No. 24-126

# In the Supreme Court of the United States

BENJAMIN GALECKI AND CHARLES BURTON RITCHIE,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the statutory definition of "controlled substance analogue," 21 U.S.C. 802(32)(A), is void for vagueness as applied to the cannabinoid XLR-11.

2. Whether, in reviewing a challenge to the sufficiency of the evidence that the defendant acted in concert with five other people, as necessary for conviction of engaging in a continuing criminal enterprise, 21 U.S.C. 848(a), a court is precluded from considering evidence about a co-defendant whom the jury acquitted.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 89 F.4th 713.

## JURISDICTION

The judgment of the court of appeals was entered on December 27, 2023. A petition for rehearing was denied on March 4, 2024 (Pet. App. 156a). On April 26, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 1, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioners Benjamin

Galecki and Charles Ritchie were each convicted of 24 crimes. Galecki Judgment 1-2; Ritchie Judgment 1-2. The crimes of conviction included six drug-trafficking offenses: (1) conspiring to manufacture, possess with intent to distribute, and distribute a controlled substance analogue, in violation of 21 U.S.C. 841(a) and (b)(1)(C) and 846; (2) manufacturing a controlled substance analogue, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); (3) distributing a controlled substance analogue, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; (4) maintaining a drug-involved premises, in violation of 21 U.S.C. 856(a)(1) and 18 U.S.C. 2; (5) possessing a listed chemical with the intent to manufacture a controlled substance analogue, in violation of 21 U.S.C. 841(c); and (6) engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. Galecki Judgment 1; Ritchie Judgment 1. The district court sentenced each petitioner to 240 months of imprisonment, to be followed by three years of supervised release. Galecki Judgment 3-4; Ritchie Judgment 3-4. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-57a.

1. Petitioners' company, Zencense Incenseworks, manufactured and distributed a substance called "spice." Pet. App. 3a. Spice contains XLR-11, a cannabinoid, and produces a high when smoked. See *id.* at 2a.

Zencense maintained the "nominal position" that spice was not meant to be smoked. Pet. App. 5a. For example, Zencense described spice as "potpourri" and sold it in packets labeled "not for human consumption." *Id.* at 3a-4a. Zencense also instructed its staff to refer to the product's varieties—such as vanilla, chocolate, and pineapple—as "aromas" or "fragrances" rather than "flavors." See *ibid.*

At the same time, Zencense marketed and sold spice to smoke shops, adult emporiums, and independent convenience stores, not to home goods stores and general retailers. See Pet. App. 4a. Its written sales script "confirmed the company's focus on selling to smoke shops." *Id.* at 5a. Zencense also "maintained 'secret' storage locations" in order to avoid the seizure of its products. *Id.* at 24a. And spice cost approximately 90 times as much as conventional potpourri. See *ibid.*

Petitioners were "aware that customers were smoking Zencense products to get high." Pet. App. 6a. For instance, Ritchie told a smoke-shop owner that spice "would knock you out for a couple of hours on the floor." *Ibid.* And Galecki told a supplier that XLR-11 was more popular than another cannabinoid because it was "fluorinated," which "made it stronger" and ensured that the "high lasts longer." *Id.* at 24a.

In July 2012, federal authorities, acting under a search warrant, searched a Zencense warehouse in Nevada and seized substantial quantities of XLR-11. See Pet. App. 6a. Ritchie then called an old acquaintance who worked as a police officer, and the officer referred Ritchie to a Drug Enforcement Administration (DEA) agent. See *ibid.* The next day, Ritchie took the DEA agent and another DEA employee on a tour of Zencense's Florida facility, offering them free samples. See *id.* at 7a. The agent asked Ritchie, "you know people smoke this, correct?" *Ibid.* (brackets omitted). Ritchie answered, "Hey, I sell it as either incense or potpourri. Whatever they do with it after that, I don't know and I don't want to know." *Ibid.* (ellipsis omitted).

2. A federal grand jury indicted petitioners on 26 counts, including the six drug-trafficking counts noted above. See Superseding Indictment 6-21; p. 2, *supra*.

The drug-trafficking charges rested on the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act or Act), 21 U.S.C. 813. That statute provides that a "controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law[,] as a controlled substance in schedule I." 21 U.S.C. 813(a).

The Analogue Act defines a "controlled substance analogue" as a substance:

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such persons represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. 803(32)(A). It is undisputed for purposes of this case that a substance qualifies as a controlled substance analogue only if the substance satisfies both subparagraph (i) and either subparagraph (ii) or subparagraph (iii). See Pet. App. 10a.

The indictment in this case alleged that XLR-11 is an analogue of JWH-018, a controlled substance listed in Schedule I. See Pet. App. 11a. The government sought

to prove at trial that XLR-11 satisfied subparagraph (i) (substantial similarity in chemical structure) and subparagraph (ii) (substantial similarity in hallucinogenic effects). See *ibid.*

One of the drug-trafficking counts was a charge under the CCE statute, which forbids engaging in "a continuing criminal enterprise." 21 U.S.C. 848(a). In order to obtain a CCE conviction, the government must prove (among other elements) that the defendant engaged in a continuing series of drug offenses "in concert with five or more other persons." 21 U.S.C. 848(c)(2)(A).

3. Before trial, Galecki filed a motion to dismiss in which he argued that the Analogue Act is void for vagueness as applied to XLR-11. See Galecki C.A. E.R. 648. A magistrate judge recommended that the motion be denied, noting that this Court and multiple courts of appeals have rejected contentions that the Act is vague. See *ibid.* The district court adopted the report and denied the motion. See *id.* at 612-616. The jury found petitioners guilty on the six drug-trafficking counts and on 18 other counts. See Galecki Judgment 1-2; Ritchie Judgment 1-2.

The district court denied a post-trial motion in which petitioners argued that the government had failed to prove, as the CCE statute required, that they had acted "in concert with five or more other persons." 21 U.S.C. 848(c)(2)(A); see Galecki C.A. E.R. 363-365. The court found sufficient evidence that petitioners had acted in concert with "at least six people." *Id.* at 364. The court found it unnecessary to decide whether it could also count a seventh person, Ryan Eaton, who had been charged as a co-defendant but had been acquitted. See *ibid.*

3. The court of appeals affirmed in part, reversed in part, and remanded. See Pet. App. 1a-57a.

The court of appeals rejected petitioners' contention that the Analogue Act's "standard for determining chemical structural similarity," as applied to XLR-11, is void for vagueness. Pet. App. 29a; see *id.* at 29a-36a. The court explained that, to establish similarity of chemical structure, the government must prove that "the two chemicals share, to a large degree or in the main, common components in terms of the arrangement of atoms and the chemical bonds between those atoms." *Id.* at 30a. The court found "ample" evidence in the trial record that XLR-11 satisfied that requirement. *Ibid.* And the court additionally observed that the statute's other elements—including "scienter" and "substantial similarity in the * * * pharmacological *effect* of the alleged analogue"—"can serve to alleviate vagueness concerns." *Id.* at 33a-34a.

The court of appeals also rejected petitioners' contention that insufficient evidence supported their CCE convictions. See Pet. App. 39a-44a. The court found sufficient evidence that petitioners acted in concert with five persons: Eaton and four others. See *id.* at 41a-44a. The court rejected petitioners' contention that Eaton's acquittal precluded counting him. See *id.* at 40a-41a & 42a n.10. It cited the "well established" principle that "a person may be convicted of conspiring with a co-defendant even when the jury acquits that co-defendant of conspiracy." *Id.* at 40a (citation omitted).

Although the court of appeals affirmed petitioners' convictions on the drug-trafficking counts, it reversed their convictions on 11 of the other counts, see Pet. App. 44a-49a, and remanded the case to the district court for

resentencing, see *id.* at 56a-57a. Petitioners have not yet been resentenced.

**ARGUMENT**

Petitioners contend (Pet. 16-29) that the Analogue Act is unconstitutionally vague as applied to XLR-11. They also contend (Pet. 29-30) that a court may not count an acquitted co-defendant in reviewing the sufficiency of the evidence supporting a CCE conviction. Their petition for a writ of certiorari arises in an interlocutory posture, which itself provides a sufficient reason to deny it. In any event, the court of appeals correctly rejected petitioners' contentions, and its decision does not warrant further review. The Court should deny the petition for a writ of certiorari.

1. As a threshold matter, the decision below is interlocutory; the court of appeals reversed the district court's judgment in part and remanded the case for resentencing. See Pet. App. 57a. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari). The Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4-55 n.72 (11th ed. 2019).

That practice promotes judicial efficiency, because proceedings on remand may affect the consideration of issues presented in a petition for a writ of certiorari. It also enables issues raised at different stages of a lower-court proceeding to be consolidated in a single petition. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have

authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case presents no occasion for this Court to depart from its usual practice.

2. In any event, petitioners' contention that the Analogue Act is vague as applied to XLR-11 does not warrant further review. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Moreover, because XLR-11 has now been listed as a controlled substance for more than a decade, the question presented is of diminishing prospective importance.

a. The Fifth Amendment's Due Process Clause prohibits the government from enforcing vague criminal laws. See *Johnson* v. *United States*, 576 U.S. 591, 595 (2015). A law is unconstitutionally vague only if it fails to provide an "ascertainable standard of guilt." *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). A law that does provide such a standard is not vague simply because it is difficult to apply in particular circumstances. See *Johnson*, 576 U.S. at 601.

In *McFadden* v. *United States*, 576 U.S. 186 (2015), this Court considered the meaning of the knowledge requirement of the Controlled Substances Act, Pub. L. No. 91-513, Tit. II, 84 Stat. 1242 (21 U.S.C. 801 *et seq.*), when the substance at issue is an analogue. See 576 U.S. at 188-189. The defendant urged the Court, in part, to adopt a more stringent knowledge requirement in order to avoid constitutional vagueness concerns, but the Court rejected that argument on "two grounds." *Id.* at 197. First, the Court observed that the constitutional-avoidance canon "has no application in the inter-

pretation of an unambiguous statute such as this one." *Ibid.* (citation and internal quotation marks omitted) Second, the Court explained that, "[e]ven if this statute were ambiguous," the vagueness argument "would falter," noting that "[u]nder [the Court's] precedents, a scienter requirement in a statute alleviates vagueness concerns, narrows the scope of its prohibition, and limits prosecutorial discretion." *Ibid.* (brackets, citation, and internal quotation marks omitted). And the Court added that "to the extent McFadden suggests that the substantial similarity test for defining analogues is itself indeterminate, his proposed alternative scienter requirement would do nothing to cure that infirmity." *Ibid.*

Consistent with *McFadden*, the court of appeals correctly determined (largely for reasons independent of *McFadden*) that the Analogue Act's definition of "controlled substance analogue" is not vague as applied to XLR-11. See Pet. App. 29a-36a. The challenged provision sets forth an "ascertainable standard," *L. Cohen Grocery*, 255 U.S. at 89, namely, that a substance is an analogue only if its "chemical structure" is "substantially similar" to "the chemical structure of a controlled substance" in Schedule I or II, 21 U.S.C. 802(32)(A). "The statute thus requires, at a minimum, that the two chemicals share, to a large degree or in the main, common components in terms of the arrangement of atoms and the chemical bonds between those atoms." Pet. App. 30a. The evidence in this case provided an "ample basis" for concluding that XLR-11 satisfies that requirement; the government presented expert testimony that "XLR-11 and JWH-018 share a common 'acylindole core,' including the 'same atoms' in the 'same locations'

with the 'exact same structure.'" *Id.* at 30a-31a (citation omitted).

In addition, the other elements of the offense "alleviate vagueness concerns by independently narrowing the potential range of conduct covered by the statute." Pet. App. 33a. The Analogue Act requires not only proof of substantial similarity in chemical structure, but also proof of "substantial similarity in the actual or represented pharmacological *effect* of the alleged analogue." *Id.* at 34a. That element "places a significant outer limit on the range of chemical variations that will fall within the statutory definition of the offense *as a whole*." *Id.* at 35a. And in this case, the government presented expert testimony that XLR-11's pharmacological effects were substantially similar to those of JWH-018. See *ibid.* The Controlled Substances Act also requires proof that the defendant acted "knowingly or intentionally." 21 U.S.C. 841(a). That element, as applied to analogues, requires proof that the defendant either (1) knew that the substance is controlled or (2) knew the specific features of the substance that make it a controlled substance analogue. See *McFadden*, 576 U.S. at 189. In this case, "ample evidence" allowed a jury to find that petitioners "were aware that XLR-11 was a controlled substance under the Analogue Act." Pet. App. 33a.

Finally, petitioners are "poorly positioned" to raise a vagueness challenge. Pet. App. 33a. Petitioners knew that people smoked spice to get high, maintained secret storage units to shield their products from seizure, and engaged in additional acts to conceal the nature and purpose of their product. See *id.* at 24a-26a. Zencense also "serially switched the cannabinoids [it] used as one after another was formally added to the [Controlled

Substances Act's] schedules." *Id.* at 26a. A person who "deliberately goes perilously close to an area of proscribed conduct * * * take[s] the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952).

b. Petitioners' contrary arguments lack merit. Petitioners err in asserting (Pet. 18-19) that the concept of "substantial similarity" is inherently incapable of application. As the Court recently reiterated, "the law is full of instances where a man's fate depends on his estimating rightly some matter of degree." *Johnson*, 576 U.S. at 604 (ellipsis omitted) (quoting *Nash* v. *United States*, 229 U.S. 373 (1913)). Congress frequently defines the scope of criminal activity with reference to objects or substances that are "similar" to other objects or substances. See, *e.g.*, 18 U.S.C. 232(5) ("any explosive, bomb, grenade, missile, or similar device"); 18 U.S.C. 1507 ("sound-truck or similar device"); 18 U.S.C. 2241(b)(2) ("drug, intoxicant, or other similar substance"). The concept of similarity is commonplace, informed by context, and understandable to lay jurors and defendants alike. And the concept of "substantial similarity" is, if anything even more determinate; this Court has recognized, "as a general matter," "the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Johnson*, 576 U.S. at 604.

Petitioners are also wrong to argue (Pet. 18-19) that the Analogue Act is vague because scientific experts might disagree about which substances are analogues. When Congress was considering the Act, the American Chemical Society assured it that "the term 'substantially similar' chemical structure is meaningful to scientists and capable of reasoned interpretation by the trier

of fact." S. Rep. No. 196, 99th Cong., 1st Sess. 5 (1985). Criminal juries, moreover, must often resolve factual issues by weighing testimony from competing experts. See, *e.g.*, *Holmes* v. *South Carolina*, 547 U.S. 319, 322-323 (2006) (describing criminal trial in which competing experts testified about DNA and fingerprint evidence). The requirement of proof beyond a reasonable doubt protects defendants in close cases.

Finally, contrary to petitioners' suggestion, the Analogue Act does not delegate "basic policy matters" to juries "for resolution on an ad hoc and subjective basis." Pet. 17 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972)). The Act does not require juries to make policy judgments. Instead, it simply requires them to resolve factual issues, which sometimes involves assessing competing testimony from expert witnesses. That is the hallmark of the jury system, not a sign of vagueness.

c. Petitioner does not assert a circuit conflict on the question presented. Courts of appeals have uniformly rejected vagueness challenges to the Analogue Act. See, *e.g.*, *United States* v. *Demott*, 906 F.3d 231, 237-239 (2d Cir. 2018); *United States* v. *Klecker*, 348 F.3d 69, 71-72 (4th Cir. 2003), cert. denied, 541 U.S. 981 (2004); *United States* v. *Desurra*, 865 F.2d 651, 653 (5th Cir. 1989) (per curiam); *United States* v. *Hofstatter*, 8 F.3d 316, 321-322 (6th Cir. 1993) (per curiam), cert. denied, 510 U.S. 1131 (1994); *United States* v. *Williams*, 106 F.4th 639, 651-653 (7th Cir. 2024); *United States* v. *Palmer*, 917 F.3d 1035, 1038-1039 (8th Cir. 2019), cert. denied, 140 S. Ct. 2552 (2020); *United States* v. *Carlson*, 87 F.3d 440, 443-444 (11th Cir. 1996), cert. denied, 522 U.S. 895 (1997).

Contrary to petitioners' suggestion (Pet. 21-25), this case does not implicate any circuit conflict about the proper interpretation of the Analogue Act. The court of appeals explained that "at least *one* way to establish * * * substantial similarity in chemical structure would be to show that (1) the alleged analogue shares a significant common core of common chemical structural features with a listed substance, in terms of arrangement of atoms and chemical bonds; and (2) any residual differences in the analogue's chemical structure, as compared to that of the listed substance, do not result in a material 'difference in the substance's relevant characteristics.'" Pet. App. 32a (citation omitted). Petitioners cite no court of appeals decision holding that such a showing is insufficient to establish substantial similarity in chemical structure.

Petitioners instead cite (Pet. 22) decisions explaining that the government may establish similarity in other ways, such as by showing that the substance "metabolized into a controlled substance upon human ingestion." But the court of appeals recognized that "[t]here may well be other ways to establish the required substantial similarity in chemical structure," and cautioned that its decision "should not be understood as foreclosing other possible approaches that may be appropriate in other cases with different facts." Pet. App. 32a n.8. In any event, petitioners' first question presented (Pet. i) focuses on vagueness, not on the statute's meaning. This case accordingly would not provide an appropriate vehicle for resolving any asserted conflict about how to interpret the Analogue Act.

Finally, petitioners err in relying (Pet. 25-26) on *United States* v. *Makkar*, 810 F.3d 1139 (10th Cir. 2015) (Gorsuch, J.). *Makkar* did not hold that the Analogue

Act was vague, either facially or as applied, as those issues were not presented in the case. See *Id.* at 1143-1144 & n.1. Instead, *Makkar* addressed a situation in which the district court had instructed the jury that it could infer that a defendant's knowledge of substantial similarity in chemical structure from his knowledge of substantial similarity in effects. See *id.* at 1143. The Tenth Circuit found the instruction plainly erroneous because it "invited the jury to infer the presence of one essential element from another, effectively collapsing two independent statutory inquiries." *Id.* at 1144. The jury in this case, however, received no such instruction. See Galecki C.A. E.R. 2947-2952. Nor did the court of appeals "collaps[e]" the two elements, Pet. 25; instead, it noted that the statute required proof of similarity in "the arrangement of atoms and the chemical bonds between those atoms," Pet. App. 30a.

d. The absence of any need for this Court's intervention on the question presented is underscored by the formal addition of XLR-11 to Schedule I in 2013. See 78 Fed. Reg. 28,735 (May 16, 2013). Although its addition postdated the offense conduct in this case, XLR-11 has been a Schedule I controlled substance for more than 11 years. As a result, the number of future XLR-11 prosecutions under the Analogue Act is likely to be small, and petitioners' challenge to that specific application of the Act does not warrant this Court's review.

3. Petitioners separately contend (Pet. 29-30) that, when a court reviews the sufficiency of the evidence supporting a CCE conviction, it may not count a co-defendant who was acquitted by the jury as one of the "five or more other persons" with whom the convicted defendants acted "in concert." 21 U.S.C. 848(c)(2)(A).

The court of appeals correctly rejected that contention, and the issue does not warrant further review.

a. In *Dunn* v. *United States*, 284 U.S. 390 (1932), this Court held that a defendant may not attack a jury's guilty verdict on one count on the ground that it conflicts with the jury's not guilty verdict on another count. The Court explained that "[c]onsistency in the verdict is not necessary." *Id.* at 393. It observed that a conflict in the jury's verdicts "'does not show that [the jury was] not convinced of the defendant's guilt'"; rather, it may simply reflect "'lenity,'" "compromise," or "mistake." *Id.* at 393-394 (citation omitted). The Court determined that "verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 394.

In *United States* v. *Powell*, 469 U.S. 57 (1984), this Court rejected efforts to "carve exceptions out of the *Dunn* rule." *Id.* at 63. The Court identified multiple considerations supporting that rule. First, inconsistent verdicts "should not necessarily be interpreted as a windfall to the Government"; "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on [one count], and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on [another]." *Id.* at 65. Second, any attempt to distinguish between jury lenity and jury error would be "imprudent and unworkable" because it would rest on either "pure speculation" or "inquiries into the jury's deliberations." *Id.* at 66. Third, a defendant "already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67.

Here, the court of appeals found sufficient evidence that petitioners acted in concert with at least five other

persons, including co-defendant Eaton, an employee who helped run a Zencense warehouse. See Pet. App. 13a, 41a-44a. Petitioners do not ask this Court to review that sufficiency determination as such. Petitioners instead argue (Pet. 29-30) that the jury's verdicts finding them guilty are inconsistent with its acquittal of Eaton. But under *Dunn*—which has "stood without exception in this Court for [92] years," *Powell*, 469 U.S. at 69—any such inconsistency provides no basis for upsetting the verdicts against petitioners. See Pet. App. 40a-41a.

b. The Fourth Circuit, like the court of appeals here, has rejected the contention that a court may not count acquitted co-defendants when reviewing the sufficiency of the evidence supporting a CCE conviction. See *United States* v. *Heater*, 63 F.3d 311, 317 (1995), cert. denied, 516 U.S. 1083 (1996). The court noted that nothing in the statutory language "suggests that the five people * * * must be convicted * * * in order to be counted." *Ibid.*

Petitioners cite (Pet. 29) a three-decades-old Sixth Circuit decision stating that "a co-defendant may not be included" as a person with whom the defendant acted in concert if the co-defendant "has been acquitted of conspiracy." *United States* v. *Ward*, 37 F.3d 243, 249 (1994) (citing *United States* v. *Patrick*, 965 F.2d 1390 (6th Cir. 1992)), cert. denied, 514 U.S. 1030 (1995). The Sixth Circuit did not cite (let alone reconcile its decision with) this Court's decisions in *Dunn* and *Powell*. See *ibid.*; *Patrick*, 965 F.2d at 1396. And petitioners identify no other circuit that has adopted the Sixth Circuit's rule. Such shallow and stale disagreement does not warrant this Court's review.

This case would in any event be a poor vehicle for addressing that question. Not only does the petition for

a writ of certiorari arise in an interlocutory posture, see pp. 7-8, *supra*, but the district court found sufficient evidence that petitioners acted in concert with at least five other persons even apart from Eaton, see p. 5, *supra*. The resolution of the second question presented accordingly appears to have no bearing on the ultimate outcome of the case. And this Court does not sit to "decide abstract questions of law" "which, if decided either way, affect no right" of the parties. *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2024