No. _____

In The
Supreme Court of the United States

MARTIN JAY MANLEY,

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

J. Scott Ballenger
Counsel of Record
Catherine E. Stetson
APPELLATE LITIGATION CLINIC
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred, in conflict with decisions of other circuits, in holding that for purposes of applying the categorical approach the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. § 1959, is divisible into an indefinite number of distinct crimes based not on the structure of the statute but on how the government satisfied VICAR's unlawfulness element.

2. Whether the Fourth Circuit erred in holding that "extreme recklessness" crimes necessarily involve a use of force against the person or property of another.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is reproduced at Pet.App.20a–25a. The opinion of the Fourth Circuit is reproduced at Pet.App.1a–19a, and its order denying rehearing *en banc* is at Pet.App.28a.

JURISDICTION

The Fourth Circuit denied a petition for rehearing *en banc* on December 28, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix (Pet.App.29a–30a) reproduces the text of 18 U.S.C. § 924(c)(3) and 18 U.S.C. § 1959 involved in this case.

INTRODUCTION

18 U.S.C. § 924(c)(3)(A) defines a "crime of violence" to include any crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." That "elements clause," and similar language in 18 U.S.C. § 16 and the Armed Career Criminals Act (ACCA), 18 U.S.C. § 924(e)(2)(B), plays an important role in federal criminal law and immigration law. This case presents the Court with an opportunity to resolve two important issues, both of which merit review.

First, the Fourth Circuit's decision deepens a circuit split about how the elements clause applies to the Violent Crimes in Aid of Racketeering (VICAR)

statute, 18 U.S.C. § 1959, as well as other statutes like the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961 *et seq.*, that depend on commission of some other predicate crime. Under the settled "categorical approach," courts look to the least culpable conduct prosecutable under a statute when deciding whether the elements clause is satisfied. VICAR makes it a federal crime to commit certain listed acts (*e.g.*, murder, maiming, kidnapping, assault with a dangerous weapon), for a racketeering purpose, and "in violation of the laws of any State or the United States." 18 U.S.C. § 1959. But rather than identifying the least culpable conduct that could satisfy those elements, the Fourth Circuit zoomed in on the particular Virginia maiming statute identified in the indictment as satisfying the "in violation of the laws of any State or the United States" element. The court of appeals held, in other words, that VICAR is divisible into distinct crimes depending on the particular violation of law the government chooses to rely on. That holding is inconsistent with this Court's decisions applying the categorical approach, including *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 579 U.S. 500 (2016). It also conflicts with holdings of the Third, Fifth, Sixth, Eighth, and D.C. Circuits. That conflict has serious implications for prosecutions under VICAR and RICO, and for how the categorical approach applies to numerous state and federal statutes with a similar structure.

Second, the Fourth Circuit decided the issue this Court left open in *Borden v. United States*, 141 S. Ct. 1817 (2021): whether so-called "extreme

recklessness" crimes involve a qualifying use of force. In *Borden* a four-Justice plurality explained that ordinary recklessness crimes do not satisfy the elements clause, because a reckless defendant has not *targeted* force against any particular victim. The plurality pointed to drunk and reckless driving as paradigmatic examples of conduct that does not involve a targeted "use" of force "against" another. In his concurrence, Justice Thomas explained that "use of physical force" is a phrase with a "well-understood meaning applying only to intentional acts designed to cause harm." *Borden*, 141 S. Ct. at 1835 (Thomas, J., concurring) (citation omitted).

The Fourth Circuit held that extreme recklessness crimes satisfy the elements clause because extreme recklessness is closer in *culpability* to knowledge or intent than to ordinary recklessness. But five Justices explained in *Borden* that highly culpable conduct is not enough to satisfy the elements clause. The statute requires *targeting* of force against a known victim or victims. Defendants are frequently convicted of extreme recklessness crimes, including second-degree murder, for exactly the sorts of conduct that the *Borden* plurality specifically explained *cannot* satisfy the elements clause—such as drunk or reckless driving, or throwing a heavy object off a balcony.

Other circuits have reached similar conclusions, and there is no split. But the fact that the circuits appear to be lining up behind a holding with which a majority of this Court may disagree is a ticking time bomb. This Court is intimately familiar with the chaos that ensues whenever it overrules a consensus

among the courts of appeals about the scope of Sections 924(c) and (e): Every defendant found guilty, or who pled guilty, under the prior understanding suddenly has a plausible claim for collateral relief. This scenario will play out again if the Court refrains from interceding while the circuits coalesce around a deeply flawed ruling that extreme reckless is, somehow, not recklessness.

STATEMENT OF THE CASE

Proceedings in the district court

A. The Guilty Plea

On October 19, 2009, Petitioner Martin Manley pled guilty to three counts of an indictment. As relevant here, Count 25 charged discharge of a firearm in relation to a crime of violence in violation of § 924(c)(1). The indictment stated that the underlying crime of violence was an assault violation of VICAR under § 1959(a)(3), "as set forth in Count Twenty-four." Pet.App.32a. Count 24 charged that Manley committed an assault, with the necessary racketeering purpose, in violation of a state maiming statute, Virginia Code § 18.2-51. *Id.*

Count 35 charged discharge of a firearm in relation to a crime of violence that resulted in death, in violation of §§ 924(c) and (j). Pet.App.34a–35a. Again the alleged underlying crime of violence was a VICAR charge, this time VICAR murder "as set forth in Count Thirty-four"—which charged a murder, for a racketeering purpose, in violation of Virginia Code § 18.2-32. *Id.*

The statement of facts submitted with the plea agreement clarified that Counts 24 and 25 were

based on Mr. Manley shooting into a pickup truck and injuring one of the truck's occupants. Pet.App.52a–53a. Counts 34 and 35 were based on Mr. Manley shooting and killing a different individual. Pet.App.53a–54a.

The Eastern District of Virginia accepted Mr. Manley's plea. In an order, the court stated that Mr. Manley had pled guilty to an indictment charging him with "conspiracy to engage in racketeering acts (Count 1), in violation of 18 U.S.C. § 1962(d); discharging a firearm in relation to a crime of violence (Count 25), in violation of 18 U.S.C. § 924(d); and use of a firearm resulting in death (Count 35), in violation of 18 U.S.C. § 924(c) and (j)." Pet.App.26a. The court found that the plea was knowing and voluntary, and that "the offense charged is supported by an independent basis in fact, establishing each of the essential elements of such offense." Pet.App.27a. However, the order accepting the plea agreement—as well as the plea agreement itself and the statement of stipulated facts—did not mention any particular predicate crimes underlying Counts 25 or 35. Pet.App.26a–27a, 36a–37a, 50a.

B. The Section 2255 Proceeding

On February 18, 2020, Mr. Manley filed a *pro se* petition under 28 U.S.C. § 2255 to vacate his convictions for Counts 25 and 35. Mr. Manley argued that the 924(c) convictions were invalid because they were predicated on offenses that did not fall under the definition of "crime of violence" after *United States v. Davis*, 139 S. Ct. 2319 (2019), invalidated the definition's residual clause. Pet.App.21a–22a.

The court denied Manley's petition. For Count 25, the district court held that assault with a dangerous weapon in aid of racketeering is a crime of violence for reasons set forth in a prior opinion. Pet.App.22a (citing *Ellis v. United States*, __ F. Supp. 3d __, No. 4:08-cr-144, 2020 WL 1844792 (E.D. Va. Apr. 10, 2020)). That opinion had reasoned that common-law assault, when combined with the use of a dangerous weapon, had as an element the use, attempted use, or threatened use of force. *Ellis*, 2020 WL 1844792, at *2.

For Count 35, the court reasoned that "[t]he common law definition of murder is the unlawful killing of another human being with malice aforethought." Pet.App.23a (citation omitted). It concluded that "[c]ommon law murder certainly involves the use, attempted use, or threatened use of physical force against the person." *Id.* (internal quotation marks omitted). In a footnote, the court held that the state offense identified as the predicate for the VICAR murder charge, Virginia murder in violation of Va. Code Ann. § 18.2-32, was also a crime of violence. Pet.App.24a n.3.

The Fourth Circuit's Decision

This Court decided *Borden* while Mr. Manley's appeal was pending. Justice Kagan's plurality opinion held that a reckless offense could not satisfy the ACCA elements clause, because the word "against" had an "oppositional, or targeted, definition." *Borden*, 141 S. Ct. at 1826. Justice Thomas's concurrence agreed that reckless crimes did not qualify, although based on the language "use

of physical force." *Id.* at 1835 (Thomas, J., concurring).

The Fourth Circuit affirmed Mr. Manley's conviction under Count 25 because it held that the Virginia maiming offense identified in Count 24 qualified as a crime of violence. Pet.App.9a–10a. The court acknowledged that Mr. Manley "argues that we should not consider the elements of the state statute" because "the predicate crime of violence alleged in Count 25 was VICAR assault, not Virginia assault." Pet.App.8a. However, the court reasoned that VICAR's unlawfulness element in turn required the government to "identify a specific state or federal law that the defendant violated by engaging in the conduct underpinning the VICAR offense," and that therefore the elements of the state crime became, in effect, elements of the VICAR crime. Pet.App.8a–9a.

The Fourth Circuit similarly affirmed Count 35 by looking through to the Virginia crime identified in Count 34. Pet.App.11a. Because Virginia murder could be committed with a *mens rea* of extreme recklessness, the court of appeals then considered whether extreme recklessness satisfies the elements clause. Pet.App.12a.

The Fourth Circuit understood *Borden* to hold that the elements clause is satisfied by crimes requiring intent to use force or knowledge that an application of force was "*practically certain* to follow," but not by mere recklessness. Pet.App.13a (quoting *Borden*, 141 S. Ct. at 1823–24 (plurality opinion)) (emphasis added by *Manley* court). The panel concluded that "extreme recklessness, as defined by Virginia law, not only falls between

'knowledge' and 'recklessness,' but also is closer in culpability to 'knowledge' than it is to 'recklessness.'" *Id.* The court cited language from the Virginia Supreme Court describing extremely reckless conduct as "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," and as "'so harmful' to the victim as to support an inference of malice." Pet.App.14a (cleaned up). The panel characterized that Virginia definition as "close" to the "'practically certain' state of 'knowing.'" Pet.App.14a. The panel acknowledged the *Borden* plurality's requirement "that the perpetrator direct his action at, or target, another individual." Pet.App.12a (quoting *Borden*, 141 S. Ct. at 1825). But the panel did not explain how that requirement is satisfied by extreme recklessness.

The Fourth Circuit pointed out that two other circuit courts had reached similar decisions after *Borden*, and one before *Borden*. Pet.App.14a (citing *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343–44 (11th Cir. 2022); *United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 340 (2022); *United States v. Báez-Martínez*, 950 F.3d 119, 125–27 (1st Cir. 2020)). The panel also reasoned that its holding "accord[ed] with the context and purpose of § 924(c)" because "murder is obviously among the most violent of crimes." Pet.App.14a–15a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's divisibility holding conflicts with decisions of this Court and other circuits on an issue of great importance. Under the modified categorical approach, a reviewing court may treat a statute as "divisible" when it "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile." *Descamps*, 570 U.S. at 257. But that approach is permitted only when the statute itself "list[s] multiple, alternative elements." *Mathis*, 579 U.S. at 513 n.4 (quoting *Descamps*, 570 U.S. at 264). When the statute lists a single element that can be satisfied many different ways, it is not divisible. In those circumstances, the categorical approach asks whether the least culpable conduct that would satisfy the statute's elements necessarily involves a qualifying use or threat of force.

The Fourth Circuit held, however, that VICAR's unlawfulness element makes it divisible into an indefinite number of different crimes. That holding is inconsistent with this Court's decisions in *Mathis* and *Descamps*, and deepens an existing circuit split about how the categorical approach applies to VICAR, RICO, and other statutes with similar unlawfulness elements.

The Fourth Circuit's holding that "extreme recklessness" crimes satisfy the elements clause cannot be reconciled with the views articulated by five Justices in *Borden*. Extreme recklessness is highly culpable, but it is still recklessness—conscious disregard of risk—not intent or knowledge. This issue will inevitably come before this Court. If a

majority ultimately disagrees with the circuits the result will be the usual jurisprudential train wreck, aggravated by the convictions and guilty pleas that have accumulated in the interim. It would be far better to address and decide the issue now.

I. THE FOURTH CIRCUIT'S DIVISIBILITY HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The Fourth Circuit's holding that VICAR is divisible into an indefinite number of sub-crimes is contrary to this Court's decisions, the purposes of the categorical approach, and decisions of several other circuits.

A. The Fourth Circuit's Decision Conflicts With This Court's Decisions In *Mathis* And *Descamps*.

When a statute sets out one set of elements defining one crime, it is considered "indivisible," making a categorical comparison of elements "straightforward"; when the same statute defines multiple crimes it is considered "divisible," and courts may look to charging and plea materials to determine which crime was the basis for the conviction. *Mathis*, 579 U.S. at 504–05. The distinction between the "categorical" and "modified categorical" approaches is critical, because the elements clause requires courts to identify the *least culpable* conduct satisfying the elements of the crime or (if divisible) sub-crime.

The VICAR statute is clearly divisible into six separately numbered subsections identifying distinct

crimes (murder, maiming, assault, etc.). *See* 18 U.S.C. § 1959(a). But the Fourth Circuit held that VICAR is *further* divisible into many sub-crimes based on the other law identified as satisfying the distinct "in violation of the laws of any State or the United States" unlawfulness element. That holding cannot be reconciled with this Court's precedents, which make clear that criminal statutes are divisible only when they explicitly "list[ ] potential offense elements in the alternative." *Descamps*, 570 U.S. at 260.

Descamps explains that divisibility is appropriate only when necessary to "discover 'which statutory phrase,' contained within a statute listing 'several different' crimes, 'covered a prior conviction.'" *Id.* at 263 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)). In such cases, the modified categorical approach "'permits a court to determine which statutory phrase was the basis for the conviction.'" *Id.* (quoting *Johnson v. United States*, 559 U.S. 133, 144 (2010)). In *Shepard v. United States*, 544 U.S. 13 (2005), and *Nijhawan*, for example, this Court considered Massachusetts burglary statutes that expressly covered breaking and entering into "boats and cars" (*Shepard*) and a "building, ship, vessel, or vehicle" (*Nijhawan*). *Id.* at 262–63. Both statutes would be divisible; each requires courts to "discover which statutory phrase … covered a prior conviction." *Id.* at 263 (cleaned up).

This Court explained that its divisibility precedents "rested on the explicit premise that the laws contained statutory phrases that cover several different crimes." *Id.* at 264 n.2 (cleaned up). By

contrast, the statute at issue in *Descamps* was not divisible because it included no list of alternatives. The modified categorical approach simply "ha[d] no role to play" without a "list of alternative elements." *Id.* The Ninth Circuit had suggested that there was no meaningful difference between statutes that explicitly list alternatives (*e.g.,* breaking and entering into any "building or vehicle") and statutes that use broad language *impliedly* embracing various alternatives (*e.g.,* breaking and entering into "property of another"). This Court rejected that view. *Id.* at 271–72. It explained that the Ninth Circuit's reasoning "would altogether collapse the distinction between a categorical and a fact-specific approach," and improperly view every crime as "containing an infinite number of sub-crimes." *Id.* at 273. "[E]very element of every statute can be imaginatively transformed" into an implied list of ways the crime can be committed, but if that exercise is indulged "then the categorical approach is at an end." *Id.* at 273–74.

Mathis further confirms that the modified categorical approach is intended only for statutes explicitly identifying alternative elements. *See* 579 U.S. at 504–05. *Mathis* explained that "[t]he comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or 'indivisible') set of elements to define a single crime. The court then lines up that crime's elements alongside those of the generic offense and sees if they match." *Id.* The modified categorical approach was approved *only* to address statutes with a "divisible" structure that "list elements in the alternative." *Id.* at 505.

VICAR's unlawfulness element contains no list of alternatives. It simply requires conduct "in violation of the laws of any State or the United States." Certainly one can hypothesize a (long) list of laws satisfying that element, just as one can hypothesize an "infinite" list of weapons or means of killing. *See Descamps*, 570 U.S. at 273–74. But since VICAR contains no list, viewing that statute as creating "an infinite number of sub-crimes" is exactly the error rebuked in *Descamps*.

As *Descamps* explained, the Fourth Circuit's approach would fundamentally undermine the purposes of the categorical approach. First, the elements clauses are meant to "function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." *See id.* at 268. Congress did not intend that "a particular crime might sometimes count toward enhancement and sometimes not, depending on the facts of the case." *Id.* (quoting *Taylor*, 495 U.S. at 601).

Second, searching for the particular means by which a defendant violated statutory elements edges perilously close to impermissible judicial factfinding. *See id.* at 269 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

Third, strict application of the categorical approach "avoids unfairness to defendants." *Mathis*, 579 U.S. at 512. The meaning of plea or trial records "will often be uncertain" and may be "downright wrong," since defendants have "little incentive to contest facts that are not elements of the charged offense." *Descamps*, 570 U.S. at 270. For example, neither the government nor Mr. Manley thought it

necessary to specify predicates in their plea agreement. Pet.App.37a. And in one recent VICAR case, even the charges did not specify a predicate crime. *See United States v. Gill*, --- F. Supp. 3d ---, No. 07-0149, 2023 WL 349844, at *9 (D. Md. Jan. 20, 2023). When the defendant challenged his conviction, the district court had to guess that Maryland murder was the appropriate violation based on other clues in the record—a task plainly inconsistent with the purposes of the categorical approach. *See id.* at *10.

Finally, elements are facts that a jury must unanimously find beyond a reasonable doubt. *See id.* at 269–70. But there is no reason to think a VICAR jury must agree on a single, specific state or federal law that was violated. Section 924 convictions, for example, may be charged based on multiple possible "crimes of violence," leaving it unclear which the jury ultimately relied on. *See, e.g.*, *United States v. Jones*, 935 F.3d 266, 269 (5th Cir. 2019); *In re Cannon*, 931 F.3d 1236, 1243 (11th Cir. 2019).

B. The Fourth Circuit's Decision Deepens An Existing Circuit Split About Whether Statutes Like VICAR And RICO Are Divisible.

Despite the clarity of this Court's decisions in *Descamps* and *Mathis*, there is now a four-to-five circuit split about whether VICAR's unlawfulness element, or analogous elements in other statutes, should be divisible based on specific violations of other law.

1. Pro-divisibility cases. Four circuits (now including the Fourth) find it appropriate to look at the predicate crime charged in applying the modified categorical approach.

The Second Circuit has relied on the elements of underlying predicate crimes to find that VICAR convictions satisfied § 924(c). *See United States v. Pastore*, 36 F.4th 423, 429–30 (2d Cir. 2022); *United States v. White*, 7 F.4th 90, 104 (2d Cir. 2021). In *White*, the Second Circuit held that "the VICAR offense in Count Six remains a valid predicate crime of violence" after *Davis* because it in turn was "premised on the New York offense of assault in the second degree," which satisfied the elements clause. *Id.* In *Pastore*, the Second Circuit analogized to its recent holding that RICO convictions were divisible based on the particular predicate racketeering acts charged. 36 F.4th at 429 (citing *United States v. Laurent*, 33 F.4th 63, 87–89 (2022)). The Second Circuit saw "no reason why the same mode of analysis should not apply to substantive offenses under the related VICAR statute. After all, VICAR complements RICO, and the statutes are similarly structured." *Pastore*, 36 F.4th at 429 (citations omitted). Because the defendant's VICAR conviction was based on attempted murder under New York law, which constituted a crime of violence, the defendant's § 924(c) conviction was upheld. *Id.* at 430.

The Tenth Circuit similarly relied on VICAR state law predicates to analyze the elements clause. *See United States v. Toki*, 23 F.4th 1277, 1279–80 (10th Cir. 2022), *cert. granted, judgment vacated sub*

nom. Kamahele v. United States, 143 S. Ct. 556 (2023). Defendants had VICAR convictions resting on state crimes that could be committed recklessly. *Id.* at 1279. The Tenth Circuit held that the VICAR convictions were not crimes of violence because those state crimes did not satisfy the elements clause after *Borden*. *Id.* at 1281–82.[1]

In *Alvarado-Linares v. United States*, the Eleventh Circuit applied the modified categorical approach to VICAR murder and attempted murder. *See* 44 F.4th 1334, 1338–39. The defendant argued that the elements of both those generic crimes and the underlying state crimes needed to satisfy the elements clause. *Id.* at 1345. The Eleventh Circuit emphasized that "whether the government *should* charge a VICAR offense by reference to a [specific] state law crime" had not been decided. *Id.* at 1343. But in that case Georgia murder and attempted murder statutes had been charged, and the Eleventh Circuit thought it appropriate to ask whether the crime "as charged and instructed" satisfied the elements clause. *Id.* The court ultimately looked at federal law too, "[a]ssuming without deciding" that the defendant was right that both crimes had to qualify under the elements clause. *Id.* at 1345. But it signaled skepticism, noting that "federal murder was not charged in the indictment or instructed to the jury." *Id.*

---

[1] This Court GVR'd *Toki* in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022), so that the Tenth Circuit could reconsider § 924(c) convictions based on Hobbs Act robbery. That remand does not implicate the Tenth Circuit's VICAR holding.

2. Anti-divisibility cases. Five circuits—the Third, Fifth, Sixth, Tenth, and D.C. Circuits—would take the position that VICAR is not divisible because it does not incorporate the specific predicate charged as an element of the substantive federal crime.

The D.C. Circuit has held that a VICAR indictment does not "incorporate[ ] the definitions of [predicate] D.C. offenses as an element of the VICAR offense." *United States v. Mahdi*, 598 F.3d 883, 890 (D.C. Cir. 2010). The defendant argued that § 924(c) convictions based on VICAR violations were multiplicitous with counts under a similar D.C. statute "charging possession of a firearm during a crime of violence" under D.C. law. *Id.* (citing D.C. Code § 22-4504(b)). To rebut that argument, the D.C. Circuit looked to the elements of the predicate offenses charged. *See id.* For the § 924(c) crime, the predicate was VICAR; for the D.C. crime, the predicates were other D.C. offenses, "first degree murder and assault with intent to murder." *Id.* To reject the multiplicity argument, the Court of Appeals held that the D.C. murder and assault offenses had an element that VICAR lacked: "premeditation or specific intent." *Id.* (citations omitted).

If the D.C. Circuit had followed the Fourth Circuit's approach to divisibility in this case, there would have been a problem: The VICAR offense was apparently predicated on those same D.C. offenses, allowing the defendant to argue that the indictment "incorporated the definitions of those D.C. offenses as an element of the VICAR offense." *See id.* But the D.C. Circuit rejected the defendant's argument that

a VICAR crime incorporates as elements the elements of other offenses identified as satisfying the unlawfulness element. *See id.* The indictment's reference to other law was only "meant to indicate unlawful conduct that constitutes a predicate offense." *Id.* (quoting *United States v. Diaz*, 176 F.3d 52, 96 (2d Cir. 1999)).

In *Manners v. United States*, the Sixth Circuit explicitly addressed VICAR's divisibility. *See* 947 F.3d 377, 379–80 (6th Cir. 2020). It held that VICAR's numbered paragraphs are "'divisible' into different substantive offenses because [they] 'list[] elements in the alternative, and thereby define[] multiple crimes,'" and because they carry different punishments. *Id.* at 380 (quoting *Mathis*, 579 U.S. at 505) (alterations omitted). The underlying conviction was for VICAR assault with a deadly weapon (§ 1959(a)(3)) in violation of Michigan law. The government had argued for applying the elements clause to the specific Michigan law. *See* Brief for the United States at 9–10, *id.* (No. 17-1171). However, the Sixth Circuit held that "[t]he relevant predicate offense is thus 18 U.S.C. § 1959(a)(3), which requires proof that the defendant committed 1) an assault 2) with a dangerous weapon 3) in furtherance of racketeering activity." *Manners*, 947 F.3d at 380. The Court did not even mention VICAR's unlawfulness element or the Michigan crime identified to satisfy it. The Sixth Circuit has since explained that *Manners* held that "the categorical approach required analysis of the generic offense of assault with a dangerous weapon, not a specific federal or state law offense." *United States v. Frazier*, 790 Fed. App'x 790, 791 (6th Cir. 2020); *see*

also Harper v. United States, 780 Fed. Appx. 236, 240 (6th Cir. 2019) (holding that analogous Tennessee attempt statute was not divisible under *Descamps* because it "did not list alternative elements").

The Eighth Circuit also does not view VICAR predicates as adding new elements to the statute. In *United States v. Kehoe*, the Eighth Circuit addressed a defendant's argument that his conviction under § 1959 for murder in aid of racketeering violated the Tenth Amendment. 310 F.3d 579, 588 (8th Cir. 2002). The argument was that the government "improperly encroached upon state sovereignty" because it was "prosecuting him for state offenses in federal court." *Id.* Impliedly equating the RICO and VICAR statutes, the Eighth Circuit explained that "'RICO's allusion to state crimes was not intended to incorporate elements of state crimes' into the RICO statute. Rather, RICO's reference to state crimes identifies the type of generic conduct which will serve as a RICO predicate and satisfy RICO's pattern requirement." *Id.* (cleaned up).

The Third Circuit has not addressed VICAR specifically, but it has refused to find very similar terms in other statutes divisible.

First, in *United States v. Brown*, the Third Circuit considered a Pennsylvania terrorism statute that prohibited "communicating, either directly or indirectly, a threat to … commit any crime of violence with intent to terrorize another." *United States v. Brown*, 765 F.3d 185, 191 (3d Cir. 2014) (citation omitted). The Third Circuit held that the least culpable conduct embraced by that statute

would not be a crime of violence as defined by the sentencing guidelines. *See id.* at 192–93. And it held that the statute could not be subdivided based on the threatened "crime of violence." Citing to *Descamps*, the Third Circuit held that the statute "does not list each crime of violence, and thus it is also indivisible." *Id.* at 193 (citing *Descamps*, 570 U.S. at 272–73).

The Third Circuit reached a similar conclusion in a case involving conviction under a Pennsylvania statute making it a crime to "use[] a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under" Pennsylvania's general criminal code or controlled substance act. *Hillocks v. Attorney General United States*, 934 F.3d 332, 336–37 (3d Cir. 2019) (cleaned up). The Board of Immigration Appeals had to determine under the categorical approach whether a conviction under that statute was an "aggravated felony" or a "conviction relating to a controlled substance," either of which would make the petitioner removable. *Id.* at 336. The Board decided that the statute was divisible, in that "each specific underlying felony is an element of the offense." *Id.* at 337 (internal quotation marks omitted). But the Third Circuit reversed, noting that "courts, including our Court, have typically held that alternate elements must be explicitly identified in the statute's text, not read into the language," and that it was reasonable to think that state prosecutors could offer multiple alternative felony predicates to the jury. *Id.* at 336, 342–43.

While the Third Circuit has not addressed the divisibility of VICAR specifically, those holdings suggest it would find the unlawfulness element in § 1959(a) not divisible based on the precise violation of other law identified. As in *Hillocks*, the alternatives are not "explicitly identified in the statute's text." *Hillocks*, 934 F.3d at 343. And as in *Brown*, the VICAR statute "does not list each [predicate crime], and thus it is also indivisible." *Brown*, 765 F.3d at 193.

The Fifth Circuit has held that a directly analogous offense, aggravated RICO conspiracy, is not divisible based on particular violations of other law that may be used to enhance the violation. In *United States v. McClaren*, the Fifth Circuit considered § 924 convictions predicated on RICO conspiracy. *See* 13 F.4th 386, 412–13 (5th Cir. 2021). Because the Fifth Circuit had already held RICO conspiracy was not a crime of violence, *id.* (citing *United States v. Jones*, 935 F.3d 266, 273–74 (5th Cir. 2019)), the government argued that RICO conspiracy was divisible based on whether a sentencing enhancement applied, and that the defendants had committed this "aggravated" version of RICO conspiracy, *see id.* at 413. The sentencing enhancement, which increased the maximum penalty to life in prison, required the conspiracy to be "based on a racketeering activity for which the maximum penalty includes life imprisonment." *Id.* (quoting 18 U.S.C. § 1963(a)). The jury had found that the defendants violated a Louisiana murder statute, which the court acknowledged was a crime of violence. *Id.* But the Fifth Circuit nonetheless held that the aggravated RICO charge did not satisfy the

elements clause. It noted that the categorical approach requires "looking only to the statutory definitions—*i.e.*, the elements—of a defendant's offense, and not to the particular facts underlying the convictions." *Id.* (quoting *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017)). The jury's finding was therefore "irrelevant" if the listed elements in the "statute itself do[] not require a crime of violence." *Id.* Here, even if the RICO conspiracy could be divided into an aggravated and non-aggravated version, the "aggravated RICO" statute, which only required any activity punishable by life imprisonment, "[did] not describe a crime of violence." *Id.* (citing § 924(c)(iii)(a)). The Fifth Circuit therefore held that the § 924 convictions had to be vacated, even under plain error review. *See id.* at 413–14.

McClaren's reasoning applies with even greater force to VICAR. While RICO sets out a list of possible racketeering activities in § 1961(1), VICAR does not set out a list of laws that may be violated. The Fifth Circuit could have applied the modified categorical approach to conclude that the defendants were convicted of aggravated RICO conspiracy based on the racketeering activity of an "act … involving murder … which is chargeable under State law." *See* § 1961(1)(A). The Fifth Circuit's refusal to delve into the specific predicate charged would therefore have even more force in the VICAR context, where there is no alternatively-phrased statute to parse.

C. The Divisibility Question Is Important and Recurring.

As this Court knows, many of the most commonly enforced federal statutes and sentencing guidelines call for application of the categorical and modified categorical approaches to underlying predicate convictions under other law. The categorical approach is used whenever statutes require determining whether the elements of a past conviction meet certain requirements or match the elements of a federal generic definition of a crime. *See, e.g., Taylor*, 495 U.S. at 602. It is used to determine if a prior conviction is a "drug trafficking" or "controlled substance" offense" under the sentencing guidelines. It determines what crimes are aggravated felonies for purposes of immigration law. It is used to determine a sex offender's "tier" and any mandatory minimum sentence under the Sex Offender Registration and Notification Act. And, of course, § 924(c) and the ACCA are regularly used to enhance federal sentences.

The proper application of the categorical and modified categorical approaches to VICAR, RICO, and similar statutes is an issue of great and recurring importance. RICO and VICAR are important tools for combating gang violence. Both statutes criminalize violations of other law undertaken for racketeering purposes. Analogous to VICAR, RICO defines "racketeering activity" to include various "act[s] or threat[s]" that are "chargeable under State law," as well as acts indictable under other specific federal laws, such as

the Currency and Foreign Transactions Reporting Act. 18 U.S.C. § 1961(1).

Numerous other federal statutes pose the same problem. It is a crime to enter a bank with intent to commit "any felony affecting such bank … and in violation of any statute of the United States, or any larceny." § 2113(a). It is a crime to deposit goods in buildings situated on the U.S. border "in violation of law," § 547, to distribute explosives to a person whose possession "would be in violation of any State law," § 842(e), to destroy Native American property "in the commission of an offense," § 1166, and to harbor on your vessel persons conspiring or preparing "to commit any offense against the United States," § 2274. State statutes similarly criminalize breaking or entering "any building with intent to commit any felony or larceny therein," N.C. Gen. Stat. Ann. § 14-54(a) (burglary statute), "confining … another person against his or her will and without lawful authority, with intent to … [c]ommit or facilitate commission of any felony," Fla. Stat. Ann. § 787.01(1)(a)(2) (West), harboring a person "seeking to escape arrest for any felony," *see* Okla. Stat. Ann. tit. 21, § 440 (West), or using a communication facility "[i]n committing, causing, or facilitating the commission of any felony," Kan. Stat. Ann. § 21-6424 (West). Some states have mini-RICO/VICAR statutes. *See, e.g.*, N.C. Gen. Stat. Ann. § 14-7.20 (punishing engagement in a continuing criminal enterprise, which requires commission of a felony). They also commonly have hate crimes provisions that depend on violations of other law. Michael Shively, *Study of Literature and Legislation on Hate*

Crime in America 23 (2005), https://www.ojp.gov/pdffiles1/nij/grants/210300.pdf.

Because of the sheer number of statutes that require commission of or intent to commit some other crime, the proper application of the modified categorical approach in these situations is a critically important question. If such statutes are divisible into a nearly infinite number of distinct crimes, the advantages of the categorical approach will be almost entirely lost and the dangers this Court warned about in *Descamps* will come to pass. Review is warranted.

II. THE EXTREME RECKLESSNESS QUESTION MERITS THE COURT'S REVIEW.

In *Borden*, the plurality recognized and reserved the question of whether "depraved heart" or "extreme recklessness" mental states satisfy the elements clause. *See Borden*, 141 S. Ct. at 1825 n.4; 18 U.S.C. § 924. The Circuits are coalescing around an affirmative answer to that question. But the various opinions in *Borden* indicate a strong possibility that a majority of this Court would disagree. If so, the ultimate resolution will disrupt federal court dockets across the country—and the longer it takes to address the issue, the more disruptive it will be.

A. The Decision Below Conflicts With The Views Expressed By Five Justices In *Borden*.

Justice Kagan's plurality opinion in *Borden* explained that the phrase "use of physical force" in

the ACCA indicates a "'volitional' or 'active' employment of force." *Borden*, 141 S. Ct. at 1825 (plurality opinion) (citation omitted). And because it modifies "use of force" in that volitional sense, the plurality explained that the "against another" phrase "demands that the perpetrator direct his action at, or target, another individual." *Id.* at 1825. The statutory language demands 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 explained that criminal law recognizes knowledge as the equivalent of purposive intent in many situations, but only if the defendant is "aware that [a] result is practically certain to follow from his conduct." *Id.* at 1823 (citation omitted).

The plurality explained that reckless conduct is simply "not aimed in [the] prescribed manner." *Id.* at 1825. A driver who runs a red light and hits a pedestrian is reckless: He "consciously disregarded a real risk, thus endangering others." *Id.* at 1827. And the result was "contact with another person." *Id.* But he does not "use[] force 'against' another person in the targeted way that [the statute] requires." *Id.*

Justice Thomas's concurrence similarly explained that the term "use of physical force" is a phrase with a "well-understood meaning applying only to intentional acts designed to cause harm." *Id.* at 1835 (Thomas, J., concurring) (quoting *Voisine v. United States*, 579 U.S. 686, 713 (2016) (Thomas, J., dissenting)). Justice Thomas's *Borden* concurrence cited to his dissent in *Voisine*, which interpreted a

statute that required force "against a family member." *Voisine*, 579 U.S. at 706. Justice Thomas read that statute to require at least transferred intent to harm the family member. *Id.* For example, a husband who threw a plate to scare his wife and accidentally hit her would have used force against the wife, but a father who drove recklessly and crashed into another car, injuring his son, would not have used force against the son. *See id.* at 706–07. The latter case would not "involve the 'use of physical force'" because it would not "involve an active employment of something for a particular purpose." Reckless wrongdoing causes an injury as "an accidental byproduct of inappropriately risky behavior" but the wrongdoer "has not actively employed force." *Id.* at 710.

The Fourth Circuit focused instead on culpability. The Virginia Supreme Court had described conduct rising to the level of extreme recklessness as so "willful and wanton," "heedless of foreseeable consequences," "indifferent to the value of human life," and "harmful to the victim" that malice could be inferred. Pet.App.14a (quoting *Watson-Scott*, 835 S.E.2d at 904) (emphasis deleted). This description tracks other states that punish reckless or grossly negligent killings resulting from a "depraved, extreme, or utter indifference to human life" as murder. 40 C.J.S. *Homicide* § 41 (2023) (footnotes omitted). The idea is that there is "higher mental culpability, *i.e.*, a depraved heart," *Mullen v. State*, 986 So.2d 320, 324 (Miss. App. 2007), culpability that "differs in degree but not in kind from the ordinary recklessness required for manslaughter," *State v. Robinson*, 934 P.2d 38, 48 (Kan. 1997).

The panel judged that "extreme recklessness, as defined by Virginia law" was "closer in culpability to 'knowledge' than it is to 'recklessness.'" Pet.App.13a. That is certainly true, and it is why depraved-heart murder is punished as murder rather than manslaughter. Indeed, the whole point of "extreme recklessness" instructions is to let juries make an *ad hoc* assessment that certain reckless conduct is culpable enough to deserve severe punishment. But that greater culpability does not necessarily supply the *targeting* that ordinary recklessness lacks. Extreme recklessness remains recklessness, requiring a risk "far less than … substantial certainty." Wayne R. LaFave & Austin W. Scott, 2 *Substantive Criminal Law* § 14.4(a), Westlaw (3d ed. database updated Oct. 2022) (footnote omitted). And the more unjustified the risk, the lower the risk needs to be. *See* Stephen P. Garvey, *What's Wrong with Involuntary Manslaughter?*, 85 Tex. L. Rev. 333, 345 n.56 (2006). A sixty percent chance has been held more than sufficient. *Commonwealth v. Ashburn*, 331 A.2d 167, 170 (Pa. 1975). One author expects a ten percent chance of harm would be enough. Garvey, *What's Wrong with Involuntary Manslaughter?*, 85 Tex. L. Rev. at 345 n.56.

A defendant displaying callous indifference to serious risks to human life is not "aware that [a] result is practically certain to follow from his conduct," and does not in any sense intend that result. *Borden*, 141 S. Ct. at 1823 (plurality opinion). The elements clause requires "a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.* at 1830.

The Fourth Circuit also ignored the examples the plurality used in *Borden*. For instance, the *Borden* plurality pointed to a case where a shoplifter jumped from a balcony and landed on top of an elderly woman, breaking her back. *Borden*, 141 S. Ct. at 1831 (citing *Craver v. State*, 2015 WL 3918057, at *2 (Tex. App. June 25, 2015)). That example is directly analogous to throwing a piece of lumber from a housetop into a street, which would be sufficient in Virginia courts to support a murder conviction. *See Mosby v. Commonwealth*, 190 S.E. 152, 154 (Va. 1937); *Whiteford v. Commonwealth*, 27 Va. 721, 724–25 (Va. Gen. Ct. 1828).

Both the plurality and Justice Thomas also held out driving offenses as paradigmatic crimes that do not satisfy the elements clause. The plurality thought the fact that "[m]any convictions for reckless crimes result from unsafe driving" illustrated the point that recklessness did not require any qualifying use of force. 141 S. Ct. at 1831 (plurality opinion). Similarly, Justice Thomas in *Voisine* explained that "[s]peeding on a roadway is not" a use of force, and that "[a] car accident is no less an 'accident' just because a driver acted negligently or recklessly." *Voisine*, 579 U.S. at 710, 713 (Thomas, J., dissenting). That understanding is hardly new. In 2004, this Court concluded that even under the now-unconstitutional residual clause a driver does not "risk[ ] having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (construing § 16(b)). *Begay v. United States* likewise interpreted the ACCA residual clause to exclude New Mexico's crime of

driving under the influence. 553 U.S. 137, 148 (2008).

Numerous defendants have been convicted of murder for drunk driving offenses that resulted in death, under extreme recklessness instructions. *See, e.g.*, *United States v. Lemus-Gonzalez*, 563 F.3d 88, 93 (5th Cir. 2009) (murder sentencing guidelines appropriate for intoxicated driver who transported aliens without seatbelts at a high rate of speed); *State v. Barstad*, 970 P.2d 324, 326 (Wash. Ct. App. 1999) (affirming murder conviction for intoxicated driver who sped through red light at busy intersection); *State v. Braden*, 867 S.W.2d 750, 753 (Tenn. Crim. App. 1993) (affirming vehicular homicide convictions for intoxicated driver who took a blind curve at over eighty miles per hour); *Allen v. State*, 611 So.2d 1188, 1189–90 (Ala. Crim. App. 1992) (affirming murder conviction for intoxicated driver who swerved into oncoming traffic); *State v. Woodall*, 744 P.2d 732, 736 (Ariz. Ct. App. 1987) (affirming murder conviction for intoxicated driver who crossed the center line while speeding); *United States v. Fleming*, 739 F.2d 945, 947–49 (4th Cir. 1984) (affirming federal murder conviction for intoxicated driver who drove at seventy to one hundred miles per hour and drove on the wrong side of the road); *Pears v. State,* 672 P.2d 903, 909 (Alaska App. 1983) (affirming murder conviction for intoxicated driver who ran stop signs, yield signs, and traffic lights), *remanded on other grounds*, 698 P.2d 1198 (Alaska 1985). These drivers displayed a highly culpable indifference to dangers to human life, but the crashes were still accidents; the

defendants did not *intend* harm or *know* that they would crash.

The Fourth Circuit also reasoned that context and purpose favor classifying murder, which "is obviously among the most violent of crimes," as a violation of the elements clause. Pet.App.14a–15a. But of course this Court is familiar with the reality that the categorical approach frequently produces counterintuitive results that Congress may not have expected. It is already clear that some forms of murder do not satisfy the force clause. *See, e.g.*, *United States v. Jackson*, 32 F.4th 278, 287 (4th Cir. 2022) (felony murder). And while Congress may well have viewed depraved-heart murder as a violent crime, it probably would have expected that crime to be covered by the residual clause instead of the elements clause. For example, in *Sykes v. United States*, the defendant "wove through traffic, drove on the wrong side of the road and through yards containing bystanders, passed through a fence, and struck the rear of a house" while fleeing police. 564 U.S. 1, 6 (2011). If the defendant had killed someone, he might have been convicted of depraved-heart murder. Instead, he was charged with felony vehicle flight. *Id.* at 4–5. This Court held that felony vehicle flight satisfied ACCA's residual clause, which required an offense to "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." *Id.* at 8–10 (quoting § 924(e)(2)(B)(ii)). The Court reasoned that "risk of violence is inherent to vehicle flight" and pointed to statistics showing that "between 18% and 41% of chases involve crashes," *id.* at 10—a risk that is

probably comparable to that posed by the kind of driving that is considered extremely reckless.

Of course, this Court later held that the ACCA residual clause is unconstitutionally vague because it leaves too much "indeterminacy about how to measure the risk" and "how much risk it takes for the crime to qualify." *Johnson v. United States*, 576 U.S. 591, 598 (2015). The Court soon extended the same holding to the § 16 and § 924(c)(3) residual clauses. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018); *Davis*, 139 S. Ct. at 2336. But when half of a two-part statutory test is declared unconstitutional and unenforceable, it should come as no surprise that the remaining provision does not cover all Congress wanted to be regulated.

Indeed, in an important sense the circuit courts are now trying to reintroduce the same kind of risk weighing that this Court deemed unconstitutional, by reading the elements clause as embracing conscious acceptance of risk so long as that risk is high enough to be extremely culpable. That is the sort of reasoning the residual clause called for. It has no place in the elements clause.

B. The Extreme Recklessness Issue Is Important and Should Be Resolved Now.

The elements clause is a staple of federal law. Section 924(c) is one of the most commonly prosecuted federal crimes; ACCA enhancements under § 924(e) are common; and the definition of a "crime of violence" in § 16 is used throughout the U.S. Code. *See, e.g.*, 18 U.S.C. § 3663A(c)(1)(A)(i) (establishing when restitution shall be awarded); 20

U.S.C. § 7946(d)(1)(A) (limiting immunity for teachers); 34 U.S.C. § 60541(g)(5)(A)(ii) (defining which offenders qualify as "eligible elderly offender[s]"); 42 U.S.C. § 14503(g)(1)(A) (limiting charitable volunteer immunity). Most notably, § 16 is used in the immigration code to define an "aggravated felony." 8 U.S.C. § 1101(a)(43)(F).

This Court has been called upon repeatedly to clarify important aspects of what it means for a crime to "ha[ve] as an element" a "use" or "threat" of force "against" another—including the distinction between violent and *de minimis* force, and the series of *mens rea* cases up to and including *Borden*. The extreme recklessness question reserved in *Borden* is the last important missing thread in that tapestry. That question will inevitably come before this Court. And it would be in the interests of justice, uniformity, and sound judicial administration for it to be resolved sooner rather than later.

Of course this Court prefers to review conflicts between the courts of appeals, and ordinarily waits for such a conflict to develop. But several considerations weigh strongly against that course here. First, the circuits are coalescing around the view that extreme recklessness crimes satisfy the elements clause. Five circuits have all fallen in line with that conclusion. The only previous dissenter—the Ninth Circuit—recently overruled its panel's decision *en banc* and joined the emerging consensus position. *See Begay*, 33 F.4th at 1093–95. It was quickly followed by the Eleventh Circuit, which decided with little analysis that Georgia implied malice murder could satisfy the § 924(c) elements

clause. *See Alvarado-Linares*, 44 F.4th at 1344. The First Circuit had already reached a similar conclusion before *Borden*. *See Báez-Martínez*, 950 F.3d at 127. Now the Fourth Circuit has joined their ranks, followed quickly by the Sixth Circuit. *See United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022). Indeed, the Sixth Circuit's decision in *Harrison* contains almost no reasoning, treating the issue as essentially settled. There is no reason to expect a circuit split will develop.

Second, the burgeoning consensus among the circuits is based on reasoning that cannot be reconciled with the views expressed by five Justices of this Court in *Borden*. Although *Borden* produced no majority opinion, and Justice Breyer has since retired and been succeeded by Justice Jackson, the plurality and concurrence both indicate that the line drawn by the elements clause has little to do with *culpability* and everything to do with the intentional or knowing *targeting* of force. The circuit court opinions also rely heavily on intuitions about Congress's expectations that resonate much more strongly with Justice Kavanaugh's dissent in *Borden* than with the plurality or concurrence. *See, e.g., Alvarado-Linares*, 44 F.4th at 1344–45 (emphasizing that "serious intentional crimes" are at stake); *Begay*, 33 F.4th at 1096 (minimizing drunk driving examples in part because most vehicle homicides are charged as manslaughter). They also make some simple but important errors, such as confusing whether § 924(c) firearms offenses *themselves* involve a threat of force with whether the predicate offenses underlying a § 924(c)(3)(A) enhancement necessarily involve a use or threat of force. *See*

Begay, 33 F.4th at 1096. Despite the lack of a circuit split there are unusually strong reasons to believe that the consensus lower court position would not be affirmed after this Court's careful review.

Third, there also are unusually strong reasons that delay for further "percolation" would be unwise here. Every previous change in this Court's interpretation of the elements clause, or of the other elements of § 924(c), has occasioned a flood of § 2255 petitions. Every defendant who was convicted, or pled guilty, under the prior understanding suddenly has a plausible claim to relief under the new one. These changes are always retroactive on collateral review. *See Welch v. United States*, 578 U.S. 120, 130–31 (2016) (holding that *Johnson*'s invalidation of the residual clause was retroactive on collateral review, and explaining that a new rule is substantive if it "alters … the range of conduct … the law punishes") (citations omitted). That problem consumed the lower federal courts a generation ago in the wake of *Bailey v. United States*, 516 U.S. 137 (1995), and *Bousley v. United States*, 523 U.S. 614 (1998), when this Court articulated a more demanding standard for what it means to "use" a firearm under 18 U.S.C. § 924(c)(1). It has been happening for the past decade after this Court's holdings in *Johnson* and *Davis* that the residual clauses in §§ 924(c)(3) and ACCA are unconstitutionally vague. And it will happen again if this Court holds, after substantial delay, that extreme recklessness crimes do not necessarily have as an element a use of force against the person or property of another. We have learned from long experience that these shifts can consume a

substantial fraction of the capacity of the federal courts. The reckoning on this issue is inevitable. The longer this Court waits to address it, the worse the problem will be. None of the traditional reasons for further deferring review is persuasive in this context.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

J. Scott Ballenger
Counsel of Record
Catherine E. Stetson
APPELLATE LITIGATION CLINIC
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu
Counsel for Petitioner