NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSHUA JAMES MJONESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when applying the modified categorical approach under *Mathis v. United States*, 136 S. Ct. 2243 (2016), a court may place determinative weight on the government's charging language in that very case when determining whether a charged offense qualifies as a predicate "crime of violence" for another charged offense?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joshua James Mjoness, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on July 13, 2021, as well as the order denying Petition for Panel Rehearing and Rehearing En Banc entered on September 3, 2021.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit in this case was originally published as *United States v. Mjoness*, 4 F.4th 967 (10th Cir. 2021). After Mr. Mjoness moved for rehearing, however, the Tenth Circuit sua sponte unpublished the decision. A copy of that unpublished version appears in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Wyoming had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on July 13, 2021. Mr. Mjoness timely petitioned for rehearing, which the Tenth Circuit denied on September 3, 2021. (Appendix at A26.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

18 U.S.C. § 924(c)(1)(A), provides, in relevant part:

> 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;
>
> . . .

18 U.S.C. § 875(c), provides, in relevant part:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

After he sent threatening text messages while possessing a gun, the government charged Mr. Mjoness with, *inter alia*, violating 18 U.S.C. § 924(c).

Section 924(c) makes it a crime to use or carry a firearm "during and in relation to any crime of violence." § 924(c)(1)(A). As relevant here, the statute defines a "crime of violence" by way of an "elements clause"—that is, as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A).

Here, the government alleged that the predicate crime of violence was transmitting a threat in interstate commerce, which statute makes it a crime to:

> "transmit[] in interstate or foreign commerce any communication containing <u>any threat to kidnap</u> any person *or* <u>any threat to injure</u> the person of another . . . ."

18 U.S.C. § 875(c) (emphasis added).

To determine whether a statute is a crime of violence, courts apply what is known as the categorical/modified categorical approach. *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016). This is, of course, an "elements-based approach," *id.*, in which the inquiry is whether the "scope of conduct covered by the elements of the [predicate] crime" necessarily satisfies § 924(c)'s definition of a crime of violence. *United States v. Bowen*, 936 F.3d 1091, 1102 (10th Cir. 2019). For alternatively-

phrased statutes like § 875(c), applying the categorical/modified categorical approach entails two principal steps. *Mathis*, 2249-50.

The "first task"—the one at issue here—is to determine whether the statute is divisible or indivisible, that is, to identify whether the alternatively "listed items are elements or means." *Id.* Because "not all statutory alternatives are elements"; rather, "some statutes merely 'enumerate[] various factual means of committing a single element.'" *United States v. Degeare*, 884 F.3d 1241, 1247 (10th Cir. 2018) (citation omitted). In *Mathis*, this Court defined the key distinction between 'elements' and 'means.' 136 S.Ct. 2243, 2248 (2016). "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Id.* (quotations omitted). In contrast, means are "various factual ways of committing some component of the offense." *Id.* at 2249.

Critically here, *Mathis* also identified for courts applying the modified categorical approach "several tools for deciding whether an alternatively phrased criminal law lists elements or means." *United Staets v. Titties*, 852 F.3d at 1267-68. These include three principal sources: first, the "statute on its face may resolve the issue"; second, court decisions may "answer the question"; and third, record documents like charging instruments and jury instructions provide "another place to

look." *Mathis*, 136 S.Ct. at 2256-57. These three sources must "satisfy [the law's] demand for certainty." *Id.* at 2257.

Mr. Mjoness argued below that § 875(c) is indivisible because it sets forth a single crime of communicating a constitutionally-proscribed "true threat," of which either a threat to injure or a threat to kidnap may suffice. He further argued that because a threat to kidnap could, by its plain statutory terms, be committed non-violently (by inveiglement, trickery, or deceit), the statute as a whole was not categorically a crime of violence. *See United States v. Mobley*, 971 F.3d 1187, 1202-03 (10th Cir. 2020) (explaining that "kidnap" in § 875(c) refers to the federal crime of kidnapping, 18 U.S.C. § 1201, which includes kidnapping by inveiglement).

The Tenth Circuit resolved the case solely on divisibility grounds. Looking to the three sources approved by *Mathis*, it agreed with Mr. Mjoness that neither case law nor the statutory text itself provided any certainty that the statue was divisible. (Appendix at A11-20.) But turning to a "peek" at the record documents, the court found that certainty, in large measure, in the government's charging decision *in this case*. (Appendix at A20-A24.)

REASONS FOR GRANTING THE WRIT

Review is warranted because the Tenth Circuit's opinion contravenes *Mathis*, conflicts with the approach taken by the Fourth Circuit, and would create

inconsistent outcomes as to whether the same statutes are, or are not, crimes of violence.

The crux of the circuit's ruling was that in charging Mr. Mjoness under § 875(c)—the predicate "crime of violence" for the § 924(c) offense—the indictment in this case specifically alleged only that Mr. Mjoness made a "threat to injure the person of another," without mentioning the "threat to kidnap" statutory language. While that's true as a matter of fact, the circuit was wrong that that charging decision has any legal importance under *Mathis*.

Indeed, as the government itself recognized below (*see* Answer Br. at 23; Appendix at 22 n.12,), the charging language here reflected merely "the government's drafting decision in [Mr.] Mjoness' case." Giving it near-dispositive weight in the divisibility analysis is problematic because it would permit the government, not the courts, to determine whether a statute is divisible, with consequences in the very case at issue. Nothing in *Mathis* counsels, let alone compels, this court to abandon *its* role to say what the law is.

Moreover, there are many reasons why the government might identify a particular means when charging the case. For instance, the presence or absence of statutory language in an indictment may reflect only the charging practices among prosecutors. Or it may simply disclose the factual basis for the charges, comporting

with basic requirements that a defendant be provided with sufficient notice of the charges against him. (Indeed, that's consistent with what occurred here, where the indictment reflects *the facts of this case*, in which Mr. Mjoness' texts involved threats of shooting, not kidnapping.) But that choice does not mean determinatively mean that the particular type of threat identified is necessarily an element, and relying so heavily on such reference simply reads far too much into far too little.

And unlike this case, *Mathis* involved application of the categorical approach under a federal statute (the Armed Career Criminal Act) to an old conviction under state law (Iowa burglary). 136 S. Ct. at 2250. In that scenario, it is reasonable that the charging decision might represent a charging practice that provides insight into the meaning of the statute under state law. But that rationale has less salience in a situation, as here, the charge in question is contained in the same indictment as the charge it is alleged to be a predicate crime of violence for.

Perhaps unsurprisingly, the Fourth Circuit has reached a contrary conclusion regarding such deference. *See United States v. Diaz*, 865 F.3d 168, 177 (4th Cir. 2017) (explaining that the "government's choice in how it charges" an offense should not "dictate [the court's] legal interpretation of the statute"). This is not a question that would benefit from further percolation in the circuits; it is a straightforward issue as to the scope of applying *Mathis*, and there is no need to let a split linger or worsen.

This is particularly so because the Tenth Circuit's approach, if adopted elsewhere, would lead to even deeper inconsistencies in this important area of law. That's because the language the government uses in its indictments is not always consistent, as exemplified by the § 875(c) charge in this very case. For example, while *here* the government elected to limit the charging language to the threat "to injure" that mirrored the facts of this case, elsewhere it has listed *both* ways to make a threat under § 875(c), *even where* only a threat to injure is implicated by the evidence. *See, e.g.*, *United States v. Mildon*, 13-cr-0481 (W.D. Tex), Indictment (March 13, 2013) *available at* 2013 WL 5503800 (charging "communication [that] contained a threat to kidnap and injure" where defendant stated "I will just go back and kill the people"); *United States v. Michael*, 2:12-cr-00001 (S.D. Ind.), Indictment (Jan. 11, 2012) *available at* 2012 WL 6200562 (charging multiple threats counts as involving "communication[s] [that] contained a threat to kidnap and injure [government personnel]" including where defendant created a Facebook event "attack on govt protected agencies"). But by the Tenth Circuit's reasoning, had divisibility been at issue in *those* cases, the court would *have to* have reached the *opposite* conclusion reached here. That is, it would have found that § 875(c) was *indivisible*, because the inclusion of *both* statutory alternatives indicates that they are means. *See Mathis*, 136

S. Ct. at 2257. Resting divisibility on such happenstance of charging practice is the antithesis of a categorical inquiry.

Mathis itself contemplated precisely the possibility that "record materials will not in every case speak plainly." 136 S.Ct. at 2257. And when they do not, *Mathis* again counsels what a court must do—it "will not be able to satisfy" the requisite "demand for certainty" and may not deem a statute divisible. *Id.* Because the Tenth Circuit's decision contravenes this clear teaching, review is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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