No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOAQUIN RAMOS DE LA CRUZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is it structural error when a defendant pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a), without being advised that one element of that offense is knowledge of his status as a felon?

II. Whether a statute has as an element the use of force against the person of another when a conviction under that statute can be based on a reckless mental state.

III. What role does the text of a statute play in the divisibility analysis under the categorical approach of the Armed Career Criminal Act? Is the Texas statute prohibiting the offense of aggravated robbery, Texas Penal Code § 29.03(a), divisible?

IV. Whether all facts—including the fact of a prior conviction—that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

RELATED PROCEEDINGS

- *United States v. De La Cruz*, No. 7:17-CR-289-1, U.S. District Court for the Southern District of Texas. Judgment entered Nov. 14, 2018. Amended judgment after limited remand entered Nov. 3, 2020.
- *United States v. De La Cruz*, No. 18-41055, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Sept. 2, 2020. Petition for panel rehearing granted Oct. 8, 2020.

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PRAYER

Petitioner Joaquin Ramos De La Cruz prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit. Alternatively, this Court should hold this petition pending its final decisions in *United States v. Gary*, ___ S. Ct., ___, 2021 WL 77245 (Jan. 8, 2021) (granting the petition for writ of certiorari), and *Borden v. United States*, 140 S. Ct. 1262 (2020) (granting the petition for writ of certiorari limited to Question 1), and then dispose of the petition as appropriate.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached to this petition as Appendix A. The Fifth Circuit's order granting the petition for panel rehearing is attached to this petition as Appendix B. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's opinion was entered on September 2, 2020. *See* Appendix A. The Fifth Circuit's order granting the petition for panel rehearing was entered on October 8, 2020. *See* Appendix B. This petition is filed within 150 days after the date of the Fifth Circuit's order granting the petition for rehearing and thus is timely. *See* Sup. Ct. R. 13.3; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e). The Armed Career Criminal Act ("ACCA")

(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

* * *

Tex. Penal Code § 29.02(a). Robbery

(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.

* * *

Tex. Penal Code § 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

(c) In this section, "disabled person" means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

STATEMENT OF THE CASE

I. Statutory framework

A conviction under 18 U.S.C. § 922(g) ordinarily carries a statutory punishment range of zero to ten years in prison. *See* 18 U.S.C. § 924(a)(2). Under the Armed Career Criminal Act ("ACCA"), however, a person faces a mandatory minimum prison sentence of 15 years with a maximum of life if he "violates section 922(g) of [Title 18] and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The statute defines the term violent felony to include:

> any crime punishable by imprisonment for a term exceeding one year . . . 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, [or] involves use of explosives[.][1]

18 U.S.C. § 924(e)(2)(B). Section (i) is referred to as the force clause (or the elements clause).

Mr. De La Cruz received the ACCA enhancement based in part on his prior convictions for Texas aggravated robbery. A person in Texas commits aggravated robbery if he "commit[s]" robbery as defined in Section 29.02" and he: "(1) causes serious bodily injury to another; (2) uses or exhibits a deadly weapon; or (3) causes bodily injury to

[1] Mr. De La Cruz omits the residual clause ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") because that part of ACCA is unconstitutionally vague. *See Samuel Johnson v. United States*, 576 U.S. 591 (2015).

another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is: (A) 65 years of age or older; or (B) a disabled person." Tex. Penal Code § 29.03(a).[2]

Texas defines robbery as follows:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code § 29.02(a).[3]

To determine whether a prior conviction, like Texas aggravated robbery, qualifies as a violent felony under ACCA, the Court employs the "categorical approach." *See Taylor v. United States*, 495 U.S. 575, 602 (1990). Under the categorical approach, courts must look to the elements of the "statute of conviction, rather than to the specific facts underlying the crime." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (citation omitted). "Distinguishing between elements and facts is therefore central to ACCA's operation." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Elements are "the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction." *Id.* (quoting Black's Law Dictionary 634 (10th ed. 2014)). "[A]t a plea

[2] Effective September 1, 1994, to present.

[3] Effective September 1, 1994, to present.

hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* Means, by contrast, are the facts of "[h]ow a given defendant actually perpetrated the crime" and are "extraneous to the crime's legal requirements" and need not be found by a jury. *Id.* at 2248, 2251. Statutes that list alternative elements that create multiple crimes are divisible—and thus subject to the modified categorical approach. *See id.* at 2246. If the statute's alternatives are means, however, the modified categorical approach has no role to play, and courts must decide whether the least of the acts sufficient to meet the statute's elements satisfies the force clause. *See Esquivel-Quintana*, 137 S. Ct. at 1568.

II. Factual background

On February 28, 2017, a federal grand jury in the McAllen Division of the United States District Court for the Southern District of Texas returned a single-count indictment charging Mr. De La Cruz with, on or about January 17, 2017, being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(2), and 924(a)(2). The indictment alleged that Mr. De La Cruz had four prior convictions in the 93rd Judicial District Court in Hidalgo County, Texas, that were punishable by imprisonment for a term exceeding one year: (1) an April 13, 2006, aggravated assault; (2) a June 4, 2009, attempted murder; (3) a June 4, 2009, aggravated robbery; and (4) another June 4, 2009, aggravated robbery.

On September 1, 2017, Mr. De La Cruz pleaded guilty to the indictment. The prosecutor proffered a factual basis to support the guilty plea. That proffer did not include any allegations that Mr. De La Cruz knew of his status as a felon.

Before sentencing, the presentence report ("PSR") calculated the advisory

imprisonment range under the United States Sentencing Guidelines to be 188 to 235 months. Mr. De La Cruz filed objections to the PSR, arguing in relevant part that none of his prior convictions qualified as violent felonies under ACCA.

The district court held a sentencing hearing on October 29, 2018, and continued that hearing on November 7, 2018. The court overruled all of Mr. De La Cruz's objections, noted the Guidelines range of 188 to 235 months, and imposed a within-Guidelines sentence of 204 months' imprisonment. The court further imposed a three-year term of supervised release and a $100 special assessment but did not impose a fine. On November 8, 2018, Mr. De La Cruz timely filed notice of appeal.

On appeal, Mr. De La Cruz argued in his opening brief that the district court reversibly erred by imposing certain special conditions of supervised release in its written judgment without having orally pronounced those conditions at sentencing. Mr. De La Cruz raised three further arguments that he acknowledged were foreclosed under Fifth Circuit precedent: (1) that a Texas aggravated robbery conviction cannot serve as a predicate offense under the force clause of ACCA; (2) that applying the Fifth Circuit's new interpretation of the force clause to his case would violate the Due Process Clause's fair warning requirement; and (3) that the district court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by enhancing his sentence under ACCA. Mr. De La Cruz later filed a motion to file a supplemental brief and proposed supplemental brief arguing that his felon-in-possession conviction was constitutionally invalid and should be vacated under the Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

On September 2, 2020, the Fifth Circuit issued its opinion, affirming in part,

vacating in part, and remanding to the district court for the limited purpose of the entry of an amended judgment that excised the special conditions of supervised release that were not pronounced at sentencing. *See* Appendix A. The court found the remaining three arguments raised in Mr. De La Cruz's opening brief were foreclosed, as he had conceded. *See* Appendix A. The court denied Mr. De La Cruz's motion to file a supplemental brief. *See* Appendix A.

On September 15, 2020, Mr. De La Cruz filed a petition for panel rehearing. He asked the Court to grant his motion for leave to file a supplemental brief and deny his *Rehaif* claim as foreclosed. On October 8, 2020, the Fifth Circuit granted the petition for panel rehearing, granted the motion to file a supplemental brief to raise the *Rehaif* claim, and found that claim to be foreclosed. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

This petition presents four questions that are worthy of this Court's attention because they involve important and recurring issues in federal sentencing law. The lower courts have intractably divided on the first three questions presented. This Court has already granted petitions for writ of certiorari to resolve the first two questions presented, and petitioner therefore requests that the Court hold this petition pending final decisions in those cases. And the fourth question presented asks the Court to address a longstanding tension in its precedent.

I. The federal courts of appeals have reached opposite conclusions on the important question of whether a *Rehaif* error is structural.

Petitioner was charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1), and 924(a)(2). Section 922(g) makes it unlawful for nine categories of individuals to possess firearms. In particular, § 922(g)(1) prohibits felons from possessing firearms. A separate statute, § 924(a)(2), provides that a person who "knowingly violates" § 922(g) is subject to punishment by up to 10 years in prison. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Court held that "the word 'knowingly' applies both to the defendant's conduct and to the defendant's status." *Rehaif*, 139 S. Ct. at 2194. As a result, the government must "show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it" to secure a conviction. *Id.* As applied to petitioner's case, that means the government had to prove that he knew he was a felon. The government, however, did not allege that element of the offense in the indictment and did not proffer that fact in support of petitioner's guilty plea.

Petitioner argued for the first time on appeal that his conviction for felon in possession was constitutionally invalid under *Rehaif* and therefore conceded that this claim was subject to the plain-error standard of review. Ordinarily, plain-error review has four prongs: an error that (1) "has not been intentionally relinquished or abandoned"; (2) is "clear or obvious"; (3) "affected the defendant's substantial rights, which in the ordinary case means he or she must show a reasonable probability that, but for the error, the outcome of the proceedings would have been different"; and (4) "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) (citations and internal quotation marks omitted).

Certain constitutional errors are structural, however, in which case reversal is automatic, without regard to prejudice. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). As will be explained in below, the first question presented is whether a *Rehaif* error constitutes structural error, as the Fourth Circuit has held, or whether a defendant must show individualized prejudice, as the Fifth Circuit has held. *Compare United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), *cert. granted*, ___ S. Ct., ___, 2021 WL 77245 (Jan. 8, 2021), *with United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020), *cert. filed* (No. 20-5489) (Aug. 25, 2020). Petitioner notes that the Court has granted the petition for a writ of certiorari in *Gary* and therefore requests that the Court hold his petition until the final decision in *Gary*, and then dispose of the petition as appropriate.

Two primary "kinds" of constitutional violations may occur in criminal proceedings: "structural error"—which affect the most basic elements of a criminal trial; and mere "trial errors"—mistakes made during the course of the defendant's trial that are

deemed less significant than "structural errors." *See Culpit v. Whitley*, 28 F.3d 532, 537 (5th Cir. 1994); s*ee also Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991). Structural errors are the kinds of errors that deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-578 (1986).

Although this Court has held that errors in the colloquy required by Fed. R. Crim. P. 11 are subject to plain-error review, in that very same case this Court recognized that an unknowing and involuntary guilty plea is constitutionally deficient and cannot "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004). The *Rehaif* error in this case does not constitute a mere Rule 11 error but rather falls into the latter situation. During petitioner's district court proceedings, no one thought the government had to prove his knowledge of his felon status at the time of his firearm possession. Unanimous and longstanding circuit court precedent established affirmatively that the government need not prove knowledge-of-status as an element. *See Rehaif*, 139 S. Ct. at 2210 & n.6 (Alito, J., dissenting) (collecting cases). As a result, neither the indictment returned by the grand jury nor the facts admitted by petitioner to support his guilty plea included that essential element of the offense. Counsel could not have advised petitioner of that essential element, nor could counsel have investigated any potential theories of defense or deficiencies in the government's evidence with respect to that element. Petitioner's guilty plea was therefore constitutionally deficient in that it was unknowing and involuntary.

In addition to *Dominguez-Benitez*, two of this Court's other cases support the conclusion that *Rehaif* errors in the guilty-plea context qualify as structural and not Rule 11 errors. In *Henderson v. Morgan*, 426 U.S. 637, 645 (1976), the question before the Court was "whether a defendant may enter a voluntary plea of guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense." *Morgan*, 426 U.S. at 638. The Court said no, reasoning that a guilty plea cannot be "voluntary in a constitutional sense . . . unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.* at 645 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). The Court found that if a defendant has "an incomplete understanding of the charge . . . his plea cannot stand as an intelligent admission of guilt." *Id.* at 645 n.13.

Significantly, the Court "assume[d] . . . that the prosecutor had overwhelming evidence of guilt available" and still concluded that the finding of guilt was defective due to the lack of notice about the *mens rea* requirement. *Id.* The Court further found it insufficient that the defendant had admitted that he had killed the victim because that admission did not "necessarily" admit "that he was guilty of second-degree murder" since the requisite intent was missing. *Id.* at 646-47. *Morgan* bears a strong resemblance to this case, where petitioner lacked notice of the true nature of the offense with which he was charged and admitted at the guilty-plea hearing only that he was a felon but did not admit to the *mens rea* element regarding that status.

Second, in *Bousley v. United States*, 523 U.S. 614 (1998), the Court considered the validity of a guilty-plea conviction for using a firearm under 18 U.S.C. § 924(c)(1).

Bousley, 523 U.S. at 616. Years after the defendant's guilty plea, *Bailey v. United States*, 516 U.S. 137, 144 (1995), held that the government must show "active employment of a firearm" to secure a § 924(c)(1) conviction. At issue in *Bousley* was whether a habeas petitioner could claim "that his guilty plea was not knowing and intelligent because he was misinformed by the District Court as to the nature of the charged crime." *Bousley*, 523 U.S. at 616. Put another way, the habeas petitioner in *Bousley* contended that "neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged" since his plea was pre-*Bailey*. *Bousley*, 523 U.S. at 618. The Court recognized that if that contention proved true, the plea would be "constitutionally invalid" under the long-standing rule that "a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley*, 523 U.S. at 618. Given that no one in the district court proceedings understood the required elements of the offense under *Rehaif*, petitioner lacked real notice of the true nature of the charge against him.

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver*, 137 S. Ct. at 1907. "Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Id.* (quoting *Fulminante*, 499 U.S. at 310). And a structural error therefore "def[ies] analysis by harmless error standards," instead requiring automatic reversal. *Id.* (quoting *Fulminante*, 499 U.S. at 309).

This Court has delineated "at least three broad rationales" for finding errors to be structural. *Id.* at 1908. First, "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest" and "harm is irrelevant to the basis underlying the right." *Id.* Second, "the effects of the error are simply too hard to measure" since "the precise 'effect of the violation cannot be ascertained.'" *Id.* (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). Third, "the error always results in fundamental unfairness." *Id.* More than one of these rationales may demonstrate that a particular error is structural. *Id.*

Under these standards, the *Rehaif* error in this case was structural. As the Fourth Circuit recognized in *Gary*, all three of the rationales for structural errors applies to *Rehaif* errors in the guilty-plea context. Regarding the first rationale, the error violated petitioner's "right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest." *Gary*, 954 F.3d at 205. This right is not tethered to protecting against erroneous convictions, but rather exists even "in the face of overwhelming evidence" against the defendant. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Everyone's misunderstanding of the elements of the charged offense in the district court deprived petitioner of his "right to make an informed choice on whether to plead guilty or to exercise his right to go to trial." *Gary*, 954 F.3d at 205 (emphasis in original).

Rehaif errors implicate the second rationale as well. Because the error permeated the proceedings, beginning with the indictment not including an essential element of the offense, "the deprivation of [petitioner's] autonomy interest under the Fifth Amendment due process clause has consequences that 'are necessarily unquantifiable and

indeterminate,' . . . rendering the impact of the district court's error simply too difficult to measure." *Gary*, 954 F.3d at 206 (quoting *Gonzalez-Lopez*, 548 U.S. at 150). This Court has recognized that the "erroneous deprivation of the right to counsel of choice" was a structural error with indeterminate consequences in part because "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery [and] development of the theory of defense." *Gonzalez-Lopez*, 548 F.3d at 150. Those types of basic strategic decisions are similarly altered by a change in the elements of an offense the government must prove to secure a conviction. As the Fourth Circuit observed, a defendant who pleads guilty waives a number of rights, and "[t]he impact of his unknowing waiver of his trial rights based on an unconstitutional guilty plea, just like the denial of other trial rights previously identified by the Supreme Court as structural error, is unquantifiable." *Gary*, 954 F.3d at 206.

As to the third rationale, "fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea." *Id.* This Court recognized in *Rehaif* that in a § 922(g) prosecution "the defendant's status is the 'crucial element' separating innocent from wrongful conduct." *Rehaif*, 139 S. Ct. at 2197 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)). Yet that crucial element was absent from petitioner's district court proceedings. That denied petitioner "any opportunity to decide whether he could or desired to mount a defendant to this element of his § 922(g)(1) charges—as it was his sole right to do." *Gary*, 954 F.3d at 207. Consequently, the error deprived petitioner of a "'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or

innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (quoting *Rose*, 478 U.S. at 577). With all three rationales present, the Court should resolve the conflict among the circuits by reaching the same conclusion as the Fourth Circuit did in *Gary* to hold that the *Rehaif* errors are structural.[4]

II. Another important and recurring question that has divided the circuits is whether an offense with a recklessness *mens rea* can serve as a predicate offense under ACCA.

Petitioner will explain below why this Court's intervention is necessary to resolve the important and recurring question of federal sentencing law, on which the circuits have divided, namely, whether an offense with a recklessness *mens rea* can serve as a predicate offense under ACCA. Petitioner acknowledges at the outset, however, that this issue is currently before the Court in *Borden v. United States*, 140 S. Ct. 1262 (2020), in which the Court granted the petition for a writ of certiorari as to Question 1: "Does the 'use of force' clause in the Armed Career Criminal Act (the 'ACCA'), 18 U.S.C. § 924(e)(2)(B)(i) encompass crimes with a *mens rea* of mere recklessness?" The Court heard argument on November 3, 2020. Petitioner therefore requests that the Court hold his petition until the final decision in *Borden*, and then dispose of the petition as appropriate.

[4] Although petitioner's *Rehaif* claim is on plain-error review, the error meets the second prong of that standard of review because the plainness of an error is judged at the time of appellate review. *See Henderson v. United States*, 568 U.S. 266, 269 (2013). Regarding the fourth prong, the Court could leave that for the lower court to resolve in the first instance. *See, e.g.*, *Tapia v. United States*, 564 U.S. 319, 335 (2011) (reversing the judgment, remanding for further proceedings, and "leav[ing] it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed" as is "[c]onsistent with [the Court's] practice).

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court considered whether a prior conviction for driving under the influence of alcohol and causing serious bodily injury qualified as a "crime of violence" under 18 U.S.C. § 16's force clause. The unanimous Court said "no," reasoning that "negligent or merely accidental conduct" does not satisfy "the critical aspect" and "key phrase" of the force clause: the "use . . . of physical force *against the person or property of another*." *Leocal*, 543 U.S. at 9 (emphasis in original). In doing so, the Court emphasized that, "when interpreting a statute that features as elastic a word as 'use,' [the Court] construe[s] language in its context and in light of the terms surrounding it." *Id.* And in the context of § 16, with its phrase "against the person of another," the Court found that "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Id.* at 11. Context was very important to the Court's decision: "[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.*; *see also Curtis Johnson v. United States*, 559 U.S. 133, 140-41 (2010) (contrasting "the context of a statutory definition of '*violent* felony'" with "a meaning derived from a common-law *misdemeanor*") (emphasis in original).

The Court in *Leocal* did not decide whether a reckless offense qualifies as a crime of violence. *Leocal*, 543 U.S. at 13. But after *Leocal*, the circuit courts uniformly held that reckless offenses, like negligent or strict liability offenses, did not satisfy § 16 either. *See United States v. Fish*, 758 F.3d 1, 10 & n.4 (1st Cir. 2014) (collecting cases); *see also United States v. Orona*, 923 F.3d 1197, 1200, 1202 (9th Cir.) (explaining how the Ninth Circuit, after *Leocal*, determined *en banc* that a reckless assault did not qualify as a § 16(a)

"crime of violence" and thereby "brought the law of [that] circuit in line with that of several of [the court's] sister circuits"), *reh'g en banc granted*, 942 F.3d 1159 (9th Cir. 2019).

Then came this Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), which has unsettled that uniformity. *Voisine* concerned 18 U.S.C. § 922(g)(9), a statute that prohibits a person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. The phrase "misdemeanor crime of domestic violence" is further defined as an offense involving a domestic relationship that "has, as an element, the use of physical force," and the Court held that the statute includes reckless domestic assaults. *Voisine*, 136 S. Ct. at 2278. The Court acknowledged *Leocal*, but found nothing in that opinion suggesting "that 'use' marks a dividing line between reckless and knowing conduct." *Id.* at 2279. However, the Court expressly noted that its decision in *Voisine* involving "misdemeanor crimes of domestic violence" did not resolve whether a "crime of violence" under § 16 encompasses reckless conduct and further acknowledged that "[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes." *Voisine*, 136 S. Ct. at 2280 n.4.

Since *Voisine*, the circuit courts have diverged on whether a reckless offense qualifies as either a "crime of violence" under § 16 or the United States Sentencing Guidelines or a "violent felony" under ACCA. The First Circuit has held that reckless offenses do not qualify as either a "crime of violence" or a "violent felony." In *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017), the First Circuit found that a prior conviction for Massachusetts assault and battery with a dangerous weapon did not qualify as a "violent felony" under ACCA due to that statute's reckless mental state. The First Circuit reasoned

that, although the Massachusetts statute required "that the wanton or reckless act be committed intentionally," the statute "does not require that the defendant intend to cause injury" or "be aware of the risk of serious injury that any reasonable person would perceive." *Id.* at 39. The First Circuit specifically pointed to cases where a conviction under the Massachusetts statute involved "reckless driving that results in a non-trifling injury." *Id.* at 38. Similarly, in *United States v. Rose*, 896 F.3d 104 (1st Cir. 2018), the First Circuit held that a prior conviction for Rhode Island assault with a dangerous weapon was not a "violent felony" under ACCA because that statute required "a mental state of only recklessness." *Rose*, 896 F.3d at 114.

Both *Windley* and *Rose* relied heavily on the First Circuit's opinion in *Bennett v. United States*, 868 F.3d 1, 9 (1st Cir.), *opinion withdrawn and vacated*, 870 F.3d 34 (1st Cir. 2017). That opinion was withdrawn and vacated due to the petitioner's death, but before that happened, the court in *Windley* "endorse[d] and adopt[ed] [*Bennett*'s] reasoning as its own." *Windley*, 864 F.3d at 37 n.2. In *Bennett*, a panel including Justice Souter carefully examined this Court's opinion in *Leocal*, recognizing that both ACCA and § 16 contain "a follow-on 'against' phrase" to which "*Leocal* gave significant weight . . . in concluding that Florida's driving-under-the-influence offense was not a 'crime of violence' under § 16." *Bennett*, 868 F.3d at 9-10. The *Bennett* opinion further evaluated the potential impact of *Voisine* on the recklessness question, acknowledging the division among the circuits after *Voisine*. *Bennett*, 868 F.3d at 15-16. Ultimately, the *Bennett* opinion determined that ACCA's context, with the "against" phrase, "arguably does convey the need for the perpetrator to be knowingly or purposefully (and not merely recklessly)

causing the victim's bodily injury in committing an aggravated assault" and that it is unclear whether it would be "natural to say that a person who chooses to drive in an intoxicated state uses force 'against' the person injured in the resulting, but unintended, car crash." *Id.* at 18. Given that uncertainty, the *Bennett* opinion invoked the rule of lenity to hold that Maine aggravated assault, which encompasses drunk driving through its reckless mental state variant, does not have as an element the use of force against another person. *Id.* at 22-24.

A panel of the Fourth Circuit has agreed with the First Circuit's approach to reckless offenses. In *United States v. Middleton*, 883 F.3d 485, 487 (4th Cir. 2018), Judge Gregory authored a majority opinion holding that a conviction for South Carolina involuntary manslaughter did not qualify as a violent felony under ACCA because that statute covered the illegal sale of alcohol to a minor that resulted in a drunk driver's death. *Id.* at 489-93. Judge Floyd authored a separate opinion concurring in part and concurring in the judgment, with Judge Harris joining Parts II.A and B. Those two subparts concluded that "South Carolina involuntary manslaughter sweeps more broadly than the ACCA because an individual can be convicted of this offense based on reckless conduct, whereas the ACCA force clause requires a higher degree of *mens rea*." *Id.* at 497 (concurring opinion). Drawing on the First Circuit's *Bennett* and *Windley* opinions, Judge Floyd and Judge Harris emphasized the phrase "against the person of another" as the critical feature distinguishing ACCA from the statute involving misdemeanor crimes of domestic violence in *Voisine*. *Middleton*, 883 F.3d at 498-99 (concurring opinion).

Although the Eighth Circuit has held, after *Voisine*, that some reckless offenses have

the use of force against another,[5] the Eighth Circuit has squarely held that an offense that can be committed by reckless driving does not have the requisite force element. In *United States v. Fields*, 863 F.3d 1012, 1013 (8th Cir.), *reh'g denied* (Nov. 7, 2017), the Eighth Circuit evaluated whether a prior conviction for Missouri second-degree assault was categorically a "crime of violence" for purposes of applying a sentencing enhancement under the United States Sentencing Guidelines. The Missouri statute defined the offense at issue as "recklessly caus[ing] serious physical injury to another person." *Fields*, 863 F.3d at 1014 (brackets in original omitted). The Eighth Circuit held that, because the Missouri statute encompassed reckless driving resulting in injury, it did not qualify as a "crime of violence." *Id.*

The Eighth Circuit in *Fields* reaffirmed its pre-*Voisine* decision in *United States v. Ossana*, 638 F.3d 895 (8th Cir. 2011). In *Ossana*, the Eighth Circuit relied on this Court's decision in *Begay v. United States*, 553 U.S. 137 (2008),[6] which "distinguished crimes that show a mere 'callousness toward risk' from crimes that 'also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.'" *Ossana*, 638 F.3d at 902 (quoting *Begay*, 553 U.S. at 146). More specifically, *Begay* pointed to reckless polluting and reckless tampering with consumer products as

[5] *See, e.g.*, *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (holding that reckless discharge of a firearm qualifies as a violent felony under ACCA).

[6] *Begay* primarily concerned the residual clause and was abrogated in that respect when the residual clause was later held to be void for vagueness. *See Samuel Johnson v. United States*, 576 U.S. 591 (2015). But if a crime does not even create the serious potential *risk* of physical injury necessary to satisfy the residual clause, it clearly does not have the use of force *as an element*.

"crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" *Ossana*, 638 F.3d at 903 (quoting *Begay*, 553 U.S. at 146). Without "any meaningful distinction between" reckless tampering with consumer products and assault statutes "encompassing reckless driving that results in an injury," the Eighth Circuit applied *Begay* to find that reckless driving was not a crime of violence. *Ossana*, 638 F.3d at 903. Although the government sought rehearing of the Eighth Circuit's decision in *Fields* to reaffirm *Ossana* after *Voisine*, the court denied the petition. *See Fields*, 863 F.3d at 1012 n.*.

Similar to the Eighth Circuit, but on a broader scale, a panel of the Ninth Circuit has re-affirmed its pre-*Voisine*, *en banc* decision that a reckless assault does not qualify as a crime of violence under § 16(a). *See Orona*, 923 F.3d at 1202-03. After *Leocal*, the *en banc* Ninth Circuit revisited (and expressly overruled) its precedent that a crime of violence included reckless offenses. *See Orona*, 923 F.3d at 1200-01 (discussing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*)). In its *en banc* decision in *Fernandez-Ruiz*, the Ninth Circuit had "relied on 'the bedrock principle of *Leocal* . . . that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another." *Orona*, 923 F.3d at 1201 (quoting *Fernandez-Ruiz*, 466 F.3d at 1132). In *Orona*, the Ninth Circuit panel examined *Voisine* in detail but concluded that *Voisine* did not "wholly undercut the theory or reasoning of *Fernandez-Ruiz*" because the Ninth Circuit panel remained persuaded, even after *Voisine*, that "'running a stop sign solely by reason of voluntary intoxication and causing physical injury to another'—similar to the conduct at issue in *Leocal*, could not 'in the ordinary sense be called active or

violent.'" *Orona*, 923 F.3d at 1203 (quoting *Fernandez-Ruiz*, 466 F.3d at 1130). The Ninth Circuit panel acknowledged the First Circuit's similar conclusion in *Rose* as well as the opposing views of other circuits. *See Orona*, 923 F.3d at 1202-03.

Four circuits have reached the opposite conclusion. The D.C. Circuit in *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019), held that the defendant's argument that D.C. assault with a dangerous weapon was not a violent felony because it included a mental state of reckless "contravenes" *Voisine*. *Haight*, 892 F.3d at 1281. The court expressed the view that "[t]he statutory provision at issue in *Voisine* contains language nearly identical to ACCA's violent felony provision." *Haight*, 892 F.3d at 1280. Unlike the First Circuit, the D.C. Circuit was unpersuaded that the differentiating phrase "against the person of another" carried significance. *See id.* at 1281. The D.C. Circuit expressly recognized the First Circuit's conclusion on reckless offenses in *Windley* but disagreed with that decision. *Haight*, 892 F.3d at 1281. The Fifth, Sixth, and Tenth Circuits have likewise extended *Voisine* to the "crime of violence" or "violent felony" contexts. *See, e.g.*, *United States v. Mendez-Henriquez*, 847 F.3d 214, 220-22 (5th Cir. 2017); *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Mann*, 899 F.3d 898, 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2637 (2019).[7]

As the above discussion demonstrates, a number of circuits have weighed in on the

[7] A three-judge panel of the Sixth Circuit, however, explained that it would have held that merely reckless conduct is not the use of force against another person, had it been writing on a clean slate and not been bound by circuit precedent. *United States v. Harper*, 875 F.3d 329, 330-32 (6th Cir. 2017), *cert. denied*, 139 S. Ct. 53 (2018). Like some other circuits, the Sixth Circuit panel was persuaded that "against the person of another" is "a restrictive phrase that describes the particular type of 'use of physical force' necessary to satisfy" the force clause. *Id.* at 331.

question presented in thoughtful and comprehensive opinions with express consideration of contrary opinions. The division among the circuits is therefore unlikely to be resolved on its own, and further percolation among the circuit courts is not necessary. Through *Bennett*, *Windley*, and *Rose*, a majority of First Circuit judges in regular active service have authored or joined opinions concluding, after extensive analysis, that reckless offenses are excluded from qualifying under § 16 and ACCA's force clauses, and so it is highly unlikely that the First Circuit will change its mind. The D.C. Circuit recognized the First Circuit's work on this subject but still reached the opposite conclusion. *Haight*, 892 F.3d at 1281. The Eighth Circuit had the opportunity to revisit its opinion on reckless driving, but declined to do so. *See Fields*, 863 F.3d at 1012 n.*. And the Fifth Circuit has denied at least one petition for rehearing *en banc* raising the recklessness issue. *See* Order, *United States v. Gomez Gomez*, No. 17-20526 (5th Cir. Apr. 23, 2019). It will therefore remain the situation, until this Court decides the issue, that whether a person's prior conviction qualifies as having the use of force against another—and the serious consequences flowing from that designation—will depend on the happenstance of geography.

Whether a prior conviction qualifies as a "crime of violence" under 18 U.S.C. § 16 or a "violent felony" under ACCA is a question with enormous consequences. Years of imprisonment turn on the answer. The penalties faced by a person convicted of being a felon in possession of a firearm increase dramatically under ACCA if that person has three previous convictions for a violent felony. The mandatory minimum prison sentence skyrockets from zero to 15 years. *Compare* 18 U.S.C. § 924(a)(2), *with id.* § 924(e)(1). The maximum prison sentence escalates from 10 years to life. *Compare id.* § 924(a)(2), *with*

id. § 924(e)(1). The force clause appears in a variety of other criminal statutes as well. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A), 924(c)(1)(C), 924(c)(1)(D)(3)(A) (firearms offenses); 18 U.S.C. § 1959(a) (RICO); 18 U.S.C. § 3142(f)(1)(A) (bail); 18 U.S.C. § 3553(f)(1)(C), (g) (eff. Dec. 21, 2018) (eligibility for "safety valve" relief from mandatory minimum drug sentences).

Given the high stakes and widespread use of force clauses in federal criminal law, this issue raised in this case is worthy of the Court's attention. Accordingly, the Court should grant Mr. De La Cruz's petition to resolve the entrenched circuit conflict over the important question of whether a reckless offense has as an element the use of force against another person and thus qualifies as a "crime of violence" or "violent felony." *See* Sup. Ct. R. 10(c).

III. This Court's intervention is necessary to resolve the division among the circuits, after *Descamps* and *Mathis*, over what role the text of a statute plays in the divisibility inquiry of the categorical approach.

In *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Court provided guidance for lower courts about how to conduct the divisibility analysis of the categorical approach. *Id.* at 2256-57; *see also Descamps v. United States*, 570 U.S. 254, 260-66 (2013). *Mathis* clearly holds that in order for a statue to be divisible, it must set forth alternative "elements," and that elements are "the things the prosecution must prove to sustain a conviction." *Mathis*, 136 S. Ct. at 2248. *Mathis* emphasizes the primary role of state law in making the means-or-elements determination. When "a state court decision definitively answers the question" by making clear that "a jury need not agree" on the particular way an offense is committed, then "a [federal] sentencing judge need only follow what it says."

Id. at 2256.

But *Mathis* further specified that the text of the statute may play a secondary role in the divisibility inquiry, in the absence of a dispositive state case on jury unanimity. *Mathis* offered three ways that "the statute on its face may resolve the issue." *Id.* First, the "statutory alternatives [may] carry different punishments" and therefore must be elements under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Mathis*, 136 S. Ct. at 2256. Second, the statute may be drafted to offer "illustrative examples," which demonstrates that the alternatives are means of committing a single crime. *Id.* And third, the statute "may itself identify which things must be charged (and so are elements) and which need not be (and so are means)." *Id.*

A. Seven circuits have construed *Mathis* to require a statute's text to answer the means-versus-elements question with certainty.

Seven circuits have interpreted *Mathis*'s text-based analysis as requiring that the statute's text definitively resolve the means-or-elements question. A good illustration of the *Mathis* approach comes from the Eighth Circuit's *en banc* decision in *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (*en banc*). Before the court was Missouri's second-degree burglary statute, which defined that offense to mean a person who "knowingly enters unlawfully or knowingly remains unlawfully *in a building or inhabitable structure* for the purpose of committing a crime therein." *Naylor*, 887 F.3d at 400 (quoting Mo. Rev. Stat. § 569.170) (emphasis added). The court had to decide whether "building" and "inhabitable structure" were means or elements.

A panel of the Eighth Circuit previously found that these alternatives were elements.

See United States v. Sykes, 844 F.3d 712 (8th Cir. 2016), *cert. granted, judgment vacated*, 138 S. Ct. 1544 (2018), and *overruled by Naylor*, 887 F.3d 397. In doing so, the panel relied solely on the presence of the disjunctive "or" between "building" and "inhabitable structure." *See Sykes*, 844 F.3d at 715.

But the *en banc* court disagreed with the panel's approach, finding that the text "does little to guide our means-elements inquiry" for two reasons. *Naylor*, 887 F.3d at 401. First, the statute assigned the same punishment to both acts. *Id.* Second, the statute did "not identify which things must be charged and which things need not be." *Id.* As the concurring opinion explained: "The statutory text is unenlightening; by listing the terms in the alternative, the text merely raises the question whether the alternatives are means or elements." *Id.* at 407 (Colloton, J., concurring in the judgment, joined by Wollman and Gruender, JJ.).

Another example of the *Mathis* approach comes from the Fourth Circuit. In *United States v. Jackson*, 713 Fed. Appx. 172 (4th Cir. 2017) (unpublished), the Fourth Circuit explained that "'mere use of the disjunctive "or" in the definition of a crime does not automatically render it divisible.'" 713 Fed. Appx. at 175 (quoting *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014)). "Rather," the court continued, "only when the law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute are we able to conclude that the statute contains alternative *elements* and not alternative *means*." *Jackson*, 713 Fed. Appx. at 175 (quoting *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015)) (emphasis in original).

Five other circuits—the Second, Sixth, Seventh, Ninth, and D.C. Circuits—have adopted the *Mathis* approach. The Second Circuit in *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017), found that the text of a New York statute prohibiting the unlawful sale of a controlled substance suggested that the legislature had created a single crime because (1) the text provided "no indication that the sale of each substance is a distinct offense"; (2) "the text does not suggest that a jury must agree on the particular substance sold"; and (3) the statute "prescribe[s] the same narrow range of penalties . . . no matter which controlled substance a defendant has sold." *Harbin*, 860 F.3d at 65.

In *Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018), the Sixth Circuit determined that the text of Georgia's burglary statute "provides no help" because (1) the text did not assign different punishments to the statutory alternatives and (2) the statute did not provide a non-exhaustive list of "illustrative examples." *Id.* at 622-23.

Likewise, the Seventh Circuit in *United States v. Edwards*, 836 F.3d 831 (7th Cir. 2016), focused on the examples from *Mathis*. The court found that the text of the Wisconsin burglary statute suggested that the subsections were "merely 'illustrative examples' of particular location types" and therefore means. *Edwards*, 836 F.3d at 937. That the alternatives all carried the same punishment buttressed the court's conclusion. *Id.* In another opinion, the Seventh Circuit described the text-based analysis under *Mathis* as a search for "unmistakable signals in the statute itself." *United States v. Franklin*, 895 F.3d 954, 959 (7th Cir. 2018).

The Ninth Circuit has also adopted the *Mathis* approach. *See United States v. Robinson*, 869 F.3d 933, 939 (9th Cir. 2017) (finding that, under *Mathis*, nothing in the

text of the Washington second-degree assault statute clarifies whether the alternatives are means or elements because the statute does not specify what must be charged and what need not be charged, does not mention any jury unanimity requirements, and does not set different punishments for the alternatives); *see also United States v. Arraiga-Pinon*, 852 F.3d 1195, 1203 (9th Cir. 2017) (Thomas, C.J., concurring) (explaining that the text of the California statute "is not a clearly elemental statute, as described in *Mathis*," because it does not provide different punishments for different alternatives and does not explicitly establish that the alternatives are elements).

Finally, the D.C. Circuit has embraced the *Mathis* approach as well. *See United States v. Sheffield*, 832 F.3d 296, 315 (D.C. Cir. 2016) ("Nothing in the statutory text or case law requires a jury, in convicting a defendant of attempted robbery, to first find that the defendant committed one of multiple alternative elements, one of which is a crime of violence under the elements clause."); *see also United States v. Redrick*, 841 F.3d 478, 482-83 (D.C. Cir. 2016) (holding that Maryland armed robbery is a separate crime from simple robbery because the statute assigns a greater penalty for robbery with a dangerous or deadly weapon than for simple robbery).

In sum, seven circuits have read *Mathis* to require that a statute's text resolve the means-versus-elements question with certainty, by looking in large part to the specific examples that *Mathis* itself provided.

B. Other circuits, taking their cue from *Descamps*, decide the means-versus elements question by simply reading the text of the statute and often drawing conclusions from the presence of the disjunctive "or."

By contrast to the *Mathis* approach of seven circuits, five circuits resolve the means-versus-elements question by simply reading the text of the statute and often drawing conclusions from the presence of the disjunctive "or." For example, the Fifth Circuit in *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), which was applied in petitioner's case, did not examine the Texas aggravated robbery statute for "unmistakable signals"[8] that the statutory alternatives were means or elements, such as the establishment of different punishments, the creation of a list of illustrative examples, or the designation of things that must or need not be charged. Rather, the Fifth Circuit reproduced the text of the statute, emphasized the words "and" and "or," and made a chart dividing the statute into four crimes. *See Lerma*, 877 F.3d at 633-34 & 636-37.

The First, Third, Tenth, and Eleventh Circuits have taken a similar approach to the role of text in the divisibility inquiry. In *United States v. Tavares*, 943 F.3d 1 (1st Cir. 2016), the First Circuit reproduced the text of the Massachusetts resisting-arrest statute and concluded that the offense "reads as a divisible statute" that defines multiple crimes. *Tavares*, 943 F.3d at 14. The Third Circuit in *United States v. Ramos*, 892 F.3d 599 (3d Cir. 2018), determined that the Pennsylvania second-degree aggravated assault statute was divisible into four offenses because the statute used "disjunctive language." *Ramos*, 892 F.3d at 609. Likewise, the Tenth Circuit in *United States v. Taylor*, 843 F.3d 1215 (10th

[8] *Franklin*, 895 F.3d at 959.

Cir. 2016), reaffirmed that court's pre-*Mathis* decision in *United States v. Mitchell*, 653 Fed. Appx. 639 (10th Cir. 2016), which held that the alternatives of an Oklahoma statute were elements based solely on the statute's use of the word "or." *Taylor*, 843 F.3d at 1222 (emphasizing the word "or" between the alternatives); *Mitchell*, 653 Fed. Appx. at 643 (same).

Lastly, the Eleventh Circuit's decision in *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), which the Sixth Circuit expressly rejected in *Richardson*,[9] takes a similar view of a federal court's role in examining a state statute's text for divisibility purposes. The Eleventh Circuit began by recommitting to its pre-*Mathis* statement in *United States v. Howard*, 742 F.3d 1334, 1346 (11th Cir. 2014), that "sentencing courts should usually be able to determine whether a statute is divisible by simply reading its text." *Gundy*, 842 F.3d at 1166 (brackets and ellipsis omitted). Then, relying on the statute's "plain text," the court concluded that the Georgia burglary statute contained elements because the alternatives were "stated in the alternative and in the disjunctive." *Id.* at 1167.

Because of this division among the circuits on this important question, the Court's intervention is necessary. In addition, the Court's intervention is necessary to resolve the tension between the Court's decisions in *Descamps* and *Mathis*. As the Sixth and Eleventh Circuits have recognized, some support for relying on disjunctive phrasing when conducting the divisibility inquiry can be found in the Court's decision in *Descamps*. *See Richardson*, 890 F.3d at 623 (quoting *Descamps*, 570 U.S. at 257); *Gundy*, 842 F.3d at

[9] *Richardson*, 890 F.3d at 623.

1167 (same). When explaining how the modified categorical approach can be used when a statute is divisible into elements, the Court in *Descamps* gave as an example a burglary statute that "involves entry into a building *or* an automobile. *Descamps*, 570 U.S. at 257 (emphasis in original). The Court emphasized the presence of the disjunctive "or," as did the Fifth Circuit in *Lerma*.

But in *Mathis*, the Court engaged in a more sophisticated analysis, disregarding the presence of the word "or" and focusing instead on state law. *See Mathis*, 136 S. Ct. at 2250. The Court in *Mathis* acknowledged the role the text of a statute can play in the divisibility inquiry, but suggested a stricter approach to the text than the Court had previously indicated in *Descamps*, by setting forth three ways in which a statute's text on its face would resolve the means-versus-elements inquiry with certainty. *See Mathis*, 136 S. Ct. at 2256 (a statute could assign different punishments to different alternatives, a statute could offer illustrative examples, or a statute could identify what must be charged or need not be charged). The Court's guidance is needed to determine whether the *Mathis* approach or the *Descamps* approach is the proper method for analyzing a statute's text when conducting the divisibility inquiry under the categorical approach.

C. The Fifth Circuit's analytical method is flawed.

In *Lerma*, the Fifth Circuit concluded that the Texas aggravated robbery statute creates four crimes. *See Lerma*, 877 F.3d at 633-34. The court reached that conclusion "[b]ased on the language of the statute." *Id.* at 634. For example, the court found that "[o]n the face of the statute, the alternatives of 'using' a deadly weapon or 'exhibiting' a deadly weapon cannot be means because they are not listed as ways of satisfying a single element."

Id. at 633.

Only after concluding that its own reading of the statute indicated that the alternatives were divisible as elements did the court turn to state law. And the court concluded that the state case law relied on by the defendant did not overcome the court's text-based conclusion. *See id.* at 634. The best example of this reasoning is the court's treatment of *Woodard v. State*, 294 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd), as "not helpful." *Lerma*, 877 F.3d at 634 n.4. The state court in *Woodard* held that jury "unanimity as to the aggravating factors was not required, and the jury could convict appellant of aggravated robbery if each juror concluded that at least one of the aggravating factors of [Tex. Penal Code §] 29.03 was proved." 294 S.W.3d at 609. But the Fifth Circuit rejected the significance of that state court case, citing as its sole authority the court's own chart dividing the statutory alternatives into four crimes. *See Lerma*, 877 F.3d at 634 n.5.

There are at least two problems with the Fifth Circuit's analysis. First, it elevates the federal court's own reading of the text of the state statute over state court law. The Fifth Circuit did not consider, from the perspective of the state court, how that court would go about answering the means-versus-elements question. Instead, the Fifth Circuit relied exclusively on its own judgment about a state statute based on the plain language of the text. This violates principles of federalism, which require federal courts to defer to state court decisions of state law. *See, e.g.*, *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010) (federal courts are "bound by" state court interpretations of state law, including the state court's determination of the elements of a state statute). The *Mathis*-based approach of the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits provides the proper

deference to state courts on matters of state law. *See Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality op.) (federal courts "are not free to substitute [their] own interpretations of state statutes for those of a State's courts") ; *see also id.* at 638 ("States must be permitted a degree of flexibility in defining" the elements of a crime).

Second, the Fifth Circuit's decision inappropriately shifts the burden to the defendant when the government is the party that bears the burden to meet the categorical approach's "demand for certainty." *Mathis*, 136 S. Ct. at 2257. Under the *Descamps*-based approach, the government can satisfy its burden by simply pointing to the disjunctive phrasing of the statute's text, *see, e.g.*, *Lerma*, 877 F.3d at 633-34, despite the fact that disjunctively phrased statutes have been found to be indivisible, *see, e.g.*, *Mathis*, 136 S. Ct. at 2249-50. Defendants then bear the burden to overcome that text-based conclusion. *See Lerma*, 877 F.3d at 633-34. The *Mathis* approach avoids this pitfall. By requiring the government to point to "unmistakable signals"[10] in the statutory text, the *Mathis* approach correctly places the burden on the government to answer the means-versus-elements question with certainty.

Applying the *Mathis* approach to this case, nothing about the text of the Texas aggravated robbery statute resolves the means-versus-elements inquiry with the requisite certainty. All of the alternatives carry the same punishment. *See* Tex. Penal Code § 29.02(b) ("An offense under this section is a felony of the first degree."). The statute does not provide a list of illustrative examples by using an umbrella term or creating a non-

[10] *Franklin*, 895 F.3d at 959.

exhaustive list. *See Mathis*, 136 S. Ct. at 2256 (citing *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014), and *United States v. Cabrera-Umanzor*, 728 F.3d 347, 353 (4th Cir. 2013)). And the statute itself does not specify which things must be charged or need not be charged. *Mathis*, 136 S. Ct. at 2256.

D. The divisibility question presented in this petition is important to federal sentencing law with significant consequences for defendants.

Years of imprisonment turn on the correct answer to the divisibility question presented by this case. The Fifth Circuit's holding in *Lerma* has the effect of dramatically increasing the sentences for criminal defendants under the Armed Career Criminal Act. The severe impact of the ACCA enhancement in petitioenrn's case illustrates the importance of the issue. Without the ACCA enhancement, petitioner's punishment exposure for the offense of felon in possession of a firearm would have been a maximum of 10 years in prison. *See* 18 U.S.C. §§ 922(g)(1) & 924(a)(2). But with the ACCA enhancement, petitioner faced a mandatory minimum sentence of 15 years, with a maximum term of life in prison. *See* 18 U.S.C. § 924(e)(1). Due to the very harsh consequences of the Fifth Circuit's erroneous decision concerning Texas aggravated robbery, the divisibility question raised by this petition is of great importance and therefore worthy of the Court's consideration.

IV. The Court should reconsider *Almendarez-Torres*.

Petitioner was subjected to an enhanced statutory minimum and maximum under 18 U.S.C. § 924(e) because the district court found that he had three prior convictions that qualified as violent felonies under ACCA. Petitioner's sentence thus depends on the

judge's ability to find the existence and date of a prior conviction—as well as whether those prior convictions qualified as "violent felonies"—and to use that conviction to increase the statutory range. This power was affirmed in *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998), which held that even where prior convictions raise the statutory maximum applicable to a defendant, the Constitution does not require that they be treated as offense elements that need to be charged in the indictment or proved to a jury beyond a reasonable doubt.

Two years later, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Although the holding of *Apprendi* retained the *Almendarez-Torres* exception for the fact of a prior conviction, the Court in *Apprendi* noted that "it is arguable that *Almendarez-Torres* was incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489 (footnote omitted). Moreover, Justice Thomas, who had been in the five-Justice majority in *Almendarez-Torres*, has expressed the view that he had been in error to join that decision. *See id.* at 520-21. Justice Thomas continues to believe that this Court should reconsider *Almendarez-Torres*. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1253 (2018) (Thomas, J., dissenting); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1202-03 (2006) (Thomas, J., dissenting from denial of certiorari).

This Court has repeatedly limited *Almendarez-Torres*. *See Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) (characterizing *Almendarez-Torres* as a narrow exception

to the general rule that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt); *Descamps v. United States*, 570 U.S. at 280 (Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *Shepard v. United States*, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion) ("While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* [*v. United States*, 526 U.S. 227 (1999)] and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute."); *Dretke v. Haley*, 541 U.S. 386, 395-396 (2004) (concluding that the application of *Almendarez-Torres* to the sequence of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible); *Nijhawan v. Holder*, 129 S.Ct. 2294, 2302 (2009) (agreeing with the Solicitor General that the loss amount of a prior offense would represent an element of an 8 U.S.C. § 1326(b) offense, to the extent that it boosted the defendant's statutory maximum).

Further, in *Alleyne* where the Court applied *Apprendi*'s rule to mandatory minimum sentences, the Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *Almendarez-Torres* as a "narrow exception to the general rule" that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2160 n.1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*,

this Court said that it would "not revisit it for purposes of [its] decision today." *Id.*

Three concurring justices in *Alleyne* provide additional reason to believe that the time is ripe to revisit *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164 (Sotomayor, Ginsburg, Kagan, J.J., concurring). Those justices noted that the viability of the Sixth Amendment principle set forth in *Apprendi* was initially subject to some doubt, and some justices believed the Court "might retreat" from it. *Id.* at 2165. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id.* Reversal of precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 2166. For these reasons, petitioner urges the Court to revisit *Almendarez-Torres*. If that decision were overruled, that would obviously undermine the use of petitioner's prior convictions to increase his statutory maximum. His sentence of 204 months of imprisonment would exceed the ten-year statutory maximum that would have applied absent the court-found ACCA enhancement.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold this petition pending its final decisions in *United States v. Gary*, ___ S. Ct., ___, 2021 WL 77245 (Jan. 8, 2021), and *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

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