No. 19-373

IN THE
Supreme Court of the United States

JAMES WALKER,
Petitioner,
v.

UNITED STATES,
Respondent.

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rules 21, 24, 33.1, and 37(b), the National Association for Public Defense (NAPD) moves this Court for leave to file the attached amicus brief in support of petitioners.

The NAPD is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel, including regularly researching and providing advice to indigent clients in state and federal criminal cases. NAPD's members are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of indigent defense representation. Their collective expertise represents state, county, and federal systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and other training to its members, including training on the utmost importance of providing vigorous indigent defense advocacy. Accordingly, NAPD has a strong interest in the question presented in this case.

The petitioner has granted blanket consent to the filing of amicus curiae briefs. The government has not. Nor has undersigned counsel been able to obtain the government's consent in this case. Undersigned

counsel contacted government counsel via email, but was unable to obtain consent prior to the filing deadline. The government has not expressly withheld consent, but it has not given consent either. For this reason, the NAPD moves this Court for leave to file its amicus brief in support of petitioners.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The National Association for Public Defense (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel, including regularly researching and providing advice to indigent clients in state and federal criminal cases. NAPD's members are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of indigent defense representation. Their collective expertise represents state, county, and federal systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and other training to its members, including training on the utmost importance of providing vigorous indigent defense advocacy. Accordingly, NAPD has a strong interest in the question presented in this case.

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[1] Petitioner consented to the filing of this brief. Pursuant to Rule 37.3(a), written consent to the filing of this brief is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Sixth Circuit held below that a crime with a mens rea of recklessness can qualify as a "violent felony" under the Armed Career Criminal Act's use-of-force clause, 18 U.S.C. § 924(e)(2)(B)(i). Pet. App. 7a-9a. That conclusion is incorrect for the reasons discussed in petitioner's brief. Pet. Br. 21-45. The first reason is the statute's text. As the petitioner persuasively explains, the use-of-force clause requires force targeted at another ("against the person of another"), and reckless offenses do not satisfy that requirement. Pet. Br. 21-24.

The petitioner's reading of the use-of-force clause is confirmed by the ACCA's overall structure. The neighboring words within the force clause, the neighboring words within § 924(e)(2)(B)(ii)'s second definition of "violent felony" (which includes the enumerated offenses clause and the residual clause), and the neighboring words within § 924(e)(2)(A)'s definition of "serious drug offense," all point to one conclusion: Congress intended the ACCA – which supplants a 10-year *statutory maximum* sentence with a 15-year *mandatory minimum* sentence – to cover intentional or purposeful crimes, not less-culpable reckless crimes. Indeed, the ACCA is only triggered by the commission of a knowing offense under 18 U.S.C. § 922(g). 18 U.S.C. § 924(e). Simply put, the ACCA was not meant to apply to reckless offenders. Congress made that clear within the Act's text and overall structure.

ARGUMENT

I. The ACCA's overall structure confirms that the Act's force clause does not reach reckless crimes.

The ACCA is a recidivist sentencing statute that mandates significantly enhanced penalties for certain defendants convicted of gun-possession offenses under 18 U.S.C. § 922(g). 18 U.S.C. § 924(e). The ACCA has two sections. The first section provides that any defendant convicted of a § 922(g) offense who "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another," is subject to a statutory penalty range of 15 years to life (as opposed to 0 to 10 years). 18 U.S.C. § § 924(e)(1); 18 U.S.C. § 924(a)(2). The second section, in two subsections, defines the phrases "serious drug offense" (in § 924(e)(2)(A)) and "violent felony" (in § 924(e)(2)(B)).

The ACCA's structure confirms that Congress intended the statute to reach purposeful or intentional crimes, and not less-culpable reckless crimes. This is so for at least seven reasons.

First, start with the text of the use-of-force clause (the particular subsection at issue here). That clause defines a violent felony as any felony that "has as an element the use . . . of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). As the petitioner's brief persuasively explains, Congress's inclusion of the phrase "against the person of another" requires force targeted at another, and reckless offenses do not satisfy that requirement. Pet. 21-24. Thus, the reckless use of force is insufficient to qualify as a violent felony under the ACCA's use-of-force

clause. Pet. 21-29.

Second, the word "use" means the "act of employing" something." Pet. Br. 21. The word's ordinary meaning implies "action and implementation." *Bailey v. United States*, 516 U.S. 137, 145 (1995). In the past (the year before Congress enacted the ACCA), when Congress has written a statute that punishes the "use" of something, without attaching a particular mens rea to it, this Court has read into the statute a knowledge requirement. *Liparota v. United States*, 471 U.S. 419, 428-429, 433-434 (1985). There is no reason not to do so here as well, particularly in the context of a statute that applies only to *violent felony* offenses. *See generally Staples v. United States*, 511 U.S. 600, 618-619 (1994). To the extent that this Court interpreted "use" in a different *misdemeanor* provision to include reckless conduct in *Voisine v. United States*, 136 S.Ct. 2272 (2016), the petitioner's brief persuasively explains why *Voisine* is inapplicable in the ACCA *violent felony* context. Pet. Br. 30-38.

Third, the use-of-force clause encompasses only those crimes with an "element" the "**use** of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Again, the word "use" connotes an act (or conduct). Pet. Br. 21. In other words, the use-of-force clause encompasses statutes with **conduct elements** that punish the "use" of force against the person of another. Under its plain terms, the clause does not encompass **result or circumstance elements**.

This is important because historically, and at the time Congress enacted the ACCA, a reckless mens rea attached only to result or circumstance elements, and not to conduct elements. Model Penal Code § 2.02(c)

(defining recklessness in terms of a conscious disregard that a "material element exists or will result from his conduct"); *see*, *e.g.*, Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 697 (1983) (explaining, in chart form, that the Model Penal Code's definition of recklessness attaches to circumstance and result elements, but not conduct elements). Although not all states have a definition of recklessness, in the states that do, most define recklessness solely in terms of a result or circumstance of the crime (and not the actus reus of the crime itself).[2] Because the ACCA's force clause is aimed at conduct ("use"), and not results or circumstances, a recklessness mens rea would not naturally attach to it. This further confirms that Congress would not have meant the "use" of force clause to encompass reckless crimes.

This point is particularly important, and arguably dispositive, in this case. That is because the petitioner's conviction is from Texas, Pet. Br. 13, and Texas has adopted the Model Penal Code's general culpability provisions. *See Brown v. State*, 955 S.W.2d

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[2]*See*, *e.g.*, Ala. Code § 13A-2-2(3); Alaska Stat. § 11.81.900(a)(3); Ariz. Rev. Stat. § 13-105(10)(c); Ark. Code Ann. § 5-2-202(3); Colo. Rev. Stat. § 18-1-501(8); Conn. Gen. Stat. § 53a-3-(13); Del. Code Ann. tit. 11 § 231(e); 720 Ill. Comp. Stat. Ann. 5/4-6; KSA § 21-5202(j); Ky. Rev. Stat. Ann. § 501.020(4); Me. Rev. Stat. Ann. tit. 17-A, § 35(3); Mo. Ann. Stat. § 562.016(4); Neb. Rev. Stat. Ann. § 28-109(20); N.D. Cent. Code Ann. § 12.1-02-02(1)(c); N.H. Rev. Stat. Ann. § 626:2(II)(c); N.J. Stat. Ann. § 2C:2-2(b)(3); N.Y. Penal Law § 15.05(3); Ohio Rev. Code Ann. § 2901.22(C); Or. Rev. Stat. Ann. § 161.085(9); 18 Pa. Cons. Stat. § 302(b)(3); S.D. Codified Laws § 22-1-2(1)(d); Tenn. Code Ann. § 39-11-302(c). Tex. Penal Code Ann. § 6.03(c); Utah Code Ann. § 76-2-103(3); Wash. Rev. Code Ann. § 9A.08.010(1)(c).

276, 284 (Tex. Ct. Crim. App. 1997) ("Because the Legislature expressed an intent to model our Code after the Model Penal Code, we may also look to the Model Code for guidance."). In jurisdictions that have adopted the Model Penal Code's mental state definitions, "a single offense definition may require a different culpable state of mind for each objective element of the offense." Model Penal Code § 1.13(9) (footnotes omitted).

The Texas "robbery" statute at issue here pairs different mental states with different elements in the statute. Tex. Penal Code Ann. § 29.02(a). An individual must have the "intent to obtain or maintain control" of property "in the course of committing a theft," but an individual must also "intentionally, knowingly, or recklessly cause[] bodily injury to another." Tex. Penal Code § 29.02(a). Importantly, the recklessness mens rea applies only to the result element (causing bodily injury). But, as explained above, the use-of-force clause is concerned with an offender's conduct (or actions), not the result of his conduct. Here, the petitioner's conduct – "committing a theft" – does not have a use-of-violent-force element. Tex. Penal Code Ann. § 31.03(a). A result element, that can be caused recklessly, should not turn a nonviolent crime into a violent one.[3]

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[3] Most of the lower courts have held that causation-of-injury elements qualify as elements of force under the ACCA, but they have done so via an "indirect force" analysis, rather than an "elements" analysis. *Compare United States v. Burris*, 910 F.3d 169, 180-181 (5th Cir. 2019) (en banc) (citing cases and holding that causation-of-injury statutes count because force can be committed indirectly), *with Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016) ("Elements are the constituent parts of a crime's legal definition – the things the prosecution must prove to sustain a conviction."). The lower courts have said virtually

Fourth, the neighboring words within the force clause also point to the exclusion of reckless crimes. *Leocal v. Ashcroft*, 543 U.S. 1, 8-9 (2004) ("we construe language in its context and in light of the terms surrounding it."). The force clause also encompasses the "attempted use" of physical force against the person of another. § 924(e)(2)(B)(i). A crime that has as an element the **attempted** use of physical force requires an intent to use force. *See*, *e.g.*, *United States v. Resendiz-Ponce*, 549 U.S. 102, 106 (2007) ("[a]t common law, the attempt to commit a crime was itself a crime if the perpetrator . . . intended to commit the completed offense"). Because Congress enumerated an "attempted use" of force, Congress most logically viewed "use" of force as an intentional or purposeful crime. After all, "one cannot intend to commit a reckless offense." *United States v. Harris*, 941 F.3d 1048, 1054 (11th Cir. 2019).[4]

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nothing about the ACCA's use of the word "element" in § 924(e)(2)(B)(i). The "indirect force" analysis has led at least one court of appeals to hold that a causation-of-injury statute that can be committed by omission qualifies as a violent felony because it has an element of force. *United States v. Ontiveros*, 875 F.3d 533, 537 (10th Cir. 2017). That decision is nonsensical. As at least one court of appeals has recognized, to do nothing is **not** to use physical force. *United States v. Mayo*, 901 F.3d 218, 229 (3rd Cir. 2018). This Court will need to resolve this conflict as well. A principled decision here, that is faithful to the ACCA's text and structure, would send a clear signal to the lower courts that it is improper to read the word "element" out of the ACCA's force clause.

[4] It is true that this point, and the preceding one, could also have been made in *Voisine*. But they were not. The word "use" was "the only statutory language either party [thought] relevant" in *Voisine*. 136 S.Ct. at 2278. And the outcome in *Voisine* turned primarily on the consequences of petitioner's reading of the statute, a reading that would have rendered the provision at

So too with the "threatened use of force clause." 18 U.S.C. § 924(e)(2)(B)(i). A threat is defined as a "communicated *intent* to inflict harm or loss on another." Black's Law Dictionary (8th ed. 2004) (emphasis added). A defendant "must know that he is transmitting a communication" when he **threatens to use** force (or anything else). *Elonis v. United States*, 135 S.Ct. 2001, 2011 (2015). While it is an unresolved question whether an individual could be reckless with respect to whether a communication is perceived as a threat, *id.* at 2012, the conduct – the act of communication itself – must be done knowingly. *Id.* That knowing conduct element reinforces that the "use" of force conduct element enumerated in § 924(e)(2)(B)(i) was not meant to reach reckless crimes.

Fifth, the force clause's neighboring subsection, § 924(e)(2)(B)(ii), further supports petitioner's argument that the ACCA does not reach reckless crimes. *See*, *e.g.*, *Global Tech Appliances v. SEB S.A.*, 563 U.S. 754, 765 (2011) (reading a knowledge requirement into one provision because a neighboring subsection had a knowledge requirement). That provision includes four enumerated offenses – "burglary, arson, or extortion, involves use of explosives" – and a residual clause ("otherwise involves conduct that presents a serious potential risk of physical injury to another"). 18 U.S.C.

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issue in that case "broadly inoperative in [] 35 jurisdictions." *Id.* at 2280. No similar consequences would result from petitioner's reading of the ACCA. Indeed, "until recently, the courts of appeals had uniformly interpreted the language at issue here to exclude offenses that can be committed recklessly." Pet. Br. 18. The ACCA was by no means "rendered inoperative" during that time.

§ 924(e)(2)(B)(ii).[5] This clause supports petitioner's position for two overarching reasons.

1. As this Court already held in *Begay*, the four enumerated offenses in § 924(e)(2)(B)(ii) "all typically involve purposeful, violent, and aggressive conduct." *Begay v. United States*, 553 U.S. 137, 144-145 (2008). The generic definition of burglary, for instance, "means unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Quarles v. United States*, 139 S.Ct. 1872, 1875 (2019) (cleaned up; emphasis added). State burglary statutes uniformly require the government to prove a knowing entry with intent to commit a crime.[6]

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[5] This Court struck down the residual clause as void for vagueness in *Johnson v. United States*, 135 S.Ct. 2551 (2015).

[6] Ala. Code § 13A-7-5; Alaska Stat. § 11.46.310; Ariz. Rev. Stat. § 13-1506; Ark. Code Ann. § 5-39-201; Cal. Penal Code § 459; Colo. Rev. Stat. § 18-4-203; Conn. Gen. Stat. § 53a-102; Del. Code Ann. tit. 11, § 825; Fla. Stat. Ann. § 810.02; Ga. Code Ann. § 16-7-1; Haw. Rev. Stat. § 708-810; Idaho Code Ann. § 18-1401; 720 Ill. Comp. Stat. Ann. 5/19-1; Ind. Code Ann. § 35-43-2-1; Iowa Code Ann.
§ 713.1; KSA § 21-3715 (1990); Ky. Rev. Stat. Ann. § 511.040(1); La. Rev. Stat. Ann. § 14:62(A); Me. Rev. Stat. Ann. tit. 17-A, § 401; Md. Code Ann., Crim. Law § 6-204; Mass. Gen. Laws Ann. ch. 266, § 14; Mich. Comp. Laws Ann. § 750.110; Minn. Stat. Ann. § 609.582; Miss. Code Ann. § 97-17-19 (1990); Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; Neb. Rev. Stat. Ann. § 28-507(1); Nev. Rev. Stat. Ann. § 205.060; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.M. Stat. Ann. § 30-16-3; N.Y. Penal Law § 140.20; N.C. Gen. Stat. Ann. § 14-54; N.D. Cent. Code Ann. § 12.1-22-02(1); Ohio Rev. Code Ann. § 2911.13; Okla. Stat. Ann. tit. 21, § 1431; Or. Rev. Stat. Ann. § 164.215(1); 18 Pa. Cons. Stat. § 3502 (1988); R.I. Gen. Laws § 11-8-2; S.C. Code Ann. § 16-11-311(A); S.D. Codified Laws § 22-32-3; Tenn. Code Ann. § 39-14-402; Tex. Penal Code Ann. § 30.02(a)(1); Utah Code Ann. § 76-6-202; Vt. Stat. Ann. tit. 13, § 1201; Va. Code Ann. § 18.2-90;

See also Taylor v. United States, 495 U.S. 575, 592-593 (1990) (noting that almost all states defined burglary as "a breaking and entering of a dwelling at night, with intent to commit a felony").

With respect to arson, the courts of appeals agree that modern generic arson requires a mens rea of at least willfulness or maliciousness, with maliciousness "requiring a purpose to inflict injury." *Brown v. Caraway*, 719 F.3d 583, 589 (7th Cir. 2013) (citing *Exxon Shipping v. Baker*, 554 U.S. 471, 493 (2008)); *United States v. Delgado-Montoya*, 663 Fed. Appx. 719, 724 (10th Cir. 2016) (unpublished) (collecting cases); Model Penal Code § 220.1(1) (1985)) (defining arson as causing a fire "with the purpose of" destroying or damaging property). And when Congress enacted the ACCA, only three states punished a form of reckless arson. John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295, 415-416 (1986). "[I]n light of the body of state law as of 1986, it is not likely that Congress intended generic" arson to include reckless crimes. *Quarles*, 139 S.Ct. at 1878 n.1 (adopting the near-consensus view of burglary, even though three states had adopted a different interpretation).

Extortion is also plainly a purposeful crime. "At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office." *Scheidler v. NOW*, 537 U.S. 393, 402 (2003). While extortion is no longer limited to public officials, the crime still generally involves the

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Wash. Rev. Code Ann. § 9A.52.020(1); W. Va. Code § 61-3-11; Wis. Stat. Ann. § 943.10(1m); Wyo. Stat. Ann. § 6-3-301(a).

unlawful deprivation and acquisition of another person's property. *Id.* at 403-404. Generic extortion is "obtaining something of value from another with his consent *induced by* the wrongful use of force, fear, or threats." *Id.* at 409 (emphasis added); *see also* Model Penal Code § 223.4 (providing that a person is guilty of theft by extortion "if he *purposely* obtains property of another" via threats) (emphasis added). And almost (if not all) of the states punish extortion as a knowing or intentional crime.[7]

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[7] *See*, *e.g.*, 18 Pa. Cons. Stat. § 3923 ("intentionally obtains or withholds"); Ala. Code § 13A-8-13 ("knowingly . . . with intent to deprive"); N.D. Cent. Code Ann. § 12.1-23-02(2) (same); Haw. Rev. Stat. § 707-764 ("with intent to deprive another"); Idaho Code Ann. § 18-2403(2)(b) (same); Me. Rev. Stat. Ann. tit. 17-A, § 355(1) (same); Utah Code Ann. § 76-6-406 ("with a purpose to deprive"); Ky. Rev. Stat. Ann. § 514.080 ("intentionally obtains property of another"); Ark. Code Ann. § 5-36-103(a)(2) ("knowingly . . . .with the purpose of depriving"); Mo. Ann. Stat. § 570.030(1)(1) ("with the purpose to deprive"); N.H. Rev. Stat. Ann. § 637:5 (same); Iowa Code Ann. § 711.4 ("with the purpose of obtaining for oneself or another anything of value"); La. Rev. Stat. Ann. § 14:66(A) ("with the intention thereby to obtain anything of value"); N.M. Stat. Ann. § 30-16-9 (same); N.C. Gen. Stat. Ann. § 14-118.4 (same); Wyo. Stat. Ann. § 6-2-402 ("with the intent to obtain property . . . or to compel action"); Miss. Code Ann. § 97-3-81 ("knowingly . . . with a view or intent to extort"); Nev. Rev. Stat. Ann. § 205.320 ("with the intent to extort"); S.C. Code Ann. § 16-17-640 (same); Ariz. Rev. Stat. § 13-1804 ("knowingly"); Colo. Rev. Stat. § 18-4-401 (same); Wash. Rev. Code Ann. § 9A.56.110 (same); 720 Ill. Comp. Stat. Ann. 5/16-1(a)(3) ("knowingly . . . by threat"); Cal. Penal Code §§ 519 & 520 ("induced by a threat" . . . to "do); Okla. Stat. Ann. tit. 21, § 1483 (same); Md. Code Ann., Crim. Law § 3-701 (same); Conn. Gen. Stat. § 53a-119(5) ("with intent to deprive another . . . compels or induces"); Or. Rev. Stat. Ann. § 164.075 (same); Del. Code Ann. tit. 11, § 846 (same); Fla. Stat. Ann. § 836.05 ("maliciously threatens . . . with intent thereby to extort . . . or with intent to compel"); R.I. Gen. Laws § 11-42-2 (same); Vt. Stat.

The final enumerated offense is one that "involves the use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). This enumerated offense differs from the other enumerated offenses in that it arguably does not identify a discrete crime, but instead targets crimes "involv[ing]" certain conduct (the "use of explosives"). Because this more general term follows more specific terms in a list, under the *ejusdem generis* canon, "the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1625 (2018). And because the more specific crimes are all purposeful crimes, Congress would have intended this fourth crime to embrace only purposeful crimes as well. *Id.*

The same outcome attaches under the *noscitur a sociis* canon – "a word is known by the company it keeps" – if one considers "use of explosives" a discrete crime. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). "This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Id.* Because the three preceding enumerated offenses are all purposeful crimes, so too the fourth enumerated offense. This is why this Court held in *Begay* that "crimes involving

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Ann. tit. 13, § 1701 (same); Wis. Stat. Ann. § 943.30(1) (same); N.Y. Penal Law § 155.05(2)(e) ("compels or induces . . . by means of instilling in him a fear"); Mass. Gen. Laws Ann. ch. 265, § 25 (same); Mich. Comp. Laws Ann. § 750.213 (same); Ind. Code Ann. § 35-45-2-1 ("communicates a threat with the intent"); Mont. Code Ann. § 45-6-301 ("purposely or knowingly obtains by threat"); N.J. Stat. Ann. § 2C:20-5 ("purposely and unlawfully obtains"); Ohio Rev. Code Ann. § 2905.12 ("with purpose to coerce"); Tenn. Code Ann. § 39-14-112 ("uses coercion upon another with the intent to").

the use of explosives . . . all typically involve purposeful . . . conduct." 553 U.S. at 144-145.[8]

Additionally, both the residual clause (discussed immediately below) and the use-of-explosives enumerated offense include the word "involves." 18 U.S.C. § 924(e)(2)(B)(ii). The provisions are also next to each other in the statute. If a broad provision that "involves" risky conduct must be purposeful (see below), then so too a broad provision that "involves" the use of explosives. There is no basis to read the phrases differently. *Global Tech*, 563 U.S. at 765.

2. The residual clause ("otherwise involves conduct that presents a serious potential risk of physical injury to another") confirms that the force clause does not reach reckless crimes. It is the residual clause that most naturally covers offenses with result elements (e.g., statutes that cause injury). 18 U.S.C. § 924(e)(2)(B)(ii). Thus, if Congress meant to include reckless crimes anywhere within the ACCA, it most logically meant to do so here. But that clause no longer exists. *Johnson*, 135 S.Ct. at 2559. And even before this Court struck the clause as void for vagueness, as petitioner's brief notes, it interpreted the residual clause to cover only "purposeful, violent, and

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[8] In his concurrence in *Begay*, Justice Scalia opined that "one of the enumerated crimes—the unlawful use of explosives—may involve merely negligent or reckless conduct." 553 U.S. at 152 (Scalia, J., concurring). But Justice Scalia did not cite to a single reckless-use-of-explosives statute. Instead, he cited to two provisions in the Model Penal Code, one of which, § 220.2(2), defines a **misdemeanor** recklessness crime. Similarly, the other provision, § 220.3, defines reckless criminal mischief as a **misdemeanor** (and purposeful criminal mischief as a felony). 553 U.S. at 152. But the Armed Career Criminal Act's violent felony provision encompasses felonies, not misdemeanors. 18 U.S.C. § 924(e)(2)(B).

aggressive" crimes. Pet. Br. 9 (discussing *Begay*, 553 U.S. at 145-146; *see also Sykes v. United States*, 564 U.S. 1, 12-13 (2011) ("*Begay* involved a crime akin to strict-liability, negligence, and recklessness crimes.").

If the residual clause covered only purposeful crimes, then, *a fortiori*, the force clause should cover only purposeful crimes. *Global Tech*, 563 U.S. at 765. As petitioner's brief persuasively explains, it would be "'strange to interpret the neighboring provisions to have different intent requirements." Pet. Br. 28 (quoting *Global Tech*, 563 U.S. at 765). "And it would be stranger still to ascribe to Congress the intent to impose a lower required mens rea when defining a 'violent felony' under the force clause than under the 'broad' residual clause." Pet. Br. 28.

In the end, because each enumerated offense typically involves purposeful conduct, *Begay* construed the residual clause to reach only purposeful crimes. 553 U.S. at 145. In doing so, the whole of § 924(e)(2)(B)(ii) does not reach reckless crimes. And if § 924(e)(2)(B)(ii) does not reach reckless crimes, as a matter of statutory construction, § 924(e)(2)(B)(i) should not reach reckless crimes either. *Global Tech*, 563 U.S. at 765.

Sixth, § 924(e)(2)(B)'s neighboring subsection, § 924(e)(2)(A), also supports petitioner's position that reckless crimes should not count under the ACCA's force clause. Section 924(e)(2)(A) defines the term "serious drug offense" in two subsections. The first enumerates various federal drug crimes that qualify as serious drug offenses, namely, any "offense under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten

years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i). The second subsection reaches state drug laws "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). Neither of these provisions reaches reckless conduct.

To start, almost all of the qualifying federal drug offenses enumerated in § 924(e)(2)(A)(i) expressly require intent or knowledge.[9] Two statutes do not include this language (or a cross-reference to a portion of a statute that does), but those statutes could not possibly be read to reach reckless crimes. *See* 21 U.S.C. § 841(d) ("Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed"); 21 U.S.C. § 854(a), (b) ("to use or invest, directly or indirectly, any part of such income, or the proceeds of such

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[9] 21 U.S.C. §§ 841(a), (c), (h) ("knowingly or intentionally"); 21 U.S.C. § 861(f) (same); 21 U.S.C. § 960(a), (d) (same); 21 U.S.C. § 856(a)(2) ("knowingly and intentionally"); 21 U.S.C. § 861(a) (same); 46 U.S.C. § 70503(a) (same); 21 U.S.C. § 856(a)(1) ("knowingly"); 21 U.S.C. § 841(f)(1), (2) ("knowingly" or "with knowledge"); 21 U.S.C. § 960a(a), (c) ("knowledge"); 21 U.S.C. § 843(b)(2) ("with the intent to manufacture or to facilitate the manufacture"); 21 U.S.C. § 849(b) (cross-referencing § 841(a)); 21 U.S.C. § 848 (same); 21 U.S.C. § 859(a), (b) (same); 21 U.S.C. § 860(a), (b), (c) (same); 21 U.S.C. § 860a (same); 21 U.S.C. § 865(a), (b) (same); 21 U.S.C. § 858 ("manufacturing a controlled substance in violation of this subchapter"); 21 U.S.C. § 846 (attempting or conspiring to commit substantive offenses); 21 U.S.C. § 963 (same).

income"). Another provision allows for imputed knowledge. 21 U.S.C. § 841(g) ("knowingly," "knowing or with reasonable cause to believe"). But none prohibit mere reckless conduct.

In contrast, the ACCA does not reach the two federal drug offenses that can be committed recklessly (because the statutory penalties for those offenses are less than ten years' imprisonment). *See* 21 U.S.C. § 842(a)(12)(B), (13), (c)(2)(A), (B). Section 924(e)(2)(A)(i) is thus yet one more subsection within § 924(e) that does not reach reckless crimes.

Section 924(e)(2)(A)(ii) is another. Again, that provision encompasses state drug offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute." This language is almost identical to the language Congress used in the cross-referenced provisions in the neighboring subsection (§ 924(e)(2)(A)(i)). *See*, *e.g.*, 21 U.S.C. § 841(a) ("to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"). And again, as just explained, the qualifying federal drug convictions punish conduct committed with knowledge or intent. In using almost identical language within § 924(e)(2)(A)(ii), Congress signaled its intent to capture only those state drug crimes committed intentionally or knowingly. *See*, *e.g.*, *Pereira v. Sessions*, 138 S.Ct. 2105, 2115 (2018) ("it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning"); *Global Tech*, 563 U.S. at 765.

Congress's use of the word "involving" in § 924(e)(2)(ii) should not alter that reading for similar reasons. While § 924(e)(2)(A)(i) cross-references federal offenses "involving" the manufacture,

distribution, or possession with intent to distribute drugs, those federal offenses must be committing knowingly or intentionally.[10] Again, in light of this, there is no reason to think that Congress intended state offenses "involving" the manufacture, distribution, or possession with intent to distribute drugs to reach reckless conduct. *See*, *e.g.*, *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009) ("Where, as here, Congress uses similar statutory language . . . in two adjoining provisions, it normally intends similar interpretations."); *Mid-Con Freight Systems, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 440, 448 (2005) (declining to read the same words in consecutive sentences as "refer[ring] to something totally different").

Additionally, Congress's use of the word "involving" here is similar to its use of "involves" in § 924(e)(2)(B)(ii)'s residual clause and use-of-explosives enumerated offense. "There is no reason we would apply one interpretation of the word 'involves' to 'serious drug offenses' and a different interpretation of the word to 'violent felonies,' as both predicate crimes are located in the same section of the ACCA." *United States v. Franklin*, 904 F.3d 793, 801-802 (9th Cir. 2018). "Generally, identical words used in different parts of the same statute are presumed to have the same meaning." *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006)). Again, the latter two clauses have not been interpreted to reach reckless crimes. Neither should

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[10] *See*, *e.g.*, 21 U.S.C. § 856(a)(1) ("knowingly" maintaining a drug house "for the purpose of manufacturing, distributing, or using any controlled substance"); 21 U.S.C. § 861(a) (prohibiting "knowingly and intentionally" employing a minor in drug operations).

§ 924(a)(2)(A)(ii).

And if there were any doubt, history should dispel it. We cannot find any state statutes from 1986 (the year Congress enacted the ACCA) that punished the reckless manufacture, reckless distribution, or reckless possession with intent to distribute drugs. We also cannot find any state statutes from 1986 "involving" the reckless manufacture, reckless distribution, or reckless possession with intent to distribute drugs.[11] *See Taylor*, 495 U.S. at 589 (defining "burglary" in relation to "the definitions of burglary in a majority of the States' criminal codes"). Like the rest of the ACCA, Congress did not draft § 924(e)(2)(A)(ii) to encompass reckless crimes.

Because § 924(e)(2)(A) reaches only purposeful or intentional crimes, it follows that § 924(e)(2)(B), including is use-of-force clause, would reach only purposeful or intentional crimes. *Global Tech*, 563 U.S. at 765; *McNeill v. United States*, 563 U.S. 816, 821 (2011) (looking to § 924(e)(2)(B) to interpret § 924(e)(2)(A)).

Seventh, § 924(e)(1) also supports petitioner's

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[11] Ohio had (and still has) a statute entitled, "Corrupting another with drugs," that prohibited an individual from "knowingly" furnishing drugs to a minor (and that carried a 12-year statutory maximum sentence). Ohio Rev. Code Ann. § 2925.02(A)(4) (1975). Although the statute could be violated either if the defendant knew the age of the minor or was "reckless in that regard," the statute still required the prosecution to prove that the defendant "knowingly" distributed the drugs or "induce[d] or cause[d]" the minor to commit a drug offense. *Id.* But the statute also punished this identical conduct when aimed at an adult. Ohio Rev. Code Ann. § 2925.02(A) (1975). The statute would thus fall within § 924(e)(2)(A)(ii)'s reach regardless of the alternative recklessness element. That element does not turn an intentional drug crime into a reckless one.

position that reckless crimes do not count as violent felonies under the ACCA. That provision provides that only those defendants convicted of gun-possession offenses under § 922(g) are eligible for enhanced punishment under the ACCA. 18 U.S.C. § 924(e)(1). Section 922(g) does not punish reckless offenders. The government can prosecute only those who "knowingly" violate this provision. 18 U.S.C. § 924(a)(2). The government "must prove that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)." *Rehaif v. United States*, 139 S.Ct. 2191, 2194 (2019). Because the ACCA cannot be triggered by reckless conduct, when triggered, its application should not turn on reckless convictions.[12]

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[12] This Court's decision in *Voisine* does not undermine this point. *Voisine* involved a prosecution under 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by any individual who has a prior conviction for a misdemeanor crime of domestic violence. *Voisine*'s holding, that a prior conviction for a misdemeanor crime of domestic violence can be committed recklessly, 136 S.Ct. at 2278, is not inconsistent with § 922(g)'s framework. *See*, *e.g.*, 18 U.S.C. § 922(g)(1) (prohibiting the possession of a firearm by any individual "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"). Congress wrote § 922(g) to keep guns out of the hands of certain classes of individuals. The typical penalty for a § 922(g) conviction is 0 to 10 years in prison. 18 U.S.C. § 924(a)(2). This means that a defendant convicted under § 922(g) might never go to prison; a district court could simply impose a probationary term. Thus, it is not out of step to think that Congress would have intended a prior reckless conviction to trigger this baseline prohibition. *See Voisine*, 136 S.Ct. at 2281. But the ACCA involves increased penalties (a minimum of 15 years in prison) to "a very small percentage" of § 922(g) offenders. *Taylor*, 495 U.S. at 581. Those

In the end, a statute's text "cannot be construed in a vacuum." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S.Ct. 361, 368 (2018). The meaning of a word or phrase "depends upon reading the whole statutory text." *Dolan v. USPS*, 546 U.S. 481, 486 (2006). This includes the statute's structure. *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2364 (2019); When the whole of the ACCA's text is considered, along with its structure, it follows that the use-of-force clause should not be interpreted to reach reckless crimes. *See*, *e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("Congress designed the Act in a specific way, and it is not our proper role to redesign the statute."); *Murphy v. Smith*, 138 S.Ct. 784, 789 (2018) ("stepping back to take in the larger statutory scheme surrounding the specific language before us reveals that this case isn't quite as close as it might first appear").

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offenders must have three prior convictions for "**serious**" drug offenses and/or "**violent**" felonies. 18 U.S.C. § 924(e)(2)(A), (B) (emphasis added). While § 922(g) seeks to keep guns out of the hands of certain classes of defendants, the ACCA seeks to imprison a small percentage of that class for significant periods of time. That difference easily explains away any difference in result in this case and *Voisine*. *See*, *e.g.*, *Sturgeon v. Frost*, 139 S.Ct. 1066, 1075 (2019) ("So if, as you continue reading, you see some tension within the statute, you are not mistaken: It arises from Congress's twofold ambitions.").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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