No. _____

IN THE

Supreme Court of the United States

JAWAN FORTIA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it a federal crime to participate in a criminal enterprise (most often, a local street gang) that is either "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(c). The Violence in Aid of Racketeering Act (VICAR) prohibits murder and other violent acts committed in furtherance of such an enterprise. 18 U.S.C. § 1959. For decades, courts have been confused about the nature and level of proof required to satisfy RICO's commerce-clause element, leading to a complex and multidimension circuit split. Some courts, like the Fifth Circuit in this case, hold that the government can obtain a RICO or VICAR conviction without proving that gang members actually engaged in or that their activities in fact affected interstate commerce at all. Instead—relying on the "aggregation of commerce" principle taken from cases examining the scope of federal jurisdiction under the Commerce Clause—those courts hold that RICO's interstate-commerce element is automatically satisfied if gang members engaged in a broad *class* of activity that has been determined to affect interstate commerce in the *aggregate*. In other words, RICO and VICAR punish purely local gang crime, even when the government does not prove that the gang's activities themselves affected interstate commerce.

The question presented is:

What proof is required to satisfy RICO and VICAR's interstate-commerce elements, and, more specifically, must prosecutors prove that an enterprise's activities in fact affected interstate commerce or is it sufficient to prove that

enterprise members engaged in a category of activity deemed to affect interstate commerce in the aggregate?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Wilson et al.*, No. 14-cr-131, U.S. District Court for the Eastern District of Louisiana. Initial judgment entered October 3, 2017.
- *United States v. McClaren et al.*, No. 17-30524, U.S. Court of Appeals for the Fifth Circuit. Judgment and remand entered September 9, 2021.
- *United States v. Wilson et al.*, No. 14-cr-131, U.S. District Court for the Eastern District of Louisiana. Final judgment entered November 28, 2023.
- *United States v. Fortia*, No. 23-30873, U.S. Court of Appeals for the Fifth Circuit. Summary affirmance entered July 24, 2024.

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JAWAN FORTIA,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jawan Fortia respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

On June 19, 2017, a jury convicted Mr. Fortia of participating in a racketeering conspiracy, committing a murder in furtherance of that conspiracy, a drug conspiracy, and a firearms conspiracy. The district court sentenced him to life imprisonment. Mr. Fortia timely appealed his judgment, and a panel of the Fifth Circuit reversed his gun conspiracy conviction and remanded his drug conspiracy conviction for resentencing. The Fifth Circuit Court of Appeals issued an initial opinion on May 18, 2021, which is reported at 998 F.3d 203. On September 9, 2021, after Mr. Fortia filed petitions for rehearing and rehearing en banc, that initial opinion was withdrawn and superseded by a second and final opinion, which is attached hereto as part of the Appendix and is available at 13 F.4th 386.

Following resentencing pursuant to the Fifth Circuit's remand, Mr. Fortia timely appealed his district court judgment and filed an unopposed motion for summary disposition of his appeal, recognizing that all remaining challenges had been adjudicated and were foreclosed by the Fifth Circuit's ruling on his first appeal. A panel for the Fifth Circuit granted the motion and entered judgment on July 24, 2024.

Copies of the two panel decisions are attached to this petition as an Appendix.

JURISDICTION

The final judgment of the Fifth Circuit Court of Appeals was entered on July 24, 2024. No petition for rehearing was filed. On September 30, 2024, Mr. Fortia filed with this Court a timely Application for Extension of Time to File a Petition for Writ of Certiorari. Justice Alito granted that application on October 2, 2024, extending the time in which to file Mr. Fortia's petition November 21, 2024. Thus, this petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art I, § 8, cl. 18 of the U.S. Constitution provides that Congress shall have the power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, 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. § 1959 provides in relevant part:

> Whoever, . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—
>
> . . . for murder, by death or life imprisonment, or a fine under this title, or both[.]

STATEMENT OF THE CASE

For decades, courts have been confused about the nature and level of proof required to satisfy RICO's critical commerce-clause element, leading to a complex and multidimension circuit split. Central to that confusion is how to apply this Court's "aggregation of commerce" theory described in cases like *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Taylor v. United States*, 579 U.S. 301, 312 (2016). That theory applies when determining the full scope of federal jurisdiction to regulate crime under the Commerce Clause. As this case illustrates, though, courts have improperly imported the principle into questions of proof, namely, whether prosecutors have met specific statutory requirements to show an interstate-commerce effect in individual cases before obtaining a conviction. That is exactly what happened here, where the Fifth Circuit held that federal prosecutors could reach purely local gang activity, without actually proving that any of the gang's activities in fact affected interstate commerce.

This case presents a long overdue opportunity to clarify the meaning of RICO's interstate-commerce element and the limits on commerce-based federal jurisdiction over local violent crime.

I. Expansion of Federal Criminal Law through the Commerce Clause.

"Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). "'The Constitution,' in short, 'withhold[s] from Congress a plenary police power.'" *Taylor*, 579 U.S. at 312 (Thomas, J., dissenting) (quoting *Lopez,* 514 U.S. at 566). And there is "no better example of the police power, which the Founders denied the National Government

and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000). Thus, "Congress has 'no general right to punish murder committed within any of the States,' for example, and no general right to punish the many crimes that fall outside of Congress' express grants of criminal authority." *Taylor*, 579 U.S. at 312 (Thomas, J., dissenting) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 426, 5 L.Ed. 257 (1821)).

Despite this foundational understanding, the past fifty years have been marked by a "rapid federalization of criminal law."[1] In 1998, the American Bar Association (ABA) warned of this "explosive growth," observing that "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970."[2] Nearly two decades later, the ABA again warned Congress that the pace of new federal criminal laws had continued unabated, resulting in a bloated federal criminal code containing more than 4,500 separate federal criminal statutes.[3] Of course, many of those federal criminal statutes purport to rely on the Commerce Clause for their authority—the constitutional provision granting Congress power "[t]o regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const. art. I, § 8, cl. 3. In reality, though, the laws often constitute extensive federal regulation of purely intrastate criminal activity.[4]

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[1] Thane Rehn, *Rico and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 Colum. L. Rev. 1991 (2008).

[2] Task Force on the Federalization of Criminal Law, Am. Bar Ass'n, The Federalization of Criminal Law 7 (1998).

[3] *See* Am. Bar Ass'n, "ABA describes over-criminalization problems in criminal justice system" (Jun. 1, 2013), *available:* https://www.americanbar.org/advocacy/governmental_legislative_work/publications/governmental_affairs_periodicals/washingtonletter/2013/june/overcriminalization/

[4] Rehn, *supra.*

On occasion, this Court has attempted to set limits on the expansion of criminal law through the commerce clause, warning that the federal government may not seek to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. At the same time, commendatores have noted the mixed signals sent by this Court's modern commerce-clause jurisprudence.[5]

In *Perez v. United States*—which examined Congressional action regulating loan sharking—this Court established the three-part framework now ubiquitous in modern Commerce Clause jurisprudence. 402 U.S. 146, 154 (1971). Specifically, this Court identified three general areas that Congress may permissibly regulate under the Commerce Clause: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and, relevant here, (3) "those activities affecting commerce." *Id.* at 150. Critically, in *Perez*, the Court did not look to whether an effect on interstate commerce could be shown in every single loan-sharking prosecution. Instead, the Court asked whether the overall "*class of activities*" regulated by Congress lay within the reach of federal power. *Id.* at 154. Thanks to *Perez*, "[w]hen Congress regulates a class of activities involved with interstate commerce, the courts permit prosecution of local crimes that are a part of the larger class, regardless of whether the particular crime has a substantial effect on interstate commerce." Thane Rehn, *Rico and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 Colum. L. Rev. 1991, 1996 (2008).

[5] *See, e.g.*, Ruhn, *supra*; Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 Am. J. Comp. L. 671, 685 (2006).

In more recent decades, this Court has reiterated and expanded application of this "class of activities" analysis. Most notably, in *Gonzales v. Raich*, this Court held that the Commerce Clause authorizes Congress to regulate the national marijuana market, even if that regulation happens to also capture purely intrastate drug activities of a noneconomic nature. 545 U.S. 1 (2005). The Court's reasoning took root in *Perez* and the "class of activity" theory, reasoning that intrastate drug transactions fall within the *classes* of activities that Congress has a "rational basis" to believe affect interstate commerce in the *aggregate*. *Id*. at 22-23 ("[W]e have often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances' of the class.'" (quoting *Perez,* 402 U.S. at 154).

A decade later, in *Taylor v. United States*, this Court reaffirmed Congress's authority to regulate the national market for marijuana, including conduct that "even in the aggregate, may not substantially affect commerce." 579 U.S. at 309. Specifically, *Taylor* examined the scope of the Hobbs Act, which prohibits robbery that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). The Hobbs Act defines "commerce" as encompassing "all other commerce over which the United States has jurisdiction"—not just interstate commerce specifically. § 1951(b)(3). Based on its particular wording, this Court held that the Act's commerce element is a "purely legal determination," and it is therefore proper for the court to instruct the jury that "the market for marijuana . . . is commerce over which the United States has jurisdiction."

United States v. Woodberry, 987 F.3d 1231, 1235 (9th Cir. 2021) (describing *Taylor*'s holding). Thus, a robbery of marijuana necessarily "obstructs, delays, or affects" commerce "over which the United States has jurisdiction." Because the defendant robbed a drug dealer (as a factual matter) and because the United States has jurisdiction over the illegal drug market (as a legal matter), the defendant "necessarily affect[ed] . . . commerce *over* which the United States has jurisdiction." *Id.* at 2078 (emphasis added). In dissent, Justice Thomas warned of the Court's holding "creates serious constitutional problems and extends our already expansive, flawed commerce-power precedents." *Id.* at 311 (Thomas, J., dissenting).

As Justice Thomas warned, many view *Raich* and its progeny as the death of any meaningful limit on the commerce-clause's reach. Indeed, "[j]ust as some scholars had predicted the *Raich* principle has been interpreted as preserving few restrictions on congressional power, particularly in cases where a congressional statute is broad enough to sweep a wide category of activity within its purview." Rehn, *supra*, at 2018. And, relevant here, "[t]he circuit split over RICO"—discussed below—"provides an illustration of [that] general retreat from upholding Commerce Clause challenges." *Id.* at 2006.

II. The Racketeering and Corrupt Organizations Act

Perhaps no law better typifies the criminal-federalization trend—and its parallel commerce-clause expansion—than the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C. §§ 1961-1968; *see also* Erwin Chemerinsky, Constitutional Law: Principles and Policies 263 (3d ed. 2006) (describing RICO as "one of the broadest and most important contemporary statutes"). RICO makes it a

federal crime for "any person employed by or associated with any enterprise engaged, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in a pattern of racketeering activity." 18 U.S.C. § 1962(c). RICO's corollary statute, Violent Crimes in Aid of Racketeering Activity (VICAR), establishes a federal offense for violent crimes committed in furtherance of a RICO organization, including murder, assault, kidnapping, and threats made in connection with a racketeering enterprise. 18 U.S.C. § 1959.

RICO defines "racketeering activity" expansively—covering numerous state-law violations with no federal nexus, including murder, robbery, and assault. *See* § 1961(1). Thus, RICO is, in essence, a pass-through provision allowing the federal government to breach the state domain. And the criminal activity it reaches generally falls within the sole province of the states and far outside the reach of federal jurisdiction. That makes proof of jurisdiction in RICO prosecutions critical, and the Constitution and Congress thus strictly circumscribe the statute's reach. RICO authority derives solely from the Commerce Clause, incorporating an explicit interstate-commerce nexus requirement, requiring proof beyond a reasonable doubt in each case that the charged enterprise either engaged in or its activities affected interstate commerce. § 1962(c).

Unquestionably, RICO's use by federal prosecutors today bears little resemblance to its original purpose. Congress initially enacted RICO in 1970 "to dismantle the Mafia and other bodies of organized crime with great economic influence." Jordan Blair Woods, *Systemic Racial Bias and Rico's Application to*

Criminal Street and Prison Gangs, 17 Mich. J. Race & L. 303, 304 (2012). As commentators have observed, "RICO's legislative findings demonstrate that Congress was particularly concerned with the infiltration of legitimate businesses that would necessarily be engaged in economic activities." Note, *First Circuit Upholds Application of RICO to Criminal Gang Not Engaged in Economic Activity*, 121 Harv. L. Rev. 1961, 1968 (2008).

Despite its original purpose, prosecutors in recent decades have shifted increasingly to using RICO to reach violent acts and other state-law crimes committed by small and purely local street gangs, rather than the economically influential mafia-style organizations to which the law initially was directed. Rehn, *supra*, at 1999. That expansion has been the subject of intensive criticism. *See, e.g.*, Jordan Blair Woods, *Systemic Racial Bias and Rico's Application to Criminal Street and Prison Gangs*, 17 Mich. J. Race & L. 303, 305–06 (2012) (collecting scholarship and noting that, "[a]s a matter of statutory interpretation, some scholars posit that Congress intended for RICO to apply exclusively to highly organized enterprises that infiltrate legitimate businesses, and that criminal street gangs do not fit this description"); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 680 (1987) ("[N]owhere in the legislative history is there even a glimmer of an indication that RICO or any of its predecessors was intended to impose additional criminal sanctions on racketeering acts that did not involve infiltration into legitimate business.").

Federal prosecutors' use of RICO to reach local criminal street gangs has led to mass-confusion among district and circuit courts alike regarding the nature and scope of federal jurisdiction in a context that has traditionally been reserved solely for state action. Because RICO expressly criminalizes state-law offenses that unquestionably fall outside of the federal domain (such as murder and assault), the statute's jurisdictional element is critical. Congress expressly limited RICO's scope to enterprises proven to have "engaged, or the activities of which affect, interstate or foreign commerce." That jurisdictional element is necessary to RICO's constitutionality. As the Eight Circuit has explained, it ensures that the enterprise in each case is at least minimally connected to interstate commerce and therefore fundamentally distinguishes RICO and VICAR from other federal statutes struck down by this Court for failing to require sufficient connection to Congress's commerce-clause authority. *United States v. Crenshaw*, 359 F.3d 977, 986 (8th Cir. 2004) (citing *Lopez*, 514 U.S. at 566; *Morrison*, 529 U.S. at 618).

Notably, RICO's interstate-commerce element is not unique to racketeering regulation—identical and substantially similar jurisdictional elements are scattered throughout dozens of federal criminal statutes, ranging from tampering with consumer products, *see* 18 U.S.C. § 1365, to hate crime legislation federalizing certain assaults, *see* § 249(a)(2)(B)(iv)(II), to the most widely applied federal firearm regulation, *see* § 922(g). Thus, this specific interstate-nexus element is a ubiquitous and common means by which Congress limits the reach of federal criminal law and ensures that federal prosecutors respect constitutional limits on Congress's ability to

regulate local affairs. In RICO's case, it represents the critical barrier preventing federal prosecutors from impermissibly piercing the state domain of local, violent crime.

In some RICO prosecutions, proof of such an interstate nexus has been relatively straight forward. For example, prosecutors have put forth evidence that an enterprise used interstate money transfer services as a part of their activities,[6] wrote bonds through an out-of-state company,[7] or caused the breaking of out-of-state contracts.[8] However, the line delineating sufficient from insufficient proof becomes blurrier in gang-related prosecutions, in which enterprise activity is highly localized and less economically focused—generally involving low-level drug-dealing and violent crime. When alleged gang members sold drugs, some courts have deemed it sufficient for prosecutors to prove that drugs sold came from another state—or for evidence to show the drugs at issue necessarily had to cross state lines or international boarders.[9]

Within these areas of gray, circuit splits have emerged. Most courts apply a highly permissible standard that merely requires an enterprise's predicate acts to have a *de minimis* impact on interstate or foreign commerce. *See, e.g.*, Woods, *supra*, at 316–17 (collecting cases and citing *United States v. Shryock*, 342 F.3d 948, 984 (9th Cir. 2003) (holding that the district court "correctly instructed the jury that a de

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[6] *United States v. Delgado*, 401 F.3d 290, 297 (5th Cir. 2005).

[7] *United States v. Walker*, 348 F. App'x 910, 912 (5th Cir. 2009).

[8] *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001).

[9] *See, e.g.*, *United States v. Velasquez*, 881 F.3d 314, 329 (5th Cir. 2018); *United States v. Gray*, 137 F.3d 765, 773 (4th Cir. 1998); *Delgado*, 401 F.3d at 297; *Crenshaw*, 359 F.3d at 992.

minimis affect on interstate commerce was sufficient to establish jurisdiction under RICO"); *United States v. Marino*, 277 F.3d 11, 35 (1st Cir. 2002) (holding that "the government does not need to show that the RICO enterprise's effect on interstate commerce is substantial"); *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001) (holding that "a de minimis connection suffices for a RICO enterprise that 'affects' interstate commerce"); *United States v. Miller*, 116 F.3d 641, 674 (2d Cir. 1997) (holding "the government need only prove that the individual subject transaction has a de minimis effect on interstate commerce" to satisfy § 1962(c))). In those courts, "[t]his low threshold allows the government to satisfy the interstate and foreign commerce element of RICO quite easily in cases that involve criminal street gangs." *Id*.

Other courts have refused to accept such a low standard for RICO's critical "affecting commerce" element, particularly when it comes to criminal street gangs, which are predominantly noneconomic in nature. For example, in *Waucaush v. United States*, the Sixth Circuit held that RICO could not reach members of a gang that engaged in violent, but noneconomic, activity unless prosecutors proved that the gang's activities *substantially* affected interstate commerce. 380 F.3d 251 (6th Cir. 2004). Shortly thereafter, in *United States v. Nascimento*, the First Circuit expressly rejected the Sixth Circuit's framework, holding that criminal street gangs—even those that engage in violent noneconomic activity—need only be shown to have had some "de minimis" effect on interstate commerce for a RICO conviction to be valid. 491 F.3d 25 (1st Cir. 2007).

At the heart of this conflict—and animating the decision in this case as well—is how to apply the "class of activity" or "aggregation of commerce" framework to RICO's interstate commerce element. Courts remain confused about both the nature and level of proof required to satisfy RICO's jurisdictional requirement.

III. The Young Melph Mafia Prosecution.

This case illustrates both the confusion discussed above and federal prosecutors' increasingly aggressive use of RICO to reach highly localized crime without any clear interstate-commerce nexus. The "Young Melph Mafia" (YMM) was a loosely organized street gang made up of teenagers who grew up together in and around the Melpomene Housing Projects in New Orleans. Some defendants—like Petitioner Jawan Fortia—were as young as fourteen when the alleged "RICO conspiracy" began, and all alleged acts by YMM members occurred within New Orleans—largely within the single neighborhood of Central City. Individual members, including Mr. Fortia, were initially charged with a collection of state law offenses, such as murder and assault. But federal prosecutors adopted the case and recharged those state law offenses as "predicate acts" for a sweeping RICO conspiracy. The various alleged murders were also charged as individual VICAR counts.

The resulting federal trial centered around purely local violence—including numerous murders—committed over an eight-year period by YMM "members." Evidence submitted by prosecutors demonstrated that some YMM members sold drugs in addition to committing various acts of violence, though the alleged violent acts did not appear to be committed in pursuit of that drug dealing. Instead, witnesses

testified that shootings arose from escalating schoolyard brawls and personal vendettas, not a turf war between rival drug syndicates. For his part, Mr. Fortia was alleged to have been a YMM member, accused of committing one murder himself and of engaging in occasional drug dealing as well.

At trial, prosecutors focused their efforts almost exclusively on proving the elements of the underlying state crimes alleged, i.e., the various acts of back-and-forth violence. Meanwhile, prosecutors simply ignored the need to prove that YMM either engaged in or that the group's activities in any way affected interstate commerce. Certainly, none of the violent acts committed by YMM members had such an effect. And, though witnesses testified that some YMM members sold drugs around the Central City neighborhood, the prosecution submitted no evidence that those members purchased drugs from outside Louisiana (or even Orleans Parish). Indeed, prosecutors did not even attempt to prove that those drugs necessarily would have had to have crossed state lines to reach Central City. And prosecutors made no mention of the interstate market for narcotics. Juries heard no evidence of the sort.

Instead, perhaps suddenly aware of this gap at the conclusion of their case, prosecutors in closing argument simply told the jury that RICO's interstate-commerce element was satisfied "by the guns and the bullets made out of state and the shooting on the interstate." This referred to the manufacturing location of two seized firearms—neither of which was used in any YMM crimes but were instead found in the proximity of members during police encounters—and a shooting that occurred on an interstate, though no evidence suggested that the incident had any

effect on interstate commerce. Apparently accepting the prosecution's cursory (and incorrect) explanation of the mandated interstate-commerce element, the jury found Mr. Fortia and three others guilty of violating both RICO and VICAR. All were sentenced to life terms of imprisonment for those crimes.

IV. The Fifth Circuit's acceptance of the government's "aggregation of commerce" theory to satisfy RICO's jurisdictional element.

On appeal, Mr. Fortia argued that the government had failed to prove beyond a reasonable doubt that YMM engaged in or that its activities in fact affected interstate commerce, as RICO requires. He pointed out that the prosecution's "guns and interstate" theory presented to the jury was facially inadequate to demonstrate RICO's required interstate-commerce nexus. In response, the government abandoned the argument made by its trial attorneys to the jury and adopted a new interstate-commerce theory. Now, relying on this Court's decision in *Taylor*, the government argued that because some YMM members sold drugs in Central City, that fact *automatically* satisfied RICO's interstate-commerce nexus requirement, without the need for actual evidence before the jury of any interstate connection or effect. Even without such evidence in the trial record, the government urged, the Fifth Circuit must simply assume that this particular type of activity affected interstate commerce in some, unspecified way.

The Fifth Circuit adopted the government's reasoning and held that the prosecution had proved RICO's interstate-commerce element beyond a reasonable doubt simply by showing that various YMM members sold drugs in their neighborhood because drug-dealing is a "type of economic activity that has been

recognized to substantially affect interstate commerce in the aggregate." *McClaren*, 13 F.4th at 402 (citing *Taylor*, 136 S. Ct. at 2080). The Court concluded: "Considering the government's demonstration of very extensive and long-term engagement in drug trafficking, a rational jury could have concluded beyond a reasonable doubt that YMM's activities had at least a minimal impact on interstate commerce. *McClaren*, 13 F.4th at 402.[10]

In other words, the panel held, because drug-trafficking is a *class* of activity affects commerce "in the aggregate" (according to previous congressional findings cited in *Taylor*), prosecutors necessarily satisfy their evidentiary burden to show a case-specific interstate-commerce effect in any case in which enterprise members sold drugs. In doing so, the Fifth Circuit replaced a case-specific factual question for the jury (i.e., whether an individual enterprise actually affects interstate commerce) with a broad legal question previously answered by this Court (i.e., whether Congress has jurisdiction to regulate the market for illegal drugs). And, because this Court previously has held that drug dealing as a class of activity can be regulated by Congress, the Fifth Circuit concluded that any individual case involving drug dealing necessarily proves that the specific drug dealing at issue in fact affected interstate commerce.

[10] Initially, the panel opinion adopted *both* the prosecution's "guns and interstate" theory *and* the aggregated drug sale theory, holding that the two "taken together" established the requisite interstate effect. Mr. Fortia moved for panel rehearing and rehearing en banc, urging that both grounds were insufficient and challenging the soundness of combining disparate and distinct connections to interstate commerce "together" to satisfy RICO's most critical statutory element. The panel then withdrew its initial opinion and deleted any reference to the "guns and interstate" theory, relying solely on the aggregated drug sale theory instead.

The Fifth Circuit remanded Mr. Fortia's for resentencing based on its sentence on a different count. Following resentencing pursuant to the Fifth Circuit's remand, Mr. Fortia timely appealed his district court judgment and filed an unopposed motion for summary disposition of his appeal, recognizing that all remaining challenges had been adjudicated and were foreclosed by the Fifth Circuit's ruling on his first appeal.

REASONS FOR GRANTING THE PETITION

I. Courts are in conflict over the nature and level of proof required to satisfy RICO and VICAR's critical interstate commerce elements.

The meaning of RICO's interstate commerce element has been confounding courts for decades now. That confusion has led not only to inconsistent results across circuits, but also threatens the constitutional integrity of the statute itself. Specifically, the circuits have been in a broad disagreement about the evidentiary standard applicable to the "affect" portion of RICO's interstate-commerce nexus requirement, namely, what it means and what evidence is necessary to show that a charged enterprise affected interstate commerce.

As discussed below, circuit courts and district courts alike are particularly confused about the application of the *Raich-Taylor* line of aggregate commerce jurisprudence—which speaks to federal *jurisdiction* to regulate a class of activity—to individual statutory elements requiring a demonstrated effect on interstate commerce in individual cases. But, beyond that, the circuits have been in a broader disagreement for decades about the evidentiary standard applicable to the "affect" portion of RICO's interstate-commerce nexus requirement—an issue that this Court

previously reserved, but could finally address now. *See United States v. Robertson,* 514 U.S. 669, 671–72 (1995).

That dispute centers around how to read *Perez*, in which the Court identified three categories of activity that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "activities having a *substantial relation* to interstate commerce." *Id*. at 558-59. Within that last category, the Court clarified that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id*. at 559.

A circuit split has emerged over what type of interstate-commerce effect must be shown when an enterprise—like here—merely "affects" interstate commerce, rather than actually engaging in it. Most courts have held that a showing of only a slight effect on interstate commerce is required under RICO's commerce element. *See Miller*, 116 F.3d at 674 (interstate commerce nexus satisfied where RICO enterprise's business was narcotics trafficking even if individual acts of racketeering occurred solely within a state); *United States v. Farmer*, 924 F.2d 647, 651 (7th Cir. 1991). Those courts similarly hold that the burden of proving a nexus between the alleged drug trafficking actions of defendants and interstate commerce is minimal. *United States v. Wilkerson*, 361 F.3d 717, 726 (2d Cir. 2004); *United States v. Marerro*, 299 F.3d 653, 655 (7th Cir. 2002); *United States v. Riddle,* 249 F.3d 529, 538 (6th Cir. 2001); *United States v. Gray,* 137 F.3d 765, 773 (4th Cir.1998); *see also United States v. Juvenile Male,* 118 F.3d 1344, 1347–49 (9th Cir. 1997).

The confusion over RICO's interstate commerce element is entrenched, well-documented by scholars, and warrants this Court's attention now.

II. The Fifth Circuit's decision stretches the "commerce aggregation" principle and this Court's decision in *Taylor* beyond any reasonable limit—a misstep occurring in other circuits as well.

The Fifth Circuit's approach to RICO's interstate-commerce element warrants particular attention by this Court. The Fifth Circuit's view undermines congressional intent, bends commerce jurisdiction to a breaking point, and threatens the constitutional integrity of RICO and other statutes that use identical jurisdictional elements to ensure their validity. The Fifth Circuit's decision also aptly illustrates fundamental misunderstandings in how to apply decisions like *Taylor* and *Raich*, which employ the highly criticized "aggregation of commerce" theory to statutes that require actual proof, in each case, of a specific interstate commerce effect.

Importantly, RICO's text explicitly requires proof that the charged enterprise either engaged in or its activities affected interstate commerce. That jurisdictional element is constitutionally mandated due RICO's broad reach and great potential to impermissibly federalize purely local crime that falls squarely and solely within the state domain. RICO's express and specific jurisdictional element also represents a reasoned determination by Congress to limit federal jurisdiction only to a certain subset of criminal enterprises with a sufficiently clear nexus to interstate commerce. Based on that determination and cognizance of the limits of its own power, Congress expressly imposed the obligation on federal prosecutors to prove *in each case* that the enterprise's specific "conduct had a *demonstrated connection or link* with [interstate] commerce." Fifth Cir. Pattern Jury Instructions (Crim.), § 2.79 (2019). That

requirement is apparent from a plain reading of RICO's text and is an element that must be proved beyond a reasonable doubt through competent evidence at trial like any other element of the crime.

Thus, the Fifth Circuit's approach represents both a misreading of the statutory text as well as a misapplication—and undue extension—of the "aggregation of commerce" theory applied in *Raich* and *Taylor*. True, *Raich* held that the Commerce Clause authorizes a comprehensive, federal regulatory scheme targeting the national marijuana market—even if regulation captures purely noneconomic and intrastate activities—because those local activities nonetheless fall within a *class* of activities that Congress has a "rational basis" to believe affect interstate commerce in the *aggregate*. 545 U.S. at 22. However, *Raich* did not hold, as a factual matter, that each and every drug sale (or even daily individual drug sales) necessarily has an actual interstate effect. Indeed, *Raich* simply held that Congress had a rational basis to believe that capturing purely local drug activity was necessary to effectively carrying out its broader regulatory scheme. Certainly, the Congressional findings cited in *Raich* to uphold that regulatory scheme were not transferable to the proof-beyond-a-reasonable-doubt of such an effect in each individual case—a factual matter to be submitted to the jury in each case, not a legal matter to be decided in broad terms by the judiciary for all cases going forward.

Importantly, neither *Taylor* nor *Raich* held, as a factual matter, that all drug activity necessarily affects interstate commerce. In fact, those cases suggested the *opposite*, namely, that *it doesn't matter* whether individual drug sales do in fact affect

interstate commerce when determining whether Congress has jurisdiction to reach that activity as part of a broad regulatory scheme. Even if individualized drug sales have no interstate-commerce impact whatsoever, this Court has explained, Congress nonetheless had *jurisdiction* to reach them through criminal statutes that regulate those markets as a whole.

The Fifth Circuit now has imported *Taylor*'s (and, by extension *Raich*'s) holding into a radically different criminal regulatory scheme and used that line of jurisprudence to interpret a critical jurisdictional element intended to limit, not expand, federal reach. The Fifth Circuit now holds that if, as a legal matter, Congress has *jurisdiction* to regulate a particular class of activity in the aggregate, then, as a factual matter, anyone engaged in that conduct must have in fact "affected interstate commerce." That broad proposition is not only wrong based on RICO's plain text but matters tremendously for RICO's constitutionality. Unlike the statutes in *Raich* and *Taylor*, RICO expressly encompasses activity over which Congress unquestionably does *not* have jurisdiction—either in individual cases or in the aggregate—such as, for example, local violent crime. That is why it is critical *in each case* that prosecutors prove, as a factual matter, that an enterprise in fact affected interstate commerce. Otherwise, RICO permits federal regulation of violent crime based on the theory that such offenses impact commerce in the *aggregate*, a theory that this Court has firmly rejected.

This confusion is not limited to the Fifth Circuit. Even pre-*Taylor*, the Second Circuit had held that when a "RICO enterprise's business is narcotics trafficking, that

enterprise must be viewed as substantially affecting interstate commerce, even if individual predicate acts occur solely within a state." *United States v. Miller*, 116 F.3d 641, 674 (2d Cir. 1997).[11] After *Taylor*, the Second Circuit doubled down on this approach, citing the Court's decision and importing aggregation principles into RICO's interstate-commerce nexus, holding the element is automatically "satisfied by evidence that the enterprise trafficked in crack cocaine" based on the fact that this Court "has recognized that drug trafficking, even local trafficking, is part of an economic 'class of activities' that have a substantial effect on interstate commerce." *United States v. Aquart*, 912 F.3d 1, 17–18 (2d Cir. 2018) (quoting *Raich*, 545 U.S. at 17, 22). And the Court expressly refused to distinguish the distinct commerce elements of RICO and Hobbs Act because both statutes are located in the same chapter of the criminal code. *Id.*

The First Circuit too has suggested that the required nexus between a charged enterprise and interstate commerce automatically is proven when enterprise members engaged in drug dealing—like the Fifth and Second Circuits, citing *Taylor* for the proposition that "[t]he market for illegal drugs constitutes commerce over which the United States had jurisdiction." *United States v. Millan-Machuca*, 991 F.3d 7, 21 n.4 (1st Cir. 2021) (citing *Taylor*, 136 S Ct. at 2081). District courts have done

[11] *See also United States v. Vasquez*, 267 F.3d 79 (2d Cir. 2001) (recognizing the potential constitutional pitfalls, but declining to find clearly erroneous a trial court instruction to the jury that cocaine or heroin trafficking necessarily implicates foreign commerce and finding the mere fact of the defendants' heroin trafficking automatically satisfied the interstate commerce nexus, even if no evidence on that effect was introduced at trial, finding that " [e]ngaging in narcotics trafficking affects *interstate* commerce, at the very least, regardless of where the raw materials originate" (emphasis in original)).

the same.[12] And, importantly, the question of *Taylor*'s application is not limited to RICO and VICAR—it affects dozens of federal statutes containing identical or substantially similar interstate-commerce elements. For example, the Fourth Circuit has applied *Taylor*-based aggregation logic to the Hate Crimes Prevention Act. *See United States v. Hill*, 927 F.3d 188, 199–201 (4th Cir. 2019). And the Seventh Circuit has done the same in the context of the federal arson statute. *United States v. Adame*, 827 F.3d 637, 644 (7th Cir. 2016).[13]

This approach ignores these statutes' plain text and is rapidly chipping away at the concrete limits they set on federal jurisdiction over local crime. It also violates this Court's warning in *Bond v. United States* that courts should always interpret federal statutes in light of the general principle that federal jurisdiction over local crime is and must be strictly limited. This Court explained: "Because our constitutional structure leaves local criminal activity primarily to the States, we have

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[12] *See, e.g.*, *United States v. Baca*, 409 F. Supp. 3d 1169, 1249 (D.N.M. 2019) (citing *Taylor* for the proposition that "[a]n enterprise's drug trafficking, even if de minimis, necessarily satisfies the interstate commerce element"); *United States v. Woods*, No. 17-20022, 2020 WL 999036, at *4 (E.D. Mich. Mar. 2, 2020), *aff'd in part, vacated in part, on other grounds*, 14 F.4th 544 (6th Cir. 2021), *cert. denied*, No. 21-6601, 2022 WL 199524 (U.S. Jan. 24, 2022) (rejecting argument in motion for acquittal that government failed to prove RICO's interstate-commerce element on the ground that the local gang at issue sold drugs, citing *Taylor* and noting that "drug trafficking is an economic activity that satisfies the interstate commerce prong."); *United States v. Conyers*, No. S13 15-CR-537 (VEC), 2016 WL 7189850, at *3 (S.D.N.Y. Dec. 9, 2016) ("Count One alleges that the YGz were engaged in drug trafficking, specifically the trafficking of crack cocaine, heroin, and marijuana. It is well established that drug trafficking substantially affects interstate commerce. Accordingly, the allegation that the YGz were engaged in drug trafficking also adequately alleges the interstate commerce element of Count One.").

[13] *See also, e.g.*, *United States v. Nichols*, No. CR1801684TUCCKJBGM, 2020 WL 3618555, at *5 (D. Ariz. July 2, 2020), *report and recommendation adopted*, No. CR181684TUCCKJBGM, 2020 WL 4812904 (D. Ariz. Aug. 17, 2020) (invoking *Taylor*'s aggregation principle to determine whether the federal theft-of-livestock statute reaches purely intrastate conduct); *APC Home Health Servs., Inc. v. Martinez*, 600 S.W.3d 381, 394 (Tex. App. 2019) (citing *Taylor* to determine the reach of the Federal Arbitration Act).

generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach." *Bond v. United States*, 572 U.S. 844, 848 (2014).

Here, the Fifth Circuit did the opposite. It ignored the plain meaning of RICO's text and eliminated its express limits on federal jurisdiction to police local crime. This Court should intervene to reinforce this basic rule of statutory construction and to clarify the key distinction between the breadth of federal jurisdiction to regulate commerce, on the one hand, and the proof required to satisfy interstate-commerce nexus requirements imposed by statutory design, on the other.

III. The Fifth Circuit's judicial fact-finding on appeal undermines the right to jury, eviscerates the "beyond a reasonable doubt" standard, and epitomizes judicial lawmaking.

Relatedly, this Court's intervention also is warranted because the Fifth Circuit's approach in particular undermines congressional intent to require actual proof of an interstate nexus in each case, while also threatening the rights of criminal defendants to be found guilty beyond a reasonable doubt based on actual evidence submitted at trial, rather than untested, post-hoc judicial fact-finding. The Fifth and Sixth Amendments "give[ ] a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States v. Gaudin,* 515 U.S. 506, 522–23 (1995). And due process mandates that a finding of guilt be based on admissible evidence presented to a jury *at trial*, not on prior congressional research or appellate court findings of fact. *Alleyne v. United States,* 570 U.S. 99, 104 (2013); *In re Winship,* 397 U.S. 358, 364 (1970).

Importantly, jurisdictional elements, like any other offense elements, must be "proved to a jury beyond a reasonable doubt." *Torres v. Lynch*, 578 U.S. 452, 482 (2016). In other words, jurisdictional elements—including the one here—are subject to a jury (not judicial) determination and must be proven beyond a reasonable doubt at trial, like any other element. The Fifth Circuit's approach abrogates that fundamental constitutional principle, curiously inserting quasi-judicial/quasi-congressional factual and legal determinations in the normal place of actual evidence and jury findings at trial. Of course, the jury in Mr. Fortia's case was not presented with the evidence upon which Congress (or the Fifth Circuit) rested its determination about the aggregate effects of drug dealing on interstate commerce—nor was the defense provided an opportunity to refute that evidence. Certainly, that information did not qualify as competent trial evidence upon which the jury could rest its determination of guilt. Indeed, the prosecution did not even argue the Fifth Circuit's theory of the element to the jury.

Nor was the factual finding inserted by the Fifth Circuit even a match for RICO's statutory element. In passing the federal regulatory scheme for illegal narcotics, Congress did not determine that each instance of localized drug activity—even daily drug dealing—actually affects interstate commerce, as RICO's plain text requires. Instead, Congress determined that the entire market for illegal narcotics substantially affects interstate commerce in the aggregate and that including purely localized drug activity within the reach of that regulation is necessary to effectuate scheme as a whole.

Of course, the standard of proof applicable to those congressional findings was different too. The question before this Court in *Raich* simply was whether Congress *had a rational basis to believe* that the regulation of purely local drug conduct constituted an essential part of a comprehensive regulatory scheme that, in the aggregate, substantially affects interstate commerce—far from the proof-beyond-a-reasonable-doubt inquiry before the jury. And *Taylor* did not hold otherwise.

Thus, the Fifth Circuit's approach to RICO's commerce element in particular warrants examination by this Court.

IV. This case is a good vehicle for addressing the question presented.

Mr. Fortia's case places these critical issues cleanly before the Court—fully preserved and unencumbered. And this Court's resolution of the question presented matters specifically for Mr. Fortia, meaning, relief in this case would make a real difference. The Fifth Circuit's decision left in place RICO and VICAR convictions carrying two life sentences. Thus, Mr. Fortia's case represents an ideal vehicle through which to address the important questions raised herein.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Fortia's petition for writ of certiorari. This case presents an excellent vehicle for addressing the entrenched circuit and district court confusion over RICO and VICAR's interstate commerce elements and to set reasonable limits on the undue expansion of federal criminal jurisdiction. However, the Fifth Circuit's decision also was simply wrong and a facially incorrect application of this Court's holding in *Taylor*. Thus, this Court alternatively could summarily reverse the Fifth Circuit's decision instead.

Respectfully submitted,

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