IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

UNITED STATES OF AMERICA §

§

v. §

§ FRANCISCO "FRANK" APODACA, JR.; MARC §

SCHWARTZ; LUTHER EDWARD JONES; § EP-10-CR-2284-FM GILBERT SANCHEZ; DAVID ESCOBAR; §

LINDA CHAVEZ; MILTON "MICKEY" § DUNTLEY; GUILLERMO "WILLIE" § GANDARA, SR.; CHARLES "CHARLIE" § GARCIA; RAYMUNDO "RAY" RODRIGUEZ; § and LARRY MEDINA §

# MOTION OF LUTHER JONES TO DISMISS RICO CONSPIRACY CHARGE BECAUSE 18 U.S.C. § 1962(d) IS VAGUE AS APPLIED

Defendant Luther Jones, through undersigned counsel, moves the Court for an order dismissing Count 1, which purports to charge a RICO conspiracy under 18 U.S.C. § 1962(d), because the statute is vague as applied under these circumstances and thus violates the Fifth Amendment Due Process Clause.

# BACKGROUND

Count 1 of the indictment purports to charge Jones and others under § 1962(d) with conspiring to conduct and participate in the conduct of the affairs of the so-called "Access Enterprise" through a pattern of racketeering activity, in violation of § 1962(c). *E.g.*, Doc. 1 at 7. The alleged conspiracy involved efforts by Access to obtain contracts with four separate public entities: El Paso Independent School District ("EPISD"), the County of El Paso, the Ysleta Independent School District ("YISD"), and the Socorro Independent School District ("SISD"). According to the indictment and the government's "Summary of Evidence," Jones was involved only with the YISD contract.

Count 1 does not identify specific predicate acts that made up the pattern of rackteering activity through which Jones and others allegedly agreed to participate in the conduct of the Access Enterprise. It charges generally that the predicate acts consisted of "multiple acts indictable under" the mail and wire fraud statutes and the honest services statute (18 U.S.C.

§§ 1341, 1343, 1346), and "multiple acts involving bribery" under state law. Doc. 1 at 7. Although other counts of the indictment charge specific offenses against various defendants, those counts are not incorporated by reference in Count 1. The only offense charged against Jones, other than RICO conspiracy, is a conspiracy to violate the mail fraud, wire fraud, and honest services statutes. Doc. 1 at 24-27.

# ARGUMENT

As applied to the facts of this case, 18 U.S.C. § 1962(d) is unconstitutionally vague and thus violates Jones' right to due process under the Fifth Amendment. The statute neither gave Jones fair warning that he was violating its provisions nor adequately limits the discretion of the prosecution and the jury. The Fifth Circuit has cautioned that "[a] RICO case is an unusually complex criminal proceeding, providing many possibilities of confusion and ambiguity." *United States v. Manzella*, 782 F.2d 533, 547 (5th Cir. 1986). Under the circumstances alleged here, that potential "confusion and ambiguity" has become an unconstitutional reality. Accordingly, Count 1 must be dismissed.

# THE VOID-FOR-VAGUENESS DOCTRINE.

The Fifth Amendment Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This void-for-vagueness doctrine has two

components: providing fair warning to potential violators, and cabining the discretion of the police, prosecutors, and juries.

The fair warning component focuses on fairness to the targeted individual. It is a bedrock principle of criminal law that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."); *United States v. Orellana*, 405 F.3d 360, 371 (5th Cir. 2005) (quoting *McBoyle*). The fair warning principle ensures that a person can "conform [his] conduct to law . . . by reading the *face* of a statute--not by having to appeal to outside legal materials." *Sabetti v. DiPaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (emphasis in original; quotation omitted) (Breyer, J.).

The prosecutorial discretion component of the vagueness doctrine focuses on a separate interest: the systemic importance of clearly drawn criminal statutes as a means of preventing police, prosecutors, and juries from targeting and convicting individuals arbitrarily. Thus, even if a statute provides fair warning, it may nonetheless be impermissibly vague if it fails adequately to restrain the discretion of police, prosecutors, and jurors. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). In that case, the statute violates due process "not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide law enforcement officers." *Morales*, 527 U.S. at 72 (Breyer, J., concurring) (quotation omitted); *see, e.g., Kolender*, 461 U.S. at 357.

# THE COURT SHOULD DISMISS COUNT 1 BECAUSE § 1962(d), AS APPLIED IN THIS CASE, NEITHER PROVIDES FAIR WARNING NOR ADEQUATELY RESTRAINS THE DISCRETION OF POLICE, PROSECUTORS, AND JURORS.

Under the foregoing principles, the RICO conspiracy statute is unconstitutionally vague as applied to the facts of this case. Jones did not have fair warning that the statute applied to his alleged conduct, and the statute--to the extent it applies here--does not adequately limit the discretion of the investigating agents, the prosecution, and the jurors.

The vagueness of § 1962(d) in the context of this case begins with the nature of the alleged enterprise. The RICO statute is paradigmatically directed to organized crime--the Mafia, drug dealing organizations, and the like. *See, e.g., United States v. Posada-Rios*, 158 F.3d 832 (5th Cir. 1998) (RICO conviction of participants in drug organization); *United States v. Krout*, 66 F.3d 1420, 1432 (5th Cir. 1995) (Mexican Mafia); *United States v. Pungitore*, 910 F.2d 1084, 1104-05 (3d Cir. 1990) (RICO not vague as applied to La Cosa Nostra); *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981) (RICO not vague as applied to illegal gambling organization); *United States v. Hawes*, 529 F.2d 472, 478-79 (5th Cir. 1976) (RICO not vague as applied to arson ring).

The case law holds that the RICO statute extends beyond such inherently illegal organizations. *See, e.g., United States v. Turkette*, 452 U.S. 576 (1981). But the farther the charges move from the organized crime core of RICO, the less clear the statute's limits become. In this case, the alleged "enterprise" is an association-in-fact consisting of an entirely legitimate company--Access Healthsource Incorporated--and several of its executives and agents. Doc. 1 at 1-2, 6. Such an "enterprise" is not so obviously criminal that a person of ordinary intelligence would understand that it falls within the RICO statute. Nor does such an elastic concept of "enterprise" provide meaningful limits on the discretion of agents, prosecutors, and jurors. And

for defendants such as Jones--who are not alleged to be part of the enterprise, but merely

"associated with" it, Doc. 1 at 6-7--the line between the criminal and the non-criminal becomes especially vague.

The underlying conduct here--alleged bribes to public officials primarily in the form of political contributions--adds to that vagueness. The dividing line between legitimate political contributions, which are protected by the First Amendment, and bribes, which are criminal, has produced a welter of confusing federal decisions. *See, e.g., McCormick v. United States*, 500 U.S. 257, 272 (1991); *Evans v. United States*, 504 U.S. 255, 272-74 (1992) (Kennedy, J.,

concurring); *United States v. Siegelman*, 640 F.3d 1159, 1170-74 (11th Cir. 2011); *United States*

*v. Tomblin*, 46 F.3d 1369, 1378-81 (5th Cir. 1995). We maintain that both under Texas law and under the honest services statute as interpreted in *United States v. Brumley*, 116 F.3d 728, 734-35 (5th Cir. 1997) (en banc), the relatively clear provisions of Tex. Penal Code § 36.02(4) must govern whether political contributions may be punished as bribes. But this Court's rulings in Jones' first case suggest that it will reject our position and apply the more elastic federal standard from *McCormick*, *Evans*, and *Tomblin*.

Thus, the nature both of the alleged enterprise (a legitimate organization and its executives and agents) and of the underlying conduct (political contributions alleged to be bribes) remove this case from the core of the RICO statute. A layer of broad statutory terms in the substantive RICO statute, § 1962(c)--"enterprise," "pattern of racketeering activity," "conduct," "participate"--further blurs the line between the criminal and the non-criminal. Cases interpreting § 1962(c) have imposed limits on these key terms that reduce the vagueness problems with that statute. *See, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2929-31 (2010) (statute should be interpreted to avoid constitutional problems if possible). An association-in- fact enterprise, for example, requires "at least three structural features: a purpose, relationships

among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 129 S. Ct. 2237, 2244 (2009). The pattern of racketeering activity must involve not merely at least two predicate acts, but also relatedness and continuity between those predicate acts. *See, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238-43 (1989). And the Supreme Court has held that the words "conduct" and "participate" in § 1962(c) require proof that that the defendant participated in the operation or management of the enterprise, substantially limiting the scope of the statute. *See Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). Collectively, these narrowing constructions lend some clarity to § 1962(c). *But cf. H.J. Inc.*, 492 U.S. at 254-56 (Scalia, J., concurring in judgment) (noting vagueness of "pattern" element).

Whatever the effect of these interpretations on the constitutionality of the *substantive* RICO statute, they do little to cure the vagueness of the RICO *conspiracy* statute in the circumstances of this case. That is because courts have held or suggested that the government need not prove several of the elements of a § 1962(c) offense to obtain a conspiracy conviction under § 1962(d). For example, the Supreme Court has held that the RICO conspiracy statute does not require proof that the defendant committed, or agreed to commit, two predicate acts. *Salinas v. United States*, 522 U.S. 52, 63-66 (1997). The Fifth Circuit has even suggested in dictum that in a conspiracy case the government does not have to prove that *anyone* actually committed predicate acts. *See United States v. Sutherland*, 656 F.2d 1181, 1186 n.4 (5th Cir. 1981). At least one court of appeals has held in the wake of *Salinas* that the government need not prove the existence of an "enterprise" under § 1962(d). *See United States v. Applins*, 637

F.3d 59, 71-77 (2d Cir.), *cert. denied*, 2011 U.S. LEXIS 7176 (Oct. 11, 2011).1 The Fifth Circuit has held as well that the *Reves* "operation or management" requirement does not apply to a conspiracy to violate § 1962(c). *See Posada-Rios*, 158 F.3d at 857-58. According to the Supreme Court, the RICO statute does not even require proof of an overt act. *See Salinas*, 522

U.S. at 63.2

Following *Salinas*, the Fifth Circuit has held that a RICO conspiracy charge has two elements: "(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense." *Posada- Rios*, 158 F.3d at 857. As currently interpreted, therefore, § 1962(d) does not require the government to prove any *conduct* at all; it need only prove an *agreement*. And, according to the court of appeals, the defendant may be found to have conspired even if "the evidence shows that [the defendant] only participated at one level of the conspiracy charged in the indictment, and only played a minor role in the conspiracy." *Id*. at 858. Moreover, "[t]he government does not have to prove that the defendant knew all of the details of the unlawful enterprise or the number or identities of all of the co-conspirators, as long as there is evidence from which the jury could reasonably infer that the defendant knowingly participated in some manner in the overall objective of the conspiracy." *Id*. And the agreement, according to the Fifth Circuit, "may be established solely by circumstantial evidence." *Id.*

The two amorphous elements of a § 1962(d) offense outlined in *Posada-Rios* fail to give "fair warning . . . to the world in language that the common world will understand, of what the

1 *But see United States v. Cauble*, 706 F.2d 1322, 1341 (5th Cir. 1983) ("Our decisions establish that a § 1962(d) conviction requires proof of the enterprise and racketeering elements plus the defendant's objective manifestation of intent to participate, either directly or indirectly, in the affairs of the enterprise.").

2 By citing the cases in this paragraph and reciting their holdings, we do not mean to imply agreement with them. We expect to propose jury instructions that will conflict with some or all of the cited cases and principles.

law intends to do if a certain line is passed," at least under the circumstances of this case. *Aguilar*, 515 U.S. at 600 (quotation omitted). Nor, as applied here, does § 1962(d) "establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quotation omitted). As the indictment in this case demonstrates, the RICO conspiracy statute permits the very thing the vagueness doctrine aims to prevent: "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id*. (quotations omitted; brackets added by *Kolender* Court). Accordingly, the Court should hold § 1962(d) void for vagueness as applied to this case.

# CONCLUSION

For the foregoing reasons, the Court should dismiss Count 1 of the indictment.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I certify that on November 1, 2011, I caused a true and correct copy of the foregoing instrument to be filed using the Court's electronic filing system, as a result of which, copies of this motion will be sent to the U.S. Attorney, and to counsel for the co-defendants.

 /s/ John D. Cline