No. 19-5410

IN THE
Supreme Court of the United States

CHARLES BORDEN, JR.,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

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

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association, founded in 1958. It works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has thousands of direct members nationwide and up to 40,000 members including affiliates. Those 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. As such, NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, providing amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in ensuring fair sentences for criminal defendants who fall outside the category of violent offenders Congress intended to reach with the weighty sentencing consequences of the Armed Career Criminal Act. The Sixth Circuit's rule would have dramatic and unjust effects on hundreds of

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

defendants each year, like Mr. Borden in this case. These individuals would be wrongly subjected to, at minimum, fifteen years' imprisonment.

SUMMARY OF ARGUMENT

If this Court were to hold that an offense with a *mens rea* of recklessness qualifies as a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), it would expand the reach of ACCA's severe sentencing consequences to defendants whose predicate offenses bear little, if any, resemblance to the knowing and purposeful acts of violence Congress intended to target. Such a broad application of ACCA is wrong as a matter of law, and it would result in unjust and disproportionate sentences for defendants nationwide.

First, ACCA's text, structure, and purpose indicate that offenses with a *mens rea* of recklessness do not fall within the statute's ambit. ACCA targets offenders who have committed three or more "violent felon[ies]." In defining the term "violent felony," ACCA's "force clause" employs the phrase "the use . . . of physical force against the person of another." That text mirrors almost exactly the force clause in 18 U.S.C. § 16(a)—a clause that this Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), held *excludes* offenses committed negligently. The Court's reasoning in *Leocal* applies with full force here. And *Voisine v. United States*, 136 S. Ct. 2272 (2016), in which the Court interpreted a much broader force clause to include reckless misdemeanor domestic assaults, does not change this result. ACCA's punitive purpose reinforces the textual distinctions that dictated the decisions in *Leocal* and *Voisine*: enhancing sentences for

repeat violent offenders differs sharply from keeping guns out of the hands of domestic abusers.

Second, if the Court determines that the statutory text is ambiguous, the rule of lenity mandates reversal. The Court has at least as much reason to apply the rule of lenity here as it did in *Leocal*, 543 U.S. at 11 n.8, where the Court found the text clear but explained that lenity would otherwise have applied. Here, the Court also has strong additional reasons to avoid a capacious reading of ACCA's force clause. In particular, a broad interpretation of what constitutes a "violent felony" would subject many more defendants to ACCA's severe minimum sentences, sweep in a host of reckless conduct that has nothing to do with violent criminality, and carry far-reaching implications for the interpretation of federal statutes deploying the related term "crime of violence."

ARGUMENT

I. ACCA's Force Clause Does Not Reach Reckless Offenses.

A. The Text Of ACCA's Force Clause, Like The Clause At Issue In *Leocal* And Unlike The Clause In *Voisine*, Does Not Cover Reckless Offenses.

The plain text of ACCA's force clause excludes reckless conduct that results in injury to others, and this Court's decision in *Voisine*, reading a broader force clause to reach reckless domestic assault, does not alter the analysis. The Sixth Circuit erred by ignoring the important textual differences between ACCA's force clause and 18 U.S.C. § 921(a)(33)(A)(ii). Those

distinctions are critical to the textual analysis and embody the fundamentally different aims Congress had when it targeted repeat violent criminals in ACCA, as opposed to domestic abusers with § 921(a).

As Petitioner notes, the proper analysis begins with the text. ACCA provides that, for certain firearms-related offenses, a sentencing court must apply, at minimum, a fifteen-year sentence without the possibility of probation where the individual has "three previous convictions . . . for a violent felony." 18 U.S.C. § 924(e)(1). ACCA defines "violent felony" to include an offense that "has as an element the use . . . of physical force against the person of another." *Id.* § 924(e)(2)(B)(i).

In determining whether ACCA applies to reckless offenses, the statutory context is critical. As this Court has repeatedly explained, the key question is not the meaning of the words "use . . . of physical force against the person of another" in isolation, but rather how that phrase informs what counts as a "violent felony." *See Johnson v. United States*, 559 U.S. 133, 140 (2010); *United States v. Castleman*, 572 U.S. 157, 166–67 (2014); *see also Leocal*, 543 U.S. at 11 ("In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'").

The very fact that Congress chose the phrase "violent felony" demonstrates that it sought to target offenses committed in "a purposeful, violent, and aggressive manner," rather than those that merely "reveal a degree of callousness toward risk." *Begay v. United States*, 553 U.S. 137, 145–46 (2008), *abrogated by*

Johnson v. United States, 135 S. Ct. 2551 (2015). As then-Judge Alito explained, "[t]he quintessential violent crimes . . . involve the intentional use of actual or threatened force against another's person." *Oyebanji v. Gonzales*, 418 F.3d 260, 264 (3d Cir. 2005) (Alito, J.)).

That plain meaning is reinforced by the limiting language of ACCA's force clause, which further constrains the definition of "violent felony" to include *only* those crimes that, as relevant here, have "as an element the use . . . of physical force *against the person of another*." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Taken together, the term "violent felony" and this modifying language circumscribe the purposeful acts that ACCA reaches.

Absent from this strictly cabined provision is any language indicating that it reaches reckless conduct. Congress knows how to apply stiff criminal penalties to reckless behavior that results in harm to another person. It enacted several statutes doing just that in the early 1980s, shortly before adopting ACCA's force clause. For example, Congress provided that someone who "recklessly causes the death of or serious bodily injury to any person" while engaging in unlawful transactions involving nuclear materials faces a prison sentence up to twenty years. 18 U.S.C. § 831(b)(1)(B)(i); Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. No. 97-351, § 2, 96 Stat. 1663, 1664. The same is true for someone who recklessly tampers with consumer products "if serious bodily injury to any individual results." 18 U.S.C. § 1365(a)(3); Federal Anti-Tampering Act, Pub. L. No. 98–127, § 2, 97 Stat. 831, 831–32 (1983). In the same bill

that contained the original version of ACCA, Congress provided for criminal penalties for individuals trafficking in counterfeit goods or services; in 2008, Congress decided expressly to apply those penalties to anyone who "recklessly causes . . . serious bodily injury." 18 U.S.C. § 2320(b)(2)(A); *compare* H.J. Res. 648, Pub. L. No. 98-473, § 1502(a), 98 Stat. 1837, 2178–79 (1984), *with* Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 205, 122 Stat. 4256, 4261–62.

Congress could have easily deployed similar language in ACCA to reach reckless conduct causing serious bodily injury. Instead, it chose to apply the mandatory minimum sentence only to "violent felon[ies]" involving "the use . . . of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). As discussed above, the well-established meaning of "violent felony" in traditional criminal law alone forecloses its application to reckless offenses. *Supra* 4–5. Congress's further decision to limit ACCA's reach to offenses insisting on the "use" of force "against the person of another"—rather than using language that might connote the reckless, accidental, or indirect causation of bodily injury—proves the point. *Cf. Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (citing the dog that did not bark canon).

To hold otherwise would misread ACCA to reach offenses that do not comport with the ordinary meaning of "violent felony." As Petitioner points out, many states make reckless conduct a felony based on the collateral consequences of careless action on another. Pet. Br. 37-42. Those provisions of state law are commonly applied

to a person's reckless driving if that driving ultimately results in serious bodily injury to another. To take just one example, under Pennsylvania law, a driver's inattention may form the basis of a prosecution for a reckless felony if the inattention results in serious bodily harm or death. *See* 75 Pa. Stat. §§ 3732(a), 3732.1(a). Pennsylvania courts have applied that rule to a driver whose eyes briefly wandered from the road while she prepared to turn left into a driveway because that momentary lapse led to a fatal collision with an oncoming motorcycle. *Commonwealth v. Setsodi*, 450 A.2d 29, 31–32 (Pa. Super. Ct. 1982). But there is no indication that Congress meant to brand such a defendant a violent felon. So, too, for contemporary forms of carelessness, such as texting while driving.

Similarly, if the phrase "use . . . of physical force against the person of another" were read to cover not only purposeful but also indirect force, *see Castleman*, 572 U.S. at 170, 174, ACCA would be expanded far beyond what Congress could have intended. For instance, in Alaska, it is a felony for a driver transporting hazardous substances in a tank vessel to recklessly cause the release of those substances if so doing "causes serious physical injury to another person or damage to the property of another." Alaska Stat. Ann. § 46.03.742(a). If the Sixth Circuit's rule were right, a driver who accidentally overturns his truck becomes a violent felon if the chemicals he hauls happen to spill out and cause injury.

Or take an example that is directly relevant to this case. Under South Carolina law, a person can commit involuntary manslaughter by illegally selling alcohol to

minors if the sale ultimately leads to another person's death. *See State v. Hambright*, 426 S.E.2d 806 (S.C. Ct. App. 1992). In *United States v. Middleton*, the Fourth Circuit held that a defendant's conviction under that law for involuntary manslaughter does not constitute a violent felony. 883 F.3d 485, 487 (4th Cir. 2018). If the Sixth Circuit's rule were right, someone who serves alcohol recklessly to others could be a violent felon after all.

Moreover, in some states, the very same reckless conduct can be a misdemeanor or a felony depending on the degree of harm caused. For example, Illinois makes "reckless conduct" a misdemeanor if it causes bodily harm but a felony if it causes "*great* bodily harm or permanent disability." 720 ILCS 5/12-5 (emphasis added). In Missouri, recklessly causing "physical injury, physical pain, or illness to another person" is a misdemeanor. Mo. Stat. Ann. § 565.056. But recklessly causing "*serious* physical injury to another person" is a felony. *Id.* § 565.052 (emphasis added). If the Sixth Circuit's rule were right, a reckless driver who causes an accident in Illinois has committed a misdemeanor if the other driver suffers a broken arm, but becomes a violent felon if the arm never heals.

None of these examples can be squared with the ordinary meaning of "violent felony," and nothing in ACCA's use-of-force language suggests that Congress intended such results. What is more, if the collateral consequences of a person's thoughtless actions were really enough to make that person a "violent felon" under ACCA, one would expect the provision to apply to *both* reckless *and* negligent offenses. After all, a

defendant can cause the same harmful results whether he disregards a risk of harm or merely fails to perceive that risk. But it is beyond dispute that ACCA does not reach negligent offenses. The only reasonable interpretation of ACCA's force clause is that it applies solely to knowing and purposeful uses of force.

The Court applied the same basic interpretive principles in *Leocal*, 543 U.S. 1, analyzing the force clause in 18 U.S.C. § 16. That provision, almost identical to ACCA, defines a "crime of violence" to include offenses involving the "use of physical force against the person or property of another." 543 U.S. at 4–5 (quotation marks omitted). Reading § 16, the Court did not address whether "the word 'use' alone supplies a *mens rea* element" as to the predicate acts the clause covers. *Id.* at 9. That would be "too narrow" in light of the "key" modifying phrase, "against the person or property of another." *Id.* (internal quotation marks omitted). That modifying phrase makes all the difference, the Court reasoned, because, while it might be possible to use, or "actively employ *something*" (force) "in an accidental manner," it was "much less natural" to say "a person actively employs physical force *against another person* by accident." *Id.* (second emphasis added). The Court further noted that in "construing . . . § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* at 11.

Considering text and context, the Court found that the provision applied to a "higher degree of intent than negligent or merely accidental conduct" that happened to cause bodily harm. *Id.* at 9. This reading reflected the

"violent, active crimes" that Congress targeted for enhanced punishment. *Id.* at 11. The same logic holds here given the almost identical language in ACCA's force clause, targeting actions with a purpose to inflict harm on another person.

Applying *Leocal*, ten courts of appeals correctly concluded that ACCA's force clause (or materially identical provisions in parallel statutes) does not encompass reckless offenses.[2] Only after this Court's subsequent decision in *Voisine*, interpreting a textually distinct provision, did some courts' misreading cause error and dis-uniformity.

But *Voisine* does not alter the analysis. The force clause at issue in that case, § 921(a)(33)(A)(ii), is a gun-control measure designed to keep firearms out of the hands of abusers previously convicted of "misdemeanor crime[s] of domestic violence." That provision defines "misdemeanor[s] . . . of domestic violence" broadly to include mere misdemeanors that have as an element the "use . . . of physical force" without any qualification or limitation.

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[2] *See United States v. Moreno*, 821 F.3d 223, 228 (2d Cir. 2016); *Popal v. Gonzales*, 416 F.3d 249, 251 (3d Cir. 2005); *Garcia v. Gonzales*, 455 F.3d 465, 469 (4th Cir. 2006); *United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (en banc); *United States v. McMurray*, 653 F.3d 367, 374–75 (6th Cir. 2011); *United States v. Rutherford*, 54 F.3d 370, 374 (7th Cir. 1995); *United States v. Boose*, 739 F.3d 1185, 1187 (8th Cir. 2014); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124–25 (10th Cir. 2008); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010); *see also Bennett v. United States*, 868 F.3d 1, 21 (1st Cir. 2017) (so holding after *Voisine*), *vacated by* 870 F.3d 34 (1st Cir. 2017).

The differences are plain between § 921(a) and the force clauses at issue here and in *Leocal*. For one, the force provision in *Voisine* defines the term "misdemeanor crime of domestic violence," rather than the term "violent felony." Thus, right off the bat, § 921(a) brings in a host of different, and lesser, predicate offenses. Indeed, by choosing the term "misdemeanor crime of domestic violence" to set the statute's reach, Congress evinced an intent to "sweep[] in . . . persons who had engaged in reckless conduct": more than two-thirds of states define such misdemeanors to include offenses with a *mens rea* of recklessness. *Voisine*, 136 S. Ct. at 2280. In ACCA, by contrast, Congress had at its disposal but chose not to use language that would have included or incorporated by reference reckless predicates.

In addition, § 921(a) omits the limiting phrase "against the person . . . of another" that guided this Court's analysis in *Leocal*. 543 U.S. at 9 (quotation marks omitted). Interpreting a more capacious clause, the Court in *Voisine* held that the word "use," absent any modifier or textual limitation, reaches reckless offenses. But the Court in *Leocal* expressly *declined* to read "use" alone because of the "key" modifying phrase, "against the person . . . of another." *Id.* (quotation marks omitted). This limiting phrase, of course, appears in ACCA and makes central the mental state of the defendant with regard to the injury inflicted on a third party. *Id.* at 11; *see Bennett v. United States*, 868 F.3d 1 (1st Cir.), *vacated by* 870 F.3d 34 (1st Cir. 2017). As this Court has recognized, using force "against the person of another" requires an intent or purpose to injure someone else; it does not connote an action causing

injury to another as a secondary and unintended consequence.

B. Excluding Reckless Offenses Comports With ACCA's Purpose, In Contrast To The Gun-Control Provision In *Voisine*.

This Court has repeatedly underscored that ACCA's severe sentencing enhancements are designed to target a narrow category of serial offenders. The history of the Act and its established aims underscore this application and contrast starkly with the prophylactic gun-control provision at issue in *Voisine*.

Congress's stated goal in passing the original version of ACCA was "incapacitating" a narrow and dangerous subset of "repeat offenders" who had been previously convicted of certain enumerated predicate crimes three or more times. H.R. Rep. No. 98-1073, at 2 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3661, 3662. Congress added ACCA's force clause in 1986 to cover felonies involving knowing and purposeful uses of violent force. *See Taylor v. United States*, 495 U.S. 575, 581–87 (1990) (discussing the legislative history of the 1986 amendments). Congress's touchstones in drafting ACCA's force clause—predicate offenses like "rape" and "murder"—underscore its design to reach only purposeful and aggressive violence. *See Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 8 (1986).[3]

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[3] Congress's particular emphasis on purpose to injure another person is reflected in its rejection of a proposed amendment that

Consistent with this history, the Court has recognized that Congress's "basic purpose" in adding the term "violent felony" to ACCA was to single out for enhanced punishment "only a particular subset of offender, namely, career criminals." 553 U.S. at 147. The Court has construed ACCA's provisions in view of this goal, reading its terms to reach convicted felons "who might *deliberately* point the gun and pull the trigger," not those who demonstrate merely "a degree of callousness toward risk." *Id.* at 146 (emphasis added); *Sykes v. United States*, 564 U.S. 1, 12 (2011), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015).

For example, in *Begay*, construing ACCA's later-invalidated residual clause, the Court found "no reason to believe that Congress intended a 15-year mandatory prison term" where an offender's predicate crimes lack "intentional or purposeful conduct." *Begay*, 553 U.S. at 146; *see Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court concluded that ACCA's predicate offenses—even under the broadly worded residual clause, *see* 18 U.S.C. § 924(e)(2)(B)(ii) (purporting to reach any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another")—must involve at least "purposeful, violent, and aggressive

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would have expanded ACCA's definition of "violent felony" to include all manner of crimes against property. *See* H.R. 4639, 99th Cong. (1986); S. 2312, 99th Cong. (1986) (proposing inclusion of crimes "involv[ing] substantial risk that physical force against the person or property of another may be used in the course of committing the offense"); *see also Taylor*, 495 U.S. at 581–88.

conduct." 553 U.S. at 145. The same must apply to ACCA's much narrower force clause.

To explain ACCA's overall scope, the Court contrasted reckless and negligent offenses with the kind of purposeful, violent conduct that Congress intended to legislate against. Drunk driving does not fall within ACCA's ambit because—the Court quoted approvingly in a parenthetical—it "is a crime of negligence *or recklessness*, rather than violence or aggression." *Id.* at 145–46 (emphasis added) (citing *Leocal*, 543 U.S. at 11, and quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part), *rev'd*, 553 U.S. 137 (2008)). The Court went further to liken negligent and reckless offenses, explaining that Congress did not evince intent "to bring within the statute's scope" offenders, such as "*reckless* polluters" and "individuals who *recklessly* tamper with consumer products," whose predicate crimes are "far removed . . . from the deliberate kind of behavior associated with violent criminal use of firearms." *Id.* at 146–47 (emphasis added). As these quotations make clear, the Court assumed that reckless offenses, like negligent ones, are *not* what Congress contemplated when imposing ACCA's weighty sentencing enhancement—even under the residual clause, the statute's broadest reach. *Id.*

This reasoning reflects the overlap between recklessness and negligence. Recklessness involves the conscious disregard of a substantial and unjustifiable risk. *See, e.g.*, Model Penal Code § 2.02(2)(c). Criminal negligence involves the failure to perceive a substantial and unjustifiable risk in a way that amounts to a "gross

deviation" from reasonable behavior. *Id.* § 2.02(2)(d). In practice, these doctrinal distinctions often blur.

Accordingly, following this Court's lead, the courts of appeals also noted the similarities between negligent and reckless offenses when holding, prior to *Voisine*, that ACCA's force clause (as well as those materially identical to it) do not reach reckless offenses. *See, e.g.*, *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) ("[A] person could be convicted of assault under Arizona Revised Statutes § 13–1203(A)(1) by running a stop sign 'solely by reason of voluntary intoxication' and causing physical injury to another." (quoting Ariz. Rev. Stat. § 13–105(9)(c)).

Just as the text in *Voisine* is critically different from the text at issue here, *see supra* 11–12, so, too, is the statutory context. Congress wrote § 921(a) to be "broader" in scope than ACCA's definition of "violent felony." 142 Cong. Rec. 26675 (1996) (statement of Sen. Lautenberg) (bill's sponsor describing the provision's language as "probably broader" than the "crime of violence" language in ACCA and other gun possession laws). In fact, as courts have explained, "[i]n the course of drafting § 921(a)(33)(A), Congress expressly rejected § 16's definition of 'crime of violence." *United States v. Booker*, 644 F.3d 12, 19 (1st Cir. 2011).

Congress enacted § 922(g) to "'close [a] dangerous loophole' in the gun control laws." 136 S. Ct. at 2276. It wanted "to prohibit domestic abusers convicted under 'run-of-the-mill' misdemeanor assault and battery laws from possessing guns" because these offenders had been erroneously—and dangerously—exempt from prior federal gun control measures. 136 S. Ct. at 2278. And

experience taught that "[f]irearms and domestic strife are a potentially deadly combination." *Id.* at 2276 (quotation marks omitted). So Congress wrote a "broader" force clause to provide special protections to a class of vulnerable victims. *See* 142 Cong. Rec. 26675.

Voisine construed that provision's force clause expansively in light of this context, purpose, and history. The Court's reasoning drew on the prophylactic purposes of § 922(g) as applied specifically to domestic violence, engaging with hypotheticals that elucidated the circumstances under which domestic violence often unfolds. 136 S. Ct. at 2280. The Court explained that Congress was correcting for past under-recognition of abuse by reaching "misdemeanor crimes of domestic violence." *See id.* at 2276 ("[M]any perpetrators of domestic violence are charged with misdemeanors rather than felonies, notwithstanding the harmfulness of their conduct."); *see also Castleman*, 572 U.S. at 164–65 & n.4 (characterizing domestic violence as a term of art that "encompasses a range of force broader than that which constitutes 'violence' simpliciter," including "acts that might not constitute 'violen[ce]' in a nondomestic context" and crediting definitions of "domestic violence to include '[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling'"); *id.* at 165 ("[M]ost physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting." (quoting DOJ, P. Tjaden & N. Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence* 11 (2000)). In light of Congress's effort "to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—

from owning guns," the Court read the force clause expansively. 136 S. Ct. at 2280.

Because Congress's purpose in passing ACCA was fundamentally different from its efforts to take guns out of the hands of any domestic abusers, *Voisine*'s analysis has no relevance here. This Court explained as much in declining to apply its prior ACCA decisions to § 922(g). *See Castleman*, 572 U.S. at 167. In so holding, the Court noted, "[w]hereas we have hesitated (as in *Johnson*) to apply the Armed Career Criminal Act to 'crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals,' we see no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom § 922(g) disqualifies from gun ownership." *Id.*

* * *

The ordinary meaning of "violent felony," the plain text of the force clause, and ACCA's manifest purpose make clear that ACCA's force clause applies only to crimes that involve the knowing or purposeful use of violent force against another person.

II. ACCA Should Not Apply To Reckless Offenses Absent A Clear Indication From Congress.

The Sixth Circuit's rule erroneously relies on *Voisine* and fails to grapple with whether ambiguity in the scope of ACCA's force clause triggers the rule of lenity. In so doing, the Sixth Circuit's rule expands ACCA to cover a class of new offenses, disregarding both the fair notice defendants must receive about the consequences of their

actions *and* the role reserved for Congress—not the courts—in defining the scope of criminal liability.[4]

Under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). The rule applies to not only interpretations of the substantive reach of criminal prohibitions, but also the penalties they impose. *Ladner v. United States*, 358 U.S. 169, 177–78 (1958).

The rule is animated by "traditional principles of fair notice and separation of powers." *Davis*, 139 S. Ct. at 2335. Regarding fair notice, the rule of lenity respects the principle that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)). And as for the separation of powers, the rule of lenity reflects the principle that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id.* Simply put, the Court's role "is always in the first instance to follow Congress's directions. But if those directions are unclear, the tie goes to the presumptively free citizen

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[4] The other courts of appeals siding with the Sixth Circuit have committed the same error. *See generally United States v. Burris*, 920 F.3d 942 (5th Cir. 2019), *petition for cert. filed*, No. 19-6186 (U.S. Oct. 7, 2019); *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016); *United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017); *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019).

and not the prosecutor." *United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc) (Gorsuch, J.).

For all of the reasons discussed above, *supra* 3–18, and in Petitioner's brief, Pet. Br. 17–42, every indicia of congressional intent favors reversal here. But at the very least, Congress has not spoken clearly enough to give defendants fair notice of whether reckless offenses can trigger a life-altering mandatory minimum sentence. Absent a clear indication, it is for Congress in the first instance to make the policy judgment as to whether an onerous mandatory minimum sentence should apply to reckless offenses. The Court is not in a position to make that judgment on Congress's behalf. At a minimum, then, any ambiguity in text of the force clause should be construed in Petitioner's favor.

A. The Court Has At Least As Much Reason To Apply Lenity Here As It Did In *Leocal*.

In *Leocal*, the Court held that strict liability and negligent offenses are not "crime[s] of violence" under § 16(a) or § 16(b). *See* 543 U.S. at 10–11. With respect to § 16(a), the Court relied on the plain meaning of the phrases "crime of violence" and "use . . . of physical force against the person or property of another." *Id.* But the Court also recognized that "[e]ven if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor." *Id.* at 11 n.8.

The same reasoning applies here. When Congress added ACCA's force clause as part of the Anti-Drug Abuse Act of 1986, it clearly intended ACCA to cover felonies involving knowing and purposeful uses of violence. *See Taylor*, 495 U.S. at 582–87 (discussing the

legislative history of the 1986 amendments). And given that § 16(a) and § 924(e)(2)(B)(i) are identical in all material respects, it is clear that ACCA's force clause does not apply to negligent offenses. *Compare* 18 U.S.C. § 16(a) *with* 18 U.S.C. § 924(e)(2)(B)(i); *see Johnson*, 559 U.S. at 140. That would also seem to follow from this Court's narrow interpretations of the more broadly worded and risk-focused residual clause. *See Begay*, 553 U.S. at 146–47; *Sykes*, 564 U.S. at 12; *Leocal*, 543 U.S. at 10–11.

This undisputed history raises two questions in this case. Did Congress mean to thread the needle by including reckless offenses as ACCA predicates while excluding negligent ones? And did Congress conclude that if a person has three convictions for reckless conduct, he is the sort of person who—in the interest of public safety—must go to prison for fifteen years to life for having possessed a firearm or a handful of bullets? *See infra* 24–25.

At a bare minimum, the answer to these questions is unclear. Notably, the evidence of Congress's intent is no more favorable to the Government here than it was in *Leocal*. In this case, as in *Leocal*, the Court is faced with a defined term that ordinarily refers to violent, intentional crimes. *See supra* 4–5; Pet. Br. 18–23; *Leocal*, 543 U.S. at 11 (holding that the ordinary meaning of "crime of violence" suggests "a category of violent, active crimes" (citing *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.) ("observing that the term 'violent felony'" "'calls to mind a tradition of crimes that involve the possibility of more closely related, active violence'" (citations omitted)))); *Oyebanji*, 418

F.3d at 264. And the use-of-force language is materially identical to the language at issue in *Leocal*. The history of ACCA does not reveal any clear intent by Congress to reach reckless offenses, any more than the history of § 16 reveals an intent to reach strict liability or negligent offenses. Under these circumstances, the Court has more than enough reason to apply the rule of lenity.

Any other result would deprive criminal defendants of fair notice. This Court has construed the language of ACCA on many occasions. Until its 2015 decision in *Johnson*, the Court generally understood even the more broadly worded residual clause to exclude reckless offenses. And until this Court's decision in *Voisine*, every court of appeals that took up the question concluded that reckless conduct was not a "violent felony" under ACCA or materially identical statutes. *See supra* 10 & n.2. It would be a surprise, to say the least, if the Court announced now that Congress had clearly intended to apply a fifteen-year-to-life mandatory minimum sentence to reckless conduct all along. *See Rentz*, 777 F.3d at 1113.

Furthermore, affirming the Sixth Circuit would require the Court to infer that Congress made a nuanced policy judgment of which there is no evidence. In *Voisine*, the Court reasoned that Congress meant for § 921(a)(33)(A) to reach reckless conduct by specifically targeting "misdemeanor" crimes. 136 S. Ct. at 2278. Because these crimes have a *mens rea* of recklessness in more than two-thirds of states, "Congress must have known it was sweeping in some persons who had engaged in reckless conduct." *Id.* at 2280. In fact, that was Congress's manifest aim. *Id.* at 2278–80.

The same cannot be said for ACCA's definition of "violent felony." As this Court recognized in *Johnson*, that term ordinarily refers to "crime[s] characterized by extreme physical force" that traditionally involve knowing or purposeful uses of violent force. *See Johnson*, 559 U.S. at 140–41 (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)); *Leocal*, 543 U.S. at 11; *Oyebanji*, 418 F.3d at 264. ACCA's force clause is devoid of any evidence of a broader scope.

As discussed above, *supra* 14–15, negligent and reckless offenses can be nearly indistinguishable in law and in fact. Nevertheless, Congress *could* in theory have drawn a bright line between negligent offenses and reckless conduct for sentencing purposes. For instance, Congress could have concluded that someone who commits reckless driving is categorically more dangerous than someone who "merely" negligently drives under the influence, a crime that this Court held was not a violent felony. *See Begay*, 553 U.S. at 144–46. But there is no indication from the text, structure, or history of ACCA that Congress made any such distinction. The Court would have to supply the relevant policy considerations itself to reach that conclusion, but that is not the Court's role. *Davis*, 139 S. Ct. at 2333 (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)); *cf. Begay*, 553 U.S. at 154 (Scalia, J., concurring in the judgment) ("I can do no more than guess as to whether drunk driving poses a more serious risk than burglary, and I will not condemn a man to a minimum of 15 years in prison on the basis of such speculation."). As often happens in ACCA cases, here the Court can do no more than guess whether

Congress meant for reckless offenses to count as violent felonies under the force clause.

Rather than risk inserting its own intuitions into the statute, the Court should (if it finds that ACCA's text does not unambiguously favor Petitioner) construe ACCA's force clause in criminal defendants' favor and give Congress the opportunity to clarify what it meant. *See Begay* 553 U.S. at 154 (Scalia, J., concurring in the judgment); *Bifulco v. United States*, 447 U.S. 381, 400–01 (1980).

B. Application Of The Rule Of Lenity Here Would Avoid The Pernicious Effects Of A Broad Reading Of ACCA.

There are at least three other considerations that counsel in favor of applying the rule of lenity here.

First, the Court has consistently recognized that it should proceed with caution before adopting expansive interpretations of ACCA and similar statutes. *Davis*, 139 S. Ct. at 2323–24; *Castleman*, 572 U.S. at 172; *Johnson*, 559 U.S. at 140; *Begay*, 553 U.S. at 144–45; *Leocal*, 543 U.S. at 10–12 & n.8. For good reason. ACCA exposes defendants to sentences that are, by design, harsh—including the possibility of life imprisonment. And, in practice, ACCA dramatically increases the sentences for hundreds of defendants convicted of firearms-related offenses each year.

For Fiscal Year 2018, the United States Sentencing Commission reported that 6,719 people were convicted for violating § 922(g). U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm*, Fiscal Year 2018, at 1, https://www.ussc.gov/sites/default/files/pdf/

research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf. For defendants who were not sentenced under ACCA, the average prison sentence was just under five years (59 months), well below the statutory maximum ten-year sentence. *Id.* at 2. But for roughly 270 people sentenced under ACCA, the average sentence was 15.5 years (186 months). *Id.* So ACCA more than tripled the sentence applied to defendants with two or fewer ACCA predicates, and 2018 was not an anomaly.[5] Moreover, when ACCA is triggered, judges overwhelmingly sentence defendants at or very near the minimum required by law. This pattern shows the extent to which ACCA already constrains sentencing judges' discretion and drives up prison terms beyond what they would impose.

If the Court holds that the force clause applies to reckless offenses, the number of defendants serving these substantially extended sentences will grow significantly. Inevitably, the Court's holding will forever alter the lives of defendants who would otherwise receive much lower sentences. The petitioner in *Walker v. United States*, No. 19-373 (2019)—another case out of the Sixth Circuit in which the Court granted certiorari—provides a case in point. Mr. Walker was convicted for possessing a handful of bullets; he was

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[5] U.S. Sentencing Comm'n, *Quick Facts, Felon in Possession of a Firearm*, Fiscal Year 2017, at 2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf (58 months vs. 188 months under ACCA); *see also* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm*, Fiscal Year 2016 at 2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY16.pdf (60 months vs. 180 months under ACCA).

sentenced under ACCA to 180 months. Petition for Writ of Certiorari at App. 2a, *Walker v. United States*, 140 S. Ct. 953 (2020) (No. 19-373), 2019 WL 4569603. The district court later held that his prior conviction for robbery under Texas law was not a violent felony under ACCA and reduced his sentence substantially—to 88 months. *Id.* 2a-3a. But the Sixth Circuit reversed, relying on its rule that ACCA applies to reckless offenses. *Walker v. United States*, 769 F. App'x 195, 196, 199-200 (6th Cir. 2019). Mr. Walker died before the Court could hear his case. *See Walker v. United States*, 140 S. Ct. 953 (2020). Unless and until Congress legislates to the contrary, all criminal defendants like Mr. Walker and Petitioner should have the benefit of a sentencing process that applies the traditional sentencing factors to their individual circumstances.

Second, the Court should apply lenity to avoid reading ACCA's force clause over-inclusively, sweeping in reckless conduct that Congress did not intend to reach. As discussed above, *supra* 7–9, the Sixth Circuit's reading would apply ACCA's force clause to a whole host of reckless offenses that do not fit the ordinary meaning of the term "violent felony." With no clear indication that Congress meant to brand citizens as violent felons for doing things like texting while driving, lenity compels reversal.

Third, if the Court were to hold that ACCA's force clause applies to reckless offenses, there is no principled way to limit that holding to ACCA's sentencing scheme alone. It would almost certainly bring reckless conduct within the scope of many other federal statutes, both criminal and civil. These run the gamut from federal

offenses, to sentencing provisions, to immigration removal. And the scope of each statute rests on distinct policy judgments that should be left for Congress to make, if it chooses. The Court should exercise a high degree of caution before expanding the scope of all of these statutes in one fell swoop.

The risk arises so acutely here because ACCA's force clause is materially identical to § 16(a). If the Court were to decide that reckless conduct can be a "violent felony," it would almost certainly have to follow that reckless conduct is a "crime of violence," too. *See Davis*, 139 S. Ct. at 2329 ("[W]e normally presume that the same language in related statutes carries a consistent meaning . . . .").

That result would, in turn, trigger a domino effect throughout Title 18 and the U.S. Code. The term "crime of violence" appears in a wide variety of federal statutes. *See Leocal*, 543 U.S. at 6–7 & n.4. Title 18 uses the term to define the elements of various federal offenses. For instance, § 373 makes it a felony to solicit or persuade another person to commit a crime of violence. *See* 18 U.S.C. § 373(a) (incorporating the same force clause). Section 931 makes it a felony for any person to purchase, own, or possess body armor if they have been convicted of a crime of violence. *Id.* § 931(a). Section 1959(a) prohibits threatening to commit a "crime of violence" in aid of racketeering. *Id.* § 1952(a). And Title 18 criminalizes many other activities that involve or relate to crimes of violence. *See Davis*, 139 S. Ct. at 2330–31 (listing additional examples).

Title 18 also uses the term "crime of violence" for sentencing enhancements. Section 25, for example,

enhances the maximum sentence for anyone who "intentionally uses a minor to commit a crime of violence." 18 U.S.C. § 25(b). For a first conviction, § 25 doubles the maximum term of imprisonment and maximum fine for the offense at issue. *Id.* § 25(b)(1). For each subsequent conviction, those maximums are tripled. *Id.* § 25(b)(2). And Title 18 mandates that defendants who have committed a "crime of violence" must pay mandatory restitution to their victims. *Id.* § 3663A(c). Outside the bounds of Title 18, the Immigration and Nationality Act provides that an alien is subject to removal proceedings for, among other things, committing a crime of violence. *See* 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii).

The Court cannot expand the scope of ACCA's force clause without affecting the scope of all these statutes. Although the severity of ACCA's sentencing scheme is reason enough to proceed with caution when determining its scope, the Court should certainly not infer that Congress meant for *all* of these statutory schemes to capture reckless conduct absent *any* clear statement to that effect.

Applying the rule of lenity here will do no more than restore the *status quo ante* in the lower courts prior to *Voisine*. As discussed above, *supra* 10 & n.2, every court of appeals that took up the question before *Voisine* correctly concluded that reckless conduct was not a violent felony or a crime of violence. And, of course, there is zero evidence that prior to *Voisine* violent criminals were roaming the streets with greater prevalence because their reckless offenses were not counted under ACCA.

This case comes before the Court based on several courts' misreading *Voisine* to interpret ACCA out of step with clear and consistent precedent. There is little risk that reversal will produce confusion about or inconsistency in the interpretation of ACCA or other similar statutes. By contrast, there is a very real risk that affirming the Sixth Circuit will open Pandora's Box, sewing confusion among courts as to the meaning of many statutes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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