No. 19-_____

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IN THE
SUPREME COURT OF THE UNITED STATES

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ADRIAN AUSBERRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Before this Court decided *Voisine v. United States*, 136 S. Ct. 2272 (2016), all circuits agreed that an offense that can be committed with a *mens rea* of recklessness does not qualify as a "violent felony" under the so-called "force clause" in the definition of "violent felony" in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), or as a "crime of violence" under the identical force clause in the Guidelines at U.S.S.G. § 4B1.2(a). Although *Voisine* interpreted a materially different force clause in a statute relating to misdemeanor offenses (18 U.S.C. § 921(33)), some circuits, including the Sixth Circuit, relied on *Voisine* to abandon their previously unanimous reading of the force clause in the ACCA and the Guidelines, both of which relate to felony offenses and include more restrictive language. Five circuits, in contrast, have reaffirmed since *Voisine* that the force clause does not reach offenses that can be committed recklessly. 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:

Does an offense that can be committed with a *mens rea* of recklessness qualify as a crime of violence under the identical force clauses in U.S.S.G. § 4B1.2(a) and the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)?

## PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

## RELATED CASES

(1) *United States v. Ausberry*, No. 1:17-cr-00065, District Court for the Eastern District of Tennessee. Judgment entered March 28, 2018.

(2) *United States v. Ausberry*, No. 18-5418, U.S. Court of Appeals for the Sixth Circuit. Opinion and judgment affirming sentencing entered August 15, 2019.

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Petitioner Adrian Ausberry respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit appears at pages 1a to 9a of the appendix to this petition. The judgment of the district court appears at pages 13a to 19a of the appendix, along with the portion of the transcript of the sentencing hearing in which the district court denied Mr. Ausberry's objection to the sentencing enhancement at issue, at pages 10a to 12a of

the appendix to this petition.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' judgment affirming the conviction and sentence was entered on August 15, 2019. Pet. App. 1a. This petition is timely filed under Supreme Court Rule 13.1.

## STATUTORY AND GUIDELINE PROVISIONS INVOLVED

18 U.S.C. § 16 provides:

> The term "crime of violence" means—
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 921(a)(33)(A) provides:

> Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) 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. § 922(g) provides:

> It shall be unlawful for any person—

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(1) provides:

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).

18 U.S.C. § 924(e)(2)(B) provides:

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 . . .

U.S.S.G. § 4B1.2(a) (2018) provides:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

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

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Tenn. Code Ann. § 39-13-102(a) (2005) provides, in relevant part:

(a) A person commits aggravated assault who:

...

(2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and:

(A) Causes serious bodily injury to another; or

(B) Uses or displays a deadly weapon.

## STATEMENT OF THE CASE

**Overview.** When Adrian Ausberry committed his federal offense in 2017, the law in the Sixth Circuit had long been established that his prior conviction for Tennessee reckless aggravated assault did not qualify as a "crime of violence" under the Guidelines' force clause in U.S.S.G. § 4B1.2(a). After he pled guilty but before he was sentenced, the Sixth Circuit changed the law. It concluded that under *Voisine v. United States*, 136 S. Ct. 2272 (2016), in which this Court held that a different force clause in 18 U.S.C. § 921(a)(33)(A) encompasses reckless offense, the force clause in § 4B1.2(a) must likewise encompass reckless offenses. *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017). Applying this change in the law in Mr. Ausberry's case increased the bottom of his guideline range by over three years.

Since then, the circuits have sharply disagreed about whether reckless offenses qualify under the force clause in the Guidelines' definition of "crime of violence" (and the same force clause in the Armed Career Criminal Act's definition of "violent felony"

in 18 U.S.C. § 924(e)(2)(B) ["ACCA"]). The First, Fourth, and Ninth Circuits hold that an offense that can be committed with a *mens rea* of recklessness does not qualify as a "crime of violence" or "violent felony" under the force clause. The Fifth, Sixth, Eighth, Tenth, and District of Columbia Circuits hold that reckless offenses do qualify, though the Eighth Circuit has carved out from its general rule offenses that can be committed by reckless driving. While the Third and Eleventh Circuits are currently considering this question in *en banc* proceedings, the circuit conflict is mature and entrenched.

The question is of crucial importance. These provisions add years to the sentences of a large number of criminal defendants. Because this case presents a good vehicle in which to resolve the conflict, the petition for a writ of certiorari should be granted for review. Alternatively, the petition should be granted and held to be considered when the Court rules on similar cases presenting the same issue.

**Background.** Beginning in 1989 and continuing today, the Sentencing Commission has used the force clause from the definition of "violent felony" in the ACCA as part of the definition of the term "crime of violence" in U.S.S.G. § 4B1.2(a). *See* U.S.S.G. § 4B1.2(1)(i) (1989). Under this force clause, an offense is a "crime of violence" or a "violent felony" if it is an offense punishable by more than one year in prison that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a) (2018); 18 U.S.C. § 924(e)(2)(B)(i). The Sixth Circuit, like every other circuit, interprets these identical force clauses the same, and cases interpreting each are used interchangeably. *United*

*States v. Vanhook*, 640 F.3d 706, 712 n.4 (6th Cir. 2011); *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018).

In 2006, the Sixth Circuit held that an offense with a reckless *mens rea* was not a "crime of violence" under the identical force clause in former U.S.S.G. § 2L1.2. *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006). In reaching this conclusion, it followed this Court's "considered dicta" in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), in which this Court interpreted the force clause in 18 U.S.C. § 16(a) as excluding offenses that can be committed accidentally or negligently. *Id.* at 11-12. Later, relying on *Portela*, the Sixth Circuit held that assault that can be committed with a *mens rea* of recklessness is not a "crime of violence" under the force clause in § 4B1.2(a), *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010), or a "violent felony" under the same force clause in the ACCA, *United States v. McMurray*, 653 F.3d 367, 373-74 (6th Cir. 2011).

In early 2017, while this binding precedent reigned, Adrian Ausberry, a convicted felon, was found in possession of a firearm. Soon thereafter, a federal grand jury returned a one-count indictment charging him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and in August 2017, he pled guilty as charged.

Over two months after he pled guilty, on October 20, 2017, the Sixth Circuit changed its interpretation of the force clause in § 4B1.2(a), relying on this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016). In *Voisine*, this Court interpreted the force clause in the definition of "misdemeanor crime of domestic

violence" in § 921(a)(33)(A). (A person convicted of a misdemeanor crime of domestic violence is also prohibited from possessing a firearm. *See* 18 U.S.C. § 922(g)(9).) The force clause at issue in *Voisine* lacks the same restrictive phrase that limits the coverage of the clauses in the Guidelines, the ACCA, and § 16(a) to offenses having as an element the use of force "*against*" another person (or property as under § 16). And in a footnote, the Court acknowledged that its decision about the force clause in § 921(a)(33)(A) "d[id] not resolve" the question whether § 16(a), the force clause at issue in *Leocal*, encompasses reckless offenses, and it "d[id] not foreclose [the] possibility" that differences between the provisions might compel a different result. *Id.* at 2280 n.4. Nevertheless, the Sixth Circuit held that *Voisine* compels the conclusion that an offense requiring only a reckless *mens rea* can qualify as a crime of violence under the Guidelines' differing force clause. *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017).

In calculating Mr. Ausberry's guideline range under U.S.S.G. § 2K2.1, the Presentence Report increased his base offense level from 20 to 24 based on his 2007 Tennessee conviction for reckless aggravated assault, citing *Verwiebe*. (PSR ¶ 13, R. 27.) That offense can be committed by reckless "use" of a vehicle as a deadly weapon by driving, causing injury. *State v. Boone*, 2005 WL 3533318, at *7 (Tenn. Crim. App. Dec. 27, 2005).[1]

[1] At the time of his offense in 2005, Tennessee's reckless aggravated assault statute provided, in relevant part, that "[a] person commits aggravated assault who . . . [r]ecklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) Causes serious bodily injury to another; or (B) Uses or displays a deadly weapon." Tenn. Code Ann. § 39-13-102(a)(2005).

Mr. Ausberry objected, maintaining that Tennesseee reckless aggravated assault is not a crime of violence under § 4B1.2(a), and that *Verweibe* improperly extended *Voisine*. (*See* Sent'g Tr. at 4-5, R. 42.) Mr. Ausberry further argued that if reckless aggravated assault is indeed a crime of violence due to *Verwiebe*'s new and expanded interpretation of the force clause, then applying that new interpretation in his case, when he committed his offense several months before *Verwiebe* was decided, violates the *ex post facto* principle inherent in the Due Process Clause of the Fifth Amendment. (*Id.* at 6-12; Supplemental Objections, R. 33.)

The district court overruled Mr. Ausberry's objection, viewing itself bound by *Verwiebe*. Pet. App. 11a. The retroactive application of *Verwiebe*'s new interpretation raised his base offense level from 20 to 24, which increased his guideline range to 130 to 162 months after giving him credit for acceptance of responsibility—a range still greater than the ten-year statutory maximum for his offense. 18 U.S.C. § 924(a)(2). The district court varied downward from the higher, post-*Verwiebe* guideline range to give Mr. Ausberry credit for pleading guilty, and sentenced him to serve 115 months in prison, to be followed by three years of supervised release. (Judgment, R. 36.)

On appeal, Mr. Ausberry argued that applying *Verwiebe* in his case violates the *ex post facto* principle inherent in the Due Process Clause of the Fifth Amendment. In his reply brief, he alternatively argued that *Verwiebe* was wrongly decided. He pointed to the three-way circuit split and asked that the court at least

do as the Eighth Circuit has done and carve out an exception for offenses that can be committed by reckless driving.

In an unpublished decision, the Sixth Circuit affirmed. It held that the advisory Guidelines are not subject to due process challenges like this one, relying on *Beckles v. United States*, 137 S. Ct. 886 (2017). Pet. App. 5a-7a. The panel otherwise declined to consider his argument that *Verwiebe* was wrongly decided, because he did not make it in his opening brief and in any event, *Verwiebe* is binding circuit precedent. Pet. App. 7a-8a.

Mr. Ausberry now seeks review of the question whether the force clause in the definition of "crime of violence" in § 4B1.2 includes offenses that can be committed recklessly. He asks that his petition be granted for review or granted and held in abeyance until the Court rules on similar cases presenting the issues raised here and considered at that time.[2]

## REASONS FOR GRANTING THE PETITION

### I. The circuits are split on the question whether reckless offenses qualify as crimes of violence.

The courts are divided on the question whether a crime that can be committed recklessly qualifies as a crime of violence under the identical "force clauses" in the ACCA and the Guidelines. The First, Fourth, and Ninth Circuits have held, after *Voisine* and after the Sixth Circuit's decision in *Verwiebe*, that recklessness cannot

[2] *See Borden v. United States*, No. 19-5410; *Walker v. United States*, No. 19-373; *Bettcher v. United States*, No. 19-5652.

satisfy the force clause. *United States v. Rose*, 896 F.3d 104, 109-10 (1st Cir. 2018); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018); *United States v. Middleton*, 883 F.3d 485, 497-500 (4th Cir. 2018) (Floyd, J., concurring); *United States v. Orona*, 923 F.3d 1197, 1202-03 (9th Cir. 2019).

In contrast, along with the Sixth, the Fifth, Tenth, and D.C. Circuits have held, after *Voisine*, that recklessness is sufficient. *See United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017); *United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018).

The Eighth Circuit has staked out yet a third approach. It has held that recklessness is generally sufficient, *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), but after *Voisine* reaffirmed that recklessness is not sufficient when the crime "'encompasses the unadorned offense of reckless driving resulting in injury.'" *United States v. Fields*, 863 F.3d 1012, 1015 (8th Cir. 2017) (relying on and quoting *United States v. Ossana*, 638 F.3d 895, 901 n.6 (8th Cir. 2011)). 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. *United States v. Harris*, 907 F.3d 1095, 1096 (8th Cir. 2018); *United States v. Schneider*, 905 F.3d 1088, 1091-92 (8th Cir. 2018); *Ossana*, 638 F.3d at 903-04. Had Mr. Ausberry been sentenced in the Eighth Circuit, the court of appeals would have reversed his sentence, as Tennessee's reckless aggravated assault likewise

encompasses the unadorned offense of reckless driving resulting in injury. *See, e.g., State v. Boone*, 2005 WL 3533318, *6 (Tenn. Crim. App. 2005).

The *en banc* Third Circuit is currently considering the question in *United States v. Harris*, 17-1861 (ACCA), and *United States v. Santiago*, No. 16-4194 (§ 4B1.2(a)), both argued on October 16, 2019. The Eleventh Circuit, too, recently voted for *en banc* rehearing in a case presenting this issue. *United States v. Moss*, 920 F.3d 752, 758 (11th Cir. 2019), *vacated, reh'rg en banc granted*, 928 F.3d 1340 (11th Cir. 2019).

Meanwhile, even within the court below, judges disagree. In a case decided just a few weeks after *Verwiebe*, a Sixth Circuit panel bound by *Verwiebe* explained why in its view *Verwiebe* was wrongly decided. *United States v. Harper*, 875 F.3d 329, 330-33 (6th Cir. 2017). The panel pointed in particular to limiting language in § 4B1.2's force clause that does not appear in the force clause at issue in *Voisine*. The force clause at issue in *Voisine* provides that an offense qualifies as a "misdemeanor crime of domestic violence" if it is a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A). In contrast, the force clause in § 4B1.2(a) and the ACCA must be "used" "*against the person of another*." *Harper*, 875 F.3d at 331. It noted as a matter of grammar that the phrase "against the person of another" is "a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy § 4B1.2." *Id.*

Judge Stranch later joined the *Harper* panel in its disagreement with *Verwiebe* in a § 2255 case in which the defendant had obtained relief from an ACCA sentence before *Verwiebe* was decided, but the government appealed and relied on *Verwiebe* in support of reversal. *See Walker v. United States*, 769 F. App'x 195, 201 (6th Cir. 2019) (Stranch, J., concurring) ("Like the *Harper* court, if we were not bound by *Verwiebe*, I would hold that an offense that requires only the reckless use of force, as does Texas robbery, is not a violent felony under the [force clause] of the ACCA."). In her view, the *Harper* panel's "painstaking[]" distinction between the statutory language at issue in *Voisine* and the language in the Guidelines' force clause is correct.

The Sixth Circuit denied rehearing in *Walker*, from which Judges Kethledge, Moore, Stranch, and White dissented. *See* 931 F.3d 467, 468 (6th Cir. 2019) (Kethledge, J., dissenting, joined by Moore, Stranch, White, JJ.); *id.* at 470 (Stranch, J., dissenting, joined by Moore, J.) In his dissenting opinion, Judge Kethledge again emphasized the restrictive language in the force clause in the ACCA, not present in the statute at issue in *Voisine*, which requires the use of force "against the person of another." *Id.* at 468, 470. "That difference in text," he explained, "yields a difference in meaning." *Id.* at 468 (reasoning that the "volitional application [of force] against the person of another" requires "knowledge or intent that the force apply to another person").

Only this Court can resolve the entrenched division among and within the lower courts.[3]

## II. This is a good vehicle to resolve this extremely important question.

The current split of authority results in inconsistent application of both the Guidelines and the ACCA, leading to substantial differences in outcomes. In guideline cases, it sets the starting point significantly higher, often by a decade or more in career offender cases. In ACCA cases, it requires an enhanced minimum sentence of fifteen years and a statutory maximum of life, up from a statutory maximum of ten years. 18 U.S.C. §§ 924(a)(2), 924(e).

Although the Solicitor General has identified two ACCA cases as good vehicles to resolve the conflict, *Borden v. United States*, No. 19-5410, and *Walker v. United States*, No 19-373, Mr. Ausberry's guideline case is an equally good vehicle. The Guidelines affect thousands of cases each year. The definition at issue here applies not only to calculate the range under § 2K2.1, but also to determine whether a person is a career offender and subject to the severe career offender penalty. U.S.S.G. § 4B1.1. The Sentencing Commission estimates that in fiscal year 2018, 1,597 defendants were sentenced as career offenders. *See* U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics* tbl.26 (FY 2018). And 7,415 defendants were sentenced under § 2K2.1. *Id.* tbl.20. It does not matter that § 4B1.2's force clause is advisory. The district court must still correctly calculate guideline range as its initial

[3] Walker petitioned this Court to grant certiorari to review this issue, *see Walker v. United States*, No. 19-373, and the Solicitor General has said that this Court should grant review in that case or in *Borden v. United States*, No. 19-5410.

starting point, *Gall v. United States*, 552 U.S. 38, 49 (2007), and "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).

Mr. Ausberry also challenged in the district court the use of the aggravated assault conviction as a crime of violence, as well as the retroactive application of *Verwiebe* in his case. That the new interpretation was retroactively applied to him, though he could not have anticipated it by reference to then-binding circuit law at the time he committed his offense, *see Marks v. United States*, 430 U.S. 188, 195 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), only adds to his bad luck of being sentenced in the Sixth Circuit.

Finally, it is no answer that the Court ordinarily does not review circuit splits involving the interpretation of the Guidelines. *See Braxton v. United States*, 500 U.S. 344, 348-49 (1991). 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). More important, the definition at issue here merely parrots the definition in the ACCA and has always been interpreted by the courts in the same way. In these circumstances, the Commission gets no "special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."

*Gonzales v. Oregon*, 546 U.S. 243, 257 (2006); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 n.5 (2019). It is up to this Court to say what these words mean. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803).

## CONCLUSION

The petition for a writ of certiorari should be granted.

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