No. 23-5207

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IN THE SUPREME COURT OF THE UNITED STATES

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OMAR ALFONSO ALAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

## QUESTION PRESENTED

Whether petitioner's conviction for malicious wounding, in violation of Va. Code Ann. § 18.2-51 (2007), qualifies as a "crime of violence" for purposes of 18 U.S.C. 16(a), and therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 63 F.4th 269. The order of the district court is unreported but is available at 2021 WL 5909830.

## JURISDICTION

The judgment of the court of appeals was entered on March 24, 2023. A petition for rehearing was denied on April 24, 2023 (Pet. App. 10a). The petition for a writ of certiorari was filed on July 24, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the Eastern District of Virginia, petitioner was convicted of illegally reentering the United States after removal following a felony conviction, in violation of 8 U.S.C. 1326(a) and (b)(1). C.A. App. 380. The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. Id. at 381-382. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner was born in El Salvador and entered the United States without authorization in 2004. Pet. App. 3a. Three years later, petitioner was convicted in Virginia state court of malicious wounding, in violation of Va. Code Ann. § 18.2-51 (2007), and sentenced to ten years of imprisonment, with five years and six months suspended. Pet. App. 3a; Presentence Investigation Report (PSR) ¶ 24. When petitioner finished serving his prison sentence, he was released into the custody of U.S. Immigration Customs Enforcement (ICE) and served with a Form I-851 notice of the government's intent to issue a final administrative removal order. Pet. App. 3a; PSR ¶ 24; C.A. App. 26. The form charged that petitioner was deportable under 8 U.S.C. 1227(a)(2)(A)(iii), Pet. App. 3a; C.A. App. 26, which provides that a noncitizen "is deportable" if he has been "convicted of an aggravated felony at any time after admission," 8 U.S.C. 1227(a)(2)(A)(iii). The form identified his Virginia malicious wounding offense as the "aggravated felony." Pet. App. 3a; C.A. App. 26.

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., defines "aggravated felony" to include, among other things, "a crime of violence (as defined in [18 U.S.C. 16], but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted). The cross-referenced provision, 18 U.S.C. 16, in turn defines "crime of violence" as "(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," or "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Petitioner signed the removal form, waiving judicial review, and was removed to El Salvador in 2011. Pet. App. 3a.

2. By 2016, however, petitioner had reentered the United States. Pet. App. 3a. In 2020, he was arrested in Virginia and charged with assault and battery. Ibid. Following that arrest, a grand jury in the Eastern District of Virginia charged petitioner with illegally reentering the United States after removal following a felony conviction, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. 3a; C.A. App. 11.

Petitioner filed a motion to dismiss the indictment, seeking to collaterally attack his 2011 removal order. Pet. App. 3a. Under 8 U.S.C. 1326(d), a defendant charged with violating Section 1326 may collaterally attack his prior removal order if he can

show: (1) that he "exhausted any administrative remedies that may have been available," (2) that the "deportation proceedings at which the order was issued improperly deprived [him of] the opportunity for judicial review," and (3) that "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d). The district court denied petitioner's motion to dismiss the indictment, finding that petitioner had failed to demonstrate that his 2011 removal order was "fundamentally unfair," as required by Section 1326(d)(3). C.A. App. 359-366.

Petitioner had attempted to satisfy that requirement by asserting that Virginia malicious wounding does not qualify as a "crime of violence" under this Court's decision in Borden v. United States, 141 S. Ct. 1817 (2021), and therefore could not serve as an "aggravated felony" justifying his removal. C.A. App. 362-365. The court rejected that argument as precluded by circuit precedent. Id. at 362-365. And although the court therefore deemed it unnecessary to decide whether petitioner had satisfied Section 1326(d)'s other requirements, id. at 366, the court observed that petitioner's claim that he was unable to obtain judicial review of his removal order, as required by Section 1326(d)(2), relied on the assertion that "he was not properly apprised of his appeal rights by the agent" who had charged him with deportability, an argument whose resolution "turn[ed] on the credibility of the [agent's] testimony," which the court was "inclined to find * * * credible." Id. at 365-366.

Petitioner subsequently pleaded guilty, reserving his right to appeal the denial of his motion to dismiss. Pet. App. 4a. The district court sentenced him to 24 months of imprisonment, to be followed by three years of supervised release. C.A. App. 381-382.

3. The court of appeals affirmed, agreeing that Virginia malicious wounding is a "crime of violence" under 18 U.S.C. 16(a) and therefore qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1227(a)(2). Pet. App. 7a-9a. The court observed that, at the time of petitioner's removal in 2011, circuit precedent established that Virginia malicious wounding was a crime of violence. Id. at 8a. And the court rejected petitioner's contention that its circuit precedent was no longer valid in light of this Court's intervening decision in Borden, which held than an offense with the "mens rea of recklessness is not a 'violent felony.'" Ibid. (quoting Borden, 141 S. Ct. at 1834).

The court of appeals observed that it had already rejected, in United States v. Manley, 52 F.4th 143 (4th Cir. 2022), cert. denied, 143 S. Ct. 2436 (2023), the argument that Borden implicitly overruled its precedent regarding Virginia malicious wounding. Pet. App. 8A. Manley had explained that the Virginia malicious-wounding statute "'demands that the perpetrator direct his action at, or target, another individual,'" thereby establishing a mens rea that is "greater than negligence or recklessness." Pet. App. 8a (quoting Manley, 52 F.4th at 148). The court of appeals therefore agreed with the district court that petitioner had not

demonstrated that his removal order was "fundamentally unfair," as required by Section 1326(d). Id. at 8a-9a.

ARGUMENT

Petitioner renews his contention (Pet. 5-19) that, in light of this Court's decision in Borden v. United States, 141 S. Ct. 1817 (2021), the Virginia offense of malicious wounding does not qualify as a "crime of violence" under 18 U.S.C. 16(a). That contention lacks merit, and no conflict exists between the decision below and any decision of this Court or another court of appeals. Petitioner errs in contending (Pet. 5-19) that his case presents the question of whether a crime with a mens rea of "extreme recklessness" qualifies as a "crime of violence" under 18 U.S.C. 16(a). The Virginia malicious wounding statute does not include a mens rea of "extreme recklessness," instead requiring an "intent to maim, disfigure, disable, or kill." Va. Code Ann. § 18.2-51 (2007). In any event, petitioner did not present his "extreme recklessness" argument to the court of appeals, which therefore did not pass on it, and there is no division in the courts of appeals regarding the status of "extreme recklessness" offenses after Borden.

This Court has previously denied review in cases presenting the closely related questions of whether a conviction under Va. Code. Ann. § 18.2-51 qualifies as a "crime of violence" under 18 U.S.C. 924(c) or a "violent felony" under 18 U.S.C. 924(e)(2)(B)(i), -- including in the case on which the decision

below relied, see Manley v. United States, 143 S. Ct. 2436 (2023) (No. 22-946); see Rumley v. United States, 141 S. Ct. 1284 (2021) (No. 20-5733); Mitchell v. United States, 140 S. Ct. 1167 (2020) (No. 19-7123); Jenkins v. United States, 139 S. Ct. 157 (2018) (No. 17-9343); Carter v. United States, 137 S. Ct. 491 (2016) (No. 15-9428). It should follow the same course here.

1. The court of appeals correctly rejected petitioner's contention that, in light of Borden, his Virginia malicious-wounding conviction no longer qualifies as a "crime of violence" under 18 U.S.C. 16(a).

a. To determine whether a prior conviction constitutes a "crime of violence" under 18 U.S.C. 16(a), courts apply a categorical approach, "look[ing] to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [a defendant's] crime." Leocal v. Ashcroft, 543 U.S. 1, 7 (2004). For Section 16(a), the relevant inquiry is whether the offense "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).

In Borden, this Court determined that a Tennessee aggravated assault offense with a mens rea of recklessness did not qualify as an offense involving the "use of physical force against the person of another" for purposes of the definition of a "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i). See 141 S. Ct. at 1825 (plurality opinion); id.

at 1835 (Thomas, J., concurring in the judgment). A plurality of the Court concluded that to use force "against another," the perpetrator must "direct his action at, or target, another individual." Id. at 1825. And the plurality determined that a perpetrator's conduct is not "opposed to or directed at another" when he acts with a mens rea of ordinary recklessness, id. at 1827, because recklessness may involve a person's "simple 'failure to perceive' the possible consequences of his behavior." Id. at 1824 (quoting Model Penal Code § 2.02(2)(d) (1985)). The perpetrator's "fault" may therefore simply be "pay[ing] insufficient attention to the potential application of force," rather than "consciously deploy[ing]" force against another in the way the ACCA elements clause requires. Id. at 1827.

b. In United States v. Manley, 52 F.4th 143 (4th Cir. 2022), cert. denied, 143 S. Ct. 2436 (2023), the court of appeals correctly recognized that the Virginia malicious wounding offense at stake in this case "satisfies [Borden's] criteria," id. at 148, for determining when an offense involves the "use, or threatened use of physical force against another," 18 U.S.C. 16(a). The malicious wounding statute specifies that the offense must be committed with an "intent to maim, disfigure, disable, or kill." Va. Code Ann. § 18.2-51. The Virginia law therefore "requires that the person causing the [bodily] injury have acted with the specific intent to cause severe and permanent injury." United States v. Rumley, 952 F.3d 538, 550 (4th Cir. 2020), cert. denied,

141 S. Ct. 1284 (2021). That mens rea is plainly "greater than negligence or recklessness," and it requires an individual to "'direct his action at, or target, another individual,'" in the manner the Borden plurality found relevant. Manley, 52 F.4th at 148 (quoting Borden, 141 S. Ct. at 1825); see United States v. Castleman, 572 U.S. 157, 169 (2014) (recognizing that a crime involving the "knowing or intentional causation of bodily injury necessarily involves the use of physical force").

Petitioner errs in suggesting (Pet. 3-4, 12) that Virginia state court decisions have expanded the Virginia malicious wounding statute beyond its text to include reckless conduct. Instead, petitioner cites cases in which Virginia lower courts have considered whether certain evidence is sufficient to prove the "intent to maim, disfigure, disable, or kill" required by the statute, in the process applying the commonsense rule that intent "'often must[] be inferred from the facts and circumstances in a particular case.'" David v. Commonwealth, 340 S.E.2d 576, 577 (Va. Ct. App. 1986) (citation omitted); see also Shimhue v. Commonwealth, No. 1736-97-2, 1998 WL 345519, at *2 (Va. Ct. App. June 30, 1998) (finding "the evidence sufficient to support the trial court's finding that Shimhue possessed the specific intent required to convict him of malicious wounding" when he "intentionally twice fired a powerful weapon into the floor of his upstairs apartment" and into the apartment beneath him); Knight v. Commonwealth, 733 S.E.2d 701, 707 (Va. Ct. App. 2012) ("A rational

fact finder could infer that, when driving at such a high rate of speed in the left turn lane, * * * appellant intended to ram into other vehicles waiting to turn into the shopping plaza."). Petitioner cites no case -- let alone a decision of the Supreme Court of Virginia -- holding that the Virginia malicious-wounding statute does not, in fact, require the specific intent described in its text.

c. Because the Virginia statute here requires the distinct mens rea of an "intent to maim, disfigure, disable, or kill," Va. Code Ann. 18.2-51, petitioner is incorrect in asserting (Pet. i, 5, 10-19) that this case presents an opportunity to address a question left open by the Borden plurality opinion: whether offenses committed with the mens rea of "'extreme recklessness' * * * fall within the [ACCA] elements clause" and similar statutes. Borden, 141 S. Ct. at 1825 n.4. In Manley, the court of appeals recognized that the mens rea of "extreme recklessness" is distinct from the mens rea in the Virginia malicious wounding statute, which requires the "intent to maim, disfigure, disable, or kill," Va. Code. Ann. § 18.2-51. While Manley recognized that either mens rea requirement is sufficient to satisfy Borden's criteria for violent felonies, the court of appeals analyzed the two mens rea requirements separately and never suggested that "extreme recklessness" and the "intent to maim, disfigure, disable, or kill" are synonymous. See 52 F.4th at 147-149 (finding that Virginia malicious wounding offense qualifies as a "violent

felony" under 18 U.S.C 924(c)); 52 F.4th at 149-151 (determining that an offense with an "extreme recklessness" mens rea qualifies).

Not only does petitioner fail to identify any state-court decision that would undermine the court of appeals' interpretation of Virginia law, this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). Petitioner identifies no reason to depart from that settled policy in this case.

2. Petitioner does not suggest any conflict in the courts of appeals regarding whether crimes committed with the "specific intent to cause severe and permanent injury," Rumley, 952 F.3d at 550, constitute "crime[s] of violence" under 8 U.S.C. 16(a). He therefore fails to demonstrate any circuit conflict relevant to this case.

Furthermore, even if the mens rea requirement of the Virginia malicious wounding statute could be categorized as "extreme recklessness," certiorari would not be warranted because every court of appeals to consider the issue has determined that an offense with a minimum mental state of extreme recklessness can

satisfy the ACCA elements clause and other statutory provisions with wording similar to 18 U.S.C. 16(a). See United States v. Báez-Martínez, 950 F.3d 119, 125-127 (1st Cir. 2020), cert. denied, 141 S. Ct. 2805 (2021) (addressing the ACCA elements clause); Manley, 52 F.4th at 148 (4th Cir.) (addressing 18 U.S.C. 924(c)(3)(A)); United States v. Griffin, 946 F.3d 759, 761-762 (5th Cir.) (per curiam), cert. denied, 141 S. Ct. 306 (2020)(addressing the ACCA elements clause); United States v. Harrison, 54 F.4th 884, 890 (6th Cir. 2022) (addressing 18 U.S.C. 3559(c)(2)(F)(ii)); Janis v. United States, 73 F.4th 628, 634 (8th Cir. 2023) (addressing 18 U.S.C. 924(c)(3)(A)); United States v. Begay, 33 F.4th 1081, 1093 (9th Cir.) (en banc), cert. denied, 143 S. Ct. 340 (2022) (same); United States v. Kepler, 74 F.4th 1292, 1303-1305 (10th Cir. 2023) (same); Alvarado-Linares v. United States, 44 F.4th 1334, 1344 (11th Cir. 2022) (same).

Contrary to petitioner's contention (Pet. 8-9), no conflict exists between those cases and the Eighth Circuit's recent decision in United States v. Lung'aho, 72 F.4th 845 (8th Cir. 2023). In Lung'aho, the Eighth Circuit found that the elements clause does not cover an arson offense that can be committed "maliciously," i.e., with at least "a 'willful disregard of [a] likelihood' of harm." Id. at 848-850 (citation omitted; brackets in original). But the Eighth Circuit subsequently observed in Janis v. United States that the "maliciously" mental state requires less "'risk and culpability'" than extreme recklessness. 73 F.4th at 632.

Lung'aho thus does not undermine Janis's recognition that a mens rea of extreme recklessness is sufficient under the ACCA's elements clause. See id. at 634. And even if Lung'aho and Janis were in conflict, such an intra-circuit disagreement would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam); Sup. Ct. R. 10.

3. At all events, this case would be a poor vehicle for judicial review because the arguments petitioner is currently advancing were neither pressed nor passed upon below and are unlikely to be outcome determinative.

Before the court of appeals, petitioner argued that his Virginia malicious wounding offense requires "a showing of only recklessness." Pet. C.A. Br. 42-43; see also id. at 45 ("Reckless intent, at most, suffices."); Pet. C.A. Reply Br. 19-20 ("[M]alicious wounding is a crime with a recklessness mens rea."). And although petitioner briefly asserted in his reply brief that Borden establishes that an offense with a mens rea of extreme recklessness cannot be a crime of violence under Section 16(a), see Pet. C.A. Reply Br. 26-27, petitioner continued to take the position that Virginia malicious wounding could be committed by mere recklessness, rather than extreme recklessness, see id. at 27. The court of appeals' opinion accordingly did not address extreme recklessness. See Pet. App. 7a-9a. And petitioner identifies no reason for this Court to depart from its usual practice of declining to review claims that were "not pressed or

passed upon" in the court of appeals below. United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted).

In addition, and independently, the question of whether petitioner's Virginia malicious wounding offense qualifies as a crime of violence is unlikely to be outcome determinative given the posture of this case. Petitioner is attempting to collaterally attack his removal order as a means of challenging his conviction for unlawful reentry. See pp. 3-4, supra. But even if petitioner were able to demonstrate that the Virginia offense is not a crime of violence, he would still have to meet the other two requirements for a collateral attack on a removal order set out in 8 U.S.C. 1326(d). And the district court suggested that, if it were to decide that issue, it would likely find that at least one of those requirements was not satisfied because petitioner's argument had been undermined by "credible" testimony from a government witness. C.A. App. 365; See p. 4, supra.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

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