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RICO—Commerce Clause—The First Circuit Extends Congressional Commerce Power to Encompass Noneconomic Criminal Conduct

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In *United States v. Nascimento,*[1] the First Circuit held that a conviction under the Racketeering Influenced Corrupt Organizations Act ("RICO")[2] is constitutional as applied to noneconomic criminal conduct under a 'substantial effects' Commerce Clause analysis.[3] The First Circuit's decision incorrectly harmonizes recent Commerce Clause jurisprudence; empowers Congress with carte blanche authority to regulate all intrastate, noneconomic activity simply by encompassing the conduct as an offshoot of a larger regulatory scheme; and allows for federal regulation of conduct traditionally reserved to the several states.

The defendant, Jackson Nascimento, was a member of the Stonehurst gang in Boston, Massachusetts, which engaged in a gang war over a two year period with its rival the Wendover gang.[4] The ensuing violence began in 1995 when Nardo Lopes, a member of the Wendover gang, shot and killed Bobby Mendes.[5] At the time of the slaying, Nardo's brother, Augosto Lopes, was incarcerated for an unrelated offense.[6] After his release, Augosto decided to kill any potential witnesses to the slaying who could testify against his brother.[7] To accomplish this, he began associating with members of the Stonehurst gang, and upon learning that the gang "had problems" with Wendover, Augosto incited a gang war hoping to eliminate potential Wendover witnesses.[8] The violence lasted from 1998 to 2000, and many members of both gangs lost their lives.[9]

In September 2004, thirteen suspects were indicted, including Nascimento, with the main charge being a RICO violation because of their

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1. 491 F.3d 25 (1st Cir. 2007).
2. 18 U.S.C. § 1962 (2000).
3. *Nascimento*, 491 F.3d at 42–43.
4. *Id.* at 30.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

membership in Stonehurst.[10] The indictment charged that the primary purpose of the enterprise was "to shoot and kill members, associates, and perceived supporters" of the Wendover gang.[11] The indictment also alleged that the Stonehurst gang had an additional purpose of selling drugs, but the trial court found the government's evidence insufficient as matter of law to prove that the Stonehurst gang—as an entity—sold illegal drugs.[12] The government eventually brought charges against seven individuals in federal district court for racketeering, conspiracy to commit racketeering, conspiracy to commit murder in the aid of racketeering in violation of the Violent Crimes in Aid of Racketeering statute ("VICAR"),[13] a VICAR assault charge, and the use of a firearm in the commission of a violent crime.[14]

At trial, there was evidence that Stonehurst possessed an arsenal of at least nine weapons its members had used to commit murder, and that on one occasion a member traveled to another state to purchase a weapon.[15] The jury found the other three individuals—including Nascimento—guilty of RICO violations and conspiracy to violate RICO violations.[16]

Nascimento appealed, arguing among other points that the prosecution of an enterprise under the RICO statute for noneconomic criminal conduct is unconstitutional.[17] Affirming the trial court, the First Circuit looked to recent Supreme Court Commerce Clause jurisprudence for guidance before concluding that the RICO statute withstands constitutional scrutiny as applied to an enterprise's noneconomic criminal conduct.[18] The majority distinguished the facts of the case from recent Supreme Court decisions in *United States v. Lopez* and *United States v. Morrison*.[19] Relying primarily on the Supreme Court's latest Commerce Clause decision in *Gonzales v. Raich*, the court reasoned that as-applied challenges to a general regulatory statute will not prevail as long as the statute "itself deals rationally with a class of activity that has a substantial relationship to interstate or foreign commerce."[20]

The *Nascimento* majority framed the issue as whether "the RICO statute, as applied to an enterprise engaged exclusively in noneconomic criminal activity, is unconstitutional."[21] To be found guilty of a RICO violation, the prosecution must establish that: "(1) an enterprise existed; (2) the enterprise participated in or its activities affected interstate com-

10. *Id.*
11. *Id.*
12. *Id.* at n.1 ("[T]he evidence at trial indicated that while individual Stonehurst members had engaged in drug trafficking, Stonehurst itself had not.").
13. 18 U.S.C. § 1959 (2000).
14. *Id.* at 31.
15. *Id.* at 44–45.
16. *Id.* at 31.
17. *Id.* at 40.
18. *See id.* at 40–43.
19. *Id.* (discussing United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995)).
20. *Id.* at 41–43.
21. *Id.* at 40.

merce; (3) the defendant was employed by or was associated with the enterprise; (4) the defendant conducted or participated in the conduct of the enterprise; (5) through a pattern of racketeering activity."[22]

The court based its holding on several recent Supreme Court cases articulating congressional authority to legislate under the Commerce Clause.[23] In *Lopez*, the Supreme Court found that a federal statute criminalizing the possession of a firearm within 1000 feet of any school was unconstitutional.[24] The Court held that Congress can only enact laws under its commerce power to regulate: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities having a substantial effect on interstate commerce.[25] In *Morrison*, the Court considered whether congressional authority to regulate gender-based crimes via the Violence Against Women Act ("VAWA") passed constitutional muster.[26] Rejecting the argument that gender-based crimes were economic in nature, the Court noted that in all previous cases, where it allowed for the aggregation of conduct to establish a substantial effect on interstate commerce, the conduct was "economic" in nature.[27] The Court further reasoned that "the suppression of violent crime" is a power traditionally reserved to the states, rejecting the argument that "Congress may [not] regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[28] In *Raich*, the Supreme Court held that the classification of marijuana as a controlled substance by the Controlled Substances Act ["CSA"] was constitutional as applied to the noncommercial cultivation of marijuana for medicinal purposes.[29] Distinguishing *Lopez*, the Court reasoned that the classification of marijuana as a controlled substance was "merely one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity was regulated.'"[30] Moreover, the Court drew parallels between *Raich* and its previous holding in *Wickard v. Filburn*, finding that medicinal marijuana was a fungible commodity and therefore could be aggregated to establish a substantial effect on interstate commerce.[31]

Although the *Nascimento* majority referenced *Morrison* and *Lopez*, it relied almost exclusively on *Raich* to decide the case, finding it to be "more directly on point" than the other Supreme Court cases because they were facial—rather than as-applied—challenges.[32] The majority ac-

22. *Id.* at 31 (citing United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002)).
23. *See id.* at 40–43.
24. *Lopez*, 514 U.S. at 551.
25. *Id.* at 558–59.
26. United States v. Morrison, 529 U.S. 598, 607 (2000).
27. *Id.* at 613.
28. *Id.* at 617–18.
29. Gonzales v. Raich, 545 U.S. 1, 9 (2005).
30. *Id.* at 24–25 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).
31. *Id.* at 18-19; *see also* Wickard v. Filburn, 317 U.S. 111, 115, 125–28 (1942).
32. United States v. Nascimento, 491 F.3d 25, 42 (1st Cir. 2007).

knowledged that *Raich* could be distinguished from the present facts because it dealt with the regulation of a fungible commodity, but nevertheless disregarded the distinction as insignificant.[33] Instead, the court focused on the overall class of conduct sought to be regulated, stating that a statute withstands constitutional scrutiny as long as the "statute itself deals rationally with a class of activity that has a substantial relationship to interstate or foreign commerce."[34] Examining the majority and concurrence of *Raich*, the court reasoned that the overall class of conduct—economic racketeering activities—should not be dissected to exclude noneconomic racketeering acts.[35] Further, the majority reasoned that because the class of activities regulated by RICO was economic in nature, judicial scrutiny should extend no further than whether Congress had a rational basis for determining that noneconomic, intrastate murder had a substantial effect on interstate commerce.[36] In reaching its conclusion, the majority found that Congress did have a rational basis because violent crime often goes hand-in-hand with racketeering.[37]

In his concurring opinion, Justice Boudin agreed with the majority's decision that RICO was constitutional as applied to the facts of the case, but preferred to base his decision on the nexus to commerce.[38] Instead of classifying the activities of the enterprise as noneconomic, Justice Boudin classified Stonehurst's conduct as "the use of guns to kill people as a part of a criminal enterprise . . . ."[39] This conduct thus established a nexus to commerce that he felt was "at least as strong" as the nexus present in felon-in-possession statutes, stating that congressional authority to regulate a gun that had once been in commerce surely translates into authority to "regulate an enterprise that uses such guns to kill."[40] By reaching this decision, Justice Boudin avoided any application of *Raich*, preferring what he claimed to be an "easier" route to upholding the constitutionality of RICO as applied to the facts of *Nascimento*.[41]

The *Nascimento* decision is based on an unremarkable synthesis of *Raich*, *Morrison*, and *Lopez*, giving little regard to the nuances that are pervasive in Commerce Clause analysis. The opinion calls into question the rational coexistence of recent Supreme Court Commerce Clause cases, and, if upheld, will effectively render *Morrison* and *Lopez* empty vessels. Moreover, the prohibition of as-applied challenges to RICO does not further the underlying purpose of the overall regulatory statute, as the conduct in question was not within the purview of congressional intent for the statute. Furthermore, the majority's opinion disregards

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 43.
38. *Id.* at 51–52 (Boudin, J., concurring).
39. *Id.* at 52.
40. *Id.*
41. *Id.* at 53.

federalism by empowering Congress to infringe upon police powers traditionally reserved for the states.

In essence, the *Nascimento* majority incorrectly used *Raich* as a sword to break down the barriers established by *Morrison* and *Lopez*, effectively turning commerce analysis on its head. The majority covertly accomplished this by its matter-of-fact statement that *Raich* prohibits as-applied constitutional challenges when the provision in question is part of a larger regulatory scheme.[42] In reality, the majority failed to assess the significance of the ruling in *Raich* that an as-applied challenge will fail if the individual application is *essential to the enforcement of the overall regulatory scheme.*[43] In *Raich*, the fungible nature of medicinal marijuana played a crucial role in the Court's decision because it increased the likelihood that the medicinal marijuana would make its way into the illegal drug market, hindering the government's ability to effectively enforce the CSA.[44] In contrast, the use of RICO to prosecute an enterprise's noneconomic criminal conduct does not help the government curtail traditional racketeering acts because noneconomic racketeering and traditional racketeering are fundamentally different—one does not increase the "supply" or "demand" of the other.

Additionally, the court blatantly ignored the detail with which the Supreme Court harmonized *Raich* with existing Commerce Clause jurisprudence. Specifically, the Court's classification of medicinal marijuana as a fungible commodity affecting the supply and demand of the illegal drug market enabled the Court to preserve its statement in *Morrison* that aggregation had never been allowed to establish a substantial effect on commerce where the conduct in question was noneconomic.[45] However, the Fifth Circuit's refusal to recognize the significance of this distinction creates discord with previous Supreme Court jurisprudence, because it effectively allows for the regulation of noneconomic conduct.[46] In addition, no language in *Raich* specifically overruled any previous Supreme Court holdings.[47] Because this principle has been consistent throughout the history of the Court and was the foundation of its recent decisions in *Morrison* and *Lopez*, it is unlikely the Court intended *Raich* to quietly reverse precedent.

Further compounding the First Circuit's illogical synthesis of existing Supreme Court jurisprudence is the fact that the application of RICO to noneconomic criminal conduct does not further RICO's underlying purpose. The legislative history of RICO clearly establishes that the congressional intent behind its enactment was to enable the government to counteract the economic harm of organized crime and the assimilation of

42. *Id.* at 41 (majority opinion).
43. *See* Gonzales v. Raich, 545 U.S. 1, 26 (2005).
44. *Id.* at 28.
45. *See* United States v. Morrison, 529 U.S. 598, 613 (2000).
46. *Id.*
47. *See Raich*, 545 U.S. at 15–19.

such crime into legitimate businesses.[48] In this respect, *Nascimento* is markedly different from *Raich*, where the underlying purpose of the CSA was to regulate the flow of illegal drugs—which encompassed both medicinal and illicit marijuana due to their fungible nature.[49] As such, it was entirely logical for the Court to reason that Congress had a rational basis for regulating the growth of medicinal marijuana. In contrast, it is highly illogical to reason that Congress had a rational basis for seeking to regulate noneconomic, intrastate criminal conduct where the underlying purpose of RICO itself seeks to regulate only economic racketeering acts. In reality, the decision to use RICO to prosecute noneconomic criminal conduct reeks more of prosecutorial abuse than a congressionally mandated rational basis.

Furthermore, the First Circuit's decision to apply RICO to noneconomic criminal conduct offends notions of federalism and, if followed, will create a slippery slope broadening congressional reach to encompass all police powers traditionally reserved to the several states. The Supreme Court has held that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[50] Finding VAWA unconstitutional, *Morrison* rejected the argument that "Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[51] However, this is exactly the activity the *Nascimento* majority allowed congressional commerce power to reach.[52] The clarity of the holdings in *Morrison* and *Cohens v. Virginia* suggest the Supreme Court did not intend this structural divide to be demolished by an obscure interpretation of one of its Commerce Clause decisions; however, *Nascimento*'s interpretation of *Raich* accomplishes this very feat by extending congressional reach and subjecting *Morrison*, *Lopez*, and *Cohens* to the whim of Congress's enigmatic "rational basis."

In conclusion, the First Circuit erred in finding that the application of RICO to noneconomic criminal activity withstands constitutional scrutiny. The majority should have been more cautious in treating *Raich* as a per se prohibition of as-applied constitutional challenges where the provision in question is part of a larger regulatory scheme. Moreover, the majority should have decided the case in accordance with existing Supreme Court jurisprudence by finding that the noneconomic nature of the conduct in question could not be aggregated to establish a substantial effect

48. Russello v. United States, 464 U.S. 16, 26, 28 (1983).

49. *See Raich*, 545 U.S. at 18–19.

50. *Morrison*, 529 U.S. at 618; *see, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power . . . ."); Cohens v. Virginia, 19 U.S. 264, 426 (1821) ("Congress has . . . no general right to punish murder committed within any of the States.").

51. *Morrison*, 529 U.S. at 617.

52. *See id.* at 618 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime . . . .").

on commerce, and that the Constitution prohibits congressional regulation of general police powers traditionally reserved to the states. The majority should have then looked to the underlying purpose of RICO and determined that Congress could not have had a rational basis for including noneconomic criminal conduct under the scope of RICO. If allowed to stand, the majority's decision will greatly expand not only congressional reach, but will also give prosecutors unbridled discretion to pursue a broad assortment of criminal activities under RICO. Therefore, the case should be reversed according to already established Commerce Clause case law.