No. 23-6702

IN THE SUPREME COURT OF THE UNITED STATES

NARDINO COLOTTI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' convictions for racketeering, in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. 1962(c), qualify as "crime[s] of violence" under 18 U.S.C. 924(c)(3)(A), where the government charged, and the jury found, that they committed a state-law crime of violence as a RICO predicate.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Ivezaj v. United States, No. 11-cv-1403 (Apr. 4, 2012)

Supreme Court of the United States:

Rudaj v. United States, No. 12-7073 (Dec. 10, 2012)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is available at 71 F.4th 102. The opinion and order of the district court (Pet. App. 38a-66a) is available at 529 F. Supp. 3d 290.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2023. Petitions for rehearing were denied on September 11, 2023 (Pet. App. 67a, 68a, 69a). The petition for a writ of certiorari was filed on December 11, 2023 (Monday). 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 Southern District of New York, petitioners were each convicted of, inter alia, racketeering in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. 1962(c), and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). See C.A. App. A235-A236, A242-A243, A249-A250, A260-A261, A267-A268. The court of appeals affirmed, see 568 F.3d 88; 336 Fed. Appx. 6, and this Court denied certiorari, 559 U.S. 998. Following this Court's decision in United States v. Davis, 588 U.S. 445 (2019), the court of appeals authorized petitioners to challenge their Section 924(c) convictions under 28 U.S.C. 2255. Pet. App. 7a-8a. The district court denied their Section 2255 motions. Id. at 38a-66a. The court of appeals affirmed. Id. at 1a-36a.

1. From the early 1990s to 2004, petitioners owned and operated extensive illegal gambling operations in parts of the Bronx, Westchester County, and Astoria, Queens. Colotti Presentence Investigation Report (PSR) ¶¶ 2-3, 67, 70. And they did so as part of a criminal organization whose members furthered its interests through such gambling operations, as well as other unlawful activities including extortion, loansharking, burglary, car theft, assaults, and the possession of firearms. Id. at ¶ 67.

Petitioners Rudaj, Colotti, and Dedaj were the primary leaders of the organization. Colotti PSR ¶ 68. Each had his own responsibilities: Rudaj was responsible for collecting gambling proceeds from the affiliated gaming clubs; Dedaj was responsible for collecting loanshark payments and proceeds from gambling machines that the organization operated; and Colotti was responsible for maintaining relationships with organized crime families, managing the organization's real estate, and investing the organization's money. Id. at ¶ 69. Rudaj was widely regarded as the head of the group and frequently dominated the decisionmaking, but all three leaders shared equally in the proceeds of the organization. Ibid.

Petitioners Ivezaj and DiPietro were salaried associates of petitioners' organization, and were considered "lieutenants and enforcers." Colotti PSR ¶¶ 72, 89. Both managed gambling clubs. Id. at ¶ 89. Ivezaj in particular worked closely with Rudaj and was one of his most trusted associates. Id. at ¶¶ 72, 90. In addition to supervising gambling clubs, Ivezaj found new locations for gambling machines and provided protection services for the owners of bars and restaurants where the organization placed its machines. Id. at ¶ 90. Ivezaj also acted as the "muscle" of the organization, assisting others with intimidation, violence, and collection of illegal proceeds. Ibid. DiPietro similarly

"participated in numerous beatings during his tenure with th[e] organization." Id. at ¶ 92.

2. A federal grand jury in the Southern District of New York charged petitioners with, inter alia, racketeering in violation of RICO, 18 U.S.C. 1962(c); and using, carrying, and brandishing firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). C.A. App. A194-A218, A232-A233. In charging the RICO offense, the grand jury charged petitioners with 14 distinct racketeering acts, id. at A201-A218, including one or two acts of extortion, in violation of N.Y. Penal Law §§ 155.05 and 155.40 (McKinney 2004), for each petitioner, C.A. App. A205-A209.

In particular, petitioners were charged with extortion based on an assault on patrons and managers of an illegal gambling club (Racketeering Act Five), and petitioners Rudaj, Dedaj, Ivezaj, and DiPietro were also charged with extortion based on an assault on a specific victim (Racketeering Act Four). C.A. App. A205-A209; Pet. App. 30a. The indictment then identified the RICO offense as the crime of violence underlying the Section 924(c) offense. C.A. App. A233.

Petitioners were tried before a jury. With respect to the substantive RICO violation of Section 1962(c), the district court instructed the jury that to find each petitioner "guilty of extortion, as charged in [the indictment,] the government must

prove beyond a reasonable doubt" that "the defendant obtained property from another person with that victim's consent" and "that the defendant knowingly and willfully induced such consent by instilling in the victim a fear that the defendant or a third person would cause physical injury to some person in the future, or cause damage to property." Pet. App. 42a-43a.

The jury found petitioners guilty on the substantive RICO count, the Section 924(c) count, and all but one of the other counts charged. C.A. App. A235-A236, A242-A243, A249-A250, A260-A261, A267-A268. In doing so, as indicated on a special verdict form, the jury specifically found beyond a reasonable doubt that all five petitioners had committed Racketeering Act Five, and that all petitioners except for Colotti had committed Racketeering Act Four. C.A. App. A454-A455.

Petitioners appealed their convictions, and the court of appeals affirmed. See 568 F.3d 88; 336 Fed. Appx. 6. Petitioners filed a petition for a writ of certiorari, which this Court denied. 559 U.S. 998.

Petitioners later moved under 28 U.S.C. 2255 to vacate their convictions on the ground of ineffective assistance of counsel. See Pet. App. 4a. The district court denied the motions and declined to issue certificates of appealability. See Colotti v. United States, No. 11-cv-1402, 2011 WL 6778475 (S.D.N.Y. Dec. 21, 2011); Colotti v. United States, Nos. 11-cv-1402, 04-cr-1110-02,

11-cv-1403, 04-cr-1110-04, 11-cv-1510, 04-cr-1110-03, 2012 WL 1122972 (S.D.N.Y. Apr. 4, 2012).

The court of appeals likewise denied their respective motions for a certificate of appealability. See Ivezaj v. United States, No. 12-2298 (2d Cir. Aug. 14, 2012); Dedaj v. United States, No. 12-2285 (2d Cir. Sept. 24, 2012); Colotti v. United States, No. 12-2308 (2d Cir. Sept. 24, 2012). This Court again declined review. 571 U.S. 869; 568 U.S. 1150; 568 U.S. 1076.

3. Several years later, petitioners sought the court of appeals' permission to bring second or successive Section 2255 motions asserting that their Section 924(c) convictions should be vacated on the theory that the underlying RICO offense did not qualify as a predicate "crime of violence" for purposes of 18 U.S.C. 924(c)(3). Petitioners contended that the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B) was unconstitutionally vague, and that their Section 924(c) convictions rested on that definition, rather than the alternative definition in Section 924(c)(3)(A). See Pet. App. 46a. Following this Court's decision in United States v. Davis, 588 U.S. 445 (2019), which held that Section 924(c)(3)(B) is unconstitutionally vague, id. at 470, the court of appeals granted petitioners' request to file successive Section 2255 motions. Pet. App. 46a.

a. The district court denied petitioners' motions on the merits, because racketeering offenses underlying their Section

924(c) convictions remained crimes of violence under Section 924(c)(3)(A). Pet. App. 38a-66a.

The district court explained that "RICO convictions can properly serve as predicate crimes of violence for * * * [Section] 924(c) convictions if a predicate racketeering act for the[] RICO conviction * * * is a crime of violence." Pet. App. 53a-54a. And it applied the "modified categorical approach" to find that at least one of the predicate racketeering acts for the RICO convictions here -- extortion under New York state law -- was a crime of violence. Id. at 54a; see id. at 54a-63a. Under that approach, a court reviewing a conviction that involves a "divisible" statute comprising multiple crimes with separate elements may determine and rely on the specific crime that the defendant was found to have committed. See Mathis v. United States, 579 U.S. 500, 505 (2016). And here, the district court found that the New York extortion statutes identified for Racketeering Acts Four and Five were divisible, and "the jury necessarily convicted each [p]etitioner of a crime of violence * * * through finding that on at least one occasion he committed extortion through the use, attempted use, or threatened use of physical force." Pet. App. 59a.

The district court rejected petitioners' contention that the Section 924(c) convictions were invalid because Racketeering Acts Four and Five charged both substantive extortion and extortion

conspiracy. Pet. App. 63a. The court observed that the jury had found that each of the petitioners "brandish[ed] a firearm" in connection with the Section 924(c) offense, and thus must "necessarily [have] found them guilty of the substantive crime of extortion" rather than an inchoate conspiracy. Ibid. And because the jury found that petitioners had each committed one or more racketeering acts that qualify as a "crime of violence," the resulting RICO convictions were crimes of violence that served as valid predicates for the Section 924(c) convictions. Id. at 64a-65a.

3. The court of appeals affirmed. Pet. App. 1a-36a.

The court of appeals noted that "both RICO and New York larceny by extortion can be committed in various ways, some of which require force while others do not." Pet. App. 10a. But the court observed that both statutes are divisible and "that substantive RICO can be a crime of violence when it is predicated on an offense that necessarily requires an actual, attempted, or threatened use of force." Id. at 11a-12a; see id. at 10a-19a. Thus, like the district court, the court of appeals found that the RICO count on which petitioners were convicted was properly considered a crime of violence because one of the predicate offenses for that count -- New York larceny by extortion through threat of injury to a person, in violation of N.Y. Penal Law

§ 155.40(2)(a) (McKinney 2004) -- is itself a crime of violence. Pet. App. 28a.

The court of appeals acknowledged that the jury instructions at trial regarding larceny by extortion had contained an error, Pet. App. 25a, but determined that the error did not result in prejudice entitling petitioners to relief under Section 2255, see id. at 28a-35a. The court observed that the "jury's express findings conform to the overwhelming evidence that the petitioners threatened physical injury in connection with the acts of extortion that the jury found proven." Id. at 30a. And the court thus found "ample evidence in the record that a properly instructed jury would have found that the petitioners committed the completed offense of New York larceny by extortion, * * * as opposed to mere conspiracy or attempt to commit larceny by extortion," as "the predicate for" the Section 924(c) count. Id. at 34a (citation and internal quotation marks omitted).

ARGUMENT

Petitioners renew their contention (Pet. 29, 31-35) that Section 1962(c) establishes a single indivisible substantive RICO offense that does not require proof of the elements of crimes charged as predicate racketeering acts, and that a violation of Section 1962(c) can therefore never qualify as a "crime of violence" for purposes of Section 924(c). The court of appeals correctly rejected that contention, and its decision does not

implicate any circuit conflict warranting this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioners contend (Pet. 32-33) that federal substantive RICO is categorically not a "crime of violence" because Section 1962(c) is not divisible and can be violated in a manner that does not involve "the use, attempted use, or threatened use of physical force." 18 U.S.C. 924(c)(3)(A). The court of appeals, however, correctly determined that Section 1962(c) is divisible into separate crimes, some of which qualify as crimes of violence.

a. To determine whether an offense constitutes a "crime of violence" under Section 924(c)(3)(A), courts generally apply a "categorical approach" under which they "focus solely" on "the elements of the crime of conviction," not "the particular facts of the case." Mathis v. United States, 579 U.S. 500, 504 (2016); see Taylor v. United States, 495 U.S. 575, 602 (1990). But when the statute of conviction lists multiple alternative elements, such that it is "divisible" into distinct offenses, courts apply a "modified categorical approach," under which a court examines the actual elements that the jury was required to find. Mathis, 579 U.S. at 505 (citation omitted); see id. at 505-506. Here, the court of appeals correctly recognized that Section 1962(c) sets out "multiple, alternative versions of the crime," Descamps v. United States, 570 U.S. 254, 262 (2013), and is thus "a divisible statute appropriate for use of the modified categorical approach,"

Pet. App. 14a (citing United States v. Laurent, 33 F.4th 63, 88 (2d Cir.), cert. denied, 143 S. Ct. 394, and 143 S. Ct. 462 (2022)).

As an initial matter, Section 1962(c) proscribes two alternative types of conduct, making it "unlawful for any person employed by or associated with any enterprise engaged in * * * 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) (emphasis added). A Section 1962(c) violation based on "a pattern of racketeering activity," ibid., then requires the jury to find that the defendant committed "at least two acts of racketeering activity" during the relevant time period, 18 U.S.C. 1961(5). And it further requires that the particular separate acts can constitute "racketeering activity." See 18 U.S.C. 1961(1) (defining "racketeering activity"). They include violations of dozens of identified federal criminal provisions, see 18 U.S.C. 1961(1)(B)-(F), as well as "act[s] or threat[s]" involving, inter alia, "murder, kidnapping, gambling, arson, robbery, bribery, [or] extortion" that are "chargeable under State law and punishable by imprisonment for more than one year," 18 U.S.C. 1961(1)(A).

The "'constituent parts' or alternative 'elements'" of a Section 1962(c) violation are "known as 'predicate acts,'" and "need to be proven beyond a reasonable doubt to sustain a

conviction." United States v. Williams, 898 F.3d 323, 333 (3d Cir. 2018), cert. denied, 139 S. Ct. 1351 (2019). "In order to find that a defendant participated in two racketeering acts, as needed to establish a 'pattern,' the jury must be unanimous not only that at least two acts were proved, but must be unanimous as to each of two predicate acts." United States v. Gotti, 451 F.3d 133, 137 (2d Cir. 2006); see United States v. Jordan, 96 F.4th 584, 592 (3d Cir. 2024) (explaining that the substantive RICO statute "is divisible" because "the elements of these predicate acts are 'alternative "elements" that need to be proven beyond a reasonable doubt to sustain a conviction'") (citation omitted). And, as relevant here, the government cannot establish that the defendant's conduct was a specific federal crime, or was "chargeable under State law," 18 U.S.C. 1961(1)(A), without proving that the conduct satisfied the elements of the specific federal or state offense.[1]

To make the violation "chargeable under State law," 18 U.S.C. 1961(1)(A), the government must be able to prove that the defendant's conduct could have resulted in state-court charges. See United States v. Marino, 277 F.3d 11, 30 (1st Cir.) ("[F]or a

[1] Because the statute requires that the defendant's conduct also satisfy a generic definition -- e.g., that it was generic "murder," "kidnapping," or "extortion," 18 U.S.C. 1961(1)(A) -- in a case in which the generic elements are a subset of the state-law elements or vice versa, the district may instruct the jury solely on the narrower set of elements.

crime to be chargeable under state law, it must at least exist under state law."), cert. denied, 536 U.S. 948 (2002). Similarly, to establish that the defendant's conduct was in fact "punishable by imprisonment for more than one year" under state law, 18 U.S.C. 1961(1)(A), the government must be able to prove each of the state-law elements beyond a reasonable doubt. See United States v. Carrillo, 229 F.3d 177, 185 (2d Cir.) (noting that when a RICO offense is based on a violation of state law, RICO requires proof that the "predicate acts constitute state law crimes"), cert. denied, 531 U.S. 1026 (2000). Thus, where the state-law predicate contains an element, the charged RICO offense necessarily does as well. And because Section 1962(c) is divisible and incorporates various state-law offenses, substantive RICO offenses based on different predicate racketeering acts are not identical offenses but are instead "multiple separate crimes." Gray v. United States, 980 F.3d 264, 266 (2d Cir. 2020) (per curiam).

b. Context reinforces that substantive RICO does not define a single offense with varying means of committing it, but rather a multitude of offenses the elements of which are defined by the underlying predicates charged in the indictment and found by the jury beyond a reasonable doubt. See, e.g., Laurent, 33 F.4th at 89; cf. Richardson v. United States, 526 U.S. 813, 818–819 (1999) (explaining that the individual violations constituting a "continuing series of violations" under 21 U.S.C. 848(c) are each

an element, not a means, of a Section 848(c) continuing-criminal-enterprise offense) (emphasis omitted). Among other things, "RICO sets forth distinct penalties for different categories of substantive violations * * * depending on the nature of the racketeering activity charged," United States v. Martinez, 991 F.3d 347, 357 (2d Cir.), cert. denied, 142 S. Ct. 179 (2021), an indicator of separate offenses, see ibid.; 18 U.S.C. 1963(a) (increased statutory maximum "if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment"); see also Mathis, 579 U.S. at 518.

Double jeopardy principles likewise indicate that substantive RICO has different elements depending on the charged predicates. If substantive RICO were indivisible, multiple prosecutions involving the same enterprise would be precluded. But "[e]very circuit to have examined the issue has agreed that double jeopardy only bars successive RICO charges involving both the same enterprise and the same pattern of racketeering activity." United States v. DeCologero, 364 F.3d 12, 18 (1st Cir. 2004); see, e.g., United States v. Basciano, 599 F.3d 184, 200 (2d Cir. 2010) ("For successive substantive racketeering prosecutions to place a defendant twice in jeopardy for the same offense, 'both the enterprise and the pattern of racketeering activity' at issue in the two cases must be the same.") (citation and emphasis omitted).

Practice in the federal courts, including in this case, further underscores the divisibility of a substantive RICO charge. See Mathis, 579 U.S. at 518 (explaining that a "peek at the record documents" may illuminate divisibility) (brackets and citation omitted). Consistent with ordinary federal practice, the indictment specified the individual predicate acts that petitioners were charged with committing. C.A. App. A201-A218; see Pet. App. 6a-7a. The district court, in accord with the federal model jury instructions on Section 1962(c), instructed the jury that it had to agree unanimously about the predicate acts that petitioners committed in order to find petitioners guilty of a substantive RICO violation. C.A. App. A427-A428; see, e.g., 3d Cir. Pattern Jury Instructions (Crim. Cases) 6.18.1962C-8 (2021); 5th Cir. Pattern Jury Instructions (Crim. Cases) 2.79 (2019); 7th Cir. Pattern Jury Instructions (Crim. Cases) at 830 (2023); 8th Cir. Model Crim. Jury Instructions 6.18.1962A, 6.18.1962G (2021); 9th Cir. Model Crim. Jury Instructions 18.12, 18.13 (2022); 10th Cir. Pattern Jury Instructions (Crim. Cases) 2.74.6 (2021); 11th Cir. Pattern Jury Instructions, Crim. Cases O75.1 (rev. Mar. 2022). And as specified on the special verdict forms, the jury found that petitioners "had committed state law extortion." Pet. App. 43a; see C.A. App. A454-A455; Pet. App. 31a, 34a-36a.

c. Petitioners do not dispute that, if a substantive RICO violation is divisible based on the elements of the state-law crime

underlying a predicate RICO act, the predicate RICO acts here were crimes of violence under 18 U.S.C. 924(c)(3)(A).[2] Instead, they argue that, notwithstanding the instructions in their own case, the statute is not in fact divisible based on the underlying state crime or more generally. In making those arguments, petitioners assert that the federal manual on criminal RICO prepared for federal prosecutors, see Staff of the Organized Crime and Gang Section, U.S. Dept. of Justice, CRIMINAL RICO: 18 U.S.C. §§ 1961-1968: A Manual for Federal Prosecutors (6th rev. ed. 2016) (RICO Manual), https://perma.cc/U8NC-F32H, supports their view. That assertion is incorrect.

Petitioners quote a sentence of the RICO Manual explaining that not every violation of RICO qualifies as a crime of violence, see RICO Manual 463, but they fail to acknowledge that the very next sentence states that "where the underlying predicate racketeering activity for a substantive RICO * * * offense involves a crime of violence, the RICO offense qualifies as a crime

[2] The court of appeals concluded that the relevant jury instructions contained an error, in that they could have allowed the jury to find petitioners guilty based on an inchoate New York larceny-by-extortion offense or an alternative version of the offense that did not involve the use of force. See Pet. App. 31a-32a. But the court found that error nonprejudicial in light of the jury's findings that petitioners all brandished firearms during the relevant predicate acts and the overwhelming evidence showing that petitioners had directed threats of violence toward persons. Id. at 28a-35a. Petitioners do not challenge that finding, or otherwise assert any instructional error, before this Court.

of violence," id. at 463-464. Petitioners also assert (Pet. 12) that "the Government itself has recognized" in the RICO Manual that "RICO does not incorporate the elements of specific state criminal statutes." But the manual expressly states that "when a RICO charge is based upon a violation of state law that satisfies the generic definition of the predicate racketeering offense referenced in Section 1961(1)(A), the Government must prove, and the jury must be instructed on, all the requisite elements of that state offense." RICO Manual 412.

Petitioners also point to statements in the RICO Manual that Section 1961(1)(A) "identif[ies] 'generically' the kind of conduct proscribed by RICO for definitional purposes." Pet. 12 (quoting RICO Manual 28). But those statements simply explain that Congress specified the state offenses that can qualify as RICO predicate acts not by listing "specific state statutes," RICO Manual 28, but instead by referring to a "'generic' definition" of a crime, ibid. -- like "murder," "kidnapping," or "extortion," 18 U.S.C. 1961(1)(A) -- that a state-law violation must satisfy. Proof of the elements of the generic definition is thus an additional requirement for conviction, on top of the elements; as the RICO Manual makes clear, "the Government must prove * * * all the requisite elements of th[e] state offense" as well. RICO Manual 412; see p. 12 n.1, supra.

2. Contrary to petitioners' contention (Pet 21-29), the decision below does not implicate any circuit disagreement that would warrant this Court's review.

a. Petitioners contend (Pet. 25-27, 29) that the decision below conflicts with United States v. Simmons, 11 F.4th 239 (4th Cir.), cert. denied, 142 S. Ct. 574 (2021), and United States v. McClaren, 13 F.4th 386 (5th Cir. 2021), cert. denied, 142 S. Ct. 1244 (2022). Neither of those cases, however, involved substantive criminal RICO violations of Section 1962(c) -- the provision at issue here.

Instead, Simmons and McClaren both addressed a separate provision, 18 U.S.C. 1962(d), which prohibits a conspiracy to violate RICO. See Simmons, 11 F.4th at 257; McClaren, 13 F.4th at 414. The determinations in Simmons and McClaren that "RICO conspiracy convictions are not categorically crimes of violence," Simmons, 11 F.4th at 257; see McClaren, 13 F.4th at 414 (similar), do not conflict with the decision below. To the contrary, the Second Circuit has likewise determined that RICO conspiracy -- unlike substantive RICO violations -- is not a crime of violence. See United States v. Capers, 20 F.4th 105, 121-122 (2d Cir. 2021) (expressly agreeing with the decisions in Simmons and McClaren).

Petitioners point (Pet. 26) to the Fourth Circuit's statement in Simmons that Section "1961(1) lists the means -- the 'alternative methods' -- of committing an aggravated RICO

conspiracy, not additional elements for committing that offense." Simmons, 11 F.4th at 260 (emphasis omitted). But that statement focuses on "conspiracy," and the actual issue in Simmons -- whether "the RICO conspiracy statute is divisible into two kinds of conspiracies: ones in which the § 1963(a) sentencing enhancement does not apply, and ones in which it does," id. at 255 -- differs from the one here. The jury there was not instructed that it had to find the elements of a particular underlying state or federal crime in order to find guilt of the conspiracy offense. See id. at 256-257 (observing that "the [indictment], jury instructions, and verdict forms do not define the substantive murder offenses as substantive elements of the RICO conspiracy conviction"). And the court of appeals reasoned in part that, had the jury in fact found the underlying state crime, it might have found a conspiracy crime (which would not be a crime of violence) as opposed to a substantive violation, see id. at 259-260.

To the extent that the reasoning of Simmons, or the Fifth Circuit's comparable reasons in McClaren, 13 F.4th at 413, is in tension with the decision below, that reasoning may well reflect the distinct context of RICO conspiracy, which allows a defendant to be found guilty even if neither the defendant nor any of the co-conspirators completed any of the agreed-upon racketeering acts. See Salinas v. United States, 522 U.S. 52, 63, 65 (1997); Capers, 20 F.4th at 121 ("Even where the substantive crime that is

the object of a conspiracy necessarily requires the use of force, a conspiracy to commit it does not."). Substantive RICO convictions, in contrast, require a finding that the defendant personally committed at least two racketeering acts. See Salinas, 522 U.S. at 62; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). Thus, neither Simmons nor McClaren would clearly bind a future panel of the Fourth or Fifth Circuit if the issue of divisibility were presented in the context of a substantive RICO conviction.

b. Petitioners are also incorrect in asserting (Pet. 21-25) that the decision below implicates a conflict in the circuits about whether substantive RICO violations incorporate elements of state law.

The Third Circuit's decision in Williams v. Stone, 109 F.3d 890, cert. denied, 522 U.S. 956 (1997), concerned whether RICO incorporated state-law rules of evidence or procedure, such as the "period of limitations." Id. at 895 (quoting United States v. Forsythe, 560 F.2d 1127, 1134 (3d Cir. 1977)). And the Third Circuit found that it does not because, while state-law offenses serve a "definitional purpose," RICO is ultimately "a federal law proscribing various racketeering acts which have an effect on interstate or foreign commerce" and is therefore governed by federal procedural rules. Ibid. (citation omitted). At the same time, the Third Circuit recognized -- in accord with the Second

Circuit's decision here -- that, in light of the definitional role state offenses play in RICO, "RICO incorporates the elements of those state offenses" that it covers. Ibid. (quoting Forsythe, 560 F.2d at 1135).

In United States v. Kehoe, 310 F.3d 579 (8th Cir. 2002), cert. denied, 538 U.S. 1048 (2003), the defendant contended that a different provision of the RICO statute, 18 U.S.C. 1959, improperly encroaches upon state sovereignty by allowing the federal government to prosecute individuals for state-law crimes, and thus violates the Tenth Amendment. Id. at 588. In rejecting that claim, the Eighth Circuit quoted the Second Circuit's statement in United States v. Carrillo that "'RICO's allusion to state crimes was not intended to incorporate elements of state crimes' into the RICO statute." Ibid. (quoting Carrillo, 229 F.3d at 182). Carrillo itself distinguishes the "proposition that the indictment need not recite all elements of the state law offense constituting a racketeering act" from "the conclusion that the government is excused from proving those elements." 229 F.3d at 183. The Eighth Circuit's quotation of the Second Circuit's decision in Carrillo, in a case that did not directly address the issue here, does not show any conflict with Second Circuit's decision in this case.

In United States v. Welch, 656 F.2d 1039 (1981), cert. denied, 456 U.S. 915 (1982), the Fifth Circuit addressed a claim that an indictment had improperly charged a RICO offense because it cited

the wrong version of an underlying state-law crime, see id. at 1057-1058. In finding the indictment's citation of one state bribery law rather than another to be nonprejudicial, the court reasoned that either one could have provided the necessary state-law predicate; it did not hold that the elements of a state-law predicate are irrelevant to a substantive RICO count. See id. at 1058 ("The reference to state law in the [RICO] statute is for the purpose of defining the conduct prohibited.") (quoting United States v. Salinas, 564 F.2d 688, 692 (5th Cir. 1977), cert. denied, 435 U.S. 951 (1978)) (brackets and emphasis omitted); id. at 1058-1059. To the contrary, in addressing the defendant's argument that "the acts of bribery charged in the indictment were not actually acts of bribery at all," but instead violations of a different state prohibition, the court examined the elements of state law. See id. at 1059. And the Fifth Circuit later clarified, in the civil RICO context, that "the elements required to state a claim vary according to the particular RICO claim asserted," given that, among other things, "'[r]acketeering activity' is defined by reference to various state and federal offenses, each of which subsumes additional constituent elements which the plaintiff must plead." Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989) (emphasis added).[3]

[3] Petitioners additionally cite (Pet. 23) the Fifth Circuit's decision in United States v. Tolliver, 61 F.3d 1189 (1995), vacated on other grounds, 516 U.S. 1105, and 519 U.S. 802 (1996). There the court determined that it was not plain error

In United States v. Watchmaker, 761 F.2d 1459 (1985), cert. denied, 474 U.S. 1100, and 474 U.S. 1101 (1986), the Eleventh Circuit found no reversible error when a district court instructed the jury on the elements of state crimes that were not cited in the indictment. Id. at 1469. The Eleventh Circuit has since explained, in the context of a civil RICO claim, that RICO "requires that a plaintiff allege facts that support each statutory element of a violation of one of the state or federal laws described in 18 U.S.C. § 1961(1)." Raney v. Allstate Ins. Co., 370 F.3d 1086, 1087 (2004) (per curiam).

Finally, in Johnson v. United States, 64 F.4th 715 (2023), the Sixth Circuit found no error where, "when instructing the jury, the [district] court made no overt reference to any [state] statute" but instead "instructed the jury on the elements of generic armed robbery," because the state "robbery statute * * * cover[ed] more than generic robbery," id. at 722-723. In that circumstance, the jury necessarily found that the defendant

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for a district court to instruct the jury only on the generic definition underlying the state-crime predicate act, and further determined that even if the "district court had committed plain error by failing to set out the elements of murder, in no way were the [a]ppellant's substantial rights affected." Id. at 1208-1209. That determination about the absence of any plain error does not conflict with the decision below. Indeed, to the extent that the Fifth Circuit addressed the requirements of RICO in regard to state offenses, it cited decisions from the Second Circuit (the court below here). See id. at 1209.

committed the state offense, see p. 12 n.1, supra, and Johnson is therefore consistent with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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