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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2026

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THOMAS SHEELY, JR.

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

In *Borden v. United States*, 593 U.S. 420 (2021), the Court held Tennessee reckless aggravated assault—committed by recklessly causing serious bodily injury to another—did not meet the ACCA’s elements clause because “an offense that has an element the use, attempted use, or threatened use of physical force against another” requires more than reckless conduct, namely, a *mens rea* of purpose or knowledge. Four circuits have since divided over how *Borden* applies to a common but different type of statute: namely, a dual *mens rea* offense that requires an intentional act causing great bodily harm, but neither purpose nor knowledge as to the harm caused.

The circuits have disagreed preliminarily on the proper reading of *Borden*, which has in turn impacted their conclusions on whether the identical federal elements clause in the ACCA and the Guidelines merely requires a *mens rea* greater than recklessness as to the *actus reus* of the crime, or also as to the harm caused by the intentional act. Specifically referencing the Model Penal Code definitions of *mens rea* invoked by the *Borden* plurality, the Ninth and Tenth Circuits hold the elements clauses requires at least a “subjective awareness” of the “practical certainty” an intentional act will cause harm. By contrast, the Sixth and Eleventh Circuits disregard the Model Penal Code *mens rea* definitions embraced not only in *Borden*, but even earlier in *Voisine v. United States*, 579 U.S. 686, 691-92, 697-98 (2016). They hold an intentional act suffices for the elements clause, even if the harm caused by the intentional act is entirely accidental.

The question presented is:

Whether an offense that requires an intentional act, but neither purpose nor knowledge as to the resulting harm, is an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another” as required by the federal elements clause.

## **PARTIES TO THE PROCEEDING**

Pursuant to Sup. Ct. R. 14.1(b)(i), Petitioner submits that there are no parties to the proceeding other than those named in the caption of the case. Petitioner Thomas Sheely, Jr. was the defendant in the district court and the appellant below. Respondent United States of America was the plaintiff in the district court and the appellee below.

## **RELATED PROCEEDINGS**

The following proceedings are related under this Court's Rule 14.1(b)(iii):

- *United States v. Thomas Sheely, Jr.*, No. 21-cr-80113-DMM (S.D. Fla. Nov. 21, 2024) (rejecting argument that Petitioner's conviction under Fla. Stat §784.041(1) does not qualify as a "crime of violence" under U.S.S.G. § 4B1.2(1)(a), for enhancement purposes under U.S.S.G. § 2K2.1, and sentencing Petitioner to 84 months imprisonment);
- *United States v. Thomas Sheely, Jr.*, No. 24-13967 (11th Cir. Aug. 13, 2026) (affirming judgment).

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UNITED STATES OF AMERICA,  
*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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Thomas Sheely, Jr. (“Petitioner”) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

**OPINION BELOW**

The Eleventh Circuit’s opinion affirming Petitioner’s sentence, *United States v. Sheely*, 186 F.4th 1338 (11th Cir. Aug. 13, 2026), is reproduced at Appendix A-1. That decision followed *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc), which is reproduced at Appendix A-2.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely filed pursuant to Supreme Court Rules 13(3) and 13.1.

## STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act defines a “violent felony” as a crime that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i).

The Federal Sentencing Guidelines uses an identical definition for “crime of violence,” U.S.S.G. § 4B1.2(a)(1), which is incorporated for several enhancements under U.S.S.G. § 2K2.1(a). *See* § 2K2.1, comment. n. (1).

The Florida felony battery statute, Fla. Stat. § 784.041(1), provides that a person commits felony battery if he “[a]ctually and intentionally touches or strikes a person against the will of the other,” and “[c]auses great bodily harm, permanent disability, or permanent disfigurement.”

## INTRODUCTION

Few phrases in federal jurisprudence have generated as much confusion, and litigation, as the federal elements clause: an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” The Armed Career Criminal Act, the Federal Sentencing Guidelines, and 18 U.S.C. § 3559(c)(2)(F)(ii) use this exact language to *identically* define “violent felony,” “crime of violence,” and “serious violent felony” for sentencing enhancements. And 18 U.S.C. § 16(a) and § 924(c)(3)(A) use materially identical language to define “crime of violence” as an element of multiple federal crimes. Term after term, the Court has returned to these 19 words.

Most often, the Court has addressed the “degree of force” required by the elements clause. *See, e.g., Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010); *Stokeling v. United States*, 586 U.S. 73, 85 (2019); *Delligatti v. United States*, 604 U.S. 423, 433 (2025). But in three cases the Court has zeroed in on the separate *mens rea* requirement in statutes with identical or similar language: *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Voisine v. United States*, 579 U.S. 686 (2016); and most recently, *Borden v. United States*, 593 U.S. 420 (2021). This petition presents the question those cases left open.

In *Borden*, five Justices agreed that crimes with a *mens rea* of recklessness do not meet the elements clause. *See* 593 U.S. at 428 (plurality opinion); 445-46 (Thomas, J., concurring in the judgment). But they disagreed on the textual source for a heightened *mens rea*. The plurality reasoned 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, and that excluding reckless crimes was consistent with Congress’s purpose to “mark out a narrow ‘category of violent, active crimes’ involving only a ‘substantial degree of force, but also a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk.’” *Id.* at 423, 427-28 (citing *Leocal*, 543 U.S. at 9, 11)). While Justice Thomas agreed that a purposeful or knowing mental state was integral to elements clause offenses, he located that same requirement in the phrase “use of physical force,” which “has a well-understood meaning applying only to intentional acts designed to cause harm.” *Id.* at 446 (Thomas, J., concurring in the judgment) (citing *Voisine*, 579 U.S. at 713 ((Thomas, J., dissenting))).

The fractured decision in *Borden* has left lower courts divided on how narrowly or broadly to read it. Although both the plurality and concurrence agreed that *at minimum* “knowing conduct” is required for an elements clause offense, *see Delligatti*, 604 U.S. at 434, n.5 (Thomas, J.) (noting

“the author of this opinion supplied the fifth vote for the holding that *the elements clause requires at least knowing conduct*”) (emphasis added), the circuits disagree on what exactly a defendant must “know” where the prior is a dual *mens rea* offense requiring an intentional act but no knowledge as to the harm caused by that act. Neither *Borden* nor *Delligatti* involved such an offense. *Cf. Borden*, 593 U.S. at 450-51 & n.2 (Tennessee reckless aggravated assault requiring reckless causation of serious bodily injury, but no intentional act, did not meet ACCA’s elements clause); *Delligatti*, 604 U.S. at 427-29 (New York second degree murder requiring “knowingly or intentionally” causing death, which could be satisfied by a failure to act, met the relevantly similar elements clause in 18 U.S.C. § 924(c)(3)(A)). Where, unlike the offenses in *Borden* and *Delligatti*, a prior requires an intentional act, but either no *mens rea*—or a *mens rea* less than knowledge—as to the serious bodily harm caused by that act, the courts of appeals are split on whether the defendant must have purpose or knowledge only as to the act itself, or also as to its consequences.

This is the next logical question in the Court’s line of elements clause *mens rea* decisions, and it is a recurring one. Dual *mens rea* statutes are common, and they differ meaningfully from the statutes examined in *Borden* and *Delligatti*. Florida felony battery requires an intentional act (a mere touch), but imposes strict liability as to the harm caused—as do the felony battery statutes in both Indiana and Idaho. California’s aggravated assault and willful infliction of injury statutes are analogous in requiring an intentional act, but no “conscious awareness” harm is “practically certain” to result from the act. And under the Model Penal Code—which most states follow on questions of *mens rea*, see *Voisine*, 579 at 697—“recklessness as to the consequences of one’s actions generally suffices for criminal liability.” *Borden*, 593 U.S. at 451 (Kavanaugh, J., dissenting). In the Ninth and Tenth Circuits, convictions under such statutes do not qualify as “violent felonies” for the ACCA, or “crimes of violence” under the Guidelines, § 16(a), or §

924(c)(3)(A) after *Borden*. But in the Sixth and Eleventh Circuits, the same offenses continue to support both sentencing enhancements and new convictions.

This case is an ideal vehicle to resolve this far-reaching question. The issue was pressed and passed upon at every stage below, and is outcome-determinative. Without the counting of his Florida felony battery as a “crime of violence,” Petitioner would face a greatly reduced sentence. And many defendants not only in Florida, but throughout the country, have analogous priors. Because the Eleventh Circuit’s rigid “prior panel precedent” rule locks in its pre-*Borden* law, only this Court can correct its erroneous post-*Borden* course.

## STATEMENT OF THE CASE

### A. Legal Background

1. A person commits Florida simple battery, Fla. Stat. § 784.03(1)(a)1, a misdemeanor, where, *inter alia*, he “[a]ctually and intentionally touches or strikes another person against the will of the other,” or “intentionally causes bodily harm to another person.” A second or subsequent battery is third-degree felony. Fla. Stat. § 784.03(2).

A person commits Florida aggravated battery, Fla. Stat. § 784.045(1)(a)1, a second degree felony, if in committing a battery, he “[i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement.”

The Florida felony battery statute, Fla. Stat. § 784.041(1), was enacted in 1997 to fill the gap between simple and aggravated battery. A person commits felony battery under this statute, a third degree felony, if he “[a]ctually and intentionally touches or strikes a person against the will of the other,” and “[c]auses great bodily harm, permanent disability, or permanent disfigurement.” Its first element is a simple battery under §784.03(1)(a)1. Its second element—causing “great bodily harm, permanent disability, or permanent disfigurement”—is the same harm required for

aggravated battery under § 784.045(1)(a)(1). The difference is *mens rea*. In aggravated battery, the “great bodily harm” must be caused intentionally or knowingly; in felony battery under § 784.041(1), it can be “unintended,” unexpected, and accidental. *See Jeffries v. State*, 849 So. 2d 401, 404 (Fla. 2d Dist. Ct. App. 2003); *T.S. v. State*, 965 So. 2d 1288 (Fla. 2d Dist. Ct. App. 2007). Florida felony battery under § 794.04(1) is essentially strict liability as to the harm caused.

2. Florida is among a minority of states that still take a common law approach to *mens rea* in its criminal statutes. Most states now either use, or have been influenced by, the Model Penal Code’s *mens rea* terminology, hierarchy, and culpability levels. *Voisine v. United States*, 587 U.S. 686, 697 (2016). Section 2.02 of the Model Penal Code provides in pertinent part:

(1) **Minimum Requirements of Culpability.** Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) **Kinds of Culpability Defined.**

(a) **Purposely.** A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; ...

(b) **Knowingly.** A person acts knowingly with respect to a material element of an offense when: ...

(ii) 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.

(c) **Recklessly.** A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. ...

Under the Model Penal Code § 2.05, offenses that impose strict liability as to any material element (such as the harm caused in Florida felony battery) are impermissible absent specific contrary legislative intent.

3. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court considered whether another Florida offense following the common law rather than Model Penal Code approach to culpability—driving under the influence and causing “serious bodily injury” in violation of Fla. Stat. § 316.193(3)(c)(2)—was a “crime of violence” within the “relevantly identical” elements clause of 18 U.S.C. § 16(a) (“an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”) DUI-causing-injury statutes like Florida’s, the Court noted, “do not require any mental statute with respect to the use of force against a person, thus reaching individuals who were negligent or less.” 543 U.S. at 13. And it held, statutes “which either do not have a *mens rea* component or require only negligence in the operation of a vehicle,” do not qualify as “crimes of violence” within § 16(a). *Id.* at 5, 9-10. The Court found no need to decide whether the word “use” “alone supplies a *mens rea* element,” because “the parties’ primary focus on that word is too narrow.” *Id.* at 9. It explained:

Particularly when interpreting a statute that features as elastic a word as ‘use,’ we construe language in its context and in light of the terms surrounding it. [T]he critical aspect of § 16(a) is that a crime of violence is one involving the “use ... of physical force *against the person or property of another*.” As we said in a similar context in *Bailey [v. United States]*, 516 U.S. 137 (1995), “use” requires active employment. [A] person would “use ... physical force against another” by pushing him; however, we would not ordinarily say a person “use[s]... physical force against” another by stumbling and falling into him. When interpreting a statute, we must give words their “ordinary and natural meaning.” The key phrase in § 16(a)—the “use of physical force against the person or property of another”—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.

*Id.* at 9-10 (internal citations omitted).

The Court added:

[W]e cannot forget that we ultimately are determining the meaning of the term “crime of violence.” The ordinary meaning of this term, combined with § 16’s emphasis on the use of physical force against another person ... suggests a category of violent active crimes that cannot be said to include DUI offenses. Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the “violent” crimes Congress sought to distinguish for heightened punishment and other crimes.

*Id.* at 11 (internal citations omitted). Because Florida’s DUI offense did not present the issue, *Leocal* reserved ruling on whether offenses with a *mens rea* of recklessness met § 16(a). *Id.* at 13.

4. Twelve years later, in *Voisine v. United States*, 579 U.S. 686 (2016), the Court answered the recklessness question for a different statute—18 U.S.C. § 922(g)(9), which bars persons convicted of a “misdemeanor crime of domestic violence” from possessing a firearm. Such an offense is defined in 18 U.S.C. § 921(a)(33)(A)(ii) as one that “has as an element, the use or attempted use of physical force” (without the elements clause’s “against another” language). In that distinct statutory context, the majority held that “use of force” requires only “volitional conduct;” it is “indifferent to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.” Maine domestic assault committed by recklessly causing bodily injury therefore qualified as a “misdemeanor crime of domestic violence” under § 922(g)(9). *Id.* at 692-93, 695.

In so holding, the *Voisine* majority embraced the Model Penal Code’s definitions of purpose, knowledge, and recklessness, because by the time § 922(g)(9) was enacted (1996), “a substantial majority of jurisdictions, following the Model Penal Code’s lead, had abandoned the common law’s approach to *mens rea* in drafting and interpreting their assault and battery statutes.” *Id.* at 697. “Indeed,” the majority noted, “most had gone down that road decades before. That was the backdrop against which Congress was legislating.” *Id.* See *id.* at 697-98 (adding that the “indeterminacy” of the common law’s “confusing phrases to describe mental states” “confirms our

conclusion that Congress had no thought of incorporating the common law’s treatment of *mens rea* into § 821(a)(33)(A)”).

Under those definitions, the majority explained, recklessness requires that a defendant “consciously disregard” a “substantial risk that one’s conduct will cause harm to another,” while to act “knowingly” or “purposefully” requires that he “act with another state of mind respecting that act’s consequences—in the first case, *to be ‘aware that [harm] is practically certain’* and, in the second, to have that result as a ‘conscious object.’” 579 U.S. at 691-92 (citing Model Penal Code §§ 2.02(2)(a)-(b)) (emphasis added). Because “use” was indifferent to *mens rea* and required only a volitional act, the majority held, a crime with a *mens rea* of recklessness as defined in § 2.02(2)(c), sufficed as a “misdemeanor crime of domestic violence” under § 922(g)(9).

Justices Thomas and Sotomayor dissented. In their view, the word “use” alone had *mens rea* significance, and the phrase “use of physical force” required “an inherently intentional act.” 579 U.S. at 700 (Thomas, J., dissenting). They defined an “intentional act” as one “done for the purpose of causing certain consequences *or at least with knowledge that those consequences will ensue.*” *Id.* at 700 (emphasis added). And, while they cited as support the definition of “intentional acts” in the Restatement of Torts, *see id.* at 700 (citing Restatement (Second) of Torts § 8A, p. 15 (1965)), they aligned with the Model Penal Code definition of “knowingly” in explaining: “A ‘use’ of physical force requires the intent to cause harm, and the law will impute that intent where the actor knows *with a practical certainty* that it will cause harm. But the law will not impute that intent from merely reckless conduct.” *Id.* at 708 (emphasis added).

The *Voisine* dissent’s reading of “use of physical force” was not statute-specific, but the majority’s was. *See id.* at 694, n. 4 (“Like *Leocal*, our decision today concerning § 921(a)(33)(A)’s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given

those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states”).

5. In *United States v. Vail-Bailon*, 838 F.3d 1091 (11th Cir. 2016), a divided Eleventh Circuit panel held Florida felony battery under § 794.041(1), which is strict liability as to harm caused by an intentional touch, did not meet the elements clause for the same reason the DUI statute in *Leocal* did not. *Id.* at 1097-98 (Rosenbaum, J.) (noting that “[t]hough both offenders intend their actions—mere touching and driving—neither intends the accidental or negligent consequences—great bodily harm under § 784.041 and serious bodily injury under [Fla. Stat.] § 316.193(3)(c)(2)”). The full court vacated that decision on the government’s petition for rehearing en banc, and reversed course.

6. In *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc), the en banc court held Florida felony battery met the elements clause because the offense requires the “use of physical force” under *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), which defined “physical force” to mean “*violent* force—that is, force capable of causing physical pain or injury to another person.” 868 F.3d at 1297. Finding the *Curtis Johnson* “test” was “the standard” that governed the elements clause determination for felony battery, *id.* at 1302, the court reasoned:

A statute that requires a touching that causes “great bodily harm, permanent disability, or permanent disfigurement,” which is what Florida battery requires, would certainly appear to be a statute that calls for force that is capable of causing pain or injury. That the “touching” identified in the Florida felony battery statute actually “caused” the significant injury called for by the statute logically suggests that the force used in administering the touch was necessarily “capable” of causing that injury.

868 F.3d at 1302. The Eleventh Circuit “[f]ound agreement” with *Douglas v. United States*, 858 F.3d 1069, 1071-72 (7th Cir. 2017), where the Seventh Circuit held *Curtis Johnson*’s “capability standard” controlled the elements clause inquiry for Indiana’s “materially indistinguishable”

(similarly-structured) felony battery statute. *Vail-Bailon*, *id.* The court left no doubt about what determined its analysis, stating: “[W]e see no need to look any further than *Curtis Johnson* itself for the controlling definition of physical force as used in the element clause.” *Id.* at 1302.

Although the defense had argued, citing *Leocal* and *Voisine*, that the elements clause also required *mens rea* as to the harm caused, neither the majority nor the principal dissent specifically engaged that argument; both addressed only the “level of force” under *Curtis Johnson*. *See* 868 F.3d at 1308-14 (Wilson, dissenting). Only Judge Rosenbaum (who authored the original panel opinion) focused on *mens rea* in a separate dissent—arguing that *Leocal* and *Voisine* “dictate that [the causation-of-harm] element cannot satisfy the ‘use’ requirement of the elements clause where as here, the statute does not require any kind of intent at all to cause harm.” *Id.* at 1316 (Rosenbaum, J., dissenting). *See generally id.* at 1316-18. The majority did not respond to that argument. 868 F.3d at 1307-8. And the court followed *Vail-Bailon* in holding felony battery was also an ACCA “violent felony.” *United States v. Green*, 873 F.3d 846, 850, 869 (11th Cir. 2017).

7. In *Borden v. United States*, 593 U.S. 420 (2021), the Court answered the *mens rea* question it had reserved in *Leocal* and *Voisine*. *Id.* at 429. Five Justices agreed that Tennessee reckless aggravated assault did not meet ACCA’s elements clause, because that clause “covers purposeful and knowing acts, but excludes reckless conduct.” *Id.* at 432 (plurality); *id.* at 445-46 (Thomas, J., concurring in the judgment) (a “crime that can be committed through mere recklessness” does not meet the elements clause).

The plurality framed the issue as “how different mental states map onto the clause’s demand that an offense entail the ‘use ... of physical force against the person of another.’” *Id.* at 421. Citing the Model Penal Code § 2.02(2)(a) and (b)(ii) (1985), it explained that: “[a] person acts purposefully when he ‘consciously desires’ a particular result;” he “acts knowingly when ‘he

is aware that[a] result is practically certain to follow from his conduct;” and he acts recklessly when he “consciously disregards a substantial and unjustifiable risk” attached to his conduct in “gross deviation” from accepted standards.” 593 U.S. at 426; *see also id.* (adding that “[a] person who injures another knowingly, even though not affirmatively wanting the result, still makes a deliberate choice with full awareness of consequent harm.”) By contrast, citing § 2.02(2)(c) and (d), the plurality explained that “[r]ecklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury.” 593 U.S. at 427.

After reviewing *Leocal* and *Voisine*, the plurality concluded that the elements clause did not include “offenses criminalizing reckless conduct” because “against another,” “when modifying ‘the use of physical force, demands that the perpetrator direct his action at, or target, another individual,” and “[r]eckless conduct is not aimed in that prescribed manner.” 593 U.S. at 427-29. “Were there any doubt about the elements clause’s meaning,” it explained, “context and purpose would resolve it.” *Id.* at 427. Citing *Curtis Johnson*, 559 U.S. at 140, it explained that a definition of “*violent felony*” covers a “narrow ‘category of violent, active crimes’” which “are best understood to involve *not only a substantial degree of force, but also a purposeful or knowing mental state*—a deliberate choice of wreaking harm on another, rather than mere indifference to risk.” 593 U.S. at 438 (emphasis added).

Justice Thomas did not dispute the plurality’s use of the Model Penal Code *mens rea* definitions for the ACCA’s elements clause—definitions he had aligned with in *Voisine*. Nor did he dispute that the elements clause required both a substantial degree of force, and a purposeful or knowing *mens rea*. He disagreed only about the textual source of that requirement, locating it in the phrase “against the person of another.” Referencing his *Voisine* dissent, 579 U.S. at 713, he

reiterated: “[U]se of physical force” “has a well-understood meaning applying only to intentional acts designed to cause harm.” 593 U.S. at 446 (Thomas, J., concurring in the judgment).

8. After *Borden*, the Eleventh Circuit held in *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023) that aggravated assault in violation of Fla. Stat. § 784.021, which requires an intentional threat to “do violence to the person of another,” cannot be committed recklessly; it necessitates “a *mens rea* of at least knowing conduct,” and therefore met the ACCA’s elements clause. *Id.* at 894-96. The court acknowledged that the *Borden* plurality and concurrence “relied on different language to reach the same conclusion” that offenses that “can be committed with a *mens rea* of recklessness do not satisfy the elements clause.” *Id.* at 895. But rejecting *Somers*’s argument that *Borden*’s “holding” was broader—and citing *Marks v. United States*, 430 U.S. 188, 193 (1977)—the court insisted the “only” holding of *Borden* by which it was bound was “that the elements clause excludes reckless conduct.” 66 F.4th at 895 (explaining, citing *Borden*, 593 U.S. at 437, n.6, that this was the “narrowest holding of the five-justice majority”).

9. Most recently, in *Delligatti v. United States*, 604 U.S. 423 (2025), the Court held New York second degree murder, which requires “knowingly or intentionally” causing death even by omission, involves a “use of physical force” within the elements clause. *Id.* at 433-35. Writing for the Court, Justice Thomas noted that as yet the Court had expressed “no view on whether the phrase ‘against another’ imports a *mens rea* requirement, which is not necessary to resolve this case.” *Id.* at 434, n.5.

## **B. Proceedings Below**

1. On August 4, 2022, Petitioner pled guilty to knowingly possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Over his objection, the district court found he had three prior “crimes of violence” meeting the elements clause of U.S.S.G.

§ 4B1.2(a)(1)—Florida attempted robbery, manslaughter, and felony battery in violation of Fla. Stat. § 784.041(1)—which yielded a base offense level of 26 under U.S.S.G. § 2K2.1(a)(1). With four levels added under § 2K2.1(b)(6)(B) for using the firearm in connection with another felony, and three subtracted for acceptance of responsibility, his total offense level was 27. At a criminal history V, his 120-150 months range was capped at the 120-month statutory maximum. The court sentenced him to 105 months imprisonment, followed by 3 years supervised release.

2. On appeal, the Eleventh Circuit vacated Petitioner’s sentence and remanded, holding his Florida attempted robbery and manslaughter convictions were not “crimes of violence” within § 4B1.2(a). *United States v. Sheely*, 2024 WL 4003394, at \*\*3-6 (11th Cir. Aug. 30, 2024). The court declined to reach Petitioner’s challenge to his Florida felony battery conviction. *Id.* at \*6.

3. On remand, the government argued Florida felony battery remained a “crime of violence” under *Vail-Bailon*, which *Borden* had not disturbed because it held only that reckless offenses did not meet the elements clause, and “did not address any mental state regarding the result of the use of force.” *Borden* required no different result than *Vail-Bailon*. “[B]y intentionally making contact with the victim,” the government contended, “the perpetrator of a felony battery has ‘direct[ed] his action at’ that individual in the way *Borden* demands.” Thus, the government argued, under § 2K2.1(a)(3) Petitioner still had one prior “crime of violence” even after *Borden*, and he faced a revised Guideline range at a level 22 of 84-105 months imprisonment.

Petitioner responded that *Vail-Bailon* had addressed only the “level of force” for an elements clause offense, not the separate *mens rea* question *Borden* later decided. And in claiming that “[b]y intentionally making contact with the victim, the perpetrator of a felony battery has ‘direct[ed] his action at’ that individual in the way *Borden* demands,” Petitioner noted, the government had mistaken *Borden*’s holding. With Justice Thomas’ fifth vote necessary to the judgment, Petitioner

argued, *Borden*’s “holding” did *not* include the plurality’s targeting rationale, but the rationale both opinions shared: namely, that the minimum *mens rea* for the elements clause is a “subjective awareness” of a “practical certainty” harm will result. And because neither element of felony battery requires that awareness—the word “intentionally” before “touch and strike” modifies only the *actus reus*—Petitioner asked to be resentenced without any “crime of violence” enhancement.

6. The district court refused, holding it remained bound by *Vail-Bailon* notwithstanding *Borden*. At the November 21, 2024 resentencing, the court rejected the government’s request for a high-end Guideline sentence (which would have re-imposed the original 105 months), and imposed a low-end sentence of 84 months imprisonment, followed by 3 years supervised release.

7. On appeal, Petitioner argued that *Borden* not only required a heightened *mens rea* of purpose or knowledge; it defined “purposely” and “knowingly” for the first time for the elements clause using the Model Penal Code definitions—which themselves require *mens rea* as to the harm caused. Because Florida felony battery requires neither purpose nor knowledge as to the harm caused by a mere touch, he argued, it could not support the “crime of violence” enhancement after *Borden*. As support, Petitioner cited decisions of the Ninth and Tenth Circuits which had applied *Borden*’s *mens rea* definitions taken from the Model Penal Code to hold analogous statutes did not meet the elements clause, because they did not require *at least* a “subjective awareness” of a “practical certainty” that an intentional act would cause harm.

Petitioner explained that *Vail-Bailon*, which considered only the “degree of force” required by *Curtis Johnson*, could not control after *Borden* because both the plurality and concurrence recognized that elements clause crimes involve “*not only* a substantial degree of force, *but also* a purposeful or knowing mental state.” 593 U.S. at 438-39 (plurality) (emphasis added); 446 (Thomas, J., concurring).

8. The Eleventh Circuit affirmed, holding “*Borden* did not abrogate *Vail-Bailon* and *Vail-Bailon* still controls.” *United States v. Sheely*, 186 F.4th 1338, 1340 (11th Cir. Aug. 13, 2026). It first explained its “prior-panel precedent rule:”

“For a Supreme Court decision to undermine panel precedent to the point of abrogation, the ‘decision must be clearly on point’ and ‘*clearly contrary*’ to the panel precedent.” *Edwards v. U.S. Att’y Gen.*, 97 F.4th 725, 743 (11th Cir. 2024) (emphasis in original) (quoting *Garrett v. Univ. of Ala. At Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)). Indeed, if the Supreme Court “‘never discussed’ our precedent and did not ‘otherwise comment[] on’ the precise issue before the panel, our precedent remains binding.” *United States v. Dubois*, 139 F.4th 887, 892-93 (11th Cir. 2025) (alteration in original) (quoting *United States v. Vega-Castillo*, 540 F.3d 1235, 1238 (11th Cir. 2008)). “Even if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision.” *Vega-Castillo*, 540 F.3d at 1237. Instead, to abrogate our precedent, the Supreme Court (or this Court en banc) must “‘demolish’ and ‘eviscerate’” all the “‘fundamental props’” of the prior-panel precedent. *Dubois*, 139 F.4th at 893 (quoting *Del Castillo v. Sec’y, Fla. Dep’t of Health*, 26 F.4th 1214, 1223 (11th Cir. 2022)). “In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.” *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009).

*Sheely*, 186 F.4th 1343-44.

The court acknowledged the *Borden* plurality and concurrence reached the same conclusion (that offenses with a *mens rea* of recklessness did not meet the elements clause) by focusing on different phrases in the clause, *id.* at 1344-45, but found its “holding” was narrow and did not meet the circuit’s exacting standard for abrogation:

As a preliminary consideration, *Borden* is a plurality opinion. We thus cannot construe *Borden* in the broad manner that *Sheely* proposes. Under the Supreme Court’s own framework, when it decides a case on a fragmented basis and “no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]’” *Marks v. United States*, 430 U.S. 188 [] (1977). ... And in other instances, when we have evaluated whether *Borden*’s reach has extended to other crimes, we have interpreted the plurality decision narrowly. *See, e.g., Somers v. United States*, 66 F.4th 890, 895 (11th Cir. 2023) (“So the narrowest holding of the five-justice majority—which is what we are

bound by, ...—was only that the elements clause excludes reckless conduct.”) Thus, the Supreme Court in *Borden* held only that an offense that can be satisfied with a *mens rea* of recklessness cannot qualify as a “violent felony” under the ACCA’s elements clause. *Id.* at 423[.]

Moreover, *Borden* did not address the same statute. *Vail-Bailon* holds that felony battery under Fla. Stat. § 784.041 is a “crime of violence” within the meaning of the Sentencing Guidelines’ elements clause. See 868 F.3d at 1308. *Borden*, by contrast, concerned reckless aggravated assault under Tennessee law. 593 U.S. at 424[.] Nor did *Borden* cite our decision in *Vail-Bailon* or engage with the reasoning underlying that decision. Additionally, *Borden* does not cite any of the precedents upon which *Vail-Bailon* relied.

*Borden* also did not abrogate this Court’s own case law. In *United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010), we held that a conviction “predicated on a *mens rea* of recklessness does not satisfy the ‘use of physical force’ requirement” for a “crime of violence.” *Id.* at 1336; see also *United States v. Carter*, 7 F.4th 1039, 1045 (11th Cir. 2021). Thus, even before *Borden* was decided, we had already determined that an offense with a *mens rea* of recklessness could not qualify as a “crime of violence.” Indeed, the plurality opinion in *Borden* itself recognized our prior conclusion “that only a statute confined to purposeful or knowing conduct can count” as such a “violent felony.” 593 U.S. at 425, n.2 [] (citing *United States v. Moss*, 920 F.3d 752, 756 (11th Cir. 2019), *opinion reinstated*, 4 F.4th 1292 (11th Cir. 2021) (en banc)). Since *Borden* did not alter this Court’s existing precedent, it did not “‘demolish’ and ‘eviscerate’” all the “fundamental props” of our prior-panel precedent in *Vail-Bailon*. 139 F.4th at 893 (citations omitted).

It thus cannot be said that *Borden* is “‘clearly on point’ and ‘clearly contrary’” to *Vail-Bailon*.

186 F.4th at 1345-46.

The court rejected Petitioner’s argument that *Vail-Bailon* “did not address the ‘separate and distinct’ *mens rea* question resolved in *Borden*,” asserting that Petitioner was

mistaken as the *mens rea* issue was briefed to the en banc court and was considered through hypotheticals advanced by the appellant and rejected by the Court. We held in *Vail-Bailon* that that felony battery under Fla. Stat. § 784.041 requires an intentional act to use physical force against the victim that is capable of causing physical pain or injury. *Vail-Bailon* thus remains binding precedent in this Circuit, and we conclude that the district court did not err in determining that Sheely’s Florida felony battery conviction qualifies as a “crime of violence.”

186 F.4th at 1346.

7. Judge Rosenbaum—the author of the *Vail-Bailon* panel opinion, and the only en banc dissenter to argue Florida felony battery could not satisfy the elements clause without *mens rea* as to the harm caused—concurred “fully” in the decision to follow *Vail-Bailon* under the circuit’s “prior panel precedent” rule. She wrote a separate concurrence, however, to explain her view that the *Borden* plurality opinion failed to support Petitioner, because the plurality declined “to adopt Justice Thomas’s reasoning.” 186 F.4th at 1346 (Rosenbaum, J., concurring). Justice Thomas, she noted, agreed with the plurality’s result because he viewed the phrase “use of physical force” in the elements clause to have a “well-understood meaning applying only to intentional acts *designed to cause harm.*” 186 F.4th at 1346 (citing 593 U.S. at 446 (Thomas, J., concurring in the judgment) (emphasis supplied by Judge Rosenbaum). Only if “Justice Thomas’s position had won the day,” Judge Rosenbaum believed, would Petitioner “be right that *Borden* had abrogated” *Vail-Bailon*. *Id.* And because Justice Thomas’ position did not win, she concluded, *Borden* has “nothing to say” about whether Florida felony battery qualifies as a crime of violence.” *Id.* at 1347 (opining, “Except for Justice Thomas’s opinion, *Borden* is agnostic” on the question).

### REASON FOR GRANTING THE WRIT

**The circuits are divided on whether, after *Borden*, an offense requiring an intentional act but neither purpose nor knowledge as to the harm caused by that act satisfies the elements clause.**

This Court’s intervention is needed to resolve an entrenched circuit conflict that has arisen in the wake of *Borden v. United States*, 593 U.S. 420 (2021) over the materially identical elements clause definitions of “violent felony” and “crime of violence” in 18 U.S.C. § 924(e), § 16(a), § 924(c)(3)(A), and U.S.S.C. § 4B1.2(a)(1). Federal convictions and sentences should not turn on geography. Equal justice requires uniform application of this Court’s precedents interpreting identical language across numerous federal statutes and the Sentencing Guidelines.

This case is an ideal vehicle to resolve the circuit conflict.

**I. The circuits are intractably divided on whether *Borden* only requires an intentional act, or also at least knowledge as to the act’s consequences.**

**A. The Ninth and Tenth Circuits require subjective awareness that an intentional act is practically certain to cause harm.**

Addressing *Borden* for the first time in *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc), the en banc Ninth Circuit held second degree murder under 18 U.S.C. § 1111(a) was a “crime of violence” within § 924(c)(3)(A) because “malice aforethought” requires an “intentional act that ha[s] a high probability of resulting in death.” *Id.* at 1095. Although that *mens rea*—known as “extreme” recklessness—is one *Borden* did not address, 33 F.4th at 1092-93 (citing 593 U.S. at 429, n. 4), the court found the plurality’s discussion of “against another” “instructive,” and concluded § 1111(a) met the elements clause because it requires “extreme disregard *for human life*.” *Id.* at 1093-95; *see also id.* at 1095 (citing with approval *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020) (finding “malice aforethought” requires a “practical certainty” that “injury to another will result”)). In the *Begay* court’s view, “the reasoning of *Borden*” undermined all prior circuit authority holding a crime requiring less than intentional conduct fell outside the elements clause. *Id.* at 1094.

In *United States v. Vega*, 2023 WL 4858148 (9th Cir. July 31, 2023), the court considered an Idaho offense almost identical to Florida felony battery: felony domestic battery with traumatic injury, Idaho Code § 18-918(2), whose least culpable conduct is an “unconsented intentional touching that happens to result in a minor physical injury.” *Id.* at \*1. The court “view[ed] the plurality and the concurrence *as each* requiring an awareness of consequent harm,” and therefore assumed without deciding that the *Borden* plurality opinion controlled under *Marks v. United States*, 430 U.S. 188, 193 (1977). *Id.* at \*1, n. 2 (emphasis added). As such, the *Vega* court read

*Borden* to “require [] that a crime of violence involve at least some awareness that the use of force will cause harm.” *Id.* at \*1.

The court explained that “in using examples to describe why a mens rea of recklessness is insufficient for a crime to constitute a violent felony, the plurality opinion noted that what unites purposeful and knowing conduct is an awareness that physical harm will befall the victim.” *Id.* at \*2 (citing *Borden*, 593 U.S. at 432-33). Indeed, it noted, “[r]unning through *Borden*, therefore, is the assumption that someone who commits a violent felony possesses some awareness that their action will harm another.” *See also id.* at \*2, n.3 (noting with significance that in *Begay*, the en banc court applying *Borden* had “likewise suggest[ed] that some awareness of harm is required for a crime of violence”). Because “[t]he Idaho felony lacks any element of such ‘awareness of consequent’ harm”—it could be committed by simply tapping someone from behind, causing him to startle, fall, and bruise a knee—the *Vega* court found the offense categorically “overbroad” and not a qualifying “crime of violence.” *Id.* at \*\*1-2. *See also United States v. Manzon*, 2023 WL 7386866, \*\*6-7 (D. Idaho Nov. 8, 2023) (citing both the *Borden* plurality and concurrence, as well as *Vega*, in holding a conviction under Idaho Code §§ 18-907(1)(a), 18-903(b)—an offense indistinguishable from Florida felony battery in penalizing an “unlawful touching that happened to cause great bodily harm”—was not a “crime of violence;” noting the statute could be violated even though the defendant “lacked awareness” the touching would cause great bodily harm; under Idaho law the intent required for the battery “does not also apply to the causation of great bodily harm;” as per the Idaho Supreme Court, no such intent is required).

Consistent with *Begay*, *Vega*, and *Manzon*, in *United States v. Gomez*, 165 F.4th 1199, 1208 (9th Cir. 2026) (en banc), *cert. denied on other grounds*, No. 25-7193 (U.S. May 18, 2026), the en banc Ninth Circuit held definitively that *Borden*’s plurality opinion controlled under *Marks*

and its prior decision in *United States v. Davis*, 825 F.3d 1014, 1021-22 (9th Cir. 2016). 165 F.4th at 1208 (explaining that as per *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”). “[T]he plurality opinion is narrower than Justice Thomas’ opinion,” the court reasoned, “because Justice Thomas would have held that the elements clause encompasses only ‘intentional acts designed to cause harm.’” 165 F.4th at 1208. Indeed, the court underscored, the government itself “now agrees that the plurality’s opinion must be treated as controlling.” *Id.*

Applying the plurality’s definitions tracking the Model Penal Code—a “person acts purposefully when he ‘consciously desires’ a particular result,” and “acts knowingly when ‘he is aware that[a]result is practically certain to follow from his conduct,’ whatever his affirmative desire,” 165 F.4th at 1208-09 (citing *Borden*, 593 U.S. at 426 (plurality opinion) (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980))—the Ninth Circuit held California assault with a deadly weapon, Cal. Penal Code § 245(a)(1), was not a “crime of violence” under §4B1.2(a). Although the government argued that the offense required “at the very least a knowing use of force,” the Ninth Circuit disagreed—noting that the California Supreme Court had held § 245(a)(1) required only “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.” 165 F.4th at 1208 (citing *People v. Williams*, 26 Cal. 4th 779 (2001)).

Because a § 245(a)(1) offense “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” of injury, the Ninth Circuit held, it was not a “crime of violence” within the elements clause. 165 F.4th at 1208-10. That *mens rea* standard, the court noted, “falls far short of *Borden*’s definition of knowledge;” indeed, it “is less culpable even than *Borden*’s definition of recklessness, which

requires conscious disregard of a substantial risk.” *Id.* at 1209-10. “[A] defendant who lacks a subjective awareness of any risk cannot ‘consciously disregard[] a substantial and unjustifiable risk.’” *Id.* at 1210 (citing *Borden*, 593 U.S. at 427 (plurality)). The Ninth Circuit therefore overruled its pre-*Borden* precedent holding that a § 245(a)(1) conviction met the elements clause. *Id.* at 1210.

And the Tenth Circuit agrees with the Ninth. In *United States v. Sjodin*, 139 F.4th 1188, 1202 n. 8 (10th Cir. 2025), it held the same California assault statute considered in *Gomez* was likewise not a “crime of violence” within § 4B1.2(a). Like the Ninth Circuit, the Tenth also treated the *Borden* plurality opinion as controlling. *Id.* at 1202, n. 8 (citing *United States v. Kepler*, 74 F.4th 1292, 1302 n. 11 (10th Cir. 2023) (finding the plurality decision to be the narrowest decisional basis of the Court, since it was a “logical subset” of Justice Thomas’ opinion)). Applying the plurality’s rationale, which “employ[ed] the Model Penal Code” *mens rea* definitions, the Tenth Circuit held a § 245(a)(1) conviction was not a “crime of violence” under the Guidelines. *Id.* at 1203. Citing the definitive interpretation of § 245(a)(1) in *Williams*, it explained “[t]he *mens rea* criminalized by the California assault statute simply spans too wide on the ‘culpability spectrum’ to constitute a crime of violence.” *Id.* The offense requires only “mere volition,” namely, an “intent to do the act that results in harm,” the Tenth Circuit noted, which was insufficient for the elements clause, since *Borden* “requires an ‘aware[ness] that [a] result is practically certain to follow from [one’s] conduct.’” *Id.* (citing 593 U.S. 426)). It found the erroneous “crime of violence” enhancement reversible even on plain-error review. *Id.* at 1205.

Most recently, in *United States v. Lopez*, 183 F.4th 1110 (9th Cir. 2026), the Ninth Circuit followed *Gomez* to hold willful infliction of corporal injury under Cal. Penal Code § 273.5 was not a “crime of violence” either. *Id.* at 1123. Its pre-*Borden* cases, the Ninth Circuit noted, “did not distinguish *which* element of a crime required a *mens rea* greater than reckless to qualify as a

crime of violence,” and “this distinction is important because crimes with multiple elements may require a different mens rea with respect to each.” *Id.* at 1115 (citing *Voisine v. United States*, 579 U.S. 686, 692-93 (2016)). Because California does not follow the Model Penal Code, the court explained, both its assault and battery offenses are “general intent crimes” requiring only that the defendant “intend to commit the act;” he need *not* have an intent to injure. *Id.* at 1118-19. And § 273.5 was such a battery offense, “requiring only ‘an intent to do the act that causes the harm,’ rather than an intent to ‘cause the resulting harm.’” *Id.* at 1120. Like the assault offense in *Gomez*, the Ninth Circuit held, § 273.5 requires no “subjective awareness of the risk of injury,” and so it is not a “crime of violence.” *Id.* at 1121 (noting the mental state for California battery is the same as for assault). As to this prior as well, the court overruled its pre-*Borden* precedent. *Id.* at 1123.

#### **B. The Sixth and Eleventh Circuits hold an intentional act suffices.**

In *United States v. Delaine*, 171 F.4th 880 (6th Cir. 2026), *pet. for cert. filed* (U.S. Aug. 20, 2026) (No. 26-231), the Sixth Circuit held the very predicate at issue here—felony battery under Fla. Stat. § 784.041(1)—met the ACCA’s elements clause after *Borden*, because the “intentional touch” requirement means “the statute has more than ‘a *mens rea* of recklessness.’” *Id.* at 891 (citing *Borden*, 593 U.S. at 445). Delaine, like Petitioner, argued that *Borden* requires that a defendant at least “know” harm will result from the force used. The Sixth Circuit rejected that argument, as one that “finds no support in either the *Borden* plurality opinion or Justice Thomas’ concurrence in the judgment. 171 F.4th at 891. It dismissed as without significance the plurality’s embracing of the Model Penal Code *mens rea* definitions, because that occurred in a “‘background’ part of its opinion” (Part II). And, the court held, Delaine “mistakes a mere example in [that part of] the plurality opinion for a holding that the elements clause requires a defendant to knowingly cause an injury.” *Id.* at 891-92. In the Sixth Circuit’s view, the plurality required only

that a defendant “consciously deploy[]” force against another, but “nowhere” suggested he must also “intend (or know of) the injury that this force causes.” *Id.* at 892. And, the court opined, given the views Justice Thomas had expressed in prior cases, he “would undoubtedly hold that Florida felony battery (an enhanced version of the common-law crime)” meets the elements clause. *Id.*

The Sixth Circuit acknowledged its sister courts’ disagreement over “[w]hich *Borden* opinion—if any—controls on the state of mind question that Delaine has raised.” *Id.* at 892-93 (noting the Ninth and Tenth Circuits treat the plurality opinion as “logically narrower” than Justice Thomas’s, while other courts hold the reasoning of neither opinion is a “logical subset of the other and thus that *Borden* itself establishes only a narrow holding: ‘that the elements clause excludes reckless conduct.’” *Id.* at 893 (citing *Somers v. United States*, 66 F.4th 890, 895 (11th Cir. 2023))). Nonetheless, the Sixth Circuit reasoned that it “need not pick sides in this *Marks* debate because we hold that Florida felony battery qualifies as a violent felony under either view of *Borden*’s precedential effect.” *Id.* at 893. If the plurality opinion controlled, it noted, it had already read that opinion to only require the intentional or knowing use of force—“not that the defendant intend or know that this force will cause an injury.” *Id.* And if the reasoning of neither opinion controls,” it held, it “would follow the decisions of the Seventh and Eleventh Circuits that have already answered the question.” *Id.* (citing *United States v. Vail-Bailon*, 868 F.3d 1293, 1299-1308 (11th Cir. 2017) and *Douglas v. United States*, 858 F.3d 1069, 1071-72 (7th Cir. 2017)). Relying on these pre-*Borden* decisions, it concluded: “[t]he plain text of the elements clause requires only an intent or knowledge with respect to the force. We do not see how it can be read to require ‘a separate intent element attached to the degree of injury.’” 171 F.4th at 893-94 (citing *Douglas*, *id.* at 1072<sup>1</sup>). The Sixth Circuit denied rehearing en banc.

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<sup>1</sup> In an unpublished decision, *United States v. Howard*, 2022 WL 10966513 (7th Cir. Oct. 19, 2022), a Seventh Circuit panel adhered to *Douglas*’ approach in concluding Indiana battery,

In the decision below, the Eleventh Circuit adhered to its pre-*Borden* decisions in *Somers* and *Vail-Bailon*, and held *Borden* changed nothing for the circuit. *United States v. Sheely*, 186 F.4th 1338, 1345-46 (11th Cir. 2026). Under its “prior panel precedent” rule, it first deferred to *Somers*’ narrow reading of *Borden*—though *Somers* had no occasion to consider a dual *mens rea* statute like Florida felony battery—and then refused to treat *Borden* as abrogating *Vail-Bailon* by changing the mode of analysis for such statutes. 186 F.4th at 1345-56.

The court declined to address Petitioner’s argument (like Delaine’s) that *Borden*’s adoption of the Model Penal Code *mens rea* definitions required at minimum a “subjective awareness” of the “practical certainty” an intentional touching would cause harm. It held, instead, that *Borden* was not “clearly on point” or “clearly contrary” to *Vail-Bailon*, because *Borden* did not mention the Florida felony battery statute, cite *Vail-Bailon*, or “engage with the reasoning underlying that decision”—and therefore it did not abrogate *Vail-Bailon*. *Id.* at 1345-46. The court declared *Vail-Bailon* had “considered through hypotheticals” and “rejected” the elements clause *mens rea* question Petitioner raised based on *Borden* in holding Florida felony battery met the elements clause because “it requires an intentional act to use physical force against the victim that is capable of causing physical pain or injury.” *Id.* at 1346. In the Eleventh Circuit, an intentional touch causing pain or injury thus meets the elements clause post-*Borden*, even without intent or knowledge the touch would have that result and the injury is purely accidental.

### **C. The conflict is entrenched and intractable**

No further percolation on the question dividing the circuits is warranted. Since the Ninth Circuit has considered that question en banc, and the Sixth Circuit has denied rehearing en banc,

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requiring intentional touching that caused serious bodily injury, met the elements clause after *Borden*. *Id.* at \*2 (finding defendant’s *Borden* challenge “frivolous,” because he was “convicted of acting ‘knowingly or intentionally,’ regardless of whether his objective was to inflict serious bodily injury”). The Seventh Circuit has not revisited *Douglas* in a published opinion post-*Borden*.

the conflict will not resolve itself. A published Seventh Circuit decision adhering to or departing from *Douglas* would only deepen the conflict. And the Eleventh Circuit will not change course. Judge Rosenbaum—the author of the *Vail-Bailon* panel decision, and sole en banc dissenter on the *mens rea* point—joined the *Sheely* majority decision “fully,” writing separately only to explain her view that *Borden* “has nothing to say about whether Florida felony battery qualifies as a ‘crime of violence.’” 186 F.4th at 1347. If even she will not revisit *Vail-Bailon* in light of *Borden*, a majority of the Eleventh Circuit will not. Indeed, the Eleventh Circuit has repeatedly denied rehearing en banc, without dissent, in cases challenging its settled rule that a change in this Court’s reasoning or “mode of analysis” in an analogous case is insufficient for abrogation. *See, e.g., United States v. Rambo*, 2024 WL 3534730 (11th Cir. July 25, 2024), *pet. for reh’g en banc denied*, (11th Cir. Oct. 23, 2024) (No. 23-13772).

## **II. The question presented is important and far-reaching.**

The question’s reach is extraordinary. *First*, the definition of “crime of violence” in § 4B1.2(a)(1) is identical to the ACCA’s definition of “violent felony,” and the definition of “serious violent felony” in 18 U.S.C. § 3559(c)(2)(F)(ii). It is materially identical to the definitions of “crime of violence” in 18 U.S.C. § 924(c)(3)(A) and 18 U.S.C. § 16(a) as well, which differ only in also reaching force against property—a difference irrelevant here. Section 16(a) is incorporated *as an element* of multiple federal statutes, as is § 924(c)(3). And § 4B1.2(a)(1)’s definition is used for “crime of violence” enhancements throughout the Guidelines: § 2K2.1 (firearms/explosive offenses), § 2K2.4 (§ 924(c) offenses), § 2L1.2 (reentry offenses), § 4B1.2 (Career Offender); § 4B1.4 (ACCA sentencing), § 7B1.1 (grading probation violations), and § 7C1.1 (grading supervised release violations).

Every circuit applies its decisions under one of these definitions to the others. *See, e.g., Sheely*, 186 F.4th at 1342, n.5 (citing *Gilbert v. United States*, 640 F.3d 1293, 1309 n.16 (11th Cir. 2011) (en banc)). That means a decision in this case will control all ACCA cases in the circuit, just as *Vail-Bailon* has done for almost a decade. And treating precedents construing the ACCA and Guidelines elements clauses as precedential for each other makes eminent sense, considering that in 1989, the Sentencing Commission rewrote § 4B1.2’s elements clause to track Congress’ 1986 definition of “violent felony” in § 924(e)(2)(B)(i). U.S.S.C., App. C., amend. 268 (effective Nov. 1, 1989) (inserting the exact language of the ACCA elements clause, in lieu of the previous “crime of violence” definition tracking § 16(a); noting in the “Reason for Amendment” that the purpose for the substitution was “to clarify,” and that the amended definition was “derived from” § 924(e)).

*Second*, offenses commonly assign different *mens rea* to different elements. *See Flores-Figueroa v. United States*, 556 U.S. 646, 660 (2009) (Alito, J., concurring in part and concurring in the judgment). A decision on Florida felony battery should therefore govern every dual *mens rea* predicate with a causation of harm element under all of the above provisions. The Indiana felony battery statute, Ind. Code § 35-42-2-1, at issue in *Douglas*, and the Idaho domestic battery statute, Idaho Code § 18-918(2), at issue in *Vega*, are identical in all relevant respects to Florida felony battery. All three impose strict liability as to bodily harm caused by an intentional touch.

*Third*, many states—*unlike* Florida, Indiana, Idaho, and California—follow the Model Penal Code’s default rule that “recklessness as to the consequences of one’s actions generally suffices for criminal liability,” *Borden*, 593 U.S. at 451 (Kavanaugh, J., dissenting), and predicate assault and battery liability upon the reckless causation of injury. *See, e.g.,* Texas Penal Code § 22.01(a)(1), (b) (a person commits simple assault, a misdemeanor, if he intentionally, knowingly, or recklessly causes bodily injury to another; and a third-degree felony if the victim is a family

member or in a dating relationship with the defendant). None of these statutes qualify as “violent felonies” or “crimes of violence” in the Ninth and Tenth Circuits, but they continue to qualify after *Borden* in the Sixth and Eleventh Circuits.

*Finally*, these four circuits alone span nearly half the states in the nation. Today, defendants in the 15 states of the Ninth and Tenth Circuits will receive far more favorable sentences—and are not guilty of a litany of crimes predicated on a “crime of violence”—compared to similarly-situated defendants in the 7 states of the Sixth and Eleventh Circuits. Justice should not vary by locale. Only this Court can end these unjustifiable disparities.

Whether the Court agrees with the Ninth and Tenth Circuits that the *Borden* plurality opinion governs and requires at least a “subjective awareness” of the “practical certainty” that an intentional act will cause harm; *or* concludes (as Petitioner argued below and the *Vega* court found) that *both* the plurality and concurrence share that rationale; *or* even if it agrees with Judge Rosenbaum that *Borden* is “agnostic” on whether *mens rea* as to harm is required for an offense like Florida felony battery, such that the Court must decide that question *de novo* based on text and context, with guidance from *Borden*—this is the logical next case after *Borden*.

### **III. This case is an ideal vehicle to resolve the question presented.**

This petition presents a pure question of law that was meticulously preserved and is outcome-determinative. The same is true of *Delaine*: had either defendant been sentenced in the Ninth or Tenth Circuits, his sentence would not have been enhanced for Florida felony battery, and he would have received a much lower sentence. But while both cases are excellent vehicles for resolving the circuit conflict, this one is better, for four reasons.

*First*, the Sixth Circuit in *Delaine* declined to decide exactly what *Borden* held—whether it should read the decision narrowly like the Eleventh Circuit, or broadly like the Ninth and Tenth

Circuits. The Sixth Circuit ultimately deemed resolution of that dispute “unnecessary” because, even if the reasoning of neither *Borden* opinion controlled, it would follow the pre-*Borden* decisions in *Vail-Bailon* and *Douglas*. 171 F.4th at 893-94. *Vail-Bailon*’s approach cannot govern post-*Borden* for the reasons argued below and further detailed *infra*. But the fact that the Sixth Circuit freely followed *Vail-Bailon* (when *not* compelled by a “prior panel precedent” rule), confirms the Eleventh Circuit’s pre-*Borden* reasoning continues to have outsize influence on the post-*Borden* reasoning of other circuits.

*Second*, it makes sense to resolve the question here presented in an Eleventh Circuit case, because the predicate here is one of the most common Florida priors. A 2025 report published by the Florida Department of Corrections (DOC), compiling data from all criminal scoresheets in Florida from July 1, 2024 through June 30, 2025, indicates there were 1,256 convictions under § 784.041 during the last fiscal year alone. *See* Florida Department of Corrections, *Florida’s Criminal Punishment Code: Assessment and Analysis* (Oct. 2025), <https://www.fdc.myflorida.com/content/download/41394/file/Criminal%20Punishment%20Code%20Report%202025.pdf?version=1>. While that DOC report does not further break down how many of the 1,256 convictions were under § 784.041(1) (battery causing great bodily harm) versus § 784.041(2) (domestic battery by knowing and intentional strangulation), DOC reports from prior fiscal years in the same database reflect largely consistent numbers. And the Court may reasonably assume that there have been hundreds, if not thousands, of § 784.041(1) convictions over the past decade given that since *Vail-Bailon* was decided in 2017, the Eleventh Circuit has repeatedly relied on Fla. Stat. § 784.041(1) convictions for enhancements under both the ACCA and the Guidelines—always on the authority of *Vail-Bailon*.<sup>2</sup>

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<sup>2</sup> For ACCA cases involving a § 784.041(1) predicate, adhering to *Vail-Bailon*, *see United States v. Yawn*, 730 F. App’x 881, 881-82 (11th Cir. 2018); *Flowers v. United States*, 724 F. App’x 820,

*Third*, a decision here will have *immediate* impact on *multiple* Eleventh Circuit defendants, facing significant enhancements under both ACCA and the Guidelines. Without the enhancement, Petitioner’s Guideline range would be reduced to 37-46 months—a term he has already overserved, likely resulting in his immediate release from custody, and commencement of supervised release. And because elements clause decisions issued in the context of Guideline enhancements always control ACCA cases—just like *Vail-Bailon* has, and the Ninth and Tenth Circuits decisions in *Gomez* and *Sjodin* do as well—a favorable decision in this case would also immediately impact Eleventh Circuit defendants now on direct review serving enhanced ACCA sentences predicated on § 784.041(1). *See, e.g., United States v. Rodriguez*, No. 25-cr-202446-KMW, DE91, DE98 (S.D. Fla. 2026), *notice of appeal filed* Sept. 28, 2026 (11th Cir. Case No. 26-13518). And plainly, a favorable decision on that prior in this case would also immediately impact defendants throughout the country with convictions under the materially identical Indiana and Idaho felony battery statutes.

*Finally*, although a decision in this case should rightly govern the elements clause determination for *every* assault, battery, or other statute with a causation-of-harm element

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822-23 (11th Cir. Feb. 16, 2018); *Makonnen v. United States*, 723 F. App’x 905, 906-07 (11th Cir. Feb. 5, 2018); *Robinson v. United States*, 2017 WL 11650156, at \*\*1-2 (11th Cir. Nov. 13, 2017); *United States v. Green*, 873 F.3d 846, 869 (11th Cir. 2017); *see also Eady v. United States*, 2019 WL 12660978, at \*2 (11th Cir. Jan. 23, 2019) (denying § 2255 on grounds reasonable jurists could not debate the issue based on *Vail-Bailon*); *Smith v. United States*, 2018 WL 3199346, at \*1 (11th Cir. May 16, 2018) (same).

For Guideline cases involving a § 784.041(1) predicate, following *Vail-Bailon*, *see United States v. Matthews*, 3 F.4th 1286, 1291 (11th Cir. 2021); *United States v. Thomas*, 789 F. App’x 839, 840 (11th Cir. Jan. 9, 2020); *United States v. Durham*, 778 F. App’x, 844, 844 (11th Cir. 2019); *United States v. Walker*, 768 F. App’x 877, 879 (11th Cir. Apr. 9, 2019) *United States v. Frederick*, 737 F. App’x 522, 523 (11th Cir. Sept. 11, 2018); *United States v. Anthony*, 744 F. App’x 597, 602 (11th Cir. 2018); *United States v. Solis-Alonzo*, 723 F. App’x 863, 866-68 (11th Cir. Jan. 30, 2018); *United States v. Gathers*, 698 F. App’x 583, 584 (11th Cir. Oct. 2, 2017); *United States v. Bron*, 709 F. App’x 551, 555-56 (11th Cir. Sept. 18, 2017).

requiring neither purpose nor knowledge as to the harm caused, that will not happen in the Eleventh Circuit without specific direction from this Court. That court—alone among the circuits—refuses to follow an intervening decision of this Court that changes the relevant mode of analysis unless this Court mentions the contrary Eleventh Circuit precedent, or “otherwise comment[s] on” the precise issue before the prior Eleventh Circuit panel. *See, e.g., United States v. Dubois*, 139 F.4th 887, 892-893 (11th Cir. 2025). In the Eleventh Circuit’s view “[t]here is a difference between the holding in a case and the reasoning that supports that holding.” *United States v. Vega-Castillo*, 540 F.3d 1235, 1237, 1239 (11th Cir. 2008) (“[e]ven if *the reasoning* of an intervening high court decision is at odds with a prior appellate decision, that does *not* provide the appellate court with a basis for departing from its prior decision”) (emphasis added).

Every other circuit rightly recognizes that an intervening decision of this Court which changes the relevant mode of analysis abrogates prior circuit precedent that did not perform the required analysis.<sup>3</sup> Indeed, no other circuit disputes that lower courts are “bound not only by the holdings of higher courts’ decisions,” but also by their “modes of analysis.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989). Any other rule is at odds with settled principles of vertical *stare decisis*. *See National Institutes of Health v. American Public Health Ass’n*, 606 U.S. \_\_\_, 145 S.Ct. 2658, 2663 (2025) (Gorsuch, J., joined by Kavanaugh, J., concurring in part and dissenting in part) (“[l]ower court judges may sometimes disagree with this Court’s decisions,” but “they are never free to defy them.”).

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<sup>3</sup> *United States v. Tavares*, 843 F.3d 1, 11 (1st Cir. 2016); *United States v. Afriyie*, 27 F.4th 161, 168 (2d Cir. 2022); *Packer on behalf of I-800-Flowers.Com, Inc. v. Ragin Capital Management, LLC*, 105 F.4th 46, 54 (2nd Cir. 2024); *In re Krebs*, 527 F.3d 82, 87 (3d Cir. 2008); *United States v. Smithers*, 92 F.4th 237 (4th Cir. 2024); *Texas v. United States*, 126 F.4th 392, 106-07 (5th Cir. 2025); *United States v. Wahi*, 850 F.3d 296 (7th Cir. 2017); *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014); *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc); *United States v. Venjohn*, 104 F.4th 179, 187 (10th Cir. 2024).

The Sixth Circuit, like the Ninth and Tenth—but *unlike* the Eleventh—does not require an intervening decision of this Court to be “precisely on point” if its “legal reasoning is directly applicable,” and “requires modification of [a] prior decision.” *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014); *The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720–721 (6th Cir. 2016) (and cases cited therein); *RLR Investments, LLC v. City of Pigeon Forge, Tennessee*, 4 F.4th 380 (6th Cir. 2021) (abrogation occurs if the intervening Supreme Court decision “mandates modification” of the prior circuit decision).

There is thus *no* danger that the Sixth Circuit would fail to apply a decision by this Court on Florida felony battery to analogous statutes. But there is a real danger the Eleventh Circuit would—unless this Court, in this case, ends that court’s practice of disregarding decisions of this Court that change the relevant mode of analysis. Resolving the conflict in Petitioner’s case will ensure the Eleventh Circuit applies a favorable *mens rea* ruling on Florida felony battery to every analogous statute requiring an intentional act, but neither purpose nor knowledge as to the harm caused by that act.

#### **IV. The decision below is wrong.**

The Eleventh Circuit avoided reckoning with *Borden* by reading its holding too narrowly. That threshold error dictated the result, and the court’s reasoning was wrong for several reasons.

1. The court below deferred, under its “prior panel precedent” rule, to *Somers*’s conclusion that *Borden* held no more than that reckless crimes fell outside the elements clause. But *Somers* misapplied settled rules of decision.

To begin, *Somers* misstated the *Marks* rule in asserting that the “narrowest *holding* of the five-justice majority” in *Borden* was all it was “bound by.” 66 F.4th at 895 (citing *Marks*, 430 U.S. at 193, and *Borden*, 593 U.S. at 437, n.6) (emphasis added). What *Marks* actually held is that

“When a fragmented Court decides a case and *no single rationale* explaining the result enjoys the assent of five justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” 430 U.S. at 193 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)) (emphasis added).

Here, the plurality and concurrence disagreed about the textual source for the elements clause’s *mens rea* requirement, but agreed on its substance. As Petitioner argued below, and as the Ninth Circuit recognized in *Vega*, both opinions accept the Model Penal Code definitions of purposely, knowingly, and recklessly; both treat its definition of knowledge as the minimum *mens rea* for the elements clause; and for a dual *mens rea* statute with a causation-of-harm element like Florida felony battery, that definition requires a “subjective awareness” of the “practical certainty” that an intentional act will cause harm.

*Somers*, and in turn the decision below, also disregarded the fundamental rule that a court’s holding is inseparable from the reasoning necessary to it. This Court has been clear that “[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [it is] bound.” *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996) (citing *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (“As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law”) (Kennedy, J., concurring and dissenting)). Indeed, the Eleventh Circuit has itself applied that rule. *See, e.g., Powell v. Thomas*, 643 F.3d 1300, 1305 (11th Cir. 2011) (the holding of a case is comprised of both its result and “those portions of the opinion necessary to that result”) (citation omitted). Yet the court below refused to consider the reasoning shared by the *Borden* plurality and

concurrence. Though they diverged on the textual anchor for *mens rea*, they aligned on the definitions of purpose and knowledge that an elements clause offense requires.

2. Even if—as the government argued in *Gomez*, and the Ninth and Tenth Circuits hold—the plurality opinion controls, the courts in *Gomez*, *Vega*, *Manzon*, *Sjodin*, and *Lopez* correctly recognized that the plurality embraced the Model Penal Code *mens rea* definitions, and that the definition of “knowingly” itself confirms that a mere intentional act that knowingly causes great bodily harm does not meet the elements clause.

3. The court below also erred in adhering to *Somers*’ narrow reading, because *Somers* involved a fundamentally different statute. Florida aggravated assault requires an intentional threat but *no* causation of harm, so *Somers* had no occasion to consider how *Borden* applies to a dual *mens rea* statute with a strict liability causation-of-harm element. *Somers* should have had no bearing on whether the elements clause requires a heightened *mens rea* as to such an element. *See Webster v. Fall*, 266 U.S 507, 511 (1925).

Nor did the Eleventh Circuit consider such a statute in *United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010). The Arizona aggravated assault statute there, like the Tennessee statute in *Borden*, required no intentional act. And the court in *Palomino Garcia* rightly held, consistent with *Leocal*, that purely accidental injury did not suffice for the elements clause. *Cf. id.* at 1332-36. Although *Borden*’s narrow holding on Tennessee aggravated assault was consistent with the reasoning in *Palomino Garcia* because the statutes at issue were similar, *Borden* said more: because only crimes with at least a knowing *mens rea* qualify, and as per the Model Penal Code definition of “knowingly” where an offense has a causation-of-harm element, the defendant must have “subjective awareness” not only as to the *actus reus* of the crime, but also as to a “practical certainty” of its result. Florida felony battery indisputably requires no such awareness.

In short, the decision below rests on a too-narrow reading of *Borden* and on inapposite circuit precedent—including *Vail-Bailon* itself, whose majority never addressed the *mens rea* argument Judge Rosenbaum there raised in dissent, which *Borden* has now confirmed.

4. As to the views of other circuits, the court below wrongly ignored those of the Ninth and Tenth Circuits requiring “subjective awareness” of the “practical certainty” of harm. Petitioner rightly argued they were persuasive. And, although the government did not bring *Delaine* to the court’s attention, had it implicitly relied on *Delaine* that would only have deepened its error. The Sixth Circuit dismissed the *Borden* plurality’s embrace of the Model Penal Code *mens rea* definitions as mere “background”—in effect, dicta. That was wrong for the reasons above, and because the Sixth Circuit disregarded this Court’s teachings in *Leocal* and *Voisine* that the same words of the elements clause, used in different statutory contexts, will always be a function of “context.” Here, the relevant context was that Congress wrote the ACCA’s elements clause, and the Commission adopted the exact definition for “crime of violence,” against a statutory backdrop where a majority of states followed the Model Penal Code on culpability. No state battery offense was among the predicates in the original ACCA, and battery has never been an enumerated “crime of violence” in the guidelines. As the Eleventh Circuit rightly noted in *Palomino Garcia*, even the enumerated (generic) crime of aggravated assault requires an intent to cause serious bodily injury. 606 F.3d at 1332.

Had Congress or the Commission wished to sweep in every state assault and battery offense with a causation-of-harm element, regardless of *mens rea* as to the harm, they could have enumerated those offenses as predicates for enhancement—or at least written an elements clause “tracking the Model Penal Code by saying that a conviction must have, as an element, the ‘intentional, knowing, or reckless causation of physical injury.’” *Voisine*, 579 U.S. at 713

(Thomas, J., dissenting) (making that argument as support for finding reckless assaults were not a “use of physical force” within the purview of § 922(g)(9)). Significantly, they did *not*.

5. Judge Rosenbaum’s view that *Borden* was “agnostic” and “says nothing” about whether Florida felony battery meets the elements clause is mistaken for the same reasons. She read Justice Thomas’ words, “intent to harm,” too literally, to mean purpose but *not* knowledge (as the Model Penal Code defines it). And she overlooked that, as counsel emphasized at oral argument, Justice Thomas confirmed in *Delligatti* that in *Borden* he had agreed that “use of physical force” requires at least “knowing conduct.” 604 U.S. at 434, n.5. By citing his *Voisine* dissent—which explained that “knowing” conduct requires a “subjective awareness” of the “practical certainty” that one’s act will cause harm—Justice Thomas incorporated that reasoning into his *Borden* concurrence. That is likewise important background “context” confirming that he, like the plurality, agreed that crimes requiring neither purpose nor knowledge as to harm caused do not involve the “use of physical force.” Florida felony battery is such a crime.

6. The Court has repeatedly cautioned that statements in its opinions must not be read “in isolation,” *Endrew F. ex. rel. Joseph F. v. Douglas School Dist. RE-1*, 580 U.S. 386, 398 (2017), or “parsed as though we [a]re dealing with language of a statute, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979), but rather must “be taken connection with the case in which those expressions are used.” *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821) (Marshall, C.J.); *see also Nat’l Pork Producers Counsel v. Ross*, 598 U.S. 356, 374-75 (2023) (“our opinions dispose of discrete cases and controversies and they must be read with a careful eye to context;” citing *Cohens*). Contrary to these instructions, the panel majority, Judge Rosenbaum in her concurrence, and the *Somers* court all wrongly read “in isolation” Justice Thomas’s statement that “use of physical force” “has a well-understood meaning applying only to intentional acts designed to cause

harm.” Again, the “context” for that single statement in *Borden* was his fuller discussion of *mens rea* in *Voisine*.

7. Finally, even *if* Judge Rosenbaum were right that *Borden* was “agnostic” and “says nothing” about the *mens rea* required for a statute like Florida felony battery, the Court would simply decide *de novo* the question left open in *Borden* and *Delligatti*: whether the “against another” language in the elements clause requires purpose or knowledge as to harm caused by the defendant’s act. *See* 604 U.S. at 434, n.5. Text and context would control. And *Leocal*, *Voisine*, and the *Borden* plurality’s embrace of the Model Penal Code *mens rea* definitions and analysis of the phrase “against another” would be highly persuasive.

The Court should grant certiorari and reverse the decision below.

### CONCLUSION

The petition for certiorari should be granted. Alternatively, the Court should hold this petition pending decision in any other case in which the question presented herein will be resolved.

Respectfully submitted,

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