No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

State sentencing law determines the statutory maximum sentence under 18 U.S.C. § 1963(a) for a RICO conviction based on a racketeering activity that is a state crime. Under Illinois state law for attempted murder, Mr. Perez could not receive a life sentence enhancement for his underlying RICO racketeering activity because he did not "personally discharg[e]" a firearm. Is a sentencing court bound by the state statutory maximum exposure for RICO violations based on state racketeering activities?

OPINION BELOW

The decision of the Court of Appeals for the Seventh Circuit ("Seventh Circuit") is a published opinion. The opinion is attached as Appendix A and is reported at *United States v. Perez*, 21 F.4th 490 (7th Cir. 2021). The Seventh Circuit denied a timely-filed petition for rehearing and suggestion for rehearing *en banc*. That Order is attached as Appendix B. The decision of the District Court for the Northern District of Illinois, Eastern Division, is located at *United States v. David Perez*, 2018 WL 835352 (N.D. Ill. Feb. 13, 2018) and is attached as Appendix C.

JURISDICTION

On December 23, 2021, the Seventh Circuit entered its opinion in Mr. Perez's appeal of his sentence. The opinion affirmed the district court's sentence.

On January 26, 2022, following an extension from the Seventh Circuit, Mr. Perez timely petitioned for rehearing and suggested rehearing *en banc*. On March 16, 2022, the Seventh Circuit denied Mr. Perez's rehearing petition.

On May 20, 2022, in Application No. 21A745, Associate Justice Amy Coney Barret granted Mr. Perez motion for an extension of time to file this petition. The deadline was extended to July 29, 2022.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 1961(1)(A)

> "racketeering activity" means (A) 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. § 1963(a)

> Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment) …

INTRODUCTION

Mr. Perez's case presents the opportunity to address an area of law that may be forthcoming in multiple contexts: the effect of state alterations to theories of criminal culpability on federal sentencing enhancement regimes. Mr. Perez pleaded guilty to a RICO conspiracy, as well as acknowledged an underlying racketeering activity of Illinois attempted murder. However, Illinois law limits the reach of a life sentence in such a case to certain circumstances, the relevant of which here was to only the individual who personally discharged a firearm. Yet the district court and Seventh Circuit held that the state's limit on life sentencing eligibility would not impact Mr. Perez's federal exposure. Therefore, he faced a life maximum sentence for his RICO conspiracy, a sentence he could not receive for the underlying state allegation.

This matter presents important issues of federalism and the extent of comity to state sentencing regimes. Under the RICO penalty statute, the maximum of 20 years increases to life only if the federal conviction is based on an underlying RICO activity for which life was a possible sentence. In turn, a racketeering can be a state crime, and it is state law that establishes its maximum penalty, and therefore the federal RICO maximum. As states adjust their statutory schemes to experiment with different liability for different actors in criminal offenses, this type of issue may reappear in other federal sentencing regimes where prior convictions or underlying conduct are used to enhance sentences. As a result, this case provides the Court with an opportunity to address both the question directly in the RICO context, but also

provide guidance to lower courts as to future instances of federal use of state sentencing regimes.

STATEMENT OF THE CASE[1]

A grand jury indicted Mr. Perez on seven counts relating to a RICO investigation of the Latin Kings.[2] Mr. Perez pleaded guilty to Counts One and Sixteen, in violation of 18 U.S.C. § 1962(d) and § 922(g)(1), respectively. (R.259:2.) In pleading guilty to Count One, Mr. Perez admitted to being a member of the Latin Kings from about 2004 to 2008, and again from 2012 to 2015. (Plea Tr. 13.) He also admitted that he knowingly conspired to conduct and participate in the activity of that enterprise through a pattern of racketeering activity. (*Id.*)

At the time of his plea, Mr. Perez and the Government agreed to resolve the question of Mr. Perez's statutory maximum sentence for Count One at a future time. (*Id.* at 28.) Count One alleged in Special Findings that Mr. Perez and four other Latin Kings members attempted to murder Victim 1, a former member of the Latin Kings, in the state of Illinois. (R.4:14.) The Special Findings also alleged that Efrain Medina and Jose Peña, two of Mr. Perez's co-conspirators, personally discharged a firearm that caused great bodily harm to Victim 1, in violation of 720 ILCS 5/8-4(c)(1)(D) and resulting in a maximum life sentence. (R.4:14.) That factor was the only aggravating factor alleged for the state attempted murder. (*Id.*)

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[1] The following abbreviations are used herein: Criminal Record on Appeal, cited by document number and page: "R. __:__," Appellate Court Record, cited by document number and page: "App. R. __:__," and Sentencing Transcripts, cited by page and line: "Sent. Tr. __:__.

[2] Mr. Perez was indicted for violations of 18 U.S.C. § 1962(c) (Count 1), 18 U.S.C. § 1959(a)(5) (Counts 2, 3, and 6), 18 U.S.C. § 1959(a)(3) (Count 4), and 18 U.S.C § 922(g)(1) (Counts 16 and 17). (R. 4.)

In briefing, the Government argued that 18 U.S.C. § 1963(a), which provides for a maximum sentence of life imprisonment for a RICO violation that is based on racketeering activity that carries a maximum penalty of life imprisonment, applied to Mr. Perez. (R.371:1.) The Government reasoned that because "standard theories of conspiracy liability" make Mr. Perez responsible for the acts of his co-conspirators (i.e., Medina and Peña), and they would be subject to a life sentence, he is subject to a maximum life sentence under § 1963(a). (R.371:7.)

In response, among other arguments, Mr. Perez stated that he was not eligible for the maximum life sentence because for the racketeering activity on which his conviction was based, the attempted first-degree murder under Illinois law, to carry a potential life sentence, the defendant must "personally discharge" a firearm, and that could not apply through vicarious liability. (R.391:6.) Mr. Perez did not personally discharge a firearm during the attempted murder, a fact that the Government conceded. (R.371:5.) Therefore, Mr. Perez reasoned, because the Government did not allege a racketeering activity that carried a potential life sentence, the enhancement in § 1963(a) did not apply to him. (R.391:4.)

After briefing and argument on January 1, 2018, (R.640), the district court found that Mr. Perez's statutory maximum sentence for Count One was life imprisonment under § 1963(a). (R.464:14; App. 14.) The court reasoned that a racketeering conspiracy "necessarily involves more than one person," so it necessarily imposes vicarious liability between co-conspirators. (*Id.* at 6; App. 6.) The district court recognized that Mr. Perez would not be subject to a life sentence in state court

but applied various theories of liability under federal law to extend the state sentence enhancement to Mr. Perez in the federal case. (*Id.*) Mr. Perez was sentenced to 336 months as to Count One and 120 months as to Count Sixteen, to run concurrently. (R. 623:2; App. 28.)

Mr. Perez appealed to the Seventh Circuit. On appeal, he discussed how the underlying racketeering activity, Illinois attempted murder, could not subject him to a life sentence. (App. R. 25:8.) As a result, under the text of the RICO penalty statute, Mr. Perez's violation was not based on a racketeering activity for which a life sentence was possible for him. (App. R. 25:10-11.) Therefore, Mr. Perez's maximum federal sentence should be 20 years.

On December 23, 2021, the Seventh Circuit issued its opinion in his Mr. Perez's appeal. *Perez*, 21 F.4th 490. The Seventh Circuit affirmed Mr. Perez's sentence. *Id*. at 494. While the court recognized that Illinois law did not include a possible life sentence for Mr. Perez, it felt the language of the statute was to be read differently. *Id*. at 493-94. Instead, the Seventh Circuit read the RICO penalty statute to include all acts of all co-conspirators, and any potential sentence that they may face. *Id*. As a result, because a co-defendant could get a life sentence, Mr. Perez could face a federal, but not state, life sentence maximum.

Following an extension of time to file, Mr. Perez petitioned for rehearing and a suggestion for rehearing *en banc*. (App. R. 54.) The Seventh Circuit denied rehearing. (App R. 62.) This petition follows.

REASONS FOR GRANTING THE PETITION

I. This Case Appears to Present an Issue of First Impression, Applying Theories of Liability to Underlying RICO Activities as They Impact Sentencing

In reviewing cases from this Court, there does not appear to be direct caselaw addressing the application of differential state theories of sentencing liability to the RICO enhancement regime. In fact, this Court has not had a case on the merits in which the confinement portion of 18 U.S.C. § 1961(a) has been addressed. This may well be because only recently have states started to reform their statutes to reflect the differing levels of punishment that may be appropriate for the wide range of individuals who may be criminally culpable but have lesser roles in criminal conduct. For example, many states have recognized the differences between the principles in homicides and felony murders, and those who may be criminally charged, but are not deserving of the significant maximums those statutes historically carried. Given the dearth of caselaw in this area, Mr. Perez's case provides an opportunity for this Court to guide lower courts as to the application of theories of liability from state sentencing regimes to federal statutes like the RICO penalty provision.

In reviewing a statutory provision, courts begin with the text. *Borden v. United States*, 141 S.Ct. 1817 (2021) (reviewing the ACCA's "physical force" statutory clause). But in addition, "the meaning of the statutory language, plain or not, depends on context." *Holloway v. United States*, 526 U.S. 1, 7 (1999). The statutory maximum for a violation of the RICO criminal statutes is generally capped at 20 years. 18 U.S.C. § 1963(a). But "if the violation is based on a racketeering activity for which the

maximum penalty includes life imprisonment," the maximum sentence increases to life. *Id*. Interpretation of § 1963(a) is then aided by § 1961(1)(A). Racketeering activity, in turn, is defined as "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)(A) (emphasis added). In considering the meaning of the text, the Court can be informed by legislative history and purpose. *Begay v. United States*, 553 U.S. 137 (2008) (discussing the purpose of the ACCA enhancement.) "Interpretation of a … phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). The purpose, as set out by Congress, helps clarify the question.

In 1988, Congress added the enhancement statutory language, located in a parenthetical phrase, to the RICO sentencing statute; before that, all RICO violations were subject to the same 20-year maximum penalty. 134 Cong. Rec. 32703 (1988). The Congressional Record reveals that the parenthetical text was added out of concern that the blanket 20-year maximum penalty was failing to adequately penalize certain crimes; that is, before the amendment, RICO imposed a 20-year maximum even with the underlying racketeering acts were punishable by life under state law. *Id.* ("The amendment remedies this deficiency by elevating the maximum penalty for RICO offenses to life imprisonment where the underlying acts are crimes punishable by life imprisonment or death.") The accompanying Senate report similarly explains that the amendment "permits imprisonment for life if the

defendant is convicted of a predicate offense that carries a maximum penalty of life." S.Rep. No. 100–459, at 7 (1988) (emphasis added).

What is clear from both the text and the statutory history above is that the RICO sentencing regime looks to and considers state sentencing provisions in determining the maximum sentence under federal law. At the same time, what is unclear, and appears to be largely unexplored across the circuits, is whether it is solely federal theories of liability that sentencing courts look to when considering the nature of the "racketeering activity" and its state penalty and resulting federal maximum sentence.

In Mr. Perez's case, the Seventh Circuit did not squarely address the issue by examining the different theories of culpability. Rather, the court relied on a recent case to say that in a RICO conspiracy case, if anyone involved is subject to a life sentence, under a federal vicarious liability theory, then all those involved in that racketeering activity were subject to an enhanced sentence. *Perez*, 21 F.4th at 493-94 (citing *United States v. Brown*, 973 F.3d 667 (7th Cir. 2020), a case discussing a state crime for which life sentence eligibility flowed to all defendants involved). This mirrored a similar case the district court cited, *United States v. Benabe*, 654 F.3d 753 (7th Cir. 2011), in which the Seventh Circuit similarly applied a life sentence enhancement to all members of a conspiracy in a case with an underlying racketeering activity, the state maximum sentence of which would apply to all defendants if the case proceeded in state court. In any event, the Seventh Circuit did not address the incongruity between the limited state theory of sentencing liability

and the expansive federal theory. It did so, in part, because this appears to be new ground. This case presents the opportunity to clarify just such an issue, and the question has started to arise in other contexts as well. The first area of guidance is regarding the application of federal theories of liability at sentencing.

While attributable criminal acts can apply through vicarious liability, this personalized enhancement would not extend under *Pinkerton* or similar theories. If *Pinkerton* were extended to sentencing exposure, a co-defendant's prior convictions, something that should uniquely apply to that individual, could stretch to all co-defendants who may not be culpable under relevant state law. As far as a circuit split is starting on the broader question of application of federal theories of liability, other courts have recognized this distinction and limiting principle. "*Pinkerton* is a doctrine about guilt-stage liability for a co-conspirator's substantive offenses. It is not a sentencing doctrine." *United States v. Hamm*, 952 F.3d 728, 747 (3d Cir. 2020) (holding that the 'death or injury' 21 U.S.C. § 841(b) sentence enhancement could not apply to appellants under *Pinkerton* liability) (internal citations omitted). The Seventh Circuit disagreed with that reasoning, and simply applied basic federal theories of liability in the sentencing context.

What is true about *Benabe* and *Pinkerton* mean that Mr. Perez is "liable" for the substantive crime of his co-conspirators: attempted murder in a RICO conspiracy. Application of *Benabe* and *Pinkerton* do not mean he is subject to his co-conspirators' unique, personal state-based sentencing ranges outside the substantive criminal elements contrary to the underlying state law. This is the case in Illinois, where the

"personally discharged" enhancement only applies to the direct actor, but similar enhancements can apply to co-conspirators through vicarious liability. *See generally People v. Rodriguez*, 891 N.E.2d 854 (Ill. 2008) (reviewing enhancements involving statutory language involving "personally" and others under Illinois law). This is the process under federal law and Illinois law: liability for the substantive crime can flow through *Pinkerton* including perhaps crimes that are modified by additional, generally applicable elements, but unique sentence enhancements attributable specifically to individuals cannot.

Mr. Perez's case is about whether a federal court should apply state theories of liability as it relates to application of its statutory sentencing schemes when sentencing a defendant under § 1963(a) for an underlying state racketeering activity. The answer is yes. The plain language of § 1963(a) appears to incorporate state sentencing law for state crimes. *Allen v. United States*, 45 Fed. Appx. 402, 405 (6th Cir. 2002) (unpublished). Were a federal prosecutor permitted to prosecute a defendant under RICO by defining the racketeering activity under state law, but then permitted to advocate for a sentence that is only possible under federal law, that would be an impermissible and unjust combination of state and federal law that is not contemplated under the RICO statutes. Mr. Perez was convicted of committing a RICO conspiracy based on the racketeering activity of attempted murder, as defined by Illinois law. The district court then sentenced Mr. Perez using federal theories of conspiracy liability to attach Illinois' sentencing enhancement for use of a firearm,

which is plainly impermissible under Illinois law. Further analysis of the relevant RICO language shows that this sentence contradicts the purpose of the statute.

In briefing below, the Government sought to characterize this matter as an issue of state procedure, which would not affect the federal sentencing determination. (App. R. 33:17-19). But in Mr. Perez's case, the issue is not one of procedure, but whether an individual could receive a given sentence for their actions in the offense using federal theories of liability.

Rather than an affirmative defense to a conviction, this issue involves the scope of potential sentencing liability. In other words, the issue explores whether the statute alters "the range of conduct or the class of persons that the [statute] punishes." *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). It does not change the allocation of authority of the sentencing judge (in the state court) or regulate the evidence the court could consider. *Id*. As a result, as held in *Welch* and prior cases, that issue is substantive. It defines the scope of the sentencing exposure for the defendant, and here that is not life for Mr. Perez.

States have started to experiment with differing theories of liability for those convicted of the same crime, but who play different roles in the offense.[3] This work

[3] States have started to mirror Illinois' work in narrowing application of its largest sentences in cases of group criminality. For example, California has adjusted felony murder in the state to a narrower group of individuals from its past broad application. Violeta Alvarez, *California's SB 1437 and Its Applicability to Attempted Murder Liability*, 2 Hastings J. Crime & Punish. 152, 152-53 (2021). Other states, including Massachusetts and Michigan, have enacted similar reforms. Abbie VanSickle, *If He Didn't Kill Anyone, Why is it Murder*, NY Times (June 27, 2018), https://www.nytimes.com/2018/06/27/us/california-felony-murder.html. Minnesota has also formed a task force on its felony murder laws, which can

may well continue as states engage in sentencing reform and statutory amendment to ensure proper fit for penalties. Given the extensive use of state prior convictions in federal sentencing enhancements, and references to their underlying maximum sentences, Mr. Perez's case provides an opportunity for this Court to help guide lower courts both in the RICO context and beyond.

II. The Court Should Consider this Case to Ensure Proper Deference to the States' Criminal Laws.

Similar to above, but separately notable, Mr. Perez's case involves a significant question involving the extent of comity to state sentencing regimes in federal criminal cases. By clarifying this matter, how far state sentencing processes control, this Court will also ensure that proper deference is given to the many states and their variety of sentencing regimes.

Typically, cases involving the parenthetical life sentence language of § 1963(a) yield straightforward results that track the plain language of the enhancing parenthetical. When a racketeering conspiracy conviction is based on racketeering activity that is defined by state law, it is the law of that state that dictates the maximum RICO sentence: 20 years or life. For example, a defendant convicted of a racketeering conspiracy under § 1961 based on a murder in a state in which murder

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carry maximum life sentences, and that task force has recommended limiting the application of felony murders to those who aid and abet underlying felonies. Lindsay Turner, Task Force on Aiding and Abetting Felony Murder, *Task Force on Aiding and Abetting Felony Murder: Report to the Minnesota Legislature* 46 (2022), https://mn.gov/doc/assets/AAFM-LegislativeReport_2-1-22_tcm1089-517039.pdf. That report also details the trend of states to limit exposure for such felony murder sentences. *Id*. at 35-31.

carries a life sentence regardless of the defendant's particular conduct during that offense, is subject to a maximum life sentence. *See, e.g., United States v. Flores*, 572 F.3d 1254, 1270 (11th Cir. 2009); *United States v. Fields*, 325 F.3d 286, 290 (D.C. Cir. 2003) (upholding a maximum life sentence under RICO for an armed kidnapping committed in Washington, D.C., where the law provides for a life sentence for armed kidnapping); *United States v. Patrick*, 248 F.3d 11, 28 (1st Cir. 2001) (upholding a maximum life sentence under RICO for a murder committed in Massachusetts, where state law provides for a life sentence for murder).

On the other hand, a defendant convicted of a racketeering conspiracy under § 1961 based on kidnapping in a state in which kidnapping does not carry a potential life sentence is not subject to a maximum life sentence under the parenthetical language of § 1963(a), even though such conduct might be punishable by life in prison elsewhere. *United States v. Nguyen*, 255 F.3d 1335, 1343 (11th Cir. 2001). In Mr. Nguyen's case, the Eleventh Circuit looked directly to what Mr. Nguyen's sentence would have been under Georgia law had he been convicted of the kidnapping offense underlying his racketeering conspiracy; since it was 20 years, rather than life, he was not subject to the increased sentence under RICO. *Id.* The United States Department of Justice itself relies on *Nguyen* to conclude that "[a]ccordingly, where a jury fails to find a RICO *defendant had committed any predicate act* with a potential penalty of life imprisonment, the defendant's maximum exposure is 20 years' imprisonment." U.S. Dep't of Justice Org. Crime and Gang Sec., *Criminal RICO: 18 U.S.C. §§1961-*

1968 A Manual For Federal Prosecutors 191 (May 2016) *available at* https://www.justice.gov/archives/usam/file/870856/download (emphasis added).

Additionally, when a defendant was convicted of violating § 1962 based on a California attempted murder, his maximum sentence was 20 years under § 1963(a), rather than life, because attempted murder under California law is only punishable by life in the presence of certain aggravating factors, none of which were present. *United States v. Fowles*, 337 Fed. Appx. 610, 611 (9th Cir. 2009) (unpublished). The federal court in Mr. Fowles' case cited extensively to California law and cases when discussing the defendant's potential federal sentence. *Id. See also United States v. Nagi,* 541 Fed. Appx. 556, 576 (6th Cir. 2013), *cert. granted, rev'd on other grounds*, 572 U.S. 1111 (unpublished) (remanding for resentence a conviction that carried a possible life sentence, but lacked the specific findings about personal eligibility for the sentence).

A defendant convicted of a RICO violation based on the predicate act of conspiracy to commit murder was not subject to a life sentence under § 1963(a) where conspiracy to commit murder carried a maximum sentence of 20 years under Connecticut law. *Rivera v. United States*, 2003 WL 22359252 (D. Conn. Jan. 14, 2003). The sentencing court looked directly to Connecticut's sentencing statutes and found that conspiracy to commit a Class A felony (murder, in this case) was a Class B felony, punishable by up to 20 years imprisonment. *Id.*

In each of the cases above, the court inquired directly into what the defendant's personal sentence exposure would have been under state law for the state offense

that was used as the underlying racketeering activity in the RICO conviction. That sentencing range controlled under § 1963(a). That is the opposite of what happened in Mr. Perez's case. In Mr. Perez's case, under Illinois law, as the Government acknowledged below, he would not be eligible for a life sentence. Under the reasoning in *Nguyen, Fowles,* and *Rivera,* and the plain language of the statute, that would mean he is not eligible for a life sentence under § 1963(a).

Even so, the district court and Seventh Circuit went beyond and contradicted the relevant state law and applied principles of federal accountability to not only liability, but state sentencing law, to increase Mr. Perez's statutory maximum sentence. Mr. Perez does not dispute the district court and Seventh Circuit findings that *Benabe* and its underlying federal rationale imposes federal liability on him for the crimes committed by his co-conspirators. (R.464:6); *Benabe*, 654 F.3d at 776 (like *Brown*, dealing with enhancements that state law imposed on co-conspirators). But it is Mr. Perez's liability, not his statutory maximum sentence, that is dictated by the principles discussed in *Benabe* and similar cases; his statutory maximum sentence is dictated by the sentencing scheme for his underlying racketeering activity, or Illinois attempted murder. In each of the cases cited above, the RICO defendants were eligible for a life sentence based exclusively on whether they personally would have been eligible for one in state court. In Mr. Perez's case, however, he faced a life sentence even though he was not personally eligible for one under relevant state law.

The plain language of the parenthetical appears to incorporate state sentencing maximums, consistent with the fact that it incorporates state criminal

offenses into potential "racketeering activity." *United States v. Fernandez*, 388 F.3d 1199, 1258 (9th Cir. 2004). Yet if it is unclear whether state liability theories control, the statute is, at worst, ambiguous.

Whether a statute is ambiguous turns not only on the text and dictionary definitions, but also on context of the statute. *Yates v. United States*, 574 U.S. 528, 537 (2015). When interpreting an ambiguous statute, the Court can consider legislative history in its interpretation. *Wooden v. United States*, 142 S.Ct. 1063 (2022) (reviewing legislative history to interpret statute). *See also Martinez v. United States*, 803 F.3d 878, 883 (7th Cir. 2015) (acknowledging that § 1963(a) is ambiguous to the point that it is unclear whether a life sentence is required for a life-eligible defendant, and turning to the statute's legislative history for guidance). In this case, perhaps "after seizing everything from which aid can be derived," that there can be no reasonable clarity as to what Congress intended in this circumstance, resulting in a "grievous ambiguity," and then interpretation in favor of the defendant is appropriate. *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (internal citations omitted).

Imposing a statutory maximum of 20 years in Mr. Perez's case, rather than life imprisonment, aligns with Congressional intent. The statutory question at issue implicates the parenthetical in § 1963(a), "or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment." This parenthetical phrase was added to the RICO sentencing statute when Congress amended it in 1988; before that, all RICO violations were subject to the same 20-year

maximum penalty. 134 Cong. Rec. 32703 (1988). Amending the sentencing statute for federal RICO sentences to better reflect state sentences fits the fact that § 1963(a) reflects Congress's intent to have RICO sentence ranges be directly based on state law. *Fernandez*, 388 F.3d at 1258 (reasoning that because § 1961 provides that racketeering activity may be state offenses and § 1963(a) provides for a life maximum sentences if the racketeering activity includes a maximum penalty of life, that the RICO statute "contemplates that both the acts charged and the sentences imposed my vary according to the law of the state where the acts occurred").

The concern highlighted by the 1988 amendment—that certain crimes which would be punishable by life if prosecuted by the state but were only punishable by 20 years when prosecuted under RICO— is not implicated in Mr. Perez's case. Here, Mr. Perez would not be eligible for a life sentence if he were prosecuted by Illinois, and as such, the 20-year maximum penalty is appropriate. Not only does the legislative history of this sentencing provision support a finding that the ambiguity in the statute be construed in favor of a 20-year statutory maximum, but the rule of lenity also supports that finding as well. That is, any significant ambiguity in a penal statute will be construed in favor of the defendant. *Muscarello*, 524 U.S. at 138-39 (internal citations omitted). Congress amended the RICO sentencing scheme to reflect a concern that existed in only a narrow set of cases; for the district court and Seventh Circuit below to apply the amended language to Mr. Perez's case contradicted that Congressional intent.

Many federal statutes directly reference state prior convictions and sentences as reasons to enhance federal sentences, both minimums and maximums. This statutory framework has now entered an era of statutory reform in which states are beginning to target particular sentences more specifically to those most culpable for criminal conduct, while still convicting those who were involved, just to a lesser degree. In the circumstance of using state statutes to define the scope of federal criminal liability, the Court has often faced the issue of the appropriate amount of deference to give to the states and their criminal laws. Mr. Perez's case presents another such opportunity to do so, but in the realm of substantive sentencing exposure in the context of group criminality.

CONCLUSION

For these reasons, both to resolve an issue of first impression and to clarify appropriate deference to state criminal law, Mr. Perez asks the Court to issue a Writ of Certiorari and review this case on the merits.

Date: July 29, 2022

Respectfully Submitted,

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