

No. 20-7348

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IN THE SUPREME COURT OF THE UNITED STATES

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ANTHONY RAY YBARRA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner contends (Pet. 25-29) that his prior conviction for felony aggravated battery against a household member, in violation of N.M. Stat. Ann. § 30-3-16(C) (Supp. 1995),<sup>1</sup> does not qualify as a “violent felony” under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), on the theory that such a conviction does not

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<sup>1</sup> Although petitioner appears to proceed (Pet. 3, 11, 26) on the premise that his conviction for New Mexico felony aggravated battery against a household member was under the current version of that statute (compare Pet. 3, 11, 26, with N.M. Stat. Ann. § 30-3-16(C) (2020)), his conviction for New Mexico felony aggravated battery against a household member occurred in 1996, which means that he was convicted under a prior version of the statute, see N.M. Stat. Ann. § 30-3-16(C) (Supp. 1995).

require proof of violent physical force. For the reasons explained on pages 5 to 13 of the government's brief in opposition to the petition for a writ of certiorari in Rodriguez v. United States, No. 17-8881 (July 11, 2018), and pages 18 to 23 of the government's brief in opposition to the petition for a writ of certiorari in Manzanares v. United States, No. 20-5774 (Jan. 6, 2021), petitioner's contentions lack merit and do not warrant this Court's review.<sup>2</sup> This Court recently denied the petition for a writ of certiorari in Rodriguez, No. 17-8881 (Oct. 1, 2018), which presented similar arguments about a prior version of this New Mexico statute, and also recently denied the petition for a writ of certiorari in Manzanares, No. 20-5774 (Feb. 22, 2021), which presented similar arguments about a similar New Mexico statute, felony aggravated battery, N.M. Stat. Ann. § 30-3-5(C) (Supp. 2004). See Pet. 13 n.6 (representing that the felony aggravated battery statute at issue in Manzanares is "nearly identical to the [felony aggravated battery against a household member statute] at issue here"). The same approach is warranted in this case.

2. Petitioner separately contends (Pet. 14-19) that his prior conviction for aggravated assault with a deadly weapon, in violation of N.M. Stat. Ann. § 30-3-2 (2014), does not qualify as a violent felony under the ACCA, because, in petitioner's view, New Mexico permits a conviction for aggravated assault based on a

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<sup>2</sup> We have served petitioner with a copy of the government's briefs in opposition in Rodriguez and Manzanares. Those briefs are also available on the Court's electronic docket.

mens rea of recklessness or no mens rea at all. For the reasons explained on pages 13 to 18 of the government's brief in opposition to the petition for a writ of certiorari in Manzanares, supra (No. 20-5774), petitioner's contentions lack merit and do not warrant this Court's review. This Court recently denied the petition for a writ of certiorari in Manzanares, supra (No. 20-5774), and other petitions presenting similar arguments about this New Mexico statute, see Sanchez v. United States, 139 S. Ct. 2011 (2019) (No. 18-7232); Marquez v. United States, 139 S. Ct. 940 (2019) (No. 18-6097); Silva v. United States, 562 U.S. 1224 (2011) (No. 10-7062), and it should do so again here.

Petitioner notes (Pet. 5, 17) that the Sixth Circuit concluded in United States v. Rede-Mendez, 680 F.3d 552 (2012), that New Mexico aggravated assault with a deadly weapon is not categorically a crime of violence under the ACCA's elements clause. See id. at 558-559. The Sixth Circuit's decision in Rede-Mendez was premised on its interpretation of the elements of New Mexico aggravated assault with a deadly weapon. See ibid. The Sixth Circuit's construction of a single state statute does not present a sound basis for review of any federal-law question in this Court. Indeed, this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of

deferring to regional courts of appeals in matters that involve the construction of state law.”). Petitioner identifies no reason to depart from that settled policy in this case.

Furthermore, although this Court granted review in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020), to address whether crimes committed with a mens rea of recklessness can involve the “use of physical force” under the ACCA’s elements clause, 18 U.S.C. 924(e)(2)(B)(i), there is no reason to hold this petition pending the decision in Borden. As explained on page 18 of the government’s brief in opposition in Manzanares, supra (No. 20-5774), the Tenth Circuit has determined that an individual cannot be convicted of New Mexico aggravated assault with a deadly weapon based on reckless conduct. Accordingly, no need exists to hold the petition because the resolution of the question presented in Borden will not affect the classification of that crime as a violent felony. This Court declined to hold the similar petition in Manzanares pending its decision in Borden, and it should follow the same course here.<sup>3</sup>

Respectfully submitted.

ELIZABETH B. PRELOGAR  
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MAY 2021

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<sup>3</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.