

**Constitutional Law**—First Circuit Requires Minimal Commercial Effect for RICO Violations Based on Local Noneconomic Activity—*United States v. Nascimento*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007)

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO), allowing federal prosecutors leeway in bringing criminal charges against associates of organized crime enterprises.<sup>1</sup> To secure a RICO conviction, the government must prove five elements, one of which is that the enterprise's activities affect interstate commerce.<sup>2</sup> In *United States v. Nascimento*,<sup>3</sup> the Court of Appeals for the First Circuit considered whether to uphold the appellants' RICO convictions where the appellants were members of a local gang whose purpose was to assault and murder rival gang members.<sup>4</sup> The First Circuit upheld the convictions and, purposefully splitting from the Sixth Circuit, concluded that RICO requires only a minimal effect on interstate commerce for local, noneconomic crimes.<sup>5</sup>

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1. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (2006) (establishing text of statute); see also G. Robert Blakey, *Law and the Continuing Enterprise: Perspectives on RICO*, 65 NOTRE DAME L. REV. 873, 874 (1990) (recounting congressional reasoning behind enactment); Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1039 (1990) (suggesting RICO designed to facilitate prosecution of mob members); *infra* note 25 and accompanying text (discussing RICO's wide latitude). RICO also gives crime victims an opportunity to bring civil charges against enterprises in an attempt to discourage organized crime. See Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 737-38 (1990) (explaining RICO's civil damages provision).

2. See 18 U.S.C. § 1962(c) (requiring enterprise affect interstate commerce); see also *United States v. Marino*, 277 F.3d 11, 33 (1st Cir. 2002) (listing five elements required to convict defendant under RICO). The government must prove: an enterprise existed; its activities affected interstate commerce; the defendant associated with the enterprise; the defendant participated in the activities; and did so through a pattern of racketeering. *United States v. Marino*, 277 F.3d 11, 33 (1st Cir. 2002). See generally 77 C.J.S. RICO § 26 (2007) (describing minimal nexus required for interstate commerce element).

3. 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007).

4. *Id.* at 29-30 (stating pivotal issue in case). The indictment stated that the Stonehurst gang's main purpose was "to shoot and kill members, associates, and perceived supporters of a rival gang in Boston known as Wendover." *Id.* at 30. In addition, the court decided Stonehurst had enough structure to constitute an enterprise. *Id.* at 33. The court also held Nascimento committed two racketeering acts. *Id.* at 45-46. See generally Robert A. Destro, *The Hostages in the 'Hood*, 36 ARIZ. L. REV. 785, 789 (1994) (describing federal law enforcement's role in controlling and eliminating gangs via federal statutes); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1101-02 (1995) (exploring common scheme for prosecuting street gangs and posses as organized criminal entities). In his article, Destro highlights New York's use of RICO to prosecute members of the "Ghost Shadows" and the Hell's Kitchen "Westies" gangs. Destro, *supra*, at 800.

5. 491 F.3d at 38 (stating court "respectfully declines" invitation to follow Sixth Circuit's interpretation of RICO's economic affect component); see Eric T. Berkman, *RICO Covers Violent, Noneconomic Activity*, *Rules 1st Circuit*, MASS. LAW. WKLY., July 16, 2007, at 30, available at 2007 WLNR 13731802 (reporting split with Sixth Circuit). Nascimento's attorney commented that had the trial occurred in Michigan rather than

The *Nascimento* case involved the rivalry of two Boston gangs.<sup>6</sup> Contention between the Stonehurst Street gang and the Wendover Street gang stemmed from the 1995 stabbing death of a Dorchester youth.<sup>7</sup> On nearly two dozen occasions between 1998 and 2000, members of Stonehurst assaulted, murdered, or attempted to murder Wendover's members and supporters.<sup>8</sup> In September 2004, federal prosecutors brought a thirty-three count indictment against thirteen Stonehurst members.<sup>9</sup>

Seven of the thirteen indicted gang members went to trial in 2005.<sup>10</sup> The indictment listed crimes including several daytime shootings outside commercial businesses and one nighttime shooting inside a tire shop, which engaged in interstate commerce.<sup>11</sup> A shared arsenal of firearms found during the police investigation further illustrated Stonehurst's violent activity.<sup>12</sup> The gang supposedly used this arsenal as a resource to carry out the alleged crimes.<sup>13</sup> At least eight of the guns traveled through interstate commerce, and on one occasion, a Stonehurst member purchased a gun in New Hampshire, used it in a Massachusetts crime, and subsequently added it to the weapons cache.<sup>14</sup>

The jury acquitted four of the defendants but found Nascimento and two others guilty of violating RICO, the Violent Crimes in Aid of Racketeering Act (VICAR), assault, and conspiracy.<sup>15</sup> The district court rejected Nascimento's

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in Massachusetts, Nascimento would not face a fourteen-year jail term; thus, due to the circuit split, sentences for the same crime varied depending on a particular defendant's geographic location. Berkman, *supra*, at 30.

6. 491 F.3d at 30 (reciting facts of case).

7. United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*1 (D. Mass. Dec. 2, 2005) (mem.) (stating violent wave between gangs began after 1995 murder), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007).

8. 491 F.3d at 30; *see* Berkman, *supra* note 5, at 30 (discussing facts of case). The court pointed out that Wendover retaliated against Stonehurst's actions. 491 F.3d at 30.

9. 491 F.3d at 30.

10. *See* United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*1 (D. Mass. Dec. 2, 2005) (mem.), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007).

11. United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*2 (D. Mass. Dec. 2, 2005) (mem.) (noting gang members participated in both daytime and nighttime shootings near businesses), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007). On appeal, the First Circuit focused more on the nighttime tire shop incident. 491 F.3d at 43.

12. United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*2 (D. Mass. Dec. 2, 2005) (mem.) (referring to arsenal as one "pillar" supporting the interstate commerce nexus), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007).

13. United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*2 (D. Mass. Dec. 2, 2005) (mem.) (theorizing gang members used guns as shared resource), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007).

14. United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*2 (D. Mass. Dec. 2, 2005) (mem.) (finding gang used out-of-state weapons), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007); 491 F.3d at 45 (discussing purchase of out-of-state gun). The First Circuit considered the act of crossing over state lines to buy weapons used in the enterprise's activities, coupled with the weapons arsenal, as the most persuasive evidence of an effect on interstate commerce. *See* 491 F.3d at 45.

15. 491 F.3d at 31 (stating three co-appellants "did not fare as well" as other defendants). The jury

argument that using firearms that had traveled through interstate commerce was insufficient to satisfy RICO's required effect on interstate commerce.<sup>16</sup> In finding that the requisite minimal effect satisfying RICO's commercial element existed, the court declined to consider that the First Circuit had never previously upheld a RICO conviction where the enterprise lacked economic or commercial activities.<sup>17</sup>

The United States Constitution permits Congress to regulate interstate commerce.<sup>18</sup> Throughout its history, however, the Supreme Court has altered the boundaries of congressional power in that respect.<sup>19</sup> In 2005, after a series of decisions narrowing Congress's commerce power, the Supreme Court interpreted the Commerce Clause broadly in *Gonzales v. Raich*.<sup>20</sup> In *Raich*, the plaintiffs possessed marijuana for medicinal purposes in compliance with

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convicted Nascimento of racketeering conspiracy, assault, racketeering, conspiracy to commit murder in aid of racketeering in violation of VICAR, and use of a firearm in the commission of a violent crime. *Id.* The court sentenced him to 171 months in prison. *Id.* The jury convicted defendant Talbert on a RICO conspiracy count, a substantive RICO count, and a murder conspiracy count in violation of VICAR. *Id.* The court sentenced him to fifty-seven months in prison. *Id.* The jury convicted defendant Lattimore of a RICO conspiracy charge and a substantive RICO count, and the court sentenced him to forty-six months in prison. *Id.*

16. United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*2 (D. Mass. Dec. 2, 2005) (mem.) (concluding sufficient evidence existed in support of jury's findings), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007); see Defendant Jackson Nascimento's Memorandum of Law in Support of Post-Verdict Motion for Judgment of Acquittal or New Trial at 19-21, United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660 (D. Mass. Oct. 17, 2005) (citing United States v. Garcia, 143 F. Supp.2d 791 (E.D. Mich. 2000)), *available at* 2005 WL 5719835 (relying on *Garcia* to argue nexus for interstate commerce not met); *infra* note 36 and accompanying text (discussing court's rejection of *Garcia* analogy).

17. See United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*2 (D. Mass. Dec. 2, 2005) (mem.) (finding purchase of guns through interstate commerce had "de minimis" impact on interstate commerce), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007); see also, e.g., United States v. Cianci, 378 F.3d 71, 80-81, 107 (1st Cir. 2004) (implying bribes in exchange for hiring employees satisfied interstate commerce requirement); United States v. Marino, 277 F.3d 11, 21, 35 (1st Cir. 2002) (concluding selling and distributing cocaine satisfied interstate commerce requirement); United States v. Patrick, 248 F.3d 11, 16, 28 (1st Cir. 2001) (implying organizing sale of crack satisfied interstate commerce requirement). In reaching its conclusion, the *Nascimento* court neglected to consider the defendant's argument. See United States v. Nascimento, No. CRIM. 03-10329PBS, 2005 WL 3277660, at \*1-3 (D. Mass. Dec. 2, 2005) (mem.), *aff'd*, 491 F.3d 25 (1st Cir. 2007), *petition for cert. filed*, No. 07-7925 (U.S. Nov. 26, 2007); Defendant Jackson Nascimento's Memorandum of Law in Support of Post-Verdict Motion for Judgment of Acquittal or New Trial, United States v. Nascimento at 20-21, No. CRIM. 03-10329PBS, 2005 WL 3277660 (D. Mass. Oct. 17, 2005), *available at* 2005 WL 5719835 (citing multiple First Circuit RICO cases where enterprise performed economic activities).

18. See U.S. CONST. art. 1, § 8, cl. 3 (Commerce Clause).

19. See United States v. Morrison, 529 U.S. 598, 617-18 (2000) (suggesting regulation of violent, non-economic crimes falls outside federal commerce power); United States v. Lopez, 514 U.S. 549, 567-68 (1995) (invalidating statute prohibiting firearm possession within school zone as violation of Commerce Clause). See generally Matthew Curtin, Note, *Sex, Drugs, and Guns: Gonzales v. Raich and the Expanding Scope of the Commerce Power*, 25 QUINNIPIAC L. REV. 887, 890-901 (2007) (detailing Supreme Court's history of expanding and reducing congressional authority under Commerce Clause).

20. 545 U.S. 1, 22 (2005) (distinguishing *Raich* from prior decisions narrowing Commerce Clause power).

California's Compassionate Use Act.<sup>21</sup> In a 6-3 decision, the Court ruled that the Federal Controlled Substances Act (CSA) applied to noncommercial use and cultivation of marijuana.<sup>22</sup> Even though the plaintiffs used the drug for noneconomic purposes, the Court held that marijuana belongs to a class of commodity that affects interstate commerce in the aggregate, thus falling under the control of the Commerce Clause.<sup>23</sup>

Critics argue *Raich* expands congressional commerce power to a point where it encroaches upon power reserved for the states in the Constitution.<sup>24</sup> Due to the recent expansion in Commerce Clause jurisprudence, federal prosecutors have wider latitude to take action against criminals who would otherwise face state prosecution.<sup>25</sup> RICO is one of many federal statutes that require an effect on interstate commerce.<sup>26</sup> Moreover, in a RICO prosecution, the federal government can show the required effect on interstate commerce either directly or indirectly.<sup>27</sup>

In 2004, the Sixth Circuit looked at the "affect [sic] on commerce" element

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21. *Gonzales v. Raich*, 545 U.S. 1, 6-7 (2005) (stating facts of case).

22. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (upholding federal statute regulating drug market as within congressional power).

23. *Gonzales v. Raich*, 545 U.S. 1, 17-19 (2005) (comparing *Raich* to *Wickard v. Filburn*, 317 U.S. 111 (1942)). In *Wickard*, the Court ruled that under the Commerce Clause, Congress can regulate personal consumption of homegrown wheat because, taken in the aggregate, it would affect interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (explaining rationale for regulating non-economic activity under Commerce Clause). Similarly, in *Raich*, the Court held that the CSA is part of a regulatory scheme substantially related to commerce. *Gonzales v. Raich*, 545 U.S. 1, 19 (2005). As such, it does not matter if the particular activity within the statute's control affects interstate commerce, but rather whether the particular activity is within a larger general class of activities that taken together affect interstate commerce. *Id.* at 18-19.

24. *See Curtin*, *supra* note 19, at 920 (stating *Raich* broadens Congress's ability to regulate intrastate, non-economic activity under guise of Commerce Clause); Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2103-04 (2006) (arguing *Raich* allows ignorance of jurisdictional hooks included in similar statutes for curbing Commerce Clause power). *But see* Jeffries & Gleeson, *supra* note 4, at 1103 (arguing federal prosecutors are more effective than state counterparts).

25. *See Coffey*, *supra* note 1, at 1036 (noting RICO captures both violent crimes and white-collar financial crimes). The RICO statute encompasses nine state criminal offenses, including murder, gambling, and kidnapping. *Id.* Additionally, in the 1980s, RICO prosecutions became more popular for white-collar crimes. *Id.* at 1040-42.

26. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (2006) (requiring enterprise affect interstate commerce); *see United States v. Morales-de Jesus*, 372 F.3d 6, 12, 22 (1st Cir. 2004) (affirming conviction under child pornography statute where materials traveled interstate); *United States v. Kallestad*, 236 F.3d 225, 226 (5th Cir. 2000) (upholding child pornography statute as within Commerce Clause power); *see also* Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 591-92 (2004) (noting federal statutes requiring effect on interstate commerce include Hobbs Act, RICO, and Travel Act).

27. *See, e.g., United States v. Robertson*, 514 U.S. 669, 671-72 (1995) (per curiam) (holding direct effect exists where defendant invested narcotics money in gold mine for interstate business purposes); *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001) (concluding direct effect where defendant engaged in interstate gambling activities); *United States v. Juvenile Male*, 118 F.3d 1344, 1349-50 (9th Cir. 1997) (deciding indirect effect where pattern of criminal gang activity included robbery); *see also* Bradley, *supra* note 26, at 605-06 (describing *Robertson*, *Riddle*, and *Juvenile Male* cases and their effects).

of RICO as it applied to local gang activity in *Waucaush v. United States*.<sup>28</sup> In *Waucaush*, Detroit's Cash Flow Posse conspired to and succeeded in murdering members of rival gangs.<sup>29</sup> The Sixth Circuit reversed the appellant's RICO conviction, holding that the gang's local, intrastate activities were not economic in nature.<sup>30</sup> The court interpreted "affecting interstate commerce" as requiring a minimal effect where the activity had an economic basis or component, but it required a substantial effect where the activity did not.<sup>31</sup>

In *United States v. Nascimento*, the First Circuit, through strict statutory construction and precedent interpretation, purposely split from the Sixth Circuit.<sup>32</sup> The court applied the rational basis test to uphold the constitutionality of the RICO statute.<sup>33</sup> The court relied heavily on *Raich*, which holds that the "class" of activity inquiry is more important than the specificities within each class.<sup>34</sup> The First Circuit labeled the Stonehurst gang as a racketeering enterprise and concluded that where racketeering enterprises mostly conduct financially driven crimes, it is irrelevant that Stonehurst engaged primarily in noneconomic activities.<sup>35</sup> Thus, the court held that the defendant's out-of-state purchase of a single weapon used in a later Massachusetts crime satisfied RICO's commercial effect requirement.<sup>36</sup> This

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28. 380 F.3d 251, 253 (6th Cir. 2004) (reversing RICO conviction).

29. *Waucaush v. United States*, 380 F.3d 251, 253 (6th Cir. 2004) (explaining indictment against defendant). The defendant belonged to the Cash Flow Posse, a gang whose members murdered members of a rival gang encroaching on their turf. *Id.* The federal prosecutors charged the defendant under RICO for murder, conspiracy for murder, and assault with intent to murder. *Id.*

30. *See Waucaush v. United States*, 380 F.3d 251, 256 (6th Cir. 2004) (holding minimal effect on commerce insufficient).

31. *See Waucaush v. United States*, 380 F.3d 251, 255-56 (6th Cir. 2004) (interpreting "affect" broadly). *But cf. Ratzlaf v. United States*, 510 U.S. 135, 143-44 (1994) (deciding interpreting same word differently throughout statute akin to "open[ing] Pandora's jar"). In *Ratzlaf*, the Court discouraged multiple interpretations of the term "willful" within a statute to avoid individualized constructions. *Id.*; *see Berkman, supra* note 5 (discussing problems with interpreting Rico's "affect" element differently).

32. 491 F.3d at 38, 40-42 (noting Sixth Circuit's failure of using traditional statutory construction techniques). Because the court disagreed with the Sixth Circuit's statutory construction of RICO, it declined to follow the Sixth Circuit's decision in *Waucaush*. *Id.* The court also described a brief line of Supreme Court Commerce Clause cases between 1995 and 2000 to illustrate how *Nascimento* fits within these decisions. *Id.* at 40-42.

33. 491 F.3d at 40, 42 (addressing issue of constitutionality of RICO statute). Realizing the rational relationship between racketeering and violent crime, the court recognized Congress's substantial interest in reducing violence as a basis for enacting RICO. *Id.* at 43.

34. *Id.* at 42 (determining non-economic motive an "isolated fact . . . of little significance"). The court emphasized that courts should analyze the class, not the activity, under the Commerce Clause. *Id.*; *see United States v. Morales-de Jesus*, 372 F.3d 6, 18 (1st Cir. 2004) (holding courts should analyze class of conduct's economic nature rather than case's individual economic facts). The federal statute in *Morales-de Jesus* prohibited production and possession of child pornography. *United States v. Morales-de Jesus*, 372 F.3d 6, 7-8 (1st Cir. 2004). The fact that the defendant's production and possession was for personal use with no economic effect on interstate commerce was irrelevant. *Id.* at 8, 17 (concluding defendant's personal use argument unpersuasive).

35. *See* 491 F.3d at 33, 43 (reaffirming courts should analyze general racketeering enterprise activity and not specific facts).

36. *See id.* at 45 (labeling New Hampshire gun purchase "paradigmatic example" of activity within

commercial transaction, coupled with the arsenal of weapons manufactured out-of-state, brought the appellants within RICO; other activities that affected interstate commerce were “frosting on the cake.”<sup>37</sup>

In addition, the First Circuit declined to interpret RICO as requiring different levels of effect on interstate commerce, depending on whether the enterprise entailed mainly economic or noneconomic activity.<sup>38</sup> The court contrasted the judicial and legislative branches of government, stating the judiciary’s role is to interpret legislation, not rewrite it.<sup>39</sup> The court criticized the Sixth Circuit’s *Waucaush* opinion, calling the decision “suspect” because it failed to use typical statutory construction techniques and also added words to the statute.<sup>40</sup> The court, however, recognized that the Sixth Circuit would likely apply the *Raich* decision had it come before *Waucaush*.<sup>41</sup> The First Circuit followed *Raich*’s precedent, holding RICO only requires a minimal effect, and declined to follow the Sixth Circuit’s variation.<sup>42</sup>

The First Circuit employed the proper Commerce Clause analysis in deciding that RICO applied in *Nascimento*.<sup>43</sup> Although the court rejected the appellants’ argument that the decision encourages federalization of state criminal activities, it did agree that courts must apply the Commerce Clause cautiously.<sup>44</sup> In doing so, the court properly analyzed the facts so that the

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Commerce Clause authority); Defendant Jackson Nascimento’s Memorandum of Law in Support of Post-Verdict Motion for Judgment of Acquittal or New Trial at 19-21, *United States v. Nascimento*, No. CRIM. 03-10329PBS, 2005 WL 3277660 (D. Mass. Oct. 17, 2005), available at 2005 WL 5719835 (noting Nascimento’s failed analogy to *United States v. Garcia*). In *Garcia*, the court noted that the gang engaged in mainly local activity and none of its members went out-of-state to purchase weapons. See *United States v. Garcia*, 143 F. Supp. 2d 791, 807 (E.D. Mich. 2000).

37. 491 F.3d at 45 (meeting interstate commerce “affect” prong). The court gave little weight to the tire shop incident, stating the shop’s customer was the intended target, not the shop itself, and no evidence of lost business existed. *Id.* at 44.

38. *Id.* at 37 (describing argument for differing levels of effect “peculiar”).

39. *Id.* at 37 (acknowledging Congress and courts have separate creation and interpretive roles over statutes). “This division of functions . . . counsels persuasively against a court trying to tease from the simple word ‘affect’ sophisticated gradations of meaning that will vary from situation to situation.” *Id.* (citing *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)).

40. *Id.* at 38 (stating result inconsistent with statutory construction). Additionally, *Waucaush* broke precedent in the Sixth Circuit because previously, RICO only required a minimal effect on interstate commerce. See *United States v. Riddle*, 249 F.3d 529, 536 (6th Cir. 2001) (holding substantial effect not required in La Cosa Nostra gambling enterprise). The Sixth Circuit distinguished *Waucaush* from *Riddle* by stating that the Cash Flow Posse was not involved with an economic enterprise. See *Waucaush v. United States*, 380 F.3d 251, 256 (6th Cir. 2004).

41. 491 F.3d at 38 n.4 (citing *Raich* as instructive precedent). The court stated, “We think it is useful to note . . . that *Waucaush* was decided without the benefit of the Supreme Court’s decision in [*Raich*].” *Id.*

42. *Id.* at 40, 42 (upholding district court’s interpretation); see *United States v. Marino*, 277 F.3d 11, 33-34 (1st Cir. 2002) (concurring RICO requires only some effect on interstate commerce).

43. 491 F.3d at 43 (specifying Commerce Clause regulates racketeering activity); see *supra* note 23 and accompanying text (describing Commerce Clause “class” analysis).

44. See 491 F.3d at 41 (noting if court rejected appellant’s argument court’s conclusion would destroy constitutional limits on federal power); see also *Jeffries & Gleeson*, *supra* note 4, at 1098 (asserting federal prosecutions constitute rule rather than exception); *Berkman*, *supra* note 5 (quoting appellant’s attorney); *supra*

enterprise itself, rather than its activities, brought the appellants within RICO's grasp.<sup>45</sup>

Additionally, the First Circuit properly analyzed the statute using strict interpretation techniques.<sup>46</sup> RICO does not include language that creates different degrees of a required effect on interstate commerce.<sup>47</sup> The Sixth Circuit improperly added language to the statute that Congress did not intend when it enacted RICO.<sup>48</sup> The role of the judiciary is to interpret statutory language, not to add new language to statutes based on certain circumstances.<sup>49</sup> RICO requires an offending act that "affects interstate or foreign commerce," and does not distinguish between economic and noneconomic activities.<sup>50</sup> In *Nascimento*, the purchase of a gun in New Hampshire and its use in a Massachusetts crime sufficed to bring the Stonehurst gang within RICO, although the effect on interstate commerce may have been quite small.<sup>51</sup>

While *Nascimento* accomplished RICO's purpose of curbing criminal enterprise activity, it will certainly add to the criticism that RICO's scope is potentially limitless.<sup>52</sup> Additionally, this decision allows the First and Sixth Circuits to treat criminal defendants differently.<sup>53</sup> While this result is seemingly unfair, case law precedent mandates that the First Circuit uphold the

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note 25 and accompanying text (discussing wide latitude federal government has in regulating activities states would otherwise govern). The appellant's attorney described the decision as allowing federal prosecutors "unfettered discretion" to federalize state offenses. Berkman, *supra* note 5. Although the court declined to consider this argument as persuasive, it did acknowledge it shares similar concerns, and that courts should be cautious of federal encroachment upon state issues. See 491 F.3d at 41.

45. 491 F.3d at 42 (comparing decision to *Raich* where Court emphasized activity's class); see *supra* note 23 and accompanying text (analyzing *Raich* decision).

46. 491 F.3d at 38 (criticizing Sixth Circuit's failure to strictly interpret statute).

47. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (2006) (omitting language pertaining to differing standards); see also 491 F.3d at 37 (concluding nothing in statute or legislative history supports differing gradations).

48. See *Waucaush v. United States*, 380 F.3d 251, 256 (6th Cir. 2004) (finding "minimal effect on commerce will not do"); *supra* note 30 and accompanying text (noting *Waucaush* court required substantial effect on interstate commerce for non-economic activities); cf. 491 F.3d at 37 (noting RICO does not distinguish between economic and non-economic activities). The First Circuit could not determine the Sixth Circuit's reasoning behind imposing different levels of effect. 491 F.3d at 37-38.

49. 491 F.3d at 37 (describing government branches and their respective duties).

50. 18 U.S.C. § 1962(c) (setting forth language of statute).

51. 491 F.3d at 45 (acknowledging purchase, together with weapons arsenal, suffices statute's nexus); see *supra* note 17 and accompanying text (highlighting other cases satisfying interstate commerce nexus requirement); *supra* note 36-37 and accompanying text (discussing court's analysis of appellant's out-of-state gun purchase and local use).

52. 491 F.3d at 51 (upholding appellants' convictions); see *United States v. Marino*, 277 F.3d 11, 18 (1st Cir. 2002) (labeling RICO as a "powerful weapon" against organized crime); *supra* note 1 and accompanying text (acknowledging RICO's purpose); see also Bradley, *supra* note 26, at 574 (criticizing RICO as "Horsemen of the Apocalypse"); Destro, *supra* note 4, at 800-01 (recognizing criticisms of judicial RICO interpretations for gang activities as too liberal).

53. See Berkman, *supra* note 5 (quoting appellant's attorney). The appellant's attorney stated that differing treatment is "a major concern within the federal system." *Id.*

conviction.<sup>54</sup> In addition, the Supreme Court's decision in *Raich*, which was unavailable to the Sixth Circuit at the time it decided *Waucaush*, offers further support.<sup>55</sup>

In *United States v. Nascimento*, the First Circuit decided whether to uphold the appellants' RICO convictions where the gang activities had a minimal effect on interstate commerce. The court balanced precedent and case law against judicial overreach, as well as a Sixth Circuit decision that produced an opposite result. In upholding the conviction, although the court purposely created a circuit split, it appropriately supported its decision with strict statutory construction and a recent Supreme Court decision, which was unavailable to the Sixth Circuit when it overturned a similar conviction. For the above reasons, the First Circuit made the correct decision despite the inconsistency with the Sixth Circuit.

*Alexandra B. Rubin*

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54. See *United States v. Marino*, 277 F.3d 11, 35 (1st Cir. 2002) (holding substantial effect not required under RICO); see also *supra* note 32 and accompanying text (discussing First Circuit's statutory construction, reliance on prior case law, and split from Sixth Circuit).

55. See *supra* note 34 and accompanying text (discussing court's reliance on *Raich* decision); *supra* note 41 and accompanying text (pointing out *Waucaush* decided before *Raich* and Sixth Circuit could therefore not rely on it).