No. _____

IN THE

Supreme Court of the United States

THOMAS JOSEPH BREWER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JASON J. TUPMAN
Federal Public Defender
MOLLY C. QUINN
Chief Appellate Attorney, *Counsel of Record*
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
101 South Main Avenue, Suite 400
Sioux Falls, SD 57104
molly_quinn@fd.org
605-330-4489

Attorneys for Petitioner

QUESTION PRESENTED

Whether federal voluntary manslaughter in violation of 18 U.S.C. § 1112(a) qualifies as a "crime of violence" under the force clause in 18 U.S.C. § 924(c)(3)(A).

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Brewer, No. 5:16-cr-50174, United States District Court for the District of South Dakota. Judgment entered October 4, 2017.

United States v. Brewer, No. 17-3294, United States Court of Appeals for the Eighth Circuit. Judgment entered December 15, 2017.

Brewer v. United States, No. 5:20-cv-05042, United States District Court for the District of South Dakota. Judgment entered September 13, 2022.

Brewer v. United States, No. 22-3452, United States Court of Appeals for the Eighth Circuit. Judgment entered January 10, 2024.

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Materials

PETITION FOR A WRIT OF CERTIORARI

Thomas Joseph Brewer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-5a) is reported at 89 F.4th 1091. The district court's memorandum and order (App. 6a-19a) is unreported but available at 2022 WL 22257697.

JURISDICTION

The court of appeals entered judgment on January 10, 2024. *See* App. 1a-5a. Brewer received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on April 1, 2024. App. 20a. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1112(a) provides:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary—Upon a sudden quarrel or heat of passion.
>
> Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

18 U.S.C. § 924(c) provides in relevant part:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> . . .
>
> (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.

1 U.S.C. § 8 provides in relevant part:

(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

. . .

INTRODUCTION

This petition presents an important question of federal law that has not been, but should be, settled by this Court—does federal voluntary manslaughter, which can be committed by depraved heart recklessness and by certain prenatal conduct—qualify as a "crime of violence" under the force clause in 18 U.S.C. § 924(c)(3)(A)? In *Borden v. United States*, this Court reserved the question of whether mental states like "depraved heart" and "extreme recklessness" that fall between ordinary recklessness and knowledge qualify under the force clause. 593 U.S. 420, 429 n.4 (2021) (plurality opinion). This case presents an ideal opportunity for the Court to resolve this important question.

STATEMENT OF THE CASE

In 2017, Thomas Joseph Brewer pleaded guilty to voluntary manslaughter in violation of 18 U.S.C. §§ 1112 and 1153 and discharge of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). App. 2a. He was sentenced to consecutive terms of 97 months for voluntary manslaughter and 120 months for the § 924(c) offense, for a total sentence of 217 months. App. 2a. His direct appeal was dismissed by the court of appeals. App. 6a.

In June 2019, about two years after Brewer's sentencing, this Court invalidated the residual clause in 18 U.S.C. § 924(c)(3)(B) as void for vagueness. *United States v. Davis*, 588 U.S. 445 (2019). Brewer timely filed a motion to vacate his § 924(c) conviction and sentence under 28 U.S.C. § 2255 based on *Davis*. *See* App. 7a. He argued that his conviction was based on the use of a firearm in

connection with voluntary manslaughter, which qualified as a "crime of violence" solely under the now-invalidated residual clause in § 924(c)(3)(B). Dist. Ct. Dkt. 1, at 2; Dist. Ct. Dkt. 2.[1] The district court denied his motion. App. 6a-19a.

Brewer appealed, and the court of appeals affirmed. *See* App. 1a-5a. The court reaffirmed its pre-*Borden* holding that federal voluntary manslaughter qualifies as a crime of violence under the § 924(c) force clause. *See* App. 3a-5a (citing *McCoy v. United States*, 960 F.3d 487 (8th Cir. 2020)). The court of appeals held that the minimum mental state required for voluntary manslaughter—depraved heart recklessness—satisfies the force clause even after *Borden* and rejected Brewer's argument that voluntary manslaughter is overbroad because it can be violated by conduct committed against an unborn child. App. 4a-5a. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253.

Brewer timely filed a petition for rehearing *en banc*. The court of appeals denied his petition in a summary order. App. 20a. This petition for a writ of certiorari follows.

[1] All references to "Dist. Ct. Dkt." are to the docket in the civil case, *Brewer v. United States*, No. 5:20-cv-05042 (D.S.D.).

REASONS FOR GRANTING THE PETITION

This case involves an important question of federal law that should be settled by this Court—does federal voluntary manslaughter qualify as a "crime of violence" under the force clause in 18 U.S.C. § 924(c)(3)(A)? The status of federal voluntary manslaughter as a crime of violence is an important question for people in Indian country and other federal enclaves. And the status of depraved heart and extreme recklessness mental states under the force clause is an important question in a variety of contexts in federal law. The Court should grant the petition for a writ of certiorari to resolve the important questions raised by this case.

I. The issue of whether federal voluntary manslaughter qualifies as a "crime of violence" raises important questions of federal law.

The federal manslaughter statute defines manslaughter as "the unlawful killing of a human being without malice." 18 U.S.C. § 1112(a). Voluntary manslaughter is defined as a manslaughter committed "[u]pon a sudden quarrel or heat of passion." *Id.* The question of whether this offense satisfies the force clause in § 924(c)(3)(A) raises important questions of federal law.

A. Depraved heart & extreme recklessness

This case raises the issue left open by this Court in *Borden v. United States*, 593 U.S. 420 (2021)—do mental states falling between ordinary recklessness and knowledge satisfy the force clause?

Voluntary manslaughter is generally understood as a homicide committed with the same *mens rea* as second-degree murder but committed in the heat of

passion. *See Brewer v. United States*, 89 F.4th 1091, 1093 (8th Cir. 2024); *United States v. Serawop*, 410 F.3d 656, 665 (10th Cir. 2005); *United States v. Paul*, 37 F.3d 496, 499 (9th Cir. 1994); *United States v. Browner*, 889 F.2d 549, 552 (5th Cir. 1989); Wayne R. LaFave, 2 Subst. Crim. L. § 15.2(a) (3d ed. Oct. 2023 update). In other words, voluntary manslaughter "requires proof of the physical act of unlawfully causing the death of another, and of the mental state that would constitute malice, but for the fact that the killing was committed in adequately provoked heat of passion or provocation." *Serawop*, 410 F.3d at 665 (quoting *Browner*, 889 F.2d at 552). To prove voluntary manslaughter, the government must show that the defendant acted with a mental state of "a general intent to kill, intent to do serious bodily injury, or . . . depraved heart recklessness." *Brewer*, 89 F.4th at 1092 (quoting *McCoy v. United States*, 960 F.3d 487, 489 (8th Cir. 2020)); *accord Serawop*, 410 F.3d at 666. The question of whether federal voluntary manslaughter and other depraved heart homicides qualify as crimes of violence under this Court's jurisprudence is an important question of federal law this Court should resolve.

Under 18 U.S.C. § 924(c)(3), "crime of violence" is defined as a felony offense that:

> (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.

18 U.S.C. § 924(c)(3). Subsection (A) is known as the "force clause" or "elements clause." *See United States v. Taylor*, 596 U.S. 845, 848 (2022) ("elements clause");

McCoy, 960 F.3d at 489 ("force clause"). Subsection (B) is known as the "residual clause." *United States v. Davis*, 588 U.S. 445, 448 (2019). This Court invalidated the residual clause in *Davis*. *See id.* at 470. After *Davis*, for an offense to qualify as a "crime of violence," it must fall under the remaining force clause.

The categorial approach governs this inquiry. *Taylor*, 596 U.S. at 850. Under this approach, the Court looks not to the facts of the particular case, but instead to whether the elements of the statute in question categorically fall under the federal definition. *Borden*, 593 U.S. at 424 (plurality opinion). As this Court has explained, "answering that question does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime." *Taylor*, 596 U.S. at 850. "The only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Id.* "If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard," and does not qualify as a crime of violence. *Borden*, 593 U.S. at 424 (plurality opinion) (addressing Armed Career Criminal Act (ACCA)).

This case raises the issue of whether an offense like federal voluntary manslaughter, which can be committed by less than purposeful or knowing conduct, qualifies under the force clause. In *Borden*, this Court held that the ACCA force clause requires a higher mental state than recklessness. *Id.* at 423; *id.* at 446

(Thomas, J., concurring).[2] Under the *Borden* plurality's reasoning, the term "against" requires targeting or consciously directing force at another:

- "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator *direct his action at, or target, another individual*." *Id.* at 429 (plurality opinion) (emphasis added).

- "Reckless conduct is not *aimed* in that prescribed manner." *Id.* (emphasis added).

- "Borden's view of 'against,' as introducing the *conscious object (not the mere recipient) of the force*, is the right one given the rest of the elements clause." *Id.* at 430 (emphasis added).

- "It is . . . the pairing of volitional action with the word 'against' that produces its *oppositional or directed meaning*—and excludes recklessness from the statute." *Id.* at 435 (emphasis added).

- " '[A]gainst the person of another,' when modifying the 'use of physical force,' introduces that action's *conscious object*." *Id.* at 443 (emphasis added).

- "So it excludes conduct, like recklessness, that is not *directed or targeted at another*." *Id.* (emphasis added).

---

[2] Because the ACCA force clause is materially identical to the § 924(c) force clause at issue here, the Court's reasoning in *Borden* applies to both. *See* 593 U.S. at 433 (plurality opinion) (finding that the ACCA force clause was "materially identical" to the 18 U.S.C. § 16(a) force clause). The § 924(c) and § 16(a) force clauses differ from the ACCA force clause only in that they cover the use of physical force against the person *or property* of another. Otherwise, the three clauses are virtually identical. *Compare* 18 U.S.C. § 16(a) (defining "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another") *and* 18 U.S.C. § 924(c)(3)(A) (defining "crime of violence" as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another") *with* 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another").

The *Borden* plurality concluded that because reckless conduct is "not opposed to or directed at another," it does not constitute the use of "force 'against' another person in the targeted way" the force clause requires. *Id.* at 432.

Justice Thomas supplied the fifth vote, basing his conclusion on the "use of force" language alone. *Id.* at 445-49 (Thomas, J., concurring). In his view, "a crime that can be committed through mere recklessness does not have as an element the 'use of physical force' because that phrase 'has a well-understood meaning applying only to intentional acts designed to cause harm.' " *Id.* at 446 (quoting *Voisine v. United States*, 136 S. Ct. 2272, 2279, 2290 (2016) (Thomas, J., dissenting)).

While the *Borden* plurality expressly reserved the question of whether mental states like "depraved heart" or "extreme recklessness," which fall between recklessness and knowledge, qualify under the force clause, *id.* at 429 n.4, the Court's reasoning makes clear that the statutory language requires a conscious targeting of force that can only be satisfied by purposeful or knowing conduct, and not by the enhanced level of recklessness sufficient for voluntary manslaughter.

While depraved heart recklessness is generally understood to require disregard of a "very high degree" of risk, "it is still something far less than certainty or substantial certainty." *See* Wayne R. LaFave, 2 Subst. Crim. L. § 14.4(a) (3d ed. Oct. 2023 update) (addressing depraved heart murder). In contrast to the purposeful or knowing conduct that qualifies under the force clause, depraved heart recklessness falls short of "a deliberate choice with *full awareness* of consequent harm." *See Borden*, 593 U.S. at 426 (plurality opinion) (emphasis added). It also

falls short of being an "intentional act[] *designed to cause harm*." *Id.* at 446 (Thomas, J., concurring) (emphasis added) (quoting *Voisine* 136 S. Ct. at 2279, 2290 (Thomas, J., dissenting)).

Indeed, the courts of appeals have upheld second-degree murder convictions for fatal collisions caused by reckless and drunk driving. *See, e.g.*:

- ***United States v. Fleming*, 739 F.2d 945, 947-48 (4th Cir. 1984)** (finding sufficient evidence of malice where highly intoxicated defendant drove at high rate of speed, lost control of the vehicle, and struck another vehicle head-on);

- ***United States v. Sheffey*, 57 F.3d 1419, 1431 (6th Cir. 1995)** (finding sufficient evidence of malice where defendant drove while under the influence of alcohol and a prescription drug that caused drowsiness and engaged in consistently dangerous driving leading up to a collision);

- ***United States v. Chippewa*, 141 F.3d 118 (table), No. 97-30160, 1998 WL 123150, at *1 (9th Cir. Mar. 17, 1998) (unpublished)** (finding sufficient evidence of extreme reckless disregard for human life to show malice aforethought where defendant drove while intoxicated, ignored two stop signs, collided with another vehicle, and had multiple prior alcohol-related driving incidents from which it could be inferred he knew yet disregarded the dangers of driving while intoxicated).

The same type of conduct has been found sufficient to establish malice aforethought in the context of evidentiary issues. *See, e.g.*:

- ***United States v. Merritt*, 961 F.3d 1105, 1118 (10th Cir. 2020)** (finding, in the context of declaring a potential evidentiary error harmless, that malice aforethought was clearly established by evidence of past drunk-driving incidents and that defendant drove while intoxicated in the wrong lane and crashed into another vehicle).

And this type of conduct has given rise to convictions for voluntary manslaughter. *See, e.g.*:

- ***United States v. Chambers*, 898 F.2d 148 (table), No. 88–5653, 1990 WL 29160, at *1 (4th Cir. Mar. 5, 1990) (per curiam) (unpublished)** (sentencing appeal in voluntary manslaughter based on automobile accident where the defendant drove between 100 and 110 miles per hour, failed to stop at two stop signs and a red light, collided with a Navy Exchange van, had a blood alcohol level of .218, and had a suspended driver's license for a prior DUI).

The conduct in these cases, while egregious, does not rise to the level of the use of "force 'against' another person in the *targeted* way" this Court has said the force clause requires. *See Borden*, 593 U.S. at 432 (plurality opinion) (emphasis added). Instead, this conduct is much closer to the unsafe driving and drunk driving examples the *Borden* plurality found should not fall under the force clause—running a stop sign, veering onto the sidewalk, text messaging while driving, drunk driving, and speeding to a crime scene in a patrol car without the siren on. *Id.* at 439-40. Just as in the examples in *Borden*, "[a]ll the defendants in the [second-degree murder and voluntary manslaughter] cases just described acted recklessly, taking substantial and unjustified risks." *Id.* at 440. "And all the defendants hurt other people, some seriously, along the way." *Id.* "But few would say their convictions were for 'violent felonies,' " *id.*, or as relevant here, "crimes of violence."

This case is an ideal opportunity for this Court to resolve the question left open in *Borden*—whether an offense (like federal voluntary manslaughter) that can be committed by depraved heart recklessness qualifies under the force clause.

B. Prenatal conduct resulting in the death of an infant after birth

This petition raises a second important question that should be resolved by this Court—does an offense (like federal voluntary manslaughter) that can be committed by certain prenatal conduct qualify under the force clause?

This issue involves the interplay between the language of the § 924(c) force clause, the federal definition of "person," and judicial interpretation of the phrase "the unlawful killing of a human being" in the federal homicide statutes.

Section 924(c)(3)(A): The § 924(c) force clause requires that the offense have "as an element the use, attempted use, or threatened use of physical force *against the person* or property *of another*." 18 U.S.C. § 924(c)(3)(A) (emphasis added). The key phrase for this issue is "against the person . . . of another."

Federal definition of "person": The term "person" is defined under federal law to exclude unborn children. Under the Dictionary Act, the term "person" has the same meaning throughout the federal code:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

1 U.S.C. § 8(a). "Born alive," in turn, means:

> the complete expulsion or extraction from his or her mother of [a member of the species homo sapiens], at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

1 U.S.C. § 8(b). "Under a literal reading of the statute, the term 'person' does not include fetuses." *United States v. Montgomery*, 635 F.3d 1074, 1086 (8th Cir. 2011).

"Unlawful killing of a human being": Finally, turning back to the federal manslaughter statute, manslaughter is defined as "the unlawful killing of a human being without malice." 18 U.S.C. § 1112(a). The term "human being" has the same meaning as "person." 1 U.S.C. § 8(a). At least one circuit has interpreted the phrase "the unlawful killing of a human being" in the context of the federal homicide statutes and found that it encompasses a pregnant person's prenatal conduct so long as it results in the death of a later-born infant. *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019). In *Flute*, the defendant was charged with involuntary manslaughter in violation of 18 U.S.C. § 1112[3] based on prenatal drug use that was alleged to have resulted in the death of her infant child shortly after birth. *Id.* at 586. The defendant moved to dismiss the indictment, arguing that § 1112 did not reach her prenatal conduct because an unborn child was not a "human being" within the meaning of federal law. *Id.* The court of appeals found that § 1112 covered the defendant's conduct because the infant was "born alive" before dying: "[B]ecause the language of the manslaughter statute plainly encompasses the death of a born-alive child—a child at the earliest possible moment that it exists outside of

[3] Section 1112(a) defines involuntary manslaughter as "the unlawful killing of a human being without malice . . . [i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112(a).

the womb—the statute necessarily extends to conduct that occurred in utero and caused death to this born-alive child." *Id.* at 588. The court noted that its conclusion was consistent with the common law "born alive" rule, under which liability for a homicide "extended to the death of a child born alive related to injuries received in utero." *Id.* (citing *United States v. Spencer*, 839 F.2d 1341, 1343 (9th Cir. 1988)).

While *Flute* was an involuntary manslaughter case, it interpreted the same statutory language—"the unlawful killing of a human being"—that applies to voluntary manslaughter and murder. *See* 18 U.S.C. § 1112(a) (defining both forms of manslaughter as "the unlawful killing of a human being without malice"); 18 U.S.C. § 1111(a) (defining murder as "the unlawful killing of a human being with malice aforethought"). Indeed, the Ninth Circuit has applied the "born alive" rule to the murder prosecution of a third party *(i.e.*, not the pregnant woman) under § 1111(a). *Spencer*, 839 F.2d at 1343. Under these cases, the "born alive" rule would allow for the prosecution of a person based on their prenatal acts that resulted in the death of the infant after birth.

Putting these statutory provisions together, the federal voluntary manslaughter statute reaches purely prenatal conduct, which is by definition conduct that takes place *before* there is another "person" under federal law. The § 924(c) force clause requires that the offense have as an element the use, attempted use, or threatened use of physical force "against the . . . person of another." Because an unborn child is not a "person" within the meaning of federal law, a pregnant person's prenatal conduct does not qualify as the use of force

"against the person . . . of another" because there was not another "person" at the time of the use, attempted use, or threatened use of force.

This is true even though the victim must be born alive before dying for the offense to fall under the federal homicide statutes. While the presence of a born-alive victim may be enough to constitute a completed murder or manslaughter, the force clause requires more. In other words, the use of "force" when there was no "person" to use it "against" cannot qualify under the force clause. Indeed, in *Borden*, this Court repeatedly emphasized that to qualify under the force clause, the force must be actively employed *against another person*:

- "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator *direct his action at, or target, another individual*." 593 U.S. at 429 (plurality opinion) (emphasis added).

- "Borden's view of 'against,' as introducing the *conscious object (not the mere recipient) of the force*, is the right one given the rest of the elements clause." *Id.* at 430 (emphasis added).

- "[A reckless driver] has not used force 'against' another person in the targeted way that clause requires." *Id.* at 432.

- " '[A]gainst 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 443 (emphasis added) (internal citation omitted).

- "Offenses with a *mens rea* of recklessness . . . do not require, as ACCA does, the active employment of force against another person." *Id.* at 445.

It is not enough under the force clause for there to eventually be another person within the meaning of federal law. Under a straightforward application of the text

of § 924(c)(3)(A), there can be no qualifying use of force against the person of another if there was no other "person" at the time of the use of force.

This case raises the important question of whether an offense (like federal voluntary manslaughter) that can be committed by certain prenatal conduct qualifies as "the use, attempted use, or threatened use of physical force against the *person* . . . of another" within the meaning of the force clause.

II. The Court should act now to address the question presented.

This case raises two important questions of federal law that have not been resolved by this Court. The Court should act now to resolve the question presented.

Brewer acknowledges that all of the courts of appeals to address whether federal voluntary manslaughter and second-degree murder satisfy the force clause after this Court's opinion in *Borden* have held that they do. *See Brewer v. United States*, 89 F.4th 1091, 1093 (8th Cir. 2024) (voluntary manslaughter); *United States v. Draper*, 84 F.4th 797, 807 (9th Cir. 2023) (voluntary manslaughter); *United States v. Kepler*, 74 F.4th 1292, 1307 (10th Cir. 2023) (second-degree murder); *Janis v. United States*, 73 F.4th 628, 636 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 1019 (2024) (second-degree murder); *United States v. Begay*, 33 F.4th 1081, 1086 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 340 (2022) (second-degree murder); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343-45 (11th Cir. 2022) (murder). The courts of appeals also agree that other depraved heart murder offenses qualify under the force clause. *See United States v. Harrison*, 54 F.4th 884, 889-90 (6th Cir. 2022) (Kentucky complicity to commit murder); *United States v. Manley*, 52 F.4th

143, 150-51 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2436 (2023) (Virginia second-degree murder); *United States v. Solís-Vásquez*, 10 F.4th 59, 65 (1st Cir. 2021) (Massachusetts second-degree murder).

Nevertheless, the Court should act now to address the important questions raised by this petition. Indeed, despite the courts of appeals' seemingly consistent holdings on depraved heart homicides, they have reached different conclusions on in-between mental states in the context of other statutes. *Compare, e.g.*, *United States v. Lung'aho*, 72 F.4th 845, 850-51 (8th Cir. 2023) (holding that the "maliciously" element of federal arson does not satisfy the force clause) *with Janis*, 73 F.4th at 631 (holding that the "malice aforethought" element of federal second-degree murder does satisfy the force clause). This Court's guidance is needed now.

Moreover, because the text of the force clause in § 924(c)(3)(A) is identical or nearly identical to force clauses found throughout the federal code and Sentencing Guidelines, the questions raised by this case affect sentencing, restitution, and immigration issues in a variety of contexts:

- Mandatory minimum sentences for possession of firearms and ammunition under the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)(i));

- Mandatory life sentences for serious violent felonies (18 U.S.C. § 3559(c)(2)(F)(ii));

- Mandatory restitution under the Mandatory Victim Restitution Act (18 U.S.C. § 3663A(C)(1)(A)(i) (incorporating definition of "crime of violence" from 18 U.S.C. § 16));

- Pretrial detention under the Bail Reform Act (18 U.S.C. § 3142(f)(1)(A));

- Calculation of the guideline range under the career offender and firearms guidelines (USSG § 4B1.2(a)(1); USSG § 4B1.1; USSG § 2K2.1(a));

- Deportation under the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(F) (incorporating § 16)).

The question of whether federal voluntary manslaughter and other depraved heart homicides qualify as crimes of violence is an important question of federal law that should be addressed by this Court.

III. This case is an ideal vehicle for the question presented.

This case squarely presents the issue of whether federal voluntary manslaughter qualifies as a "crime of violence" under the force clause. At the time of Brewer's conviction, voluntary manslaughter unquestionably qualified as a "crime of violence" under the residual clause in § 924(c)(3)(B). This Court invalidated the residual clause as void for vagueness in *Davis*. This case squarely raises the question of whether voluntary manslaughter qualifies under the remaining force clause in § 924(c)(3)(A). If it does, Brewer's motion to vacate his § 924(c) conviction was properly denied. If it does not, Brewer's § 924(c) conviction and sentence were entered in violation of his due process rights. This case is an ideal vehicle for the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 27th day of June, 2024.

Respectfully submitted,

JASON J. TUPMAN
Federal Public Defender
By:

/s/ Molly C. Quinn
Molly C. Quinn, Chief Appellate Attorney
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
101 South Main Avenue, Suite 400
Sioux Falls, SD 57104
molly_quinn@fd.org
Phone: (605) 330-4489

Counsel of Record for Petitioner