No. 19-5410

IN THE

Supreme Court of the United States

CHARLES BORDEN, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

RYAN P. MULVEY
Counsel of Record
MICHAEL PEPSON
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 444-2841

rmulvey@afphq.org

Counsel for Amicus Curiae

May 4, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF is interested in this case because it believes that the Armed Career Criminals Act ("ACCA") is an irrational, draconian statute that is a prime contributor to the problem of mass incarceration and a symptom of the broader problem of overcriminalization. The ACCA, like other mandatory minimum laws, leads to cruel, unjust penalties for individual defendants, collaterally harms their families, damages communities, and undermines the legitimacy of our criminal justice system—all at taxpayer expense.

AFPF also believes that, at the least, ACCA enhancements should be reserved for the most dangerous armed career criminals who intend to violently harm others. The ACCA's severe sentencing

---

[1] All parties have consented to the filing of this brief. *Amicus* states that no counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

consequences should not be imposed based on a defendant's prior reckless actions; that is, when the defendant had no intent to physically hurt anyone. The ACCA's plain language supports this conclusion and is consistent with the historical background presumption that, absent a clear statement to the contrary, criminal statutes that are silent about *mens rea* should be construed to require knowing or intentional conduct.

AFPF believes that the real-world stakes are high and radiate far beyond the specific facts of this particular case. If allowed to stand, the Sixth Circuit's overbroad interpretation of the ACCA's force clause to extend to reckless conduct would wrongly extend its reach to conduct often involving mishaps and mistakes, such as falling asleep at the wheel or failing to put a seat belt on a child. As a practical matter, this would cruelly expand the universe of defendants potentially subject to ACCA sentencing enhancement for conduct as innocuous as possessing a few bullets, which is only *malum prohibitum* for a subset of people (*i.e.*, convicted felons).

SUMMARY OF ARGUMENT

The ACCA and other mandatory minimum statutes frequently result in cruel, unjust outcomes. Those statutes also impose real costs on our society as a whole and undermine the legitimacy of our criminal justice system. As one federal district court judge put it: "Mandatory minimum sentences mean one-size-fits-all injustice. . . . [They] not only harm those unfairly subject to them, but do grave damage to the federal criminal justice system . . . . Perhaps the most serious damage is to the public's belief that the federal

system is fair and rational." Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the U.S. H.R. Judiciary Comm. (June 1, 2017) (statement on behalf of the Judicial Conference of the United States from U.S. District Judge Paul Cassell), *reprinted in* 19 Fed. Sent. R. 344, 344–47 (2007). And as a Sixth Circuit judge aptly put it in another ACCA matter where a defendant was sentenced to fifteen years for possession of a few bullets: "Society pays a great price when Congress over-criminalizes conduct. The cycle of poverty, criminality, and incarceration decimates communities, often for no truly good law enforcement reason." *United States v. Young*, 766 F.3d 621, 633 (6th Cir. 2014) (Stranch, J., concurring) (cleaned up). "Perhaps one of the greatest harms is that indiscriminate criminalization erodes the faith of our citizens in the federal criminal justice system. That loss of faith in the system entrusted with societal justice reverberates through our communities, damaging our families, our schools, and our workplaces[.]" *Id.* at 634. So too here.

The public-health consequences of draconian mandatory minimum statutes like the ACCA have also come home to roost in tragic fashion, endangering not only an aging and vulnerable prison population, as well as prison staff, during the ongoing global health emergency caused by COVID-19.

The reason why the ACCA, in particular, leads to grossly disproportionate and arbitrary sentences is that the triggering event for eligibility for sentencing enhancement—possession of ammunition or a firearm—is not *malum in se* but rather *malum prohibitum* and solely based on status as a felon. There is no requirement that the underlying

convictions (for which the defendant has already paid a debt to society) supporting the fifteen-year mandatory minimum be related—temporally or otherwise—to the events giving rise to the felon-in-possession charge. Thus, the mere possession of bullets may give rise to a mandatory fifteen-year prison sentence, based on state felony convictions dating back over a decade. That is just plain wrong.

Particularly where severe criminal penalties are involved, and a statute is silent about the required *mens rea*, courts should presume a defendant must have acted intentionally to fall within its scope, and that mere recklessness is insufficient. The rule of lenity further counsels in favor of this result. At the least, Congress must speak clearly if it wishes to displace traditional *mens rea* requirements.

It is fundamentally unfair for Mr. Borden (and many others) to languish in prison based on an expansive, overbroad reading of the ACCA that flips the rule of lenity on its head and casts the ACCA dragnet far beyond the limited universe of intentional violent conduct that Congress intended to capture. This Court can, and should, correct this error of statutory interpretation, which has led to profoundly unjust consequences for countless defendants, their families, their communities, and our country.

ARGUMENT

I. THE ACCA IS A CLASSIC EXAMPLE OF OVERCRIMINALIZATION: A REAL PROBLEM THAT HARMS REAL PEOPLE

"The ACCA is not only poorly drafted, but its irrational harshness has become one of the engines driving mass over-incarceration in America." Stephen R. Sady & Gillian R. Schroff, Johnson: *Remembrance of Illegal Sentences Past*, 28 Fed. Sent. R. 58, 63 (2015). As a Chief Deputy Federal Public Defender has aptly explained:

> A penal statute's moral validity should be reflected in society's acceptance of both the prohibition and the punishment as generally applied. . . . The broad reach of the ACCA creates a deep gulf between the statute's literal purpose—incarcerating dangerous career criminals—and its sweep. The Act has no requirement of recency. A career ordinarily connotes a commitment to a course of conduct that is continuing. Can any rational definition of career criminal include someone who committed no new crimes for thirty-five years? Or fifteen years? Or even five years?

Stephen R. Sady, *The Armed Career Criminal Act—What's Wrong with "Three Strikes, You're Out"?*, 7 Fed. Sent. R. 69, 69 (1994).

Many cases showcase the gulf between the ACCA's putative purpose and its all-too-broad and irrational sweep, which leads to unjust and arbitrary results.[2]

Consider James Walker, who was sentenced to fifteen years for the crime of possessing a handful of bullets. (Sadly, after the Court granted cert in Mr. Walker's case, he passed away in January 2020.[3] *See Walker v. United States*, 140 S. Ct. 953 (2020).). His case called to mind Jean Valjean in Les Misérables, who served nearly twenty years in prison for stealing a single loaf of bread to feed his starving family. *See* Victor Hugo, Les Misérables (1893). Or perhaps, as a federal district judge in another case suggested, Mr. Walker's story is better described as something out of a Charles Dickens novel. *See* Sentencing Tr. 25, *United States v. Young*, No. 12-45 (E.D. Tenn. May 9,

---

[2] Prosecutors often use draconian mandatory-minimum sentencing enhancements, like those available under the ACCA, to leverage plea bargains and impose a severe penalty on defendants who, like Mr. Walker, dare to go to trial. *See, e.g.*, *Holloway v. United States,* No. 01–1017, 2014 WL 1942923, at *1 (E.D.N.Y. May 14, 2014) ("This almost 20–year–old case encapsulates several of the problems that have plagued our federal criminal justice system in recent years. Specifically, it is a window into (1) the excessive severity of sentences, (2) racial disparity in sentencing, and (3) prosecutors' use of ultraharsh mandatory minimum provisions to annihilate a defendant who dares to go to trial.").

[3] As a result of the district court's resentencing of Mr. Walker to time served after becoming unshackled from the ACCA, and Mr. Walker's pro bono attorneys' efforts after the Sixth Circuit's erroneous decision, Mr. Walker was not incarcerated when he passed away. Instead, he was free and with his family. This is what is at stake here, if the Sixth Circuit decision stands.

2013) [hereinafter 05/09/13 Sentencing Tr.], ECF No. 41. Sadly, this is an all-too-common tale. "The issue here recurs frequently and typically doubles a defendant's sentence[.]" *Walker v. United States*, 931 F.3d 467, 469 (6th Cir. 2019) (Kethledge, J., dissenting from denial of rehearing en banc).

A *fifteen-year* mandatory minimum sentence for the crime of possessing a handful of bullets—*not even a gun*—is beyond draconian under any set of circumstances in a rational world. Mr. Walker's case is a perfect example of the ACCA's harshness and irrationality. He was punished not for his *present* conduct but for his *past crimes* (for which he had already served his sentence).[4] The *most recent* of the state felonies that purportedly supported Mr. Walker's ACCA sentencing enhancement occurred in 1994—that is, twenty-five years ago. It was not until 2007—thirteen years later—that Mr. Walker was

---

[4] In response to pleas for leniency, one federal judge, in imposing the ACCA-required fifteen-year mandatory minimum for otherwise innocent possession of a few shotgun shells, likened it to something out of a Charles Dickens novel, explaining: "This is a case where the Congress of the United States has instructed federal district judges like myself to impose a sentence of at least 180 months, that is, 15 years. And . . . *this sentence is not so much a punishment for the present crime as it is a punishment for your history of crimes*. . . . And the thinking of the Congress was that people who are in court continually with violations of the law are just too much of a burden to society, so at some point the response should be that we'll just put those people away, and then they will not be a burden and coming into court repeatedly." 05/9/13 Sentencing Tr. 25:14–25 (emphasis added). Judge Collier added that "[a] lot of people think these laws are unfair," urging Mr. Young to appeal. *Id.* at 26:01, 28:17–25.

charged under Section 922(g) as a felon-in-possession simply for possessing thirteen bullets.

Tellingly, there was broad agreement that Mr. Walker did not deserve to spend *fifteen* years in prison based, in large measure, on his past mistakes—for which he had long ago already been punished and paid his debt to society. As the district court put it at Mr. Walker's resentencing in the course of reevaluating the ACCA enhancement after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding the ACCA's "residual clause" violates due process for vagueness):

> And I don't—maybe my recollection is a little faulty, but no one in the courtroom as best I can recall thought that was a just sentence. Whatever Mr. Walker was up to or had been up to and whatever his criminal history was, it was too high. And so I ended up sentencing Mr. Walker to 180 months which is a mandatory minimum sentence in this case, fifteen years in prison.
>
> I usually don't say much about disagreeing with the law. I try not to because I don't make the policy. But I might have said something to the effect that I thought that was too high and that I was going to follow it because I had to.

Resentencing Tr. 07:03–17, *United States v. Walker*, No. 07-20243 (W.D. Tenn. June 28, 2017) [hereinafter 06/28/17 Resentencing Tr.], ECF No. 148.

Again, as the district court emphasized in 2017, Mr. Walker, without question, made mistakes. But he also did everything he could since being arrested in 2007 to turn his life around. *See id.* at 79–86; *see also* Sentencing Tr. 58:07–10, *United States v. Walker*, No. 07-20243 (W.D. Tenn. July 14, 2011) [hereinafter 07/14/11 Sentencing Tr.], ECF No. 124 ("[The Court:] I think Mr. Walker has tried to lead a cleaner life. He seems to have stayed off drugs. He's gotten married. He's tried to devote himself to his family and his church. He's worked. These are all good things."). Indeed, Mr. Walker's "life did stabilize with his marriage [to] . . . a very impressive lady." 06/28/17 Resentencing Tr. 82:18–25; *see also id.* at 82:10–12 ("Unfortunately, his wife is ill and he realizes it's worse than it was. So there is a family need" for his release from prison.). He also successfully overcame the substance-abuse issues he had battled earlier in life, "so [over] the last ten years he's been clean."[5] *Id.* at 80:22.

While incarcerated, Mr. Walker was a model prisoner and did not have any disciplinary infractions. *Id.* at 83. And although Mr. Walker only had an eighth-grade education, while incarcerated he "worked hard for his GED . . . [and] tried to further his education." *Id.* at 83–84. As the district court put

---

[5] When Mr. Walker was sentenced in 2011, the district court indicated that, so long as he remained drug free, he could be a contributing member of society. But the court still expressed doubt as to whether Mr. Walker could win this battle. *See* 07/14/11 Sentencing Tr. 59:15–22. Mr. Walker did just that, as the district court found in 2017. That was no small accomplishment.

it, Mr. Walker, who was then sixty-three years old, was "an older man with a significant criminal history who is locked up for what he thinks may be the rest of his life, and [yet] he's still productive. That's a test of character . . . [and] he passes that test." *Id.* at 86. Given Mr. Walker's personal progress, the district court noted that "really [continued] incarceration doesn't benefit Mr. Walker although it has [previously] benefited him." *Id.* at 85.

Unconstrained by the ACCA, and in light of both Mr. Walker's efforts to rehabilitate himself and his family circumstances, the district court resentenced him to eighty-eight months of imprisonment—which he had already served—and ordered his release from custody.[6] Yet under the ACCA, as interpreted by the Sixth Circuit, Mr. Walker would have been sent back to prison. As Judge Stranch observed after the government's successful appeal of the district court's resentencing:

> James Walker is a 65-year-old man, convicted of possessing 13 bullets that he had found in a rooming house he managed and removed for safekeeping. . . . He has since been released from prison. But because our caselaw has changed, we are sending him back. He

---

[6] The conclusion of the resentencing hearing was telling, and it underscored the undue harshness of Mr. Walker's sentence: "THE COURT: I can't say that I considered your sentence before to be a just sentence, and I hope I've done better with this one." 06/28/17 Resentencing Tr. 07:20–23.

> will now be required to serve a prison sentence that is over double as long—a sentence of no less than 15 years. . . . Our decision today is not only unjust, it is also unsound.

Walker v. United States, 769 F. App'x 195, 200–01 (6th Cir. 2019) (Stranch, J., concurring).

Judge Kethledge echoed this sentiment:

> [T]hough the decision whether to rehear a case en banc depends primarily on jurisprudential concerns, it bears mention that—by our inaction—we send back to prison, quite wrongly in my view, a 65-year-old man whose crime was possession of a dozen bullets and who had already served the sentence . . . that the district court thought sufficient.

Walker, 931 F.3d at 469 (Kethledge, J., dissenting from denial of rehearing en banc). In short, the ACCA resulted in a shocking injustice for Mr. Walker.

But, sadly, this is not an isolated example. Consider the case of Edward Young, who "received a mandatory fifteen-year prison sentence for the crime of having in a drawer in his home seven shotgun shells belonging to his widowed neighbor." *Young*, 766 F.3d at 630 (Stranch, J., concurring). "Young was then caught in the dragnet of the [ACCA] . . . which imposes the same minimum sentence on a person who acquires shotgun shells passively as it does on a recently-released felon who possesses automatic weapons." *Id.* at 630.

As the Circuit explained, "[t]he magnitude of Young's crime was low, as was his culpability and motive." *Id.* at 627 (per curiam). Indeed, "[o]n the well-accepted scale of criminal culpability, ranging from negligent and reckless acts to malicious acts, Young's act of innocently acquiring and knowingly continuing to possess ammunition entail[ed] the lowest level of culpability that could have rendered him guilty of the [felon-in-possession] crime." *Id.* Yet that crime still exposed Young to the ACCA's sentencing enhancement.[7] *Id.* In a concurring opinion, Judge Stranch understandably "express[ed] concern that the ACCA and other mandatory minimum laws are ineffective in achieving their purpose and damaging to our federal criminal justice system and our nation," pointing to Young's "case as another example of the need to reconsider the ACCA and mandatory sentencing in general."[8] *Id.* at 634 (Stranch, J., concurring).

---

[7] Young "acquired the shotgun shells passively, he kept them without any criminal motive, and his knowledge extended only to his possession and not to its illegality." *Young*, 766 F.3d at 627.

[8] "Mandatory minimums can also conflict with the separation of powers doctrine by transferring punishment decisions from the judiciary to the executive branch, thereby converting federal prosecutors into de facto sentencers. Many mandatory minimum cases implicate federalism concerns as well, given that gun and drug prosecutions in U.S. District Courts involve conduct already criminalized by the states and handled predominantly by local courts." Paul G. Cassell & Erik Luna, *Sense and Sensibility in Mandatory Minimum Sentencing*, 23 Fed. Sent. R. 219, 219 (2011).

Another tragic example of the ACCA is the case of Dane Allen Yirkovsky, who "[i]nstead of paying rent, . . . agreed to remodel a bathroom at the home [where he was staying] and to lay new carpeting in the living room and hallway." *United States v. Yirkovsky*, 259 F.3d 704, 705 (8th Cir. 2001). "While in the process of removing the old carpet, Yirkovsky found a Winchester .22 caliber, super x, round. Yirkovsky put the round in a small box and kept it in the room in which he was living[.]" *Id.* For the "crime" of putting a single bullet he found in a box, Yirkovsky received a mandatory-minimum fifteen-year prison sentence under the ACCA as an "armed career criminal." *See id.* at 706. In affirming this sentence, the Eighth Circuit observed: "In our view Yirkovsky's sentence of fifteen years is an extreme penalty under the facts as presented to this court. However, . . . our hands are tied in this matter by the mandatory minimum sentence which Congress established in 18 U.S.C. § 924(e)." *Id.* at 707 n.4.

Mr. Borden, too, fits into this pattern to a certain degree. True enough, he pleaded guilty to being a felon in possession of a firearm, which is a crime. But the reason why Mr. Borden possessed the gun, while not entirely innocent, was not for the purpose of committing any violent acts. Instead, Mr. Borden traded drugs for the gun, which he planned to sell for money.[9] While what Mr. Borden did, and admitted to

---

[9] *See* Am. Plea Agreement ¶ 4(c), *United States v. Borden*, No. 17-CR-120 (E.D. Tenn. filed Jan. 10, 2018), ECF No. 22.

doing,[10] without question violates Section 922(g) and constitutes a felony, that simply is not the type of conduct Congress intended to target under the ACCA.

And, like Mr. Walker and others, the *most recent* of the state felony convictions supporting the ACCA enhancement against Mr. Borden here under the "force clause" was *ten years* before he was charged as a felon in possession.[11] An ACCA-based mandatory minimum simply does not fit comfortably with the facts and circumstances of Mr. Borden's case. This is particularly so because, even in the absence of the ACCA enhancement, the statutory maximum term of imprisonment for a Section 922(g) violation is still *ten years*. There is no rational reason why the district court should not have at least had discretion to impose a reasonable and appropriate term of imprisonment, consistent with the Section 3553(a) factors and applicable sentencing guidelines. Congress did not intend for defendants like Mr. Borden to be caught within the ACCA's dragnet.

As these all-too-common examples illustrate, the ACCA is a driving force of overincarceration. *See* Sady & Schroff, *supra*, at 58; *see also* Benjamin Levin, *Guns and Drugs*, 84 Fordham L. Rev. 2173 (2016). It

---

[10] Relatedly, at sentencing, the government requested a downward departure for Mr. Borden due to the substantial assistance he provided to law enforcement, which was granted.

[11] Mr. Borden was arrested for possessing a firearm on April 11, 2017. *See* Am. Plea Agreement ¶ 4(c). The three aggravated assault convictions supporting enhancement under the ACCA's "force" clause occurred in 2002, 2003, and 2007, respectively. *See id.* ¶ 4(g).

is also part of a broader pathology in the federal criminal law toward excessive punishment. *Cf. Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting) (The "real issue [is] overcriminalization and excessive punishment in the U.S. Code.").

To avoid or limit the ACCA's harshest and most irrational applications, its scope at least should be properly cabined to limit its reach to only the most dangerous armed career criminals clearly targeted by Congress. As discussed below, the ACCA's force clause was never intended to apply to reckless conduct. Instead, Congress's focus was on giving prosecutors a tool—to be used sparingly—to protect the public from violent, recidivist career offenders who have shown a penchant for intentionally inflicting serious harm against others using weapons and who would pose a real danger to society if not incarcerated.

II. ABSENT A CLEAR STATEMENT TO THE CONTRARY, COURTS SHOULD PRESUME THAT CRIMINAL STATUTES REQUIRE KNOWING OR INTENTIONAL CONDUCT

A. The ACCA's Force Clause Unambiguously Distinguishes Between Intentional and Reckless Conduct Resulting in Harm

As Petitioner ably explains, *see* Pet. Br. at 18–23, the ACCA's plain language unambiguously forecloses imposition of a sentencing enhancement based on crimes that could be committed with a *mens rea* of recklessness. Instead, only crimes that *require*, as an element, the intentional use of substantial, purposeful, violent force *against the person of another* qualify to make someone an "armed career criminal."

To be sure, this Court has "held that reckless assaults—for example, a husband hurling 'a plate in anger against the wall near where his wife is standing,' which causes the shards to ricochet and injure her—involve 'the use . . . of physical force' as that phrase is used in [Section] 921(a)(33)(A)." *United States v. Harper*, 875 F.3d 329, 331 (6th Cir. 2017) (quoting *Voisine v. United States*, 136 S. Ct. 2272, 2278–79 (2016)). *But see Voisine*, 136 S. Ct. at 2284 (Thomas, J., dissenting) ("When a person talks about 'using force' against another, one thinks of intentional acts—punching, kicking, shoving, or using a weapon. Conversely, one would not naturally call a car accident a 'use of force,' even if people were injured by the force of the accident. As Justice Holmes observed, '[E]ven a dog distinguishes between being stumbled over and being kicked.'" (quoting Oliver Wendell Holmes, Jr., The Common Law 3 (1881)).

But notwithstanding *Voisine*'s interpretation of the phrase "the use of physical force," as used in a different statute,[12] to only require a *mens rea* of recklessness, the ACCA's force clause requires more—namely, the "use of physical force *against the person of another*[.]" 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added);[13] *see* Jeffrey A. Turner, Note, *Reestablishing a*

---

[12] *But see Voisine*, 136 S. Ct. at 2290 (Thomas, J., dissenting) ("[A] 'use of physical force' has a well-understood meaning applying only to intentional acts designed to cause harm.").

[13] "*Voisine* expressly did not decide whether reckless conduct falls within the scope of § 16(a) and instead confirmed that it did not foreclose a different interpretation of that statute." *United States v. Orona*, 923 F.3d 1197, 1203 (9th Cir. 2019), *reh'g granted*, 942 F.3d 1159 (9th Cir. 2019).

Knowledge Mens Rea Requirement for Armed Career Criminal Act "Violent Felonies" Post-Voisine, 72 Vand. L. Rev. 1717, 1731–44 (2019) (explaining why *Voisine*'s narrow holding turning on the word "use" and its reasoning do not extend to the ACCA).

"While the word 'use' by itself is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness, the subsequent phrase *against the person of another* arguably conveys the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury." *United States v. Middleton*, 883 F.3d 485, 498 (4th Cir. 2018) (Floyd, J., concurring in part and concurring in the judgment) (cleaned up); *accord Walker*, 931 F.3d at 469 (Kethledge, J., dissenting from denial of rehearing en banc) (explaining the ACCA force clause requires that the defendant act knowingly or intentionally with respect to the harm against another); *cf. Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("The key phrase in [18 U.S.C.] § 16(a)—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.").

The ACCA's title, the "Armed Career Criminals Act," further underscores the statute's focus: protecting society from dangerous *armed* career criminals who, on purpose and by design, use firearms and other weapons to perpetrate violent crimes against others. "As suggested by its title, the [ACCA] focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Begay v. United States*, 553 U.S. 137, 146 (2008); *see United States v. Begay*,

470 F.3d 964, 981 n.3 (10th Cir. 2006) (McConnell, J., dissenting in part) (explaining "the title—the 'Armed Career Criminal Act'—was not merely decorative"), *overruled by* 553 U.S. 137 (2008); *see also Yates*, 135 S. Ct. at 1090 (Alito, J., concurring in the judgment) ("Titles can be useful devices to resolve doubt about the meaning of a statute." (cleaned up)). The ACCA's "title is especially valuable here because it reinforces what the text's nouns and verbs independently suggest," *id.*, namely, that only crimes where the perpetrator knowingly or purposely causes the victim bodily injury can be ACCA enhancement predicates.

This makes sense because "[t]he ACCA aims at state offenses that 'show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger,' rather than offenses that merely 'reveal a degree of callousness toward risk.'" *Middleton*, 883 F.3d at 499 (Floyd, J., concurring in the judgment) (quoting *Begay*, 553 U.S. at 146). Reckless use of force resulting in harm may give rise to criminal liability, but it does not meet this test. *See United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992) ("The term 'career offender' implies an ongoing intent to make a living through crime, and it is doubtful that one can make a career out of recklessness."); *see generally* Turner, *supra*, at 1717 (arguing for a knowledge *mens rea* requirement for ACCA-triggering "violent felonies"). Instead, use of force against the person of another with the intent and purpose of causing harm is the *sine qua non* and touchstone for a "violent felony" under the ACCA.

Congress's decision to draw a sharp distinction between reckless and intentional harm also reflects

the fundamental principle that intent matters in assigning blameworthiness, as well as the bedrock background presumption in the criminal law that unless Congress clearly states otherwise, criminal liability should only be imposed for knowing or intentional harms.

B. The Role of *Mens Rea* in Distinguishing Culpability Levels is Deeply Rooted in Our System of Law

The ACCA's force clause should be construed "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples v. United States*, 511 U.S. 600, 605 (1994). "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951).

The modern form of the principle that the accused must have possessed the requisite *mens rea* at the time of an action before that action can qualify as a criminal offense dates to at least the thirteenth century. *See* Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Liability*, 30 B.C. L. Rev. 337, 338 n.4 (1989) ("There is no debate that, by the middle of the thirteenth century when Bracton wrote *De Legibus Angelae*, *mens rea* was becoming necessary[.]"); *see generally* Michael Pepson, Comment, *Therapeutic Jurisprudence in Philosophical Perspective,* 2 J. of Law, Phil. & Culture 239, 254–56 (2008). Indeed, by the end of the twelfth century, English jurists had begun to pay attention to the ancient Roman concepts of *dolus* and *culpa*, both of which centered on the mindset of the accused.

See Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 983 (1932) ("Bracton borrow[ed] ideas . . . directly from the Code and Digest," which were Roman texts.).

As the concept of *mens rea* became firmly embedded in English jurisprudence, so too did the notion that the moral culpability of the accused was required for conviction. *Id.* at 988–89. Consequently, by the dawn of the seventeenth century, *mens rea* was recognized "as a *sine qua non* for criminal conviction." Singer, *supra*, at 337–38. And, as Blackstone would write in the eighteenth century, "an unwarrantable act without a vicious will is no crime at all. To constitute a crime against human laws there must be first, a vicious will, and secondly, an unlawful act consequent upon such vicious will." 4 William Blackstone, Commentaries *21.

The fulcrum of the criminal law's impositions of liability has historically turned on a finding that the accused has made a blameworthy choice: "*Actus non facit reum nisimens sit rea*." *See* Sayre, *supra*, at 988. As this Court put it:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It 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. A relation between some mental element and punishment for a harmful act is almost as instinctive as

> the child's familiar exculpatory "But I didn't mean to[.]"

United States v. Morissette, 342 U.S. 246, 250–51 (1952) (footnotes omitted). Accordingly, "[t]he law has long used actors' intent or purpose to distinguish between two acts that may have the same result. . . . Put differently, the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their unintended but foreseen consequences." *Vacco v. Quill*, 521 U.S. 793, 802–03 (1997).

Importantly, *mens rea* does not merely play a critical threshold gatekeeping role in distinguishing between innocuous and criminal conduct at the guilt-innocence stage. Even when a defendant's actions, by all accounts, give rise to criminal liability, *mens rea* performs an important function: distinguishing the *degree* to which the defendant is culpable and how blameworthy the actions are. *Mens rea* has therefore historically played a vital role in assigning the proper punishment proportional to an offense.

"*Mens rea*, a principle central to our criminal law, is crucial in linking punishment to individual culpability. It is the bridge between morality and law." Hon. Jack Weinstein, *et al.*, *The Denigration of Mens Rea in Drug Sentencing*, 7 Fed. Sent. R. 121, 121 (1994). "The operation of the *mens rea* principle takes on a special character at the sentencing stage. . . . [O]ne might assume that concerns about the *mens rea* principle fall away once a finding of guilt has attached. In fact, the opposite is true." *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 521 (E.D.N.Y. 1993). "Commission of a blameworthy act is merely the first of two culpability-related inquiries; it is also

necessary to ask whether the defendant's act was sufficiently blameworthy to warrant the penalties afforded by the statute in question." Stephen F. Smith, *Proportional Mens Rea*, 46 Am. Crim. L. Rev. 127, 155 (2006). Unless Congress clearly states otherwise, "'[i]nnocence' will never be fully protected until courts recognize that *mens rea* must, to the maximum extent possible, guarantee both culpability and proportionality for every potential federal defendant[.]" *Id.*

By way of example, as one commentator aptly put it in the context of homicide:

> The failure to distinguish between those who intend to take life and those who do not, or between those who intend to inflict gratuitous suffering and those who do not, or between those who kill in order to further a felony and those who do not, creates a difficulty which extends well beyond lack of theoretical congruence. The distinctions between intent, recklessness, negligence, and pure accident permeate the criminal law. They are the primary criteria by which society grades offenses. For any given prohibited result, if society makes a distinction at all . . . it always treats the person whose purpose was to produce that result as the most serious offender. Perhaps the main reason for this is that choice underlies any theory of desert.

Daniel Givelber, *The New Law of Murder*, 69 Ind. L.J. 375, 421–42 (1994); *see* Stephen F. Smith, *"Innocence"*

and the Guilty Mind, 69 Hastings L.J. 1609, 1635 (2018) ("Assault, in any form, is morally blameworthy, yet modern legislatures often peg the level of offense and punishment for particular types of assaults to *mens rea*. Basic assault is a crime, often punished as a misdemeanor, but the penalties for assault increase based on *mens rea*: intent to inflict serious bodily harm, rape, or kill results in felony convictions and progressively more severe penalties."). Indeed, "some of the law's harshest punishments are often (and have long been) reserved for intentional wrongs precisely because to intend something is to endorse it as a matter of free will—and freely choosing something matters." Neil Gorsuch *et al.*, A Republic, If You Can Keep It 206 (2019).

So, too, with the ACCA's force clause: those who commit crimes with the *intent* to cause bodily harm to others deserve a more severe sanction than those who recklessly do so because some actions that result in harm are less blameworthy than others. And reckless conduct is less blameworthy than intentional conduct. This makes sense because "[p]lainly, a meaningful analytical distinction does exist between intending and foreseeing a consequence." *Id.*

Drunk driving, for example, may lead to terrible consequences, and there is no question that criminal sanctions of varying degrees may be appropriate penalties. But a defendant who drives drunk and gets into an accident that results in bodily harm to another—without any intention of doing so—is a far cry from a defendant who on purpose shoots another person with the intent to kill them. *See Leocal,* 543 U.S. at 13 (noting, for purposes of 18 U.S.C. § 16, that certain DUI statutes "do not require any mental state

with respect to the use of force against another person, thus reaching individuals who were negligent or less" and consequently do not qualify as crimes of violence). And it bears noting, as Petitioner explains, under Tennessee law individuals have been convicted of reckless aggravated assault for a variety of driving infractions. *See* Pet. Br. 38–39; *see also, e.g.*, *State v. Cope*, No. M2014-00775-CCA-R3-CD, 2015 WL 4880347, at *6 (Tenn. Crim. App. Aug. 14, 2015) (affirming reckless aggravated assault conviction rejecting sufficiency challenge when defendant had blood-alcohol level of 0.02, took Alprazolam medication as prescribed, and ran red light causing accident).

"[T]he distinction between knowing or intentional conduct, on the one hand, and reckless conduct, on the other, is one of the more familiar in criminal law. And a desire to simplify . . . [courts'] own application of the law is hardly good enough reason to double a man's Guidelines range[.]" *Harper*, 875 F.3d 329, 333 (6th Cir. 2017). There is a material difference in the culpability of those who *specifically intend* to cause bodily harm to other human beings and those whose actions negligently or recklessly cause harm. A purse-snatcher who intends to steal the purse for the purpose of obtaining money and accidentally causes harm to the purse owner in the process has certainly committed a crime deserving of punishment. But such conduct is not, as a matter of degree, as blameworthy as that of a purse-snatcher who, on purpose, violently attacks the victim with the specific intent of harming her. The former "lower grade offenders," who do not intend to cause physical harm, "do not bear the hallmarks of being the kind of people

who are likely to point a gun and pull the trigger[.]" *Stokeling v. United States*, 139 S. Ct. 544, 559 (2019) (Sotomayor, J., dissenting). The key point is that "[r]eckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, *the actor does not intend to cause the harm which results from it*." Restatement (Second) of Torts § 500 cmt. f (Am. Law Inst. 1965) (emphasis added).

C. There Should Be a Background Presumption in Favor of a Knowledge or Intent *Mens Rea* for Statutes Like the ACCA that Expose Defendants to Severe Penalties

"[D]etermining the mental state required for commission of a federal crime requires construction of the statute and inference of the intent of Congress." *Staples*, 511 U.S. at 605 (cleaned up). Accordingly, this Court has "stated that offenses that require no mens rea generally are disfavored and . . . some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime." *Id.* at 606 (cleaned up).

This Court has not hesitated to "read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). "The fact that the statute does not specify any required mental state . . . does not mean that none exists. . . . The central thought is that a defendant must be blameworthy in mind before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter,

malice aforethought, guilty knowledge, and the like." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (cleaned up). "[A] severe penalty is a . . . factor tending to suggest that Congress did not intend to eliminate a mens rea requirement." *Staples*, 511 U.S. at 618.

Of course, subject to other constitutional limits on Congress's authority to criminalize conduct, Congress has the power to clearly specify a low *mens rea* for a *malum prohibitum* crime carrying severe penalties. And, unfortunately, Congress has done so all too often. Under our system of government, Congress may pass stupid laws that are nonetheless constitutional. "Justice Scalia once said that he wished all federal judges were given a stamp that read 'stupid but constitutional.'" *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 714 (7th Cir. 2016).

But absent a clear congressional statement to the contrary, "[c]rimes for which Congress has prescribed severe penalties should require correspondingly high levels of *mens rea* (such as purpose or knowledge) so that offenders will be seriously blameworthy. Only then will convicted offenders be morally deserving of the stiff penalties federal law routinely affords." Smith, *Innocence*, *supra*, at 1660. At the least, ACCA enhancements should be reserved for truly "violent felonies" in which the defendant knowingly or intentionally harmed his or her victim. *See* Turner, *supra*, at 1747 ("[I]n an era where government and society are recognizing the perils of mass incarceration, an express knowledge requirement would ensure that the ACCA imposes fifteen-year mandatory minimum sentences only on the most dangerous offenders.").

Particularly given that imposition of the ACCA enhancement carries with it a *fifteen-year* mandatory minimum, coupled with the ACCA's focus on incapacitating truly dangerous, armed career criminals, a default *mens rea* of knowingly and purposely using force to harm another person should be presumed here.[14]

III. UNDER THE RULE OF LENITY, THE ACCA'S FORCE CLAUSE MUST BE NARROWLY CONSTRUED

If there were any doubt whether "use of force against the person of another" necessarily limits the ACCA's force clause to intentional, as opposed to reckless, conduct, the rule of lenity demands the statute be construed in favor of Mr. Borden.[15]

"[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 135 S. Ct. at 1088 (cleaned up); *see, e.g.*, *Begay*, 553 U.S. at 148 (Scalia, J., concurring in the judgment) ("[B]ecause I cannot say that drunk driving clearly poses such a risk (within the meaning of the statute), the rule of lenity brings me to concur in the judgment

---

[14] The Model Penal Code's default "recklessness" *mens rea* is ill suited to the ACCA given its extreme harshness and literal focus: armed career criminals. *See generally* Model Penal Code § 2.02(3) (establishing recklessness as the statutory default for culpability if the statute does not otherwise provide a *mens rea*).

[15] "[T]he burden is on the government to show that a prior conviction counts as a predicate offense for the purpose of an ACCA sentence enhancement." *United States v. Scott*, 954 F.3d 74, 87 (2d Cir. 2020).

of the Court."). Under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is 'perhaps not much less old than' the task of statutory 'construction itself.'" *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 95 (1820) (Marshall, C. J.)).

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008); *see also Leocal,* 543 U.S. at 11 n.8 (reasoning that "[e]ven if § 16 lacked clarity" on whether negligent or strict-liability crimes were crimes of violence, the Court "would be constrained to interpret any ambiguity in the statute in petitioner's favor"). Thus, "when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987). As Justice Scalia explained: "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

The rule of lenity dictates that the ACCA's force clause cannot be triggered by reckless conduct. *See, e.g.*, *United States v. Rose*, 896 F.3d 104, 109–10 (1st Cir. 2018) ("[T]he rule of lenity brought us to the

conclusion that Maine reckless aggravated assault was not a violent felony under ACCA's force clause."); *United States v. Griffin*, No. 07-28-1, 2018 U.S. Dist. LEXIS 159377, at *15 (E.D. Pa. Sept. 18, 2018) (explaining "the rule of lenity counsels against interpreting the ACCA to include reckless conduct"); *see also Yates*, 135 S. Ct. at 1088 (invoking the rule of lenity when a definition meant the difference between up-to-twenty years in prison and no liability).

It is simply wrong for Mr. Borden, and those similarly situated, to "languish[] in prison" without "the lawmaker ha[ving] clearly said they should." *United States v. Bass*, 404 U.S. 336, 348 (1971). "[I]t is appropriate, before . . . [the Court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Yates*, 135 S. Ct. at 1088 (quotation marks omitted)); *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1225–27 (2018) (Gorsuch, J., concurring in part and in the judgment). Because the ACCA's force clause does not clearly specify that the qualifying predicate "violent felonies" may be committed with a *mens rea* of recklessness, only those crimes that necessarily require purposeful and intentional violence against the person of another as an element of the offense can trigger the ACCA enhancement.

IV. MASS OVERINCARCERATION THREATENS PUBLIC HEALTH

Although ultimately unnecessary to the resolution of this case, it does bear brief mention that a proper interpretation of the ACCA's "force" clause to exclude crimes that can be committed with a *mens rea* of recklessness actually protects public safety, including

the safety of prison staff and health professionals, and conserves medical supplies—and taxpayer resources.

As one commentator recently put it:

> The spread of the coronavirus may only be the tipping point for what can happen when we fail to consider all the costs and consequences of our system of mass incarceration. We justify locking people up to protect public safety. Yet public safety will be at even greater peril if we fail to mitigate risks associated with confining too many people in jails . . . during a pandemic.

Josiah Rich *et al.*, *We Must Release Prisoners to Lessen the Spread of Coronavirus*, Wash. Post, Mar. 17, 2020, https://wapo.st/2S353lc; *see generally* Rich Schapiro, *1st Prison Inmate to Die of Coronavirus Wrote Heartbreaking Letter to Judge*, NBC News, Apr. 5, 2020, https://nbcnews.to/2yBQGNN.

This particularly cruel collateral consequence resonates here. As of May 3, 2020, 1,926 federal inmates have confirmed positive test results for COVID-19, and 38 federal inmate deaths have been attributed to the virus. *See COVID-19 Coronavirus*, Fed. Bureau of Prisons, https://bit.ly/3eKDo27 (last visited May 4, 2020). Public health experts have cautioned that federal prisons are "breeding grounds" for COVID-19 that pose "significant health risks" to the people in them. *See* Letter from Public Health Experts to the President Donald J. Trump (Mar. 27,

2020), *available at* https://bit.ly/351IpPp. Almost 20 percent of federal inmates are over the age of 50. *See Inmate Age*, Fed. Bureau of Prisons, https://bit.ly/3azrip4 (last visited May 4, 2020). Many of these older inmates remain incarcerated due to mandatory minimum sentences imposed pursuant to statutes like the ACCA that are grossly disproportionate to the crime of conviction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RYAN P. MULVEY
Counsel of Record
MICHAEL PEPSON
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
rmulvey@afphq.org

Counsel for Amicus Curiae

May 4, 2020