No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALAN VICTOR GOMEZ GOMEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

KATHRYN SHEPHARD
Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTION PRESENTED

Whether a statute has as an element the use of force against the person of another when a conviction under that statute can be based on a reckless mental state.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

None.

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MISCELLANEOUS

PRAYER

Petitioner Alan Victor Gomez Gomez prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Westlaw version of opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Gomez Gomez's case is attached to this petition as Appendix A. The judgment of the United States Court of Appeals for the Fifth Circuit affirming the district court's judgment is attached to this petition as Appendix B. The order of the United States Court of Appeals for the Fifth Circuit denying Mr. Gomez Gomez's petition for rehearing *en banc* is attached to this petition as Appendix C. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment (along with an unpublished opinion that was later revised and reissued as published) was entered on February 25, 2019. *See* Appendix B. The Fifth Circuit denied Mr. Gomez Gomez's petition for rehearing *en banc* on April 23, 2019. *See* Appendix C. This petition is filed within 90 days after the denial of rehearing. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to any alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other

sentence[;] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

* * * *

8 U.S.C. § 1101(a)(43)(F)

The term "aggravated felony" means--

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

* * * *

18 U.S.C. § 16

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Tex. Penal Code § 22.01. Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

* * * *

Tex. Penal Code § 22.02. Aggravated assault

(a) A person commits an offense if the person commits assault as defined in [Tex. Penal Code] § 22.01 and the person:

(1) causes serious bodily injury to another, including the person's spouse; or

(2) uses or exhibits a deadly weapon during the commission of the assault.

* * * *

STATEMENT OF THE CASE

I. Statutory framework

A person who is convicted of the crime of illegal reentry, that is, of being found unlawfully present in the United States after a previous deportation, faces up to two years in prison. 8 U.S.C. § 1326(a). That penalty increases to 10 years if the person has pre-deportation felony conviction. 8 U.S.C. § 1326(b)(1). If the person has a pre-deportation conviction for an "aggravated felony," however, he or she is subject to a term of 20 years in prison. 8 U.S.C. § 1326(b)(2).

The term "aggravated felony" is defined to include, among other things, "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense" for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16 of Title 18, in turn, defines crime of violence as:

> (a) an offense that that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

Since § 16(b), the "residual clause," is void for vagueness, *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1213-15 (2018), that leaves only § 16(a), the "force clause," for analyzing whether a prior conviction qualifies as a "crime of violence"-type of "aggravated felony."

Like § 16, the Armed Career Criminal Act ("ACCA") has a force clause. *See* 18

U.S.C. § 924(e)(1)(B)(i). Under ACCA, a person who commits the offense of unlawful possession of a firearm or ammunition after three convictions for a "violent felony" faces a mandatory minimum sentence of 15 years in prison. 18 U.S.C. § 924(e)(1). ACCA defines "violent felony" to include (in relevant part) "any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(1)(B)(i). The only difference between the two force clauses is that § 16 includes property but ACCA does not. Because the force clauses are nearly identical, courts typically treat the two clauses as interchangeable. *See, e.g.*, *United States v. Ramos*, 744 Fed. Appx. 215, 217 (5th Cir. 2018) (unpublished); *United States v. Holston*, 471 Fed. Appx. 308, 308 (5th Cir. 2012) (unpublished).

Interpreting the applicability of these force clauses requires courts to employ the categorical approach. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990). Under that approach, courts examine whether the elements in the statute of the prior conviction meets the requirements of the force clause, without regard to the underlying facts, or means, that are "extraneous to the crime's legal requirements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). To determine whether a statute contains elements or means, courts must decide whether the statute's alternatives are indivisible because they create a single crime that can be committed in various ways or whether the alternatives are divisible because they define separate crimes. *See, e.g.*, *id.* at 2250-57. If the statute's alternatives are elements, the modified categorical approach permits courts to examine the prior conviction

documents to determine which offense the defendant committed, and then determine whether that offense satisfies the force clause. *See id.* at 2253-54. If the statute's alternatives are means, however, the modified categorical approach has no role to play, and courts must decide whether the least of the acts sufficient to meet the statute's elements satisfies the force clause. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017).

In Texas, a person commits simple assault in one of three ways: (1) "intentionally, knowingly, or recklessly caus[ing] serious bodily injury to another"; (2) intentionally of knowingly threaten[ing] another with imminent bodily injury"; or (3) "intentionally or knowingly caus[ing] physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Penal Code § 22.01(a). Texas defines aggravated assault as committing a simple assault as defined in Tex. Penal Code § 22.01 with either one of the following aggravating factors: (1) "caus[ing] serious bodily injury to another" or (2) "us[ing] or exhibit[ing] a deadly weapon during the commission of the assault." Tex. Penal Code § 22.02(a).

Although the three types of Texas simple assault are divisible because they are elements comprising separate crimes, the culpable mental states in the Texas simple assault statute, as well as the aggravating factors in the Texas aggravated assault statute, are alternative means and therefore indivisible. *See, e.g., United States v. Howell*, 838 F.3d 489, 498-99 (5th Cir. 2016); *Landrian v. State*, 268 S.W.3d 532, 537-39 (Tex. Crim. App. 2008). As a result, a person's conviction cannot be narrowed under the modified categorical approach except to the type of simple assault with the minimum mental state under the

statute (*e.g.*, reckless bodily injury assault) with an aggravating factor.

Because of how Texas has chosen to define these offenses, Texas aggravated assault reaches some unexpected conduct, including drunk or reckless driving that results in serious bodily injury. In Texas, a "deadly weapon" includes a vehicle driven by a drunk person. *See Tyra v. State*, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995) (holding that, where the defendant was too drunk to control the vehicle and accidentally killed a man, the vehicle was "a deadly weapon" because "a thing which actually causes death is, by definition, 'capable of causing death'"). So too is a recklessly driven automobile, even if the driver did not intend to use the car as a weapon. *Walker v. State*, 897 S.W. 2d 812, 814 (Tex. Crim. App. 1995); *see also Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156, *4-*5 (Tex. App.—Dallas Nov. 27, 2013, no pet.) (unpublished); *McNair v. State*, No. 02-10-00257-CR, 2011 WL 5995302, at *9 (Tex. App.—Fort Worth Nov. 23, 2011, no pet.) (unpublished). With this broad definition of "deadly weapon," Texas aggravated assault extends to when a drunk driver causes serious bodily injury. *See Stanley v. State*, 470 S.W.3d 664, 667 (Tex. App.—Dallas, no pet.) (aggravated assault indictment based on drunk driving). An aggravated assault conviction can also be secured based on a person's reckless driving—including by speeding—that causes serious bodily injury. *See Venegas v. State*, 560 S.W.3d 337, 351 (Tex. App.—San Antonio 2018, no pet.) (To obtain an aggravated assault conviction, "the State was required to prove beyond a reasonable doubt that Venegas intentionally, knowingly, or recklessly caused serious bodily injury to Ramos by failing to maintain a reasonable speed or driving in a manner that disregarded the safety

of other motorists on the roadway.").

Another unusual application of the Texas aggravated assault statute involves consensual sexual contact. Texas has convicted defendants of aggravated assault where consensual sexual contact passed a virus to the unwitting partner, under both the "serious bodily injury" aggravating factor and the "deadly weapon" aggravating factor. *See, e.g.*, *Billingsley v. State*, No. 11-13-00052-CR, 2015 WL 1004364, at *2 (Tex. App.—Eastland Feb. 27, 2015, pet. ref'd) (unpublished). In fact, in *State v. Zakikhani*, Case No. 151228901010 (Crim. Dist. Ct. No. 176, Harris Co., Tex., June 20, 2018), the defendant was convicted of aggravated assault for transmitting HIV through consensual intercourse, where one complainant made clear that the actus reus was not physically forceful and the defendant was friendly and charming.[1]

Finally, the State of Texas has charged a man with aggravated assault with a deadly weapon by sending a Tweet with an animation that induced the victim to have a seizure. *See* Indictment, *State v. Rivello*, Case No. F-1700215-M (Crim. Dist. Ct. No. 5, Dallas Co. Tex., Mar. 20, 2017).

II. Factual background

On March 15, 2017, Petitioner Alan Victor Gomez Gomez was charged by indictment with being found in the United States without the consent of the Attorney General or Secretary of the Department of Homeland Security after previously having been

[1] Tera Robertson & Jace Larson, *Man may be knowingly infecting victims with HIV, police say*, Click2Houston.com, June 9, 2016, https://www.click2houston.com/news/investigates/man-may-be-knowingly-infecting-victims-with-hiv-police-say (last visited July 17, 2019).

deported following an aggravated felony conviction, in violation of 8 U.S.C. § 1326(a) and (b)(2). On May 19, 2017, he pleaded guilty to the indictment. At the rearraignment, the prosecutor proffered the following factual basis:

> Your Honor, with respect to Mr. Gomez Gomez, if we were to go to trial, the United States would prove beyond a reasonable doubt that this defendant is a citizen of Mexico and not the United States.
>
> On April 15, 2011, this defendant was convicted in Fort Bend County District Court of aggravated assault with a deadly weapon and was sentenced to two years['] confinement.
>
> On July 17, 2012, this defendant was deported from the United States at Laredo to Mexico.
>
> On February 24, 2017, this defendant was found in the United States in Alvin, Texas.
>
> The defendant's A-file and the Central Index System have been searched. There is no evidence that this defendant has ever applied for or received permission to reapply for admission to the United States.
>
> Finally, this defendant's known prints have been compared with warrants of deportation and other relevant documents. They have all been found to have been made by one person.

Counsel for Mr. Gomez Gomez preserved for sentencing any possible argument about whether Mr. Gomez Gomez's offense should be classified as a violation of § 1326(b)(1), rather than § 1326(b)(2).

Before sentencing, Mr. Gomez Gomez filed a written objection arguing, among other things, that his offense is not punishable under 8 U.S.C. § 1326(b)(2) because a conviction for Texas aggravated assault is not an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43)(F). The district court overruled that objection. The district court

sentenced Mr. Gomez Gomez to 19 months of imprisonment, to be followed by a one-year term of supervised release. The written judgment entered by the district court on August 22, 2017, states that Mr. Gomez Gomez was convicted of "[i]llegal re-entry by a previously deported alien after an aggravated felony conviction" in violation of "8 U.S.C. § 1326(a) and (b)(2)."

Mr. Gomez Gomez filed a timely notice of appeal on August 18, 2017. On appeal, he argued that the district court committed reversible error when it convicted, sentenced, and entered judgment against Mr. Gomez Gomez under 8 U.S.C. § 1326(b)(2) because a conviction for Texas aggravated assault does not qualify as an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43). Originally, Mr. Gomez Gomez made this argument based on the Fifth Circuit's longstanding precedent distinguishing between crimes with the use of force as an element and crimes with mere causation of injury as an element. However, the Fifth Circuit overruled this precedent in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (*en banc*). Through court-ordered supplemental briefing after *Reyes-Contreras*, Mr. Gomez Gomez argued that Texas aggravated assault is not a "crime of violence"-type of "aggravated felony" because a conviction for that offense can be sustained based on (1) a drunk/reckless driving accident that results in death or serious bodily injury; (2) a defendant transmitting a virus to an unwitting partner during consensual sexual contact; and (3) a defendant sending a Tweet with animation that induced the victim to have a seizure. A panel of the Fifth Circuit, with one judge concurring in the judgment only, affirmed the district court's judgment in a published opinion. *United States v. Gomez*

Gomez, 917 F.3d 332 (5th Cir. 2019). Mr. Gomez Gomez filed a petition for rehearing *en banc*, but that petition was denied on April 23, 2019.

Mr. Gomez Gomez now seeks to have this Court settle the circuit split on whether a statute with a reckless mental state has as an element the use of physical force against the person of another.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

Whether a reckless offense has as an element the use of force against another person is a question on which the circuits have acknowledged that they are divided, and this Court's intervention is therefore necessary to resolve this important and recurring question of federal sentencing and immigration law.

In *Leocal v. United States*, 543 U.S. 1 (2004), this Court considered whether a prior conviction for driving under the influence of alcohol and causing serious bodily injury qualified as a "crime of violence" under 18 U.S.C. § 16's force clause. The unanimous Court said "no," reasoning that "negligent or merely accidental conduct" does not satisfy "the critical aspect" and "key phrase" of the force clause: the "use . . . of physical force *against the person or property of another*." *Leocal*, 543 U.S. at 9 (emphasis in original). In doing so, the Court emphasized that, "when interpreting a statute that features as elastic a word as 'use,' [the Court] construe[s] language in its context and in light of the terms surrounding it." *Id.* And in the context of § 16, with its phrase "against the person of another," the Court found that "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Id.* at 11. Context was very important to the Court's decision: "[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.*; *see also Curtis Johnson v. United States*, 559 U.S. 133, 140-41 (2010) (contrasting "the context of a statutory definition of '*violent* felony'" with "a meaning derived from a common-law *misdemeanor*") (emphasis in original).

The Court in *Leocal* did not decide whether a reckless offense qualifies as a crime

of violence. *Id.* at 13. But after *Leocal*, the circuit courts uniformly held that reckless offenses, like negligent or strict liability offenses, did not satisfy § 16 either. *See United States v. Fish*, 758 F.3d 1, 10 & n.4 (1st Cir. 2014) (collecting cases); *see also United States v. Orona*, 923 F.3d 1197, 1200, 1202 (9th Cir. 2019) (explaining how the Ninth Circuit, after *Leocal*, determined *en banc* that a reckless assault did not qualify as a § 16(a) "crime of violence" and thereby "brought the law of [that] circuit in line with that of several of [the court's] sister circuits").

Then came this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), which has unsettled that uniformity. *Voisine* concerned 18 U.S.C. § 922(g)(9), a statute that prohibits a person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. The phrase "misdemeanor crime of domestic violence" is further defined as an offense involving a domestic relationship that "has, as an element, the use of physical force," and the Court held that the statute includes reckless domestic assaults. *Voisine*, 136 S. Ct. at 2278. The Court acknowledged *Leocal*, but found nothing in that opinion suggesting "that 'use' marks a dividing line between reckless and knowing conduct." *Id.* at 2279. However, the Court expressly noted that its decision in *Voisine* involving "misdemeanor crimes of domestic violence" did not resolve whether a "crime of violence" under § 16 encompasses reckless conduct and further acknowledged that "[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes." *Voisine*, 136 S. Ct. at 2280 n.4.

Since *Voisine*, the circuit courts have diverged on whether a reckless offense

qualifies as either a "crime of violence" under § 16 or the United States Sentencing Guidelines or a "violent felony" under the Armed Career Criminal Act ("ACCA"). The First Circuit has held that reckless offenses do not qualify as either a "crime of violence" or a "violent felony." In *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017), the First Circuit found that a prior conviction for Massachusetts assault and battery with a dangerous weapon did not qualify as a "violent felony" under ACCA due to that statute's reckless mental state. The First Circuit reasoned that, although the Massachusetts statute required "that the wanton or reckless act be committed intentionally," the statute "does not require that the defendant intend to cause injury" or "be aware of the risk of serious injury that any reasonable person would perceive." *Id.* at 39. The First Circuit specifically pointed to cases where a conviction under the Massachusetts statute involved "reckless driving that results in a non-trifling injury." *Id.* at 38. Similarly, in *United States v. Rose*, 896 F.3d 104 (1st Cir. 2018), the First Circuit held that a prior conviction for Rhode Island assault with a dangerous weapon was not a "violent felony" under ACCA because that statute required "a mental state of only recklessness." *Rose*, 896 F.3d at 114.

Both *Windley* and *Rose* relied heavily on the First Circuit's opinion in *Bennett v. United States*, 868 F.3d 1, 9 (1st Cir.), *opinion withdrawn and vacated*, 870 F.3d 34 (1st Cir. 2017). That opinion was withdrawn and vacated due to the petitioner's death, but before that happened, the court in *Windley* "endorse[d] and adopt[ed] [*Bennett*'s] reasoning as its own." *Windley*, 864 F.3d at 37 n.2. In *Bennett*, a panel including Justice Souter carefully examined this Court's opinion in *Leocal*, recognizing that both ACCA and § 16

contain "a follow-on 'against' phrase" to which "*Leocal* gave significant weight . . . in concluding that Florida's driving-under-the-influence offense was not a 'crime of violence' under § 16." *Bennett*, 868 F.3d at 9-10. The *Bennett* opinion further evaluated the potential impact of *Voisine* on the recklessness question, acknowledging the division among the circuits after *Voisine*. *Bennett*, 868 F.3d at 15-16. Ultimately, the *Bennett* opinion determined that ACCA's context, with the "against" phrase, "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" and that it is unclear whether it would be "natural to say that a person who chooses to drive in an intoxicated state uses force 'against' the person injured in the resulting, but unintended, car crash." *Id.* at 18. Given that uncertainty, the *Bennett* opinion invoked the rule of lenity to hold that Maine aggravated assault, which encompasses drunk driving through its reckless mental state variant, does not have as an element the use of force against another person. *Id.* at 22-24.

A panel of the Fourth Circuit has agreed with the First Circuit's approach to reckless offenses. In *United States v. Middleton*, 883 F.3d 485, 487 (4th Cir. 2018), Judge Gregory authored a majority opinion holding that a conviction for South Carolina involuntary manslaughter did not qualify as a violent felony under ACCA because that statute covered the illegal sale of alcohol to a minor that resulted in a drunk driver's death. *Id.* at 489-93. Judge Floyd authored a separate opinion concurring in part and concurring in the judgment, with Judge Harris joining Parts II.A and B. Those two subparts concluded that "South

Carolina involuntary manslaughter sweeps more broadly than the ACCA because an individual can be convicted of this offense based on reckless conduct, whereas the ACCA force clause requires a higher degree of *mens rea*." *Id.* at 497 (concurring opinion). Drawing on the First Circuit's *Bennett* and *Windley* opinions, Judge Floyd and Judge Harris emphasized the phrase "against the person of another" as the critical feature distinguishing ACCA from the statute involving misdemeanor crimes of domestic violence in *Voisine*. *Middleton*, 883 F.3d at 498-99 (concurring opinion).

Although the Eighth Circuit has held, after *Voisine*, that some reckless offenses have the use of force against another,[2] the Eighth Circuit has squarely held that an offense that can be committed by reckless driving does not have the requisite force element. In *United States v. Fields*, 863 F.3d 1012, 1013 (8th Cir. 2017), *reh'g denied* (Nov. 7, 2017), the Eighth Circuit evaluated whether a prior conviction for Missouri second-degree assault was categorically a "crime of violence" for purposes of applying a sentencing enhancement under the United States Sentencing Guidelines. The Missouri statute defined the offense at issue as "recklessly caus[ing] serious physical injury to another person." *Fields*, 863 F.3d at 1014 (brackets in original omitted). The Eighth Circuit held that, because the Missouri statute encompassed reckless driving resulting in injury, it did not qualify as a "crime of violence." *Id.*

The Eighth Circuit in *Fields* reaffirmed its pre-*Voisine* decision in *United States v.*

[2] *See, e.g.*, *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (holding that reckless discharge of a firearm qualifies as a violent felony under ACCA).

Ossana, 638 F.3d 895 (8th Cir. 2011). In *Ossana*, the Eighth Circuit relied on this Court's decision in *Begay v. United States*, 553 U.S. 137 (2008),[3] which "distinguished crimes that show a mere 'callousness toward risk' from crimes that 'also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.'" *Ossana*, 638 F.3d at 902 (quoting *Begay*, 553 U.S. at 146). More specifically, *Begay* pointed to reckless polluting and reckless tampering with consumer products as "crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" *Ossana*, 638 F.3d at 903 (quoting *Begay*, 553 U.S. at 146). Without "any meaningful distinction between" reckless tampering with consumer products and assault statutes "encompassing reckless driving that results in an injury," the Eighth Circuit applied *Begay* to find that reckless driving was not a crime of violence. *Ossana*, 638 F.3d at 903. Although the government sought rehearing of the Eighth Circuit's decision in *Fields* to reaffirm *Ossana* after *Voisine*, the court denied the petition. *See Fields*, 863 F.3d at 1012 n.*.

Similar to the Eighth Circuit, but on a broader scale, the Ninth Circuit has re-affirmed its pre-*Voisine*, *en banc* decision that a reckless assault does not qualify as a crime of violence under § 16(a). *See Orona*, 923 F.3d at 1202-03. After *Leocal*, the *en banc* Ninth Circuit revisited (and expressly overruled) its precedent that a crime of violence included reckless offenses. *See Orona*, 923 F.3d at 1200-01 (discussing *Fernandez-Ruiz v.*

[3] *Begay* primarily concerned the residual clause and was abrogated in that respect when the residual clause was later held to be void for vagueness. *See Samuel Johnson v. United States*, 135 S. Ct. 2251 (2015). But if a crime does not even create the serious potential *risk* of physical injury necessary to satisfy the residual clause, it clearly does not have the use of force *as an element*.

Gonzales, 466 F.3d 1121 (9th Cir. 2006) (*en banc*)). In its *en banc* decision in *Fernandez-Ruiz*, the Ninth Circuit had "relied on 'the bedrock principle of *Leocal* . . . that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another." *Orona*, 923 F.3d at 1201 (quoting *Fernandez-Ruiz*, 466 F.3d at 1132). In *Orona*, the Ninth Circuit examined *Voisine* in detail but concluded that *Voisine* did not "wholly undercut the theory or reasoning of *Fernandez-Ruiz*" because the Ninth Circuit remained persuaded, even after *Voisine*, that "'running a stop sign solely by reason of voluntary intoxication and causing physical injury to another'—similar to the conduct at issue in *Leocal*, could not 'in the ordinary sense be called active or violent.'" *Orona*, 923 F.3d at 1203 (quoting *Fernandez-Ruiz*, 466 F.3d at 1130). The Ninth Circuit acknowledged the First Circuit's similar conclusion in *Rose* as well as the opposing views of other circuits. *See Orona*, 923 F.3d at 1202-03.

Four circuits have reached the opposite conclusion. The D.C. Circuit in *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019), held that the defendant's argument that D.C. assault with a dangerous weapon was not a violent felony because it included a mental state of reckless "contravenes" *Voisine*. *Haight*, 892 F.3d at 1281. The court expressed the view that "[t]he statutory provision at issue in *Voisine* contains language nearly identical to ACCA's violent felony provision." *Haight*, 892 F.3d at 1280. Unlike the First Circuit, the D.C. Circuit was unpersuaded that the differentiating phrase "against the person of another" carried significance. *See id.* at 1281. The D.C. Circuit expressly recognized the First Circuit's conclusion on reckless offenses in *Windley*

but disagreed with that decision. *Haight*, 892 F.3d at 1281. The Fifth, Sixth, and Tenth Circuits have likewise extended *Voisine* to the "crime of violence" or "violent felony" contexts. *See, e.g.*, *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Mann*, 899 F.3d 898, 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2637 (2019). A three-judge panel of the Sixth Circuit, however, explained that they would have held that merely reckless conduct is not the use of force against another person, had they been writing on a clean slate and not been bound by circuit precedent. *United States v. Harper*, 875 F.3d 329, 33032 (6th Cir. 2017), *cert. denied*, 139 S. Ct. 53 (2018). Like some other circuits, the Sixth Circuit panel was persuaded that "against the person of another" is "a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy" the force clause. *Id.* at 331.

As the above discussion demonstrates, a number of circuits have weighed in on the question presented in thoughtful and comprehensive opinions with express consideration of contrary opinions. The division among the circuits is therefore unlikely to be resolved on its own, and further percolation among the circuit courts is not necessary. Through *Bennett*, *Windley*, and *Rose*, a majority of First Circuit judges in regular active service have authored or joined opinions concluding, after extensive analysis, that reckless offenses are excluded from qualifying under § 16 and ACCA's force clauses, and so it is highly unlikely that the First Circuit will change its mind. The D.C. Circuit recognized the First Circuit's work on this subject but still reached the opposite conclusion. *Haight*, 892 F.3d at 1281.

The Eighth Circuit had the opportunity to revisit its opinion on reckless driving, but declined to do so. *See Fields*, 863 F.3d at 1012 n.*. And the Fifth Circuit, in this very case, denied Mr. Gomez Gomez's petition for rehearing *en banc* raising that precise issue. *See* Appendix C. It will therefore remain the situation, until this Court decides the issue, that whether a person's prior conviction qualifies as having the use of force against another—and the serious consequences flowing from that designation—will depend on the happenstance of geography.

The Court's guidance on the question presented is further necessary because of the conflict, or at the very least tension, between the Court's decisions in *Leocal* and *Begay* and the holding of circuits like the Fifth Circuit that drunk driving that results in injury constitutes the use of force. Twice this Court has found that a statute prohibiting drunk driving does not qualify as either a "crime of violence" or a "violent felony." Leocal, 543 U.S. at 8-10; *see also Begay*, 553 U.S. at 141-46. In fact, the Court has held that a statute prohibiting drunk driving does not even have a substantial *risk* that force against another person will be used. *Leocal*, 543 U.S. at 10; *see also Begay*, 553 U.S. at 146 (citing with approval *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part), which described drunk driving as "a crime of negligence or recklessness, rather than violence or aggression"). Yet the Fifth Circuit has held that Texas aggravated assault has the use of force as an element, even though Texas courts have construed that statute to cover the exact same conduct: "operating a vehicle while intoxicated and causing injury." *Leocal*, 543 U.S. at 11.

Whether a prior conviction qualifies as a "crime of violence" under 18 U.S.C. § 16 or a "violent felony" under ACCA is a question with enormous consequences. Years of imprisonment turn on the answer. The penalties faced by a person convicted of being a felon in possession of a firearm increase dramatically under ACCA if that person has three previous convictions for a violent felony. The mandatory minimum prison sentence skyrockets from zero to 15 years. *Compare* § 924(a)(2), *with* § 924(e)(1). The maximum prison sentence escalates from 10 years to life. *Compare* § 924(a)(2), with § 924(e)(1).

The force clause appears in a variety of other criminal statutes as well. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A), 924(c)(1)(C), 924(c)(1)(D)(3)(A) (firearms offenses); 18 U.S.C. § 1959(a) (RICO); 18 U.S.C. § 3142(f)(1)(A) (bail); 18 U.S.C. § 3553(f)(1)(C), (g) (eff. Dec. 21, 2018) (eligibility for "safety valve" relief from mandatory minimum drug sentences).

And, the interpretation of the force clause carries severe immigration consequences. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering an alien deportable for committing a crime of violence); *id.* § 1229b(a)(3) (rendering an alien ineligible for cancellation of removal). Indeed, "a conviction under [8 U.S.C.] § 1326(b)(2)—involving a prior conviction of an aggravated felony—is itself an aggravated felony, 'rendering [the defendant] permanently inadmissible to the United States.'" *United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017) (quoting *United States v. Briceno*, 681 Fed. Appx. 334, 337 (5th Cir. 2017) (unpublished)) (brackets added in *Ovalle-Garcia*).

Given the high stakes and widespread use of force clauses in federal criminal and immigration law, this issue raised in this case is worthy of the Court's attention.

Accordingly, the Court should grant Mr. Gomez Gomez's petition for certiorari to resolve the entrenched circuit conflict over the important question of whether a reckless offense has as an element the use of force against another person and thus qualifies as a "crime of violence" or "violent felony." *See* Sup. Ct. R. 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: July 22, 2019

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By 
KATHRYN SHEPHARD
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 26, 2019
Lyle W. Cayce
Clerk

No. 17-20526

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ALAN VICTOR GOMEZ GOMEZ,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before CLEMENT, HIGGINSON, and HO, Circuit Judges.*

JAMES C. HO, Circuit Judge:

Alan Victor Gomez Gomez pled guilty to illegally reentering the United States after deportation. The district court sentenced him under 8 U.S.C. § 1326(b)(2), based on the conclusion that his prior conviction for aggravated assault constitutes a "crime of violence" under 18 U.S.C. § 16, and thus an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). On appeal, he challenges the characterization of his prior conviction as a crime of violence. We affirm.

We recently revisited the definition of "crime of violence," in one of the most consequential en banc rulings our court has issued in recent years. *See*

* Judge Higginson concurs in the judgment only.

United States v. Reyes-Contreras, 910 F.3d 169 (5th Cir. 2018) (en banc). That en banc decision expressly overruled no fewer than eighteen of our prior circuit precedents.

No court approaches the act of overruling one of its prior precedents lightly—let alone eighteen of them. But our court deemed it "necessary" to do so, in order to bring our circuit back into alignment with the statutory text as enacted by Congress and construed by the Supreme Court, not to mention numerous precedents of our sister circuits. *Id.* at 173. In doing so, *Reyes-Contreras* provided important clarity to the issues that originally gave birth to this appeal, as it undoubtedly will in countless other pending and future appeals in our circuit.

Congress defined "crime of violence" in 18 U.S.C. § 16(a) to include "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Gomez Gomez argues that aggravated assault under Tex. Penal Code § 22.02(a)(1) is not a crime of violence, because the offense can be committed through indirect as well as direct uses of force.

This argument might have had some force prior to *Reyes-Contreras*, under our precedents that recognized a distinction between direct and indirect uses of force. But we abrogated that distinction in *Reyes-Contreras*. 910 F.3d at 180–81. We now instead recognize, consistent with the Supreme Court's decision in *United States v. Castleman*, 572 U.S. 157, 162–68 (2014), that the "use of force" under 18 U.S.C. § 16(a) incorporates the common-law definition of force—and thus includes indirect as well as direct applications of force.

Recognizing the significance of our en banc ruling in *Reyes-Contreras*, Gomez Gomez argues that it should not apply precisely because it is a change in the law. That is, he argues that retroactively applying *Reyes-Contreras* to his sentence would violate the Ex Post Facto Clause of Article I, Section 9 of

the Constitution. But the Ex Post Facto Clause does not apply to the judiciary. *See, e.g., Rogers v. Tennessee*, 532 U.S. 451, 460 (2001) ("The Ex Post Facto Clause, by its own terms, does not apply to courts.").

A retroactive application of a judicial decision can in theory violate the Due Process Clause. For example, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Supreme Court held that a defendant's due process rights could be violated by a retroactive application of an unexpected and indefensible expansion of substantive criminal liability. *Id.* at 353–54.

But *Reyes-Contreras* did not make previously innocent activities criminal. It merely reconciled our circuit precedents with the Supreme Court's decision in *Castleman*. As our ruling explained: "The Fifth Circuit stands alone in restricting the reasoning of *Castleman* on direct versus indirect force to misdemeanor crimes of domestic violence." *Reyes-Contreras*, 910 F.3d at 180. We simply backed away from our anomalous position and aligned our circuit with the precedents of other circuits. In short, *Reyes-Contreras* was neither unexpected nor indefensible. *See also United States v. Martinez*, 496 F.3d 387, 390 (5th Cir. 2007) (holding that a retroactive application of a judicial decision resolving a circuit split to a defendant's sentencing was not a violation of due process under *Bouie*).

That conclusion dooms this appeal. In *Reyes-Contreras*, we held that *Castleman* "is not limited to cases of domestic violence," and "that for purposes of identifying a conviction as a [crime of violence], there is no valid distinction between direct and indirect force." 910 F.3d at 182. This holding forecloses Gomez Gomez's use of the distinction between direct and indirect force—a distinction he had hoped would help him establish that aggravated assault under Texas law is not a crime of violence under 18 U.S.C. § 16. *See also United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) (holding that Texas simple bodily assault does not require the use of force and is therefore

not a crime of violence), *overruled by Reyes-Contreras*, 910 F.3d at 181–82 ("We therefore necessarily overrule Part I.A of *Villegas-Hernandez* . . . to the extent that *Villegas-Hernandez* concluded that indirect force does not constitute the use of physical force."). Accordingly, we affirm.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 25, 2019
Lyle W. Cayce
Clerk

No. 17-20526

D.C. Docket No. 4:17-CR-148-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ALAN VICTOR GOMEZ GOMEZ,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Texas

Before CLEMENT, HIGGINSON, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20526

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ALAN VICTOR GOMEZ GOMEZ,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Revised Opinion 3/1/19, 5 Cir., _____, _____ F.3d _____)

Before CLEMENT, HIGGINSON, and HO, Circuit Judges.

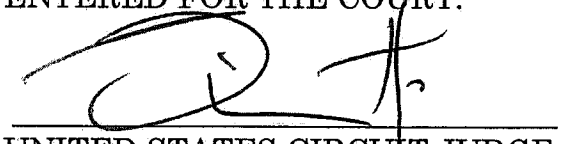
PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and

a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE