No. 18-7500

IN THE SUPREME COURT OF THE UNITED STATES

CLAY O'BRIEN MANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the federal offense of assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6), qualifies as a crime of violence under 18 U.S.C. 924(c) (2012).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 899 F.3d 898. A prior opinion of the court of appeals is reported at 786 F.3d 1244. The order of the district court (Pet. App. 12a-16a) is not published in the Federal Supplement but is available at 2017 WL 3052521.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2018. A petition for rehearing was denied on October 19, 2018 (Pet. App. 11a). The petition for a writ of certiorari was filed

on January 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his indictment in the United States District Court for the District of New Mexico for discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii), petitioner moved to dismiss the indictment. Pet. App. 12a. The district court granted his motion, id. at 12a-16a, and the court of appeals reversed, id. at 1a-10a.

1. Late one night in July 2010, petitioner's neighbors invited about a dozen friends to a bonfire at their undeveloped property on an Indian reservation. Pet. App. 3a, 12a. In the early morning hours, petitioner, who had been drinking, hurled a lit artillery-shell firework in the direction of the partygoers. Id. at 3a. The firework exploded, and petitioner's neighbors and their guests scattered. Ibid. Three of the partygoers unwittingly ran in petitioner's direction, and he fired nine shots with a semiautomatic rifle, killing one person and wounding two others. Ibid. Petitioner then patrolled the fence line separating the properties while shouting profanities and threats at the remaining partygoers. Ibid. He eventually drove away and was apprehended later that morning. Ibid.

During an interview with law enforcement, petitioner admitted that he first fired a warning shot in the direction of one of his victims, Ames Jim. 786 F.3d at 1247. He also admitted centering

the gun, firing again, and striking Jim. Ibid. He heard Jim wheezing from the gunshot, and he shot him again. Ibid. Petitioner claimed that when Jim fell, petitioner saw "a girl," Paula Nez, fall behind Jim. Ibid. He expressed surprise that he had shot a third person, Mark Bolding. Ibid.

2. A federal grand jury returned an eight-count indictment against petitioner. Pet. App. 3a. Before trial, the district court dismissed without prejudice, due to a technical defect, one count charging petitioner with discharging a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii), relating to the shooting of Bolding (which the indictment had sought to allege to be an assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6)). Pet. App. 4a; see 786 F.3d at 1249 n.6. After a trial on the remaining counts, the jury found petitioner guilty on one count of involuntary manslaughter, in violation of 18 U.S.C. 1112(a); two counts of assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6); and two counts of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). Pet. App. 3a, 10a. The court dismissed one of the Section 924(c) counts and sentenced petitioner to just over 14 years in prison. Id. at 3a-4a. The court of appeals affirmed. 786 F.3d at 1244.

While petitioner's first appeal was pending, another federal grand jury returned a second indictment against petitioner that contained the Section 924(c) charge that had been dismissed without

prejudice before trial. Pet. App. 4a. After a trial, the jury was unable to reach a unanimous verdict, and the district court declared a mistrial. Ibid. Before a third trial began, petitioner moved to dismiss the indictment, contending that assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6), is not a crime of violence under Section 924(c) because it can be committed recklessly. Pet. App. 4a.

Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute contains its own definition of "crime of violence," 18 U.S.C. 924(c)(3), which is applicable only "[f]or purposes of this subsection," ibid., and which has two subparagraphs, (A) and (B). Section 924(c)(3)(A) specifies that the term "crime of violence" includes any "offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Section 924(c)(3)(B) specifies that the term "crime of violence" also includes any "offense that is a felony * * * that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B).

The district court granted petitioner's motion and dismissed the indictment. Pet. App. 12a-16a. The court noted that the Tenth

Circuit had previously determined that an offense committed with a mens rea of recklessness cannot constitute a crime of violence under a different statute, 18 U.S.C. 16. Pet. App. 13a (citing United States v. Zuniga-Soto, 527 F.3d 1110, 1124 (10th Cir. 2008)). Although the district court acknowledged this Court's later decision in Voisine v. United States, 136 S. Ct. 2272, 2278 (2016) -- which had held that reckless domestic assault qualifies as a misdemeanor crime of domestic violence under 18 U.S.C. 922(g)(9) -- it "believe[d] that Voisine does not control the interpretation of" Section 924(c)(3). Pet. App. 15a.

3. The court of appeals reversed. Pet. App. 1a-10a. The court initially observed that this Court's decision in Leocal v. Ashcroft, 543 U.S. 1 (2004), was "inconclusive" about whether an offense that could be committed with a mens rea of recklessness involved the use of force under a similarly worded statute. Id. at 5a. And although a prior circuit decision had taken the view that "recklessness falls into the category of accidental conduct that the Leocal Court described as failing to satisfy the use of physical force requirement," the court of appeals noted that Voisine had undercut that determination. Id. at 5a-6a (quoting Zuniga-Soto, 527 F.3d at 1124).

In interpreting the phrase "use of physical force" in the definition of "'misdemeanor crime of domestic violence'" in 18 U.S.C. 921(a)(33)(A)(ii), Voisine held that a "person who assaults another recklessly 'uses' force, no less than one who carries out

that same action knowingly or intentionally." 136 S. Ct. at 2280 (brackets omitted). The "dominant formulation" of recklessness, this Court explained, requires a person "to 'consciously disregard' a substantial risk that the conduct will cause harm to another." Id. at 2278 (brackets and citation omitted). Accordingly, the Court determined that "reckless behavior" involves "acts undertaken with awareness of their substantial risk of causing injury" and that "[t]he harm such conduct causes is the result of a deliberate decision to endanger another." Id. at 2279.

"After Voisine," the court of appeals explained, "a proper categorical approach focuses on whether the requisite force 'is "volitional" or instead "involuntary" -- it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly.'" Pet. App. 6a (quoting United States v. Hammons, 862 F.3d 1052, 1054 (10th Cir. 2017), cert. denied, 138 S. Ct. 702 (2018)). The court accordingly observed that in Hammons, and later in United States v. Pam, 867 F.3d 1191, 1207 (10th Cir. 2017), it had applied Voisine's reasoning to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), which defines a violent felony to include any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). See Pet. App. 6a. And the court determined that "Voisine's reasoning extends to [Section] 924(c)(3)(A) as well." Ibid.

The court of appeals explained that "reckless conduct is no less 'the [volitional] use . . . of physical force against the person or property of another,' for purposes of 18 U.S.C. [] 924(c)(3)(A)," than it is a volitional use of force under the ACCA or the statute at issue in Voisine. Pet. App. 6a. Although the ACCA requires the use of "physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), while Section 924(c) requires the use of "physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), the court observed that the difference in language means "simply that [Section] 924(c)(3)(A) reaches property crimes and the ACCA does not." Pet. App. 8a. The court reasoned that Congress did not, "by expanding the reach of [Section] 924(c)(3)(A) relative to the ACCA in an obvious textual sense, simultaneously intend[] to restrict its reach by surreptitiously adding a heightened mens rea requirement." Ibid.

The court of appeals thus found that federal assault causing serious bodily injury is a crime of violence under subparagraph (A) of Section 924(c)(3). Pet. App. 9a. The court did not address the government's alternative argument that the same offense also qualifies as a crime of violence under subparagraph (B) of Section 924(c)(3), noting that it had recently held that provision to be unconstitutionally vague. Id. at 4a (citing United States v. Salas, 889 F.3d 681, 683 (10th Cir. 2018), petition for cert. pending, No. 18-428 (filed Oct. 3, 2018)).

ARGUMENT

Petitioner contends (Pet. 6-20) that federal assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6), does not qualify as a crime of violence under Section 924(c)(3)(A). The court of appeals correctly rejected that contention, as federal serious-bodily-injury assault has as an element the "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). Although a shallow and recent circuit conflict exists on whether reckless assault falls within the ACCA's definition of a violent felony, no other court of appeals has addressed whether an offense that may be committed recklessly qualifies as a crime of violence under Section 924(c)(3)(A). In addition, this case would be an inappropriate vehicle for resolving that question because it arises in an interlocutory posture and because even a decision in petitioner's favor would not necessarily support the dismissal of his indictment.

1. The court of appeals correctly determined that federal serious-bodily-injury assault -- which requires proof that a defendant committed a willful or purposeful act, consciously disregarding a known risk of serious bodily injury, and in fact caused such injury, Pet. App. 7a -- involves the "use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), and thus qualifies as a crime of violence under Section 924(c). That determination

follows from this Court's decision in Voisine v. United States, 136 S. Ct. 2272 (2016). In Voisine, the Court held in the context of 18 U.S.C. 921(a)(33)(A)(ii), which defines a "misdemeanor crime of domestic violence," that the term "use . . . of physical force" includes reckless conduct. 136 S. Ct. at 2278 (citation omitted). Although Voisine had no occasion to decide whether its holding extends to other statutory contexts, id. at 2280 n.4, the court of appeals correctly recognized that Voisine's reasoning applies to Section 924(c), see Pet. App. 6a-7a.

This Court explained in Voisine that the word "'use'" requires the force to be "volitional" but "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." 136 S. Ct. at 2279; see ibid. (explaining that the word "'use'" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct"). The Court also noted that "nothing in Leocal v. Ashcroft," 543 U.S. 1 (2004), which addressed the mens rea requirement for a statutory "crime of violence" definition similar to the one at issue here, see 18 U.S.C. 16(b), "suggests a different conclusion -- i.e., that 'use' marks a dividing line between reckless and knowing conduct." Voisine, 136 S. Ct. at 2279; see Pet. App. 6a. The Court instead found that the key

"distinction [was] between accidents and recklessness." Voisine, 136 S. Ct. at 2279.

Thus, as the court of appeals correctly observed, "[a]fter Voisine, * * * a proper categorical approach" to analyzing whether an offense has the "use" of force as an element "focuses on whether the requisite force 'is "volitional" or instead "involuntary" -- it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly.'" Pet. App. 6a (quoting United States v. Hammons, 862 F.3d 1052, 1054 (10th Cir. 2017), cert. denied, 138 S. Ct. 702 (2018)). Because Section 113(a)(6) requires proof of volitional and willful conduct that results in serious bodily injury, it necessarily involves a "use of physical force against the person or property of another," within the meaning of Section 924(c)(3)(A). Id. at 7a.

2. Petitioner contends (Pet. 13-19) that Voisine's logic applies neither to Section 924(c)(3)(A) nor to the ACCA. As an initial matter, petitioner did not properly preserve that argument, as he did "not ask [the court of appeals] to overrule" its two decisions extending Voisine's reasoning to the ACCA. Pet. App. 8a; see Pet. C.A. Br. 26-33. In any event, the argument lacks merit.

a. Petitioner asserts (Pet. 14-15) that the phrase "against the person of another" in the ACCA and "against the person or property of another" in Section 924(c)(3)(A) render Voisine's

reasoning inapplicable to those provisions. As the Sixth Circuit has explained, however, "Voisine's key insight is that the word 'use' refers to 'the act of employing something' and does not require a purposeful or knowing state of mind." United States v. Verwiebe, 874 F.3d 258, 262 (2017) (citing Voisine, 136 S. Ct. at 2278-2279), cert. denied, 139 S. Ct. 63 (2018). "That insight does not change if a statute says that the 'use of physical force' must be 'against' a person, property, or for that matter anything else." Ibid. (emphasis omitted).

Indeed, "the provision at issue in Voisine still required the defendant to use force against another person -- namely, the 'victim.'" United States v. Haight, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (quoting 18 U.S.C. 921(a)(33)(A)(ii)), cert. denied, 139 S. Ct. 796 (2019); see ibid. ("In the words of the Supreme Court in Voisine, the phrase 'misdemeanor crime of domestic violence' is 'defined to include any misdemeanor committed against a domestic relation that necessarily involves the 'use . . . of physical force.'") (quoting Voisine, 136 S. Ct. at 2276) (emphasis added). And Voisine itself took as a given that the object of the recklessness would be another person, as it defined recklessness to require a person "to consciously disregard a substantial risk that the conduct will cause harm to another." 136 S. Ct. at 2278 (emphasis added; brackets, citation, and internal quotation marks omitted); see id. at 2279 (explaining that "reckless behavior" involves "acts undertaken with awareness of their substantial risk

of causing injury," such that any "harm such conduct causes is the result of a deliberate decision to endanger another") (emphasis added).

Petitioner thus errs in suggesting (Pet. 15) that, to avoid superfluity, the "against" phrases in Section 924(c) and the ACCA must require a mens rea greater than recklessness. Those phrases clarify how the force must be used (or attempted or threatened). For Section 922(g)(9), at issue in Voisine, the force must be used against a domestic relation. Verwiebe, 874 F.3d at 263. For the ACCA, the force must be used against a person. Pet. App. 8a. And for Section 924(c), the force must be used against a person or property. Ibid. The different objects of these three statutory provisions underscore that Congress had reason to specify the targets of the force used.

b. Petitioner also fails more generally to identify a relevant distinction between Section 922(g)(9) and Section 924(c) or the ACCA, such that Voisine's logic would not be controlling as to all three. First, petitioner asserts (Pet. 17) that excluding reckless assaults from Section 922(g)(9) would render the statute broadly inoperative, while "[t]here is no shortage of crimes fitting within [the ACCA] and [Section] 924(c)(3)." But to the extent that is correct, coverage of other offenses is no reason to disregard the linguistic congruity and to exclude paradigmatically violent crimes, like assault, that can be committed with a mens rea of recklessness.

Second, petitioner notes (Pet. 17) that the definition of "physical force" in the ACCA -- and, he suggests, Section 924(c)(3)(A) -- differs from the definition of "physical force" in the context of Section 922(g)(9). See Johnson v. United States, 559 U.S. 133, 140 (2010) (ACCA); United States v. Castleman, 572 U.S. 157, 162-163 (2014) (Section 922(g)(9)); United States v. Hill, 890 F.3d 51, 58 n.10 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019) (questioning whether Johnson's definition applies to the ACCA). But a difference in the amount of force does not suggest a difference in the meaning of the word "use"; although the common law requires more force for felonies than misdemeanors, a mens rea of recklessness has nevertheless long supported felony liability. See, e.g., United States v. Zunie, 444 F.3d 1230, 1234 (10th Cir. 2006).

Third, petitioner similarly asserts that Voisine should not apply to the ACCA or Section 924(c)(3)(A) because those provisions putatively target more "purposeful and aggressive" or "violent" offenses. Pet. 18 (citation omitted). But his argument overlooks Voisine's observation that someone who acts recklessly in fact intends to engage in violent and dangerous conduct. 136 S. Ct. at 2279 (describing reckless conduct as "volitional conduct" that involves "a deliberate decision to endanger another"); see Webster's New Collegiate Dictionary 1297 (1981) (defining "violent" to include "marked by extreme force or sudden intense activity").

Fourth, petitioner highlights (Pet. 17-18) the different penalties under Section 992(g)(9) and Section 924(c), but those different penalties simply reflect the distinctions between the overall crimes that those provisions define. Compare 18 U.S.C. 922(g)(9) (prohibiting possession of a firearm by anyone who has been convicted of a misdemeanor crime of domestic violence), with 18 U.S.C. 924(c)(1) (prohibiting the use (or carrying, intending to use) of a firearm "during and in relation to" a crime of violence).

Finally, petitioner briefly argues (Pet. 18) for application of the rule of lenity. But the rule of lenity applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended," Castleman, 572 U.S. at 172-173 (citation omitted), and no such grievous ambiguity exists here.

Petitioner also asserts (Pet. 19-20) that, even if Voisine's reasoning applies to Section 924(c), federal serious-bodily-injury assault is not a Section 924(c) crime of violence because it can be committed through reckless driving resulting in serious bodily injury. But the court of appeals correctly rejected petitioner's request to "carv[e] out an exception for * * * offenses that encompass reckless driving." Pet. App. 7a. That result again follows from Voisine itself, which considered a Maine assault statute that prohibited the reckless causation of bodily injury,

without limitation as to the manner in which the injury was caused. See Voisine, 136 S. Ct. at 2277 (citing Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (Supp. 2004)). Indeed, the dissent in Voisine specifically objected to the majority's holding on the ground that Maine reckless assault could be committed through reckless driving. See id. at 2284, 2287-2290 (Thomas, J., dissenting). As this Court observed in Voisine, someone who acts recklessly intends his conduct but may not have as a "conscious object" the specific result of his volitional acts. 136 S. Ct. at 2278-2279 (citation omitted). Indeed, if, as petitioner seems to assert (Pet. 19), a Section 924(c) crime of violence requires that the defendant intend the harm caused by his actions, then even knowing assaults would not qualify as crimes of violence. See Voisine, 136 S. Ct. at 2278-2279 (observing that someone who acts knowingly need not intend or have as a "conscious object" the result of his actions, but rather acts with knowledge that the result is likely to happen) (citation omitted).

3. Petitioner asserts (Pet. 10-12) that the courts of appeals have divided over whether federal serious-bodily-injury assault constitutes a Section 924(c) crime of violence. No other court of appeals, however, has addressed whether reckless crimes fall within Section 924(c)'s definition of a crime of violence.

a. A recent and shallow circuit split exists regarding the application of Voisine's logic to the ACCA. The majority of the courts of appeals to address the issue after Voisine have held

that reckless crimes can constitute ACCA violent felonies. Davis v. United States, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, No. 18-6706 (Mar. 25, 2019); United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017); Hammons, 862 F.3d at 1054 (10th Cir.); Haight, 892 F.3d at 1281 (D.C. Cir.).[1] But, as petitioner correctly notes (Pet. 11-12), the First Circuit has departed from the approach followed by the other courts of appeals. Although the scope of earlier First Circuit decisions was uncertain, that court has since made clear that its precedent "forecloses the argument that crimes with a mens rea of recklessness may be violent felonies under the [ACCA's] force clause." United States v. Rose, 896 F.3d 104, 109 (2018).

The Fourth Circuit's position is less clear. In United States v. Middleton, 883 F.3d 485 (2018), the Fourth Circuit concluded that the South Carolina crime of involuntary manslaughter, which proscribes killing another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. Id. at 489 (citation omitted). The court reasoned that the statute had been applied to cover an "illegal sale" that, through an "attenuated * * * chain of causation," had resulted in injury. Id. at 492. In a concurrence in part and

[1] In addition, the Fifth Circuit has held that reckless conduct may constitute a crime of violence within the meaning of a similarly worded provision of the Sentencing Guidelines, see United States v. Reyes-Contreras, 910 F.3d 169 (2018) (en banc), while the Ninth Circuit has noted in dicta that reckless conduct may constitute a crime of violence under 18 U.S.C. 16, see United States v. Benally, 843 F.3d 350, 354 (2016).

in the judgment, one judge -- joined in relevant part by one of the judges in the majority -- wrote that he would have instead concluded that "South Carolina involuntary manslaughter cannot serve as an ACCA predicate" because "the ACCA force clause requires a higher degree of mens rea than recklessness." Id. at 500 (Floyd, J.). It is not yet clear what precedential effect, if any, the Fourth Circuit will give that two-judge portion of a separate opinion.[2]

Finally, the Eleventh Circuit recently relied on pre-Voisine circuit precedent in concluding that, to qualify as a violent felony under the ACCA, "a conviction must be predicated on the intentional use of physical force." United States v. Moss, No. 17-10473, 2019 WL 1474821, at *5 (Apr. 4, 2019). The court did so without evaluating Voisine's effect on that prior precedent, see

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[2] In United States v. Hodge, 902 F.3d 420 (2018), a subsequent panel of the Fourth Circuit noted that the United States had conceded that "Maryland reckless endangerment constitutes a 'violent felony' only under the ACCA's [now-defunct] residual clause," and cited the Middleton concurrence for the proposition that "the ACCA force clause requires a higher degree of mens rea than recklessness." Id. at 427 (quoting Middleton, 883 F.3d at 498 (Floyd, J., concurring in part and concurring in the judgment)) (brackets omitted). But although the United States had conceded that Maryland reckless endangerment is not a violent felony under the ACCA, it had not conceded that the Middleton concurrence's reasoning controlled. Such a concession was unnecessary, as Maryland reckless endangerment likely does not satisfy the ACCA's elements clause regardless of whether other crimes involving a mens rea of recklessness can constitute violent felonies. In particular, Maryland reckless endangerment does not require proof of "contact [that] was not consented to by the victim," Manokey v. Waters, 390 F.3d 767, 772 (4th Cir. 2004) (citation and internal quotation marks omitted), cert. denied, 544 U.S. 1034 (2005).

ibid., so it is not yet clear whether that court will maintain the same view when presented with the opportunity for further consideration. See, e.g., United States v. Carter, No. 17-15495 (11th Cir.) (presenting the issue of whether Eleventh Circuit precedent remains controlling after Voisine).

Even if a limited conflict might warrant review in an appropriate case of whether reckless conduct may constitute an ACCA violent felony, this case does not present that question. Instead, it involves Section 924(c), as to which no such conflict has arisen. Given that petitioner's core argument is an attempt to distinguish between similarly worded provisions, if the Court wishes to consider whether Voisine's reasoning applies to the ACCA, it should do so in a case that presents that precise question.

b. Petitioner also asserts (Pet. 19-20), that the court of appeals' decision conflicts with decisions of the Eighth Circuit, which has applied Voisine's reasoning to the ACCA, see Fogg, supra, but has carved out an exception for "the unadorned offense of reckless driving resulting in injury," United States v. Fields, 863 F.3d 1012, 1015 (8th Cir. 2017) (quoting United States v. Ossana, 638 F.3d 895, 901 n.6 (8th Cir. 2011)). The vitality of pre-Voisine precedent about reckless driving remains the subject of some debate within the Eighth Circuit. See id. at 1016 (Loken, J., dissenting) ("[P]rior decisions holding that recklessly driving a motor vehicle can never be a 'crime of violence' * * * were wrongly overbroad when decided, and they have been overruled

or significantly restricted by subsequent Supreme Court and Eighth Circuit decisions."); United States v. Ramey, 880 F.3d 447, 449 (8th Cir.) (questioning, in dicta, "the vitality of [Ossana] after Voisine and Fogg"), cert. denied, 139 S. Ct. 84 (2018); but see United States v. Schneider, 905 F.3d 1088, 1091–1092 (8th Cir. 2018) (applying Fields to find that North Dakota aggravated assault statute, which "covers reckless driving," is not a crime of violence under the Sentencing Guidelines).

The court of appeals here rightly declined to carve out a similar exception in the Tenth Circuit, which was "not burdened by such precedent." Pet. App. 7a. And any disagreement regarding whether to exempt assaults that may be committed by reckless driving from the ACCA and other similar statutory or Guidelines provisions does not warrant this Court's review in this Section 924(c) case.

4. In addition, this would be a poor vehicle in which to address the question presented for two further reasons. First, because the court of appeals reversed the district court's dismissal of the indictment and remanded the case for further proceedings, the court of appeals' decision is interlocutory. That posture "alone furnishe[s] sufficient ground for the denial of" the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see VMI v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). If, on remand, petitioner is convicted of

the Section 924(c) offense and that conviction is affirmed on appeal, petitioner will then have the opportunity to raise his current claim, together with any other claims that may arise, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

Second, even if federal serious-bodily-injury assault does not categorically involve a "use, attempted use, or threatened use of physical force against the person or property of another," within the meaning of Section 924(c)(3)(A), petitioner's offense -- shooting at his neighbors' guests -- "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," and so qualifies as a crime of violence under Section 924(c)(3)(B). This Court has granted certiorari to address whether Section 924(c)(3)(B) should be interpreted to adopt such a circumstance-specific approach. See United States v. Davis, No. 18-431 (argued Apr. 17, 2019). If the Court adopts that construction in Davis, resolution of the question presented here would not result in a different outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

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