No.

IN THE SUPREME COURT OF THE UNITED STATES

RONDALE YOUNG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

BENJAMIN L. COLEMAN
Benjamin L. Coleman Law PC
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@blcolemanlaw.com

Counsel for Petitioner

QUESTION PRESENTED

The Violent Crimes in Aid of Racketeering Activity ("VICAR") offense applies to a defendant who commits certain enumerated crimes of violence "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity . . . ." 18 U.S.C. § 1959. The Ninth Circuit has held that the government only needs to prove that such a motive was a "substantial" purpose of the defendant's violent crime, *see United States v. Rodriguez*, 971 F.3d 1005, 1010-11 (9th Cir. 2020), while the Sixth Circuit, in an opinion written by Judge Sutton, has held that *Burrage v. United States*, 571 U.S. 204 (2014) requires the government to prove a similar motive element was the but-for cause of a defendant's violent crime. *See United States v. Miller*, 767 F.3d 585, 591-92 (6th Cir. 2014). The question presented is:

Whether the purpose element of the VICAR offense, 18 U.S.C. § 1959, requires the government to prove that the racketeering-enterprise motive was a but-for cause of the violent crime.

STATEMENT OF RELATED CASES

- *United States v. Rondale Young*, No. 10CR00923-SJO, U.S. District Court for the Central District of California. Judgment entered November 18, 2019.

- *United States v. Rondale Young*, No. 19-50355, U.S. Court of Appeals for the Ninth Circuit. Judgment entered July 28, 2021, rehearing and rehearing *en banc* denied October 1, 2021.

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The decision below can be found at *United States v. Young*, No. 19-50355, 2021 WL 3201103 (9th Cir. July 28, 2021). In a prior appeal, the Ninth Circuit reversed petitioner's convictions in a decision that can be found at *United States v. Young*, 720 Fed. Appx. 846 (9th Cir. Dec. 27, 2017). Both decisions are included in the Appendix ("App.").

JURISDICTION

The court of appeals filed its memorandum opinion on July 28, 2021 and denied a petition for rehearing and rehearing *en banc* on October 1, 2021. App. 1-2.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The Violent Crimes in Aid of Racketeering Activity ("VICAR") statute provides:

> 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 . . . .

18 U.S.C. § 1959(a) (emphasis added).

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[1] "App." refers to the Appendix. "ER" refers to the Excerpts of Record in the Ninth Circuit.

STATEMENT OF THE CASE

The VICAR statute requires the government to prove that the defendant committed a crime of violence "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity . . . ." 18 U.S.C. § 1959. The question presented is whether this purpose or motive must be a but-for cause of the violent crime, or whether an undefined "substantial" purpose will suffice. Over petitioner's objections, the jury that convicted him of VICAR murder was instructed on an undefined "substantial" purpose standard based on Ninth Circuit precedent that conflicts with the views of the Sixth Circuit and state appellate courts, and with the presumption of but-for causation that is firmly established in this Court's precedent. Due to the VICAR conviction, petitioner was sentenced to mandatory life imprisonment without the possibility of parole, a sentence that both the district judge and a concurring judge in the Ninth Circuit believed was unjustified. The Court should grant review.

The government's theory was that petitioner was the driver of a vehicle involved in a drive-by shooting, but it lacked direct evidence that he had the requisite motive and instead based its case regarding the purpose element on a circumstantial inference. Specifically, the government alleged that petitioner was a member (but not a particularly active member) of the Pueblo Bishops Bloods gang, which is based out of the Pueblo Del Rio Housing Project in south Los Angeles,

California. ER 477. The gang is generally comprised of African-American males. ER 477-79. Its main rival is the predominantly Hispanic 38th Street gang, which operates in an adjacent territory. ER 482.

On the morning of August 2, 2009, petitioner's friend and alleged Pueblo member Jesse "Skeebo" McWayne was killed during a drive-by shooting in the Pueblo Del Rio Housing Project. ER 727. Approximately 30 minutes later, Francisco Cornelio, who had *no* gang ties, was killed at a car wash in nearby 38th Street gang territory by two black men who exited a vehicle and shot him. *Id.* Although the victim had *no* gang ties, the government's theory was that the murder was a mistaken gang-retaliation murder which supplied the requisite motive under the VICAR statute.

Officers suspected that the vehicle involved in the car wash shooting belonged to Helen Young, petitioner's mother, because her car resembled a suspected vehicle captured on video surveillance that had a distinctive decal on the back windshield, and her license plate matched eyewitness descriptions. *Id.* On September 22, 2009, officers arrested petitioner and subsequently conducted interrogations in which he admitted that he had driven the vehicle on the morning of the shooting. ER 727-28. Petitioner was held in custody, and the State of California prosecuted him for murder for the car wash shooting. ER 163, 167. In 2010, a federal grand jury in the Central District of California also returned an

indictment charging him and numerous codefendants with various offenses, including the same murder under a VICAR theory. ER 167.

In January 2013, a jury acquitted petitioner on the murder charge in state court, ER 167, and he then proceeded to trial in federal court in December 2013 on what was ultimately a third superseding indictment. Count 1 charged him with RICO conspiracy and alleged that he joined the Pueblo Bishops gang in 2000 and was called "Pueblo Grump." ER 545-47. The RICO charge, however, only alleged that petitioner engaged in three overt acts during his alleged ten-year period with the gang: (1) a 2006 robbery; (2) a January 2009 gun possession with intent to shoot rival gang members; and (3) the August 2, 2009 shooting. ER 547-49. Counts 2, 3, and 5 charged him with VICAR conspiracy to commit murder, VICAR murder, and use of a firearm in furtherance of a crime of violence under § 924(c), all for the August 2, 2009 shooting. ER 551-56. Count 4 charged a § 924(c) violation for the January 2009 gun possession. ER 554. A jury convicted petitioner on Counts 1-3 and 5, but acquitted on Count 4; as to Count 1, the jury rejected the robbery allegation. CR 2410. Thus, the jury essentially found that the only gang activity that petitioner was involved in was the August 2, 2009 shooting.

On December 27, 2017, the Ninth Circuit reversed petitioner's convictions based on multiple errors. App. 12-21. Petitioner's second federal trial (third overall) began in April 2019. The "trial indictment" alleged the same Counts 1, 2,

3, and 5, with Count 4 omitted due to the acquittal in the earlier federal trial. ER 476-94. The government's presentation focused on the car wash shooting and primarily relied on the fact that Ms. Young's vehicle was used and petitioner's admissions; the government also presented its case agent as an expert about the Pueblo Bishops gang and a few former members who had pled guilty pursuant to cooperation agreements and testified that petitioner was a member of the gang. The latter witnesses had significant credibility problems, with the district court commenting as to one, "I have significant concerns about his credibility." ER 726.

The government's theory of substantive murder was based on accessorial liability – that petitioner was the driver, not the shooter; it had no direct evidence that petitioner was ordered by the gang to act as a driver or that he had made any statements indicating a desire to maintain or enhance his position in the gang and instead simply asked the jury to infer that, despite the victim's lack of gang ties, petitioner's motivation was gang-related given the temporal proximity between the two shootings. ER 21-26, 689.

At the jury instruction conference, defense counsel objected to the VICAR murder instructions, contending that the government had to prove that the prohibited motive was a but-for cause of the murder. ER 43-44, 108-22. The district court overruled petitioner's objection and instructed the jury that: "It is not necessary for the government to prove that this motive was the sole purpose, or

even the primary purpose of the defendant in committing the charged crime. You need only find that enhancing his status in the enterprise was a substantial purpose of the defendant or that he committed the charged crime as an integral aspect of membership in the enterprise." ER 25.

The jury returned guilty verdicts. The district judge held that life imprisonment was mandatory and reluctantly imposed a life sentence, stating that he did not believe it was the appropriate punishment (repeating his comments from the previous sentencing). ER 690-91, 717. On appeal, petitioner pursued his challenge to the jury instructions on the purpose element of the VICAR offense.

The Ninth Circuit held that the "district court correctly gave a 'substantial purpose' rather than a 'but-for cause' instruction for the VICAR purpose element." App. 6. It further explained: "Young argues *Burrage v. United States*, 571 U.S. 204 (2014) requires a 'but-for' causal relationship between the racketeering enterprise and the murder. This argument was rejected in *United States v. Rodriguez*, 971 F.3d 1005, 1010-11 (9th Cir. 2020) and thus we reject it here." App. 6.

The Ninth Circuit did, however, reverse the § 924 count. App. 7-8. Judge Watford issued a separate concurring opinion, noting that "this case illustrates why mandatory minimum sentences of any sort – especially a sentence of life without parole – are both unjust and unwise." App. 9.

ARGUMENT

I. The Ninth Circuit's view that a but-for standard does not apply conflicts with Judge Sutton's opinion for the Sixth Circuit in *Miller* and the recent decisions of state appellate courts; this Court should grant review to resolve the conflict.

The VICAR statute requires the government to prove that a defendant committed a crime of violence "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity . . . ." 18 U.S.C. § 1959. The Ninth Circuit has held that this motive element does not need to be the but-for cause of the crime of violence. In the context of a similar motive element, the Sixth Circuit has taken a contrary view, holding that but-for causation is required. State appellate courts have also recently agreed that but-for causation is required when considering similar motive elements. This Court should grant review to resolve the conflict, which is based on fundamentally different interpretations of this Court's decision in *Burrage v. United States*, 571 U.S. 204 (2014).

In *Burrage*, the question was whether a defendant's distribution of drugs resulted in the victim's death under 21 U.S.C. § 841(b), and the government advocated a standard which required the defendant's conduct to be a "substantial" factor in producing the result. This Court rejected the argument, holding that a "but-for" standard was required. Writing for the Court, Justice Scalia explained

that the government "could not specify how important or how substantial a cause must be to qualify." *Id.* at 218. "Is it sufficient that use of a drug made the victim's death 50 percent more likely? Fifteen percent? Five? Who knows." *Id.* This Court concluded that "[u]ncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Id.*

This Court's rationale also made clear that a but-for standard was not limited to the specific language used in § 841(b) and instead was the standard that generally applies in this context. *Id.* at 213-14. Indeed, the Court relied on its "mixed motive" cases, which are obviously highly relevant to the purpose or motive element at issue here, to justify the but-for standard. *Id*. at 212-13 (impermissible motive must be the but-for cause of an adverse employment decision). This Court explained that a wide range of phraseology conveys a but-for standard, including terms such as "because of," "based on," and "by reason of." *Id*. at 212-13.

Writing for the Sixth Circuit, Judge Sutton followed *Burrage* in the context of a similar motive or purpose element in *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014), where the defendants were charged with hate crimes, specifically assaulting the victims because of their religion. The district court instructed the jury "that the faith of the victims must be a 'significant factor' in motivating the

assaults[,]" *id.* at 589, and the Sixth Circuit reversed based on *Burrage*, finding that the "motive element" required "a showing that [the defendants] would not have acted *but for* the victim's actual or perceived religious beliefs." *Id.* at 591 (emphasis in original).

Judge Sutton emphasized that the but-for standard applies regardless of whether the critical element is "an easier-to-show prohibited act or a harder-to-prove prohibited motive." *Id.* at 591-92. "That conclusion makes good sense in the context of a criminal case implicating the motives of the defendants. The alternative proposed definition of the phrase ('significant motivating factor') does not sufficiently define the prohibited conduct. How should a jury measure whether a specific motive was significant in inspiring a defendant to act? Is a motive significant if its one of three reasons he acted? One of ten?" *Id.* at 592. He concluded that a significant factor standard is impermissibly vague, and the rule of lenity compels a but-for standard for a motive or purpose element. *Id.*

The Ninth Circuit took a different approach in *United States v. Rodriguez*, 971 F.3d 1005, 1010-11 (9th Cir. 2020), which controlled the panel below. App. 6. In *Rodriguez*, the Ninth Circuit declined to follow *Burrage* and rejected a similar challenge to a "substantial purpose" jury instruction given as to a VICAR charge. In explaining why *Burrage* did not control, the Ninth Circuit stated that the VICAR statutory language "concerns motive whereas the ["results from" language

in § 841 at issue in *Burrage*] concern[ed] causation, such that the causation-oriented reasoning of *Burrage* does not readily extend to the VICAR purpose requirement." *Rodriguez*, 971 F.3d at 1010. The Sixth Circuit rejected this distinction in *Miller*, 767 F.3d at 591-92, and the Ninth Circuit's analysis ignores the heavy reliance on *mixed-motive* cases in *Burrage*, 571 U.S. at 212-13.[2]

The Ninth Circuit's rationale also ignores *Burrage*'s reasoning that the but-for standard applies to a wide range of statutory language, not just the specific language used in the § 841 statute. *Id*. In any event, the "for the purpose of" language used in § 1959 does not indicate a different standard; shortly before the VICAR offense was enacted in 1984, Congress stated that the phrase "for the purpose of" in another statute conveyed a but-for standard. *See Maryland Dept. of Human Resources v. United States Dept. of Agriculture*, 976 F.2d 1462, 1470-71 (4th Cir. 1992). The Seventh Circuit has also suggested that the "for the purpose

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[2] Although *Rodriguez* did not address Judge Sutton's opinion, it did cite the pre-*Miller* decision in *United States v. Hackett*, 762 F.3d 493, 500-01 (6th Cir. 2014). *Rodriguez*, 971 F.3d at 101 n.4. *Hackett*, however, did not involve a claim of instructional error and merely concluded that the government sufficiently proved that a gang-motive was an "animating purpose" of the crime; it did *not* articulate a "substantial purpose" standard. Actually, *Hackett* confirms another flaw in the instruction given here because it cited *United States v. Faulkenberry*, 614 F.3d 573, 585-86 (6th Cir. 2010), which stated that the element is focused on the defendant's purpose, not the effect of his crime. The instruction here stated that it was sufficient if the defendant "committed the charged crime as an integral aspect of membership in the enterprise." ER 25. An "integral aspect" of gang membership could involve an assessment of the effect of the crime rather than the defendant's *purpose*.

of" language means but-for causation. *See Nauman v. Abbott Laboratories*, 669 F.3d 854, 857 and n.2 (7th Cir. 2012).

Like the Sixth Circuit, two state appellate courts have recently rejected the Ninth Circuit's basis for distinguishing *Burrage*. In *Lucas v. United States*, 240 A.3d 328 (D.C. Ct. App. 2020), the court considered a statute that required an underlying crime of violence to be motived by bias or prejudice and followed the reasoning in *Burrage* and *Miller*. In concluding that a but-for standard was required, the *Lucas* court explained that the same rationale given in *Burrage* as to causation applied equally to a motive element, and that the precise language used in the statute was not determinative because a but-for standard is the "traditional understanding" reflected in the Model Penal Code, is actually the *minimum* requirement that should apply in the criminal context, and that a substantial motivating factor standard was vague and would conflict with the rule of lenity. *Id.* at 339-41. The Missouri Court of Appeal recently reached a similar conclusion in *State v. Street*, 633 S.W. 3d 468, 470 (Mo. Ct. App. 2021), holding that a but-for standard was required under Judge Sutton's reasoning in *Miller*, which it described as accurately applying this Court's precedent.

In sum, the Ninth Circuit's position conflicts with the view of the Sixth Circuit and state appellate courts. This Court should grant review to resolve the conflict on this important issue.

II. This Court should also grant review because the Ninth Circuit's minority view conflicts with this Court's precedent.

As mentioned above, the Ninth Circuit's opinion conflicts with the analysis and reasoning in *Burrage*. *Burrage* concluded that a "substantial" standard like the one adopted by the Ninth Circuit is impermissibly vague for a criminal statute and contravenes the rule of lenity. *See Burrage*, 571 U.S. at 218. There is no reason why the same rule should not apply to a purpose or motive element.

If anything, the statutory language and the purpose element at issue make a but-for standard all the more clear and important. Indeed, *Burrage* relied on this Court's *mixed-motive* cases applying a but-for standard. *Id.* at 212-13 (citing *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 347 (2013); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009)). Mixed-motive opinions like *Nassar* and *Gross* are even more relevant to the purpose element at issue here than the element that was at issue in *Burrage*. Likewise, the fact that Congress preceded the word "purpose" in § 1959 with the definite article "the" suggests more than an undefined substantial purpose. *See Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019). Arguably, the use of the definite article "the" indicates that the racketeering motive must be the "only" purpose, *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004), but at the very least the minimum requirement of a but-for standard is applicable.

This Court has continued to emphasize that the but-for standard is the "traditional" test that is meant to apply to federal statutes with a motive element. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1739 (2020). It is the "ancient and simple" test established at common law that "supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action." *Comcast Corporation v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1014 (2020). This same presumptive rule applies in the context of federal criminal statutes with motive or purpose elements. *Id.* at 1015 (relying on a motive-based criminal statute in articulating a but-for standard).

Finally, this Court has also continued to emphasize that it will not interpret federal criminal statutes broadly so as to upset the sensitive balance between federal and state powers. *See Bond v. United States*, 572 U.S. 844, 858-59 (2014); *Jones v. United States*, 529 U.S. 848, 858 (2000); *United States v. Enmons*, 410 U.S. 396, 411-12 (1973); *United States v. Bass*, 404 U.S. 336, 349 (1971). Here, the racketeering-enterprise motive converts a state-law offense into a federal one and serves as the constitutional basis for federal jurisdiction. To preserve the sensitive federal-state balance, at least a but-for standard should apply. A lesser standard would upset the constitutional balance by permitting federal prosecutions with only the most tenuous basis for federal jurisdiction.

III. This case is an excellent vehicle for review because the claim is thoroughly preserved, the government's case as to the purpose element was weak, and judges below expressed their view that the mandatory life sentence imposed on petitioner for the VICAR murder violation was unjust.

This case is an excellent vehicle for review. Petitioner has fully preserved his challenge to the jury instructions on the VICAR purpose element. Furthermore, although this Court will typically remand to the lower court for consideration of harmless error in the first instance, *see, e.g.*, *McFadden v. United States*, 576 U.S. 186, 197 (2015), it is worth noting that the the watered-down "substantial" standard sent to the jury was harmful. In *Burrage*, for example, the government did not even attempt to show that the failure to instruct on a but-for standard was harmless. *See Burrage*, 571 U.S. at 219.

Likewise, in *Miller*, Judge Sutton concluded that instructing on a "substantial" motive rather than a but-for standard was not harmless. The Sixth Circuit reasoned: "As Justice Breyer aptly explained, 'In a case where we characterize a person's actions as having been taken out of multiple motives, to apply 'but-for' causation is to engage in a hypothetical inquiry about what would have happened if the person's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious.'" *Miller*, 767 F.3d at 600. "An improper instruction on motive and but-for causation poses a thorny issue that frequently will not be harmless. Experience bears this out." *Id.*

Lacking any statements or other evidence regarding how the shooting was planned (if it was even planned at all), the government's theory of motive essentially amounted to a circumstantial inference based on the close timing between the two shootings that was not particularly forceful. Indeed, the victim was *not* a rival gang member, and the timing of the shooing demonstrated that it was more of a spontaneous act. The jurors could have believed that the timing showed that the shooting was the result of the defendants' rage at witnessing the murder of their friend and that it would have occurred regardless of the purported motive to maintain or increase gang status.

Under the government's theory, petitioner was only the driver, casting even more doubt as to whether he believed this less central role would have maintained or enhanced his gang status. Even if petitioner's alleged role as a driver would have had the *effect* of maintaining or increasing his alleged position in the gang, it is far from clear that such a motive was the but-for *purpose* of his participation. Furthermore, petitioner was *acquitted* of the murder in state court, and a codefendant, one of the alleged shooters, was acquitted of the VICAR offense at a separate trial. App. 3, 10. The error was certainly not harmless beyond a reasonable doubt. *See McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016).

Finally, both the district judge and Judge Watford believed that the mandatory life sentence imposed on petitioner based on the VICAR murder

conviction was unjust. App. 9.[3] Judge Watford explained: "Young's character and background did not suggest that he deserved the law's most severe sanction short of death. He was 26 years old at the time of the offense, a devoted father, and employed as a delivery driver for Arrowhead. He had only a minor criminal record. In addition, there was no evidence suggesting that Young had planned or orchestrated the murder, so his role in the offense rendered him at least somewhat less culpable than the other two participants." App. 10. "Yet the judge had already sentenced one of those defendants – the one who prosecutors believed had actually shot the victim – to 40 years in prison. (That defendant, Anthony Gabourel, had been tried separate from Young and acquitted of the VICAR murder charge, so he avoided the mandatory life sentence that Young faced.)." *Id.*

In sum, this case is an excellent vehicle for review. There is a lower-court conflict on an important issue, which is fully preserved, and multiple judges who have considered this case believe that the result was unfair and unjust.

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[3] The defective jury instruction on the purpose element tainted both the substantive and conspiratorial VICAR convictions (Counts 2 and 3). The error also tainted the § 924 conviction (Count 5), which used the VICAR offense as a predicate, and which the Ninth Circuit reversed anyhow on other grounds. App. 8. Petitioner contends that the instructional error also tainted the RICO conspiracy conviction (Count 1), a point that should be considered in the first instance on remand. At the very least, however, it is clear that the district judge would not have imposed life imprisonment if the only remaining conviction is the RICO conspiracy conviction, which does not require mandatory life imprisonment. *See* 18 U.S.C. § 1963.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Dated: December 30, 2021

Respectfully submitted,

BENJAMIN L. COLEMAN
Benjamin L. Coleman Law PC
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@blcolemanlaw.com

Counsel for Petitioner