No. __-_____

IN THE

Supreme Court of the United States

OMAR ALAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition concerns the categorical approach, and how crimes of "extreme recklessness" should be classified. Several federal statutes and sentencing guidelines define a "crime of violence," with its harsh attendant consequences for sentencing and immigration, as a crime that "has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a); 8 U.S.C. § 1101(a)(43)(G) defining "aggravated felony" for immigration to include crimes of violence under § 16); *see also* 18 U.S.C. § 924(c)(3)(A) (use of a firearm in relation to a crime of violence); 18 U.S.C. § 924(e)(B)(i) (Armed Career Criminal Act definition including "use of physical force against the person of another); U.S.S.G. § 4B1.2(a)(1) (same) ("crime of violence" for Career Offender sentencing enhancement). In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court held that crimes with a negligence *mens rea* do not qualify as crimes of violence; then in *Borden v. United States*, 141 S.Ct. 1817 (2021), a majority of this Court held that crimes of at least ordinary recklessness do not qualify, though crimes with a *mens rea* of intent or knowledge do. It left open the question presented here:

> Whether a crime with a *mens rea* of extreme recklessness has, "as an element, the use, attempted use, or threatened use of physical force against the person or property of another" and thus can qualify as crimes of violence under the elements clause of 18 U.S.C. § 16(a)?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Omar Alas*, 63 F.4th 269 (4th Cir. 2023) (No. 22-4193).

(2) *United States v. Omar Alas*, No. 3:21CR51-REP, United States District Court for the Eastern District of Virginia. Judgment entered March 11, 2022.

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PETITION FOR WRIT OF CERTIORARI

Omar Alas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 9a of the appendix to the petition and is available at *United States v. Omar Alas*, 63 F.4th 269 (4th Cir. 2023).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. That court issued its opinion and judgment on March 24, 2023. Mr. Alas filed a petition for rehearing on April 7, 2023, which was denied on April 24, 2023. Pet. App'x. 10a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, United States Code § 16(a) provides:

The term "crime of violence" means—

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

STATEMENT OF THE CASE

Mr. Alas was born in El Salvador. C.A.J.A. 367.[1] He grew up in El Salvador with an adopted family after his mother abandoned him without warning in a city marketplace as a young child. He eventually became a bus driver in El Salvador. When Mr. Alas was about thirty years old, his employer—who also owned a trucking business in the United States—asked him to come to the United States to continue driving for him in this country. His employer arranged for Mr. Alas to cross the Mexican border into the United States in 2004 and employed Mr. Alas as a truck driver in the United States. Three years after he arrived in the United States, Mr. Alas was in Virginia and was convicted of malicious wounding. He pled guilty to that charge and served a prison sentence, 10 years with 5 years and six months suspended. C.A.J.A. 367. Mr. Alas was removed from the United States after serving his sentence, but returned. He was encountered once by police in Texas in a hospital after he had been beaten severely by an employer who threatened to report him to ICE, but he was not prosecuted then. He was later found in the Eastern District of Virginia and charged with illegal reentry after deportation under 8 U.S.C. § 1326(a) and (b)(1).

This petition arises from that prosecution. Mr. Alas moved to dismiss the indictment, collaterally attacking the underlying removal order under § 1326(d). Mr. Alas had been ordered removed on the sole allegation that his conviction for malicious

[1] "C.A.J.A." refers to the joint appendix filed in the court of appeals. *See* Joint Appendix, *United States v. Alas,* No. 22-4193, Doc. 13 (filed Jul. 18, 2022).

wounding was an aggravated felony. *See* 18 U.S.C. § 1228(b) (expedited removal of aliens convicted of aggravated felonies); 8 U.S.C. § 1101(a)(43)(G) (defining aggravated felony to include crimes of violence under 18 U.S.C. § 16). He argued that the relevant advice and forms telling him of the charges and his procedural rights had not been translated into a language he understood. And he argued, among other things, that his prior conviction in Virginia state court for malicious wounding is not an aggravated felony because malicious wounding can be committed with a *mens rea* of recklessness, and thus under *Borden v. United States*, 141 S. Ct. 1817 (2021) it is not a crime of violence and therefore is not an aggravated felony. The district court denied the motion in a written opinion. C.A.J.A. 360.

On appeal to the Fourth Circuit after a conditional plea, Mr. Alas repeated his argument that malicious wounding in Virginia did not require the use, attempted use, or threatened use of physical force, because it could be committed recklessly. Therefore, he argued, his conviction was not an aggravated felony, and his removal order was infirm. In particular, despite the language of Va. Code § 18.2-51, which appears to require an intent to maim, disfigure, disable or kill, Virginia courts upholding convictions under the statute for injuries that were inflicted unintentionally but recklessly. *See Shimhue v. Commonwealth*, No. 1736-97-2, 1998 WL 345519, at *1 (Va. Ct. App. June 30, 1998) (upholding a conviction for malicious wounding when the defendant twice fired his weapon into the floor of his apartment to frighten a woman, but one bullet traveled through the floor and struck the leg of a neighbor in the apartment below); *David v. Commonwealth*, 2 Va.App. 1, 340 S.E.2d

576, 577 (1986) (upholding a conviction for unlawful wounding after the defendant intentionally fired a gun at the cement near where other people were standing and the bullet ricocheted and hit the victim's foot); *Knight v. Commonwealth*, 61 Va.App. 148, 733 S.E.2d 701, 702–03 (2012) (upholding a conviction for malicious wounding based on the defendant's traveling at dangerously excessive speeds in a populated area and causing a multi-car crash). Thus, he argued, Virginia's interpretation of malicious wounding included recklessness. He argued that crimes with a recklessness *mens rea* were excluded by this Court's opinion in *Borden*.

While Mr. Alas's appeal was pending, the Fourth Circuit decided *United States v. Manley*, 52 F.4th 143, 150 (4th Cir. 2022), cert. denied, 143 S. Ct. 2436 (2023), in which it held that Virginia extreme recklessness qualifies as a crime of violence under *Borden* because "it is closer in culpability to 'knowledge' than it is to 'recklessness.'").

When it issued, the opinion below in Mr. Alas's case stipulated that its decision revolved on "whether malicious wounding as defined by Virginia law has as an element the use, attempted use, or threatened use of physical force." *Id*. at 278. It held that after *Borden*, and in light of *Manley*, the Fourth Circuit "ha[d] already ruled that *Borden* did not change the status of malicious wounding as a crime of violence." *Id*. at 179. Given its decision on the aggravated felony issue, the panel did "not consider whether Alas could satisfy the other requirements of § 1326(d). *Id*. at 278.

Mr. Alas filed a petition for rehearing on April 7, 2023, which was denied on April 24, 2023. This petition follows.

REASONS FOR GRANTING THE PETITION

In *Borden v. United* States, 141 S.Ct. 1817 (2021), this Court held that crimes with a mental state element of ordinary recklessness do not have, as an element, the use, threatened use, or attempted use of physical force against the person of another. The words "use," with respect to physical force, according to Justice Thomas's concurrence, and "against the person of another," according to the plurality opinion, "demand[] that the perpetrator direct his action at, or target, another individual." *Id.* at 1825. Because the statute at issue in *Borden* involved ordinary recklessness, this Court reserved on whether "extreme recklessness" could qualify. *Id.* at n.4.

The Circuit courts quickly took up that question, and disagreements immediately emerged. Whether malice and extreme recklessness crimes qualify as crimes of violence is both the subject of a split in authority and, on its own, is an important question with grave implications across federal criminal and immigration law. Resolving that uncertainty before it deepens or spreads should be an urgent priority for the Court.

I. The Courts of Appeal Disagree About Whether Extreme Recklessness Crimes Qualify Under the Elements Clause

Barely two years have passed since *Borden v. United* States, 141 S.Ct. 1817 (2021) was decided, yet already the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits have issued published opinions and dissents, creating a split on the question it left open: whether extreme recklessness crimes qualify under the elements clause. The Courts of Appeal disagree about how even to approach the question; one set focuses on culpability, and the other on certainty. The Fourth Circuit and its cohorts

set aside the text of the force clause, and instead evaluate extreme recklessness on a scale of *moral culpability*. They hold that it is closest in moral blameworthiness to knowledge. *See United States v. Manley*, 52 F.4th 143, 150 (4th Cir. 2022), cert. denied, 143 S. Ct. 2436 (2023) (Virginia extreme recklessness qualifies under *Borden* because "it is closer in culpability to 'knowledge' than it is to 'recklessness.'"); *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc) (holding malice qualifies under *Borden*); *United States v. Harrison*, 54 F.4th 884 (6th Cir. 2022) (same); *Alvarado-Linares v. United States*, 44 F.4th 1334 (11th Cir. 2022).

The Ninth Circuit has expressly adopted an inquiry that prioritizes its perception of the 'context and purpose' of the crime of violence definition in disregard of the statutory language. *Begay*, 33 F.4th at 1095 (citations omitted). In *Begay*, it frankly acknowledged that a crime with an implied malice *mens rea* "does not require conduct intended to harm, nor that the defendant target his conduct at any particular individual," but held that such crimes qualify because they "are among the most culpable of crimes," which the court felt the crime of violence definition was meant to reach. *Id.*[2]

[2] It expressed skepticism that a DUI resulting in death would be classified as murder, absent extreme conduct. *Id.* at 1096; *But see, e.g.*, *Allen v. State*, 611 So. 2d 1188, 1192-93 (Ala. Ct. Crim. App. 1992) (upholding finding of extreme recklessness where intoxicated defendant was weaving in own lane, swerving into oncoming lane, and running onto shoulder of road); *Jeffries v. State*, 90 P.3d 185, 187 (Alaska Ct. App. 2004), *aff'd.* 169 P.3d 913 (Alaska 2007) (surveying common law and MPC jurisdictions, noting that both groups uphold extreme recklessness findings where proof "rested primarily on an intoxicated driver's persistent recidivism and failures at rehabilitation" as opposed to conduct while driving).

Next came *Alvarado-Linares v. United States*, 44 F.4th 1334 (11th Cir. 2022). There the Eleventh Circuit acknowledged this Court's opinion in *Borden* limited crimes of violence to those that involve "a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id*. at 1344 (quoting *Borden*, 141 S.Ct. at 1830). It also acknowledged that Georgia implied malice covered unintended deaths where the conduct demonstrated an "abandoned and malignant heart." *Id*. at 1345 (citations omitted). But the court did not at that point compare the level of certainty required by the word "use" or "against the person of another" as this Court did in *Borden*. Instead, it resorted immediately to the "context and purpose" of the crime of violence provision, and held that malice murder "meets the common, ordinary definition of a violent crime." *Id*.

The Sixth Circuit soon joined the Eleventh and Ninth in *United States v. Harrison*, 54 F.4th 884 (6th Cir. 2022). It held that crimes with a *mens rea* of "wantonness under 'circumstances manifesting an extreme indifference to human life'" qualify, even after *Borden*, simply because "[t]hat's a more culpable mental state than recklessness". *Id*. Concurring, Judge Cole acknowledged that wantonness crimes are "in theory unintentional" but that wantonness "equates to a level of culpability described as one 'assimilated to [intention][.]" *Id*. at 894 (first brackets in original, citations omitted).

The Fourth Circuit joined this group with *United States v. Manley*, 52 F.4th 143 (4th Cir. 2022), on which the opinion in this case relied. In *Manley*, the Fourth Circuit held that "an offense with a mens rea of extreme recklessness satisfies the

mens rea of a 'crime of violence[.]'" *Id*. at 151. It acknowledged that extreme recklessness did not equate with knowledge, but "it comes close." *Id*. In the end it resorted, like the other courts, to the "context and purpose" of the statute, and noted that "murder is obviously among the most violent of crimes." *Id*. 151.

On the other hand, the Eighth Circuit in *United States v. Lung'Aho*, ___ F.4th ____, 2023 WL 4359975 (8th Cir. 2023)[3] and dissenting judges in the 9th Circuit focus on the level of certainty to evaluate whether extreme recklessness falls within the scope of the verb phrase "use of physical force" and the limiting phrase "against the person or property of another," as this Court did in *Borden*. The *Lung'Aho* court examined the federal arson statute, which require malice, defined as "willful disregard of the likelihood that property with a federal connection will be damaged or destroyed." *Id*. at *3-*4 (quotations, citations omitted). It attentively parsed this Court's opinions in *Borden*, and evaluated them based on the level of awareness or certainty required, as opposed to moral culpability.

> A conscious decision to ignore a risk of harm is different from intending it. Although malice involves a higher level of risk than recklessness, the two share a common trait: neither requires actors to "consciously direct[]" their acts towards a specific person or property. Even consciously disregarding a high risk of harm does not necessarily involve "targeting."

[3] A different panel of the Eighth Circuit issued an opinion on the same day holding that malice murder does qualify under the elements clause, but the opinion was later withdrawn and superseded with an opinion that acknowledged *Lung'Aho*, though without changing the holding. *Janis v. United States*, 2023 WL 4361107, *withdrawn and superseded by* ___ F.4th ____, 2023 WL 4540528 (8th Cir. 2023).

Id. (quoting *Borden*, 141 S.Ct. at 1823–24, 1826–27 (plurality opinion) (explaining that the word "against" incorporates "an intent requirement")). Turning to Justice Thomas's concurrence, it noted that malice crimes do not require "use" of force because they lack as an element a "design to cause harm." *Id*. at *4-*5.

In *Begay*, Judge Ikuta dissented, joined in relevant parts by Judges VanDyke and Wardlaw. 33 F.4th at 1099. Judge Ikuta noted that as originally drafted, the since-invalidated risk prong would have covered crimes of malice and extreme recklessness. *Id*. at 1100-01. The dissenters pointed to the reasoning of *Borden*, which required "proof that the perpetrator 'direct[ed] his action at, or target[ed], another individual'" and noted that element was missing from malice crimes. *Id*. at 1103. The dissenters criticized the majority for prioritizing its view of the "context and purpose" of the elements clause over the statutory text and reasoning of *Borden*. *Id*. at 1106.

Meanwhile, Chief Judge Murguia and Judge Clifton embraced that same idea. While concurring in the opinion, they separately noted that the majority's interpretation "is not the only plausible reading of the *Borden* plurality's textual analysis" but joined the opinion only *because* its approach also "factor[s] context, purpose, and common sense into [its] analysis." In the end, five of eleven judges on the *en banc* panel, and Judge Dorothy Nelson of the original panel all appeared to agree that the text alone of the elements clause did not encompass extreme recklessness crimes – either they did not qualify, or a resort to an intuitive policy-based "context and purpose" gloss was needed to rope such crimes in.

So less than two years after *Borden*, a split has emerged. The Fourth, Sixth, Ninth, and Eleventh Circuits follow a culpability-based approach divorced from the text of the elements clause, and anchored in what they perceive is the context and purpose of that provision. The Eighth Circuit and dissenters in the Ninth, on the other hand, hew to the text of the elements clause and follow the reasoning in *Borden*.

II. The Proper Characterization of Extreme Recklessness Crimes is an Important and Urgent Issue

Three concerns make this issue important. First, experience teaches that categorical approach disputes benefit from prompt resolution. Second, the issue arises frequently, and continued application of an erroneous standard will lead inevitably to collateral challenges and undermine finality. Third, the increasingly uncivil rhetoric from concurrences in the Courts of Appeal when it comes to the categorical approach undermines this Court's authority and respect for the rule of law, in preference of judges' legislative instincts. This deserves immediate and unequivocal correction. And, last, correction is in order because the culpability-based approach is not only wrong, but threatens to re-tie the Gordian knot of risk-based inquiries that this Court just cut in *Johnson v. United States*, 135 S.Ct. 2251 (2015) and *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018).

A. Requiring Fruitless Debate to Continue in the Lower Courts is Counterproductive; Prompt Resolution is More Important

Many issues benefit from thorough digestion in the Courts of Appeal; categorical approach cases generally do not. Positions are set, as the critical tone of concurrences show. And given the critical (usually dispositive) role that the proper

classification of convictions plays in criminal and immigration cases, waiting is an invitation to chaos. For example, *Leocal* held nearly twenty years ago that DUI is not an aggravated felony crime of violence. But this Court had to address the consequence of an erroneous misclassification term before last in *United States v. Palomar-Santiago*, 141 S.Ct. 1615, 1620 (2021) (In light of *Leocal*, "Palomar-Santiago's DUI conviction was not a crime of violence under 18 U.S.C. § 16(a), and so not an aggravated felony under 8 U.S.C. § 1101(a)(43). Palomar-Santiago's removal order thus never should have issued.").

Prompt resolution of categorical approach deviations leads to certainty and saves resources, as the Court's history shows. In *Descamps v. United States*, 570 U.S. 254 (2013), this Court established a rule for determining whether offenses were divisible and justified resort to the modified categorical approach. A short three years later this Court had to revisit the same issue, and only after *Mathis v. United States*, 579 U.S. 500 (2016) did the resistance abate. *See id.* at 514 ("But a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same[.]"). Examples further back are of the same genre. *See Moncrieffe v. Holder*, 569 U.S. 184, 206, 133 S. Ct. 1678, 1693 (2013) ("This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.' Once again we hold that the Government's approach defies 'the 'commonsense conception" of these terms."); *Lopez v. Gonzales*, 549 U.S. 47, 56-57 (2006) (holding simple drug possession not to be trafficking) ("But before this

provision is given the Government's expansive treatment, it makes sense to ask whether it would have some use short of wrenching the expectations raised by normal English usage."). Delaying a resolution does not produce consensus, it only multiplies the inevitable need for corrective collateral litigation. *See, e.g.*, *Welch v. United States*, 578 U.S. 120 (2016) (holding *Johnson* retroactively applicable).

B. Extreme Recklessness Crimes Are Common, and the Elements Clause is Frequently Used

Crimes affected by this issue rea are plentifully and frequently charged. Federal law and the law of every state includes common crimes with a *mens rea* between ordinary recklessness and knowledge. There are three general groups: first, those crimes derived from common law malice crimes, such as arson, murder, and mayhem. *See, e.g.*, 18 U.S.C. § 1111 (murder); 18 U.S.C. § 81 (arson). Second are crimes with an explicit statutory requirement of recklessness-plus. *See, e.g.*, N.Y. Penal Law § 120.10 ("Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person"). Last are statutes with explicit intent requirements which have been expanded to include recklessness by judicial construction. *See, e.g.*, Va. Code § 18.2-51 (requiring intent to main, disfigure, disable, or kill); *Knight v. Commonwealth*, 61 Va.App. 148, 733 S.E.2d 701, 702–03 (2012) (upholding a conviction under Va. Code § 18.2-51 based on the defendant's traveling at dangerously excessive speeds in a populated area and causing a multi-car crash); Cal. Penal Code § 245 (assault with a deadly weapon); *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 1188 (Cal. Ct. App. 2012) (upholding

assault with deadly weapon conviction under Cal. Penal Code § 245 where defendant "rac[ed] through a red light at a busy intersection" while street racing). Even a cursory survey shows that some of the most commonly committed and charged crimes – assault, arson, and homicide – include a theory of enhanced recklessness.[4] *See* LaFave, *Substantive Criminal Law* (3d ed. 2022) §§ 16.2(d) (discussing mental state for aggravated battery); 21.3(e) (same for arson); 14.4(b) (discussing subjective awareness of risk for depraved heart murder).

And since the abolition of the various crime-of-violence risk clauses, crimes that previously qualified under those clauses must be reevaluated under the elements clause. And the above-listed crimes with an extreme recklessness *mens rea* are exactly the type that previously were categorized by risk and now must be evaluated in light of the "use" of force as an element. The combined frequency of extreme recklessness crimes and the elements clause as the sole means of enhancement for such crimes make for a fast buildup, and the scope of the elements clause is the bottleneck. It is no surprise therefore that seven published federal opinions on various state statutes have issued and a split emerged since *Borden* was decided barely two years ago. It is therefore not only important but urgent that the Court

[4] Circuit Courts of Appeal are now more frequently leaning on state supreme courts to answer certified questions regarding their criminal law. *See, e.g.*, *United States v. Harris*, 289 A.3d 1060, 1077 (Pa. 2023) (Mundy, J., concurring), (certified question from Third Circuit) ("It is also problematic that extreme recklessness can be the mens rea for [Pennsylvania] aggravated assault. This may impact upon whether the crime always requires the 'use' of force 'against' another."); *White v. United States*, 300 Va. 269 (Va. 2021) (responding to question certified by Fourth Circuit).

tackle the last remaining question on what *mens rea* is required by the elements clause.

C. Continued Criticism of this Court's Categorical Approach Jurisprudence (and Especially Its Tone) Undermines Respect for the Law and the Courts

No other area of law has produced such strident complaints from judges required to apply it. The level of invective has been rising, and the level of respect falling. *See, e.g.*, *United States v. Begay*, 934 F.3d 1033, 1042 (9th Cir. 2019) (Smith, J., dissenting) ("MURDER in the second-degree is NOT a crime of violence??? ... How can this be? 'I feel like I am taking crazy pills.'"), rev'd en banc, 33 F.4th 1081 (9th Cir. 2022) (quoting Ben Stiller (Director), Zoolander [Film], United States: Paramount Pictures (2001)); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (Graber, J., concurring) ("The categorical approach requires us to perform absurd legal gymnastics, and it produces absurd results."); *United States v. Williams*, 898 F.3d 323, 337 (3d Cir. 2018) (Roth, J., concurring) ("approaches ludicrous"); *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc) (Pryor, J., concurring) (categorical approach is "nuts" and an "ongoing judicial charade"); *United States v. Battle*, 927 F.3d 160, 163 n.2 (4th Cir. 2019) (Quattlebaum, J.) (categorical approach is an "Alice in Wonderland path").

Judge Wilkinson, who wrote the opinion in this case below, has himself called the categorical approach "a protracted ruse" to benefit criminal defendants. *United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J. concurring).[5]

It is one thing to urge this Court to revisit its precedent; it is another to call its opinions "nuts," "absurd," "an ongoing judicial charade," "a protracted ruse" or other insulting terms. The Ninth Circuit and its followers consciously disregard the plain language of the force clause in preferment of their view of the policy underlying the definition (to get at bad people, put simply). Frustration of this purpose leads to the insults above. In this way these opinions are a microcosm of the entire lower-court revolt against the categorical approach. Correcting the immediate and deliberate deviation from the plain text of the statute and this Court's reasoning provides an opportunity to address and correct the cause of this legislative propensity in the lower courts.

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[5] Judge Wilkinson's thinking has apparently evolved. In *United States v. Wilson*, 951 F.2d 586 (4th Cir. 1991), the defendant argued that his prior robbery conviction was for mere pickpocketing and objected to its classification as a crime of violence. Holding for the government, and refusing even to consider the defendant's proffer, Judge Wilkinson penned a full-throated defense of the categorical approach. *Id*. at 590 ("First, the categorical approach to crimes of violence . . . economizes on judicial resources . . . Second, the categorical approach furthers the important values of comity and federalism . . . Third, the categorical approach promotes the Guidelines' goal of uniformity in sentencing because it avoids *ad hoc* determination about what kind of conduct merits application of the career offender provision."). *Caveat emptor*.

D. The Culpability-Based Approach Requires Impossible Line-Drawing and Revives the Spectre of Unconstitutional Vagueness

The certainty-based approach draws a clear and easily administered line. Crimes that require knowledge or intent qualify; crimes that, on the other hand, do not require subjectively directed conduct, like recklessness in its various forms, do not. The government and proponents of the culpability-based approach further require courts to define *how much* or *what kind* of risk of force raises a crime from ordinary recklessness to the level of extreme recklessness. That venture has been tried before and ended badly.

The government and some courts have tried a hand at drawing lines. *See, e.g.*, *United States v. Baez-Martinez*, 950 F.3d 119, 126 (1st Cir. 2020) (asserting that shooting into an occupied room is extreme recklessness; but recklessly shoot[ing] a gun in the woods while hunting" is ordinary recklessness; and that average drunk driving homicide is "only" manslaughter, but driving with a .315 BAC at 100 mph into oncoming traffic is murder); *see also United States v. Kepler*, Brief of the United States, 2022 WL 17853242 at 29 (10th Cir. No. 22-5006) ("[A] driver with the *mens rea* of extreme recklessness would be more culpable than a commuter who decides to run a red light and unwittingly hits a pedestrian[.]").

The difficulty is that states can and do define their crimes by the level of risk disregarded along a wide spectrum whose determining variables do not line up neatly with federal categorical approach cases. And the distinctions the culpability-approach proponents make between *ordinary* reckless driving or shooting and

extremely reckless acts of the same type don't reflect the vagaries of state law. *See Jeffries v. State*, 90 P.3d 185, 187 (Alaska Ct. App. 2004), *aff'd*. 169 P.3d 913 (Alaska 2007) (surveying common law and MPC jurisdictions, noting that both groups uphold extreme recklessness findings where proof "rested primarily on an intoxicated driver's persistent recidivism and failures at rehabilitation" as opposed to conduct while driving); *Hines v. State*, 276 Ga. 491 (Ga. 2003) (upholding felony murder conviction arising from hunting accident where defendant "took an unsafe shot at dusk, through heavy foliage, at a target eighty feet away that he had not positively identified as a turkey" and thus his felonious possession of the gun "created a foreseeable risk of death"); *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 1188 (Cal. Ct. App. 2012) (upholding assault with deadly weapon conviction under Cal. Penal Code § 245 where defendant "rac[ed] through a red light at a busy intersection" while street racing); *United States v. Jimenez-Arzate*, 781 F.3d 1062, 1064 (9th Cir. 2015) (discussing *Aznavoleh*, holding that § 245 qualifies as crime of violence under elements clause); *United States v. Alfaro*, 408 F.3d 204 (5th Cir. 2005) (holding that shooting into an occupied dwelling did not have as an element use, threatened use, or attempted use of force against another person); *United States v. Curtis*, 645 F.3d 937, 942 (7th Cir. 2011) (firing into an occupied *dwelling* is not a crime of violence, but firing into an occupied *vehicle* is, because of the "difference in size proportion to the average person").

Courts can't even agree on *how*, let alone *where* to draw the line between unintentional crimes that qualify and those that don't. *See Lung'Aho*, 2023 WL

4359975 at *2 (asserting that extreme recklessness differs from ordinary recklessness by the degree of risk); *Janis v. United States*, 2023 WL 4540528 at *5 (8th Cir. 2023) (noting Model Penal Code's definition of malice "contains a direct object – it limits murder to reckless conduct 'manifesting extreme indifference *to the value of human life*.") (emphasis in original, quotations omitted)); *United States v. Begay*, 33 F.4th 1081, 1095 (9th Cir. 2022) (en banc) (both – noting that malice differs from ordinary recklessness both as to degree of indifference and object of risk). Even this distinction does not line up with the line some states draw between extreme and ordinary recklessness. *Beckwitt v. State*, 477 Md. 398, 469-470 (Md. 2022) (second degree murder requires "extreme indifference to the value of human life" while gross negligence involuntary manslaughter requires "only a wanton and reckless disregard for human life"). Making federal courts evaluate, in the abstract, the subjective level of risk of various common state crimes is a path this Court has already tried. Everyone knows where it leads. *See Johnson v. United States*, 135 S.Ct. 2251 (2015) (holding the ACCA risk-based crime of violence clause void for vagueness); *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (same for 18 U.S.C. § 16(b)). It did not work when the yardstick was an *objective* level of risk; there is no reason to think it work any better when the level of risk is one the defendant must *subjectively* perceive and disregard.

III. This Case is a Clean Vehicle to Resolve the Issues Raised

The Fourth Circuit's opinion in this case was published, and its resolution of Mr. Alas's collateral attack depended solely on the conclusion that Virginia malicious

wounding is an aggravated felony. *Alas*, 63 F.4th at 278 ("We hold that Alas cannot show he suffered unfairness as required by § 1326(d)(3), because malicious wounding is indeed a removable offense. As his claim fails on the third requirement, we need not consider whether Alas could satisfy the other requirements of § 1326(d)."). There are no factual disputes underlying the issue and the question is purely legal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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