No. _____

In the
Supreme Court of the United States

WILLIAM FRAZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit is correct that—contrary to every other circuit's application of the plain statutory language—the VICAR statute, 18 U.S.C. § 1959(a), "is not subject to standard rules of statutory interpretation," such that the statutory *mens rea* requirement does not apply to every element of the offense.

2. Whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "crime of violence" within the meaning of 18 U.S.C. § 924(c)(3)(A).

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner: *William Frazier*

Respondent: *United States*

William Frazier's appeal was consolidated in the Sixth Circuit with the appeals of several codefendants, who were named in the same indictment as Frazier. Only one of those codefendants—Christopher Odum—was Frazier's codefendant at trial. None of Frazier's codefendants is a party to this petition.

RELATED PROCEEDINGS

Proceedings that are directly related to this petition are as follows:

United States District Court (E.D. Mich.):

United States v. Frazier, No. 2:13-cr-20764-14 (Dec. 8, 2015).

United States Court of Appeals (6th Cir.):

United States v. Odum, Nos. 15-2280/2503 (Nov. 30, 2017).

United States v. Frazier, No. 15-2503 (Jan. 24, 2020).

Supreme Court of the United States:

Frazier v. United States, No. 17-8381 (Oct. 9, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, William Frazier, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit Court of Appeals' opinion on remand from this Court was issued on January 24, 2020, in Case Number 15-2503. Pet. App. 1a-4a. It is not published in the Federal Reporter but is reprinted at 790 F. App'x 790. The Sixth Circuit's prior order affirming Frazier's convictions and sentence was issued on November 30, 2017, in Case Numbers 15-2280/15-2503 and is published at United States v. Odum, 878 F.3d 508 (6th Cir. 2017). Pet. App. 6a-24a. The district court's criminal judgment as to Frazier was entered on December 8, 2015, in Case Number 13-cr-20764-14. Pet. App. 25a-31a.

JURISDICTION

The Sixth Circuit Court of Appeals' decision and opinion was entered on January 24, 2020. This Court's order dated March 19, 2020 extended the deadline for filing all petitions for certiorari until 150 days after the date of the lower court's opinion. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(3) provides,

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 1959 provides,

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of [1] under this title, or both.

(b) As used in this section—

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

> (2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

STATEMENT OF THE CASE

1. William Frazier was convicted by jury of violating 18 U.S.C. § 1959(a) (the "VICAR" statute) and 18 U.S.C. § 924(c)(1)(A) for discharging a firearm in furtherance of a "crime of violence." Pet. App. 9a.

The VICAR statute pertains to so-called "violent crimes in aid of racketeering activity." *See* 18 U.S.C. § 1959. In this case, the government indicted several members of the Detroit-area Phantoms Motorcycle Club (the "Phantoms"), which it alleged engaged in racketeering in violation of the RICO statute. Pet. App. 9a. The bulk of the prosecution's case centered upon a murder conspiracy that occurred in October 2013. Pet. App. 10a.

Unlike almost all of his codefendants, Frazier was not indicted for any substantive RICO offense; he was indicted solely under VICAR and § 924(c) for participating in a state-law assault during a bar-fight in Columbus, Ohio, in October 2012—a year before the murder conspiracy came to fruition. Pet. App. 9a.

Notably, there was no evidence at trial that Frazier knew about any of the Phantoms' racketeering activity; each of the government's witnesses agreed that Frazier was not involved in any of it. (Transcript, R. 725 at PageID 10229-32). In fact, Frazier moved away from Detroit to Florida in mid-2010, shortly after he joined the motorcycle club. There is no evidence that he was involved in any illegal activity, other than the bar-fight in October 2012.

Even that incident is only tenuously connected to the Phantoms. The scuffle started when one Phantoms member was elbowed by another patron at the bar as he was attempting to order food. The government's witnesses agreed at trial that the scuffle was spontaneous and had nothing to do with the Phantoms motorcycle club. (Transcript, R. 727 at PageID 10583; R.716 at PageID 9684).

The victim of the assault also claimed that Frazier did not participate in the assault and was not the person who shot him. In fact, the victim (who was himself African-American) claimed that he was assaulted by three African-American members of the Phantoms and was shot by "a black male with medium complexion" wearing "a clean cut goatee, and braids." (ATF Report of Investigation, R. 732-1 at PageID 10815-16). The victim corroborated this description twice: both immediately after the assault and in an interview with ATF agents two years later. (*Id.*; *see also* Defense Ex. E (audio recording of interview submitted to Sixth Circuit)). Frazier is unmistakably Caucasian. The victim's description of his assailants categorically excludes Frazier from participation in the assault.

Nevertheless, Frazier was tried with another member of the Phantoms, who had not joined the Phantoms until after Frazier had moved to Florida, and who was indicted as a participant in the independent murder conspiracy dating from October 2013—none of which had any connection to Frazier or any relevance to the charges against him. The evidence is undisputed that—just like with respect to the rest of the Phantoms' alleged racketeering—Frazier had no knowledge of any of the Phantoms' conduct in October 2013. (Transcript, R. 725 at PageID 10229-32).

Ultimately, after hearing weeks of significantly prejudicial testimony about a murder conspiracy that was irrelevant to Frazier's case, the jury convicted Frazier of participating in the one-off assault that occurred the year before, in October 2012.

2. On appeal, Frazier argued that section 1959(a)'s *mens rea* requirement applies to each element listed subsequently in the statute. In other words, it was not enough for the government to prove merely that Frazier intended to advance himself in "an enterprise"; the government was instead required to prove that Frazier intended to advance himself in a specific type of enterprise—that is, "an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a). And without knowing that the enterprise was engaged in racketeering, Frazier could not have intended to advance himself in "an enterprise engaged in racketeering activity." Pet. App. 14a-15a.

As applied to Frazier's case, this distinction is critical. VICAR's definition of "enterprise" is not limited to illegal gangs; instead, it includes ". . . any union or group of individuals associated in fact . . ." *See* 18 U.S.C. § 1959(b)(2). If the government is correct that a VICAR conviction does not require the defendant to know that the enterprise in question is "engaged in racketeering," then VICAR could apply to a defendant who attempted to advance himself in an organization that he believed was innocuous or legal.

In Frazier's case, the government introduced no evidence that Frazier knew about any of the Phantoms' racketeering conduct. Instead, each of its witnesses agreed that Frazier did not participate in any of it and was living in Florida during

almost the entire relevant time period. There is no evidence that Frazier knew what the Phantoms had done before he joined the club or when he was not around. Not a single witness placed Frazier at any Phantoms event other than the spontaneous assault that was the basis of his convictions. All of the alleged racketeering conducted by Phantoms members was coordinated by members who were also Vice Lords, and the government agreed at Frazier's sentencing that "there was no evidence deduced at trial that Mr. Frazier was a member of the Vice Lords." (Transcript, R. 723 at PageID 10116).

3. The Sixth Circuit rejected Frazier's argument. As the court recognized, the ordinary rule is that a statutory *mens rea* requirement applies to all elements of the crime, under principles of "basic statutory interpretation." Pet. App. 14a. The court also recognized that the requirement that the enterprise was "engaged in racketeering activity" is a separate element of a VICAR offense. Pet. App. 11a. Ordinary principles of statutory interpretation therefore direct that the statute's *mens rea* requirement extends to that element.

Nevertheless, the Sixth Circuit held that the opposite conclusion is necessary in a case under VICAR. According to the Sixth Circuit, "even if Frazier's argument . . . were compelling," it could not carry the day because "VICAR is not subject to standard rules of statutory interpretation." Pet. App. 15a. According to the Sixth Circuit, the VICAR statute's "remedial purpose" could overcome the statute's plain language. *Id*. The Sixth Circuit also rejected Frazier's argument that 18 U.S.C. § 924(c)(3)(B)'s definition of "crime of violence" is unconstitutionally vague.

Although the Sixth Circuit's opinion initially was unpublished, the government moved the court to publish the opinion. The most important feature of the court's opinion, according to the government, was that it "established what the government is not required to prove [in a VICAR prosecution]: that the 'defendant actually knew that the enterprise was engaged in racketeering activity.'" The Sixth Circuit granted the government's motion and published its opinion.

4. Frazier filed his initial petition for certiorari with this Court in March 2018. In his petition, Frazier asserted that (1) the Sixth Circuit erred in exempting the VICAR statute from the ordinary rules of statutory interpretation in order to eliminate the application of its *mens rea* requirement to each element of the offense, and (2) the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague.

Shortly after Frazier's petition was filed, this Court handed down its decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), concluding that statutory language that was virtually identical to the wording of § 924(c)(3)(B) was unconstitutionally vague. This Court ordered the Government to file a response to Frazier's petition. In its response, the Government argued that the Sixth Circuit's interpretation of the VICAR statute was not aberrant and that Frazier's § 924(c) conviction would be upheld under the "elements" clause of the statute (18 U.S.C. § 924(c)(3)(A)), such that the constitutionality of the residual clause made no difference in his case.

Frazier filed a reply, observing that every relevant decision from this Court requires a statutory *mens rea* requirement to extend to every element of the offense and that Frazier's § 924(c) conviction cannot be sustained under the elements clause because the relevant portion of the VICAR statute—18 U.S.C. § 1959(a)(3)—is not categorically violent. On the latter point, § 1959(a)(3) requires proof that the defendant committed "assault with a dangerous weapon or assault resulting in serious bodily injury," and Frazier observed that (1) it is possible to commit either of these crimes without the use of violent force, which means that they are not categorically violent under *Johnson v. United States*, 559 U.S. 133, 140 (2010); (2) it is possible to commit either of these crimes with a mens rea of recklessness, which means that they are not categorically violent under the reasoning of cases such as *United States v. Windley*, 864 F.3d 36, 38 (1st Cir. 2017); and (3) the Government's identification of the "elements" of a VICAR conviction differed not only from the Government's position in the Sixth Circuit but also from every other court that has addressed the issue.

On October 9, 2018, this Court granted Frazier's petition, vacated the Sixth Circuit's judgment, and remanded the case to the Sixth Circuit for further consideration. Pet. App. 5a.

5. While Frazier's case was on remand in the Sixth Circuit, this Court issued its opinion in *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019), which ruled that 18 U.S.C. § 924(c)(3)'s residual clause was unconstitutionally vague. In view of *Davis*, Frazier argued on remand that the VICAR statute was not categorically

violent under § 924(c)(3)'s elements clause, either, due to the fact that it may be violated through less-than-violent means. In order to preserve his argument that VICAR's *mens rea* requirement extends to every element of the offense, Frazier also requested on remand that the Sixth Circuit revisit its determination of that issue, especially considering this Court's intervening decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which reiterated the principle that a statutory *mens rea* requirement extends to every element of the offense.

Shortly before Frazier's appeal could be argued on remand, the Sixth Circuit issued a published decision in a separate appeal, *Manners v. United States*, 947 F.3d 377 (6th Cir. 2020), which held that a VICAR offense is categorically violent under § 924(c)(3)'s elements clause. The Sixth Circuit held that its published decision in *Manners* foreclosed Frazier's appeal. Pet. App. 3a. Viewing this Court's remand order as limited to the § 924(c)(3) issue, the Sixth Circuit "decline[d] to revisit" its holding that VICAR's mens rea requirement does not extend to each element of the offense. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

I. No other circuit has held that "VICAR is not subject to standard rules of statutory interpretation."

The Sixth Circuit's decision to apply a specialized version of statutory interpretation in order to eliminate the presumptive *mens rea* requirement from the VICAR statute is contrary to the approach of every other circuit court that has construed the statute. The Sixth Circuit's interpretive decision has substantial implications. To begin with, a VICAR conviction can carry the death penalty. *See* 18

U.S.C. § 1959(a)(1). This Court should grant certiorari in order to bring the Sixth Circuit's reasoning in line with that of the other circuits.

A. Instead of exempting VICAR from the "standard rules" of statutory interpretation, the other circuits have relied upon the "plain meaning" of the statutory text.

Frazier is not aware of any case in which this Court has relied upon a statute's background "remedial purpose" to trump the plain language of the statute. Instead, the "standard rules" of statutory interpretation apply equally across the board: where there is a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). "[I]f the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of [the] analysis." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007).

Nor has any circuit other than the Sixth Circuit exempted VICAR from the ordinary tenets of statutory interpretation. The Sixth Circuit pointed to the Second Circuit's decisions in *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), and *United States v. Mapp*, 170 F.3d 328 (2d Cir. 1999), as support for the notion that VICAR's remedial purpose can trump the statute's plain language. But, in fact, these cases stand for the opposite proposition. *Concepcion*'s holding turned on the "ordinary meaning" of VICAR's statutory text; unlike the Sixth Circuit's decision in this case, it did not rely upon the legislative history in order to overcome the plain language of the statute. *Concepcion*, 983 F.2d at 381. The decision in *Mapp*, likewise, does not leverage VICAR's broad remedial purpose in order to overcome an otherwise compelling plain-language argument. Instead, *Mapp* went out of its way to point out

that its reasoning was consistent with "both the text and the purpose" of the statute. *Mapp*, 170 F.3d at 336.

Thus, none of the authority cited by the Sixth Circuit supports the proposition that VICAR's plain text can be surmounted by its generalized remedial purpose. Instead, the cases relied upon by the Sixth Circuit reject its approach. As both *Concepcion* and *Mapp* pointed out, VICAR was intended to apply to defendants who committed crimes "as an integral aspect of membership" in a RICO enterprise. *Concepcion*, 983 F.2d at 381; *Mapp*, 170 F.3d at 336. The Sixth Circuit's decision provides for exactly the opposite: it allows a defendant to be convicted under VICAR even if the defendant did not know that an enterprise was engaged in racketeering at all.

This inconsistency is reflective of the widespread confusion among the circuits over the precise elements of a VICAR offense. The Sixth Circuit held in one published opinion that an offense under § 1959(a)(3) has five elements, *see United States v. Odum*, 878 F.3d 508, 516 (6th Cir. 2017), *cert. granted, judgment vacated sub nom. Frazier v. United States*, 139 S. Ct. 319 (2018), and held in another published opinion that it has only three, *see Manners*, 947 F.3d at 380. The Ninth Circuit has identified four elements. *See United States v. Banks*, 514 F.3d 959, 964 (9th Cir. 2008). The Fourth Circuit, for its part, recently held that § 1959(a)(3) requires proof that the defendant engaged in conduct "that violated both th[e] enumerated federal offense as well as a state law offense"—in other words, that the government must also prove that the defendant committed a "generic" federal-law

offense, such that there are essentially six elements of a § 1959(a)(3) offense. *United States v. Keene*, 955 F.3d 391, 394, 398–99 (4th Cir. 2020). If the Fourth Circuit's analysis in *Keene* is correct, then all of the other circuits are wrong.

The Government itself has been confused about the elements of the offense. In the first round of briefing in the Sixth Circuit, the Government argued that there are only five elements of a VICAR offense. (Gov't Br., 6th Cir. DE 54, at 34, 59-60). When opposing Frazier's petition for certiorari in this Court, the Solicitor General argued that proof of a commission of a state crime was an element of a VICAR offense and made no mention of any need to prove a "generic" federal-law crime. (Gov't Resp. in Opp. to Cert., at 15; *id*. at 7-8). But on remand in the Sixth Circuit, the Government asserted at length that a VICAR conviction also requires proof of a "generic" assault with a dangerous weapon. (Gov't Supp. Br., 6th Cir. DE 111, at 12-18). The Government used one set of elements to convince the jury to send Frazier to prison and then advanced a different set of elements to keep him there.

This confusion is indicative of the substantial unclarity in the federal Circuits over the nature of the elements of a VICAR offense. At minimum, no Circuit other than the Sixth has held that VICAR is exempt from the ordinary rules of statutory interpretation, such that the statute's plain language can be overcome by its underlying purpose. The lower courts are overdue for a definitive explication of the elements of a § 1959(a)(3) offense. Frazier's case—in which the Sixth Circuit adopted an outlier approach—is well-suited for this Court's resolution of the uncertainty.

B. The Sixth Circuit's analysis of VICAR's *mens rea* requirement is demonstrably incorrect.

The Sixth Circuit's rejection of Frazier's plain-language argument is also almost certainly incorrect.

Just last term, this Court again rejected the notion that a statutory *mens rea* requirement does not extend to all of the non-jurisdictional elements of a federal crime, observing, "The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion." *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (holding that 18 U.S.C. § 922(g) requires proof that the defendant knew that he was a felon or had unlawful immigration status). The "longstanding presumption, traceable to the common law," is that "Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Id*. at 2195 (citation omitted). That is because "a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." *Elonis v. United States*, 135 S. Ct. 2009, 2011 (2015) (citation omitted).

These principles apply with full force here. The VICAR statute criminalizes certain conduct committed "for the purpose of gaining entrance to or maintaining or increasing position in" a specific type of enterprise—that is, "an enterprise engaged in racketeering activity"—as opposed to simply an "enterprise," which could include any innocuous association-in-fact. *See* 18 U.S.C. § 1959(b)(2) (broadly defining "enterprise" as "includ[ing] any partnership, corporation,

association, or other legal entity, and any union or group of individuals associated in fact . . ."). The Sixth Circuit recognized that proof that the enterprise is "engaged in racketeering activity" is a separate element of a VICAR offense. Pet. App. 11a. Section 1959(a)'s *mens rea* requirement therefore applies to this element of the offense.

As this Court pointed out in *Elonis*, the statute there applied not merely to defendants who "communicat[e] *something*"; it applied only to those defendants who communicate something specific: a threat. *Elonis*, 135 S. Ct. at 2011. VICAR functions similarly. It is not enough for the government to prove that the defendant was jockeying for position in what he thought was merely an enterprise-in-fact (including an innocuous club, a trade union, or the like); the government must prove that he was trying to assert himself in a group that he knew was a specific kind of enterprise—that is, "an enterprise engaged in racketeering."

Ordinary grammar and common parlance are relevant to this question, *see Flores-Figueroa v. United States*, 556 U.S. 646, 650-52 (2009), and they support this result. For example, if someone moved to a certain locality "for the purpose of gaining a position at a company engaged in coal mining," no one would suspect that he or she relocated there without a very specific intent about the nature of his or her chosen industry. *See United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 436-37 (6th Cir. 2016) (discussing *Flores-Figueroa v. United States*, 556 U.S. 646, 650-52 (2009)). In the same way, a defendant cannot be convicted under VICAR of acting "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity"

without proof that he had an intent to advance his position in a particular type of enterprise: namely, "an enterprise engaged in racketeering activity."

This Court has repeatedly interpreted similar statutory language as extending the *mens rea* requirement to each element of the offense. *See, e.g.*, *Rehaif*, 139 S. Ct. at 2197; *Elonis*, 135 S. Ct. at 2011; *Flores-Figueroa*, 556 U.S. at 650-52; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994); *Liparota v. United States*, 471 U.S. 419, 420 (1985); *Morissette v. United States*, 342 U.S. 246, 271 (1952).

The lone exception to the presumptive scienter requirement is for "statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties." *Rehaif*, 139 S. Ct. at 2197. That exception does not apply here. A VICAR conviction can carry the death penalty. *See* 18 U.S.C. § 1959(a)(1) (providing potential death penalty for murder in aid of racketeering); *see also Rehaif*, 139 S. Ct. at 2197 (noting that a 10-year possible punishment is not a minor offense). Congress did not intend to eliminate the presumptive *mens rea* requirement in a criminal statute that provides for the death penalty.

The only way to accept the Sixth Circuit's reading of the statute is to dispense with the ordinary rules of statutory construction. No other case has done so.

C. The issues presented are important and recurring.

As highlighted by the government in its motion requesting that the Sixth Circuit publish its initial decision so that this very issue would be enshrined in published authority, the implications of the Sixth Circuit's decision are significant for VICAR prosecutions. Rejecting a requirement that the defendant have knowledge of the racketeering nature of the enterprise permits a court to do what it did here—that

is, to find that a defendant violated VICAR even if the relevant enterprise did not blossom into a racketeering enterprise until well after the date of his conduct. Such an approach allows the government to significantly expand VICAR prosecutions to circumstances well beyond the scope contemplated by the plain language of the VICAR statute. *Concepcion*, 983 F.2d at 381. Frazier has canvassed the reported appellate decisions involving VICAR offenses and is not aware of any other VICAR case—and the government did not identify one—involving equally scanty evidence of racketeering, even in cases involving motorcycle clubs. *See, e.g., United States v. Donovan*, 539 F. App'x 648, 660-61 (6th Cir. 2013) (defendant participated in distributing drugs and stored stolen motorcycles at his residence); *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994) (motorcycle club that engaged in significant drug distribution activity). The government's successful prosecution of Frazier has marked out a new frontier in the realm of VICAR liability.

Further, the court's reasoning in this case appears to have led it to rely upon events that post-date October 2012 in order to reject Frazier's assertion that the government failed to prove that the Phantoms were "engaged in racketeering" as of October 2012. Pet. App. 14a. But Frazier cannot have violated VICAR if he attempted to advance himself an enterprise that wasn't already "engaged in racketeering" at the time of his conduct. Even the government did not advance such a reading of the statute. The Sixth Circuit's faulty reasoning led it down that path, ending in a place that cannot be squared with the statutory text.

Added to this is the potential mischief caused by the Sixth Circuit's invitation to disregard the plain language of a federal criminal statute in order to effect a nebulous "remedial" purpose. The significant implications of the Sixth Circuit's decision warrant relief from this Court.

D. This case is an excellent vehicle for resolving the split of authority on this issue.

This case squarely presents the question whether the VICAR statute is exempt from the standard rules of statutory interpretation or whether, on the other hand, it requires the government to prove that the statute's *mens rea* requirement extends to each element of the offense, including the element that the relevant enterprise be "engaged in racketeering."

The answer to that question is dispositive of this case. There is no evidence in the record that Frazier knew as of October 2012 (or later, for that matter) that the Phantoms were engaged in racketeering. Frazier joined the Phantoms by being "patched over" with friends from a different club, who all left when Frazier moved to Florida in 2010. (Transcript, R. 715 at PageID 9583; R. 727 at PageID at 10566). The Phantoms had legitimate social purposes, and held numerous events to which members' families were invited. (Transcript, R. 727 at PageID 10559). Nor does the mere fact that Frazier was a member mean that he knew of all of the Phantoms' activities. It is legal to be a member of a motorcycle club; in fact, at least one member of the Phantoms was a law enforcement officer. (Transcript, R. 545 at PageID 6500).

The Sixth Circuit recognized on remand that its reasoning likely was wrong, especially in light of *Rehaif*. Pet. App. 4a. Nevertheless, the Sixth Circuit

attempted to insulate its holding by asserting in a footnote that its elimination of the *mens rea* requirement would make no difference to Frazier's appeal. Pet. App. 4a.

This, respectfully, is the Sixth Circuit's third flawed attempt at justifying the same incorrect analysis. First, it eliminated the *mens rea* requirement by incorrectly opining that VICAR is not subject to ordinary rules of statutory interpretation. Pet. App. 15a. That approach, as indicated above, is inconsistent with this Court's long-standing precedent.

Second, the Sixth Circuit suggested a fallback rationale for its decision: namely, that, "[w]ere we to adopt Frazier's position, VICAR might not cover an individual who commits a violent crime as a part of gaining entry to a gang but who does not have specific knowledge of the group's racketeering activities." Pet. App. 15a. But that is the whole point of a *mens rea* requirement: to punish defendants only when they have the requisite degree of knowledge or purpose. Although a defendant is not required to "know that his conduct is illegal," he ordinarily cannot be convicted unless he "know[s] the facts that make his conduct fit the definition of the offense." *Elonis*, 135 S. Ct. at 2009. The Sixth Circuit erroneously identified the intended effect of the *mens rea* requirement as the very reason not to apply it. That logic is circular.

This third attempt is no better. According to the Sixth Circuit, "there was sufficient evidence for a rational trier of fact to find that he knew that the enterprise was engaged in racketeering," because "Frazier was the head of a local chapter of the enterprise; he joined the enterprise soon after it had committed various acts of racketeering; and he was personally acquainted with the national president,

who ordered these acts." Pet. App. 4a. But, first, the fact that Frazier knew who the national president was by no means shows that he knew about everything that the national president had done. Second, it is a non sequitur to charge Frazier with knowledge of events that occurred before he even came on the scene. There was no suggestion at trial that Frazier knew about any racketeering conduct dating from before he joined the motorcycle club. And third, as for the period of time after he joined the club, every witness agreed that Frazier had nothing to do with any of the club's racketeering conduct.

The stubborn reality is that (1) every witness at trial testified that Frazier was not involved in any of the Phantoms' acts of racketeering; (2) there was no testimony at trial suggesting that Frazier knew about any of these acts; and (3) the vast majority of racketeering conduct alleged in the case is irrelevant to Frazier because it occurred long after the facts for which he was convicted occurred.[1] Notwithstanding the Sixth Circuit's dicta, this case is an ideal vehicle for this Court to resolve the split of authority on the question of VICAR's *mens rea*.

[1] For the period of time before October 2012, the government's evidence of "racketeering" is limited to two events: (1) the stealing of a single out-of-state motorcycle from Kokomo, Indiana; and (2) an assault against members of the Omen motorcycle club in 2010. Pet. App. 7a. (The Sixth Circuit's opinion states that one other event—an altercation with the Zulus in 2009—was a "racketeering" event because it involved "intimidat[ion]," *id.*, but "intimidation" is not an offense listed in 18 U.S.C. § 1961(1) and therefore cannot constitute "racketeering." *See* 18 U.S.C. § 1959(b)(2).) In any event, every witness acknowledged that Frazier was not part of these events and had nothing to do with them. There is no evidence that he even knew about them.

II. The Court should hold Frazier's case pending its decision in *Borden v. United States*.

The Sixth Circuit's decision that VICAR is categorically violent under the elements clause, § 924(c)(3)(A), also presents an issue upon which the circuits are squarely split. The question whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), is already before this Court in *Borden v. United States*, No. 19-5410 (certiorari granted March 2, 2020).

The resolution of this question makes a difference in Frazier's case. The relevant language in 18 U.S.C. § 924(e)(2)(B)(i) is in all material respects identical to the text of 18 U.S.C. § 924(c)(3)(A). The only difference is that § 924(e)(2)(B)(i) provides that a violent felony must have "as an element the use, attempted use, or threatened use of physical force against the person of another," whereas § 924(c)(3)(A) provides that a crime of violence must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." (emphasis added).

In the event that § 924(e)(2)(B)(i) and § 924(c)(3)(A) do not encompass offenses that may be committed where a defendant merely has a *mens rea* of recklessness, then the VICAR statute, 18 U.S.C. § 1959(a), is not categorically a crime of violence. That is because it can be triggered through commission of a predicate crime of aggravated assault with a deadly weapon—which itself may only require a *mens rea* of recklessness for conviction. *Burris*, 912 F.3d at 397. The same is true for various other state-law assault offenses. *See, e.g.*, *United States v. Rose*, 896 F.3d 104,

105 (1st Cir. 2018) (Rhode Island offense of assault with a dangerous weapon is not a violent felony under § 924(e) because it requires only recklessness).

Thus, if this Court rules in *Borden* that a crime is not categorically violent under the materially identical language in § 924(e)(2)(B)(i) if it can be committed by a defendant with a *mens rea* of recklessness, then Frazier's § 924(c) conviction will need to be vacated, as well. If certiorari is not granted on the initial question presented in Frazier's petition, then Frazier's petition should be held pending a ruling in *Borden*.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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