No. 18-7500

In the

Supreme Court of the United States

CLAY O'BRIEN MANN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Reply Brief in Support of Petition for Writ of Certiorari

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Reply Argument

I. *Voisine* is ill-suited to the analysis of whether a felony offense is a crime of violence as defined by the force clause in 18 U.S.C. § 16 and 18 U.S.C. § 924(c)(3).

The government, like the Tenth Circuit, believes that *Voisine v. United States*, 136 S.Ct. 2272 (2016), is determinative of the question presented. Br. in Opp. 9-10. *Voisine* interpreted 18 U.S.C. § 922(g)(9) and § 921(a)(33)(A)(ii), its accompanying force clause. The Court did not address the force clause at issue here, 18 U.S.C. § 924(c)(3)(A). Section 924(c)(3)(A) differs in text, context, and purpose from §§ 922(g)(9) and 921(a)(33)(A)(ii). The government and the Tenth Circuit conspicuously avoid giving any serious consideration to these differences. Not only did the Tenth Circuit ignore that the "against the person of another" clause is found in § 924(c)(3)(A), but not in § 921(a)(33)(A)(ii), the court, like the government, did not examine whether these distinctions materially affected its analysis. Worse still, the government argues these distinctions are irrelevant because it insists this clause is implied in § 921(a)(33)(A)(ii). Br. in Opp. 9-11.

Although the government suggests *Voisine* interpreted §§ 922(g)(9) and 921(a)(33)(A)(ii) as including a 'force against another' element, and thus, controls the outcome here, these statutes plainly do not include § 924(c)(3)(A)'s "against the person or property of another" qualifier. Br. in Opp. 11. Actually, *Voisine* invalidates the government's argument. There,

the Court said its decision that a reckless offense could constitute a "misdemeanor crime of domestic violence" under § 922(g)(9) did not resolve whether a reckless offense constituted a "crime of violence" under 18 U.S.C. § 16, the statute reviewed in *Leocal v. Ahscroft*, 543 U.S. 1 (2004). 136 S. Ct. at 2280 n.4. As Mann argued in his petition, this distinction is critical because § 924(c)(3)(A)'s force clause is almost identical to § 16(a)'s, but different in material respects from § 921(a)(33)(A)(ii), the force clause analyzed in *Voisine*. *See* Pet. 13-15, 17; *United States v. Castleman*, 572 U.S. 157, 163-67 (2014).

The "against the person of another" phrase was essential to the Court's conclusion in *Leocal* that § 16(a)'s crime of violence definition incorporates a higher mens rea requirement than mere negligence. 543 U.S at 9. Because § 924(c)(3)(A)'s force clause is indistinguishable from § 16(a)'s, *Leocal*'s rationale necessarily applies to any comparison between § 922(g)(9) and § 924(c)(3). In other words, the "against the person of another" qualifier in § 924(c)(3)(A) means that the actor must purposefully apply violent force to another person or know that result to be practically certain. *Leocal*, 543 U.S. at 9, 11. 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 (noting such conduct is not the "active employment" of force); *see also Johnson v.*

United States, 559 U.S. 133, 139-40 (2010) (felony force clause applies to offenses involving extreme, active, violent force capable of causing physical pain or injury). Notably, the government never explains why *Leocal*'s interpretation of § 16(a)'s force clause should not apply to § 924(c)(3)(A)'s clause.

Irrespective of the government's obfuscation, its approach, like the Tenth Circuit's, conflicts directly with this Court's precedents. Repeatedly, this Court has explained that courts should interpret use-of-force language in light of the overall context of the statute at issue. *See Voisine*, 136 S. Ct. at 2280 n.4 (given difference in context and purpose possible heightened mental state expected for felony crime of violence); *Johnson*, 559 U.S. at 143-44 (refusing to decide whether 'physical force' has same meaning in context of misdemeanor 'crime of violence'); *Leocal*, 543 U.S. at 9 (statute construed "in its context"). As the government has conceded to this Court, "important textual and contextual differences counsel against according Section 16 and Section 922(g)(9) the same meaning." Br. for the United States at 12, *Voisine v. United States*, 136 S. Ct. 2272 (2016) (No. 14-10154), 2016 WL 1238840. After all, in *Castleman* and *Johnson*, the Court used the purpose and context of different statutory provisions to interpret the identical phrase, "physical force" in two different ways. *Castleman*, 572 U.S. at 163; *Johnson*, 559 U.S. at 139, 140-41.

Moreover, in *Voisine*, the Court recognized that statutory differences might require a conclusion different from the one it reached regarding reckless conduct in the misdemeanor context. It explained that 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. *Voisine*, 136 S. Ct. at 2280-81; *see also Castleman*, 572 U.S. at 159-60. Remarkably, the government believes the mandatory minimum prison terms required by § 924(c)(1)(A-C) do not affect the interpretation of § 924(c)(3)(A)'s force clause. Br. in Opp. 14. Again its argument deliberately ignores the statute's context and is at odds with this Court's precedent.

In *Leocal*, the Court said to interpret § 16(a)'s force clause to include accidental or negligent conduct "would blur the distinction between 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." 543 U.S. at 11. There is no indication that Congress meant the significantly enhanced prison terms in § 924(c) to apply to a reckless driver. *See Voisine*, 136 S. Ct. at 2287-90 (Thomas, J., dissenting) (reckless driving causing injury is not the "use of physical force" justifying exacting punishment); *United States v. Zunie*, 444 F.3d 1230, 1232 (10th Cir. 2004) (evidence that accused drove while intoxicated and caused injury supports conviction for assault resulting in serious bodily harm under 18 U.S.C.

§ 113(a)(6)). Nor does the government point to anywhere in the congressional record that it was Congress's intent that these punishments be used against reckless actors. Consequently, *Leocal* said that the ordinary meaning of the term "crime of violence" together with § 16(a)'s emphasis on the use of physical force against another person "suggests a category of violent, active crimes that cannot be said naturally to include" driving while intoxicated offenses. 543 U.S. at 11; *see also United States v. Middleton*, 883 F.3d 485, 492 (4th Cir. 2018) (interpreting ACCA's force clause narrowly and thus sale of alcohol not included within its definition); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) ('physical force' in § 16 means "actual violent force," therefore leaving infant alone near swimming pool is not a crime of violence as defined in § 16).

Additionally, the government incorrectly argues that § 924(c)(3)(A)'s reference to the "use" of force means that all conduct, whether reckless or knowing, is covered by that provision. Br. in Opp. 11-13. 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." As the Court explained in *Leocal*, "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." 543 U.S. at 9. *Voisine* proves this exact 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 that particular context. *Voisine*, 136 S. Ct. at 2278, 2280-81. In the context of Mann's petition, the more apt interpretation of *Voisine* is that "when physical injuries result from purely reckless conduct – there is no 'use' of physical force" against the person of another. *Voisine*, 136 S. Ct. at 2287.

II. The government concedes that there is a conflict on the question presented.

The government concedes there is a well established and direct conflict among the courts of appeals on the question presented. Br. in Opp. 15-18. It does not argue that further percolation will resolve this conflict: Indeed, it admits that approximately nine months ago, 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" as defined in the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). Br. in Opp. 16 (citing *United States v. Rose*, 896 F.3d 104, 114 (1st Cir. 2018)).

Mann's case is worthy of this Court's intervention. It lets the Court resolve an acknowledged conflict among the courts of appeals over whether *Voisine* can be applied beyond its expressly defined parameters. Harsh, enhanced prison terms of numerous defendants have been sanctioned in circuits where *Voisine* has been incorrectly expanded. The Court should

grant Mann's petition for certiorari to prevent the continuing sentencing disparity produced by this conflict.

The government does not argue that the question presented is unimportant. Rather it characterizes the conflict as "shallow." Br. in Opp. 8, 15. That is an odd description of a conflict that is demonstrably real, important, and will not resolve itself of its own accord. Since this Court decided *Voisine* almost three years ago, five courts of appeals and at least nine district courts have opined on how *Voisine* affects the felony force clauses in the ACCA and § 924(c)(3)(A). The question presented is thus clearly one that arises frequently in various but similar ways. For example, Mann's petition asks whether a recklessness mens rea, such as reckless driving while intoxicated, satisfies the requirements of the force clause in § 924(c)(3)(A), when the offense does not require proof of any purposeful or knowing act to use violent physical force against the person or property of another. How this Court decides his case will also affect how sentencing courts employ the ACCA's force clause. This is because numerous state jurisdictions incorporate recklessness into the mens rea requirement for crimes like assault which have been and will continue to be offered as predicate offenses by the government to argue for the ACCA's enhanced prison terms. *See*, *e.g.*, *United States v. Windley*, 864 F.3d 36, 37 (1st Cir. 2017) (Massachusetts); *United States v. Bennett*, 868 F.3d 1, 4 (1st Cir. 2017) (Maine); *United States*

v. Fogg, 836 F.3d 951, 955-56 (8th Cir. 2016) (Minnesota); *United States v. Pam*, 867 F.3d 1191, 1205-06 (10th Cir. 2017) (New Mexico); *United States v. Mendez-Henriquez*, 847 F.3d 214, 219-20 (5th Cir. 2017) (California); *United States v. Fish*, 758 F.3d 1, 10 n.4 (1st Cir. 2014) (collecting cases involving statutes from New York, Pennsylvania, Virginia, Texas, Florida,Indiana, Minnesota, Arizona, and California); *cf. Voisine*, 136 S. Ct. at 2280 (noting that 34 states and D.C. define misdemeanor assaults to include reckless infliction of bodily harm).

It is very unlikely that the courts of appeals will resolve this issue of their own accord. It is the law in the First Circuit that offenses with a reckless mens rea do not constitute violent felonies. In his petition, Mann argued that the Fourth Circuit also has held that offenses with a mens rea of recklessness do not qualify as violent felonies as defined in the ACCA's force clause. Pet. 6, 11-12. The government suggests that after *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018), it is not "clear" the Fourth Circuit is aligned with the First. Br. in Opp. 16-17. But it acknowledges, in *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018), a unanimous panel endorsed *Middleton*'s plurality opinion (Middleton, 883 F.3d at 498 ((Floyd, C.J., writing for the plurality). *Hodge* thus evidences the First and Fourth Circuits' unified opposition to the decisions of the D.C., Eighth and Tenth Circuits.

Even if only the First Circuit truly disagrees with the others, as the government contends, that does not make the circuit conflict on this question "shallow" or unworthy of this Court's review. The fact that the ACCA's force clause, § 924(e)(2)(B), means something different for defendants in the Tenth Circuit and its five states than it does for defendants in Puerto Rico and four other states illustrates the breadth of the conflict's impact. Furthermore, in the past this Court has granted 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*, 559 U.S. 133.

Although Mann challenges the Tenth Circuit's decision that an offense with a reckless mens rea element is a crime of violence as described in § 924(c)(3)(A)'s force clause rather than the ACCA's clause, that does not mean, as the government intimates, that the conflict over the ACCA's clause does not affect him. Br. in Opp. 15. As proof, here the Tenth Circuit's relied on its ACCA force clause decisions in *Pam* and *United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017), to find assault resulting in serious bodily injury, even when committed recklessly, satisfies § 924(c)(3)(A)'s force clause. *Mann*, 899 F.3d at 905. *Mann* paves the way for those circuits aligned with the Tenth – and for prosecutors within those circuits – to do the same. Its decision therefore, will affect not only Native American defendants charged in

that circuit but also those in the Eighth and Ninth Circuits where Native Americans comprise a significant proportion of the defendants charged with federal assault offenses.[1] And as the First and Fourth Circuits have Native American reservations or other federal enclaves within their borders, the circuit conflict assuredly carries over to § 924(c)(3)(A)'s force clause.

III. This case gives the Court the opportunity to resolve this important circuit conflict.

The government believes Mann's case is in an "interlocutory posture" and so maintains that this Court need not grant his petition. Br. in Opp. 8, 19. The government is incorrect. A case is in an "interlocutory posture," when, unlike here, the circuit court has remanded the case to a lower court to review various remedies to resolve the dispute or to make additional findings before deciding a legal issue. For example, in *VMI v. United States*, 508 U.S. 946 (1993), on which the government relies (Br. in Opp. 19), Justice Scalia explained "exercising" the Court's "certiorari jurisdiction" was not yet necessary since the circuit court had remanded the case for "determination of

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[1] The majority of aggravated assault defendants in the federal system are Native Americans. *See* United States Sentencing Commission, Report of the Native American Advisory Group, 31 (Nov. 3, 2013) (noting that "[w]hile Indians represent less than 2% of the U.S. population, they represent about 34% of individuals in federal custody for assault."). According to the Sentencing Commission, the five districts with the most cases from Native American reservations include South Dakota, New Mexico, Montana, Arizona and North Dakota. Minnesota and the Eastern District of Oklahoma join the Dakotas and Montana as the districts with the highest proportion of Native American defendants. United States Sentencing Commission, *Quick Facts - Native Americans in the Federal Offender Population* (2013).

an appropriate remedy." *Id.* Because the circuit had "suggested permissible remedies" other than compelling VMI to abandon its admissions policy, Justice Scalia said it was prudent to wait for a final judgment at which time VMI could raise the same issues in a later petition. *Id.* Here, the Tenth Circuit's remand is purely a ministerial act, with no discretion given to the district court. *See*, *e.g.*, *Burrell v. United States*, 467 F.3d 160, 164 (2d Cir. 2006) (explaining that a ministerial act is one that involves obedience to instructions or laws instead of discretion, judgment, or skill). The circuit's decision dictates that the district court must set aside its order dismissing the latest indictment and reinstate it so that for a third time, the government may prosecute Mann for the same offense. Pet. App. 9a.

The other cases cited by the government are similarly inapposite. Br. in Opp. 19-20. In both *Garvey* and *Hamilton-Brown Shoe Co.*, the Court said when a party requests certiorari from a circuit's most recent judgment, the Court has authority to consider questions decided in earlier stages of the litigation. *MLB Players Ass'n. V. Garvey*, 532 U.S. 504, 508 n. 1 (2001); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 254, 257-58 (1916). Although, in *Garvey*, the Players Association filed a petition for certiorari after the circuit's second opinion, but not its first, that did not bar the Court from considering issues raised in the earlier decision. 532 U.S. at 508 n. 1. Similarly, *Hamilton Brown Shoe Co.* said that, notwithstanding the

Court's denial of the party's first petition, it still may examine questions decided in an earlier decision when reviewing the party's second petition for a writ of certiorari. 240 U.S. at 257-58. These rulings are not factually or legally relevant here.

Here, by contrast, both the district and circuit courts squarely addressed the question presented, with the district court agreeing with Mann, *see* Pet. App. 12a-17a, and the court of appeals disagreeing in a published opinion, *see id.* at 1a-10a. The government does not disagree that this is how Mann's petition comes to this Court, nor does it dispute that this Court could resolve the conceded conflict in Mann's case.

Instead, the government says this Court should deny Mann's petition because he can relitigate the same issue after his trial and sentencing. Br. in Opp. 19-20. This suggestion is not only unreasonable, it is not expedient. The present appeal was brought by the government after the district court dismissed the latest indictment.

The district court issued an opinion in which it explained that § 924(c)(3) does not encompass offenses, like assault resulting in serious bodily injury, that may be committed by mere recklessness. Pet. App. 15a. In the Tenth Circuit, the government then got what it asked for – a third opportunity to prosecute Mann for a nine year old offense for which it has been unable to secure a conviction. After briefing from the parties and

hearing from them at argument, the court published its decision reversing the district court. It noted the circuit conflict but believed its earlier ACCA force clause decisions relying on *Voisine*, compelled it to side with the D.C. and Eighth Circuits. Pet. App. 7a-9a. The issue presented is ideally set for this Court's consideration.

Unquestionably, there is no lingering remedial course for the district court to pursue. Nor is it expected to make additional factual findings before resolving a legal question. If this Court's grants Mann's petition *and* rules in his favor, the government will be unable to prosecute him further. He will serve his remaining prison term and no more time will be added to it. The government does not explain why he should wait another year or more to present the same issue to this Court. Without this Court's immediate review, defendants in the Tenth Circuit, like Mann, will continue to serve more exacting prison terms than those in the First, Fourth and Sixth Circuits.

Conclusion

For all the reasons detailed here and in Mann's petition, this Court should grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: May 6, 2019

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Certificate of Service

I, Margaret A. Katze, hereby certify that on May 6, 2019, a copy of the petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice,

Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

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