# 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***

# 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.

# 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 .

1. Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: .
2. Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

# 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.”).

# ARGUMENT

1. **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]](#footnote-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*.

*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]

# 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.

# 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.

# 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.

# 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]

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). [↑](#footnote-ref-1)