No. _____

In the

Supreme Court of the United States

VINCENT JAMES SANCHEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Does *Borden v. United States*, 141 S. Ct. 1817 (2021), mean that the elements clause requires the specific intent to use, attempt to use, or threaten to use force, as the Eleventh, Tenth, and Third Circuits have found, or, as the Ninth Circuit concluded in this case, does *Borden* merely stand for the proposition that reckless crimes are outside the reach of the elements clause?

Statement of Related Proceedings

- *United States v. Vincent James Sanchez.,* 20-50236 (9th Cir. Dec. 6, 2021)
- *United States v. Vincent James Sanchez,* 5:19-cr-00283-RGK-1 (C.D. Cal. Aug. 24, 2020)

Table of Contents

Page(s)

Table of Authorities

Page(s)

Federal Cases

Federal Cases (continued)

State Cases

Table of Authorities

Page(s)

Federal Statutes and Sentencing Guidelines

State Statutes

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Vincent James Sanchez petitions for a writ of certiorari to review the memorandum decision entered by the United States Court of Appeals for the Ninth Circuit affirming the judgment entered below.

Opinions Below

The Ninth Circuit's memorandum disposition affirming the district court judgment was not published. (App. 2a-4a.) The petition for panel rehearing and reheaing en banc was summarily denied on February 24, 2022. (App. 1a.) The district court judgment was entered August 28, 2020, and is not published. (App 9a-14a.)

Jurisdiction

The Ninth Circuit issued its memorandum disposition affirming the judgment on December 16, 2021, and denied a rehearing petition on February 24, 2022. (App. 1, 2a-4a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory and Guideline Provisions Involved

California Penal Code 240 states:

> An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

California Penal Code Section 245(b) states:

> Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years.

U.S.S.G. § 4B1.2 provides the relevant crime of violence definition:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Introduction

Just last term, this Court clarified the mens rea required for offenses that satisfy the elements clause of the federal crime-of-violence definition. The elements clause "demands that the perpetrator direct his action at, or target, another individual." *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021) (plurality opinion). Thus, a crime fails to satisfy the elements clause unless it involves a "deliberate choice of wreaking harm on another." *Id.* at 1830. Reckless conduct is excluded from the elements clause's reach because it is "not aimed in that prescribed manner." *Id.* at 1825. Only where use, attempted use, or threatened use of force is a "conscious object" of the conduct does the elements clause come into play.

Borden brought to the fore an already simmering circuit split about which elements of the offense must have an intent or knowledge requirement. In the crosshairs are statutes that require intentional or knowing conduct, but something less than purpose as to the risk of force occasioned by that conduct. Some courts have recognized that the import of *Borden* is to exclude offenses that lack a specific intent to use force. Others, like the Ninth Circuit, seem to have concluded that *Borden* means only that reckless crimes are excluded from the reach of the elements clause—and thus have found no reason to revisit

caselaw holding that intentional conduct that was negligent or reckless as to the resulting use of force satisfies the elements clause.

Only one of those views is true to the reasoning of *Borden*. By holding that the elements clause requires conduct that has the use of force as its conscious object, this Court has already rejected the reasoning the Ninth Circuit accepted in this case. The Court should stop this misreading of *Borden* in its tracks, before countless more individuals are subjected to unwarranted sentencing enhancements.

This Court should grant certiorari and correct the error.

Statement of the Case

1. On December 9, 2019, Vincent Sanchez appeared before the district court and entered a guilty plea to the charge of being a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g). A presentence investigation report calculated Mr. Sanchez's base offense level as 20. That conclusion was based on the finding that his prior conviction for assault with a semi-automatic rifle under California Penal Code § 245(b) qualified as a crime of violence for purposes of U.S.S.G. § 2K2.1(a)(4)(A). After accounting for acceptance of responsibility, the advisory guideline range as calculated by the probation office was 51 to 63 months.

Mr. Sanchez objected to the PSR's decision to designate his prior assault

conviction as a crime of violence, but the district court adopted the PSR's calculation, and imposed a slightly below guideline sentence of 46 months.

2. During the pendency of appeal, this Court decided *Borden v. United States*, 141 S. Ct. 1817 (2021), the latest in a series of cases refining what it means for an offense to have "as an element, the use, attempted use, or threatened use of physical force against the person of another." *See* 18 U.S.C. § 924(e). Though this "elements clause" definition contains no explicit mens rea requirement, this Court held, in *Leocal*, that the word "use," plus the requirement that the force be employed *against* another person, excluded offenses that could be committed by accident or negligence. *Leocal v. Ashcroft*, 543 U.S. 1, 10–11 (2004). While *Leocal* described what did not satisfy the elements clause, it left some doubt about what mens rea did meet the standard. But *Borden* addressed the question left open in *Leocal*, and more precisely drew the line between those mens rea that satisfy the elements clause and those that don't.

Purpose and knowledge fall on one side of that line. *Borden*, 141 S. Ct. at 1823 (plurality opinion).[1] A person acts purposefully if he "consciously

[1] Though the parenthetical is not repeated in each citation, cites in this brief are to *Borden*'s plurality decision. The United States has conceded that *Borden*'s plurality reasoning was binding. Oral Argument, *United States v. Begay*, 14-10080, at 33:40-34:04, https://www.ca9.uscourts.gov/media/video/?20220124/14-10080/

desires" a particular outcome. *Id.* (cleaned up). He acts knowingly if he is "aware that a result is practically certain to follow from his conduct," regardless of his subjective desire. *Id.* (cleaned up). The distinction between purpose and knowledge is limited; with both, the defendant can be said to have made a "deliberate choice with full awareness of the consequent harm." *Id*. In the context of the crime-of-violence definition, moreover, it is not just any element of intent or knowledge that suffices. Instead, it must be the intentional or knowing use *of force*. *Id.* at 1826. The use of force must be the "conduct's conscious object." *Id.* Nothing less will suffice.

On the other side of the line is reckless, negligent, and accidental uses of force. "Recklessness," as *Borden* uses it, is a conscious disregard of a substantial and unjustifiable risk of using force. *See Borden*, 141 S. Ct. at 1824. Unlike knowledge, which requires a practical certainty that the outcome will follow from the conduct, with recklessness, the "risk need not come anywhere close to a likelihood." *Id.* Negligence is an even lower standard, and describes the conduct of a person who is not, but should be aware of a substantial and unjustifiable use of force. *Id.* Offenses that can be committed by recklessness or negligence do not have use of force as their "conscious object," and thus are not crimes of violence. *Id.* at 1826.

Because Tennessee aggravated assault could be committed by a reckless assaultive act, the *Borden* court concluded that it was not a violent felony—a

term that shares the same language as the crime-of-violence definition at issue here—and thus remanded for the petitioner to be sentenced without the otherwise applicable fifteen-year ACCA sentence.

3. The question in Mr. Sanchez's appeal thus became whether California's assault statute satisfied *Borden*'s standard. Mr. Sanchez argued no: The California Supreme Court has said a person can be guilty of assault even if he "honestly believes that his act [is] not likely to result in a battery." *People v. Williams*, 29 P.3d 197, 203 n.3 (Cal. 2001). And it has sustained convictions where the defendant affirmatively believed his conduct would not result in force at all, or where the defendant was unaware that there was any person on the scene who was threatened by his conduct. California assault thus fails to satisfy *Borden*'s definition of the kinds of offenses that satisfy the element clause—ones that involve a deliberate choice to employ force with "full awareness of consequent harm." *Borden*, 141 S. Ct. at 1823.

The Ninth Circuit, however, found otherwise. In an unpublished decision, the Ninth Circuit affirmed the district court's judgment. "We have long held that assaults under other subdivisions of California Penal Code § 245 are categorically crimes of violence." (App. 3a.) And *Borden*, in the panel's mind, created no reason to revisit that caselaw. Despite argument that California's intent requirement applied only to the conduct and not to the likelihood that the use of force would result, and thus did not satisfy *Borden*'s

test, the Court concluded that *Borden* did not abrogate Ninth Circuit precedent on this issue and did not require specific intent to use force. (App. 3a-4a.)

A timely petition for rehearing was denied without opinion. (App. 1a.)

Reasons for Granting the Writ

In the immediate wake of *Borden*, the courts of appeal have struggled to decide how far the Court's holding in *Borden* extends. Some have concluded that *Borden* is limited to its holding that crimes denominated as the reckless use of force fall outside the reach of the elements clause. Others have viewed *Borden* as saying something more: that the elements clause requires not merely intent to do the conduct, but specific intent to use, threaten or attempt force, or knowledge that the use of force is practically certain to result from one's conduct. The latter courts ask not whether there is some element that requires intent, but specifically whether there is an element that requires intent or knowledge with respect to the use of force. This split is outcome determinative with respect to offenses—common in the states—that require intentional or volitional conduct, but something less than specific intent with respect to the use of force.

The Court should nip this conflict in the bud. Only one of these views is consistent with the reasoning of *Borden*. This Court should say that the elements clause is satisfied only by the specific intent to use, attempt, or

threaten force, or the knowledge that the use, attempted use, or threatened use of force is likely to result from one's intentional conduct. And it should do so in this case, because a proper view of *Borden* would require a court to find that California assault is not a crime of violence.

A. There is a conflict in the courts of appeals reading the reach of *Borden*.

Though *Borden* was issued less than a year ago, the circuits have split into two camps about the import of the decision.

1. *Some circuits conclude that Borden eliminates reckless crimes from the realm of the elements clause, and nothing more.*

The first camp reads *Borden* as a decision that merely settles a dispute among the circuits about whether recklessness crimes fall within the ambit of the elements clause—not that it reflects a requirement that a defendant specifically intent to use, threaten, or attempt to use force. So, in *United States v. Robinson*, 29 F.4th 370 (7th Cir. 2022), the Seventh Circuit considered a defense argument that *Borden* required vacatur of an ACCA sentence premised on knowing discharge into an occupied building. The defendant there argued that the "knowing" element of the statute applied only to knowingly discharging a weapon and knowledge that the building was occupied, but did not require either a specific intent to use force or knowledge that force was practically certain to result from the conduct. He thus argued that his conduct

fell outside the elements clause under *Borden*. But the Seventh Circuit rejected that argument, holding that *Borden* did not change the law applicable to this conviction. The statute is "replete" with words indicating that it covers only knowing actions, and knowledge is one of the mentes rei that *Borden* found to satisfy the elements clause. *Id.* at 375-376. Thus *Borden* effected no change in the caselaw that led the court previously to find that the firearms offense satisfied the elements clause.

The Ninth Circuit's reasoning in the instant memorandum disposition is terse, but it appears driven by the same reasoning. The Ninth Circuit had previously held that a statute that required intentional conduct, with negligence as to the result of that conduct, could satisfy the elements clause. *United States v. Werle*, 877 F.3d 879, 883 (9th Cir. 2017). Asked to revisit that caselaw in light of *Borden*, the court of appeals demurred, holding in a published opinion that *Borden* did not require specific intent. *Amaya v. Garland*, 15 F.4th 976, 983 (9th Cir. 2021). And while it was unclear in *Amaya* whether the court was using specific intent as distinct from knowledge, or whether it was using it in the sense of specific intent to use force, the panel in this case apparently viewed it as the latter. (App. 2a-3a.) It thus sustained the crime-of-violence designation in this case, even though California assault convictions can be premised on a volitional act that an objectively reasonable person would take as risky—a standard lower than recklessness. (*Id.*)

Thus, as the Seventh and Ninth Circuits have interpreted *Borden*, an offense is a crime of violence if it requires intentional or knowing conduct, even if it lacked specific intent to use force.

2. Other circuits read Borden to require that the intent or knowledge mens rea be attached to the element involving use of force.

Other circuits read *Borden* more broadly, as requiring the specific intent to use, attempt to use, or threaten to use force.

In *Somers v. United States*, for example, the Eleventh Circuit considered a defense argument that *Borden* had held that the elements clause encompassed only offenses that involved a specific intent to use force. *Somers*, 15 F.4th 1049, 1053 (11th Cir. 2021). The Eleventh Circuit agreed. *Borden*, in its view, clarified that an offense only satisfied the elements clause where it required *both* the general intent to volitionally take the action of using, attempting, or threatening to use force *plus* "something more: that the defendant direct the action at a target, namely another person." *Id.* at 1053. While Florida assault clearly required purposeful conduct, the Eleventh Circuit found the Florida courts hopelessly split on whether specific intent to use force was required, and thus certified to the Florida Supreme Court the question whether Florida assault required the specific intent to use force. *Id.* at 1056.

The Tenth Circuit, too, has taken the *Borden* language requiring

"targeted" uses of force to require more than merely volitional conduct. In *United States v. Sanchez*—no relation to the petitioner in this case—the court of appeals remanded in light of *Borden*. New Mexico's assault statute required an unlawful threat that causes another person "to reasonably believe that he is in danger of receiving an immediate battery." *Sanchez*, 13 F.4th 1063 (10th Cir. 2021). But an unlawful threat that might be taken as a reasonable person as a threatened use of force is not the same as the specific intent to threaten the use of force. Indeed with respect to New Mexico assault in the Tenth Circuit, it was the government who acknowledged that the statute failed to meet *Borden*'s standards. *See* Appellee's Answering Brief, *United States v. Gonzales*, No. 21-2022, at *4 (10th Cir. Jul. 21, 2021) (stating that, while New Mexico assault requires a purposeful criminal act, "*Borden* reveals that this type of conduct, though intentional in one sense, is insufficient to bring the statute within ACCA because, 'like recklessness, [it] is not directed or targeted at another.'" (quoting *Borden*, 141 S. Ct. at 1833) (plurality opinion).

Likewise, the Third Circuit—in acknowledged tension with the Ninth Circuit's decision in *Werle*—found no crime of violence in an offense that requires intentionally spitting or transmitting bodily fluids onto another with negligence as to the risk that the bodily fluid came from someone with a communicable disease. *United States v. Quinnones*, 16 F.4th 414 (3d Cir.

2021). The government argued that the statute was categorically a crime of violence because it, in every case, required a knowing or intentional act or throwing bodily fluids onto another. Br. of the United States, *United States v. Quinnones*, 2021 WL 1541266, at *17 (3d Cir. 2021). The fact that a different element of the offense could be satisfied by negligence, the government argued, was irrelevant. *Id.* at *18. But the Third Circuit disagreed. At least where a mens rea of recklessness or negligence attached to the "attendant circumstances that make the actus reus dangerous," the offense was not a crime of violence, even if the statute required intentional, volitional conduct. *Id.* at 421.

Thus, in the Eleventh, Tenth, and Third Circuits, an offense does not satisfy the elements clause unless a mens rea of intent or knowledge attaches to the element requiring the use, attempted use, or threatened use of force.

B. The Ninth Circuit reached the wrong conclusion.

Those courts that view the elements clause as requiring specific intent to use force (as opposed to merely the general intent to commit the offense) have it right. *Borden*'s test requires, not merely that the offense has some intentional element, but that the intent element attach to the use, attempted use, or threatened use of force. This is clear from every statement of the test that *Borden* employs: that the defendant must have made a "deliberate choice

with full awareness of the consequent harm," *Borden*, 141 S. Ct. at 1823; that the use of force must be the "conduct's conscious object." *id.*; that the elements clause "demands that the perpetrator direct his action act, or target, another individual," *id.* at 1825; that the elements clause requires "a deliberate choice of wrecking harm on another," *id.* at 1830. In each formulation, the *Borden* court took sides in the above split—coming down firmly on the side that would require not only general intent to commit a volitional act, but specific intent to use or attempt to use or threaten to use force.

More to the point, the minority view echoes the government's argument in *Borden*, which were rejected. The government urged the Court to adopt the standard that *Voisine* had set for crimes of domestic violence—that is, a volitional act qualifies even if the actor is merely reckless as to the potential harmful consequences of his conduct. *See* Br. of the United States, *Borden v. United States*, 19-5410, at 7–8, 10 (June 2020) (citing *Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016)). But *Borden* found that view incompatible with the phrase "against the person of another." 141 S. Ct. at 1825. To satisfy the elements clause, there must be volitional conduct *and* that conduct must involve the employment of physical force against another person as its conscious object. *Id.* at 1826. The minority circuits act as though the government's view prevailed in *Borden* when it did not.

Moreover, applying this standard here, the Ninth Circuit reached the wrong result: California assault is not a crime of violence because it does not require purposeful or knowing use of force against another person. The California Supreme Court has said a person can be guilty of assault even if he "honestly believes that his act [is] not likely to result in a battery." *People v. Williams*, 29 P.3d 197, 203 n.3 (Cal. 2001). And it has sustained convictions where the defendant affirmatively believed his conduct would not result in force at all.[2] California assault thus fails to satisfy *Borden*'s definition of the kinds of offenses that satisfy the element clause—ones that involve a deliberate choice to employ force with full awareness of consequent harm. *Borden*, 141 S. Ct. at 1823.

In fact, California assault doesn't even require the reckless use of force, as *Borden* defined it. California does not require a "subjective[] aware[ness] of the risk that a battery might occur." *Williams*, 29 P.3d at 203. Instead, a defendant is guilty of assault if he is "aware of the facts that would lead a

[2] *See, e.g.*, *People v. Starling*, 2003 WL22906712, at *7 (Cal. Ct. App. 2003) (defendant said that he believed he could drive through the gap between the police officer's car and sidewalk without hitting officer; conviction sustained because a reasonable person would have recognized that a battery—hitting the police car—would occur); *People v. Yorba*, 2008 WL 727693, at *3, 6 (Cal. Ct. App. 2008) (defendant believed he could drive through red light without collision because he believed driver in the intersection made eye contact with him and would stop; conviction sustained because a reasonable person would have recognized that a collision was the probable result of his conduct).

reasonable person to realize that a battery would directly, naturally, and probably result from his conduct." *Id.* But knowledge of facts that would make a reasonable person aware of the risk of force is not recklessness: Recklessness requires that the defendant be "*aware of facts* from which the inference could be drawn that a substantial risk of serious harm exists, and he must *also draw the inference*." *United States v. Rodriguez*, 880 F.3d 1151, 1160 (9th Cir. 2018) (emphasis in original, citation omitted). That subjective awareness of the risk—the actual drawing of the inference of riskiness—is the defining feature of recklessness. *Id.* A statute that requires only awareness of facts that would make a reasonable person aware of the risk states a negligence standard.

Though the *Williams* majority is less than direct on this point, the decision as a whole is unmistakable. Not only does *Williams* use an objective, reasonable person standard, it also says the defendant has to intend to commit an act, the natural and probable consequences of which are the application of force. *Williams*, 29 P.3d at 203, 204. Under California law, "liability for the natural and probable consequences of an intended act is regarded as legally equivalent to liability for reasonably foreseeable consequences, and is another way of expressing liability for negligence." *People v. Smith*, 67 Cal. Rptr. 2d 604, 609 (1997) (cleaned up), *abrogated on other grounds as recognized in People v. Wright*, 123 Cal. Rptr. 2d 494, 497 (Cal. Ct. App. 2002). The *Williams* dissent calls out the majority for turning assault into a negligence crime.

Williams, 29 P.3d at 207 (Kennard, J., dissenting). And this is how the lower California courts have read *Williams*—as a negligence, or negligence-adjacent test. *People v. Wright*, 123 Cal. Rptr. 2d 494, 497 (Cal. Ct. App. 2002) (*Williams* "defines the mental state [for Penal Code 245] as a species of negligent conduct, a negligent assault."); *see also People v. Aznavoleh*, 148 Cal. Rptr. 3d 901 (Cal. Ct. App. 2012) (finding itself bound by *Williams* to apply a negligence standard); *People v. Navarro*, 152 Cal. Rptr. 3d 109, 117 (Cal. Ct. App. 2013).

Because a prosecutor need not prove the defendant either purposefully committed a battery or was practically sure that a battery would follow from his conduct, California assault is not a crime of violence. But if more proof is needed that California assault flunks *Borden*'s standard, it is found in *Williams*' statement of the test it is rejecting. *Williams* considered a lower court decision holding that the mens rea for assault was "either a desire to cause an application of physical force or substantial certainty that such an application would result"—language that closely mirrors Justice Kagan's description of those mens rea that satisfy the elements clause. *See Borden*, 141 S. Ct. at 1823 (the elements clause is satisfied when a defendant "consciously desires" a particular result or "is aware that a result is practically certain to follow from his conduct") (cleaned up). But the California Supreme Court rejected the lower court's characterization of California law, saying "the Court of Appeal's description of the mental state for assault is erroneous." *Williams*, 29 P.3d at

200. California's highest court had the opportunity to adopt a standard that tracked directly the requirements of the elements clause and explicitly rejected it. This Court should take California Supreme Court at its word—characterizing California assault as satisfying the elements clause would be an erroneous view of California law.

The fact is, there is a gap between the "intent" and "knowledge" required under the assault statute and that required by *Borden*. The "intent" required under California law is the general intent to act—an intent that would exclude one who strikes another after losing consciousness, *See People v. Rainville*, 2017 WL 712603, at *4 (Cal. Ct. App. 2017), or who accidentally pushes the gas pedal instead of the brakes, *see People v. Flanigan*, 2020 WL 5494926, at *5 (Cal. Ct. App. 2020). But the further intent required under *Borden*—the intentional or knowing employment of force—is not an element of under California law. *See Williams*, 29 P.3d at 202. California caselaw makes this distinction clear: While there can be no conviction for a non-volitional act, neither is there an "accident" defense under California law for the individual who simply didn't intend the consequences of his behavior. *Flanigan*, 2020 WL 5494926, at *5.

Nor is California's knowledge requirement the equivalent of the knowledge standard in *Borden*. The "knowledge" that satisfies the elements clause is knowledge that conduct is practically certain to result in the use of

force. *Borden*, 141 S. Ct. at 1823, 1827. But California's knowledge standard is not that—again, the *Williams* court rejected that description of its standard. *Williams*, 29 P.3d at 200 (labeling "erroneous" that an assault conviction required "substantial certainty that [the application of force] would result"). The knowledge required under California law is only knowledge of facts that would lead a *reasonable person* to perceive the risk of harm; whether a defendant "expects" his actions to result in the application of force on another is irrelevant. *People v. White*, 194 Cal. Rptr. 3d 323, 327 (Cal. Ct. App. 2015). That is not practical certainty of a result or even subjective awareness of the risk of the result; it is a much lesser standard than recklessness. *Rodriguez*, 880 F.3d at 1160.

Because the intent and knowledge requirements for California assault fall short of *Borden*'s standard, as properly interpreted, California assault is not a crime of violence.

C. This is an important issue that merits the Court's attention.

This is an important issue that merits the Court's consideration, because it results in vastly different sentences for very similar prior convictions based solely on the phrasing of the statute and the circuit of conviction. Assault statutes typify the problem. Some statutes, like the Tennessee assault statute at issue in *Borden* itself, frame their coverage as "recklessly committing an

assault." *Borden*, 141 S. Ct at 1837 n.2 (Kavanaugh, J., dissenting) (reciting Tenn. Code Ann. § 39-13-102). After *Borden*, there is no question that such statutes do not satisfy the elements clause. *Id.* at 1834; *United States v. Gomez-Gomez*, 23 F.4th 575, 577-78 (5th Cir. 2022) (finding that Texas's assault statute does not satisfy the elements clause, because it can be committed by "recklessly causing bodily injury to another"); *United States v. Ash*, 7 F.4th 962, 963 (10th Cir. 2021) (Kansas's aggravated battery statute is not a crime of violence because it can be committed by "recklessly causing bodily harm to another person with a deadly weapon"). But other states, including California and New Mexico, are framed differently, requiring volitional or "intentional" conduct with something less than specific intent as to the result. *See* N.M. Stat. § 30-3-1 (assault consists of an "unlawful act . . . which causes another person to reasonably believe that he is in danger of receiving an immediate battery").

Though phrased differently, these two groups of statutes are really only separated by a razor's edge—recklessness, after all, still requires a volitional act. *United States v. Woods*, 576 F.3d 400, 410-11 (7th Cir. 2009) ("Every crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome."). But under the current state of the law, much depends on these minor differences in framing and the circuit in which one is sentenced. Individuals who were convicted under statutes that cover "reckless assaults" escape the crime-of-violence designation, and the serious mandatory-

minimum sentences triggered by the elements clause in firearms cases. *See, e.g.*, *United States v. Combs*, 2022 WL 287556, at *1 (5th Cir. Jan. 31, 2022) (unpublished) (vacating fifteen-year mandatory minimum sentence under ACCA because Texas assault is not a violent felony under *Borden*). And individuals in circuits that focus on specific intent to use force will escape sentencing enhancements as well. *See, e.g.*, *Sanchez*, 13 F.4th at 1078-79 (vacating ACCA sentence premised on New Mexico assault); *United States v. Carter*, 7 F.4th 1039, 1045 (11th Cir. 2021) (Georgia's aggravated assault statute not a crime of violence because it does not require specific intent to use force, but merely "placing a victim in reasonable apprehension of harm by intentionally using the aggravating object"). Only those like Mr. Sanchez—unlucky both in the phrasing of the California assault statute and in the circuit where he was convicted—are left subject to an enhancement for assault offenses that lack a specific intent to use force.

Given the serious enhancements that hinge on this Court's interpretation of the elements clause of the crime-of-violence definition, permitting this misreading of *Borden* to persist will mean that defendants sentenced in vast swaths of the country will continue to receive improper sentencing enhancements. The Court should take up the issue without delay.

D. This case presents an excellent vehicle for review of this issue.

Moreover, the Court should grant the writ in this case. Mr. Sanchez's case involves a preserved issue where the Ninth Circuit addressed the question of *Borden*'s impact head-on. The question was dispositive in his case: Had the Court sided with him, his guideline range would have been 30 to 37 months, instead of 51 to 63 months. The enhancement was thus no doubt harmful, in that a contrary ruling on the crime-of-violence finding would have required a remand for resentencing. *See United States v. Munoz-Camarena*, 631 F.3d 1028, 1031 (9th Cir. 2011). This case thus presents an excellent vehicle for review of this *Borden* spinoff issue.

Conclusion

For the foregoing reasons, Mr. Sanchez respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: May 25, 2022

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