

No. 26-231

---

**In the Supreme Court of the United States**

---

MARIO DELAINE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

**On Petition For A Writ of Certiorari To The  
United States Court of Appeals For The Sixth  
Circuit**

---

**BRIEF OF THE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS AMICUS  
CURIAE IN SUPPORT OF PETITIONER**

---

Jeffrey T. Green  
*Co-Chair, Amicus  
Committee,*

National Association  
of Criminal Defense  
Lawyers (NACDL)  
1660 L St., N.W.  
Washington, D.C. 20036

Adeel M. Bashir\*  
*11th Circuit Vice-Chair,  
NACDL Amicus Comm.*

400 N. Tampa Street  
Suite 2660  
Tampa, FL 33602  
adeel\_bashir@fd.org  
703-835-3929

*\*Counsel of Record  
Counsel for Amicus Curiae*

---

## TABLE OF CONTENTS

|                                                                                                                                                                                      | Page |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Table of Contents .....                                                                                                                                                              | i    |
| Table of Authorities.....                                                                                                                                                            | ii   |
| Interest of Amicus Curiae.....                                                                                                                                                       | 1    |
| Introduction and Summary of Argument.....                                                                                                                                            | 2    |
| Argument.....                                                                                                                                                                        | 5    |
| I. The Split Is Mature, and Further<br>Percolation Will Not Resolve It. ....                                                                                                         | 5    |
| A. The circuits disagree about what<br><i>Borden</i> held.....                                                                                                                       | 5    |
| B. The circuits will not resolve the<br>conflict internally, and as a result<br>defense counsel must navigate an<br>unworkable landscape across a<br>common statutory structure..... | 9    |
| II. The Sixth Circuit's Rule Confuses the<br>Character of the Force With the<br>Defendant's Culpability. ....                                                                        | 11   |
| A. <i>Borden's</i> culpability requirement does<br>not disappear when an unintended<br>result follows.....                                                                           | 12   |
| B. ACCA's recidivism structure depends<br>on the culpability judgment the Sixth<br>Circuit disregards.....                                                                           | 15   |
| Conclusion .....                                                                                                                                                                     | 19   |

## TABLE OF AUTHORITIES

Page

**Cases:**

|                                                                                |                     |
|--------------------------------------------------------------------------------|---------------------|
| <i>Alleyne v. United States</i> , 570 U.S. 99<br>(2013).....                   | 17                  |
| <i>Borden v. United States</i> , 593 U.S. 420<br>(2021).....                   | 2, 12, 15,<br>18    |
| <i>Delligatti v. United States</i> , 604 U.S. 423<br>(2025).....               | 3, 7, 8,<br>14, 18  |
| <i>Douglas v. United States</i> , 858 F.3d 1069<br>(7th Cir. 2017).....        | 8                   |
| <i>Johnson v. United States</i> , 559 U.S. 133<br>(2010).....                  | 3, 4, 13,<br>17, 18 |
| <i>Jefferies v. State</i> , 849 So. 2d 401 (Fla.<br>Dist. Ct. App. 2003) ..... | 14, 15              |
| <i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004) .....                            | 2, 11, 18           |
| <i>Marks v. United States</i> , 430 U.S. 188<br>(1977).....                    | 6                   |
| <i>Morissette v. United States</i> , 342 U.S. 246<br>(1952).....               | 16                  |
| <i>Rehaif v. United States</i> , 588 U.S. 225<br>(2019).....                   | 16                  |

## TABLE OF CONTENTS—Continued

|                                                                                           | Page                |
|-------------------------------------------------------------------------------------------|---------------------|
| <i>Staples v. United States</i> , 511 U.S. 600<br>(1994).....                             | 16                  |
| <i>Stokeling v. United States</i> , 586 U.S. 73<br>(2019).....                            | 8                   |
| <i>United States v. Delaine</i> , 171 F.4th 880<br>(6th Cir. 2026).....                   | 6, 8, 13,<br>14, 17 |
| <i>United States v. Howard</i> , 2022 WL<br>10966513 (7th Cir. 2022).....                 | 9                   |
| <i>United States v. Gomez</i> , 165 F.4th 1199<br>(9th Cir. 2026) (en banc).....          | 6                   |
| <i>United States v. Lopez</i> , 2026 WL 2165840<br>(9th Cir. 2026).....                   | 6, 7, 9             |
| <i>United States v. Sheely</i> , ___ F.4th ___,<br>2026 WL 2349505 (11th Cir. 2026) ..... | 8, 9                |
| <i>United States v. Sjodin</i> , 139 F.4th 1188<br>(10th Cir. 2025).....                  | 9                   |
| <i>United States v. Vail-Bailon</i> , 868 F.3d<br>1293 (11th Cir. 2017) (en banc).....    | 8, 14, 15           |

## TABLE OF CONTENTS—Continued

|                                                                            | Page       |
|----------------------------------------------------------------------------|------------|
| <i>United States v. Vega</i> , 2023 WL 4858148<br>(9th Cir. 2023).....     | 6          |
| <i>Wooden v. United States</i> , 595 U.S. 360<br>(2022).....               | 16         |
| <br><b><i>Statutes, Guidelines, and Other Authorities:</i></b>             |            |
| 18 U.S.C. § 16 .....                                                       | 11         |
| 18 U.S.C. § 922(g) .....                                                   | 10, 11, 16 |
| 18 U.S.C. § 924(a)(8).....                                                 | 16         |
| 18 U.S.C. § 924(c)(3) .....                                                | 11         |
| 18 U.S.C. § 924(e) .....                                                   | 2, 11, 16  |
| California Penal Code § 273.5.....                                         | 7          |
| Fla. Stat. § 784.041(1) .....                                              | 14, 16     |
| USSG § 4B1.2 .....                                                         | 11         |
| William Blackstone, <i>Commentaries on the Laws of England</i> (1769)..... | 2, 16      |

## INTEREST OF AMICUS CURIAE

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.<sup>1</sup>

NACDL has a strong interest in the question presented, and it has served as amicus curiae in this Court as the elements-clause and categorical-approach doctrines have developed. Its members represent defendants whose sentences turn on these questions in every federal circuit, and that work supplies on-the-ground insight into how the categorical approach and the mens rea principles this

---

<sup>1</sup> No persons or entities other than *amicus*, its members, or its counsel authored this brief, in whole or in part, or made a monetary contribution to this brief's preparation or submission. Under Supreme Court Rule 37.2, *amicus* provided timely notice to counsel of record for all parties of its intent to file this brief.

Court has recognized shape charging decisions, plea negotiations, and sentencing exposure.

## INTRODUCTION AND SUMMARY OF ARGUMENT

From the common law forward, courts and scholars agree that American criminal law grades punishment by culpability, insisting that harsher penalties demand a proportionately greater showing of moral fault. Blackstone, for instance, thought any other rule “absurd” and “a kind of quackery in government” to “apply the same punishment to crimes of different malignity.”<sup>4</sup> William Blackstone, *Commentaries on the Laws of England* 17 (1769). Rather, “in every state a scale of crimes should be formed, with a corresponding scale of punishments.” *Id.* at 18. That principle governs when the increased punishment turns on a defendant’s prior convictions no less than where it turns on the offense of conviction.

The Armed Career Criminal Act enhances the sentence of a defendant whose three prior convictions include, among other things, a “violent felony.” *See* 18 U.S.C. § 924(e). The elements clause is one critical gate, sorting the prior offenses whose commission satisfies that culpability judgment from those that do not.

This Court’s elements-clause decisions implement the same culpability principle tracing from the common law. For example, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), excluded negligent conduct. *Borden v. United States*, 593 U.S. 420, 445 (2021), excluded reckless conduct. And most recently, *Delligatti v.*

*United States*, 604 U.S. 423 (2025), reserved a mens rea question as to the phrase “against another.” *Id.* at 434 n.5.

This case asks whether an offense that requires an intentional act, but no mens rea as to the resulting physical pain or injury, qualifies as a “violent felony” under ACCA’s elements clause. *See* Pet. i. That question sits squarely within the mens rea reservation the Court left open in *Delligatti*. In the decision below, the Sixth Circuit held that no mens rea need attach to the resulting harm. In contrast, the Ninth and Tenth Circuits hold that it must. The question is cleanly presented and consequential.

Petitioner Delaine shows why this case meets the criteria for review. *See generally* Pet. NACDL writes to underscore three points, which bolster the case for certiorari.

First, confusion in the lower courts is growing, not settling, and only this Court can resolve it. The split emerged within a year of *Borden*, disagreeing not only about what *Borden* says about culpability, but about what *Borden* actually held. Lower courts have since looked for answers in related cases, like *Delligatti*. But *Delligatti* doesn’t answer the question here, and courts have mistaken its holding on the character of force for a resolution of the mens rea question it expressly reserved. None of this disarray will clear up without this Court’s intervention.

Second, the Sixth Circuit’s rule confuses the character of force with the fortuity of injury. In *Johnson v. United States*, 559 U.S. 133 (2010), this Court held that Florida simple battery falls outside

the elements clause because its intentional-touch element reaches “the slightest offensive touching.” *Id.* at 139. Florida felony battery shares that element and criminalizes the same quantum of force. It adds one thing, a result of great bodily harm. On the Sixth Circuit’s reading, that unintended result transforms the same touch, backed by the same mens rea *Johnson* deemed insufficient, into violent force. Nor is the mismatch peculiar to Florida. Similar statutes across the country pair a minimally culpable act with a result-based aggravator that carries no mens rea as to the harm. Under the Sixth Circuit’s rule, each qualifies as an ACCA predicate. That rule imports the tort principle that a defendant takes his victim as he finds him, and it imports that principle where a state-offense element triggers a fifteen-year mandatory minimum. But criminal law grades punishment by culpability, not by the fortuity of the harm.

Third, the Sixth Circuit’s rule cannot be reconciled with the culpability principle American criminal law has long applied to enhanced punishment. Statutes imposing enhanced penalties carry a presumption that a mens rea attaches to the fact that triggers them. ACCA sits at the severe end of that spectrum, converting a felon-in-possession conviction ordinarily carrying no mandatory minimum into one carrying a fifteen-year mandatory floor. Under the Sixth Circuit’s rule, the fact that lifts a defendant across that line, the resulting injury, is a strict-liability fact. That inversion abandons the culpability judgment Congress built into ACCA and hinges decades of federal sentencing exposure on the fortuity of harm rather than the mens rea the prior offense required.

## ARGUMENT

### **I. The Split Is Mature, and Further Percolation Will Not Resolve It.**

The federal courts of appeals split three to two on the question presented. The Sixth, Seventh, and Eleventh Circuits hold that no mens rea need attach to the resulting harm. The Ninth and Tenth Circuits hold that it must. *See* Pet. 11–17. The divide runs across a familiar class of state predicates: assault, battery, and domestic violence statutes that pair a volitional act with a result-based aggravator. *See* Pet. 17–18. Under the Sixth Circuit’s rule, these statutes qualify as ACCA predicates. Under the Ninth Circuit’s rule, they do not. Same defendant, same prior conviction, opposite fifteen-year mandatory floor.

The split alone warrants this Court’s intervention. Federal recidivism sentencing exposure now turns on the geography of the prosecution, and only this Court can supply the answer the statute requires.

The case for review runs deeper still. Lower courts read *Borden* in inconsistent ways. Government lawyers press inconsistent theories across circuits. NACDL’s members meet that confusion every day. They cannot advise clients whose prior convictions might, or might not, expose them to a minimum of fifteen years in prison. This Court’s guidance is needed, and it is needed now.

#### **A. The circuits disagree about what *Borden* held.**

The Sixth and Ninth Circuits do not merely disagree about how *Borden* applies to Florida felony

battery or California assault. They disagree about what *Borden* held.

The Ninth Circuit reads the *Borden* plurality as narrower than Justice Thomas’s concurrence and therefore binding under *Marks v. United States*, 430 U.S. 188 (1977). See *United States v. Lopez*, 2026 WL 2165840, at \*3 n.2 (9th Cir. July 28, 2026); *United States v. Gomez*, 165 F.4th 1199, 1208 (9th Cir. 2026) (en banc). The plurality’s mens rea rule therefore governs. The Sixth Circuit reads *Marks* differently and holds that Florida felony battery qualifies under either *Borden* opinion. See *United States v. Delaine*, 171 F.4th 880, 893–94 (6th Cir. 2026).

The circuits disagree over what the mens rea must reach. The Ninth Circuit requires the mens rea to reach the harm itself. In *Gomez*, the en banc court held that the clause does not cover an offense requiring only an intent to act, rather than an “intent to cause harm.” 165 F.4th at 1208–09. *United States v. Vega*, 2023 WL 4858148 (9th Cir. July 31, 2023), made the same point structurally: where injury is a separate element, the mens rea must extend beyond the underlying battery to the resulting injury. See *id.* at \*1. And *Lopez* confirmed that the required mental state must reach “the use of force sufficient to cause pain or injury.” 2026 WL 2165840, at \*4. The Sixth Circuit takes the opposite view. It requires intent only as to the force, so an intentional touch qualifies even if the defendant neither intended nor knew that harm would result. See *Delaine*, 171 F.4th at 892. That is

not a disagreement more percolation can resolve. Rather, the circuits read *Borden* itself differently.

Indeed, the courts see the divide. In *Lopez*, decided this past summer, the Ninth Circuit cited *Delaine* by name while noting the open dispute over whether *Borden* requires a mens rea as to the resulting injury or only as to the direction of force at another. *See Lopez*, 2026 WL 2165840, at \*4 n.5. The court did not need to resolve that dispute, because the statute failed under either reading, and it reaffirmed the rule it announced in *Gomez*. That the disagreement now appears by name in a published opinion is strong evidence of a mature split.

The government has not held a single position either. Below, the government urged the Sixth Circuit to reject the Ninth and Tenth Circuits' approach, arguing that those decisions "incorporate the intent-to-harm view of *Borden* which this Court expressly rejected." *See* Pet. 15 (citing U.S. C.A. Br. 20). In the Ninth Circuit, the government defended California Penal Code § 273.5 as a categorical crime of violence, relying on precedent that did not engage *Borden*. *See Lopez*, 2026 WL 2165840, at \*9. The Ninth Circuit rejected the argument. Federal prosecutors give different accounts of what *Borden* requires, and those accounts drive the sentences defendants serve.

While the disagreement traces to *Borden*, lower courts have looked elsewhere for an answer *Borden* left them unable to agree on. Take *Delligatti*. The Court there decided a discrete question, whether causing bodily injury by omission constitutes the "use" of physical force. *See* 604 U.S. at 429–34. The predicate offense, New York second-degree murder, required proof that the defendant intentionally

caused the death of another. *Id.* at 427. Intent to harm was built into the offense. The disputed question was whether a failure to act could supply the “use” component. The Court answered yes, restating the settled rule that “any force that actually causes injury or death” qualifies as violent force. *Id.* at 432 (quoting *Stokeling v. United States*, 586 U.S. 73, 83 (2019)). The Court then reserved the mens rea question, declining to express any view “on whether the phrase ‘against another’ imports a mens rea requirement.” *Id.* at 434 n.5.

The confusion over *Borden*’s holding has driven courts to search cases, like *Delligatti*, for answers those cases do not contain. The Sixth Circuit, for example, lifted the “any force that actually causes injury” language from *Delligatti*, using it to answer both the force question and the mens rea question. See *Delaine*, 171 F.4th at 891. That flawed approach revives a reading the Eleventh and Seventh Circuits had adopted years earlier, before *Delligatti*, reasoning that intentional force “that in fact causes” great bodily harm is necessarily force “capable” of causing it. *United States v. Vail-Bailon*, 868 F.3d 1293, 1302–03 (11th Cir. 2017) (en banc); see also *Douglas v. United States*, 858 F.3d 1069, 1071 (7th Cir. 2017). And recently, the Eleventh Circuit doubled down on that reading, holding in *United States v. Sheely*, \_\_\_ F.4th \_\_\_, 2026 WL 2349505 (11th Cir. Aug. 13, 2026), that *Borden* did not abrogate *Vail-Bailon*.

This reasoning conflates two questions. One question—whether a touch is capable of causing injury—concerns the character of the force. The other—whether the offense requires the defendant to use that force with a culpable state of mind—concerns

mens rea. *Delligatti* answered the first in a case where the predicate offense already required intentional causation of death. It did not, however, answer the second. Reading *Delligatti* to resolve both treats the force inquiry as the whole inquiry and reads out the mens rea question the Court reserved. Only this Court can separate what *Delligatti* held about force from the question it left open.

**B. The circuits will not resolve the conflict internally, and as a result defense counsel must navigate an unworkable landscape across a common statutory structure.**

Nor will the circuits close the split among themselves. The Ninth Circuit has spoken en banc in *Gomez*. This Court denied certiorari on other grounds. Pet. 12. A three-judge panel then extended *Gomez* to a different California statute in *Lopez*. See 2026 WL 2165840, at \*4–8. Both routes to Ninth Circuit reconsideration are closed.

The Sixth Circuit denied rehearing en banc in this case. See Pet. (1). The Seventh Circuit refused to revisit *Douglas* after *Borden*, holding instead that a conviction for acting “knowingly or intentionally” satisfies the mental state *Borden* demands. *United States v. Howard*, 2022 WL 10966513, at \*2 (7th Cir. Oct. 19, 2022). The Tenth Circuit joined the Ninth in *United States v. Sjodin*, 139 F.4th 1188 (10th Cir. 2025). And the Eleventh Circuit has now decided *Sheely*, 2026 WL 2349505, reaffirming *Vail-Bailon* after *Borden*. The panel read the *Borden* plurality narrowly as excluding only reckless conduct and

concluded that *Borden* did not abrogate *Vail-Bailon*. The result reinforces rather than resolves the split.

The pattern is unmistakable. Every circuit that has spoken has done so through its most authoritative internal process. And each circuit has held its position when given the chance to reconsider. None will move without this Court's intervention.

The split falls on defendants and the lawyers who represent them. NACDL's members counsel clients across all five circuits and on both sides. They cannot give reliable sentencing advice, because federal law itself is unsettled.

Petitioner's case shows the consequences. Without ACCA, his Guidelines range would have been 41 to 51 months. With ACCA, he received 188 months. Pet. 4. In the Ninth or Tenth Circuit, the same predicate would not qualify, and the same defendant would face the shorter range. Sentencing Commission data confirms that the difference here is typical. The average 18 U.S.C. § 922(g) sentence without ACCA is 70 months. With ACCA, 192 months. See Pet. 11.

The statutes producing that draconian result recur across the country. See Pet. 19 n.1 (cataloguing state statutes). Each shares the structure at issue here, a culpable mental state as to the underlying act and no separate mens rea as to the result. Under the Sixth Circuit's rule, every one of these statutes qualifies as an ACCA predicate. Under the Ninth Circuit's rule, none does. Multiplied across five circuits and dozens of statutes, the stakes reach

thousands of defendants and thousands of years of imprisonment.

The consequences extend beyond ACCA. The elements-clause language recurs in USSG § 4B1.2, 18 U.S.C. § 924(c)(3), and 18 U.S.C. § 16. *See Leocal*, 543 U.S. at 6–7. The Court’s answer will govern the career-offender guideline, consecutive firearm sentences, and aggravated-felony removability under the Immigration and Nationality Act. NACDL’s members represent defendants at every stage of that pipeline.

The result on the ground is geographic disparity. A defendant with a Florida felony battery conviction charged under § 922(g) faces a fifteen-year mandatory minimum in the Sixth Circuit and none in the Ninth. Prosecutors know it. Defense counsel know it. Clients feel it as the difference between five years and fifteen. Congress designed ACCA to apply uniformly. *See* § 924(e). The current landscape does not deliver uniformity, and further percolation will not produce it.

## **II. The Sixth Circuit’s Rule Confuses the Character of the Force With the Defendant’s Culpability.**

The rule below is not a modest quarrel about statutory text. The Sixth Circuit’s rule treats the character of the force and the defendant’s culpability as one inquiry. *Borden*, however, treated them as two. That collapse cannot be reconciled with *Borden* itself, with the culpability principle American criminal law has long applied to enhanced punishment, or with the doctrinal line running from *Leocal* through *Delligatti*.

**A. *Borden's* culpability requirement  
does not disappear when an  
unintended result follows.**

Start with common ground. The *Borden* plurality and Justice Thomas disagreed about where in the elements clause to locate the mens rea requirement. Neither treated the occurrence of injury as a substitute for the culpability the clause requires.

The plurality demanded “a deliberate choice of wreaking harm on another, rather than mere indifference to risk.” 593 U.S. at 438. It grounded that demand in the Model Penal Code’s hierarchy, which orders mental states by what the actor perceives about consequences. *See id.* at 425–27. A person acts purposefully when he “consciously desires” a result. *Id.* at 426. He acts knowingly when he is aware harm is “practically certain to follow.” *Id.* He acts recklessly when he “consciously disregards a substantial and unjustifiable risk.” *Id.* at 427. Each formulation describes what the actor perceives about the consequence. That focus is the framework, not an incident of it.

The plurality’s driver examples make the point. The driver who accelerates toward a pedestrian he sees uses force against that pedestrian. His conduct targets another. *See id.* at 432. The driver who runs a red light and strikes a pedestrian he never saw does not. His “fault is to pay insufficient attention to the potential application of force.” *Id.* Same collision. Same injury. Different mens rea. Different result. The line is awareness.

Justice Thomas reached the same result by a different route. He read “use of physical force” to reach only “intentional acts designed to cause harm.” *Id.* at

446 (Thomas, J., concurring in the judgment). An intentional touch that happens to injure is not an act designed to cause the injury. However they parted on text, both opinions converge on one rule. The elements clause reaches conduct culpable in relation to the force and its application to another, not conduct that merely produces harm.

The Sixth Circuit collapses that rule. It reads *Borden* to require only that the defendant consciously deploy force against another person, without awareness of harm. *See Delaine*, 171 F.4th at 892. On that reading, “against the person of another” does no independent work beyond requiring the intentional act to land on a person.

Petitioner shows in detail why that reasoning cannot be reconciled with *Borden*’s text or structure. Pet. 20–23. Amicus adds that the anomaly the rule produces reaches beyond Florida. Florida’s simple/felony battery pair supplies the sharpest illustration, but the same mismatch appears wherever a statute pairs a minimally culpable act with a result-based aggravator.

This Court has explained what to make of Florida battery’s intentional-touch element. In *Johnson*, the Court held that Florida simple battery falls outside the elements clause because the touch element reaches “the slightest offensive touching.” 559 U.S. at 139. That was a holding about the quantum of force. A slight touch is not violent force. The Sixth Circuit accepted the point. *Delaine*, 171 F.4th at 891.

Florida felony battery has the same touch element and criminalizes the same quantum of force. It adds a result requirement. The touch must cause great bodily

harm. Fla. Stat. § 784.041(1)(b). The panel read that added element to transform the same touch, backed by the same mens rea *Johnson* deemed insufficient, into violent force. “[A]ny force that actually causes injury” qualifies as violent force, the panel held. *Delaine*, 171 F.4th at 891 (quoting *Delligatti*, 604 U.S. at 432). Florida courts describe felony battery as “a species of the specific intent crime of battery . . . but with resulting and unintended great bodily harm.” *Jefferies v. State*, 849 So. 2d 401, 404 (Fla. Dist. Ct. App. 2003).

The panel’s rule makes the resulting injury do the work that the character of the force and the defendant’s culpability are supposed to do.

That reasoning imports a tort rule into criminal law. Under the eggshell rule, a defendant who delivers an ordinary touch that produces catastrophic injury bears liability for the full harm, because civil liability compensates the injured party and severity of injury drives the size of recovery. Criminal law follows a different rule. It grades punishment by culpability. Homicide law sorts the same death into murder, manslaughter, or negligent homicide by the defendant’s mental state. Same result, different mens rea, different punishment. The Sixth Circuit’s rule imports the tort measure where a state-offense element triggers a fifteen-year mandatory floor.

*Vail-Bailon* divided the Eleventh Circuit when its majority imported that tort rule into criminal law. The dissent explained that the result element “has no bearing on the degree of force necessary to commit” the offense, and that the degree of force “is not somehow altered because the touching happens to result in great bodily harm.” *Vail-Bailon*, 868 F.3d at

1311–12 (Rosenbaum, J., dissenting). “A spitball that happens to cause great bodily harm is still just a spitball.” *Id.* at 1312. Severity of injury does not transform the character of the underlying conduct.

Justice Thomas’s concurring analysis in *Borden* reaches the same conclusion from a different direction. He would confine the elements clause to “intentional acts designed to cause harm.” 593 U.S. at 446 (Thomas, J., concurring in the judgment). Florida felony battery does not require such an act. It requires only an intentional touch that causes unintended great bodily harm. *See Jefferies*, 849 So. 2d at 404. The gap between mens rea as to the act and mens rea as to the result is the mens rea question *Delligatti* reserved. It is the question this case presents.

**B. ACCA’s recidivism structure depends on the culpability judgment the Sixth Circuit disregards.**

This Court has explained that ACCA’s recidivism enhancement turns on the culpability of the prior conduct, not merely its outcome. *Borden* held that the elements clause reaches only offenders who made “a deliberate choice of wreaking harm on another, rather than mere indifference to risk.” 593 U.S. at 438 (plurality opinion); *see id.* at 446 (Thomas, J., concurring in the judgment) (elements clause covers only “intentional acts designed to cause harm”). A defendant whose Florida felony battery conviction rested on an intentional touch that produced unforeseen injury does not fit either description. Consider a bar patron who pokes a stranger in the chest, unaware that the stranger wears an implanted cardiac device the poke dislodges. Under Florida law,

the patron has committed felony battery. He intentionally touched another, and the touch caused great bodily harm. *See* Fla. Stat. § 784.041(1). Under the Sixth Circuit’s rule, that conviction supplies an ACCA predicate. The patron has shown nothing of the deliberate choice *Borden* requires. The rule sweeps him in anyway.

The reallocation collides with a settled presumption. American criminal law presumes that a culpable mental state attaches to each material element of an offense, and it disfavors strict liability where the penalty is severe. *See Morissette v. United States*, 342 U.S. 246 (1952); *Staples v. United States*, 511 U.S. 600 (1994); *Rehaif v. United States*, 588 U.S. 225 (2019); *see also Wooden v. United States*, 595 U.S. 360 (2022) (Kavanaugh, J., concurring). The presumption reflects the same culpability principle Blackstone described. Because “the same punishment” should not attach to “crimes of different malignity,” the law demands a mens rea proportioned to the sentence at stake. Blackstone, *Commentaries on the Laws of England* at 17.

That principle applies with special force to ACCA. A conviction for possession of a firearm by a felon under § 922(g) ordinarily carries no mandatory minimum. *See* 18 U.S.C. § 924(a)(8). ACCA transforms that sentencing exposure into a fifteen-year mandatory floor. *See id.* § 924(e)(1). Petitioner’s sentence more than tripled because of the enhancement, from a Guidelines range of 41 to 51 months to 188 months. *See* Pet. 9. The presumption applies with full force to the fact that carries that increase. This Court has held that a fact which raises the mandatory minimum is an element of the offense.

*Alleyne v. United States*, 570 U.S. 99 (2013). Elements ordinarily carry mens rea requirements. Attaching a strict-liability rule to the fact that triggers a fifteen-year mandatory floor is in tension with that structure.

The Sixth Circuit inverts it. Simple battery does not satisfy the elements clause. *See Delaine*, 171 F.4th at 891; *Johnson*, 559 U.S. at 139. What lifts Florida felony battery over the line, in the panel's view, is the resulting injury, and the panel holds that no mens rea attaches to that result. *See Delaine*, 171 F.4th at 892. The lever that triggers ACCA's fifteen-year floor thus becomes a strict-liability fact. The Sixth Circuit's rule thus imposes the same punishment on offenders of different culpability and treats the fortuity of injury as a substitute for the culpable state of mind the enhancement was designed to demand.

The consequences run deeper than one harsh sentence. The rule undoes the culpability judgment Congress built into ACCA. Congress used the elements-clause category to identify defendants whose prior conduct marks them for enhanced punishment. Read the mens rea out of the fact that triggers the category, and the category no longer distinguishes a violent use of force from an intentional touch that happened to produce serious harm. Whether a defendant faces fifteen years then turns on the fortuity of the injury rather than the culpability the prior offense required. The recidivism enhancement loses its mooring to the recidivism it was designed to reach.

\*\*\*

This Court has taken up the elements clause repeatedly, and each decision has refined what the

clause requires. *Leocal* excluded negligent conduct. *See* 543 U.S. at 9–11. *Borden* excluded reckless conduct. *See* 593 U.S. at 445. *Delligatti* held that knowing or intentional causation of bodily injury involves the use of force, whether by act or omission. *See* 604 U.S. at 432. Each decision answered a question the prior decisions left open. Each preserved the same structure. The clause reaches only offenses that satisfy both its force requirement and its mens rea requirement.

Furthermore, *Delligatti* left this case’s question open. The Court there considered a predicate offense that required intentional causation of death. It asked whether causation by intentional act or omission constitutes the “use” of force. *See id.* at 429–34. It did not decide whether a state offense must require any mens rea as to the harm to satisfy the elements clause. *See id.* at 434 n.5. Petitioner’s question presented sits squarely within that reservation. The Sixth Circuit’s answer, that no mens rea as to harm is required, conflicts with the Ninth and Tenth Circuits’ reading of *Borden*. This case therefore presents the next unresolved question in the Court’s elements-clause decisions.

Lastly, this Court has granted certiorari to resolve elements-clause questions of just this character. *See, e.g., Leocal*, 543 U.S. 1; *Johnson*, 559 U.S. 133; *Borden*, 593 U.S. 420; *Delligatti*, 604 U.S. 423. The same features that warranted review there are present here: a mature circuit conflict; a recurring statutory structure; stakes measured in decades of federal sentencing exposure; and a culpability question in a posture where the split is fully developed and where this Court’s guidance is needed.

**CONCLUSION**

For the reasons above and those set forth in the Petition, the Court should grant certiorari.

Respectfully submitted,

Adeel M. Bashir\*  
*11th Circuit Vice-Chair,*  
*NACDL Amicus Comm.*  
400 N. Tampa Street  
Suite 2660  
Tampa, FL 33602  
adeel\_bashir@fd.org  
703-835-3929

Jeffrey T. Green  
*Co-Chair, Amicus*  
*Committee,*  
National Association of  
Criminal Defense  
Lawyers (NACDL)  
1660 L St., N.W.  
Washington, D.C. 20036

*\*Counsel of Record*  
*Counsel for Amicus Curiae*

September 11, 2026