No. 22-7692

In the Supreme Court of the United States

GREGORY ALLEN OAKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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The decision below deepens a circuit conflict, confirming the confusion among the courts of appeals over a question this Court expressly left open in *Borden v. United States*, 141 S. Ct. 1817 (2021): whether a crime with a *mens rea* of extreme recklessness can be a "violent felony" under the force clause of the Armed Career Criminal Act.

The government minimizes the disarray in the circuits and alludes to insubstantial vehicle issues. Yet the disarray is real, and it has only become more pronounced since the petition in this case was filed. The Eighth Circuit has now correctly

held that an extreme-recklessness crime cannot qualify, because that *mens rea* involves ignoring a significant risk of harm rather than targeting or directing force toward a specific recipient, as the *Borden* plurality requires (or an express *mens rea* of purpose or knowledge, as Justice Thomas would require). By contrast, the Fourth, Fifth, and Sixth Circuits focus on relative culpability and risk, rather than targeting; under their reasoning, extreme-recklessness offenses qualify across the board.

And the confusion among the circuits runs even deeper. The Tenth Circuit has now joined the First, Ninth, and Eleventh Circuits in relying on crime-specific reasoning to conclude that extreme-recklessness murder offenses satisfy the force clauses of ACCA and similar provisions. Those four courts conclude that *Borden*'s targeting requirement is satisfied for murder offenses because committing murder with malice aforethought involves awareness of a heightened risk of harm to some person—reasoning that would be inapplicable here. For their part, the Fourth, Fifth, and Sixth Circuits do not rely on murder-specific reasoning in concluding that extreme-recklessness offenses qualify.

The resulting chaos in the courts of appeals, on a question of indisputable significance to the criminal justice system, is intolerable. Because the courts of appeals are in conflict on an important question of federal law, and because this case presents an ideal vehicle to answer the question presented, this Court should grant the petition for a writ of certiorari.

A. The Decision Below Is Incorrect And Conflicts With The Decisions Of Other Courts Of Appeals

The government primarily contends (Br. in Opp. 7-18) that the decision below does not conflict with the decision of any other court of appeals. That contention lacks merit.

1. As a threshold matter, the government claims that decisions since the filing of this petition reinforce a "consensus" in the courts of appeals on the question presented. *See* Br. in Opp. 10, 17-18. That is wrong. In a published opinion—which the government relegates to a footnote—the Eighth Circuit correctly held that extreme-recklessness offenses such as arson cannot qualify as crimes of violence under the force clause of ACCA and similar statutes. And the Tenth Circuit has now joined the First, Ninth, and Eleventh Circuits in relying on crime-specific reasoning to conclude that *Borden* does not require force to be directed at a specific victim for a malice-aforethought murder offense to qualify as a crime of violence—reasoning that would be inapplicable here. By contrast, the Fourth, Fifth, and Sixth Circuits have classified extreme-recklessness offenses as "violent felonies" across the board. The resulting conflict warrants this Court's review.

a. After the petition in this case was filed, the Eighth Circuit held in *United States v. Lung'aho* that an extreme-recklessness crime such as arson does not "use . . . physical force against the person or property of another" within the meaning of "crime of violence" under 18 U.S.C. § 924(c)(1)(A). *See* 72 F.4th 845, 850-51 (8th Cir. 2023). Writing for a unanimous panel, Judge Stras noted that this Court "saw this difficulty coming in *Borden*" and explained that, "[a]lthough *Borden* does not address

what happens in the case of th[is] in-between mental state[], its reasoning points us to the right answer." *Id.* at 849.

The Eighth Circuit proceeded to analyze *Borden*'s reasoning—both that of the plurality and that of Justice Thomas (who concurred in the judgment)—and concluded that extreme recklessness "does not satisfy the force clause." 72 F.4th at 850. That is because, under the *Borden* plurality's reasoning, physical force requires "targeting," meaning "conduct . . . 'consciously directed' at someone or something." *Id.* (quoting *Borden*, 141 S. Ct. at 1826). Extreme recklessness does not meet that standard, the Eighth Circuit concluded, because "[a] conscious decision to ignore a risk of harm is different from intending it," even when the risk ignored is a "high risk." *Id.* For example, the Eighth Circuit explained, a person lighting fireworks in a national park, during an extreme fire warning, knowing there is "a good chance" it would burn down a nearby ranger station, has not "'targeted' the ranger station." *Id.*

Turning to Justice Thomas's reasoning that the force clause requires an "intentional act designed to create harm," the Eighth Circuit found the result to be "even clearer." 72 F.4th at 850 (quoting *Borden*, 141 S. Ct. at 1835 (Thomas, J., concurring in the judgment)). Under that approach, an extreme-recklessness statute that requires a perpetrator willfully to disregard a risk is a fundamental "mismatch" with the intent requirement. *Id.* at 851.

Shortly after *Lung'aho* was decided, another panel of the Eighth Circuit issued a decision in *Janis v. United States*, holding that a murder offense with a *mens rea* of extreme recklessness in the form of "malice aforethought" does satisfy the force clause

in Section 924(c)(3)(A). 73 F.4th 628, 632-35 (8th Cir.), *reh'g denied*, 2023 WL 6852218 (Oct. 18, 2023). The *Janis* panel attempted to limit *Lung'aho* to non-murder offenses involving mere "malic[e]," which it characterized as the "'willful disregard of the likelihood' of harm." *Id.* at 632 (citation omitted).

That attempted limitation, which the government uncritically repeats (Br. in Opp. 16 n.3), does not withstand scrutiny. In *Lung'aho*, the Eighth Circuit rejected any such distinction, expressly "pick[ing] a side" in the debate over whether the force clause encompasses a *mens rea* "between recklessness and knowledge"—namely, the state of mind described as "extreme recklessness," "depraved heart," and "malice." 72 F.4th at 849 (quoting *Borden*, 141 S. Ct. at 1825 n.4). The court broadly stated that its decision implicated extreme recklessness in any form; indeed, the court noted that, at common law, both arson and murder required the same *mens rea*—malice—which involves "intentionality or a 'willful disregard of [a] likelihood' of harm." *Id.* at 848 (citation omitted).

But putting aside the merits of *Janis*'s attempted distinction, it is clear, at a minimum, that *Lung'aho* continues to govern non-murder extreme-recklessness offenses in the Eighth Circuit: it affirmatively holds that those offenses do not qualify as "violent felonies," and it thus plainly conflicts with the decision below as well as with decisions from the Fifth and Sixth Circuits. *See* Pet. App. 2; *see also* pp. 9-10, *infra*. Because petitioner was sentenced in the Fourth Circuit, his extreme-recklessness assault offense qualified as a "violent felony" under ACCA's force clause,

whereas in the Eighth Circuit, it unambiguously would not have. That conflict alone is sufficient to trigger this Court's review.

b. For its part, the Tenth Circuit has now joined the First, Ninth, and Eleventh Circuits, *see* p. 8, *infra*, in relying on crime-specific reasoning to conclude that extreme-recklessness murder offenses can satisfy the force clause on the ground that *Borden*'s targeting requirement does not require an identified victim. In *United States v. Kepler*, the Tenth Circuit considered whether federal second-degree murder constituted a "crime of violence" with the meaning of Section 924(c)(3)(A). 74 F.4th 1292, 1300 (10th Cir. 2023). The court determined that, in the context of a murder offense requiring malice aforethought, extreme recklessness (described there as acting with a "depraved heart") is sufficiently "directed" or "aimed" against another person because a defendant who kills with a depraved heart acts with an awareness of "'a serious risk of death or serious bodily harm' to another." *Id.* at 1304 (citation omitted). The court explained that its "definition of depraved-heart recklessness" requires a person to "have consciously 'use[d] force against the person . . . of another.'" *Id.* The court gave, as an example of its definition, that "a driver would act with a depraved heart when driving at a group of people on a crosswalk, conscious of likely hitting at least one of them." *Id.* The court provided "fir[ing] randomly into a crowd" while "not intend[ing] to kill any specific person" as another example of depraved-heart recklessness. *Id.* In those situations, the court explained, force "might not be aimed at a specific person, but as long as force is targeted at someone, the depraved-heart offense is a crime of violence." *Id.* at 1311. The Tenth Circuit's reasoning was

thus confined to the context of offenses with a murder-specific *mens rea* such as "malice aforethought" and does not extend to offenses with the *mens rea* of extreme recklessness more generally.

2. In a similar vein to its position that the recent decisions from the Eighth and Tenth Circuits demonstrate "consensus" among the circuits, the government contends (Br. in Opp. 16-17) that, even before those recent decisions, no circuit conflict existed because the murder-specific reasoning of the First, Ninth, and Eleventh Circuits "suggests" that extreme-recklessness offenses outside the context of murder would qualify as "violent felonies." That contention is also wrong.

a. Before *Borden*, after concluding that ordinary-recklessness offenses generally did not qualify as "violent felonies" under ACCA, *see United States v. Rose*, 896 F.3d 104, 109-10 (1st Cir. 2018), the First Circuit charted an alternative approach to the type of recklessness that establishes malice aforethought for murder convictions, *see United States v. Báez-Martínez*, 950 F.3d 119, 126-29 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2805 (2021). Under that approach, the court reasoned that a defendant who "shoots a gun into the woods while hunting and kills another person" is reckless, but "the defendant who shoots a gun into a crowded room has acted with malice aforethought . . . because there is a much higher probability—a practical certainty—that injury to another will result." *Id.* at 126-27. The defendant with malice aforethought, the court continued, "can . . . fairly be said to have actively employed force . . . 'against the person of another'" within the meaning of ACCA's force clause, because he "certainly must be aware that there are potential victims." *Id.* at 127.

b. Since *Borden*, the Ninth and Eleventh Circuits have adopted a "substantially similar" approach to the First Circuit's and have set malice-aforethought murder offenses apart from other types of offenses when holding that these murder offenses qualify as "violent felonies" under ACCA. *United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (citing *Báez-Martínez*, 950 F.3d at 127-28); *see Alvarado-Linares v. United States*, 44 F.4th 1334, 1344 (11th Cir. 2022). Noting how "[t]he elements of second-degree murder stand in stark contrast to the elements of offenses that do not require a showing of malice aforethought," the Ninth Circuit explained that malice aforethought does not require that the defendant "target his conduct at any particular individual," but nonetheless meets ACCA's force clause because it involves "*extreme indifference . . . toward human life*." *Begay*, 33 F.4th at 1094-95 (emphasis in original).[1] The Eleventh Circuit agreed, determining that *Borden*'s targeting requirement is satisfied with respect to malice aforethought, because that concept "incorporates the intent to kill that goes beyond mere recklessness." *Alvarado-Linares*, 44 F.4th at 1344 (internal quotation marks and citation omitted).

3. The government agrees (Br. in Opp. 15-16) that the Fourth, Fifth, and Sixth Circuits have held that extreme-recklessness offenses qualify as "violent felonies" across the board. Those decisions rely on judgments about the level of culpability accorded to disregarding a heightened level of risk and cannot be reconciled with this Court's reasoning in *Borden*.

[1] In dissent, Judge Ikuta would have held that even second-degree murder does not qualify under the force clause, citing *Borden*'s requirement of "a directed or targeted use of force against the victim." 33 F.4th at 1106.

a. In *United States v. Manley*, the Fourth Circuit held that second-degree murder under Virginia law constituted a "crime of violence" for purposes of Section 924(c)(1)(A). 52 F.4th 143, 145 (4th Cir. 2022). At the outset, the court acknowledged that *Borden* "demands that the perpetrator direct his action at, or target, another individual." *Id.* at 148, 150 (citation omitted). Instead of explaining how extreme recklessness involves targeting, however, the court cited the relative culpability of an offender who acts with extreme recklessness, reinforced by the "context and purpose" of Section 924(c). *Id.* at 151. At the same time, the court made clear that its holding ultimately rested on the difference between ordinary and extreme recklessness—the latter being "closer in culpability to 'knowledge' than it is to 'recklessness'"—and that its analysis would thus apply "under any given statute." *Id.* at 150, 151. The court below relied on *Manley* to conclude that extreme-recklessness offenses qualify as "violent felonies" across the board. *See* Pet. App. 2.

That approach does not comport with the *Borden* plurality opinion, which explained that a crime "revealing only a 'degree of callousness toward risk'"—"[h]owever blameworthy" the underlying conduct—"is 'far removed' from the 'deliberate kind of behavior'" covered by the force clause. 141 S. Ct. at 1830 (quoting *Begay v. United States*, 553 U.S. 137, 147 (2008)). Put another way, qualifying crimes "are best understood to involve not only a substantial degree of force, but also a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.*

b. The Fifth and Sixth Circuits' decisions suffer from the same flaw as the Fourth Circuit's. In a pre-*Borden* decision, relying on circuit precedent that ordinary-recklessness offenses could qualify as ACCA predicates, the Fifth Circuit held that aggravated assault under Mississippi law qualified as a "violent felony" under ACCA on the ground that it could be committed "recklessly under circumstances manifesting extreme indifference to the value of human life." *United States v. Griffin*, 946 F.3d 759, 761-62 (5th Cir. 2020) (citation omitted). And in *United States v. Harrison*, the Sixth Circuit similarly concluded that an extreme-recklessness offense qualified as a "serious violent felony" under 18 U.S.C. § 3559(c)(2)(F)(ii). 52 F.4th 884, 889-90 (6th Cir. 2022). While the Sixth Circuit seemingly employed a more searching analysis in its recent decision in *United States v. Jamison*, it ultimately adhered to an approach that assessed the relative culpability of extreme recklessness on the "scale of moral blameworthiness." 85 F.4th 796, 803 (6th Cir. 2023) (quoting *People v. Goeke*, 579 N.W.2d 868, 879 (Mich. 1998)). The resulting conflict with the Eighth Circuit in particular, and also with the First, Ninth, Tenth, and Eleventh Circuits, warrants the Court's review.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The question presented is exceedingly important, and this case is an ideal vehicle to consider it. Since the passage of ACCA, this Court has been repeatedly called upon to clarify its scope. The Court should intervene now to resolve the disarray in the lower courts and answer the important and recurring question left open in *Borden*.

1. The government does not dispute the importance of the question presented. *See* Pet. 15-18. Instead, the government dismisses as a "statute-specific claim," Br. in Opp. 13, petitioner's argument that his crime of conviction reaches conduct, such as "ordinary reckless and drunk driving," that is categorically not a violent felony, *id.* (quoting Pet. 15). But that argument would apply to every case raising a crime-of-violence issue, because every ACCA case involves the question whether the conduct prosecutable under a particular statute categorically requires the use of physical force against another person. After all, that *is* the categorical approach. *See*, *e.g.*, *Johnson v. United States*, 559 U.S. 133, 136-38 (2010). And drunk driving is the paradigmatic example of conduct that, "though morally culpable, do[es] not fit within the ordinary meaning of the term 'violent' crime." *Borden*, 141 S. Ct. at 1830 (internal quotation marks, citation, and alterations omitted); *see Begay*, 553 U.S. at 148; *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004).

What is more, the question presented in this case has obvious and far-reaching practical implications. Contrary to the government's suggestion (at 13), the statute at issue here is not unique: some nineteen states have aggravated-assault statutes that define assault in terms of an "extreme indifference to human life," *see* Pet. 16 & n.3, and at least seven of those statutes have been used to prosecute drunk drivers, *see* Pet. 17-18 & n.4.[2]

[2] Nor are those prosecutions limited to "extreme cases," as the government incorrectly suggests. Br. in Opp. 13-14; *compare Borden*, 141 S. Ct. at 1831-32 & n.8 (plurality opinion), *with id.* at 1854-55 (Kavanaugh, J., dissenting).

Further, the definition of a "violent felony" in ACCA's force clause, and the similarly construed phrase "crime of violence," are used throughout the United States Code. *See*, *e.g.*, 2 U.S.C. § 1967(a); 18 U.S.C. § 16(a); 18 U.S.C. § 842(p)(2); 18 U.S.C. § 924(c)(3); 18 U.S.C. § 3559(c) (defining "serious violent felony" for purposes of the three-strikes mandatory life sentence); 18 U.S.C. § 3663A(c)(1)(A)(i); 20 U.S.C. § 7946 (d)(1)(A); 21 U.S.C. § 841(b)(7)(A); 34 U.S.C. § 40702(d)(3); 34 U.S.C. § 60541 (g)(5)(A)(ii); 42 U.S.C. § 14503(g)(1)(A); *see also* 8 U.S.C. § 1101(a)(43)(F) (defining "aggravated felony" in immigration law). Deciding whether extreme-recklessness offenses satisfy the force clause of ACCA will ensure the evenhanded and correct application of these laws to thousands of people throughout the United States.

Even focusing on ACCA alone, the sentences of 300 to 600 defendants are enhanced under Section 924(e) each year. *See* United States Sentencing Commission, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways* 18 (2021) <tinyurl.com/2021ACCAReport>. The effects of applying ACCA are harsh; its application should be correct and consistent among the circuits. This case is a classic example of the dramatic effect of that enhancement: for the relevant count, a maximum term of imprisonment of 10 years, *see* 18 U.S.C. § 924(a)(2) (2002), became a 15-year *minimum*, *see id.* § 924(e)(1); *see also Borden*, 141 S. Ct. at 1822 (describing the increase as "severe"). If petitioner's Tennessee aggravated-assault conviction does not qualify as a "violent felony" under ACCA, he would be entitled to resentencing without the enhancement.

2. This case provides an ideal opportunity to resolve the question presented. The question was passed upon below, *see* Pet. App. 2-3, 28-29, and resolving it in petitioner's favor would be dispositive on his eligibility for the ACCA enhancement, *see* Pet. 24. And this case would be a better vehicle than any future case involving a murder offense, because the circuit conflict is clearly defined in the non-murder context. *See* pp. 3-5, *supra*.

The government refers to the fact that this case arises in the context of the denial of a certificate of appealability. *See* Br. in Opp. 8-9, 18. But it conspicuously stops short of affirmatively identifying that as an obstacle to this Court's review, and for good reason. This Court has previously addressed important questions, including the scope of ACCA, in precisely the same posture. *See Buck v. Davis,* 580 U.S. 100, 105 (2017); *Welch v. United States*, 578 U.S. 120, 127-28 (2016). And in any event, petitioner is obviously entitled to a certificate of appealability here, as "reasonable jurists [do] debate" the answer to the question presented. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted); *compare*, *e.g.*, *Lung'aho*, 72 F.4th at 850-51, *and Begay*, 33 F.4th at 1106 (Ikuta, J., dissenting), *with Manley*, 52 F.4th at 151.

* * * * *

In all, at least seven courts of appeals have now addressed the question presented. Those courts have reached different conclusions after substantial analysis, and they are divided over the correct answer to a question that this Court left open in *Borden*. There is no doubt that ultimate resolution of the question here will affect cases pending in federal courts across the country. Not even the government argues

that further percolation would provide any benefit; indeed, the longer it takes the Court to answer the question presented, the more disruptive the inevitable answer will be. Because this case is an ideal vehicle for resolution of that question, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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