No. 18-370

IN THE
Supreme Court of the United States

MARLON HAIGHT,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

REPLY ON PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

The government concedes there is a well-established and direct conflict among the courts of appeals on the question presented. *See* BIO 7, 14. The government does not argue that further percolation will resolve this conflict: Indeed, it notes that as recently July 2018, the First Circuit reaffirmed its position—directly contrary to decisions of the D.C., Eighth, and Tenth Circuits—that an offense with a reckless *mens rea* does not qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). *See* BIO 13 (citing *United States v. Rose*, 896 F.3d 104, 114 (1st Cir. 2018)). The government does not argue that the question presented is unimportant: In the last two years alone, at least fourteen different courts have ruled on the question presented, and the division among those courts has led to defendants with substantively identical predicate offenses receiving vastly different sentences under the *exact* same provision of federal law. Finally, the government does not argue that any vehicle issue would preclude this Court from resolving the question presented through petitioner's case.

Rather, the government makes two arguments as to why certiorari should be denied. Neither is persuasive. *First*, tellingly, the government spends the majority of its brief arguing that the decision below was correct on the merits. BIO 7-12. Even if the government were correct in this respect—and it is not, *see* Pet. 22-25; *infra* 8-11—that is no reason to deny certiorari when a clear, and conceded, conflict among the courts of appeals exists. *Second*, the government observes that "[b]ecause then-Judge Kavanaugh wrote the opinion for the court of appeals . . . the full Court would presumably

not be available to decide this case." BIO 14-15. Other than its argument on the merits, this is the *only* argument the government makes for denying certiorari, and it devotes a mere two sentences, and no substantive argument, to this point. With good reason. This Court does not deny certiorari because of the potential recusal of a Justice. Not only has the Court frequently granted and decided cases that necessitated the recusal of certain Justices, but the government itself has petitioned for, or supported, certiorari in these cases, *including one case this Term.* The government does not even suggest a reason why eight Justices of this Court could not resolve the question presented.

This case presents an ideal vehicle for this Court to resolve an acknowledged conflict among the courts of appeals that has led to significantly disparate sentences for hundreds if not thousands of defendants.

The petition for certiorari should be granted.

I. THE GOVERNMENT CONCEDES THAT THERE IS A CONFLICT ON THE QUESTION PRESENTED.

As the government acknowledges four times in its brief in opposition, "the First Circuit has departed from the approach followed by the other courts of appeals" on the question presented. BIO 13; *see also id.* at 7, 12, 14. That is, the First Circuit has explicitly held that "crimes with a *mens rea* of recklessness" do not qualify as "violent felonies under the force clause" of the ACCA. *United States v. Rose*, 896 F.3d 104, 109 (1st Cir. 2018). By contrast, the D.C. Circuit "reached a contrary conclusion" in the decision below, holding that a "conviction for assault with a dangerous weapon"—a

crime with a *mens rea* of recklessness—"counts as a violent felony under ACCA." Pet. App. 17a. The D.C. Circuit's position, as the government recognizes, is consistent with holdings of the Eighth and Tenth Circuits. *See United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017); *United States v. Pam*, 867 F.3d 1191, 1207-08 (10th Cir. 2017).

Although conceding a direct conflict among the circuits over what the term "violent felony" means under the ACCA, the government characterizes the conflict as "shallow." BIO 14. But there is no dispute that the conflict is real, important, and will not resolve itself of its own accord.

First, the question of whether an offense with a reckless *mens rea* qualifies as a "violent felony" under § 924(e)(2)(B) arises with frequency and has important practical consequences for defendants. As petitioner's own case demonstrates, the legal question over which courts are in disagreement is the *sole* determining factor in whether many defendants are subject to a fifteen-year mandatory minimum sentence for a violation of 18 U.S.C. § 922(g)(1), or not. Since 2016 alone, over 560 defendants convicted of a § 922(g) violation have been sentenced pursuant to the ACCA, and as petitioner previously noted, numerous states incorporate recklessness into the *mens rea* requirement for crimes such as assault. Pet. 19-20 (citing cases). Were any further indication needed of the importance of this question, in the two years since this Court decided *Voisine v. United States*, 136 S. Ct. 2272 (2016), fourteen

courts have already been required to choose a position on the question presented.

Second, the government sensibly does not argue that further percolation might lead the courts of appeals to resolve this issue of their own accord. With the exception of the Eighth Circuit, the first to rule on the question presented, all three other courts of appeals to have issued published decisions on this question were forced to choose between their position and the contrary one. *See* Pet. 11. These thoroughly-reasoned decisions—in which a current and retired Justice of this Court have now reached contrary conclusions on the meaning of § 924(e)(2)(B)—demonstrate that without this Court's review, federal law on this important issue will continue to mean different things in different places. *See Bennett v. United States*, 868 F.3d 1, 7 (1st Cir. 2017), *withdrawn and vacated*, 870 F.3d 34 (1st Cir. 2017) (Souter, J., on panel).

Third, the fact that only the First Circuit, to date, has issued a published opinion squarely holding that offenses with a reckless *mens rea* do not constitute violent felonies for purposes of the ACCA does not render the circuit conflict on this question "shallow" or unworthy of this Court's review.[1] For one, the fact that

[1] As the government acknowledges, BIO 14 n.3, a unanimous panel of the Fourth Circuit has now endorsed the plurality opinion in *United States v. Middleton*, 883 F.3d 485, 498 (4th Cir. 2018) (Floyd, C.J., writing for the plurality). *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018). *Hodge* demonstrates the likelihood that the Fourth Circuit will join the First on the question presented. Regardless, the government concedes that a conflict exists on the question presented, regardless of how the Fourth Circuit would decide the issue.

the exact same provision of federal law, § 924(e)(2)(B), means something different for defendants in the District of Colombia and thirteen states than it does for defendants in Puerto Rico and four other states demonstrates the wide-ranging impact of the conflict. Moreover, this Court frequently grants certiorari to resolve circuit conflicts in which one circuit has disagreed with other circuits, including specifically in the ACCA context. *See*, *e.g.*, *Voisine*, 136 S. Ct. at 2277-78; *Johnson v. United States*, 559 U.S. 133 (2010). Doubtless it was for this very reason the district court below observed that "courts are unfortunately hopelessly split" on the question presented, Pet. App. 33a, and anticipated that this Court "will very likely weigh in, in the near future," Pet. App. 36a.

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THIS IMPORTANT CIRCUIT CONFLICT.

As petitioner previously explained, this case is a strong vehicle for this Court to resolve the question presented. *See* Pet. 21. During petitioner's sentencing, the government identified three prior convictions that could constitute predicate offenses under the ACCA, and petitioner conceded that two of them qualified. *See* Pet. App. 11a. Thus, if this Court agrees with petitioner that the third conviction—for assault with a dangerous weapon under D.C. Code § 22-402—does not qualify as an ACCA predicate, petitioner would not be subject to the ACCA's fifteen-year mandatory minimum. If this Court disagrees, petitioner will be subject to that mandatory term of imprisonment. Because petitioner was sentenced, without the ACCA enhancement, to 12

years and eight months imprisonment, the application of the ACCA will have a material impact on his sentence. *See* Pet. App. 5a, 24a. Both courts squarely addressed the question presented, with the district court agreeing with petitioner, *see* Pet. App. 36a-37a, and the court of appeals disagreeing in a published opinion, *see id.* at 17a.

The government disagrees with none of the foregoing and does not dispute that this Court could resolve the conceded conflict in petitioner's case. Rather, in a mere two sentences, the government claims "this case does not present an ideal vehicle" because "the full Court would presumably not be able to decide this case," because then-Judge Kavanaugh authored the decision for the court of appeals. BIO 7, 14-15. That novel argument presents no basis whatsoever to deny certiorari here.

This Court frequently grants cases notwithstanding its knowledge at the time certiorari is granted that a particular Justice would likely be recused from sitting to decide the case, including at least one example from this Term. *See, e.g.*, *Carpenter v. Murphy*, 138 S. Ct. 2026 (2018) (No. 17-1107); *Chavez-Meza v. United States*, 138 S. Ct. 1959 (2018); *Dahda v. United States*, 138 S. Ct. 1491 (2018); *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016). In the cases in which it filed briefs in opposition—*Chavez-Meza* and *Dahda*—the government did not even mention a Justice's potential recusal, let alone suggest it was a reason to deny certiorari. Indeed, the government *itself* has filed petitions for certiorari notwithstanding its knowledge at the time the petition was filed that a Justice would be recused from the case. *See* Pet. for a Writ of Certiorari, *United States v. Quality*

Stores, 572 U.S. 141 (2014) (No. 12-1408), 2013 WL 2390247. And the government has filed briefs in support of petitions for certiorari in the exact same situation, including once already this Term. *See* Brief *Amicus Curiae* of the United States, *Carpenter v. Murphy*, 138 S. Ct. 2026 (2018) (No. 17-1107), 2018 WL 3642789; *see also* Brief *Amicus Curiae* of the United States, *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018) (No. 16-534), 2017 WL 4998231. Unsurprisingly, the government offers no reason why this Court should deviate from its normal practice, nor does it explain why eight Justices of this Court could not address and resolve the question presented.[2]

Perhaps recognizing the importance of the question presented, the government cites *United States v. Santiago*, No. 16-4194 (3d Cir.) (*reh'g en banc* ordered June 8, 2018), in arguing that "other circuits are currently considering the question" and thus will provide other vehicles to address the issue presented in the petition. BIO 14. That assertion is simply incorrect. *Santiago* does *not* present the question of whether offenses with a reckless *mens rea* constitute violent felonies under the ACCA. Rather, as clearly stated in the government's own brief as appellant, "[t]he sole issue presented in this appeal is whether a conviction for third degree aggravated assault upon a law enforcement officer, in violation of N.J.S.A. 2C:12-1b(5)(a), is a crime of violence under the elements clause in U.S.S.G § 4B1.2(a)(l)." Gov't Br. 7, *Santiago supra*. Thus,

[2] There is, moreover, nothing unusual about this Court reviewing a decision authored by a then-judge subsequently appointed as a Justice of this Court. *See Azar v. Allina Health Servs.*, 139 S. Ct. 51 (2018) (No. 17-1484).

Santiago addresses the question of what "crime of violence" means under *sentencing guidelines*, an issue upon which this Court has recently denied certiorari. *See* BIO 12 n.2. As the government has explained in one of its own briefs in opposition, "[g]iven that the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines." Brief of the United States 14, *Harper v. United States*, 139 S. Ct. 53 (2018) (No. 17-7613). Absent its mischaracterization of *Santiago*, the government does not identify a single case pending in any court of appeals addressing the question presented. This Court should not deny certiorari now on this important question, affecting hundreds of defendants a year, in reliance on unidentified "other opportunities" to address the issue later. BIO 15.

III. THE DECISION BELOW IS INCORRECT.

The government devotes the majority of its brief to arguing why the decision below was correct. *See* BIO 7-12. Even if the government were correct on the merits, that is not a reason to deny certiorari. But in any event, the government is incorrect.

First, the government suggests that *Voisine* resolves the question presented. BIO 8. But *Voisine* says exactly the opposite. In *Voisine*, the Court recognized that its holding that a reckless offense could constitute a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) did *not* resolve whether a reckless offense constituted a "crime of violence" under 18 U.S.C. § 16, the provision at issue in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). As petitioner previously

explained, this distinction is critical because the ACCA's force clause—§ 924(e)(2)(B)(i)—is almost identical to § 16(a) but different in material respects from § 921(a)(33)(A)(ii), the force clause at issue in *Voisine*. *See* Pet. 22-23; *United States v. Castleman*, 572 U.S. 157, 163-67 (2014).

Like the Eighth, Tenth, and D.C. Circuits, the government almost entirely ignores these critical differences. For one, the text of § 924(e)(2)(B)(i) includes the qualifier that a violent felony involves the use of force "against the person of another." Section 921(a)(33)(A)(ii), by contrast, contains no such qualifier—a fact the First Circuit found significant. *See Bennett*, 868 F.3d at 8. The fact that § 16(a) includes essentially the same qualifier was crucial to *Leocal*'s holding that a use of force must be knowing or purposeful, rather than accidental, in order to be a "crime of violence." *See* 543 U.S. at 9. The "against the person of another" qualifier in § 924(e)(2)(B)(i) suggests that the actor must purposefully apply violent force *to another person* or know that result to be practically certain. *See United States v. Hayes*, 555 U.S. 415, 421 n.4 (2009); *Leocal*, 543 U.S. at 9. It is not enough for the actor to merely "use physical force" in a way that presents a substantial risk that violent force will be applied, such as by throwing a plate or slamming a door. *See Voisine*, 136 S. Ct. at 2279. This conclusion is bolstered by the fact that the ACCA enhances sentences for "violent felonies." As then-Judge Alito explained in *Oyebanji v. Gonzales*, the quintessential violent crimes "involve the intentional use of actual or threatened force against another's person." 418 F.3d 260, 263-64 (3d Cir. 2005) (Alito, C.J.).

Moreover, this Court has recognized that force clauses should be read in their statutory context. *See Leocal*, 543 U.S. at 9-11. As the Court has recognized, the different meanings of "violent felony" and "misdemeanor crime of domestic violence" lead to different conclusions about how to apply their similarly worded force clauses. *Castleman*, 572 U.S. at 163; *see also Johnson*, 559 U.S. at 140-41. The government does not even address the very different purposes behind § 922(g)(9) and § 924(e).

As the Court recognized in *Voisine*, Congress likely intended to apply § 922(g)(9) to reckless conduct because many acts of domestic violence—the substantive target of the provision at issue—are prosecuted as misdemeanor assault or battery, crimes with a reckless *mens rea*. *See Voisine*, 136 S. Ct. at 2280-81; *Castleman*, 572 U.S. at 159-60. Here, by contrast, there is no indication that Congress meant apply the labels "violent felon" or "armed career criminal" to a reckless driver, an individual who sells alcohol to a minor, or to a mother who once leaves her child unattended near a swimming pool. *See Voisine*, 136 S. Ct. at 2287-90 (Thomas, J., dissenting) (reckless driving); *United States v. Middleton*, 883 F.3d 485, 487-90 (4th Cir. 2018) (sale of alcohol); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) (swimming pool).

Second, the government is not correct that § 924(e)(2)(B)'s reference to the "use" of force means that all conduct, whether reckless or knowing, is covered by that provision. BIO 8-9. If that were the case, this Court in *Voisine* would not have reserved the question of whether reckless conduct was covered by § 16, given

that § 16 itself covers the "*use* of physical force against the person . . . of another." Moreover, as the Court has explained, "when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9. *Voisine* itself demonstrates this very point by not construing the phrase "use . . . of physical force" in the abstract but rather drawing heavily on the history of § 922(g)(9) and evidence of Congress's intent to define that phrase's meaning in its particular context. *See Voisine*, 136 S. Ct. at 2278, 2280-81.

Third, the government gives short shrift to the rule of lenity. BIO 11-12. Although the text and context of § 924(e)(2)(B) resolve this case in petitioner's favor, if the Court determines any ambiguity exists, that ambiguity should be resolved in petitioner's favor. As *Leocal* reasoned, "[e]ven if § 16 lacked clarity" on whether negligent or strict-liability crimes were crimes of violence, the Court "would be constrained to interpret any ambiguity in the statute in petitioner's favor." 543 U.S. at 11 n.8. The First Circuit has correctly applied that same rationale to § 924(e)(2)(B). *See Bennett*, 868 F.3d at 23; *see also Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) ("[I]t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (quotation marks omitted)); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225-27 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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