No. 22-827

In the Supreme Court of the United States

CARLOS HERRERA, DANIEL SANCHEZ, AND ANTHONY RAY BACA, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' facial Commerce Clause challenge to their statute of conviction is a claim that "the court lacks jurisdiction," which "may be made at any time while the case is pending" under Federal Rule of Criminal Procedure 12(b)(2).

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (10th Cir.):

United States v. *Garcia*, No. 19-2109 (Oct. 25, 2019) (dismissal of co-defendant's appeal)

United States v. *Gutierrez*, No. 23-2028 (Mar. 2, 2023) (co-defendant's appeal docketed)

United States v. *Garcia*, No. 19-2148 (Apr. 17, 2023) (decision in co-defendant's appeal)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-132a) is reported at 51 F.4th 1226. The order of the district court (Pet. App. 133a-574a) is not published in the Federal Supplement but is available at 2020 WL 353856.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2022. On January 20, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including February 24, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioners were

convicted of conspiring to commit murder in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(5), and VICAR murder, in violation of 18 U.S.C. 1959(a)(1). D. Ct. Doc. 2725, at 1-2 (June 27, 2019) (Herrera Judgment); D. Ct. Doc. 2846, at 1-2 (Sept. 5, 2019) (Sanchez Judgment); D. Ct. Doc. 2966, at 1-2 (Nov. 4, 2019) (Baca Judgment); see Pet. App. 10a. Petitioners Herrera and Sanchez were sentenced to life imprisonment, to be followed by five years of supervised release, and petitioner Baca was sentenced to life imprisonment, to be followed by three years of supervised release. Herrera Judgment 3-5; Sanchez Judgment 3-4; Baca Judgment 3-5. The court of appeals affirmed. Pet. App. 1a-132a.

1. Petitioners were members of the Sindicato de Nuevo Mexico (SNM), a prison gang that has operated in the New Mexico state prison system for decades. Pet. App. 10a, 12a. Baca was the head of the gang, and Sanchez and Herrera served as mid-level leaders. *Id.* at 12a.

In March 2014, Baca learned that another imprisoned SNM member, Javier Molina, had been cooperating with law enforcement. Pet. App. 12a; D. Ct. Doc. 2682 ¶ 22 (June 6, 2019) (Baca Presentence Investigation Report (PSR)). Baca ordered Molina's murder, and Herrera and Sanchez selected two SNM members to carry it out. Baca PSR ¶¶ 22-23, 26. Those two SNM members then killed Molina by stabbing him at least 43 times with a shank. Baca PSR ¶¶ 17-20, 26.

In 2015, Baca ordered the murders of two senior corrections officials, allegedly in retaliation for the stiffening of security measures following Molina's murder. Pet. App. 14a; Baca PSR ¶¶ 27-37. Neither official was ultimately harmed. Pet. App. 14a.

2. A grand jury in the District of New Mexico returned a 16-count indictment that charged petitioners and 19 other SNM members with numerous offenses. D. Ct. Doc. 949, at 1-18 (Mar. 9, 2017); Pet. App. 12a. As relevant here, the indictment charged petitioners on two counts stemming from Molina's murder: VICAR conspiracy to murder, in violation of 18 U.S.C. 1959(a)(5), and VICAR murder, in violation of 18 U.S.C. 1959(a)(1). D. Ct. Doc. 949, at 12-13. The indictment also charged Baca with two additional counts of VICAR conspiracy to murder, in violation of 18 U.S.C. 1959(a)(5), based on the conspiracy to murder the two corrections officials. D. Ct. Doc. 949, at 14-15. The district court severed the case into multiple trials, assigning petitioners to the first trial. Pet. App. 12a. The jury at that trial found petitioners guilty of those VICAR offenses. *Id.* at 10a.

After petitioners' trial, a co-defendant assigned to a later trial, Arturo Garcia, filed a post-trial motion for a judgment of acquittal or dismissal with respect to a different VICAR murder count. Pet. App. 112a-113a, 182a & n.10; see D. Ct. Doc. 2422, at 1-2 (Oct. 16, 2018). Garcia challenged the facial constitutionality of the provision of the VICAR statute making it a federal offense to commit violent crimes "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity," 18 U.S.C. 1959(a), on the theory that Congress lacked authority to enact it under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. See Pet. App. 182a-187a; D. Ct. Doc. 2422, at 1-15. Garcia also challenged the constitutionality of the provision as applied to his VICAR murder charge, which concerned a 2007 murder with which petitioners were not charged. Pet. App. 187a-188a; D. Ct. Doc. 949, at 10-11; see D. Ct. Doc. 2422, at 16-18. And Garcia

contended that the district court "lack[ed] subject-matter jurisdiction" over his case, based on the theory that the trial evidence against him proved only "'a state crime.'" Pet. App. 188a (citation omitted); see D. Ct. Doc. 2422, at 18-19.

Petitioners did not file their own motion raising the Commerce Clause arguments made by Garcia. Instead, petitioners orally sought permission to join Garcia's motion at a hearing held after petitioners' trial. Pet. App. 113a, 260a. The district court deemed Herrera and Sanchez to have "joined" the motion, which it then denied. *Id.* at 182a n.10;[1] see *id.* at 416a-442a. The court explained that the challenged VICAR provision is facially constitutional because it "punishes crimes committed to further the purposes of an enterprise engaged in interstate commerce." *Id.* at 426a; see *id.* at 420a-426a. The court emphasized that the VICAR statute "contains an express jurisdictional element" that "confin[es] its scope to include only crimes related to racketeering enterprises that affect interstate commerce." *Id.* at 426a (citing 18 U.S.C. 1959(b)(2)); see 18 U.S.C. 1959(b)(2) (defining "enterprise" to include any legal entity or group of individuals associated in fact "which is engaged in, or the activities of which affect, interstate or foreign commerce").

The district court also rejected Garcia's contentions that the VICAR statute was unconstitutional as applied to his case, which contested his 2007 murder's "connection to interstate commerce," and that the court lacked "jurisdiction" over his VICAR charge. Pet. App. 427a-

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[1] The district court did not state that Baca had joined Garcia's motion, but in the court of appeals the government did not dispute he had done so, and the court of appeals analyzed the waiver issue as to all petitioners. Pet. App. 113a.

428a (citation omitted); see *id.* at 427a-442a. Because the VICAR statute required proof of a racketeering enterprise's effect on interstate commerce and the connection between a defendant's conduct and his status in the enterprise, the court construed Garcia's as-applied claim and jurisdictional claim as challenges to the sufficiency of the evidence, which it rejected. *Id.* at 433a; see *id.* at 436a.

The district court observed that, in arguing that the court "lacks subject-matter jurisdiction because of an insufficient connection to interstate commerce," Garcia had "'mistake[n] an essential element of the crime with a jurisdictional requirement.'" Pet. App. 434a (citation omitted). Explaining that an indictment's failure to allege an element of a crime does not affect a court's subject-matter jurisdiction, the court found that it had jurisdiction under 18 U.S.C. 3231. Pet. App. 434a-435a. And the court also found that sufficient evidence supported Garcia's particular VICAR murder conviction. *Id.* at 436a-442a.

3. The district court sentenced Herrera and Sanchez to life imprisonment, to be followed by five years of supervised release, and Baca to life imprisonment, to be followed by three years of supervised release. Herrera Judgment 3-5; Sanchez Judgment 3-5; Baca Judgment 3-4.

4. The court of appeals affirmed. Pet. App. 1a-132a.

The court of appeals found, *inter alia*, that petitioners had relinquished their facial constitutional challenge to the VICAR statute by failing to raise it in a pretrial motion. Pet. App. 112a-122a. The court rejected Herrera's contention that petitioners' facial challenge implicated the district court's subject-matter jurisdiction. *Id.* at 113a-119a. The court observed that,

under its precedent, an as-applied challenge to the constitutionality of a criminal statute does "'not implicate a court's subject matter jurisdiction'" because "jurisdiction involves a court's power to adjudicate a case," and "deciding the constitutionality of a statute 'is squarely within the power of the federal courts.'" *Id.* at 114a, 117a-118a (quoting *United States* v. *DeVaughn*, 694 F.3d 1141, 1153-1154 (10th Cir. 2012)). The court found that the same reasoning applied to facial constitutional challenges because "district courts have the power to act regardless of whether a constitutional challenge is facial or as applied." *Id.* at 118a.

The court of appeals accordingly treated petitioners' constitutional challenge to the VICAR statute as a claim of "a defect in the indictment" that must, absent a "good cause" excuse, be raised before trial under Federal Rule of Criminal Procedure 12(b)(2) and (3)(B), rather than as a "jurisdictional" claim that may be raised "at any time" under Rule 12(b)(2). Pet. App. 119a. And because petitioners had neither preserved their Commerce Clause claim nor shown good cause, the court declined to consider petitioners' constitutional challenge. *Id.* at 122a.

5. On April 17, 2023, the court of appeals issued an opinion in an appeal filed by Garcia and two of petitioners' other co-defendants. See *United States* v. *Garcia*, No. 19-2148, 2023 WL 2965760 (10th Cir. Apr. 17, 2023) (per curiam). Among other issues, the court of appeals addressed Garcia's facial and as-applied Commerce Clause challenges to the VICAR statute. *Id.* at *6-*9. The court rejected both arguments, concluding that VICAR "meets the requirements the Supreme Court has established in its Commerce Clause jurisprudence

as long as the government proves the interstate element necessary for liability." *Id.* at *8.

ARGUMENT

Petitioners contend (Pet. 11-33) that their facial Commerce Clause challenge to the VICAR statute is a claim that the district court "lacks jurisdiction" that they were free to raise "at any time while the case is pending" under Federal Rule of Criminal Procedure 12(b)(2). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another other court of appeals. This case would in any event be a poor vehicle to address the question presented because petitioners' underlying Commerce Clause challenge lacks merit. The petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly recognized that petitioners' failure to raise a facial Commerce Clause challenge to the VICAR statute before their trial bars them from challenging the constitutionality of that statute on appeal.

Federal Rule of Criminal Procedure 12(b)(3) requires that any objection based on a "defect in instituting the prosecution" or a "defect in the indictment or information" "must be raised by pretrial motion." Fed. R. Crim. P. 12(b)(3)(B). If a defendant fails to "meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely," such that "a court may consider the defense, objection, or request if [he] shows good cause." Fed. R. Crim. P. 12(c)(3); see *Davis* v. *United States*, 411 U.S. 233, 241 (1973) ("If defendants were allowed to flout" the time limitations of Rule 12(b), "there would be little incentive to comply with its terms").

Rule 12(b)(2) exempts claims that a "court lacks jurisdiction" from that limitation, providing that they

"may be made at any time while the case is pending." Fed. R. Crim. P. 12(b)(2). But the standard definition of "jurisdiction" in the judicial context, both when Rule 12(b) was enacted and now, refers to subject-matter jurisdiction, *i.e.*, "the courts' statutory or constitutional *power* to adjudicate the case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (citation omitted); see *Black's Law Dictionary* 1038 (3d ed. 1933) (defining "jurisdiction" to mean "[t]he power and authority constitutionally conferred upon * * * a court or judge to pronounce the sentence of the law") (capitalization and emphasis omitted). And consistent with the standard definition of the word "jurisdiction," courts recognized shortly after Rule 12's enactment that "[t]he 'lack of jurisdiction' referred to in [Rule 12(b)] obviously refers to jurisdiction over the subject matter." *Pon* v. *United States*, 168 F.2d 373, 374 (1st Cir. 1948); see *United States* v. *Holdsworth*, 9 F.R.D. 198, 201 (D. Me. 1949) (interpreting Rule 12 to permit, "shortly before trial," "[c]onsideration of the question of this court's jurisdiction of the subject matter of this indictment").

The subject-matter jurisdiction of the federal courts is criminal cases, both then and now, is established by 18 U.S.C. 3231, which vests federal district courts with "original jurisdiction * * * of all offenses against the laws of the United States." See Pet. App. 435a. And this Court's decision in *United States* v. *Williams*, 341 U.S. 58 (1951), makes clear that a claim that a criminal statute is unconstitutional, either on its face or as applied, is not a question of subject-matter jurisdiction under Section 3231. *Id.* at 66-69. The Court held in *Williams* that a district court is "authorized to render judgment on the indictment" even when the charges in the indictment are legally defective. *Id.* at 66. The Court

emphasized that "[e]ven the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction." *Ibid.* "Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional," it nevertheless "has proceeded with jurisdiction." *Id.* at 68-69.

Petitioners' constitutional challenge to the VICAR statute therefore falls outside Rule 12(b)(2), and is subject to preclusion under Rule 12(b)(3). "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano,* 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States,* 321 U.S. 414, 444 (1944)). Similarly, even the "most basic rights of criminal defendants are * * * subject to waiver." *Peretz* v. *United States,* 501 U.S. 923, 936 (1991); see *id.* at 936-937 (listing examples). Here, petitioners' failure to raise their claim before trial rendered it "untimely," and thus—in the uncontested absence of a "good cause" excuse—precluded. Fed. R. Crim. P. 12(c)(3); see Pet. App. 122a.

b. During the proceedings below, petitioners argued that their Commerce Clause challenge to the VICAR statute could not be precluded because it constituted an attack on the district court's subject-matter jurisdiction. See Pet. App. 114a, 118a-119a & n.26, 182a, 188a; Herrera C.A. Br. 80-89; Baca C.A. Br. 2 (joining Herrera's brief); Sanchez Corrected C.A. Br. 1 (same); Herrera C.A. Reply Br. 38-42; D. Ct. Doc. 2422, at 1-2, 18-19. In this Court, however, petitioners acknowledge (Pet. 24-25) that a "facial constitutional challenge to a

criminal statute of conviction does not implicate a federal court's subject matter jurisdiction."

Petitioners nevertheless contend that their constitutional challenge to the VICAR statute constitutes a claim that the district court "lacks jurisdiction" within the meaning of Federal Rule of Criminal Procedure 12(b)(2). See Pet. 25-32. Petitioners' contention rests on a new argument that the term "jurisdiction" in Rule 12(b)(2) means something broader than the subject-matter jurisdiction to which that term ordinarily refers. Petitioners' contention is unsound.

Petitioners err in relying (Pet. 28) on the Court's 19th-century decision in *Ex parte Yarbrough*, 110 U.S. 651 (1884), for the proposition that "jurisdiction" historically had a broad meaning in the criminal context. As this Court has explained, in the era in which *Yarborough* was decided, the Court embraced a "somewhat expansive notion of 'jurisdiction,'" *Custis* v. *United States*, 511 U.S. 485, 494 (1994), to address constitutional claims on habeas, when habeas review was limited to claims that "the convicting court had no jurisdiction to render the judgment which it gave," *Cotton*, 535 U.S. at 630 (citation and internal quotation marks omitted), and direct review of a criminal conviction in this Court did not exist, *ibid.* But by the middle of the 20th century —when Rule 12 was enacted—the Court had "openly discarded the concept of jurisdiction * * * as a touchstone of the availability of federal habeas review." *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977) (citing *Waley* v. *Johnston*, 316 U.S. 101, 104-105 (1942) (per curiam)).

Petitioners' reliance on the original advisory committee notes to Rule 12 is likewise misplaced. Petitioners note that, as originally enacted, Rule 12(b) contained a

subsection, Rule 12(b)(2), providing that motions based on a "[l]ack of jurisdiction or the failure of the indictment . . . to charge an offense" could be made "at any time during the pendency of the proceeding." Pet. 27 (citing Fed. R. Crim. P. 12(b)(2) (1944)). Petitioners then cite the Advisory Committee Note accompanying Rules 12(b)(1) and (2), which described "all defenses and objections which are capable of determination without a trial on the general issue," including "former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc," as optionally, but not necessarily, brought pretrial. Fed. R. Crim. P. 12(b)(1) and (2) advisory committee's note (1944) (18 U.S.C. App. at 471) (1944 Advisory Committee Note).

The 1944 Advisory Committee Note listed objections to "lack of jurisdiction" separately from objections based on "former jeopardy, former conviction, [or] former acquittal." 1944 Advisory Committee Note 12(b)(1) and (2). That textual separation indicates that the Advisory Committee considered the latter set of claims distinct from challenges to the district court's jurisdiction, not a subcategory of such challenges. At the time the Notes were written, the Committee may well have believed, for example, that objections based on double jeopardy were non-waivable and thus beyond the permissible scope of the preservation procedures that the Rule's text requires. It was not until the decision in *Ricketts* v. *Adamson*, 483 U.S. 1 (1987), that this Court "made clear that the protection against double jeopardy is subject to waiver." *United States* v. *Broce*, 488 U.S. 563, 568 (1989).

c. Petitioners contend that interpreting "jurisdiction" in current Rule 12(b)(2) to mean subject-matter

jurisdiction would "largely deprive the rule of meaning." Pet. 29. But petitioners acknowledge that if "jurisdiction" in Rule 12(b)(2) is construed to mean subject-matter jurisdiction, defendants could still invoke the rule in cases where the government did not "alleg[e] that the defendant violated a federal criminal statute." Pet. 29-30 (quoting *United States* v. *Yousef*, 750 F.3d 254, 259 (2d Cir.), cert. denied, 574 U.S. 898 (2014)). While the universe of such cases is likely to be small, petitioners do not assert that it is a null set.[2]

2. As petitioners acknowledge (Pet. 17-20), the decision below accords with decisions from the First, Second, and D.C. Circuits. See, *e.g.*, *United States* v. *Baucum*, 80 F.3d 539, 542 (D.C. Cir. 1996) (per curiam) (rejecting defendant's claim that his Commerce Clause challenge to his statute of conviction "is jurisdictional and nonwaivable"); *United States* v. *Cardales-Luna*, 632 F.3d 731, 737-738 (1st Cir.) (agreeing with *Baucum*), cert. denied, 565 U.S. 1034 (2011); *United States* v. *Le*, 902 F.3d 104, 109 (2d Cir. 2018) (applying plain

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[2] Petitioners briefly assert (Pet. 31-32) in the alternative that even if their constitutional claim is not "jurisdictional," it falls outside the scope of Federal Rule of Criminal Procedure 12(b)(3)(A) and (B), which require a defendant to raise any "defect in instituting the prosecution" or "defect in the indictment or information" by pretrial motion. Petitioners failed to raise that argument below, and the Court should similarly decline to consider it. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is "a court of review, not of first view"). Even in this Court, moreover, petitioners fail to develop the argument and cite no cases to support it. See Pet. 31-32. Federal courts generally "refuse to take cognizance of arguments that are made in passing without proper development." *Johnson* v. *Williams*, 568 U.S. 289, 299 (2013). Petitioners identify no basis for this Court to depart from that practice and address their underdeveloped new argument in the first instance.

error review to defendant's facial challenge to the constitutionality of his statute of conviction and rejecting defendant's attempt to "avoid plain error review by recasting his statutory challenge[] as a jurisdictional argument"), cert. denied, 139 S. Ct. 1274 (2019); *United States* v. *Balde*, 943 F.3d 73, 91 (2d Cir. 2019) ("[W]hen all elements of a federal statute are alleged [in the indictment], that is sufficient to defeat a defendant's attempt to escape a waiver by arguing that a putative flaw in the prosecution was jurisdictional.") (emphasis omitted).

Petitioners contend (Pet. 11-16) that the decision below conflicts with decisions from the Third, Sixth, Seventh, Ninth, and Eleventh Circuits. That is incorrect. Those circuits have, at least in some circumstances, permitted a federal criminal defendant to raise a facial constitutional challenge to a criminal statute underlying the charges to which he has pleaded guilty, based on the view that the constitutional argument is "jurisdictional."[3] But none of those courts has adopted petitioners' view that a facial Commerce Clause challenge to a statute of conviction amounts to a non-waivable claim that the district court "lacks jurisdiction" within the meaning of Rule 12(b)(2). To the contrary, all of the courts of appeals petitioners rely upon have issued

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[3] See, *e.g.*, *United States* v. *Saac*, 632 F.3d 1203, 1208 (11th Cir.), cert. denied, 565 U.S. 835 (2011); *United States* v. *Rodia*, 194 F.3d 465, 469 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000); *United States* v. *Bell*, 70 F.3d 495, 497 (7th Cir. 1995) (permitting facial challenge "in the circumstances of this case"); *United States* v. *Skinner*, 25 F.3d 1314, 1317 (6th Cir. 1994); *United States* v. *Sandsness*, 988 F.2d 970, 971 (9th Cir. 1993) (citing *United States* v. *Broncheau*, 597 F.2d 1260, 1262 n.1 (9th Cir.), cert. denied, 444 U.S. 859 (1979)) (stating that guilty plea "does not bar appeal of claims that the applicable statute is unconstitutional").

decisions indicating that they would reject petitioners' position.

In *United States* v. *Al-Maliki*, 787 F.3d 784 (6th Cir.), cert. denied, 577 U.S. 887 (2015), for example, the defendant argued for the first time on appeal that Congress "exceeded its Foreign Commerce Clause authority" when it passed the statute of conviction. *Id.* at 791. The Sixth Circuit, however, rejected his contention that his challenge amounted to a claim that "federal courts lack 'jurisdiction' over the case," *id.* at 790, and found that he "can and did forfeit" it "by failing to raise it below," *id.* at 791.

The Sixth Circuit explained that Section 3231 "'plainly'" gives federal courts "'authority over' all offenses against the laws of the United States"; that challenges to "Congress's 'jurisdiction' to pass the law," address "*Congress's* authority to regulate certain conduct," rather than a court's "power to hear a case"; and that "challenges to Congress's authority to pass a law can be forfeited by litigants, and indeed, can be outright waived." *Al-Maliki*, 787 F.3d at 791 (citations omitted). And the Sixth Circuit likewise recognized in *United States* v. *Bacon*, 884 F.3d 605 (cited at Pet. 13), cert. denied, 139 S. Ct. 471 (2018), that "if Congress acts outside the scope of its authority under the Commerce Clause when enacting legislation, the validity of the statute is implicated, not the authority of the federal courts to adjudicate prosecution of offenses proscribed by the statute." *Id.* at 609.

The Seventh Circuit has similarly rejected the contention that a Commerce Clause challenge to a criminal statute "may be advanced at any time." *United States* v. *Rogers*, 270 F.3d 1076, 1078 (2001). The court of appeals recognized that "[c]ourts sometimes call the link

between a statute and a source of national authority a 'jurisdictional' requirement," but emphasized that "[o]nly limits on the adjudicatory power of the court are open at any time," and explained that the defendant's Commerce Clause arguments "must be raised in the district court." *Ibid.* And the Ninth Circuit has recognized that, "so long as [the defendant] is charged with a federal crime, the district court has subject-matter jurisdiction to hear his case, whether or not the statute defining the crime was constitutionally enacted," such that a claim of unconstitutionality "cannot be raised at every point in the proceedings." *United States* v. *Ghanem*, 993 F.3d 1113, 1131 n.6 (2021).[4]

The Eleventh Circuit's decisions also do not establish that that court of appeals would embrace petitioners' view that a Commerce Clause challenge to a defendant's statute of conviction is a non-waivable jurisdictional claim. The Eleventh Circuit's decision in *United States* v. *Saac*, 632 F.3d 1203, cert. denied, 565 U.S. 835 (2011), addressed whether a constitutional challenge

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[4] The additional Ninth Circuit decisions that petitioners cite do not hold otherwise. See *United States* v. *Brown*, 875 F.3d 1235, 1238-1239 & n.2 (2017) (finding that defendant's unconditional guilty plea did not preclude appellate review of "*pre-plea rulings*" on "'jurisdictional claims,' i.e., those challenging a conviction independently of the question of factual guilt") (emphasis added); *United States* v. *Cortez*, 973 F.2d 764, 766-767 (1992) (finding that Rule 12(b) required the defendant to his raise selective-prosecution claim before trial, absent district court's grant of relief from the waiver, and declining to decide whether "selective prosecution could be a jurisdictional claim"); *Journigan* v. *Duffy*, 552 F.2d 283, 285-286 & n.4 (1977) (reviewing state habeas petitioner's constitutional challenge to statute of conviction, which petitioner had raised "in a state habeas corpus proceeding" following his guilty plea, in accordance with California law).

was "jurisdictional" for purposes of determining whether it was precluded by the defendant's guilty plea. See *id.* at 1208. The question whether a guilty plea precludes such a claim was later addressed by this Court in *Class* v. *United States*, 138 S. Ct. 798 (2018). As petitioner recognizes, however, (*e.g.*, Pet. 12), that plea-preclusion question is separate from the Rule 12(b)(2) question at issue here. *Saac* did not address whether "the court lacks jurisdiction" under Rule 12(b)(2) when Congress lacks constitutional authority to enact a statute. And the Eleventh Circuit has since observed that "the interstate commerce element" of a criminal statute "is 'jurisdictional' only in the sense that it relates to the power of *Congress* to regulate the forbidden conduct," and thus does not "bear[] on whether the *district court* had subject matter jurisdiction or authority to adjudicate the case." *United States* v. *Grimon*, 923 F.3d 1302, 1306, cert. denied, 140 S. Ct. 536 (2019).

For similar reasons, it is far from clear that the Third Circuit would apply Rule 12(b)(2) in the manner that petitioners urge. Petitioners suggest (Pet. 16 n.5) that three Third Circuit decisions (one of which was not published) between 1995 and 2004 "held that facial challenges to criminal statutes of conviction are jurisdictional" and thus "may not be waived by a guilty plea." Petitioners acknowledge, however, that those decisions neither "elaborated upon [the court's] reasoning" nor "explained in any detail what [the court] means by the use of the term 'jurisdiction' in this context." Pet. 16. The decisions therefore offer little basis for concluding that the Third Circuit would have ruled for petitioners in this case. Moreover, since issuing the decisions petitioners cite, the Third Circuit has emphasized that, when its past cases stated "that only 'jurisdictional'

defenses survive a defendant's unconditional plea of guilty," the court was not employing the word "jurisdiction" to "discuss 'the nature and limits of the judicial power of the United States.'" *United States* v. *Porter*, 933 F.3d 226, 228-229 (2019) (citation omitted).

At bottom, petitioners fail to identify any decision of any court of appeals that would allow their claim to proceed under Rule 12(b)(2). And such a per se approach to constitutional claims would be in tension with the fact that "virtually all circuits"—including circuits petitioners contend have accepted their position—"have addressed constitutional challenges to criminal statutes and have either refused to address them because the defendants had neglected to raise them below, or decided to reach them only upon determining that the lower court's failure to address them constituted 'plain error.'" *Baucum*, 80 F.3d at 541; see *id.* at 541 n.2 (citing cases).

3. Even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle for considering it because, as the Tenth Circuit has already held in a separate appeal by petitioners' co-defendants, petitioners' underlying Commerce Clause challenge is insubstantial. See *United States* v. *Garcia*, No. 19-2148, 2023 WL 2965760, at *6-*9 (Apr. 17, 2023) (per curiam). A decision in petitioners' favor would therefore have no practical effect on their convictions. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties); *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of

meaningful litigation. Its function in resolving conflicts among the [c]ourts of [a]ppeals is judicial, not simply administrative or managerial.").

Under the Commerce Clause, Congress may regulate even "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). And the VICAR statute expressly requires that an "enterprise" be "engaged in," or have activities that "affect," interstate or foreign commerce. 18 U.S.C. 1959(b)(2). At a minimum, Congress had a "rational basis" for concluding that the effects of the targeted racketeering activity, taken in the aggregate, would substantially affect interstate commerce. *Raich*, 545 U.S. at 22.

Relying on these principles, the Tenth Circuit has held, in a decision post-dating the decision below, that Section 1959 "meets the requirements the Supreme Court has established in its Commerce Clause jurisprudence as long as the government proves the interstate element necessary for liability." *Garcia*, 2023 WL 2965760 at *8. Every court of appeals to consider the question has agreed with this conclusion. See *United States* v. *Umaña*, 750 F.3d 320, 336-339 (4th Cir. 2014), cert. denied, 576 U.S. 1035 (2015); *United States* v. *Crenshaw*, 359 F.3d 977, 983-987 (8th Cir. 2004); *United States* v. *Riddle*, 249 F.3d 529, 536-538 (6th Cir.), cert. denied, 534 U.S. 930 (2001); *United States* v. *Torres*, 129 F.3d 710, 717 (2d Cir. 1997). Petitioners offer no sound reason to conclude that the Tenth Circuit would reverse course if this Court were to grant review and remand for consideration of their own Commerce Clause challenge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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