No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN CARLOS BURNS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does second-degree murder in violation of 18 U.S.C. § 1111 categorically qualify as a "crime of violence" within the meaning of 18 U.S.C. § 924(c)(3)(A)?

RULE 14.1(b) STATEMENT

(i) All parties to the proceeding are listed in the caption.

(ii) The petitioner is not a corporation.

(iii) The following are directly related proceedings: *United States v. Burns*, No. 17-cr-00445-DGC (D. Ariz.) (judgment entered March 7, 2018); *United States v. Burns*, No. 18-10083 (9th Cir.) (judgment entered November 16, 2023).

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Petitioner Juan Carlos Burns respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 16, 2023. App. A.

OPINIONS BELOW

The court of appeals' memorandum is designated Not for Publication, but is available at 2023 WL 7876414 and 2023 U.S. App. LEXIS 30529.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal criminal charges against Mr. Burns pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 16, 2023. App. A at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

18 U.S.C. § 924(c)(3) provides as follows:

> **(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, or
>
> **(B)** 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.

STATEMENT OF THE CASE

On September 25, 2016, a 35-year-old man named Justin Gaston was shot and killed at a Chevron station on the Salt River Pima-Maricopa Indian Community

(SRPMIC) in Scottsdale, Arizona. Based largely on the allegations of a young woman who had been with Mr. Gaston that evening, police connected the shooting to Juan Carlos Burns, a then-21-year-old member of the SRPMIC. The government indicted Mr. Burns on one count of first-degree murder in violation of 18 U.S.C. §§ 1111 and 1153, and one count of discharge of a firearm causing Mr. Gaston's death during and in relation to a "crime of violence," in violation of 18 U.S.C. § 924(c)(1)(A) and (j). Mr. Burns pleaded not guilty and invoked his right to a jury trial.

Mr. Burns' trial lasted four days. While instructing the jury on the § 924(c) count at the close of trial, the district court stated that the jury should return a guilty verdict if it found that Mr. Burns had knowingly discharged a firearm during and in relation to either the charged offense of first-degree murder, or the lesser-included offense of second-degree murder, "which I instruct you are both crimes of violence." App. B. The jury convicted Mr. Burns of second-degree murder and discharge of a firearm during a "crime of violence." The district court sentenced him to 293 months of incarceration on the second-degree murder conviction, followed by 120 consecutive months on the § 924(c) count.

Mr. Burns appealed the judgment to the United States Court of Appeals for the Ninth Circuit. His first claim on appeal was that the district court erred in instructing the jury that second-degree murder is a "crime of violence" pursuant to the applicable definition set forth in 18 U.S.C. § 924(c)(3). Mr. Burns noted that the Ninth Circuit had held in *United States v. Begay*, 934 F.3d 1033, 1037–41 (9th Cir.

2019), that second-degree murder does not categorically qualify as a "crime of violence" under § 924(c)(3), because it can be committed recklessly. The government in its answering brief acknowledged the *Begay* opinion, but urged the court to reserve its decision of the issue until it had resolved the government's petition for rehearing in *Begay*.

After this Court granted certiorari in *Borden v. United States*, 593 U.S. 420 (2021), the court of appeals held this case in abeyance pending the final resolution of that case. After the Court issued its opinion in *Borden*, the parties filed supplemental briefs addressing the opinion's relevance to the instant case. The court of appeals continued to hold the instant case in abeyance pending the resolution of its en banc proceeding in *Begay*.

In May of 2022, the court of appeals issued its en banc opinion in *Begay*, rejecting the panel's conclusion, and holding that second-degree murder *does* categorically qualify as a "crime of violence" pursuant to § 924(c)(3). *United States v. Begay*, 33 F.4th 1081, 1089–96 (9th Cir. 2022) (en banc). The court of appeals continued to hold the instant case in abeyance pending the resolution of the defendant's petition for certiorari in *Begay*, which this Court denied on October 11, 2022. *Begay v. United States*, No. 22-5566.

After further supplemental briefing unrelated to the issue presented in this petition, the court of appeals issued its memorandum affirming Mr. Burns' convictions on November 16, 2023. App. A. The court held that its en banc opinion

in *Begay* compelled it to deny relief on Mr. Burns' challenge to the district court's "crime of violence" jury instruction. *Id*. at 2–3.

REASONS FOR GRANTING THE WRIT

In holding that second-degree murder categorically qualifies as a "crime of violence," the circuit courts have failed to heed this Court's holding in *Borden v. United States* that this definition applies only to crimes that necessarily involve the targeted use of force against another.

This case presents an important question pertaining to the meaning of the term "crime of violence" as defined in 18 U.S.C. § 924(c)(3). Because subsection (B) of the definition (which describes offenses that present a "substantial risk" that physical force may be used against the person or property of another) is unconstitutionally vague, *United States v. Davis*, 139 S. Ct. 2319 (2019), the question revolves around subsection (A)—the "elements clause"—which describes a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." This question is typically analyzed pursuant to the "categorical approach" laid out in *Taylor v. United States*, 495 U.S. 575 (1990), which requires courts to look, not to the facts of the individual case, but solely to a comparison of the elements of the statute forming the basis of the defendant's conviction with the elements of a "crime of violence." *Descamps v. United States*, 570 U.S. 254, 257 (2013).

Because the elements clause describes the "use" of force "against" the person or property of another, it covers only crimes that categorically involve intentional and purposeful conduct. *Leocal v. Ashcroft*, 543 U.S. 1 (2004). (*Leocal* construed 18

U.S.C. § 16, but the Court has construed this statute and the relevantly identical § 924(c)(3) *in pari materia*. *Davis*, 139 S. Ct. at 2326.)

As the original panel opinion in *Begay* held, second-degree murder in violation of 18 U.S.C. § 1111 does not categorically satisfy the elements clause, because it can be committed recklessly. *Begay*, 934 F.3d at 1038. The crime involves two elements: (1) an unlawful killing (2) "with malice aforethought." *Id.* at 1040. "Malice aforethought" in turn covers four different mental states: (1) intent to kill, (2) intent to do serious bodily injury, (3) depraved heart (*i.e.*, reckless indifference), and (4) intent to commit a felony." *Id.* And because a "depraved heart" second-degree murder is committed recklessly, rather than willfully or intentionally, the crime does not categorically involve the "use" of physical force against the person or property of another. *Id.* at 1040–41.

This Court's subsequent opinion in *Borden* strongly supports the *Begay* panel's conclusion. In *Borden* the Court construed the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA), which mandates a 15-year minimum sentence for persons convicted of illegally possessing a gun who have three or more prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). The "elements clause" of the statute's definition of a "violent felony" describes an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B)(i). Like § 16, this definition is relevantly identical to § 924(c)(3). *Borden*, 593 U.S. at 427.

The petitioner in *Borden* argued that his Tennessee assault conviction did not qualify as a "crime of violence" "because a mental state of recklessness suffice[d] for conviction." *Id*. at 425. The district and circuit courts disagreed, and this Court granted certiorari. *Id*. Justice Kagan's opinion for the plurality found that the phrase "against the person of another" exclude[d] not only negligent but also reckless offenses, because when modifying the "use of force," this phrase "demands that the perpetrator direct his action at, or target, another individual," whereas "[r]eckless conduct is not aimed in that prescribed manner." *Id*. at 429. The Court reserved the question of whether the same analysis applies to crimes requiring the form of mens rea "often called 'depraved heart' or 'extreme recklessness.'" *Id*. at 429 n.4.

Justice Thomas concurred, agreeing with the plurality's conclusion that ACCA's elements clause excludes criminal statutes that "c[an] be violated through mere recklessness," but resting this conclusion on the statutory phrase "use of physical force." *Id*. at 446 (Thomas, J., concurring). The remaining Justices joined Justice Kavanaugh's dissent. *Id*. at 449–85 (Kavanaugh, J., dissenting).

The *Borden* Court's analysis closely tracked the *Begay* panel's reasoning. Like the *Begay* panel, the *Borden* Court concluded that *Leocal* effectively answered the recklessness question, because even though recklessness is more culpable than negligence, recklessness and negligence alike are categorically distinguishable from the "purposeful" conduct at which the statute is aimed. *Borden*, 593 U.S. at 432–34. And while extreme recklessness takes a step up the ladder of culpability from

ordinary recklessness, just as ordinary recklessness takes a step up from negligence, this additional step does not bridge the categorical divide between non-purposeful and purposeful conduct—and it is *that* divide that the phrase "against the person or property of another" rendered "'critical.'" *Id.* at 433–34 (*quoting Leocal*, 543 U.S. at 9). Moreover, as the Court explained in *Borden*, the mental states of purpose and knowledge satisfy the elements clause's requirement of the use of force against the person or property of another, because both entail "target[ed]" action against another. *Id.* at 429. Even the "extreme" form of recklessness sufficient for second-degree murder, by contrast, does not demand such targeted action; it merely requires an inadequate concern with a higher risk of injury than ordinary recklessness.

The en banc Ninth Circuit failed to heed these principles. The majority reasoned that second-degree murder satisfies *Borden*'s "targeting" requirement because it calls for "*extreme indifference . . . toward human life*." *Begay*, 33 F.4th at 1094–95. Borrowing from the First Circuit's pre-*Borden* opinion in *United States v. Báez-Martínez*, 950 F.3d 119 (1st Cir. 2020), the court further reasoned that "a defendant 'certainly must be aware that there are potential victims before he can act with indifference toward them.'" *Id.* at 1095 (*quoting Báez-Martínez*, 950 F.3d at 127). The majority also rested its conclusion on statutory context, reasoning that offenses charged as murder are "among the most culpable of crimes," and that malice aforethought involves "an intentional act that ha[s] a high probability of resulting in death." *Id.* (internal quotation marks omitted).

Other circuits have followed the Ninth Circuit, agreeing that the federal and various state forms of second-degree murder categorically qualify as "crimes of violence." *United States v. Jamison*, 85 F.4th 796, 802–04 (6th Cir. 2023), *pet. for cert. filed* (No. 23-6134) (second-degree murder under Michigan law); *United States v. Kepler*, 74 F.4th 1292, 1300–11 (10th Cir. 2023); *Janis v. United States*, 73 F.4th 628, 629–36 (8th Cir. 2023), *pet. for cert. filed* (No. 23-6514); *United States v. Manley*, 52 F.4th 143, 149–51 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2436 (2023) (second-degree murder under Virginia law); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343–45 (11th Cir. 2022) (second-degree murder under Georgia law). But as Judge Ikuta explained in her dissenting opinion in *Begay*, the en banc majority's holding and reasoning are not faithful to this Court's precedent.

Judge Ikuta, joined by Judges Vandyke and (in pertinent part) Wardlaw, explained that the majority's conclusion was "contrary to [this Court's] clear direction." *Begay*, 33 F.4th at 1100 (Ikuta, J., dissenting). Judge Ikuta noted that "[a] jury can convict a defendant of second-degree murder under § 1111(a) without finding the defendant used force against a particular target." *Id*. at 1102. And she observed that the defendant had shown that second-degree murder had been successfully charged against individuals who did not consciously use force to target another, including persons convicted of causing deaths by driving drunk, driving the wrong way on a highway, allowing a vicious dog to escape, and setting a fire in an abandoned building. *Id*. at 1103–04 (citing cases).

Judge Ikuta rejected the majority's reasoning, noting that reckless conduct such as drunk or wrong-way driving, although it may result in death, "does not constitute action directed against, or targeting, another individual." *Id*. at 1106. And, she noted, the majority's observation that second-degree murder is "among the most culpable of crimes" was beside the point, because it did not tend to support the conclusion that the offense necessarily involves conduct "targeted against another." *Id*. Judge Murguia, joined by Judge Clifton, wrote a brief concurrence in which she acknowledged that the majority's reading of *Borden* was "not the only plausible" one, but explained that she was nevertheless persuaded that it was the more "sensible" one, once "context, purpose, and common sense" were factored into the analysis. *Id*. at 1098 (Murguia, J., concurring).

For the reasons set forth in Judge Ikuta's dissent, it is evident that the en banc Ninth Circuit—as well as the Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits—have decided an important question of federal law in a way that conflicts with this Court's opinion in *Borden*. S. Ct. R. 10(c). Rather than allowing additional circuits to follow this misguided consensus, the Court should grant certiorari and make plain that, pursuant to the principles of *Borden*, second-degree murder under 18 U.S.C. § 1111 (and substantively similar statutes) does not categorically qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted on February 13, 2024.

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