No. 20-

IN THE

Supreme Court of the United States

RAYNAL KING & HOWARD R. ROSS, III,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a crime that requires a resulting death categorically includes, as an element, "the use, attempted use, or threatened use of physical force against the person or property of another" under the elements clause of 18 U.S.C. 924(c)(3)(A), even when the offense can be proven without a volitional use of force.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Raynal King and Howard R. Ross, III, defendants-appellants below. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

The petition is directly related to the following proceedings: The underlying criminal prosecutions were *United States* v. *King*, No. 18-2877, and *United States* v. *Ross*, No. 18-2800, in the Western District of Missouri. Petitioners were convicted February 12, 2018, and sentenced August 15, 2018. Petitioners appealed their convictions and sentences to the Eighth Circuit, docketed as *United States* v. *Ross*, No. 18-2800, and *United States* v. *King*, No. 18-2877. The Eighth Circuit affirmed the District Court's judgment on August 11, 2020. Petitioners petitioned for rehearing *en banc* and rehearing by panel on August 24, 2020. The petitions were denied October 26, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 969 F.3d 829 (8th Cir. 2020) and is reproduced in the appendix. Pet. App. 1a–21a. The order of the Eighth Circuit denying en banc and panel rehearing is reported at 977 F.3d 1295 and is reproduced at Pet. App. 36a–38a. The judgment of the United States District Court for the Western District of Missouri is unpublished and is reproduced at Pet. App. 24a–35a

JURISDICTION

The Eighth Circuit entered judgment and issued an opinion on August 11, 2020. The court denied Mr. King's and Mr. Ross' petitions for panel and en banc rehearing on October 26, 2020. On March 19, 2020 this Court extended the time for filing a petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A) reads:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for

an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(D) reads:

Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. § 924(c)(3)(A) reads: "For purposes of this subsection the term 'crime of violence' means an offense that is a felony and—(A) has as an element the

use, attempted use, or threatened use of physical force against the person or property of another."

18 U.S.C. § 924(j) reads:

> A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or imprisonment for any term of life; and
>
> (2) if the killing is a manslaughter (as defined in section 1112), be punished as provided in that section.

18 U.S.C. § 1201(a) reads, in relevant part:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

INTRODUCTION

This Court should grant certiorari to resolve the question of whether a crime that requires a resulting death categorically includes, as an element, "the use, attempted use, or threatened use of physical force against the person or property of another" under the elements clause of 18 § U.S.C. 924(c)(3)(A), even when the offense can be proven without a volitional use of force. In *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004), this Court unanimously held that the elements clause of 18 U.S.C. § 16(b)—which is identical to that of § 924(c)(3)(A)—requires "a higher *mens rea* than [] merely accidental or negligent conduct"; see

also *Voisine* v. *United States*, 136 S. Ct. 2272, 2278–79 (2016) (holding that use of force against the person or property of another under § 16(a) requires that the force "be volitional").

There is an entrenched circuit split as to whether a resulting death categorically satisfies the elements clause when there is no *mens rea* element to use force during the conduct that results in death. The Fourth, Sixth, and Ninth Circuits have all held that a death alone does not categorically satisfy the elements clause. In contrast, the First, Fifth, and Eighth Circuits have held that any resulting death during a crime necessarily satisfies the force clause.

This question is particularly significant after this Court's holding in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), which voided for vagueness the "crime of violence" residual clause in 18 U.S.C. § 924(c)(3)(B). The residual clause swept more broadly than the elements clause, so as a result of invalidating the residual clause, the range of statutes that fall within the definition of a "crime of violence" has narrowed. This question is vitally important because it determines whether an individual has been improperly convicted of a crime that could result in a sentence as severe as life imprisonment. See *id.* at 2332 ("[The government's] case-specific reading would cause § 924(c)(3)(B)'s penalties to apply to conduct they have not previously been understood to reach: categorically nonviolent felonies committed in violent ways.").

Numerous defendants are currently serving lengthy sentences based on convictions under various federal criminal statutes that contain a "death results" element—including petitioners' life sentences. This is concerning because "[i]n our republic, a speculative possibility that a man's conduct violated the law

should never be enough to justify taking his liberty." *Id.* at 2335. And § 924(c)(3)(A) mirrors elements clauses in other statutes defining a "crime of violence." See *infra* at 6–7. Because of that broad reach, this issue warrants this Court's immediate review.

The Eighth Circuit's holding is wrong because the majority failed to rely solely on the elements of the statute defining kidnapping resulting in death, as required by the categorical approach. Conceding that the 18 U.S.C. § 1201(a) "death results" element has no *mens rea* attached, the Eighth Circuit instead supplies a "use of force" element that is wholly absent from the statute defining kidnapping resulting in death and from the jury instructions given by the trial court.

This case is an excellent vehicle because it squarely and cleanly presents the issue that has divided the lower courts. The Eighth Circuit panel considered the question presented, which is dispositive of whether petitioners' convictions are considered crimes of violence, and that court denied *en banc* review over dissent. Furthermore, the crime at issue contains no elements other than "death results" to otherwise satisfy the elements clause.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The central question is whether a crime that results in death—here, a kidnapping resulting in death—satisfies the elements clause, 18 U.S.C. § 924(c)(3)(A), and is, as a result, a crime of violence. Answering this question as to Petitioners' convictions requires examining the interaction between two statutes. The first statute is the federal kidnapping statute, 18 U.S.C. § 1201(a), which forms the basis of the

relevant charge. The second statute is 18 U.S.C. § 924(c)(3), which determines whether the underlying crime—here, kidnapping resulting in death—is a "crime of violence." If it is not, then Count Three—using a firearm in furtherance of kidnapping—has no basis and must be vacated. Pet. App. 6a–7a.

The federal kidnapping statute requires that a prosecutor prove a defendant "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person." 18 U.S.C. § 1201(a); Pet. App. 9a ("The kidnapping statute requires an intentional scienter."). The statute includes a sentencing enhancement "if the death of any person results," increasing the available punishment to either death or life imprisonment. *Id.* Notably, though, the "death results" provision contains no associated *mens rea*. It simply requires that the death stem from the kidnapping. The elements of kidnapping and kidnapping resulting in death are identical, with the one exception that a death *somehow* results, whether from an unexpected heart attack or an intentional slaying. See *Camacho* v. *English*, 872 F.3d 811, 814 (7th Cir. 2017) ("[Section] 1201(a)'s enhancement provision requires simply that 'the death of any person results[;]' the specific cause of death is immaterial."). Numerous other federal crimes include a "death results" element. See *infra* 15–16 n.2 (collecting statutes).

Section 924(c)(3) is then applied to determine whether kidnapping resulting in death is a crime of violence. It contains two clauses to make this determination—the elements clause, and the residual clause. This Court recently held the residual clause to be unconstitutionally vague. *Davis*, 139 S. Ct. at 2336. Thus the only available method of determining whether kidnapping where "death results" is a "crime

of violence" under § 924(c) is to inquire whether the underlying crime "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The elements clause in § 924(c)(3)(A) closely resembles that in a variety of other federal provisions, including the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the general federal definition of "crime of violence," 18 U.S.C. § 16(a), and the United States Sentencing Commission Guidelines, U.S.S.G. § 4B1.2(a)(1).

Federal courts apply the categorical approach to determine whether a statute is a crime of violence. *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). That approach ignores the defendant's actual conduct and instead asks whether a conviction under the underlying criminal statute necessarily requires the use, attempted use, or threatened use of physical force. See *United States* v. *Middleton*, 883 F.3d 485, 487–88 (4th Cir. 2018) ("This characteristic of the categorical approach is sometimes counterintuitive because it requires courts to review the 'most innocent conduct' that the law criminalizes, rather than the specific facts on which the defendant was convicted."). In other words, it asks whether a prosecutor *must* prove an element involving the use of force in order to sustain *any* conviction. If a defendant could be convicted of violating the underlying statute without proof of the use, attempted use, or threatened use of physical force, then the crime is categorically not a crime of violence. Cf. *Stokeling* v. *United States,* 139 S. Ct. 544, 553 (2019) (describing the same principle applied to determining whether a robbery conviction satisfied the elements clause when the crime categorically required overcoming the victim's resistance).

II. FACTUAL AND PROCEDURAL BACKGROUND

The indictment alleged that on September 6, 2016, Mr. King and Mr. Ross carjacked and kidnapped the victim, Jaime Patton, in Kansas City, Missouri, and that Patton's death resulted from these crimes. Petitioners allegedly intended to rob Patton, taking him across state lines to withdraw money from several ATMs. The attempted withdrawals failed. Soon afterward, the victim was found on the side of a road with multiple gunshot wounds; he later died from those injuries.

The government indicted Mr. Ross and Mr. King on six offenses: (1) conspiracy to commit kidnapping, see 18 U.S.C. § 1201(a)(1), (c); (2) aiding and abetting kidnapping resulting in death, see 18 U.S.C. §§ 1201(a)(1); (3) using a firearm in furtherance of kidnapping, see 18 U.S.C. §§ 924(c), 924(j)(1); (4) carjacking resulting in death, see 18 U.S.C. §§ 2119(3); (5) using a firearm in furtherance of a carjacking, see 18 U.S.C. §§ 924(c), 924(j)(1); and (6) aiding and abetting each other in the unlawful possession of a firearm as a previously convicted felon, see 18 U.S.C. §§ 922(g)(1), 924(a)(2).

After a jury trial, petitioners were convicted of all six charges, and subsequently sentenced to five life sentences, three concurrent and two consecutive, along with a 120-month sentence on Count VI. On appeal, the Eighth Circuit affirmed petitioners' convictions and sentences. Specifically, the Eighth Circuit held that the convictions on Count Three for using a firearm in furtherance of kidnapping in violation of 18 U.S.C. § 924(c) remained a crime of violence, even after this Court's holding in *Davis*. The majority concluded that, because § 1201(c) required the government to prove that the victim's death re-

sulted during the kidnapping, it categorically satisfied the elements clause of § 924(c) because "an offense that requires proof that the defendant caused death has as an element the use of force." Pet. App. 8a.

Judge Stras dissented, concluding that the panel opinion's "definition of 'use of force' amounts to an endangerment-like standard, which really just imports the language from a separate definition of 'crime of violence'—one that the Supreme Court recently declared unconstitutional" in *Davis*. Pet. App. 21a. He highlighted the majority's faulty reasoning:

> Once there has been a 'a deliberate decision to endanger' a victim, the court tells us, the act of kidnapping 'necessarily involves the use of force,' even if the means employed is 'inveigle[ment]' or 'decoy.' But 'inveigle[ment]' and 'decoy' are not themselves forceful acts, and nowhere does the court identify any other possible use of force, direct or indirect, by the *perpetrator* in either scenario. With the substantial-risk definition of 'crime of violence' now off the table, this means that kidnapping, even one resulting in death, no longer qualifies.

Id. (internal citations removed) (emphasis in original).

A divided Eighth Circuit denied the petition to rehear the case *en banc* in a 7 to 4 vote. Pet. App. 36a. Judge Erickson separately dissented from the denial of rehearing *en banc*. *Id.* at 37a–38a. He reiterated the points made in Judge Stras' dissenting opinion, maintained that the majority used "legal gymnastics" to reach its result, and concluded that "in the world that exists today, kidnapping resulting in death is not

a crime of violence under the categorical approach." *Id.* at 38a.

REASONS FOR GRANTING THE PETITION

This Court's intervention is again necessary to secure uniformity in the application of the categorical approach to the elements clause in the lower courts. *Davis* settled any doubt that the categorical approach applies to the determination whether a crime constitutes a "crime of violence" under 18 U.S.C. § 924(c)(3). 139 S. Ct. at 2334 (citing *Leocal,* 543 U.S. at 10). The question presented is much broader than just whether kidnapping remains a crime of violence after *Davis* and extends to a host of other federal and state crimes that have a "death results" element or a similar "death results" element. The stakes could not be any higher for petitioners, and the countless others like them, whose liberty is being deprived because their convictions rest only on a residual-clause-like analysis already held unconstitutional by this Court.

I. THE CIRCUITS ARE SPLIT ON WHETHER A "DEATH RESULTS" ELEMENT CATEGORICALLY SATISFIES THE ELEMENTS CLAUSE OF § 924(C)

1. Three circuits have held that convictions for crimes where "death results" do not categorially satisfy the relevant statute's elements clause. *Middleton*, 883 F.3d at 493 (holding that South Carolina's involuntary manslaughter statute does not satisfy ACCA's elements clause); *Dunlap* v. *United States*, 784 F. App'x 379, 386–87 (6th Cir. 2019) (holding that Tennessee's voluntary manslaughter statute does not satisfy ACCA's elements clause); *United States* v. *Vederoff*, 914 F.3d 1238, 1248 (9th Cir. 2019) (holding that Washington's second-degree murder statute does

not satisfy the federal Sentencing Guidelines' elements clause).

But three circuits have held the opposite—that where a "death results" element is found, it necessarily satisfies the elements clause. See *United States* v. *Tsarnev*, 968 F.3d 24, 103–05 (1st Cir. 2020) (holding that conspiracy to use a weapon of mass destruction resulting in death categorically satisfies § 924(c)(3)(A)'s elements clause), *cert. granted on separate question*, No. 20-443, 2021 WL 1072279 (Mar. 22, 2021); *In re Hall*, 979 F.3d 339, 347 (5th Cir. 2020) (adopting the Eighth Circuit's reasoning in *Ross* to conclude that kidnapping resulting in death satisfies § 924(c)(3)(A)'s elements clause); Pet. App. 8a (holding that kidnapping resulting in death satisfies the elements clause).

In practice, then, the First, Fifth, and Eighth Circuits have constructed a bright-line rule that, without qualification, "an offense that requires proof that the defendant caused death has as an element the use of force." *Id.*; *accord Tsarnev*, 968 F.3d at 104 ("[A]ny crime for which 'death results' . . . automatically satisfies the ACCA's 'violent force' requirement."). But this ignores that not all "death results" crimes have the same elements. Nor does it grapple with various ways death can result, not all of which require the use, attempted use, or threatened use of physical force, as Judge Stras acknowledged in his dissent. Pet. App. 20a–21a..

This split requires that this Court provide guidance to lower courts on the reach of § 924(c)(3)'s elements clause. Under the categorical approach, the *elements* of the underlying offense determine whether a crime is a crime of violence under § 924(c)—not the facts of the individual case. See *Middleton*, 883 F.3d at 488 (noting that the categorical approach "requires courts

to review 'the most innocent conduct' that the law criminalizes"). But the First, Fifth, and Eighth Circuits' approach risks turning the elements clause into a broader "endangerment-like standard," one divorced from the statute's text. Pet. App. 21a.

2. The First, Fifth, and Eighth Circuits' approach constructs a non-rebuttable presumption that any death necessarily results from the "use, attempted use, or threatened use of physical force" with no regard to whether the prosecution *must* prove such use of force. 18 U.S.C. § 924(c)(3)(A). But this is inconsistent with the categorical approach, which applies in "death results" scenarios as it does in any other: The focus of the inquiry must be what the "prosecution must prove to sustain a conviction." *Mathis*, 136 S. Ct. at 2248 (internal citation omitted). This will capture some "death results" crimes—those that *require* the government to prove the "use, attempted use, or threatened use of physical force against … another." § 924(c)(3)(A). Knowingly using weapons of mass destruction, for example, uses force in every sense of the word and easily satisfies the elements clause because the government must prove the use of force before reaching the "death results" provision. See *Tsarnev*, 968 F.3d at 103–05.

But the mere fact that death resulted, without accounting for the crime's actual elements, does not categorically require the use of force against another. See *United States* v. *Runyon*, 983 F.3d 716, 727 (4th Cir. 2020) (holding that murder-for-hire satisfies the elements clause because it "has heightened *mens rea* elements" of having "the specific intent that a murder be committed for hire"); see also *United States* v. *Mayo*, 901 F.3d 218, 227 (3d Cir. 2018) ("[P]hysical force and bodily injury are not the same thing.") (internal citation omitted). As the dissenting opinion in

the Eighth Circuit noted, kidnapping does not "*necessarily* require[] the 'use of physical force'"—even when "death results." Pet. App. 20a (internal citation omitted); *accord In re Hall*, 979 F.3d at 354 (Dennis, J., dissenting). And the Seventh Circuit, while avoiding the question as to kidnapping resulting in death, recently noted the tension present due to kidnapping's nonviolent status. *Ruiz* v. *United States*, No. 18-1114, 2021 WL 915939, at *7 (7th Cir. Mar. 10, 2021).

3. Because there is no additional *mens rea* requirement with respect to a resulting death for the crime of kidnapping resulting in death, it cannot categorically be assumed that the death necessarily involves the use, attempted use, or threatened use of physical force against another. See *Leocal*, 543 U.S. at 9 ("[T]he 'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." (quoting 18 U.S.C. § 16(a))). Under the kidnapping statute, 18 U.S.C. § 1201(a), for example, the death need only stem somehow from the kidnapping, a crime that does not require the use of physical force because it can also be committed through inveiglement or decoy. There is no requirement that the death result from a separate culpable mental state or that it involve *any* "volitional conduct" against another, which this Court held is required to establish the use of force against another under the elements clause defining "misdemeanor crimes of domestic violence" for purposes of a felon-in-possession conviction. 18 U.S.C. §§ 921(a)(33)(A)(ii); 922(g)(9); *Voisine*, 136 S. Ct. at 2279 (requiring that to use force against another, a defendant must have a "mental state of intention, knowledge, or recklessness"); see also *Burrage* v. *United States*, 571 U.S.

204, 210 (2014) (describing a "death results" provision as a separate element).

For this case, then, the operative question is not whether Mr. King and Mr. Ross's conduct was violent, like the Eighth Circuit thought, nor is it whether the death itself occurred violently. Rather, the question is whether federal kidnapping, as the statute is written, criminalizes conduct that does not involve the use of physical force against another. See Pet. App. 21a (internal citation omitted) ("'[I]nveigle[ment]' and 'decoy' are not themselves forceful acts."). Every court of appeals to address that question outside the "death results" context answered in the affirmative.[1] And because the additional "death results" provision of the federal kidnapping statute does not differentiate a requisite *mens rea*, but rather captures any death resulting in any way from a kidnapping, see *Camacho*, 872 F.3d at 814, kidnapping resulting in death cannot be treated differently from generic kidnapping for purposes of the categorical approach.

4. The Eighth Circuit's opinion rests on a false premise. It professed that it did not know "the merit" of the question whether "kidnapping *without* a death" satisfies the elements clause. Pet. App. 8a (emphasis added). But since *Davis*, the court has vacated § 924(c) convictions based on kidnapping without a death in unpublished opinions. See Judgment,

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[1] *See United States* v. *Walker*, 934 F.3d 375, 378–79 (4th Cir. 2019); *United States* v. *Dixon*, 799 F. App'x 308, 309 (5th Cir. 2020); *Knight* v. *United States*, 936 F.3d 495, 497 (6th Cir. 2019); *United States* v. *Brazier*, 933 F.3d 796, 800–01 (7th Cir. 2019); *United States* v. *Khamnivong*, 779 F. App'x 482, 483–84 (9th Cir. 2019); *United States* v. *Hopper*, 723 F. App'x 645, 646 (10th Cir. 2018); *United States* v. *Gillis*, 938 F.3d 1181, 1204–05 (11th Cir. 2019).

Eizember v. *United States*, No. 17-1406 (8th Cir. Sept. 6, 2019) (vacating a § 924(c) conviction predicated on kidnapping without a death); *United States* v. *Noble*, No. 18-1992, 2019 WL 10948620 (8th Cir. Sept. 12, 2019). And it ignores that every circuit to have addressed kidnapping without a death has found that it does not satisfy the elements clause. *Supra* at 14 n.1.

II. THE ISSUE IS IMPORTANT AND RECURRING

1. The question of whether a resulting death necessarily makes an offense a crime of violence under § 924(c) is important because it ensures that defendants do not serve unfounded, consecutive, life sentences after *Davis*. As in *Johnson* v. *United States*, 576 U.S. 591 (2015), this case allows this Court to clarify that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 602. *Davis*, of course, held the residual clause of § 924(c)(3) unconstitutionally vague. 139 S. Ct. at 2335–36. But the Eighth Circuit here contravenes that ruling by effectively turning the elements clause into a residual clause. See Pet. App. 21a. That judicial alchemy flies in the face of this Court's directives, ones that the lower courts are bound to follow. See *Byrd* v. *Lamb*, No. 20-20217, 2021 WL 871199, at *3 (5th Cir. Mar. 9, 2021) (Willett, J., concurring) ("Middle-management circuit judges must salute smartly and follow precedent.").

2. This issue is also important because twenty-three federal crimes include sentencing enhancements when "death results."[2] To permit any crime

[2] 18 U.S.C. §§ 43(b)(5); 241; 242; 245(b); 247(d)(1); 248(b); 249; 844(d), (f)(3) & (i); 1038(a)(1)(C) & (a)(2)(C); 1201(a); 1203(a);

from which "death results" to mechanically satisfy the elements clause reads in a volitional use of force to any resulting death that the prosecution is not required to prove. The First, Fifth, and Eighth Circuit's approach thus creates an irrebuttable presumption that a resulting death establishes a crime of violence, regardless of the statutory elements of the crime.

Under that irrebuttable presumption, any "death results" element of any of the twenty-three federal crimes with that provision qualifies as a crime of violence—from interference with an animal enterprise, 18 U.S.C. § 43(b)(5), to health care fraud, 18 U.S.C. § 1347(a)—regardless of whether the elements require proof of use of force against another. A prosecutor need only show that the death somehow stemmed from the offense. See Pet. App. 7a–9a; *Camacho*, 872 F.3d at 814 ("[B]ut-for causation is incompatible with the statutory goal of § 1201(a)."). To construe a "death results" element to include, in all instances, a use of force that the prosecution is not required to prove contravenes the categorial approach and turns the narrower elements clause into the unconstitutional residual clause. See *Davis*, 139 S. Ct. at 2336.

3. Lastly, § 924(c)'s elements clause is nearly identical to the definitions of "crime of violence" contained in the ACCA, the general federal definition, and the Sentencing Guidelines. See 18 U.S.C. § 924(e)(2)(B) (defining "violent felony" as a crime punishable by over one years' imprisonment and that "has as an element the use, attempted use, or threatened use of physical force against the person of another"); § 16(a) ("The term 'crime of violence' means an offense that has as an element the use, attempted use, or threat-

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1347(a); 1583(b)(1); 1584(a); 1589(d); 1716(j)(3); 1992(a); 2113(e); 2119(3); 2261(b)(1); 2332a(a); 2441(a); 21 U.S.C. § 841.

ened use of physical force against the person or property of another."); U.S.S.G. § 4B1.2(a)(1) (defining as a crime of violence any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). Circuits, including the Eighth, have construed these provisions in the same manner. *United States* v. *Peeples*, 879 F.3d 282, 287 (8th Cir. 2018) (concluding that Iowa's attempted murder statute satisfies the Sentencing Guidelines' elements clause); *accord United States* v. *Gillis*, 938 F.3d 1181, 1201 (11th Cir. 2019) (stating that nearly identical elements clauses should be construed the same). This question, then, applies to a far broader swath of federal criminal law than § 924(c)(3)(A) alone. Because of this issue's importance, both to Mr. Ross and Mr. King, as well as to numerous prosecutions under other federal statutes, this Court should resolve the entrenched split among the circuits.

III. THE EIGHTH CIRCUIT'S HOLDING IS WRONG BECAUSE ITS APPROACH TO THE CATEGORICAL ANALYSIS IS FUNDAMENTALLY FLAWED

A grant of certiorari is also warranted to course-correct a developing line of § 1201(a) kidnapping-with-death cases that cite the Eighth Circuit's flawed approach. See *In re Hall*, 979 F.3d at 347 (approving the Eighth Circuit's reasoning) and *Ruiz*, 2021 WL 915939, at *7–8 (discussing the question and noting the Eighth and Fifth Circuit dissenting opinions). The Eighth Circuit failed to rely solely on the elements of the statute defining kidnapping resulting in death, 18 U.S.C. § 1201, as required by the categori-

cal approach.[3] Properly recognizing that the "death results" element has no *mens rea* attached, the majority goes on to improperly supply a "use of force" element, conflating the elements analysis with the very same risk assessment just held unconstitutional in *Davis*.

The Eighth Circuit conceded that "§ 1201(a) includes no separate *mens rea* element for a death that results from kidnapping" but posits that "the use of force is still a necessary element of the crime." Pet. App. 9a. It points to nothing in petitioners' jury instruction or the plain language of § 1201 that supports that proposition. The absence of such element from the statute is fully dispositive of the categorical analysis, because the only thing the categorical analysis cares about is what the "prosecution must prove to sustain a conviction." *Mathis*, 136 S. Ct. at 2248 (internal citation omitted).

Kidnapping where "death results" does not satisfy the elements clause because, although the kidnapping act is volitional, the victim's death need not be the result of any volitional use of force, which is what the elements clause requires. *Leocal*, 543 U.S. at 11; *United States* v. *Torres-Villalobos*, 487 F.3d 607, 616 (8th Cir. 2007); see also *Voisine*, 136 S. Ct. at 2278–79 (use of force against another requires that force "be volitional"). Other circuits agree that "death re-

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[3] *See Mathis*, 136 S. Ct. at 2245 ("'Elements' are the constituent parts of a crime's legal definition, which must be proved beyond a reasonable doubt to sustain a conviction; they are distinct from 'facts,' . . . ignored by the categorical approach."). The elements of kidnapping resulting in death are not disputed and require, in relevant part, 1) a kidnapping ("unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away"), and 2) that the death of any person results. Pet. App. 7a (quoting 18 U.S.C. § 1201(a)).

sults" does not include a *mens rea* requirement for a variety of crimes.[4]

It is undisputed that kidnapping *without* a death does not require force.[5] The Eighth Circuit admits "1201(a) includes no separate *mens rea* element for a death that results from kidnapping." Pet. App. 9a. *Voisine* requires a volitional use of force against another to trigger the elements clause. 136 S. Ct. at 2278–9 ("[F]orce . . . must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force."). It is im-

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[4] Bank robbery in Section 2113(e), for example, "makes no mention of a *mens rea* and even describes the killing in the passive voice." *United States* v. *McDuffy*, 890 F.3d 796, 801 (9th Cir. 2018). "These facts suggest Congress intended to omit a *mens rea* requirement," and "that the omission was purposeful." *Id.* (citing *Dean* v. *United States*, 556 U.S. 568, 572 (2009)); *see also United States* v. *Poindexter*, 44 F.3d 406, 409 (6th Cir. 1995) ("[T]he settled principles of construction direct us to conclude that the legislature did not intend to add an additional scienter requirement to the killing component of the crime."), *superseded by statute on other grounds as recognized in United States* v. *Parks*, 583 F.3d 923 (6th Cir. 2009); *see also United States* v. *McVeigh*, 153 F.3d 1166, 1195 (10th Cir. 1998) ("Nothing in § 2332a(a)(2) links the 'if death results' language of the statute to any scienter whatsoever.").

[5] *See*, *e.g.*, Pet. App. 8a (not disputing "the merit of [the] contention" that "kidnapping does not qualify as a crime of violence under § 924(c)"); *Ruiz*, 2021 WL 915939, at *7 ("simple kidnapping is not a crime of violence"); *In re Hall*, 979 F.3d at 353 (Dennis, J. dissenting) ("Section 1201(a) kidnapping . . . is not categorically a COV"); *United States* v. *Walker*, 934 F.3d 375, 379 (4th Cir. 2019) ("kidnapping clearly does not categorically qualify as a crime of violence"); *cf. United States* v. *Taylor*, 848 F.3d 476, 491 (1st Cir. 2017) ("[t]he government admit[ted] that kidnapping" under § 1201(a) "cannot" qualify as a crime of violence under the force clause); *Knight*, 936 F.3d at 497 ("The government concedes that under *Davis* kidnapping . . . is not a 'crime of violence.'").

possible, therefore, to discern what *element of the crime* of kidnapping resulting in death supplies the "use . . . of physical force against the person or property of another", *id.* at 2279, for the Eighth Circuit majority. Grasping for a solution to this problem, the Eight Circuit followed two flawed approaches.

First, the Eighth Circuit relied on its conclusion that "'results' means that the kidnapping is a but-for cause of death." Pet. App. 8a (citing *Burrage*, 571 U.S. 204) (where use of a drug is not independently sufficient to cause death, it cannot satisfy an enhancement statute unless such use is a but-for cause of death). But causation is insufficient to establish that kidnapping where "death results" *automatically* requires the "use . . . of physical force against . . . another." *Voisine,* 136 S. Ct. at 2279. The Eighth Circuit has "interpreted the term 'results' broadly, stating that [§ 1201(a)] requires 'only that the death of any person results in the course of the kidnapping,'" not that the kidnapping conduct cause the death or that death be the result of any volitional use of force. *United States* v. *Montgomery*, 635 F.3d 1074, 1087 (8th Cir. 2011) (quoting *United States* v. *Barraza,* 576 F.3d 798, 807 (8th Cir. 2009)). It is unclear how far beyond the poly-substance intoxication context *Burrage*'s holding extends, 571 U.S. at 212 (courts read statutory phrases like "results from" in light of surrounding "textual" and "contextual indication[s]"), and the Seventh Circuit has specifically rejected the notion of applying *Burrage*'s but-for causation requirement to § 1201(a). *Camacho*, 872 F.3d at 814 ("§ 1201(a)'s enhancement provision requires simply that 'the death of any person results[;]' the specific cause of death is immaterial" so "but-for causation is incompatible with the statutory goal of § 1201(a).").

Second, the Eighth Circuit attempted to graft a recklessness *mens rea* that appears nowhere in the statute onto the "death results" element based on its assessment of how risky unadorned kidnapping is. See Pet. App. 9a–10a. But this approach runs far afield from the elements of § 1201(a) kidnapping where "death results" and, instead, "amounts to an endangerment-like standard, which really just imports the language from a separate definition of 'crime of violence'—one that the Supreme Court recently declared unconstitutional" in *Davis*. *Id.* at 21a.

Congress did not set forth reckless disregard as an element of § 1201(a), and the jury made no recklessness finding at trial. Congress *could* have written § 1201(a) to require a knowing or reckless use of physical force to satisfy "the death of any person results" element of the statute, for example, by requiring "the death of any person results *by use of force*." But it did not. The statute must be interpreted as written.

This Court's holding in *Leocal*—that offenses with no *mens rea* component are not "crimes of violence"—and the Eighth Circuit's own prior recognition of that holding[6] were significant barriers to the decision of the majority below given that § 1201's "death results" element has no *mens rea* requirement. The Eighth Circuit wished *Leocal* away by using a risk assessment that kidnapping entails a greater "disregard for human life" than drunk driving because kidnapping "carr[ies] a grave risk of death." *Id.* at 9a. It is hardly arguable that, at the heavy cost of nearly 30 deaths per day,[7] drunk driving entails a lesser disregard for

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[6] *See Torres-Villalobos*, 487 F.3d at 615.

[7] *Drunk Driving*, National Highway Traffic Safety Administration, https://www.nhtsa.gov/risky-driving/drunk-driving.

human life. And this comparison assumes that a relative risk assessment is appropriate in the first place, which, we know from *Davis*, it is not.

The elements clause has never operated via a risk assessment. Here again, "federal prosecutors have attempted to stretch the bounds" of the elements clause to compensate for the now invalid residual clause. *Middleton*, 883 F.3d at 492–93. The ACCA's residual clause was held unconstitutional in *Johnson*, which led to the holding of *Davis*, 139 S. Ct. at 2326, because it involves a "judicial assessment of risk." *Johnson*, 576 U.S. at 597. "How does one go about deciding" that, "[a] statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Id.* (internal citation omitted). Problematically, the Eighth Circuit is *still* engaging in this judicial assessment of risk post-*Davis*, contrary to this Court's repeated direction on how to properly conduct the categorical analysis.

IV. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT SPLIT

This case squarely and cleanly presents the issue that has divided the lower courts. It is thus an ideal vehicle for resolving the question presented.[8]

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[8] In *Borden* v. *United States*, this Court will decide whether a crime committed recklessly may qualify as a violent felony under the ACCA. *See Borden*, 19-5410 (S. Ct. argued Nov. 3, 2020). The outcome of *Borden* may not impact the question presented because, as highlighted herein, the "death results" element requires no additional *mens rea*. Thus, if this Court were to conclude in *Borden* that recklessness satisfies the elements clause of the ACCA, that would still leave open the question of whether the "death results" element categorically satisfies the elements clause.

However, if this Court were to hold in *Borden* that a reckless *mens rea* is insufficient to satisfy the elements clause, this peti-

First, the question presented was carefully preserved in the district court and appellate court proceedings. Both the district court and the Eighth Circuit squarely addressed the question presented.

Moreover, the question was presented in a petition for rehearing to the Eighth Circuit *en banc*. Judge Colloton wrote an opinion for the majority twice (both for the panel and for court denying *en banc* review), while Judge Stras and Judge Erickson wrote separate dissenting opinions. Thus, the question has been extensively considered and debated.

Second, resolution of the question presented is dispositive to the legal question of whether petitioners were improperly convicted and sentenced to a consecutive life sentence under § 924(c). Stated another way, if the "death results" element does not satisfy the elements clause, neither the government nor the Eighth Circuit have maintained that petitioners' kidnapping conviction would remain a crime of violence. See *supra* at. 14–15. Thus, if the Court were to reject the Eighth Circuit's approach to the elements clause, Mr. Ross and Mr. King's consecutive-life-sentence convictions and sentences under Count Three of the indictment would have to be vacated.

A case like Petitioners' is an optimal vehicle to resolve the question presented because Petitioners are serving life sentences.

Some defendants did not have the opportunity to raise the specific issue before this Court after *Davis*,

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tion for certiorari should be granted, vacated, and remanded for further proceedings because the Eighth Circuit's opinion was improperly predicated on the assumption that offenses requiring proof of a recklessness *mens rea* satisfy the elements clause. Pet. App. 11a (citing *United States* v. *Rice*, 813 F.3d 704, 706 (8th Cir. 2016)).

and now will never able to do so. See *In re Hall*, 979 F.3d at 341 (rejecting challenge to conviction under §924(c)); defendant was executed on November 19, 2020. Therefore this is not a case that the Court might have to dismiss.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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