No. 19-5410

IN THE
Supreme Court of the United States

CHARLES BORDEN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF LAW PROFESSORS LEAH LITMAN *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, listed in the Appendix, are leading law professors and scholars who teach, research, and write extensively about constitutional law, criminal procedure, and related topics. *Amici* have a professional interest in promoting clear, consistent, and constitutional interpretation of the law, including an interest in ensuring that the Armed Career Criminal Act is applied according to its text and within constitutional limits.

[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amici* and their counsel made such a contribution. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

I. A. The Armed Career Criminal Act's force clause defines "violent felony" as encompassing crimes that require, "as an element," the "use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). That text—and particularly the prepositional phrase "against the person of another"—forecloses any effort to read the ACCA's force clause to include crimes of recklessness as predicate offenses. It is wholly unnatural to say that someone who stumbles into another has used "force against the person of another," *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004), whether that stumble resulted from negligence or recklessness. Instead, as a matter of ordinary usage, "use of physical force against" another person requires "'knowledge or intent that the force apply to another person.'" *Walker* v. *United States*, 931 F.3d 467, 468 (6th Cir. 2019) (Kethledge, J., dissenting), cert. dismissed, 140 S. Ct. 953 (2020). When Congress intends instead to punish recklessly causing injury to others, it knows how to do so. Nothing in the text of the ACCA—a statute imposing lengthy mandatory sentences on "armed career criminals"—extends to individuals previously punished for mere recklessness.

B. The ACCA's plain meaning is reinforced by the absurd consequences of a contrary interpretation. If the force clause included reckless use of force affecting rather than targeting others, it would sweep in crimes that are neither "violent and aggressive" nor worthy of the "'armed career criminal[]'" label. *Begay* v. *United States*, 553 U.S. 137, 146, 148 (2008). Force-clause predicate offenses would include crimes that, though recklessly resulting in bodily harm, are far more naturally described as accidents than violent felonies. It would reach a police officer who drives recklessly to a crime scene and acci-

dentally strikes another officer; or a thief who grabs a bag of money, to have it accidentally catch on a woman's ring and cause her finger minor injury. It would also reach myriad state and federal statutory offenses that punish the mere creation of some *risk* of bodily harm. For example, in Tennessee, the government's interpretation of "use" or "threatened use" of force "against the person of another" would encompass someone who, without touching another vehicle or causing harm, created a risk of injury by passing other drivers in a no-passing zone while evading arrest. *State* v. *Cross*, 362 S.W.3d 512, 524 (Tenn. 2012). Punishing such offenses with 15-year mandatory minimum sentences defies statutory text and common sense alike.

II. A. Stretching the force clause to encompass recklessness also threatens to render the force clause unconstitutionally vague—a problem that has already invalidated another part of the ACCA. In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), this Court identified two features of the ACCA's so-called "residual clause" that rendered it unconstitutionally vague. First, that clause required the use of a "categorical approach" that ties judicial assessment of whether a crime is a violent felony "to a judicially imagined 'ordinary case' of [the] crime." *Id.* at 2557. Second, it left "uncertainty about how much risk it takes" to elevate a crime to a violent felony. *Id.* at 2558. Those features "required courts to assess the hypothetical risk posed by an abstract generic version of the offense"—an unacceptably indeterminate task. *Welch* v. *United States*, 136 S. Ct. 1257, 1262 (2016).

B. Re-imagining the force clause to encompass reckless crimes would have the same effect. The categorical approach requires courts to look to the generic version of the offense (this time, to identify its typical elements) and

to hypothesize the least culpable conduct that would realistically be prosecuted. Courts conducting that analysis will face serious uncertainty about which—and whether—such reckless offenses categorically require force against the person of another. Given the range of crimes and offending conduct, as well as the diverse array of state and federal definitions for "recklessness," the analysis would generate the very arbitrariness this Court condemned in *Johnson*. It would also require federal courts to draw unstable distinctions between recklessness and negligence under varying state laws and make indeterminate guesses about how state courts would define the degree and type of risk their offenses require. The resulting analysis is irredeemably vague.

ARGUMENT

Text and common sense dictate the same result here. The text of the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. §924(e), limits its draconian penalties to recidivists who repeatedly commit armed or violent crimes. The ACCA's "force clause" cannot be read, consistent with ordinary usage, to encompass offenses that are merely reckless. The contrary view would not just produce absurd results; it would also threaten to render the ACCA's "force clause" unconstitutionally vague.

I. THE TEXT OF THE ARMED CAREER CRIMINAL ACT CONTROLS THIS CASE

Questions of statutory construction must "begin with the text." *Limtiaco* v. *Camacho*, 549 U.S. 483, 488 (2007). The ACCA's text forecloses any interpretation that would reach offenses committed recklessly. That conclusion is reinforced by the absurd consequences of a contrary construction.

A. The Force Clause's Text Forecloses Efforts To Extend It to Reckless Offenses

The ACCA defines "violent felony" to include any "crime punishable by imprisonment for a term exceeding one year" that "has as an element the *use*, *attempted use*, or *threatened use* of physical force *against the person of another*." 18 U.S.C. §924(e)(2)(B)(i) (emphasis added). That phrase cannot, in ordinary usage, be read to encompass merely reckless offenses.

1. The word "use," standing alone, may say nothing about the actor's "mental state * * * with respect to the harmful consequences of his volitional conduct." *Voisine* v. *United States*, 136 S. Ct. 2272, 2279 (2016). But Congress's decision to require the use of force "against the person of another" speaks volumes. The ordinary meaning of "against" includes "'in opposition to'" and "'adverse or hostile to.'" Pet. Br. 19 (gathering dictionary definitions). As this Court has observed, "the preposition 'against'" is "followed by the *target* of * * * hostilities." *District of Columbia* v. *Heller*, 554 U.S. 570, 586 (2008) (emphasis added). Thus, "'understood the way the English language is ordinarily understood,' the phrase 'use . . . of physical force against the person of another' requires 'not merely recklessness as to the consequences of one's force, but knowledge or intent that the force apply to another person.'" *Walker* v. *United States*, 931 F.3d 467, 468 (6th Cir. 2019) (Kethledge, J., dissenting), cert. dismissed, 140 S. Ct. 953 (2020).

Precedent all but confirms that conclusion. In *Leocal* v. *Ashcroft*, this Court recognized it would be unnatural to say a person used physical force against another "by stumbling and falling into him." 543 U.S. 1, 9 (2004). That remains true if the stumble and fall result from recklessness—*e.g.*, texting while running or performing

an ill-advised parkour maneuver. In ordinary usage, using force "against the person of another" means the intentional application of force to a person, not unintended impact (even if recklessly caused).

It is likewise unnatural to equate using force "against the person of another" with using force *against something else* (property, the air, a structure). That remains true even if the actor exhibited some indifference to the risk someone might be injured. Conduct may recklessly harm an unfortunate bystander, affecting him and injuring him. But no one would say that the offender "used force against" him as that phrase is ordinarily understood.

2. A contrary construction fails to "give effect to" the restrictive prepositional phrase "against the person of another," *Leocal*, 543 U.S. at 12, rewriting the statute to impose a 15-year minimum in connection with uses of force that simply *cause injury to* or *affect* another person.

If Congress had intended to punish conduct injuring a person, affecting a person, or targeting a non-person, "it kn[ew] how to do so." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476 (2003). When Congress first enacted the ACCA, it simultaneously amended 18 U.S.C. §844(f), which criminalizes malicious destruction of federal property "by means of fire or an explosive." Act of Oct. 12, 1984, Pub. L. 98-473, §1014, 98 Stat. 1837, 2142. The amendment provided for an enhanced sentence whenever "personal injury results to any person * * * as a *direct or proximate result* of conduct prohibited by this subsection." *Ibid.* (emphasis added). Congress had already specified a *mens rea*—"malicious"—which typically includes acting "with willful disregard of the likelihood that damage or injury will result." *McFadden* v. *United States*, 814 F.2d

144, 146 (3d Cir. 1987). If Congress had intended to punish recklessly caused injuries under the force clause, it would have used similarly "express language." *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 378 (1954). It did not. It required the use of force "against" another person instead.[2]

Congress also understood how to include uses of force against objects. In other contexts, Congress has chosen to punish "the use * * * of physical force against the person *or property* of another." 18 U.S.C. § 924(c)(3)(A) (emphasis added); see also 18 U.S.C. § 16(a) (same). By specifying "the person of another" as the mandatory target of force, Congress "implie[d] the exclusion of other[ ]" non-human targets—or conduct with no target whatsoever. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018).

For those reasons, the ACCA contrasts with the statute at issue in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016). That provision, 18 U.S.C. § 921(a)(33)(A), defines "misdemeanor crime of domestic violence" to include any offense requiring "the use or attempted use of physical force," with no requirement that it be "against" anything. Consequently, this Court read it as encompassing "volitional" uses of force, whether directed at another person, a wall, or nothing; the statute thus applied even if the

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[2] Congress regularly uses express language, such as "affecting" (rather than "against"), when it seeks to enhance punishment based on potentially unintended consequences. *E.g.*, 10 U.S.C. § 919(b) (party guilty of involuntary manslaughter if he "perpetrate[s] an offense * * * directly affecting" the victim); *United States* v. *Moglia*, 3 M.J. 216, 217-218 (C.M.A. 1977) (distributing drugs "to the deceased" falls within § 919(b)); see *United States* v. *Bennitt*, 72 M.J. 266, 271 (C.A.A.F. 2013) (assuming "the distribution of drugs could * * * directly affect[ ] the person").

actor was merely reckless as to the "consequences of his volitional" use of force. *Voisine*, 136 S. Ct. at 2279. But the ACCA is deliberately different: It adds the "key" modifying phrase "'against the person * * * of another.'" *Leocal*, 543 U.S. at 9. As Judge Kethledge explained, "[t]hat difference in text yields a difference in meaning." *Walker*, 931 F.3d at 468 (dissenting opinion).[3]

B. Congress Appropriately Excluded Reckless Felonies To Avoid Absurd Consequences

Congress had good reason to exclude reckless felonies from the force clause's ambit: Such a construction yields absurd results. It extends the ACCA—and its breathtaking mandatory minimums—to felonies that cannot remotely be considered "violent." Congress avoided that result by enacting a statute that requires violent conduct "*against*" and not merely "affecting" the "person of another."

1. There are a "host of crimes" that would qualify as predicates for a 15-year mandatory minimum if the force clause encompassed recklessness that merely affects the person of another. *Begay* v. *United States*, 553 U.S. 137, 146 (2008). "[T]hough dangerous" in that harm or death

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[3] Although the statute in *Voisine* required the perpetrator be a family member "of the victim," 18 U.S.C. § 921(a)(33)(A)(ii), use of the term "victim" makes no difference. "[U]nfortunate victim[s]" exist even absent *negligence*. *N.Y. Cent. R.R. Co.* v. *Ambrose*, 280 U.S. 486, 490 (1930). There are victims of blameless "misfortune," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978), or "their own success," *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 226 (2011). The term "victim" implies nothing about an offender's mental state. By contrast, in ordinary English, using force "against the person of another" means intentional application of force to a person, not unintended impact (even if recklessly caused).

can result, such offenses are far more easily described as accidents than violent felonies. *Ibid.* None is "typically committed by those whom one normally labels 'armed career criminals.'" *Ibid.*

For example, Texas punishes recklessly "caus[ing] serious bodily injury to another," when committed "by a public servant acting under color of the servant's office or employment." Tex. Penal Code Ann. § 22.02(a)(1), (b)(2)(A). A police officer was convicted of that crime when, speeding to the scene of a reported crime without activating his lights or siren, he collided with another car, tragically "propell[ing] [the officer's] patrol car into" another officer nearby. See *Seaton* v. *State*, 385 S.W.3d 85, 88 (Tex. Ct. App. 2012). The notion that Congress intended that officer's reckless offense to potentially convert him into an armed career criminal—by categorizing it as "the use" of force "against the person of another"—blinks reality.

That Texas offense hardly stands alone. States have enacted assault and robbery statutes that require, as an element, reckless causation of bodily injury. But individuals have been convicted under those statutes when they recklessly caused injury or death by:

- driving unsafely, such as by speeding without headlights, *Williams* v. *State*, 31 So. 3d 69, 72, 82 (Miss. 2010) (Miss. Code Ann. § 97-3-7(2));
- disregarding a stop sign and crossing three lanes of a four-lane road, *State* v. *Gillon*, 15 S.W.3d 492, 496-497 (Tenn. Crim. App. 1997) (Tenn. Code Ann. § 39-13-102(a)(2) (Supp. 1993), now at § 39-13-102(a)(1)(B));
- driving drunk, *State* v. *Reando*, 313 S.W.3d 734, 740 (Mo. Ct. App. 2010) (Mo. Ann. Stat. § 565.060.1(3) (2000), now at § 565.052.1(3)); *Gray* v. *State*, 427 So.

2d 1363, 1365-1366 (Miss. 1983) (Miss. Code Ann. § 97-3-7(2));

- jumping over the second-floor railing to the ground of the mall while fleeing, *Craver* v. *State*, No. 02-14-76-CR, 2015 WL 3918057, at *5 (Tex. Ct. App. June 25, 2015) (Tex. Penal Code Ann. § 29.02(a)(1)); and
- grabbing a bag with money without touching another person, but causing minor injuries because the bag scratched the owner's hand, *State* v. *Jones*, No. 85050, 2005 WL 1190723, at *1-3 (Ohio Ct. App. May 19, 2005) (Ohio Rev. Code § 2911.02(A)(2)), or unexpectedly snagged on a ring as it was pulled away, *State* v. *Pellegrini*, No. 1-12-30, 2013 WL 221506, at *1, 8 (Ohio Ct. App. Jan. 22, 2013) (same).[4]

Courts in jurisdictions where recklessness satisfies the force clause have repeatedly held that those statutes qualify as force-clause predicate offenses. *United States* v. *Griffin*, 946 F.3d 759 (5th Cir. 2020) (Miss. Code Ann. § 97-3-7(2)); *United States* v. *Burris*, 920 F.3d 942, 952 (5th Cir. 2019) (Tex. Penal Code Ann. § 29.02(a)(1)); *Davis* v. *United States*, 900 F.3d 733, 734-735 (6th Cir. 2018) (Tenn. Code. Ann. § 39-13-102(a)(1)); *United States* v. *Harper*, 875 F.3d 329, 330 (6th Cir. 2017) (same); *United States* v. *Patterson*, 853 F.3d 298, 303 (6th Cir. 2017) (Ohio Rev. Code § 2911.02(A)(2)); *Byers* v. *United States*, No. 4:16-cv-943, 2017 WL 2535704, at *7-8 (E.D. Mo.

[4] Ohio Rev. Code § 2911.02(A)(2) requires only recklessness. *State* v. *Colon*, 885 N.E.2d 917, 921 (Ohio 2008), overruled on other grounds, *State* v. *Horner*, 935 N.E.2d 26, 33 (Ohio 2010).

June 12, 2017) (Mo. Ann. Stat. § 565.060.1(3) (2000), now at § 565.052.1(3)).

Those offenses do require that another person be injured. But none of them require a defendant to use, threaten, or attempt to use force "against" another person as that phrase is ordinarily understood. Nor can they be characterized as "violent and aggressive crimes" worthy of the "'armed career criminal[]'" label. *Begay*, 553 U.S. at 146, 148. The conduct is criminal; the offender can be guilty of recklessness; and serious injury may result. But it disrespects ordinary English usage to say someone who recklessly jumped over a railing or ran a stop sign thereby "used" "force against the person of another."

2. Some courts have attempted to justify an extension of the force clause to such reckless offenses by invoking *United States* v. *Castleman*, 572 U.S. 157, 170 (2014), which created a presumption that any *intentional* causation of bodily injury, however indirect, necessarily requires a qualifying use of force. See, *e.g.*, *United States* v. *Verwiebe*, 874 F.3d 258, 260 (6th Cir. 2017). But extending *Castleman*'s presumption to reckless offenses exacerbates the absurdities described above. It has no logical stopping point and fails to distinguish reckless from negligent offenses. If neither knowledge nor intent is required—and all that matters is the causation of bodily harm—there would be no reason to exclude crimes punishing negligently caused injuries. That would mean a person convicted for "'failing to keep a proper lookout'" while driving a boat, resulting in a collision with another boat and a passenger's death, could be deemed a violent felon. *Littlefield* v. *Acadia Ins. Co.*, 392 F.3d 1, 4 (1st Cir. 2004) (alterations omitted). The same reasoning would make it a force-clause predicate to cause serious

bodily injury by "falsely reporting" an emergency if a responding emergency vehicle causes a serious accident, N.Y. Penal Law § 240.60(3), or by burning a piece of government property if it results in "firemen [being] injured by high speed driving of fire equipment" on the way to the scene, *United States* v. *Eichman*, 957 F.2d 45, 46-47 (2d Cir. 1992). This Court forbade any such reading of the force clause in *Leocal* because it makes no sense. 543 U.S. at 9. *Castleman* cannot be extended to declare mere accidents—whether caused recklessly or negligently—"violent" felonies. See pp. 5-6, *supra*.

Extending the *Castleman* presumption to recklessness, moreover, would lead courts to define offenses as violent felonies simply because they create a *risk* of bodily injury. See *United States* v. *Pam*, 867 F.3d 1191, 1211 (10th Cir. 2017) (the force clause reaches reckless felonies even when "no injury" results). That would make the creation of a *risk* of harm the equivalent to the actual use, attempted use, or threatened use of force against the person of another—even where no harm or threat was intended, no harm results, and there is no direct interaction (let alone use of force) between the perpetrator and anyone else.

Numerous state and federal offenses punish the creation of such risks. But attempting to shoehorn them into the ACCA's requirement of using force "against the person of another" does violence to the ACCA's text. In Texas, for example, it is a felony to "recklessly * * * emit[ ] an air contaminant that places another person in imminent danger of death or serious bodily injury." Tex. Water Code Ann. § 7.182(a). Employees of a chemical company were charged with violating that criminal statute when rising water from Hurricane Harvey knocked out power to a chemical plant, causing chemicals stored there to

catch fire and emit pollution.[5] Under the government's interpretation, these employees could be armed career criminals because they used or threatened the use of force against another. Or consider the federal law that makes it a felony to "tamper[ ]" with certain consumer products, labels, or containers, "with reckless disregard for the risk that another person will be placed in danger of death or bodily injury." 18 U.S.C. §1365(a). A pharmacist was convicted of that crime when he "'opened' a box containing Fentanyl patches, 'removed' the patches, and 're-glued' the box," leaving it empty. *United States* v. *Lyle*, 742 F.3d 434, 439 (9th Cir. 2014) (alterations omitted). No reasonable English-speaking person would describe that conduct as the use or threatened use of force against another. Yet that is what the government insists Congress meant in the ACCA.

Other examples abound. Tennessee criminalizes evading arrest by fleeing in such a way as to create "'a risk' of injury to the drivers of" other vehicles or "'innocent bystanders or third parties.'" *State* v. *Cross*, 362 S.W.3d 512, 524 (Tenn. 2012) (applying Tenn. Code Ann. §39-16-603(b)(3)). A driver was convicted of that crime when, while fleeing a traffic stop, he "passed two other vehicles on blind curves in 'no passing' zones." *Id.* at 516. Under the government's construction, that is the stuff that makes one an armed career criminal.

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[5] Rebecca Hersher, *Texas Criminal Trial Highlights Climate Liability For Factories In Floodplains*, NPR (Mar. 2, 2020, 4:58 PM), https://www.npr.org/2020/03/02/723217659/texas-criminal-trial-highlights-climate-liability-for-factories-in-floodplains; Benjamin Patton & Mary Balaster, *What The Arkema Indictment Means For Chemical Cos.*, LAW360 (Sept. 6, 2018, 3:10 PM), https://www.law360.com/articles/1079659.

Properly viewed, none of those crimes require any person to be injured by or threatened with a use of force. Nor is there an attempt to use force. *Braxton* v. *United States*, 500 U.S. 344, 351 (1991) (attempt requires specific intent). At most, those crimes involve the *potential* (*i.e.*, risk) of an *unintentional* impact on the person of another. Sweeping such offenses into the force clause would penalize a defendant with a mandatory 15-year sentence based in part on reckless conduct that "set[] into motion" events that ultimately merely *risked* harm to other persons. *United States* v. *Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017); see *Pam*, 867 F.3d 1211.

Castleman does not support that result. When an actor is merely reckless about potential injury, it makes no sense to say that any and all indirectly caused injuries render the underlying felony "violent" under the ACCA. That would attribute the force of pollutants released in the wake of Hurricane Harvey, or the resulting threatened force of exploding chemical plants, to the individuals who recklessly created conditions susceptible to that result. See p. 12-13 & n.5, *supra*. It would attribute a use of physical force "against the person of another" to recklessly aggressive drivers who unintentionally cause serious accidents between *other* cars by flashing their headlights, honking their horns unnecessarily, and tailgating—but never touching another vehicle. Ind. Code Ann. §§ 9-21-8-55, 35-42-2-2, 35-50-2-7. And it would attribute a threatened use of force against another person to a driver trying to evade arrest by passing cars in a no-pass zone, even if no harm or collision resulted. *Cross*, 362 S.W.3d at 524. Such chains of events are far too attenuated to constitute the use, threatened use, or attempted use of physical force "against the person of

another," even if others are injured as a result of recklessness. "Against" does not mean "affecting."[6]

II. Incorporating Reckless Offenses Into The Force Clause Risks Unconstitutional Arbitrariness

When this Court has a choice between two constructions, one that is plainly constitutional and another that "raise[s] serious constitutional problems," it chooses the former. *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). That "cardinal principle" is "beyond debate," *ibid.*, and counsels strongly against the "adventurous application" of the statutory text the government presses here, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

A. The Due Process Clause Prohibits Prosecutions under Vague Criminal Statutes

Due process demands that criminal statutes "'define'" their respective offenses "'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling* v. *United States*, 561 U.S. 358, 402-403 (2010) (alterations omitted). "The void-for-vagueness doctrine embraces these requirements," *id.* at 403, while protecting separation-of-powers principles that place "responsibility for defining

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[6] It is no response to assert that the offenders' initial conduct in the above examples did not involve "physical force." Force is required to unglue a box, step on a gas pedal, turn into a no-passing zone, honk a car's horn, and prepare a power plant for a hurricane. "'[P]hysical force' is simply 'force exerted by and through concrete bodies,' as opposed to 'intellectual force or emotional force.'" *Castleman*, 572 U.S. at 170. It would, however, be absurd to say that the risks of harm that arise as a consequence of such uses of force require the "use" of "force *against the person of another*."

crimes" in the hands of elected officials rather than "relatively unaccountable" judges, *United States* v. *Davis*, 139 S. Ct. 2319, 2325 (2019).

In *Johnson* v. *United States*, this Court applied that doctrine to find the "residual clause" of the ACCA—which defines "violent felony" to include crimes that "involve[ ] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii)—unconstitutionally vague. 135 S. Ct. 2551, 2557 (2015). The Court rested its reasoning on two grounds, the combination of which "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2558.

First, the residual clause requires use of "the categorical approach" to determine whether a crime qualifies as a violent felony. *Johnson*, 135 S. Ct. at 2557. In the context of the residual clause, that approach permitted reliance on "neither the 'real-world facts' nor the bare 'statutory elements' of an offense." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1213-1214 (2018). Instead, it tied the "judicial assessment" of whether a crime was a violent felony "to a judicially imagined 'ordinary case' of [the] crime." *Johnson*, 135 S. Ct. at 2557. And it "offer[ed] no reliable way to choose between * * * competing accounts" of what conduct each "ordinary" crime encompassed. *Id.* at 2558.

Second, the residual clause left "uncertainty about how much risk it takes" to elevate a crime to a violent felony. *Johnson*, 135 S. Ct. at 2558. A "serious potential risk" standard, the Court explained, is inscrutable when applied "to a judge-imagined abstraction" of each type of crime. *Ibid.* The "residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by

an abstract generic version of the offense." *Welch* v. *United States*, 136 S. Ct. 1257, 1262 (2016).

Applying those same principles, this Court has invalidated other provisions that require the categorical approach—reinforcing the conclusion that due process does not allow courts to decide whether an "abstraction" of a crime presents "some not-well-specified-yet-sufficiently-large degree of risk." *Dimaya*, 138 S. Ct. at 1216; see *Davis*, 139 S. Ct. 2326 (punishment may not be based "on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case' ").

B. Reading the Force Clause To Encompass Recklessness Likewise Threatens To Render It Unconstitutionally Vague

Construing the "force against the person of another" clause expansively to encompass reckless offenses threatens the force clause's constitutionality as well. As in *Johnson*, *Davis*, and *Dimaya*, there is no coherent guiding principle for applying the categorical approach to the force clause. Courts lack the tools to determine when reckless offenses categorically require, as an element, the use of force against a person—let alone to distinguish such crimes from those negligent or accidental offenses that categorically do not. This Court should not countenance the imposition of mandatory 15-year sentences based on a construction so elaborate that courts will struggle in its application—and that average citizens cannot hope to understand.

1. *Efforts To Apply the Categorical Approach to Reckless Felonies Will Prove Futile—and Deprive Citizens of Fair Notice*

When federal courts decide whether felonies qualify under the ACCA's force clause, they must apply the categorical approach—just as they did for the now-void

residual clause. *Begay*, 553 U.S. at 141. Applying that approach requires a determination of whether the elements of a statute categorically require the use of force against another person. As applied to statutes criminalizing reckless conduct, however, that analysis will prove just as unworkable and vague as the approach *Johnson* held constitutionally infirm.

a. Courts applying the categorical approach generally "may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" *Descamps* v. *United States*, 570 U.S. 254, 261 (2013) (emphasis omitted). But—just as in *Johnson*—applying the categorical approach to the force clause requires federal courts to look beyond the unadorned "'statutory elements' of an offense." *Dimaya*, 138 S. Ct. at 1214. They must identify the "least of the[] acts" that meets the relevant felony's elements. *Johnson* v. *United States*, 559 U.S. 133, 137 (2010). State law governs that assessment, *id.* at 138, because "state courts are the ultimate expositors of state law," *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975); see *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

In practice, courts applying the force clause look to "real world conduct," *Villanueva* v. *United States*, 893 F.3d 123, 137 (2d Cir. 2018) (Pooler, J., dissenting), and ask whether the "least culpable conduct" punished by the offense satisfies the ACCA, *e.g.*, *Burris*, 920 F.3d at 947; *Villanueva*, 893 F.3d at 128; *Verwiebe*, 874 F.3d at 260. That inquiry, however, "is not an invitation to apply 'legal imagination' to the state offense." *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013). Instead, "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside

the *generic definition* of a crime.'" *Ibid.* (emphasis added).[7]

To determine whether a particular hypothetical crime "'falls outside'" an offense's "'generic'" version, courts must first decide what the generic offense entails. *Moncrieffe*, 569 U.S. at 191. A statute's "'text alone,'" however, "'is simply not enough'" to reveal an offense's generic definition or a specific variant's probability of prosecution. *United States* v. *Reyes-Contreras*, 910 F.3d 169, 185 (5th Cir. 2018) (en banc). Federal courts thus generally turn to "'supporting state case law'" to assess—and define—the contours of each generic state crime before they resolve the force-clause inquiry. *Id.* at 184-185.

Sometimes that abstract analysis is unnecessary. If the statute expressly requires, as an element, knowingly or intentionally causing bodily harm to another person, for example, courts can simply apply *Castleman*'s presumption that any knowing or intentional causation of bodily harm necessarily requires the use of force against another. See p. 11, *supra*. In that scenario, there is no need to draw lines between generic and less generic versions of the offense.

b. For offenses of recklessness, by contrast, any effort to distinguish between those that categorically involve the required use of force against another and those that do not rapidly disintegrates. For example, numerous States punish recklessly injuring another person. See pp. 8-11, *supra*. But those statutes often leave undefined

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[7] The Court has not yet applied its "realistic probability" test to the force clause, but lower courts do. *E.g.*, *United States* v. *Scott*, 954 F.3d 74, 80 (2d Cir. 2020); *United States* v. *Battle*, 927 F.3d 160, 164 (4th Cir.), cert. denied, 140 S. Ct. 671 (2019); *Pam*, 867 F.3d at 1211.

the type of conduct that can be responsible for causing injury. Courts will thus be (repeatedly) left to ask whether recklessly causing bodily harm requires, as an element, that the defendant use force against the injured person. Indeed, the aggravated assault statute in this case raises that exact question. Tenn. Code Ann. §39-13-102(a)(1) (punishing recklessly "caus[ing] bodily injury," §39-13-101(a)(1), in such a way that it "[r]esults in serious bodily injury," §39-13-102(a)(1)).

It is practically impossible to determine whether a statute punishing unspecified conduct that recklessly causes injury realistically satisfies the force clause as a general matter. Such statutes are far too broad, covering far too many potential scenarios, to allow any meaningful inquiry into whether they categorically require the defendant's application *of force against a person*.

Consider Missouri's second-degree assault statute, which criminalizes "[r]ecklessly caus[ing] serious physical injury to another person." Mo. Ann. Stat. §565.052.1(3). That statute would encompass a reckless janitor who—knowing the building was occupied—became distracted in the middle of mopping the stairs, leaving them wet and soapy. When a person comes along five minutes later, he falls down those stairs and fractures his skull. The janitor is convicted of second-degree assault without ever having used force against another person. Compare the janitor to an intramural baseball player who, standing near a sharp corner, practices his swing. When a person comes around the corner, he is hit in the head with the bat, fracturing his skull. The baseball player is convicted of second-degree assault. Unlike the janitor, he used force.

To determine whether the potential janitor scenario categorically precludes a Missouri second-degree assault

from qualifying as a predicate offense under the ACCA's force clause, federal courts must ask: What is the realistic probability that Missouri would prosecute the janitor for that crime? That sort of inquiry runs afoul of the principles set forth in *Johnson*. The categorical approach requires courts to decide what crimes that punish recklessly causing injury look like "generic[ally]" in each State to assess the likelihood of prosecution for fringe cases. *Moncrieffe*, 569 U.S. at 191. Then, courts must decide whether that abstract conduct necessarily requires the use of force by the defendant against the person of another.

If that sounds impossible, that's because it is. It would require courts to weigh "competing accounts of what" the typical conduct associated with assault, robbery, or other reckless crimes entails. *Johnson*, 135 S. Ct. at 2557-2558. But "[c]rimes can be committed in many different ways"—particularly when the main requirement is that a person's conduct recklessly create harm or a risk of harm. *Stokeling* v. *United States*, 139 S. Ct. 544, 554 (2019).

Interpreting the force clause to include reckless offenses would thus raise the same kind of indeterminacy this Court rejected in *Johnson*, *Davis*, and *Dimaya*. Attempting to determine whether recklessly causing injury to another person categorically requires the use of force is just as impossible as deciding how risky conduct might be in the "ordinary" case of a crime. *Johnson*, 135 S. Ct. at 2557.

c. Rather than confront that indeterminacy, courts extending the force clause to recklessness have tried to get around it: They have extended *Castleman*'s presumption to recklessness, holding that every *reckless* offense that results in (or creates the risk of) bodily harm requires

the use of force. Under that theory, "[a] defendant uses physical force whenever his volitional act sets into motion a series of events that results in the application of a 'force capable of causing'" injury—even if that result was actually unintended. *Verwiebe*, 874 F.3d at 261; see, *e.g.*, *Burris*, 920 F.3d at 952.

That conclusion is legally incorrect and factually indefensible. It ignores the force clause's plain meaning, which requires intent or knowledge. See pp. 5-8, *supra*. It redefines the "use of physical force against" another as the use of "force that is 'reasonably expected to cause pain or injury'"—a standard this Court has already rejected as not "administrable." *Stokeling*, 139 S. Ct. at 554. And it imputes *volitional* uses of force even to those who unintentionally or negligently cause accidents. See pp. 11-15, *supra*. The janitor who leaves a soapy floor may be reckless, but the mere fact that he "set[] into motion" events resulting in injury does not make his recklessness a violent felony. *Verwiebe*, 874 F.3d at 261. The same is true of the boat driver who fails to keep a proper lookout and crashes, or the college student who pulls a fire alarm as a prank only to find out later that a fire truck tragically struck a pedestrian on the way to the scene. See pp. 11-12, *supra*.

2. *Multifarious Positions on Recklessness Likewise Preclude Sufficiently Definite Application*

Extending the ACCA's force clause to reckless offenses also threatens incoherence given the varying and uncertain applications of recklessness under state and federal law. Whatever this Court's decision in this case, federal courts applying the ACCA still must exclude "negligent[ly] or merely accidental[ly]" harming others as a qualifying use of force "'against the person * * * of an-

other.'" *Leocal*, 543 U.S. at 9-10. But excluding such offenses will be no easy task.

While there are relatively settled understandings about knowledge and intent, "'[r]eckless disregard' cannot be fully encompassed in one infallible definition." *Trentecosta* v. *Beck*, 703 So. 2d 552, 561 (La. 1997). The States, federal government, and even individual criminal statutes have widely varying definitions, some perilously close to negligence and gross negligence. Recklessness can mean:

- "consciously disregard[ing] a substantial and unjustifiable risk that [a] material element exists or will result" from conduct where the risk is "of such a nature and degree that * * * its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe," Model Penal Code §2.02(c); cf. Neb. Rev. Stat. Ann. §28-109 (similar, but requiring only "disregard" rather than "conscious[ ]" disregard);
- "consciously disregard[ing] a risk" created by conduct where "the actor is aware of his or her conduct," *State* v. *Burdette*, 832 S.E.2d 575, 579-580 (S.C. 2019);
- "'conscious[ly] cho[osing] a course of action . . . with knowledge of the serious dangers to others involved,'" *Commonwealth* v. *Hardy*, 123 N.E.3d 773, 781 (Mass. 2019);
- "willfully or wantonly disregard[ing] the safety of persons or property," Iowa Code Ann. §702.16; see, *e.g.*, Fla. Stat. Ann. §316.192 (similar);
- "ignor[ing] a substantial risk of harm," the precise meaning of which may vary across different "con-

texts," *Williams* v. *Hous. Auth. of the City of Bridgeport*, 174 A.3d 137, 152-153 (Conn. 2017); or

- "culpable disregard of foreseeable consequences" rendering conduct of a "heedless nature" that is "actually or imminently dangerous to the rights or safety of others," even where there is no knowledge that conduct "is substantially certain to cause [the] result," Manual for Courts–Martial, United States, p. IV–72, ¶52.c(1)(c) (2019).

Confronted with offenses subject to those various definitions, federal courts will be charged with determining whether any given offense's required mental state and risk are categorically sufficient to establish recklessness, while excluding negligence, for purposes of the ACCA's force clause. That task is not merely unenviable. It is impossible.

Awareness of Risk. Federal courts would struggle to draw an intelligible line between recklessness and other mental states that float in the "twilight zone * * * between ordinary [civil] negligence and intentional injury." *Pleasant* v. *Johnson*, 325 S.E.2d 244, 247 (N.C. 1985). For example, many felonies punish criminally negligent conduct, sometimes called gross or culpable negligence, particularly when it causes a person's death (*e.g.*, vehicular or negligent homicide).

The Model Penal Code purports to distinguish such culpable negligence from recklessness by removing the requirement of "conscious[ ] disregard[ ]" of risk, and replacing it with a requirement of an unreasonable failure *to perceive* "a substantial and unjustifiable risk," such that the failure "involves a gross deviation from the standard of care that a reasonable person would observe." Model Penal Code §2.02(d). One could argue that the failure to perceive is less volitional—and less culpable—

than conscious disregard, taking it outside the ACCA's use of force clause. But federal courts applying *that* distinction, to include recklessness but exclude lesser mental states, would have to decide whether each potential predicate offense as a categorical matter imposes the Model Penal Code's requirement of "conscious" disregard, as opposed to failure to perceive, as an element.

To use a phrase in common usage today, good luck with that. The definitions of culpable negligence vary State by State and offense by offense.[8] Some States have complicated matters still further by "equat[ing]" culpable negligence with recklessness, *Brown* v. *ANA Ins. Grp.*, 994 So. 2d 1265, 1269 (La. 2008),[9] or even describing certain negligent offenses as requiring a *higher* "degree of culpability" than other reckless offenses, *Santisteban* v. *State*, 72 So. 3d 187, 195 (Fla. Ct. App. 2011).

Such variation means federal courts will be required to examine, State by State and statute by statute, whether

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[8] For example, gross negligence has been defined as "a departure from" the conduct of an "ordinarily prudent or careful" person "incompatible with a proper regard for human life, or an indifference to consequences," *State* v. *Diaz*, 46 A.3d 849, 865 (R.I. 2012), and as the "entire absence of care," *Brown* v. *ANA Ins. Grp.*, 994 So. 2d 1265, 1269 n.7 (La. 2008).

[9] See, *e.g.*, *Gray*, 427 So. 2d at 1367 (negligent homicide's culpable-negligence standard "analogous" to aggravated assault's recklessness standard); *People* v. *Calvaresi*, 534 P.2d 316, 318 (Colo. 1975) (no intelligible "distinction between a gross deviation from, and a wanton and willful disregard of, a standard of care"). The federal government has conflated them too. *E.g.*, Manual for Courts–Martial, United States, pp. IV–72, IV–79 ¶¶ 52.c(1)(c), 57.c(2)(i) (2019) (negligence and recklessness for different offenses both defined as "culpable disregard" of "foreseeable consequences").

the required *mens rea* for harming or risking harm to a person satisfies whatever minimum standard is imposed by the force clause. Courts will have to identify what it is about "recklessness" that rises to the level of a use of force "against" a person—and craft a federal benchmark for qualifying recklessness. Then they will have to assess whether each individual offense, with whatever standard it employs, measures up to that benchmark.

Degree of Risk. Determining whether the required degree of risk is sufficient will complicate matters still more. *Johnson* rejected the residual clause as vague because it required courts to apply a "'serious potential risk' standard to an idealized ordinary case of the crime." 135 S. Ct. at 2561. Incorporating reckless offenses into the force clause will require courts to determine once more whether the "risk" required by the offense is sufficiently serious to meet the ACCA's force clause—and to exclude negligence. Applying *Moncrieffe*, federal courts will thus ask whether (1) the "generic" version of the crime requires recklessness as to a sufficiently high risk of injury to meet some federal benchmark; (2) there are any non-generic versions of the offense that *would not* rise to the federal benchmark and thus would fall outside the force clause; and (3) there is a "realistic probability" that such non-generic offenses would be prosecuted, looking to the types of charges that have historically been brought. 569 U.S. at 191.

Every step of that analysis is irredeemably vague. For example, Iowa makes it a felony to "unintentionally cause[ ] a serious injury" by "[d]riving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property." Iowa Code Ann. § 707.6A(2), (4). A federal court deciding whether that statute qualifies under the ACCA would have to consider whether

driving with "willful or wanton disregard for the safety of persons or property" in such a way that results in serious injury—but not death—necessarily requires, as an element, a sufficient risk of injury to satisfy the force clause while excluding negligent injuries.

To make that decision, the court would need to establish a minimum federal standard of risk under the ACCA. It might, for example, adopt the Model Penal Code's definition of recklessness—"conscious[ ] disregard[ ]" of a "substantial and unjustified risk," that "involves a gross deviation from the standard of care that a reasonable person would observe." Model Penal Code § 2.02(c). It would then ask:

- Is willful and wanton disregard for safety the same as "conscious[ ] disregard[ ]" of "a substantial and unjustifiable risk" of bodily injury?
- Do texting while driving—prima facie evidence of recklessness under the statute, Iowa Code Ann. § 707.6A(2)—or other purportedly generic ways to violate the statute "involve[ ] a gross deviation from the standard of conduct that a law-abiding person would observe"?[10]

Johnson teaches that there are no principled ways to answer those questions under the categorical approach.

Type of Risk. Federal courts would also be required to decide when a crime has as an element the creation of *bodily* risk (*i.e.*, a risk of harming "the person of another")

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[10] The answer to such a question would be further complicated by the indeterminacy of what makes conduct risky in the first place. The act of texting "does not, in and of itself, normally cause physical injury"; the "risk of injury arises because" it might set off a chain of events causing serious injury. *Johnson*, 135 S. Ct. at 2557.

as opposed to some other type of risk (*e.g.*, to property, the environment, public land). General definitions of recklessness are often silent on the *type* of risk involved. See, *e.g.*, Model Penal Code § 2.02(c). There is nothing inherent in recklessness that requires the risk be of bodily harm. As a result, courts will have to determine the generic type of risk for the state crime and assess whether the offense would realistically be prosecuted if it presented some other kind of risk. And again they will have to look to state law to do so. *Johnson*, 559 U.S. at 138; see p. 18, *supra*.

State laws are often unclear or silent as to the type of risk to be punished. Consider, for example, a statute that punishes the "reckless[ ] use[ ] [of] an armor piercing bullet" or ammunition that "simulate[s] a flame-thrower." 720 Ill. Comp. Stat. Ann. 5/24-3.2(a). The law does not specify if the recklessness needs to be as to the potential harm to the safety of a person, the damage that could be done to an empty car with an armor-piercing round, or the risk of burning a forest on public land with a flamethrower. State courts are unlikely to provide guidance, as they rarely have reason to ask in the *abstract* what kinds of risk a particular crime is designed to punish—instead, prosecutors, judges, and juries decide on each "*particular occasion*" whether conduct falls within the statute. See *Johnson*, 135 S. Ct. at 2561.[11]

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[11] Even where state decisional law appears to clarify statutory ambiguity, peril abounds. In New Mexico, for example, it is a fourth-degree felony to "commit[ ] shooting at or from a motor vehicle that does *not* result in great bodily harm to another person." N.M. Stat. Ann. § 30-3-8(B) (emphasis added). Initially, the New Mexico Supreme Court held that the purpose of that statute was "'to protect the public from reckless shooting * * * and the possible *property damage*

So often left without guidance as to the elements of state-law offenses, the governing standard of recklessness under state law, and the types of risks the provision targets, federal courts will have to conduct *Erie* guesses—guesses that determine the scope of a criminal statute. In civil cases, *Erie* guesses anticipate what the State's "highest court, from all that is known about its methods of reaching decisions and the authorities it tends to rely on, is likely to adopt sometime in the not too distant future." Charles A. Wright & Arthur R. Miller, 19 Fed. Prac. & Proc. Juris. §4507 (3d ed.) (Apr. 2020 Update).

But when a federal court *guesses* the extent of risk required by state law, the type of risk required, or the awareness of risk required, it must engage in exactly the process proscribed by *Johnson*: It must determine whether conduct falling outside federal requirements under the ACCA would realistically be prosecuted under the statute. State courts do not violate due process when they merely construe their criminal laws in individual cases. See *Johnson*, 135 S. Ct. at 2561. But federal courts under the ACCA would not just be forced to guess how a state court would construe the state statute—they would have to do so based on abstractions about the purportedly typical conduct the crime punishes. That is exactly the analysis *Johnson* condemned as "produc[ing] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2558.

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and bodily injury that may result.'" *Pam*, 867 F.3d at 1209 (emphasis added). Later, it reversed itself, concluding that the statute was instead "'intended to protect against threats to personal safety, and not to threats to property.'" *Ibid.*

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A
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