No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HECTOR ENAMORADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROSEMARY CURRAN SCAPICCHIO
COUNSEL OF RECORD FOR PETITIONER
LAW OFFICES OF ROSEMARY C. SCAPICCHIO
107 UNION WHARF
BOSTON, MA 02109
(617) 263-7400
ROSEMARY@SCAPICCHIOLAW.COM

EMMA QUINN-JUDGE
ZALKIND DUNCAN & BERNSTEIN LLP
65A ATLANTIC AVE
BOSTON, MA 02110
(617) 742-6020
EQUINN-JUDGE@ZALKINDLAW.COM

ATTORNEYS FOR PETITIONER
HECTOR ENAMORADO

QUESTIONS PRESENTED

Petitioner Hector Enamorado was convicted on a single count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d). During closing arguments, a codefendant's counsel decided to make the jury's task "a little bit easy" by confessing his client's role in the criminal enterprise as a whole and in an underlying murder, thereby specifically implicating Enamorado—who had maintained his innocence—in the murder.

The questions presented are:

1. Whether a confession by codefendant's counsel on behalf of his client during a multi-defendant trial is subject to *Bruton v. United States,* 391 U.S. 123 (1968), and violates the Sixth Amendment rights of a non-confessing codefendant implicated by that confession, an issue on which the circuits are split.
2. Whether a RICO conspiracy to violate 18 U.S.C. § 1962(c)—by conducting or participating, directly or indirectly, in the conduct of a RICO enterprise's affairs through a pattern of racketeering activity—requires proof that a conspirator knowingly agreed to facilitate the activities of those who are operating or managing the RICO enterprise, a standard that harmonizes *Reves v. Ernst & Young*, 507 U.S. 170 (1993), and *Salinas v. United States*, 522 U.S. 52 (1997).
3. Whether state law RICO predicates are elements of a RICO offense that must be found by a jury.

PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Hector Enamorado.

Respondent is the United States of America.

In addition to Hector Enamorado and the United States of America, Noe Salvador Pérez-Vásquez and Luis Solís-Vásquez were parties in the court of appeals.

RELATED CASES

United States v. Enamorado, No. 15-CR-10338-FDS, U.S. District Court for the District of Massachusetts. Judgment entered on July 16, 2019.

United States v. Enamorado, Nos. 18-1975, 19-1734, U.S. Court of Appeals for the First Circuit. The court issued its decision on July 26, 2021, and judgment entered on August 20, 2021.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 2

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

I. The courts of appeals are split regarding the application of *Bruton* to remarks by counsel 8

A. In multi-defendant trials, this Court uses a functional approach to determine whether admission of a codefendant's confession violates the non-confessing codefendant's Confrontation Clause rights 10

B. Three courts of appeals recognize *Bruton*'s application to remarks by counsel 15

C. Three courts of appeals wrongly hold that *Bruton* cannot apply to remarks by counsel 17

D. Confessions and multi-defendant trials are common, and the current positions of several courts of appeals jeopardize defendants' Sixth Amendment rights on a large scale 21

E. This case presents the ideal vehicle to address the applicability of *Bruton* to remarks by counsel 23

II. This Court should harmonize its decisions in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), and *Salinas v. United States*, 522 U.S. 52 (1997) 24

A. *Reves* and *Salinas* should be harmonized by holding that liability for RICO conspiracy requires a knowing agreement to facilitate the activities of those who are operating or managing the RICO enterprise 24

B. The decision below was wrong 28

C. This case presents an ideal vehicle for addressing the intersection of *Reves* and *Salinas*..... 31

III. This Court should conclude that RICO predicates are elements that must be found by a jury..... 31

CONCLUSION..... 36

APPENDIX A – Opinion of the United States Court of Appeals for the First Circuit (July 26, 2021)……..…1a

APPENDIX B – Judgment of the United States Court of Appeals for The First Circuit (Aug. 20, 2021)……..…….50a

APPENDIX C – Transcript Excerpts from Jury Trial Day 16 – Closing Argument (Apr. 18, 2018)……..…..51a

APPENDIX D – Transcript Excerpts from Jury Trial Day 16 – Jury Instructions (Apr. 18, 2018)……..…..83a

TABLE OF AUTHORITIES

Cases

Alleyne v. United States, 570 U.S. 99 (2013) 32, 35

Apprendi v. New Jersey, 530 U.S. 466 (2000) 35

Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961 (7th Cir. 2000) 26, 27

Bruton v. United States, 391 U.S. 123 (1968) ..... passim

Commonwealth v. Brown, 592 Pa. 376, 925 A.2d 147 (2007) 17

Commonwealth v. Cannon, 610 Pa. 494, 22 A.3d 210 (2011) 17

Crawford v. Washington, 541 U.S. 36 (2004) 9, 10

Douglas v. Alabama, 380 U.S. 415 (1965) 13, 14, 18, 23

Frazier v. Cupp, 394 U.S. 731 (1969) ..... passim

Gray v. Maryland, 523 U.S. 185 (1998) 12, 13, 15, 17

Krulewitch v. United States, 336 U.S. 440 (1949) 22

Pointer v. Texas, 380 U.S. 400 (1965) 8

Reves v. Ernst & Young, 507 U.S. 170 (1993) ..... passim

Richardson v. Marsh, 481 U.S. 200 (1987) ..... passim

Richardson v. United States, 526 U.S. 813 (1999) 34, 35

Salinas v. United States, 522 U.S. 52 (1997) ..... passim

Smith v. Berg, 247 F.3d 532 (3d Cir. 2001) 25

United States v. Adkins, 883 F.3d 1207 (9th Cir. 2018) 33, 34

United States v. Applins, 637 F.3d 59 (2d Cir. 2011) 26

United States v. Arrington, 409 F. App'x 190 (10th Cir. 2010) 33

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983) 34

United States v. Carr, 424 F.3d 213 (2d Cir. 2005) 34

United States v. Carrillo, 229 F.3d 177 (2d Cir. 2000) 32, 34, 36

United States v. Cummings, 395 F.3d 392 (7th Cir. 2005) 26

United States v. Espinosa, 771 F.2d 1382 (10th Cir. 1985) 16

United States v. Fernandez, 388 F.3d 1199 (9th Cir. 2004) 25

United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977) 34

United States v. Gonzalez, 981 F.3d 11 (1st Cir. 2020) 35

United States v. Gotti, 451 F.3d 133 (2d Cir. 2006) 34

United States v. Huezo, 546 F.3d 174 (2d Cir. 2008) 30

United States v. Long, 900 F.2d 1270 (8th Cir. 1990) 15

United States v. Marino, 277 F.3d 11 (1st Cir. 2002) 33

United States v. Millán-Machuca, 991 F.3d 7 (1st Cir. 2021) 29

United States v. Mouzone, 687 F.3d 207 (4th Cir. 2012) 25, 27

United States v. Owens, 167 F.3d 739 (1st Cir. 1999) 26

United States v. Pérez-Vásquez, 6 F.4th 180 (1st Cir. 2021) 2

United States v. Quintero, 38 F.3d 1317 (3d Cir. 1994). 19, 20

United States v. Rodríguez-Torres, 939 F.3d 16 (1st Cir. 2019) 26

United States v. Rosenthal, 805 F.3d 523 (5th Cir. 2015) 25

United States v. Sacco, 563 F.2d 552 (2d Cir. 1977) 15

United States v. Salinas, 564 F.2d 688 (5th Cir. 1977) 34

United States v. Sandini, 888 F.2d 300 (3d Cir. 1989) 18, 19, 20

United States v. Sandoval, 6 F.4th 63 (1st Cir. 2021) 7, 29

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 14

United States v. Starrett, 55 F.3d 1525 (11th Cir. 1995) 25

United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982)..... 18, 19

United States v. Warneke, 310 F.3d 542 (7th Cir. 2002) 26

United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985)..... 33

United States v. Wilson, 605 F.3d 985 (D.C. Cir. 2010) 25

United States v. Zelaya, 908 F.3d 920 (4th Cir. 2018) 29

United States v. Zichettello, 208 F.3d 72 (2d Cir. 2000)..... 25

Statutes

18 U.S.C. § 1961..... 31

18 U.S.C. § 1962..... 2, 3, 24, 28

21 U.S.C. § 848..... 34

28 U.S.C. § 1254..... 2

Mass. Gen. Laws ch. 265, § 1 (2021) 32

Other Authorities

Alison Cook et al., *Firing Back at the Backfire Effect: The Influence of Mortality Salience and Nullification Beliefs on Reactions to Inadmissible Evidence*, 28 L. and Human Behavior 389 (2004) 22

Allison D. Redlich et al., *Comparing True and False Confessions Among Persons with Serious Mental illness*, 17 Psychol. Pub. Pol'y & L. 394 (2011) 21

Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349 (2006)..... 21

Brief of Defendant-Appellant, *United States v. Enamorado*, Nos. 18-1975, 19-1734 (1st Cir. Sept. 27, 2019) 28

Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 Mich. J. Race & L. 303 (2012) 28

Constitutional Provisions

Fifth Amendment to the United States Constitution 2, 32, 35, 36

Sixth Amendment to the United States Constitution..... passim

PETITION FOR WRIT OF CERTIORARI

Hector Enamorado petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals appears at Appendix 1a-49a to the petition and is reported at *United States v. Pérez-Vásquez*, 6 F.4th 180 (1st Cir. 2021).

JURISDICTION

The First Circuit issued its opinion on July 26, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, provides, in relevant part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or

foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

Hector Enamorado was charged in a multi-count multi-defendant indictment with a single count of conspiracy to violate the Racketeer and Corrupt Influence Organizations Act (RICO), 18 U.S.C. § 1962(d). The government alleged that Enamorado and his codefendants were members of MS-13, and that MS-13's who engaged in racketeering offenses including murder and drug trafficking. *See* App. 5a, 19a-20a.

Enamorado, along with codefendants Salvador Pérez-Vásquez and Luis Solís-Vásquez proceeded to trial, where the evidence included the following. "La Mara Salvatrucha, commonly known as MS-13, is a transnational gang headquartered in El Salvador and with extensive operations in the United States, including in Eastern Massachusetts." App. 4a. The gang's "primary mission" is "killing rivals, especially members of the 18th Street gang." *Id.* Leadership, "usually in El Salvador," makes high-level decisions. App. 5a.

MS-13 is organized into regional programs, within which there are local groups called "cliques." App. 4a. Within each clique, there are different levels of involvement. *Id.* Generally, with some variations among cliques, a "homeboy" is

someone who has committed crimes for the group and has been beaten into the gang. App. 4a & n.1.

The government alleged that Enamorado was a "homeboy" in the Chelsea Locos Salvatrucha clique. App. 5a. The government introduced no evidence about the alleged Chelsea clique, including who its members were, who its leaders were, how it functioned, what it did, its purpose, or how, if at all, it was connected to the other cliques. The government introduced no evidence as to how or when Enamorado allegedly joined the clique. *Cf.* App. 20a-21a.

Codefendant Pérez-Vásquez was allegedly second in command of the Everett Locos Salvatrucha clique, whereas Solís-Vásquez was a "homeboy" in the Eastside Locos Salvatrucha clique. App. 5a.

On the night of December 12-13, an individual later identified by some witnesses as Enamorado visited an apartment near his mother's house in Chelsea, Massachusetts, where a woman sold tamales and beer after bars had closed. *See* App. 8a. He encountered Javier Ortiz and some friends, who were later identified by some witnesses as 18th Street gang members. *See id.*; *see also* App. 21a. Ortiz and some friends beat Enamorado and burned him with a cigarette. App. 8a. The following night, Enamorado allegedly returned to apartment and again encountered Ortiz. *Id.* Enamorado called Pérez-Vásquez, who brought Enamorado a pistol. App. 8a-9a. The government alleges that Enamorado shot Ortiz three times in the back, killing him; he also shot a nearby patron, who survived. App. 9a. Enamorado was arrested leaving Massachusetts. App. 10a.

During an interrogation in which the recording system failed, Enamorado allegedly admitted that he was an MS-13 member and that his nickname was Vida Loca, and stated that he had blacked out and did not remember anything from the night of the murder, but if he had gone back to the apartment, it would have been for revenge. App. 10a-11a.

Enamorado's principal defense was that he was not Vida Loca (a name by which the shooter was identified), that he was not an MS-13 member, and that evidence to the contrary relied on unreliable sources.

During closing arguments, Pérez-Vásquez's attorney made a series of unexpected admissions. *See generally* App. C. He first stated that "[w]e're going to try to make your task a little bit easy for you in that we are acknowledging and we're not contesting that our client, Mr. Pérez-Vásquez, had a membership in a criminal enterprise." App. 55a. He then admitted that Pérez-Vásquez had "provided that gun to Vida Loca," but that in doing so Pérez-Vásquez "didn't know that Vida Loca was going in to shoot a rival." App. 77a. He went on to argue that Pérez-Vásquez did not share Enamorado's intent, emphasizing that "you have to be convinced beyond a reasonable doubt that when he gave that gun to Vida Loca that evening, he shared the intent that Vida Loca had to kill somebody." App. 78a. Counsel argued that "if he didn't share the intent that Mr. Enamorado had at the time he discharged that weapon into Mr. Javier Ortiz, then you can't find Mr. Pérez-Vásquez guilty of that crime." *Id.* Enamorado's counsel moved for a mistrial, arguing that "[t]he codefendant has just become a witness against my defendant

without notice in violation of *Bruton*, and there's no way this jury now is going to be able to give Mr. Enamorado a fair verdict after what just happened." App. 80a. The district court summarily denied the motion. *Id.* Enamorado did not request a limiting instruction. App 15a.

The jury instructions included an instruction on murder, one of the RICO predicate offenses. *See generally* App. D. The court told the jury that "Murder may be committed in the first degree or the second degree" but informed the jury that "[i]n this case, the distinction between first-degree and second-degree is not relevant." App. 82a. The court therefore instructed the jury on second-degree murder, using malice as the mental state, and not—as would be required for first-degree murder—premeditation or extreme atrocity or cruelty. App. 82a-83a; *see also* App. 42a ("the instructions given to the jury clearly described second-degree murder").

All three men were convicted on the RICO conspiracy count. App. 16a. The jury returned a special verdict finding each defendant responsible for the murder of Javier Ortiz and codefendant Pérez-Vásquez responsible for the murder of a second individual. *Id.* Pérez-Vásquez was also convicted of conspiracies to possess cocaine and marijuana with intent to distribute. *Id.*

At sentencing, the district court applied the guideline for first-degree murder and not second-degree murder, over an objection from Enamorado that there was no way to know what degree of murder the jury had found. App. 17a. The district court concluded that the degree of murder was "a matter of guideline interpretation for

the Court, not something that the jury would find." *Id.* The court applied the first-degree murder guideline, which increased the base offense level for Enamorado, then sentenced him to life imprisonment. *Id.*

Enamorado appealed and the First Circuit affirmed. With respect to Pérez-Vásquez 's closing argument, the court of appeals held that no "reasonable jury would have concluded that this argument was actually a confession by Pérez-Vásquez stating that a different defendant, Enamorado, was guilty of RICO conspiracy," because the jury would have understood that Pérez-Vásquez 's counsel was only making such statements to convince the jury that his client "was not guilty for lack of intent." App. 37a. The court of appeals rejected Enamorado's *Bruton* argument by noting that "the jury was instructed that '[l]awyers are not witnesses. What they say in their . . . closing arguments . . . is not evidence'" and by citing two decisions of the Court of Appeals for the Third Circuit. *Id.*

The First Circuit also rejected Enamorado's arguments that the evidence was insufficient to prove that he knowingly joined the MS-13 conspiracy and that he "agreed that at least two acts of racketeering would be committed in furtherance of the conspiracy." App. 19a (quoting *United States v. Sandoval*, 6 F.4th 63, 75 (1st Cir. 2021)). The court concluded that Enamorado's alleged admission to being an MS-13 member, in addition to testimony from witnesses who "understood him to be 'from the Chelsea Locos clique'" and a homeboy, was sufficient to conclude that Enamorado had joined MS-13, and that based on the evidence the jury heard about MS-13's purpose, "a jury could also conclude that an individual who joined a gang

with this mission therefore agreed that a member of the group would commit racketeering acts." App. 20a-21a. The court further rejected Enamorado's argument that there was no evidence regarding the alleged Chelsea clique's activities or connection to MS-13, because "members of other MS-13 cliques … clearly understood Enamorado to have been part of an MS-13 clique." App. 21a.

Finally, the First Circuit rejected Enamorado's challenge to the trial court's decision to instruct the jury only on second-degree murder, while sentencing Enamorado using the guideline for first-degree murder. App. 43a. The court of appeals concluded that, although the difference in degree the guideline sentencing range, there was no prejudice to Enamorado, because "a district court may use the first-degree murder guideline if it finds by a preponderance of the evidence that the defendant committed first-degree murder, even if the jury only finds the defendant guilty of second-degree murder." *Id.*

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are split regarding the application of *Bruton* to remarks by counsel

The Sixth Amendment's Confrontation Clause guarantees to every criminal defendant the right "to be confronted with the witnesses against him," U.S. Const. amend. VI, and the "right of cross-examination is included in" that right to confrontation, *Pointer v. Texas*, 380 U.S. 400, 404 (1965). In *Bruton v. United States*, this Court addressed the Sixth Amendment's application to multi-defendant trials, where one codefendant's prior confession implicates another, non-confessing codefendant. 391 U.S. 123 (1968). In that situation, the Sixth Amendment prohibits

introduction of the confession against the non-confessing codefendant who is implicated by it, unless that confessing codefendant is subject to cross examination. *Id; see Crawford v. Washington*, 541 U.S. 36, 59 (2004). But under *Bruton*, even if the confession is technically admitted against only the confessing codefendant, its admission nonetheless violates the non-confessing codefendant's Sixth Amendment rights. *Bruton*, 391 U.S. at 137. In that situation, no jury could reasonably be expected not to consider the confession in assessing the non-confessing codefendant's guilt, even if given a limiting instruction to that effect. *Id.* at 135. Thus, no "limiting instruction[]" could be an "adequate substitute" for the non-confessing codefendant's "constitutional right of cross-examination," and the Sixth Amendment prohibits introduction of the confession. *Id.* at 137.

In applying this Court's *Bruton* line of cases, the courts of appeals are split on one key question: whether and, if so, under what circumstances remarks by counsel can create a Confrontation Clause violation. Three courts of appeals—the Second, Eighth, and Tenth Circuits—have acknowledged the possibility that such remarks are relevant to a *Bruton* analysis. But three courts of appeals—the First, Third, and Eleventh Circuits—have reached the opposite conclusion, categorically declaring that counsel remarks are not evidence and thus not relevant under *Bruton*. In doing so, those courts have ignored governing precedent which contradicts that conclusion. This Court should resolve this split among the courts of appeals and ensure compliance by the lower courts with *Bruton* and its progeny.

A. In multi-defendant trials, this Court uses a functional approach to determine whether admission of a codefendant's confession violates the non-confessing codefendant's Confrontation Clause rights

Bruton governs in a narrow, albeit fairly frequent, subset of cases: multi-defendant criminal trials, where one codefendant's confession implicates but is not admissible against another, non-confessing codefendant.[1] Under this Court's *Bruton* line of cases, the introduction of that confession *against the confessing codefendant* violates the non-confessing codefendant's rights under the Confrontation Clause, even though the confession was not technically introduced against and is not in evidence against the non-confessing codefendant.

The logic underlying *Bruton* is clear: although our judicial system generally assumes that juries follow the court's instructions, "there are some contexts in

---

[1] Under *Crawford v. Washington*, a confessing co-defendant's testimony is inadmissible against a non-confessing defendant who is implicated by that confession, unless the confessing co-defendant is available for cross examination at trial or is unavailable and the non-confessing defendant had a prior opportunity to cross examine. 541 U.S. 36, 59 (2004). Thus, unless the confessing codefendant testifies at trial (and is subject to cross examination) or was previously subject to cross examination, his confession is inadmissible *against* any codefendant implicated by that confession.

But in a multi-defendant trial, the admissibility of the confession is not the only question. Although the confession is inadmissible against the non-confessing codefendant, the confession will often be admissible against the confessing codefendant, and therefore it may be heard by the jury. Thus, although *Crawford* resolves the *admissibility* of the confession against the non-confessing codefendant, the *Bruton* issue remains: whether the introduction of the confession *against only the confessor* violates the Sixth Amendment rights of the non-confessing defendant, against whom the confession is inadmissible, because the jury will be unable to thrust the confession out of its mind in assessing the guilt of the non-confessing defendant.

which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135. But even if a limiting instruction directs the jury not to consider the confession against the non-confessing codefendant, in reality, "[t]he effect is the same as if there had been no instruction at all." *Id.* at 137. "It was against such threats to a fair trial that the Confrontation Clause was directed." *Id.* at 136. *Bruton*'s functional approach to the protections of the Confrontation Clause is premised upon the recognition that, as a practical matter, the jury will not be able to put a codefendant's confession out of its mind and give the non-confessing defendant the fair trial to which he is constitutionally entitled.

In *Richardson v. Marsh* and *Gray v. Maryland*, this Court considered whether codefendant confessions might still be admissible in certain narrow circumstances or with specific redactions. Under *Richardson*, if a codefendant's confession does not "expressly implicate" the non-confessing defendant, but rather is only inferentially incriminating "when linked with evidence introduced later at trial," it can be used against both defendants without violating the Confrontation Clause. *Richardson v. Marsh*, 481 U.S. 200, 208 (1987). This is so because "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Id.* But where the codefendant's prior confession "obviously refer[s] directly to someone, often obviously the [non-confessing] defendant," introducing it violates the Confrontation

Clause, even if the confession is redacted to exclude the non-confessing defendant's name and identity. *Gray v. Maryland*, 523 U.S. 185, 196 (1998). A violation of the Confrontation Clause thus turns on the likelihood that a jury will be able to follow a limiting instruction: where a redacted confession obviously refers directly to a non-confessing codefendant, "the accusation that the redacted confession makes 'is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.'" *Id.* (quoting *Richardson*, 481 U.S. at 208).

Underlying all three decisions is one crucial question: whether the circumstances of the confession's introduction are such that a jury could "thrust [it] out of mind" in assessing the guilt of the non-confessing defendant. *Id.* Where a codefendant makes an explicitly incriminating statement, "the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the [non-confessing] defendant's guilt." *Richardson*, 481 U.S. at 208.

Neither the Confrontation Clause nor *Bruton* and its progeny are limited to accusations or confessions that are admitted into evidence. Rather, in employing a functional approach, this Court has repeatedly recognized that non-evidentiary aspects of a trial may still result in a Sixth Amendment violation. In fact, this Court directly addressed that possibility in *Frazier v. Cupp*, recognizing that "some remarks included in an opening or closing statement could be so prejudicial that . . . constitutional error[] would be unavoidable." 394 U.S. 731, 736 (1969). Although it may be safe to assume that "the jury will *ordinarily* be able to limit its consideration to the evidence introduced during the trial," *id.* (emphasis added), this

Court recognized the possibility that in some circumstances, a jury will be unable to thrust opening or closing remarks by counsel out of its mind.

And in *Douglas v. Alabama*—upon which the *Bruton* court relied heavily in announcing its rule—this Court held that trial conduct that was "not technically testimony" could violate the Confrontation Clause in circumstances where it "may well have been the equivalent in the jury's mind of testimony." 380 U.S. 415, 419 (1965). In that case, a state prosecutor read directly from a codefendant's prior confession in questioning that codefendant, ostensibly to refresh his recollection as to his prior confession. But the confessing codefendant invoked his privilege against self-incrimination and thus did not testify regarding his confession and was not available for cross-examination. *Id.* This Court held that even though the prior confession had only been read by counsel in questioning—and thus had not actually been introduced into evidence—the non-confessing defendant's "inability to cross-examine [the confessing codefendant] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.*

As in *Bruton*, *Richardson*, and *Gray*, underlying this Court's decisions in *Frazier* and *Douglas* was a functional analysis of the jury's ability to disregard a codefendant's confession. The *Frazier* court ultimately held that the prosecutor's opening did not violate the Confrontation Clause because, given the circumstances of that opening—in which the "anticipated" but ultimately "unproduced[] evidence [was] not touted to the jury as a crucial part of the prosecution's case"—it was "'hard for us to imagine that the minds of the jurors would be so influenced by such

incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately.'" *Frazier*, 394 U.S. at 736 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940)). But in *Douglas*, the prosecutor's questioning violated the Confrontation Clause because, combined with the confessing codefendant's refusal to answer, that questioning "may well have been the equivalent in the jury's mind of testimony" confirming that confession and thus "created a situation in which the jury might improperly infer both that the statement had been made and that it was true." *Douglas*, 380 U.S. at 419.

Thus, under *Bruton, Frazier, and Douglas*, a codefendant's confession which comes in through counsel or is not technically in evidence can nonetheless violate the Confrontation Clause where the circumstances suggest that, like in *Bruton*, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the [non-confessing] defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135. Indeed, in recognizing that a non-confessing defendant's Confrontation Clause rights can be violated by a confession which is *not admitted against him*, *Bruton* itself rejects the idea that only remarks which are technically in evidence can produce a Confrontation Clause violation.

But in the intervening decades, the lower courts have strayed from this approach. Some courts of appeals recognize the possibility that counsel's remarks can violate the Confrontation Clause, while others categorically reject the possibility that counsel remarks could violate the Confrontation Clause.

B. Three courts of appeals recognize *Bruton*'s application to remarks by counsel

The Courts of Appeals for the Second, Eighth, and Tenth Circuits, along with at least one state supreme court, have acknowledged that remarks by counsel are properly analyzed under *Bruton*.

The Courts of Appeals for the Second and Eighth Circuits have tracked closely to this Court's functional approach. In *United States v. Sacco*, the Second Circuit considered whether the closing argument made by a codefendant's counsel violated *Bruton*. 563 F.2d 552, 556 (2d Cir. 1977). In that case, one codefendant's closing argument admitted to specific alleged activities, including that he and a non-confessing codefendant went to a certain meeting and that the non-confessing defendant "did what he was told." *Id.* The non-confessing defendant argued that the closing argument violated his rights under the Confrontation Clause. Although the court rejected the defendant's argument, it did so under *Bruton*, and not because counsel's remarks were not evidence. *Id.* Rather, the court concluded that counsel did not violate *Bruton* because the closing was not "clearly inculpatory" or "vitally important to the government's case," as would be required "[f]or Bruton to apply." *Id*. Thus, the *Sacco* court tracked this Court's functional approach to *Bruton* violations, mirroring the analysis in *Richardson* and *Gray*. *Id.*

Like the Second Circuit, the Eighth Circuit recognized in *United States v. Long* that remarks which are not technically in evidence can still implicate *Bruton*. 900 F.2d 1270, 1280 (8th Cir. 1990). In *Long*, one codefendant's prior confession was introduced against her, but because she did not testify at trial and thus could not be

confronted, the non-confessing defendant's name was redacted from that confession and replaced by "someone." *Id.* But in cross-examining the agent who introduced the prior confession, the confessing codefendant's counsel "led the jury straight to the conclusion" that "someone" was actually the non-confessing defendant. *Id.* The *Long* court followed this Court's functional approach to *Bruton*, holding that the non-confessing defendant's rights under the Confrontation Clause and *Bruton* had been violated. *Id.*

And in *United States v. Espinosa*, the Tenth Circuit cited *Frazier* at length in recognizing the possibility that an opening statement by counsel could violate *Bruton*. 771 F.2d 1382 (10th Cir. 1985). In *Espinosa*, a pro se defendant referred in his opening statement to activities of his codefendants, although none were identified by name or specific description. *Id.* at 1398 n. 19. In considering the codefendants' argument that his statements violated their rights under the Confrontation Clause, the Tenth Circuit embarked upon a functional analysis of those statements, aligning more closely with this Court's approach. In so doing, the *Espinosa* court recognized that the pro se defendant's opening was "closer to 'testimony' than the attorney's summary of expected evidence in *Frazier*," and thus closer to a *Bruton* violation. *Id.* at 1399. But in looking at the substance of that "generalized and brief" opening, the Tenth Circuit found it was not "clearly inculpatory" such that it would violate *Bruton*. *Id.* at 1400. In basing its decision on the substance of the defendant's admission, not simply on the fact that it was not technically testimony, the Tenth Circuit more closely tracked the functional

analysis of a statement's likely impact on the jury employed in *Bruton*, *Richardson*, and *Gray*.

The Supreme Court of Pennsylvania has adopted a similar approach, based in large part on *Bruton*. It has on several occasions observed that although *Bruton* did not directly address "comments by counsel," "there might be an instance where remarks during an opening or closing statement could be so prejudicial that a finding of error would be unavoidable." *Commonwealth v. Cannon*, 610 Pa. 494, 22 A.3d 210, 218 (2011). Tracking *Richardson* and *Gray*, that court has held that where a "prosecutor's comment only affected the redaction [of a codefendant's confession] indirectly and by inference," *Bruton* was not violated. *Id.* at 218 n.8 (discussing *Commonwealth v. Brown*, 592 Pa. 376, 925 A.2d 147 (2007)). Ultimately, the Pennsylvania Supreme Court held that "a *Bruton* violation may arise when a prosecutor discloses to the jury that the codefendant's statement has been redacted and unequivocally identifies the defendant as the individual whose name was removed." *Id.* at 219.

In following this Court's functional approach, these courts have properly applied its *Bruton* line of cases and thus protected the Sixth Amendment rights of criminal defendants in multi-defendant trials.

C. Three courts of appeals wrongly hold that *Bruton* cannot apply to remarks by counsel

Meanwhile, the Courts of Appeals for the First, Third, and Eleventh Circuits have taken the opposite approach, categorically rejecting the possibility that statements made at trial which are not in evidence could violate *Bruton*. In so

doing, these courts have adopted a position that fundamentally conflicts with *Frazier*, *Douglas*, and the reasoning underlying *Bruton*.

In *United States v. Vadino*, the Court of Appeals for the Eleventh Circuit disregarded *Bruton*'s functional analysis and rejected the possibility that a codefendant's opening statement confessing liability could violate the Confrontation Clause. 680 F.2d 1329 (11th Cir. 1982). In *Vadino*, counsel for two codefendants admitted in their opening statements "that most of the prosecutor's opening statements describing the relevant events was correct." *Id.* at 1333. The court of appeals rejected the argument advanced by three other defendants that those admissions by counsel violated their Sixth Amendment rights, declaring that the openings "were not the equivalent of co-defendants' statements" and "not evidence." *Id.* at 1336. In reaching that conclusion, the *Vadino* court ignored *Frazier*'s application of the functional *Bruton* analysis to an opening statement and its acknowledgement that "some remarks included in an opening or closing statement" could result in a constitutional violation. *Frazier*, 394 U.S. at 735.

Citing *Vadino*, the Court of Appeals for the Third Circuit adopted a similar position in *United States v. Sandini*, 888 F.2d 300 (3d Cir. 1989). In that case, a codefendant's counsel admitted the existence of the conspiracy in his closing argument but placed blame for its management on the non-confessing defendant. *Id.* at 308-09. That non-confessing defendant argued that his codefendant's "attorney's remarks were tantamount to an inculpatory confession" which incriminated him, in violation of *Bruton*. *Id.* at 309. The court of appeals

categorically rejected that argument, holding that *Bruton* "has nothing to do with arguments of counsel," which "are simply not evidence." *Id.* at 310-11. The Third Circuit confirmed its categorical approach in *United States v. Quintero*, declaring that *Bruton* "does not apply when an attorney for a co-defendant implicates the defendant during a closing argument." 38 F.3d 1317, 1342 (3d Cir. 1994). Like the *Vadino* court, the *Sandini* court neither cited nor discussed *Frazier*, ignoring this Court's approach to the very question before it.

And in this case, the Court of Appeals for the First Circuit joined the Third and Eleventh Circuits in rejecting the possibility that an opening or closing argument could produce a *Bruton* violation. In his closing argument, counsel for Enamorado's codefendant Noe Salvador Pérez-Vásquez offered to make the jury's "task a little bit easy" and proceeded to confess on behalf of his client. App. 55a. Counsel for Pérez-Vásquez admitted that his client had provided the gun used to commit the murder with which the defendants were charged but argued that his client was not guilty for lack of intent. App. 76a-78a. In so doing, he explicitly implicated Enamorado just before deliberations began in a manner no jury could reasonably be expected to thrust out of its mind: "And, once again, if [Mr. Pérez-Vásquez] didn't share the intent that Mr. Enamorado had at the time he discharged that weapon into [the victim] Mr. Javier Ortiz, then you can't find Mr. Pérez-Vásquez guilty of that crime." App. 78a.

But like the Third and Eleventh Circuits, the First Circuit ignored *Frazier* and categorically rejected Enamorado's argument that the confession of Pérez-

Vásquez, in combination with his lack of opportunity to cross examine Pérez-Vásquez, violated the Confrontation Clause. Citing *Quintero, Sandini*, and the trial court's general instruction that closing arguments are "not evidence," the court of appeals concluded that the confession of Pérez-Vásquez did not even warrant a limiting jury instruction, let alone the mistrial for which Enamorado's trial counsel moved. App. 37a. The trial court denied that motion for mistrial without argument or explanation, App. 80a, and neither court conducted the type of functional analysis of the impact on the jury of that confession required by the *Bruton* line of cases.

The confession directly and unequivocally accused Enamorado of having shot and killed the victim. The jury heard the confession on the final day of trial, after the Enamorado's counsel had given his closing, leaving Enamorado no opportunity to respond. The confession torpedoed Enamorado's longstanding assertion of actual innocence—he denies that he is "Vida Loca" or the shooter—moments before the jury began deliberations. It therefore "may well have been the equivalent in the jury's mind of testimony" which it could not ignore in assessing Enamorado's guilt. And although it almost certainly could not have abided by any such instruction, the jury received no reminder that the confession could be considered only against Pérez-Vásquez. Nevertheless, the court of appeals concluded without explanation that "a reasonable jury" would not "have concluded that this argument was actually a confession by Pérez-Vásquez stating that a different defendant, Enamorado, was guilty of" the RICO conspiracy in which the murder was charged. App. 37a.

In joining the Third and Eleventh Circuits, the First Circuit's holding ignored this Court's Confrontation Clause jurisprudence, which acknowledges the potential for violations in closing arguments and is premised upon recognition that some statements are so inculpatory, so inflammatory, and ultimately so unforgettable that we cannot reasonably expect a jury to ignore them. By condoning a runaround of *Bruton* and ignoring its reasoning, these decisions have, in practice, eviscerated its protections for all but a very narrow subset of codefendant confessions.

D. Confessions and multi-defendant trials are common, and the current positions of several courts of appeals jeopardize defendants' Sixth Amendment rights on a large scale

Throughout a five-year study of the joinder practices of the federal courts, roughly one-third of criminal defendants were joined with codefendants, and nearly one-quarter of criminal defendants who proceeded to trial were joined with codefendants. See Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349, 368 (2006). Not only are multi-defendant trials particularly common, but they are more likely to result in conviction: federal defendants charged in multi-defendant cases face higher rates of conviction than single defendants. *See id.* Confessions are even more common, with another recent study finding that about sixty-five percent of suspects fully or partially confess to the police. See Allison D. Redlich et al., *Comparing True and False Confessions Among Persons with Serious Mental illness*, 17 Psychol. Pub. Pol'y & L. 394, 395 (2011). Although many defendants who confess never proceed to trial, the long line of cases applying *Bruton*

indicates that the frequency of confessions and multi-defendant trials presents a recurrent opportunity for constitutional violations.

Of course, if juries could always faithfully follow a trial court's limiting instruction regarding the admissibility of a confession against only the confessing defendant, the frequency of confessions and multi-defendant trials would pose no issue. But as *Bruton* acknowledged, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

Studies and psychological analysis of the realities of that "naive assumption" confirm Justice Jackson's pessimistic view: "research suggests admonitions to disregard inadmissible evidence are not always effective, especially when that evidence is incriminating." Alison Cook et al., *Firing Back at the Backfire Effect: The Influence of Mortality Salience and Nullification Beliefs on Reactions to Inadmissible Evidence*, 28 L. and Human Behavior 389, 390 (2004) (citing studies). In fact, "limiting instructions to ignore information may even backfire, causing jurors to weigh inadmissible evidence more heavily than if the evidence was admissible." *Id.* (citing studies).

The lower courts must not be permitted to whittle away the protections of the Sixth Amendment in blind reliance on the "unmitigated fiction" that remarks by counsel cannot violate the Confrontation Clause because the jury is instructed that they are not evidence. On the contrary, such instructions are likely to draw further attention to a codefendant's confession, regardless of whether that confession reaches the jury through testimony or counsel. This Court must now reaffirm its functional approach to the Confrontation Clause and realign the lower courts' approach to *Bruton* in order to ensure that the Sixth Amendment's protections are available with equal force to all criminal defendants, regardless of whether they stand trial alone or together.

E. This case presents the ideal vehicle to address the applicability of *Bruton* to remarks by counsel

Because this case squarely raises the question of whether a codefendant's confession by counsel violates the Confrontation Clause, an issue on which the Courts of appeals are split, it is the ideal vehicle for this Court to intervene and ensure compliance with existing precedent. There could be no confession by counsel which more directly implicates this Court's reasoning in *Bruton* than the closing argument confession by Enamorado's codefendant: it directly and unequivocally accused Enamorado of the charged murder, in a manner and at a point during trial which the jury could not possibly have been expected to ignore. If that confession does not violate Enamorado's Sixth Amendment rights, then the lower courts have effectively overturned this Court's recognition in *Douglas*, *Frazier*, and *Bruton* that

the protections of the Confrontation Clause go beyond matters which are technically in evidence against a criminal defendant.

II. This Court should harmonize its decisions in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), and *Salinas v. United States*, 522 U.S. 52 (1997)

An individual defendant may be convicted of conspiracy under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(d), so long as he "knew about and agreed to facilitate" a scheme to violate a substantive RICO provision. *See Salinas v. United States*, 522 U.S. 52, 65-66 (1997). Typically, RICO conspiracy is charged as a conspiracy to violate 18 U.S.C. § 1962(c), that is, a conspiracy to "conduct or participate, directly or indirectly, in the conduct" of a RICO "enterprise's affairs through a pattern of racketeering activity."

In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), and *Salinas*, 522 U.S. 52, this Court interpreted the requirements of § 1962(c) and 1962(d), respectively. This Court has never cited the two cases together, and the courts of appeals do not agree as to whether or how *Reves* impacts RICO conspiracy charges.

A. Reves and *Salinas* should be harmonized by holding that liability for RICO conspiracy requires a knowing agreement to facilitate the activities of those who are operating or managing the RICO enterprise

In *Reves*, this Court concluded that a substantive violation of section 1962(c) required proof that the individual "participate[d] in the operation or management of the enterprise itself." 507 U.S. at 185. The Court emphasized that this restriction did not limit liability to high-level players: "An enterprise is 'operated' not just by upper management but also by lower rung participants who are under the direction

of upper management," and may also be "'operated' or 'managed' by others 'associated with' the enterprise who exert control over it." *Id.* at 184.

Four years later, this Court decided *Salinas*, resolving a circuit split by holding that an individual can be liable for RICO conspiracy without agreeing personally to commit the two predicate acts required to create a pattern of racketeering activity. 522 U.S. at 61-66.

While *Salinas* did not mention *Reves*, after *Salinas*, numerous courts of appeals concluded that *Reves* does not apply to conspiracy charges, and that an individual may conspire to violate § 1962(c) without conspiring to participate in the operation or management of the enterprise. *See, e.g.*, *United States v. Zichettello*, 208 F.3d 72, 98-99 (2d Cir. 2000); *Smith v. Berg*, 247 F.3d 532, 536-38 (3d Cir. 2001); *United States v. Mouzone*, 687 F.3d 207, 217-18 (4th Cir. 2012); *United States v. Rosenthal*, 805 F.3d 523, 532 (5th Cir. 2015); *United States v. Fernandez*, 388 F.3d 1199, 1228-30 (9th Cir. 2004); *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995); *United States v. Wilson*, 605 F.3d 985, 1019-20 (D.C. Cir. 2010).

Courts that have held that *Reves* does not apply to conspiracy have concluded that applying it to a conspiracy charge would run afoul of *Salinas*, which "provided an extensive discussion indicating that RICO's conspiracy section . . . is to be interpreted in light of the common law of criminal conspiracy." *See Smith*, 247 F.3d at 537; *see also Fernandez*, 388 F.3d at 1229 (*Salinas* outlined "'certain well-established principles' of the law on conspiracies that were equally applicable to RICO conspiracies") (quoting *Salinas*, 522 U.S. at 63).

The First Circuit, on the other hand, has explicitly declined to reach the *Reves* issue. *United States v. Rodríguez-Torres*, 939 F.3d 16, 28 n.6 (1st Cir. 2019). In applying *Reves* to substantive RICO violations, the First Circuit has, however, construed *Reves* narrowly, applying it only to individuals who are "outside" a RICO enterprise, rather than those who are insiders. *See, e.g.*, *United States v. Owens*, 167 F.3d 739, 753-54 (1st Cir. 1999).

Only the Seventh Circuit appears to have made a direct attempt to integrate *Reves* and *Salinas*, concluding that while a conspirator need not directly operate or manage the enterprise, he must nonetheless agree "to knowingly facilitate the activities of the operators or managers to whom [§ 1962(c)] applies." *United States v. Cummings*, 395 F.3d 392, 397 (7th Cir. 2005) (quoting *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000)). RICO conspiracy "is an agreement, not to operate or manage the enterprise, but personally to facilitate the activities of those who do." *Id.* (quoting *Brouwer*, 199 F.3d at 967). Thus, while a defendant need not himself direct, manage, or otherwise conduct the enterprise, he must "join[] forces with someone *else* who manages or operates the enterprise." *United States v. Warneke*, 310 F.3d 542, 547 (7th Cir. 2002). This analysis is consistent with the Second Circuit's approach to RICO conspiracy, which has emphasized that an agreement to "conduct the affairs of an enterprise [] through a pattern of racketeering" requires a "*meeting of the minds as to the operating of the affairs* of the enterprise through a pattern of racketeering conduct." *United States v. Applins*, 637 F.3d 59, 77 (2d Cir. 2011) (citations omitted) (emphasis added). Under

these similar standards, the necessary agreement to join a RICO conspiracy requires some understanding of who is operating an enterprise or how it is being operated.

The Seventh Circuit's approach recognizes those general conspiracy principles set forth in *Salinas*, namely that "[a] person . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas*, 522 U.S. at 64. Thus, an individual may conspire to violate § 1962(c) without himself intending to operate or manage the enterprise. But the Seventh Circuit applies conspiracy principles—that a defendant knowingly agree to facilitate the commission of the underlying substantive offense—without eviscerating the basic requirements of the underlying substantive offense. This is consistent, moreover, with the requirement in *Salinas* that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy *all* of the elements of a substantive criminal offense." 522 U.S. at 65 (emphasis added).

Applying *Reves* in this manner also removes the risk that RICO conspiracy be used to criminalize group membership. Indeed, even in concluding that *Reves* does not apply directly to RICO conspiracy, the Fourth Circuit recognized that its holding increased the risk that RICO would be used to criminalize group membership and reiterated "that the RICO conspiracy statute does not 'criminalize mere association with an enterprise.'" *Mouzone*, 687 F.3d at 218 (quoting *Brouwer*, 199 F.3d at 965). Criminalizing association is particularly problematic in the RICO context, not only because the statute sweeps broadly, but because evidence suggests

that RICO may be used disproportionately to prosecute street gangs affiliated with one or more racial minority groups. *See generally* Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 Mich. J. Race & L. 303 (2012).

As such, this Court should ensure that the specific intent required for RICO conspiracy reach the full scope of the relevant statutory provisions—§ 1962(c) and (d)—and should harmonize its decisions in *Reves* and *Salinas* by holding that liability for RICO conspiracy requires a knowing agreement to facilitate the activities of those who are operating or managing the RICO enterprise.

B. The decision below was wrong

Enamorado argued on appeal that the evidence to convict him was insufficient because the government had not proved that he had a role in directing MS-13's affairs or "participated in the 'operation or management' of the enterprise itself."[2] Enamorado also stressed the absence of evidence about the alleged Chelsea clique and how it operated, either on its own or in relation to any other cliques. While the government introduced extensive evidence about MS-13 generally and about the operations of certain regional MS-13 cliques in particular, App. 4a-5a, 12a-15a, the government lacked any evidence about the Chelsea clique to which Enamorado allegedly belonged, the circumstances under which Enamorado allegedly joined it, and its overall relation to the MS-13 enterprise, *cf.* App. 20a-21a.

[2] Brief of Defendant-Appellant at 75, *United States v. Enamorado*, Nos. 18-1975, 19-1734 (1st Cir. Sept. 27, 2019) (citing *Reves*, 507 U.S. at 179, 183); *id.* at 73 ("[T]here was insufficient evidence that Enamorado performed any acts or duties related to the operation of MS-13.").

There was, moreover, no evidence that Enamorado managed or operated the relevant criminal enterprise or that he knowingly agreed to facilitate the activities of an operator or manager of any such enterprise, as *Reves* and *Salinas* require.

In addressing Enamorado's sufficiency challenge, the First Circuit ignored the *Reves* issue. *See* App. 20a-21a. The court narrowed Enamorado's challenge to the sufficiency of evidence about the Chelsea clique to the question of the clique's connection to MS-13, ignoring the broader lack of evidence about the operation of the clique itself. *See* App. 20a. Instead, the court focused on the understanding of third parties to conclude that the evidence was sufficient to show that Enamorado had knowingly agreed to enter a conspiracy. *See* App. 21a ("Enamorado was involved with members of other MS-13 cliques who clearly understood Enamorado to have been part of an MS-13 clique").

What other individuals understood, however, does not prove what Enamorado himself understood or, more importantly, to what he agreed. Inferring his intent from the understanding of others, who were in turn inferring it from his presence, rather than his actions, would vastly expand conspiracy liability. [3] And

[3] Indeed, no reported case suggests that alleged MS-13 membership alone is sufficient to prove knowing agreement to join a RICO conspiracy. Instead, such cases routinely recount leadership roles, conversations, and repeated participation in criminal activity in furtherance of MS-13 objectives. *See, e.g.*, *United States v. Sandoval*, 6 F.4th 63, 75-79 (1st Cir. 2021) (recounting defendants' leadership roles and/or participation in conversations about MS-13 operations and attacks); *United States v. Millán-Machuca*, 991 F.3d 7, 22-25 (1st Cir. 2021) (outlining defendants' leadership roles and participation in planning and leadership conversations); *United States v. Zelaya*, 908 F.3d 920, 926 (4th Cir. 2018) (describing defendants' *repeated* involvement in fighting rival gang members and/or taxing drug dealers).

while the government alleged, for example, that Enamorado attended certain MS-13 meetings, the government failed to show the content of those meetings or what was discussed at any meetings Enamorado allegedly attended. In other words, "[t]here is no evidence that [the defendant] was privy to or participated in any conversations that referenced" the conspiracy's purpose, such that his knowing agreement to the conspiracy could be properly inferred. *See United States v. Huezo*, 546 F.3d 174, 192 (2d Cir. 2008) (Sotomayor, J., dissenting).

The court further relied on Enamorado's alleged role in Ortiz's murder to conclude that he had knowingly joined the criminal enterprise, because the murder "fit in with the conspiracy's purpose." App. 21a. While it may have fit, that alone was insufficient to establish knowledge or intent, because it was equally consistent with an entirely different belief or purpose. *See Huezo*, 546 F.3d at 192 (Sotomayor, J., dissenting) (evidence that defendant engaged in criminal conduct that is consistent with conspiracy—but may simply be other criminal conduct—does not show "the requisite knowledge" regarding the broader purpose of the conspiracy). The evidence showed that Enamorado had been beaten up and injured by Ortiz the night before the murder, and Enamorado allegedly told the police that had he returned to the apartment it would have been for "revenge." App. 8a, 11a. As such, this incident was equally consistent with proof of other criminal conduct and could not be used to establish the requisite knowledge of the purpose and operations of the broader conspiracy.

C. This case presents an ideal vehicle for addressing the intersection of *Reves* and *Salinas*

This case squarely presents the question of whether an individual need be facilitating the activities of those who are managing or operating a criminal enterprise to be liable for RICO conspiracy. On the one hand, the government presented evidence that MS-13 is a vast transnational enterprise across the United States with senior leadership in El Salvador. On the other, the government presented no evidence about the structure, operation, membership, or requirements of the clique of MS-13 with which Enamorado was allegedly associated. In these circumstances, the risk that a RICO conspiracy charge will lead to liability for an individual based on "mere association" becomes pronounced. Adopting a standard that harmonizes *Reves* and *Salinas* would ensure that an individual's agreement to a conspiracy be knowing, in that it would require that an individual knowingly agree to facilitate the activities of those managing or operating the criminal enterprise.

III. This Court should conclude that RICO predicates are elements that must be found by a jury

RICO includes in its definition of prohibited racketeering activity only acts prohibited by enumerated federal statutes or "any act or threat involving murder . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1). The indictment here alleged that the killing of Ortiz was first-degree murder *or* second-degree murder. The Massachusetts murder statute instructs that "[t]he degree of murder shall be found

by the jury." Mass. Gen. Laws ch. 265, § 1 (2021). The trial court, however, instructed the jury using only the second-degree standard, App. 86a-88a, and on the basis of those instructions, the jury made a special finding that each defendant was guilty of murdering Ortiz, App. 16a. At sentencing, the court concluded that the degree of murder was "a matter of guideline interpretation for the Court, not something that the jury would find." App. 17a. Although the jury had only found second-degree murder, the court applied the first-degree murder guideline, which increased the base guideline offense level for Enamorado. *See* App. 16a-17a.

The Sixth Amendment right to trial "by an impartial jury" and due process together "require[] that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (plurality opinion). "It is difficult to see . . . how the defendant could be properly convicted" under RICO "if the conduct found by the jury did not include all the elements of the state offense since RICO requires that the defendant have committed predicate acts 'chargeable under state law.'" *United States v. Carrillo*, 229 F.3d 177, 183-84 (2d Cir. 2000). Courts of appeals are nonetheless divided on whether the juries must be instructed regarding the underlying elements of the specific state law offense.

The Second Circuit has suggested that to give "the jury sufficient instruction and the defendant adequate protection in all circumstances," instructing on underlying elements is the better practice, and a failure to do so "can prejudice the defendant." *Carrillo*, 229 F.3d at 185. As the court of appeals explained, "even assuming evidence from which a jury *could* find a violation of state law, if the

defendant's acts as found by the jury did not include all the essential elements of the state law offense, by definition, no state offense would have been found." *Id.* at 183. Failure to properly charge the jury would prevent the trial court and an appellate court from knowing "what were the factual determinations on which the jury based its verdict." *Id.* at 184. For instance, "if the evidence included testimony to the effect that the defendant acted with the intent to kill, but the jury rejected that evidence," then . . . we doubt the [RICO] conviction could stand because the defendant's actions, *according to the jury's findings*, would not constitute murder." *Id.*

The Ninth Circuit concurred, noting in the context of Violent Crime in Aid of Racketeering Act (VICAR), that the failure to provide a state-law definition for murder would prevent a reviewing court from "knowing what the jury found the defendant's state of mind to be." *United States v. Adkins*, 883 F.3d 1207, 1211 (9th Cir. 2018); *see also United States v. Arrington*, 409 F. App'x 190, 195 (10th Cir. 2010) ("Under [(VICAR)], the government must satisfy each element of the predicate offense under state or federal law.").

The First Circuit has declined to decide whether state offenses that are RICO predicates are to be defined, "generally or by element." *United States v. Marino*, 277 F.3d 11, 31 (1st Cir. 2002).

Older appellate decisions suggested that the underlying state law predicate is not an element of the RICO offense. *See, e.g., United States v. Watchmaker*, 761 F.2d 1459, 1469 (11th Cir. 1985) ("the state statute is not relied upon to specify the

terms of the offense"); *United States v. Bagaric*, 706 F.2d 42, 62-63 (2d Cir. 1983)) ("[s]tate offenses are included by generic designation" (citation omitted)); *United States v. Salinas*, 564 F.2d 688, 690 (5th Cir. 1977) ("Courts construing the racketeering statutes have found that the references to state law serve a definitional purpose"); *United States v. Frumento*, 563 F.2d 1083, 1087 n.8A (3d Cir. 1977) ("Section 1961 requires, in our view, only that the conduct on which the federal charge is based be typical of the serious crime dealt with by the state statute, not that the particular defendant be 'chargeable under State law,' at the time of the federal indictment"); *but see Carrillo*, 229 F.3d at 182-86 (criticizing *Bagaric* without formally overruling). These decisions fail to recognize the risk described in *Carrillo* and *Adkins* regarding whether the jury has made the requisite findings.

These decisions also pre-date much of this Court's Sixth Amendment jurisprudence regarding the jury's fact-finding role. In *Richardson v. United States*, this Court held that the "series of violations" required to establishing a "continuing criminal enterprise" under 21 U.S.C. § 848, requires jury "unanimity in respect to each individual violation." 526 U.S. 813, 815-16 (1999). The Second Circuit has assumed that *Richardson* applies to RICO, meaning that for a substantive RICO violation, the jury must be "unanimous as to each of two predicate acts," such that in "the absence of unanimity . . . , as with any other element, . . . the jury may not convict." *United States v. Gotti*, 451 F.3d 133, 137-38 (2d Cir. 2006); *see also United States v. Carr*, 424 F.3d 213, 224 (2d Cir. 2005) ("And the jury must find that the

prosecution proved each one of those two or more specifically alleged predicate acts beyond a reasonable doubt.").

In *Alleyne v. United States* and *Apprendi v. New Jersey*, this Court further concluded that the Sixth Amendment and due process require that facts that alter statutory sentencing ranges be found by a jury, and not a judge. *See Alleyne*, 570 U.S. 99, 103 (2013) (concluding that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."); *Apprendi*, 530 U.S. 466, 490 (2000) ("any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

Alleyne and *Apprendi* emphasized that "any fact that influences judicial discretion" need not be found by a jury. *Alleyne*, 570 U.S. at 116; *see also Apprendi*, 530 U.S. at 481. But they did not state the converse and suggest that any fact that does not alter the statutory sentencing range need *not* be found by a jury. *Cf. Richardson*, 526 U.S. at 817-23 (analyzing whether statutory requirement is element that requires factfinding without discussing sentencing). Thus, while in *United States v. Gonzalez*, 981 F.3d 11, 16-17 (1st Cir. 2020), the First Circuit rejected the view that the degree of murder underlying a RICO charge needed to be found by a jury because the degree of murder does not affect the statutory sentencing range, that analysis does not end the inquiry into whether the elements of the predicate acts are elements of the RICO offense.

Reading *Carrillo* and this Court's Sixth Amendment jurisprudence together, this Court should hold that the Sixth Amendment and due process require that a jury be instructed on and make findings on the underlying elements that form the predicate acts for RICO offenses, and that the trial court therefore erred in failing to so instruct the jury—and in treating the degree of murder as a sentencing factor within his discretion—in this case.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ROSEMARY CURRAN SCAPICCHIO
Counsel of Record for Petitioner
Law Offices of Rosemary C. Scapicchio
107 Union Wharf
Boston, MA 02109
(617) 263-7400
rosemary@scapicchiolaw.com

EMMA QUINN-JUDGE
Zalkind Duncan & Bernstein LLP
65A Atlantic Ave
Boston, MA 02110
(617) 742-6020
equinn-judge@zalkindlaw.com

Attorneys for Petitioner
Hector Enamorado

October 25, 2021