RECORD NO. _____

IN THE
Supreme Court of the United States

KAREEM DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court's jurisdiction is respectfully invoked to answer a question on which the circuit courts of appeals are split:

Is murder in aid of racketeering ("VICAR murder"), in violation of 18 U.S.C. § 1959(a)(1), an indivisible offense requiring a categorical analysis based on the generic federal definition of murder or a divisible offense to which the modified categorical approach applies for crime of violence predicate analysis under 18 U.S.C. § 924(c)(3)(A)?

The Congressional Record is clear that Congress intended the generic definition of murder to apply to prosecutions under § 1959. Yet, the circuits are split on the application of § 1959 as a crime of violence predicate. Some circuits, including the Sixth and the Ninth, perform a categorical analysis, looking to the generic federal definition of murder. Others, including the First and Second, perform a modified categorical analysis, looking to the elements of the charged state offense predicate. Courts in the Tenth Circuit say that a conviction under § 1959 must satisfy both the federal and the state definition of the charged crime. The Fourth Circuit disclaims application of the categorical approach altogether. The Court's guidance is urgently needed to ensure uniformity in the application of federal law.

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PETITION FOR A WRIT OF CERTIORARI

Kareem Davis ("Davis" or "Petitioner") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The precedential opinion of the United States Court of Appeals for the Second Circuit in *United States v. Kareem Davis*, 21-1486-cr, 74 F.4th 50 (July 18, 2023), concerning which this Court's jurisdiction is invoked, is appended hereto as Appendix A.

Davis' remaining claims on appeal, which are not implicated herein, were decided in a companion Summary Order, *United States v. Kareem Davis*, 21-1486-cr, 2023 WL 4582002 (2d Cir. July 18, 2023).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 18, 2023. No petition for rehearing was filed. This petition is timely filed within the 90-day statutory time limitation. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18 U.S. Code section 1959(a)(1) provides, in relevant part, that:

> (a) Whoever, . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, . . . any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished . . . . (1) for murder, by death or life imprisonment, or a fine under this title, or both; . . .

18 U.S.C. § 1959(a)(1).

Title 18 U.S. Code section 924(j) provides that, "A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; . . ." 18 U.S.C. § 924(j)(1).

Section 924(c) provides for mandatory minimum sentences for a defendant "who, during and in relation to any crime of violence . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." As is relevant here, a "crime of violence" is defined as a felony that "has 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). Equivalent language defining a "crime of violence" appears in 18 U.S.C. §§ 16(a) and 3156(a)(4)(A) and in USSG § 4B1.2(a)(1). Relatedly, the Armed Career Criminal Act ("ACCA") defines a "violent felony" in relevant part as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

Section 1111(a) provides:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

18 U.S.C. § 1111(a).

STATEMENT OF THE CASE

1. In December 2019, a jury convicted Kareem Davis of (I) racketeering conspiracy (violation of 18 U.S.C. § 1962(d)) in connection with the Killbrook gang between 2007 and October 2017, (II) murder of Bolivia Beck in aid of racketeering (violation of 18 U.S.C. §§ 1959(a)(1) and 2), and (III) use of a firearm causing death (violation of 18 U.S.C. §§ 924(j)(1) and 2). On June 7, 2021, the Honorable Lorna G. Schofield sentenced Davis to the statutorily mandated term of life in prison on Count Two and to concurrent terms of 30 years on Counts One and Three. Davis is serving that sentence.

In Count Two, the Indictment charged that Davis, his brother Gary Davis, and "others known and unknown" had violated 18 U.S.C. §§ 1959(a)(1) and (2) by "knowingly murder[ing] and aid[ing] and abet[ing] the murder of Bolivia Beck" in violation of New York Penal Law §§ 125.25, 125.27, and 20.00 by causing her death "with intent to cause the death of another person" and by "recklessly engag[ing] in conduct which created a grave risk of death to another person, and thereby caus[ing] the death of Beck, and aid[ing] and abet[ing] the same" "under circumstances evincing a depraved indifference to human life."

In Count Three, the Indictment charged that Davis, Gary Davis, and "others known and unknown, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely, the murder in aid of

racketeering charged in Count Two of this Indictment," had caused the death of Bolivia Beck through the use of a firearm, "which killing is murder as defined in Title 18, United States Code, Section 1111(a)," and aided and abetted the same.

Gary Davis testified at trial that, in the course of shooting at a rival gang member Joey Colon on a pathway within the Mill Brook Houses, he and Petitioner had unintentionally shot and killed Beck, who was Colon's girlfriend, and was standing next to him at the time. Surveillance video showed that 12 shots had been fired in 11 seconds.

2. At the conclusion of the trial, Davis moved to dismiss Count Three under *United States v. Davis*, 139 S.Ct. 2319 (2019), noting that "there has been litigation about what constitutes a crime of violence for a 924(c), for a 924(j) conviction, and that litigation is ongoing. . . . So, . . .we move to dismiss on Count Three, or we move for a judgment of acquittal that they failed to prove that the firearm was possessed and discharged in connection with a crime of violence under the technical definition in the statutes." *United States v. Davis*, 17-cr-610 (LGS) (SDNY) at Dkt #546 at p. 820. The district court denied the motion. *Id.* at 832.

3. On direct appeal, Davis argued that his conviction on Count Three should be vacated because neither VICAR murder nor reckless conduct under New York Penal Law § 125.25(2) categorically qualify as a crime of violence predicate. Davis argued that "murder" in 18 U.S.C. § 1959(a)(1) was an indivisible offense to which the categorical approach should be applied. Because the generic federal definition of murder includes reckless conduct while § 924(c)(3)(A) requires the intentional "use

of force capable of causing physical pain or injury," Davis argued, a VICAR murder conviction is not a predicate crime of violence for § 924(c). *United States v. Davis*, 21-1486-cr (2d Cir.) at Dkt. #36 (Brief of Appellant Kareem Davis) at p. 44 (referencing *United States v. Castleman*, 572 U.S. 157, 169 n.8 [2014] [noting near unanimity among Courts of Appeals that "recklessness is not sufficient" to "constitute a 'use' of force"]); *United States v. Begay*, 934 F.3d 1033 (9th Cir.2019) (holding that federal second-degree murder, which "may be committed recklessly - - with a depraved heart mental state -- and need not be committed willfully or intentionally," is not a § 924(c)(3)(A) crime of violence)); *see also United States v. Davis*, 21-1486-cr (2d Cir.) at Dkt. #62 (Reply Brief of Appellant Kareem Davis) at p. 15 (referencing *Borden v. United States*, 141 S. Ct. 1817, 1821, 210 L. Ed. 2d 63 [2021] [an offense committed with a *mens rea* of recklessness is not a "violent felony."]).

Thus, Davis argued, even if the Court employed the modified categorical approach, reaching the elements of the New York Penal Law § 125.25 provisions under which Davis had been charged, his conduct had been reckless (e.g., a violation of § 125.25(2)) – conduct that was insufficient to constitute the intentional use of violent physical force required for a § 924(c)(3)(A) predicate. *United States v. Davis*, 21-1486-cr (2d Cir.) at Dkt. #36 at pp. 45-47.

The Second Circuit affirmed Davis' conviction. First, the Court explained that, under Second Circuit precedent, the modified categorical approach applied to the question whether Davis' VICAR murder conviction was a crime of violence

because, as with the substantive RICO statute, VICAR requires the underlying predicate crimes "to be identified in the charging instrument." A7 (*United States v. Davis*, 74 F.4th at 54 [referencing *United States v. Pastore*, 36 F.4th 423, 429 (2d Cir.2022)]). Therefore, "Davis' VICAR murder conviction 'hinged on' his having committed the underlying predicate offense of second degree murder in violation of New York law." A8 (*Davis*, 74 F.4th at 54).

Next, the Court concluded that, even though Davis was charged in the alternative with intentional murder and depraved indifference murder under New York's second-degree murder statute, application of the modified categorical approach confirmed that he had been convicted of second-degree intentional murder, based on the district court's jury charge:

> Here, the district court's jury charge on VICAR murder, Count Two, instructed that, "[u]nder New York Law, murder requires proving that a person, one, caused the death of a victim; and two, with the intent of causing the victim's death or another person's death." The district court did not give an instruction on Count Two regarding depraved indifference murder or its statutory reference to recklessness as charged in the indictment. Nor was the indictment sent to the jury. It follows from these instructions that the jury "necessarily found" that Davis intended to cause death.

A10 (*Davis*, 74 F.4th at 55 [footnotes omitted]).

The Second Circuit then proceeded to consider whether second-degree intentional murder under New York Penal Law § 125.25(1) was a crime of violence under § 924(c)(3)(A). Applying the Circuit's precedents in *United States v. Scott*, 990 F.3d 94 (2d Cir.) (en banc), *cert. denied*, 142 S.Ct. 397 (2021), and *United States v.*

Pastore, 36 F.4th 423 (2d Cir. 2022)[1], the Circuit concluded that it was. A11-A12 (*Davis*, 74 F.4th at 55-56).

The Second Circuit explained that it had previously held that New York first-degree manslaughter was a categorical crime of violence "because first-degree manslaughter, regardless of whether it may be completed by commission or omission, "can only be committed by a defendant who causes death—the ultimate bodily injury—while intending to cause at least serious physical injury, necessarily requiring the use of physical force." A11 (*Davis*, 74 F4th at 56 [citing *Scott*, 990 F.3d at 98-101]). "To hold otherwise," the Court concluded, "would preclude courts from recognizing even intentional murder as a categorically violent crime," "an untenable consequence." *Id.* Further, because first-degree manslaughter under New York Law "is a homicide crime second only to murder in its severity," "[i]t follows logically . . . that second-degree intentional murder – a crime more serious than first-degree manslaughter that definitionally requires the use of force – is categorically a crime of violence under § 924(c)." *Id.*

REASONS FOR GRANTING THE WRIT

Summary of the Argument

This Court should hear Mr. Davis' case because the precedential holding of the Second Circuit that VICAR murder predicated on second-degree intentional murder under New York Penal Law § 125.25(1) categorically qualifies as a crime of

[1] On October 2, 2023, the Second Circuit issued a revised opinion in *Pastore* – *United States v. Pastore*, -- F.4th --, 2023 WL 6379704 (2d Cir. Oct. 2, 2023). The revisions do not affect the holding cited in *Davis*, i.e., that "intentionally causing the death of another person involves the use of force." *See* A10 (*Davis*, 74 F.4th at 56).

violence under 18 U.S.C. § 924(c) conflicts with the intent of Congress in enacting 18 U.S.C. § 1959(a)(1), conflicts with decisions of other circuits in its rationale, and conflicts in the application with a decision of the Ninth Circuit and a decision within the Fourth Circuit.

The circuits are split on the question whether the sufficiency of a VICAR murder conviction under 18 U.S.C. § 1959(a)(1) for an 18 U.S.C. § 924(c)(3)(A) crime of violence predicate is analyzed under federal law, state law, both, or either. The Court's guidance is required to clarify for the circuits that analysis of the sufficiency of a VICAR murder conviction as a § 924(c) crime of violence predicate requires analysis under the generic federal definition of murder, as Congress intended.

Without clarification from this Court, the circuits will continue to diverge in their analysis and in their application, and defendants will be exposed to different punishments for the same conduct based solely on where they live.

Argument

I. This Court Should Grant Certiorari to Clarify that Analysis of the Sufficiency of a VICAR Murder Conviction for a § 924(c)(3)(A) Predicate Crime of Violence Requires Consideration of the Generic Federal Definition of Murder.

The Congressional Record makes clear that the VICAR statute was intended primarily to facilitate prosecution of crimes by illegal enterprises operating across state lines:

> [T]he need for Federal jurisdiction is clear, in view of the Federal Government's strong interest, as recognized in existing statutes, in suppressing the activities of organized criminal enterprises, and the fact that the FBI's experience and network of informants and intelligence with respect to such enterprises will often facilitate a

> successful Federal investigation where local authorities might be stymied.

H.R.Rep. No. 98–1030, at 305, *reprinted in* 1984 U.S.S.C.A.N. 3182, 3484. Thus,

> While section [1959] proscribes murder, kidnaping, maiming, assault with a dangerous weapon, and assault resulting in serious bodily injury in violation of federal or State law, it is intended to apply to these crimes in a *generic sense*, whether or not a particular State has chosen those precise terms for such crimes.

129 CONG. REC. S1, 22,906 (daily ed. Aug. 4, 1983) (emphasis added).

It is clear that "Congress intended section 1959 to apply uniformly across the United States as a federal crime. The predicate requirement was included simply to avoid criminalizing new conduct. Requiring the state predicate to categorically match the enumerated offense would limit the application of section 1959 'to the drafting whims of fifty state legislatures, a result plainly not intended by Congress.'" Teresa Wallbaum, *Novel Legal Issues in Gang Prosecutions*, 68 DOJ J. Fed. L. & Prac. 99, 105-06 (2020) (quoting *United States. v. Le*, 316 F. Supp. 2d 355, 360 (E.D. Va. 2004)) (footnotes omitted).

Yet, despite Congress' clear intent, district courts, circuit courts, and United States Attorney's Offices around the country have taken conflicting positions on the interpretation of § 1959. As the District Court of D.C. recently summarized, "Because the VICAR statute does not define its offenses, courts have employed two methodologies to determine whether a VICAR conviction satisfies the elements clause." *Sorto v. United States*, No. CR 08-167-4 (RJL), 2022 WL 558193, at *3 n7 (D.D.C. Feb. 24, 2022). "Some have applied the categorical approach to the state-crime predicate underlying the VICAR conviction, reasoning that the jury

necessarily found that the defendant violated this predicate to return the VICAR conviction." *Sorto*, 2022 WL 558193, at *3 n7 (referencing, *e.g.*, *United States v. Toki*, 23 F.4th 1277, 1280–81 (10th Cir. 2022); *Moore v. United States*, No. 16-3715-PR, 2021 WL 5264270, at *2 (2d Cir. Nov. 12, 2021); *United States v. Mejia-Quintanilla*, 859 F. App'x 834, 836 (9th Cir. 2021); *United States v. Mathis*, 932 F.3d 242, 264–65 (4th Cir. 2019); *accord Hall v. United States*, No. 3:20-CV-00646, 2021 WL 119638, at *8–*10 (M.D. Tenn. Jan. 13, 2021) (collecting cases)).

"[O]thers have applied the categorical approach to the VICAR conviction itself, relying on the generic federal elements of the offenses enumerated in the VICAR statute." *Sorto*, 2022 WL 558193, at *3 n7 (referencing, *e.g.*, *Manners v. United States*, 947 F.3d 377, 379–82 (6th Cir. 2020); *Kinard v. United States*, No. 3:21-CV-00161-GCM, 2021 WL 5099596, at *4–*5 (W.D.N.C. Nov. 2, 2021); *Thomas v. United States*, No. 2:11-CR-58, 2021 WL 3493493, at *6 (E.D. Va. Aug. 9, 2021); *Cousins v. United States*, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016)).

Although the D.C. District Court held that, "These approaches are not mutually exclusive, and both are consistent with the VICAR statute" (*Sorto*, 2022 WL 558193, at *3 n7 [referencing, *cf. In re Thomas*, 988 F.3d 783, 791–92 (4th Cir. 2021)]), this conclusion is wrong and leads to the uneven application of federal law in the circuits. "[T]he application of federal legislation is nationwide." *Jerome v. United States*, 318 U.S. 101, 104 (1943). The need for a common understanding of these provisions, which feature daily in federal jurisprudence, is clear. *See also, e.g., Becker v. Montgomery*, 532 U.S. 757, 762 (2001) ("We granted certiorari to assure

the uniform interpretation of the governing Federal Rules."); *Logan v. United States*, 552 U.S. 23, 27 (2007) (In interpreting a federal criminal statue, "we noted that our decision would ensure greater uniformity in federal sentences."); *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008) (noting the Court's "responsibility and authority to ensure the uniformity of federal law") (Roberts, C.J., dissenting); Sup. Ct. R. 10(a), 10(c) (Certiorari is warranted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or where it "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

Certiorari should be granted here because the circuits' varied approaches lead to conflicting applications of federal law, frustrating Congress' stated intent to facilitate cross-state prosecution of the crimes of illegal enterprises by using generic offense definitions. The circuits' varied approaches go beyond a simple split and result in a chaotic application of 18 U.S.C. § 1959.

In the Second Circuit, courts look to the underlying state predicate in the Indictment, yet, in applying the modified categorical approach, look not to the charging language, but to the language of the jury charge to determine the state predicate offense of which the defendant was convicted. The analysis of federal VICAR murder turns, therefore, on the application of state law. *See*, *e.g.*, A11 (*Davis*, 74 F.4th at 56) (concluding that New York second-degree intentional murder

is a categorical crime of violence because it must be committed with the intent to cause serious physical injury). The First Circuit looks to the state offense as well. See *United States v. Báez-Martínez*, 950 F.3d 119, 127–28 (1st Cir. 2020).

The Ninth Circuit, in contrast, has looked to the federal definition of second degree murder in 18 U.S.C. § 1111(a). *United States v. Begay*, 33 F.4th 1081 (9th Cir.), *cert. denied*, 143 S. Ct. 340, 214 L. Ed. 2d 153 (2022); *see also United States v. Vederoff*, 914 F.3d 1238, 1246–47 (9th Cir. 2019) (adopting the generic definition of murder in order to apply the categorical approach in an appeal challenging the career offender sentencing enhancement under U.S.S.G. § 4B1.2(a)). Similarly, the Fourth Circuit looks to the generic federal definition. *In re Irby*, 858 F.3d 231, 237 (4th Cir. 2017) ("Common sense dictates that murder is categorically a crime of violence under the force clause...."); *see also Cousins v. United States*, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016) ("to determine if the alleged VICAR predicate satisfies this element of a § 1959 offense, the court must look at the elements of the VICAR predicate as it is generically defined").

Other courts have required that the defendant's conduct satisfy *both* the federal and state law definitions of the charged offense. *See*, *e.g.*, *United States v. Martinez*, 545 F. Supp. 3d 1079, 1081 (D.N.M. 2021)("Establishing that Martinez violated VICAR murder in violation of New Mexico law requires the United States to prove: (i) that Martinez' conduct constitutes generic murder; and (ii) that Martinez' conduct also violated New Mexico law."); *United States v. DeLeon*, 318 F. Supp. 3d 1272, 1276 (D.N.M. 2018) (concluding that "no matter whether [defendant]

conspired [to commit assault resulting in serious bodily injury in violation of the state statute,] he only violated VICAR if also he conspired to commit assault resulting in serious bodily injury, in a generic sense").

The Eleventh Circuit takes yet another approach, placing discretion for the analysis in the hands of the Government by looking to the offense as charged. *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343 (11th Cir. 2022) ("the indictment alleged that Alvarado-Linares's VICAR charges were based on violations of the Georgia malice murder statute and attempted murder statute, and the trial court told the jury to consider whether Alvarado-Linares committed those crimes as defined by state law. The modified categorical approach requires us to ask whether a crime, as charged and instructed, has '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).").

Other courts have disclaimed application of the categorical approach entirely. In *United States v. Keene*, 955 F.3d 391, 398–99 (4th Cir. 2020), the Fourth Circuit concluded that, "Reading the language of the VICAR statute under which the defendants were charged, we conclude that Congress intended for individuals to be convicted of VICAR assault with a dangerous weapon by engaging in conduct that violated both that enumerated federal offense as well as a state law offense, regardless whether the two offenses are a categorical 'match.'" Indeed, the Fourth Circuit explained:

> Nothing in [section 1959's] language suggests that the categorical approach should be used to compare the enumerated federal offense of

> assault with a dangerous weapon with the state offense of Virginia brandishing. In fact, the most natural reading of the statute does not require any comparison whatsoever between the two offenses. By using the verb "assaults" in the present tense, the language requires that a defendant's presently charged conduct constitute an assault under federal law, while simultaneously also violating a state law. The VICAR statute includes no language suggesting that *all* violations of a state law also must qualify as the enumerated federal offense, a result that would be required under the categorical approach.
> ...
>
> This unambiguous statutory language precludes application of a formalistic, overinclusive categorical approach, and instead holds defendants accountable for their actual conduct as presented to a jury.

Keene, 955 F.3d at 397-98. *See also United States v. Elmore*, 624 F. Supp. 3d 1123, 1142 (N.D. Cal. 2022) ("the best reading of the VICAR murder statute is that it requires the defendant to 'murder[ ]' (for present purposes, an act falling within the generic meaning) and it requires that this murder be 'in violation of the laws of any State or the United States.' And when assessing whether the murder is in violation of the relevant law, it requires evaluating whether the defendant's conduct violated the law, not whether the law itself is a categorical match for anything."); *United States v. Rivas Gomez*, 2021 WL 431409, at *3 (E.D. Cal. Feb. 8, 2021) (concluding that "state law predicates may be prosecuted under VICAR, even if the state statute is broader than the generic definition of the underlying crime, so long as the conduct in question also satisfies VICAR's generic definition of the charged offense.").

Meanwhile, the Government has taken advantage of courts' confusion to argue both sides of the split. *Compare*, *e.g.*, *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343–44 (11th Cir. 2022) (Government says look to the generic

definition) *and Battle v. United States*, No. 3:14-CV-01805, 2021 WL 1611917, at *8 (M.D. Tenn. Apr. 26, 2021), *aff'd*, No. 21-5457, 2023 WL 2487342 (6th Cir. Mar. 14, 2023), *cert. denied*, 143 S. Ct. 2621 (2023) ("The Government, and certain other courts, have taken the approach that, in analyzing whether murder in aid of racketeering under 18 U.S.C. § 1959 constitutes a 'crime of violence,' a court is to consider the elements of 'generic' murder, rather than murder as defined by Tennessee law.") *and United States v. Gill*, No. CR JKB-07-0149, 2023 WL 349844, at *9 (D. Md. Jan. 20, 2023) ("The Government counters that, '[i]n assessing whether a predicate VICAR offense constitutes a 'crime of violence,' several courts within this Circuit have analyzed the generic, federal definition of the crime at issue, rather than the underlying state predicate offense(s).' . . . It further avers that "this approach is consistent with the language of § 924(c), which requires the predicate offense to be evaluated under federal law." . . . Therefore, according to the Government, "the underlying federal crime for [Gill's] VICAR murder offense is federal premediated first-degree murder, in violation of 18 U.S.C. § 1111." (*Id.*)"), *with* A7-A8 (*Davis*, 74 F.4th at 54) (noting the Government's position that the Court should analyze Davis' conviction according to the elements of the state law offense of conviction) *and with United States v. Rivas Gomez*, 2021 WL 431409, at *2–4 (E.D. Cal. Feb. 8, 2021) ("[T]he government argues, in essence, that a plain reading of the VICAR statute and consideration of other relevant factors mean that a VICAR prosecution for a state law predicate first requires proof that the defendant violated the generic definition of the charged crime and then also

requires proof that the same conduct constitutes a violation of the particular state statute.")

In short, the circuits are confused about the appropriate framework for analysis of whether VICAR murder under 18 U.S.C. § 1959(a)(1) qualifies as a crime of violence predicate for a § 924 offense, the Government is taking advantage of the circuits' confusion to advocate both sides of the issue, and the resulting uneven and varied application of federal law is having a disparate impact on defendants nationwide. This Court's guidance to resolve these differing approaches is urgently required.

II. This Court Should Grant Certiorari Because the Circuits' Differing Approaches to the VICAR Murder Analysis Results in an Inequitable Application of Federal Law.

In Davis' case, the Second Circuit held that second-degree murder under New York Penal Law § 125.25 is categorically a crime of violence. A12. But if Davis had been charged in California or in Maryland, his second-degree murder conviction would not have been an adequate predicate crime of violence for a § 924 conviction. In *United States v. Mejia-Quintanilla*, 857 F. App'x 956, (Mem)–957 (9th Cir.), *amended*, 859 F. App'x 834 (9th Cir. 2021), *opinion withdrawn and superseded on reh'g*, No. 17-15899, 2022 WL 3278992 (9th Cir. Aug. 11, 2022)[2], *cert. denied*, 143 S. Ct. 1094, 215 L. Ed. 2d 402 (2023), the Ninth Circuit held that murder under the California Penal Code is not a crime of violence because it may be committed

[2] The superseding opinion finds Mejia-Quintanilla's appeal barred by the appeal waiver in his plea agreement but does not disturb the logic of its prior conclusion concerning California's murder statute.

recklessly. *Id.* ("Under recent case law, murder in violation of section 187 of the California Penal Code is not a crime of violence for purposes of 18 U.S.C. § 924(c). This is because a conviction for an offense with a mens rea of recklessness does not constitute a crime of violence under the elements clause of 28 U.S.C. § 924(c)(3)(A), *see United States v. Begay*, 934 F.3d 1033, 1041 (9th Cir. 2019); *see also Borden v. United States*, —— U.S. ——, 141 S. Ct. 1817, 1834, 210 L.Ed.2d 63 (2021), and section 187 of the California Penal Code permits conviction if a defendant is found to have a mens rea of recklessness. Cal. Penal Code § 188(a) (murder conviction under section 187 may be based on 'express' or 'implied' malice)").

Similarly, in *United States v. Gill*, No. CR JKB-07-0149, 2023 WL 349844, at *12 (D. Md. Jan. 20, 2023), the court concluded that second-degree murder under Maryland law is not categorically a crime of violence because the Maryland murder statute is indivisible and because "felony murder, 'the most innocent conduct criminalized by' Maryland's murder statutes, 'requires only the mens rea necessary to attempt or complete the underlying felony (i.e., arson, escape, etc.).' . . . Under Maryland law, 'a felony murder committed in the course of certain enumerated felonies ... is murder in the first degree, notwithstanding the fact that the killing may have been reckless or merely accidental.' . . . 'That mens rea is not more than recklessness and thus, does not satisfy *Borden*.'" (citations omitted).

Thus, if Davis had been convicted in Maryland or in California of the same federal VICAR murder, with a state law second-degree murder predicate, he could

not have been convicted for the use of a firearm causing death in violation of 18 U.S.C. § 924(j) because the second-degree murder offense would not have been an acceptable crime of violence predicate. Yet, because he was prosecuted in New York, he is serving an additional 30-year sentence for the use of a firearm causing death in violation of New York's second-degree murder statute. To avoid this inequitable application of federal law, the Court should grant certiorari and clarify that the generic, federal definition of murder should be applied in the VICAR crime of violence analysis.

Further, because generic murder in the second degree may be committed recklessly, this Court should remand Davis' case for reconsideration and for further proceedings in accordance with *Borden v. United States*, 141 S. Ct. 1817, 210 L. Ed. 2d 63 (2021).

III. To the Extent Differing Approaches Are Compatible with the Statutory Text of 18 U.S.C. § 1959, the Rule of Lenity Compels Application of the Generic Offense Definitions.

Lenity, a rule "'perhaps not much less old than' the task of statutory 'construction itself,'" says "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333 (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)). *See also United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) ("[A]mbiguous criminal laws [should] be interpreted in favor of the defendants subjected to them."); *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (the rule of lenity applies to sentencing statutes as well as to offense elements).

There is no real ambiguity here – Congress has made clear that it intended the generic federal offense definitions to be applied to the listed offenses in § 1959. Nonetheless, the "time-honored" rule of lenity, *United States v. Kozminski*, 487 U.S. 931, 952 (1988), should be applied here. Lenity is founded on three tenets that have "long been part of our tradition." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). *First*, the rule of lenity enforces the requirement of "fair warning," in "language that the common world will understand," of "what the law intends to do if a certain line is passed." *Bass*, 404 U.S. at 348 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). To ensure the warning is fair, "the line should be clear." *Id.*; *see also United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[The] rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.").

Second, the rule "minimize[s] the risk of selective or arbitrary enforcement" of criminal laws and penalties. *Kozminski*, 487 U.S. at 952. It does so by "fostering uniformity in the interpretation of criminal statutes." *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). Thus, the rule "generate[s] greater objectivity and predictability" in applying criminal laws. Eskridge, *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-679 (1999). This is likewise a fundamental goal of the judicial function more generally. *See Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility ... is to ensure the integrity and uniformity of federal law.").

Third, the rule holds that because the "seriousness of criminal penalties" often represents the "moral condemnation" of the community, "legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. This policy embodies "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Id.* (quoting Friendly, *Mr. Justice Frankfurter and the Reading of Statutes,* in *Benchmarks* 196, 209 (1967)); *see also Davis*, 139 S. Ct. at 2333 ("'[T]he power of punishment is vested in the legislative, not in the judicial department.'" (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 95)). Accordingly, the rule "maintain[s] the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952; *see Santos*, 553 U.S. at 514 (plurality opinion) (The rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.").

As noted above, courts are engaged in making criminal law in Congress' stead by interpreting 18 U.S.C. § 1959 to require analysis of more than just the generic version of the offenses set forth therein. These decisions are contrary to clearly expressed Congressional intent. More importantly, they have the effect of broadening the application of § 924(j) and (c) to reach conduct that is outside the scope of the Congressional directive. To "maintain the proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952, to "minimize the risk of selective or arbitrary enforcement" of federal criminal laws and penalties, *Id*, and to "foster[] uniformity in the interpretation of criminal statutes." *Bryan*, 524

U.S. at 205 (Scalia, J., dissenting), the Court should hear Davis' case and should clarify that the generic federal definitions apply to the enumerated crimes within § 1959.

IV. This Case Presents a Strong Vehicle to Address the Issues Identified Herein.

For his conviction on Count Two, Davis is serving a sentence of life imprisonment. If this Court overturns his conviction on Count Three – the § 924(j) conviction -- as lacking a sufficient crime of violence predicate, he will continue to serve that life sentence. However, he will not be required to serve an additional 30-year consecutive term for his violation of § 924(j).

The case clearly presents an instance in which the Second Circuit's interpretation of § 1959, in violation of Congress' clearly stated intent, has resulted in the uneven application of federal law. To stop the deepening circuit split and to prevent the uneven application of federal law, this Court should grant the petition and hear Davis' case.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to consider the questions raised herein.

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Respectfully submitted,

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