No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALFONSO LOPEZ-RODRIGUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute has as an element the use of physical force against the person or property of another, for purposes of 18 U.S.C. § 16(a), when a conviction under that statute can be based on a reckless mental state.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

DIRECTLY RELATED PROCEEDINGS

- *United States v. Lopez-Rodriguez*, No. 19-cr-897, U.S. District Court for the Southern District of Texas. Judgement entered February 21, 2020.
- *United States v. Lopez-Rodriguez*, No. 20-40097, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 18, 2020.

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PRAYER

Petitioner Alfonso Lopez-Rodriguez prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit. Alternatively, this Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Lopez-Rodriguez's case, reported at 817 Fed. Appx. 18, is attached to this petition as an Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit issued its opinion on August 18, 2020. *See* Appendix. This petition is filed within 150 days after the entry of judgment. *See* Sup. Ct. Order of Mar. 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to any alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence[;] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

* * * *

8 U.S.C. § 1101(a)(43)(F)

The term "aggravated felony" means--

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

* * * *

18 U.S.C. § 16

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other 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.

* * *

Tex. Penal Code § 29.02(a). Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear

of imminent bodily injury or death.

* * *

Tex. Penal Code § 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

(c) In this section, "disabled person" means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

STATEMENT OF THE CASE

I. Statutory framework

A person who is convicted of the crime of illegal reentry, that is, of being found unlawfully present in the United States after a previous deportation, faces up to two years in prison. 8 U.S.C. § 1326(a). The maximum penalty increases to 10 years if the person has pre-deportation felony conviction. 8 U.S.C. § 1326(b)(1). If the person has a pre-deportation conviction for an "aggravated felony," however, he or she is subject to a maximum term of 20 years in prison. 8 U.S.C. § 1326(b)(2).

The term "aggravated felony" is defined to include, among other things, "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense" for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16 of Title 18, in turn, defines crime of violence as:

> (a) an offense that that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other 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. § 16. Since § 16(b), the "residual clause," is void for vagueness, *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1213-15 (2018), that leaves only § 16(a), the "force clause," for analyzing whether a prior conviction qualifies as a "crime of violence" and thus an "aggravated felony."

Like § 16, the Armed Career Criminal Act ("ACCA") has a force clause. *See* 18

U.S.C. § 924(e)(1)(B)(i). Under ACCA, a person who commits the offense of unlawful possession of a firearm or ammunition after three convictions for a "violent felony" faces a mandatory minimum sentence of 15 years in prison. 18 U.S.C. § 924(e)(1). ACCA defines "violent felony" to include (in relevant part) "any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(1)(B)(i). The only difference between the two force clauses is that § 16 encompasses force against another person as well as property, while ACCA covers force against another person only. Because the force clauses are nearly identical, courts typically treat the two clauses as interchangeable. *See, e.g.*, *United States v. Ramos*, 744 Fed. Appx. 215, 217 (5th Cir. 2018) (unpublished); *United States v. Holston*, 471 Fed. Appx. 308, 308 (5th Cir. 2012) (unpublished).

Interpreting the applicability of these force clauses requires courts to employ the categorical approach. *See, e.g., Taylor v. United States*, 495 U.S. 575 (1990). Under that approach, courts examine whether the elements in the statute of the prior conviction meet the requirements of the force clause, without regard to the underlying facts, or means, that are "extraneous to the crime's legal requirements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). To determine whether a statute contains elements or means, courts must decide whether the statute's alternatives are indivisible because they create a single crime that can be committed in various ways or whether the alternatives are divisible because they define separate crimes. *See, e.g.*, *id.* at 2250-57. If the statute's alternatives are elements, the modified categorical approach permits courts to examine only "a limited class

of documents (for example, the indictment, jury instructions, or plea agreement and colloquy)" to determine which offense the defendant committed. *Id.* at 2248.

In Texas, a person commits aggravated robbery "if he commits robbery as defined in [Tex. Penal Code] Section 29.02" and he:

> (1) causes serious bodily injury to another;
>
> (2) uses or exhibits a deadly weapon; or
>
> (3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:
>
> (A) 65 years of age or older; or
>
> (B) a disabled person.

Tex. Panel Code § 29.03(a). A simple robbery under Tex. Penal Code § 29.02 is committed if a person, "in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property,"

> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code § 29.02(a).

Although the Fifth Circuit held in *United States v. Lerma*, 877 F.3d 628, 633-44 (5th Cir. 2017), that the Texas aggravated robbery statute is divisible into elements, there are no documents in the record that permit narrowing Mr. Lopez-Rodriguez's conviction to a particular form of aggravated robbery. The only document in the record is the state court judgment of conviction. But that document simply lists first-degree aggravated robbery as the degree and offense of conviction, and all types of Texas aggravated robbery

are first-degree felonies. *See* Tex. Penal Code § 29.03(b). Therefore, the judgment does not rule out that the robbery underlying Mr. Lopez-Rodriguez's aggravated robbery conviction is robbery by recklessly causing bodily injury to another, in violation of Tex. Penal Code § 29.01(a)(1). This means that, under the categorical approach, the least culpable act encompassed in Mr. Lopez-Rodriguez's aggravated robbery conviction necessarily has as an element the *mens rea* of recklessness. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017).

II. Factual background

On October 1, 2019, Petitioner Alfonso Lopez-Rodriguez was charged by indictment with being found in the United States without the consent of the Attorney General or Secretary of the Department of Homeland Security after previously having been deported following an aggravated felony conviction, in violation of 8 U.S.C. § 1326(a) and (b)(2). On November 13, 2019, he pleaded guilty to the indictment. At the rearraignment, the prosecutor proffered the following factual basis:

> On September 5th of 2019, the Defendant, Alfonso Lopez-Rodriguez was found in the United States in Cameron County, Texas by Border Patrol Agents. It was determined that he was an alien and citizen of Mexico who had entered the United States illegally. The Defendant had been previously deported or removed from the United States on April 20th of 2017, after having been convicted of the aggravated felony of aggravated robbery on March 20, 2012. The Defendant had not received consent from the Attorney General or Secretary of Homeland Security to reapply for admission in the United States when found.

The district court held a sentencing hearing on February 5, 2020, and sentenced Mr. Lopez-Rodriguez to 57 months in the custody of the Bureau of Prisons, with no

supervised release to follow. The written judgment entered by the district court on February 21, 2020, states that Mr. Lopez-Rodriguez was convicted under "8 U.S.C. §§ 1326(a) and (b)(2)."

Mr. Lopez-Rodriguez filed a timely notice of appeal on February 21, 2020. On appeal, he argued that the district court committed reversible plain error when it convicted, sentenced, and entered judgment against him under 8 U.S.C. § 1326(b)(2), because a conviction for Texas aggravated robbery does not qualify as an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43). Mr. Lopez-Rodriguez argued that Texas aggravated robbery is not a "crime of violence"-type of "aggravated felony" because a conviction for that offense can be sustained based on a *mens rea* of recklessness. And, no documents in the record permitted the narrowing of his conviction to eliminate the recklessness form of Texas aggravated robbery. The Fifth Circuit granted the government's unopposed motion for summary affirmance, agreeing that the only issue on appeal was foreclosed by circuit precedent. *See* Appendix.

Mr. Lopez-Rodriguez now seeks to have this Court settle the circuit split on whether a statute with a reckless mental state has as an element the use of physical force against the person of another.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

Whether a reckless offense has as an element the use of physical force against another person is a question on which the circuits have acknowledged that they are divided, and this Court's intervention is therefore necessary to resolve this important and recurring question of federal sentencing and immigration law. Alternatively, this Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

A. This Court's intervention is necessary to resolve an important and recurring question of federal sentencing and immigration law that has divided the circuits.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court considered whether a prior conviction for driving under the influence of alcohol and causing serious bodily injury qualified as a "crime of violence" under 18 U.S.C. § 16's force clause. The unanimous Court said "no," reasoning that "negligent or merely accidental conduct" does not satisfy "the critical aspect" and "key phrase" of the force clause: the "use . . . of physical force *against the person or property of another*." *Leocal*, 543 U.S. at 9 (emphasis in original). In doing so, the Court emphasized that, "when interpreting a statute that features as elastic a word as 'use,' [the Court] construe[s] language in its context and in light of the terms surrounding it." *Id.* And in the context of § 16, with its phrase "against the person of another," the Court found that "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Id.* at 11. Context was very important to the Court's decision: "[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.*; *see also Curtis Johnson v. United States*, 559 U.S.

133, 140-41 (2010) (contrasting "the context of a statutory definition of '*violent* felony'" with "a meaning derived from a common-law *misdemeanor*") (emphasis in original).

The Court in *Leocal* did not decide whether a reckless offense qualifies as a crime of violence. *Id.* at 13. But after *Leocal*, the circuit courts uniformly held that reckless offenses, like negligent or strict liability offenses, did not satisfy § 16 either. *See United States v. Fish*, 758 F.3d 1, 10 & n.4 (1st Cir. 2014) (collecting cases); *see also United States v. Orona*, 923 F.3d 1197, 1200, 1202 (9th Cir.) (explaining how the Ninth Circuit, after *Leocal*, determined *en banc* that a reckless assault did not qualify as a § 16(a) "crime of violence" and thereby "brought the law of [that] circuit in line with that of several of [the court's] sister circuits"), *reh'g en banc granted*, 942 F.3d 1159 (9th Cir. 2019).

Then came this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), which has unsettled that uniformity. *Voisine* concerned 18 U.S.C. § 922(g)(9), a statute that prohibits a person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. The phrase "misdemeanor crime of domestic violence" is further defined as an offense involving a domestic relationship that "has, as an element, the use of physical force," and the Court held that the statute includes reckless domestic assaults. *Voisine*, 136 S. Ct. at 2278. The Court acknowledged *Leocal*, but found nothing in that opinion suggesting "that 'use' marks a dividing line between reckless and knowing conduct." *Id.* at 2279. However, the Court expressly noted that its decision in *Voisine* involving "misdemeanor crimes of domestic violence" did not resolve whether a "crime of violence" under § 16 encompasses reckless conduct and further acknowledged that "[c]ourts have sometimes given those two statutory definitions divergent readings in light

of differences in their contexts and purposes." *Voisine*, 136 S. Ct. at 2280 n.4.

Since *Voisine*, the circuit courts have diverged on whether a reckless offense qualifies as either a "crime of violence" under § 16 or the United States Sentencing Guidelines or a "violent felony" under the Armed Career Criminal Act ("ACCA"). The First Circuit has held that reckless offenses do not qualify as either a "crime of violence" or a "violent felony." In *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017), the court found that a prior conviction for Massachusetts assault and battery with a dangerous weapon did not qualify as a "violent felony" under ACCA due to that statute's reckless mental state. The First Circuit reasoned that, although the Massachusetts statute required "that the wanton or reckless act be committed intentionally," the statute "does not require that the defendant intend to cause injury" or "be aware of the risk of serious injury that any reasonable person would perceive." *Id.* at 39. The First Circuit specifically pointed to cases where a conviction under the Massachusetts statute involved "reckless driving that results in a non-trifling injury." *Id.* at 38. Similarly, in *United States v. Rose*, 896 F.3d 104 (1st Cir. 2018), the First Circuit held that a prior conviction for Rhode Island assault with a dangerous weapon was not a "violent felony" under ACCA because that statute required "a mental state of only recklessness." *Rose*, 896 F.3d at 114.

Both *Windley* and *Rose* relied heavily on the First Circuit's opinion in *Bennett v. United States*, 868 F.3d 1, 9 (1st Cir.), *opinion withdrawn and vacated*, 870 F.3d 34 (1st Cir. 2017). That opinion was withdrawn and vacated due to the petitioner's death, but before that happened, the court in *Windley* "endorse[d] and adopt[ed] [*Bennett*'s] reasoning as its own." *Windley*, 864 F.3d at 37 n.2. In *Bennett*, a panel including Justice Souter

carefully examined this Court's opinion in *Leocal*, recognizing that both ACCA and § 16 contain "a follow-on 'against' phrase" to which "*Leocal* gave significant weight . . . in concluding that Florida's driving-under-the-influence offense was not a 'crime of violence' under § 16." *Bennett*, 868 F.3d at 9-10. The *Bennett* opinion further evaluated the potential impact of *Voisine* on the recklessness question, acknowledging the division among the circuits after *Voisine*. *Bennett*, 868 F.3d at 15-16. Ultimately, the *Bennett* opinion determined that ACCA's context, with the "against" phrase, "arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury in committing an aggravated assault" and that it is unclear whether it would be "natural to say that a person who chooses to drive in an intoxicated state uses force 'against' the person injured in the resulting, but unintended, car crash." *Id.* at 18. Given that uncertainty, the *Bennett* opinion invoked the rule of lenity to hold that Maine aggravated assault, which encompasses drunk driving through its reckless mental state variant, does not have as an element the use of force against another person. *Id.* at 22-24.

A panel of the Fourth Circuit has agreed with the First Circuit's approach to reckless offenses. In *United States v. Middleton*, 883 F.3d 485, 487 (4th Cir. 2018), Judge Gregory authored a majority opinion holding that a conviction for South Carolina involuntary manslaughter did not qualify as a violent felony under ACCA because that statute covered the illegal sale of alcohol to a minor that resulted in a drunk driver's death. *Id.* at 489-93. Judge Floyd authored a separate opinion concurring in part and concurring in the judgment, with Judge Harris joining Parts II.A and B. Those two subparts concluded that "South

Carolina involuntary manslaughter sweeps more broadly than the ACCA because an individual can be convicted of this offense based on reckless conduct, whereas the ACCA force clause requires a higher degree of *mens rea*." *Id.* at 497 (concurring opinion). Drawing on the First Circuit's *Bennett* and *Windley* opinions, Judge Floyd and Judge Harris emphasized the phrase "against the person of another" as the critical feature distinguishing ACCA from the statute involving misdemeanor crimes of domestic violence in *Voisine*. *Middleton*, 883 F.3d at 498-99 (concurring opinion).

Although the Eighth Circuit has held, after *Voisine*, that some reckless offenses have the use of force against another,[1] the Eighth Circuit has squarely held that an offense that can be committed by reckless driving does not have the requisite force element. In *United States v. Fields*, 863 F.3d 1012, 1013 (8th Cir.), *reh'g denied* (8th Cir. 2017), the Eighth Circuit evaluated whether a prior conviction for Missouri second-degree assault was categorically a "crime of violence" for purposes of applying a sentencing enhancement under the United States Sentencing Guidelines. The Missouri statute defined the offense at issue as "recklessly caus[ing] serious physical injury to another person." *Fields*, 863 F.3d at 1014 (brackets in original omitted). The Eighth Circuit held that, because the Missouri statute encompassed reckless driving resulting in injury, it did not qualify as a "crime of violence." *Id.*

The Eighth Circuit in *Fields* reaffirmed its pre-*Voisine* decision in *United States v.*

[1] *See, e.g., United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (holding that reckless discharge of a firearm qualifies as a violent felony under ACCA).

Ossana, 638 F.3d 895 (8th Cir. 2011). In *Ossana*, the Eighth Circuit relied on this Court's decision in *Begay v. United States*, 553 U.S. 137 (2008),[2] which "distinguished crimes that show a mere 'callousness toward risk' from crimes that 'also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.'" *Ossana*, 638 F.3d at 902 (quoting *Begay*, 553 U.S. at 146). More specifically, *Begay* pointed to reckless polluting and reckless tampering with consumer products as "crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" *Ossana*, 638 F.3d at 903 (quoting *Begay*, 553 U.S. at 146). Without "any meaningful distinction between" reckless tampering with consumer products and assault statutes "encompassing reckless driving that results in an injury," the Eighth Circuit applied *Begay* to find that reckless driving was not a crime of violence. *Ossana*, 638 F.3d at 903. Although the government sought rehearing of the Eighth Circuit's decision in *Fields* to reaffirm *Ossana* after *Voisine*, the court denied the petition. *See Fields*, 863 F.3d at 1012 n.*.

Similar to the Eighth Circuit, but on a broader scale, a panel of the Ninth Circuit, before the rehearing *en banc* was granted, re-affirmed its pre-*Voisine*, *en banc* decision that a reckless assault does not qualify as a crime of violence under § 16(a). *See Orona*, 923 F.3d at 1202-03. After *Leocal*, the *en banc* Ninth Circuit revisited (and expressly overruled) its precedent that a crime of violence included reckless offenses. *See Orona*, 923 F.3d at

[2] *Begay* primarily concerned the residual clause and was abrogated in that respect when the residual clause was later held to be void for vagueness. *See Samuel Johnson v. United States*, 576 U.S. 591 (2015). But if a crime does not even create the serious potential *risk* of physical injury necessary to satisfy the residual clause, it clearly does not have the use of force *as an element*.

1200-01 (discussing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*)). In its *en banc* decision in *Fernandez-Ruiz*, the Ninth Circuit had "relied on 'the bedrock principle of *Leocal* . . . that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another." *Orona*, 923 F.3d at 1201 (quoting *Fernandez-Ruiz*, 466 F.3d at 1132). In *Orona*, the Ninth Circuit panel examined *Voisine* in detail but concluded that *Voisine* did not "wholly undercut the theory or reasoning of *Fernandez-Ruiz*" because the Ninth Circuit remained persuaded, even after *Voisine*, that "'running a stop sign solely by reason of voluntary intoxication and causing physical injury to another'—similar to the conduct at issue in *Leocal*, could not 'in the ordinary sense be called active or violent.'" *Orona*, 923 F.3d at 1203 (quoting *Fernandez-Ruiz*, 466 F.3d at 1130). The Ninth Circuit panel acknowledged the First Circuit's similar conclusion in *Rose* as well as the opposing views of other circuits. *See Orona*, 923 F.3d at 1202-03.

Four circuits have reached the opposite conclusion. The D.C. Circuit in *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019), held that the defendant's argument that D.C. assault with a dangerous weapon was not a violent felony because it included a mental state of reckless "contravenes" *Voisine*. *Haight*, 892 F.3d at 1281. The court expressed the view that "[t]he statutory provision at issue in *Voisine* contains language nearly identical to ACCA's violent felony provision." *Haight*, 892 F.3d at 1280. Unlike the First Circuit, the D.C. Circuit was unpersuaded that the differentiating phrase "against the person of another" carried significance. *See id.* at 1281. The D.C. Circuit expressly recognized the First Circuit's conclusion on reckless offenses in *Windley*

but disagreed with that decision. *Haight*, 892 F.3d at 1281. The Fifth, Sixth, and Tenth Circuits have likewise extended *Voisine* to the "crime of violence" or "violent felony" contexts. *See, e.g.*, *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Mann*, 899 F.3d 898, 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2637 (2019). A three-judge panel of the Sixth Circuit, however, explained that they would have held that merely reckless conduct is not the use of force against another person, had they been writing on a clean slate and not been bound by circuit precedent. *United States v. Harper*, 875 F.3d 329, 330-32 (6th Cir. 2017), *cert. denied*, 139 S. Ct. 53 (2018). Like some other circuits, the Sixth Circuit panel was persuaded that "against the person of another" is "a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy" the force clause. *Id.* at 331.

As the above discussion demonstrates, a number of circuits have weighed in on the question presented in thoughtful and comprehensive opinions with express consideration of contrary opinions. The division among the circuits is therefore unlikely to be resolved on its own, and further percolation among the circuit courts is not necessary. Through *Bennett*, *Windley*, and *Rose*, a majority of First Circuit judges in regular active service have authored or joined opinions concluding, after extensive analysis, that reckless offenses are excluded from qualifying under § 16 and ACCA's force clauses, and so it is highly unlikely that the First Circuit will change its mind. The D.C. Circuit recognized the First Circuit's work on this subject but still reached the opposite conclusion. *Haight*, 892 F.3d at 1281. The Eighth Circuit had the opportunity to revisit its opinion on reckless driving, but

declined to do so. *See Fields*, 863 F.3d at 1012 n.*. And the Fifth Circuit has denied at least one petition for rehearing *en banc* raising the recklessness issue. *See* Order, *United States v. Gomez Gomez*, No. 17-20526 (5th Cir. Apr. 23, 2019). It will therefore remain the situation, until this Court decides the issue, that whether a person's prior conviction qualifies as having the use of force against another—and the serious consequences flowing from that designation—will depend on the happenstance of geography.

Whether a prior conviction qualifies as a "crime of violence" under 18 U.S.C. § 16 or a "violent felony" under ACCA is a question with enormous consequences. Years of imprisonment turn on the answer. The penalties faced by a person convicted of being a felon in possession of a firearm increase dramatically under ACCA if that person has three previous convictions for a violent felony. The mandatory minimum prison sentence skyrockets from zero to 15 years. *Compare* § 924(a)(2), *with* § 924(e)(1). The maximum prison sentence escalates from 10 years to life. *Compare* § 924(a)(2), with § 924(e)(1).

The force clause appears in a variety of other criminal statutes as well. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A), 924(c)(1)(C), 924(c)(1)(D)(3)(A) (firearms offenses); 18 U.S.C. § 1959(a) (RICO); 18 U.S.C. § 3142(f)(1)(A) (bail); 18 U.S.C. § 3553(f)(1)(C), (g) (eff. Dec. 21, 2018) (eligibility for "safety valve" relief from mandatory minimum drug sentences).

And, the interpretation of the force clause carries severe immigration consequences. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering an alien deportable for committing a crime of violence); *id.* § 1229b(a)(3) (rendering an alien ineligible for cancellation of removal). Indeed, "a conviction under [8 U.S.C.] § 1326(b)(2)—involving a prior conviction of an

aggravated felony—is itself an aggravated felony, 'rendering [the defendant] permanently inadmissible to the United States.'" *United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017) (quoting *United States v. Briceno*, 681 Fed. Appx. 334, 337 (5th Cir. 2017) (unpublished)) (brackets added in *Ovalle-Garcia*).

Given the high stakes and widespread use of force clauses in federal criminal and immigration law, the issue raised in this case is worthy of the Court's attention. Accordingly, the Court should grant Mr. Lopez-Rodriguez's petition for certiorari to resolve the entrenched circuit conflict over the important question of whether a reckless offense has as an element the use of force against another person and thus qualifies as a "crime of violence" or "violent felony." *See* Sup. Ct. R. 10(c).

B. Alternatively, this Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

Petitioner alternatively requests that the Court hold his petition until it decides *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate. In *Borden*, the Court has granted the petition of certiorari as to Question 1, which is whether the "use of force" clause in the ACCA encompasses crimes with a *mens rea* of mere recklessness. Although *Borden* involves the force clause in ACCA, as noted previously, the only difference between that force clause and the one at issue in petitioner's case is that 18 U.S.C. § 16 includes force against property while ACCA does not. That difference is unlikely to be significant in the context of the recklessness argument. While the recklessness argument in petitioner's case is on plain-error review, that procedural posture presents no obstacle to this Court's review because, if this Court were to agree with

the petitioner in *Borden*, the error would be plain in petitioner's case. *See Henderson v. United States*, 568 U.S. 266, 279 (2013) (holding that "whether a legal question was settled or unsettled at the time of trial, it is enough that an error be plain at the time of appellate consideration" for the second-prong of plain-error review to be satisfied) (internal quotation marks and citation omitted). Accordingly, if the Court does not grant the petition, it should hold the petition for *Borden* and dispose of it as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

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Respectfully submitted,

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