No. 19-373

In the Supreme Court of the United States

JAMES WALKER

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae National Association of Federal Defenders ("NAFD"), formed in 1995, is a nationwide, non-profit, volunteer organization whose members are attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD attorneys represent tens of thousands of individuals in federal court each year, including many who face or risk facing the fifteen-year mandatory minimum sentence imposed by 18 U.S.C. § 924(e). *Amicus* therefore has particular expertise and interest in the subject matter of this appeal. The issues presented are of great importance to our work and to the lives of our clients.

SUMMARY OF ARGUMENT

Congress enacted the Armed Career Criminal Act ("ACCA") to ensure that "violent criminals" would face harsher punishment. *Begay v. United States*, 553 U.S.

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[1] Counsel of record for all parties have consented to the filing of this brief. S. Ct. R. 37.3(a). 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.

137, 146–47 (2008). In doing so, Congress was concerned with a "*deliberate* kind of behavior associated with violent criminal use of firearms." *Id.* at 147 (emphasis added). Congress thus targeted ACCA's fifteen-year mandatory minimum sentence at individuals "who might *deliberately* point the gun and pull the trigger," but not at persons whose prior offenses involve only "callousness toward risk." *Id.* at 146 (emphasis added).

Recognizing ACCA's purpose, federal circuit courts have long interpreted § 924(e)'s force clause to require intentional or knowing conduct. In the decade after this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), federal appellate courts achieved a consensus: "the 'use of physical force' clause of the ACCA . . . requires more than reckless conduct." *United States v. McMurray*, 653 F.3d 367, 375 (6th Cir. 2011); *see United States v. Castleman*, 134 S. Ct. 1405, 1414 n.8 (2014) ("[T]he Courts of Appeals have almost uniformly held that recklessness is not sufficient.").

Here, the position taken by the Government[2] ignores ACCA's central purpose and makes "violent felonies" out of many offenses that Congress never intended to target with ACCA. While Congress intended ACCA to apply to "violent, dangerous recidivists," the Government wants a

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[2] *See* Br. for Respondent-Appellant United States at 20, *Walker v. United States*, 769 F. App'x 195 (6th Cir. 2019) (Nos. 17-5782 & 17-5783) ("Reckless conduct satisfies the use of force clause.").

fifteen-year mandatory minimum to apply far more broadly. But such a rule would produce anomalous and profoundly unjust results. To name just a few, the Government's approach would render the following offenses predicates under ACCA even though the state criminal statutes require only a reckless mens rea:

- A man who, while driving, "look[ed] down at a text message" and swerved into oncoming traffic, injuring a passenger. *State v. Belleville*, 88 A.3d 918, 922 (N.H. 2014) (second-degree assault under N.H. Rev. Stat. Ann. § 631:2(I)(a) (2010)).

- A woman who shared a lawfully prescribed painkiller with her boyfriend, leading to a fatal overdose. *State v. Elkins*, No. 69HI-CR-16-138 (Minn. D. Ct. 2017) (second-degree manslaughter under Minn. Stat. Ann. § 609.205(1) (1995)).

- An angry hospital patient who "flung" a "large metal cart in a small room with others in close proximity," causing injury to a bystander. *State v. Anderson*, 198 A.3d 681, 686 (Conn. App. Ct. 2018) (second-degree assault under Conn. Gen. Stat. § 53a-60(a)(3) (2015)).

- A twenty-four-year-old Uber driver who acquiesced to a passenger's request to "car surf" on

top of the moving car, resulting in the passenger's death. *People v. Cheema*, No. 2057-2018 (N.Y. Suffolk Cty. Ct. 2018) (second-degree manslaughter under N.Y. Penal Law § 125.15(1) (McKinney 2018)).

These incidents and others like them are tragic. But while they may entail moral culpability and support criminal convictions, they are assuredly *not* "violent felonies" as Congress defined and used the phrase in ACCA.

For these reasons, among others, the Court should reject the Government's approach and hold that § 924(e)'s force clause applies only to predicate offenses that are committed intentionally or knowingly.

ARGUMENT

I. A RULE THAT TREATS "RECKLESSNESS" OFFENSES AS ACCA PREDICATE CRIMES FRUSTRATES THE ACT'S CENTRAL PURPOSE

A. ACCA TARGETS "PURPOSEFUL, VIOLENT" CRIMES COMMITTED BY "THE VERY WORST OFFENDERS"

The "basic purpose[]" of ACCA is to mitigate "the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Begay*, 553 U.S. at 146. That danger is

unique because "[c]rimes committed in such a purposeful, violent, and aggressive manner are 'potentially more dangerous when firearms are involved.'" *Id.* at 145 (quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)). Such "purposeful, violent, and aggressive" crimes are "characteristic of the armed career criminal, the eponym of the statute." *Ibid.* (quoting *Begay*, 470 F.3d at 980).

ACCA thus targets a narrow group: the most serious offenders who repeatedly commit purposeful, violent crimes. Taking aim at a "small number of hardcore offenders," *United States v. Balascsak*, 873 F.2d 673, 682 (3d Cir. 1989), Congress sought to impose ACCA's enhanced penalties on only those individuals who had been convicted of predicate crimes characterized by "*active* violence," *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.) (emphasis added). As this Court has explained, ACCA targets individuals whose past violent offenses suggest that they are more likely to "*deliberately* point the gun and

pull the trigger." *Begay*, 553 U.S. at 146 (emphasis added).[3]

ACCA's legislative history confirms that Congress enacted ACCA to impose enhanced punishment on "the very worst offenders" who repeatedly commit purposeful, violent crimes.

In 1982–83, several bills—which would ultimately lead to ACCA's enactment the following year—were first introduced in Congress. These bills targeted a limited class of "particularly troublesome criminals." S. Rep. No. 97-585, at 69 (1982); *see id.* at 62–63 (noting that the legislation is aimed at the "hard core of career criminals"). A Senate Report from this period confirmed that the "goal" was to "incapacitate the armed career criminal for the rest of the normal time span of his career." S. Rep. No. 98-190, at 9 (1983).

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[3] Congress's focus on purposeful, violent offenses—as distinct from offenses committed negligently or recklessly—is rooted in the philosophy of moral culpability that is the underlying foundation for criminal law in the United States. As Blackstone saw it, there must be a "vicious will" for a crime to be committed. 4 William Blackstone, *Commentaries* *21; *see, e.g.*, *Morissette v. United States*, 342 U.S. 246, 250–51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is . . . as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

The House Judiciary Committee's Report confirms the same: These legislative proposals targeted a "*particular segment* of the career criminal population" by bringing "more severe penalties to bear on the *most serious offenders*." H.R. Rep. No. 98-1073, at 3, 5 (1984) (emphases added). The objective was to "incapacitat[e] . . . repeat offenders" who were committing a high proportion of violent crime. *Id.* at 2.

Thus, when Congress enacted ACCA in 1984, it clearly intended its harsh penalty—a mandatory minimum of fifteen years and a maximum of life imprisonment—to incapacitate only habitual offenders who had continued to commit purposeful, violent offenses.

In 1986, Congress considered legislation to broaden the range of prior offenses that could serve as ACCA predicates. Congress again emphasized that it intended to provide "new leverage against some of the worst offenders." *Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. 4 (1986) (statement of Rep. Ron Wyden) [hereafter "1986 Senate Hearing"]. A senior Department of Justice official testified that the amendments would clarify that ACCA was not concerned with "simple misdemeanors," but instead with the most serious, violent crimes like "assault with a

deadly weapon, rape, [and] murder." *Id.* at 10 (statement of James I.K. Knapp, Deputy Assistant Att'y Gen., Criminal Division).[4]

Concern with these types of purposeful, violent felonies—murder, rape, aggravated assault with a deadly weapon—pervaded Congress's discussion of ACCA's expansion. *See, e.g.*, *id.* at 5 (statement of Rep. Wyden) (noting that expansion of the Act would cover a "habitual offender with prior convictions for rape and murder"); *id.* at 9 (testimony of Deputy Assistant Att'y Gen. Knapp) ("Persons who have been convicted of, for example, two rapes and an assault with a deadly weapon."); *id.* at 17 (testimony of U.S. Attorney Joe DiGenova) ("Serious assaults or homicides" should be included because they are "violent in nature and dangerous."). House members stressed the need to "target th[e] very worst offenders," who had committed purposeful, violent felonies. *Hearing on H.R. 4639 and H.R. 4768 Before the H. Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong.

[4] Local law enforcement officials echoed the point in stating that they "want[ed] to take the most dangerous offender and the person with the longest record and put them in the Armed Career Criminal Act, but still treat a middle-level person not quite as harshly." *Id.* at 55 (testimony of Ronald D. Castille, Philadelphia District Attorney); *see id.* at 57 ("[I]t is great to have the fallback of the Armed Career Criminal Act to handle the really violent and bad offenders.").

8 (1986) (statement of Rep. Wyden) [hereafter "HJC Hearing"]; *see also id.* at 11 (testimony of Rep. William J. Hughes, Chairman, H. Subcomm. on Crime) ("[I]t is important to prioritize offenses.").

In the course of considering the 1986 amendments, Congress debated multiple proposals, which it later narrowed to two before settling on the compromise language that became § 924(e). The amendments that Congress ultimately adopted confirm ACCA's narrow focus on the very worst habitual offenders. Under the broadest proposal, predicate "crimes of violence" would have encompassed *any* conviction (felony or misdemeanor) that had "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* at 4. This proposal also included any felony that involved "a substantial risk that physical force against the person or property of another may be used." *Ibid.* *See generally Taylor v. United States*, 495 U.S. 575, 583–86 (1990).

In hearings on the proposed amendments, there was substantial opposition to this broad definition. Members and witnesses alike favored limiting ACCA predicates to only the most serious violent crimes. *See id.* at 26 (testimony of Chairman Hughes) (agreeing with Deputy Assistant Attorney General Knapp that misdemeanors "should not be included as predicate offenses"); *id.* at 15 (testimony of Deputy Assistant Att'y Gen. Knapp) ("The bill would not cover misdemeanors

against a person like simple assault or battery—that aspect we endorse . . . ."); *id.* at 26 (same); *id.* at 38 (testimony of Bruce M. Lyons, President-Elect, National Association of Criminal Defense Lawyers) ("[M]y concern with the former version . . . was that it might include misdemeanors.").

Ultimately, in adopting what would become § 924(e) of ACCA, Congress rejected the expansive force-clause language that would have rendered violent misdemeanors ACCA predicates. Moreover, Congress excluded property-related offenses from ACCA's force clause altogether, while identifying only four specified, inherently dangerous property crimes in what would become ACCA's enumerated-offenses clause. *Compare* HJC Hearing at 4, *with* 18 U.S.C. § 924(e)(2)(B) (2018). These choices—to include felonies (but not misdemeanors) and inherently dangerous property crimes (but not general categories of property-related offenses)—reflect Congress's intent to "target th[e] very worst offenders" who had committed purposeful, violent felonies. HJC Hearing at 2.

B. TREATING RECKLESSNESS OFFENSES AS ACCA PREDICATES WOULD PRODUCE ANOMALOUS AND UNJUST RESULTS AT ODDS WITH ACCA'S PURPOSE

As an organization comprised of attorneys who represent defendants in federal criminal cases every day, *amicus curiae* has a unique awareness of the

anomalous and unjust consequences of a rule that could sweep "recklessness" offenses into ACCA's ambit. Adopting such a rule would transform a wide array of unintentional, reckless offenses into potential ACCA predicates, including:

- A defendant who "threw or swung a glass," striking another person in the face and causing injury. *State v. McElhaney*, 579 P.2d 328, 328–329 (Utah 1978) (aggravated assault under Utah Code Ann. § 76-5-103(1)(b) (West 1977)).

- A driver who misjudged oncoming traffic when making a high-speed turn, resulting in injuries to an oncoming motorcyclist. *State v. Blan*, 358 P.3d 316, 316–17 (Or. Ct. App. 2015) (third-degree assault under Or. Rev. Stat. § 163.165(1)(a) (West 2012)).

- A driver who sped through a stop sign on a hilly road with the sun in his eyes, resulting in a fatal crash. *State v. Lopez-Aguilar*, No. 17-914, 2018 WL 3913672, at *6 (Iowa Ct. App. Aug. 15, 2018) (reckless driving under Iowa Code § 707.6A(2)(a) (West 2017)).

- A man who, after buying explosives to dislodge boulders on his family farm, jump-started the car in which they were stored, thereby causing an explosion that killed his family. *See State v.*

Bicek, 429 N.W.2d 289, 291 (Minn. Ct. App. 1988) (second-degree manslaughter under Minn. Stat. Ann. § 609.205(1) (1995)).[5]

- A speeding diabetic driver who—while experiencing a severe hypoglycemia episode—ran a stop sign resulting in the death of a motorcyclist. *State v. Janklow*, 693 N.W.2d 685, 690–91 (S.D. 2005) (second-degree manslaughter under S.D. Codified Laws § 22-16-20 (1995)).

See also pp. 3–4, *supra*. As the legislative history underscores, crimes like these are flatly discordant with Congress's intent that ACCA should incapacitate only the very worst offenders.[6]

This Court has recognized the dangers of an overbroad construction of § 924(e) and similar definitions. For example, in *Begay*, the Court warned that such an interpretation would treat as predicates "a host of

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[5] The mens rea term used in Minn. Stat. Ann. § 609.205(1) is "culpable negligence," but that term requires proof of recklessness. *See State v. Beilke*, 127 N.W.2d 516, 521 (Minn. 1964) (defining "culpable negligence" as "gross negligence coupled with the element of recklessness").

[6] It may be that some of the foregoing examples do not involve the kind or degree of "force" required to constitute a "violent felony" under ACCA, or do not qualify as predicate offenses for some other reason. But what most clearly distinguishes them from the violent felonies to which ACCA applies is the absence of any mens rea greater than recklessness.

crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" *Begay*, 553 U.S. at 146–47 (citing multiple criminal statutes that can be violated by reckless conduct).

Justice Thomas's dissent in *Voisine v. United States*, 136 S. Ct. 2272, 2283 (2016), also illustrates the concern. As he explained, "Recklessly leaving a loaded gun in one's trunk, which then discharges after being jostled during the car ride[] would not" constitute "use" of a firearm in relation to a crime. *Ibid.* (Thomas, J., dissenting) (arguing that the Court's precedents were inconsistent with a holding that "pure" recklessness crimes qualify as predicates under § 921(a)(33)(A)). But, under the Government's rule, such conduct could qualify as an ACCA predicate offense if criminalized under state law. The same is true of "recklessly injuring a passenger by texting while driving resulting in a crash." *Id.* at 2284.

Circuit courts have likewise emphasized the counterintuitive consequences of permitting recklessness crimes to serve as ACCA predicates. In *United States v. Middleton*, 883 F.3d 485, 489 (4th Cir. 2018), the Fourth Circuit held that South Carolina's involuntary manslaughter statute, which can be violated with a mens rea of recklessness, did not qualify as an ACCA predicate. *See* S.C. Code. Ann. § 16-3-60 (1993). Concurring, Judge Floyd warned that a rule allowing recklessness crimes to serve as ACCA predicates

would risk "broadly sweeping run-of-the-mill criminals as violent felons subject to the heavy hand of the ACCA's sentencing enhancement." *Middleton*, 883 F.3d at 499 n.3 (Floyd, J., joined by Harris, J., concurring).

By way of example, Judge Floyd explained, the defendant in *State v. Hambright*, 426 S.E.2d 806, 808 (S.C. Ct. App. 1992), was convicted of involuntary manslaughter for recklessly selling alcohol to minors, ultimately resulting in a car crash. *Middleton*, 883 F.3d at 497–98. Allowing such a conviction to serve as an ACCA predicate would be inconsistent with the statute's "purpose in targeting the truly purposeful and aggressive criminals." *Id.* at 499. But under the Government's proposed interpretation of ACCA, such a conviction—as well as convictions in the majority of states with similar involuntary manslaughter statutes—could serve as an ACCA predicate. *See* p. 17 & note 8, *infra*.

Similarly, the Ninth Circuit has emphasized that "a person could be convicted of assault under [Arizona law] by running a stop sign solely by reason of voluntary intoxication and causing physical injury to another." *United States v. Orona*, 923 F.3d 1197, 1201 (9th Cir.) (quoting *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc)), *pet. for reh'g granted*, 942 F.3d 1159 (9th Cir. 2019).

The en banc decision in *Fernandez-Ruiz*, 466 F.3d at 1130 n.10, identifies several additional cases where a defendant who acted recklessly but not intentionally was convicted of aggravated assault. For example, recklessly running a stop sign and causing an accident could qualify as a "crime of violence" and expose the defendant to enhanced penalties under 18 U.S.C. § 16.[7] *Id.* at 1130 & n.10 (citing *State v. Miles*, 123 P.3d 669, 671 (Ariz. Ct. App. 2005)). Surely, the court reasoned, "[s]uch conduct cannot, in the ordinary sense, be called 'active' or 'violent.'" *Id.* at 1130.

The Eighth Circuit, in a decision authored by Judge Colloton, has likewise held that a "crime of violence" under 18 U.S.C. § 16 does not encompass reckless conduct. *See United States v. Torres-Villalobos*, 487 F.3d 607, 616 (8th Cir. 2007). In its decision, the court surveyed various types of conduct covered by

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[7] The language used in several criminal statutes (as well as provisions of the U.S. Sentencing Guidelines) is the same as, or nearly identical to, ACCA's force clause, 18 U.S.C. § 924(e)(2)(B)(i). The cited statute, 18 U.S.C. § 16 [hereafter "§ 16"], is a definitional provision that is referenced in a variety of other federal criminal and immigration statutes. Section 16(a) thereof defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Although § 16(b) originally supplemented this definition, it was struck down as void for vagueness in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). For other provisions similar to ACCA's force clause, see note 9, *infra*.

Minnesota's second-degree manslaughter statute: "recklessly leaving a child alone with lit candles that later start a fire"; "allowing a child to die of dehydration while in the person's care"; "leaving explosives and blasting caps stored in an automobile"; and "driving drunk with 'culpable negligence' in a manner that causes the death of a passenger." *Ibid.* These kinds of offenses may involve dangerous—and blameworthy—conduct. But such conduct is not the type of "violent" crime that Congress intended to reach with § 16. *Ibid.* Much less do such offenses predict the "future violent, aggressive, and purposeful 'armed career criminal behavior'" targeted by ACCA. *Begay*, 553 U.S. at 148.

The First Circuit, in an opinion by then-Chief Judge Breyer, made a similar point in *Doe*, 960 F.2d at 226, when it held that violation of the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), did not qualify as a "violent felony" under ACCA's residual clause. "[T]o read [ACCA] less narrowly . . . would also bring within the statute's scope a host of other crimes that do not seem to belong there." *Id.* at 225. Instead, the court "read the definition in light of the term to be defined, 'violent felony,' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Ibid.* By contrast, a host of non-active, non-violent crimes would qualify under the force clause if the Government's proposed interpretation were to be adopted.

As these courts recognized, such anomalies are not isolated problems. At least twenty-three states have felony aggravated-assault offenses that require at least a mens rea of recklessness, all of which stand to qualify as ACCA predicates under the Government's interpretation.[8] Similarly, in a majority of states, recklessness satisfies the mens rea element for manslaughter. *See United States v. Castillo*, 896 F.3d 141, 152 & n.62 (2d Cir. 2018) (collecting state statutes). Consequently, many offenses that do not evince "purposeful violence" would qualify as ACCA predicates.

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[8] *See* Note, *Reestablishing a Knowledge Mens Rea Requirement for Armed Career Criminal Act "Violent Felonies" Post-*Voisine, 72 Vand. L. Rev. 1717, 1741 & n.169 (2019) (citing Ala. Code § 13A-6-21(a)(3) (2019); Alaska Stat. § 11.41.220(a)(1) (2019); Ariz. Rev. Stat. Ann. § 13-1204 (2019); Colo. Rev. Stat. § 18-3-203(1)(d) (2019); Conn. Gen. Stat. § 53a-60(a)(3) (2019); Del. Code Ann. tit. 11, § 612(a) (2019); Haw. Rev. Stat. § 707-711 (2018); Iowa Code § 708.2(4) (2019); Kan. Stat. Ann. § 21-5413(b)(2) (2019); Ky. Rev. Stat. Ann. § 508.025(1)(a) (West 2019); Me. Rev. Stat. Ann. tit. 17-a, § 208 (2019); Mass. Gen. Laws ch. 265, § 13A(a) (2019); Mo. Rev. Stat. § 565.052 (2016); Neb. Rev. Stat. § 28-309(1)(b) (2016); N.H. Rev. Stat. Ann. § 631:2(I)(a) (2019); N.J. Stat. Ann. § 2C:12-1(b)(3) (West 2019); N.Y. Penal Law § 120.05 (Consol. 2019); N.D. Cent. Code § 12.1-17-02 (2019); Okla. Stat. tit. 21, §§ 641–642, 646(A)(1) (2019); Or. Rev. Stat. § 163.165 (2018); Tenn. Code Ann. § 39-13-102(a)(1)(B) (2019); Tex. Penal Code Ann. §§ 22.01(a)–22.02(a) (West 2019); Utah Code Ann. § 76-5-103(1) (LexisNexis 2019)).

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Congress intended ACCA to impose enhanced sentences on only "the very worst offenders" who repeatedly commit "purposeful, violent" crimes. The Government's proposed rule would frustrate congressional intent and produce anomalous, unjust outcomes. The Court should reject it.

II. PRIOR TO *VOISINE*, FEDERAL CIRCUIT COURTS GENERALLY EXCLUDED RECKLESSNESS OFFENSES FROM ACCA'S FORCE CLAUSE

The courts of appeals have interpreted ACCA in light of its history and purpose: Because ACCA targets "the very worst offenders" who commit "purposeful, violent" crimes, offenses that are recklessly committed do not qualify as ACCA predicates. Following this Court's decision in *Leocal*, the circuit courts reached a nationwide consensus that recklessness is not sufficient to satisfy the force clauses in ACCA, 18 U.S.C. § 16, or the Sentencing Guidelines.[9] These

[9] As noted, *see* note 7, *supra*, § 16(a) is nearly identical to ACCA's force clause. The Sentencing Guidelines include similar provisions. The Guidelines impose a sentencing enhancement for defendants convicted of a "crime of violence," which is defined in § 4B1.2(a)(1) as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." In addition, U.S.S.G. § 2LI.2 contains a definition of "crime of violence" with a force clause identical to ACCA's. As this Court and courts of appeals have recognized,

carefully reasoned decisions strongly support Petitioner's position that § 924(e) requires intent or knowledge, not mere recklessness, to trigger ACCA's severe penalties. Nothing in this Court's decision in *Voisine* requires a different result.

A. FOLLOWING ACCA'S ADOPTION, MULTIPLE COURTS OF APPEALS CONCLUDED THAT RECKLESSNESS CRIMES WERE NOT PREDICATE OFFENSES

In the years after ACCA's enactment, and prior to this Court's decision in *Leocal*, 543 U.S. at 9, the circuit courts considered the minimum mens rea required for a crime to satisfy the "use of force . . . against the person of another" language as used in ACCA and other laws with nearly identical language. While the courts were not unanimous in their views, at least five circuits carefully analyzed these provisions and concluded that only intentional or knowing

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these laws typically present the same interpretive issues. *See Castleman*, 134 U.S. at 169 n.8; *United States v. Vanhook*, 640 F.3d 706, 712 n.4 (6th Cir. 2011) ("Given the similarity between the ACCA's definition of 'violent felon' and the definition of 'crime of violence' contained in the pertinent guideline provision, courts, including this one, have taken the position that authority interpreting one phrase is generally persuasive when interpreting the other," and identifying other circuits that have held the same.).

offenses met these requirements—and that recklessness was insufficient.[10]

For example, in *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995), the Seventh Circuit interpreted the term "crime of violence" under the then-mandatory "career offender" Sentencing Guidelines.[11] The court held that a first-degree assault conviction—which encompassed reckless conduct—could not serve as a predicate under the force clause in the Guidelines because the "use of force requires an intentional act." *Id.* at 371–74.

Moreover, the Seventh Circuit continued, any other rule would produce "disturbing consequences": people who engage "in low-risk activity but unluckily manage to hurt someone" would be transformed into "career offenders" and subjected to correspondingly harsh prison sentences. *Id.* at 374. This also "creates a sense of arbitrariness" between § 4B1.2's force and residual clauses: "if a speeder barely avoids an accident, he is not a violent offender" (because his conduct is not "serious" under the residual clause), "but if the

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[10] *But see United States v. Gonzalez-Lopez*, 335 F.3d 793, 797–99 (8th Cir. 2003) (holding that U.S.S.G. § 2L1.2's definition of "crime of violence" does not "contain a volitional element"); *see also United States v. Vargas-Duran*, 356 F.3d 598, 603 n.6 (5th Cir. 2004) (en banc) (identifying a circuit split and collecting cases).

[11] *See* note 9, *supra*.

same speeder is not so fortunate and hits someone, he is suddenly transformed into a violent criminal" (because he has recklessly "used" force against another). *Ibid.*

Similarly, the en banc Fifth Circuit decided, in interpreting the Guidelines' definition of "crime of violence" in § 2LI.2,[12] that "the plain meaning of the word 'use' requires intent." *United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (en banc). The Second and Third Circuits likewise held that 18 U.S.C. § 16 "contemplates only intentional conduct." *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) (quoting *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001)); *see United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) (addressing both U.S.S.G. § 4B1.2(1)(i) (1989) and § 16(a)).

B. AFTER *LEOCAL*, THE CIRCUIT COURTS UNANIMOUSLY HELD THAT ACCA'S FORCE CLAUSE (AND OTHERS LIKE IT) DO NOT COVER RECKLESSNESS OFFENSES

After this Court's decision in *Leocal*, the trend exemplified by *Rutherford* and *Vargas-Duran* solidified into a nationwide consensus: Recklessness is not sufficient to satisfy the force clauses in ACCA, § 16, or

[12] *See* note 9, *supra*.

the Guidelines. The Court should reaffirm this understanding based on Congress's clear intent that ACCA applies to only a narrow class of purposeful, violent recidivist offenders.

In *Leocal*, this Court for the first time addressed the minimum mens rea required under 18 U.S.C. § 16's definition of a "crime of violence." *See Leocal*, 543 U.S. at 8. A unanimous Court, in an opinion by Chief Justice Rehnquist, held that the "'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 9.

In part, the Court focused on the text of the statute, emphasizing that including accidental conduct did not square with § 16(a)'s specification that the use of force must be directed *against* another person. *Id.* at 9–11. But *Leocal* also gave weight to Congress's judgment that only a narrow set of crimes ought to lead to the "heightened punishment" associated with § 16. *Id.* at 11. "Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Ibid.* To be sure, the purpose underlying § 16 is not identical to ACCA's. But as discussed above, *see* pp. 4–10, *supra*, ACCA likewise singles out a specific class of offenders from the mine run of defendants. And, as the lower courts quickly recognized, both ACCA and

§ 16 are similarly undermined by blurring the line between those categories.

The *Leocal* Court declined to resolve whether the principles driving its holding also excluded recklessness crimes from the definition of "crimes of violence." *Leocal*, 543 U.S. at 13. But on the heels of *Leocal*, the courts of appeals uniformly answered this question by holding that the "use . . . of physical force . . . against the person of another" requires knowledge or intent, not mere recklessness.

Some of the first post-*Leocal* cases to address the issue arose in the Third Circuit. In a trio of cases, that court held that recklessness crimes could not meet either of § 16's (then-operative) definitions of "crimes of violence." *See Popal v. Gonzales*, 416 F.3d 249, 254 (3d Cir. 2005); *Tran v. Gonzales*, 414 F.3d 464, 470–72 (3d Cir. 2005); *Oyebanji v. Gonzales*, 418 F.3d 260, 264 (3d Cir. 2005).

In the third and last of these cases, then-Judge Alito analyzed why *Leocal* compelled this result. *See Oyebanji*, 418 F.3d at 264. Although *Leocal* did not address recklessness crimes, the Court's repeated emphasis on the ill fit between mere accidents and the "quintessential violent crimes" that Congress intended to capture with § 16 strongly suggested that reckless offenses, too, should not qualify as "crimes of violence." *See ibid.* As Judge Alito explained, "we can-

not overlook the Court's repeated statement that 'accidental' conduct (which would seem to include reckless conduct) is not enough to qualify as a crime of violence." *Ibid.* Doing so would blur the line that Congress drew separating "crimes of violence" from other crimes that simply involve dangerous activity. *Ibid.* In Mr. Oyebanji's case, that would have meant transforming a vehicular homicide conviction into a "crime of violence," and therefore an "aggravated felony" that rendered him deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) (2018). *Oyebanji*, 418 F.3d at 261–62. While such an offense might carry a "substantial degree of moral culpability" under state law, *see id.* at 264, this was not the kind of "violence" that Congress intended to reach with § 16. *Ibid.*

Soon after, the en banc Ninth Circuit relied on *Leocal* and *Oyebanji* to overrule its earlier precedents and hold that "an offense must involve the intentional use of force against the person or property of another" in order to qualify as a "crime of violence" under § 16(a). *See Fernandez-Ruiz*, 466 F.3d at 1132. Writing for the en banc majority, Judge Bea relied on the text of § 16 and the precedents interpreting it. *Id.* at 1127–30. In addition, the Ninth Circuit emphasized the troubling implications of holding that recklessness was sufficient to qualify an offense as a "crime of violence." *Id.* at 1130. If unintentional acts that happened to result in physical contact were to be swept into § 16, the special penalties associated with that

provision could fall on people well outside Congress's intended class of offenders. *Ibid*.

The Eighth Circuit soon reached the same conclusion. *See Torres-Villalobos*, 487 F.3d at 616. Surveying the now-ample case law, the court agreed that recklessness crimes could not be considered "crimes of violence." *Ibid.* In so holding, the court identified some of the calamities that could turn risky behavior into harshly punished "crimes of violence" if recklessness were a sufficient mental state. *Ibid.*

Although these decisions addressed force clauses other than ACCA's, their reasoning was directly applicable to ACCA's almost identical language. And the courts that did address ACCA relied on these cases to reach the same conclusions. *See, e.g.*, *McMurray*, 653 F.3d at 374–75; *United States v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010); *Griffin v. United States*, 617 F. App'x 618, 623–24 (8th Cir. 2015); *United States v. Smith*, 544 F.3d 781, 786 (7th Cir. 2008) (addressing ACCA's residual clause).

In sum, after *Leocal*, one court after another held that crimes of recklessness were not covered by ACCA or nearly identical statutes. *See, e.g.*, *Bennett v. United States*, 868 F.3d 1, 3 (1st Cir.), *withdrawn as moot*, 870 F.3d 34, 36 (1st Cir. 2017); *United States v. Moreno*, 821 F.3d 223, 228 (2d Cir. 2016); *Oyebanji*, 418 F.3d at 264; *Garcia v. Gonzales*, 455 F.3d 465, 469 (4th Cir. 2006); *McMurray*, 653 F.3d at 374–75;

Smith, 544 F.3d at 786; *Torres-Villalobos*, 487 F.3d at 616; *Fernandez-Ruiz*, 466 F.3d at 1132; *United States v. Zuniga-Soto*, 527 F.3d 1110, 1117 (10th Cir. 2008); *United States v. Mitchell*, 653 F. App'x 639, 644 n.5 (10th Cir. 2016); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 & n.16 (11th Cir. 2010) (noting the court's lack of surprise that the Government could "cite[] no authority . . . that a conviction based on recklessness satisfies the 'use of physical force' requirement," given the circuit courts' "near unanimity" on the question).

Indeed, not a single circuit decision between *Leocal* and *Voisine* held that crimes of recklessness could satisfy ACCA's, or any other statute's, force clause.[13]

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[13] Although there was brief uncertainty on the issue in two circuits, it was quickly resolved to support the consensus view. In *Zuniga-Soto*, 527 F.3d at 1123, the Tenth Circuit held that reckless conduct cannot satisfy § 16(a)'s force clause and rejected a contrary suggestion in *United States v. Zunie*, 444 F.3d 1230, 1235 n.2 (10th Cir. 2006), saying that the earlier ruling "was dicta, and it does not control." In *Lopes v. Keisler*, 505 F.3d 58, 63 (1st Cir. 2007), the First Circuit held that *Leocal* did not apply because the underlying Rhode Island assault statute did not permit conviction based on negligence. The court later clarified that the state assault definition likely did not include recklessness and noted that *Lopes* did not "address[] recklessness." *Campos-Gomez v. Mukasey*, 298 F. App'x 22, 24 (1st Cir. 2008). Following *Voisine*, the First Circuit held that ACCA's force clause does not include recklessness offenses. *See Bennett*, 868 F.3d at 3.

Taken together, these cases comprise a remarkable consensus on the question presented in this case. Especially considered alongside the plain meaning of ACCA's text, *see* Pet'r Br. at 21–24, and Congress's clear purpose in enacting it, *see* pp. 4–10, *supra*, this uniformity provides a convincing demonstration that crimes committed with a reckless mens rea cannot serve as predicate "violent felonies."

C. *VOISINE* DOES NOT SUPPORT THE GOVERNMENT'S POSITION BECAUSE IT INVOLVED A STATUTE WITH DIFFERENT TEXT AND A DIFFERENT PURPOSE FROM ACCA

This Court's decision in *Voisine* did not overrule this long line of consistent court of appeals decisions. In fact, *Voisine* expressly reserved whether "recklessness" offenses can serve as predicates under § 924(e). *Voisine*, 136 S. Ct. at 2280 n.4. In any event, *Voisine* interpreted a provision of the Misdemeanor Crimes of Domestic Violence ("MCDV") Act,[14] in which the statutory text differs significantly from all of the force

[14] Under 18 U.S.C. § 922(g)(9), it is a federal offense for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. That phrase is defined in 18 U.S.C. § 921(a)(33)(A) as "a misdemeanor under Federal, State, or Tribal law" that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," by a domestic relation of the victim. For clarity, we refer herein to these provisions collectively as the "MCDV Act."

clause provisions discussed above. These textual differences are dispositive. *See* Pet'r Br. at 33–34.

In addition to these textual differences, ACCA and the MCDV Act impose vastly different consequences and serve far different purposes. Recognizing these differences, one court described attempts to analogize the statutes as "compar[ing] plums with pomegranates." *United States v. Meade*, 175 F.3d 215, 221 (1st Cir. 1999). Because of these differences, *Voisine*'s interpretation of the MCDV Act provides no support for the Government's proffered interpretation of ACCA.

The penalties under the MCDV Act differ substantially from those under ACCA. Under the MCDV Act—which seeks to keep guns and ammunition out of the hands of domestic abusers—the sentence for a violation may range from *no term* of imprisonment to a *maximum* of ten years. *See* U.S. Sent'g Commission, *Quick Facts: Felon in Possession of a Firearm* 2 (July 2019), http://bit.ly/35Jrlwt (reporting sentencing data for convictions under § 922(g)). In contrast, ACCA—which seeks to incapacitate recidivist offenders for the duration of their criminal careers—imposes a fifteen-year mandatory *minimum* with a maximum of *life imprisonment*. In short, "[t]he title of the ACCA—the *Armed Career Criminal* Act—'was not merely decorative.'" *Middleton*, 883 F.3d at 499 (emphasis in original) (Floyd, J., joined by Harris, J., concurring). ACCA's severe penalties preclude a meaningful analogy to the MCDV Act.

Given these differences, it is evident that "ACCA does not share the same purpose as the MCDV statute." *Id.* at 499. These differences "warrant[] a narrower reading" of ACCA. *Ibid.* Whereas ACCA targets "truly purposeful and aggressive criminals," Congress enacted the MCDV Act for the "broad purpose of preventing domestic abusers from possessing firearms." *Ibid.*; *see Bennett*, 868 F.3d at 21 ("Specifically, ACCA seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons. By contrast [the MCDV Act] addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence." (internal citations and quotation marks omitted)); *United States v. Booker*, 644 F.3d 12, 20–21 (1st Cir. 2011) ("To be sure, the ACCA and [the MCDV Act] are both animated by a protective rationale. . . . However, the statutes address significantly different threats.").

This Court in *Voisine* recognized as much: "Congress enacted [the MCDV Act] . . . to bar those domestic abusers convicted of *garden-variety assault or battery misdemeanors* . . . from owning guns." *Voisine*, 136 S. Ct. at 2280 (emphasis added). "Garden-variety" misdemeanors are markedly different from the "purposeful, violent" crimes that ACCA targets.

These differences are made starker by the statutes' divergent legislative histories. As noted, ACCA's architects stressed that their concern was with "the

worst offenders." *See* 1986 Senate Hearing at 4 (statement of Rep. Wyden) (disclaiming interest in "simple misdemeanors"); pp. 4–10, *supra*. The MCDV Act, on the other hand, was directed *precisely* at lower-level domestic misdemeanors that too often lead to greater violence. *See* 142 Cong. Rec. S10377-01, S10379 (daily ed. Sept. 12, 1996) (statement of Sen. Paul Wellstone) ("What the Senator from New Jersey is trying to do is plug this loophole and prohibit someone convicted of domestic abuse, whether felony or misdemeanor, of purchasing a firearm.").

The MCDV Act's broad scope is confirmed in comments by Senator Lautenberg, who was the driving force behind the law. He expressed Congress's objective to reach scenarios that *lack* the element of deliberate intent—those in which domestic arguments "get out of control," in which "anger will get physical," and in which one partner will do violence "*almost without knowing what he is doing*." 142 Cong. Rec. S11872-01, S11876 (daily ed. Sept. 30, 1996) (emphasis added). Thus, the paradigmatic conduct at the heart of the MCDV Act—reckless violence—is far removed from the felonies animating ACCA. *See* HJC Hearing at 5 (statement of Rep. Wyden) (identifying murder and rape as core predicates under ACCA).

Finally, Congress settled on the definitional language in the MCDV Act only after it "expressly rejected" the "crime of violence" definition in 18 U.S.C. § 16. *Booker*, 644 F.3d at 19. For this reason, lower

courts have described the analogy between the MCDV Act and § 16(a) (which mirrors ACCA's force clause) as "particularly weak." *Ibid.*

Given the substantially divergent texts, histories, and purposes of ACCA and the MCDV Act, "[t]here are sound reasons to decline to interpret the two statutes in tandem." *Id.* at 20. *Voisine* therefore does not control the interpretation of ACCA's force clause and the decision below erred in applying *Voisine* to interpret ACCA.

CONCLUSION

ACCA's heightened punishment of imprisonment for fifteen years to life was intended to incapacitate the most violent recidivists for the remainder of their criminal careers. The Court should reject any rule that expands ACCA's reach beyond this intentionally narrow scope. Such an approach would undermine ACCA's purpose, overrule a nearly uniform body of precedent that developed over many years in the courts of appeals, and produce anomalous and unjust results. The judgment of the court of appeals should be reversed.

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