No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

CARMELITA BARELA,

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

JODI LINKER
Federal Public Defender
Northern District of California
JOHN PAUL REICHMUTH*
ROBIN PACKEL
Assistant Federal Public Defenders
1301 Clay Street, Suite 1350N
Oakland, California 94612
(510) 637-3500
john_reichmuth@fd.org
** Counsel of Record for Petitioner*

QUESTION PRESENTED

The circuit courts have held unanimously that Hobbs Act robbery qualifies categorically as a "violent felony" and "crime of violence." Therefore, all Hobbs Act robbery offenses must involve the use, attempted use, or threatened use of "violent force," as defined in, *inter alia*, *Borden v. United States*, 141 S. Ct. 1817 (2021), and *Stokeling v. United States*, 139 S. Ct. 544 (2019).

Can a Hobbs Act robbery conviction be sustained where the only claimed use of "violent force" is coughing and claiming to have "Covid" while shoplifting, when the conduct implicitly threatened encompasses at most *indirect* force imparted through *reckless* (rather than intentional) disregard of a risk of transmission?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption.

DIRECTLY RELATED LOWER-COURT PROCEEDINGS

United States v. Carmelita Barela, No. 20-cr-00254 CRB (N.D. Cal. Aug. 6, 2021)

United States v. Carmelita Barela, No. 21-10231 (9th Cir. Dec. 22, 2022)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carmelita Barela respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's memorandum disposition affirming Ms. Barela's conviction is attached at Appendix ["App."] 1-5. The court's order denying rehearing en banc is attached at App. 29.

JURISDICTION

The Ninth Circuit entered its judgment on December 22, 2022. It denied Ms. Barela's petition for rehearing en banc on March 29, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.3.

RELEVANT STATUTORY PROVISIONS

"[T]he term 'crime of violence' means an offense that is a felony and – (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ."[1] 18 U.S.C. § 924(c)(3).

"Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery . . . shall be fined . . . or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a).

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[1] The similar definitions of "crime of violence" and "violent felony" that appear in various statutory and Sentencing Guidelines contexts generally are construed alike. *See, e.g., Borden,* 141 S. Ct. at 1822.

"The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . ." 18 U.S.C. § 1951(b)(1).

INTRODUCTION

This petition raises a critically important question in the modern era: whether federal Hobbs Act robbery, categorically a "violent felony" and "crime of violence" with a twenty-year statutory maximum sentence, extends beyond the common-law definition of robbery, that of intentional and direct uses or threats of physical force, to also reach merely indirect and reckless forms of force such as creating, or threatening to create, a risk of infection while shoplifting.

This Court should answer that question and decline such an extension, because the government's unprecedented application of the Hobbs Act to this case contradicts both centuries of common law and recent Supreme Court precedent on the definition of "force" for robbery purposes.[2] In holding that attempted Hobbs Act

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[2] Although, as discussed below, this case stands out from the typical Hobbs Act robbery based on the absence of even a threat of violent physical force, it is another example of the government's expansion of Hobbs Act robbery to include offenses – like this one -- with only the most minimal and/or hypothetical connection to actual commerce between states. *See, e.g., United States v. Luong*, 965 F.3d 973, 982-84 (9th Cir. 2020) (affirming conviction based on defendant's use of Craigslist to post ad for used car that lured victim to robbery, even absent any evidence that anything connected to robbery crossed a state line or that any person outside state saw ad); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 761-63 (Feb. 2005) (citing Hobbs Act robbery cases involving thefts of as little as $20); *see also Gamble v. United States*, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring) (questioning expansion of Commerce Clause authority to allow federal "incursion

robbery does not qualify as a crime of violence, this Court has already declined to "vastly expand the statute's reach by sweeping in conduct that poses an abstract risk to community peace and order" rather than "specific actions against specific persons." *United States v. Taylor*, 142 S. Ct. 2015, 2023 (2022). Including within the definition of violent felony the broad concept of "indirect" force and generalized threats to public health "would invite the type of unfettered inquiry this Court rejected in holding the residual clause unconstitutionally vague." *Id.* It thus is no surprise that, although disease and the common-law offense of robbery have co-existed for centuries, the government has not pointed to any case in which the "force" requirement of robbery was met by merely stating one has an illness and exhibiting symptoms while or after taking property belonging to someone else.

The source of this overreach, and conflict among the circuit courts, is a line in dicta from this Court's opinion in *United States v. Castleman*, 572 U.S. 157 (2014) positing that misdemeanor battery is broad enough to encompass even "indirect" uses of force, such as "by administering poison or by infecting with a disease." *Castleman*, 572 U.S. at 170. Importing such attenuated, speculative, and delayed harms into the force requirement of robbery directly contradicts this Court's decision in *Stokeling v. United States*, holding that robbery is a "violent felony" for purposes of the Armed Career Criminal Act ["ACCA"] if the level of force meets the common-law requirement of "physical force" sufficient to "overcome" "resistance by the victim." 139 S. Ct. 544, 549 (2019). Such force must be "a violent act directed

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into the States' general criminal jurisdiction and an imposition on the People's liberty.").

against a robbery victim," *id.* at 551, one that "necessarily involves a physical confrontation and struggle," rather than merely an offensive touching. *Id.* at 553. It is the "physical contest" between robber and victim that forms the core of the "force" requirement. *Id.* The "indirect force" theory of prosecution from *Castleman* dicta finds no support in the common law of robbery, and it cannot be reconciled with *Stokeling*.

Treating an indirect, unintentional, unspecified threat of illness as "violent force" for Hobbs Act purposes likewise contradicts this Court's decision in *Borden v. United States*, holding that no crime, robbery or otherwise, can satisfy the "use of force" requirement under the ACCA absent proof that the defendant knowingly or intentionally – and not merely recklessly – "direct[ed] his action at, or target[ed], another individual" for the purpose of exerting force. 141 S. Ct. 1817, 1825 (2021). Here, the jury was told it needed to find merely that Ms. Barela "threaten[ed] to infect" others through her conduct, which would include acting recklessly by disregarding the risk that people near her may become infected. The indirect route of violent force especially implicates *Borden*, because the reckless creation of risk of infection through general exhalation and coughing of nonvolitional objects is flatly excluded from violent force by *Borden*.

In short, Ms. Barela's conviction conflicts with this Court's precedent and decisions from other circuits about the limits of the threatened use of violent force necessary for an offense to qualify categorically as a violent felony or crime of violence ["VF/COV"]. Unless this Court stands ready to overturn unanimous circuit

opinions holding that Hobbs Act robbery is a VF/COV,[3] there is no way to reconcile Ms. Barela's conviction, or the cases embracing indirect force in reliance on *Castleman*, with the holdings of *Stokeling* and *Borden*. Whatever the outer boundaries of Hobbs Act robbery and VF/COVs may be, they do not include the reckless and indirect conduct in this case. The Court should grant the petition for certiorari to reconcile conflicting circuit opinions and confirm that *Stokeling* and *Borden* do not permit violent force classification based on threatened creation of the risk of indirect force.

STATEMENT OF THE CASE

Ms. Barela was convicted of Hobbs Act robbery based on her coughing and saying "I have COVID" while shoplifting several bottles of body wash from a Walgreens store. App. 4. During the few minutes she was in the Walgreens, no one confronted, challenged, interacted with, or came within several feet of Ms. Barela. She did not touch or speak directly to anyone. She did not cough on, or at, anyone or explicitly threaten to do so. Thus, her conviction hinged on whether an implicit

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[3] After *Taylor*, which held that attempted Hobbs Act robbery was not a VF/COV, at least seven circuits have reaffirmed in published opinions that completed Hobbs Act robbery is a COV. *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023); *United States v. Stoney*, 62 F.4th 108, 113 (3d Cir. 2023); *United States v. Hatley*, 61 F.4th 536, 538 (7th Cir. 2023); *United States v. Ivey*, 60 F.4th 99, 116-17 (4th Cir. 2023); *United States v. McCoy*, 58 F.4th 72, 74 (2d Cir. 2023); *United States v. Linehan*, 56 F.4th 693, 700 (9th Cir. 2022); *United States v. Baker*, 49 F.4th 1348, 1356-59 (10th Cir. 2022). Before *Taylor*, the additional circuits, except for the District of Columbia, which apparently has not addressed the issue, *United States v. Cooper*, 610 F. Supp. 3d 184, 204 (D.D.C. 2022), held that Hobbs Act robbery was a COV. *United States v. Garcia-Ortiz*, 904 F.3d 102, 106 (1st Cir. 2018); *Diaz v. United States*, 863 F.3d 781, 783 (8th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *In re St. Fleur*, 824 F.3d 1337, 1340-41 (11th Cir. 2016).

threat to use indirect force recklessly was legally sufficient to meet the Hobbs Act element that the robbery be achieved "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person." 18 U.S.C. § 1951(b)(1).

Because the Ninth Circuit, like ten other circuits, had held that Hobbs Act robbery is a VF/COV, Ms. Barela argued that the government had to prove at least a knowing "use, attempted use, or threatened use of force." *Taylor*, 142 S. Ct. at 2020. This issue was raised in several disputed jury instructions. First, the district court rejected Ms. Barela's request to make clear that the jury had to determine whether she stole the body wash "by *intentional* means of actual or threatened force, or violence, or fear of injury." App. 3 n.1. Second, Ms. Barela objected to the government's requested instruction that "[t]hreatening to infect another person with a disease can amount to threatened force, violence or fear of injury, immediate or future, to that person." App. 1-2. These rulings manifestly permitted a conviction based on (1) so-called "indirect force," namely, infectious particles in breath, and (2) a reckless threat and/or a reckless type of force threatened. Given these disputed instructions, the jury convicted Ms. Barela of Hobbs Act robbery.

After oral argument, the Ninth Circuit affirmed Ms. Barela's conviction. App. 1. "Barela's threat to expose Walgreens employees to COVID-19 could have easily put the store clerks in 'fear of injury,'" App. 2, and "threatening someone denotes intentionality." App. 3. The Ninth Circuit also held that the jury instructions "adequately conveyed the force required for a conviction and did not need the

addition of a 'violent force' instruction as argued by Barela for the first time on appeal." App. 4.[4] It denied Ms. Barela's petition for rehearing en banc. App. 29.

REASONS FOR GRANTING THE WRIT

This Court has left open the question whether a VF/COV may be committed by an "indirect application" of force, such as by poisoning or infecting with a disease, particularly, as here, in the absence of any bodily injury. *Castleman*, 572 U.S. at 170. The circuits are split. The Court should grant the petition for certiorari to resolve this disputed and recurring question.

Nor has this Court addressed the VF/COV violent-force requirement where, as here, the offense did not require proof of any physical harm and there was no use or attempted use of force, *i.e.*, where any use of force was merely threatened. The Ninth Circuit's decision conflicts with other circuits' application of *Borden* in the threat context. The Court should grant review to reconcile the circuits and give them guidance on this significant and recurring question.

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[4]Ms. Barela preserved the challenge she raises here to whether the threatened use of indirect force qualifies as "violent force." The VF/COV violent-force standard was the basis for the disputed instruction that a threat to infect with a disease can be "threatened force, violence or fear of injury." *See* App. 13-23, 25-26 (government arguing for instruction based on "*Castleman*'s use of force definition appl[ying] in a Hobbs Act context," and defense arguing that was "an incorrect statement of the law"). In another case, the government agreed that "the jury should have been told that the 'force' in Hobbs Act robbery means 'violent force.'" *United States v. Jefferson*, 911 F.3d 1290, 1299 (10th Cir. 2018), *vacated on other grounds,* 140 S. Ct. 861 (2020), *remanded to* 989 F.3d 1173 (10th Cir. 2021).

I. This Court left open whether indirect force suffices for a VF/COV, and the circuits are split

This Court in *Castleman* held that a misdemeanor battery charge involving only an "offensive touching" satisfies the "use of force" requirement for a "misdemeanor crime of domestic violence" under the firearm-ownership ban of 18 U.S.C. § 922(g)(9). 572 U.S. at 159. Indeed, *Castleman* noted in dictum that misdemeanor battery is a broad enough crime to encompass even "indirect" use of force such as "by administering poison or by infecting with a disease." *Id.* at 170. This Court left open the question whether a VF/COV, which requires "violent force," may be committed by an "indirect application" of force, such as by poisoning or infecting with a disease. *Id.*

But later, in *Stokeling*, this Court reiterated that this sort of "offensive touching" or "nominal contact," although enough for misdemeanor battery, is not enough to meet the greater force requirement of the ACCA, which targets violent felonies like robbery. 139 S. Ct. at 552-53 (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)). In fact, this Court repeatedly has distinguished one type of common-law force – the force required for a common-law misdemeanor battery -- from the "*violent* force" required for VF/COVs such as Hobbs Act robbery. *Borden*, 141 S. Ct. at 1833-34; *Stokeling*, 139 S. Ct. at 553; *Castleman*, 572 U.S. at 163; *Johnson*, 559 U.S. at 163. *Castleman* common-law force, sufficient for common-law misdemeanor battery, is "different in kind from the violent force necessary to overcome resistance by a victim" for robbery. *Stokeling*, 139 S. Ct. at 553.

Indirect force is not found in the common law of robbery. Implicitly acknowledging the absence of indirect force in the history of robbery, federal courts

have rejected defense ACCA claims that robbery is not a violent felony because its "force" element could be proven through use of indirect means such as poison. *See, e.g., United States v. Hill*, 890 F.3d 51, 58-59 & n.11 (2d Cir. 2018) (defendant did not show "a 'realistic probability' that the Hobbs Act would reach the conduct [he] describes," quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); *United States v. Burns-Johnson*, 864 F.3d 313, 318 (4th Cir. 2017) ("even if North Carolina statutory armed robbery could be committed by use of poison, the crime necessarily still would entail the use, attempted use, or threatened use of violent physical force"); *United States v. McNeal*, 818 F.3d 141, 156 (4th Cir. 2016) ("it will be the rare bank robber who commits that offense with poison. Indeed, McNeal and Stoddard have not identified a single bank robbery prosecution where the victim feared bodily harm from something other than violent physical force.").

Despite this Court's clear and repeated distinction between "violent force" and common-law battery force, many circuit opinions have relied on *Castleman*'s common-law misdemeanor battery dicta to import indirect force into the definitions of robbery and other VF/COVs. *See, e.g., Amaya v. Garland,* 15 F.4th 976, 981 & n.4 (9th Cir. 2021); *United States v. Sanchez*, 940 F.3d 526, 535 (11th Cir. 2019); *United States v. Werle*, 877 F.3d 879, 882 (9th Cir. 2017); *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017). Other courts and dissenting judges disagree. *See, e.g., United States v. Harris,* 68 F.4th 140, 148 (3d Cir. 2023) (rejecting application of *Castleman* common-law force definition to ACCA VF); *United States v. Mayo*, 901 F.3d 218, 229 n.15 (3d Cir. 2018) (noting disagreement among judges "on how far to extend *Castleman*"); *Whyte v. Lynch*, 807 F.3d 463,

470-71 (1st Cir. 2015) (declining to apply *Castleman*'s indirect-use-of-force reasoning, noting that *Castleman* did not address the VF/COV context); *United States v. Scott*, 990 F.3d 94, 140-41 (2d Cir. 2021) (en banc) (Pooler, et al., dissenting) (rejecting majority's application of *Castleman* to VF/COV context); *see also United States v. Butler*, 253 F. Supp. 3d 133, 146 n.7 (D.D.C. 2017) (same).

Applying *Castleman*'s indirect-force dicta in the VF/COV context is even less appropriate when, as here, the offense did not require proof of any bodily injury. The Tennessee assault statute at issue in *Castleman* required proof that the defendant at least knowingly caused bodily injury, which "necessarily involves the use of physical force," at least "force in the common-law sense," though not necessarily the *Johnson* sense. 572 U.S. at 169-70; *see United States v. Bullock*, 970 F.3d 210, 216-17 (3d Cir. 2020) (characterizing *Castleman*, and prior circuit case relying on it, as rejecting any "attempted distinction between direct and indirect force *that results in bodily injury*"; emphasis added). Other circuits that have held VF/COVs could be committed with indirect force similarly have relied on proof that the defendant at least knowingly caused bodily injury. *See, e.g., United States v. Rumley,* 952 F.3d 538, 550 (4th Cir. 2020); *Ontiveros*, 875 F.3d at 538. Here, there was no injury, let alone injury at least knowingly inflicted.

The risk from Ms. Barela was even less direct than from poison; she simply coughed into the air and claimed in earshot of someone that she had a contagious illness, at most implying a possible physical risk to someone pursuing her, akin to threatening "I'm about to run into traffic." Whatever the outer boundaries are of physical force for Hobbs Act purposes, they cannot be stretched to include such an

indirect, implied possibility of risk to a pursuer. The Court should grant review to decide whether a conviction for Hobbs Act robbery, and other VF/COVs, can be based on an implicitly threatened indirect use of force, like the threat to infect with a disease in this case.

II. This Court has not addressed how *Borden*'s *mens rea* requirement applies to VF/COVs based on threats, and circuits are split

This Court held in *Borden* that the "use of physical force against the person of another" cannot be reckless; it must be knowing or intentional. 141 S. Ct. at 1821-22. The force clause "demands that the perpetrator direct his action at, or target, another individual." *Id.* at 1825. "The 'use of physical force" . . . means the 'volitional' or 'active' employment of force." *Id.* This is so, this Court reasoned, because VF/COV offenses are within the "narrow category of violent, active crimes" that 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.* at 1830 (cleaned up). Because viral particles, like "'waves' and 'baseballs' have no volition — and indeed, cannot naturally be said to 'use force' at all," *id.* at 1826, to support a conviction, their deployment must have been knowing and targeted.

Although *Borden* did not specifically address a VF/COV based on a threat, its *mens rea* requirement must apply equally to threatened uses of force. Yet the jury instructions here did not require proof of an intentional or knowing threat or threat to use force, even though *mens rea* was strongly implicated by implied threats to act recklessly toward public health.

A. This case conflicts with *Borden* and decisions from other circuits in failing to require at least a knowing threat

Particularly when indirect force is involved, as here, courts have emphasized that *the force threatened or employed must be knowing or intentional. See, e.g., Castleman*, 134 S. Ct. at 1415 ("use of force" is "the act of employing poison *knowingly* as a device to cause physical harm"; emphasis added); *Rumley*, 952 F.3d at 551 (in omission cases, "the use of force is the employing of that mechanism knowingly as a device to cause physical harm"; cleaned up). The jury instructions in this case failed to require at least a knowing threat.

It is no answer to state, as the Ninth Circuit did, that the concept of a threat connotes intention. *See United States v. Frazier*, 48 F.4th 884, 887 (8th Cir. 2022) (rejecting government's claim that state threat statute satisfied *Borden* just because "a threat must be intentional"). This Court has rejected the claim that "every definition of 'threat' or 'threaten' conveys the notion of an intent to inflict harm"; dictionary definitions "speak to what the statement conveys – not to the mental state of the author." *Elonis v. United States*, 575 U.S. 723, 732-33 (2015). In the absence of Ms. Barela's requested instruction directing the jury to determine whether she made any threat intentionally, the jurors could have convicted her based on whether they themselves would have felt threatened by her coughing.

Consistent with this understanding of threats and with *Borden*, but in conflict with the Ninth Circuit's reasoning, the Sixth Circuit recently held that Ohio aggravated robbery was not a violent felony because it could be committed with a *mens rea* of no more than recklessness. *United States v. White*, 58 F.4th 889, 895 (6th Cir. 2023). The statute in *White* prohibited, (1) in attempting or committing a

theft offense, (2) having or controlling a deadly weapon and (3) displaying, brandishing, indicating possession of, or using it. *Id.* The Sixth Circuit acknowledged that the statute's weapon requirement "convey[ed] an implied threat to inflict physical harm." *Id.* at 896 (brackets added; internal quotation marks omitted). But that court rejected the argument that the implied threat conveyed by a thief who at least indicated the possession of a weapon "is necessarily accomplished with a mens rea greater than recklessness." *Id.* Holding "the defendant criminally liable for indicating possession of a weapon based only on the way he held his hands and the impression he conveyed to the victim . . . could clearly be the result of recklessness and not intent." *Id.* at 899.

The Sixth Circuit thus, relying on a hypothetical very similar to this case, rejected the reasoning of the Ninth Circuit here, that an implicit threat necessarily requires a *mens rea* of at least knowledge. Allowing the jury to convict of Hobbs Act robbery based merely on a finding that Ms. Barela threatened to infect with a disease, without any determination that she made the threat knowingly or intentionally, conflicts with *White* and *Borden*.

B. This case conflicts with *Borden* and decisions from other circuits in failing to require a threat to at least knowingly use force

Even if a threat is made intentionally, *Borden* requires a further finding that what was knowingly or intentionally threatened was at least a knowing use of violent force against another person or thing. *See Taylor*, 142 S. Ct. at 2021 (citing hypothetical where defendant convicted of attempted Hobbs Act robbery would not have "threaten[ed] the use of force against anyone or anything"). A knowing threat

to act recklessly -- by being sick in a Walgreens, for example -- does not satisfy the force clause. The Ninth Circuit's decision conflicts with recent cases from other circuits that have honored this aspect of *Borden* where VF/COV offenses were based on threats.

The Eighth Circuit, for example, rejected the government's claim that a state threat statute satisfied *Borden* just because (echoing the panel in this case) "a threat must inherently be intentional." *Frazier*, 48 F.4th at 887.

> [T]he question under the force clause is not simply whether the defendant made an intentional threat, but whether the defendant threatened the use of physical force against the person of another. . . . Threatening to commit an act that does not satisfy the force clause likewise does not satisfy the force clause, even if the threat itself is intentional.

Id.

The Eighth Circuit thus held that the defendant's prior conviction -- for threatening to discharge a dangerous weapon into an occupied building or vehicle or crowd of people, placing the people in reasonable apprehension of serious injury in circumstances raising a reasonable expectation that the threat will be carried out – was not a crime of violence. *Id.* at 885. "The offense does not require that the defendant knowingly or intentionally target the person of another with force or threatened force." *Id.* at 887. Because the offense could be committed by the defendant intentionally shooting into a building "but only recklessly caus[ing] an occupant to fear serious injury," it did not satisfy *Borden*'s *mens rea* requirement. *Id.*; *see also United States v. Quinnones*, 16 F.4th 414, 419-21 (3d Cir. 2021) (state offense of causing another prisoner to come into contact with bodily fluid that came

from someone with communicable disease did not require the VF/COV use of physical force: "Spitting or expelling fluid," alone, cannot cause physical pain or injury, and *mens rea* for why the expelled fluid was dangerous was not more than "should have known," or negligence).

The Eleventh Circuit similarly held that a Georgia aggravated assault conviction for "committing an act with a deadly weapon which places another in reasonable apprehension of immediately receiving a violent injury" was not a COV. *United States v. Carter*, 7 F.4th 1039, 1045 (11th Cir. 2021). Proof "that the defendant intended to do the act that placed another in reasonable apprehension of immediate violent injury" is not proof that he intended to place another in reasonable apprehension of harm, which can be done recklessly and is insufficient under *Borden*. *Id*; *see also, e.g., United States v. Williams,* 24 F.4th 1209, 1212 (8th Cir. 2022) (holding that Nebraska terroristic threats statute was not VF after *Borden* because it could be committed with "reckless disregard of the risk of causing . . . terror or evacuation"); *Somers v. United States*, 15 F.4th 1049, 1054-56 (11th Cir. 2021) (certifying question to Florida Supreme Court of *mens rea* required for Florida assault because not clear whether statute required "a specific intent to threaten another person," which would satisfy *Borden*, or could be proved by willful and reckless disregard for others' safety, which would not).

Nor does having an intent to rob necessarily imply an "intentional use of force." *United States v. Smith*, 2023 WL 1860518, at *11 (11th Cir. Feb. 9, 2023) (unpublished). Accordingly, some district courts have held that threat-based robbery offenses do not qualify as VF/COVs after *Borden*. *See United States v. Ruffin*, 2022

WL 1485283, at *9 (W.D. Pa. 2022) (following the reasoning of *United States v. Blakney*, 2021 WL 3929694 (E.D. Pa. 2021)) (threatening "immediate serious bodily injury by consciously disregarding the substantial risk that such action constitutes a threat to cause immediate serious bodily injury . . . . is the epitome of recklessness.").

This case presents an opportunity to address the effect of *Borden* on the Court's VF/COV jurisprudence in the context of threats and to bring consistency to the circuits.

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

The string of this Court's cases addressing VF/COVs demonstrates the frequency with which these provisions are applied and the complexity of applying them to a wide range of state and federal offenses. Moreover, the number of Hobbs Act robbery cases has increased over the past ten years, surpassing bank robbery as the most common federal robbery offense.[5]

This case squarely presents the validity of indirect and inherently risk-based force in the violent-felony analysis. The facts of this case may be unusual, as the district court judge acknowledged based on his 50 years of experience in the federal judicial system: "a shoplifting case with a twist." ER-19. And to be sure, nearly all Hobbs Act robberies at least pose a greater risk of physical danger than Ms.

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[5] United States Sentencing Commission, *Federal Robbery: Prevalence, Trends, and Factors in Sentencing* 12 ["Federal Robbery"] (Aug. 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220818_Robbery.pdf.

Barela's.[6] *See, e.g., United States v. Davis,* 953 F.3d 480, 486 (7th Cir. 2020) (affirming conviction because jury could have found former co-conspirator reasonably feared injury where defendant pulled gun on her); *United States v. Jefferson*, 911 F.3d 1290, 1300 (10th Cir. 2018) (affirming conviction where defendant "'grabb[ed] at the front door with the clerk clinging to it in resistance"), *vacated on other grounds,* 140 S. Ct. 861 (2020), *remanded to* 989 F.3d 1173 (10th Cir. 2021); *United States v. Thomas*, 849 F.3d 906, 909 (10th Cir. 2017) (upholding conviction based on "aggressive" push). But it is this case, once considered a hypothetical, that involves "the least serious conduct" the offense covers and that determines the categorical boundaries of violent felonies and crimes of violence. *Borden*, 141 S. Ct. at 1832. Thus, the issues it raises are important, disputed, and recurring in various robbery, assault, and VF/COV contexts.

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[6] More than three quarters of federal robberies "involved dangerous weapons," overwhelmingly firearms. Federal Robbery at 30. More than 60% of federal robbery offenders received enhancements for at least possessing a firearm or threatening death, *id.* at 19, and more than 55% of Hobbs Act robbery offenders also were convicted of violating 18 U.S.C. § 924(c) for at least possessing a firearm in connection with the robbery. *Id.* at 27.

> [T]he overwhelming majority of robbery events that involved threats of physical force involved such threats with a dangerous weapon – 89.7 percent of robbery events involved a threat of physical force, and 83.6 percent of those threats involved a dangerous weapon. Such threats included individuals brandishing, displaying, or claiming to have a weapon, as well as 'racking' or cocking of a firearm, or firing into the air.

Id. at 31. Approximately a third of federal robberies (32.9%) involved verbal threats. *Id.*

This case also raises important issues related to the criminalization of public health. For example, is it a violent felony assault, child abuse, or domestic violence to disregard a mask or vaccine mandate? What if the common cold is threatened? Should spitting count as a violent felony prior conviction if it was criminalized before it was learned that spitting could not transmit the pathogen in question? Are symptoms alone, without the claim that one is ill, a form of violent force? Could outward manifestations of poverty or homelessness, because they are known structural drivers of infectious disease, amount to a threat of violent force? These are not hypothetical issues. This prosecution, like some laws giving rise to past convictions employed to dramatically enhance sentences, arose in the early phase of a pandemic. There were similarly well-intended but overwrought criminal-justice responses when HIV first emerged as a public-health challenge:

> During the early years of the HIV epidemic, many states implemented HIV-specific criminal exposure laws to discourage actions that might lead to transmission, promote safer sex practices, and, in some cases, receive funds to support HIV prevention activities. These laws were passed at a time when little was known about HIV including how HIV was transmitted and how best to treat the virus. Many of these state laws, then and now, criminalize actions that cannot transmit HIV – such as biting or spitting – and apply regardless of actual transmission, or intent.[7]

Cases relying on *Castleman* have upheld sentencing enhancements based on prior convictions under these very same outdated pandemic-era statutes and prosecutions. Thus, the issues presented are relevant and recurring, even if this case is unusual. Such statutes also give an indication as to the merits of this

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[7] Centers for Disease Control and Prevention, *HIV and STD Criminalization Laws*, (March 3, 2023), https://www.cdc.gov/hiv/policies/law/states/exposure.html.

petition. At their core, distinct from the common law of robbery but analogous to the facts of this case, is the criminalization of *reckless* behavior toward epidemiological risk of indirect harm, conduct that does not amount to violent force under *Stokeling* and *Borden*.

These questions about indirect force and *mens rea* for threat VF/COVs were raised and preserved in this case. The only claimed "use of force" was Ms. Barela's coughing and saying she had COVID, App. 2-4, which was at most, as the government said, "an implied threat." App. 6. The jury instruction that "[t]hreatening to infect another person with a disease can amount to threatened force, violence or fear of injury, immediate or future, to that person," App. 1-2, incorporated *Castleman*'s indirect-force dicta. App. 15-16, 25-26. Ms. Barela objected to this instruction. App. 6, 13-14, 25.

Because a threat of potential infection is not violent force under *Borden* and *Stokeling*, contrary to the holdings of several courts of appeals, the Court should grant the petition for a writ of certiorari.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,
JODI LINKER
Federal Public Defender
Northern District of California

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JOHN PAUL REICHMUTH
ROBIN PACKEL
Assistant Federal Public Defenders