No. _____

In the Supreme Court of the United States

MARK JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in applying the categorical approach, a federal offense that incorporates by reference the commission of an underlying offense is divisible between underlying offenses.

2. Whether a criminal offense that can be committed with a *mens rea* of general intent can qualify as a "crime of violence" under 18 U.S.C. 924(c)(3)(A).

RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. *Jordan*, Crim. No. 94-524 (May 19, 2022) (amended order denying motion under 28 U.S.C. 2255)

United States v. *Jordan*, Crim. No. 94-524 (Oct. 30, 1995) (final judgment)

United States Court of Appeals (3d Cir.):

Jordan v. *United States*, No. 22-2153 (March 25, 2024)

In re: Mark Jordan, No. 16-2563 (Aug. 27, 2019)

In re: Mark Jordan, No. 16-2720 (Aug. 27, 2019)

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Mark Jordan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The revised opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 96 F.4th 584. The order of the court of appeals granting panel rehearing and denying rehearing en banc (App., *infra*, 17a-18a) is reported at 96 F.4th 628. The earlier opinion of the court of appeals (App., *infra*, 19a-34a) is reported at 88 F.4th 435. The district court's order (C.A. App. 4-8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2023. Panel rehearing was granted, a revised opinion was issued, and rehearing en banc

was denied on March 25, 2024 (App., *infra*, 17a-18a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924 of Title 18 of the United States Code provides in pertinent 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.

Section 2113 of Title 18 of the United States Code provides in pertinent part:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

* * * * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

STATEMENT

This case presents two significant and recurring questions of federal criminal law that require the Court's review: (1) whether, in applying the categorical approach, a federal offense that incorporates by reference the commission of an underlying offense is divisible between underlying offenses, and (2) whether a criminal offense that can be committed with a mental state of general intent qualifies as a "crime of violence" under 18 U.S.C. 924(c). There is profound confusion among the courts of appeals over both questions, and this Court's intervention is necessary.

1. In 1995, by plea of guilty, petitioner Mark Jordan was convicted in the Eastern District of Pennsylvania of two counts of violating 18 U.S.C. 924(c) and three counts of violating 18 U.S.C. 2113(d). The district court sentenced Mr. Jordan to a total of 318 months of imprisonment. App., *infra*, 3a; C.A. App. 4-5, 98-100.[1]

2. Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute defines the term "crime of violence" with two alternative definitions. Section 924(c)(3)(A)—which courts often refer to as containing the "force" or "elements" clause—states that the term "crime of violence" includes any "offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or

[1] In a subsequent federal case involving unrelated charges, Mr. Jordan was sentenced to a term of imprisonment of 420 months, to be served consecutively to the sentence imposed in this case. *See United States* v. *Jordan*, No. 04-cr-00229, Doc. 311 (D. Colo. April 11, 2006). He is currently in custody serving that sentence.

property of another." 18 U.S.C. 924(c)(3)(A). Section 924(c)(3)(B)—which courts often refer to as containing the "residual" clause—states that the term "crime of violence" also includes any "offense that is a felony and * * * 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)(B).

Mr. Jordan's Section 924(c) counts were predicated on the charged violations of 18 U.S.C. 2113(d). Section 2113(d) provides:

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. 2113(d). Subsections (a) and (b) of 2113 set forth various offenses involving entry into and taking money from banks and similar institutions.

3. In 2016, Mr. Jordan sought authorization from the court of appeals to file a second or successive Section 2255 motion seeking vacatur of his Section 924(c) convictions.[2] *See* C.A. App. 104-112; 28 U.S.C. 2255(h). While Mr. Jordan's motion was pending, the Supreme Court decided *United States* v. *Davis*, 588 U.S. 445 (2019), which held that Section 924(c)'s residual clause is unconstitutionally vague. Shortly thereafter, the court of appeals granted Mr. Jordan leave to file a second or successive

[2] Mr. Jordan had previously filed a pro se motion for a reduction of the amount of restitution imposed, which the district court treated as a motion under 28 U.S.C. 2255. *See* D. Ct. Dkt. No. 47.

habeas petition in light of *Davis*. *See* Order, Nos. 16-2563 & 16-2720 (3d Cir. Aug. 27, 2019).

Mr. Jordan's Section 2255 motion explained that, because the residual clause is unconstitutional, his Section 2113(d) offenses must satisfy the alternative definition of "crime of violence" in the force clause of Section 924(c). Relevant here, Mr. Jordan argued that 18 U.S.C. 2113(d) can be committed by reckless conduct, and thus cannot qualify as a predicate under Section 924(c)'s force clause after the Supreme Court's decision in *Borden* v. *United States*, 593 U.S. 420 (2021). In addition, Mr. Jordan argued that 18 U.S.C. 2113(d) criminalizes putting in jeopardy the life of "any person," and is therefore broader than the force clause of Section 924(c), which requires the use or threatened use of force that is targeted "against the person or property *of another*." 18 U.S.C. 924(c)(3)(A) (emphasis added). *See* C.A. App. 127-134, 138-143, 155-165.

4. The district court denied Mr. Jordan's Section 2255 motion, relying on pre-*Borden* precedent of the court of appeals holding that Section 2113(d) is a "crime of violence" under Section 924(c). *See* C.A. App. 4-8. Nonetheless, the district court recognized that "reasonable jurists could debate the application of *Borden*" to 2113(d), and therefore "recommend[ed] that a certificate of appealability should be issued." *Id.* at 8.

5. Mr. Jordan appealed, and the court of appeals affirmed.

a. As an initial matter, the court of appeals held that Section 2113(d) is divisible into crimes predicated on subsection (a) and those predicated on subsection

(b). *See* App., *infra*, 25a-31a. The court of appeals rejected Mr. Jordan's argument that the plain conjunctive language of Section 2113(d)—"any" of the offenses in subsections (a) "and" (b)—defines a single indivisible crime In the court's view, the text of the statute suggested divisibility but did not "plainly" resolve the issue, and therefore the court of appeals looked to Mr. Jordan's indictment and plea colloquy to confirm its conclusion. *Id.* at 25a-28a. The court of appeals also relied on its precedent holding that the Racketeer Influenced and Corrupt Organizations Act (RICO) statute is divisible between underlying crimes, and the court distinguished a recent decision by another panel concluding that a Pennsylvania statute was *indivisible* as between underlying crimes. *Id.* at 28a-31a. Based on its analysis, the court of appeals broadly opined that, "as a rule, federal nested crimes that depend on alternative predicate crimes are divisible." *Id.* at 31a.

b. After determining that Mr. Jordan's Section 2113(d) offenses were predicated on subsection (a), the court of appeals addressed Mr. Jordan's two arguments that his Section 2113(d) offenses did not satisfy Section 924(c)'s force clause. *First*, the court of appeals held that a Section 2113(d) offense, predicated on subsection (a), requires a sufficient *mens rea* to satisfy the force clause. App., *infra*, 32a-33a. In so holding, the court of appeals rejected Mr. Jordan's argument that Section 2113(a) is a general intent crime, and general intent encompasses a *mens rea* of recklessness as defined by *Borden*. *See* C.A. Br. 17-27, 35-42; C.A. Reply Br. 3-15, 22-25. Relying on its pre-*Borden* precedent, the court of appeals concluded that Section 2113(a) does not criminalize reckless conduct. App., *infra*, 32a-33a.

Second, the court of appeals rejected Mr. Jordan's argument that because Section 2113(d) criminalizes putting in jeopardy the life of "any person," it is facially broader than the force clause of Section 924(c), which requires the use or threatened use of force "against the person or property *of another*." 18 U.S.C. 924(c)(3)(A) (emphasis added). The court of appeals held that "precedent forecloses" this argument, relying on its previous conclusion in *United States* v. *Johnson*, 899 F.3d 191 (3d Cir. 2018), that Section 2113(d) is a crime of violence. App., *infra*, 33a-34a.

6. Mr. Jordan filed a petition for panel rehearing and rehearing en banc, arguing that the court of appeals incorrectly applied the doctrine of stare decisis and that its divisibility analysis was erroneous. The court of appeals granted panel rehearing and issued a revised opinion. App., *infra*, 1a-16a. The revisions eliminated the discussion of stare decisis but did not change the court of appeals' conclusion, and the judgment affirming the district court remained in place. *See id.* at 17a-18a. The court of appeals denied rehearing en banc. *Ibid.*

REASONS FOR GRANTING THE PETITION

A. The Decision Below Is Incorrect

In holding that Section 2113(d) qualifies as a "crime of violence" under Section 924(c), the court of appeals made two fundamental errors that warrant this Court's attention.

1. *First*, the court of appeals' conclusion that Section 2113(d) is indivisible as between underlying crimes flouts the divisibility precedents of this Court. Critically, the court of appeals erred adopting a broad, generally applicable "rule" that "federal

nested crimes that depend on alternative predicate crimes are divisible." App., *infra*, 13a. The question whether a statute is divisible turns on the text of the *particular* statute at issue, and whether that statutory text sets out alternative elements or means. *See Mathis* v. *United States*, 579 U.S. 500, 514 (2016); *Descamps* v. *United States*, 570 U.S. 254, 275, 133 (2013). There can be no general rule for federal "nested crimes"; each statute must be subject to individualized statutory interpretation.

Further, the court of appeals' interpretation of the text is flawed. As this Court has explained, a divisibility analysis is only required insofar as a statute is "alternatively phrased." *Mathis*, 579 U.S. at 517. Section 2113(d) is not alternatively phrased: it refers generally to "any offense defined in subsections (a) and (b)." 18 U.S.C. § 2113(d). Accordingly, and contrary to the court of appeals' interpretation, Section 2113(d) is not "disjunctive." App., *infra*, 9a. Rather, "any" expansively refers to an offense in those subsections "of whatever kind," *Babb* v. *Wilkie*, 589 U.S. 399, 405 n.2 (2020), and the ordinary meaning of "and" is conjunctive, *see* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 116 (2012) (Reading Law). By its plain language, Section 2113(d) is a single indivisible offense; it does not provide for alternative offenses based on the particular underlying offense *within* subsections (a) or (b). The divisibility analysis for Section 2113(d) begins and ends with the text, and the court of appeals erred by concluding otherwise. *See Mathis*, 579 U.S. at 517. Once again, a lower court has disregarded what this Court has "earlier said (and said and said)" about how to apply the categorical approach. *Id.* at 515-16.

2. The court of appeals likewise erred in holding that Section 2113(d), predicated on subsection (a), contains a sufficient *mens rea* to satisfy the force clause of Section 924(c).

Section 2113(d) makes it a crime to "assault[]" any person or "put[] in jeopardy the life of" any person by the use of a dangerous weapon while committing any of the bank-related offenses in subsections (a) or (b). Section 2113(d) is silent as to *mens rea*, and the best reading of that statute is that it requires a *mens rea* of recklessness—the common default *mens rea* for an offense that does not expressly contain one. *See Voisine* v. *United States*, 579 U.S. 686, 695 (2016) (citing Model Penal Code § 2.02(3), Comments 4-5, at 243-244 (1962)). That understanding of Section 2113(d) comports with the text of the statute. The phrase "puts in jeopardy the life of any person by the use of a dangerous weapon or device" fits comfortably with a *mens rea* of recklessness, which involves conscious disregard of a "substantial and unjustifiable risk." *Borden*, 593 U.S. at 427. A perpetrator can put a person's life in jeopardy without intending to hurt that person and without knowing that harm is practically certain to occur; the perpetrator need only "consciously disregard[] a real risk, thus endangering others." *Id.* at 432.

Perhaps due to the strength of the foregoing arguments, the court of appeals focused on the *mens rea* required for Section 2113(a) instead of subsection (d). But, even if the court's divisibility analysis were correct, subsection (a) likewise can be committed by reckless conduct. The first paragraph of Section 2113(a) penalizes someone who "by force and violence, or by intimidation, takes, or attempts to take,

from the person or presence of another" property or money belonging to, or in the custody of, any bank or similar named institutions. 18 U.S.C. 2113(a). In *Carter* v. *United States*, 530 U.S. 255 (2000), this Court considered the *mens rea* required by 2113(a) and held that it does not require proof of specific intent to steal. The Court "read subsection (a) as requiring proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation)." *Id.* As the government itself has recognized in other litigation, "general intent" encompasses recklessness and therefore cannot satisfy the force clause under *Borden*. *See* U.S. Br., *United States* v. *Gonzales*, No. 21-2022, 2021 WL 3236540, at *3-*4 (10th Cir. 2021) (conceding that general intent is insufficient under *Borden*); U.S. Br., *Voisine* v. *United States*, 2016 WL 1238840, at *18 (2016) (explaining that "'general intent' traditionally encompassed not only purposeful, but also knowing and reckless conduct").

In *Borden*, the Court did not use the traditional terms "general intent" and "specific intent." Instead, the plurality opinion employed the four mental states of negligence, recklessness, purpose, and knowledge "as described in modern statutes and cases." 593 U.S. at 425-426. Critically, the opinion defined purpose and knowledge—the mental states that satisfy the force clause—by reference to a particular *result*. As the plurality explained, a "person acts purposefully when he 'consciously desires' a particular result." *Id.* at 426 (quoting *United States* v. *Bailey*, 444 U.S. 394, 404 (1980) and citing Model Penal Code § 2.02(2)(a) (1985)). A person

acts "knowingly when 'he is aware that [a] result is practically certain to follow from his conduct,' whatever his affirmative desire." *Id.* (quoting *Bailey*, 444 U.S. at 404 and citing Model Penal Code § 2.02(2)(b)(ii)).

There is a key distinction between the traditional concept of "general intent"—as used in *Carter*—and the more modern mental states of purpose and knowledge defined in *Borden*. While "general intent" refers to having knowledge or intent with respect to the *actus reus*, *Carter*, 530 U.S. at 268, purpose and knowledge as used in *Borden* refer to a mental state with respect to the *result*, *see Borden*, 593 U.S. at 426. A person can knowingly or intentionally engage in an *act* (and thus have general intent) without "consciously desir[ing] a particular *result*" or being aware that such a "*result* is practically certain to follow" (and thus lack modern purpose or knowledge). *Ibid.* (emphases added and internal quotation marks omitted). For that reason, the traditional concept of "general intent"—though requiring knowledge or intent with respect to the *actus reus*—encompasses the modern concepts of purpose, knowledge, *and recklessness*. *See United States* v. *Zunie*, 444 F.3d 1230, 1234-1235 ("What the common law would traditionally consider a 'general intent' crime . . . encompasses crimes committed with purpose, knowledge, or recklessness."); Model Penal Code § 2.02(3), Explanatory Note (discussing "correspondence" between a requirement of purpose, knowledge, or recklessness and "the common law requirement of 'general intent'"); *cf. Counterman* v. *Colorado*, 600 U.S. 66, 81 (2023) ("specific intent" is "presumably equivalent to purpose or knowledge"). Consequently, under *Borden*, general intent is insufficient.

Because Section 2113(a) requires only "general intent," *Carter*, 530 U.S. at 268, an individual can violate the statute merely by knowingly or intentionally engaging in an *act* of "intimidation." That means that "intimidation" can occur without an individual's "conscious[] desire" to threaten force (purpose) or "aware[ness]" that a threat of force "is practically certain to follow from his conduct" (knowledge). *Borden,* 593 U.S. at 426. Indeed, this Court's recent discussion of knowing and reckless threats in *Counterman* is instructive. As the Court explained in *Counterman*, "[a] person acts knowingly" in the threats context "when he knows to a practical certainty that others will take his words as threats." 600 U.S. at 79. By contrast, "[a] person acts recklessly" when he "is aware that others could regard his statements as threatening violence and delivers them anyway." *Ibid.* (internal quotation marks omitted). *Counterman's* recklessness standard maps onto Section 2113(a): it does not require that the speaker know to a practical certainty that others will take his words as threats, but instead requires only that the speaker disregards a substantial risk that his communications would be perceived as a threat.

The court of appeals erred in holding that a Section 2113(d) offense predicated on subsection (a), a general intent crime, satisfies the force clause.

B. The Decision Below Is In Substantial Tension With Decisions Of Other Courts Of Appeals

The court of appeals' decision implicates two independent questions on which the lower courts are in significant tension. Both questions are ripe for this Court's intervention.

1. The court of appeals' holding that, as a rule, a federal nested crime is divisible between underlying crimes is at odds with the reasoning of the Fourth Circuit in *United States* v. *Simmons*, 11 F.4th 239 (4th Cir. 2021). There, the Fourth Circuit held that a RICO conspiracy does not qualify as a "crime of violence" under 924(c). The RICO statute proscribes "conduct[ing] . . . [an] enterprise's affairs through a pattern of racketeering activity or a collection of unlawful debt." 18 U.S.C. 1962(c). "[R]acketeering activity," in turn, is defined by reference to myriad alternative predicate acts and offenses. *See* 18 U.S.C. 1961(1). Among other analysis, the Fourth Circuit explained in *Simmons* that Section 1961(1) "lists a number of crimes which can serve as the means for satisfying" the element of "a pattern of racketeering activity." 11 F.4th at 259. Because the underlying acts in 1961(1) are *means* and not elements, under the Fourth Circuit's reasoning, the RICO statute is necessarily indivisible as between those underlying acts.

The Fourth Circuit's reasoning in *Simmons* is incompatible with the decision of the court of appeals below. The court of appeals' broad holding that, as a rule, federal nested crimes are divisible necessarily applies to a statute like RICO. Indeed, in the decision below, the court of appeals relied on its prior decision in *United States* v. *Williams*, which held that RICO is divisible as between predicate acts of "racketeering activity." 898 F.3d 323, 333 (3d Cir. 2018); *see* App., *infra*, 10a-11a. The decision in *Williams*, and the broader rule adopted in the decision below, cannot be squared with the Fourth Circuit's reasoning in *Simmons*.

2. Separately and independently, the court of appeals' holding that a general intent crime (like Section 2113(a)) can satisfy the force clause conflicts with decisions of several other circuits. Although courts of appeals have uniformly held that Section 2113(a) qualifies as a "crime of violence," those decisions have failed to grapple with the distinction between general intent—which requires only knowledge as to the actus reus (and encompasses recklessness)—and knowledge as used in *Borden*—which requires knowledge as to the result. This Court's intervention is needed to resolve the confusion among the courts of appeals.

a. In *United States* v. *Garner*, 28 F.4th 678 (2022), the Fifth Circuit held that Louisiana's aggravated assault with a firearm statute does not satisfy the force clause of U.S.S.G. § 4B1.2(a), which is nearly identical to the force clause of Section 924(c). *See* 28 F.4th at 682-84. As the court explained, Louisiana aggravated assault requires "general intent," which exists when "the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire on his part to have accomplished such result." *Id.* at 683 (internal quotation marks omitted). For example, a Louisiana court upheld a conviction under the aggravated assault statute where a defendant "intentionally placed the victim in reasonable apprehension of receiving a battery involving a firearm" and the defendant's "behavior would very reasonably result in the victim's apprehension of harm." *Id.* (citation omitted). Thus, the Fifth Circuit concluded that because "reckless or even negligent states of mind can satisfy Louisiana's general intent standard, so long as a reasonable person would know that the criminal consequences would result

from the defendant's actions," the Louisiana aggravated assault offense does not satisfy the force clause. *Id.* at 683-84.

b. Similarly, in *United States* v. *Frazier*, 48 F.4th 884 (2022), the Eighth Circuit held that Iowa's offense of Intimidation with a Dangerous Weapon does not qualify as a crime of violence under U.S.S.G. § 4B1.2(a). The Iowa statute penalizes a person who "shoots, throws, launches, or discharges a dangerous weapon at, into, or in" a building or other enumerated locations, or "threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out." Iowa Code § 708.6(2). The Eighth Circuit concluded that "examining § 708.6(2) in light of *Borden* shows that a violation of the Iowa statute does not satisfy the force clause." 48 F.4th at 887. As the Court explained, the Iowa offense at issue "is a general intent crime." *Ibid.* "As such, there is no requirement that the defendant subjectively desire the prohibited result; he need only intend to commit the prohibited act." *Ibid.* "In other words," the court explained, "a defendant may violate § 708.6(2) without knowingly or intentionally placing an occupant in reasonable apprehension of serious bodily injury." *Ibid.* "It is sufficient, for example, if the defendant intentionally fires a gun inside a building, but only recklessly causes an occupant to fear serious injury." *Ibid.* Accordingly, abrogating pre-*Borden* precedent, the court held that a violation of Iowa Code § 708.6(2) does not satisfy the force clause. *See ibid.*

c. Employing similar reasoning, the government recently conceded in the Tenth Circuit that, after *Borden*, a conviction under New Mexico's aggravated assault with a deadly weapon statute is not a qualifying offense under the force clause. *See*

U.S. Br., *United States* v. *Gonzales*, No. 21-2022, 2021 WL 3236540, at *3-*4 (10th Cir. 2021). As the government explained, "[o]ne of the ways in which aggravated assault with a deadly weapon can be committed in New Mexico is through 'any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery.'" *Id*. at *3 (quoting N.M. Stat. § 30-3-1). Although the offense requires "general criminal intent" to engage in the act that puts the victim in fear of injury, the government reasoned, "*Borden* reveals that this type of conduct, though intentional in one sense, is insufficient to bring the statute within the [force clause] because 'like recklessness, [it] is not directed or targeted at another.'" *Id.* at *4 (quoting *Borden,* 593 U.S. at 443). Accepting the government's concession, the Tenth Circuit vacated the defendant's sentence and remanded for resentencing. *See United States* v. *Gonzales*, 2021 WL 4185952 (10th Cir. 2021).

d. Likewise, in *United States* v. *Carter*, 7 F.4th 1039 (2021), the Eleventh Circuit applied *Borden* and held that Georgia's aggravated assault with a deadly weapon statute does not satisfy the ACCA's force clause. *See id.* at 1045. The court explained that Georgia assault "does not require proof of specific intent" to harm; rather, the "State need only prove that the defendant intended to do the act that placed another in reasonable apprehension of immediate violent injury." *Ibid*. That general intent requirement can be satisfied by a *mens rea* of recklessness, and thus the statute does not satisfy the force clause under *Borden*. *See ibid.*

e. In contrast to the foregoing decisions, the court of appeals in the decision below failed to wrestle with the relationship between general intent and recklessness. Instead, the court of appeals simply relied on its pre-*Borden* precedent, *United States* v. *Wilson*, 880 F.3d 80 (3d Cir. 2018), to conclude that Section 2113(a) "requires purpose or knowledge." App., *infra*, 14a-15a. But *Wilson* reflects a misunderstanding of general intent, that cannot survive *Borden*. Indeed, *Wilson* acknowledged that Section 2113(a) is general intent crime, explaining that because the statute requires "only general intent, it is enough for the government to prove that the defendant took knowing action to rob a bank." 880 F.3d at 87. Contrary to the reasoning of the courts of appeals discussed above, and contrary to *Borden*, the *Wilson* court concluded that a general intent crime satisfies the force clause. In the decision below, the court of appeals reiterated *Wilson's* holding and opined that Mr. Jordan's argument "overreads" *Borden*. App., *infra*, 14a-15a. That decision conflicts with the decisions of other circuits that have correctly applied *Borden* to hold that general intent crimes do not satisfy the force clause.

C. The Questions Presented Are Important And Warrant Review In This Case

This Court should grant review to address (1) whether, as a rule, federal crimes that incorporate underlying offenses are divisible between the underlying offenses, and (2) whether an offense with a *mens rea* of general intent satisfies the force clause. As shown above, both questions are the source of widespread confusion among the courts of appeals, and this Court's intervention is needed.

The questions presented are of substantial importance. The government frequently prosecutes Section 924(c) offenses connected to federal bank robberies and similar crimes. *See* U.S. Pet. 21, *United States* v. *Taylor*, No. 20-1495 (discussing data from the U.S. Sentencing Commission indicate that in Fiscal Year 2019 alone, 813 federal defendants were convicted under both Section 924(c) and a federal robbery statute, including 18 U.S.C. 2113). Section 924(c) imposes harsh additional penalties for using or carrying a firearm during a crime. As this Court has explained, "[v]iolators of § 924(c) face a mandatory minimum sentence of five years in prison, over and above any sentence they receive for the underlying crime of violence or drug trafficking crime." *Davis*, 588 U.S. at 449-450. The minimum sentence rises to seven years if the defendant brandishes the firearm and ten years if he discharges it. *Ibid.* Certain types of weapons also trigger enhanced penalties. *Ibid.*

Further, the questions presented impact cases beyond those involving Section 924(c). The Sentencing Guidelines and other statutory provisions contain clauses that require the categorical approach, and the court of appeals' divisibility rule will presumably apply whenever a federal predicate is at issue. *See Davis*, 588 U.S. at 458. Moreover, in addition to Section 2113(a), other federal crimes and numerous state crimes can be committed with a *mens rea* of general intent, but the lower courts are in disarray as to whether a general intent crime satisfies the force clause. *See* pp. 14-18, *supra*.

Because of the large number of Section 924(c) convictions—to say nothing about the other statutory and sentencing provisions that contain language similar to

Section 924(c)'s force clause—it is imperative that the lower courts have clarity on how to apply the categorical approach and on the *mens rea* that is required to satisfy the force clause. There can be no doubt that the questions presented will continue to recur frequently until this Court intervenes. And, without this Court's review, the ongoing confusion among the courts of appeals will continue to impact scores of criminal defendants across the country. This case presents an optimal vehicle in which to resolve the tension among the courts of appeals on both questions. The Court should grant the petition for certiorari and address these important questions of federal criminal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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