APPENDIX

115 F.4th 987
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Jesus Ramiro GOMEZ, aka Hunter, Defendant - Appellant.

No. 23-435

Argued and Submitted March 5, 2024 Pasadena, California

Filed September 4, 2024

Synopsis

Background: Defendant pled guilty in the United States District Court for the Central District of California, James V. Selna, J., to distribution of methamphetamine and was sentenced, as a career offender, to 188 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals, Desai, Circuit Judge, held that:

plurality opinion in *United States v. Borden*, 593 U.S. 420, 141 S.Ct. 1817 was binding;

assault under California law was not a "crime of violence" under elements clause of career offender guidelines enhancement; and

assault under California law was not a "crime of violence" under enumerated offenses clause of career offender sentencing enhancement.

Vacated and remanded.

James Alan Soto, United States District Judge for the District of Arizona, sitting by designation, filed concurring opinion.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

***989** Appeal from the United States District Court for the Central District of California, James V. Selna, District Judge, Presiding, D.C. No. 8:20-cr-00171-JVS-FWS-5

Attorneys and Law Firms

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Todd W. Burns (argued), Burns & Cohan Attorneys at Law, San Diego, California, for Defendant-Appellant.

Before: Holly A. Thomas and Roopali H. Desai, Circuit Judges, and James Alan Soto, District Judge.[*]

Opinion by Judge Desai;

Concurrence by Judge Soto

OPINION

DESAI, Circuit Judge:

***990** Jesus Ramiro Gomez was sentenced to 188 months' incarceration for one count of distribution of methamphetamine. At sentencing, the district court applied a career offender enhancement, which doubled the recommended range for Gomez's sentence. To apply the enhancement, the district court found that Gomez's prior conviction for assault with a deadly weapon under California Penal Code § 245(a)(1) was a crime of violence. We have previously held that California Penal Code § 245(a)(1) constitutes a crime of violence, but our decisions are clearly irreconcilable with the Supreme Court's ruling in *Borden v. United States*, 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021). In light of *Borden*, we hold that convictions under California Penal Code § 245(a)(1) do not qualify

as crimes of violence, and the district court incorrectly applied the career offender enhancement in this case.

BACKGROUND

We do not recount the underlying facts of Gomez's conviction because they are largely immaterial on appeal. The relevant facts include that Gomez pleaded guilty to distribution of methamphetamine after selling drugs to an undercover agent, and the presentence report ("PSR") prepared by the probation office concluded that Gomez was a "career offender."

The career offender enhancement operates like a three-strike rule: if a defendant has three convictions for controlled substance offenses or "crimes of violence," the enhancement applies. U.S. Sent'g Guidelines Manual § 4B1.1 (U.S. Sent'g Comm'n 2001) [hereinafter U.S.S.G.]. The career offender finding in Gomez's PSR was based on his current conviction, as well as his two prior convictions: one for assault with a deadly weapon under California Penal Code § 245(a)(1) and one for possession of cocaine for sale.

The career offender enhancement ultimately increased Gomez's base offense level from level 27 to level 34, resulting in an increase in the advisory sentencing range from 130–162 months to 262–327 months. The government did not contest that Gomez qualified as a career offender but sought a three-level downward variance and urged a sentence of 188 months' imprisonment. The district court followed the government's recommendation and sentenced Gomez to 188 months' incarceration. Gomez objected to the career offender finding for the first time on appeal.

STANDARD OF REVIEW

Before reaching the merits of Gomez's claim, we must decide whether to apply de novo review or plain error review. We ordinarily review de novo whether a crime is a crime of violence. *United States v. Begay*, 33 F.4th 1081, 1087 (9th Cir. 2022) (en banc). But here, the government argues that we should apply plain error review because Gomez did not object to the career offender enhancement at sentencing. When an appeal presents a pure question of law and the opposing party is not prejudiced by the defendant's failure to object, we may apply de novo review in our discretion. *United States v. Eckford*, 77 F.4th 1228, 1231 (9th Cir. 2023).

The parties do not dispute that Gomez's appeal presents a pure question of law. And the government does not argue that it was prejudiced by Gomez's failure to object to the career offender enhancement at sentencing. The government nevertheless argues that we must apply plain error review because, in its view, our precedent permitting de novo review for pure questions of law has been implicitly overruled ***991** by two recent Supreme Court cases. But the cases relied on by the government are not clearly irreconcilable with our court's precedent and practice. We may thus apply de novo review consistent with our precedent.

In *Davis v. United States*, the Supreme Court invalidated the Fifth Circuit's practice of "declining to review certain unpreserved *factual* arguments" under any standard of review, including plain error. 589 U.S. 345, 347, 140 S.Ct. 1060, 206 L.Ed.2d 371 (2020) (per curiam) (emphasis added). Because *Davis* only addressed whether unpreserved *factual* issues are subject to plain error review or no review at all, its holding is not clearly irreconcilable with our precedent holding that we may review *legal*, not factual, issues de novo.

In *Greer v. United States*, the second case relied on by the government, the Supreme Court rejected a defendant's attempt to circumvent plain error review based on a "futility" exception. 593 U.S. 503, 511, 141 S.Ct. 2090, 210 L.Ed.2d 121 (2021). The defendant argued that it would have been futile to object below, and thus his claim that he did not possess the requisite mens rea for a felon in possession conviction was not subject to plain error review. *Id.* at 511, 141 S.Ct. 2090. Specifically, he alleged that objecting would have been futile because a "uniform wall of precedent" against his position existed in the circuit courts. *Id.* at 511–12, 141 S.Ct. 2090.

The Court disagreed, explaining that neither the text of Federal Rule of Criminal Procedure 51 ("Rule 51") nor precedent supported a new "futility" exception to the plain error standard. *Id.* The Court emphasized

that Rule 51, which defines how a party may preserve an objection for appeal, was inconsistent with a futility exception because it "focus[ed] on a party's *opportunity* to object—rather than a party's likelihood of *prevailing* on the objection." *Id.* at 512, 141 S.Ct. 2090. And the Court suggested that a "futility" exception was inconsistent with its precedent, noting that it had previously applied plain error review even when reviewing a claim for which virtually every circuit court had already rejected the defendant's position. *Id.* (citing *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)).

Greer's reasoning does not mandate plain error review here. While in *Greer* the Court noted that a "futility" exception would have conflicted with its prior cases, *id.*, the government here does not identify any Supreme Court case which would have come out differently had the Supreme Court reviewed a pure question of law de novo instead of for plain error. Nor does the government identify any inconsistency of the kind identified in *Greer* between our approach and the federal rules. Even if there is "some tension" between *Greer*'s approach and our application of de novo review, our precedents permitting de novo review of a pure question of law are not "clearly irreconcilable" with *Greer*. *See Alonso-Juarez v. Garland*, 80 F.4th 1039, 1049 (9th Cir. 2023).

Indeed, we have applied de novo review in circumstances similar to Gomez's even since *Greer* and *Davis* were decided. In *Eckford*, 77 F.4th at 1231, we considered whether aiding and abetting Hobbs Act Robbery in violation of 18 U.S.C. § 1851(a) constituted a crime of violence. The parties in *Eckford* disputed whether the defendant had adequately preserved the issue for appeal. *Id.* We declined to resolve that dispute, however, explaining that regardless of whether the defendant raised the issue before the district court, we had the discretion to review the issue de novo because it presented "a question that is purely one of law ... where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial ***992** court." *Id.* (quoting *United States v. McAdory*, 935 F.3d 838, 841–42 (9th Cir. 2019)). Because we have continued to apply this exception even since *Greer* and *Davis*, neither case constitutes an "intervening" decision abrogating our "prior circuit precedent" permitting de novo review. *See Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018).

Under our established precedent, because we do not need a factual record to resolve the purely legal question before us, we exercise our discretion to review the challenge de novo.

ANALYSIS

In this case, we must determine whether the career offender enhancement was properly applied to Gomez as a matter of law. The sentencing guidelines' career offender enhancement applies if the defendant has three felony convictions that qualify as a controlled substance offense or a "crime of violence." U.S.S.G. § 4B1.1(a). Gomez's prior conviction for possession of cocaine and current conviction for distribution of methamphetamine are controlled substance offenses. The career offender enhancement could thus only apply to Gomez if he had a third felony conviction for a crime of violence. The question before us then is whether his prior conviction for assault with a deadly weapon in California constitutes a "crime of violence."

We employ a "categorical approach," to determine whether a crime is a crime of violence. *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). Under this approach, "the facts of a given case are irrelevant," and our focus is "whether the elements of the statute of conviction meet the federal" crime of violence definition. *Borden*, 593 U.S. at 424, 141 S.Ct. 1817. The least culpable act criminalized under the statute of conviction must involve the level of force described in the crime of violence definition. *Id.* If the statute criminalizes any conduct less culpable than a federal crime of violence requires, "the statute is not a categorical match," and it does not qualify as a crime of violence. *See Begay*, 33 F.4th at 1091.

I. California Penal Code § 245(a)(1) is not a crime of violence.

Under the categorical approach, we must determine whether assault with a deadly weapon matches the federal crime of violence definition. The sentencing guidelines provide that a crime of violence is an offense that "has as an element the use, attempted

use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). This definition is known as the "elements clause." *Begay*, 33 F.4th at 1090. Gomez argues that his § 245(a)(1) conviction does not match the elements clause because it criminalizes a lesser mens rea than the elements clause. We agree.

A. To satisfy the elements clause, a crime must require the use of force with a mens rea more culpable than recklessness, as defined in *Borden v. United States.*

Before we analyze whether the assault statute and the elements clause contain the same mens rea requirements, we must determine the mens rea that the elements clause requires. On its face, the elements clause does not require a specific mens rea, but the Supreme Court has interpreted the clause to require a mens rea more culpable than recklessness.

In *Leocal v. Ashcroft*, the Supreme Court addressed whether a statute criminalizing negligent or accidental uses of force satisfies the elements clause.[1] ***993** 543 U.S. 1, 8–9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (analyzing Florida's DUI statute). The Court held negligent or accidental conduct does not satisfy the elements clause, reasoning that "[t]he key phrase in [the elements clause]—the 'use ... of physical force against the person ... of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 9, 125 S.Ct. 377. However, the Court declined to address whether offenses requiring proof of a reckless use of force qualified as crimes of violence. *Id.* at 13, 125 S.Ct. 377.

Borden answered this question. 593 U.S. at 445, 141 S.Ct. 1817. In *Borden*, the defendant argued that his conviction for reckless aggravated assault under Tennessee law did not satisfy the elements clause because the elements clause requires the statute of conviction to have a mens rea more culpable than recklessness. *Id.* at 424–25, 141 S.Ct. 1817. The Court agreed in a plurality opinion.

The plurality held that the mens rea requirement stems from the language requiring that force be used "against the person ... of another." *Id.* at 427–28, 141 S.Ct. 1817; U.S.S.G. § 4B1.1(a). It relied on the Model Penal Code's mens rea definitions, noting that a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk." *Id.* at 427, 141 S.Ct. 1817 (quoting Model Penal Code § 2.02(2)(c) (1985)). The more culpable mens rea, knowledge, is defined as "aware[ness] that [a] result is practically certain to follow" from a person's conduct. *Id.* at 426, 141 S.Ct. 1817 (quoting *United States v. Bailey*, 444 U.S. 394, 404, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980)) (second alteration in original). And the most culpable mens rea, purpose or intent, is when a person "consciously desires a particular result." *Id.* (citing Model Penal Code § 2.02(2)(a) (1985)) (cleaned up). The plurality held that "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Id.* at 429, 141 S.Ct. 1817. Because "[r]eckless conduct is not aimed in that prescribed manner," it does not satisfy the elements clause. *Id.*

Justice Thomas, concurring in the judgment, agreed that reckless crimes do not satisfy the elements clause. His analysis relied on a different phrase in the statute: "use of physical force." *Id.* at 446, 141 S.Ct. 1817 (Thomas, J., concurring). In Justice Thomas's view, the use of physical force "has a well-understood meaning applying only to intentional acts designed to cause harm." *Id.* (quoting *Voisine v. United States*, 579 U.S. 686, 713, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (Thomas, J., dissenting)). Because the reckless aggravated assault statute at issue "could be violated through mere recklessness," it did not satisfy the elements clause.[2] *Id.*

***994** After *Borden*, the elements clause is only satisfied by crimes that require uses of force with a mens rea more culpable than simple recklessness. Put another way, if a person can be convicted under a criminal statute by using force against another with only the "conscious[ ] disregard[ ]" of a "substantial and unjustifiable risk," the crime is not a crime of violence. *Id.* at 427, 141 S.Ct. 1817.

We now turn to analyzing whether California's assault statute satisfies the elements clause. The government argues that California's assault statute does not criminalize merely reckless uses of force under this definition. We disagree. Gomez was previously

convicted under California Penal Code § 245(a)(1) for assault with a deadly weapon that is not a firearm. In California, assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240. The assault statute does not, on its face, require a specific mens rea. *Id.* We thus look to the California courts' interpretation of the statute to determine the requisite mens rea. *Johnson v. United States*, 559 U.S. 133, 138, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (explaining that while interpreting the elements clause is a question of federal law, the court is bound by the state court's "interpretation of state law, including its determination of the elements" of the relevant crime). California's assault statute has not changed since 1872 and does not use or acknowledge modern mens rea labels. *People v. Williams*, 26 Cal.4th 779, 111 Cal.Rptr.2d 114, 29 P.3d 197, 200 (2001). Although several California Supreme Court cases have attempted to clarify the law, *see, e.g., People v. Colantuono*, 7 Cal.4th 206, 26 Cal.Rptr.2d 908, 865 P.2d 704 (1994); *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d 197, "[t]he *mens rea* required for assault under California law has been the subject of a long, tortured, and ongoing set of explanations in the California courts," *United States v. Grajeda*, 581 F.3d 1186, 1193 (9th Cir. 2009).

The prevailing definition of the assault mens rea, according to the California Supreme Court, is "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 204. This definition does not fit neatly within any of the mens rea definitions provided in *Borden*, but it falls short even of *Borden*'s definition of recklessness. To illustrate, we first explain how California's definition of the mens rea for assault necessarily captures uses of force with mental states less culpable than intent or knowledge.

For starters, the assault statute criminalizes uses of force with a mens rea less culpable than intent. The California Supreme Court expressly recognizes that § 245(a)(1) does not require an intent to cause harm; it merely requires an intent to do the act that results in harm. *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 204 ("[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur."). The "intentional act" requirement does not equate to an "intent" or "purpose" mens rea. It only requires that the act in question be volitional. *See id.*, 111 Cal.Rptr.2d 114, 29 P.3d at 201. This is directly contrary to the definition of purpose or intent in *Borden*, which is to "consciously desire[ ] a particular result." 593 U.S. at 426, 141 S.Ct. 1817 (cleaned up). Even in *Leocal*, the volitional act of driving under the influence did not establish that the use of force was "intentional." *See* 543 U.S. at 9, 125 S.Ct. 377. Simply put, volition does not establish intent to apply force to another person.

***995** A recent, post-*Borden* case confirms this conclusion. *See Gutierrez v. Garland*, 106 F.4th 866 (9th Cir. 2024). In *Gutierrez*, we held that carjacking under California Penal Code § 215 is not categorically a crime of violence.[3] *Id.* at 874. Even though carjacking necessarily involves the act of taking a vehicle with the intent to deprive its owner, the elements clause requires more. *Id.* at 873. *Gutierrez* illustrates that when a state statute does not assign a sufficiently culpable mens rea to the use of force itself—as opposed to other elements of the crime—it fails to satisfy the elements clause. *Id.* at 876 ("That California courts do not consider a defendant's *mens rea* as to [the use of force] element [of carjacking] further suggests that a defendant can be convicted for accidental or reckless use of 'force.' ").

The government argues that the assault statute requires, at the very least, a knowing use of force. While superficially appealing, this reading ignores the California Supreme Court's own interpretations of the statute. The California Supreme Court has expressly held that assault "does not require ... a subjective awareness of the risk that an injury might occur." *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 204. *Williams* makes this point even clearer, noting that a "defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally, and probably result in a battery." *Id.*, 111 Cal.Rptr.2d 114, 29 P.3d at 203 n.3. This description contradicts the definition of knowledge in *Borden*, which is "aware[ness] that [a] result is practically certain to follow from [one's] conduct." 593 U.S. at 426, 141 S.Ct. 1817 (second alteration in original). Although California requires

knowledge of the facts that make the action the type of act likely to result in harm, this does not equate to the subjective awareness that harm "is practically certain" to result. *See id.*

Indeed, "knowledge of [the] ... facts sufficient to establish that the act by its nature will probably" result in force, *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 204, is less culpable even than *Borden*'s recklessness definition—that is, conscious disregard of a substantial risk, 593 U.S. at 427, 141 S.Ct. 1817. To illustrate, *Borden* explains that a driver who "sees a pedestrian in his path but plows ahead anyway, knowing the car will run him over" has knowledge and satisfies the elements clause. *Id.* at 432, 141 S.Ct. 1817. It further explains that a driver who "decides to run a red light, and hits a pedestrian whom he did not see," is merely reckless, and does not satisfy the elements clause. *Id.* The California assault statute not only sweeps in both types of conduct, but does so even when the defendant is not conscious of the risk he disregards. *See, e.g., People v. Yorba*, No. G038293, 2008 WL 727693, at *6 (Cal. Ct. App. Mar. 19, 2008) (affirming defendant's § 245(a)(1) conviction for running a red light during a police chase because "[a]ny reasonable person under virtually any circumstances would be aware a collision was a probable result of speeding through a traffic-light-controlled intersection against a red light"); *People v. Lopez*, No. D053543, 2010 WL 780369, at *5 (Cal. Ct. App. Mar. 9, 2010) (affirming ***996** defendant's § 245(a)(1) conviction for swerving toward an officer on the highway to avoid a tire deflation device because "a reasonable person [in defendant's position] would realize that [his] act by its nature would directly and probably result in the application of force" to the officer). These cases show that the least culpable conduct covered by the California assault statute does not require an intent to apply force, knowledge that an action will cause force to be applied to another, or even subjective awareness of a risk that such force will result.

The government argues that we need only look to the label California uses to describe the mens rea for assault. It points to one sentence in *Williams* stating that "mere recklessness or criminal negligence" is insufficient to satisfy the assault statute. 111 Cal.Rptr.2d 114, 29 P.3d at 203. But this argument improperly relies on labels, thus elevating form over substance. The *Williams* court itself explained that the quoted language uses "recklessness" synonymously with criminal negligence, rather than with the modern definition of recklessness. *Id.*, 111 Cal.Rptr.2d 114, 29 P.3d at 203 n.4 (explaining that the court uses recklessness "in its historical sense as a synonym for criminal negligence, rather than its more modern conception as a subjective appreciation of the risk of harm to another"). Given that the court meant only that criminal negligence does not satisfy the assault statute, this statement from *Williams* does not answer the question before us: whether the assault statute criminalizes reckless uses of force.

Because we conclude California's assault statute sweeps in reckless uses of force, as defined in *Borden*, a conviction under § 245(a)(1) is not a categorical match with the elements clause and does not constitute a crime of violence.

B. *Borden* is clearly irreconcilable with our cases holding that California Penal Code § 245(a) is a crime of violence.

Our prior holdings to the contrary are not binding. Before *Borden*, we held that § 245(a) convictions are crimes of violence. *United States v. Heron-Salinas*, 566 F.3d 898 (9th Cir. 2009) (per curiam); *Grajeda*, 581 F.3d 1186; *United States v. Jimenez-Arzate*, 781 F.3d 1062 (9th Cir. 2015) (per curiam); *United States v. Vasquez-Gonzalez*, 901 F.3d 1060 (9th Cir. 2018). But these holdings are clearly irreconcilable with intervening precedent, namely *Borden*. *See Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc); *United States v. Lindsey*, 634 F.3d 541, 548 (9th Cir. 2011) ("In order to be controlling on the panel, a higher court's decision must undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." (cleaned up)).

Before *Borden*, we held that crimes with a recklessness mens rea do not satisfy the elements clause. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc). But our subsequent cases analyzing § 245(a)(1) did not use a definition of recklessness consistent with *Borden*'s. Most of our cases focused on whether § 245(a) can sustain a conviction for unintentional conduct and concluded it cannot. As a result, we have not conducted a

meaningful analysis of whether the statute is satisfied by *reckless* uses of force using *Borden*'s definition of recklessness. This gap in analysis puts our holdings at odds with *Borden*, which requires analyzing whether the statute criminalizes uses of force with a reckless mens rea.

In *United States v. Grajeda*, we held that § 245(a)(1) was a crime of violence because it requires " 'violent' and 'active' " force and "not merely accidental" uses of force.[4] 581 F.3d at 1195–96. We were thus ***997** satisfied that § 245(a)(1) did not criminalize merely "reckless" conduct. *Id.* at 1195.[5] But this analysis fails to consider *Borden*'s more rigorous definition of recklessness. 593 U.S. at 427, 141 S.Ct. 1817. *Grajeda*'s conclusion that a crime is a crime of violence whenever it requires at least (1) active force and (2) non-accidental conduct is irreconcilable with *Borden*'s holding that a crime is not a crime of violence if it encompasses a mens rea in which the defendant acts deliberately, but consciously disregards an unjustifiable—though not practically certain—risk.

Next, *Jimenez-Arzate* considered whether two California cases undercut the holding of *Grajeda* and demonstrated that the assault mens rea did not match the mens rea of the elements clause. 781 F.3d at 1064–65. In one California case, the Court of Appeal upheld a conviction under § 245(a)(1) when the defendant "intentionally ran a red light while racing another car down the street even though he saw a car entering the intersection on the green," and made "no effort to stop despite a passenger warning him that he needed to stop." *Id.* at 1064 (citing *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 1185, 1189, 148 Cal.Rptr.3d 901 (2012)). And in the other, the Supreme Court of California upheld a conviction for manslaughter and assault on a child causing death because "substantial evidence established that defendant knew he was striking his young son with his fist, forearm, knee, and elbow, and that he used an amount of force a reasonable person would realize was likely to result in great bodily injury." *Id.* (quoting *People v. Wyatt*, 48 Cal.4th 776, 108 Cal.Rptr.3d 259, 229 P.3d 156, 157 (2010)).

We held that these California cases did not demonstrate that § 245(a)(1) criminalizes conduct less culpable than the elements clause requires. We noted that in both cases the defendant either "heedlessly disregard[ed] a perceived likelihood of death or grave injury to others" or "a reasonable person would have recognized the dangers" of the defendant's actions. *Jimenez-Arzate*, 781 F.3d at 1064–65. We also recognized that under the assault statute, the defendant need "not [be] subjectively aware of the risks" his actions posed. *Id.* at 1065. This analysis is plainly at odds with *Borden* because, under *Borden*, even a subjective awareness of a risk of harm is not sufficient. 593 U.S. at 427, 429, 141 S.Ct. 1817.[6]

***998** In our most recent decision on this issue, we held that § 245(a)(1)'s "intentional act" requirement establishes that it is an intentional crime, which satisfies the elements clause. *Vasquez-Gonzalez*, 901 F.3d at 1068 (holding that the intentional act requirement in § 245(a) established an intentional use of force under the elements clause). But this is irreconcilable with *Borden*'s definition of intent. *Borden* explains that intent means not only intent to act, but a desire that the action will result in harm. 593 U.S. at 426, 141 S.Ct. 1817. We also did not properly consider whether the statute criminalizes a mens rea more culpable than recklessness in *Vasquez-Gonzalez.* Although we quoted *Williams*, saying "recklessness or criminal negligence" is insufficient under the assault statute, as noted above, this phrase only encompasses criminal negligence. *Vasquez-Gonzalez*, 901 F.3d at 1067. Our analysis thus fails to comply with *Borden*'s requirements.[7]

In sum, *Borden* establishes a bright line rule: if a statute criminalizes uses of force committed only with a conscious disregard of a substantial risk to another person, it is not a crime of violence. Our prior cases do not apply that test, and thus improperly categorize § 245(a)(1) as a crime of violence in violation of *Borden.*[8] They are not merely in tension with *Borden*; they are irreconcilable.

II. Assault under § 245(a)(1) also does not satisfy the enumerated offenses clause.

The government argues that we can affirm on the ground that § 245(a)(1) satisfies an alternative definition of a crime of violence. A conviction can also constitute a crime of violence if it falls within a narrow category of enumerated offenses. U.S.S.G. § 4B1.2(a)(2) (specifying several offenses that constitute

crimes of violence: "murder, voluntary manslaughter, kidnapping, ***999** aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm"). The government argues that § 245(a)(1) meets the definition for aggravated assault under the enumerated offenses clause. But aggravated assault under the enumerated offenses clause requires a mens rea greater than extreme recklessness. *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1085 (9th Cir. 2015). And as explained above, § 245(a)(1) does not limit its scope to uses of force with a mens rea greater than recklessness, let alone extreme recklessness. It thus does not constitute aggravated assault under the enumerated offenses clause.

CONCLUSION

For the foregoing reasons, convictions under California Penal Code § 245(a)(1) are not crimes of violence and cannot serve as the predicate for the career offender enhancement. The district court thus improperly applied the career offender enhancement to Gomez at sentencing. We remand for the district court to correct this error and resentence Gomez accordingly.

VACATED and REMANDED.

SOTO, District Judge, concurring:

I agree with the majority that § 245(a) of the California Penal Code criminalizes conduct with a mental state short of recklessness, and therefore does not constitute a crime of violence according to *Borden v. United States*, 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021). However, an en banc panel of this circuit reached a different conclusion in a case concerning substantively the same facts and law. *See United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (holding that a second-degree-murder conviction under 18 U.S.C. § 1111(a) is a crime of violence). The majority opinion distinguishes *Begay* on the ground that a conviction under § 1111 requires "extreme recklessness" while a conviction under § 245 requires only "ordinary recklessness." For the reasons explained below, I do not believe this distinction fully addresses the tension that *Begay* creates with *Borden.* Further, I believe this conflict may lead to inconsistent outcomes in future cases and that en banc review may be appropriate to resolve this conflict.

I.

Borden held that a crime of violence requires the "targeted" use of force. A crime of violence must include the "use, attempted use, or threatened use of physical force against the person or property of another."[1] U.S.S.G. § 4B1.2(a)(1). In *Borden*, a plurality of the Supreme Court held that "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual."[2] 593 U.S. at 429, 141 S.Ct. 1817. Therefore, a crime of violence requires that a perpetrator direct his action at, or target, another individual.[3] ***1000** Because "reckless conduct is not aimed in that prescribed manner," a crime that can be committed with a reckless mens rea is not a crime of violence. *Id.*

II.

Begay outlines conduct that satisfies *Borden's* "targeting" requirement. In *Begay*, a post-*Borden* en banc panel concluded that second-degree murder under 18 U.S.C. § 1111(a) constitutes a crime of violence. 33 F.4th at 1096. Second-degree murder is the unlawful killing of a human being with malice aforethought. § 1111(a). "Malice aforethought" encompasses "four kinds of 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." *United States v. Pineda-Doval*, 614 F.3d 1019, 1038 (9th Cir. 2010). Because the en banc panel reasoned that depraved-heart murder encompasses the "least culpable conduct" for a conviction under § 1111,[4] the panel analyzed whether depraved-heart murder requires a perpetrator to "direct his action at, or target" another individual. *Begay*, 33 F.4th at 1091. In concluding that it does, the panel held that any conviction under § 1111 constitutes a federal crime of violence. *Id.* at 1093.

Judge Ikuta dissented, highlighting the many ways that a conviction under § 1111 can be sustained without

a perpetrator "direct[ing]" or "target[ing]" their force at another individual. *Begay*, 33 F.4th at 1103-04 (citing *United States v. Merritt*, 961 F.3d 1105, 1118 (10th Cir. 2020) (upholding depraved-heart murder conviction for a defendant who was driving drunk in the wrong lane resulting in the death of another motorist); *United States v. Sheffey*, 57 F.3d 1419, 1431 (6th Cir. 1995) (upholding depraved-heart murder conviction for a defendant who was driving under the influence, resulting in the death of another motorist, despite the defendant's testimony "that he did not intend to hurt anybody"); *State v. Davidson*, 267 Kan. 667, 987 P.2d 335, 344 (1999) (upholding depraved-heart murder conviction for a defendant whose dogs escaped and mauled a child to death after the defendant failed to properly train and secure them); *People v. Arzon*, 92 Misc.2d 739, 401 N.Y.S.2d 156, 157, 159 (N.Y. Sup. Ct. 1978) (charging a defendant with depraved-heart murder after he set fire to a couch in an abandoned building which later contributed to the death of a responding fireman)).

Nevertheless, under the majority's reasoning in *Begay*, the above-cited conduct satisfies the "targeting" requirement articulated in *Borden.*

III.

This panel looks at identical conduct to that outlined in *Begay* and concludes that it does not satisfy *Borden's* "targeting" requirement. In her dissent, Judge Ikuta cites *Stallard v. State*, 209 Tenn. 13, 348 S.W.2d 489, 490 (1961), a case that would satisfy *Borden's* targeting requirement under the *Begay* majority's reasoning. In that case, the defendant was convicted of second-degree murder for killing another motorist after he drove on the wrong side of the road while racing another vehicle. *Id.* at 490. The defendant, who was racing his friend up a hill, collided with the victim's vehicle at the crest, never slowing his speed, presumably because he never saw the victim's car before impact. *Id.*

In contrast, the majority here relies on ***1001** *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 148 Cal. Rptr. 3d 901, 903 (2012), as an example of a case that *does not* satisfy Borden's "targeting" requirement. In that case, the defendant was convicted of assault with a deadly weapon for severely injuring another motorist after he deliberately ran a red light while racing another vehicle on a busy city street. *Id.* at 1183-84, 148 Cal.Rptr.3d 901. There, the defendant saw the victim's car entering the intersection on the green and never slowed his speed, despite his passenger imploring him to stop. *Id.* at 1189, 148 Cal.Rptr.3d 901.

An inescapable tension arises when two panels look at nearly identical conduct and reach different conclusions. The majority here attempts to create a meaningful distinction between these cases, stating that the modifier "extreme" before the word "reckless" makes § 1111 conduct more "targeted" than § 245 conduct. The majority elevates form over substance.

It is true that while § 1111 requires a mens rea of "extreme" recklessness to sustain a conviction, an individual can be convicted under § 245 for conduct that is merely reckless. One could therefore interpret § 1111 as requiring a higher degree of culpability than § 245, seemingly satisfying *Borden*'s "greater-than-recklessness" standard. But this interpretation ignores *Borden's* targeting requirement. Indeed, "greater than recklessness" is not the mens rea standard articulated in *Borden.* Rather, it is a characterization of a mental state that satisfies *Borden*'s "targeted" or "directed" use of force requirement. *See Borden*, 593 U.S. at 429, 141 S.Ct. 1817 ("The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual. Reckless conduct is not aimed in that prescribed manner.").

Adding the modifier "extreme" before "recklessness" does not make the least culpable conduct criminalized under § 1111 any more *targeted* than the least culpable conduct criminalized under § 245. Rather, the function of "extreme" is to add the "human-life" element.[5] The human-life element only pertains to the consequences of one's actions, namely the loss of human life. I do not dispute that extreme recklessness is more severe than ordinary recklessness, only that the increase in severity is along an axis not relevant to the *Borden* analysis. I see no meaningful distinction between the minimum level of targeting required for ordinary recklessness and that required for extreme recklessness.

The tension between *Begay* and *Borden* has already led to inconsistent results. Three subsequent Circuit decisions, albeit unpublished, have concluded that the conduct required for a conviction under § 245 satisfies *Borden's* mens rea requirement. *United States v. Man*, No. 21-10241, 2022 WL 17260489, at *1 (9th Cir. Nov. 29, 2022); *United States v. Morton*, No. 21-10291, 2022 WL 17076203, at *1 (9th Cir. Nov. 18, 2022); *Paz-Negrete v. Garland*, No. 16-73889, 2023 WL 4404348, at *1 (9th Cir. July 7, 2023). That is because there is no meaningful distinction between the conduct required to sustain a conviction under § 1111 and the conduct required to sustain a conviction under § 245.

IV.

Under *Begay*, a conviction for a crime that requires no "targeted" use of force whatsoever may constitute a crime of violence. *Begay* treated depraved-heart murder, or reckless indifference, as the least culpable mental state within the ambit of ***1002** malice aforethought. For reasons not articulated in the opinion, the panel disregarded the fourth mental state,[6] intent to commit a felony. *See Pineda-Doval*, 614 F.3d at 1038.

The least culpable conduct criminalized by felony murder does not involve the targeted use of force required for a crime of violence under *Borden.* In fact, an individual may be convicted for felony murder under § 1111 even if the resulting death is *entirely unforeseeable.*[7] Take for example a drug dealer who intentionally sells drugs unknowingly laced with a deadly chemical, resulting in the death of the buyer. Or an arsonist who sets an abandoned building on fire, resulting in the death of a responding firefighter. Or an individual who robs a bank, resulting in a customer's death by heart attack 15-20 minutes later. Under the *Begay* panel's reasoning these actors' conduct would sustain a conviction under § 1111, and therefore constitute categorical crimes of violence. However, these actors never targeted the victims with physical force, as required by the elements clause.

V.

I agree with the majority that § 245 does not constitute a crime of violence; this holding is consistent with the Supreme Court's directive in *Borden.* I also believe the majority opinion cannot be reconciled with the en banc decision in *Begay.* It is not for me to say how this inconsistency should be resolved; however, it is my obligation to call attention to what I fear will precipitate confusion and disparate outcomes in future cases.

All Citations

115 F.4th 987, 2024 Daily Journal D.A.R. 8607

Footnotes

* The Honorable James Alan Soto, United States District Judge for the District of Arizona, sitting by designation.

1 *Leocal* analyzed the elements clause in Title 18 of the U.S. Code, which is nearly identical to the elements clause in the sentencing guidelines. *See* 18 U.S.C. § 16(a) ("The term 'crime of violence' means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." (cleaned up)). We regularly treat cases interpreting crimes of violence as applicable irrespective of the statute or guideline from which it originates. *Begay*, 33 F.4th at 1091 n.6.

2 The government alleges that the plurality's reasoning is not binding because a majority of justices did not agree. But "when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other," the opinion is binding. *United States v. Davis*, 825 F.3d 1014, 1021–22 (9th Cir. 2016). Here, the plurality opinion is narrower than Justice Thomas's opinion because Justice Thomas would have held the elements clause encompasses only "intentional acts designed to cause harm." *Borden*, 593 U.S. at 446, 141 S.Ct. 1817 (Thomas, J., concurring). And since *Borden*, we

have articulated the plurality's reasoning in an en banc decision, making it binding precedent in this circuit. *Begay*, 33 F.4th at 1092–94 (majority op.), 1100 n.2 (Ikuta, J., dissenting in part).

3 Under California Penal Code § 215,

> [c]arjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.

Cal. Penal Code § 215(a).

4 Before *Grajeda*, we concluded in *Heron-Salinas*, that assault with a firearm under California Penal Code § 245(a)(2) was a crime of violence. *Heron-Salinas*, 566 F.3d at 899. But *Heron-Salinas* based its reasoning primarily on a portion of the statute that the Supreme Court has since held is unconstitutionally vague. *Id.*; *see also* 18 U.S.C. § 16(b) (" '[C]rime of violence' means ... any other offense that is a felony and 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."); *see also Sessions v. Dimaya*, 584 U.S. 148, 152, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018) (holding that this clause is unconstitutionally vague). The only independent analysis based on the constitutional portion of the statute—the elements clause—conclusively held, "[t]he use of a firearm in the commission of the crime is enough to demonstrate the actual force was attempted or threatened." *Heron-Salinas*, 566 F.3d at 899. This does not address the mens rea requirement and is largely inapplicable because Gomez was convicted under § 245(a)(1), which specifically criminalizes assaults with "a deadly weapon or instrument *other* than a firearm" (emphasis added).

5 *Grajeda* also relied on our decision in *Heron-Salinas*, as well as the Supreme Court of California's statement in *Williams* that "mere recklessness or criminal negligence is ... not enough." *Id.* at 1194–96 (quoting *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 203). As we have explained above, however, neither of these decisions shows that § 245(a)(1) satisfies *Borden*'s mens rea requirement.

6 Several of our colleagues have observed that the categorical approach yields inconsistent or absurd results. *See Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149–50 (9th Cir. 2020) (Graber, J., joined by Tunheim, J., concurring) ("The categorical approach requires us to perform absurd legal gymnastics, and it produces absurd results."); *United States v. Brown*, 879 F.3d 1043, 1051 (9th Cir. 2018) (Owens, J., concurring) ("This case ... typifies how far this doctrine has deviated from common sense.... [T]his is a really, really bad way of doing things."); *United States v. Valdivia-Flores*, 876 F.3d 1201, 1210 (9th Cir. 2017) (O'Scannlain, J., specially concurring) ("[This case] illustrates the bizarre and arbitrary effects of the ever-spreading categorical approach for comparing state law offenses to federal criminal definitions."). Indeed, the categorical approach requires courts to conclude that obviously violent crimes are not "crimes of violence," such as the fatal beating of a child in *Wyatt* or, even more strikingly, the arson charges from the Boston Marathon bombing, which killed three and injured hundreds. *See* 108 Cal.Rptr.3d 259, 229 P.3d at 157; *United States v. Tsarnaev*, 968 F.3d 24, 102 (1st Cir. 2020). But absent Supreme Court or congressional action directing a departure from the categorical approach, we must continue to apply it.

7 Our court's unpublished cases post-*Borden* are not persuasive because they, too, conducted a labels-over-substance inquiry. *See, e.g., United States v. Man*, No. 21-10241, 2022 WL 17260489, at *1 (9th Cir. Nov. 29, 2022) (stating, without analyzing the definition of recklessness under *Borden*, "we have previously held that section 245 offenses are crimes of violence—and thus, violent felonies—precisely because the statute requires a mens rea greater than recklessness"); *see also United States v. Morton*, No. 21-10291, 2022 WL 17076203, at *1 (9th Cir. Nov. 18, 2022) (same).

8 In a post-*Borden* case, *United States v. Begay*, our en banc court held that second-degree murder under 18 U.S.C. § 1111(a), which requires an "extreme recklessness" mens rea, constitutes a crime of violence. 33 F.4th at 1093–94. The *Begay* court held that second-degree murder is a crime of violence because, unlike crimes committed with simple recklessness, the recklessness required for second-degree murder must be

"extreme," and the risk disregarded must specifically be a risk *to human life*. *Id.* at 1094–95. Section 245 does not involve the type of extreme recklessness at issue in *Begay*, and thus *Begay* does not control the outcome here.

1 This language, in its various appearances across federal law, is called the "elements clause."

2 The plurality opinion from *Borden* is binding for the reasons articulated in footnote 2 of the majority opinion.

3 The plurality used the following example to illustrate the "targeting" requirement:

> A commuter who, late to work, decides to run a red light, and hits a pedestrian whom he did not see. The commuter has consciously disregarded a real risk, thus endangering others. And he has ended up making contact with another person, as the Government emphasizes. *See* Brief for United States 23. But as the Government just as readily acknowledges, the reckless driver has not directed force at another: He has not trained his car at the pedestrian understanding he will run him over. *See id.*, at 26.... [B]ecause his conduct is not opposed to or directed at another—he does not come within the elements clause. He has not used force "against" another person in the targeted way that the clause requires.

593 U.S. at 432, 141 S.Ct. 1817.

4 The categorical approach requires the court to analyze whether the "least culpable conduct" criminalized by a statute satisfies the federal elements clause.

5 Unlike ordinary recklessness, which requires disregard of a substantial and unjustifiable risk, extreme recklessness requires disregard for human life. *Borden* at 443, 141 S.Ct. 1817.

6 "Malice aforethought" encompasses "four kinds of 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." *United States v. Pineda-Doval*, 614 F.3d at 1038.

7 *See People v. Dillon*, 34 Cal.3d 441, 477, 194 Cal.Rptr. 390, 668 P.2d 697 (1983) (holding that first-degree felony murder includes "a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.").

165 F.4th 1199
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Jesus Ramiro GOMEZ, aka Hunter, Defendant - Appellant.

No. 23-435

Argued and Submitted En Banc September 9, 2025 San Francisco, California

Filed January 13, 2026

Synopsis

Background: Defendant pled guilty in the United States District Court for the Central District of California, James V. Selna, J., to distribution of methamphetamine and was sentenced, as a career offender, to 188 months' imprisonment. Defendant appealed. The Court of Appeals, 115 F.4th 987, vacated and remanded.

Holdings: On rehearing en banc, the Court of Appeals, Thomas, Circuit Judge, held that:

pure question of law exception to criminal procedure rule requiring preservation of error for review unless the error is plain and affects substantial rights was incompatible with Supreme Court precedent and plain language of the rules of criminal procedure, and thus unpreserved claims of legal error may be reviewed only for plain error; overruling *United States v. Patrin*, 575 F.2d 708; *Guam v. Okada*, 694 F.2d 565; *United States v. Whitten*, 706 F.2d 1000; *United States v. Rubalcaba*, 811 F.2d 491; *United States v. Carlson*, 900 F.2d 1346; *United States v. Flores-Payon*, 942 F.2d 556; *United States v. Smith*, 905 F.2d 1296; *United States v. McAdory*, 935 F.3d 838; *United States v. Garcia-Lopez*, 903 F.3d 887; *United States v. Eckford*, 77 F.4th 1128;

California offense of assault with a deadly weapon that was not a firearm was not a "crime of violence" under enumerated offenses clause of career offender sentencing enhancement; overruling *United States v. Grajeda*, 581 F.3d 1186; *United States v. Jimenez-Arzate*, 781 F.3d 1062; *United States v. Vasquez-Gonzalez*, 901 F.3d 1060; and

district court's error in finding defendant's California conviction for assault with a deadly weapon that was not a firearm qualified as a crime of violence was not plain.

Affirmed.

Collins, Circuit Judge, filed an opinion concurring in part and concurring in judgment.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

Appeal from the United States District Court for the Central District of California, James V. Selna, Senior District Judge, Presiding, D.C. No. 8:20-cr-00171-JVS-FWS-5

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Before: Mary H. Murguia, Chief Judge, and Ronald M. Gould, Milan D. Smith, Jr., Jacqueline H. Nguyen, Ryan D. Nelson, Eric D. Miller, Daniel P. Collins, Lucy H. Koh, Jennifer Sung, Holly A. Thomas, and Ana de Alba, Circuit Judges.

Opinion by Judge H.A. Thomas;

Concurrence by Judge Collins

OPINION

H.A. THOMAS, Circuit Judge:

***1203** Jesus Ramiro Gomez pleaded guilty to distribution of methamphetamine. At sentencing, the district court found that he was subject to a career offender enhancement and sentenced him to 188 months' imprisonment. In applying the enhancement, the district court determined that Gomez's prior conviction for assault with a deadly weapon under California Penal Code § 245(a)(1) was a crime of violence— a classification Gomez did not challenge until his opening brief on appeal.

The government argued that Gomez's unpreserved challenge should be reviewed only for plain error under Federal Rule of Criminal Procedure 52. In a long series of decisions, however, we had previously held that "where the appeal presents a pure question of law and there is no prejudice to the opposing party," we may review de novo rather than for plain error. *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 426 (9th Cir. 2011). Applying this exception, a three-judge panel of our court reviewed de novo whether a conviction under Section 245(a)(1) constitutes a crime of violence and concluded that it did not. *See United States v. Gomez*, 115 F.4th 987, 999 (9th Cir. 2024), *vacated and reh'g en banc granted*, 133 F.4th 1083 (9th Cir. 2025).

We have jurisdiction over this appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Sitting en banc, we now overrule our precedent recognizing a "pure question of law" exception to Rule 52 and hold that unpreserved claims of legal error may be reviewed only for plain error. We further hold that, in light of the Supreme Court's decision in *Borden v. United States*, 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021), a conviction under California Penal Code § 245(a)(1) does not qualify as a crime of violence. But because the district court's error in concluding otherwise was not plain, we affirm the district court's judgment.

I.

Pursuant to the Sentencing Reform Act and the United States Sentencing Guidelines ("U.S.S.G."), the "career offender" enhancement applies when a defendant is sentenced for a controlled substance offense or a "crime of violence" and has two prior such convictions. U.S.S.G. § 4B1.1(a) (U.S. Sent'g Comm'n 2018); *see also* 28 U.S.C. § 994(h) (directing the Sentencing Commission to include such a provision in the Guidelines). For purposes of this enhancement, a crime of violence is defined in part as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that ... has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G.

§ 4B1.2(a). This portion of the definition is known as the "elements clause." *United States v. Davis*, 588 U.S. 445, 451–52, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019) (referring to the corresponding clause of multiple similar statutory definitions of violent crimes as the "elements clause").

***1204** Courts employ the "categorical approach" to determine whether a conviction constitutes a qualifying offense under Section 4B1.2(a). *See United States v. Prigan*, 8 F.4th 1115, 1118–19 (9th Cir. 2021); *see also Borden*, 593 U.S. at 424, 141 S.Ct. 1817 (plurality opinion) (applying categorical approach to the comparable elements clause in § 924(e)(2)(B)(i)); *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (describing categorical approach). Under this approach, a court must examine whether a conviction "fits within the scope of a generically defined crime, such as ... a 'crime of violence.' " *United States v. Ellsworth*, 456 F.3d 1146, 1152 (9th Cir. 2006); *see also Borden*, 593 U.S. at 424, 141 S.Ct. 1817 (plurality opinion) ("The focus is ... on whether the elements of the statute of conviction meet the federal standard."). When applying the categorical approach, "the facts of a given case are irrelevant." *Borden*, 593 U.S. at 424, 141 S.Ct. 1817 (plurality opinion). Instead, courts focus only on "whether the elements of the statute of conviction meet the federal" crime of violence definition. *Id.* If, when conducting this examination, a court determines that the statute of conviction makes unlawful any conduct less culpable than that required to constitute a crime of violence, then there is "not a categorical match." *United States v. Begay*, 33 F.4th 1081, 1091 (9th Cir. 2022) (en banc).

In 2022, Gomez pleaded guilty to distribution of methamphetamine. *See* 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). At sentencing, the district court applied a career offender enhancement because, in addition to Gomez's latest conviction for distribution of methamphetamine and a previous conviction for possession of cocaine for sale, he had also previously been convicted of assault with a deadly weapon under California Penal Code § 245(a)(1), which the court determined was a "crime of violence" under Section 4B1.1(a). The application of the career offender enhancement increased Gomez's adjusted offense level from 27 to 34[1] and his advisory sentencing range from 130–162 to 262–327 months' imprisonment. The district court sentenced Gomez to 188 months' imprisonment.

Gomez did not object to the district court's finding that his Section 245(a)(1) conviction was a crime of violence. He raised this challenge for the first time on appeal. Reviewing that challenge, the three-judge panel vacated Gomez's sentence and remanded the case to the district court for resentencing. *See Gomez*, 115 F.4th at 999. Applying our "pure question of law" exception to plain error review, the panel exercised its discretion to review Gomez's unpreserved legal challenge de novo. *See id.* at 990–92; *see also United States v. Eckford*, 77 F.4th 1228, 1231 (9th Cir. 2023). The panel held that a Section 245(a)(1) conviction is not a crime of violence and thus could not serve as a predicate offense for the career offender enhancement. *Gomez*, 115 F.4th at 992–99. We vacated that decision after a majority of the nonrecused active judges on our court voted to rehear this matter en banc. *See Gomez*, 133 F.4th at 1083.

II.

We first address the applicable standard of review for an unpreserved claim of error.

Under Federal Rule of Criminal Procedure 52(a), "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). But under ***1205** Rule 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention." Fed. R. Crim. P. 52(b).

The import of Rule 52 could hardly be clearer: if an error is not plain or does not affect substantial rights, it must be ignored if it was not raised below. Although this concept has gone more or less unchanged since the Federal Rules of Criminal Procedure were put into place in 1944, beginning in the late 1970s, our court created an exception to plain error review. In 1978, relying on several decisions in non-criminal cases, we held in *United States v. Patrin* that although "[a]s a general rule, 'a federal appellate court does not consider an issue not passed upon below,' " there nevertheless existed a "narrow exception to the general rule" for situations where "the issue conceded

or neglected in the trial court is purely one of law and ... does not affect or rely upon the factual record developed by the parties." 575 F.2d 708, 712 (9th Cir. 1978) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)). Our decision in *Patrin* did not mention Rule 52(b). *See generally id.*

A series of conforming decisions followed. *See, e.g., Guam v. Okada*, 694 F.2d 565, 570 n.8 (9th Cir. 1982), *opinion amended on denial of reh'g*, 715 F.2d 1347 (9th Cir. 1983); *United States v. Whitten*, 706 F.2d 1000, 1012 (9th Cir. 1983); *United States v. Rubalcaba*, 811 F.2d 491, 493 (9th Cir. 1987); *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). By the early 1990s, we had clearly delineated a category of criminal appeals presenting "pure questions of law" to which we could apply de novo review, which existed alongside those to which plain error applied. For instance, in *United States v. Flores-Payon*, we held that our "narrow exceptions to the general rule against review on appeal of issues not raised below" included situations where "the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court," and observed that "[f]urther exception may be made when plain error has occurred and an injustice might otherwise result." 942 F.2d 556, 558 (9th Cir. 1991) (first citing *Carlson*, 900 F.2d at 1349; *United States v. Smith*, 905 F.2d 1296, 1302 (9th Cir. 1990); then citing *Whitten*, 706 F.2d at 1012; Fed. R. Crim. P. 52).

By the early aughts, however, the Supreme Court had made clear that appellate courts have limited authority to review unpreserved legal issues. First, in *Jones v. United States*, the Court rejected the argument that the Federal Death Penalty Act of 1994 created an exception to Rule 52(b)'s plain error review. *See* 527 U.S. 373, 388–89, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). Then, in *United States v. Vonn*, the Court held that "a defendant who lets Rule 11 error pass without objection in the trial court ... has the burden to satisfy the plain-error rule," despite the expression of a harmless error standard in Rule 11(h). 535 U.S. 55, 58–59, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). The Court emphasized that to hold otherwise would "amount to finding a partial repeal of Rule 52(b) by implication"—a "disfavored" result. *Id.* at 65, 122 S.Ct. 1043.

In 2009, the Court further "cautioned that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice, and that the creation of an unjustified exception to the Rule would be '[e]ven less appropriate.' " *Puckett v. United States*, 556 U.S. 129, 135–36, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (alterations in original) (citation omitted) (first quoting ***1206** *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); and then quoting *Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). Holding that "a forfeited claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review," the Court noted that the "real question in this case is not *whether* plain-error review applies ..., but rather what conceivable reason exists for disregarding its evident application." *Id.* at 131, 136, 129 S.Ct. 1423 (emphasis in original). The Court underlined that while the breach of a plea agreement was "undoubtedly a violation of the defendant's rights, ... the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others." *Id.* at 136, 129 S.Ct. 1423 (citation omitted).

After *Puckett*, it should arguably have been beyond debate that our application of a "pure question of law" exception to plain error review could not survive. What, after all, could "all others" have referred to if not the remainder of forfeited errors that a defendant might raise on appeal? Indeed, as at least one of our colleagues has observed, "our sister circuits routinely review pure questions of law for plain error."[2] *United States v. Zhou*, 838 F.3d 1007, 1016 (9th Cir. 2016) (Graber, J., concurring).

To be sure, our application of a "pure question of law" exception to Rule 52(b) has not gone unquestioned. *See, e.g., Begay*, 33 F.4th at 1090 n.3 ("The government did not ask us to revisit our precedent allowing the application of de novo review to pure questions of law where we are satisfied the government will not be prejudiced. And because the outcome is the same regardless of what standard we apply, we need not consider whether that precedent can be reconciled with the Supreme Court's cases interpreting

Federal Rule of Criminal Procedure 52(b)." (citations omitted)); *United States v. Castillo*, 69 F.4th 648, 653 (9th Cir. 2023) ("[T]he assumption that de novo review applies to purely legal questions that have not been argued below has been called into question both by our court and by the Supreme Court."). Nevertheless, we have as a court continued to reaffirm and reapply the principle that we "are not limited to [plain error] review when we are presented with [1] a question that is purely one of law and [2] where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *Eckford*, 77 F.4th at 1231 (alterations in original) (quoting *United States v. McAdory*, 935 F.3d 838, 841–42 (9th Cir. 2019)); *see also, e.g., United States v. Garcia-Lopez*, 903 F.3d 887, 892 (9th Cir. 2018).

The time has come for us to right our course. We "creat[ed] out of whole cloth" a pure question of law exception to Rule 52(b)—an exception that is incompatible with Supreme Court precedent and the plain language of the Rule. *See Johnson*, 520 U.S. at 466, 117 S.Ct. 1544. We now overrule our precedent establishing such ***1207** an exception. Because Gomez did not object in the district court to the classification of his Section 245(a)(1) conviction as a crime of violence, his claim is reviewable only for plain error. *See* Fed. R. Crim. P. 52(b). To prevail in this appeal, Gomez must therefore demonstrate that the district court (1) committed an error (2) that is plain and that (3) affects his substantial rights. *See Greer v. United States*, 593 U.S. 503, 507–08, 141 S.Ct. 2090, 210 L.Ed.2d 121 (2021). If those three requirements are satisfied, we have discretion to remedy the error if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135, 129 S.Ct. 1423 (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

III.

Applying the standard set forth above, we turn next to whether the district court erred in determining that assault with a deadly weapon under California Penal Code § 245(a)(1) is a crime of violence.

A.

We have observed that, under the categorical approach, the least culpable act criminalized under the statute of conviction must involve the level of force described in the federal crime of violence definition. *See Begay*, 33 F.4th at 1091. If the statute criminalizes any conduct less culpable than the federal definition's requirement, "the statute is not a categorical match," and a conviction under that statute does not qualify as a crime of violence. *Id.* Gomez argues that assault with a deadly weapon under Section 245(a)(1) does not match the "elements clause" of U.S.S.G. § 4B1.2(a)(1) because Section 245(a)(1) criminalizes a lesser mens rea than the federal definition. We agree.

In *Borden*, the Supreme Court determined that a defendant's conviction for reckless aggravated assault under Tennessee law did not satisfy the elements clause because that clause requires the statute of conviction to have a mens rea greater than recklessness. *See* 593 U.S. at 445, 141 S.Ct. 1817 (plurality opinion). The plurality concluded that the mens rea requirement stems from the language in the elements clause requiring that force be used "against the person of another." *Id.* at 429, 141 S.Ct. 1817. The plurality relied on the Model Penal Code's mens rea definitions, noting that a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk." *Id.* at 427, 141 S.Ct. 1817 (quoting Model Penal Code § 2.02(2)(c) (1985)). The Model Penal Code defines the most culpable mens rea—purpose—as when a person " 'consciously desires' a particular result." *Id.* at 426, 141 S.Ct. 1817 (quoting *United States v. Bailey*, 444 U.S. 394, 404, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980)). The plurality concluded that "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Id.* at 429, 141 S.Ct. 1817. Because "[r]eckless conduct is not aimed in that prescribed manner," it does not satisfy the elements clause. *Id.*

Justice Thomas, concurring in the judgment, agreed that reckless crimes do not satisfy the elements clause. *See id.* at 446, 141 S.Ct. 1817 (Thomas, J., concurring). His analysis, however, relied on a different phrase in the statute: "use of physical force." *Id.* In Justice

Thomas's view, the use of physical force "has a well-understood meaning applying only to intentional acts designed to cause harm." *Id.* (quoting *Voisine v. United States*, 579 U.S. 686, 713, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (Thomas, J., dissenting)). Because the reckless aggravated assault statute at issue ***1208** "could be violated through mere recklessness," it did not satisfy the elements clause. *Id.*

As we held in *United States v. Davis*, "when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other," the opinion is binding. 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc); *see also Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (explaining that the holding of the Court in a plurality opinion is the narrowest ground agreed upon by at least five Justices). In *Borden*, the four-justice plurality and Justice Thomas agreed that a mens rea of recklessness is insufficient to satisfy the elements clause. The plurality opinion is narrower than Justice Thomas's opinion because Justice Thomas would have held that the elements clause encompasses only "intentional acts designed to cause harm." *Borden*, 593 U.S. at 446, 141 S.Ct. 1817 (Thomas, J., concurring) (quoting *Voisine*, 579 U.S. at 713, 136 S.Ct. 2272 (Thomas, J., dissenting)). Even if we had not articulated the plurality's reasoning in our decision in *Begay, see* 33 F.4th at 1092–94, it would therefore be binding upon us. And, indeed, the government now agrees that the plurality opinion must be treated as controlling.

Following *Borden*, the elements clause is satisfied only by crimes that require uses of force with a mens rea more culpable than recklessness. Stated differently, if a person can be convicted under a criminal statute by using force against another with only the "conscious[ ] disregard[ ]" of a "substantial and unjustifiable risk," then the crime is not a crime of violence. [3] *Borden*, 593 U.S. at 427, 141 S.Ct. 1817 (plurality opinion).

B.

Gomez was convicted under California Penal Code § 245(a)(1) for assault with a deadly weapon that is not a firearm. In California, assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240. The assault statute does not, on its face, require a specific mens rea. *See id.* We thus look to the California Supreme Court's interpretation of the statute to determine the requisite mens rea requirement. *See Johnson v. United States*, 559 U.S. 133, 138, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (explaining that while interpreting the elements clause is a question of federal law, we are bound by the state court's "interpretation of state law, including its determination of the elements" of the relevant crime).

The California Supreme Court has held that the requisite mens rea for a conviction under Section 245(a)(1) is "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." *People v. Williams*, 26 Cal.4th 779, 111 Cal.Rptr.2d 114, 29 P.3d 197, 204 (2001). Section 245(a)(1), therefore, does not require an intent to apply force, knowledge that an action will cause force to be applied to another, or even subjective awareness of a risk that such force will result.

"A person acts purposefully when he 'consciously desires' a particular result." ***1209** *Borden*, 593 U.S. at 426, 141 S.Ct. 1817 (plurality opinion) (quoting *Bailey*, 444 U.S. at 404, 100 S.Ct. 624). Under *Williams*, Section 245(a)(1) does not require an intent to cause harm; it merely requires an intent to do an act that results in harm. A defendant need not have "specific intent to cause injury or a subjective awareness of the risk that an injury might occur." *Williams*, 26 Cal.4th 779, 111 Cal.Rptr.2d 114, 29 P.3d at 204; *see also People v. Wyatt*, 48 Cal.4th 776, 108 Cal.Rptr.3d 259, 229 P.3d 156, 158 (2010) ("[T]he criminal intent required for assault is 'the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.' " (quoting *People v. Rocha*, 3 Cal.3d 893, 92 Cal.Rptr. 172, 479 P.2d 372, 376–77 (1971))). The "intentional act" requirement in Section 245(a)(1) requires only that the act in question be volitional. *See Williams*, 26 Cal.4th 779, 111 Cal.Rptr.2d 114, 29 P.3d at 201 ("The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm." (quoting

People v. Colantuono, 7 Cal.4th 206, 26 Cal.Rptr.2d 908, 865 P.2d 704, 712 (1994))). It does not require the intentional application of force against another.[4]

A person "acts knowingly when 'he is aware that [a] result is practically certain to follow from his conduct,' whatever his affirmative desire." *Borden*, 593 U.S. at 426, 141 S.Ct. 1817 (plurality opinion) (alteration in original) (quoting *Bailey*, 444 U.S. at 404, 100 S.Ct. 624). The government argues that Section 245(a)(1) requires, at the very least, a knowing use of force. But such a reading is incompatible with the California Supreme Court's holding, recited above, that assault "does not require ... a subjective awareness" of the risk of injury the defendant has created. *Williams*, 26 Cal.4th 779, 111 Cal.Rptr.2d 114, 29 P.3d at 204. While it is true that—as the government emphasizes—the California Supreme Court requires knowledge of the facts that make the action the type of act likely to result in harm, this does not equate to a subjective awareness that harm "is practically certain" to result. *Borden*, 593 U.S. at 426, 141 S.Ct. 1817 (plurality opinion). Rather, as the California Supreme Court has explained, even "a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to [the] defendant, would find that the act would directly, naturally and probably result in a battery." *Williams*, 26 Cal.4th 779, 111 Cal.Rptr.2d 114, 29 P.3d at 203 n.3. This falls far short of *Borden*'s definition of knowledge.[5] Indeed, ***1210** "knowledge of [the] ... facts sufficient to establish that the act by its nature will probably" result in force, *id.*, 111 Cal.Rptr.2d 114, 29 P.3d at 204, is less culpable even than *Borden*'s definition of recklessness, which requires conscious disregard of a substantial risk, 593 U.S. at 427, 141 S.Ct. 1817 (plurality opinion).

Our concurring colleague disagrees, writing that the requisite mens rea for a conviction under Section 245(a)(1) is "a significantly more demanding mental state than the sort of recklessness rejected in *Borden*." Concurrence at 1216. Our colleague emphasizes that "a defendant who violates § 245(a)(1) must be shown to have *intentionally* committed an act with actual *subjective knowledge of circumstances* that objectively establish that a battery *will directly occur* as a result." *Id.* But, as explained, Section 245(a)(1) "does not require ... a subjective awareness of the risk that an injury might occur."[6] *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 204. Awareness of the facts that would cause a reasonable person to "find that the act would directly, naturally and probably result in a battery," *id.*, 111 Cal.Rptr.2d 114, 29 P.3d at 203 n.3, does not equate to awareness of the risk. And a defendant who lacks a subjective awareness of any risk cannot "consciously disregard[ ] a substantial and unjustifiable risk." *Borden*, 593 U.S. at 427, 141 S.Ct. 1817 (plurality opinion).

Accordingly, we overrule our pre-*Borden* decisions holding that a conviction under Section 245(a)(1) is a crime of violence under Section 4B1.1(a). *See, e.g.*, *United States v. Grajeda*, 581 F.3d 1186, 1189–97 (9th Cir. 2009); *United States v. Jimenez-Arzate*, 781 F.3d 1062, 1064–65 (9th Cir. 2015) (per curiam); *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1065–68 (9th Cir. 2018). And we hold that the district court erred when it ruled to the contrary in Gomez's case.[7]

IV.

We next consider whether the district court's error was plain. "[T]he Supreme Court has made clear that whether an error is 'plain' for purposes of Rule 52(b) is judged 'at the time of review' by the appellate court and *not* at the 'time of error.' " *United States v. Irons*, 31 F.4th 702, 713 (9th Cir. 2022) (emphasis in original) (quoting *Henderson v. United States*, 568 U.S. 266, 273, 133 S.Ct. 1121, 185 L.Ed.2d 85 (2013)). "The question, then, is whether the district court's [determination], 'even if now wrong (in light of the ***1211** new appellate holding),' should ... be characterized as 'questionabl[y]' wrong rather than '*plainly* wrong.' " *Id.* (second alteration and emphasis in original) (quoting *Henderson*, 568 U.S. at 278, 133 S.Ct. 1121). This requires us to assess "whether our analysis reveals the question at issue to have a 'plain' answer or whether that analysis confirms that we have instead answered a close and difficult question." *Id.* Undertaking that analysis, we conclude that the decision we have reached today is a "close and difficult" one. *Id.*

Both before and after *Borden*, we have consistently held that Section 245(a)(1) qualifies as a crime of violence. First, in *Grajeda*, we held that Section

245(a)(1) was a crime of violence because it requires " 'violent' and 'active' " force and "not merely accidental" uses of force. 581 F.3d at 1195. We were thus satisfied that the assault statute did not criminalize merely "reckless" conduct. *Id.*

Next, in *Jimenez-Arzate*, we considered whether two California cases undercut *Grajeda*'s holding and determined that they did not. 781 F.3d at 1064–65. We explained that in *People v. Aznavoleh*, 210 Cal. App. 4th 1181, 148 Cal.Rptr.3d 901 (2012), the California Court of Appeal upheld a conviction under Section 245(a)(1) when the defendant "intentionally ran a red light while racing another car down the street even though he saw a car entering the intersection on the green," and made "no effort to stop despite a passenger warning him that he needed to stop." *Jimenez-Arzate*, 781 F.3d at 1064 (citing *Aznavoleh*, 210 Cal. App. 4th at 1185, 1189, 148 Cal.Rptr.3d 901). And we noted that in *Wyatt*, the California Supreme Court upheld a conviction for manslaughter and assault on a child causing death because "substantial evidence established that [the] defendant knew he was striking his young son with his fist, forearm, knee, and elbow, and that he used an amount of force a reasonable person would realize was likely to result in great bodily injury." *Id.* (quoting *Wyatt*, 108 Cal.Rptr.3d 259, 229 P.3d at 157). We held that these decisions did not demonstrate that Section 245(a)(1) criminalizes conduct less culpable than the elements clause requires. *Id.* at 1064–65. We observed that the defendant in *Aznavoleh* "heedlessly disregard[ed] a perceived likelihood of death or grave injury to others," and that in *Wyatt* "a reasonable person would have recognized the dangers" of the defendant's actions. *Id.*

In our most recent pre-*Borden* decision on this issue, we held that Section 245(a)(1)'s "intentional act" requirement establishes that it is an intentional crime, which satisfies the elements clause. *Vasquez-Gonzalez*, 901 F.3d at 1068. Although we quoted the California Supreme Court's conclusion in *Williams* that "recklessness or criminal negligence" is insufficient under the assault statute, we did not identify that, as discussed earlier, recklessness here was a synonym for criminal negligence rather than a separate mental state. *See id.* at 1067.

In the years since the Supreme Court decided *Borden*, we have continued to rely upon these earlier decisions to reject defendants' arguments that Section 245(a)(1) is not a crime of violence. Although these decisions are unpublished, they demonstrate that we did not identify *Borden* as being irreconcilable with our prior precedent. *See, e.g., United States v. Morton*, No. 21-10291, 2022 WL 17076203, at *1 (9th Cir. Nov. 18, 2022) ("Morton argues that *Borden v. United States* ... abrogates [our] precedent.... We previously held that section 245 offenses are crimes of violence precisely because the statute requires a mens rea greater than recklessness. *Borden* requires nothing more." (citations omitted)); ***1212** *United States v. Man*, No. 21-10241, 2022 WL 17260489, at *1 (9th Cir. Nov. 29, 2022) (same); *Paz-Negrete v. Garland*, No. 16-73889, 2023 WL 4404348, at *1 (9th Cir. July 7, 2023) ("Paz-Negrete argues that § 245(a)(1) is broader than § 16(a) because its elements can be satisfied by an offensive touching or reckless or negligent conduct, but our court rejected both those arguments in *United States v. Grajeda* ... and *United States v. Vasquez-Gonzalez* .... Because *Grajeda* and *Vasquez-Gonzalez* are binding authority, we conclude the IJ correctly determined that Paz-Negrete's § 245(a)(1) conviction constituted an aggravated felony."). And in *Amaya v. Garland*, we rejected the argument that a crime of violence requires proof of specific intent after *Borden*. 15 F.4th 976, 983 (9th Cir. 2021).

Given these decisions—and the analysis we have undertaken above—we cannot conclude that the answer we have reached today is plain. *Cf. Irons*, 31 F.4th at 713 (concluding that the "textual analysis" at issue there was "sufficiently one-sided, and sufficiently dictate[d] the answer" that it was plain error for the district court to reach a different conclusion). Gomez has therefore not satisfied his burden of showing that the district court committed plain error when it applied the career offender enhancement to his sentence. And, in light of that conclusion, we need not answer whether the error affected Gomez's substantial rights.

V.

For the reasons discussed above, we overrule our precedent recognizing a "pure question of law"

exception to Rule 52 and hold that forfeited claims of legal error are subject to plain error review. We further conclude that convictions under California Penal Code § 245(a)(1) are not crimes of violence and cannot serve as the predicate for the application of the career offender enhancement. But because the district court's error in concluding otherwise was not plain, its judgment stands **AFFIRMED**.

COLLINS, Circuit Judge, concurring in part and concurring in the judgment:

I agree with the court's decision to overrule our precedent recognizing unwritten exceptions to the plain error standards set forth in Federal Rule of Criminal Procedure 52(b). I therefore join section II of the court's opinion. I also agree with the majority's ultimate judgment affirming Jesus Ramiro Gomez's sentence, but I reach that conclusion by a very different route. Contrary to what the majority concludes, I believe that we should adhere to our precedent holding that a conviction for assault with a deadly weapon under California Penal Code § 245(a)(1) qualifies as a "crime of violence," because that caselaw is not inconsistent with the Supreme Court's decision in *Borden v. United States*, 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021). Consequently, I would hold that the district court did not err at all, and not merely that it did not commit a plain error. I therefore respectfully concur in part and in the judgment.

I

In determining Gomez's sentencing range under the sentencing guidelines, the district court applied the career offender enhancement contained in U.S.S.G. § 4B1.1(a). That ruling rested dispositively on the district court's conclusion that Gomez's prior conviction for assault with a deadly weapon, in violation of California Penal Code § 245(a)(1), constituted a "crime of violence" within the meaning of U.S.S.G. § 4B1.2(a). That conclusion was dictated by our precedent holding that § 245(a)(1) is categorically a crime of violence under the various comparable definitions ***1213** of that phrase in federal criminal law. *See United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1065–68 (9th Cir. 2018); *United States v. Jimenez-Arzate*, 781 F.3d 1062, 1064–65 (9th Cir. 2015); *United States v. Grajeda*, 581 F.3d 1186, 1189–97 (9th Cir. 2009). Gomez claims for the first time on appeal that this settled precedent is no longer good law in light of *Borden*, and I agree with the majority that we review this contention under the plain error standards of Federal Rule of Criminal Procedure 52(b). Under those standards, Gomez must first show that (1) there was an error; (2) the error is plain; and (3) the error affects Gomez's "substantial rights, which generally means that there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Greer v. United States*, 593 U.S. 503, 507–08, 141 S.Ct. 2090, 210 L.Ed.2d 121 (2021) (simplified). "If those three requirements are met, [we] may grant relief if [we] conclude[ ] that the error had a serious effect on the fairness, integrity or public reputation of judicial proceedings." *Id.* at 508, 141 S.Ct. 2090 (simplified). In my view, Gomez fails at the first step, because there was no error.

II

A

In evaluating whether our § 245(a)(1) precedent is inconsistent with *Borden*, we must first determine what the binding holding of *Borden* is.

In *Borden*, the defendant had previously been convicted of "recklessly committing an assault" in violation of a Tennessee statute, *see Borden*, 593 U.S. at 424–25, 141 S.Ct. 1817 (plurality) (simplified), and he argued that this offense did not qualify as a "violent felony" for purposes of the sentencing enhancement provided under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The relevant definition of "violent felony" in the ACCA, like that of "crime of violence" in U.S.S.G. § 4B1.2(a), applies to any offense that has as an element the "use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i); *see also* U.S.S.G. § 4B1.2(b) (same). In *Borden*, the plurality framed the question presented there as whether this "elements clause" of the definition "includes offenses," like the Tennessee statute, that "criminaliz[e] reckless conduct." 593 U.S. at 429, 141 S.Ct. 1817 (plurality). The plurality answered that question in the negative, holding that the definition

"covers purposeful and knowing acts, but excludes reckless conduct." *Id.* at 432, 141 S.Ct. 1817. The plurality reasoned that the phrase "use of physical force *against* the person of another" denotes a *targeted* use of force, and thereby "sets out a *mens rea* requirement—of purposeful or knowing conduct." *Id.* at 432, 434, 141 S.Ct. 1817 (emphasis added). Reckless conduct, which "is not opposed to or directed at another," therefore does not suffice under the plurality's view. *Id.* at 432, 141 S.Ct. 1817.

Justice Thomas concurred in the judgment, agreeing that the Tennessee offense was not a violent felony under the ACCA. *Borden*, 593 U.S. at 445, 141 S.Ct. 1817 (Thomas, J., concurring in the judgment). However, his reasoning differed from the plurality's. He concluded that "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.* (emphasis added) (additional quotation marks omitted).

In these circumstances, in which there is no majority opinion for the Court, the binding holding of the decision is the "position ***1214** taken by those [Justices] who concurred in the judgment[ ] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). As the majority notes, the narrowest ground of decision between the plurality and Justice Thomas in *Borden* is their agreement that an offense that may be committed with a *mens rea* of recklessness does not satisfy the "elements clause" of the definition of "violent felony" in the ACCA. *See* Opin. at 1208. *Borden* therefore establishes that if a particular statutory offense may be committed merely by showing that the person acted with "conscious[ ] disregard[ ]" of a "substantial and unjustifiable risk ... in gross deviation from accepted conduct"—which the plurality described as "the most common formulation" of recklessness—then that offense does not satisfy the elements clause. *Borden*, 593 U.S. at 427, 141 S.Ct. 1817 (plurality); *id.* at 446, 141 S.Ct. 1817 (Thomas, J, concurring in the judgment) (relying on the reasoning in his prior dissent in *Voisine v. United States*, 579 U.S. 686, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016)); *see also Voisine*, 579 U.S. at 709, 136 S.Ct. 2272 (Thomas, J., dissenting) (asserting that the "standard for recklessness"—*viz.*, disregard of "a substantial and unjustifiable risk"—does not satisfy the *mens rea* required by the elements clause).

Because (1) the plurality's and Justice Thomas's rejection of a *mens rea* of recklessness is the least common denominator that defines the holding of *Borden* in construing the elements clause; (2) there is no overlap between the *Borden* plurality opinion and Justice Thomas's concurring opinion as to the extent to which a *mens rea* of *knowledge* would be sufficient; and (3) it is generally inappropriate to combine portions of a plurality or concurring opinion "with a *dissent*" to try to form a majority rationale that would be binding under *Marks, see Johnson v. City of Grants Pass*, 72 F.4th 868, 913 (9th Cir. 2023) (Collins, J., dissenting), *rev'd*, 603 U.S. 520, 144 S.Ct. 2202, 219 L.Ed.2d 941 (2024), *Borden* does not establish a standard for the *minimum mens rea*, above recklessness, that would be needed to satisfy the elements clause. Instead, it simply holds that recklessness does not suffice.

Indeed, even if the *Borden* plurality opinion were construed as a binding majority opinion in all respects, I do not think that that opinion is fairly read as purporting to articulate exactly what the requisite minimum level of *mens rea* is. On the contrary, in describing the holding that resulted from the combination of the plurality opinion and Justice Thomas's concurrence in the judgment, the plurality itself described that holding exactly as I have:

> Four Justices think that the "use" phrase, as modified by the "against" phrase, in ACCA's elements clause excludes reckless conduct. One Justice thinks, consistent with his previously stated view, that the "use" phrase alone accomplishes that result. *See post*, at 446 [141 S.Ct. 1817] (THOMAS, J., concurring in judgment). And that makes five to answer the question presented. Q: Does the elements clause exclude reckless conduct? A: Yes, it does.

593 U.S. at 437 n.6, 141 S.Ct. 1817 (plurality).

Moreover, the notion that the *Borden* plurality opinion establishes a minimum level of *mens rea* seems impossible to square with the plurality's insistence, in a footnote, that it was *not* addressing whether "mental states (often called 'depraved heart' or 'extreme recklessness') *between* recklessness and knowledge"

satisfied the elements clause. *Borden*, 593 U.S. at 429 n.4, 141 S.Ct. 1817 (emphasis added). And we have previously explicitly recognized, in ***1215** a prior en banc decision, that "the Supreme Court's decision in *Borden* stopped short of deciding whether offenses that may be committed with mental states *between* ordinary recklessness and knowledge ... qualify as crimes of violence." *United States v. Begay*, 33 F.4th 1081, 1086 (9th Cir. 2022) (en banc). Put simply, if the *Borden* plurality expressly declined to address whether any *mens rea* standard "between" recklessness and knowledge satisfies the elements clause, then the plurality's opinion cannot be read to define what the requisite minimum *mens rea* is. *Borden* merely holds that, whatever the exact line is, "ordinary recklessness" does not meet it. *Borden*, 593 U.S. at 429 n.4, 141 S.Ct. 1817 (plurality).

In my view, the majority therefore errs in extracting from *Borden* a minimum standard as to the level of knowledge that must be included in an offense's elements in order for that offense to satisfy the elements clause. According to the majority, *Borden* restricts the qualifying offenses to those that include a knowledge requirement that meets or exceeds the particular definition of knowledge set forth in the Model Penal Code and a few other sources. Thus, under the majority's view, an offense suffices *only* if its *mens rea* element requires knowledge in the sense of a defendant's subjective "aware[ness] that [a] result is *practically certain* to follow from his conduct." *See* Opin. at 1209 (quoting *Borden*, 593 U.S. at 426, 141 S.Ct. 1817 (plurality) (emphasis added)); *see also* Model Penal Code § 2.02(b)(ii) ("A person acts knowingly with respect to a material element of an offense when: ... if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

But in referencing this particular definition of knowledge, the *Borden* plurality did not suggest that it was the *only* one that would be acceptable under the elements clause. Rather, the *Borden* plurality invoked this formulation in order to underscore just how sharply the concept of knowledge contrasts with that of recklessness. As the plurality explained, recklessness is very different from knowledge because the "substantial and unjustifiable risk" that, if disregarded, establishes recklessness "need not come anywhere close to a *likelihood*," much less the practical certainty required under the Model Penal Code formulation of knowledge. *Borden*, 593 U.S. at 427, 141 S.Ct. 1817 (plurality) (emphasis added); *see also id.* (noting that recklessness covers "low-probability events" and "possible consequence[s]"). Furthermore, the Supreme Court authority on which *Borden* relied on this point did not itself consistently enunciate a "practical certainty" standard. In discussing the *mens rea* of knowledge, *Borden* cited *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), which in turn interchangeably referenced both knowledge that a result was "practically certain" to occur and "knowledge that the proscribed effects would *most likely follow*." *Id.* at 444–45, 98 S.Ct. 2864 (emphasis added) (citations omitted); *see also id.* at 444, 98 S.Ct. 2864 (referencing "action undertaken with knowledge of its *probable* consequences" (emphasis added)). Nothing in *Borden* required the Court to settle upon an *exact* line as to what *mens rea* above recklessness would suffice for purposes of the elements clause, and the Court did not do so.

Accordingly, the binding holding of *Borden* is that an offense with a *mens rea* of recklessness, as described in *Borden*, does not satisfy the elements clause.

B

The question, then, is whether California Penal Code § 245(a)(1) permits a conviction ***1216** based on the sort of recklessness that was rejected by *Borden.* The answer is no.

As definitively construed by the California Supreme Court, the "assault" offense set forth in § 245(a)(1) requires, *inter alia*, "[1] an intentional act and [2] actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." *People v. Williams*, 26 Cal.4th 779, 111 Cal.Rptr.2d 114, 29 P.3d 197, 204 (2001) (emphasis added). In other words, § 245(a)(1) requires subjective knowledge of those facts that, in turn, *objectively* establish that a battery is *likely* to occur as the *direct* result of the defendant's intentional act, but the statute

does not require subjective knowledge that the battery itself will occur.

This distinctive *mens rea* is a significantly more demanding mental state than the sort of recklessness rejected in *Borden.* The latter standard, as the plurality explained, did not require that the risk of a battery "come anywhere close to a likelihood," *Borden*, 593 U.S. at 427, 141 S.Ct. 1817 (plurality), whereas the *Williams* standard affirmatively requires that a battery will be the "probabl[e] and direct[ ] result." *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 204; *see also id.*, 111 Cal.Rptr.2d 114, 29 P.3d at 202 (explaining that "the mental state for assault incorporates the language of probability, *i.e.*, direct, natural and probable consequences"). Moreover, in contrast to a defendant acting with ordinary recklessness, who merely "pay[s] insufficient attention to the potential application of force," a defendant who violates § 245(a)(1) must be shown to have *intentionally* committed an act with actual *subjective knowledge of circumstances* that objectively establish that a battery *will directly occur* as a result. *Borden*, 593 U.S. at 432, 141 S.Ct. 1817 (plurality). And because § 245(a)(1) thus requires an intentional act and subjective knowledge of the facts that make the battery likely to directly result from that act, a § 245(a)(1) violation involves a "targeted" use of force "against" another person in a way that ordinary recklessness does not. *Id.* Although *Williams*'s *mens rea* standard falls short of the Model Penal Code's knowledge standard (because it does not require *subjective* knowledge that the battery itself is *practically certain* to occur), it is more demanding than the sort of mere recklessness rejected in *Borden.*

The majority does not dispute that, as compared to ordinary recklessness, the nuanced *mens rea* element described in *Williams* requires a much greater likelihood that a battery will result from the act that the defendant intentionally commits with knowledge of the associated objectively-risk-creating circumstances. But the majority says that this difference does not matter because there is another difference that cuts the other way: in contrast to the "most common formulation" of recklessness, which requires a showing that the defendant "*consciously disregard[ed]* a substantial and unjustifiable risk," *Borden*, 593 U.S. at 427, 141 S.Ct. 1817 (plurality) (emphasis added), the *Williams* standard "does not require ... a *subjective awareness of the risk* that an injury might occur," *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 204 (emphasis added). Given this latter difference, the majority argues, the much higher probability of the risk required by *Williams* is "not relevant," and the *Williams* standard is "*less culpable* even than *Borden*'s definition of recklessness." *See* Opin. at 1210 & n.6 (emphasis added). The majority's reasoning is flawed.

There are good reasons to doubt the majority's conclusion that an aggravated assault under § 245(a)(1) is "less culpable" ***1217** than the reckless assault offense at issue in *Borden*, but that issue is ultimately beside the point.[1] The relevant question here is not relative culpability in the abstract but whether the elements of the offense establish the requisite *targeting* of force *against* another person. *See Borden*, 593 U.S. at 429, 141 S.Ct. 1817 (plurality). There is no such directing of force at another when, as with ordinary recklessness, the risk created by the defendant "need not come anywhere close to a likelihood." *Id.* at 427, 141 S.Ct. 1817. But when the defendant's intentional actions make it likely that force will be applied against another person as the direct consequence of those actions, and the defendant knows the facts that create that direct likelihood, he has "used force 'against' another person in the targeted way that [the elements] clause requires." *Id.* at 432, 141 S.Ct. 1817.[2] The fact that the defendant may not subjectively perceive the obvious direct consequence of what he knows he is doing does not negate the "directedness or targeting," *id.* at 430, 141 S.Ct. 1817, that inheres in the close connection between his known actions and their direct consequence.

Viewed in this fuller context, § 245(a)(1)'s *mens rea* requirement is somewhere "*between* ordinary recklessness and knowledge" as defined in the Model Penal Code provisions quoted in *Borden.* ***1218** *Begay*, 33 F.4th at 1086. Because § 245(a)(1) does not allow conviction based on the sort of recklessness rejected in *Borden*, our existing caselaw holding that § 245(a)(1) satisfies the elements clause is not inconsistent with the binding holding of *Borden.* Absent further guidance from the Supreme Court, I therefore would adhere to our precedent on *stare decisis* grounds and hold that § 245(a)(1) is a crime of violence for purposes of the elements clause.

C

As I have noted, the majority's contrary view is based on the premise that *Borden* requires that the knowledge element must meet or exceed the knowledge required under the Model Penal Code formulation. I agree with the majority that its conclusion properly follows from that assumption, but for the reasons I have explained, I do not think that *Borden* requires us to adopt that premise. Beyond that, I have one final concern about the majority's approach. Specifically, despite the majority's insistence to the contrary, *see* Opin. at 1208 n.3, the reasoning in its opinion today cannot be reconciled with our en banc decision in *Begay.*

I agree that *Begay*'s holding—*viz.*, that "crimes committed with 'extreme recklessness' or a 'depraved heart' satisfy the elements clause"—is logically "consistent" with the rule that "if a person can be convicted under a criminal statute by using force against another with only the conscious disregard of a substantial and unjustifiable risk, then the crime is not a crime of violence" under *Borden. See* Opin. at 1208 & n.3 (simplified). Stated differently, I agree with the majority that the statute at issue in *Begay* requires more than the recklessness rejected in *Borden*, and in that sense *Begay* is consistent with *Borden. See supra* at 1215-16 (explaining that the binding holding of *Borden* is simply that "an offense with a *mens rea* of recklessness, as described in *Borden*, does not satisfy the elements clause").

The problem with the majority's approach is that the "extreme recklessness" and "depraved heart" standards discussed in *Begay* do *not* satisfy the Model Penal Code's knowledge standard, which the majority later deploys as a sufficient basis for its conclusion that § 245(a)(1) fails the elements clause under *Borden. See* Opin. at 1209-10. Indeed, we expressly acknowledged in *Begay* that the "mental states" that were "at issue" there fell "between recklessness and knowledge" as described in *Borden. Begay*, 33 F.4th at 1093. If, as the majority insists, the Model Penal Code standard of knowledge *must* be met in order for a particular offense to satisfy the elements clause, then *Begay* was wrongly decided and cannot stand. The majority seems unwilling to accept that conclusion, but it does not explain how the statute at issue in *Begay* satisfies the majority's test while § 245(a)(1) fails that test.

* * *

Borden held that ordinary recklessness does not suffice under the elements clause, and that holding is consistent with our existing caselaw addressing § 245(a)(1). Because *Borden* does not disturb that precedent, I would adhere to it unless and until the Supreme Court further refines its understanding of the elements clause. I would therefore hold that the district court correctly concluded that § 245(a)(1) is a crime of violence. Accordingly, the district court did not err, much less plainly err, by applying the career offender enhancement. On that basis, I respectfully concur in part and in the judgment.

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Footnotes

1 The district court applied a three-level downward adjustment to the base offense level for Gomez accepting responsibility. *See* U.S.S.G. § 3E1.1(a), (b).

2 *See, e.g., United States v. Bennett*, 469 F.3d 46, 50 (1st Cir. 2006); *United States v. Gamez*, 577 F.3d 394, 397 (2d Cir. 2009) (per curiam); *United States v. Henderson*, 64 F.4th 111, 116–17 (3d Cir. 2023); *United States v. Carthorne*, 726 F.3d 503, 509 (4th Cir. 2013); *United States v. Chavez-Hernandez*, 671 F.3d 494, 497 (5th Cir. 2012); *United States v. Woodruff*, 735 F.3d 445, 448 (6th Cir. 2013); *United States v. Jaimes-Jaimes*, 406 F.3d 845, 849 (7th Cir. 2005); *United States v. Ellis*, 127 F.4th 1122, 1126 (8th Cir. 2025); *United States v. Gonzalez-Jaquez*, 566 F.3d 1250, 1251 (10th Cir. 2009); *United States v. Laines*, 69 F.4th 1221, 1233 (11th Cir. 2023); *United States v. Williams*, 358 F.3d 956, 966 (D.C. Cir. 2004).

3 Our holding in *Begay* is consistent with this conclusion. *See* 33 F.4th at 1093–95. In *Begay*, we held that crimes committed with "extreme recklessness" or a "depraved heart" satisfy the elements clause because they require sufficient awareness of the risk to constitute active uses of force against another person. *Id.*

4 Our decision in *Gutierrez v. Garland*, 106 F.4th 866 (9th Cir. 2024), is consistent with this conclusion. In *Gutierrez*, we held that carjacking under California Penal Code § 215 is not categorically a crime of violence. *See id.* at 871–77. Even though carjacking under California law necessarily involves the act of taking a vehicle with the intent to deprive its owner of that vehicle, we reasoned that the elements clause also requires a sufficiently culpable mens rea as to the use of force. *See id.* at 874–77. Our decision in *Gutierrez* demonstrates that when a state statute does not assign a sufficiently culpable mens rea to the use of force —as opposed to other elements of the crime—it fails to satisfy the elements clause. *See id.* at 876 ("That California courts do not consider a defendant's *mens rea* as to [the use of force] element [of carjacking] further suggests that a defendant can be convicted for accidental or reckless use of 'force ....' ").

5 The government also points to a single sentence in *Williams* stating that "mere recklessness or criminal negligence" is insufficient to satisfy California's assault statute. 111 Cal.Rptr.2d 114, 29 P.3d at 203. But the California Supreme Court explained that the quoted language uses the term recklessness "in its historical sense as a synonym for criminal negligence, rather than its more modern conception as a subjective appreciation of the risk of harm to another." *Id.,* 111 Cal.Rptr.2d 114, 29 P.3d at 203 n.4.

6 Our colleague writes that recklessness under *Borden* "did not require that the risk of a battery 'come anywhere close to a likelihood,' *Borden*, 593 U.S. at 427, 141 S.Ct. 1817 (plurality), whereas the *Williams* standard affirmatively requires that a battery will be the 'probabl[e] and direct[ ] result.' *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 204." Concurrence at 1216. But the probability of the risk of harm—even assuming that *Williams* requires a higher probability than a substantial and unjustifiable risk—is not relevant to the mens rea because *Williams* does not require a defendant to have any awareness of that risk.

7 The government argues that, even if Section 245(a)(1) does not satisfy the elements clause, it still meets the definition of a crime of violence contained in the enumerated offenses clause. *See* U.S.S.G. § 4B1.2(a)(2) (specifying that "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm" constitute crimes of violence). Aggravated assault under the enumerated offenses clause, however, requires a mens rea greater than extreme recklessness. *See United States v. Garcia-Jimenez*, 807 F.3d 1079, 1085 (9th Cir. 2015). For the reasons explained above, Section 245(a)(1) does not meet that standard.

1 Culpability is the focus of *other* provisions, such as the provision of the Immigration and Nationality Act declaring "inadmissible" certain persons who have committed a "crime involving moral turpitude," 8 U.S.C. § 1182(a)(2)(A)(i)(I). *See Safaryan v. Barr*, 975 F.3d 976, 985–88 (9th Cir. 2020) (holding that § 245(a)(1) is categorically a crime involving moral turpitude, because its combination of aggravating factors and *mens rea* makes the offense sufficiently turpitudinous under the applicable "sliding scale," which considers the combined culpability of both "a sufficiently reprehensible *actus reus* and a sufficiently culpable *mens rea*"). The much greater likelihood of bodily harm inherent in an aggravated assault under § 245(a)(1) as opposed to the reckless assault offense at issue in *Borden* significantly augments the former offense's culpability, and that substantially increased culpability outweighs the relatively modest countervailing distinction in culpability "between (1) someone who is subjectively aware of the facts that create [an] obvious risk versus (2) someone who is subjectively aware of [the] risk." *Id.* at 987. Nonetheless, I do not discern anything in the majority's decision that calls into question *Safaryan*'s holding that § 245(a)(1) is categorically a crime involving moral turpitude. *See id.* at 988 (noting that, under the sliding scale that governs the distinct analysis applicable to a "crime involving moral turpitude," even "recklessness is an adequate *mens rea* for assault if combined with additional aggravating factors").

2 The panel opinion was therefore wrong in contending that § 245(a)(1) would cover the hypothetical described in *Borden* in which "a driver ... 'decides to run a red light, and hits a pedestrian whom he did not see.' " *United States v. Gomez*, 115 F.4th 987, 995 (9th Cir. 2024) (quoting *Borden*, 593 U.S. at 432, 141 S.Ct.

1817 (plurality)). Because *Williams* makes clear that a defendant cannot be convicted based on "facts he did not know but should have known" and must be shown to have known "the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct," *Williams*, 111 Cal.Rptr.2d 114, 29 P.3d at 203, § 245(a)(1) does not apply to a defendant who actually thinks the crosswalk is clear when he runs the red light. *Cf. People v. Yorba*, 2008 WL 727693, at *6 (Cal. Ct. App. 2008) (upholding a § 245(a)(1) conviction because a jury could reasonably find that the defendant knew the facts making a collision likely when he "was speeding through a red light" and he saw "another car whose driver was proceeding legally with the left-turn arrow and who had looked both ways before entering the intersection," even though "defendant was honking his horn while approaching the intersection, was being chased by police cars with their sirens on, and had illegally driven through other traffic-light-controlled intersections while evading the police at unsafe speeds well in excess of the posted speed limits without being involved in other collisions").