No. _____

In the

Supreme Court of the United States

JEREMY GLENN POWELL,
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. Whether the Texas offense of simple robbery, Penal Code § 29.02(a), "has as an element the use, attempted use, or threatened use of physical force against the person of another," and thus qualifies as a "violent felony" under the Armed Career Criminal Act.

2. Whether the retrospective application of a significant and unexpected change in Fifth Circuit statutory interpretation jurisprudence violated the fair warning requirement of the Fifth Amendment's Due Process Clause.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Jeremy Glenn Powell was the defendant in the district court, appellant and cross-appellee in the Fifth Circuit, and is the petitioner here. The United States was the plaintiff in the district court; appellee and cross-appellant in the Fifth Circuit appeal, and Respondent here.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Jeremy Glenn Powell*, No. 3:17-CR-511-1 (N.D. Texas)

2. *United States v. Jeremy Glenn Powell*, No. 18-11050 (5th Cir.)

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Petitioner Jeremy Glenn Powell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, at 1a–2a) is not published in the Federal Reporter but is reprinted at 785 F. App'x 227. The district court did not enter a written opinion, but its oral ruling on the Armed Career Criminal Act is reprinted on pages 4a–5a of the Appendix.

JURISDICTION

The Fifth Circuit issued its opinion affirming the district court's judgment of conviction and sentence on November 15, 2019. App., *infra*, 1a. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fifth Amendment to the U.S. Constitution:

> 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; nor shall private property be taken for public use, without just compensation.

The case also involves interpretation and application of the Armed Career Criminal Act, and in particular the definition of "violent felony." Title 18, Section 924(e) 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--
>
> * * * *

> (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

The state convictions at issue arose under Texas Penal Code § 29.02, which defines simple "robbery." That statute provides, in pertinent part:

> (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 Jeremy Glenn Powell pleaded guilty to possessing a firearm after felony conviction, a violation of 18 U.S.C. § 922(g)(1). App., *infra*, at 6a. At sentencing, the Government urged the district court to enhance Mr. Powell's sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). App., *infra*, at 4a–5a. Without the ACCA, the maximum possible punishment was ten years in prison. *See* 18 U.S.C. § 924(a)(2). If the ACCA applied, the mandatory minimum would be raised to fifteen years in prison, and the maximum would be raised to life in prison. § 924(e)(1).

The Government argued that five of Mr. Powell's prior Texas convictions were "violent felonies" under the ACCA: one was for "burglary"; one was for "aggravated

robbery"; and three were for simple "robbery." App., *infra*, at 4a.[1] The district court refused to apply the ACCA, relying on two decisions that were later abrogated by the Fifth Circuit: *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), *vacated*, 139 S. Ct. 2712 (2019), *on remand*, 941 F.3d 173 (5th Cir. 2019), and *United States v. Burris*, 892 F.3d 801 (5th Cir. 2018), *as modified*, 896 F.3d 320 (5th Cir. 2018), *vacated*, 308 F.3d 152, *on rehearing*, 920 F.3d 942 (5th Cir. 2019), *pet. for cert. filed*, No. 19-6186 (U.S. filed Oct. 7, 2019). The court imposed a non-ACCA statutory maximum sentence of 120 months in prison, and ordered the sentence run consecutive to whatever was left of an earlier ACCA-enhanced sentence.[2] App., *infra*, at 7a

Mr. Powell appealed, arguing (as relevant here) that the district court should have ordered this sentence to run concurrently with a previous ACCA-enhanced sentence that was itself unlawful. The Government cross-appealed, arguing that the sentence here should have been enhanced under the ACCA. In light of significant

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[1] Two of the simple robbery convictions were committed on March 7, 2001, and the Government cannot show through cognizable evidence that these crimes were committed on separate "occasions." 18 U.S.C. § 924(e)(1); *see United States* v. *Fuller*, 453 F.3d 274, 279 (5th Cir. 2006) ("Based on the indictments alone, therefore, we cannot determine as a matter of law that the burglaries occurred on different occasions.").

[2] In 2011, Mr. Powell pleaded guilty to a previous violation of § 922(g)(1) committed in 2009. *See United States v. Powell*, No. 3:09-CR-173 (N.D. Tex. Mar. 2, 2011). The court ordered the ACCA-enhanced sentence to run concurrently with anticipated state-court sentences. *Ibid.* According to the Presentence Investigation Report in this case, state prison authorities released Mr. Powell in September 2016 when he had not yet completed service of the federal sentence. *See* Sealed 5th Cir. R. 223 ¶ 53.

changes to Fifth Circuit jurisprudence that arose after Mr. Powell committed his offense, the Fifth Circuit vacated the sentence and remanded with instructions "for resentencing in light of *Burris*." App., *infra*, at 2a. The court later granted Mr. Powell's request to stay the mandate pending the filing of this petition. App., *infra*, at 3a. This timely petition follows.

REASONS TO GRANT THE PETITION

If the Fifth Circuit's 2018 decision in *Burris* was correct—that is, if Texas simple robbery is no longer a violent felony without the ACCA's residual clause—then Mr. Powell is not an Armed Career Criminal. Even assuming his burglary and aggravated robbery convictions were violent felonies, the Government would not have a third. *Cf.* 18 U.S.C. § 924(e)(1). But if the Fifth Circuit's 2019 decision in *Burris* were correct—that is, if all forms of Texas robbery are violent felonies—then Mr. Powell concedes that he would be an Armed Career Criminal, even if the burglary conviction is not for a violent felony.[3] That is because Mr. Powell has two convictions for simple robbery committed on different occasions and one conviction for aggravated robbery, and aggravated robbery requires proof of all the elements of simple robbery. *See* Texas Penal Code § 29.03.

[3] The Fifth Circuit's ACCA jurisprudence about Texas burglary is just as confused and unsteady as its rulings about Texas robbery. By the time this Court considers this Petition, it will also have the petition in *Michael Herrold v. United States*, which will challenge the Fifth Circuit's most recent decision in that case, 941 F.3d 173. The Court may wish to hold this petition until *Herrold* is resolved.

I. THIS COURT SHOULD HOLD THIS PETITION PENDING A DECISION IN *BURRIS V. UNITED STATES*, NO. 19-6186.

The district court relied on the June 2018 opinion in *Burris* to hold that the simple robbery convictions were not violent felonies, and to reject the application of the ACCA. App., *infra*, at 5a. The Fifth Circuit reversed that decision, based on the April 2019 *Burris* opinion. App., *infra*, 2a. The 2019 *Burris* opinion held that all Texas robberies—even simple robberies—are categorically violent. 2019 *Burris* also approved the retrospective application of precedent that "significantly changed this court's ACCA jurisprudence." *Burris*, 920 F.3d at 952.

This Court recently granted certiorari to decide whether Texas simple robbery satisfies the ACCA's elements clause in *Walker v. United States*, No. 19-373 (pet. for cert. granted Jan. 27, 2020). Unfortunately, Mr. Walker passed away before this Court could vindicate his arguments. The Solicitor General has recently recommended that this Court grant certiorari in *Burris*. *See* U.S. Letter, *Walker v. United States*, No. 19-373 (filed Jan. 24, 2020). Whether the Court ultimately agrees with the Solicitor General and grants certiorari in *Burris*, or chooses another case to resolve whether recklessly causing injury is a violent felony under ACCA's elements clause, it would be appropriate to hold this case and dispose of it in accordance with whatever decision it reaches in the *Burris* petition.

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II. ALTERNATIVELY, THIS COURT SHOULD GRANT THE PETITION AND HOLD THAT TEXAS SIMPLE ROBBERY DOES NOT SATISFY THE ACCA'S ELEMENTS CLAUSE.

If the question remains open when the Court considers this petition, then Mr. Powell would ask, in the alternative, that the Court grant certiorari here and hold that Texas robbery does not satisfy the ACCA's elements clause. Texas defines the offense of "robbery" in an uncommonly broad way:

> (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.

Texas Penal Code § 29.02(a). The Texas Court of Criminal Appeals has held that this statute defines a single offense for double-jeopardy purposes, and at least two judges on that Court have held that the theories described in (a)(1) and (a)(2) "are simply alternative methods of committing a robbery." *Cooper* v. *State*, 430 S.W.3d 426, 434 (Tex. Crim. App. 2014) (Keller, P.J., concurring).

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).

Given this very broad statute, it comes as no surprise that people are convicted of Texas "robbery" for actions that would not be robbery anywhere else.

For example, in *Craver v. State*, 02-14-00076-CR, 2015 WL 3918057, at *5 (Tex. App. 2015), the court affirmed a defendant's robbery conviction because—while fleeing from loss prevention managers in a mall, the defendant "jump[ed] over the railing of the second floor down onto the first floor" and landed on another shopper. In *Martin v. State*, No. 03-16-00198-CR, 2017 WL 5985059, at *6 (Tex. App. 2017), the defendant tried to convince loss-prevention officers to release her by shouting "I have AIDS."

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 are in conflict about whether reckless offenses satisfy the 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)[4]; *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. *See Burris*, 920 F.3d at 950–951. The court held that *Reyes-Contreras* and *Voisine*, "confirm that reckless conduct constitutes the 'use' of physical force under the ACCA." *Id.* at 952. The Sixth, Tenth, and District of

[4] 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.

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). 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").[5]

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

[5] 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)).

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 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. Texas also permits conviction where the injury the victim *suffered* (under (a)(1)) or *feared* (under (a)(2)) would not result from a physical, kinetic-energy collision.

Texas law also uniquely illustrates the differences between a "use of physical force against" a victim and causing a victim to suffer, or fear, "injury." In normal, everyday usage, "use of physical force against" someone implies some type of physical, kinetic energy collision between something set in motion by the defendant and the victim's "person" or body. But Texas cases demonstrate that the state convicts people for assaultive offenses that do not involve use, attempted use, or threatened use of physical force, as those terms are commonly understood. In *Saenz v. State*, 451 S.W.3d 388 (Tex. Crim. App. 2014), the defendant was convicted of aggravated assault for putting bleach into a syringe. In *State v. Rivello*, No. F-1900747 (Crim. Dist. Ct. No. 5, Dallas Co., Tex.), prosecutors have charged a defendant with aggravated assault, alleging that the defendant recklessly caused the victim to suffer a seizure by sending an animated, strobe-image tweet. There are multiple examples of aggravated assault convictions based on consensual but unprotected sex. *See, e.g.*, *Billingsley v. State*, No. 11-13-00052-CR, 2015 WL 1004364, at *2 (Tex. App. 2015) (affirming aggravated assault conviction because the defendant "caused serious bodily injury to [the victim] by causing [the victim] to contract human immunodeficiency virus (HIV)"); *see also Padieu v. State*, 05-09-00796-CR, 2010 WL 5395656, at *1 (Tex. App.) ("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.")

And the *Martin* case shows that a defendant can be convicted of robbery in Texas by making the victim *afraid of* catching AIDS: the victims testified that "when Martin stated that she had AIDS," the comment made them "worried," "scared" of "contracting AIDS [and] dying" if the defendant were to spit at them. *Martin*, 2017 WL 5985059, at *1.

CONCLUSION

Petitioner asks this Court to hold the petition and resolve it in light of the forthcoming decision in *Burris*, which raises nearly identical questions presented (and which involves the same decision that motivated the outcome below). Alternatively, he asks this Court to grant the petition and set the case for a decision on the merits as to whether Texas simple robbery satisfies the ACCA's "violent felony" definition without the residual clause

Respectfully submitted,

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