No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CONOLY FREDDIE FRANKLIN III and ANDRE ANTHONY FRANKLIN, AKA TOMMY MARTIN

Petitioners,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does Federal Rule of Criminal Procedure 12(b)(3) bar reviewing the sufficiency of a charging document absent a showing of good cause as the Ninth Circuit held in Petitioners' case, or does plain error review still apply as four other circuits have held? *United States v. Robinson*, 855 F.3d 265 (4th Cir. 2017); *United States v. Vasquez*, 899 F.3d 363 (5th Cir. 2018); *United States v. Soto*, 794 F.3d 635 (6th Cir. 2015); *United States v. Sperrazza*, 804 F.3d 1113 (11th Cir. 2015).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Southern District of California, *United States v. Franklin,* 18-cr-04187-WQH. The district court entered the judgments on September 13, 2019. *See* Appendix B.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Franklin,* Nos. 19-50297, 19-50303. *See* Appendix A. The Ninth Circuit entered judgment on February 17, 2021, and denied a petition for rehearing and suggestion for rehearing en banc, on May 4, 2021. *See* Appendix C.

3. No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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Petitioners, Andre Franklin and Conoly Franklin, ask for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered February 17, 2021.

OPINION BELOW

The memorandum decision of the court of appeals, *United States v. Franklin*, Nos. 19-50297, 19-50303, 847 Fed.Appx. 387 (9th Cir. 2021), appears at Appendix A to this petition and is unpublished.

JURISDICTION

The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on May 4, 2021. *See* Attachment B. This petition is being filed within the 150-day time limit for certiorari petitions arising during the coronavirus pandemic.[1] The Court has jurisdiction under 28 U.S.C. § 1254(1).

INVOLVED FEDERAL LAW

Federal Rule of Criminal Procedure 12(b)(3)(B) requires that objections to the information for failure to state an offense must be raised before trial.[2]

Federal Rule of Criminal Procedure 52(b): "Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

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[1] https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

[2] "(3) Motions that must be made before trial. The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits: . . . .

(B) a defect in the indictment or information, including: . . . .

(v) failure to state an offense"

STATEMENT OF THE CASE

The United States convicted Conoly Franklin and Andre Franklin, father and son, in a sting case using a fake Facebook profile called "Ash Lee." The fifty-year-old Conoly messaged Ash Lee and was electronically introduced to what Conoly Franklin believed to be a mid-twenties blond eager to choose him as her pimp, send him money, and then support him in Nevada by prostituting herself. During the sting, Ash Lee suggested to Franklin that they bring along her fictitious minor sister and Franklin allowed it which led to a real ten-year minimum mandatory under 18 U.S.C. § 2422(b).

Andre Franklin, the son and fellow Facebook user, was already in the government's crosshairs when his father started clicking and messaging with Ash Lee. Andre Franklin had come to the attention of law enforcement and was targeted in a separate online sting using another fictitious persona. Ultimately, Andre Franklin accompanied his father, Conoly Franklin, on a trip to San Diego to meet Ash Lee. Both were arrested when they arrived at Ash Lee's hotel.

Post-arrest, Conoly Franklin stated that what he said on Facebook was nothing other than talk, and that he had no intent to do anything illegal with Ash Lee. As a Nevada resident, Franklin correctly believed that Nevada law had flexibility when it came to the exchange of affection for resources, and that even prostitution could be done legally.

PRETRIAL PROCEEDINGS

The Franklins waived indictment and the United States filed a four-count information charging a sex trafficking conspiracy (18 U.S.C. § 1594) and three substantive counts of attempted enticement of a person to engage "in prostitution and sexual activity for which a person can be charged with a criminal offense" under the Mann Act (18 U.S.C. § 2422(a) and (b)). At trial, in response to the Franklins' argument about the lawfulness of their conduct under Nevada law, the United States requested and received a jury instruction which described Nevada's law regarding prostitution: "It is unlawful in the state of Nevada for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution."

The jury acquitted the Franklins of the sex trafficking conspiracy, but convicted Conoly Franklin of the attempted enticement of Ash Lee and her fictitious little sister, and Andre Franklin of the attempted enticement of the fictitious law enforcement minor persona. The district court imposed the minimum ten-year sentences.

THE ISSUES ON APPEAL

18 U.S.C. § 2422(b) criminalizes attempts to coerce or persuade a person to travel in interstate or foreign commerce to "engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." On appeal, the Franklins argued that because their conduct did not violate Nevada law, their prosecution violated the 10th Amendment. If Nevada has the power to allow legal prostitution, then the federal government lacks the power to stop citizens of other states from traveling to Nevada to engage in what Nevada deems lawful. The Franklins argued that Section 2422(b)'s target offense requirement is a necessary constitutional limitation which respects the 10th Amendment.

The legal status of prostitution and the changing social morays give reason to read the disjunction of Section 2422(b) as both parts requiring illegality under a state's law. While it is generally the case that "or" means one or the other, this is not always the case. *See Alaska v. Lyng*, 797 F.2d 1479, 1483 n.4 (9th Cir. 1986). Rather, we must strive to give effect to the plain, common-sense meaning of the enactment without resorting to an interpretation that 'def[ies] common sense.' *Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1473-74 (9th Cir. 1987) (citation omitted)." *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003).

Interpreting the criminal offense requirement from the other disjunct phrase avoids the constitutional problem, and abides the statutory interpretation tool of inverted ejusdem generis in which the general list of offenses is used to define the specific, rather than the specific being used to define the general. *Cf. Dong v. Smithsonian Inst.*, 125 F.3d 877, 879-80 (D.C. Cir. 1997) ("For those who collect canons of construction it might be termed an application of reverse ejusdem generis (where the general term reflects back on the more specific rather than the other way around), [so] that the phrase 'A, B, or any other C' indicates that A is a subset of C." (internal quotation marks omitted)).

The information against the Franklins lacked this element, and its omission extended throughout the trial. The jury was not asked to find what law the Franklins were violating. The post-arrest statement of Conoly Franklin established the defense that he believed his arrangement with Ash Lee would be lawful in Nevada. The information and the jury instructions, however, required the jury to convict the Franklins if the jury found that the Franklins were attempting to persuade these personae into engaging in prostitution regardless of the lawfulness in Nevada. The requirement that the prostitution be unlawful in Nevada is a necessary limitation to make the statute comport with the 10th Amendment, and such an allegation was absent from the information, nor was it cured by the findings of the jury at trial. In short, if the legal status of prostitution

does not matter, then the Franklins cannot prevail. But if the legal status of prostitution matters, then the Franklins had what amounts to a good-faith, mens rea defense that they did not intend to violate Nevada law.

The United States responded the claim was waived under Federal Rule of Criminal Procedure 12(b)(3) because the Franklins did not raise it pretrial. Answering Br. at 27 (Dkt No. 19). The United States also argued that even if the claim was reviewed for plain error, the argument would fail because the United States could prohibit interstate travel for purposes of prostitution irrespective of the forum state's law. *Id*. at 29.

THE PANEL'S OPINION

The Panel held any error in the charging document was waived under Rule 12(b)(3) for lack of a good cause showing for not raising it pretrial. *United States v. Franklin*, Nos. 19-50297, 19-50303, 847 Fed.Appx. at 390. Second, the Panel held that the legality of prostitution under state law does not matter under the Mann Act:

> Even if it were not waived, the Franklins' claim ignores the language of 18 U.S.C. § 2422, which refers in both of its subsections to causing a person (adult or minor) "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense." § 2422(a) and (b) (emphasis added). The only evidence brought before the jury related solely to "prostitution." Under the plain language of the statute, neither subsection requires that "prostitution" be in violation of a specific criminal statute. *See United States v. LeCoe*,

> 936 F.2d 398, 402-03 (9th Cir. 1991). The evidence in the record is overwhelming that the Franklins enticed three women to engage in prostitution. The attack on the alleged deficiency or ambiguity relating to the remainder of the statute is irrelevant.

Id. at 390.

REASONS TO GRANT THE WRIT

Supreme Court Rule 10(a) states that a circuit split is a sufficient reason to grant certiorari. There is a circuit split regarding whether untimely objections to a charging document can be still be reviewed for plain error even if the objection does not meet the good cause standard of Rule 12(b)(3). Along with the Ninth Circuit in the Franklins' case, the First, Second, Third,[3] Seventh, Eighth, and Tenth Circuits do not apply plain error review to claims waived under Rule 12(b)(3).[4] The Fourth, Fifth, Sixth, and Eleventh Circuits review claims barred by Rule 12 motions for plain error.[5]

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[3] The Third Circuit has split authority on the question. *United States v. Ferriero*, 866 F.3d 107, 122 n.17 (3d Cir. 2017) ("We have not decided the standard of review for Rule 12(b)(3) claims raised for the first time on appeal, but courts of appeal that have applied the rule have employed plain-error review. *See United States v. Soto*, 794 F.3d 635, 652, 655 (6th Cir. 2015); *United States v. Sperrazza*, 804 F.3d 1113, 1121 (11th Cir. 2015).")

[4] *United States v. Galindo-Serrano*, 925 F.3d 40 (1st Cir. 2019); *United States v. O'Brien*, 926 F.3d 57 (2d Cir. 2019); *United States v. Fattah*, 858 F.3d 801 (3d Cir. 2017); *United States v. McMillian*, 786 F.3d 630 (7th Cir. 2015); *United States v. Anderson*, 783 F.3d 727 (8th Cir. 2015); *United States v. Bowline*, 917 F.3d 1227 (10th Cir. 2019).

[5] *United States v. Robinson*, 855 F.3d 265 (4th Cir. 2017); *United States v. Vasquez*, 899 F.3d 363 (5th Cir. 2018); *United States v. Soto*, 794 F.3d 635 (6th Cir. 2015); *United States v. Sperrazza*, 804 F.3d 1113 (11th Cir. 2015).

The Franklins' argument goes to the ability of the federal government to outlaw what a state has made lawful under the state's constitutionally given police powers. If Congress can blockade people from going to Nevada in order to prevent them from taking advantage of Nevada law, what stops Congress from doing so for other state services such as for same sex marriages? *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584 (2015). Congress could effectively eviscerate the laboratories of democracy[6] model by blockading states from having out-of-state citizens come to enjoy what is lawful under state law.

This problem is obviated by the target offense requirement because then Nevada's law is being honored in the federal prosecution. The plain text of Section 2422(b) requires it, and the constitutional avoidance doctrine means that unless

[6] "This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.' *Oregon v. Ice*, 555 U.S. 160, 171 (2009); see *United States v. Lopez*, 514 U.S. 549, 581, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (Kennedy, J., concurring) ('[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.'); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting) ('It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'). Deference to state lawmaking 'allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 564 U.S. 211, 221, 564 U.S. 211, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269, 280 (2011)) (quoting *Gregory*, 501 U.S. at 458, 111 S. Ct. 2395, 115 L. Ed. 2d 410)." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817, 135 S. Ct. 2652, 2673 (2015).

Congress's intent is clearly against the Franklins' proposed construction, then the Court should adopt the reading that avoids the constitutional issue. *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (explaining that the doctrine of constitutional avoidance applies when a statute is susceptible to two different constructions and one avoids the constitutional problem).

The view that Congress can intrude directly into the state's police power was rejected in *Bond v. United States*, 564 U.S. 211, 216 (2011). *Bond* clarified that the Franklins have the "personal right" to not be convicted under a constitutionally invalid law. *Bond v. United States*, 564 U.S. at 226 (Ginsburg, J., concurring); *see also id.* at 217 (majority opinion) (custody is a concrete harm that can be avoided by the invalidation of the conviction).

The Franklins' argument is consistent with *Class v. United States*, 138 S. Ct. 798 (2018), which allowed a defendant that pled guilty to argue on appeal that his conduct was beyond Congress's power to regulate. *Id.* at 806 (argument could go forward despite guilty plea because if successful the government's power to constitutionally prosecute him would be extinguished). Indeed, while the Supreme Court in *Class* did not speak in terms of jurisdiction or jurisdictional indictment defects, it suggested, albeit in dicta, that a claim that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all cannot

be waived by a defendant's guilty plea because that kind of claim challenges the district court's power to act. *See Class*, 138 S. Ct. at 805.

"Notably, the Supreme Court in *Class*, in its discussion of historical examples of claims not waived by a guilty plea, included cases in which the defendant argued that the charging document did not allege conduct that constituted a crime. *Id.* at 804 (citing *United States v. Ury*, 106 F.2d 28, 28-30 (2d. Cir. 1939); *Hocking Valley Ry. Co. v. United States*, 210 F. 735, 738-39 (6th Cir. 1914); *Carper v. Ohio*, 27 Ohio St. 572, 575-76 (1875); *Commonwealth v. Hinds*, 101 Mass. 209, 210 (1869))." *United States v. St. Hubert*, 909 F.3d 335, 343-44 (11th Cir. 2018), *overruled on other grounds*, *United States v. Davis*, 139 S.Ct. 2319, 2324 (2019).

The Seventh Circuit harmonized *Class* with Federal Rule of Criminal Procedure 12(b) in *Grzegorczyk v. United States*, 997 F.3d 743, 747 (7th Cir. 2021), which found that Class was confined to claims about the power of the government to prosecute a defendant. *Id.* at 748 ("He has not challenged the government's power to criminalize his admitted conduct. *See Class*, 138 S. Ct. at 805. Instead, Grzegorczyk merely asserts that murder-for-hire is not a 'crime of violence' under the elements clause.")

The Franklins' claim was exclusively a constitutional argument about the United States's ability to prosecute them. Their claim would be tenable under the Seventh Circuit's *Grzegorczyk* decision, but not under the Ninth Circuit's hardline rule. And inasmuch as *Class* involved a guilty plea, it would be very strange if the Franklins were in a worse position than *Class* because they contested their guilt at trial.

The Franklins are only asking the Court to decide whether they can receive plain error review of their claim.

CONCLUSION

A writ of certiorari is warranted to resolve this conflict in the circuits.

Respectfully submitted,

Dated: August 31, 2021

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