No. 18-_____

In the

Supreme Court of the United States

HOWARD LEON COMBS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

A person is guilty of Texas aggravated assault if his reckless driving causes another person to suffer injury; if he transmits a virus to an unwitting (but otherwise consenting) sexual partner; or if he sends a flashing strobe image over the internet which causes a victim to suffer a seizure. Do these scenarios involve "the use, attempted use, or threatened use of physical force against the person of another?"

2.

Should this case be remanded to the Fifth Circuit for further consideration in light of the forthcoming decision in *Shular v. United States*, 139 S. Ct. 2773 (2019)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Howard Leon Combs was the defendant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff in the district court, the appellee in the court below, and is the Respondent here.

RELATED PROCEEDINGS

No other proceedings that are directly related to this one. The case came before the Fifth Circuit on direct review of Petitioner's federal conviction and sentence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Howard Leon Combs asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is not published in the Federal Reporter. *See United States v. Combs*, 772 F. App'x 108 (5th Cir. 2019), reprinted at Pet. App. 1a–4a. The district court's only written opinion was a tentative conclusion that Petitioner's objection to ACCA was "without merit." Pet. App. 10a. The Appendix contains copies of the district court's original judgment of conviction (Pet. App. 6a–9a) and the Sentencing Transcript. Pet. App. 11a–24a.

JURISDICTION

The Fifth Circuit entered judgment affirming the conviction and sentence on June 11, 2019. Pet. App. 5a. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Armed Career Criminal Act, 18 U.S.C. § 924(e). That Act provides, in pertinent part:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

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

* * * *

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

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

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

18 U.S.C. § 924(e)(1), (2)(A)–(B).

Texas aggravated assault is defined in Texas Penal Code §§ 22.01 & 22.02:

§ 22.01 Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

* * * *

§ 22.02 Aggravated Assault

> (a) A person commits an offense if the person commits assault as defined in § 22.01 and the person:
>
> > (1) causes serious bodily injury to another, including the person's spouse; or
> >
> > (2) uses or exhibits a deadly weapon during the commission of the assault.

* * * *

STATEMENT OF THE CASE

Petitioner pleaded guilty to possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). 5th Cir. R. Pet. App. 1a. He had two prior Texas convictions for delivery of drugs (marijuana and methamphetamine) and one prior conviction for aggravated assault. 5th Cir. R. 112, 113, 116, 127–173. After the Presentence Investigation Report recommended application of ACCA, Petitioner objected that his aggravated assault conviction was not a violent felony. 5th Cir. R. 176–184. The district court overruled his objection:

> There is no way that the defendant could be convicted of an aggravated felony under Texas law without whatever he did that led to the conviction and without the offence of conviction containing an element of—having an element, the use—attempted use or threatened use of physical force against a person.

Pet. App. 17a.

On appeal, Petitioner identified three scenarios where a defendant would be guilty of Texas aggravated assault (causing bodily injury) but did not use, attempt to use, or threaten to use physical force against the person of another: (1) transmitting a virus through (otherwise consensual) sexual intercourse; (2) drunk or reckless

driving leading to collision; and (3) sending a flashing image via "tweet" which caused a victim to suffer a seizure. *See* Appellant Supp. Br., *United States v. Combs*, No. 16-11402 (5th Cir. filed Dec. 17, 2018). The Fifth Circuit disagreed, holding that each of these scenarios constitutes a use or threatened use of physical force against the person of the victim. Pet. App. 3a–4a. This timely petition follows.

REASONS TO GRANT THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT REGARDING ACCA'S ELEMENTS CLAUSE AND RECKLESS OFFENSES.

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court held that a drunk driver does not "use physical force against" the victim of an automobile accident. There, an alien was convicted of causing "serious bodily injury" to a victim by drunk driving. *Leocal*, 543 U.S. at 4 (citing Fla. Stat. § 316.193(3)(c)(2)). This Court held that Leocal did not use force against the victims when he caused the collision:

> 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 acci-dent. Thus, a person would "use . . . physical force against" an-other when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him.

Leocal, 543 U.S. at 9.

"Although *Leocal* reserved the question whether a reckless application of force could constitute a 'use' of force, *id.*, at 13 . . . the Courts of Appeals have almost uniformly held that recklessness is not sufficient." *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014) & cases cited. But that near uniformity was shattered by *Voisine v. United States*, 136 S. Ct. 2272 (2016). In *Voisine*, this Court held that

recklessly causing injury is a "use of physical force" for purposes 18 U.S.C. § 921(a)(33)(A), "misdemeanor crime of domestic violence." *Id.* at 2280. Thereafter, the lower courts splintered over reckless offenses under ACCA's definition of "violent felony." It will take an opinion from this Court to sort out that division.

A. The circuits are divided.

The First, Fourth, Eighth, and Ninth Circuits have all held that reckless causation of injury is not a "use" of physical force "against" the victim's person. *See United States v. Begay*, __ F.3d __, 2019 WL 3884261, at *4–6 (9th Cir. Aug. 19, 2019) (Second-degree murder under 18 U.S.C. § 1111 does not have use of physical force against a victim's person as an element because it can be committed recklessly); *United States v. Middleton*, 883 F.3d 485, 500 (4th Cir. 2018) (Floyd, J., concurring in the judgment and joined by Harris, J.) ("I believe these divergent contexts and purposes require us to construe the word 'use' in the ACCA's force clause to require a higher level of mens rea than recklessness."); *United States v. Windley*, 864 F.3d 36, 38 (1st Cir. 2017) (Massachusetts assault and battery with a dangerous weapon is not a violent felony: "reckless driving that results in a non-trifling injury has led to convictions for Massachusetts reckless ABDW."); *United States v. Fields*, 863 F.3d 1012, 1015–1016 (8th Cir. 2017), reh'g denied (Nov. 7, 2017) (recognizing that a defendant could be convicted of "reckless driving that results in injury," which would not necessarily involve the use of physical force against the victim).

The Fifth, Sixth, Eighth, Tenth, and D.C. Circuits have held that reckless offenses *can* satisfy ACCA's elements clause (or linguistically identical provisions such as 18 U.S.C. § 16 and U.S.S.G. § 4B1.2(a)(1)). *See United States v. Burris*, 920

F.3d 942, 951 (5th Cir. 2019) ("[T]he use of force under the ACCA includes reckless conduct."); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Pam*, 867 F.3d 1191, 1207–1208 (10th Cir. 2017); and *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016).

This split is both acknowledged and entrenched. *See* e.g., *Walker v. United States*, 931 F.3d 467, 470 (6th Cir. 2019) (Kethledge, J., dissenting from denial of reh'g) ("And by denying rehearing we have rendered more intractable what has become a deep circuit split."); *see also Verwiebe*, 874 F.3d at 262 (acknowledging that "the First Circuit, has come out the other way, or at least partly the other way");

B. The issue is important enough for immediate Supreme Court review.

The recklessness issue "recurs frequently and typically doubles a defendant's sentence." *Walker*, 931 F.3d at 469 (Kethledge, J., dissenting). Without ACCA, Petitioner would have been sentenced to no more than ten years in prison. *See* 18 U.S.C. § 924(a)(2). His advisory guideline range likely would have been even lower.[1] There is no need to await further percolation in the lower courts; at this point, en banc review in any of these circuits "would not resolve the existing circuit split." *Walker*, 931 F,3d at 470 (Stranch, J., dissenting from denial of reh'g).

[1] The Government did not address Petitioner's arguments regarding the non-ACCA guideline calculations. *See* 5th Cir. R. 192. But if Petitioner prevailed regarding the drug convictions (which did not receive criminal history points and thus are not countable as guideline predicates), his total offense level would have been no higher than 23, which would correspond to an advisory guideline range of 70–87 months. *Cf.* 5th Cir. R. 109–110.

No matter which side prevails, everyone should agree that the accident of *geography* should not make the difference between ACCA and non-ACCA sentencing. As long as the split remains unresolved, defendants in Dallas, Denver, and the District of Colombia will be sentenced much more severely than defendants with identical records who committed identical firearm crimes in Boston, St. Louis, San Diego, and Arlington, Virginia. The Court should grant this petition and resolve the issue to eliminate the uncertainty and inconsistency surrounding ACCA.

C. Texas's "aggravated assault" offense includes vast swaths of conduct beyond the violent, face-to-face confrontation typically associated with that label.

A "substantial majority of U.S. jurisdictions require more than extreme indifference recklessness to commit aggravated assault." *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015). Because Texas aggravated assault includes reckless causation of serious bodily injury (or reckless causation of any bodily injury using a "deadly weapon"), the Fourth Circuit has held that the offense is broader than generic aggravated assault. *United States v. Barcenas-Yanez*, 826 F.3d 752, 756–757 (4th Cir. 2016). That holding is not directly relevant to ACCA, which does not list aggravated assault as an enumerated offense. But it does suggest that Texas aggravated assault is broader than the typical offense.

As noted above, Texas aggravated assault requires proof of an assault under Texas Penal Code § 22.01 and one of the aggravators found in § 22.02. The three theories of assault are separate, divisible offenses. *United States v. Torres*, 923 F.3d 420, 425 (5th Cir. 2019) (citing *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim.

App. 2008)).[2] Here, Petitioner was convicted of an assault by *causing bodily injury*. Pet. App. 3a.

1. Texas Prosecutors have secured convictions for that same offense—aggravated assault by causing bodily injury—where consensual sexual contact caused the victim to acquire a virus. Sometimes, prosecutors and courts relied on the "serious bodily injury" aggravator. *See*, *e.g.*, *Billingsley v. State*, No. 11-13-00052-CR, 2015 WL 1004364, at *2 (Tex. App. – Eastland 2015, pet. ref'd) (affirming aggravated assault conviction because the defendant "caused serious bodily injury to [the victim] by causing [the victim] to contract human immunodeficiency virus (HIV)"). Other times, prosecutors charge the "deadly weapon" alternative. *See, e.g., Padieu v. State*, 05-09-00796-CR, 2010 WL 5395656, at *1 (Tex. App.—Dallas Dec. 30, 2010, pet. ref'd) ("Philippe Padieu was indicted on six charges of aggravated assault with a deadly weapon for intentionally, knowingly, and recklessly causing six women serious bodily injury by exposing them to the HIV virus through unprotected sexual contact. A jury convicted [Padieu] on all charges" and sentenced him to "forty-five years in prison.").

In *State v. Zakikhani*, Case No. 1512289 (Crim. Dist. Ct. No. 176, Harris Co., Tex. June 20, 2018), Texas again convicted a defendant of aggravated assault for transmitting HIV through consensual intercourse. One complainant made clear that

[2] The same Texas authority holds that the *aggravators*—deadly weapon or serious bodily injury—are alternative *means* of committing a single offense, and the defendant is not entitled to jury unanimity. *Landrian*, 268 S.W.3d at 541–542 (holding that the jury need not unanimously agree whether the defendant "intentionally and knowingly caused bodily injury [while using a deadly weapon] or recklessly caused serious bodily injury.").

the *actus reus* was *not* physically forceful: during the time she and the defendant were intimate, he was "friendly, charming, outgoing," and he cared for her and her child. Tera Robertson, *Man may be knowingly infecting victims with HIV, police say*, Click2Houston.com, (June 9, 2016).[3]

This behavior—reprehensible, no doubt—is a far cry from the "physical confrontation and struggle" typically associated with a term like "violent felony." *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019). While aggravated assault, like robbery, "has always been within the 'category of violent, active crimes' that Congress included in ACCA," *id.* (citation omitted), passing a virus through consensual sexual contact falls outside the ordinary or expected definition of "aggravated assault." Reckless but consensual sex is not a "use of force against another," and that does not change if the reckless behavior resulted in the "impairment" of one partner's "physical condition." Tex. Pen. Code § 1.07(8) (defining "bodily injury"). It is, however, enough to trigger conviction in Texas.

2. Texas prosecutors have also convicted people for assaultive offenses (including aggravated assault) by using a "deadly weapon" when their drunk or reckless driving caused bodily injury. For example, the Court of Criminal Appeals held that a drunk driver "used" a deadly weapon—the automobile—during the commission of involuntary manslaughter:

> In the instant cause, Tyra was convicted of involuntary manslaughter, accidentally killing a man with his pickup truck because he was too drunk to control the vehicle. Our precedents

[3] https://www.click2houston.com/news/investigates/man-may-be-knowingly-infecting-victims-with-hiv-police-say (accessed Oct. 30, 2018).

> establish that anything, including a motor vehicle, which is actually used to cause the death of a human being is a deadly weapon. This is necessarily so because a thing which actually causes death is, by definition, "capable of causing death." It follows that Tyra's pickup was undoubtedly a deadly weapon in the instant cause.

Tyra v. State, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995) (citations omitted). A recklessly driven automobile is a deadly weapon, even if the defendant did not *intend* to use the car as a weapon. *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995).

In *Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156 (Tex. App.—Dallas Nov. 27, 2013), the court held that the defendant committed aggravated assault because (a) he recklessly drove a motor vehicle, (b) his reckless driving caused injury to the victim, and (c) the *manner* he drove the car made it a "deadly weapon," because it was "capable" of causing death or serious bodily injury to the victim. Similarly, the court in *McNair v. State*, No. 02-10-00257-CR, 2011 WL 5995302, at *9 (Tex. App. Nov. 23, 2011), held that a 76-year old defendant would be guilty of aggravated assault if he "failed to properly control his vehicle" as he attempted to drive past a line of striking picketers into work.

This Court unequivocally held that a drunk driver does not "use physical force against" the victim of an automobile accident. In *Leocal*, 543 U.S. 1, an alien had previously been convicted of causing "serious bodily injury" to a victim by drunk driving. *Leocal*, 543 U.S. at 4 (citing Fla. Stat. § 316.193(3)(c)(2)). Yet this Court held that Leocal did not *use* force *against* the victims when he caused the collision:

> 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. Thus, a person would "use . . . physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him.

Leocal, 543 U.S. at 9.

As Judge Kethledge has forcefully argued, *Voisine* interpreted a separate definition that *lacked* this "against" language: § 921(a)(33)(A)(ii)'s "misdemeanor crime of domestic violence," "unlike the one here, requires only a 'use . . . of physical force' period, rather than a use of force 'against the person of another.'" *Walker*, 931 F.3d at 468 (Kethledge, J., dissenting). "That difference in text yields a difference in meaning." *Id*.

Following this logic, at least three circuit courts have recently held that the elements clause categorically *excludes* crimes that can be committed by reckless-driving collisions. *Middleton*, 883 F.3d at 500 (4th Cir. 2018) (Floyd, J., concurring in the judgment and joined by Harris, J.) ("I believe these divergent contexts and purposes require us to construe the word 'use' in the ACCA's force clause to require a higher level of mens rea than recklessness."); *Windley*, 864 F.3d at 38 (Massachusetts assault and battery with a dangerous weapon is not a violent felony: "reckless driving that results in a non-trifling injury has led to convictions for Massachusetts reckless ABDW."); *Fields*, 863 F.3d at 1015–1016 (recognizing that a defendant could be convicted of "reckless driving that results in injury," which would not necessarily involve the use of physical force against the victim).

This Court should adopt the same reasoning. Because Texas aggravated assault *can be* committed by reckless driving—and such convictions have been

affirmed by Texas state courts—the crime does not categorically satisfy ACCA's elements clause.

3. "Texas has recently charged a man with assault (that is, 'causing bodily injury') by sending a Tweet with animation that caused the victim to have a seizure." *United States v. Burris*, 896 F.3d 320, 331 (5th Cir. 2018), *withdrawn*, 908 F.3d 152 (5th Cir. Nov. 14, 2018) (citing Indictment, *State v. Rivello*, Case No. F-1700215-M (Crim. Dist. Ct. No. 5, Dallas Co., Tex.). According to the allegations in that case, the Maryland-based defendant sent the Texas-based victim an animated or flashing strobe image through the internet, and the victim later suffered a seizure when he saw that image.[4] These allegations do not suggest any "use" of "physical force," at least under the commonly accepted meaning of those terms.

"The adjective 'physical' . . . plainly refers to force exerted by and through concrete bodies," but plainly *excludes* "for example, intellectual force or emotional force." *(Curtis) Johnson v. United States*, 559 U.S. 133, 138 (2010). That is true even though emotional and intellectual barbs must be transmitted through some physical medium—a "victim" cannot read a sign without light, nor could he hear a taunt without some physical medium to carry the sound waves. A "tweet" that causes a physical reaction such as epilepsy is not physically different than an insulting tweet that causes emotional distress. Both employ concrete bodies only in the most abstract sense—because living humans are physical creatures, anything they do is manifest

[4] These allegations are detailed in a complaint and affidavit filed in a related federal case: *United States v. Rivello*, No. 3:17-MJ-192 (N.D. Tex. filed Mar. 10, 2017, later dismissed).

in the physical world. A tweet is not like a bullet or poison In Rivello's case, nothing made physical contact with the victim, save photons.

This prosecution shows that Texas aggravated assault is not limited to physical collisions or face-to-face confrontations. It thus reaches conduct outside ACCA's elements clause.

II. ALTERNATIVELY, THIS COURT SHOULD HOLD THIS PETITION PENDING RESOLUTION OF *SHULAR*.

Petitioner urges the Court to grant certiorari as to the first Question Presented, which would eliminate any need to consider this second question. But, in the event the Court is not inclined to grant the first question, he asks that the Court hold this case pending resolution of *Shular*. At the time Petitioner was sentenced (and when the appeal was decided), Fifth Circuit precedent held that Texas's definition of "delivery" of a controlled substance was sufficient to satisfy the definition of "serious drug offense."

Texas's definition of the term "deliver" includes "offers to sell" a controlled substance. *See* Texas Health & Safety Code §481.002(8). Under the plain meaning of the Texas statute, then, Petitioner could have committed his offenses by offering a drug for sale, or by possessing a drug with intent to offer it for sale. Further, the Fifth Circuit has held that possession of drugs with intent to deliver them and delivery – including offer to sell—are but different means of committing a single offense. *See United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017). Accordingly, Petitioner's prior statutes of conviction criminalized conduct that involved neither the actual distribution of drugs nor the possession of drugs with intent to actually deliver them.

ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." See 18 U.S.C. §924(e). Notably, this definition does not name offering to sell or possessing a drug with intent to offer it for sale as qualifying acts. And the Fifth Circuit has held that the crime does not satisfy the Sentencing Guidelines' definition of "controlled substance offense." *Tanksley*, 848 F.3d at 352 (Texas's "delivery" offense "criminalizes a 'greater swath of conduct than the elements of the relevant [Guidelines] offense.'").

Even so, the Fifth Circuit has held that the Texas delivery offense qualifies as a "serious drug offense" because Congress's use of the term "involving" was intended to have an "exceedingly broad" meaning. *See United States v. Vickers*, 540 F.3d 356, 365 (5th Cir. 2008). Under *Vickers*, drug offenses are ACCA predicates if they are "related to or connected with" the acts of drug trafficking named in ACCA's definition of a "serious drug offense": the manufacture, distribution, or possession of drugs with intent to manufacture or distribute. *Vickers*, 540 F.3d at 365 (quoting *United States v. Winbus*h, 407 F.3d 703 (5th Cir. 2005)). The Fifth Circuit continues to adhere to *Vickers* as binding precedent. *See United States v. Cain*, 877 F.3d 562, 562–563 (5th Cir. 2017).

This Court recently granted certiorari in *Shular v. United States*, 139 S. Ct. 2773 (2019), to decide whether the categorical approach applies to ACCA's definition of "serious drug offense." There, the Eleventh Circuit affirmed an ACCA sentence

predicated on Florida convictions for selling cocaine. Shular's petition noted the similarity between the Fifth and Eleventh Circuits in their broad construction of the term "involving," and argued against this approach. *See* Petition for Certiorari 19, *Shular v. United States*, No. 18-6662 (filed Nov. 8, 2018). Specifically, the petition contended that drug offenses ought not qualify the defendant for ACCA unless they contain all of the elements of the offenses enumerated in the definition of a "serious drug offense." *Id.* at 10–11, 15, 23–24.

In the event that Shular prevails, there will be at least a reasonable probability of a different result in this case. Shular has maintained, and must maintain to prevail, that the term "involving" does not extend the definition of "serious drug offenses" beyond the elements of the offenses it names. See *id.* at 15 ("The use of the term 'involving' does not negate the categorical approach."). If this Court embraces this argument, that would show that the Texas offenses here—delivery of marijuana and of methamphetamine—do not qualify as "serious drug offenses." These offenses may be committed by a mere offer to sell, or even by possession with intent to offer a drug for sale. *See* Texas Health & Safety Code §§481.002(8), 481.002(a). And those acts are not among those named ACCA's definition of a "serious drug offense": manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance. See 18 U.S.C. §924(e)(2)(A).

Petitioner argued below that he was not an Armed Career Criminal, but his argument focused on the first Question Presented. That is sufficient reason to reverse

the Court below. But in the alternative, he asks that this Court hold this petition pending the outcome in *Shular*.

CONCLUSION

This Court should grant the petition and set the case for a decision on the merits. Alternatively, the Court should hold the petition pending a decision in *Shular*.

Respectfully submitted,

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SEPTEMBER 9, 2019