No. 19-5410

In the Supreme Court of the United States

CHARLES BORDEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Tennessee offense of reckless aggravated assault, Tenn. Code Ann. § 39-13-102(a)(2) (2003), is a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), because that offense "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).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 266.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2019. The petition for a writ of certiorari was filed on July 24, 2019. The petition was granted on March 2, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Tennessee, petitioner

was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5. He was sentenced to 115 months of imprisonment, to be followed by five years of supervised release. *Id.* at 6-7. The court of appeals affirmed. *Id.* at 1-4.

1. Concerned that "a 'large percentage' of crimes of theft and violence" were "'committed by a very small percentage of repeat offenders,'" Congress enacted the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to "supplement the States' law enforcement efforts against 'career' criminals." *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (quoting H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1 (1984) (1984 House Report)); see Pub. L. No. 98-473, Tit. II, ch. 18, 98 Stat. 2185 (18 U.S.C. App. 1202(a) (1982 & Supp. II 1984)) (repealed in 1986 by the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 459). As originally enacted, the ACCA prescribed a 15-year minimum sentence for any person who received, possessed, or transported a firearm in commerce following three prior convictions "for robbery or burglary, or both." 18 U.S.C. App. 1202(a) (1982 & Supp. II 1984). Its definition of robbery "mirrored the elements of the common-law crime of robbery." *Stokeling* v. *United States*, 139 S. Ct. 544, 550 (2019); see *id.* at 551; see also 18 U.S.C. App. 1202(c)(8) (Supp. II 1984). Common-law robbery in many States included theft accompanied by recklessly injuring another. See Wm. L. Clark & Wm. L. Marshall, *A Treatise on the Law of Crimes* 553, 559 (Herschel Bouton Lazell ed., 2d ed. 1905).

In 1986, Congress amended the ACCA to "expand[] the predicate offenses triggering the sentence enhancement from 'robbery or burglary' to 'a violent felony or a

serious drug offense.'" *Taylor*, 495 U.S. at 582; see Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39 to 3207-40. Senator Specter, who sponsored a bill that was one of the sources of that amendment, explained that because the ACCA "ha[d] been successful with the basic classification of robberies and burglaries as the definition for 'career criminal,'" the "time ha[d] come to broaden that definition so that we may have a greater sweep and more effective use of this important statute." *Taylor*, 495 U.S. at 583 (quoting 132 Cong. Rec. 7697 (1986)); see H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) (1986 House Report) (observing that "a consensus developed in support of an expansion" of the ACCA to cover "violent felonies, generally").

The amended version of the ACCA, which remains in effect today, applies its enhanced penalty to a defendant who is convicted of unlawful possession, transportation, or receipt of a firearm in violation of 18 U.S.C. 922(g), and who has three prior convictions for a "violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). It defines a "'violent felony'" to include

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii), beginning with "otherwise," is known as the "residual clause," which this Court has held to be unconstitutionally vague. See *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016).

The House Report accompanying the ACCA amendments explained that the language of the elements clause would encompass both "robbery" and other crimes "involving physical force against a person such as murder, rape, [and] assault." 1986 House Report 3; see *id.* at 4 (explaining that the elements clause "adds all State and Federal felonies * * * involving physical force against a person," including "murder, rape, assault, [and] robbery"); see also *Armed Career Criminal Legislation: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 2 (1986) (1986 Hearings) (observing that the proposed elements clause would classify "felonies involving physical force against a person—that is, murder, rape, assault, robbery, et cetera—as predicate offenses"). Then, as now, many jurisdictions defined felony assault, as well as murder, to require proof only of a mens rea of recklessness. See pp. 16, 19-22 & nn.2, 4-7, *infra*.

2. In April 2017, officers found petitioner sitting in the passenger seat of a car stopped on the road. Revised Presentence Investigation Report (PSR) ¶ 8. At the time, petitioner was the subject of an active arrest warrant. *Ibid.* The driver of the car consented to a search, and petitioner told the officers that there was a gun in the car. PSR ¶ 9. The officers found the gun; they also found digital scales, a pill bottle, and drug par-

aphernalia. *Ibid.* Petitioner later admitted to possessing the gun, which he had purchased with methamphetamine and planned to resell. PSR ¶ 10.

Petitioner pleaded guilty to one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1; PSR ¶¶ 2, 4. Before sentencing, the Probation Office submitted a presentence report in which it determined that petitioner's convictions in 2002, 2003, and 2007 for aggravated assault, in violation of Tenn. Code Ann. § 39-13-102(a) (Supp. 2000, Supp. 2002, and 2003), were violent felonies, and that he was subject to sentencing under the ACCA. PSR ¶¶ 26, 45, 47, 52, 62.[1] The Probation Office calculated an advisory Sentencing Guidelines range of 168 to 210 months. PSR ¶ 112.

Application of the elements clause to a prior conviction involves a "categorical approach" that looks to the statutory definition, rather than the facts, of the crime. *Stokeling*, 139 S. Ct. at 555; see *Taylor*, 495 U.S. at 600-601. Where a statute of conviction is "divisible" into multiple separate crimes, "a sentencing court looks to a limited class of documents * * * to determine what crime, with what elements, a defendant was convicted of." *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016). As relevant here, the Tennessee aggravated-assault statute is divisible into two sets of crimes. See *Braden* v. *United States*, 817 F.3d 926, 933 (6th Cir. 2016); see also Pet. Br. 11. The first requires proof that the defendant "[i]ntentionally or knowingly commit[ted]

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[1] The presentence report also classified a prior Tennessee conviction for promotion of methamphetamine as a serious drug offense. PSR ¶ 26. But due to inadequate documentation of that conviction, the government at sentencing relied solely on petitioner's three aggravated-assault convictions. See D. Ct. Doc. 48, at 20-21 (June 20, 2018).

an assault" and either "[c]ause[d] serious bodily injury to another" or "[u]se[d] or display[ed] a deadly weapon." Tenn. Code Ann. § 39-13-102(a)(1) (2003). The second requires proof that the defendant "[r]ecklessly commit[ted] an assault" involving bodily injury to another, and either caused "serious bodily injury to another" or "[u]se[d] or display[ed] a deadly weapon." *Id.* § 39-13-102(a)(2); see *id.* § 39-13-101(a)(1).

The record showed that petitioner's 2002 and 2003 aggravated-assault convictions were for knowing or intentional aggravated assault, and petitioner did not challenge their classification as violent-felony convictions. Gov't C.A. Br. 5 n.3. The parties agreed, however, that petitioner's 2007 aggravated-assault conviction was for a reckless version of the offense. See *ibid.* The district court overruled petitioner's objection to classifying that conviction as a violent-felony conviction, and agreed with the Probation Office that he was subject to the ACCA. Pet. App. 2. After granting the government's motion for a departure below the ACCA-minimum sentence based on petitioner's substantial assistance to law enforcement, the court sentenced petitioner to 115 months of imprisonment. *Ibid.*; see 18 U.S.C. 3553(e).

3. The court of appeals affirmed. Pet. App. 1-4. Adhering to its previous decision in *United States* v. *Verwiebe*, 874 F.3d 258 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018), the court rejected petitioner's argument that Tennessee reckless aggravated assault is not a violent felony. Pet. App. 1-4. In *Verwiebe*, the court had relied on this Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), to reason that an offense may require the "use of physical force against

the person of another" even if "a mental state of recklessness suffices for conviction." *Verwiebe*, 874 F.3d at 261-262 (citation and internal quotation marks omitted). The court of appeals observed that "*Voisine*'s key insight is that the word 'use' refers to 'the act of employing something' and does not require a purposeful or knowing state of mind." *Ibid.* (quoting *Voisine*, 136 S. Ct. at 2278-2279). "That insight," the court explained, "does not change if a statute says that the 'use of physical force' must be 'against' a person, property, or for that matter anything else." *Ibid.* (emphasis omitted).

SUMMARY OF ARGUMENT

Under the ACCA's elements clause, a "violent felony" includes crimes that have "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). As the court of appeals correctly recognized, that definition encompasses crimes like the Tennessee aggravated-assault offense at issue here, which requires proof that an offender recklessly caused bodily injury to another person. Tenn. Code Ann. § 39-13-102(a)(2) (2003). Petitioner's narrowing construction of the elements clause, which would exclude all crimes that can be committed recklessly, cannot be squared with this Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), with Congress's design of the elements clause to include prototypically violent crimes like aggravated assault and murder, or with the commonsense practical application of the ACCA.

A. In *Voisine*, this Court recognized that a person "'use[s]'" physical force when he acts "reckless[ly] with respect to the harmful consequences of his volitional conduct." 136 S. Ct. at 2279. The Court explained that the word "'use' * * * is indifferent as to whether the

actor has the mental state of intention, knowledge, or recklessness." *Ibid.* And the Court observed that its natural understanding of "use" is consistent with the common default rule that "a *mens rea* of recklessness should generally suffice to establish criminal liability." *Id.* at 2280 (citing Model Penal Code § 2.02(3), Comments 4-5, at 243-244 (1962)).

Voisine's interpretation of the phrase "use * * * of physical force" in an analogous statute applies equally to the ACCA's elements clause. The ACCA provides no indication, textual or otherwise, that Congress employed the same words in an unnatural way, to draw a much less salient line between recklessness and knowledge. To the contrary, when the elements clause was enacted, at least ten States defined robbery—"the quintessential ACCA-predicate crime," *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019)—to include the reckless causation of injury. And Congress designed the elements clause specifically to encompass not only robbery, but also other violent offenses, such as felony "assault" or "murder," that are often defined to include reckless conduct. 1986 House Report 3-4. At the time, more than half of States had aggravated-assault provisions that encompassed recklessness, and two-thirds of States had murder statutes that did not require intent or knowledge. This Court does "not lightly conclude that Congress enacted a self-defeating statute," *Quarles* v. *United States*, 139 S. Ct. 1872, 1879 (2019), and Congress here did not fail to cover the very offenses at which the elements clause was directed.

B. Petitioner's narrowing construction of the ACCA's elements clause relies heavily on the observation that it, unlike the provision in *Voisine*, expressly

refers to the use of force "against the person of another," 18 U.S.C. 924(e)(2)(B)(i). But that prepositional phrase most naturally describes the *object* of the force, not its intended *target*. Indeed, *Voisine* itself explicitly described reckless domestic-violence crimes as involving the "use of physical force *against* a domestic relation," and considered a use-of-force statute that included an "against" phrase to be "similar" for analytical purposes to one that did not. 136 S. Ct. at 2279, 2282 (emphasis added; ellipses and internal quotation marks omitted). The inclusion of such a phrase in the ACCA was not a roundabout way of enacting a heightened mens rea requirement, and construing it as such would contravene this Court's admonition not to "read[] words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

Petitioner's implied mens rea requirement would also lead to a host of consequences that Congress did not intend and that would conflict with commonsense intuitions about violent crime. Petitioner would exclude many robberies, aggravated assaults, and even murders that actually involve bodily injury or death, but would include attempts or threats to commit those offenses. So, for example, attempted murder would qualify as a violent felony in many States, but completed murder would not. Likewise, robbery or assault in which an offender threatens his victim with injury would qualify, but robbery or assault in which an offender actually carries out the threat and injures his victim would not. And those sorts of anomalies would likely extend beyond the ACCA to other statutory schemes with similar elements clauses, including the "crime of violence" definitions in 18 U.S.C. 16 and 924(c).

C. The rule of lenity does not apply. That rule has force only if, after considering all of the traditional tools of statutory construction, "there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 173 (2014) (citation omitted). No such grievous ambiguity existed in *Voisine*, see 136 S. Ct. at 2282 n.6, and *Voisine* itself provides even further clarity here.

ARGUMENT

PETITIONER'S THIRD TENNESSEE AGGRAVATED-ASSAULT CONVICTION IS A CONVICTION FOR A VIOLENT FELONY UNDER THE ACCA'S ELEMENTS CLAUSE

This Court recognized in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), that a person "'use[s]'" physical force when he acts "reckless[ly] with respect to the harmful consequences of his volitional conduct." *Id.* at 2279. It necessarily follows that petitioner's third conviction for Tennessee aggravated assault, which required proof that he recklessly caused bodily injury to another person, was for an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" under the ACCA's element clause, 18 U.S.C. 924(e)(2)(B)(i). Nothing in the text, context, or history of the ACCA supports departing from *Voisine*'s interpretation, in a related statutory context, of the phrase "use of physical force." Contrary to petitioner's suggestion, the ACCA's requirement that the force be applied "against the person of another" does not alter the definition of "use" or otherwise obliquely imply that the elements clause in fact omits so many of the crimes—including "assault," "robbery," and even "murder," 1986 House Report 3—that it was specifically designed to cover.

A. An Offense That Requires Reckless Causation Of Bodily Injury Requires The "Use Of Physical Force Against The Person Of Another"

This Court's decision in *Voisine* illustrates that the language of the elements clause encompasses not only knowing and intentional conduct, but reckless conduct as well. Many prototypically violent crimes can be committed with a mens rea of recklessness, and Congress designed the elements clause to include them.

1. **Voisine** *makes clear that the language of the ACCA's elements clause includes reckless conduct*

As the majority of the courts of appeals to address the issue have correctly recognized, *Voisine*'s definition of the phrase "use of physical force" to include reckless conduct applies to the ACCA's elements clause. See *United States* v. *Burris*, 920 F.3d 942, 951 (5th Cir. 2019), petition for cert. pending, No. 19-6186 (filed Oct. 3, 2019); *Davis* v. *United States*, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019); *United States* v. *Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017); *United States* v. *Pam*, 867 F.3d 1191, 1207-1208 (10th Cir. 2017); *United States* v. *Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (Kavanaugh, J.), cert. denied, 139 S. Ct. 796 (2019).

a. In *Voisine*, this Court held that reckless conduct can qualify as the "use . . . of physical force" under 18 U.S.C. 921(a)(33)(A). 136 S. Ct. at 2278. That provision defines the term "misdemeanor crime of domestic violence" as used in 18 U.S.C. 922(g)(9)'s prohibition on possessing a firearm following conviction for such a crime. The pertinent portion of the definition requires, in language analogous to the ACCA's elements clause, that a qualifying misdemeanor offense "has, as an element, the use or attempted use of physical force * * *

committed by" someone in a specified domestic relationship with the "victim." 18 U.S.C. 921(a)(33)(A)(ii).

The Court in *Voisine* recognized that the definition's language "applies to reckless assaults, as it does to knowing or intentional ones." 136 S. Ct. at 2278. The Court emphasized that reckless conduct "'consciously disregard[s]' a substantial risk" that a particular result will occur. *Ibid.* (quoting Model Penal Code § 2.02(2)(c) (1962)) (brackets in original); see *Farmer* v. *Brennan*, 511 U.S. 825, 836-837 (1994) (noting that a person acts recklessly only when he disregards a substantial risk of harm "of which he is aware"). And it found no distinction, for purposes of the statutory language, between acting with such conscious disregard and acting "knowingly" (*i.e.*, "'aware that [the result] is practically certain'") or "intentionally" (*i.e.*, with the result as a "'conscious object'"). *Voisine*, 136 S. Ct. at 2278 (quoting Model Penal Code § 2.02(2)(a)-(b)).

The Court explained that force applied with any of those three mental states necessarily involves the "active employment"—and thus the "'use'"—of force. *Voisine*, 136 S. Ct. at 2278-2279. Relying on standard dictionary definitions of "use," the Court observed that the word requires the force to be "volitional," but "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." *Id.* at 2279. Put differently, the word "'use' * * * is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Ibid.* Accordingly, crimes committed with a mens rea of recklessness—"no less than * * * knowing or intentional ones"—satisfied the statutory

requirement of the "use . . . of physical force." *Id.* at 2278 (citation and internal quotation marks omitted).

The Court specifically rejected the argument that its prior decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), "suggests a different conclusion—*i.e.*, that 'use' marks a dividing line between reckless and knowing conduct." *Voisine*, 136 S. Ct. at 2279. In *Leocal*, the Court had concluded that a driving-under-the-influence statute that "d[id] not require proof of any particular mental state," 543 U.S. at 7, did not require "the use . . . of physical force against the person or property of another," for purposes of the definition of "crime of violence" in 18 U.S.C. 16(a). 543 U.S. at 9-10. *Leocal* had reasoned that "[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident." *Id.* at 9. But *Leocal* had not held that Section 16(a) would exclude "a state or federal offense that requires proof of the *reckless* use of force against a person or property of another." *Id.* at 13.

The Court in *Voisine* accordingly made clear that the critical distinction, "recognized" in "*Leocal* itself," is "between accidents and recklessness," not recklessness and knowledge or intention. 136 S. Ct. at 2279. As *Voisine* observed, when "acts [are] undertaken with awareness of their substantial risk of causing injury," any resulting harm "is the result of a deliberate decision to endanger another—no more an 'accident' than if the 'substantial risk' were 'practically certain.'" *Ibid.*; see *id.* at 2278 (comparing reckless and knowing acts).

b. Although *Voisine* limited its explicit holding to the statutory context at issue, see 136 S. Ct. at 2280 n.4,

its definitional logic applies in full to the ACCA's similarly worded elements clause, 18 U.S.C. 924(e)(2)(B)(i). *Voisine* observed that "[d]ictionaries consistently define the noun 'use' to mean the 'act of employing' something," and explained that "active employment" includes "reckless behavior." 136 S. Ct. at 2278-2279. As Judge Sutton explained for the Sixth Circuit in *United States* v. *Verwiebe*, 874 F.3d 258 (2017), cert. denied, 139 S. Ct. 63 (2018), "*Voisine*'s key insight is that the word 'use' refers to 'the act of employing something' and does not require a purposeful or knowing state of mind." *Id.* at 262 (quoting *Voisine*, 136 S. Ct. at 2278-2279). That "key insight" applies to the ACCA's elements clause as well. *Ibid.*; see *Haight*, 892 F.3d at 1280-1282. Thus, the "use * * * of physical force against the person of another" in the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i), includes the reckless employment of force against the person of another.

As a result, the ACCA's elements clause plainly encompasses a crime like Tennessee aggravated assault, which requires proof that the defendant (at least) "recklessly cause[d] bodily injury to another," Tenn. Code Ann. § 39-13-101(a)(1) (2003); see *id.* § 39-13-102(a)(2). The Tennessee statute's requirement of proof that the defendant caused an actual bodily injury to another person necessarily establishes the requisite degree of force—namely, force "capable of causing physical pain or injury to another person," *Stokeling* v. *United States*, 139 S. Ct. 544, 553 (2019) (citation omitted). And its requirement of proof of reckless behavior necessarily establishes the "use" of that force. See *Voisine*, 136 S. Ct. at 2278-2280.

c. Congress's usage of language that naturally encompasses reckless crimes, along with knowing and intentional ones, comports with the common default mens rea for criminal liability. As this Court observed in *Voisine*, by the time Congress enacted the ACCA, the Model Penal Code had long "taken the position that a *mens rea* of recklessness should generally suffice to establish criminal liability." 136 S. Ct. at 2280 (citing Model Penal Code § 2.02(3), Comments 4-5, at 243-244). In the ACCA's elements clause, Congress did not indicate any intent to depart from that default rule.

As a matter of both theory and practice, the line between reckless and negligent conduct is much more salient than the line between knowing and reckless conduct. A defendant who "consciously disregards a substantial and unjustifiable risk" of a harmful result has a culpable state of mind, even if the defendant is not "practically certain" that the result will occur. Model Penal Code § 2.02(2)(b)-(c); see *Voisine*, 136 S. Ct. at 2680. Unlike a negligent defendant, who merely "*should be* aware of a substantial and unjustifiable risk" of a particular result, Model Penal Code § 2.02(2)(d) (emphasis added), a reckless defendant consciously and subjectively disregards the unjustifiable risk of harm to others in order to further his own ends. And empirical studies suggest that jurors do not reliably distinguish between recklessness and knowledge and instead view the two as equally worthy of condemnation. See Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. Rev. 1306, 1339-1344 (2011).

This Court has accordingly "described reckless conduct as morally culpable" in "a wide variety of contexts." *Elonis* v. *United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in

part) (citing *Farmer*, 511 U.S. at 835-836; *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964); *Tison* v. *Arizona*, 481 U.S. 137, 157 (1987)). The recklessness default is also expressly codified in many state criminal codes.[2] And even as to jurisdictions that use common-law terminology to describe mens rea, the Model Penal Code has observed—contrary to petitioner's description (Br. 4)—a "rough correspondence" between its own default of recklessness "and the common law requirement of 'general intent.'" Model Penal Code § 2.02 (subsec. (3) note) (1985).

2. The elements clause was specifically designed to cover prototypically violent reckless crimes

The genesis and evolution of the ACCA confirm that Congress designed the elements clause to encompass offenses committed with a mens rea of recklessness. Common-law robbery, which in many States included theft accompanied by the reckless causation of bodily injury, was the model elements-clause offense. And the

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[2] Sixteen States have statutory default mens rea provisions. The large majority of those provisions follow the Model Penal Code and provide that where an offense does not specify a mental state, recklessness will suffice. See Alaska Stat. § 11.81.610(b) (1983); Ark. Code Ann. § 5-2-203(b) (1976); Del. Code Ann. tit. 11, § 251(b) (1979); Haw. Rev. Stat. § 702-204 (1985); 2 Ill. Rev. Stat. ch. 38, ¶¶ 4-3(a), 4-6 (1985); Kan. Stat. Ann. § 21-5202(a) (2011); N.D. Cent. Code § 12.1-02-02(1)(e) and (2) (1985); Ohio Rev. Code Ann. § 2901.21(C)(1) (2014); 18 Pa. Cons. Stat. Ann. § 302 (1986); Tenn. Code Ann. § 39-11-301(c) (1990); Tex. Penal Code Ann. § 6.02(c) (West 1974); Utah Code Ann. § 76-2-102 (1986). Two States establish criminal negligence as the default. See Ga. Code Ann. § 16-2-1 (1984); Or. Rev. Stat. § 161.105(3) (1985). Only Missouri and New Jersey have statutes establishing knowledge as the default. See Mo. Rev. Stat. § 562.021.3 (1986); N.J. Rev. Stat. § 2C:2-2(c)(3) (1986).

goal of the 1986 ACCA amendments that replaced the original reference to "robbery" with the elements clause was to broaden the definition of "violent felony" to cover other offenses—such as felony "assault" or even "murder"—that are likewise often defined to include reckless conduct. See 1986 House Report 3-4.

a. As this Court has recognized, "robbery" is "the quintessential ACCA-predicate crime." *Stokeling*, 139 S. Ct. at 551. The original version of the ACCA listed only "burglary" and "robbery" as predicate offenses. *Id.* at 550 (quoting 18 U.S.C. App. 1202(a) (1982 & Supp. II 1984)). And it included a statutory definition of "robbery" that "mirrored the elements of the common-law crime of robbery." *Ibid.*; see *id.* at 551. When Congress expanded the set of ACCA predicates, replacing the reference to "robbery" with the elements clause, robbery remained the touchstone elements-clause crime. See *id.* at 551. And at that time, Congress would have been aware that a conviction for robbery could often be premised on proof of reckless, rather than knowing or intentional, causation of bodily injury.

At common law, a theft resulting in bodily injury to the victim constituted robbery. See *Stokeling*, 139 S. Ct. at 550 (citing 2 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* 68 (2d ed. 1828) (explaining that "if any injury be done to the person, * * * there will be a sufficient actual 'violence'" to establish robbery); Wm. L. Clark & Wm. L. Marshall, *A Treatise on the Law of Crimes* 553 (Herschel Bouton Lazell ed., 2d ed. 1905) ("If there is any injury to the person of the owner, * * * there is sufficient violence to make the taking robbery[.]")). That was true regardless of whether the defendant intended the injury; the

common law required only that the theft be accompanied by a felonious intent to deprive an owner of his property. See Russell 64; Clark 559; 4 William Blackstone, *Commentaries on the Laws of England* 239, 242 (1769).

As a result, at the time the ACCA was enacted, many States defined robbery by reference to the injury caused. At least seven States and the Model Penal Code defined robbery to include theft accompanied by the reckless causation of bodily injury.[3] And at least three other States prohibited robbery-by-injury without specifying the mens rea requirement as to the injury. See Mont. Code Ann. § 45-5-401(1)(a) (1985) (defining robbery as involving the "inflict[ion]" of "bodily injury upon another"); Wyo. Stat. Ann. § 6-2-401(a)(i) (1983) (same); *Cooper* v. *State*, 265 A.2d 569, 571 (Md. Ct. Spec. App. 1970) (explaining that robbery was "a common law crime in Maryland" satisfied by "any injury to the person of the owner in the taking of the property"); cf. *Henderson* v. *State*, 70 S.E.2d 713, 714 (Ga. 1952) (construing Georgia's robbery-by-force statute to apply "[i]f there is any injury done to the person").

Those robbery-by-injury crimes would have been "robbery" under the original version of the ACCA, which defined that term to include "any felony consisting of the taking of the property of another from the

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[3] See Haw. Rev. Stat. § 708-841(1)(c) (1985); Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(A) (1983); N.D. Cent. Code §§ 12.1-02-02(1)(e) and (2), 12.1-22-01(1) (1985); Ohio Rev. Code Ann. §§ 2901.21(B), 2911.01(A)(2) (1982); 18 Pa. Cons. Stat. §§ 302(c), 3701(a)(1)(i) and (iv) (1986); Tex. Penal Code Ann. § 29.02(a)(1) (West 1974); Vt. Stat. Ann. tit. 13, §§ 608(a), 1023(a)(1) (1973); Model Penal Code §§ 2.02(3), 222.1(1)(a). In Hawaii and Maine, however, separate robbery-by-injury provisions with heightened penalties applied to the intentional causation of injury. See Haw. Rev. Stat. § 708-840(1)(a) (1985); Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(D) (1983).

person or presence of another by force or violence." 18 U.S.C. App. 1202(c)(8) (Supp. II 1984); see *Stokeling*, 139 S. Ct. at 550. Nothing indicates that Congress, when it "expand[ed] the number of qualifying offenses" by enacting the elements clause, *Stokeling*, 139 S. Ct. at 551, in fact excised them solely because they could involve the reckless, rather than knowing or intentional, causation of injury. Although the elements clause eliminated the express reference to "violence," that does not reflect any contraction of the ACCA's scope, as "common-law authorities frequently used the terms 'violence' and 'force' interchangeably." *Id.* at 550. And if Congress understood the reckless causation of injury to a robbery victim as a "taking * * * by force" under the prior language, 18 U.S.C. App. 1202(c)(8) (Supp. II 1984), then Congress would naturally also have understood such robbery as involving the "use of force against the person of" the victim under the expanded language, 18 U.S.C. 924(e)(2)(B)(i).

b. That understanding of the elements clause's language is further reinforced by the frequency of recklessness as a sufficient mens rea for many of the aggravated-assault and murder offenses that the elements clause was designed to capture. See 1986 House Report 3-4. As this Court recounted in *Voisine*, the publication of the Model Penal Code in 1962 prompted most States to revise their criminal laws to establish recklessness as a sufficient mens rea for assault. See 136 S. Ct. at 2280. By 1986, a clear majority of States had at least one aggravated-assault offense, or comparable felony assault provision, that could be committed with a mens rea of recklessness. At least 24 States had felony assault provisions that expressly encompassed a mens rea of

recklessness.[4] And in at least four additional jurisdictions, courts had construed felony assault offenses to encompass recklessness.[5] Congress necessarily would have intended to include those crimes, particularly because many of the relevant provisions included alternative mental states in the same statutory subsection, and

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[4] See Ala. Code § 13A-6-21(a)(3) (1982); Alaska Stat. §§ 11.41.200(a)(1), 11.41.210(a)(2), 11.41.220(a) (1983); Ariz. Rev. Stat. Ann. §§ 13-1203(A)(1), 13-1204 (1986); Colo. Rev. Stat. § 18-3-203(1)(d) (1986); Conn. Gen. Stat. § 53a-60(a)(3) (1985); Del. Code Ann. tit. 11, §§ 612(3), 613(3)-(4) (Supp. 1986); Haw. Rev. Stat. § 707-711(1)(b) (Supp. 1986); Ky. Rev. Stat. Ann. §§ 501.020, 508.020(1)(c) (LexisNexis 1985); Me. Rev. Stat. Ann. tit. 17-A, § 208(1) (1983); Miss. Code Ann. § 97-3-7(2)(a) (Supp. 1974); Mo. Rev. Stat. § 565.060.1(3) (1986); Neb. Rev. Stat. § 28-309(1)(b) (1985); N.H. Rev. Stat. Ann. § 631:2(I)-(III) (1986); N.J. Stat. Ann. § 2C:12-1(b)(1) and (3) (1986); N.Y. Penal Law §§ 120.05(4), 120.10(3) (McKinney 1975); N.D. Cent. Code §§ 12.1-02-02(1)(e), 12.1-17-02(1) (1985); Or. Rev. Stat. § 163.165(1) (1985); 18 Pa. Cons. Stat. § 2702(a)(1) and (2) (1980); Tenn. Code Ann. § 39-2-101(b)(1) (Supp. 1986); Tex. Penal Code Ann. §§ 22.01(a)(1), 22.02 (West Supp. 1986); Vt. Stat. Ann. tit. 13, § 1024(a)(1) (1985); Wyo. Stat. Ann. § 6-2-502(a)(i) and (iv) (Supp. 1986); see also Ark. Code Ann. § 5-13-204(a) (1986) (requiring "extreme indifference to the value of human life"); S.D. Codified Laws § 22-18-1.1(1) (Supp. 1986) (same).

[5] See *Parker* v. *United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966) (D.C. assault with a dangerous weapon); *State* v. *Farris*, 542 P.2d 725, 729-730 (Kan. 1975) (Kansas aggravated assault); *Commonwealth* v. *Burno,* 487 N.E.2d 1366, 1368-1369 (Mass. 1986) (Massachusetts assault and battery with a dangerous weapon); *State* v. *Royball*, 710 P.2d 168, 170 (Utah 1985) (Utah aggravated assault); see also *DuPree* v. *State*, 310 So. 2d 396, 398 (Fla. Dist. Ct. App. 1975) (Florida aggravated assault; defining criminal negligence in recklessness terms); *State* v. *Patterson*, 88 P.2d 493, 495 (Idaho 1939) (Idaho assault with a deadly weapon; similar).

thus might not have been divisible based on the required mental state.[6] It is implausible that Congress would have excluded from the ACCA not only reckless aggravated assaults, but also many intentional and knowing aggravated assaults.

Similarly, while even petitioner acknowledges (Br. 28) that murder is the ultimate act of violence, see *Graham* v. *Florida*, 560 U.S. 48, 69 (2010), courts have long recognized that common-law murder does not require a mens rea of intent or knowledge. See, *e.g.*, *Harris* v. *United States*, 8 App. D.C. 20, 30, 31 (1896) ("malignant recklessness"); *Tarver* v. *State*, 16 S.W. 1041, 1044 (Tenn. 1891) ("high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice"); *People* v. *Potter*, 5 Mich. 1, 7 (1858) ("reckless disregard of the safety or lives of others"); *Moore* v. *State*, 18 Ala. 532, 534 (1851) ("recklessly" throwing wood off a roof). As of 1986, more than two-thirds of the States had murder statutes that applied to a person who causes death with a mens rea lower than intent or knowledge—typically extreme recklessness or depraved indifference to human life.[7] Unless the ACCA's

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[6] See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 13-1203(A)(1), 13-1204 (1986); Del. Code Ann. tit. 11, § 613(4) (Supp. 1986); Me. Rev. Stat. Ann. tit. 17-A, § 208(1) (1983); Miss. Code Ann. § 97-3-7(2)(a) (Supp. 1974); N.H. Rev. Stat. Ann. § 631:2(I) (1986); N.J. Rev. Stat. § 2C:12-1(b)(1) (1986); N.D. Cent. Code §§ 12.1-02-02(1)(e), 12.1-17-02(1) (1985); 18 Pa. Cons. Stat. § 2702(a)(1) and (2) (1980); Tenn. Code Ann. § 39-2-101(b)(1) (Supp. 1986); Tex. Penal Code Ann. §§ 22.01(a)(1), 22.02 (West Supp. 1986); Vt. Stat. Ann. tit. 13, § 1024(a)(1) (1985); Wyo. Stat. Ann. § 6-2-502(a)(i) and (iv) (Supp. 1986).

[7] See Ala. Code § 13A-6-2(a)(2) (1982); Alaska Stat. § 11.41.110(a)(2) (1983); Ariz. Rev. Stat. Ann. § 13-1104(A)(3) (1986); Cal. Penal Code §§ 188, 189 (Supp. 1985); Colo. Rev. Stat. § 18-3-102(1)(d) (1986);

elements clause encompasses at least those forms of conscious disregard of a known risk, then Congress unfathomably failed to classify even the most serious of offenses as a "violent felony."

B. Petitioner's Reading Of The ACCA's Elements Clause To Exclude All Reckless Conduct Is Textually And Practically Unsound

Petitioner provides no sound reason to excise reckless crimes from the elements clause. The distinctions that he posits between this case and *Voisine* are either distinctions without a difference or not distinctions at all. And it is his construction of the statute, not the one that predominates in the courts of appeals, that would produce consequences that Congress could not plausibly have intended.

D.C. Code § 22-2403 (1981); Del. Code Ann. tit. 11, §§ 635(1), 636(a)(2) and (4) (1979); Fla. Stat. § 782.04(2) (1985); Ga. Code Ann. § 16-5-1(a)-(b) (1984); Idaho Code Ann. §§ 18-4002, 18-4003(g) (1979); 2 Ill. Rev. Stat. ch. 38, ¶ 9-1(a)(2) (1986); Ky. Rev. Stat. Ann. §§ 501.020(3), 507.020(1)(b) (LexisNexis 1985); Me. Rev. Stat. Ann. tit. 17-A, § 201(1)(B) (1983); Md. Code Ann., Crim. Law Art. 27, § 411 (1987); Mass. Gen. Laws ch. 265, § 1 (1986); Mich. Comp. Laws Ann. § 750.317 (1986); Minn. Stat. § 609.195 (1986); Miss. Code Ann. § 97-3-19(1)(b) (Supp. 1983); Nev. Rev. Stat. §§ 200.020(2), 200.030 (1985); N.H. Rev. Stat. Ann. § 630:1-b(I)(b) (1986); N.M. Stat. Ann. § 30-2-1(A)(3) (LexisNexis 1984); N.Y. Penal Law § 125.25(2) (McKinney 1975); N.C. Gen. Stat. § 14-17 (Supp. 1986); N.D. Cent. Code § 12.1-16-01(1)(b) (1985); Okla. Stat. tit. 21, § 701.8(1) (1981); 18 Pa. Cons. Stat. § 2502(c) (1978); R.I. Gen. Laws § 11-23-1 (1986); S.C. Code Ann. § 16-3-10 (1985); S.D. Codified Laws § 22-16-7 (Supp. 1986); Tenn. Code Ann. § 39-2-201 (1982); Utah Code Ann. § 76-5-203(1)(c) (1986); Va. Code Ann. § 18.2-32 (1982); Vt. Stat. Ann. tit. 13, § 2301 (1986); Wash. Rev. Code § 9A.32.030(1)(b) (1985); W. Va. Code § 61-2-1 (1984); Wis. Stat. Ann. § 940.02(1) (1985).

1. The logic of Voisine *applies no differently to the ACCA*

Nothing in the text, context, history, or purpose of the ACCA warrants an interpretation of the elements clause that departs from *Voisine* or from the Model Penal Code's default mens rea.

a. The centerpiece of petitioner's argument is the observation (*e.g.*, Br. 30-34) that the ACCA's elements clause refers to the use of force "against the person of another," 18 U.S.C. 924(e)(2)(B)(i), while the provision in *Voisine* did not. That prepositional phrase—far from being superfluous, see Pet. Br. 34, 37—limits the scope of the elements clause to crimes involving force applied to another person, thereby excluding many property crimes, like arson. See 1986 Hearings 4 (proposing elements clause that would have encompassed the use of force "against the person or property of another"). The phrase is not, as petitioner would have it, a roundabout way of ratcheting up the mens rea requirement to demand that "the consequence of the use * * * be intended or known," Br. 33 (emphasis omitted).

The term "against" introduces the *object* of the force, not its intended "target" (Pet. Br. 19). Although the word "against" can in some contexts mean "opposition," as petitioner describes (*ibid.*), that is not its ordinary meaning in the context of one thing applying force "against" another. Instead, the term "against" in that context more naturally indicates that one thing "makes contact with" another—like waves crashing "against" the shore or a baseball hitting "against" the outfield fence. See, *e.g.*, *The American Heritage Dictionary of the English Language* 23 (New College ed. 1976) ("So as to come into forcible contact with"); *The Oxford Eng-*

lish Dictionary 241 (2d ed. 1989) ("Toward and into contact with; into direct collision with"); *Webster's New Collegiate Dictionary* 21 (1981) ("in contact with").

The Court in *Voisine* not only used the term "against" in that exact sense, but treated the statute in that case *as if* it contained a prepositional phrase similar to the ACCA's. In summarizing its holding, for example, the Court stated that the "federal ban on firearms possession" at issue in the case "applies to any person with a prior misdemeanor conviction for the 'use . . . of physical force' *against* a domestic relation." *Voisine*, 136 S. Ct. at 2282 (quoting 18 U.S.C. 921(a)(33)(A)) (emphasis added); see *id.* at 2276 (similar phrasing). "That language, naturally read," the Court continued, "encompasses acts of force undertaken recklessly—*i.e.*, with conscious disregard of a substantial risk of harm." *Id.* at 2282. If petitioner were in fact correct (Br. 20, 36) that "ordinary usage" suggests that the "use of force *against*" someone must be knowing or intentional, then the Court would not have adopted that very locution to describe its holding that recklessness suffices.

Consistent with its description of the holding, the Court in *Voisine* repeatedly took as a given that the object of the reckless conduct would be another person. The Court defined recklessness in the *Voisine* context to require a person "to consciously disregard a substantial risk that the conduct will cause harm *to another*." 136 S. Ct. at 2278 (emphasis added; brackets, citation, and internal quotation marks omitted); see *id.* at 2279 (explaining that "reckless behavior" involves "acts undertaken with awareness of their substantial risk of causing injury," such that any "harm such conduct causes is

the result of a deliberate decision to endanger another"). And the Court's examples of reckless conduct that would be covered by the statute in *Voisine*—a husband cutting his wife with a shard from a plate that he angrily threw near her and a boyfriend hurting his girlfriend by slamming a door while she followed closely—do not involve conscious disregard of whether force is generated; the throwing and slamming are plainly "volitional," *ibid.* Those examples instead involve "conscious disregard of [the volitional action's] substantial risk *of causing harm*" to the wife or girlfriend. *Ibid.* (emphasis added).

Voisine's treatment of *Leocal* further illustrates that the Court did not view the required mental state to depend on the presence or absence of an "against" phrase identifying the object of the use of force. The relevant provision in *Leocal*, 18 U.S.C. 16(a), contained such a phrase, defining a "crime of violence" to include "an offense that has as an element the use * * * of physical force against the person or property of another." Yet *Voisine* did not distinguish *Leocal* on that basis—to the contrary, it described *Leocal* as "address[ing] a statutory definition similar to § 921(a)(33)(A)." 136 S. Ct. at 2279. The Court instead distinguished *Leocal* by observing that the accidental conduct described in *Leocal* did not amount to "reckless behavior"; emphasizing that "*Leocal* itself recognized the distinction between accidents and recklessness"; and explaining that "nothing in *Leocal* * * * suggests * * * that 'use' marks a dividing line between reckless and knowing conduct." *Ibid.* All of that analysis was unnecessary if the phrase "against the person or property of another" were in fact the sharp linguistic departure from *Voisine* that petitioner's theory requires. See *Verwiebe*, 874 F.3d at 263

(explaining that *Voisine* "tellingly placed no weight on the absence of 'against the person or property of another' from § 921(a)(33)(A)(ii)").

The phrase "against the person of another" would be an exceedingly oblique way for Congress to deviate from the Model Penal Code's default mens rea of recklessness. Had Congress in fact wanted to limit the ACCA's elements clause to intentional or knowing conduct, it would have chosen a word other than "use"—which contains no such limitation, see *Voisine*, 136 S. Ct. at 2278-2280—or would have qualified that word directly. Congress could, for example, have specified that an offense have, as an element, "the intentional or knowing use of force against the person of another." Petitioner's effort to read the phrase "against the person of another" as the equivalent of such an express qualifier contravenes this Court's ordinary reluctance to "read[] words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

Furthermore, petitioner's reading of the phrase "against the person of another" proves too much. Petitioner repeatedly asserts (Br. 19-20) that the phrase implies that a defendant "aimed" or "targeted his action at the other person." But that definition would appear to exclude not just a defendant who recklessly causes injury but one who knowingly does so. See *United States* v. *Bailey*, 444 U.S. 394, 404 (1980) ("[A] person who causes a particular result * * * is said to act knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.") (internal quotation marks omitted). Yet even petitioner does not endorse that implausible result. See Pet. Br. 33.

b. Petitioner's efforts (Br. 25-27) to infer his desired mens rea from other aspects of the ACCA's elements clause are likewise flawed. Contrary to his suggestion, the elements clause's coverage of "attempted" and "threatened" uses of force does not advance his argument. The provision at issue in *Voisine* similarly defined a misdemeanor crime of domestic violence by reference to "the use *or attempted use* of physical force." 18 U.S.C. 921(a)(33)(A)(ii) (emphasis added). And the mental-state component of one alternative has no logical bearing on the mental-state component of another. Attempt, for example, generally requires a specific intent "to commit the completed offense," *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106 (2007), but requiring the same mens rea for the completed use of force would exclude both reckless *and* knowing crimes—a result that even petitioner does not advocate. And were a comparison of mental states relevant, that would not help petitioner, as threat statutes may incorporate a mens rea of recklessness with respect to the consequences of the defendant's words or actions. See *Elonis*, 135 S. Ct. at 2013 (acknowledging possibility of such an interpretation of federal threat statute); see also, *e.g.*, Model Penal Code § 211.3 (defining "terroristic threats" to include a threat made "in reckless disregard of the risk of causing such terror or [serious public] inconvenience") (capitalization omitted).

Petitioner's attempt to read reckless crimes out of the elements clause by reference to the now-defunct residual clause is similarly misguided. As an initial matter, petitioner is mistaken (Br. 26) that this Court held in *Begay* v. *United States*, 553 U.S. 137, 145 (2008), abrogated by *Johnson* v. *United States*, 135 S. Ct. 2551

(2015), that "only 'purposeful' crimes fall within the residual clause." To the contrary, the Court explained that the driving-under-the-influence offenses at issue did not qualify as violent felonies under the residual clause because the statute of conviction "impose[d] strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all." *Ibid.* In any event, even if the residual clause clearly excluded offenses that could be committed with a mens rea of recklessness, applying a different rule to the elements clause would hardly be "strange," Pet. Br. 26 (citation omitted). Congress could reasonably have believed—and evidence suggests it did believe—that different standards were appropriate under the elements clause and the residual clause, which had far fewer obvious textual limits. 1986 House Report 3; see *Taylor* v. *United States*, 495 U.S. 575, 587 (1990).

c. For reasons explained above, see pp. 16-22, *supra*, the history of the ACCA strongly supports the inclusion of reckless crimes in the elements clause. Petitioner's contrary contention rests on an untenable chain of inferences. He asserts that, when enacting the ACCA in 1984, Congress "intended the predicate offenses to incorporate the states of mind from an omnibus criminal bill," Pet. Br. 27 (citing S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983) (1983 Senate Report)), and that a report accompanying that separate omnibus crime bill "stated that, as to the force used in a robbery, 'the applicable state of mind that must be proved is at least "knowing,"'" *ibid.* (quoting S. Rep. No. 307, 97th Cong., 1st Sess. 672 (1981) (1981 Senate Report)). But the omnibus crime bill, which proposed overhauling the federal criminal code and replacing all federal robbery

statutes with a single robbery offense requiring knowing conduct, see 1981 Senate Report 668-675, was never enacted. Meanwhile, the 1983 Senate Report addressed a prior proposed version of the ACCA that likewise was never enacted. See 1984 House Report 4. Thus, even assuming that the Senate once intended to incorporate the mens rea from a proposed (but never enacted) federal robbery statute into a proposed (but never enacted) version of the ACCA, see Pet. Br. 27, it does not follow that Congress intended the same when it rejected the Senate's proposal and instead adopted a different version of the ACCA, see 1984 House Report 4.

And even assuming it had some attenuated relevance, the legislative history from 1984 would not be nearly as illuminating as the legislative history from 1986, when Congress adopted the text of the elements clause. That legislative history explains that the 1986 amendments were designed to "expand[] the predicate offenses triggering the sentence enhancement." *Taylor*, 495 U.S. at 582; see *Stokeling*, 139 S. Ct. at 550. In particular, the key report repeatedly made clear that the elements clause had been drafted to cover violent crimes like robbery, murder, rape, and assault. See, *e.g.*, 1986 House Report 3 (explaining that the elements clause would cover felonies "involving physical force against a person such as murder, rape, [and] assault"); *id.* at 4 (describing "murder, rape, assault, [and] robbery" as prototypical felonies "involving physical force against a person"). Petitioner's cramped construction of the element clause, however, would exclude many of those offenses. See pp. 16-22, *supra*.

d. Finally, petitioner contends (Br. 23-25, 34-36) that *Voisine*'s analysis does not apply to the ACCA because *Voisine* involved a firearm-possession ban with

different purposes. But differences in the purposes of the two schemes—both of which are designed to deter dangerous convicts from possessing firearms—do not suggest that the ACCA's elements clause excludes all crimes committed with the reckless mens rea that is the default for criminal liability.

Someone like petitioner, who has "consciously disregard[ed] a substantial risk that [his] conduct will cause harm to another," has made "a deliberate decision to endanger another." *Voisine*, 136 S. Ct. at 2278-2279 (citation and internal quotation marks omitted). That increases the "likelihood that the offender is the kind of person who might deliberately point [a] gun and pull the trigger," the very type of offender at whom the ACCA is directed. *Begay*, 553 U.S. at 146. And Congress adequately ensured that the ACCA would not be a trap for the occasional "rowdy drunks and reckless dads," Pet. Br. 42. Only when someone has *three* convictions for violent felonies or serious drug offenses committed on different occasions, and then unlawfully and knowingly possesses a gun, will the ACCA come into play. See 18 U.S.C. 924(e). Congress could, and did, legitimately consider the set of people who meet those requirements to be dangerous recidivist criminals. It need not, and frequently will not, be the case that all three of an ACCA defendant's qualifying prior convictions are for reckless conduct. And even if they are, someone who *repeatedly* risks bodily injury to others with subjective awareness of that substantial risk reveals a deep-seated disregard for human life or bodily integrity. See 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.4(g) (3d ed. 2018) ("Subjective fault is greater fault than objective fault; one who consciously does risky things is

morally a worse person than one who unconsciously creates risk.").

It is unnecessary to excise reckless crimes from the scope of the elements clause in order to differentiate (each of the three required) ACCA predicates from the misdemeanor domestic-violence crimes at issue in *Voisine*. The statute at issue there applies to misdemeanors, whereas the ACCA requires felonies. Compare 18 U.S.C. 921(a)(33)(A), with 18 U.S.C. 924(e)(2). And, relatedly, the degree of "force" required is different. A misdemeanor crime of domestic violence may include an offense committed by mere unwanted touching, see *United States* v. *Castleman*, 572 U.S. 157, 163 (2014); an ACCA violent felony, by contrast, requires the use of "*violent* force," *Johnson* v. *United States*, 559 U.S. 133, 140 (2010); see *Stokeling*, 139 S. Ct. at 553. That difference reflects a requirement at common law (and in many statutes today) that distinguishes felonies from misdemeanors. See *Johnson*, 559 U.S. at 141. No similar difference exists with respect to mens rea—to the contrary, a mens rea of recklessness has long supported felony liability. See *Voisine*, 136 S. Ct. at 2280 (noting that "[s]everal decades" before Section 922(g)(9)'s enactment, "the Model Penal Code had taken the position that a *mens rea* of recklessness should generally suffice to establish criminal liability"); see, *e.g,* Model Penal Code § 210.2(1)(b) (felony reckless murder); *id.* § 211.1(2)(a) (felony reckless aggravated assault); *id.* § 222.1 (felony robbery-by-injury). And where the defendant is reckless with respect to "*violent* force," *Johnson*, 559 U.S. at 140, his crime can be classified as a "violent felony."

2. Petitioner's knowledge-plus requirement would contravene Congress's objectives and produce illogical results

Contrary to petitioner's contention (Br. 37-42), it is his construction of the ACCA, not the court of appeals', that would lead to nonsensical results. Superimposing a knowledge-plus requirement onto the ACCA's elements clause would generate a host of exclusions that Congress did not intend and draw lines that have no obvious relation to the seriousness of the offenses involved.

a. Petitioner's knowledge-plus requirement would exclude from the ACCA many of the very crimes that it was designed to cover

As discussed above, see pp. 16-22, *supra*, excising reckless crimes from the ACCA would exclude many of the robbery, aggravated-assault, and possibly even murder offenses that Congress clearly considered to be violent felonies and that are naturally described as such. See 1986 House Report 3-4; see also *Johnson*, 559 U.S. at 140-141 (noting that *Black's Law Dictionary* "define[d] 'violent felony' as 'a crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon'") (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)) (brackets omitted). In particular, at the time of the elements clause's enactment, petitioner's approach would have cut out robbery-by-injury crimes in at least ten States (as well as the Model Penal Code), aggravated-assault crimes in at least 28 States, and possibly murder crimes in more than two-thirds of the States. See pp. 16-22 & nn.3-7, *supra*. As in previous ACCA cases, this

Court "should not lightly conclude that Congress enacted a self-defeating statute." *Quarles* v. *United States*, 139 S. Ct. 1872, 1879 (2019).

Petitioner's theory would also produce other anomalous consequences. Petitioner would treat (Br. 25) *attempted* assault or assault by *threat* of bodily injury as ACCA violent felonies, while excluding reckless conduct that actually *causes* bodily injury. Here, for example, petitioner would exclude as an ACCA predicate his 2007 conviction under the Tennessee aggravated-assault subsection that prohibits assault where the defendant recklessly causes serious bodily injury. Tenn. Code Ann. § 39-13-102(a)(2)(A) (2003). But petitioner would include as an ACCA predicate his 2002 and 2003 convictions under the subsection that prohibits assault where a defendant "[u]ses or displays a deadly weapon" and, among other things, "[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury." *Id.* §§ 39-13-101(a)(2), 39-13-102(a)(1)(B). Thus, under petitioner's view of the ACCA, he committed a violent felony when he used a weapon to put his victims in fear of injury, but he did not commit a violent felony when he consciously disregarded a substantial risk of injuring someone and then did in fact injure someone.

That distinction makes little sense "in the context of a statutory definition of '*violent* felony,'" *Johnson*, 559 U.S. at 140. A conviction for threatening bodily injury does not necessarily require proof that the defendant would actually have employed force; a mere bluff could suffice. See, *e.g.*, *Virginia* v. *Black*, 538 U.S. 343, 359-360 (2003); 2 LaFave § 16.3 (2018) (explaining that "[t]he weight of authority, fortified by the modern trend, is to include" threats of injury that a defendant

does not intend to carry out). A crime requiring reckless causation of bodily injury, on the other hand, requires that the defendant deliberately—not just accidentally, see *Voisine*, 136 S. Ct. at 2279—place his own interests ahead of the bodily safety of others, and cause harmful results. Petitioner's approach, which would anomalously include threat offenses but not reckless-causation offenses, "not only would defy common sense, but also would defeat Congress' stated objective of imposing enhanced punishment on armed career criminals who have three prior convictions for * * * violent felonies." *Quarles*, 139 S. Ct. at 1879.

The anomalies would not be limited to aggravated assault. On petitioner's view, attempted or threatened murder would (presumably) still qualify as a violent felony, but in many States, *completed* murder might not. Similarly, robbery by threat of bodily injury would be a violent felony, while robbery by causation of bodily injury would not. Take, for example, the Texas robbery statute at issue in *Walker* v. *United States*, cert. dismissed, No. 19-373 (Jan. 27, 2020), on which petitioner relies (Br. 41). One subsection prohibits robbery-by-injury, whereas another subsection prohibits robbery-by-threat—*i.e.*, theft where the offender, with intent to obtain or maintain control of the property, "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death," Tex. Penal Code Ann. § 29.02(a)(2) (West 1974); see *id.* § 29.02(a)(1). The robbery-by-threat subsection is indisputably a violent felony because it involves a knowing or intentional "threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i); see *Burris*, 920 F.3d at 956. Yet under petitioner's view, a defendant who

makes good on his threat and is later convicted of causing bodily injury to his victim has not committed a violent felony. Again, that makes little sense.

b. Petitioner's knowledge-plus requirement could lead to additional nonsensical results under other similarly worded provisions

Petitioner's atextual insertion of a heightened mens rea requirement into the phrase "use * * * of physical force against the person of another" could also have significant repercussions beyond the ACCA. In particular, the "crime of violence" definitions in 18 U.S.C. 16 and 924(c) both include elements clauses worded similarly to the ACCA's. Excluding crimes committed with a mens rea of recklessness from those statutes would further undermine Congress's expectations.

i. Section 16 defines a "crime of violence" for purposes of many statutory provisions, including the classification of a felony crime of violence as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 8 U.S.C. 1101(a)(43)(F). Under Section 16(a), a crime of violence includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 16(a).

Section 16 was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. X, Pt. A, § 1001(a), 98 Stat. 2136. Congress anticipated that Section 16(a) would cover even "threatened or attempted simple assault [in violation of 18 U.S.C. 113(e) (1982), now codified at 18 U.S.C. 113(a)(5)] or battery [in violation of 18 U.S.C. 113(d) (1982), now codified at 18 U.S.C. 113(a)(4)] on another person." S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (footnotes omitted).

But under petitioner's theory, Section 16(a) would exclude aggravated assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6)—a plainly more serious offense than the attempted simple assaults Congress expected the statute to reach—simply because such injurious assaults can be committed recklessly.

Section 16(a) also applies in the INA's "crime of domestic violence" provision, which renders an alien removable if he or she commits "any [Section 16] crime of violence * * * against a person" in a specified domestic relationship with the alien. 8 U.S.C. 1227(a)(2)(E)(i). Unlike the INA's aggravated-felony provision, see 8 U.S.C. 1101(a)(43)(F), the domestic-violence provision covers misdemeanor crimes, see 8 U.S.C. 1227(a)(2)(E)(i). If reckless crimes were excluded from Section 16, that would "risk[] rendering" the domestic-violence provision "broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness." *Voisine*, 136 S. Ct. at 2280. That, in turn, would lead to the same untenable result—that "domestic abusers of all mental states" would often fall outside a misdemeanor-domestic-violence statute—that this Court avoided in *Voisine*, under a similar domestic-violence provision. *Id.* at 2281; compare 8 U.S.C. 1227(a)(2)(E)(i), with 18 U.S.C. 921(a)(33)(A).

ii. Another similarly worded elements clause appears in Section 924(c), which prohibits using or carrying a firearm "in relation to any crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). Like Section 16, Section 924(c) defines a "'crime of violence'" to include a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A).

Interpreting Section 924(c) to exclude crimes committed with a mens rea of recklessness would potentially eliminate even federal second-degree murder as a "crime of violence." Second-degree murder, in violation of 18 U.S.C. 1111(a), "may be committed recklessly—with a depraved heart mental state—and need not be committed willfully or intentionally." *United States* v. *Begay*, 934 F.3d 1033, 1039-1040 (9th Cir. 2019). As a result, a panel of the Ninth Circuit recently held that, under pre-*Voisine* circuit precedent, second-degree murder "does not constitute a crime of violence" under Section 924(c). *Id.* at 1038.[8] As the dissenting judge in *Begay* explained, the exclusion of second-degree murder from Section 924(c)'s elements clause leads to "glaringly absurd" results. *Id.* at 1047 (Smith, J., concurring in part and dissenting in part) (citation omitted).

c. Petitioner's knowledge-plus requirement lacks any sound practical justification

By comparison, petitioner does not identify any consequences that would justify abandoning the construction of the ACCA that the courts of appeals have predominantly adopted. His characterization (Br. 17) of their approach as "distort[ing]" the ACCA lacks grounding in the default mens rea principles against which Congress legislated, in any of Congress's articulated objectives for the ACCA or similarly worded statutes, or in real-world experience.

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[8] The Ninth Circuit subsequently granted rehearing en banc in another case to reconsider its pre-*Voisine* precedent. See *United States* v. *Orona*, 923 F.3d 1197, reh'g en banc granted, 942 F.3d 1159 (2019). It has since postponed proceedings in both cases pending this Court's decision here. Order, *Orona*, *supra* (No. 17-17508) (Apr. 1, 2020); Order, *Begay*, *supra* (No. 14-10080) (Dec. 5, 2019).

i. Petitioner primarily contends (Br. 38-39) that the reckless use of force cannot satisfy the ACCA's elements clause because certain reckless assaults can be committed with a car. Neither the statutory text nor legislative history reveals any intention to carve out from the ACCA an exception for violent crimes that involve reckless driving, let alone every violent crime that can be committed recklessly.

By the time Congress enacted the ACCA and similar elements clauses, courts had long recognized that reckless driving can support an aggravated assault or murder conviction if the facts are sufficiently grave to establish the mental state and other elements of the offense. See, *e.g.*, *Shiflet* v. *State*, 392 S.W.2d 676, 680 (Tenn. 1965) (second-degree murder); *Farm Bureau Mut. Auto. Ins. Co.* v. *Hammer*, 177 F.2d 793, 796 (4th Cir. 1949) (assault and battery), cert. denied, 339 U.S. 914 (1950); *Nestlerode* v. *United States*, 122 F.2d 56, 59 (D.C. Cir. 1941) (second-degree murder); *State* v. *Trott*, 130 S.E. 627, 630 (N.C. 1925) (murder); *Tift* v. *State*, 88 S.E. 41, 41 (Ga. Ct. App. 1916) (assault and battery). In one case, for example, a defendant was convicted of murder for recklessly striking a man with his car when, after having already driven "through a traffic light, * * * striking and fatally injuring" a woman, he continued through city streets "at a rapid speed" "[w]ithout stopping his car"; struck a parked car and then another car; kept going "at a rapid speed through a red light"; and then, "while driving on the wrong side of the street," hit and killed his victim. *Nestlerode*, 122 F.2d at 57, 59. That defendant used force against that victim, just as much as if he had pointed a loaded gun out his car window and fired without regard to whether a bullet hit that victim, or anyone else. In amending the ACCA

to add the elements clause, Congress operated against that legal backdrop and did not draft an exception for reckless driving or other reckless crimes.

Contrary to petitioner's contention (Br. 39), declining to create a reckless-driving carve-out is unlikely to subject the "speeder or stop-sign runner" to the ACCA. All but the most serious reckless drivers—including in Tennessee—are more readily prosecuted for (and, presumably, are more willing to plead to) less serious offenses, such as misdemeanor reckless driving or driving under the influence, rather than felony aggravated assault or murder. Misdemeanor reckless-driving statutes generally do not require proof that the defendant consciously disregarded a known risk of harm to, or actually harmed, another person; proof of harm to property, for example, may suffice. See Tenn. Code Ann. § 55-10-205 (2019) (defining misdemeanor reckless driving to include disregard for property); see also, *e.g.*, Tex. Transp. Code Ann. § 545.401 (2019) (same); N.Y. Veh. & Traf. Law § 1212 (West 2019) (defining misdemeanor reckless driving to include operating a vehicle "in a manner which unreasonably interferes with the free and proper use of the public highway"). And driving-under-the-influence statutes generally do "not require proof of any particular mental state," or "require only proof that the person acted negligently in operating the vehicle." *Leocal*, 543 U.S. at 7-8; see *Begay*, 553 U.S. at 148 (characterizing driving under the influence as "a strict-liability crime"); see also *State* v. *Turner*, 953 S.W.2d 213, 215 (Tenn. Crim. App. 1996) (describing Tennessee driving under the influence as a strict-liability crime).

Felony aggravated assault, by contrast, generally requires proof that a defendant was subjectively aware

of a substantial and unjustifiable risk that that he would cause bodily injury to another, that he consciously disregarded such risk, and that he in fact caused such injury. See Tenn. Code Ann. §§ 39-11-302(a)-(b), 39-13-102(a)(2) (2003); see also, *e.g.*, Tex. Penal Code Ann. §§ 6.03(c), 22.02 (West 2019); N.Y. Penal Law §§ 15.05(3), 120.05(4) (2019). Assault charges thus appear to be reserved for only the most serious reckless-driving offenses. Petitioner's two examples (Br. 38) of convictions of drivers for Tennessee aggravated assault bear that out. One defendant was convicted for driving 55 miles an hour through a red light at a "busy intersection" and "T-bon[ing]" another car without ever applying the brakes, causing "serious injuries" to the driver of that car. *State* v. *Cope*, No. 2014-775, 2015 WL 4880347, at *1, *7 (Tenn. Crim. App. Aug. 14, 2015). The other was convicted for "tailgating" a driver through a residential neighborhood, "zoom[ing] around him," "turning a sharp curve * * * at a high rate of speed," and, without applying the brakes, "collid[ing] head-on with [another] car," "very severely injur[ing]" two passengers, *State* v. *Norris*, 874 S.W.2d 590, 592-593, 596 (Tenn. Crim. App. 1993) (internal quotation marks omitted), overruled on other grounds by *State* v. *Imfeld*, 70 S.W.3d 698 (Tenn. 2002).

Petitioner's select few examples from other States involve comparably extreme facts. See *Collins* v. *State*, No. 09-04-407, 2005 WL 3074154, at *1 (Tex. Ct. App. June 8, 2005) (defendant "r[a]n three stop signs * * * traveling at fifty-five to sixty miles per hour" before crashing into another car, causing "significant injuries" to her victim); *Tam Ha Huynh* v. *State*, No. 03-17-645, 2018 WL 4100849, at *5 (Tex. Ct. App. Aug. 29, 2018)

(defendant stopped his car on a highway, "perpendicular to oncoming traffic with its headlights off at night and in a poorly lit area," causing both an 18-wheel truck and another car to hit defendant's car, resulting in serious injuries to the victim). Furthermore, because the ACCA applies only to repeat offenders who knowingly possess a firearm or ammunition after three violent felonies or serious drug offenses, 18 U.S.C. 924(e)(1), nobody could be subject to it based on a single reckless-driving incident. And even if reckless-driving convictions are occasionally used as ACCA predicates,[9] petitioner's blinkered focus on them provides no reason to dramatically narrow the ACCA to exclude all reckless crimes.

The Tennessee reckless-aggravated-assault statute at issue here covers classically violent crimes. It has been applied to a defendant who "sw[u]ng[] a hot, metal pipe at [a woman], and [a different victim] was hit while attempting to break up the altercation," *State* v. *Nolan*, No. W2014-990, 2015 WL 5838739, at *8 (Tenn. Crim. App. Oct. 7, 2015); a defendant who beat his victim and caused "hearing loss, missing teeth, impaired vision and

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[9] One of petitioner's amici purports to provide examples of serious reckless-driving incidents that were used as ACCA predicates. See FAMM Amicus Br. 7. But none of the cited cases actually found that the state offense in question satisfied the ACCA's elements clause. See *Kirk* v. *United States*, 481 Fed. Appx. 249, 249 (6th Cir. 2012) (per curiam) (noting government concession that conviction was not an ACCA predicate); *United States* v. *Herrick*, 545 F.3d 53, 57-58 (1st Cir. 2008) (concluding that conviction fell within the now-defunct residual clause); *United States* v. *Penny*, 220 Fed. Appx. 449, 450-451 (8th Cir. 2007) (per curiam) (not reaching the question); *Thornton* v. *United States*, No. 11-cr-253, 2018 WL 1088028, at *5 (M.D. Pa. Feb. 28, 2018) (concluding that conviction was not an ACCA predicate).

impaired memory," *State* v. *McAmis*, No. M2007-2643, 2010 WL 2244124, at *4 (Tenn. Crim. App. June 4, 2010); a defendant who "looked the victim directly in the eye, lifted both legs, and kicked [her] beneath her chin," sending her "airborne" and breaking her pelvis, *State* v. *Day*, No. E2016-632, 2017 WL 3206605, at *8 (Tenn. Crim. App. July 27, 2017); and a defendant who "slamm[ed] his fist into the face of a man whom he did not know and who had done nothing more threatening than walk behind him in a parking lot," *State* v. *Jarnagin*, No. 03C01-9609-CR-351, 1997 WL 624862, at *3 (Tenn. Crim. App. Oct. 9, 1997). Nothing suggests that Congress wholly excluded such crimes from the ACCA's "violent felony" definition out of misplaced concern that the ACCA might somehow be applied to a relatively sympathetic reckless driver.

Finally, petitioner errs in suggesting (Br. 39-40) that the INA's definition of a "serious criminal offense"—which includes (1) "any felony," (2) "any crime of violence" under Section 16, or (3) "any crime of reckless driving or of driving while intoxicated" if the defendant's "crime involves personal injury to another," 8 U.S.C. 1101(h)—indirectly requires excising reckless-aggravated-assault crimes from Section 16(a)'s "crime of violence" definition. Classifying reckless aggravated assault as a crime of violence under Section 16(a) does not make paragraph (3) of the INA definition redundant. Some "reckless driving" crimes do not require proof of a conscious disregard of a known risk, and thus would not satisfy Section 16(a). See, *e.g.*, Va. Code Ann. § 46.2-862 (2019) (providing that a "person shall be guilty of reckless driving" for exceeding certain speeds). Subsection (3) also covers offenses that do not categorically require injury, so long as the underlying

offense conduct involved such injury. See *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1255 (2018) (Thomas, J., dissenting) (observing that Section 1101(h)(3) "employ[s] the underlying-conduct approach"); see also, *e.g.*, *Nijhawan* v. *Holder*, 557 U.S. 29 (2009) (applying underlying-conduct approach to neighboring INA provision); *United States* v. *Hayes*, 555 U.S. 415, 421 (2009) (applying underlying-conduct approach to misdemeanor-crime-of-domestic-violence definition). And in any event, "[r]edundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute"—let alone a two-steps-removed statute like the ACCA—"contrary to its text." *Barton* v. *Barr*, 140 S. Ct. 1442, 1453 (2020).

ii. For similar reasons, petitioner's constrictive reading of the ACCA finds no meaningful support in his invocation (Br. 20, 34, 40-42) of a smattering of other convictions—actual or hypothesized—for reckless behavior that he views as insufficiently violent. That species of ACCA argument is not unique to the particular interpretive issue here, and this Court has previously seen, and properly disregarded, similar requests to focus on putatively sympathetic corner cases. See, *e.g.*, Pet. Br. at 26-27, *Quarles*, *supra* (No. 17-778) (positing burglary prosecution of homeless defendant who shelters in building and takes a coat to keep warm); Pet. Br. at 34-36, *Stokeling*, *supra* (No. 17-5554) (highlighting robbery conviction for grabbing money from a closed fist). In defining "violent felony," Congress identified crimes that it considered sufficiently violent as a categorical matter to warrant application of the ACCA based on three qualifying convictions and later knowing possession of a firearm. Cf. *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). Like previous defendants

who have made similar arguments, petitioner here identifies no likelihood that someone would be swept up in the statute on the basis of one sympathetic-sounding fact pattern.

Moreover, many of petitioner's select examples of recklessness-based offenses that, according to him, "Congress surely did not intend to cover" within the scope of the ACCA (Br. 40), are flawed. Some of those offenses may not qualify as ACCA violent felonies because the statutes of conviction do not require proof of ordinary recklessness. See, *e.g.*, Tex. Penal Code Ann. § 22.04(a) (West 2019) (defining crime to include "criminal negligence"). And other cited convictions (Br. 40-41) could, in fact, be fairly classified as "violent and aggressive" crimes, *Begay*, 553 U.S. at 148. See *Cuevas* v. *State*, 576 S.W.3d 398, 399 (Tex. Crim. App. 2019) (defendant "tried to push past [the victim], jumped on the [victim], and knocked him down"); *Hall* v. *State*, 158 S.W.3d 470, 472 (Tex. Crim. App. 2005) (defendant "punched [the victim] in his face with such force that [the victim] collapsed to the ground"); *Seaton* v. *State*, 385 S.W.3d 85, 90 (Tex. Ct. App. 2012) (officer drove "at least ninety-nine miles per hour through a red light at an intersection" without ever "us[ing] his police cruiser's emergency lights and siren"); *Craver* v. *State*, No. 02-14-76, 2015 WL 3918057, at *1-*2 (Tex. Ct. App. June 25, 2016) (fleeing defendant jumped over second-floor railing onto an elderly woman, breaking her back).

Petitioner's hypotheticals about a police officer who "tests a can of pepper spray near a crowd of peaceful protestors," Br. 20, or someone who "hurls a plate" at a spider, Br. 34, are likewise misplaced. Petitioner identifies no convictions for reckless aggravated assault based on such fact patterns, and it would be difficult to

prove that someone testing a can of pepper spray or attempting to kill a spider both was aware of a "substantial and unjustifiable" risk of injuring another person and engaged in conduct constituting "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Model Penal Code § 2.02(2)(c). Those fact patterns are much more likely to involve true accidents or, at most, criminal negligence. See *id.* § 2.02(2)(d). And to the extent someone in the hypothesized circumstances were in fact to consciously disregard a substantial risk of injury to another, it would not be "unnatural," as petitioner contends (Br. 20), to describe the actor as using force against the victim. Indeed, this Court has already found that comparable hypotheticals constitute the use of force—and implicitly the use of force against a domestic relation. See *Voisine*, 136 S. Ct. at 2279 (describing an offender who "throws a plate in anger against the wall near where his wife is standing" and recklessly uses force when "a shard from the plate * * * ricochet[s] and injure[s]" her). No different result is warranted here.

C. The Rule Of Lenity Does Not Apply

Finally, petitioner contends (Br. 42-44) that the rule of lenity requires interpreting the ACCA's elements clause to exclude his Tennessee aggravated-assault conviction. "But 'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.'" *Castleman*, 572 U.S. at 172 (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)); see *Shular* v. *United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring).

No such grievous ambiguity exists here. Indeed, the clarity that *Voisine* provides makes this case particularly unsuitable for application of the rule of lenity. Petitioner suggests (Br. 43-44) that the ACCA's elements clause must be ambiguous because, *before* this Court's decision in *Voisine*, several courts of appeals had interpreted the ACCA to exclude reckless offenses. But the decisions excluding recklessness were based on a misreading of *Leocal*. See, *e.g.*, *United States* v. *Bettcher*, 911 F.3d 1040, 1045 (10th Cir. 2018) ("As did the other circuit courts after *Leocal*, we grouped reckless conduct with accidental and negligent conduct."). After this Court corrected that misreading in *Voisine*, courts of appeals have largely recognized that the ACCA's elements clause should be interpreted similarly. See p. 11, *supra*.

In any event, a circuit conflict alone—which is present for most issues that this Court resolves—is far from a sufficient reason to apply the rule of lenity. For example, even though this Court had noted that the courts of appeals had "almost uniformly held that recklessness" does not "constitute a 'use' of force," *Castleman*, 572 U.S. at 169 n.8, *Voisine* summarily rejected the defendant's request for lenity on that basis, 136 S. Ct. at 2282 n.6. The Court has likewise rejected similar requests in other "use of physical force" cases. See *Castleman*, 572 U.S. at 172-173. It should do so again here, where *Voisine* and the plain statutory text eliminate any possible need to "simply guess as to what Congress intended," *id.* at 173 (citation omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

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

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

2. 18 U.S.C. 921(a)(33)(A) provides:

Definitions

(a) As used in this chapter—

(33)(A) Except as provided in subparagraph (C),[1] the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal[2] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with

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[1] So in original. No subparagraph (C) has been enacted.

[2] So in original. Probably should not be capitalized.

whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

3. 18 U.S.C. 922(g) provides in pertinent part:

Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924 provides in pertinent part:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if

committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

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

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of

the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for

a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *