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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The government's opposition[1] seeks to convert the bright-line rule of *Smith v. Illinois*, 390 U.S. 129 (1968)--which requires disclosure of the names of prosecution witnesses--into a vague balancing test of the kind this Court has rejected in related contexts. The government's approach would--in *Smith*'s words--"emasculate the right of cross-examination itself." *Id.* at 131.

The government's defense of the "lawful joint venture" theory under Rule 801(d)(2)(E) ignores the plain language of the rule--which excludes from the hearsay prohibition statements by a party's "coconspirator" in furtherance of a "conspiracy"--and rests on the fictitious agency rationale that the Rule's drafters disavowed. The unprincipled expansion of the co-conspirator exception that the Fifth Circuit adopted ignores this Court's reluctance to "expand this narrow exception to the hearsay rule" and "create . . . a further breach of the general rule against the admission of hearsay evidence." *Krulewitch v. United States*, 336 U.S. 440, 444 (1949).

Both issues present important and recurring questions. Both are cleanly presented here. And in both instances the Fifth Circuit and other courts of appeals have taken positions fundamentally at odds with the thrust of this Court's decisions. The Court's review is needed to curb the lower courts' departure

[1] Brief for the United States in Opposition ("Opp."). The petition is cited as "Pet."

from the bright-line *Smith* rule and the plain language of Rule 801(d)(2)(E). At the very least, if *Smith* is to be reduced to a balancing test, and if a new hearsay exception for statements in furtherance of lawful joint ventures is to be created, those developments should not occur without this Court's supervision. Both are too fundamental to criminal prosecutions to germinate and take hold in the lower courts without the Court's scrutiny.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THE BRIGHT LINE *SMITH* RULE REQUIRING DISCLOSURE OF THE NAMES OF PROSECUTION WITNESSES.

1. The government insists that no circuit conflict exists because all courts weigh competing interests in considering disclosure of the names of prosecution witnesses to the defense. Opp. 15. But that broad assertion masks a critical split: the Fourth and Fifth Circuits engage in balancing to determine *whether* to disclose a witness' identity. In cases from other courts, the government disclosed the witness' true name to the defense, either by court order or voluntarily; those courts balanced solely to determine *when and how* the disclosure must be made, not *whether* it should be made. Pet. 15-22 (describing split).

In other words, the Fourth and Fifth Circuits have replaced the bright-line *Smith* rule with a vague weighing of interests that will almost invariably favor the prosecution. Other courts honor

the *Smith* rule but balance interests to ensure that witnesses are protected to the extent possible consistent with the defendant's Confrontation Clause rights. That split in the circuits--and the departure by the Fourth and Fifth Circuits from *Smith*'s clear rule--warrants this Court's intervention.

2. The government contends that the *Smith* rule requiring disclosure does not apply because Avi and Major Lior were not as "central" to the prosecution case as the anonymous witness in *Smith*. Opp. 13-14, 16. But Avi was the critical expert for the government who made the essential link between the zakat committees and Hamas. He was arguably the *most* important prosecution witness. Major Lior, although less central than Avi, was the custodian for many of the key documents in the prosecution case. Nothing in *Smith* suggests that its bright-line rule requiring disclosure applies only to eyewitnesses or would otherwise exclude Avi and Major Lior.

3. The government does not defend the Fifth Circuit's reliance on *Roviaro v. United States*, 353 U.S. 53 (1957), which governs disclosure of a nontestifying informant's name in discovery. Instead, the government cites *Delaware v. Van Arsdall*, 475 U.S. 683 (1986), for its balancing approach. Opp. 10, 14. *Van Arsdall* permits "reasonable limits" on cross-examination concerning a witness' bias, including limits to protect "witness safety." 475 U.S. at 679. But nothing in the opinion suggests that it overrules or limits *Smith*, or that complete refusal to disclose a prosecution witness'

name can ever be "reasonable." To the contrary, *Van Arsdall* concludes that "prohibit[ing] *all* inquiry" into a topic that may expose bias violates the Confrontation Clause. *Id.* (emphasis in original). The district court here did exactly what *Van Arsdall* says cannot be done: it prohibited *all* inquiry into the witnesses' names, which this Court calls "the very starting point in exposing falsehood and bringing out the truth." *Smith*, 390 U.S. at 131.

This Court rejected an equally "amorphous" Confrontation Clause standard in *Crawford v. Washington*, 541 U.S. 36 (2004). The multifactor "reliability" test of *Ohio v. Roberts*, 448 U.S. 56 (1980), overturned in *Crawford*, suffered the same defect as the balancing test the Fifth Circuit applied here: it was "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations." *Crawford*, 541 U.S. at 63. Just as the Court adopted a bright-line rule in *Crawford* barring "testimonial" out-of-court statements, it should reaffirm the bright-line *Smith* rule requiring disclosure of prosecution witnesses' names.

When this Court *has* accepted a weighing of interests in the Confrontation Clause context, it has required that any variation from otherwise applicable constitutional requirements be subject to strict scrutiny, including narrow tailoring. In *Maryland v. Craig*, 497 U.S. 836 (1990), for example, the Court considered the circumstances under which a child witness could testify without requiring the child to confront the defendant face-to-face. The Court permitted such testimony "only where denial of such

confrontation is *necessary* to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id*. at 850 (emphasis added); *see, e.g., Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("denial or significant diminution" of right of confrontation "requires that the competing interest be closely examined"); *cf. Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2738-39 (2011) (applying strict scrutiny, including narrow tailoring, in First Amendment context).

The Fifth Circuit did not use strict scrutiny here, and the government does not argue that it could satisfy a narrow tailoring requirement. Complete denial of the names was not "necessary," both because protective measures of the kind used in the cases cited at Pet. 16-20 were available, and because the government had noticed a second, named expert witness, Col. Jonathan Fighel, to cover the same subjects as Avi.

4. The government suggests that this case is a poor vehicle for resolving the circuit split over anonymous witnesses because the error in withholding the names of Avi and Major Lior was harmless. Opp. 16-17. But the court of appeals did not address the government's harmless error argument, and the question should be left to that court on remand. *See, e.g., Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 n.11 (2011) ("[W]e express no view on whether the Confrontation Clause error in this case was harmless. The New Mexico Supreme Court did not reach that question . . . and nothing in this opinion impedes a harmless-

error inquiry on remand."); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 n.14 (2009) ("We of course express no view as to whether the error was harmless. The Appeals Court of Massachusetts did not reach that question and we decline to address it in the first instance.").

The government (like the court of appeals) trivializes the harm to petitioners because they cannot state with precision the information they would have discovered if the true names of Avi and Major Lior had been disclosed. But that critique ignores this Court's recognition that "[c]ounsel often cannot know in advance what pertinent facts may be elicited on cross-examination. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." *Alford v. United States*, 282 U.S. 687, 692 (1931).

There is every reason to think that the court of appeals will reject the government's argument that the failure to disclose the witnesses' names was harmless beyond a reasonable doubt. The evidence against petitioners is far from compelling; it failed to convince the first jury to convict on a single count, and the second jury took nine days to return its guilty verdicts. Moreover, the conviction in the second trial was obtained with the benefit of four *other* errors the court of appeals found harmless, each of which marked a significant difference between the first trial and the second. App. 105-27.

The court would have no basis for finding a *fifth* error harmless under a proper harmless error analysis.

II. THE COURT SHOULD REJECT THE "LAWFUL JOINT VENTURE" VARIANT OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE.

It is telling that the government's defense of the "lawful joint venture" variant of Fed. R. Evid. 801(d)(2)(E) never addresses the text of the rule, focusing instead on the rule's legislative history. Opp. 17-20. This Court's decisions foreclose the government's interpretive approach. Because the Federal Rules are "legislative enactment[s]," the Court interprets them using the "traditional tools of statutory construction." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (Fed. R. Evid. 106) (quotation omitted); *see, e.g., United States v. Vonn*, 535 U.S. 55, 65 (2002) (Fed. R. Crim. P. 11(h)). The first such "tool" is the rule that when the text of the statute is unambiguous, resort to legislative history is not only unnecessary but improper; "Congress's authoritative statement is the statutory text, not the legislative history." *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (quotation omitted).[2] The plain text of Rule 801(d)(2)(E) precludes the "lawful joint venture" theory. And

[2] *See, e.g., Milner v. Department of the Navy*, 131 S. Ct. 1259, 1267 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it."); *Boyle v. United States*, 556 U.S. 938, 950 (2009) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity.").

even if resort to legislative history were allowed here, it would not help the government.

1. The plain language of Rule 801(d)(2)(E) excludes from the hearsay prohibition statements by a party's "coconspirator" in furtherance of a "conspiracy." A "coconspirator" is not a lawful joint venturer, and a "conspiracy" is not a lawful joint venture. By their plain meaning, the words "conspiracy" and "coconspirator" require an element of illegality; as the prosecutor put it in the district court, conspiracy requires "an agreement among two or more people basically to do something wrong." 7 R.9508. The rule's unambiguous language should end the inquiry. *See State v. Tonelli*, 749 N.W.2d 689, 694 (Iowa 2008).

2. To the extent reliance on the legislative history of Rule 801(d)(2)(E) is appropriate, that history does not support engrafting the "lawful joint venture" variant onto the plain language of the rule. Pet. 33-36; *see* Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581, 607-08, 627-29 (2010). The excerpt from the Senate Report on which the government principally relies (Opp. 19)--stating that Rule 801(d)(2)(E) "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. 1277, 93d Cong., 2d Sess. 24, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7073--means only that the rule applies regardless of whether the conspiracy is charged. That excerpt does not change or undermine the plain language of

the rule, which requires a "conspiracy." Trachtenberg, *supra*, 61 Hastings L.J. at 607. At most the Senate Report is ambiguous, and the Court has made clear that ambiguous legislative history cannot trump clear statutory language. *See, e.g., Milner*, 131 S. Ct. at 1267.

The government relies heavily on its reading of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), which applied a common-law precursor to Rule 801(d)(2)(E). Opp. 18-19. As amici evidence professors demonstrate, however, *Hitchman Coal* cuts squarely against the "lawful joint venture" theory. Brief of Amici Curiae Professors of Evidence in Support of Petitioners at 14. The issue in *Hitchman Coal* was whether the proponent of a coconspirator statement had to establish the elements of the exception by evidence independent of the statement itself. The Court held that "it is necessary to show by independent evidence that there was a combination between [the declarants] and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. *The element of illegality may be shown by the declarations themselves.*" 245 U.S. at 249 (emphasis added).[3]

[3] The government contends that the "element of illegality" to which *Hitchman Coal* refers "was not a prerequisite to admissibility, but instead the substantive illegality necessary to prove liability for the conspiracy alleged in that case." Opp. 18 n.4. But the entire passage in which the phrase appears addresses "admissibility" of out-of-court statements. The discussion of "independent evidence" bears solely on establishing the requirements of admissibility.

The emphasized language shows that, at common law, an "element of illegality" *was* required to invoke the coconspirator exception, but it did not have to be proved by independent evidence; the alleged coconspirator statements themselves could establish that requirement. To the extent the common law that preceded the Federal Rules of Evidence bears on the proper interpretation of the terms "conspiracy" and "coconspirator" in Rule 801(d)(2)(E), therefore, *Hitchman Coal* confirms that an "element of illegality" is required.[4]

3. The government contends that this case is an unsuitable vehicle for consideration of the "lawful joint venture" theory because, years after the Elbarasse and Ashqar documents were created, President Clinton issued an Executive Order that made financial support for Hamas illegal. Opp. 21-22. But the Fifth Circuit did not base its decision on the theory that Rule 801(d)(2)(E) applies to "a scheme that became illegal midstream," Opp. 22; it held instead, consistent with its precedent, that the term "conspiracy" in the rule includes lawful joint ventures, App. 45-52.

The government's proposed "narrower" theory is baseless in any event. The government concedes

[4] The government (Opp. 18) emphasizes a sentence that follows the "element of illegality" reference, in which the Court refers to "the prosecution of a common plan or enterprise, lawful or unlawful." *Hitchman Coal*, 245 U.S. at 249. But the authorities on which the Court relies for that reference appear to involve either conspiracies (*i.e.*, agreements with illegal objectives) or true agency relationships (*i.e.*, partnerships). Read in context, this portion of *Hitchman Coal* does not create a hearsay exception outside the recognized coconspirator and agency relationships.

even now that "raising money for Hamas was not illegal when petitioners first commenced their operations in the late 1980s" and did not become so until "early 1995, when the President issued an Executive Order specially designating Hamas as a terrorist organization." Opp. 3-4. When the alleged co-conspirator statements were made, therefore, there was no "conspiracy"--that is, no agreement to do something illegal--and the declarants and petitioners were not "coconspirators." The fact that (according to the government) a conspiracy came into existence later is irrelevant to the proper application of the co-conspirator exception. By its plain terms the rule requires that the out-of-court statement be made "*during* . . . the conspiracy," not years before the conspiracy began. Fed. R. Evid. 801(d)(2)(E) (emphasis added).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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