NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

DARVILL JIMMY JOSEPH BRAGG,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR 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, Seventh, Ninth, Tenth, and Eleventh Circuits have held that unambiguously overbroad statutory language alone establishes a prior state 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 state statute was applied in an overbroad manner, even if a statute is overbroad on its face.

Last term, this Court rejected the government's argument that a defendant must provide a case example to establish overbreadth in the face of a plainly overbroad federal statute in *Taylor v. United States*, 142 S. Ct. 2015 (2022). After *Taylor*, the Eighth Circuit has reaffirmed its prior position, finding *Taylor* is limited to the analysis of federal statutes.

The question presented is:

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

PARTIES TO THE PROCEEDINGS

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 Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Bragg, 3:19-CR00112-001, (S.D. Iowa) (criminal proceedings) judgment entered May 3, 2021.

United States v. Bragg, 21-2096 (8th Cir.) (direct criminal appeal), judgment and opinion entered August 15, 2022.

United States v. Bragg, 21-2096 (8th Cir.) (direct criminal appeal), Order denying petition for rehearing en banc and rehearing by the panel entered October 4, 2022.

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Darvill Bragg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's published opinion in Mr. Bragg's case is available at 44 F.4th 1067 and is reproduced in the appendix to this petition at Pet. App. p. 10.

JURISDICTION

The Eighth Circuit entered judgement in Mr. Bragg's case on August 15, 2022, Pet. App. p. 27 and denied Mr. Bragg's petition for rehearing *en banc* on October 4, 2022. Pet. App. p. 29.

This Court has jurisdiction over this case 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;.

STATEMENT OF THE CASE

A. Introduction.

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

First, the Eighth Circuit's position conflicts with this Court's precedent on the application of the categorical approach in the criminal context, most notably this Court's decision last term in *Taylor v. United States*, 142 S. Ct. 2015 (2022). 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 *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), to contradict this precedent and find that even when the elements of a statute are plainly overbroad, this is insufficient. This is even after this Court stated explicitly in *Taylor* that a defendant is not required to point to a specific case example in the face of overbroad statutory language.

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. As the panel acknowledged in Mr. Bragg's case, 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 in Mr. Bragg's case the Eighth Circuit 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).

Second, 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. This split has only deepened after *Taylor*.

The First, Second, Third, Fourth, Seventh, 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. And post-*Taylor*, the Sixth Circuit has indicated it agrees with the Eighth on this issue.

Because of the Eighth Circuit's approach, Mr. Bragg had his sentence substantially increased based upon plainly overbroad statutes—his sentence is double what should be the statutory-maximum sentence. This Court should grant certiorari to address this circuit split and ensure compliance with this Court's precedent.

B. Mr. Bragg is sentenced as an Armed Career Criminal based upon his Illinois robbery convictions, which only require a reckless *mens rea*, and his Iowa willful injury conviction, which only require a defendant "cause mental illness."

After a jury trial, Mr. Bragg was convicted of one count of being a felon in possession of a firearm. His case proceeded to sentencing, where the prosecution asserted Mr. Bragg was an Armed Career Criminal, thereby increasing his statutory range from zero to ten years of imprisonment to fifteen years to life imprisonment. The prosecution asserted that Mr. Bragg's Iowa willful injury conviction and his two Illinois robbery convictions were violent felonies. Mr. Bragg objected to the ACCA enhancement, and the district court overruled the objection. Mr. Bragg was sentenced to 240 months of imprisonment.

Mr. Bragg appealed, and, as relevant to this petition, maintained his ACCA challenge. He asserted that both his Iowa willful injury conviction and his Illinois robbery convictions were overbroad based upon their statutory language alone, and that overbroad statutory language was sufficient to establish overbreadth under the categorical approach.

First, Iowa willful injury, in violation of Iowa Code § 708.4(1), states: "[a]ny person who does an act which is not justified and which is intended to cause serious injury to another commits willful injury, which is punishable as ... [a] class 'C' felony, if the person causes serious injury to another." Mr. Bragg noted that Iowa statute defines serious injury to include "disabling mental illness," and therefore based upon

the plain language of the statute it did not require the use of violent force. *See* Iowa Code § 702.18.

Next, as to his Illinois robbery convictions, the plain language of the statute only requires a reckless *mens rea*.[1] Mr. Bragg asserted that after *Borden v. United States*, 141 S. Ct. 1817 (2021), his Illinois convictions were not violent felonies.

While Mr. Bragg's appeal was pending, the Supreme Court decided *Taylor v. United States*, 142 S. Ct. 2015 (2022). Mr. Bragg filed a Rule 28(j) letter, arguing *Taylor* definitively held that overbroad statutory language alone was sufficient to satisfy the categorical approach.

The circuit rejected Mr. Bragg's Armed Career Criminal challenge. *United States v. Bragg*, 44 F.4th 1067 (8th Cir. 2022). In doing so, the court determined that unambiguously overbroad statutory language was insufficient to show overbreadth in the criminal context. *Id.* at 1076-77. The Eighth Circuit acknowledged that, in the immigration context, it had held that overbroad statutory language alone was sufficient to establish that a prior conviction was overbroad. *Id.* at 1076. However, the circuit determined that the same standard did not apply in the criminal context. *Id.* Instead, the court applied a more difficult standard for criminal defendants, requiring defendants to point a specific case example to establish overbreadth.

[1] Illinois has amended the Illinois robbery statute since Mr. Bragg's convictions, requiring a knowing *mens rea*.

The court rejected that this holding was inconsistent with *Taylor*. The court stated:

> The Court in *Taylor* noted that the case involved "only whether the elements of one federal law align with those prescribed in another," whereas in [*Gonzales* v. *Duenas-Alverez*, 549 U.S. 183 (2007),] the Court had noted a federalism concern in ruling that "it made sense to consult how a state court would interpret its own State's law." 142 S. Ct. at 2025. Thus, *Taylor* did not overrule our controlling "realistic probability" precedents such as [*United States v. Quigley*, 943 F.3d 390 (8th Cir. 2019)] and [*United States v. Tinlin*, 20 F.4th 426 (8th Cir. 2021)].

Id. at 1076.

Based upon this reasoning, the court held that Mr. Bragg's Iowa willful injury conviction was a violent felony, in spite of the overbroad statutory language. *Id.* For similar reasons, the court rejected Mr. Bragg's argument that his version of Illinois robbery was a violent felony, even though this prior version allowed a reckless *mens rea*. *Id*. at 1078 ("[W]e see no realistic probability that a person would be charged with and convicted of Illinois armed robbery based on merely reckless conduct.").

REASONS FOR GRANTING THE WRIT

I. 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, the categorical approach has been rooted in text over application, focusing first and foremost on "the elements of the statute of conviction." *Taylor v. United States*, 495 U.S. 575, 601 (1990) (*Taylor* I). 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).

Consistent with this precedent, this Court in *Taylor* unequivocally held that overbroad statutory language alone establishes a mismatch. In *Taylor*, the Court addressed whether attempted Hobbs Act robbery was a crime of violence under 18 U.S.C. § 924(c)(3)(A). Mr. Taylor asserted that attempted Hobbs Act robbery was overbroad because it did not require a communicated threat of force. As relevant to this petition, the government asserted that Mr. Taylor needed to identify a specific case where the government had successfully prosecuted an individual for attempted Hobbs Act robbery without proving a communicated threat.

This Court rejected the government's argument. 142 S. Ct. at 2024. The Court first noted the "oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits," and it pointed to the practical burdens such a requirement it would present, as most cases end in guilty pleas and are not accessible via legal databases. *Id*.

This Court also found *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), inapplicable when the statutory language was overbroad on its face. The Court held that *Duenas-Alvarez* was distinguishable, because in that case "the elements of the relevant state and federal offenses clearly overlapped and the only question the Court faced was whether state courts also 'appl[ied] the statute in [a] special (nongeneric) manner.'" *Id*. at 2025 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)) (alterations in original). Instead, as in *Taylor*, when the relevant statutes simply do

not match the generic definition, that "ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise." *Id.*

And it should have ended the inquiry for Mr. Bragg. Like *Taylor*, Mr. Bragg does not argue that notwithstanding a complete match between his statutes of conviction and the definition of violent felony, state courts also applied their statutes in a special mismatched way. Rather, he argues that the Iowa and Illinois statutes at issue expressly establish overbreadth. After *Taylor*, the Eighth Circuit's reliance upon *Duenas-Alvarez* to require Mr. Bragg point to a specific case is incorrect.

The Eighth Circuit found *Taylor* inapplicable when analyzing a prior state conviction, because *Taylor* also noted that federalism concerns were present in *Duenas-Alvarez*, and that these concerns supported requiring a specific case example. *See id.* at 2024. In *Duenas-Alvarez*, the state statute language matched with the federal generic definition, but the immigration petition asserted that, in state court practice, there was a mismatch. *Id.* In those circumstances, the Court deemed it necessary to "test th[e petitioner's] assertion" by looking to "state decisional law" to determine "whether a 'realistic probability' existed that the State 'would apply its statute to conduct that falls outside' the federal generic definition." *Id.* at 2024-25 (quoting *Duenas-Alvarez*, 549 U.S. at 193).

Taylor confirms that the goal of the actual-case requirement is to understand how a state court interprets its statute—it is not a means of finding empirical evidence of what types of cases the prosecution would realistically prosecute. State

cases are consulted regarding the interpretation of state laws because state courts are the "final arbiters of state law in our federal system." 142 S. Ct. at 2025. As discussed, Mr. Bragg's circumstance differs because he is not asserting state courts apply their statutes in a manner inconsistent with the statutory language. It is a question of what the statutory language allows, on its face. In fact, with respect to Illinois robbery, as will be discussed later, the state's highest court has *already* interpreted the version of the statute at issue here and held that recklessness sufficed.

Indeed, here, federalism concerns *support* not requiring a specific case example when a statute is unambiguously overbroad on its face. Unlike *Duenas-Alvarez*, there is clearly a mismatch between the Iowa and Illinois state statutes and federal generic definition. By requiring a case example, the Eighth Circuit is stating that state legislatures do not mean what they say. This approach ignores clear directives from state legislatures, and fails to show deference and respect to state legislatures on how to define their own laws. In doing so, federal courts "could mistakenly cast doubt on the much higher volume of state criminal prosecutions under those same state statutes." *Najera-Rodriguez v. Barr*, 926 F.3d 343, 354 (7th Cir. 2019); *see also United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018) (vacating a panel decision regarding divisibility and certifying the question to the state supreme court because "this issue of state law is important for both the federal and state court systems, and

a wrong decision on our part could cause substantial uncertainty and confusion if the Wisconsin Supreme Court were to disagree with us in a later decision.").

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." *Borden,* 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."[2] *Id.* at 765.

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.

II. 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, 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

[2] 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 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).

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." The Seventh Circuit recently definitively adopted this position as well in *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450-51 (7th Cir. 2022).

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 determined overbroad statutory language sufficient 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).

The Ninth Circuit has reaffirmed this principle post-*Taylor*. The Ninth Circuit interpreted *Taylor* as confirmation of the already majority rule—overbroad statutory language is sufficient to establish overbreadth, whether interpreting a state or federal statute. The Ninth Circuit cited *Taylor* for the proposition that when "overbreadth is evident from a [state statute's] text, we need not identify a case in which the state courts did in fact apply the statute in a nongeneric manner." *Cordero-*

Garcia v. Garland, 44 F.4th 1181, 1193 (9th Cir. 2022) (citing *Taylor*, 142 S. Ct. at 2025).

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. The Eighth Circuit has determined that overbroad statutory language is sufficient to establish overbreadth *only* in the immigration context. *Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021). In the criminal context, the Eighth Circuit requires a criminal defendant to provide a case example to show overbreadth, as it did in Mr. Bragg's case

The Sixth Circuit has indicated it agreed with the Eighth Circuit's interpretation of *Taylor*. *See United States v. Paulk*, 46 F.4th 399, 403 n.1 (6th Cir. 2022). Previously, the Sixth Circuit had appeared to find overbroad statutory language alone sufficient. *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).

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

III. THIS ISSUE IS FREQUENTLY OCCURRING. MR. BRAGG'S CASE PRESENTS AN IDEAL VEHICLE FOR REVIEW.

The issue presented in this petition is frequently reoccurring. While Mr. Bragg's case involves application of ACCA, 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), sentencing enhancements for prior convictions under the federal drug trafficking statutes, 21 U.S.C. §§ 841, 851, as well as the advisory Guidelines.

Mr. Bragg's cases presents a clean vehicle for review of this purely legal issue. Mr. Bragg preserved this question before the district court and on appeal.

Both statutes of conviction include plainly overbroad statutory language. First, Iowa willful injury only requires "causing mental illness." Next, the Solicitor General has previously conceded that Mr. Bragg's Illinois robbery conviction includes a reckless *mens rea*, making it overbroad.[3] This is likely because the Illinois Supreme Court has explicitly stated that "either intent, knowledge, or *recklessness* is an element of robbery." *People v. Jones*, 595 N.E.2d 1071, 1075 (Ill. 1992). The pattern jury instructions also provide that recklessness suffices for an Illinois robbery conviction. *See, e.g., People v. Hardeman*, 2020 WL 5545268, *8-9 (Ill. Ct. App. Sept. 1, 2020) (citing Ill. Pattern Jury Instr.—Crim § 14.01, which states: "A person commits the offense of robbery when he [(intentionally) (knowing) (recklessly)] takes

[3] In *Borden v. United States*, the Solicitor General listed Illinois as one of the jurisdictions where "recklessness" is the criminal-code default. *See* Brief for the U.S. in *Borden v. United States*, 2020 WL 4455245, at *16 n.2 (June 8, 2020).

property from the person or the presence of another . . .”). And, necessarily acknowledging that recklessness would suffice, years after Mr. Bragg’s Illinois conviction, in 2012, the Illinois legislature rewrote the statute to add a *mens rea* of “knowingly.” *See* 2012 Ill. Legis. Serv. P.A. 97-1108 (H.B. 2582); *see also* 720 Ill. Comp. Stat. § 5/18-1(a) (“A person commits robbery when he or she knowingly takes property . . . .”).

The issue is squarely presented, as the Eighth Circuit explicitly refused to find the statute overbroad based upon statutory language alone, finding that *Taylor* did not overrule its prior realistic-probability precedent requiring a case example. *Bragg*, 44 F.4th at 1076.

Finally, the impact of the sentencing enhancement in Mr. Bragg’s case is significant. Mr. Bragg went from a ten-year maximum to a fifteen-year mandatory minimum, and was ultimately sentenced to twenty years of imprisonment

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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