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## **Evidence - For the Sake of the Marriage: First Circuit's Rejection of the Joint Participants Exception Complicates Criminal Prosecution of Married Co-Conspirators - United States v. Pineda-Matteo, 905 F.3d 13 (1st Cir. 2018)**

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# **EVIDENCE—FOR THE SAKE OF THE MARRIAGE: FIRST CIRCUIT’S REJECTION OF THE JOINT PARTICIPANTS EXCEPTION COMPLICATES CRIMINAL PROSECUTION OF MARRIED CO-CONSPIRATORS—UNITED STATES V. PINEDA-MATEO, 905 F.3D 13 (1ST CIR. 2018).**

The federal government is prohibited from compelling a married person to testify against their spouse in a criminal proceeding.<sup>1</sup> This concept is referred to as the spousal testimonial privilege (the “Privilege”), and it grants a spouse the right to refuse to take the witness stand against their defendant-spouse.<sup>2</sup> Accordingly, the witness-spouse holds the Privilege.<sup>3</sup> There are two modern rationales sustaining the Privilege.<sup>4</sup> The first rationale is the interest of “fostering the harmony and sanctity of the marital relationship.”<sup>5</sup> The Privilege is intended to uphold the significance of

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<sup>1</sup> See *Trammel v. United States*, 445 U.S. 40, 53 (1980) (“[T]he witness may be neither compelled to testify nor foreclosed from testifying” in a federal criminal case in which defendant is witness’s spouse); see also Amy G. Bermingham, *Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony*, 53 *FORDHAM L. REV.* 1019, 1019 (1985) (explaining Privilege from witness’s point of view: “[t]he privilege against adverse spousal testimony is the privilege of a witness in federal proceedings to refuse to testify against his or her spouse.”); Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 *LA. L. REV.* 751, 761 (2010) (“[T]he spousal testimonial privilege allows spouses to refuse to testify against each other in criminal trials.”).

<sup>2</sup> See *United States v. Breton*, 740 F.3d 1, 9–10 (1st Cir. 2014) (identifying two marital privileges recognized by federal courts); see also *Trammel*, 445 U.S. at 53 (developing Privilege in order to satisfy modern rationales). In *Trammel*, the Supreme Court adapted the Privilege to allow the witness-spouse to choose whether to testify adversely against the defendant-spouse. *Trammel*, 445 U.S. at 53.

<sup>3</sup> See Naomi Harlin Goodno, *Protecting “Any Child”: The Use of the Confidential-Marital-Communications Privilege in Child-Molestation Cases*, 59 *U. KAN. L. REV.* 1, 3 (2010) (“Generally, the adverse-spousal-testimony privilege prevents a witness-spouse from testifying adversely at trial against the defendant-spouse unless the witness-spouse chooses to testify; thus, the witness-spouse holds this privilege.”).

<sup>4</sup> See *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (considering rationales behind Privilege); see also *United States v. Yerardi*, 192 F.3d 14, 18 (1st Cir. 1999) (“[T]he privilege is rooted in a dual desire to protect marital harmony and to avoid the unseemliness of compelling one spouse to testify against the other in a criminal proceeding . . .”).

<sup>5</sup> See *Trammel*, 445 U.S. at 44 (noting Privilege’s rationales); see also *Hawkins*, 358 U.S. at 77 (discussing prior changes to Privilege and explaining Court’s current rationale).

The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to

marriage and reinforce the intimacy and privacy that makes the marital bond unique.<sup>6</sup> The second rationale seeks to avoid the “natural repugnance” that “every fair-minded person” would perceive if the government were to compel a wife or husband “to be the means of the other’s condemnation” through adverse testimony and, in so doing, subject the defendant-spouse “to the humiliation of being condemned by the words of his [or her] intimate life partner.”<sup>7</sup>

Recently, a case came before the United States Court of Appeals for the First Circuit that presented the opportunity to recognize an exception to the Privilege.<sup>8</sup> The joint participants exception (“Exception”) allows the prosecutor in a federal criminal proceeding (the “Government”) to compel a witness-spouse to testify against a defendant-spouse if that witness-spouse is alleged to have participated in the alleged criminal act.<sup>9</sup> On September 25, 2015, dfYovannys Guerrero-Tejada (“Guerrero”) answered a phone call from a confidential informant seeking to purchase heroin.<sup>10</sup> During this phone call, Guerrero was heard consulting with another individual, alleged

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foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well.

*Hawkins*, 358 U.S. at 77; *Lutwak v. United States*, 344 U.S. 604, 615 (1953) (“The reason for the rule at common law disqualifying the [witness-spouse] is to protect the sanctity and tranquility of the marital relationship.”).

<sup>6</sup> See *State ex rel. Barker v. McAuley*, 51 Tenn. (4 Heisk.) 424, 433 (Tenn. 1871) (“If [spouses were] permitted [to testify against each other], it would tend to destroy that bond of mutual confidence and unquestioning trust that is essential to the peace and happiness of this most sacred of all domestic relations.”); see also *Yerardi*, 192 F.3d at 18 (upholding Privilege and outlining its purpose).

<sup>7</sup> See *In re Malfitano*, 755 F.2d 1022, 1028 (2d Cir. 1985) (internal quotation marks omitted), vacated as moot *sub nom.* *United States v. Koecher*, 475 U.S. 133 (1986); see also *Yerardi*, 192 F.3d at 18 (citing *Trammel*, 445 U.S. at 53) (discussing two rationales supporting Court’s current reasoning for upholding marital privileges); *In re Malfitano* Oct. 18, 1979 Witness, 633 F.2d 276, 277 (3d Cir. 1980) (“The main rationale for the privilege today is that it protects the marriage from the discord that occurs when one spouse testifies against the other.”) (citation omitted). e

<sup>8</sup> See *United States v. Pineda-Mateo*, 905 F.3d 13, 14 (1st Cir. 2018) (presenting issue of whether to recognize Exception to Privilege).

<sup>9</sup> See *id.* at 16–18 (outlining brief history of Exception); see also Bermingham, *supra* note 1, at 1021 (“In 1983 the Seventh Circuit held that the privilege cannot be claimed by a witness who is alleged to have participated in the crime with which his or her spouse is charged and about which the witness is summoned to testify.”); Matt Clarke, *First Circuit Announces No Joint Participation Exception to Spousal Testimonial Privilege*, CRIM. LEGAL NEWS (Feb. 14, 2019), <https://www.criminallegalnews.org/news/2019/feb/14/first-circuit-announces-no-joint-participation-exception-spousal-testimonial-privilege/> [<https://perma.cc/SZH3-2A3U>] (reporting on First Circuit’s decision in *Pineda-Mateo* and providing history of Exception).

<sup>10</sup> See *Pineda-Mateo*, 905 F.3d at 18 (detailing facts that led to charges). “[Guerrero] told the informant to raise \$1,000 to pay part of a prior drug debt before arranging another drug transaction. Three days later, the informant called Guerrero again and ‘arranged to purchase three fingers of heroin from Guerrero and Pineda.’” *Id.*; see also *United States v. Tejada*, No. 15-cr-215-01/02-JL, 2017 U.S. Dist. LEXIS 124851, at \*2–3 (D.N.H. Aug. 8, 2017) (recounting facts of case).

to have been her husband, Eric Pineda-Mateo (“Pineda”).<sup>11</sup> On October 6, 2015, Guerrero met the confidential informant in the parking lot of a mall in Newington, New Hampshire and exchanged a bag of heroin for \$1,000 in cash.<sup>12</sup>

The informant contacted Guerrero again on October 21, asking to purchase more heroin.<sup>13</sup> Guerrero met with the informant and exchanged twenty-five grams of heroin for \$1,000.<sup>14</sup> Although Pineda joined his wife for this meeting, Guerrero was the one who physically performed the drug transaction.<sup>15</sup> Guerrero and the informant had multiple conversations over the next several weeks.<sup>16</sup> They arranged a third transaction for November 16.<sup>17</sup> When Guerrero and Pineda arrived for this third transaction, they were arrested by the New Hampshire State Police.<sup>18</sup> The police searched the car, which was registered to Pineda, and recovered twenty-five grams of fentanyl.<sup>19</sup>

The government alleged that the evidence established a conspiracy between Guerrero and Pineda based on the events that transpired.<sup>20</sup> Guerrero and Pineda were jointly indicted for conspiracy to possess heroin and fentanyl with the intent to distribute and conspiracy to distribute those

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<sup>11</sup> See *Pineda-Mateo*, 905 F.3d at 18 (recounting facts of case).

<sup>12</sup> See *Tejeda*, 2017 U.S. Dist. LEXIS 124851, at \*2 (recounting facts of case).

<sup>13</sup> See *id.* (recounting facts of case).

<sup>14</sup> See *id.* at \*2–3 (describing amount purchased as five “fingers” of heroin).

<sup>15</sup> See Brief of Appellant at 5, *United States v. Pineda-Mateo*, 905 F.3d 13 (1st Cir. 2018) (No. 17-1857) (“Guerrero handed the cooperator a bag of heroin underneath the table, and the cooperator handed Guerrero \$1,000.”).

<sup>16</sup> See *Pineda-Mateo*, 905 F.3d at 18 (“Two weeks later, the informant arranged a second drug transaction with Guerrero and Pineda, after which the informant attempted to set up a third transaction.”).

<sup>17</sup> See *id.* (recounting facts of case).

<sup>18</sup> See *United States v. Tejeda*, No. 15-cr-215-01/02-JL, 2017 U.S. Dist. LEXIS 124851, at \*3 (D.N.H. Aug. 8, 2017) (recounting facts of case).

<sup>19</sup> See *Pineda-Mateo*, 905 F.3d at 18. (recounting facts of case).

<sup>20</sup> See *id.* (recounting evidence of conspiracy). The Government primarily based its conspiracy charges on the following information:

[D]uring the recorded phone calls with the informant, Guerrero repeatedly referred to ‘her husband’ and negotiated the transactions in concert with him. Additionally, Pineda also appeared to be the person who acquired the heroin subsequently sold to the informant. Furthermore, agents observed both Guerrero and Pineda meeting with the informant in person to conduct the second transaction, during which Guerrero and Pineda spoke to each other in Spanish before speaking in English to the informant. Finally, Guerrero and Pineda were arrested together at the location of the planned third drug transaction.

*Id.*

substances.<sup>21</sup> Guerrero pled guilty to all counts, and Pineda elected to go to trial on the single count against him.<sup>22</sup> Through a pretrial subpoena and motion, the prosecution indicated its intent to call Guerrero as a witness at Pineda's trial, which was scheduled to begin on May 8, 2017.<sup>23</sup> Before trial began, Guerrero invoked her adverse spousal testimonial privilege and moved to quash the Government's subpoena.<sup>24</sup> In response, the Government moved the court to compel Guerrero's testimony, seeking to invoke an exception to the Privilege "for a jointly participating spouse in a criminal conspiracy."<sup>25</sup>

The district court granted Guerrero's motion to quash the Government's subpoena and denied the Government's motion to compel Guerrero's testimony.<sup>26</sup> In doing so, the district court acknowledged that there is a circuit split among the federal courts—with one circuit adopting and three rejecting the Exception—that the Government now moved the First Circuit to recognize.<sup>27</sup>

Rule 501 of the Federal Rules of Evidence ("Rule 501") governs claims of privilege in federal courts.<sup>28</sup> At its inception, Rule 501 was designed to provide a list of privileges applicable in federal courts.<sup>29</sup> However, Rule 501 was modified to allow for the evolution and development of privileges, so that privileges could always reflect modern laws and societal

<sup>21</sup> See *id.* at 18–19 (detailing charges); *Tejeda*, 2017 U.S. Dist. LEXIS 124851, at \*3 (recounting procedural history of case). They were indicted under 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. *Tejeda*, 2017 U.S. Dist. LEXIS 124851, at \*3; see also 21 U.S.C.S. § 841(a)(1) (LEXIS through Pub. L. No. 116-135) (d"[A]ny person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

<sup>22</sup> See *Pineda-Mateo*, 905 F.3d at 19 (recounting facts of case).

<sup>23</sup> See *id.* ("Intending to call her as a witness at trial, the Government subpoenaed Guerrero and filed a motion in limine 'seeking a determination, pursuant to Federal Rule of Evidence 104(a), that her testimony is admissible.'"); see also FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

<sup>24</sup> See *Pineda-Mateo*, 905 F.3d at 19 (recounting procedural postures of parties).

<sup>25</sup> See *id.* (internal quotation marks omitted) (introducing Exception in opinion).

<sup>26</sup> See *id.* (recounting procedural postures of court and parties).

<sup>27</sup> See *id.* at 19–20 (discussing district court's ruling and reasoning). Based on the weight of authority, the district court was unable to seriously consider adopting the Exception. *Id.*

<sup>28</sup> See FED. R. EVID. 501 (establishing rule and governing claims of privilege in federal courts). "The common law—as interpreted by United States courts in light of reason and experience—governs a claim of privilege" unless otherwise provided by the Constitution, a federal statute, or rules prescribed by the Supreme Court. *Id.*

<sup>29</sup> See NOTES OF COMM. ON THE JUDICIARY, H.R. REP. NO. 93-650 (1975) (including lawyer-client, psychotherapist-patient, husband-wife privileges). When the evidentiary rule on privileges was first submitted to Congress, it contained thirteen rules, nine of which specified privileges that federal courts were to recognize. *Id.*; see also *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (discussing source of attorney-client privilege in federal courts).

interests.<sup>30</sup> Rule 501 now provides the federal courts with a standard to apply when determining whether a privilege exists, should exist, or, if one already exists, whether that privilege should be modified.<sup>31</sup> The standard is expressed as follows: “the common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege . . . .”<sup>32</sup> In sum, rather than listing specific rules of privilege to

<sup>30</sup> See NOTES OF COMM. ON THE JUDICIARY, H.R. REP. NO. 93-650 (1975).

The Committee amended Article V to eliminate all of the Court’s specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases.

*Id.*; see also *Trammel v. United States*, 445 U.S. 40, 47 (1980) (“In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to ‘provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,’ and to leave the door open to change.”) (citations omitted); Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J. L. FAM. STUD. 279, 283–84 (2008) (discussing modern rates of marriage among young people); Imran Rasul, *Marriage Markets and Divorce Laws*, 22 U. CHI. J. L., ECON. & ORG. 1, 1 (2005) (discussing changing marital dynamics). Because Rule 501 offers the ability to adapt and develop privileges to conform to modern societal interests, it is worthwhile to note that “[t]he nature of family life in America has changed dramatically over the past fifty years. Fewer persons are marrying than ever before, those who marry do so later in life, and more marriages are now broken by divorce than death.” Rasul, *supra* note 30, at 1. These statistics do not indicate that the ideals of marriage are less valued than they once were—as a variety of factors contribute to them—but they could tilt the scales when it comes to balancing society’s interests in these ideals versus prosecuting conspirators. See Rasul, *supra* note 30, at 1.

<sup>31</sup> See NOTES OF COMM. ON THE JUDICIARY, H.R. REP. NO. 93-650 (1975) (noting uniform standard prescribed by Rule 501); see also *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (refusing to recognize privilege protecting from disclosure peer-review materials contained in tenure files). The Supreme Court recognized that Rule 501 “manifests a Congressional desire ‘not to freeze the law of privilege’” and that the Rule is intended to provide flexibility, so that rules of privilege can be developed on a case-by-case basis. *Univ. of Pa.*, 493 U.S. at 189 (citations omitted). However, the Court also expressed its disinclination to do so. *Univ. of Pa.*, 493 U.S. at 189; *Freiermuth v. PPG Indus.*, 218 F.R.D. 694, 697 (N.D. Ala. 2003) (“Although Federal Rule of Evidence 501 allows development of rules of privilege on a case-by-case basis, the court treads cautiously when being asked to recognize a new privilege.”); *Winton v. Bd. of Comm’rs*, 188 F.R.D. 398, 399 (N.D. Okla. 1999) (discussing standard).

Rule 501 creates no substantive privileges by its own force. Rule 501 simply informs federal courts of how they are to determine whether a particular privilege exists. Federal courts must look to sources external to Rule 501 (i.e., state law or common law) to determine if a particular privilege . . . exists in a certain context.

*Winton*, 188 F.R.D. at 399; *Lewis v. United States*, 517 F.2d 236, 238 n.4 (9th Cir. 1975) (“The legislative history of Rule 501 of the Federal Rules of Evidence makes it clear that Congress intended that the courts should continue to develop the federal common law of privilege on case-by-case basis.”).

<sup>32</sup> See FED. R. EVID. 501 (listing language of law). The Rule offers exceptions to the broad discretion that it granted the federal courts by limiting that discretion if there are applicable rules

which the federal courts must adhere, Rule 501 empowers the federal courts to “[develop] rules of privilege on a case-by-case basis.”<sup>33</sup> Furthermore, federal courts—with Rule 501 as their beacon—are bestowed the right and entrusted “the responsibility to examine the policies behind the federal common law privileges and to alter or amend them when ‘reason and experience’ so demand.”<sup>34</sup>

The common law recognizes two distinct, but related marital privileges.<sup>35</sup> One is the spousal testimonial privilege, which allows the witness-spouse to refuse to testify adversely against the other in criminal or related proceedings.<sup>36</sup> The second is the marital communications privilege, which permits a defendant to refuse to testify and allows a defendant to bar his or her spouse or former spouse from testifying about any confidential communications made during their marriage.<sup>37</sup>

The Privilege has ancient roots.<sup>38</sup> It was borne from the conjunction of “two canons of medieval jurisprudence” that have since been discredited

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provided by the Constitution, federal statutes, or the Supreme Court. *Id.* The Rule goes on to specify that in a civil case, “state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” *Id.*

<sup>33</sup> See *United States v. Gillock*, 445 U.S. 360, 367 (1980) (stressing courts’ ability to modify rules of privilege using Rule 501).

<sup>34</sup> See *United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975) (using Rule 501 to alter marital communications privilege). The *Allery* court was presented with a brutal set of facts: the defendant was appealing his conviction for attempting to rape his 12-year-old daughter. *Id.* at 1363–64. Most of the evidence used against the defendant involved testimony from his spouse. *Id.* The case turned on the marital communications privilege rather than the adverse testimonial privilege. *Id.* Although an exception to the marital communications privilege already existed when one spouse harmed the witness-spouse, the *Allery* court expanded that exception to include instances in which children of the marriage were harmed. *Id.* at 1367; see also Goodno, *supra* note 3, at 31–32 (arguing for even more expansive interpretation of marital communications privilege).

<sup>35</sup> See *United States v. Breton*, 740 F.3d 1, 9–11 (1st Cir. 2014) (outlining marital privileges); *United States v. Yerardi*, 192 F.3d 14, 17–19 (1st Cir. 1999) (providing facts of case and history of both marital privileges); *United States v. Bey*, 188 F.3d 1, 4 (1st Cir. 1999) (discussing marital communications privilege); *Allery*, 526 F.2d at 1366 (invoking Rule 501 to shape marital communications privilege as required by facts of case); Goodno, *supra* note 3, at 3–10 (detailing both privileges); see also *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992) (listing rationales behind marital communications privilege). Like the adverse testimonial privilege, the primary rationale for the existence of the marital communications privilege is the “public policy interests in protecting the integrity of marriages and ensuring that spouses freely communicate with one another.” *White*, 974 F.2d at 1138; *United States v. Mendoza*, 574 F.2d 1373, 1380 (5th Cir. 1978) (“In [the Seventh and Second] Circuits[,] marital communications having to do with the commission of a crime and not with the privacy of the marriage itself do not fall within the [marital communications] privilege’s protection.”).

<sup>36</sup> See sources cited *supra* note 34 and accompanying text.

<sup>37</sup> See sources cited *supra* note 34 and accompanying text.

<sup>38</sup> See *Trammel v. United States*, 445 U.S. 40, 43–46 (1980) (delving into background of spousal privileges).

and abandoned.<sup>39</sup> The rule in its original form, banning all testimony by a witness-spouse, survived until a Supreme Court decision in 1933.<sup>40</sup>

In *Funk v. United States*, the Court abolished this complete testimonial disqualification in the federal courts and allowed a defendant's spouse to provide testimony in favor and in support of the defendant.<sup>41</sup> Importantly, the Court did not modify the aspect of the rule that allowed "either spouse [to] prevent the other from giving adverse testimony."<sup>42</sup> As a result, "[t]he rule thus evolved into one of privilege rather than one of absolute disqualification."<sup>43</sup>

In *Pineda-Mateo*, the Government, in its brief, discussed the *Funk* decision to convey that the historical justifications of an absolute ban on

<sup>39</sup> See *id.* at 44 (expanding on history of Privilege). The first canon from which the rule derives dictated that "an accused was not permitted to testify on his own behalf because of his interest in the proceeding." *Id.* The second canon dictated that husband and wife were one, and that "because the woman had no recognized separate legal existence," the husband embodied and controlled that one. *Id.*

<sup>40</sup> See *id.* (referring to important changes in *Funk v. United States*); see also *Funk v. United States*, 290 U.S. 371, 373, 386–87 (1933) (ruling that wife was competent to testify on her husband's behalf). In modifying the spousal testimonial privilege to allow beneficial testimony, the Supreme Court reasoned that the notions that fueled the prohibition were outdated. *Funk*, 290 U.S. at 386–87. The Court did not agree with the idea that a spouse testifying on behalf of their partner would somehow endanger "the harmony and confidence of marital relations." *Funk*, 290 U.S. at 381. Furthermore, the concern that a witness-spouse is likely to commit perjury on behalf of the defendant-spouse is one properly left to the jury. *Funk*, 290 U.S. at 376; *Hawkins v. United States*, 358 U.S. 74, 76 (1958) (discussing *Funk* decision, reasoning, and ramifications). *Funk* "rejected the phase of the common-law rule which excluded testimony by spouses for each other." *Hawkins*, 358 U.S. at 76 (emphasis in original). The reason for barring beneficial testimony by the witness-spouse for the defendant-spouse "had been the practice of disqualifying witnesses with a personal interest in the outcome of a case." *Hawkins*, 358 U.S. at 76. However, "[w]idespread disqualifications because of interest . . . [have] long since been abolished . . . in accordance with the modern trend" allowing "interested witnesses to testify" and leaving the responsibility of "assess[ing] their credibility" for the jury. *Hawkins*, 358 U.S. at 76.

<sup>41</sup> See *Funk*, 290 U.S. at 380–82 (dismantling historical foundation of complete ban on spousal testimony); see also *Trammel*, 445 U.S. at 44 ("Indeed, it was not until 1933, in *Funk v. United States*, that this Court abolished the testimonial disqualification in the federal courts, so as to permit the spouse of a defendant to testify in the defendant's behalf.") (citation omitted).

<sup>42</sup> See *Trammel*, 445 U.S. at 44 (acknowledging aspect of rule left undisturbed by *Funk*); *Funk*, 290 U.S. at 386 ("[T]he decision of the court below, in holding the wife incompetent, is erroneous.").

<sup>43</sup> See *Trammel*, 445 U.S. at 44 (explaining decision's role in evolution of Privilege); see also Bermingham, *supra* note 1, at 1023–26 (discussing history and modernization of Privilege).

[T]he Supreme Court abolished the portion of the rule excluding testimony by one spouse in favor of the other, reasoning that the rationale behind it—witness incompetency because of interest—was outdated and therefore no longer supported the rule's application. The remainder of the rule was treated as a privilege barring adverse testimony in the absence of the consent of both spouses.



spousal testimony were outdated: “the law long had abandoned the principle that a defendant could not testify in his own defense, and therefore exclusion of the non-accused spouse’s testimony in favor of the defendant was no longer justified.”<sup>44</sup> Conversely, Pineda construed the *Funk* ruling as conservative, noting that, while the Court tweaked the Privilege to allow beneficial testimony, it kept intact the ability of either spouse to prevent the other from offering adverse testimony.<sup>45</sup> Pineda argued that, although the Privilege is now vested in the witness-spouse rather than existing as an absolute ban of spousal testimony, this is merely a minor adjustment that left the important goal of protecting spouses from being compelled to contribute to their loved one’s prosecution untouched.<sup>46</sup>

The Supreme Court then considered the scope of the Privilege in 1958 with *Hawkins v. United States*.<sup>47</sup> In *Hawkins*, the defendant’s wife volunteered to testify against him and the defendant invoked the Privilege in an effort to stop her from doing so.<sup>48</sup> The Government argued that the court should draw a distinction between compelling a witness-spouse to testify adversely and allowing a witness-spouse to do so voluntarily.<sup>49</sup> However, the Court disagreed, finding that “the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences.”<sup>50</sup> Referring to the societal interest of upholding the intimate and private nature of marriages, the Court elected to maintain the

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<sup>44</sup> See Brief of Appellant, *supra* note 15, at 15 (addressing evolution of Privilege beginning in *Funk*).

<sup>45</sup> See Brief of Appellee at 12, *United States v. Pineda-Mateo*, 905 F.3d 13 (1st Cir. 2018) (No. 17-1857) (discussing Court’s modification of common law rule since *Funk*).

<sup>46</sup> See *id.* at 14–16 (explaining how developing Privilege does not diminish its societal interests).

<sup>47</sup> See *Hawkins v. United States*, 358 U.S. 74, 76–79 (1958) (discussing Privilege, its historical weight, and courts’ reluctance to modify it).

<sup>48</sup> See *id.* at 74–75 (stating facts of case). Petitioner was convicted in federal court for violating the Mann Act. *Id.* at 74. Over the petitioner’s objection, the district court permitted the Government to use his wife as a witness against him. *Id.* at 74–75. Relying on precedent, the Tenth Circuit held that this permission was not erroneous. *Id.* at 75. The Supreme Court granted certiorari because of the “long-standing rule of evidence which bars a husband or wife from testifying against his or her spouse.” *Id.*

<sup>49</sup> See *id.* at 77 (identifying Government’s argument and Court’s hesitation to agree). The Court noted that the Government did not suggest that “authority, reason or experience” require that the “old rule” prohibiting adverse spousal testimony be wholly rejected. *Id.* Instead, the Government asked only for a modification of the existing rule. *Id.* The Government sought to establish that either spouse be permitted to testify voluntarily, even if said testimony would be adverse to the defendant-spouse’s case. *Id.* However, the Court rejected this argument and declined to expand the Privilege accordingly, insisting instead that it is against public policy interests to pit spouses against one another. *Id.* at 78–79. Nonetheless, the Court also recognized that expansions and modifications to the Privilege are sometimes necessary to further the interests of the public and that such changes have occurred in the past. *Id.* at 76.

<sup>50</sup> See *id.* at 78–79 (explaining Court’s reason for rejecting Government’s argument).

"rule which bars the testimony of one spouse against the other unless both consent."<sup>51</sup> Importantly, the Court mentioned in its conclusion that "this decision does not foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'"<sup>52</sup>

In his brief, Pineda stressed the rigidity of the Privilege that was applied in *Hawkins* and the consequences of relaxing its requirements.<sup>53</sup> Quoting *Hawkins*, Pineda noted that "[a]dverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage."<sup>54</sup> Conversely, the Government noted that the *Hawkins* Court never mentioned the Exception and thus never expressly forbade it.<sup>55</sup> Further, the Government's brief characterized the *Hawkins* decision as one that retained a broad construction of the Privilege and briefly discussed an exception known as the "injured spouse exception."<sup>56</sup> The Government noted that the

<sup>51</sup> See *id.* at 78 (discussing interests preserved by spousal testimonial privilege). The Court noted that the absolute ban of one spouse testifying on behalf of the other had been eradicated and "undermined" by "time and changing legal practices." *Id.* at 77. Further, the Court added that such influences had not undermined the barring of adverse testimony between spouses and that the "policy was necessary to foster family peace, not only for [the family in question], but for the benefit . . . of the public as well." *Id.*

<sup>52</sup> See *Hawkins*, 358 U.S. at 79 (mentioning explicitly that Privilege should change and develop as needed). In this passage, the *Hawkins* Court quoted the language of Rule 501 to emphasize its intent to allow federal courts to make decisions regarding privileges. *Id.* In doing so, the courts may establish and amend such decisions after considering the facts of each case and the modern circumstances surrounding—and implicated by—the privileges. *Id.*

<sup>53</sup> See Brief of Appellee, *supra* note 45, at 12–13 (stressing importance of interests protected by Privilege).

<sup>54</sup> See *id.* (arguing that changes, especially one offered by Government, are best left to Congress) (internal quotation marks omitted).

<sup>55</sup> See Brief of Appellant, *supra* note 15, at 16 (arguing Privilege should apply despite unfavorable precedent). "The government [in *Hawkins*] did not ask the Court to discard the privilege entirely but rather to hold that the privilege is controlled by the non-defendant spouse so that a non-defendant spouse could testify voluntarily, even when it was against the defendant-spouse's wishes." *Id.* "The *Hawkins* Court rejected the government's request" and "concluded that the modern rationale for the privilege was its necessity in fostering 'family peace.'" *Id.* (quoting *Hawkins*, 358 U.S. at 77).

<sup>56</sup> See *id.* at 16–17 (discussing issue presented before *Hawkins* Court). The Government quoted the Court in its brief, mentioning that *Hawkins* relied heavily on the interest of fostering "family peace." *Id.* at 16 (internal quotation marks omitted).

While the *Hawkins* Court retained a broad construction of the [Privilege], just two years later, the Supreme Court recognized an exception to [it]. The *Wyatt* Court held that the [G]overnment could compel an unwilling wife to testify against her husband for an offense that he committed against her. The Court held that an exception for spouse-on-spouse crime was necessary because of the need for evidence from the victim spouse in such cases. The spouse-on-spouse crime exception includes not only violent crimes but also crimes committed by one spouse against the property of the other. In addition, lower courts have expanded this exception to cover crimes committed by one spouse against children, and have applied it to both marital privileges.

*Hawkins* Court ultimately held that the defendant-spouse shall continue to be permitted to invoke the Privilege and prevent a willing witness-spouse to testify.<sup>57</sup>

The Supreme Court revisited the Privilege and its scope in 1980 in *Trammel v. United States*.<sup>58</sup> The defendant sought to suppress the voluntary testimony of his wife, an unindicted but alleged co-conspirator who agreed to testify against her husband in exchange for immunity from prosecution.<sup>59</sup> The Tenth Circuit held that the defendant's wife was permitted to testify against her husband, declaring an exception to the Privilege when the "defendant [spouse] . . . has jointly participated in a criminal conspiracy with [the witness spouse]."<sup>60</sup> However, the Supreme Court—instead of adopting the Exception in its entirety—acknowledged that "[t]he ancient foundations for so sweeping a [spousal testimonial] privilege have long since disappeared," but held that "the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely."<sup>61</sup>

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*Id.* at 16–17 (citations omitted).

<sup>57</sup> See *id.* at 16 (citing *Hawkins*, 358 U.S. at 77) (defending Privilege for upholding "family peace").

<sup>58</sup> See *Trammel v. United States*, 445 U.S. 40, 41–42 (1980) (reviewing Privilege and its challenges). The defendant was indicted for importing heroin into the United States from Thailand and the Philippines. *Id.* at 42. The defendant's wife was named as a co-conspirator because authorities discovered heroin in her belongings during a routine customs search in Hawaii. *Id.* During her testimony, "[s]he explained that her cooperation with the Government was based on assurances that she would be given lenient treatment." *Id.* at 42–43. "She then described, in considerable detail, her role and that of her husband in the heroin distribution conspiracy." *Id.* at 43.

<sup>59</sup> See *id.* at 42–43 (reviewing procedural history).

<sup>60</sup> See *United States v. Trammel*, 583 F.2d 1166, 1169 (10th Cir. 1978) (using precedent established in *Hawkins* to respond to defendant's argument). The Tenth Circuit noted that "[n]othing in *Hawkins* or any other reported decision, to [its] knowledge, prohibits the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony." *Id.* at 1168. Furthermore, if it were the court's mission to uphold the sanctity of marriage and protect familial values, then it would be vital to punish "those who have committed grievous criminal acts which most assuredly have led to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics." *Id.* at 1171.

<sup>61</sup> See *Trammel*, 445 U.S. at 52–53 (accepting narrower version of Exception). The Supreme Court modified the Privilege by allowing the witness-spouse to decide whether to testify adversely. *Id.* The Court reached this result by balancing the interests protected by the Privilege against the broader societal interest of investigating and prosecuting those who commit criminal acts. *Id.* at 50–51.

Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence." As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

Accordingly, “the witness may be neither compelled to testify nor foreclosed from testifying.”<sup>62</sup>

In his brief, Pineda relied heavily on the *Trammel* decision because the Supreme Court had an opportunity to adopt the Exception and declined to do so.<sup>63</sup> In contrast, the Government noted that the Court never mentioned the Exception specifically, concluding instead that the Privilege rests only with the non-defendant spouse and, therefore, a defendant-spouse could not invoke the Privilege to bar a willing witness-spouse from testifying.<sup>64</sup>

Three federal circuits—the Second, Third, and Ninth—have likewise declined to recognize the Exception.<sup>65</sup> However, the Seventh Circuit ruled

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*Id.* at 50 (citations omitted).

<sup>62</sup> See *id.* at 53 (rejecting *Hawkins* and suggesting modification of Privilege). In its explanation of the Privilege and its final decision to modify it, the Court noted that the Privilege has faced immense criticism. *Id.* at 44–45. The Court quoted legal scholar and professor, John Henry Wigmore: “[the Privilege is] the merest anachronism in legal theory and an indefensible obstruction to truth in practice.” *Id.* at 45 (internal quotation marks omitted). “The Committee on Improvements in the Law of Evidence of the American Bar Association called for [the Privilege’s] abolition. In its place, Wigmore and others suggested a privilege protecting only private marital communications, modeled on the privilege between priest and penitent, attorney and client, and physician and patient.” *Id.* (citations omitted).

<sup>63</sup> See Brief of Appellee, *supra* note 45, at 14 (pointing to Court’s decision in *Trammel*). Pineda argued that, because only the Seventh Circuit adopted the Exception since the Court’s decision in *Trammel*, it was indicative of an overall consensus among the remaining circuits that the Exception is too broad or that reason and experience do not yet demand it. *Id.* at 5. Further, Pineda contended that “[t]he interests the spousal testimonial privilege serves, preserving marital harmony and preventing the impropriety of requiring one spouse to condemn his or her partner to conviction and likely incarceration, have not weakened since the Supreme Court considered the privilege in *Trammel*.” *Id.* at 7. Because these interests have not abated, it was argued the Privilege that protects them should not be modified. See *id.*

<sup>64</sup> See Brief of Appellant, *supra* note 15, at 7–8 (reiterating that Court did not forbid an exception to Privilege). In its brief, the Government argued against the idea that the Exception was rejected. *Id.* at 10. The Government emphasized the fact that the Court never mentioned the joint participation exception to the Privilege. *Id.* at 10–11. Further, the Government continued, the job of the Supreme Court is to “decide important questions of federal law, not to resolve cases on the narrowest grounds possible.” *Id.* at 11. “The Supreme Court’s election not to base its decision on an available, narrower ground tells us nothing other than the Court understood that its primary role is to decide important questions of federal law like the continued viability of a prior Supreme Court precedent.” *Id.* at 12.

<sup>65</sup> See *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1042 (9th Cir. 1997) (refusing to incorporate Exception into Ninth Circuit jurisprudence). The witness-spouse assisted her husband, the defendant, with his heroin-trafficking business by answering calls, translating, and relaying instructions. *Id.* at 1032–33. The court, relying on *Trammel*, ruled that the Government “improperly compelled” the witness-spouse’s testimony against her husband. *Id.* at 1042; see also *In re Malfitano*, 755 F.2d 1022, 1026–28 (2d Cir. 1985) (refusing to incorporate exception into Second Circuit jurisprudence). This court also found *Trammel* persuasive when rejecting the Exception. *Malfitano*, 755 F.2d at 1026; *In re Grand Jury Empanelled October 18, 1979 Witness*, 633 F.2d 276, 278–80 (3d Cir. 1980) (refusing to incorporate Exception into Third Circuit jurisprudence). The appellant challenged an order holding her in contempt for refusing to testify against her husband. *Grand Jury*, 633 F.2d at 276. The court denied the Government’s argument

in *United States v. Van Drunen* that it would adopt the Exception.<sup>66</sup> In that case, the court stated that by adopting the Exception, it limited the Privilege “to those cases where it makes most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouse’s crime.”<sup>67</sup> The court specified two main reasons for adopting the Exception:

The first was that the goal intended to be served by the [P]rivilege, *i.e.* preventing either spouse from committing the “unforgivable act” of testifying against the other in a criminal case, did not justify assuring a criminal that he or she could enlist the aid of a spouse in a criminal enterprise without fear that by recruiting an accomplice the criminal was creating another potential witness. The second reason was that the rehabilitative effect of a marriage, which in part justifies the [P]rivilege, is diminished when both spouses are participants in the crime.<sup>68</sup>

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that a marriage between two criminals engaged in a conspiracy together is not worth salvaging because that marriage will probably dissolve anyway. *Grand Jury*, 633 F.2d at 277–78.

<sup>66</sup> See *United States v. Van Drunen*, 501 F.2d 1393, 1396 (7th Cir. 1974) (recognizing Exception). In *Van Drunen*, the Government wanted to compel the co-conspirator witness-spouse to testify and asked the court to adopt the Exception. *Id.* at 1395–96. The Court of Appeals permitted the testimony and declared: “we think [the] goal [of preserving familial interests] does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.” *Id.* at 1396. Therefore, the court acknowledged the need for the Exception by weighing the interest of protecting marital harmony against the interest of prosecuting spouses involved in crimes as co-conspirators. See *id.* The court explained that its holding limited the Privilege to those cases where the witness-spouse is neither a conspirator nor a victim. See *id.* at 1397. In such circumstances, the Privilege upholds the important interest of preserving the sanctity of marriage, contributes to the rehabilitation of the defendant-spouse, and simultaneously ensures that the Privilege itself sides with the interests of justice and truth. See *id.* The court acknowledged that *Hawkins* touched on the idea of an exception, but explained that it is not precedential in this area:

We do not view *Hawkins* as controlling. *Sub silentio* holdings “obviously [. . .] are not of the same precedential value as would be an opinion of this Court treating the question on the merits.” *Hawkins* must be accorded even less precedential value on the question whether there is a coconspirator exception to the privilege against spousal testimony, because the facts are so uncertain that it is not clear there was even a *sub silentio* holding.

*Id.* (citations omitted).

<sup>67</sup> See *id.* at 1397 (justifying adoption of Exception and providing circumstances to which it applies).

<sup>68</sup> See *United States v. Clark*, 712 F.2d 299, 301 (7th Cir. 1983) (citing *Van Drunen*, 501 F.2d at 1396–97) (stressing important interest of prosecuting all parties). The “rehabilitative effect” of the Privilege may be expressed as follows: “the [P]rivilege encourages the preservation of a marriage which may conceivably be an important institution contributing to the rehabilitation of the defendant spouse.” *Van Drunen*, 501 F.2d at 1397.

The First Circuit's decision in *Pineda-Mateo* aligned with both the historical weight of the Privilege and the traditional interests of marriage that the Privilege was enacted to protect.<sup>69</sup> The court made clear the Government's argument: that the evidentiary needs of compelling a joint-participant spouse to offer adverse testimony outweigh the policy rationales behind the Privilege.<sup>70</sup> The evidentiary needs stem from two main ideas: (1) that a conspiracy, which amounts to a collective criminal agreement, presents a unique and potentially devastating threat to the public;<sup>71</sup> and (2) that conspiracies are often inchoate and secretive processes.<sup>72</sup> In addressing the first idea, the Government argued that failure to allow it to efficiently build its case against conspirators wrongly placed the law on the side of conspiracies within marriages.<sup>73</sup> In addressing the second idea, the Government emphasized that it often needs to obtain testimony of co-conspirators in order to subvert the conspiracy.<sup>74</sup> However, the counterargument to that notion is, that by allowing the Government to

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<sup>69</sup> See *United States v. Pineda-Mateo*, 905 F.3d 13, 17 (1st Cir. 2018) (outlining history of Privilege and stressing interests it preserves). The first strike against the prospect of adopting the Exception, the court declared, is that it does not have nearly as extensive a history in federal jurisprudence as the Privilege itself does. *Id.* at 16.

<sup>70</sup> See *id.* at 22 (outlining Government's position).

<sup>71</sup> See *id.* (discussing specifics of Government's position). The Government argues that a "[c]ollective criminal agreement . . . presents a greater potential threat to the public than individual derelicts." *Id.* (internal quotation marks omitted).

<sup>72</sup> See *id.* (explaining Government's reasoning in argument in favor of Exception); Brief of Appellant, *supra* note 15, at 9 (discussing rationales of criminalizing conspiracy and its intricacies). "One of the primary rationales for criminalizing conspiracy separately from the underlying offense is that the conspirators will obtain comfort and support from each other, making it more probable that they will commit additional and more complex crimes in the future." Brief of Appellant, *supra* note 15, at 9; see also 18 U.S.C. § 371 (1994) (imposing criminal liability whenever "two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy.").

<sup>73</sup> See *Pineda-Mateo*, 905 F.3d at 22 (citing Brief of Appellant, *supra* note 15, at 28) (stating Government's asserted need for evidence due to threat and harm caused by conspiracy).

Not allowing the Government to abrogate the privilege in this context "wrongly places the law on the side of protecting conspiracies within a marriage," and therefore the Government "has a particularly strong need for evidence so that it can dismantle the conspiracy before it inflicts additional harms on the public."

*Id.*

<sup>74</sup> See *id.* (continuing discussion of Government's argument). Here, the Government pointed to the hearsay exception for statements of a co-conspirator to show how the courts have understood conspiracies to be complex and secretive. *Id.* Therefore, the Government the importance of testimony in their unraveling. See *id.*

compel co-conspirators to testify against their defendant-spouse, it presents a unique danger due to the broad application of the concept of conspiracy.<sup>75</sup>

In response to the Government's argument, the Court relied on its historical recognition of the Privilege alone, without invoking the Exception.<sup>76</sup> Furthermore, the evidentiary interests that the Government proffered, according to the Court, were "less hefty" than the interests that the Privilege is designed to serve, namely those of marital and familial harmony.<sup>77</sup> Finally, the court rested its conclusion on the Supreme Court's decision in *Trammel*, stating that the Court was "provided the opportunity to address" this Exception, yet "chose to vest the [P]rivilege only in the testifying spouse instead of opting for the narrower remedy of recognizing a joint participant exception."<sup>78</sup>

In arguing its case, the Government failed to persuasively use the Supreme Court's rulings in *Funk* and *Van Drunen* and the Tenth Circuit's ruling in *Trammel*.<sup>79</sup> Instead, the Government stressed the crucial evidentiary interests that exist when investigating and prosecuting

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<sup>75</sup> See Birmingham, *supra* note 1, at 1032 n.88 (outlining concern of prosecutorial abuse in situations where Exception applies).

Although in order to convict an individual of conspiracy the prosecution must prove there was an agreement to carry out an unlawful purpose, the existence of the agreement may be inferred from circumstantial evidence. As to the requirement that one of the agreeing persons must have committed an act in furtherance of the conspiracy, proof of a noncriminal and relatively insignificant act will suffice. The law has repeatedly been criticized as overbroad.

*Id.* (citations omitted).

<sup>76</sup> See *Pineda-Mateo*, 905 F.3d at 22 (discrediting Government's argument). The court found it damaging that the Government did not address the "'experience' side" of Rule 501's equation. *Id.* "This Court has recognized the spousal testimonial privilege without the joint-participant exception for many years, and yet the Government never present[ed] an argument as to how our experience with the spousal testimonial privilege shows that we should now recognize this exception when we did not in the past." *Id.*

<sup>77</sup> See *id.* at 23–24 (refuting Government's argument). The court listed several reasons as to why it was not persuaded by the Government's argument: (1) the Government's logic would outweigh other evidentiary privileges, such as the Fifth Amendment; (2) there are many types of evidence the Government can obtain without "piercing" the Privilege; and (3) the court will not decide which marriages are worthy of protection and which are not. See *id.*

<sup>78</sup> See *id.* at 24 (reasoning Supreme Court could have adopted Exception in *Trammel*). The court stated that the *Trammel* holding was "not conclusive that no joint participation exception should be recognized." *Id.*

<sup>79</sup> See *id.* (rebutting Government's use of *Van Drunen*). "We also decline the Government's invitation to follow the Seventh Circuit's lead because we do not find persuasive the two rationales on which the Seventh Circuit's view is based." *Id.*; Brief of Appellant, *supra* note 15, at 17–19, 52 (discussing *Van Drunen* Court's reasoning). In *Van Drunen*, the Seventh Circuit allowed the Government to compel the witness-spouse's testimony based on its ruling that preserving familial interests is outweighed by disallowing a criminal to recruit an accomplice without fear of creating another witness. *United States v. Van Drunen*, 501 F.2d 1393, 1396 (7th Cir. 1974).

conspiracies, and how the Privilege complicates such prosecutions.<sup>80</sup> The court did not find these interests compelling enough to outweigh the interest of preserving marital harmony.<sup>81</sup> The Government could have simultaneously stressed the need for testimonial evidence in conspiracy cases while also using the Seventh and Second Circuits' decisions to explain that the public's interest in punishing and deterring criminal activity outweighs, and in fact supports, the public interest of marital harmony and protecting families.<sup>82</sup> The Government should have presented its case to the First Circuit as an opportunity to adapt and develop the Privilege to more closely meet and satisfy modern day societal interests, as had been done in prior Supreme Court cases.<sup>83</sup>

The Government should have used the *Funk* decision to symbolize both the ability and the duty that the federal courts have to modify the Privilege so that it adheres to modern public policy.<sup>84</sup> Specifically, the

<sup>80</sup> See Brief of Appellant, *supra* note 15, at 27–28 (noting pitfalls presented by Privilege). First, the Government highlighted the “unique danger” that conspiracies pose: “[t]he privilege, when invoked where the conspiracy involves spouses, helps foster the continued existence of dangerous criminal confederations under the guise of a marriage.” *Id.* at 27. Then, the Government reiterated the “inchoate nature” of offenses involving conspiracies, which makes them difficult to investigate: “[c]onspiracies are ‘characterized by secrecy, rendering [them] difficult of detection [and] requiring more time for [their] discovery . . .’” *Id.* at 29 (alteration in original) (quoting *United States v. Rabinowich*, 238 U.S. 78, 88 (1915)).

<sup>81</sup> See *Pineda-Mateo*, 905 F.3d at 24 (explaining briefly rejection of Government’s argument).

<sup>82</sup> See *id.* (rejecting Government’s argument); see also *Trammel v. United States*, 445 U.S. 40, 52–53 (1980) (outlining Court’s reasons for modifying Privilege, noting “contemporary justification for affording an accused such a privilege is also unpersuasive.”); *United States v. Trammel*, 583 F.2d 1166, 1171 (10th Cir. 1978) (discussing government interests). Before *Trammel* went before the Supreme Court, the Government persuaded the Tenth Circuit that compelling the defendant’s spouse, an unindicted co-conspirator, to provide adverse testimony was more conducive to the interests upheld by the Privilege, particularly when the marriage in question was between co-conspirators who distributed heroin. *Trammel*, 583 F.2d at 1171. “The illicit heroin importation activities pursued by the parties would have effectively denied the establishment of ‘family peace’ which could in anywise have been alienated by [the witness spouse’s] testimony.” *Trammel*, 583 F.2d at 1171. In order to uphold the sanctity of marriage and protect familial values, it is vital to punish those who “have committed grievous criminal acts which most assuredly have led to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics.” *Trammel*, 583 F.2d at 1171.

<sup>83</sup> See *Trammel*, 445 U.S. at 52–53. (failing to persuade Supreme Court to develop Privilege to protect modern societal interests). In reaching its conclusion in *Trammel*, the Supreme Court focused on Rule 501’s flexibility and the necessity of adapting federal privileges in order to meet the societal interests of the time. *Id.* “Our consideration of the foundations for the privilege and its history satisfy us that ‘reason and experience’ no longer justify so sweeping a rule as that found acceptable by the Court in *Hawkins*.” *Id.* at 53.

<sup>84</sup> See *Funk v. United States*, 290 U.S. 371, 381 (1933) (stating public policy rationale surrounding spousal testimony has changed with modern legislation). The Court recognized evolving public policy when it stated that “[t]he public policy of one generation, under changed conditions, may not . . . be the public policy of another.” See *id.*



Government could have illustrated how the Supreme Court in *Funk* was willing to expand the Privilege by permitting the supportive testimony of one spouse for their defendant-spouse—a stark contrast from the absolute ban that the Privilege demanded previously.<sup>85</sup>

Furthermore, the First Circuit focused much of its analysis on Rule 501 and the “‘reason and experience’” prongs of Rule 501’s privilege standard.<sup>86</sup> However, the Supreme Court in both *Hawkins* and *Trammel*, while never addressing the Exception itself, expressly left the “door open” to allow future courts the opportunity to update the Privilege as they see fit.<sup>87</sup> Armed with the Supreme Court’s acknowledgement that the Privilege will continue to evolve, as well as the broad discretion and language of Rule 501, the Government in *Pineda-Mateo* would have benefited from addressing an ever-evolving society and its current view on marriage.<sup>88</sup> The *Trammel* Court expressly stated the idea that privileges should evolve with the times.<sup>89</sup> Had the Government presented such an argument, it would have forced the First Circuit to address declining marriage rates and increasing divorce rates in the United States and consider what these numbers indicate about the public’s perception of marriage and its interests—particularly in context of

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The conclusion which the court reached was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative.

*Id.* at 380; Brief of Appellant, *supra* note 15, at 15 (mentioning *Funk* only briefly).

<sup>85</sup> See *Funk*, 290 U.S. at 386 (holding wife was in fact competent to testify).

<sup>86</sup> See *Pineda-Mateo*, 905 F.3d at 24 (weighing heavily on Privilege’s extensive history).

<sup>87</sup> See *Trammel*, 445 U.S. at 47 (using Rule 501 to weigh Government’s need for evidence against public policy); see also FED. R. EVID. 501 (allowing federal courts to use reason and experience to determine whether Privilege applies); *Hawkins v. United States*, 358 U.S. 74, 79 (1958) (“[T]his decision does not foreclose whatever changes in the rule may eventually be dictated by ‘reason and experience.’”).

<sup>88</sup> See *Trammel*, 445 U.S. at 44 (stating history of Privilege and its impact when applied). “That the privilege is one affecting marriage, home, and family relationships—already subject to much erosion in our day—also counsels caution.” *Id.* at 48. The *Trammel* Court acknowledged the idea that perhaps society’s perception of the institution of marriage has changed over time. See *id.*

<sup>89</sup> See *id.* at 52 (explaining evolving perception of marriage). The Court recognized the evolution of gender roles and women’s rights in a marriage: “[c]hip by chip, over the years those archaic notions have been cast aside so that ‘[no] longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.’” *Id.* (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)).

the Privilege and in conjunction with the interest of prosecuting conspirators who threaten the safety of the public.<sup>90</sup>

A more complete argument in support of the First Circuit's adoption of the Exception would address the concern of abuse due to the broad application of conspiracy; this concern should have been starkly contrasted against the dangers of conspiracies and the difficulty of prosecuting them.<sup>91</sup> Additionally, the Government must address both concerns protected by the Privilege: (1) preserving the sanctity of marriage, which is addressed thoroughly; and (2) avoiding the unseemliness of pitting husband and wife against each other, which is often overlooked in the argument.<sup>92</sup>

Given the precedential weight persuading the First Circuit to reject the Exception, it is not surprising that the Privilege remains intact. However, Rule 501 bestows upon the Federal Courts the discretion and responsibility

<sup>90</sup> See Garrison, *supra* note 30, at 283–84 (discussing modern rates of marriage among young people).

An important reason why marriage is controversial is that it is in decline. All across the industrialized world, young adults are marrying later and increasing numbers may not marry at all. Those who do marry face a relatively high probability that their relationships will terminate in divorce. As a result of these convergent trends, today's adults spend, on average, a smaller proportion of their adult lives within a marital household than did their ancestors.

*Id.*; see also Rasul, *supra* note 30, at 1–2, 19, 22 (analyzing modern marriage rates and economic interests contributing to their decline).

<sup>91</sup> See *Krulewitch v. United States*, 336 U.S. 440, 446–49 (1949) (stressing just how broad concept of conspiracy can be).

The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always “predominantly mental in composition” because it consists primarily of a meeting of minds and an intent.

... It is not intended to question that the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer.

*Id.*

<sup>92</sup> See *Trammel*, 445 U.S. at 52 n.12 (justifying modification of Privilege with maintaining protection of societal interests).

It is argued that abolishing the privilege will permit the Government to come between husband and wife, pitting one against the other. That, too, misses the mark. Neither *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.

*Id.*

to establish and adapt the rules of evidence. In consideration of modern societal interests, there seems to be a push for adoption of the Exception. Upon adoption, the Government would have the concerning ability to compel a witness-spouse to testify adversely against their defendant-spouse in a criminal proceeding. In doing so, the sanctity and privacy of marriage would be compromised. However, it would be compromised in the name of truth, justice, and the goal of protecting families from those who would seek to endanger the public by breaking the laws by which the rest of society has agreed to live.

*Dean Fiotto*

