No. 23-____

In the Supreme Court of the United States

DEARNTA LAVON THOMAS, PETITIONER

v.

UNITED STATES

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c) of Title 18, U.S. Code, makes it a crime to carry a firearm in furtherance of a "crime of violence." As this Court's recent decisions make clear, a predicate crime of violence is an offense that "has as an element the use, attempted use, or threatened use of physical force" purposefully targeted "against the person or property of another." 18 U.S.C. § 924(c)(3)(A); *see Borden v. United States*, 593 U.S. 420, 424 (2021); *United States v. Davis*, 588 U.S. 445, 470 (2019). To decide whether a predicate offense is a crime of violence under § 924(c), courts use the categorical approach and look to the predicate's elements—not to a defendant's conduct in a given case—and determine whether every conviction for that predicate crime necessarily involves force purposefully directed at another.

The statute that formed the basis for the § 924(c) conviction here, the violent crimes in aid of racketeering (VICAR) statute, 18 U.S.C. § 1959, makes it a crime to support a racketeering enterprise by committing an enumerated offense—including murder, maiming, and assault with a dangerous weapon—"in violation of the laws of any State or the United States." *Id.* § 1959(a). That means that a VICAR offense, in turn, must rest on some predicate state or federal crime, and the elements of a charged VICAR offense include the elements of that predicate.

The question presented is whether, when a defendant's § 924(c) conviction is predicated on a VICAR offense, a court must apply the categorical approach to the offense on which that VICAR offense is predicated, and determine whether that underlying offense is categorically a crime of violence.

RELATED PROCEEDINGS

United States Court of Appeals (4th Cir.):

United States v. Thomas, No. 21-7257 (Nov. 29, 2023) (decision below)

In re Thomas, No. 19-292 (Feb. 23, 2021) (decision authorizing successive 28 U.S.C. § 2255 application)

United States District Court (E.D. Va.):

Thomas v. United States, No. 11-CR-00058 (Aug. 9, 2021) (district court memorandum opinion and order denying relief under § 2255)

United States v. Thomas, No. 11-CR-00058 (Dec. 13, 2011) (judgment and sentence)

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INTRODUCTION

This case presents an acknowledged circuit split over an important methodological question: how to apply the modified categorical approach to determine whether a defendant has committed a crime of violence under 18 U.S.C. § 924(c), when that § 924(c) conviction, in turn, rests on a violation of 18 U.S.C. § 1959, the violent crimes in aid of racketeering (VICAR) statute.

Section 924(c) makes it a felony to carry a firearm in furtherance of a "crime of violence." A crime of violence is an offense that has as an element "the use, attempted use, or threatened use of physical force" purposefully targeted "against the person or property of another." 18 U.S.C. § 924(c)(3)(A); *see Borden v. United States*, 593 U.S. 420, 424 (2021); *United States v. Davis*, 588 U.S. 445, 470 (2019). To decide whether a predicate offense meets that definition, courts use the categorical approach, looking to the predicate offense's elements—not the defendant's conduct—to determine whether every conviction for that predicate crime necessarily involves force purposely directed against the person or property of another.

The VICAR statute makes it a felony to support a racketeering enterprise by committing an enumerated offense—including murder, maiming, and assault with a dangerous weapon—"in violation of the laws of any State or the United States." 18 U.S.C. § 1959(a). A VICAR offense thus requires a predicate state or federal offense, and the elements of a VICAR offense include the elements of that predicate.

The question presented, on which the courts of appeals have split 2–2, is whether a court must consider the elements of the predicate underlying the VICAR

offense when determining whether the VICAR offense is a crime of violence under § 924(c). The question is an important one, especially given § 924(c)'s mandatory minimums, and it merits this Court's review. This case is the perfect example: In the Second and Eleventh Circuits, Mr. Thomas' § 924(c) conviction would be invalid because the Virginia-law predicates for his VICAR conviction do not categorically match the elements § 924(c) requires. But because Mr. Thomas had the misfortune to be prosecuted in the Fourth Circuit, his conviction stands. The Court should grant review.

1. The courts of appeals have split 2–2 over whether courts must analyze the predicate supporting a VICAR offense when determining if that VICAR offense is a crime of violence under § 924(c). The Second and Eleventh Circuits hold that courts must look to the elements of the underlying predicate, because that offense defines the crime of which the defendant was convicted. *See Alvarado-Linares v. United States*, 44 F.4th 1334, 1342-43 (11th Cir. 2022); *United States v. Pastore*, 83 F.4th 113, 119-20 (2d Cir. 2022). If the predicate offense isn't categorically a crime of violence, those courts reason, then neither is the VICAR offense, and the § 924(c) conviction is invalid.

But the Fourth Circuit below joined the Sixth Circuit to hold that the generic VICAR offense itself can be a crime of violence, no matter what specific predicate crime the defendant was actually charged with to support the VICAR offense. *See* App. 16a; *Nicholson v. United States*, 78 F.4th 870, 877-79 (6th Cir. 2023). In those circuits, courts conduct the categorical approach by considering the elements of the generic version of the VICAR offense. Worse still, the Fourth Circuit below held that *every* VICAR offense satisfies § 924(c)'s

requirement that a crime of violence involve purposefully targeting the person or property of another, *see Borden*, 593 U.S. at 429, no matter the elements of the underlying predicate offense, simply because a separate element of every VICAR offense is that the defendant had a racketeering purpose. *See* App. 14a.

The split is entrenched, and percolation won't help. The Fourth Circuit has acknowledged the disagreement, App. 16a n.*, and denied en banc review in a subsequent case—despite two judges' concerns about the court's approach, *see United States v. Kinard*, 93 F.4th 213, 216-17 (4th Cir. 2024) (Keenan, J., concurring). Only this Court can resolve the conflict.

2. The decision below is wrong. The Second and Eleventh Circuits correctly hold that courts should look to the predicate crime underlying the VICAR offense and evaluate whether that predicate is categorically a crime of violence under § 924(c). Because a VICAR offense "hinge[s] on" the substantive elements of the predicate crime, *Pastore*, 83 F.4th at 119-20, applying the categorical approach to the elements of the predicate offense is the only way to ensure that the VICAR offense is a categorical match for a § 924(c) crime of violence.

Indeed, the government here charged Mr. Thomas with (and Mr. Thomas pleaded guilty to) committing VICAR assault with a dangerous weapon by committing two underlying Virginia-law offenses, not by committing the elements of some generic VICAR offense. App.106a-108a. The government cannot now claim, more than ten years later, that Mr. Thomas actually pleaded guilty to some generic elements written in invisible ink. Under the correct analysis, Mr. Thomas' § 924(c) conviction must be vacated, because

the two Virginia crimes supporting his VICAR offense are not categorically crimes of violence because they can be committed without purposefully using physical force against the person or property of another.

3. The question presented is important, and this case is an ideal vehicle for resolving it. Many individuals are convicted under § 924(c) every year, the statute imposes long mandatory minimums, and the uncertainty caused by the question presented is costly to courts and parties alike. And the split is outcome-determinative here: Because the Virginia offenses on which Mr. Thomas' VICAR offense rests aren't crimes of violence, his § 924(c) conviction is invalid under the Second and Eleventh Circuits' view.

The Court should grant review.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-17a) is reported at 87 F.4th 267. The district court's opinion (App. 18a-35a) is unpublished but available at 2021 WL 3493493.

JURISDICTION

The court of appeals entered its judgment on November 29, 2023. App. 1a. This Court's orders of February 23, 2024, and March 15, 2024, extended the time to file a petition for a writ of certiorari to April 27, 2024. *See* 28 U.S.C. § 2101(c). This petition is timely filed on April 26, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant federal statutes (18 U.S.C. §§ 924(c) and 1959) and Virginia statutes (Va. Code §§ 18.2-53.1

and 18.2-282) are reproduced in the appendix. *See* App. 152a-158a.

STATEMENT

A. Legal background

This case involves the interaction of two federal criminal statutes, 18 U.S.C. §§ 924(c) and 1959, with various state criminal statutes. The courts of appeals have split over the proper analytical framework for applying the modified categorical approach to determine whether a conviction under § 1959 qualifies as a "crime of violence" under § 924(c).

1. Section 924(c) imposes a severe penalty—at least five and sometimes ten years in prison—on a criminal defendant who "uses or carries a firearm" "during and in relation to any crime of violence." 18 U.S.C. § 924(c)(1)(A).

a. The statute defines a "crime of violence," in what is known as the elements clause, as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* § 924(c)(3)(A). Before 2019, the statute's "residual clause" additionally defined a crime of violence to include a felony "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." *Id.* § 924(c)(3)(B). In *Davis*, however, the Court held that § 924(c)'s residual clause was unconstitutionally vague. 588 U.S. at 470. Thus, for a § 924(c) conviction to stand, it must rest on a crime of violence that satisfies the elements clause.

b. This Court's recent decision in *Borden* makes clear that, to satisfy the § 924(c) elements clause, the

defendant must have used, attempted to use, or threatened to use force against the person or property of another with a mens rea greater than recklessness. 593 U.S. at 429. In *Borden*, the Court construed the term "violent felony" in § 924(e), and held that it requires a mens rea greater than recklessness. Section 924(e) contains an elements clause that defines "violent felony" almost identically to how § 924(c)'s elements clause defines "crime of violence." Under § 924(e)(2)(B)(i), a "violent felony" "has as an element the use, attempted use, or threatened use of physical force against the person of another." Under § 924(c)(3)(A), a "crime of violence" "is a felony and" "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The only difference is that subsection (e)'s elements clause contemplates "force against the person of another," and subsection (c)'s elements clause contemplates "force against the person or property of another." *Borden* explained that "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." 593 U.S. at 429. And "[r]eckless conduct," the Court concluded, "is not aimed in that prescribed manner." *Id.*

The upshot, after *Davis* and *Borden*, is that a "crime of violence" under § 924(c) is a crime that that includes "as an element the use, attempted use, or threatened use of physical force" against another, 18 U.S.C. § 924(c)(3)(A), *and* that requires that element to be committed with a mens rea greater than recklessness. As the court of appeals here recognized, "[b]oth of these things are necessary." App. 6a.

2. To determine whether a predicate offense meets the definition of a "crime of violence," courts use

the "categorical approach." *United States v. Taylor*, 596 U.S. 845, 850 (2022).

a. Under the categorical approach, courts look to the elements of the predicate offense—not the facts of the particular defendant's conduct—to determine whether that offense is a crime of violence. *Borden*, 593 U.S. at 424. A court considers the least culpable conduct necessary for a defendant to be convicted of the predicate crime. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). If that minimum conduct does not entail the "use, attempted use, or threatened use of physical force" against another, with more than mere recklessness, then it is not a crime of violence. *Borden*, 593 U.S. at 424; *supra* pp. 5-6. Applying the categorical approach "does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime." *Taylor*, 596 U.S. at 850. Rather, "[t]he only relevant question," as the Court has explained, "is whether the … felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Id.* Thus, under the categorical approach, an offense cannot be a crime of violence under § 924(c) "unless the *least* serious conduct it covers falls within the elements clause." *Borden*, 593 U.S. at 441.

b. Where "a statute lists multiple, alternative elements, and so effectively creates 'several different … crimes,'" it is considered "divisible" and courts apply the "modified categorical approach." *Descamps v. United States*, 570 U.S. 254, 263-64 (2013). "Under that approach, a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant

was convicted of." *Mathis v. United States*, 579 U.S. 500, 505-06 (2016). That process allows a court to identify the specific crime—and the elements of that crime—that the defendant was necessarily convicted of. Only then is the court able to apply the categorical approach. *Id.* at 506.

The modified categorical approach is, therefore, "a tool" to determine which specific crime "the defendant was convicted of." *Descamps*, 570 U.S. at 263-64. But it "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Id.* at 263. The elements of the crime of conviction must be "the same as, or narrower than," the crime compared to for it to be a categorical match. *Mathis*, 579 U.S. at 503.

3. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968, criminalizes participation in an organized-crime enterprise. Another statute, 18 U.S.C. § 1959, defines the separate federal offense of committing violent crimes in aid of racketeering (VICAR).

Specifically, the VICAR statute makes it a crime if a defendant, "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"—but only if doing so is a "violation of the laws of any State or the United States." *Id.* § 1959(a). That means that, "[t]o sustain a VICAR conviction" under § 1959, "the defendant must have committed another state or federal crime that fits within" one of the categories of offenses enumerated in that statute.

App. 38a n.1. What's more, § 1959 is divisible, as it enumerates separate categories of offenses punished under the statute. *See* 18 U.S.C. § 1959(a)(1)–(6). For example, VICAR "assault with a dangerous weapon," is punishable "by imprisonment for not more than twenty years," *id.* § 1959(a)(3), but "maiming" is punishable "by imprisonment for not more than thirty years," *id.* § 1959(a)(2).

4. The courts of appeals have split on the proper method for applying the modified categorical approach to determine whether a VICAR offense under § 1959 is a predicate "crime of violence" under § 924(c). The question presented is, because a § 924(c) conviction is predicated on a § 1959 offense that is in turn predicated on another offense, *which crime* must categorically qualify as a crime of violence? Some courts of appeals, like the Fourth Circuit below, have held that a generic version of the charged § 1959 offense (such as assault with a dangerous weapon, maiming, or murder) can be the crime of violence necessary to sustain the § 924(c) conviction. App. 11a-14a. But other courts of appeals have held that a court must look to the specific crime serving as the predicate for the VICAR offense and determine whether that *predicate* offense is a crime of violence. *Infra* pp. 15-18.

B. Factual and procedural background

1. In 2011, Dearnta Thomas pleaded guilty to a RICO offense and to possessing a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). App. 58a-59a. The predicate for the § 924(c) conviction was VICAR assault with a dangerous weapon under 18 U.S.C. § 1959(a)(3). App. 106a-108a. That VICAR offense, in turn, rested on two Virginia state-law offenses: use or display of a firearm, Va. Code § 18.2-

53.1, and brandishing a firearm, *id.* § 18.2-282. *See* App. 107a.

Section 18.2-53.1 of the Virginia Code criminalizes using or displaying a firearm while committing or attempting to commit one of several enumerated felonies. The offense has two elements: that the defendant (1) "displayed in a threatening manner", "used," or "attempted to use" a firearm (2) while "committing or attempting to commit" one of the enumerated crimes. Virginia Model Criminal Jury Instruction No. 18.700, https://www.vacourts.gov/courts/circuit/resources/model_jury_instructions_criminal.pdf.

Section 18.2-282 of the Virginia Code makes the brandishing of a firearm a misdemeanor. That offense also has two elements: (1) pointing, holding, or brandishing a firearm (2) "in such a manner as to reasonably induce fear in the mind of a victim." *Kelsoe v. Commonwealth*, 308 S.E.2d 104, 104 (Va. 1983) (per curiam). A defendant brandishes a firearm if he "exhibit[s] or expose[s] the weapon in a shameless or aggressive manner." *Morris v. Commonwealth*, 607 S.E.2d 110, 114-15 (Va. 2005).

Mr. Thomas was sentenced to five years' imprisonment on the RICO offense. App. 57a. On the § 924(c) offense—which had a mandatory minimum sentence of ten years, required to run consecutively with any other sentence of imprisonment—Mr. Thomas received the mandatory minimum, for a total sentence of fifteen years. *Id.*

2. After obtaining authorization from the court of appeals to file a second or successive § 2255 petition based on the invalidation of § 924(c)'s residual clause in *Davis*, App. 36a-53a, Mr. Thomas filed his petition in district court, App. 19a. He explained that his

§ 924(c) conviction was invalid and should be vacated, because the predicate VICAR offense did not qualify as a crime of violence under § 924(c), since the Virginia state crimes necessary for the government to prove the VICAR offense are not categorically crimes of violence. App. 27a.

The district court denied relief, reasoning that Mr. Thomas' "predicate VICAR conviction qualifies as a crime of violence" under § 924(c). App. 34a. The court applied the modified categorical approach, noting that Mr. Thomas had pleaded to VICAR "assault with a dangerous weapon" as the predicate for his § 924(c) conviction. App. 26a. Rather than looking at the underlying Virginia offenses, the court "only look[ed] to the generic federal offense of 'assault with a dangerous weapon.'" App. 33a. The court reasoned that that generic federal offense required as an element the "use, attempted, use, or threatened use of physical force against the person or property of another," and that the use of a "*dangerous* weapon" required the mens rea that "the offender intended to commit the assault *with violent force*." App. 34a.

3. The court of appeals affirmed, but recognized that it was deepening a circuit split in doing so.

a. The court held that VICAR assault with a dangerous weapon is categorically a crime of violence under § 924(c), without regard to the predicate state-law crimes supporting the VICAR offense. App. 14a. The court first determined that VICAR assault with a dangerous weapon falls within § 924(c)'s elements clause. The court reasoned that one of "the elements necessary for a conviction of VICAR assault with a dangerous weapon" is that "the defendant … committed an assault 'with a dangerous weapon.'" App. 11a.

And, extending its holding that different federal assault crimes, 18 U.S.C. §§ 111(b), 2114(a), constitute crimes of violence, the court explained that "the inclusion of a dangerous-weapon element" in § 1959 "elevates an assault to a crime of violence for purposes of § 924(c)." App. 11a.

The court also concluded that "VICAR assault with a dangerous weapon satisfies *Borden*'s mens rea requirement because it cannot be committed recklessly." App. 13a. The court explained that VICAR offenses must be committed "'for the purpose of gaining entrance to or maintaining or increasing position' in [a] racketeering enterprise." *Id.* (quoting 18 U.S.C. § 1959(a)). Thus, in the court's view, all VICAR offenses "are deliberate and purposeful." App. 14a.

Because the court of appeals concluded that the § 1959 offense charged is categorically a crime of violence, it held that it need not consider whether the predicate Virginia crimes were also crimes of violence. The court explained that, if "the generic federal offense"—in this case "federal assault with a dangerous weapon"—"standing alone can satisfy the crime-of-violence requirements, courts need not double their work by looking to the underlying predicates as well." App. 15a-16a.

b. The court of appeals recognized that its decision deepened a circuit split. It noted that "[o]ther courts have been wrestling with this question" of how to apply the categorical approach when a § 924(c) conviction rests on a § 1959 offense that in turn rests on a state offense, and that those courts "have taken different approaches." App. 16a n.*. The court of appeals below "c[a]me to the same conclusion" as the Sixth Circuit, App. 12a, which held "that VICAR assault

with a dangerous weapon was itself a crime of violence without analyzing its predicates," App. 16a n.* (citing *Manners v. United States*, 947 F.3d 377, 380-81 (6th Cir. 2020)). But the Fourth Circuit noted that the Eleventh Circuit has held that, when a VICAR offense is "based on state-law predicates, the court must consider the underlying state-law predicates to determine whether they constitute crimes of violence." *Id.* (citing *Alvarado-Linares*, 44 F.4th at 1343).

REASONS FOR GRANTING THE PETITION

The courts of appeals have split 2–2 over how to determine whether a VICAR offense qualifies as a crime of violence under § 924(c). The Eleventh and Second Circuits hold that courts must evaluate whether the *predicate* offense supporting the VICAR offense is a crime of violence. But the Fourth Circuit here joined the Sixth Circuit to hold that courts should determine whether the generic federal definition of the VICAR offense qualifies as a crime of violence, without regard to the underlying predicate. The split is entrenched—the Fourth Circuit has recently denied en banc review in another case—and there is no benefit to further percolation.

The Fourth Circuit's decision is wrong, and this case is an ideal vehicle for resolving the question presented, because Mr. Thomas' § 924(c) conviction would be invalid in the Second and Eleventh Circuits. Applying the modified categorical approach requires courts to analyze the offense of which the defendant was actually convicted. Because a VICAR offense must rest on a predicate state or federal offense, the court must consider the elements of that predicate. And under that correct approach, Mr. Thomas' § 924(c) conviction must be vacated, because neither

Virginia-law offense underlying his VICAR assault-with-a-dangerous-weapon offense qualifies as a crime of violence because neither requires force purposely targeted at another's person or property. *See Borden*, 593 U.S. at 429. The Fourth Circuit's rejection of that approach and its conclusion that VICAR's purpose element—that the conduct be undertaken for pecuniary gain or to bolster a defendant's position in a racketeering enterprise—instead satisfies § 924(c)'s mens rea requirement are wrong. An individual can act with the purpose of advancing in a criminal enterprise and, as a result, recklessly use force.

The question presented is important. Section 924(c) offenses are frequently charged, and because they subject defendants to lengthy mandatory minimum sentences, it is critical to justice and fairness that defendants actually committed the offense of which they were convicted. Without this Court's intervention, the confusion in the lower courts will persist, at great cost to defendants, the government, and the courts alike.

This Court should grant review.

I. The courts of appeals have divided over how to apply the categorical approach to determine whether a VICAR offense is a crime of violence under § 924(c).

The courts of appeals have split over how to determine whether a VICAR offense qualifies as a crime of violence under § 924(c). The Second and Eleventh Circuits hold that courts must evaluate whether the charged VICAR predicate is a categorical match for a crime of violence under § 924(c). But the Fourth Circuit below, though acknowledging that approach and the split, sided with the Sixth Circuit, holding that a

generic VICAR offense enumerated in § 1959 can categorically qualify as a crime of violence, no matter whether the predicate offense—which is necessary to sustain the VICAR conviction—is a crime of violence. Only this Court can resolve the conflict.

A. In the Second and Eleventh Circuits, courts evaluate whether the crime on which the VICAR offense rests qualifies as a crime of violence under § 924(c).

1. The Second Circuit directs courts to look to the predicate state-law crime in evaluating whether a VICAR offense qualifies as a crime of violence under § 924(c).

a. In *Pastore*, the court held that it had to "look to" the VICAR "predicate offense[] to determine whether" the defendant "was charged with and convicted of a crime of violence." 83 F.4th at 119-20. There, the defendant was convicted of "attempted murder in aid of racketeering" under § 1959(a) and "using and carrying a firearm during and in relation to a crime of violence" under § 924(c). *Id.* at 115-16. And the "superseding indictment specified that the 18 U.S.C. § 1959(a)(5) charge was predicated on" the defendant "having 'knowingly attempted to murder [a victim]' in violation of" New York law. *Id.* at 120.

"To answer [the] question" whether the VICAR offense was a crime of violence under § 924(c), the court first had to "clarify" how "substantive VICAR offenses should be analyzed under the modified categorical approach." *Id.* at 119. The court explained that, because a "substantive VICAR offense 'hinge[s] on' the underlying predicate offense," it had to determine whether the predicate was a crime of violence. *Id.* at 119-20. Under that analysis, the § 924(c) conviction was valid,

because the New York attempted-murder offense was categorically a crime of violence. *Id.* at 120-22.

b. In *United States v. Davis*, 74 F.4th 50 (2d Cir. 2023), and *United States v. Morris*, 61 F.4th 311 (2d Cir. 2023), the Second Circuit reaffirmed that courts must look to the state-law predicate to determine whether a VICAR offense is a crime of violence under § 924(c). In *Davis*, the defendant was convicted of a § 924(c) offense predicated on a VICAR murder offense, which in turn rested on second-degree murder under New York law. 74 F.4th at 51-52, 54. The defendant argued that his § 924(c) conviction was unlawful because it was predicated on "the generic, federal definition of second-degree murder," which "includes reckless conduct," and therefore cannot be a crime of violence under *Borden*. *Id.* at 53. The Second Circuit held that its decision in *Pastore* "squarely answers" the question of which offense the court must analyze under the categorical approach—the underlying New York crime and not the generic federal definition of murder. *Id.* "Because a 'substantive VICAR offense "hinge[s] on" the underlying predicate offense,'" a court must "'look to th[at] predicate offense[]" in determining whether § 924(c)'s crime-of-violence element is satisfied. *Id.* at 54.

In *Morris*, the Second Circuit summed up its approach. "[T]he first step … is to determine which VICAR" offense "is the predicate crime of violence underlying" the § 924(c) conviction. *Morris*, 61 F.4th at 318. The "second step is to determine which" state or federal law the defendant "violated during the commission of the specific VICAR" offense. *Id.* And the "third and final step is to determine whether the committed VICAR [offense], premised on a violation of the

relevant state or federal law" "is a 'crime of violence' under § 924(c)'s elements clause." *Id.*

2. The Eleventh Circuit applies the same framework. In *Alvarado-Linares*, the court held that if a § 924(c) conviction rests on a VICAR offense that is itself predicated on another crime, that predicate must be a crime of violence for the § 924(c) conviction to stand. 44 F.4th at 1343. There, prosecutors used Georgia murder offenses as predicates for four VICAR offenses that, in turn, served as predicates for corresponding § 924(c) charges. *Id.* at 1339. The jury convicted. Thus, the court explained that it had to decide which crime it must "consider for the purposes of the modified categorical approach" to assess the validity of the § 924(c) convictions, "the elements in the VICAR statute" or "the elements of state law murder." *Id.* at 1342.

Holding that it must look to the elements of the underlying Georgia murder offenses, the court rejected the government's argument that it "should look only to the generic federal definition of 'murder' as that term is used in [§ 1959]." *Id.* As the court explained, under the modified categorical approach, it had to "ask whether a crime, *as charged and instructed*, has 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" *Id.* at 1343 (emphasis added; quoting 18 U.S.C. § 924(c)(3)(A)). And, because "the indictment alleged that [the defendant's] VICAR charges were based on violations of the Georgia malice murder statute and attempted murder statute," the court could not decide whether the defendant had been convicted of a crime of violence "without looking at Georgia law." *Id.* Indeed, the trial judge had "told the jury to consider whether [the defendant]

committed" murder and attempted murder "as defined by state law." *Id.* In other words, because the jury convicted the defendant based upon the elements of the state-law crime—not based upon the elements of some generic federal murder offense—the court could not determine whether an element of the defendant's crime entailed the use of force by looking at a generic crime the defendant was not charged with.

Applying the modified categorical approach to the underlying state-law crimes, the court concluded that the predicate Georgia offenses were crimes of violence under § 924(c). Because Georgia's malice murder statute criminalized killing with malice aforethought, and killing with malice aforethought "necessarily entails the use of physical force against the person of another" with a mens rea greater than recklessness, the Georgia statute qualified as a crime of violence under *Borden*. *Id.* at 1344. Thus, the VICAR murder convictions predicated on that Georgia offense also qualified as crimes of violence. *Id.* The VICAR attempted-murder offenses were crimes of violence, too, because the predicate state-law offenses required a defendant to have "the intent to kill someone and to have completed a substantial step towards that goal," which qualifies "as an attempted use of force under the elements clause." *Id.* at 1346.

B. In the Fourth and Sixth Circuits, the generic federal VICAR offense can qualify as a crime of violence without regard to whether the underlying VICAR predicate is categorically a crime of violence under § 924(c).

Recognizing the split, the Fourth Circuit below rejected the Second and Eleventh Circuits' views and

joined the Sixth Circuit in holding that a generic federal VICAR offense enumerated in § 1959 can qualify as a crime of violence under § 924(c), regardless of whether the VICAR predicate is categorically a crime of violence.

1. As the Fourth Circuit acknowledged below, App. 16a n.*, the Sixth Circuit holds that § 924(c)'s crime-of-violence element can be satisfied based on a generic federal VICAR offense, without analyzing the VICAR offense's predicate crime. In *Manners*, a criminal defendant was convicted of § 924(c) predicated on VICAR assault with a dangerous weapon. 947 F.3d at 378-79. Like the court of appeals below, the Sixth Circuit held that the VICAR conviction was "necessarily" a crime of violence under § 924(c) because "the dangerous weapon element" in VICAR "'elevate[s]' even the most minimal type of assault into 'violent force' sufficient to establish this offense as a 'crime of violence.'" *Id.* at 381-82.

The Sixth Circuit reaffirmed that holding in *Nicholson*, reiterating that courts must perform the modified categorical approach without regard to the predicate crimes supporting the VICAR offense. 78 F.4th at 878-80. There, two defendants challenged their § 924(c) convictions, arguing that the two § 1959 offenses on which they rested—VICAR conspiracy and VICAR aiding-and-abetting assault with a dangerous weapon—were not crimes of violence. *Id.* at 876-78. Consistent with *Manners*, the court held that VICAR assault with a dangerous weapon (even on an aiding and abetting theory) was categorically a crime of violence. *Id.* at 878-80. But the court held that VICAR conspiracy *could not* qualify for a crime of violence, explaining that "*most* conspiracy convictions" are not crimes of violence and determining that none of the

elements of VICAR conspiracy necessarily involved the use of "physical force." *Id.* at 878 (emphasis added; citing 18 U.S.C. § 1959(a)(6)). In the Sixth Circuit's view, its categorical analysis was complete without also considering whether the predicate crime supporting the VICAR conspiracy offense might have been an exception to the rule that *most* conspiracy crimes are not crimes of violence.

2. The Fourth Circuit below sided with the Sixth Circuit and held that a VICAR offense can qualify as a crime of violence under § 924(c), without consideration of the underlying crime supporting the VICAR offense. What's more, the Fourth Circuit held that *every* VICAR offense satisfies *Borden*'s requirement that a predicate crime of violence under § 924(c) must be committed with a mens rea greater than recklessness. The Fourth Circuit has already reaffirmed those holdings twice since Mr. Thomas' appeal was decided.

a. In the opinion below, the court of appeals held that "VICAR assault with a dangerous weapon satisfies both [§ 924(c)'s elements] clause and *Borden*'s mens rea requirement." App. 8a. The court thus held that Mr. Thomas' VICAR offense was a crime of violence under § 924(c), even if the state-law predicates were not. App. 14a-16a.

i. The court of appeals determined that § 1959 assault with a dangerous weapon necessarily was covered under § 924(c)'s elements clause. App. 11a. That's because, as the court explained, one of "the elements necessary for a conviction of VICAR assault with a dangerous weapon" is that "the defendant … committed an assault 'with a dangerous weapon.'" *Id.* And, under circuit precedent analyzing different federal assault statutes, "the inclusion of a dangerous-

weapon element" in § 1959's assault with a dangerous weapon crime "elevates an assault to a crime of violence for purposes of § 924(c)." *Id.* (citing *United States v. Bryant*, 949 F.3d 168 (4th Cir. 2020)).

The court also held that "VICAR assault with a dangerous weapon satisfies *Borden*'s mens rea requirement because it cannot be committed recklessly." App. 13a. An element of every VICAR offense is that the defendant committed the offense "'as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from' a racketeering enterprise or 'for the purpose of gaining entrance to or maintaining or increasing position' in the racketeering enterprise." *Id.* (quoting 18 U.S.C. § 1959(a)). According to the court, that "purposefulness requirement means that, to be guilty of VICAR assault with a dangerous weapon, the defendant must have committed the assault for one of these purposes." *Id.* (emphasis omitted). In the court's view, VICAR's purpose element removes the possibility that a defendant committed the VICAR offense recklessly. App. 13a-14a. Although the court did not directly say so, that reasoning means that, in the Fourth Circuit, *no* VICAR offense covered by § 1959(a) can be committed recklessly.

ii. Splitting with the Second and Eleventh Circuits, the Fourth Circuit concluded that it need not consider whether a predicate to a VICAR offense was a crime of violence. It explained that "where, as here, the generic federal offense standing alone can satisfy the crime-of-violence requirements, courts need not double their work by looking to the underlying predicates as well." App. 16a. That's because § 924(c)'s "text speaks so explicitly in terms of a single element" in its crime-of-violence definition. App. 15a. Thus, "[i]f one

element of an offense satisfies the force clause, it becomes superfluous to inquire whether other elements likewise meet the requirement." *Id.*

b. In the five months since the Fourth Circuit decided Mr. Thomas' appeal, it has twice reaffirmed that courts need not look to a state-law predicate in determining whether a VICAR offense is a crime of violence. And it denied a petition for rehearing en banc in one of those cases, showing that it will not reconsider its view despite the conflict with the Second and Eleventh Circuits.

i. In *United States v. Tipton*, 95 F.4th 831, 848 (4th Cir. 2024), the Fourth Circuit held that VICAR murder qualifies as a crime of violence, without regard to whether the predicate murder offenses are crimes of violence. The defendants argued that "the proper § 924(c) 'crime of violence' analysis of their VICAR murder offenses requires an examination of the elements of the state or federal law" serving as the predicate to the VICAR offense. *Id.* at 848-49.

But the court said that it had "considered" and "roundly rejected" that argument in *Thomas*. *Id.* at 849. "That is," the court had already "rejected the proposition that the proper § 924(c) 'crime of violence' analysis of a VICAR offense requires a court to 'look through' the VICAR statute to the underlying violation of state or federal law." *Id.* Thus, in *Thomas*, the Fourth Circuit split with the Second and Eleventh Circuits on the analytical framework for applying the categorical approach, and in *Tipton*, it extended the split even more squarely to VICAR murder.

ii. Similarly, in *Kinard*, the Fourth Circuit again reaffirmed that VICAR assault with a dangerous weapon, which there was predicated on a North

Carolina assault crime, categorically qualifies as a crime of violence under § 924(c). 93 F.4th at 216. The court reached that conclusion even though the North Carolina crime could be committed recklessly. The court explained that its "holding in *Thomas*" "resolve[d] the present appeal." *Id.*

Even so, two judges on the *Kinard* panel wrote separately, agreeing that the result was required by *Thomas* but expressing their "concerns" with that decision's reasoning. *Id.* at 216-17 (Keenan, J., concurring). The concurrence "disagree[d] that the purpose element of the VICAR statute necessarily satisfies the mens rea requirement under *Borden*." *Id.* at 217. In the concurrence's view, "proof of a 'gang-related motive' under the purpose element does not, of itself, establish that the defendant consciously directed any force 'against' a target, as required to qualify that offense as a § 924(c) 'crime of violence.'" *Id.* at 219. Thus, the concurrence would have looked to the charged state-law predicate to determine whether *Borden*'s mens rea requirement was satisfied. *Id.* at 222.

The concurrence also "briefly address[ed]" and took issue with *Thomas*' conclusion that every VICAR offense has "a separate generic offense element." *Id.* at 220-21. In the concurrence's view, each enumerated VICAR offense, like "assault with a dangerous weapon," 18 U.S.C. § 1959(a)(3), "simply identifies the relevant generic federal offense and does not add an element of proof to the VICAR crime charged in the indictment," *Kinard*, 93 F.4th at 220 (Keenan, J., concurring). The elements of the crime come from the predicate for the VICAR offense.

Even though two of the three judges on the *Kinard* panel had expressed misgivings about *Thomas*, the Fourth Circuit denied a petition for rehearing en banc in *Kinard* without a vote. Order Denying Rehearing En Banc, *United States v. Kinard*, No. 22-6285 (4th Cir. Apr. 19, 2024), ECF No. 52.

C. The split is outcome-determinative, and only this Court can resolve it.

The circuit split is outcome-determinative: Had Mr. Thomas been prosecuted in the Second or Eleventh Circuit, the court would have asked whether either of the Virginia-law offenses supporting his VICAR conviction was categorically a crime of violence under § 924(c). And the answer, as explained below (at 26-28) is no, because neither of those state-law offenses requires a mens rea of more than recklessness. Neither the Second nor the Eleventh Circuit would have looked to VICAR's separate purpose element—rather than the underlying VICAR predicate—to see if *Borden*'s mens rea requirement was satisfied. The result was an onerous mandatory minimum sentence Mr. Thomas would not have faced in New York or Georgia.

Only this Court can resolve the circuit conflict. Indeed, the Fourth Circuit acknowledged that "[o]ther courts have been wrestling with this question and have taken different approaches." App. 16a n.*. It nonetheless deepened the circuit split and later denied en banc review despite separate writings expressing concern. This Court should grant review.

II. The Fourth Circuit's decision is wrong.

The Second and Eleventh Circuits' approach is correct. Courts must look to the underlying predicate supporting a VICAR offense when evaluating whether

that VICAR offense is categorically a crime of violence under § 924(c). And under that proper framework, Mr. Thomas' VICAR offense is not a crime of violence, because neither Virginia-law predicate is a crime of violence. That's because neither offense requires a defendant to purposefully target force at another person. *See Borden*, 593 U.S. at 429.

What's more, even assuming a court may look at the generic federal offense under § 1959 in conducting the categorical analysis, the Fourth Circuit's mens rea analysis contravened *Borden* in concluding that VICAR assault with a dangerous weapon is a crime of violence under § 924(c). The court held that § 1959(a)'s element that a VICAR offense be committed for a racketeering purpose means that the violent act constituting the VICAR offense could not have been committed recklessly. Not so. A defendant doesn't necessarily "direct his action at, or target, another individual" or property, *id.*, just because he commits an offense for a racketeering purpose. VICAR's purpose element thus cannot provide the requisite mens rea, and a court must evaluate whether the generic offense satisfies the mens rea requirement. Of course, the Fourth Circuit could have avoided this error altogether if it had correctly answered the question presented and followed the Second and Eleventh Circuits' approach.

A. In applying the modified categorical approach, courts must evaluate whether the predicate offense supporting the VICAR conviction is a crime of violence under § 924(c).

1. The Second and Eleventh Circuits' approach is correct. Under those courts' framework, Mr.

Thomas' VICAR offense is not a crime of violence. His § 924(c) conviction thus must be vacated.

a. As noted (at 15-18), the Second and Eleventh Circuits hold that, to determine whether a VICAR offense is a crime of violence under § 924(c), courts must apply the modified categorical approach to the *predicate* to the VICAR offense. That makes sense, because the modified categorical approach directs courts to look to the elements of the crime "as charged and instructed," *Alvarado-Linares*, 44 F.4th at 1343, or to which the defendant pleaded guilty, *Mathis*, 579 U.S. at 511-12. And VICAR assault with a dangerous weapon must be predicated on a specific state or federal crime—an offense "in violation of the laws of any State or the United States." *Morris*, 61 F.4th at 319 (quoting 18 U.S.C. § 1959(a)). Thus, a court must look at the elements of that specific predicate to assess whether the "offense of conviction" is a categorical match with § 924(c)'s elements clause. *Id.* (quoting *Pastore*, 36 F.4th at 428).

b. Although this Court need not decide the question, and remand would be a sensible approach, under the correct framework for applying the categorical approach, Mr. Thomas' VICAR offense is not a crime of violence under § 924(c). That's because neither of the two Virginia-law predicates for that offense is categorically a crime of violence. The predicates for Mr. Thomas' VICAR offense were violations of §§ 18.2-53.1 and 18.2-282 of the Virginia Code. Section 18.2-53.1 criminalizes using or displaying a firearm while committing or attempting to commit one of several enumerated felonies. Section 18.2-282 makes brandishing a firearm a misdemeanor. *Supra* p. 10. Neither offense is a crime of violence under § 924(c) and this Court's precedents.

As an initial matter, neither statute includes an intent requirement, *see* Va. Code §§ 18.2-53.1, 18.2-282, and the Virginia Supreme Court has made clear that "courts construe statutes and regulations that make no mention of intent as dispensing with it and hold that the guilty act alone makes out the crime." *Esteban v. Commonwealth*, 587 S.E.2d 523, 526 (Va. 2003). Thus, neither statute purports to require purposeful conduct, a requirement under *Borden* for either statute to be a crime of violence.

What's more, Virginia caselaw makes clear that neither statute requires purposeful force targeted at another person, as *Borden* further requires. Section 18.2-282 is a misdemeanor that can be violated with reckless conduct. A defendant commits that offense if he "exhibit[s]" a firearm "in an ostentatious, shameless, or aggressive manner," *Morris*, 607 S.E.2d at 114-15, and "reasonably induce[s] fear in the mind of the victim" by doing so, *Kelsoe*, 308 S.E.2d at 104. So a defendant who waves a gun—but does not direct that action toward any particular person—and reasonably frightens an observer has committed a § 18.2-282 offense. But that conduct does not involve any purposeful force so is not a crime of violence under § 924(c).

Similarly, § 18.2-53.1 makes it a crime to use or display a firearm while committing or attempting to commit one of several enumerated felonies. But it does not require the use or threat of force *against another*. Threatening self-harm can be punished under the statute. For example, the Virginia Court of Appeals upheld a conviction under § 18.2-53.1 based on a defendant's holding a gun to his own head and threatening to kill himself if a rape victim did not have sex with him. *Breeden v. Commonwealth*, 596 S.E.2d

563, 569 (Va. Ct. App. 2004). Because a defendant can be convicted under this provision based on targeting violent force against *himself*, it is not a categorical match for a crime of violence under § 924(c), which requires that a defendant target force at the person or property of another.

2. The Second and Eleventh Circuits' framework, unlike the Fourth and Sixth Circuits' approach, is faithful to the categorical approach and ensures that defendants sentenced under § 924(c) have actually been convicted of crimes of violence. The Second and Eleventh Circuits follow this Court's instruction that the purpose of the categorical approach is to determine what statutory elements actually formed "the basis for [a] conviction." *Johnson v. United States*, 559 U.S. 133, 144 (2010). Indeed, that is why, when a crime is divisible, a court considers "charging documents, plea agreements, … and jury instructions" to determine which elements were actually proven or admitted to. *Id.* Because a "substantive VICAR offense 'hinge[s] on' the underlying predicate offense," there is no way to tell what crime a defendant has been convicted of without looking to the predicate crime. *Pastore*, 83 F.4th at 119-20.

This case illustrates the problems with the Fourth and Sixth Circuits' approach. Mr. Thomas pleaded guilty in 2011 to a § 924(c) offense, based on an indictment that made clear that the elements of the predicate VICAR offense included the elements of §§ 18.2-53.1 and 18.2-282 of the Virginia Code. Now, more than ten years later, the government is suggesting that there were additional elements of his crime, written in invisible ink in his indictment, that he also agreed he committed. For example, the government below suggested that VICAR assault with a dangerous

weapon includes the elements of generic federal assault, which it says are now codified in 18 U.S.C. § 113, U.S. CA Br. 6, even though that statute appears nowhere in Mr. Thomas' indictment or plea agreement. If the Fourth and Sixth Circuits are correct, that means that *every* VICAR offense includes elements of some federal generic crime—even though juries in VICAR cases are instructed not on the generic's elements but rather on the predicate offense's elements. Those circuits' approach thus calls many VICAR convictions into question by implying that juries were improperly instructed. This Court should make clear that the modified categorical approach requires looking at the elements of the crime a defendant was actually charged with and convicted of.

B. The Fourth Circuit's mens rea analysis contravenes *Borden*—an error the court would not have made under the Second and Eleventh Circuits' approach.

Even assuming that courts can consider the elements of a federal generic offense in determining whether a VICAR offense is a crime of violence under § 924(c), the Fourth Circuit's mens rea analysis is wrong, meaning its entire approach to § 1959 predicates is erroneous. *See supra* pp. 20-21. For an offense to qualify as a crime of violence, it must involve force directed against the person or property of another, and *Borden* makes clear that offenses that can be committed recklessly don't meet that standard. 593 U.S. at 429. In the Fourth Circuit's view, VICAR's purpose element necessarily means that every VICAR offense satisfies *Borden*'s mens rea requirement. App. 13a. That element provides that a VICAR offense must be committed "as consideration for … anything of pecuniary value from" a racketeering enterprise "or 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). The Fourth Circuit reasoned that VICAR's "purposefulness requirement means that, to be guilty of VICAR assault with a dangerous weapon, the defendant must have committed the assault *for one of these purposes*." App. 13a.

That makes no sense. Section 1959's requirement that a VICAR offense be committed for a racketeering-related purpose does not mean that the underlying violent force was purposefully "directed or targeted at another," as § 924(c) requires. *Borden*, 593 U.S. at 443. The government cannot graft a purpose requirement from a *different* element of a criminal statute onto the force element to satisfy § 924(c).

Judge Keenan's hypothetical in *Kinard* shows why. Suppose a defendant "sees a rival gang member's empty car parked on a deserted street" and "fires a 'warning shot'" at the car, which "hit[s] and injure[s] a rival gang member, whom the defendant had not seen standing nearby." *Kinard*, 93 F.4th at 219 (Keenan, J., concurring). The defendant may have purposefully fired the gun to maintain his position in a racketeering organization—thus satisfying § 1959's purpose element—but he "did not purposefully hit the individual he had not seen." *Id.* Instead, the defendant "*recklessly* applied force to an individual, rather than *directing* force at a target." *Id.* Thus, assuming shooting the gun violated some predicate assault statute, the defendant committed a VICAR offense, but, under *Borden*, he did not commit a crime of violence under § 924(c).

As a result, even if the Fourth Circuit were correct that courts should look to the generic VICAR offense, courts would have to evaluate whether the generic crime categorically requires a mens rea greater than recklessness. That means that even if Mr. Thomas does not prevail on the question presented, the Fourth Circuit would still need to redo its mens rea analysis on remand. Of course, the court never would have made this error if it had instead looked—as the Second and Eleventh Circuits require—to the underlying predicate supporting the VICAR offense to determine whether that predicate is categorically a crime of violence under § 924(c). Correctly answering the question presented thus also corrects the Fourth Circuit's serious *Borden* error (which warrants reversal in its own right).

III. The question presented is important, and this case is an ideal vehicle for resolving it.

A. The question presented is important and recurring.

1. The proper resolution of this issue matters for ensuring just prosecution and sentences for defendants convicted of § 924(c) offenses predicated on VICAR offenses. Each year, many criminal defendants are convicted and sentenced under § 924(c). In fiscal year 2022 alone, the United States Sentencing Commission reported 2,790 convictions under that statute. U.S. Sentencing Commission, *Quick Facts: 18 U.S.C. § 924(c) Firearm Offense*, at 1 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY22.pdf. Section 924(c) convictions predicated on VICAR offenses are, of course, only a subset of those convictions. But proper resolution of the question

presented matters for those defendants. Defendants convicted under § 924(c) face long mandatory minimum sentences—five years, or ten years if the defendant discharged the gun while committing the predicate crime, 18 U.S.C. § 924(c)(1)(A)—as well as the collateral and downstream consequences of an additional conviction that may not be warranted. Those defendants thus have a strong interest in ensuring that their sentences are based on actual crimes of violence. And, of course, getting the question presented right is the only way to remain faithful to the congressional intent reflected in § 924(c)'s elements clause.

2. Without this Court's review, the uncertainty created by the question presented will only continue to impose costs on defendants, the government, and courts. Over the past five years, in light of *Davis* and *Borden*, the courts of appeals have heard numerous challenges to § 924(c) convictions on the ground that predicate VICAR offenses do not qualify as crimes of violence, and the question presented will continue to vex courts of appeals that haven't yet reviewed it. But that percolation won't sharpen the Court's review, because the split is already entrenched, and courts on both sides have articulated their views. The Tenth Circuit has also weighed in, siding with the Eleventh and Second Circuits, though that opinion was later vacated. *See United States v. Toki*, 23 F.4th 1277, 1280 (10th Cir. 2022), *vacated sub nom. Kamahele v. United States*, 143 S. Ct. 556 (2023). And, as noted (at 23-24), two judges in the Fourth Circuit have expressed their disagreement with the court's decision here (but did not convince the court to go en banc). The split will persist without this Court's intervention.

B. This case presents an ideal vehicle for resolving the question presented. Ruling for Mr. Thomas

would result in vacatur of his § 924(c) conviction and resentencing. If this Court holds that courts must evaluate whether the state-law crimes underlying VICAR offenses are categorically crimes of violence under § 924(c), Mr. Thomas would secure relief on remand. Specifically, the court of appeals would conclude that Mr. Thomas is entitled to vacatur of his § 924(c) conviction and resentencing because neither Virginia crime charged as the predicate to his VICAR offense qualifies as a crime of violence. That's because an offense can be a crime of violence under § 924(c) only if the offense categorically requires that a defendant purposefully "direct his action at, or target, another individual." *Borden*, 593 U.S. at 429. But a defendant can be convicted of either Virginia state-law offense without targeting violence at another person. *Supra* pp. 26-28.

Resentencing would make a difference to Mr. Thomas. He was sentenced to ten years imprisonment—the mandatory minimum—for his § 924(c) conviction, but only five years for his RICO offense. *Supra* p. 10. Resolving the question presented in Mr. Thomas' favor would result in resentencing and likely a shortened term of supervised release, given that he has already served his term of imprisonment.

* * *

The courts of appeals have split 2–2 over an important question about a federal crime that carries long mandatory minimum sentences. Getting the answer right matters to Mr. Thomas and criminal defendants like him and is the only way to ensure that courts are applying § 924(c)'s elements clause as Congress intended. The Court should grant review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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