No. 23-6702

In the
Supreme Court of the United States

Nardino Colotti, Alex Rudaj, Prenka Ivezaj,
Nikola Dedaj, and Angelo DiPietro,
Petitioners,

-v.-

United States of America,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY BRIEF FOR PETITIONERS

Michael S. Schachter
Anna Occhipinti
Willkie Farr & Gallagher LLP
787 7th Avenue
New York, NY 10019
Tel.: (212) 728-8102
aocchipinti@willkie.com
Counsel to Prenka Ivezaj

Anthony DiPietro
Law Offices of Anthony DiPietro
15 Chester Avenue
White Plains, NY 10601
Tel.: (914) 948-3242
dipietrolaw@yahoo.com
Counsel to Angelo DiPietro

Edward S. Zas
Counsel of Record
Sarah Baumgartel
Federal Defenders of New York, Inc.
52 Duane Street, 10th Floor
New York, NY 10007
Tel.: (212) 417-8742
Edward_Zas@fd.org
Counsel to Nardino Colotti,
Alex Rudaj, and Nikola Dedaj

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 2
I. The circuit splits identified in the petition are genuine and should be resolved 3
II. The Second Circuit's holdings are wrong 6
CONCLUSION 11

TABLE OF AUTHORITIES

Federal Cases

Apprendi v. New Jersey,
530 U.S. 466 (2000) 7, 8
Blockburger v. United States,
284 U.S. 299 (1932) 8
H.J. Inc. v. Northwestern Bell Tel. Co.,
492 U.S. 229 (1989) 10
Johnson v. United States,
64 F.4th 715 (6th Cir. 2023) 3, 4
Mathis v. United States,
579 U.S. 500 (2016) 7
Taylor v. United States,
495 U.S. 575 (1990) 4
United States v. Davis,
588 U.S. 445 (2019) 10
United States v. Kehoe,
310 F.3d 579 (8th Cir. 2002) 3
United States v. Knight,
659 F.3d 1285 (10th Cir. 2011) 10
United States v. Luong,
393 F.3d 913 (9th Cir. 2004) 6
United States v. Marino,
277 F.3d 11 (1st Cir. 2002) 1
United States v. McClaren,
13 F.4th 386 (5th Cir. 2021) 5, 6
United States v. Nardello,
393 U.S. 286 (1969) 4
United States v. Pungitore,
910 F.2d 1084 (3d Cir. 1990) 8
United States v. Salinas,
564 F.2d 688 (5th Cir. 1977) 3
United States v. Simmons,
11 F.4th 239 (4th Cir. 2021) 5, 6
United States v. Wallen,
953 F.2d 3 (1st Cir. 1991) 7
United States v. Watchmaker,
761 F.2d 1459 (11th Cir. 1985) 3
United States v. Welch,
656 F.2d 1039 (5th Cir. 1981) 3
United States v. Yarbrough,
852 F.2d 1522 (9th Cir. 1988) 7

Williams v. Stone,
109 F.3d 890 (3d Cir. 1997) 3

Federal Statutes

18 U.S.C. § 16 9
18 U.S.C. § 924(c)(3)(A) 9
18 U.S.C. § 924(c)(3)(B) 10
18 U.S.C. § 1961 ..... 6, 9
18 U.S.C. § 1961(1) 5
18 U.S.C. § 1961(1)(A) 1, 2, 3
18 U.S.C. § 1961(6) 3
18 U.S.C. § 1962(c) 2, 3, 5, 7, 8, 9
18 U.S.C. § 1962(d) 5
18 U.S.C. § 1963(a) 8

Other Authorities

Brief for the United States of Am., *United States v. Zichettello*, 208 F.3d 72 (2d Cir. 2000) (Nos. 98-1376(L), 98-1377, 98-1378, 98-1379, 98-1380) 2
5 Wayne R. LaFave, *et al.*, *Criminal Procedure* § 19.2(b) (4th ed. Nov. 2021 update) 9
Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920 (1987) 7
U.S. Dep't of Justice, Staff of the Organized Crime and Gang Section, *CRIMINAL RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors* (6th rev. ed. May 2016). 9, 10

INTRODUCTION

The Government's Brief in Opposition does not dispute that this case provides a good vehicle for resolving the two important questions of federal law presented by the petition. But the Government opposes certiorari, claiming that the decision below: (1) implicates no circuit split "warranting this Court's review," BIO 9-10, 18; (2) correctly concludes that RICO's reference to predicate acts "chargeable under State law" (18 U.S.C. § 1961(1)(A)) incorporates the specific elements of individual state criminal codes; and (3) properly holds that RICO's "racketeering activity" element is "divisible" into a multitude of discrete state-law predicate acts.

These claims are incorrect. First, the splits identified in the petition are genuine, have been recognized, and should be resolved. *See United States v. Marino*, 277 F.3d 11, 31 (1st Cir. 2002) (noting the circuit disagreement over whether "the state law crimes used as RICO predicate acts are to be defined[] generally or by element"). Contra the Government's opposition brief, several circuits reject the Second Circuit's position that RICO incorporates the "precise elements" of various state penal codes. *See* Pet. 21-25. Likewise, the Fourth and Fifth Circuits disagree with the Second Circuit's holding that RICO's expansive list of "racketeering activity" is divisible into individual predicate acts, thereby allowing RICO offenses to qualify (but only in some cases) as a "crime of violence." *See* Pet. 25-27.

Second, the Second Circuit misconstrues the limited role state law plays under RICO. As the Government itself argued for decades, "It is well established …

that [a RICO] Indictment need not allege all of the elements of the state law or even specify the precise state statute the defendant's actions are alleged to have violated. … The gravamen of section 1962 is a violation of federal law and reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." Brief for the United States of Am. 55-56, *United States v. Zichettello*, 208 F.3d 72 (2d Cir. 2000) (Nos. 98-1376(L), 98-1377, 98-1378, 98-1379, 98-1380) (citations and internal quotation marks omitted). The Government was right.

Finally, the Government wrongly claims that RICO is divisible because it sets forth "multiple, alternative versions of the crime." BIO 10. The plain text of the statute refutes this notion. Section 1962(c), as relevant, makes it a crime "to conduct or participate … in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." This provision contains no subsections or alternative elements. Thus, a violation of § 1962(c) is a single, indivisible federal offense that does not require "force" as an element. It is therefore not a "crime of violence" under this Court's categorical-approach jurisprudence. This Court should grant certiorari and so hold.

ARGUMENT

The petition asks this Court to resolve two significant and related circuit splits concerning (1) the elements of a RICO violation premised on acts "chargeable under State law," § 1961(1)(A); and (2) whether RICO's "racketeering activity" element, § 1961(1)(A), is divisible, such that some violations of § 1962(c) qualify as

"crimes of violence." The Government's opposition presents no good reason to leave these important and recurring questions of federal law unsettled.

I. The circuit splits identified in the petition are genuine and should be resolved.

1. As the petition discussed (at 21-25), the circuits are divided over the elements of a RICO violation predicated on racketeering acts "chargeable under State law." Five circuits hold, contrary to the Second Circuit, that § 1961(1)(A) does not incorporate the elements of state crimes as defined by a particular state's penal code. Instead, the statute simply references generic state offenses (e.g., acts involving "extortion") that can give rise to a federal racketeering violation. *See* Pet. 21-23 *(*citing, *inter alia*, *Williams v. Stone*, 109 F.3d 890, 895 (3d Cir. 1997); *Johnson v. United States,* 64 F.4th 715, 721-22 (6th Cir. 2023); *United States v. Kehoe*, 310 F.3d 579, 588 (8th Cir. 2002); *United States v. Watchmaker*, 761 F.2d 1459, 1469 (11th Cir. 1985); *United States v. Welch*, 656 F.2d 1039, 1058-59 (5th Cir. 1981); *United States v. Salinas*, 564 F.2d 688, 690 (5th Cir. 1977)).

The Government denies the existence of a cert.-worthy split, suggesting that these circuits merely hold that RICO does not incorporate a state's "procedural" or evidentiary rules. *See* BIO 20-24. Not so. *Salinas*, for example, did not involve a rule of procedure or evidence—it involved a RICO prosecution premised on state-law racketeering acts involving the collection of illegal debts allegedly "incurred in connection with the business of gambling," in violation of Texas law. 564 F.2d at 689-90; *see* 18 U.S.C. §§ 1961(6), 1962(c). But Texas had no law specifically

prohibiting the "business of gambling." The Fifth Circuit nevertheless held, relying on this Court's decision in *United States v. Nardello*, 393 U.S. 286 (1969), that the RICO prosecution was proper because RICO's "references to state law serve a definitional purpose, to identify generally the kind of activity made illegal by the federal statute." 564 F.2d at 690.

Similarly, in *Johnson,* where the defendants were charged with RICO offenses predicated on robberies in Michigan, the Sixth Circuit opined that it was not necessary to instruct the jury on the elements of robbery under Michigan law; it was sufficient to "instruct[] the jury on the elements of generic armed robbery" (although the defendants argued that the elements of generic robbery and Michigan robbery were different). 64 F.4th at 722. The Sixth Circuit relied upon this Court's reasoning in *Nardello* and *Taylor v. United States*, 495 U.S. 575, 580 (1990), to conclude that Congress's references to generic state crimes such as "robbery" were intended to have some "uniform definition" independent of the specific requirements of a given state's criminal code. *See Johnson*, 64 F.4th at 724-25.

These decisions, and similar rulings of other circuits, *see* Pet. 21-25, are fundamentally at odds with the Second Circuit's holdings that RICO incorporates the specific elements of state criminal codes. *See, e.g., United States v. Martinez*, 991 F.3d 347, 358 (2d Cir. 2021) (concluding that "RICO violations require the indictment to charge, the government to prove, and the jury to find beyond a reasonable doubt, the *precise elements of particular … state offenses*.") (emphasis added). Thus, these divergent decisions show real and significant disagreement

among the circuits as to what the Government must plead and prove to establish a RICO violation predicated on acts chargeable under state law. Accordingly, this Court's intervention is warranted.

2. The circuits also disagree over whether RICO's expansive list of "racketeering activity" (§ 1961(1)) makes RICO a "divisible" statute. The Fourth and Fifth Circuits hold, contrary to the Second and Third Circuits, that § 1961(1) does not render RICO divisible because it merely "lists the *means*—the 'alternative methods'"—of violating RICO, not "elements" of separate and divisible RICO crimes. *United States v. Simmons*, 11 F.4th 239, 260 (4th Cir. 2021); *see United States v. McClaren*, 13 F.4th 386, 413 (5th Cir. 2021). Accordingly, these circuits hold, this Court's precedent "requires that [the] categorical analysis consider *the entire class* of qualifying racketeering acts, not just the specific ones that [the defendants] committed in this case." *Simmons*, 11 F.4th at 260*; see also McClaren*, 13 F.4th at 413 (holding that RICO is not "severable").

The Government notes that *Simmons* and *McClaren* both involved conspiracies to violate RICO (§ 1962(d)), not a substantive violation of RICO (§ 1962(c)). BIO 18-20. But that distinction does not negate the split because the juries in *Simmons* and *McClaren* were required to find beyond a reasonable doubt that the defendants committed *substantive* "racketeering activity" as defined in 18 U.S.C. § 1961(1), the same statute at issue here. *Simmons*, 11 F.4th at 258-59 (noting that the jury was required to find that "the defendant[s] committed a 'racketeering activity,' as that term is defined in 18 U.S.C. § 1961, that carries a

maximum statutory penalty of life imprisonment"); *McClaren*, 13 F.4th at 413 (noting that the jury "specifically found that Defendants violated Louisiana's second-degree murder statute, which is clearly a crime of violence"). Nevertheless, the Fourth and Fifth Circuits held that the list of racketeering acts in § 1961(1) does not render RICO "divisible"—because it merely describes the different ways or "means" of engaging in racketeering activity, not "elements" of multiple and distinct RICO offenses. *Simmons*, 11 F.4th at 259, 260; *McClaren*, 13 F.4th at 413. Accordingly, this reading of § 1961(1) squarely contradicts the Second Circuit's interpretation of the same provision.

II. The Second Circuit's holdings are wrong.

The Court should also grant this petition because the Second Circuit's holdings are wrong.

1. Nothing in RICO's text, structure, or history supports the Second Circuit's view that Congress intended to saddle the Government with the burden of pleading and proving the precise and idiosyncratic elements of the various state penal codes to establish a federal RICO violation. *See* Pet. 32-35.

2. The Second Circuit, and the Government's opposition brief, are also wrong in saying that RICO is divisible, and creates "multiple separate crimes" depending on which state-law racketeering acts are proven in a particular case. BIO 13.

RICO was Congress's effort to create a single, broad federal crime. *See, e.g.*, *United States v. Luong*, 393 F.3d 913, 917 (9th Cir. 2004) (holding that "RICO

criminalizes structural conduct that is separate and apart from the predicate offenses"); *United States v. Wallen*, 953 F.2d 3, 5-6 (1st Cir. 1991) ("Although it may encompass a number of underlying acts, a RICO conviction is for a single offense."); *United States v. Yarbrough*, 852 F.2d 1522, 1531 (9th Cir. 1988) (holding that RICO sets forth "*one* federal crime—violation of the federal racketeering laws"); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 942 (1987) (noting that "section 1962(c) is defined as a single crime" and "is not reducible to the predicate acts of racketeering"). Thus, RICO is not divisible. *See Mathis v. United States*, 579 U.S. 500, 506 (2016) (holding that statutory alternatives are "means," and do not create a divisible statute, if they are merely "alternative methods of committing one offense").

The Government notes that some courts have held that RICO is divisible as between RICO offenses involving "a pattern of racketeering activity" and those involving "collection of unlawful debt." BIO 11. But that is because § 1962(c) itself sets out those two alternative elements, at least one of which must be proven beyond a reasonable doubt in every RICO prosecution for substantive racketeering. *See* § 1962(c) (prohibiting the conduct of an enterprise's affairs "through a pattern of racketeering activity *or* collection of unlawful debt") (emphasis added). The fact that RICO is divisible in this limited respect does not mean that the "pattern of racketeering activity" element is further divisible down to the hundreds (if not thousands) of individual predicate acts listed in RICO. As the petition showed, it isn't.

The Government says that RICO must be divisible because certain predicate acts can increase the statutory maximum penalty and, therefore, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), must be treated as statutory "elements." *See* BIO 13-14. In particular, the statutory maximum term of imprisonment for a violation of § 1962(c) increases from 20 years to life if the violation is based on racketeering activity that itself carries a life maximum. *See* 18 U.S.C. § 1963(a). But that has nothing to do with this case because none of the racketeering activity charged here or found by petitioners' jury carried a maximum penalty of life. The maximum penalty was the default RICO statutory maximum of 20 years, irrespective of which predicate acts were proven. Accordingly, *Apprendi* has no application, and none of the predicate acts here must be treated as "elements," rather than mere "means" of commission.

The Government also invokes "Double Jeopardy principles," arguing that "[i]f substantive RICO were indivisible, multiple prosecutions involving the same enterprise would be precluded." BIO 14. This, too, is incorrect. Whether or not RICO is "divisible," multiple (or successive) RICO prosecutions based on the same enterprise, but a different "pattern of racketeering activity," would not necessarily offend Double Jeopardy principles. The reason is straightforward: the Double Jeopardy Clause permits successive prosecutions if they are based on offenses committed on different occasions (or involving different victims), even if the legal "elements" of the offenses are technically the same. *See, e.g., Blockburger v. United States*, 284 U.S. 299, 301-02 (1932) (stating that a defendant may be convicted and

punished for multiples incidents that are similar without violating the Double Jeopardy Clause so long as the relevant statutes prohibit "individual acts" and the incidents consist of "distinct and separate" acts committed "at different times"); *United States v. Pungitore*, 910 F.2d 1084, 1109 (3d Cir. 1990) (holding that the Double Jeopardy Clause does not foreclose "successive prosecutions in cases of compound-complex felonies such as RICO, which involve several criminal acts occurring at different times in different places"); *see generally* 5 Wayne R. LaFave, *et al.*, *Criminal Procedure* § 19.2(b) (4th ed. Nov. 2021 update) ("Of course, even if the crimes charged in [successive] prosecution[s] do not each present a separate element, that does not invariably mean that they present the same offense. The facts sustaining the elements may have been different, producing different offenses, *as where the defendant in the same criminal episode commits the same crime against different victims or on separate occasions commits the same crime against the same victim*.") (emphasis added).

The petition notes that the Second Circuit's holding—that substantive racketeering in violation of § 1962(c) can qualify as a "crime of violence" under the "force" clause of § 924(c)(3)(A)—contradicts the Government's own longstanding position. Pet. 13. The Government's *RICO Manual*[1] (last updated in 2016), expressly recognizes that, "[b]y definition, RICO is not a crime of violence: it is not

[1] U.S. Dep't of Justice, Staff of the Organized Crime and Gang Section, *CRIMINAL RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors* (6th rev. ed. May 2016).

'an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *RICO Manual* at 463 (quoting 18 U.S.C. § 16). The Government now tries to run away from this conclusion, arguing that the "very next sentence" of the *RICO Manual* says that a RICO offense can qualify as a "crime of violence" if the underlying racketeering activity involves a "crime of violence." BIO 16-17. The Government fails to mention that this sentence was based on cases interpreting the sweeping (and now-defunct) *residual clause* of § 924(c)(3)(B), which this Court struck down as unconstitutional in *United States v. Davis*, 588 U.S. 445 (2019)—*not the force clause*. *See RICO Manual* at 463-64 (citing cases interpreting the residual clause, § 924(c)(3)(B)). Thus, the sentence the Government invokes does nothing to undermine the Justice Department's own conclusion that RICO, "[b]y definition," does not qualify as a "crime of violence" under the force clause. *RICO Manual* at 463.

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Uncertainty "is bad enough with respect to any statute, but it is intolerable with respect to RICO." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Kennedy, J., concurring). Given the persistent confusion and division over the two important questions presented, this Court should take this opportunity to bring badly needed clarity to RICO, a "powerful" but "confounding" statute. *United States v. Knight*, 659 F.3d 1285, 1288 (10th Cir. 2011).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward S. Zas
Counsel of Record
Sarah Baumgartel
Federal Defenders of New York, Inc.
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8742
Edward_Zas@fd.org

Counsel to Nardino Colotti, Alex Rudaj, and Nikola Dedaj

Michael S. Schachter
Anna Occhipinti
Willkie Farr & Gallagher LLP
787 7th Avenue
New York, NY 10019
Tel.: (212) 728-8102
aocchipinti@willkie.com

Counsel to Prenka Ivezaj

Anthony DiPietro
Law Offices of Anthony DiPietro, P.C.
15 Chester Avenue
White Plains, NY 10601
Tel. (914) 948-3242
dipietrolaw@yahoo.com

Counsel to Angelo DiPietro