

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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BILLY JOHNSON,

*Petitioner,*

v.

UNITED STATES,

*Respondent,*

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**On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Sixth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

18 U.S.C. § 1958(a) makes it a crime to travel in or use a facility in interstate or foreign commerce “with intent that a murder *be* committed” for money or something of pecuniary value, or to conspire to do so. The statute was patterned after the Travel Act, 18 U.S.C. § 1952(a).

The First, Seventh, and Tenth Circuits narrowly apply § 1958(a) to interstate activity intended to make easier, or facilitate, the commission of the murder – consistent with the format and interpretation of the Travel Act, 18 U.S.C. § 1952(a).

The Sixth, Eighth, and Eleventh Circuits hold that § 1958(a) applies more expansively so that a violation requires only that some aspect of the scheme or strategy, including activities after the murder, be made easier or facilitated by the interstate activity.

The question presented is:

Does § 1958(a) require that the interstate activity be done for the purpose of facilitating or making easier the commission of the underlying crime of murder?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

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### OPINIONS BELOW

The opinion of court of appeals is unpublished, but is available at 2011 WL 4585234 (6<sup>th</sup> Cir. Oct. 5, 2011), and reprinted in the Appendix at App. 1. The district court's opinion denying petitioner's motion for a judgment of acquittal and new trial is unpublished, but is available at 2009 WL 2447978 (W.D. Tenn. Aug. 6, 2009). It is reprinted in the Appendix at App. 30 and excerpted to include only the portions relevant to this petition.

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### JURISDICTION

The judgment and opinion of the Court of Appeals was entered on October 5, 2011. App., *infra*, 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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## STATUTES INVOLVED

18 U.S.C. § 1958 states:

**(a)** Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than \$250,000, or both.

**(b)** As used in this section and section 1959 –

**(1)** “anything of pecuniary value” means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

**(2)** “facility of interstate or foreign commerce” includes means of transportation and communication; and

**(3)** “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

18 U.S.C. § 1952 states:

**(a)** Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –

**(1)** distribute the proceeds of any unlawful activity; or

**(2)** commit any crime of violence to further any unlawful activity; or

**(3)** otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform –

**(A)** an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

**(B)** an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

**(b)** As used in this section (i) “unlawful activity” means (1) any business enterprise

involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Attorney General.

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## STATEMENT OF THE CASE

The court of appeals’ decision in this case deepens a divide between the circuits concerning the proper interpretation of 18 U.S.C. § 1958(a)’s interstate-activity requirement.<sup>1</sup> Section 1958(a), formatted like

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<sup>1</sup> The federal murder-for-hire statute was first codified at 18 U.S.C. § 1952A, but in 1988, it was renumbered as 18 U.S.C. § 1958. See Pub.L. No. 100-690, Tit. VII, § 7053(a), 102 Stat. 4181, 4402 (Nov. 18, 1988).

the Travel Act, 18 U.S.C. § 1952(a), makes it a crime to travel in or use a facility in interstate commerce “with intent that a murder *be* committed” in violation of state or federal law in exchange for something of pecuniary value, or to conspire to do so. Petitioner Billy Johnson agreed to pay a hitman \$50,000 to kill his mother. The hitman received \$5,000 in advance with the rest of the money to be paid after petitioner collected on a life insurance policy his mother had purchased. All the key players and events were in Tennessee: petitioner, the hitman, and the victim all lived there; and the hitman’s hiring and the victim’s killing occurred there. Two days before the murder, after having paid and instructed the hitman, petitioner and his extended family went on their annual summer trip to Arkansas. After the murder, petitioner received in the mail \$102,000 in life insurance proceeds from an insurance company in Florida. Petitioner was convicted of conspiring to violate § 1958 and two substantive § 1958 counts, all based on (i) his travel to Arkansas before the murder, and (ii) his receipt in the mail of the insurance proceeds from Florida after the murder. The Sixth Circuit affirmed, rejecting petitioner’s challenge to the jury instructions on the theory that § 1958(a) required nothing more than that his trip to Arkansas and post-murder receipt of the insurance proceeds further any aspect of the defendant’s scheme or strategy, not necessarily the underlying murder itself.

Three other courts of appeals read § 1958(a) to require that, like the Travel Act, the interstate activity must facilitate or make easier the commission of the

underlying murder in violation of a state or federal law. But three other courts of appeals – including the court of appeals in this case – have decided that the interstate activity may further any aspect of the overall scheme, even if subsequent to the murder’s commission. The interpretation of § 1958(a) adopted by the Sixth Circuit cannot be squared with the statute’s terms, statutory context, and history. And because the Sixth Circuit’s approach would widely expand state murder cases into federal felonies whenever – as is not unusual – insurance money is received in the mail subsequent to the murder or some other interstate activity occurs incidental to the murder itself, the decision below provides for a profoundly expanded application of the federal racketeering laws. This Court’s review is warranted.

1. Petitioner’s mother, Martha Johnson, owned a bar and approximately 520 acres of land, much of which was used as a cattle farm. Petitioner worked at both locations. Ms. Johnson also had a life insurance policy worth \$102,000 for which she previously had chosen petitioner as the sole beneficiary, though she also had a second son and a nephew from a third, deceased son. Ms. Johnson and petitioner had a long-running disagreement over whether the farm land should be developed into homes. In July 1999, petitioner solicited Danny Winberry at the bar to murder Ms. Johnson. They agreed on a price of \$50,000, with petitioner advancing Winberry \$5,000 and promising to pay the remaining \$45,000 after the petitioner received the proceeds from the life insurance policy.

Petitioner instructed Winberry over the telephone to commit the murder after petitioner traveled with family and friends for their annual summer vacation to Arkansas.<sup>2</sup> On July 22, 1999, while Ms. Johnson was still at work, Winberry used a key supplied by petitioner to enter her trailer home and waited for her inside. Shortly after Ms. Johnson came home, Winberry bludgeoned her to death and, later that night, returned to set fire to the trailer. Petitioner subsequently received \$102,000 in life insurance proceeds mailed from a life insurance company in Florida. *See App., infra*, 2-9. Winberry never received nor asked petitioner to pay the remaining \$45,000.

2. Petitioner was charged with conspiracy in violation of 18 U.S.C. § 1958(a) and two substantive violations based on (i) his trip to Arkansas, and (ii) his receipt via the mails of the insurance proceeds from Florida.<sup>3</sup> *App., infra*, 2. Section 1958(a) makes it a crime if anyone “travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility of interstate or foreign commerce, with intent that a murder *be* committed in violation of the laws of any

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<sup>2</sup> The indictment did not reference and the government did not rely at trial on this phone call to satisfy the interstate-activity element of any of three § 1958(a) charges.

<sup>3</sup> Petitioner, who testified before the grand jury during the government’s investigation, was also charged with eight counts of making false declarations to the grand jury in violation of 18 U.S.C. § 1623. *App., infra*, 2.

State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so[.]” (Emphasis added.) The government, however, did not rely on any pre-murder phone calls to plan the crime between petitioner and Winberry. Instead, the government took the position that petitioner’s receipt of the life insurance monies after Ms. Johnson’s death and his trip to Arkansas to establish an alibi, after having already paid and instructed Winberry, satisfied § 1958(a)’s interstate-activity requirement. *See App., infra, 2.*

The jury found petitioner guilty of three counts of violating § 1958(a). The district court sentenced petitioner to three life terms and restitution in the amount of \$611,893.56.<sup>4</sup> *Id.* at 3. Petitioner timely moved unsuccessfully for a judgment of acquittal and new trial based, in part, on a challenge to the court’s jury instructions on § 1958, which the district court denied. *App., infra, 30-34.*

3. The Sixth Circuit affirmed. *App., infra, 1-29.* The court rejected petitioner’s contention that § 1958(a) requires the interstate activity to facilitate or make easier the commission of an underlying murder in violation of state or federal law, and not be

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<sup>4</sup> Petitioner also was convicted of the eight § 1623 false declaration counts for which he received a sentence of 60 months’ imprisonment to be served concurrently with the life sentences. *App., infra, 3.*

incidental to the intended murder or merely further another aspect of the overall scheme. *Id.* at 22-26. The Sixth Circuit reasoned that petitioner’s trip to Arkansas to establish an alibi did not need to make easier the commission itself of a murder in violation of state or federal law. The alibi needed only to facilitate planning the scheme to pay a hitman for a murder. *Id.* at 24. Similarly, with respect to the post-murder mailing of the insurance proceeds, the court reasoned that § 1958(a) did not require that “use of the mail in the facilitation of the criminal enterprise take place prior to the murder” and thereby make easier committing the murder. *Id.* at 25. Rather, the court ruled that § 1958(a) “simply involves the use of interstate activities, such as mail, that enable murder for hire *schemes*.” *Id.* (emphasis added). The Sixth Circuit explained that § 1958(a) requires only “a nexus between the [interstate activity] and the furtherance of the murder for hire *strategy*” – not committing the murder itself. *Id.* (emphasis added).<sup>5</sup>

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<sup>5</sup> Although petitioner was also convicted of conspiracy to violate § 1958(a), that conviction would have to be reversed if this Court held the Sixth Circuit wrongly interpreted the statute. The district court did not correctly explain to the jury all the elements of the substantive statutory violation that the petitioner agreed to violate. *United States v. Frampton*, 382 F.3d 213, 219 n. 5 (2d Cir. 2004); see *United States v. Driggers*, 559 F.3d 1021, 1024 (11th Cir. 2009) (Kozinzki, J.) (holding if the district court has misinterpreted the law and rendered inaccurate instructions, the jury must be presumed to have misunderstood incorrect instructions).

## REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case deepens a divide between the circuits over whether § 1958(a) requires that interstate travel or use of an interstate facility must facilitate or make easier the intended commission of the underlying crime of murder, consistent with the Travel Act's format and interpretation. Three courts of appeals give § 1958(a) this circumspect reading. Three other courts of appeals give the statute's interstate-activity requirement a more expansive application to any aspect of the scheme or strategy to commit murder for hire. The issue also has significant consequences for federal-state relations and the related administration of the federal racketeering laws. This case squarely raises the issue and presents a highly suitable vehicle for resolving it. In addition, the Sixth Circuit's decision cannot be squared with § 1958(a)'s terms, statutory context and history, with the court's decision ignoring the plain text of § 1958(a) in favor of an overly expansive and incorrect reading. The approach of the Sixth, Eighth and Eleventh Circuits effectively rewrites § 1958(a), which Congress wrote using the Travel Act as a template. This Court therefore should grant review.

**A. The Courts Of Appeal Are Deeply Divided On Whether 18 U.S.C. § 1958(a) Requires That The Interstate Activity Must Make Easier The Intended Commission Of The Underlying Crime Of Murder Versus Any Aspect of the Overall Scheme Or Strategy Being Made Easier By The Interstate Activity**

1. The Sixth Circuit held that § 1958(a), unlike the Travel Act, is not limited to interstate travel or the use of interstate facilities that facilitates or makes easier committing the underlying crime of murder. App., *infra*, at 25. Rather, the Sixth Circuit read § 1958(a) much more expansively to encompass interstate activity that furthers any aspect of the defendant's murder-for-hire scheme or strategy.<sup>6</sup> App., *infra*, at 24-25. The Sixth Circuit's interpretation is shared by the Eighth Circuit and the Eleventh Circuit.

In *United States v. Mueller*, 661 F.3d 338 (8th Cir. 2011), the court held that the defendant's receipt through the mail of life insurance proceeds from the victim's death several years *after* the murder was enough to satisfy § 1958(a)'s interstate-activity element because one object of the scheme was to obtain the insurance money. *Id.* at 346. Similarly, the

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<sup>6</sup> Compare *United States v. Perrin*, 580 F.2d 730, 736 (5th Cir. 1978) (the Travel Act requires the interstate activity to at least facilitate or make easier the criminal activity specified in 18 U.S.C. § 1952(a)), *aff'd*, 444 U.S. 37 (1979); *accord, e.g., United States v. McPartlin*, 595 F.2d 1321, 1361 (7th Cir. 1979).

Eleventh Circuit has held that § 1958(a) is violated if the interstate activity is neither accidental nor incidental, but instead done “knowingly to further a *scheme* to commit murder-for-hire.” *United States v. Drury*, 396 F.3d 1303, 1313 (11th Cir. 2005). Accordingly, the Sixth, Eighth, and Eleventh Circuits are the only courts of appeals to read § 1958(a)’s interstate-activity requirement in a way that ignores not only the statute’s textural limitation that the interstate travel or use of an interstate facility must be done with the intent that a murder *be* committed, but also the statute’s structural dependence on the Travel Act. *See* S.Rep. No. 225, 98th Cong., 1st Sess. 306, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3485 (noting that the murder-for-hire statute “follows the format” of the Travel Act).

2. The First Circuit has accorded § 1958(a) a narrower interpretation that tracks the statute’s plain text and the Travel Act’s format. *Id.* In *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996), the court held that interstate travel or use of an interstate facility will satisfy § 1958(a) only if the travel or usage makes easier or facilitates the intended commission, or commission, of the underlying crime of murder. *Id.* at 1292; Black’s Law Dictionary 627 (8th ed. 2004) (defining “facilitation” as “the act of making it easier . . . to commit a crime”). The First Circuit concluded that “the jury rationally could find a facilitative nexus between the use of telephones and the criminal activities [murder] *underlying* the counts of conviction.” *Id.* (emphasis added). The First Circuit’s

opinion, unlike the Sixth and Eighth Circuits' interpretation, recognized that the term "criminal activities underlying" a § 1958(a) violation is neither the defendant's murder-for-hire scheme nor strategy. *Id.* Rather, the underlying "criminal activities" that § 1958(a) requires the interstate activity to facilitate, or make easier, is the crime of murder in violation of an identifiable law of the particular state involved – exactly as the statutory text directs and in accord with its template from the Travel Act. *See id.* at 1292-93. "In interpreting 18 U.S.C. § 1958, it is entirely appropriate to look to case law construing the Travel Act, 18 U.S.C. § 1952." *Id.* at 1292 (citing S.Rep. No. 225, 98th Cong., 1st Sess. 306, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3485). And § 1958's legislative history expressly states that the statute "follows the format" of the Travel Act. *Id.* (quoting S.Rep. No. 225, 98th Cong., 1st Sess. 306, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3485).

The First Circuit's interpretation of § 1958(a) thus closely tracks this Court's analysis of the Travel Act, 18 U.S.C. § 1952(a). The Travel Act's text substantially mirrors § 1958(a) by making it a crime to travel in interstate commerce or use any facility in interstate commerce "with intent to . . . facilitate the . . . carrying on[ ] of any unlawful activity [*i.e.*, crimes under state and federal law proscribed in the statute]" and to thereafter commit an act to affect the specified unlawful activity. 18 U.S.C. § 1952(a). "Section 1952(a) prohibits interstate activity with the intent to . . . facilitate certain kinds of illegal

activity[.]” *Rewis v. United States*, 401 U.S. 808, 811 (1971) (internal marks omitted). This Court confirmed that “§ 1952 applie[s] . . . to those individuals whose agents or employees cross state lines [or use an interstate facility] in furtherance of illegal activity” – which does not mean a scheme or strategy to violate § 1952 itself, but only the specific state and federal crimes listed in the statute. *Id.* at 813. *Erlenbaugh v. United States*, 409 U.S. 239 (1972), held that § 1952(a)’s application “is limited to those who act with an intent to further [specific state and federal crimes listed in the statute].” *Id.* at 248; see *United States v. Nardello*, 393 U.S. 286, 295 (1969) (“the inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the . . . activity charged.”).

The Seventh Circuit, like First Circuit, holds that § 1958(a) is violated only if the interstate travel and use of interstate facilities make easier the intended commission of the underlying crime of murder in violation of a state or federal law. In *United States v. Richeson*, 338 F.3d 653 (7th Cir. 2003), the court held “§ 1958 requires only that the interstate facility employed in a particular case be useful, not integral, to the commission or planning of *the contract killing*.” *Id.* at 659 (emphasis added). The Tenth Circuit has also applied § 1958(a) based on the clear statutory text in the same circumspect manner as the First and Seventh Circuits. In *United States v. Robertson*, 473 F.3d 1289 (10th Cir. 2007), the court rejected a challenge jury instructions citing the text of

§ 1958(a) coupled with the district court’s explanation that “the use of an interstate commerce facility with the intent that a *murder* be committed.” *Id.* at 1293. On the question of the interstate-activity requirement, the Tenth Circuit expressly approved the instruction that “[t]he government must prove that the use of an interstate facility was done with the intent to further or facilitate the commission of the *murder*” – not the overall scheme to commit a murder for hire or any related strategy. *Id.* (emphasis added).

3. The courts of appeals have created a clear disagreement on the scope of § 1958(a)’s interstate-activity requirement. There is no justification for prolonging the interpretive gulf between the courts of appeals depending solely on where a defendant happens to reside – with defendants who travel between states or use a telephone, for example, after the commission of a murder are subject to prosecution exclusively under state law in 12 states among three circuits, but identically situated defendants are subject to federal prosecution in 14 states among three other circuits. This Court should grant review to resolve the disagreement and eliminate that disparity.

**B. Determining The Proper Reach Of 18 U.S.C. § 1958(a)'s Interstate-activity requirement Is Highly Significant To Federal-State Relations And The Related Administration Of The Federal Racketeering Laws, And This Case Presents An Ideal Vehicle For Resolving The Issue**

1. The Sixth Circuit's interpretation of § 1958(a) dramatically expands the statute's reach and substantially affects not only the administration of the federal racketeering laws. The court's decision, however, also expands the federal government's role, while simultaneously diminishing of the role of state and local authorities and their historical responsibility for murder investigations and prosecutions. Doing so also would affect the continued usurpation of significant cases by federal authorities that could be handled as well or better at the local level is precisely what concerned Congress when § 1958 was enacted. *See* S.Rep. No. 225, 98th Cong., 1st Sess. 306, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484.

Principles of federalism, settled federal-state relations, and the legislative history plainly suggest eschewing the expansive reading of § 1958(a) employed by the Sixth Circuit. Adopting the court of appeal's construction of § 1958(a) to interpret the statute's interstate activity requirement would over-extend the reach of the federal murder-for-hire statute to new realms of traditionally and, for the most part, exclusively state jurisdiction. For example, Tennessee and Texas make the solicitation of murder

for money first-degree murder and an aggravating circumstance at sentencing. *See* T.C.A. § 39-13-204(c), (i)(5); Tex. Penal Code § 19.03(a)(3). On the other hand, for example, Alabama and New York make murder-for-hire its own statutory offense punishable by death. Ala. Code § 13A-5-40(a)(7); N.Y. Penal Law § 125.27(1)(a)(vi).

It also is hard to conceive – particularly with the use of cell phones and computers – a murder-for-hire scheme that would not involve the use of an interstate facility within the meaning of § 1958. The Sixth Circuit’s statutory interpretation, coupled with those of Eighth and Eleventh Circuits, would thus markedly increase federal criminal liability in this area. Equally important, the federal government’s jurisdiction and independence over traditionally state-law matters would enable the government to transform neighborhood homicides into federal felonies.

2. This case presents a highly suitable vehicle for resolving whether § 1958(a) extends to an interstate activity that furthers any aspect of a scheme to commit murder for money, even after the killing, or is merely incidental to the underlying crime. Petitioner has preserved, throughout this case, the claim that § 1958(a) fails to reach his summary trip to Arkansas or the post-murder receipt of the insurance policy proceeds. *See App., infra*, 23-26, 31-33. This case squarely raises the issue, moreover, because it is undisputed that the government relied exclusively on post-murder mailing and the Arkansas trip to prove the interstate-activity requirement for all three

charges. *Id.* at 24. The Sixth Circuit applied § 1958(a) to petitioner on the obvious understanding that the two interstate activities did not facilitate, further, or make easier the underlying crime of murder, but only furthered his general scheme or strategy to pay someone to kill his mother.

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## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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