

No. 11-1390

IN THE
Supreme Court of the United States

GHASSAN ELASHI, SHUKRI ABU BAKER,
MUFID ABDULQADER, AND ABDULRAHMAN ODEH,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

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

**BRIEF OF AMICI CURIAE
PROFESSORS OF EVIDENCE
IN SUPPORT OF PETITIONERS**

June 2012

Ben Trachtenberg
Counsel of Record
University of Missouri
School of Law
203 Hulston Hall
Columbia, MO 65203
(573) 882-7293
trachtenbergb@missouri.edu

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), extends to out-of-court statements in furtherance of a lawful joint venture.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Original Conspirator Statement Exception Applied to Unlawful Conspiracies, not to Lawful Ventures.	4
A. The Birth of the Exception at English Common Law.....	4
B. Receipt of the Exception in America	5
II. The Drafters of the Federal Rules of Evidence Intended To Codify the Traditional Meaning of the Coconspirator Statement Exception, not To Expand its Scope.	7
A. Plain Meaning.....	8
B. Advisory Committee Note and Legislative History.....	9

III.	Since 1975, Courts Applying Rule 801(d)(2)(E) Have Overwhelmingly Limited Its Scope to Unlawful Combinations.....	11
A.	Results of a Study of 2,500 Federal Cases.....	11
B.	Nearly All Pre-2006 Cases Reciting the Lawful Joint Venture Exception Are Dicta.....	12
C.	Courts Adopting the Lawful Joint Venture Rule Since 2006 Have Created a Circuit Split.....	15
IV.	Rules 801(d)(2)(D), 803(6), and 803(8) as Written Further Sound Policy.	20
A.	The Lawful Joint Venture Exception Undermines the Limitations of Rule 801(d)(2)(D)	20
B.	The Lawful Joint Venture Exception Undermines the Limitations of Rule 803(6) and Rule 803(8)	23
C.	The Lawful Joint Venture Exception May Chill Participation in Lawful Activities.....	25
	CONCLUSION	28
	APPENDIX OF AMICI CURIAE.....	a1

TABLE OF AUTHORITIES

CASES

<i>Am. Fur Co. v. United States</i> , 27 U.S. (2 Pet.) 358 (1829).....	7
<i>Datatreasury Corporation v. Wells Fargo & Co.</i> , No. 2:06-CV-72 DF, 2010 WL 903257 (E.D. Tex. Mar. 4, 2010)	15
<i>Hitchman Coal & Coke Co. v. Mitchell</i> , 245 U.S. 229 (1917).....	14
<i>Huff v. White Motor Corp.</i> , 609 F.2d 286 (7th Cir. 1979).....	23
<i>Palmer v. Hoffman</i> , 318 U.S. 109 (1943)	24
<i>Smith v. Bray</i> , No. 11–1935, --- F.3d ----, 2012 WL 1871855 (7th Cir. May 24, 2012).....	16, 17, 18
<i>State v. Tonelli</i> , 749 N.W.2d 689 (Iowa 2008).....	16
<i>United States v. El-Mezain</i> , 664 F.3d 467 (5th Cir. 2011).....	14, 16, 27
<i>United States v. Gewin</i> , 471 F.3d 197 (D.C. Cir. 2006).....	12, 14, 15, 18
<i>United States v. Hunt</i> , 272 F.3d 488 (7th Cir. 2001).....	21
<i>United States v. Kelley</i> , 864 F.2d 569 (7th Cir. 1989).....	17
<i>United States v. Layton</i> , 855 F.2d 1388 (9th Cir. 1988).....	14

<i>United States v. Postal</i> , 589 F.2d 862 (5th Cir. 1979).....	13, 14
<i>United States v. Rinaldi</i> , 393 F.2d 97 (2d Cir. 1968).....	10
<i>United States v. Spencer</i> , 415 F.2d 1301 (7th Cir. 1969).....	11
<i>United States v. Weisz</i> , 718 F.2d 413 (D.C. Cir. 1983).....	14

RULES

Fed. R. Evid. 801(d)(2)	3, 24
Fed. R. Evid. 801(d)(2)(A)	3
Fed. R. Evid. 801(d)(2)(D)	passim
Fed. R. Evid. 801(d)(2)(E)	passim
Fed. R. Evid. 801, Advisory Committee Note	2, 9
Fed. R. Evid. 803(6).....	20, 24
Fed. R. Evid. 803(8).....	20, 24
S. Rep. No. 93–1277 (1974)	10

OTHER AUTHORITIES

Ben Trachtenberg, <i>Coconspirators, “Coventurers,” and the Exception Swallowing the Hearsay Rule</i> , 61 Hastings L.J. 581 (2010)	passim
<i>Black’s Law Dictionary</i> (8th ed. 2004).....	8
Christopher B. Mueller, <i>The Federal Coconspirator Exception: Action</i> ,	

<i>Assertion, and Hearsay</i> , 12 Hofstra L. Rev. 323 (1984)	5
John H. Wigmore, <i>The History of the Hearsay Rule</i> , 17 Harv. L. Rev. 437 (1904).....	5
S. March Phillipps, <i>A Treatise on the Law of Evidence</i> (N.Y., Banks, Gould & Co. 3d ed. 1849)	7
Steven A. Saltzburg et al., <i>Federal Rules of Evidence Manual</i> (8th ed. 2002)	21
Thomas Starkie, <i>A Practical Treatise on the Law of Evidence</i> (Phila., P.H. Nicklin & T. Johnson 3d American ed. 1830).....	6

BRIEFS

Brief for the United States, <i>United States v. El-Mezain</i> , No. 09-10560 (5th Cir. Jan. 28, 2011).....	15
Gov't Motion in Limine, <i>United States v. Edwards</i> , No. 1:11-CR-161-1-CCE, 2012 WL 628691 (M.D.N.C. Feb. 15, 2012)	25
Government's Memorandum of Law in Support of Its Motion in Limine, <i>United States v. Stein</i> , 488 F. Supp. 2d 370 (S.D.N.Y. June 13, 2007) (S1 05 Crim. 888).....	19
Government's Opposition to Defendant's Motion for a New Trial, <i>United States v. Stevens</i> , No. 1:08-CR-231, 2009 WL 192240 (D.D.C. Jan. 16, 2009).....	22

Government’s Trial Memorandum, <i>United States v. Bruno</i> , No. 09-CR-029 (N.D.N.Y. Oct. 5, 2009)	22
Letter Reply Brief of United States, <i>United States v. Schiff</i> , 538 F. Supp. 2d 818 (D.N.J. Feb. 25, 2008) (Crim. No. 06-406)	19
SEC’s Trial Brief & Motion Pursuant to FRE 801(d)(2)(A) & (E) to Admit Defendant Jordan’s Prior Testimony into Evidence Against All Defendants, <i>SEC v. Pietrzak</i> , No. 1:03-CV-1507 (N.D. Ill. July 16, 2007)	19

INTEREST OF AMICI CURIAE¹

Amici curiae are professors of evidence who have studied, taught, and written about the Federal Rules of Evidence. Amici believe this case presents important questions concerning the admissibility of evidence at federal trials. Amici law professors, as a group, have a special insight into the purposes of the hearsay rule and its exceptions, and a professional interest in ensuring the rational and coherent development of American evidence law.

Amici include authors of leading evidence texts such as the *Federal Rules of Evidence Manual* (10th ed. 2011), *Evidence in Context* (4th ed. 2010), *Learning Evidence: From the Federal Rules to the Courtroom* (2d ed. 2011), and *Problems and Materials in Evidence and Trial Advocacy* (5th ed. 2010). Ben Trachtenberg, lead author of brief for amici, is an Associate Professor of Law at the University of Missouri School of Law and is the author of *Coconspirators*, *“Coventurers,”* and *the*

¹ Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae’s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made such a monetary contribution.

Exception Swallowing the Hearsay Rule, 61
Hastings L.J. 581 (2010).

A complete list of amici who reviewed and join in this brief is included in the attached Appendix. The views expressed herein are those of the individual amici, not of any institutions or groups with which they may be affiliated.

SUMMARY OF ARGUMENT

The coconspirator statement exception to the hearsay rule, codified at Federal Rule of Evidence 801(d)(2)(E), does not cover statements made in furtherance of lawful ventures. For centuries, courts in England and America have recognized an exception to the hearsay rule allowing use of a statement against a party if the statement was uttered by the party's coconspirator during the pendency of and in furtherance of their conspiracy. Unlike classes of hearsay deemed admissible because of their inherent reliability—such as excited utterances and statements made for medical diagnosis—coconspirator statements are deemed “not hearsay” because of practical necessity. Absent such evidence, the prosecution of many serious crimes, committed in secret by clandestine conspirators, would be impossible. Indeed, the Advisory Committee Note to Rule 801 provides that “no guarantee of [the coconspirator declarant's] trustworthiness is required” to admit coconspirator hearsay.

In addition, like other opposing party statements (*i.e.*, “admissions by party-opponent”) codified at Federal Rule of Evidence 801(d)(2), coconspirator hearsay is admissible in part because the party against whom it is used has brought it upon himself. A party’s own statements may be used against him, *see* Rule 801(d)(2)(A), because a litigant is estopped from questioning his own reliability. Moreover, statements by an agent or employee may be used against the principal or employer, *see* Rule 801(d)(2)(D), because the boss may properly be held responsible for the actions of her underlings, under a theory like that of *respondeat superior* in tort. Similarly, statements of a party’s coconspirator may be used against him, *see* Rule 801(d)(2)(E), because the party made his bed upon joining the conspiracy, and at trial he must sleep in it.

Centuries of treatises and court opinions demonstrate that the coconspirator hearsay exception has been limited to statements made in furtherance of illegal enterprises, and for good reason. The credible justifications for a coconspirator exception—(1) the need to uncover and punish heinous crimes committed in hiding and (2) the sense that a conspirator has only himself to blame when his fellow lawbreaker’s words are used to hang him—make no sense when applied to “lawful joint ventures,” that is, to all perfectly legitimate activities involving multiple persons. After all, lawful ventures present no special danger justifying a relaxation of normal evidence law, and joining a legitimate venture

should not subject someone to unreliable evidence. Recent court decisions construing Rule 801(d)(2)(E) to include “coventurer hearsay” are outliers that have created a split among the circuits, and this Court should reject the “lawful joint venture” interpretation of the coconspirator exception.

ARGUMENT

I. The Original Conspirator Statement Exception Applied to Unlawful Conspiracies, not to Lawful Ventures.

From the earliest reported cases in which hearsay was admitted pursuant to a coconspirator statement exception, the exception has applied to illegal schemes, as the word “coconspirator” implies. The exception became part of American law before our independence, and from the earliest treatises and judicial opinions one finds consistent references to illegal conduct. In the centuries since our separation from Britain, American reporters brim with cases in which courts use the words “criminal,” “unlawful,” “illegal,” or “illicit” when describing the sort of joint venture relevant to the exception. In short, any argument that the coconspirator exception has traditionally included “lawful joint venture hearsay” misstates historical facts.

A. The Birth of the Exception at English Common Law

A hearsay rule similar to its modern incarnation did not exist until between 1675 and

1690. Before then, hearsay “objections” went to the weight of such evidence instead of its admissibility. See John H. Wigmore, *The History of the Hearsay Rule*, 17 Harv. L. Rev. 437, 444-45 (1904). The coconspirator exception is of comparable vintage, arising around the same time as the crystallization of the hearsay rule. In the earliest cases, like the 1683 treason trial of Lord Russell, coconspirator hearsay often consisted of statements that themselves were criminal—such as treasonous statements. Although statements illegal in and of themselves often require no hearsay exception at all—such as when they are offered not “to prove the truth of the matter asserted” but instead to convict the declarant for the crime of uttering them—English commentators and judges drew from these early cases a general rule authorizing the admission against a conspirator of statements made by his coconspirators in furtherance of their criminal scheme. See Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 Hofstra L. Rev. 323, 325–26 (1984). By the eighteenth century, English evidence law included a coconspirator statement exception materially identical to that codified in the Federal Rules of Evidence.

B. Receipt of the Exception in America

The exception is noted in early American evidence treatises and appears in cases older than the Republic. Considering the origin of the exception, it is no surprise that the earliest

American references to it explicitly mention the illegal conduct performed by the coconspirators. Thomas Starkie, whose English treatise on evidence was republished in multiple American editions and received great respect from American jurists, described the exception as follows:

Where several combine together for the same *illegal purpose*, ... a declaration made by one conspirator at the time of doing an act in furtherance of the general design, is evidence against the other conspirators.

2 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 402 (Phila., P.H. Nicklin & T. Johnson 3d American ed. 1830) (emphasis added). S.M. Phillipps, another scholar well respected when the United States was young, used similar language to discuss when statements of conspirators could be admitted despite the hearsay rule:

It is an established rule, that where several persons are proved to have combined together for the same *illegal purpose*, ... any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and therefore part of the *res gestae*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were

used in furtherance of a common design.

1 S. March Phillipps, *A Treatise on the Law of Evidence* 199–200 (N.Y., Banks, Gould & Co. 3d ed. 1849) (emphasis added). By 1829, this Court had clearly described the modern coconspirator exception. *See Am. Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 363–65 (1829). This Court held:

[W]here two or more persons are associated together for the same *illegal purpose*, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gesta*, may be given in evidence against the others.

Id. at 365 (emphasis added). Similar language would appear throughout the nineteenth and twentieth centuries.

II. The Drafters of the Federal Rules of Evidence Intended To Codify the Traditional Meaning of the Coconspirator Statement Exception, not To Expand its Scope.

When the time came to codify federal evidence rules, the authors chose to keep the traditional coconspirator hearsay exception, deciding neither to expand nor to contract its scope. The language of Rule 801(d)(2)(E), the Advisory Committee Note, and the legislative history all demonstrate a clear purpose to

maintain the existing exception, which covered statements made in furtherance of illegal combinations.

A. Plain Meaning

As enacted in 1975, Federal Rule of Evidence 801(d)(2)(E) provided that a statement is not hearsay if it “is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.” This sentence should be enough to bury the “lawful joint venture” interpretation of the coconspirator hearsay exception. To conclude that Rule 801(d)(2)(E) includes lawful ventures, one must believe that the United States Congress, seeking to convey a concept such as “any joint enterprise, whether legal or illegal” could find no word more apt than “conspiracy.” Proponents of the “coventurer hearsay” theory ask this Court to hold that the word “conspiracy” does not connote illegality. *But see Black’s Law Dictionary* 329 (8th ed. 2004) (defining “conspiracy” as “agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose”). Respect for plain English demands rejecting the lawful joint venture hearsay exception.

B. Advisory Committee Note and Legislative History

Neither the Advisory Committee Note to Rule 801 nor the legislative history contained in congressional committee reports provides any indication that those voting for the Federal Rules intended Rule 801(d)(2)(E) to cover statements made in furtherance of lawful ends. Rather, the Advisory Committee rejected a proposal that the coconspirator exception should cover all statements made concerning a conspiracy during its pendency, instead of only those made “in furtherance” of the conspiracy. Although Rule 801(d)(2)(D), which codifies the principal-agent hearsay exception, was written to include “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” and was not limited to statements “in furtherance” of the agency or employment relationship, the Advisory Committee concluded that coconspirator hearsay is not properly analogized to statements of agents. The Advisory Committee Note states that “the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility [of coconspirator hearsay] beyond that already established.” The Note then cites cases and legal commentary, all concerning statements in furtherance of illegal activity. See Ben Trachtenberg, *Coconspirators, “Coventurers,” and the Exception Swallowing the Hearsay Rule*, 61 *Hastings L.J.* 581, 604-07 (2010) (reviewing cited cases and articles in detail).

Appeals to the Advisory Committee Note in support of the lawful joint venture hearsay exception are in vain.

Legislative history is no better for the lawful joint venture exception. Proponents quote the Senate Report on the Federal Rules of Evidence, which states:

While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged.

S. Rep. No. 93-1277, at 26-27 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7073. The words "joint venturer" allow the initial misconception that no unlawful act is required to create a "conspiracy" under the exception. Not so. What the Senate Report makes clear is that despite the inclusion of the word "conspiracy" in the codified exception, the drafters did not intend to limit the scope of the exception to charged conspiracies. Under Rule 801(d)(2)(E), a "conspiracy" may be uncharged, but it must still be a conspiracy. The two cases cited in the Senate Report show that lawful conduct was not on the legislative agenda. The cases are *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir. 1968), which concerned a conspiracy to lie to immigration officers, and *United States v. Spencer*,

415 F.2d 1301, 1304 (7th Cir. 1969), which concerned a conviction for the possession and sale of heroin.

III. Since 1975, Courts Applying Rule 801(d)(2)(E) Have Overwhelmingly Limited Its Scope to Unlawful Combinations.

In addition to the plain language of Rule 801 and its legislative history, decades of judicial practice since the codification of the Federal Rules demonstrate that the coconspirator exception is properly limited to illegal ventures. Before the adoption of the lawful joint venture exception in 2006 by the U.S. Court of Appeals for the D.C. Circuit, federal cases admitting statements made in furtherance of lawful ventures pursuant to Rule 801(d)(2)(E) were nearly nonexistent.

A. Results of a Study of 2,500 Federal Cases

Following the enactment of the Federal Rules of Evidence, federal courts applied the coconspirator exception in thousands of cases, issuing opinions to settle disputes over whether a given statement was “in furtherance” of a conspiracy, whether it was made during the conspiracy, and whether a conspiracy even existed between the declarant and the party against whom the evidence was offered. A 2010 article reports the results of a study reviewing about 2,500 cases in which federal courts issued opinions noting the admission of evidence under Rule 801(d)(2)(E).

The study covered trial court and appellate opinions from eight circuits, published and unpublished. The results are stark: Of the 2,516 opinions for which the object of a conspiracy was recorded, all but four concerned an illegal object. *See* Trachtenberg, *supra*, at 623-26. Three of the four outliers concerned the same criminal case from the District of Kansas, which yielded multiple opinions discussing the issue. The other outlier is a civil case in which the trial judge noted that he was bound to follow the D.C. Circuit’s holding in *United States v. Gewin*, 471 F.3d 197 (D.C. Cir. 2006). In other words, if the Federal Rules of Evidence as codified in 1975 allowed the admission under Rule 801(d)(2)(E) of statements made in furtherance of lawful joint ventures, litigants ignored this hearsay exception—forgoing the opportunity to use the sort of evidence deemed so important by Respondent in this case—for three decades. If the lawful joint venture theory were credible, one would find court opinions discussing the quotidian matters addressed in traditional coconspirator hearsay cases: whether a “joint venture” existed, and whether the proffered statement was “in furtherance” of it. Yet no evidence of such cases has been presented.

B. Nearly All Pre-2006 Cases Reciting the Lawful Joint Venture Exception Are Dicta

To compensate for their lack of cases applying the “lawful joint venture” theory, proponents pepper their briefs with string cites

purporting to prove that several courts have admitted “coventurer hearsay.” Nearly all of those cases are dicta. In addition, “lawful joint venture” proponents misread an opinion of this Court commonly cited for the proposition that the “combination” of the declarant and the party against whom hearsay is offered need not be “criminal or otherwise unlawful.”

Prosecution briefs filed recently in several courts tend to cite the same batch of cases, and the brief of Respondent submitted to the Fifth Circuit in this case is no different. *See* Trachtenberg, *supra*, at 612-13 (collecting citations to briefs). These court opinions, despite containing language that if quoted out of context seems to imply that courts have adopted the “lawful joint venture” exception, do not actually involve the admission of statements made in furtherance of lawful ventures. *See id.* at 613-620 (analyzing commonly cited cases). For example, briefs commonly cite *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979) to show that a recreational boat trip is a “joint venture” that allows admission of hearsay under Rule 801(d)(2)(E), quoting the opinion as follows:

It is clear to us that the voyage was a “joint venture” in and of itself apart from the illegality of its purpose and that the logbook was therefore admissible as nonhearsay under the rule.

Id. at 886 n.41. *Postal*, however, concerned the logbook of a ship used to smuggle about “eight thousand pounds” of marijuana, *id.* at 867, meaning that the opinion’s conclusions concerning “lawful joint ventures” are pure dicta.² Other commonly cited cases that happen to contain dicta useful to revisionists concern bribery of a Congressman, *see United States v. Weisz*, 718 F.2d 413, 416, 433 (D.C. Cir. 1983), and the murder of a Congressman at the “People’s Temple” in Guyana, *see United States v. Layton*, 855 F.2d 1388, 1393-94, 1398 (9th Cir. 1988). Until the D.C. Circuit issued *Gewin* and its progeny, no court of appeals had applied Rule 801(d)(2)(E) in a case involving lawful conduct.

Further, a decision of this Court commonly cited by “lawful joint venture” proponents, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), simply does not support the application of the coconspirator exception to lawful ventures. True, the *Hitchman Coal* opinion recites the fiction that the coconspirator exception is justified by the law of agency, *see id.* at 249, but the opinion states on the very same page that a proponent of conspirator hearsay must establish the “element of

² The court below cited *Postal* as binding precedent. *See United States v. El-Mezain*, 664 F.3d 467, 502-02 (5th Cir. 2011) (“The defendants argue that *Postal* misread the legislative history of Rule 801(d)(2)(E), and they urge us to reject the so-called ‘lawful joint venture theory.’ However, our circuit has embraced the theory in precedent that we may not ignore.”).

illegality” to win admission of the evidence. *Id.* The dispute in *Hitchman Coal* was over whether the hearsay statements themselves could support a finding of illegality, not over whether illegality was a necessary part of conspirator hearsay.³

The D.C. Circuit and Fifth Circuit have misinterpreted the conspirator exception—in part because of a misreading of this Court’s precedent—and have departed from the longstanding practice of sister circuits.

C. Courts Adopting the Lawful Joint Venture Rule Since 2006 Have Created a Circuit Split

Since the D.C. Circuit announced its adoption of the joint venture hearsay exception in *United States v. Gewin*, 471 F.3d 197 (D.C. Cir. 2006), various federal courts have stated that a “conspiracy” need not be unlawful to satisfy Rule 801(d)(2)(E). *See, e.g., Datatrans Corporation v. Wells Fargo & Co.*, No. 2:06-CV-72 DF, 2010 WL 903257, at *2 (E.D. Tex. Mar. 4, 2010) (“A joint venture or ‘conspiracy’ need not be for an unlawful purpose to satisfy the hearsay exception.”); *Smith*

³ In its brief to the Fifth Circuit, Respondent quoted *Hitchman Coal* to illustrate “the conspirator exception’s grounding in the law of agency” and to “explain[] why a ‘conspiracy’ under the Rule need not be criminal” but did not mention the “element of illegality” required by the *Hitchman Coal* Court. *See* Brief for the United States at 76-77, *United States v. El-Mezain*, No. 09-10560 (5th Cir. Jan. 28, 2011).

v. Bray, No. 11–1935, --- F.3d ----, 2012 WL 1871855, at *13 (7th Cir. May 24, 2012) (“[T]he rule ... embodies the long-standing doctrine that when two or more individuals are acting in concert toward a common goal, the out-of-court statements of one are admissible against the others, if made in furtherance of the common goal.”) (quoting *Gewin*); *United States v. El-Mezain*, 664 F.3d 467, 503 (5th Cir. 2011) (“[W]e are not alone in our construction of Rule 801(d)(2)(E), as our sister circuits have also held that statements made in furtherance of a lawful common enterprise are admissible.”).⁴ Combined with the dicta discussed above, these decisions from the last several years provide ammunition for those who would avoid the plain meaning of “conspiracy” in Rule 801(d)(2)(E).

A recent decision of the U.S. Court of Appeals for the Seventh Circuit exemplifies the confusion sown by the lawful joint venture theory. Considering the appeal of a grant of summary judgment in an employment discrimination case, the court addressed what evidence would have been admissible at trial. *See Smith v. Bray*, No.

⁴ One state court has explicitly rejected this interpretation of its own coconspirator hearsay exception, which is modeled on the federal rule. *See State v. Tonelli*, 749 N.W.2d 689, 693-94 (Iowa 2008) (rejecting *Gewin* and holding “that Iowa Rule of Evidence 5.801(d)(2)(E) may be applied where there is evidence of a conspiracy to accomplish a criminal or unlawful act, or to do a lawful act in an unlawful manner, but not to combinations or agreements in furtherance of entirely lawful goals advanced by lawful means”).

11-1935, --- F.3d ----, 2012 WL 1871855, at *9 (7th Cir. May 24, 2012). Certain challenged evidence consisted of hearsay the plaintiff claimed was admissible under Rule 801(d)(2)(E), and the court approvingly quoted *Gewin* and other opinions stating that “Rule 801(d)(2)(E) applies not only to conspiracies but also to joint ventures.” *Id.* at *13 (quoting *United States v. Kelley*, 864 F.2d 569, 573 (7th Cir. 1989)). The court then, however, held that the challenged hearsay was not admissible under Rule 801(d)(2)(E) because the plaintiff could not show that the declarant and the defendant shared an unlawful motive.

We do not think this testimony shows that [defendant] Bray conspired with [hearsay declarant] Bianchetta to retaliate against [plaintiff] Smith for his complaints of discrimination. In a corporation or other business or institution, one should expect to find some concerted action among people with different responsibilities who are expected to work together, like supervisors and human resources staff. In a case of individual liability, evidence of that legitimate concerted action should not be interpreted too easily as evidence of a conspiracy so that one person’s admission of an unlawful motive is attributed to another.

Id. at *14. In other words, despite reciting the lawful joint venture rule, the Seventh Circuit refused to apply the coconspirator hearsay exception to entirely lawful joint activity. *See id.* at *15 (“[Plaintiff’s evidence] may show some concert of action between Bianchetta and Bray, but it does not indicate that they shared a common *unlawful* motive.”) (emphasis added); *see also id.* at *15 n.7 (“The fact that Bray told Bianchetta that Concentra was managing Smith’s disability claim does nothing to suggest the existence of an unlawful conspiracy between them. Rather, providing that sort of information is precisely the kind of conversation one would expect to occur routinely between human resource managers and supervisors.”).

In *Gewin*, by contrast, the D.C. Circuit found that a “group had engaged in a common enterprise of stock promotion” and “rejected *Gewin*’s claim ... that Rule 801(d)(2)(E) ... requires, before admission of co-conspirators’ out-of-court statements, a showing of an *unlawful* conspiracy, not merely action in concert toward a common goal.” 471 F.3d at 200 (emphasis in original).

Accordingly, a split exists among the circuits. The D.C. Circuit and the Fifth Circuit have held that Rule 801(d)(2)(E) applies to statements made in furtherance of all joint ventures, whether lawful or unlawful. The Seventh Circuit has rejected this interpretation, refusing to admit hearsay made in furtherance of lawful business. The study recounted above

demonstrates that the courts adopting the lawful joint venture hearsay exception have departed from decades of practice. Before 2006, federal courts did not admit evidence under the coconspirator hearsay exception unless the underlying “conspiracy” violated the law. Now, multiple circuits have squarely held that a “conspiracy” need not be illegal under the rule.

Further, prosecutors have begun citing *Gewin* and its progeny nationwide, seeking to claim new territory for the lawful joint venture exception. See, e.g., Government’s Memorandum of Law in Support of Its Motion in Limine at 10-11, *United States v. Stein*, 488 F. Supp. 2d 370 (S.D.N.Y. June 13, 2007) (S1 05 Crim. 888) (arguing that Rule 801(2)(d)(E) applied because “defendants and their colleagues were plainly engaged in a joint venture to devise, market, and implement tax shelters,” the alleged illegality of which was “wholly distinct from the instant evidentiary question”); SEC’s Trial Brief & Motion Pursuant to FRE 801(d)(2)(A) & (E) to Admit Defendant Jordan’s Prior Testimony into Evidence Against All Defendants at 5-6, *SEC v. Pietrzak*, No. 1:03-CV-1507 (N.D. Ill. July 16, 2007) (“[I]t is axiomatic that the SEC need not plead or prove an unlawful conspiracy, but may satisfy this requirement by showing that the Defendants ‘act[ed] in concert toward a common goal’ by a preponderance of the evidence.”) (quoting *Gewin*); Letter Reply Brief of United States at 1, *United States v. Schiff*, 538 F. Supp. 2d 818 (D.N.J. Feb. 25, 2008) (Crim. No. 06-406) (“The defendant’s

main contention is that the conspiracy or joint venture shown for purposes of Federal Rule of Evidence 801(d)(2)(E) ‘must have as its object an unlawful purpose.’ The law, however, is to the contrary.”). By addressing this issue now, this Court can prevent error from tainting trials across the country.

IV. Rules 801(d)(2)(D), 803(6), and 803(8) as Written Further Sound Policy.

The circuit split is particularly damaging because it renders ineffective multiple provisions of the Federal Rules of Evidence, undermining the sound policies of Rule 801(d)(2)(D), Rule 803(6), and Rule 803(8).

A. The Lawful Joint Venture Exception Undermines the Limitations of Rule 801(d)(2)(D)

The lawful joint venture interpretation of the coconspirator hearsay exception undermines the careful construction of Rule 801(d)(2)(D), which codifies the principal-agent (or employer-employee) exception. Rule 801(d)(2)(D) provides that the words of underlings may be used against the supervisors who control them (or, at least, could control them), but the words of bosses cannot be used against subordinates. *See id.* (defining as not hearsay a statement “made by the party’s agent or employee on a matter within the scope of that relationship and while it existed”). The coconspirator exception, however, has no such

limitation. It allows the use of statements by any member of a conspiracy against all the others, meaning that an underling can be faced with the unfronted hearsay of his superior. See 4 Steven A. Saltzburg et al., *Federal Rules of Evidence Manual* § 801.02[6][f]-[g] (8th ed. 2002); *United States v. Hunt*, 272 F.3d 488, 495 (7th Cir. 2001). In other words, Rule 801(d)(2)(E) allows use of a drug kingpin’s words—if uttered in furtherance of a conspiracy—against a low-level street corner dealer.

Conversely, the principal-agent exception works only in one direction: The agent’s statements may be admitted against the principal, but not vice versa. The existing broad scope of Rule 801(d)(2)(E) may be justifiable, at least in part, on the basis that only people who are part of illegal ventures suffer its harms.⁵ That is, hearsay evidence can be admitted against a party under the coconspirator exception only if a federal judge finds by a preponderance of the evidence that the party and the declarant shared the same unlawful ends.

These justifications hold no water when applied to members of “lawful joint ventures,” such

⁵ In addition, the “both-directions” nature of Rule 801(d)(2)(E) tracks the *Pinkerton* rule, which renders all members of a conspiracy liable for the substantive crimes of coconspirators (if committed in furtherance of the conspiracy, and reasonably foreseeable).

as two employees of the same corporation (whose common scheme is to earn profits for the company), or two persons collaborating on a federal grant proposal (whose common goal is lawfully obtaining the grant).⁶ Yet federal prosecutors have used “conspiracies” such as these when proffering evidence under the revisionist interpretation of the exception. *See* Trachtenberg, *supra*, at 624 n.259; *see also* Government’s Opposition to Defendant’s Motion for a New Trial at 2, *United States v. Stevens*, No. 1:08-CR-231, 2009 WL 192240 (D.D.C. Jan. 16, 2009) (arguing statements should be admitted because the declarant and defendant “collaborated closely and over a long period of time on renovating defendant’s chalet”); Government’s Trial Memorandum at 14-15, *United States v. Bruno*, No. 09-CR-029 (N.D.N.Y. Oct. 5, 2009) (“In view of Bruno’s contractual associations with [various businesses], documents of those entities, as well as oral statements made by their representatives, are admissible pursuant to Fed. R. Evid. 801(d)(2)(E) as co-conspirator statements.”). The lawful joint venture rule has also already begun infecting civil litigation, and it will massively increase discovery burdens once attorneys learn of an immense new

⁶ This is not to say that partners in a lawful joint venture should never be responsible for one another’s statements. If the partners are agents of one another, their statements might be deemed not hearsay by Rule 801(d)(2)(D), the principal-agent exception. Unless their partnership is unlawful, however, the coconspirator hearsay exception is not applicable.

category of admissible hearsay. *See* Trachtenberg, *supra*, at 645-48.

When the “venture” is a law-abiding business instead of a traditional “conspiracy,” the hearsay declarants are not alleged to have done anything illegal, much less to have participated in an illegal scheme with the defendant. The “conspiracy” alleged is the daily workings of a corporation. And the action of the defendant that subjects him to hearsay without the benefit of cross-examination—statements no more reliable than the vast universe of utterances barred by the hearsay rule⁷—is working an honest job. Use of this evidence impairs the truth-seeking function of federal trials and punishes parties who have committed no misconduct whatsoever.

**B. The Lawful Joint Venture Exception
Undermines the Limitations of Rule
803(6) and Rule 803(8)**

As the prosecution briefs cited above demonstrate, the lawful joint venture exception also undermines the limitations of the business

⁷ As noted above and in the Advisory Committee Note, statements deemed “party admissions” are not considered especially reliable. Limiting the flow of unreliable hearsay to federal juries, courts have recognized that “the very explicitness of Rule 801(d)(2) suggests that the draftsmen did not intend to authorize the courts to add new categories of admissions to those stated in the rule.” *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979).

records exception, codified at Rule 803(6), and the public records exception, codified at Rule 803(8). If all statements in furtherance of lawful ventures are “not hearsay,” the proponent of a business record often need not show that it was “made ... by — or from information transmitted by — someone with knowledge,” Fed. R. Evid. 803(6)(A), much less prove this traditional requirement with the testimony or certification of a qualified witness, *see* Fed. R. Evid. 803(6)(D).⁸

Rule 803(6) covers business records only when “neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.” *See* Fed. R. Evid. 803(6)(E). Because trustworthiness is not required under Rule 801(d)(2), this prong of the business records exception is undermined by the lawful joint venture exception, as is the similar prong of the public records exception, *see* Fed. R. Evid. 803(8)(B).

When examining proffered records for evidence of trustworthiness—or a lack thereof—federal courts have considered whether, for example, the author had a self-serving motive. *See, e.g., Palmer v. Hoffman*, 318 U.S. 109 (1943) (railroad accident report inadmissible). Under the lawful joint venture theory, such unreliable

⁸ Even if the lawful joint venture exception is good law, the showing would be required before a business record could be offered against someone unaffiliated with the business.

business records are admissible against anyone sharing the common goal of their authors. Accordingly, if one employee writes that a workplace accident was caused by an injured colleague's negligence, as opposed to inadequate safety equipment, the hearsay report could be offered against the injured plaintiff-employee by the defendant-employer.

C. The Lawful Joint Venture Exception May Chill Participation in Lawful Activities

The recent campaign finance prosecution of former Senator John Edwards exemplifies the breathtaking scope of the lawful joint venture hearsay exception. The Edwards trial concerned money paid by supporters to help Edwards placate and hide his pregnant mistress, Rielle Hunter. Prosecutors argued that they could offer against Edwards any statement made in furtherance of the goal of electing Edwards to the presidency. See Gov't Motion in Limine, *United States v. Edwards*, No. 1:11-CR-161-1-CCE, 2012 WL 628691, at 7 (M.D.N.C. Feb. 15, 2012). A prosecution brief referred to "a common goal among ... Edwards [and others] to keep Rielle Hunter happy and out of the spotlight in order to protect Edwards' candidacy" and argued that statements "made in furtherance of that joint effort fall within the scope of Rule 801(d)(2)(E)." *Id.* If this theory is correct, such statements are admissible against any member of the Edwards campaign—including volunteers; the declarants at issue were not campaign staff members—because coconspirator

statements may be used against all members of a conspiracy, not only the leader. It might make sense to offer against Edwards statements made by campaign employees, and perhaps even low-level volunteers shaking hands in Iowa, because such persons may fairly be described as “agents” of a presidential candidate. Edwards could fire campaign staff and volunteers; they worked for him. Accordingly, Rule 801(d)(2)(D) might allow admission of the statements under the principal-agent exception. But the lawful joint venture rule goes much further, stating that under Rule 801(d)(2)(E), if someone volunteers to canvas for a presidential campaign in Iowa, any statements made by her “coconspirators” shaking hands and kissing babies in New Hampshire may be admitted against her at trial.

The Fourth Circuit has not yet decided whether to join the D.C. Circuit and the Fifth Circuit in their adoption of the lawful joint venture rule, or instead to stand with the Seventh Circuit and maintain the traditional coconspirator exception. The trial judge in the Edwards case therefore could not be sure whether statements made in furtherance of a lawful project such as a presidential campaign count as statements “made by the party’s coconspirator during and in furtherance of the conspiracy.” Fed. R. Evid. 801(d)(2)(E). Even if the Fourth Circuit were to decide the question, the proper application of Rule 801(d)(2)(E) would remain in doubt until this Court settles the question: Is the new lawful joint

venture hearsay exception a correct reading of the Federal Rules of Evidence?

If the lawful joint venture exception is good law, then participation in purely lawful, even laudable, conduct subjects a person to the danger that unreliable hearsay will be admitted against her in federal court. For example, imagine that a homeowners' association president says at a meeting, "I am proud that Ms. Jones, a member of our association, sent a strong message by slashing the tires of those kids who keep parking illegally in the neighborhood." Such a statement might well further the goals of the homeowners' association, and the lawful joint venture exception would allow its admission against Jones to prove the truth of the matter asserted—that Jones slashed the tires. As the Fifth Circuit wrote explaining the judgment below, "it is of no moment for purposes of Rule 801(d)(2)(E) that" prosecutors could not connect the hearsay documents admitted against Petitioners to unlawful conduct because "statements made in furtherance of a lawful common enterprise are admissible." *El-Mezain, supra*, 664 F.3d 502-03.

Especially when one considers the weak textual arguments advanced to support the lawful joint venture hearsay exception, there is no reason for this Court to choose to adopt a rule that will admit more unsworn, unreliable evidence at federal trials. A new rule authorizing use of such evidence against criminal defendants risks fomenting appeals based on Due Process

arguments, a constitutional question this Court can avoid deciding by adhering to the traditional scope of the coconspirator exception. By granting the petition for a writ of certiorari, this Court can provide needed clarity to the interpretation of federal evidence law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ben Trachtenberg
Counsel of Record
University of Missouri
School of Law
203 Hulston Hall
Columbia, MO 65203
(573) 882-7293
trachtenbergb@missouri.edu

June 2012

Counsel for Amici Curiae

APPENDIX OF AMICI CURIAE

Edward K. Cheng is Professor of Law at Vanderbilt Law School. He has published in journals such as the *Yale Law Journal*, *Stanford Law Review*, and the *Columbia Law Review*, is co-author of the five-volume treatise *Modern Scientific Evidence*, and is a former Chair of the Section on Evidence of the American Association of Law Schools.

Janet C. Hoeffel is the Vice Dean of Academic Affairs and the Catherine D. Pierson Associate Professor of Law at Tulane Law School. She is the co-author (with Weaver, Abramson, Bacigal, Hancock, and Lively) of *Criminal Procedure: Cases, Problems and Exercises* (4th ed. 2009).

James L. Kainen is the Brendan Moore Chair in Advocacy at Fordham University School of Law. Professor Kainen is the author of *The Impeachment Exception to the Exclusionary Rules: Policies, Principles and Politics*, 44 *Stan. L. Rev.* 1301 (1992), and *The Case for a Constitutional Definition of Hearsay: Requiring Confrontation of Testimonial Nonassertive Conduct and Statements Admitted to Explain an Unchallenged Investigation*, 93 *Marq. L. Rev.* 1415 (2010).

Deborah Jones Merritt is the John Deaver Drinko/Baker & Hostetler Chair in Law at The Ohio State University's Moritz College of Law. Professor Merritt is the co-author of *Learning*

Evidence: From the Federal Rules to the Courtroom (2d ed. 2011), a leading text on the Federal Rules of Evidence.

Colin Miller is an Associate Professor of Law at The John Marshall Law School. Professor Miller is the author of *Even Better than the Real Thing: How Courts Have Been Anything But Liberal in Finding Genuine Questions Raised as to the Authenticity of Originals Under Rule 1003*, 68 Md. L. Rev. 160 (2008).

Richard Moberly is the Associate Dean for Faculty and an Associate Professor of Law at the University of Nebraska College of Law. Professor Moberly is the co-author of two textbooks related to evidence: *Evidence in Context* (4th ed. 2010) and *Problems and Materials in Evidence and Trial Advocacy* (5th ed. 2010).

Ann Murphy is a Professor of Law at Gonzaga University School of Law. She is the author of *Spin Control and the High-Profile Client — Should the Attorney-Client Privilege Extend to Communications with Public Relations Consultants?*, 55 Syracuse Law Review 545 (2005), and *Federal Rule of Evidence 502: The “Get-Out-Of-Jail-Free Provision” — Or Is It?*, 41 N.M. L. Rev. 193 (2011).

Stephen Saltzburg is the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. He is

co-author of the *Federal Rules of Evidence Manual* (10th ed. 2011).

Ben Trachtenberg is an Associate Professor of Law at the University of Missouri School of Law. Professor Trachtenberg, the lead author of the brief for amici, is the author of *Coconspirators*, “*Coventurers*,” and *the Exception Swallowing the Hearsay Rule*, 61 *Hastings L.J.* 581 (2010).