No. _____

IN THE
Supreme Court of the United States

TIFFANY JANIS,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal second-degree murder in violation of 18 U.S.C. § 1111(a) qualifies as a "crime of violence" under the force clause in 18 U.S.C. § 924(c)(3)(A).

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Janis, No. 5:18-cr-50024, United States District Court for the District of South Dakota. Judgment entered March 25, 2019.

Janis v. United States, No. 5:20-cv-05043, United States District Court for the District of South Dakota. Judgment entered May 13, 2022.

Janis v. United States, No. 22-2471, United States Court of Appeals for the Eighth Circuit. Judgment entered July 6, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Tiffany Janis 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 opinion of the court of appeals (App. 1a-14a) is reported at 73 F.4th 628. The district court's memorandum and order is unreported but available at 2022 WL 1500691.

JURISDICTION

The court of appeals entered judgment on July 6, 2023. App. 27a. Janis received an extension of time to file a petition for rehearing. The court of appeals denied her timely petition for rehearing *en banc* on October 18, 2023. App. 26a. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1111(a) provides:

> (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.
>
> Any other murder is murder in the second degree.

18 U.S.C. § 924(c) provides in relevant part:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> . . .

(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.

1 U.S.C. § 8 provides in relevant part:

(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

. . .

INTRODUCTION

This petition presents an important question of federal law that has not been, but should be, settled by this Court—does federal second-degree murder, which can be committed by depraved heart recklessness and by certain prenatal conduct—qualify as a "crime of violence" under the force clause in 18 U.S.C. § 924(c)(3)(A)? In *Borden v. United States*, this Court reserved the question of whether mental states like "depraved heart" and "extreme recklessness" that fall between ordinary recklessness and knowledge qualify under the force clause. 141 S. Ct. 1817, 1825 n.4 (2021) (plurality opinion). This case presents an ideal opportunity for the Court to resolve this important question.

STATEMENT OF THE CASE

Tiffany Janis pleaded guilty to second-degree murder in violation of 18 U.S.C. §§ 1111(a) and 1153 and discharge of a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). App. 2a. On March 22, 2019, she was sentenced to consecutive terms of 10 years in prison for each count, for a total sentence of 20 years in prison. App. 16a.

Approximately three months after Janis's sentencing, this Court invalidated the residual clause in 18 U.S.C. § 924(c)(3)(B) as void for vagueness. *United States v. Davis*, 139 S. Ct. 2319 (2019). Janis timely filed a motion to vacate her § 924(c) conviction and sentence under 28 U.S.C. § 2255 based on *Davis*. App. 16a. She argued that her conviction was based on the use of a firearm in connection with second-degree murder, which qualified as a "crime of violence" solely under the now-

invalidated residual clause in § 924(c)(3)(B). Dist. Ct. Dkt. 1, at 2; Dist. Ct. Dkt. 2.[1] The district court denied her motion. App. 15a-25a.

Janis appealed, and the court of appeals held that federal second-degree murder qualifies as a "crime of violence" under the § 924(c) force clause. *See* App. 1a-14a.[2] The court found that the "malice aforethought" element of second-degree murder satisfies the force clause:

> The history and definition of "malice aforethought" demonstrate that federal second-degree murder satisfies § 924(c)'s force clause. The phrase "malice aforethought" necessarily denotes the oppositional conduct that the force clause requires: "an intent willfully to act in callous and wanton disregard of the consequences to human life." This requires "more risk and culpability" than the standard of "willful disregard of the likelihood" of harm. Second-degree murder is thus a crime of violence.

App. 7a-8a (internal citations omitted). It also rejected Janis's argument that second-degree murder was overbroad because it could be violated by by conduct committed against an unborn child. App. 13a. Because the court found that second-degree murder was a "crime of violence," it affirmed the denial of Janis's § 2255 motion. *See* App. 14a. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. App. 1a.

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[1] All references to "Dist. Ct. Dkt." are to the docket in the civil case, *Janis v. United States*, No. 5:20-cv-05043 (D.S.D.).

[2] The court of appeals *sua sponte* vacated its original opinion in this case and issued the opinion at issue here. *See Janis v. United States*, No. 22-2471, 2023 WL 4361107 (8th Cir. July 6, 2023), *vacated*, No. 22-2471, 2023 WL 4555018 (8th Cir. July 14, 2023), and *opinion vacated and superseded*, 73 F.4th 628 (8th Cir. 2023).

Janis timely filed a petition for rehearing *en banc*. The court of appeals denied her petition in a summary order. App. 26a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This case involves an important question of federal law that should be settled by this Court—does federal second-degree murder, which can be committed by depraved heart recklessness and by certain prenatal conduct—qualify as a "crime of violence" under the force clause in 18 U.S.C. § 924(c)(3)(A)? The status of federal second-degree murder as a crime of violence is an important question for people in Indian country and other federal enclaves. And the status of depraved heart and extreme recklessness mental states under the force clause is an important question in a variety of contexts in federal law. This Court should grant the petition for a writ of certiorari to resolve the important questions raised by this case.

I. The issue of whether federal second-degree murder qualifies as a "crime of violence" raises important questions of federal law.

The federal murder statute defines "murder" as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). First-degree murder is:

> 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 . . . .

Id. Second-degree murder is the catchall: "Any other murder is murder in the second degree." *Id.*

A. Depraved heart & extreme recklessness

This case raises the issue left open by this Court in *Borden v. United States*, 141 S. Ct. 1817 (2021)—do mental states falling between ordinary recklessness and knowledge satisfy the force clause? Second-degree murder does not require proof of knowledge or intent to kill. *United States v. Water*, 413 F.3d 812, 817 (8th Cir. 2005). "To kill with malice aforethought means to kill *either* deliberately and intentionally *or* recklessly with extreme disregard *for human life*." *United States v. Begay*, 33 F.4th 1081, 1091 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 340 (2022) (citation omitted). "Even in the absence of subjective intent to kill, 'malice' may be determined by application of an objective standard, where conduct is reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm." *United States v. Cox*, 509 F.2d 390, 392 (D.C. Cir. 1974). This standard is often called "depraved heart recklessness." *See United States v. Serawop*, 410 F.3d 656, 663 n.4 (10th Cir. 2005) ("The concepts of 'depraved heart' and 'reckless and wanton, and a gross deviation from the reasonable standard of care' are functionally equivalent in this context."). The question of whether federal second-degree murder and other depraved heart murder

offenses qualify as crimes of violence under this Court's jurisprudence is an important question of federal law that this Court should resolve.

Under 18 U.S.C. § 924(c)(3), "crime of violence" is defined as a felony offense that:

> (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.

18 U.S.C. § 924(c)(3). Subsection (A) is known as the "force clause" or "elements clause." *See United States v. Taylor*, 142 S. Ct. 2015, 2019 (2022) ("elements clause"); *McCoy v. United States*, 960 F.3d 487, 489 (8th Cir. 2020) ("force clause"). Subsection (B) is known as the "residual clause." *United States v. Davis*, 139 S. Ct. 2319, 2323-24 (2019). This Court invalidated the residual clause in *Davis*. *See id.* at 2336. After *Davis*, for an offense to qualify as a "crime of violence," it must fall under the remaining force clause.

The categorial approach governs this inquiry. *Taylor*, 142 S. Ct. at 2020. Under this approach, the Court looks not to the facts of the particular case, but instead to whether the elements of the statute in question categorically fall under the federal definition. *Borden*, 141 S. Ct. at 1822 (plurality opinion). As this Court has explained, "answering that question does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime." *Taylor*, 142 S. Ct. at 2020. "The only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an

element of its case—the use, attempted use, or threatened use of force." *Id.* "If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard," and does not qualify as a crime of violence. *Borden*, 141 S. Ct. at 1822 (plurality opinion) (addressing Armed Career Criminal Act (ACCA)).

This case raises the issue of whether an offense like federal second-degree murder, which can be committed by less than purposeful or knowing conduct, qualifies under the force clause. In *Borden*, this Court held that the ACCA force clause requires a higher mental state than recklessness. 141 S. Ct. at 1821-22 (plurality opinion); *id.* at 1835 (Thomas, J., concurring).[3] Under the *Borden* plurality's reasoning, the term "against" requires targeting or consciously directing force at another:

- "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator *direct his action at, or target, another individual*." *Id.* at 1825 (plurality opinion) (emphasis added).

[3] Because the ACCA force clause is materially identical to the § 924(c) force clause at issue here, the Court's reasoning in *Borden* applies to both. *See* 141 S. Ct. at 1827 (plurality opinion) (finding that the ACCA force clause was "materially identical" to the 18 U.S.C. § 16(a) force clause). The § 924(c) and § 16(a) force clauses differ from the ACCA force clause only in that they cover the use of physical force against the person *or property* of another. Otherwise, the three clauses are virtually identical. *Compare* 18 U.S.C. § 16(a) (defining "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another") *and* 18 U.S.C. § 924(c)(3)(A) (defining "crime of violence" as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another") *with* 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another").

- "Reckless conduct is not *aimed* in that prescribed manner." *Id.* (emphasis added).

- "Borden's view of 'against,' as introducing the *conscious object (not the mere recipient) of the force*, is the right one given the rest of the elements clause." *Id.* at 1826 (emphasis added).

- "It is . . . the pairing of volitional action with the word 'against' that produces its *oppositional or directed meaning*—and excludes recklessness from the statute." *Id.* at 1829 (emphasis added).

- " '[A]gainst the person of another,' when modifying the 'use of physical force,' introduces that action's *conscious object*." *Id.* at 1833 (emphasis added).

- "So it excludes conduct, like recklessness, that is not *directed or targeted at another*." *Id.* (emphasis added).

The *Borden* plurality concluded that because reckless conduct is "not opposed to or directed at another," it does not constitute the use of "force 'against' another person in the targeted way" the force clause requires. *Id.* at 1827.

Justice Thomas supplied the fifth vote, basing his conclusion on the "use of force" language alone. *Id.* at 1834-37 (Thomas, J., concurring). In Justice Thomas's view, "a crime that can be committed through mere recklessness does not have as an element the 'use of physical force' because that phrase 'has a well-understood meaning applying only to intentional acts designed to cause harm.' " *Id.* at 1835 (quoting *Voisine v. United States*, 579 U.S. 686, 713 (2016) (Thomas, J., dissenting)).

While the *Borden* plurality expressly reserved the question of whether mental states like "depraved heart" or "extreme recklessness," which fall between recklessness and knowledge, qualify under the force clause, *id.* at 1825 n.4, the Court's reasoning makes clear that the statutory language requires a conscious

targeting of force that can only be satisfied by purposeful or knowing conduct, and not by the enhanced level of recklessness sufficient for the malice aforethought element of second-degree murder.

While depraved heart recklessness is generally understood to require disregard of a "very high degree" of risk, "it is still something far less than certainty or substantial certainty." *See* Wayne R. LaFave, 2 Substantive Criminal Law § 14.4(a) (3d ed. Oct. 2022 update). In contrast to the purposeful or knowing conduct that qualifies under the force clause, depraved heart recklessness falls short of "a deliberate choice with *full awareness* of consequent harm." *See Borden*, 141 S. Ct. at 1823 (plurality opinion) (emphasis added). It also falls short of being an "intentional act[] *designed to cause harm*." *Id.* at 1835 (Thomas, J., concurring) (emphasis added) (quoting *Voisine v. United States*, 136 S. Ct. 2272, 2279, 2290 (2016) (Thomas, J., dissenting)).

Indeed, the courts of appeals have upheld second-degree murder convictions for fatal collisions caused by reckless and drunk driving. *See, e.g.*:

- ***United States v. Fleming*, 739 F.2d 945, 947-48 (4th Cir. 1984)** (finding sufficient evidence of malice where highly intoxicated defendant drove at high rate of speed, lost control of the vehicle, and struck another vehicle head-on);

- ***United States v. Sheffey*, 57 F.3d 1419, 1431 (6th Cir. 1995)** (finding sufficient evidence of malice where defendant drove while under the influence of alcohol and a prescription drug that caused drowsiness and engaged in consistently dangerous driving leading up to a collision);

- ***United States v. Chippewa*, 141 F.3d 118 (table), No. 97-30160, 1998 WL 123150, at *1 (9th Cir. Mar. 17, 1998) (unpublished)** (finding sufficient evidence of extreme reckless disregard for human

life to show malice aforethought where defendant drove while intoxicated, ignored two stop signs, collided with another vehicle, and had multiple prior alcohol-related driving incidents from which it could be inferred he knew yet disregarded the dangers of driving while intoxicated).

The same type of conduct has been found sufficient to establish malice aforethought in the context of evidentiary issues. *See, e.g.*:

- ***United States v. Merritt*, 961 F.3d 1105, 1118 (10th Cir. 2020)** (finding, in the context of declaring a potential evidentiary error harmless, that malice aforethought was clearly established by evidence of past drunk-driving incidents and that defendant drove while intoxicated in the wrong lane and crashed into another vehicle).

The conduct in these cases, while egregious, does not rise to the level of the use of "force 'against' another person in the *targeted* way" this Court has said the force clause requires. *See Borden*, 141 S. Ct. at 1827 (plurality opinion) (emphasis added). Instead, this conduct is much closer to the unsafe driving and drunk driving examples the *Borden* plurality found should not fall under the force clause—running a stop sign, veering onto the sidewalk, text messaging while driving, drunk driving, and speeding to a crime scene in a patrol car without the siren on. *Id.* at 1831. Just as in the examples in *Borden*, "[a]ll the defendants in the [second-degree murder] cases just described acted recklessly, taking substantial and unjustified risks." *Id.* "And all the defendants hurt other people, some seriously, along the way." *Id.* "But few would say their convictions were for 'violent felonies,'" *id.*, or as relevant here, "crimes of violence."

This case is an ideal opportunity for this Court to resolve the question left open in *Borden*—whether an offense (like federal second-degree murder) that can be committed by depraved heart recklessness qualifies under the force clause.

B. Prenatal conduct resulting in the death of an infant after birth

This petition raises a second important question that should be resolved by this Court—does an offense, like federal second-degree murder, that can be committed by certain prenatal conduct qualify under the force clause?

This issue involves the complex interplay between the language of the § 924(c) force clause, the federal definition of "person," and judicial interpretation of the phrase "the unlawful killing of a human being" in the federal homicide statutes.

Section 924(c)(3)(A): The § 924(c) force clause requires that the offense have "as an element the use, attempted use, or threatened use of physical force *against the person* or property *of another*." 18 U.S.C. § 924(c)(3)(A) (emphasis added). The key phrase for this issue is "against the person . . . of another."

Federal definition of "person": The term "person" is defined under federal law to exclude unborn children. Under the Dictionary Act, the term "person" has the same meaning throughout the federal code:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

1 U.S.C. § 8(a). "Born alive," in turn, means:

> the complete expulsion or extraction from his or her mother of [a member of the species homo sapiens], at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

1 U.S.C. § 8(b). "Under a literal reading of the statute, the term 'person' does not include fetuses." *United States v. Montgomery*, 635 F.3d 1074, 1086 (8th Cir. 2011).

"Unlawful killing of a human being": Finally, turning back to the federal murder statute, murder is defined as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). The term "human being" has the same meaning as "person." 1 U.S.C. § 8(a). At least one circuit has interpreted the phrase "the unlawful killing of a human being" in the context of the federal homicide statutes and found that it encompasses a pregnant person's prenatal conduct so long as it results in the death of a later-born infant. *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019) (addressing involuntary manslaughter under 18 U.S.C. § 1112). In *Flute*, the defendant was charged with involuntary manslaughter in violation of 18 U.S.C. § 1112[4] based on prenatal drug use that was alleged to have resulted in the death of her infant child shortly after birth. *Id.* at 586. The defendant moved to dismiss the indictment, arguing that § 1112 did not reach her prenatal conduct

[4] Section 1112(a) defines manslaughter as "the unlawful killing of a human being without malice." 18 U.S.C. § 1112(a). The statute further defines voluntary manslaughter as a killing "[u]pon a sudden quarrel or heat of passion" and involuntary manslaughter as a killing "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." *Id.*

because an unborn child was not a "human being" within the meaning of federal law. *Id.* The court of appeals found that § 1112 covered the defendant's conduct because the infant was "born alive" before dying: "[B]ecause the language of the manslaughter statute plainly encompasses the death of a born-alive child—a child at the earliest possible moment that it exists outside of the womb—the statute necessarily extends to conduct that occurred in utero and caused death to this born-alive child." *Id.* at 588. The court noted that its conclusion was consistent with the common law "born alive" rule, under which liability for a homicide "extended to the death of a child born alive related to injuries received in utero." *Id.* (citing *United States v. Spencer*, 839 F.2d 1341, 1343 (9th Cir. 1988)).

While *Flute* was an involuntary manslaughter case, it interpreted the same statutory language—"the unlawful killing of a human being"—as the second-degree murder statute. *Compare* 18 U.S.C. § 1112(a) (defining manslaughter as "the unlawful killing of a human being without malice") *with* 18 U.S.C. § 1111(a) (defining murder as "the unlawful killing of a human being with malice aforethought"). Indeed, the Ninth Circuit has applied the "born alive" rule to the murder prosecution of a third party (i.e., not the pregnant person) under § 1111(a). *United States v. Spencer*, 839 F.2d 1341, 1343 (9th Cir. 1988). Under these cases, the "born alive" rule would allow for the prosecution of a person based on their prenatal acts that resulted in the death of the infant after birth.

Putting these statutory provisions together, the federal second-degree murder statute reaches purely prenatal conduct, which is by definition conduct that

takes place *before* there is another "person" under federal law. The § 924(c) force clause requires that the offense have as an element the use, attempted use, or threatened use of physical force "against the . . . person of another." Because an unborn child is not a "person" within the meaning of federal law, a pregnant person's prenatal conduct does not qualify as the use of force "against the person . . . of another" because there was not another "person" at the time of the use, attempted use, or threatened use of force.

This is true even though the victim must be born alive before dying for the offense to fall under the federal homicide statutes. While the presence of a born-alive victim may be enough to constitute a completed murder or manslaughter, the force clause requires more. In other words, the use of "force" when there was no "person" to use it "against" cannot qualify under the force clause. Indeed, in *Borden*, this Court repeatedly emphasized that to qualify under the force clause, the force must be actively employed *against another person*:

- "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator *direct his action at, or target, another individual*." 141 S. Ct. at 1825 (plurality opinion) (emphasis added).

- "Borden's view of 'against,' as introducing the *conscious object (not the mere recipient) of the force*, is the right one given the rest of the elements clause." *Id.* at 1826 (emphasis added).

- "[A reckless driver] has not used force 'against' another person in the targeted way that clause requires." *Id.* at 1827.

- " '[A]gainst the person of another,' when modifying the 'use of physical force,' introduces that action's *conscious object*. So it excludes conduct, like recklessness, that is not *directed or targeted at another*." *Id.* at 1833 (emphasis added) (internal citation omitted).

- "Offenses with a *mens rea* of recklessness . . . do not require, as ACCA does, the active employment of force against another person." *Id.* at 1834.

It is not enough under the force clause for there to eventually be another person within the meaning of federal law. Under a straightforward application of the text of § 924(c)(3)(A), there can be no qualifying use of force against the person of another if there was no other "person" at the time of the use of force.

This case raises the important question of whether an offense (like federal second-degree murder) that can be committed by certain prenatal conduct qualifies as "the use, attempted use, or threatened use of physical force against the *person* . . . of another" within the meaning of the force clause.

II. The Court should act now to address the question presented.

This case raises two important questions of federal law that have not been resolved by this Court. The Court should act now to resolve the question presented.

Janis acknowledges that all the courts of appeals to address whether depraved heart murder (like federal second-degree murder) qualifies under the force clause after this Court's opinion in *Borden* have held that it does. *See United States v. Kepler*, 74 F.4th 1292, 1307 (10th Cir. 2023) (federal second-degree murder); *Janis v. United States*, 73 F.4th 628, 636 (8th Cir. 2023) (federal second-degree murder); *United States v. Harrison*, 54 F.4th 884, 889-90 (6th Cir. 2022) (Kentucky complicity to commit murder); *United States v. Manley*, 52 F.4th 143, 150-51 (4th Cir. 2022) (Virginia second-degree murder); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343-45 (11th Cir. 2022) (Georgia malice murder and federal murder);

United States v. Begay, 33 F.4th 1081, 1086 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 340 (2022) (federal second-degree murder); *United States v. Solís-Vásquez*, 10 F.4th 59, 65 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 833 (2022) (Massachusetts second-degree murder) (applying pre-*Borden* opinion in *United States v. Báez-Martínez*, 950 F.3d 119 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2805 (2021), *reh'g denied*, 142 S. Ct. 922 (2021)).

Nevertheless, the Court should act now to address the important questions raised by this petition. Indeed, despite the courts of appeals' seemingly consistent holdings on depraved heart murder, they have reached different conclusions on in-between mental states in the context of other statutes. *Compare, e.g.*, *United States v. Lung'aho*, 72 F.4th 845 (8th Cir. 2023) (holding that the "malciously" element of federal arson does not satisfy the force clause) *with Janis*, 73 F.4th 628 (holding that the "malice aforethought" element of federal second-degree murder does satisfy the force clause). This Court's guidance is needed now.

Moreover, because the text of the force clause in § 924(c)(3)(A) is identical or nearly identical to force clauses found throughout the federal code and Sentencing Guidelines, the questions raised by this case affect defendants and other individuals in a variety of other contexts:

- Mandatory minimum sentences for possession of firearms and ammunition under the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)(i));
- Mandatory life sentences for serious violent felonies (18 U.S.C. § 3559(c)(2)(F)(ii));

- Mandatory restitution under the Mandatory Victim Restitution Act (18 U.S.C. § 3663A(C)(1)(A)(i) (incorporating definition of "crime of violence" from 18 U.S.C. § 16));

- Pretrial detention under the Bail Reform Act (18 U.S.C. § 3142(f)(1)(A));

- Calculation of the guideline range under the career offender and firearms guidelines (USSG § 4B1.2(a)(1); USSG § 4B1.1; USSG § 2K2.1(a));

- Deportation under the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(F) (incorporating § 16)).

The question of whether federal second-degree and other depraved heart murders qualify as crimes of violence is an important question of federal law that should be addressed by this Court.

III. This case is an ideal vehicle for the question presented.

This case squarely presents the issue of whether federal second-degree murder qualifies as a "crime of violence" under the force clause. At the time of Janis's conviction, second-degree murder unquestionably qualified as a "crime of violence" under the residual clause in § 924(c)(3)(B). This Court invalidated the residual clause as void for vagueness in *Davis*. The only question below was whether second-degree murder qualified under the remaining force clause in § 924(c)(3)(A). If it did, Janis's motion to vacate her § 924(c) conviction was properly denied. If it did not, Janis's § 924(c) conviction and sentence were entered in violation of her due process rights. This case is an ideal vehicle for the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 12th day of January, 2024.

Respectfully submitted,

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