22-6067 ORIGINAL

No._____

In The
Supreme Court of the United States

YAZAN AL-MADANI,
Petitioner,

v.

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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One: Whether under the Racketeer Influenced and Corrupt Organizations Act ("RICO") an entity can be both an "enterprise" and a "victim" – when it profited from the alleged fraudulent act.

Question Two: Whether an unelected physician, with no governmental authority whatsoever, can qualify as a "public official" under the Hobbs Act; and if so, whether reducing the number of days an employee is required to work, but not their hours, constitutes an "official act".

Question Three: Whether a loss-calculation error at sentencing should be considered harmless when the error deprives the defendant from seeking meaningful appellate review.

Question Four: Whether the United States was required to prove an unauthorized intent to defraud in counts of the Indictment that did not contain a specific *mens rea* element.

PARTIES TO THE PROCEEDING

Petitioner Yazan Al-Madani was the Defendant-Appellant in the proceedings below.

Respondent United States of America was the Plaintiff-Appellee in the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Hills, 27 F. 4th 1155 (6th Cir. 2022)* and reproduced in the attached Appendix. The order of the Court of Appeals denying the Petition for Rehearing is unreported but is reproduced in the attached Appendix.

JURISDICTION

On March 3, 2022, the United States Court of Appeals for the Sixth Circuit affirmed the Petitioners conviction, sentence of imprisonment, and restitution order. See: *Hills at 1203.* On May 9, 2022, and later amended on May 10, 2022 Petitioners timely Petition for Rehearing was denied. On July 29, 2022, this Court granted the Petitioners Motion for an extension of time in which to file his certiorari petition. In the Order, the Court gave the Petitioner under October 7, 2022 in which to file his certiorari petition. See: *Al-Madani v. United States, No. 22A87 (July 29, 2022, Kavanaugh, J.).*

Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution prohibits any person from being deprived his or her liberty without due process of law. Specifically, the Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." See: *U.S. Const. Amend. V*

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1962(c):

> "(c) 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." See: *18 U.S.C. §1962(c).*

18 U.S.C. §1951(a), (b):

> "(a)Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. (b)As used in this section— (1)The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence

of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

The Petitioner[1], Dr. Yazan Al-Madani ("Al-Madani")[2], began his professional career in the Dental Department of MetroHealth, a publicly owned hospital located in Cleveland Ohio, in 2007. Al-Madani would start working with MetroHealth through their Residency Program; upon completion of the Program, Al-Madani would become an attending dentist. At all relevant times, Al-Madani was an employee of MetroHealth. See: *Appendix "A" at 2.*

While employed with MetroHealth, Al-Madani would work under the direction of Dr. Edward R. Hills ("Hills"), who served as the Chair of the Dental Department and later interim Chief Operating Office ("COO"). During his 18-months as interim COO, Hills would lead MetroHealth to realizing a net profit of over $89 million dollars. See: *Id.*

The majority of the allegations contained in the 33-count indictment center around seven distinct fraudulent schemes. As it relates to Al-Madani, the Sixth Circuit summed the fraudulent schemes as follows:

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[1] Because Al-Madani is proceeding in this matter without the benefit of counsel, he respectfully requests that this Court apply a liberal interpretation to the questions and arguments asserted herein. See: *Hughes v. Rowe, 449 U.S. 5, 15 (1980) ("An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims").*

[2] In the interests of judicial economy, only the facts relevant to the questions presented by Al-Madani are discussed herein.

"Stream of Benefits Bribery Scheme[3]. From 2009 through 2014, Hills solicited and received bribes (in cash and other things of value) from Alqsous, Al-Madani, and Elrawy in exchange for favorable treatment with respect to their employment at MetroHealth (*i.e.* , bonuses, schedules, and an accommodation for a preferred candidate for residency). The jury found Hills, Alqsous, and Al-Madani each guilty of Conspiracy to Commit Hobbs Act bribery (Count 2).

Dental Resident Bribery Scheme. From 2008 until 2014, Alqsous, Al-Madani, and Sayegh solicited and/or accepted bribes from dentists applying to the dental residency program at MetroHealth. Hills, however, was not charged in any counts related to this scheme. Alqsous, Al-Madani, and Sayegh were each convicted of Conspiring to Commit Bribery Concerning a Program Receiving Federal Funds (Count 3) and Conspiring to Commit Honest Services Mail and Wire Fraud (Count 4). This scheme also resulted in substantive convictions for federal-program bribery: one count against Alqsous and Sayegh (Count 5) and two counts against Al-Madani and Sayegh (Counts 6 and 7).

Oral Health Enrichment (OHE) Scheme. From 2009 through 2013, Hills and unindicted business partner Julie Solooki operated Oral Health Enrichment (OHE) to provide training for dentists with discipline or performance issues. Some of OHE's business was accomplished using MetroHealth personnel, equipment, or facilities without permission or compensation. Hills, Alqsous, and Al-Madani were convicted of Conspiracy to Commit Money or Property Mail and Wire Fraud (Count 8). Hills was also convicted of four related substantive counts of Money and Property Mail Fraud (Counts 9-12). Alqsous and Al-Madani were acquitted of those same substantive charges.

Patient Referral Kickback Scheme. In March 2014, Hills announced that MetroHealth's dental patients could be referred to Buckeye Dental Clinic—a private clinic owned by Alqsous and Al-Madani—for which Hills received payments that included seven

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[3] Any abbreviations not defined in quoted text are those abbreviations used by Court of Appeals. Most of these abbreviations refer to Al-Madani's co-defendants.

> checks notated "consulting fees." This resulted in the convictions of Hills, Alqsous, and Al-Madani for Conspiracy to Solicit, Receive, Offer and Pay Health Care Kickbacks (Count 13) and Conspiracy to Commit Honest Services and/or Money and Property Mail Fraud (Count 28). The seven checks from Noble Dental—another private clinic owned by Alqsous and Al-Madani—were the basis of the substantive convictions (1) of Hills for receipt of the kickbacks (Counts 14-20) and (2) of Alqsous and Al-Madani for offering or paying such kickbacks (Counts 21-27).
>
> ***Obstruction of Justice Scheme.*** Hills, Alqsous, and Al-Madani were each convicted of Conspiracy to Obstruct Justice after the FBI investigation commenced in May 2014 (Count 29). Evidence of that conspiracy included recorded discussions during a dinner meeting, a warning to one of the bribing residents to stay quiet, preparing a 1099 to hide the "kickback" payments to Hills, and telling a grand
> jury witness to "forget about" seeing envelopes of cash. Al-Madani also was convicted of making false
> statements to the FBI in connection with the investigation (Count 30).
>
> ***Free Labor Scheme.*** For the period from 2008 through 2010, Hills assigned MetroHealth residents, including Alqsous and Al-Madani, to work at Noble Dental for which they were compensated personally (Count 1)." See: *Id. at 2-3 (footnotes omitted).*

Following a jury trial, Al-Madani was found guilty of the following charged offenses:

> 18 U.S.C. §§1962(c), 1963(a), 1341, 1951, 1512, 1962(d), 1343 - Racketeering In Corrupt Organizations, Conspiracy (Count 1); 18 U.S.C. §1951(a) - Conspiracy To Commit Hobbs Act Bribery (Count 2); 18 U.S.C. §§371, 666 - Conspiracy To Commit Bribery Concerning Programs Receiving Federal Funds (Count 3); 18 U.S.C. §§1349, 1341, 1343 & 1346 - Conspiracy To Commit Honest Services Mail and Wire Fraud (Count 4); 18 U.S.C. §666(a)(1)(B) and 2 - Bribery In Relation To Federally Funded Program (Count 6 & 7); 18 U.S.C. §§1341, 1343, 1349 - Conspiracy To Commit Money, Property Mail, and Wire Fraud (Count 8);

> 18 U.S.C. §371 and 42 U.S.C. §1320a-7b - Conspiracy to Solicit, Receive, Offer & Pay Health Care Kickbacks (Count 13); 42 U.S.C. §1320a-7b(b)(2)(A) - Offering of Paying Kickbacks in Connection with a Federal Health Care Program (Counts 21-27); 18 U.S.C. §§1341, 1346, 1349 - Conspiracy to Commit Honest Services and Money and Property Mail Fraud (Count 28);
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> 18 U.S.C. §§1512(k), 1512(b)(1), 1512(b)(3), 1512(d), 1512(c)(2) - Conspiracy to Obstruct Justice (Count 29); and 18 U.S.C. §1001(a)(2) - False Statements or Representations (Count 30).[4] See: *Judgment of Conviction Appendix "C" at 1*

At sentencing, the District Court ordered Al-Madani to pay restitution to MetroHealth in the amount of $897,934.48. See: *Id. at 6.* The District Court imposed the following custodial sentence:

> "121 months on each Counts 1, 2, 4, 8, 28, & 29; 120 months on each of Count 6 & 7; and 60 months on each of Counts 3, 13, 21-27, & 30, all to be served concurrently." See: *Id. at 2*

In his Appeal to the Sixth Circuit, Al-Madani raised the following questions:

> I. Whether the RICO conspiracy allegation (Count 1) fails to state an offense; II. Whether the indictment's inclusion of allegations that the government conceded could not be proven at trial violates due process of law under the Fourteenth Amendment?; III. Whether the district court erred in denying Appellant's Rule 29 Motion, as there was insufficient evidence of Appellant's guilt of the conspiracy charges and substantive counts; IV. Whether the district court erred in its jury instructions on RICO conspiracy, Hobbs Act conspiracy, honest services fraud, public official status, and the anti-kickback statute; V. Whether the district court's sentence was procedurally unreasonable in utilizing incorrect enhancements and improperly calculating loss; VI. Whether

[4] Al-Madani was found not guilty of Counts 9-12. See: *Id.*

restitution should have been ordered. See: *Appendix "A" Generally*[5]

As it relates to the Questions Presented for Review, the Sixth Circuit held:

Holding relevant to Question One:

> "Alqsous and Al-Madani argue for the first time on appeal that the RICO conspiracy count is legally insufficient because MetroHealth cannot be both the "enterprise" and the "victim" within the meaning of § 1962(c). For support, defendants rely on the Third Circuit's holding in *Jaguar Cars* that § 1962(c) reaches only circumstances where officers or employees use the corporate enterprise to victimize others. *See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.* , 46 F.3d 258, 266-67 & n.6 (3d Cir. 1995) (discussing *Reves v. Ernst & Young* , 507 U.S. 170, 183, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), and *NOW, Inc. v. Scheidler* , 510 U.S. 249, 259, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994)). The Eleventh Circuit has rejected that reasoning in *Jaguar Cars* as both dictum and an unpersuasive "leap of logic." *United States v. Browne* , 505 F.3d 1229, 1272-73 (11th Cir. 2007) (citation omitted); *see id.* at 1273 (holding Congress intended § 1962(c) to target " 'the exploitation and appropriation of legitimate businesses by corrupt individuals,' *not merely the use of an enterprise to swindle third parties* " (emphasis added) (quoting *United States v. Goldin Indus., Inc.* , 219 F.3d 1268, 1270 (11th Cir. 2000) (en banc))); *see also Cedric Kushner* , 533 U.S. at 164, 121 S.Ct. 2087 (noting that RICO protects both a legitimate enterprise from those who would "victimize it" and the public from those who would use an enterprise "as a vehicle" through which illegal activity is committed). Although the Eleventh Circuit's view seems to represent the better reading of *Reves* and *Scheidler* , this court has yet to confront this issue. Defendants' failure to raise this as an objection to the indictment or in their Rule 29

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[5] These claims are taken for *Appellant's Opening Brief, Statement of Issues, Page 9.* Each claim is discussed in the Sixth Circuit's Opinion, as a result Al-Madani did not attach a copy of the brief as an Appendix.

> motions limits our review to plain error. *See United States v. Soto* , 794 F.3d 635, 655 (6th Cir. 2015). Given the absence of controlling authority and defendants' own description of the issue as one of "unsettled law" and "first impression," defendants cannot demonstrate an error that was "obvious or clear." *See Puckett v. United States* , 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (holding that to be "clear or obvious" an error cannot be "subject to reasonable dispute")." See: *Id. at 5.*

Holding relevant to Question Two:

> "Hills, Alqsous, and Al-Madani contend that the evidence was insufficient to support their convictions for conspiracy to commit Hobbs Act bribery because: (1) Hills was not a public official; (2) the "things of value" were merely "gifts" that were not given in return for anything; and (3) even if given in return for something, there was not an agreement to give those things in return for "official acts" as is required under *McDonnell* . We are not persuaded... Relying on *United States v. Lee* , 919 F.3d 340, 343 (6th Cir. 2019), defendants assert that only *elected* officials are "public officials" for purposes of Hobbs Act bribery. To be sure, the defendant in *Lee* was an elected member of the County Council. But nothing in *Lee* suggests that the official act for Hobbs Act bribery (or for that matter Honest Services Fraud) must involve an *elected* public official. Indeed, the Supreme Court upheld a conviction for conspiracy to commit Hobbs Act bribery in *Ocasio* that involved no elected officials—only Baltimore police officers who received payments in return for steering individuals who were in auto accidents to certain auto repair shop owners... In reversing the convictions of Virginia's former governor in *McDonnell* , the Supreme Court narrowed the scope of conduct that constitutes an "official act" for purposes of Hobbs Act bribery (as well as Honest Services Mail and Wire Fraud)... *McDonnell* held that the former governor's informal actions—setting up a meeting, calling another public official, and hosting an event to help promote a businessman's dietary supplement—did not meet either prong of the "official acts" test. Rather, an official act "involve[s] a formal exercise of governmental power" with respect to something "specific and focused." *McDonnell* , 136 S. Ct. at 2372... Defendants maintain that the "official acts" test is not met here because the things of value were not given in return for acts, or promises to act, on any particular question or matter

> involving a formal exercise of governmental power. Their arguments are unavailing." See: *Id. at 7-9.*

Holding relevant to Question Three:

> "The district court found the following amounts should be counted for each scheme: (1) $661,176.90 from the "flex-time" scheduling policy; (2) $92,829 in upward adjustments to the incentive bonuses; (3) $105,126.94 in salary paid to Nassar; (4) $373,908 in salaries paid to the four dental residents who were solicited and/or paid bribes; (5) $17,600 paid to Hills in connection with the patient referrals to Buckeye; (6) $111,900 charged to nine OHE clients; (7) $99,961 that Hills received from Noble Dental in connection with work performed by MetroHealth's residents; and (8) $15,907.40 in dental services provided without charge to Jordan. The defendants were each held accountable for those amounts—except that Jordan's dental work was not counted against Al-Madani, and the resident bribery amounts were not attributed to Hills at all and were only partially attributed to Al-Madani. Once tallied, the district court attributed a total of $1,104,501.24 to Hills; $1,276,595.84 to Al-Madani; and $1,478,409.24 to Alqsous... Defendants counter that MetroHealth suffered no "loss" because Alqsous, Al-Madani, and Elrawy were so much more productive under the flex-time policy than they would have been if they had worked a five-day, 40-hour week. That increased productivity might be a relevant set off if the district court had accepted the government's initial position that the harm should be based on lost revenue that could have been generated if they had worked five days per week... The government posited that $3.3 million in revenue was lost... But the district court rejected the government's resulting claim of $2.5 million in lost productivity as too speculative... Instead, the district court found that the best measure was the "benefit received or to be received" by Alqsous, Al-Madani, and Elrawy as a result of the adoption of the flex-time policy—namely, full-time pay for less than full-time work... The district court did not clearly err in determining the value of the benefit received or to be received from the flex-time scheduling policy for purposes of § 2C1.1(b)(2) to be $661,176.90. Because that amount exceeded $550,000, the district court did not err in applying the 14-level increase to the defendants' offense levels." See: *Id. at 23, 27.*

Holding relevant to Question Four:

> "Al-Madani claim that the jury should have been given a "good faith" defense instruction. Although the record is not specific about what instruction was requested, defendants now argue that it was an abuse of discretion not to have instructed the jury that: "An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct." Sixth Circuit Pattern Criminal Jury Instruction 10.04(2)... Because there is no claim that the jury was inaccurately or insufficiently instructed regarding the intent required to prove any of the offenses, any error in failing to also give a good faith instruction would be harmless. *See United States v. McGuire* , 744 F.2d 1197, 1201-02 (6th Cir. 1984). The jury's finding that a defendant acted with the requisite intent necessarily negates the possibility that the defendant acted in good faith." See: *Id. at 20.*

The Appellate Court denied Al-Madani's Petition for Panel Rehearing, without issuing any additional substantive rationale. See: *Order Denying Re-Hearing Appendix "B".*

This timely Petition for the Issuance of a Writ of Certiorari follows.

REASONS FOR GRANTING THIS PETITION

I. Introduction

This Court's guidance is necessary on each of the Questions Presented for Review to resolve several splits amongst the Circuits and/or to clarify existing and controlling precedent – incorrectly interpreted by the Sixth Circuit Court of Appeals.

At their core, the Questions ask the Court to consider establishing appropriate universal safeguards to prevent prosecutorial over-reach. The absence of these universal safe-guards, at the time of Al-Madani's case, allowed the United States to successfully assert that: under RICO an enterprise and victim can be one and the same, even when the victim receives a win fall from the RICO conduct; a dentist qualified as a public official; abiding by the terms of a contractual agreement can constitution a Hobbs Act violation; and, work committed outside of the fraud scheme, for which the purported victim generated substantial revenue, should not offset any fraudulent payments made.

II. An Enterprise and Victim Cannot be One and the Same Under RICO

The Indictment alleged that MetroHealth was both the enterprise and victim of the RICO[6] conduct. While Al-Madani challenged the sufficiency of the indictment on this ground, the Sixth Circuit elected not to resolve the "unsettled law" See: *Appendix "A" at 5.* The Court concluded that because Al-Madani failed to first raise the argument with the District Court, the plain error review standard applied; and applying the standard they could not identity an error that was "clear or obvious". See: *Id.*

Respectfully, while Al-Madani concedes that the law in the Sixth Circuit is unsettled, the dual role assigned in the Indictment to MetroHealth presents an error that is not "subject to reasonable dispute". See: *Puckett v. United States, 566 U.S. 129, 135 (2009).* This Court has long held that the RICO statute should be "liberally construed to effectuate its remedial purposes." See: *H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 243 (1989).* However, even with this liberal construction, this Court has never held that an entity can be both an "enterprise" and a "victim" under the statute. In fact, the exact opposite has been suggested to be the case.

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[6] 18 U.S.C. §1962(c) makes it "unlawful for any person employed by or associated with any enterprise...to conduct or participate...in the conduct of such enterprise's affairs through a pattern of racketeering activity." See: *18 U.S.C. §1962(c).*

In *National Organization of Women*, this Court determined that "the 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of the activity." See: *National Organization of Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994).* Shortly after *National Organization of Women* was handed down, the Third Circuit, applying the sound reasoning used by this Court, issued its Opinion in *Jaguar Cars*. Wherein, the Appellate Court held that an entity can be either a victim or the enterprise, not both. See: *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F. 3d 258, 267 (3rd Cir. 1995).* *Jaguar Cars* remains controlling in the Third Circuit. See: *Blue Cross Blue Shield Ass'n v. GlaxoSmithkline, LLC., 417 F. Supp. 3d 531, 560 (E.D. Pa 2019) (explaining that Jaguar Cars remains controlling).*

To date the only Circuit that has directly rebutted the holding in *Jaguar Cars*, has been the Eleventh. In *Browne*, the Eleventh Circuit, ignoring the jurisprudence put forth by this Court, determined that an entity could be both an "enterprise" and a "victim" - because the *National Organization of Women* only addressed the economic component of RICO and nothing more. See: *United States v. Browne, 505 F. 3d 1229, 1273 (11th Cir. 2007).* In an Opinion that pre-dates both *National Organization of Women* and *Jaguar Cars* the Seventh Circuit reached the same conclusion as the Third Circuit, albeit it with slightly different rationale. See: *United States v. Kovic, 684 F. 2d 512,*

517 (7th Cir. 1982). Both *Browne* and *Kovic* remain controlling in their respective circuits. See: *LaSalle Bank Lake View v. Seguban, 937 F. Supp. 1309, 1322-13 (N.D. Ill. 1996) (determining that Kovic's holding remains intact after National Organization of Women decision).*

Though the Sixth Circuit did not decide the issue, it suggested that it was leaning towards the approach taken by the Eleventh Circuit. See: *Appendix "A" at 5.* In making this suggestion, the Sixth Circuit cited *Cedric Kushner Promotions, LTD. v. King*. See: *Id.* However, a cursory look at the holding in *Kushner* confirms that this Court affirmed *Jaguar Cars*. See: *Cedric Kushner Promotions, LTD. v. King, 533 U.S. 158, 161 (2001) ("Other Circuits, applying §1962(c) in roughly similar circumstances, have reached a contrary conclusion. See, e.g...Jaguar Cars, Inc...We granted certiorari to resolve the conflict. We now agree with these Circuits").* While perhaps this affirmation was not directly tied to the "element" / "victim" argument – the fact remains that the holding was affirmed, without reference to any part of the lower Court's decision being inapplicable.

When "Congress enacted RICO in 1970, it was particularly concerned with bringing to justice leaders of organized crime syndicates" See: *United States v. Lopez, No. 18-1418 at * 13 (1st Cir. April 30, 2020).* Today, the statute has been expanded well beyond its original intent. Indeed, no rationale argument can be made that Congress enacted RICO to permit the prosecution

of healthcare providers – who worked over their required 40-hours per week, but allegedly altered their time sheets to show the work was completed in less than five days. Even assuming every argument made by the United States at trial was correct, it still defies all reasonable credulity to conclude that Al-Madani engaged in a pattern of conduct described under the RICO statute. As MetroHealth benefited from the 40-hours of work Al-Madani completed each week – it was not victimized by it. Perhaps, Al-Madani completed his 40-hours in four days, this does not change the fact that he still completed the work. MetroHealth, by their own admission, realized a profit of $89 million dollars while they were purportedly being victimized. If MetroHealth is both an "enterprise" and "victim" under RICO – why were they not required to disgorge the profits? Certainly, some of those funds were the result of work completed by Al-Madani and his co-defendants. As a "victim" perhaps MetroHealth should be entitled to keep the funds; as an "enterprise" – or the conduit of the fraudulent activity – they should not. Put plainly, when the enterprise benefits from the fraudulent conduct – they can also claim to be a victim.

Respectfully, intervention from this Court is necessary reign in the continued impermissible expansion of RICO to ensure that it is not continued to be applied in cases where it simply is not applicable.

Additionally, intervention in this case will resolve a circuit split of great importance. Defendants like Al-Madani, with the same offense conduct, can be charged with RICO violations in the Seventh and Eleventh Circuits, but not in the Third. Thus, if for no other reason intervention is necessary to ensure the equal administration of justice[7].

III. A Dentist Does not Qualify as a Public Official Under the Hobbs Act; and Even if he Does, no "Official Act" Was Committed.

A. A Dentist is Not a Public Official

The Sixth Circuit determined that Hills, a dentist serving in a non-elected role as COO, qualified as a public official under the Hobbs Act. See: *Appendix "A" at 6-7.* In reaching this conclusion the Appellate Court determined that "Hills was not only an employee of the county-owned hospital, but he was also the long-serving Chair of the Dental Department and COO of the county-owned hospital". See: *Id.* Curiously, they cited two cases involving sworn law enforcement officers to support their position[8]. See: *Id.*

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[7] Some District Courts have adopted the "Innocent Victim Enterprise" Theory. Because Al-Madani believes that *National Organization of Women* forecloses this theory, it is not discussed herein. See: *In re Pharmaceutical Industry, 263 F. Supp. 2d 172, 185 (D. Mass. 2003).*

[8] Specifically, the Sixth Circuit cited *Ocasio v. United States, 578 U.S. 282 (2016)* and *Dixson v. United States, 465 U.S. 482 (1984).*

This Court long ago defined the phrase "public official" as "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." See: *Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).* While this definition was reached in a case that did not involve a Hobbs Act related offense, there is nothing to suggest that a special meaning should be applied. This is especially true, given that Congress elected not to define the phrase when they codified the Hobbs Act.

The Sixth Circuit's reliance upon *Ocasio* and *Dixson* is simply misplaced. As in both cases the Hobbs Act offenders, while not elected officials, were peace officers – who took a publicly administered oath. By virtue of their job and oath they had the requisite "responsibility" or "control" over the "conduct of governmental affairs" – namely the enforcement of laws enacted by elected officials. Hills had no such requirement or responsibility. To be clear, as a dentist – Hills responsibility was to see and treat patients; as dental department chair – Hills responsibility was to oversee other physicians to ensure they were providing an appropriate standard of case; and, as COO – Hills responsibility was to oversee the day-to-day operations of MetroHealth, while reporting to the Chief Executive Officer and Board. While certainly, MetroHealth placed a great deal of trust in Hills and his abilities, they did not ask or expect him to preform governmental affairs. Of course, this ask was not

made – because MetroHealth is not in a position to preform governmental affairs.

If this Court does not intervene and expressly define what constitutes a public official under the Hobbs Act, it is entirely likely that in a few years – the United States will argue that any employee of an entity that receives or benefits from government funding, can be considered a public official. At first blush this might sound far reaching. However, this likely future argument only takes the United States' current argument – to its next logical step. If a practicing dentist, at a state ran hospital, can be a public official – why then can't the physician who exclusively accepts Medicare patients at his private practice be defined as a public official? Respectfully, intervention from this Court is needed to prevent this overreach from going any further. This Court defined "public official" 56 years ago, the interests of justice so command that the definition now be applied to Hobbs Act offenses.

B. No "Official Act" Occurred

Assuming ***arguendo*** that a dentist can qualify as a public official, the Sixth Circuit nevertheless misconstrued this Court's jurisprudence in *McDonnell* in determining that Al-Madani provided Hills gifts "in return for acts, or promises to act, on any particular question or matter involving a formal exercise of governmental power." See: *Appendix "A" at 9.* The Sixth Circuit's rationale that an official act could be identified as "whether to allow

flex-time schedules, make adjustments to incentive bonuses, and/or increase the number of dental residents in the dental department of a public hospital." (See: *Id.)* stretches the very fabric of *McDonnell.*

In stretching *McDonnell* the Appellate Court relied upon cases involving payments being made to sworn peace officers. In the cases cited, the law enforcement officers received payment in exchange for preforming a task – authorized through the scope of their employment. See: *United States v. Van Buren, 940 F. 3d 1192 (11th Cir. 2019) (case involving a police officer who received payment in exchange for running the license plates of private citizens); See also: United States v. Henderson, 2 F. 593, 595 (6th Cir. 2021) (case involving prison guard who smuggled contraband into a county jail in exchange for payment and failing to report the violation to prison officials, as required by employment oath).* As noted *supra.* there is a distinguishable difference between a sworn peace officer and a dentist, who just happens to work at a public-hospital. Thus, any reliance the Appellate Court placed in *Van Buren* and *Henderson* is simply misplaced.

However, even if the Sixth Circuit's reliance was not misplaced – the expansion of *McDonnell* is simply impressible. In *McDonnell* this Court held that to meet its burden in identifying an "Official Act" the United States must "identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought before a public official". See:

McDonnell v. United States, 136 S. Ct. 2355, 2368 (2016). This Court defined the words "cause", "suit", "proceeding", and "controversy" to "connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination." See: *Id.* Ultimately, in *McDonnell* it was concluded that "setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) –without more – does not fit that definition of 'official act'. See: *Id. at 2370.* Respectfully, setting employment schedules, without any alteration to the number of hours worked, hardly fits the definitions set by this Court in *McDonnell.*

The Sixth Circuit's decision to expand the definitions established in *McDonnell* to include scheduling – is in direct contrast with the First and Second Circuit. In *United States v. Tavares, 844 F. 3d 46 (1st Cir. 2016),* the First Circuit held that prosecutors "overstepped" their bounds in charging a Hobbs Act offense based upon "hiring" and "employment practices". See: *Id.* Likewise, in *United States v. Silver, 948 F. 3d 538, 556 (2d Cir. 2020)*[9] the Second Circuit determined that post *McDonnell* any payment made in advance of a favor that is yet to be specified, is not actionable. See: *Id.* This Court's intervention is necessary to settle the split amongst the Circuits on this issue.

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[9] Justice's Thomas and Gorsuch voted in favor of granting certiorari to *Silver* to address the conflation of extortion and bribery "when a public official is the defendant". See: *Silver v. United States, 141 S. Ct. 656 (2021) (Gorsuch, J., Thomas, J. dissenting).*

The practical application of controlling law to the facts in this case is simply baffling. Al-Madani, worked 40-hours per week but did so in four-days. According to the United States, to get around not having to work a fifth day he provided Hills gifts. But nowhere was it ever alleged, much less proven, that Al-Madani failed to complete his required 40-hours of work; or that he failed to provide an appropriate level of patient care. In fact, Al-Madani was one of the top preforming dentists within MetroHealth. Whether he completed his required 40-hours of work in 2 days or 7 – is not relevant, he completed the work without complaint from his employer.

The mere fact that Al-Madani gave Hills gifts on occasion, is not evidence of a fraudulent scheme. Rather, it is evidence of a decades long friendship between two physicians[10]. Al-Madani gave the gifts without asking or expecting anything in return, in short there was no *quid pro quo*. To believe the United States' theory relating to the gifts any employee that provides a superior with a Christmas or birthday gift and, at some point, thereafter, is allowed to take a day off work with pay - has committed a Hobbs Act offense.

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[10] Perhaps, if Al-Madani had provided gifts to Hills in exchange for only having to work 20-hours per week, while getting paid for 40, the theory would make sense. Though, under *McDonnell* it would still not satisfy the "official act" threshold.

IV. A Loss-Calculation Error is not Harmless

Despite acknowledging that during the purported fraudulent scheme MetroHealth realized a profit of $89 million dollars – the Sixth Circuit found only a "harmless error" with the District Court finding that Al-Madani caused MetroHealth a loss of $1,276,595.84. See: *Appendix "A" at 25.* The Appellate Court reached this conclusion by finding that there was adequate evidence in the record to support a loss of at least $661,176.90[11]. Therefore, even if the other loss determinations made by the District Court were erroneous – it would not change the relevant guideline level, since the loss was greater than $500,00 but less than $1.5 million. See: *Id.*

Respectfully, the Sixth Circuit's approach to harmless error ignores the reality of when a loss-calculation error is truly harmless. A loss-calculation error, like any other error at sentencing, is harmless if and only if a reviewing court can confidently conclude that the sentence imposed was not affected by the calculation. See e.g.: *United States v. Icaza*, 492 F.3d 967 (8th Cir. 2007); *United States v. Hymas, 780 F.3d 1285 (9th Cir. 2015); United States v.*

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[11] Al-Madani disagrees with the Sixth Circuit's analysis of this loss calculation. To presume that MetroHealth lost revenue because he worked 40 hours over four days instead of five – is illogical. As he was still able to see the same number of patients within his 40-hour work week. As but for Al-Madani seeing and treating the patients he did, MetroHealth would not have realized the $89 million dollar profit.

Snowden, 806 .3d 1030 (10th Cir. 2015). To be sure, if the district court explicitly states that its sentence is not affected by a particular Sentencing Guidelines dispute, *i.e.,* that the court would give the same sentence even if it agreed with the defendant's loss calculation, then the error truly is harmless -- because the court of appeals knows that the dispute was inconsequential. But absent that situation, the error, unless truly immaterial (*e.g.,* a rounding error) is not harmless. *See: Hymas at 1292 ("Sometimes a district court says in finding a loss amount that it would reach the same result under either standard, but the court in this instance did not." remanded for further sentencing proceedings).* The District Court made no such statements in this case. Therefore, for the Sixth Circuit to conclude that any restitution calculation error was harmless, denied Al-Madani meaningful review of a clear error.

No sentencing error can ever truly be harmless. Because the Appellate Court erroneously determined that the United States need not be required to prove each dollar of the loss amount alleged, intervention from this Court is necessary and proper.

V. *Mens Rea* was not Established as it Relates to Al-Madani's Intent to Defraud

The Sixth Circuit determined that the District Court did not error in failing to include a "Good Faith" instruction because there "is no claim that the jury was inaccurately or insufficiently instructed regarding the intent required to prove any of the offenses" and as such any failure to include a good faith instruction would have been "harmless". See: *Appendix "A" at 20.* This determination is in direct conflict with this Court's holding in *Ruan.*

In *Ruan* this Court confirmed the principle that "our criminal law seeks to punish the 'vicious will'". See: *Xiulu Ruan v. United States, 142 S. Ct. 2370 (2022) (citation omitted).* This Court went on to conclude that when a statute is silent on scienter, the *mens rea* element is necessary to "separate wrongful conduct from otherwise innocent conduct". See: *Ruan at 2371.* That did occur in Al-Madani's case.

As noted throughout, Al-Madani always provided MetroHealth what he was contractually required to provide – that is 40 hours of work per week. Perhaps, completing this work in four rather than five days, might have been a technical violation of this contract – but the violation was not committed with the required "vicious will", this Court explained was necessary. Thus, a good faith instruction would have permitted the jury to consider whether Al-Madani truly meant to defraud MetroHealth – or simply complete his required workload more efficiently.

As to the purported patient referral scheme. No allegation was made that Al-Madani failed to provide prompt and effective care to the patients that were referred to his private practice by MetroHealth. Just as, no allegation was made that Al-Madani overbilled for his services. In fact, evidence submitted at trial suggested that Al-Madani actually billed less then MetroHealth would have. Referring the patients to Al-Madani allowed them to receive prompt and affordable care – that they could not at the time, receive from MetroHealth. This is not evidence of "vicious will" – it is the sign of a good physician. A good faith instruction would have permitted the jury to consider whether Al-Madani in taking patients referred by MetroHealth was seeking to engage in fraud or simply provide an appropriate level of care that the patients deserved.

In sum, Al-Madani's entire defense at trial was that he never intended to cause MetroHealth harm. This defense necessitated the need for a good faith instruction, because the vast majority of the charged offenses contained no *mens rea* element. Because the United States failed to prove an unauthorized intent to defraud, as required by *Ruan*, this Court's intervention is necessary.

CONCLUSION

For the foregoing reasons, Al-Madani prays that this Honorable Court grant his Petition for a Writ of Certiorari.

Respectfully Submitted,

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