CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2023 Term

STEVEN HUFFMAN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Borden v. United States*, 141 S. Ct. 1817 (2021), five members of this Court vacated a 15-year mandatory minimum sentence under the Armed Career Criminal Act ("ACCA"). They agreed that reckless assault was not a predicate violent felony having as an element "the use of physical force against another." Justice Kagan's plurality opinion reasoned the "force clause" definition in 18 U.S.C. § 924(e)(2)(B)(i)'s reference to "the use . . . of physical force against the person of another," "excluded "conduct, like recklessness, that is not directed or targeted at another." Justice Thomas concurred in result because "use of physical force" bore a "well understood meaning applying only to intentional acts designed to cause harm."

Petitioner argued the plurality and concurring opinions also excluded knowing conduct not targeted as intentional acts designed to harm another. This invalidated a Missouri crime of knowingly exhibiting a weapon in an angry or threatening manner, a law interpreted to require no intent to target, injure or threaten another. Missouri defines the law's knowing mental state as requiring mere awareness that one's conduct could be objectively viewed as angry or threatening, but the witness to the display need not perceive an actual threat. The Eighth Circuit denied relief reasoning that *Borden*'s plurality and concurring opinions only excluded reckless crimes. The Circuits disagree on which opinion states the rule of *Borden*. Some deem the plurality constitutes the narrowest and finding rule as a logical subset of the Justice Thomas's concurrence, citing *Marks v. United States*, 430 U.S. 188, 193 (1977). The issues here are:

1. Whether knowing conduct not intentionally designed to harm a targeted person satisfies the force clause definition of violent felony in 924(e)(2)(B)(i)?

2. What is the controlling rule of *Borden*?

Parties to the Proceedings

Petitioner Steven Huffman was represented in the lower court proceedings by his appointed counsel, Nanci H. McCarthy, Federal Public Defender, and Assistant Federal Public Defender Melissa K. Goymerac, 1010 Market, Suite 200, Saint Louis, Missouri 63101. The United States was represented by United States Attorney Sayler Fleming and Assistant United States Attorney Cassandra J. Wiemken, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri 63102.

Directly Related Proceedings

This case arises from the following proceedings:

- *United States v. Huffman*, 4:20-CR-00750-AGF-1, (E.D. Mo) (criminal proceeding), judgment entered June 14, 2022;
- *United States v. Huffman*, 22-2463 (8th Cir.) (direct criminal appeal), appellate judgment entered Feb. 13, 2023;
- *United States v. Huffman*, 22-2463 (8th Cir.) (direct criminal appeal), order denying petition for rehearing en banc entered Mar. 24, 2023; and
- *Huffman* v. *United States*, 22A1074 (Supreme Court) (Application to extend time to file a petition for a writ of certiorari) order granting additional time entered Aug. 21, 2023.

There are no other proceedings directly related to the case under Rule 14.1(b)(iii).

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THE OPINION BELOW

The summary affirmance of the United States Court of Appeals for the Eighth Circuit is not published. The order appears in the Appendix ("Appx") at 1.

JURISDICTION

Mr. Huffman was sentenced under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. §924(e)(2)(B)(i), on June 14, 2022. The Eighth Circuit Court of Appeals entered its judgment on February 13, 2023. Appx. 1. Mr. Huffman filed a timely motion for rehearing and rehearing *en banc*, which was denied March 24, 2023. Appx. 8. Justice Kavanaugh, Circuit Justice for the Eighth Circuit, granted petitioner's request for additional time to file this petition to August 21, 2023. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS

18 U.S.C. § 922(g) Unlawful acts.

It shall be unlawful for any person—

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(c)(3). For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

STATE STATUTES

Iowa Code §708.6(2):

> A person commits a class "D" felony when the person shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.

Mo. Rev. Stat. §571.031.1(4) Unlawful Use of a Weapon. 1. A person commits the offense of unlawful use of weapons . . . if he or she knowingly:

*****

> (4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner[.]

STATEMENT OF THE CASE

The Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA") mandates a 15-year prison term for illegal gun possession by a person with three prior convictions for a "violent felony" having as an element "the use, attempted use, or threatened use of physical force against the person of another." A plurality of this Court held in 2021 that Congress's use of the words "physical force . . . against the person of another" meant that the "force clause" excluded "conduct, like recklessness, that is not directed or targeted at another." *Borden v. United States,* 141 S. Ct. 1817, 1833 (2021) (Justice Kagan's plurality opinion). Justice Thomas concurred in the result on the basis that the words "use of force" carried a well-established meaning signifying "intentional acts designed to cause harm." The Circuits of the federal Courts of Appeal have reached different conclusions as to what binding rule this Court established in *Borden.*

Mr. Huffman's case presents the proper vehicle to examine the issue. He argued below that the rationales of both the plurality and concurring opinions in *Borden* invalidated his Missouri conviction for knowingly exhibiting a firearm in an angry or threatening manner. He based this claim on Missouri state caselaw rejecting any requirement that one target or intend injury or threat toward the bystander whose presence makes the exhibition a crime. He further cited state caselaw interpreting the "knowing" *mens rea* for exhibiting only required exhibitors to be cognizant that an objective observer might view their display as angry or threatening.

Mr. Huffman pled guilty to possessing a gun after a felony conviction, 18 U.S.C. § 922(g)(1). The offense normally carries a maximum penalty of 10 years in prison, 18 U.S.C. § 924(a)(2). This increases to a mandatory minimum 15-year term for persons having three prior convictions satisfying ACCA's "violent felony" definitions, 18 U.S.C. §924(e)(2)(B). Under this Court's precedents, federal courts must use a "categorical approach" to decide whether a

prior conviction satisfies the "force clause." This requires courts to focus on the elements of the offense, whereas the actual facts of a defendant's prior conviction are irrelevant. *Borden*, 141 S. Ct. at 1822. The District Court applied ACCA to Mr. Huffman, relying on a Missouri conviction for exhibiting a weapon in an angry or threatening manner, Mo. Rev. Stat. §571.030.1(4) (2012).

The Missouri law provides that "[a] person commits the offense of unlawful use of weapons . . . if he or she knowingly:

*****

> (4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner[.]

In 2009, the Eighth Circuit declared Missouri's UUW-exhibiting crime a "violent felony" under the identical "force clause" definition in the United States Sentencing Guidelines, U.S.S.G. §4B1.2(a). *See Pulliam*, 566 F.3d at 788. Its analysis, in total, held that, "[i]t goes without saying that displaying an operational weapon before another in an angry or threatening manner qualifies as threatened use of physical force against another person." Id. The parties' briefs in *Pulliam* made no reference to Missouri state court cases. Appx. 15-16. Nor did the *Pulliam* case identify the least serious conduct sufficient to support an exhibiting conviction. *Id.*

Mr. Huffman argued in the District Court and in the Eight Circuit that *Borden* required reconsideration of *Pulliam*. The *Borden* plurality interpreted the ACCA "force clause" clause's reference to "force . . . against the person of another" to "exclude[] conduct, like recklessness, that is not directed or targeted at another." 141 S. Ct. at1833 . Mr. Huffman argued that Justice Thomas's concurrence adopted much the same rule relying on the statutory reference to "use of force" which had a long-established meaning requiring "intentional acts designed to cause harm." *Id*. at 1835. The *Borden* plurality also explicitly established that courts evaluating

proposed predicate ACCA convictions must focus on the least serious conduct required for a conviction under the law at issue. *Id*. at 1832 (plurality opinion). Mr. Huffman cited Missouri cases interpreting the law to require only an angry display witnessed by a child in the exhibitor's company at the time. Other cases showed the state did not have to prove an exhibitor intended to injure or threaten or target the person in whose presence the display occurred. *Id.* Mr. Huffman cited several cases in which federal judges United States District Court for the Western District of Missouri had already ruled that *Borden* invalidated *Pulliam*. Appx. 15.

The District Court declared itself bound by *Pulliam* until the Eighth Circuit reconsidered it. It sentenced Mr. Huffman to the minimum manatory180 months in prison. Mr. Huffman timely filed an appeal based on *Borden* to challenge his ACCA sentence. After he filed his opening brief, the Eighth Circuit issued its first—and, to date, its only—published opinion declaring that *Borden* only excluded crimes defined by a reckless *mens rea*, whereas Missouri exhibiting still qualified because the statute defined "knowing" acts. *United States v. Larry*, 51 F. 4th 290, 291-92 (8th Cir. 2022).[1] Mr. Larry did not seek rehearing specifically because he was to be released from his sentence just one month after the Eighth Circuit's decision. Appx. 13.

Before the pending deadline for the United States' brief as appellee, the Government filed a motion for summary disposition citing the Eighth Circuit's Local Rule 47A(b), which provides for such disposition on the motion of a party limited to claims that the Court of Appeals lacked jurisdiction. It cited the *Larry* decision and did not address the issue of whether Missouri exhibiting required as an element the targeted use of force designed to injure another person or identify the least serious conduct required for a conviction. Mr. Huffman opposed summary

[1] Mr. Larry raised his challenge to a Sentencing Guidelines enhancement based on an identical "force clause" definition that this Court and the Court of Appeals interpret interchangeably with the ACCA force clause. *See United States v. Sykes,* 914 F.3d 615, 620 (8th Cir. 2019).

dismissal on the Government's request as unauthorized by the Eighth Circuit's rule limiting summary disposition on the motion of a party to claims that the Court of Appeals lacked jurisdiction of the appeal. Appx. 4-5. He further noted the incongruity of the *Larry* decision in light of the Circuit's invalidation of an Iowa law prohibiting intimidation by gunfire based on *Borden* in *United States v. Frazier*, 48 F. 4th 884 (8th Cir. 2022). Like exhibiting, the Iowa law was not defined by a reckless *mens rea. Id.* at 4. Petitioner also noted that the Eighth Circuit had not addressed any of the Missouri state court decisions he had cited establishing that Missouri exhibiting required no intent to target, injure or threaten another. Appx. 7-8.

The Eighth Circuit issued a one sentence order granting the Government's request for summary affirmance on February 13, 2023. Appx 1. Petitioner filed a motion for rehearing *en banc*. Appx. 11. He cited the unusual procedure taken in his case where the government's sole basis for summary disposition did not challenge the Court's jurisdiction. Appx 12. Mr. Huffman again cited the conflict between the ruling in his case with the reversal of circuit precedent in *Frazier.* Appx. 18-19. He explicitly noted the Eighth Circuit's reliance in *Frazier* on the general intent applicable to the Iowa statute which did not require offenders to subjectively desire the prohibited result, but only an intent to commit the prohibited act and cited the Missouri caselaw construing the knowing mental state for exhibiting the same way. *Id.* Mr. Huffman argued that the *Larry* decision and its application to his case essentially produced a rule that was contrary to the plurality and concurring opinions in *Borden* as well as this Court's subsequent decision in *United States v. Taylor*, 142 S. Ct. 2015, 2023 (2022). Appx. At 22-23.

The Eighth Circuit denied the motion for rehearing on March 24, 2023. Appendix 2. Justice Kavanaugh, Circuit Justice for the Eighth Circuit, granted Mr. Huffman's request for additional time to file his petition for certiorari up through August 21, 2023. Appendix 3.

GROUNDS FOR GRANTING THE WRIT

I. The Eighth Circuit's ruling that a law prohibiting knowing conduct which an offender need never targeted or threatened against another satisfies the "force clause" conflicts with the plurality and concurring opinions in *Borden*.

The Eighth Circuit's rule that Missouri exhibiting satisfies the "force clause" in Section 924(e)(2)(B)(i) conflicts with both the *Borden* plurality opinion that the "force clause" excludes "conduct, like recklessness, that is not directed or targeted at another," Borden, 141 S. Ct. at 1833 (plurality opinion); and Justice Thomas's conclusion that it requires "intentional acts designed to cause harm." *id.* at 1835 (Thomas, J., concurring). The Circuit's avoidance of Missouri state caselaw interpreting the exhibiting statute to require no intent or attempt to harm or injure another person violates the categorical inquiry this Court reiterated in *Borden* and its mandate that courts must focus on the least serious conduct required for a conviction. *Id.* at 1832, citing *Moncrieffe v. Holder*, 569 US. 184, 190-191 (2013). The Eighth Circuit based its 2009 *Pulliam* decision solely on an intuitive belief that "it goes without saying" that an angry or threatening display constituted the threat of force, 566 F.3d at 788. This impressionistic rule clashes with Missouri case law interpreting the exhibiting statute to require no targeted force or intentional design to cause injury to another, but merely an awareness that one's exhibition, objectively viewed, might be viewed as an angry or threatening display. Appx 15-17

Certiorari is warranted when the decision of the Court of Appeals appears to be inconsistent with prior decisions of this Court. *See Spears v. United States*, 555 U.S. 261, 263 (2009) (granting certiorari and reversing for new sentencing because the Eighth Circuit's decision conflicted with *Kimbrough v. United States*, 552 U.S. 85 (2008)); *United States v. Bass*, 536 U.S. 862, 864 (2002) (granting certiorari because the Sixth Circuit's decision was contrary to *United States v. Armstrong*,517 U.S. 456 (1996). The Eighth Circuit's resolve to preserve the

terse conclusion in *Pulliam* despite its conflict with *Borden* perpetuates illegally inflated ACCA prison terms based on UUW-exhibiting convictions, as well as Sentencing Guideline calculations under the interchangeably interpreted "force clause" in U.S.S.G. §4B1.2(a). *See, e.g., United States v. Dominique Tipler*, No. 22-1629, Per Curiam Opinion, Slip Op. 2 (8th Cir., May 5, 2023) ("Tipler's reading of *Borden* conflicts with our more narrow interpretation of its holding. We have held *Borden s* holding 'only that the force clause categorically excludes offenses that can be committed recklessly."). *United States v. Darren McDonald*, No. 20-1417, Per Curiam Opinion, Slip Op. 2-3 (8th Cir., Feb. 16, 2023) (the Eighth Circuit has previously rejected McDonald's claim that *Borden* established that the "force clause" excludes state crimes defined by the creation of risks of injury not requiring an intentional design to cause harm to another).

The Eighth Circuit's conclusion that *Borden* did not hold that crimes defined by knowing conduct had to require as an element a deliberate or targeted use or threat of physical force designed against another or a design to cause injury collapses against the plain language of the plurality and concurring opinions. Borden argued his Tennessee aggravated assault conviction fell outside the definition because it was satisfied by a mens rea of recklessness. 141 S. Ct. at 1825 (plurality opinion), 1835 (Thomas, J., concurring in judgment). Justice Kagan's plurality opinion reasoned that the phrase "'against [the person of] another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." Id. at 1825. As Justice Kagan explained,

> "'against the person of another,' when modifying the 'use of physical force,' introduces that action's conscious object. So it excludes conduct, like recklessness, that is not directed or targeted at another."

Id. at 1833 (internal citation omitted, emphasis added). Justice Thomas's concurring opinion adopted the same rule, relying on Congress's choice of the phrase "use of physical force" to

incorporate "a well-understood meaning applying only to intentional acts designed to cause harm." *Id*. at 1335, quoting *Voisine v. United States*, 579 U. S. 686, 712 (2016) (Thomas, J., dissenting).

Neither the plurality nor Justice Thomas's concurrence suggested that knowing conduct lacking targeted use of physical force against another or an intentional design to cause injury satisfied Section 924(e)(2)(B)(i). Both opinions clarified and limited the scope and contours of what constitutes "the use, attempted use, or threatened use of physical force against another" before resolving Mr. Borden's challenge that his reckless assault conviction did not qualify. The plurality explicitly eliminated not only reckless acts, but also crimes defined by "conduct, *like* recklessness, that is not directed or targeted at another." *Id.* at 1833 (emphasis added). Knowing conduct "that is not directed or targeted at another," lacks the object "person of another" the "force clause" requires. *Id.* at 1833 (plurality decision). Likewise, an angry display that is not intentionally designed to cause injury fails to qualify under Justice Thomas's formulation. *Id.* and at 1835 (Thomas, J., concurring in result).

The Eighth Circuit's failure to consult (or acknowledge) the Missouri state court cases to determine the least serious conduct required for a conviction explains the irreconcilable conflict the Eighth Circuit's decision in *Larry* poses with *Borden.* The exhibiting statute does not require an angry *and* threatening display; rather, an "angry" display alone is enough. *See State v. Overshon*, 528 S.W.2d 142, 143 (Mo. Ct. App. 1975) (the State did not have to prove an exhibition was rude, angry, and threatening). Missouri courts have long recognized that when a statute prohibits an offense that may be perpetrated by different means listed disjunctively, the offense may be charged in a single count alleging each of the means listed in the statute, and proof of the consummation of the offense in any one of the ways will sustain the allegation. *See*

United States v. Naylor, 887 F.3d 397, 401-02 (8th Cir. 2018) (en banc), citing *State v. Lusk*, 452 S.W.2d 219, 223 (Mo. 1970). An angry display may pose a risk of harm to persons present to see it, but the "elements" definition is not satisfied by merely creating a risk of harm to others. *See Borden*, 141 S. Ct. at 1835 (Thomas, J., concurring) (noting that Congress intended the now-invalidated "residual clause" to identify predicate offenses that increase the risk of harm to others, but which do not come within the "force" clause).

Missouri courts have long held that a prohibited weapon exhibition does not require that an offender point, aim, or direct a weapon at, toward, or against anyone. *State v. Horne*, 710 S.W.2d 310, 315 (Mo. Ct. App. 1986). One need not intend an exhibition to threaten another person. *State v. Meyers*, 333 S.W.3d 39, 48 (Mo. Ct. App. 2010). Missouri law likewise does not require the State to prove that anyone near the exhibition felt threatened. *See United States v. Betts*, 509 F.3d 441, 445 (8th Cir. 2007). The "presence of another" element is satisfied by a child in the company of an adult who fires a gun prompted by road rage triggered by a motorist who has driven away. *See Gheen*, 41 S.W.3d at 605 (Gheen's admission he exhibited a weapon in response to road rage of another motorist in the presence of his girlfriend and her son established the presence of another). In fact, Missouri courts have long held that assault is not a lesser-included offense of Missouri exhibiting, because it does not require purposely placing another person in apprehension of immediate physical injury. *State v. Cavitt*, 703 S.W.2d 92, 93 (Mo. Ct. App. 1985). In short, the Missouri case law establishing the least conduct required for an exhibiting conviction proves the law does not require force directed or targeted at another, nor intentional acts designed to cause harm.

The Eighth Circuit itself applied *Borden* to an Iowa law not defined by a reckless *mens rea* which outlawed intimidation by shooting at occupied locations, and assemblies of people.

United States v. Frazier, 49 F. 4th 884 (8th Cir. 2022). The Eighth Circuit concluded that Iowa Code §708.6(2) encompassed two alternative offenses, one in which an offender discharges a firearm at a building or other specified locations including occupied vehicles or assemblies of people, and a second alternative in which the offender threatens to commit any such act. *Id.* at 885-886. The First alternative constituted a "general intent" crime, such that no requirement existed that the defendant subjectively desire a prohibited result; he need only intend to commit the prohibited act. *Id.* at 886. 'It is sufficient, for example, if the defendant intentionally fires a gun inside a building, but only recklessly causes an occupant to fear serious injury." *Id.* The Eighth Circuit noted that Iowa courts had upheld convictions for the threatened conduct based on instances where the offender fired a gun in one part of the house while a spouse or partner was in another. *Id.* The Circuit concluded that its pre-*Borden* decision holding the intimidation satisfied the force clause definition "apparently concluded that recklessly placing an occupant in reasonable apprehension of serious injury as sufficient to constitute a threatened use of force." *Id.* "Threatening to commit an act that does not satisfy the force clause likewise does not satisfy the force clause, even if the threat itself is intentional." *Id.*

In fact, Missouri caselaw shows the same to be true of "knowingly" exhibiting a firearm in an angry or threatening manner. In *State v. Johnson*, 964 S.W.2d 465 (Mo. App. 1998, the defendant fired a gun into an unoccupied car, which unbeknownst to him was witnessed by persons looking out of the house behind him. *Id.* at 467. As in the Iowa case law the Eighth Circuit cited an analyzed in in *Frazier*, the exhibition in *Johnson* just as easily qualified as "only recklessly caus[ing]" a bystander to fear serious injury, but Missouri law does not require than any such witness feels threatened. felt threatened. *Betts*, 509 F.3d at 445. The Eighth Circuit has never addressed *Johnson* in affirming ACCA convictions based on Missouri exhibiting.

Nowhere did the plurality or Justice Thomas's concurrence declare that the requirement of targeted force designed to injure the person of another excluded *only* reckless crime. Nor did they suggest that knowing criminal conduct that is *not* directed or targeted at another satisfied the ACCA. Both opinions referred to the scope of the statutory interpretation of "the use of physical force" in broad terms. The plurality referred to the definition as "demand[ing] that the perpetrator direct his action at, or target another individual," *Borden*, at 1825, and Justice Thomas's concurrence explained that it "appl[ies] only to intentional acts designed to cause harm." *Id*. at 1835. A merely angry display of a firearm that is never fired or pointed at the person whose presence renders the exhibition a crime is not an "intentional act designed to cause harm."

This Court's intervening construction of a materially identical "force clause in 18 U.S.C. § 924(c)(3)(A) in *United States v. Taylor* bolsters the need for this Court to address the clearly mistaken perpetuation of the Eighth Circuit's mistaken analysis of *Borden* in *Larry* and Petitioner's case. Section 924(c) establishes a distinct federal crime and mandatory consecutive sentences for the possessing, brandishing or discharging a firearm in relation to predicate "crimes of violence." Section 924(c)(3)(A) presents a nearly identical "force clause" defining the predicate "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]." *Id.* The majority opinion drafted by Justice Gorsuch and joined by six other Justices in *Taylor* described this language as "plainly" encompassing crimes that "require[] the government to prove that the defendant took specific actions against specific persons or their property." *Id.* The Court rejected the Government's argument that the statute's reference to a "threat" encompassed more abstract and predictive notions of threat to the community, which "would vastly expand the

statute's reach by weeing in conduct that poses an abstract risk to community peace and order, whether known or unknown to anyone at the time." *Id.*

This Court should grant certiorari to cure the stark conflict between the Eighth Circuit's 2009 *Pulliam* precedent perpetuated in *Larry* and Mr. Huffman's case in light of the Missouri cases plainly showing the crime requires no targeted use or threat of targeted force or any intentional design to cause injury.

This Court should grant certiorari to cure the stark conflict between the Eighth Circuit's 2009 *Pulliam* precedent perpetuated in *Larry* and Mr. Huffman's case in light of the Missouri cases plainly showing the crime requires no targeted use or threat of targeted force or any intentional design to cause injury.

II. <u>The Circuits disagree as to what constitutes the binding rule in *Borden*.</u>

The varying circuit interpretations of *Borden*'s precedential force also warrants prompt resolution by this Court by certiorari. Some of the Circuits explicitly cite the rule in *Marks v. United States*,430 U.S. 188, 193 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* The Ninth and Tenth Circuits deem the *Borden* plurality opinion's finding that "physical force against the person of another" excludes "conduct . . . not directed or targeted at another" a logical subset of Justice Thomas's rule that "use of force" refers "only to intentional acts designed to cause harm, some of which may not be targeted. *See United States v. Kepler*, 74 F. 4th 1292, __ & n.11 (10th Cir. 2023); *United States v. Begay*, 33 F. 4th 1081, 1100 & n. 2 (9th Cir. 2022).

The Eighth Circuit did not cite *Marks* in *Larry* or any of the unpublished decisions reiterating that UUW-exhibiting still qualifies based on *Pulliam* as a "force clause" ACCA predicate. *Larry,* 51 F. 4th at 292. One panel of the Eighth Circuit recently opined in a footnote that "[i]f we tried to determine which 'position' is controlling, the plurality opinion would likely be the 'narrowest.'" *United States v. Lung'aho*, 72 F. 4th 845, 849-51 (8th Cir. 2023). However, the Court's *Larry* decision read the plurality and concurring decisions together as agreeing on *nothing* beyond the result of each rule in the context of "reckless" conduct. *Id.* ("When the plurality and concurring opinions are read together then, *Borden* holds only that the force clause categorically excludes offenses that can be committed recklessly.:). *Compare United States v. Davis*, 825 F.3 1014, 1022 (9th Cir.2016) ("When no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts."). The Eleventh Circuit openly cites the *Marks* rule but concluded that the fact the plurality and concurring decisions cited different words within the same "force clause" definition, the narrowest holding of the five-justice majority "was only that the elements clause excludes reckless conduct. *United States v. Somers,* 66 F. 4th 890, 895 (11th Cir. 2023).

At the very least, overlap exists in a definition encompassing conduct wherein an offender directs or targets physical force against another and the broader range of conduct intentionally designed to cause harm. This simply fact supports the reasoning of the circuits that have already declared the plurality's requirement of "conduct . . . directed or targeted at another" comprises a "logical subset" of Judge Thomas's requirement of "intentional acts designed to cause harm." *See Kepler,* 74 F. 4th 1292; *Begay*, 33 F. 4th at 1100 & n.2. Two other Circuits (the Fourth and the Sixth) cite the plurality decision in applying *Borden* in the context of challenges to crimes involving extreme recklessness or malice aforethought, *see United States v.*

Manley, 52 F. 4th 143, 147-48 (4th Cir. 2022); *United States v. Harrison*, 54 F. 4th 884, 890 (6th Cir. 2022).

III. This case presents the right vehicle in which to resolve these conflicts.

This Court alone holds the authority to settle this confusion. Petitioner's case presents a ready vehicle to do so. Missouri's exhibiting statute fails the principles of *both* the plurality requirement of "physical force directed or targeted at the person of another," because the exhibitor never has to intend a witness to feel threatened, or even that the witness to the display feels threatened, as the Eighth Circuit has itself recognized, *see Betts*, 509 F.3d at 445. The government need never prove that an exhibitor intended to target or threaten the other person who witnesses the display. Thus, an exhibitor need not ever design an exhibition to cause harm, alarm, or a sense of threat.

The potential impact of misapplication of the Armed Career Criminal Act based on Missouri exhibiting statutes is substantial. In 2019, the City of Saint Louis alone filed exhibiting charges in 129 cases. Kurt Erickson and Jack Suntrup, *Missouri attorney general defends intervention in McCloskey prosecution*, A1 (Post-Dispatch, July 22, 202).[2] The Eastern and Western Districts of Missouri tends to lead the nation in the number of prosecutions for illegal firearm possession. U.S. Sentencing Commission, *Quick Facts-Felon in Possession of a Firearm* (2020).[3] The issue was fully preserved in the Eighth Circuit. The severe toll the error exacts requires immediate correction to save individuals from sentences five years longer than the maximum term Congress actually authorized for non-violent possession of firearms. *Compare Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018), quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, Circuit Judge).

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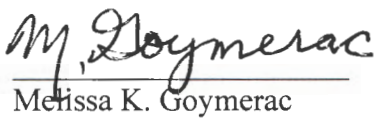
[2] Accessible on Lexis.

[3] Accessible at Quick Facts on Felon in Possession of Firearm (ussc.gov) (last visited Aug. 18, 2023)

CONCLUSION

WHEREFORE, Petitioner Huffman requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,



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