No._____

IN THE

Supreme Court of the United States

GREGORY ALLEN OAKS,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Borden v. United States*, 141 S. Ct. 1817 (2021), five Justices of this Court agreed that offenses with a reckless *mens rea* do not qualify as a "violent felonies" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). Although the *Borden* plurality identified "drunk driving" as an offense that doesn't fit within the ordinary meaning of "violent felony," the Court declined to address whether extreme-recklessness offenses qualify under the ACCA's definition of "violent felony." Does an assault offense that requires an extreme-recklessness mens rea and is used to prosecute drunk drivers qualify as a "violent felony" under the Armed Career Criminal Act?

RELATED PROCEEDINGS

United States v. Oaks, 2022 WL 16835642, No. 19-7602, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Nov. 9, 2022. Rehearing denied Jan. 18, 2023.

United States v. Oaks, No. 1:16-CV-151, U.S. District Court for the Western District of North Carolina. Judgment entered Aug. 28, 2019

United States v. Oaks, 246 F. App'x 218, No. 06-5111, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Aug. 30, 2007.

United States v. Oaks, No. 1:02-CR-89, U.S. District Court for the Western District of North Carolina. Judgment entered Oct. 3, 2006.

United States v. Oaks, 185 F. App'x 298, No. 04-4113, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Jul. 7, 2006.

United States v. Oaks, No. 1:02-CR-89, U.S. District Court for the Western District of North Carolina. Judgment entered Feb. 9, 2004.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gregory Allen Oaks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished panel opinion (Pet. App. 1-3) is available at 2022 WL 16835642. The Fourth Circuit's order denying rehearing en banc (Pet. App. 38) is unreported. The district court's order and judgment denying post-conviction relief (Pet. App. 4 -31) are unreported. The district court's amended judgment in the criminal case (Pet. App. 32-37) is unreported.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on November 9, 2022. Pet App. 1-3. The Fourth Circuit denied a timely petition for rehearing en banc on January 18, 2023. *Id.* at 38. On April 3, 2023, the Chief Justice extended the time to file this petition for a writ of certiorari up to and including June 2, 2023. *See* No. 22A863. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portions of the Armed Career Criminal Act applicable to Oaks provide:

> (1) in the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any

other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that the person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(e) (2002).

The Tennessee reckless aggravated assault statute in effect in 1986, which is the subject of the issue presented, provides:

> **39-2-101. Aggravated assault.** — (a) As used in this section, unless the context otherwise requires:
>
> (1) "Bodily injury" includes a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness or impairment of the function of a bodily member, organ, or mental faculty.
>
> (2) "Serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member or organ.
>
> (b) A person is guilty of the offense of aggravated assault, regardless of whether the victim is an adult, a child, or the assailant's spouse, if such person:
>
> (1) Attempts to cause or causes serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
>
> (2) Attempts to cause or willfully or knowingly causes bodily injury to another with a deadly weapon;
>
> (3) Assaults another while displaying a deadly weapon or while the victim knows such person has a deadly weapon in his possession;
>
> (4) Being the parent or custodian of a child or the custodian of an adult, willfully or knowingly fails or refuses to protect such child or adult from an aggravated assault described in subdivisions (1), (2), or (3) above; or
>
> (5) After having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit a battery against an individual or individuals, attempts to cause or causes bodily injury or commits or attempts to commit a battery against such individual or individuals.
>
> (c) Except in the case of ex parte restraining orders or injunctions, the court issuing the restraining order, injunction, probation or diversion agreement or other order restraining conduct described in subdivision (b)(5) of this section shall immediately, upon the issuance of the same, state the substance of such order to the defendant and ascertain that the defendant understands the terms thereof, if the defendant shall have agreed in open court, and a copy of such order shall be provided by the district attorney general or the

> attorney for the plaintiff, as the case may be, to the law enforcement agency in the county responsible for enforcing the terms of the order.
>
> (d) Aggravated assault shall be punishable by not less than two (2) nor more than ten (10) years imprisonment.

Tenn. Code Ann. § 39-2-101 (1986 Supp.). This statute was repealed in 1989. Tenn. Pub. Acts 1989, c. 591, § 1.

STATEMENT OF THE CASE

Under the Armed Career Criminal Act ("the ACCA"), an offender who has three prior convictions for a "violent felony" or a "serious drug offense" is subject to a mandatory-minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e). The ACCA provides three ways in which an offense may qualify as a "violent felony": (1) where the offense's elements require a use, attempted use, or threatened use of force against another person; (2) where the offense qualifies as a listed, generic offense; and (3) where the "residual," or catch-all clause, applies. 18 U.S.C. § 924(e)(2)(B). In *Johnson v. United States*, 576 U.S. 591, 598 (2015), this Court held that the ACCA's residual clause is unconstitutionally vague. As a result, if an offender's prior conviction is not for "burglary, arson, or extortion," it now counts as a "violent felony" under the ACCA only if it "has as an element the use, attempted use, or threatened use of force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

In *Borden v. United States*, 141 S. Ct. 1817 (2021), this Court addressed what minimum level of *mens rea* is required for a statute to have "as an element the use, attempted use, or threatened use of force against the person of another." A four-justice plurality explained that ordinary recklessness crimes do not satisfy the

elements clause, because a reckless defendant has not targeted force *against* a particular victim. 141 S. Ct. at 1825. The plurality identified drunk and reckless driving—"the too-common stuff of ordinary offenders"—as paradigmatic examples of conduct that does not target "use" of force "against" another. *Id.* at 1830-31. Justice Thomas concurred in the Court's judgment. In his opinion, the phrase "use of physical force" by itself, even without the additional language requiring the use of force "against the person of another," has a "well-understood meaning applying only to intentional acts designed to cause harm." *Id.* at 1835 (Thomas, J., concurring) (internal citation omitted).

In *Borden*, the Court explicitly left open the question whether a mental state "between recklessness and knowledge," "often called 'depraved heart' or 'extreme recklessness,'" falls "within the elements clause." *Id.* at 1825 n.4 (plurality opinion). Gregory Oaks's case squarely presents this question. His Tennessee assault conviction under Tenn. Code Ann. § 39-2-101(b)(1) (1986 Supp.) was necessary to qualify him as an armed career criminal. And that offense can be committed "recklessly under circumstances manifesting extreme indifference to the value of human life." Tenn. Code Ann. § 39-2-101(b)(1). This Court should grant certiorari now to answer the question reserved in *Borden*; a circuit split leaves the lower courts in disarray, with ACCA enhancements depending on the Circuit of prosecution. As a result, lower courts need an answer sooner, rather than later.

A. Factual background

On March 5, 2003, a jury convicted Oaks of three counts: one, possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), with a maximum sentence of 20 years; two, using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and three, possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Amended Judgment, Crim. Dkt. 67.[1] At the time of Oaks's offense, the count-three firearm offense generally carried a maximum prison term of ten years. *See* 18 U.S.C. § 924(a)(2) (2002). But the ACCA mandated a 15-year minimum sentence—and a maximum of life in prison—for a felon who has "three previous convictions . . . for a violent felony or for a serious drug offense." 18 U.S.C. § 924(e)(1).

The probation officer prepared a Presentence Investigation Report (PSR) recommending that the district court apply the ACCA enhancement based on Oaks's prior Tennessee convictions for aggravated assault and aggravated robbery. PSR, Crim. Dkt. 77 at 7.[2] Because of the ACCA designation, the PSR recommended a sentencing range of 262 to 327 months, plus a mandatory, consecutive 7-year sentence on count two. Dkt. 77 at 22. The erroneous ACCA designation both increased the Guidelines range applicable to count one and permitted the district

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[1] Oaks refers to the docket in the case below as "Dkt." and the docket in the associated criminal case as "Crim. Dkt." There was no Joint Appendix in the Court of Appeals because the Court of Appeals didn't order formal briefing in the case.
[2] The PSR did not identify which of Oaks's prior offenses constituted a third predicate offense for ACCA purposes.

court to impose a 300-month sentence on count three, when the sentence on that count should have been capped at 10 years.

B. Procedural history

Oaks appealed his original conviction and 384-month sentence to the Court of Appeals for the Fourth Circuit; the court vacated the original sentence for procedural reasons. *United States v. Oaks*, 185 F. App'x 298, 300 (4th Cir. 2006). On remand, the district court again sentenced Oaks to "240 months on count 1, 300 months on count 3, to be served concurrently, and a term of 84 months on count 2 to be served consecutively to the terms imposed in counts 1 and 3, for a total term of 384 months." Amended Judgment, Dkt. No. 67. Oaks appealed to the Court of Appeals once more, and this time the court affirmed his sentence. 246 F. App'x 218 (4th Cir. 2007).

In 2016, Oaks filed a motion to vacate under 28 U.S.C. § 2255, asserting that his 300-month ACCA sentence is unconstitutional under *Johnson v. United States*, 576 U.S. 591 (2015), and exceeds the statutory maximum sentence of 10 years' imprisonment. Dkt. 1. He also asserted that his 240-month sentence on count one, which is based on the Guidelines' ACCA enhancement, violates due process. The district court denied that motion in 2019. Pet. App. 29.

The district court recognized that Oaks's ACCA designation "affected his sentence on Count One, the drug trafficking conviction, as well as his firearms conviction," because "[w]ithout the ACCA designation," Oaks would have been

sentenced at a Guidelines range of 210 to 262 months. Pet. App. 13. The court also rejected the government's procedural-default argument. Pet. App. 10-11. But the court parted ways with Oaks when it came to the merits of his claim, concluding that he had three prior convictions that qualified as violent felonies under the ACCA's force clause. Pet. App. 29. The court recognized that the validity of Oaks's ACCA designation depended on whether his Tennessee conviction for aggravated assault "still qualif[ied] as [a] 'violent felon[y]' in light of *Johnson*." Pet. App. 15-16.

Oaks was convicted of aggravated assault in 1987 under Tenn. Code Ann. § 39-2-101, which criminalized, among other things, "[a]ttempt[ing] to cause or caus[ing] serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." Before that statute was repealed in 1989, Tennessee authorities repeatedly used it to prosecute drunk or reckless drivers who injured other people in automobile accidents. *See, e.g., State v. Braden*, 867 S.W.2d 750 (Tenn. Crim. App. 1993) (aggravated assault conviction under § 39-2-101 affirmed where defendant had drunk four beers, was aware that he was approaching a blind curve, and was speeding when he collided with the victims' vehicle); *State v. Bullington*, 702 S.W.2d 580 (Tenn. Crim. App. 1985) (expressly rejecting argument that § 39-2-101 doesn't apply to motor vehicle accidents and affirming conviction based on drunk driving on wrong side of highway); *State v. Cravens*, 1986 WL 12478 (Tenn. Crim. App. 1986) (unpublished) (defendant who had a blood-alcohol level of .15 percent crossed into

oncoming lane of traffic and caused a head-on collision); *State v. Martin*, 1998 WL 74351 (Tenn. Crim. App. 1998) (unpublished) (conviction affirmed where defendant had been drinking and using cocaine, had a blood alcohol level of .04 percent, was driving faster than 45 to 50 mph around a curve, and crossed the center line); *State v. Primeaux*, 1988 WL 3912 (Tenn. Crim. App. 2001) (unpublished) (defendant had a blood alcohol level of .183 percent and collided with another vehicle head-on, at high speed).

In concluding pre-*Borden* that Oaks's conviction for Tennessee aggravated assault under Tenn. Code Ann. § 39-2-101(b) qualifies as a "violent felony," the district court recognized that the Tennessee indictment charged Oaks with violating subsection (b)(1). That subsection "criminalized causing or attempting to cause 'serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." Pet. App. 24. But the court believed that an offense requiring at least a reckless *mens rea* satisfies the ACCA's force clause. Pet. App. 24-27. After making that mistake, the court went on to say that the Tennessee assault offense qualified as a violent felony because it could be committed "recklessly under circumstances manifesting extreme indifference to the value of human life," which "requires a higher degree of intent than mere recklessness." Pet. App. 28-29.

C. The Fourth Circuit's ruling below.

After this Court decided *Borden*, Oaks argued on appeal that the Tennessee reckless aggravated assault offense does not require a conscious targeting of force as *Borden* requires. Inf. Op. Br. at 1, *United States v. Oaks*, No. 19-7602 (4th Cir. Aug. 11, 2021). But, relying on its recent decision in *United States v. Manley*, 52 F.4th 143 (4th Cir. 2022), *cert. denied*, ___ S. Ct. ___, 2023 WL 3158388 (May 1, 2023), the Fourth Circuit rejected Oaks's argument, concluding that "Oaks' aggravated assault conviction, which at minimum can be committed with a mens rea of extreme recklessness, satisfies the mens rea of a 'violent felony' under 18 U.S.C. § 924(e)." Pet. App. 2. Although *Manley* had addressed the definition of "crime of violence" under 18 U.S.C. § 924(c), the court applied *Manley* to Oaks's case because "crime of violence" is "materially similar" to "violent felony" as defined in § 924(e). *Id.*

In *Manley*, the Fourth Circuit evaluated whether Virginia's second-degree murder offense is a crime of violence under 18 U.S.C. § 924(c). 52 F.4th at 149. Under Virginia law, second-degree murder can be based on "implied malice," which "encapsulates a species of reckless behavior so willful and wanton, so heedless of foreseeable consequences, and so indifferent to the value of human life that it supplies the element of malice." *Id.* at 150 (quoting *Watson-Scott v. Commonwealth*, 835 S.E.2d 902, 904 (Va. 2019)). Categorizing this *mens rea* as "extreme recklessness," the court believed it could "derive" an answer to the crime of violence question "from the Court's analysis" in *Borden*. 52 F.4th at 150.

It began with the premise "that extreme recklessness falls on the *mens rea* scale of culpability between 'knowledge' and 'recklessness,' where 'knowledge' is a sufficient *mens rea* for a violent felony and 'recklessness' is not." *Id.* (quoting *Borden*, 141 S. Ct. at 1825 n.4). The court then determined that, on this scale, "extreme recklessness, as defined by Virginia law, not only falls between 'knowledge' and 'recklessness' but . . . is closer in culpability to 'knowledge' than it is to 'recklessness.'" *Id.* at 150. The court concluded that this level of culpability "comes close" to knowledge and thus "requires conduct that uses physical force *against* another, as required by the definition of a crime of violence in § 924(c)(3)(A)." *Id.* at 151. The panel in *Manley* assured us that "the difference between 'extreme recklessness' and ordinary criminal recklessness assuages the concern articulated in *Borden* that a lower *mens rea* requirement may 'blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and [all] other crimes.'" 53 F.4th at 151 (quoting *Borden*, 141 S. Ct. at 1831) (plurality opinion)).

Shortly after providing that assurance, in *Oaks* the Fourth Circuit nevertheless applied *Manley* to a Tennessee aggravated assault statute used to prosecute drunk and reckless drivers. And according to this Court, those two categories of offenders should not be subject to the ACCA's extreme sentencing enhancement. *Borden*, 141 S. Ct. at 1831, 1835 (plurality opinion); *Begay v. United States*, 553 U.S. 137, 1586-87 (2008), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015).

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's ruling below deepens a circuit split over whether extreme-recklessness crimes other than murder can count as violent felonies.

The Fourth Circuit's post-*Borden* application of ACCA's "violent felony" definition to an aggravated assault offense in *Oaks* deepens a split among the circuits. Six circuits have addressed the question left open in *Borden*. While the Fifth and Sixth Circuits align with the Fourth, the First, Ninth, and Eleventh disagree with the Fourth Circuit's application of *Borden* to an offense other than murder.

Before this Court decided *Borden*, the Fifth Circuit concluded that Mississippi aggravated assault—which permits convictions based on a mens rea of "recklessly under circumstances manifesting extreme indifference to the value of human life"—qualifies as a violent felony under the ACCA. *United States v. Griffin*, 946 F.3d 759, 760-61 (5th Cir.), *cert. denied*, 141 S. Ct. 306 (2020). Post-*Borden*, the Sixth Circuit—like the Fourth Circuit in *Manley*—included extreme-recklessness assaults within the ACCA's sweep by drawing the line for qualifying violent felonies at the outer edge of ordinary recklessness. *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022). In counting a Kentucky murder offense as a "serious violent felony" under 18 U.S.C. § 3559(c)(2)(F), the court took note of the required *mens rea* of "wantonness under 'circumstances manifesting an extreme indifference to human life.'" *Id.* (quoting Ky. Rev. Stat. § 507.020). It reasoned: "[t]hat's a more culpable mental state than recklessness, and the Supreme Court explicitly noted that its

decision in *Borden* didn't extend that far." *Id.* As in the Fourth Circuit, *Harrison*'s broad ruling sweeps in extreme-recklessness assaults. *See, e.g.*, *United States v. Young*, No. CR 5:19-033-DCR, 2023 WL 2759706, at *5–6 (E.D. Ky. Apr. 3, 2023) (concluding that Kentucky assault statute criminalizing "wanton" causation of injury is a violent felony under the ACCA).

By contrast, three other circuits—the First, Ninth, and Eleventh—have restricted their decisions counting extreme-recklessness offenses as "violent" to murder offenses. Before this Court decided *Borden*, the First Circuit evaluated the "[m]alice-aforethought-style recklessness" required to convict a person of second-degree murder under Puerto Rico law and the Model Penal Code. *United States v. Baez-Martinez*, 950 F.3d 119, 127 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2805 (2021). The court focused on the dividing line between manslaughter, which can be committed with ordinary recklessness, and second-degree murder, which requires recklessness "under circumstances manifesting extreme indifference to the value of human life." *Id.* at 125-26. It was careful to point out that "'the vast majority of vehicular homicides,' including 'the average drunk driving homicide, are treated only as manslaughter." *Id.* at 126 (quoting *United States v. Fleming*, 739 F.2d 945, 948 (4th Cir. 1984)). The court also reasoned that "'in terms of moral depravity,' murder is often said to stand alone among all other crimes." *Id.* at 128 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (cleaned up)).

Under the Eleventh Circuit's decision in *Alvarado-Linares v. United States*, Georgia malice murder, which can rest on implied malice "where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart," is a "crime of violence." 44 F.4th 1334, 1344 (11th Cir. 2022). While it noted that this offense "requires a mental state greater than ordinary recklessness," the court went on to say that "[t]he Georgia Supreme Court's decisions affirming convictions for implied-malice murder involve very serious intentional crimes." *Id.* at 1344. Further, it distinguished these "very serious intentional crimes" from "the 'too common' recklessness that *Borden* excludes from its definition of violent crimes." *Id.*

In an en banc decision, the Ninth Circuit limited its extreme-recklessness holding even more than did the First and Eleventh Circuits. *United States v. Begay*, 33 F.4th 1081 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 340 (2022). There, the court evaluated the federal second-degree murder offense, 18 U.S.C. § 1111(a), which can be committed "recklessly with extreme disregard for human life." *Id.* at 1091. While the Ninth Circuit had suggested before *Borden* "that anything less than intentional conduct does not qualify as a crime of violence," it viewed *Borden*'s analysis as requiring a conclusion that "a defendant who acts with extreme indifference to the value of human life" actively employs force "against the person of another." *Id.* at 1094-95. But like the First and Eleventh Circuit, it didn't end its analysis there. The court went on to say that "context is important"; "offenses

charged as murder are among the most culpable of crimes"; and murder offenses require "an intentional act that ha[s] a high probability of resulting in death." *Id.* at 1095. Realizing that deaths caused by ordinary drunk or reckless driving offenses cannot be included as violent felonies under *Borden*, the court went even further: It said, "[n]othing in our opinion should be read to suggest that a drunk driving case that results in a death necessarily represents conduct evidencing the use of force directed at another with extreme disregard for human life." *Id.* at 1096.

Under these decisions in the First, Ninth, and Eleventh Circuits, the Tennessee extreme-reckless assault offense—which authorities used to prosecute ordinary reckless and drunk driving offenses that caused personal injury—would not be a violent felony. The split among the circuits is clear.

II. The question presented is important.

The question presented is important for two reasons. First, as this Court has recognized, when Congress enacted the Armed Career Criminal Act, it intended to ensure "that the same type of conduct is punishable on the Federal level in all cases." *Taylor v. United States*, 495 U.S. 575, 582 (1990) (quoting S.Rep. No. 98-190, p. 20 (1983)). After explaining Congress's intent to use "uniform categorical definitions to identify predicate offenses," the Court in *Taylor* described the breakdown that would occur if the definition of "burglary" were not uniform: "[A] person imprudent enough to shoplift or steal from an automobile in California would be found, under the Ninth Circuit's view, to have committed a burglary

constituting a 'violent felony' for enhancement purposes—yet a person who did so in Michigan might not." *Id.* at 591. Congress also requires courts, when imposing sentences, to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Thus, a uniform application of the Armed Career Criminal Act to defendants with similar criminal records is important.

And if this Court does not intervene, the split among the circuits will lead to a lack of uniformity in imposing the Armed Career Criminal Act and a disparity in sentences among defendants with similar records who have been found guilty of illegally possessing firearms. Nineteen states now have aggravated assault statutes that include an "extreme indifference to human life" form of assault.[3] Consequently,

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[3] *See* Ala. Code § 13A-6-20(a)(3) ("under circumstances manifesting extreme indifference to the value of human life"); Alaska Stat. Ann. § 11.41.200(a)(3) ("under circumstances manifesting extreme indifference to the value of human life"); Ark. Code Ann. § 5-13-21(a)(3) ("under circumstances manifesting extreme indifference to the value of human life"); Colo. Rev. Stat. Ann. § 18-3-202(1)(c) ("Under circumstances manifesting extreme indifference to the value of human life"); Conn. Gen. Stat. Ann. § 539-59(a)(3) ("under circumstances evincing an extreme indifference to human life"); D.C. Stat. § 22-404.01(a)(2) ("circumstances manifesting extreme indifference to human life"); Ky. St. § 508.060(1) ("A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person."); N.H. Rev. Stat. § 631:2(I)(c) ("under circumstances manifesting extreme indifference to the value of human life"); N.J. Stat. Ann. § 2C:12-1(b)(1) ("under circumstances manifesting extreme indifference to the value of human life"); N.Y. Penal Code § 120.10(3) ("Under circumstances evincing a depraved indifference to human life"); 17 Maine Rev. Stat. Ann. § 208.1.C ("under circumstances manifesting extreme indifference to the value of human life"); Miss. Code Ann. § 97-3-7(2)(a) ("recklessly under circumstances manifesting extreme indifference to the value of human life"); Or. Rev. Stat. Ann § 163.175(1)(c) ("under

"extreme indifference" assault convictions are not unusual and will frequently appear in defendants' criminal histories. But as it stands, whether an offender's "extreme indifference" assault conviction will result in the ACCA's "heightened punishment" meant for "a violent criminal," *Borden*, 141 S. Ct. at 1830, depends on where he possesses a firearm. If he possesses it in South Carolina, he gets a 15-year-minimum ACCA sentence under *Manley* and *Oaks*. *See* 18 U.S.C. § 924(e). But if he possesses it over the border in Georgia, or across the country in California, he faces a 15-year *maximum*. *See* 18 U.S.C. § 924(b)(8). This disparity is contrary to Congressional intent. The Court should grant certiorari to ensure that the ACCA's severe enhancement is applied uniformly across the country.

Second, this Court has identified reckless and drunk driving—"the too-common stuff or ordinary offenders"—as offenses that "do not fit within 'the ordinary meaning of the term "violent" crime.'" *Borden*, 141 S. Ct. at 1830, 1831 (quoting *Oyebanji v. Gonzales*, 418 F.3d 260, 264 (3d Cir. 2005)); *id.* at 1825, 1827. Yet, as Tennessee did with the assault statute at issue in this case, at least seven of

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circumstances manifesting extreme indifference to the value of human life"); 18 Pa. Stat. § 2702 ("recklessly under circumstances manifesting extreme indifference to the value of human life"); S.D. Cod. Laws § 22-18-1.1(1) ("under circumstances manifesting extreme indifference to the value of human life"); 13 Vt. Stat. Ann. § 1024 ("recklessly under circumstances manifesting extreme indifference to the value of human life"); Va. Code Ann. § 18.2-51.4 (causing injury as a result of driving while intoxicated "in a manner so gross, wanton, and culpable as to show a reckless disregard for human life"); Wis. Stat. Ann. § 940.23(1)(a) ("under circumstances which show utter disregard for human life"); Wyo. Stat. Ann. § 6-2-502(a)(i) ("recklessly under circumstances manifesting extreme indifference to the value of human life").

the states that have "extreme indifference" assaults on their books have prosecuted drunk drivers under these statutes.[4] This Court should grant certiorari to ensure that the ACCA enhancement is not applied to "ordinary offenders" and that it instead is reserved for those who "might deliberately point the gun and pull the trigger." *Id.* at 1830 (quoting *Begay*, 553 U.S. at 145-46).

[4] Alabama, Arkansas, Kentucky, New Jersey, Mississippi, Oregon, and Wyoming have prosecuted drunk drivers under their "extreme indifference" assault statutes. *See, e.g., Turner v. State*, 588 S.W.3d 375, 379 (Ark. App. 2019) ("A person who operates an automobile while intoxicated does so under circumstances manifesting extreme indifference to the value of human life."); *Little v. Commonwealth*, No. 2007-SC-00610-MR, 2009 WL 1110336 (Ky. 2009) (unpublished) (evidence sufficient to show defendant acted with extreme indifference to human life where evidence showed he had consumed "several beers and shots of whiskey before getting in his car to drive," and his poor driving forced another driver off the road) *Ex parte Robey*, 920 So.2d 1069, 1070 (Ala. 2004) (allowing prosecution under "extreme indifference" aggravated assault provision where defendant had a blood-alcohol level of .128 and the presence of other drugs in his system after he "swerved across the dividing line of the road and into the lane of oncoming traffic"); *State v. Pigueiras*, 781 A.2d 1086, 1100 (N.J. App. Civ. 2001) (defendant's drunk and reckless driving, including speeding in an area he admitted he was unfamiliar with, satisfied "extreme indifference" assault statute); *Nowack v. State*, 774 P.2d 561, 561-62, 656 (Wyo. 1989) (driving across a median and causing a head-on collision with another vehicle while drunk satisfied requirement of committing acts "recklessly under circumstances manifesting extreme indifference to the value of human life"); *State v. Boone*, 661 P.2d 917, 922 (Or. 1983) (en banc) (defendant who caused an accident while driving recklessly with a blood-alcohol content of .24 percent could be prosecuted under extreme-indifference assault statute); *Gray v. State*, 427 So.2d 1363 (Miss. 1983) (evidence that defendant had a blood-alcohol content of .20 percent and caused accident by crossing center line supported conviction under "extreme indifference" assault statute).

III. The Fourth Circuit's ruling on extreme recklessness crimes conflicts with the views expressed by five Justices in *Borden* and is wrong.

In addition to deepening a circuit split on whether extreme-recklessness crimes other than murder can qualify as violent felonies, the Fourth Circuit's decisions below and in *Manley* conflict with the opinions of a majority of this Court's Justices in *Borden*. The operative majority in *Borden* was five votes, with a plurality opinion written by Justice Kagan and a concurrence written by Justice Thomas. While the plurality opinion expressly left open the question whether extreme recklessness can amount to a use of force against another person under the ACCA's force clause, both the plurality's reasoning and Justice Thomas's reasoning leave no room for a "violent felony" that doesn't require a conscious targeting of force. And a conscious targeting of force can only be satisfied by purposeful or knowing conduct, not by any form of recklessness, whether ordinary or extreme.

The *Borden* plurality opinion began by explaining the traditional hierarchy of culpable mental states in criminal law, with "purpose and knowledge" at the top. 141
S. Ct. at 1823. "A person acts purposefully when he 'consciously desires' a particular result," and "knowingly when 'he is aware that [a] result is practically certain to follow from his conduct,' whatever his affirmative desire." *Id.* (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980)). The plurality explained that "the distinction between the two [i]s 'limited'" and "'has not been considered important' for many crimes," because a person who injures another knowingly, "even though not

affirmatively wanting the result, still makes a deliberate choice with full awareness of consequent harm.'" *Id.* (quoting *Bailey*, 444 U.S. at 403-04). Both a purposeful and a knowing actor "have consciously deployed [force] at another person," just "for different reasons." *Id.* at 1827. As a result, the law views a knowing offender as intending the harmful result, even if the harmful result was not his specific *purpose*. *Id.* (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978)).

By contrast, "[r]ecklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury." *Id.* at 1824. A person who acts recklessly "'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards." *Id.* (quoting Model Penal Code § 2.02(2)(c)). But he does not have a purpose to cause injury or "full awareness of consequent harm," 141 S. Ct. at 1823; thus, he does not *intend* a harmful result.

The *Borden* plurality explained that the phrase "use of physical force" in the ACCA indicates a "'volitional' or 'active' employment of force." *Id.* at 1825 (quoting *Voisine*, 136 S. Ct. at 2279-81). Consequently, the "against another" phrase "demands that the perpetrator direct his action at, or target, another individual." *Id*. Together, the phrases demand an "oppositional, or targeted, definition" that requires a conscious decision and therefore "covers purposeful and knowing acts, but excludes reckless conduct." *Id.* at 1826.

The plurality used the example of a reckless driver to illustrate its view. Reckless conduct, the plurality explained, is simply "not aimed in [the] prescribed manner." *Id.* at 1825. For example, a driver who "drives his car straight at a reviled neighbor, desiring to hit him," or who "sees a pedestrian in his path but plows ahead anyway, knowing the car will run him over," has consciously deployed physical force against another person. *Id.* at 1826-27. A reckless driver, however, has not. As the plurality described, "[i]magine a commuter who, late to work, decides to run a red light, and hits a pedestrian whom he did not see." *Id.* at 1827. This driver has "consciously disregarded a real risk, thus endangering others," and he has made physical contact with another person, but he "has not directed force at another." *Id.* Consequently, this driver "has not used force 'against' another person in the targeted way" the force clause requires." *Id.* Instead, the force clause requires "*a deliberate choice* of wreaking harm on another, rather than mere indifference to risk." *Id.* at 1830 (emphasis added). The plurality also singled out "drunk driving and other crimes of recklessness" as not fitting "within 'the ordinary meaning of the term "violent" crime.'" *Id.* (quoting *Oyebanji*, 418 F.3d at 264).

Justice Thomas, concurring, agreed that crimes requiring only reckless conduct cannot satisfy the force clause. *See id.* at 1835 (Thomas, J., concurring in the judgment). Unlike the plurality, Justice Thomas based that holding solely on the statutory phrase, "use of physical force." *Id.* Consistent with the plurality's view, he concluded that "a crime that can be committed through mere recklessness

does not have as an element the use of physical force because that phrase has a well-understood meaning applying only to *intentional acts designed to cause harm*." *Id.* (internal quotation marks omitted) (emphasis added).

The plurality's analysis requires a "deliberate choice" to cause harm, and Justice Thomas's analysis requires "intentional acts designed to cause harm." *Id.* at 1830, 1835. Putting these analyses together, there is no room to interpret the statutory phrase "use . . . of physical force against the person of another" to include "extreme indifference" reckless conduct. Regardless of the level of the defendant's culpability or the justification for severe punishment, such conduct involves neither "a deliberate choice of wreaking harm on another" nor an "intentional act[ ] designed to cause harm." *Id.*

Nevertheless, the Fourth Circuit decided in *Manley* that crimes with a minimum *mens rea* of extreme recklessness can qualify as crimes of violence under *Borden*, and the panel below applied that ruling to an aggravated assault statute, which the State of Tennessee has used to prosecute drunk and reckless drivers. In *Manley*—the sole cited authority for the panel's decision below—the Fourth Circuit acknowledged that this Court's decision in *Borden* "directs us to the statutory definition's requirement of the '*use* of physical force *against* the person of another,' 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added) and notes that it 'demands that the perpetrator direct his action at, or target, another individual." 52 F. 4th at 150 (quoting *Borden*, 141 S. Ct. at 1825). And it pointed out that this reliance on the

requirement of targeting another individual led the Court to "hold that conduct that is 'purposeful' or 'knowing' fits § 924(e)'s *mens rea* requirement, whereas conduct that is 'reckless' or 'negligent' does not." *Id.* (citing *Borden*, 141 S. Ct. at 1826-28). The Fourth Circuit also recognized this Court's statement "that it was not addressing whether the definition of a violent felony could be satisfied with a *mens rea* of extreme recklessness." *Id.* (citing *Borden*, 141 S. Ct. at 1825 n.4). But the court believed "that the answer to that question can nonetheless be derived from the Court's analysis" in *Borden*. *Id.*

After making that statement, though, the Court of Appeals never addressed the central premise that united the plurality and Justice Thomas in *Borden*: The statutory definition of "violent felony" requires "a deliberate choice of wreaking harm on another," 141 S. Ct. at 1830 (plurality op.)—or, put another way, "intentional acts designed to cause harm." *Id.* at 1835 (Thomas, J., concurring). Instead, the Fourth Circuit focused on the relative culpability of offenses, judging that "extreme recklessness, as defined by Virginia law" was "closer in culpability to 'knowledge' than it is to 'recklessness.'" 52 F.4th at 150. But while extreme-recklessness crimes may deserve punishment similar to knowing or purposeful crimes, that level of culpability still doesn't supply the "deliberate choice" to harm or "design to cause harm" that the ACCA statute's language requires under *Borden*.

The Court's application of *Manley* in this case shows just how far *Manley*'s reasoning strays from *Borden*. The plurality in *Borden* described "reckless drivers"

as "far afield from the 'armed career criminals' ACCA addresses"; it also singled out "drunk driving" as not fitting "within 'the ordinary meaning of the term "violent" crime.'" 141 S. Ct. at 1825, 1830. As this Court also recognized in *Begay v. United States*, while drunk or reckless driving convictions may "reveal a degree of callousness toward risk," they don't increase the "likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." 553 U.S. at 146. The ACCA is not meant to reach drunk or reckless driving offenses, "far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms." *Id.* The Fourth Circuit's rulings in *Manley* and below, labeling any offense with an extreme-recklessness *mens rea* as a violent felony—thereby encompassing an assault statute used to prosecute drunk and reckless drivers—conflicts with *Borden* and *Begay*.

IV. This case presents an ideal vehicle for resolving the question.

Finally, this case presents an ideal vehicle for resolving the question. The issue was passed upon by both the court of appeals and the district court. Pet. App. 2-3; *id.* 28-29. Additionally, the answer to the question is dispositive of this case, as Oaks is not eligible for an ACCA sentence if his prior Tennessee assault conviction does not count as a violent felony.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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