NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

MICHAEL CHRISTIAN TINLIN, KWANE DEMARCHEL WHEAT, AND CARLOS DEJUAN HUTCHINSON,

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

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The categorical approach, as applied in the criminal context, requires comparison of the elements of a defendant's prior conviction with the generic definition of a sentencing enhancement provision. Based upon this principle, the First, Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have held that unambiguously overbroad statutory language alone establishes a prior conviction is broader than the generic definition. The Eighth and Fifth Circuits disagree. These circuits interpret *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), to require defendants to point to a case-specific example where the statute was applied in an overbroad manner, even if a statute is overbroad on its face.

The question presented is:

Whether plainly overbroad statutory language is sufficient to establish a prior conviction is broader than the generic definition of a criminal sentencing enhancement provision?

PARTIES TO THE PROCEEDINGS

Petitioners were convicted in separate proceedings before the district court, and the United States Court of Appeals for the Eighth Circuit entered separate judgments in each of their cases. Because petitioners seek review of these judgments on the basis of identical questions, they jointly file this petition with this Court. *See* SUP. CT. R. 12.4. The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Iowa, United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Hutchinson, 1:19-CR00129-001, (N.D. Iowa) (criminal proceedings) judgment entered September 28, 2020.

United States v. Hutchinson, 20-3116 (8th Cir.) (direct criminal appeal), judgment entered March 3, 2022.

United States v. Hutchinson, 20-3116 (8th Cir.) (direct criminal appeal), Order denying petition for rehearing en banc and rehearing by the panel entered April 8, 2022.

United States v. Tinlin, 4:19-cr-00224-001, (S.D. Iowa) (criminal proceedings) judgment entered August 21, 2020.

United States v. Tinlin, 20-2862 (8th Cir.) (direct criminal appeal), judgment entered December 15, 2021.

United States v. Tinlin, 20-2862 (8th Cir.) (direct criminal appeal), Order denying petition for rehearing en banc and rehearing by the panel entered January 18, 2022.

United States v. Wheat, 3:20-CR03031-001, (N.D. Iowa) (criminal proceedings) judgment entered June 24, 2021.

United States v. Wheat, 21-2531 (8th Cir.) (direct criminal appeal), judgment entered March 10, 2022.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Carlos Hutchinson, Michael Tinlin, and Kwane Wheat respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's published opinion in Mr. Hutchinson's case is available at 27 F.4th 1323 and is reproduced in the appendix to this petition at Pet. App. p. 15.

The Eighth Circuit's published opinion in Mr. Tinlin's case is available at 20 F.4th 426 and is reproduced in the appendix to this petition at Pet. App. p. 36.

The Eighth Circuit's opinion in Mr. Wheat's case is available at 2022 WL 714886 and is reproduced in the appendix to this petition at Pet. App. p. 53.

JURISDICTION

The Eighth Circuit entered judgement in Mr. Hutchinson's case on March 3, 2022, Pet. App. p. 26 and denied Mr. Hutchinson's petition for rehearing *en banc* on April 8, 2022. Pet. App. p. 28.

The Eighth Circuit entered judgment in Mr. Tinlin's case on December 15, 2021, Pet. App. p. 39, and denied Mr. Tinlin's petition for rehearing *en banc* on January 18, 2022. Pet. App. p. 41. This Court granted two extension requests.

The Eighth Circuit entered judgment in Mr. Wheat's case on March 10, 2022. Pet. App. p. 55. This Court granted Mr. Wheat's extension request.

This Court has jurisdiction over these cases under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

28 U.S.C. § 994:

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46

U.S.S.G. § 4B1.1:

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

U.S.S.G. § 2K2.1(a)(2):

(a) Base Offense Level (Apply the Greatest):

. . .

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense . . . .

U.S.S.G. § 4B1.2(a) defines a "crime of violence" as follows:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

STATEMENT OF THE CASE

A. Introduction

This Court should grant the joint petition for writ of certiorari for two reasons.

First, a well-established circuit split exists on whether *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), requires a criminal defendant to advance proof in every case that the statute has been applied in an overbroad manner, or whether such evidence is unnecessary when the elements of the state statute are plainly broader on their face than the generic definition.

The First, Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have found the "realistic probability" test of *Duenas-Alvarez* inapplicable when a statute is plainly overbroad on its face. Instead, these courts recognize that in these circumstances, the "legal imagination" concerns of *Duenas-Alvarez* are not present.

The Eighth and the Fifth Circuits disagree. These circuits still require defendants to point to separate evidence where a statute was applied in an overbroad manner, even if the statute is plainly overbroad on its face.

In fact, in Mr. Hutchinson's case, the Eighth Circuit went even farther than the Fifth Circuit—applying the "realistic probability" test in a manner that no other Circuit does. First, the majority held that the unambiguously overbroad language of the Texas statute was insufficient to establish the Armed Career Criminal enhancement was unwarranted. Next, the majority determined the Texas state case examples, in which the defendants were convicted of Texas burglary by committing a reckless offense (making it overbroad), were also insufficient. The majority

acknowledged that the Texas case examples involved a burglary conviction for *reckless* offenses, but the majority still believed the defendant in those state cases did have the specific intent, and found this dispositive. In doing so, the majority turned the focus to the specific facts of those state appellate cases, not the elements that the state prosecutor had to prove beyond a reasonable doubt.

Second, the Eighth Circuit's position conflicts with this Court's precedent on the application of the categorical approach in the criminal context. Under this Court's precedent, the categorical approach is focused "on elements, not facts." *Descamps v. United States*, 570 U.S. 254 (2013); *see also Mathis v. United States*, 579 U.S. 500, 501 (2016) (allowing "a sentencing judge to go any further [in the categorical analysis] would raise serious Sixth Amendment concerns"). Yet the Eighth Circuit has stretched *Duenas-Alvarez* to contradict this precedent and find that even when the elements of a statute are plainly overbroad, this is insufficient. Further, in Mr. Hutchinson's case, the circuit looked to the facts of Texas state appellate cases to find the statute was not overbroad, instead of limiting its focus to the elements the state prosecutors had to prove beyond a reasonable doubt. This heightened burden on a criminal defendant is inconsistent with this Court's recent confirmation that the categorical approach in the Armed Career Criminal context demands certainty from the government, not the defendant. *Pereida v. Wilkinson*, 141 S. Ct. 754, 766 n. 7 (2021).

The Eighth Circuit's approach has also established a higher standard for criminal defendants than immigration petitioners, which is incompatible with this Court's precedent. The Eighth Circuit has ruled in the immigration context that plainly overbroad statutory language is sufficient, and the realistic probability test is inapplicable under these circumstances. *Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021). Yet as Mr. Hutchinson, Mr. Tinlin, and Mr. Wheat's cases illustrate, the circuit has consistently refused to apply this principle in the criminal context. This approach conflicts with the Court's decision in *Pereida v. Wilkinson*, which held that the demand for certainty is higher in the criminal context than the immigration context, and the burden remains with the government. 141 S. Ct. 754 (2021).

Because of the Eighth Circuit's approach, Mr. Hutchinson, Mr. Tinlin, and Mr. Wheat all had their sentences substantially increased based upon plainly overbroad statutes. This Court should grant certiorari to address this circuit split and ensure compliance with this Court's precedent.

B. Mr. Hutchinson is sentenced as an Armed Career Criminal based upon his Texas burglary convictions, which can be committed by entering a building or habitation and committing a reckless offense.

Mr. Hutchinson was indicted on one count of being a felon and unlawful drug user in possession of a firearm. R. Doc. (1:19-CR00129-001) 2.[1] Soon thereafter, Mr. Hutchinson filed a notice of his intent to plead guilty and consented to preparation of

[1] In this petition, "R. Doc. (1:19-CR00129-001)" refers to the criminal docket in Northern District of Iowa Case No. 1:19-CR00129-001, and is followed by the docket entry number. "Sent. Tr. (1:19-CR00129-001)" refers to the sentencing transcript in Northern District of Iowa Case No. 1:19-CR00129-001, and is followed by the page number.

a pre-plea presentence report ("PSR"). R. Doc. (1:19-CR00129-001) 26. The PSR determined that Mr. Hutchinson was an Armed Career Criminal under 18 U.S.C. § 924(e) because he had three prior Texas convictions for Burglary of a Habitation, Second Degree, in violation of Tex. Penal Code Ann. § 30.02(c)(2). R. Doc. (1:19-CR00129-001) 29; *see* PSR ¶¶ 25, 26, 29. The PSR thus increased Mr. Hutchinson's statutory sentencing range from 0 to 10 years of imprisonment to 15 years to life; his advisory guideline range was 180 months. PSR ¶¶ 86, 87; *see* 18 U.S.C. § 924(e)(1); U.S.S.G. § 5G1.1(b).

Mr. Hutchinson objected to the Armed Career Criminal enhancement. R. Doc. (1:19-CR00129-001) 31. Each of the relevant offenses was a violation of Tex. Penal Code Ann. § 30.02(a), which provides:

> A person commits an offense if, without the effective consent of the owner, the person:
>
> > (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
> >
> > (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
> >
> > (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Tex. Penal Code Ann. § 30.02 (West 2002); *see* PSR ¶¶ 25, 26, 29. Mr. Hutchinson argued that the statute was indivisible, because the alternative ways to commit a burglary were alternative means, not elements. R. Doc. (1:19-CR00129-001) 31, 35. He next asserted the statute was overbroad because subsection three does not require

"intent to commit a crime," as required by generic burglary. R. Doc. (1:19-CR00129-001) 31, 35. Instead, this subsection can be violated by entering a building or habitation without the effective consent of the owner, and then committing one of the Texas felonies that requires mere recklessness, without forming the intent to commit a crime. R. Doc. (1:19-CR00129-001) 31, 35. Mr. Hutchinson asserted that the plain language of the statute established it was overbroad. R. Doc. (1:19-CR00129-001) 31, 35; Sent. Tr. (1:19-CR00129-001) p. 32. He noted that the Fifth Circuit rejected this argument in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), and held the "realistic probability" test required the defendant to point to a specific case. R. Doc. (1:19-CR00129-001) 35. Mr. Hutchinson asserted *Herrold* was wrongly decided. R. Doc. (1:19-CR00129-001) 35.

At a combined plea and sentencing, the district accepted Mr. Hutchinson's guilty plea and found that Mr. Hutchinson's three Texas burglaries qualified as Armed Career Criminal predicates. Sent. Tr. (1:19-CR00129-001) pp. 23:7–23, 34:7–35:24. The district court imposed a 180-month sentence, but stated:

> To be clear, if I was not bound by a mandatory minimum sentence of 180 months, I would find a sentence below that, and perhaps significantly below that, would be sufficient but not greater than necessary to achieve the goals of sentencing. But I am bound by what I believe to be an appropriate and accurate conclusion that the defendant is an armed career criminal, although perhaps the Eighth Circuit will disagree with me, but that's my conclusion.

Sent. Tr. (1:19-CR00129-001) pp. 40-41.

Mr. Hutchinson appealed, maintaining his argument that his Texas burglary convictions were not Armed Career Criminal predicates. In a 2-1 decision, the Eighth Circuit rejected Mr. Hutchinson's arguments and affirmed. *United States v. Hutchinson*, 27 F.4th 1323 (8th Cir. 2022). The majority first agreed that Texas burglary was indivisible. *Id.* at 1326-27. However, the majority ultimately determined that the Texas burglary statute contains the "generic specific intent requirement," even if not present in the statutory text. *Id.* at 1327.

The majority found that Mr. Hutchinson had not demonstrated a "realistic probability" that Texas burglary could be committed with a reckless intent. *Id.* at 1327. Relying on *Gonzales v. Duenas Alvarez*, 549 U.S. 183 (2007), the majority determined that Mr. Hutchinson must point to a Texas case that affirmed a burglary conviction where the defendant did not have the specific intent to commit a crime. *Id.*

The majority found the case examples that Mr. Hutchinson did provide were unpersuasive. *Id.* While the majority appeared to acknowledge that some of the cases involved offenses that only required a reckless *mens rea*, the majority still determined the cases were insufficient because the defendants in those cases *did* have the specific intent to commit an offense. *Id.*

Judge Kelly dissented. *Id.* at 1328-30 (Kelly, J., dissenting). Judge Kelly noted that because subsection three "requires only *commission* of a crime of recklessness without separate proof of intent, the statute is broader on its face than generic

burglary, which requires proof of specific intent to commit a crime." *Id*. at 1329 (emphasis in original). According to the dissent, "[t]he inquiry should end here." *Id*. Because the statute is not ambiguous, and it is overbroad on its face, the dissent determined the realistic probability test was inapplicable under the Eighth Circuit's immigration decision in *Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021). *Id*.

The dissent found the Fifth Circuit's decision in *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), which held that Texas burglary qualified as generic burglary, unpersuasive. *Id*. Judge Kelly noted that *Herrold* found the realistic probability test not satisfied, but that in the Fifth Circuit, unambiguous, overbroad statutory language is insufficient to establish that a statute is overbroad on its own.[2] *Id*.

Alternatively, the dissent rejected the majority's interpretation of Texas appellate cases, finding instead that Texas case law establishes that no specific intent is required. *Id*. at 1330. The dissent also noted that the Texas statute was similar to a Minnesota burglary statute, which the Seventh Circuit has recently found overbroad in *Van Cannon v. United States*, 890 F.3d 656 (7th Cir. 2018). *Id.* The dissent would reverse for resentencing without the Armed Career Criminal enhancement. *Id.*

[2] The majority noted that the Fourth Circuit had held that this Texas statute met the generic definition of burglary. *Id.* at 1327 (citing *United States v. Pena*, 952 F.3d 503, 510–11 (4th Cir. 2020); *United States v. Bonilla*, 687 F.3d 188, 193 (4th Cir. 2012), cert. denied, 571 U.S. 829, 134 S.Ct. 52, 187 L.Ed.2d 47 (2013). In the two cases cited, the Fourth Circuit did not address the specific intent argument made by Mr. Hutchinson, and in fact in *Pena* expressly noted that the defendant had waived that argument. *Pena*, 952 F.3d at 511.

C. Mr. Tinlin is sentenced as a career offender, increasing his advisory Guideline range by over five years, based upon a state conviction for Iowa assault that only required an intent to inflict "mental illness."

Mr. Tinlin was indicted on one count of conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), one count of possession with intent to distribute 5 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), one count of possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c), and one count of possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). R. Doc. (4:19-cr-00224-001) 1.[3] Eventually, Mr. Tinlin plead guilty to the conspiracy count and the 18 U.S.C. § 924(c) count, pursuant to a plea agreement. R. Doc. (4:19-cr-00224-001) 25.

A PSR was created. The PSR initially determined Mr. Tinlin's base offense level was 34. PSR ¶ 22. However, the PSR applied the career-offender enhancement based upon two prior convictions: (1) Iowa domestic abuse assault with intent to inflict serious injury, PSR ¶ 36, and (2) Iowa domestic abuse assault – impeding normal breathing. PSR ¶ 47. The application of the career-offender enhancement increased Mr. Tinlin's base offense level to 37. PSR ¶ 28. After an adjustment for acceptance of responsibility, the PSR calculated Mr. Tinlin's guideline range at 322

[3] In this petition, "R. Doc. (4:19-cr-00224-001)" refers to the criminal docket in Southern District of Iowa Case No. 4:19-cr-00224-001, and is followed by the docket entry number. "Sent. Tr. (4:19-cr-00224-001)" refers to the sentencing transcript in Southern District of Iowa Case No. 4:19-cr-00224-001, and is followed by the page number.

to 387 months of imprisonment. PSR ¶ 113. Without the career-offender enhancement, Mr. Tinlin's range would be 248 to 295 months, a difference of over five years. R. Doc. (4:19-cr-00224-001) 42.

Mr. Tinlin objected to the career-offender enhancement. R. Doc. (4:19-cr-00224-001) 35, 42. As relevant to this petition, Mr. Tinlin asserted that his Iowa domestic abuse assault with intent to inflict serious injury conviction, in violation of Iowa Code §§ 708.1, 708.2A(2)(c), was overbroad because it did not require violent force. *Id.* A defendant violates this statute when he or she commits a generic assault, defined under Iowa Code § 708.1, with the aggravating factor under Iowa Code § 708.2A(2)(c), in this case where "the domestic abuse assault is committed with the intent to inflict a serious injury upon another . . . ." By statute, specifically Iowa Code § 702.18, Iowa defined "serious injury" to include "disabling mental illness."

At sentencing, the district court overruled Mr. Tinlin's objection, finding that his convictions were crimes of violence under Eighth Circuit precedent. Sent. Tr. (4:19-cr-00224-001) pp. 16-17. The district court accepted the PSR's calculation of the advisory Guideline range. Sent. Tr. (4:19-cr-00224-001) p. 17. After hearing argument on the ultimate disposition, the district court sentenced Mr. Tinlin to 240 months on the drug conspiracy count, and 60 months on the 18 U.S.C. § 924(c), for a total of 300 months of imprisonment. Sent. Tr. (4:19-cr-00224-001) p. 32.

Mr. Tinlin appealed, maintaining his argument that Iowa domestic abuse assault with intent to commit serious injury was not a crime of violence. Mr. Tinlin

first noted that this Circuit's case law established that Iowa's assault statute, Iowa Code § 708.1, was not a crime of violence, as the court had already found that it did not require violent force. Therefore, his prior conviction could only qualify if the "intent to inflict serious injury" statutory enhancement under § 708.2A(2)(c), met the crime of violence definition. Mr. Tinlin asserted his statute did not qualify under either the force clause or the enumerated offense clause because the plain language of the Iowa statute defined "serious injury" to include mental illness. *See* Iowa Code § 702.18.

In response, the government appeared to concede that Iowa's generic assault statute, Iowa Code § 708.1, was not a crime of violence. The government also appeared to concede, or at least did not seriously dispute, that the definition of "serious injury" under Iowa statute was facially overbroad.[4] Instead, the government asserted that Mr. Tinlin's argument was foreclosed by Eighth Circuit case law, and alternatively that the realistic probability test still required Mr. Tinlin to point to a specific case in which it was applied in an overbroad manner.

This Eighth Circuit affirmed. *United States v. Tinlin*, 20 F.4th 426 (8th Cir. 2021). The panel determined it was bound by this Court's prior decision in *United States v. Quigley*, 943 F.3d 390 (8th Cir. 2019). In *Quigley*, the Court held that Iowa assault with intent to inflict serious injury was a crime of violence under the force clause, finding the defendant could not establish a "reasonable probability" that Iowa

[4] The government agreed that the definition of serious injury was indivisible.

courts would apply "serious injury" in a manner that would not satisfy the force clause, despite the statutory language.

D. Mr. Wheat's advisory Guideline range is almost doubled based upon a state conviction for Iowa assault that only required an intent to inflict "mental illness."

Mr. Wheat was indicted on two counts of being a prohibited person in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(3) & (g)(8). R. Doc. (3:20-CR03031-001) 2.[5] Eventually, Mr. Wheat pleaded guilty to both counts, without a plea agreement. R. Doc. (3:20-CR03031-001) 32.

A PSR was created. The PSR increased Mr. Wheat's base offense level from 14 to 20 for having a prior conviction for a crime of violence. PSR ¶ 12. The PSR identified Mr. Wheat's predicate as an Iowa conviction for assault with intent to inflict serious injury, under Iowa Code § 708.2(1).[6] PSR ¶¶ 12, 26. The PSR recommended a four-level increase for possessing the firearm in connection with another felony offense under USSG § 2K2.1(b)(6)(B). PSR ¶ 13. After a three-level reduction for acceptance of responsibility, the PSR calculated the advisory Guideline range to be 46 to 57 months, based on a total offense level of 21 and criminal history category III. PSR ¶ 73. Without the increase his base offense level, Mr. Wheat's advisory Guideline range would be 24 to 30 months of imprisonment.

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[5] In this petition, "R. Doc. (3:20-CR03031-001)" refers to the criminal docket in Northern District of Iowa Case No. 3:20-CR03031-001, and is followed by the docket entry number. "Sent. Tr. (3:20-CR03031-001)" refers to the sentencing transcript in Northern District of Iowa Case No. 3:20-CR03031-001, and is followed by the page number.

[6] This statute is virtually identical to Mr. Tinlin's statute of conviction, except for the domestic relationship requirement.

Mr. Wheat objected to PSR's Guideline calculation. R. Doc. (3:20-CR03031-001) 42. As relevant to this petition, he objected to the increase in his base offense level, challenging that his Iowa assault conviction was a crime of violence. R. Doc. (3:20-CR03031-001) 42. He asserted his Iowa assault statute of conviction only required the intent to cause serious injury, and Iowa statute defines "serious injury" to include nonphysical injury. R. Doc. (3:20-CR03031-001) 48. Mr. Wheat noted that under the Eighth Circuit's decision in *Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021), statutory language is sufficient to establish that a statute is overbroad in the immigration context. R. Doc. (3:20-CR03031-001) 48. He argued this trumped the circuit's decision in *United States v. Quigley*, 943 F.3d 390 (8th Cir. 2019), which held that Iowa assault with intent to commit serious injury was a crime of violence. R. Doc. (3:20-CR03031-001) 48.

At sentencing, Mr. Wheat maintained his Guideline objection to the increase in his base offense level. Sent. Tr. (3:20-CR03031-001) p. 5. The district court acknowledged the tensions in the Eighth Circuit between *Quigley* and *Gonzalez*, but ultimately found *Quigley* binding and that Mr. Wheat's prior conviction was a crime of violence. Sent. Tr. (3:20-CR03031-001) pp. 9-10. The district court stated:

> I do find that I'm still bound by *Quigley*. Number one, I don't know exactly what the circuit will do when it's presented with another chance to look at this statute. Now with the layer of *Gonzalez* and that layer of arguments being out there, it could ultimately result in a different outcome. But it hasn't yet.
>
> I am faced with binding published circuit precedent in *Quigley* plus two other Eighth Circuit cases that are unpublished in *Chapman*

> and *Thiel*, all of which point the same direction which is 708.2-1 or 708.1 dash – start over. 708.1, subparagraph -- where am I? I'm sorry. I was looking at the wrong paragraph. Let me start over.
>
> My point is I guess between Quigley -- it is 708.2, subparagraph 1. *Quigley* along with *Chapman* and *Thiel* have all said that a violation of that statute is categorically a crime of violence. And I don't have any other Eighth Circuit law at this point overruling *Quigley* or applying the analysis of *Gonzalez* to reach a different outcome.
>
> So I do find that I am bound by *Quigley* and that I do have to find that the conviction in paragraph 26 is a crime of violence for purposes of establishing the base offense level.
>
> So again, I think it's a good argument and one that the circuit will have to take up when it's presented with it. But given the current state of the law in the circuit, I do overrule the defense objection to paragraph 12. I find that the base offense level should be 20 because Mr. Wheat does have one prior conviction that constitutes a crime of violence under the guidelines.

The district court accepted the PSR's range of 46 to 57 months, based on a total offense level of 21 and criminal history category III. Sent. Tr. (3:20-CR03031-001) p. 12. The district court then imposed a sentence of 52 months of imprisonment. Sent. Tr. (3:20-CR03031-001) p. 27.

Mr. Wheat appealed, maintaining his challenge to the base offense level. The Eighth Circuit affirmed. *United States v. Wheat*, No. 21-2531, 2022 WL 714886 (8th Cir. March 10, 2022). Like in Mr. Tinlin's appeal, the circuit found its prior decision *United States v. Quigley*, 943 F.3d 390, 395 (8th Cir. 2019), binding. *Id*. The court determined that Mr. Wheat had failed to establish a realistic probability that his statute would be applied in an overbroad manner. *Id*.

REASONS FOR GRANTING THE WRIT

I. A CIRCUIT SPLIT EXISTS ON WHETHER OVERBROAD STATUTORY LANGUAGE ALONE ESTABLISHES THAT A STATE CONVICTION IS BROADER THAN THE GENERIC DEFINITION OF A CRIMINAL SENTENCING ENHANCEMENT.

a. The First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have all held that the "realistic probability" test is inapplicable when statutory language is unambiguously overbroad on its face.

The vast majority of circuits have addressed the question presented in this petition for certiorari, and most circuits have determined that overbroad statutory language alone is sufficient to establish that a prior conviction is not a qualifying sentencing enhancement predicate. First, in *Swaby v. Yates*, the First Circuit considered the categorical breadth of the Rhode Island drug schedules in comparison to the federal drug schedules. 847 F.3d 62, 66 (1st Cir. 2017). The court held that the Rhode Island statute was broader on its "plain terms," "whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug." *Id.* Similarly, in *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018), the Second Circuit determined that the realistic probability test is only applicable when the statutory language "has an indeterminate reach." The court held that when the statutory language itself is overbroad, this is sufficient to establish overbreadth. *Id.* at 63.

Next, in *Singh v. Attorney General of the U.S.*, the Third Circuit held that when the elements of a crime of conviction are different, on their face, from the elements of a generic federal offense, a court errs by conducting a "realistic probability inquiry."

839 F.3d 273, 286 (3d Cir. 2016). The Fourth Circuit agreed in *Gordon v. Barr*, 965 F.3d 252, 260 (4th Cir. 2020), stating that "when the state, through plain statutory language, has defined the reach of a state statute to include conduct that the federal offense does not, the categorical analysis is complete; there is no categorical match."

In *Mendieta-Robles v. Gonzales*, the Sixth Circuit rejected the Eighth Circuit's interpretation of the *Duenas-Alvarez* rule because "it requires us to ignore the clear language" of a statute. 226 F. App'x 564, 572 (6th Cir. 2007) (unpublished). The Sixth Circuit has repeatedly reaffirmed this principle, including in published decisions. *See, e.g., United States v. Camp,* 903 F.3d 594, 602 (6th Cir. 2018); *United States v. Lara*, 590 F. App'x 574, 584 (6th Cir. 2014).

In *United States v. Grisel*, the Ninth Circuit, sitting *en banc*, provided perhaps the most straight-forward articulation of its interpretation of the *Duenas-Alvarez* rule: "Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." 488 F.3d 844, 850 (9th Cir. 2007) (en banc). The Tenth Circuit followed this reasoning when analyzing Hobbs Act robbery, stating:

> [The government] contends [the defendant] failed to demonstrate that the government has or would prosecute threats to property as a Hobbs Act Robbery. . . . But he does not have to make that showing. Hobbs Act robbery reaches conduct directed at "property" because the statute specifically says so. *See* 18 U.S.C. § 1951(b)(1). We cannot ignore the statutory text and construct a narrower statute than the plain language supports.

United States v. O'Connor, 874 F.3d 1147, 1154 (10th Cir. 2017). Finally, in *Vassell v. United States*, the Eleventh Circuit held: "*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition." 839 F.3d 1352, 1362 (11th Cir. 2016).

b. The Fifth and Eighth Circuits have held that plainly overbroad statutory language alone is insufficient, and that *Gonzales v. Duenas-Alvarez* requires a defendant point to a specific case example.

The Fifth Circuit was the first circuit to disagree with the majority position. *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017). In *Castillo-Rivera*, the Fifth Circuit determined overbroad statutory language alone was insufficient, holding "[t]here is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face." *Id*. at 223.

The Eighth Circuit has taken an odd approach. At first glance, it appears the circuit held that overbroad statutory language is sufficient to establish overbreadth, at least in the immigration context. *Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021). In *Gonzalez v. Wilkinson*, the Eighth Circuit rejected the government's argument that a defendant must find a case example when the statutory language is overbroad, stating:

> The government's interpretation invites us to conclude that "realistic probability" means that petitioners must prove through specific convictions that unambiguous laws really mean what they say. Not only is this proposal contrary to our understanding of *Duenas-Alvarez* and

> *Moncrieffe*, but it is also at odds with the categorical approach itself, which asks us to focus on the language of the statutory offense, "not the facts underlying the case." *Moncrieffe*, 569 U.S. at 190, 133 S.Ct. 1678; *see also Descamps*, 570 U.S. at 261, 133 S.Ct. 2276 ("The key [of the categorical approach] ... is elements, not facts."). We therefore reject the government's interpretation and conclude that, "in applying the categorical approach, state law crimes should ... be given their plain meaning."

Id. at 660-61.

Despite this clear decision, later Eighth Circuit decisions have pushed back on *Gonzalez v. Wilkinson's* holding. For example, *Peh v. Garland*, 5 F.4th 867, 871 (8th Cir. 2021), called *Gonzalez v. Wilkinson's* holding a "competing view" on the realistic probability standard, citing an earlier decision, *Mowlana v. Lynch*, 803 F.3d 923 (8th Cir. 2015), for the proposition that overbroad language alone is insufficient. After *Peh*, the Eighth Circuit has consistently refused to apply *Gonzalez v. Wilkinson's* holding in the criminal context, most notably in Mr. Hutchinson, Mr. Tinlin, and Mr. Wheat's cases.

In fact, in Mr. Hutchinson's case the Eighth Circuit went farther than the Fifth Circuit and found that even case examples were insufficient to establish overbreadth. As the majority seemed to acknowledge, the cases provided examples of Texas burglary convictions that only required commission of a crime that required a reckless *mens rea.* 27 F.4th at 1327. Going beyond the elements of the offense, the majority still determined the cases were insufficient because the defendants in those cases *did* have the specific intent to commit an offense. *Id.*

This Court should grant the petition for certiorari to address this circuit split.

II. THE EIGHTH CIRCUIT HAS OVEREXTENDED *GONZALES V. DUENAS-ALVAREZ* AND CREATED A HEIGHTENED BURDEN FOR CRIMINAL DEFENDANTS THAT IS INCONSISTENT WITH THIS COURT'S PRECEDENT ON THE APPLICATION OF THE CATEGORICAL APPROACH IN THE CRIMINAL CONTEXT.

From its inception in *Taylor v. United States*, the categorical approach has been rooted in text over application, focusing first and foremost on "the elements of the statute of conviction." 495 U.S. 575, 601 (1990). Subsequent decisions from this Court confirms this. In *Descamps v. United States*, 570 U.S. 254, 257 (2013), this Court stated that the categorical approach "demands" that courts "compare the elements of the crime of conviction … with the elements of the generic crime." And this Court bluntly stated in *Mathis v. United States*, 579 U.S. 500, 519 (2016), that "application of ACCA involves, and involves only, comparing elements."

In spite of this precedent, the Eighth Circuit has taken this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), and impermissibly stretched it in the criminal setting to find overbroad elements are insufficient to establish that a prior conviction is not a categorical match. In *Duenas-Alvarez*, the Court addressed how to handle when statutory language is vague in the immigration context. This Court stated:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime . . . requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Id. This principle was reaffirmed in *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

Duenas-Alvarez did not overrule this Court's prior precedent, which required courts to compare the elements of the statute with the generic definition. In *Duenas-Alvarez*, the Court was concerned with an immigration petitioner who sought to establish a statute as overbroad in an unlikely way, through "the application of legal imagination." 549 F.3d at 193. But in the face of unambiguous statutory language, no legal imagination is required because the plain language of the statute of prior conviction is overbroad on its face. It is in these instances that a hyper-rigid interpretation of the *Duenas-Alvarez* rule serves no purpose but to limit a defendant's ability to defeat an erroneous sentencing enhancement.

This Court has not held criminal defendants to such a high burden in the face of plainly overbroad statutory language. For example, the Massachusetts burglary statute in *Shepard* v. *United States* was non-generic because (on its face) it applied to "boats and cars." 544 U.S. 13, 17 (2005). The Iowa burglary statute in *Mathis* was also non-generic because, on its face, it included "a broader range of places" than generic burglary, including any "land, water, or air vehicle." 570 U.S. at 507 (citation omitted). And the Kansas drug statute in *Mellouli* did not "relat[e] to" controlled substances, as defined in 21 U.S.C. § 802, because the Kansas crime applied to "at least nine substances not included in the federal lists." *Mellouli v. Lynch*, 575 U.S. 798, 802 (2015).

The Eighth Circuit's approach has resulted in burden shifting to the defendant that is also inconsistent with "*Taylor's* demand for certainty." *Shepard*, 544 U.S., at 21. In the criminal context, the burden is on the government to establish that the prior conviction warrants the sentencing enhancement. *Pereida v. Wilkinson*, 141 S. Ct. 754, 766 (2021). Yet the Eighth Circuit's approach requires defendants, in the face of clearly overbroad statutory language, to provide additional evidence to establish that their prior conviction does not qualify.

What if the defendant is representing him- or herself and does not have access to court records in other cases? *See* Elizabeth Y. McCuskey, *Submerged Precedent*, 16 Nev. L.J. 515, 520 (2016) (noting that there are "a mass of reasoned opinions available only on court dockets, and not available on Westlaw, or Lexis. These putative precedents are essentially submerged from public view and therefore excluded from consideration among the body of precedential law.").What if the statute is newly enacted? What about the inconsistencies that would surely result when one defendant's prior conviction is counted as a sentencing enhancement because he cannot point to case law applying the statute in a specified way, but a year later, a state case does, in fact, apply the statute in the specified way, allowing subsequent defendants to make the *Duenas-Alvarez* demonstration that the first defendant could not?

Finally, the Eighth Circuit's willingness to find overbroad statutory language alone sufficient to establish overbreadth in the immigration context *but not* the

criminal context is plainly inconsistent with this Court's recent decision in *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021). In *Pereida*, the Court explained that the government is held to a higher standard in the categorical approach for criminal cases than it is in immigration cases. This Court resolved a circuit split as to whether in the Immigration and Nationality Act ("INA") "Congress meant for any ambiguity about an alien's prior convictions to work against the government, not the alien." 141 S. Ct. at 760. This Court drew a line in the sand between the ACCA and INA, noting their conflicting purposes and approaches. Rejecting the argument "that the ACCA and INA have a shared text and purpose", Justice Gorsuch, writing for the Court, concluded "the ACCA and INA provision at issue here bear different instructions." *Pereida*, 141 S. Ct. at 766 at n.7. While "[b]oth may call for the application of the categorical approach . . . the ACCA's categorical approach demands certainty from the government, the INA's demands it from the alien." *Id*. (emphasis added). The Court explained why immigration cases are treated differently than ACCA criminal cases, stating "[w]hen it comes to civil immigration proceedings, Congress can, and has, allocated the burden differently." *Id*. This is important because while "evidentiary gaps work against the government in criminal cases, they work against the alien seeking relief from a lawful removal order." *Id*. The Court specifically stated that "any lingering ambiguity" in the categorical analysis means "the government will fail to carry its burden of proof in a criminal case."[7] *Id*. at 765.

[7] It is debatable whether the "realistic probability" approach applies in the criminal context at all. This Court has only applied it once in a criminal case, the only Supreme Court case analyzing the

To use *Duenas-Alvarez* to make the statute of conviction narrower than it is on its own terms would be inconsistent with the above precedent. The Eighth Circuit's decision must be overruled.

III. THIS ISSUE IS FREQUENTLY OCCURRING. MR. TINLIN, MR. HUTCHINSON, AND MR. WHEAT'S CASES PRESENT AN IDEAL VEHICLE FOR REVIEW.

The issue presented in this petition is frequently reoccurring, as illustrated by the fact that it arose three times in the Eighth Circuit alone in two months. While the petitioners' cases here involve application of ACCA and increases to the advisory Guidelines range, the issue goes much farther. This issue will also arise when analyzing the potential application of "three strikes" law, 18 U.S.C. § 3559(c), as well as the sentencing enhancements for prior convictions under the federal drug trafficking statutes, 21 U.S.C. §§ 841, 851.

All three cases present a clean vehicle for review of this purely legal issue. Mr. Hutchinson, Mr. Tinlin, and Mr. Wheat all preserved this question before the district court and on appeal. All three cases involve plainly overbroad statutory language. As the dissent noted in Mr. Hutchinson's case, his statute is unambiguously overbroad. Further, the government in Mr. Tinlin's and Mr. Wheat's cases acknowledged, or at minimum did not seriously dispute, that the statutes can only

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ACCA that has mentioned the "realistic probability" test was analyzing the now void residual clause, did so in a "cf" citation, and has since been overruled. *See James v. United States*, 550 U.S. 192, 208 (2007); overruled by *Johnson v. United States*, 576 U.S. 591 (2015).

qualify if the "serious injury" enhancement requires violent force, and that the statutory definition of "serious injury" is facially overbroad.

Finally, the impact of the sentencing enhancement in each petitioner's case is significant. Mr. Hutchinson went from a ten-year maximum to a fifteen-year mandatory minimum—a sentence that the district court acknowledged it would not have found warranted without the ACCA finding. Mr. Tinlin's advisory Guideline range was increased by over five years. Mr. Wheat's advisory Guideline range was almost doubled.

CONCLUSION

The Eighth Circuit's decision is the minority position in a well-established circuit split. It also represents an application of the categorical approach that is inconsistent with this Court's precedent. For these reasons, Mr. Wheat, Mr. Tinlin, and Mr. Hutchinson respectfully request that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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