No.

In the Supreme Court of the United States

JAMES WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e).

RELATED PROCEEDINGS

United States District Court (W.D. Tenn.):

United States v. *Walker*, Crim. No. 07-20243 (July 21, 2011) (judgment in a criminal case)

United States v. *Walker*, Crim. No. 07-20243 (June 28, 2017) (judgment in a criminal case after resentencing)

Walker v. *United States*, Civ. No. 14-2021 (June 29, 2017)

United States Court of Appeals (6th Cir.):

United States v. *Walker*, No. 11-5910 (Nov. 28, 2012)

Walker v. *United States*, No. 17-5782 (Apr. 16, 2019)

United States v. *Walker*, No. 17-5783 (Apr. 16, 2019)

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James Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 195. The order of the court of appeals denying rehearing en banc (App., *infra*, 54a-55a) and opinions dissenting from the denial of rehearing en banc (App., *infra*, 55a-61a) are reported at 931 F.3d 467. The district court's order (App., *infra*, 14a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2019. A petition for rehearing was denied on July 23, 2019 (App., *infra*, 54a-55a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(e) of Title 18 of the United States Code provides in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection—
>
> * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

STATEMENT

This case presents a significant and frequently recurring question of criminal law that urgently requires the Court's review: whether a criminal offense that can be committed with a *mens rea* of recklessness qualifies as a "violent felony" under the Armed Career Criminal Act (ACCA). There is a deep and widely recognized conflict in the courts of appeals over that question—a question that the government itself has conceded is exceptionally important.

After discovering 13 bullets in a rooming house that he managed and removing them for safekeeping, petitioner was convicted of possessing ammunition as a felon, in violation of 18 U.S.C. 922(g). He was sentenced to a mandatory minimum of 15 years of imprisonment under the ACCA. In the wake of this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), holding that the ACCA's residual clause was unconstitutionally vague, petitioner filed a motion for postconviction relief. As is relevant here, the application of the ACCA to petitioner turned on whether one of his past convictions, which could be committed with a *mens rea* of recklessness, qualified as a violent felony under the ACCA's force clause. The district court held that it did not and then resentenced petitioner to 88 months of imprisonment.

On the government's appeal, the Sixth Circuit reversed, applying circuit precedent and holding that an offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the force

clause. The Sixth Circuit subsequently denied petitioner's petition for rehearing en banc. Judge Kethledge, joined by three other judges, dissented, urging that rehearing was appropriate because the panel had erred and because its decision had "rendered more intractable what has become a deep circuit split." App., *infra*, 59a. Judge Stranch, joined by one other judge, also dissented, agreeing with Judge Kethledge and adding that rehearing would have been appropriate even though a change in the Sixth Circuit's position "would not resolve the existing circuit split." *Id.* at 60a.

As the dissenters recognized, the decision below implicates a mature and entrenched circuit conflict. The First, Fourth, and Ninth Circuits hold that offenses that can be committed with a *mens rea* of recklessness do not qualify as "violent felon[ies]" under the ACCA's force clause. The Fifth, Sixth, Eighth, Tenth, and District of Columbia Circuits hold that such offenses can qualify. The Third and Eleventh Circuits are currently considering this question in en banc proceedings. And the circuit conflict on the question has vast practical consequences: the "violent felony" provision adds years to the sentences of a large number of criminal defendants. Because there is an intractable conflict on what all parties agree is an exceptionally important question of criminal law, and because this case presents the ideal vehicle in which to resolve that conflict, the petition for a writ of certiorari should be granted.

A. Background

1. Federal law prohibits a person previously convicted of a felony from possessing firearms or ammunition. See 18 U.S.C. 922(g)(1). Standing alone, such a conviction carries a maximum sentence of 10 years of imprisonment. See 18 U.S.C. 924(a)(2). The ACCA, however,

serves to "impos[e] enhanced punishment on armed career criminals" by requiring greater sentences for firearms-possession offenses committed by individuals who have previously committed a certain number of predicate crimes. See *Quarles* v. *United States*, 139 S. Ct. 1872, 1879 (2019). In particular, under the ACCA, a person who has previously been convicted of three or more "serious drug offense[s]" or "violent felon[ies]" faces a mandatory minimum sentence of 15 years of imprisonment for a possession offense under Section 922(g). See 18 U.S.C. 924(e)(1).

The ACCA defines a "violent felony" as follows. *First*, a "violent felony" includes any crime punishable by more than one year in prison 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). This prong of the definition is commonly known as the "force" or "elements" clause. *Second*, a "violent felony" also includes any crime that is punishable by more than one year in prison that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii). This prong is commonly known as the "enumerated offenses" clause. As drafted, the ACCA also contains a third clause, which defined a violent felony to include crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." *Ibid.* This prong was commonly known as the "residual" clause.

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), this Court held that the residual clause was unconstitutionally vague. As a result, any crime that is not burglary, arson, or extortion and does not involve use of explosives must now satisfy the ACCA's force clause in order to qualify as a violent felony. This Court has held that the rule of *Johnson* applies retroactively, see *Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016), with the result that

defendants sentenced under the ACCA before *Johnson* may challenge their sentences on the ground that their predicate offenses do not satisfy the now-narrowed definition of "violent felony."

In determining whether a conviction qualifies as a "violent felony" under the ACCA, this Court uses the familiar "categorical approach"—examining the elements of the offense and not the particular facts underlying the defendant's previous conviction. See *Begay* v. *United States*, 553 U.S. 137, 141 (2008). The Court reviews the minimum conduct necessary for a conviction for the offense; only if that minimum conduct satisfies one of the ACCA clauses does the offense qualify as a predicate offense. See *ibid.* In applying the categorical approach, the Court first asks if the statute is divisible because it lists alternative elements. See *Shepard* v. *United States*, 544 U.S. 13, 25-26 (2005). If it is, the Court looks to a narrow set of documents to determine which alternative element formed the basis of the defendant's conviction; it then assesses the minimum conduct necessary for a conviction under that element. See *ibid.*; *Descamps* v. *United States*, 570 U.S. 254, 263-264 (2013).

2. In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court interpreted 18 U.S.C. 16(a), which defines "crime of violence" for purposes of many federal statutes, holding that it does not encompass negligent conduct. See *id.* at 6-7, 9. Section 16(a) defines a "crime of violence" to include an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Other than including offenses "against the * * * property of another," that provision is identical to the ACCA's force clause. See 18 U.S.C. 924(e)(2)(B)(i). Arguing that negligent conduct sufficed in *Leocal*, the government contended "that the 'use' of force

does not incorporate any *mens rea* component." 543 U.S. at 9.

The Court declined to resolve whether "the word 'use' alone supplies a *mens rea* element," explaining that a focus on the word "use" was "too narrow" in the context of the statute. *Leocal*, 543 U.S. at 9. Instead, "[t]he critical aspect" of the provision was the limiting phrase "*against the person or property of another*." *Ibid.* The Court reasoned that, while it was possible to "actively employ *something* in an accidental manner," it was "much less natural" to say that "a person actively employs physical force against another person by accident." *Ibid.* For that reason, the Court concluded that the provision required a "higher degree of intent" than negligence and encompassed only a narrower "category of violent, active crimes" for which Congress intended enhanced punishment. *Id.* at 9, 11. Following that decision, the courts of appeals uniformly interpreted the ACCA's force clause to exclude offenses that could be committed with a *mens rea* of recklessness. See App., *infra*, 58a.

3. This Court later interpreted the definition of "misdemeanor crime of domestic violence" for purposes of a firearms-possession offense in Section 922(g). *Voisine* v. *United States*, 136 S. Ct. 2272, 2276 (2016). While the ACCA's force clause limits "violent felon[ies]" to offenses that require the use of physical force "against the person of another," the provision at issue in *Voisine* has no such restriction. It encompasses any offense (including a misdemeanor) that has as an element any "use or attempted use of physical force" by a person who has a specified relationship with the victim. 18 U.S.C. 921(a)(33)(A)(ii).

The Court held that offenses that could be committed with a *mens rea* of recklessness satisfied that broader definition. See *Voisine*, 136 S. Ct. at 2276. In so holding, the Court focused on the word "use," reasoning that a person

can "use" force without the "purpose or practical certainty that it will cause harm." *Id.* at 2278-2279. For that reason, the Court concluded that reckless offenses involving the use of force were sufficient, even when the force used was not specifically directed at the person or property of another. See *ibid.* Significantly, in a footnote, the Court explicitly acknowledged that its decision "d[id] not resolve" the question whether the force clause at issue in *Leocal* encompassed offenses that could be committed recklessly, and it "d[id] not foreclose [the] possibility" that differences between the provisions might compel a different result. *Id.* at 2280 n.4.

B. Facts And Procedural History

1. In 2007, petitioner was helping to manage a boarding house in Memphis, Tennessee. While cleaning a room, he discovered 13 bullets and placed them in his room for safekeeping. Several weeks later, officers with the Memphis Police Department responded to a complaint of drug sales at the house. Petitioner consented to a search of the premises. The officers discovered the 13 bullets, along with 0.3 grams of crack cocaine. Petitioner explained that he did not have a firearm, and no firearm was recovered at the scene. App., *infra*, 11a, 16a, 28a.

2. A grand jury in the Western District of Tennessee indicted petitioner on one count of possessing ammunition as a felon, in violation of 18 U.S.C. 922(g). He was convicted after a jury trial. App., *infra*, 16a.

At sentencing, the government sought an enhanced sentence under the ACCA. The district court found that petitioner was subject to the ACCA on the basis of five prior felony convictions: two Tennessee convictions for robbery, two Tennessee convictions for burglary or attempted burglary, and a Texas conviction for robbery. App., *infra*, 2a.

The district court sentenced petitioner to the ACCA's mandatory minimum of 15 years of imprisonment. The court imposed the minimum sentence in light of petitioner's advanced age; the age of his previous convictions; and the critical role he played in supporting his mother, his wife, and his disabled stepson. The court later explained that the mandatory minimum sentence was "too high" and that it had imposed it only because it "had to" under the ACCA. App., *infra*, 2a; 6/28/17 Resentencing Tr. 7; 7/14/11 Sentencing Tr. 28, 57-58.

On direct appeal, petitioner challenged his 15-year sentence for the possession of 13 bullets as "grossly disproportionate" and invalid under the Eighth Amendment. The court of appeals affirmed. See 506 Fed. Appx. 482, 489 (6th Cir. 2012). In so doing, however, the court stated that, "[l]ike the district court," it would "[not] have imposed a mandatory 180-month sentence if left to [its] own devices." *Id.* at 490.

3. Petitioner then filed a motion for postconviction relief under 28 U.S.C. 2255; following this Court's decision in *Johnson*, he amended his petition to include a claim that he was no longer subject to an enhanced sentence under the ACCA. As is relevant here, petitioner argued that his Texas conviction for robbery did not qualify as a "violent felony" under the ACCA's force clause because the statute of conviction encompassed reckless conduct.[1]

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[1] As the case comes to this Court, petitioner does not dispute that the two Tennessee convictions for robbery qualified as "violent felon[ies]," and the government has conceded that the two Tennessee convictions for burglary or attempted burglary no longer qualify. Accordingly, it is undisputed that whether petitioner is subject to the ACCA turns entirely on whether the Texas conviction for robbery qualifies as petitioner's third "violent felony." App., *infra*, 2a-3a.

At the time of petitioner's conviction, Texas defined robbery as a theft during which a person "intentionally, knowingly, or recklessly causes bodily injury to another," Tex. Penal Code § 29.02(a)(1) (1974), or "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death," *id.* § 29.02(a)(2). Petitioner was convicted under the first prong of the definition, which expressly allows a conviction where a defendant "recklessly cause[d] bodily injury to another." App., *infra*, 6a.[2]

The district court granted petitioner's motion for post-conviction relief, holding that the Texas offense of robbery did not qualify as a "violent felony" under the ACCA. App., *infra*, 14a-53a. The district court observed that, under then-existing Sixth Circuit precedent, offenses that could be committed recklessly could not be "violent felon[ies]" under the force clause. *Id.* at 47a. The district court rejected the government's suggestion that this Court's decision in *Voisine* undermined that precedent. *Id.* at 48a n.13.

Unconstrained by the 15-year mandatory minimum, the district court subsequently resentenced petitioner to 88 months of imprisonment; because of the time petitioner had already served, the court ordered his release from custody. In imposing that sentence, the district court emphasized petitioner's perfect disciplinary record and personal progress since his conviction, as well as his compelling family circumstances. The probation office had agreed that a lower sentence would be appropriate given petitioner's "encouraging" progress. At the conclusion of the resentencing hearing, the court observed that petitioner's previous sentence had not been "just." App., *infra*, 2a; 6/28/17 Resentencing Tr. 67-69, 84-85, 96, 101.

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[2] The government has conceded that the first prong is not further divisible. See App., *infra*, 7a.

4. Following petitioner's release, the government appealed from the district court's judgments granting petitioner's motion for postconviction relief and reducing his sentence.

The court of appeals reversed and remanded. App., *infra*, 1a-10a. As is relevant here, the court held that a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the ACCA's force clause. App., *infra*, 7a-9a. In so holding, the court of appeals relied on its earlier decision in *United States* v. *Verwiebe*, 874 F.3d 258 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018), which analyzed a provision of the Sentencing Guidelines worded identically to the ACCA provision at issue here. Relying on this Court's decision in *Voisine*, the Sixth Circuit had held in *Verwiebe* that the force clause in Section 4B1.2(a)(1) of the Guidelines encompassed offenses that could be committed recklessly. App., *infra*, 9a.

The court of appeals acknowledged that, in *United States* v. *Harper*, 875 F.3d 329 (6th Cir. 2017), cert. denied, 139 S. Ct. 53 (2018), a different panel of the court had addressed the same question and expressed the opposite view. App., *infra*, 9a. The court in *Harper* recognized that, because the opinion in *Verwiebe* had been released "shortly before," it was bound to follow *Verwiebe* as controlling precedent. *Harper*, 875 F.3d at 330. But the court wrote at length to explain why it believed *Verwiebe* to be "mistaken." See *ibid.* In the opinion below, the court of appeals noted that, in yet another opinion, it had applied *Verwiebe* to the ACCA's force clause, resolving the specific question presented in this case. App., *infra*, 9a (citing *Davis* v. *United States*, 900 F.3d 733 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019)).

Judge Stranch concurred. App., *infra*, 11a-13a. She wrote separately to explain that she was concurring "for

one reason only": the result was "required by [Sixth Circuit] precedent." *Id.* at 11a. She observed that the court's decision "is not only unjust, it is also unsound." *Ibid.* Judge Stranch contended that the *Harper* court's "painstaking[]" distinction between the statutory language at issue in *Voisine* and the language in the ACCA's force clause was correct, and she noted that "[a]t least two other circuits" had reached the same conclusion. *Id.* at 12a-13a (citing *United States* v. *Hodge*, 902 F.3d 420 (4th Cir. 2018); *United States* v. *Rose*, 896 F.3d 104 (1st Cir. 2018); and *United States* v. *Middleton*, 883 F.3d 485 (4th Cir. 2018) (Floyd, J., concurring)). But Judge Stanch "reluctantly concur[red]" in the court's opinion because she was bound by circuit precedent absent intervention by this Court or the en banc Sixth Circuit. *Id.* at 13a.

5. Petitioner filed a petition for rehearing en banc. Over the dissent of four judges, the court of appeals denied the petition. App., *infra*, 54a-55a.

a. Judge Kethledge, joined by Judges Moore, Stranch, and White, dissented from the denial of rehearing en banc. App., *infra*, 55a-59a. He emphasized that, whereas this Court in *Voisine* "expressly limited its inquiry" to the meaning of the word "use," the provision at issue here requires the use of force "against the person of another." *Id.* at 56a. "That difference in text," he explained, "yields a difference in meaning." *Ibid.* Judge Kethledge reasoned that "volitional application [of force] against the person of another" requires "knowledge or intent that the force apply to another person." *Id.* at 57a (internal quotation marks and citation omitted). Such an interpretation, he explained, was consistent with this Court's recognition in *Leocal* that the restrictive phrase "against the person or property of another" was the "critical aspect" of the language at issue. *Id.* at 59a (emphasis omitted). Judge Kethledge lamented that "by chance"

Verwiebe was decided before *Harper*, and he criticized *Verwiebe*'s analysis—as well as that of the other circuits that had adopted the same interpretation—as "rough-cut textualism." *Id.* at 57a-58a.

Judge Kethledge added that, by denying rehearing, the Sixth Circuit had added confusion to a critical area of federal sentencing and "rendered more intractable what has become a deep circuit split." App., *infra*, 59a. As Judge Kethledge noted, the provision at issue is "one of the more important definitions in all of federal criminal law," *ibid.*, and the question whether an offense that can be committed recklessly constitutes a valid predicate offense under the ACCA's force clause "recurs frequently and typically doubles a defendant's sentence," *id.* at 58a. Judge Kethledge concluded that, "by our inaction[,] we send back to prison, quite wrongly in my view, a 65-year-old man whose crime was possession of a dozen bullets and who had already served the sentence (88 months) that the district court thought was sufficient." *Id.* at 59a.

b. Judge Stranch, joined by Judge Moore, also dissented. App., *infra*, 60a-61a. She wrote separately to note that "[t]he Supreme Court has explicitly left open the possibility that the term 'use of physical force' should be given 'divergent readings' in [the statute at issue in *Voisine*] and the ACCA 'in light of differences in [the statutes'] contexts and purposes.'" *Id.* at 60a (quoting *Voisine*, 136 S. Ct. at 2280 n.4). According to Judge Stranch, "the statutes' divergent 'contexts and purposes' provide a substantial basis to conclude that the ACCA's requirement of the use of physical force *against the person of another* is more stringent than [the *Voisine* statute's] requirement of the use of physical force *period*." *Id.* at 61a. At the same time, Judge Stranch recognized that a change in the Sixth Circuit's position "would not resolve the existing circuit split." *Id.* at 60a.

REASONS FOR GRANTING THE PETITION

This case presents a deep and widely acknowledged circuit conflict on a question of statutory interpretation under the definition of "violent felony" in the Armed Career Criminal Act—a provision that, because of its central importance in federal criminal sentencing, this Court has frequently addressed. The answer to the question presented will affect the sentences of a broad group of criminal defendants. The government has acknowledged the importance of the question. Eight courts of appeals have addressed the question (splitting 5-3 in the government's favor), and an additional two courts of appeals are currently considering the question en banc. Given the depth of the conflict, there is no realistic possibility that it will be resolved without this Court's intervention.

This case is an optimal vehicle for addressing and definitively resolving the question. It presents the question in the context of the ACCA's statutory text; there are no threshold questions about the scope of the applicable state law; and the resolution of the question presented will be outcome-dispositive. Reinforcing the case for review, the decision below reached a deeply unjust result, reinstating a 15-year mandatory minimum sentence for storing a handful of bullets. This case is a compelling candidate for the Court's review. The petition for a writ of certiorari should be granted.

A. The Decision Below Implicates A Conflict Among The Courts Of Appeals

As numerous courts have recognized, there is an entrenched circuit conflict on the question whether offenses that can be committed recklessly satisfy the force clause of the ACCA's definition of "violent felony." Before this Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), all of the courts of appeals to have considered

the question had agreed that such offenses do not qualify. But *Voisine*, which interpreted a different statutory provision to encompass such offenses, brought an end to that consensus.

Since *Voisine*, three courts of appeals have held that the ACCA's force clause does not cover offenses that can be committed recklessly, and five others have reached the contrary conclusion. Two additional courts of appeals have agreed to consider the question en banc. In light of that state of play, the question presented undoubtedly requires resolution by this Court, and further percolation would serve no value and would merely waste judicial resources. The time is ripe for the Court to address the question presented and bring to an end the uncertainty in the lower courts.

1. By holding that an offense that can be committed with a *mens rea* of recklessness satisfies the ACCA definition of "violent felony," the Sixth Circuit's decision squarely conflicts with the decisions of the First, Fourth, and Ninth Circuits.

a. The First Circuit has addressed the question presented on three separate occasions, each time unanimously holding that offenses that can be committed recklessly cannot qualify as "violent felon[ies]" under the ACCA. In *United States* v. *Windley*, 864 F.3d 36 (2017), the First Circuit held that assault and battery with a dangerous weapon under Massachusetts law did not qualify as a "violent felony" because the offense could be committed with a *mens rea* of recklessness, which "does not require that the defendant intend to cause injury * * * or even be aware of the risk of serious injury that any reasonable person would perceive." *Id.* at 38. That level of *mens rea*, the court explained, did not "fit with ACCA's requirement that force be used against the person of another." *Ibid.* Similarly, in *United States* v. *Rose*, 896 F.3d

104 (2018), the First Circuit held that assault with a dangerous weapon under Rhode Island law did not qualify as a "violent felony" under the force clause because there was at least a possibility that recklessness would be sufficient for conviction of that offense. See *id.* at 110, 114.

Both *Windley* and *Rose* relied heavily on the reasoning of *Bennett* v. *United States*, 868 F.3d 1 (1st Cir. 2017)—a decision that was later withdrawn as moot because the defendant had died shortly before it was issued. See 870 F.3d 34 (1st Cir. 2017). There, in an opinion joined by Justice Souter, the First Circuit held that aggravated assault under Maine law did not satisfy the ACCA's force clause because it encompassed reckless conduct. See 868 F.3d at 4, 8. In so holding, the court emphasized "the differences in contexts and purposes between the statute construed in *Voisine* and ACCA," and it reasoned that the rule of lenity supported its holding. *Id.* at 23 (internal quotation marks and citation omitted). Those decisions—which were joined by five different judges and a retired Justice—squarely conflict with the decision below.

b. The Fourth Circuit has similarly held that offenses that can be committed recklessly cannot qualify as "violent felon[ies]" under the ACCA. In *United States* v. *Hodge*, 902 F.3d 420 (4th Cir. 2018), the government actually conceded—in briefing that followed this Court's decision in *Voisine*—that offenses that could be committed recklessly could not satisfy the ACCA's force clause. See *id.* at 427. The Fourth Circuit agreed, holding that reckless endangerment under Maryland law was not a "violent felony." See *ibid.* The Fourth Circuit relied on an earlier concurring opinion by the majority of a panel that explained that the "ACCA force clause requires a higher degree of *mens rea* than recklessness." *Ibid.* (quoting *United States* v. *Middleton*, 883 F.3d 485, 498 (4th Cir.

2018) (Floyd, J., joined by Harris, J., concurring)) (alteration omitted).

c. The latest circuit to weigh in on the question presented, the Ninth Circuit, recently joined the First and Fourth Circuits in holding that offenses that can be committed recklessly cannot qualify as "violent felon[ies]" under the ACCA's force clause. In *United States* v. *Orona*, 923 F.3d 1197 (2019), the Ninth Circuit concluded that *Voisine* did not abrogate its prior precedent, which had held that such offenses do not qualify. See *id.* at 1203. The court emphasized that *Voisine* had expressly left open the question whether reckless conduct satisfied the provision at issue in *Leocal*—a provision that, like the ACCA's force clause, requires "the use * * * of physical force against the person * * * of another." See *ibid.* The Ninth Circuit recognized that its holding was contrary to that of several other circuits, but noted that it was consistent with the First Circuit's. See *id.* at 1202-1203.[3]

Just last month, the Ninth Circuit reaffirmed that holding in *United States* v. *Begay*, No. 14-10080, 2019 WL 3884261 (Aug. 19, 2019), and extended it to hold that extreme recklessness was insufficient to satisfy an almost identical force clause in the definition of another firearms offense. See *id.* at *5. While a dissenting judge disagreed with the majority's characterization of extreme recklessness, he did not dispute that standard recklessness would have been insufficient to satisfy the force clause. See *id.* at *6-*12 (N.R. Smith, J., dissenting).

d. Finally, a panel of the Eleventh Circuit likewise held that offenses that can be committed recklessly cannot qualify as "violent felon[ies]" under the ACCA's force clause. See *United States* v. *Moss*, 920 F.3d 752, 754

[3] The government has filed a petition for rehearing en banc in *Orona*, and the defendant's response is due on October 15, 2019.

(2019). While that opinion has been vacated in light of the Eleventh Circuit's decision to grant rehearing en banc, see 928 F.3d 1340 (2019), it reflects the views of three additional judges on the question presented.

2. In the decision below, the Sixth Circuit, like the Fifth, Eighth, Tenth, and District of Columbia Circuits, reached the opposite conclusion: that offenses that can be committed recklessly can nevertheless qualify as "violent felon[ies]" under the ACCA's force clause.

a. The Fifth Circuit has held that, in light of *Voisine*, the ACCA's force clause "includes reckless conduct." *United States* v. *Burris*, 920 F.3d 942, 951 (2019). The court did not consider the significance of the phrase "against the person of another" in the force clause and instead emphasized that "reckless conduct" can involve the "use" of force. *Id.* at 952.

Relying on *Voisine*, the Eighth Circuit likewise concluded, after just a single paragraph of analysis, that an offense that "required a mens rea of recklessness * * * qualified as a violent felony under the ACCA's force clause." *United States* v. *Fogg*, 836 F.3d 951, 956 (2016), cert. denied, 137 S. Ct. 2117 (2017).

In *United States* v. *Hammons*, 862 F.3d 1052, 1056 (2017), cert. denied, 138 S. Ct. 702 (2018), the Tenth Circuit reached the same conclusion, also with just a single paragraph of analysis. The court took the view that, for purposes of determining whether an offense constitutes a valid ACCA predicate, "it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly." *Ibid.* In a subsequent decision, the Tenth Circuit recognized that the First Circuit's intervening decision in *Bennett* "raise[d] questions" about its analysis, but concluded that

it was "bound" by its decision in *Hammons* absent intervention by this Court or the en banc court. *United States* v. *Pam*, 867 F.3d 1191, 1208 n.16 (2017).

The D.C. Circuit has also held that, in light of *Voisine*, offenses that can be committed recklessly can qualify as "violent felon[ies]" under the ACCA's force clause. See *United States* v. *Haight*, 892 F.3d 1271 (2018), cert. denied, 139 S. Ct. 796 (2019). In so holding, the D.C. Circuit "recognize[d] that the First Circuit ha[d] reached a contrary conclusion," but it "respectfully disagree[d]" with it. *Id.* at 1281.

b. In the decision under review, the Sixth Circuit also held that robbery under Texas law qualifies as a "violent felony" under the ACCA's force clause even though it can be committed with a *mens rea* of recklessness. App., *infra*, 11a; see *Davis* v. *United States*, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019). Judge Stranch, who concurred on the basis of prior circuit precedent, observed that "[a]t least two other circuits have taken [the contrary] position." App., *infra*, 13a. And at the rehearing stage, Judge Kethledge emphasized that the Sixth Circuit's decision had "rendered more intractable what has become a deep circuit split." *Id.* at 59a.

3. Two courts of appeals have agreed to consider the question presented en banc. See *United States* v. *Moss*, 928 F.3d 1340 (11th Cir. 2019); *United States* v. *Santiago*, No. 16-4194 (3d Cir. June 8, 2018). Each of those cases is likely months away from a decision: The Third Circuit will hear argument on October 16, 2019, and the Eleventh Circuit will hear argument on February 24, 2020. Whichever way those courts ultimately come out on the question presented, however, it will only exacerbate the existing circuit conflict.

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In short, the courts of appeals have taken divergent and flatly inconsistent positions on whether offenses that can be committed recklessly qualify as "violent felon[ies]" under the ACCA's force clause. Several of those courts have expressly acknowledged the existence of the circuit conflict, which has only continued to deepen. And the consequences of that conflict could not be more stark: if petitioner's case had arisen in the First, Fourth, or Ninth Circuits, he would be home for good with his family. But because his case arose in the Sixth Circuit, he faces the prospect of returning to prison to serve out the remaining years of a 15-year mandatory minimum sentence that the district court itself described as unjust. The mature circuit conflict on the question presented warrants the Court's review.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

As the United States has itself recognized, the question presented is tremendously important, with the ongoing conflict having a dramatic and disparate effect on scores of criminal defendants across the country. The Court's intervention is desperately needed, and this case presents an optimal vehicle in which to resolve the conflict.

1. As Judge Kethledge noted in his dissent at the rehearing stage, the question presented "recurs frequently and typically doubles a defendant's sentence." App., *infra*, 58a. Last year alone, more than 6,700 individuals were convicted under 18 U.S.C. 922(g), the firearms-possession statute to which the ACCA applies, and that number has been increasing. See United States Sentencing Commission, *Quick Facts, Felon in Possession of a Firearm, Fiscal Year 2018* <tinyurl.com/QuickFactsFY18>.

Hundreds of those offenders were given mandatory minimum sentences under the ACCA. See *ibid.*

From those numbers—to say nothing about the large number of reported cases addressing the question presented—there can be no doubt that the question will continue to recur frequently until this Court intervenes. And as this case well illustrates, the consequences for individual defendants are vast, with the answer to the question determining whether a defendant is subject to a mandatory 15-year minimum or what is often a substantially lower sentence. See *ibid.* (noting that the average ACCA sentence for a Section 922(g) violation is 186 months, whereas the average non-ACCA sentence is 50 months).

What is more, the answer to the question presented will have a bearing on "various other provisions of the criminal code, as well as the Sentencing Guidelines," App., *infra*, 55a, where Congress has employed the phrase "use of physical force against the person of another." See, *e.g.*, *Begay*, 2019 WL 3884261, at *5 (18 U.S.C. 924(c)); *United States* v. *Bettcher*, 911 F.3d 1040, 1043 (10th Cir. 2018) (U.S.S.G. § 4B1.2), petition for cert. pending, No. 19-5652 (filed Aug. 16, 2019); *United States* v. *Mendez-Henriquez*, 847 F.3d 214, 220 (5th Cir.) (U.S.S.G. § 2L1.2), cert. denied, 137 S. Ct. 2177 (2017); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1125 (9th Cir. 2006) (18 U.S.C. 16(a)). Accordingly, it is no exaggeration to describe the provision at issue here as "one of the more important definitions in all of federal criminal law." App., *infra*, 59a (Kethledge, J., dissenting from denial of rehearing en banc).

The Court need not take our word for it: the United States has made exactly the same points in seeking further review on the question. In its petition for rehearing en banc in *Orona*, *supra*, the government described the question presented as "exceptionally important." Pet. for Reh'g at 17, *Orona*, No. 17-17508 (9th Cir.) (filed Aug. 22,

2019). The government emphasized the practical importance of the question in light of the "plethora of predicate offenses carrying reckless mens rea." *Id.* at 18. And it described the perils of the "circuit split," in which the "15-year ACCA mandatory minimum sentence[]" and "a host of other legal consequences that rely on 'violent felony' and 'crime of violence' definitions" turn on whether a defendant's crime occurs "in New Mexico" or steps away on the other side of "the Arizona border." *Id.* at 18-19. While the government is wrong on the merits, it is correct on the importance of the question. And until this Court resolves the question, the fate of scores of criminal defendants will depend on an accident of geography.

2. This Court's review is urgently needed. Since the Court was squarely presented with the question earlier this year (in a case that would have been heard by an eight-member Court), see *Haight* v. *United States*, 139 S. Ct. 796 (cert. denied Jan. 7, 2019) (No. 18-370), the circuit conflict has developed significantly: the Ninth Circuit has now sided with the First and Fourth Circuits, as did a panel of the Eleventh Circuit in a now-vacated opinion, while the Fifth Circuit has sided with the Eighth, Tenth, and D.C. Circuits, and the Sixth Circuit declined to reconsider the question in this case over two impassioned dissents.

Notably, the question presented has also been the subject of substantial en banc activity. As noted above, the en banc Third and Eleventh Circuits are scheduled to hear oral arguments on the question in the coming months. See p. 19, *supra*. And a government petition for rehearing is currently pending in the Ninth Circuit. See p. 17 n.3 & pp. 21-22, *supra*.

In light of the extensive authority on both sides of the circuit conflict, there would be little value to additional percolation. Indeed, absent the Court's intervention in

this case, two if not three courts of appeals will expend considerable resources on en banc hearings, all to address a question that the Court will inevitably need to answer definitively. For that reason, even setting aside the vast personal stakes for "the defendants and families impacted" nationwide by the question in the interim, App., *infra*, 60a (Stranch, J., dissenting from denial of rehearing en banc), considerations of judicial economy warrant immediate review.

3. This case also provides an optimal vehicle in which to decide the question presented. The question is squarely presented here and is outcome-dispositive. The sole remaining dispute in this case is whether one state-law offense, a Texas robbery, qualifies as a predicate offense under the ACCA. See App., *infra*, 3a. There is no dispute that recklessness suffices for that offense by the plain terms of state law. And there are no threshold questions about petitioner's other prior offenses. Accordingly, nothing stands between the Court and resolution of the question presented in this case.

Despite the practical significance of the question presented, the Court rarely gets a clean vehicle in which to address it. Three pending petitions for certiorari would allow the Court to resolve a related but distinct question: whether an offense with a *mens rea* of recklessness can qualify as a "crime of violence" under Section 4B1.2 of the Sentencing Guidelines, which contains a force clause identical to the one under the ACCA. See *Ash* v. *United States*, No. 18-9639 (filed June 10, 2019); *Borden* v. *United States*, No. 19-5410 (filed July 24, 2019); *Bettcher* v. *United States*, No. 19-5652 (filed Aug. 16, 2019). The decision challenged in each of those cases addressed only the Guidelines and not the ACCA. See *United States* v. *Ash*,

917 F.3d 1238, 1239 (10th Cir. 2019); *United States* v. *Borden*, 769 Fed. Appx. 266, 267 (6th Cir. 2019); *Bettcher*, 911 F.3d at 1041.

This case presents the optimal vehicle in which to address any question concerning the meaning of the language at issue here. The Court does not ordinarily grant review to resolve an asserted conflict arising from the application of the advisory Guidelines, for the simple reason that the Sentencing Commission could eliminate the conflict by revising the Guidelines' language. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). Accordingly, the Court has denied review in previous cases presenting the question whether an offense with a *mens rea* of recklessness can qualify as a "crime of violence" under the force clauses of Section 2L1.2 and Section 4B1.2 of the Guidelines. See *United States* v. *Harper*, 875 F.3d 329 (6th Cir. 2017), cert. denied, 139 S. Ct. 53 (2018); *United States* v. *Verwiebe*, 874 F.3d 258 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018); *United States* v. *Ramey*, 880 F.3d 447 (8th Cir.), cert. denied, 139 S. Ct. 84 (2018); *United States* v. *Mendez-Henriquez*, 847 F.3d 214 (5th Cir.), cert. denied, 137 S. Ct. 2177 (2017). Here, by contrast, it makes good sense that the Court should resolve the conflict on the interpretation of the force clause in the context of the ACCA, where the traditional tools of statutory interpretation squarely apply and where the Court's decision will be the final word.[4]

[4] Should the Court grant the petition in this case, it may wish to hold any petitions that pose related questions under the Guidelines, then remand those cases for further consideration in light of its decision here.

* * * * *

In sum, this case presents the question whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the ACCA's force clause. There is a deep and widely acknowledged circuit conflict on that question. Only this Court's intervention can resolve that stark conflict on the interpretation of what Judge Kethledge called "one of the more important definitions in all of federal criminal law." App., *infra*, 59a. And once again, only this Court can eliminate the uneven application of the ACCA to criminal defendants nationwide. The Court should grant the petition for certiorari and end the chaos in the lower courts on an important question concerning the day-to-day administration of federal criminal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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