No. ____

IN THE

Supreme Court of the United States

JAMIE CAPALBO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal offense with a reckless *mens rea* qualifies as a "violent felony" under the elements clause of the Armed Career Criminal Act, which requires the offense to have "as an element the use . . . of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i).

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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Petitioner respectfully seeks a writ of certiorari to review an order of the U.S. Court of Appeals for the Eleventh Circuit affirming the district court's denial of his motion for relief pursuant to 28 U.S.C. § 2255.

OPINION BELOW

The Eleventh Circuit's order is reproduced in the Appendix at A-1. The district court's final judgment and order is reproduced in the Appendix at A-2.

JURISDICTION

The Eleventh Circuit issued its decision on April 15, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act ("ACCA") defines "violent felony," as a felony 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." 18 U.S.C. § 924(e)(2)(B). In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the ACCA's residual clause was unconstitutionally vague.

In Florida, "[a]n 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. § 784.011. The offense of "aggravated assault" is

an "assault" either "[w]ith a deadly weapon without intent to kill," or "[w]ith an intent to commit a felony." Fla. Stat. § 784.021.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

It is unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year to possess a firearm. 18 U.S.C. § 922(g)(1). For those convicted of being a felon in possession of a firearm, the Armed Career Criminal Act ("ACCA") transforms the ten-year statutory maximum penalty into a fifteen-year mandatory minimum. 18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(e). The enhancement applies where the defendant has a three "violent felonies" or "serious drug offenses."

In 2016, Petitioner pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. §846. He was subject to the ACCA enhancement based, in part, on a prior conviction for aggravated assault under Fla. Stat. § 784.021. He was sentenced to the 15-year mandatory minimum.

The ACCA contains three definitions of a "violent felony"—a felony 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." 18 U.S.C. § 924(e)(2)(B). The definition in subsection (i) is known as the "elements" clause. The first half of the definition in subsection

(ii) is known as the "enumerated" offense clause. And the second half of the definition in subsection (ii) is known as the "residual" clause.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that the ACCA's residual clause was unconstitutionally vague. *Johnson*, however, left undisturbed the validity of the elements and enumerated-offense clauses. *Id.* at 2563. The following term, this Court held that *Johnson* announced a new, substantive rule of constitutional law, and it therefore had retroactive effect to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Following *Johnson* and *Welch*, numerous federal prisoners filed motions to vacate, pursuant to 28 U.S.C. § 2255, arguing that their ACCA sentences were no longer valid given the retroactive invalidation of the residual clause.

Within one year of *Johnson*, Petitioner filed an initial § 2255 motion, arguing that his ACCA sentence was no longer valid without the residual clause. He argued, *inter alia*, that his Florida aggravated assault conviction was not a violent felony because it did not satisfy the ACCA's still-viable elements clause. He explained that "the Florida courts have held that a person may be convicted under § 784.021 upon a *mens rea* of 'culpable negligence,' which is akin to recklessness," and this Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) required more than a reckless *mens rea*. Dist. Ct. Dkt. Entry 23 at 15. Although he acknowledged that, in *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1338 (11th Cir. 2013), the Eleventh Circuit had held that § 784.021 did categorically satisfy the elements

clause, Petitioner argued that *Turner* was wrongly decided because it did not consider Florida case law or the reckless *mens rea* of the offense. *See id.* at 16.

The district court denied Mr. Capalbo's 2255 motion, finding that Florida aggravated assault remained a violent felony under the elements clause because *Turner* remained binding precedent. Appendix at A-2.

Mr. Capalbo appealed the district court's denial of his § 2255 motion. The court of appeals affirmed the district court's denial of Mr. Capalbo's § 2255 motion. In a written opinion, it concluded that *Turner* was binding precedent that foreclosed Mr. Capalbo's argument that his conviction for aggravated assault did not satisfy the elements clause of the ACCA. The court of appeals opined that "…even if we were convinced that *Turner* was wrongly decided. We are bound by it because it has not been abrogated by the Supreme Court or this Court sitting *en banc*."

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE OPENLY DIVIDED ON THE QUESTION PRESENTED

In *Leocal* v Ashcroft, 543 U.S. 1 (2004), this Court interpreted the elements clause in 18 U.S.C. § 16(a), which uses language almost identical to the ACCA's elements clause to define the term "crime of violence." Rejecting the government's argument that § 16(a) lacked any *mens rea* component, the Court held that "'use' requires active employment," because "[w]hile one may, in theory, actively employ *something* in an accidental matter, it is much less natural to say that a person actively employs physical force against another by accident." *Leocal*, 543 U.S. at 9. Thus, the Court held that § 16(a) "naturally suggests a higher degree of intent than

negligent or merely accidental conduct." *Id.* Although *Leocal* reserved ruling on reckless conduct, *id.* at 13, the lower courts agreed that its reasoning excluded such conduct from § 16, as well as the elements clause in the ACCA and the Guidelines, S*ee, e.g.*, *Bennett v. United States*, 868 F.3d 1, 11–12 & n.8 (1st Cir. 2017), *withdrawn and vacated as moot*, 870 F.3d 34 (1st Cir. 2017); *Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010).

Confusion arose, however, in the wake of *Voisine v. United States*, 136 S. Ct. 2272 (2016), where this Court held that reckless conduct *did* satisfy the *different* elements clause in 18 U.S.C. § 921(a)(33)(A), which defined the term "misdemeanor crime of violence" in 18 U.S.C. § 922(g)(9). In so holding, however, the Court noted that its decision "concerning § 921(a)(33)(A)'s scope does not resolve whether § 16" (and, in turn, the ACCA) "includes reckless behavior," since "[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their context and purposes." *Id.* at 2280 n.4. The circuits are now divided over whether reckless conduct satisfies the ACCA's elements clause.

The First Circuit has held that it does not. *See United States v. Windley*, 864 F.3d 36, 37–39 & n.2 (1st Cir. 2017) (endorsing and adopting reasoning in *Bennett*); *United States v. Rose*, 896 F.3d 104, 109–10 (1st Cir. 2018) (following *Windley*). In *Bennett*, a case for which Justice Souter was on the panel, the First Circuit explained that *Voisine* did not control due to differences between § 921(a)(33)(A) on the one hand, and § 16(a) and the ACCA on the other. Due to those differences, the court found it uncertain whether the ACCA's elements clause applied to reckless

conduct, and it therefore held that it did not under the rule of lenity. *Id.* at 2–3, 8, 23. The majority of a Fourth Circuit panel has since agreed with *Bennett*'s reasoning and rejected the contrary conclusion reached by other courts. *See United States v. Middleton*, 883 F.3d 485, 498–500 & n.3 (4th Cir. 2018) (Floyd, J., concurring in part and concurring in the judgment, joined by Harris, J.).

By contrast, the Fifth, Sixth, Eighth, Tenth, and D.C. Circuits have held that, in light of *Voisine*, reckless conduct does satisfy the elements clause of the ACCA or the Guidelines. However, they have done so either with little analysis or have improperly discounted material distinctions between the § 16(a)/ACCA and § 921(a)(33)(A). *See United States v. Haight*, 892 F.3d 1271, 1280–81 (D.C. Cir. 2018) (Kavanaugh, J.) (ACCA), *cert. petition filed* (Sept. 20, 2018) (U.S. No. 18-370); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017) (Guidelines); *United States v. Pam*, 867 F.3d 1191, 1207–08 & n.16 (10th Cir. 2017) (ACCA); *United States v. Mendez-Henriquez*, 847 F.3d 214, 220–22 (5th Cir. 2017) (Guidelines); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (ACCA).

The lower courts have expressly recognized this conflict of authority and openly disagreed with their sister circuits. *See, e.g.*, *Haight*, 892 F.3d at 1281 ("We recognize that the First Circuit has reached a contrary conclusion, but we respectfully disagree with that court's decision."); *Pam*, 867 F.3d at 1208 n.16 (noting that *Bennett* "raises questions as to whether . . . *Voisine* should be extended to the ACCA," but finding itself bound by circuit precedent); *Verwiebe*, 874 F.3d at 262–64 (recognizing that the First Circuit "has come out the other way," but

criticizing its reasoning); *Middleton*, 883 F.3d at 499 n.3, 500 (Floyd, J., concurring in part and concurring in the judgment) (agreeing with the First Circuit and criticizing Sixth, Eighth, and Tenth Circuit decisions).

II. THE ACKNOWLEDGED CIRCUIT CONFLICT WARRANTS REVIEW

Due to the circuit conflict, individuals with identical criminal histories are now subject to disparate treatment based solely on the circuit in which they are sentenced. Hundreds of federal defendants are subject to the ACCA enhancement each year. And that enhancement transforms a ten-year statutory maximum into a fifteen-year mandatory minimum. Individuals should not face at least five additional years in prison based solely on the happenstance of geography.

That geographic disparity is particularly untenable given the frequency with which the question presented arises. That frequency is reflected by the number of post-*Voisine* cases addressing whether reckless conduct satisfies the elements clause. And *Voisine* was decided only two years ago. Those cases, moreover, span the nation and address various offenses from different jurisdictions. *See, e.g.*, *Haight*, 892 F.3d at 1280–81 (D.C. assault with a dangerous weapon); *Verwiebe*, 874 F.3d at 262 (federal assault); *Bennett*, 868 F.3d at 4 (Maine aggravated assault); *Pam*, 867 F.3d at 1207–08 (New Mexico shooting at or from a motor vehicle); *Windley*, 864 F.3d at 37–39 (Massachusetts assault and battery with dangerous weapon); *Mendez-Henriquez*, 847 F.3d at 220–22 (California discharging firearm at occupied motor vehicle); *Fogg*, 836 F.3d at 956 (Minnesota drive by shooting).

Lastly, the conflict on this important, recurring issue is intractable. The First Circuit has, on at least three separate occasions, held that reckless conduct does not satisfy the ACCA, and it has done so in the face of contrary decisions from other circuits. And that intractable conflict derives from confusion about the relationship between *Leocal* and *Voisine*. Only this Court can resolve the confusion.

III. THIS IS AN EXCELLENT VEHICLE TO RESOLVE THE CONFLICT

This case provides the Court with an excellent opportunity to do so. Petitioner's ACCA enhancement is based on three prior convictions, one of which is for Florida aggravated assault. And the Eleventh Circuit denied relief from that ACCA enhancement below on the exclusive ground that his aggravated assault conviction (and another one not challenged here) satisfied the ACCA's elements clause, relying on binding circuit precedent in *Turner*. Appendix at A-1; *see United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) ("[E]ven if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it."); *In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016) (reiterating and applying *Turner*).

Moreover, Florida case law makes abundantly clear that aggravated assault requires only a reckless *mens rea*. *See LaValley v. State*, 633 So.2d 1126, 1127 (Fla. Dist. Ct. App. 1994) ("'reckless disregard for the safety of others' [may] substitute for proof of intentional assault on the victim") (quoting *Kelly v. State*, 552 So.2d 206, 208 (Fla. Dist. Ct. App. 1989) (citing *DuPree v. State*, 310 So.2d 396, 398 (Fla. Dist. Ct. App. 1975) and *Green v. State*, 315 So.2d 499, 499–500 (Fla. Dist. Ct. App. 1975))); *accord Golden*, 854 F.3d at 1258 (Jill Pryor, J., concurring in result)

(recognizing that "the State may secure a conviction under the aggravated assault statute by offering proof of less than intentional conduct, including recklessness"). Thus, this case squarely presents the question on which the circuits have divided.

IV. RECKLESS CONDUCT DOES NOT SATISFY THE ACCA'S ELEMENTS CLAUSE

The First Circuit has persuasively explained why reckless conduct does not satisfy the ACCA's elements clause, notwithstanding *Voisine*. The major reason is that there are material distinctions between the text, context, and purpose of the elements clause in § 16(a)/ACCA and that in § 921(a)(33)(A). When analyzing these provisions, this Court has repeatedly emphasized such distinctions. *See Voisine*, 136 S. Ct. at 2280 n.4; *Castleman v. United States*, 572 U.S. 157, 163–68 & n.4 (2014); *Curtis Johnson v. United States*, 559 U.S. 133, 143–44 (2010); *Leocal*, 543 U.S. at 9. Indeed, even the government recognized in *Voisine* that "[t]he definition of a 'misdemeanor crime of violence' under Section 922(g)(9) does not embody the same meaning as the term 'crime of violence' under 18 U.S.C. 16." Brief for Appellee at 12, *Voisine v. United States*, 136 S. Ct. 2272 (2016) (No. 14-10154).

As a textual matter, the First Circuit properly emphasized that, like § 16(a), the ACCA's elements clause requires that the use of force be directed "against the person or another"—language that *Leocal* found significant, 543 U.S. at 9—whereas § 921(a)(33)(A) requires the use of force without any such qualification. *Bennett*, 868 F.3d at 8–9. "And, in context, the word 'against' arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury in committing an aggravated assault." *Id.* at 18.

That is particularly true given that the elements clause in § 16(a) and the ACCA define the terms "crime of violence" and "violent felony," respectively, not "misdemeanor crime of violence." *See id*. at 22 (observing that assault committed by reckless conduct "does not necessarily reveal a defendant to pose the kind of risk that Congress appears to have had in mind in defining 'violent felony' under ACCA."). And this Court has repeatedly emphasized the importance of those underlying statutory terms. *See, e.g.*, *Curtis Johnson*, 559 U.S. at 139 ("Ultimately, context determines meaning," and "[h]ere we are interpreting the phrase 'physical force' as used in defining . . . the statutory category of 'violent felonies'") (brackets omitted); *Leocal*, 543 U.S. at 11 ("In construing . . . § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'").

Lastly, as a matter of statutory purpose, the ACCA targets offenders who would be likely to "deliberately point the gun and pull the trigger," not those who merely "reveal a callousness toward risk." *Bennett*, 868 F.3d at 21 (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)). By contrast, § 921(a)(33)(A) was designed to broadly reach all criminal acts of domestic violence, even those "that one might not characterize as 'violent' in a nondomestic context." *Id*. (quoting *Castleman*, 572 U.S. at 16). Thus, while including reckless conduct in *Voisine* comported with the statutory purpose, doing so in the ACCA context would not.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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