NO. 22-6130

IN THE

Supreme Court of the United States

DARVILL JIMMY JOSEPH BRAGG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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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.

INTRODUCTION

The government's response focuses on whether Mr. Bragg's state statutes of conviction are facially overbroad. When analyzed more closely, it is apparent the government's argument is burden shifting disguised as an improper vehicle argument. Because the statutes are overbroad on their face, this Court should grant certiorari to resolve this important circuit split that will continue to fester without this Court's intervention.

ARGUMENT

I. MR. BRAGG'S CASE PRESENTS AN IDEAL VEHICLE FOR REVIEW. THE STATE STATUTES AT ISSUE ARE FACIALLY OVERBROAD.

The government's main argument in opposition to the petition for writ of certiorari is that Mr. Bragg's "case does not implicate [the present circuit split] because the court of appeals did not explicitly adopt petitioner's view that the predicate state crimes are plainly overbroad." Opp. 8. When discussing Mr. Bragg's argument regarding his Iowa willful injury conviction, the Eighth Circuit stated:

> [Mr.] Bragg argues that this "realistic probability" analysis does not apply because [Iowa Code] § 708.4(1) is "unquestionably overbroad," and "[o]verbroad statutory language alone is sufficient to establish that the statute does not qualify" under the force clause, citing *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021). *Gonzalez*, like [*Gonzales v.*] *Duenas-Alvarez*, [549 U.S. 183 (2007)], was a case arising under the Immigration and Nationality Act. In *Peh v. Garland*, 5 F.4th 867, 871-72 (8th Cir. 2021), we labeled *Gonzalez* a "competing view" and

> remanded to the BIA with directions to explain its understanding of the "realistic probability" requirement. We have not applied *Gonzalez* in an ACCA or career offender force clause case and decline to do so here.

App. 21 (third alteration in original). Whether viewed as an implicit or explicit holding, the Eighth Circuit is unambiguous that in the criminal context, overbroad statutory language alone is insufficient to establish a categorical mismatch.

Regardless of the specific language used in the Eighth Circuit's opinion, Iowa's willful injury statute is plainly overbroad. The government does not seriously assert that it is not. Iowa willful injury only requires a defendant to commit an unjustified act with the intent to "cause mental illness." The Sixth Circuit has held that a similarly worded statute does not require violent force. *United States v. Burris*, 912 F.3d 386, 398–99 (6th Cir. 2019).

The closest the government comes to disputing Iowa willful injury's overbreadth is when it argues:

> And it is far from clear that standard principles of statutory interpretation would logically lead to the conclusion that Iowa's Class C felony prohibition -- with a ten-year maximum sentence, Iowa Code § 902.9(1)(d) (2014) -- on "commit[ting] willful injury," through "an act which is not justified and which is intended to cause serious injury" and that in fact does "cause serious injury," would apply to a crime with no force-related component, akin to the pure verbal infliction of emotional distress, Iowa Code § 708.4(1) (2014).

Opp. 8-9. The government's argument illustrates why this Court should grant the petition for writ of certiorari to address the issue. First, it is burden shifting—if its "far from clear" how the statutory language should be interpreted, this uncertainty should be held against the government, not the criminal defendant. *Pereida v.*

Wilkinson, 141 S. Ct. 754, 766 n.7 (2021). Second, federal courts and federal prosecutors should not second guess the plain language used by state legislatures.

Next, Mr. Bragg's Illinois robbery statute of conviction is facially overbroad. The government cites to *People v. Jones*, 595 N.E.2d 1071 (Ill. 1992), for the proposition that recklessness is insufficient. The government cites to an isolated section of the *Jones* opinion, which analyzes the intent requirement for the "taking" of robbery. Elsewhere in the same opinion, the Illinois Supreme Court explicitly states that Illinois robbery offenses are satisfied with a recklessness *mens rea*. 595 N.E.2d at 1075 ("Therefore, either intent, knowledge or recklessness is an element of robbery even though the statutory definition of robbery does not expressly set forth a mental state.").

Overall, the government's argument illustrates how the "realistic probability" language from *Duenas-Alvarez* has been misinterpreted to shift the burden to criminal defendants. A defendant could point to (1) an Illinois Supreme Court case stating that the statute is satisfied with a reckless *mens rea*, (2) a statute which explicitly states that recklessness is sufficient if the statute is silent on *mens rea*, 720 Ill. Comp. Stat. Ann. 5/4-3, and (3) the Illinois model jury instructions which include recklessness as a potential *mens rea* for the offense of conviction, *People v. Hardeman*, No. 4-18-0557, 2020 WL 5545268, *8-9 (Ill. Ct. App. Sept.1, 2020), and the defendant's position will still be "theoretical."

This is inconsistent with this Court's precedent and should be corrected. The categorical approach has always been about comparing elements with the generic definition. *Taylor v. United States*, 495 U.S. 575, 601 (1990); *Descamps v. United States*, 570 U.S. 254, 257 (2013); *Mathis v. United States*, 579 U.S. 500, 519 (2016). The Eighth Circuit's holding, and government's position, will require federal defendants to present "empirical evidence" about state prosecutors' charging habits when the elements are facially overbroad—a practice this Court has already rejected. *Taylor v. United States*, 142 S. Ct. 2015, 2024 (2022).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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