No. 21-1089

# 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**

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


CRAIG A. DALY, P.C.
*Attorney for Jeff Garvin Smith*
P.O. Box 720
Royal Oak, Michigan 48068
(248) 439-0132
4bestdefense@sbcglobal.net
*Counsel of Record*

MARK SATAWA
*Attorney for Cary Dale Vandiver*
26777 Central Park Blvd., Suite 300
Southfield, Michigan 48076
(248) 356-8320
mark@satawalaw.com

SIDNEY KRAIZMAN
*Attorney for Patrick Michael McKeoun*
645 Griswold, Suite 2200
Detroit, Michigan 48226
(313) 961-7078
sidkraizman@sbcglobal.net

LAURA E. DAVIS
*Attorney for David Randy Drozdowski*
9111 Cross Park Drive, Suite D-200
Knoxville, Tennessee 37923
(865) 229-4663
lawyer.ledavis@gmail.com

PHILLIP COMORSKI
*Attorney for Vincent John Witort*
1300 Broadway St., Suite 800
Detroit, Michigan 48226
(313) 963-5101
comorskiphillip@gmail.com



COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

## ARGUMENT IN REPLY

### It is impossible to determine the longevity of a hypothetical future endeavor.

This Court has held that the "enterprise" element of RICO conspiracy "is proved by evidence of an *ongoing* organization, formal or informal, and by evidence that the various associates function as a *continuing unit*." *United States v. Turkette*, 452 U.S. 576, 583 (1981) (emphasis added). A RICO "association-in-fact enterprise 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) (emphasis added).

The Sixth Circuit below and the government here posit the existence of an enterprise need not be proven in order to convict of RICO conspiracy, that an agreement that such an organization would exist sometime in the future is sufficient. This would require the government to prove that would-be criminals imagined not only putting a band together but also imagined that band being together long enough for its members to "pursue the enterprise's purpose." *Boyle*, 556 U.S. at 946. The band must have "affairs of sufficient duration to permit an associate to participate in those affairs through a pattern of racketeering activity." *Id*. (internal punctuation omitted). This thrusts the government – and jury – into a realm of fever dream and fantasy, which are anathema to due process.

**_Salinas_ should not be expanded to allow for conviction based on the hypothetical future existence of _all_ of the elements of a RICO conspiracy.**

In *Salinas v. United States*, 522 U.S. 52, 61, 66 (1997), this Court narrowly held that a defendant could be convicted of RICO conspiracy even if he himself had not committed two predicate acts. It is enough for a defendant to agree "to facilitate the scheme," especially when a co-conspirator commits two or more predicate acts. *Id*. The existence of an enterprise was not in question, and was arguably presupposed in the decision. *Id*. at 65, 66; *see also Turkette*, 452 U.S. 583 (detailing what need be proved regarding enterprise in a RICO conspiracy prosecution).

Though even the Sixth Circuit recognized that *Salinas* did not "decide the precise issue before" it in the case at bar (App. 7), the government flatly approves of the extension of *Salinas* to the existence of an enterprise. (Gov't Br. 18). The government endorses the district court's use of the "would be" language for *every element* of RICO conspiracy. This is a bridge too far for a statute carrying a potential life sentence. The government would have this Court adopt the Tenth Circuit's expansive interpretation rule:

> . . . the government need not prove a defendant actually committed two racketeering acts, nor that the objectives or purposes of the conspiracy, whatever they may have been, have been achieved or accomplished, nor that the alleged enterprise was actually

> established, that the defendant was actually employed by or associated with the enterprise, or that the enterprise was actually engaged in, or its activities actually affected, interstate or foreign commerce. The essential nature of [RICO conspiracy] is the conspiratorial agreement; the ultimate success or failure of the conspiracy is irrelevant.

*United States v. Harris*, 695 F.3d 1125, 1131 (10th Cir. 2012). In other words, mere speech, standing alone, about possible future events is criminalized. A purely hypothetical crime.

The government argues that writ of certiorari should be denied because "[t]his Court has previously denied petitions for writs of certiorari raising this issue, and the same result is warranted here." (Gov't Br. 16). The government also claims that no Circuit split exists on the issue and, in any event, the deficient instructions would be harmless error. (Gov't Br. 27).

For the reasons presented in the petition for writ of certiorari and in the courts below, each of the government's contentions are without merit. There can be no doubt that a Circuit split exists as to whether the government must prove the existence of an enterprise, or whether the existence of an agreement to create an enterprise at some point in the future is sufficient. *See United States v. Velazquez-Fontanez*, 6 F.4th 205, 212 (1st Cir. 2021) (elements of RICO conspiracy are (1) the existence of an enterprise; (2) each defendant knowingly joined the enterprise; and (3) that each defendant agreed to commit a pattern of racketeering activity);

*Feinstein v. Resolution Trust Corp.*, 941 F.2d 34, 41 (1st Cir. 1991); *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir. 1995) ("the government must prove (1) the existence of an enterprise . . . "); *United States v. Neopolitan*, 791 F.2d 489, 499 (7th Cir. 1986) ("The second distinctive aspect of a RICO conspiracy is the need to establish the existence of an enterprise."); *United States v. Cornell*, 780 F.3d 616, 621 (4th Cir. 2015) ("[T]o satisfy §1962(d), the government must prove that an enterprise affecting commerce existed."); *United States v. Ramirez-Rivera*, 800 F.3d 1, 18 (1st Cir. 2015) (the government must prove "the existence of an enterprise"); *see also* Eighth Circuit Model Jury Instruction, 6.18.1962B, RICO conspiracy. The Sixth Circuit's conclusion that an agreement to create an enterprise at some point in the future is sufficient to convict for RICO conspiracy directly conflicts with the above precedent. The government's contention otherwise falls flat.

The government attempts to support its contention by making it appear that this Court considered a similar claim in three separate cases and denied certiorari. (Gov't Br. 16) (citing *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)). This invites misconception. The defendants in these cases were all codefendants and all three of the certiorari denials came from one decision by the Second Circuit in 2010, *United States v. Applins*, 637 F.3d 59 (2d Cir. 2010). The issue decided by the Second Circuit in

*Applins* was not, as it is here, "whether the existence of an enterprise was an element of RICO conspiracy or whether the government need only prove an agreement to create an enterprise in the future in order to convict." Instead, *Applins* dealt with whether it violated a Double Jeopardy Clause when the jury instructions were conflicting as to the elements of RICO conspiracy. *Id*. at 62.

Further, even if the issue in *Applins* was the same issue raised in this case, the fact certiorari was denied in *Applins* does not mean that certiorari should be denied in the instant case. If that were the standard, this Court would have never issued decisions such as *United States v. Booker*, 543 U.S. 220 (2005) (finding the mandatory application of Sentencing Guidelines violated rights to due process and a jury trial and correcting violation by ordering Guidelines to be applied in an advisory manner prospectively); or *Johnson v. United States*, 576 U.S. 591 (2015) (finding the residual clause in the ACCA unconstitutionally vague and striking the clause to correct the violation). Certainly, this Court rejected certiorari requests in other cases based on arguments that later became precedent in *Booker* and *Johnson*.

In any event, the fact that certiorari was denied in *Applins* is not relevant given the expanding Circuit split concerning the elements of RICO conspiracy following that decision. *Compare United States v. Cornell*, 780 F.3d 616, 621 (4th Cir. 2015) ("[T]o satisfy §1962(d), the government must prove that an enterprise affecting commerce existed."), *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) require this explicitly, *see* 18 U.S.C. §1962(a), (c), and subsection (d) requires it implicitly by virtue of incorporating the elements of subsection (c)."), and *United States v. Ramirez-Rivera*, 800 F.3d 1, 18 (1st Cir. 2015) (the government must prove "the existence of an enterprise"); *with United States v. Harris*, 695 F.3d 1125, 1131 (10th Cir. 2012) (the government need not prove the existence of an enterprise). Contrary to the government's assertions that petitioners mainly rely on pre-*Salinas* decisions (Gov't Br. 23), *Cornell*, *Almanza*, and *Ramirez-Rivera* were all decided after *Salinas*. The Circuit split continues to exist, the claim has ripened and certiorari should now be granted.

Finally, the contention that the error in not requiring the jury to find an essential element of RICO conspiracy cannot be affirmed as harmless error. The Sixth Circuit never addressed the possibility of harmless error. However, as noted by Judge Donald in her dissent,

> This error [in instruction] eliminated the government's burden of proving a key element of the RICO conspiracy offense and allowed the government to convict multiple defendants based on potentially insufficient evidence. It is a grave error that cannot be remedied other than by reversing each of the defendants'

> convictions and sentences and remanding for a new trial.

*United States v. Rich*, 14 F.4th 489, 500 (6th Cir. 2021). Also, if the government was so confident about their "expansive evidence" of the actual existence of an enterprise, there would have been no need to insist on the "would be" language in the jury instruction.

In sum, the elements of RICO conspiracy require the jury to find that an enterprise existed. The district court's refusal to require the jury to make this finding relieved the government of its burden of proof with respect to this and all of the other essential elements of a RICO conspiracy. The Sixth Circuit's holding that the government is not required to prove the existence of a racketeering enterprise, but need merely prove an agreement to create an enterprise in the future conflicts with decisions from other Circuit Courts which require a jury finding that the association or enterprise must exist in order to secure a RICO conspiracy conviction. Thus this Court should grant writ of certiorari to resolve this Circuit conflict pursuant to Supreme Court Rule 10.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CRAIG A. DALY, P.C.
*Attorney for Jeff Garvin Smith*
P.O. Box 720
Royal Oak, Michigan 48068
(248) 439-0132
4bestdefense@sbcglobal.net
*Counsel of Record*

SIDNEY KRAIZMAN
*Attorney for Patrick Michael McKeoun*
645 Griswold St., Suite 2200
Detroit, Michigan 48226
(313) 961-7078
sidkraizman@sbcglobal.net

PHILLIP COMORSKI
*Attorney for Vincent John Witort*
1300 Broadway St., Suite 800
Detroit, Michigan 48226
(313) 963-5101
comorskiphillip@gmail.com

MARK SATAWA
*Attorney for Cary Dale Vandiver*
25777 Central Park Blvd., Suite 300
Southfield, Michigan 48076
(248) 356-8320
mark@satawalaw.com

LAURA E. DAVIS
*Attorney for David Randy Drozdowski*
9111 Cross Park Drive, Suite D-200
Knoxville, Tennessee 37923
(865) 229-4663
lawyer.ledavis@gmail.com

May 2022