CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN JACKSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is federal first-degree murder, 18 U.S.C. § 1111(a), which includes felony murder, a crime of violence within the meaning of the force clause of 18 U.S.C. § 924(c)(3)(A)?

2. Is federal first-degree murder, 18 U.S.C. § 1111(a), which defines multiple ways to commit that crime, indivisible such that premeditated and felony murder are different means of committing a single offense, or is the statute divisible, such that premeditated and felony murder are separate crimes that must be separately charged and unanimously found by a jury?

STATEMENT OF RELATED PROCEEDINGS

United States v. Jackson, No. 20-9 (United States Court of Appeals for the Fourth Circuit) (order denying rehearing filed on June 17, 2022).

United States v. Jackson, No. 1:16-cv-212 (United States District Court for the Western District of North Carolina) (judgment dismissing successive motion for relief under 28 U.S.C. § 2255 filed March 31, 2020).

In re Jackson, No. 19-5 (United States Court of Appeals for the Fourth Circuit) (order denying leave to amend successive motion for relief under 28 U.S.C. § 2255 filed May 30, 2019).

In re Jackson, No. 16-10 (United States Court of Appeals for the Fourth Circuit) (order granting authorization to file a successive motion for relief under 28 U.S.C. § 2255 filed June 16, 2016).

Jackson v. United States, No. 11-6315 (Supreme Court of the United States) (order denying petition for writ of certiorari filed October 1, 2012).

United States v. Jackson, No. 09-10 (United States Court of Appeals for the Fourth Circuit) (order denying petition for rehearing and rehearing en banc filed April 11, 2011).

Jackson v. United States, No. 1:04-cv-251 (United States District Court for the Western District of North Carolina) (judgment denying certificate of appealability filed July 13, 2010).

Jackson v. United States, No. 03-5929 (Supreme Court of the United States) (order denying petition for certiorari filed November 17, 2003).

United States v. Jackson, No. 01-9 (United States Court of Appeals for the Fourth Circuit) (opinion affirming conviction and sentence on direct appeal filed March 18, 2003).

United States v. Jackson, No. 1:00-cr-74 (United States District Court for the Western District of North Carolina) (judgment of guilt and sentence of death entered May 14, 2001).

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The published opinion of the United States Court of Appeals for the Fourth Circuit appears in the appendix and is reported as *United States v. Jackson*, 32 F.4th 278 (4th Cir. 2022). A timely petition for rehearing en banc was denied by order on June 17, 2022, is not reported, and appears in the appendix.

The opinion of the United States District Court for the Western District of North Carolina denying Petitioner's motion to vacate conviction and sentence pursuant to 28 U.S.C. § 2255, *Jackson v. United States*, No. 1:16-cv-212, 2020 WL 154234 (W.D.N.C. Mar. 31, 2020), is unreported and appears in the appendix.

JURISDICTION

The Court of Appeals, after granting a Certificate of Appealability, affirmed the denial of Mr. Jackson's motion pursuant to 28 U.S.C. § 2255 on April 20, 2022, and denied a petition for rehearing on June 17, 2022. Chief Justice Roberts granted an extension of time until October 31, 2022, to file a petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 924 provides in pertinent part:

* * * * *

(c)

(3) 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, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * * * *

(j) 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 by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

18 U.S.C. § 1111 provides in pertinent part:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. . . .

STATEMENT

Petitioner Richard Jackson was charged with murder and related offenses related to the 1994 kidnapping, sexual abuse, and murder of Karen Styles in Pisgah National Forest near Asheville, North Carolina. The charges alleged that he kidnapped Ms. Styles as she ran along a trail and forced her into the woods where she was restrained, sexually assaulted, and eventually shot.

Mr. Jackson was initially tried in North Carolina state court, where he was convicted of murder and related offenses and sentenced to death. On direct appeal, the North Carolina Supreme Court vacated Mr. Jackson's conviction and sentence, finding that the police had violated *Edwards v. Arizona*, 451 U.S. 477 (1981), during their interrogation of Mr. Jackson. *State v. Jackson*, 497 S.E.2d 409 (N.C. 1998).

The State's petition for writ of certiorari was denied by the Court on October 13, 1998. *North Carolina v. Jackson*, 525 U.S. 943 (1998).

Before his second trial in state court, Mr. Jackson pled guilty on March 3, 2000, to second-degree murder and related offenses. He was sentenced to 25 to 31 years in state prison. Mr. Jackson has never challenged this state sentence in any forum.

On October 2, 2000, just months after this guilty plea but nearly seven years since the date of the offense, the federal government capitally indicted Mr. Jackson with a single count of violating 18 U.S.C. § 924(c) and § 924(j) (carrying or using a firearm during a "crime of violence" resulting in death), in the Western District of North Carolina. The predicate offenses alleged as "crimes of violence" for this single count were federal first-degree murder pursuant to § 1111(a), federal kidnapping pursuant to § 1201, and federal aggravated sexual abused pursuant to § 2241. Mr. Jackson was not charged with any underlying substantive offenses.

In 2001, a jury convicted Mr. Jackson on this single count. The jury sentenced Mr. Jackson to death. The Fourth Circuit affirmed his conviction and sentence on direct appeal. *United States v. Jackson*, 327 F.3d 273 (4th Cir. 2003). The Court denied certiorari. *Jackson v. United States*, 540 U.S. 1019 (2004).

The Western District of North Carolina denied Mr. Jackson's first motion for relief under 28 U.S.C. § 2255, *Jackson v. United States*, 638 F. Supp. 2d 514 (W.D.N.C. 2009), and subsequently denied a certificate of appealability, *Jackson v. United States*, No. 1:04-cv-251, 2010 WL 2775402 (W.D.N.C. July 13, 2010)

(unpublished). The Fourth Circuit denied a certificate of appealability and dismissed Mr. Jackson's appeal. Order, *Jackson v. United States*, No. 09-10 (4th Cir. Feb. 11, 2011). This Court denied certiorari. *Jackson v. United States*, No. 11-6315 (Oct. 1, 2012).

The legal landscape underlying Mr. Jackson's conviction was substantially changed by this Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015) and *Welch v. United States*, 578 U.S. 120 (2016). In *Johnson*, this Court held that the definition of a "violent felony" in the residual clause of the Armed Career Criminal Act, which is nearly identical to the definition of a "crime of violence" in the residual clause found in 18 U.S.C. § 924(c)(3)(B), under which Mr. Jackson was convicted, was unconstitutionally vague. *Welch* subsequently held that Johnson applies retroactively to cases on collateral review. 578 U.S. at 129-30.

On June 16, 2016, the Fourth Circuit granted Mr. Jackson's motion and authorized him to file a second or successive § 2255 motion in the Western District of North Carolina in light of *Johnson* and *Welch*. In this motion, Mr. Jackson argued that his federal conviction must be vacated because the residual clause of 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague in light of *Johnson*, and the three predicate crimes underlying his conviction (federal first-degree murder pursuant to § 1111(a), federal kidnapping pursuant to § 1201, and federal aggravated sexual abuse pursuant to § 2241) no longer qualified as "crimes of violence" under the remaining force clause of § 924(c)(3)(A) because none categorically "has as an

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

The district court stayed Mr. Jackson's § 2255 motion pending various decisions by the Fourth Circuit and this Court. This Court subsequently held that the reasoning of Johnson applies to and invalidates the residual clause of 18 U.S.C. § 924(c)(3)(B). *United States v. Davis*, 139 S. Ct. 2319 (2019).

On January 15, 2020, the Government filed a Motion to Dismiss Mr. Jackson's § 2255 motion. Mr. Jackson filed a Response on March 30, 2020. On the next day, the district court granted the Government's motion to dismiss and denied Mr. Jackson a certificate of appealability. Mr. Jackson filed a timely notice of appeal from that order.

On July 31, 2020, the Fourth Circuit placed the case in abeyance pending a decision by the Court in *Borden v. United States*, 769 F. App'x 266 (6th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (Mar. 2, 2020). The Court decided *Borden* on June 13, 2021, holding that the elements clause's definition of "violent felony" in the Armed Career Criminal Act, which requires the "use of physical force against the person of another," does not encompass offenses criminalizing reckless conduct. *Borden v. United States,* 141 S. Ct. 1817, 1826 (2021).

The Fourth Circuit granted Mr. Jackson a certificate of appealability and, after briefing and oral argument, affirmed the district court. To reach this conclusion, the Fourth Circuit held that federal first-degree murder under § 1111(a) is a divisible statute. Rejecting this Court's reasoning in *Schad v. Arizona*, 501 U.S.

624 (1991), and *Mathis v. United States*, 579 U.S. 500 (2016), the Fourth Circuit held.:

> The first component of § 1111(a) sets out premeditated murder as a type of first-degree murder, while the second component sets out felony murder as a type of first-degree murder. Each of these components requires the Government to prove a unique element that the jury must find unanimously; the first component requires proof of premeditation, and the second requires proof of the accomplishment (or attempted accomplishment) of a listed felony. Therefore, these two components list alternative versions of first-degree murder, which makes the statute divisible.

Jackson, 32 F.4th at 285.

Thus, although the Fourth Circuit recognized that felony murder was not a crime of violence because it could be committed recklessly or accidentally, the court affirmed the denial of relief, because under a divisible statute, the inclusion of premeditated first-degree murder under 18 U.S.C. § 1111(a) was sufficient to constitute a "crime of violence" under the force clause of 18 U.S.C. § 924(c)(3)(A).[1] *Jackson*, 32 F.4th at 287.

REASONS FOR GRANTING THE WRIT

The question in this case is whether federal first-degree murder under 18 U.S.C. § 1111(a) is a crime of violence within the meaning of the force clause of 18 U.S.C. § 924(c)(3)(A). That question, in turn, depends upon whether the statute is indivisible. If so, it is not a crime of violence because it includes felony murder, a

[1] The Fourth Circuit recognized that it had previously held that kidnapping does not qualify as a crime of violence, and did not reach the question of whether aggravated sexual abuse qualifies. *Jackson*, 32 F.4th at 284 n.5.

crime that can be committed accidentally or recklessly. *See Jackson,* 32 F.4th at 285. The Fourth Circuit, however, held that the statute was divisible.

This issue is one of first impression and is of exceptional importance. By interpreting the federal first-degree statute to establish premeditated and felony murder as separate offenses, the Fourth Circuit narrowed the scope and application of the statute in ways that are inconsistent with common law and historical practices. No court has ever before adopted this view of the statute.

These changes have significant implications for both past and future prosecutions. Under this decision, federal prosecutors will not be able to secure a first-degree murder conviction when jurors cannot agree on the exact method of the killing, even though they all believe the defendant is guilty. And prisoners who were convicted without jury findings as to a specific form of murder may have a new basis to challenge their convictions.

Moreover, the panel's opinion conflicts with *Schad v. Arizona*, 501 U.S. 624 (1991), and *Mathis v. United States*, 579 U.S. 500 (2016), both of which support the conclusion that the statute is indivisible. This Court should grant review to consider the proper application of *Schad* and *Mathis* to the question of whether federal first-degree murder is a "crime of violence" within the meaning of the force clause.

I. The Fourth Circuit's Decision Is in Conflict with the Common Law and Historical Origins of the Federal First-Degree Murder Statute, as well as *Schad v. Arizona*.

Borden held that a criminal offense *cannot* "count as a 'violent felony' if it requires only a *mens rea* of recklessness—a less culpable mental state than purpose

or knowledge." 141 S. Ct. at 1821-22. Under *Borden*, federal murder is not a crime of violence because felony murder can be committed recklessly or accidentally.

The Fourth Circuit conceded this point. "[Mr. Jackson] is correct. . . . Felony murder cannot qualify as a 'crime of violence' because it requires only the mens rea necessary to attempt or complete the underlying felony (i.e., arson, escape, etc.). That mens rea is not more than recklessness and thus, does not satisfy *Borden*." *Jackson*, 32 F.4th at 285.

Given that conclusion, the court properly recognized that the validity of Mr. Jackson's conviction would depend on whether § 1111(a) is an indivisible statute (meaning premeditated murder and felony murder are only separate means of committing the single crime of first-degree murder) or a divisible statute (meaning premeditated murder and felony murder are two entirely different crimes). *Jackson*, 32 F.4th at 285 ("We turn to the critical issues in this appeal: whether § 1111(a) is divisible . . .").

The court held that § 1111(a) is a divisible statute, so that premeditated first-degree murder and felony first-degree murder are distinct and different crimes. *Id.* at 285-86. Under this logic, premeditated and felony murder would have to be separately and specifically charged, and a jury would be required to unanimously find that the accused committed the specific form of murder charged. This holding is in conflict with the common law and historical origins of the federal murder statute, as well as *Schad* and *Mathis*.

A. The Decision Below Conflicts with the Common Law.

At common law, murder was defined as the unlawful killing of another human being with "malice aforethought." The intent to kill and the intent to commit a felony were alternative aspects of the single concept of "malice aforethought." *See* Stephen, J., 3 History of the Criminal Law of England 21–22 (1883). *Schad* recognized this common law definition and noted that most state statutes (like the federal statute) "retained premeditated murder and some form of felony murder . . . as alternative means of satisfying the mental state that first-degree murder presupposes." 501 U.S. at 640-41.

Under this common law approach, "'it was not necessary that all the jurors should agree" on whether there was a premeditated or felony murder; "it was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first-degree as that offense is defined by the statute.'" *Id.* (quoting *People v. Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903)). *Schad* recognized that, at common law, "neither premeditation nor the commission of a felony is formally an *independent element* of first-degree murder; they are treated as mere means of satisfying a mens rea element of high culpability." *Id.* at 639 (emphasis added). Thus, at common law, first-degree murder was a single indivisible offense.

Schad's focus on the common law was consistent with this Court's approach to statutory interpretation. Congress is understood to legislate against the background of the common law. *Sammantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010). When a statute covers an issue previously covered by the common law, this

Court presumes that Congress intended to retain the substance of the common law. *Id.* Absent contrary indications, Congress intended to incorporate the "well settled meaning" of common law terms into the words it chooses. *Sekhar v. United States*, 570 U.S. 729, 732 (2013); *see also Stokeling v. United States,* 139 S. Ct. 544, 561-63 (2019) (relying on common law to define term used in statute); *United States v. Castleman*, 572 U.S. 157, 162-63 (2014) (looking to the common law to determine meaning of statute).

The legislative history of the federal murder statute shows Congress's intent to follow the common law. The law's drafters explicitly stated that the federal murder statute is based on "the common law definition [of murder], and is similar in terms to the statutes defining murder in a large majority of the States." Special Joint Comm. on the Revision of the Laws, Revision and Codification of the Laws, Etc., H.R. Rep. No. 2, 60th Cong., 1st Sess. 1-5 (1908).

But the Fourth Circuit gave no weight to the common law and did not interpret § 1111(a) against that background. Instead, although Congress has given no indication that it intended to depart from the common law, the Fourth Circuit adopted an approach that was contrary to the common law, holding that premeditated and felony murder were separate crimes and not, as they had been at common law, different means of committing the single crime of first-degree murder.

Consider the following hypothetical. Two masked armed robbers commit a bank robbery during which a bank teller is shot and killed. Defendant claims that he never intended for anyone to be killed and blames his codefendant for shooting

and killing the teller. Six jurors believe defendant's claims, while six jurors believe that defendant was the killer.

Under common law, the defendant would be guilty of first-degree murder regardless of these differences because first-degree murder is a single indivisible crime. But under the Fourth Circuit's view that the federal first-degree murder statute defines separate crimes, the defendant would be acquitted because the jury could not unanimously agree whether he was guilty of premeditated or felony murder.

The Fourth Circuit offered no explanation for its deviation from the common law and historical roots of the federal first-degree murder statute. This Court's review is needed to ensure that the statute is interpreted consistently with Congressional intent and its historical roots.

B. This Court's Reasoning in *Schad* Should Govern Here.

Schad recognized that premeditated and felony murder are two separate ways of committing the same crime of first-degree murder. *Schad* upheld an Arizona first-degree murder conviction based on a "general verdict predicated on the possibility of combining findings of what can best be described as alternative mental states, the one being premeditation, the other the intent required for murder combined with the commission of an independently culpable felony." 501 U.S. at 632. The Court noted that the statute was consistent with the common law and that many states "have in most cases retained premeditated murder and some form of felony murder . . . as alternative *means* of satisfying the mental state that first-degree murder presupposes." *Id.* at 641.

The Court then listed eleven state court decisions that agreed (and only one that disagreed) with this common law definition of murder and the principle that "'it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one; it was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute.'" *Id.* (quoting *People v. Sullivan*, 65 N.E. at 989-90); *see also id.* at 641-42 (collecting cases). The Court noted that "Arizona's equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a *single offense* of first-degree murder finds substantial historical and contemporary echoes." *Id.* at 640 (emphasis added).

Thus, under common law and the law of most states, "neither premeditation nor the commission of a felony is formally an *independent element* of first-degree murder; they are treated as mere means of satisfying a mens rea element of high culpability." *Id.* at 639 (emphasis added). Because premeditation and felony murder are different means of proving the single offense of first-degree murder, federal first-degree murder is a single indivisible offense. *See, e.g.*, *United States v. Mathis*, 932 F.3d 242, 267 (4th Cir. 2019) ("Although the statute describes various ways that an individual may commit the act of kidnapping, namely, by force, intimidation, or deception, these alternatives represent various means of committing the crime, not

alternative elements of the crime."); *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015) ("Accordingly, although § 1591(a) refers to alternative *means* of commission, it contains a single, indivisible set of *elements*, and the categorical approach applies.") (emphasis in original). And a "statute is indivisible when 'the jury need not agree on anything past the fact that the statute was violated.'" *Id.* at 498 (quoting *Rendon v. Holder*, 764 F.3d 1077, 1085 (9th Cir. 2014)); *see also Rendon*, 764 F.3d at 1086 ("Thus, when a court encounters a statute that is written in the disjunctive (that is, with an "or"), that fact alone cannot end the divisibility inquiry. Only when state law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute are we able to conclude that the statute contains alternative *elements* and not alternative *means*."); *United States v. Hamilton*, 889 F.3d 688, 692-93 (10th Cir. 2018) (concluding disjunctively listed locational alternatives in Oklahoma second-degree burglary statute must be regarded as means rather than elements, and thus statute was indivisible).

Yet the court below did not apply the reasoning in *Schad* to the federal murder statute. Instead, it followed the *Schad* dissent and subdivided first-degree murder into separate crimes. In a footnote, the panel dismissed *Schad* as having no relevance to the federal statute. *Jackson*, 32 F.4th at 285 n.7.

Schad cannot be so readily dismissed. As Justice Scalia aptly recognized, the federal first-degree murder statute is the same type of statute, with the same type of common law origin, as the Arizona statute. *Schad*, 501 U.S. at 649 (Scalia, J.,

concurring). Other circuits have recognized the application of *Schad* to federal first-degree murder. *See United States v. Nguyen*, 155 F.3d 1219, 1229 (10th Cir. 1998) (applying *Schad* to federal first-degree murder); *United States v. Thomas*, 34 F.3d 44 (2d Cir. 1994) (same). The Fourth Circuit's opinion conflicts with *Schad* and the sister circuits.

C. The Decision Below Conflicts with Justice Scalia's Concurrence in *Schad*.

Justice Scalia, concurring in *Schad*, opined that murder statutes, such as § 1111(a), were indivisible statutes identifying alternative means of committing a single crime. He observed, "down to the present time *the United States* and most States have a single crime of first-degree murder that can be committed by killing in the course of a robbery as well as premeditated killing." *Schad*, 501 U.S. at 649 (Scalia, J., concurring) (citing 18 U.S.C. § 1111) (emphasis added). In his view, "Schad and the dissenting Justices would in effect have us abolish the crime of first-degree murder and declare that the Due Process Clause of the Fourteenth Amendment requires the subdivision of that crime into (at least) premeditated murder and felony murder." *Id.* Justice Scalia rejected that view: "it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Id.*

Justice Scalia offered a hypothetical to explain the purpose and importance of this reasoning:

> That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd

> to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.

Id. at 649-50.

The Fourth Circuit took the opposite view here. The Court subdivided the single offense of federal first-degree murder into multiple separate offenses. It viewed *Schad* as applicable only to the Arizona statute and ignored Justice Scalia's observations that the federal statute arose from the same historical origins as the Arizona statute, and that Congress made a deliberate choice not to create separate crimes in order to preserve prosecutorial flexibility. Given the conflict with Justice Scalia's view of § 1111(a), this Court's review is appropriate.

II. The Decision Below Conflicts with *Mathis v. United States*.

The panel's opinion is also in conflict with this Court's holding in *Mathis*. Under *Mathis*, if the law does not "speak plainly" on whether an offense is divisible, a statute must be deemed indivisible. 579 U.S. at 519. Thus, "unless we are certain that a statute's alternatives are elements rather than means, the statute isn't divisible and we must eschew the modified categorical approach." *United States v. Cantu*, 964 F.3d 924, 929 (10th Cir. 2020) (citation omitted). "[W]e need to insist on clear signals— that convince us to a certainty that the elements are correct and support divisibility." *Najera-Rodriguez v. Barr*, 926 F.3d 343, 356 (7th Cir. 2019).

Since § 1111(a) does not speak plainly and with certainty that it is divisible, *Mathis* dictates that it is indivisible. The Fourth Circuit failed to acknowledge or apply these standards.

A. The Court Failed to Apply the Categorical Approach as Required by *Mathis*.

Mathis requires that the analysis of whether a particular crime is a "crime of violence" start by applying the categorical approach. 579 U.S. at 506. For the reasons discussed above, application of the categorical approach supports the conclusion that, like most other first-degree murder statutes, federal first-degree murder is an indivisible statute that sets out "multiple 'mental states as alternative means of satisfying the mens rea element of the single crime of first-degree murder.'" *United States v. Lobaton-Andrade*, 861 F.3d 538, 544 (5th Cir. 2017) (quoting *Schad*, 501 U.S. at 642).

The text of the federal murder statute further supports a finding of indivisibility. Because a court "can readily determine the nature of [the] alternatively phrased list," *Mathis*, 579 U.S. at 518, in the first-degree murder statute as means rather than elements, the crime is indivisible. The panel's refusal to apply the categorical approach conflicts with *Mathis*.

B. *Mathis* Is Clear that the Use of the Disjunctive in the First-Degree Murder Statute Is Immaterial to the Divisibility Analysis.

The Fourth Circuit reasoned that because premeditated murder and felony murder are listed in the disjunctive in § 1111(a), this factor weighs in favor of divisibility. *Jackson,* 32 F.4th at 286. Such reasoning conflicts with *Mathis* where this Court explained that a statute is not divisible merely because it lists means of committing an offense disjunctively. *Mathis*, 579 U.S. at 512-13 ("Whether or not mentioned in a statute's text, alternative factual scenarios remain just that . . . a statute's listing of disjunctive means does nothing to mitigate the possible

unfairness of basing an increased penalty on something not legally necessary to a prior conviction."). The burglary statute at issue in *Mathis* included disjunctive terms, as did the Arizona murder statute at issue in *Schad*. Yet this Court still found both to be indivisible. *Accord Vurimindi v. Att'y Gen. of the United States*, 46 F.4th 134, 143-45 (3d Cir. 2022); *Hamilton*, 889 F.3d at 692-93; *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014). Indeed, *Mathis* noted that the statute at issue there "concern[ed] a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element," and then cited *Schad* as an example of such a disjunctive listing of alternative means rather than elements. *Mathis*, 579 U.S. at 506. *Mathis* makes it clear that both means and elements can be listed disjunctively in a statute. The decision below conflicts with this authority.

C. Under *Mathis,* the Fact that Premeditated and Felony Murder Involve Different Types of Conduct Does Not Control the Divisibility Analysis.

Next, the panel opined that because the underlying conduct of premeditated murder and felony murder differ significantly, this factor weighs in favor of divisibility. *Jackson*, 32 F.4th at 286. Again, this reasoning departs from precedent.

Whatever differences there are between felony and premeditated murder did not stop the *Schad* Court from treating them as different means of committing the single offense of first-degree murder. In other circumstances too, this Court has deemed statutes indivisible even though they include significantly different types of conduct. For example, *Mathis* found that the Iowa burglary statute was indivisible even though it covered entry into "any building, structure, *[or] land, water, or air*

vehicle." 579 U.S. at 501 (emphasis added); *accord Descamps v. United States,* 570 U.S. 254, 279-80 (2013) (Thomas, J. concurring).

At any rate, the underlying conduct of premeditated and felony murder do not differ significantly. Rather, from the common law to the present, those differences were regularly viewed as alternative means of providing the necessary mens rea for the single crime of murder. As Justice Scalia's example from *Schad* illustrates, there is in fact significant overlap between the two means of commission.

III. The Fourth Circuit's Decision May Have a Substantial Impact on Past and Future Prosecutions.

By finding § 1111(a) divisible, the Fourth Circuit treats felony murder and premeditated murder as separate offenses, which must be separately charged, and upon which the jury must unanimously agree. *Jackson*, 32 F.4th at 285 ("Each of these components requires the Government to prove a unique element that the jury must find unanimously."). This holding, the first such by any court, increases the government's burden of proof by requiring a unanimous finding on a specific form of murder and requires significant changes in the way in which federal first-degree murder can be charged and tried.

Prior to the panel's decision, both the common law and this Court's caselaw did not require the government to identify a specific form of first-degree murder, but allowed the government to identify multiple forms of murder in a single count. Nor did the law require the jury to make a unanimous finding on a specific form of murder. As Justice Scalia's hypothetical in *Schad* explained, a jury that could not

unanimously agree on premeditated or felony murder could still convict of first-degree murder if they could all agree that at least one form, though not necessarily the same form, of murder had been committed. *Schad*, 501 U.S. at 649-50 (Scalia, J., concurring).

The pattern jury instructions from the District Court of South Carolina for §1111(a) exemplify the point. The suggested instructions do not require the jury to agree on a specific form of murder; rather each juror need only agree that any one of the applicable forms of murder had been proven. Ruschky, E., Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina at 230-31 (2020 Online Edition). The opinion below changes that. Under the Fourth Circuit's new rule, Justice Scalia's hypothetical, as well as the hypothetical suggested by Petitioner, would result in acquittal, not conviction, because the jury could not unanimously agree on a specific form of murder.

Of course, prior to the opinion, the government was free to charge, and the jury was free to convict, a defendant, of a specific means of first-degree murder. *Jackson,* 32 F.4th at 286 n.9. But nothing required them to do so. Now, if the Fourth Circuit is correct, the government no longer has that choice. It will be required to charge and prove a specific kind of first-degree murder.

The change may not just affect future prosecutions, it may impact past prosecutions as well. A defendant who was convicted of first-degree murder without a unanimous finding on a specific form of murder may seek to use the Fourth

Circuit's opinion to challenge that conviction because an essential element of the crime has not been found unanimously and beyond a reasonable doubt by a jury.

This Court's review is appropriate to give careful consideration to the changes emanating from the Fourth Circuit's opinion.

IV. It Is Up to Congress to Address Any Concerns Raised by a Proper Application of *Johnson*, *Davis*, and *Borden*.

Petitioner recognizes that the proper application of *Johnson* and its progeny may lead to results that appear problematic. The conclusion that first-degree murder is not a crime of violence will be, at the least, an uncomfortable one. But the solution to that discomfort is not, as the court below did, to twist a statute away from its historical roots, ignore relevant Supreme Court authority, and reinterpret the statute in a way that its drafters never intended. Rather, any solution must come from Congress, not the courts.

Congress has defined federal first-degree murder in very broad terms by including murders that were committed intentionally, such as premeditated murder, as well as killings that could be committed accidentally or recklessly, such as felony murder. *See* 18 U.S.C. §1111(a). Congress also broadly defined what is a "crime of violence," by including a narrow elements or force clause and a broad residual clause. 18 U.S.C. § 924(c)(3). Under this scheme, there was no question that first-degree murder was a crime of violence even though it included some accidental or unintentional killings, because it readily met the residual clause.

This broad Congressional scheme unraveled after this Court declared in *Johnson* and *Davis* that the residual clause's definition of a "crime of violence" was

unconstitutionally vague. Now, a broadly written statute such as § 1111(a) can only be a crime of violence if it meets the narrow definition of the force clause.

This created a dilemma. If federal first-degree murder were to continue to be a crime of violence, Congress would have to act to fix the problem. It should not be the court's job to rewrite the statute to meet the requirements of the force clause.

Justice Thomas recognized the dilemma arising from *Johnson* in *Borden*, 141 S. Ct. at 1835 (Thomas, J., concurring in judgment). He explained that the job of resolving that dilemma properly belongs to Congress and not to the courts. He noted that it is the legislature's role to provide the general rules for the governance of society and that the alteration of rules in light of *Johnson* is "quintessentially legislative work." *Id.* at 1836.

The Fourth Circuit, by contrast, did not leave this task to Congress. Instead, the court decided it could narrow the scope and applicability of first-degree murder by finding that the statute was divisible and that premeditated murder and felony murder were separate and distinct elements of first-degree murder. *Jackson*, 32 F.4th at 286-87. Neither Congress nor any court had ever previously interpreted the statute in that manner.

By choosing to rewrite the statute to turn premeditated and felony murder into separate offenses, the Fourth Circuit encroached upon Congress's role and violated the separation of powers. The decision also created new burdens for the government. Now, the government is required to particularly charge a defendant

with a specific form of murder and prove beyond a reasonable doubt to a unanimous jury that a defendant committed this specific form of first-degree murder.

In light of the importance and scope of the court's decision, its inconsistency with Supreme Court precedent, and its impact on future murder prosecutions, this Court should grant the petition for certiorari so that it may address these important and previously undecided issues.

CONCLUSION

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

Respectfully submitted,

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