No. 17-8381

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The government has not identified any case in which a court has ruled that a federal criminal statute is exempt from "standard rules of statutory interpretation." Nor has it identified any other circuit that interprets the VICAR statute, 18 U.S.C. § 1959(a), the way that the Sixth Circuit has. The Sixth Circuit's approach, moreover, is almost certainly incorrect. This Court has repeatedly held that a statutory *mens rea* requirement applies to each element of the offense, and the VICAR statute is no different.

The government is likewise mistaken when it contends that a ruling on the constitutionality of 18 U.S.C. § 924(c)(3)'s residual clause in this case would have "no effect" on Frazier's § 924(c) conviction. Contrary to the government's argument, it is quite likely that Frazier's conviction would not be upheld under § 924(c)(3)'s "elements" clause on remand. The only way that the government supports its argument is by (1) advancing an entirely novel approach to divisibility, which no court has applied to any statute, much less to VICAR, and (2) ignoring several cases that have held that VICAR-predicate crimes are not categorically violent, such that VICAR cannot be categorically violent under the elements clause. At bare minimum, the novel arguments that the government advances with respect to the elements clause are much better addressed on remand than in this Court for the first time. The constitutionality of § 924(c)(3)'s residual clause is squarely presented in this case.

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

With respect to the first question presented in Frazier's petition, two items are noticeably absent from the government's brief: (1) a citation to any case in which a court has held that a criminal statute's generalized "remedial purpose" can overcome the statute's plain language; and (2) any argument that, in this case, Frazier had any knowledge of the relevant enterprise's racketeering conduct. The government's statement of the case makes various assertions about the activities of the motorcycle club in question. But the trial evidence was wholly undisputed that Frazier did not know about any of the motorcycle club's racketeering conduct. The Sixth Circuit's decision to exempt VICAR from the ordinary rules of statutory interpretation is not only different than the approach of the other circuits; it is also dispositive of this case.

A. The Sixth Circuit's approach is unique among the circuits.

Although the government attempts to position the Sixth Circuit's decision in line with other circuits, the Sixth Circuit's approach is in truth markedly divergent. The government has failed to cite any other case in which a court has ruled that a federal criminal statute is "not subject to standard rules of statutory interpretation."

In none of the cases cited by the government as stressing the "broad remedial purposes" of the RICO and VICAR statutes did the court allow the statute's generalized remedial purpose to trump the plain language of the statute. As explained in Frazier's petition, all of the cases that mention VICAR's remedial purpose have done so only while applying the ordinary rules of statutory interpretation. That is, the courts first assess the statute's text, and only subsequently double-check their textual analysis in light of the statute's broad purposes. *See, e.g.*, *United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008) (reaching its decision "[b]ecause the text of the statute is clear and conforms with both its context and purpose"); *United States v. Mapp*, 170 F.3d 328, 336 (2d Cir. 1999) (holding was consistent with "both the text and the purpose" of VICAR); *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992) (holding turned on the "ordinary meaning" of VICAR's statutory text). None of these decisions held or even hinted that VICAR is not subject to ordinary rules of statutory construction, such that a court may reject the statute's plain language. In fact, none of these cases even found VICAR's language to be ambiguous. The analysis in each of the cases turned on the plain meaning of the statutory text. *See ids.*

The Sixth Circuit, by contrast, cited VICAR's broad remedial purpose in order to overcome an "otherwise compelling" plain-language argument. Instead of analyzing the statute's text, the Sixth Circuit simply rejected it. Pet. App. 8a. That is a deeply problematic method of statutory interpretation, especially in the context of criminal statutes, where the rule of lenity ordinarily applies as a tie-breaker. *United States v. Santos*, 553 U.S. 507, 514 (2008). It is also a method of statutory interpretations that has not been adopted by any other court, much less in the context of the VICAR statute.

B. The Sixth Circuit is wrong on the merits.

The government has also failed to identify any other court that has allowed a defendant to be convicted under VICAR without any evidence that the defendant intended to advance himself in a specific type of enterprise—that is, an "enterprise engaged in racketeering"—as opposed to simply an "enterprise," which could include any innocuous association-in-fact. *See* 18 U.S.C. § 1959(b)(2) (broadly defining "enterprise" as "includ[ing] any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact . . .").

The language of the VICAR statute is not ambiguous. For example, if someone moved to a certain locality "for the purpose of gaining a position at a company engaged in coal mining," no one would suspect that he or she relocated there without a very specific intent about the nature of his or her chosen industry. In the same way, common parlance dictates that a defendant cannot be convicted under VICAR of acting "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity" without proof that he had an intent to advance his position in a particular type of enterprise: namely, "an enterprise engaged in racketeering activity."

This Court has repeatedly recognized this principle in the context of similarly worded criminal statutes, ruling that a statutory *mens rea* requirement presumptively applies to all elements of the crime. The government attempts to re-cast this repeated admonition, suggesting that this Court's approach in *X-Citement*

Video,[1] *Liparota*,[2] *Elonis*,[3] and *Morissette*[4] applies only where attaching the *mens rea* requirement to each element is necessary to separate otherwise innocent conduct from illegal conduct. But the government's interpretation fails to appreciate that this rule applies only to "federal criminal statutes that are silent on the required mental state," not to those that contain a textual *mens rea* requirement. *Elonis*, 135 S. Ct. at 2010.

The government's position also fails to account for this Court's decision in *Flores-Figueroa v. United States*, where the Court held that the federal aggravated-identity-theft statute, which criminalizes a defendant who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," requires 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). Obviously, knowingly using a means of identification without lawful authority is not purely innocent conduct, regardless of whether the defendant knows that the identification belongs to someone else. The government is therefore incorrect that a textual *mens rea* requirement applies only within the context of "otherwise innocent" conduct. *Flores-Figueroa* demonstrates that it does not.

The government separately argues that *Flores-Figueroa* is distinguishable because the statute at issue in *Flores-Figueroa* required proof of the defendant's

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[1] *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).
[2] *Liparota v. United States*, 471 U.S. 419 (1985).
[3] *Elonis v. United States*, 135 S. Ct. 2009 (2015).
[4] *Morissette v. United States*, 342 U.S. 246 (1952).

knowledge, whereas VICAR requires proof of the defendant's *purpose*. But this difference in the statutes' terms is not a difference in the statutes' structures. Both statutory phrases begin with a *mens rea* requirement that presumptively applies to each element of the offense that is contained in the subsequent clauses of the sentence. Any terminological difference between the two statutes is not a structural difference between them, and the government identifies no reason why it would be.

The government is also incorrect to suggest that the majority of courts have rejected such an interpretation of VICAR. In the seminal case of *Concepcion*, for example, the court explained that VICAR was intended to reach "a defendant who holds a position in a RICO enterprise and who committed an underlying crime of violence with a motive of retaining or enhancing that position." *Concepcion*, 983 F.2d at 381. The court's analysis was predicated on the proposition that the VICAR statute was intended to punish "crimes committed 'as an integral aspect of membership' in such enterprises." *Id*. Each of the cases cited by the government operates on the same basis. *See, e.g.*, *United States v. Jones*, 566 F.3d 353, 361 (3d Cir. 2009) (defendant "had sworn to kill for the gang during his initiation"); *United States v. Carson*, 455 F.3d 336, 371 (D.C. Cir. 2006) (specifically distinguishing other cases as "inapposite because each [decision] involved individuals who were not members of the charged enterprise"). *See also Banks*, 514 F.3d at 965 (collecting cases, each of which links the defendant's purpose to membership in a RICO enterprise).

The analysis in *Concepcion*, *Jones*, *Carson*, and *Banks* relies upon the assumption that the defendant knows that the relevant enterprise is not simply an innocuous association but is engaged in racketeering activity. There is no suggestion that these courts would uphold a VICAR conviction where the defendant not only was not a member of the RICO enterprise but did not have any knowledge that the enterprise was engaged in any racketeering activity.

The Sixth Circuit upheld Frazier's conviction even though Frazier was never indicted as a member of a RICO enterprise, and the government's key witnesses admitted repeatedly at trial that Frazier did not know about any of the motorcycle club's racketeering conduct. The defendant cannot have the specific purpose of advancing his position in "an enterprise engaged in racketeering" when there is no proof that he even knows that the enterprise in question is engaged in any racketeering activity. Contrary to the government's argument, the Sixth Circuit's decision is not simply toeing the same line that was drawn by the other Circuits. It has drawn a different line altogether.

C. The Sixth Circuit did not identify a valid independent ground for its decision.

Finally, the government is incorrect to suggest that the Sixth Circuit identified a sufficient independent ground for rejecting Frazier's statutory interpretation argument. Instead, the only other ground that the Sixth Circuit identified as a reason for rejecting Frazier's argument is this: "Were we to adopt Frazier's position, VICAR might not cover an individual who commits a violent crime as a part of gaining entry to a gang but who does not have specific knowledge of the group's racketeering activities." Pet. App. 8a. But that is the whole point of a *mens rea* requirement: to punish defendants only when they have the requisite degree of knowledge or purpose. Although a defendant is not required to "know that his conduct is illegal," he ordinarily cannot be convicted unless he "know[s] the facts that make his conduct fit the definition of the offense." *Elonis*, 135 S. Ct. at 2009. The Sixth Circuit erroneously identified the intended effect of the *mens rea* requirement as the very reason not to apply it. That logic is circular. Thus, the alternative ground for affirmance identified by the government is in truth simply another instance of the same error that warrants this Court's review.

No circuit other than the Sixth Circuit has exempted VICAR from the ordinary tenets of statutory interpretation. The government recognizes that Frazier properly preserved the issue and that it is squarely presented in this Court. This petition is an ideal vehicle in which to decide it.

II. This case is an excellent vehicle for resolving whether 18 U.S.C. § 924(c)(3)(B)'s definition of "crime of violence" is unconstitutionally vague.

A. The constitutionality of § 924(c)(3)'s residual clause is squarely presented in this case.

There is a clear split of authority on the question of whether 18 U.S.C. § 924(c)(3)'s residual clause is unconstitutional. Compare*, e.g.*, *United States v. Salas*, 889 F.3d 681, 685 (10th Cir. 2018), and *United States v. Eshetu*, No. 15-3020, 2018 WL 3673907, at *1 (D.C. Cir. Aug. 3, 2018) (holding that the residual clause is unconstitutionally vague), with *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (holding that it is not).

As the government properly recognizes, the issue is squarely presented in Frazier's case.[5] Even before this Court issued its decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), Frazier preserved the issue in the Sixth Circuit, and the sole basis for the Sixth Circuit's rejection of Frazier's argument was its published authority in *Taylor*, 814 at 375–79. Pet. App. 10a.

Presumably, the government will be seeking certiorari in *Salas*. *See United States v. Salas*, No. 18A152 (application for extension of time to file until September 20, 2018). This Court will very likely be resolving the issue this Term one way or another, and Frazier's case is a much cleaner vehicle than most in which to do so.

B. Frazier's § 924(c) conviction cannot be upheld under the "elements" clause.

The government suggests that Frazier's position is inevitably doomed to failure under § 924(c)(3)'s elements clause, rendering the constitutionality of the residual clause a moot point as far as he is concerned. But (1) the government is incorrect on the merits of its argument, and (2) the analysis is in any event much more complicated than the government suggests. This Court cannot predict with any degree of confidence that Frazier's convictions would be upheld under § 924(c)(3)'s elements clause. The potential applicability of the elements clause is far

[5] The only way that the constitutionality of § 924(c)(3)'s residual clause could be avoided in this case is if this Court grants certiorari and reverses on the first question presented in Frazier's petition—*i.e.*, whether the Sixth Circuit properly interpreted the VICAR statute. That is because Frazier's VICAR convictions serve as the predicates for his § 924(c) conviction. If Frazier's VICAR convictions are reversed, his § 924(c) conviction necessarily will be reversed, as well. *See, e.g.*, *Banks*, 514 F.3d at 977.

better left for the lower courts to resolve on remand, after the constitutionality of § 924(c)(3)'s residual clause has been determined.

1. VICAR likely is not categorically violent under the elements clause.

If this Court determines that the residual clause is unconstitutional, then several considerations strongly suggest that VICAR is not categorically a "crime of violence" under § 924(c)(3)'s elements clause.

a. The elements clause does not apply to crimes requiring less-than-violent force.

First, the elements clause does not apply to crimes that require less-than-violent force for conviction. *See Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). This has important implications for a VICAR conviction. Assuming that the VICAR statute is divisible, the provision relevant to Frazier is 18 U.S.C. § 1959(a)(3). That subsection of VICAR requires proof that the defendant committed "assault with a dangerous weapon or assault resulting in serious bodily injury" in violation of "the laws of any State or the United States." *Id.* Thus, if it is possible under "the laws of any State or the United States" to commit assault with a dangerous weapon or assault resulting in serious bodily injury without the use of violent force, then a violation of § 1959(a)(3) is not categorically a crime of violence.

This is undoubtedly the case. Several courts have held that state assault offenses that would trigger § 1959(a)(3) are not categorically crimes of violence under statutory provisions that parallel § 924(c)(3)(B) because they can be committed with non-violent force. *See, e.g.*, *United States v. Mayo*, No. 16-4282, 2018 WL 3999884, at *8 (3d Cir. Aug. 22, 2018) (Pennsylvania aggravated assault statute, under which the defendant must cause serious bodily injury, is not a "violent felony" for purposes of 18 U.S.C. § 924(e)); *United States v. Jordan*, 812 F.3d 1183, 1187 (8th Cir. 2016) (Arkansas aggravated assault offense is not a violent felony under 18 U.S.C. § 924(e)); *United States v. Rede-Mendez*, 680 F.3d 552, 558 (6th Cir. 2012) (New Mexico offense of aggravated assault with a deadly weapon does not qualify as a crime of violence under the Sentencing Guidelines); *United States v. Ceja-Romero*, 75 F. App'x 618, 620 (9th Cir. 2003) (Washington state offense of assault with a deadly weapon is not a "crime of violence" for purposes of Sentencing Guidelines); *United States v. Brown*, 249 F. Supp. 3d 287, 295 (D.D.C. 2017) (North Carolina conviction for assault with a deadly weapon with intent to kill is not an ACCA "violent felony").

Because VICAR can be committed by a defendant who commits a state-law offense requiring less-than-violent force, VICAR is not categorically a crime of violence under § 924(c)(3)'s elements clause. This Court's decision in *Stokeling v. United States*, No. 17-5554, may also impact the analysis in a manner that is relevant to Frazier's case on remand.

b. The elements clause arguably does not apply to crimes that can be committed with only a *mens rea* of recklessness.

Second, the circuits are split on whether statutory provisions that are materially identical to § 924(c)(3)'s elements clause apply to offenses that can be committed with a *mens rea* of recklessness, as opposed to a *mens rea* of knowledge or purpose. Compare, *e.g.*, *United States v. Windley*, 864 F.3d 36, 38 (1st Cir. 2017) (Massachusetts offenses of assault and battery with a dangerous weapon are not "violent felonies" for purposes of § 924(e) because they can be committed with a mens rea of recklessness), with *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (holding that an offense is categorically violent even if it can be committed recklessly).

Here, again, Frazier's conviction is susceptible to attack under the elements clause, because a VICAR conviction would not be categorically violent if any state-law offense that could serve as a predicate for § 1959(a)(3) could be committed with a *mens rea* of recklessness. And that is assuredly true. *See, e.g.*, *United States v. Rose*, 896 F.3d 104, 105 (1st Cir. 2018) (Rhode Island offense of assault with a dangerous weapon is not a violent felony under § 924(e) because it requires only recklessness). The government is therefore incorrect that Frazier's § 924(c) conviction will inevitably be upheld under the elements clause.

2. The government has failed to cite any case that supports its argument that VICAR is hyper-divisible.

Instead of acknowledging that Frazier could easily benefit on remand from the foregoing percolations in the relevant case law, the government relies upon a novel, wholly untested theory of divisibility in order to argue that Frazier could not possibly benefit from a favorable ruling on the residual clause's constitutionality. The government asserts not only that VICAR is divisible by virtue of the fact that subsections (a)(1) through (6) of the statute set forth different penalties for different types of conduct, but that each subsection of VICAR—including § 1959(a)(3)—is further divisible, such that a reviewing court must assess the elements of the particular state crime underlying a particular defendant's VICAR conviction in order to determine whether the VICAR conviction is a "crime of violence" for purposes of the elements clause.

But the government cites no court that has adopted such an analysis and identifies no statute that has been deemed hyper-divisible in the manner that the government now suggests. The government has not cited even a single case that analyzes the divisibility of VICAR in the manner that the government argues is appropriate. There is therefore no merit to the government's assertion that its chosen analysis would be inevitable on remand. It almost certainly would not.

In fact, there are plenty of courts that have hewed to this Court's traditional divisibility tests in the context of VICAR, instead. For example, the decision in *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018), did not adopt the position that the government advances here. *Id.* at 307–09 (concluding that a conviction under § 1959(a)(5) for conspiracy to commit murder in aid of racketeering was not a crime of violence under the Guidelines).

Nor is there any independent reason to believe that the government's position is correct. Only "the elements" of the offense are relevant to divisibility; the particular "means" by which an individual defendant meets one or more of the elements are not. *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). Courts have long believed that one of VICAR's elements is "that the defendant committed the alleged [predicate] crime of violence." *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992). The fact that the prosecution must prove this element by showing the commission of a crime does not make the elements of the predicate state-law crime also become elements of VICAR. In fact, some of the circuits do not even require that an indictment that charges a VICAR offense must identify the specific state statute that serves as the predicate offense. *See, e.g.*, *United States v. Martinez*, 136 F.3d 972, 978 (4th Cir. 1998).

The elements of the predicate crime thus do not become the "elements" of VICAR for purposes of the categorical approach under § 924(c)(3)'s elements clause. If the government's argument was correct, then the same analysis would apply to other crimes that rely upon proof of an underlying predicate crime. For example, the "elements" of any given § 924(c)(1)(A) conviction would also include each element of the underlying predicate "crime of violence." That, of course, is not the rule. Neither is the position that the government has staked out for the first time here.

3. Even if VICAR is hyper-divisible, Frazier would still benefit from remand.

Finally, even if the government was correct that VICAR is hyper-divisible in the manner that it suggests, it is still wrong that Frazier's argument would necessarily have no traction on remand. The particular state crime underlying Frazier's VICAR conviction is Ohio felony assault, pursuant to Ohio Rev. Code § 2903.11(A). As the government properly observed, the Sixth Circuit is currently considering en banc whether an offense under a materially identical Ohio statute is a crime of violence under a Guidelines provision that is materially indistinct from § 924(c)(3)'s elements clause. *See United States v. Burris*, No. 16-3855, 2017 WL 6368852, at *2 (6th Cir. Dec. 13, 2017), *reh'g en banc granted, opinion vacated* (Feb. 26, 2018). Depending upon how *Burris* is decided, there is a very good chance that—

even assuming that the government's novel divisibility argument is correct—Frazier would still be entitled to reversal of his § 924(c) conviction on remand.[6]

The government is therefore incorrect that it would make no difference in this case if § 924(c)(3)'s residual clause was ruled unconstitutional. In fact, a ruling that the residual clause is unconstitutionally vague likely will require a reversal of Frazier's § 924(c) conviction, as it likely cannot be upheld under the elements clause. If this Court does not grant a writ of certiorari with respect to the first question presented in Frazier's petition, this Court should nevertheless grant Frazier's petition with respect to the second question presented, adjudicate the threshold issue of the residual clause's constitutionality in light of *Dimaya*, and then remand for further proceedings with respect to the relatively complex issues pertaining to § 924(c)(3)'s elements clause as applied in the VICAR context.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Dated: September 7, 2018

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[6] Although the government notes that Frazier did not address the en banc *Burris* court's action in his petition for certiorari, that is because Frazier's petition was filed before this Court issued its decision in *Dimaya*. Until *Dimaya* provided a basis for upending the residual-clause analysis under the Sixth Circuit's hitherto-controlling authority in *Taylor*, the elements clause would never have been in play, and the outcome in *Burris* would have been irrelevant to Frazier.