No. 21-6787

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Brief for the United States in Opposition ("BIO") does not dispute that this case is an excellent vehicle to decide whether the motive element of the Violent Crimes in Aid of Racketeering Activity ("VICAR") offense, 18 U.S.C. § 1959, requires a but-for standard. The government instead contends that review is unwarranted because the Ninth Circuit's rejection of a but-for test does not conflict with decisions of this Court or another court of appeals. BIO 7. The decision below, however, conflicts with *Burrage v. United States*, 571 U.S. 204 (2014) and several other decisions of this Court addressing analogous motive elements, most of which are ignored in the government's brief. This Court's precedent dictates that the "for the purpose of" language in the VICAR statute requires at least a but-for test. *See Mortensen v. United States*, 322 U.S. 369, 374 (1944). The contrary rule articulated below also conflicts with Judge Sutton's opinion following *Burrage* in *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014), and even the Ninth Circuit itself continues to struggle with the requisite standard, as demonstrated by a divided opinion issued after this petition was filed. *See United States v. Flucas*, 22 F.4th 1149 (9th Cir. 2022). The government's opposition confirms that this Court's prior efforts to establish a default but-for standard have not succeeded, and it should therefore grant this petition to correct the Ninth Circuit's erroneous view and to resolve the lingering confusion.

ARGUMENT

1. The "substantial" purpose standard articulated by the Ninth Circuit for the VICAR motive element conflicts with *Burrage* and a wealth of this Court's other authority. Like the Ninth Circuit, *see* App. 6; *United States v. Rodriguez*, 971 F.3d 1005, 1010-11 (9th Cir. 2020), the government contends that *Burrage* does not control because it considered "causation" whereas the element of the VICAR offense at issue here relates to purpose or motive. BIO 9-10. This purported distinction ignores the reasoning and cases cited in *Burrage*.

As stated in the petition, *Burrage* arrived at a but-for standard as to the disputed causation element by relying on this Court's *mixed-motive* precedent. *See Burrage*, 571 U.S. 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)). The government does not address this reasoning in *Burrage*, nor does it even mention cases like *Nassar* and *Gross*. Surely, if this Court's but-for standard governing motive as set forth in cases like *Nassar* and *Gross* applied to the causation element in *Burrage*, that same standard should also govern the motive or purpose element at issue here; obviously, cases like *Nassar* and *Gross* are even *more* relevant in this context.

Another reason why *Burrage* settled on a but-for standard is because a "substantial" standard was simply too vague and unworkable for a criminal statute.

See Burrage, 571 U.S. at 218. Like the Ninth Circuit, the government fails to explain why a "substantial" standard is not vague and can otherwise work in this context. Furthermore, the but-for standard 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" statutes. *Comcast Corporation v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1014 (2020); *see Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1739 (2020). Because the government ignores these cases, it does not offer any explanation as to why the "default" but-for standard should not apply to the motive element of the VICAR offense.

The only possible basis that the government argues for ignoring this Court's well-established precedent in this context is that the language "for the purpose of" in the VICAR statute is different than the language cited as non-exclusive examples in *Burrage*, such as "because of," "based on," and "by reason of." BIO 9. The government does not offer any textual analysis as to why the phrase "for the purpose of" should be treated differently, nor does it dispute that Congress has used the "for the purpose of" language to signify 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); *see also Nauman v. Abbott Laboratories*, 669 F.3d 854, 857 and n.2 (7th Cir. 2012).

Furthermore, the government does not cite any of this Court's precedent to support its position that the "for the purpose of" language signifies a lesser standard. Its failure to do so is likely because this Court's precedent suggests that the "for the purpose of" language requires at least a but-for test, if not an arguably higher standard requiring that the prohibited purpose be the "dominant motive" for committing the conduct. *Mortensen*, 322 U.S. at 374 (considering the Mann Act, which used "for the purpose of" language); *see Hawkins v. United States*, 358 U.S. 74, 79 (1958) ("dominant purpose"); *Cleveland v. United States*, 329 U.S. 14, 20 (1946) ("dominant motive"). The bottom line is that the Ninth Circuit's view, apparently endorsed by the government, conflicts with this Court's precedent in multiple respects. Review is therefore warranted for this reason alone.

2. Review is also warranted because there is conflict and confusion in the lower courts. Although the government maintains uniformity among the circuits, it largely relies on cases decided before *Burrage* and inaccurately describes the current state of affairs. BIO 8. For example, after this petition was filed, the Ninth Circuit issued a splintered decision reflecting the confusion in the lower courts.

In *Flucas*, the Ninth Circuit recently considered revised versions of the Mann Act, the statute considered in *Mortensen*, which required the defendant to have transported someone with the intent that the person engage in illicit sexual activity. *See* 18 U.S.C. § 2421, 2423. The jury was instructed: "[Y]ou need not

find that the intended criminal sexual activity was the defendant's sole or most important purpose [in the transportation]. It is sufficient if the government proves beyond a reasonable doubt that the sexual activity was a significant, dominant, or motivating purpose." *Flucas*, 22 F.4th at 1153. Although a majority held that the instruction was not erroneous for including a "motivating" purpose standard, *id.* at 1154-64; *id.* at 1164-65 (Schroeder, J., concurring), Judge Bybee dissented, reasoning that the instruction was inconsistent with this Court's opinion in *Mortensen*. *Id.* at 1165-79 (Bybee, J., dissenting).

Judge Bybee explained: "Federal courts since *Mortensen* have struggled with the Court's 'dominant motive' formulation. Indeed, 'courts turn handsprings trying to define 'dominant.'" *Id.* at 1167 (citation omitted). He also described how even after decades of considering the issue, "courts thought that the phrase 'dominant motive' was still confusing and began tinkering with alternative word formulas." *Id.* at 1168. Perhaps unsurprisingly (and given the correlation as discussed above and in *Burrage*), some "courts of appeals looked to causation language borrowed from tort." *Id.* After exhaustively reciting the widespread confusion, *id.* at 1167-71, Judge Bybee ultimately concluded that a "motivating" purpose standard was erroneous and, in doing so, suggested that an earlier Ninth Circuit opinion that had rejected a but-for standard should have come out

differently if it was not reviewing for plain error. *Id.* at 1172-73.[1]

The lower courts continue to struggle with the requisite definition because they have not heeded this Court's repeated instructions that a but-for standard is the ancient and simple test applicable in this context. Due to this ancient and simple test, courts need not tinker with vague descriptive words such as "substantial," or "significant," or "motivating," or "integral." They simply need to instruct on a but-for standard, as established by this Court's opinions in *Burrage*, *Nassar*, and *Gross* (and *Comcast* and *Bostock*).

This is exactly what Judge Sutton concluded when considering a similar motive element in *Miller*, 767 F.3d at 589-92. The government attempts to distinguish the Sixth Circuit's opinion by contending that the statute in *Miller* used "because of" language. BIO 11-12. As explained above and dictated by *Mortensen*, 322 U.S. at 374, the "for the purpose of" language in the VICAR statute should be treated no differently. *See Lucas v. United States*, 240 A.3d 328, 339-41 (D.C. Ct. App. 2020) (following *Burrage* and *Miller* and adopting a but-for standard for a motive element regardless of the precise language in the statute).

The government also seeks to blunt the conflict by pointing to the Sixth

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[1] Judge Bybee was the author of *United States v. Banks*, 514 F.3d 959 (9th Cir. 2008), which spawned the Ninth Circuit's erroneous motive standard in the VICAR context and is cited in the opposition. BIO 8, 10. While the government clings to *Banks*, Judge Bybee's dissenting analysis in *Flucas* suggests that even he has reconsidered the issue.

Circuit's opinion in *United States v. Hackett*, 762 F.3d 493, 500-01 (6th Cir. 2014), *see* BIO 10, 12, but, as noted in the petition, *Hackett* did not involve a claim of instructional error and merely concluded that the government presented sufficient evidence of a gang motive. To the extent that the government argues that *Hackett* established an "animating purpose" standard for the Sixth Circuit, that language would create all of the same vagueness and confusion recently noted by Judge Bybee in *Flucas*, 22 F.4th at 1169-75, and that Judge Sutton sought to avoid in *Miller*. *See Miller*, 767 F.3d at 591-92. It is doubtful that the Sixth Circuit silently sought to undo *Miller*, and even if *Hackett* somehow conflicts with *Miller*, it simply shows that the question presented has also generated intra-circuit conflicts and is all the more reason to grant review.

Like *Hackett*, the other lower-court cases cited by the government were, for the most part, sufficiency-of-the-evidence cases (not jury-instruction cases), and they were generally decided before *Burrage* (and even before *Nassar* and *Gross*) and did not address a but-for standard. *See* BIO 8-9. For example, the pre-*Burrage* opinion in *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992) was a sufficiency case and merely stated that the purpose element does not require proof that the gang motive was the defendant's "sole" purpose, a standard that

petitioner is not advocating.[2] The more recent opinion in *United States v. Velasquez*, 881 F.3d 314, 332 (5th Cir. 2018) was also a sufficiency case that said the same thing and did not even purport to address *Burrage* or a but-for standard. The one jury-instruction case cited by the government, the Ninth Circuit's opinion in *Banks*, was pre-*Burrage* and, as mentioned, was authored by Judge Bybee, who now appears to have changed his view as expressed in his recent *Flucas* dissent.

To the extent that lower-court opinions have fixated on what the government is *not* required to prove, they are not particularly helpful in explaining what *is* required. Ultimately, the government's efforts to cast Judge Sutton's opinion in *Miller* as a limited outlier in the lower courts is all the more reason to grant this petition. This Court should clarify that using vague terms such as "substantial" or "significant" while telling jurors what the government is not required to prove fails to convey the requisite, simple, and traditional but-for standard.

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[2] Relying on a *civil* RICO case, the Second Circuit remarked that the VICAR statute should be construed "liberally" to effectuate RICO's remedial purpose. *Concepcion*, 983 F.2d at 381. This purported principle of construction is doubtful in this context given this Court's repeated admonition that federal criminal statutes should not be broadly interpreted so as to upset the sensitive balance between federal and state powers. *See Bond v. United States*, 572 U.S. 844, 858-59 (2014). Moreover, the other Second Circuit sufficiency cases cited by the government are not relevant; *United States v. Thai*, 29 F.3d 785, 817-19 (2d Cir. 1994) found insufficient evidence of the VICAR motive element and could not have expressed a view on *Burrage*, which was decided two decades later. The pre-*Burrage* opinion in *United States v. Dhinsa*, 243 F.3d 635, 671-72 (2d Cir. 2001) was also a sufficiency of the evidence case, not an instructional-error case, and did not comment on a but-for standard.

3. Finally, the government does not dispute that this case is an excellent vehicle for review. It concedes that the issue is preserved and does not contend that the error was harmless, setting up a clean legal issue. Although the question-presented page of the government's brief phrases the issue as whether the district court "abused its discretion" in instructing the jury, the body of the opposition does not explain the reference to a discretionary standard or provide any analysis or supporting authority, and the government's brief in the Ninth Circuit conceded that the instructional issue was subject to *de novo* review. As a result, any claim of a discretionary standard is waived. *See Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998). In any event, the question presented is a purely legal issue regarding whether the district court erroneously instructed the jury on a critical element of the offense, *see McDonnell v. United States*, 579 U.S. 550, 577-79 (2016), and the lower court did *not* review for abuse of discretion. App. 6.

Petitioner was sentenced to mandatory life in prison without the possibility of parole, a result that the district judge, who was no "soft touch" in criminal cases, believed was unjust; a Ninth Circuit judge agreed with his assessment. App. 9-10. This unjust result was based on a verdict tainted by jury instructions that conflict with several of this Court's precedents. This is precisely the type of criminal case where review should be granted.

CONCLUSION

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

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Respectfully submitted,

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