

No. 20-8257

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR DANIEL RIOS BENITEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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. 5-7) that his prior conviction for assault of a family member, in violation of Tex. Penal Code Ann. § 22.01(b) (2)(B) (West 2013), does not qualify as an aggravated felony under 8 U.S.C. 1326(b) (2), on the theory that an offense that can be committed with a mens rea of recklessness does not include as an element the "use, attempted use, or threatened use of physical force against the person or property of another" under 18 U.S.C. 16(a). See 8 U.S.C. 1101(a) (43) (F) (defining "aggravated felony" for purposes of Section 1326(b) (2) to include any "crime of violence" as defined in Section 16(a)). In Borden v. United States, 141 S. Ct. 1817 (2021), this Court determined that

Tennessee reckless aggravated assault, in violation of Tenn. Code Ann. § 39-13-102(a)(2), lacks a mens rea element sufficient to satisfy the definition of "violent felony" under a similarly worded provision of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i). Accordingly, the appropriate course is to grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of Borden.*

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

AUGUST 2021

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