

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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**Oscar Daniel Rios Benitez,**  
*Petitioner,*

v.

**United States of America,**  
*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether 18 U.S.C. §16(a) includes offenses that may be committed by the reckless infliction of bodily injury?

## **PARTIES TO THE PROCEEDING**

Petitioner is Oscar Daniel Rios Benitez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Oscar Denial Rios Benitez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

The unpublished opinion of the Court of Appeals is reported at *United States v. Rios Benitez*, 832 Fed. Appx. 917 (5th Cir. January 8, 2021)(unpublished). It is reprinted in Appendix A to this Petition. The District Court entered written Judgment and Sentence May 15, 2020, which document is reprinted in Appendix B.

### **JURISDICTION**

The opinion and judgment of the Fifth Circuit were entered on January 8, 2021. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

### **RELEVANT STATUTES**

Section 16 of Title 18 provides:

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.

Section 1101(a)(43) of Title 8 provides in relevant part:

(43) The term “aggravated felony” means--

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(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 at3 least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at3 least one year;

\*\*\*

(U) an attempt or conspiracy to commit an offense described in this paragraph.

Tex. Penal Code §22.01 provides in relevant part:

(a) A person commits an offense if the person:

- (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
- (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
- (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

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(b-3) Notwithstanding Subsection (b)(2), an offense under Subsection (a)(1) is a felony of the second degree if:

- (1) the offense is committed against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code;
- (2) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, or 21.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; and
- (3) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.

## STATEMENT OF THE CASE

### A. District Court Proceedings

Petitioner Oscar Daniel Rios-Benitez pleaded guilty to one count of illegally re-entering the country following removal. A Presentence Report calculated a statutory maximum of 20 years imprisonment, arising from the conclusion that he had sustained an “aggravated felony” prior to the removal named in the indictment. *See* 8 U.S.C. §1326(b)(2). It named five pre-removal convictions: two assaults for which the sentence imposed was less than a year; one misdemeanor conviction for giving false information to a police officer; one attempted theft for which the sentence imposed was less than a year, and, finally, a family violence conviction for which the sentence imposed was more than a year.

At sentencing, the district court adopted the PSR. And it imposed sentence of 18 months, the bottom of the applicable Guideline range. The judgment specified a conviction under 8 U.S.C. §1326(b)(2), the statutory subsection applicable to re-entry defendants who have sustained conviction for an aggravated felony prior to the indicted removal. *See* [Appx. B]; 8 U.S.C. §1326(b)(2).

### B. Proceedings in the Court of Appeals

Petitioner appealed, contending that his assault conviction for which the sentence imposed exceeded a year did not constitute an “aggravated felony” because it could be committed recklessly. He thus contended that it fell outside the scope of 8 U.S.C. §1101(a)(43)(F) and 18 U.S.C. §16(a), the sole arguable bases for an “aggravated felony” designation. He thus requested, *inter alia*, that the Court of

Appeals remand his case so that the District Court could strike the designation 8 U.S.C. §1326(b)(2) from the Judgment.

The Court of Appeals affirmed with the following comments:

As Rios Benitez correctly concedes, his argument is foreclosed. *See [United States v.] Gracia-Cantu*, 920 F.3d [252,] 253–55 [(5<sup>th</sup> Cir. 2019)](holding that assault causing bodily injury under Tex. Penal Code Ann. § 22.01(a)(1) and (b)(2) is a crime of violence under § 16(a)). He raises the issue only to preserve it for future review. Consequently, the Government is “clearly right as a matter of law,” such that “there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

Accordingly, the Government's motion for summary affirmance is GRANTED, and the district court's judgment is AFFIRMED. The Government's alternative motion for an extension of time to file a brief is DENIED AS MOOT.

*United States v. Rios Benitez*, 832 F. App'x 917, 918 (5th Cir. 2021); [Appx. A].

## REASONS FOR GRANTING THE PETITION

**There is a reasonable probability that this Court’s forthcoming decision in *Borden v. United States*, No. 19-5410, \_\_\_U.S.\_\_, 140 S.Ct. 1262 (March 2, 2020)(granting cert.) will reveal error in the sole ground for decision below. This Court should hold the instant Petition pending that decision, and grant certiorari, vacate the judgment below, and remand for reconsideration in the event that the petitioner prevails in that case.**

Section 1326(b)(2) of Title 8 provides for an enhanced statutory maximum when an illegal re-entry defendant has been convicted of an “aggravated felony” prior to the last removal. *See* 8 U.S.C. §1326(b)(2). The court below has held that a judgment finding that a defendant has been previously convicted of an aggravated felony binds all future courts on this question, even if the law changes, and even in civil proceedings. *See United States v. Gamboa-Garcia*, 620 F.3d 546 (5<sup>th</sup> Cir. 2010); *United States v. Piedra-Morales*, 843 F.3d 623 (5<sup>th</sup> Cir. 2016); *United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017). Here, the district court adopted a PSR that found a 20 year statutory maximum, and entered judgment that expressly declared Petitioner guilty under 8 U.S.C. §1326(b)(2). *See* [Appx. B]. This will bind all future courts in the Fifth Circuit, even if the law changes.

The term “aggravated felony” is defined in 8 U.S.C. §1101(a)(43). Of Petitioner’s five pre-removal convictions, only one arguably satisfies this definition. “Crimes of violence” as defined in 18 U.S.C. §16 are “aggravated felonies” but only if the defendant suffers a sentence of at least one year. *See* 8 U.S.C. §1101(a)(43)(F).

Petitioner's first two assault convictions received sentences of less than that. His misdemeanor conviction for giving false information to a police officer does not arguably satisfy any portion of the "aggravated felony" definition. *See* 8 U.S.C. §1101(a)(43). His attempted theft conviction is probably a "theft conviction," but those are "aggravated felonies" only if the defendant receives more than a year's imprisonment, which Petitioner did not. *See* 8 U.S.C. §1101(a)(43)(G).

This leaves Appellant's 2017 family violence conviction, arising under Tex. Penal Code §22.01(b)(2)(B). This Court has held that such offenses constitute "crimes of violence" under 18 U.S.C. §16(a), which include offenses that have as an element the use, attempted use, or threatened use of physical force against the person or property of another. *See Gracia-Cantu*, 920 F.3d at 253-55.

Recently, however, this Court granted certiorari to decide whether the "force clause" in 18 U.S.C. §924(e) encompasses reckless conduct. *See Borden v. United States*, No. 19-5410, \_\_\_U.S.\_\_, 140 S.Ct. 1262 (March 2, 2020)(granting cert.). The "force clause" of 18 U.S.C. §924(e) is identical to that of 18 U.S.C. §16(a). Accordingly, a holding that reckless injury is not necessarily the use of physical force against the person of another would extend to 18 U.S.C. §16(a) and exclude such offenses from the ambit of that position. Because Petitioner's prior statute of conviction may be violated by the reckless infliction of injury, *see* Tex. Penal Code §§22.01(a)(1), (b)(2), a victory for the Petitioner in *Borden* would reveal plain error in the Judgment's reference to 8 U.S.C. 1326(b)(2). In such event, the court below would remand to strike that notation from the judgment. *See United States v. Godoy*, 890 F.3d 531, 542

(5th Cir. 2018); *United States v. Mondragon-Santiago*, 564 F.3d 357, 369 (5th Cir. 2009); *United States v. Quintanilla-Ventura*, 616 Fed.Appx. 189 (5th Cir. 2015); *United States v. Mejia*, 589 Fed.Appx. 296 (5th Cir. 2015)(unpublished); *United States v. Briceno*, 681 Fed.Appx. 334 (5th Cir. 2017)(unpublished).

Where, after an opinion of the court of appeals, but before the finality of the case, an “intervening development … reveals a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation,” this Court will grant certiorari, vacate the judgment below and remand for reconsideration. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). A holding in *Borden* that reckless injury need not be “the use of physical force against the person of another” would meet this standard.

## CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 4th day of June, 2021.

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