No. 24-5754

IN THE

Supreme Court of the United States

AZIBO AQUART,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Federal district courts have jurisdiction over only those criminal prosecutions that allege "offenses against the laws of the United States." 18 U.S.C. § 3231. The government candidly admits that there is a circuit split arising from *United States* v. *Cotton*, 535 U.S. 625 (2002), concerning whether indictment defects are categorically non-jurisdictional under § 3231. Opp. 16–20. Though the government tries to minimize this disagreement, there is no way to reconcile the categorical approach of the Second, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits with the more nuanced approach of the First and Eleventh Circuits. And on the merits, the government fails to address the absurd consequences that follow when indictment defects are treated as categorically non-jurisdictional.

Finally, this case is a suitable vehicle to resolve the split. For example, the Second Circuit refused to consider Mr. Aquart's argument regarding his VICAR convictions based solely on its view that he alleged non-jurisdictional errors. If that view is wrong, a remand will be necessary so that the courts below may consider his arguments concerning the VICAR statute in the first instance. And contrary to the government's argument, there is at least a substantial question on the merits of those arguments, given this Court's precedent mandating the categorical approach under similar statutory schemes.

ARGUMENT

I. The government concedes that the courts of appeals are split on the question presented.

Since this Court decided *Cotton* over two decades ago, the circuits have divided over its meaning. The

Second, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits have read *Cotton* to mean that indictment defects are never jurisdictional. See *United States* v. *Rubin*, 743 F.3d 31, 37 (2d Cir. 2014); *United States* v. *Scruggs*, 714 F.3d 258, 261 (5th Cir. 2013); *Vanwinkle* v. *United States*, 645 F.3d 365, 367–68 (6th Cir. 2011); *United States* v. *Perez*, 673 F.3d 667, 668 (7th Cir. 2012); *United States* v. *De Vaughn*, 694 F.3d 1141, 1142–43 (10th Cir. 2012); *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1339 (D.C. Cir. 2004). The First and Eleventh Circuits, by contrast, have rejected this categorical approach and instead held that whether an indictment defect is jurisdictional depends on the type of defect. See *United States* v. *Rosa-Ortiz*, 384 F.3d 33, 34 (1st Cir. 2003); *United States* v. *Peter*, 310 F.3d 709, 715 (11th Cir. 2002) (per curiam).

The government does not deny the split. Indeed, it acknowledges that the First and Eleventh Circuits have issued opinions concerning the jurisdictional nature of indictment defects that conflict with the opinions of other circuits. Opp. 17–20. Instead, it argues that the disagreement "has become increasingly narrow and does not warrant the Court's review in this case." *Id.* at 20. But none of the government's contentions succeed in refuting or minimizing the significance of this circuit split.

1. The government argues that, in *United States* v. *Brown*, the Eleventh Circuit limited *Peter* to the "specific and narrow circumstances" presented in that case. Opp. 20 (quoting 752 F.3d 1344, 1353 (11th Cir. 2014)). The circumstances in *Peter* were such that the conduct alleged in the indictment "undoubtedly fell outside the sweep of the [charging] statute." *Brown*, 752 F.3d at 1353. In *Brown*, by contrast, the indictment indisputably charged a federal offense but simply "omitted one element" of that offense. *Id.*

Brown is not relevant here. The indictment against Mr. Aquart is defective not because it is missing any elements of a federal offense, but rather because it alleges conduct that simply does not constitute a federal offense. *Peter* controls this case, not *Brown*.

Relying on *Brown*'s interpretation of *Peter*, the government says the Eleventh Circuit considers indictment defects to be jurisdictional only when it is "clear from the face of the charging document that the misconduct alleged [is] not a federal crime." Opp. 20. That purported limitation is illogical. Again, a federal district court has jurisdiction when an indictment alleges an "offense[] against the laws of the United States." 18 U.S.C. § 3231. Federal jurisdiction does not extend to a twilight zone where the conduct alleged in the indictment *might* be a federal offense and does not *obviously* fall outside the sweep of the charging statute, dependent upon a subjective determination by the assigned judge.

Further, the government's purported limitation on *Peter* does nothing to diminish the significance of the circuit split. The courts of appeals are divided over whether indictment defects are *categorically* non-jurisdictional. Even if indictment defects in the Eleventh Circuit are only *sometimes* jurisdictional under narrow circumstances, that approach is still deeply at odds with the view of the Second, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits, where indictment defects are *always* non-jurisdictional.

2. Turning to the First Circuit, the government notes that *Rosa-Ortiz* "did not mention, let alone attempt to distinguish, this Court's decision in *Cotton*." Opp. 17. The fact that *Rosa-Ortiz* does not cite *Cotton*—which had been decided by the Court only one year earlier—has no bearing on the precedential value of the First Circuit's opinion. If anything, it suggests

that *Cotton* does not sweep as broadly as other courts have subsequently found and as the government now argues.

The government insists that "the First Circuit has both distinguished and questioned the continuing validity of *Rosa-Ortiz*" in subsequent opinions, including *United States* v. *Gonzalez-Mercado*, 402 F.3d 294 (1st Cir. 2005), and *United States* v. *George*, 676 F.3d 249 (1st Cir. 2012). Opp. 17. But the government does not contend that *Rosa-Ortiz* has ever been overruled by the First Circuit sitting en banc or abrogated by a decision of this Court. In the absence of any such decision, the clear holding of *Rosa-Ortiz* remains the law of the First Circuit. And the First Circuit left no room for ambiguity when it explained that a federal court "lacks jurisdiction to enter a judgment of conviction when the indictment charges no offense under federal law whatsoever." *Rosa-Ortiz*, 348 F.3d at 36.

Moreover, the subsequent cases cited by the government are inapposite. In *Gonzalez-Mercado*, the First Circuit explained that the case was "a horse of a different hue" than *Rosa-Ortiz* because the appellant did not argue that "the indictment failed to charge a cognizable federal offense" or that the district court "lacked authority to hear the case in the first instance." *Gonzalez-Mercado*, 402 F.3d at 300. And in *George*, the First Circuit described *Rosa-Ortiz* as using an "awkward locution" to describe "a non-waivable defect," since *Cotton* had clarified that "an indictment's factual insufficiency does not deprive a federal court of subject matter jurisdiction." *George*, 676 F.3d at 259–60. That limitation of *Rosa-Ortiz* is not relevant here, as this case involves a non-offense, not factual insufficiency.

II. The government does not dispute the absurd results of treating indictment defects as categorically non-jurisdictional.

As the petition explained—and as the government does not dispute—treating indictment defects as categorically non-jurisdictional would require federal courts to exercise jurisdiction in situations where it is obvious that no federal offense could occur. Pet. 11. Not only does this approach violate the plain language of the jurisdictional statute—"offenses against the laws of the United States," 18 U.S.C. § 3231—it also removes an important check on the authority of federal prosecutors.

Consider the hypotheticals raised in the petition, which the government ignores. Under the government's approach to indictment defects, a prosecutor could file an indictment alleging that a defendant violated the racketeering statute, 18 U.S.C. § 1961(1), by participating in a conspiracy to deal in the controlled substance of sugar. Pet. 12. Or a prosecutor could file an indictment alleging that a defendant is subject to additional penalties for carrying a firearm while engaging in the "crime of violence" of cyberbullying. *Id.* (quoting 18 U.S.C. § 924(c)(1)(A)). Obviously, neither indictment would allege a federal offense because sugar is not a controlled substance, see 21 U.S.C. § 802(6), and cyberbullying is not a crime of violence, see 18 U.S.C. § 924(c)(3)(A). But under the government's reasoning, these issues would go to the merits of the government's case, and a district court would therefore be obligated to exercise jurisdiction over the indictments.

The government offers no response. But it cannot be the case that a federal prosecutor can invoke the criminal jurisdiction of a district court simply by slapping

the label of a federal criminal statute on an indictment. The power of the federal government to prosecute individuals for criminal offenses is not so unbounded. Cf. *Class* v. *United States*, 583 U.S. 174, 181 (2018) ("[A] guilty plea does not bar a claim on appeal where on the face of the record the court had no power to enter the conviction or impose the sentence." (internal quotation marks omitted)). Yet that is the consequence of the government's view of indictment defects, carried to its logical endpoint.

Borrowing from the civil context, the government cites *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), for the proposition that "to ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question." Opp. 15 (quoting *Morrison*, 561 U.S. at 254). In *Morrison*, the jurisdictional statute at issue, 15 U.S.C. § 78aa, gave the district court exclusive jurisdiction over violations of the Securities Exchange Act. The plaintiff alleged transnational securities fraud, and the question presented was whether section 10(b) of the Exchange Act applies extraterritorially. See *Morrison*, 561 U.S. at 251–54. The Court concluded that the jurisdictional statute authorizes the district court to determine whether section 10(b) applies to extraterritorial conduct. *Id.* at 254. That is a far cry from holding that a district court has jurisdiction to review any allegations whatsoever, no matter how far removed from the statute. It would be farcical to suggest, for example, that a district court has jurisdiction to review whether jaywalking violates the Securities Exchange Act.

Indeed, the government's analogy is properly turned around. In the civil context, "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper . . . [if] the claim is so insubstantial, implausible . . . or otherwise completely

devoid of merit as not to involve a federal controversy." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (cleaned up). Although such claims are framed under federal law and purportedly invoke "a federal right," they lie beyond the district courts' jurisdiction over civil claims "arising under the Constitution, laws, or treaties of the United States." See *Oneida Indian Nation* v. *Oneida Cnty.*, 414 U.S. 661, 667 (1974). By the same token, an indictment alleging conduct that *cannot* constitute a federal offense does not trigger the district courts' criminal jurisdiction.

III. The case is a suitable vehicle to resolve the question presented.

According to the government, this case is not an appropriate vehicle because Mr. Aquart's legal arguments will ultimately fail, even if he is permitted to raise them on a remand for resentencing. Opp. 20. But as the petition explained, both the VICAR and drug-related murder counts at least raise substantial questions that the Second Circuit would have to address if it had jurisdiction to do so.

For example, with respect to the VICAR murder conviction, the government contends that the VICAR statute, 18 U.S.C. § 1959, "does not require that the state crime underlying a charge of VICAR murder categorically match the federal generic crime." Opp. 21. The only case the government cites that adopted this interpretation of the VICAR statute is *United States* v. *Keene*, 955 F.3d 391 (4th Cir. 2020), which involved a conviction of VICAR assault with a dangerous weapon. Opp. 21. But neither this Court nor the Second Circuit has addressed whether the categorical approach to comparing state offenses to federal generic offenses applies to the VICAR statute. See *United States* v. *Ray*, No. 20-cr-110, 2022 WL 17175799, at *13 & n.4 (S.D.N.Y. Nov. 23, 2022). And this Court has held that

the categorical approach applies in various statutory schemes that similarly require comparing state offenses to federal generic offenses. See, e.g., *Taylor* v. *United States*, 495 U.S. 575, 600 (1990) (applying the categorical approach to 18 U.S.C. § 924(e)); *Sessions* v. *Dimaya*, 584 U.S. 148, 153–54 (2018) (applying the categorical approach to 18 U.S.C. § 16(b)); *United States* v. *Davis*, 588 U.S. 445, 455–56 (2019) (applying the categorical approach to 18 U.S.C. § 924(c)). Indeed, the Second Circuit evidently concluded that Mr. Aquart's arguments on the VICAR issue were complex enough that it should not try to address them in the alternative. See Pet. App. 13a ("Whatever the merits of this line of reasoning—a matter we do not pursue . . . .").

If the Court grants the petition and ultimately concludes that the defects in Mr. Aquart's indictment are non-jurisdictional, a remand will be necessary for the lower courts to determine in the first instance whether the categorical approach applies to the VICAR statute. Given this Court's categorical-approach precedents, there is at least a substantial chance that Mr. Aquart will prevail on the merits. Accordingly, this case presents a proper vehicle for addressing the question presented and resolving the circuit split over the jurisdictional nature of indictment defects.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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