No. 18-6706

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMIAH DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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A. That which Justice Thomas foretold in his Voisine dissent has come to pass, on a much greater scale.

In his *Voisine* dissent, Justice Thomas draws an important distinction between "persons who *intentionally* use force that *recklessly* causes injuries" and the person whose "reckless wrongdoing" causes injury as "an accidental byproduct of inappropriately risky behavior." *Voisine v. United States*, 136 S. Ct. 2272, 2288-89 (2016) (Thomas, J., dissenting) (emphasis in the original). "Merely discarding a risk that a harm will result, however, does not supply the requisite intent." *Id*. at 2289.

Justice Thomas gives the examples of the Text-Messaging Dad, who while texting and driving rear ends another car, injuring his passenger, and the Reckless Policeman, who speeds to a crime scene without activating his lights and siren, causing a car accident that hurts a pedestrian. *Id*. at 2287. Justice Thomas' examples "do not involve the 'use of physical force' under any conventional understanding of 'use' because they do not involve an active employment of something for a particular purpose." *Id*. These individuals do not "engage in any violence against persons or property." *Id*. "[W]hen physical injuries result from purely reckless conduct[,] there is no 'use' of physical force." *Id*. These examples are given in contrast to Justice Kagan's examples of someone who intentionally throws a plate against a wall, recklessly injuring his nearby wife, and someone who intentionally slams a door closed, recklessly squashing his girlfriend's fingers. *Id*. at 2279.

Justices Thomas and Kagan focus their opinions on 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A), not only because that was the question presented, but also because the *purpose* of the statute influences its interpretation. *Id*. at 2278. Excluding from § 922(g)(9) misdemeanor crimes of domestic violence that can be committed recklessly would mean 35 jurisdictions'

statutes would not qualify, largely nullifying § 922(g)(9). *Id*. at 2275. However, *Voisine* never raises the spectre of this decision's impact on 18 U.S.C. § 924(e)(2)(B)(i).

And yet. Justice Thomas worries Texting Dad might be banned from gun possession for life. *Voisine*, 136 S. Ct. at 2291. In Tennessee, Texting Dad is far more likely to be prosecuted for aggravated assault. *See, e.g., State v. Huffine*, No. E201602267CCAR3CD, 2018 WL 1611591, at *1 (Tenn. Crim. App. Apr. 3, 2018) (unpublished) (driver on wrong side of road causes crash, killing other driver (vehicular homicide) and injuring his passenger wife (aggravated assault)). The Sixth Circuit's application of *Voisine* to § 924(e)(2)(B)(i) would have this prior conviction expose Texting Dad to life in prison, and a mandatory minimum five years longer than the unenhanced statutory maximum, for purely reckless behavior. Limiting the application of § 924(e)(2)(B)(i) to intentional and knowing conduct would not nullify the Armed Career Criminal Act. For instance, Tennessee's current aggravated assault statute is now clearly divisible, with clear language delineating intentional and knowing conduct, Tenn. Code Ann. § 39-13-102(a)(1)(A) (2018), from reckless conduct, Tenn. Code Ann. § 39-13-102(a)(1)(B) (2018).

B. The Circuit split is neither too narrow nor too green.

The government characterizes the post-*Voisine* Circuit split as "shallow and recent." (BIO at 8). It is perhaps better described as immediate, pervasive, and impactful.

In less than three years, three Circuits have ruled reckless offenses are never a predicate offense, or not a predicate if committed via reckless driving. *United States v. Rose*, 896 F.3d 104, 109 (1st Cir. 2018) (no crimes with reckless *mens rea*); *United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017) (assault committed by reckless driving causing non-trifling injury is not

a violent felony); *United States v. Middleton*, 883 F.3d 485, 493 (4th Cir. 2018) (Floyd, J., concurring) (the ACCA force clause requires a higher degree of *mens rea* than recklessness); *United States v. Fields*, 863 F.3d 1012, 1014-16 (8th Cir. 2017) (assault statute that can be violated by reckless driving causing injury is not crime of violence). Four Circuits have ruled all reckless force offenses are predicates. *United States v. Mendez-Henriquez*, 847 F.3d 214, 218-22 (5th Cir. 2017); *Davis v. United States*, 900 F.3d 733 (6th Cir. 2018); *Mann v. United States*, 899 F.3d 898 (10th Cir. 2018), *petit. for cert. pending*, No. 18-7500; *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018). The First Circuit initially held reckless driving was not a predicate offense, but later doubled down and held that *no* reckless offense would qualify. *Compare Windley*, 864 F.3d at 38-39, *with Rose*, 896 F.3d at 109. That other Circuits have not yet weighed in may speak less about the import of the issue and more about the pace of cases through the district courts and courts of appeals in those Circuits.

The government also seems to suggest the split is shallow because Mr. Davis seeks a modest solution: excluding crimes that can be committed by reckless driving or driving under the influence that results in injury. (BIO at 9). If modesty negates certiorari worthiness, then perhaps this Court should reserve judgment on Mr. Davis' petition until after it has evaluated *Mann v. United States*, No. 18-7500, which seeks broader relief under a rubric that would include Mr. Davis' argument.

The split is, indeed, causing significant sentencing disparities between people with identical criminal histories prosecuted in different Circuits. For instance, if Justice Thomas' Texting Dad caused an accident and injury in New Hampshire, he could be convicted of Second Degree Assault, N.H. Rev. Stat. Ann. § 631:2, a felony that can be committed with a reckless *mens rea*. *State v. Belleville*, 88 A.3d 918, 921-24 (N.H. 2014) (driver who looked at text

message long enough to move into oncoming traffic and collide with multiple cars acted recklessly). Should New Hampshire Texting Dad be later prosecuted for being a felon in possession of a firearm, the First Circuit would hold that his reckless second degree assault is *not* a violent felony or crime of violence. However, should New Hampshire Texting Dad come South and get charged with a gun in the Sixth Circuit, that same prior conviction would mean a higher base offense level as a crime of violence, and in combination with other offenses increase his statutory maximum of ten years in prison to a minimum of 15 years up to life in prison under the ACCA.

The Sixth Circuit's misapplication of *Voisine* is radically increasing prison sentences. In Mr. Davis' case, it would return him to prison after 22 months of exemplary conduct on supervised release.

CONCLUSION

For the reasons set forth here and in his petition, Jeremiah Davis requests that the petition for certiorari be granted.

Respectfully submitted,

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