No. 17-1607

In the Supreme Court of the United States

KENNETH E. FAIRLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found that the district court did not abuse its discretion in admitting out-of-court statements as nonhearsay under Federal Rule of Evidence 801(d)(2)(E), on the ground that they were made by petitioner and his coconspirator during and in furtherance of their scheme to defraud a federal housing program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 880 F.3d 198. The order of the district court is not published in the Federal Supplement but is available at 2016 WL 6407423.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2018. A petition for rehearing was denied on February 26, 2018 (Pet. App. 45). The petition for a writ of certiorari was filed on May 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on one count of conspiracy to commit theft of government funds, in violation of 18 U.S.C. 371, and two counts of theft of government funds, in violation of

18 U.S.C. 641. Judgment 1. Petitioner was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3. The court of appeals affirmed petitioner's conviction on the conspiracy count, vacated the convictions on the two substantive counts, and remanded for resentencing. Pet. App. 1-44.

1. Petitioner's prosecution stemmed from his agreement with his friend, Arthur Fletcher, to submit inflated bills for construction work allegedly performed by their businesses on behalf of a federally funded affordable-housing program. Pet. App. 2.

a. The U.S. Department of Housing and Urban Development (HUD) operates the HOME Investment Partnerships Program (HOME program), the goal of which is to expand the supply of "decent, safe, sanitary, and affordable housing" for low-income Americans. 42 U.S.C. 12741. Through the HOME program, HUD makes funds available to "participating jurisdictions," including cities and other local governments, to expend on eligible affordable-housing projects. 42 U.S.C. 12742; see 42 U.S.C. 12746. These participating jurisdictions then may certify non-profit Community Housing Development Organizations (CHDOs), which are "eligible to receive HUD grants for construction and renovation of affordable housing units." Pet. App. 3.

Petitioner served as the executive director of Pinebelt Community Services, Inc. (Pinebelt). Pet. App. 3. In March 2010, the City of Hattiesburg, Mississippi (the City)—a participating jurisdiction in the HOME program—certified Pinebelt as a CHDO. *Ibid.* In August 2010, the City and Pinebelt entered into a contract in which the City promised to pay Pinebelt up to $100,000 in HOME program funds, plus up to approximately $18,600 in operating funds, in exchange for Pinebelt's

work on affordable-housing development activities. *Ibid.* As amended, the parties' contract provided that Pinebelt would renovate two single-family homes: the "South Street and 5th Street homes." *Ibid.*

In July and August 2011, Pinebelt submitted to the City two "request[s] for funds" totaling $98,000. Pet. App. 3 (brackets in original). Petitioner signed these requests on behalf of Pinebelt, which "ostensibly sought reimbursement for 'services rendered and allowable costs/expenditures' associated with rehabilitating the South Street and 5th Street homes." *Ibid.* Pinebelt also submitted documents stating that it had chosen Interurban Housing and Development LLC (Interurban) as a construction contractor, purportedly pursuant to a competitive bidding process. *Id.* at 4. In seeking reimbursement, Pinebelt represented that Interurban had billed Pinebelt $98,000 for work performed by Interurban at the two homes under renovation. *Ibid.* The City then paid Pinebelt the full $98,000 that it had requested. *Ibid.*

As a subsequent investigation revealed, however, Pinebelt's submissions were fraudulent. Interurban—a company owned by petitioner's "old friend," Fletcher—in fact had done no work on the properties at all. Pet. App. 4. Fletcher had merely allowed petitioner "to use Interurban's name to qualify for HUD grants," *ibid.*, and had also caused a charity he controlled to make certain "seed money" available to petitioner, *id.* at 5. Subsequently, "after receiving the $98,000 from the [C]ity," petitioner "sent $72,000 to Interurban." *Id.* at 4.

Although Interurban did no work on the properties, petitioner did hire other laborers. As an Internal Revenue Service agent later testified, however, Pinebelt "spent only approximately $38,000 renovating the two

properties," notwithstanding that it had sought and obtained reimbursement of $98,000. Pet. App. 5. The government also presented evidence that the work done was "shoddy" and that "the properties did not pass inspection until years after Pinebelt was paid." *Ibid.*

b. A federal grand jury returned an indictment charging petitioner with, *inter alia*, one count of conspiracy to commit theft of government funds, in violation of 18 U.S.C. 371 and 641. Indictment 1-4. The indictment alleged that the criminal conspiracy between petitioner and Fletcher began around August 2010 and "continu[ed] through on or about December 12, 2012." *Id.* at 1. The indictment alleged six overt acts, occurring between May 2011 and August 2011, taken in furtherance of that conspiracy. *Id.* at 4. The grand jury also charged petitioner with two substantive counts of theft of government funds, in violation of 18 U.S.C. 641 and 2. Indictment 4-5.[1]

At trial, the government presented evidence that petitioner conspired with Fletcher to defraud the government by obtaining contracts for affordable-housing projects, submitting inflated construction bills, and then splitting the proceeds. Among other evidence, the government introduced recordings of phone calls between

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[1] Petitioner was also charged with one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h) and 1957, and two counts of money laundering, in violation of 18 U.S.C. 1957 and 2, see Indictment 5-6, but the government chose not to proceed to trial on those counts. The indictment had additionally charged Fletcher with conspiracy to commit theft of government funds, conspiracy to commit money laundering, and one count of money laundering, see Indictment 1-6, but those charges were dropped shortly before trial, when Fletcher pleaded guilty to a related charge in a separate proceeding, see Pet. App. 4 n.3.

petitioner and Fletcher that took place in early December 2012. During the calls, petitioner and Fletcher discussed "many things related to the conspiracy," including "efforts to file documents to adequately document alleged work done on the project, including allowing [petitioner] to sign Fletcher's name," "attempts by Fletcher to be repaid 'seed money' put into the project," and "other general topics of conversation, most of which surround the conspiracy." 10/28/16 Order (Order) 2. The district court admitted the recordings over petitioner's objection, determining that the conversations were admissible as nonhearsay under Federal Rule of Evidence 801(d)(2)(E). See Pet. App. 27-28. That Rule provides that "[a] statement * * * is not hearsay" if it is "offered against an opposing party" and "was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

c. The jury found petitioner guilty of conspiracy to commit theft of government funds, in violation of 18 U.S.C. 371, and two counts of theft of government funds, in violation of 18 U.S.C. 641. Pet. App. 1. Petitioner moved for a new trial, arguing, *inter alia*, that the district court had erred in admitting the recorded conversations into evidence. See Order 1-4. Petitioner contended that the recorded statements "were not made in the course of the conspiracy, nor in * * * furtherance of the conspiracy," because the conversations occurred after petitioner had been paid by the City for the South Street and 5th Street projects and because they reflected the existence of some disagreements between petitioner and Fletcher. Order 2.

The district court denied petitioner's motion. Order 1-4. As relevant here, the court rejected petitioner's argument that the conspiracy had ended by the time of the

recorded conversations. The court noted that "[t]he indictment alleges that the conspiracy began in August of 2010 and continued through on or about December 12, 2012," and "[t]he recordings were made during th[at] alleged period." Order 2. The court observed that the recordings confirmed that petitioner and Fletcher remained "involved in a scheme to allow [petitioner] to submit inflated bills for reimbursement" and then to "pocket the difference [between] the bills and the actual costs" incurred by petitioner. Order 3. The court further explained that "statements are admissible even if they evidence an internal conflict between the defendant and other members of the conspiracy," such as the existence of efforts to "'collect [an] intra-conspiracy debt.'" Order 2 (quoting *United States* v. *Graham*, 711 F.3d 445, 454 (4th Cir.), cert. denied, 571 U.S. 963 (2013)).

2. The court of appeals affirmed in part, vacated and remanded in part, and remanded for resentencing. Pet. App. 1-37.[2]

As relevant here, the court of appeals affirmed petitioner's conviction for conspiracy to commit theft of government funds. Petitioner challenged his conspiracy conviction principally by arguing that the district court had erred in admitting the recorded conversations and that the admission of that evidence had deprived him of a fair trial. Petitioner argued that the government had "failed to establish that the [recorded] statement[s] w[ere] made during the course of the conspiracy or in

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[2] Over Judge Costa's dissent, the panel majority vacated petitioner's convictions on the two counts of theft of government funds after finding plain error in the description of elements of the offense in the indictment, jury instructions, and verdict form. Pet. App. 7-25; see *id.* at 38-44 (Costa, J., dissenting in part). Those rulings are not at issue here.

furtherance of it" because the conversations occurred after the conspiracy had purportedly ended and because petitioner and Fletcher were assertedly "acting as adversaries" in the conversations. Pet. App. 28.

The court of appeals unanimously rejected petitioner's evidentiary challenge. Pet. App. 27-31. The court observed that petitioner's argument that the conspiracy ended in 2011 rested on an assumption that the "conspiracy" was necessarily coterminous with the "overt acts charged in the indictment," which had occurred between May and August 2011, *id.* at 29. The court noted that, under long-established circuit precedent, "the evidentiary rule of conspiracy is founded on concepts of agency law' and therefore 'differs from conspiracy as a crime.'" *Ibid.* (quoting *United States* v. *El-Mezain*, 664 F.3d 467, 503 (5th Cir. 2011), cert. denied, 568 U.S. 977 (2012)). The court further noted that "a conspiracy for the purpose of hearsay exclusion may be shown 'merely by engaging in a joint plan that was non-criminal in nature.'" *Ibid.* (brackets, citation, and ellipsis omitted).

Upon considering the trial record, the court of appeals found that the "statements, combined with the government's ample evidence of the existence of a conspiracy between [petitioner] and Fletcher, show that the conspiracy remained in effect at the time the conversations were recorded" in December 2012. Pet. App. 31. As the court explained, the "recorded conversations themselves" not only "confirm[ed] the continuing nature of the venture" as of December 2012, but they also reflected petitioner's "plans to continue working together in the future." *Id.* at 29-30.

The court of appeals also rejected petitioner's argument that the recorded statements were not made in fur-

therance of the conspiracy because they reflected the existence of some disagreement between petitioner and Fletcher. The court explained that "statements [made] in order to encourage loyalty and obedience among the conspirators" are readily understood to further the conspiracy. Pet. App. 31 (quoting *United States* v. *Flores*, 63 F.3d 1342, 1377 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996)) (brackets in original). The court accordingly determined that "Fletcher's attempt to enforce his understanding of his bargain with" petitioner—that is, his demand for repayment of money given to petitioner to help him win government-funded affordable-housing projects—was therefore "made in furtherance of the conspiracy." *Ibid.*; see *id.* at 28.

ARGUMENT

Petitioner contends (Pet. 8-25) that this Court should grant review to decide whether Federal Rule of Evidence 801(d)(2)(E) allows the admission of conspiratorial statements made in furtherance of non-criminal joint ventures. But that question is not squarely presented on the facts of this case, which involves a criminal conspiracy. The question also would not warrant review in any event, because the court of appeals' statements about the application of Rule 801(d)(2)(E) to non-criminal joint ventures are correct and consistent with the decisions of every court of appeals to have specifically addressed the question. Furthermore, this case would be an unsuitable vehicle for the addressing the question for the additional reason that the challenged statements are admissible on alternative grounds. The petition should be denied.

1. Under the Federal Rules of Evidence, hearsay is "not admissible" unless authorized by statute or rule. Fed. R. Evid. 802. The Rules generally define "hearsay" to mean "a statement that: (1) the declarant does not

make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). But Rule 801(d) also sets forth five categories of statements that are, as a definitional matter, "not hearsay" and therefore not rendered inadmissible by Rule 802. Fed. R. Evid. 801(d).

As relevant here, a statement is "not hearsay" if it is "offered against an opposing party" and "was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). "Before admitting a co-conspirator's statement over an objection that it does not qualify under [the Rule], a court must be satisfied that * * * [t]here [is] evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.'" *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987) (quoting Fed. R. Evid. 801(d)(2)(E) (1987)). That determination, which must be made by a "preponderance of the evidence," *id.* at 176, may include consideration of the content of the proffered statements themselves, *id.* at 181. A statement is "in furtherance of the conspiracy" if it in any way "advance[s] the ultimate objects of the conspiracy," *United States* v. *Ebron*, 683 F.3d 105, 135 (5th Cir. 2012), cert. denied, 571 U.S. 989 (2013), including by seeking "the payment of money for services rendered in accomplishing the illegal goals of [the] conspiracy," *United States* v. *Grant*, 683 F.3d 639, 648 (5th Cir. 2012) (citation omitted); see generally Mark S. Brown et al., *Weinstein's Federal Evidence* § 801.34[5] (2d ed. 2017).

The evidentiary concept of "conspiracy" as used in Rule 801(d)(2)(E) differs from the concept of "conspiracy" as used in substantive criminal law. Rule 801(d)(2)(E),

which is "based on concepts of agency and partnership law," "'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.'" *United States* v. *Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006) (quoting *United States* v. *Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027, and 465 U.S. 1034 (1984)). While "[s]ubstantive conspiracy laws create criminal penalties for coordinated wrongdoing[,] Rule 801(d)(2)(E), on the other hand, addresses teamwork more generally." 30B Charles Alan Wright & Jeffrey Bellin, *Federal Practice and Procedure* § 6778, at 210 (2017) (Wright). As the Senate Advisory Committee Note explains, the Rule thus "carr[ies] forward the universally accepted doctrine that a *joint venturer* is considered as a coconspirator for the purpose of this [R]ule even though no conspiracy has been charged." *Weisz*, 718 F.2d at 433 (quoting S. Rep. No. 1277, 93d Cong., 2d Sess. 26 (1974)) (second set of brackets in original). Accordingly, "admissibility under Rule 801(d)(2)(E) does not turn on the criminal nature of the endeavor." *United States* v. *El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011), cert. denied, 568 U.S. 977 (2012).

Every court of appeals to have addressed the issue has determined that the term "conspiracy" in Rule 801(d)(2)(E) includes non-criminal joint undertakings.[3]

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[3] Leading treatises are in agreement. See, *e.g.*, 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:59, at 497-498 & n.4 (4th ed. 2013) (noting that "[t]he exception can apply even if the proponent does not show that the venture is unlawful"); Wright § 6778, at 210 ("For purposes of Rule 801(d)(2)(E), the goal of the identified 'conspiracy' need not be criminal or even illicit.") (footnote omitted).

See, *e.g.*, *United States* v. *Russo*, 302 F.3d 37, 45 (2d Cir. 2002) ("[T]he objective of the joint venture need not be the crime charged in the indictment * * * . Indeed, the objective of the joint venture that justifies deeming the speaker as the agent of the defendant need not be criminal at all."), cert. denied, 537 U.S. 1112 (2003); *Government of the Virgin Islands* v. *Brathwaite*, 782 F.2d 399, 403 (3d Cir. 1986) (the proponent of evidence under Rule 801(d)(2)(E) "need not show that the combination of individuals including the defendant * * * was 'criminal or otherwise unlawful'") (citations omitted); *United States* v. *Nelson*, 732 F.3d 504, 516 (5th Cir. 2013) ("A conspiracy may be shown 'merely by engaging in a joint plan[] . . . that was non-criminal in nature.'") (quoting *El-Mezain*, 664 F.3d at 502), cert. denied, 134 S. Ct. 2682 (2014)) (brackets in original); *United States* v. *Kelley*, 864 F.2d 569, 573 (7th Cir.) ("Rule 801(d)(2)(E) applies not only to [criminal] conspiracies but also to joint ventures" and "a charge of criminal conspiracy is not required to invoke the evidentiary rule."), cert. denied, 493 U.S. 811 (1989); *United States* v. *Layton*, 855 F.2d 1388, 1400 (9th Cir. 1988) ("Rule 801(d)(2)(E) applies to statements made during the course and in furtherance of any enterprise, whether legal or illegal, in which the declarant and the defendant jointly participated."), cert. denied, 489 U.S. 1046 (1989), overruled on other grounds by *Guam* v. *Ignacio*, 10 F.3d 608 (9th Cir. 1993); *United States* v. *Brockenborrugh*, 575 F.3d 726, 735 (D.C. Cir. 2009) ("[D]espite its use of the word 'conspiracy,' Rule 801(d)(2)(E) allows for admission of statements by individuals acting in furtherance of a lawful joint enterprise.") (citing *Gewin*, 471 F.3d at 201-202, and *Weisz*, 718 F.2d at 433); see also *United States* v. *Porter*, 933 F.2d 1010, 1991 WL 85290

(6th Cir.) (Tbl.) (per curiam), cert. denied, 502 U.S. 895 (1991).

2. a. Petitioner urges this Court to grant review to decide whether the term "conspiracy," as used in Rule 801(d)(2)(E), includes joint ventures undertaken for a non-criminal purpose. That question, however, is not squarely implicated here.

This case involves petitioner's prosecution for, *inter alia*, his participation in a criminal conspiracy to commit theft of government funds. At trial, the government sought admission of the challenged recordings on the ground that they contained coconspirator statements made during and in furtherance of that same criminal conspiracy. Although petitioner has argued that "whatever conspiracy existed * * * ended the year before, in 2011," Pet. C.A. Br. 37, the district court found that (as the indictment alleged) the criminal conspiracy in fact continued through December 2012. See Order 2; Indictment 1. To the extent petitioner contends that the court committed clear error in making that finding, cf. Pet. 6-7; Pet. C.A. Br. 37-41, that factbound challenge does not warrant this Court's review. See Sup. Ct. R. 10.

Thus, even if petitioner were correct that Rule 801(d)(2)(E) is limited to *criminal* combinations, the statements at issue in this case would still be admissible under that Rule. As the district court correctly recognized, see Order 2-3, the statements were made during and in furtherance of a criminal conspiracy—indeed, the very conspiracy for which petitioner was criminally charged. See Gov't C.A. Br. 34 ("The proof amply showed that Fletcher was involved in an ongoing conspiracy to promote [petitioner's] obtaining HUD funding for a total of four projects."); *id.* at 34-37 (discussing evidence supporting conclusion that "[t]he conspiracy

was still ongoing at the time of the [recorded] calls," *id.* at 37); cf. Pet. C.A. Br. 34 (acknowledging that the recordings at issue concerned "precisely the matter that was the subject of the prosecution: the rehabilitation projects at 202 South Street and 127 E. 5th Street"); Pet. C.A. Reply Br. 12 (describing the recordings as "the heart of the Government's evidence in this case").

The court of appeals did not disturb the district court's determination on that point or otherwise tie the validity of petitioner's conviction to the admissibility under Rule 801(d)(2)(E) of statements in furtherance of a venture that does not itself directly violate the criminal laws. Although the court of appeals explained that the Rule does, in fact, allow such statements to be admitted, see Pet. App. 29, its analysis of the specific record here is consistent with the district court's finding of a continuing criminal conspiracy at the time the relevant statements were made, *id.* at 30-31. The court of appeals determined that the "statements, combined with the government's ample evidence of the existence of a conspiracy between [petitioner] and Fletcher, show that the conspiracy remained in effect at the time the conversations were recorded." *Id.* at 31. Given that the statements included a reference to the 5th Street project that was the subject of the criminal charges, see *id.* at 30, that analysis indicates an ongoing *criminal* conspiracy. The court's judgment was accordingly correct regardless of the resolution of the question presented.

b. In any event, the question raised by petitioner would not warrant this Court's review even were it squarely presented. The court of appeals' statement that "a conspiracy for the purpose of the hearsay exclusion may be shown 'merely by engaging in a joint plan

that was non-criminal in nature,'" Pet. App. 29 (brackets, ellipsis, and citation omitted), is both correct and consistent with both the decisions of this Court and with every federal court of appeals to have specifically addressed the question. See pp. 10-12, *supra*.

Petitioner asserts (Pet. 9-12) that the court of appeals' recitation of the law conflicts with this Court's decision in *Bourjaily*, *supra*. As reflected in the very passages that petitioner has excerpted (Pet. 9-10), however, *Bourjaily* in no way addressed the question whether a "conspiracy" requires the existence of a criminal objective for purposes of Rule 801(d)(2)(E). Similarly, the other decisions cited by petitioner (Pet. 10-16)—*Giles* v. *California*, 554 U.S. 553 (2008), *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *United States* v. *Inadi*, 475 U.S. 387 (1986)—did not concern interpretation of Rule 801(d)(2)(E) at all, but instead addressed the distinct question whether the admission of out-of-court coconspirator testimony would violate the Confrontation Clause. See, *e.g.*, *Giles*, 554 U.S. at 374 n.6 (explaining that coconspirator statements generally "d[o] not violate the Confrontation Clause" because such statements are not "testimonial" when made).

c. Petitioner's contention (Pet. 16-21) that the court of appeals' recitation of the law conflicts with decisions of other courts of appeals is similarly misplaced. As noted above, all of the courts of appeals that have specifically addressed the question have concluded, as the court of appeals did below, that Rule 801(d)(2)(E) applies in the context of lawful joint ventures or agreements to pursue lawful objectives. See pp. 10-12, *supra*.

Petitioner maintains that "[t]he First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits all require that the association be a *criminal* one for the

hearsay exception to be available." Pet. 20-21 (footnotes omitted). But none of the cases cited by petitioner (Pet. 20-21 nn.25-32) actually addressed the question whether Rule 801(d)(2)(E) applies to non-criminal combinations. To the extent that some of the cited cases make reference to, *e.g.*, the existence of an "illicit association," *United States* v. *Broome*, 732 F.2d 363, 364 n.1 (4th Cir.), cert. denied, 469 U.S. 855 (1984), a "joint criminal venture," *United States* v. *Craig*, 522 F.2d 29, 31 (6th Cir. 1975), or the "unlawful ends of [a] conspiracy," *United States* v. *Dickerson*, 248 F.3d 1036, 1050 (11th Cir. 2001), cert. denied, 536 U.S. 957 (2002), those statements simply reflect that the facts of those cases involved allegedly criminal combinations.[4] Indeed, two of the circuits that petitioner mistakenly claims (Pet.

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[4] See *Broome*, 732 F.2d at 364 & n.1 (rejecting appellant's argument that government had failed to prove that appellant "kn[ew]" about a conspiracy to "transport and sell stolen motor vehicles in interstate commerce"); *Craig*, 522 F.2d at 31 (finding lack of "sufficient evidence from which the jury could have found that a conspiracy or joint criminal venture existed between Patterson and Craig" to possess illegal drugs, because there was no evidence of a "proof of [an] agreement among the parties"); *Dickerson*, 248 F.3d at 1050 (affirming admission of written entries in telephone book under Rule 801(d)(2)(E) because the entries "facilitat[ed] communication among co-conspirators to engage in the unlawful ends of the conspiracy, for example, the scheduling of cocaine deliveries").

The almost two dozen other cases cited by petitioner are similar. See, *e.g.*, *United States* v. *Morrow*, 39 F.3d 1228, 1234-1236 (1st Cir. 1994) (conspiracy to commit automobile insurance fraud), cert. denied, 514 U.S. 1010, and 514 U.S. 1045 (1995); *United States* v. *Meggers*, 912 F.2d 246, 248-250 (8th Cir. 1990) (conspiracy to distribute and possess with intent to distribute marijuana and cocaine); *United States* v. *Jannotti*, 729 F.2d 213, 218-219 (3d Cir.) (conspiracy to interfere with interstate commerce and conduct a racketeering enterprise), cert. denied, 469 U.S. 880 (1984).

20-21 & nn. 26, 29) as being in conflict with the decision below have expressly recognized that Rule 801(d)(2)(E) is not limited in the manner petitioner asserts. See *Smith* v. *Bray*, 681 F.3d 888, 904-905 (7th Cir. 2012) (collecting Seventh Circuit cases), overruled on other grounds by *Ortiz* v. *Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016); *Brathwaite*, 782 F.2d at 403 & n.1 (3d Cir.).[5] Accordingly, no disagreement among the courts of appeals warranting this Court's intervention exists.

3. In any event, this case would be an unsuitable vehicle for addressing the proper interpretation of Rule 801(d)(2)(E) because the conversations at issue in this case would still be admissible on other grounds. As the government argued below, see Gov't C.A. Br. 38-41, petitioner's own statements during the recorded calls are admissible as the admission of a party opponent. See Fed. R. Evid. 801(d)(2)(A) (providing that a statement is "not hearsay" if it is "offered against an opposing party" and "was made by the party in an individual or representative capacity"). In turn, Fletcher's statements to petitioner during those conversations are derivatively admissible because they "were reciprocal and integrated utterances and * * * put [petitioner's] own statements in context." *United States* v. *Flores*, 63 F.3d 1342, 1358-1359 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996); see also, *e.g.*, *United States* v. *Davis*, 890 F.2d 1373, 1380 (7th Cir. 1989) (collecting cases "embrac[ing] the evidentiary rule that the entirety of

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[5] Even one of the cases cited by petitioner (Pet. 21 n.29), *United States* v. *Coe*, 718 F.2d 830 (7th Cir. 1983), expressly recognizes that Rule 801(d)(2)(E) applies to non-criminal "joint venture[s]." *Id.* at 835; see *id.* at 836 n.3 ("In a civil case, there may be no criminal conspiracy or unlawful actions involved, yet the coconspirator or 'joint venture' hearsay exception could be invoked.").

tape recorded conversations between a defendant and a third party informant are admissible where the defendant's statements are offered as verbal acts or admissions and the third party's statements are necessary to place the defendant's statements in a proper context"), cert. denied, 493 U.S. 1092 (1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2018