Nos. 21-1089, 21-7083, 21-7095, and 21-7119

In the Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA

MICHAEL KENNETH RICH, PETITIONER

v.

UNITED STATES OF AMERICA

PAUL ANTHONY DARRAH, PETITIONER

v.

UNITED STATES OF AMERICA

VICTOR CARLOS CASTANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether conspiracy under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. 1962(d), which makes it a crime to conspire to participate in the conduct of the affairs of an enterprise through a pattern of racketeering, requires proof of a preexisting RICO enterprise rather than one that is part of the conspirators' plan.

2. Whether the lower courts erred in determining that the government's wiretap applications for petitioner Darrah's phone sufficiently established that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. 2518(3)(c).

3. Whether the lower courts erred in determining that the government's particular proffer agreement with petitioner Castano did not preclude the government from presenting Castano's proffer statements in the grand-jury proceedings and at trial, where the district court found that he had breached his obligations under the agreement.

4. Whether the district court properly calculated the drug quantity attributable to petitioner Castano at sentencing.

5. Whether the district court reversibly erred at sentencing in finding that petitioner Rich's relevant conduct included certain acts, where that determination did not affect the calculation of Rich's advisory Sentencing Guidelines range.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

Werth v. *United States*, No. 18-cv-11067 (Apr. 2, 2018) (filing of co-defendant's motion to vacate sentence under 28 U.S.C. 2255)

United States Court of Appeals (6th Cir.):

United States v. *Battaglia*, No. 13-1917 (Oct. 7, 2013) (co-defendant's appeal of order denying reopening of detention hearing)

United States v. *Castano*, No. 14-1849 (Oct. 6, 2014) (appeal of order denying motion to vacate pretrial detention order)

United States v. *Castano*, No. 19-1028 (Sept. 13, 2021)

United States v. *Darrah*, Nos. 12-2001 & 12-2006 (Sept. 28, 2012) (appeal of pretrial-detention order)

United States v. *Vandiver*, Nos. 13-1280 & 13-1281 (July 12, 2013) (appeal of pretrial-detention order)

United States v. *Villa*, No. 16-1611 (June 1, 2016) (order granting co-defendant's motion to voluntarily dismiss appeal)

United States v. *Werth*, No. 14-1053 (May 2, 2014) (co-defendant's appeal of order denying leave to proceed pro se for the purpose of conducting discovery)

United States v. *Werth*, No. 15-1743 (Aug. 11, 2015) (co-defendant's appeal of denial of several pretrial motions)

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United States v. *Werth*, No. 16-2011 (June 23, 2017)
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In the Supreme Court of the United States

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OPINIONS BELOW

The published opinion of the court of appeals (21-7095 Pet. App. 1-16) is reported at 14 F.4th 489.[1] The unpublished appendix to that opinion (Pet. App. 18-122) is not published in the Federal Reporter but is available at 2021 WL 4144059. The order of the district court denying petitioner Darrah's motions to suppress is not published in the Federal Supplement but is available at 2014 WL 5311534.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2021. Petitions for rehearing were denied on November 16, 2021 (Pet. App. 123). The petitions for writs of certiorari were filed on February 2, 2022 (Smith, Vandiver, McKeoun, Drozdowski, and Witort); February 4, 2022 (Rich); February 7, 2022 (Darrah); and February 10, 2022 (Castano). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following two jury trials in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. 1961 *et seq.*, in violation of 18 U.S.C. 1962(d), and numerous other offenses. Castano Judgment 1; Darrah Judgment 1; Drozdowski Judgment 1; McKeoun Judgment 1; Rich Judgment 1; Smith Judgment 1; Vandiver Judgment 1; Witort Judgment 1.[2]

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[1] Unless otherwise specified, all citations to the "Pet. App." are to the appendix to the petition in No. 21-7095. The last page of that appendix is not paginated; this brief cites it as page 123.

[2] Unless otherwise specified, all citations to district court documents and docket entries are to those in No. 11-cr-20129.

Darrah, Smith, and Witort were each sentenced to life imprisonment, to be followed by five years of supervised release. Darrah Judgment 2-3; Smith Judgment 2-3; Witort Judgment 2-3. See 11-cr-20066 Darrah Judgment 2-3; 11-cr-20066 Smith Judgment 2-3. Vandiver was sentenced to life imprisonment, to be followed by three years of supervised release. Vandiver Judgment 2-3; see 11-cr-20066 Vandiver Judgment 2-3. Drozdowski was sentenced to 456 months of imprisonment, to be followed by ten years of supervised release. Drozdowski Judgment 2-3. McKeoun was sentenced to 372 months of imprisonment, to be followed by five years of supervised release. McKeoun Judgment 2-3. Rich was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. Rich Judgment 2-3; see 11-cr-20066 Rich Judgment 2-3. Castano was sentenced to 336 months of imprisonment, to be followed by ten years of supervised release. Castano Judgment 2-3; see 11-cr-20066 Castano Judgment 2-3. The court of appeals affirmed. Pet. App. 1-16, 18-122.

1. Petitioners were members of "the 'Devils Diciples [sic] Motorcycle Club' (DDMC)," a national motorcycle club that manufactured and distributed large quantities of methamphetamine and engaged in other criminal activities, including stealing motorcycles and maintaining illegal gambling machines. Pet. App. 18 (brackets in original); see *id.* at 19. Smith was the DDMC's national president, Darrah was the DDMC's national vice president, and Vandiver was the DDMC's national "warlord." *Id.* at 19. Witort frequently supplied other DDMC members with distribution quantities of methamphetamine, and Smith, Darrah, Vandiver, and McKeoun (a "respected [DDMC] elder") "all helped oversee and facilitate the drug's movement in and

outside the Club." *Ibid.* Drozdowski was "a prolific methamphetamine cook," Castano trafficked in methamphetamine and marijuana, and Rich was a DDMC "elder statesman" who encouraged the use and distribution of methamphetamine. *Ibid.*

The DDMC used violence to enforce club rules, resulting in at least three murders and several assaults against members and their associates. Pet. App. 20. Among other things, Witort and other DDMC members, acting at Smith's direction, violently attacked rogue DDMC members, dumping some of them in a remote desert area known as "Box Canyon." *Id.* at 39; Witort Presentence Investigation Report (PSR) ¶ 64-74. In addition, on at least one occasion, a DDMC member assaulted an innocent bystander who was wearing a vest that looked like a rival club's vest. Pet. App. 20. On another occasion, DDMC leadership coordinated perjurious testimony to help a club member defeat a firearm charge. *Ibid.*

2. During its investigation of the DDMC, the government approached Castano to ask that he submit a proffer of his knowledge about illegal activities by the DDMC. Pet. App. 27. The government's proffer letter promised that "no statement made . . . during [the] proffer discussion [would] be offered against [Castano] in the government's case-in-chief in any criminal prosecution . . . for the matters currently under investigation." *Ibid.* (brackets in original). That offer of immunity was contingent, however, on Castano making "a complete and truthful statement of his knowledge of (and role in) the matters under investigation" and "fully and truthfully answer[ing] all questions." *Ibid.* The letter advised Castano that he would be in material breach of the agreement if his proffer "omit[ted] facts about

crimes, other participants, or his . . . involvement in the offenses." *Id.* at 27-28. The letter additionally clarified that the letter and interview were not plea discussions within the meaning of Federal Rule of Criminal Procedure 11 or Federal Rule of Evidence 410, which meant that "[a]ny use of the statements and information" from the interview was governed only by the "terms of [the] letter." Pet. App. 28 (brackets in original).

Castano agreed to the terms in the letter and "met with the government for an interview." Pet. App. 28. During the interview, he "admitted that he became a DDMC prospect" in July 2003 and became "a full member shortly thereafter." *Ibid.* He also discussed some of his marijuana dealings and other issues relating to his earlier trial in another case on drug-distribution and firearm-possession charges. *Ibid.*; see *id.* at 27. Castano implicated two DDMC members who had testified against him in that earlier trial, but he largely did not discuss other DDMC members. *Ibid.* "About three weeks after Castano's proffer, the government used his testimony in the ongoing grand jury proceedings related to the DDMC investigation." *Id.* at 28.

3. A grand jury in the Eastern District of Michigan returned indictments in two cases that collectively charged petitioners with conspiring to violate the RICO Act, in violation of 18 U.S.C. 1962(d), and other crimes. D. Ct. Doc. 72 (July 13, 2012) (third superseding indictment with charges for all petitioners); D. Ct. Doc. 1476 (Aug. 26, 2015) (fifth superseding indictment with updated charges for Castano, Rich, and Drozdowski); 11-cr-20066 D. Ct. Doc. 3 (July 13, 2012) (indictment with additional charges for Smith, Darrah, Vandiver, Castano, and Rich).

a. Before his trial, Darrah filed two motions to suppress evidence obtained from government wiretaps on his phone from approximately March 2008 to October 2008. D. Ct. Doc. 822 (June 2, 2014); D. Ct. Doc. 823 (June 2, 2014). Each wiretap was authorized by a district judge under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* D. Ct. Doc. 1045, at 1 (Oct. 17, 2014), which allows such authorization if a judge finds, *inter alia*, probable cause of a crime and that "normal investigative procedures" have failed or are unlikely to succeed. 18 U.S.C. 2518(3)(c); see 18 U.S.C. 2518(3)(b). An application for a wiretap accordingly must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(1)(c).

An "aggrieved person" may seek to suppress evidence obtained through a wiretap if the authorizing order was facially invalid, if the wiretap was not conducted "in conformity with the order," or if the evidence was "unlawfully intercepted." 18 U.S.C. 2518(10)(a). In his motions to suppress, Darrah argued in part that the government's wiretap applications had failed to demonstrate that a wiretap was necessary, as required by Title III. See D. Ct. Doc. 822, at 4; D. Ct. Doc. 823, at 3-4. The district court denied the motions, explaining that, among other things, "[t]he detailed affidavits offered in support of the wiretap applications were thorough and provided an ample basis for a finding of * * * necessity." D. Ct. Doc. 1045, at 4; see also D. Ct. Doc. 2438, at 72-74 (Apr. 8, 2019). And for that and other reasons, the court also denied Darrah's motion to dismiss. D. Ct. Doc. 1045, at 3-5; D. Ct. Doc. 2438, at 74.

b. Before Castano's trial, the government filed a motion in limine to introduce Castano's proffer statements against him in the government's case-in-chief, on the ground that Castano had materially breached the terms of the proffer letter by failing to comply fully with his disclosure obligations. Pet. App. 28. At the hearing on the government's motion, "'[t]he only issue' was whether Castano made 'omissions significant enough' to have materially breached the proffer agreement." *Ibid.* (brackets in original).

The district court granted the motion, agreeing with the government that Castano had "intentionally omitted material information about the DDMC's dealings" by, for example, omitting information that he had arranged for another DDMC member "to purchase 400 pounds of marijuana in a single transaction." Pet. App. 29. *Ibid.* The court found that Castano had "omitted significant facts" during his proffer and that his omissions were "intentional and certainly material." *Ibid.*

c. In late 2014, six petitioners—Darrah, Drozdowski, McKeoun, Smith, Vandiver, and Witort—proceeded to trial together. See D. Ct. Docket entry (Oct. 1, 2014). At the end of trial, the district court instructed the jury that the RICO conspiracy count required the government to prove that "each defendant knowingly agreed that a conspirator, which may include the defendant himself, would commit a violation of 18 U.S.C. § 1962(c)." D. Ct. Doc. 1265, at 23 (Feb. 20, 2015). The court further instructed that the RICO conspiracy count more specifically required the government to prove (1) "[t]he existence of an enterprise or that an enterprise would exist"; (2) "[t]he enterprise was or would be engaged in, or its activities affected or would affect, interstate commerce"; (3) "[a] conspirator was or would

be employed by or associated with the enterprise"; (4) "[a] conspirator did or would conduct or participate in, either directly or indirectly, the conduct of the affairs of the enterprise"; and (5) "[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." *Id.* at 24; see Pet. App. 3.

In late 2015, three petitioners—Castano, Drozdowski, and Rich—proceeded to trial together.[3] See D. Ct. Docket entry (Sept. 17, 2015). At the end of that trial, the district court's instructions on RICO conspiracy were substantially the same as the instructions from the first trial. See D. Ct. Doc. 1610, at 25-26 (Dec. 16, 2015).

Following those two jury trials, all petitioners were convicted of RICO conspiracy, in violation of 18 U.S.C. 1962(d). Castano Judgment 1; Darrah Judgment 1; Drozdowski Judgment 1; McKeoun Judgment 1; Rich Judgment 1; Smith Judgment 1; Vandiver Judgment 1; Witort Judgment 1. In addition, all petitioners except Rich were convicted of conspiring to manufacture, distribute, and possess with intent to distribute controlled substances, in violation of 21 U.S.C. 841, 846. Castano Judgment 1; Darrah Judgment 1; Drozdowski Judgment 1; McKeoun Judgment 1; Smith Judgment 1; Vandiver Judgment 1; Witort Judgment 1. Castano, Darrah, Rich, Smith, and Vandiver were convicted of conspiracy to suborn perjury and obstruct justice, in

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[3] Drozdowski was a defendant in both trials because the district court declared a mistrial as to him on two counts at the first trial after the jury was unable to reach a unanimous verdict on those counts. See D. Ct. Doc. 1261, at 1 (Feb. 24, 2015).

violation of 18 U.S.C. 371. 11-cr-20066 Castano Judgment 1; 11-cr-20066 Darrah Judgment 1; 11-cr-20066 Rich Judgment 1; 11-cr-20066 Smith Judgment 1; 11-cr-20066 Vandiver Judgment 1. Darrah, Drozdowski, Smith, and Vandiver were convicted of assault in aid of racketeering activity, in violation of 18 U.S.C. 1959(a)(3). Darrah Judgment 1; Drozdowski Judgment 1; Smith Judgment 1; Vandiver Judgment 1. Darrah, Smith, and Vandiver were convicted of conspiring to obstruct justice by witness tampering, in violation of 18 U.S.C. 1512(b)(3). Darrah Judgment 1; Smith Judgment 1; Vandiver Judgment 1. Castano, Rich, and Vandiver were convicted of suborning perjury, in violation of 18 U.S.C. 1622; and obstructing justice, in violation of 18 U.S.C. 1503(a) and (b)(3). 11-cr-20066 Castano Judgment 1; 11-cr-20066 Rich Judgment 1; 11-cr-20066 Vandiver Judgment 1. Darrah and Vandiver were convicted of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1). Darrah Judgment 1; Vandiver Judgment 1. Darrah and Smith were convicted of conspiracy to conduct an illegal gambling business, in violation of 18 U.S.C. 371, 1955. Darrah Judgment 1; Smith Judgment 1. Drozdowski was convicted of possessing ammunition as a felon, in violation of 18 U.S.C. 922(g)(1); and manufacturing methamphetamine, in violation of 21 U.S.C. 841(a)(1). Drozdowski Judgment 1. Castano was convicted of conspiring to distribute and to possess with intent to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1), 846. 11-cr-20066 Castano Judgment 1. Smith was convicted of attempted assault in aid of racketeering activity, in violation of 18 U.S.C 1959(a)(6). Smith Judgment 1. Vandiver was convicted of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1); and possession

of methamphetamine precursors, in violation of 21 U.S.C. 843(a)(6). Vandiver Judgment 1.

4. Darrah, Smith, and Witort were sentenced to life imprisonment, to be followed by five years of supervised release. Darrah Judgment 2-3; Smith Judgment 2-3; Witort Judgment 2-3. See 11-cr-20066 Darrah Judgment 2-3; 11-cr-20066 Smith Judgment 2-3. Vandiver was sentenced to life imprisonment, to be followed by three years of supervised release. Vandiver Judgment 2-3; see 11-cr-20066 Vandiver Judgment 2-3. Drozdowski was sentenced to 456 months of imprisonment, to be followed by ten years of supervised release. Drozdowski Judgment 2-3. McKeoun was sentenced to 372 months of imprisonment, to be followed by five years of supervised release. McKeoun Judgment 2-3. Rich was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. Rich Judgment 2-3; see 11-cr-20066 Rich Judgment 2-3. Castano was sentenced to 336 months of imprisonment, to be followed by ten years of supervised release. Castano Judgment 2-3; see 11-cr-20066 Castano Judgment 2-3.

a. The government's evidence at trial included a spreadsheet showing that DDMC members had purchased 1129 grams of pseudoephedrine for use in the manufacture of methamphetamine. Pet. App. 119; D. Ct. Doc. 2429, at 19 (Apr. 8, 2019). In its presentence report for Castano, the Probation Office determined that Castano was accountable for at least 500 grams but less than 1.5 kilograms of actual methamphetamine, which corresponded to a base-offense level of 34 under the Sentencing Guidelines. Castano PSR ¶ 96; see Castano PSR ¶ 48; see also Sentencing Guidelines § 2D1.1(c)(3) (2016) (providing a base offense level of

34 where the offense involved at least 500 grams but less than 1.5 kilograms of methamphetamine (actual)).

At Castano's sentencing hearing, the district court likewise determined that the evidence supported a base-offense level of 34. D. Ct. Doc. 2429, at 67. The court found that Castano became a "fully-patched" member of the DDMC in August 2003 and that his "rapid rise in status" within the gang was "indicative of an unusual degree of familiarity and acceptance of the precepts of DDMC," which in turn focused on the gang's "efforts to acquire, distribute, and possess with intent to distribute marijuana, methamphetamine, and other substances." *Id.* at 13. The court additionally found that, from July 2003, Castano was "fully aware of and supportive of the illegal goals of this entity and [was] responsible for them." *Id.* at 14. The court explained that the evidence supported the inference that Castano was "part and parcel of the DDMC's drug creation, drug manufacturing, possession, and distribution cartel" for "just about all of" the period at issue and that Castano had "a great deal of responsibility for methamphetamine." *Id.* at 42.

b. Before Rich's sentencing, the Probation Office determined that, based on drug weight alone, Rich's base offense level under the Sentencing Guidelines would be 38 and Rich's total offense level—after adjustments for specific offense characteristics—would be 43. Pet. App. 117; Rich PSR ¶¶ 119-125. Based on additional conduct, including the Box Canyon incident, the Probation Offense determined that Rich's combined adjusted offense level was 48, but because that calculation exceeded 43 (the highest level) the Probation Office set Rich's total offense level at 43, which corresponded to an advisory Guidelines sentence of life imprisonment. Rich PSR

¶¶ 171-178, 273-276, 279, 328; see Sentencing Guidelines Ch. 5, Pt. A and comment. (n.2) (2016) (sentencing table setting a Guidelines sentence of "life" for offense level 43, and commentary specifying that in the "rare case[]" an "offense level of more than 43" is calculated, the offense level "is to be treated as * * * 43").

At Rich's sentencing hearing, the district court agreed that the evidence supported the Probation Office's determination that the drug quantity attributable to Rich corresponded to a base offense level of 38. D. Ct. Doc. 2422, at 29-33 (Apr. 8, 2019). The court additionally found that certain conduct committed by DDMC members, including the Box Canyon incident, was foreseeable to Rich and part of his relevant conduct. *Id.* at 46-47, 80. The court accordingly adopted the presentence report and determined that Rich's total offense level was 43, which corresponded to an advisory Guidelines sentence of life imprisonment. Rich Statement of Reasons Sec. III; see 11-cr-20066 Rich Statement of Reasons Sec. III.

5. The court of appeals affirmed. Pet. App. 1-16, 18-122.

a. In a published opinion, the court of appeals rejected petitioners' challenge to the district court's use of "future-tense language" in its jury instructions on RICO conspiracy. Pet. App. 2; see *id.* at 2-8. The court of appeals observed that those instructions "accurately stated the law," *id.* at 2-3, because "Section 1962(d) is a conspiracy offense" that "criminalizes an *agreement* rather than any substantive criminal offense," *id.* at 5. "In other words," the court explained, "an agreement to associate with and participate in a yet-to-be-formed racketeering enterprise that would affect interstate commerce constitutes a completed offense under § 1962(d)."

Ibid. In reaching that conclusion, the court "heed[ed]" this Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997), finding that *Salinas* established that "an individual can 'intend to further an endeavor which, if completed, would satisfy all the elements of a [RICO offense],' * * * even if the RICO enterprise is not yet formed." Pet. App. 5 (quoting *Salinas*, 522 U.S. at 65) (brackets in original).

b. In the unpublished appendix to its published opinion, the court of appeals affirmed the district court's denial of Darrah's motion to suppress evidence resulting from the wiretaps of his phone. Pet. App. 21-26. The court rejected Darrah's contention that the government's wiretap applications had failed to show that "normal investigative procedures ha[d] been tried and ha[d] failed or reasonably appear[ed] to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(3)(c); see Pet. App. 24-25. The court found that the government's affidavit in support of the initial wiretap did "exactly what Title III requires," because the affidavit "made clear that '[t]raditional investigative means were considered and were correctly deemed insufficient to meet the Government's legitimate need of uncovering the extent of the alleged criminal enterprise, the potential participants, and determining how the enterprise functioned.'" Pet. App. 24 (brackets in original). The court likewise found that the affidavits supporting the extensions of the wiretap adequately "explained why an extension of the wiretap was justified." *Id.* at 25. And although Darrah argued that the government's alleged ability "to obtain 'overwhelming evidence' from other sources" precluded a finding of necessity, the court disagreed, explaining that "some measure of success in

obtaining evidence from other sources is not determinative of necessity." *Id.* at 24.

The court of appeals also rejected Castano's contention that his proffer agreement with the government precluded the government from using his statements during grand-jury proceedings and at trial. Pet. App. 27-32. The court first determined that the government's promise not to use Castano's statements in its "case-in-chief in any criminal prosecution" did not cover grand-jury proceedings because "'[c]ase-in-chief' is a term of art that refers to a trial, and not preliminary proceedings." *Id.* at 30. The court also determined that the district court did not clearly err in finding that Castano breached the proffer agreement by making intentional and substantial omissions. *Id.* at 31-32.

The court of appeals additionally rejected Castano's contention that, at his sentencing, the district court clearly erred in finding him accountable for 1129 grams of pseudoephedrine. Pet. App. 118-120. The court of appeals explained that, based on the record, the pseudoephedrine purchases made by other DDMC members were "certainly" within the scope of the conspiracy and reasonably foreseeable to Castano. *Id.* at 119. The court observed that, during his DDMC membership from 2003 through 2012, Castano "was heavily involved in the meth trade"; "was part of the group actively manufacturing and distributing it"; and "made pseudoephedrine purchases for the purpose of manufacturing meth." *Ibid.* The court accordingly found that, "even if Castano did not know every person who purchased pseudoephedrine for the [DDMC's] meth cooks, it was reasonably foreseeable to him that other members of the organization were acquiring it either in exchange for the finished product or for money." *Ibid.*

Finally, the court of appeals rejected Rich's challenge to the district court's determination that his relevant conduct at sentencing included the so-called "Box Canyon incident." Pet. App. 117. Noting that Rich had "not challenged any aspect of the district court's Guidelines calculation based on the DDMC's meth trafficking," the court of appeals observed that Rich's presentence report established that, "based on drug weight alone, Rich's offense level would have been 43." *Ibid.* The court accordingly explained that, even if Rich's relevant-conduct argument were correct, any error was harmless because "it would not have changed his Guidelines range." *Ibid.* The court thus declined to "delve further into the district court's relevant-conduct inquiry." *Ibid.*

c. Judge Donald concurred in part and dissented in part. Pet. App. 12-16. In her view, "the existence of an enterprise is an essential element of" RICO conspiracy, and she dissented from the court of appeals' decision on the jury instructions. *Id.* at 12. She joined the rest of the court's opinion. *Ibid.*

ARGUMENT

Petitioners contend (21-1089 Pet. 6-16; 21-7083 Pet. 14-18; 21-7095 Pet. 6-15; 21-7119 Pet. 7-11) that the court of appeals erred in rejecting their challenge to the district court's instructions on RICO conspiracy. Darrah contends (21-7095 Pet. 15-19) that the lower courts erred in determining that the government's wiretap applications for his phone established that "normal investigative procedures ha[d] been tried and ha[d] failed or reasonably appear[ed] to be unlikely to succeed if tried or to be too dangerous," as required by 18 U.S.C. 2518(3)(c). Castano contends (21-7119 Pet. 15-27) that the lower courts erred in determining that the

government did not violate its proffer agreement with him by presenting statements from his proffer in the grand-jury proceedings and at trial. Castano also contends (21-7719 Pet. 12-15) that the district court erred in finding him accountable for at least 500 grams of methamphetamine at sentencing. Finally, Rich contends (21-7083 Pet. 7-14) that the district court reversibly erred at sentencing in finding that his relevant conduct included certain acts.

The court of appeals correctly resolved each of these issues, and its decision neither conflicts with any decision of this Court nor implicates any square conflict in the courts of appeals. In addition, this case would be an unsuitable vehicle for further review. The petitions for writs of certiorari should accordingly be denied.

1. The court of appeals correctly recognized that establishing the existence of an actual enterprise is not a necessary element for a RICO conspiracy offense, and that decision does not conflict with any decision of this Court or any other court of appeals' application of this Court's RICO decisions. This Court has previously denied petitions for writs of certiorari raising this issue, and the same result is warranted here. See *Thomas* v. *United States*, 565 U.S. 1087 (2011) (No. 11-6514); *Jones* v. *United States*, 565 U.S. 1087 (2011) (No. 11-5975); *Robinson* v. *United States*, 565 U.S. 1087 (2011) (No. 11-5342).

a. The RICO conspiracy statute makes it a crime "to conspire" to commit a substantive RICO offense. 18 U.S.C. 1962(d). The elements of a substantive RICO offense under 18 U.S.C. 1962(c) are "(1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas* v. *United States*, 522 U.S. 52, 62 (1997). The RICO statute defines an "enterprise" to include

"any individual, partnership, corporation, association, or other legal entity," as well as "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). For an association-in-fact enterprise to qualify as a RICO enterprise, it "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle* v. *United States*, 556 U.S. 938, 946 (2009). A "pattern of racketeering activity," in turn, requires at least two of the specifically enumerated acts listed in 18 U.S.C. 1961(1). 18 U.S.C. 1961(5).

This Court has held that Congress used the term "to conspire" in Section 1962(d) "in its conventional sense" and that "certain well-established principles follow" from that fact. *Salinas*, 522 U.S. at 63. As the Court recognized in *Salinas*, one of those principles is that "a conspiracy may exist and be punished whether or not the substantive crime ensues." *Id.* at 65. And a person "may be liable for conspiracy even though he was incapable of committing the substantive offense." *Id.* at 64. It follows that, in order to be guilty of conspiracy, a person need only agree "to further an endeavor which, *if* completed, would satisfy all of the elements of a substantive criminal offense." *Id.* at 65 (emphasis added).

Based on those principles, the courts of appeals have uniformly held with respect to the pattern element of RICO conspiracy that a defendant can be liable regardless of whether the predicate acts of racketeering were actually committed—the government must only show "that the defendant *agreed* that at least two acts of racketeering would be committed in furtherance of the conspiracy." *United States* v. *Leoner-Aguirre*, 939 F.3d

310, 317 (1st Cir. 2019), cert. denied, 140 S. Ct. 820 (2020); see, *e.g.*, *United States* v. *Fowler*, 535 F.3d 408, 421 (6th Cir.), cert. denied, 555 U.S. 1060 (2008); *United States* v. *Amaya*, 828 F.3d 518, 531 (7th Cir. 2016). As the court of appeals in this case correctly recognized, the enterprise element of a RICO conspiracy offense should logically be treated the same as the pattern element. See Pet. App. 4-5.

Under *Salinas*, the government may establish a RICO conspiracy with proof that the defendant agreed to participate in the conduct of an enterprise that *would* exist; it need not show that the enterprise actually existed. In other words, although a RICO conspiracy may be (and typically is) proved by evidence that the defendant agreed with others to conduct the affairs of an existing enterprise through a pattern of racketeering activity, it may also be proved by evidence that the defendant agreed with others to form a RICO enterprise whose affairs would be conducted through a pattern of racketeering activity. See *United States* v. *Harris*, 695 F.3d 1125, 1130-1134 (10th Cir. 2012) ("[J]ust as the Government need not prove that a defendant personally committed or agreed to commit the requisite predicate acts to be guilty of § 1962(d) conspiracy, neither must the Government prove that the alleged enterprise actually existed."); *United States* v. *Applins*, 637 F.3d 59, 73-75 (2d Cir.), cert. denied, 565 U.S. 960, and 565 U.S. 1087 (2011) ("[T]he establishment of an enterprise is not an element of the RICO conspiracy offense."); *United States* v. *Fernandez*, 388 F.3d 1199, 1223 n.13 (9th Cir. 2004) ("[T]he *contemplated* or actual existence of a RICO enterprise is * * * a necessary element of a § 1962(d) conspiracy.") (emphasis added), cert. denied, 544 U.S. 1009, 544 U.S. 1041, and 544 U.S. 1043 (2005);

see also Third Circuit Model Crim. Jury Instruction 6.18.1962D (Nov. 2018) ("[T]he government is not required to prove that the alleged enterprise actually existed, or that the enterprise actually engaged in or its activities actually affected interstate or foreign commerce."); Pattern Crim. Jury Instruction of the Seventh Circuit for 18 U.S.C. 1962(d) (2020 ed.) (requiring proof that the relevant association "was" or "*would be*" an enterprise to establish a RICO conspiracy) (emphasis added).

Petitioners argue (21-1089 Pet. 9-11; 21-7095 Pet. 8-10) that a requirement that the enterprise already existed is implicit in the language of Section 1962. Petitioners rely primarily on the text of Section 1962(c), which makes it unlawful for a person who is "employed by or associated with [an] enterprise" to "conduct or participate * * * in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Petitioners contend that because the existence of an enterprise is a prerequisite to a substantive RICO offense, the actual existence of a RICO enterprise must also be a prerequisite to an offense of conspiring to violate that provision under Section 1962(d). But nothing in the language of the relevant statutory provisions suggests that, to prove a RICO conspiracy, the government must show that some elements of the substantive offense (like the existence of an enterprise and the defendant's employment by or association with that enterprise) were in existence already, while it may show that other elements (like the pattern element) were simply part of the planned conspiracy. To the contrary, Section 1962(d) simply makes it unlawful "to conspire to violate any of the provisions of [S]ubsection * * * (c)." 18 U.S.C. 1962(d). An agreement with others

to form—and thus to be associated with—a RICO enterprise whose affairs would be conducted through a pattern of racketeering activity plainly qualifies as such a conspiracy.

b. Petitioners additionally contend (21-1089 Pet. 14-16; 21-7095 Pet. 14-15) that the district court's instructions violated the First Amendment, on the theory that those instructions permitted the jury to find petitioners guilty based only on "mere speech about the future." 21-1089 Pet. 14 (emphasis omitted). None of the petitioners raised that First Amendment claim in their opening briefs in the court of appeals, and the Sixth Circuit did not address it. This Court ordinarily does not address questions not pressed or passed upon in the decision below. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

In any event, petitioners' new First Amendment argument lacks merit. The district court instructed the jury that, to convict a defendant of RICO conspiracy, the government must prove that the "defendant knowingly agreed that a conspirator * * * would commit a violation of 18 U.S.C. § 1962(c)." D. Ct. Doc. 1265, at 23; D. Ct. Doc. 1610, at 25. The instructions thus permitted the jury to find each petitioner guilty of RICO conspiracy only if the jury determined that he had conspired to commit a substantive racketeering offense.

To the extent that the government used the petitioners' statements to prove their participation in that conspiracy, it "has never been deemed an abridgement of freedom of speech * * * to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). As the Court

has explained, "the constitutional freedom for speech" does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 498. "Many long established criminal proscriptions—such as laws against conspiracy," as well as laws against "incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities." *United States* v. *Williams*, 553 U.S. 285, 298 (2008). Such "'prevention and punishment'" of "speech integral to criminal conduct" has "'never been thought to raise any Constitutional problem.'" *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010) (citation omitted). And petitioners identify no court that has departed from these well-settled principles to adopt their novel view that the First Amendment precludes the government from presenting a defendant's statements of future intent as proof of his participation in a RICO conspiracy.

c. Petitioners err in suggesting (21-7095 Pet. 9; 21-7119 Pet. 9) that the court of appeals' application of *Salinas* conflicts with this Court's decision in *Boyle*. In *Boyle*, the Court addressed the adequacy of a jury instruction concerning the necessary structural features of an association-in-fact enterprise in a case in which the government alleged that a defendant had committed acts of racketeering in furtherance of an existing enterprise. 556 U.S. at 940-941. The Court had no occasion to consider whether the government could establish a RICO conspiracy with evidence that the defendant agreed to form an enterprise as defined by the statute, when the agreed-upon enterprise never came into existence.

Nor are the courts of appeals in conflict regarding the application of *Salinas*. Petitioners do not dispute

that the decision below accords with decisions from at least three circuits. See *Applins*, 637 F.3d at 73-75 (2d Cir.); *Fernandez*, 388 F.3d at 1223 n.13 (9th Cir.); *Harris*, 695 F.3d at 1130-1134 (10th Cir.). And although petitioners claim (21-1089 Pet. 11-12; 21-7083 Pet. 17-18; 21-7095 Pet. 10-11; 21-7119 Pet. 10) that the court of appeals' decision in this case conflicts with decisions of multiple other circuits, none of the cases they cite addressed whether a RICO enterprise's actual existence is an element of a RICO conspiracy offense under the principles set out in *Salinas*.

For example, the First Circuit has specifically rejected the contention that *United States* v. *Ramírez-Rivera*, 800 F.3d 1 (1st Cir. 2015) (cited by 21-1089 Pet. 11, 21-7095 Pet. 10-11, and 21-7119 Pet. 10), cert. denied, 577 U.S. 1108 (2016), establishes that "prosecutors in a RICO-conspiracy case must prove that the enterprise actually existed, that the defendant was actually employed by or associated with the enterprise, that the enterprise's activities actually affected interstate or foreign commerce, and that the defendant actually participated in the enterprise's affairs." *United States* v. *Rodríguez-Torres*, 939 F.3d 16, 38 n.12 (2019), cert. denied, 140 S. Ct. 972, 140 S. Ct. 975, and 140 S. Ct. 2819 (2020). The court instead explained that *Ramírez-Rivera* "did not have to confront that issue," *ibid.*; it found that "no binding precedent exists on that issue," *ibid.*; and it declined to decide whether a district court erred in giving RICO conspiracy instructions similar to the contested instructions at issue here, *i.e.*, instructions "that 'the enterprise *would* exist,' [and] that the enterprise's 'activities *would* [a]ffect interstate or foreign commerce.'" *Id.* at 38 (brackets in original); see *id.* at 35-38 & n.12. More generally, the First Circuit has also recognized that

Ramírez-Rivera and *Feinstein* v. *Resolution Trust Corp.*, 942 F.2d 34 (1st Cir. 1991) (cited by 21-7119 Pet. 9-10), contain statements that are inconsistent with *Salinas*. See *United States* v. *Velazquez-Fontanez*, 6 F.4th 205, 213 n.2, cert. denied, 142 S. Ct. 500 (2021), and 142 S. Ct. 1164 (2022). Accordingly, the First Circuit has—consistent with *Salinas* and the decision below—explained that a RICO conspiracy offense requires proof that "the defendant knowingly joined the conspiracy, agreeing with one or more coconspirators to further [the] endeavor, which, *if completed*, *would* satisfy all the elements of a substantive [RICO] offense." *Id.* at 212 (emphasis added; citations and internal quotation marks omitted; brackets in original).

Other cases petitioners rely on predate *Salinas*, and intervening circuit precedent indicates those courts of appeals could well agree with the decision below if squarely confronted with this question. In *United States* v. *Riccobene*, 709 F.2d 214, cert. denied, 464 U.S. 849 (1983), the Third Circuit stated in passing that a RICO conspiracy charge requires the government to prove "that an 'enterprise' did in fact exist," *id.* at 221, but the Third Circuit has since recognized that, under *Salinas*, "[i]t is enough that the defendant 'knew about and agreed to facilitate'" a scheme that "at least would have resulted in the satisfaction of § 1962(c)'s elements," *United States* v. *Williams*, 974 F.3d 320, 369 (2020) (quoting *Salinas*, 522 U.S. at 66), cert. dismissed, 141 S. Ct. 2170, and cert. denied, 142 S. Ct. 309, and 142 S. Ct. 310 (2021). And in that post-*Salinas* decision, the Third Circuit described the requirements of RICO conspiracy in terms that track the district court's instructions here, stating that RICO conspiracy requires in part "that two or more persons agree to further an

enterprise whose activities affect *or would affect* interstate or foreign commerce, and whose execution results *or would result* in a person conducting or participating directly or indirectly in the enterprise's affairs through a pattern of racketeering activity." *Ibid.* (emphasis added).

Similarly, the Seventh Circuit's post-*Salinas* jurisprudence and current model jury instructions indicate that its pre-*Salinas* statements in *United States* v. *Neapolitan*, 791 F.2d 489, cert. denied, 479 U.S. 939, and 479 U.S. 940 (1986), regarding "the necessity of proving the existence of an enterprise" in connection with a RICO-conspiracy charge, *id.* at 498, may no longer represent that court's views. Although *United States* v. *Volpendesto*, 746 F.3d 273, cert. denied, 574 U.S. 936 (2014), did not present the issue directly, the Seventh Circuit's decision in that case focused on *Neapolitan*'s language regarding "*an agreement* to conduct or participate in the affairs of an enterprise," rather than the actual existence of an enterprise. *Id.* at 284 (quoting *Neapolitan*, 791 F.2d at 499) (emphasis added); see *ibid.* (recounting evidence of "a group with a cohesive, hierarchical structure that persisted over a long period of time" as the basis for concluding that each defendant "*agreed* not just to commit isolated acts but also 'to associate together for a common purpose'") (emphasis added; citation omitted). Similarly, the Seventh Circuit's model jury instructions now indicate that proof that the relevant association "was" or "*would be*" an enterprise is required to establish a RICO conspiracy. Pattern Crim. Jury Instruction of the Seventh Circuit for 18 U.S.C. 1962(d) (2020 ed.) (emphasis added). It is thus far from clear that if squarely confronted with the RICO question presented here, the Seventh Circuit

would disagree with the court of appeals in the decision below.

While such indicators can create doubt about the current state of circuit law, petitioners err in relying on such nonbinding aspects of circuit opinions as proof of a conflict. A number of the cases cited by petitioners simply list the enterprise element of RICO conspiracy in passing while considering challenges involving other issues. See *United States* v. *Cornell*, 780 F.3d 616, 621-623 (4th Cir.) (addressing the interstate-commerce element of RICO conspiracy), cert. denied 577 U.S. 856 (2015); *United States* v. *Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) (determining that RICO conspiracy "does not require that a defendant have a role in directing an enterprise"), cert. denied, 568 U.S. 1110 (2013); *Almanza* v. *United Airlines, Inc.*, 851 F.3d 1060, 1067-1074 (11th Cir. 2017) (affirming dismissal of civil RICO complaint where the plaintiffs' theory was that the defendants had actually "formed an enterprise among themselves to commit their racketeering" but the complaint failed to "paint a plausible picture of an agreement, let alone an enterprise"). In some of the cases, the first question presented by these petitions could not have arisen because the actual existence of an enterprise was either conceded or necessarily established to prove a separate substantive RICO offense under Section 1962(c). See *United States* v. *Starrett*, 55 F.3d 1525, 1541, 1545 (11th Cir. 1995) (per curiam), cert. denied, 517 U.S. 1111, and 517 U.S. 1127 (1996); *United States* v. *Alonso*, 740 F.2d 862, 870 & n.5 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985).

In other cases, courts have identified the enterprise element of Section 1962(d) as distinguishing the offense from other federal conspiracy crimes. See, *e.g.*, *United*

States v. *Bennett*, 44 F.3d 1364, 1374-1375 (8th Cir.), cert. denied, 515 U.S. 1123, 515 U.S. 1145, and 516 U.S. 828 (1995). Such cases are entirely consistent with the court of appeals' decision in this case; RICO conspiracy remains distinct from other federal conspiracy offenses regardless of whether Section 1962(d)'s enterprise element is proved with evidence of an enterprise's actual existence or with evidence that the defendant agreed with others to form a RICO enterprise.

In short, the statements in the opinions cited by petitioners referring to proof of a RICO enterprise as an element of RICO conspiracy in a variety of distinguishable contexts provide no reason to believe that other circuits will be constrained by such language to reach a different result from the Sixth Circuit if called upon to consider the RICO question presented by these petitions. Indeed, in this case and others, courts of appeals have correctly rejected the relevance of similar language from previous circuit opinions in cases where the government had relied exclusively on evidence of an enterprise's actual existence. See Pet. App. 6-7 & n.1; *Rodríguez-Torres*, 939 F.3d at 38 n.12; *Harris*, 695 F.3d at 1131-1132; *Applins*, 637 F.3d at 75 n.4. To the extent that petitioners fault these circuits for the way they have distinguished their own precedent (21-1089 Pet. 12-14; 21-7095 Pet. 12-13), such assertions, even if accurate, would not warrant this Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Similarly, to the extent that petitioners attempt to identify a broader conflict among the circuits by invoking other circuits' pattern jury instructions, see, *e.g.*, 21-1089 Pet. 11, pattern instructions are instructive but not

binding. See, *e.g.*, *United States* v. *Dohan*, 508 F.3d 989, 994 (11th Cir. 2007) (per curiam) (observing that the pattern instructions are "a valuable resource" but "are not binding") (citation omitted), cert. denied, 553 U.S. 1034 (2008); *United States* v. *Sparkman*, 500 F.3d 678, 684 (8th Cir. 2007) (observing that the Eighth Circuit's model jury instructions "are available for use by the district courts, but they are not binding"). They thus do not present a sound basis for concluding that circuits would apply different legal rules or reach a different outcome in this case.

d. In any event, this case would be a poor vehicle for reviewing the first question presented because a decision in petitioners' favor would not affect the judgment below. It is well settled that an error in instructing the jury on an element of an offense may be harmless. See *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999). Here, any error in the district court's instruction on the elements of a RICO conspiracy was harmless because the trial evidence amply proved that the DDMC *was* an existing enterprise.

Specifically, the evidence established that the DDMC was formed in the late 1960s and had national officers, including Smith, Darrah, and Vandiver, during the 20-year period covered by the indictment. Gov't C.A. Br. 18-20.[4] Petitioners thus "never disputed" the existence of the DDMC. *Id.* at 96. And as the government explained below, the trial evidence also established that the DDMC was an association-in-fact RICO enterprise whose members and associates operated

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[4] Unless otherwise specified, all citations to "Gov't C.A. Br." are to the government's consolidated brief in Sixth Circuit Nos. 18-2323, 18-2324, 18-2342, 18-2364, 18-2365, 18-2401, 18-2407, 18-2408, and 18-2410.

together in a coordinated manner in furtherance of a common purpose. *Id.* at 54-58; see *id.* at 18-45 (describing trial evidence in detail).

Indeed, the court of appeals found that the government had presented "expansive evidence" about the DDMC's "hierarchical approach to manufacturing and distributing methamphetamine," Pet. App. 59; "significant testimony regarding the DDMC's violent proclivities," *id.* at 60; and additional evidence showing "DDMC's efforts to stifle collaboration with law enforcement," *ibid.* In light of all that evidence, any error in the jury instructions on RICO conspiracy was harmless.

2. The lower courts correctly determined that the government's wiretap applications for Darrah's phone sufficiently established that "normal investigative procedures have been tried or have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(3)(c). As the lower courts found, the affidavit in support of the initial wiretap authorization "made clear that '[t]raditional investigative means were considered and were correctly deemed insufficient to meet the Government's legitimate need of uncovering the extent of the alleged criminal enterprise, the potential participants, and determining how the enterprise functioned.'" Pet. App. 24 (brackets in original).

That is "exactly what Title III requires of officers seeking a wiretap," Pet. App. 24, and Darrah identifies no court that has held otherwise. His contention (Pet. 17-18) that the existence of probable cause (itself a wiretap prerequisite) weakens the need for a wiretap disregards the government's ultimate burden to obtain and present evidence proving crimes beyond a reasonable

doubt. Darrah nevertheless contends that the government lacked "a genuine need to engage in wiretapping" in this case, on the theory that the government managed to obtain substantial evidence about the DDMC's crimes through other methods, such as confidential informants and search warrants. 21-7095 Pet. 16; see *id.* at 17-19. That fact-bound contention does not warrant this Court's review. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10.

Moreover, as the government explained below, the government's acquisition of other evidence about the DDMC's crimes did not obviate the need to wiretap Darrah's phone. See Gov't C.A. Br. 163-164. For example, the affidavit explained that cooperators who were members or former members of the DDMC lacked access to information maintained "within the inner circle of Smith, Darrah, and club leadership," and that "efforts to penetrate that inner circle would pose an unacceptable risk to the cooperator and the investigation." *Id.* at 164 (citation and internal quotation marks omitted). In addition, as the government observed below, "cooperators are readily impeached," while wiretap evidence "'is the gold standard when it comes to trustworthy evidence.'" *Ibid.* (citation omitted). The lower courts thus correctly found that the government's wiretap applications satisfied the necessity requirement in 18 U.S.C. 2518(3)(c).

3. The lower courts also correctly determined that in the particular circumstances of this case, the government did not violate its proffer agreement with Castano by presenting statements from Castano's proffer in the grand-jury proceedings and at trial. Under that proffer

agreement, the government promised not to offer any of Castano's proffer statements "in the government's case-in-chief in any criminal prosecution." Pet. App. 27. As the court of appeals found, that promise did not preclude the government from using Castano's proffer statements in grand-jury proceedings because "'[c]ase-in-chief' is a term of art that refers to a trial, and not preliminary proceedings." *Id.* at 30. Although Castano contends (21-7119 Pet. 17-24) that the proffer agreement's reference to "the government's case-in-chief in any criminal prosecution," Pet. App. 27, should be read to encompass grand-jury proceedings, he identifies no court that has adopted such an understanding of "case-in-chief." Castano thus fails to show that any court would disagree with the court of appeals' interpretation of the proffer agreement in this case.

Furthermore, even if Castano were correct about the scope of the proffer agreement, his material breach of that agreement eliminated any government obligation to refrain from using Castano's proffer statements in this criminal case. In particular, the proffer agreement's grant of immunity was contingent on Castano making "a complete and truthful statement of his knowledge of (and role in) the matters under investigation" and "fully and truthfully answer[ing] all questions." Pet. App. 27. The agreement further provided that Castano would be in material breach of the agreement if he were to "omit facts about crimes, other participants, or his . . . involvement in the offenses." *Id.* at 27-28. As the government explained below, the record amply supported the district court's determination that Castano committed such a breach by intentionally "omit[ing] significant facts" during his proffer. *Id.* at

29; see 18-2268, 18-2269, 18-2401, 19-1028, 19-1029 Gov't C.A. Br. 96-101.

Although Castano argues (21-7119 Pet. 24-27) that he did not intentionally omit significant facts during his proffer, the district court's contrary factual findings are reviewed only for clear error. See Pet. App. 31. Castano does not acknowledge or attempt to meet that demanding standard of review, and in any event, that fact-bound question would not warrant this Court's review. See *Johnston*, 268 U.S. at 227.

4. The district court's fact-bound determination at sentencing that Castano was accountable for 1129 grams of pseudoephedrine also does not warrant review. When calculating the drug quantity for sentencing purposes, the court was authorized to consider all "reasonably foreseeable" acts and omissions of others "within the scope of the jointly undertaken criminal activity" and "in furtherance of that criminal activity." Sentencing Guidelines § 1B1.3(a)(1)(B) (2016). Here, the evidence showed that, from 2003 to 2012, "Castano was heavily involved in the meth trade" and was part of the DDMC group that was "actively manufacturing and distributing it." Pet. App. 119. In addition, "Castano, his girlfriend, and several of his associates made pseudoephedrine purchases for the purpose of manufacturing" methamphetamine. *Ibid.* Accordingly, as the court of appeals found, the district court did not clearly err in finding that other DDMC members' purchases of ephedrine were within the scope of the conspiracy that Castano joined and was reasonably foreseeable to him. *Id.* at 119-120.

Moreover, the record does not support Castano's contention (21-7119 Pet. 12-15) that the district court failed to make an individualized determination

regarding the scope of the jointly undertaken criminal activity between Castano and other DDMC members. To the contrary, at Castano's sentencing, the court made a number of factual findings that addressed the scope of Castano's agreement to manufacture and distribute methamphetamine with other DDMC members. See, *e.g.*, D. Ct. Doc. 2429, at 13-14, 41-42. And in affirming the district court's drug-quantity finding, the court of appeals likewise made an individualized assessment of Castano's involvement in the DDMC's drug activity. See Pet. App. 119. Accordingly, no conflict exists between the decision below and the various court of appeals' decisions that Castano cites in support of his sentencing claim.

5. Finally, the district court's determination at sentencing that Rich's relevant conduct included certain acts committed by other DDMC members, including the Box Canyon incident, likewise does not warrant review. Rich did not challenge on appeal "any aspect of the district court's guidelines calculation based on the DDMC's meth trafficking," and the court of appeals found that any error in attributing the Box Canyon incident to Rich did not affect Rich's guidelines range and was therefore harmless. Pet. App. 117. The court of appeals thus declined to address Rich's current relevant-conduct arguments. Compare *ibid.* with 21-7083 Pet. 7-14.

This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and Rich identifies no reason for this Court to address his current relevant-conduct claim in the first instance. Furthermore, even if the court of appeals had addressed Rich's claims, the record supported the district court's relevant-conduct determination, see 18-2268, 18-

2269, 18-2401, 19-1028, 19-1029 Gov't C.A. Br. 125-126, and Rich's fact-bound challenges to that finding would not warrant this Court's review. See *Johnston*, 268 U.S. at 227.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
JENNY C. ELLICKSON
Attorney

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