No. 20-

IN THE
Supreme Court of the United States

XAVIER DEMETRIUS PORTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court applying the categorical approach is required to give significant weight to on point dicta from the relevant State's highest court.

PARTIES TO THE PROCEEDING

Xavier Demetrius Porter, petitioner on review, was the petitioner-appellant below.

United States of America, respondent on review, was the respondent-appellee below.

RELATED PROCEEDINGS

United States Court of Appeals for the Sixth Circuit:

Porter v. *United States*, No. 18-5091 (6th Cir. May 20, 2020) (reported at 959 F.3d 800);

Porter v. *United States*, No. 18-5091, 2018 WL 7135358 (6th Cir. Nov. 13, 2018) (granting application for a certificate of appealability in part).

United States District Court for the Western District of Kentucky:

Porter v. *United States*, No. 3:13-CR-164, 2017 WL 5560697 (W.D. Ky. Nov. 17, 2017);

Porter v. *United States*, No. 3:13-CR-164, 2017 WL 5560657 (W.D. Ky. Apr. 24, 2017).

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Xavier Demetrius Porter respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 959 F.3d 800. Pet. App. 1a. The Sixth Circuit's order granting Porter's motion for a certificate of appealability in part is unreported, but is available at 2018 WL 7135358. *Id.* at 9a. The District Court's November 17, 2017 opinion is unreported, but available at 2017 WL 5560697. *Id.* at 16a. The magistrate judge's April 24, 2017 report and recommendation is unreported, but is available at 2017 WL 5560657. *Id.* at 22a.

JURISDICTION

The Sixth Circuit entered judgment on May 20, 2020. On March 19, 2020, the Court extended the deadline to petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g), in relevant part, provides:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * *
>
> to * * * possess in or affecting commerce, any firearm or ammunition * * * .

18 U.S.C. § 924(e)(1), in relevant part, 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 * * * such person shall be fined under this title and imprisoned not less than fifteen years * * *.

18 U.S.C. § 924(e)(2)(b), in relevant part, provides:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another * * *.

Ga. Code § 16-8-41(a) provides:

> A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.

INTRODUCTION

The Armed Career Criminal Act (ACCA), like multiple federal criminal and immigration statutes, requires a federal judge to step into a state court judge's shoes. Under ACCA, a prior state law conviction subjects a defendant to a sentence enhancement, but only if the state law offense amounts to a "violent felony" under the Act. It will not do so if only *some* ways a person can commit the state law offense meet the Act's definition of a violent felony; *all* of the ways must meet that definition. That means that federal judges must decide what the state law offense requires.

As this Court has said over and over, when interpreting state laws, a federal judge must ask what a state court judge would do. *See, e.g.*, *Washington State Dep't of Licensing* v. *Cougar Den, Inc.*, 139 S. Ct. 1000, 1010 (2019). And this Court has also made clear that this role-playing exercise requires giving significant weight to on point statements of state law—even when those statements are not binding. *See Hawks* v. *Hamill*, 288 U.S. 52, 59 (1933). That is what a state court judge would do when interpreting

a state law, and so that is what a federal court judge should do, too.

This basic principle applies to the ACCA. And yet, the Sixth Circuit below declined to consider on point dicta from the Georgia Supreme Court that bore on whether petitioner's prior Georgia conviction was an ACCA predicate. As relevant here, the Act allows a court to enhance a defendant's federal sentence only when her predicate conviction involves a threat to a person. 18 U.S.C. § 924(e)(2)(B)(i). But the Georgia Supreme Court has said that Georgia's armed robbery statute can be violated by a defendant who threatens only *property*, not people. *See Green* v. *State*, 818 S.E.2d 535, 540 (Ga. 2018); *Lucky* v. *State*, 689 S.E.2d 825, 828 (Ga. 2010) (same). As such, the petitioner's Georgia armed robbery conviction cannot support an ACCA enhancement. Nevertheless, the Sixth Circuit upheld the enhancement by writing off multiple statements from the Georgia Supreme Court as "loose language" that need not be seriously considered. Pet. App. 6a.

In doing so, the Sixth Circuit created a split among the federal courts of appeals as to whether federal courts applying the categorical approach may give no weight to on point dicta from the State's highest court. The Sixth Circuit's approach undermines the sovereignty of state courts and arrogates power to federal courts in an area that is quintessentially left to the states. And it has grave consequences for how federal courts apply the categorical approach in sentencing, immigration, and beyond.

This case offers a clean vehicle to address this important issue implicating the balance of state and federal power. The Court should take it.

STATEMENT

1. The ACCA prescribes a sentence enhancement for defendants who possessed a firearm during the commission of a crime despite three previous convictions for a "violent felony." 18 U.S.C. § 924(e). An ACCA enhancement turns a conviction that would otherwise carry a maximum penalty of ten years into one with a minimum penalty of 15 years. *See id.* § 924(a)(2), (e)(1). Whether the ACCA enhancement applies depends on the defendant's previous convictions. A crime counts as a "violent felony" under ACCA's elements clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B)(i). To determine whether a predicate state offense satisfies that definition, a federal court applies the "categorical approach." *See, e.g.*, *Stokeling* v. *United States*, 139 S. Ct. 544, 555 (2019). That approach requires the court to determine whether the crime of conviction as enumerated by the state legislature and state's highest court "sweeps more broadly than" the federal definition, regardless of how the defendant actually committed the crime. *Descamps* v. *United States*, 570 U.S. 254, 261 (2013).

2. In 2013, a federal grand jury indicted Porter on 18 counts related to a series of robberies of fast food restaurants, convenience stores, and specialty shops in Louisville, Kentucky. Pet. App. 2a; 23a. Porter pled guilty to multiple counts of Hobbs Act robbery, one count of brandishing a firearm during and in relation to a crime of violence, and one count of being a felon in possession of a firearm. *Id.* at 2a (citing 18 U.S.C. §§ 922(g)(1), 924(c)(1)(A)(ii)).

The presentence report identified Porter as eligible for an ACCA sentence enhancement based on three previous Georgia armed robbery convictions. Pet. App. 10a; *see also* Ga. Code Ann. § 16-8-41(a). At the time of Porter's sentencing, underlying crimes—like Porter's—that were not one of the offenses specifically enumerated in the statute could count as violent felonies only if they satisfied at least one of two clauses: (1) the elements clause or (2) the residual clause, which applied to a conviction that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924 (e)(2)(B)(ii). Without specifying which clause Porter qualified under, the district court applied the ACCA sentence enhancement and sentenced Porter to a total of 30 years' incarceration. *See* Pet. App. 2a.

3. After the district court entered judgment, this Court decided *Johnson* v. *United States*, 576 U.S. 591 (2015). The Court concluded the ACCA's residual clause was unconstitutionally vague—a ruling that the Court later held applied retroactively. *See id.* at 597; *Welch* v. *United States*, 136 S. Ct. 1257, 1268 (2016). Porter filed a timely *pro se* motion to vacate his sentence under 28 U.S.C. § 2255 in light of *Johnson*.

The district court referred Porter's petition to a magistrate judge for a report and a recommendation. Pet. App. 22a-23a. The magistrate recommended dismissing the motion on the grounds that *Johnson* "afford[ed] Porter no relief" because the petition appeared to be challenging his 924(c) conviction for brandishing a firearm in relation to a crime of violence, not his ACCA sentence enhancement. *See id.* at 26a-27a.

Porter objected to the findings. *See id.* at 11a. Still *pro se*, he argued that *Johnson* applied to his case because, based on *Johnson*, he was actually innocent of his ACCA enhancement, and his sentence was imposed in violation of the Constitution. *See id.* at 10a-11a, 20a.

The district court nonetheless adopted the magistrate judge's recommendation and denied Porter's § 2255 motion. It concluded that because Porter did not raise the ACCA argument in his original petition, he had waived it. *Id.* at 20a-21a.

4. The Sixth Circuit granted Porter a certificate of appealability and appointed counsel to represent him on appeal. *See id.* at 12a-15a. The court concluded, among other things, that reasonable jurists could disagree about "whether the district court should have overlooked" the fact that Porter first raised his *Johnson* challenge to his ACCA sentence enhancement for being a felon in possession in his response to the magistrate judge's report and recommendation. *Id.* at 13a. It also suggested that, in any event, Porter's ACCA argument "may * * * be timely," because it "arguably 'relate[s] back' to his § 924(c) challenge." *Id.* (citing *Mayle* v. *Felix*, 545 U.S. 644, 649-650 (2005)). And since the Court had yet to decide whether a conviction for Porter's predicate offenses—Georgia armed robbery—"constitute[d] a violent felony without reference to the ACCA's residual clause, reasonable jurists could debate the merits of Porter's underlying claim." *Id.* at 13a-14a.

Porter explained that his ACCA enhancement could not stand after *Johnson*. Porter pointed to multiple occasions where the Georgia Supreme Court

had stated that Georgia armed robbery criminalizes threats to property. *Id.* at 6a; *see also Green*, 818 S.E.2d at 540 ("'[U]se of an offensive weapon' takes place when the weapon is used as an instrument of actual or constructive force—that is, actual violence exerted on the victim or force exerted upon the victim by operating on the victim's fears of injury to the person, *property*, or character of the victim * * *." (emphasis added)); *Lucky*, 689 S.E.2d at 828 (same). That meant that Georgia armed robbery could not categorically qualify as a "violent felony" under ACCA's elements clause because the clause only applies to crimes that "ha[ve] as an element the use, attempted use, or threatened use of physical force against *the person* of another." 18 U.S.C. § 924 (e)(2)(B)(i) (emphasis added); Pet. App. 7a-8a. Porter's ACCA enhancement was thus invalid.

5. The Sixth Circuit disagreed and affirmed. While it noted that the parties had made arguments about waiver and forfeiture, the Sixth Circuit below chose to resolve the merits of Porter's ACCA argument. Pet. App. 3a. It reasoned that while, "[t]o be sure, there's some loose language in a few cases suggesting that a defendant can simply threaten a person's 'property' or 'character,' " "Georgia courts have never upheld a conviction for armed robbery based on this language." *Id.* at 6a (quoting *Green*, 818 S.E.2d at 540). As such, Porter "ha[d]n't shown a realistic probability that Georgia would apply its statute to cases in which a defendant threatens only a victim's property." *Id.* at 7a (internal quotation marks omitted).

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATED A CIRCUIT SPLIT.

By not giving any weight to clear statements in multiple Georgia Supreme Court opinions, the decision below created a split among the federal courts of appeals as to whether federal courts imposing federal sentences that rely on predicate state court convictions may disregard on point dicta from the relevant state supreme court.

1. In the Fifth and Fourth Circuits, a federal court must give significant weight to on point dicta from a state supreme court. In *United States* v. *Reyes*, 866 F.3d 316, 321 (5th Cir. 2017), the Fifth Circuit relied on dicta in an opinion from the relevant state supreme court to determine whether an offense counted as a "crime of violence" under the sentencing guidelines. The Fifth Circuit used a hypothetical in the Illinois State Supreme Court's discussion of an unrelated issue—whether aggravated battery with a firearm is a separate offense from aggravated battery—to decide the issue at hand: whether aggravated battery involving the use of a deadly weapon was divisible. *Id.* Even though the Illinois Supreme Court's discussion concerned a hypothetical case not before it, the Fifth Circuit followed the Illinois high court's decision. It did so, because "a federal court tasked with interpreting state law must give state supreme court dicta great weight." *Id.*

The Fifth Circuit looked to this Court's *Erie* cases, which require "a federal court [to] identify and apply state law." *Id.* at 321 n.4. And "in the absence of a clearly controlling state supreme court opinion, the analogous *Erie* inquiry calls on federal courts to

'guess' how a state supreme court 'would decide.' " *Id.* The court explained that "this 'guess' is not a surmise of what the state law would become if the state supreme court addressed the issue but rather what the state law *is*." *Id.*; *see also Avakian* v. *Citibank, N.A.*, 773 F.3d 647, 651 (5th Cir. 2014) (relying on "dicta" from state supreme court where party had "pointed to no other Mississippi Supreme Court decision that undermines it"). The Fifth Circuit therefore interpreted Illinois law consistent with the Illinois Supreme Court's dicta.

The en banc Fourth Circuit has reached the same conclusion. In *United States* v. *Aparicio-Soria*, 740 F.3d 152, 153 (4th Cir. 2014) (en banc), the court considered whether Maryland resisting arrest was categorically a "crime of violence" under U.S. Sentencing Guideline § 2L1.2. To determine whether Maryland resisting arrest had "as an element the use, attempted use, or threatened use of violent force capable of causing physical pain or injury against another person," the Court looked to dicta from the state's highest court. *Id.* at 155. In *Nicolas* v. *State*, 44 A.3d 396 (Md. 2012), the Maryland Court of Appeals considered a different question: whether the offense of Maryland second degree assault merges into the offense of Maryland resisting arrest. *Id.* at 408-409. The court concluded that it did, because in Maryland the " 'force' that is required to find a defendant guilty of resisting arrest is the same as the 'offensive physical contact' that is required to find a defendant guilty of the battery variety of second degree assault." *Id.* at 409.

The Fourth Circuit relied on that statement to conclude that Maryland resisting arrest is categori-

cally not a "crime of violence." *See Aparicio-Soria*, 740 F.3d at 155. The Fourth Circuit explained that "[a]ccording to the Court of Appeals of Maryland, the force required for conviction pursuant to the Maryland resisting arrest statute is merely 'offensive physical contact.' " *Id.* at 155, 157-158 (quoting *Nicolas,* 44 A.3d at 409). And, as a result, the crime was not a crime of violence within the meaning of the federal guidelines. *Id.* The Fourth Circuit acknowledged that this statement was not the holding of *Nicolas*. *See id.* at 156 n.4; *see also id.* at 164 (Wilkinson, J., dissenting) (faulting the majority for "basing its entire conclusion on [a] bit of dicta"). Nevertheless, the Fourth Circuit followed it, because "the law as articulated by Maryland's highest court * * * is the law that binds us." *Id.* at 156.

2. In the Sixth Circuit, in contrast, a federal court need not give weight to on point dicta from a state supreme court. As the Sixth Circuit acknowledged below, there are multiple Georgia Supreme Court cases explaining that a defendant can commit Georgia armed robbery by "threaten[ing] a person's 'property' or 'character.' " Pet. App. 6a (quoting *Green*, 818 S.E.2d at 540 (Ga. 2018)). Because the ACCA's elements clause only applies to crimes that "ha[ve] as an element the use, attempted use, or threatened use of physical force against *the person* of another," 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added), that Georgia's statute can be satisfied by threats to property would be enough to show that it "sweeps more broadly than" the ACCA definition and thus that a Georgia armed robbery conviction cannot count as an ACCA predicate. *Descamps*, 570 U.S. at 261. Yet, instead of taking the Georgia Supreme Court's statements as a strong indication that "Geor-

gia armed robbery can involve the use of force against 'property' rather than a 'person,'" the Sixth Circuit disregarded those statements as "loose language." Pet. App. 6a. The court of appeals believed that because "Georgia courts have never upheld a conviction for armed robbery based on the language," the court need not give it significant weight. *Id.* The courts of appeals are thus split on the issue.

II. THE DECISION BELOW IS WRONG.

The decision below adopted the wrong approach. In evaluating whether state crimes fit into federal definitions, federal courts must give significant weight to on point language from the relevant state supreme court. In taking the opposite approach, the Sixth Circuit below effectively re-wrote Georgia law. It also undermined federalism values and acted in tension with the values underlying *Erie*.

1. Federal courts are bound by on point interpretations of state law from state supreme courts. *See, e.g.*, *Johnson* v. *United States*, 559 U.S. 133, 138 (2010) (hereinafter "*Curtis Johnson*"). The Court has reaffirmed time and again that "state law as announced by the highest court of the State is to be followed." *Comm'r* v. *Bosch's Estate*, 387 U.S. 456, 465 (1967). That is so because "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State," and thus the interpretation of a state statute by the State's supreme court is "binding on federal courts." *Johnson* v. *Fankell*, 520 U.S. 911, 916 (1997). In short, "the construction that a state court gives a state statute is not a matter subject to [a federal court's] review." *New York* v. *Ferber*, 458 U.S. 747,

767 (1982); *see also Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 447 U.S. 207, 226 n.9 (1980) (explaining that "matter[s] of state statutory construction" are for "the [State's] Supreme Court, as the final arbiter of that State's law"). To "construe [state law] to mean what the [State's] Supreme Court has said it does not," is "to overstep the bounds of [a federal court's] authority." *Cougar Den, Inc.*, 139 S. Ct. at 1010.

This is true when a federal court uses the categorical approach to decide whether a predicate state court conviction fits within a federal statutory definition. In *Curtis Johnson* v. *United States*, for example, the Court explained that federal courts analyzing how state crimes fit into federal definitions are "bound by [a State] Supreme Court's interpretation of state law." 559 U.S. at 138.

It is also true when a federal court sitting in diversity applies state law. Under *Erie Railroad Co.* v. *Tompkins*, federal courts sitting in diversity must apply "the law of the state * * * declared by its Legislature in a statute or by its highest court." 304 U.S. 64, 78 (1938). That is so because "the highest court of the state is the final arbiter of what is state law." *West* v. *Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). So, "[w]hen it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted." *Id.*

Federal courts must also follow directions from state Supreme Courts when those statements are not holdings. This Court has said that "considered dictum" in cases from state high courts should be

considered. *Hawks*, 288 U.S. at 59. In *Hawks*, the Court explained that federal courts should act "with caution and reluctance" before disregarding dicta from state supreme courts because "[t]he stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot." *Id.* at 60. And this Court has previously granted, vacated, and remanded a case to a court of appeals with instructions to consider "relevant dictum" from the appropriate state supreme court. *See Nolan* v. *Transocean Air Lines*, 365 U.S. 293, 295-296 (1961).

In fact, in the *Erie* context this court has actually *instructed* federal courts to look to dicta from state supreme courts in order to determine state law. In *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198 (1956), the Court explained that when it was unclear whether a 46-year-old precedent from the relevant state supreme court should decide the question, the court was to look to "legislative movement," "subsequent rulings or *dicta*," and whether the old rule had been "undermine[d]." *Id.* at 204-205 (emphasis added). And the leading treatise agrees that "[c]onsidered dicta by the state's highest court" provides "reliable indicia of how the state tribunal might rule." 19 Fed. Prac. & Proc. Juris. § 4507 (3d ed.) (quoting *McKenna* v. *Ortho Pharm. Corp.*, 622 F.2d 657, 662 (3d Cir. 1980)).

Such an approach makes sense. After all, state supreme courts are not themselves bound by holdings in prior decisions. *See Bernhardt*, 350 U.S. at 204. So, a statement that a state supreme court has repeated multiple times across a number of years—

like a prior holding of the state supreme court—is not foolproof, but it is a good indication of what state law is. Plus, this Court instructed that even intermediate appellate court decisions are "not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West*, 311 U.S. at 237. That is so because, even though they are not binding on the state supreme court, they offer an important "datum for ascertaining state law." *Id.* The same is true of on point, yet non-binding, statements in state supreme court decisions.

And for good reason. Making criminal laws is a quintessential state power. *United States* v. *Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' ") (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993)). Indeed, this Court has explained that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime." *United States* v. *Morrison*, 529 U.S. 598, 618 (2000). As such, permitting federal courts to disregard clear indications from state courts as to what state law is arrogates to federal courts a quintessential state-law power: "defining * * * the criminal law." *Lopez*, 514 U.S. at 561 n.3.

Allowing federal courts to give no weight to on point statements from state supreme courts also undermines state sovereignty. This Court has emphasized that a key reason for honoring state court interpretations of state law is to ensure that federal courts are not overstepping their authority

and "invad[ing] rights * * * reserved by the Constitution to the several states." *Erie*, 304 U.S. at 80; *Bosch's Estate*, 387 U.S. at 465 (explaining that even when a case is "not a diversity case," the principles underlying *Erie* still apply). Indeed, respecting state supreme courts' interpretations of state law ensures "the proper distribution of judicial power between State and federal courts." *Guaranty Tr. Co. of N.Y.* v. *York*, 326 U.S. 99, 109 (1945).

Giving significant weight to clear statements from state supreme courts also ensures that federal courts do not overstep their constitutional authority. As the Court in *Erie* explained, when a federal court attempts to supersede a state supreme court's clear statement as to what its law means that is "an unconstitutional assumption of powers by the Courts of the United States." *Erie*, 304 U.S. at 79.

2. The Sixth Circuit's decision below is at odds with these fundamental principles. As the Sixth Circuit acknowledged, the Georgia Supreme Court has on multiple occasions clearly stated that Porter's crime of conviction, Georgia armed robbery, can be carried out by threatening property, not people. *See* Pet. App. 6a (quoting *Green*, 818 S.E.2d at 540); *accord Lucky*, 689 S.E.2d at 828. Georgia's armed robbery statute says that "[a] person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon." Ga. Code Ann. § 16-8-41(a). For years, the Georgia Supreme Court has said that the statute's requirement that a weapon be used is satisfied "when the

weapon is used as an instrument of actual or constructive force—that is, actual violence exerted on the victim or force exerted upon the victim by operating on the victim's fears of injury to the person, *property*, or *character of the victim*." *Lucky*, 689 S.E.2d at 828 (emphases added). And it reiterated this requirement two years ago. *See Green*, 818 S.E.2d at 540.

If the Sixth Circuit had given significant weight to this clear language from the Georgia Supreme Court, it would have been forced to conclude that Porter's convictions could not count as "violent felon[ies]" under ACCA. This is so because unlike the nearly identically worded elements clause of 18 U.S.C. § 924(c), ACCA's elements clause does not include within its gambit crimes that involve threats to property but not people. *Compare* 18 U.S.C. § 924(c)(3)(A) (including crimes that have as an element the use of force "against the person *or property* of another" (emphasis added)); *with id.* § 924(e)(2)(B)(i) (including crimes that have as an element use of force merely "against the person of another"); *accord In re Sams*, 830 F.3d 1234, 1237 (11th Cir. 2016) (per curiam) ("Notably, the ACCA's elements clause only involves the use of force 'against the person of another,' while the [§ 924(c)] use-of-force clause involves the use of force 'against the person *or property* of another.' "). Rather, for a crime to fit within the elements clause of ACCA, it must categorically require "force capable of causing physical pain or injury to *another person*." *Curtis Johnson*, 559 U.S. at 140 (emphasis added). A crime that can be accomplished—in the words of the Georgia Supreme Court—"by operating on the victim's fears of injury to * * * *property*" plainly falls outside

ACCA's statutory definition. *Green*, 818 S.E.2d at 540. Because the "minimum conduct criminalized by the state statute"—robbing someone by threatening their property not their person—does not count as a "violent felony" under ACCA, Georgia armed robbery is categorically not a "violent felony." *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013).

The Sixth Circuit below went astray by concluding that because the on point statements from the Georgia Supreme Court were not formal holdings, the Sixth Circuit did not have to give them any weight. That was error. The Georgia Supreme Court's repeated affirmations that Georgia armed robbery criminalizes threats to property offers "the best evidence available" on how the Georgia Supreme Court views the issue. *Hawks*, 288 U.S. at 60. By disregarding that evidence, the Sixth Circuit below did precisely what *Hawks* warned against: it purported to understand Georgia law better than the Georgia Supreme Court, even though the Sixth Circuit judges were "stranger[s] from afar, unacquainted with the local ways." *Id.* Accordingly, the Sixth Circuit below was wrong to not give any weight to on point dicta from the Georgia Supreme Court. By not taking seriously the Georgia Supreme Court's statements as to what Georgia law is, the Sixth Circuit "invaded rights * * * reserved by the Constitution to the several states." *Erie*, 304 U.S. at 80. This Court's correction is essential.

III. THIS CASE IS A GOOD VEHICLE TO RESOLVE THIS IMPORTANT QUESTION.

This case presents a good opportunity to address an important issue that goes to the heart of how power is distributed in our federal system. And allowing

the decision below to stand will hurt criminal defendants, States, and federalism.

1. Resolving the question presented is urgently important because it has serious consequences for criminal defendants. ACCA enhancements transform a crime that would otherwise carry a *maximum* penalty of ten years into one with a *minimum* penalty of 15 years. *See* 18 U.S.C. § 924(a)(2), (e)(1). That means that a federal court's refusal to give significant weight to clear language from a state supreme court in an ACCA case can result—as it did here—in a defendant receiving a significant sentence enhancement that he would not have received had his case been heard in the Fifth or Fourth Circuits. The same goes for federal courts applying state supreme court precedent to determine whether someone qualifies for deportation. This Court should not allow the accident of geography to determine such consequential questions.

The question presented is also important because it has far-reaching effects. For one, the question colors how federal courts address multiple federal statutory schemes. Federal courts are frequently tasked with determining whether prior state court convictions fit within federal statutory definitions. They must do so when applying the Armed Career Criminal enhancement at issue here, as well as when considering whether someone is deportable under the Immigration and Nationality Act due to a qualifying conviction. *See, e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 7 (2004); *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017). So, too, when considering various provisions of the Federal Sentencing Guidelines. *See, e.g.*, *Beckles* v. *United States*, 137 S. Ct. 886, 890

(2017) (discussing U.S.S.G. § 4B1.1(a) career-offender enhancement based on prior convictions "under federal or *state law*" (emphasis added)). Federal courts must also rely on decisions of state courts when determining whether a defendant meets the requirements for a conviction under 18 U.S.C. § 922 for illegally possessing a firearm. *See, e.g.*, *United States* v. *Castleman*, 572 U.S. 157, 161 (2014).

This question is important because it frequently recurs. Statutory schemes that require federal courts to interpret state crimes are the subject of frequent litigation in federal courts. In recent years, around 400 defendants a year have received an ACCA enhancement. *See* U.S. Sent'g Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 17 fig.3 (Mar. 2018) (hereinafter "*Mandatory Minimum Penalties for Firearms Offenses*"), *available at* https://tinyurl.com/yc249x7u. Plus, deportation proceedings are currently occurring at a record pace. As of August 2020, more than 1.2 million deportation cases are pending across the country. *See Backlog of Pending Cases in Immigration Courts as of August 2020*, Transactional Records Access Clearinghouse - Immigration, Syracuse University, https://tinyurl.com/qpglbbx (last visited October 16, 2020). And since January 2017 deportation cases pending in federal courts have nearly doubled. *See* Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, Wall St. J. (Sept. 18, 2019, 9:22 pm ET) https://tinyurl.com/y6638z3s.

It is no surprise then that in the last four years alone, this Court has decided two cases where federal courts have had to look to state court interpretations

of state law. *See Stokeling*, 139 S. Ct. at 553-555 (2019) (applying state supreme court decisions to determine whether Florida robbery was a "violent felony"); *Mathis* v. *United States*, 136 S. Ct. 2243, 2256 (2016) (applying a state supreme court decision to determine whether listed items in Iowa's burglary law were elements or means); *cf.* Philip L. Torrey, *Unpacking the Rise in Crimmigration Cases at the Supreme Court*, 44 Harbinger 109, 109 (2020) (noting that in the last three terms the Court has decided or granted ten cases involving the application of the categorical approach).

Correcting the Sixth Circuit's error below is particularly important because of the outsize role that the Sixth Circuit plays in applying ACCA. Indeed, in the most recent year on record, 17.8 percent of all ACCA cases nationwide came out of the Sixth Circuit—more than all but one other federal court of appeal. *See Mandatory Minimum Penalties for Firearms Offenses*, *supra* at 36.

2. This case is a good vehicle to address this important question. For one, the opinion below considered the merits of the ACCA issue. Because the decision below chose to focus on the merits of the question, this Court need not second-guess that decision. *See* Pet. App. 3a. And the government waived its waiver argument by failing to raise it in the district court. *Cf. id.* at 16a-30a (making no mention of any waiver argument).[1]

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[1] Although the Sixth Circuit below did not address the forfeiture of Porter's ACCA argument, the Sixth Circuit indicated when granting Porter's certificate of appealability that his

The issue is clearly presented because the Sixth Circuit below acknowledged the on point precedent from the Georgia Supreme Court. *See id.* at 6a. And resolving the question presented would resolve the ACCA issue, because if the Sixth Circuit below had followed the Georgia Supreme Court's clear language, it would have had to have concluded that Porter was not eligible for an ACCA enhancement. *See*, *supra*, pp. 17-18.

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claim could be timely because it related back to his original petition, and also that the district court may have erred by not overlooking Porter's forfeiture. *See* Pet. App. 13a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2020