No. 23-1168

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The courts of appeals have split 2–2 over how to determine whether a defendant has committed a crime of violence under 18 U.S.C. § 924(c), when that offense rests on a violation of 18 U.S.C. § 1959, the violent crimes in aid of racketeering (VICAR) statute. The Second and Eleventh Circuits hold that courts must look to the elements of the state or federal offense underlying the VICAR offense, which defines the precise crime of conviction. But the Fourth Circuit below joined the Sixth Circuit in holding that the generic VICAR offense, standing alone, can be a crime of violence, no matter the underlying predicate.

In fact, the Fourth Circuit's approach categorically makes virtually *every* VICAR offense a crime of violence, leaving the state-law predicate irrelevant to the categorical analysis. That's because the Fourth Circuit reasoned that VICAR's purpose requirement—that an offense must be committed for the purpose of advancing a defendant's standing in a racketeering organization—satisfies the mens rea requirement under *Borden v. United States*, 593 U.S. 420, 429 (2021), that a crime of violence involve the actual, attempted, or threatened use of physical force against another with more than mere recklessness.

The government doesn't dispute that the question presented is important, because § 924(c) prosecutions are common. Instead, the government primarily argues that the circuits aren't in direct conflict. But the government acknowledges that the Second and Eleventh Circuits look to the state-law predicates in their crime-of-violence analyses, and that the Fourth and Sixth Circuits look to the VICAR generic offense. The

government nonetheless insists that those approaches don't conflict.

That argument fails, as the caselaw makes clear. The Second and Eleventh Circuits have held that where, as here, a VICAR conviction rests on a state-law offense, courts *must* look to the state-law offense in their categorical analysis. That rule directly conflicts with the Fourth Circuit's reasoning, which categorically makes virtually every VICAR offense a crime of violence, no matter the predicate. Unsurprisingly, the Fourth Circuit acknowledged the split when picking a side. *See* App. 16a n.*.

The government also insists that the Fourth Circuit's *Borden* error is outside the scope of the question presented. That's wrong. The Fourth Circuit answered the question presented with its *Borden* reasoning, which is incorrect—indeed, the government doesn't bother defending it. But for that error, the court would have concluded that the VICAR offense here is *not* a crime of violence. Put differently, the Fourth Circuit's *Borden* reasoning is within the question presented precisely because it is a key premise of the court's *answer* to the question presented, and the court's reason for splitting with the Second and Eleventh Circuits.

The split is entrenched and won't resolve without this Court's intervention. Indeed, the Fourth Circuit denied en banc rehearing on the issue even after two judges addressed the court's analytical errors. Pet. 23-24. Given the lower courts' cemented views and the importance of the question presented, the Court should grant review before the split deepens.

ARGUMENT

I. The courts of appeals have divided over how to determine whether a VICAR offense is a crime of violence.

A. The courts of appeals have split 2–2 over how to determine whether a VICAR offense is a crime of violence under § 924(c).

1. In the Eleventh and Second Circuits, courts must evaluate whether the predicate underlying the VICAR offense is a crime of violence. Pet. 15-18.

In *Alvarado-Linares v. United States*, 44 F.4th 1334, 1342 (11th Cir. 2022), the Eleventh Circuit addressed whether, "for the purposes of the modified categorical approach," it had to examine "the elements in the VICAR statute" or "the elements of state law murder." Because the VICAR charges in the indictment were based on violations of Georgia law, the court explained that it couldn't decide whether the defendant had been convicted of a crime of violence "without looking at Georgia law." *Id.* at 1343.

Similarly, in *United States v. Pastore*, 83 F.4th 113, 119-20 (2d Cir. 2022), the Second Circuit explained that, because a "substantive VICAR offense 'hinges on' the underlying predicate offense," it needed to determine whether the predicate was a crime of violence. Indeed, the Second Circuit later held that *Pastore* "squarely answers" the question of which offense courts must analyze under the categorical approach. *United States v. Davis*, 74 F.4th 50, 53 (2d Cir. 2023). Courts must "look to [the] predicate offense." *Id.* at 54.

2. But in the Fourth and Sixth Circuits, courts determine whether the generic federal definition of

the VICAR offense qualifies as a crime of violence without regard to the state-law predicate. Pet. 18-24.

In *Manners v. United States*, 947 F.3d 377, 380-81 (6th Cir. 2020), the Sixth Circuit held that § 924(c)'s crime-of-violence element can be satisfied based on a generic federal offense alone. And in *Nicholson v. United States*, 78 F.4th 870 (6th Cir. 2023), the court made clear that courts should look *exclusively* to the generic federal offense. There, without examining state-law predicates, the court determined that a VICAR conspiracy offense was *not* a crime of violence. *Id.* at 877-78. In short, the Sixth Circuit looks only to the federal generic VICAR offense, no matter the underlying predicate.

The Fourth Circuit below acknowledged the split and sided with the Sixth Circuit. App. 16a n*. It held that if "the generic federal offense standing alone can satisfy the crime-of-violence requirements, courts need not … look[] to the underlying predicate as well." App. 16a. And, under the Fourth Circuit's reasoning, every generic federal VICAR offense (except conspiracy offenses, which don't necessarily require physical force, *see* Pet. 19-20) is a crime of violence. That's because, in the court's view, VICAR's purpose requirement means that all VICAR offenses satisfy § 924(c)'s requirement that the defendant targeted the person or property of another with a mens rea greater than recklessness. App. 14a; *see Borden*, 593 U.S. at 429; Pet. 21.

B. The government says the Second and Eleventh Circuits' decisions don't "directly conflict" with the Fourth Circuit's. Opp. 15. That's wrong, as the Fourth Circuit itself made clear. App. 16a n.*. As noted (at 3-4), in the Fourth and Sixth Circuits, the

analysis doesn't require or permit assessment of the underlying state-law predicate. That approach directly conflicts with the Second and Eleventh Circuits' rule.

1. The government recognizes (Opp. 15) that the Second Circuit looks to the state-law predicate in conducting the modified categorical approach. It nonetheless claims that there's no split because the Second Circuit has never held that a court "cannot rely on" the generic federal VICAR offense "in classifying a VICAR offense as a crime of violence." Opp. 15-16. But the Second Circuit's reliance on state-law predicates conflicts with the Fourth and Sixth Circuits' rule, which refuses to look at those predicates.

In the Second Circuit, because a "substantive VICAR offense hinges on the underlying predicate offense," courts "look to that predicate offense" to determine whether a defendant "was charged with and convicted of a crime of violence." *Davis*, 74 F.4th at 54 (quoting *Pastore*, 36 F.4th at 119-20). Thus, in *United States v. Morris*, 61 F.4th 311, 321 (2d Cir. 2023), the Second Circuit held that it "must determine" whether a defendant's state-law violation underlying the VICAR offense was a crime of violence.

That rule conflicts with the Fourth Circuit's decision here, which necessarily held that *all* nonconspiracy VICAR offenses are categorically crimes of violence, no matter the state-law predicate. The court explained that "a necessary element of any VICAR offense is that it be committed" for a racketeering purpose. App. 13a. And "[t]his purposefulness requirement," the court continued, meant that VICAR assault with a dangerous weapon was categorically a crime of violence. *Id.* The court emphasized that "[t]he

VICAR statute's purposefulness requirement applies to every offense in § 1959(a), including murdering and maiming." App. 14a. Under the court's logic, then, *every* VICAR offense that involves any use or threatened use of force is categorically a crime of violence. And, as the Fourth Circuit explained, if "the generic federal offense" enumerated in § 1959(a) "standing alone can satisfy the crime-of-violence requirements, courts need not double their work by looking to the underlying predicates." App. 16a.

2. The government also denies conflict with the Eleventh Circuit, claiming that *Alvarado-Linares* did "not address whether a court may rely on an element of the generic federal offense in assessing whether a VICAR conviction is a crime of violence." Opp. 16. That contention is wrong, too. Indeed, the Fourth Circuit itself recognized that courts in the Eleventh Circuit "must consider the underlying state-law predicates to determine whether they constitute crimes of violence." App. 16a n.*.

That makes sense. *Alvarado-Linares* expressly rejected the argument that courts "should look only to the generic federal definition of 'murder.'" 44 F.4th at 1342. Because the VICAR offense there rested on Georgia crimes, the court explained that it "cannot" conduct the categorical analysis "without looking at Georgia law." *Id.* at 1343. And since *Alvarado-Linares*, the Eleventh Circuit has reiterated that courts "*must* look to how the government charged the VICAR offense, and when, as here, it incorporated the state law elements into the jury charge for the VICAR offense, then [courts] *must* look to the state predicate offense." *United States v. Cosimano*, No. 19-14841, 2022 WL 3642170, at *6 (11th Cir. Aug. 24, 2022) (per curiam) (emphases added).

Here, the predicates for Mr. Thomas' VICAR offense were state-law offenses. The Eleventh Circuit therefore would have analyzed whether those offenses were crimes of violence, in direct conflict with the Fourth and Sixth Circuits' approach. Mr. Thomas' conviction couldn't stand in the Eleventh Circuit, because the underlying state-law offenses aren't crimes of violence. Pet. 26-28.

II. The Fourth Circuit's decision is wrong.

A. The Fourth Circuit wrongly held that Mr. Thomas could be convicted of a crime of violence under § 924(c) based on elements of a generic federal offense he was never charged with or pleaded guilty to. Pet. 24-31.

1. The Second and Eleventh Circuits' approach is correct. Courts must look to the underlying predicate supporting a VICAR offense to evaluate whether that VICAR offense is categorically a crime of violence. Pet. 25-26. That makes sense. The modified categorical approach requires courts to analyze the elements of the crime "as charged and instructed," *Alvarado-Linares*, 44 F.4th at 1343, or to which the defendant pleaded guilty, *Mathis v. United States*, 579 U.S. 500, 511-12 (2016). Because VICAR assault with a dangerous weapon must rest on a specific state or federal offense, courts should look to the elements of that offense.

Even assuming courts can evaluate a generic federal offense in conducting the crime-of-violence analysis, the Fourth Circuit nonetheless erred because it contravened *Borden*. Pet. 29-31. As noted (at 4-6), the court held that § 1959(a)'s purpose element—that a VICAR offense be committed for a racketeering purpose—satisfies *Borden*'s mens rea

requirement. In the Fourth Circuit's view, that purpose element means that the VICAR offense could not have been committed recklessly. App. 13a-14a. But that reasoning fails. A defendant doesn't purposefully "direct his action at, or target, another individual" or property, *Borden*, 593 U.S. at 429, just because he acts to advance a racketeering purpose. Pet. 29-31.

2. Although the Court need not resolve the underlying merits, under the proper framework, Mr. Thomas' § 924(c) conviction doesn't rest on a crime of violence because neither Virginia-law predicate of his VICAR offense is a crime of violence. Pet. 26-28. The government doesn't dispute that neither offense requires a defendant to purposefully target force at another person. *See Borden*, 593 U.S. at 429. Section 18.2-282, which criminalizes brandishing a firearm, is a misdemeanor that can be committed recklessly. Pet. 10, 27. And § 18.2-53.1, which criminalizes using or displaying a firearm while committing one of several enumerated felonies, doesn't require force to be targeted *at another*. Pet. 10, 27-28.

B. The government's counterarguments fail.

1. The government argues that VICAR "requires proof of both a generic federal offense" and a predicate offense. Opp. 10-13. And it asserts that, "by including the enumerated offenses" in § 1959(a) "without defining those terms, Congress indicated that the conduct at issue must fall within the generic federal definition of the particular offense." Opp. 10-11. Thus, the argument goes, each VICAR offense includes elements of some generic federal crime, and a court can conduct the modified categorical approach by looking to those elements. That argument fails for two reasons. *First*,

as charged, VICAR offenses don't necessarily include a federal generic offense. *Second*, even if they did, the generic assault-with-a-dangerous-weapon offense is not categorically a crime of violence.

a. The government cannot show, in practice, that it charges—or courts require it to charge—elements of a generic federal offense when it prosecutes defendants under VICAR. *See* Pet. 23. As Judge Keenan recently explained, "the phrase 'assaults with a dangerous weapon'" "does not add an element of proof to the VICAR crime charged in the indictment." *United States v. Kinard*, 93 F.4th 213, 220 (4th Cir. 2024) (Keenan, J., concurring). That's why "prior cases addressing VICAR offenses" "have not identified the enumerated federal offense as a separate element." *Id.* Indeed, the government doesn't cite a single case in which a court has endorsed its view of how VICAR offenses must be charged.

The charging documents here show that the government didn't charge Mr. Thomas with a generic federal offense. The indictment (App. 106a-107a) doesn't "expressly allege[]" the elements of a federal offense. *Contra* Opp. 13-14. Indeed, the government still doesn't say what the elements of the generic federal offense *are*. *See* Opp. 10-14. Instead, the government charged Mr. Thomas with—and Mr. Thomas pleaded guilty to—VICAR assault with a dangerous weapon based on two underlying Virginia-law offenses. App. 106a-107a. Mr. Thomas's plea provided that he "did unlawfully and knowingly assault D.B. with a dangerous weapon, and did aid, abet, counsel, command, induce, and procure the commission of said offense, *in violation of Va. Code Ann. §§ 18.2-53.1 and 18.2-282*." App. 107a (emphasis added).

The government attacks a strawman when it responds that, because Mr. Thomas was prosecuted in federal court, his "guilty plea did not limit the VICAR charge to the underlying state-law predicates." Opp. 14. Everyone agrees that Mr. Thomas pleaded guilty to federal offenses under §§ 924(c) and 1959(a). But the VICAR offense *incorporated* the elements of the enumerated state-law offenses, and Mr. Thomas pleaded guilty to *those* elements. Thus, the government's statement that "[a] pure state-law crime would not be a valid Section 924(c) predicate," Opp. 14, is beside the point. What's more, the government doesn't even try to explain what the elements of the supposed generic assault-with-a-dangerous-weapon offense are. That failure shows why the government's view of the categorical approach fails. Courts must evaluate the elements charged, not elements the government later claims it must have charged.

b. Even if the VICAR charge here had included generic assault with a dangerous weapon, the Fourth Circuit's decision would still be wrong, because that offense isn't categorically a crime of violence. To define a "'generic' version" of a particular offense, the Court considers how "the offense [is] commonly understood," *Mathis*, 579 U.S. at 503, "look[ing] to state criminal codes" for guidance, *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 395 (2017). And in most states, both assault and assault with a dangerous weapon (when states define that crime) can be committed recklessly or negligently, CA4 Doc. 30, at 39-47 & nn.5-14, meaning the offenses fail *Borden*'s requirements.

2. The government also asserts that whether VICAR's general purpose requirement, in and of itself, makes a VICAR offense a crime of violence isn't

encompassed within the question presented. Opp. 16 n.4. That argument fails.

As Mr. Thomas explained (Pet. 29-31), the Fourth Circuit's incorrect mens rea analysis resulted from its misapplication of the categorical approach. The court wouldn't have committed the error had it used the correct approach and analyzed the state-law predicates, as the Second and Eleventh Circuits require. Thus, if the Court holds that the Fourth Circuit is wrong on the question presented, the Fourth Circuit's *Borden* error will necessarily be corrected, too. That issue is thus "set out in the petition, or fairly included therein." Sup. Ct. R. 14(1)(a).

Tellingly, the government doesn't defend the Fourth Circuit's *Borden* analysis. That's because it's indefensible. VICAR's purpose element doesn't satisfy *Borden*'s mens rea requirement, because a defendant can be convicted of a VICAR offense where he "*recklessly* applied force to an individual, rather than *directing* force at a target." *See Kinard*, 93 F.4th at 219 (Keenan, J., concurring).

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

A. The government doesn't dispute that the question presented is important. Section 924(c) convictions are common and subject defendants to long mandatory-minimum sentences. Pet. 31-32. The split is entrenched, and further percolation won't aid this Court's review. The Court should intervene.

B. This case is an ideal vehicle. Pet. 32-33. The question presented is outcome-determinative: A court in the Second or Eleventh Circuit would have analyzed whether either Virginia offense supporting Mr. Thomas' VICAR conviction is categorically a crime of

violence. Because the answer is no, *supra* p. 8; Pet. 26-28, Mr. Thomas' § 924(c) conviction must be vacated.

The government wrongly gestures (Opp. 14 n.1) at the possibility of procedural default. *See* App. 25a. But that argument just merges with the merits. Below, the government argued that "[Mr. Thomas] cannot show actual innocence, or prejudice"—necessary to overcome a purported procedural default—"because his legal argument about the nature of VICAR assault with a dangerous weapon fails as a matter of law." Dist. Ct. Doc. 696, at 9. In other words, the government's procedural-default argument turned on the underlying merits, which in turn depend on the methodological question presented here. But as Mr. Thomas has shown (at 7-8), his arguments succeed because his VICAR conviction is not a crime of violence. Thus, the government has no independent procedural-default argument.

CONCLUSION

The Court should grant review.

Respectfully submitted.

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