No. 22–_____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT SPEED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), makes it a federal crime to participate in, or to conspire to participate in, a racketeering enterprise "through a pattern of racketeering activity." *Id.* § 1962(c), (d). The statute defines "racketeering activity" broadly to include hundreds of federal and state crimes, many of which do not require any force or violence whatsoever. *Id.* § 1961(1).

In assessing whether an offense such as a RICO violation qualifies as a "crime of violence" within the meaning of 18 U.S.C. § 924(c)(3)(A), courts must apply a "categorical approach" and consider only the statutory elements of the offense, not "how any particular defendant may commit the crime." *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). In cases involving "divisible" statutes—i.e., those that "set[] out one or more elements of the offense in the alternative"—courts may apply a "modified categorical approach" and consult certain documents "to determine which alternative formed the basis of the defendant's ... conviction." *Descamps v. United States*, 570 U.S. 254, 257 (2013). But courts may not apply this "modified" approach to an offense with "a single, indivisible set of elements." *Id.*

The question presented is: In assessing whether RICO is a § 924(c)(3)(A) "crime of violence," is the statutory definition of "racketeering activity" divisible, such that a court may use the modified approach to

examine the particular racketeering acts committed by the defendant, as the Second and Third Circuits hold, or is the statutory definition indivisible, requiring application of the standard categorical approach, as the Fourth and Fifth Circuits hold?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Federal Cases

Federal Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Speed respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

OPINIONS AND ORDERS BELOW

The Court of Appeals' decision (Pet. App.[1] 1a-7a) is reported at 2022 WL 16984680. The District Court's decision denying petitioner's § 2255 motion (Pet. App. 8a-24a) is reported at 2020 WL 7028814. The District Court's decision granting a certificate of appealability (Pet. App. 25a) is not reported.

JURISDICTION

The Court of Appeals entered judgment on November 17, 2022. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. The District Court had jurisdiction under 28 U.S.C. § 2255.

[1] "Pet. App." refers to the Appendix annexed to this petition; "2d Cir. App'x" refers to the two-volume Appendix filed by petitioner in the Second Circuit, *see Speed v. United States*, 2d Cir. No. 20-3769 (ECF 22 & 23).

RELEVANT STATUTORY PROVISIONS

Section 924(c)(1)(A) of title 18, U.S.C., provides:

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> **(i)** be sentenced to a term of imprisonment of not less than 5 years;
>
> **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> **(iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

Section 924(c)(3) of title 18, U.S.C., provides:

> **(3)** For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> **(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(B)** that by its nature, involves a substantial risk that physical force against the person or property of

another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

Section 1961 of title 18, U.S.C., provides in relevant part:

> As used in this chapter—
>
> **(1)** "racketeering activity" means **(A)** any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; **(B)** any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 932 (relating to straw purchasing), section 933 (relating to trafficking in firearms), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of

naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1592 (relating to peonage, slavery, and trafficking in persons)[], sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a

copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), **(C)** any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), **(D)** any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, **(E)** any act which is indictable under the Currency and Foreign Transactions Reporting Act, **(F)** any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or **(G)** any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States,

any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt **(A)** incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and **(B)** which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate[.]

18 U.S.C. § 1961(1)-(6).

Section 1962(c) of title 18, U.S.C., provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

> enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

Section 1962(d) of title 18, U.S.C., provides:

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

18 U.S.C. § 1962(d).

Section 1963(a) of title 18, U.S.C., provides in relevant part:

> **(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), or both[.]

18 U.S.C. § 1963(a).

INTRODUCTION

Is racketeering, in violation of 18 U.S.C. § 1962(c), a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)? The answer would appear to be a straightforward "no" under this Court's well-settled categorical-approach jurisprudence because the RICO statute can be violated in myriad ways that do not entail any force or violence whatsoever. Indeed, the Government itself has determined that, "[b]y definition, RICO is not a crime of violence; it is not 'an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" U.S. Dep't of

Justice, Organized Crime and Gang Section, *Criminal RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors* 463 (6th rev. ed. May 2016), https://www.justice.gov/archives/usam/file/870856/download.

Yet the Second Circuit has long held—and reiterated in this case—that the RICO statute is divisible, thereby allowing a court to apply the modified categorical approach and look beyond the statute's elements to determine which underlying acts of "racketeering activity" the defendant committed in a particular case. *See* Pet. App. 4a-5a; *United States v. Laurent*, 33 F.4th 63, 88-89 (2d Cir.), *cert. denied*, 143 S. Ct. 394 (2022); *United States v. Ivezaj*, 568 F.3d 88, 96 (2d Cir. 2009). If any one of those acts qualifies as a "crime of violence," the Second Circuit holds, then the overall RICO offense itself qualifies as a "crime of violence." *See* Pet. App. 4a; *Laurent*, 33 F.4th at 88. And since a RICO offense is a crime for which the defendant "may be prosecuted in a court of the United States," 18 U.S.C. § 924(c)(1)(A), it can serve as a valid § 924(c) predicate. *See* Pet. App. 4a; *Laurent*, 33 F.4th at 88; *Ivezaj*, 568 F.3d at 96 .

The Third Circuit similarly holds that § 1962(c) is a "divisible statute" and, therefore, subject to the "modified categorical approach." *United States v. Williams*, 898 F.3d 323, 333-34 (3d Cir. 2018) (holding that the defendant's RICO conviction under § 1962(c) qualified as a "controlled substance offense"

under the "modified categorical approach" because the underlying "predicate acts" satisfied the definition of a "controlled substance offense").

This approach—a fact-specific inquiry into which underlying racketeering acts a particular defendant committed—violates this Court's long line of precedents explaining how the categorical approach works. In particular, the Second and Third Circuits erroneously construe the RICO statute as creating multiple, and therefore divisible, RICO offenses. It doesn't.

The position of the Second and Third Circuits also conflicts with holdings issued by the Fourth and Fifth Circuits. In *United States v. Simmons*, 11 F.4th 239 (4th Cir.), *cert. denied sub nom. Lassiter v. United States*, 142 S. Ct. 574 (2021), the Fourth Circuit held that RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1), is *not* divisible, for it merely "lists the *means*—the 'alternative methods'"—of violating RICO, not elements of separate and divisible RICO crimes. *Id.* at 260. Accordingly, the court held, Supreme Court precedent "requires that [the] categorical analysis consider *the entire class* of qualifying racketeering acts, not just the specific ones that [the defendants] committed in this case." *Id.*

The Fifth Circuit agrees. *See United States v. McClaren*, 13 F.4th 386, 413 (5th Cir. 2021) (holding that the standard categorical approach applies to RICO because the statute is not "severable"—i.e., not divisible—and does not

invariably require proof of violence; "the specific finding by the jury that Defendant committed a crime of violence in this case is irrelevant [because] the statute itself does not require a crime of violence."), *cert. denied sub nom. Fortia v. United States*, 142 S. Ct. 1244 (2022).

This case presents an ideal opportunity for this Court (1) to resolve this 2-to-2 circuit split over an important and recurring question of federal criminal law; (2) to decide, for the first time, how the categorical approach applies to complex and multi-layered statutes like RICO, *see United States v. Martinez*, 991 F.3d 347, 357-58 (2d Cir.) (noting that "RICO is a highly unusual statute" and that "[t]he Supreme Court has never addressed how the categorical or modified categorical approaches applies to such a statute"), *cert. denied*, 142 S. Ct. 179 (2021); and (3) to correct the Second Circuit's erroneous position. Accordingly, review should be granted.

STATEMENT OF THE CASE

I. Statutory Background and the "Categorical Approach"

1. Section 924(c)(1)(A) of title 18, U.S.C., makes it a crime to use, carry, or possess a firearm in relation to any "crime of violence" for which the person "may be prosecuted in a court of the United States." Section 924(c)(3) sets forth two definitions of a "crime of violence." The only one that remains valid, § 924(c)(3)(A) (known as "the force clause" or "the elements

clause"), defines a "crime of violence" as any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (holding unconstitutional the other definition of "crime of violence," contained in § 924(c)(3)(B)).

2. To determine whether an offense qualifies as a "crime of violence," courts must apply the "categorical approach" or, in a "narrow range of cases," the "modified categorical approach." *Descamps v. United States*, 570 U.S. 254, 260-61 (2013); *see also United States v. Taylor,* 142 S. Ct. 2015, 2020 (2022) (applying the categorical approach to decide whether attempted Hobbs Act robbery qualifies as a § 924(c)(3)(A) "crime of violence"); *Davis,* 139 S. Ct. at 2336 (rejecting a "case-specific approach" that would examine the defendant's actual conduct in deciding whether an offense qualifies as a § 924(c) "crime of violence").

The categorical approach applies to "indivisible" statutes, those that set out "a single, indivisible set of elements" that define a single crime. *Descamps*, 570 U.S. at 258. It asks whether the elements of the offense "necessarily" require "the use, attempted use, or threatened use of physical force." *Borden v. United States*, 141 S. Ct. 1817, 1822 (2021). Courts may not consider how the crime is typically committed or "how any particular defendant may commit the crime." *Taylor*, 142 S. Ct. at 2020. Instead, courts

must focus on the "least culpable conduct" necessary to satisfy the statutory elements. *Stokeling v. United States*, 139 S. Ct. 544, 556 (2019). "The only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Taylor*, 142 S. Ct. at 2020.

In a "narrow range of cases," when a conviction is for violating a so-called "divisible statute," courts may employ a variant of this categorical method—known as the "modified categorical approach." *Descamps*, 570 U.S. at 261. A divisible statute lists "potential offense elements in the alternative," and thus creates "multiple, alternative versions of the crime." *Descamps*, 570 U.S. at 257. Because the statute sets forth multiple crimes, it is not possible to determine by reference to the statute alone if the defendant was convicted of a "crime of violence." *See Descamps*, 570 U.S. at 260. Accordingly, the modified categorical approach allows courts to look to certain documents like the indictment, jury instructions, and verdict sheet (so-called "*Shepard* documents," *see Shepard v. United States*, 544 U.S. 13 (2005)) for the sole purpose of determining which of the statute's alternative elements "formed the basis of the defendant's … conviction." *Descamps*, 570 U.S. at 257. From there, a court applies the usual categorical approach to that offense to determine whether it is a "crime of violence." *Id.*

In *Mathis v. United States*, 579 U.S. 500 (2016), this Court clarified that to determine whether an "alternatively phrased statute" is indivisible (thus requiring use of the categorical approach) or divisible (allowing use of the modified categorical approach), courts must decide whether the alternatives in the statute are "means" or "elements." *Id.* at 517. Statutory alternatives are "means," and do not create a divisible statute, if they are merely "alternative methods of committing one offense." *Id.* Statutory alternatives are "elements," and thereby produce a divisible statute setting forth "separate crimes," if the jury must unanimously find them beyond a reasonable doubt in every case to convict. *Id.* at 506.

3. RICO provides severe criminal penalties (ordinarily, up to 20 years of imprisonment, but up to life imprisonment if the statutory maximum penalty for the underlying "racketeering activity" is life imprisonment, *see* § 1963(a)) for persons who engage in a "pattern of racketeering activity" or "collection of an unlawful debt" and who have a specified relationship to an "enterprise" that affects interstate or foreign commerce. The RICO statute defines "racketeering activity" broadly to include more than 100 enumerated federal crimes and countless state felony offenses, some of which require actual or threatened violence (e.g., "any act or threat involving murder") and some of which do not (e.g., "any act or threat involving … gambling"). § 1961(1)(A). A "pattern of

racketeering activity" consists of any combination of two or more of these state or federal crimes committed within ten years of each other. § 1961(5). Moreover, the predicate acts must be related and amount to, or pose a threat of, continued criminal activity. *H.J. Inc v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240, 242 (1989).

RICO proscribes three different substantive criminal violations, as well as conspiracy to commit those offenses. § 1962(a)-(d). As relevant here, § 1962(c) (substantive RICO) makes it a crime to conduct the affairs of an enterprise affecting interstate or foreign commerce "through a pattern of racketeering activity." For example, an automobile dealer violates this provision by using the dealership's facilities to operate a stolen car ring through a pattern of predicate violations.

Section 1962(c) requires the Government to prove five elements:

1. the existence of an enterprise;
2. that the enterprise affected interstate commerce;
3. that the defendant was employed by or associated with the enterprise;
4. that the defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and
5. that the defendant participated through a pattern of racketeering activity, i.e., through the commission of at least two racketeering acts listed in 18 U.S.C. § 1961(1).

See, e.g., Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985); *United States v. Russo*, 796 F.2d 1443, 1455 (11th Cir. 1986).

Moreover, courts assume that, under *Richardson v. United States*, 526 U.S. 813 (1999), which did not involve RICO, "the jury must be unanimous not only that at least two racketeering acts were proven" beyond a reasonable doubt, "but must be unanimous as to each of two racketeering acts." *E.g.*, *United States v. Gotti*, 451 F.3d 133, 137 (2d Cir. 2006). However, even if that assumption is correct, nothing in RICO (or in any case) holds that the statute requires the Government to prove that any of the racketeering acts involved violence. Proof of two non-violent state felonies based on "any act or threat involving … bribery," for example, is sufficient. 18 U.S.C. § 1961(1)(A); *see, e.g.*, *United States v. Gilmore*, 590 F. App'x 390, 401-04 (4th Cir. 2014) (upholding a RICO conviction predicated on two acts of state-law bribery).

II. Proceedings Below

1. From 1995 through 2002, petitioner and others were part of a "crew" that engaged in robberies of homes, robberies of businesses, burglaries, transportation of stolen property, and other crimes. During the robberies, one or more of the culprits would sometimes possess and brandish a firearm.

In 2005, a grand jury in the Southern District of New York returned a superseding indictment charging petitioner with multiple offenses. 2d Cir. App'x 181-202. As relevant, the indictment alleged:

> • *Count One*: Racketeering, 18 U.S.C. § 1962(c). Petitioner "unlawfully, willfully, and knowingly conducted and participated, directly and indirectly, in the conduct of the affairs of th[e] enterprise through a pattern of racketeering activity, that is, through the commission of the following acts of racketeering[.]" 2d Cir. App'x 185. The ten charged racketeering acts included various substantive and conspiratorial robberies, in violation of New York and New Jersey law, as well as non-violent crimes such as transporting stolen property and possessing stolen goods, in violation of federal law. *See* 2d Cir. App'x 185-94.
>
> • *Count Two*: Racketeering conspiracy, 18 U.S.C. § 1962(d). Petitioner and others "unlawfully, willfully, and knowingly combined, conspired, confederated and agreed together and with each other to violate [18 U.S.C. § 1962(c)]."
>
> 2d Cir. App'x 195.
>
> • *Count Three*: Use or carrying of a firearm, 18 U.S.C. § 924(c)(1)(A)(ii). Petitioner, "during and in relation to a crime

> of violence for which he may be prosecuted in a court of the United States, to wit, the offenses charged in Counts One and Two of this Indictment, unlawfully, willfully, and knowingly did use and carry, and aid and abet the use and carrying of, firearms, and did possess, and aid and abet the possession of, firearms in furtherance of such crimes of violence, and which firearms were brandished." 2d Cir. App'x 196.

As to Count One, the substantive RICO count, the court instructed the jury that the Government had to prove five elements:

> First, that the criminal enterprise set out in the indictment existed.
>
> Second, that the defendant was associated with or employed by the enterprise.
>
> Third, that the defendant engaged in a pattern of racketeering activity.
>
> Fourth, that the defendant unlawfully, willfully and knowingly conducted or participated in the conduct of the affairs of that enterprise through that pattern of racketeering activity.
>
> And fifth, that the enterprise affected interstate or foreign commerce.

2d Cir. App'x 367. The court explained that "[a] person engages in a pattern of racketeering activity if he commits at least two related acts of racketeering within ten years." 2d Cir. App'x 371. The court set forth the elements of each of the ten charged racketeering acts (2d Cir. App'x 376-

407), told the jury that the Government had to establish each of those elements to prove each racketeering act (2d Cir. App'x 376), and instructed the jury that it had to be "unanimous as to which racketeering acts have been proven beyond a reasonable doubt" (2d Cir. App'x 372).

As to Count Two, charging RICO conspiracy, the court instructed the jury that the Government had to prove four elements:

> First, that the enterprise alleged in the indictment existed.
>
> Second, that the defendant was employed by or associated with the enterprise.
>
> Third, that the defendant unlawfully, willfully and knowingly conspired with at least one other person to participate in the conduct of the affairs of that enterprise.
>
> And fourth, that the enterprise affected interstate or foreign commerce.

2d Cir. App'x 408.

Finally, as to Count Three, the § 924(c) count, the court instructed the jury that the Government had to prove four elements:

> First, that the defendant committed a crime of violence for which he might be prosecuted in a court of the United States.
>
> Second, that … [the defendant] used, carried or possessed a firearm or aided and abetted others to do so.
>
> Third, that the defendant did so unlawfully, willfully and knowingly.

> Fourth, that the defendant used and carried the firearm during and in relation to a crime of violence, namely, the offenses charged in Counts 1 and 2, or that the defendant possessed the firearm in furtherance of any such crime of violence.

2d Cir. App'x 415. The court told the jury that "the crimes of Count 1 and Count 2 are crimes of violence" as a matter of law. 2d Cir. App'x 416. That instruction was erroneous in light of *Davis*. As the District Court recognized below (Pet. App. 14a), and as all circuits agree, RICO conspiracy does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. § 924(c)(3)(A). *See, e.g., United States v. Brown,* 797 F. App'x 52, 54 (2d Cir. 2019) (noting that if "the underlying crime of violence was a racketeering conspiracy … [t]he Government concedes that … *Davis* … requires vacatur of th[e] [§ 924(c)] counts of conviction"); *Simmons*, 11 F.4th at 257 ("Every circuit to consider whether a RICO conspiracy is a 'crime of violence" has held, under the categorical approach, that it is not.") (collecting authorities).

The jury convicted on Count One, charging substantive RICO. The jury found in a special verdict that the following seven Racketeering Acts within Count One were "proven": Racketeering Act 2 (robbery and conspiracy to rob, in violation of New Jersey law); Racketeering Act 3 (transportation and sale of stolen property); Racketeering Act 4 (robbery and conspiracy to rob, in violation of New York law); Racketeering Act 6 (same); Racketeering Act 8

(same); Racketeering Act 9 (same); Racketeering Act 10 (same). *See* 2d Cir. App'x 243-46.

The jury returned a general guilty verdict on Count Two (RICO conspiracy) and Count Three (the § 924(c) count). Neither the court's instructions nor the verdict sheet required the jury to specify which purported "crime of violence"—Count One, Count Two, or both—or which underlying Racketeering Act, was the predicate for the § 924(c) conviction. *See* 2d Cir App'x 246.

The District Court sentenced petitioner principally to concurrent terms of 336 months of imprisonment, to be followed by the mandatory minimum consecutive 84-month term on the § 924(c) count. The Court of Appeals affirmed petitioner's conviction and sentence on direct appeal, *United States v. Speed,* 272 F. App'x 88 (2d Cir. 2008), and this Court denied certiorari, *Speed v. United States*, No. 08-7832 (Apr. 20, 2009).

2. Following *Davis*, petitioner moved under 28 U.S.C. § 2255 to vacate his § 924(c) conviction and sentence. He argued, as relevant, that neither RICO conspiracy nor substantive RICO qualifies as a § 924(c)(3)(A) "crime of violence" after *Davis*. Accordingly, his § 924(c) conviction could not stand.

The District Court denied the motion. Pet. App. 8a-24a. Applying Second Circuit precedent treating a RICO offense as a "crime of violence" so

long as at least two racketeering acts so qualify, the court held that Count One, substantive RICO, remains a valid "crime of violence" after *Davis*. That was because the jury found that the Government had proven at least two underlying racketeering acts that still qualify as crimes of violence: namely, multiple substantive robberies in violation of New York law. Pet. App. 19a-24a (citing *Ivezaj*, 568 F.3d at 96). But the court granted a certificate of appealability, concluding that petitioner "has made a substantial showing of the denial of a constitutional right." Pet. App. 25a; 28 U.S.C. § 2253(c)(2).

3. The Court of Appeals affirmed. Pet. App. 1a-7a. The court relied on its precedential opinions in *Ivezaj* and *Laurent*, the latter of which was decided while petitioner's appeal was pending. *Laurent* held that substantive RICO is subject to the modified categorical approach and qualifies as a "crime of violence" after *Davis* if at least "one of the two racketeering acts required for [the] substantive RICO violation [itself] conforms to the definition of a crime of violence." 33 F.4th at 88. Here, the jury found that the Government had proven at least one such racketeering act: namely, substantive New Jersey robbery, which requires "force" as an element. Pet. App. 4a-5a. On that basis, and even though petitioner had argued that New Jersey robbery, a state offense, is not a crime that can be "prosecuted in a court of the United States," as § 924(c)(1)(A) requires, the court ruled that petitioner's § 924(c) conviction remains valid. Pet. App. 5a.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for three reasons. First, this case presents an important and recurring question of federal law that divides the Courts of Appeals. Second, this case provides a suitable vehicle for resolving the issue. Finally, the Second Circuit's position is incorrect and inconsistent with this Court's precedents regarding the proper application of the categorical approach in deciding whether an offense qualifies as a "crime of violence."

I. This case presents an important and recurring question of federal law that divides the circuits.

The Courts of Appeals are sharply divided over how to determine whether a RICO offense qualifies as a "crime of violence." While two circuits hold that RICO's "pattern of racketeering activity" element is divisible, and thus subject to the modified categorical approach, two other circuits hold the opposite. This conflict over the proper construction of an important and far-reaching federal criminal statute like RICO invites this Court's intervention. *See, e.g.*, *United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) (noting that whether a statute is divisible presents a question of "statutory interpretation"); *Dorsey v. United States*, Nos. 1:16 Cv. 738 (LMB), 1:99 Cr. 203-2 (LMB), 2019 WL 3947914, at *3 (E.D. Va. Aug. 21, 2019) ("Assessing a criminal statute's divisibility is a matter of statutory interpretation[.]").

A. The Second and Third Circuits hold that RICO is divisible.

The Second Circuit holds that RICO is divisible and, therefore, subject to the modified categorical approach. In the Second Circuit's view, a violation of § 1962(c) sometimes qualifies as a "crime of violence," and sometime not, depending on the nature of the predicate acts proven in any given case.

The Second Circuit first adopted this position almost 15 years ago, in 2009. *See Ivezaj*, 568 F.3d at 96. The court, purporting to apply the categorical approach, reasoned that "[b]ecause racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering, we look to the predicate offenses to determine whether a crime of violence is charged." *Id.* Applying this logic, the court held that substantive RICO qualifies as a "crime of violence" where the Government proves "(1) the commission of at least two acts of racketeering and (2) at least two of those acts qualify as § 924(c) 'crime[s] of violence.'" *Id.* The *Ivezaj* court further held that it does not matter whether the racketeering acts are state crimes only, even though § 924(c) expressly requires that the predicate "crime of violence" be one for which the defendant "may be prosecuted in a court *of the United States,*" i.e., a federal court. § 924(c)(1)(A) (emphasis added). The Circuit ruled: "We conclude that whether the alleged firearms conduct was premised on state or federal predicates is irrelevant, provided that the government proves, as it

did here, that the § 1962 offense alleging the pattern of racketeering is a crime of violence." *Id.*

The Second Circuit has since recognized that, given this Court's more recent categorical-approach decisions, and *Davis*'s invalidation of the § 924(c)(3)(B) residual clause, *Ivezaj* may have been wrongly decided. In *United States v. Heyward*, 3 F.4th 75, 86 (2d Cir. 2021), for example, the court questioned "the extent to which *Ivezaj* retains any of its force." *See also Martinez*, 991 F.3d at 356 ("The Supreme Court precedents discussed above have certainly called into question, if not the premises directly underlying *Ivezaj*, many of the principles and precedents that formed the legal background against which the case was decided.").

Nevertheless, the Second Circuit has now double-downed on *Ivezaj* and, indeed, has transformed that case's holding in a way that further expands the reach of § 924(c) in RICO cases. In *Laurent*, the court squarely held that *Ivezaj* remains "good law," 33 F.4th at 88, that the RICO statute is divisible into violent RICO crimes and non-violent ones, *id.*, and that a substantive RICO offense qualifies as a "crime of violence" so long as "at least *one* racketeering act"—not at least two, as *Ivezaj* held—qualifies as a "crime of violence," *id.* And the panel here expressly relied on *Laurent*, a controlling decision, to hold that petitioner's RICO conviction qualifies as a "crime of violence" under the modified categorical approach. Pet. App. 4a-5a.

The Third Circuit has similarly held that "RICO, in particular Section 1962(c), is [a] divisible statute." *Williams*, 898 F.3d at 333. Based on that determination, the court applied the modified categorical approach to hold that the defendant's conviction under § 1962(c) qualified as a "controlled substance offense" under the Sentencing Guidelines, and thus made him a "career offender," because the underlying "predicate acts" in that case satisfied the definition of a "controlled substance offense." *Id*. at 333-34.

B. The Fourth and Fifth Circuits hold that RICO is not divisible.

The Fourth and Fifth Circuits take the opposite position, holding that RICO's "pattern of racketeering activity" element, §§ 1961(1) & (5), 1962, is not divisible. Accordingly, the statute is not subject to the modified categorical approach.

In *Simmons*, the Government argued that the defendants' convictions for RICO conspiracy qualified as a § 924(c)(3)(A) "crime of violence." Although conceding that RICO conspiracies generally need not involve force, the Government noted that the jury in that case, like the jury here, had returned a special verdict finding that the defendants had committed several violent racketeering acts under state law—there, five first-degree murders in violation of Virginia law—"as part of the racketeering conspiracy." 11 F.4th at 258. Because those murders carried a maximum sentence of life, the

jury's finding had the effect of increasing the maximum term of imprisonment under RICO from 20 years to life imprisonment. *Id.*; § 1963(a). Thus, the Government argued, the court could apply the categorical approach to that fact-specific "aggravated" RICO offense found by the jury—i.e., "a RICO conspiracy in which the violent racketeering acts of Virginia first-degree murder were committed"—to decide that the overall RICO offense was a "crime of violence." 11 F.4th at 258.

The Fourth Circuit rejected the Government's position, holding that it was "not a faithful applicable of the modified categorical approach" as articulated by this Court in *Descamps* and *Mathis*. *Id.* In particular, the court held that the statutory definition of "racketeering activity" in § 1961(1), which applies to both substantive RICO offenses and RICO conspiracies, is not divisible because it merely "lists the *means*—the 'alternative methods'"—of committing a RICO offense, not additional or distinct "elements" of separate RICO crimes. *Id.* The court held: "*Mathis* thus requires that our categorical analysis consider *the entire class* of qualifying acts, not just the specific ones that [the defendants] committed in this case." *Id.* at 260.

The *Simmons* court also ruled that the Government was improperly attempting to "inject into the 'crime of violence' inquiry a conduct-specific analysis … [that] seeks to have courts look only at the precise racketeering acts completed to determine whether the defendant's particular aggravated

RICO conspiracy is a crime of violence instead of just one of many available means in that category of offenses." *Id.* The court rejected this effort:

> While [defendants'] conspiracy conviction may have been a crime of violence in a colloquial sense under the facts of this specific case, the Supreme Court bars utilizing such a fact-specific approach. Indeed, the Government's "case-specific reading" here would make the force clause "apply to conduct [it has] not previously been understood to reach: categorically nonviolent felonies committed in violent ways." *Davis*, 139 S. Ct. at 2332 . . . . Just as the Supreme Court has done time and again, we reject such a reading.

Id. at 261 (additional citations omitted).

The Fifth Circuit's decision in *McClaren* is to the same effect. There, the defendants were convicted of conspiring to violate RICO, and the jury "specifically found that [they] violated Louisiana's second-degree murder statute, which is clearly a crime of violence." 13 F.4th at 413. As in *Simmons*, that finding was necessary to increase the statutory maximum penalty from 20 years to life imprisonment, arguably making it an "element" of the crime. *Id.* The Government argued that the court could therefore apply the modified categorical approach and look to the underlying predicate murders found by the jury. The Fifth Circuit disagreed, holding that the standard categorical approach applied. *Id.* The jury's finding that a "crime of violence" was committed in a particular RICO case is "irrelevant" for purposes of crime-of-

violence analysis, the court held, because the RICO "statute itself does not require a crime of violence." *Id.*

These holdings thus conflict with the holdings of the Second and Third Circuits. Though *Simmons* and *McClaren* specifically involved RICO conspiracy, not substantive RICO, both decisions turned on the correct interpretation of "pattern of racketeering activity," as defined in § 1961(1) & (5), the same statutory element at issue here. The Fourth Circuit, like the Fifth Circuit, holds that, in assessing whether a RICO offense qualifies as a "crime of violence," a court must "consider the *entire class* of qualifying racketeering acts" listed in § 1961(1), *Simmons*, 11 F.4th at 260, while the Second and Third Circuits hold that a court may consider the specific racketeering acts committed by the defendant. The conflict is thus pronounced and real.

C. This Court should resolve the split.

For at least three reasons, this Court should act now to resolve the confusion and conflict over the question presented.

1. The question whether RICO's "pattern of racketeering activity" element is divisible, and thus whether a violation of § 1962(c) can qualify as a "crime of violence," is important. The Government regularly charges substantive RICO as a predicate for § 924(c) counts, especially (but not

exclusively) within the Second Circuit. *See, e.g.*, *Laurent*, 33 F.4th at 85; *Martinez*, 991 F.3d at 354; *Ivezaj*, 568 F.3d at 95; *United States v. Espinoza*, 52 F. App'x 846, 847 (7th Cir. 2002); *United States v. Montgomery*, No. 3:98 Cr. 289, 2022 WL 1572026, at *6 (E.D. Va. May 18, 2022); *Rudaj v. United States*, 529 F. Supp. 3d 290, 293 (S.D.N.Y. 2021); *Mayes v. United States*, Nos. 12 Cr. 385 (ARR), 20 Cv. 2826 (ARR), 21 Cv. 4108 (ARR), 2021 WL 3111906, at *1, *5 (E.D.N.Y. July 21, 2021); *Chue v. United States*, 894 F. Supp. 2d 487, 488 (S.D.N.Y. 2012). And a § 924(c) conviction triggers a mandatory consecutive term of imprisonment ranging from at least five years up to life. *E.g.*, *United States v. Shabazz*, 564 F.3d 280, 289 (3d Cir. 2009). Accordingly, this Court's resolution of the question presented could affect the liberty of many criminal defendants, as well as the Government's charging decisions in future cases.

2. Further, the continued uncertainty regarding the divisibility of RICO is unacceptable. It subjects similarly situated defendants to different treatment based solely upon the jurisdiction in which they find themselves. Consider a defendant who used or carried a gun during a substantive RICO offense that involved violent racketeering acts. This defendant would not be guilty of violating § 924(c) in the Fourth or Fifth Circuits because those courts treat the "pattern of racketeering activity" element of RICO as

indivisible. But that same defendant *would* be guilty of violating § 924(c) in the Second and Third Circuits, resulting in a potential life sentence.

3. The question presented here resembles—and is at least as important as—many that this Court regularly grants certiorari to resolve. *E.g.*, *Taylor*, 142 S. Ct. at 2018-19 (resolving whether the elements clause of § 924(c)(3)(A) encompassed attempted Hobbs Act robbery); *Borden,* 141 S. Ct. 1817, 1821-23 (2021) (resolving whether the ACCA's elements clause encompassed a Tennessee conviction for reckless aggravated assault); *Stokeling*, 139 S. Ct. at 548-49 (resolving whether the ACCA's elements clause encompassed Florida robbery); *Leocal v. Ashcroft*, 543 U.S. 1, 4 (2004) (resolving whether a Florida conviction for driving under the influence of alcohol was a "crime of violence" under 18 U.S.C. § 16); *Johnson v. United States*, 559 U.S. 133, 135 (2010) (resolving whether a Florida battery conviction was a "violent felony" under the ACCA). And this Court granted review in *Descamps* and *Mathis* to address specifically the proper application of the categorical and modified-categorical approaches.

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In sum, the Courts of Appeals are divided over the question presented. If petitioner had been prosecuted in the Fourth or Fifth Circuits, the categorical approach used by those courts would preclude his RICO offense

from qualifying as a § 924(c) "crime of violence." But because he was prosecuted in the Second Circuit, he must serve an extra seven years in prison. This Court should intervene because the meaning of RICO and the reach of § 924(c)—and the mandatory imposition of additional years or decades of imprisonment—should not turn on this accident of geography.

II. This case provides an appropriate vehicle for resolving the question.

This case offers a suitable opportunity for this Court to answer the question presented.

1. The question dividing the circuits is cleanly presented. The facts are not in dispute. And petitioner preserved the issue for this Court's review by arguing at length in both the District Court and the Court of Appeals that RICO's "pattern of racketeering activity" element is not divisible, such that substantive RICO does not qualify as a § 924(c) "crime of violence." Both courts issued reasoned decisions, based on controlling Second Circuit precedent, rejecting that argument on the merits.[2]

[2] The Second Circuit ruled that, because petitioner's claim failed on the merits, he could not show "prejudice" excusing his procedural default on direct appeal. Pet. App. 7a. But that ruling is not a barrier to this Court's review because, as the District Court recognized, if petitioner is correct on the merits, he *would* be able to establish "prejudice." Pet. App. 13a-14a.

2. The answer to the question presented is also outcome-determinative. The only two alleged "crime[s] of violence" in the § 924(c) count were substantive RICO and RICO conspiracy. All agree that RICO conspiracy, as charged in Count Two, is not a "crime of violence." Thus, if this Court grants review and decides that RICO's "pattern of racketeering activity element" is not divisible, substantive RICO would *also* cease to qualify as a "crime of violence," and petitioner would be entitled to vacatur of his § 924(c) conviction (and 84-month consecutive sentence) and to resentencing. *See Taylor*, 142 S. Ct. at 2019-20, 2026 (affirming the Fourth Circuit's decision to vacate the defendant's invalid § 924(c) conviction and to remand for resentencing).

3. The Second Circuit's decision not to publish its ruling is not a basis to deny review. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 4-34 (11th ed. 2019). This Court reviews "with some frequency" (*id.*) unpublished circuit rulings that present important and divisive questions of federal law—particularly where, as here, a Court of Appeals simply applied binding circuit precedent to the facts. *E.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2122-23 (2019); *Descamps,* 570 U.S. at 260; *Tapia v. United States*, 564 U.S. 319, 322-23 (2011); *Kimbrough v. United States*, 552 U.S. 85, 93 & n.4 (2007); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006).

III. The Second Circuit's position is wrong.

Given the importance of the question presented and the circuit disagreement over the divisibility of the RICO statute, certiorari is warranted regardless of which side of the split is correct. But the fact that the Second Circuit's position is wrong makes review especially appropriate.

1. Preliminarily, there can be no dispute that substantive RICO is not a "crime of violence" under the categorical approach. Under that approach, "[t]he only relevant question is whether [§ 1962(c)] always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Taylor*, 142 S. Ct. at 2020. Section 1962(c) fails that test. It contains five—and only five—elements: (1) an enterprise existed; (2) it affected interstate or foreign commerce; (3) the defendant was associated with or employed by the enterprise; (4) the defendant engaged in a pattern of racketeering activity (or the collection of an unlawful debt); and (5) the defendant conducted or participated in the conduct of the enterprise through that pattern of racketeering activity (or collection of an unlawful debt). § 1962(c); *see, e.g., Sedima,* 473 U.S. at 496; *Russo*, 796 F.2d at 1455. The "pattern of racketeering activity" element requires proof of at least two acts of "racketeering activity." § 1961(5).

This crime thus does not invariably require "as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). It merely requires, as relevant, proof of a "pattern of racketeering activity." And the statute defines "racketeering activity" broadly to include a wide variety of state and federal crimes that need not involve any violence or force whatsoever, including transportation of stolen property, bribery, embezzlement, gambling offenses, offenses relating to fraudulent conduct, and unlawful procurement of immigration documents, just to name a few. *See* § 1961(1). The categorical approach functions as an "on-off switch," *Descamps*, 570 U.S. at 268: An offense either is, or is not, a "crime of violence." *See Taylor*, 142 S. Ct. at 2020 (holding that the "only relevant question" is what the Government "always" must prove). Yet under the erroneous approach of the Second and Third Circuits, RICO offenses sometimes will, and sometimes will not, qualify, depending on defendants' factual conduct. That result runs headlong into decades of categorical-approach jurisprudence. *See, e.g., Descamps*, 570 U.S. at 268 (rejecting the idea that a particular crime "might sometimes count" and sometimes not as a "violent felony" under the ACCA) (citing *Taylor*, 495 U.S. 575, 601 (1990)).

2. Nor is the "pattern of racketeering activity" element divisible. While RICO defines "racketeering activity" to include a wide variety of

criminal conduct "chargeable under State law," § 1961(1)(A), including both violent and non-violent conduct, the listed conduct "merely describes different ways or '*means*' of engaging in "racketeering activity," not elements of separate and distinct RICO offenses. *Simmons*, 11 F.4th at 260. Thus, it cannot be held divisible under this Court's cases. *E.g.*, *Mathis*, 579 U.S. at 517.

Moreover, nothing in RICO's text, structure, or history indicates that Congress intended to create hundreds of distinct RICO offenses based on the type of racketeering activity committed, much less the presence or absence of violence. On the contrary, RICO was Congress's effort to create a single, indivisible federal crime—a violation of the federal racketeering laws—that can be committed in myriad ways, violent as well as non-violent. *See United States v. Luong*, 393 F.3d 913, 917 (9th Cir. 2004) (holding that "RICO criminalizes structural conduct that is separate and apart from the predicate offenses"); *United States v. Wallen*, 953 F.2d 3, 5-6 (1st Cir. 1991) ("Although it may encompass a number of underlying acts, a RICO conviction is for a single offense."); *United States v. Yarbrough*, 852 F.2d 1522, 1531 (9th Cir. 1988) (holding that RICO sets forth "one federal crime—violation of the federal racketeering laws"); *United States v. Cain*, No. 05-CR-360A(SR), 2007 WL 9782861, at *16 (W.D.N.Y. July 10, 2007) (holding that a count charging a violation of § 1962(c) "only charges one

crime, to wit, the unlawful conducting of the affairs of an enterprise through a pattern of racketeering activity"; the individual racketeering acts "merely describe the various *means* by which such affairs were conducted") (emphasis added). Thus, because it creates only one federal crime with a constant set of elements, RICO is not divisible. *See Mathis*, 579 U.S. at 506 (holding that statutory alternatives are "means," and do not create a divisible statute, if they are merely "alternative methods of committing one offense").

3. The Second Circuit thought that it makes "good sense" to treat RICO as creating two separate, and thus divisible, sets of RICO crimes: those that involve at least one "violent" racketeering act and those that do not. *Laurent*, 33 F.4th at 89. But Congress made a different policy judgment. It decided that all violations of § 1962(c) would have the same five essential elements and, in general, would carry the same maximum sentence—20 years of imprisonment—regardless of whether they are violent. To the extent Congress intended to create separate tiers of RICO offenses, the dividing line is whether the proven "racketeering activity" carries a maximum term of life imprisonment, not whether the activity involved violence. *See* § 1963(a). In other words, if RICO is divisible at all, it is divisible only between (a) RICO offenses that carry a maximum of life imprisonment and (b) those that do not—not between those that do or do not involve "physical force." *See*

Simmons, 11 F.4th at 278 (Richardson, J., concurring). The Second Circuit may not override Congress's decision, even if divisibility based on violence makes "good sense" to the court. *E.g.*, *United States v. Sotelo,* 436 U.S. 268, 279 (1978) (holding that "judges cannot override the specific policy judgments made by Congress in enacting the statutory provisions").

The Second Circuit similarly erred by holding that, because the Government must prove at least two acts of "racketeering activity," those acts may be treated as divisible "elements" of RICO, not merely different "means" of committing the single, indivisible element of a "pattern of racketeering activity." This overlooks the crucial point for purposes of categorical "crime of violence" analysis: while at least two racketeering acts must be proven to establish a "pattern," nothing in RICO requires the Government to prove—as an element, in every case—that any of those acts involved "force."

Of course, there will be many cases in which the Government *does* prove—or it is readily apparent—that the defendants engaged in violent racketeering acts. The jury in this case, for example, found that petitioner had committed, *inter alia*, substantive robberies in violation of New York and New Jersey law. No matter. The fact that a jury finds violent conduct in a particular case is irrelevant to proper "crime of violence" analysis because RICO does not require such a finding as an essential element. As the Fifth Circuit held in *McClaren*, "the specific finding by the jury that Defendants

committed a crime of violence in this [RICO] case is irrelevant if th[e] statute itself does not *require* a crime of violence." *McClaren*, 13 F.4th at 413 (emphasis added).

4. The Second Circuit's approach also leads to unfair and arbitrary results inconsistent with the categorical approach. Unless a trial court requires a special verdict in a RICO case, it will often be impossible to know which predicate acts of racketeering activity a jury has found "proven." And the use of special verdicts in criminal cases, including RICO cases, is discretionary. *See, e.g.*, *United States v. Applins*, 637 F.3d 59, 82 (2d Cir. 2011); *United States v. Ogando*, 968 F.3d 146, 149 (2d Cir. 1992).

Applying the modified categorical approach to RICO will thus lead to arbitrary consequences and unwarranted disparities. Suppose, for example, that Smith and Jones were convicted in separate trials of using of a gun during a substantive RICO offense alleging six racketeering acts: four acts of bribery and two acts of state-law armed robbery. In Smith's case, no special verdict was used; the jury only said "guilty." But in Jones's case, in contrast, the jury returned a special verdict finding all six racketeering acts "proven." Under the Second Circuit's approach, Jones would be guilty of using a gun during a "crime of violence," but not Smith—even though their criminal conduct was identical. Such a disparate outcome—based solely on the happenstance of whether the trial court used a special verdict, at a time

when no one could have anticipated that the choice would have any future significance—is exactly what the categorical approach is supposed to prevent. *See Descamps*, 570 U.S. at 267 (reiterating that the categorical approach "averts 'the practical difficulties and potential unfairness of a factual approach'") (quoting *Taylor*, 495 U.S. at 601); *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013) (rejecting a "circumstance-specific approach" because it "would require the sort of *post hoc* investigation into the facts of predicate offenses that we have long deemed undesirable").

5. Finally, the Second Circuit's approach is internally contradictory. On the one hand, the court holds that, in § 924(c) cases premised on RICO, the relevant "crime[s] of violence" are the underlying racketeering acts committed by the defendant—here, robberies in violation of New Jersey and New York law. But when defendants like petitioner point out that those state crimes are not ones that "may be prosecuted in a court of the United States," as § 924(c)(1)(A) requires, the court switches gears by holding that the relevant "crime of violence" is the overall RICO offense itself, not the underlying racketeering acts. *E.g., Ivezaj*, 568 F.3d at 96. The court cannot have it both ways.

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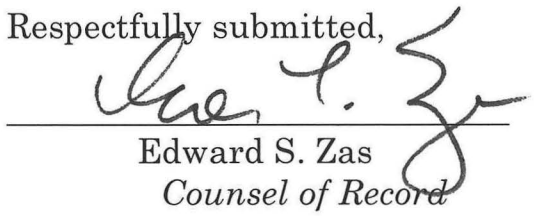
The need for this Court's intervention is evident. The Second Circuit erroneously holds, in accord with the Third Circuit but contrary to the Fourth

and Fifth Circuits, that RICO's "pattern of racketeering activity" element is divisible into individual racketeering "acts" that can sometimes render RICO a "crime of violence." Under this Court's precedents, however, and a faithful application of the categorical approach, the statute is not divisible—and petitioner's violation of § 1962(c) does not qualify as a "crime of violence." Given the importance of this issue, and the erroneous position of the Second and Third Circuits, this Court should grant review.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,



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