No. 24-

IN THE

Supreme Court of the United States

AL DORSEY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an accessory offense has "as an element the use, attempted use, or threatened use of physical force" under U.S.S.G. § 4B1.2 where it (1) does not have, as an element, the use, attempted use, or threatened use of physical force by the accessory offender and (2) does not require that the accessory offender intend to promote or assist the commission of the principal offense.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Al Dorsey, an inmate incarcerated at FCI Beckley in Beaver, West Virginia.

Respondent is the United States of America.

There are no corporate parties involved in this case.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings:

United States v. *Dorsey*, No. 23-5082 (6th Cir.) (opinion and judgment issued on January 23, 2024; rehearing denied on March 26, 2024).

U.S. District Court for the Eastern District of Tennessee, No. 1:21-CR-77 (sentencing hearing held and judgment entered January 12, 2023).

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

OPINIONS BELOW

The Sixth Circuit's order denying Mr. Dorsey's petition for rehearing en banc, Pet.App.61a, is not reported but available at 2024 WL 1506771. The Sixth Circuit's panel opinion, Pet.App.1a, is reported at 91 F.4th 453. The district court's sentencing decision, Pet.App.15a, is not reported.

JURISDICTION

The judgment of the court of appeals was entered January 23, 2024. The order of the court of appeals denying Mr. Dorsey's petition for rehearing en banc was entered on March 26, 2024. On May 22, 2024, Justice Kavanaugh extended the time to petition for a writ of

certiorari until August 23, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINES PROVISION INVOLVED

The pertinent United States Sentencing Guidelines provision is U.S.S.G. § 4B1.2(a)(1), which provides:

> Crime of Violence. The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that ... has as an element the use attempted use, or threatened use of physical force against the person of another.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are Tenn. Code Ann. § 39-11-403(a); Tenn. Code Ann. § 39-11-402(2); 18 U.S.C. § 2; and 18 U.S.C. § 3.

Tenn. Code Ann. § 39-11-403(a) provides:

> A person is criminally responsible for the facilitation of a felony, if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony.

Tenn. Code Ann. § 39-11-402(2) provides:

> A person is criminally responsible for an offense committed by the conduct of another, if: … Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense.

18 U.S.C. § 2(a) provides:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. § 3 provides:

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Like the statutory regimes they mirror, the Federal Sentencing Guidelines feature sentencing enhancements intended to address the special risks posed by recidivist violent offenders. This Court repeatedly has warned against "blur[ring] the distinction between the 'violent' crimes" deemed worthy of "distinguish[ing] for heightened punishment" and "[all] other crimes." *Borden* v. *United States*, 593 U.S. 420, 440 (2021) (quoting *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004)). The courts below ignored that admonition by holding that convictions for the non-violent "facilitation" offense under Tennessee

law are crimes of violence for purposes of the Sentencing Guidelines.

When he was 17 years old, Al Dorsey pleaded guilty to two counts of Tennessee facilitation of aggravated robbery and was sentenced to probation. Under Tennessee law, facilitation is "a separate and distinct theory of liability from that of a principal offender or someone who is criminally responsible for the conduct of another." *State* v. *Locke*, 90 S.W.3d 663, 672 (Tenn. 2002). It requires only that the defendant, "knowing that another intends to commit a specific felony, but without [intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense], … knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a); *id.* § 39-11-402(2).

Nearly a decade later, Mr. Dorsey was arrested after firing shots into the sky to celebrate New Year's Eve and pleaded guilty to being a felon in possession of a firearm. At sentencing, the district court applied an enhancement to significantly increase Mr. Dorsey's Guideline range because the court concluded that Mr. Dorsey's earlier facilitation offenses were crimes of violence. The Sixth Circuit agreed.

The Sixth Circuit's decision both entrenches a longstanding conflict among the circuits and is wrong. First, the Ninth Circuit has held that an analogous offense—federal accessory after the fact—is *not* a crime of violence because it does not require that the accessory offender use or threaten force and because the principal offender's culpability cannot be imputed to the accessory offender. *United States* v. *Innie*, 7 F.3d 840, 850-851 (9th Cir. 1993). That conflicts with the decision below, which reaffirmed the Sixth Circuit's earlier decision in *United*

States v. *Gloss*, 661 F.3d 317 (2011), holding that facilitation is a violent felony even though it also does not require that the facilitator use or threaten force. Second, the Sixth Circuit's decision conflicts with this Court's decision in *Borden* v. *United States*, 593 U.S. 420 (2021), which held that, in order to be a categorical violent felony, an offense must require a knowing or purposeful *mens rea* with respect to the use of force. The Sixth Circuit concluded that Tennessee facilitators have committed categorically violent crimes, but those convicted of facilitation have only reckless *mens rea* regarding the principal's use or threatened use of physical force, which is insufficient under *Borden*.

Uncorrected, this entrenched circuit split will continue to produce inconsistent sentencing outcomes based on nothing but geography. And its impact reaches beyond the Guidelines: numerous statutes contain substantively identical elements clauses, which courts interpret uniformly with the Guidelines' elements clause, defining categories of violent offenses for purposes of deportation and other severe, mandatory penalties. The split is also unlikely to deepen or be resolved by the Sentencing Commission, which has been aware of it for over a decade. The Court should grant certiorari.

STATEMENT

A. Statutory Background

1. Under the Federal Sentencing Guidelines, if a district court finds that a criminal defendant convicted of being a felon in possession of a firearm has two or more prior convictions for "crime[s] of violence," it must increase the offense level and corresponding Guideline range for the defendant's sentence. U.S.S.G. § 2K2.1(a)(2). A crime of violence, under what is

commonly referred to as the Guidelines' "elements clause," is defined as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 4B1.2(a)(1). Such Guidelines enhancements were intended to "ensure that recidivist violent and drug offenders received stiffer sentences …, to remove such dangerous offenders from the streets and to deal more effectively with the growing problem of violent crime." *United States* v. *Parson*, 955 F.2d 858, 864 (3d Cir. 1992), *abrogated on other grounds by Begay* v. *United States*, 553 U.S. 137 (2008). When the Sentencing Commission adopted this provision, it modeled it after "the congressional sanction" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), so that sentences under Section 2K2.1 would be "proportional" to the mandatory minimum established by the ACCA. *See* U.S. Sent'g Comm'n, *Firearms and Explosive Materials Working Group Report* 19-27, 32 & n.59 (1990). Indeed, Section 4B1.2(a)(1)'s elements clause is identical to the elements clause in the ACCA and materially identical to the elements clause in 18 U.S.C. § 16(a).

2. Tennessee's facilitation offense prohibits "knowingly furnish[ing] substantial assistance in the commission of [a] felony" with "know[ledge] that another intends to commit a specific felony, *but without the intent required for criminal responsibility under § 39-11-402(2)*." Tenn. Code Ann. § 39-11-403(a) (emphasis added). Section 39-11-402(2), in turn, provides that a defendant is criminally responsible for the offense of another (the principal) if the defendant acts with the "intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense." *Id.* § 39-11-402(2). Therefore, one cannot be convicted of facilitation in Tennessee if one intends to promote or

assist the commission of the principal's offense or to benefit from it. Instead, by statutory definition, Tennessee facilitators must have a lesser *mens rea*.

Consistent with their lack of intent to promote, benefit from, or assist the commission of the offense, individuals convicted of facilitation in Tennessee are not responsible for the conduct of the principal. Instead, "facilitation is a separate and distinct theory of liability from that of a principal offender or someone who is criminally responsible for the conduct of another." *State* v. *Locke*, 90 S.W.3d 663, 672 (Tenn. 2002). Indeed, the Tennessee Sentencing Commission has noted that the facilitation provision "recognizes a lesser degree of criminal responsibility than that of a party" to an offense, and facilitators accordingly receive "lesser punishment." Comments of the Tennessee Sentencing Commission on Tenn. Code Ann. § 39-11-403(a).

B. Factual Background

Al Dorsey had a tumultuous childhood. When he was six years old, he and his siblings were removed from their mother's care and placed into state custody. Pet.App.38a; Pet.App.53a; Dist. Ct. Dkt. 44, Revised Presentence Report ("PSR") ¶ 46, PageID#236. They had been living with their aunt when her home burned down. *Id.* Mr. Dorsey later bounced between several foster homes. *Id.* At age 13, Mr. Dorsey was adjudicated delinquent and placed in the custody of Tennessee's Department of Children's Services Juvenile Justice Division. PSR ¶¶ 32-35, 47, PageID#229-233, 236.

When Mr. Dorsey was 17 years old, he and two other teenagers were involved in a robbery of fifteen dollars and assorted other items from a couple. Pet.App.39a; PSR ¶ 36, PageID#233. Mr. Dorsey pleaded guilty to two counts of Tennessee facilitation of aggravated

robbery, Pet.App.3a, and was sentenced to probation, Pet.App.43a.

Soon after he turned 18 and while he was still on probation, Mr. Dorsey committed a robbery. Pet.App.43a-44a; Pet.App.52a. His probation for the earlier facilitation offenses was revoked and he was sentenced to ten years in prison; he ultimately served six and a half years. Pet.App.43a; Pet.App.53a; PSR ¶ 37, PageID#234. After his release, Mr. Dorsey married and settled down. Pet.App.48a.

In the early morning hours of January 1, 2021, Mr. Dorsey made an unwise decision to join others in celebrating the new year by firing shots into the air when midnight arrived. Pet.App.2a. Nobody was harmed in connection with Mr. Dorsey's celebration. PSR ¶ 16, PageID#227.

C. Procedural History

Mr. Dorsey was charged in the Eastern District of Tennessee with a single count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet.App.3a. He pleaded guilty to this charge. *Id.*

In calculating the applicable Guideline range for sentencing, the district court considered whether Mr. Dorsey's two Tennessee convictions for facilitation qualify as "crime[s] of violence" as defined in U.S.S.G. § 4B1.2(a)(1). Pet.App.3a. Mr. Dorsey argued that these facilitation convictions did not qualify as crimes of violence because (1) the facilitation statute "specifically require[d] that Mr. Dorsey did not have the necessary intent to commit the aggravated robbery" and required only that Mr. Dorsey act recklessly, and (2) satisfaction of the elements clause requires that a defendant "have committed a crime that has an element of force in it," but

Tennessee facilitation does not impute a principal offender's intent to use force to the individual convicted of facilitation. Pet.App.20a; Pet.App.22a.

The district court disagreed, concluding that Mr. Dorsey's two Tennessee convictions for facilitation qualify as "crimes of violence" as defined in the elements clause of U.S.S.G. § 4B1.2(a)(1) because the underlying offense—aggravated robbery—necessarily involves the use or threatened use of physical force. Pet.App.3a; Pet.App.24a. Treating Mr. Dorsey's facilitation convictions as "crime[s] of violence" increased his advisory Guideline range from 46 to 57 months to 84 to 105 months. Pet.App.3a. The district court imposed a downward variance of 12 months based on Mr. Dorsey's upbringing and the need to avoid unwarranted sentencing disparities with similarly situated defendants, and ultimately sentenced Mr. Dorsey to 72 months' imprisonment. Pet.App.3a; Pet.App.47a-48a.

The Sixth Circuit affirmed. Relying on its prior decision in *Gloss*, 661 F.3d 317, the court held that Tennessee facilitation of aggravated robbery is a crime of violence because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). Consistent with previous Sixth Circuit decisions such as *United States* v. *Chandler*, 419 F.3d 484, 487-488 (6th Cir. 2005), the court held that it need not limit its analysis to the facilitation of a felony offense of which Mr. Dorsey was convicted and could instead consider the underlying felony—aggravated robbery—as well. Pet.App.5a.

The Sixth Circuit recognized that facilitation of aggravated robbery does not require proof that the facilitator himself used, attempted to use, or threatened to use force. Pet.App.7a. Nonetheless, it held that the

offense will always involve the use or attempted or threatened use of force within the meaning of the elements clause because "a facilitation [of aggravated robbery] offense always requires the prosecution to prove that an aggravated robbery … has occurred," and aggravated robbery, in turn, will always involve the use or threatened use of force by the principal. Pet.App.6a. The Sixth Circuit held that it is sufficient for the "the robber (the main culprit) … to be the only person who knowingly engages in the 'use' or 'threatened use' of force" because the elements clause requires only that "*someone*" knowingly use or threaten force. Pet.App.7a. And it held that "the robber's 'use' or 'threatened use' of force" can be attributed to the facilitator because, by knowingly assisting the crime, the facilitator "knowingly uses the force (or threatened force) that the robber wields (or threatens to wield)." *Id.*

The Sixth Circuit also rejected Mr. Dorsey's argument that *Gloss* was irreconcilable with this Court's decision in *Borden*, which held that only offenses with a knowing or purposeful *mens rea* with respect to the use of force are crimes of violence. The Sixth Circuit held it was enough, under *Borden*, that "[a] facilitator of aggravated robbery must knowingly assist the robber while also knowing of the robber's plan to commit the crime." Pet.App.12a. According to the Sixth Circuit, *Borden* requires only that an offense have some "knowing state of mind," not a knowing state of mind regarding the use or attempted use of force. *Id.* (emphasis omitted).

Mr. Dorsey sought rehearing, which the court of appeals denied. Pet.App.61a. Mr. Dorsey now petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT

In the decision below, the Sixth Circuit held that, although facilitators are not criminally culpable for the conduct of the principal, the principal's use or threatened use of force can be imputed to the facilitator for purposes of determining whether facilitation qualifies as a "crime of violence" under the Sentencing Guidelines. Pet.App.5a-6a. That conflicts with decisions of the Ninth Circuit that have held that the analogous federal offense of "accessory after the fact," which also does not treat the accessory as culpable for the principal offense, does not qualify as a crime of violence under the same elements clause even when the principal has committed a crime of violence. *See United States* v. *Innie*, 7 F.3d 840, 850-851 (9th Cir. 1993); *United States* v. *Avila*, 13 F. App'x 645, 646 (9th Cir. 2001).

The federal offense of "accessory after the fact" is materially identical to the Tennessee offense of facilitation. That offense provides that "[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." 18 U.S.C. § 3. As with Tennessee facilitation, the conduct underlying an accessory-after-the-fact offense is distinct from the conduct of the principal. Like Tennessee facilitation, the federal accessory-after-the fact offense requires only knowledge of the underlying crime as a *mens rea*. *Compare* Tenn. Code Ann. § 39-11-403(a) ("if, knowing that another intends to commit a specific felony"), *with* 18 U.S.C. § 3 ("[w]hoever, knowing that an offense against the United States has been committed"). And

so, like Tennessee facilitation, the federal accessory-after-the fact offense does not punish the offender as a principal. Just as a facilitator is not "criminally responsible for the conduct of another," *State* v. *Locke*, 90 S.W.3d 663, 672 (Tenn. 2002), an accessory after the fact is not "punishable as a principal," *see* 18 U.S.C. § 2.

The Ninth Circuit in *Innie*, however, held that the federal accessory after the fact offense is not a crime of violence under the elements clause of the Sentencing Guidelines. In *Innie*, the defendant had a previous conviction under 18 U.S.C. § 3 for being an accessory after the fact to murder for hire. The Ninth Circuit first concluded that the generic offense of accessory after the fact—standing alone—did not constitute a crime of violence because it "does not require, as an element, the use, attempted use, or threatened use of physical force against the person or property of another." 7 F.3d at 850. At the government's urging, the court then considered whether accessory after the fact to murder for hire specifically qualified as a crime of violence. *Id.* at 850-851. Based on the features of the offense highlighted above—the accessory's criminal conduct being distinct from that of the principal, the *mens rea* requiring only knowledge of the underlying crime, and the accessory not being held responsible for the principal's conduct—the Ninth Circuit concluded that accessory after the fact is not a crime of violence, even when paired with murder for hire. *Id.* at 851. The Ninth Circuit held that even if (1) "the underlying … offense" is "considered to be an element of the accessory offense," and (2) that underlying offense is itself a crime of violence, the accessory after the fact offense still does not satisfy the elements clause because culpability for the underlying offense "is not attributed to the accessory defendant." *Id.* at 850-851. To reach that conclusion, the Ninth Circuit

explained that "[t]he accessory defendant is liable for the act of receiving, relieving, comforting, or assisting a murderer"—not the murder itself—and "[f]or that reason, an accessory after the fact is not liable as a principal." *Id.* (citing 18 U.S.C. § 2). "Thus," the Ninth Circuit reasoned, "being an accessory after the fact to murder for hire does not fit" the elements clause, *id.*, even though an accessory after the fact aids the principal "knowing that an offense against the United States has been committed," 18 U.S.C. § 3.

The Sixth Circuit below reached the opposite conclusion. Similar to the Ninth Circuit, its analysis began from the baseline that "a facilitation [of aggravated robbery] offense always requires the prosecution to prove that an aggravated robbery (that is, a crime of violence) has occurred," such that a defendant could only be convicted of facilitating aggravated robbery if there was (1) "proof—that '*someone*'"—the principal—"used or threatened to use force," and (2) "that the defendant 'knowingly provided substantial assistance to that person.'" Pet.App.6a. But unlike the Ninth Circuit, the Sixth Circuit concluded that the principal's use or threatened use of force was enough to bring a facilitation offense within the elements clause. According to the Sixth Circuit, under that elements clause, "defendants *themselves* [need not] knowingly use or threaten force so long as '*someone*' does so." *Id.* And whereas the Ninth Circuit took seriously the distinction between the accessory offense and the principal offense, the Sixth Circuit suggested that even the principal's more culpable *mens rea* could also be imputed to the facilitator, stating that "one might say the facilitator knowingly uses the force (or threatened force) that the robber wields (or threatens to wield)." *Id.*

The Sixth Circuit's reasoning and holding squarely split with the Ninth Circuit and further entrenches a longstanding split between the Sixth and Ninth Circuits on whether facilitation-type offenses satisfy the elements clause under the Guidelines or similar statutory provisions that courts have long interpreted in tandem with the Guidelines. *See Avila*, 13 F. App'x at 646 (accessory after the fact is not an "aggravated felony" under 18 U.S.C. § 16); *United States* v. *Gloss*, 661 F.3d 317, 319 (6th Cir. 2011) (facilitation of aggravated robbery is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)). In the Sixth Circuit, conviction for a secondary offense that does not itself involve the use or threatened use of force and does not render the offender criminally liable for the principal offense is a crime of violence if the principal offense is a crime of violence. In the Ninth Circuit, it is not.

II. THE DECISION BELOW IS WRONG

The Sixth Circuit's decision conflicts with *Borden* v. *United States*, 593 U.S. 420 (2021), because the Sixth Circuit held that an offense satisfies the elements clause of U.S.S.G. § 4B1.2 so long as it involves a "knowing state of mind," Pet.App.12a, whereas *Borden* interpreted the identically worded elements clause of the ACCA, which the Sixth Circuit and other courts interpret uniformly with the Guidelines, *see United States* v. *Harrison*, 54 F.4th 884, 890 (6th Cir. 2022) (collecting cases)—to require a *mens rea* of at least knowledge with respect to the use or attempted use of force in particular. *Compare* 18 U.S.C. § 924(e)(2)(B)(i) (an offense is a "violent felony" if it "has as an element the use, attempted use, or threatened use of physical force against the person of another"), *with* U.S.S.G. § 4B1.2(a)(1) (an offense is a "crime of violence" if it "has as an element the use,

attempted use, or threatened use of physical force against the person of another").

The *Borden* plurality held that the plain text of the ACCA's elements clause "covers purposeful and knowing acts, but excludes reckless conduct." 593 U.S. at 432. In particular, it held that the phrase "use of physical force *against* the person of another" requires "a kind of directedness or targeting" that recklessness lacks. *Id.* at 430. That is because "'use of force' denotes volitional conduct" and the word "'against' … introduce[s] the conscious object (not the mere recipient) of the force." *Id.* at 430, 431. The plurality offered as an example a driver who "decides to run a red light, and hits a pedestrian whom he did not see." *Id.* at 432. In this scenario, the driver acted recklessly: he "consciously disregarded a real risk, thus endangering others," but he did not "train[] his car at the pedestrian understanding he will run him over." *Id.* The plurality concluded that this conduct would not satisfy the elements clause because the driver did not employ force against the pedestrian in the "targeted way" that the clause requires. *Id.* Instead, "his fault is to pay insufficient attention to the potential application of force" that could result from his purposeful running of the red light. *Id.*

The plurality then confirmed its interpretation of the elements clause against the term it defines—under the ACCA, a "violent felony"—because that term's ordinary meaning informs [the elements clause's] construction." 593 U.S. at 437. "With that focus in place, … those crimes are best understood to involve not only a substantial degree of force, but also a purposeful or knowing state." *Id.* at 438. That is, these crimes involve "a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.* To extend the reach of the elements clause beyond these types of offenses

would "blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and [all] other crimes." *Id.* at 440 (quoting *Leocal*, 543 U.S. at 11).

Justice Thomas, concurring in the judgment, reached the same result as the plurality based on the text. He interpreted the phrase "use of physical force" to apply only to "intentional acts designed to cause harm." *Id.* at 446 (Thomas, J., concurring) (quoting *Voisine* v. *United States*, 579 U.S. 686, 713 (2016) (Thomas, J., dissenting)). Justice Thomas previously explained in *Voisine* that the "use" of force "requires the intent to cause harm, and the law will impute that intent where the actor knows with a practical certainty that it will cause harm." *Id.* at 708. In cases where both the offender's unleashing of the force and the resulting harm were reckless, such as a driver who, "[k]nowing that he should not be texting and driving," sends a text message and rear ends the car in front of him, there is no "use of physical force." *Id.* at 707.

The decision below conflicts with *Borden* because it held that facilitation is a "crime of violence" even though the offense does not require the perpetrator to purposefully or knowingly use or threaten force. On the Sixth Circuit's view, facilitation of aggravated robbery satisfies *Borden* because the facilitator must "knowingly assist the robber while also knowing of the robber's plan to commit the crime (and thus of the planned use or threatened use of force)." Pet.App.12a. But under *Borden*, it is not enough for the defendant to act with just any knowing state: the defendant must act knowingly specifically with respect to the use or attempted use of force. 593 U.S. at 432. A facilitator does not do so.

To the contrary, a facilitator is just like the driver in *Borden* who makes an intentional or knowing choice to run a red light. That driver "consciously"—in other words, knowingly—disregards the risk that his conduct might result in the application of force against another. *Borden*, 593 U.S. at 432. A facilitator of aggravated robbery likewise knows that his conduct may contribute to the commission of a crime that involves the use or threatened use of force but does not, himself, knowingly use or threaten force. This is not, as the elements clause requires, "a deliberate choice of wreaking harm on another." *Id.* at 438. Instead, this is textbook recklessness: "consciously disregard[ing] a substantial and unjustifiable risk" that force will be used or threatened. *Id.* at 427. For example, an individual can be convicted of facilitation for providing the principal offender with directions to the planned location of the burglary and theft. *State* v. *Monholland*, 1995 WL 489438, at *2 (Tenn. Crim. App. Aug. 16, 1995). Providing directions does not satisfy the elements clause under *Borden*, even if the facilitator knows that the principal offender may use or threaten force once at the destination.

Nor is it enough, under *Borden*, that the principal offender, rather than the facilitator, knowingly used or threatened force. *See* Pet.App.7a. The *Borden* plurality held that the elements clause requires that the "*perpetrator*"—here, the facilitator—"direct his action at, or target, another individual." 593 U.S. at 429 (emphasis added); *see also United States* v. *Taylor*, 596 U.S. 845, 854 (2022) (holding that attempted Hobbs Act robbery does not satisfy the analogous elements clause in 18 U.S.C. § 924(c) because no element requires "that the *defendant* used, attempted to use, or even threatened to use force" (emphasis added)). The Sixth Circuit was wrong to suggest that the principal's use of force can be

attributed to the facilitator, analogizing to an armed assailant's relationship to the bullet the assailant shoots. The Sixth Circuit suggested that "just as an armed assailant who shoots a victim knowingly uses the 'force it takes for the bullet to injure the victim's body,' one might say that the facilitator knowingly uses the force (or threatened force) that the robber wields (or threatens to wield)." Pet.App.7a. But unlike an assailant who fires the bullet, a facilitator does not necessarily participate in the use of force. As this Court has recognized in the context of another accessory offense, a person can be convicted as an accessory offender "without proof that he participated in each and every element of the offense." *Rosemond* v. *United States*, 572 U.S. 65, 73 (2014) (quoting *United States* v. *Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987)). And multiple circuit courts, including the Sixth Circuit, have declined to attribute the principal offender's intent to an accessory offender whose crime does not involve the intent to commit the underlying offense in the similar controlled-substance context. *United States* v. *Woodruff*, 735 F.3d 445, 451 (6th Cir. 2013) (holding that facilitation of the sale of cocaine is not a controlled substance offense under the Sentencing Guidelines); *United States* v. *Liranzo*, 944 F.2d 73 (2d Cir. 1991) (same).

In sum, the Sixth Circuit's decision engages in exactly the problem that the *Borden* plurality warned against: "blur[ring] the distinction" between the violent crimes Congress intended to distinguish for heightened punishment and all other crimes. *Borden*, 593 U.S. at 440 (quoting *Leocal*, 543 U.S. at 11). Unlike crimes of violence, facilitation does not require the offender to make "a deliberate choice of wreaking harm on another." *Borden*, 593 U.S. at 483. It requires no more than providing directions.

III. This Case Is An Ideal Vehicle For Resolving A Question Of Clear Importance

A. The Sixth Circuit's Decision Will Wrongly Increase Defendants' Criminal Sentences In That Circuit

The question presented here is important. The Sixth Circuit's decision had a significant effect on Mr. Dorsey's overall term of imprisonment, as it will for many others in the Sixth Circuit. The Sentencing Guidelines play a "central role in sentencing, … provid[ing] the framework for the tens of thousands of federal sentencing proceedings that occur each year." *Molina-Martinez* v. *United States*, 578 U.S. 189, 191-192 (2016). Although advisory, the Guidelines "remain the foundation of federal sentencing decisions." *Hughes* v. *United States*, 584 U.S. 675, 685 (2018). This is by design: federal courts "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," *Peugh* v. *United States*, 569 U.S. 530, 541 (2013) (quoting *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007)), in part to "ensur[e] that sentencing decisions are anchored by the Guidelines," *id.* National data shows the Guidelines impose a strong anchoring effect on sentences. *See generally* U.S. Sent'g Comm'n, The Influence of the Guidelines on Federal Sentencing (Dec. 2020).

Mr. Dorsey's own case demonstrates the impact of the Sixth Circuit's error: But for his sentencing enhancement, Mr. Dorsey's advisory Guideline range would have been 38 to 48 months lower. Because of the significant anchoring effect that the Guidelines have on sentences, a lower Guideline range almost certainly would have resulted in a shorter sentence for Mr. Dorsey. As this Court has recognized, "any amount of

actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration," *Rosales-Mireles* v. *United States*, 585 U.S. 129, 139 (2018) (internal quotations and citations omitted), and resolving this question is necessary to eliminate unwarranted incarceration for not just Mr. Dorsey but many other defendants in the Sixth Circuit. The Sixth Circuit's approach undermines Congress's unambiguous command "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6), because prosecutors outside the Sixth and Ninth Circuits rarely, if ever, assert that facilitation-type offenses satisfy the elements clause. *Cf.* N.Y. Penal Law §§ 115.01, 115.05, 115.08; N.D. Cent. Code § 12.1-06-02.

B. The Sixth Circuit's Decision Will Impact Interpretation Of The Armed Criminal Career Act And Immigration And Nationality Act

The Sixth Circuit's decision is not limited to the Sentencing Guidelines. Its interpretation of the elements clause bears directly on the interpretation of statutes that use a substantively identical elements clause in defining categories of violent offenses. For example, the ACCA and the federal three-strikes law use the same language in defining "violent felony" and "serious violent felony" respectively. *See* 18 U.S.C. § 924(e)(2)(B)(i) ("[T]he term 'violent felony' means any crime" that meets certain criteria and that "has as an element the use, attempted use, or threatened use of physical force against the person of another."); 18 U.S.C. § 3559(c)(2)(F)(ii) (defining "serious violent felony" to include certain offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force

against the person of another"). Similarly, 18 U.S.C. § 16, which "defines a 'crime of violence' for purposes of many federal statutes," *United States* v. *Davis*, 588 U.S. 445, 452 (2019), contains an elements clause that covers "offense[s] that ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." The Immigration and Nationality Act ("INA"), for example, treats a crime of violence under Section 16 as an aggravated felony, and the INA renders deportable any person who is not a U.S. citizen or national and commits an aggravated felony. 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

Courts generally treat interpretations of the various elements clauses interchangeably. *See, e.g.*, *United States* v. *Haight*, 892 F.3d 1271, 1280 (D.C. Cir. 2018) (applying Section 4B1.2 caselaw to the ACCA), *abrogated on other grounds by Borden*, 593 U.S. 420; *Harrison*, 54 F.4th at 890 (recognizing that the Sixth Circuit and seven of its sister circuits interpret the elements clause in the ACCA and Section 4B1.2 "in the same way"); *United States* v. *Campbell*, 865 F.3d 853, 856 (7th Cir. 2017) (noting that the force clause in Section 924(e), Section 924(c), Section 16(a), and Section 4B1.2 have "[s]imilar language," so "courts' interpretations of the clauses generally have been interchangeable"); *Roberts* v. *Holder*, 745 F.3d 928, 930 (8th Cir. 2014) (Section 924(e), Section 16(a), and Section 4B1.2 are "virtually identical").

Accordingly, the Sixth Circuit's resolution of this case will affect the way courts resolve similar questions arising under other elements clauses, which trigger severe, mandatory penalties and deportation. For example, the ACCA imposes a 15-year statutory minimum, 18 U.S.C. § 924(e)(1), and the elements clause in Section 16(a), which itself is incorporated into the immigration

code, defines a set of crimes that results in automatic deportation and permanent exclusion from the United States. *See* 8 U.S.C. § 1101(a)(43)(F). Absent this Court's intervention, individuals in the Sixth Circuit with facilitation convictions will wrongly be subject to these penalties.

C. The Circuit Split Will Not Resolve Itself Or Deepen

The Court should address the split between the Sixth and Ninth Circuits now. The split will not resolve itself because both the Ninth Circuit and the Sixth Circuit have repeatedly reaffirmed their conflicting holdings. In *United States* v. *Avila*, 13 F. App'x 645, 646 (9th Cir. 2001), the Ninth Circuit applied *Innie* to a conviction for accessory after the fact to assault with a deadly weapon. That led the Ninth Circuit to reverse the district court's enhancement of the defendant's sentence by sixteen levels based on its erroneous conclusion that accessory to assault with a deadly weapon was an aggravated felony. *Id.* Similarly, the decision below reaffirmed a prior Sixth Circuit decision, *United States* v. *Gloss*, 661 F.3d 317 (2011). In *Gloss*, the Sixth Circuit concluded that facilitation of aggravated robbery categorically constituted a violent felony because "[i]t makes no difference that the defendant was not the person who committed the aggravated robbery," and "[a]ll that matters is that someone did so, and that the defendant knowingly provided substantial assistance to that person." *Id.* at 319.

Moreover, it is unlikely that the split will deepen. It appears that there are few, if any, states outside the Sixth and Ninth Circuits where prosecutors regularly assert that facilitation-type offenses satisfy the elements clause in the Sentencing Guidelines, the ACCA,

and other laws. *Cf., e.g.*, *Gloss*, 661 F.3d at 319 (arguing that facilitation of aggravated robbery is a violent felony); *Innie*, 7 F.3d at 850-851 (arguing that accessory after the fact is a crime of violence); *Avila*, 13 F. App'x at 646 (same). Accordingly, it is unlikely that additional courts of appeals will take up the issue and weigh in to further elucidate the issue or create a multi-circuit split.

D. The Court Should Not Wait For The Sentencing Commission To Resolve The Split

The Sentencing Commission is unlikely to resolve this split. The Commission has been on notice of the split concerning the treatment of certain accessory offenses under Section 4B1.2 since at least 2011, when the Sixth Circuit first created the split in *Gloss*, 661 F.3d 317, but it has taken no actions to clarify its understanding of the Guideline's application. Thus, this Court's intervention is required.

Moreover, this Court can, and should, intervene to correct lower courts' erroneous interpretations of Guidelines provisions. *See, e.g.*, *Salinas* v. *United States*, 547 U.S. 188 (2006) (per curiam) (reversing Fifth Circuit's interpretation of career offender Sentencing Guidelines). In adopting Section 2K2.1, the Commission was implementing congressional directives. The Commission patterned the text of Section 2K2.1 on 18 U.S.C. § 924(e) so that Section 2K2.1 sentences would be "proportional" to the ACCA's 15-year mandatory minimum. *See* U.S. Sent'g Comm'n, *Firearms and Explosive Materials Working Group Report* 19-27, 32 & n.59 (1990). And the Guidelines' definition of "crime of violence," which Section 2K2.1 incorporates, implements Congress's directive in the Sentencing Reform Act of 1984 to establish Guideline sentences "at or near the maximum term authorized for categories of defendants" who

have been convicted of two or more "crime[s] of violence." 28 U.S.C. § 994(h). The Commission adopted an elements clause for the definition of "crime of violence" that is materially identical to the elements clause by which Congress defined "crime of violence" in 18 U.S.C. § 16 as part of the Sentencing Reform Act.

Thus here, whether accessory offenses such as Tennessee facilitation of aggravated robbery satisfy the elements clause is ultimately a determination of whether these offenses are "crime[s] of violence" under the Sentencing Reform Act of 1984. *See Leocal*, 543 U.S. at 11 ("[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'"). That is a question the Court, not the Sentencing Commission, should answer. *See Loper Bright Enters.* v. *Raimondo*, 603 U.S. ----, 144 S. Ct. 2244, 2257 (2024) (The "final 'interpretation of the laws'" is the "proper and peculiar province of the courts." (quoting The Federalist No. 78, p. 525 (J. Cooke ed. 1961) (A. Hamilton))).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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