No. _____

In The
Supreme Court of the United States

JEFF GARVIN SMITH, CARY DALE VANDIVER, PATRICK MICHAEL MCKEOUN, DAVID RANDY DROZDOWSKI, VINCENT JOHN WITORT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners were convicted of RICO Conspiracy, 18 U.S.C. §1962(d). The district court inserted the future-tense language, "or would", for all of the elements of the charge. The Sixth Circuit majority opinion affirmed, joining a minority of circuits. The majority of circuits require proof of the existence of an enterprise.

The questions presented are:

I. Should the jury have been allowed to convict the defendants on the hypothetical existence of all of the elements of a RICO Conspiracy?

II. Did the jury instruction violate the defendants' right to free speech in violation of the First Amendment by punishing mere talk?

PARTIES TO THE PROCEEDINGS

Jeff Garvin Smith, Cary Dale Vandiver, Patrick Michael Mckeoun, David Randy Drozdowski, and Vincent John Witort are the Petitioners in this cause, as they were the defendants in the District Court for the Eastern District of Michigan, Southern Division, wherein the Respondent was the United States of America. On appeal to the Sixth Circuit Court of Appeals, Smith, Vandiver, Mckeoun, Drozdowski, and Witort were the appellants and the United States of America was the appellee.

RELATED CASES

United States of America v. Jeff Garvin Smith, Michael Kenneth Rich, Carey Dale Vandiver, Patrick Michael McKeoun, David Randy Drozdowski, Paul Anthony Darrah, Vincent John Witort, Victor Carlos Castano, Nos. 2:11-cr-20129 and 2:11-cr-20066, United States District Court for the Eastern District of Michigan, Southern Division at Detroit. Judgment entered November 13, 2015.

United States of America v. Michael Kenneth Rich (18-2268/2269); Carey Dale Vandiver (18-2323/2324); Patrick Michael McKeoun (18-2342); Jeff Garvin Smith (18-2364/2365); David Randy Drozdowski (18-2401); Paul Anthony Darrah (18-2407/2408); Vincent John Witort (18-2410); Victor Carlos Castano (19-1027/1029) United States Court of Appeals for the Sixth Circuit, decided September 13, 2021.

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Petitioners, Jeff Garvin Smith, Cary Dale Vandiver, Patrick Michael Mckeoun, David Randy Drozdowski, Vincent John Witort request this Court to grant a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit, entered on September 13, 2021. The Sixth Circuit denied *en banc* review on November 16, 2021.

OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Sixth Circuit Opinion and Judgment affirming the convictions and sentences on appeal from the United States District Court for the Eastern District of Michigan, Southern Division at Detroit is reproduced in the Appendix, 1-24, 25-26. The Order of the Sixth Circuit Court of Appeals denying rehearing *en banc* is reproduced in the Appendix, 27-28.

STATEMENT OF JURISDICTION

The Opinion and Judgment affirming the convictions and sentences of the United States Court of Appeals for the Sixth Circuit was entered on September 13, 2021. App. 1-24; 25-26. The Order of the United States Court of Appeals for the Sixth Circuit denying rehearing *en banc* was entered on November 16, 2021. App. 27-28. This Court has jurisdiction to review the Opinion and Judgment. 28 U.S.C. §1254(1). Rule 13(1) and (2) of the Supreme Court allows for ninety days within which to file a Petition for Writ of Certiorari after entry of an order denying rehearing. Accordingly, this Petition is timely.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I: "Congress shall make no law . . . abridging the freedom of speech . . . "

United States Constitution, Amendment XIV: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . "

18 U.S.C. §1962(c) makes it "unlawful for any person employed or associated with any enterprise engaged in . . . 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."

18 U.S.C. §1962(d) provides that it is "unlawful for any person to conspire to violate any of the provisions" of §1962 including §1962(c).

INTRODUCTION AND STATEMENT OF THE CASE

The issues presented in this case address whether the Sixth Circuit majority opinion affirming the District Court's erroneous instruction to the jury on the elements of the RICO conspiracy charge, by including the future tense language of "would exist" into all of the elements of the offense, violated the Defendants' Rights to the Due Process of Law and Freedom of Speech. Joining a minority of circuits, the Sixth Circuit

affirmed the convictions and sentences of all of the defendants in a consolidated appeal. The sentences range from twenty-eight years to life.

The government alleged that the Devil Disciples Motorcycle Club (DDMC) was involved in criminal activity under the RICO conspiracy statute, by manufacturing and distributing controlled substances, illegal gambling, theft, firearm possession, assaults and obstruction of justice, and perjury. The defendants were not charged with a substantive violation of RICO under 18 U.S.C. §1962(c).

At the insistence of the government and over objection, the district court added an alternative basis for a conviction on *all* of the elements of the RICO conspiracy charge: that the defendants could be convicted if the government proved that the elements of the crime "would exist". The jury was instructed:

> [T]o convict a defendant on the RICO conspiracy offense based on an agreement to violate . . . such a 1962(c) . . . the Government must prove the following five elements beyond a reasonable doubt:
>
> One, the existence of an enterprise *or that an enterprise would exist*.
>
> Two, that the enterprise was *or would be* engaged in, or its activities affected *or would affect* interstate commerce.
>
> Three, a conspirator was *or would be* employed by or associated with the enterprise.

> Four, a conspirator did *or would* conduct *or would* participate in, directly or indirectly, the conduct of the affairs of the enterprise.
>
> And five, a conspirator did *or would* knowingly participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity as described in the indictment; that is, a conspirator did *or would* commit at least two acts of racketeering activity.
>
> If you find from your consideration of the evidence that each of these elements has been proven beyond a reasonable doubt as to a particular defendant, then you should find that defendant guilty on Count 1. (Emphasis added).

There were no further instructions or explanations regarding the added language.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit majority opinion continues a circuit split on an issue of national significance. Does a RICO conspiracy require the government to prove the existence of an enterprise for a conviction? The First, Third, Fourth, Seventh, Eighth and Eleventh Circuits have answered the question in the affirmative. The minority of circuits, the Second, Ninth and Tenth Circuits do not have such a requirement. The Sixth Circuit majority opinion, which ignored intra-circuit *stare decisis*, joins the minority of circuits. The Court should exercise its discretionary appellate jurisdiction and

supervisory power to resolve the conflicting decisions on this important issue of federal law. Sup. Ct. R. 10(a).

In addition, the future tense language on all of the elements of the RICO conspiracy charged in this case is an unconstitutional expansion of the RICO conspiracy statute by allowing for a conviction based on mere speech.

The Department of Justice is engaged in an expansive use of the RICO conspiracy statute, often without charging an underlying substantive RICO violation. The RICO statute is already expansive in its reach. The Sixth Circuit impermissibly extends it further. Under the instruction approved by the Sixth Circuit, defendants will be charged and can be convicted with tenuous connections to racketeering activity based on mere speech and on speculation of what could happen in the future.

I. THE DEFENDANTS WERE DEPRIVED OF DUE PROCESS WHEN THE JURY WAS ALLOWED TO CONVICT THE DEFENDANTS OF RICO CONSPIRACY ON THE HYPOTHETICAL EXISTENCE OF ALL OF THE ELEMENTS.

The defendants challenged, in both the district court and on appeal, the erroneous jury instruction *on all of the elements* of the RICO conspiracy charge. The district court, at the insistence of the government, inserted future-tense language that allowed for a conviction if "an enterprise *would* exist," that the enterprise

"*would* be" engaged in activities that affected interstate commerce, that a conspirator "*would* be" employed or associated with the enterprise, that a conspirator "*would*" conduct or participate in the affairs of the enterprise, and that a conspirator "*would*" commit at least two acts of racketeering activity. In short, the jury was instructed that none of the elements of the RICO conspiracy had to exist at any time. This erroneous language allowed for a conviction in violation of the defendants' due process rights to have the government prove each element of the crime beyond a reasonable doubt. The jury instruction is contrary to the majority of circuits that require proof of the existence of an enterprise for a RICO conspiracy conviction.

The erroneous jury instruction strikes at the heart of United States Supreme Court precedent, holding jury instructions that relieve the government of its burden to prove beyond a reasonable doubt every element of the offense violates due process. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *In re Winship*, 397 U.S. 358, 364 (1970). If the standard of reasonable doubt is to be taken seriously, a conviction based on what *could* happen, without a defendant *doing* anything, is not grounded in reason or an articulable rationale, but rather speculation and the ambiguity of the future. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979) ("[a] reasonable doubt, at a minimum, is one based on reason.").

In this case, the district court allowed for a conviction on the RICO conspiracy count on a legally invalid theory. *Skilling v. United States*, 561 U.S. 358, 414

(2010) ("constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory."). The jury was instructed that none of the elements of a RICO offense had to exist, at any time, in order for there to be a conviction. In other words, if two or more people agreed to hypothetically create an enterprise (as defined in the law), agreed that the hypothetical enterprise engage in hypothetical activity affecting interstate commerce (as defined in the law), agreed that the conspirator would hypothetically be employed or associated with the hypothetical enterprise, agreed to hypothetically conduct or participate in the affairs of the hypothetical enterprise, and agreed that a conspirator would hypothetically commit two acts of hypothetical racketeering activity in the conduct of the affairs of the hypothetical enterprise, a conviction is warranted. None of those hypothetical scenarios constitute a violation of §1962(c), as the statute requires. This was wrong and lowered the burden of proof on the essential elements.

Section §1962(d) makes it "unlawful for any person to conspire to violate" 18 U.S.C. §1962(c). "[A] defendant can be convicted under §1962(d) upon proof that the defendant knew about or agreed to facilitate the commission of acts *sufficient to establish a §1962(c) violation*". *United States v. Smith*, 413 F.3d 1253, 1265 (10th Cir. 2005) (emphasis added) (citing to *Salinas v. United States*, 522 U.S. 52, 63-66 (1997)). A RICO conspiracy requires a knowing agreement *to commit a RICO violation*, and to participate in the conduct of the

enterprise through a pattern of racketeering activity. *Smith v. United States*, 568 U.S. 106, 110 (2013).

A RICO violation, the object of the RICO conspiracy, is set forth in §1962(c). Pertinent to the charges, subsection (c) 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.

As the Sixth Circuit dissent aptly points out, an enterprise must exist for the substantive RICO offense under subsection (c), citing to this Court's decision in *Boyle v. United States*, 356 U.S. 938, 944, 947 (2009). App. 18-19. The dissent, referencing *Boyle*, accurately describes the necessity of proving the existence of an enterprise as a separate element. RICO does not include individuals engaged in a pattern of racketeering activity, such as drug dealing, without proof of the existence of the enterprise. App. 19-21; *Boyle*, 556 U.S. at 947 n.4.

The majority panel of the Sixth Circuit approved the jury instruction relying primarily on this Court's decision in *Salinas*. Specifically, the majority opinion relied on the language in *Salinas* that reiterates established principles of conspiracy law and that §1962(d) is satisfied where "[a] conspirator . . . intend[ed] to

further an endeavor, which if completed, would satisfy all of the elements of a substantive criminal offense." App. 6. And while it is clear that a §1962(d) conspiracy punishes the agreement, the agreement must be to commit the substantive offense, that is, §1962(c). That is what this Court said in *Salinas*, that a defendant could be convicted under §1962(d) so long as the endeavor "*if completed . . . satisfied all the elements of a substantive offense*." 522 U.S. at 65 (emphasis added). That is what the statute requires.

A simple statutory construction of the plain language of §1962(d) is that it is "unlawful to conspire to commit the substantive offense of §1962(c)", as *Salinas* explicitly says. The instructions as given here, do *not* describe a §1962(c) violation, by adding the future tense language. As this Court in *Salinas* noted, the RICO conspiracy statute is "simple in formulation," that "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." 522 U.S. at 63. In other words, as the Court noted, the goal of the RICO conspiracy was the substantive RICO offense. *Id.* at 62. The added future tense language in the jury instruction encompasses conduct outside the unambiguous language of the statute, that is, outside a §1962(c) violation. Here, the plain language answers the question presented in this case and the Court need not go further. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)

(Powell, J., concurring) (plain meaning is always the starting point).[1]

The majority of circuits, specifically the First, Third, Fourth, Seventh, Eighth and Eleventh, require proof of the *existence* of an enterprise. *United States v. Ramirez-Rivera*, 800 F.3d 1, 18 (1st Cir. 2015); *United States v. Riccobene*, 709 F.2d 214, 220-221 (3d Cir. 1983); *United States v. Cornell*, 780 F.3d 616, 621 (4th Cir. 2015); *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) ("The government must prove that an enterprise affecting interstate commerce existed."); *United States v. Neopolitan*, 791 F.2d 489, 499 (7th Cir. 1986) (the jury should be instructed to find that an enterprise does exist); Eighth Circuit Model Jury Instruction 2020, 6.18.1962B RICO Conspiracy (18 U.S.C. §1962(d)); *United States v. Bennett*, 44 F.3d 1364, 1375 (8th Cir. 1995) (the substantive RICO and RICO conspiracy offenses require proof of the existence of an enterprise); Eleventh Circuit Pattern Jury Instructions (Criminal) §075.2 RICO Conspiracy Offense 18 U.S.C. §1962(d); Judicial Council of the United States, Eleventh Judicial Circuit, 2019, 075.2 RICO-*Conspiracy* offense 18 U.S.C. §1962(d) (2019); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1067 (11th Cir. 2017) ("Each of these subsections [§1962(a), (c) and (d)] requires Plaintiffs to have alleged the existence of an 'enterprise' – subsection (a) and (c) requires this

[1] The jury was instructed on the general principals of conspiracy law and informed that it was a crime for two or more people to conspire or agree to commit the criminal act even if they never actually achieved their goal.

explicitly, and subsection (d) requires it implicitly by virtue of incorporating the elements of subsection (c)."); *United States v. Alonso*, 740 F.2d 862, 870 (11th Cir. 1984) ("The focus is on the agreement to participate in the enterprise through a pattern of racketeering."); *United States v. Starrett*, 55 F.3d 1525, 1543 (11th Cir. 1995).

The majority panel joins the minority circuits, the Second, Ninth and Tenth Circuits. *See United States v. Harris*, 695 F.3d 1125, 1133 (10th Cir. 2012);[2] *United States v. Applins*, 637 F.3d 59, 73-74 (2d Cir. 2011); *United States v. Fernandez*, 388 F.3d 1199, 1223, n.13 (9th Cir. 2004). In doing so, the majority panel established circuit precedent creating a conflict within the Sixth Circuit. *See United States v. Tocco I*, 200 F.3d 401, 424 (6th Cir. 2000) ("Proof of a charge under §1962(d) [RICO conspiracy] requires proof that the association or enterprise *existed* and that the named defendants were associated with and agreed to participate in the conduct of its affairs, which effect interstate commerce, through a pattern of racketeering activity.") (emphasis added); *United States v. Rios*, 830 F.3d 403, 421 (6th Cir. 2016) ("[T]he government was required to

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[2] In *Harris*, the defendants failed to object at trial and were charged with a substantive §1962(c) violation, unlike the present case. Nor did the instructions in *Harris* include the "or would" language at issue in this case. In *Applins*, the defendants did object, but again, the instructions did not include the "or would exist" language in the elements. Footnote 13 of *Fernandez*, relied upon by the majority panel, offers no solace to their position because the issue involved the sufficiency of the evidence on the substantive count of §1962(c) and not a jury instruction.

prove both the *existence* of a racketeering enterprise and each defendant's association with that enterprise.") (emphasis added); *United States v. Nicholson*, 716 F. App'x 400, 405 (6th Cir. 2017) (unpublished).

The majority's attempt to distinguish these cases on the grounds that they addressed the sufficiency of the evidence is hardly compelling, especially in light of the majority's reliance on this Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997) in order to approve of the jury instruction in this case. The issue in *Salinas* was whether there was sufficient evidence to support a conviction under §1962(d), not the propriety of a jury instruction. In the end, the majority panel of the Sixth Circuit conceded that *Salinas* did not "decide the precise issue before us", thus going even further than the minority circuits the Sixth Circuit adopted. App. 7.

Finally, the majority's reliance on decisions from the Tenth and Second Circuit also failed to acknowledge the conflicts in panels in those circuits. *Compare*, *United States v. Applins*, 637 F.3d 59, 73-74 (2d Cir. 2011) (ruling on whether a particular defendant must commit two predicate acts), *with United States v. Reifler*, 446 F.3d 65, 88 (2d Cir. 2006) (an "essential element" of a RICO conspiracy charge included the "existence of a RICO 'enterprise' "); and *United States v. Harris*, 695 F.3d 1125, 1133 (10th Cir. 2012) (government need not prove that the alleged enterprise existed) *with United States v. Smith*, 413 F.3d 1253, 1266 (10th Cir. 2005) ("we hold that in order to convict a defendant for violating §1962(d), the government must

prove beyond a reasonable doubt that the defendant: (1) by knowing about and agreeing to facilitate the commission of two or more acts (2) constituting a pattern (3) of racketeering activity (4) participates in (5) an enterprise (6) the activities of which affect interstate or foreign commerce.").

Since the district court's instructions misled the jury on all of the elements in violation of the defendants' constitutional rights, a new trial is warranted.

II. THE JURY INSTRUCTION ALLOWED FOR PUNISHMENT FOR MERE SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

This Court has said that to establish a RICO conspiracy, the government need not allege or prove that any overt act has been committed. *Salinas v. United States*, 522 U.S. 52, 63 (1997) ("There is no requirement of some overt act in the statute before us. . . ."). The jury instruction in this case expands beyond the *Salinas* observation to include mere speech *about the future*, in violation of the First Amendment. This Court has long held that the Government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

The jury instructions given permitted the jury to convict based only on mere speech in violation of the Petitioners' First Amendment rights. Through the use of Title III wiretaps, confidential informants recording

conversations, and clubhouse meetings, the Government introduced many recordings which it argued showed the DDMC's violent and criminal nature. The erroneous use of the future "would exist" language in the jury instructions violated the Petitioners' First Amendment rights. Further, it violated this Court's longstanding directive that mere speech is protected from Governmental sanction.

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), this Court struck down the Ohio Criminal Syndicalism Act. The defendant, a leader of Ohio's Ku Klux Klan, was convicted following a Klan rally in Hamilton County. At the rally, the defendant spoke and told the group that "this is an organizer's meeting . . . if our President, our Congress, our Supreme Court, continues to suppress the white, Causcausian (sic) race, it's possible that there might have to be some revengeance (sic) taken. We are marching on Congress July the Fourth, four hundred thousand strong . . . " *Brandenburg*, at 446.[3]

This Court struck down the Ohio statute and other similar state statutes. Only speech that explicitly or implicitly encourages the imminent use of violence or lawless action is outside the protection of the First Amendment. *Brandenburg*, 395 U.S. at 447. The mere tendency of speech to encourage unlawful acts is not a

[3] The rally was several days and evidence was admitted that there was a cross burning, anti-Jewish and anti-black speech as well as rifles and other firearms. *Id.*

sufficient reason for banning it. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. *Id*.

CONCLUSION

WHEREFORE, for all the foregoing reasons, this Court should reverse the Sixth Circuit and remand for relief consistent with this Court's opinion.

Respectfully submitted,

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