No. _____

IN THE
Supreme Court of the United States

DAVID LINEHAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

David Linehan was charged with, as relevant here, soliciting a crime of violence under 18 U.S.C. § 373(a). That provision punishes the solicitation of a federal felony that has "as an element the use, attempted use, or threatened use of physical force" against property or another person. Specifically, Linehan was charged with soliciting the transportation of an explosive under 18 U.S.C. § 844(d). That provision, in turn, makes it a felony to "transport[] or receive[] . . . in interstate . . . commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual" or damage any property.

As pertinent here, a jury convicted Linehan of the solicitation offense and the Ninth Circuit affirmed in a published opinion. The court of appeals held that § 844(d) categorically requires the "attempted use" of physical force and is therefore a crime of violence under § 373(a). But in doing so, the court concluded that "attempted use" in the elements clause requires only taking a "substantial step" toward the use of physical force, and does not also require "a mens rea commensurate with that required for attempt crimes," thereby creating a circuit split and departing from the well-settled meaning of attempt in criminal law.

The question presented is:

Whether "attempted use" in the elements clause means taking a substantial step toward the use of physical force plus the specific intent to use such force.

PARTIES TO THE PROCEEDING

Petitioner is David Linehan, who was Defendant-Appellant below.

Respondent is the United States of America, which was Plaintiff-Appellee below.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. *Linehan*, No. 20-cr-00417 (Sept. 13, 2021)

United States Court of Appeals (9th Cir.):

United States v. *Linehan*, No. 21-50206 (Dec. 22, 2022), *reh'g denied* (Feb. 9, 2023)

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PETITION FOR A WRIT OF CERTIORARI

David Linehan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–15a) is reported at 56 F.4th 693. The judgment of the district court (Pet. App. 16a–21a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2022. A petition for rehearing was denied on February 9, 2023. Pet. App. 22a. Justice Kagan extended the deadline to petition for a writ of certiorari to July 9, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 373(a) of Title 18 of the U.S. Code provides in pertinent part:

> Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or . . . fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both . . . .

Section 844(d) of Title 18 of the U.S. Code provides in pertinent part:

> Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title, or both . . . .

INTRODUCTION

In this case, the Ninth Circuit created a split of authority over the meaning of the phrase "attempted use" in the elements clause. Other courts of appeals have held, as the Eleventh Circuit recently did, that attempted use requires *both* a substantial step toward the use of physical force *and* the requisite intent to use such force. These courts apply the well-settled, criminal-law meaning of the term attempt, which is consistent with our common-law tradition and this Court's longstanding precedents.

The Ninth Circuit, by contrast, became the first court of appeals to hold that "attempted use" in the elements clause requires *only* a substantial step and nothing else. That novel interpretation jettisons the traditional and time-honored understanding of attempt in criminal law, drastically expands the attempted use prong of the elements clause, and risks exposing to federal prosecution and heightened punishment individuals who do not truly intend to use violent force against property or another person. On this basis alone, the Court's review is warranted.

But there are other reasons to grant certiorari. The question presented involves an exceptionally important and frequently recurring facet of federal law—the categorical approach. The statutory phrase "attempted use" in the elements clause is implicated in countless criminal and immigration cases, and its improper application to underlying offenses can result in a person serving decades of additional time in prison or being removed from the country. This case is also an ideal vehicle for settling the disagreement between the circuits, given that the proceedings below were straightforward and the pure legal question is properly preserved for this Court's review. Moreover, the Ninth Circuit's decision is wrong. The underlying offense at issue here, 18 U.S.C. § 844(d), requires the government to prove neither that the defendant took a substantial step toward the use of physical force nor that he had the specific intent to use such force.

The petition should be granted.

STATEMENT

1. In 1989, David Linehan got into a car accident in Florida. Pet. App. 5a. A state trooper named David Sims arrived on the scene and gave him a ticket for careless driving. *Ibid.* Linehan contested the ticket, but Sims testified against him at a traffic court hearing. *Ibid.* The court found Linehan liable and imposed a small fine. *Ibid.* Unfortunately, the other driver later committed suicide. *Ibid.* Linehan thought that Sims had wrongly blamed him for the other driver's tragic death. *Ibid.* This spawned civil litigation concerning Linehan's liability, and prompted Linehan to engage in harassing and threatening behavior toward Sims over the course of many years. *Ibid.*

Linehan eventually moved overseas, living in various countries in Asia. Pet. App. 5a. In 2017, he threatened to firebomb the U.S. Embassy in Phnom Penh, Cambodia, over certain grievances against government officials. *Ibid.* He was deported from Cambodia and arrested upon his return to the United States. *Ibid.* Linehan was then charged with and ultimately convicted of transmitting a threatening communication in foreign commerce under 18 U.S.C. § 875(c), based in part on Sims's testimony for the government. *Id.* at 5a–6a. The district court sentenced Linehan to 33 months in prison, and the Ninth Circuit affirmed. *Id.* at 6a; see also *United States* v. *Linehan*, 835 F. App'x 914 (9th Cir. 2020).

While serving his federal sentence, Linehan asked a soon-to-be-released inmate to find Sims and mail a bomb to his home. Pet. App. 6a. Linehan offered to pay $200 at the outset, plus an additional $25,000 when the bomb was delivered. *Ibid.* But the other inmate informed the FBI, began cooperating, and then connected Linehan with an undercover agent posing as a would-be bomber. *Ibid.* In recorded conversations, Linehan confirmed that he wanted the undercover FBI agent to deliver a bomb to Sims's house and would provide payment. *Ibid.*

2. A grand jury in the Central District of California returned an indictment against Linehan. Pet. App. 6a. He was charged with one count of retaliating against a witness under 18 U.S.C. § 1513(a), and two counts of soliciting a crime of violence under 18 U.S.C. § 373(a). *Ibid.* Specifically, Linehan was charged with soliciting the transportation of an explosive under 18 U.S.C. § 844(d) and soliciting murder for hire under 18 U.S.C. § 1958(a). *Ibid.*

Linehan moved to dismiss both solicitation counts for failure to state an offense under Federal Rule of Criminal Procedure 12(b)(3). Pet. App. 6a. He argued that neither § 844(d) nor § 1958(a) are crimes of violence under § 373(a) because they do not have "as an element the use, attempted use, or threatened use of physical force." *Ibid.* The district court denied his motion and the case went to trial. Linehan reasserted his argument in a motion for a judgment of acquittal under Rule 29(a), and later renewed it under Rule 29(c). *Ibid.* The court denied relief each time. *Ibid.*

The jury returned a mixed verdict. It acquitted Linehan on the retaliation count, but convicted him on both solicitation counts. Pet. App. 6a. The district court sentenced Linehan to 120 months in prison (consisting of two consecutive 60-month terms), followed by three years of supervised release. *Ibid.*

3. The Ninth Circuit affirmed in part, reversed in part, and remanded for resentencing. Pet. App. 5a–15a. The court of appeals held that § 844(d) is a crime of violence under § 373(a). *Id.* at 7a–14a. It first determined that § 844(d) is "divisible" into completed and attempted offenses, and upon reviewing the indictment and jury instructions in this case, Linehan was charged with and convicted of soliciting the completed offense of transporting an explosive. *Id.* at 8a–9a.

The Ninth Circuit next concluded that § 844(d) categorically involves the "attempted use" of physical force. Pet. App. 9a–12a.[1] It held that this statutory

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[1] The Ninth Circuit did not decide whether 18 U.S.C. § 844(d) requires the "use" of physical force, and it assumed that the statute does not involve the "threatened use" of such force. Pet. App. 9a. The government did not make the former argument on appeal

(continued . . .)

phrase requires a "substantial step" toward the use of physical force, which is something "beyond mere preparation." *Id.* at 10a. And it found that the conveyance of an explosive with knowledge or intent that it will be used for harmful purposes is "better characterized" as a substantial step toward the use of such force. *Ibid.* The court of appeals relied primarily on the fact that a "prepared explosive" is capable of causing serious physical harm, and that an individual must convey such a device "in service of a violent objective." *Id.* at 11a; see also *id.* at 12a (stating that § 844(d) requires an explosive "readily capable of violent force" and an "imminent connection to a violent aim"). The court also sought to "align" itself with other circuits that have treated § 844(d) as a crime of violence, "albeit without analysis." *Id.* at 12a.

Consistent with the traditional, criminal-law understanding of attempt, Linehan and the government agreed that "attempted use" in § 373(a) means both a "substantial step" toward the use of physical force and the "specific intent" to use such force. Compare Appellant's C.A. Suppl. Br. 2 (Doc. 40), with Gov't C.A. Suppl. Br. 1 (Doc. 45). Nonetheless, the Ninth Circuit remarked that this aspect of the elements clause has received "little independent consideration in the case law" (Pet. App. 9a), then held that the statute requires only a substantial step and *not* "a mens rea commensurate with that required for attempt crimes." *Id.* at

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and essentially conceded the latter, given that § 844(d) does not require "an outwardly communicated threat of harm." *Ibid.*; *see also* Gov't C.A. Suppl. Br. 11 (Doc. 54) (explaining that "threatened use" of physical force requires "actual communication (explicit or implicit) of that threat to the victim, as opposed to simply an objective threat that such force was imminent." (citing *United States* v. *Taylor*, 142 S. Ct. 2015, 2022–23 (2022)).

13a; see also *ibid.* ("We . . . do not read § 373(a) as incorporating a further mens rea requirement specific to attempt."). Any other reading would, in the court of appeals' view, "confusingly layer multiple mens rea requirements into the same elements clause." *Ibid.* Alternatively, the court noted that, even if "attempted use" did require specific intent to use physical force, the "knowledge or intent" element in § 844(d) would suffice. *Id.* at 13a–14a. The court therefore affirmed Linehan's conviction for soliciting the transportation of an explosive. *Id.* at 14a.

The Ninth Circuit also held that § 1958(a) is not a crime of violence under § 373(a). Pet. App. 14a–15a. The government conceded this point, and the court of appeals agreed. *Ibid.*; see also U.S. Br. at 9–10, *Grzegorczyk* v. *United States*, 142 S. Ct. 2580 (2022) (No. 21-5967) (taking the position that § 1958(a) does not require the use, attempted use, or threatened use of physical force). Accordingly, the court reversed Linehan's conviction for soliciting murder for hire and remanded for resentencing. Pet. App. 15a.

Linehan petitioned for rehearing en banc, which the Ninth Circuit denied. Pet. App. 22a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WELL-SETTLED PRINCIPLES OF ATTEMPT LAW.

The courts of appeals are divided over an important categorical-approach question: Does "attempted use" in the elements clause require taking a substantial step toward the use of physical force, alone, or does it also require the specific intent to use such force? In this case, the Ninth Circuit held that "attempted use"

requires only a substantial step. That novel interpretation created a circuit split and is contrary to the well-settled meaning of attempt in criminal law. Certiorari is warranted for this reason alone.

1. The Eleventh Circuit recently held that "attempted use" in the elements clause requires a substantial step toward the use of physical force, as well as the requisite intent to use such force. *Alvarado-Linares* v. *United States*, 44 F.4th 1334, 1347 (11th Cir. 2022). Among other issues in that case, the court of appeals addressed whether Georgia attempted murder is a crime of violence under 18 U.S.C. § 924(c)(3). *Id.* at 1345–48. It explained that anyone convicted of attempted murder under Georgia law "must have had the intent to kill someone and to have completed a substantial step towards that goal," meaning that the offense qualifies an "attempted use of force under the elements clause." *Id.* at 1346. Indeed, as part of its ruling, the court expressly stated: "[W]hen a crime has as an element a substantial step plus intent to use force against another person, that crime has as an element the 'attempted use . . . of physical force against the person of another.'" *Id.* at 1347.

Other circuits are in accord. For example, in *United States* v. *McCoy*, 995 F.3d 32 (2d Cir. 2021), *vacated on other grounds*, 142 S. Ct. 2863 (2022),[2] the Second

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[2] This Court vacated the Second Circuit's judgment in *McCoy* and remanded for further consideration in light of *Taylor*. *See McCoy* v. *United States*, 142 S. Ct. 2863 (2022); *Nix* v. *United States*, 142 S. Ct. 2860 (2022). *Taylor* rejected the government's syllogistic argument that, "because completed Hobbs Act robbery qualifies as a crime of violence, it follows that attempted Hobbs Act robbery does too." 142 S. Ct. at 2021. *McCoy* was clearly wrong on that point, and Linehan does not contend otherwise.

(continued . . .)

Circuit likewise described the phrase "attempted use" in § 924(c) as requiring "an intent to use physical force" and "a substantial step towards . . . the use of physical force . . . ." *Id.* at 55. In *United States* v. *White*, 258 F.3d 374 (5th Cir. 2001), the Fifth Circuit held that Texas terroristic threats does not involve the "attempted use of physical force," given that "[a]ttempt requires an intent to commit the attempted act *and* a substantial step . . . toward committing it." *Id.* at 384; see also *United States* v. *Calderon-Pena*, 383 F.3d 254, 261 (5th Cir. 2004) (en banc) (per curiam) ("[T]he 'attempted use of physical force' requires *at least* that the perpetrator harbor an intent to use physical force against the victim's person."), *overruled on other grounds by United States* v. *Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018). And in *United States* v. *Rutherford*, 54 F.3d 370 (7th Cir. 1995), *abrogated on other grounds by Begay* v. *United States*, 553 U.S. 137 (2008), the Seventh Circuit similarly explained that "attempted use of force" demands an intentional act because, "[u]nder the common law, an attempt 'include[d] a specific intent to commit the unlawful act.'" *Id.* at 373.

Courts on this side of the circuit split employ the traditional, criminal-law meaning of attempt. *E.g.*, *Alvarado-Linares*, 44 F.4th at 1347 ("[T]he hornbook criminal-law definition of 'attempt' is a (1) substantial step plus (2) intent." (citing 2 Wayne LaFave, Substantive Criminal Law § 11.4; Model Penal Code § 5.01)); *McCoy*, 995 F.3d at 55 (explaining that "[t]he definition of 'attempt' both in federal law and in the

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Still, *Taylor* did not address the question presented in this case, and the Second Circuit's general discussion of the meaning of "attempted use" in the elements clause is helpful for purposes of describing each side of the identified circuit split.

Model Penal Code had long been settled by 1986," when § 924(c) was adopted); *White*, 258 F.3d at 383 & n.11 ("Attempt necessarily imports a specific intent."). These courts appropriately recognize that, when Congress said "attempted use" in the elements clause, it meant to adopt the long-settled understanding of attempt under the common law. *McCoy*, 995 F.3d at 55; see also *United States* v. *Castleman*, 572 U.S. 157, 162–63 (2014) ("It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'"); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind . . . .").

This Court, too, has long understood "attempt" to carry its traditional meaning in the criminal-law context. *E.g.*, *United States* v. *Hansen*, No. 22-179, 2023 WL 4138994, at *7 (U.S. June 23, 2023) ("In a criminal prohibition, we would not understand 'attempt' in its ordinary sense of 'try.' We would instead understand it to mean taking 'a substantial step' toward the completion of a crime with the requisite *mens rea*." (internal citation omitted)); *Taylor*, 142 S. Ct. 2015 at 2020 ("[T]o win a case for *attempted* Hobbs Act robbery the government must prove two things: (1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a 'substantial step' toward that end."); *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 107 (2007) ("[A]s used in the law for centuries, [the word 'attempt'] encompasses both the overt act and intent

elements."); *Braxton* v. *United States*, 500 U.S. 344, 349 (1991) ("For [a defendant] to be guilty of an attempted killing under 18 U.S.C. § 1114, he must have taken a substantial step towards that crime, and must also have had the requisite *mens rea*."); *id.* at 351 n. * (explaining that, at common law, an attempt required "a specific intent to commit the unlawful act").

2. The Ninth Circuit took a different position in this case. It held that "attempted use" in the elements clause requires only a substantial step toward the use of physical force. Pet. App. 12a–13a. Indeed, that is how the court described its own holding in a subsequent decision. See *United States* v. *Alvarez*, 60 F.4th 554, 561 (9th Cir. 2023) ("In *Linehan*, we expressly addressed the 'attempted use' element and rejected the argument that there is an additional, higher mens rea requirement for attempted uses of physical force under the crime of violence definition.").

The Ninth Circuit acknowledged that "attempt traditionally requires the mens rea of specific intent." Pet. App. 13a; see also *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (en banc) ("The common law meaning of 'attempt' is the specific intent to 'engage in criminal conduct . . . an overt act which is a substantial step towards committing the crime."). But it still faulted Linehan for "read[ing] too much into the 'attempted use' of force clause." Pet. App. 13a. The court of appeals said it would not "import a specific intent mens rea that is associated with attempt offenses, so that a predicate offense like § 844(d) that requires merely 'knowing' misconduct is insufficient." *Ibid.* It reasoned that *Borden* v. *United States*, 141 S. Ct. 1817, 1825 (2021) (plurality opinion), already calls for something more than reckless-

ness, so incorporating specific intent would "confusingly layer multiple mens rea requirements into the same elements clause." Pet. App. 13a.[3] In short, the court saw no need to "impose a further mens rea requirement beyond the one that the elements clause already requires." *Ibid.*; see also *Alvarez*, 60 F.4th at 561 ("Our prior holdings that knowledge is enough were not limited to the 'use' or 'threatened use' of physical force . . . . [W]e spoke in terms of the mens rea requirement for the crime of violence definition as a whole.").

In discarding the specific-intent requirement (a request made by neither party and a view taken by no other circuit), the Ninth Circuit said that it did not wish to deprive the phrase "attempted use" of content. Pet. App. 13a. But its interpretation did just that. The specific-intent requirement is a stringent component of attempt law, necessary to "separate[] criminality itself from otherwise innocuous behavior." See *United States* v. *Bailey*, 444 U.S. 394, 405 (1980) (describing the purpose of "a heightened mental state" in "the law of inchoate offenses such as attempt"). Indeed, "[t]he reason for requiring specific intent for attempt crimes is to resolve the uncertainty whether the defendant's

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[3] The Ninth Circuit also pointed out that § 373(a) has "its own" mens rea requirement. Pet. App. 13a; see also 18 U.S.C. § 373(a) (punishing those who act with "intent," and "under circumstances strongly corroborative of that intent"). But that is beside the point. *See Taylor*, 142 S. Ct. at 2025 ("Congress tasked the courts with a . . . straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force."). The relevant question here is whether the underlying offence—that is, § 844(d)—has as an element the "attempted use" of physical force, which traditionally would require proof beyond a reasonable doubt of specific intent to use such force.

purpose was indeed to engage in criminal, rather than innocent, conduct." *Gracidas-Ulibarry*, 231 F.3d at 1193 ("When the defendant's conduct does not constitute a completed criminal act . . . , a heightened intent requirement is necessary to ensure that the conduct is truly culpable."); see also *Borden*, 141 S. Ct. at 1823 n.3 (recognizing that "heightened culpability" merits special attention for inchoate offenses, like attempt, because it "help[s] separate criminal conduct from innocent behavior"). The court of appeals' ruling improperly expands the reach of the "attempted use" portion of the elements clause, sweeping in for criminal punishment individuals who did not complete an act involving the use of physical force and who did not truly have a culpable state of mind.

In sum, the Ninth Circuit's decision conflicts with the position of every other circuit to address the question presented thus far and departs from the classic meaning of attempt in criminal law. Certiorari is merited to resolve this split and make clear that "attempted use" means a substantial step plus the specific intent to use physical force.

II. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW AND PROVIDES AN EXCELLENT OPPORTUNITY TO ADDRESS IT.

The question presented—whether "attempted use" in the elements clause requires taking a substantial step toward the use of physical force, and also the specific intent to use such force—involves the categorical approach, which is an important and recurring aspect of federal law. This case, moreover, is an ideal vehicle for addressing the issue.

1. The categorical approach is a pervasive aspect of federal law. Under 18 U.S.C. § 373(a), a federal felony is a "crime of violence" if it has "as an element the use, attempted use, or threatened use of physical force" against property or another person. But that definitional phrase or a substantially identical one—the so-called elements clause—also appears in a wide variety of other statutory and Sentencing Guidelines provisions. *E.g.*, 18 U.S.C. § 16(a) (generally defining a "crime of violence"); 18 U.S.C. § 924(c)(3)(A) (imposing escalating penalties for using a firearm in connection with a "crime of violence"); 18 U.S.C. § 924(e)(2)(B)(i) (imposing heightened punishment for unlawful firearm possession after three prior convictions for a "violent felony"); U.S.S.G. § 2L1.2 cmt. n.2 (defining "crime of violence" for purposes of illegal reentry guideline); U.S.S.G. § 4B1.2(a) (defining "crime of violence" for purposes of career offender guideline).

As a result of this overlap, federal courts tend to apply categorical-approach precedents across doctrinal areas. *E.g.*, *United States* v. *Castillo*, 36 F.4th 431, 437 (2d Cir. 2022) ("[W]e may draw upon case law interpreting [the Armed Career Criminal Act]'s force clause to help us interpret U.S.S.G. § 4B1.2(a)(1)."). In fact, that is precisely what the Ninth Circuit did here. Pet. App. 7a (explaining that "the same basic framework used for other elements clauses applies to the elements clause in § 373(a)"); see also *id.* at 11a–12a (analogizing to *Taylor*'s discussion of whether attempted Hobbs Act robbery is a "crime of violence" under § 924(c)). It follows that a proper interpretation of the elements clause is of paramount importance not just in this case, but also in countless other federal cases involving different statutes and Guidelines provisions.

There is also an overriding need for national uniformity, given the enormous stakes involved in many categorical-approach cases. Indeed, a court's decision on whether a particular offense qualifies as a "crime of violence" or "violent felony" can often result in decades of additional imprisonment or even banishment in exile. *E.g.*, *Taylor*, 142 S. Ct. at 2019 (petitioner faced an additional 10 years in prison under § 924(c)); *Leocal* v. *Ashcroft*, 543 U.S. 1, 4 (2004) (petitioner faced deportation from the country under 8 U.S.C. § 1227(a)(2)(A)(iii), which ultimately incorporates § 16); *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (petitioner faced no less than 15 years in prison under § 924(e)); see also *Borden*, 141 S. Ct. at 1822 (discussing "severe" criminal penalties associated with § 924(e)); *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019) (describing "long" prison sentences associated with § 924(c)). Only this Court—by ensuring a uniform interpretation of the elements clause—can prevent similarly situated individuals from suffering grave disparities in punishment based on mere geographic location.

In addition, this Court's review would provide the lower courts with much needed guidance and thereby promote judicial efficiency. It is no secret that the federal courts regularly find themselves mired in categorical-approach conundrums. *E.g.*, *Quarles* v. *United States*, 139 S. Ct. 1872, 1881 (2019) (Thomas, J., concurring) (describing categorical approach as "difficult to apply"); *Mathis* v. *United States*, 579 U.S. 500, 538 (2016) (Alito, J., dissenting) (describing categorical approach as a "mess"). Such questions consistently crop up in the federal courts, presenting challenging legal issues and placing an immense burden on available judicial resources. See *Rendon* v. *Holder*, 782 F.3d 466, 471 (9th Cir. 2015) (Graber, J., dissenting

from denial of reh'g en banc) ("The . . . categorical approach arises frequently in both immigration and criminal cases," which "comprise a substantial majority of our docket."); *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011) (en banc) ("[O]ver the past decade, perhaps no other area of the law has demanded more of our resources."); Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 206 (2019) (describing how categorical-approach issues "end up clogging the federal court dockets").

For many of these reasons, perhaps, it is unsurprising that this Court has frequently granted certiorari to settle divisions of authority over the categorical approach in recent years. *E.g.*, *Taylor*, 142 S. Ct. at 2020; *Borden*, 141 S. Ct. at 1823; *Quarles*, 139 S. Ct. at 1876; *Stokeling* v. *United States*, 139 S. Ct. 544, 550 (2019); *United States* v. *Stitt*, 139 S. Ct. 399, 404 (2018); *Mathis*, 579 U.S. at 509; *Descamps* v. *United States*, 570 U.S. 254, 260 (2013); see also Philip L. Torrey, *Unpacking the Rise in Crimmigration Cases at the Supreme Court*, 44 Harbinger 109 (2020) (observing that the Court recently granted certiorari in 10 categorical-approach cases over the span of three terms). It should do the same here.

2. This case also provides an excellent opportunity to address the question presented and settle the identified circuit split. The factual record is simple, the proceedings below were straightforward, and the purely legal issue was properly preserved for this Court's review. Indeed, the Ninth Circuit squarely addressed the question presented—with the benefit of original and supplemental briefing, as well as oral argument. It then issued a lengthy published opinion

that both conflicts with the decisions of other circuits and departs from the time-honored meaning of attempt in criminal law. In addition, the issue is of great practical significance to the parties because it bears directly on the validity of Linehan's only remaining count of conviction in this proceeding. That is, if the Ninth Circuit wrongly held that § 844(d) is a crime of violence under § 373(a), Linehan's conviction and sentence in the instant case must be vacated entirely.

III. THE DECISION BELOW IS WRONG.

The Ninth Circuit incorrectly held that 18 U.S.C. § 844(d) always involves the "attempted use" of physical force and is thus categorically a crime of violence under 18 U.S.C. § 373(a). Section 844(d) does not require the government to prove beyond a reasonable doubt that the defendant took a substantial step toward the use of physical force or that he had the specific intent to use such force.

1. As this Court has explained, "the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct," i.e., a "substantial step" toward completing the offense. *Resendiz-Ponce*, 549 U.S. at 107. A substantial step must be "strongly corroborative of the actor's criminal purpose." Model Penal Code § 5.01(2). It cannot be established through "mere preparation." *Swift & Co.* v. *United States*, 196 U.S. 375, 402 (1905). Rather, the defendant's conduct must "cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstance." *United States* v. *Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007) (per curiam); see also *United States* v. *Buffington*, 815 F.2d 1292, 1301 (9th Cir. 1987) ("A substantial step consists of conduct that is strongly

corroborative of the firmness of a defendant's criminal intent.").

Section 844(d) makes it unlawful to (1) transport or receive in interstate commerce any explosive, (2) with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully damage any property. 18 U.S.C. § 844(d); Ninth Circuit Model Criminal Jury Instructions § 14.28 (2022). The Ninth Circuit determined that this offense always involves a substantial step toward the use of physical force. Pet. App. 10a–12a. Its conclusion rested on the notion that any such device must be "readily capable" of explosion *and* conveyed with an "imminent connection to a violent aim." *Id.* at 12a; *id.* at 11a ("[O]ne must . . . at a minimum intend to intimidate by deploying a readied explosive capable of causing death, injury, or damage to property.").

The court of appeals got it wrong. No single element of § 844(d) requires the government to prove beyond a reasonable doubt—in all cases—that the defendant took a substantial step toward the use of physical force against property or another person. For starters, the defendant may be convicted even if the device is not triggered or never reaches its ultimate destination. Pet. App. 10a (acknowledging that "[t]he explosive need not be detonated or cause harm; what is criminalized is the conveyance of the explosive in commerce . . . ."). The preparatory act of conveying a device in interstate commerce, even one that may be capable of causing an explosion, does not "unequivocally" demonstrate that the defendant will use violent force against property or another person unless interrupted by independent circumstances. *E.g.*, *United States* v. *Shrader*, 639 F. App'x 501, 502 (9th Cir. 2016) (affirming conviction under § 844(d) because,

"[r]egardless of whether the explosive device mailed by [the defendant] was functional, the jury could rationally have found that he intended that [the victim] view the device as a sufficiently serious . . . act of intimidation"). And whatever violent aim the defendant may have, whether it is to kill, injure, or intimidate another person or damage property, that is merely an aim. *See Taylor*, 142 S. Ct. at 2020 ("[A]n intention is just that, no more.").

2. The Ninth Circuit held that "attempted use" in the elements clause does not require a specific intent to use physical force. Pet. App. 12a–14a. For the reasons given above (*supra* at pp. 7–13), that was incorrect. *E.g.*, *Alvarado-Linares*, 44 F.4th at 1347 (requiring the "intent to use force against another person"); *McCoy*, 995 F.3d at 55 (requiring the "intent to use physical force"); *Calderon-Pena*, 383 F.3d at 260–61 (requiring the "intent to use physical force"); see also *Braxton*, 500 U.S. at 351 n. * (attempt requires "a specific intent to commit the unlawful act").

But the court of appeals' alternative ruling also missed the mark. The court said that, even if "attempted use" did require a specific intent to use physical force, the mens rea in § 844(d) would fit the bill. Pet. App. 13a–14a. That is because, in the court's view, a person who transports an explosive knowing that it "*will be used*" for harmful purposes "is not engaged in innocent behavior." *Id.* at 14a.

The problem, of course, is that a defendant can be convicted of transporting an explosive with mere "knowledge" that it will be used to kill, injure, or intimidate another person or damage property. 18 U.S.C. § 844(d); Ninth Circuit Model Criminal Jury Instructions § 14.28. In *Bailey*, 444 U.S. at 403, this Court explained the difference between the common-

law concepts "specific intent" and "general intent," while recognizing that "[t]his venerable distinction . . . has been the source of a good deal of confusion." The concept of specific intent corresponds with "purpose," while the concept of general intent corresponds with "knowledge." *Id.* at 405. A person acts with purpose when he "consciously desires" a particular result," while a person acts with knowledge when he is aware that a result is "practically certain to follow from his conduct," whatever his affirmative desire. *Borden*, 141 S. Ct. at 1823 (quoting *Bailey*, 444 U.S. at 404).

The Ninth Circuit, however, effectively collapsed this distinction in concluding that § 844(d)'s mens rea satisfies the common-law, specific-intent requirement. Pet. App. 14a (suggesting that "specific intent" lies when a person "knows that that result is practically certain to follow from his conduct"). That was wrong. If "attempted use" in the elements clause incorporates the common-law concept of specific intent, a defendant must "consciously desire[]" the use of physical force. See *Borden*, 141 S. Ct. at 1823; *Gracidas-Ulibarry*, 231 F.3d at 1196 ("A person . . . is said to have acted purposely if he or she consciously desired that result . . . ."). It is not enough, as the court of appeals implied here, that a person knows that the use of such force is "practically certain" to follow. Pet. App. 14a. Nor does the language "will be used" in § 844(d) transform the statute's knowledge mens rea into one that satisfies the common-law, specific-intent standard. *E.g.*, *United States* v. *Brooks*, 610 F.3d 1186, 1195 (9th Cir. 2010) (distinguishing a mens rea of "*knowing* . . . that [underaged victim] *will be caused* to engage in a commercial sex act" from specifically intending that the victim engage in prostitution) (emphases added)).

3. The Ninth Circuit also claimed it was "align[ed]" with every other circuit to hold—"albeit without analysis"—that that § 844(d) is a crime of violence. Pet. App. 12a (citing *Worman* v. *Entzel*, 953 F.3d 1004 (7th Cir. 2020); *United States* v. *Barefoot*, 754 F.3d 226 (4th Cir. 2014); *United States* v. *Strickland*, 261 F.3d 1271 (11th Cir. 2001)).

But none of these cases provide support for the Ninth Circuit's decision. In *Worman*, 953 F.3d at 1008–11, the Seventh Circuit considered whether a federal habeas petitioner could invoke 28 U.S.C. § 2255(e)'s savings clause to assert a claim of a sentencing error under *Dean* v. *United States*, 581 U.S. 62 (2017). In describing the procedural history of the case, the court simply stated that the defendant's "mailing of a pipe bomb constituted the predicate crime of violence for purposes of the § 924(c) charge." *Worman*, 953 F.3d at 1006. It did not, and obviously had no occasion to, hold that § 844(d) qualifies as a crime of violence under the elements clause.

Similarly, in *Barefoot*, 754 F.3d at 240–48, the Fourth Circuit considered whether a prior plea agreement precluded the government from using certain information obtained from the defendant to later prosecute him for receiving an explosive. The answer in that case turned on whether the charged offense was a crime of violence, "as set forth in the November 2002 edition of the Sentencing Guidelines." *Id.* at 247. At the time, this definition included any felony that "involves use of explosives" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Ibid.* (quoting U.S.S.G. § 4B1.2(a) (Nov. 2002)). In resolving this plea-agreement dispute, the court merely said that the defendant's conviction for receiving an explosive "would have been a

crime of violence *according to the parties' mutual understanding*." *Ibid.* (emphasis added). It certainly did not address whether § 844(d) is a crime of violence under the elements clause of § 373, which does not even include offenses that "involve[] the use of explosives" or satisfy the now-obsolete residual clause.

And in *Strickland*, 261 F.3d at 1273, the Eleventh Circuit addressed a single issue: whether "multiple counts and consecutive sentences for the violations of [§] 844(d) and [§] 924(c), based on a single course of conduct, violate the Double Jeopardy Clause." The court held only that it is constitutional for Congress to "mandate[] cumulative punishments under two statutes," even when those statutes "proscribe the same course of conduct." *Id.* at 1274. The court noted, in hewing to the statutory text, that any sentence imposed under § 924(c)(1) shall be "in addition to the punishment provided for [the predicate] crime of violence." *Ibid.* But the defendant did not address whether, and the court did not hold that § 844, is in fact a crime of violence under the elements clause.

In addition, the Ninth Circuit said its decision in this case was consistent with an "analogous precedent," *United States* v. *Collins*, 109 F.3d 1413 (9th Cir. 1997). Pet. App. 12a. There, the court of appeals held that mailing injurious articles under 18 U.S.C. § 1716 is a crime of violence for purposes of § 924(c)(1). *Collins*, 109 F.3d at 1419. It concluded that a violation of § 1716 involves "the use or attempted use of a destructive device to kill or injure another person," but did not mention the categorical approach and appears to have based its analysis on the defendant's actual conduct (i.e., the particular facts of his case). *Ibid.* (concluding that the defendant's offense qualified as a crime of violence because "[he] was accused . . . of

mailing a device with the intent to kill and injure" a highway patrol trooper); see also *ibid.* (rejecting defendant's argument that the offense did not involve "use" of physical force because "[t]he evidence [wa]s undisputed" that he "actively employed a destructive device during and in relation to mailing it with the intent to kill" a highway patrol trooper). *Collins* therefore provides no support for the court's decision, either. See *Mathis*, 579 U.S. at 504 ("[d]istinguishing between elements and facts is . . . central" to applying the categorical approach).

CONCLUSION

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

Respectfully submitted,

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