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

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2463

United States of America

Plaintiff - Appellee

v.

Steven Huffman

Defendant - Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:20-cr-00750-AGF-1)

JUDGMENT

Before LOKEN, COLLOTON, and ERICKSON, Circuit Judges.

The government's motion for summary disposition has been considered by the court and is granted. The judgment of the district court is affirmed on the authority of *United States v. Larry*, 51 F.4th 290, 292 (8th Cir. 2022).

February 13, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2463

United States of America

Appellee

v.

Steven Huffman

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:20-cr-00750-AGF-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 24, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Search documents in this case: Search

No. 22A1074

Title:	**Steven Huffman, Applicant** **v.** **United States**
Docketed:	June 13, 2023
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Numbers:	(22-2463)

DATE	PROCEEDINGS AND ORDERS
Jun 01 2023	Application (22A1074) to extend the time to file a petition for a writ of certiorari from June 22, 2023 to August 21, 2023, submitted to Justice Kavanaugh. **Main Document** **Proof of Service**
Jun 14 2023	Application (22A1074) granted by Justice Kavanaugh extending the time to file until August 21, 2023.

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THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plainiff-Appellee,	)	
	)	
vs.	)	Appeal No. 22-2463
	)	
STEVEN HUFFMAN,	)	From the United States District
	)	Court, Eastern District of Missouri
Defendant-Appellant.	)	No. 4:20-cr-00750-AGF-1

APPELLANT'S SUGGESTIONS IN OPPOSITION TO GOVERNMENT'S MOTION TO HOLD APPEAL IN ABEYANCE

Steven Huffman, through undersigned counsel, opposes the Government's motion to summarily affirm his appeal which raises arguments not addressed in *United States v. Larry*, 51 F. 4th 290 (8th Cir. 2022). Neither the *pro se* appeals nor the orders enforcing appeal waivers the Government cites support its invocation of Local Rule 47A(b) here:

1. Appellant challenges a designation of Missouri's law against angry exhibitions of guns as a violent felony under 18 U.S.C. §924(e)(2)(B)(i) compelling a 15-year prison term. Appellant's Brief ("App. Br") at 6, 17-19. His brief was filed before the six-paragraph *Larry* ruling issued. He argued this Court had applied *Borden v. United States*, 141 S. Ct. 1817 (2021), to disqualify an intimidation by gunfire law not defined by a reckless *mens rea* in *United States v. Frazier,* 48 F. 4th 884 (8th Cir. 2022). He cited Missouri cases based on untargeted exhibitions seen by a child or shooting an empty car seen by someone in a neighboring house. *Larry* did not address these arguments.

2. The Government's belated request for summary affirmance plainly falls outside the narrow scope 8th Circuit Local Rule 47A(b) provides for summary disposition based on the motion of a party, limited to claims that this Court lacks jurisdiction. This Court made this very ruling in the Government's primary authority, *Faysound, Ltd. v. Walter Fuller Aircraft Sales, Inc.* 952 F.2d 980, 981 (8th Cir. 1991). The Court in *Faysound* chose to invoke its own authority under Rule 47A(a) to summarily dispose of the appeal which related to a jurisdictional issue in the district court. *Id.* The Government does not claim any jurisdictional defect here. Nor does the Government's claim get support from the summary affirmance of an undetailed *pro se* appeal in *Kallbah v. Corr. Med. Servs.*, 202 Fed. Appx. 145, 145 (8th Cir. 2006).

3. The Court of Appeals' enforcement of negotiated appeal waivers by summary motions also does not support the Government's request for the very reasons set out in *United States v. Mujica-Aranda*, 806 F.3d 999, 1000-1001 (8th Cir. 2015). The government's motion is "enmeshed with the merits of the issues [Mr. Huffman] seeks to raise on appeal," *Id.* at 1000, including the question of whether *Larry* or the pair of unpublished rulings decided at the same time[1] actually answered the distinct argument Mr. Huffman raises based on *Frazier*. To grant the Government's pending motion, this Court will have to address the distinct claims Mr. Huffman's Brief raised, including his

[1] Government's motion citing *United States v. Irwin* No. 22-1121, 2022 WL10801252 (8th Cir., Oct. 19, 2022); *United States v. Harrison*, No. 21-1340, 2022 WL 9644996 (8th Cir., Oct 17, 2022).

claim that the least serious conduct Missouri requires for an exhibiting conviction is an untargeted angry display, which *Borden* now requires. It will have to determine whether Missouri exhibiting encompasses reckless threats as this Court deemed "apparently" true of the Iowa law disqualified in *Frazier*, *see* 48 F. 4th at 887. None of the prior cases the Government cites (including *Larry* and its few unpublished progeny) have actually addressed these arguments. Therefore, "the government's motion should be denied and decided by the panel to which the appeal is assigned *after full briefing*." *Mujica-Aranda*, 806 F.3d at 1000-1001 (emphasis added).

4. The Government's motion itself does not address Mr. Huffman's contention that the minimum conduct required for a Missouri conviction of exhibiting is an angry display witnessed by a loved one against whom the exhibitor neither intends or attempts to threaten or direct anger. Appellant's Brief at 13-15. Nor does the Government's motion offer any answer to Mr. Huffman's actual argument that *Frazier* explicitly applied *Borden*'s requirement of force targeted against the person despite the fact the Iowa intimidation by gunfire law is not defined to include a reckless *mens rea.* These issues require further consideration and resolution and preclude summary affirmance.

5. The Government instead presents a string list of cases citing the terse 2009 conclusion in 2009 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," in *United States v. Pulliam*, 566 F.3d 784, 788 (8th Cir.

2009). Gov. Motion, at 4-5. The bare fact of affirmance in *Pulliam* and its progeny does not constitute binding authority as to arguments "neither raised by the parties *nor discussed by the panel.*" *Streu v. Dormire*, 557 F.3d 960, 964 (8th Cir. 2009 (emphasis added)). *See also United States v. Gammell*, 932 F.3d 1175, 1183 (8th Cir. 2019) (Kobes, J., concurring) (noting that Gammell raised a different argument as to the scope of Minnesota's aiding and abetting liability that was not foreclosed by a prior panel's rejection of a claim that modern criminal law abrogated distinctions between principals and accomplices). Prior to *Borden,* the Supreme Court had not explicitly declared that the courts must measure a proposed predicate "crime of violence" by the least serious conduct required for conviction, 141 S. Ct. at 1832.

6. The Government's request that this Court ignore Mr. Huffman's argument based on *Frazier* simply because *Larry* and one of its unpublished progeny cite *Frazier* does not justify summary affirmance because neither of those cases addressed the argument Mr. Huffman makes. The Government itself does not face the merits of Mr. Hoffman's distinct claim that *Frazier* applied *Borden's* requirement of "force targeted against the person of another" to the Iowa statute even though it did *not* define the offense as having a reckless *mens rea.* Appellant's Brief at 8-9, 16-19 The Iowa statute in *Frazier*, Iowa Code §708.6(2) (2022), makes no reference to recklessness. Nevertheless, this Court excluded the Iowa intimidation statute as a violent felony under *Borden* because "the question under the force clause is not simply whether the defendant

made an intentional threat, but whether the defendant threatened the use of physical force against the person of another." *Id.* at 887.

7. Mr. Huffman's brief argued in detail that the Iowa caselaw *Frazier* cited concerning the mental state for the state's intimidation statute mirrored the Missouri case law defining the "knowing" mental state for exhibiting:

> The predicate statute in *Frazier,* Iowa Code §708.6(2) (2022), was not defined by a reckless *mens rea*. It requires proof that one intentionally shot or threatened to shoot a firearm into an assembly of people or an occupied building or vehicle placing them in reasonable apprehension of serious bodily injury (neither of which requirement appears in the Missouri statute). This Court characterized the first alternative in which an Iowa defendant shoots in a building and thereby places another in fear is a general intent crime, having no requirement that an offender subjectively desired the prohibited result; but only an intent to commit the prohibited act. *Id*, citing *Bacon ex rel. Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). This corresponds to Missouri court descriptions of the knowing conduct UUW-Exhibiting requires, *see*, *e.g.*, [*State v.*] *Meyers*, 333 S.W.2d [30,]at 38 [(Mo. Ct. App. 2010)]..

Appellant's Brief at 18. The Missouri Court of Appeals in *Meyers* described the element of "knowingly" exhibiting a firearm in an angry or threatening way in the very same terms the *Frazier* panel used to describe the "intentional" conduct encompassed by Iowa's intimidation by gunfire statute: "A person acts knowingly '[w]ith respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist[.]" *Meyers*, 333 S.W.3d at 48. Although Meyers repeatedly denied an intent to threaten "the question is not whether Meyers's purpose was to threaten [the victim], it is whether he knew that his actions were threatening." *Id.*

Neither *Larry* nor its unpublished progeny address the essentially identical nature of the "general intent" defining the Iowa law rejected as a violent felony in *Frazier* and the Missouri courts' definition of the element of "knowingly" exhibiting Mr. Huffman challenges here. This matter compels full briefing and consideration by a panel of this court, not summary affirmance.

8. The *Frazier* panel reconsidered a brief 2014 Eighth Circuit ruling that Iowa's intimidation statute qualified as a violent felony because, whether "by discharging—or threatening to discharge—'a dangerous weapon' at a place occupied by another, causing 'reasonable apprehension of serious injury," any violation "necessarily require[d] violent force." 48 F. 4th at 886, citing *United States v. Langston*, 772 F.3d 560, 562-63 (8th Cir. 2014). This reviewed the Iowa statute and cases interpreting it before concluding that the law was satisfied by a person firing a gun into the floor of a room or out of a door leading outside while another person was present inside the house. *Frazier*, 48 F. 4th at 886. From these cases it concluded anew that "[i]t is sufficient [to violate the Iowa law] . . . if the defendant intentionally fires a gun inside a building, but only recklessly causes an occupant to fear serious injury." *Id.* at 887. Mr. Huffman's brief cited Missouri cases upholding a conviction for exhibiting based on a defendant's conduct in firing a gun at an unoccupied car because a person inside a house behind him looked out and saw what appeared to be a flash of light. Appellant's Brief at 15-16 (citing *State v. Johnson*, 964 S.W.2d 465, 467 (Mo. Ct. Ap. 1998). Here again, Mr. Huffman raises the very same

grounds the *Frazier* panel relied on to invalidate the Iowa intimidation law to establish that Missouri exhibiting fails to qualify as a crime of violence in the wake of *Borden*.

9. The *Frazier* panel's reasoning that the *Langston* panel "apparently concluded that recklessly placing an occupant in reasonable apprehension of serious injury was sufficient to constitute a threatened use of force" could just as readily be said of the *Pulliam* decision. Both the Iowa law and Missouri exhibiting lack any requirement "that the defendant subjectively desire the prohibited result; he need only intend to commit the prohibited act." *Compare Frazier*, 48 F.4th at 887 with *State v. Meyers*, 333 S.W.3d 39, 49 (Mo. Ct. App. 2010). The decision in *Larry* did not address let alone resolve the conflict between the reasoning in the *Larry* and *Frazier* decisions.

WHEREFORE, Mr. Huffman respectfully requests that the Court deny the government's motion for summary affirmance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
vs.	)	No. 22-2463
	)	
STEVEN HUFFMAN,	)	
	)	
Defendant-Appellant.	)	

Appellant's Motion for Rehearing and Rehearing En Banc

Appellant, through Attorney Melissa K. Goymerac, requests rehearing *en banc* to resolve Circuit conflict and secure uniformity on these important issues:

1. The panel's one-sentence affirmance cites *United States v. Larry*, 51 F. 4th 290 (8th Cir. 2022), but does not address Appellant's claim Missouri's law against angry gun exhibition fails the "element of force" definition in 18 U.S.C. §924(e) for the same reasons upon which this Court reversed its view of Iowa's intimidation by gunfire law in *United States v. Frazier*, 48 F. 4th 884 (8th Cir. 2022), citing *Borden v. United States*, 141 S. Ct. 1817 (2021). *Frazier* reversed circuit precedent on the issue, citing the Iowa law's definition of a general intent to commit the prohibited acts (gunfire causing reasonable apprehension of injury or threats thereof) but no subjective desire for that result. Missouri interprets the "knowing" mental state for exhibiting a weapon the same way. Neither state defines these offenses as having a reckless *mens rea*, yet this Court held the Iowa law was apparently satisfied by reckless threats where one shoots a gun inside a house while a spouse was in another room. 48 F. 4th at 887. Exhibiting also encompasses reckless threats, as when one shoots at an empty car on a street which the owner witnesses by looking out of a house *behind* the exhibitor.

2. The *Larry* ruling tacitly presumes that crimes defined by knowing acts of force that are not targeted to injure another person satisfy the "element of force" definition in 18 U.S.C §924(e)(2)(B). This conflicts with *Borden* and *United States v. Taylor*, 142 S. Ct. 2015, 2023 (2022).

Rehearing *en banc* is warranted under Fed. R. App. P. 35(b)(1)(A) when a panel's ruling conflicts with a decision of the United States Supreme Court or of the Court to which the petition is addressed. Both justifications exist here.

Further cause for rehearing exists in the panel's unusual action of granting the Government's request for summary affirmance in lieu of filing a responsive brief. The Government did not claim a lack of jurisdiction, the sole basis for summary affirmance on the motion of a party under Eighth Circuit Local Rule 47A(b). Nor did it ask to enforce an appellate waiver precluding the appellant from raising the claim. The Government simply cited *Larry* which adhered to the one sentence conclusion in *United States v. Pulliam*, 566 F. 3d 784, 788 (8th Cir. 2009), that Missouri's exhibiting law's qualification was self-evident.

Still additional cause for rehearing exists given that the *Larry* case the panel cited here was designated for "No Argument" before full briefing had occurred in that case—and well before the *Frazier* invalidated a very similar law—in response to the Government's request to hold *Larry* in abeyance so the issue could be decided in a case originally briefed before *Borden* issued. *See United States v. Larry*, No. 21-3237, Judge Order (8th Cir., Feb. 23, 2022); *id.,* Motion to Hold Case in Abeyance, p. 1 (8th Cir., Feb. 18, 2022); *id.,* Opposition to Motion to Hold Case in Abeyance, p. 1 (8th Cir., Feb. 22, 2022). It has previously been observed that rehearing is warranted when a case applying an intervening Supreme Court

interpretation of the "elements" definition is not "decided in the normal course by whichever randomly assigned panel first encountered the issues." *See United States v. Williams*, 546 F.3d 961, 964 (8th Cir. 2008) (Colloton, J., dissenting from denial of rehearing) ("[T]he law of the circuit should not depend on which three-judge panel, among many with comparable cases pending first volunteers to decide the questions in the aftermath of *Begay*."). Mr. Larry did not seek rehearing due to his imminent release from prison Nov. 21, 2022. *See United States v. Larry*, No. 21-3237, Letter (8th Cir. Oct. 31, 2022).

Mr. Huffman's opening brief cited the conflict the *Larry* opinion creates with both *Frazier* and the Supreme Court rulings in *Borden* and *Taylor*. Appellant's Brief at 8-9, 11-12, 17-19. Neither *Larry* nor any other ruling of this Court have analyzed these conflicts. Circuit precedent is not binding when an appeal raises "an issue not squarely addressed in prior case law." *Passmore v. Astrue*, 533 F.3d 658, 660-63 (8th Cir. 2008). *See also United States v. Miller,* 11 F.4th 944, 956 n.5 (8th Cir. 2021). No other post-*Larry* decision has addressed or resolved these conflicts.

Background

Mr. Huffman pled guilty to unlawfully possessing a firearm in violation of 18 U.S.C. § 922(g)(1). The offense normally carries a maximum penalty of ten years in prison, 18 U.S.C. § 924(a)(2). Proof of three prior convictions qualifying

as a "violent felony" compels an enhanced 15-year minimum prison term under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2)(B)(i). As relevant here, ACCA defines "violent felony" as offenses punishable by more than one year in prison that "[have] as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* The District Court applied ACCA to sentence Mr. Huffman to 15 years relying in part 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[.]

Prior circuit precedent declared Missouri exhibiting a "violent felony" under the "elements" clause in 2009. *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.*

Mr. Huffman argued in the District Court and on appeal that the Supreme Court's *Borden* decision required reconsideration of *Pulliam*. *See* Appellant's

Brief at 6-7, 8-23. The *Borden* plurality interpreted the ACCA "elements" 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 . Justice Thomas's concurrence adopted 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" to others. *Id.* at 1835. The *Borden* plurality also explicitly required courts evaluating proposed predicate convictions to determine 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 exhibition occurred. Mr. Huffman noted that District Court judges in the Western District of Missouri had several times ruled that *Borden* invalidated *Pulliam*'s conclusion. However, the District Court declared itself bound by *Pulliam* until this Court reconsidered it. It sentenced Mr. Huffman to 180 months in prison.

Larry and prior Circuit precedents do not address whether the least conduct Missouri exhibiting requires consists of recklessly threatening displays.

This Court has never identified the least serious conduct required to convict a person for angry exhibiting, as *Borden* now requires. 141 S. Ct. at 1832 (plurality opinion). The panel that decided *Pulliam* faced no mandate to do so—indeed, the

parties' briefs cited no Missouri state court decisions. Appellant's Brief at 21, citing *United States v. Joseph Pulliam,* No. 08-2454, Appellant's Brief (8th Cir., filed August 5, 2008); *Id.*, Appellee's Brief (filed Sept. 9, 2008). The panel that decided *Larry* also made no attempt to examine Missouri case law to determine the least serious conduct it required for conviction. Instead, the *Larry* panel held that *Borden* only disqualified crimes with a *mens rea* of recklessness and upheld Missouri exhibiting under the "elements" clause because the statute referred to acts committed "knowingly." 51 F. 4th at 292. It did not address Missouri cases interpreting that mental state.[1]

Missouri state courts have long held that exhibiting does not require a finding that an exhibitor intentionally threatened force against another person. *See State v. Meyers,* 333 S.W3d 39, 48 (Mo. Ct. App. 2010); *State v. Horne*, 710 S.W.2d 310, 315 (Mo. Ct. App. 1986). A merely angry display of a weapon suffices, as the law does not require an angry *and* threatening exhibition. *See State v. Overshon*, 528 S.W.2d 142, 143 (Mo. Ct. App. 1975) (the State did not have to prove rude, angry, *and* threatening exhibition). An angry display may pose a risk of harm to untargeted persons present at the time, but the "elements" definition is not satisfied by merely creating a risk of harm to others. *See Borden*, 141 S. Ct. at

[1] *Larry* challenged a Sentencing Guidelines enhancement based on an identically worded "elements" definition in U.S.S.G. § 4B1.2(a)(1) that this Court interprets interchangeably with the ACCA provision. 51 F. 4th at 291 & n.2.

1835 (Thomas, J., concurring) (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). The "presence of another" element is satisfied by a child in the company of an adult who fires a gun in anger prompted by road rage of a motorist who is then some distance removed. *See State v. Gheen*, 41 S.W.3d 598, 605 (Mo. Ct. App. 2001) (Gheen's admission he exhibited a gun in the presence of his girlfriend and her son provided the presence of another).

The least conduct encompassed by Missouri's exhibiting statute appears to be an exhibition that only recklessly threatens someone who witnesses it. In *State v. Johnson*, the defendant fired a gun into an unoccupied car parked on the street. 964 S.W.2d 465, 467 (Mo. Ct. App. 1998). The Missouri Court of Appeals held this satisfied the statute because the owner of the car looked out a window of the house *behind* the exhibitor and saw what appeared to be flashes from a gun. *Id.*

Like the reckless assault the defendant committed in *Borden*, a Missouri exhibitor's fault consists of insufficient concern for the risks an angry display may pose, yet the "use of force" definition excludes such conduct because, "like recklessness, [it] is not directed or targeted at another." *Borden*, 141 S. Ct. at 1827 (plurality opinion). Under the Missouri exhibiting statute, the threatening conduct encompassed by the statute did not have to be targeted at, intended for, or even perceived by another person constructively in the exhibitor's presence—the

exhibition need only be of a character that could be objectively interpreted as threatening by some other. *Meyers,* 333 S.W.3d at 48. An untargeted display that recklessly manifests threatening behavior qualifies as exhibiting—the very conduct this Court found *Borden* excluded from the "elements" clause in *Frazier.*

Larry did not address Mr. Huffman's claim that *Frazier*'s invalidation of Iowa's intimidation based on reckless threats applies to Missouri Exhibiting

The decision in *Larry* did not address directly or otherwise Mr. Huffman's claim that the reasoning by which the panel in *Frazier* reexamined and rejected Iowa's intimidation by gunfire law as encompassing reckless threats applied just as readily to Missouri exhibiting and *Pulliam*. Appellant's Brief at 7, 9, 15-16. The Iowa intimidation statute is no more defined by a reckless *mens rea* than Missouri's exhibiting statute. Iowa case law interpreting the requisite mental state mirror Missouri cases defining the knowing *mens rea* for exhibiting a gun in an angry or threatening manner. The law examined in *Frazier,* Iowa Code §708.6(2) (2022), does not define a reckless *mens rea.* It requires proof that one intentionally shot or threatened to shoot a firearm into an assembly of people or an occupied building or vehicle placing them in reasonable apprehension of serious bodily injury (neither of which requirement appears in the Missouri statute). This Court characterized the first alternative in which an Iowa defendant shoots in a building and thereby places another in fear as a "general intent" crime, with no requirement that the offender subjectively desire the prohibited result, only an intent to commit

the prohibited act. *Frazier*, 48 F. 4th at 887, citing *Bacon ex rel. Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). This corresponds to Missouri court descriptions of the knowing conduct UUW-Exhibiting requires, *see, e.g., Meyers*, 333 S.W.2d 39, 48 (Mo. Ct. App. 2010)(an exhibitor need not intend an exhibition to threaten another person). Missouri prosecutors need not prove anyone near an exhibition felt threatened by it. *See United States v. Betts*, 509 F.3d 441, 445 (8th Cir. 2007).

In *Frazier*, this Court accepted the Government's claim the defendant was convicted of threatening to commit the prohibited conduct. 51 F. 4th at 886. The Court cited Iowa cases upholding convictions for threats of intimidation based on a man firing a gun into the floor of a bedroom while a spouse was in another room, *id.* citing *State v. Gregersen,* 899 N.W.2d 740 (Iowa Ct. App. 2017), or a man firing a gun from the kitchen of his home through a door leading outside, while his fiancée was in a bedroom, *id.* citing *State v. Hopper*, 899N.W.2d 739 (Iowa Ct. App. 2017). The Court concluded that a defendant could violate the Iowa law without knowingly or intentionally placing an occupant in reasonable apprehension of serious bodily injury. "It is sufficient . . . if the defendant intentionally fires a gun inside a building, but only recklessly causes an occupant to fear serious injury." *Id.* at 887. "Before *Borden*," the *Frazier* panel concluded, "our decision in *Langston* apparently concluded that recklessly placing an occupant in reasonable

apprehension of serious injury was sufficient to constitute a threatened use of force." *Id.*

The reasoning by which the panel in *Frazier* determined that *Borden*'s invalidation of reckless untargeted threats or force excluded the Iowa law just as readily applies to the Missouri cases establishing the least serious conduct it requires for conviction. In *Johnson*, the defendant fired a gun into an unoccupied car parked on the street. 964 S.W.2d at 467. The Missouri Court of Appeals held this satisfied the statute because the owner of the car looked out a window of the house *behind* the exhibitor and saw what appeared to be flashes from a gun. *Id.*

Like the reckless assault the defendant committed in *Borden*, a Missouri exhibitor's fault consists of insufficient concern for the risks an angry display may pose, yet the "use of force" definition excludes such conduct because, "like recklessness, [it] is not directed or targeted at another." *Borden*, 141 S. Ct. at 1827 (plurality opinion). Examining Iowa case law in *Frazier*, this Court deemed that shooting a gun inside a house while another is present "apparently" qualified as a reckless threat that categorically excluded the Iowa intimidation statute because it was not targeted at another person. 48 F. 4th at 887. Under the Missouri exhibiting statute, the threatening conduct encompassed by the statute did not have to be targeted at, intended for, or even perceived by another person constructively in the exhibitor's presence. The exhibition need only be of a character that another

could objectively interpret as threatening, whether the exhibitor intended it as such. *State v. Meyers,* 333 S.W.3d 39, 48 (Mo. Ct. App. 2010).

The *Frazier* analysis applies and supports invalidation of Missouri exhibiting, yet the panel here affirmed without addressing this argument. The conflict *Larry* creates with *Frazier* warrants rehearing to obtain consistency in the Circuit's precedents. Fed. R. App. P. 35(b)(1)(A).

The Government's motion for summary dismissal did not dispute that Mr. Huffman's survey of Missouri state caselaw proved that the crime required no targeted use of force designed to injure or threaten specific other persons. In fact, the few prior cases in which the Government filed briefs on *Borden*'s impact on *Pulliam* accepted for argument the appellants' arguments that the Missouri law was satisfied by an angry display merely witnessed by a child in the care of an exhibitor who bears no animus toward or intent to injure such a bystander and does not target their exhibition at them. *See, e.g., United States v. Keith Larry*, No. 21-3237, Appellee's Brief, at 12 (8th Cir., filed March 29, 2022); *United States v. Darren McDonald*, No. 22-1417, p. 13 (8th Cir., filed July 25, 2022). They instead argued that *prior to Borden* this Court had applied *Pulliam* even in a couple of cases wherein Appellants argued the 'elements" clause required targeted force aimed at another person. *Id., McDonald,* Appellant's Brief at 13-14, citing *United States v. Pryor*, 927 F.3d 1042, 1044 (8th Cir. 2019). In none of those cases did

this Court squarely address that argument or acknowledge—let alone analyze—the pre-*Pulliam* Missouri caselaw confirming that exhibiting required no targeted use of force. Therefore, those cases are not binding precedent refuting the arguments Mr. Huffman raised in his appeal. *See Miller,* 11 F.4th at 956 n.5.

Even if this Court had squarely addressed this argument prior to *Borden*, the intervening decision in *Borden* would compel reconsideration of the Circuit precedent, as the panel in *Frazier* undertook despite prior circuit precedent summarily qualifying Iowa's intimidation law on the basis that it "necessarily requires violent force." 48 F. 4th at 886, invalidating *United States v. Langston*, 772 F. 3d 560 (8th Cir. 2014).

This Court's precedents do no address Mr. Huffman's claim that *United States v. Taylor* refutes *Larry*'s tacit premise that *Borden*'s targeted force analysis only excludes statutes defined by a reckless *mens rea*

Rehearing is also required in this case because *Larry* and the bare citation to it by the panel in this case conflicts with the Supreme Court's 2022 decision in *United States v. Taylor*, 142 U.S. 2015. The *Larry* opinion cited a terse summary in *Frazier* that "[t]he upshot of *Borden* is that a crime committed with a *mens rea* of recklessness does not involve 'the use, attempted use, or threatened use of physical force against the person of another.'" 51 F. 4th at 292, quoting *Frazier,* 58 F. 4th at 886. The *Larry* panel dismissed *Borden*'s relevance to Missouri exhibiting because the statute refers to a defendant who "knowingly" engages in

the exhibition of a weapon in an angry or threatening manner." 51 F. 4th at 292. In doing so, the panel tacitly suggested that the "elements" clause in Section 924(e)(2)(B)(i) is satisfied by knowing crimes that do *not* require force targeted against the person of another. This part of the *Larry* ruling appears to grant credence to the Government's proposal in that case that the lack of a majority opinion in *Borden* negated any precedential value to the plurality's interpretation of the statutory definition's reference to "the use . . . of physical force against" another as requiring force targeted against the person of another. 51 F. 4th at 292, citing *Borden*, 141 S. Ct. at 1825; *United States v. Larry*, No. 21-3237, Appellee's Brief, 16-17 (8th Cir., filed March 29, 2022).

Mr. Huffman's Opening Brief challenged this interpretation of *Borden* on two grounds First, he noted that although the plurality opinion and Justice Thomas's concurrence cited different words within the "elements definition," they both reached a conclusion that it limits qualifying crimes to those requiring intentional conduct designed to injure specific other persons. *See supra* at 4-5; Appellant's Opening Brief, pp. 11.

Second, he noted that a majority opinion Justice Gorsuch wrote for the Court in 2022 interpreted a nearly identical definition in 18 U.S.C. § 924(c)(3)(A) as "[p]lainly" requiring "that the defendant took specific actions against specific persons or their property." *See United States v. Taylor*, 142 S. Ct. 2015, 2023

(2022); Appellant's Opening Brief at 11-12. The *Taylor* decision contains no suggestion that its interpretation of the elements clause as requiring targeted force *only* excludes crimes committed defined by a reckless *mens rea*.

Rehearing should be granted to resolve the inconsistency between the *Larry* decision and the interpretation the Supreme Court gave the materially identical definition in Section 924(c)(3)(A) in *Taylor*. Fed. R. App. P. 35(b)(1)(A).

WHEREFORE, Mr. Huffman requests rehearing *en banc*.

Respectfully submitted,

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WORD COUNT CERTIFICATION

The undersigned hereby certifies that the foregoing was prepared using Microsoft Word 2016, in 14-point Times New Roman font, and that the body of the petition contains 3,371 words, excluding the style of the case, the signature block and these certificates of compliance, as determined by the Microsoft Word 2016 word-counting feature.

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