No: ________

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY WAYNE BETTCHER,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION PRESENTED

Before this Court issued its decision in *United States v. Voisine*, 136 S.Ct. 2272 (2016), the circuits all agreed that the "force clause" in the Armed Career Criminal Act and the Career Offender Guideline did not include crimes that could be committed recklessly. Although *Voisine* was interpreting the scope of a *different* force clause (18 U.S.C. § 921(33)), some circuits, including the Tenth Circuit in this case, relied on *Voisine* to abandon the previously unanimous reading of the other force clause. Five circuits, however, have reaffirmed since *Voisine* that the force clause does not reach reckless conduct. In contrast to both lines of cases, the Eighth Circuit has adopted a third rule, holding that while the force clause generally includes reckless crimes, it does not include crimes that can be accomplished by reckless driving. This Court must resolve the three-way split on this important question:

> Do reckless crimes qualify categorically as crimes of violence under the force clause of these statutes and guidelines?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Bettcher respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published decision is available at 911 F.3d 1040 and is included in the appendix at A2. The district court's oral ruling is at A15.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its decision on December 21, 2018, and denied Petitioner's request for rehearing on March 19, 2019. On June 6, 2019, Justice Sotomayor extended the time to file until August 16, 2019. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal law provides an enhanced penalty for offenders who have previously been convicted of a felony that:

> has as an element the use, attempted use, or threatened use of physical force against the person of another.

USSG §4B1.2; 18 U.S.C. § 924(e)(2)(B)(i) (Armed Career Criminal Act); *see also* 18 U.S.C. § 924(c)(3)(A); 18 U.S.C. § 16(a).

By contrast, a "misdemeanor crime of domestic violence" that restricts an offender from possessing a firearm is one that:

> 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 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.

18 U.S.C. § 921(a)(33)(A)(ii).

STATEMENT OF THE CASE

Petitioner Anthony Bettcher was convicted of unlawfully possessing a firearm. At sentencing, the government asked the court to increase his sentence under the "force clause" of USSG §4B1.2. Under this provision, a prior conviction is a "crime of violence" if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG §4B1.2(a)(1). The government did not propose any other basis for applying the enhancement, so the only issue at sentencing was whether Mr. Bettcher's prior Utah conviction for aggravated assault satisfied the force clause of §4B1.2. Virtually identical language triggers a 15-year mandatory minimum under the Armed Career Criminal Act (ACCA), § 924(e)(2)(B)(i) (Armed Career Criminal Act); a 25-year mandatory minimum under 18 U.S.C. § 924 (c)(3)(A); or mandatory deportation and permanent banishment from the United States, 18 U.S.C. § 16(a); 8 U.S.C. § 1101(a)(43)(F).

The government conceded that Utah aggravated assault can been committed recklessly. Pet. App. A15. As a result, the district court rejected this request because the Tenth Circuit had held that reckless convictions did not qualify categorically as crimes of violence under the "force clause" of USSG §4B1.2(a)(1). Pet. App. A19. In fact, this Court acknowledged that the circuits had "almost uniformly held that recklessness is not sufficient." *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405, 1414 n.8 (2014) (citing cases).

The Government appealed, and the Tenth Circuit reversed, holding that reckless crimes *do* count as crimes of violence under the force clause. It did so based on this Court's interpretation of a *different* force clause—the force clause that defines a misdemeanor crime of domestic violence in 18 U.S.C. § 921(a)(33)(A)(ii)—in *Voisine v. United States*, 136 S.Ct. 2272 (2016). Pet. App. A2.

Since *Voisine*, a three-way circuit split has emerged on this issue. Five circuits have continue to apply the old rule that the force clause does not apply to reckless crimes. *United States v. Orona*, 923 F.3d 1197, 1203 (9th Cir. 2019); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Kennedy*, 881 F.3d 14, 19 (1st Cir. 2018); *United States v. Campbell*, 865 F.3d 853, 856-857 (7th Cir. 2017); *United States v. Lewis*, 720 Fed. Appx. 111, 114, 117 (3d Cir. 2018) (unpublished).

Four circuits, including the Tenth, have read *Voisine* to abrogate the old rule, though they have done so over criticism from within. *See, e.g., United States v.*

Harper, 875 F.3d 329, 332 (6th Cir. 2017) (criticizing Sixth Circuit decision to expand the force clause to reckless crimes).

By contrast to both lines of cases, the Eighth Circuit has charted its own course, holding that while the force clause generally includes reckless crimes, it does not include crimes that can be accomplished by reckless driving. *United States v. Harris*, 907 F.3d 1095, 1096 (8th Cir. 2018).

If the Tenth Circuit had maintained its (and every other circuit's) original reading of the force clause, or even if it had adopted the Eighth Circuit's narrower rule, it would have had to affirm. As it now stands, the government seeks to have Mr. Bettcher resentenced to a longer sentence based on a prior conviction that did not categorically require the intentional use, attempted use, or threatened use of force as an element. Mr. Bettcher asks this court to resolve the circuit split on this important question and affirm the sentence originally imposed.

REASONS FOR GRANTING THE WRIT

In the face of a three-way split, this court must grant certiorari to resolve the confusion among the circuits. This question is extremely important because it affects not only the Guidelines' force clause but the virtually identical force clauses that trigger lengthy mandatory minimums in the ACCA and § 924(c). It also affects the general "crime of violence" definition in § 16(a), which then becomes the basis for mandatory deportation and other severe immigration consequences as an "aggravated felony." 8 U.S.C. § 1101(a)(43)(E). The Tenth Circuit's analysis of the

force clause flies in the face of this Court's precedents and fails as a matter of statutory construction. The Court should use this case, which turned on solely on whether a reckless crime can count as a crime of violence, to resolve this important conflict.

I. The circuits are split three ways over whether reckless crimes satisfy the force clause.

The Circuits are split three ways over whether reckless crimes can count as violent crimes. Four Circuits—the First, Fourth, Seventh, and Ninth—have held in published decisions that reckless crimes cannot count as violent crimes. *Orona*, 923 F.3d at 1203; *Hodge*, 902 F.3d at 427; *Kennedy*, 881 F.3d at 19; *Campbell*, 865 F.3d at 856-857. And the Third Circuit has held the same in an unpublished decision. *Lewis*, 720 Fed. Appx. at 114, 117. These cases were all decided after *Voisine*.

The Eighth Circuit has taken a narrower view, holding that some reckless crimes can count as crimes of violence but that others cannot. Specifically, the Eighth Circuit has held that a number of reckless driving statutes, like Missouri's second-degree domestic assault statute, North Dakota's aggravated-assault statute, and Arizona's aggravated-assault-with-a-deadly-weapon statute, are not crimes of violence. *Harris*, 907 F.3d at 1096; *United States v. Schneider*, 905 F.3d 1088, 1091-1092 (8th Cir. 2018); *United States v. Ossana*, 638 F.3d 895, 903-904 (8th Cir. 2011).

If the Tenth Circuit were to adopt this rule, Mr. Bettcher would prevail because Utah courts have held that a vehicle can be a "dangerous weapon" under Utah's

aggravated assault statute. *See e.g., State v. C.D.L.*, 250 P.3d 69, 76 (Utah App. 2011). Under Utah law, aggravated assault may be based on reckless driving, and under the Eighth Circuit's rule, the enhancement would not apply.

The Tenth Circuit below acknowledged the Eighth Circuit caselaw but chose not to follow it. Pet. App. A11 n.11. Instead, it held (in a published decision) that reckless crimes can count as crimes of violence under the force clause of §4B1.2. Pet. App. A14. But it did so only by abandoning overruling prior precedent that reckless crimes do not count as crimes of violence. Pet. App. A11-12.

Three other courts of appeals—the Fifth, Sixth, and D.C. Circuits—have held in published decisions that reckless crimes can count as violent crimes. *United States v. Howell*, 838 F.3d 489, 499-501 (5th Cir. 2016); *United States v. Verwiebe*, 874 F.3d 258, 262-264 (6th Cir. 2017); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018). But the Sixth Circuit is internally divided, as another published decision from that court criticizes *Verwiebe*. *United States v. Harper*, 875 F.3d 329, 332 (6th Cir. 2017).

Thus, as it stands now, there is a 5-1-4 Circuit split over whether reckless crimes can count as violent crimes. This conflict is extensive and entrenched.

This Court cannot reasonably expect the lower courts cannot resolve this conflict on their own. To be sure, the Eleventh Circuit recently voted for en banc rehearing in a case that presented this issue. *United States v. Moss*, 920 F.3d 752, 758 (11th Cir. 2019), *reh'rg en banc granted in* 928 F.3d 1340 (11th Cir. 2019). But,

however the Eleventh Circuit comes out on this issue, it cannot resolve the split. To accomplish that, at least five courts of appeals would have to switch sides in the conflict, which they appear unwilling to do. *See, e.g., Harper*, 87 F.3d at 332 (disagreeing that reckless crimes can be crimes of violence, but following contrary precedent); *United States v. Orona*, 923 F.3d 1197, 1203 (9th Cir. 2019) (refusing to switch sides in the conflict post-*Voisine* because of, among other things, the First Circuit's "similar conclusion" that reckless crimes do not count); *Haight*, 892 F.3d at 1281 (acknowledging the First Circuit's contrary view, but "respectfully disagree[ing] with that court's decision").

Had Mr. Bettcher been prosecuted in any of the circuits that do not count reckless crimes, he would not be facing resentencing and a possible sentence increase. The conflict will persist until this Court resolves it.

II. The scope of the force clause is critically important because it triggers severe, mandatory penalties and deportation in a variety of statutes.

Resolution of this split is critical because the force clause affects a broad number of cases, its impact is severe, and its application in other statutes deprives courts of discretion they otherwise enjoyed.

A. The force clause affects several categories of cases that impact thousands of offenders under the Sentencing Guidelines.

First, the force clause at issue in this case, the one in USSG §4B1.2, imposes significant increases on a wide variety of cases. For example, it can be applied to those who, like Mr. Bettcher, unlawfully possess a firearm. USSG § 2K2.1, comment. n.1.

Under the force clause, firearm offenders can face a 6- or even 10-level increase under the Guidelines. USSG §2K2.1(a).

Nonviolent drug offenders can face an even greater increase under the career offender guideline. Congress directed the Commission to adopt guidelines that would impose "a term of imprisonment at or near the maximum term authorized" for drug offenders with two prior convictions for a crime of violence. 28 U.S.C. § 994(h)(2). Pursuant to this directive, the Commission adopted §4B1.1 and §4B1.2, which artificially move a defendant into Criminal History Category VI, even if his criminal history placed him in a much lower category, and impose significant increases to the offense level beyond what is required based on drug type and quantity alone.

The career offender guideline also applies to those convicted of a federal crime of violence. USSG §4B1.1(a)(2). Thus, under the Tenth Circuit rule, federal offenders who use force only recklessly can be classified as career offenders under the force clause. *Cf. United States v. Mann*, 899 F.3d 898, 902 (10th Cir. 2018) (acknowledging that assault under 18 U.S.C. § 113(a)(6) could be committed recklessly but treating it as a crime of violence under the force clause of § 924(c)).

Additionally, §4B1.2 increases the penalty imposed on a supervised release revocation, reclassifying it from a Grade B felony offense to a more serious, Grade A offense. USSG §7B1.1(a)(1)(A)(i). For some offenders, this reclassification will more than double the applicable guideline range for a supervised release violation. USSG §7B1.4(a)(2).

These guidelines affect thousands of cases each year. The Sentencing Commission estimated that in FY 2018, 1,597 defendants were sentenced as career offenders. *See* USSC, 2018 Sourcebook of Federal Sentencing Statistics – Table 26. And 7,415 defendants were sentenced under §2K2.1. *Id.* Table 20.

It does not matter that §4B1.2's force clause is advisory. This Court has made clear, specifically in the guidelines context, that "any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018) (cleaned up). It also does not matter that this case involves §4B1.2 and not a statutory penalty—this Court has granted certiorari in previous cases to interpret §4B1.2. *See, e.g., Beckles v. United States*, 137 S.Ct. 886 (2017); *Buford v. United States*, 532 U.S. 59 (2001); *Salinas v. United States*, 547 U.S. 188 (2006); *Stinson v. United States*, 508 U.S. 36 (1993). The potential application of §4B1.2 in thousands of cases each year makes this issue extremely important to resolve.

B. The force clause triggers severe, mandatory penalties and deportation.

The question presented in this case is made more important by the fact that the force clause in §4B1.2 is virtually identical to the force clause in the ACCA, § 924(c), and §16(a), all of which trigger severe, mandatory penalties. The inevitable application of the Tenth Circuit's rule in this case to those statutes increases the importance of the question presented here.

As discussed above, the force clause in §4B1.2 increases a defendant's guideline range based on a prior conviction for a felony that "has as an element the use, attempted use, or threatened use of force. This language came directly from the ACCA's definition of the term "violent felony." USSG App. C., amend. 268. The force clause in §4B1.2 and § 924(e) are identical. *Compare* USSG §4B1.2(a)(1) *with* 18 U.S.C. § 924(e)(2)(B)(i).

While the force clause in § 924(c) and § 16(a) differ slightly from §4B1.2, the difference does not matter here. The only difference is that where §4B1.2 requires force "against the person of another," these other two statutes apply to cases of force "against the person *or property* of another." *Compare* 18 U.S.C. § 924(c)(3)(A) (emphasis added) *and* 18 U.S.C. § 16(a) *with* USSG §4B1.2(a)(1). In all other respects, they are identical.

As a result, circuits routinely apply decisions issued in the context of one force clause to later cases that involve one of these other force clauses. Pet. App. at 12 (finding "no sense" in construing the force clause in §4B1.2 differently from the clause in § 924(e)(2)(B)); *see also, e.g., Hunter v. United States*, 873 F.3d 388, 390 (1st Cir. 2017) (concluding interpretation of § 924(c)(3)(A) was controlled by §4B1.2 caselaw); *United States v. Hill*, 890 F.3d 51, 56-60 (2nd Cir. 2016) (applying ACCA and 16(a) caselaw to § 924(c)(3)(A)); *United States v. Wilson*, 880 F. 3d 80, 83 (3rd Cir. 2018) (applying § 924(c) caselaw to §4B1.2); *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017) (applying § 924(c) caselaw to ACCA); *Unites States v. Jones*, 854 F.3d 737,

740 (5th Cir. 20) (applying §4B1.2 caselaw to § 924(c)(3)(A)); *United States v. McMurray*, 653 F.3d 367, 373-74 (6th Cir. 2011) (applying § 16(a) caselaw to ACCA); *United States v. Campbell*, 865 F.3d 853, 856 (7th Cir. 2017) (noting that the force clause in § 924(e), § 924(c), § 16(a), and §4B1.2 have "[s]imilar language," so "courts' interpretations of the clauses generally have been interchangeable); *Roberts v. Holder*, 745 F.3d 928, 930 (8th Cir. 2014) (§ 924(e), § 16(a), and §4B1.2 are "virtually identical"); *United States v. Lawrence*, 627 F.3d 1281, 1284 n.3 (9th Cir. 2010) (stating § 16(a) is "materially identical" to § 924(e)); *United States v. Hubert*, 883 F.3d 1319, 1333-34 (11th Cir. 2018) (applying ACCA caselaw to § 924(c)); *United States v. Haight*, 892 F.3d 1271, 1280 (D.C. Cir. 2018) (applying §4B1.2 caselaw to the ACCA).

Additionally, when this Court issues a decision in a § 924(e) case, the lower courts apply that decision in the §4B1.2 context. *See, e.g.*, *United States v. Ash*, 917 F.3d 1238, 1239 (applying this Court's ACCA ruling to §4B1.2); *United States v. Moore*, 916 F.3d 231, 242 (2d Cir. 2019) (same); *United States v. Rodriguez*, 659 F.3d 117, 119 n.1 (1st Cir. 2011) (same analysis applies to both provisions); *United States v. Charles*, 576 F.3d 1060, 1068 n.2 (10th Cir. 2009) (same); *United States v. Sprouse*, 394 F.3d 578, 580 (8th Cir. 2005) (same). And this Court has applied its ACCA caselaw to § 924(c). *United States v. Davis*, 139 S.Ct. 782 (2019). Thus, a decision in this case would resolve this issue for the other violent-crimes contexts. *See* Pet. App. A12 (noting that because §4B1.2 and § 924(e) "have historically mirrored each other," there is "no sense" in treating them differently).

Under these statutes, the force clause can trigger some of the severest statutory penalties. Under the ACCA, it imposes a 15-year statutory minimum for a statute that would otherwise be capped at 10 years. 18 U.S.C. § 924(a)(2) & (e)(1). And defendants who carry a gun during a crime of violence face a statutory minimum of at least 5 years, and possibly even 25 years in prison. 18 U.S.C. § 924(c)(1)(A)(i), (C)(i).

Several other criminal statutes have a similar provision. *See, e.g.,* 18 U.S.C. § 521(c)(2) (prohibiting crimes of violence committed by criminal street gangs); 18 U.S.C. § 929(a)(1) (enhanced penalties for possessing restricted ammunition during a crime of violence); 18 U.S.C. § 931(a)(1) (prohibiting possession of body armor by anyone with a prior conviction for a crime of violence); 18 U.S.C. § 2250(d)(1) (enhanced penalties for sex offenders who fail to register and commit "a crime of violence under Federal law"); 18 U.S.C. § 3156(a)(4) (defining "crime of violence" in bail statutes); 18 U.S.C. § 3181(b)(1) (incorporating § 16 definition of crime of violence in extradition context); 18 U.S.C. § 3663A(c)(1)(A)(i) (restitution in cases involving crimes of violence under § 16).

In addition to its relevance in a variety of criminal proceedings, the force clause in § 16(a) defines a set of crimes that results in automatic deportation and permanent exclusion from the United States. The immigration code incorporates § 16(a) into the term "aggravated felony." 8 U.S.C. § 1101(a)(43)(F). Foreign nationals convicted of an aggravated felony are deportable and ineligible for any cancellation of removal, so

deportation is mandatory. 8 U.S.C. § 1227(a)(2)(A)(iii), § 1229b(a)(3); *see also Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013). While removal proceedings are pending, the immigrant may not be released on bond—detention is mandatory. 8 U.S.C. § 1226)(c)(1)(B), § 1231(a)(2). They are subject to administrative removal without ever seeing an immigration judge. 8 U.S.C. § 1228. And they are permanently inadmissible and ineligible for any waiver. 8 U.S.C. § 1182(a)(9)(A), (h)(2). Under the Tenth Circuit rule, this means that an individual convicted of reckless driving or reckless assault (whether simple or aggravated) faces mandatory removal and permanent exclusion from the United States. This is so even if the conviction is a misdemeanor with a fully-suspended, 1-year sentence. *See* 8 U.S.C. § 1101(a)(43)(F), (48)(B); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000). For many immigrants, this result will be far more significant than whatever sentence was imposed for the criminal offense. *See Padilla v. Kentucky*, 559 U.S. 356, 364 n.7 (2010).

The present conflict necessarily spills over into these other contexts as well. This Court often reviews violent-crimes designations under the ACCA to ensure that individuals do not serve unnecessarily long sentences, as well as to resolve conflicts in the Circuits with respect to violent-crimes issues. *See, e.g., Quarles v. United States*, 139 S.Ct. 1872 (2019); *United States v. Stitt*, 139 S.Ct. 399 (2019); *Stokeling v. United States*, 139 S.Ct. 544 (2019); *Mathis v. United States*, 136 S.Ct. 2243; *Johnson v. United States*, 135 S.Ct. 2551 (2015); *Descamps v. United States*, 570 U.S. 254 (2013); *Sykes v. United States*, 564 U.S. 1 (2011); *McNeill v. United States*, 563

U.S. 816 (2011); *Johnson v. United States*, 559 U.S. 133 (2010); *Chambers v. United States*, 555 U.S. 122 (2009); *United States v. Rodriquez*, 553 U.S. 377 (2008); *Begay v. United States*, 553 U.S. 137 (2008); *Logan v. United States*, 552 U.S. 23 (2007); *James v. United States*, 550 U.S. 192 (2007); *Shepard v. United States*, 544 U.S. 13 (2005); *Caron v. United States*, 524 U.S. 308 (1998); *Taylor v. United States*, 495 U.S. 575 (1990). And it did the same during the last term with respect to the scope of § 924(c). *United States v. Davis*, 139 S.Ct. 782 (2019). It should do so here as well.

Until this conflict is resolved, the application of severe, mandatory penalties will depend entirely on the geography of the district court. And because many of these Circuits share borders (the Tenth with the Eighth and Ninth, for instance), individuals are bound to be treated differently just based on what state they are in until this Court resolves the conflict.

The split is particularly problematic in the immigration context, whose venue rules differ significantly from criminal cases. In contrast to criminal prosecutions, which must be brought in the district where the crime was committed, venue for removal proceedings lies wherever immigration officials decide to file a charging document. 8 CFR § 1003.14(a), § 1003.20(a). Experience in removal proceedings shows that immigrants arrested in one district are often transported to another district, even in another circuit. Thus, immigration officials could move an alien between the neighboring border states of New Mexico (in the Tenth Circuit, which includes reckless crimes) and Arizona (in the Ninth Circuit, which does not). In this

way, government officials can control whether an immigrant is an aggravated felon or not.

Given the broad use of the force clause in a variety of statutes, and the serious consequences that follow from it, this question is exceptionally important. The Court should grant certiorari to ensure it is applied fairly and consistently across all of these statutes and across the country.

III. The decision below conflicts with this Court's decision in *Leocal* and its progeny.

Another reason for granting the writ is that the decision below conflicts with *Leocal v. United States*, 543 U.S. 1 (2004), as it was interpreted by this Court and every other circuit. *Castleman v. United States*, 572 U.S. 157, 169 n.8 (2014) (citing cases).

Leocal considered whether a negligent DUI statute was a "crime of violence" under 18 U.S.C. §16. With respect to the force clause in §16(a), the problem was that the statute required the "use" of force, but it was silent whether that use must be negligent, reckless, or intentional. The parties tried to fill this gap by making inferences from the meaning of the word "use," but this Court held that the effort to infer a mens rea from the word "use" by itself was "too narrow": "Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it." *Id.* at 9.

The "critical aspect of §16(a)" was the requirement that force be used "against the person or property of another." *Id*. "While 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*. Thus, in this context, "'use' requires active employment" and "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id*. For similar reasons, *Leocal* held that the residual clause in §16(b) could not be satisfied by a showing of negligence.

Finally, the Court noted that both clauses must be understood in context of a legal term of art: "crime of violence." "The ordinary meaning of this term, combined with §16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Id*. at 11. In this way, it was not the abstract meaning of the word "use" by itself but its meaning within its context and statutory scheme that provided a basis for inferring the missing mens rea.

Leocal did not decide whether the force clause could be satisfied by "a state or federal offense that requires proof of the reckless use of force against a person." *Id*. at 11-13. However, following the reasoning in *Leocal*, every circuit to consider this issue—including the Tenth—agreed that reckless crimes would not satisfy §16(a)'s "use" of physical force. *See Castleman*, 572 U.S. at 169 n.8 (citing cases).

This Court then concluded in *Begay v. United States*, 553 U.S. 137 (2008), that a DUI conviction was not a violent felony under the ACCA's residual clause. This was because the Court concluded the ACCA required "purposeful, violent, and aggressive conduct." 553 U.S. at 145. *Begay* is relevant because it explained what the ACCA's recidivist enhancements were intended to accomplish.

Begay explained that the enhanced penalties under the ACCA were premised on the belief that a prior violent conviction "makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." 553 U.S. at 145. Only purposeful conduct can satisfy that requirement.

By contrast, a reckless crime provides no indication of a propensity to later "deliberately . . . harm a victim." *Id*. *Begay* expressed concern with applying the ACCA too broadly and explained that only intentional, violent acts are "characteristic of the armed career criminal." *Id*. (quoting *United States v. Begay*, 470 F.3d 964, 980 (2006) (McConnell, J., dissenting)). An offender who previously acted only recklessly is not characteristically an "armed career criminal" or a "career offender," and extending these enhancements to that offender does so without proper justification. Without such limitations, the ACCA's 15-year mandatory minimum "would apply to a host of crimes which, though dangerous, are not typically committed by those who one normally labels 'armed career criminals.'" *Id*. at 147.

While these considerations were made in the context of the now-defunct residual clause, this Court has relied on *Begay* to interpret the force clause. In

Castleman, the Court cited *Begay* to explain why it interpreted § 921 and the ACCA differently. 572 U.S. at 167. And the dissenters in *Stokeling v. United States*, 139 S.Ct. 544 (2019), emphasized that the ACCA's force clause must be interpreted against the backdrop of *Begay*. *Id* at 559 (Sotomayor, J., dissenting).

If the unconstitutionally broad residual clause was limited to purposeful crimes, it follows that the narrower force clause must be as well. In light of the purpose identified in *Begay* for recidivist enhancements under the force clause, reckless offenses must fall outside all provisions of the ACCA and §4B1.2. The court below rejected the old rule without even discussing *Begay*.

IV. The Tenth Circuit misapplied *Voisine*.

A. Voisine did not articulate a new "reading of Leocal"

The Tenth Circuit concluded its old "reading of *Leocal*" was "mistaken" and "at odds with *Voisine*," "which puts us on a different course." Pet. App. A9, A11, A12. In reality, *Voisine* and *Leocal* are not at odds, so the Tenth Circuit was mistaken to abandon its original reading of *Leocal* based on *Voisine*.

In reality, *Voisine* discussed *Leocal* only to note that their holdings were *consistent*, and *Voisine* was explicit that it was not speaking to the continued vitality of post-*Leocal* decisions. 136 S.Ct. at 2280 n.4. *Voisine* considered the scope of a materially different force clause in 18 U.S.C. § 921(a)(33), which is used to decide when a person unlawfully possesses a firearm after being convicted of a "misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). Under § 921, a

person is guilty of a misdemeanor crime of domestic violence if his domestic violence conviction "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii).

Like it did in *Leocal*, this Court in *Voisine* focused on the meaning of the word "use." The Court reasoned that the word "use" by itself did not limit the clause "to knowing or intentional domestic assaults." 136 S.Ct. at 2278. "Use" implies a volitional act, but it "does not demand that the person applying force have the purpose of practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." *Id.* at 2279. Thus, "use" did not inherently "mark[] a dividing line between reckless and knowing conduct." *Id.*

But *Voisine* was explicit that its understanding of the word "use" in § 921 was consistent with *Leocal*. *Id.* Indeed, these decisions were consistent because neither decision found a particular mens rea requirement inherent in the word "use." Because "the word 'use'" was "the only statutory language either party [thought was] relevant" in *Voisine*, *id.* at 2278, force under § 921 could be "used" with any mens rea, including recklessness. The Court acknowledged in footnote 4 that its analysis of § 921 did not necessarily apply to § 16. While the meaning of "use" in § 921 was limited only by the requirement of a volitional act, this Court acknowledged that the different context and purposes of § 16(a) could require different limitations under that statute. *Id.* at 2280 n.4.

Footnote 4 makes clear that *Voisine* was not imposing a "new reading" on §16(a). In light of footnote 4, the Tenth Circuit's conclusion that it was obligated to "conform [its] reading of Leocal to that announced in *Voisine*," Pet. App. A11, was plainly wrong.

B. Voisine's interpretation of the word "use" is not the only reasonable interpretation of that word—the text and context of that word here requires intentional conduct.

To be sure, *Voisine* understood "use" differently in § 921 than *Leocal* did in § 16(a). However, *Voisine's* interpretation of the word in one context does not mean the word must have that meaning in *every* context. In contrast to § 921, where the word "use" was "the only statutory language either party [thought] relevant," 136 S.Ct. at 2278—the force clause in §4B1.2 has other important contextual clues, which are vital to understanding its meaning.

This Court recognized early on the difficulties this analysis would encounter if the result hinged on the meaning of a single "elastic" word, saying that a "primary focus" on a single word was "too narrow." *Leocal*, 543 U.S. at 9. As a result, the Court looked to "its context and in light of the terms surrounding it." *Id*. In that context, the "critical aspect of §16(a)" was the requirement that force be used "against the person or property of another." *Id*. (quoting §16(a)). That same language is found in §4B1.2, so the force clause must be understood in light of that language.

Whereas §4B1.2(a)(1) requires that the element of force be used "against the person of another," § 921(a)(33)(A)(ii) includes a list of individuals who must have

"committed" the prior crime (i.e., the domestic abuser). There is no additional requirement that the domestic-abuser defendant's prior act be directed "against the person of another." *Voisine* itself acknowledges the point. 136 S.Ct. at 2279 (noting that the statute would reach an abuser who throws a plate toward his wife, but not at her); see also *Leocal*, 543 U.S. at 9 (interpreting "use of physical force" in 18 U.S.C. § 16 to include a mens rea element because of the statute's inclusion of the phrase "against the person of another"). Conversely, §4B1.2 applies to the defendant's prior convictions, regardless of the defendant's relationship with the victim.

Section 4B1.2 has the same statutory language that demands the exclusion of reckless conduct under § 16(b). Specifically, the force clause of §4B1.2 requires that the force be used "against the person of another." This distinction is one reason to interpret the statutes differently, and its presence in §4B1.2 should compel this court to reinstate the old rule that reckless crimes don't fit within §4B1.2. "[T]he subsequent phrase against the person of another arguably conveys 'the need for the perpetrator to be knowingly or purposefully (and not merely recklessly) causing the victim's bodily injury.'" *United States v. Middleton*, 883 F.3d 485, 498-99 (4th Cir. 2018) (Floyd, J., concurring) (quoting *United States v. Bennett*, 868 F.3d 1, 18 (1st Cir.)).

The court below misread *Voisine* as drawing a line between volitional conduct on the one hand and reckless or intentional conduct on the other. In reality, the volitional act requirement cannot be the aspect of "use" that implies the required

mens rea because a volitional act is a necessary component of any criminal offense; an involuntary act is not even a crime. “A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.” Model Penal Code §2.01(1).

However, a volitional act is not the only characteristic of a crime, including a crime that is based on “using” something. Under the Model Penal Code, an act may be committed “purposely, knowingly, recklessly, or negligently.” *Id*. § 2.02(1); *see also* Utah Code § 76-2-102. These words are all words that characterize the manner of performing a volitional act. Many volitional acts—such as shooting a gun, driving a car, or hitting or throwing an object—involve force and can be committed in any of these ways. Neither the definition of “use” nor the volitional character of the act suggests definitively where to draw the line in a statute that does not explicitly identify a mens rea. In the absence of further statutory clues, *Voisine* reasonably concluded that reckless acts were included in the word “use” in §921.

The Tenth Circuit’s failure to address the significance of the different language and context in these provisions is reason for this Court to take up this issue.

C. The Tenth Circuit ignored the different purposes of these statutes.

In addition to looking at the statutory text, the outcome in *Voisine* also turned on this Court's understanding of § 921's background and purposes. The aim of this statute was "to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors . . . from owning guns." 136 S.Ct. at 2280. If the statute were read to exclude reckless offenses, it would effectively nullify the statute because so many states had misdemeanor assault statutes that could be committed recklessly. *Id*. at 2280-82. By contrast, the "concern in *Voisine* that excluding reckless conduct from the term 'use' would render 18 U.S.C. §922(g)(9) functionally inoperative in the majority of the United States is simply not present in the context of the career offender enhancement [§4B1.2]." *United States v. Wehunt*, 230 F.Supp.3d 838, 847 (E.D. Tenn. 2017).

Other contextual differences reflect the statutes' different purposes: (1) the relevant statutory provision in *Voisine* sets forth an element of the offense, whereas §4B1.2 operates as a recidivist-sentencing guideline; (2) the statute in *Voisine* is aimed only at misdemeanor crimes, whereas §4B1.2 excludes misdemeanor crimes from its reach; and (3) the statute at issue in *Voisine* reaches only crimes of *domestic* violence, whereas §4B1.2 has no such limit.

USSG §4B1.2 and the ACCA are limited to felonies, so they apply to a different category of crimes than those covered by § 921. Whereas § 921 imposed a general ban on firearm possession for misdemeanor domestic violence, §4B1.2 and the ACCA

trigger significant sentencing enhancements under a very specific recidivist theory: the idea that a past user of violence is a violent person who should be punished more severely when he later possesses a firearm. The court below failed to consider at all whether the purposes and background of §4B1.2 and the ACCA require a different interpretation of the word "use" than the one adopted in *Voisine*.

This failure puts the decision below at odds with this Court's decisions in *Castleman* and *Begay*. Relying on *Begay*, *Castleman* made clear that the same word—"force"—that was used in the ACCA and § 921 did not need to be interpreted in the same way because the two statutes had "differences in their contexts and purposes." *Voisine*, 136 S.Ct. 2272, 2280 n.4 (citing *Castleman*, 572 U.S. at 164 n.4). The decision below ignores the important purposes discussed in *Begay* that limit these recidivist enhancements to "purposeful, violent, and aggressive conduct," nor does it acknowledge the clear precedent in *Castleman* for interpreting § 921 and the force clause in §4B1.2 and the ACCA differently. Faced with these failures, this Court must grant certiorari to ensure that the rule announced below conforms to those authorities.

Additionally, the decision below ignores other structural clues. For one thing, the enumerated offense clause includes only intentional crimes. USSG §4B1.2(a)(2); See *Begay*, 553 U.S. at 145 (noting that the enumerated offenses in § 924(e)(2)(B) are all purposeful crimes); *see also United States v. Koufos*, 666 F.3d 1243, 1251 (10th Cir. 2011) (same, but in the context of §4B1.2); *United States v. Park*, 649 F.3d 1175,

1180 (9th Cir.2011) (same). And when §4B1.2 included a residual clause, that clause too reached only purposeful crimes. *Begay*, 553 U.S. at 144-145; see also *United States v. Williams*, 559 F.3d 1143, 1148 (10th Cir. 2009) ("The Supreme Court has stated the residual clause is intended to reach purposeful, violent, and aggressive conduct rather than merely negligent or reckless acts."); *United States v. Crews*, 621 F.3d 849, 855 (9th Cir. 2010) ("Following *Begay*, our sister circuits have similarly held that crimes involving only negligent or reckless mens reas do not fall within the residual clause.") (citing decisions from the First, Second, Fourth, Sixth, and Seventh Circuits).

Section 4B1.2's commentary further indicates that the provision includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG §4B1.2, comment. (n.1). Aiding and abetting is an intentional crime. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) ("[T]o aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"); *see also United States v. Rosalez*, 711 F.3d 1194, 1205 (10th Cir. 2013) (to convict under an aiding and abetting theory, "[t]here must be 'some showing of intent to further the criminal venture'"). Conspiracy is also an intentional crime. *Ocasio v. United States*, 136 S.Ct. 1423, 1429 (2016) ("A defendant must merely reach an agreement with the 'specific intent that the underlying crime be committed' by some member of the conspiracy."). And criminal

attempts require proof of specific intent to commit the underlying crime. *Braxton v. United States*, 500 U.S. 344, 351 n. (1991).

In light of the text and context, a use-of-force offense must also be committed intentionally. Otherwise, §4B1.2's "use" of physical force provision would be interpreted inconsistently with the rest of §4B1.2. *See, e.g., Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1010 (2017) (noting that a court must "look to the provisions of the whole law" when interpreting a statutory phrase). On this point, this Court's decision in *Global Tech Appliances v. SEB S.A.*, 563 U.S. 754, 765 (2011), is particularly instructive. There, this Court found a knowledge requirement in one provision in light of its determination that a neighboring subsection had a knowledge requirement. *Id*. So too here.

With respect to purpose, §4B1.2's purpose, as articulated by Congress, is to ensure that certain offenders are sentenced "at or near" the statutory maximum term of imprisonment. 28 U.S.C. § 994(h). That purpose is ill-served by including unintentional crimes. See *Staples v. United States*, 511 U.S. 600, 616 (1994) ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea.").

In light of the context, history, and purpose of the force clause in §4B1.2, the Tenth Circuit's application of *Voisine* to this force clause was misplaced. This Court should grant certiorari to ensure the force clause is correctly applied.

D. Applying **Voisine** *to the force clause would lead to unjust results.*

This Court in *Johnson v. United States* said it would be a "comical misfit" to extend the ACCA to non-violent offenses. 559 U.S. 133, 145 (2010). *Begay* expressed a similar concern with applying the ACCA to "a host of crimes which, though dangerous, are not typically committed by those who one normally labels 'armed career criminals.'" 553 U.S. at 146. And the same is true for offenders facing enhanced penalties under §4B1.2 as a career offender. Applying the force clause to reckless crimes runs the very risk that this court warned against in *Johnson* and *Begay*.

The court in *United States v. Bennett* gave an example of how the inclusion of reckless offenses could create a "comical misfit": "three past convictions for injuries that result from reckless plate throwing (the example discussed at length in *Voisine*), or reckless driving, could be sufficient to earn a designation as an 'armed career criminal.'" 2016 WL 3676145 at *3 (D. Maine 2016), *affirmed by Bennett v. United States*, 868 F.3d 1 (1st Cir. 2017).

That such convictions could be used to apply these enhancements is not fanciful or unrealistic, especially under Utah's aggravated assault statute. In *State v. McElhaney*, the Utah Supreme Court affirmed a conviction for Utah aggravated assault when the defendant recklessly threw a glass, hitting another person in the face and cutting him. 579 P.2d 328 (Utah 1978). Though he "was unaware of [the victim] standing in its path" and threw the glass recklessly, he was guilty of aggravated assault. *Id*. at 328. Utah has also applied its aggravated assault statute

to automobile cases. *State v. C.D.L.*, 250 P.3d 69, 76 (Utah App. 2011). Under the Tenth Circuit's reading of the force clause, convictions such as these could subject an individual to future designation as an Armed Career Criminal or Career Offender.

Such reckless offenses do not support the inference "that an offender, later possessing a gun, will use that gun deliberately to harm a victim." 553 U.S. at 145. It does not make sense to impose mandatory imprisonment or deportation on a plate thrower or reckless driver. The Tenth Circuit's (and every circuit's) former rule is a better fit, and this Court should grant certiorari to correct this significant error.

V. Congress or the Sentencing Commission—not the courts—should clarify the scope of an ambiguous statute.

In the end, if it is not clear that the force clause does not reach reckless crimes, it is at least ambiguous—the government cannot credibly argue that the unanimous interpretation of this clause before *Voisine* was an unreasonable reading of the statute. Thus, the rule of lenity resolves that ambiguity in Mr. Bettcher's favor. *United States v. Manatau*, 647 F.3d 1048, 1055-1056 (10th Cir. 2011) (Gorsuch, J.) (applying the rule of lenity in the guidelines context to "support treating intent to mean purpose rather than some lower standard likely to increase the defendant's sentence"); *United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017) (applying the rule of lenity to hold that a reckless crime does not count as a crime of violence).

If Congress or the Sentencing Commission thinks that reckless crimes should count as crimes of violence, the proper course is to amend the statutes and/or

guidelines. *See, e.g., Home Depot v. Jackson*, 139 S.Ct. 1743, 1751 (2019); *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1725 (2017) (such tasks are "for Congress, not this Court, to resolve"); *see also Perry v. Merit Sys. Prot. Bd.*, 137 S.Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting) ("If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation."). Not only has this never happened, but other statutory clues suggest the Commission and Congress agree that the force clause does not reach reckless crimes.

Despite the Commission's broad and ongoing authority to amend the guidelines, 28 U.S.C. § 994(o), the Commission has never called into question lower court precedent that reckless crimes do not count as crimes of violence. This omission cannot be a result of just not getting around to it. In 2016 the Commission amended §4B1.2 to replace the residual clause with a list of enumerated offenses. USSG Amend. 798. Had it disagreed with the circuits' unanimous reading of the force clause, it could have adopted a broader definition. The fact that it didn't suggests it accepted the rule that the force clause did not reach reckless crimes. Under the prior construction canon of statutory interpretation, "if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning." *Lightfoot v. Cendant Mortg. Corp.*, 137 S.Ct. 553, 563 (2017).

Indeed, the legislative history of the 2016 amendment shows that the Commission intended to preserve this rule. The Commission reports that it

"considered feedback from the field, . . . received extensive comment, and is aware of numerous court opinions expressing a videw that the definition of 'crime of violence' is complex and unclear." USSG App'x C, Amend. 798 (Reason for Amendment). With respect to the mens rea issue, the Commission specifically noted that it excluded involuntary manslaughter from the list of enumerated offenses because it "generally would not have qualified as a crime of violence under the residual clause." *Id.* (citing *Begay's* limitation of the ACCA residual clause to "purposeful, violent, and aggressive conduct").

This explanation shows that the Commission was aware of the limitations in the caselaw that excluded reckless offenses from the Career Offender guideline. If courts or practitioners were dissatisfied with the rule, the Commission surely would have been alerted to that during its study of this guideline. And if it had wanted to reject the rule, it had the power and the opportunity to do so. There is no evidence that courts struggled to apply the old rule or that any stakeholder sought to change to this rule.

There is another statutory clue that Congress did not understand the force clause to apply to reckless crimes. Another term of art in the immigration context is the term "serious criminal offense." 8 U.S.C. § 1101(h). Like the aggravated felony definition, this term incorporates the crime of violence definition in § 16. However, the term is broader than aggravated felony, reaching "any felony," any crime of violence under § 16 (misdemeanor or felony), and "any crime of reckless driving . . . if

such crime involves personal injury to another." If § 16(a) included reckless offenses, as the Tenth Circuit concluded it does, the language in § 1101(h)(3) would be superfluous. The fact that Congress specifically included reckless driving offenses here shows *it* understands that reckless crimes are not covered by § 16(a). *See, e.g., Lockhart v. United States*, 136 S.Ct. 958, 966 (2016) (discussing rule against superfluity).

This Court should grant certiorari to ensure that the courts do not improperly expand these significant enhancements beyond what Congress has enacted.

VI. This case is an excellent vehicle to resolve this conflict.

Finally, this case is an ideal vehicle to resolve the conflict. The question presented was preserved below. The government offered no other basis for applying the enhancement, so the scope of force clause is dispositive to the outcome of this case. There are no procedural hurdles to this Court's direct review of the rules governing sentencing in this case.

And for the reasons stated above, the court should not wait for the issue to arise in the context of statutory enhancements because the language is identical, and courts have always applied the provisions with reference to the others. Defendants and immigrants *right now* are being impacted as a result of the Tenth Circuit's decision in this case. The decision below is the one that articulated the Tenth Circuit's rationale for abandoning its old rule, so the appeal in *this* case is the perfect vehicle to address this arguments and merits surrounding this issue.

The Tenth Circuit reversed the district court and abandoned its old understanding of the force clause in a published a decision. In so doing, it firmly entrenched the three-way split on this issue. This Court should use this case to resolve the conflict.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

SCOTT KEITH WILSON
FEDERAL PUBLIC DEFENDER

By:______________________________

/S/Benjamin C. McMurray
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46 W Broadway Ste, 110
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Salt Lake City, Utah
August 16, 2019

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ANTHONY WANYE BETTCHER,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

AFFIDAVIT OF SERVICE

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Franscisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the United States Postal Service on August 16, 2019 and all parties required to be served have been served.

/S/ Benjamin C. McMurray
Assistant Federal Public Defender,
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46 W Broadway Ste, 110
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ANTHONY WAYNE BETTCHER,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

AFFIDAVIT OF MAILING

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service on August 16, 2019, and all parties required to be served have been served.

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