No. _____

In the
Supreme Court of the United States

JORGE HIRAM BÁEZ–MARTÍNEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Eric A. Vos
Franco L. Pérez-Redondo
Kevin E. Lerman

Federal Public Defender
District of Puerto Rico
Attorney of Record

Federal Public Defender's Office
241 F.D. Roosevelt Ave.
San Juan, PR 00918
787-281-4922

Attorneys for Petitioner

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Petitioner, Jorge Hiram Báez–Martínez ("Mr. Báez"), respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on February 11, 2020.

QUESTION PRESENTED FOR REVIEW

Whether crimes that may be committed recklessly with a depraved heart mens rea — as opposed to willfully or intentionally — can qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States District Court for the District of Puerto Rico:

United States v. Báez–Martínez, Crim. No. 12-281 (Nov. 27, 2013) (judgment in a criminal case)

United States v. Báez–Martínez, Crim. No. 12-281 (Mar. 21, 2018) (amended judgment in a criminal case after resentencing)

United States Court of Appeals for the First Circuit:

United States v. Báez–Martínez, No. 14-1036 (May 13, 2015)

United States v. Báez–Martínez, No. 18-1289 (February 11, 2020)

Supreme Court of the United States:

Báez–Martínez v. United States, 136 S. Ct. 545 (2015) (mem.) (Nov. 30, 2015)

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OPINIONS AND ORDERS BELOW

The published opinion of the Court of Appeals for the First Circuit is available at 950 F.3d 119, and is included in the appendix at A-1. The district court's opinion and order is available at 258 F. Supp. 3d 228, and is included at A-16. The district court's amended judgment is included in the appendix at A-30.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2020. Rule 13.1 of the Supreme Court allows for ninety days within which to file a petition for a writ of certiorari after entry of the judgment of the court of appeals. This Court enlarged the time to file a petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower court judgment. Accordingly, this petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1):

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony, or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B):

As used in this subsection –

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

P.R. Laws Ann. tit. 33, § 4001 (repealed June 18, 2004):

Murder is the killing of a human being with malice aforethought.

P.R. Laws Ann. tit. 33, § 4002 (repealed June 18, 2004):

Murder in the first degree shall be:

(a) any murder perpetrated by means of poison, lying in wait or torture, or any willful, deliberate and premeditated killing, or which is committed while perpetrating or attempting to perpetrate aggravated arson, rape, sodomy, robbery, carjacking, burglary, kidnapping, mayhem, mutilation or escape.

(b) causing the death of a member of the Police, a member of the Municipal Guard, a Penal Guard, or a member of the National Guard while substituting or supporting the Police, when any of these persons is acting in the performance of their duties and their death is the result of the commission or attempted commission of a felony or the concealment thereof.

All other murders shall be deemed as second degree murders.

STATEMENT OF THE CASE

In 2012, a jury sitting in the United States District Court for the District of Puerto Rico found Mr. Báez guilty of one count of being a felon in a possession of a firearm pursuant to 18 U.S.C. § 922(g)(1). The indictment also charged Mr. Báez under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), raising his sentencing exposure from no more than ten years' imprisonment to a term of fifteen years to life in prison.

The presentence investigation report ("PSR") concluded that Mr. Báez was subject to the ACCA since his criminal history contained three prior convictions and each qualified as a "violent felony" under 18 U.S.C. § 924(e)(2)(B).

The PSR did not specify which convictions it had relied upon to apply the ACCA. The PSR did reflect, however, that Mr. Báez had convictions for, *inter alia*, attempted murder, second-degree murder, robbery of a motor vehicle, robbery, and kidnapping – all under Puerto Rico law. These convictions were sustained between 1995 and 1998, when Mr. Báez was in his early twenties. He is presently forty-six years old. Mr. Báez did not object to the Armed Career Criminal designation.

At the initial disposition hearing, held on November 15, 2013, the district court sentenced Mr. Báez to 180 months' imprisonment, the statutory mandatory minimum.

Mr. Báez appealed his conviction to the Court of Appeals for the First Circuit, raising claims unrelated to sentencing. On May 13, 2015, the First Circuit affirmed his conviction and sentence in a written opinion. *See United States v. Báez–Martínez*, 786 F.3d 121 (1st Cir. 2015).

About a month later, this Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidating the "residual clause" in the ACCA's definition of "violent felony," 18 U.S.C. § 924(e)(2)(B)(ii).

Relying on *Johnson*, Mr. Báez filed a pro se petition for a writ of certiorari, challenging the validity of his ACCA-enhanced sentence. Upon the Solicitor General's request, this Court summarily granted certiorari, vacated Mr. Báez's sentence, and remanded the case for resentencing in light of *Johnson*. *See Báez–Martínez v. United States*, 136 S. Ct. 545 (2015) (mem.).

On remand, the United States Probation Office ("Probation") concluded that Mr. Báez remained subject to the ACCA. This time, the ACCA enhancement was predicated on Mr. Báez's 1996 second-degree

murder conviction, his 1996 attempted murder conviction, and his 1997 attempted murder conviction.

Mr. Báez objected to his treatment as an Armed Career Criminal in filings to the district court. He argued, among other things, that Puerto Rico's crime of second-degree murder can be committed with a mens rea of recklessness or its operative equivalent, falling short of the intentional mens rea required by the force clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i). A-26–29.

In an opinion and order, the district court concluded that Mr. Báez remained an Armed Career Criminal despite *Johnson*'s excision of the residual clause. A-17–29. The district court found that second-degree murder requires "malice aforethought" and thus satisfied the ACCA's force clause. The district court again sentenced Mr. Báez to the statutory mandatory minimum of 180 months of prison, noting it would have imposed a lower sentence. A-30–36.

Mr. Báez appealed his sentence to the First Circuit. Once again, he argued, in relevant part, that because second-degree murder could be committed recklessly, it was not a violent felony and could not serve as a predicate offense under the ACCA.

On February 11, 2020, the First Circuit issued an opinion affirming Mr. Báez's fifteen-year sentence. *United States v. Báez–Martínez*, 950 F.3d 119 (1st Cir. 2020). The court, following binding precedent, acknowledged that the force clause of the ACCA reaches offenses with at least a purposeful mental state, a threshold ordinary recklessness does not surmount. *Id.* at 125; A-7. The court also concluded that second-degree murder requires more than ordinary recklessness — i.e., depraved heart recklessness — and that this reckless indifference mental state does satisfy the force clause. *Id.* at 127; A-9. This timely petition followed.

REASONS FOR GRANTING THE WRIT

I. This Court's review is necessary to resolve a circuit split on the important issue of what mental state is categorically necessary for an offense to qualify as a violent felony under the ACCA.

This case presents this Court with a singular opportunity to clarify whether mental states constituting "unintentional conduct" — that is, ordinary recklessness or a heightened "depraved heart" recklessness – are sufficient to trigger the mandatory minimum fifteen-year sentence prescribed by the ACCA.

This Court has not yet defined what mental state is required to satisfy the force clause of the ACCA's definition of "violent felony," 18 U.S.C. § 924(e)(2)(B)(i). This Court has held, in the context of a substantially similar "force" clause, that the putative predicate crime must have a mens rea of "intentionally." *See Leocal v. Ashcroft*, 543 U.S. 1, 10–11 (2004). Nevertheless, the Circuits are divided on the question whether a crime encompassing ordinary recklessness falls within the scope of the force clause.

A. The Circuits are divided as to whether crimes requiring ordinary recklessness are sufficient under the ACCA's force clause.

The First, Fourth, and Ninth Circuits have held, after *Voisine v. United States*, 136 S. Ct. 2272 (2016), that recklessness is not sufficient to satisfy the force clause in this context. *United States v. Rose*, 896 F.3d 104, 109-10 (1st Cir. 2018) (holding reaffirmed in *Báez–Martínez*, 950 F.3d at 125, but distinguished from so-called heightened recklessness); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Middleton*, 883 F.3d 485, 497-500 (4th Cir. 2018) (Floyd, J., concurring); *United States v. Orona*, 923 F.3d 1197, 1202–03 (9th Cir. 2019), reh'g held in abeyance, 942 F.3d 1159 (9th Cir. 2019).

In contrast, the Sixth, Fifth, Tenth, and D.C. Circuits have held, after *Voisine*, that recklessness is sufficient. *United States v. Méndez–Henríquez*, 847 F.3d 214, 220–22 (5th Cir. 2017); *United States v. Borden*, 769 Fed.Appx. 266 (6th Cir. 2019), cert. granted March 2, 2020; *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018), reh'g denied Mar. 19, 2019, cert. pending (S. Ct. No. 19-5652); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018), reh'g denied March 19, 2019.

The Eleventh Circuit recognizes that *Voisine* presents a potential conflict with its precedent but has not yet resolved the dispute. *See United States v. Harris*, 941 F.3d 1048, 1054 (11th Cir. 2019). The Third Circuit granted en banc hearings sua sponte in two cases where the mens rea issue is apposite, and those cases are now stayed pending this Court's decision in *Borden*, S. Ct. No. 19-541. *United States v. Harris*, held in abeyance (3d Cir. No. 17-1861) (ACCA), and *United States v. Santiago*, held in abeyance (3d Cir. No. 16-4194), (career offender).

The Eighth Circuit has held that certain reckless offenses are sufficient to constitute violent felonies, *see McCoy v. United States*, 960 F.3d 487, 489–90 (8th Cir. 2020) (holding that reckless manslaughter *is* a crime of violence), but others are not. *See United States v. Fields*, 863 F.3d 1012, 1015 (8th Cir. 2017) (limiting the scope of *Voisine* to reckless driving offenses on the view that reckless driving "is distinct from other crimes of recklessness").

To settle the question whether reckless crimes are sufficient, this Court granted a petition for a writ of certiorari only to dismiss the case two months later after the petitioner's died. *See Walker v. United States*, 769 F. App'x 195 (6th Cir. 2019), cert. granted, --- U.S. ----, 140 S. Ct. 519

(U.S. Nov. 15, 2019) (No. 19-373), and cert. dismissed, --- U.S. ---, 140 S. Ct. 953 (U.S. Jan. 27, 2020) (dismissing petition due to petitioner's death). The Court later granted certiorari in *Borden*, a case presenting the same issue: whether reckless crimes can qualify as violent felonies under the force clause.

At bottom, this case asks the very question at issue in *Borden*: What mental state is necessary to satisfy the force clause of the ACCA? But it also presents an equally important complementary question, which is not present in *Borden*: Whether offenses that may be committed recklessly – with a "depraved heart" or "extremely reckless" mental state – are also violent felonies under the ACCA.

B. The Circuits are similarly divided on whether crimes requiring a heightened "depraved heart" recklessness – are sufficient to constitute violent felonies under the ACCA.

The Ninth Circuit, in *United States v. Begay*, has already — in contrast to First Circuit in *Báez–Martínez* — held that that federal second-degree murder was not a crime of violence. 934 F.3d 1033 (9th Cir. 2019), reh'g held in abeyance, 2019 WL 7900329 (9th Cir. 2019). The Ninth Circuit, recognizing the potential impact of *Borden*, has stayed proceedings pending this Court's decision. The Fourth Circuit, like the

First, has held that second-degree "retaliatory" murder is a "crime of violence" under 18 U.S.C. § 924(c). *In re Irby*, 858 F.3d 231 (4th Cir. 2017).

Instead of leaving this complementary issue for another day, the Court should consider *Báez–Martínez* alongside *Borden* so that both can be decided in tandem. Hearing the cases together will allow the Court to resolve the heightened and ordinary recklessness questions at the same time rather than piecemeal. Only then will the Court define the precise mental state necessary to trigger liability under the ACCA. For, if the Court declines to hear this case, it is unlikely that *Borden* will provide a definitive answer as to which mental state is sufficient. Indeed, assuming the Court overturns the Sixth Circuit's decision in *Borden* to find ordinary reckless offenses do not satisfy the force clause, that holding will only implicate the decision below if it is broad enough to eliminate *all* forms of recklessness – an unlikely scenario.

Granting certiorari here would allow the Court to decide whether all forms of recklessness suffice, thereby resolving the confusion that is brewing in the lower courts. Moreover, it would avoid another round of costly litigation on a question that is substantially like and complementary to the question presented in *Borden*.

II. The First Circuit decision in *Báez–Martínez* misapplied *Voisine* and *Leocal* to erroneously include crimes with the mens rea of heightened recklessness within the force clause of the ACCA.

The ACCA's force clause defines "violent felony" as encompassing crimes that require, "as an element," the "use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). The First Circuit correctly interpreted the ACCA to require a mental state *above* recklessness for a predicate offense to constitute a violent felony under ACCA's force clause. *Báez–Martínez*, 950 F.3d at 125.

As *Báez–Martínez* noted, this Court's mens rea analysis of "violent felonies" from *Leocal v. Ashcroft*, 543 U.S. 1 (2004) was applied to the ACCA starting in *Begay v. United States*, 553 U.S. 137 (2008).

But the First Circuit wrongly distinguished so-called heightened recklessness required to commit second-degree murder, the predicate applied to Mr. Báez. *Báez–Martínez*, 950 F.3d at 124. And the court demonstrated the arbitrary results that can follow from any ambiguity of what level of reckless conduct can establish a violent felony. The ACCA's force clause should be read *only* to apply knowing and intentional conduct, not merely reckless, or even extremely reckless conduct.

A. The First Circuit's holding erroneously conflates mental state distinctions relevant to homicide culpability with the strict elements-based categorical approach applicable to the ACCA.

The First Circuit's decision departs from the ACCA's statutory limitation to intentional conduct against the person of another. The ACCA defines "violent felony" to include any "crime 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." 18 U.S.C. § 924(e)(2)(B)(i). That phrase cannot, in ordinary usage, be read to encompass reckless offenses, and cannot be read to encompass reckless or "extremely reckless" conduct.

While the reference to "use" alone may not describe the guilty party's "mental state with respect to the harmful consequences of his volitional conduct," it is critical that Congress required the use of force "against the person of another." *Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016). As this Court has observed, "the preposition 'against'" is "followed by the target of . . . hostilities." *District of Columbia v. Heller*, 554 U.S. 570, 586 (2008) (emphasis added). Thus, "'understood the way the English language is ordinarily understood,' the phrase 'use . . . of physical force against the person of another' requires 'not merely

recklessness as to the consequences of one's force, but knowledge or intent that the force apply to another person.'" *Walker v. United States*, 931 F.3d 467, 468 (6th Cir. 2019) (Kethledge, J., dissenting), cert. dismissed, 140 S. Ct. 953 (2020).

In *Leocal*, this Court recognized it would be unnatural to say a person used physical force against another "by stumbling and falling into him." 543 U.S. 1, 9 (2004). It is likewise unnatural to equate using force "against the person of another" with using force against something else (property, the air, a structure).

Indeed, *Voisine* illustrated the difference between conduct "against the person of another" and reckless conduct that could merely affect the person of another. *Voisine* addressed 18 U.S.C. § 921(a)(33)(A), which defines a "misdemeanor crime of domestic violence" as any offense requiring "the use or attempted use of physical force." That statute contains no requirement that it be "against" anything. As such, this Court's holding in *Voisine* allowed for a misdemeanor-crime-of-violence predicate to be based not just on use of force against another person but, critically, against inanimate objects or nothing at all; the statute applied so long as a person was reckless as to the "consequences of his volitional"

use of force. *Voisine*, 136 S. Ct. at 2279. As such, the ACCA is materially different, including the deliberately limiting phrase "'against the person of another.'" *Leocal*, 543 U.S. at 9.

Congress knows how to punish recklessly causing injury to other. If Congress had intended to punish conduct injuring a person, affecting a person, or targeting a non-person, "it kn[ew] how to do so." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003). Congress regularly uses express language, such as "affecting" (rather than "against"), when it seeks to enhance punishment based on potentially unintended consequences. For example, 10 U.S.C. § 919(b) criminalizes involuntary manslaughter if a person "perpetrate[s] an offense . . . directly affecting" the victim. As such, distributing drugs "to the deceased" falls within § 919(b). *United States v. Moglia*, 3 M.J. 216, 217-218 (C.M.A. 1977).

In other contexts, Congress chose to punish "the use . . . of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A) (emphasis added); *see also* 18 U.S.C. § 16(a) (same). By specifying "the person of another" as the mandatory target of force, Congress "implie[d] the exclusion of other[]" non-human targets — or conduct with no specific target whatsoever. *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018).

B. The First Circuit ignored the different purposes of the force clause and statute addressed in *Voisine*.

This distinction is precisely what set apart *Voisine* and *Castleman*. In *Voisine*, this Court held that the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. § 921(a)(33)(A) includes reckless assaults. *Voisine*, 136 S. Ct. at 2278. But this Court pronounced the caveat that its decision "concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior.

Courts have sometimes given these two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to the required mental states." *Id.* at 2280 n.4. *Voisine*'s qualification, based on the unique context and purpose of domestic violence, left appropriate room for this Court to clarify that violent felonies under § 924(e) require intentional use of force. That is knowledge or intent. That is the only way to save the force clause from constitutional vagueness.

C. The First Circuit wrongly conflated homicide mental state analysis with the elements-based force clause.

The First Circuit's opinion relies on an unsupported conclusion that "extreme recklessness" or "malice aforethought" necessarily entails the

use of force "against the person of another." *Báez–Martínez*, 950 F.3d at 128–29. In so doing, the First Circuit relied on distinctions that may be important for deciding between manslaughter and murder, but do not impact the elements-based "violent felony" definition in force clause. *See id.* at 127.

The First Circuit noted that academic analyses of recklessness place "malice-aforethought-style recklessness . . . somewhere between ordinary recklessness and knowledge on the mens rea spectrum." *Id.* at 126 (citing C. Duffy, Note, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, 57 Duke L.J. 425, 429 (2007) (hereinafter, "Duffy")). While "extreme recklessness" may indeed be a "peculiar kind of recklessness," it remains a "kind of reckless," not a kind of knowledge or intent. *Id.* at 129. Second-degree murder offenses including extreme recklessness remain "unintentional" offenses. *Id.*; Duffy, *supra*, at 428, 431, 439, 453, 455; *see also* A. Michaels, Note, *Defining Unintended Murder*, 85 Colum. L. Rev. 786, 787 (1985).

As such, "[b]ecause second-degree murder can be committed recklessly, rather than intentionally, it does not categorically constitute a crime of violence." *United States v. Begay*, 934 F.3d 1033, 1041 (9th Cir.

2019), reh'g held in abeyance, No. 14-10080, 2019 WL 7900329 (9th Cir. Dec. 5, 2019). No matter how extreme the recklessness of a second-degree murder, it can be committed without the intentional conduct required by ACCA's force clause. While some jurists may find this undesirable, this is the result compelled by Congress's drafting choices, and it remains the more reasonable interpretation of the force clause's text.

III. The First Circuit's faulty reading of the force clause will perpetuate an unconstitutional, unworkable approach to mens rea and risk assessment for violent felony analysis.

The First Circuit saw no reason to apply to rule of lenity in Mr. Báez's favor because it found no ambiguity in the Puerto Rico law at issue. *Báez–Martínez*, 950 F.3d at 129–30. But as to the application of the ACCA itself, stretching the force clause to encompass extreme recklessness threatens to render the force clause unconstitutionally vague. This problem has resulted in the invalidation of another part of the ACCA. In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court identified two features of the ACCA's "residual clause" that rendered it unconstitutionally vague.

First, that clause required the use of a "categorical approach" that ties judicial assessment of whether a crime is a violent felony "to a

judicially imagined 'ordinary case' of [the] crime." *Id.* at 2557. Second, it left "uncertainty about *how much risk* it takes" to elevate a crime to a violent felony. *Id.* at 2558 (emphasis added). Those features "required courts to assess the hypothetical risk posed by an abstract generic version of the offense" — an unacceptably indeterminate task. *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016).

A. Reading the force clause to encompass recklessness likewise threatens to render it unconstitutionally vague.

While excluding "extreme reckless" from the force clause's reach will exclude second-degree murder convictions from the ACCA, such exclusion is compelled by Congress's drafting of the ACCA. And far more absurd results will be perpetuated if court's analysis is to include the sort of risk assessment the First Circuit adopted in *Báez–Martínez*.

Given the range of offending conduct that can lead to second-degree murder, as well as the diverse array of state and federal definitions for "extreme recklessness" or "depraved indifference," the analysis would generate the very arbitrariness this Court condemned in *Johnson*. *See* Duffy, *supra*, at 436–52. As in *Johnson*, *Davis*, and *Dimaya*, there is no

coherent guiding principle for applying the categorical approach to the force clause. *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213–14 (2018).

Applying that approach requires a determination of whether the elements of a statute categorically require the use of force against another person. As applied to statutes criminalizing extremely reckless conduct, however, that analysis will prove just as unworkable and vague as the approach *Johnson* held constitutionally infirm.

When this Court has a choice between two constructions, one that is plainly constitutional and another that "raise[s] serious constitutional problems," it chooses the former. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Due process demands that criminal statutes "'define'" their respective offenses "'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United States*, 561 U.S. 358, 402–403 (2010) (alterations omitted).

In practice, courts applying the force clause look to "real world conduct," *Villanueva v. United States*, 893 F.3d 123, 137 (2d Cir. 2018)

(Pooler, J., dissenting), and ask whether the "least culpable conduct" punished by the offense satisfies the ACCA, *e.g.*, *United States v. Burris*, 920 F.3d 942, 947 (5th Cir. 2019); *Villanueva*, 893 F.3d at 128; *United States v. Verwiebe*, 874 F.3d 258, 260 (6th Cir. 2017). That inquiry, however, "is not an invitation to apply 'legal imagination' to the state offense." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

In *Báez–Martínez*, the First Circuit — as courts did with the residual clause before *Johnson* — waded into a minefield of legal imaginings to examine "how much risk" was entailed in second-degree murder's extreme recklessness. *Báez–Martínez*, 950 F.3d at 125–30. The First and Fourth Circuits, along with the Ninth Circuit's dissent in *Begay* purport to apply "common sense" to their statutory interpretations to avoid absurd results. *See id.* at 127–28; *In re Irby*, 858 F.3d at 237 ("Common sense dictates that murder is categorically a crime of violence under the force clause."). In *Begay*, the dissent protested: "MURDER in the second-degree is NOT a crime of violence??? Yet attempted first-degree murder, battery, assault, exhibiting a firearm, criminal threats (even attempted criminal threats), and mailing threatening communications are crimes of violence. How can this be? "I feel like I am

taking crazy pills." *Begay*, 934 F.3d (Smith, J. dissenting) (citation omitted).

The dissent's consternation in *Begay* does not reflect an absence of common sense in the majority but rather the impossibility of determining whether recklessly — or extremely recklessly — causing injury to another person categorically requires the use of force; this determination is just as impossible as deciding how risky conduct might be in the "ordinary" case of a crime. *Johnson*, 135 S. Ct. at 2557.

Rather than confront the indeterminacy of weighing out the risk of deferent levels of reckless, the legally correct determination is to reject application of the force clause to any offense that does not require "intent or knowledge." That is the plain meaning of the force clause.

IV. The Case presents an issue of national importance.

The circuit split regarding both reckless mens rea and "extremely reckless" mens rea generates an inconsistent application of the ACCA, and thus arbitrary application of the 15-year mandatory minimum. An individual with a prior conviction for second-degree murder would get a minimum sentence of fifteen years — and up to life imprisonment — if he was unlucky enough to be indicted in the First or Fourth Circuits, yet,

that same individual would not be subject to the ACCA sentencing range if he were convicted in the Ninth Circuit. This arbitrary application of substantially different statutory ranges is not tolerable, and violates due process.

V. This case provides an ideal vehicle for answering the question of whether extreme recklessness suffices under the force clause.

This case and the decision below offer an ideal vehicle for deciding which mental state is necessary to satisfy the force clause of the ACCA. There are no tangential or preliminary questions here that could get in the way of review. The facts are undisputed. No jurisdictional issues are implicated. The question presented comes before the Court on direct rather than collateral review. The case involves the ACCA, not the Sentencing Guidelines. And, in holding that offenses that can be committed with extreme recklessness fall within the scope of the force clause, the First Circuit expressly recognized that its decision was in direct conflict with a decision rendered by the Ninth Circuit. *See Báez–Martínez*, 950 F.3d at 128.

VI. If this Court does not grant certiorari, it should hold this case behind *Borden*.

The Ninth Circuit, recognizing the potential impact of *Borden*, has stayed proceedings pending this Court's decision. *Begay*, 934 F.3d 1033, reh'g held in abeyance, 2019 WL 7900329 (9th Cir. 2019). Similarly, if the Court is disinclined to grant certiorari here, this case should be held pending the decision in *Borden* given the overlapping issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted.

In San Juan, Puerto Rico, this 10th day of July, 2020.

ERIC A. VOS
Federal Public Defender
District of Puerto Rico

_____
Franco L. Pérez-Redondo
Assistant Federal Public Defender
Attorney of Record

_____
Kevin E. Lerman
Research & Writing Attorney

Federal Public Defender's Office
District of Puerto Rico
241 F.D. Roosevelt Ave.
San Juan, PR 00918
787-281-4922
Franco_Perez@fd.org

Attorneys for Petitioner