No. 19-373

In the Supreme Court of the United States

JAMES WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Texas offense of robbery resulting in bodily injury, in violation of Tex. Penal Code Ann. § 29.02(a)(1) (West 1974), is a violent felony under the Armed Career Criminal Act, 18 U.S.C. 924(e).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 195. The order of the court of appeals denying rehearing en banc and the opinions dissenting from the denial of rehearing en banc (Pet. App. 54a-61a) are reported at 931 F.3d 467. The order of the district court (Pet. App. 14a-53a) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 506 Fed. Appx. 482.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2019. A petition for rehearing was denied on July 23, 2019 (Pet. App. 54a-61a). The petition for a writ of certiorari was filed on September 19, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 1a-2a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. 07-cr-20243 D. Ct. Doc. 110, at 2-3 (July 21, 2011). The court of appeals affirmed. 506 Fed. Appx. 482. In 2014, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district court granted. Pet. App. 14a-53a. The court of appeals reversed. *Id.* at 1a-13a.

1. In July 2007, undercover officers from the Memphis Police Department purchased crack cocaine from petitioner on multiple occasions at a rooming house that he managed. 506 Fed. Appx. at 483; Presentence Investigation Report (PSR) ¶¶ 5-9. Specifically, they made five purchases ranging between 0.2 and 0.4 grams of crack cocaine from him over the course of the month, twice directly and three additional times through an intermediary who would take the money and then retrieve the drugs from petitioner. PSR ¶¶ 5-9.

Shortly thereafter, after receiving numerous complaints of drug sales at the rooming house, officers conducted a knock-and-talk. 506 Fed. Appx. at 483. Petitioner answered the door and consented to a search of his room, where the officers found 0.3 grams of crack cocaine and thirteen 9mm rounds of ammunition. *Ibid.* Petitioner was arrested for possession of crack cocaine. *Ibid.* Petitioner claimed that he had recovered the ammunition three or four weeks earlier from a house that he managed, but acknowledged that he had previously been convicted of a felony. *Ibid.*

2. A federal grand jury returned an indictment charging petitioner with possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2a, 15a. Petitioner proceeded to trial, and a jury found him guilty. *Id.* at 2a.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for possession of ammunition by a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), however, prescribes a term of 15 years to life if the defendant had "three previous convictions" for "violent felon[ies]" committed on different occasions. 18 U.S.C. 924(e)(1). Under the ACCA's "elements clause," a "'violent felony'" is defined to include felony offenses that have "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).

The district court found that petitioner was subject to the ACCA because he had five prior convictions for violent felonies: (1) a 1974 Tennessee conviction for robbery with a deadly weapon; (2) a 1982 Texas conviction for robbery; (3) a 1983 Tennessee conviction for attempted third-degree burglary; (4) a 1986 Tennessee conviction for burglary; and (5) a 1994 Tennessee conviction for robbery. Pet. App. 2a. The court sentenced petitioner to the statutory minimum of 15 years of imprisonment. *Ibid.* On direct appeal, petitioner did not challenge the applicability of the ACCA, but instead argued that the imposition of a 15-year sentence violated the Eighth Amendment. See 506 Fed. Appx. at 489-490. The court of appeals affirmed. *Id.* at 490.

3. In January 2014, petitioner timely filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, raising several claims that are not at issue here. Pet. App. 2a. While that motion was pending, this Court

held that the "residual clause" of the ACCA's definition of "violent felony" was void for vagueness. *Johnson* v. *United States*, 135 S. Ct. 2551, 2557 (2015). The district court allowed petitioner to amend his Section 2255 motion to add a claim that, after *Johnson*, he no longer qualified for a sentence under the ACCA. Pet. App. 2a.

The government agreed that, after *Johnson*, petitioner's 1983 Tennessee conviction for attempted third-degree burglary no longer qualified as a violent felony under the ACCA, but it maintained that petitioner's four other convictions still qualified. Pet. App. 2a-3a. The district court however, concluded that petitioner's Texas robbery and Tennessee burglary convictions were not violent felonies, leaving only petitioner's two Tennessee robbery convictions. *Id.* at 3a. On the belief that only two of petitioner's five robbery and burglary crimes were violent felonies, the court granted petitioner's Section 2255 motion, vacated his ACCA sentence, and resentenced him to 88 months of imprisonment. *Ibid.*

4. a. The court of appeals reversed. Pet. App. 1a-13a.

On appeal, the government contended that petitioner's 1982 Texas robbery conviction qualifies as a conviction for a violent felony under the ACCA.[1] At the

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[1] The government also initially argued that petitioner's 1986 Tennessee burglary conviction qualifies as a violent felony conviction. Pet. App. 3a. After briefing concluded, however, the court of appeals in a different case held that the offense is not a violent felony. *Ibid.* (citing *Cradler* v. *United States*, 891 F.3d 659, 671 (6th Cir. 2018)). The government did not challenge that binding circuit precedent. Meanwhile, petitioner contended in the court of appeals that his two Tennessee robbery convictions do not qualify as violent felonies. *Ibid.* The court of appeals rejected that contention, *id.* at 6a (citing *United States* v. *Southers*, 866 F.3d 364, 367-369 (6th Cir. 2017); *United States* v. *Taylor*, 800 F.3d 701, 718-719 & n.5 (6th Cir. 2015); *United States* v. *Mitchell*, 743 F.3d 1054, 1059-1060 (6th Cir.),

time of petitioner's offense, Texas Penal Code § 29.02 defined robbery as follows:

> (a) A person commits an offense if, in the course of committing theft * * * 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 Ann. § 29.02 (West 1974). The court of appeals determined that Sections 29.02(a)(1) and 29.02(a)(2) delineated distinct crimes, and that petitioner had been convicted of bodily-injury robbery under Section 29.02(a)(1). Pet. App. 7a. But although the indictment specified that petitioner had been charged with robbery involving "intentionally caus[ing] bodily injury," the court concluded that Section 29.02(a)(1) was not itself further divisible into separate crimes corresponding to each mental state. *Ibid.* (brackets in original).

The court of appeals determined, however, that the unitary crime defined by Section 29.02(a)(1) qualifies as a "violent felony" under the ACCA's elements clause. Pet. App. 8a-10a. The court reasoned that "[t]o be convicted of causing bodily injury"—defined as "physical pain, illness, or any impairment of physical condition," Tex. Penal Code Ann. § 1.07(7) (West 1974)—a defendant "must have necessarily used force 'capable of causing physical pain or injury,'" sufficient to satisfy the ACCA's elements clause. Pet. App. 9a (quoting *Stokeling* v. *United States*, 139 S. Ct. 544, 553 (2019)).

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cert. denied, 135 S. Ct. 158 (2014)), and petitioner does not renew it in this Court.

The court of appeals rejected petitioner's contention that Section 29.02(a)(1) nevertheless does not have "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), because the injury it requires can be caused recklessly. Pet. App. 8a-9a. The court explained that, in *United States* v. *Verwiebe*, 874 F.3d 258 (2017), cert. denied, 139 S. Ct. 63 (2018), it had already determined—based in part on this Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016)—that a crime committed with a mens rea of recklessness could qualify as a crime of violence under a provision of the Sentencing Guidelines that is worded similarly to the ACCA's elements clause. Pet. App. 9a. The court also observed that it had since applied *Verwiebe*'s reasoning to the ACCA's elements clause. *Ibid.* (citing *Davis* v. *United States*, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019)).

Judge Stranch filed a concurring opinion. Pet. App. 11a-13a. She noted that, if she were not bound by the prior panel decision in *Verwiebe*, she would have held that an offense that involves reckless conduct cannot qualify as a violent felony. *Ibid.*

b. The court of appeals denied en banc review, over the dissent of four judges. Pet. App. 54a-61a. Judge Kethledge (joined by Judges Moore, Stranch, and White) acknowledged that in *Voisine*, this Court determined that a crime committed recklessly may constitute a misdemeanor crime of domestic violence, defined to include offenses that have as an element the "use * * * of physical force," 18 U.S.C. 921(a)(33)(A)(ii), but would have distinguished the ACCA. Pet. App. 56a. Judge Stranch (joined by Judge Moore) wrote separately to

additionally assert that *Voisine*'s reasoning should not apply to the ACCA. *Id.* at 60a-61a.

DISCUSSION

Petitioner contends (Pet. 14-25) that his prior conviction for robbery resulting in bodily injury under Tex. Penal Code Ann. § 29.02(a)(1) (West 1974) does not qualify as a violent felony under the ACCA, on the theory that an offense that can be committed recklessly does not include 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). Although the court of appeals correctly rejected that contention, the question presented warrants this Court's review, and this case would be an appropriate vehicle in which to consider it.

1. The court of appeals correctly determined that petitioner's robbery resulting in bodily injury—which required that petitioner commit theft and, with intent to obtain or maintain control of the property, "intentionally, knowingly, or recklessly cause[] bodily injury to another," Tex. Penal Code Ann. § 29.02(a)(1) (West 1974)—involved the "use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), and thus qualifies as a violent felony under the ACCA. That determination follows from this Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016). In *Voisine*, the Court held, in the context of 18 U.S.C. 921(a)(33)(A)(ii), that the term "use . . . of physical force" includes reckless conduct. 136 S. Ct. at 2278 (citation omitted). Although *Voisine* had no occasion to decide whether its holding extends to other statutory contexts, *id.* at 2280 n.4, the Sixth Circuit has correctly recognized that "*Voisine*'s analysis applies with equal force" to the elements clauses in the definitions of "crime of violence" under the Sentencing Guidelines

and "violent felony" under the ACCA. *United States* v. *Verwiebe*, 874 F.3d 258, 262 (2017), cert. denied, 139 S. Ct. 63 (2018); see *Davis* v. *United States*, 900 F.3d 733, 736 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019).

This Court explained in *Voisine* that the word "'use'" requires the force to be "volitional" but "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." 136 S. Ct. at 2279. The Court observed that the word "'use'" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Ibid.* Moreover, the Court noted, "nothing in *Leocal v. Ashcroft*," 543 U.S. 1 (2004), which addressed the mens rea requirement for a statutory "crime of violence" definition similar to the "violent felony" definition at issue here, see 18 U.S.C. 16(a), "suggests a different conclusion—i.e., that 'use' marks a dividing line between reckless and knowing conduct." *Voisine*, 136 S. Ct. at 2279. Rather, the Court indicated, the key "distinction [was] between accidents and recklessness." *Ibid.* Thus, under *Voisine*, "[a]s long as a defendant's use of force is not accidental or involuntary, it is 'naturally described as an active employment of force,' regardless of whether it is reckless, knowing, or intentional." *United States* v. *Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (Kavanaugh, J.) (quoting *Voisine*, 136 S. Ct. at 2279), cert. denied, 139 S. Ct. 796 (2019).

The judges who dissented from the denial of rehearing en banc in this case contended that *Voisine*'s logic does not apply to the ACCA. See Pet. App. 56a-61a. They primarily argued that the phrase "against the person of another" in the ACCA renders inapplicable *Voisine*'s

discussion of recklessness. See *id.* at 55a-59a. But as the court of appeals has previously explained, "*Voisine*'s key insight is that the word 'use' refers to 'the act of employing something' and does not require a purposeful or knowing state of mind." *Verwiebe*, 874 F.3d at 262 (citing *Voisine*, 136 S. Ct. at 2278-2279). "That insight does not change if a statute says that the 'use of physical force' must be 'against' a person, property, or for that matter anything else." *Ibid.* (emphasis omitted). Rather, the phrase "against the person of another" in the ACCA merely identifies the object of the use of force.

Indeed, "the provision at issue in *Voisine* still required the defendant to use force against another person—namely, the 'victim.'" *Haight*, 892 F.3d at 1281 (quoting 18 U.S.C. 921(a)(33)(A)(ii)); see *ibid.* ("In the words of the Supreme Court in *Voisine*, the phrase 'misdemeanor crime of domestic violence' is 'defined to include any misdemeanor committed *against a domestic relation* that necessarily involves the 'use . . . of physical force.'") (quoting *Voisine*, 136 S. Ct. at 2276) (emphasis added). And *Voisine* itself took as a given that the object of the recklessness would be another person, as it defined recklessness to require a person "to consciously disregard a substantial risk that the conduct *will cause harm to another*." 136 S. Ct. at 2278 (emphasis added; brackets, citation, and internal quotation marks omitted); see *id.* at 2279 (explaining that "reckless behavior" involves "acts undertaken with awareness of their substantial risk of causing injury," such that any "harm such conduct causes is the result of a deliberate decision to endanger another").

2. Although the court below correctly resolved the question presented, its decision implicates a circuit con-

flict that warrants resolution by this Court. The majority of the courts of appeals to address the issue after *Voisine* have determined that *Voisine*'s logic applies to the ACCA. See *United States* v. *Burris*, 920 F.3d 942, 951 (5th Cir. 2019), petition for cert. pending, No. 19-6186 (filed Oct. 3, 2019); *Davis*, 900 F.3d at 736 (6th Cir.); *United States* v. *Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017); *United States* v. *Pam*, 867 F.3d 1191, 1207-1208 (10th Cir. 2017); *Haight*, 892 F.3d at 1281 (D.C. Cir.).

Meanwhile, the First and Ninth Circuits have concluded otherwise. Although the scope of earlier First Circuit decisions was uncertain, that court has now made clear that its precedent "forecloses the argument that crimes with a mens rea of recklessness may be violent felonies under the [ACCA's] force clause." *United States* v. *Rose*, 896 F.3d 104, 109 (2018). And a panel of the Ninth Circuit recently held in *United States* v. *Orona*, 923 F.3d 1197 (2019), that it was bound to apply pre-*Voisine* precedent holding that reckless crimes cannot constitute ACCA violent felonies, although it noted that "*Voisine* casts serious doubt on the continuing validity of" that precedent. *Id.* at 1202; see *id.* at 1202-1203. Another panel of that court, applying *Orona*, has held that federal second-degree murder is not a "crime of violence" under the elements clause of 18 U.S.C. 924(c) (2012), which is similar to the ACCA's, because second-degree murder can be committed with a mens rea of "extreme" recklessness. *United States* v. *Begay*, 934 F.3d 1033, 1040 (9th Cir. 2019); see *id.* at 1038-1041. The United States has filed a petition for rehearing en banc in *Orona*. Pet. for Reh'g, *Orona*, *supra* (No. 17-17508).

Petitioner contends (Pet. 16-17) that the Fourth Circuit agrees with the First and the Ninth Circuits. But

the Fourth Circuit's position is not clear. In *United States* v. *Middleton*, 883 F.3d 485 (2018), the Fourth Circuit concluded that the South Carolina crime of involuntary manslaughter, which proscribes killing another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. *Id.* at 489 (citation omitted); see *id.* at 493. The court reasoned that the statute had been applied to cover an "illegal sale" that, through an "attenuated * * * chain of causation," had resulted in injury. *Id.* at 492. In a concurrence in part and in the judgment, one judge—joined in relevant part by one of the judges in the majority—wrote that he would have instead concluded that "South Carolina involuntary manslaughter cannot serve as an ACCA predicate" because "the ACCA force clause requires a higher degree of *mens rea* than recklessness." *Id.* at 500 (Floyd, J.). It is not yet clear what precedential effect, if any, the Fourth Circuit will give that two-judge portion of a separate opinion.[2]

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[2] Petitioner relies (Pet. 16) on *United States* v. *Hodge*, 902 F.3d 420 (2018), in which a subsequent panel of the Fourth Circuit noted that the United States had conceded that "Maryland reckless endangerment constitutes a 'violent felony' only under the ACCA's [now-defunct] residual clause," and cited the *Middleton* concurrence for the proposition that "'[t]he ACCA force clause requires a higher degree of *mens rea* than recklessness.'" *Id.* at 427 (quoting *Middleton*, 883 F.3d at 498 (Floyd, J., concurring in part and concurring in the judgment)) (brackets omitted). But although the United States had conceded that Maryland reckless endangerment is not a violent felony under the ACCA, it did not concede in the court of appeals that "offenses that could be committed recklessly could not satisfy the ACCA's force clause," Pet. 16, or that the *Middleton* concurrence's reasoning controlled. Such a concession was unnecessary, as Maryland reckless endangerment likely does not satisfy the

Finally, as petitioner correctly notes (Pet. 19), the Third and Eleventh Circuits have both sua sponte ordered rehearing en banc to address the issue. See *United States* v. *Moss*, 920 F.3d 752, 758 (11th Cir.), reh'g en banc granted and opinion vacated, 928 F.3d 1340 (11th Cir. 2019); Order for Reh'g en banc, *United States* v. *Santiago*, No. 16-4194 (3d Cir. June 8, 2018).

3. The question of whether *Voisine*'s logic applies to the ACCA's elements clause is important and frequently recurring, and it warrants this Court's review. Several circuits are currently considering, or may consider, the issue en banc. See pp. 10-12, *supra*. The court of appeals here declined to do so, adhering to its application of *Voisine* to the ACCA's elements clause. See Pet. App. 54a-61a. Meanwhile, a majority of active judges in the First Circuit appears to agree with that circuit's rejection of *Voisine* in this context. See *Rose*, 896 F.3d at 109-110; *United States* v. *Windley*, 864 F.3d 36, 37-39 (2017) (per curiam). It is therefore highly unlikely that the conflict will resolve itself without this Court's intervention. And although the Court could potentially await further percolation, the interests of judicial economy favor resolution of the issue this Term.

This case presents a suitable vehicle for resolving it. The court of appeals did not discuss the issue at length because of binding circuit precedent, but it was outcome-determinative. The Texas robbery statute covers reckless conduct, and the government relied on a conviction

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ACCA's elements clause regardless of whether other crimes involving a mens rea of recklessness can constitute violent felonies. In particular, Maryland reckless endangerment does not require proof of "contact [that] was not consented to by the victim." *Manokey* v. *Waters*, 390 F.3d 767, 772 (4th Cir. 2004) (citation and internal quotation marks omitted), cert. denied, 544 U.S. 1034 (2005).

under that statute to apply the ACCA to petitioner. See Pet. App. 3a, 10a.

Seven other pending petitions for writs of certiorari raise similar questions. See *Ash* v. *United States*, No. 18-9639 (filed June 10, 2019); *Gomez Gomez* v. *United States*, No. 19-5325 (filed July 19, 2019); *Borden* v. *United States*, No. 19-5410 (filed July 24, 2019); *Bettcher* v. *United States*, No. 19-5652 (filed Aug. 16, 2019); *Lara-Garcia* v. *United States*, No. 19-5763 (filed Aug. 28, 2019); *Combs* v. *United States*, No. 19-5908 (filed Sept. 9, 2019); *Burris* v. *United States*, No. 19-6186 (filed Oct. 3, 2019). Several present less suitable vehicles. *Ash* and *Bettcher* involve the interpretation of a provision of the Sentencing Guidelines. Typically, this Court leaves such issues in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). In both *Gomez Gomez* and *Lara-Garcia*, the question presented did not affect the petitioner's sentence under 8 U.S.C. 1326(b) and would at most be relevant for a future immigration or criminal proceeding. In *Combs*, the defendant has alternatively requested relief under this Court's pending decision in *Shular* v. *United States*, No. 18-6662 (cert. granted June 28, 2019), which raises the possibility that he would be entitled to relief regardless of the disposition of the question presented here. And in *Burris*, the petitioner has combined the argument about the application of *Voisine* to the ACCA with other overlapping arguments, and thus does not cleanly present the *Voisine* issue.

In addition to this petition, one other pending petition, *Borden*, involves the ACCA and appears to offer a

suitable vehicle in which to consider the question presented. This case, however, may be a marginally better vehicle for this Court's review, as the panel and the dissents from the denial of rehearing en banc clearly addressed the ACCA question. See Pet. App. 6a-10a, 55a-61a. The panel in *United States* v. *Borden*, 769 Fed. Appx. 266 (6th Cir. 2019), by contrast, repeatedly misstated the question presented as one involving the "crime of violence" designation under the Sentencing Guidelines. See *id.* at 267-268; but see Appellant's Br. at 3, *Borden*, *supra*, No. 18-5409 (Dec. 27, 2018); Gov't Br. at 2, *Borden*, *supra*, No. 18-5409 (Jan. 28, 2019). The petition here is also limited to the *Voisine* question, while the petition in *Borden* raises an additional due process claim that does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, if the Court grants the petition for a writ of certiorari in *Borden* v. *United States*, No. 19-5410 (filed July 24, 2019), the petition here should be held pending the disposition of that case.

Respectfully submitted.

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