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RICO After *Raich*: The Commerce Clause and Federal Prosecution of Street Gangs

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INTRODUCTION

In October 1995, a twenty-three-year-old Cape Verdean named Bobby Mendes was stabbed in the heart in the Dorchester neighborhood of Boston.[1] His death at the hands of another Cape Verdean created a rift in the local community, sparking a street war between two neighborhood gangs known as Stonehurst and Wendover. The conflict ultimately produced the worst period of spontaneous, ruthless violence in Boston since the Irish gang wars of the 1960s, as each gang sought revenge for past slights and systematically murdered witnesses who could testify to its own members' crimes.[2] Dorchester became a "virtual shooting gallery" for much of a decade as the escalating mayhem and indiscriminate gunfire claimed dozens of lives.[3] In an effort to stem the violence, federal authorities targeted gang members for prosecution under the Racketeer Influenced and Corrupt Organizations Act, better known as RICO.[4]

In 2004, three members of the Stonehurst gang were indicted for violations of 18 U.S.C. § 1962(c),[5] a RICO provision that criminalizes racketeering activities by members of an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce."[6] Their subsequent convictions tested the outer

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1. Kevin Cullen, *A Dozen Bloody Years and An Arrest: Pursuing the Case That Tore at Boston's Cape Verdeans*, BOSTON GLOBE, July 20, 2007, at A1; *see also* John R. Ellement, *13 Years Later, Lopes Describes Slaying*, BOSTON GLOBE, Sept. 24, 2008, at B2.
2. *See* Cullen, *supra* note 1; *see also* United States v. Nascimento, 491 F.3d 25, 33 (1st Cir. 2007).
3. Cullen, *supra* note 1; Ellement, *supra* note 1.
4. *See Nascimento*, 491 F.3d at 31.
5. *See id.* at 30.
6. 18 U.S.C. § 1962(c) (2006).

limits of Congress's Article I Commerce Clause power.[7] Just a month earlier, the United States Court of Appeals for the Sixth Circuit had overturned a conviction based on similar charges in *Waucaush v. United States*.[8] Relying on the Supreme Court's "new federalism" jurisprudence—expressed most prominently in *United States v. Lopez*[9] and *United States v. Morrison*[10]—the *Waucaush* court held that members of a street gang not "involved in any sort of economic enterprise" could not be convicted of RICO offenses unless the gang's activities had a "substantial" effect on interstate commerce.[11] In 2007, after the three Stonehurst members appealed their convictions using a similar argument in the case of *United States v. Nascimento*, the United States Court of Appeals for the First Circuit rejected *Waucaush*'s conclusions.[12] Instead, the First Circuit concluded that prosecutors only needed to prove that Stonehurst had a de minimis effect on interstate commerce.[13]

The resulting circuit split goes to the heart of the Supreme Court's recent Commerce Clause jurisprudence and has critical implications for federal authorities' ability to combat organized crime. This Comment argues that RICO encompasses racketeering activities by members of street gangs, even if the gangs themselves have only a de minimis effect on interstate commerce. Thus, gang members could be convicted of a RICO offense so long as prosecutors demonstrated, for instance, that the gang had disrupted the activities of businesses operating in interstate commerce,[14] transported newly purchased weapons across state lines,[15] or engaged in the sale or purchase of illegal drugs.[16]

This reading comports with the scope of Congress's Commerce Clause authority following the Supreme Court's ruling in *Gonzales v. Raich*,[17] which clarified Congress's power to regulate purely intrastate activity in pursuance of a larger, permissible interstate policy. *Raich*'s role is crucial because it emphasized the federal government's authority to prohibit conduct that is itself only *minimally* connected to interstate commerce, as long as the prohibition is a compo-

7. U.S. CONST. art. 1, § 8, cl. 3.

8. Waucaush v. United States, 380 F.3d 251, 258 (6th Cir. 2004).

9. 514 U.S. 549 (1995).

10. 529 U.S. 598 (2000).

11. *Waucaush*, 380 F.3d at 256.

12. United States v. Nascimento, 491 F.3d 25, 38 (1st Cir. 2007).

13. *Id.* at 37-40.

14. *See id.* at 43-44.

15. *See id.* at 45.

16. *See Waucaush*, 380 F.3d at 257; United States v. Tucker, 90 F.3d 1135, 1140 (6th Cir. 1996); *cf.* United States v. Rodriguez, 360 F.3d 949, 953 (9th Cir. 2004) (holding that the federal government could criminalize conspiracy to steal cocaine from narcotics traffickers).

17. 545 U.S. 1 (2005).

nent of a larger scheme regulating activities that are *substantially* related to interstate commerce. The case undoubtedly influenced the First Circuit's subsequent decision in *Nascimento*,[18] and, if issued earlier, it may have even altered the Sixth Circuit's approach in *Waucaush*, which predated the *Raich* ruling. Yet *Raich* was merely the clearest expression of a principle that had been embraced by the Court since *Lopez*, and the Sixth Circuit gave too short shrift to the earlier expressions of the *Raich* doctrine. Under *Raich*, Congress possesses the power to eradicate street gangs because they often facilitate the activities of interstate criminal organizations and sometimes develop into criminal groups with interstate and even international reach.

I. THE LONG REACH OF RICO

Now considered perhaps the most powerful weapon in the federal government's effort to combat street gangs,[19] RICO was created with a broad purpose in mind. Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970,[20] which had as its stated goal "the eradication of organized crime in the United States."[21] Congress found that organized crime was

> a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy[,] . . . weaken[s] the stability of the Nation's economic system, . . . seriously burden[s] interstate and foreign commerce, threaten[s] the domestic security, and undermine[s] the general welfare of the Nation and its citizens.[22]

Although this expansive understanding of organized crime clearly included large hierarchical organizations like the American Mafia, Congress purposefully left RICO's language flexible enough to encompass a wide array of smaller and less professional groups.[23] Indeed, Congress was so concerned that RICO be

18. *See* United States v. Nascimento, 491 F.3d 25, 41 (1st Cir. 2007).

19. Joseph Alesia & John Lausch, *Use of Federal Statutes To Attack Street Gangs*, U.S. ATT'YS' BULL., July 2008, at 15, 23.

20. Pub. L. No. 91-452, §§ 901-904, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961-1968 (2006)).

21. *Id.* at 923.

22. *Id.* at 922-23.

23. The Organized Crime Control Act's principal sponsor in the Senate, John Little McClellan, stated that the Act would apply lessons learned from the nation's experience with large-scale organized crime to a broader range of criminal activities. *See* 116 CONG. REC. 18,913 (1970). Similarly, House Judiciary Committee Chairman Emanuel Celler stated during debate that RICO's scope "was left flexible." 116 CONG. REC. 35,302 (1970).

adaptable to a wide range of criminal activity that it inserted a clause specifying that courts should construe RICO's provisions liberally.[24]

RICO-based criminal charges are most often brought under § 1962(c),[25] which encompasses a wide range of racketeering activity—a term broadly defined to include acts of murder, kidnapping, arson, robbery, bribery, extortion, obstruction of justice, and other crimes.[26] This provision imposes harsh criminal and civil penalties on any person who "through a pattern of racketeering activity" conducts or participates in the affairs of an enterprise engaged in or affecting interstate commerce.[27] The federal courts of appeals that have addressed the provision's interstate commerce requirement generally have held that it demands only a minimal connection between the underlying racketeering acts and interstate commerce.[28]

In rejecting this consensus by interpreting RICO to require a "substantial" connection between street gangs and interstate commerce, *Waucaush* neglected the principle that a single statutory term should generally be given a consistent meaning.[29] In essence, the Sixth Circuit found that section 1962(c)'s requirement that a RICO enterprise "affect . . . interstate or foreign commerce" was two-tiered. RICO enterprises that "engage in economic activity" need have only a de minimis effect on interstate commerce, the court concluded, but organizations that do not engage in economic activity—like most street gangs—must demonstrate a "substantial" connection to interstate commerce.[30] The court arrived at this curious result by invoking the doctrine of constitutional avoidance,[31] which provides that when a statute is susceptible of multiple

24. *See* Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) ("The provisions of this title shall be liberally construed to effectuate its remedial purposes."). The Supreme Court has recognized this clause's importance in applying RICO to a broad range of racketeering activities. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985).

25. 18 U.S.C. § 1962(c) (2006); *see* Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 DEL. J. CORP. L. 519, 521-22 (2002); Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. §§ 1962(c) and 1964(c)*, 32 VT. L. REV. 171, 173 (2007).

26. *See* 18 U.S.C. § 1961(1) (2006).

27. *Id.* § 1962(c).

28. *See* United States v. Delgado, 401 F.3d 290, 297 (5th Cir. 2005); United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001); United States v. Juvenile Male, 118 F.3d 1344, 1348 (9th Cir. 1997); United States v. Miller, 116 F.3d 641, 674 (2d Cir. 1997); United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir. 1996).

29. *See* Ratzlaf v. United States, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. . . . We have even stronger cause to construe a *single* formulation . . . the same way each time it is called into play.").

30. *See* Waucaush v. United States, 380 F.3d 251, 256-57 (6th Cir. 2004).

31. *See id.* at 255.

constructions, a court should interpret the statute in a manner that will not raise "grave and doubtful" constitutional questions.[32] Finding that RICO's application to street gangs with only minimal connections to interstate commerce would raise such constitutional doubts, the *Waucaush* court simply read its two-tiered structure into the statute.

But the legislative history and text of RICO make its proper interpretation clear: It is a means to attack organized crime at all levels by prohibiting the operations of myriad criminal organizations, including those (like street gangs) operating at a relatively low degree of sophistication. As the Supreme Court has noted: "Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime. . . . Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."[33]

Congress, in other words, was intentionally vague. It hoped to create a statute flexible enough to impose criminal and civil sanctions on any racketeering-influenced enterprise affecting interstate commerce. Accordingly, where Congress has failed to indicate explicitly that a certain class of enterprise apparently encompassed by the text should be excluded from RICO liability, the Supreme Court has generally held that RICO liability applies.[34] To interpret RICO's broad language as an indication of uncertainty about the meaning of the statute, and thus justify constraints on RICO's scope under the constitutional avoidance doctrine, would be to subvert the very reasons for Congress's adoption of that language in the first place. As the Court has stated, "[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[35]

II. THE "NEW" NEW FEDERALISM? RICO AND THE COMMERCE CLAUSE AFTER *RAICH*

The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States" and "[t]o make all Laws which shall be necessary and

32. *See* Jones v. United States, 529 U.S. 848, 857 (2000).

33. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 246, 248-49 (1989); *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985) (recognizing this language's importance in applying RICO to a broad range of racketeering activities).

34. *See* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 261 (1994) (holding that RICO does not require that the underlying activity have an economic purpose, based in part upon the lack of any such requirement in the statute's text); United States v. Turkette, 452 U.S. 576, 580-81 (1981) (holding that RICO applies to illegitimate as well as legitimate enterprises, because Congress did not distinguish between the two in the text).

35. *Sedima*, 473 U.S. at 499 (quoting Haroco, Inc. v. Am. Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984)).

proper for carrying into Execution" this authority.[36] In concluding that RICO's application to street gangs with only a minimal connection to interstate commerce would have exceeded this authority, the Sixth Circuit relied principally[37] on *United States v. Morrison*, in which the Supreme Court held that Congress had exceeded its Commerce Clause authority by creating a federal civil action for victims of gender-motivated violence.[38] *Morrison* built on the foundations established in *United States v. Lopez*, which held that Congress's admittedly broad Commerce Clause power did not extend to regulation of noneconomic firearm-related crimes that did not, in the aggregate, "substantially affect[]" interstate commerce.[39]

RICO, however, differs markedly from the laws struck down in *Lopez* and *Morrison*. Those decisions invalidated statutes that lacked jurisdictional elements requiring the government to demonstrate a connection to interstate commerce in each case[40] that relied on an attenuated rather than substantial connection between the regulated activity and interstate commerce,[41] and that were based on expansive readings of the Commerce Clause that would federalize large areas of criminal law traditionally under state control.[42] RICO, of course, contains just the sort of jurisdictional element the Court found lacking in *Lopez* and *Morrison*. More importantly, the Court's remaining concerns are inapplicable to RICO because it is not, like the laws at issue in those cases, an assertion of authority over a wide swath of purely noncommercial intrastate activity.

RICO is, instead, a regulatory scheme targeting organized criminal activities as a whole, which sweeps some intrastate activity into its ambit in furtherance of its overall objective. As *Lopez* itself recognized, such schemes are permissible even when they require some regulation of intrastate activity with minimal connections to interstate commerce: What matters for constitutional purposes is that the *larger* scheme be directed at an activity with a substantial effect on interstate commerce.[43] There can be no doubt that organized crime, in the aggregate, substantially affects interstate commerce.[44]

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36. U.S. CONST. art. I, § 8, cl. 3, 18.
37. *See* Waucaush v. United States, 380 F.3d 251, 256-58 (6th Cir. 2004).
38. United States v. Morrison, 529 U.S. 598, 613 (2000).
39. United States v. Lopez, 514 U.S. 549, 558-60 (1995).
40. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.
41. *Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 567.
42. *See Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 564.
43. *See Lopez*, 514 U.S. at 561 (noting that the invalidated statute "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"); *id.* at 558 ("[T]he Court has said ... that where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under

The Sixth Circuit reached a different conclusion only by relying heavily on the *Morrison* Court's "reject[ion of] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[45] But this language has no application to a more general regulatory scheme like RICO. It applies, in the Court's own words, only to regulation of criminal conduct based *solely* on *that conduct's* impact on interstate commerce. *Lopez* established, however, that a larger legislative scheme may reach intrastate activity with only a minimal connection to interstate commerce, based upon the substantial effect on interstate commerce of the activity the scheme seeks to regulate *in general*. Such is the essential implication of Congress's constitutional authority to make laws necessary and proper to the execution of its commerce power; a legislative scheme governing interstate commerce would be ineffective without the ability to regulate areas of traditional state concern that influence the success of the larger scheme. A congressional effort to eradicate drug trafficking, for instance, would be practically hopeless without the accompanying authority to criminalize wholly intrastate possession of drugs.[46]

The Supreme Court relied on this principle for its holding in *Gonzales v. Raich*, which reinforced Congress's power to regulate some intrastate activity as part of a wider regulatory scheme.[47] The respondents in *Raich* were users of locally-grown marijuana that was prescribed to them pursuant to state law. The Court rejected their contention that the federal government overstepped its Commerce Clause authority by regulating their activities as part of its larger effort to combat the drug trade. Instead, the Court held that Congress could regulate intrastate activity if it rationally concluded that such activity was "an essential part of the larger regulatory scheme."[48] The Court determined that the respondents' marijuana use, although entirely local, "tend[ed] to frustrate" the legitimate federal objective of eliminating the interstate drug market and was therefore subject to federal regulation.[49] The *Raich* standard is highly deferen-

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that statute is of no consequence.") (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (internal quotation marks and emphasis omitted)).

44. *See* Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970) (statement of findings).

45. *Morrison*, 529 U.S. at 617, *quoted in* Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004).

46. *See* Controlled Substances Act, Pub. L. No. 91-513, tit. 2, § 101, 84 Stat. 1242 (1970) (codified at 21 U.S.C.A. § 801(6) (West 2008)) (finding that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic").

47. 545 U.S. 1 (2005).

48. *Id.* at 27.

49. *Id.* at 19, 22; *cf.* Wickard v. Filburn, 317 U.S. 111 (1942) (reaching similar conclusions with respect to the cultivation of wheat).

tial: Courts must provide "a strong presumption of validity" to a congressional judgment that exempting certain behavior (like homegrown medical marijuana use or intrastate gang activity) would "undermine the orderly enforcement of the entire regulatory scheme."[50]

There is thus no absolute constitutional requirement that the violent activities of street gangs—as one manifestation of the organized criminal activity regulated by RICO—be prosecuted only upon a showing that the individual gangs *themselves* have a substantial connection to interstate commerce. The only remaining question is whether Congress in fact could reasonably have concluded that exempting street gang activity from RICO would have "undermine[d] the orderly enforcement" of RICO in its entirety.[51] Because such a conclusion was justified for the reasons explained below, *Lopez* and *Raich* require only that street gangs subject to RICO liability have a de minimis connection to interstate commerce.

III. Street Sweeping: A Proactive RICO-Based Approach to Fighting Organized Crime

Gang activity is increasingly national in scope and continues to expand.[52] As of September 2008, an estimated 1 million people belonged to over 20,000 gangs spread throughout the United States.[53] Gangs are becoming more violent and sophisticated, blurring the line between simple street gangs and traditional organized crime. Federal and state law enforcement agencies now report cooperation between local street gangs and more complex organized crime groups, particularly drug cartels operating along the U.S.-Mexican border.[54] Yet state and local prosecutors are too pressed for time and lacking in resources to pursue the lengthy investigations necessary to dismantle an entire gang; state prosecutions of gang members usually involve stand-alone indictments for single offenses, like murder or armed robbery.[55]

A growing body of research on the evolution of gangs suggests that the broad distribution and widened scope of street gang activity is no accident. Criminologists have theorized that gangs can be grouped into three classes: *first-generation gangs* that are localized, unsophisticated, primarily motivated by a desire to protect their own turf, and engaged in an array of opportunistic criminal activity; *second-generation gangs* that are more cohesive, more centralized, and focused on cornering the drug market rather than protecting turf; and

50. *See Raich*, 545 U.S. at 28.

51. *Id.*

52. Nat'l Gang Intelligence Ctr., National Gang Threat Assessment 2009 iii (2009) [hereinafter 2009 NGTA].

53. *Id.*

54. *Id.* at 7.

55. *See* James M. Trusty, *Gang Prosecution*, 41 Md. B.J. 4, 6 (2008).

third-generation gangs that are highly sophisticated, transnational, and willing to commit acts of terrorism to seize or maintain political or financial power.[56] Not all gangs evolve to the next generation, but those that do generate increasing levels of violence and instability and are more likely to affiliate themselves with international drug trafficking rings.[57] Indeed, some of the most violent gangs operating in the United States today originated as neighborhood-level street gangs.[58]

The widespread, dynamic, and increasingly international threat demonstrated by American gangs demands a flexible national response. While first-generation gangs standing alone may not fall within Congress's power to regulate interstate commerce, the relatively more market-oriented second- and third-generation gangs certainly do. To require the federal government to wait until street gangs like Stonehurst have evolved into national or transnational threats is to hamstring any attempt at an effective national policy of gang control. A proactive approach involving RICO prosecutions of violent first-generation gangs, however, would save time and money by allowing investigators to dismantle such groups before they adopt more sophisticated means of evading law enforcement. This approach would also undercut street gangs that support more sophisticated criminal groups; in 2005, more than a quarter of American law enforcement agencies reported that gangs were cooperating with organized crime entities in their jurisdictions.[59]

It is true that such a framework could sweep up many first-generation gangs that would never have evolved into more serious threats, but this over-inclusion is not the deciding factor under *Raich*. The test established by the Supreme Court is only whether it would be rational for Congress to conclude that the eradication of organized crime on a national scale required the regulation of street gang activity. Of course, it would be impractical for the federal government to prosecute large numbers of first-generation gangs, even if it had to prove merely that those gangs had at least a de minimis effect on interstate commerce. But prosecutors could exercise their discretion to target only those

56. *See* CONG. RESEARCH SERV., REPORT NO. RL34233, THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS? 4-5 (2008) [hereinafter TRANSNATIONAL GANG THREATS]; John P. Sullivan, *Third Generation Street Gangs: Turf, Cartels and NetWarriors*, 13 CRIME & JUST. INT'L (1997), *available at* http://www.cjcenter.org/cjcenter/publications/cji/archives/cji.php?id=543; John P. Sullivan & Robert J. Bunker, *Drug Cartels, Street Gangs, and Warlords*, *in* NON-STATE THREATS AND FUTURE WARS 40, 48-50 (Robert J. Bunker ed., 2003).

57. 2009 NGTA, *supra* note 52, at 13; MAX G. MANWARING, STREET GANGS: THE NEW URBAN INSURGENCY 11 (2005), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB597.pdf.

58. Examples include Mara Salvatrucha (or MS-13) and the 18th Street Gang, both recognized as emerging transnational threats. *See* NAT'L ALLIANCE OF GANG INVESTIGATORS ASS'NS, 2005 NATIONAL GANG THREAT ASSESSMENT 8-9, 17 (2005) [hereinafter 2005 NGTA]; TRANSNATIONAL GANG THREATS, *supra* note 56, at 2-4.

59. 2005 NGTA, *supra* note 58, at 2.

gangs with the strongest ties to organized crime or the strongest likelihood of evolving into more dangerous criminal threats. On the other hand, if they left first-generation gangs untouched while targeting more sophisticated threats, authorities would ensure a constant supply of entrepreneurial criminals ready to fill the profitable niche left vacant by the dismantling of more complex gangs. The Commerce Clause cannot be so restrictive that it prevents Congress from targeting a national threat at its source, rather than at its severest manifestations.

Conclusion

Raich merely bolstered the principle announced in *Lopez* that the intrastate character of essential parts of an interstate regulatory scheme should not prevent the federal government from applying its superior resources to combat threats of national or transnational dimensions. This principle has important implications for a wide range of federal law enforcement activities, from immigration enforcement to the war on drugs. Both immigration and the war on drugs, furthermore, have ambitious goals that may significantly depend on Congress's ability to regulate intrastate conduct. The Court designed its new federalism jurisprudence to prevent the federal government from usurping the traditional role played by state law enforcement, not to hamstring national responses to national or international problems. Of course, courts should carefully scrutinize any federal encroachment on the traditional authority of the states. But where Congress has reasonably determined that a national criminal problem requires a uniform national response in areas of traditional state authority, the Commerce Clause—to that limited extent—poses no obstacle.