No. 20-7447

IN THE SUPREME COURT OF THE UNITED STATES

ELIJAH HASAN JONES, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioner contends (Pet. 4-6) that his prior conviction for Florida aggravated assault, in violation of Fla. Stat. § 784.021, does not qualify as a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), on the theory that an offense that can be committed with a mens rea of recklessness does not "ha[ve] 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). This Court has granted review in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020), to address whether crimes that can be committed with a mens rea of recklessness can satisfy the definition of "violent felony" under

the ACCA. It would not be appropriate, however, to hold the petition here pending the outcome of Borden, because petitioner would not benefit from a decision in favor of the petitioner in Borden. Even if this Court were to interpret the ACCA's elements clause to exclude offenses that can be committed through the reckless use of force, such a holding would not affect petitioner, both because the court determined that any ACCA error had been invited and because petitioner's aggravated-assault conviction was not for an offense that can be committed with a mens rea of recklessness.

As an initial matter, the court of appeals determined that "[t]he doctrine of invited error prevent[ed] [the court] from considering the arguments" about petitioner's sentence under the ACCA because petitioner had "expressly disclaimed [them] before the district court." Pet. App. 7. The court of appeals found that petitioner's contentions about the ACCA were thus foreclosed altogether, not merely subject to plain-error review. Ibid. In any event, as the court of appeals also observed, it had previously determined in Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds by Johnson v. United States, 576 U.S. 591 (2015), that Florida aggravated assault is a violent felony under the ACCA's elements clause. Pet. App. 8. And in Turner, the Eleventh Circuit relied on the plain language of Florida's assault statutes to

determine that Florida aggravated assault requires proof of intent to threaten to do violence. 709 F.3d at 1338.

Turner observed that, under Florida law, an "assault" is defined as "'an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.'" Id. at 1137-1138 (quoting Fla. Stat. § 784.011 (1981)). And the court explained that, in light of that definition, Florida aggravated assault "will always include as an element the threatened use of physical force against the person of another." Id. at 1138 (citation and ellipsis omitted). Turner therefore had no need to consider, did not address, and does not depend on whether an offense committed with a mens rea of recklessness can satisfy the ACCA's elements clause.

Petitioner does not explain how this Court's decision in Borden could undermine the court of appeals' determination in Turner. At most, he suggests (Pet. 4) that Turner is inconsistent with Florida decisional law. But this Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). This Court has previously declined to hold similar petitions for writs

of certiorari pending its decision in Borden. See Preston v. United States, 141 S. Ct. 661 (2020) (No. 19-8929); Ponder v. United States, 141 S. Ct. 90 (2020) (No. 19-7076); Brooks v. United States, 140 S. Ct. 2743 (2020) (No. 19-7504); Tinker v. United States, 140 S. Ct. 1137 (2020) (No. 19-6618). The same result is warranted here, and the petition for a writ of certiorari should therefore be denied.*

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

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* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.