness." *See* Fed. R. Evid. 803(6)(E). Because

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courts have recognized that "the very explicitness of Rule 801(d)(2) suggests that the draftsmen did not intend to authorize the courts to add new categories of admissions to those stated in the rule." *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979).

[9] Even if the lawful joint venture exception is good law, the showing would be required before a business record could be offered against someone unaffiliated with the business.

trustworthiness is not required under Rule 801(d)(2), this prong of the business records exception is undermined by the lawful joint venture exception, as is the similar prong of the public records exception, *see* Fed. R. Evid. 803(8)(B).

When examining proffered records for evidence of trustworthiness—or a lack thereof—federal courts have considered whether, for example, the author had a self-serving motive. *See, e.g.*, *Palmer v. Hoffman*, 318 U.S. 109 (1943) (railroad accident report inadmissible). Under the lawful joint venture theory, such unreliable business records are admissible against anyone sharing the common goal of their authors. Accordingly, if one employee writes that a workplace accident was caused by an injured colleague's negligence, as opposed to inadequate safety equipment, the hearsay report could be offered against the injured plaintiff-employee by the defendant-employer.

C. The Lawful Joint Venture Exception May Chill Participation in Lawful Activities

The campaign finance prosecution of former Senator John Edwards exemplifies the breathtaking scope of the lawful joint venture hearsay exception. The trial concerned money paid by supporters to help Edwards placate and hide his pregnant mistress, Rielle Hunter. Prosecutors argued that they could offer against Edwards any statement made in furtherance of the goal of electing Edwards to the presidency. *See* Gov't Motion

in Limine, *United States v. Edwards*, No. 1:11-CR-161-1-CCE, 2012 WL 628691, at 7 (M.D.N.C. Feb. 15, 2012). A prosecution brief referred to "a common goal among . . . Edwards [and others] to keep Rielle Hunter happy and out of the spotlight in order to protect Edwards' candidacy" and argued that statements "made in furtherance of that joint effort fall within the scope of Rule 801(d)(2)(E)." *Id.* If this theory is correct, such statements are admissible against any member of the Edwards campaign—including volunteers; the declarants at issue were not campaign staff members—because coconspirator statements may be used against all members of a conspiracy, not only the leader. It might make sense to offer against Edwards statements made by campaign employees, and perhaps even low-level volunteers shaking hands in Iowa, because such persons may fairly be described as "agents" of a presidential candidate. Edwards could fire campaign staff and volunteers; they worked for him. Accordingly, Rule 801(d)(2)(D) might allow admission of the statements under the principal-agent exception. But the lawful joint venture rule goes much further, stating that under Rule 801(d)(2)(E), if someone volunteers for a presidential campaign in Iowa, any statements made by her "coconspirators" in New Hampshire are admissible against her at trial.

The Fourth Circuit has not yet decided whether to join the D.C. Circuit and the Fifth Circuit in their adoption of the lawful joint venture rule, or instead to maintain the traditional coconspirator exception. The trial judge in the Edwards case therefore could not be sure

whether statements made in furtherance of a lawful project such as a presidential campaign count as statements "made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). Even if the Fourth Circuit were to decide the question, the proper application of Rule 801(d)(2)(E) would remain in doubt until this Court settles the question: Is the new lawful joint venture hearsay exception a correct reading of the Federal Rules of Evidence?

If the lawful joint venture exception is good law, then participation in purely lawful, even laudable, conduct subjects a person to the danger that unreliable hearsay will be admitted against her in federal court. For example, imagine that a homeowners' association president says at a meeting, "I am proud that Ms. Jones, a member of our association, sent a strong message by slashing the tires of those kids who keep parking illegally in the neighborhood." Such a statement might well further the goals of the homeowners' association, and the lawful joint venture exception would allow its admission against Jones to prove the truth of the matter asserted—that Jones slashed the tires. As the Fifth Circuit wrote explaining its interpretation of the coconspirator exception, "it is of no moment for purposes of Rule 801(d)(2)(E) that" prosecutors could not connect hearsay documents admitted against criminal defendants to unlawful conduct because "statements made in furtherance of a lawful common enterprise are admissible." *El-Mezain*, *supra*, 664 F.3d 502–03.

Especially when one considers the weak textual arguments advanced to support the lawful joint venture hearsay exception, there is no reason for this Court to adopt a rule that will admit more unsworn, unreliable evidence at federal trials. In light of Sixth Amendment jurisprudence holding that admitting unreliable non-testimonial hearsay cannot violate Confrontation Clause rights, *see Whorton v. Bockting*, 549 U.S. 406, 420 (2007), the proper scope of hearsay exceptions under ordinary evidence law has exceptional importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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