No. _____

In the
Supreme Court of the United States

WILLIAM FRAZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Stephen J. van Stempvoort
Counsel of Record
MILLER JOHNSON
45 Monroe Avenue SW, Suite 1100
Grand Rapids, MI 49503
vanstempvoorts@millerjohnson.com
(616) 831-1765
Counsel for Petitioner

QUESTIONS PRESENTED

1. This Court has repeatedly held that, as a matter of statutory construction, a criminal statute's *mens rea* requirement extends to each element of the offense. When that rule is applied to the VICAR statute, 18 U.S.C. § 1959(a) (which criminalizes conduct in which a defendant engages "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity"), the government is required to prove not simply that the defendant intended to advance his position in an "enterprise" but that the defendant intended to advance his position in a particular type of enterprise: namely, "an enterprise engaged in racketeering activity." The Sixth Circuit, however, rejected this analysis by ruling that § 1959(a) "is not subject to standard rules of statutory interpretation." No other circuit has exempted § 1959(a) from the standard principles of statutory interpretation; instead, they have applied its plain language.

The first question presented is: Whether the Sixth Circuit is correct that—contrary to every other circuit's approach—the VICAR statute, 18 U.S.C. § 1959(a), "is not subject to standard rules of statutory interpretation," such that the government does not need to prove that the defendant intended to advance himself in an enterprise "engaged in racketeering activity" but must instead prove only that the defendant intended to advance himself in an "enterprise."

2. The second question presented is: Whether the definition of the term "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner: *William Frazier*

Respondent: *United States*

William Frazier's appeal was consolidated in the Sixth Circuit with the appeals of several codefendants, who were named in the same indictment as Frazier. Only one of those codefendants—Christopher Odum—was Frazier's codefendant at trial. The remainder of the codefendants either pled guilty or were convicted at a previous trial, and their appeals were resolved in a separate opinion from the Sixth Circuit. Two of Frazier's codefendants, Marvin Nicholson and Antonio Johnson, filed separate petitions for writ of certiorari, raising issues related to their separate trial and appeal. (*Nicholson v. United States*, No. 17-7833; *Johnson v. United States*, No. 17-8178).

The Sixth Circuit's opinion that is the subject of Frazier's petition for certiorari also addressed the consolidated appeal of Frazier's codefendant, Christopher Odum.

None of Frazier's codefendants is a party to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, William Frazier, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit Court of Appeals' opinion affirming Frazier's convictions and sentence was issued on November 30, 2017, in Case Numbers 15-2280/15-2503 and is published at *United States v. Odum*, 878 F.3d 508, 518 (6th Cir. 2017). Pet. App. 1a-17a. The Sixth Circuit's order denying Frazier's petition for rehearing and rehearing en banc was issued on January 4, 2018. Pet. App. 25a. The district court's criminal judgment as to Frazier was entered on December 8, 2015, in Case Number 13-cr-20764-14. Pet. App. 18a-24a.

JURISDICTION

The Sixth Circuit Court of Appeals' decision and opinion was entered on November 30, 2017. The Sixth Circuit denied a timely petition for rehearing on January 4, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(3) provides,

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 1959 provides,

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or 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—

> (1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;
>
> (2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;
>
> (3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;
>
> (4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;
>
> (5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and
>
> (6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of [1] under this title, or both.

(b) As used in this section—

> (1) "racketeering activity" has the meaning set forth in section 1961 of this title; and
>
> (2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

STATEMENT OF THE CASE

1. William Frazier was convicted by jury of violating 18 U.S.C. § 1959(a) (the "VICAR" statute) and 18 U.S.C. § 924(c)(1)(A) for discharging a firearm in furtherance of a "crime of violence." Pet. App. 2a.

The VICAR statute pertains to so-called "violent crimes in aid of racketeering activity." *See* 18 U.S.C. § 1959. In this case, the government indicted several members of the Detroit-area Phantoms Motorcycle Club (the "Phantoms"), which it alleged engaged in racketeering in violation of the RICO statute. Pet. App. 2a. The bulk of the prosecution's case centered upon a murder conspiracy that occurred in October 2013. Pet. App. 3a.

Unlike almost all of his codefendants, Frazier was not indicted for any substantive RICO offense; he was indicted solely under VICAR and § 924(c) for participating in a state-law assault during a bar-fight in Columbus, Ohio, in October 2012—a year before the murder conspiracy came to fruition. Pet. App. 2a.

Notably, there was no evidence at trial that Frazier knew about any of the Phantoms' racketeering activity; each of the government's witnesses agreed that Frazier was not involved in any of it. (Transcript, R. 725 at PageID 10229-32). In fact, Frazier moved from Florida to Detroit in mid-2010, shortly after he joined the motorcycle club. There is no evidence that he was involved in any illegal activity, other than the bar-fight in October 2012.

Even that incident is only tenuously connected to the Phantoms. The scuffle started when one Phantoms member was elbowed by another patron at the bar as he was attempting to order food. The government's witnesses agreed at trial that

the scuffle was spontaneous and had nothing to do with the Phantoms motorcycle club. (Transcript, R. 727 at PageID 10583; R.716 at PageID 9684).

The victim of the assault also claimed that Frazier did not participate in the assault and was not the person who shot him. In fact, the victim (who was himself African-American) claimed that he was assaulted by three African-American members of the Phantoms and was shot by "a black male with medium complexion" wearing "a clean cut goatee, and braids." (ATF Report of Investigation, R. 732-1 at PageID 10815-16). The victim corroborated this description twice: both immediately after the assault and in an interview with ATF agents two years later. (*Id.*; *see also* Defense Ex. E (audio recording of interview submitted to Sixth Circuit)). Frazier is unmistakably Caucasian. The victim's description of his assailants categorically excludes Frazier from participation in the assault.

Nevertheless, Frazier was tried with another member of the Phantoms, who had not joined the Phantoms until after Frazier had moved to Florida, and who was indicted as a participant in the independent murder conspiracy dating from October 2013—none of which had any connection to Frazier or any relevance to the charges against him. The evidence is undisputed that—just like with respect to the rest of the Phantoms' alleged racketeering—Frazier had no knowledge of any of the Phantoms' conduct in October 2013. (Transcript, R. 725 at PageID 10229-32). Ultimately, after hearing weeks of significantly prejudicial testimony about a murder conspiracy that was irrelevant to Frazier's case, the jury convicted Frazier of participating in the one-off assault that occurred the year before, in October 2012.

2. On appeal, Frazier argued that section 1959(a)'s *mens rea* requirement applies to each element listed subsequently in the statute. In other words, it was not enough for the government to prove merely that Frazier intended to advance himself in "an enterprise"; the government was instead required to prove that Frazier intended to advance himself in a specific type of enterprise—that is, "an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a). And without knowing that the enterprise was engaged in racketeering, Frazier could not have intended to advance himself in "an enterprise engaged in racketeering activity." Pet. App. 7a-8a.

As applied to Frazier's case, this distinction is critical. VICAR's definition of "enterprise" is not limited to illegal gangs; instead, it includes ". . . any union or group of individuals associated in fact . . ." *See* 18 U.S.C. § 1959(b)(2). If the government is correct that a VICAR conviction does not require the defendant to know that the enterprise in question is "engaged in racketeering," then VICAR could apply to a defendant who attempted to advance himself in an organization that he believed was innocuous or legal.

In Frazier's case, the government introduced no evidence that Frazier knew about any of the Phantoms' racketeering conduct. Instead, each of its witnesses agreed that Frazier did not participate in any of it and was living in Florida during almost the entire relevant time period. There is no evidence that Frazier had any idea what the Phantoms had been up to when he was not around. Not a single witness placed Frazier at any Phantoms event other than the spontaneous assault

that was the basis of his convictions. All of the alleged racketeering conducted by Phantoms members was coordinated by members who were also Vice Lords, and the government agreed at Frazier's sentencing that "there was no evidence deduced at trial that Mr. Frazier was a member of the Vice Lords." (Transcript, R. 723 at PageID 10116).

3. The Sixth Circuit rejected Frazier's argument. As the court recognized, the ordinary rule is that a statutory *mens rea* requirement applies to all elements of the crime, under principles of "basic statutory interpretation." Pet. App. 7a. The court also recognized that the requirement that the enterprise was "engaged in racketeering activity" is a separate element of a VICAR offense. Pet. App. 4a. Ordinary principles of statutory interpretation therefore direct that the statute's *mens rea* requirement extends to that element.

Nevertheless, the Sixth Circuit held that the opposite conclusion is necessary in a case under VICAR. According to the court, a defendant may be convicted under § 1959(a) even if the defendant does not know that the enterprise was engaged in racketeering, and even if the defendant believes that the enterprise was an innocuous association-in-fact. The court held that "even if Frazier's argument . . . were compelling," it could not carry the day because "VICAR is not subject to standard rules of statutory interpretation." Pet. App. 7a. According to the Sixth Circuit, the VICAR statute's "remedial purpose" could overcome the statute's plain language. *Id.*

The Sixth Circuit also rejected Frazier's argument that 18 U.S.C. § 924(c)(3)(B)'s definition of "crime of violence" is unconstitutionally vague. The sole basis for the Sixth Circuit's decision was that current Sixth Circuit precedent—namely, *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016)—precluded Frazier's argument. Pet. App. 10a.

4. Although the Sixth Circuit's opinion initially was unpublished, the government moved the court to publish the opinion. The most important feature of the court's opinion, according to the government, was that it "established what the government is not required to prove [in a VICAR prosecution]: that the 'defendant actually knew that the enterprise was engaged in racketeering activity.'" The Sixth Circuit granted the government's motion and published its opinion. It subsequently denied Frazier's petition for rehearing en banc. Pet. App. 25a.

REASONS FOR GRANTING THE PETITION

I. No other circuit has held that "VICAR is not subject to standard rules of statutory interpretation."

A. Instead of exempting VICAR from the "standard rules" of statutory interpretation, the other circuits have relied upon the "plain meaning" of the statutory text.

Frazier is not aware of any case in which this Court has relied upon a statute's background "remedial purpose" to trump the plain language of the statute. Instead, the "standard rules" of statutory interpretation apply equally across the board: where there is a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). "[I]f the intent of Congress is clear and unambiguously expressed by the statutory language

at issue, that would be the end of [the] analysis." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007).

Nor has any circuit other than the Sixth Circuit exempted VICAR from the ordinary tenets of statutory interpretation. The Sixth Circuit pointed to the Second Circuit's decisions in *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), and *United States v. Mapp*, 170 F.3d 328 (2d Cir. 1999), as support for the notion that VICAR's remedial purpose can trump the statute's plain language. But, in fact, these cases stand for the opposite proposition. *Concepcion*'s holding turned on the "ordinary meaning" of VICAR's statutory text; unlike the Sixth Circuit's decision in this case, it did not rely upon the legislative history in order to overcome the plain language of the statute. *Concepcion*, 983 F.2d at 381. The decision in *Mapp*, likewise, does not leverage VICAR's broad remedial purpose in order to overcome an otherwise compelling plain-language argument. Instead, *Mapp* went out of its way to point out that its reasoning was consistent with "both the text and the purpose" of the statute. *Mapp*, 170 F.3d at 336.

Thus, none of the authority cited by the Sixth Circuit supports the proposition that VICAR's plain text can be surmounted by its generalized remedial purpose. Instead, the cases relied upon by the Sixth Circuit reject its approach. As both *Concepcion* and *Mapp* pointed out, VICAR was intended to apply to defendants who committed crimes "as an integral aspect of membership" in a RICO enterprise. *Concepcion*, 983 F.2d at 381; *Mapp*, 170 F.3d at 336. The Sixth Circuit's decision provides for exactly the opposite: it allows a defendant to be convicted under VICAR

even if the defendant did not know that an enterprise was engaged in racketeering at all. Such a defendant can hardly be said to be acting in a manner consistent with membership in a "racketeering" enterprise.

No other Circuit has held that VICAR is exempt from the ordinary rules of statutory interpretation, such that the statute's plain language can be overcome by its underlying purpose. The Sixth Circuit's analysis conflicts with both this Court's precedent and with that of its sister circuits.

B. The Sixth Circuit's analysis of VICAR's *mens rea* requirement is demonstrably incorrect.

The Sixth Circuit's rejection of Frazier's plain-language argument is also almost certainly incorrect.

When determining whether a statutory *mens rea* requirement is applicable, there is a "presumption in favor of a scienter requirement." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Ordinarily, a statute's *mens rea* requirement "should apply to each of the statutory elements that criminalize otherwise innocent conduct"—such as belonging to a motorcycle club. *Id.* That is because "a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." *Elonis v. United States*, 135 S. Ct. 2009, 2011 (2015) (citation omitted).

VICAR's statutory language is straightforward: it criminalizes certain conduct committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a) (emphasis added). This Court has repeatedly interpreted similar statutory

language as extending the *mens rea* requirement to each element of the offense. For example:

- In *Morissette v. United States*, the Court ruled that a statute making it criminal for a defendant to "knowingly convert[ ] to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States" required that the prosecution prove that the defendant "have knowledge of the facts that made the taking a conversion—*i.e.*, that the property belonged to the United States." 342 U.S. 246, 271 (1952).
- In *Liparota v. United States*, a statute that made it a crime to "knowingly use[ ] . . . [food stamps] in any manner not authorized by [the statute] or the regulations" required the government to prove the defendant's knowledge of the facts that made the use of the food stamps unauthorized. 471 U.S. 419, 420 (1985).
- In *X-Citement Video*, a statute that criminalized a defendant who "knowingly receives, or distributes, any visual depiction . . . if . . . the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct" required the government to prove that the defendant not only knowingly distributed the depictions but also knew that the individuals depicted in them were minors. 513 U.S. at 68.

- In *Flores-Figueroa v. United States*, this Court held that the federal aggravated-identity-theft statute, which criminalized a defendant who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," required proof not only that the defendant knowingly used a means of identification but that the defendant knew that the identification belonged to "another person." 556 U.S. 646, 650-52 (2009)).
- In *Elonis*, the Court held that a statute criminalizing "any communication containing any threat" requires that the prosecution prove the defendant's knowledge not only of the fact that he is transmitting a communication but also of "the fact that the communication contains a threat." 135 S. Ct. at 2011.

The reasoning of each of these cases is on all fours with the plain-language argument that the Sixth Circuit rejected in this case. Section 1959(a) criminalizes certain crimes committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise *engaged in racketeering activity*." (emphasis added). The panel opinion recognized that proof that the enterprise is "engaged in racketeering activity" is a separate element of a VICAR offense. Pet. App. 4a. Section 1959(a)'s *mens rea* requirement therefore applies to this element of the offense.

As the Court pointed out in *Elonis*, the statute there applied not merely to defendants who "communicat[e] *something*"; it applied only to those defendants who

communicate something specific: a threat. *Elonis*, 135 S. Ct. at 2011. VICAR functions similarly. It is not enough for the government to prove that the defendant was jockeying for position in what he thought was merely an enterprise-in-fact (including an innocuous club, a trade union, or the like); the government must prove that he was trying to assert himself in a group that he knew was a specific kind of enterprise—that is, "an enterprise engaged in racketeering."

To borrow *Flores-Figueroa*'s cheese sandwich analogy, the Sixth Circuit's approach is like saying that doing something "for the purpose of eating a sandwich with cheese" connotes no intent that the sandwich have any particular topping. *See United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 436-37 (6th Cir. 2016) (discussing *Flores-Figueroa*, 556 U.S. at 651). The only way to accept that reading of the statute is to dispense with the ordinary rules of statutory construction. No other case has done so.

C. The issues presented are important and recurring.

As highlighted by the government in its motion requesting that the Sixth Circuit publish its decision so that this very issue would be enshrined in published authority, the implications of the Sixth Circuit's decision are significant for VICAR prosecutions. Rejecting a requirement that the defendant have knowledge of the racketeering nature of the enterprise permits a court to do what it did here—that is, to find that a defendant violated VICAR even if the relevant enterprise did not blossom into a racketeering enterprise until well after the date of his conduct. Such an approach allows the government to significantly expand VICAR prosecutions to circumstances well beyond the scope contemplated by the plain language of the

VICAR statute. *Concepcion*, 983 F.2d at 381. Frazier has canvassed the reported appellate decisions involving VICAR offenses and is not aware of any other VICAR case—and the government did not identify one—involving equally scanty evidence of racketeering, even in cases involving motorcycle clubs. *See, e.g., United States v. Donovan*, 539 F. App'x 648, 660-61 (6th Cir. 2013) (defendant participated in distributing drugs and stored stolen motorcycles at his residence); *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994) (motorcycle club that engaged in significant drug distribution activity).[1] The government's successful prosecution of Frazier has marked out a new frontier in the realm of VICAR liability.

Further, the court's reasoning in this case appears to have led it to rely upon events that post-date October 2012 in order to reject Frazier's assertion that the government failed to prove that the Phantoms were "engaged in racketeering" as of October 2012. Pet. App. 7a. But Frazier cannot have violated VICAR if he attempted to advance himself an enterprise that wasn't already "engaged in racketeering" at the time of his conduct. Even the government did not advance such a reading of the statute. The Sixth Circuit's faulty reasoning led it down that path, ending in a place that cannot be squared with the statutory text.

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[1] For the period of time before October 2012, the government's evidence of "racketeering" is limited to two events: (1) the stealing of a single out-of-state motorcycle from Kokomo, Indiana; and (2) an assault against members of the Omen motorcycle club in 2010. Pet. App. 7a. (The Sixth Circuit's opinion states that one other event—an altercation with the Zulus in 2009—was a "racketeering" event because it involved "intimidat[ion]," *id.*, but "intimidation" is not an offense listed in 18 U.S.C. § 1961(1) and therefore cannot constitute "racketeering." *See* 18 U.S.C. § 1959(b)(2).) In any event, every witness acknowledged that Frazier was not part of these events and had nothing to do with them. There is no evidence that he even knew about them.

Added to this is the potential mischief caused by the Sixth Circuit's invitation to disregard the plain language of a federal criminal statute in order to effect a nebulous "remedial" purpose. The significant implications of the Sixth Circuit's decision warrant relief from this Court.

D. This case is an excellent vehicle for resolving the split of authority on this issue.

This case squarely presents the question whether the VICAR statute is exempt from the standard rules of statutory interpretation or whether, on the other hand, it requires the government to prove that the statute's *mens rea* requirement extends to each element of the offense, including the element that the relevant enterprise be "engaged in racketeering."

The answer to that question is dispositive of this case. There is no evidence in the record that Frazier knew as of October 2012 (or later, for that matter) that the Phantoms were engaged in racketeering. Frazier joined the Phantoms by being "patched over" with friends from a different club, who all left when Frazier moved to Florida in 2010. (Transcript, R. 715 at PageID 9583; R. 727 at PageID at 10566). The Phantoms had legitimate social purposes, and held numerous events to which members' families were invited. (Transcript, R. 727 at PageID 10559). Nor does the mere fact that Frazier was a member mean that he knew of all of the Phantoms' activities. It is legal to be a member of a motorcycle club; in fact, at least one member of the Phantoms was a law enforcement officer. (Transcript, R. 545 at PageID 6500).

Nor did Frazier have any involvement in any racketeering activity. Frazier was living in Florida after 2010. The only incident in which Frazier ever featured was the spontaneous assault in October 2012. In fact, unlike the majority of his codefendants, Frazier was not a Vice Lord and was never indicted with a substantive RICO offense. If the Sixth Circuit's analysis of VICAR's *mens rea* requirement is wrong, then there is no question that Frazier's convictions must be reversed. This case is an ideal vehicle for this Court to resolve the split of authority on this issue.

II. The Court should hold Frazier's case pending its decision in *Sessions v. Dimaya*, or, alternatively, should grant certiorari on the question whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, as that question has split the circuits.

The Sixth Circuit's rejection of Frazier's challenge to the constitutionality of § 924(c)(3)(B)'s residual clause also presents an issue upon which the circuits are squarely split. Compare *United States v. Jackson*, 865 F.3d 946, 954 (7th Cir. 2017) (holding that § 924(c)(3)(B) is unconstitutionally vague), with *United States v. Eshetu*, 863 F.3d 946, 953–55 (D.C. Cir. 2017); *Ovalles v. United States*, 861 F.3d 1257, 1265 (11th Cir. 2017); *United States v. Prickett*, 839 F.3d 697, 699–700 (8th Cir. 2016) (per curiam); *United States v. Hill*, 832 F.3d 135, 145–49 (2d Cir. 2016); *Taylor*, 814 F.3d at 375–379 (holding that it is not).

Taylor itself is pending writ of certiorari in this Court. *See Taylor v. United States*, No. 16-6392. Like *Taylor*, Frazier's petition should be held pending this Court's decision in *Sessions v. Dimaya*, No. 15-1498. Alternatively, this Court should grant certiorari on the question whether 18 U.S.C. § 924(c)(3)(B) is

unconstitutionally vague, for the reasons stated in the petitions for writ of certiorari filed in *Taylor* and in *Prickett v. United States*, No. 16-7373.

The resolution of this question makes a difference in Frazier's case. If 18 U.S.C. § 924(c)(3)(B) is ruled unconstitutional, then Frazier's § 924(c) conviction can stand only if VICAR is categorically a crime of violence under the "elements" clause of § 924(c)(3)(A). That clause, in turn, applies only if a VICAR conviction categorically has, as an element, "the use, attempted use, or threatened use of physical force against the person or property of another." It does not.

Frazier does not believe that § 1959(a) is divisible. *See Mathis v. United States*, 136 S. Ct. 2243 (2016). But even if it is, the subsection of VICAR that is relevant to Frazier is subsection (a)(3), which applies to "assault with a dangerous weapon or assault *resulting in serious bodily injury*." 18 U.S.C. § 1959(a) (emphasis added). As several courts have observed, "[t]here is . . . a difference between a defendant's causation of an injury and the defendant's use of force." *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc). *See also Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003) ("[H]uman experience suggests numerous examples of intentionally causing physical injury without the use of force."). Because these courts have specifically found that various assault offenses "resulting in serious bodily injury" do not require use of physical force and because VICAR sweeps in "the laws of any State," *see* 18 U.S.C. § 1959(a), subsection (a)(3) of § 1959 is not a crime of violence, even if the statute is divisible.

A similar analysis has guided other courts. For example, the Fourth Circuit found that a conviction for conspiracy to commit murder in aid of racketeering under § 1959(a)(5) is not categorically a "crime of violence" within the meaning of § 4B1.2(a) of the United States Sentencing Guidelines. *United States v. McCollum*, ___ F.3d ___, 2018 WL 1386159, at *6 (4th Cir. Mar. 20, 2018). Similarly, the Tenth Circuit has ruled that Hobbs Act robbery under 18 U.S.C. § 1951(b)(1) does not qualify as a "crime of violence" under the Guidelines. *United States v. O'Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017). A similar analysis will apply here if § 924(c)(3)(B) is ruled unconstitutional.

Thus, a ruling that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague will require a reversal of Frazier's § 924(c) conviction. If certiorari is not granted in *Taylor* or *Prickett* on this question, it should be granted on Frazier's petition.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Dated: March 27, 2018

/s/ Stephen J. van Stempvoort
Stephen J. van Stempvoort
Counsel of Record
MILLER JOHNSON
250 Monroe Avenue NW, Suite 800
Grand Rapids, MI 49503
vanstempvoorts@millerjohnson.com
(616) 831-1765
Counsel for Petitioner