PRACTICE ADVISORY[1]
Overview of *Borden v. United States* for Immigration Counsel

June 22, 2021

On June 10, 2021, the U.S. Supreme Court issued *Borden v. United States*, __ U.S. __, No. 19-5410 (June 10, 2021), a federal sentencing enhancement case with important implications for immigration law. In *Borden*, the Court held that crimes that include a mens rea of recklessness cannot qualify as "violent felonies" under the Armed Career Criminal Act's (ACCA) elements clause. In doing so, the Court effectively held that the similarly-worded definition of a "crime of violence" under 18 U.S.C. § 16(a) excludes crimes with a recklessness mens rea. Section 16(a) is referenced in the aggravated felony crime of violence and crime of domestic violence definitions in the Immigration and Nationality Act (INA).

Although *Borden* addressed the scope of the definition of a "violent felony" under the ACCA, the Court's plurality decision expressly noted that it is reaching a question left open by two prior Supreme Court decisions: whether reckless crimes qualify as crimes of violence under 18 U.S.C. § 16. Slip op. at 7. *Borden* reverses adverse case law in the Fifth, Sixth, Eighth, and Tenth Circuits. **The decision effectively abrogates case law supporting the proposition that crimes of violence under § 16(a) encompass crimes with a recklessness mens rea**.

This advisory reviews the mens rea requirement for crimes of violence prior to *Borden* (Section I) and the holding in the case (Section II). It also covers immigration law considerations post-*Borden* (Section III). Finally, it covers suggested strategies for individuals whose cases are affected by *Borden* (Section IV) and includes a sample motion to reconsider such cases, **which should be filed by July 12, 2021.**[2] (Appendix).

---

[1] Released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). The authors of this advisory are Khaled Alrabe of the National Immigration Project of the National Lawyers Guild (NIPNLG), Andrew Wachtenheim of the Immigrant Defense Project (IDP), and Trina Realmuto of the National Immigration Litigation Alliance (NILA). The authors would like to thank Matt Vogel, Nabilah Siddiquee, Cristina Velez, Kristin MacLeod-Ball, Ryan Muennich, Dan Kesselbrenner, and Katie McCoy for their contributions. Practice advisories identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice advisories do not replace independent legal advice provided by an attorney or representative familiar with a client's case.

[2] A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, 8 U.S.C. § 1229a(c)(6)(B). If the time for filing has elapsed, motions should be filed within 30 days of June 10, 2021, the date the Court issued its decision in *Borden*, i.e., July 10, 2021. Because July 10 is a Saturday, the deadline is construed to fall on the next business day.

PRELIMINARY NOTE ON DIVISIBILITY: In this advisory, when we state that reckless crimes are categorically not crimes of violence, we are assuming the statute at issue covers reckless conduct exclusively, or is indivisible between mental states. In determining whether a statute of conviction that includes a reckless mens rea is a crime of violence, it is crucial for advocates to analyze divisibility under *Mathis v. United States*, 136 S. Ct. 2243 (2016). If a statute of conviction exclusively includes reckless (or less than reckless) mens rea, then it is categorically not a crime of violence under a properly applied categorical approach analysis. A statute of conviction that lists a recklessness mental state as well as higher mens rea, such as knowledge or intent, may in some cases still trigger the crime of violence immigration consequences if the various mental states listed are describing *separate* criminal offenses (divisible statute) rather than a single crime (indivisible statute).[3]

I. Pre-*Borden*: "Crimes of Violence" and Mens Rea

Congress defined a "crime of violence" in 18 U.S.C. § 16(a) as "an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another."[4] The reach of § 16(a) is extremely important for immigration law. Convictions that fall under § 16(a) are deportable offenses as aggravated felonies under 8 U.S.C. § 1101(a)(43)(F) if a sentence of one year or more is imposed and also trigger the "crime of domestic violence" deportability ground, regardless of the sentence imposed, if the victim and perpetrator share a qualifying domestic relationship. 8 U.S.C. § 1227(a)(2)(E)(i). Additionally, convictions that qualify as an aggravated felony "crime of violence" enhance criminal sentences for illegal reentry. 8 U.S.C. § 1326(b)(2).

Prior to *Borden*, the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held that crimes that require a mental state of negligence or lower mens rea do not qualify as crimes of violence under § 16(a).[5] In *Leocal*, a noncitizen challenged a removal order based on an aggravated felony crime of violence predicated on a Florida conviction for DUI which could be sustained with a negligence mens rea. *Id.* at 3. In a unanimous decision, the Court concluded that

---

[3] The divisibility analysis is beyond the scope of this advisory, for more information see Katherine Brady, ILRC, *How to Use the Categorical Approach Now* (Dec. 2019), https://bit.ly/34fxJ1m.

[4] The definition of a crime of violence includes two sub-sections: § 16(a), referred to as the elements clause or the use of force clause, which is discussed in this advisory, and § 16(b), referred to as the residual clause. In 2018, the Supreme Court struck down the residual clause as unconstitutionally void for vagueness. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Like § 16, ACCA's definition of a "violent felony" also includes a similarly-worded residual clause, which was found to be unconstitutional prior to *Dimaya*. *See Johnson v. United States*, 576 U.S. 591 (2015).

[5] In determining whether a criminal conviction qualifies as a crime of violence, adjudicators must use the categorical approach which requires that the "least of th[e] acts criminalized" fall under the definition of a crime of violence. *Moncrieffe v. Holder*, 569 U.S. 184, 185 (2013) (internal citations omitted). For more information about the categorical approach, see Brady, *supra* note 3.

negligence crimes cannot qualify as crimes of violence based on the language of § 16(a). Specifically, the Court disagreed with both parties' focus on whether the phrase "use of physical force" dictates a mens rea requirement. *Id.* at 8-10. Rather, the Court explained that the operative language in § 16(a) is that force must be used "*against the person or property of another.*" *Id*. at 9 (emphasis in original). The Court reasoned that given that the term "use" requires active employment, it is not natural to say that a person actively employed physical force against another person by accident. *Id*. Additionally, the Court supported its reading of § 16(a) by looking to the ordinary meaning of the term "crime of violence," which "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Id.* at 11.

Leocal expressly reserved the question of "whether a state or federal offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16." *Id.* at 13. Every circuit court to address this question had held that reckless crimes do not qualify as crimes of violence,[6] until a circuit split emerged after the Court's 2016 decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016).

In *Voisine*, the Court addressed the question of whether the statutory phrase "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) included a domestic assault statute with a recklessness mens rea.[7] A "misdemeanor crime of domestic violence" is defined in 18 U.S.C. § 921(a)(33)(A) as a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse or [person with other specified relationship with the victim]." Significantly, the provision does not include the "against the person or property" language that the Court in *Leocal* found to be dispositive of a mens rea requirement.

In *Voisine*, the Court held that reckless domestic assault qualifies as a misdemeanor crime of domestic violence. The Court found that the ordinary meaning of the term "use of physical force" means the "act of employing" something. *Voisine*, 136 S. Ct. at 2278. Based on this understanding, it held that the term "use" requires a volitional act that is "indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Id*. at 2279. Additionally, the Court looked to the purpose and context of the statute to confirm its reading, noting that Congress enacted the provision to address offenders with "run-of-the-mill" domestic violence *misdemeanors* and that

---

[6] *See United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014) (noting that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to satisfy the requirements for a "crime of violence" and citing cases addressing either 18 U.S.C. § 16 or the similarly worded 2L1.2 United States Sentencing Guideline (USSG) provision); *United States v. Moreno*, 821 F.3d 223, 228 (2d Cir. 2016); *Popal v. Gonzales*, 416 F.3d 249, 254 (3d Cir. 2005); *Garcia v. Gonzales*, 455 F.3d 465, 469 (4th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc). *See also United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (extending *Leocal*'s holding to reckless crimes in the context of the almost identically worded definition of a "crime of violence" under the USSG); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (same); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010) (same); *United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (en banc) (holding similarly a few months prior to *Leocal*), *cert. denied*, 543 U.S. 995 (2004).

[7] Under 18 U.S.C. § 922(g)(9), federal law prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm.

the majority of state jurisdictions include a recklessness mens rea in their DV statutes. *Id.* at 2278. The Court reasoned that an interpretation of the statute that excludes a recklessness mens rea would render § 922(g)(9) simply ineffective and would run afoul of Congress' intent. *Id*. at 2280-81. Relevant to *Borden*, Justice Thomas filed a dissenting opinion arguing that the phrase "use of physical force" implies an intentional act with a higher mens rea than recklessness. *Voisine*, 136 S. Ct. at 2283 (Thomas, J., dissenting).

As in *Leocal*, the Court in *Voisine* expressly noted that the decision "does not resolve whether § 16 includes reckless behavior." 136 S. Ct. at 2280 n.4. In fact, the Court noted that it did not "foreclose th[e] possibility" that § 16 should be interpreted differently given that "courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes." *Id*.

Despite this pronouncement, the Fifth, Sixth, Eighth, and Tenth U.S. Circuit Courts relied on *Voisine* to hold that statutes of conviction that include reckless mens rea can be violent felonies and crimes of violence.[8] The Board of Immigration Appeals has not taken a position on the circuit split following *Voisine*. Instead, the Board noted in several decisions that it would defer to the circuit courts on the question of whether reckless crimes qualify as crimes of violence for immigration purposes.[9]

II. The Holding in *Borden v. United States*

The ACCA imposes a fifteen year minimum sentence for persons found guilty of illegally possessing a gun if they have three or more prior convictions for a "violent felony." 18 U.S.C. § 924(e)(2)(B). A violent felony under the ACCA's so-called 'elements clause' is defined as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). This definition is identical to § 16(a) except the ACCA's elements clause does not cover property crimes; it excludes the phrase "or property." *See Borden*, slip op. at 6.

In *Borden*, the Court addressed the question of whether crimes that include reckless mental states qualify as violent felonies under the ACCA's elements clause. The petitioner, Charles Borden, Jr., challenged his sentence enhanced under the ACCA because one of the three prior convictions found to be predicate violent felonies was a reckless aggravated assault under Tennessee law. Mr. Borden argued that his Tennessee conviction was not a violent felony under the ACCA because it criminalized reckless conduct. He lost this argument at the District Court and at the Sixth Circuit.

---

[8] *See, e.g.*, *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) (extending *Voisine* to hold that the definition of a "crime of violence," in the Sentencing Guidelines context, a definition that is materially the same as § 16(a), includes reckless crimes); *United States v. Verwiebe*, 872 F.3d 408 (6th Cir.), *amended*, 874 F.3d 258, 264 (6th Cir. 2017) (same); *United States v. Ramey*, 880 F.3d 447, 449 (8th Cir. 2018) (same); *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018).

[9] *See Matter of Chairez-Castrejon*, 27 I.&N. Dec. 21, 23 (BIA 2017); *Matter of Cervantes Nunez*, 27 I.&N. Dec. 238, 241 n.3 (BIA 2018).

The Court reversed the Sixth Circuit decision and held that reckless crimes do not qualify as violent felonies under the ACCA's elements clause. Justice Kagan wrote the plurality opinion —which was joined by Justices Breyer, Sotomayor, and Gorsuch. Justice Thomas did not join Justice Kagan's opinion but concurred in the judgment.

A. Plurality Opinion

The plurality reached its conclusion by (1) looking to the meaning of the phrase "use of physical force against the person of another," (2) examining the context and purpose of the ACCA, and (3) distinguishing *Voisine*. Before analyzing the ACCA's elements clause, Justice Kagan began by drawing a clear line regarding culpability, between purposeful and knowing mental states on the one hand, which entail the highest level of culpability in criminal law, and negligent and reckless mental states on the other hand, which are "less culpable mental states because they instead involve insufficient concern with a risk of injury." Slip op. at 5.

1. The phrase "use of physical force against the person of another" excludes reckless crimes.

The plurality found that the phrase "use of physical force against the person of another" must be understood to exclude reckless crimes. Justice Kagan explained that the phrase "use of physical force" alone means "the 'volitional' or 'active' employment of force" as described in *Voisine*. *Id.* at 8. In *Voisine*, the court held that, at least in the context of "misdemeanor crimes of domestic violence," that phrase includes reckless conduct. *See supra* § I. The dispute, therefore, is about whether the word "against" affects this reading. Slip op. at 8. Citing to dictionary definitions, Justice Kagan notes that "the word can mean either '[i]n opposition to' or 'in contact with,' depending on the context." *Id.* at 9. Justice Kagan illustrates this distinction by noting the difference in usage between a military general deploying his forces *against* a rival regiment and a wave crashing *against* the shore. *Id.* Justice Kagan explains that "[o]nly if the 'against' phrase lacks [an oppositional] connotation—if, as the Government argues, it is indifferent to whether the conduct is directed at another— can the elements clause include reckless offenses." *Id*.

Justice Kagan concludes that the word "against" in the context of the elements clause entails the oppositional or targeted definition of the word and is "introducing the conscious object (not the mere recipient) of the force." *Id*. That is so because the elements clause pairs the word "against" with a volitional action—"the use of physical force." *Id*. Referencing her prior examples, Justice Kagan notes that unlike a general deploying forces *against* the enemy, a wave crashing *against* the shore has "no volition—and indeed, cannot naturally be said to 'use force' at all." *Id*.

Given this reading, the plurality reasoned that the ACCA's elements clause only includes purposeful and knowing acts and excludes reckless conduct. Justice Kagan illustrates this by describing the actions of a reckless driver who runs a red light and hits a person he did not see. *Id*. at 10. While "the commuter has consciously disregarded a real risk, thus endangering others" and has made contact with another person, "he has not trained his car at the pedestrian understanding he will run him over…[h]e has not used force 'against' another person in the targeted way the clause requires." *Id.* at 10-11.

The plurality relies on *Leocal* to confirm its conclusion. Justice Kagan notes that as in *Leocal*, the Court must read the "against" phrase as the "critical aspect" of the mens rea question. *Id*. at 11. Crucially, Justice Kagan notes that the one difference between § 16(a) and the elements clause— "or property"—does not require that the statutes be read differently on this question and in fact works against the government. *Id.* at 11-12. The government had argued that the "against" phrase under the elements clause is not about intent, rather it merely clarified that violent felonies under the clause are limited to crimes against persons rather than property. *Id* at 12. The plurality opinion rejected this argument because such a reading would render the "against" phrase in § 16(a) superfluous as it covers force against persons *or* property—the only two plausible targets of physical force. *Id.*

2. The context and purpose of the elements clause confirm that "violent felonies" do not include reckless crimes.

The plurality decision confirms its reading of the elements clause by looking to the statutory context and the purpose of the ACCA.

First, relying heavily on its analysis in *Leocal*, Justice Kagan explains that the Court must use the ordinary meaning of the term "violent felony" to inform its statutory interpretation in the same way that *Leocal* looked to the ordinary meaning of a "crime of violence." The plurality characterizes the terms "violent felony" and "crime of violence" as describing a "narrow 'category of violent, active crimes.'" *Id*. at 16 (quoting *Leocal*, 543 U.S. at 11). The ordinary meaning of these terms indicates that reckless crimes do not fall under their ambit: "[T]hose crimes 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." *Id*.

Second, the plurality reasoned that the purpose of the ACCA supports its reading of the elements clause as excluding reckless offenses. The ACCA is designed to deter "an offender who has repeatedly committed purposeful, violent, and aggressive crimes" from possessing firearms as such offenders pose an "uncommon danger" of using firearms to harm others. *Id*. at 17 (citations and quotations omitted). Justice Kagan explains that reckless and negligent conduct is "far removed" from the type of violent felony that makes an offender likely to deliberately use firearms. *Id*. Again relying on *Leocal*, Justice Kagan concludes:

> Extending the elements clause to reckless offenses would thus do exactly what *Leocal* decried: 'blur the distinction between "violent" crimes Congress sought to distinguish for heightened punishment and [all] other crimes.'
>
> *Id.* at 19 (quoting *Leocal*, 543 U.S. at 11).

3. Excluding reckless crimes from "violent felonies" does not conflict with *Voisine.*

Finally, the plurality opinion addresses the government's argument that *Voisine* requires reading the elements clause to include reckless crimes. As noted, *supra* § I, the Court in *Voisine* understood the phrase "use of physical force" as encompassing reckless conduct. The plurality rejected the government's argument based on the differences in text and purpose between the ACCA and § 922(g)(9) at issue in *Voisine*.

First, the plurality explains that the text of the elements clause and the definition of a misdemeanor crime of domestic violence are different in that the latter does not include the "against" phrase. Slip op. at 21. Because in *Leocal*, the 'against' phrase is the '"critical' text for deciding the level of mens rea needed," it makes sense that the provision in *Voisine*, lacking that language, would be treated differently. *Id.* at 21-22.

Second, the plurality again highlights the context and purpose differences that were essential to the Court's holding in *Leocal* and *Voisine*. The provision in *Voisine* defines a "*misdemeanor* crime of domestic violence" and not a "*violent felony*." *Id.* at 23 (emphasis added). The ordinary meaning of these two phrases supports dissimilar mental states for each type of offense. *Id*. Additionally, Justice Kagan explains, the ACCA and § 922(g)(9) serve very different purposes. The ACCA is designed to impose "greatly enhanced" prison sentences on "armed career criminals" whereas § 922(g)(9) merely disqualifies those convicted of misdemeanor domestic violence offenses from possessing a firearm. *Id.* These distinct purposes are consistent with the different mens rea requirements of each statute.

B. Justice Thomas's Concurrence

Justice Thomas concurs with the plurality that the ACCA elements clause does not encompass reckless crimes but does not join Justice Kagan's opinion. He finds that the phrase "use of physical force" alone excludes reckless crimes. J. Thomas, slip op. at 2. He maintains that *Voisine* was wrongly decided because the "use of physical force" should be read as "applying only to intentional acts designed to cause harm," which excludes reckless conduct. *Id.* The "against" phrase is not relevant to his analysis.

Additionally, Thomas argues that this outcome, although required by the language of the statute, is contrary to the broad purposes of the ACCA. *Id*. He explains that the Tennessee aggravated assault statute in question *would* have been a violent felony under the ACCA's residual clause that the Court deemed unconstitutionally void for vagueness in *Johnson v. U.S.*, 576 U.S. 591 (2015). *Id.* at 2-3; *see also supra* note 4 and accompanying text. He argues that *Johnson* should be overruled. *Id.* at 3-4.

Because Justice Thomas's opinion is premised on broad reasoning that conflicts with *Voisine*, the plurality opinion is the controlling holding of the court. Under *Marks v. United States*, when "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. 188, 193 (1977) (citations omitted).

III. Immigration Law Considerations Post-*Borden.*

A. Reckless crimes do not qualify as crimes of violence under immigration law.

The most important implication for noncitizens is that offenses that criminalize reckless conduct (other than those requiring a minimum mens rea of *extreme* recklessness) can no longer be a categorical match to § 16(a) and would not trigger the immigration consequences tied to the aggravated felony crime of violence ground of deportation or the crime of domestic violence ground of deportation.[10] While *Borden* ultimately addressed an ACCA provision, the Court began its analysis by declaring that "[t]oday, we reach the question we reserved in both *Leocal* and *Voisine*." Slip op. at 7. Neither of those cases were ACCA cases, and the *only* question reserved by both is whether reckless crimes qualify as crimes of violence under § 16(a). *See Leocal*, 543 U.S. at 13; *Voisine*, 136 S. Ct. at 2280 n.4. Moreover, in discussing both the text and the context and purpose of the ACCA's elements clause, Justice Kagan heavily grounds the plurality's reasoning on *Leocal*. *See supra* §§ II.A.1, 2.

B. *Borden* does not address crimes involving "extreme recklessness" or "depraved heart" mental states.

The plurality opinion at the outset describes the various criminal law mental states. While not providing a definitive definition of recklessness, the plurality explains, relying on the Model Penal Code (MPC), that a "person acts recklessly, in the most common formulation, when he consciously disregards a substantial and unjustifiable risk attached to his conduct, in gross deviation from accepted standards." Slip op. at 5 (citations and quotations omitted). Later on, in footnote 4, the plurality reserves the question of whether "mental states (often called 'depraved heart' or 'extreme recklessness') between recklessness and knowledge" fall under the ACCA's elements clause. *Id.* at 7 n.4. Noncitizens in immigration proceedings may argue that crimes with such mental states are not crimes of violence as that remains an open question under *Borden,* but counsel should be prepared for DHS to argue that such crimes do not benefit from the reasoning espoused in *Borden*.[11] In assessing the immigration consequences of criminal convictions with a minimum mens rea of extreme recklessness, noncitizens in criminal proceeding should be more cautious: *Borden* does not render such convictions safe.

C. *Borden* strongly reaffirms the categorical approach.

In reaching its conclusion, the plurality affirmed the application of the categorical approach and implicitly rejects policy arguments suggesting that the categorical approach is counter-intuitive or disruptive insofar as it might prevent the removal of individuals who have

---

[10] As noted at the outset of the advisory, it is essential for counsel to assess the issue of the divisibility of mental states under *Mathis v. United States*, 136 S. Ct. 2243 (2016) for statutes of conviction that list a recklessness mental state along with higher mens rea such as knowledge or intent.

[11] Practitioners should note that the BIA has held that "depraved heart" murder qualifies as an aggravated felony "murder" as defined in 8 U.S.C. § 1101(a)(43)(A) and has not addressed the issue of whether such a crime qualifies as a crime of violence. *See Matter of M-W*, 25 I&N Dec. 748, 750 (BIA 2012).

been convicted of very serious crimes. The government argued that excluding reckless crimes would remove many "classically violent crimes" from the violent felony category and listed a variety of examples. In response, the plurality affirmed that such examples are irrelevant under the categorical approach and explains:

> Th[e] [categorical] approach is under-inclusive by design: It expects that some violent acts, because charged under a law applying to nonviolent conduct, will not trigger enhanced sentences. So what matters are not the convictions the Government offers, but those for, say, running a stop sign or skiing too wildly. Because a law criminalizing recklessness covers—indeed, was likely designed for—that kind of conduct, the offense cannot count as a violent felony.
>
> Slip. op at 20.

D. *Borden's* reasoning applies equally to the aggravated felony "crime of violence" and the "crime of domestic violence" deportability grounds.

Under 8 U.S.C. § 1227(a)(2)(E)(i), an individual convicted of a "crime of domestic violence" is deportable. That phrase is defined as "any crime of violence (*as defined in section 16 of title 18*) against a person" where the perpetrator and victim shared a qualifying domestic relationship. 8 U.S.C. § 1227(a)(2)(E)(i) (emphasis added). For purposes of immigration law, a "crime of domestic violence" *must* also be a "crime of violence" under § 16(a). Accordingly, the Board has applied *Leocal* to the definition of a "crime of domestic violence." *See Matter of Velasquez*, 25 I.&N. Dec. 278, 282 (BIA 2010). DHS, therefore, cannot rely on the reasoning in *Borden* differentiating between the definition of a "misdemeanor crime of domestic violence" and a "violent felony" to argue that a "crime of domestic violence" under immigration law necessitates a special analysis with respect to the mens rea requirement.

E. *Borden*'s implications on the nature of force required for "crimes of violence."

The Court's plurality decision reaffirms that the phrase "use of physical force" warrants a different interpretation depending on whether it's used in the "crime of violence" definition or the "misdemeanor crime of domestic violence" definition under 18 U.S.C. § 921(a)(33)(A) addressed in *Voisine*. Practitioners may want to argue, therefore, that *Borden* calls into question cases that apply interpretations of "the use of physical force" under § 921(a)(33)(A) to the crime of violence context.

In *Johnson v. United States*, the Supreme Court held that the meaning of "physical force" under the ACCA's elements clause (and by extension § 16(a)) is "*violent* force—*i.e.,* force capable of causing physical pain or injury to another person." 559 U.S. 133, 134 (2010) (emphasis in original). Later, in *United States v. Castleman*, the Court interpreted the meaning of "physical force" in the context of the definition of a "misdemeanor crime of domestic violence" as incorporating the common law meaning of force—i.e. any offensive physical contact, not just violent force. 572 U.S. 157, 164 (2014). Despite these differing definitions, U.S. courts of appeals have relied on language in *Castleman* to expand the nature of

force required to satisfy a crime of violence, especially in the context of the indirect use of force.[12]

The plurality in *Borden* again clearly separates between the type of crimes implicated by *Leocal* and *Borden* on the one hand and *Castleman* and *Voisine* on the other, by highlighting that the nature of force required varies between the two. Justice Kagan explained that the provision at play in *Voisine* and *Castleman* "captures not violent active conduct alone, but also 'acts that one might not characterize as 'violent' in a nondomestic context.'" Slip op. at 23 (quoting *Castleman*, 572 U. S. at 165). Additionally, Justice Kagan distinguishes the category of crimes that fall under a "violent felony" or a "crime of violence" as "best understood to involve not only a *substantial degree of force*, but also a purposeful or knowing mental state." *Id.* at 16 (emphasis added). This separation between "crimes of violence" and "misdemeanor crimes of domestic violence" may help practitioners argue that cases that apply interpretations of "the use of physical force" under § 921(a)(33)(A) to the crime of violence context should be reexamined.

IV. Suggested Strategies for Cases Affected by *Borden*

Because both the crime of violence aggravated felony ground and the crime of domestic violence ground affect deportability and relief eligibility, individuals must assess the impact of *Borden* on their particular case—i.e., whether they can seek termination of removal proceedings or the ability to apply for discretionary relief from removal. The advisory includes a sample motion to reconsider and terminate for individuals who can argue that they are no longer deportable as a result of *Borden. See* Appendix. The sample motion to reconsider seeks only termination but can be adapted for filing in the relief eligibility context.

A. Individuals in Pending Removal Proceedings

Individuals who are in removal proceedings and whose cases are affected by *Borden* should bring the decision to the attention of the IJ or BIA and explain how it affects removability or relief eligibility. An individual can do so by filing a notice of supplemental authority, *see* BIA Practice Manual, ch. 4.6(g) (Supplemental Briefs): 4.9 (New Authorities Subsequent to Appeal), a motion to terminate (if appropriate), or a merits brief. If the case is on appeal at the BIA and the person is newly eligible for relief as a result of the decision, it is advisable to file a motion to remand, *see* BIA Practice Manual, ch. 5.8 (Motions to Remand), before the BIA rules on the appeal to preserve his or her statutory right to later file one motion to reconsider and reopen (*see infra*, § IV.B.3).

Where the sole ground of removability is a domestic violence crime or an aggravated felony crime of violence and the predicate conviction incorporates a recklessness mens rea,

[12] *Castleman* interpreted the phrase "use of physical force" under § 921(a)(33)(A) as encompassing use of force that is not typically viewed as "violent" (e.g., sprinkling poison into a victim's drink). *Castleman*, 559 U.S. at 171. Almost every circuit court has extended this reasoning to crimes of violence or the ACCA elements clause. *See United States v. Scott*, 990 F.3d 94, 112 (2d Cir. 2021) (en banc); *United States v. Reyes-Contreras*, 910 F.3d 169, 182 (5th Cir. 2018) (en banc)*; United States v. Deshazior*, 882 F.3d 1352, 1358 (11th Cir. 2018); *United States v. Chapman*, 866 F.3d 129, 132–33 (3d Cir. 2017); *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017); *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017); *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016).

individuals are advised to file a motion to terminate removal proceedings. Once removal proceedings are terminated, DHS can no longer amend charges under 8 C.F.R. § 1003.30 and would have to file a new NTA with new charges. In that case, counsel should argue that res judicata, also known as claim preclusion, bars DHS from bringing any new charges based on facts that were available to DHS in the prior proceedings because DHS had the opportunity to amend the charges during the pendency of the prior removal proceedings but chose not to.[13]

B. Individuals with Final Orders

1. Pending Petition for Review

Individuals with pending petitions for review may wish to bring *Borden* to the attention of opposing counsel and a joint motion to remand the case to the BIA. Alternatively, they could consider filing a motion to summarily grant the petition or a motion to remand the case to the BIA, whichever is appropriate. Regardless, whether a motion to remand is filed, if briefing has not been completed, the opening brief and/or the reply brief should address *Borden*. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure (FRAP) 28(j) ("28(j) Letter") informing the court of the decision and its relevance to the case. Individuals in this category also may file administrative motions to reconsider or reopen. *See infra* § IV.B.3.

2. Denied Petition for Review

If the court of appeals already denied a petition for review, and the time for seeking rehearing has not expired (see FRAP 35 and 40 and local rules), a person may file a petition for rehearing, explaining *Borden*'s relevance to the case and its impact on the outcome. If the court has not issued the mandate, a person may file a motion to stay the mandate. *See* FRAP 41 and local rules. If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. *See* FRAP 27 and 41, and local rules. Through the motion, the person should ask the court to reconsider its prior decision in light of *Borden* and remand the case to the BIA. Individuals in this category may also file administrative motions to reconsider or reopen. *See infra* § IV.B.3.

3. Filing a Motion to Reconsider or Reopen with the BIA or Immigration Court

If the Immigration Judge or BIA has issued a final order of removal against a person, that individual may file a motion to reconsider or reopen removal proceedings based on *Borden*, regardless of how long ago the removal order issued and regardless of whether an individual sought judicial review. He or she may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case). The BIA and

---

[13] *See*, *e.g.*, *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007) (holding that res judicata bars DHS from initiating a second removal proceeding on the basis of charges that it could have brought in a prior proceeding). *But see Matter of Jasso Arangure*, 27 I&N Dec. 178, 185 (BIA 2017) (holding that res judicata does not apply in the context of removal proceedings involving aggravated felony grounds of removability). Although the Sixth Circuit vacated *Matter of Jasso Arangure* in *Arangure v. Whitaker*, 911 F.3d 333 (6th Cir. 2018), the case remains a published BIA precedential decision outside of that circuit.

immigration courts may grant reconsideration in these cases by recognizing fundamental changes in the law as "errors of law" in the prior decision that warrant reconsideration. *See* 8 U.S.C. § 1229a(c)(6)(C). Likewise, they may grant reopening by treating the decision as a "new fact." *See* 8 U.S.C. § 1229a(c)(6)(B). As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual if the person is not detained. This risk may increase when the motion is untimely.

Individuals ordered removed within 30 or 90 days of Borden should file motions to reconsider within 30 days of the removal order. If 30 days have passed, they should file motions to reopen within 90 days of the removal order.[14] Individuals can also request *sua sponte* reconsideration as an alternative and secondary argument (i.e., "Statutory Motion to Reconsider or, in the Alternative, Reconsider Sua Sponte").

Individuals ordered removed more than 30 days or more than 90 days prior to Borden should file motions to reconsider within 30 days of June 10, 2021, the date of the *Borden* decision, i.e., July 12, 2021. Alternatively, they should file motions to reopen within 90 days of June 10, 2021, i.e., September 8, 2021. These individuals will need to argue and document that they merit equitable tolling of the 30- or 90-day statutory deadline, and the motions therefore are treated as timely filed. As addressed in the sample motion to reconsider in the Appendix, to merit equitable tolling of the deadlines, individuals must prove diligence in pursuing the motion and extraordinary circumstances that prevented filing earlier.[15] Arguably, the BIA may not deny a motion in the exercise of discretion where the person is no longer deportable as a result of *Borden*.[16] Individuals can also request *sua sponte* reconsideration as an alternative and secondary argument (i.e., "Statutory Motion to Reconsider or, in the Alternative, Reconsider Sua Sponte").

4. Individuals Abroad

Individuals abroad should be treated no differently from individuals within the United States if their petitions for review or statutory motions to reconsider are granted. There is a government process for DHS to facilitate their return to the United States.[17]

Although there are regulations that purport to deprive the IJ and BIA of jurisdiction to review motions filed by individuals abroad, *see* 8 C.F.R. §§ 1003.23(b)(1), 1003.2(d), if a motion

---

[14] *See* 8 U.S.C. §§ 1229a(c)(6)(B) (motion to reconsider deadline) and 1229a(c)(7)(C)(i) (motion to reopen deadline); *see also* 8 C.F.R. § 103.5 (providing 30 days for filing a motion to reopen or reconsider a DHS decision for individuals in administrative removal proceedings under 8 U.S.C. § 1228(b)).

[15] *See Holland v. Florida*, 560 U.S. 631, 649 (2010).

[16] For more on this point, please see AIC, *The Basics of Motions to Reopen EOIR-Issued Removal Orders*, at 6 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf.

[17] *See* ICE Policy Directive Number 11061.1 (Feb. 24, 2012). For mentorship on returning individuals from abroad, please contact info@immigrationlitigation.org.

to reconsider or reopen is either timely filed or the deadline merits equitable tolling, an IJ or the BIA will not lose jurisdiction over the motion.[18]

With respect to *sua sponte* motions, the BIA has interpreted the regulations as depriving the IJ and the BIA of jurisdiction to adjudicate motions if the individual has departed the country. The Ninth and Tenth Circuits have rejected the Board's interpretation of the regulation.[19] The basis of those decisions is the Supreme Court's intervening 2019 decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), where the Court clarified the deference standards for an agency's interpretation of its own regulation. The Second, Third, and Fifth Circuits have upheld the Board's interpretation of the regulation and applied the post-departure bar in the context of *sua sponte* motions, but these decision pre-date *Kisor*.[20] Individuals abroad should therefore continue to include an alternative *sua sponte* basis in their motions and argue that after *Kisor* post-departure *sua sponte* motions are not barred by regulation.

---

[18] *Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. Att'y Gen*., 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); Pruidze v. Holder, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); Contreras-*Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. Att'y Gen*., 681 F.3d 1236 (11th Cir. 2012). The Eighth Circuit is the only court of appeals that has not yet ruled on this issue.

[19] *See Rubalcaba v. Garland*, __ F.3d __, No. 17-70845, 2021 WL 2214087 (9th Cir. June 2, 2021); *Reyes-Vargas v. Barr*, 958 F.3d 1295 (10th Cir. 2020).

[20] *See Desai v. Att'y Gen.*, 695 F.3d 267 (3d Cir. 2012); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009).

APPENDIX

SAMPLE
STATUTORY MOTION TO RECONSIDER TO TERMINATE REMOVAL PROCEEDINGS (FOR FILING WITH THE BIA)

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

This motion is applicable to:

Cases originating in the Fifth, Sixth, Eighth, and Tenths Circuits where a "crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i) or an aggravated felony for a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F) was the **sole** ground of removability and the statute of conviction criminalizes reckless conduct.*

***NOTE ON DIVISIBILITY**: This motion assumes that the statute of conviction covers reckless conduct exclusively, or it includes multiple mens rea, including recklessness, but is indivisible between mental states. It is **essential** for advocates to analyze divisibility under *Mathis v. United States*, 136 S. Ct. 2243 (2016) where the statute covers multiple mental states. If a statute of conviction exclusively includes reckless (or less than reckless) mens rea, then it is categorically not a crime of violence under a properly applied categorical approach and the motion may be used as is. A statute of conviction that lists a recklessness mental state as well as higher mens rea such as knowledge or intent may in some cases still trigger the crime of violence immigration consequences if the various mental states listed are describing *separate* criminal offenses (divisible statute) rather than a single crime (indivisible statute). The divisibility analysis is beyond the scope of this motion as it is statute specific. For more information on how to conduct this analysis, see Katherine Brady, ILRC, *How to Use the Categorical Approach Now* (Dec. 2019), https://bit.ly/34fxJ1m.

This motion is formatted for filing with the Board of Immigration Appeals (BIA). If the person did not appeal to the BIA, the motion should be modified for filing with the Immigration Court because different regulations apply.

In cases where the person was deportable based on *additional* grounds of removability, counsel should assess whether the person now is eligible for relief from removal as a result of *Borden v. United States*. These respondents would need to seek reconsideration or reopening and the opportunity to apply for relief from removal.

[If applicable: DETAINED]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
_____	)	

RESPONDENT'S MOTION TO RECONSIDER AND TERMINATE REMOVAL PROCEEDINGS, OR, IN THE ALTERNATIVE, *SUA SPONTE* MOTION TO RECONSIDER AND TERMINATE, IN LIGHT OF THE SUPREME COURT'S DECISION IN *BORDEN v. UNITED STATES*

I. INTRODUCTION

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, moves for reconsideration in light of the Supreme Court's decision in *Borden v. United States*, No. 19-5410, __ U.S. __, 2021 WL 2367312 (June 10, 2021). In *Borden*, the Supreme Court held that a crime that requires a mens rea of recklessness cannot qualify as a "violent felony" under the Armed Career Criminal Act's (ACCA) elements clause. 2021 WL 2367312 at *12. Because the definition of a "violent felony" under the ACCA's elements clause is materially identical to the definition of a "crime of violence" under 8 U.S.C. § 16(a), under *Borden*, a statute of conviction where the minimum conduct requires a mens rea of recklessness is not a "crime of violence" under 18 U.S.C. § 16(a), and therefore not a "crime of violence" aggravated felony under INA § 101(a)(43)(F) or "crime of domestic violence" under INA § 237(a)(2)(E)(i). Indeed, the Court expressly noted that its decision

resolves the question of whether reckless crimes qualify as "crimes of violence" under §16(a). *Id.* at *5.

In light of *Borden*, crimes with reckless mens rea do not fall within the ambit of §16(a) and the decision abrogates all caselaw suggesting or holding otherwise. In particular, *Borden* overrules the following decisions of the Fifth, Sixth, Eighth, and Tenth Circuits: *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018); *United States v. Verwiebe*, 872 F.3d 408 (6th Cir.), *amended*, 874 F.3d 258 (6th Cir. 2017); *United States v. Ramey*, 880 F.3d 447, 449 (8th Cir. 2018); and *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018).

The Court's decision in *Borden v. United States* controls this case. Respondent was found deportable solely based on a statute of conviction that criminalizes reckless conduct, namely [insert statute of conviction]. As such, Respondent is no longer deportable and the Board should grant reconsideration and terminate removal proceedings.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Homeland Security (DHS) alleged that Respondent was admitted as a [insert as appropriate: lawful permanent resident, other status] on or about _____. *See* Notice to Appear, dated _____. DHS charged Respondent with deportability for having been convicted of [an aggravated felony under INA §§ 237(a)(2)(A)(iii), 101(a)(43)(F), 18 U.S.C. § 16(a), for a "crime of violence," OR of a "crime of domestic violence" under INA § 237(a)(2)(E)(i), 18 U.S.C. § 16(a)].

On_____, the Immigration Judge (IJ) found Respondent deportable as charged. *See* IJ Decision. This Board affirmed the IJ's decision on_____. *See* BIA Decision.

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

(1) The validity of the removal order [has been or is OR has not been and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is: _____. The proceeding took place on:_____. The outcome is as follows_____.

(2) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is:_____.

(3) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider within 30 days of the date of a final removal order. INA § 240(c)(6)(A)–(B), 8 C.F.R. § 1003.2(b)(2).

[If motion is filed within 30 days of BIA's decision] The Board issued its decision in Respondent's case on_____. This motion is timely filed within 30 days of the date of that decision.

[If more than 30 have elapsed since the date of the Board's decision] Both the time and numeric limitations are subject to equitable tolling. The Board issued its decision in Respondent's case on_____. The Board should treat the instant motion as a timely filed statutory motion to reconsider because Respondent merits equitable tolling of the time [if applicable: and numeric] limitations. *See* § IV.B., *infra*; *see also* 8 C.F.R. § 1003.1(d)(1)(ii) ("a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.").

IV. ARGUMENT

A. As a Matter of Law, the Board Erred in Finding the Respondent Removable Based on a ["Crime of Violence" Aggravated Felony **OR** "Crime of Domestic Violence"]

Respondent was charged with and found deportable for a ["crime of domestic violence" under INA § 237(a)(2)(E)(i) **OR** aggravated felony under INA §§ 237(a)(2)(A)(iii), 101(a)(43)(F)] for a prior conviction under [insert statute of conviction]. *See* BIA Decision at_. The mental state requirement of the statute of conviction includes recklessness. In light of the Supreme Court's decision in *Borden*, it was legal error for the Board to find the Respondent's statute of conviction—for which the minimum conduct is committed with a mens rea of recklessness—is a ["crime of domestic violence" under INA § 237(a)(2)(E)(i) **OR** aggravated felony under INA §§ 237(a)(2)(A)(iii), 101(a)(43)(F)]. The Board must grant reconsideration and terminate removal proceedings against Respondent.

In *Borden v. United States*, the Supreme Court held that a "violent felony" under ACCA's elements clause excludes crimes with a mental state of recklessness. Critically, the definition of a violent felony under the ACCA's elements clause is materially identical to 18 U.S.C. § 16(a). *See* 18 U.S.C. § 924(e)(2)(B)(i) (an 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. § 16(a) ("an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another"). Relying on its prior precedent in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court reasoned that the "against" phrase, combined with the "use of physical force" phrase, requires a mental state of purposeful or knowing conduct. *Borden*, 2021 WL 2367312 at *6-7. Additionally, the Court explained that it must look to the ordinary meaning of the term "violent felony" to inform its statutory interpretation in the same way that *Leocal* looked to the ordinary meaning of a "crime of violence." *Id.* at *9. The Court describes both "crimes of violence" and "violent felonies" as

falling under a "narrow category of violent, active crimes" that 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." *Id*. (citations omitted).

Although *Borden* addresses an ACCA provision, the Court's analysis applies here. The Court began its analysis by declaring that "[t]oday, we reach the question we reserved in both *Leocal* and *Voisine* [*v. United States*, 136 S. Ct. 2272 (2016)]." *Id.* at *5. Neither of those cases were ACCA cases, and the *only* question reserved by both is whether reckless crimes qualify as crimes of violence under §16(a). *See Leocal*, 543 U.S. at 13; *Voisine*, 136 S. Ct. at 2280 n.4. Moreover, the reasoning of *Borden* is heavily grounded in *Leocal*, a §16(a) case. By its own language and analysis, the majority acknowledged that the *Borden* holding also applies to §16(a).

In *Leocal*, the Supreme Court held that crimes requiring a negligence mens rea do not qualify as crimes of violence under §16(a). 543 U.S. at 10. The Court understood the phrase "use of physical force against the person or property of another" as necessitating some level of intent because of the word "against." *Id.* at 9. The Court explained that "[w]hile one may, in theory, actively employ something in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident." *Id.* Additionally, the Court confirmed its reading of §16(a) by looking to the ordinary meaning of the term "crime of violence," which "suggests a category of violent, active crimes that cannot be said naturally to include" negligent offenses. *Id.* at 11. The Court in *Leocal* reserved the question of "whether a state or federal offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16." *Id*. at 13.

Following *Leocal*, nearly all the Courts of Appeals have held that reckless crimes do not qualify as crimes of violence. *See United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014) (noting

that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to satisfy the requirements for a crime of violence).

This changed following *Voisine v. United States*, 136 S. Ct. 2272 (2016). In *Voisine*, the Supreme Court addressed the meaning of the phrase "use of physical force" in the definition of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), a statutory scheme distinguishable from §16(a) both in its text and purpose.[1] The Court held that reckless crimes qualify as "misdemeanor crimes of domestic violence" because the term "use" requires a volitional act that is "indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Id.* at 2279. As in *Leocal*, the Court in *Voisine* expressly noted that the decision "does not resolve whether § 16 includes reckless behavior. "136 S. Ct. at 2280 n.4.

Following *Voisine*, the [Fifth / Sixth / Eighth / Tenth] Circuit where this case arises, extended *Voisine* to hold that crimes with a recklessness mental state qualify as "crimes of violence." [*See United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) / *United States v. Verwiebe*, 872 F.3d 408 (6th Cir.), *amended*, 874 F.3d 258 (6th Cir. 2017) /*United States v. Ramey*, 880 F.3d 447, 449 (8th Cir. 2018) / *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018)]. The Board has not taken a position on the circuit-split created after this Court, among others, deviated from the post-*Leocal* consensus following *Voisine*.

---

[1] Federal law prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 922(g)(9). A "misdemeanor crime of domestic violence" is defined in 18 U.S.C. § 921(a)(33)(A) as a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse or [person with other specified relationship with the victim]." It does not include the "against" phrase used in §16(a).

Borden now has settled the questions left open in *Leocal* and *Voisine*. Its holding means that a statute of conviction that includes a mens rea of recklessness is categorically not a crime of violence or crime of domestic violence. The decision overrules the decisions of the Fifth, Sixth, Eighth, and Tenth Circuits, holding that a reckless offense is a crime of violence. *See, e.g.*, *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018); *United States v. Verwiebe*, 872 F.3d 408 (6th Cir.), *amended*, 874 F.3d 258, 264 (6th Cir. 2017); *United States v. Ramey*, 880 F.3d 447, 449 (8th Cir. 2018); *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018). Respondent was charged with and found deportable for a ["crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i) / an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)]. *See* BIA Decision at . [Explain that the mental state requirement of the statute of conviction includes recklessness].

Thus, in light of *Borden*, the Board should grant reconsideration and terminate removal proceedings against Respondent.

[If more than 30 days have elapsed since the BIA's decision, insert section B]

B. THE BOARD SHOULD TREAT THE INSTANT MOTION AS A TIMELY FILED STATUTORY MOTION BECAUSE RESPONDENT MERITS EQUITABLE TOLLING OF THE TIME AND NUMERICAL LIMITATIONS.

1. Standard for Equitable Tolling

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), or, under the doctrine of equitable tolling, as soon as practicable after finding out about an extraordinary circumstance that prevented timely filing.

The Supreme Court has consistently articulated the standard for determining whether an individual is "entitled to equitable tolling." *See*, *e.g.*, *Holland v. Florida*, 560 U.S. 631, 649 (2010). Specifically, an individual must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely

filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). *See also Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). The Supreme Court also requires that those seeking equitable tolling pursue their claims with "reasonable diligence," but they need not demonstrate "maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal quotations omitted).

The Supreme Court also has recognized a rebuttable presumption that equitable tolling is read into every federal statute of limitations. *Id.* at 645–46. Relevant here, courts of appeals recognize that motion deadlines in immigration cases are subject to equitable tolling. *See Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (en banc) *overruled on other grounds by Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en banc); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo v. AG*, 713 F.3d 1357, 1363 n.5 (11th Cir. 2013) (en banc); *cf. Bolieiro v. Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013) ("Notably, every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen."). [If applicable] Similarly, federal courts recognize that the numeric limit on motions is subject to tolling. *See Jin Bo Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002); *cf. Lugo-Resendez*, 831 F.3d at 343 ("If [a noncitizen] qualifies for equitable tolling of the . . . numerical limitation[] on a motion to reopen, the motion is treated as if it were the one the [noncitizen] is statutorily entitled to file.") (quoting *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011)). Thus, the time [and numeric] limitations on motions to reconsider at issue in this case are subject to equitable tolling.

2. Respondent Is Diligently Pursuing [Her/His] Rights and Extraordinary Circumstances Prevented Earlier Filing of this Motion.

The Supreme Court's decision in *Borden*, overruling the [Fifth / Sixth / Eighth / Tenth] Circuit's decision in [*United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) / *United States v. Verwiebe*, 872 F.3d 408 (6th Cir.), *amended*, 874 F.3d 258 (6th Cir. 2017) /*United States v. Ramey*, 880 F.3d 447, 449 (8th Cir. 2018) / *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018)], constituted an extraordinary circumstance that prevented Respondent from timely filing a motion to reconsider. Additionally, [he/she] pursued [his/her] case with reasonable diligence. Equitable tolling of the motion to reconsider deadline is therefore warranted in this case.

The Supreme Court's decision in *Borden* abrogates the Board's erroneous finding that [his/her] conviction was a ["crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i) / an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)]. Furthermore, it corrected the decision of the [Fifth / Sixth / Eighth / Tenth] Circuit Court which previously prevented the Board from correctly determining that Respondent was not removable and would have made an early motion challenging this determination futile. This extraordinary circumstance prevented Respondent from timely filing [his/her] motion to reconsider.

Borden was decided on June 10, 2021. Respondent has exhibited the requisite diligence both before and after learning of the decision. [She/He] first learned of the decision on _____when_____. *See* Declaration of Respondent; Declaration of [Name of Attorney]. [She/He] is filing the instant motion to reopen within_____days of discovering that [she/he] is not deportable [insert if true] and within 30 days of the Supreme Court decision. As set forth in Respondent's accompanying declaration, Respondent attempted to challenge the Immigration Judge's decision by appealing the decision to this Board, [if

applicable] and later via Petition for Review to the [insert appropriate circuit]. [If Respondent did not seek circuit review, explain the reason why and support claims with corroborating evidence if possible; If Respondent sought review, explained what happened]. [Include any other steps Respondent took to pursue case prior to the *Borden* decision including contacting attorneys.] Respondent is filing this motion as soon as practicable after finding out about the decision and has displayed reasonable diligence in pursuing [his/her] rights.

C. IN THE ALTERNATIVE, THE BOARD SHOULD RECONSIDER RESPONDENT'S REMOVAL ORDER SUA SPONTE.

An immigration judge or the Board may reconsider a case on its own motion at any time. *See* 8 C.F.R. §§ 1003.23(b)(1), 1003.2(a). The Board invokes its authority to reopen or reconsider a case following fundamental changes in law. *See Matter of G-D-*, 22 I&N Dec. 1132, 1135 (BIA 1999). The Supreme Court's decision in *Borden* amounts to a fundamental change in law warranting sua sponte reopening or reconsideration. *See supra* Section IV.A. Reconsideration is especially warranted in this case because [describe equitable factors supported by attached evidence]. *See* Declaration of Respondent.

V. CONCLUSION

The Board should reconsider its prior decision in this case and terminate removal proceedings.

Dated:_____ Respectfully submitted,

_____

[Attach proof of service on opposing counsel]