No. ______________

In the

Supreme Court of the United States

LATROY LEON BURRIS,
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

J. MATTHEW WRIGHT
* *COUNSEL OF RECORD*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
(806) 324-2370
MATTHEW_WRIGHT@FD.ORG

QUESTIONS PRESENTED

(1) Does recklessly causing another person to suffer injury necessarily involve the "use of physical force against" that person for purposes of the Armed Career Criminal Act, 18 U.S.C. 924(e)?

(2) Given that precedent in the Fifth Circuit (and most others) squarely foreclosed any application of ACCA as of the date of the offense, did the statute—as construed by federal courts—provide fair warning that the enhancement would apply?

PARTIES TO THE PROCEEDING

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

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Burris*, No. 3:16-CR-163 (N.D. Tex. April 25, 2017)
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PETITION FOR A WRIT OF CERTIORARI

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

INTRODUCTION

Petitioner's 188-month ACCA-enhanced sentence depends on the conclusion that Texas simple robbery is a violent felony. But Texas has adopted an unusually broad definition of "robbery." "The majority of states" follow the common-law formulation and "require property to be taken from a person or a person's presence by means of force or putting in fear," *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006), *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013). But a defendant commits "robbery" in Texas if, during a theft or attempted theft, and with intent to obtain or maintain control of the property, he:

> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Pen. Code § 29.02(a).

Unlike most robbery offenses, including the Florida version recently analyzed in *Stokeling v. United States*, 139 S. Ct. 544 (2019), the Texas crime does not "require the criminal to overcome the victim's resistance." *Id.* at 550. In fact, Texas does not even "require interaction between the accused and the purported victim." *Howard v. State*, 333 S.W.3d 137, 138–140 (Tex. Crim. App. 2011) (affirming aggravated robbery

conviction where the victim observed the theft on a video screen from a separate, secure room).

Many years ago, the Fifth Circuit recognized that Texas's very broad version of robbery does not have use of physical force against the person of another as an element because § 29.02 "does not define 'robbery' in terms of the use or threat of force." *Santiesteban-Heranandez*, 469 F.3d at 379. The court held that the crime was a violent felony under ACCA's residual clause instead. *United States v. Davis*, 487 F.3d 282, 285–287 (5th Cir. 2007)[1]; *accord United States v. Gore*, 636 F.3d 728, 744 (5th Cir. 2011) (Higginbotham, J., concurring) ("We have previously concluded that, as defined by Texas law, both robbery and aggravated robbery are violent felonies under the Residual Clause, and the statutory history of the ACCA supports that conclusion.").

If Texas robbery was a residual-clause violent felony, but not an elements-clause violent felony, then Texas robbery is no longer a violent felony after *Johnson v. United States*, 135 S. Ct. 2551 (2015). After *Johnson*, many judges in the Fifth Circuit embraced that conclusion and refused to apply (or reversed prior applications of) the Armed Career Criminal Act. The panel majority here *originally* reversed the ACCA sentence. App., *infra*, 28a–44a; *see also United States v. Fennell*, 2016 WL 4491728 (N.D. Tex. Aug. 25, 2016), *reconsideration denied*, 2016 WL 4702557 (Sept.

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[1] *Davis*, decided four years before *Howard*, incorrectly assumed that "an individual must interact with the victim in order to cause bodily or place the victim in fear of it." 487 F.3d at 286.

8, 2016), *aff'd*, 695 F. App'x 780 (5th Cir. 2017); *United States v. Wheeler*, 733 F. App'x 221 (5th Cir. 2018), *vacated on reh'g*, 754 F. App'x 282 (5th Cir. 2019).

But while this appeal was still pending, the Fifth Circuit "significantly changed [its] ACCA jurisprudence." App., *infra*, at 14a. Relying on intervening changes in decisional law that dramatically expanded the reach of ACCA, the panel eventually affirmed Petitioner's ACCA sentence and the en banc Court denied rehearing. App., *infra*, at 1a–24a, 26a–27a.

Petitioner first asks this Court to resolve a statutory interpretation question that has flummoxed the lower courts: when a defendant's reckless actions cause someone else to suffer bodily injury, has that person "*used* physical force *against*" the victim? 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Even if the answer turns about to be affirmative, Petitioner asks this Court to say whether ACCA, "either standing alone or as construed, made it reasonably clear" that Petitioner was an Armed Career Criminal when he committed the offense. *United States v. Lanier*, 520 U.S. 259, 267 (1997). Resolution of either issue in Petitioner's favor would lower his sentence dramatically.[2]

OPINIONS BELOW

The Fifth Circuit issued several opinions . The original opinion, issued June 18, 2018, and revised later that same day, was published in the advance sheet at 892 F.3d 801. That opinion was subsequently withdrawn from the bound volume, revised,

[2] According to an addendum to the Presentence Investigation Report, without the Armed Career Criminal Act enhancement, Petitioner's advisory guideline range would be 70–87 months. 5th Cir. R. 277.

modified, and revised again. The revised and modified opinion (App., *infra*, at 28a–54a) was published at 896 F.3d 320. That opinion was withdrawn on November 14, 2018, by an order published at 908 F.3d 152. The April 10, 2019 opinion on rehearing (App., *infra*, at 1a– 24a) was published at 920 F.3d 942. The order denying rehearing en banc (App., *infra*, at 26a–27a) was not reported.

JURISDICTION

The Fifth Circuit denied a timely petition for rehearing en banc on June 3, 2019. App., *infra*, at 26a–27a. This Court granted Petitioner's timely application (No. 19A190) to extend the time to petition for certiorari on August 19, 2019. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

Title 18, United States Code § 924(e) provides, in relevant part:

> (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—

* * * *

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

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

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

Texas Penal Code § 29.02 defines simple robbery as follows:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

STATEMENT

Petitioner pleaded guilty to two federal offenses: possession of a firearm after felony conviction and possession of heroin with intent to distribute. App., *infra*, at 2a. He committed both offenses on January 20, 2016. App., *infra*, at 55a. That was around seven months after this Court struck down ACCA's residual clause in *Johnson*. And it was around five months before this Court held, for the first time, that a reckless offense could count as a "use of physical force," at least for purposes of the

"misdemeanor crime of domestic violence" definition, 18 U.S.C. § 921(a)(33)(A). *See Voisine v. United States*, 136 S. Ct. 2272 (2016).

In both the district court and on appeal, Petitioner argued that he was not an Armed Career Criminal. To overcome that argument, the Government had to convince the lower courts that Texas simple robbery was a "violent felony." *See* App., *infra*, at 3a. Texas simple robbery can be committed by recklessly causing injury to any other person during the course of a theft, including injury caused while fleeing from a botched shoplifting attempt. E.g., *Smith v. State*, 2013 WL 476820, at *2 (Tex. App. 2013).[3] Petitioner argued (a) a defendant can cause physical injury without using physical force; (b) reckless causation of injury is not a "use" of force against the victim for purposes of ACCA; and (c) Texas defines "bodily injury" too broadly to satisfy ACCA's definition of "force." 5th Cir. R. 105–110, 187–196 (citing *Fennell*).

Petitioner was sentenced in April of 2017—after *Voisine*. App., *infra*, at 55a. The district court acknowledged a difference of opinion among judges who had considered Texas robbery, but overruled Petitioner's argument:

> This is an issue that the Fifth Circuit is going to need to resolve, and my understanding is that [the decision in *Fennell*], which is contrary to mine, is on appeal at this time.

5th Cir. R. 112. The *Fennell* decision affirmed the non-ACCA sentence, but it was not precedential. *See United States v. Fennell*, 695 F. App'x 780 (5th Cir. 2017). The Fifth Circuit set out to settle the issue in Petitioner's case.

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[3] Petitioner also showed that Texas prosecuted and convicted a defendant for aggravated robbery based on injuries suffered by a pursuing police officer that resulted from the defendant's reckless driving. Burris 5th Cir. Reply Br. 20a–27a.

The panel majority initially "held that Burris's conviction for simple robbery was not a violent felony under ACCA." App., *infra*, at 3a; *see id.* at 28a–44a. But the Government filed a petition for rehearing en banc, and the case remained pending for many months. During that time, a majority of the en banc Court upended the Fifth Circuit's settled interpretation of the elements clause. *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018) (en banc) ("It is high time for this court to take a mulligan on [crimes of violence].")[4] The *Reyes-Contreras* majority entirely dismissed the interpretive regime that governed at the time Petitioner committed his offense: "The well-intentioned experiment that launched fifteen years ago has crashed and burned." *Id.* at 186. The Court overruled eighteen prior decisions, including two en banc decisions from 2004, because (in the majority's judgment) they were "barnacles that need to be scraped from our caselaw ship." *Id.* at 183.

Three aspects of the Fifth Circuit's change of course affected the outcome of Petitioner's appeal. First, the court had long ago decided that *recklessly* causing an injury was not a use of physical force against a victim. *See United States v. Vargas-Duran*, 356 F.3d 598, 599 (5th Cir. 2004) (en banc) ("We hold that the 'use' of force requires that a defendant intentionally avail himself of that force."). *Reyes-Contreras* overruled that precedent. 910 F.3d at 183. Second, the Fifth Circuit had long observed "a difference between a defendant's causation of an injury and the defendant's use of force." *Vargas-Duran*, 356 F.3d at 606. That distinction, too, was eliminated by *Reyes-*

[4] Five judges declined to join the relevant portion of the *Reyes-Contreras* opinion. *See Reyes-Contreras*, 910 F.3d at 172 n.**.

Contreras, 910 F.3d at 183–184. Finally, the Fifth Circuit previously defined "element" in the traditional way: "If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element—implicit or explicit—of the crime." *Vargas-Duran*, 356 F.3d at 605. *Reyes-Contreras* cast that aside, too: rather than requiring the government to prove that the use of force was a true *element* of Texas robbery, the court now requires the defendant to show "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct" lacking any use, attempted use, or threatened use of force. *Reyes-Contreras*, 910 F.3d at 184; *see Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Relying on these changes in statutory interpretation, as well as this Court's recent decision in *Stokeling*, the panel issued a new opinion reaching the opposite conclusion: the court unanimously affirmed the ACCA sentence. App., *infra*, at 1a–24a. The panel acknowledged that these intervening decisions "significantly changed [the Fifth Circuit's] ACCA jurisprudence," but rejected Petitioner's fair-warning challenge because the intervening decisions "merely reconciled our circuit precedents" decisions from other circuits. App., *infra*, at 15a (quoting *United States v. Gomez-Gomez*, 917 F.3d 332 (5th Cir. 2019)). Because (according to the Fifth Circuit) the "common law . . . presupposes a measure of evolution," the Court rejected Petitioner's challenge to retroactive application of *Voisine* and *Reyes-Contreras*. App., *infra*, at 14a (quoting *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001)).

Petitioner urged the en banc Court to rehear the case. He argued that the "circuit splits" preceding *Voisine* and *Reyes-Contreras* did not yet exist when he committed his offense in January of 2016; at that time, the Fifth Circuit continued to apply its prior interpretive framework without any expression of doubt. The problem was not merely that the law changed between the first and final panel decisions; the problem was that the Court expanded the substantive reach of ACCA in a way that was unpredictable and indefensible *as of the date he committed his offense*. Petitioner's rehearing petition argued that the fair-warning claim should therefore be governed by *Marks v. United States*, 430 U.S. 188 (1977), rather than *Rogers*.

Rogers was concerned only with "an act of common law judging," which (according to this Court) granted more "flexibility" to change rules mid-case. *Rogers*, 532 U.S. at 461. Here, *Reyes-Contreras* was a statutory interpretation decision that "marked a significant departure from" *Vargas-Duran* and the other statutory construction decisions that governed the interpretation of ACCA at the time Petitioner committed his offense. *Marks*, 430 U.S. at 194. Because these new decisions "expanded criminal liability," *id.*, in a way that was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue," *Bouie v. City of Columbia*, 378 U.S. 347, 356, 361–362 (1964), it violated the rules of fair warning to apply them here. The Fifth Circuit denied rehearing. App., *infra*, at 26a.

REASONS TO GRANT THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE INTERPRETIVE DISPUTE OVER ACCA'S APPLICATION TO RECKLESSLY CAUSED INJURIES.

A. Before *Voisine*, appellate courts agreed that recklessly causing an injury was not a use of physical force against the victim.

In 2004, this Court held that a Florida offense defined as "causing serious bodily injury" to another while "driving under the influence of alcohol" did not "have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (quoting Fla. Stat. § 316.193(c)(2) & 18 U.S.C. § 16(a)). The Court thus rejected a central premise of the opinion below—that *causing bodily injury* is equivalent to *use of physical force against* a victim. In *Leocal*, the Florida crime lacked the *mens rea* necessary to qualify as a *use* of force *against* a victim:

> The critical aspect of § 16(a) is that a crime of violence is one involving the "use . . . of physical force *against the person or property of another*." (Emphasis added.) As we said in a similar context . . . "use" requires active employment. . . . 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 (internal citation omitted). *Leocal* held that the statutory language required "a higher degree of intent than negligent or merely accidental conduct." *Id.*

"*Leocal* reserved the question whether a reckless application of force could constitute a 'use' of force." *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014)

(citing *Leocal*, 543 U.S. at 9). But all of the lower courts to consider the question—including the Fifth Circuit—"held that recklessness is not sufficient." *Id.* (citing *United States v. Palomino Garcia*, 606 F.3d 1317, 1335–1336 (11th Cir. 2010); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615–616 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1127–1132 (9th Cir. 2006) (en banc); *Garcia v. Gonzales*, 455 F.3d 465, 468–469 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263–265 (3d Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003); and *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001)).

B. After *Voisine*, the lower courts cannot agree about whether reckless offenses satisfy ACCA's elements clause.

In *Voisine*, this Court interpreted a similar elements clause found in the definition of "misdemeanor crime of domestic violence," 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9). "That provision, unlike the one here, requires only a 'use . . . of physical force' period, rather than a use of force 'against the person of another.'" *Walker v. United States*, 931 F.3d 467, 468 (6th Cir. 2019) (Kethledge, J., dissenting from denial of reh'g). This Court held—for purposes of MCDV—that a "person who assaults another recklessly 'use[s]' force, no less than one who carries out that same action knowingly or intentionally." *Voisine*, 136 S. Ct. at 2280. Excluding recklessness would "render[ ] § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness." *Id.* (assuming that the relevant crimes are indivisible).

After *Voisine*, the lower courts are sharply divided over whether reckless-injury crimes count as a *use* of force *against* a victim. In the First, Fourth, Eighth, and Ninth Circuits, reckless-injury crimes do not count because they do not have *use* of physical force *against* the victim as an element. *See United States v. Windley*, 864 F.3d 36, 38 (1st Cir. 2017); *United States v. Fields*, 863 F.3d 1012, 1015–1016 (8th Cir. 2017)[5]; *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018) (discussing *United States v. Middleton*, 883 F.3d 485, 500 (4th Cir. 2018) (Floyd, J., concurring in the judgment and joined by Harris, J.)); *United States v. Begay*, 934 F.3d 1033, 1038–1041 (9th Cir. 2019).

The Fifth Circuit disagreed. App., *infra*, at 11a–13a. The court held that *Reyes-Contreras* and *Voisine*, "confirm that reckless conduct constitutes the 'use' of physical force under the ACCA." App., *infra*, at 13a. The Sixth, Tenth, and District of Columbia Circuits have also held that recklessness is enough. *See Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018); *United States v. Pam*, 892 F.3d 1271, 1280–1281 (D.C. Cir. 2018); *United States v. Haight*, 892 F.3d 1271, 1280–1281 (D.C. Cir. 2018) (Kavanaugh, J.).

Some of these circuits have drawn distinctions among reckless crimes. For example, the Eighth Circuit has concluded that recklessly shooting a gun at someone satisfies the elements clause. *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016).

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[5] In *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), the court embraced the argument that a reckless drive-by shooting could be a use of physical force against a victim. Fogg was convicted of *attempting* a drive-by shooting, *id.* at 953, so his conviction likely precluded recklessness. But more importantly—as *Fields* explained—he probably had specific intent.

Prior to the decision below, the Fifth Circuit had likewise held that a reckless *mens rea* coupled with an inherently forceful *actus reus* would satisfy the elements clause. *See United States v. Howell*, 838 F.3d 489, 502 (5th Cir. 2016) (analyzing Texas Penal Code § 22.01(b)(2)(B), "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person *by applying pressure to the person's throat or neck or by blocking the person's nose or mouth*") (emphasis added); *United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017) (analyzing Cal. Penal Code § 246, "discharging a firearm at an inhabited dwelling house").[6]

But the decision below went further, and brought the Fifth Circuit into direct conflict with the Eighth Circuit. As explained in *Fields*, "[n]either *Voisine* nor *Fogg* considered . . . a statute that also criminalizes reckless driving." *Fields*, 863 F.3d at 1015. Said another way, the Eighth Circuit holds that an otherwise-forceful action (like shooting a gun at someone) counts as a "use" of force "against" that person, even when shooting recklessly; but the Fifth Circuit holds that *all* reckless causation of injury—no matter the action—is a use of physical force against the victim.

The Third and Eleventh Circuits have agreed to consider this question en banc. In *United States v. Moss*, 920 F.3d 952 (11th Cir. 2019), a panel held that Georgia aggravated assault did not have use of force against a victim as an element because

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[6] The Tenth Circuit's decisions in *Pam*, 867 F.3d at 1205–1208; *United States v. Johnson*, 911 F.3d 1062, 1074 (10th Cir. 2018); and *United States v. Hammons*, 862 F.3d 1052, 1055–1056 (10th Cir. 2017), all deal with recklessly *shooting at* someone or some thing. But the court later extended the reasoning of those cases to a federal statute prohibiting reckless causation of serious bodily injury. *See United States v. Mann*, 899 F.3d 898, 905–906 (10th Cir. 2018) (applying 18 U.S.C. § 924(c)(3)(A) to § 113(a)(6)).

the crime could be committed by recklessly causing injury. *Id.* at 758–759. That decision was vacated after a majority of the court voted to rehear the case en banc. *See United States v. Moss*, 928 F.3d 1340 (11th Cir. 2019). In the Third Circuit, the Court sua sponte ordered rehearing en banc in *United States v. Santiago*, No. 16-4194, and *United States v. Harris*, No. 17-1861, which both apparently depend upon this question. *Cf.* U.S. Letter, *United States v. Santiago*, No. 16-4194 (3d Cir. Filed Sept. 30, 2019) (discussing allocation of argument for both cases).

Further percolation will not resolve this split. There is significant tension between the reasoning of *Leocal* and the reasoning of *Voisine*, and no one but the Supreme Court can say whether the reasoning of *Castleman* and *Voisine* applies outside of the MCDV context. Until this Court resolves the question, gun-possessing felons with similar or even identical criminal records will suffer vastly different sentences based solely on the accident of geography.

C. Under the better reading of this Court's decisions, recklessly causing injury is ***not*** synonymous with a use of physical force against the injured victim.

Even though "*Leocal* reserved" the question of whether recklessly causing injury was a use of force against the injured person, the decision provided a roadmap for resolving the issue.

1. *Leocal* rejected the argument that a drunk-driver who causes a collision has *used* physical force *against* the victim or the victim's property. This conclusion was based upon an anlysis of the plain meaning of the statutory terms "use" and "against": a person would "'use physical force against' another when pushing him;

however, we would not ordinarily say a person 'uses physical force against' another by stumbling and falling into him." 543 U.S. at 9 (alterations omitted).

2. There is little or no daylight between an intoxicated driver and a reckless driver. Bodily Injury Robbery—like most other Texas assaultive crimes—is a "result-oriented offense." *Landrian v. State*, 268 S.W.3d 532, 533 (Tex. Crim. App. 2008); *see Cooper v. State*, 430 S.W.3d 426, 443 (Tex. Crim. App. 2014) (Price, J., dissenting) ("Indeed, apart from the added acquisitive conduct/intent element, the robbery statute is practically indistinguishable from the simple assault statute."); *McCrary v. State*, 327 S.W.3d 165, 175 (Tex. App. 2010) ("Both [aggravated assault and aggravated robbery] are result-oriented crimes with injury being the result."). Because Texas defines robbery by its *result*, "[t]he precise act or nature of conduct in this result-oriented offense is inconsequential." *Landrian*, 268 S.W.3d at 537.

Texas defines recklessness in a way that surely includes most, if not all, drunk-driving accidents:

> (c) A person acts recklessly, or is reckless, with respect to . . . the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Texas Penal Code § 6.03(c). In *United States v. Vargas-Soto*, 700 F.3d 180 (5th Cir. 2012), the court analyzed a Texas prosecution where a single drunk-driving accident resulted in a conviction for intoxicated assault and manslaughter. *Id.* at 184.

3. In *Leocal*, this Court relied on Congress's decision to include both drunk-driving accidents and "crimes of violence" under the broader heading of "serious

criminal offense" within the Immigration and Nationality Act. *Leocal*, 543 U.S. at 12 (discussing 8 U.S.C. § 1101(h)). The statute in question also lists *reckless driving* offenses that cause injury:

> For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--
>
> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of Title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

8 U.S.C. § 1101(h) (emphasis added). If—as the Fifth Circuit held and Respondent now argues—recklessly caused injuries were, by definition, a use of physical force against the victim, then those crimes would be violent under 18 U.S.C. § 16(a). "[T]he distinct provision for" reckless-driving-injury offenses under [§ 1101(h)] should "bolster[ ]" Petitioner's argument that the use-of-force clause "does not itself encompass" reckless-injury offenses. *Leocal*, 543 U.S. at 12 & n.9.

4. There is a non-trivial linguistic difference between "using physical force" and causing physical injury. *Leocal* acknowledged the difference. 543 U.S. at 10–11 & n.7. Section 16(b), this Court reasoned "plainly does not encompass all offenses which create a 'substantial risk *that injury will result from a person's conduct*.'" *Id.* at 10 n.11 (emphasis added). Congress used both *injury* and *force* within § 924 itself, which suggests it intended a different meaning. *Compare* § 924(c)(3)(A), (c)(3)(B), (e)(2)(B)(i), *with* § 924(e)(2)(B)(ii). Within ACCA's elements clause, Congress specified

that *use of force* must be an element of the offense. Surely Congress did not believe that language would extend to all statutes defined by causing injury.

5. "Even if" ACCA "lacked clarity on this point," this Court "would be constrained to interpret any ambiguity in the statute in petitioner's favor." *Leocal*, 543 U.S. at 12 n.8. ACCA, like § 16, "is a criminal statute," and "the rule of lenity applies." *Id.* ACCA's elements clause is not merely *susceptible* to an interpretation that excludes recklessly caused injuries; that was the universally accepted meaning prior to *Voisine*.

5. *Voisine* is distinguishable. First, excluding recklessness would not render ACCA broadly inapplicable. Most robbery offenses (which share the common law definition) would still be included, as would intentional and knowing crimes. Second, ACCA's definition contains the term "*against*," which was "critical" to the analysis in *Leocal*, 543 U.S. at 9.

D. This case is an ideal vehicle to resolve the split.

The Fifth Circuit here explicitly applied ACCA to cover a reckless-injury offense. App. 12a–13a. This is a statutory interpretation case, so (unlike *Reyes-Contreras*) the issue did not arise in the context of the Sentencing Guidelines. And the case comes to the Court on direct appeal, which means there is no need to worry about the complex issues that surround *collateral* review for otherwise final convictions.

This case is also ideal exactly *because* Texas robbery is so broadly defined. In Texas, *any* injury caused by *any* reckless behavior elevates a theft to a robbery. There

is no need to prove *resistance* by the victim or even an *encounter* with the victim. *Howard*, 333 S.W.3d at 138–140. There is no need to worry about whether the presence or use of a weapon supplies an element of force that might otherwise be missing. This statute is satisfied whenever a thief's reckless actions cause someone else to suffer injury. The case thus presents the purest form of the question that has divided the circuits.

II. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE FIFTH CIRCUIT'S FAIR-WARNING DECISION CONFLICTS WITH SUPREME COURT PRECEDENT.

As Justice Holmes explained, the Fifth Amendment demands that criminal laws provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27, 51 (1931). Two "related manifestations" of the fair-warning requirement are relevant here:

> [1] the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered;
>
> [and]
>
> [2] due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.

United States v. Lanier, 520 U.S. 259, 266 (1997). Fair-warning "principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Johnson*, 135 S. Ct. at 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). "[T]he touchstone is whether the statute, either standing alone or as

construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267.

A. In January 2016, no one could have predicted the sea-change in Fifth Circuit statutory interpretation.

As the Fifth Circuit acknowledged, the eventual decision affirming Petitioner's sentence was only possible because—subsequent to his crime—that court issued decisions that "significantly changed this court's ACCA jurisprudence." App., *infra*, at 14a. These intervening decisions "marked a significant departure from" the prior governing regime, and "expanded criminal liability" under ACCA. *Marks v. United States*, 430 U.S. 188, 194 (1977). That means they cannot be retroactively applied against Petitioner.

To reject Petitioner's fair-warning claim, the Fifth Circuit had to rely on *other* decisions rendered after he committed his crime. This defies Supreme Court precedent. *See Lanier*, 527 U.S. at 267; *see also Marks*, 430 U.S. at 190–194. The Fifth Circuit's *post hoc* approach to fair-warning "threatens due process (fair notice) problems by foisting retroactively on litigants textual interpretations they would have had difficulty imagining when arranging their affairs." *Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 830 F.3d 1219, 1223 (10th Cir. 2016) (Gorsuch, J.).

When Petitioner committed his offense, binding (and as-yet unquestioned) Fifth Circuit precedent precluded any application of the Armed Career Criminal Act. Texas robbery did not satisfy ACCA's elements clause because it did not "define 'robbery' in terms of the use or threat of force." *Santiesteban-Hernandez*, 469 F.3d at 379. Going back to at least 2004, the en banc Fifth Circuit had held that reckless

conduct was not a *use* of force *against* the victim, and *causing injury* did not necessarily entail a *use of physical force*. Each of these rules would independently exclude Texas simple robbery. Moreover, a well-informed reader of precedent would have confidence in the longevity of those two rules, because "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989).

1. The Fifth Circuit continued to apply its longstanding rule that *recklessly* injuring a victim was not a *use* of physical force *against* that victim.

As noted earlier, long before Petitioner committed his offense, the Fifth Circuit embraced the nearly universal view that reckless-injury crimes were not a use of physical force against the victim. Result-oriented reckless crimes (like robbery) could satisfy ACCA's *residual* clause,[7] but the court never suggested (prior to January 2016) that recklessly causing injury alone would be a *use* of force *against* a victim.

The Fifth Circuit continued to recognize and follow that rule after *Castleman* was decided. For example, in April of 2014, the court recognized that North Carolina assault with a deadly weapon involving serious injury did not satisfy the elements clause because it did not require "intentional conduct." *United States v. Ocampo-Cruz*, 561 F. App'x 361, 365–367 (5th Cir. 2014). The Fifth Circuit also adhered to this rule in June 2014 (*United States v. Garcia-Figueroa*, 753 F.3d 179, 185 (5th Cir. 2014))

[7] *See Davis*, 487 F.3d at 287; *see also United States v. Espinoza*, 733 F.3d 568, 573–574 (5th Cir. 2013).

and again in February 2015 (*United States v. Garcia-Perez*, 779 F.3d 278, 283–284 (5th Cir. 2015)).

The Fifth Circuit, of course, was not alone. As this Court recognized in March of 2014, "the Courts of Appeals ha[d] almost uniformly held that recklessness is not sufficient" " to constitute a 'use' of force" against a victim. *Castleman*, 134 S. Ct. at 1414 n.8 & cases cited. Indeed, just one day before Petitioner committed his federal gun-possession offense, Respondent filed its *Voisine* merits brief in this Court arguing that MCDV embraced reckless offenses precisely because MCDV is "broader than the term[ ] . . . 'violent felony' under the Armed Career Criminal Act." *See* U.S. Br. 31–37, *Voisine v. United States*, No. 14-10154 (U.S. filed Jan. 19, 2016). Respondent should have to explain how ACCA (standing alone or as construed) provided Petitioner with "fair notice" of a construction of ACCA different from Respondent's own construction of the law at the time he committed the present offense.

2. The Fifth Circuit also continued to apply its longstanding distinction between *injury* and *force* in the months before Petitioner committed his offense.

In addition to the *mens rea* issue, the Fifth Circuit had long held that a result-of-conduct offense did not have use of physical force as an element. *Vargas-Duran*, 356 F.3d at 606. While the current Fifth Circuit majority has deemed that distinction "unnatural," *Reyes-Contreras*, 910 F.3d at 183, it was settled law in the Fifth Circuit for more than a decade. [8]

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[8] *See*, e.g., *United States v. Villegas-Hernandez*, 468 F.3d 874, 882–883 (5th Cir. 2006); *United States v. Cortez-Rocha*, 552 F. App'x 322, 326–327 (5th Cir. 2014); *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017); *United States v. Resendiz-Moreno*, 705 F.3d 203, 205 (5th Cir. 2013); *United States v. Fierro-Reyna*,

If *Castleman* was the harbinger of change for statutes *other than* MCDV, that message was lost on judges and litigants in the Fifth Circuit. The Fifth Circuit continued to rely on and apply the force-injury distinction in May 2014,[9] December 2014,[10] January 2015,[11] and February 2015.[12] It is even harder to accept the Fifth Circuit's premise that its new regime was "reasonably clear" in January of 2016 in light of the fact that Fifth Circuit judges rejected the *Castleman*-based argument once the Government started raising it. App., *infra*, at 38a ("This court has also held, in two published decisions, that—unlike *Voisine*—*Castleman*'s holding does *not* apply outside of the MCDV context."); *see also United States v. Rico-Mejia*, 859 F.3d 318, 321 (5th Cir. 2017); *United States v. Reyes-Contreras*, 882 F.3d 113, 123 (5th Cir. 2018), both abrogated by the en banc decision in *Reyes-Contreras*.

3. The circuit splits addressed by *Reyes-Contreras* and *Voisine* did not exist in January 2016.

While Respondent and the Fifth Circuit were unable to cite any suggestion in *Fifth Circuit* decisions that the rules had changed, the court noted that *Reyes-Contreras* and *Voisine* both resolved circuit splits. The court adopted its earlier reasoning in *United States v. Gomez Gomez*, 917 F.3d 332 (5th Cir. 2019):

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466 F.3d 324, 326 (5th Cir. 2006); *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc); *United States v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002).

[9] *United States v. Herrera-Alvarez*, 753 F.3d 132, 135 (5th Cir. 2014).

[10] *United States v. Ceron*, 775 F.3d 222, 229 (5th Cir. 2014).

[11] *United States v. Rodriguez-Rodriguez*, 775 F.3d 706, 711–712 (5th Cir. 2015).

[12] *Garcia-Perez*, 779 F.3d at 283–284.

> *Reyes-Contreras* ... merely reconciled our circuit precedents with the Supreme Court's decision in *Castleman* . . . We simply backed away from our anomalous position and aligned our circuit with the precedents of other circuits. In short, *Reyes-Contreras* was neither unexpected nor indefensible.

Id. at 334; *see* App., *infra*, at 13a–14a. This might be deemed the "death by 1,000 cuts" defense of the Fifth Circuit's new regime.

The problem is, none of those cuts had been applied at the time Petitioner committed his crime in January 2016. By the time of *Reyes-Contreras* (November 2018), "the First through Eleventh Circuits and the District of Columbia Circuit" had all cast doubt on the viability of the force-versus-injury distinction for statutes other than MCDV. *Reyes-Contreras*, 910 F.3d at 180–182 & n.23. But the "precedents of other circuits" listed in footnote 23 of *Reyes-Contreras* did not yet exist when Mr. Burris committed his crime. The earliest decision cited in that footnote is the Second Circuit's August 2016 opinion *United States v. Hill*, 882 F.3d 135 (2d Cir. 2016).

The precedent that existed *when Petitioner committed his crime* tells a different story. Courts consistently *distinguished* between the Lautenberg Amendment's broad definition of MCDV (interpreted in *Castleman*), and the narrower definition of "violent force" used in ACCA.[13] The First Circuit's December 2015 decision in *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015), illustrates the state of precedent one month later, in January 2016. Though the First Circuit had already

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[13] *See*, e.g., *United States v. Voisine*, 778 F.3d 176, 181 (1st Cir. 2015), *aff'd*, 136 S. Ct. 2272 (2016); *United States v. Vinson*, 794 F.3d 418, 422 (4th Cir. 2015), on reh'g, 805 F.3d 120 (4th Cir. 2015); *United States v. Garcia-Santana*, 774 F.3d 528, 540 (9th Cir. 2014).

held that MCDV included *reckless* offenses, that reasoning only applied "in the context of the more capacious, common law meaning of 'physical force' embodied in the Domestic Violence Gun Offender Ban." *Id.* at 471–472. Indeed, the seminal First Circuit decision cited in *Castleman* and eventually affirmed in *Voisine* trumpeted this distinction: "There are sound reasons to decline to interpret the two statutes in tandem." *United States v. Booker*, 644 F.3d 12, 20 (1st Cir. 2011).

Outside of MCDV, courts (including the First Circuit) continued to hold that recklessness does not constitute a *use* of physical force *against* a victim. *Castleman*, 134 S. Ct. at 1414 n.8 & cases cited. In other words, when Petitioner committed his offense in January 2016, Fifth Circuit law was not "anomalous." *Contra Gomez Gomez*, 917 F.3d at 334. There was no reason to doubt *Vargas-Duran*'s continued viability, which the Fifth Circuit had "consistently" applied for more than ten years. *United States v. Rodriguez-Rodriguez*, 775 F.3d at 711–712.

B. The decision below conflicts with this Court's precedent.

Even if Respondent prevails regarding the correct interpretation of ACCA's elements clause, it would be worth taking a second look at the Fifth Circuit's retroactivity analysis. By failing to discuss *Marks*, the Fifth Circuit's decision imputes a level of legal clairvoyance to an "ordinary" citizen that was not even shared by federal appellate judges in January 2016.

1. The Fifth Circuit's retroactivity decision ignores the important role of existing circuit precedent when evaluating fair-warning claims.

When Petitioner committed his offense, no one could reasonably be expected to anticipate "what the law intend[ed] to do" in response to his possession of the gun.

McBoyle, 283 U.S. at 27; *see also Bouie*, 378 U.S. at 351. Stare decisis and lenity would both require a ruling in Petitioner's favor at that time, and no judicial decision "fairly disclosed" that a newly expanded conception of ACCA would bring simple robbery "within its scope." *Lanier*, 520 U.S. at 266.

A "judicial gloss on an otherwise uncertain statute" is very important in the fair-warning context. *Id.* Often, these interpretations supply enough "clarity" to save a statute that would otherwise be void-for-vagueness. *Id.* But if ordinary citizens are expected to know the "judicial gloss" on statutory language, then they should also be allowed to *rely* on that gloss. This is especially true here, where the judicial gloss was firmly established in more than a decade worth of published decisions.

Under *Lanier*, the rules governing fair-warning for criminal laws are the same as the rules that govern qualified immunity "[i]n the civil sphere." *Lanier*, 520 U.S. at 270. That doctrine is supposed to provide government officials with "the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* at 270–271. A government official is not civilly liable unless "existing precedent . . . placed the statutory or constitutional question beyond debate." *Cf. Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Here, "existing precedent" unequivocally resolved the statutory question in Petitioner's favor. That means he should get the benefit of the law that governed when he committed his offense.

2. The Fifth Circuit failed to address *Marks*.

Even *correct* decisions that expand criminal statutes must not be applied retroactively. *Marks v. United States* illustrates that principle. In *Marks*, the

defendants distributed a pornographic movie. Their distribution ended in February 1973. At that time, this Court had not yet finalized its definition of "obscenity." The most recent controlling decision at the time of the crime was the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), but that had never been accepted by a majority of the Supreme Court.

In June 1973—after the crime but before the trial—this Court overruled *Memoirs* in *Miller v. California*, 413 U.S. 15 (1973). *Miller* announced new standards for defining obscenity. The trial court quite reasonably applied *Miller*, because that was the "correct" law. But *Marks* rejected that approach. The question was not whether *Miller* was a correct statement of the law—it was. For fair warning, the only issue was whether *Miller* "*expanded criminal liability*" as compared to the law that applied when the crime was committed. *Marks*, 430 U.S. at 194 (emphasis added).

The Fifth Circuit recognized that intervening decisions "significantly changed" its "ACCA jurisprudence." App., *infra*, at 14a. These changes were outcome-determinative—Petitioner prevailed in June of 2018, but he lost in light of new decisions. Thus, these intervening decisions expanded criminal liability. Under *Marks*, the application of these new decisions violated his right to due process.

3. The Fifth Circuit elided the distinction between "common law judging" and statutory interpretation.

The Fifth Circuit's quotation of *Rogers v. Tennessee* seems to ignore a critical contextual distinction. App., *infra*, at 14a (quoting *Rogers*, 532 U.S. at 461). *Rogers* held that a court engaged in "an act of common law judging" has more "flexibility" to change the rules than when it engages in "interpretation of a statute." 532 U.S. at

461. The Fifth Circuit joined the chorus: "The common law . . . presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles." App., *infra*, at 14a.

But this discussion in *Rogers* was limited to the context where

> the allegedly impermissible judicial application of a rule of law involves *not the interpretation of a statute but an act of common law judging*. In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of ex post facto principles *in that context* would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system.

Rogers, 532 U.S. at 461 (emphasis added).

Here, of course, the Fifth Circuit was not engaging in "common law judging." It was instead interpreting a criminal statute, a task where the importance of fair warning is at its zenith. *Shepard v. United States*, 544 U.S. 13, 23 (2005) ("We are, after all, dealing with an issue of statutory interpretation, and the claim to adhere to case law is generally powerful once a decision has settled statutory meaning.") (citation omitted).

If "new circumstances and fact patterns" warrant changes to ACCA—including the changes wrought by *Johnson*—the "fix" must come from Congress, not from the courts. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the

legislative power is implicated, and Congress remains free to alter what we have done.”).

C. Granting the petition would allow the Court to resolve the statutory interpretation question *in light of* the fair-warning principles.

As Petitioner argued above, the rule of lenity counsels in favor of the traditional rule that reckless-injury crimes lack an element of “use of physical force against” a victim. But by granting this petition, the Court will also have an opportunity to address the retroactivity aspect of fair notice. Circuit law was plainly settled in Petitioner’s favor at the time he committed his crime. Even if those decisions were incorrect, Petitioner is entitled to their benefit. It is not fair to change the rules of the game after it has been played.

CONCLUSION

Petitioner respectfully asks that this Court grant this petition and set the case for a decision on the merits.

Respectfully submitted,

____

J. MATTHEW WRIGHT
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
MATTHEW_WRIGHT@FD.ORG
(806) 324-2370

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