No. 23-5207

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

REPLY BRIEF OF PETITIONER

GEREMY C. KAMENS
Federal Public Defender

Joseph S. Camden
Assistant Federal Public Defender
Counsel of Record
701 East Broad Street, Suite 3600
Richmond, VA 23219
(804) 565-0800
Joseph_Camden@fd.org

Dec. 22, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Miscellaneous

No. 23-5207

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

REPLY BRIEF OF PETITIONER

Extreme recklessness does not require knowing or purposeful use of force and therefore cannot be directed or targeted at another person. The Fourth Circuit's opinion in this case, and in other Circuits which agree, have created a new and confusing "culpability" test divorced from the focus on the level of subjective certainty that this Court established in *Borden v. United States*, 141 S. Ct. 1817 (2021). The Court should grant certiorari to resolve the question left open in *Borden*, whether a crime with a *mens rea* of extreme recklessness can qualify under the force clause. The level of confusion (and frustration) that the culpability test has created and threatens

to create cannot be overstated. Since 2021, it has produced a dozen published opinions and half again as many concurrences and dissents of diverging reasoning.[1]

The government urges the Court to deny certiorari because, it claims in an assortment of arguments, (A) the Fourth Circuit's interpretation of Virginia law is correct; (B) the issue was not passed on below; (C) there is no split in the Circuit Courts of Appeal and (D) the issue is not dispositive in this case;. It is wrong on all counts, and this case is an ideal vehicle to clarify, after *Borden*, whether extreme recklessness crimes have as an element the use, attempted use, or threatened use of physical force.

A. Virginia Courts Consistently Hold That Recklessness Satisfies the Nominal Intent-to-Injure Element

First the government argues that Mr. Alas is wrong on the merits, because Virginia malicious wounding requires the Commonwealth to prove a specific intent to inflict certain physical injuries. Brief in Opposition (BIO) 9-10. But this argument ignores the opinions of Virginia's courts, who are authoritative expositors of Virginia law, and focuses instead only on the "label [Virginia] assigns" to the element, not its substance. *Mathis v. United States*, 579 U.S. 500, 509 (2016). Although the statute nominally includes such an element, Virginia courts have held that the element can be satisfied by negligent or reckless unintentional conduct with an objective level of

---

[1] The same issue – whether a crime with a *mens rea* of extreme recklessness can has as an element the use, attempted use, or threatened use of force after *Borden* – is also pending before this Court in *Oaks v. United States*, No. 22-7692, scheduled for the same January 5, 2024 conference. If the Court grants certiorari in that case, it could consolidate the cases or hold either pending resolution of the other.

sufficiently high risk, as a matter of law. The court need not rely on the parties' characterizations because "a state court decision definitively answers the question." *Id*. at 217.

> We must decide whether one may be convicted of unlawful wounding with intent to maim, disfigure, disable or kill another, when there is no direct evidence of a subjective intent to inflict bodily harm to the injured person. Under the facts of this case, we answer in the affirmative.

David v. Commonwealth, 340 S.E.2d 576, 577 (Va. Ct. App. 1986). *David* cited approvingly to, and quoted from, *State v. Anania*, 340 A.2d 207 (Me. 1975):

> An "intention ... to do some violence" may be established, given appropriate facts, by evidence of a specific, subjective purpose "to do some violence." However, it is equally clear that proof of the requisite "intent" is not necessarily confined to such evidence.... Criminal "intent" may equally well flow, *as a matter of law*, from intentionally doing an act which has the inherent potential of doing bodily harm, and doing so in a criminally negligent manner.

David, 340 S.E.2d at 578 (emphasis in original). Virginia's intent-to-injure element is satisfied where "it reasonably could have been anticipated" that a bullet fired into the sidewalk "would be deflected." *Id*. This unambiguously sets an objective *mens rea* of recklessness or even negligence – and certainly well short of requiring the knowing or intentional application of force.

Following *David*, in *Shimhue v. Commonwealth*, 1990 WL 345519 (Va. Ct. App. 1998), the defendant shot a rifle into the floor of his apartment "for the purpose of encouraging [a woman] to leave the apartment." *Id*. at *1. A man sleeping in the apartment below was hit in the leg. The trial court made an explicit factual finding that even when the defendant was interviewed by police later, "Shimhue was unaware that he had injured" the victim and credited his initial statement *because*

"it was given before Shimhue realized [the victim] had been injured. The Court of Appeals held that the intent requirement was satisfied because the defendant "*must have known* that the repeated discharge of the weapon into the floor of his upstairs apartment at a time when the building's occupants *should* be home *could* result in severe bodily harm or death." *Id.* at *2 (emphasis added). This evidence alone satisfied the intent-to-harm element of Virginia's malicious wounding statute. The standard applied used explicitly probabilistic language in lieu of a finding of subjective intent – "must have," "should," "could." *Id.* And it held the same for the malice element: "The wilful and deliberate act of firing a deadly weapon supports an inference of malice." *Id.* So the malice element does nothing to narrow the mental state requirement to knowledge or intent to use force against another person.

More recently, Virginia courts have explained that this theory of malice does not require proof of an actual subjective mental state, but instead is "constructive malice" which is where "malice as such *does not exist* but the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist." *Knight v. Commonwealth*, 733 S.E.2d 701 (Ct. App. Va. 2012) (emphasis added). It used this standard to affirm the conviction of Mr. Knight for malicious wounding from a traffic accident where he was driving over 100 miles an hour and collided with a car in a turn lane despite attempting to brake. *Id.* at 703. This was sufficient to "infer implied malice." *Id.*at 161.

The government's evaluation of Virginia law improperly stops at labels. Virginia can call the element implied malice or inferred intent or "Mary Jane." *Ring*

v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). But this Court looks to the minimum conduct sufficient to violate the statute, as reflected in actual prosecutions, which shows that sufficiently reckless conduct suffices. Mr. Alas' characterization of the elements is correct because he can and does "point to . . . other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

B. The Issue Here Was Explicitly and Thoroughly Litigated Below

Distressingly, the government claims the question here was not presented below. BIO 13. This argument contradicts its position below. Mr. Alas consistently argued from the district court to here that Virginia malicious wounding did not qualify as a crime of violence in light of *Borden* because it lacked an intentional or knowing *mens rea* with respect to the application of force. C.A.J.A. 17-20 (Motion to dismiss under 8 U.S.C. § 1326(d)); 68-70 (reply, discussing *Borden*); 364 (order denying motion to dismiss, acknowledging argument); Opening Br. at 46-54, *United States v. Alas*, 4th Cir. No. 22-4193 (Doc. 12, Jul. 18, 2022) (discussing *Borden* / force clause argument); Reply Br. at 30, *id.* (Doc. 20, Sep. 15, 2022) (reply, same). The Fourth Circuit's authoritative statement on the intent element of this very same statute in *United States v. Manley*, 52 F.4th 143, 145 (4th Cir. 2022) was only issued after briefing had been completed. In *Manley* the Fourth Circuit first held that extreme recklessness qualified under the force clause.

In its letter to the Fourth Circuit under Fed. R. App. P. 28(j), informing the court below about *Manley*, the government argued the opposite of what it says here.

It claimed that *Manley* "resolved a central issue in this appeal," noted Mr. Alas's argument regarding recklessness, and claimed that *Manley* "rejected the defendant's argument, and in doing so, resolved the legal question at issue in this appeal." Supp. Auth. Letter, *United States v. Alas*, 4th Cir. No. 22-4193 (Doc. 22, Nov. 2, 2022). It is inconsistent to claim now that Mr. Alas had not pressed the issue of whether Va. Code § 18.2-51 qualifies as a crime of violence after *Borden*, when it acknowledged the opposite below, and claimed that the very case cited by the Fourth Circuit to deny Mr. Alas relief conclusively "resolved" Mr. Alas's claim. It did, and that's the point; because *Manley*, on which the court below relied, was wrongly decided, and involves a split of authority on an important issue, this Court should grant certiorari.

Even if there were daylight between the particulars of the argument below and the question as framed by the government here, they are immaterial. A petitioner "generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Even under the government's reasoning, this petition presents only a variant "argument in support of that claim," which this Court has not recognized as a reason to deny review. *Id.* at 534.

C. There is a Split of Authority in Courts Below

The government claims that there is no circuit split on this issue, and that *United States v. Lung'aho*, 72 F.4th 845 (8th Cir. 2023) is consistent with other opinions across other circuits, or at most shows an intra-circuit split. BIO 12-13.

Lung'aho held that arson, with a *mens rea* of malice, did not qualify as a crime of violence after *Borden* because "[a] conscious decision to ignore a risk of harm is different from intending it," and therefore does not amount to "consciously direct[ing]" force at someone or something. Id. at 850.

But, the government says, the Eighth Circuit walked that back or distinguished it in *Janis v. United States*, 73 F.4th 628, 630 (8th Cir. 2023), when it held that that "the 'maliciously' mental state requires less "risk and culpability" than extreme recklessness." BIO 12. But *Janis* concerned the "malice aforethought" element of murder, as reflected in a depraved heart theory, and *Lung'aho* concerned the "maliciously" element of arson. So unless *Janis* invented a new and intermediate version of malice somewhere between extreme recklessness and ordinary criminal recklessness, the government's take on the case is just wrong. Malice murder and malice arson both require malice – a unitary common law-derived mens rea reflecting a degree of risk certainty above ordinary recklessness and below knowledge. In fact, the *Janis* opinion, with no attempt to distinguish *Lung'aho*'s discussion of *Borden* or malice, held that depraved heart murder satisfies the force clause *not* because it includes intentional or knowing application of force, but because the level of *culpability* was closer to knowledge than to ordinary recklessness. *Id.* at 633-34. And, illustrating the split in reasoning, *Lung'aho* was cited in *United States v. Harris*, ___ F.4th ____, 2023 WL 8655275, *13 n.21 (3d Cir. 2023) (Jordan, J., concurring in denial of rehearing en banc) as an example of a defendant who "escaped the enhanced sentences that Congress said should apply[.]"

More worryingly, characterizing the divergence of authority as an *intra*-circuit split, BIO 13, gives the government a perverse incentive to muddy the waters in the courts below. Instead of treating published circuit cases as final, and proceeding with orderly review *en banc* or on a petition for certiorari, the government can, as it did in *Janis* and other cases, continue to pursue rejected arguments in the hopes that a later panel will publish an opinion with inconsistent reasoning so that it can argue the split is merely intra-circuit or insufficiently developed. This is not cynical speculation: the government or courts below have done it, multiple times, recently, in categorical approach cases, even just looking within the Fourth Circuit.[2] Denying certiorari would incentivize the government at least not to avoid intra-circuit splits on contentious categorical approach issues, especially where it knows that many judges in the courts below are dissatisfied with this Court's opinions. *See, e.g.*, *United*

---

[2] *See, e.g.*, *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022) (commentary to U.S.S.G. § 4B1.2 including inchoate offenses was void under *Stinson* and *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019); and West Virginia drug distribution statute did not qualify because it includes attempts); *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022) (actually, *Kisor* does not apply to the Guidelines); *Id.*, No. 21-4067, Doc. 46 (4th Cir. 2022) (Niemeyer, J., concurring in denial of rehearing en banc, acknowledging disagreement with *Campbell* but justifying denying rehearing)[2]; Brief for the United States in Opposition to Certiorari, 2022 WL 17155762 at *15 (arguing in support of denying certiorari, that resolving "internal difficulties" between *Campbell* and *Moses* "is primarily a job for the court of appeals, not this Court"); *United States v. Groves*, 65 F.4th 166, 173-74 (4th Cir. 2023) (refusing to apply *Campell* to identically worded statute, because panel believed *Campbell* panel missed West Virginia statute pertinent to analysis); *United States v. Davis*, 75 F.4th 428, 444 (4th Cir. 2023) (same); *see also, e.g.*, *United States v. White*, 24 F.4th 378, 283 (4th Cir. 2022) (holding, after certifying question to Va. Sup. Ct., that Virginia robbery does not have force as element); *United States v. Williams*, 64 F.4th 149, 154 (4th Cir. 2023) (rejecting attempt by government to avoid *White* by claiming it had not made a certain argument before).

States v. Harris, ___ F.4th ____, 2023 WL 8267258 (3d Cir. Nov. 27, 2023) (Jordan, J., concurring in denial of rehearing en banc, joined Chagares, C.J., and Hardiman, Krause, Bibas, Porter, & Matey, JJ.); Pet. at 14-15 (collecting cases expressing judges' frustration at categorical approach).

D. Whether Mr. Alas's Conviction is an Aggravated Felony is "Central" to the Resolution of this Case, As the Government Acknowledged Below

The government claims that the issue presented – whether Mr. Alas's prior conviction is an aggravated felony – is not dispositive to his collateral attack on the removal order. To the contrary, the issue presented in this petition is the sole basis of the opinion below, and a "central issue in this case," Supp. Auth. Letter, *United States v. Alas*, 4th Cir. No. 22-4193 (Doc. 22, Nov. 2, 2022), as the government *previously* claimed in a letter to the court below; and not "unlikely to be outcome determinative" as it *now* claims. BIO 13. And recent experience does not justify the importance the government puts on this aspect of the case. Just two terms ago this Court granted certiorari on the government's petition on appeal of a collateral attack of removal order under 8 U.S.C. § 1326(d) to address a single element (the exhaustion requirement), and remanded without opining on any of the other elements, nor even on whether there was another theory on which he could prevail on the element in dispute. *United States v. Palomar-Santiago*, 141 S.Ct. 1615 (2021). And after remand to the district court, the government *itself* moved to dismiss the indictment, which was granted. *United States v. Palomar-Santiago*, 3:17CR116-LRH-CSD (D. Nev.), Docs. 86, 88. The government's concerns about whether the issue is case

dispositive should therefore be taken with a grain of salt. The Court need not share the government's purported concerns about whether the issue presented here is dispositive of the entire case. It is enough that it is on an issue necessary to the Fourth Circuit's decision – whether a conviction under Va. Code 18.2-51 satisfies the force clause after *Borden*.

But in any case, Mr. Alas would likely prevail on the remaining elements of 8 U.S.C. § 1326(d). The district court here already found that Mr. Alas had satisfied the exhaustion requirement under 8 U.S.C. § 1326(d)(1), a decision which the Fourth Circuit did not revisit. C.A.J.A. 365. As for deprivation of judicial review under § 1326(d)(2), the government stipulated that Mr. Alas did not speak English, C.A.J.A. 77, and the deportation officer whom the district court was inclined to find credible, testified that he did *not* translate the forms informing Mr. Alas of his right to judicial review because he was not proficient enough in Spanish, C.A.J.A. 111, and that he did not typically inform *anyone* that they had a right to petition for review in the Circuit Court of Appeals, C.A.J.A. 117, instead resorting to "a bridge of language" to explain generally that they could "fight" their case in some court. C.A.J.A. 113. So a positive credibility determination does not help the government, it in fact goes to establish that Mr. Alas was deprived of the opportunity for judicial review under 8 U.S.C. § 1326(d)(2). *See United States v. Mendoza-Lopez*, 481 U.S. 828, 842 (1987) (deprivation of judicial review established where available discretionary relief "was not adequately explained" to alien respondents). In any case, the outcome of the case

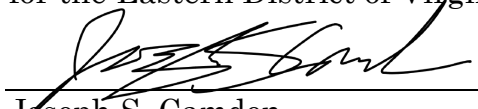
on remand, if this Court holds his prior conviction not to be an aggravated felony, is by no means a foregone conclusion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEREMY C. KAMENS
Federal Public Defender
for the Eastern District of Virginia



Joseph S. Camden
Counsel of Record
Assistant Federal Public Defender
Office of the Federal Public Defender
for the Eastern District of Virginia
701 East Broad Street, Suite 3600
Richmond, VA 23219
(804) 565-0830
Joseph_Camden@fd.org

December 22, 2023