No. 19-6186

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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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?

SUPPLEMENTAL BRIEF FOR PETITIONER

In light of events subsequent to the filing of his petition, Petitioner Latroy Leon Burris re-urges this Court to grant certiorari in this case.

1. On September 19, 2019—two weeks before Mr. Burris filed his petition—this Court docketed the petition for certiorari in *Walker* v. *United States*, No. 19-373. That case was remarkably similar to this one.

Like Petitioner, Mr. Walker challenged his enhancement under the Armed Career Criminal Act. The legality of Mr. Walker's ACCA enhancement—like the legality of Petitioner's—turned on whether his prior conviction for Texas simple robbery, under Penal Code § 29.02(a), was a "violent felony" under 18 U.S.C. § 924(e)(2)(B). Like Petitioner, Mr. Walker argued that Texas simple robbery could no longer qualify as a "violent felony" after this Court struck down the ACCA's residual clause in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Like Petitioner, Mr. Walker argued that one can *recklessly* cause another person to suffer bodily injury—enough to upgrade a theft into a robbery in Texas—without *using* physical force *against* the victim. That means the "use of physical force against" the victim is not an "element" of Texas simple robbery, and the offense is not covered by 18 U.S.C. § 924(e)(2)(B)(i).

2. On November 15, 2019, this Court granted Mr. Walker's petition for certiorari. The Government then filed its response here, urging the Court to hold this petition pending a decision in *Walker*. U.S. Resp. 2.

3. Earlier this month, Mr. Walker filed a robust merits brief. That brief explored the vast breadth of conduct covered by reckless-injury statutes with an

emphasis on Texas's *very* broad result-oriented offenses. The brief explained why those crimes do not satisfy the ACCA's elements clause. Six *amici curiae* filed briefs in support of Mr. Walker.

4. Tragically, Mr. Walker passed away before this Court could vindicate his (and *amicorum*) arguments. *See* Suggestion of Death, *Walker* v. *United States*, No. 19-373 (filed Jan. 22, 2020). This Court dismissed Mr. Walker's case on January 27, 2020.

5. The Government recognizes that this case "would provide the most suitable substitute for" *Walker*. *See* U.S. Letter, *Walker* v. *United States*, No. 19-373 (filed Jan. 24, 2020). Petitioner agrees. As noted in the Government's letter, Petitioner's counsel is ready, willing, and able to file a brief in time for this case to be heard this term if that is what the Court desires. Whether the Court hears the case this term or next, this case is an ideal vehicle.

a. This case would be a one-for-one match with *Walker*, involving the exact same question examined through the lens of the exact same predicate offense. *Amici* could file nearly identical briefs in support of Petitioner.

b. The Government presumably began preparing its response to Mr. Walker's brief, and it has plenty of experience litigating about Texas robbery crimes in the Fifth Circuit. That research will not be wasted if the Court grants certiorari in this case.

c. The stakes are very high for Petitioner, so he has strong incentive to present the very best arguments for reversal. Without the ACCA, the maximum

lawful sentence on the firearm count was 120 months in prison (*see* 18 U.S.C. § 924(a)(2)), and the advisory guideline range for both of Petitioner's offenses would have been 70–87 months. Pet. 3, n.2 (citing sealed 5th Cir. R. 277). But the ACCA required a sentence of at least 180 months in custody on the firearm count (18 U.S.C. § 924(e)(1)), and the enhancement also raised the advisory guideline minimum for both counts to 188 months. The district court imposed the guideline-minimum sentence. Pet. App. 29a. In other words, a favorable decision would probably shorten Petitioner's sentence by 118 months—nearly a decade.

6. Granting review of the reckless-injury question in *this* case would ensure deep familiarity with the substantive law governing the state predicate offense. The same could not be said of petitions involving other states' reckless offenses.

This Court's normal preference for granting review of *published* decisions, all other things being equal, recognizes that extra effort below is likely to yield a better-informed decision here. The Fifth Circuit expended considerable effort to resolve this case against Petitioner. The parties first appeared for oral argument in March 2018.[1] Since that time: the panel issued multiple published opinions (recounted on pages 3–4 of the petition); the case went through two stages of petition-and-response en banc briefing; the Fifth Circuit "significantly changed" its "ACCA jurisprudence" (Pet. App. 14a); and the current petition for certiorari was filed. The parties also have the benefit

[1] In many ways, that effort built upon the attorneys' (and the court's) work in a prior decision, *United States v. Fennell*, 695 F. App'x 480 (5th Cir. 2017).

of all the briefs filed in *Walker*. Between this case, *Walker*, and the others involving Texas robbery cited in the petition, the parties have surely discovered everything important there is to learn about Texas robbery vis-à-vis the ACCA's elements clause. The same would not be true of an unpublished decision that followed a single round of briefing.

7. When the Government acquiesced to certiorari in *Walker*, it expressed the view that *Walker* was a superior vehicle to this case because Petitioner "combined" his argument about reckless-injury offenses "with other overlapping arguments"—apparently referring to Petitioner's fair-warning question. U.S. Br. 13, *Walker* v. *United States*, No. 19-373 (U.S. filed Oct. 21, 2019). But the "overlapping arguments" in the second question are inseparable from the merits of the first question. Even without a separate question presented, Mr. Walker's merits brief emphasized the uniform understanding of the lower courts prior to *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), and the fair-warning principles enshrined in the doctrine of lenity. *See Walker* Br. 27–28 & 43–45.

The ACCA's text, structure, and Congressional purpose all support Petitioner's argument that the ACCA's elements clause excludes reckless-injury offenses like Texas robbery. Whether this Court chooses to grant certiorari on both questions or only the first, Petitioner can argue lenity in unusually stark terms. At the time he committed his offense (January 2016), the residual clause was gone, and everyone (including the Government) interpreted the ACCA's elements clause to exclude

reckless-injury offenses. *See* Pet. 21 (discussing the Government's January 19, 2016 brief in *Voisine*).

The ideal vehicle to resolve the reckless-injury question would involve (a) a published, direct-review opinion (b) interpreting ACCA (c) to affirm an aggregate sentence of more than fifteen years (d) where the so-called "force" required by the predicate offense is nothing more than taking "a known and unjustifiable risk of harm or injury to others" that in fact results in such injury. *Walker* Br. 40–41 (discussing *Craver* v. *State*, 02-14-00076-CR, 2015 WL 3918057, at *4 (Tex. App. 2015)). This case checks all of those boxes. The fact that Petitioner committed his crime after *Johnson* but before *Voisine* only strengthens the lenity argument that any other petitioner would raise.

CONCLUSION

Petitioner agrees with the Government that the Court should grant certiorari in this case. Petitioner is prepared to brief the case for argument this term if the Court is willing to accept an expedited schedule. If this Court chooses to hear this issue next term, this case remains the most ideal vehicle.

Respectfully submitted,

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