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

REPLY BRIEF FOR THE PETITIONER

KANNON K. SHANMUGAM
JESSICA A. MORTON
STACIE M. FAHSEL
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

NICHOLAS A. HANDLER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

ERIN P. RUST
Counsel of Record
JENNIFER NILES COFFIN
FEDERAL DEFENDER
SERVICES OF EASTERN
TENNESSEE, INC.
835 Georgia Avenue,
Suite 600
Chattanooga, TN 37402
(423) 756-4349
erin_rust@fd.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Statutes:

Miscellaneous:

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No. 19-5410

CHARLES BORDEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

The government's construction of the ACCA's force clause is inconsistent with the statutory text and would work a dramatic and unwarranted expansion of the ACCA's reach. Remarkably, the government does not even get to the relevant statutory text until page 23 of its brief. But the text resolves this case. The critical phrase in the force clause, "against the person of another," modifies and limits the phrase "the use * * * of physical force": it restricts the use of force to one that is "against," or intentionally or knowingly aimed at, another person.

The government contends that the "against" phrase merely indicates that the object of the force must be a person, rather than property. That contention is foreclosed

by *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), where the Court made clear that such a phrase does not merely define the object of the force but establishes the "degree of intent" that the use of force requires. The government would effectively read the critical "against" phrase out of the force clause and expand the ACCA's scope beyond the small subset of defendants who can fairly be called career criminals.

The government bases its expansive interpretation almost entirely on an improper application of *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), to the ACCA. But in *Voisine*, the Court addressed distinct statutory language in a fundamentally different context. The statute at issue did not contain the key phrase "against the person of another." The Court left open the question presented here and, at the government's behest, took pains to highlight the distinct features of the domestic-violence firearms ban. Unlike the statute in *Voisine*, the ACCA was intended to impose a severe 15-year mandatory minimum sentence only on the worst offenders. Petitioner's interpretation is the only one that accounts for those crucial differences in text and context.

Beyond its reliance on *Voisine*, the government has little to say. The government relies on the legislative history of the 1986 amendments to the ACCA, but nowhere in the legislative history did Congress say it intended to cover reckless offenses. In fact, the legislative history indicates the opposite. The government's interpretation would give the force clause a dramatically broader scope than Congress intended, by sweeping in a host of unintentional and nonviolent offenses. Petitioner's interpretation, by contrast, covers only those offenses that demonstrate a likelihood that the defendant will deliberately point a gun at someone in the future.

At a minimum, given that the courts of appeals had for many years uniformly interpreted the force clause not to include reckless offenses (without weakening the ACCA or rendering it ineffective), the government cannot seriously dispute that the force clause is ambiguous and therefore subject to the rule of lenity. It was only after *Voisine* that some courts of appeals, led astray by the government, began to adopt the government's interpretation. The Court should correct that erroneous reading of *Voisine* and restore the preexisting understanding of the scope of the force clause. The judgment of the court of appeals should be reversed.

A. Under The Plain Meaning Of The ACCA's Force Clause, A Predicate Offense That Can Be Committed Recklessly Does Not Qualify As A 'Violent Felony'

As this Court has recognized in interpreting a materially identical provision, the "critical" and "key" phrase in the force clause is "against the person * * * of another." *Leocal*, 543 U.S. at 9. As a matter of basic grammar, that prepositional phrase modifies the phrase "the use * * * of physical force." It thereby defines *how* the physical force is used: the force must be used "against," or targeted at, another person. That limitation compels the conclusion that offenses that can be committed recklessly are not covered: a person who has committed a reckless offense has not directed his use of force at another person.

The government resists that straightforward logic (Br. 23-26), but its contrary arguments lack merit.

1. The government contends that the phrase "against the person of another" would be an "exceedingly oblique" and "roundabout" way for Congress to "limit" the force clause to intentional or knowing conduct. Br. 23, 26. But that argument runs headlong into *Leocal*. There, the

Court described the corresponding language as the "critical" and "key" phrase that "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9. The government thus cannot be correct that the "against" phrase has no bearing on the necessary mens rea, or else *Leocal* would not have come out the way it did.

2. The government recognizes that the phrase "against the person of another" "limits the scope" of the force clause, but it proceeds to eliminate all meaning from that limitation. Specifically, it contends that the phrase merely "exclud[es] many property crimes" and thereby leaves covered "crimes involving force applied to another person." Br. 23.

Leocal squarely forecloses that argument too. The statute in *Leocal* differs in one respect from the ACCA's force clause: it covers "an offense that has as an element the use * * * of physical force against the person *or property* of another." 18 U.S.C. 16(a) (emphasis added). Under the government's interpretation, the "against" phrase would denote that Section 16(a) reaches crimes where the object of the force is either a person or property. But there is no plausible object of force other than a person or property. On the government's view, the "against" phrase was superfluous and could have been omitted from the statute altogether. Far from giving the phrase that empty meaning, the Court emphasized that it was the "critical" and "key" phrase defining the "degree of intent" that the statute required. *Leocal*, 543 U.S. at 9.

So too here. In arguing that the phrase "against the person of another" merely indicates that the object of the force must be a person as opposed to property, the government focuses narrowly on the single word "against." Acknowledging that "against" can "in some contexts mean 'opposition,'" the government says it merely means

"make[] contact with" in the context of "one thing applying force 'against' another." Br. 23.

But that is not the context here. As the government seemingly acknowledges (Br. 23), the prepositional phrase "against the person of another" modifies "the *use* * * * of physical force." 18 U.S.C. 924(e)(2)(B)(i) (emphasis added). And "use of force" means the "active employment of force," *Voisine*, 136 S. Ct. at 2279—not the more passive "application" of force that the government contemplates. Accordingly, the entire phrase "use * * * of physical force against the person of another" most naturally refers to the active employment of force that is directed or aimed at another person. Put another way, the phrase "against the person of another" introduces the *target* of "the use * * * of physical force," and not merely the object of the force.

The government's chosen examples illustrate the fatal flaw with its interpretation. Both of those examples—waves crashing against the shore and a baseball hitting against the fence (Br. 23)—involve two objects making contact with each other without any specified "active employment of force" by an individual. The force clause, by contrast, reaches "violent, active crimes" in which one person "use[s] * * * force against" another person. *Leocal*, 543 U.S. at 11. It thus plainly contemplates the directing or aiming of force at another.

3. The sole question that this Court left open in *Leocal* is precisely what mens rea the "against" phrase requires—*i.e.*, whether mere recklessness is enough. It is not, because the "against" phrase requires an actor to target his use of force in a particular way (*i.e.*, to use force intentionally or knowingly) and thereby excludes uses of force where the actor is indifferent to the consequences.

The government contends (Br. 26) that petitioner's interpretation would exclude knowing offenses. That is incorrect. When a person acts with knowledge that his conduct will cause a particular result, the law imputes to that person the intent to cause that result. See 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(a), at 457 (3d ed. 2018) (LaFave). While the government correctly notes that a person can be deemed to have knowledge if he is "practically certain" of the consequences of his action (Br. 26), that merely reflects the reality that a person "cannot of course 'know' infallibly that a certain result will follow from engaging in conduct." Model Penal Code § 2.02 cmt. 3, at 236-237 n.13 (1985). Such a person can be said to have aimed or directed his action in a way that a person who is merely reckless (*i.e.*, indifferent to the consequences of his action) cannot.

For that reason, and contrary to the government's repeated suggestions (Br. 8, 15), the line between recklessness and intent or knowledge is far more "salient" than the line between recklessness and criminal negligence. As any first-year law student knows, that distinction is "one of the more familiar in criminal law." *United States* v. *Harper*, 875 F.3d 329, 333 (6th Cir. 2017) (Kethledge, J.), cert. denied, 139 S. Ct. 53 (2018). The Model Penal Code itself describes that distinction as an "important" one. Model Penal Code § 2.02 cmt. 3, at 236. An action that an actor intends or knows will cause harm is different in kind from an action that merely involves a substantial risk of harm.

For evidence of that proposition, one need look no further than the assault statutes cited in the government's brief (Br. 20 n.4): many of those statutes, including the Tennessee statute at issue here, group together intentional and knowing assault and define reckless assault as a distinct and lesser offense subject to lower penalties.

See, *e.g.*, Tenn. Code Ann. § 39-13-102(a) (2003). And, as the government itself recognizes, certain States even "defin[e] criminal negligence in recklessness terms." Br. 20 n.5. It is far more intuitive, as well as more consistent with the statutory text, to distinguish between intentional or knowing offenses, on the one hand, and reckless or negligent offenses, on the other.

B. This Court's Decision In *Voisine* Does Not Support The Contrary Interpretation

Rather than engaging with the statutory text, the government relies almost entirely on *Voisine*. See Br. 11-16, 29-31. The Court there expressly left open the question whether a reckless offense can qualify as a predicate offense under 18 U.S.C. 16(a), the provision at issue in *Leocal* (and materially identical to the provision at issue here). See 136 S. Ct. at 2280 n.4. More broadly, as the Court recognized, the statute in *Voisine* differs from the ACCA's force clause in numerous critical respects.

1. The provision at issue in *Voisine*, 18 U.S.C. 922(g)(9), prohibits persons with misdemeanor domestic-violence convictions from possessing firearms. That provision contains the phrase "use * * * of physical force," but without the qualifying "against" phrase found in Section 16(a) (and the ACCA's force clause). Accordingly, while recognizing that Section 16(a) was "similar[]" to Section 922(g)(9), the Court took pains to note that it was interpreting the word "use"—"the only statutory language either party thinks relevant." 136 S. Ct. at 2278, 2280 n.4.

Nothing in *Voisine* addressed the "critical" and "key" phrase in the force clause—"against the person of another"—which modifies and constrains "use of physical force." *Leocal*, 543 U.S. at 9. As a result, in *Voisine*, the Court simply did not answer the question presented

here—as the Court itself recognized. See 136 S. Ct. at 2280 n.4. Although the "use * * * of physical force" may encompass volitional conduct where "the actor has the mental state of * * * recklessness with respect to the harmful consequences of his volitional conduct," *id.* at 2279, the Court made clear in *Leocal* that the "use * * * of physical force against the person of another" means something different.

While the government previously acknowledged that "important textual difference," U.S. Br. at 35, *Voisine*, *supra* (No. 14-10154); see U.S. Br. at 31, *United States* v. *Castleman*, 572 U.S. 157 (2014) (No. 12-1371), it elides it now—without acknowledging, much less explaining, its expedient change in position. The government even accuses the Court of "treat[ing] the statute in [*Voisine*] *as if* it contained a prepositional phrase similar to the ACCA's"—quoting the use of the word "against" in the Court's opinion. Br. 24 (quoting 136 S. Ct. at 2282). But the Court did no such thing, not least because it would have run directly into the reasoning of *Leocal*. See p. 4, *supra*. To the contrary, the Court precisely focused on the language of the provision at issue and held that it did not exclude reckless offenses. See *Voisine*, 136 S. Ct. at 2279.

2. The government does not come to grips with the different contexts and purposes of Section 922(g)(9) and the ACCA's force clause—differences that the *Voisine* Court acknowledged could support divergent interpretations. See 136 S. Ct. at 2280 n.4.

As the Court has explained, Section 922(g)(9) was enacted "to 'close a dangerous loophole' in the gun control laws." *Voisine*, 136 S. Ct. at 2276 (quoting *Castleman*, 572 U.S. at 160) (alteration omitted). Recognizing that "the presence of a firearm increases the likelihood that [domestic violence] will escalate to homicide," Congress

sought to prevent domestic abusers from having the means of escalation at hand. *Castleman*, 572 U.S. at 160.

As this Court made clear in construing the two statutes differently in *Castleman*, however, the ACCA serves a very different purpose. Although the Court saw "no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom [Section] 922(g) disqualifies from gun ownership," it has "hesitated * * * to apply the Armed Career Criminal Act to 'crimes which, though dangerous, are not typically committed by those whom one normally labels "armed career criminals"'" and for whom the result is a dramatically harsher punishment. 572 U.S. at 167 (quoting *Begay* v. *United States*, 553 U.S. 137, 146 (2008)). While excluding reckless domestic-violence offenses from Section 922(g) would have allowed domestic abusers to own guns in much of the Nation, see *Voisine*, 136 S. Ct. at 2275, there is no analogous concern in the context of the ACCA: individuals who commit felonies are still prohibited from owning guns under Section 922(g), and the only question is which of those individuals is subject to the ACCA's more severe penalties.

The government ignores the foregoing differences in context, arguing only that it is "unnecessary" to limit the force clause to intentional and knowing offenses in order to differentiate "violent felonies" under the ACCA from "misdemeanor crimes of domestic violence" under Section 922(g)(9). Br. 31. But the different statutory purposes compel a divergent interpretation—especially given the different statutory language. Indeed, in order to serve the statutory purpose of identifying the narrow group of offenders with an "increased likelihood" of deliberately pointing a gun at someone in the future, this Court has already construed the ACCA's residual clause to reach

only offenders who have committed crimes involving "intentional or purposeful conduct" and not those whose crimes merely "reveal a degree of callousness toward risk" (such as drunk drivers). *Begay*, 553 U.S. at 146. Despite the government's efforts to sweep *Begay* (like *Leocal*) under the carpet, that reasoning applies equally to the force clause here.

C. The ACCA's Context, Structure, And History Also Support The Conclusion That Reckless Offenses Do Not Qualify As 'Violent Felonies'

The context, structure, and history of the ACCA confirm that the force clause reaches only intentional and knowing offenses. The government's contrary arguments (Br. 16-22, 27-29) lack merit.

1. The ACCA's context supports petitioner's interpretation. As the government appears to acknowledge (Br. 17), the fact that the force clause is situated within "a statutory definition of '*violent* felony'" is critical to the analysis. *Johnson* v. *United States*, 559 U.S. 133, 140 (2010). While the government suggests that the phrase "violent felony" refers only to the degree of force used by a defendant (Br. 31), the Court has taken a broader view, explaining that the phrase "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Johnson*, 559 U.S. at 141 (quoting *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.)). As then-Judge Alito explained, "[t]he quintessential violent crimes * * * involve the intentional use of * * * force," and crimes that "require[] only recklessness" do not fall within the "ordinary meaning of the term 'violent' crime." *Oyebanji* v. *Gonzales*, 418 F.3d 260, 264 (3d Cir. 2005).

2. The ACCA's structure points in the same direction. As noted above, in *Begay*, the Court construed the

now-defunct residual clause to reach only offenders who have committed crimes involving "intentional or purposeful conduct." See pp. 9-10. It would be incongruous for an assault offense such as Tennessee's—which punishes "[r]ecklessly * * * [c]aus[ing] serious bodily injury to another," Tenn. Code Ann. § 39-13-102(a)(2) (2003)—to satisfy the ACCA's force clause when it could not have satisfied a clause encompassing conduct that "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

The government's contrary argument—that *Begay* was concerned only with strict-liability crimes, Br. 28—is wrong. As the Court has noted, "*Begay* involved a crime akin to strict-liability, negligence, and recklessness crimes." *Sykes* v. *United States*, 564 U.S. 1, 13 (2011). And as the Court made clear in *Begay* itself, the ACCA distinguishes between "purposeful, violent, and aggressive" conduct on the one hand, and conduct that "need not be purposeful or deliberate" on the other. 553 U.S. at 145. Perhaps recognizing that its interpretation cannot be squared with *Begay*, the government suggests that Congress "could" have intended to impose a lower mental-state requirement under the force clause than the residual clause (Br. 28). But that makes little sense, given that the whole point of the residual clause was to serve as a broad catch-all.

3. Contrary to the government's contention (Br. 28-29), the ACCA's history also supports petitioner's interpretation. The original version of the ACCA, enacted in 1984, expressly defined its predicate offenses—robbery and burglary—to include intentional conduct. See 18 U.S.C. App. 1202(c)(8)-(9) (Supp. II 1984).

Rather than confronting those definitions head-on, the government complains (Br. 29) that the evidence of Congress's intention to limit ACCA predicates to intentional

conduct was contained in a 1983 Senate Report addressing an earlier version of the ACCA and that the omnibus crime bill was not enacted. But that is beside the point: the incorporated report makes clear that Congress intended to require at least a "knowing" mens rea for the ACCA's original predicate crimes. See S. Rep. No. 307, 97th Cong., 1st Sess. 672 (1981). In any event, even if the 1983 Senate Report were discounted, a 1984 House Report affirmed Congress's desire to cover offenses that were "*deliberately directed* against innocent individuals." H. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984) (emphasis added). The government points to nothing else in the legislative history of the original ACCA that directly addresses the required mens rea.

The government contends that the legislative history of the original ACCA is not "nearly as illuminating" as the legislative history from 1986, when Congress amended the ACCA to its current form. Br. 29. But nothing indicates that Congress's understanding of the required mens rea changed when it amended the ACCA. To be sure, the 1986 amendments aimed to expand the qualifying predicate offenses to avoid the incongruity that bank robbery counted but serious offenses such as "murder [or] rape" did not. H. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986). But it does not follow that Congress intended to expand the ACCA's scope to include reckless offenses.

The government attempts to insert a recklessness requirement into the ACCA by citing a provision in the Model Penal Code indicating that recklessness should be the default mens rea for criminal offenses that do not specify one. See Br. 15. But Congress did not incorporate the Model Penal Code into the ACCA. The government cannot point to any legislative history suggesting that Congress had that intention, and in fact other materials

show that Congress intended the ACCA to apply only to deliberate offenses. See p. 12, *supra*.

4. Relying on the history of the ACCA's amendments, the government contends (Br. 16-22) that, because members of Congress stated a desire to cover offenses such as murder, rape, robbery, and felony assault in the amended version of the ACCA, Congress must have intended to sweep in every variant of those offenses, including variants that can be committed recklessly. That contention is multiply flawed.

a. As a preliminary matter, in the force clause, Congress did not enumerate particular offenses that would qualify as ACCA predicates, as it did in a neighboring clause. Instead, Congress covered all "violent felon[ies]" "having [a] certain common characteristic[]," *Taylor* v. *United States*, 495 U.S. 575, 589 (1990), and it directed courts to consider whether the offense at issue contained a particular element: *viz.*, "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). Congress thus focused on intentional and knowing violent offenses, thereby addressing those offenders most likely to pull the trigger of a gun deliberately—the worst of the worst.

b. In addition, the vast majority of States had murder, robbery, and felony-assault offenses at the time of the 1986 amendments that would be covered by the force clause under petitioner's interpretation.

i. As to robbery and assault: the government asserts (Br. 18-20) that "many" States defined robbery and assault to encompass reckless conduct, pointing to 10 States that had at least one robbery offense and 24 States that had at least one felony-assault offense that encompassed reckless conduct. See Br. 18 & n.3, 20 n.4. But that would not be enough to qualify reckless robbery and assault as

violent felonies even if robbery and assault were enumerated offenses. See *United States* v. *Stitt*, 139 S. Ct. 399, 406 (2018); *United States* v. *Schneider*, 905 F.3d 1088, 1095 (8th Cir. 2018).

More importantly, most States had other robbery and felony-assault offenses for which intent or knowledge was required. As to robbery, of the 10 States cited by the government, at least six had discrete robbery offenses that could be committed intentionally or knowingly. See App. 1a, *infra*. As to felony assault, at least 35 States had discrete offenses or variants that could be committed intentionally or knowingly. See *id.* at 1a-4a. And Congress could well have believed that, even as to the minority of States that listed a reckless mental state in the same subsection as intentional or knowing mental states, offenders who committed those offenses intentionally or knowingly would still be subject to the ACCA. Cf. *Taylor*, 495 U.S. at 602 (subsequently adopting the categorical approach).

To the extent the government relies on the common law of robbery as evidence of what Congress intended to cover in the force clause, that too provides little support. The government contends (Br. 17-18) that, at common law, any theft that resulted in injury constituted a robbery, regardless of the robber's intent to use force. Common-law robbery consisted of the taking of property with felonious intent by means of "force" or "violence." *Stokeling* v. *United States*, 139 S. Ct. 544, 550 (2019). As the government's own sources make clear, however, the use of force or violence was not incidental; it was itself an intentional component of the broader intentional act of taking property, and the distinguishing feature between robbery and other larcenies. See William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* 554 (Herschel Bouton Lazell ed., 2d ed. 1905); 2 William Oldnall

Russell, *A Treatise on Crimes and Indictable Misdemeanors* 64 (2d ed. 1828); 4 William Blackstone, *Commentaries on the Laws of England* 239, 242 (1769).

ii. As to murder: the government again resorts to the common law. See Br. 21-22. But that has little relevance here, because American jurisdictions had long since "modified the common law by legislation classifying murder by degrees." *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991). In most States, the primary distinguishing factor between the degrees of murder is the defendant's mens rea (with first-degree murder typically requiring intent plus premeditation). 2 LaFave § 14.7, at 648-649.

To the extent States had murder statutes with a mens rea lower than intent or knowledge, see Br. 21 & n.7, most of those States defined that variation of murder as a distinct and lesser offense and had separate intentional-murder offenses. See App. 4a-6a, *infra*. And as the government acknowledges, nearly all of those States required "extreme" or "depraved indifference" recklessness. Br. 21. This case does not present the question whether that mens rea is sufficient under the ACCA's force clause; as the government itself recently told the Court in a case involving second-degree murder, that mens rea is "not identical" to ordinary recklessness. See Br. in Opp. at 12-13, *Thompson* v. *United States*, No. 19-7217 (Apr. 10, 2020).

iii. The government further notes (Br. 16 n.2) that, at the time of the 1986 amendments, 16 States had established recklessness as the "default" mens rea for criminal liability. That is beside the point. Those "default" rules apply to criminal offenses that lack a statutorily specified mens rea requirement—typically misdemeanors and nonviolent felonies. See, *e.g.*, Alaska Stat. § 11.81.610(b) (1983); Ark. Code Ann. § 5-22-230(a) (1976). They usually do not apply to the small number of "violent felonies" with which Congress was concerned in the ACCA's force

clause; those offenses ordinarily have specified mens rea requirements. See p. 14, *supra*. To the extent that States have reckless variants of offenses such as robbery and assault, the government offers no reason to believe that Congress intended to sweep those less serious variants into the force clause.

D. The Government's Interpretation, Not Petitioner's, Would Distort The ACCA's Reach

The government advances an expansive interpretation of the ACCA (Br. 32-45) that would sweep a variety of minor crimes into the ACCA. The government's efforts to defend that interpretation, and to identify anomalies with petitioner's interpretation, are unavailing.

1. The government's interpretation of the ACCA would sweep in reckless drivers, petty thieves, and many others who cannot plausibly be "label[ed] 'armed career criminals'" and whose prior convictions do not demonstrate an "increased likelihood" that "the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146. Although the government derides them as "putatively sympathetic corner cases" (Br. 43), petitioner and his amici have identified a slew of commonplace offenses that would indisputably qualify as ACCA predicates under the government's interpretation. See Pet. Br. 37-42; NACDL Br. 6-9; FAMM Br. 7-17.

In particular, the government's interpretation would cover offenses that involve reckless driving resulting in injury. Beyond noting that reckless driving can sometimes give rise to murder charges, but see p. 15, *supra*, the government primarily asserts that "[a]ll but the most serious reckless drivers" are typically charged with misdemeanors, rather than felonies such as aggravated assault. Br. 39. That assertion is incorrect, as demonstrated

by the many cases cited by petitioner and his amici (which the government mostly ignores). See Pet. Br. 37-42; FAMM Br. 7-10. But more broadly, this Court has never credited that sort of "just trust us" argument emanating from the government, and it should not start now. See, *e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). Whether an offender receives a 15-year mandatory minimum sentence should not turn on the government's unsubstantiated assurance that charging decisions, in every jurisdiction, tend toward leniency.

As for the many other examples of offenses that would unjustly qualify as ACCA predicates under the government's interpretation, the government gives them only cursory consideration, merely suggesting that some plainly unintentional acts "could" be described as "violent and aggressive" crimes. Br. 44. But many others cannot. The government cannot seriously dispute that its interpretation would sweep many "run-of-the-mill criminals" into the ACCA. *United States* v. *Middleton*, 883 F.3d 485, 499 n.3 (4th Cir. 2018) (Floyd, J., joined by Harris, J., concurring).

2. The government contends (Br. 32-35) that petitioner's interpretation would be underinclusive because it would exclude certain robbery and assault offenses (and "possibly" certain murder offenses) from the scope of the force clause. That policy argument is merely a warmed-over version of the government's legislative-history argument, and it fails for largely the same reason: there is no support for the premise that Congress intended to cover every variant of those offenses, including variants that can be committed recklessly. See pp. 11-12, *supra*.

At the time of the 1986 amendments, only a subset of robbery and felony-assault offenses could be committed recklessly; today, the vast majority of States have discrete intentional or knowing robbery and felony-assault

variants or offenses. See App. 6a-11a, *infra*. Indeed, courts of appeals applying the categorical approach under the Sentencing Guidelines have determined—based on the offenses of a majority of States—that recklessness does not satisfy the mental-state requirement for generic "aggravated assault." See, *e.g.*, *Schneider*, 905 F.3d at 1095. There is no reason to believe that petitioner's interpretation will exclude a significant proportion of assault and robbery offenses.

The best evidence for that? In the decade between *Leocal* and *Voisine*, petitioner's interpretation of the force clause was adopted as the uniform rule from coast to coast. See Pet. Br. 28-29. Yet there is no evidence that significant categories of offenses were excluded from the ACCA's reach during that period; to the contrary, the evidence indicates that courts were imposing ACCA sentences at a consistent rate during that period (and at a higher rate than in the preceding decade). See U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* 36 fig. 25 (Mar. 2018) <tinyurl.com/mandatory-mins>.

In a related vein, the government suggests (Br. 34) that it would be "anomalous[]" for the ACCA to cover threats or attempts to commit injury, while excluding conduct that results in injury. By its terms, however, the ACCA was concerned not with the fact of injury, but rather with the defendant's culpability. Again, as this Court has put it, the ACCA was concerned with identifying the type of person "who might deliberately point [a] gun and pull the trigger." *Begay*, 553 U.S. at 146. Someone who threatens or attempts an act of violence is precisely the kind of person who falls into that category. By contrast, someone who uses force without an intent to injure, even if it in fact results in injury, is not engaged in the sort of

conduct "typically committed by those whom one normally labels 'armed career criminals.' " *Id.* at 146, 148.

3. In addition, the government's interpretation of the ACCA's force clause cannot readily be reconciled with other statutes, whereas petitioner's can.

a. For purposes of one of its admissibility provisions, the Immigration and Nationality Act (INA) defines "serious criminal offense" to include both a "crime of violence" (as defined in Section 16) and "any crime of reckless driving or of driving while intoxicated or under the influence of alcohol * * * if such crime involves personal injury to another." 8 U.S.C. 1101(h). As this Court explained in *Leocal*, interpreting Section 16 to include driving-under-the-influence offenses would leave the INA's separate enumeration of such offenses "practically devoid of significance." 543 U.S. at 12; see *Oyebanji*, 418 F.3d at 264 (Alito, J.). That reasoning applies with equal force here—even if the government can point to a single State whose supposed "reckless driving" statute does not in fact require recklessness. See Br. 42 (citing Va. Code Ann. § 46.2-862 (2019)).

b. The government contends that the force clause in Section 16(a) must reach reckless offenses because its legislative history indicates Congress intended to cover the crimes of threatened or attempted assault and battery in federal jurisdiction, and petitioner's interpretation would exclude the "plainly more serious" crime of assault causing serious bodily injury. Br. 35-36. Again, however, there is nothing anomalous about that result, because someone who threatens or attempts assault is more culpable than someone who uses force without an intent to injure. See p. 18, *supra*. And petitioner's interpretation would continue to cover a number of other assaults in federal jurisdiction, such as assault with a dangerous weapon. See, *e.g.*, 18 U.S.C. 113(a)(3).

The government claims (Br. 36) that interpreting the force clause in Section 16(a) not to include reckless offenses would subvert another INA provision, 8 U.S.C. 1227(a)(2)(E)(i), which renders an alien removable if the alien is convicted of a Section 16 "crime of violence" against a person with whom he or she is in a specified domestic relationship. But as explained above, Section 922(g)(9) was a prophylactic measure designed to keep guns out of the hands of domestic abusers. See pp. 8-9. The government cites no authority indicating that Section 1227(a)(2)(E)(i)—which can trigger the severe penalty of removal—was intended to serve a similar purpose or to apply with similar breadth. To the contrary, Congress enacted both Section 1227(a)(2)(E)(i) and Section 922(g)(9) in the same legislation, and it chose to adopt Section 16(a)'s "crime of violence" definition for the former but not the latter. See Pub. L. No. 104-208, §§ 350, 658, 110 Stat. 3009-371, 3009-640 (1996).

Finally, the government contends (Br. 36-37) that petitioner's interpretation would remove federal second-degree murder as a predicate offense from the materially identical force clause in 18 U.S.C. 924(c), which prohibits using a firearm in connection with certain offenses. But the government acknowledges that federal second-degree murder requires "depraved heart" recklessness, Br. 37, and that mens rea may be covered by the force clause even if ordinary recklessness is not. See p. 15, *supra*. And even if Congress intended to include second-degree murder within the scope of Section 924(c), it does not follow that it also intended to include the many other offenses that can be committed with the less culpable mental state of ordinary recklessness. It is the government's interpretation of the force clause that leads to multiple anomalies and is untenably overbroad.

E. The Rule Of Lenity Requires Interpreting The ACCA's Force Clause To Exclude Predicate Offenses That Can Be Committed Recklessly

Contrary to the government's contention (Br. 45-46), the ACCA's force clause is at a minimum ambiguous. This Court has already held that the materially identical force clause in Section 16(a) excludes negligent offenses—with the Court noting that, if Section 16(a) were ambiguous, the rule of lenity would require the ambiguity to be resolved in favor of a narrower interpretation. See *Leocal*, 543 U.S. at 11 n.8. While the government correctly notes (Br. 46) that the mere existence of a circuit conflict does not compel application of the rule of lenity, the courts of appeals had until recently *uniformly* interpreted the force clause not to include reckless offenses. The government counters that *Voisine* not only "corrected [those courts'] misreading" of the force clause but eliminated any ambiguity. Br. 46. But that is a singularly odd contention given that the Court left open the question presented here. See 136 S. Ct. at 2280 n.4.

Even if, as the government suggests, almost every court of appeals in this country got it wrong, it is hardly reasonable to imagine that the average criminal defendant was on fair notice that those courts were all mistaken—particularly given the textual difference between the statutes at issue in *Leocal* and *Voisine*. At a minimum, therefore, this case should be governed by the "time-honored interpretive guideline" that "uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988).

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KANNON K. SHANMUGAM
JESSICA A. MORTON
STACIE M. FAHSEL
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006

NICHOLAS A. HANDLER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

ERIN P. RUST
JENNIFER NILES COFFIN
FEDERAL DEFENDER
SERVICES OF EASTERN
TENNESSEE, INC.
835 Georgia Avenue,
Suite 600
Chattanooga, TN 37402
(423) 756-4349
erin_rust@fd.org

JULY 2020

APPENDIX

APPENDIX

STATE STATUTES

1. Discrete intentional or knowing robbery offenses in effect in 1986 in States with reckless robbery offenses:

Hawaii: Haw. Rev. Stat. §§ 708-841(1)(a), (b); Haw. Laws 2006, ch. 230, § 42 (Westlaw 2006).

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(B), (C), (D) (West 1983).

Montana: Mont. Code Ann. § 45-5-401(1)(b); Mont. Laws 1995, ch. 482, § 7 (Westlaw 1995).

Pennsylvania: 18 Pa. Cons. Stat. § 3701(a)(1)(ii) (1983).

Texas: Tex. Penal Code Ann. § 29.02(a)(2) (West 1983).

Vermont: Vt. Stat. Ann. tit. 13, § 608(a) (1974); see *State* v. *Powell*, 608 A.2d 45, 46 (Vt. 1992).

2. Discrete intentional or knowing felony-assault offenses in effect in 1986:

Alabama: Ala. Code §§ 13A-6-20(a)(1), (2), 13A-6-21(a)(1), (2) (1982).

Alaska: Alaska Stat. §§ 11.41.200(a)(2), 11.41.210(a)(1) (1983).

Arizona: Ariz. Rev. Stat. Ann. §§ 13-1203(A)(2), 13-1204 (1986).

Colorado: Colo. Rev. Stat. §§ 18-3-202(1)(a), (b), 18-3-203(1)(b), (c), (g) (1986).

Connecticut: Conn. Gen. Stat. §§ 53a-59(a)(1), (2), 53a-60(a) (1984); Conn. Legis. Serv. P.A. 92-87, § 1 (Westlaw 1992); Conn. Legis. Serv. P.A. 93-246, § 3 (Westlaw 1992).

Delaware: Del. Code Ann. tit. 11 §§ 612 (1), (2), (4), (5), 613(1), (2), (5), (6) (1986).

Florida: Fla. Stat. Ann. §§ 784.011(1), 784.021(1) (1985); see *State* v. *Shorette*, 404 So. 2d 816, 817 (Fla. Dist. Ct. App. 1981).

Georgia: Ga. Code. Ann. § 16-5-21(a)(1); see *Rhodes* v. *State*, 359 S.E.2d 670, 672 (Ga. 1987).

Hawaii: Haw. Rev. Stat. § 707-710(1).

Idaho: Idaho Code §§ 18-901, 18-905 (1979).

Iowa: Iowa Code Ann. § 708.4 (1985).

Kansas: Kan. Stat. Ann. §§ 21-3408, 21-3410(c) (1970).

Kentucky: Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(a), (b) (1986).

Michigan: Mich. Comp. Law Ann. § 750.82 (1993); see *People* v. *Johnson*, 284 N.W.2d 718, 718-719 (Mich. 1979).

Minnesota: Minn. Stat. Ann. §§ 609.221, 609.222 (1986)**;** *Johnson* v. *State*, 421 N.W.2d 327, 330 (Minn. Ct. App. 1988); *State* v. *Spencer*, 298 Minn. 456, 216 N.W.2d 131, 132 (1974).

Mississippi: Miss. Code Ann. § 97-3-7(2)(b) (1986).

Missouri: Mo. Ann. Stat. §§ 565.050(1), 565.052(1), (2); 2014 Mo. Legis. Serv. S.B. 491, § A.

Montana: Mont. Code Ann. § 45-5-202(1), (2) (1985).

Nebraska: Neb. Rev. Stat. §§ 28-308(1), 28-309(1)(a) (1985).

New Hampshire: N.H. Rev. Stat. Ann. §§ 631:1(I), (II), 631:2(IV) (1986).

New Jersey: N.J. Stat. Ann. § 2C:12-1(b)(2) (1985).

New York: N.Y. Penal Law §§ 120.05(1),(2), 120.10(1), (2) (West 1975).

North Carolina: N.C. Gen. Stat. Ann. § 14-32(a), (c) (1986).

North Dakota: N.D. Cent. Code § 12.1-17-02(2) (LexisNexis 1991).

Ohio: Ohio Rev. Code Ann. § 2903.12 (1993).

Oregon: Or. Rev. Stat. §§ 163.175(1)(a), (b), 163.185(1) (1985).

Pennsylvania: Pa. Cons. Stat. Ann. § 2702(a)(3), (4), (5) (1983).

South Dakota: S.D. Codified Laws § 22-18-1.1(2)-(4) (1988).

Tennessee: Tenn. Code Ann. § 39-601(b)(2) (Supp. 1980).

Texas: Tex. Penal Code Ann. §§ 22.01(a)(2), 22.02(a) (West 1986).

Utah: Utah Code Ann. § 76-5-103(1)(a) (1978).

Vermont: Vt. Stat. Ann. tit. 13, § 1024(a)(2); 2005 Vt. Laws P.A. 83, § 6.

Washington: Wash. Rev. Code §§ 9A.36.011(1), 9A.36.021(1) (Supp. 1986).

West Virginia: W. Va. Code § 61-2-9; *State* v. *Combs*, 280 S.E.2d 809, 810 (W. Va. 1986); see *State* v. *Barrow*, 359 S.E.2d 844, 849 (W. Va. 1987).

Wyoming: Wyo. Stat. Ann. § 6-2-502(a)(ii), (iii) (1986).

3. Discrete intentional and reckless murder offenses in effect in 1986:

Alabama: Ala. Code § 13A-6-2(a)(1), (2) (1982).

Alaska: Alaska Stat. §§ 11.41.100(a)(1), 11.41.110(a)(1), (2) (1983).

Arizona: Ariz. Rev. Stat. Ann. §§ 13-1104(A)(1), (2), (3), 13-1105(A)(1) (1985).

Colorado: Colo. Rev. Stat. §§ 18-3-102(1)(a), (d), 18-3-103(1)(a) (1986).

Delaware: Del. Code Ann. tit. 11, § 635(1) (1972); 59 Del. Laws, ch. 203, § 35 (1973); Del. Code Ann. tit. 11, § 636(1), (4) (1974); 63 Del. Laws, ch. 354, § 1 (1982).

Florida: Fla. Stat. Ann. § 782.04(1)(a)(1) (1985).

Illinois: 2 Ill. Rev. Stat. ch. 38, § 9-1(a)(1), (2) (1985).

Kentucky: Ky. Rev. Stat. Ann. § 507.020(1)(a), (b) (1986).

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 201(1)(A), (B) (Supp. 1986).

Michigan: Mich. Comp. Law §§ 750.316(a), 750.31.

Minnesota: Minn. Stat. §§ 609.195, 609.185(1), (3), 609.19(1), (2) (1986).

Mississippi: Miss. Code Ann. § 97-3-19(1)(a), (b) (1983).

Montana: Mont. Code Ann. § 45-5-102(1)(a) (1979); 1981 Mont. Law, ch. 513, § 1.

New Hampshire: N.H. Rev. Stat. §§ 630:1(I), 630:1-a(I)(a), 630:1-b(I)(a), (b); *State* v. *Kilgus*, 519 A.2d 231, 235 (N.H. 1986); *State* v. *Glidden*, 459 A.2d 1136, 1139-1140 (N.H. 1983).

New Mexico: N.M. Stat. Ann. § 30-2-1(A)(1), (3) (1980).

New York: N.Y. Penal Law §§ 125.25(2), 125.27(1) (1974); *People* v. *Register*, 457 N.E. 704, 709-710 (N.Y. 1983), *overruled by People* v. *Feingold*, 852 N.E.2d 1163 (N.Y. 2006).

North Dakota: N.D. Cent. Code Ann. § 12.1-16-01(1)(a), (b) (1985).

Oklahoma: Okla. Stat. tit. 21, §§ 701.7(A), 701.8(1).

Pennsylvania: 18 Pa. Con. Stat. § 2502(a) (1983).

South Dakota: S.D. Cod. Laws §§ 22-16-7 (1980).

Tennessee: Tenn. Code Ann. § 39-2-201 (1982).

Utah: Utah Code Ann. §§ 76-5-202, 76-5-203(1)(a)-(c) (1986).

Washington: Wash. Rev. Code Ann. §§ 9A.32.030(1)(a), (b), 9A.32.050(1)(a) (1985).

Wisconsin: Wis. Stat. Ann. §§ 940.01(1), 940.02(1) (1986).

4. Discrete intentional or knowing felony-assault offenses under current law:

Alabama: Ala. Code §§ 13A-6-20(a)(1), (2), 13A-6-21(a)(1), (2).

Alaska: Alaska Stat. Ann. §§ 11.41.200(a)(2), 11.41.210(a)(1), 11.41.220(a)(2).

Arizona: Ariz. Rev. Stat. Ann. § 13-1204(B)(1).

Colorado: Colo. Rev. Stat. §§ 18-3-202(1)(a), (b), 18-3-203(1)(b), (c), (g).

Connecticut: Conn. Gen. Stat. §§ 53a-59(a)(1), (2), (5), 53a-60(a)(1), (2).

Delaware: Del. Code Ann. tit. 11, § 613(a)(1), (2).

Florida: Fla. Stat. Ann. §§ 784.011(1), 784.021(b).

Georgia: Ga. Code Ann. §§ 16-5-20(A)(1), 16-5-21(a)(1).

Hawaii: Haw. Rev. Stat. § 707-710(1).

Idaho: Ida. Code §§ 18-901, 18-905; see *State* v. *Larson*, 158 Idaho 130, 135-137 (Ct. App. 2014).

Iowa: Iowa Code Ann. § 708.1(2); see *State* v. *Benson*, 919 N.W.2d 237, 245 (Iowa 2018).

Kansas: Kan. Stat. Ann. § 21-5412.

Kentucky: Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(a), (b).

Maryland: Md. Code Ann., Crim. Law § 3-202(a)(1).

Massachusetts: Mass. Gen. Laws ch. 265, § 13A; see *Commonwealth* v. *Porro*, 939 N.E.2d 1157, 1162 (Mass. 2010).

Michigan: Mich. Comp. Law Ann. § 750.82; see *People* v. *Bosca*, 871 N.W.2d 307, 325 (Mich. Ct. App. 2015).

Minnesota: Minn. Stat. Ann. §§ 609.02, subd. 10(2), 609.221, 609.222, 609.223; see *State* v. *Fleck*, 810 N.W.2d 303, 309 (Minn. 2012).

Mississippi: Miss. Code Ann. § 97-3-7(2)(a)(ii).

Missouri: Mo. Ann. Stat. §§ 565.050(1)(1), 565.052(1)(1), (2), 565.054(1).

Montana: Mont. Code Ann. § 45-5-202(1).

Nebraska: Neb. Rev. Stat. §§ 28-308(1), 28-309(1)(a).

Nevada: Nev. Rev. Stat. §200.471(1)(a).

New Hampshire: N.H. Rev. Stat. Ann. §§ 631:1(I)(a)-(c), 631:2(I)(d), (f).

New Jersey: N.J. Stat. Ann. § 2C:12-1(b)(2).

New Mexico: N.M. Stat. Ann. §§ 30-3-1(A), 30-3-2.

New York: N.Y. Penal Law §§ 120.05(1), (2), 120.10(1), (2).

North Carolina: N.C. Gen. Stat. Ann. § 14-32(a), (c).

North Dakota: N.D. Cent. Code § 12.1-17-02(1)(b), (c).

Ohio: Ohio Rev. Code Ann. § 2903.13(A).

Oregon: Or. Rev. Stat. §§ 163.165(1)(e), (h), 163.175(1)(a), (b), 163.185(a), (b).

Pennsylvania: 18 Pa. Cons. Stat. § 2702(a)(3)-(5).

South Dakota: S.D. Codified Laws § 22-18-1.1(2), (4).

Tennessee: Tenn. Code Ann. § 39-13-102(a)(1)(A).

Texas: Tex. Penal Code Ann. §§ 22.01(a)(2), 22.02(1), (2).

Vermont: Vt. Stat. Ann. tit. 13, § 1024(a)(2), (3)

Washington: Wash. Rev. Code Ann § 9A.36.011.

West Virginia: W. Va. Code § 61-2-9(a); see *State* v. *Barrow*, 359 S.E.2d 844, 849 (W. Va. 1987).

Wyoming: Wyo. Stat. Ann. § 6-2-502(a)(ii).

5. Discrete intentional or knowing robbery offenses under current law:

Alabama: Ala. Code § 13A-8-43.

Alaska: Alaska Stat. § 11.41.510.

Arizona: Ariz. Rev. Stat. Ann. § 13-1902.

Arkansas: Ark. Code Ann. § 5-12-102.

California: Cal. Penal Code § 211; see *People* v. *Jackson*, 376 P.3d 528, 583 (Cal. 2016).

Colorado: Colo. Rev. Stat. § 18-4-301; see *People* v. *DeGreat*, 428 P.3d 541, 545-556 (Colo. 2018).

Connecticut: Conn. Gen. Stat. Ann. § 53a-133.

Delaware: Del. Code Ann. tit. 11, § 831.

Florida: Fla. Stat. Ann. § 812.13; see *Perkins* v. *State*, 814 So.2d 1177, 1178 (Fla. Dist. Ct. App. 2002).

Hawaii: Haw. Rev. Stat. §§ 708-840(1)(a)-(c), 708-841(1)(a), (b).

Idaho: Idaho Code § 18-6501; see *State* v. *Martinez*, 988 P.2d 710, 713 (Ida. 1999).

Illinois: Ill. Rev. Stat. ch. 38, para. 18-1.

Iowa: Iowa Code § 711.1.

Kentucky: Ky. Rev. Stat. Ann. § 515.030.

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(B).

Maryland: Md. Code Ann., Crim. Law § 3-401; see *Fetrow* v. *State*, 847 A.2d 1249, 1257 (Md. Ct. Spec. App. 2004).

Minnesota: Minn. Stat. § 609.24.

Mississippi: Miss. Code Ann. § 97-3-73.

Missouri: Mo. Rev. Stat. §§ 570.023, 570.025; see *id.* § 562.021(3).

Montana: Mont. Code Ann. § 45-5-401(1)(b).

Nebraska: Neb. Rev. Stat. § 28-324.

Nevada: Nev. Rev. Stat. Ann. § 200.380.

New Hampshire: N.H. Rev. Stat. Ann. § 636:1(I)(b).

New Jersey: N.J. Stat. Ann. § 2C:15-1; see *id.* § 2C:2-2(c).

New York: N.Y. Penal Law § 160.00.

Oklahoma: Okla. Stat. tit. 21, § 792.

Oregon: Or. Rev. Stat. § 164.395.

Pennsylvania: Pa. Cons. Stat. § 3701(a)(1)(ii).

Tennessee: Tenn. Code Ann. § 39-13-401; see *State* v. *Owens*, 20 S.W.3d 634, 638 (Tenn. 2000).

Texas: Tex. Penal Code Ann. § 29.02(a)(2).

Utah: Utah Code Ann. § 76-6-301.

Vermont: Vt. Stat. Ann. tit. 13, § 608; *State* v. *Powell*, 608 A.2d 45, 46 (Vt. 1992).

Virginia: Va. Code Ann. § 18.2-58.

Washington: Wash. Rev. Code § 9A.56.190.

West Virginia: W. Va. Code § 61-2-12; see *State* v. *Harless*, 285 S.E.2d 461, 463 (1981).

Wisconsin: Wis. Stat. Ann. § 943.32.

Wyoming: Wyo. Stat. § 6-2-401(a)(ii).