No. 20-5075

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

PETITION FOR REHEARING UNDER SUPREME COURT RULE 44.2

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Pursuant to Supreme Court Rule 44.2, Petitioner Jorge H. Báez–Martínez ("Mr. Báez"), respectfully petitions for rehearing of this Court's June 21, 2021 order denying his petition for a writ of certiorari.

REASONS FOR GRANTING REHEARING

Supreme Court Rule 44.2 allows petitioners to file a petition for rehearing from the denial of a petition for certiorari on the basis of "intervening circumstances of a substantial or controlling effect or . . . other substantial grounds not previously presented." S. Ct. R. 44.2. The intervening development in this case is the recognition by other courts of the analytical impact of this Court's decision in *Borden v. United States*, 141 S. Ct. 1817 (2021), on cases involving extreme recklessness offenses.

This Court's June 10, 2021 decision in *Borden* held that an offense committable with a mens rea of ordinary recklessness cannot satisfy the elements clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).

Both Mr. Báez and the Solicitor General anticipated the *Borden* case might impact the viability of the First Circuit's decision below that extreme recklessness suffices under the same elements clause. As the Solicitor General put it: "[I]f this Court were to hold that 'a crime encompassing ordinary recklessness' cannot satisfy the ACCA's elements clause, the possible inclusion of reasoning 'broad enough to eliminate all forms of recklessness as sufficient' would implicate the court of appeals' resolution of this case." Mem. for the United States 2–3 (citation omitted). Of course, the Solicitor General was in good company: its view was taken directly from the First Circuit's

opinion below. *See* Pet. App. A7 n.5. Both parties — and the First Circuit — were correct.

While *Borden* cautions that its holding does not, on its own, extend to reckless homicide, its reasoning is quite broad. From the viewpoint of the plurality and the dissent, the Court's understanding of recklessness as excluded from the ACCA leaves no daylight between recklessness as understood by the First Circuit's review of the mental state and that needed for Mr. Báez's Puerto Rico Second Degree Murder conviction.

The reasoning of *Borden* must be applied to Mr. Báez's petition just as it is being applied in the Ninth Circuit. While this Court remanded dozens of ordinary recklessness petitions that were redundant to *Borden*, its denial here, if upheld, will disparately impact Mr. Báez as compared to similarly situated ACCA-sentenced defendants around the United States. Though the Ninth Circuit has now opened the door to briefing in at least two cases, the Court's denial of certiorari in this case has unfairly shut the door on further review. In other words, the ongoing review in the Ninth Circuit of this same issue underscores the need for the Court to act to preserve the uniformity of federal law and clarify its own precedent in *Borden* and the line of categorical approach cases preceding it.

In light of the natural analytical extension of *Borden* to Mr. Báez's case, and the ongoing briefing in

similar cases, the Court should grant plenary review to consider whether reckless homicide qualifies as an ACCA predicates. Alternatively, the Court should grant certiorari, summarily vacate the First Circuit's opinion, and remand for consideration in light of *Borden* for proceedings equivalent to those in similar matters throughout the country.

A. The *Borden* holding may not, on its own terms, control reckless homicide cases, but its reasoning, as the parties predicted, directly impacts the First Circuit's holding on Puerto Rico Second Degree Murder.

In *Borden*, the Court held that the phrase "the use, attempted use, or threatened use of physical force against the person of another" in 18 U.S.C. § 924(e)((2)(B)(i) does not encompass reckless conduct. *Id.* 1834; *see also id.* at 1834–37 (Thomas, J., concurring).

Borden may not have come out to say whether force against the person of another encompasses extreme recklessness, *id.* at 1825 n.4, but the rationale of the plurality and concurring opinions compels that conclusion.

The four-Justice plurality held that "[t]he 'against' phrase indeed sets out a mens rea requirement — of purposeful or knowing conduct." *Id.* at 1828. The mental state at issue in Mr. Báez's case does not require "any deliberate intent," *People v. Colón Soto*,

109 D.P.R. 545, 9 P.R. Offic. Trans. 722, 729 (1980) (citation omitted), just an act that leads to a "result [that], though unwanted, has been foreseen or could have been foreseen by the person as a natural or probable consequence of his act or omission." *Id.* (quoting P.R. Laws Ann. tit. 33, § 3062 (1974)). The First Circuit decision comes down to a conclusion that the more extreme recklessness sufficient for second-degree murder makes it fairer to say a defendant "actively employed force (*i.e.*, 'used' force) 'against the person of another.'" Pet. App. A-9. But the *Borden* plurality emphasized that the "against" phrase of the ACCA "excludes conduct, like recklessness, that is not directed or targeted at another." *Borden*, 141 S. Ct. at 1833. In so doing, the *Borden* decision leaves no room for the First Circuit's extreme recklessness carveout.

For all the *Borden* dissent's forty-two separate reference to "reckless homicide," warning of a broader impact, the plurality joined with Justice Thomas's concurrence in a holding that some more knowledgeable, more intentional mental state was required to meet the ACCA's elements clause. Arguably, Justice Thomas espoused an even more limiting view of mental states, resting his analysis on the phrase "use of physical force," which, he said, "has a well-understood meaning applying *only to* intentional acts designed to cause harm." *Borden*, 141 S. Ct. at 1835. (Thomas, J., concurring) (citation omitted) (emphasis added). An action taken with even an extreme dis-

regard for human life — such as attempting to knock someone's hat off their head with a gunshot, *see Colón Soto*, P.R. Offic. Trans. at 724–25, or firing a gun in a crowded room, *see id.* at 729 (citation omitted); *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019) — is not an action that is *designed* to cause harm.

B. New developments in the Ninth Circuit since *Borden* justify reconsideration of this Court's order denying certiorari.

Following the *Borden* decision, the Court granted writs of certiorari in numerous cases, vacating appellate judgments and remanding the cases to courts of appeals for further consideration in light of *Borden*. *See, e.g.*, Order, 594 U.S. --- (U.S. June 21, 2021). All these cases appear to involve ordinary recklessness. Despite the parties' shared view that *Borden* also stood to impact extreme recklessness, and *Borden*'s repeated discussions of reckless homicide both by name and in hypothetical circumstances, the Court denied certiorari summarily in the same order.

Since the *Borden* decision, the Ninth Circuit has asked for supplemental briefing to address the impact of the Court's decision in *Borden*. *See United States v. Burns*, No. 18-10084, Order (9th Cir. June 15, 2021). The Ninth Circuit's decision in *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019), similarly remains in flux. In *Begay*, the Ninth Circuit held that federal second-degree murder was *not* a crime of violence

under 18 U.S.C. § 924(c)(3)'s elements clause, a clause remarkably similar to the ACCA. *Id.* at 1038–41.

Like *Borden*, the *Begay* opinion was fractured, containing a strongly worded dissent questioning how a crime resulting in death could be considered legally to no involve force against the person of another: "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.'" 934 F.3d at 1042 (Smith, J., dissenting in part). The *Begay* dissent strikes a similar chord as the *Borden* dissent and the First Circuit here. In its analysis, the First Circuit included a plea to common sense as the final reason it did not follow the Ninth Circuit's lead in *Begay*. Pet. App. A-9.

In a sense, the dissents in *Begay* and *Borden* illustrate an ongoing tension between the robustly developed analytical orthodoxy this Court has used when applying the categorical approach and the common-sense analysis judges regret cannot be used under this Court's precedent. These were the same laments pronounced in a 2013 concurrence in the Seventh Circuit, arguing that a test requiring the court to hold that petitioner's battery conviction was not a crime of domestic violence was "divorced from common sense." *Flores v. Ashcroft*, 350 F.3d 666, 672-73 (7th Cir. 2003) (Evans, J., concurring). A

similar Fifth Circuit concurring opinion decried the "nonsensical results" that came from applying *Taylor*'s strict categorical approach. *United States v. Martínez–Cortez*, 988 F.2d 1408, 1418 (5th Cir. 1993) (Jolly, J., concurring); *Taylor v. United States*, 495 U.S. 575 (1990).

Nevertheless, the *Borden* dissent, the *Begay* dissent, *and the First Circuit's opinion below*, conflict with the Court's categorical approach. Analytically, the two dissents strongly resemble the First Circuit's opinion. It raises grave concerns to simply terminate review of the First Circuit position while the Ninth Circuit's *Begay* decision came out the other way and that circuit continues assessing the majority opinion's impact, if any, there. And this is to say nothing of the long-standing Fifth Circuit decision that Florida second-degree murder is not a qualifying offense under the similarly worded (but now deleted) U.S.S.G. § 2L1.2 "crime of violence" elements clause. *United States v. Hernández–Montes*, 831 F.3d 284, 294 (5th Cir. 2016).

In sum, when Mr. Báez sought certiorari there was already a mature circuit split with the First and Fourth Circuit adopting reasoning akin to the *Borden* dissent and the Ninth Circuit adopting reasoning that harmonized with the *Borden* majority. In light of the Ninth Circuit's actions following *Borden*, this Court should exercise its discretion under Rule 10 since these decisions both illustrate a split in authority, S. Ct. R. 10(a), and the First Circuit's decision now

amounts to a resolution of "an important federal question in a way that conflicts with" *Borden*, a "relevant decision[ ] of this Court," S. Ct. R. 10(c).

At a bare minimum, given the ongoing post-*Borden* litigation in *Begay* and *Burns* over *Borden*'s impact on second-degree-murder offenses, if the Court denies plenary review, it should grant this petition for rehearing, summarily grant Mr. Báez's certiorari petition, vacate the judgment below, and remand for further consideration in light of *Borden* so that the case is afforded the same consideration as the Ninth Circuit is now affording *Begay* and *Burns*.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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