No. _____

IN THE

Supreme Court of the United States

JAWAN FORTIA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Racketeer Influenced and Corrupt Organizations Act (RICO) contains a constitutionally-mandated jurisdictional element requiring prosecutors to prove in each case that the charged criminal enterprise either engaged in, or that its activities affected, interstate commerce.

In this case—a federal prosecution of a neighborhood gang—the government did not allege that the group engaged in interstate commerce, nor did it present any evidence showing that the group's activities affected interstate commerce either. Nonetheless, the Court of Appeals affirmed the gang members' RICO convictions, holding that since some members engaged in frequent street-level drug dealing, the jury could simply assume that the group's activities had the requisite interstate effect. Citing this Court's decision in *Taylor v. United States*, 579 U.S. 301 (2016), the panel hinged its determination on this Court's prior holding that "[d]rug-trafficking is a *type* of economic activity that has been recognized to substantially affect interstate commerce in the *aggregate*." *United States v. McClaren*, 13 F.4th 386, 402 (5th Cir. 2021) (emphasis added).

Thus, the question presented is:

Can the government obtain a conviction under RICO without proving that the targeted enterprise's activities actually affected interstate commerce, so long as enterprise members engaged in a class of activity that has been recognized to substantially affect interstate commerce in the aggregate?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Wilson et al.*, No. 14-cr-131, U.S. District Court for the Eastern District of Louisiana. Judgment entered October 3, 2017.
- *United States v. McClaren et al.*, No. 17-30524, U.S. Court of Appeals for the Fifth Circuit. Judgment entered September 9, 2021.

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PETITION FOR A WRIT OF CERTIORARI

This case arose from a federal racketeering prosecution targeting hyper-local violent crime in the Central City neighborhood of New Orleans. At trial, prosecutors focused on various acts of violence committed over an eight-year period by "members" of the so-called "Young Melph Mafia" (YMM). Local violence of this type generally falls squarely outside the reach of federal regulation. Indeed, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000). Nonetheless, prosecutors attempted to reach the local crime here through the Racketeer Influenced and Corrupt Organizations Act (RICO), which prohibits "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[.]" 18 U.S.C.

§ 1962(c). The "racketeering activity" federal prosecutors may reach through RICO is broad and expressly encompasses numerous purely state law offenses like murder and robbery. *See* § 1961. Thus, RICO's express commerce-derived jurisdictional requirement is critical to the statute's constitutionality. In each case, prosecutors must prove that the targeted enterprise either engaged in or actually affected interstate commerce. *See* § 1962(c).

In this case, prosecutors simply ignored that necessary element, introducing no evidence demonstrating that any of YMM's activities affected interstate commerce in any way. Certainly, none of the violent acts committed by YMM members had such an effect. And, though witnesses testified that some YMM members frequently sold drugs around the Central City neighborhood, the prosecution submitted no evidence that those members purchased drugs from outside Louisiana (or even Orleans Parish). Indeed, prosecutors did not even attempt to prove that those drugs necessarily would have had to have crossed state lines to reach Central City.

The Fifth Circuit affirmed nonetheless, holding that, because drug-trafficking as a *class* of activity affects commerce "in the aggregate," prosecutors necessarily satisfy their evidentiary burden to show a case-specific interstate-commerce effect in any case in which enterprise members sold drugs. That holding represented a fundamental misread and undue expansion of this Court's decision in *Taylor v. United States*, 579 U.S. 301 (2016), which applied similar "aggregation of commerce" principles to the Hobbs Act, a federal robbery statute. In doing so, the Fifth Circuit conflated the scope of federal jurisdiction (i.e., Congress's regulatory power over broad

classes of activity) with required statutory elements and the evidentiary proof necessary to support a criminal conviction (i.e., the facts federal prosecutors must prove in every case in order to satisfy a crime's elements). Several other circuits and a number of district courts have made the same error, which affects not just RICO, but dozens of other federal statutes that incorporate the same or similar jurisdictional requirements.

This Court should grant certiorari.

OPINIONS BELOW

The Fifth Circuit Court of Appeals issued an initial opinion on May 18, 2021, which is reported at 998 F.3d 203. On September 9, 2021, after Mr. Fortia filed petitions for rehearing and rehearing en banc, that initial opinion was withdrawn and superseded by a second and final opinion, which is attached hereto as part of the Appendix and is available at 13 F.4th 386.

JURISDICTION

The Fifth Circuit entered its original judgement on May 18, 2021, and Mr. Fortia timely filed petitions for panel rehearing and for rehearing en banc. The Fifth Circuit then withdrew its prior opinion, replacing it with a new published opinion on September 9, 2021, and entered final judgment on that date. On November 24, 2021, Mr. Fortia filed with this Court a timely Application for Extension of Time to File a Petition for Writ of Certiorari. Justice Alito granted that application on December 1, 2021, extending the time in which to file Mr. Fortia's petition by 58 days, until February 4, 2022. Thus, this petition for a writ of certiorari is timely filed

pursuant to Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art I, § 8, cl. 18 of the U.S. Constitution provides that Congress shall have the power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

18 U.S.C. § 1962(c) provides:

> 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.

18 U.S.C. § 1959 provides in relevant part:

> Whoever, . . . 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—
>
> . . . for murder, by death or life imprisonment, or a fine under this title, or both[.]

STATEMENT OF THE CASE

I. The Racketeering and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act (RICO) is an expansive federal statute that reaches a broad swath of criminal activity—even run-of-the-mill state law offenses. *See* 18 U.S.C. §§ 1961, 1962. The law originally was enacted based on the "Federal Government's strong interest . . . in suppressing the activities of organized criminal enterprises." S. Rep. No. 98–225, at 305 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484. Thus, to vindicate that interest, Congress sought to "proscribe[ ] murder and other violent crimes committed," as well as non-violent crimes like drug trafficking, "as an integral aspect of membership in a" racketeering enterprise. *Id.* at 304. As one commentator has explained, RICO essentially makes it a federal crime "to be a criminal." Gerard E. Lynch, *Rico: The Crime of Being A Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 665 (1987).

RICO's text prohibits "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[.]" § 1962(c). And RICO's companion provision, the Violence in Aid of Racketeering Act (VICAR), similarly prohibits murder and other violent acts committed "for the purpose of . . . maintaining or increasing position in an enterprise engaged in racketeering activity"—defining

"enterprise" identically to RICO. § 1959.[1]

RICO defines "racketeering activity" expansively—covering numerous state-law violations with no federal nexus, including murder, robbery, and assault. *See* § 1961(1). Thus, RICO is, in essence, a pass-through provision allowing the federal government to breach the state domain. And the criminal activity it reaches generally falls within the sole province of the states and far outside the reach of federal jurisdiction. Indeed, this Court repeatedly has warned Congress that it lacks a "plenary police power," *United States v. Lopez*, 514 U.S. 549, 566 (1995); *Morrison*, 529 U.S. at 618. And there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618.

That makes proof of jurisdiction in RICO prosecutions critical, and the Constitution and Congress thus strictly circumscribe the statute's reach. Like many federal criminal statutes, RICO authority derives solely from the Commerce Clause, which grants Congress power "[t]o regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const. art. I, § 8, cl. 3. Thus, RICO has an explicit interstate-commerce nexus requirement, requiring proof beyond a reasonable doubt in *each case* that the charged enterprise either engaged in or its activities affected interstate commerce. § 1962 (c).

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[1] For simplicity, this petition refers to RICO throughout, but the arguments apply equally to VICAR's identical commerce element and Mr. Fortia's VICAR conviction.

That jurisdictional element is necessary to RICO's constitutionality. As the Eight Circuit has explained, it ensures that the enterprise in each case is at least minimally connected to interstate commerce and therefore fundamentally distinguishes RICO and VICAR from other federal statutes struck down by this Court for failing to require sufficient connection to Congress's Commerce authority. *United States v. Crenshaw*, 359 F.3d 977, 986 (8th Cir. 2004) (citing *Lopez*, 514 U.S. at 566; *Morrison*, 529 U.S. at 618). And RICO's interstate-commerce element is not unique to racketeering regulation—identical and substantially similar jurisdictional elements are scattered throughout dozens of federal criminal statutes, ranging from tampering with consumer products, *see* 18 U.S.C. § 1365, to hate crime legislation federalizing certain assaults, *see* § 249(a)(2)(B)(iv)(II), to the most widely applied federal firearm regulation, *see* § 922(g). Thus, this specific interstate-nexus element is a ubiquitous and common means by which Congress limits the reach of federal criminal law and ensures that federal prosecutors respect constitutional limits on Congress's ability to regulate local affairs.

Previously, prosecutors have satisfied RICO's interstate-commerce element by proving, for example, that an enterprise used interstate money transfer services,[2] wrote bonds through an out-of-state company,[3] or caused the breaking of out-of-state contracts.[4] When enterprise members sold drugs, prosecutors have proved that the

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[2] *United States v. Delgado*, 401 F.3d 290, 297 (5th Cir. 2005).
[3] *United States v. Walker*, 348 F. App'x 910, 912 (5th Cir. 2009).
[4] *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001).

drugs came from another state—or produced evidence showing the drugs at issue necessarily had to cross state lines or international boarders—in order to demonstrate a case-specific, interstate-commerce effect, which courts have held is sufficient to prove the commerce element.[5]

II. The Young Melph Mafia Prosecution.

This case arose from the sweeping federal racketeering prosecution of the so-called "Young Melph Mafia" (YMM), a name that referred to a loose collective of teenagers who grew up together in and around the Melpomene Housing Projects in New Orleans. Some defendants—like Mr. Fortia—were as young as fourteen when the alleged RICO conspiracy began, and all alleged acts occurred within New Orleans—largely within a single neighborhood. The lengthy trial focused exclusively on purely local violence—including numerous murders—committed over an eight-year period by YMM "members." Evidence at trial demonstrated that some YMM members sold drugs in addition to committing various acts of violence, though the alleged violent acts did not appear to be committed in pursuit of that drug dealing. Instead, witnesses testified that shootings arose from escalating schoolyard brawls and personal vendettas, not a turf war between rival drug syndicates. Mr. Fortia was alleged to have been a YMM member and "gunman" for the enterprise, accused of

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[5] *See, e.g.*, *United States v. Velasquez*, 881 F.3d 314, 329 (5th Cir. 2018); *United States v. Gray*, 137 F.3d 765, 773 (4th Cir. 1998); *Delgado*, 401 F.3d at 297; *Crenshaw*, 359 F.3d at 992.

committing at least one murder himself and of engaging in occasional drug dealing as well.

At the lengthy YMM trial, prosecutors focused their efforts almost exclusively on proving the elements of the underlying state crimes alleged—murders and assaults—while largely ignored RICO's interstate commerce nexus requirement and ultimately introducing no evidence demonstrating that YMM was engaged in or its activities actually affected interstate commerce. Notably, all of the alleged violent acts and other criminal activity occurred within Orleans Parish, and prosecutors never alleged YMM members engaged in any sort of commerce across state lines themselves. Nor did any evidence demonstrate a drug-related interstate connection—such as evidence showing that any of the drugs YMM sold originated from out of state—and prosecutors did not even attempt to argue any interstate connection of that sort to the jury during closing arguments. Instead, prosecutors simply told the jury that RICO's interstate-commerce element was satisfied "by the guns and the bullets made out of state and the shooting on the interstate." This referred to the manufacturing location of two seized firearms—neither of which was used in any YMM crimes but were instead found in the proximity of members during police encounters—and a shooting that occurred on an interstate, though no evidence suggested that incident had any effect on interstate commerce.

The jury found Mr. Fortia and three others guilty of violating both RICO and VICAR. All three were sentenced to life terms of imprisonment for those crimes.

III. The Fifth Circuit's Decision Misapplying *Taylor v. United States.*

On appeal, Mr. Fortia argued that the government failed to prove beyond a reasonable doubt that YMM engaged in or that its activities affected interstate commerce as RICO requires. He pointed out that the prosecution's "guns and interstate" theory presented to the jury was facially inadequate to demonstrate RICO's required interstate-commerce nexus. In response, the government abandoned the approach of its trial attorneys and adopted a new defense of its evidence—this one rooted in the drugs sold by YMM members. Now, the government argued that evidence showing that some YMM members sold drugs automatically satisfied RICO's interstate-commerce nexus requirement, without evidence of any actual interstate connection or effect. Jurors were entitled to simply assume, the government suggested, that this activity affected interstate commerce in some way.

In a paragraph-long explanation, the Fifth Circuit adopted the government's reasoning and held that the prosecution had satisfied RICO's interstate-commerce element simply by virtue of the fact that various YMM members sold drugs:

> The government provided evidence that YMM engaged in daily drug trafficking over a period of several years. Drug-trafficking is a type of economic activity that has been recognized to substantially affect interstate commerce in the aggregate. *See Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016) ("The production, possession, and distribution of controlled substances constitute a class of activities that in the aggregate substantially affect interstate commerce[.]"). Considering the government's demonstration of very extensive and long-term engagement in drug trafficking, a rational jury could have concluded beyond a reasonable doubt that YMM's activities had at least a minimal impact on interstate commerce.

McClaren, 13 F.4th at 402.[6]

In other words, the panel held, because drug-trafficking as a *class* of activity affects commerce "in the aggregate" (according to previous congressional findings), prosecutors necessarily satisfy their evidentiary burden to show a case-specific interstate-commerce effect in any case in which enterprise members sold drugs. In doing so, the Fifth Circuit replaced a factual question for the jury (i.e., whether an individual enterprise actually affects interstate commerce) with a legal question previously answered by this Court (i.e., whether Congress has jurisdiction to regulate the market for illegal drugs). And, because this Court has held that drug dealing as a class of activity can be regulated by Congress, jurors in individual cases can assume that individual drug dealing always has the requisite interstate-commerce effect.

The Fifth Circuit based this broad holding on this Court's decision in *Taylor v. United States*, which examined a separate commerce element contained in the Hobbs Act. That federal statute prohibits robbery that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). Thus, like RICO, the Hobbs Act reaches hyper-local criminal conduct, deriving authority to do so from the Commerce Clause. But, unlike RICO, the Hobbs

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[6] Initially, the panel opinion adopted *both* the prosecution's "guns and interstate" theory *and* the aggregated drug sale theory, holding that the two "taken together" established the requisite interstate effect. Mr. Fortia moved for panel rehearing and rehearing en banc, urging that both grounds were insufficient and challenging the soundness of combining disparate and distinct connections to interstate commerce "together" to satisfy RICO's most critical statutory element. The panel then withdrew its initial opinion and deleted any reference to the "guns and interstate" theory, relying solely on the aggregated drug sale theory instead.

Act defines "commerce" expansively: as encompassing "all other commerce over which the United States has jurisdiction"—not just *inter*state commerce. § 1951(b)(3). That makes the statute "unmistakably broad" and unique among analogous federal criminal statutes. *Taylor*, 136 S. Ct. at 2079. Indeed, based on its particular wording, this Court in *Taylor* held that the Hobbs Act's commerce element is a "purely legal determination," and it is therefore proper for the court to instruct the jury that "the market for marijuana . . . is commerce over which the United States has jurisdiction." *United States v. Woodberry*, 987 F.3d 1231, 1235 (9th Cir. 2021).

Thus, the Court held, the defendant in *Taylor* was wrong that his Hobbs Act robbery conviction required proof that the drugs stolen actually traveled in interstate commerce. Instead, it mattered only whether his robbery "obstruct[ed], delay[ed], or affect[ed] commerce" that Congress has jurisdiction to regulation—in other words, whether the market for illegal drugs falls within Congress's jurisdiction. And that question—a legal determination—was easy to answer based on *Gonzales v. Raich*, 545 U.S. 1 (2005). *Raich* held that the Commerce Clause authorizes Congress to regulate the national marijuana market—even if regulation captures purely intrastate activities—because they are classes of activities that Congress has a "rational basis" to believe affect interstate commerce in the *aggregate*. 545 U.S. at 22.

Importantly, *Raich* did not hold, as a factual matter, that all drug activity necessarily affects interstate commerce. And the Congressional findings cited therein certainly do not qualify as proof-beyond-a-reasonable-doubt of such an effect in each individual case. But for the purposes of the Hobbs Act in *Taylor*, the case-specific

interstate nexus question was of no moment—all that mattered was whether the robbery affected drug commerce. Because the defendant robbed a drug dealer (as a factual matter) and because the United States has jurisdiction over the illegal drug market (as a legal matter), the defendant "necessarily affect[ed] . . . commerce over which the United States has jurisdiction." *Id*. at 2078. For purposes of the Hobbs Act, the Court held, "if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected." *Id*. at 2080–81. It would not be necessary to prove that stolen drugs came from another state, the Court explained, because "purely *intra*state production and sale of marijuana is commerce over which the Federal Government has jurisdiction," *Id*. at 2080, and the statute itself encompasses more than "interstate" commerce.

The Fifth Circuit now has imported *Taylor*'s holding into a radically different criminal regulatory scheme and used that case to interpret a critical jurisdictional element used throughout the criminal law to limit federal authority. The Fifth Circuit now holds that if, as a legal matter, Congress has jurisdiction to regulate a particular class of activity in the aggregate, anyone engaged in that conduct—no matter how locally that activity may be—must be considered to have actually "affected interstate commerce," within the meaning of this ubiquitous statutory element.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's decision stretches the "commerce aggregation" principle and this Court's decision in *Taylor* beyond any reasonable limit—a misstep occurring in other circuits as well.

RICO's text explicitly requires proof that the charged enterprise either engaged in or its activities affected interstate commerce. That jurisdictional element is constitutionally mandated due RICO's broad reach and great potential to impermissibly federalize purely local crime that falls squarely and solely within the state domain. RICO's express and specific jurisdictional element also represents a reasoned determination by Congress to limit federal jurisdiction only to a certain subset of criminal enterprises with a sufficiently clear nexus to interstate commerce. Based on that determination and cognizance of the limits of its own power, Congress expressly imposed the obligation on federal prosecutors to prove *in each case* that the enterprise's specific "conduct had a *demonstrated connection or link* with [interstate] commerce." Fifth Cir. Pattern Jury Instructions (Crim.), § 2.79 (2019). That requirement is apparent from a plain reading of RICO's text and is an element that must be proved beyond a reasonable doubt through competent evidence at trial like any other element of the crime.

Thus, the Fifth Circuit's approach represents both a misreading of the statutory text as well as a misapplication—and undue extension—of the "aggregation of commerce" theory applied in *Raich* and *Taylor*. True, *Raich* held that the Commerce Clause authorizes a comprehensive, federal regulatory scheme targeting the national marijuana market—even if regulation captures purely intrastate activities—because those local activities nonetheless fall within a *class* of activities

that Congress has a "rational basis" to believe affect interstate commerce in the *aggregate*. 545 U.S. at 22. However, *Raich* did not hold, as a factual matter, that each and every drug sale (or even daily individual drug sales) necessarily has an actual interstate effect. Indeed, *Raich* simply held that Congress had a rational basis to believe that capturing purely local drug activity was necessary to effectively carrying out its broader regulatory scheme. Certainly, the Congressional findings cited in *Raich* to uphold that regulatory scheme were not transferable to the proof-beyond-a-reasonable-doubt of such an effect in each individual case—a factual matter to be submitted to the jury in each case, not a legal matter to be decided in broad terms by the judiciary for all cases going forward.

This confusion is not limited to the Fifth Circuit. Even pre-*Taylor*, the Second Circuit had held that when a "RICO enterprise's business is narcotics trafficking, that enterprise must be viewed as substantially affecting interstate commerce, even if individual predicate acts occur solely within a state." *United States v. Miller*, 116 F.3d 641, 674 (2d Cir. 1997).[7] After *Taylor*, the Second Circuit doubled down on this approach, citing the Court's decision and importing aggregation principles into RICO's interstate-commerce nexus, holding the element is automatically "satisfied

[7] *See also United States v. Vasquez*, 267 F.3d 79 (2d Cir. 2001) (recognizing the potential constitutional pitfalls, but declining to find clearly erroneous a trial court instruction to the jury that cocaine or heroin trafficking necessarily implicates foreign commerce and finding the mere fact of the defendants' heroin trafficking automatically satisfied the interstate commerce nexus, even if no evidence on that effect was introduced at trial, finding that " [e]ngaging in narcotics trafficking affects *interstate* commerce, at the very least, regardless of where the raw materials originate" (emphasis in original)).

by evidence that the enterprise trafficked in crack cocaine" based on the fact that this Court "has recognized that drug trafficking, even local trafficking, is part of an economic 'class of activities' that have a substantial effect on interstate commerce." *United States v. Aquart*, 912 F.3d 1, 17–18 (2d Cir. 2018) (quoting *Raich*, 545 U.S. at 17, 22). And the Court expressly refused to distinguish the distinct commerce elements of RICO and Hobbs Act because both statutes are located in the same chapter of the criminal code. *Id*.

The First Circuit too has suggested that the required nexus between a charged enterprise and interstate commerce automatically is proven when enterprise members engaged in drug dealing—like the Fifth and Second Circuits, citing *Taylor* for the proposition that "[t]he market for illegal drugs constitutes commerce over which the United States had jurisdiction." *United States v. Millan-Machuca*, 991 F.3d 7, 21 n.4 (1st Cir. 2021) (citing *Taylor*, 136 S Ct. at 2081). District courts have done the same.[8] And, importantly, the question of *Taylor*'s application is not limited to

[8] *See, e.g.*, *United States v. Baca*, 409 F. Supp. 3d 1169, 1249 (D.N.M. 2019) (citing *Taylor* for the proposition that "[a]n enterprise's drug trafficking, even if de minimis, necessarily satisfies the interstate commerce element"); *United States v. Woods*, No. 17-20022, 2020 WL 999036, at *4 (E.D. Mich. Mar. 2, 2020), *aff'd in part, vacated in part, on other grounds*, 14 F.4th 544 (6th Cir. 2021), *cert. denied*, No. 21-6601, 2022 WL 199524 (U.S. Jan. 24, 2022) (rejecting argument in motion for acquittal that government failed to prove RICO's interstate-commerce element on the ground that the local gang at issue sold drugs, citing *Taylor* and noting that "drug trafficking is an economic activity that satisfies the interstate commerce prong."); *United States v. Conyers*, No. S13 15-CR-537 (VEC), 2016 WL 7189850, at *3 (S.D.N.Y. Dec. 9, 2016) ("Count One alleges that the YGz were engaged in drug trafficking, specifically the trafficking of crack cocaine, heroin, and marijuana. It is well established that drug trafficking substantially affects interstate commerce. Accordingly, the allegation that the YGz were engaged in drug trafficking also adequately alleges the interstate commerce element of Count One.").

RICO and VICAR—it affects dozens of federal statutes containing identical or substantially similar interstate-commerce elements. For example, the Fourth Circuit has applied *Taylor*-based aggregation logic to the Hate Crimes Prevention Act. *See United States v. Hill*, 927 F.3d 188, 199–201 (4th Cir. 2019). And the Seventh Circuit has done the same in the context of the federal arson statute. *United States v. Adame*, 827 F.3d 637, 644 (7th Cir. 2016).[9]

This approach ignores these statutes' plain text and is rapidly chipping away at the concrete limits they set on federal jurisdiction over local crime. It also violates this Court's warning in *Bond v. United States* that courts should always interpret federal statutes in light of the general principle that federal jurisdiction over local crime is and must be strictly limited. This Court explained: "Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach." *Bond v. United States*, 572 U.S. 844, 848 (2014).

Here, the Fifth Circuit did the opposite. It ignored the plain meaning of RICO's text and eliminated its express limits on federal jurisdiction to police local crime. This

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[9] *See also, e.g.*, *United States v. Nichols*, No. CR1801684TUCCKJBGM, 2020 WL 3618555, at *5 (D. Ariz. July 2, 2020), *report and recommendation adopted*, No. CR181684TUCCKJBGM, 2020 WL 4812904 (D. Ariz. Aug. 17, 2020) (invoking *Taylor*'s aggregation principle to determine whether the federal theft-of-livestock statute reaches purely intrastate conduct); *APC Home Health Servs., Inc. v. Martinez*, 600 S.W.3d 381, 394 (Tex. App. 2019) (citing *Taylor* to determine the reach of the Federal Arbitration Act).

Court should intervene to reinforce this basic rule of statutory construction and to clarify the key distinction between the breadth of federal jurisdiction to regulate commerce, on the one hand, and the proof required to satisfy interstate-commerce nexus requirements imposed by statutory design, on the other.

II. The Fifth Circuit's judicial fact-finding on appeal undermines the right to jury, eviscerates the "beyond a reasonable doubt" standard, and epitomizes judicial lawmaking.

This Court's intervention also is warranted because the Fifth Circuit's approach also threatens the rights of criminal defendants to be found guilty beyond a reasonable doubt based on actual evidence submitted at trial, rather than untested, post-hoc judicial fact-finding. The Fifth and Sixth Amendments "give[ ] a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States v. Gaudin,* 515 U.S. 506, 522–23 (1995). And due process mandates that a finding of guilt be based on admissible evidence presented to a jury *at trial*, not on prior congressional research or appellate court findings of fact. *Alleyne v. United States,* 570 U.S. 99, 104 (2013); *In re Winship,* 397 U.S. 358, 364 (1970).

Importantly, jurisdictional elements, like any other offense elements, must be "proved to a jury beyond a reasonable doubt." *Torres v. Lynch*, 578 U.S. 452, 482 (2016). In other words, jurisdictional elements—including the one here—are subject to a jury (not judicial) determination and must be proven beyond a reasonable doubt at trial, like any other element. The Fifth Circuit's approach abrogates that fundamental constitutional principle, curiously inserting quasi-judicial/quasi-congressional factual and legal determinations in the normal place of actual evidence

and jury findings at trial. Of course, the jury in Mr. Fortia's case was not presented with the evidence upon which Congress (or the Fifth Circuit) rested its determination about the aggregate effects of drug dealing on interstate commerce—nor was the defense provided an opportunity to refute that evidence. Certainly, that information did not qualify as competent trial evidence upon which the jury could rest its determination of guilt. Indeed, the prosecution did not even argue the Fifth Circuit's theory of the element to the jury.

Nor was the factual finding inserted by the Fifth Circuit even a match for RICO's statutory element. In passing the federal regulatory scheme for illegal narcotics, Congress did not determine that each instance of localized drug activity—even daily drug dealing—actually affects interstate commerce. Instead, Congress determined that the entire market for illegal narcotics substantially affects interstate commerce in the aggregate and that including purely localized drug activity within the reach of that regulation is necessary to effectuate scheme as a whole. Of course, the standard of proof applicable to those findings was different too. The question before this Court in *Raich* simply was whether Congress *had a rational basis to believe* that the regulation of purely local drug conduct constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce—far from the proof-beyond-a-reasonable-doubt inquiry before the jury. And *Taylor* did not hold otherwise.

Thus, this Court's intervention is necessary to clarify and guard these fundamental constitutional principles.

III. This Court should intervene to resolve long-standing circuit confusion over the meaning of this ubiquitous statutory element.

Finally, this question deserves this Court's attention because the meaning of RICO's interstate commerce element has been confounding courts for decades now. Certainly, circuit courts and district courts alike are confused about the application of the *Raich-Taylor* line of aggregate commerce jurisprudence—which speaks to federal *jurisdiction* to regulate a class of activity—to individual statutory elements requiring a demonstrated effect on interstate commerce in individual cases. But, beyond that, the circuits have been in a broader disagreement for decades about the evidentiary standard applicable to the "affect" portion of RICO's interstate-commerce nexus requirement—an issue that this Court previously reserved, but could finally address now.

That dispute centers around how to read *Lopez*, in which the Court identified three categories of activity that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "activities having a *substantial relation* to interstate commerce." *Id*. at 558-59. Within that last category, the Court clarified that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id*. at 559.

A circuit split emerged over what type of interstate-commerce effect must be shown when an enterprise—like here—merely "affects" interstate commerce. Most courts have held that merely a slight effect on interstate commerce is all that is required under RICO's commerce element, *see United States v. Miller*, 116 F.3d 641,

674 (2d Cir. 1997) (interstate commerce nexus satisfied where RICO enterprise's business was narcotics trafficking even if individual acts of racketeering occurred solely within a state); *United States v. Farmer*, 924 F.2d 647, 651 (7th Cir. 1991), and that the burden of proving a nexus between the alleged drug trafficking actions of defendants and interstate commerce is minimal. *United States v. Wilkerson*, 361 F.3d 717, 726 (2d Cir. 2004); *United States v. Marerro*, 299 F.3d 653, 655 (7th Cir. 2002); *United States v. Riddle,* 249 F.3d 529, 538 (6th Cir. 2001); *United States v. Gray,* 137 F.3d 765, 773 (4th Cir.1998); *see also United States v. Juvenile Male,* 118 F.3d 1344, 1347–49 (9th Cir. 1997).

Certainly, that rule applies to enterprises "engaged in" interstate commerce, as this Court held in *United States v. Robertson,* 514 U.S. 669, 671–72 (1995). However, this Court left open whether prosecutions based on enterprises that merely "affect" interstate commerce must show a "substantial" effect instead, leading to a circuit split. *See Waucaush v. United States,* 380 F.3d 251 (6th Cir. 2004).

IV. This case is a good vehicle for addressing the questions presented.

Mr. Fortia's case places these critical issues cleanly before the Court—fully preserved and unencumbered. And this Court's resolution of the question presented matters specifically for Mr. Fortia, meaning, relief in this case would make a real difference. The Fifth Circuit's decision left in place RICO and VICAR convictions carrying two life sentences. Thus, Mr. Fortia's case represents an ideal vehicle through which to address the important questions raised herein.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Fortia's petition for writ of certiorari. This case presents an excellent vehicle for addressing the entrenched circuit and district court confusion over RICO's application and to set reasonable limits on the undue expansion of federal criminal jurisdiction. However, the Fifth Circuit's decision also was simply wrong and a facially incorrect application of this Court's holding in *Taylor*. Thus, this Court alternatively could summarily reverse the Fifth Circuit's decision instead.

Respectfully submitted,

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