No. 19-373

In the Supreme Court of the United States

JAMES WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a criminal offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Statutes:

Page

Statutes—continued:

Miscellaneous:

Page

Miscellaneous—continued:

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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 (Pet. App. 54a-55a) and opinions dissenting from the denial of rehearing en banc (Pet. App. 55a-61a) are reported at 931 F.3d 467. The district court's order (Pet. App. 14a-53a) is unreported.

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-55a). The petition for a writ of certiorari was filed on September 19, 2019, and granted on November 15, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(e) of Title 18 of the United States Code provides in relevant part:

> (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[.]

STATEMENT

This case presents an important question concerning the interpretation of the Armed Career Criminal Act (ACCA): whether a criminal offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the ACCA's force clause and may thus serve as a predicate for imposing the ACCA's 15-year mandatory minimum sentence.

Petitioner is a 66-year-old man. In 2007, he discovered 13 bullets in a rooming house he was managing and removed them for safekeeping. He was convicted in federal court of possessing ammunition as a felon, in violation of 18 U.S.C. 922(g). He was sentenced to 15 years of imprisonment, the mandatory minimum under the ACCA.

After this Court invalidated the ACCA's residual clause, petitioner sought postconviction relief. It is undisputed that the proper application of the ACCA to petitioner turned on whether one of his previous convictions, which could be committed with a mens rea of recklessness, qualified as a "violent felony" under the ACCA's force clause. The district court held that it did not. Unconstrained by the statutory mandatory minimum, the district court resentenced petitioner to 88 months of imprisonment, and, because of the time petitioner had already served, ordered his immediate release.

The government appealed, and the court of appeals reversed. It held that an offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the ACCA's force clause. Over a dissent by Judge Kethledge (joined by three other judges), the court of appeals subsequently denied petitioner's petition for rehearing en banc.

The court of appeals' holding is inconsistent with the text and context of the ACCA and with this Court's prec-

edents. The ACCA's force clause encompasses only offenses that have as an element the "use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). The requirement that force be used "against" the person of another conveys that the offender must use force with direction and intentionality, and it thus excludes offenses involving the unintentional use of force. As applied here, that understanding accords with Congress's intent in enacting the ACCA: namely, to provide enhanced sentences for offenders whose previous convictions demonstrate that they are likely to commit further violent crimes. Reckless offenses do not fall within the circumscribed category of violent felonies that qualify as predicate offenses under the ACCA.

The decision below, and similar decisions from other circuits, upended what had been a longstanding consensus among the federal courts: that the force clause excludes offenses that can be committed recklessly. The "violent felony" provision, of which the force clause is a part, adds years to the sentences of a large number of criminal defendants. The court of appeals' interpretation of the force clause has improperly expanded the scope of that provision beyond Congress's intent, with significant consequences for federal criminal sentencing. This Court should reject the court of appeals' interpretation and reverse its judgment.

A. Background

1. At common law, crimes were generally understood to require either specific intent or general intent. See *United States* v. *Bailey*, 444 U.S. 394, 403 (1980). Between 1962 and 1985, the American Law Institute published and revised the Model Penal Code, which took a new approach to mens rea with four levels of criminal culpability: purpose (loosely corresponding to specific intent), knowledge

(loosely corresponding to general intent), recklessness, and negligence. See *ibid.*

Purpose, the highest level of culpability, exists when the actor has as "his conscious object" to cause a particular result. Model Penal Code § 2.02(2)(a)(i) (1985). Knowledge, the next highest level, exists when the actor is "practically certain that his conduct will cause such a result," regardless of whether he affirmatively desires that result. *Id.* § 2.02(2)(b)(ii). For most crimes, there is a "limited distinction" between purpose and knowledge. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 445 (1978).

Purpose and knowledge, however, stand apart from recklessness and negligence. Recklessness exists when the actor "consciously disregards a substantial and unjustifiable risk" that a result will follow from his conduct, and the disregard involves a "gross deviation" from "the standard of conduct that a law-abiding person would observe." Model Penal Code § 2.02(2)(c). A reckless actor "does not desire harmful consequences" but instead "takes [a] risk" without "car[ing] about [them]." *Black's Law Dictionary* 1462 (10th ed. 2014); see, *e.g.*, Tex. Penal Code Ann. § 6.03(c). Recklessness requires only "consciousness of something far less than certainty or even probability." Wayne R. LaFave, *Substantive Criminal Law* § 5.4(f), at 507 (3d ed. 2017). Similarly, criminal negligence exists where the actor "should be aware of a substantial and unjustifiable risk" but is not, and the failure to perceive the risk involves a "gross deviation" from "the standard of care that a reasonable person would observe." Model Penal Code § 2.02(2)(d).

2. Federal law prohibits various persons from possessing firearms or ammunition, including a person previously convicted of a felony. See 18 U.S.C. 922(g). Standing alone, such a conviction carries a maximum sentence

of 10 years of imprisonment. See 18 U.S.C. 924(a)(2). The ACCA, however, "impos[es] enhanced punishment on armed career criminals" by requiring greater sentences for certain firearms-related offenses committed by individuals who have previously committed a certain number of predicate offenses. *Quarles* v. *United States*, 139 S. Ct. 1872, 1879 (2019).

As originally enacted, the ACCA applied to offenders who "receive[d], possesse[d], or transport[ed]" a firearm in commerce and who had three previous convictions "for robbery or burglary, or both." 18 U.S.C. App. 1202(a) (Supp. II 1984). It defined "robbery" as "any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury"; it defined "burglary" as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. App. 1202(c)(8)-(9) (Supp. II 1984). When Congress originally enacted the ACCA, it viewed robbery as a crime "involv[ing] physical violence or the threat thereof, being deliberately directed against innocent individuals." H.R. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984) (citation omitted).

In 1986, Congress amended the ACCA to its current form. Congress replaced the requirement that an offender "receive[], possess[], or transport[]" a firearm with a cross-reference to Section 922(g). See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(4), 100 Stat. 458-459. Later the same year, it expanded the qualifying predicate offenses by replacing the two defined offenses with broader categories of offenses. See Career Criminals Amendment Act of 1986, Pub. L. No. 99-570,

Tit. I, Subtit. I, § 1402(a), 100 Stat. 3207-39. The ACCA now prescribes a 15-year minimum sentence for a person who is convicted of an offense under Section 922(g), and who has previously been convicted of three or more "serious drug offense[s]" or "violent felon[ies]." 18 U.S.C. 924(e)(1).

The ACCA defines a "violent felony" (the category relevant here) in three different ways. *First*, a "violent felony" includes any crime punishable by more than one year in prison that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). This prong of the definition is commonly known as the "force" (or "elements") clause. *Second*, a "violent felony" also includes any crime that is punishable by more than one year in prison that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii). This prong is commonly known as the "enumerated offenses" clause. As drafted, the ACCA also contains a third clause, which defined a "violent felony" to include any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Ibid.* This prong is commonly known as the "residual" clause.

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), this Court invalidated the residual clause on the ground that it was unconstitutionally vague. As a result, any crime that is not burglary, arson, or extortion and does not involve use of explosives must now satisfy the ACCA's force clause in order to qualify as a violent felony. This Court has held that the rule of *Johnson* applies retroactively. See *Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016). Accordingly, defendants sentenced under the ACCA before *Johnson* may challenge their sentences on the ground that their predicate offenses no longer qualify under the now-narrowed definition of "violent felony."

In determining whether a conviction qualifies as a "violent felony" under the ACCA, this Court uses the familiar "categorical approach"—examining the elements of the offense and not the particular facts underlying the defendant's previous conviction. See *Begay* v. *United States*, 553 U.S. 137, 141 (2008). The Court reviews the minimum conduct necessary for a conviction for the offense; only if that minimum conduct satisfies one of the ACCA clauses does the offense qualify as a predicate offense. See *ibid.* In applying the categorical approach, the Court first asks if the statute is divisible because it lists alternative elements. See *Descamps* v. *United States*, 570 U.S. 254, 263-264 (2013). If it is, under the so-called "modified categorical approach," the Court looks to a narrow set of documents to determine which alternative element formed the basis of the defendant's conviction; it then assesses the minimum conduct necessary for a conviction with that element. See *ibid.*; *Shepard* v. *United States*, 544 U.S. 13, 25-26 (2005).

3. a. In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court held that 18 U.S.C. 16(a), which defines "crime of violence" for purposes of many federal statutes, does not encompass negligent or accidental conduct. See 543 U.S. at 6-7, 9. Section 16(a) defines a "crime of violence" to include an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Other than including offenses "against the * * * property of another," that provision is identical to the ACCA's force clause. See 18 U.S.C. 924(e)(2)(B)(i). Arguing that negligent or accidental conduct sufficed in *Leocal*, the government contended that "the 'use' of force does not incorporate any *mens rea* component." 543 U.S. at 9.

The Court declined to resolve whether "the word 'use' alone supplies a *mens rea* element," explaining that, in the

context of the provision at issue, a "focus on that word is too narrow." *Leocal*, 543 U.S. at 9. Instead, the "key phrase" in the provision was the limiting phrase "*against the person or property of another*." *Ibid.* The Court reasoned that "use" requires "active employment"; while it was theoretically possible to "actively employ *something* in an accidental manner," it was "much less natural" to say that "a person actively employs *physical force against another person* by accident." *Ibid.* (second emphasis added). For that reason, the Court concluded that the provision required a "higher degree of intent than negligent or merely accidental conduct" and encompassed only a narrower "category of violent, active crimes" for which Congress intended enhanced punishment. *Id.* at 9, 11.

b. In *Begay*, *supra*, this Court held, before its decision in *Johnson*, that the ACCA's residual clause did not encompass the New Mexico offense of driving under the influence of alcohol. See 553 U.S. at 145-146. The Court reasoned that Congress intended to apply the ACCA's 15-year mandatory minimum sentence only to "purposeful," "violent," and "aggressive" prior offenses—in other words, the type of conduct that renders an offender, "later possessing a gun," more likely to "use that gun *deliberately* to harm a victim." *Id.* at 145 (emphasis added).

Acknowledging that "[d]runk driving is an extremely dangerous crime," the Court nevertheless concluded that it was not sufficiently "purposeful" to fall within the ambit of the ACCA. 553 U.S. at 141, 145. Citing *Leocal*, the Court rejected the government's argument that the "inherent recklessness" of drunk driving rendered it sufficiently similar to the enumerated offenses that constituted "violent felonies." *Id.* at 145. Although an offender might display a "degree of callousness toward risk" by driving drunk, the Court reasoned that drunk driving does not demonstrate an "increased likelihood" that "the

offender is the kind of person who might deliberately point [a] gun and pull the trigger." *Id.* at 146. In the Court's view, Congress did not "intend[] a 15-year mandatory prison term where that increased likelihood does not exist." *Ibid.*; see *Sykes* v. *United States*, 564 U.S. 1, 12-13 (2011) (reiterating that offenses "akin to strict-liability, negligence, and recklessness crimes" do not qualify under the ACCA's residual clause).

Following this Court's decisions in *Leocal* and *Begay*, all but one of the courts of appeals weighed in on the question presented here. Interpreting the plain language of the statute and applying the reasoning of *Leocal* and *Begay*, those courts uniformly held that a criminal offense that can be committed with a mens rea of recklessness does not qualify as a "violent felony" under the ACCA's force clause (or materially identical provisions). See *United States* v. *Moreno*, 821 F.3d 223, 228 (2d Cir. 2016); *Popal* v. *Gonzales*, 416 F.3d 249, 254 (3d Cir. 2005); *Garcia* v. *Gonzales*, 455 F.3d 465, 469 (4th Cir. 2006); *United States* v. *Vargas-Duran*, 356 F.3d 598, 603 (5th Cir.) (en banc), cert. denied, 543 U.S. 995 (2004); *United States* v. *McMurray*, 653 F.3d 367, 374-375 (6th Cir. 2011); *United States* v. *Rutherford*, 54 F.3d 370, 374 (7th Cir.), cert. denied, 516 U.S. 924 (1995); *United States* v. *Boose*, 739 F.3d 1185, 1187 (8th Cir. 2014); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *United States* v. *Zuniga-Soto*, 527 F.3d 1110, 1124-1125 (10th Cir. 2008); *United States* v. *Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010).

4. Recently, in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), this Court interpreted a substantially different statutory definition of "misdemeanor crime of domestic violence." That definition identified the offenses that trigger Section 922(g)(9), which prohibits domestic abusers whose prior conduct did not rise to the level of a felony

from possessing firearms. See *id.* at 2276. While the ACCA's force clause limits "violent felonies" to offenses that require the use of physical force "against the person of another," the text of the provision at issue in *Voisine*, enacted a decade later, contains no such restriction: it encompasses misdemeanors that have as an element the simple "use or attempted use of physical force" by a person with a specified relationship with the victim. 18 U.S.C. 921(a)(33)(A)(ii).

In *Voisine*, the Court held that offenses that could be committed with a mens rea of recklessness satisfied that broader definition. See 136 S. Ct. at 2276. In so holding, the Court focused on the word "use," reasoning that a person can "use" force without the "purpose or practical certainty that it will cause harm." *Id.* at 2279. The court explained 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.*

Significantly, the Court acknowledged that its decision "d[id] not resolve" the question of whether Section 16 (the provision at issue in *Leocal* with a force clause materially identical to the ACCA's) encompassed offenses that could be committed recklessly. 136 S. Ct. at 2280 n.4. The Court observed that courts have "sometimes given [the *Voisine* and *Leocal*] statutory definitions divergent readings in light of differences in their contexts and purposes," and it "d[id] not foreclose that possibility" as to the "required mental states" for the statutes' predicate offenses. *Ibid.*

B. Facts And Procedural History

1. In 2007, petitioner was helping to manage a boarding house in Memphis, Tennessee. According to the unrebutted testimony at trial, while cleaning a room, petitioner discovered 13 bullets left behind by an occupant and

placed them in his room for safekeeping. Several weeks later, officers with the Memphis Police Department responded to a complaint of drug sales at the house. Petitioner consented to a search of the premises. The officers seized the 13 bullets, along with 0.3 grams of crack cocaine, from petitioner's room. Petitioner explained that he did not have a firearm, and no firearm was ever found. Pet. App. 2a, 11a, 15a-16a, 26a-27a.

2. A grand jury in the Western District of Tennessee indicted petitioner on one count of possessing ammunition as a felon, in violation of 18 U.S.C. 922(g). He was convicted after a jury trial. Pet. App. 2a, 15a.

At sentencing, the government sought an enhanced sentence under the ACCA. The district court found that petitioner was subject to the ACCA on the basis of five prior felony convictions he incurred between 1974 and 1994: two Tennessee convictions for robbery, two Tennessee convictions for burglary or attempted burglary, and a Texas conviction for robbery. Pet. App. 2a.

The district court sentenced petitioner to the ACCA's mandatory minimum of 15 years of imprisonment. The court imposed the minimum sentence in light of petitioner's advanced age; the time elapsed since his previous convictions; and the critical role he played in supporting his mother, his wife, and his disabled stepson. The court later explained that the mandatory minimum sentence was "too high" and that it had imposed it only because it "had to" under the ACCA. Pet. App. 2a, 16a; 6/28/17 Resentencing Tr. 7; 7/14/11 Sentencing Tr. 28, 57-58.

On direct appeal, petitioner challenged his 15-year sentence for the possession of 13 bullets as "grossly disproportionate" and invalid under the Eighth Amendment. The court of appeals affirmed. See 506 Fed. Appx. 482, 489 (6th Cir. 2012). In so doing, however, the court of appeals stated that, "[l]ike the district court," it could not

"say that [it] would have imposed a mandatory 180-month sentence if left to [its] own devices." *Id.* at 490.

3. Petitioner then filed a motion for postconviction relief under 28 U.S.C. 2255. Following this Court's decision in *Johnson*, he amended his motion to include a claim that he was no longer subject to the ACCA. It is undisputed that, of petitioner's five prior felony convictions, the two Tennessee convictions for burglary and attempted burglary no longer qualify as "violent felonies." See Pet. App. 2a-3a. As is relevant here, petitioner argued in his amended motion that his Texas conviction for robbery also does not qualify as a "violent felony" under the ACCA's force clause.

Texas law defines robbery as a theft during which, with intent to obtain or maintain control of property, a person "intentionally, knowingly, or recklessly causes bodily injury to another," Tex. Penal Code Ann. § 29.02(a)(1), or "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death," *id.* § 29.02(a)(2). Petitioner was convicted under the first prong of the Texas robbery definition; petitioner and the government agreed that the first prong was not divisible. See Pet. App. 7a.

Accordingly, the offense of which petitioner was convicted could be committed where a defendant "recklessly cause[d] bodily injury to another." In that respect, the Texas offense of robbery diverges from common-law robbery, which required the offender to "take" the property by exerting "sufficient force * * * to overcome the resistance encountered." *Stokeling* v. *United States*, 139 S. Ct. 544, 550 (2019) (internal quotation marks and citation omitted).

The district court granted petitioner's motion for postconviction relief, holding that the offense did not qualify as a "violent felony" under the ACCA. Pet. App. 14a-53a.

The district court observed that, under then-existing Sixth Circuit precedent, offenses that could be committed recklessly could not be "violent felonies" under the force clause. *Id.* at 47a (citing *McMurray*, 653 F.3d at 375). The district court rejected the government's suggestion that this Court's decision in *Voisine* undermined that precedent. *Id.* at 48a n.13.

Unconstrained by the 15-year mandatory minimum, the district court subsequently resentenced petitioner to 88 months of imprisonment; because of the time petitioner had already served, the court ordered his immediate release. In imposing that sentence, the district court emphasized petitioner's perfect disciplinary record and personal progress since his conviction, as well as his compelling family circumstances. The probation office had agreed that a lower sentence would be appropriate in light of petitioner's conduct since his conviction. At the conclusion of the resentencing hearing, the court observed that petitioner's previous sentence had not been "just." Pet. App. 2a; 6/28/17 Resentencing Tr. 67-69, 84-85, 96, 101.

4. Following petitioner's release, the government appealed from the district court's judgments granting petitioner's motion for postconviction relief and reducing his sentence.

The court of appeals reversed and remanded. Pet. App. 1a-10a. As is relevant here, the court held that a criminal offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the ACCA's force clause. *Id.* at 7a-9a. It explained that it was bound by its decision in *Davis* v. *United States*, 900 F.3d 733 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019), which had declined to follow earlier Sixth Circuit precedent in light of *Voisine* and held that the force clause encompassed offenses that could be committed recklessly. Pet. App. 9a.

Judge Stranch concurred. Pet. App. 11a-13a. She wrote separately to explain that she was concurring "for one reason only": the result was "required by [Sixth Circuit] precedent." *Id.* at 11a. She observed that the court's decision, which was "sending [petitioner] back to prison" because the circuit's case law had changed, was both "unjust" and "unsound." *Ibid.*

Judge Stranch contended that the "distinction in phrasing" between the text at issue in *Voisine* and in this case is "significant." Pet. App. 12a. She reasoned that "against the person of another" "describes the particular type of 'use of physical force' necessary to satisfy the ACCA." *Ibid.* (citation and alteration omitted). That type of force "requires not merely a volitional application of force, but a volitional application 'against the person of another.'" *Ibid.* (citation omitted). Judge Stranch explained that a reckless actor does not meet this requirement: while his "employment of force is volitional," "the force's application 'against the person of another' is not." *Ibid.* (citation omitted). She noted that at least two other circuits had reached the same conclusion. *Id.* at 13a (citations omitted). Bound by circuit precedent, Judge Stranch "reluctantly concur[red]" in the court's opinion. *Ibid.*

5. Petitioner filed a petition for rehearing en banc. Over the dissent of four judges, the court of appeals denied the petition. Pet. App. 54a-55a.

a. Judge Kethledge, joined by Judges Moore, Stranch, and White, dissented from the denial of rehearing en banc. Pet. App. 55a-59a. He emphasized that, whereas this Court in *Voisine* "expressly limited its inquiry" to the meaning of the word "use," the provision at issue here requires the use of force "against the person of another." *Id.* at 56a. "That difference in text," he explained, "yields a difference in meaning." *Ibid.*

Judge Kethledge reasoned that "volitional application [of force] against the person of another" requires "knowledge or intent that the force apply to another person." Pet. App. 57a (internal quotation marks and citation omitted). Such an interpretation, he explained, was consistent with this Court's recognition in *Leocal* that the restrictive phrase "against the person or property of another" was the "critical aspect" of the language at issue. *Id.* at 59a (emphasis omitted). Judge Kethledge criticized the Sixth Circuit's post-*Leocal* change in position—as well as that of other circuits—as "rough-cut textualism." *Id.* at 57a-58a.

Judge Kethledge noted that the provision at issue is "one of the more important definitions in all of federal criminal law." Pet. App. 59a. He added that the question whether an offense that can be committed recklessly constitutes a valid predicate offense under the ACCA's force clause "recurs frequently and typically doubles a defendant's sentence." *Id.* at 58a. Judge Kethledge concluded that, "by our inaction[,] we send back to prison, quite wrongly in my view, a 65-year-old man whose crime was possession of a dozen bullets and who had already served the sentence (88 months) that the district court thought was sufficient." *Id.* at 59a.

b. Judge Stranch, joined by Judge Moore, also dissented. Pet. App. 60a-61a. She wrote separately to note that "[t]he Supreme Court has explicitly left open the possibility that the term 'use of physical force' should be given 'divergent readings' in [the statute at issue in *Voisine*] and the ACCA 'in light of differences in [the statutes'] contexts and purposes.'" *Id.* at 60a (quoting *Voisine*, 136 S. Ct. at 2280 n.4). According to Judge Stranch, "the statutes' divergent 'contexts and purposes' provide a substantial basis to conclude that the ACCA's require-

ment of the use of physical force *against the person of another* is more stringent than [the *Voisine* statute's] requirement of the use of physical force *period*." *Id.* at 61a.

SUMMARY OF ARGUMENT

The court of appeals incorrectly held that a criminal offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the ACCA. Its judgment should be reversed.

A. Under the ACCA's force clause, a "violent felony" is a crime punishable by imprisonment of more than one year that has as an element the "use * * * of physical force against the person of another." As this Court has recognized in interpreting a materially identical provision in another statute, the critical phrase in the force clause is "against the person of another." That phrase describes the subset of ways to "use force" that satisfy the clause: namely, to use force in a manner that is aimed at another person. When a person uses force recklessly, however, he is indifferent as to whether it falls on another person or on no one at all. Such an offense does not qualify as a "violent felony" under the force clause.

Ordinary usage confirms the foregoing understanding. In everyday English, one does not describe a reckless action that results in harm to another person as an action being taken against that person. For example, a police officer who recklessly throws a can of tear gas to a colleague near a crowd of peaceful protesters has not used the tear gas against the crowd if the can falls and discharges. So too here, a thief who recklessly causes bodily injury to another person is not targeting the person with the use of force.

The statutory context and structure reinforce the plain-language interpretation. Under the ACCA, the ultimate inquiry is whether a particular predicate offense

constitutes a "violent felony." In interpreting the now-invalidated residual clause, this Court explained that violent felonies are crimes that involve the intentional use of violence against another. Crimes that can be committed recklessly (such as reckless driving) do not comfortably fit in that category.

By defining violent felonies as it did, Congress sought to identify the type of offender who might, in the future, deliberately point a gun at another person. While the commission of a crime of recklessness reflects a callousness toward risk, it does not suggest a likelihood of future violent behavior of the sort Congress was targeting. This Court has explained that Congress did not intend to impose a harsh 15-year mandatory minimum sentence where such a risk is absent.

In light of the statutory text and context, as well as this Court's precedents, the correct analysis here is straightforward. Indeed, until recently, the courts of appeals had uniformly interpreted the language at issue here to exclude offenses that can be committed recklessly from the range of eligible predicate offenses.

B. The court of appeals thought that the Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), dispositively altered the foregoing analysis. That was mistaken. In *Voisine*, the Court interpreted the phrase "misdemeanor crime of domestic violence" in 18 U.S.C. 922(g)(9), which is defined to include offenses that merely require the "use of physical force." The Court held that offenses that could be committed recklessly satisfied that definition. But it made clear that it was not resolving the question presented here, recognizing that courts (including the Court itself) had treated that definition differently.

In its text and context, the provision at issue in *Voisine* differs in significant respects from the ACCA's force

clause. Most importantly, that provision lacks the critical restriction that force be used "against the person of another." In *Voisine*, the Court explained that the word "use" required volitional action, but that it was "indifferent" as to the actor's mental state concerning the action's consequence. That indifference disappears with the addition of the limiting phrase "against the person of another," which requires the use of force to be directed in a particular way. A person who uses force but is indifferent as to whether the force falls onto another person has used force, but not against another.

What is more, the contexts of the two provisions are worlds apart. The provision at issue in *Voisine*, Section 922(g)(9), operates as a prophylactic provision in the unique context of domestic violence. Enacted long after the ACCA, Section 922(g)(9) does not seek to identify particularly blameworthy offenders; rather, it extends the prohibition on possessing firearms to domestic abusers whose prior conduct did not rise to the level of a felony. In that way, it disables *any* domestic abuser from accessing a gun that could make domestic violence lethal. And because the predicate domestic-violence offenses that Congress sought to capture in Section 922(g)(9) could be committed recklessly in more than two-thirds of the States, excluding reckless domestic-violence offenses would have rendered Section 922(g)(9) inoperative in much of the Nation. The Court recognized that unique context when it gave the definition of "misdemeanor crime of domestic violence" an expansive interpretation in *Voisine*. But none of that context is relevant to the ACCA.

Properly understood, the Court's decision in *Voisine* has no bearing on this case. The court of appeals overread *Voisine* when it abandoned its precedent excluding offenses that can be committed recklessly from the scope of the ACCA's force clause.

C. Including reckless offenses would distort the meaning of "violent felony" by bringing garden-variety offenses into the ACCA's harsh regime. In particular, various reckless driving offenses would become "violent felonies" under the ACCA (and, presumably, "crimes of violence" for purposes of other criminal and immigration statutes). This Court has made clear that the ACCA did not seek to capture those types of offenses. And including those offenses would render meaningless another provision that separately delineates reckless driving offenses from the offenses at issue here. It would be similarly incongruous to treat petitioner's conviction for Texas robbery as a "violent felony," because the Texas robbery statute, unlike traditional robbery statutes, permits a conviction for what is effectively reckless shoplifting. And a host of similar offenses would be swept within the scope of the ACCA as well.

D. At best, the ACCA is ambiguous as to whether offenses that can be committed recklessly can qualify as valid predicate offenses. Given the preexisting consensus among the circuits that such offenses are excluded and this Court's decisions before *Voisine*, it certainly cannot be said that the ACCA clearly encompasses reckless offenses. Defendants have not been on notice that the commission of such offenses would expose them to the ACCA's 15-year mandatory minimum sentence. Under those circumstances, the rule of lenity demands that the Court adopt the narrower interpretation. In all events, that interpretation is plainly the better one. The court of appeals' judgment should therefore be reversed.

ARGUMENT

A CRIMINAL OFFENSE THAT CAN BE COMMITTED WITH A MENS REA OF RECKLESSNESS DOES NOT QUALIFY AS A 'VIOLENT FELONY' UNDER THE ARMED CAREER CRIMINAL ACT

A. Under The Plain Meaning Of The ACCA's Force Clause, A Predicate Offense That Can Be Committed Recklessly Does Not Qualify As A 'Violent Felony'

The ACCA's force clause defines a "violent felony" as a crime, punishable by imprisonment for more than one year, that "has 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). As this Court has previously recognized in the context of a materially identical provision, the key language in that clause is "against the person of another." *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004). Reading that clause to reach reckless offenses, as the court of appeals did, fails to give effect to the clause's plain meaning and structure.

1. The ACCA's Force Clause Requires Force Targeted At Another, And Reckless Offenses Do Not Satisfy That Requirement

As always on questions of statutory interpretation, the Court begins with the language of the statute, considered "in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 8-9. The ACCA's force clause defines as a "violent felony" any felony that "has 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).

The relevant language, then, is "the use * * * of physical force against the person of another." When used as a noun, "use" means the "act of employing" something. See, *e.g.*, *Webster's New International Dictionary* 2806 (2d ed. 1954) ("[a]ct of employing anything"); *Random*

House Dictionary 2097 (2d ed. 1987) ("act of employing, using, or putting into service"); *Black's Law Dictionary* 1541 (6th ed. 1990) ("[a]ct of employing," "application"); accord *Voisine* v. *United States*, 136 S. Ct. 2272, 2278 (2016).

As a matter of grammar, "against the person of another" is an adjectival prepositional phrase, used restrictively to modify (and limit) the phrase "use * * * of physical force." Margaret Shertzer, *The Elements of Grammar* 7 (1986). Put another way, the phrase describes the type of "use * * * of physical force" that constitutes the required offense element: namely, "the use * * * of physical force against the person of another." The phrase thus supplies "words of limitation designed to restrict" the provision's otherwise expansive scope. *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 828 n.3, 831 (1983).

In the phrase "against the person of another," in turn, the preposition "against" introduces the target of the preceding action ("the use * * * of physical force"). See, *e.g.*, *Webster's New International Dictionary* 46 (2d ed. 1954) (defining "against" as "[i]n opposition to"; "counter to"; "adverse to"); *Random House Dictionary* 36 (2d ed. 1987) (defining "against" as "[i]n opposition to; contrary to; adverse or hostile to"; "in resistance to or defense from"); *Black's Law Dictionary* 61 (6th ed. 1990) (defining "against" as "[a]dverse to; contrary"; "in conflict with"); see also, *e.g.*, *District of Columbia* v. *Heller*, 554 U.S. 570, 586 (2008) (explaining that "the preposition 'against'" introduces the "target" of the action). Accordingly, in this context, the phrase "the use * * * of physical force against the person of another" clarifies that only a certain kind of use of physical force suffices: one that is directed or aimed at another person.

The distinction between an action that is targeted at another person, on the one hand, and an action that involves a substantial risk of harm to another person, on the other, maps onto the broader distinction between purposeful or knowing conduct, on the one hand, and reckless or negligent conduct, on the other. An actor who does not know that harm to another person will occur because he "consciously disregards" a substantial risk of harm has acted recklessly. Model Penal Code § 2.02(2)(c) (1985); see p. 5, *supra*. But he has not targeted his action at the other person.

In that regard, an actor who "consciously disregards" a substantial risk of harm is indistinguishable from an actor who, in a "gross deviation" from the reasonable standard of care, should be but is not aware of that risk (and thus has acted negligently). Model Penal Code § 2.02(2)(d). While the reckless actor's deviation from norms may be greater, that is a difference in degree and not in kind. Because neither actor's conduct is focused on or directed at another person, neither actor can be said to have acted *against* that person.

The ordinary usage of the word "against" confirms that understanding. Consider a police officer who intentionally sprays protesters with pepper spray in order to disperse them. As a matter of everyday speech, that officer unquestionably has used pepper spray against the protesters. But now consider an officer who recklessly throws a can of tear gas to a colleague near a crowd of peaceful protesters. If the can falls to the ground and discharges, the effect on the protesters is identical, but it would be unnatural to say the officer has used tear gas against the protesters.

So too when the thing used is physical force. A person who fires a gun at another person has unquestionably

used physical force against him, but a person who recklessly tosses his gun into the air, causing it to discharge and injure another person, has not. The plain language of the ACCA's force clause makes clear that offenses that can be committed recklessly do not qualify as predicate offenses.

2. This Court's Decision In Leocal *Supports The Conclusion That Reckless Offenses Do Not Qualify As 'Violent Felonies'*

This Court's decision in *Leocal*, *supra*, confirms the foregoing analysis. There, the Court considered whether the Florida law offense of driving under the influence and causing serious bodily injury, a crime that did not require a mental state for the use of force against another person, qualified as a crime of violence under 18 U.S.C. 16(a). That provision, which covers "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," is materially identical to the provision at issue here (with the exception that the property of another, as well as his person, can be the target of the use of the force).

In interpreting that provision, the Court took note of the government's argument that "a use of force may be negligent or even inadvertent." 543 U.S. at 9. But it deemed a focus on the word "use" "too narrow" in the context of Section 16(a). *Ibid.* Instead, the Court explained that "[w]hether or not the word 'use' alone supplies a *mens rea* element," the "key phrase" in the provision was the "use * * * of physical force *against the person or property of another*." *Ibid.* The Court reasoned that, while a person "may, in theory, actively employ *something* in an accidental manner," it is "much less natural to say that a person actively employs *physical force against another person* by accident." *Ibid.* (second emphasis added).

For example, a person would use physical force against another "when pushing him," but "we would not ordinarily say a person uses physical force against another by stumbling and falling into him." *Ibid.* (internal quotation marks, ellipsis, and alteration omitted).

The Court emphasized that the "ultimate[]" question was "the meaning of the term 'crime of violence.'" 543 U.S. at 11. In the Court's view, the "ordinary meaning of th[at] term," as well as the provision's "emphasis on the use of physical force against another person," "suggests a category of violent, active crimes." *Ibid.* Interpreting the force clause to encompass negligent or accidental conduct would "blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Ibid.*

To be sure, the Court held only that the use of physical force against the person of another required a "higher degree of intent than negligent or merely accidental conduct"; the Court made clear that it was not resolving whether reckless offenses would satisfy the statute. 543 U.S. at 9, 13. But the Court's reasoning strongly suggests that they would not. As an initial matter, the Court emphasized that, while the word "use" alone did not resolve the question of the requisite mens rea, the phrase introduced by "against" was critical to the analysis. See *id.* at 9. And as explained above, that is the language that requires an actor to target his use of force in a particular way and that thereby eliminates uses of force where the actor is indifferent to the consequences. See pp. 21-24.

What is more, much of the Court's logic in *Leocal* applies equally in the context of recklessness as it does in the context of negligence or accident. See 543 U.S. at 9. A person does not "use physical force *against another person*" when he stumbles into that person, whether that

stumble is due to mere negligence or instead to recklessness (because he is daydreaming, reading e-mails on his phone, or riding an electric scooter for the first time). See *ibid.* And a crime of recklessness, like a crime of negligence, does not fall within the "category of violent, active crimes" that the phrase "crime of violence" suggests. *Id.* at 11. Indeed, interpreting the relevant statutory language to encompass reckless offenses would reach reckless driving offenses that are closely comparable to driving under the influence—the offense at issue in *Leocal*. See pp. 38-40, *infra*.

3. The ACCA's Context And Structure Also Support The Conclusion That Reckless Offenses Do Not Qualify As 'Violent Felonies'

Other statutory cues reinforce the plain-language interpretation of the ACCA's force clause.

a. In interpreting the ACCA, this Court has recognized that "the context of a statutory definition of 'violent felony'" is critical to the analysis. *Johnson* v. *United States*, 559 U.S. 133, 140 (2010) (emphasis omitted); see *Leocal*, 543 U.S. at 11. The phrase "violent felony" itself "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Johnson*, 559 U.S. at 141 (quoting *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.)).

As then-Judge Alito explained in construing the provision at issue in *Leocal*, "[t]he quintessential violent crimes—murder, assault, battery, rape, etc.—involve the intentional use of actual or threatened force against another's person." *Oyebanji* v. *Gonzales*, 418 F.3d 260, 264 (3d Cir. 2005). Crimes that, although "involving a substantial degree of moral culpability, * * * require[] only recklessness" do not fall within the "ordinary meaning of

the term 'violent' crime." *Ibid.* So too here, a crime committed recklessly is not the type of "violent, active crime[]" that constitutes a "violent felony." *Leocal*, 543 U.S. at 11. As discussed below, interpreting the force clause to encompass reckless offenses would sweep in myriad crimes that one would not naturally describe as "violent felonies." See pp. 38-41, *infra*.

b. The ACCA's purpose points in the same direction. When it applies, the ACCA converts what would be a 10-year *maximum* sentence into a mandatory *minimum* sentence of 15 years. See 18 U.S.C. 924(a)(2). By sharply enhancing the applicable sentence based on the commission of multiple prior violent felonies, the ACCA "focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun." *Begay* v. *United States*, 553 U.S. 137, 146 (2008); see *Taylor* v. *United States*, 495 U.S. 575, 587-588 (1990). For that reason, the Court has "hesitated * * * to apply the [ACCA] to crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" *United States* v. *Castleman*, 572 U.S. 157, 167 (2014) (internal quotation marks and citation omitted).

As this Court previously recognized, the mens rea of a predicate offense is closely linked to the ACCA's goal of identifying the worst of the worst. A "prior record of violent and aggressive crimes committed intentionally" is naturally "associated with a likelihood of future violent, aggressive, and purposeful 'armed career criminal' behavior." *Begay*, 553 U.S. at 148. And there is "no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist." *Id.* at 146. An offender whose prior conduct reveals a "degree of callousness toward risk" but who has no pat-

tern of "intentional or purposeful conduct" does not qualify as the "career criminal" identified by the ACCA's title. *Ibid.*

c. The ACCA's structure provides additional confirmation. In its most recent enacted form, the ACCA contained the force clause, the enumerated offenses clause, and a catch-all residual clause. See 18 U.S.C. 924(e). The Court ultimately invalidated the residual clause as unconstitutionally vague. See *Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015). But before it did so, it held that a drunk-driving offense did not qualify as a "violent felony" under that clause. *Begay*, 553 U.S. at 148.

In so holding, the Court emphasized that drunk driving "need not be purposeful or deliberate"—it is "a crime of negligence or recklessness, rather than violence or aggression." *Begay*, 553 U.S. at 145-146 (citation omitted). The Court indicated that, even if drunk driving were committed recklessly, it would be excluded, because only "purposeful" crimes fall within the residual clause. See *id.* at 146. It would be "strange" to interpret neighboring provisions to have different intent requirements. See, *e.g.*, *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754, 765 (2011). And it would be stranger still to ascribe to Congress the intent to impose a lower required mens rea when defining a "violent felony" under the force clause than under the "broad" residual clause. See *James* v. *United States*, 550 U.S. 192, 199-200 (2007). For that reason, too, the force clause does not reach reckless offenses.

* * * * *

If all of this seems easy, that's because it is. Until recently, the courts of appeals had uniformly held that an offense that can be committed with a mens rea of recklessness does not qualify as a predicate offense under the ACCA (or materially identical provisions). See *United*

States v. *Moreno*, 821 F.3d 223, 228 (2d Cir. 2016); *Popal* v. *Gonzales*, 416 F.3d 249, 254 (3d Cir. 2005); *Garcia* v. *Gonzales*, 455 F.3d 465, 469 (4th Cir. 2006); *United States* v. *Vargas-Duran*, 356 F.3d 598, 603 (5th Cir.) (en banc), cert. denied, 543 U.S. 995 (2004); *United States* v. *McMurray*, 653 F.3d 367, 374-375 (6th Cir. 2011); *United States* v. *Rutherford*, 54 F.3d 370, 374 (7th Cir.), cert. denied, 516 U.S. 924 (1995); *United States* v. *Boose*, 739 F.3d 1185, 1187 (8th Cir. 2014); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *United States* v. *Zuniga-Soto*, 527 F.3d 1110, 1124-1125 (10th Cir. 2008); *United States* v. *Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010); see also *Bennett* v. *United States*, 868 F.3d 1, 21 (1st Cir.), vacated as moot, 870 F.3d 34 (1st Cir. 2017) (so holding after this Court's decision in *Voisine*).

Those courts agreed that, although this Court's holding in *Leocal* was limited to negligence, its reasoning extended to crimes of recklessness under a materially identical provision. See *Fernandez-Ruiz*, 466 F.3d at 1129-1130. Those courts relied on *Begay* to distinguish between crimes that involve "mere callousness toward risk" and those that involve purposeful behavior. See *Boose*, 739 F.3d at 1187 (internal quotation marks and citation omitted). And emphasizing that there is little difference between recklessness and criminal negligence, those courts reasoned that including reckless offenses would capture minor conduct that cannot be considered "violent" or "active." See *Fernandez-Ruiz*, 466 F.3d at 1130; *Rutherford*, 54 F.3d at 374. Those courts correctly interpreted the relevant statutory language, and this Court should now adopt the same interpretation.

B. This Court's Decision In *Voisine* Does Not Support The Contrary Interpretation

The court of appeals in this case, like some other circuits, reversed course and adopted a contrary interpretation based entirely on this Court's intervening decision in *Voisine*, *supra*. But nothing in *Voisine*, which interpreted the definition of "misdemeanor crime of domestic violence" for purposes of Section 922(g)(9), disturbs the foregoing analysis.

To begin with, in *Voisine*, the Court expressly reserved the question whether a criminal offense that can be committed recklessly can qualify as a predicate offense for purposes of the provision at issue in *Leocal* (and, by extension, the materially identical provision of the ACCA at issue here). See 136 S. Ct. at 2280 n.4. In so doing, the Court recognized that "[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes," and it emphasized it was "not foreclos[ing] that possibility with respect to [the statutes'] required mental states." *Ibid.*

The reasoning of *Voisine* does not support the contrary interpretation either. The operative statutory language in *Voisine* differs in a critical respect from the language at issue here: it omits the restriction that the use of force be "against the person of another," the very language that rules out reckless or negligent offenses. In addition, the "context[] and purpose[]" of the provision in *Voisine*—prohibiting domestic abusers convicted of misdemeanors from possessing firearms that could make future domestic abuse lethal—differs markedly from the context and purpose of the ACCA. 136 S. Ct. at 2280 n.4. The court of appeals' reliance on *Voisine* was thus mistaken.

1. The provision at issue in *Voisine*, 18 U.S.C. 922(g)(9), prohibits a person who has been convicted of a

"misdemeanor crime of domestic violence" from possessing a firearm. Congress enacted that provision to expand Section 922(g), which "already barred convicted felons from possessing firearms," to domestic abusers convicted only of misdemeanors. *Voisine*, 136 S. Ct. at 2276. In particular, Congress sought to reach "domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws." *Id.* at 2278. Congress defined a "misdemeanor crime of domestic violence" as any misdemeanor that has, as an element, "the use or attempted use of physical force * * * committed by [certain family members] of the victim." 18 U.S.C. 921(a)(33)(A). Relying on "[s]tatutory text and background," the Court held in *Voisine* that an offense that can be committed recklessly can qualify as a "misdemeanor crime of domestic violence." 136 S. Ct. at 2278.

In interpreting the statutory language, the Court noted that "the word 'use' * * * is the only statutory language either party thinks relevant." 136 S. Ct. at 2278. It reasoned that "use" means "the 'act of employing' something," and that using force requires "volitional conduct." *Id.* at 2278-2279 (citation omitted). But, the Court continued, 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." *Id.* at 2279.

The Court illustrated the point with two examples confirming the ordinary meaning of "use." First, a person who throws a plate in anger against a wall near his wife uses force, even if the plate thrower did not know, but instead disregarded a substantial risk, that a shard would injure her. See 136 S. Ct. at 2279. Second, a person who slams a door shut as his girlfriend follows closely behind has used force, even if he did not know, but instead disregarded a substantial risk, that her fingers would be

caught in the jamb. See *ibid.* Based on those examples, the Court concluded that a person could "use * * * physical force" even if the person was indifferent to the consequences of his behavior (for example, because the person was acting recklessly).

The Court further explained that nothing in *Leocal* required it to interpret "use" as "mark[ing] a dividing line between reckless and knowing conduct." 136 S. Ct. at 2279. The Court noted that, in *Leocal*, it had "reserv[ed]" the question whether a criminal offense that could be committed recklessly could qualify as a predicate offense for purposes of the provision at issue there. See *ibid.* The Court acknowledged that conduct such as stumbling or dropping a plate would not be sufficiently volitional to constitute "use." See *ibid.* But it reiterated that volitional conduct, such as throwing a plate, constituted a use of force even if it was undertaken with mere awareness of a substantial risk of injury, rather than an intent that injury occur. See *ibid.*

In adopting that interpretation of the definition of "misdemeanor crime of domestic violence," the Court relied heavily on the provision's context and purpose. It explained that Congress enacted the provision in order to "close a dangerous loophole in the gun control laws" by "tak[ing] guns out of the hands of abusers." 136 S. Ct. at 2276, 2281 (internal quotation marks and alteration omitted). In particular, Congress sought to "bar those domestic abusers convicted of garden-variety assault or battery misdemeanors * * * from owning guns." *Id.* at 2280. Because more than two-thirds of the States "defined such misdemeanor offenses to include the reckless infliction of bodily harm," excluding reckless offenses would have substantially frustrated Congress's intent by rendering Section 922(g)(9) "ineffective" in much of the Nation. *Id.* at 2280-2281.

2. The text and context of the ACCA's force clause differ from those of the provision at issue in *Voisine* in critical respects.

a. As to the text: in *Voisine*, the "only" relevant language was "the use * * * of physical force." 136 S. Ct. at 2278. But, as the Court recognized in *Leocal*, the critical language in Section 16(a) (and by extension here) is "against the person * * * of another." 543 U.S. at 9 (citation omitted).

"That difference in text yields a difference in meaning." Pet. App. 56a (Kethledge, J., dissenting from denial of rehearing en banc); see U.S. Br. at 35, *Voisine*, *supra* (No. 14-10154) (emphasizing the "important textual difference" between the provisions at issue in *Voisine* and *Leocal*); *id.* at 12 (explaining that the provision in *Voisine* omitted the "against" phrase "which was critical to *Leocal*'s determination that Section 16 required a higher *mens rea*" (internal quotation marks and citation omitted)). The touchstone of "use" is volitional action. See *Voisine*, 136 S. Ct. at 2279. A nonvolitional action, such as "los[ing] [the] grip on a plate," is not enough. *Ibid.* But the touchstone of "use against the person of another" is volitional action *targeted at another*. See pp. 21-24, *supra*. As Judge Kethledge explained in his dissent below, that means that "the force's *application to another person* must be volitional or deliberate": or, put another way, that the *consequence* of the use has to be intended or known. Pet. App. 57a (emphasis added).

In the words of *Voisine*, while the word "use" alone "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," 136 S. Ct. at 2279, the phrase "use * * * against the person of another" is not. An actor who does not know that harm to another person will occur has used force, but he has not

used force *against another*. Because the restrictive phrase present here (and missing in *Voisine*) requires the action to be directed in a particular way ("against the person of another"), it excludes actions that merely involve a substantial risk of harm to another person (reckless or negligent actions), leaving only actions that the actor intends or knows will cause harm (purposeful or knowing ones).

To take an example: if a homeowner, seeing a spider, hurls a plate at it without regard for a houseguest standing nearby and a shard cuts the guest's finger, the homeowner has used force (and, indeed, has used force against the spider). But he has not used force *against the guest*. His use of force was volitional, but he did not aim the force at the guest; he simply acted recklessly, disregarding the risk that the guest would be injured.

To read "the use * * * of physical force" and "the use * * * of physical force against the person of another" synonymously—as the decision below requires—would contravene the familiar principle that a statute should be construed to avoid superfluity. See, *e.g.*, *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011); *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994); see generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-176 (2012). It is the Court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted). That is particularly so when "the words describe an element of a criminal offense." *Ratzlaf*, 510 U.S. at 141. It simply cannot be correct that the phrase "against the person of another" does no meaningful work in the ACCA's force clause.

b. As to context and purpose: the provision at issue in *Voisine* defines a "misdemeanor crime of domestic violence," whereas the provision at issue here defines a "violent felony." As discussed above, the phrase "violent felony" "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Johnson*, 559 U.S. at 141 (quoting *Doe*, 960 F.2d at 225 (Breyer, C.J.)); see p. 26, *supra*. As the government has explained, "domestic violence" in Section 922(g)(9) is a "term of art" that encompasses different and "broader" conduct. U.S. Br. at 34-35, *Voisine*, *supra*.

More fundamentally, Section 922(g)(9) is prophylactic rather than punitive. Congress enacted Section 922(g)(9) in 1996—some ten years after the current version of the ACCA. See *Voisine*, 136 S. Ct. at 2276. In doing so, Congress aimed to "establish a policy of zero tolerance when it comes to guns and domestic violence." 142 Cong. Rec. 22,985 (1996). Recognizing that the presence of a firearm increases the likelihood that domestic violence will escalate to homicide, Congress passed Section 922(g)(9) in order to "take guns out of the hands of abusers convicted under the misdemeanor assault laws then in general use in the States." *Voisine*, 136 S. Ct. at 2281; see *Castleman*, 572 U.S. at 160, 164. But because most misdemeanor assault and battery statutes allow convictions for reckless conduct, excluding such offenses as predicates would render the provision "broadly inoperative" in much of the Nation. *Voisine*, 136 S. Ct. at 2280. Given that unique context, Section 922(g)(9) sought to capture "[m]inor uses of force" that "may not constitute 'violence' in the generic sense." *Castleman*, 572 U.S. at 165.

That legislative purpose stands in stark contrast to the purpose animating Congress in enacting the ACCA a decade earlier. The ACCA does not itself prohibit additional

conduct, but instead enhances sentences for a limited category of recidivist offenders. See 18 U.S.C. 924(e). The ACCA focuses on "the kind of person" an offender is likely to be and seeks to single out for increased punishment offenders who are (as the title of the law suggests) "armed career criminals." *Begay*, 553 U.S. at 146.

This Court has recognized that such differences may warrant divergent treatment. See *Voisine*, 136 S. Ct. at 2280 n.4. In particular, this Court has held that a particular common-law meaning of "force" was relevant in the context of misdemeanor crimes of domestic violence, but was a "comical misfit" with the ACCA's definition of violent felonies—even though both statutes defined their predicate offenses in terms of "the use * * * of physical force." *Castleman*, 572 U.S. at 163 (citation omitted). Where, as here, the relevant text of the two statutes more explicitly diverges, there is all the more reason to interpret the two statutes differently. Cf. U.S. Br. at 31-37, *Voisine*, *supra* (urging the Court to interpret the two statutes differently); U.S. Br. at 31, *Castleman*, *supra* (No. 12-1371) (same). In short, nothing in *Voisine* undermines the conclusion that an offense that can be committed with a mens rea of recklessness does not qualify as a predicate offense under the ACCA.

3. To the extent that courts of appeals have flipped their interpretation of the ACCA's force clause in the wake of *Voisine*, none of those courts has given valid reasons for doing so. Most of those courts entirely failed to give effect to the different language of the two provisions, treating *Voisine* as dispositive despite its express reservation of the question presented here. See, *e.g.*, *United States* v. *Burris*, 920 F.3d 942, 950-952 (5th Cir. 2019), pet. for cert. pending, No. 19-6186 (filed Oct. 3, 2019); *United States* v. *Pam*, 867 F.3d 1191, 1207-1208 (10th Cir. 2017);

United States v. *Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017).

The few courts that have engaged with the statutory language have suggested that the reference to a "victim" in the definition of "misdemeanor crime of domestic violence" performs the same function as the phrase "against a person of another." See *United States* v. *Haight*, 892 F.3d 1271, 1280-1281 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 796 (2019); *United States* v. *Verwiebe*, 874 F.3d 258, 263 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018). But the definitional provision does not require use of force *against* a victim. See 18 U.S.C. 921(a)(33)(A)(ii). Instead, the provision refers to a victim in defining the *offender*, requiring that the offense be "committed by a current or former spouse, parent, or guardian of the victim," or others in a specified relationship with the victim. *Ibid.* It does not follow from the fact that a victim exists that force was targeted at the victim; "there are legions of victims harmed by force applied recklessly" or even negligently. See Pet. App. 59a (Kethledge, J., dissenting from denial of rehearing en banc). A person could be the "victim" of a car accident even if the accident was just that, accidental. The two provisions thus cannot be conflated in the manner those courts have suggested.

Finally as to those courts, their approach ignores "two important mandates": it fails to account for the canon against superfluity, and it fails to acknowledge the different contexts of the two provisions. *United States* v. *Middleton*, 883 F.3d 485, 499 n.3 (4th Cir. 2018) (Floyd, J., joined by Harris, J., concurring). Given the lack of valid reasons for adopting the contrary interpretation, the Court should side with those courts that have adhered to their interpretations of the ACCA's force clause in the wake of *Voisine*, recognizing that the two provisions diverge in numerous material respects. See *id.* at 497-500;

United States v. *Windley*, 864 F.3d 36, 37-38 (1st Cir. 2017); *United States* v. *Orona*, 923 F.3d 1197, 1202-1203 (9th Cir.), pet. for reh'g granted, No. 17-17508 (Nov. 18, 2019).

C. The Contrary Interpretation Would Distort The ACCA By Sweeping In Offenses That Cannot Be Considered 'Violent Felonies'

The ACCA imposes a 15-year mandatory minimum sentence, cutting off a sentencing judge's discretion to impose a lower sentence regardless of the circumstances of a particular case. This case, in which the district court viewed itself bound to impose a sentence it described as not "just," well illustrates the implications of applying the ACCA. In the ACCA, Congress sought to punish a defendant with a record so egregious that the defendant could fairly be described as an "armed career criminal." *Castleman*, 572 U.S. at 167. Interpreting the force clause to cover offenses that can be committed recklessly would bring a slew of everyday offenses within the ACCA's reach, thereby "blur[ring] the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal*, 543 U.S. at 11.

1. Under the court of appeals' interpretation, felonies that involve the reckless use of force would qualify as predicate offenses under the ACCA's force clause. Among the most prominent of those felonies are assault offenses that criminalize recklessly causing serious bodily injury to another. See, *e.g.*, Tex. Penal Code Ann. § 22.02 (aggravated assault); N.Y. Penal Law § 120.05[4] (second-degree assault); Tenn. Code Ann. § 39-13-102 (aggravated assault).

A common way to commit those offenses is by engaging in reckless driving that injures another. Individuals have been convicted of those assault offenses based on

recklessness as a result of driving while intoxicated and stopping a car on the highway without headlights on, see *Tam Ha Huynh* v. *State*, Crim. No. 03-17-645, 2018 WL 4100849, at *6 (Tex. Ct. App. Aug. 29, 2018); speeding, failing to stop at a stop sign, and failing to yield to oncoming traffic, see *Collins* v. *State*, Crim. No. 09-04-407, 2005 WL 3074154, at *2 (Tex. Ct. App. June 8, 2005); using a car to push another vehicle out of the way and injuring a person getting out of the vehicle, see *People* v. *Acton*, 149 A.D.2d 839, 840-841 (N.Y. App. Div. 1989); causing a collision while driving on the wrong side of the street, see *State* v. *Norris*, 874 S.W.2d 590, 596 (Tenn. Crim. App. 1993); and colliding with another vehicle after failing to notice due to glare that the traffic light had turned red, see *State* v. *Cope*, Misc. No. 2014-775, 2015 WL 4880347, at *7 (Tenn. Crim. App. 2015).

Such behavior, though unquestionably "dangerous," is not the kind of behavior "committed by those whom one normally labels 'armed career criminals.'" *Begay*, 553 U.S. at 146. Yet that is precisely the kind of behavior that would be swept in under the rule adopted by the court of appeals. Indeed, the Tenth Circuit previously held that Texas's offense of aggravated assault was not a crime of violence under section 4B1.2(a)(1) of the Sentencing Guidelines—which is materially identical to the provision at issue here—because it could be committed with a mens rea of recklessness. See *United States* v. *Duran*, 696 F.3d 1089, 1093 (2012). But if this Court deems recklessness sufficient, it would sweep into the ACCA the reckless speeder or stop-sign runner who injures another.

What is more, interpreting the "use * * * of physical force against the person of another" to encompass reckless driving cannot readily be reconciled with Congress's use of the materially identical definition in the Immigration and Nationality Act (INA). The INA "renders

inadmissible any alien who has previously exercised diplomatic immunity from criminal jurisdiction in the United States after committing a 'serious criminal offense.'" *Leocal*, 543 U.S. at 12 (citing 8 U.S.C. 1182(a)(2)(E)). A "serious criminal offense" includes both a "crime of violence," as defined in Section 16 (the provision at issue in *Leocal*), and "any crime of reckless driving * * * if such crime involves personal injury to another." 8 U.S.C. 1101(h).

A court must "interpret that separate listing as suggesting that injury-causing reckless driving offenses in particular are excluded from the category of crimes of violence." *Oyebanji*, 418 F.3d at 264 (Alito, J.); cf. *Leocal*, 543 U.S. at 12 (applying the same reasoning to driving-under-the-influence offenses). Interpreting the phrase "use * * * of physical force against the person of another" to encompass reckless driving offenses would leave the separate enumeration of those offenses in the INA "practically devoid of significance." *Leocal*, 543 U.S. at 12. And if that is so, there is no valid reason to interpret the materially identical phrase in the ACCA's force clause any differently.

2. Including the offense at issue here—the Texas offense of robbery—would itself sweep potentially minor crimes into the ACCA. Under Texas's unusual robbery statute, a person can commit robbery if, "in the course of committing theft" and "with an intent to obtain or maintain control of the property," he "recklessly causes bodily injury to another." Tex. Penal Code Ann. § 29.02(a).

Despite being denominated a "robbery" statute, that provision is broad enough to capture relatively minor conduct. A defendant in Texas was recently convicted of robbery after shoplifting from a department store and, upon being approached by a store employee, leaping over a second-floor railing and landing on a bystander. See *Craver*

v. *State*, Crim. No. 02-14-76, 2015 WL 3918057, at *3 (Tex. Ct. App. June 25, 2015). In affirming the conviction, the Texas Court of Appeals explained that the conduct constituted robbery because jumping over a railing during business hours entails a known and unjustifiable risk of harm to others. See *id.* at *4. But the crime was neither "violent" nor "aggressive," nor would its commission suggest that its perpetrator is "the kind of person who might deliberately point [a] gun and pull the trigger." *Begay*, 553 U.S. at 146. The very offense at issue in this case thus illustrates the overbreadth of the court of appeals' interpretation.

3. The court of appeals' interpretation would also bring other offenses that Congress did not intend to cover within the scope of the ACCA.

Consider the felony offense of assault on a public servant, which Texas defines as "intentionally, knowingly, or recklessly caus[ing] bodily injury" to a public servant such as a police officer. Tex. Penal Code Ann. § 22.01(b)(1). Under the court of appeals' interpretation, the offense would qualify as a "violent felony." Yet an offender under that provision need not engage in the type of deliberate conduct associated with a career criminal. A woman was convicted under that provision because, while intoxicated at her home, she swung open a door, injuring the arm of a police officer who had come to investigate a noise complaint. See National Immigration Project Br. at 14-16 & n.3, *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018) (No. 15-1498). And a police officer was convicted of the related offense of aggravated assault by a public servant after speeding to a crime scene without activating his emergency lights or siren, striking another police officer. See *Seaton* v. *State*, 385 S.W.3d 85, 88 (Tex. Ct. App. 2012).

Or consider the offense of recklessly causing bodily harm to a child. See, *e.g.*, Wis. Stat. Ann. § 948.03(3); cf.

Tex. Penal Code Ann. § 22.04(a), (e). In Wisconsin, a father was convicted of recklessly injuring his daughter when she was ejected from a go-kart that he was driving. See *State* v. *Gimino*, No. 2014AP1532, 2015 WL 13134204, at *1 n.3 (Wis. Ct. App. Apr. 15, 2015). Similarly, in Texas, a father was convicted of recklessly injuring his child when he placed her in the front seat of his car without a seat belt and then rear-ended a truck, resulting in a broken leg. See *Mayhew* v. *State*, 271 S.W.3d 294, 296 (Tex. Ct. App. 2008).

Again, while such offenses involve a risk of harm, they do not constitute the type of "violent and aggressive crimes" that are "typically committed by those whom one normally labels 'armed career criminals.'" *Begay*, 553 U.S. at 146, 148. Under the court of appeals' interpretation, however, rowdy drunks and reckless dads would qualify as violent felons. That outcome is impossible to square with Congress's intent to ensure that only the most dangerous offenders are subject to the ACCA's greatly enhanced penalties, or with the exclusion of such offenses under the broad residual clause. See pp. 26-28, *supra*.

In sum, the court of appeals' interpretation of the ACCA's force clause would subject a defendant to a 15-year minimum sentence based on comparatively minor prior offenses where the defendant did not intend to cause harm. There is no reason to believe that Congress would have wanted to convert such offenses into ACCA predicates and thereby sweep "run-of-the-mill criminals" into the ACCA. *Middleton*, 883 F.3d at 499 n.3 (Floyd, J., joined by Harris, J., concurring).

D. The Rule Of Lenity Requires Interpreting The ACCA's Force Clause To Exclude Predicate Offenses That Can Be Committed Recklessly

At a minimum, the ACCA's force clause does not unambiguously cover offenses that can be committed recklessly. Even if the court of appeals' contrary interpretation of the ACCA's force clause were plausible, therefore, the rule of lenity forecloses that interpretation.

A "canon of strict construction of criminal statutes," *United States* v. *Lanier*, 520 U.S. 259, 266 (1997), the rule of lenity dictates that "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019). The rule of lenity serves the constitutionally rooted purpose of "promot[ing] fair notice to those subject to the criminal laws, * * * minimiz[ing] the risk of selective or arbitrary enforcement, and * * * maintain[ing] the proper balance between Congress, prosecutors, and courts." *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). It is well established that the rule of lenity applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. See *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

Application of the rule of lenity is particularly appropriate where the statute at issue will dramatically increase defendants' sentences (in many cases by double or more) and where the government's interpretation will significantly expand the statute's reach. See *Begay*, 553 U.S. at 148 (Scalia, J., concurring in the judgment) (applying the rule of lenity to the ACCA's residual clause); cf. *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (finding the rule of lenity relevant where the government "urge[d] a reading * * * that exposes individuals to 20-year prison sentences" for a broad array of offenses).

The text of the ACCA's force clause is at least ambiguous as to whether it reaches reckless offenses. This Court has already observed that, even if the phrase "use * * * of physical force against the person of another" were unclear as to whether it reached offenses that could be committed negligently or accidentally, the rule of lenity would "constrain[] [the Court] to interpret any ambiguity in the statute" to exclude such offenses. *Leocal*, 543 U.S. at 11 n.8. And given that the courts of appeals until recently *uniformly* interpreted the ACCA to exclude reckless offenses—with many of them taking the position that the statutory text was unambiguous—there can be no serious argument that criminal defendants have been on "fair notice" that reckless offenses might subject them to the ACCA's harsh penalties. *Kozminski*, 487 U.S. at 952.

To be sure, the Court did not rely on the rule of lenity in *Voisine*. As explained above, however, the "use * * * of physical force" unambiguously requires only volitional action; the "use * * * of physical force against the person of another," the language at issue here and in *Leocal*, is critically different. See pp. 30-36, *supra*. As the Court has made clear, for a word as "elastic" as "use," "its context and * * * the terms surrounding it" are critical. *Leocal*, 543 U.S. at 9. At a minimum, the inclusion of the restrictive "against" phrase introduces ambiguity that must be resolved in a criminal defendant's favor.

Notably, at least one court of appeals has relied on the rule of lenity in the wake of *Voisine* in holding that the ACCA's force clause excludes reckless offenses, reasoning that it "d[id] not see how [it] could conclude, based on *Voisine*," that the relevant language "must construed to *include* reckless offenses when a version of that same language was for so long and so uniformly construed to *exclude* them." *Bennett*, 868 F.3d at 8; see *Windley*, 864 F.3d at 38-39. The court concluded that it could not "have

confidence" that it would be "doing Congress's will" if were to extend a "sentencing enhancement of great consequence" to reckless offenses. *Bennett*, 868 F.3d at 23. Exactly so. In the event this Court were to conclude that the ACCA's force clause does not unambiguously exclude reckless offenses, therefore, it should apply the rule of lenity and reach the same result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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